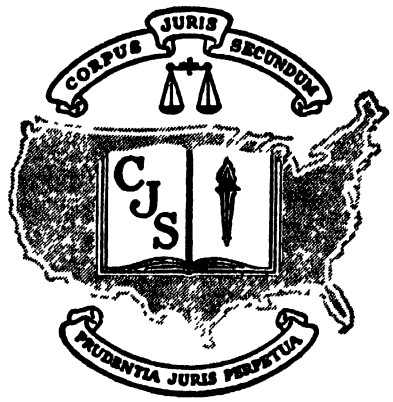
THE TEXT IS LIGHT IN THE BOOK



"The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."

Chief Justice Greene, in 1 R.I. 356.

CITE BY TITLE AND SECTION

Thus

40 C.J.S. Highways § 183

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

DONALD J. KISER, LL. D.

Editor in Chief

Assisted by
The Combined Editorial Staffs
of
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been two-fold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefor a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112) The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A	Atlantic Reporter
Abb	Abbott (U S.)
Abb Adm	Abbott's Admiralty (U S)
Abb App Dec.	Abbott's Appeals Decisions (N Y)
Abb Dec	Abbott's Decisions (N Y)
Abb N Cas.	Abbott's New Cases (N Y.)
Abb Pr	Abbott's Practice (N Y)
Abb Pr N S	Abbott's Practice New Series (N Y)
A'Beck Res. Judgm	A'Beckett's Reserved Judgments (Vict)
[1917] A C.	[1917] Appeal Cases (Can)
[1918] A C.	Law Reports [1918] Appeal Cases (Eng)
Acton	Acton (Eng)
Adams	Adams Reports (N H)
Add	Addison (Pa)
Add Eccl.	Addams' Ecclesiastical (Eng)
A & E	Adolphus & Ellis (Eng)
A & E Enc L	American & English Encyclopædia of Law
A & E Enc L & Pr.	American & English Encyclopædia of Law & Practice
Aik	Aikens (Vt)
A K Marsh.	A K Marshall (Ky.)
Ala	Alabama
Ala App.	Alabama Appellate Court
Alaska	Alaska
Alb L J.	Albany Law Journal
A L C	American Leading Cases
Al & N.	Alcott & Napier (Eng)
Alc Reg Cas	Alcock's Registry Cases (Eng)
Aleyn	Aleyn (Eng)
Alison Pr	Alison's Practice (Sc)
Allen	Allen (Mass)
Allen (N B)	Allen, New Brunswick
Alta L	Alberta Law
A L R	American Law Reports
Am Bankr.	American Bankruptcy (U S)
Ambl	Ambler (Eng)
A M C	American Maritime Cases
Am Corp Cas	American Corporation Cases
Am Cr	American Criminal
Am D	American Decisions
Am & E Corp Cas	American & English Corporation Cases
Am & E Corp Cas. N S	American & English Corporation Cases New Series
Am & Eng Ency. Law	American and English Encyclopedia of Law
Am & E Eq D.	American & English Decisions in Equity
Am & Eng Pat. Cas	American and English Patent Cases
Am & Eng R R. Cas	American and English Railroad Cases
Am Electr Cas	American Electrical Cases
Am & E R Cas	American & English Railroad Cases
Am & E R Cas N. S	American & English Railroad Cases New Series
Am J Int L.	American Journal of International Law
Am L J	American Law Journal (Pa)
Am L J N S	American Law Journal New Series (Pa)
Am L Rec	American Law Record (Ohio)
Am L Reg	American Law Register
Am L Reg N S	American Law Register New Series
Am Law Reg (O S)	American Law Register Old Series
Am L Rev	American Law Review
Am L T Bankr.	American Law Times Bankruptcy Reports
Am Law Inst.	American Law Institute, Restatement of the Law
Am Negl Cas.	American Negligence Cases
Am Negl R	American Negligence Reports
A M & O	Armstrong, Macartney & Ogle (Ir.)
Am Prob	American Probate
Am Prob N S.	American Probate New Series
Am Pr	American Practice
Am R	American Reports
Am R & Corp	American Railroad & Corporation
Am R Rep	American Railway Reports
Am S R	American State Reports
Am St R D.	American Street Railway Decisions
And	Anderson (Eng)
Andr	Andrews (Eng)
Ann Cas	American & English Annotated Cases
Ann Cas 1912A	American Annotated Cases 1912A, et seq
Anstr	Anstruther (Eng)
Anth N P	Anthon's Nisi Prius (N Y)
App D C	Appeal Cases (D C)
App Cas	Law Reports Appeal Cases (Eng.)
App Div	Appellate Division (N Y)
Ariz	Arizona
Ark	Arkansas
Ark Just.	Arkley's Justiciary (Sc)
Arn	Arnold (Eng)
Arn & H.	Arnold & Hodges (Eng)
Ashm	Ashmead (Pa)
Aspin	Aspinall's Maritime Cases (Eng)
Atk	Atkyn (Eng)
Austr C L R	Commonwealth Law Reports, Australia
Austr Jur	Australian Jurist
Austr L T	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng)
Bail Eq	Bailey's Equity (S C)
Bailey	Bailey's Law (S C)
B & Ad	Barnewall & Adolphus (Eng)
B & Ald	Barnewall & Alderson (Eng)
Baldw	Baldwin (U S)
Balf Pr	Balfour's Practice (Sc)
Ball & B	Ball & Beatty (Ir)
Bank & Ins R.	Bankruptcy and Insolvency Reports (Eng)
Bann	Bannister (Eng)
Bann & A.	Banning & Arden (U S)
Barb	Barbour (N Y)
Barb Ch.	Barbour's Chancery (N Y)
B & Arn.	Barron & Arnold (Eng)
Barn	Barnardiston King's Bench (Eng.)
Barn Ch	Barnardiston Chancery (Eng)
Barnes	Barnes Practice Cases (Eng)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir)
B & Aust.	Barron & Austin (Eng)
Baxt	Baxter (Tenn)
Bay	Bay (S C)
B & B.	Broderip & Bingham (Eng)
B C.	British Columbia

B &C.	Barnewall & Cresswell (Eng.)
B &Macn.	Browne & Macnamara (Eng)
B D &O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir)
Beav.	Beavan (Eng.)
Beav.&Wal Ry. Cas	Beavan & Walford's Railway and Canal Cases (Eng)
Beav.R &C Cas.	English Railway and Canal Cases
Beaw Lex.Mer.	Beawes Lex Mercatoria (Eng)
Bee	Bee (U.S)
Bell.	Bellewe (Eng)
Bell App Cas.	Bell's Appeal Cases (Sc)
Bell Cas.	Bell's Cases (Sc.)
Bell C C.	Bell's Crown Cases (Eng)
Bell Comm.	Bell's Commentaries (Eng)
Bell Sc Cas.	Bell's Scotch Court of Session Cases
Ben	Benedict (U S)
Benl	Benloe (Eng)
Benl &D.	Benloe & Dalison (Eng)
B &H.Cr Cas	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky)
Bing	Bingham (Eng)
Bing N Cas.	Bingham's New Cases (Eng)
Binn.	Binney (Pa)
Biss	Bissell (U S)
Bitt W &P.	Battleson, Wise & Parnell (Eng)
Black	Black (U S)
Blackf	Blackford (Ind.)
Blackstone Comm	Blackstone Commentaries
Bla H	Henry Blackstone's English Common Pleas (Eng)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland s Ch.	Bland Chancery (Md.)
Blatchf	Blatchford (U S)
Blatchf &H	Blatchford & Howland (U S)
Blatchf PrizeCas	Blatchford's Prize Cases (U S)
Bligh	Bligh (Eng)
Bligh N S.	Bligh New Series (Eng)
B Mon.	B Monroe (Ky.)
Bond	Bond (U S)
Bouvier	Bouvier's Law Dictionary
Boyce	Boyce (Del)
B &P	Bosanquet & Puller (Eng)
B &P N R.	Bosanquet & Puller's New Reports (Eng)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf Surr.	Bradford's Surrogate (N Y.)
Brayt	Brayton (Vt)
B R C.	British Ruling Cases
Brev.	Brevard (S C)
Brewst	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El Cas	Brightly's Election Cases (Pa)
Bro Ch	Brown's Chancery (Eng)
Brock	Brockenbrough (U S)
Brock Cas.	Brockenbrough's Virginia Cases
Brod &B	Broderip & Bingham (Eng)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am &E Pat Cas	Brodix's American & English Patent Cases
Bro Just	Broun's Justiciary (Sc)
Brook Abr	Brook's Abridgments (Eng)
Brook N Cas	Brook's New Cases (Eng)
Brooke N C	Brooke's New Cases
Bro P C	Brown's Parliament Cases (Eng)
Brown Adm	Brown's Admiralty (U S)
Brown, Ch	Brown's Chancery Cases (Eng)
Brown Ecc	Brown Ecclesiastical (Eng)
Brown N P	Brown's Michigan Nisi Prius
Brown,Parl Cas.	Brown Parliamentary Cases (Eng)
Browne	Browne (Pa)
Brown &L	Browning & Lushington (Eng)
Brownl &G	Brownlow & Goldesborough (Eng)
Bruce	Bruce (Sc)
Brunn Coll Cas.	Brunner's Collective Cases (U S)
B &S	Best & Smith (Eng)
B T A.	Board of Tax Appeals (U S)
Buck	Buck (Eng.)
Buller N P.	Buller's Nisi Prius (Eng)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr S Cas.	Burrows' Settlement Cas (Eng)
Busb	Busbee (N C)
Busb Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab &E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai Cas.	Caines' Cases (N Y)
Cal.	California
Cal (2d)	California Reports, Second Series
Cal App.	California Appellate Court
Cal App (2d)	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng)
Cal Unrep Cas.	California Unreported Cases
Cam Cas	Cameron's Cases (Can.)
Campb	Campbell (Eng)
Canal Zone	Canal Zone Supreme Court
Can App Cas.	Canadian Appeal Cases
Can Cr Cas.	Canadian Criminal Cases
Can Exch.	Canadian Exchequer
Can L J.	Canada Law Journal
Can L J N S.	Canada Law Journal New Series
Can L T Occ. Notes	Canadian Law Times Occasional Notes
Can R Cas.	Canadian Railway Cases
Can S C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng)
Car &K.	Carrington & Kirwan (Eng)
Car &M.	Carrington & Marshman (Eng)
Car &P	Carrington & Payne (Eng)
Car H &A.	Carrow, Hamerton & Allen (Eng)
Carp P C.	Carpmael Patent Cases (Eng)
Carter	Carter (Eng)
Carth	Carthew (Eng)
Cartwr Cas.	Cartwright's Cases (Can)
Cary	Cary (Eng)
Cas	Casey (Pa)
Cas t Hardw.	Cases temp Hardwicke (Eng)
Cas t Holt	Cases temp Holt (Eng)
Cas t King	Cases temp. King (Eng)
Cas t Talb.	Cases temp Talbot (Eng)
C B.	Common Bench (Manning, Granger & Scott) (Eng)
C B N S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng)
C C A.	Circuit Court of Appeals (U S)
C C P A	Court of Customs and Patent Appeals
Centr L J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb Rep.	Chamber (Ont)
Chandl	Chandler (Wis.)
Charlt R M	R M Charlton (Ga)
Charlt T U P	T U P Charlton (Ga)
Chase	Chase (U S)
Ch Cas	Cases in Chancery (Eng)
Ch Chamb	Chancery Chambers (U C.)
Ch Col Op	Chalmers' Colonial Opinions
Ch D.	Law Reports Chancery Division (Eng.)
Chest Co.	Chester County (Pa)
Chev.	Cheves (S C)
Chit	Chitty (Eng.)
Choyce Cas Ch.	Choyce Cases in Chancery (Eng)
Ch Rep	Chancery Reports (Eng.)
Ch Sent	Chancery Sentinel (N Y)
Cinc L Bul	Weekly Law Bulletin (Oh)
Cinc Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct R	City Court Reports (N Y)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ Proc.Rep.	Civil Procedure Reports (N.Y.)
C J	Corpus Juris
C J Ann.	Corpus Juris Annotations
C J S	Corpus Juris Secundum
C &K.	Carrington & Kirwan (Eng)
C &L	Connor & Lawson (Ir)
Cl App.	Clark's Appeal Cases (Eng)
Cl Ch.	Clarke's Chancery (N Y)
Clark &F	Clark & Finnelly (Eng)
Clark &Fin N S	Clark's House of Lords Cases (Eng)
Clarke	Clarke's Chancery (N Y)
Clarke &S Dr Cas	Clarke & Scully's Drainage Cases (Ont)
Clarke Ch.	Clarke's Chancery (N Y)
Clayt	Clayton's Reports, York Assizes (Eng)
C L Chamb	Chamber's Common Law (U C)
Clev L Rec	Cleveland Law Record (Oh)
Clev L Rep	Cleveland Law Reporter (Oh)
Cl &F	Clark & Finnelly (Eng)
Clif El Cas.	Clifford's Southwick Election Cases
Cliff	Clifford (U S)
C L R	Common Law Reports (Eng)
C &M	Carrington & Marshman (Eng)
C M &R	Crompton, Meeson & Roscoe (Eng)
Cock &Rowe	Cockburn & Rowe's Election Cases
Code Rep	Code Reporter (N Y)
Code Rep N S.	Code Reports New Series (N Y)
Coff Prob.	Coffey's Probate (Cal)
Co Inst	Coke's Institutes
Coke	Coke (Eng)
Col Cas	Coleman's Cases (N Y)
Col &C Cas.	Coleman & Caines' Cases (N Y)
Col C C.	Collyer's Chancery Cases (Eng)
Coldw	Coldwell (Tenn)
Coll	Collyer (Eng)
Col L Rep	Colorado Law Reporter
Col Law Review	Columbia Law Review
Coll &E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng)
Colo	Colorado
Colo App.	Colorado Appeals
Colq	Colquit
Coltm	Coltman (Eng)
Comb	Comberbach (Eng)
Com Cas	Commercial Cases (Eng)
Com L	Commercial Law (Can)
Comptr Treas Dec	Comptroller Treasury Decisions
Comst	Comstock (N Y)
Comyns	Comyns (Eng)
Comyns Dig.	Comyns Digest (Eng)
Con &Law	Connor & Lawson (Ir)
Conf	Conference Reports (N C)
Conn	Connecticut
Conn Surr.	Connolly's Surrogate (N Y)
Const	Constitutional Reports (N C)
Cooke	Cooke (Eng)
Cooke	Cooke (Tenn)
Cooke & A	Cooke & Alcock (Ir)
Cook Vice-Adm	Cook's Vice-Admiralty (L C)
Coop	Cooper's Chancery (Eng)
Coop Pr Cas	Cooper's Practice Cases (Eng)
Coop t Brough.	Cooper's Cases temp Brougham (Eng)
Coop t Cott.	Cooper's Cases temp Cottenham (Eng)
Coop t Eld	Cooper's Cases *tempore* Eldon (Eng)
Co P C	Coke's Reports (Eng)
Corb &D	Corbett & Daniell's Election Cases (Eng)
Court &Macl.	Courtnay & Maclean (Sc.)
Cow	Cowen (N Y)
Cow Cr Rep	Cowen's Criminal (N Y)
Cowp.	Cowper (Eng)
Cox Am T M Cas	Cox's American Trade-Mark Cases
Cox C C	Cox's Criminal Cases (Eng)
Cox Ch	Cox's Chancery (Eng)
Cox &Atk.	Cox & Atkinson (Eng)
C &P.	Carrington & Payne (Eng)
C P C	C P Cooper's Chancery Practice Cases (Eng)
C P D.	Law Reports Common Pleas Division (Eng)
Crabbe	Crabbe (U S.)
Cranch	Cranch (U S)
Cranch C C	Cranch's Circuit Court (U S)
Cranch Pat Dec.	Cranch's Patent Decisions (U S.)
Cr App	Criminal Appeals (Eng)
Crawf &D	Crawford & Dix (Ir)
Crawf &D Abr. Cas	Crawford & Dix's Abridged Cases (Ir)
Cripp's Ch Cas.	Cripp's Church and Clergy Cases
Cr L Mag.	Criminal Law Magazine
Cr &Ph.	Craig & Phillips (Eng)
C Rob.	Christopher Robinson's Admiralty (Eng)
Cro Car	Croke Charles (Eng)
Cro Eliz.	Croke Elizabeth (Eng.)
Cro Jac	Croke's Reports tempore James (Jacobus) (Eng)
Cromp &J	Crompton & Jervis (Eng)
Cromp &M.	Crompton & Meeson (Eng)
Crosw Pat Cas.	Croswell's Collection of Patent Cases (U.S)
Cr &Ph	Craig & Phillips (Eng)
Ct Cl	Court of Claims (U S)
Ct Cust &Pat. App	Court of Customs and Patent Appeals
Cunn	Cunningham (Eng)
Curt	Curtis (U S)
Curt Eccl.	Curteis Ecclesiastical (Eng)
Cush	Cushing (Mass)
Cust A.	United States Customs Appeals
Cyc	Cyclopedia of Law & Procedure
Cyc Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak	Dakota
Dal C P	Dalison's Common Pleas (Eng)
Dall	Dallaman's Decisions (Tex)
Dall	Dallas (Pa)
Dall	Dallas (U S)
Dalr Dec.	Dalrymple's Decisions (Sc)
Daly	Daly (N Y)
Dan	Damell (Eng)
Dana	Dana (Ky)
Dane Abr	Dane's Abridgment
Dans &L	Danson & Lloyd (Eng)
D'Anv Abr	D'Anver's Abridgment (Eng)
Dauph Co	Dauphin County (Pa)
Dav &M	Davison & Merivale (Eng)
Davys	Davys (Ir)
Day	Day (Conn)
D B &M	Dunlop, Bell & Murray (Sc.)
D C	District of Columbia
D Chipm	D Chipman (Vt)
Deac	Deacon (Eng)
Deac &C.	Deacon & Chitty (Eng)
Deady	Deady (U S)
Dears &B	Dearsley & Bell (Eng)
Dears C C	Dearsley's Crown Cases (Eng)
Deas & A.	Deas & Anderson (Eng)
De Gex	De Gex (Eng)
De G F &J	De Gex, Fisher & Jones (Eng)
De G J &S	De Gex, Jones & Smith (Eng)
De G &J	De Gex & Jones (Eng)
De G M &G	De Gex, MacNaghten & Gordon (Eng)
De G &Sm.	De Gex & Smale (Eng)
Del	Delaware
Del Ch	Delaware Chancery
Del Co	Delaware County (Pa)
Dem Surr.	Demarest's Surrogate (N Y)
Den	Denio (N Y)
Den C C	Denison's Crown Cases (Eng)
Desaus Eq	Desaussure (S C)
Dev Ct Cl	Devereux's Court of Claims (U S.)
Dev L	Devereux (N C)
Dev &Bat.	Devereux & Battle (N C)
Dick	Dickens (Sc)
Dill	Dillon (U S)
Dirl Dec.	Dirleton's Decisions (Sc)
Disn.	Disney (Oh)

D &L	Dowling & Lowndes (Eng)
Dods	Dodson's Admiralty (Eng)
Dom L R.	Dominion Law Reports (Can)
Donnelly	Donnelly (Eng)
Dorion	Dorion (L C)
Dougl	Douglas (Eng.)
Dougl	Douglass (Mich)
Dougl El Cas	Douglas' Election Cases (Eng)
Dow	Dow (Eng)
Dow & Cl.	Dow & Clark (Eng)
Dow &L	Dowling & Lowndes (Eng)
Dow N S.	Dowling, New Series (Eng)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl P C.	Dowling's Practice Cases (Eng)
Dowl P C.N.S.	Dowling's Practice Cases New Series (Eng)
D &R	Dowling & Ryland (Eng)
Draper	Draper (U C)
Drew	Drewry (Eng)
Drinkw	Drinkwater (Eng)
D &R Mag Cas.	Dowling & Ryland's Magistrate Cases (Eng)
D &R N P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr &Sm.	Drewry & Smale (Eng)
Drury	Drury (Ir)
Dr &Wal.	Drury & Walsh (Ir)
Dr &War.	Drury & Warren (Ir)
D &Sw	Deane & Swabey (Eng)
Dud Eq.	Dudley (S C)
Dudl	Dudley (Ga)
Duer	Duer's Superior Court (N Y)
Dunl B &M	Dunlop, Bell & Murray (Sc)
Dunlop	Dunlop (Sc)
Dunn	Dunning (Eng)
Durie	Durie (Sc)
Durn &E.	Durnford & East (Eng)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng)
East L R.	Eastern Law Reporter (Can)
East P C.	East's Pleas of the Crown (Eng)
East T.	Eastern Term (Eng)
E &B	Ellis & Blackburn (Eng)
E B &E.	Ellis, Blackburn & Ellis (Eng)
E B &S.	Ellis, Best & Smith (Eng)
E C L.	English Common Law
Eden	Eden (Eng)
Edgar	Edgar (Sc)
Edm Sel Cas	Edmond's Select Cases (N Y)
E D Smith	E D Smith (N Y)
Edw	Edwards (Eng)
Edw	Edwards' Chancery (N Y)
Edw Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw Adm.	Edwards' Admiralty (Eng)
E &E	Ellis & Ellis (Eng)
Enc Pl &Pr.	Encyclopædia of Pleading & Practice
Ency Law.	American and English Encyclopædia of Law
Eng Ad.	English Admiralty
Eng C C.	English Crown Cases
Eng Ch	English Chancery
Eng Eccl	English Ecclesiastical Reports
Eng Ecc R.	English Ecclesiastical Reports
Eng Exch	English Exchequer Reports
Eng L &Eq	English Law & Equity
Eng Rep R	English Reports, Full Reprint
Eng Ry &C Cas.	English Railway and Canal Cases
Eng &Ir App.	Law Reports, English and Irish Appeal Cases
Eq Cas Abr.	Equity Cases Abridged (Eng.)
Eq Rep.	Equity Reports (Eng)
E R C.	English Ruling Cases
Esp	Espinasse's Nisi Prius (Eng)
Euer	Euer (Eng)
Exch	Exchequer (Eng)
Exch Cas	Exchequer Cases (Sc)
Ex D.	Law Reports Exchequer Division (Eng)
Eyre	Eyre's Reports (Eng)

F

Falc	Falconer's Court of Sessions (Sc.)
Falc &F.	Falconer & Fitzherbert (Eng)
Far	Farresley (Eng)
F.Cas No.	Federal Cases (U S)
F.(Ct.Sess)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U S)
F (2d)	Federal Reporter Second Series
F R D.	Federal Rules Decisions
F Supp.	Federal Supplement
Feig Cons.	Feigueson's Consistory (Eng)
F &F	Foster & Finlason (Eng)
Fish Pat Cas.	Fisher's Patent Cases (U S)
Fish Pat R	Fisher's Patent Reports (U S)
Fish PrizeCas.	Fisher's Prize Cases (U.S)
Fitzg.	Fitzgibbon (Eng)
Fitzh	Fitzherbert's Abridgment (Eng)
Fitzh N Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp	Flippin (U S)
Fl &K.	Flanagan & Kelly (Ir)
Fonb Eq.	Fonblanque's Equity (Eng.)
Fonbl	Fonblanque (Eng)
Fonbl R.	Fonblanque's English Cases
Forbes	Forbes (Eng)
Forr.	Forrest (Eng)
Forrester	Forrester's Cases (Eng)
Fortesc.	Fortescue (Eng)
Fost.	Foster (Eng)
Fost.	Foster (N H)
Fost &Fin.	Foster & Finlason (Eng)
Fount Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng)
Fox & S.	Fox & Smith (Ir)
Freem.	Freeman's Chancery (Eng)
Freem	Freeman's Chancery (Miss)
Freem K B.	Freeman's King's Bench (Eng.)

G

Ga	Georgia
Ga App.	Georgia Appeals
Ga Dec.	Georgia Decisions
Gale	Gale (Eng)
Gal	Gallison (U S)
G Coop.	G Cooper (Eng)
G &D	Gale & Davidson (Eng)
Geld &M.	Geldart & Maddock (Eng)
Gibb Surr.	Gibbon's Surrogate (N Y)
Giffard	Giffard (Eng)
Giff &H.	Giffard and Hemming (Eng.)
Gil	Gilfillan's Edition (Minn)
Gilb	Gilbert's (Eng)
Gilb Cas.	Gilbert's Cases (Eng)
Gilb C P	Gilbert's Common Pleas (Eng)
Gilb Exch.	Gilbert's Exchequer (Eng)
Gill	Gill (Md)
Gill&J.	Gill & Johnson (Md)
Gilm	Gilmer (Va)
Gilm &Falc.	Gilmour & Falconer (Sc)
Gilp	Gilpin (U S)
Glasc.	Glascock (Ir)
Glyn&J.	Glyn & Jameson (Eng)
Godb	Godbolt (Eng)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb	Goebel's Probate Court Cases
Gosf	Gosford (Eng)
Gouldsb	Gouldsborough (Eng)
Gow	Gow (Eng)
Gow N P	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa)
Grant Ch	Grant's Chancery (U C)
Grant Err &App	Grant's Error & Appeal (U C)
Gratt.	Grattan (Va)
Gray	Gray (Mass)

Green Cr.	Green's Criminal Law (Eng)
Greene	Greene (Iowa)
Gwill T Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd	Haddington (Eng)
Hagg Adm	Haggard's Admiralty (Eng)
Hagg Cons.	Haggard's Consistory (Eng)
Hagg Eccl	Haggard's Ecclesiastical (Eng)
Hailes Dec.	Hailes' Decisions (Sc)
Hale	Hale's Common Law (Eng)
Hale Ecc	Hale's Ecclesiastical (Eng)
Hale P C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N Y.)
Hall&T	Hall & Twells (Eng)
Halsbury L Eng.	Halsbury's Law of England
Handy	Handy (Oh)
Han (N B)	Hannay's Reports, New Brunswick
Hard	Hardin (Ky)
Hardres	Hardres (Eng)
Hare	Hare (Eng)
Harp Eq	Harper (S C)
Harr	Harrison's Chancery (Mich)
Harr (Del)	Harrington (Del)
Harr (Mich)	Harrington's Michigan Chancery Reports
Harr &G	Harris & Gill (Md)
Harr Ch	Harrison's Chancery (Eng)
Harr &H	Harrison & Hodgins (U C.)
Harr &J	Harris & Johnson (Md)
Harr &M	Harris & McHenry (Md)
Harr &R	Harrison & Rutherford (Eng)
Harr &W	Harrison & Wollaston (Eng)
Hask	Haskell (U S)
Havil	Haviland (Pr Edw Isl)
Hawan	Hawanan
Hawan Fed	Hawanan Federal
Hawaiian Rep	Hawaii Reports
Hawk P C	Hawkins' Pleas of the Crown (Eng)
Hay Exch	Hayes Exchequer (Ir)
Hayes	Hayes (Ir)
Hayes&J	Hayes & Jones (Ir)
Hay&M	Hay & Marriott (Eng)
Hayw	Haywood (N C)
Hayw	Haywood (Tenn)
Hayw &H	Haywood & Hazelton (U S)
Haz Reg	Hazard's Register (Pa)
H Bl	Henry Blackstone (Eng)
H &C.	Hurlstone & Coltman (Eng)
Head	Head (Tenn)
Heisk	Heiskell (Tenn)
Hem &M	Hemming & Miller (Eng)
Hempst	Hempstead (U S)
Hen &M.	Henning & Munford (Va)
Het	Hetley (Eng)
Het C P.	Hetley's Common Pleas (Eng)
H &H	Horn & Hurlstone (Eng.)
Hill	Hill (N Y)
Hill S C	Hill (S C)
Hill &Den	Hill & Denio (N Y)
Hill &Den Supp	Lalor's Supplement to Hill & Denio's (N Y)
Hilt	Hilton (N Y)
Hil T	Hilary Term (Eng)
H L Cas.	House of Lords Cases (Eng)
H &N	Hurlstone & Norman (Eng)
Hob	Hobart (Eng)
Hodg El.	Hodgins' Election (U C)
Hodges	Hodges (Eng)
Hoffm	Hoffman's Chancery (N Y)
Hoffm Land Cas	Hoffman's Land Cases (U S)
Hog	Hogan (Ir)
Holmes	Holmes (U S)
H P Adm Cas	Holt's English Admiralty Cases
Holt Eq	Holt's Equity (Eng)
Holt K B	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng)
Home	Home (Sc)
Hope Dec	Hope's Decisions (Sc)
Hopk.	Hopkins' Chancery (N Y.)
Hopk.Dec	Hopkins' Decisions (Pa)
Hopw &C.	Hopwood & Coltman (Eng)
Hopw &P.	Hopwood & Philbrick (Eng)
Hosea	Hosea (Ohio)
Houst	Houston (Del)
Houst.Cr	Houston's Criminal Cases (Del)
How	Howard (U S.)
How (Miss)	Howard (Miss)
How A Cas	Howard's Appeal Cases (N Y)
How N P	Howell's Nisi Prius (Mich)
How Pr	Howard's Practice (N Y)
How Pr N S	Howard's Practice New Series (N Y.)
How St Tr.	Howell's State Trials (Eng)
Hud &B	Hudson & Brooke (Ir)
Hughes	Hughes (Ky)
Hughes	Hughes (U.S)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N Y)
Hurl &Gord	Hurlstone & Gordon (Eng)
Hurl.&W	Hurlstone & Walmsley (Eng)
Hutt.	Hutton (Eng)

I

Idaho	Idaho
Iddings D R D	Iddings Dayton Term Reports
Ill	Illinois
Ill App.	Illinois Appellate Court
Ill Cir.	Illinois Circuit Court
Ind	Indiana
Ind App	Indiana Appellate Court
Ind T	Indian Territory
Ins L J	Insurance Law Journal
Int Com Commn.	Interstate Commerce Commission
Int Com Rep.	Interstate Commerce Reports
Int Rev Rec.	Internal Revenue Record
Iowa	Iowa
[1891] Ir.	Law Reports [1891] Irish
Ir Ch	Irish Chancery
Ir C L	Irish Common Law
Ir Eccl.	Irish Ecclesiastical Reports
Ired	Iredell (N C)
Ir Eq	Irish Equity
Ir Law Rep.	Irish Law Reports
Ir Law &Eq	Irish Law and Equity Reports
Ir R 1894	Irish Law Reports for year 1894
Ir R C L.	Irish Reports Common Law
Ir R Eq.	Irish Reports Equity
Irv Just.	Irvine's Justiciary Cases (Eng)

J

Jac	Jacob (Eng)
Jac &W	Jacob & Walker (Eng)
J Bridgm.	John Bridgman (Eng)
J &C	Jones & Carey (Ir)
Jebb &B.	Jebb & Bourke (Ir)
Jebb C C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir)
Jefl	Jefferson (Va)
Jenk	Jenkins (Eng)
J J Marsh	J J Marshall (Ky)
J &L	Jones & La Touche (Eng)
Johns	Johnson (Eng)
Johns	Johnson (N Y)
Johns Cas	Johnson's Cases (N Y)
Johns Ch	Johnson's Chancery (N Y.)
Johns V C	Johnson's English Vice-Chancellors (Eng)
Johns &H	Johnson & Hemming (Eng)
Jones Exch	Jones Exchequer (Ir)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W	Sir William Jones' English King's Bench Reports
Jones&Spen	Jones & Spencer (N Y)
Journ Jur	Journal of Jurisprudence (Pa)
J P	Justice of Peace (Eng)
Jur	Jurist (Eng)
Jur N S	Jurist New Series (Eng)
Just.L R.	Justices' Law Reporter (Pa)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid	Kames' Elucidation (Sc.)
Kames Rem Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng)
Keilw.	Keilway (Eng.)
Kel C C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes	Keyes (N Y.)
Keyl.	Keilwey (Eng)
K &G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng)
Knapp&O.	Knapp & Ombler (Eng.)
Kn &Moo.	Knapp & Moore (Eng)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N S Wales)
Kulp	Kulp (Pa.)
Ky	Kentucky
Ky Dec.	Kentucky Decisions
Ky L.	Kentucky Law Reporter
Ky Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La A (Orleans)	Court of Appeal, Parish of Orleans
La Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa)
Lack Leg N.	Lackawanna Legal News (Pa)
Lack Leg Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N Y.)
Lanc Bar	Lancaster Bar (Pa)
Lanc L Rev.	Lancaster Law Review (Pa)
Land Dec.	Land Decisions (U S.)
Lane	Lane (Eng)
Lans.	Lansing (N.Y.)
Lans Ch.	Lansing's Chancery Decisions (N Y)
Latch	Latch (Eng.)
Law Rep.N S.	Law Reports New Series (N Y)
L C.	Lower Canada
L &C	Leigh & Cave (Eng)
L C Jur	Lower Canada Jurist
L C L J	Lower Canada Law Journal
L C.Rep S Qu.	Lower Canada Reports Seignorial Questions
L D.	Law Dictionary
Ld Ken.	Lord Kenyon (Eng.)
Ld Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn)
Leach C.C.	Leach's Crown Cases (Eng)
L Ed	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng)
Lee t Hardw.	Lee temp Hardwicke (Eng.)
Lef Dec	Lefevre's Parliamentary Decisions (Eng)
Leg Chron.	Legal Chronicle (Pa.)
Leg Gaz	Legal Gazette (Pa)
Leg &Ins R.	Legal & Insurance Reporter (Pa.)
Leg.Int	Legal Intelligencer (Pa.)
Leg Op	Legal Opinions (Pa.)
Leg Rec	Legal Record (Pa)
Lehigh Co L J.	Lehigh County Law Journal (Pa.)
Lehigh Val L R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky)
Litt.	Littleton (Eng.)
Litt Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng)
L.J.Ch O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C P.	Law Journal Common Pleas New Series (Eng.)
L.J C.P.O S.	Law Journal Common Pleas Old Series (Eng.)
L J Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L J Exch	Law Journal Exchequer New Series (Eng.)
L J Exch O.S.	Law Journal Exchequer Old Series (Eng)
L J.K B	Law Journal King's Bench New Series (Eng.)
L J K B O.S.	Law Journal King's Bench Old Series (Eng.)
L J M C.	Law Journal Magistrate Cases New Series (Eng)
L J.M C.O S.	Law Journal Magistrate Cases Old Series (Eng)
L J P C	Law Journal Privy Council New Series (Eng.)
L.J P D &Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng)
L J P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L J.Q B.	Law Journal Queen's Bench New Series (Eng)
L J Rep	Law Journal Reports (Eng)
Ll &G t Pl.	Lloyd & Goold temp Plunket (Ir)
Ll &G t S.	Lloyd & Goold temp Sugden (Ir)
Ll &W	Lloyd & Welsby (Eng)
L &M	Lowndes & Maxwell (Eng)
L M &P.	Lowndes, Maxwell & Pollack (Eng.)
Loc Gov.	Local Government (Eng.)
Lofft	Lofft (Eng)
Longf &T.	Longfield & Townsend (Ir.)
Low Can Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U S)
L.R.	Law Reports (U S)
L R A.	Lawyers' Reports Annotated
L R A 1915A.	Lawyers' Reports Annotated 1915A
L R App Cas.	English Law Reports, Appeal Cases (Eng)
L.R.A &E.	Law Reports Admiralty & Ecclesiastical (Eng)
L R A N S.	Lawyers' Reports Annotated New Series
L R C C.	Law Reports Crown Cases (Eng)
L R Ch.	Law Reports Chancery Appeal Cases (Eng)
L R.C P.	Law Reports Common Pleas Cases (Eng)
L R Eq	Law Reports Equity Cases (Eng)
L R Exch.	Law Reports Exchequer Cases (Eng)
L R H L	Law Reports House of Lords (English & Irish Appeal Cases)
L R H L Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L R Indian App	Law Reports Indian Appeals (Eng)
L R Ir	Law Reports Irish
L R P C	Law Reports Privy Council (Eng)
L.R P &D.	Law Reports Probate & Divorce (Eng.)
L R Q B.	Law Reports Queen's Bench Cases (Eng)
L T.	Law Times (Pa.)
L T N S.	Law Times New Series (Pa)
L T O S	Law Times, Old Series (Eng)

L.T.Rep.N.S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw Reg Cas.	Lutwyche's Registration Cases (Eng.)
Luz Leg Obs.	Luzerne Legal Observer (Pa.)
Luz Leg Reg.	Luzerne Legal Register (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA Pat.Cas.	MacArthur's Patent Cases (D C.)
MacArth.	MacArthur's District of Columbia Reports
MacAr &M.	MacArthur & Mackey's District of Columbia Reports
Macc.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl &R.	Maclean & Robinson (Eng.)
Macn &G.	Macnaghten & Gordon (Eng.)
Macph	Macpherson (Sc.)
Macph S &L.	Macpherson, Shirreff & Lee (Sc.)
Macq	Macqueen's Scotch Appeal Cases
Madd	Maddock (Eng.)
Madd Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man El Cas	Manning's Election Cases (Eng.)
Man Exch Pr.	Manning's Exchequer Practice (Eng.)
Man Gr &S	Manning, Granger, & Scott (Eng.)
Man L J	Manitoba Law Journal
Man &Ry	Manning & Ryland (Eng.)
Man &Ry.Mag. Cas	Manning & Ryland's Magistrates' Cases (Eng.)
Man &S	Manning & Scott (Eng.)
Mann Unrep Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man t Wood	Manitoba temp. Wood
March	March (Eng.)
Mar Prov	Maritime Province Reports (Can.)
Mars Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh J.J.	J. J. Marshall (Ky.)
Mart	Martin Old Series (La.)
Mart (N S.)	Martin, New Series (La.)
Mart.	Martin (N C.)
Marv	Marvel (Del.)
Mart N S.	Martin New Series (La.)
Mart &Y.	Martin & Yerger (Tenn.)
Mason	Mason (U S.)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U S.)
McC.	McCahon (Kan.)
McClell	McClelland (Eng.)
McClell &Y.	McClelland & Younge (Eng.)
McCord	McCord (S C.)
McCrary	McCrary (U S.)
McG.	McGloin (La.)
McLean	McLean (U S.)
McMul.	McMullan (S C.)
Md.	Maryland
Md Ch.	Maryland Chancery
Me.	Maine
Mees &Ros.	Meeson & Roscoe (Eng.)
Mees &W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc	Metcalfe (Ky.)
M &G.	Manning & Granger (Eng.)
M &H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill.Const.	Mill's Constitutional (S C.)
Mill Dec.	Miller's Decisions (U.S.)
Mills	Mills (N Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss Dec	Mississippi Decisions
Miss St.Cas	Mississippi State Cases
M &M.	Moody & Malkin (Eng.)
Mo	Missouri
Mo App.	Missouri Appeals
Moak	Moak (Eng.)
Mo A R.	Missouri Appeals Reporter
Mod	Modern (Eng.)
Mod Cas L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont Bank Rep.	Montagu's English Bankruptcy Reports
Mont L R.	Montreal Law Reports (Can.)
Mont &A.	Montagu & Ayrton (Eng.)
Mont &B	Montagu & Bligh (Eng.)
Mont &C.	Montagu & Chitty (Eng.)
Mont D &DeG.	Montagu, Deacon & De Gex (Eng.)
Montg Co.	Montgomery County Law Reporter (Pa.)
Mont &M	Montagu & McArthur (Eng.)
Montr.Cond Rep	Montreal Condensed Reports
Montr Leg N	Montreal Legal News
Montr Q B	Montreal Law Reports Queen's Bench
Montr.Super	Montreal Law Reports Superior Court
Moody C C	Moody's Crown Cases (Eng.)
Moore C P	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K B.	Moore's King's Bench (Eng.)
Moore P C.	Moore's Privy Council Old Series (Eng.)
Moore P C N S	Moore's Privy Council New Series (Eng.)
Moore&S	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor Min Rep	Morrison's Mining Reports
Morr	Morris (Iowa)
Morr Bankr Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr St Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M &P	Moore & Payne (Eng.)
M &R.	Manning & Ryland (Eng.)
M &Rob	Moody & Robinson (Eng.)
M &S	Maule & Selwyn (Eng.)
Mun Corp.Cas.	Municipal Corporation Cases
Munf	Munford (Va.)
Murph.	Murphey (N C.)
Murr	Murray (Sc.)
M &W.	Meeson & Welsby (Eng.)
Myl &C.	Mylne & Craig (Eng.)
Myl &K	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr Reg	National Bankruptcy Register (U S.)
Nat Corp Rep.	National Corporation Reporter
Nat L Rep	National Law Reporter
N.B.	New Brunswick
N Benl	New Benloe (Eng.)
N B Eq.	New Brunswick Equity
N C.	North Carolina
N Chipm.	N Chipman (Vt.)
N C Conf.	North Carolina Conference
N C T Rep.	North Carolina Term Reports
N D.	North Dakota
N.E.	North Eastern Reporter
N E (2d)	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.(Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels Abr.	Nelson's Abridgment of the Common Law

Nev	Nevada
Newb Adm.	Newberry's Admiralty (U.S.)
Newfoundl	Newfoundland
Newf Sel Cas.	Newfoundland Select Cases
New Rep.	New Reports in all Courts (Eng)
New Sess Cas.	New Session Cases (Eng)
New Zeal L	New Zealand Law
N H	New Hampshire
N J Eq	New Jersey Equity
N J Law	New Jersey Law
N J L J	New Jersey Law Journal
N J Misc.	New Jersey Miscellaneous
N M	New Mexico
N &M	Nevile & Manning (Eng)
N &Macn.	Neville & Macnamara (Eng)
Nolan	Nolan (Eng)
North	Northington (Eng)
North Co.	Northampton County Reporter (Pa)
Northum	Northumberland County Legal News (Pa.)
Northumb.Co Leg N	Northumberland County Legal News (Pa)
Notes of Cas.	Notes of Cases (Eng)
Nott & McC	Nott & McCord (S C)
Noy	Noy (Eng)
N &P	Nevile & Perry (Eng)
N S.	Nova Scotia
N S Dec.	Nova Scotia Decisions
N S Wales	New South Wales
N S Wales L	New South Wales Law
N S Wales L R Eq	New South Wales Law Reports Equity
N W	North Western Reporter
N Y	New York
N Y Ann Cas	New York Annotated Cases
N Y City Ct	New York City Court
N Y City Ct Suppl.	New York City Court Supplement
N Y Civ Proc	New York Civil Procedure
N Y Civ Pr Rep	New York Civil Procedure Reports
N Y Code Reports, N S.	New York Code Reports, New Series
N Y Cr	New York Criminal
N Y Leg Obs	New York Legal Observer
N Y L Rec	New York Law Record
N Y Month L Bul.	New York Monthly Law Bulletin
N Y S	New York Supplement
N.Y St	New York State Reporter
N Y Super	New York Superior Court
N.Y Wkly Dig.	New York Weekly Digest

O

O Ben	Old Benloe (Eng)
O Bridgm	Orlando Bridgman (Eng)
Off Gaz	Official Gazette
Ohio	Ohio
Ohio App	Ohio Court of Appeals
Ohio Cir Ct	Ohio Circuit Court
Ohio Cir Ct N S	Ohio Circuit Court New Series
Ohio Cir Dec	Ohio Circuit Decisions
Ohio Dec (Reprint)	Ohio Decisions (Reprint)
Ohio F Dec	Ohio Federal Decisions
Ohio L J	Ohio Law Journal
Ohio N P	Ohio Nisi Prius
Ohio N P N S	Ohio Nisi Prius New Series
Ohio O	Ohio Opinions
Ohio Prob	Ohio Probate
Ohio S &C P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Okl	Oklahoma
Okl Cr.	Oklahoma Criminal
Olcott	Olcott (U S)
Oliv B &L	Oliver, Beavan & Lefroy (Eng.)
O'M &H	O'Malley & Hardcastle (Ir)
Ont.	Ontario
Ont A	Ontario Appeals
Ont El Cas	Ontario Election Cases
Ont L	Ontario Law
Ont.L J	Ontario Law Journal
Ont L J N S	Ontario Law Journal New Series
Ont Pr	Ontario Practice
Ont.W N.	Ontario Weekly Notes
Ont W R.	Ontario Weekly Reporter
Op Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op Sol Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng)

P

P	Pacific Reporter
P (2d)	Pacific Reporter Second Series
[1891]P.	Law Reports [1891] Probate (Eng)
Pa	Pennsylvania State
Pa Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa Co	Pennsylvania County Court
Pa C Pl	Common Pleas (Pa)
Pa Dist.	Pennsylvania District
Pa Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N Y)
Paine	Paine (U S)
Pa L J.	Pennsylvania Law Journal
Pa L Rec	Pennsylvania Law Record
Pa L J R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park	Parker (Eng)
Park Cr.	Parker's Criminal (N Y)
Park Exch	Parker's Exchequer (Eng)
Park Ins	Parker's Insurance (Eng)
Pars Eq Cas.	Parsons' Equity Cases (Pa)
Pa Super	Pennsylvania Superior Court
Paton App Cas	Paton's Appeal Cases (Sc)
Patrick El Cas.	Patrick's Election Cases (Can)
Patt &H.	Patton & Heath (Va)
P D	Law Reports Probate Division (Eng)
P &D.	Perry & Davison (Eng)
Peake N P.	Peake's Nisi Prius (Eng)
Pearce C C.	Pearce's Reports in Dearsly's (Eng)
Pearson	Pearson (Pa)
Peck	Peck (Tenn)
Peck El Cas.	Peckwell's Election Cases (Eng)
Pennew	Pennewill (Del)
Pennyp	Pennypacker (Pa)
Penr &W.	Penrose & Watts (Pa)
Perry & Kn.	Perry & Knapp Election Cases (Eng)
Pet	Peters (U S)
Pet Adm.	Peters' Admiralty (U S)
Pet C C.	Peters' Circuit Court (U S.)
Phil.	Phillips (Eng)
Phil	Phillip (N C)
Phila	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng)
Pick	Pickering (Mass)
Pig &R.	Pigott & Rodwell (Eng)
Pig Rec.	Pigott's Recoveries (Eng)
Pinn	Pinney (Wis)
Pittsb.	Pittsburgh (Pa.)
Pittsb Leg J.	Pittsburgh Legal Journal (Pa)
Pittsb Leg J.N S.	Pittsburgh Legal Journal New Series (Pa)
P &K.	Perry & Knapp (Eng)
Plowd.	Plowden (Eng)
Pollexf.	Pollexfen (Eng)
Poph.	Popham (Eng)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow Surr	Powers' Surrogate (N Y)
P R &D El.Cas.	Power, Rodwell & Dew's Election Cases (Eng)
Prec Ch	Precedents in Chancery (Eng)
Pr Edw.Isl.	Prince Edward Island
Price	Price (Eng)
Price Pr Cas.	Price's Practice Cases (Eng.)
Prid &C.	Prideaux & Cole (Eng)
Prob [1917]	Law Reports, Probate Division (Eng.)

Prob Rep.	Probate Reports (Eng.)
Pr Rep	Practice Reports (Eng.)
P Wms.	Peere-Williams (Eng.)
P.U R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)
[1891] Q B.	Law Reports [1891] Queen's Bench (Eng.)
Q B D.	Law Reports Queen's Bench Division (Eng.)
Queensl J P.	Queensland Justice of the Peace
Queensl L.	Queensland Law
Queensl L J.	Queensland Law Journal
Que L.	Quebec Law
Que Pr	Quebec Practice
Que Q B	Quebec Official Reports Queen's Bench
Que Rev Jud.	Quebec Revised Judicial
Que Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand	Randolph (Va.)
Rap Jud Q C S	Rapports Judiciaries de Quebec Cour Superieure
Rawle	Rawle (Pa.)
R C L	Ruling Case Law
R & Can Cas	Railway & Canal Cases (Eng.)
R & Can Tr Cas	Railway & Canal Traffic Cases (Eng.)
Redf	Redfield's Surrogate (N Y.)
Redf & B	Redfield & Bigelow's Leading Cases (Eng.)
Redf R Cas.	Redfield's Railway Cases (Eng.)
Redf Surr	Redfield's Surrogate (N Y.)
Reeve Eng L.	Reeve's English Law
Reports	Reports (Eng.)
Reprint	English Reprint
Rep t Finch	Cases temp Finch (Eng.)
Rep t Hard	Lee's Reports *tempore* Hardwicke (Eng.)
Rep t Holt	Reports *tempore* Holt (English Cases of Settlement)
Res & Eq Judgm	Reserved & Equity Judgments (N S Wales)
Rev Crit	Revue Critique (Can.)
Rev de Jur	Revue de Jurisprudence (Can.)
Rev de Legis	Revue de Legislation (Can.)
Rev Leg	Revue Legale (Can.)
Rev Leg N S	Revue Legale New Series (Can.)
Rev Rep	Revised Reports (Eng.)
R I	Rhode Island
Rice	Rice (S C.)
Rich	Richardson (S C.)
Rich C P.	Richardson's Practice Common Pleas (Eng.)
Ridg	Ridgeway's Reports *tempore* Hardwicke (Eng.)
Ridg Ap	Ridgeway's Appeal (Ir.)
Ridg L & S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg P C	Ridgeway's Parliament Cases (Ir.)
Ridg t Hardw	Ridgeway temp Hardwicke (Eng.)
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R & M	Ryan & Moody (Eng.)
R M Charlt.	R M Charlton (Ga.)
Rob	Robinson (La.)
Rob	Robinson (Va.)
Robb Pat Cas	Robb's Patent Cases (U S.)
Robert App Cas	Robertson's Appeal Cases (Sc.)
Rob Eccl	Robertson's Ecclesiastical (Eng.)
Robin App Cas.	Robinson's Appeal Cases (Sc.)
Rob Wm Adm	William Robinson's Admiralty (Eng.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
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Rom Cas.	Romilly's Notes of Cases (Eng.)
Root	Root (Conn.)
Rose	Rose (Eng.)
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R & R	Russell & Ryan Crown Cases (Eng.)
Russ	Russell (Eng.)
Russ & C Eq Cas.	Russell's & Chesley's Equity Cases (N.S.)
Russ Eq Cas.	Russell's Equity Cases (N.S.)
Russ & Geld.	Russell & Geldert Nova Scotia
Russ & M.	Russell & Mylne (Eng.)
Ry & M.	Ryan & Moody (Eng.)

S

Salk	Salkeld (Eng.)
Sandf	Sandford's Superior Court (N Y.)
Sandf Ch	Sandford's Chancery (N.Y.)
Sask L	Saskatchewan Law
Saund	Saunders (Eng.)
Saund & C.	Saunders & Cole (Eng.)
Sau & Sc	Sausse & Scully (Ir.)
S Austr. L.	South Australia Law
Sav	Savile (Eng.)
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Saxt	Saxton (N J.)
Sny	Sayer (Eng.)
S C.	South Carolina
[1907] S C	Court of Session Cases (Sc.)
Scam	Scammon (Ill.)
S C Eq	South Carolina Equity
Sch & Lef	Schoales & Lefroy (Ir.)
[1907] S C (J.)	Court of Justiciary Cases (Sc.)
Sc Jur	Scottish Jurist
S C L	South Carolina Law
Sc L Rep	Scottish Law Reporter
Scot L T	Scot Law Times
Scott	Scott (Eng.)
Scott N R	Scott's New Reports (Eng.)
Scr L T	Scranton Law Times (Pa.)
Sc Sess Cas.	Scotch Court of Session Cases
S Ct	Supreme Court Reporter (U S.)
S D	South Dakota
S E	South Eastern Reporter
Searle & Sm	Searle & Smith (Eng.)
Sel Cas Ch	Select Cases in Chancery (Eng.)
Seld	Selden's Notes (N Y.)
Selden	Selden (N Y.)
Selw	Selwyn's Nisi Prius (Eng.)
Serg & R	Sergeant & Rawle (Pa.)
Sess Cas	Court of Session Cases (Eng.)
Shan	Shannon (Tenn.)
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Shaw & D	Shaw & Dunlop (Sc.)
Shaw Dec	Shaw's Digest of Decisions (Sc.)
Shaw Dunl & B	Shaw Dunlop & Bell (Sc.)
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Silv Sup	Silvernail's Supreme (N Y.)
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Smith K B	Smith's King's Bench (Eng.)
Smith Lead Cas	Smith's Leading Cases (Eng.)
Smith Reg	Smith's Registration (Eng.)
Sm & M	Smedes & Marshall (Miss.)
Sm & M Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
So	Southern Reporter
Sol J.	Solicitor's Journal (Eng.)
Sp	Speers (S C.)
Spinks	Spinks Admiralty (Eng.)
Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)

Spinks, P C.	Spinks' Prize Cases (Eng)
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Spottisw Eq.	Spottiswoode's Equity (Sc.)
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Stark.	Starkie Nisi Prius (Eng.)
Stat. at L.	United States Statutes at Large
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Stew.	Stewart's Reports (N S)
Stew &P	Stewart & Porter (Ala.)
Stockt Vice-Adm	Stockton's Vice-Admiralty (N B)
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Str	Strange (Eng.)
Strob	Strobhart (S C)
Stuart Vice-Adm	Stuart's Vice-Admiralty (L C.)
Stu M &P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng)
Sumn	Sumner (U S)
Susq Leg Chron.	Susquehanna Legal Chronicle (Pa)
S W	South Western Reporter
S W (2d)	South Western Reporter Second Series
Swab	Swabey's Admiralty (Eng)
Swab &Tr.	Swabey & Tristram (Eng)
Swan	Swan (Tenn)
Swanst.	Swanston (Eng.)

T

Taml	Tamlyn (Eng)
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Tapp	Tappan (Oh)
Taunt	Taunton (Eng)
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T B Mon.	T B Monroe (Ky)
Tenn	Tennessee
Tenn App.	Tennessee Appeals
Tenn Cas	Unreported Tennessee Cases
Tenn Ch	Tennessee Chancery
Tenn Ch A	Tennessee Chancery Appeals
Tenn Civ A.	Tennessee Civil Appeals
Terr L	Territories Law (Northwest Territories)
Tex	Texas
Tex App	Texas Court of Appeals
Tex A Civ Cas	White & Wilson's Civil Cases (Tex)
Tex Civ App.	Texas Civil Appeals
Tex Cr	Texas Criminal
Tex Suppl	Texas Supplement
Tex Unrep Cas.	Posey's Unreported Cases (Tex)
Thach Cr	Thacher's Criminal Cases (Mass)
Thomps &C.	Thompson & Cook (N Y)
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Tinw	Tinwald (Sc)
T Jones	Thomas Jones (Eng)
T L R	Times Law Reports (Eng)
T M R.	Trade Mark Reports
T &M.	Temple & Mew (Eng)
Toth	Tothill (Eng)
T R	Term Reports (Durnford & East) (Eng)
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T Raym	Thomas Raymond (Eng)
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Trin T	Trinity Term (Eng)
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Tuck Sel Cas.	Tucker's Select Cases (Newfoundland)
Tuck Surr	Tucker's Surrogate (N Y.)
T U P Charlt.	T U P Charlton (Ga)
Turn &R.	Turner & Russell (Eng)
Tyler	Tyler (Vt)
Tyrw.	Tyrwhitt (Eng)
Tyrw &G.	Tyrwhitt & Granger (Eng)

U

U C	Upper Canada
U C Ch	Upper Canada Chancery
U C Cham.	Upper Canada Chamber
U C C P	Upper Canada Common Pleas
U C E &A.	Upper Canada Error and Appeal
U.C.K B.	Upper Canada King's Bench Reports
U C Q B.	Upper Canada Queen's Bench
U C Q B.O S.	Upper Canada Queen's Bench Old Series
U S.	United States
U S Aviation Rep	Aviation Reports (U S)
U S C A.	United States Code Annotated
Utah	Utah

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Va.	Virginia
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Va Ch Dec.	Chancery Decisions (Va)
Va Dec	Virginia Decisions
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Vern Ch.	Vernon's Chancery (Eng.)
Vern &S.	Vernon & Scriven (Ir)
Ves	Vesey Senior (Eng)
Ves &B	Vesey & Beames (Eng)
Ves Jr	Vesey Junior (Eng)
Ves Jr Suppl	Vesey Junior Supplement (Eng)
Ves Suppl.	Vesey Senior Supplement (Eng)
Vict	Victorian
Vict L	Victorian Law
Vict L T.	Victorian Law Times
Vict Rep	Victorian Reports
Vict St Tr.	Victorian State Trials
Vin Abr	Viner's Abridgment (Eng)
Virgin Islands	Virgin Islands
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W

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Wall C C	Wallace (U S)
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Wallis	Wallis (Ir)
Ware	Ware (U S)
Wash	Washington
Wash	Washington (Va)
Wash St	Washington State
Wash C C	Washington Circuit Court (U S)
Wash T	Washington Territory
Watts	Watts (Pa)
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W Bl	William Blackstone (Eng)
W C C.	Minton-Senhouse's Workmen's Compensation Cases (Eng)
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Web Pat Cas.	Webster's Patent Cases (Eng)
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Wend	Wendell (N Y)
West	West (Eng)
West L J	Western Law Journal (Oh)
West L Month	Western Law Monthly (Oh)
West L R	Western Law Reporter (Can)
West L T.	Western Law Times (Can)
West R	Western Reporter
West t Hardw.	West temp Hardwicke (Eng)
West Wkly	Western Weekly (Can)
[1917] West.Wkly	[1917] Western Weekly (Can)
Whart	Wharton (Pa)
Wheat	Wheaton (U S)
Wheel Cr.	Wheeler's Criminal (N Y.)
White&T Lead. Cas Eq	White & Tudor's Leading Cases in Equity (Eng)
Whitm Pat.Cas.	Whitman's Patent Cases (U.S)
Wight.	Wightwicke (Eng)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind)

Wils Ch	Wilson's Chancery (Eng)
Wils C P	Wilson's Common Pleas (Eng.)
Wils Exch.	Wilson's Exchequer (Eng)
Wils P C.	Wilson's Privy Council (Eng.)
Wils &S.	Wilson & Shaw (Sc.)
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Wis	Wisconsin
W Jones	William Jones (Eng)
W Kel	William Kelynge (Eng)
Wkly L Gaz.	Weekly Law Gazette (Oh)
Wkly N C	Weekly Notes of Cases (Pa)
Wkly Rep	Weekly Reporter (Eng)
Wms Saund.	Williams Notes to Saunders' Reports
W N	Weekly Notes (Eng)
Wolf &B	Wolferstan & Bristow's Election Cases (Eng)
Wolf &D.	Wolferstan & Dew's Election Cases (Eng)
Woll	Wollaston (Eng)
Woodb &M.	Woodbury & Minot (U S.)
Woods	Woods (U S)
Woodw	Woodward's Decisions (Pa)
Woolw	Woolworth (U S)
Words & Phrases	Words & Phrases
Wright	Wright (Oh)
W.Rob.	William Robinson's Admiralty (Eng.)
Wr Pa.	Wright (Pa)
W Va	West Virginia
W W Harr.	W W. Harrington
W W &D.	Willmore, Wollaston & Davidson (Eng)
W W &H.	Willmore, Wollaston & Hodges (Eng.)
Wyo	Wyoming
Wythe	Wythe's Chancery (Va)
Wy &W	Wyatt & Webb (Vict)
Wy.W &A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Yates Sel Cas.	Yates Select Cases (N Y)
Y B	Year Book (Eng)
Y &C Exch.	Younge & Collyer's Exchequer (Eng)
Y &Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa)
Yelv	Yelverton (Eng)
Yerg	Yerger (Tenn.)
Y &J	Younge & Jervis (Eng)
York Leg Rec.	York Legal Record (Pa)
Young Adm.	Young's Admiralty Decisions (N S.)
Younge	Younge Exchequer (Eng)

LAW REVIEWS AND LAW JOURNALS

A B A Jour	American Bar Association Journal
Am J Int Law	American Journal of International Law
Am Law S Rev	American Law School Review
B U L Rev	Boston University Law Review
Brooklyn L Rev.	Brooklyn Law Review
Calif L Rev	California Law Review
Camb L J	Cambridge Law Journal
Chi-Kent Rev.	Chicago-Kent Review
Colum L Rev.	Columbia Law Review
Com L J	Commercial Law Journal
Cornell L Q	Cornell Law Quarterly
Detroit L Rev.	Detroit Law Review
Dick L Rev	Dickinson Law Review
Fed B A J	Federal Bar Association Journal
Fla L J	Florida Law Journal
Fordham L Rev	Fordham Law Review
Geo Wash L Rev	George Washington Law Review
Geo L J	Georgetown Law Journal
Harv L Rev.	Harvard Law Review
Ia L Rev	Iowa Law Review
Idaho L J.	Idaho Law Journal
Ill L Rev	Illinois Law Review
Ind L J	Indiana Law Journal
J Am Jud Soc.	Journal of the American Judicature Society
J Comp Leg	Journal of the Society of Comparative Legislation
J N A Referees Bank	Journal of the National Association of Referees in Bankruptcy
J Soc Pub Teach Law	Journal of the Society of Pub Teachers of Law
John Marshall L Q	The John Marshall Law Quarterly
Kan City L Rev.	Kansas City Law Review
Kan St L J.	Kansas State Law Journal
Ky L J.	Kentucky Law Journal
L J	Law Journal
L Lib J	Law Library Journal
Law Ser Mo Bull	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L Rev.	Lincoln Law Review
Marq L Rev	Marquette Law Review
Mass L Q	Massachusetts Law Quarterly
Mercer, Beasley L Rev	Mercer, Beasley Law Review
Mich L Rev.	Michigan Law Review
Minn L Rev.	Minnesota Law Review
Miss L J.	Mississippi Law Journal
Neb L B	Nebraska Law Bulletin
N J L J	New Jersey Law Journal
N J L Rev	New Jersey Law Review
N Y U L Q Rev.	New York University Law Quarterly Review
Notre Dame Law	Notre Dame Lawyer
N C L Rev	North Carolina Law Review
Okla S B J	Oklahoma State Bar Journal
Oreg L Rev.	Oregon Law Review
Phil L J	Philippine Law Journal
Rocky Mt L Rev	Rocky Mountain Law Review
St John's L Rev	St John's Law Review
St Louis L Rev.	St Louis Law Review (now Washington University Law Quarterly)
So Calif L Rev.	Southern California Law Review
Temp L Q	Temple Law Quarterly
Tenn L Rev.	Tennessee Law Review
Tex L Rev.	Texas Law Review
Tul L Rev	Tulane Law Review
U Chi L Rev.	University of Chicago Law Review
U Cin L Rev	University of Cincinnati Law Review
U Detroit L J.	University of Detroit Law Journal
U Pa L Rev	University of Pennsylvania Law Review
U of Pitts L Rev	University of Pittsburgh Law Review
U Toronto L J.	University of Toronto Law Journal
Va L Rev	Virginia Law Review
Wash L Rev.	Washington Law Review
Wash U L Q.	Washington University Law Quarterly
W Va L Q.	West Virginia Law Quarterly and The Bar
Wis L Rev.	Wisconsin Law Review
Yale L.J.	Yale Law Journal

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CORPUS JURIS SECUNDUM

VOLUME FORTY

HIGHWAYS

This Title includes roads open for free passage to the public, established for public benefit; nature and scope of power to establish and maintain such roads in general; constitutional and statutory provisions relating thereto, appointment and removal, rights, powers, duties, and liabilities of highway boards, officers, etc, establishment of such roads by statutory proceedings, construction, repair, and improvement thereof, and alteration, vacation, and abandonment thereof, taxes for highway purposes and local assessments for particular roads, title to and rights in the land occupied, and removal of and liabilities for obstructions, encroachments, etc, and use of such roads, and liabilities for injuries from defects, obstructions, etc, therein, and for injuries from violations of the law of the road causing collisions, etc

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except to the extent that they conflict with particular constitutional provisions[31] A statutory regulation which tends to promote efficient and uninterrupted performance of work performed under command of the state, to carry out an obligation owed to the state, on a highway of the state, is not beyond the power of the state[32]

A judgment that under existing law the state has no power to make a certain highway contract does not preclude the subsequent enactment of a statute retroactively empowering the state to make such a contract[33]

Validity of state appropriations in aid of construction of roads under constitutional provisions pertaining to works of internal improvement is considered in the C J S title States § 140, also 59 C J. p 212 notes 74, 79, p 213 notes 87, 88

c. Construction and Operation Generally

(1) Constitutional provisions
(2) Statutes

(1) Constitutional Provisions

The words "construction and maintenance" in a constitutional provision authorizing statutes as to state highways should be given a broad construction. An amendment authorizing a bond issue should not be construed to enlarge the state highway system unless such intention is plainly manifested.

Wis —State v Zimmerman, 204 N W 803, 187 Wis 180

(15) Statute relating to road construction on a retaining wall along a beach —Ladner v Road Protection Commission, 116 So 602, 150 Miss 416

(16) Bill providing for leasing to highway department by state bridge corporation of all its bridges and other property terms and conditions thereof, and making appropriation therefor —In re Opinions of the Justices, 145 So 820, 226 Ala 165

(17) A statute authorizing road improvement district to use district funds in part payment of cost of building new bridge over small nonnavigable river crossed by road — McAdams v Henley, 273 S W 355 169 Ark 97, 41 A L R 629

(18) Statute pertaining to an election on the question of adopting a road unit system, although it fails to provide for notice of election - State ex rel Beck v Board of Com'rs of Allen County, 57 P 2d 450, 143 Kan 898

(19) Statute requiring approval of state highway director for the erection of signal lights —Village of Englewood v Bettis 30 Ohio N P ,N S , 491

(20) Acts requiring that township road funds be kept in separate accounts and not expended in other townships —White v Miller, 1 S W 2d 814, 175 Ark 1078

(21) Law relative to highways passing through cities and villages --State v Babcock, 220 N W 408, 175 Minn 103

(22) Statute authorizing transfer of balance in bond refunding fund to general refunding bond redemption account —Scougale v Page, 106 S W 2d 1023, 194 Ark 980

(23) Provision of act setting apart out of highway construction and maintenance fund fixed sum to pay preliminary costs and attorney's fees incurred in proceeding authorized to be taken to test legality of the act which authorized the borrowing of money for construction of roads and bridges —Carter v Miley, 103 P 2d 933, 187 Okl 530

(24) Statute authorizing paving of county roads on petition of abutting property owners —Arbogast v Buncombe County 181 S E 626, 208 N C 515

(25) Statute requiring county court of county in which road improved by highway commission is situated to pay for lands necessary therefor State Road Commission v Kanawha County Court, 163 S E 815, 112 W Va 98

(26) An act, authorizing named citizen of state to institute suit against it through state highway commission for damage resulting from personal injuries caused by negligence of commission's employees and requiring payment of judgment against state by commission out of any funds thereof which may be legally used for such purpose —Mallard v State, La App , 194 So 447

(27) Statute permitting payment of administrative salaries and expenses from highway fund
Ark —Lawhorn v Johnson, 120 S W 2d 720, 196 Ark 991, overruling Ladd v Stubblefield, 111 S W 2d 555, 195 Ark 261, and Burrow v Floyd, 99 S W 2d 573, 193 Ark 220
Minn —Cory v King, 8 N W 2d 614
Okl —Helm v Childers, 75 P 2d 398, 181 Okl 535

Indefinite words which constitute a mere clerical error have been held not to invalidate a statute —Davis v Road Improvement Dist No 7 of Little River County, 257 S W 724, 162 Ark 98

Statutes held invalid under particular constitutional provisions

(1) Statute imposing the cost of a state highway passing through several counties on all but one of the counties, and specially exempting that county - Berry v Hayes, 28 S W 2d 50, 160 Tenn 577

(2) Act authorizing county road commission to use all unexpended balances realized from bond issue for hard-surface roads - Martin v Saye 145 S E 186, 147 S C 133

(3) Statute adding new route to state highway system which did not begin, terminate, or pass through county seat, but did intersect another trunk highway at point twenty two miles distant therefrom —State v Babcock, 200 N W 843, 161 Minn 80

(4) Provision that state highway commission may use highway loan funds to meet outstanding contract obligations incurred in anticipation of aid for state aid or third class highway construction projects —In re Opinion of the Justices, 167 A 174, 132 Me 502

(5) Statute directing payment out of trunk highway fund of damages resulting from negligence of highway department in maintaining trunk highways —State v Babcock, 232 N W 718, 181 Minn 409

(6) Special act vesting state department of highways and public works with full control over expenditure of funds received by certain counties from state for road and highway purposes, including gasoline tax —Hassell v Walters, 93 S W 2d 1268, 170 Tenn 206

31. Ark - Taylor v J A Riggs Tractor Co, 122 S W 2d 608, 197 Ark 383
Minn —Cory v King, 296 N W. 506, 209 Minn 431
29 C J p 583 notes 57, 58.

32. N Y —Long Island R Co v Department of Labor of State of New York, 177 N E 17, 256 N Y 498, affirming 247 N Y S 278, 138 Misc 612

33. Idaho —Powell v McKelvey, 53 P 2d 626, 56 Idaho 291.

The words "construction and maintenance" in a constitutional provision authorizing the legislature to enact a statute for the construction and maintenance of state highways should be given a broad rather than a narrow construction.[34] A constitutional amendment authorizing a bond issue for highway purposes should not be construed to enlarge the state highway system except where such intention is plainly manifested.[35]

(2) Statutes

The usual principles of statutory construction are applied to statutes pertaining to the construction, improvement, or repair of highways

The usual principles of statutory construction are applied in determining the legislative intent expressed by the terms of statutes pertaining to the construction, improvement, or repair of highways.[36] The statutes should be liberally[37] and reasonably[38] construed to carry out the legislative intent, and the general purpose of the acts should be kept in mind,[39] but the statutes must be interpreted as written, and the courts cannot depart from the explicit declaration of the legislature.[40] A statute will be construed as mandatory[41] or directory,[42] as required by the evident intent of the legislature. Statutes fixing the time for an act to be done by public officers are often construed as directory where a disregard of such time cannot injuriously affect the rights of interested parties.[43]

All the statutory provisions pertaining to the same subject matter should be considered and construed together as a whole if possible.[44] A repeal

34. Miss.—State ex rel. Cowan v. State Highway Commission, 13 So. 2d 614.

35. Mo.—State ex rel. Russell v. State Highway Commission, 42 S.W.2d 196, 328 Mo. 942.

36. Mo.—State ex rel. R. Newton McDowell, Inc. v. Smith, 67 S.W.2d 50, 334 Mo. 653.
N.C.—Lassiter v. Board of Com'rs of Wake County, 124 S.E. 738, 188 N.C. 379.
W.Va.—Hill v. Barbour County Court, 185 S.E. 227, 117 W.Va. 288.
29 C.J. p. 583 notes 57, 59.

Rule of ejusdem generis

A statute, requiring appropriation of portion of road funds from three-mill road tax, gasoline tax, per capita tax, automobile tax "or any other tax," in hands of county court, was held to refer only to taxes of similar character to those enumerated, and not to general revenues, under the rule of ejusdem generis.—Mover v. Altheimer, 270 S.W. 91, 168 Ark. 271.

Assumption as to matters considered by legislature

In determining meaning of statute relating to distribution of gross receipts tax among counties and application thereof, court must assume that legislature was familiar with financial conditions of counties, that legislature regarded constitutional provisions and statutes relating to counties' finances as in pari materia, and that legislature was familiar with construction of such constitutional provisions and statutes by court of appeals.—Fiscal Court of Scott County v. Davidson, 82 S.W.2d 801, 259 Ky. 498.

37. Cal.—City and County of San Francisco v. Boyd, 110 P.2d 1036, 17 Cal.2d 606.
N.J.—Taylor-White Extracting Co. v. State Highway Commission, 136 A. 183, 5 N.J.Misc. 255, affirmed 144 A. 921, 105 N.J.Law 498.
Wis.—Muscoda Bridge Co. v. Worden-Allen Co., 219 N.W. 428, 196 Wis. 76.

38. Cal.—Watson v. Greely, 232 P. 475, 69 Cal.App. 643.
N.Y.—Smith v. Helmer, 7 Barb., N.Y., 416.

Use of different expressions

The use in a statute of different expressions all meaning one and the same thing has been held to be immaterial.—Hastings v. Pfeiffer, 43 S.W.2d 1073, 184 Ark. 952.

39. Ariz.—Koch v. Johnson, 243 P. 611, 30 Ariz. 14.
Ark.—Cowan v. Thompson, 9 S.W.2d 790, 178 Ark. 44.
Miss.—Mississippi Road Supply Co. v. Hester, 188 So. 281, 185 Miss. 839, 124 A.L.R. 574.

Purpose of particular statutes

(1) One of the purposes of the road and bridges law is to provide a fund to be levied by the commissioners of highways for ordinary road purposes, and another purpose is to provide means by special taxation or the issuance of bonds, to be authorized by a vote of the people, to raise funds to improve roads which may be hard-surfaced or otherwise.—People ex rel. Singer v. Illinois Cent. R. Co., 26 N.E.2d 840, 373 Ill. 523.

(2) The primary purpose of the act creating the state highway department and dealing with the state highway system was to establish and construct a uniform state highway system.—Reilly v. Sugar Creek Tp. of Harrison County, 139 S.W.2d 525, 345 Mo. 1248.

Contradictory provision defeating purpose of act

A provision in a refunding act which is contradictory to other provisions of the act and which would defeat the plan and purpose of the act will be disregarded as surplusage.—Cherry v. Leonard, 75 S.W.2d 401, 189 Ark. 869.

40. N.C.—Carlyle v. State Highway Commission, 136 S.E. 612, 193 N.C. 36.

41. Iowa.—Newton v. Jasper County, 112 N.W. 167, 135 Iowa 27, 124 Am.S.R. 256.

42. Cal.—Fresno County v. Fowler Switch Canal Co., 9 P. 309, 68 Cal. 359.

43. Ind.—Clark Civil Tp. v. Brookshire, 16 N.E. 132, 114 Ind. 437.
Minn.—State v. Anding, 155 N.W. 1048, 132 Minn. 36.
Ohio.—Dix v. Shoemaker, 24 Ohio N.P.,N.S., 321.

44. Ariz.—Lee Moor Contracting Co. v. Hardwicke, 106 P.2d 332, 56 Ariz. 149.
Cal.—California Highway Commission v. Ballard, 247 P. 527, 77 Cal.App. 404.
Ind.—Town of Brownsburg v. Trucksess, 185 N.E. 315, 98 Ind.App. 322.—Cole v. Board of Com'rs of Noble County, 138 N.E. 859, 82 Ind.App. 640, rehearing denied 140 N.E. 448, 82 Ind.App. 640.
Mo.—State ex rel. R. Newton McDowell, Inc., v. Smith, 67 S.W.2d 50, 334 Mo. 653.
Tenn.—Woodard v. Haywood County, 13 Tenn.App. 332.

Statute dealing with distribution and application of funds

(1) The statute dealing with apportionment and distribution of the highway fund must be construed in its entirety with a view of giving effect to legislative intent.—Emporia Tp. of Lyon County v. Williams, 89 P.2d 919, 149 Kan. 860.

(2) In determining meaning of statute relating to gross receipts tax, distribution thereof among counties and application of proceeds, constitutional provisions and other statutes relating to counties' finances and taxes must be considered in pari

by implication of one statute by another is not favored[45] and will be held not to exist if by any reasonable construction an irreconcilable conflict can be avoided.[46] As a general rule a subsequently enacted statute will be held to repeal a former statute in irreconcilable conflict therewith,[47] and where the legislature enacts two separate acts at the same session the last act will be held to prevail.[48] Although usually a specific statute will prevail over a general statute,[49] particularly where it is the later of the two acts,[50] a subsequently enacted general act will repeal or supplant a specific statute if it expressly so provides,[51] or if from the whole scheme and purpose of the general law an implied repeal is clearly intended by the legislature,[52] such as where an act is intended to cover the entire sub-

materia—Fiscal Court of Scott County v Davidson, 82 S W 2d 801, 259 Ky 498

45. Ark—Page v Rodgers, 134 S W 2d 573, 199 Ark 307
Cal—California Highway Commission v Ballard, 247 P 527, 77 Cal App 404
Ind—Town of Brownsburg v Trucksess, 185 N E 315, 98 Ind App 322—Cole v Board of Com'rs of Noble County, 138 N E 859, 82 Ind App 640, rehearing denied 140 N E 448, 82 Ind App 640

46. Ark—Page v Rodgers, 134 S W 2d 573, 199 Ark 307
Cal—California Highway Commission v Ballard, 247 P 527, 77 Cal App 404
Ind—Town of Brownsburg v Trucksess, 185 N E 315 98 Ind App 322—Cole v Board of Com'rs of Noble County, 138 N E 859, 82 Ind App 640 rehearing denied 140 N E 448, 82 Ind App 640
Or—Cabell v City of Portland, 57 P 2d 1292, 153 Or 528
Tenn—County Board of Highway Com'rs v Wilde, 163 S W 2d 329—Crockett County v. Walters, 95 S W 2d 305, 170 Tenn 337

Statutes held not amended, repealed, or conflicting

(1) Statutes relating to the formation of road districts have been held not repealed by laws relating to state highways or authorizing a state highway system
Ark—Cowan v Thompson, 9 S W 2d 790, 178 Ark 44
Mo—Johnson v Underwood, 24 S W 2d 133, 324 Mo 579

(2) A statute giving the highway commissioner full charge and control over state roads was held not to repeal statutes charging township commissioners, county boards, or municipalities with the maintenance of roads within the townships or municipalities and vesting them with power to vacate such roads—Rogers v City of Jackson, 231 N W 621, 251 Mich 256

(3) The statute providing for acquiring rights of way for state highways was not repealed by subsequently enacted statute levying a motor vehicle fuel tax for refunding of highway district obligations, etc., and providing that the portion of the tax going to counties was to be apportioned under existing laws.—Arkansas State Highway Commission v Pulaski County, Ark., 168 S W 2d 1098

(4) The statutes governing automobile registration and licensing and mileage taxes are not repugnant to, and do not amend, repeal, or affect, previous statutes limiting estimates of income for county highway funds—Lowden v Alfalfa County Excise Board, 79 P 2d 209, 182 Okl 607

(5) The statute requiring proceeds of gasoline taxes to be placed in the county highway fund, and providing that proceeds shall be used exclusively for specified purposes, which do not include payment of mileage of county commissioners, is not in conflict with provision of amendatory statute previously adopted at same session of legislature and providing that all money appropriated for payment of traveling expenses of county commissioners shall be set aside from the county highway cash fund, and the former statute does not repeal the latter provision—Carter County Excise Board v Stanolind Pipe Line Co., Okl., 127 P 2d 810

(6) The statute providing for payment to municipal treasury of one half of all ad valorem taxes collected by or for a county for road purposes on property within a municipality, the streets of which are worked at municipal expense or by municipal authority, was neither repealed nor amended by enactment of homestead exemption act and the act providing for reimbursement of taxing units for maintenance tax lost by reason of homestead exemption, but was continued in full force and effect as representing the legislative policy—Coahoma County v City of Clarksdale, 7 So 2d 882, 192 Miss 851

(7) A statute defining the authority and duties pertaining to a newly created office will not be held by implication to repeal statutes defining the authority and duties pertaining to other offices—Thompson v Chilton County, 181 So 701, 236 Ala 142

(8) A statute which merely invests the boards of supervisors with more powers is not incongruous with a prior statute defining their powers—Watson v Greely, 227 P. 664, 67 Cal App 328

(9) A statute which merely pertains to the manner of entering into contracts for construction of highways does not modify or change existing law as to the manner of doing the construction work—Southern California Roads Co v. McGuire, 39 P 2d 412 2 Cal 2d 115.

(10) Other statutes
Ark—Mooring v Wardell & Whitton Road Maintenance Dist No 2, 22 S W 2d 163, 180 Ark 660
Cal—Chilson v Jerome, 283 P 862, 102 Cal App 635
Nev—Leech v Armstrong, 283 P 396, 52 Nev 125, rehearing denied 287 P 174, 52 Nev 125
Tex—Robbins v Limestone County, 268 S W 915, 114 Tex 345, answers to certified questions conformed to, Civ App., 272 S W 526—Johnson v. Ferguson, Civ App., 55 S W 2d 153, error dismissed

47. Ark—Johnson County v Town of Hartman, 8 S W 2d 469, 177 Ark. 1009—City of Conway v Summers, 4 S W 2d 19, 176 Ark 796
Pa—Carr v Fuls, 133 A. 150, 286 Pa 137
S C—Chesterfield County v State Highway Department of South Carolina, 3 S E 2d 686, 191 S C 19
Tex—Johnson v Ferguson, Civ App., 55 S W 2d 153, error dismissed

48 Miss—Miller v Tucker, 105 So. 774, 142 Miss 146

49. Mont—Durland v Prickett, 39 P 2d 652, 98 Mont 399
Tex—Stovall v Shivers, 103 S W 2d 363, 129 Tex 256 affirming Shivers v Stovall, Civ App., 75 S W 2d 276—Hill County v Bryant & Huffman, 16 S W 2d 513, 118 Tex 359, affirming in part and reversing in part, Civ App., 264 S W 520—Austin Bros v Patton, Civ App., 245 S W 991, reversed on other grounds, Com App., 288 S W 182, modified on other grounds 290 S W 153, motion denied 291 S W 537

50. Mo—State ex rel Wammack & Welborn v Affolder, 257 S W 493, 214 Mo App 500

51. Minn—State v Babcock, 222 N. W 285, 175 Minn 583, followed in State v Babcock, 222 N W 287, 175 Minn 590
Pa—Jefferson County v Rose Tp., Jefferson County, 129 A. 78, 283 Pa 126

52. Wash—Great Northern Ry Co. v Glover, 77 P 2d 598, 194 Wash. 146.

ject of building, maintenance and control of roads,[53] and this is true even though the general statute specifically repeals other statutes but omits to repeal the one in question.[54]

Omissions in substitute statute. Where a statute is enacted as a substitute for a former statute, an omission of a provision which was included in the original statute is usually held to repeal such provision.[55]

§ 176. Highway Funds

a In general
b Grant of funds by federal government
c Allocation or grant of funds by state
d. Allocation or distribution of funds by county
e. Agreements as to contributions or expenditures
f Custody, control, and ownership of funds
g Manner of payment or disbursement
h Expenditure for proper purpose
i Remedies

a. In General

Disbursements for highway purposes must be made out of the fund designated or authorized therefor by statute Funds appropriated for certain highway construction may by supplemental appropriation be transferred for other highway construction

Disbursements for general highway purposes or for particular highway projects or charges must be made out of the fund designated or authorized by statute.[56] A general fund for governmental expenses has been held not available for highway purposes,[57] but in other jurisdictions it has been held that the construction and maintenance of roads as an undisputed function of government may in certain instances be paid for out of the general fund.[58] A provision that the state highway fund shall be subject to appropriation for the improvement of a system of state highways removes such fund beyond all doubt from the general revenue fund and devotes, but does not appropriate, it to the purpose stated.[59]

The validity and propriety of the use for highway purposes generally of gasoline tax funds is considered in the C J S title Licenses §§ 30, 56, also 37 C J p 224 note 68 [a], 42 C J p 738 notes 55, 58 The use of vehicle tax funds generally is considered in the C J S title Licenses §§ 30, 56, also 37 C J p 229 note 12, and the use of motor vehicle tax funds in the C J S title Motor Vehicles §§ 136, 143, 144, also 42 C J p 729 notes 14–16, p 735 notes 21, 26–p 736 note 33, p 737 notes 36, 37 The general disposition of proceeds of highway taxes and of local assessments is discussed infra §§ 292 and 305, respectively

Anticipatory or estimated revenue A claim may be paid out of current revenues anticipated and appropriated for highway purposes,[60] and, where a tax has been assessed and is in process of collection, orders may be drawn on such fund.[61] When so provided by statute the use of anticipatory receipts from sources other than ad valorem taxes must not exceed the actual collection from such sources for the immediately preceding fiscal year.[62] After expenditure of the total sum authorized by statute for highway purposes, the county authorities cannot make further expenditures in anticipation of the ensuing annual levy.[63]

53. Ark —City of Conway v Summers, 4 S W 2d 19, 176 Ark 796
Tenn —Goetz v Smith, 278 S W 417, 152 Tenn 451
Wash —Great Northern Ry Co v Glover, 77 P 2d 598, 602, 194 Wash 146

54 Wash —Great Northern Ry Co v Glover, supra

55. Ala —Mitchell v Walden Motor Co, 177 So 151, 235 Ala 34
Tex —Johnson v Ferguson, Civ App, 55 S W 2d 153, error dismissed

Amendment to "read as follows"
Amendment of act relating to highways to "read as follows" works repeal of all of former act not contained in second —Lassiter v Board of Com'rs of Wake County, 124 S E 738, 188 N C 379

56. Kan —State v Board of Com'rs of Johnson County, 292 P 921, 131 Kan 403
La.—State ex rel Varnado v Louisiana Highway Commission, 147 So 361, 177 La 1—Mallard v State, App, 194 So 447
Mo —State v Hackmann, 282 S W 1007, 314 Mo 33
Pa -In re State Highway Construction Through Municipalities, 12 Pa Dist & Co 523

Payment from bond proceeds
There being no highway funds in hand except those derived from sale of bonds, an obligation of the county highway commission to the state highway commission for work done on a part of a state highway in the county may be paid therefrom —Board of Com'rs of Mecklenburg County v Mecklenburg Highway Commission, 109 S E 848, 182 N C 617
Disbursement by state to counties or districts see infra subdivision c of this section
Payment of bonds see infra subdivision h (2) (c) of this section

57. Va —Godwin v Board of Sup'rs of Nansemond County, 171 S E 521, 161 Va 494

58. Cal —Ferguson v Gardner, 260 P 961 86 Cal App 421

Surplus remaining in general fund held available
Ga —Spain v Hall County, 165 S E 612, 175 Ga 600

59. Tex —Johnson v Ferguson, Civ App, 55 S W 2d 153, error dismissed

60. Okl —Carter v. Miley, 103 P 2d 933, 187 Okl 530

61. Me —Barnard v Argyle, 20 Me 296

62. Okl —Lowden v Alfalfa County Excise Board, 79 P 2d 209, 182 Okl 607

63. Wis —Webster v Douglas County, 77 N W 885, 78 N W 451, 102 Wis 181, 72 Am S R 870.

The state highway commission should conduct the business of the department on the basis of the revenue provided and which it is reasonably certain will be received.[64] In accordance with statutory provisions, the budget of the state highway commission is based on estimates of income furnished by the state tax commission at the beginning of the fiscal year,[65] and if the original estimate is revised by the state tax commission, the auditor of public accounts should give effect to the revision on his budget ledger.[66] At the close of the fiscal year the difference between the estimated receipts of the state highway commission and the actual receipts should be charged or credited on the auditor's budget ledger for the next fiscal year.[67]

Supplemental appropriations Funds appropriated for highway construction at certain designated places may, by supplemental appropriation, be transferred to highway construction at other places,[68] in the same manner as provided by statute for supplemental appropriations for current expense purposes.[69]

b. Grant of Funds by Federal Government

In accordance with statutory provisions, funds may be procured from the federal government for highway purposes but the state highway authorities, unless specifically required by statute, have no duty to procure federal aid

The primary objective of state statutes providing means whereby the state may procure an advance of money from the federal government has been held to be to make the funds offered by the federal government available and to authorize the state highway department to enter into specific contracts with the federal government to obtain such funds.[70] In the absence of a statutory requirement the state highway department does not have the duty to secure federal aid for any highway but only to use it when available,[71] but when specifically required by statute the state highway commission has the duty to comply with all rules and conditions of the federal government to obtain payment of funds allotted to the state by the federal government.[72] The engagement of a state to meet federal aid does not exempt the state, in dealing with the federal government, from the direction of its constitution and the operation of its statutes.[73]

Under statutes so providing, counties or districts may avail themselves of federal aid in the construction or maintenance of roads.[74] A statute which pertains to counties of a certain population but provides no means by which the population is to be ascertained will be construed as pertaining to the last federal census in order to render the statute definite and certain.[75]

c. Allocation or Grant of Funds by State

State funds are to be allocated or apportioned to counties or other political subdivisions of the state for construction and improvement of highways in accordance with constitutional or statutory provisions authorizing such disbursement

In furtherance of a purpose to establish a uniform state highway system[76] and to construct, improve, or maintain county highways,[77] constitutional or statutory provisions have been adopted permitting state funds to be allocated or apportioned to counties, districts or other political subdivisions. In accordance with the particular terms of such provisions, state funds or funds received from the state may be disbursed for future construction and improvement,[78] or for past construction and im-

64. Ky—State Highway Commission v Coleman, 33 S W 2d 318, 236 Ky 444

65. Ky—State Highway Commission v Coleman, supra

66. Ky—State Highway Commission v Coleman, supra

67. Ky—State Highway Commission v Coleman, supra

68. Okl—Protest of Chicago, R I & P Ry Co, 12 P 2d 902, 158 Okl 135

69. Okl—Protest of Chicago, R I & P Ry Co, supra

70. Colo—Johnson v McDonald, 49 P 2d 1017, 97 Colo 324

71. SC—Gaston v State Highway Department of South Carolina, 132 S E 680, 134 S C 402

72. Mo—Davis Const Co v State Highway Commission, App, 141 S W 2d 214.

73 Neb State v Marsh, 196 N W 130, 111 Neb 185

74. The term "maximum of federal aid," in Acts 1925 No 215 § 2, providing that road improvement districts which cannot obtain maximum of federal aid without issuing additional bonds or making additional assessment of benefits shall be entitled to benefits of such act, has been held to mean the highest amount which will be awarded to a given district, and statute does not mean that district cannot proceed under the act unless it is awarded aid equal to highest percentage of construction cost awarded any other district—Taylor v Williams, 272 S W 852, 169 Ark 52

75. Ark—Ark-Ash Lumber Co v Pride & Fairley, 258 S W 335, 162 Ark 235

76. Fla—Carlton v Mathews, 137 So 815, 103 Fla 301.

77 Ark—Hastings v Pfeifler, 43 S W 2d 1073, 184 Ark 952

Okl—Delaware County Excise Board v St Louis-San Francisco Ry Co, 49 P 2d 523, 173 Okl 574

78. Ariz—Koch v Johnson, 243 P 611, 30 Ariz 14

N C—Oliver v Board of Com'rs of Johnston County, 139 S E 767, 194 N C 380

Time computed from original statute

The statute of 1923 if construable as transferring future burden of taxation for financing future construction maintenance, and repair of highways to motorists has been held to effect transfer of such burden in 1923, not in 1932 when act was amended, and allocation of gasoline tax and license funds to payment of cost of construction, maintenance, or repair incurred since original enactment would conform to legislative in-

provement,[79] or the state may assume the debts or claims against political subdivisions incurred from past construction or improvement of particular roads.[80] Where the legislature has assumed plenary ownership and control of county and district roads as state roads, it has the power to declare that money expended by the counties and districts in the construction of those roads is a proper state expense,[81] and the fact that such roads were constructed as a county or district purpose or expense does not affect its power.[82] A constitutional provision authorizing the legislature to enact a statute for the construction and maintenance of state highways confers the right to pay for a necessary link of roadway already constructed.[83]

The state authorities have the mandatory duty to comply with the constitutional or statutory provisions,[84] and the county or district has a right to the disbursement in accordance with such provisions,[85] regardless of indebtedness owed to the state under another statute.[86] On the other hand the liabilities

tention—Bridges v. State ex rel. Vaughn, 190 N.E. 758, 208 Ind. 684.

Application for state aid

Under a statute which permits an application for state aid in the construction of intercounty highways without the presentation of any petition, county commissioners may apply for state aid for improving intercounty highway without petition of abutting property owners.—Matthews v. Huwe, 19 Ohio App. 113, error dismissed 147 N.E. 610, 109 Ohio St. 628.

79. Ark.—Page v. Paving Improvement Dist. No. 11 of Russellville, 158 S.W.2d 905, 203 Ark. 657.—Arkansas State Highway Commission v. Otis & Co., 31 S.W.2d 127, 182 Ark. 242.
Fla.—Carlton v. Mathews, 137 So. 815, 103 Fla. 301.
Ind.—Bridges v. State ex rel. Vaughn, 190 N.E. 758, 208 Ind. 684.
Kan.—State v. State Highway Commission, 295 P. 986, 132 Kan. 327.
Miss.—State ex rel. Cowan v. State Highway Commission, 13 So.2d 614.
S.C.—Briggs v. Greenville County, 135 S.E. 153, 137 S.C. 288.
Tenn.—Baker v. Hickman County, 47 S.W.2d 1090, 164 Tenn. 294.

Debts incurred prior to the statutory enactment have been held to be included.
Ala.—Cochran v. Marshall County, 6 So.2d 489, 242 Ala. 314.
Ark.—Hastings v. Pfeiffer, 43 S.W.2d 1073, 184 Ark. 952.

Proposed warrants as debts

Warrants proposed to be issued by county dated January 1, 1942, for purpose of financing county's obligations under contract with the state for improvement of highways, the cost of which was to be shared by county, and to be financed by being made payable out of funds to be received by county as its share of proceeds of state gasoline tax, would not be "debts" within proviso in Code of 1940 limiting amount governing body of a county is authorized to expend from gasoline tax fund in payment of any debt that may have been incurred by county for the construction or maintenance of roads or bridges to one-third of the total amount of such fund.—Cochran v. Marshall County, 6 So.2d 489, 242 Ala. 314.

80. Retroactive application of statute

A statute relieving counties of liability for cost of state highway rights of way will be given a retroactive application if such is the clearly expressed legislative intention.—Baker v. Donegan, 52 S.W.2d 152, 164 Tenn. 625, affirming 47 S.W.2d 1095, 164 Tenn. 625.

Assumption of payment of certificates of indebtedness

A statute providing for the assumption and payment by the state highway commission of bonds of road improvement districts includes by implication the payment of certificates of indebtedness.—Arkansas State Highway Commission v. Kerby, 300 S.W. 377, 175 Ark. 652.

Claims paid by county

A statute imposing liability on the state for claims against the county does not contemplate reimbursement to the county for claims already paid by the county.—Jackson County v. Burris, 56 S.W.2d 739, 165 Tenn. 559.

81. Fla.—Carlton v. Mathews, 137 So. 815, 103 Fla. 301.
Validity of statutes see supra subdivision b of this section.

82. Fla.—Carlton v. Mathews, supra.

83. Miss.—State ex rel. Cowan v. State Highway Commission, 13 So.2d 614.

84. Ark.—Arkansas State Highway Commission v. Otis & Co., 31 S.W.2d 127, 182 Ark. 242.
Cal.—San Benito County v. Riley, 263 P. 349, 88 Cal.App. 131.
Miss.—State ex rel. Cowan v. State Highway Commission, 13 So.2d 614.

Duty as affected by other obligations

The duty to comply with a mandatory constitutional requirement that the state pay over a certain amount to a city for maintenance of streets which are used as state highways is not affected by the state highway commission's secondary duty to pay out a certain sum for road construction, nor is it affected by the fact that other contracts could not be fulfilled in event of compliance.—State ex rel. City of New Orleans v. Louisiana Highway Commission, 156 So. 806, 180 La. 512.

Duty to bring each county to parity

Act providing for road construction to bring each county in state to parity" required all counties to be brought in same condition regarding aid in road building, "parity" meaning equality.—Arkansas State Highway Commission v. Otis & Co., 31 S.W.2d 427, 181 Ark. 242.

Duty to appraise

State highway commission taking over, as part of state highway system, bridge constructed by county was required to make an appraisal of county's proportionate value of bridge, even if commission did not have money on hand with which to reimburse the county.—State ex rel. Cowan v. State Highway Commission, Miss., 13 So.2d 614.

85. Kan.—State v. State Highway Commission, 295 P. 986, 132 Kan. 327.
Mo.—State ex rel. Reynolds County v. State Highway Commission, 42 S.W.2d 193, 328 Mo. 859.

Interpretation of statutes to do justice to indebted counties or districts

Where legislature has taken over for state purposes roads constructed by counties and districts and has by statute declared a purpose to compensate counties and districts, statutes giving relief to counties from indebtedness assumed for road taken over by state should be interpreted to do justice to counties and districts which have assumed large indebtedness for road construction.—State ex rel. Hill v. Cone, 191 So. 50, 140 Fla. 1.

Money expended on county bridge

Where abandoned county bridge is moved and incorporated into state highway system at another point, the county is entitled to moneys expended thereon.—State ex rel. Reynolds County v. State Highway Commission, 42 S.W.2d 193, 328 Mo. 859.

86. Cal.—San Benito County v. Riley, 263 P. 349, 88 Cal.App. 131.

of the state[87] or the rights of the political subdivisions[88] cannot exceed those created by the terms of the provisions, and the indebtedness or improvement for which a disbursement is sought must be qualified as within the classification designated therein.[89] Disbursement to the counties or districts can be made only from funds derived from the particular source designated by the constitutional or statutory provision authorizing the disbursement.[90]

To whom disbursed In accordance with statutory provisions state aid is to be given to counties,[91] and is to be given districts,[92] and state aid is

87. Mo—State ex rel Reynolds County v State Highway Commission, 42 S.W.2d 193, 328 Mo 859

Duty to reimburse as requiring assumption of indebtedness

(1) A statute providing for reimbursement to counties and districts for moneys expended in construction of certain roads does not impose on the state the duty to assume the bonded indebtedness of the counties and districts—Hillsborough County v Bregenzer, Fla., 10 So.2d 498—Holland v State ex rel Goss, Fla., 10 So.2d 338

(2) Thus the board of administration may not lawfully pay from state funds derived from gasoline taxes that part of a judgment against special road and bridge district which represented interest that accrued after maturity of the bonds, and such other costs as accrued incident to securing the judgment, including interest on the judgment from date it was secured to date of payment—Holland v State ex rel Goss, supra

88. Fla—Carlton v Mathews, 137 So. 815, 103 Fla. 301

Theory entitling county to refund

The county is not entitled to a refund on the theory of ownership, but it is so entitled on the theory of its voluntary aid in the construction of projects—State ex rel Reynolds County v State Highway Commission, 42 S.W.2d 193, 328 Mo 859

Credit for expenditure on county roads

Under a statute which permits the county to expend a certain percentage of the fund derived from the state on county or township roads rather than on state highways, the money must be actually expended on such roads and not merely set aside for such use in order that the county may claim credit for the expenditure in a settlement of accounts between the state and the county—State ex rel Bennett v State Highway Commission, 26 P.2d 606, 138 Kan. 294, rehearing denied 33 P.2d 330, 139 Kan. 655; State ex rel Smith v State Highway Commission, 295 P. 986, 132 Kan. 327

Surplus funds payable to county

(1) The statute relating to application by state board of administration of funds for payment of road indebtedness of counties, which provided that "surplus in county accounts," designated as "sinking fund account," should be remitted to county for construction and maintenance of roads therein did not contemplate existence of a surplus in the accounts until accomplishment of the state's plan to make restitution to counties for construction by counties of roads subsequently taken over by state and designated as state roads—State ex rel Proctor v Cone, 193 So. 753, 141 Fla. 606

(2) In the statute the words "surplus" and "sinking fund" were used in their ordinary meaning, and "surplus in county accounts" had reference in general to certain portion of the second gas tax and might not include any portion of the ad valorem taxes—State ex rel Proctor v Cone, supra

(3) The county could not have a surplus from gas tax funds so long as roads constructed by it and taken over by state as state roads were unpaid for or any bonds thereon were outstanding—State ex rel Proctor v Cone, supra

(4) If any outstanding bonds on roads constructed by county and taken over by state had not matured or could not be acquired and sinking fund ample to pay principal and interest thereon when and as due was provided for and invested in liquid securities approved by state board of administration or as directed by law, such bonds would be considered as having been taken care of and a "surplus" as contemplated by the statute could then accrue—State ex rel Proctor v Cone, supra

89. Fla—Carlton v Mathews, 137 So. 815, 103 Fla. 301

Minn—State v Babcock, 242 N.W. 474, 186 Minn. 132

Mo—State ex rel Reynolds County v State Highway Commission, 42 S.W.2d 193, 328 Mo 859

"Farm-to-market roads," within act designating purposes for which road funds were allotted to counties, has been held to mean county public highways leading directly to, or intersecting, state highways leading to markets—Hastings v Pfeiffer, 43 S.W.2d 1073, 184 Ark. 952

City streets

A statute authorizing reimbursement where "road" on highway system had been built under benefit district plan was held not to authorize reimbursement to cities for improving street designated as part of highway system—State ex rel Ice v. State Highway Commission, 17 P.2d 839, 136 Kan. 652

Bonds for roads and public buildings

A judgment on county bonds, which were designated "road and bridge funding bonds," but which recited that they were issued for construction, equipment, repair, and maintenance of public roads and bridges, and repair and maintenance of public buildings, was not a "judgment based upon an indebtedness created by the construction of county roads and bridges" within provision of the Kentucky Gross Receipts Tax Act for use of county road fund for payment of bonded or floating indebtedness for construction or maintenance of county roads and bridges—Charles A. Hinsch & Co. v Rowan County, C.C.A.Ky., 126 F.2d 189

Acquisition of right of way

Acquisition by county of right of way for new road was held not "improving" or "improvement" of road within constitutional provision authorizing reimbursement out of trunk highway fund—State v Babcock, 242 N.W. 474, 186 Minn. 132

Ordinary repairs

A constitutional provision permitting the state to reimburse counties out of trunk highway fund for "permanently improving" roads does not apply to ordinary repairs which are not permanent improvements—State v Babcock, supra

Temporary maintenance by state

pending completion of the state highway system does not show the project to have been taken into the system, so as to entitle the county to a refund—State ex rel Reynolds County v State Highway Commission, 42 S.W.2d 193, 328 Mo 859

90. U.S.—Charles A. Hinsch & Co., v Rowan County, C.C.A.Ky., 126 F.2d 189

Miss.—State Highway Commission v Gulley, 145 So. 351, 167 Miss. 631

Necessity for disbursement from designated or authorized fund generally see supra subdivision a of this section

91. S.C.—Briggs v Greenville County, 135 S.E. 153, 137 S.C. 288

92. U.S.—Black v Street Improvement Dist. No. 2 of Dardanelle, D.C.Ark., 37 F.Supp. 894

Ark.—Page v Paving Imp. Dist. No. Four of Marianna, 167 S.W.2d 490

to be given to townships;[93] it is not to be paid to individual property owners.[94] A statute providing for donations for the improvement of roads has been held not to contemplate donating funds to a road district organized under an unconstitutional act and as a private venture,[95] but when expressly so provided by statute a road improvement district which has issued bonds and completed road improvements, although it has been organized under an invalid act, is entitled to share in funds from the state.[96]

Method and amount The amount and extent of state aid[97] and the method of distribution or apportionment,[98] are dependent on the terms of the constitutional or statutory provisions authorizing such aid. In accordance therewith a county or township which has furnished funds for a project subsequently becoming a part of the state highway system is not entitled to reimbursement in cash but is entitled to reimbursement in additional roads.[99] Particular statutory directions have been held not to be mandatory but to vest a certain discretion in the state highway commission,[1] but the directory feature of the statute should not be arbitrarily ignored.[2]

The state may, under statutory authorization, withhold a portion of the turnback funds due the county.[3]

d. Allocation or Distribution of Funds by County

A county must allocate or distribute its highway funds to cities, townships, districts, or precincts within the county in accordance with statutes so providing.

Under express provisions of some statutes a county must allocate or distribute its highway funds derived from the state or from other sources to cities, townships, districts, or precincts within the county,[4] or must allocate funds for use on streets or highways therein,[5] but its duties or liabilities do not exceed those imposed by the statute,[6] and the city,

—Jackson v Foster, 94 S W 2d 113, 192 Ark 712

93. Mo—Reilly v Sugar Creek Tp of Harrison County, 139 S W 2d 525, 345 Mo 1248- State ex rel Liberty Tp Stoddard County, v State Highway Commission, 287 S W 39, 315 Mo 747

Ohio—State v Tracy, 149 N E 392, 113 Ohio St 434

94. U S—Black v Street Improvement Dist No 2 of Dardanelle, D C Ark 37 F Supp 894

Ark—Jackson v Foster, 94 S W 2d 113, 192 Ark 712

Application to credit of property owners

Financial relief extended by state to improvement district need not be used as credit against assessment of betterments for benefit of taxpayers whose property is on, or contiguous to, continuations of state highways, to exclusion of other taxpayers in district—Wood v Tobin 104 S W 2d 203, 193 Ark 964—Jackson v Foster, 94 S W 2d 113, 192 Ark 712

95. Ark—Texarkana-Forest Park Paving, etc, Dist No 1 v State, for Use of Miller County, 74 S W 2d 784, 189 Ark 617

96. Ark—Page v Rodgers, 134 S W 2d 573, 199 Ark 307

97. Ark—Page v Paving Improvement Dist No 11 of Russellville, 158 S W 2d 905, 203 Ark 657—Cone v Hope-Fulton-Emmett Road Improvement Dist, 277 S W 544, 169 Ark 1032

Ohio—State v Tracy, 149 N E 392, 113 Ohio St 434

98. Mich—Wayne County v Fuller, 229 N W. 911, 250 Mich 227.

99. Mo—State ex rel Russell v State Highway Commission, 42 S W 2d 196, 328 Mo 942—State ex rel Liberty Tp, Stoddard County, v State Highway Commission, 287 S W 39, 315 Mo 747

1. S D—State ex rel Conway v Berry, 257 N W 664, 63 S D 275

Discretion as to time of construction

Under Centennial Road Law § 33, state highway commission may exercise reasonable discretion in determination of time for construction of additional roads as reimbursement to township, providing funds for road subsequently designated as part of state highway system—State ex rel Liberty Tp, Stoddard County v State Highway Commission, 287 S W 39, 315 Mo 747

2. S D—State ex rel Conway v Berry, 257 N W 664, 63 S D 275

3. **Cost of right of way in county**

On compliance with statutory provisions, the state may withhold from the turnback fund due a county one half the cost of acquiring a right of way for the relocation of a state highway within the county—Arkansas State Highway Commission v Pulaski County, Ark, 168 S W 2d 1098

4. Kan—City of Osawatomie v Board of Com'rs of Miami County, 110 P 2d 748, 153 Kan 332—Emporia Tp of Lyon County v Williams, 89 P 2d 919, 149 Kan 860

Miss—Coahoma County v City of Clarksdale, 7 So 2d 882, 192 Miss 851

5 Mich—City of Menominee v Menominee County, 277 N W 863, 283 Mich 146

All taxes collected within city

All of the tax collected by county authorities on property within a city or village must be expended on streets in or about the municipality, when so required by statute—Newton v Jasper County, 112 N W 167, 135 Iowa 27, 124 Am S R 256

Streets and alleys outside incorporated cities and villages

In accordance with statutory provisions, money received by a county from the state for the maintenance of "township roads" taken over by the county may be allocated by the board of supervisors for use on dedicated streets and alleys in platted areas outside incorporated cities and villages—City of Iron Mountain v Road Com'rs of Dickinson County, 277 N W 862, 283 Mich 213

6. Kan—Emporia Tp of Lyon County v Williams, 89 P 2d 919, 149 Kan 860

Duty to pay township's debts

(1) A statute which gives to county commissioners authority to expend gasoline tax and automobile registration fees received from state to discharge townships' debts for repair and maintenance of highways outstanding when townships' jurisdiction of highways was transferred to commissioners under original act has been held not to require commissioners to pay such debts out of such funds—Board of Com'rs of Delaware County v Farmers State Bank of Eaton, 10 N E 2d 769, 104 Ind App 692

(2) The act providing that all expenses incurred in maintenance, repair, and preservation of county highways, including township high-

township, district, or precinct must comply with the conditions imposed by the statute in order to be entitled to a portion of the fund.[7] Where a county collects, retains, and expends road funds which are claimed by a city, the county acts as trustee for the city and does not acquire ownership of the fund free from the trust by mere lapse of time.[8]

Method and amount The county must comply with the statutes prescribing the amount and method of distribution or apportionment.[9] In accordance with statutory provisions the county authorities are vested with a broad discretion,[10] but they must not act arbitrarily or abuse this discretion[11] and ignore other directory features of the statute,[12] if they do so their action is subject to review by a court of competent jurisdiction,[13] although the court is without power to determine how the fund should be apportioned.[14] A practice by county authorities of dividing the county highway funds into parts exclusively for each district or precinct has been held to be improper.[15] Where the county, at the request of a city, proceeds under one statute as to apportionment the city is not entitled to have funds apportioned under another statute,[16] particularly where the city by reason of its delay in asserting its right to a larger fund is guilty of laches.[17] Under a statute which requires the funds to be apportioned and paid over to townships, the county must make payment to a township and it has no authority to expend on its own account a township's portion for roads in the township.[18]

e. Agreements as to Contributions or Expenditures

Agreements as to contributions and expenditures of road funds have been held to be valid, and enforceable according to their terms

Agreements between the state and the county as to contributions and expenditures of road funds have been held to be valid,[19] and enforceable ac-

ways transferred to counties, shall be paid out of funds derived from gasoline tax and automobile license fees paid to counties by state, was intended to limit such expenses to amount of funds received by counties, and it was not intended that debts incurred before passage of act should be paid out of such funds—Board of Com'rs of Delaware County v Farmers State Bank of Eaton, supra

Limitation as to amount

Private Acts 1921 c 525 limits the amount to be expended by Haywood County for road purposes in the respective civil districts to the amount of taxes collected from the property within each civil district—Woodard v Haywood County, 13 Tenn App 332

7. Kan—City of Ellsworth v Wilson, 87 P 2d 611, 149 Kan 486

8. Neb—City of Fremont v Dodge County, 266 N W 771, 130 Neb 856

9. Kan—Emporia Tp of Lyon County v Williams, 89 P 2d 919, 149 Kan 860

Mich—City of Menominee v Menominee County, 277 N W 863, 283 Mich 146

S D—Dubbeldee v Minnehaha County, 253 N W 445, 62 S D 465

Tex—Stovall v Shivers, 103 S W 2d 363, 129 Tex 256, affirming Shivers v Stovall, Civ App, 75 S W 2d 276

10. Tex—Stovall v Shivers, supra—Garland v Sanders, Civ App, 114 S W 2d 302, error dismissed

11. Tex—Stovall v Shivers, 103 S W 2d 363, 129 Tex 256, affirming Shivers v Stovall, Civ App, 75 S W 2d 276—Garland v Sanders, Civ App, 114 S W 2d 302, error dismissed.

"Judiciously and equitably"

As used in statute requiring county commissioners' court to expend road and bridge fund judiciously and equitably, term "judiciously" means that commissioners should be directed by sound judgment and term "equitably" means that fund should be spent fairly and impartially—Shivers v Stovall Civ App 75 S W 2d 276, affirmed Stovall v Shivers, 103 S W 2d 363, 129 Tex 256

12. Tex—Stovall v Shivers, 103 S W 2d 363, 129 Tex 256, affirming Shivers v Stovall, Civ App, 75 S W 2d 276

13. Tex—Stovall v Shivers, supra

Petition held sufficient to show abuse of discretion

Tex—Stovall v Shivers, supra

14. Tex—Stovall v Shivers supra—Garland v Sanders, Civ App, 114 S W 2d 302, error dismissed

15 Okl—Board of Com'rs of Stephens County v Oklahoma Tractor & Equipment Co, 80 P 2d 638, 183 Okl 143—Board of Com'rs of Carter County v Landrum, 21 P 2d 736, 163 Okl 199

Tex—Stovall v Shivers, 103 S W 2d 363, 129 Tex 256, affirming Shivers v Stovall, Civ App, 75 S W 2d 276

16. Kan—City of Chetopa v Board of Com'rs of Labette County, 130 P 2d 614, 155 Kan 886, rehearing denied 133 P 2d 174, 156 Kan 290

17. Kan—City of Chetopa v Board of Com'rs of Labette County, 133 P 2d 174, 156 Kan 290, denying rehearing 130 P 2d 614, 155 Kan 886

18. S.D—Dubbeldee v Minnehaha County, 253 N W 445, 62 S D 465

19. Ga—Myrick v Brooks County, 165 S E 50, 175 Ga 155

Ky—State Highway Commission v Mitchell, 44 S W 2d 533, 241 Ky 553

N C—Johnson v Board of Com'rs of Wake County, 135 S E 618, 192 N C 561—Young v Board of Com'rs of Johnston County, 128 S E 401, 190 N C 52

S C—Briggs v Greenville County, 135 S E 153 137 S C 288

Consideration for contract

There is valuable consideration, supporting agreement of county commissioners to advance county money to the highway commission to construct part of the highway system in the county, in the commission's agreement to repay the county, without interest, out of the funds allocated to the county from the proceeds of bond issues thereafter to be authorized by the legislature, "or out of other road construction funds," to the extent that such funds may be sufficient therefor there being other road construction funds available annually under existing law from which some payments on the loan could be made—Young v Board of Com'rs of Johnston County, 128 S E 401, 190 N C 52

Agreement changing use of funds

A supplemental agreement that money allocated to county for repayment of the county's loan to the state highway commission should be used in construction of certain roads, instead of applied toward retirement of bonds sold to obtain money loaned by county was held not invalid—Oliver v Board of Com'rs of Johnston County, 139 S E 767, 194 N.C. 380.

cording to their terms [20] When a highway project, to be completed by joint use of county funds and funds of the state highway commission, is rightfully abandoned before any work has been performed, the county's funds held by the state for this purpose must be returned,[21] and if abandoned after partial completion the ratable portion of the county's funds must be returned [22]

Where costs of a certain highway are to be apportioned between the county and a city, a donation to the fund for the project is to be deducted before the cost is apportioned, when this is expressly provided for by statute,[23] but in the absence of such a statute it has been held that where a village agrees with the county to pay a certain percentage of the cost of a certain road it is not entitled to a refund by the fact that the county receives state or federal aid to finance its share of the cost.[24]

A contract between the fiscal court of a county and contributors to a fund for the construction of a highway will be enforced in accordance with its terms [25]

f. Custody, Control, and Ownership of Funds

Highway funds are to be placed and kept in the proper account within the custody, supervision, and control of the duly authorized and designated officer or agency. Funds credited by the state to a county may or may not be county funds prior to actual payment, dependent on the provisions of the particular statute.

Highway funds are to be placed and kept within the custody, supervision, and control of the duly authorized and designated officer or agency[26] subject, within constitutional limitations,[27] to the continuing power and control of the legislature [28] Ac-

20 Ky—Estill County v Price, 153 S W 2d 921, 287 Ky 484—State Highway Commission v Mitchell, 44 S W 2d 533, 241 Ky 553

Mo—State ex rel St Louis County v State Highway Commission, 86 S W 2d 1066, 337 Mo 878

Verbal agreement of county to secure and pay for right of way if state would take over county road was held binding, where agreement had been fully executed—State ex rel St Louis County v State Highway Commission, 86 S W 2d 1066, 337 Mo 878

21. Okl—Board of Com'rs of Harmon County v Oklahoma State Highway Commission 23 P 2d 681, 163 Okl 207

22. Okl—Board of Com'rs of Harmon County v Oklahoma State Highway Commission, supra

23 Kan—State ex rel Boss v State Highway Commission, 22 P 2d 969, 137 Kan 800

24. Minn—Village of Sanborn in Redwood County v Redwood County, 208 N W 9, 166 Minn 354

25. Contract as affecting appropriations

A contract between the fiscal court and the contributors to a fund for the construction of a highway, which set out an order of the fiscal court appropriating the twenty-cent annual tax each year for the construction of the road until its completion, but which imposed on the contributors the obligation to pay their contributions if the road was constructed in accordance with the order of the court, shows that the prime purpose was the construction of the road, and not the method by which it should be paid for, so that the contract does not prevent the fiscal court, after the issuance of bonds for road construction, from applying enough of the proceeds of the sale of the bonds to complete the road affected by the contract, thereby releasing the annual twenty-cent levy for the payment of the bonds, as required by the constitution—Smith v Livingston County, 242 S W 612, 195 Ky 382

26. Mich—Excelsior Tp v Kirkby, 231 N W 56, 250 Mich 695

Mo—State ex rel Wammack & Welborn v Affolder, 257 S W 493, 214 Mo App 500

Mont—State v Mills, 261 P 885, 81 Mont 86

N Y—In re More, 202 N Y S 421, 207 App Div 79—Pilbeam v Sisson, 198 N Y S 834, 204 App Div 762

Tenn—County Board of Highway Com'rs v Wilde, 163 S W 2d 329

Supervision of expenditures and depository of funds

Under a statute so providing, the state highway department has supervision over expenditures of state highway funds, state treasurer being merely depository of funds—Texas Co v Schriewer, Tex Civ App, 38 S W 2d 111, modified on other grounds Smith v Texas Co, 53 S W 2d 774, followed in Smith v G B Johnson Hardware Co, 53 S W 2d 779 and Smith v Jacksboro Stone Products Co, 53 S W 2d 780, affirming, Civ App, 41 S W 2d 347

Expenditure by state under supervision of county department

Where the statute provides that taxes turned over by the county to the state highway department are to be used on county highways and bridges as the county highway department may direct a resolution of quarterly county court directing that taxes belonging to county be turned over to state department of highways and public works to be expended by them for period of twelve months, with no restriction as to use of fund, was void—Robbins v Phillips, 136 S W 2d 507, 175 Tenn 568

Assumption of liability for payment

Where a statute vests all local authority over the roads of a county in the county highway commission, and requires the board of county commissioners to place all funds available for such purpose to the credit of the commission, the latter, and not the board, should assume the balance due to the state highway commission for work done by a state contractor on a part of a state highway in the county control of which was vested in the state highway commission—Board of Com'rs of Mecklenburg County v Mecklenburg Highway Commission, 109 S E 848, 182 N C 617

27. Tenn—Hassell v Walters, 93 S W 2d 1268, 170 Tenn 206

28. Iowa—State v Executive Council of State of Iowa, 223 N W 737, 207 Iowa 923

The state highway commission cannot expend any funds except those alloted to it by legislative direction—State Highway Commission v Gulley, 145 So 351, 167 Miss 631

Funds held by county as trustee for city

(1) Proceeds of county road levy held by county as trustee for city are at all times subject to paramount right of legislature to dictate how such tax funds should be used or allocated—City of Fremont v Dodge County, 266 N W 771, 130 Neb 856

(2) Thus a county which collected county road tax levies for long period of time was held not liable to municipalities for such taxes under statute authorizing counties under township organization to retain all moneys theretofore collected as county road levy and which had not theretofore been paid to township or municipality in county—City of Fremont v Dodge County, supra

(3) **The county is not liable not-**

cordingly supervision and control of the expenditures may be exercised by a particular court,[29] and an order of another court which improperly interferes with this supervision and control is invalid.[30] The appropriation of money for highway purposes does not constitute the fund a trust fund for the benefit of the contractor.[31] The manner and procedure by which securities in which surplus highway funds were invested should be converted into cash on the maturity of road bonds rest, unless otherwise provided by statute, in the discretion of the statutory trustee.[32]

The highway commissioners cannot tie up the taxpayers' money an unreasonable length of time.[33]

Placement or retention in separate accounts. In accordance with statutory provisions, separate and distinct highway funds derived from particular sources or to be used for particular purposes are to be kept in separate accounts,[34] and all money subsequently received is to be placed with the fund of which it properly is a part.[35] A surplus of highway funds for one purpose is not to be transferred to an account for another purpose in the absence of statutory authorization therefor.[36]

Revenue from motor vehicle fees, operator's license fees, and motor fuel taxes which is required by statute to be paid into the general fund rather than into a separate account does not, in the absence of further statutory or constitutional direction, constitute a trust fund to be used exclusively for highway purposes.[37]

Funds apportioned or contributed by state. In accordance with the terms of the particular statutory or constitutional provisions, funds in the state treasury credited to the county highway fund have been held to be state funds[38] to which the county

withstanding statutes were passed subsequent to date when city obtained judgment against county—City of Beatrice v Gage County, 266 N W 777, 130 Neb 850

29. Ky—McKechnie v Canada, 250 S W 111, 198 Ky 807

Commissioners' court

Under statutes so providing a road commissioner, whether employed by the commissioners' court as such, or acting in an ex officio capacity, must expend the money under the control direction and authority of the commissioners' court itself—Stovall v Shivers, 103 S W 2d 363, 129 Tex 256, affirming Shivers v Stovall, Civ App., 75 S W 2d 276

Expenditure without order of appropriation by court

An order of the fiscal court providing that the funds derived from the levy of a road tax in each magisterial district should be returned to that district is not an appropriation of such funds for the construction or improvement of the roads or bridges or other public property of the county, so as to sustain an expenditure of such funds for road purposes by the magistrate of that district—McKechnie v Canada, 250 S W 111, 198 Ky 807

Statute designating place of expenditure

A statute requiring the expenditure of road funds in districts where collected does not by its terms take supervision from the county court—White v Miller, 1 S W 2d 814, 175 Ark 1078

Examination of annual settlements filed by commissioners

The annual settlements showing collections and disbursements which commissioners of road improvement districts organized under Acts 1915 No 338 are required to file are subject to readjustment by the county court, and under Crawford & M Dig § 5452 the adjustment is subject to reexamination in the chancery court for error mistake or fraud at the instance of the commissioners or any taxpayer in the district - Wallace v Allen 238 S W 47, 152 Ark 381

30 Ark Burrow v Floyd, 99 S W 2d 573, 193 Ark 220

Factors not justifying order

(1) Voters' petition for appointment of named commissioners before road bond election or institution of suit to compel appointment of road commissioners did not authorize circuit court to compel fiscal court to surrender control of expenditures to commissioners appointed after bond election—Muhlenburg County Fiscal Court v Muhlenburg County Road Commission, 9 S W 2d 129, 225 Ky 432

(2) Circuit court cannot compel fiscal court to surrender control of expenditures to road commissioners appointed after bond election on theory of compromise of suit to compel appointment—Muhlenburg County Fiscal Court v Muhlenburg County Road Commission, supra

31. Wis—State v Nemachek, 225 N W 170, 199 Wis 13

32. Fla—State ex rel Elston Bank & Trust Co v Sholtz, 165 So 670, 122 Fla 333

33 N C—Coburn v Board of Com'rs of Swain County, 131 S E 372, 191 N C 68

34. Ark—State v Cox, 243 S W 651, 154 Ark 493

Ill—People ex rel Clark v Baltimore & O S W Ry Co 187 N E 463, 353 Ill 492—Cosgrove v. Highway Commissioner of Town of Rockville, 281 Ill App 406

Kan—State ex rel Bennett v State Highway Commission, 26 P 2d 606, 138 Kan 294, rehearing denied 33 P 2d 330 139 Kan 655

Okl—Protest of Chicago, R I & P Ry Co, 1 P 2d 383, 150 Okl 167—Albrecht v Jones, 267 P 270, 130 Okl 277—Magnolia Petroleum Co v Sappington, 253 P. 483, 124 Okl 16

35. A premium derived from sale of bonds issued for the purpose of constructing and improving public highways is a part of the road fund created by such bonds, and the county had a right to place that sum in the road construction account—People v Millard, 139 N E 113, 307 Ill 556

Interest from bond proceeds

Interest derived from banks on deposit of funds from the sale of bonds issued for highway improvements is a part of the earnings of unexpended road construction funds, and is to be credited to that account, and not to the bond issue interest account—People v Millard, supra.

Tax collector's commissions

Under express statutory provisions tax collector's commissions on road district maintenance funds are not to be paid into general county treasury, but properly paid as part of whole sum collected to credit of road district maintenance fund—Board of Sup'rs of Lowndes County v Robertson, 103 So 435, 138 Miss 638

36. Okl—Carter County Excise Board v Kurn, 126 P 2d 997

37. Wis—Friedrich v Zimmerman, 298 N W 760, 238 Wis 148

38. Ark—Stanfield v Kincannon, 46 S W 2d 22, 185 Ark 120.

has no vested property right,[39] at least until paid to the state treasurer as ex officio county treasurer.[40] Under other statutes a fund apportioned to a county is the property of the county to which the apportionment is made although not actually paid over to it.[41] A county's or district's share of the state gasoline tax when prorated and paid to a county or district officer or trustee becomes county or district funds.[42]

Funds paid or payable by county to state. Proceeds of taxes which are collected by a county as an agent for the state for the construction of state roads[43] and contributions or appropriations by a county to a state aid fund for improvement of highways in the county[44] are not strictly county funds but become state funds dedicated to the specific purpose.

g. Manner of Payment or Disbursement

The statutory method prescribed for drawing on the highway funds must be followed

The statutory method prescribed for drawing on the highway funds must be followed,[45] and in accordance therewith disbursements are to be made through vouchers, warrants, checks, or other written orders issued by the proper officer or officers.[46]

h. Expenditure for Proper Purpose

(1) In general
(2) What constitutes proper purpose

(1) In General

Highway funds cannot be legally expended or disbursed for purposes other than those for which the funds have been raised, acquired, or appropriated

Public funds raised, acquired, or appropriated for general or specific highway purposes cannot be legally expended or disbursed for another purpose,[47] and they must be used in the manner provided by

39. Practice of prescribing allotment on percentage basis

The practice of the highway department of prescribing percentage allotment of total construction funds to each county on percentage basis was a mere administrative practice for more convenient and equitable handling or budgeting of construction funds and did not have effect of vesting in the county an inviolable property right to any of the funds, nor could recognition of the practice by statute have that effect, since statute at most merely regulates conduct of the department and does not create any contractual right.—Chesterfield County v. State Highway Department of South Carolina, 3 S.E.2d 686, 191 S.C. 19.

40. Proceeds of second gas tax

levied to reimburse counties and special road districts for moneys expended in construction of state roads do not become county funds until paid to state treasurer as ex officio county treasurer.—Carlton v. Mathews, 137 So. 815, 103 Fla. 301.

41. Ariz.—Koch v. Johnson, 243 P. 611, 30 Ariz. 14.

42. Fla.—In re Advisory Opinion to Governor, 11 So.2d 580—Carlton v. Mathews, 137 So. 815, 103 Fla. 301.
Ky.—Short v. Fiscal Court of Ballard County, 215 S.W. 535, 185 Ky. 650.
Tenn.—Hassell v. Walters, 93 S.W.2d 1268, 170 Tenn. 206.

43. Mich.—Alcona County v. White, 20 N.W. 537, 54 Mich. 503.

44. N.Y.—Eastern Rock Products v. Mayer, 244 N.Y.S. 96, 137 Misc. 555.

45. Ga.—McGinty v. Pickering, 179 S.E. 358, 180 Ga. 447.
Mont.—State v. Mills, 261 P. 885, 81 Mont. 86.

46. Cal.—San Benito County v. Riley, 263 P. 349, 88 Cal.App. 131.
Ga.—McGinty v. Pickering, 179 S.E. 358, 180 Ga. 447.
Iowa.—Fuller & Hiller Hardware Co. v. Shannon & Willfong, 215 N.W. 611, 205 Iowa 104.
Mont.—State v. Mills, 261 P. 885, 81 Mont. 86.
S.D.—Dubbeldee v. Minnehaha County, 253 N.W. 445, 62 S.D. 465.

"Warrant," as used in statute authorizing state highway commission to draw warrants on primary road contingent fund, has been held to mean an ordinary check or written order.—Missouri Gravel Co. v. Federal Surety Co., 237 N.W. 635, 212 Iowa 1322.

Primary road construction contracted for by state

The cost of primary road construction on contracts made by state highway commission is payable by warrants drawn by the state auditor rather than by the county auditor.—Missouri Gravel Co. v. Federal Surety Co., supra.

Particular funds allocated by state

(1) Funds inherited by state board of administration from previous statutory board for application to county and district road bonds pass to present board in their status when received and if still in state roads distribution fund, should be distributed to counties by state comptroller's warrants countersigned by governor.—In re Advisory Opinion to Governor, Ala., 11 So.2d 580.

(2) Funds distributed to counties by statutory state board of administration for application to county and district road bonds before effective date of constitutional amendment creating present board may be disbursed thereby as it deems wise, but governor need not countersign warrants or checks.—In re Advisory Opinion to Governor, supra.

(3) Gasoline tax funds, received by state board of administration after effective date of constitutional amendment creating board for application to county and district road bonds, should be distributed to counties by state comptroller's warrants countersigned by governor.—In re Advisory Opinion to Governor, supra.

47. Ala.—Ramage Parks & Co. v. Folmar, 121 So. 504, 219 Ala. 142.
Cal.—California Highway Commission v. Ballard, 247 P. 527, 77 Cal.App. 401.
Ill.—Miller v. Hale, 139 N.E. 411, 308 Ill. 275—Town of Dry Grove v. Otto, 266 Ill.App. 234.
Okl.—Hickman v. Board of Comrs. of Pottawatomie County, Okl., 35 P.2d 960, 169 Okl. 72—Protest of Chicago, R. I. & P. Ry. Co., 1 P.2d 383, 150 Okl. 167—Wentz v. Dawson, 299 P. 493, 149 Okl. 94.

Transfer of authority for state road building from county commissioners to state highway commission involved no substantial diversion of moneys raised by taxation.—State v. State Highway Commission, 295 P. 986, 132 Kan. 327.

Charges or costs payable from particular fund

(1) Claim against county for labor chargeable against the county highway fund should have been denied where claimant failed to establish an unencumbered balance in the specific items appropriated with

the constitution[48] or statutes,[49] or designated by the voters.[50] This rule has been applied to highway funds derived from various sources, including general or special property taxes,[51] gasoline or motor vehicle license taxes,[52] proceeds of bond issues,[53] or funds allocated by the state to political subdivisions.[54] In accordance with constitutional and statutory provisions the highway commissioner or other designated officer or agency may be vested with a discretionary power as to the matter of expenditures within the general scope of the purpose for which the funds are to be appropriated,[55] and

which to pay the claim—Board of Pontotoc County Com'rs v. Witherspoon, 116 P.2d 719, 189 Okl. 277—Board of Com'rs of Pontotoc County v. Campbell, 115 P.2d 256, 189 Okl. 20.

(2) Commissions payable to a town supervisor as ex officio treasurer of the common road and bridge fund under the Roads and Bridges Act, Smith-Hurd Rev.St.1931, c. 121, § 59, and as such treasurer of the permanent hard road fund under Smith-Hurd Rev.St.1931, c. 121, § 122, are payable only out of the respective fund to which they pertain, and moneys in one fund cannot be appropriated to pay commissions pertaining to the other fund.—Town of Dry Grove v. Otto, 266 Ill.App. 234.

(3) In counties where the highway commissioner is "road district officer" not "county officer," he must necessarily be paid from road and bridge fund.—People ex rel. Dennison v. Atchison, T. & S. F. Ry. Co., 189 N.E. 285, 355 Ill. 124.

(4) Under Code 1921, § 4608, the entire cost of changing or relocating a highway is to be paid from the primary road fund.—Nichol v. Neighbour, 210 N.W. 281, 202 Iowa 406.

(5) Where a statute imposes the duty on a special road district board to keep roads under its charge in as good repair as the means at its command will permit, repair services should be paid for out of the funds of the district available for such purpose.—Bixler v. Special Road Dist. No. 1, Newton County, 156 S.W.2d 950, 236 Mo.App. 336.

Transfer of appropriated funds by supplemental appropriation see supra subdivision a of this section

48. Me.—In re Opinion of the Justices, 167 A. 174, 132 Me. 502.

Minn.—Cory v. King, 296 N.W. 506, 209 Minn. 431—State v. Babcock, 232 N.W. 718, 181 Minn. 409.

29 C.J. p. 739 note 5

49. U.S.—Shelby County, Tex. v. Provident Sav. Bank & Trust Co., C.C.A.Tex., 54 F.2d 602, certiorari denied Provident Savings Bank & Trust Co. v. Shelby County, Texas, 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.

Ala.—Long v. Alabama Highway Corporation, 174 So. 41, 234 Ala. 142—Ramage, Parks & Co. v. Folmar, 121 So. 504, 219 Ala. 142.

Ark.—State ex rel. Attorney General v. Broadaway, 93 S.W.2d 1248, 192 Ark. 634.

Fla.—W. J. Howey Co. v. Williams, 195 So. 181, 142 Fla. 415, rehearing denied 195 So. 184, 142 Fla. 562 and 196 So. 214, 142 Fla. 756—State ex rel. Georgia Bond & Mortgage Co. v. Cone, 189 So. 47, 137 Fla. 412—State ex rel. Hamner v. Williams, 140 So. 668, 104 Fla. 304.

Ill.—Devo v. Commissioner of Highways of Sheridan, 256 Ill.App. 3.

Kan.—State v. Mills, 223 P. 261, 115 Kan. 531.

Miss.—State Highway Commission v. Gulley, 145 So. 351, 167 Miss. 631.

Okl.—Albrecht v. Jones, 267 P. 270, 130 Okl. 277—Magnolia Petroleum Co. v. Sappington, 253 P. 483, 124 Okl. 16.

29 C.J. p. 739 note 6

50. Ga.—Marks v. Richmond County, 140 S.E. 880, 165 Ga. 316.

Iowa.—Wallace v. Foster, 241 N.W. 9, 213 Iowa 1151—Harding v. Board of Sup'rs of Osceola County, 237 N.W. 625, 213 Iowa 560.

La.—O'Beirne v. Police Jury of Red River Parish, 97 So. 461, 154 La. 329—O'Beirne v. Police Jury of Red River Parish, 92 So. 709, 151 La. 1088.

Okl.—Wentz v. Dawson, 299 P. 493, 149 Okl. 94—Wentz v. Board of Com'rs of Lincoln County, 295 P. 599, 147 Okl. 173—Wentz v. Ingenthron, 294 P. 151, 146 Okl. 165.

Tex.—Robbins v. Limestone County, 268 S.W. 915, 114 Tex. 345, answers to certified questions conformed to, Civ.App., 272 S.W. 526.

29 C.J. p. 739 note 7

51. Okl.—Albrecht v. Jones, 267 P. 270, 130 Okl. 277—Magnolia Petroleum Co. v. Sappington, 253 P. 483, 124 Okl. 16.

29 C.J. p. 739 notes 5–7

Applicability of constitutional provision to local assessments

Const. art. 16, § 11, which prohibits the use of tax moneys for any other purpose than that for which tax was levied, applies only to general taxation, not to local assessments.—McAdams v. Henley, 273 S.W. 355, 169 Ark. 97, 41 A.L.R. 629.

52. Miss.—State Highway Commission v. Gulley, 145 So. 351, 167 Miss. 631.

Okl.—Carter County Excise Board v. Stanolind Pipe Line Co., 127 P.2d 810.

S.D.—White Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397.

53. Ga.—Marks v. Richmond County, 140 S.E. 880, 165 Ga. 316.

Iowa.—Wallace v. Foster, 241 N.W. 9, 213 Iowa 1151.

La.—O'Beirne v. Police Jury of Red River Parish, 97 So. 461, 154 La. 329—O'Beirne v. Police Jury of Red River Parish, 92 So. 709, 151 La. 1088.

Okl.—Wentz v. Board of Com'rs of Lincoln County, 295 P. 599, 147 Okl. 173—Wentz v. Ingenthron, 294 P. 151, 146 Okl. 165.

S.C.—Martin v. Save, 145 S.E. 186, 147 S.C. 433.

Use of bond proceeds to repurchase bonds see infra subdivision h (2) (c) of this section

54. Fla.—W. J. Howey Co. v. Williams, 195 So. 181, 142 Fla. 415, rehearing denied 195 So. 184, 142 Fla. 562 and 196 So. 214, 142 Fla. 756, State ex rel. Georgia Bond & Mortgage Co. v. Cone, 189 So. 47, 137 Fla. 412.

Kan.—State v. Hays, 230 P. 1041, 117 Kan. 348.

Ky.—Fiscal Court of Scott County v. Davidson, 82 S.W.2d 801, 259 Ky. 498.

55. Ga.—Burns v. Decatur County, 173 S.E. 127, 178 Ga. 275.

Ill.—Austin v. Healy, 35 N.E.2d 78, 376 Ill. 633.

Iowa.—Scharnberg v. Iowa State Highway Commission, 213 N.W. 334, 214 Iowa 1041.

Kan.—Nyhart v. Iverson, 272 P. 176, 127 Kan. 48.

Mo.—State ex rel. State Highway Commission v. Sevier, 97 S.W.2d 427, 339 Mo. 179.

Mont.—State v. Mills, 261 P. 885, 81 Mont. 86.

Tex.—Garland v. Sanders, Civ.App., 114 S.W.2d 302, error dismissed.

Funds alloted by state

(1) In accordance with statutory provisions, funds derived from gasoline and motor vehicle taxes alloted by the state to a county may be used for highway purposes by the county board of commissioners without any limitation by the legislature.—Bateman v. State, 14 N.E.2d 1007, 214 Ind. 138—Bridges v. State ex rel. Vaughn, 190 N.E. 758, 208 Ind. 684—Williams v. Willett, 1 N.E.2d 664, 102 Ind.App. 193.

(2) No appropriation for specific purposes by the county council is necessary.—Bateman v. State, supra—Williams v. Willett, supra.

(3) Nor is a petition by freehold-

the court has no supervisory power if the discretion is not abused.[56]

Funds from illegal tax levy. Funds received from an unauthorized and illegal tax levy are not to be expended even for the purpose for which the taxes were levied.[57]

(2) What Constitutes Proper Purpose

(a) In general
(b) Particular roads or classes of roads
(c) Bonds and warrants
(d) Administrative and engineering salaries and expenses, attorney's fees
(e) Damages, compensation insurance
(f) Invalid or unapproved claim

(a) In General

A highway fund may be used for the general purpose for which it exists, including everything appropriately connected with, and necessarily incidental to, the complete accomplishment of the purpose. A surplus at the end of one fiscal year is available for the same purposes in the succeeding year, and a deficit in one year may be taken care of in the succeeding year unless the disbursing agency of the previous year had no authority to create the deficit

A highway fund may be used for the general purpose for which it exists,[58] including everything appropriately connected with, and necessarily incidental to, the complete accomplishment of the purpose.[59] Within this rule an expenditure for road machinery,[60] for the construction of a bridge on the road to be improved,[61] and for the ordinary and usual devices used to promote the safety and convenience of traffic[62] have been held proper. In accordance with the terms by which the particular fund has been acquired or its expenditure authorized, it may be used for both construction and maintenance,[63] or it may be limited to construction only[64] or to maintenance only.[65] Ordinarily a fund for construction and maintenance may be used to acquire rights of way for highways,[66] but it cannot

ers or voters necessary - Williams v Willett, supra

Allocating funds to minimize defaults in matured obligations

If funds in statutory administration board's hands are insufficient to pay matured obligations without default in interest on others board has discretion impartially to allocate funds to minimize defaults.--State ex rel Orrell v Johnson, 147 So 251, 109 Fla 263

Alternative use of funds

Where refunds to county from the state of money expended on highways may be used either to retire bonds or to construct new roads objectors to levy of taxes cannot complain that such funds are not used to retire bond indebtedness - People v Millard, 139 N E 113, 307 Ill 556

56 Mo.—State ex rel State Highway Commission v Sevier, 97 S W 2d 127, 339 Mo 479
N M.—Gallegos v Conroy, 29 P 2d 331, 38 N M 154
Tex.—Stovall v Shivers, 103 S W 2d 363, 129 Tex 256, affirming, Shivers v Stovall, Civ App, 75 S W 2d 276
—Garland v Sanders, Civ App, 114 S W 2d 302, error dismissed

Assumption in favor of propriety of disbursement

Where county commissioners, in the exercise of their discretion, allocated gasoline tax and automobile license funds for payment of road bonds, motorist could not complain, since it must be presumed, in absence of contrary showing, that county commissioners would properly maintain highways and that, if gasoline and license funds received in future by county were insufficient for such maintenance, property tax would be levied - Bridges v State ex rel Vaughn, 190 N E 758, 208 Ind 681

Discretion held not abused

La.—Williams v Police Jury of Concordia Parish, 107 So 126, 160 La 325
S C.—Summer v State Highway Commission of South Carolina, 141 S E 366, 143 S C 196

57. Wis.—Stamper v Hopkins, 197 N W 929, 184 Wis 129

58 Okl.—Carter v Miley, 103 P 2d 933, 187 Okl 530

The test for determining whether an appropriation is toward a "highway purpose" within constitutional provision requiring trunk highway fund to be used solely for highway purposes is not whether each dollar appropriated is earmarked for each separate item of highway expense but rather whether the charge on the highway fund accurately reflects highway expenses and does not exceed the amount of expense properly attributable to highway matters - Cory v King, Minn., 8 N W 2d 611

59. Ky.—Grauman v Department of Highways, 151 S W 2d 1061, 286 Ky 850
Miss.—State Highway Commission v Gulley, 145 So 351, 167 Miss 631

60. Ark.—Anderson v American State Bank, 11 S W 2d 444, 178 Ark 652
Okl.—National Drill & Mfg Co v Davis, 120 P 976, 29 Okl 625
Wash.—State ex rel Dryden v Renschler, 19 P 2d 931, 172 Wash 223

Classification in budget

Standard classification established by division of municipal corporations for class A counties that expenses of replacement of tractors be classified in budget under general class of "maintenance and operation" was held reasonable and applicable to first class counties.—State ex rel Dryden v Renschler, supra

61 Ark. McAdams v Henley, 273 S W 355, 169 Ark 97, 41 A L R 629

62 Ky.—Grauman v Department of Highways, 151 S W 2d 1061, 286 Ky 850

Stop and go signal

Ky.—Grauman v Department of Highways, supra

63. Ala.—Lyon v Shelby County, 177 So 306, 235 Ala 69
Fla. Carlton v Mathews, 137 So 815, 103 Fla 301
Miss.—Seavey v Lincoln County, 88 So 771, 126 Miss 353

64 Ill.—Cosgrove v Highway Commissioner of Town of Rockville, 281 Ill App 106

65. Ohio.—State v Brown, 148 N E 95, 112 Ohio St 590
Okl.—Protest of Chicago R I & P Ry Co, 1 P 2d 383, 150 Okl 167

"Current expenses" as used in Ohio Const art 2 § 1d in addition to including expenses incident to officering and maintaining of state government, includes expenses of keeping in repair and maintaining its property, and as applied to roads, includes maintaining and repair thereof as distinguished from new construction.—State v Brown, 148 N E 95, 112 Ohio St 590

66. Ill.—McKean v Carroll County, 154 N E 896, 324 Ill 243
Mo.—Reilly v. Sugar Creek Tp of

be so used if the statutes provide that the cost of acquiring rights of way is payable out of the general fund.[67] Particular statutory provisions have been held to authorize a temporary withdrawal from the highway fund of a sum necessary to pay bills for lighting the highways, subject to reimbursement from the special levy for lighting,[68] or to authorize the use of a road district's funds to improve a city's streets.[69] Where commissioners have power to make an immaterial change in road improvement plans after approval by the county court, they have the power to pay for the added cost out of the highway funds.[70]

A highway fund cannot be used to defray the general costs or the current expenses of government,[71] or to pay private debts of a highway contractor.[72]

Use of surplus highway fund. An unexpended balance in a highway fund at the end of one fiscal year is available for the same highway purposes in the succeeding year.[73] It cannot be used in a district other than that for which it was acquired,[74] nor can it be used for general governmental expenses,[75] unless the necessity for a fund for highway construction and maintenance no longer exists.[76] A balance remaining after the primary purpose of a fund has been fulfilled may be expended for its secondary purpose.[77]

Payment of deficit from preceding year. A deficit in one year may be taken care of in the succeeding year,[78] but not if the disbursing agency of the previous year had no authority to create the deficit.[79]

(b) Particular Roads or Classes of Roads

As a general rule funds raised or acquired for the improvement of a particular road or class of roads cannot be used for other roads. Under particular constitutional or statutory provisions a county may expend or lend its funds for state roads or roads constructed or maintained through state aid.

As a general rule funds raised or acquired for the improvement of a particular highway may be used therefor although unsubstantial changes are made in its course,[80] but they cannot be used for the construction or improvement of an entirely different highway,[81] or for the designated highway after it has been so materially changed as to constitute a new road,[82] even though the funds are insufficient for the original purpose[83] or the construction or improvement of another road is more feasible or practical.[84] An exception to the general rule

Harrison County, 139 S.W.2d 525, 345 Mo. 1248.

Mont.—State v. District Court of Fourteenth Judicial Dist. in and for Brady ter County, 260 P. 134, 80 Mont. 528.

Tex.—Stites v. Sutton County, Civ. App., 77 S.W. 506.

67. Ky.—Waller v. Union County, 4 S.W.2d 111, 223 Ky. 636.

Composition of fund for rights of way

General county fund used for acquiring rights of way under the statute presumably consists of proceeds of general levy and surplus of funds appropriated for specific purposes. Waller v. Union County, supra.

68. Pa.—In re Report of Auditors of Cumru Tp., 172 A. 13, 112 Pa. Super. 559.

69. Tex.—Cannon v. Healy Const. Co., Civ. App., 242 S.W. 526.

70. Ark.—Carson v. Road Improvement Dist. No. 2 of Craighead County, 231 S.W. 257, 150 Ark. 379.

71. Ala.—Ramage Parks & Co. v. Folmar, 121 So. 501, 219 Ala. 142.
Ill.—People ex rel. Clark v. Baltimore & O. S. W. Ry. Co., 187 N.E. 463, 353 Ill. 492.
Minn.—Cory v. King, 296 N.W. 506, 209 Minn. 431.

Voting machines

Moneys distributed to counties by legislature under statute for construction and repair of roads could not be used by county for the purchase of voting machines.—Hudson County v. State House Commission, 31 A.2d 780, 130 N.J.Law 90.

County commissioners' expense items, including per diem, mileage, and sundries, are current or general fund expenses coming within limitation prescribed for such taxes.—Protest of St. Louis San Francisco Ry. Co., 299 P. 190, 119 Okl. 53.

72. Kan.—Barker v. Hufty Rock Asphalt Co., 18 P.2d 568, 136 Kan. 874.

73. Ky.—State Highway Commission v. Coleman, 33 S.W.2d 318, 236 Ky. 444.
Okl.—Carter County Excise Board v. Kurn, 126 P.2d 997.

74. Neb.—In re Ruhter, 231 N.W. 29, 119 Neb. 826.

75. Ariz.—Frohmiller v. J. D. Halstead Lumber Co., 272 P. 95, 34 Ariz. 425.
Okl.—Delaware County Excise Board v. St. Louis San Francisco Ry. Co., 49 P.2d 523, 173 Okl. 571.

76. Va.—Godwin v. Board of Sup'rs of Nansemond County, 171 S.E. 521, 161 Va. 494.

77. Va.—Godwin v. Board of Sup'rs of Nansemond County, supra.

78. Ky.—State Highway Commission v. Coleman, 33 S.W.2d 318, 236 Ky. 444.

79. N.Y.—People v. Clark, 60 N.Y.S. 1015, 45 App.Div. 65.
29 C.J. p. 739, note 9.

80. Ga.—Murph v. Macon County, 116 S.E. 845, 157 Ga. 859.
La.—Parker v. Police Jury of Rapides Parish, 109 So. 353, 161 La. 675.

81. Ga.—Marks v. Richmond County, 140 S.E. 880, 165 Ga. 316.
Iowa.—Schamberg v. Iowa State Highway Commission, 243 N.W. 334, 214 Iowa 1041.—Harding v. Board of Sup'rs of Osceola County, 237 N.W. 625, 213 Iowa 560.
La.—Jeanne v. Police Jury, Vernon Parish, 113 So. 372, 163 La. 1053.
Okl.—Wentz v. Dawson, 299 P. 493, 149 Okl. 94.—Wentz v. Board of Com'r. of Lincoln County, 295 P. 599, 147 Okl. 173.—Wentz v. Ingenthron, 294 P. 151, 146 Okl. 165.
Tex.—Fletcher v. Howard, 39 S.W.2d 32, 120 Tex. 298, reversing, Civ. App., 26 S.W.2d 441 and rehearing denied 40 S.W.2d 52, 120 Tex. 298.—Fletcher v. King, Civ.App., 75 S.W.2d 980, error refused.—Fletcher v. Ely, Civ.App., 53 S.W.2d 817, error refused.

82. Ga.—Marks v. Richmond County, 140 S.E. 880, 165 Ga. 316.

83. La.—Jeane v. Police Jury, Vernon Parish, 113 So. 372, 163 La. 1053.

84. Ga.—Marks v. Richmond County, 140 S.E. 880, 165 Ga. 316.

has been noted to the effect that, where bonds are issued under legislative authority without a popular vote and no contractual rights have arisen, the proceeds may be appropriated to a road other than the one originally planned and for which the bonds could have been issued in the first instance.[85] In accordance with the general rule, funds acquired for the improvement of state or primary roads cannot be used for the improvement of a road not within that classification,[86] and where bonds have been voted for primary or state roads as designated and located the proceeds cannot be expended on roads subsequently designated as primary or state roads.[87] Where a bond issue is passed for construction of state highway projects, the proceeds cannot be devoted to construction of highways no longer a part of the state highway system although they were a part of the system at the time the bond issue was voted on.[88] A statute authorizing an expenditure of funds for state highways is not necessarily limited to highways so classified at the time of the enactment of the statute.[89] Where bonds are issued for the general purpose of constructing improved public roads, the proceeds may be applied to the construction of any road in the district which can be classed as an improved public road.[90]

Paved or hard-surfaced roads The proceeds of bonds issued for the purpose of constructing paved or hard-surfaced roads must be used for the construction of roads answering that description.[91]

Part of road Where bonds are voted to build a described road, the whole of the proceeds cannot be used in building a part only of such road,[92] even though the state highway commission has agreed to construct the rest of the road at some indefinite time in the future.[93]

Federal forest road Under a statute permitting the state to match federal aid allotments on the federal highway system within the state, the state may expend its funds to match allotments for a portion of the federal highway system which is also a part of the federal forest road system.[94]

Expenditure by county for township roads When authorized by statute, a county may expend its highway funds for a county highway through a township.[95]

Expenditure by county for state or state-aid roads In accordance with constitutional or statutory authorization, a county may appropriate and expend funds for state roads or roads constructed or maintained through state aid,[96] or it may lend

La.—Jeane v. Police Jury Vernon Parish, 113 So. 372, 163 La. 1052.

Refusal of other aid for old route

County funds raised for paving a certain road cannot be diverted to new route because the state highway board or the federal bureau of roads refuses to furnish funds for the old route.—Marks v. Richmond County, 140 S.E. 880, 165 Ga. 316.

85. Tenn.—White v. Jefferson County, 16 S.W.2d 24, 157 Tenn. 652, denying rehearing, 11 S.W.2d 863, 157 Tenn. 652.

86. Iowa.—Scharnberg v. Iowa State Highway Commission, 243 N.W. 334, 214 Iowa 1041.—Harding v. Board of Sup'rs of Osceola County, 237 N.W. 625, 213 Iowa 560.

Mo.—State ex rel. Russell v. State Highway Commission, 42 S.W.2d 196, 328 Mo. 942.

City streets

Board of supervisors could not divert proceeds of road bonds voted for improvement of "primary roads of county" to improvement of city streets which were continuations of "primary roads".—Wallace v. Foster, 241 N.W. 9, 213 Iowa 1151.

87. Iowa.—Scharnberg v. Iowa State Highway Commission, 243 N.W. 334, 214 Iowa 1041.—Harding v. Board of Sup'rs of Osceola County, 237 N.W. 625, 213 Iowa 560.

88. Ky.—Moore v. Polsgrove, 293 S.W. 965, 219 Ky. 410.

89. S.C.—Summer v. State Highway Commission of South Carolina, 141 S.E. 366, 143 S.C. 196.

90. Miss.—Shields v. Holmes County, 91 So. 563, 128 Miss. 813.

91. Fla.—McDonald v. Raleigh, 98 So. 830, 86 Fla. 577.

Sand clay roads

The proceeds of such bonds may be used for the construction of sand clay roads providing that a proper combination of the materials is used and the road is so constructed as to produce a hard surfaced road in fact.—McDonald v. Raleigh, supra.

92. La.—O'Bierne v. Police Jury of Red River Parish, 92 So. 709, 151 La. 1088.

93. La.—O'Bierne v. Police Jury of Red River Parish, 97 So. 461, 154 La. 329.

94. Mont.—State v. State Highway Commission, 265 P. 1, 82 Mont. 63.

95. Pa.—Garr v. Fuls, 133 A. 150, 286 Pa. 137.

96. Ga.—Myrick v. Brooks County, 165 S.E. 50, 175 Ga. 155.—Marks v. Richmond County, 140 S.E. 880, 165 Ga. 316.

Ky.—Estill County v. Price, 153 S.W. 2d 924, 287 Ky. 484.—Grauman v. Department of Highways, 151 S.W. 2d 1061, 286 Ky. 850.

Use of county bond proceeds

(1) County could use proceeds of county bonds previously issued to establish, construct, and maintain county roads for grading state-aid road under contract with highway board, pending board's payment of part of costs as agreed by it.—Spain v. Hall County, 165 S.E. 612, 175 Ga. 600.

(2) Where, pursuant to a contract between the county and the state highway commission, the latter commenced construction of a road it is entitled to the proceeds of a county bond issue voted for such construction.—Estill County v. Price, 153 S.W. 2d 924, 287 Ky. 484.

Use of share of gasoline tax

County's pro rata of gasoline tax could be used for grading state-aid road within county under contract whereby county and highway board shared expenses.—Spain v. Hall County, 165 S.E. 612, 175 Ga. 600.

Rights of way

(1) County may pay for rights of way for construction of roads to be taken into the state highway system.—McKean v. Carroll County, 154 N.E. 896, 324 Ill. 243.

(2) Expenditures made by county for right of way after highway was taken over by state were held not unauthorized as expenditure of county funds for state highway, where expenditures were made pursuant to agreement whereby county was to secure and pay for right of way to widen county road in return for state's taking it over.—State ex rel.

county funds for that purpose.[97] The power of the legislature to confer on a county the power to build public roads includes the power to give it the right to contribute to, or aid in the construction of, a public road in the county to be owned and maintained by the state.[98] However, it has been held that, where state highways and county roads are in distinct and separate classifications, funds received by the county from taxes or other sources for county roads or other specific purposes cannot be used or advanced to the state for the construction and maintenance of state highways without violating a constitutional provision prohibiting the diversion of such funds,[99] but county highway funds may be used for county roads which have been designated as part of the state highway system.[1]

Payment by township of expenses incurred by state In accordance with statutory authorization, a township may pay for land condemned by the state highway department for the purpose of building a supplementary state highway.[2] Under a statutory power to direct the raising of money by taxation for the construction and repair of roads within the township and to make contracts necessary to the exercise of such power, a township may appropriate money to defray a portion of the expense incurred by the state in improving a road within the township.[3]

(c) Bonds and Warrants

Highway funds may be used, in accordance with statutory provisions, to pay bonds issued for the construction or improvement of highways. Warrants must be paid pursuant to number and date when so required by statute

In accordance with statutory provisions, highway funds may be used to pay bonds issued for the construction or improvement of highways,[4] not only the principal thereof but the interest as well.[5] A fund raised or acquired for the payment of road

St. Louis County v. State Highway Commission, 86 S.W.2d 1066, 337 Mo. 878.

97. N.C.—Johnson v. Board of Com'rs of Wake County, 135 S.E. 618, 192 N.C. 561. Young v. Board of Com'rs of Johnston County, 128 S.E. 401, 190 N.C. 52.

98. Fla.—Lewis v. Leon County, 107 So. 146, 91 Fla. 118.

Authorization as to county bond proceeds

(1) Legislature may enact statute permitting money raised from county bonds to be turned over to state road department to construct state roads within county.—Jackson Lumber Co. v. Walton County, 116 So. 771, 95 Fla. 632, appeal dismissed 49 S.Ct. 338, 73 L.Ed. 1011.

(2) Such a statute has been held to intend that proceeds of county bond allocated to state roads should be applied to construction thereof only within county.—Jackson Lumber Co. v. Walton County, supra.

99. Kan.—State v. Board of Com'rs of Saline County, 278 P. 54, 128 Kan. 437.
Or.—Calkins v. Lane County, 208 P. 744, 105 Or. 127.

1. Kan.—State ex rel. McMullen v. State Highway Commission, 33 P.2d 324, 139 Kan. 858.

Bridges on roads of state highway system

County's use of money, raised by levy for bridge purposes, for construction of bridges on roads constituting part of state highway system was held not an unlawful diversion.—State ex rel. Bennett v. State Highway Commission, 26 P.2d 606, 138 Kan. 291, rehearing denied 33 P.2d 330, 139 Kan. 655.

2. Mo.—Reilly v. Sugar Creek Tp. of Harrison County, 139 S.W.2d 525, 345 Mo. 1248.

3. Neb.—State v. Bone Creek Tp., Butler County, 190 N.W. 586, 109 Neb. 202, rehearing denied 193 N.W. 767, 109 Neb. 202.

4. Ky.—Fiscal Court of Scott County v. Davidson, 82 S.W.2d 801, 259 Ky. 498.
Md.—Weilbrenner v. Commissioners of Baltimore County, 159 A. 600, 162 Md. 240.

Primary road fund

State may use primary road fund to pay county road bonds.—State v. Executive Council of State of Iowa, 223 N.W. 737, 207 Iowa 923.

Use of funds allocated to county

(1) County commissioners were held authorized to allocate, for payment of county unit and township road bonds, surplus funds from special road fund consisting of gasoline tax and automobile license fees collected by state and apportioned to county for the construction, maintenance and repair of highways.—Bridges v. State ex rel. Vaughn, 190 N.E. 758, 208 Ind. 684.

(2) Under the Acts 1929 (Ex. Sess.) c. 14486, § 14, as amended by Acts 1933, c. 15891, moneys credited to county from gasoline taxes, but never specifically appropriated by commissioners to replace county or district tax levy for payment of road bonds, or otherwise allocated by state board of administration cannot be withheld by latter for payment of such bonds after commissioners have otherwise directed, but should be disbursed by board for purchase of bonds.—State ex rel. De Soto County v. Sholtz, 157 So. 645, 117 Fla. 258.

(3) Where the terms of the statute, authorizing state board of administration to use gasoline tax funds credited to county for purchase of county or district road bonds are not seasonably invoked by county commissioners, board must apply funds to payment of interest on and principal of bonds, regardless of instructions from county.—State ex rel. De Soto County v. Sholtz, supra.

(4) Where gasoline taxes have been duly budgeted and appropriated to interest or sinking fund requirements for outstanding bonds of road and bridge district state board of administration was held not authorized to use proceeds of such gasoline taxes for purchase of bonds of road and bridge district so as to reduce outstanding indebtedness.—State ex rel. Florida Nat. Bank v. State Board of Administration, 156 So. 15, 115 Fla. 753.

(5) County commissioners' resolution adopting statute authorizing use of gasoline tax revenues to purchase bonds of county and districts thereof was held sufficient to permit county to operate under statute, notwithstanding subsequent estimate of revenues on which budget was based inadvertently included gasoline tax revenues where commissioners thereafter adopted resolution amending record of budget to show nunc pro tunc that gasoline tax revenues were appropriated for purchase of bonds.—State ex rel. Wall v. Sholtz, 160 So. 877, 119 Fla. 103.

5. Iowa.—Harding v. Board of Sup'rs of Osceola County, 237 N.W. 625, 213 Iowa 560.

bonds cannot be used for refunding bond expenses [6] Only funds specified by statute are to be used for payment of particular bonds [7] Administrative officials who have collected only part of the money necessary for payment cannot, in the absence of express statutory authorization, reserve the money for any particular portion of the road bond indebtedness,[8] and they cannot legally apply funds to the payment of refunding bonds to the exclusion or prejudice of payments on original bonds of the same nature [9] The proceeds of bonds issued for the improvement of a particular road may be authorized by the voters to be used to repurchase the bonds when improvement of that road is no longer feasible [10]

Where the statute requires that, if the fund on hand is insufficient to meet all outstanding warrants, the warrants are redeemable pursuant to number and date, the creation of a special road fund to pay subsequent warrants, thus repudiating outstanding warrants, is unauthorized and void [11] Interest on warrants is not recoverable from a highway fund which by statute is liable only for the principal [12]

(d) Administrative and Engineering Salaries and Expenses; Attorney's Fees

Administrative salaries and expenses, consulting engineers' salaries, and attorney's fees have been held properly payable from highway funds.

Administrative salaries and expenses are properly payable from a fund for the construction and maintenance of roads.[13] A fund especially allocated for administration and engineering purposes may be expended for housing facilities for the state highway commission [14]

Where the majority of the state highway committee lacks confidence in the ability of the state engineer, the salary of a consulting engineer is properly payable from a highway fund appropriated for emergencies.[15]

Attorney's fees Attorney's fees for legal services rendered in connection with the construction and maintenance of highways are properly payable from the highway fund, as within the general purpose of the fund [16]

6. Fla —Taylor v Williams, 196 So 214, 142 Fla 756 denying rehearing 195 So 175, 142 Fla 402 rehearing denied 195 So 184 142 Fla 562—W J Howey Co v Williams, 196 So 214, 142 Fla 756, denying rehearing 195 So 181 142 Fla 415, rehearing denied 195 So 184, 142 Fla 562—Pierce v Isaac, 184 So 669 135 Fla 101

7. Fla —State ex rel Johnson v Sholtz 156 So 331 116 Fla 106

Payments to state board of administration

Fund derived from sale of county road and bridge bonds issued under act authorizing surplus to be held by trustees and paid out for maintenance and improvements or for construction of other roads and bridges and county fund derived from taxation for payment of obligation due another county for share of road construction under agreement between respective boards of county commissioners, where county was not obligated to pay any part of road bonds of other or its refunding bonds, were held not funds for payment of bonds within statute requiring trustees and other officials to turn over such funds to state board of administration —State ex rel Johnson v Sholtz supra

Premium from sale of bonds

A premium derived from the sale of bonds issued for the purpose of constructing and improving public highways is not required to be used in repayment of an installment on the principal —People v Millard, 139 N E 113, 307 Ill 556.

8. Fla —State ex rel Georgia Bond & Mortgage Co v Cone, 189 So 47, 137 Fla 412

9 Fla —State ex rel Georgia Bond & Mortgage Co v Cone, supra

10 Tex —Fletcher v King, Civ App, 75 S W 2d 980, error refused

11 Ark —Stanfield v Kincannon, 46 S W 2d 22 185 Ark 120

12. Kan —First Nat Bank v Board of Com'rs of Wabaunsee County, 66 P 2d 558, 145 Kan 552

Liability on warrant as contractual obligation

Interest on warrants issued by county was held not recoverable from highway commission on ground that warrants were "contracts" and that under act creating commission it was required to assume liabilities of various counties on all existing "contracts," where statute contemplated existing contracts for construction, improvement, reconstruction, or maintenance of state highways and bridges and for purchase of machinery, equipment, or material for use on state highways —First Nat Bank v Board of Com'rs of Wabaunsee County, supra

13 Ala —Johnson v Robinson, 192 So 112, 238 Ala 568

Ark —Lawhorn v Johnson, 120 S W 2d 720, 196 Ark 991, overruling Ladd v Stubblefield, 111 S W 2d 555, 195 Ark 261, and Burrow v Floyd, 99 S W 2d 573, 193 Ark 220

Fla —Harrell v Woodberry, 56 So. 297, 62 Fla 205

Minn —Corv v King, 8 N W 2d 614—State v Babcock, 232 N W 718, 181 Minn 409

Okl —Helm v Childers, 75 P 2d 398, 181 Okl 535

County judge's services as ex officio road commissioner

Ark - Lawhorn v Johnson, 120 S W 2d 720, 196 Ark 991, overruling Ladd v Stubblefield, 111 S W 2d 555 195 Ark 261, and Burrow v Floyd, 99 S W 2d 573, 193 Ark 220

Publicity director of state travel and tourist bureau

Okl —Helm v Childers, 75 P 2d 398, 181 Okl 535

Obligation of legislature to provide for payment

Where the legislature by law confers authority and imposes duty on an administrative body to be performed for the public good in the construction, maintenance, and supervision of public roads and bridges, a moral obligation arises which justifies the legislature, in the absence of constitutional restrictions, in providing for the payment of such service out of funds set apart by the legislature itself for the construction and maintenance of public roads and bridges —Johnson v Robinson, 192 So 112, 238 Ala 568

14. Mont —Guillot v State Highway Commission of Montana, 56 P 2d 1072, 102 Mont 149

15 Wash —State v Clausen, 272 P 22, 150 Wash 20

16. Okl —Carter v Miley, 103 P 2d 933, 187 Okl 530.

(c) Damages; Compensation Insurance

Damages for personal injuries cannot be paid from funds solely for the maintenance and construction of highways, but may be paid from highway funds not specifically allocated for a particular purpose where a statute authorizes payment A state highway commission cannot, without statutory authorization, expend its funds for the payment of premiums on a policy of workmen's compensation insurance

Funds solely for the maintenance and construction of highways cannot be used to pay a judgment for personal injuries,[17] nor can they be used to satisfy a claim for unliquidated damages claimed by a contractor[18] Damages for personal injuries may be paid from highway funds not specifically allocated for a particular purpose where a statute authorizes payment by the highway commission but specifies no particular fund[19]

Compensation insurance In the absence of statutory authorization a state highway commission cannot expend its funds for the payment of premiums on a policy of workmen's compensation insurance covering employees of the commission[20]

(f) Invalid or Unapproved Claim

An invalid claim or a claim which is not substantiated or approved as required by statute is properly refused payment

An invalid claim[21] or a claim which is not substantiated[22] or approved as required by statute[23] is properly refused payment A claim to be payable need not be approved by any particular officer if such approval is not required by statute.[24]

Money derived from the sale of bonds may be used to pay for roads constructed by the district notwithstanding the district's contract for the construction of the road was illegal, since the district has received the benefits of the contract.[25]

i. Remedies

The court may enjoin the illegal and unauthorized use or expenditure of the highway funds

The court may enjoin the illegal and unauthorized use or expenditure of the highway funds[26] but it cannot restrain the use of funds for authorized purposes[27] Petitioners who seek to enjoin the expenditure of proceeds of a bond issue on any road other than that for which the bonds were voted are not entitled to a decree giving relief on any matter other than that specifically requested,[28] and a decree enjoining the expenditure of the fund on any other road does not enjoin the expenditure for other purposes than road projects,[29] nor does it prevent the taxpayers from voting to use the fund to repurchase the bonds[30]

By looking to the state board of administration for relief and seeking to participate in the funds administered by it, bondholders and other creditors are, to the extent they seek participation in the fund handled by the board, deemed to have accepted the terms and conditions of the statute under which the board was created and functions[31]

Proceeds of bond issue

The fees of attorneys who assist in the issuance of bonds for the construction and improvement of roads are properly payable out of the proceeds of the bond issue—State ex rel Wammack & Welborn v Affolder, 257 S W 493, 214 Mo App 500

Statute allowing fees incident to creation of district

Attorney's fees for approving bonds and defending the legality of the creation of a district are properly payable out of funds for highway construction where the statute allows attorney's fees incident to the creation of a district—Page v Paving Improvement Dist No 11 of Russellville, 158 S W 2d 905, 203 Ark 657

17. La—State ex rel Varnado v Louisiana Highway Commission, 147 So 361, 177 La 1—Mallard v State, App, 194 So 447
Minn—State v Babcock, 232 N W 718, 181 Minn 409

18. Tex—Eastland County v Davisson, Civ App, 277 S W 779, reversed on other grounds Davisson v Eastland County, Com App, 287 S W 901.

19. La—State ex rel Varnado v Louisiana Highway Commission, 147 So 361, 177 La 1—Mallard v State, App, 194 So 447

20. Okl—Leininger v Minter, 281 P 801 139 Okl 169

21. N Y—Hiscox v Holmes, 260 N Y S 667 237 App Div 240

22. Ark—Page v Paving Improvement Dist No 11 of Russellville, 158 S W 2d 905, 203 Ark 657

23. Ark—Page v Paving Improvement Dist No 11 of Russellville, supra Ladd v Stubblefield, 111 S W 2d 555, 195 Ark 261
Ga—McGinty v Pickering, 179 S E 358, 180 Ga 447
Kan—State ex rel Bennett v State Highway Commission 26 P 2d 606, 138 Kan 294, rehearing denied 33 P 2d 330, 139 Kan 655
Okl—Clarence L Boyd Co v Blachly, 43 P 2d 162, 171 Okl 626

24. N Y—Hiscox v Holmes, 260 N Y S 667, 237 App Div 240—Eastern Rock Products v Mayer, 244 N Y S 96, 137 Misc 555

25. Ark—Morehart v Mabelvale Road Imp Dist No 29, 36 S W 2d 68, 183 Ark 411

26. Fla—Pierce v Isaac, 184 So 669, 135 Fla 101
Iowa—Harding v Board of Sup'rs of Osceola County, 237 N W 625, 213 Iowa 560
Okl—Hawks v Seay, 1 P 2d 148, 150 Okl 160
Tex—Fletcher v Ely, Civ App, 53 S W 2d 817, error refused
Power of court to supervise discretion of
County authorities in apportioning funds see supra subdivision d of this section
Disbursing authorities generally see supra subdivision h (1) of this section
State authorities in apportioning funds see supra subdivision c of this section

27. Ga—Myrick v Brooks County, 165 S E 50, 175 Ga. 155
Okl—Hawks v Seay, 1 P 2d 148, 150 Okl 160

28. Tex—Fletcher v King, Civ App, 75 S W 2d 980, error refused

29. Tex—Fletcher v King, supra

30. Tex—Fletcher v King, supra

31. Fla—State ex rel Orrell v Johnson, 147 So 254, 109 Fla. 263.

The rights and remedies of taxpayers are considered infra § 311.

§ 177. Authority and Duty to Construct or Repair

a. In general
b State highways and highway systems
c County or township highways
d Agreements between governmental authorities
e Necessity and time for work, statutory preliminaries

a. In General

The construction and repair of public roads is a governmental function which may be exercised by the state or delegated to state or local agencies or bodies, and under some circumstances duties may rest on a private individual or corporation with respect to the maintenance of a highway

The construction, maintenance, and repair of public highways is a governmental function,[32] which belongs primarily to, and may be exercised by, the state and the state legislature.[33] The power of the state to exercise this function is inherent,[34] plenary,[35] and part of its police powers,[36] but the power of local authorities to provide for the improvement of roads is statutory,[37] and proceedings by such authorities looking to the completion of a road improvement are null and void where taken after the repeal of the statute enabling them to act.[38]

To accomplish the governmental purpose of laying out, constructing, and maintaining highways the legislature may abolish an old system and adopt and institute a new one,[39] and, as shown infra subdivision b of this section, in many jurisdictions provision has been made for a system of state or state-aid highways to take the place of some other mode of maintaining highways. Under some statutes there exist a state highway system and a county highway system and the two systems are separate and distinct, controlled and operated under different jurisdictions.[40]

Subject to constitutional restrictions,[41] the work of constructing or maintaining highways may be

32. U S —Kansas City Bridge Co v Alabama State Bridge Corporation, C C A Ala 59 F 2d 48, rehearing denied 59 F 2d 1065, rehearing denied 53 S Ct 90 287 U S 644, 77 L Ed 557—Howell v Port of New York Authority, D C N J, 34 F Supp 797
Ind - Wright v House, 121 N E 433 188 Ind 247
La Hulin v Road Dist No 4, Parish of Vermilion, 115 So 650, 165 La 113
Me -Grindell's Case, 138 A 66, 126 Me 287
Md --Winebrenner v Salmon, 142 A 723, 155 Md 563
N H —Grimes v Keenan, 187 A 100, 88 N H 230
N J —Miller v Port of New York Authority, 15 A 2d 262, 18 N J Misc 601
N Y —New Paltz H & P Traction Co v Ulster County, 195 N Y S 623, 202 App Div 234—Voorhis v Cornell Contracting Corporation, 10 N Y S 2d 378, 170 Misc 908
Vt —Stalbird v Town of Washington 172 A 623, 106 Vt 213
Wis —Muscoda Bridge Co v Village of Muscoda, 214 N W 435, 193 Wis 457

33. U S —Howell v Port of New York Authority, D C N J, 34 F Supp 797
Conn —De Capua v City of New Haven, 13 A 2d 581, 126 Conn 558—Moleske v MacDonald, 146 A 820, 109 Conn 336
Fla —State ex rel Harrell v Cone, 177 So 854, 130 Fla 158—Carlton v Mathews, 137 So 815, 103 Fla 301—Parrish v Hillsborough County, 123 So 830, 98 Fla 430, 436
Ga —Calfee v Jones, 188 S E 307, 54 Ga App 481
Mont —State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, 69 P 2d 112, 105 Mont 44
N J —Miller v Port of New York Authority, 15 A 2d 262, 18 N J Misc 601
N Y —Voorhis v Cornell Contracting Corporation, 10 N Y S 2d 378, 170 Misc 908
Or —Cabell v City of Portland, 57 P 2d 1292, 153 Or 528
Pa —Luzerne County v Township of Hanover, 33 Luz Leg Reg 98
29 C J p 583 note 64, p 590 note 83 [a]

Rural highways

The power of the state to provide a system of rural highways is well settled —Alabama Great Southern R Co v Denton, 195 So 218, 239 Ala 301

Improvement of highways on section lines

The state, acting in its sovereign capacity, may grade and improve highways on section lines as it becomes necessary to do so for the convenience and safety of the public —King v Stark County, 266 N W 654, 66 N D 467

Use of land for highway

Where the state has acquired land for the purpose of constructing a certain highway, and the highway has been constructed according to the plans finally adopted, the state has the legal right to use the land for the purpose for which it was acquired —State v Brewer, Tex, 169 S W 2d 468, reversing, Civ App, 162 S W 2d 466

34. Wis —Muscoda Bridge Co v Village of Muscoda, 214 N W 435, 193 Wis 457

35. Ala —Alabama Great Southern R Co v Denton, 195 So 218, 239 Ala 301
Fla —State ex rel Hill v Cone, 191 So 50, 140 Fla 1

36. Ky —Ashland Transfer Co v State Tax Commission, 56 S W 2d 691, 247 Ky 141, 87 A L R 534

37. Ill —Dickison v Clark, 2 N E 2d 91, 363 Ill 258
Pa —Township of Luzerne v Fayette County, 199 A 327, 330 Pa 247—Greene County v Center Tp, 157 A 777, 305 Pa 79

38. Ark —Huff v Cunningham, 298 S W 340 174 Ark 1045

39. Tenn —Butler v McMahan, 64 S W 2d 1, 166 Tenn 511

40 Mo —State ex rel State Highway Commission v Huff, 51 S W 2d 40, 330 Mo 939

41. Ga —Calfee v Jones, 188 S E 307, 54 Ga App 481
Miss —Trahan v State Highway Commission, 151 So 178, 169 Miss 732
Mo —State ex rel R Newton McDowell, Inc, v Smith, 67 S W 2d 50, 334 Mo 653
Pa —Shapera v Allegheny County, 25 A 2d 566, 344 Pa 473—Greene County v Center Tp 157 A. 777, 305 Pa 79
29 C.J p 583 note 63

done by the state,[42] in its own name,[43] or the power or duty to do the work, at least with respect to a specific class of highways, may be conferred or imposed on local communities and political subdivisions of the state,[44] such as towns,[45] townships,[46] and counties,[47] or on a designated officer, body, board, or agency,[48] such as a state highway department, commission, commissioner, or director,[49] a state department of public works,[50] county commissioners or a board of county commissioners,[51]

Constitutional provision held not to destroy legislative control

A constitutional provision relating to authority of counties or political subdivisions to issue bonds or lend their credit and to levy taxes for construction and maintenance of roads, has been held not to divest legislature of control over public roads and highways and expenditure of road funds by counties or other agencies of government, but only to provide a method and means by which roads may be constructed under legislative provisions—Robbins v Limestone County, 268 S W 915, 114 Tex 345, answers to certified questions conformed to, Civ App, 272 S W 526

Absence of constitutional provision

(1) In some jurisdictions there is no constitutional provision regulating the construction or maintenance of public roads or requiring the state or any of its territorial subdivisions to establish and maintain highways for public travel

Fla—State v Brevard County 126 So 353, 99 Fla 226

Mass—Opinion of the Justices, 148 N E 889, 250 Mass 591

(2) It has been said that the power to have public highways repaired or improved may be exercised by the legislature in such a manner and way, and under such circumstances, as it may deem best and that "there is no constitutional or other limitation on this power in this particular matter"—Lee County v City of Smithville, 115 S E 107, 110, 154 Ga 550

42. Ala—In re Opinions of the Justices, 145 So 820, 226 Ala 165

Me—Grindell's Case, 138 A 66, 126 Me 287

29 C J p 583 note 66

43. U S—Kansas City Bridge Co v Alabama State Bridge Corporation, C C A Ala, 59 F 2d 48, rehearing denied 59 F 2d 1065, rehearing denied 53 S Ct 90, 287 U S 644, 77 L Ed 557

44. Idaho—Ada County v Wright, 92 P 2d 134, 60 Idaho 394

Me—Grindell's Case, 138 A 66, 126 Me 287

29 C J p 583 note 67

County or township highways see infra subdivision c of this section

Power and duty of municipal authorities to improve streets and other ways see the C J S title Municipal Corporations § 1044, also 44 C J. p 162 note 1—p 167 note 76

45. Conn—Moleske v MacDonald, 146 A 820, 109 Conn 336

Mass—Tuckerman v Moynihan, 185 N E 2, 282 Mass 562

29 C J p 583 note 68

Corporate capacity

Under some statutes towns have a corporate capacity as respects the construction of highways—Woodruff v Glendale, 23 Minn 537

46. Mich—Webb v Wakefield Tp, 215 N W 43, 239 Mich 521

29 C J p 583 note 68 [a] (2)

Absence of duty on township

Pa—Commonwealth v Woods, 22 Erie Co 126

47. Ala—Fuller v Knight, 2 So 2d 605 241 Ala 257, 135 A L R 760

Fla—State ex rel Harrell v Cone, 177 So 854, 130 Fla 158—Webb v Hillsborough County, 175 So 874, 128 Fla 471

Ill—Natural Products Co v Du Page County, 145 N E 298, 314 Ill 74

Kan—Board of County Com'rs of Neosho County v Burdick, 244 P 866 120 Kan 698

Minn—In re Highways in Fillmore and Houston Counties 191 N W 598, 154 Minn 246

Neb—State v Steffen, 236 N W 141, 121 Neb 39

Pa—Commonwealth ex rel Walker v Centre County Com'rs, 9 Pa Dist & Co 571, 41 York Leg Rec 173

29 C J p 583 note 69, p 590 note 81 [d]

County purpose

"The building, repairing, and maintaining of roads is a county purpose"—Grindstaff v Carter County, 279 S W 1041 1042, 152 Tenn 605

Statute held not to restrict county's power

A statute authorizing the county to direct the state tax commission to pay to the state highway department such part of the county's share of state gasoline taxes as might be agreed on by the county and the governor has been held not to restrict the general power of the county over the matter of road construction—Isbell v Shelby County, 180 So 567, 235 Ala 571

48. U S—Kansas City Bridge Co v Alabama State Bridge Corporation, C C A Ala, 59 F 2d 48, rehearing denied 59 F 2d 1065, rehearing denied 53 S Ct 90, 287 U S 644, 77 L Ed 557

Conn—De Capua v City of New Haven, 13 A 2d 581, 126 Conn 558—Moleske v MacDonald, 146 A 820, 109 Conn 336

Fla—State ex rel Harrell v Cone, 177 So 854, 130 Fla 158

Ga—Lee County v City of Smithville, 115 S E 107, 154 Ga 550—Calfee v Jones, 188 S E 307, 54 Ga App 481

Pa—Shapera v Allegheny County, 25 A 2d 566, 344 Pa 473—Greene County v Center Tp, 157 A 777, 305 Pa 79

29 C J p 584 note 72

Powers of

Highway boards or commissions generally see supra § 157

Highway officers or agents generally see supra § 168

49. Ohio—Village of Englewood v. Bettis, 30 Ohio N P, N S, 491

Pa—Commonwealth v Bebbington, 24 Pa Dist & Co 245

29 C J p 584 note 73, p 590 note 85 [a]

Powers of state authorities as to construction or maintenance of state highways see infra subdivision b of this section

Power not unlimited

The power of the highway department to construct, maintain, or improve public roads is not unlimited - In re Opinions of the Justices, 145 So 820 226 Ala 165

Reconstruction of paved roads

The authority of the state highway commission to improve the roads of the state is not confined to dirt roads, it may reconstruct a road already paved - De Nette v Duby, 239 P 109, 115 Or 511

Improvement ordered by county commissioners

Where a road improvement had been ordered by a board of county commissioners, but before the improvement had been made the legislature passed an act transferring the duty of making the improvement to the state highway commission, it was held to be the duty of the state highway commission to construct the ordered improvement promptly—State v Board of Com'rs of Miami County, 289 P 394, 131 Kan 114

50. Idaho—Murtaugh Highway Dist v Merritt, 85 P 2d 685, 59 Idaho 603

Ill—Village of Glencoe v Hurford, 148 N E 69, 317 Ill 203, followed in Village of Glencoe v Olson, 148 N E 78, 317 Ill 263

51. Kan—Norton v Board of Com'rs of Montgomery County, 199 P. 388, 109 Kan 559

Md—Walter v Board of Com'rs of Montgomery County, 25 A 2d 682, 180 Md 498—Walter v. Board of

county supervisors or boards of supervisors,[52] township supervisors[53] or trustees,[54] commissioners of road improvement districts,[55] local commissioners of highways,[56] surveyors of highways,[57] overseers,[58] police juries,[59] and other officers or bodies[60]

In constructing, maintaining, and controlling public highways, the political subdivisions of the state act in a governmental capacity and perform a governmental function or duty,[61] being in such case mere agents or auxiliaries of the state[62] for the purpose of exercising such powers as may lawfully

Com'rs of Montgomery County, 22 A 2d 472, 179 Md 665
Ohio—Hamlet v Board of County Commissioners of Clark County, 24 Ohio N P,N S, 161
Pa—Commonwealth v Ball, 121 A 191, 277 Pa 301, 29 A L R 626—Garr v Northampton County, 5 Pa Dist & Co 220, 19 North Co 199, affirmed Garr v Fuls, 133 A 150, 286 Pa 137
S C—Barnwell v Matthews, 128 S E 712, 132 S C 314
Wash—Bush v King County, 236 P 298, 134 Wash 626
29 C J p 584 note 75

Extent of jurisdiction; quasi-legislative function

(1) "Boards of commissioners have exclusive original jurisdiction in all matters involving the establishment or improvement of public highways in their respective counties"—Ward v Board of Com'rs of Lake County, 157 N E 721, 723, 199 Ind 467

(2) Courts of county commissioners are courts of unlimited jurisdiction and powers as to the construction maintenance and improvement of the public roads, except as their jurisdiction may be limited by the local or special statutes of the state, and in the performance of their duties such courts exercise a function that is quasi legislative—Thompson v Chilton County, 181 So 701, 236 Ala 142

Secondary highways in township

Laying out and construction of secondary highways in township have been held to be beyond authority of board of county commissioners—Dubbelde v Minnehaha County, 253 N W 445, 62 S D 465

Division of road into different strips for repair

An order of a county road commission requiring a township to repair a road has been held not invalid as against the contention that the order divided the road into different strips for repair and that such action constituted an attempt to split an entire road into sections which could be repaired within the limits of the statutory powers of the commission—Town of Shrewsbury v Davis, 142 A 91, 101 Vt 181

Lease of railroad right of way for road

A board of county commissioners may validly lease part of the right of way of a railroad for the construction of a road and such a lease may contain provisions requiring the board properly to maintain the leased premises and pay the taxes thereon—Ruff v Board of Com'rs of Shawnee County, 272 P 189, 127 Kan 188

Effect of appeal from order discontinuing highway

The pendency of an appeal in the county court from the order of town selectmen discontinuing a highway does not preclude county commissioners from ordering repairs made on the road—Town of Shrewsbury v Davis, 142 A 91, 101 Vt 181

52. Cal—Sharp v Joint Highway Dist No 6, 295 P 841, 111 Cal App 81
Ill—Hayes v Department of Public Works and Buildings, 168 N E 364, 336 Ill 233
Mich—Baird v Board of Sup'rs of Saginaw County, 197 N W 222, 226 Mich 80
Miss—Mississippi Road Supply Co v Hester, 188 So 281, 185 Miss 839, 121 A L R 571—Ladner v Road Protection Commission, 116 So 602, 150 Miss 416
29 C J p 584 note 75

Protection wall; apron

Board of supervisors and road protection commission may construct a protection wall, with an apron extending back of the wall a sufficient distance to protect the wall from being undermined by adjacent water, and such apron may be used as a highway—Ladner v Road Protection Commission, 116 So 602, 150 Miss 416

In Arizona county supervisors cannot spend county funds on any roads except county public highways or state routes, established under certain statutes, and only when such highways are under supervisors' exclusive control—Board of Sup'rs of Apache County v. Udall, 1 P 2d 343, 38 Ariz 497

53. Pa—Commonwealth v Kauffman, 10 Pa Dist & Co 316, 43 Montg Co 77

54. Ohio—Gause v Peeler, 180 N E 384, 41 Ohio App 192
29 C J p 585 note 79

55. Ark—Taylor v Rogers, 2 S W 2d 56, 176 Ark 156—Road Improvement Dist No 4 of Saline County v Ball, 281 S W 5, 170 Ark 522—Thompson v Mann, 252 S W 4, 159 Ark 391—Higginbotham v Road Improvement Dist No 3 of Lonoke County, 241 S W 866, 154 Ark. 112

56 Ill—Dickison v Clark, 2 N E 2d 91, 363 Ill 258
29 C J p 584 note 74

57. Mass—Tuckerman v Moynihan, 185 N E 2, 282 Mass 562
29 C J p 585 note 78

58. Kan—Marts v Freeman, 136 P 943, 91 Kan 106
29 C J p 584 note 76

59. La—De Moss v Police Jury of Bossier Parish, 118 So 700, 167 La 83, 68 A L R 336, reversing and conforming to 120 So 137, 9 La App 215—Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La 471—Williams v Police Jury of Concordia Parish, 107 So 126, 160 La 325—Barrow v Hepler, 34 La Ann 362

60. General court

Mass—Opinion of the Justices, 148 N E 889, 250 Mass 591

Fiscal or county courts

Ky—Rowe v Alexander, 161 S W 508, 156 Ky 507
29 C J p 585 note 80

Road supervisor, although in immediate charge of the construction, maintenance, and repair of roads, has been held to have duties which are purely ministerial, and subordinate to the court of county commissioners—Thompson v Chilton County, 181 So 701, 236 Ala 142

Road commissioners

Under some statutes it is the duty of the road commissioners to make repairs ordered by county commissioners where the town has taken no action to determine that specific repairs should be made—Wood v Town of Concord, 167 N E 311, 268 Mass 185

61. Mont—State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, 69 P 2d 112, 105 Mont 44
N J—Buffington v Atlantic County, 167 A 527, 11 N J Misc 443
N Y—New Paltz, H & P Traction Co v Ulster County, 195 N Y S 623, 202 App Div 234
Pa—Greene County v Center Tp, 157 A 777, 305 Pa 79—Garr v Fuls, 133 A 150, 286 Pa 137
Vt—Stalbird v Town of Washington, 172 A 623, 106 Vt 213.

62. Me—State v Fuller, 105 Me 571, 75 A 315
Mont—State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lew-

be delegated to them.[63] Power to construct a highway ordinarily includes power to obtain rights of way,[64] and some statutory provisions have been construed to show a legislative intent that local subdivisions of the state, such as counties and townships, should aid in constructing highways by furnishing and paying for the rights of way.[65]

Culverts Construction of culverts may be directed by the proper officials,[66] and, so far as concerns their maintenance, culverts are part of the road on which they are located and are governed by the law applicable to roads.[67]

Federal power; effect of federal statutes The establishment and maintenance of highways over privately owned lands belongs primarily to the state authorities and not to the federal government,[68] and the federal statutes relative to federal aid in the construction and maintenance of state roads have no effect on the power of state agencies to establish roads,[69] but only come into play in connection with the contributions to be made by the federal government in money to aid in the construction and maintenance of the roads when and if they have been established.[70]

Grading, change of grade The duty to keep a road in good and sufficient repair as imposed by statute does not require a radical change of level in the road to prevent inundation constituting in effect the making of a new road.[71] Under a statutory power to grade the hills on a highway, the authorities may not only require the hills to be cut down but require the earth taken from the cut to be filled in the highways between the hills.[72] Technically "grading" is the reduction of the earth's surface to a given line fixed as the grade and may include filling or excavating, or both, as may be necessary to accomplish that object.[73] In its common usage "to grade a road" means simply to change its level.[74] Under statutes imposing liability on the highway authorities to abutters damaged by a change of grade, the term "grade" signifies something more than the mere preparation of the highway for travel which may often be accompanied by slight, superficial changes,[75] but it does include any elevation or depression of the surface of the highway as it in fact exists and which has never been brought to a uniform grade resulting from such an attempt to establish such a grade.[76]

Duty or authority of private individuals or corporations. The burden of keeping and improving highways cannot be placed on the owners of abutting lands, whether inclosed or not, merely because of their frontage.[77] Circumstances may exist however, under which duties may rest on a private individual or corporation with respect to the maintenance of a highway,[78] as where he obstructs it,[79] or where the way is built for his convenience;[80] and the governmental authorities may obtain a recovery against one who has damaged a road[81] or

is and Clark County, 69 P 2d 112, 105 Mont 44
Pa—Cheltenham Tp v Philadelphia Rapid Transit Co, 141 A 259, 292 Pa 384
Vt—Stalbird v Town of Washington, 172 A 623, 106 Vt 213
29 C J p 590 note 83 [a]

63. Vt—Stalbird v Town of Washington, supra

64. Mont—State v District Court of Fourteenth Judicial Dist in and for Broadwater County 260 P 134, 80 Mont 228
State highway commission can acquire right of way after compliance with statute requiring it to present petition to county court—Arkansas State Highway Commission v Pulaski County, Ark, 168 S W 2d 1098

65. Mo—Reilly v Sugar Creek Tp of Harrison County, 139 S W 2d 525, 345 Mo 1248

66. Neb—Fokenga v Churchill, 96 N W 143, 2 Neb (Unoff) 304
29 C J p 581 note 75 [e]

67 Mich—Gellasch v Van Syckle, 255 N W 345 267 Mich 378

68. U S—U S v Rindge, D C Cal, 208 F. 611.

69. Fla—Sibley v Volusia County, 2 So 2d 578 147 Fla 302

70. Fla—Sibley v Volusia County, supra

71. Conn—Goodspeed's Appeal, 53 A 728, 75 Conn 271

72. Me—Acton v York County, 77 Me 128

73. Tenn—Louisville & N R Co v State, 193 S W 113, 137 Tenn 341

74. N J—State v Warren R Co, 29 N J Law 353

75. R I—Aldrich v Providence, 12 R I 241

76. Conn—Pickles v City of Ansonia, 56 A 552, 76 Conn 278
Change of grade
As taking for public use imposing liability for damages see Eminent Domain §§ 123–125
Of city streets see Municipal Corporations §§ 1227–1232, also 44 C J p 429 note 86–p 435 note 72
Rights of abutter to damages generally see infra § 212
Surface of highway
The term grade is used in such a statute not to signify a level precisely established by mathematical points and lines, but the surface of the highway as it in fact exists—Pickles v City of Ansonia, 56 A 552, 76 Conn 278—McGarr v Bristol, 42 A 1000, 71 Conn 652, 656

77. N J—Weller v McCormick, 1 A 516, 47 N J Law 397, 54 Am R 175
Under old English law when a highway became unsafe a traveler might pass over the adjoining private property, and consequently if the tenant of that property inclosed it so as to exclude the traveler, he was bound to keep the road in front of his premises repaired—Weller v McCormick, supra

78. Ind—Indianapolis v Indianapolis Water Co, 113 N E 369, 185 Ind 277

79. Mass—Middlefield v Church Mills Knitting Co, 35 N E 780, 160 Mass 267
29 C J p 586 note 6
Obstruction as nuisance **see infra § 217**

80 Me—Shattuck v York County, 76 Me 167
29 C J p 586 note 7.

81. Ky—Winston v Clark County, 199 S W 51, 178 Ky 447.
29 C J p 586 note 11.

who has failed to do his duty as to road work [82] The fact that an individual is under a duty to repair does not exonerate the municipality,[83] unless the sole duty is imposed on the individual by express statutory provision [84] The municipality may delegate to individuals authority to improve a road,[85] and may reimburse individuals for work done for the public benefit,[86] except, it has been held, where the work was done without contract or authority,[87] but in the absence of a clearly expressed legislative intent, a statute should not be so construed as to commit the function of maintaining a part of the public highways to a private company [88]

b State Highways and Highway Systems

Duties as to the construction and maintenance of highways may be removed from the local authorities and imposed on state highway authorities pursuant to provisions establishing a state highway system and providing for the incorporation therein of local highways

In many jurisdictions provision has been made for a state highway system under which the construction and maintenance of state or state-aid highways is undertaken by the state or an appropriate branch of its administrative machinery, and, pursuant to such provision, roads may be added to the system and the state authorities may take over roads previously under the supervision of, or constructed by, counties and other political subdivisions [89] The purposes of such provisions have been variously stated to be to establish a uniform system of highways[90] as to width and the like,[91] to insure continuous roads from one county to another,[92] to relieve the county or county taxpayers of the cost of the construction and maintenance of the roads,[93] to have the county relinquish to the state its control over the roads,[94] and to fix, as a matter of record, responsibility for the supervision and maintenance of such roads [95] The conclusion of the state legislature as to whether a certain road should be made a state highway or a part of the state highway system cannot be successfully challenged,[96] as, for example, by a county [97] The legislature may limit the total mileage to be constructed and maintained as state-aid roads,[98] but a statute limiting the amount of high-type pavement which can be constructed by the state highway department has been held to apply only to state highways designated by the state highway commission after it took charge of the state highways,[99] and not to benefit district

82. Wis —West Bend v Mann, 17 N W 972 59 Wis 69
29 C J p 586 note 9

83 N Y —Bryant v Randolph, 30 N E 657, 133 N Y 70 affirming 14 N Y S 814
29 C J p 586 note 14
Liability for damages see infra § 212

84. Mass —White v Quincy, 97 Mass 430
29 C J p 586 note 15

85. Neb —Hitchcock v Zink, 113 N W 795, 80 Neb 29 127 Am S R 713 13 L R A ,N S , 1110
Va —Lewis v Washington, 5 Gratt 265, 46 Va 265

86. Mass - Curran v Holliston, 130 Mass 272
Mont —Wilcox v Deer Lodge County, 2 Mont 574

87. Ky —Rowe v Alexander, 161 S W 508, 156 Ky 507
29 C J p 586 note 13

88. Wis —Muscoda Bridge Co v Village of Muscoda, 214 N W 435, 193 Wis 457

89. Cal —Watson v Greely, 227 P 664, 67 Cal App 328
Fla —State ex rel Hill v Cone, 191 So 50, 140 Fla 1
Ga —Lee County v City of Smithville, 115 S E 107, 154 Ga 550
Me — Grindell's Case, 138 A 66, 126 Me 287

State purpose

The construction of state highways is a state, and not a county, purpose —Berry v Hayes, 28 S W 2d 50, 160 Tenn 577

State's assumption of construction and maintenance

The construction of any portion of a highway as a state-aid project constitutes a complete assumption by the state of the construction and maintenance thereof —State v Malone Tex Civ App , 168 S W 2d 292, error refused

Confirmation of action of commission

The legislature may by statutory enactment confirm the action of the state highway commission in adding a section of road to the state highway system - Summer v State Highway Commission of South Carolina, 141 S E 366, 143 S C 196

Designation of new lines of roads

Under a constitutional provision conferring power on the legislature to designate certain highways as state highways and to place them under the control and supervision of the state highway commission for such construction and maintenance, the legislature may designate new lines of roads to be constructed — Trahan v State Highway Commission 151 So 178, 169 Miss 732

Use of section paved by township

A statute restricting the obligation to make reimbursement for improvements made by a township with township funds does not prevent the department of public works and buildings from appropriating and using as part of route section of road paved by township —Flatt v Department of Public Works and Buildings, 167 N E 772, 335 Ill 558

90. Okl - Hillsdale Co v Zorn 100 P 2d 436, 187 Okl 38

91. Mo —Reilly v Sugar Creek Tp of Harrison County, 139 S W 2d 525, 345 Mo 1248

92. Mo —Reilly v Sugar Creek Tp of Harrison County, supra

93. N C —Board of Com'rs for Wake County v State Highway Commission of North Carolina, 141 S E 539, 195 N C 26
Va —Henrico County v City of Richmond, 15 S E 2d 309, 177 Va 754

94. Mont —State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, 69 P 2d 112, 105 Mont 44

95. Mont —State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, supra

96. Cal —Watson v Greely, 227 P. 664 67 Cal App 328

97. Mont —State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, 69 P 2d 112, 105 Mont 44

98. Ga —State Highway Department of Georgia v Marks, 145 S E 866, 167 Ga. 397

99. Kan —State v Board of Com'rs of Johnson County, 292 P. 921, 131 Kan 403.

highways[1] The terms of the governing statutes determine the roads which constitute, or which may be designated as parts of, the state highway system,[2] and the acts which constitute the adoption of a road as part of the state system[3] Under some statutory provisions the adoption of a road as part of the state highway system must be shown by the records of the highway commission[4] Where the statute sets no time limit as to the assumption of control by the state highway commission of roads constituting part of the state highway system, the matter rests in the sound judgment and discretion of the commission[5] It has been held, under some statutes, that when a county road has been taken over by the state it no longer remains a county highway,[6] although it may revert to its character as a county highway upon its abandonment by the state,[7] but under other statutory provisions it has been held that a road taken over by the state highway department, and thereby becoming a state-aid road, does not cease to be a county road, but remains a public road of the county and a part of the system of roads of the county in which it is situated[8]

In jurisdictions in which a state highway system has been established, the duty or authority to designate, construct, or maintain state highways is generally imposed or conferred on a particular state agency, such as a state highway commission or department[9] Under some provisions the jurisdiction

1. Kan—State v Board of Com'rs of Johnson County, supra

2 Main market road

A road which has been made a main market road does not necessarily become a state road nor does the construction of part of a main market road by the state make the entire road a state road, only the part actually constructed by the state becomes a state road—Hanks v Board of Com'rs of Adams County, 172 N E 423, 35 Ohio App 246

"Public roads," as used in a statute authorizing the state highway commission to act with county commissioners in designating public roads as state highways, has been construed to mean roads in use when the statute was passed—State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, 69 P 2d 112, 105 Mont 44

State bond issue road

In Illinois a road established under the state bond issue acts is not, regardless of its mileage, merely a local road primarily for the convenient connection of its termini, such a road is part of the state-wide system and the controlling element in its construction is the interest of the whole public—Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 354 Ill 58

3. Declaration of commission

When a "state route" is established by the state highway commission it becomes for the purposes of construction and maintenance a county highway until declared a "state highway" by the commission—Board of Sup'rs of Apache County v Udall, 1 P 2d 343, 38 Ariz 497

Acts held not to constitute adoption

Acts of state highway commission in procuring adjacent landowners to set fences back for road widening, and in marking, mapping, and maintaining road with state funds for several years, did not amount, in law, to adoption of such road as part of state highway system—Palmer v State Highway Commission, 69 S W 2d 653, 334 Mo 1070

4. Mo—Palmer v State Highway Commission, supra

5. N C—Carlyle v State Highway Commission, 136 S E 612, 193 N C 36

6. Okl—Hillsdale Co v Zorn, 100 P 2d 436, 187 Okl 38

Under classification by legislature placing state highways in one group and classifying all other highways as county and township roads, state highways cannot be regarded as county roads—State v Board of Com'rs of Saline County, 278 P 54, 128 Kan 437

7. Okl—Hillsdale Co v Zorn, 100 P 2d 436, 187 Okl 38

8 Ga—Felton Farm Co v Macon County, 175 S E 29, 49 Ga App 239

9. Ariz—Rowland v McBride, 281 P 207, 35 Ariz 511

Mass—Sloper v City of Quincy, 16 N E 2d 14, 301 Mass 20

Mo—State ex rel and to Use of Chicago Great Western R Co v Public Service Commission of Missouri, 51 S W 2d 73, 330 Mo 729, certiorari denied Chicago Great Western R Co v Public Service Commission of State of Missouri, 53 S Ct 89, 287 U S 641, 77 L Ed 555

Neb—Porter v Lancaster County, 266 N W 584, 130 Neb 705

N C—Board of Com'rs for Wake County v State Highway Commission of North Carolina, 141 S E 539 195 N C 26

Okl—Leininger v H L Cannady Co, 282 P 474, 139 Okl 301—Leininger v Ward-Beekman & Brooks, 282 P 467, 139 Okl 292

Or—Cabell v City of Portland, 57 P 2d 1292 153 Or 528

S C—Heidt v State Highway Dept, 1 S E 2d 188, 189 S C 310

Tex—Nairn v Bean, 48 S.W 2d 584, 121 Tex 355—Singeltary v Heathman, Civ App, 300 S W 242, affirmed Heathman v Singletary, Com App, 12 S W 2d 150

W Va—State v State Road Commission of West Virginia, 122 S E 527, 96 W Va 184

Discretion

(1) Whether a road should be improved as a state highway is a matter entirely within the discretion of the highway commission—Moody v Benson, 220 P 561, 109 Or 414

(2) Where state highway commissioner, after fair and adequate investigation of feasible routes, determines that construction of highway between two county seats is inadvisable, his conclusion, where reasonable on the facts, is not reviewable—Cheatham County v Baker, 64 S W 2d 31, 16 Tenn App 1

Necessity of accepting all portions of roads

A statute providing for the assumption by the state highway commission of control and maintenance of such hard-surfaced public highways as had previously been constructed by parishes has been held not to require the commission to accept all portions of such roads constructed by parishes or other subdivisions, or by the former highway department, but to empower the commission to change the road or route or select others—Claiborne v Louisiana Highway Commission, 98 So. 172 154 La 743

Highway crossed by facilities of public utility

In Pennsylvania matters pertaining to the state highway system, its construction and maintenance are under authority of department of highways, subject to limitation that where any highway, state, county, or township, is crossed by facilities of a public utility, then matters pertaining to the crossing are subject to the exclusive jurisdiction of the public utility commission—Department of Highways of Pennsylvania

of the state highway commission or department is confined to the construction and maintenance of state highways only,[10] although as to such highways its jurisdiction is exclusive.[11] The state highway commission has such powers as are specifically conferred on it and also all powers necessary or proper to enable it to carry out fully the construction and maintenance of the state highway system,[12] and a county cannot control the acts of the commission done in compliance with its statutory mandate.[13] Under some statutory provisions the state highway department can build state-aid roads alone or in conjunction with county commissioners.[14] A state highway commission, in constructing state-aid highways, has been held to act on behalf of the state and not as joint agent of towns and the state.[15]

Local authorities ordinarily are without authority, or at least have only a limited authority, with respect to the construction and maintenance of state highways.[16] Thus a statute authorizing county highway commissioners to construct county highways does not give them any power with respect to the construction of state highways,[17] nor does the general authority and duty of a town to maintain its public ways give it authority to construct state-aid highways,[18] and a county commissioners' court cannot restore a country road to the rank of a state highway, or enforce its improvement as such, after its discontinuance as a link in the state highway system by the state highway department.[19] However, the legislature has the power to authorize the county commissioners of the various counties to take such action as they deem necessary to carry out a state-wide program in the field of highways,[20] and some authority or duty with respect to the construction or maintenance of state highways is sometimes conferred or imposed by statute on counties,[21] further, the fact that a state highway system has been provided for has been held not to prevent cities and local communities from furnishing additional facilities by opening streets in cities and building feeder roads into the more remote and iso-

v Pennsylvania Public Utility Commission, 14 A 2d 611, 141 Pa Super 376—Somerset County v Pennsylvania Public Utility Commission, 1 A 2d 806, 132 Pa Super 585

State highway detour

The state highway commission has the duty of maintaining and repairing a county or township road which the commission has designated as a state highway detour, but this duty is the same as, and no greater than, that devolving on the county or township before the road was designated as a state highway detour—Chicago, I & L Ry Co v Downey, 5 N E 2d 656, 103 Ind App 672

10. Ky—Johnson v Clark County, 80 S W 2d 571, 258 Ky 563

11. Ark—Taylor v Rogers, 2 S W 2d 56, 176 Ark 156
Pa—O'Brien v Borough of Jeanette, 194 A 314, 128 Pa Super 443

12. Mo—State ex rel St Louis County v State Highway Commission, 286 S W 1, 315 Mo 707

Powers compared with those of township authorities

In the construction and maintenance of state highways, the state highway commissioner has all the rights and powers that supervisors or commissioners in townships have as to the construction or maintenance of township roads—Haverford School v Department of Highways of the Commonwealth, 8 Pa Dist & Co 305, 30 Dauph Co 99

In Maine the state highway commission cannot construct a state-aid highway on its own motion without initiative action on the part of any interested town, plantation, or group thereof, by their municipal officers, or by county commissioners—Rangeley Land Co v Farnsworth, 174 A 43, 133 Me 70

In Montana the state highway commission may construct a state road with federal aid although it has not been laid out or designated as a state highway by the board of county commissioners and although no road map has been filed with the county clerk and recorder—State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, 69 P 2d 112, 105 Mont 44

13. Mont—State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, supra

14. Ga—Lee County v City of Smithville, 115 S E 107, 154 Ga 550

15. Me—Grindell's Case, 138 A 66, 126 Me 287

16. Me—Williams v Inhabitants of Town of Vinalhaven, 124 A 213, 123 Me 505
Mo—State ex rel State Highway Commission v Huff, 51 S W 2d 40, 330 Mo 939
Tex—Fletcher v King, Civ App, 75 S W 2d 980, error refused

Location in county

Under a Missouri constitutional provision it has been held that the power of the county highway commission with respect to state highways is limited to matters concerning the location thereof in the county—State ex rel State Highway Commission v Huff, 51 S W 2d 40, 330 Mo 939

17. Mo.—State ex rel State Highway Commission v. Huff, supra.

18. Me—Williams v Inhabitants of Town of Vinalhaven, 124 A 213, 123 Me 505

19. Tex—Fletcher v King, Civ App, 75 S W 2d 980, error refused

20. Wash—State ex rel Cruikshank v Baker, 97 P 2d 638, 2 Wash 2d 145

21. **Acquisition of rights of way by county**

(1) Under some provisions the county has the duty to acquire a right of way for state highway purposes when requested to do so by the state highway commission—Grigsby v Miller, 25 P 2d 908, 144 Or 551

(2) A county cannot, under some provisions, defeat the acquisition of rights of way for the state highway system by its refusal to cooperate, the state highway commission can proceed to condemn rights of way for designated highways if the county authorities do not act immediately on the request of the highway commission—Liles v Creveling, 268 S W 625, 151 Tenn 61

In Washington the maintenance of those portions of a primary state highway lying within a county, but outside of cities, is a county duty and is under the jurisdiction of the governing body of the county, the county commissioners—Bush v King County, 236 P 298, 134 Wash 626

In Wisconsin the county is under no duty to maintain any road unless it is a part of a state trunk highway or of the system of prospective state highways—Stoehr v Town of Red Springs, 219 N W 98, 195 Wis 399, reversing 216 N W 487, 195 Wis 399.

lated parts of highway districts, or from repairing country roads already opened but needing improvement [22] Joint action of the county and state authorities is sometimes required before a highway can become a state-aid road,[23] and, where the statute commits the duty and power of selecting particular lateral roads to be improved from state funds to the state roads commission and the county commissioners of the respective counties, the selection must be made by the concurrent acts of both [24] It may be necessary for the local authorities or municipalities to initiate the proposition and submit it to the state highway authorities for approval,[25] but the consent of the state highway commission may be required before any change proposed by a county board in the system of prospective state highways can become effective [26] In the absence of an express requirement of the statute, county authorities, under their power to appropriate funds for any good and necessary purpose for the use of the county, may, without previous authorization by vote of the people, contribute general county funds toward the improvement of a highway in the county selected as a part of the state highway system [27]

c County or Township Highways

Powers and duties as to the construction and maintenance of county or township roads usually rest with the local authorities, although under some statutes the state authorities have certain limited powers with respect to such roads.

With respect to its maintenance, a road which has been adopted and approved as a part of the county road system is a county road,[28] and it has been held that a public highway becomes a county road from the date of the final decree of the court directing the county to enter upon, take over, and improve the road [29] The authority or duty to provide for, construct, or maintain county or township roads usually is conferred or imposed on the governing or other authorities of the county or township, such as county commissioners,[30] and it has been held proper to assume that a road as to which county commissioners took jurisdiction to order specific repairs was a county road [31] Under some statutes a county board cannot make a road a county highway without taking the steps prescribed by statute for making such highway a part of the system of prospective state highways,[32] and the consent of the state highway commission is sometimes required before any change proposed by a county board in the system of prospective county highways can become effective [33]

In Kentucky authority to provide for the construction of county roads is in the county court of the county,[34] and the state highway commission has

22. Idaho—Ada County v Wright, 92 P 2d 141 60 Idaho 294

23. Ill—Mason County v Furrer, 150 N E 636 320 Ill 305

24. Md—Murphy v Uhl, 149 A 566, 159 Md 7

25. Me—Rangeley Land Co v Farnsworth, 174 A 43, 133 Me 70

26. Wis—Stoehr v Town of Red Springs 219 N W 98, 195 Wis 399, reversing 216 N W 487, 195 Wis 399

27. N C—Lassiter v Board of Com'rs of Wake County, 124 S E 738 188 N C 379

28. Mich Baird v Board of Sup'rs of Saginaw County, 197 N W 222, 296 Mich 80

A township road which has been approved as a county road becomes a county road immediately on its approval as such from which time the county is responsible for its proper maintenance—In re Taylorstown-Claysville Road 6 Pa Dist & Co 565

29. Pa—Township of North Middleton v Weary, 78 Pa Super 503

30. Ala—Alabama Great Southern R Co v Denton, 195 So 218, 239 Ala 301
Ill—Austin-Western Road Mach Co v Wetzel, 264 Ill App 254
Md—Willis v Milling, 194 A 584, 173 Md 28
Mo—State ex rel State Highway Commission v Huff 51 S W 2d 40, 330 Mo 939
Mont—French v Lewis and Clark County, 288 P 455, 87 Mont 448
N Y—Pilbeam v Sisson 198 N Y S 834, 201 App Div 762
N C—Lassiter v Board of Com'rs of Wake County, 124 S E 738, 188 N C 379
Ohio—Gause v Peeler, 180 N E 384 41 Ohio App 192
Pa—Township of North Middleton v Weary, 78 Pa Super 503
Tex—Dennett v Dancy Civ App, 10 S W 2d 1057 error refused

Statute held not to destroy county jurisdiction

A county which has adopted the county road system has been held not relieved of its jurisdiction over county roads and culverts, and of its statutory duty to maintain them, by a statute authorizing the state highway department to design all bridges and culverts and to construct and maintain certain bridges—Smith v Kent County, 204 N W 756, 231 Mich 681

Reference to road as state-aid route

The authority of the commissioner of highways of a township to construct a proposed road as a township highway is not affected by the fact that in other proceedings the route proposed may have been referred to as a state-aid route—Dickison v Clark, 2 N E 2d 91, 363 Ill 258

Commissioners' failure to maintain road

Where township highway commissioners neglect to keep a lawfully established township road in condition the work may be performed by order of the board of county commissioners or the county engineer—Dunham Stock Farm Co v County Com'rs of Pottawatomie County, 226 P 781, 116 Kan 315

In Ohio the roads required to be maintained by county commissioners include all roads improved by the county or built by the state and not part of the state system, together with roads that may be constructed by a township to conform to the standard for a county road—Sroka v Green Cab Co, 172 N E 531, 35 Ohio App 438 error dismissed Smith v New York Cent R Co, 170 N E 637 122 Ohio St 45

31. Mass - Wood v Town of Concord, 167 N E 311, 268 Mass 185

32. Wis—Stoehr v Town of Red Springs, 219 N W 98, 195 Wis 399, reversing 216 N W 487, 195 Wis 399

33. Wis—Stoehr v. Town of Red Springs, supra

34. Ky—Johnson v Clark County, 80 S W 2d 571, 258 Ky. 563.

no jurisdiction over such roads or any right to direct the county authorities to provide therefor[35] Fiscal courts of counties possess no jurisdiction to provide for the construction of county highways,[36] being confined to the expenditure of county funds in maintaining, and acquiring rights of way for, public county roads after the county court has properly established them over the selected routes,[37] and the fiscal court of a county cannot expend money to repair a road which has never been taken over by the county as part of its system of roads[38]

d. Agreements between Governmental Authorities

Agreements for the construction or repair of roads may be made between governmental authorities, as, for example, between the state and a political subdivision thereof, or between two political subdivisions Contracts of this nature must be executed by officials having the requisite authority and will be construed according to the rules applicable to contracts generally

The general rules governing the construction of contracts have been applied to contracts between governmental authorities for road construction[39] A county which has been guilty of breach of contract for the construction or improvement of a state highway which it could have lawfully performed will be liable for the damages resulting from the breach,[40] but, if the county is without authority to make improvements on designated state highways, it cannot lawfully contract so to do,[41] and consequently it will not be liable for failure to perform an unauthorized undertaking[42] A county cannot contract away the right of the state to construct a state road in such manner as the state sees fit[43]

Between state and political subdivision An agreement for the construction, improvement, or maintenance of a highway may properly be made between a state or a state agency and a political subdivision of the state,[44] although legislation in clear terms is required to authorize a partnership relation between the state and one of its towns for the construction of state-aid highways[45] While the agreement need not be in any particular form,[46] it must nevertheless be duly executed by officials having the requisite authority to act,[47] and must not contain terms which are beyond the power of

35. Ky —Johnson v Clark County, supra

36. Ky —Johnson v Clark County, supra

37. Ky --Johnson v Clark County, supra

38. Ky —Jefferson County v Jefferson County Fiscal Court, 108 S W 2d 181, 269 Ky 515

39. Okl — Board of Com'rs of Canadian County v State Highway Commission, 55 P 2d 106, 176 Okl 207

Agreements with private contractors for road work see infra §§ 208 211

Contract to construct at earliest time

A contract between two such authorities, whereby the hard surfacing of the highway was to be completed at the earliest time possible, has been construed, in view of the governing statutes, to mean the earliest time, considering the best advantage of the people of the state — Board of Comr's of Canadian County v State Highway Commission, supra

Related contracts construed together

An original and a supplemental contract between a board of county commissioners and a state highway commission will be construed together —Board of Com'rs of Geary County v State Highway Commission, 57 P 2d 82, 143 Kan 976

40. Tex —Iverson v Dallas County, Civ App, 110 S W 2d 255

41 Tex —Iverson v Dallas County, supra

42. Tex —Iverson v. Dallas County, supra

County held not to possess requisite authority

Tex —Iverson v Dallas County, supra

43 Tex —Iverson v Dallas County, supra

44. Ala —Bullock County v Sherlock, 5 So 2d 800, 242 Ala 262— Isbell v Shelby County, 180 So 567 235 Ala 571

Ga — Spain v Hall County 165 S E 612 175 Ga 600—Perkerson v Mayor and Council of Greenville, 180 S E 22, 51 Ga App 240

Ill —Dickison v Clark, 2 N E 2d 91, 363 Ill 258

Kan —Board of Com'rs of Geary County v State Highway Commission, 57 P 2d 82 143 Kan 976

Me --Rangeley Land Co v Farnsworth, 174 A 43 133 Me 70—Williams v Inhabitants of Town of Vinalhaven, 124 A 213, 123 Me 505

N C —Parker v State Highway Commission, 143 S E 871, 195 N C 783

Okl —Board of Com'rs of Harmon County v Oklahoma State Highway Commission, 23 P 2d 681, 163 Okl 207

Compulsory joinder in enterprise

The state cannot compel municipalities to take part in the joint enterprise, nor can the municipalities compel the state to do so —Rangeley Land Co v Farnsworth, 174 A 43, 133 Me 70

Agreement conditioned on acquisition of right of way

The state may agree to construct a supplementary state highway on condition that the local authorities furnish a right of way - Reilly v Sugar Creek Tp of Harrison County, 139 S W 2d 525, 345 Mo 1248

Direct contract with highway department

Under some statutes, whenever a county undertakes to aid in the construction or maintenance of a state highway within its borders, it must make its contract to do so directly with the state highway department —Hall v Wilbarger County, Tex Civ App, 37 S W 2d 1041 affirmed Wilbarger County v Hall, Com App, 55 S W 2d 797

45 Me —Grindell's Case, 138 A 66, 126 Me 287

46. U S — Ætna Casualty & Surety Co v American Surety Co of New York C C A W Va, 64 F 2d 577

Absence of formal written agreement; ratification

An agreement for a road improvement between a state road commission and a county may be established through oral statements and written correspondence, and the absence of a formal written agreement is not fatal, and, if any defect exists in the execution of the agreement or in the authority of the agents of the commission, it may be cured by the ratification of the commission, signified by the acts of its agents in carrying the agreement into effect — Ætna Casualty & Surety Co v American Surety Co of New York, supra.

47. Mass —Wood v Town of Concord, 167 N E 311, 268 Mass 185

such officials to make[48] A contract whereby a state agency agrees with an inferior body to build a particular road has been held not to compel it to discharge its contracted duty in all events,[49] as, for example, where, by reason of a change in circumstances, great loss would result to the state as a whole by building the road[50]

Between political subdivisions The extent to which political subdivisions of the state may agree between themselves on matters concerning the construction or improvement of roads depends on the terms of the governing statutes[51] Under some,[52] but not other,[53] statutory provisions a county can enter into a contract with a city or township for the construction, improvement, or maintenance of a road on the agreement of the city or township to pay certain amounts, and by virtue of some statutes a county and township may join in the improvement of a state highway if the highway department approves[54] A statute providing that a road may be improved through the cooperation of a city and county is not mandatory and does not deprive the city of its right to cooperate or not as it sees fit;[55] and, if such a statute permits cooperation only if the work is done under the provisions of the statute, cooperation either before the work is done or after it is completed is prohibited where the work is done otherwise than under such provisions[56]

With federal authorities A contract between local and federal authorities for road construction or maintenance can properly be made only after the completion of such preliminary requirements as are prescribed by statute,[57] and should not contain provisions which are beyond the scope of the powers of such authorities[58]

e. Necessity and Time for Work; Statutory Preliminaries

After the completion of the preliminaries required by statute, the work of constructing and repairing roads

Recital as evidence of authority

A recital in a contract between the board of selectmen of a town and the state highway commission, that it was executed by the town by its board of selectmen duly authorized, is not evidence of the authority of the selectmen to bind the town—Wood v Town of Concord, supra

Execution by supervisors in official capacity

Under some provisions it is proper for a board of supervisors of a county to enter into a contract with the board of directors of state institutions for the construction of a highway, such a contract is properly signed by and executed in the name of, the members of the board of supervisors in their official capacity—Koch v Johnson, 213 P 611, 30 Ariz 11

48. Miss—Wilkinson County v State Highway Commission, 4 So 2d 298, 191 Miss 750

Okl—Board of Com'rs of Harmon County v Oklahoma State Highway Commission, 23 P 2d 681, 163 Okl 207

State highway commission cannot contract away its discretion in reference to the discharge of its duties to the citizens of the state—Board of Com'rs of Harmon County v Oklahoma State Highway Commission, supra

Contract period

(1) A statute under which the cost of maintaining roads taken over by the state highway commission is to be paid by the commission does not authorize the commission to make a contract with a county which will bind the commission to maintain a road after its abandonment in the process of relocating the highway—Wilkinson County v State Highway Commission, 4 So 2d 298, 191 Miss 750

(2) A statute prohibiting contracts for road work in which the period for payment of the contract price extends for more than ten years is not violated by a contract between a state and county which stipulates no period for its completion, since in such case the law implies a reasonable time which, in view of the statute, cannot exceed ten years—Bullock County v Sherlock, 5 So 2d 800, 242 Ala 262

49. Okl—Board of Com'rs of Harmon County v Oklahoma State Highway Commission, 23 P 2d 681, 163 Okl 207

50. Okl—Board of Com'rs of Harmon County v Oklahoma State Highway Commission, supra

51. In California one county may grant to another the use of a strip of land for the purpose of constructing and maintaining a highway thereon notwithstanding no road exists on which the proposed highway is to be constructed, it is sufficient that the strip be dedicated and accepted, marked out, or set apart, for county road purposes, and such a grant may also be made of the use of an unimproved road which requires improvement, although not of a highway already improved—Watson v Greely, 232 P 475, 69 Cal App 643

52. Ga—Faver v City of Washington, 126 S E 464, 159 Ga 568—City of Washington v. Faver, 117 S E 653, 155 Ga 680—Perkerson v Mayor and Council of Greenville, 180 S E 22, 51 Ga App 240.

Pa—Horn v Northampton County, 159 A 187, 105 Pa Super 171

53. Neb—Lann v Kearney County, 236 N W 192, 121 Neb 122

54. Pa—Jefferson County v Rose Tp., Jefferson County, 129 A 78, 283 Pa 126

55 Ariz—Peterson v Chalmers, 210 P 465, 29 Ariz 237

56 Ariz—Peterson v Chalmers supra

57. Ariz—Board of Sup'rs of Apache County v Udall, 1 P 2d 313, 38 Ariz 497

Issuance of bonds

Under some provisions a county board of supervisors can enter into a cooperative contract for highway construction with the federal secretary of agriculture only where county bonds have been issued under specified circumstances Board of Sup'rs of Apache County v Udall, supra

58. Ariz—Board of Sup'rs of Apache County v Udall, supra

Perpetual maintenance; abandonment

County supervisors cannot, by contract with the secretary of agriculture, bind the county to maintain a road indefinitely where the statutes give such supervisors the right to abandon highways under certain circumstances, for the supervisors cannot contract away the statutory right of abandonment, and, in the case of a state route, the supervisors cannot bind themselves to maintain perpetually a road which may be removed from their jurisdiction at any time by the highway commission—Board of Sup'rs of Apache County v Udall, supra.

should be undertaken promptly and completed within a reasonable time

While the officials having charge of the construction and repair of roads have some discretion as to the time when and the circumstances under which the work should be done,[59] ordinarily they must do the work promptly[60] and within a reasonable time,[61] after such preliminaries as may have been prescribed by the applicable statutes.[62] Justifiable delay does not cause them to lose jurisdiction over the matter,[63] and they are not required to repair immediately any particular road when the instrumentalities under their control may be otherwise allocated and engaged at places where there is greater need,[64] or, as shown infra § 178, when the necessary funds are unavailable.

§ 178. —— As Dependent on Availability of Funds

The duty to improve a road generally depends on the availability of funds; but some repairs may and should be made notwithstanding the funds on hand are insufficient to make all necessary improvements, particularly where means exist for obtaining additional funds

While there is authority holding that the duty to repair is absolute,[65] and that the question of ability to maintain the highway in good repair is not open in an action for a defective highway, at least where the statute providing for the repair of highways is peremptory,[66] the duty to repair and consequent liability for failure to do so has in many cases been held to be dependent on availability of funds for the work.[67] It is not necessary that there be sufficient funds on hand at any one time to make all necessary improvements,[68] and, where funds are lacking to complete an entire road program, the authorities may determine on which part of the program the available funds should be used.[69] Liability for failure to construct or repair a road cannot be avoided where the means of obtaining sufficient funds are at hand,[70] as, for example, by tax-

59. Conn.—Atwood v. Partree, 14 A. 85, 56 Conn. 80.
Md.—Walter v. Board of Com'rs of Montgomery County, 25 A.2d 682, 180 Md. 498.—Walter v. Board of Com'rs of Montgomery County, 22 A.2d 472, 179 Md. 665.
29 C.J. p. 584, note 73 [a] (2).

Conclusiveness of report

Under some statutory provisions the report of county commissioners as to the necessity of repairs is final and conclusive.—Town of Shrewsbury v. Davis, 142 A. 91, 101 Vt. 181.

60. Kan.—State v. Board of Com'rs of Miami County, 289 P. 394, 131 Kan. 144.

61. Mass.—Boxford v. Essex County, 7 Pick. 337.
29 C.J. p. 585, note 81.

62. Me.—Rangeley Land Co. v. Farnsworth, 174 A. 43, 133 Me. 70.
29 C.J. p. 585, note 83.

Assessment

(1) Under a statute authorizing work to proceed on a road improvement any time after the assessment has been made, the word "made" refers to the time when the commissioner files with the clerk of the court the amounts of the damages and benefits.—Munson v. MacDonald, 155 A. 910, 113 Conn. 651.

(2) Declaration in statute that all land within proposed highway district would be benefited at least to extent of contemplated improvements, without making assessment thereof, is arbitrary finding and does not authorize improvement until it is first ascertained that special benefits to land will equal or exceed cost of improvement.—Meek v. Christian, 270 S.W. 614, 168 Ark. 313.

Prior to payment for old road

"The fact that the law authorizes the improvement of roads implies that a new road can be built on the site of the old one, before the old one has been fully paid for if it becomes necessary or advisable to do so."—State v. Hess, 204 P. 695, 696, 110 Kan. 596.

63. Kan.—Norton v. Board of Com'rs of Montgomery County, 199 P. 388, 109 Kan. 559.

Loss of jurisdiction not shown

Jurisdiction is not lost where the statute does not say when the work shall begin or be finished and the delay has been caused by the endeavor of the officials to secure federal aid in the construction, there being nothing to show that the project was abandoned or that such officials did not, during the period of the delay, attempt in good faith to secure construction of the road.—Norton v. Board of Com'rs of Montgomery County, supra.

64. Md.—Walter v. Board of Com'rs of Montgomery County, 25 A.2d 682, 180 Md. 498.

65. Wis.—Burns v. Elba, 32 Wis. 605.
29 C.J. p. 585, note 85.

66. N.H.—Winship v. Enfield, 42 N.H. 197.

67. Md.—Walter v. Board of Com'rs of Montgomery County, 25 A.2d 682, 180 Md. 498.
W.Va.—State v. State Road Commission of West Virginia, 122 S.E. 527, 96 W.Va. 184.
29 C.J. p. 585, note 84.
Expenses of road work see infra §§ 201-207.

Conclusiveness of report

Under some statutory provisions the road commission's report is final as to the amount required for necessary repairs.—Town of Shrewsbury v. Davis, 142 A. 91, 101 Vt. 181.

Statutory limitation as to cost

In providing for the construction of a road the legislature may properly limit the cost thereof.—Thompson v. Mann, 252 S.W. 4, 159 Ark. 391.

Availability of state funds

Under some statutes it is the duty of the state and not of the local authorities to reject a proposed improvement of a public road because of the condition of the state fund appropriated for such improvement.—La Monte v. Somerset County, N.J.Sup., 35 A. 1.

68. Minn.—Benton v. Hennepin County, 146 N.W. 1110, 125 Minn. 325.
29 C.J. p. 585, note 1.

69. Ariz.—Peterson v. Chalmers, 240 P. 165, 29 Ariz. 237.
Tenn.—Crye v. Monroe County, 255 S.W. 16, 148 Tenn. 246.

Designation of part to be improved

Where the funds available were insufficient to complete the entire road building program of a county and a city therein proceeded without objection of the county highway commission to pave a street which was part of the original county program, such action was held equivalent to a determination that the road in question was not one designated to be improved by the county commission.—Peterson v. Chalmers, 240 P. 165, 29 Ariz. 237.

70. Advancement by private persons

The authorities should commence the steps looking to the improvement of the road where, pursuant to statute, private persons having a

ation,[71] additional assessment,[72] borrowing,[73] taking a small amount from funds due for repairs already made,[74] or making a transfer from a fund not exhausted by the building of another road,[75] nor will such liability be avoided where the defect has existed during a time within which funds could have been had,[76] or where repairs can be made on the credit of the town as authorized by statute,[77] or where the road committee has power to call out the inhabitants to do the work,[78] or, in the case of the liability of a town, where the insufficiency of funds in the hands of road officers of the town is due to the fault of another town officer.[79] An order directing a road improvement cannot be disregarded by township supervisors merely on their assertion that the funds in their hands are necessary for other purposes,[80] but a township committee will not be required to appropriate to the opening of a new road the moneys voted expressly for reparation of the old highways.[81]

§ 179. Mode, Plan, and Sufficiency

a. In general

b. State highways and highway systems

a. In General

The method or plan of work in constructing, maintaining, or repairing highways is in the discretion of the highway authorities, within the restrictions of law and subject to the rights of abutters.

The method or plan of work in the construction, maintenance, or repair of highways is in the discretion or judgment of the highway authorities,[82] within the restrictions imposed by law,[83] and subject to the rights of abutting owners,[84] and the courts will not interfere except in cases of fraud or manifest injustice or abuse of discretion.[85] The proper officers may direct generally what roads,[86] and how

special interest in the construction of certain portions of it advance the the necessary money—Commonwealth v Reiter, 78 Pa 161.

Casting expense on county

The financial condition of a town is unimportant where, by statute, provision is made in the case of poor towns for casting the expense of the road on the county—Glaub v Goshen Tp, 7 Kulp (Pa) 292

71. Pa—In re Lower Merion Tp Road, 8 Pa Dist 561, 22 Pa Co 297, 15 Montg Co 79
29 C J p 585 note 96

72. N Y—Weed v. Ballston Spa, 76 N Y 329

73. N Y—Ivory v Deepark, 22 N E 1080, 116 N Y 476

74. N Y—Rhines v Royalton, 15 N Y S 944

75. N Y—Queens County v Phipps, 51 N Y S 203, 28 App Div. 521

76. N Y—Whitlock v Brighton, 37 N Y S 333, 2 App Div 21, affirmed 49 N E 1106, 154 N Y 781

77. N Y—Whitlock v. Brighton, supra

78. N J—Reger v Madison Tp, Sup, 71 A 1115—Kinmonth v Wall Tp Committee, 63 A 861, 73 N J Law 440.

79. N Y—Clapper v Waterford, 16 N Y S 640, 62 Hun 170, reversed on other grounds 30 N E 240, 131 N Y 382

80. Pa—In re Roaring Brook Tp Road, 28 Wkly N C 141

81. N J—Whitenock v Bernards Tp Committee, 39 N J Law 60

82. Ala—Henry v Rogers, 97 So 427, 19 Ala App 376
Pa—Commonwealth v Ball, 121 A 191, 277 Pa 301, 29 A L R 626
29 C J p 586 note 17.

"A very wide discretion is vested in such officials under all the authorities, the only limitation upon their power being that they act impartially and honestly"—Crye v Monroe County, 255 S W 46, 148 Tenn 246

"Police juries . . are clothed with plenary and exclusive powers to regulate, by ordinance, the manner of making or repairing roads in their respective parishes . [They] are vested with discretion in . repairing public roads"—De Moss v Police Jury of Bossier Parish, 118 So 700, 702, 167 La 83, 68 A L R 336, reversing and conformed to 120 So 137, 9 La App 215

83. Ark—Crawford v Pulaski Road Improvement Dist No. 10, 242 S W 559, 154 Ark 311
Pa—Commonwealth v Pardee Bros & Co, 165 A 396, 310 Pa 353
29 C J p 585 note 82, p 586 note 18

Adaptation to hauling of ordinary loads

Under Civ Code 1910 § 5441, the commissioners of roads and revenues of the various counties are required "in building, repairing, and working the public roads, to so build and repair them that ordinary loads with ordinary ease and facility can be continuously hauled over such public roads"—Morgan v Shirley, 158 S E 581, 583, 172 Ga 727—Terry v. Wade, 101 S E 539, 149 Ga. 580.

Resurfacing

(1) Resurfacing of dirt roads with gravel and silica roads with thin layer of Warrenite held merely restoration of original improvement within statute authorizing "repairs," and not an "entirely new improvement in disregard of the original plans"—Cowan v. Thompson, 9 S W 2d 790, 792, 178 Ark 44

(2) An act providing that commissioners of a road improvement district should make plans "for the improvement of such roads by grading, draining, rolling and otherwise improving them as in the judgment of said commissioners may be deemed best" authorized macadam surfacing—Southern Crawford Road Improvement Dist v Brown, 245 S W 821, 156 Ark 267

(3) However, resurfacing a highway with a different material has been held not a repair, but a reconstruction—Bettenbrock v. Miller, 112 N E 771, 185 Ind 600

84. Iowa—Bartels v Woodbury County, 156 N W 303, 174 Iowa 82
29 C J p 587 note 19

85. Tex—Mosheim v Rollins, Civ App, 79 S W 2d 672, error dismissed
29 C J p 587 note 20

Change to secure state aid

A change by the county commissioners of the location of a county road in order to secure state aid in its construction, where made in the exercise of their discretion and without any showing of bad faith, will not be interfered with by the courts—Board of Permanent Road Com'rs of Hunt County v Johnson, Tex Civ App, 231 S W 859

86. Ark—Crawford v Pulaski Road Improvement Dist No. 10, 242 S W 559, 154 Ark 311.
29 C J p 587 note 21

Control of county board by local officers

"Under chapter 176, Laws of 1914, as amended by chapter 277, Laws of 1920," although the commissioners of a road district "recommend the construction of a certain road, the board of supervisors may order the construction of a different road, and their discretion in the matter cannot be controlled by the will or judgment of the highway commission."—

much, or what portions, thereof,[87] shall be improved or constructed, specify the character and amount of work needed,[88] and provide for sidewalks,[89] sidepaths,[90] railroad rights of way,[91] and their duties extend to remedying defects and obstructions caused by snow.[92]

Under governing statutes, the authorities may have the power to alter the details of the plans in order better to carry out the improvement as originally contemplated,[93] so long as the character of the improvement is not changed[94] and the authorized limit of expenditure is not exceeded,[95] but they are not authorized to change the plan of the improvement to a wholly different one,[96] without submitting the revised plan for approval[97]

Under express statutory authority a county court may change the route of a road as described and laid out in an act constituting an improvement district to a route designated in the order of the county court where the termini remain the same,[98] hence it may change the route to that shown by the survey prepared by the state highway department[99] So the board of commissioners of the district may make changes in the route not constituting an entire departure from the improvement contemplated in the statute,[1] but it may not adopt a route materially different from that prescribed by the act creating the district.[2] Further, the creation of an improvement district is not invalidated by the fact that the commissioners are authorized by the act creating it to select or vary the routes of the roads to be improved[3]

The abandonment of construction of a portion of a highway cannot be shown by mere unauthorized and unofficial letters by members of the local commission to the state highway department in an effort to procure state and federal aid[4]

Board of Sup'rs of Claiborne County v Callender, 90 So 722, 128 Miss 159

Order of construction

(1) The order of construction cannot be attacked collaterally except on the ground of fraud—Le Moyne v Washington County, 62 A. 516, 213 Pa 123

(2) Roads enumerated in resolution submitting question of bond issue to the people under Pub Acts 1st Extra Sess 1913 c 26 need not be constructed in the order in which they are enumerated, the enumeration being merely descriptive—Crye v Monroe County, 255 S W 46, 148 Tenn 246

(3) Under Spec Acts 36th Leg 1919 c 67, as to constructing and maintaining macadamized roads in Rockwall County, the commissioners' court held not required to complete the road No 1, mentioned in the act, east to the line between Rockwall County and Hunt County before any other road is commenced—Davidson v Wells, Tex Civ App, 233 S W 518

87. Ark—Crawford v Pulaski Road Improvement Dist No. 10, 242 S W 559, 154 Ark 311
29 C J p 587 note 22

Sea wall not on previous right of way

Board of supervisors and road protection commission, constructing protection wall along beach or shore, with apron extending back of wall and usable as highway, need not adhere to old road's right of way—Ladner v Road Protection Commission, 116 So 602, 150 Miss 416

State-aid highway

The fact that the state highway department approves the entire improvement for which county commissioners seek state aid, namely, the improvement of all that part of an intercounty highway situated in their county, does not bind them to proceed with the entire improvement under one contract—Matthews v Huwe, 19 Ohio App 113, error dismissed 144 N E 610, 109 Ohio St 628

88. Ark—Garland County v Arkansas Corrugated Metal Culvert Co, 165 S W 631, 112 Ark 608

89. Neb—Hitchcock v Zink, 113 N W 795, 80 Neb 29, 127 Am S R 743, 13 L R A, N S, 1110
Contra Haverford School v Department of Highways of the Commonwealth 8 Pa Dist & Co 305, 30 Dauph Co 99

90. N Y—O'Donnell v Preston, 77 N Y S 305, 74 App Div 56
29 C J p 587 note 25

91. Pa—In re Sterrett Tp Road, 7 A 765, 114 Pa 627—Williamsport & N B R Co v Supervisors, 4 Pa Co 588

92. Mass—Loker v Brookline, 13 Pick 343

93. Ark—Rayder v Warrick, 202 S W 831, 133 Ark 491
Mich—Campau v Grosse Pointe Highway Comr, 93 N W 879, 132 Mich 365

94. Ark—Carson v Road Improvement Dist No 2 of Craighead County, 234 S W 257, 150 Ark 379
Mich—Campau v Grosse Pointe Highway Com'r, 93 N W 879, 132 Mich 365

95. Mich—Campau v Grosse Pointe Highway Com'r, supra

Increased cost covered by federal aid

Where changes in the plans of a road do not affect the route, termini, or character of the road, but only increase its width, the increased cost of which will be taken care of by an allowance of federal aid which would not otherwise have been made, the changes, although extensive in the matter of cost, are not so material as to be beyond the authority of the commissioners to make—House v Road Improvement Dist No 2, Conway County, 251 S W 12, 158 Ark 330, error dismissed House v Road Improvement Dist No 2 of Conway County, Ark, 45 S Ct 60, 266 U S 175, 69 L Ed 229

96. Ark—Rayder v Warrick, 202 S. W 831, 133 Ark 491
29 C J p 587 note 30

97 Pa—Gloman v Finn, 15 Pa Dist 727

98. Ark—Matlock v Jones, 284 S W 30, 171 Ark 450

99. Ark—Matlock v Jones, supra

1. Ark—Mashburn v North Arkansas Highway Improvement Dist. No 3, 266 S W 964, 167 Ark 58

2. Ark—Averitt v Dodd, 265 S W 70, 165 Ark 553

3. Ark—Matlock v Jones, 284 S W 30, 171 Ark 450—Board of Com'rs of Road Improvement Dist No 9 v Furlow, 262 S W 991, 165 Ark 60

Where road is to follow "as near as practicable" a named road, the commissioners are authorized to make only immaterial changes—Wimberly v Road Improvement Dist No 7 in Polk County, 255 S W 556, 161 Ark 79

4. Ark—House v Road Improvement Dist No 5, Conway County, 251 S W 21, 158 Ark 357, error dismissed House v Road Improvement Dist No 2 of Conway County, Ark, 45 S Ct. 60, 266 U S 175, 69 L Ed. 229.

b. State Highways and Highway Systems

(1) In general
(2) Location and establishment
(3) Alteration and relocation
(4) Abandonment or discontinuance

(1) In General

The construction and improvement of state highways and state highway systems are, broadly speaking, governed by the discretion of the officers intrusted with the duty, as limited by the terms of the statutes under which they act

Under statutory authority a state highway commission or other body having authority over the construction and improvement of the state highways may build any kind of a thoroughfare which it desires,[5] and in accomplishing its statutory duties to maintain such highways its judgment is supreme[6] if exercised within its statutory authority,[7] the courts being without power to interfere with its discretionary action within the scope of its authority or the exercise of powers conferred by statute on the sole ground that its action is characterized by lack of wisdom or sound judgment,[8] it being necessary that the reviewing power of the courts be exercised with caution.[9] Where authority is conferred on the state highway officers to designate, locate, and alter roads of the state highway system, they may do so without consent of the local authorities.[10]

Plans and specifications The preparation of a plan of a proposed improvement is not necessary unless required by statute.[11] Where the statute so provides, the plans and specifications for the improvement must be on file in designated offices at the time of advertisement for bids for the proposed contract.[12]

Order of construction Where a particular route has been legally selected and designated by the commission, the portion which shall be first constructed is, as a rule, within the discretion of the board.[13]

State-aid highways The proceedings for the improvement of state-aid highways are statutory and are invalid unless in conformity with the statutory provisions.[14] When the local authorities have abandoned their intention of collaborating with the state authorities in the establishment of a state-aid high-

5. N J—Everett W Cox Co v State Highway Commission, 133 A 419, 4 N J Misc 510

Increase of minimum statutory width

State highway commission could, by resolution or ordinance reasonably increase minimum statutory width of highway by adopting uniform rule generally applicable to state highways—North Carolina State Highway Commission v Young, 158 S E 91, 200 N C 603

6. Tex—Mosheim v Rollins, Civ App, 79 S W 2d 672, error dismissed

Planting Bermuda grass up to and touching adjoining property lines held proper despite possibility that it may spread to adjoining lands—Mosheim v Rollins, supra

7. Tex—Mosheim v Rollins, supra.

Parkway

The provisions of the Merritt Parkway Act relate to the same highway as the act of 1927, which included the highway from Stratford to the New York and Connecticut state line in the trunk line system of highways, but manifest a legislative intent that the road in question be of the parkway type—Stock v Cox, 6 A 2d 346, 125 Conn 405

Construction of gasoline station

A gasoline station being essential incident of modern public parkway, which is a "public highway" such a station may be constructed on Eastern State Parkway with state funds by superintendent of public works on approval of Taconic State Park commission in exercise of its power of control and management of such parkway, without express statutory power to construct and maintain such station—Anderson v Taconic State Park Commission, 28 N Y S 2d 832, 262 App Div 592, reversing 25 N Y S 2d 473, 175 Misc 942, and affirmed 39 N E 2d 289, 287 N Y 668

8. Mont—State ex rel State Highway Commission of Montana v District Court of First Judicial Dist in and for Lewis and Clark County, 81 P 2d 347, 107 Mont 126
Tex—Mosheim v Rollins, Civ App, 79 S W 2d 672, error refused

9. Mont—State ex rel State Highway Commission of Montana v District Court of First Judicial Dist in and for Lewis and Clark County, 81 P 2d 347, 107 Mont 126

10. N D—Rode v State Highway Commission, 225 N W 801, 58 N D 219

11. Pa—Wahaly v Allegheny County, 29 A 2d 9, 345 Pa 509

12. **Resident engineer**

In view of Gen Code § 154-40, 109 Ohio L p 118, and §§ 1206, 7182, "in counties where a resident engineer has been appointed by the state highway commissioner to superintend construction of state highways, the plans and specifications should be kept on file in the office of such resident engineer"—State v Baker, 117 N E 501, 112 Ohio St 356

13. Mont—State ex rel State Highway Commission of Montana v District Court of First Judicial District in and for Lewis and Clark County, 81 P 2d 347, 107 Mont 126

Wanton waste

Notwithstanding the strip selected for first construction will in itself benefit few persons and will be constructed through a sparsely settled country, the court is not authorized to overrule the highway commission's exercise of its discretion on the ground that a "wanton waste" is being committed—State ex rel State Highway Commission of Montana v District Court of First Judicial District in and for Lewis and Clark County, supra

Bribery

Allegations that the majority of the members of the highway commission acted fraudulently and illegally in authorizing construction of a particular strip of a proposed highway, that the members acted because of promises and inducements offered them by interested persons, and that the members authorized construction of the strip for the purpose of receiving benefits for themselves and for the communities in which they lived state merely conclusions and are insufficient to charge bribery—State ex rel State Highway Commission of Montana v District Court of First Judicial District in and for Lewis and Clark County, supra

14. Me—Williams v Inhabitants of Town of Vinalhaven, 124 A. 213, 123 Me 505

way, they may proceed under the provisions of other statutes authorizing them to lay out and open roads[15] Where a contract between the state highway commission and the county authorities whereby the proceeds of a county bond issue are to be supplemented by state funds for the construction of roads within the county provides that the order in which the roads shall be selected shall be left to the discretion of the state highway commission and the fiscal court of the county, the road to be first constructed may be agreed on pending an appeal from an order requiring the highway commission to build the road on another route when it undertook the construction[16]

Sidewalks The state is not, except as required by statute, under an obligation to build or improve sidewalks or sidepaths along state highways[17]

(2) Location and Establishment
- (a) In general
- (b) Discretion of highway authorities
- (c) Deviation from existing highways
- (d) Time for location
- (e) Procedure
- (f) Revocation of order

(a) In General

State highways and state highway systems may be located or laid out by the state legislature or by state agencies or local authorities to which it has delegated its power, and specific constitutional and statutory designations of their location must be conformed to Federal-aid roads must be laid out in accordance with federal and state laws

A state legislature has authority to lay out the routes of the highways of the state,[18] and its action with regard thereto is binding on the other departments or instrumentalities of the state government[19] The legislature may exercise this power through its own agencies or delegate it to inferior bodies[20] The purpose of vesting the power of locating roads in county and state highway commissions and of not vesting it in the authorities of minor political subdivisions is to maintain a uniform system[21]

The location of state highways is, under the statutes, ordinarily vested exclusively in the state highway officers,[22] and such authority cannot be exercised by the courts[23] In the absence of a grant of such power, however, a highway commission has no authority to determine the route of a public road,[24] such power is not implied from a power given to construct highways[25]

Federal aid road The designation and location of a federal aided state highway must be in accordance with the provisions of the federal and state statutes[26] So, in order to obtain federal aid on any particular location of a state highway, the location, where the statute so requires, must be approved by the federal bureau of roads[27]

15 Tex—Parker v Archer County Civ App, 61 S W 2d 175, error refused

16. Ky—Mitchell v State Highway Commission 56 S W 2d 991, 247 Ky 188

17. N Y—Marino v State 15 N Y S 2d 640 257 App Div 731 reversing 10 N Y S 2d 295 170 Misc 341

18 Ga Calfee v Jones, 188 S E 307 54 Ga App 481
La—Crichton v Louisiana Highway Commission, 129 So 373, 170 La 863
S C Boykin v State Highway Department of South Carolina, 144 S E 227 146 S C 483 Gaston v State Highway Department of South Carolina, 132 S E 680, 131 S C 402
Tenn—Marshall v State, 171 S W 2d 269 -Southeastern Greyhound Lines v Dunlap 160 S W 2d 418, 178 Tenn 546 - Johnson Freight Lines v Davis, 123 S W 2d 820, 174 Tenn 51

Purpose of North Carolina Road Act, Pub L 1921 c 2, is to provide service to "all county-seats, all principal towns, state parks, and principal state institutions"—Town of Newton v State Highway Commission of North Carolina, 133 S E. 522, 524, 192 N C 1, rehearing denied 134 S E 483, 192 N C 834

19. Ariz—Rowland v McPride 281 P 907, 35 Ariz 511
Ill—Watts v Department of Public Works and Buildings 160 N E 201 328 Ill 587
La—Crichton v Louisiana Highway Commission, 129 So 373, 170 La 863
S C Boykin v State Highway Department of South Carolina 144 S E 227, 146 S C 483- Gaston v State Highway Department of South Carolina, 132 S E 680, 131 S C 402

Legislative, not judicial, function

The power to determine the location of such highways is a legislative not a judicial, function' Department of Public Works and Buildings v Legg, 29 N E 2d 515, 518, 371 Ill 306

20 Ga—Calfee v Jones, 188 S E 307 54 Ga App 481
Ill Mowry v Department of Public Works and Buildings 177 N E 753 345 Ill 121—MacGregor v Miller, 154 N E 707, 324 Ill 113

21. Mo—Reilly v Sugar Creek Tp of Harrison County, 139 S W 2d 525, 345 Mo 1248.

22 N C- Town of Newton v State Highway Commission 138 S E 601, 194 N C 159, petition dismissed 139 S E 613 194 N C 803

23 N C Town of Newton v State Highway Commission, supra

24 Mo—State ex rel St Louis County v State Highway Commission 286 S W 1, 315 Mo 707

25 Mo -State ex rel St Louis County v State Highway Commission, supra

"Refund roads"

Under Centennial Road L §§ 29 33, county authorities and not state highway commission, have authority to determine routes of so-called 'refund roads," although 'constructed under state supervision" the latter phrase giving no power to select routes—State ex rel St Louis County v State Highway Commission supra

26. Tex -Singeltary v Heathman, Civ App 300 S W 242, affirmed Heathman v Singletary, Com App, 12 S W 2d 150

27. Tex—Quisenberry v Mitchell, 292 S W 160, 116 Tex 378—Heathman v Singletary, Com App, 12 S W 2d 150, affirming Singeltary v Heathman, Civ App, 300 S W. 242.

Specific constitutional or statutory designations As stated infra subdivision b (2) (b) of this section, the discretion often delegated to the highway authorities with regard to the location of highways must be exercised within the terms of the statutes conferring it, and after the legislature has definitely located a state highway it is not, except as provided by statute, within the power of a state highway board or commission to depart from that location [28] Where the statute designates the particular towns and cities through which the highway must pass, such designation is controlling on the highway authorities,[29] but, where the statute, although stating the towns through which the highway shall run, permits the highway commission to make local changes, it has power to make changes from the points or places specified in the act [30] The general rules of statutory construction apply with reference to statutes designating specific routes or highways,[31] and, where a statute contains a map showing in detail what roads are included, such map is as binding as any other portion of the statute [32]

Connection of county seats or particular communities Where the statute contemplates that county seats shall be served by the highway system substantially as designated on a map incorporated in the act, the highway commission has no discretion as to whether a county seat shall be served by the highway system [33] On the other hand, it has been held that, although the statute authorized the highway commission to designate main traveled roads with a view of connecting all county seats, the highway commissioner is not required to construct a highway between two county seats where, after fair and adequate investigation and consideration of feasible routes, he has determined that it is impracticable because of physical difficulties and prohibitive expense,[34] and this is true notwithstanding the highway commissioner in exercising his discretion to locate and improve roads must have regard for the declared legislative purpose of connecting county seats,[35] and it is not necessary that the connection between county seats be made by the shortest possible route [36]

Statutes requiring highway routes to afford intervening communities between designated points reasonable connection with one another must be obeyed,[37] but "reasonable connection" does not require that the road pass through the principal part

Bond election not specifying route

(1) Where a particular highway all through a county is a federal-aided state highway at the time proceedings are begun to raise county funds by a bond issue and where the terms of the election for the bonds do not specify the particular route, its designation and location in every part thereof can be made legally only by the state highway commission under its own plans and specifications with the approval of the federal bureau of roads—Singletary v Heathman Tex Civ App, 300 S W 242, affirmed Heathman v Singletary, Com App, 12 S W 2d 150

(2) Where a state highway commission in good faith, within the scope of its authority, relocates a state highway after a highway bond election in order to secure federal aid, and no route was designated in the order for election the taxpayers cannot restrain the county commissioners' court from appropriating and expending the proceeds of the sale of bonds toward constructing the highway—Heathman v Singletary, Tex Com App, 12 S W 2d 150, affirming, Civ App, Singletary v Heathman, Civ App, 300 S W 242

28. Wash—State ex rel Coyle v Superior Court in and for Walla Walla County, 223 P 3, 128 Wash 460

"The legislative location of a highway is binding on the other departments of the state government The executive department has no right to change the route, or select a different route, on the basis that it is better or cheaper"—Rowland v McBride, 281 P 207, 208, 35 Ariz 511

29. Ky—Smith v State Highway Commission, 57 S W 2d 1014, 247 Ky 816

Or—Rockhill v Benson, 191 P 497, 97 Or 176

30. Or—Zilesch v Polk County, 215 P 578, 107 Or 659.

31. Ky—Moore v Polsgrove, 293 S W 965, 219 Ky 410

"And" read as "or"

Where a highway is described in a statute as a road leading from a particular point by way of two other points, the conjunctive "and" between them may be read as "or" where at the time of the enactment of the statute there was no road passing by way of both of such points and it is not practicable to build a road connecting them—Moore v Polsgrove, supra

32. N C—Town of Newton v State Highway Commission of North Carolina, 133 S E 522, 192 N C 1, rehearing denied 134 S E 483, 192 N C 834

33. N C—Town of Newton v State Highway Commission of North Carolina, supra

Considerably increased cost of constructing a route connecting a county seat with the state highway system is not an excuse for evading the positive mandate of the road act requiring it—Town of Newton v State Highway Commission of North Carolina, supra

Departures as to other county seats

The fact that the highway commission had made radical departures in roads connecting other county seats with the state highway system is not an excuse for evading the positive mandate of the statute in another particular case—Town of Newton v State Highway Commission of North Carolina, supra

Junction with another route

State highway connecting two county seats cannot be terminated thirteen miles from one by junction with another route—Carlyle v State Highway Commission, 136 S E 612, 193 N C 36

Road running to corporate limits of county seat, but not through the town as formerly, does not connect the town with the state highway system—Town of Newton v State Highway Commission of North Carolina, 133 S E 522 192 N C 1, rehearing denied 134 S E 483, 192 N C 834

34. Tenn—Cheatham County v. Baker, 64 S W 2d 31, 16 Tenn App. 1

35 Tenn—Cheatham County v. Baker, 30 S W 2d 234, 161 Tenn. 222

36. Tenn—Cheatham County v. Baker, 64 S W 2d 31, 16 Tenn App 1.

37. **"Intervening community"**

(1) "As used in the act . . an 'intervening community' is intend-

of a community[38] It cannot be held as a matter of law that a town is disconnected from a state highway system when a road passes within three hundred feet of its railroad station[39]

Requirement that highways shall run to, near, or touch certain communities A requirement that highways shall "extend, as nearly as possible," along described routes, and "shall touch" designated towns does not require that the highways go through such towns,[40] and accessibility, rather than actual contact, is required[41]

"To" a named city, in a statutory description of a route, has been held to mean to the city limits[42]

The term "near," as used in a statute requiring a highway to be near a named locality, is indefinite, and implies that considerable latitude is given the authorities in fixing the exact location[43]

Designation of route without specification of highways Where the statute providing for a highway system designated particular routes without selecting the specific highways, the department vested with authority to make final decisions in the carrying out of the work has authority to select the particular highways within reasonable limits on the highway route designated by the statute[44]

Highway not previously located Where a road designated as a highway route has not been previously definitely and finally located, it may be located by the state highway commission on taking it over and incorporating it as a permanent link of the state system of highways[45]

Trunk highways. Where the intention of the constitution is apparent, trunk highways provided for do not extend within the limits of cities of the first class[46]

Superimposing routes. In locating state highways it may, at least in the absence of statutory prohibition, be proper to locate one highway on the roadbed used by another for a short distance out of the particular terminal point[47]

Effect of laying out The laying out of highway rights of way by the state highway commission manifests a purpose to acquire an easement in the entire width of each highway for the use of the public, although only a part would ordinarily be used for travel[48]

(b) Discretion of Highway Authorities

In the location of highway improvements, highway authorities are commonly regarded as vested with broad discretion, to be exercised in conformity to governing statutes, the courts will not interfere with the exercise of such discretion unless it is abused In locating state highways, the primary interest to be considered is that of the state at large, rather than any local or private interest

Subject to specific limitations imposed by the constitutional or statutory provisions under which they act, the authorities intrusted with the supervision and control of state highways and state highway systems ordinarily are vested with discretion as to the location of particular highways and routes,[49] such a discretion must, however, be ex-

ed by the Legislature to mean persons living more or less in proximity, who for the purpose of travel between the principal cities mentioned on the routes defined would naturally select approximately the same route or general direction of travel" —Fisher v Department of Public Works and Buildings, 170 N E 283, 338 Ill 222—Watts v Department of Public Works and Buildings, 160 N E 201, 205, 328 Ill 587

(2) Particular routes held not to pass through "intervening communities"—Fisher v Department of Public Works and Buildings, supra—Watts v Department of Public Works and Buildings, supra—People ex rel Greene v State Department of Public Works and Buildings, 234 Ill App 111

Reasonable connections held afforded Ill—Mowry v Department of Public Works and Buildings, 177 N E 753, 345 Ill 121—Flatt v Department of Public Works and Buildings, 167 N E 772, 335 Ill 558

38. Ill—People v Department of Public Works and Buildings, 158 N E 396, 326 Ill 589

39 N C—Johnson v Board of Comrs of Wake County, 135 S E 618, 192 N C 561

40. La—Louisiana Highway Commission v Cormier, 128 So 56, 13 La App 459

41. La—Louisiana Highway Commission v Cormier supra

42. Mich—Rogers v City of Jackson, 231 N W 621, 251 Mich 256

43 Mo—Benton County v State Highway Commission, 52 S W 2d 995

Construction of highway within two miles of town constitutes substantial compliance with statutory requirement that it be "near" town —Benton County v State Highway Commission, supra.

44. Ill—Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 354 Ill 58

Department of public works and buildings Ill—Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, supra

45 N C—Smith v State Highway Commission, 139 S E 606, 194 N C 333

46 Minn—State v Babcock, 220 N W 408, 175 Minn 103

Such a construction is authorized by consideration of the arguments advanced in favor of enactment of the provision and is not precluded as imposing an unequal tax burden on the first class cities or because the stopping of the highways at city limits and continuing them from opposite city limits would prevent continuity of travel or because of the necessity of connecting two large cities where they are in fact adjoining and in effect a continuous municipality —State v Babcock, supra

47. Fla—Enzian v State Road Department, 165 So 695, 122 Fla 527.

48. N C—North Carolina State Highway Commission v Young, 158 S E 91, 200 N C 603

49. Ariz—Rowland v McBride, 281 P. 207, 35 Ariz 511.

ercised within the limits imposed by constitutional and statutory provisions.[50] Where the statute confers on the state highway commission power to abandon or change any part of the state highway system, it is given a broad discretion in the selection of the routes to make up such highway system.[51] So, where the statute authorizes the designation and construction of roads to connect principal population centers of the state, without naming them although limiting the number of miles of road which may be constructed, the state highway authorities are given discretion as to the choice of the population centers to be connected and in the location of the roads connecting them.[52]

Effect of general designation of route. The fact that the general route of a highway is prescribed by statute, as where its terminal points are fixed or cities, towns, or other intermediate points are designated through which the highway must pass, does not otherwise restrict the discretion of the highway authorities as to its location.[53] So a statutory designation of a road as running south and west through intermediate points to another designated point does not require that it must run either directly south or directly west at any given point.[54]

Judicial control and review of discretion. The courts will not interfere with the location of a highway route or highway in the absence of an abuse of the discretion vested in the highway authorities,[55] as where their action is clearly unrea-

Ark.—State Highway Commission v Saline County, 171 S.W.2d 60.

Ga.—Murph v Macon County, 146 S.E. 845, 167 Ga. 859; Jackson v State Highway Department of Georgia, 138 S.E. 847, 164 Ga. 434.

Ill.—Mowry v Department of Public Works and Buildings, 177 N.E. 753, 345 Ill. 121—Hitt v Department of Public Works and Buildings, 168 N.E. 337, 336 Ill. 306—Department of Public Works and Buildings v Spanogle, 158 N.E. 526, 327 Ill. 122.

La.—Claiborne v Louisiana Highway Commission, 98 So. 172, 154 La. 743.

Md.—Murphy v Uhl, 149 A. 566, 159 Md. 7.

N.C.—Coburn v Board of Com'rs of Swain County, 131 S.E. 372, 191 N.C. 68—Cameron v State Highway Commission, 123 S.E. 465, 188 N.C. 84.

Tenn.—Cheatham County v Baker, 30 S.W.2d 234, 161 Tenn. 222; Cheatham County v Baker, 64 S.W.2d 31, 16 Tenn. App. 1.

50. Ill.—Department of Public Works and Buildings v Pittman, 189 N.E. 191, 355 Ill. 182—Boyden v Department of Public Works and Buildings, 182 N.E. 379, 349 Ill. 363—Mowry v Department of Public Works and Buildings, 177 N.E. 753, 345 Ill. 121—Fisher v Department of Public Works and Buildings, 170 N.E. 283, 338 Ill. 222—Stewart v Department of Public Works and Buildings, 168 N.E. 364, 336 Ill. 513—Hayes v Department of Public Works and Buildings, 168 N.E. 364, 336 Ill. 233—Watts v Department of Public Works and Buildings, 160 N.E. 201, 328 Ill. 587.

La.—Crichton v Louisiana Highway Commission, 129 So. 373, 170 La. 863.

N.C.—Carlyle v State Highway Commission, 136 S.E. 612, 193 N.C. 36—Town of Newton v State Highway Commission of North Carolina, 133 S.E. 522, 192 N.C. 1, rehearing denied 134 S.E. 483, 192 N.C. 834.

S.C.—Boykin v State Highway Department of South Carolina, 114 S.E. 227, 146 S.C. 183.

Letter of law held not disregarded in construction of ambiguous statute to give highway commission some discretion in location of proposed highways.—Louisiana Highway Commission v Cormier, 128 So. 56, 13 La. App. 459.

51. Ariz.—Rowland v McBride, 281 P. 207, 35 Ariz. 511.

52. Mo.—Castilo v State Highway Commission of Missouri, 279 S.W. 673, 312 Mo. 244.

53. Fla.—Morrison v Farnell, 171 So. 528, 126 Fla. 385.

Ill.—Department of Public Works and Buildings v Schlich, 194 N.E. 587, 359 Ill. 337; Chicago, N. S. & M. R. Co. v Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 188 N.E. 177, 351 Ill. 58; Boyden v Department of Public Works and Buildings, 182 N.E. 379, 349 Ill. 363—Mowry v Department of Public Works and Buildings, 177 N.E. 753, 345 Ill. 121—Stewart v Department of Public Works and Buildings, 168 N.E. 372, 336 Ill. 513—Hayes v Department of Public Works and Buildings, 168 N.E. 364, 336 Ill. 233—Department of Public Works and Buildings v McCaughey, 163 N.E. 795, 332 Ill. 416—Wiley v Department of Public Works and Buildings, 161 N.E. 783, 330 Ill. 312—Watts v Department of Public Works and Buildings, 160 N.E. 201, 328 Ill. 587.

Ky.—Smith v State Highway Commission, 57 S.W.2d 1014, 247 Ky. 816.

La.—Louisiana Highway Commission v Cormier, 128 So. 56, 13 La. App. 459.

Miss.—Trahan v State Highway Commission, 151 So. 178, 169 Miss. 732.

Mo.—Palmer v State Highway Commission, 69 S.W.2d 653, 334 Mo. 1070—Benton County v State Highway Commission, 52 S.W.2d 995—Selecman v Matthews, 15 S.W.2d 788, 321 Mo. 1047, 63 A.L.R. 512—Castilo v State Highway Commission of Missouri, 279 S.W. 673, 312 Mo. 244.

S.C.—Gaston v State Highway Department of South Carolina, 132 S.E. 680, 134 S.C. 409.

Tenn.—Cheatham County v Baker, 64 S.W.2d 31, 16 Tenn. App. 1.

Power to determine "'the more specific and detailed locations' unquestionably carries with it the discretionary right in the commission to build the highway on such a line as it might think proper between the points designated in the act."—Louisiana Highway Commission v Cormier, 128 So. 56, 58, 13 La. App. 459.

54. Mo.—Palmer v State Highway Commission, 69 S.W.2d 653, 334 Mo. 1070.

55. Ga.—Blackwell v State Highway Board of Georgia, 160 S.E. 503, 173 Ga. 392—Town of Camak v State Highway Board, 143 S.E. 367, 166 Ga. 359—Jackson v State Highway Department of Georgia, 138 S.E. 847, 164 Ga. 434.

Ohio.—State v Shuff, 152 N.E. 300, 20 Ohio App. 432.

Tenn.—Cheatham County v Baker, 30 S.W.2d 234, 161 Tenn. 222.

Reasons for rule.

(1) "The privilege of . . constructing a highway [on a line which the commission thinks proper between designated points] involves a question of mere administration."—Louisiana Highway Commission v Cormier, 128 So. 56, 58, 13 La. App. 459.

(2) The power to determine the location of state highways is a legislative, and not a judicial one.—Department of Public Works and Buildings v. Legg, 29 N.E.2d 515, 374 Ill. 306.

sonable, arbitrary, or capricious,[56] or unless they have acted fraudulently, corruptly, oppressively, or with gross injustice,[57] or under mistake or accident;[58] and this is true although the court may differ with them as to the wisdom of their action,[59] their decision being conclusive if there is room for

Interference only in "extraordinary situations"

Tex —San Patricio County v Maxwell, Civ App, 56 S W 2d 295, 296

Failure to investigate routes

(1) "A decision by the commissioner to construct a parallel road . . reached without a fair and reasonable investigation of feasible routes which would meet the declared purpose of the highway statute would be a gross or palpable abuse of discretion, and, in fact, a failure to exercise discretion, amounting to an arbitrary and capricious exercise of power"—Cheatham County v Baker, 30 S W 2d 234, 238, 161 Tenn 222

(2) Failure to make location survey held not to show that investigation of routes was unfair and inadequate—Cheatham County v Baker, 64 S W 2d 31, 16 Tenn App 1

Paralleling other roads

The location of a state-aid road near another parallel road does not show an abuse of discretion where the new road is more economical, more direct, and safer—Blackwell v State Highway Board of Georgia 160 S E 503, 173 Ga 392

Discretion held abused

Ill —Department of Public Works and Buildings v Schlich, 194 N E 587, 359 Ill 337

Discretion held not abused

Ala —Bouchelle v State Highway Commission, 100 So 884, 211 Ala 474

Fla Morrison v Farnell, 171 So 528, 126 Fla 385

Ga - Blackwell v State Highway Board of Georgia, 160 S E 503, 173 Ga 392 Jackson v State Highway Department of Georgia, 138 S E 847, 164 Ga 434

Ill —Department of Public Works and Buildings v Fisher, 4 N E 2d 83, 364 Ill 194—Department of Public Works and Buildings v Pittman, 189 N E 491, 355 Ill 482 —Boyden v Department of Public Works and Buildings, 182 N E 379, 349 Ill 363 - Department of Public Works and Buildings v Challand 181 N E 405, 348 Ill 385—Mowry v Department of Public Works and Buildings, 177 N E 753, 345 Ill 121 —Stewart v Department of Public Works and Buildings 168 N E 372, 336 Ill 513—Hitt v Department of Public Works and Buildings, 168 N E 337, 336 Ill 306—Department of Public Works and Buildings v Epperson, 164 N E 676, 333 Ill 313—Wiley v Department of Public Works and Buildings, 161 N E 783, 330 Ill 312—Department of Public Works and Buildings v Spanogle, 158 N E 526, 327 Ill 122—People v Department of Public Works and Buildings, 158 N E 396, 326 Ill 589

La —Claiborne v Louisiana Highway Commission, 98 So 172, 154 La 743

Md —Murphy v Uhl, 149 A 566, 159 Md 7

Mo —Palmer v State Highway Commission, 69 S W 2d 653, 334 Mo 1070

Ohio —State v Shuff, 152 N E 300, 20 Ohio App 432

S C —Sloan v State Highway Department, 148 S E 183, 150 S C 337—Hargrove v Sawyer 116 S E 685, 149 S C 79—Northwestern Ry Co of South Carolina v State Highway Department of South Carolina, 144 S E 926, 147 S C 100—Gaston v State Highway Department of South Carolina, 132 S E 680, 131 S C 402

Tenn —Cheatham County v Baker, 64 S W 2d 31, 16 Tenn App 1

56 Ariz —Rowland v McBride, 281 P 207 35 Ariz 511

Ga —Blackwell v State Highway Board of Georgia, 160 S E 503 173 Ga 392—Barnes v Terrell County, 151 S E 509, 169 Ga 725—Murph v Macon County 146 S E 845, 167 Ga 859—Appleby v Holder, 143 S E 596 166 Ga 512

Ill —Weber v Department of Public Works and Buildings, 195 N E 427, 360 Ill 11—Department of Public Works and Buildings v Schlich, 194 N E 587, 359 Ill 337—Chicago N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 354 Ill 58 Boyden v Department of Public Works and Buildings, 182 N E 379, 349 Ill 363—Department of Public Works and Buildings v Challand 181 N E 405, 348 Ill 385—Mowry v Department of Public Works and Buildings, 177 N E 753, 345 Ill 121 Hitt v Department of Public Works and Buildings, 168 N E 337, 336 Ill 306

Ky Smith v State Highway Commission, 57 S W 2d 1014, 247 Ky 816

La —Claiborne v Louisiana Highway Commission, 98 So 172, 154 La 743

Md —Murphy v Uhl, 149 A 566, 159 Md 7

Mo —Palmer v State Highway Commission, 69 S W 2d 653, 334 Mo 1070

N C —Parks v Board of Com'rs of Lenoir County, 120 S E 46, 186 N C 490

Tex —Nairn v Bean, 48 S W 2d 584, 121 Tex 355—State Highway Commission v Humphreys, Civ App, 58 S W 2d 144, error refused.

57. Ill —Department of Public Works and Buildings v Legg, 29 N E 2d 515, 374 Ill 306—Weber v Department of Public Works and Buildings, 195 N E 427, 360 Ill 11—Department of Public Works and Buildings v. Pittman, 189 N E 491, 355 Ill 482—Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 354 Ill 58—Boyden v Department of Public Works and Buildings 182 N E 379, 349 Ill 363—Mowry v Department of Public Works and Buildings, 177 N E 753, 345 Ill 121 —Stewart v Department of Public Works and Buildings, 168 N E 372, 336 Ill 513

Mo —Scleeman v Matthews 15 S W 2d 788 321 Mo 1047, 63 A L R 512

Ohio —State v Shuff, 152 N E 300, 20 Ohio App 432

Tex —Nairn v Bean, 48 S W 2d 584, 121 Tex 355—Heathman v Singletary Com App 12 S W 2d 150, affirming Singletary v Heathman, Civ App, 300 S W 242—San Patricio County v Maxwell Civ App, 56 S W 2d 295

"In [the location of highways] the commission exercises an administrative and quasi legislative function which, when free from fraud or corruption, cannot be reviewed by the courts" Bouchelle v State Highway Commission, 100 So 884, 889 211 Ala 474

Corrupt or oppressive action held not shown

Ill —Mowry v Department of Public Works and Buildings, 177 N E 753, 345 Ill 121

Fraud or corruption held not shown

Ala —Bouchelle v State Highway Commission, 100 So 884, 211 Ala 474

Good faith held shown

Tenn Cheatham County v Baker, 64 S W 2d 31, 16 Tenn App 1

58. Tex —Nairn v Bean, 48 S W 2d 584, 121 Tex 355—Heathman v Singletary, Com App, 12 S W 2d 150 affirming, Singletary v Heathman, Civ App 300 S W 242—San Patricio County v Maxwell, Civ App, 56 S W 2d 295

59. Ill —Weber v Department of Public Works and Buildings, 195 N E 427, 360 Ill 11—Department of Public Works and Buildings v Pittman, 189 N E 491, 355 Ill 482 —Chicago N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works

a reasonable difference of opinion.[60] In locating the route of a state highway as authorized by statute, a state highway commission acts in an administrative capacity notwithstanding it is required to exercise judgment and discretion, hence certiorari will not lie to review its determination.[61] Where the power of designating a highway route is, under the statutes, vested in the state highway department and not in the county officials, the state highway commissioners are necessary parties to any litigation affecting the exercise of such power.[62] Where the statute provides that no action shall be maintained against the highway commission to determine the location of any state highways or portion thereof except by the road-governing body of the county in which the road is situated or the county seat or principal town affected, the action of the highway commission cannot be reviewed by the supreme court in an appeal from a judgment sustaining a demurrer to a complaint in an action brought by citizens and taxpayers.[63]

Factors to be considered In locating state highways, or highways on which state funds are used or which are treated as part of a state-wide system, the primary interest to be considered is that of the state at large, and the general public good, and not the interest of any particular locality or any private interest.[64] As between two possible routes, comparative costs of construction are to be considered,[65] but are not, of themselves, a determining

and Buildings, 188 N E 177, 351 Ill 58

Mere bad judgment does not show abuse of discretion—Davidson v Wells, Tex Civ App, 233 S W 518

60. Ill—Department of Public Works and Buildings v Pittman, 189 N E 491, 355 Ill 482—Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 351 Ill 58—Boyden v Department of Public Works and Buildings, 182 N E 379, 349 Ill 363—Mowry v Department of Public Works and Buildings, 177 N E 753 345 Ill 121

61. N Y—Matter of Sherman, 133 N Y S 931, 76 Misc 45
29 C J p 490 note 60

62. Tex—San Patricio County v Maxwell, Civ App 56 S W 2d 295

63. N C—Parker v State Highway Commission, 143 S E 871, 195 N C 783

64. Fla—Sibley v Volusia County, 2 So 2d 578 147 Fla 302—Lewis v Leon County, 107 So 146, 91 Fla 118

Ill—Weber v Department of Public Works and Buildings, 195 N E 427 360 Ill 11—Department of Public Works and Buildings v Pittman, 189 N E 491 355 Ill 482—Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 351 Ill 58—Department of Public Works and Buildings v Challand 181 N E 405 348 Ill 385 Fisher v Department of Public Works and Buildings 170 N E 283, 338 Ill 222 Stewart v Department of Public Works and Buildings 168 N E 372 336 Ill 513—Hitt v Department of Public Works and Buildings 168 N E 337, 336 Ill 306—Flatt v Department of Public Works and Buildings 167 N E 772, 335 Ill 558—Department of Public Works and Buildings v McCaughey, 163 N E 795 332 Ill 416—Wiley v Department of Public Works and Buildings, 161 N E 783 330 Ill 312—Watts v Department of Public Works and Buildings, 160 N E 201, 328 Ill 587—Department of Public Works and Buildings v Spanogle, 158 N E 526 327 Ill 122—People v Department of Public Works and Buildings 158 N E 396, 326 Ill 589—MacGregor v Miller, 154 N E 707 324 Ill 113

La—Louisiana Highway Commission v Cormier, 128 So 56, 13 La App 459

Md—Murphy v Uhl, 149 A 566, 159 Md 7

Okl—Board of Com'rs of Canadian County v State Highway Commission 55 P 2d 106, 176 Okl 207

Tex—Elliott v Ely Civ App, 58 S W 2d 839 error refused—Mosel v Real, Civ App, 49 S W 2d 475, error refused

Wis—Agnew v Hotchkiss 206 N W 849, 189 Wis 1

Where two routes are considered highway authorities have right to select either, as best interest of state may appear—Weber v Department of Public Works and Buildings, 195 N E 427, 360 Ill 11—Boyden v Department of Public Works and Buildings, 182 N E 379, 349 Ill 363—Mowry v Department of Public Works and Buildings 177 N E 753, 345 Ill 121—Stewart v Department of Public Works and Buildings, 168 N E 372 336 Ill 513

"The county seats and principal towns of the state constituted important units of the general public which the law did not intend should be side-tracked"—Town of Newton v State Highway Commission of North Carolina 131 S E 183, 484, 192 N C 834 denying rehearing 133 S C 522 192 N C 1

"A local custom of travel may be disregarded where another road serves the people of the state better and at the same time meets the requirements of the inhabitants of the particular places which it is to serve"—Boyden v Department of Public Works and Buildings, 182 N E 379, 383, 349 Ill 363—Mowry v Department of Public Works and Buildings, 177 N E 753, 761, 345 Ill 121

Loss of tourist trade held not ground for enjoining construction on route selected

Tex—State Highway Commission v Humphreys Civ App, 58 S W 2d 141, error refused

Wis—Agnew v Hotchkiss, 206 N W 849, 189 Wis 1

Results of judgment

"In a case . . . involving the construction of a statute [providing as to a highway route] affecting the general interest of the traveling public we think the palpable results of a judgment can legitimately be taken into account as an essential element in properly determining the controversy"—Louisiana Highway Commission v Cormier, 128 So 56 58, 13 La App 459

Disregard of primary interest of state not shown

Evidence held not to show that public works department's location of roads disregarded primary interest of state at large—Mowry v Department of Public Works and Buildings 177 N E 753, 345 Ill 121—Watts v Department of Public Works and Buildings 160 N E 201, 328 Ill 587

65. Ga—Barnes v Terrell County, 151 S E 509 169 Ga 725—Murph v Macon County, 146 S E 845, 167 Ga 859—Jackson v State Highway Department of Georgia, 138 S E 847 164 Ga 434

Ill—Weber v Department of Public Works and Buildings 195 N E 427, 360 Ill 11—Department of Public Works and Buildings v Pittman, 189 N E 491 355 Ill 482—Department of Public Works and Buildings v Challand 181 N E 405, 348 Ill 385—Hitt v Department of Public Works and Buildings, 168 N E 337, 336 Ill. 306—Wiley v De-

factor[66] Directness is also to be considered,[67] but is not necessarily conclusive.[68] Other factors which, in the application of governing statutes, have been held properly considered in locating highway improvements are comparative cost of maintenance,[69] safety,[70] relation of the particular road whose construction is under consideration to the other roads of the state-wide system,[71] adaptability to the persons using the route,[72] probable amount of travel,[73] volume of traffic accommodated,[74] accommodation of future, as well as present, traffic,[75] convenience in the operation of traffic,[76] the service of as large a territory as possible,[77] the securing of main trunk line routes through the state,[78] comparative topographic and construction difficulties,[79] center of population of communities served,[80] and customary line of travel[81] A proposed route which has been the principal and accepted means of travel for a number of years must be presumed to be a direct and feasible route, or the most direct and feasible one[82]

While an avoidance of grade railroad crossings is desirable, it is not necessarily controlling as to the discretion of the highway commissioners in the location of a highway.[83]

State highway authorities properly exercise a discretion which they possess with regard to the location of a state highway in selecting a location on which the federal authorities are willing to extend federal aid[84]

Surrender of discretion Where, under the statutes, the location of a highway forming a part of the state highway system is within the discretion of the local officials, such officials cannot surrender their discretion to the judgment of the highway officials of another state[85]

partment of Public Works and Buildings, 161 N E 783 330 Ill 312—Department of Public Works and Buildings v Spanogle, 158 N E 526, 327 Ill 122

Mo—Palmer v State Highway Commission, 69 S W 2d 653, 334 Mo 1070

Tenn—Cheatham County v Baker, 64 S W 2d 31, 16 Tenn App 1

66. Ill—Weber v Department of Public Works and Buildings, 195 N E 427, 360 Ill 11

Ohio—State v Shuff, 152 N E 300, 20 Ohio App 432

67. Ill—Department of Public Works and Buildings v McCaughey, 163 N E 795, 332 Ill 416

68. Ala—Bouchelle v State Highway Commission, 100 So 881 211 Ala 474

Ill—Weber v Department of Public Works and Buildings, 195 N E 427, 360 Ill 11

69 Ala—Bouchelle v State Highway Commission, 100 So 881, 211 Ala 474

Ga—Raines v Terrell County, 151 S E 509 169 Ga 725- Murph v Macon County, 146 S E 845, 167 Ga 859—Jackson v State Highway Department of Georgia, 138 S E 847 164 Ga 434

Ill—Department of Public Works and Buildings v Spanogle, 158 N E 526 327 Ill 122

Mo—Palmer v State Highway Commission, 69 S W 2d 653, 334 Mo 1070

70. Ga—Raines v Terrell County, 151 S E 509, 169 Ga 725—Murph v Macon County, 146 S E 845, 167 Ga 859

Ill—Department of Public Works and Buildings v Pittman, 189 N E 491, 355 Ill 482—Department of Public Works and Buildings v Challand 181 N E 405, 348 Ill 385—Hitt v Department of Public Works and Buildings, 168 N E 337, 336 Ill 306—Department of Public Works and Buildings v McCaughey 163 N E 795 332 Ill 416—Wiley v Department of Public Works and Buildings, 161 N E 783, 330 Ill 312—Department of Public Works and Buildings v Spanogle 158 N E 526, 327 Ill 122—People v Department of Public Works and Buildings, 158 N E 396, 326 Ill 589

Ohio—State v Shuff 152 N E 300, 20 Ohio App 432

Tex—State Highway Commission v Humphreys Civ App, 58 S W 2d 144 error refused

71. Ill—Chicago N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 351 Ill 58

72 Ill—Department of Public Works and Buildings v Pittman, 189 N E 491, 355 Ill 482—Department of Public Works and Buildings v McCaughey 163 N E 795, 332 Ill 416

73. Ill—Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 351 Ill 58

74 Ill—Wiley v Department of Public Works and Buildings, 161 N E 783, 330 Ill 312

75. Ill—Department of Public Works and Buildings v Pittman, 189 N E 491, 355 Ill 482

76. Ill—Hitt v Department of Public Works and Buildings, 168 N E 337, 336 Ill 306

77. Ga—Jackson v State Highway Department of Georgia, 138 S E 847, 161 Ga 434

78 Ga—Raines v Terrell County, 151 S E 509, 169 Ga 725—Murph v Macon County 146 S E 845 167 Ga 859—Jackson v State Highway Department of Georgia, 138 S E 847, 164 Ga 434

79. Ga—Raines v Terrell County, 151 S E 509, 169 Ga 725—Murph v Macon County 146 S E 845, 167 Ga 859—Jackson v State Highway Department of Georgia 138 S E 847 164 Ga 434

Ill—Department of Public Works and Buildings v Spanogle, 158 N E 526 327 Ill 122

80 Ill Mowry v Department of Public Works and Buildings, 177 N E 753, 345 Ill 121

81 Ill Mowry v Department of Public Works and Buildings supra

82 Ill—Weber v Department of Public Works and Buildings, 195 N E 427, 360 Ill 11—Stewart v Department of Public Works and Buildings, 168 N E 37?, 336 Ill 513 Watts v Department of Public Works and Buildings, 160 N E 201, 328 Ill 587

83 Ill—Mowry v Department of Public Works and Buildings, 177 N E 753, 345 Ill 121

84 Tex—State Highway Commission v Humphreys Civ App, 58 S W 2d 144, error refused

85 N C—Coburn v Board of Com'rs of Swain County, 131 S E 372, 191 N C 68

Connecting link in foreign state

A local board of highway commissioners cannot surrender its discretion with regard to the construction of a local highway to the action of the highway officials of a foreign state by the suspension of work until an agreement is reached with the foreign highway commissioners pro-

Representations or promises in connection with bond elections The discretion of the authorities as to the location of a highway cannot be controlled by representations made by individual members of the highway commission or members of the public prior to the election for the issuance of bonds that the highway would be located on a particular route where such representations are not shown to have been authorized or ratified by the board[86] In any event, the county authorities are not bound to construct a highway on any particular route unless their actions are sufficient to constitute a contract with, or a pledge to, the voters that the proceeds of the bond sale should be used in the construction of a highway on that route[87] So the commissioners' court of a county or the state highway commission is not precluded by reason of promises by a publicity committee during a campaign for a highway bond issue or by reason of having designated the highway over a certain route and secured an appropriation for the construction thereof from changing the designation of and relocating the route of a state highway along a shorter way[88]

Personal disqualification of members of board or commission Since a highway commission is not a court exercising judicial functions, but is an administrative body, its members are not affected by the common-law principles which govern qualification of judges and judicial officers,[89] and the disqualifications mentioned in the statutes under which they act are exclusive[90]

(c) Deviation from Existing Highways

The highway authorities may deviate from existing roads or lay out new ones in the location of state highways or state highway routes under their general powers to alter or locate such routes unless they are specifically restricted by the statutes under which they act

The fact that a statute establishes certain highway routes or state roads or highways and describes them by their termini, or by their termini and intermediate points, does not in itself require the adoption of the route then occupied by the existing road between such points[91] Further, the right to deviate from such road or to establish a new road is implicit in statutory authorization to purchase or condemn rights of way,[92] or to make alterations or changes in the highways[93] So, where the statute requires the highway commissioner to designate main traveled roads to be included in the general highway plan of the state and authorizes him to alter the course or grade or otherwise improve any road selected, he may designate the construction of a highway on a new route that does not follow any existing road[94] However, it has been held that, where the statute establishing a state highway system provides that it shall consist of the highways on certain described routes, incorporating the highways constituting the then existing, more or less loosely connected, system of highways which had been created by the state highway commission with the consent and cooperation of the local road authorities of the several counties, the intent of the legislature

viding for a connecting link, making it an interstate road—Coburn v Board of Com'rs of Swain County, supra

86. N C—Johnson v Board of Com'rs of Wake County, 135 S E 618, 192 N C 561

87. Ky—Smith v State Highway Commission, 57 S W 2d 1014, 247 Ky 816

88. Tex—Singletary v Heathman Civ App 300 S W 212, affirmed Heathman v Singletary, Com App 12 S W 2d 150

89. Ala—Bouchelle v State Highway Commission, 100 So 884, 211 Ala 471

90. Interest in contract or agreement for construction

State highway commissioner owning land, value of which will be greatly increased by location and construction of proposed state highway held not "indirectly interested" in contract or agreement for construction or maintenance of road, within Acts 1923 p 375 § 11½, so as to disqualify him to vote for such location—Bouchelle v State Highway Commission, supra

91. Fla—Sibley v Volusia County, 2 So 2d 578, 147 Fla 302—Enzian v State Road Department, 165 So 695, 122 Fla 527

Miss—Trahan v State Highway Commission, 151 So 178, 169 Miss 732

92. Ill—Department of Public Works and Buildings v Challand, 181 N E 405, 348 Ill 385—Department of Public Works and Buildings v McCaughey, 163 N E 795, 332 Ill 416—Wiley v Department of Public Works and Buildings, 161 N E 783, 330 Ill 312—People v Department of Public Works and Buildings, 150 N E 655, 320 Ill 117

Mo—Castilo v State Highway Commission of Missouri, 279 S W 673, 312 Mo 214

93. Ark—Wilson v Rambo, 21 S W 2d 158, 180 Ark 226

Ill—Department of Public Works and Buildings v Challand, 181 N E 405, 348 Ill 385—Department of Public Works and Buildings v McCaughey 163 N E 795, 332 Ill 416—Wiley v Department of Public Works and Buildings, 161 N E 783, 330 Ill 312—People v Department of Public Works and Buildings, 150 N E 655, 320 Ill. 117.

Consistency of changed route with original plans for improvement held required—Wilson v Rambo, 21 S W 2d 158, 180 Ark 226

Running road through edge of village, instead of through main street as previously, held authorized as minor change—Department of Public Works and Buildings v Epperson, 161 N E 676, 333 Ill 313

Approval of governor required for minor changes—Parrish v Miller, 168 N E 671, 336 Ill 630

Three-mile cutoff, built to eliminate four miles of original road held not too long, as compared to length of state highway, to be permissible—Jenkins v State Highway Commission 218 N W 258, 205 Iowa 523

94. Tenn—Cheatham County v Baker, 61 S W 2d 31, 37, 16 Tenn App 1 "A fair construction of the statute would be that ordinarily, and as far as the public interest would permit, a main traveled road should be followed, but whenever by reason of undue expense or physical obstacles this is not feasible, the commissioner may choose another route or not build at all"—Cheatham County v. Baker, supra.

that the commission, in constructing the highways on the designated routes, shall maintain the identity of the then existing roads is indicated,[95] but the principle has been held inapplicable to a highway built by the state highway commission under the authority to adopt any route which it considers wise.[96]

Under a statute providing for the construction of improved roads on the public highways of the state along designated routes and conferring on the highway department the right to make minor changes in the location of such routes, while the purpose is evident that existing public highways shall be improved as far as possible,[97] where the conditions are such that new highways must be established in order to carry out the intent of the statute and best serve the public good, the department has discretion to make such minor changes,[98] although the departures from the public highways contemplated usually constitute a small proportion of the whole route, which forms an integral portion thereof, and are not independent public highways.[99] So, although it may be possible to lay out a route entirely on existing highways, the circumstances may be such as to warrant the department in deviating therefrom.[1]

The mere declaration in the order for a bond election that the money shall be expended on a designated highway does not require that the location of the new roadway coincide with the location of the old roadway throughout.[2]

Discretion and factors justifying deviation. While highway officials may not act arbitrarily in deviating from existing highways,[3] a court is not justified in setting aside their action in so doing merely because it doubts the wisdom or necessity of the deviation,[4] and such deviation has been held justified where greater safety, or more favorable traffic conditions,[5] as by the avoidance of grade crossings,[6] or greater convenience of travel,[7] or a saving in the cost of construction or operation,[8] would be attained thereby.

(d) Time for Location

Unless required by statute, the highway need not be located before the funds are advanced for its construction, nor need the entire route be located before construction on a part is begun.

In the absence of an express requirement of the statute, it is not necessary that the whole length of

95 S C —Hargrove v Sawyer, 146 S E 685, 149 S C 79—Boykin v State Highway Department of South Carolina, 144 S E 227, 230, 146 S C 183

The word "on," as used in the statute in the phrase "on route No 26," was not "intended by the Legislature to mean such course as the highway department might select along the general direction of highway No 26," but must be given its "ordinary, common-sense meaning"—Boykin v State Highway Department of South Carolina supra

96 S C—Flint v State Highway Department 162 S E 262, 164 S C. 187

97 Ill—Hayes v Department of Public Works and Buildings, 168 N E 364, 336 Ill 233—Department of Public Works and Buildings v Spanogle, 158 N E 526, 327 Ill 122—People ex rel Greene v State Department of Public Works and Buildings, 234 Ill App 111

98. Ill—Department of Public Works and Buildings v Pittman, 189 N E 491, 355 Ill 482—Stewart v Department of Public Works and Buildings, 168 N E 372, 336 Ill 513—Hayes v Department of Public Works and Buildings, 168 N E 364, 336 Ill 233—Hiitt v Department of Public Works and Buildings, 168 N E 337, 336 Ill 306

Establishment of new highway held justified

Ill—Department of Public Works and Buildings v Challand, 181 N E 405, 348 Ill 385—Hayes v. Department of Public Works and Buildings, 168 N E 364, 336 Ill 233—Department of Public Works and Buildings v Spanogle, 158 N E 526, 327 Ill 122

99. Ill—Department of Public Works and Buildings v Spanogle, supra

1. Ill—Department of Public Works and Buildings v Pittman 189 N E 491, 355 Ill 482—Hayes v Department of Public Works and Buildings 168 N E 364, 336 Ill 233

2. Tex—Mosel v Real Civ App 49 S W 2d 475, 476, error refused

3. Ill—Department of Public Works and Buildings v Challand, 181 N E 405, 348 Ill 385—Flatt v Department of Public Works and Buildings, 167 N E 772, 335 Ill 558—Department of Public Works and Buildings v Spanogle 158 N E 526, 327 Ill 122—People v Department of Public Works and Buildings, 158 N E 396, 326 Ill 589—People v Department of Public Works and Buildings, 150 N E 655, 320 Ill 117

4. Ill—Department of Public Works and Buildings v Pittman, 189 N E 491, 355 Ill 482

5. Ark—Crawford v. Pulaski Road Improvement Dist No 10, 242 S W 559, 154 Ark 311

Ill—Department of Public Works and Buildings v Challand, 181 N E 405, 348 Ill 385—Flatt v Department of Public Works and Buildings, 167 N E 772, 335 Ill 558—People v Department of Public Works and Buildings, 158 N E 396, 326 Ill 589—Stratton v Henkel, 151 N E 546, 320 Ill 526—People v Department of Public Works and Buildings, 150 N E 655, 320 Ill 117

Miss—Trahan v State Highway Commission 151 So 178, 169 Miss 732

S C—Sloan v State Highway Department, 148 S E 183, 150 S C 337

6 Ill—MacGregor v Miller, 154 N E 707, 324 Ill 113

Miss—Trahan v State Highway Commission, 151 So 178, 169 Miss 732

Tex—State Highway Commission v Humphreys, Civ App, 58 S W 2d 144, error refused

Building of new bridge

A statutory provision that bridges forming part of present roads should, when in proper condition be used in the proposed highway system, does not prevent a relocation requiring the building of a new bridge, where the condition of the old bridge is not shown and the use thereof would necessitate grade crossings—MacGregor v Miller, 154 N E 707, 324 Ill 113

7. Ark—Sale v Road Improvement Dist No 16 of Woodruff County, 246 S W 843, 156 Ark 501

8. Ark—Crawford v Pulaski Road Improvement Dist No 10, 242 S W. 559, 154 Ark 311

Ill—Stratton v Henkel Const Co, 151 N E 546, 320 Ill 526

Tenn—Cheatham County v Baker, 64 S.W 2d 31, 16 Tenn App 1.

the route shall have been definitely located before work may be begun on any part of it[9] Under a contract whereby county commissioners advanced money to a state highway commission for highways to be located by the commission, it was held that the location could be made at any time before construction[10]

(c) Procedure

The procedure prescribed by the particular statute involved is controlling.

Where the statutes provide the procedure for the location and changes therein of state highways, the procedure established by general highway statutes is inapplicable[11] The fact that a state highway commission has been vested with powers formerly exercised by county authorities does not render statutes governing such authorities when laying out new roads binding on the commission[12] The effect of state-aid laws in some jurisdictions is to permit state-aid roads to be located and built without complying with provisions of the former laws as to the laying out and building of roads[13] A statute authorizing the future location of a highway to be designated and its width and lines established is applicable only to cases falling within its provisions.[14]

(f) Revocation of Order

An order for location may be revoked before vested rights have been acquired

An order by an administrative tribunal locating a state highway is subject to revocation or change until vested rights have been acquired because thereof[15] The alteration or abandonment of the highway after establishment is considered infra subdivisions b (3), (4) of this section.

(3) Alteration and Relocation

The state highway authorities may, where, and only where, authorized by constitutional or statutory provisions, alter or change an established state highway route or highway, and their discretion, where the statutory procedure is followed, ordinarily will not be reviewed.

Where a state highway route or state highway has been established by the constitution or statute or proceedings thereunder, it cannot be altered or relocated[16] in the absence of express authority, and the power to alter or relocate it may be expressly limited by statute[17] However, the state highway

9. Ill—Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings 188 N E 177, 354 Ill 58

10 N C—Parker v State Highway Commission, 143 S E 871, 195 N C 783

11. **Location of new roads in county** Location of state highways does not come under general provisions relating to location of new roads in counties—Cunningham v Koons, Tex Civ App 33 S W 2d 761

12. Tex—State Highway Commission v Humphreys Civ App, 58 S W 2d 141 error refused

13. Ga—Waters v Hall County, 163 S E 609, 174 Ga 596

14. Pa—May v Westmoreland County, 98 Pa Super 188

In case of divergence from highway Act of May 11, 1925, P L p 701, applies only where the secretary of highways deems it uneconomical to widen an existing state highway but decides to maintain the present highway until such time as the amount of traffic warrants the construction of a new one but has no application where a divergence is made from a present highway and the old highway is no longer maintained, in which case the establishment of the ultimate widths and lines is under the act of April 6, 1921 P L p 107—May v Westmoreland County, supra

15. Tex—Heathman v Singletary, Com App, 12 S W 2d 150, affirming Singeltary v Heathman, Civ App, 300 S W 242.

16. Iowa—Scharnberg v Iowa State Highway Commission, 243 N W 334, 214 Iowa 1041

Immaterial change

The abandonment of an established highway some seven miles in length and the construction of a new highway through new territory a mile distant, where no road has ever existed for much of the way cannot be said to be an immaterial change—Scharnberg v Iowa State Highway Commission, supra

"State routes," except as it may otherwise be provided by statute, after having been designated by the highway authorities, cannot be altered or abandoned except by the authority which created them—Apache County v Udall, 1 P 2d 340, 38 Ariz 188

Substantial change

Within a prohibition as to the making of substantial changes in designated state highways except for certain purposes a change which consists of running the highway diagonally through the three tracts owned by three individual plaintiffs instead of running it alongside of each tract and which causes a road to run on the north side of a quarter section instead of the east and south sides of it is it has been intimated, not a substantial change in a country highway—State v Kansas State Highway Commission, 299 P 955, 133 Kan 357

17. **Disconnection of principal towns** A statutory limitation on highway changes amounting to a disconnection of principal towns shown on the map of the highway system is applicable only to localities falling within its intent and where the locality is not within the intent of the statute the consent of local authorities to the change need not be procured—Town of Yadkin College v State Highway Commission, 138 S E 717, 194 N C 180—Cameron v State Highway Commission, 123 S E 465, 188 N C 84

Permanent links of highway system N C—Town of Newton v State Highway Commission 138 S E 601 194 N C 159 petition dismissed 139 S E 613 194 N C 303—Carlyle v State Highway Commission, 136 S E 612, 193 N C 36

Purpose of obtaining most practicable route does not permit the changing of roads connecting county seats established by the state highway commission as a part of the highway system—Carlyle v State Highway Commission, supra

Resort to line of former road after selection of new road as state highway is not authorized—Town of Newton v State Highway Commission, 138 S E 601 194 N C 159, petition dismissed 139 S E 613, 194 N C 303

Roads on map

(1) Where a map is adopted showing in detail the roads which shall constitute the state highway system, but the highway commission is given power to change, alter, add to, or discontinue the roads so shown, subject to statutory provisos, the highway commission has power to deviate from highways shown on such

authorities under express authority to alter or relocate,[18] or to make necessary changes and additions in,[19] the highways constituting the state highway system may alter or relocate an established highway, for example, for the securing of the public safety,[20] this latter being the only ground on which an alteration may be had under some statutes.[21] Notwithstanding the highway commission is not regarded as having power to make substantial or radical departures, it may, in the construction of an existing highway, make changes and relocations to eliminate curves, to shorten the alignment of the road, to alter grades, and to utilize to the best advantage the topography of the ground where the road is located.[22] Although a portion of the original route was selected because it was already paved, the commission may depart therefrom where the paving is so inferior as to make its use impracticable.[23]

The exercise of their discretionary power by highway officers regarding changes is not subject to judicial review.[24] However, although the board or officers are given power to change, alter, or discontinue existing roads, subject to a proviso that certain conditions shall be met, their decision as to the matters involved in such conditions presents a mixed question of law and fact which is subject to judicial review in the manner ordinarily prevailing as to the review of decisions of administrative bodies.[25]

Tentative location A highway authority has been held authorized to make a change from its tentative location or route.[26] So, where a highway has been

map where such deviation, under the facts and circumstances does not constitute a radical departure—Town of Yadkin College v State Highway Commission, 138 S E 717, 194 N C 180

(2) The posting of a map of a proposed highway in a county for the purpose of allowing objections to be made by local authorities does not restrict a general discretionary authority conferred on the highway commission to change, alter add to, or discontinue roads in the state highway system—Road Commission of Edgecombe County v State Highway Commission, 115 S E 886, 185 N C 56

Substantial or radical departures will not be permitted after county roads have been taken over and become parts of the state highway system—Smith v State Highway Commission 139 S E 606, 194 N C 333

18. Md—Huffman v State Roads Commission of Maryland, 137 A 358, 152 Md 566

After location by legislative committee

Where the determination of a special committee of the legislature on the selection of routes by the highway commission is made final, it does not preclude a future change in the location by the commission, it being the intent merely to preclude an appeal or further review of the determination of the legislative committee—Agnew v Hotchkiss, 206 N W 849, 189 Wis 1

Implied repeal

Proviso limiting highway commission's power to make minor relocations in highways to highways inundated by water power project construction did not repeal statute previously enacted at same session empowering commission to make minor relocations—State ex rel State Highway Commission v Gordon, 36 S W 2d 105, 327 Mo 160, followed in State ex rel State Highway Commission v Lewis 36 S W 2d 108

Consent of local authorities

When under the statutes the consent of the county authorities is required where a relocation involves more than a specified length of road the consent is not invalidated by the fact that a proviso is added to it that it shall not apply in case a different route is selected—Bosshard v Hotchkiss 207 N W 695 190 Wis 29

On property not highway

Under a statute providing that the highway commission may change the trunk highway system, it may change or relocate a portion of a state trunk highway although the property designated is not as yet a public highway—Muscoda Bridge Co v Worden-Allen Co, 219 N W 128, 196 Wis 76

Thoroughfare

Street through city on which state highway entered city and which had exit on another street connecting with another state highway was held a "thoroughfare" within statute authorizing department of public works and buildings to relocate state highway routes over existing streets or "thoroughfares" within cities—Department of Public Works and Buildings v Fisher, 4 N E 2d 83, 364 Ill 194

19. Ark—Bonds v Wilson, 284 S W 24, 171 Ark 328

20. Conflicting statutes

The power given to highway officers to relocate state highways when any part of them is dangerous or inconvenient to the traveling public is not incompatible with the provisions of another statute giving the public service commission exclusive power over the alteration, relocation or abolition of railroad grade crossings—In re Northern Pipe Line Co, 1 A 2d 526 132 Pa Super 406

21. Kan—Bobbitt v State Highway Commission of Kansas, 26 P 2d 1115, 138 Kan 487

Elimination of right-angle turns

Under such a statute a change for the purpose of the elimination of right-angle turns is in the interest of public safety—State v Kansas State Highway Commission, 299 P 955, 133 Kan 357

22. N C—Town of Newton v State Highway Commission, 138 S E 601, 194 N C 159, petition dismissed 139 S E 613, 194 N C 303

23. Ill—Stratton v Henkel Const Co 151 N E 516, 320 Ill 526

24. N C—Johnson v Board of Com'rs of Wake County, 135 S E 618, 192 N C 561

Injunction against change see infra § 199

Action on protest or appeal

The action by the state highway board with respect to a protest or to an appeal with regard to a change, alteration or abandonment of a road located and maintained by the state highway commission as a part of the state highway system is not subject to judicial review—Parker v State Highway Commission, 143 S E 871, 195 N C 783

25. Disconnection of county seats

Although Pub L 1921 c 2, otherwise vested discretionary power in state highway commission to construct state highway system altering, changing discontinuing, etc existing roads a proviso prohibiting alteration, etc, "so as to disconnect county seats, principal towns" etc, made determination of what are "principal towns" a mixed question of law and fact, and hence subject to judicial review—Cameron v State Highway Commission, 123 S E 465, 188 N C 84

26. Ill—Department of Public Works and Buildings v Legg, 29 N

tentatively located prior to an election for a local bond issue, while an order for the election fixing definite and specific places as points to be reached by the road will be given effect, the actual location on the ground of the intermediate route is subject to such changes as are necessary to obtain the approval of state and federal authorities [27]

Effect of general designation of route Where the statute merely designates the general route of the state highway as running to, through, or between certain designated points, without specifying the particular route to be followed, the state highway board can relocate such highway after it has been originally located [28]

Effect of map A provision that the highway commission shall not have authority to eliminate any part of the contemplated highway system shown on a map referred to does not prevent a change in the route between specific termini shown on such map [29]

Securing federal aid Under an authorization to comply with the conditions imposed by the federal authorities for the allocation of federal funds to the state for highway construction, a highway commission may change the location of highways when required to do so by the federal government as a condition to securing federal aid [30] A similar conclusion has been reached under a statute authorizing the state highway commission to cooperate with the state highway department and the federal government and to have the power to do all things necessary to the securing of such federal and state aid as may at any time be available [31]

Rights of landowners Except as restricted by statute, the state highway commission, where, when acting in a reasonable exercise of the discretion conferred on it, it believes that it is in the best interest of the public that the route of a highway be changed, may change such route notwithstanding the effect of such change is seriously to damage or to destroy the value of property along the old location [32] So, also, a state highway commission is not estopped from changing the route of a highway to a particular location because of a promise made to a landowner to change the route to another location, where no authority in the promisor, or want of power in the commission to make the change, is shown [33]

Agreements not to alter The state highway authorities have no power, in the absence of statute, to make a contract to maintain the designation of a road or route as a state highway,[34] nor is there any implied contract between the state authorities and the abutting owners arising out of the issuance and sale of bonds for the construction of the road as originally designated and located [35] The discretion of state highway officers as to the changing of a state highway route cannot be surrendered by them[36] or by any state officer,[37] and no promise or agreement by them can create a vested right in the holder of adjoining property that the main line of the route shall continue to exist as promised [38] Hence, the state highway authorities are not bound by an agreement not to change the loca-

NE 2d 515, 374 Ill 306—MacGregor v Miller, 151 NE 707, 321 Ill 113
NC—Johnson v Board of Com'rs of Wake County, 135 SE 618, 192 NC 561
Tex - Singletary v Heathman Civ App, 300 SW 212, affirmed, Heathman v Singletary, Com App, 12 SW 2d 150
Va—State Highway Commission v Williams, 121 SE 55, 138 Va 217—Baker v Evers, 120 SE 278, 137 Va 492

Change to eliminate grade crossings held proper

Ill—Department of Public Works and Buildings v Legg, 29 NE 2d 515, 374 Ill 306

Prior abandonment of route held immaterial

In a suit to compel highway authorities to locate a road over a highway other than that selected by them, the fact that the route selected had been chosen for a road under another statute but had been abandoned, is immaterial—Wiley v Department of Public Works and Buildings, 161 NE 783, 330 Ill 312

Filing of map held not final location State Highway Commission v Williams, 121 SE 55, 138 Va 217

27. Tex - Quisenberry v Mitchell, 292 SW 160, 116 Tex 378

28 Miss—Wilkinson County v State Highway Commission, 4 So 2d 298, 191 Miss 750—Trahin v State Highway Commission, 151 So 178, 169 Miss 732
Wash—State ex rel Coyle v Superior Court in and for Walla Walla County, 223 P 3, 128 Wash 460

Departure of several miles

The state highway commission has power to relocate line of state highway between points designated by legislature and, in eliminating curves, shortening distances, and otherwise finding better location may establish new line departing from old one as much as eight to twelve miles for any good reason in interest of through traffic—Wilkinson County v State Highway Commission 4 So 2d 298, 191 Miss 750

29. Ark—Bonds v Wilson, 284 SW 24, 171 Ark 328

30 Mo—Logan v Matthews, 52 SW 2d 989, 330 Mo 1213

Deviation from towns through which it was specified by statute that a highway should run may be permitted—Logan v Matthews, supra

31. SC—Eargle v Richland County Permanent Roads Commission, 116 SE 145, 123 SC 368

32. Ariz—State ex rel Sullivan v Carrow, 114 P 2d 896, 57 Ariz 131

33. Tex—Cunningham v Koons, Civ App 31 SW 2d 761

34. Tex—Elliott v Ely, Civ App, 58 SW 2d 839, error refused

35 Tex—Elliott v Ely, supra

36. Ariz—State ex rel Sullivan v Carrow 114 P 2d 896, 57 Ariz 131
Okl - Board of Com'rs of Canadian County v State Highway Commission, 55 P 2d 106, 176 Okl 207

37. Ariz—State ex rel Sullivan v. Carrow, 114 P 2d 896, 57 Ariz 434.

38. Ariz—State ex rel Sullivan v. Carrow, supra.

tion of the route or highway whether such agreement was made by them[39] or by any state officer.[40]

Procedure In the absence of statutory restriction, the same proceeding may be one for an alteration of a highway under one section of the statute and for a change in the system of highways under another section[41] In the absence of statutory authority, the county court in acting on a petition by the state highway commission for changes in the location of the highway has no authority to make changes in the project but may only grant or deny the petition[42] Notice of a hearing as to a proposed change in the highway system is not necessary unless required by statute[43] Where notice of a hearing for location of the route has been given, it is not necessary, in the absence of statute, to give notice to the same people of a second hearing for a change of the route[44] The failure to file a definite description of the highway and a map thereof on relocation, as provided for by statute, cannot be complained of by a taxpayer[45] On collateral attack on the order of the county authorities for a change in the location of a state highway, it will be presumed that the state engineer was authorized to sign the petition for the state highway department[46]

Operation and effect Where a plan for relocating a state highway is approved as required by law, the road as relocated becomes the state highway in place of the old road[47] According to some authorities the selection of a new route by the state highway commission for a new road constitutes an abandonment of the old road.[48] However, according to other authorities, while abandonment of the old highway is usually an incident of a relocation,[49] the relocation of a state highway is not necessarily an abandonment of the old[50] So the fact that the old highway is no longer kept up by the state highway authorities after the construction of a new relocated highway does not establish abandonment or negative the presumption of the continuance of the old highway under county maintenance or under private maintenance with approval of the county[51] Although the relocation of a portion of a state highway is several miles long, it may, in view of the length of the entire highway, be regarded not as the laying out of a new highway but as a change in an existing one[52]

(4) Abandonment or Discontinuance

(a) In general

(b) Operation and effect

(a) In General

The state highway authorities may, when authorized by law, abandon or discontinue a state highway, and their discretion ordinarily will not be reviewed, but the statutory procedure must be adhered to

The general rule is that a state highway can be abandoned only by the authority which created it[53] A power granted to state highway officers to establish highways does not include the power to vacate them,[54] and a power to change or alter has been held not to include the power to abandon entirely[55] The state highway commission may abandon any part of the existing highway where such power is expressly conferred by statute[56] A statute authorizing the state highway department to resurvey and

39 Okl—Board of Com'rs of Canadian County v State Highway Commission, 55 P 2d 106, 176 Okl 207

Tenn—Lilles v Creveling, 268 S W 625, 151 Tenn 61

Tex—Nunn v Bean, 48 S W 2d 581, 121 Tex 355

Agreement with county commissioners

The state highway commission is not bound by an agreement with the county commissioners not to change the location—Board of Com'rs of Canadian County v State Highway Commission, 55 P 2d 106, 176 Okl 207

40 Ariz—State ex rel Sullivan v Carrow, 114 P 2d 896, 57 Ariz 434

41 Wis—Bosshard v Hotchkiss, 207 N W 695, 190 Wis 29

42 Ark—Highway Commission v Saline County, 171 S W 2d 60

43 Wis—Agnew v Hotchkiss, 206 N W 849, 189 Wis 1.

44 Ill—Stratton v Henkel Const Co, 151 N E 546, 320 Ill 526

45 Wis—Bosshard v Hotchkiss, 207 N W 695, 190 Wis 29

46 Ark—Crawford County v Simmons, 1 S W 2d 561, 175 Ark 1051

47 Pa—In re Northern Pipe Line Co, 1 A 2d 526, 132 Pa Super 406

48 La—Gill v Louisiana Highway Commission, App, 153 So 329

49 Wis—Bosshard v Hotchkiss, 207 N W 695, 696, 190 Wis 29

50 Wis—Bosshard v Hotchkiss, supra

Avoidance of right-angle turn

The text rule "is evidenced by the frequent conditions we have where a right-angle turn at a crossroad is avoided by a gentle curve from one road to the other Usually the old highway to the crossroad is kept in use to permit those who wish to depart from the state highway at such point to do so"—Bosshard v. Hotchkiss, supra

51 NC—Long v Melton, 10 S E 2d 699, 218 N C 94

52 Wis—Bosshard v Hotchkiss, 207 N W 695, 190 Wis 29

53 Ariz—Apache County v. Udall, 1 P 2d 340, 38 Ariz 188

54 Mont—State v Hoblitt, 288 P. 181, 87 Mont 403

55 N C—Town of Newton v State Highway Commission, 138 S E 601, 194 N C 159 petition dismissed 139 S E 613, 194 N C 303

Court may determine commission's right to abandon highway, adopted as part of state system, without thereby locating or selecting road—Town of Newton v. State Highway Commission, supra

56 Ariz—Rowland v McBride, 281 P 207, 35 Ariz 511

Substitution of routes

Under the power given it by statute, the state highway commission had authority to abandon one county road as a state-aided route and select

relocate in their entirety any roads taken over by it as state-aid roads, keeping in view only the control points, permits the highway commission to construct an entirely new state-aid road[57] However, the power merely to relocate does not include the power of establishing a new road and of entirely abandoning an existing road,[58] but implies preservation of the identity of the way without material change[59] Where there is, however, no material change in the general direction and location of the designated road other than such as is dictated by the public interest, in establishing a road for use in the state highway system the judgment of the state highway commission will not be interfered with.[60] Under a power to abandon or change any part of, or to add to, the state highways constituting the state highway system, the commission may abandon or change any part whether or not the abandoned portion has actually been constructed[61]

A contract of the highway commission to reconvey unconditionally the right of way on vacation of a highway to be located requires a conveyance free from any burden or encumbrance making the conveyance conditional and not absolute[62]

In the absence of statute notice to the state is not required in proceedings to vacate a state highway[63]

Judicial control. In general the statutory power of a state highway body to discontinue a highway is not subject to judicial control except where its exercise is capricious, arbitrary, or fraudulent[64] The exercise of the power to abandon a state highway and establish another in lieu thereof is administrative rather than essentially legislative[65] Under statutes empowering state highway commissions to discontinue roads provided no roads shall be discontinued so as to disconnect "principal towns" and highway systems of other states, the decision as to what is a "principal town" is a mixed question of law and fact not to be determined by the mere fact that the name of the town appears on certain maps[66]

As between state and local authorities. When a state highway commission establishes a highway as a "state route," there can be no abandonment thereof as a county highway, even though the road remains such for all other purposes until declared a "state highway,"[67] and when a state highway department has induced a county to expend money jointly with it for the construction of a road, there can be no abandonment on the part of the state of its responsibility for the continued upkeep of the highway[68] Where the legislature has enacted a statute governing relocation of so-called "state-aid roads," and the consequent closing or abandonment of the old right of way, and has placed such matters in the hands of the state highway department and not with county officials, prior statutes regulating the discontinuance of the old roads by county officials and prescribing the procedure therefor are inapplicable to the discontinuance of a state-aid road[69]

(b) Operation and Effect

A state highway, or a portion thereof, which has been abandoned by the state highway authorities, and which has not been thereafter maintained as a public road by the local authorities, ceases to exist as a highway for the general public as against the owners in fee of the land, although abutting owners ordinarily may not be deprived of access to their property.

After a state road or a part thereof has been abandoned by the state highway authorities, it passes, it has been held, into the hands of the local authorities[70] Under some statutes, portions of the

another in the same county between the same two termini—State Highway Dept of Georgia v. Marks, 145 S E 866, 167 Ga 397

57. Ga—State Highway Department of Georgia v Richmond County, 177 S E 501, 179 Ga 642—Ward v State Highway Board, 157 S E 328, 172 Ga 414

58. Ga—Marks v State Highway Department, 146 S E 838, 167 Ga 792

59. Ga—Marks v State Highway Department, supra

60. Ga—Raines v Terrell County, 151 S E 509, 169 Ga 725—Murph v Macon County, 146 S E. 845, 167 Ga 859

61. Ariz—Rowland v McBride, 281 P 207, 35 Ariz 511

62. Kan—Kucera v. State Highway Commission, 64 P 2d 66, 145 Kan 121

63 Pa—In re Vacation of State Highway Roads, 24 Pa Dist 530

Notice to state or its commissioner as not requisite

Municipality's vacating state road within city limits without notice to state or to state highway commissioner was valid, since no statute required such notice—Rogers v City of Jackson, 231 N W 621, 251 Mich 256

64. W Va—White v McCroskey, 8 S E 2d 827, 122 W Va 261—Heavner v State Road Commission, 191 S E 574, 118 W Va 630.

65. Md—Huffman v State Roads Commission of Maryland, 137 A 358, 152 Md 566

66. N C—Cameron v State Highway Commission, 123 S E 465, 188 N C 84

67. Ariz—Board of Sup'rs of Apache County v Udall, 1 P 2d 343, 38 Ariz 497

68. Idaho—Murtaugh Highway Dist v Merritt, 85 P 2d 685, 59 Idaho 603

69. Ga—Calfee v Jones, 188 S E 307, 54 Ga App 481

70. Ga—Calfee v Jones, 188 S E 307, 54 Ga App 481

S C—Sloan v State Highway Department, 148 S E 183, 150 S C 337

Board of county supervisors are not prohibited from retaking public road abandoned as a state highway—Trahan v State Highway Commission, 151 So 178, 169 **Miss. 732.**

state road system which have been abandoned by the state highway authorities, but which remain open and in general use by the public, constitute neighborhood public roads,[71] while under other statutes a road formerly maintained by the county reverts to the county on abandonment by the state, and final abandonment lies wholly with the county authorities and must be accomplished in the manner provided for by statute.[72] Where the road has been abandoned by the state and is not maintained by the local authorities, it ceases to exist as a highway for the use of the general public as against the owners in fee of the land it traversed.[73] On abandonment of the original road on relocation of the state highway, it reverts to the jurisdiction of the county.[74]

Effect on abutting owners. The designation of a road as a state highway does not confer on abutting owners any special property right which will allow them to prevent the highway commission from designating another road as such state highway route, notwithstanding it would result in a diversion of traffic.[75] Where a part of a state highway is abandoned on relocation by the state highway authorities, the abandoned part of the old road may not be closed without the consent of persons whose property fronts thereon or over whose lands it passes,[76] abutting owners have a right of egress and ingress from and to their property of which they may not be deprived by the owners in fee of the land over which the highway traversed, at least where there has been continuous use of the road for the period of prescription.[77]

The doctrine that, where abutting owners have purchased with reference to a map showing the streets, the municipality cannot close such streets to the use of the abutting owners has been held not applicable to alterations or changes in public roads forming a part of the state highway system.[78]

§ 180. —— Materials for Construction or Repair

a. In general
b Taking material from abutters

a. In General

Within the limits of pertinent statutory provisions, highway authorities have discretion as to the materials to be used in constructing or repairing highways; and the

On location of permanent trunk highway by highway commission, practicable road along general location is not vacated, but reverts to control of county or town board—State v Lambert, 214 N W 653, 171 Minn 369

71. N C—Mosteller v Southern Ry Co, 17 S E 2d 133, 220 N C 275

Statute as conferring private easement

Purpose of statute declaring that all highways abandoned by state highway commission, but which remain open and in general use by the public are to be neighborhood public roads, is not to give any private easement in the further use of an abandoned road, but only to continue the status as a public road—Mosteller v Southern Ry Co, supra

72. Okl—Hillsdale Co v Zorn, 100 P 2d 436, 187 Okl 38

Purpose of State Highway Act was not to deprive county of any of its powers with reference to roads—Hillsdale Co v Zorn, supra

73. N C—Cohoon v Roughton, 1 S E 2d 362, 215 N C 116

Persons who do not live on road or use the same as a method of ingress and egress to and from their homes may not claim the continued use of the road as against a property owner whose land the road had crossed—Cohoon v Roughton, supra

Where public does not own fee in a road abandoned both by the state and county highway officials, the rights of the public to the continued use of the road are determinable by the statutes and general law relating to dedication and easement—Calfee v Jones, 188 S E 307, 54 Ga App 481

74. Minn—Trahan v State Highway Commission, 151 So 178, 169 Minn 732

Miss—Wilkinson County v State Highway Commission, 4 So 2d 298, 191 Miss 750

75. Tex—Elliott v Ely, Civ App, 58 S W 2d 839, error refused

76. N C—Davis v Alexander, 162 S E 372, 202 N C 130

S C—Sloan v State Highway Department, 148 S E 183, 150 S C 337

Right of abutting owners generally see supra § 141

77. N C—Davis v Alexander, 162 S E 372, 202 N C 130

Compensation for destruction of access on abandonment of highway see Eminent Domain § 126 c

State Highway Road Act was never intended to deprive owners on the old road of ingress and egress to and from the new improved road when necessary deviations were made—Davis v Alexander, 162 S E 372, 202 N C 130

Extent of right

(1) The right of an abutting owner as against the owners of the fee over which the highway crossed is confined to the exigency of egress and ingress, and such persons are not entitled to have the whole road throughout its length left to them in its original unimpaired condition, on the basis of mere inconvenience in reaching objectives formerly more accessible, at least where the highway has not been used by the abutting owner for the prescriptive period—Mosteller v Southern Ry Co, 17 S E 2d 133, 136, 220 N C 275

(2) "Ancient doctrines pertaining to roads of the horse and buggy days, when those roads were for the most part trails through the woods and fields, must be applied to modern conditions with caution and sound discretion. Once, 'ingress and egress' were practically all such a road afforded, and there is logic in the thought that it is all of such a doctrine which should survive."—Mosteller v Southern Ry Co, supra

(3) After an abutting owner has used the highway for the period of prescription, he has been held to be entitled, as against the owner in fee of the land beneath such road, to have the entire width of the old road kept open for the purpose of providing a reasonable means of ingress and egress to and from his property, even though a less satisfactory and less valuable means of ingress and egress would remain if the contested portion of the old road were closed—Long v Melton, 10 S E 2d 699, 218 N C 94

78. N C—Mosteller v Southern Ry Co, 17 S E 2d 133, 220 N C. 275

petition for road improvement may also limit their discretion

In the absence of any statutory limitation or restriction, it is for the highway authorities to decide what materials are to be used in the construction or repair of highways[79] Under certain statutes, prescribing in some respects and to some extent the materials to be used, the officers have some latitude in the selection of the type of road to be built in any particular locality and the material to be used in its construction,[80] provided such officers act in good faith,[81] and do not pay excessive or unreasonable prices[82]

If the petition for a road improvement does not specify the character of the material that shall be used, the highway authorities have a discretion in the matter,[83] but if it specifies the character of materials to be used it is valid and binding on the authorities, and their discretion in that regard is limited,[84] and, where bonds are voted for road improvement on the representation and theory that a particular material would be used, such material should be used[85]

b. Taking Material from Abutters

Where a statute permits, but not otherwise, highway officers may take from abutters materials for construction or repair, for due compensation

In the absence of statute, highway officers have no authority to take from abutters materials for construction or repair,[86] but under some statutes they are authorized to do so, due compensation being provided.[87] The officer is the sole judge of the necessity of the taking,[88] and as long as he does not willfully annoy the owners of property a court of equity will not restrain him,[89] and an indictment may lie for obstructing him[90] However, the officer cannot pass over cultivated or improved land for this purpose,[91] nor can an overseer take for public use timber prepared for the owner's own use[92]

§ 181. —— Removal of Fences, Buildings, and Other Property

Road officers laying out, altering, or improving a road must conform to statutory requirements as to notice to landowners or occupants to remove fences, buildings, or other property, and the allowance of reasonable time to do so

Under some statutes, road officers are required to give a reasonable time, on laying out, altering, or improving a road, for the removal of timber, fences,

79. Ala Henry v Rogers, 97 So 127, 19 Ala App 376
Okl—Eckerle v Ferris, 51 P 2d 766, 175 Okl 107
S C—McDonald v State Highway Department, 164 S E 920, 166 S C 115
29 C J p 587 note 33

Surfacing of county road with gravel is not required of county—Board of County Com'rs of Neosho County v Burdick, 211 P 866, 120 Kan 698

Repairs not limited to original materials

Statute was held not to limit road repair districts to use of materials of which road was originally built, since "to repair the roads . . . means to . . . make them over with such material for resurfacing as experience and advance in the science of road building teach will be the best and the most economical in the long run"—Cowan v Thompson 9 S W 2d 790 792 178 Ark 44

Designation to be made by state highway commission, not board of county commissioners—State v Board of Com'rs of Johnson County, 292 P 921, 131 Kan 107

80 Ind—Cole v Board of Com'rs of Noble County, 138 N E 859, 82 Ind App 640, rehearing denied 140 N E 448, 82 Ind App 640
29 C J p 587 notes 31, 35

"Hard surface"

Where county votes bonds for hard-surface roads without designating material, county commissioners may choose material as long as improvement comes within "statutory designation of what shall be considered hard surface"—Allen v Board of Com'rs of Logan County, 267 P 860, 863 131 Okl 11

"Paved roads"

Roads covered with sand clay or any material making a firm hard smooth surface over which horses carriages, automobiles, and other vehicles may pass are "paved roads" within Const art 3 § 52 and Vernon's Sayles Civ St Annot 1914 art 619 authorizing the construction only of macadamized or paved roads and turnpikes—Gibson v Davis Tex Civ App, 236 S W 202

Use of patented articles and materials permitted

Ill—Penniman v Bennett, 221 Ill App 53

81. Pa—Le Moyne v Washington County, 62 A 516, 213 Pa 123

82. Ind Strange v Grant County, 91 N E 242 173 Ind 640
Pa—Le Moyne v Washington County 62 A 516, 213 Pa 123

83. Ill Marteeny v Louth, 197 Ill App 106

Petition for bonds, duty of county court

Where petition praying for the issuance of bonds for construction of a permanent highway over a designated course was filed, and the county court concurred in the proposition issued notice of election to determine whether the county court should issue bonds to provide for permanent road construction and the electors voted the bonds the duty of selecting the type of road was a responsibility devolving on the county court—Trippeer v Couch, 220 P 1012 110 Or 446

84. Ark Rayder v Warrick, 202 S W 831 133 Ark 491
29 C J p 588 note 40

85. Okl—Simpkins v Curtiss 243 P 188 116 Okl 101

Use of asphaltum as a binder held not a departure from representation as to use of gravel in view of highway commission's specifications for "gravel roads"—Simpkins v Curtiss, supra

86 N Y Durvea v Smith, 16 N Y. S 688
29 C J p 588 note 52
Right to soil and materials on highway see supra § 138

87 Mass—Hatch v Hawkes, 126 Mass 177
29 C J p 588 note 46

88. Or—Kendall v Post, 8 Or 141.

89 Or—Kendall v Post, supra

90 S C—State v Huffman, 31 S C L. 617

91. Me—Wellman v Dickey, 2 A. 133 78 Me 29
29 C J p 588 note 50

92. Wis—Goodman v. Bradley, 2 Wis 257.

buildings, or other property,[93] after notice to the landowner or occupant,[94] which notice, under some statutes, must not specify a period which will expire in the winter months.[95] If the owners neglect to remove the property within the time specified it is the duty of the officer to do so,[96] but in removing without notice,[97] or before the expiration of the time allowed,[98] the officer is a trespasser, and injunction will lie to prevent an improper removal.[99] Failure to give the notice does not, however, affect the validity of the layout.[1]

County commissioners have no authority to allow a portion of a building to remain.[2]

It has been held to be within the province of a state highway commission to determine whether or not the present or prospective traffic at an intersection is such as to require the removal of obstructions to view.[3]

A contract whereby a county widening a highway agreed to reimburse a company furnishing electricity for expenses incurred in removing a transmission line was held not to entitle the company to recover the cost of purchasing a new right of way and installing its facilities thereon, or for such items as depreciation.[4]

§ 182. —— Guideposts

A statutory requirement of the erection of guideposts or of guideboards must be obeyed.

Statutory requirement of the erection of guideposts[5] or of guideboards[6] must be obeyed.

§ 183. Existence and Character of Road

The duty to improve and repair public roads extends only to those legally in existence and not to roads which have never been opened or which have been abandoned; and such duty frequently depends on the class or character of the particular road in question.

Matters concerning the construction, improvement, and repair of roads frequently are affected by the character of the road,[7] and hence in considering such matters the courts have often had occasion to define a class of roads or to determine the character of particular roads as falling within the terms of particular constitutional or statutory provisions.[8]

93 Mass.—White v. Foxborough, 23 N.E. 652, 151 Mass. 28.—Murray v. Norfolk County, 21 N.E. 757, 149 Mass. 328.
29 C.J. p. 588 note 53.

94 Wis.—Morris v. Edwards, 112 N.W. 248, 132 Wis. 91.
29 C.J. p. 588 note 54.

City water pipes.
Persons grading public roads may not tear up and destroy city water pipes laid thereunder without giving reasonable notice and opportunity to change pipes. City of Chadron v. State, 214 N.W. 297, 115 Neb. 650, rehearing denied 215 N.W. 137, 115 Neb. 650.

95 Ind.—Conley v. Grove, 24 N.E. 731, 124 Ind. 208.
Wis.—Kellar v. Earl, 74 N.W. 364, 98 Wis. 488.

96 Wis.—Brock v. Hishen, 40 Wis. 674.
29 C.J. p. 588 note 56.

97. Ill.—Taylor v. Marcy, 25 Ill. 518.

98. Kan.—Hartman v. Baldwin, 176 P. 115, 103 Kan. 764.
Mass.—Loker v. Damon, 17 Pick. 284.

99. Ind.—Conley v. Grove, 24 N.E. 731, 124 Ind. 208.

1. Vt.—Robinson v. Winch, 28 A. 884, 66 Vt. 110.

2. Me.—Mann v. Marston, 12 Me. 32.
Mass.—Colburn v. Kittridge, 131 Mass. 470.

3. N.J.—Toscano v. State Highway Commission, 154 A. 601, 9 N.J. Misc. 479.

4. Tex.—Willacy County v. Central Power & Light Co., Civ.App., 73 S.W.2d 1060, error dismissed.

Expenditures held not sufficiently alleged and proved by purported itemized statement.—Willacy County v. Central Power & Light Co., supra.

5. Me.—State v. Swanville, 61 A. 83, 100 Me. 402.
29 C.J. p. 588 note 62.

6. Mass.—Sharon v. Smith, 62 N.E. 981, 180 Mass. 539.

7. **Road constructed under reimbursement plan.**
The provision in the South Carolina Pay-As-You-Go act that no county shall have two hard-surfaced cross-county roads until every other county in the state has one, is not applicable to roads constructed under the reimbursement plan.—Briggs v. Greenville County, 135 S.E. 153, 137 S.C. 288.

8. **Belt lines.**
Under a statute authorizing the state highway commission to construct belt lines, the term "belt line" will be construed so as to give effect to the legislative intent, and a section of road divided into two segments has been considered to constitute two belt lines and hence not to violate a restriction on the length of belt lines, notwithstanding the combined length of the two segments exceeded the length allowed for one belt line.—Summer v. State Highway Commission of South Carolina, 141 S.E. 366, 143 S.C. 196.

"Connecting" routes.
Within the meaning of a constitutional provision authorizing the legislature to add to the trunk highway system additional routes connecting newly constituted county seats and other points in the state, "connecting" means directly connecting, and the additional highway must be a link in the chain by which county seats are united and must begin or end at, or pass through, the new county seat.—State v. Babcock, 200 N.W. 843, 161 Minn. 80.

Public highway.
A strip of land or right of way described with such certainty as to facilitate a ready identification thereof, granted to and accepted by a county for county road purposes, has been held to constitute a public highway, within the meaning of a statute permitting a county to grant the use of its highways to an adjoining county for certain construction purposes.—Watson v. Greely, 232 P. 476, 69 Cal.App. 643.

Traffic relief road connecting two highways has been held to be a supplementary highway, within the meaning of a constitutional provision authorizing the state highway commission to construct supplementary highways.—State ex rel. and to Use of Chicago Great Western R. Co. v. Public Service Commission of Missouri, 51 S.W.2d 73, 330 Mo. 729, certiorari denied Chicago Great Western R. Co. v. Public Service Commission of State of Missouri, 53 S.Ct. 89, 287 U.S. 641, 77 L.Ed. 555.

Trunk-line highway.
Within the meaning of statutes pertaining to the construction of

The duty to improve, maintain, and repair extends to such roads, and only such, as have a legal existence as public highways,[9] by virtue of statute or statutory proceedings and formal opening,[10] dedication,[11] and acceptance,[12] or prescription,[13] or by alterations of old roads.[14] The fact that a statute speaks of the improvement of roads and the designation of roads to be improved does not confine it to established roads where a contrary intent is plain from its various provisions.[15]

The authority and duty of the state or its agencies to improve and maintain roads does not extend to a road which constitutes a mere private right of way,[16] although a byway or private way adopted for temporary use while a highway is out of repair becomes a highway for the time being, and the town is liable for injuries occasioned by failure to make it reasonably safe.[17] A landowner cannot by his act alone create a public highway so as to charge the public with responsibility for its care and maintenance, without the consent of the government acting through some authorized agency.[18]

As a general rule, the authorities are bound to keep in repair only that portion of a highway in actual use,[19] and not a highway or portion thereof which has been vacated[20] or abandoned,[21] or not completed,[22] or which has not been in use for the period required by statute.[23] The duty relates to every portion of the highway actually used for public travel,[24] although the road was laid out for the accommodation of an individual and is subject to gates and bars,[25] and although title to some of the highway is not actually in the town.[26]

Stock passageway The duty to maintain a cattle or stock passageway across a highway may rest on local authorities by virtue of contract made between them and a landowner.[27]

§ 184. —— Roads in Different Jurisdictions

In the absence of statutory provision or special arrangement, where a road extends into different jurisdictions each jurisdiction has the burden of maintaining and repairing that portion lying within its own territorial limits.

Where the center of the road forms the line between two subdivisions of the state and no crosswise division has been made, each must repair the portion on its side of the line,[28] but if, pursuant to statutory provision, a crosswise division has been made, each must repair the part of the road assigned to it.[29]

trunk-line highways, a trunk-line highway continues to be such regardless of legislative restrictions as to the kind of vehicle which shall use it, where no specifications as to the type of layout or method of construction of such a road are prescribed in the statutes—Stock v. Cox, 6 A 2d 346, 125 Conn 405.

Unimproved roads

The fact that the surface of a paved road is in need of reconstruction does not make the road an unimproved road, within the meaning of statutes pertaining to the construction and repair of unimproved roads—Paterson, N & N Y R Co v Town of Belleville, 197 A 902, 120 N J Law 1.

9. Ariz—Graham County v Dowell, 71 P 2d 1019, 50 Ariz 221
Kan—Sandburg v Board of Com'rs of Wyandotte County, 245 P 1029, 121 Kan 26
Pa—Greiner v Commonwealth, 6 A 2d 67, 334 Pa 299
Wyo—George W Condon Co v Board of Com'rs of Natrona County, 103 P 2d 401, 407, 56 Wyo 38, citing **Corpus Juris.**

Implied establishment not shown

The construction of a road under an invalid agreement is not sufficient to show an implied establishment of a county road so as to permit the county to authorize work thereon—George W Condon Co v Board of Com'rs of Natrona County, 103 P 2d 401, 56 Wyo 38.

10. Pa—Greiner v Commonwealth, 6 A 2d 67, 334 Pa 299—In re Urbanski, 194 A 210, 128 Pa Super 293
29 C J p 589 note 64

11. Ala—Webb v Story, 64 So 153, 184 Ala 583
Mich—Williams v Petoskey, 66 N W 55, 108 Mich 260

12. Md—United Finance Corporation v Royal Realty Corporation, 191 A 81, 172 Md 138
29 C J p 589 note 66

13. Pa—Felt v West Homestead Borough, 103 A 508, 260 Pa. 11
29 C J p 589 note 67

14. S C—Hill v Laurens County, 13 S E 318, 34 S C 141
29 C J p 589 note 68

15. Kan—State v Board of Com'rs of Johnson County, 260 P 985, 124 Kan 511

16. Ariz—Graham County v Dowell, 71 P 2d 1019, 50 Ariz 221
N Y—Oak Hill Country Club v Town of Pittsford, 252 N Y S 101, 140 Misc 863, affirmed 266 N Y S 995, 240 App Div 802, reversed on other grounds 190 N E 321, 264 N Y 133, reargument denied 191 N E 620, 264 N Y 672
Pa—Greiner v Commonwealth, 6 A 2d 67, 334 Pa. 299

17. Vt—Dickinson v. Rockingham, 45 Vt 99
29 C J p 589 note 77.

18. Md—United Finance Corporation v Royal Realty Corporation, 191 A 81, 172 Md 138

19. Wash—Neel v King County, 102 P 396, 53 Wash 490
29 C J p 589 note 72.

20 Mass—Tinker v. Russell, 14 Pick 279

21. N H—State v. Alstead, 18 N H 59
N J—Zimmermann v Township Committees of Bergen & Boiling Springs, 30 A 180, 57 N J Law 68

22. Me—Lowell v Moscow, 12 Me 300

23. Mich—McKellet v Monitor Tp, 41 N W 412, 78 Mich 485
29 C J p 589 note 76

24. Conn—Paulsen v Wilton, 61 A 61, 78 Conn 58

25 N H—Proctor v Andover, 42 N H 348

26. Conn—Paulsen v. Wilton, 61 A 61, 78 Conn 58

27. Ill—Livingston v. Gardner, 220 Ill App 35

Construction of contract

In construing such a contract, consideration may be given to the contemporaneous construction given to the contract by the parties—Livingston v Gardner, supra

28. Ind—Rodenbarger v. State, 76 N E 398, 165 Ind 685
29 C J p 589 note 78

29. Me—State v. Thomaston, 74 Me 198
29 C J p 590 note 79.

In the absence of constitutional prohibition the legislature may authorize two or more political subdivisions of the state, contiguously situated to each other, to jointly build and maintain highways through their respective territories,[30] or may authorize one subdivision, when public convenience so demands, to extend at its own expense any of its own roads over limited portions of an adjoining subdivision,[31] but unless a special arrangement has been made, a road officer cannot extend improvements into adjacent road districts,[32] and if he does so any improvements he may make are under the control of the supervisor of the district into which they have been so extended.[33] The burden of constructing and maintaining a highway may be imposed on a territorial subdivision of the state benefited thereby, notwithstanding the highway is located outside the limits of such subdivision.[34]

In the case of a highway which passes through a municipal corporation, the part of the highway lying outside the city limits is to be improved or repaired, under some statutes, by the county, township, or district in which such part lies.[35] The power or duty to control, construct, improve, or repair the part within the municipal corporation is considered in the C J S title Municipal Corporations §§ 1042, 1044, also 44 C J. p 160 note 62–p 161 note 71, p 164 notes 28–34

§ 185 Drainage

Questions with respect to the drainage of highways are discussed in detail infra §§ 186–190.

Examine Pocket Parts for later cases.

§ 186. —— Power and Duty

a. General considerations
b Scope of power and duty as to surface water and drainage over abutting or adjacent land in general
c. Power, duty, and liability of state and state highway authorities
d. Landowner's right to drain into highway and to obstruct or interfere with drainage
e Nature, measure, and amount of damages
f. Actions

a. General Considerations

Highway authorities may make proper provision for the drainage of highways, the liability of a political subdivision for acts or omissions affecting such drainage depends largely on specific statutory provision or on the nature of its interest in, or its duty with respect to, highways.

The proper authorities have power to provide for the drainage of surface water from highways,[36] and to build ditches and culverts,[37] such power being in-

30. Ark —Tarvin v Perry County Road Impr Dist No 1, 209 S W 81, 137 Ark 354
Cal —Watson v Greely, 227 P 664, 67 Cal App 328
29 C J p 590 note 89
Agreements between political subdivisions see supra § 177

31. Cal —Watson v Greely, 227 P 664, 67 Cal App 328

32. Ohio —Grove v Mikesell, 13 Ohio St 158

33. Ohio —Grove v Mikesell, supra.

34 Mont —State ex rel Siegfried v Carbon County, 92 P 2d 301, 108 Mont 510, 123 A L R 1456

35. N J —McNeal Pipe & Foundry Co v Lippincott, 31 A 399, 57 N J Law 540
29 C J p 590 note 84

Plans construed

Plans on which the line of a road was marked as extending into a city for a short distance have been held not to call for the improvement of a city street, where only the portion of the road outside the city was colored on the plat to indicate the part of the road to be improved — Mack v Paragould & Hopkins Bridge Road Imp Dist No 1, 271 S W 958, 168 Ark 867

36 Cal.—Genazzi v Marin County, 263 P. 825, 88 Cal.App 545.
Iowa —Harman v Drew, 249 N W 277, 216 Iowa 315—Schwartz v Wapello County, 227 N W. 91, 208 Iowa 1229
29 C J p 590 note 90

In Louisiana statutory powers of police juries with respect to administration of public roads within their jurisdiction include matters concerning natural drainage —Louisiana Irrigation & Mill Co v Sixth Ward Drainage Dist, 104 So 623, 158 La 701

Liability for expense of repair of drainage facilities

In view of L 1929 c 225 § 19, Rev St § 68–419, providing that the state highway commission shall assume the rights and liabilities of the various counties on all existing contracts for the construction, improvement, or maintenance of state highways, a county was not liable to a drainage district for moneys expended by the latter in repairing a floodgate connected with a drain in a levee of the drainage district, which drain and floodgate had been installed by the county for the purpose of draining a highway, pursuant to a contract between the county and the drainage district which imposed on the county the obligation of maintaining the drain and floodgate and of keeping them in repair, where the highway in question had become a state highway —Verdigris River Drainage Dist No 1 v City of Coffeyville, 97 P 2d 105, 150 Kan 765—Verdigris River Drainage Dist No 1 v City of Coffeyville, 86 P 2d 592, 149 Kan 191

Scope and extent of power to dispose of surface water in general see infra subdivision b of this section

37. Cal —Genazzi v Marin County, 263 P 825, 88 Cal App 545
Iowa —Herman v Drew, 249 N W 277, 216 Iowa 315—Schwartz v. Wapello County, 227 N W 91, 208 Iowa 1229
Neb —Lindberg v Challburg, 194 N. W 733, 110 Neb 626.
N Y —Abkarian v Niagara County, 289 N Y S 968, 159 Misc 895
Pa —De Nobile v Wilkins Tp, 74 Pa Super 389
29 C J p 590 note 91

In Texas, in view of Const art 5 § 18 giving commissioners' court the right to exercise powers and jurisdiction over all county business, and Rev St 1925 art 235, subd 6 giving commissioners' court power to exercise general control over all roads and highways, construction of drainage ditch to divert flood waters and so protect roads in county was within power and jurisdiction of commis-

cident to the power to lay out, build, and repair highways.[38]

Authority to provide for the drainage of highways involves in general the exercise of a large discretion,[39] and, therefore, as a general rule no action lies merely because of the adoption of a particular system within that authority,[40] or because of a mere error of judgment.[41] This discretion cannot be controlled by a court[42] except in case of fraud or bad faith[43] or the invasion of some private right of a citizen.[44]

In some jurisdictions, in the absence of constitutional or statutory provision imposing liability, a county is not liable for damages for injuries resulting from its negligence,[45] or from the negligence of its officers or agents,[46] with respect to the construction or maintenance of drainage facilities for a highway, the reason usually given being that, in constructing or maintaining a highway, a county exercises governmental functions or functions of a sovereign delegated by the state, or performs acts as an agency of the state, with respect to which it is not liable in the absence of constitutional or statutory provision imposing liability.[47] In some jurisdictions, in the absence of statute imposing liability, a town is not liable for failure to maintain in proper condition drainage facilities connected with a highway where no power is conferred, or duty imposed, on it to construct or maintain such facilities,[48] and it is not liable for injuries resulting from acts or omissions of a highway officer who is not an agent of the town.[49]

sioners' court.—El Paso County v Elam Tex Civ App 106 S W 2d 39.

Employment of county surveyor

In view of Rev Codes 1921 county commissioners were not required to employ county surveyor to make surveys and establish grades required in construction of drainage ditch for the protection of public highways.—Durland v Prickett, 89 P 2d 652, 98 Mont 399.

Construction

And maintenance of bridges and culverts by drainage authorities as to public drains intersecting highway see Drains § 44 b.

Of public drain under or across highway see Drains § 40.

38. Cal.—Genazzi v Marin County, 263 P 825, 88 Cal App 545.
29 C J p 591 note 92.

"Maintain and repair"

Under a statute authorizing the commissioners of a road district to maintain and repair the roads constructed under their supervision, shaping up ditches and putting in culverts and proper drainage are not beyond the scope of authority to "maintain and repair".—Higginbotham v Road Improvement Dist No 3 of Lonoke County, 241 S W 866, 151 Ark 112.

39. Pa.—De Noble v Wilkins Tp, 74 Pa Super 389.
29 C J p 591 notes 93, 94.

40. Kan.—Marts v Freeman, 136 P 913, 91 Kan 106.
Mich.—Dean v Millard, 115 N W 739, 151 Mich 582.
29 C J p 591 note 94.

Flood waters

Where a county constructed a levee on a public highway which merely obstructed the flow of overflow flood waters and returned them to a channel of a stream earlier than they would have been returned if not diverted, which caused a greater overflow on property not contiguous to the highway, the county was not liable for damages therefor.—Herring v Lee County, 93 So 136, 130 Miss. 1.

41. Kan.—Dennis v Osborn, 89 P 925, 75 Kan 557.
29 C J p 591 notes 94, 95.

42. Cal.—Genazzi v Marin County, 263 P 825, 88 Cal App 545.
29 C J p 591 notes 98, 99.

43. Kan.—Marts v Freeman, 136 P 913, 91 Kan 106; Dennis v Osborn, 89 P 925, 75 Kan 557.

44. Cal.—Genazzi v Marin County, 263 P 825, 88 Cal App 545.
Ill.—Eldorado Tp Highway Comrs v Foster, 174 Ill App 520.

45. Iowa.—Van De Walle v Tama County, 201 N W 44, 198 Iowa 1330.
N D.—Mayer v Studer & Manion Co, 262 N W 925, 66 N D 190.
S D.—Vesely v Charles Mix County, 287 N W 51, 66 S D 570.

Failure to keep ditch open

It has been held that county was not liable for damage to land flooded because of failure to keep ditches along highway open.—Fryar v Hamilton County, 22 S W 2d 353, 160 Tenn 216.

Negligence of state highway department

Notwithstanding the cost of procuring a right of way for a state highway is imposed on the county by statute the county is not liable for damages resulting from the negligent acts or omissions of the state highway department or commission with respect to drainage in the construction of the highway.—Perry County v Riley, 101 S W 2d 1090, 268 Ky 325.—Barnes v Ohio County, 41 S W 2d 928, 240 Ky 119.—Jones v Louisville & N R Co, 25 S W 2d 31, 233 Ky 132.

Liability of county for torts in general see Counties § 215.

46. Iowa.—Van De Walle v Tama County, 201 N W 44, 198 Iowa 1330.
Packard v Voltz, 62 N W 757, 94 Iowa 277, 58 Am S R 396.
Neb.—Hopper v Douglas County, 106 N W 330, 75 Neb 329, followed in 106 N W 331, 75 Neb 332.—Stocker v Nemaha County, 93 N W 621, 4 Neb 230.
S C.—Hope v Berkeley County, 61 S E 203, 80 S C 32.

Work done by town at direction of county

County in its corporate capacity was not liable to the owner of land adjacent to a highway with respect to work done, including drainage work by a contractor for a town in improving the highway where the county commissioners, acting under statute, had directed the improvement but under the statute the town was required to perform the work specified.—Wormer v Worcester County, 158 N E 329, 261 Mass 90.

Liability of county for torts of its officers, agents or employees in general see Counties §§ 220, 221.

47. Neb.—Hopper v Douglas County, 106 N W 330, 75 Neb 329, followed in 106 N W 331, 75 Neb 332.
N D.—Mayer v Studer & Manion Co, 262 N W 925, 66 N D 190.
Tenn.—Fryar v Hamilton County, 22 S W 2d 353, 160 Tenn 216.
S C.—Hope v Berkeley County, 61 S E 203, 80 S C 32.

48. N Y.—Brothers v Town of Leon, 189 N Y S 590, 198 App Div 114.

49. Mass.—Lead Lined Iron Pipe Co v Wakefield, 112 N E 237, 223 Mass 485.
29 C J p 591 note 94 [b].

Want of control of highways

A town is not liable for failure of a highway officer to provide adequate drainage facilities where such officer is not the agent of the town and the town, in its corporate capacity, has no control over highways, if no stat-

In some jurisdictions, however, by virtue of its proprietary interest in or control over highways, or of its power and duty with respect to construction or maintenance, a county[50] or a town[51] may be liable in damages, under some circumstances, for injuries to land abutting on, or adjacent to, a highway resulting from acts or omissions relating to drainage facilities, and in some jurisdictions a county[52] or a town[53] may be liable on the theory that the acts or omissions as to drainage created a nuisance with respect to abutting or adjacent property, but in other jurisdictions a county is not liable on the theory that a nuisance was created and maintained.[54]

Some statutes impose liability on a county, under certain circumstances, for injuries to land abutting on, or adjacent to, a highway caused by flooding or overflowing due to acts in the construction, improvement, or maintenance of a highway or of

ute imposes liability—Barber v New Scotland 34 N.Y.S. 968, 88 Hun 522

Natural brook not a main drain within statute

Mass.—Lead Lined Iron Pipe Co. v. Wakefield, 112 N.E. 237, 223 Mass. 485

29 C.J. p. 591 note 3 [c]

50. Minn.—Kieler v. Ramsey County, 167 N.W. 362, 140 Minn. 113—Lindstrom v. Ramsey County, 161 N.W. 222, 136 Minn. 46

29 C.J. p. 591 notes 1, 2

In Washington

(1) Counties have been held liable in damages for injuries to land resulting from the flowing of water on such land as a result of the construction or improvement of a highway and the system of drainage established for the highway in cases in which the court did not refer in its opinion to the general statutory provision now Remington Rev. St. § 951, that an action may be maintained against a county for injury to the rights of plaintiff arising from some act or omission of the county.—Whiteside v. Benton County, 195 P. 519, 114 Wash. 463.—Wendel v. Spokane, 67 P. 576, 27 Wash. 121, 91 Am. St. R. 825

29 C.J. p. 591 note 1 [c] (1)

(2) In view of L.1921, c. 96, § 18, under which county was responsible for the maintenance of a part of a primary state highway, the county was liable for the flooding of land due to negligence with respect to providing adequate drainage facilities.—Bush v. King County, 236 P. 298, 134 Wash. 626

(3) Owner of land abutting highway had no duty to erect barriers against flowage over raised roadway, caused by reduction of areaway for passage of water under bridge, thereby anticipating results of county's negligence.—Bush v. King County, supra

Matters not constituting defense

Md.—Kent County v. Godwin, 56 A. 478, 98 Md. 84

29 C.J. p. 591 note 1 [b] [c]

51. Minn.—Gunnerson v. Spring Prairie, 98 N.W. 340, 91 Minn. 473.—Peters v. Fergus Falls, 29 N.W. 586, 35 Minn. 549.

Vt.—Haynes v. Burlington, 38 Vt. 350

29 C.J. p. 591 notes 1, 2

In Illinois

(1) In view of a statutory provision expressly imposing on road authorities the duty to construct good and sufficient culverts, or other convenient crossings, if a ditch is made at certain places along a highway, the view was taken that the town was liable for damages where the duty so imposed was not complied with.—Taylor v. Reed, 206 Ill. App. 479

(2) It has been held or recognized, however, that a town is not liable for the unlawful act of highway officers in diverting water from its natural course onto the land of another.—Cooney v. Town of Hartland, 95 Ill. 516.—Taylor v. Reed, supra

In New Hampshire

(1) In an action on the case, a town has been held liable in damages for injury to property abutting on a highway resulting from negligent failure to remove an obstruction from a culvert after the town had notice of conditions, since the town was bound to exercise reasonable care in maintaining the highway so as not unnecessarily to injure abutting property.—Burnham v. Windham, 88 A. 701, 77 N.H. 103

(2) Fact that plaintiff might have removed obstruction did not constitute a defense.—Burnham v. Windham, supra

(3) But the right to recover from the town for injuries to abutting property resulting from the obstruction of a culvert was denied in an early case.—Ball v. Winchester, 32 N.H. 435

(4) The right to maintain a common-law action for damages to abutting land resulting from repairing a highway and constructing drainage facilities was denied, as plaintiff had a complete remedy under a statute providing for an application to selectmen for assessment of damages.—Bartlett v. Bristol, 24 A. 906, 66 N.H. 420

(5) It was held that a town was not liable for injuries due to the obstruction of a stream by a surveyor of highways who was not the agent of the town.—Ball v. Winchester, supra

Act not within governmental duties

A town which directs the performance of an act in respect of drainage which is not within the scope of imposed governmental duties becomes liable, like any other wrongdoer, for the resulting injury.—Rudnyai v. Harwinton, 63 A. 948, 79 Conn. 91

52. Wis.—Matson v. Dane County, 179 N.W. 774, 172 Wis. 522

29 C.J. p. 591 note 1 [b]

Matters not constituting nuisance

(1) Failure of county official to keep open ditches along highway, causing water to concentrate on adjacent land, constituted omission of duty, not maintenance of nuisance, and county was not liable.—Fryar v. Hamilton County, 22 S.W.2d 353, 160 Tenn. 216

(2) A county was not liable for damages to crops resulting from diversion of waters from usual course by negligent construction or maintenance of highway and bridge on theory that county was liable for "nuisance" created by it to special injury of citizen where alleged omission of county was mere negligent conduct incident to, and in direct course of, performance of statutory duty and was not an act separate from duty of constructing and maintaining highways and bridges.—Vesely v. Charles Mix County, 287 N.W. 51, 66 S.D. 570

53. R.I.—Stillman v. Pendleton, 60 A. 234, 26 R.I. 585

54 In Georgia

(1) The right of a landowner to recover damages from a county in a suit based on allegations of the creation and maintenance of a nuisance by reason of changes in a highway with resultant diversion of flow of water from its normal course and ultimately onto plaintiff's land, has been denied.—Floyd County v. Fincher, 150 S.E. 577, 169 Ga. 460

(2) In an earlier case, however, the right to recover from the county in an action for damages resulting from the maintenance of a nuisance apparently was recognized.—Nalley v. Carroll County, 70 S.E. 788, 135 Ga. 825.

drainage facilities connected therewith.[55] According to the construction given some statutes imposing liability for injuries resulting from defects in highways, the political subdivision specified may be liable for injuries to abutting or adjacent land caused by flooding or overflowing due to defective drainage facilities,[56] but some statutes providing for liability for injuries resulting from defects in, or want of repair of, highways refer only to injuries sustained in the use of a highway as such and do not include injuries to abutting land caused by flooding or overflowing.[57]

There can be no recovery from a political subdivision where the injuries complained of were not caused by any act or omission of such subdivision for which it is liable in damages,[58] or where its acts are not the cause of such injury.[59]

The liability of political subdivisions for injuries from defects in highways generally is discussed infra § 250, and the liability in tort of municipal corporations with respect to water courses and surface water in the C.J.S. title Municipal Corporations §§ 882, 883, also 43 C J. p 1140 note 44–p 1147 note 33; and the flooding of land and interference with drainage as ground for compensation as for property taken or injured under the power of eminent domain generally in Eminent Domain § 117.

Interference with right of access In the absence of statute to the contrary, highway authorities may make ditches along the highway which may render less convenient access or passage between the highway and abutting property,[60] but, by virtue of some statutes, highway authorities may not make ditches in such manner as unnecessarily to interfere with such access or passage.[61]

The right of access of an abutting owner as between the highway and his land in general is discussed supra § 141

Liability of persons other than public entity or officers. A contractor who is negligent in the con-

55 Wis—Thurs Box Co v Marathon County, 289 N W 691, 233 Wis 387.

In Texas

(1) A county has been held liable under Rev St 1911 art 6935, Rev St 1925 art 6730, for damages to land abutting on a highway due to overflowing as a result of flood waters from a creek entering excavations at side of road embankment, where the work on the highway was done under the direction of the county—Southern Surety Co v McGuire, Tex Civ App, 275 S W. 845

(2) Recovery under statute for injuries from surface water see infra subdivision b of this section

In Nebraska

(1) In view of Comp St 1922 § 2747, Comp St 1929 § 39–833, where a county raised the grade of a highway under its control at a place where it crossed the flood channel of a natural stream, without providing a bridge, culvert, or spillway for the natural drainage across the highway, the county was liable for the damages resulting from the accumulation of water due to such construction—Clark v Cedar County, 225 N W. 235, 118 Neb 465

(2) In such case, in order to permit the county to avoid liability on the theory that the injuries complained of were caused by an act of God, in that a rainfall or flood which occurred was so great that the county was not required to make provision therefor, it must appear that the flood was so extraordinary and unprecedented that it could not have been anticipated, liability cannot be avoided on the theory that the county was not required to provide against an extraordinary rainfall or flood—Clark v Cedar County, supra

56. **In New York**

(1) It has been held that the defect contemplated by the provision of Highway L § 74, now § 215, that every town shall be liable for damages sustained to person or property by reason of any defects in highways, existing because of the neglect of any town superintendent, is not merely a defect which interferes with travel along the highway, and that the statute imposes liability for damages resulting from overflowing of adjacent lands because of a defective or inadequate culvert constructed by town authorities—Bowman v Chenango, 125 N E 809, 227 N Y 459, reversing 171 N Y S 1079, 184 App Div 472 affirming 168 N Y S 1030—Dye v Cherry Creek, 149 N Y S 497, 87 Misc 207, affirmed 152 N Y S 1108, 167 App Div 959—29 C J p 591 note 3

(2) In an earlier case, however, the view was taken that the statute refers to the defects affecting the condition of the highway for public travel and that it does not impose liability on the town for injuries to land caused by overflowing due to an inadequate culvert carrying a stream through a highway—Barber v New Scotland, 34 N Y S 968, 88 Hun 522

(3) In another case, in which the view was expressed that the statute was intended to cover only a liability which resulted from defects interfering with travel along a highway, it was held that a town was not liable for damages caused by backing up of water due to failure of commissioner of highways to keep open a sluiceway—Winchell v Camillus, 95 N Y S 688, 109 App Div 341, affirmed 83 N E 1134, 190 N Y 536

(4) Liability of a town was denied under an earlier form of the statute in an action to recover damages sustained as a result of repairing a highway in such a manner as to throw water on plaintiff's land—Acker v Town of New Castle, 1 N Y S 223, 48 Hun 312, appeal dismissed 23 N E 1145, 119 N Y 631.

57. Me—Peck v Ellsworth, 36 Me 393
N H—Ball v Winchester, 32 N H 435
S D—Vesely v Charles Mix County, 287 N W 51, 66 S D 570

58. Kan—Baldwin v Ohio Tp, 78 P 424, 70 Kan 102
Me—Peck v Ellsworth, 36 Me 393
Md—Kent County v Godwin, 56 A. 478, 98 Md 84
N Y—Klein v Town of Pittstown, 272 N Y S 324, 241 App Div 202
Tex—Angelina County v Jones, Civ App, 32 S W 2d 400
Vt—Haynes v Burlington, 38 Vt 350

59. Kan—Baldwin v Ohio Tp, 78 P 424, 70 Kan 102, 109 Am S R 414, 67 L R A 642

60. Mich—Dean v Highway Commissioner 115 N W 739, 151 Mich 582—Highway Commissioner v. Ely, 19 N W 940, 54 Mich 173.

61. Ill—Taylor v Reed, 206 Ill App. 479
Iowa—Haydon v Whitaker, 135 N. W 361, 156 Iowa 87
Ohio—Sell v Ernsberger, 8 Ohio Cir. Ct 499, 4 Ohio Cir Dec. 100.
29 C J. p 592 note 12.

struction of drainage facilities connected with a highway may be liable to the owner of abutting property which is damaged by reason of such negligence,[62] and a private corporation which, on refusal of county authorities to grade and improve a highway, undertakes to do the work at its own expense may be liable to such an owner for injuries resulting from inadequate drainage facilities[63]

Whether one who, under authorization of public authorities, constructs a highway across the natural course of surface water is liable for damages on adjacent land due to the insufficiency of a drain to carry off water from an unprecedented rainfall depends on whether the drain was reasonably sufficient with respect to rainfalls which should have been anticipated[64]

As a general rule a person who works on a highway under the direction of a highway official is not liable for injuries to land resulting from acts or omissions affecting drainage, in the absence of any tort with which such person is chargeable individually[65]

b. Scope of Power and Duty as to Surface Water and Drainage over Abutting or Adjacent Land in General

Subject to certain limitations, highway authorities may drain surface waters from highways and onto abutting or adjacent land, and, under some statutes, may construct drains on such land; but as a general rule they may not, by artificial means, divert water, collect it in a body, and cast it onto such land

In some jurisdictions certain political subdivisions or highway authorities have the same rights and obligations with respect to the drainage of surface water from highways as an individual has with respect to his land[66] Under the rule in some jurisdictions it is the right and duty of highway authorities so to improve or maintain a highway that surface waters will flow in the natural course of drainage,[67] but in other jurisdictions the installation and maintenance of a drainage ditch in a course other than the natural course of drainage is not necessarily beyond the power of drainage authorities.[68]

In general highway authorities may drain, or permit the drainage of, surface water in its natural course from a highway onto abutting land,[69] and

62. Ariz —Grande v Casson, 72 P 2d 676, 50 Ariz 397

Construction in accordance with plans and without negligence

A contractor constructing highway without negligence under plans of state highway commission is not liable for damages resulting from obstruction of stream on right of way —H H Miller Const Co v Collins, 108 S W 2d 663, 269 Ky 670—Combs v Codell Const Co, 52 S W 2d 719, 244 Ky 772

63. Tenn —Ridgeway Land Co v Vincent, 7 Tenn App 262

64. Minn —Van Wilgen v Payne Inv Co, 223 N W. 301, 176 Minn 339

To what facilities landowner entitled

In case of a highway built under circumstances stated in the text, it was held that adjacent landowner was not entitled to drainage afforded by ditch constructed to facilitate construction of roadway, as regards liability of defendant constructing road embankment for flooding —Van Wilgen v Payne Inv. Co, supra

65. Person in charge of crew

A person who was acting under the general direction of a representative of the state highway department and who was in charge of a crew of men engaged in repairing and improving a public way, which resulted in an increased flow of surface waters onto abutting property, was not liable to the owner of such property in an action on the case for tort, in the absence of any proof that defendant acted maliciously or negligently or in a manner otherwise unreasonable or improper, since defendant acted under competent public authority —Boober v Towne, 143 A 176, 127 Me 332

Person required to work on highway

A person who is required to work on a highway and who works under the direction of a road supervisor is not liable, in the absence of trespass, for an injury to land occasioned by surface water improperly deflected from its natural course by reason of highway improvements made by such supervisor —Mulvihill v Thompson, 87 N W 693, 114 Iowa 734

66. In Louisiana

(1) The rights and obligations of a police jury with respect to the drainage of roads are precisely the same as those of any other owner of an estate —Louisiana Irrigation & Mill Co v Sixth Ward Drainage Dist, 104 So 623, 158 La 701

(2) Rights of police jury as to drainage of public roads are no greater than those of individual proprietor of an upper estate —Ogden v Police Jury of East Baton Rouge Parish, 118 So 65, 166 La 869

In Minnesota a town has the same rights and is subject to the same liabilities with respect to the drainage of surface water from highways and the disposal of such water as an individual owner —Sandmeier v Town of St James, 205 N W 634, 165 Minn 34—Oftelie v Town of Hammond, 80 N W 1123, 78 Minn 275

Civil-law rule granting rights as to surface water to upper proprietor of rural lands in general see the C J S title Waters § 114, also 67 C J p 864 note 45–p 866 note 59

Common-law or common-enemy rule as to surface water on rural lands in general see the C J S title Waters § 114, also 67 C J p 866 note 61–p 868 note 68

Power to provide for drainage of surface water from highways in general see supra subdivision a of this section

67. Iowa —Herman v Drew, 249 N W 277, 216 Iowa 315

Culvert

Highway authorities may maintain culvert in public highway to convey surface waters across highway in natural course of drainage —Herman v Drew, supra

68. Minn —Sandmeier v Town of St James, 205 N W 634, 165 Minn. 34

69. Iowa —Schwartz v Wapello County, 227 N W 91, 208 Iowa 1229

La —Louisiana Irrigation & Mill Co v Sixth Ward Drainage Dist, 104 So 623, 158 La 701

Mich —Tower v Somerset Tp, 106 N. W 871, 143 Mich 195

Pa —Woolheater v Mifflin Tp, 74 Pa. Super 557

29 C J p 591 note 4

Protection of servient estate

The maintenance of ditches in a highway by the public for its protection, through which a portion of the surface water accumulating in the highway was carried away, does not entitle an adjoining landowner to have the ditches enlarged and so

in some jurisdictions acts which cause surface water to flow more freely over abutting or adjacent land are not necessarily beyond the power of highway authorities.[70] In some jurisdictions they may reasonably divert surface water from its natural course and onto abutting land,[71] but in other jurisdictions they may not in general make such diversion of surface waters onto abutting land.[72] As a general rule highway authorities may not, in an artificial manner, divert water, collect it in a body, and cast it on abutting or adjacent premises,[73] and a like rule applies, according to some cases, where the water is diverted from its natural course and cast on certain land the topography of which is such that the water will inevitably flow onto other land so as to injure such other land.[74] Some statutes require the construction and maintenance of drainage facilities sufficient to permit the unobstructed flow of surface water which may reasonably be expected, if a highway is constructed or maintained which obstructs the natural flow of such water.[75]

Some statutes authorizing drainage into or

constructed and maintained as fully to protect his land from overflow, or to change the natural course of drainage.—Pate v. Rogers, 187 N.W. 451, 193 Iowa 726.

Returning surface water to its natural course

(1) Notwithstanding a system of drainage, which had diverted surface water from its natural course, had been established and had existed for more than ten years, highway authorities were entitled to make such changes as would cause it to resume its natural course, where no rights under contract were involved and the facts were not such as to constitute an estoppel against the highway authorities. Statute of limitations could not be invoked by an abutting owner to prevent the change.—Schwartz v. Wapello County, 227 N.W. 91, 208 Iowa 1229.

(2) Highway authorities were entitled to make such constructions as would cause surface water to flow in the natural direction onto lower abutting land, notwithstanding for a number of years the water had run in a different direction through a channel worn by the water, as a result of the obstruction of a sluice by the elements.—Tower v. Somerset Tp., 106 N.W. 874, 143 Mich. 195.

(3) Town repairing road, washed out by storm, was not bound to maintain artificial bank on side thereof, although such bank prevented surface water from spreading onto adjacent land.—Klein v. Town of Pittstown, 272 N.Y.S. 324, 241 App.Div. 202.

Liability of town for damages

Where the natural course of drainage of surface water from a highway was toward plaintiff's premises and the highway authorities, in the exercise of discretion, had adopted a method of drainage, the township was not liable to plaintiff in damages merely because water flowed over his premises when floods were strong, in the absence of proof that there was an abuse of discretion on the part of the highway authorities.—De Noble v. Wilkins Tp., 74 Pa.Super. 389.

Injunctions in general see infra § 189.

70. Me.—Gardiner v. Camden, 30 A. 13, 86 Me. 377.

29 C.J. p. 591 note 4

Increased flow in natural course

(1) County would not be liable for damages for increased volume of surplus water allegedly caused by reconstruction of highway if flow of water was not diverted from its natural course.—Abkarian v. Niagara County, 289 N.Y.S. 968, 159 Misc. 895.

(2) Commissioners of highways may collect surface water and discharge it into a natural watercourse although the flow of water over the servient estate is increased.—Preemption Highway Comrs. v. Whitsitt, 15 Ill.App. 318.

Test of prudent construction

Prudent construction of highway did not turn on quantity of water thrown on abutting land, but on what was necessary to drain highway properly.—York v. Pike County, 11 S.W.2d 712, 226 Ky. 703.

71. Minn.—Oftelie v. Town of Hammond, 80 N.W. 1123, 78 Minn. 275.

26 C.J. p. 591 note 4

In Nebraska

(1) The rule stated in the text has been recognized.—Churchill v. Beethe, 66 N.W. 992, 48 Neb. 87, 35 L.R.A. 412.

(2) If public authorities, in constructing drain along the side of a highway in order to render it passable, divert the waters of a pond out of the natural course of drainage and onto the land of one not consenting to the work, ordinarily they may not be enjoined if the work is done in good faith, as shown infra § 189, but the court said that they may be liable for damages to persons whose lands or crops are injured.—Lindberg v. Challburg, 194 N.W. 733, 110 Neb. 626.—Wachter v. Lange, 113 N.W. 207, 94 Neb. 290.

72. Cal.—Robinson v. San Diego County, 300 P. 971, 115 Cal.App. 153.

29 C.J. p. 592 note 11

In Louisiana a road district cannot impose greater burden on property below by increasing flow of water for benefit of road district.—Ogden v. Police Jury of East Baton Rouge Parish, 118 So. 65, 166 La. 869.

In Pennsylvania

(1) A township has no right to divert surface water from its natural course and onto abutting or adjacent land and thus increase the area of the watershed draining over such land.—Yocom v. Union Tp., 98 Pa.Super. 540.—Woolheater v. Mifflin Tp., 74 Pa.Super. 557.

(2) Act June 13, 1836 (P.L. 560) § 32 conferring large powers on supervisors with relation to drains and ditches along public roads, does not authorize them to close up natural water course which drains certain property and turn it into another course to the detriment of the property holder.—Yocom v. Union Tp., supra.—Woolheater v. Mifflin Tp. supra.

Permitting drainage from higher land

It is the duty of highway authorities to place openings in grades thrown up in the highway, so as to permit surface water to escape in its natural course of flowage from higher to lower lands.—Pate v. Rogers, 187 N.W. 451, 193 Iowa 726.

73. Ill.—Young v. Maquon Tp. Highway Com'rs., 25 N.E. 689, 134 Ill. 569.

Ind.—Patoka Tp. v. Hopkins, 30 N.E. 896, 131 Ind. 112, 31 Am.S.R. 417.

Minn.—Kieler v. Ramsey County, 167 N.W. 362, 140 Minn. 143.

N.Y.—Klein v. Town of Pittstown, 272 N.Y.S. 324, 241 App.Div. 202.

Wash.—Tope v. King County, 65 P.2d 1283, 189 Wash. 463.

29 C.J. p. 592 note 11

Accumulation of surface water in artificial manner and discharge in body generally see the C.J.S. title Waters § 116, also 67 C.J. p. 877 notes 41-45.

74. Wash.—Tope v. King County, supra.

75. Wis.—Thurs. Box Co. v. Marathon County, 289 N.W. 691, 233 Wis. 387.

Unnatural or extraordinary flow

St. § 88.38 does not require county to make provision for an unnatural or extraordinary flow of surface water.—Thurs. Box Co. v. Marathon County, supra.

through private lands have been given a strict construction on the ground that they are in derogation of private rights,[76] and the rights conferred are subject to such limitations as the statutes impose[77]

A political subdivision, if it is liable generally in actions for damages under rules stated supra subdivision a of this section, may be liable for injuries to abutting or adjacent property resulting from improperly draining surface water onto such property[78]

The liability in tort of municipal corporations with respect to surface water is discussed in the C J S title Municipal Corporations § 883, also 43 C J p 1143 note 89, p 1147 note 33

Entering, or constructing drains, on abutting or adjacent land Under some circumstances highway authorities may enter on land abutting a highway in order to take steps necessary to protect the highway from surface water flowing from such land onto the highway[79] or to remove an obstruction from a natural watercourse which flows across and under a highway and thence through the abutting land[80]

Under some statutes they may enter on abutting lands and construct drainage ditches,[81] in the manner,[82] and after the preliminaries,[83] provided by statute, the requirement sometimes being imposed that suitable drainage cannot be otherwise provided[84]

Some statutes imposing liability on a county for damages to land within the county resulting from the establishment, maintenance, or repair of drains for highways constructed or improved by, or under the supervision of, the state apply only where there

76. Conn—Sozanska v Town of Stratford 153 A 164, 112 Conn 563- Torrington v Messenger, 50 A 873, 74 Conn 321

77. Conn—Sozanska v Town of Stratford 153 A 164, 112 Conn 563—Torrington v Messenger, 50 A 873 74 Conn 321

Facts not bringing case within statute

Conn—Sozanska v Town of Stratford, 153 A 164, 112 Conn 563

78. Pa—Yocom v Union Tp, 98 Pa Super 540—Woolheater v Mifflin Tp, 74 Pa Sup r 557

Wash—Tope v King County, 65 P 2d 1283 189 Wash 463

29 C J p 592 note 11

In Texas

(1) Under statute, now Rev Civ St 1925 art 6730, a county is liable for injuries to land adjacent to highway resulting from the construction of drainage facilities for public roads to dispose of surface water in the exercise of lawful authority—Harris County v Gerhart, 283 S W 139, 115 Tex 449, affirming Gerhart v Harris County, Civ App, 241 S W 1103—Nussbaum v Bell County, 76 S W 430 97 Tex 86—Angelina County v Bond Civ App, 16 S W 2d 338—Palo Pinto County v Grimes Civ App, 168 S W 391—Voss v Harris County, 76 S W 600, 33 Tex Civ App 249

(2) Under such statute, liability of the county is not conditioned, and does not depend, on negligence—Harris County v Gerhart, supra—Angelina County v Bond supra—Jones County v Moore, Civ App, 4 S W 2d 289

(3) Without referring to such statute, the view has been taken that a county may be made liable for damages caused by the overflow of land caused by the construction of a drainage ditch by the commissioners' court, in the exercise of power duly conferred on it, which was designed to protect the roads of the county by diverting flood waters—El Paso County v Elam, Civ App, 106 S W 2d 393

(4) Defective construction of ditch to carry off waters diverted from natural drains was immaterial as bearing on county's liability for damages traceable directly to grading of road and the erection of dams across natural drains leading from the road - Jones County v Moore, supra

(5) The right to recover from the county has been denied, however, on the ground that damages claimed, if any accrued, were due solely to the negligent construction of a ditch—Zavalla County v Akers, Civ App, 91 S W 215

(6) County which constructs public road and parallel drainage ditch is not liable for injury to land of adjacent owner caused by unprecedented rain which could not have reasonably been anticipated by the county at the time of construction—Knox v Stephens County, Tex Civ App, 284 S W 691

(7) In action for damages from overflow from public road, it appearing without dispute that overflow was caused by act of other landowner acting on own initiative county was not liable—Angelina County v Jones, Civ App, 32 S W 2d 400

In Wisconsin

(1) St § 88 38 imposes liability for damages resulting from failure to provide drainage facilities sufficient to permit the unobstructed flow of surface water which may reasonably be expected, if a highway is constructed or maintained which obstructs the natural flow of such water—Thurs Box Co v Marathon County, 289 N W 691, 233 Wis. 387

(2) A county was not liable under the statute for flooding of private land by surface waters which had accumulated because of alleged inadequacy of culvert under the grade of a federal-state highway which, although located on land acquired on condemnation by the county which made appropriations for the improvement thereof, was constructed and maintained by the state highway commission—Leininger v Pierce County, 277 N W 187, 226 Wis 515

79. N Y—Laduca v Draves, 129 N Y S 113 115 App Div 159

80. Mass—Johnson v Dunn, 131 Mass 522

81. Ill—Dierks v Addison Tp Highway Com'rs, 31 N E 496, 142 Ill 197

29 C J p 592 note 5

In Michigan

(1) In a case involving the drainage of highways it was said that the highway authorities did not have the right to enter on land and dig a channel—Tower v Somerset Tp, 106 N W 871, 113 Mich 195

(2) Under Comp L 1929 §§ 4949–4951, highway commissioner has power to construct drain through lands adjacent to highway only in event principal purpose is drainage of highway, and, where object of proposed ditch is to drain lands of individuals and not roads, such commissioner is without authority to construct ditch—Dunn v Meyer, 235 N W 254, 253 Mich 563

82. Ill—Dierks v Addison Tp Highway Com'rs, 31 N E 496, 142 Ill 197

Ind—Cauble v Hultz, 20 N E 515, 118 Ind 13

83. Ind—Cauble v Hultz, supra

84. Ind.—Cauble v Hultz, supra.

is an entry on the land for the purpose of such establishment, maintenance, or repair [85]

c. Power, Duty, and Liability of State and State Highway Authorities

The state or state highway authorities may make proper provision for the drainage of state highways, liability of the state or of a state highway commission for acts or omissions as to drainage depends on constitutional or statutory provision.

The state or state highway authorities, in constructing and maintaining highways, may establish or construct facilities for drainage,[86] subject, however, to limitations in this regard in a deed conveying a right of way for a state highway [87]

In view of the rule that the state, by reason of its sovereignty, may not be sued without its consent, considered generally in the C J S title States § 214, also 59 C J p 300 note 31 et seq, in the absence of such consent, an action to recover damages to land abutting on, or adjacent to, a highway under the direct control of the state, resulting from acts or omissions affecting drainage, will not lie against the state [88] Some statutes, however, provide for the liability of the state with respect to such damages, under certain circumstances,[89] but the state is liable only for such acts or omissions as are within the purview of the statutes [90]

The right to maintain an action against a state

85. In Pennsylvania

(1) Rule stated in the text applies under Act of Apr 29, 1925, 36 P S § 346, where drains are established by state department of highways without entering on the land damaged — Heid v Allegheny County, 186 A 215, 122 Pa Super 312—New York Cent R Co v Venango County, 161 A 488 105 Pa Super 245

(2) Thus the county was not liable where surface water was diverted onto plaintiff's land as a result of the establishment of a drain within the highway by the state department of highways, without actual entry on land injured--Heid v. Allegheny County, supra

86. Ariz—Grande v Casson, 72 P 2d 676, 50 Ariz 397
N Y—Bull v State, 247 N Y S 183, 231 App Div 313

Duty of highway authorities

(1) In a case in which a state highway was involved, the rule was announced that, if the highway authorities undertake to establish drains, culverts, and sewers under a highway, they must construct them in a reasonably careful and prudent manner, so that they will fulfill the function for which they were designed—Grande v. Casson, 72 P 2d 676, 50 Ariz 397

(2) State highway department which raised the grade of a highway roadbed was bound only to furnish for owner through whose land the highway ran, drainage at least equal in capacity and efficiency to that existing prior to the reconstruction of the highway—Milhous v State Highway Department, 8 S E 2d 852, 194 S C 33, 128 A L R 1186

87. Necessary drainage

Under a deed granting to the state highway department certain land for a right of way, and the right to do all necessary drainage in the construction and maintenance of the highway, both over the right of way so granted and over adjacent lands of grantor, the highway board is not authorized to do unnecessary drainage in the construction and maintenance of the highway—State Highway Board v Baxter, 144 S E 796, 167 Ga 24

88. Ariz—Grande v Casson, 72 P 2d 676, 50 Ariz 397.

89. In New York

(1) An inadequate culvert connected with a state highway has been regarded as a defect in the highway within the meaning of Highway L § 176, now § 58—Wallace Pond Ice Co v State, Claim No 18709, 19 N Y S 2d 690, 259 App Div 938—Logan v State, 296 N Y S 639, 162 Misc 793, affirmed 5 N Y S 2d 908, 254 App Div 410—Ortalano v State, 268 N Y S 366, 150 Misc 144

(2) In a case in which a claim was based on the backing up of water due to an inadequate culvert along a state highway, and in which the damage occurred during the period from May 1 to November 15, to which period liability of the state is limited by Highway L § 176, now § 58, it was said that such section applied Liability was denied, however, on the ground that surface water was involved—Ortalano v State, supra

(3) The state has been held liable for the flooding of lands due to an inadequate culvert carrying a stream under a state highway, where such flooding occurred during such period and where the state had notice that the culvert was inadequate—Wallace Pond Ice Co v. State, Claim No 18709, supra

(4) Even where damage to adjacent land from an inadequate culvert carrying a stream under a state highway occurred outside such period, the state has been held liable under Court of Claims Act § 12-a, which provides that the state waives immunity from liability for the torts of its officers and agents and consents to have its liability for such torts determined in the court of claims, since the damages were the result of the negligence of the state's officers and employees—Logan v State, 5 N Y S 2d 908, 254 App Div 410, affirming 296 N Y S 639, 162 Misc 793

(5) In such case, the state was liable, notwithstanding the flood was unusual and was contributed to by the thawing of large quantities of snow, where the flood was not unprecedented and the state could reasonably have contemplated the consequences which followed the flood The officers and employees of the state were put on notice of the inadequacy of the culvert under a highway which was taken over by the state for maintenance, and permitting the condition to continue was such negligence on the part of such officers and employees as rendered the state liable under Court of Claims Act § 12-a—Logan v State, 296 N Y S 639, 162 Misc 793 affirmed 5 N Y S 2d 908, 254 App Div 410

(6) Where state in constructing highway changed channel of stream and built culvert and bridge with insufficient capacity for flow of creek so that water and ice which normally spread out in meadow above claimant's land was thrown down on his property where it flooded his buildings, the state was negligent in construction and maintenance of the artificial channel and was liable for resulting damage—Inkawhich v. State, 22 N Y S 2d 761.

90. In New York

(1) State is not liable for damages resulting from surface defect in state highway sustained outside maintenance period specified in Highway L § 58, formerly § 176—Logan v State, 296 N Y S 639, 162 Misc 793, affirmed 5 N Y S 2d 908, 254 App Div 410

(2) Court of Claims Act § 12-a, waiving state's immunity from liability for its officers' and employees' torts did not repeal provision of Highway L § 176, now § 58, absolving state from liability for damages from defect in state highway outside designated maintenance period —Logan v. State, 296 N.Y.S. 639, 162

highway commission for damages to land resulting from negligence in the construction of drainage facilities connected with a state highway has been denied because of the absence of a statute imposing liability on the commission for the negligence of its officers and agents,[91] or because of the absence of a statute authorizing actions against the commission in its official capacity.[92] In some jurisdictions, however, in view of a statutory provision making the state highway commission a body corporate which may sue and be sued, such commission is liable in a proper case for damages for the flooding of lands by blocking adequate drainage facilities without making provision for adequate alternative drainage,[93] but in general the commission is not liable where it is not guilty of any negligence in constructing or improving the highway and the flooding is due to natural causes.[94]

State highway authorities have the right generally to claim the benefit of the civil law rule, considered generally in the C.J.S. title Waters § 114, also 67 C.J. p. 864 note 45, giving an upper proprietor of rural land the right to have surface water flow in its natural course over lower land in jurisdictions in which such rule has been adopted,[95] subject, however, to the further rule requiring reasonable use of the right for the purpose of avoiding undue hardship on the lower proprietor.[96] In some jurisdictions the state may construct and maintain such facilities as will prevent the flowing of sur-

Misc. 793, affirmed 5 N.Y.S.2d 908, 254 App.Div. 410.

(3) Where state in constructing highway between claimant's property and river, which customarily overflowed its banks at flood season, placed culverts under highway at location of an existing flood channel, and thereafter culverts were dammed up but dam was washed out by first flood, there was no negligence on part of state, for which claimant could recover for flood damage, based either on construction of culverts or on leaving culverts open after dam failed to hold.—Farrar v. State, 29 N.Y.S.2d 490, 176 Misc. 989.

(4) Where a culvert built by the state under a highway to carry a stream was larger than the county culvert which it replaced, and a violent storm caused débris to accumulate in it, and on the following day, while state employees were cleaning out the débris, there occurred one of the worst storms and floods that had occurred in that vicinity in many years, the water reaching a depth across the highway of about ten feet, the state was not liable for damage to claimant's land caused by the water.—Wood v. State, 202 N.Y.S. 340, 122 Misc. 860.

91. Miss.—State Highway Commission v. Knight, 154 So. 263, 170 Miss. 60.

92. Ariz.—Grande v. Casson, 72 P.2d 676, 50 Ariz. 397.

93 In Louisiana.

(1) The right to recover damages in an action against the commission has been upheld against the objection that the injury complained of resulted from an alleged tort of the commission's agents while engaged in the discharge of a governmental function, and the objection that the action was actually against the state, in a case in which the state had not consented to be sued. In support of the right to recover, the court cited the provision of Const. art. 1 § 2, that private property shall not be taken or damaged except for a public purpose and after just and adequate compensation is paid.—Murff v. Louisiana Highway Commission, 140 So. 863, 19 La.App. 847.

(2) In the supreme court the liability of the state highway commission in a proper case has been recognized in a case in which such constitutional provision was not cited and in which it was stated that the suit was predicated on Rev.Civ.Code art. 2315, which gives a right of action for damages caused by negligence and carelessness.—Schwartzenburg v. Louisiana Highway Commission, 168 So. 125, 184 La. 989.

(3) The right to recover includes damages to crops on flooded lands.—Schwartzenburg v. Louisiana Highway Commission, supra.—Murff v. Louisiana Highway Commission, App. 146 So. 328, rehearing denied 146 So. 767.—Murff v. Louisiana Highway Commission, 140 So. 863, 19 La.App. 847.

(4) State highway commission was liable for damages from destruction of crops on land overflowed because of inadequate culverts installed in constructing highway, in lieu of adequate facilities formerly existing.—Grounds v. Louisiana Highway Commission, 157 So. 385, 180 La. 670.—Connolly v. Louisiana Highway Commission 147 So. 505, 177 La. 78, followed in Grounds v. Louisiana Highway Commission, 147 So. 506, 177 La. 83.

94. La.—Schwartzenburg v. Louisiana Highway Commission, 168 So. 125, 184 La. 989.

95. Md.—Whitman v. Forney, 31 A.2d 630.

In Louisiana, state highway commission was not liable for damages from flooding lands alleged to have been caused by commission's destruction of adequate drains and installing inadequate ones, in improving a highway, where it was shown that the flooded land was lowland serving as a natural reservoir for water coming from other lands and that there were unusually heavy rainfalls during the period in question.—Schwartzenburg v. Louisiana Highway Commission, 168 So. 125, 184 La. 989.

96 Md.—Whitman v. Forney, 31 A.2d 630.

Method of drainage over lower land

(1) Where state roads commission had impliedly consented to filling of open ditch with a pipe carrying off surface water from a state road, and to the construction of part of a house over the pipe, commission was not entitled to have the ditch open and was held to have consented to the pipe method for diverting the water, nor would it be proper to compel a lower proprietor to permit the flow of surface water into the pipe and ditch across his land and to restore the pipe to its original condition, where to compel such action would result in recreating a hazard to health condemned by the county health officer.—Whitman v. Forney, supra.

(2) Where, in such case, the pipe was broken under the house of the lower proprietor, the state roads commission was not entitled to compel such proprietor to maintain the pipe line at his own expense, but it was entitled to go on his land for the purpose of repairing and keeping in repair the pipe and ditch and to have the drain reopened after proper repairs were made.—Whitman v. Forney, supra.

(3) In such case, the court cannot make an agreement for, nor compel an agreement by, the parties, by which the line might be relocated so as not to interfere with defendants' cellar, but the court was required under the rule of reasonableness of use to take the case made by the record and to determine what was fair and reasonable to be done, in view of the circumstances and the rights of the parties.—Whitman v. Forney, supra.

face waters onto the highway from higher abutting land, without rendering itself liable for resultant damages to such land[97] It has been announced as a general rule in some jurisdictions, however, that the state highway commission has no right to make any change in the construction or reconstruction of a road which will divert water from its natural course and cast it on adjacent lands[98]

d. Landowner's Right to Drain into Highway and to Obstruct or Interfere with Drainage

The right of the owner of abutting land to drain from his land into a highway is recognized, but it is not unlimited In some jurisdictions, he may erect on his land barriers to surface water flowing from the highway, but in other jurisdictions, he may not bar the natural flow of such water, and in general a landowner may not obstruct an artificial ditch lawfully constructed

The right of the owner of land abutting on a highway to drain the water from such land into the highway in a reasonable manner, if the public convenience is not interfered with, has been recognized[99] In general, however, he may not collect water in a ditch and cast it onto the highway in volume exceeding the natural drainage, to the detriment of the highway;[1] nor, in some jurisdictions at least, is he entitled to conduct water by drains or channels constructed on his own land and thereby cause it to flow onto a highway at a place other than that to which it naturally would flow[2]

In some jurisdictions the owner of land abutting on a highway in general may take necessary measures to protect his lands from surface water flowing from the highway by erecting barriers or obstructions on his own land,[3] but in other jurisdictions, the owner of land onto which water naturally flows from a highway may not in general obstruct such flow and cast the water back onto the highway[4]

A landowner has no right to obstruct an artificial drain or culvert lawfully constructed,[5] nor may he place within the lines of a highway an obstruction to a stream over which the highway passes, to the detriment of the use of the highway[6]

An overseer of highways has no right to relieve his own premises of drainage water at the expense of the public by filling up an artificial channel on his own land and extending an artificial channel along a highway so as to injure the highway[7]

97 Ariz—Grande v Casson, 72 P 2d 676, 50 Ariz 397

In New York

(1) It has been stated broadly that the state is not liable for an increased flow of surface waters due to improvement of its highways and culverts, so long as the flow of water has not been diverted from its natural course—McCormick v State, 31 N Y S 2d 362 263 App Div 791 reversed on other grounds 43 N E 2d 715 289 N Y 572

(2) Where damage to crops was caused by surface water which backed up on claimant's land because of inadequate culvert which was not rebuilt or altered in eliminating a railroad grade crossing, it was held that the state was not liable in damages—Ortalano v State, 268 N Y S 366, 150 Misc 111

(3) It has been held that state which maintained sluiceway along highway to carry off surface waters which drained into adjacent land was not liable to landowner for flooding when sluiceway plugged up—Bull v State, 247 N Y S 183, 231 App Div 313

(4) In a case in the court of appeals, however, in which apparently surface water was involved the state was held liable on a claim for damages sustained by negligent flooding of claimant's land, where water was diverted from its natural course by a slight change in the angle of a culvert and the grade of the floor of the culvert was greater than in the case of an old bridge—McCormick v State 43 N E 2d 715 289 N Y 572, reversing 31 N Y S 2d 362, 263 App Div 791

98. Ky—Department of Highways v McKinney, 162 S W 2d 179, 180, 291 Ky 1

Plan illegal

"Any plan which does so is unskillful, impractical, improper, and illegal"—Department of Highways v McKinney, supra

99 Neb—Thom v Dodge County, 90 N W 763, 64 Neb 845

1. Iowa—Brightman v Hetzel, 167 N W 89, 183 Iowa 385

N Y—Laduca v Draves, 129 N Y S 133, 145 App Div 159

2. Ill Town of Saratoga v Jacobsen, 193 Ill App 110

67 C J p 881 note 62

3. Me—Murphy v Kelley, 68 Me 521

Mass—Kennison v Beverly 16 N E 278, 146 Mass 467—Franklin v Fisk, 13 Allen 211, 90 Am D 191

29 C J p 593 notes 23, 24

Common-law or common-enemy rule giving owner right to protect his lands from surface water in general see the C J S title Waters § 114, also 67 C J p 866 note 61—p 867 note 65

4. Iowa—Herman v Drew, 249 N W 277, 216 Iowa 315

La—Louisiana Irrigation & Mill Co v Sixth Ward Drainage Dist, 104 So 623, 158 La 701

In Illinois, in a case in which it was pointed out that the civil-law rule as to surface water had been adopted, it was held that the owners of land on the side of a highway, which was lower than the land on the other side were not entitled to obstruct a ditch on their land which carried water onto such land from a tile drain which had been constructed across the highway—Nameoki v Buenger, 111 N E 129, 275 Ill 423

Civil-law rule giving superior rights as to surface waters to upper proprietor of rural land in general see the C J S title Waters § 114, also 67 C J p 801 note 45

5 Ga—State Highway Board v Baxter 114 S E 796 167 Ga 124

Iowa—Adams County v Rider, 218 N W 60 205 Iowa 137

Kan—Marts v Freeman, 136 P 943, 91 Kan 106

29 C J p 593 note 26

6. Iowa—Adams County v Rider, 218 N W 60, 205 Iowa 137

Removal of débris

In view of recognition by county authorities of a landowner's use of bridge in highway over a stream, in connection with a barrier erected by him in the stream within the lines of the highway, he could not be required to remove débris which lodged against bridge as a result of the erection of the barrier—Adams County v Rider, supra

7. N Y—Kellogg v. Thompson, 66 N Y 88.

In general a landowner has no right to change the method of drainage along a highway on which his land abuts [8]

Abatement of drainage nuisance by landowner is considered infra § 188 Rights of abutting owner with respect to highways in general are considered supra §§ 141–143

e. Nature, Measure, and Amount of Damages

In an action to recover for injury to land from flooding or overflowing due to the drainage of a highway, plaintiff may recover nominal damages if his rights have been invaded, where there is no proof of special damages, general rules as to the measure and amount of damages apply in such an action

In the absence of proof of special damages, plaintiff who shows an invasion of his rights by the flooding or overflowing of his lands, as the result of the drainage of a highway, is entitled to recover nominal damages [9]

General rules, stated in Damages §§ 84, 85, as to the measure and amount of damages for injury to real property, apply in actions to recover for injury to such property resulting from flooding or overflowing due to acts or omissions with respect to drainage facilities for highways [10]

f. Actions

Before bringing an action to recover for injury to land due to alleged acts or omissions as to the drainage of a highway, there must be due compliance with any applicable statute requiring notice or presentation of a claim as a condition precedent Rules as to pleading, evidence, and trial, applicable in civil actions generally, apply in such an action

There must be due compliance with a statutory requirement for presenting or giving notice of a claim before bringing an action against a public entity for damages for injury to real property resulting from acts or omissions with respect to drainage of a highway [11]

Pleading and proof In an action against a public entity to recover damages for injury to land abutting on, or adjacent to, a highway from flooding or overflowing, the complaint or petition must allege facts which constitute a cause of action [12]

8 Pa Township of Industry v Lee, 193 A 74, 127 Pa Super 469

9. Pa —Yocom v Union Tp, 98 Pa Super 540
Nominal damages in general see Damages §§ 8–16

10. **Permanent injury to real property**
Where in an action against county for damages for permanent injury to farm land by diversion of flood waters as result of construction of drainage ditch, uncontroverted evidence showed damage to fruit trees and grape vines, that item was required to be included in damage to land on which trees and vines were growing in order to avoid double recovery —El Paso County v Elam, Tex Civ App, 106 S W 2d 393

Destruction of, or injury to, growing crops
(1) The general rule has been announced that the value of crop when destroyed by water, impounded on grower's lands because of inadequate drainage facilities through highway constructed by state highway commission, was the measure of damages recoverable from commission —Murff v Louisiana Highway Commission, La App, 157 So 134—Murff v Louisiana Highway Commission, La App 146 So 328, rehearing denied 146 So 767

(2) Where in such case crops destroyed were so immature as to have no market value and season was too far advanced to permit replanting, cultivating, and maturing of crops usually raised on the land, the measure of damages is the rental or usable value of the land -Grounds v Louisiana Highway Commission 157 So 385 180 La 670

(3) Where in such case the crop produced was far below normal in quantity and it was too late in the season to replant and mature the crop the measure of damages adopted was the total amount of expense incurred in preparing and planting the entire acreage together with the cost of the seed, less the price received for the crop actually produced to which was added the rental value of that part of the land on which the growing crop was totally destroyed, the extent in acreage of such part being fixed on the average, normal production per acre —Grounds v Louisiana Highway Commission, supra

(4) The general rule has been announced however, that, where a crop is merely damaged, the measure of damages is the difference between the value of the crop before and after the injury at the time and place thereof, with interest from the date of the injury —Murff v Louisiana Highway Commission, La App, 146 So 328 rehearing denied 146 So 767

11. **In New York** an action against a town to recover damages for injury to plaintiff's crops because of negligence in failing to keep a highway ditch open could not be maintained under Highway L § 71, now § 215, where notice of claim required by the statute had not been given, the court did not express an opinion as to whether the action could have been maintained under such statute if the notice had been given —Brothers v Town of Leon, 189 N Y S 590, 198 App Div 114

In Texas in a case in which a cause of action, under Rev St 1911 art 6935, Rev St 1925 art 6730, against a county for damages resulting from the overflowing of land, due to the construction of a highway ditch, was stated in the petition the view was expressed that there was a sufficient presentation of the claim under Rev St 1911 art 1366, Rev St 1925 art 1573, where although no written claim had been presented plaintiff had presented his claim orally and in person to the commissioners' court --Southern Surety Co v McGuire, Civ App, 275 S W 845

12 **In Texas**
(1) In an action to recover from a county under Rev St 1925 art 6735, Rev St 1911 art 6935, damages for injury to land resulting from overflow of surface water from a highway, petition was sufficient as against general demurrer, notwithstanding it did not allege that the grading of the road was done by the road overseer or by order of the commissioners' court —Jones County v Moore, Civ App, 4 S W 2d 289, error refused

(2) In such case allegation of negligence of county officers in diverting water flow across highway was unnecessary and surplusage —Jones County v Moore, supra

(3) In such case allegations as to how diversion of water was effected were held sufficiently specific —Jones County v Moore, supra

(4) In such case petition was not so insufficient as to leave it uncertain

In such an action, defendant may allege matters which constitute a defense [13]

In general plaintiff may not introduce, in support of his case, evidence of matters which he has not alleged in his pleading [14]

Evidence. In an action against a public entity to recover for injury to land abutting on, or adjacent to, a highway resulting from flooding or overflowing, plaintiff has the burden of proving the essentials of a cause of action,[15] and defendant has the burden of proving facts constituting a defense [16]

In such actions, questions as to the sufficiency of evidence are determinable on the consideration of the evidence involved in the particular case [17]

Trial. Rules as to instructions to jury in civil

as to whether county or county judge and commissioners were liable for damage—Jones County v Moore, supra

(5) Petition to recover damages to abutting land resulting from diversion of water from a creek in constructing a highway held to state a cause of action against a county under the above statute—Southern Surety Co v McGuire, Civ App, 275 S W 845

(6) In an action against a county, the allegations of the petition were held sufficient as to damage to land by flooding due to the construction of a drainage ditch designed to protect public roads in the county—El Paso County v Elam, Civ App, 106 S W 2d 393

Pleading held insufficient

In action against county for damage for injury to crops on land adjacent to highway, complaint alleging that damage was caused by surface waters accumulated and backed up on lands because of defendant's negligence in construction of grade and in construction and maintenance of bridge was demurrable—Vesely v Charles Mix County, 287 N W 51, 66 S D 570

Declaration, complaint, or petition in civil actions generally see the C J S title Pleading §§ 63–98, also 49 C J p 128 note 30–p 179 note 56

13 Refusal to sustain exceptions to answer not error

Answer that work by county on road causing overflow of owner's lands was done under instruction of competent engineers, and that damages would not have resulted except for unprecedented rain, was not subject to exceptions by plaintiff—Knox v Stephens County, Tex Civ App, 284 S W 691

Plea or answer and affidavit of defense in civil actions generally see the C J S title Pleading §§ 99-166, §§ 177–183, also 49 C J p 179 note 58–p 309 note 13

14. Testimony properly excluded

In an action to recover from a county damages for injuries to land resulting from the overflow of water from a highway where there was no allegation in the petition that alkali dirt was washed in over land, testimony as to whether witness could tell effect of alkali on farm land was properly excluded—Knox v Stephens County, supra.

Evidence admissible under pleadings in civil actions generally see the C J S title Pleading §§ 324–330, also 49 C J p 791 note 15–p 804 note 1

15. Claim against state

Claimant had the burden of showing that injury to his lands adjacent to a state highway, resulting from the flooding of such land, was due to the negligence of the state's employees, in order to recover damages from the state for such injury—Farrar v State, 29 N Y S 2d 490, 176 Misc 989

Burden of proof in civil actions generally see Evidence §§ 103–113

16 Unusual weather conditions

County which diverted waters from their natural course so that they would inevitably flow on property of landowners had burden of showing that damage to landowners after unusual snowfall and sudden thaw and heavy rain considered as acts of God, was caused solely by such acts of God and was wholly unaffected by waters which came from territory from which county had diverted water - Tope v King County, 65 P 2d 1283, 189 Wash 463

17. Evidence held sufficient

(1) To support finding that water was diverted by culvert so as to render state liable for the flooding of land—McCormick v State 43 N E 2d 715, 289 N Y 572 reversing 31 N Y S 2d 362, 263 App Div 791

(2) To sustain findings that culvert under state highway was inadequate that state had provided no adequate drainage elsewhere, and that such defect in highway was sole cause of flooding of land—Wallace Pond Ice Co v State, Claim No 18709, 19 N Y S 690, 259 App Div 938

(3) To show that overflow of plaintiff's land was due to blocking and reducing of drainage outlets by remodeling of highway by state highway commission—Grounds v Louisiana Highway Commission, 157 So 385, 180 La 670—Murfi v Louisiana Highway Commission, La App, 146 So 328, rehearing denied 146 So 767

(4) To show negligence of defendant town with respect to maintenance of culvert—Burnham v Windham, 88 A 701, 77 N H 103.

(5) To sustain finding that rainfall at time of inundation of claimant's land by water from a drain connected with a state highway was unusually heavy—Mead v State, 189 N Y S 516 197 App Div 739

(6) To show that flooding of land was due to fact that it was lowland serving as natural reservoir for water from other lands and that there were unusually heavy rainfalls during the period involved, in case in which it was sought to recover damages from state highway commission—Schwartzenburg v Louisiana Highway Commission, 168 So 125, 184 La 989

Evidence held insufficient

(1) To authorize recovery from county on ground that the reconstruction of highway resulted in improper diversion of surface water onto abutting land—Abkarian v Niagara County, 289 N Y S 968, 159 Misc 895

(2) To show negligence on the part of the state in constructing a culvert connected with a state highway or in failing to anticipate that the culvert would prove inadequate—Mead v State, 189 N Y S 516, 197 App Div 739

(3) To show an abuse of discretion by highway authorities of a township in determining the size and form of ditches along highway—De Noble v Wilkins Tp, 74 Pa Super 389

(4) To show in an action against a county, which diverted waters from their natural course and cast them on lands whose topography was such as to make other land their inevitable recipient, that damage to such other land after unusual snowfall, a sudden thaw, and heavy rain, which could be considered as acts of God, was not caused by waters which were diverted by county—Tope v King County, 65 P 2d 1283, 189 Wash 463

Damages

Plaintiff's uncontradicted testimony, supported by itemized expense account, to which he testified, and evidence of rental value of land, mules, and farming implements, were sufficient to show that cotton crop was worth amount to which he testified when destroyed by water impounded on his lands because of inadequate drainage allowances

actions generally, considered in the C.J.S. title Trial §§ 266–448, also 64 C J. p 510 note 3–p 1008 notes 15–19, apply in actions to recover for injuries to land resulting from flooding or overflowing, due to acts or omissions with respect to drainage affecting a highway [18]

In such action, the rule applicable in civil actions generally, that questions of fact are for the jury, stated in the C J S title Trial § 203, also 64 C J p 298 note 55, or for the court when it is the trier of the facts, stated in the C J S. title Trial § 574, also 64 C J p 1189 notes 64, 65, applies [19]

In such an action, rules as to special findings by the jury in civil actions generally, considered in the C J S title Trial §§ 526–573, also 64 C J p 1112 note 21–p 1189 note 61, apply [20]

§ 187. —— Personal Liability of Officer

Subject to limitations obtaining in some jurisdictions, highway officials may be liable personally for negligence in the performance of their duties with respect to drainage; they are also liable for malicious or corrupt acts, or for acting without authority or in bad faith, with regard to the construction or maintenance of drains.

Highway officials may be liable personally for negligence in the performance of their duties with respect to the drainage of highways,[21] but, according to some cases, they are not liable for the consequences of nonfeasance as to drainage in connection with their duty to supervise highways, in the absence of willful misconduct or facts from which misconduct may be imputed,[22] and, even with re-

through highway constructed by defendant state highway commission—Murff v Louisiana Highway Commission La App, 157 So 134

Weight and sufficiency of evidence in civil actions generally see Evidence §§ 1016–1050

18. Instruction as to sufficiency of drainage facilities

(1) In an action against a private corporation which constructed a road under authorization of public authorities, in which liability depended on inadequacy of drainage facilities from adjacent lands, an instruction should have been given to the effect that defendant was not liable for damages resulting from an unprecedented rainfall, if defendant made reasonable provision for the escape of waters from such floods as were known to occur in the vicinity—Van Wilgen v Payne Inv Co, 223 N W 301 176 Minn 349

(2) Instruction was held erroneous with respect to conditions for which county must provide in constructing highway—Clark v Cedar County, 225 N W 235, 118 Neb 465

(3) Instruction was held correct as to conditions for which county must provide in constructing and maintaining drainage facilities—Thurs Box Co v Marathon County, 289 N W 691, 233 Wis 387

19. Questions held for jury or trier of facts

(1) Whether a flood which inundated land abutting on, or near, a highway was of such a character that it should have been anticipated and provided for is a question for the jury or trier of the facts—Mead v State, 189 N Y S 516, 197 App Div 739

(2) In action against county for injuries caused by flooding land as result of highway washout, negligence of county in maintenance of highway was for jury to decide under the evidence—Bush v King County, 236 P 298, 134 Wash 626

(3) In an action against a county for damages to plaintiffs' crops, caused by impairment of drainage by the county and its agents in the improvement of a road, in which the county alleged that the damage was occasioned by the acts of a navigation district in disposing of the spoil from its dredging operations and in which there was evidence to support such allegation, the issue should have been submitted to the jury on the county's request therefor—Gerhart v Harris County, Civ App 244 S W 1103 affirmed Harris County v Gerhart, 283 S W 139, 115 Tex 449

(4) Evidence held sufficient to authorize submission to jury of issue as to whether land was damaged by flooding—El Paso County v Elam, Tex Civ App, 106 S W 2d 393

(5) Where plaintiff's petition showed that he sought to recover damages for permanent injury to his land and there was some evidence tending to show that injury was temporary rather than permanent, there should have been submitted to the jury the question whether the value of the land had been impaired permanently—El Paso County v Elam, supra

(6) In action against county for damages for permanent injury to farm land by diversion of flood waters as result of construction of drainage ditch, whether damages were proximate result of permanent and continuing character of ditch, or its maintenance, as constituting permanent injury to reasonable market value of land, was a question for jury—El Paso County v Elam, supra

(7) In such action, whether construction or maintenance of state highway proximately caused, or contributed to cause, waters to back on and cause damage to part of land and especially to growing crops thereon was a question for jury—El Paso County v Elam, supra

20. Necessity for finding of permanent injury to land

Where plaintiff's petition shows that he seeks to recover damages for permanent injury to land, there must be a finding by the jury that such injury was sustained in order to permit a recovery of such damages—El Paso County v Elam supra

Findings not conflicting

In action against county for damages to land by diversion of flood waters as result of construction of drainage ditch to protect highways, jury's negative answer to question whether person of ordinary prudence in plaintiff's position would not, at time of construction, have foreseen that it would result in flooding land, and affirmative answer to question whether person of ordinary prudence could not have foreseen damage, if any, suffered by plaintiff, were not conflicting, since first question applied to plaintiff and second to ditch builder—El Paso County v Elam, supra

21. Ill—Tearney v Smith, 86 Ill 391

29 C J p 592 note 14

Evidence held insufficient to authorize recovery—Padfield v Frey, 133 Ill App 232

Civil liability of highway officer in general see supra § 171

22. Tenn—Fryar v Hamilton County, 22 S W 2d 353, 160 Tenn 216

Failure to keep open ditches and drains

County officials, charged with the duty of supervising highways, were not liable for flood damage caused by failure to keep open ditches and drains along highway, where it did not appear that such failure was a willful neglect of duty, since it cannot be inferred from mere failure to exercise power that duty was will-

spect to negligence as to merely ministerial duties in this regard, they are liable only for negligent failure to perform a positive duty imposed by law [23]

Such officials are liable for malicious[24] or corrupt[25] action, or for acting without authority[26] or in bad faith,[27] in constructing or maintaining drains, but not in general for damage caused by drainage established by them within their authority [28] They are not liable for injuries occasioned by inadvertence or error of judgment,[29] or for mere omission to perform an act the performance of which, although proper and necessary to prevent incidental injury, cannot be exacted as a legal right [30] Defendant officials are not liable for injuries which are not caused by their acts [31]

The right to recover damages from a highway official because of the construction of a ditch so as to interfere with plaintiff's access to his property, in violation of statute, has been denied on the ground that the statute itself provided an exclusive remedy.[32]

Successors of negligent commissioners are not liable for their predecessors' acts [33]

The burden of showing that defendant official did not act in good faith, but that he acted without reasonable care, corruptly, or maliciously is on plaintiff [34]

§ 188. —— Abatement of Drainage Nuisance

A landowner may under some circumstances abate, in a peaceable manner, a nuisance created in connection with the drainage of a highway.

If drainage upon adjacent land is in the nature of a nuisance, the landowner may have a right to cure the condition himself by peaceable abatement,[35] as by filling a ditch,[36] so as to throw surface water back onto the highway, and it has been held that, where the obstruction of an artificial watercourse across a highway creates a nuisance, a landowner who is entitled to have such watercourse maintained may remove the obstruction in a proper manner after the highway authorities, on due notice, have failed to act [37]

The right of an owner of land abutting on a highway as to surface water generally is discussed supra § 186

§ 189. —— Injunction

In a proper case an injunction may be granted to protect a landowner from injury from wrongful drainage of a highway, and a landowner may be prevented by injunction from wrongfully interfering with such drainage

Unless another and exclusive remedy is provided by statute,[38] injunction may be allowed to protect individual landowners from irreparable injury from wrongful drainage,[39] only, however, where the work

fully neglected—Fryar v Hamilton County, supra.

23. Tenn—Fryar v Hamilton County, supra

24. N H - Rowe v Addison, 34 N H 306
Pa—Warfel v Cochran, 34 Pa 381

25. Ind—McOsker v Burrell, 55 Ind 425

26. Ill—Daum v Cooper, 103 Ill App 4, affirmed 65 N E 1071, 200 Ill 538
Me—Plummer v Sturtevant, 32 Me 325
Mich—Conrad v Smith, 32 Mich. 429.
N H—Rowe v Addison, 34 N H 306

Motive immaterial

Road supervisor and those working on roads under his direction were, without regard to motive, liable for compensatory damages for the diversion of water from its natural course and casting it onto the lands of another, where no right to make such diversion had been acquired by the public—Wrightsel v Fee, 81 N E 975, 76 Ohio St 529, 13 L R A,N S, 233

27. Kan—Logerman v Wilson, 295 P 674, 132 Kan 280

Sufficiency of evidence

In an action against persons who were township trustees, as individuals, to recover damages caused by digging ditches along a highway, which resulted in the flooding of plaintiff's land evidence sustained finding that defendants acted in bad faith in digging ditches and supported judgment against them for damages—Logerman v Wilson supra

28. Ind—McOsker v Burrell, 55 Ind 425
Tex—Nussbaum v Bell County, 76 S W 430, 97 Tex 86
29 C J p 592 note 18

Removal of obstruction

A highway official who, in exercising his right to remove an obstruction from a natural watercourse flowing across and under a highway and thence through land abutting on the highway, entered on such land and, in removing the obstruction, acted with due regard to the safety and protection of such land from needless injury, was not liable for consequential injury to such land—Johnson v Dunn, 134 Mass 522

Liability of person working under direction of highway officials see supra § 186 a

29. N Y—Gould v. Booth, 66 N Y 62

30. N Y—Gould v. Booth, supra

31. Ill—Davidson v Sprague, 21 Ill. App 611

32. Mass—Benjamin v. Wheeler, 15 Gray 486—Elder v. Bemis, 2 Metc 549

33. N Y—Gould v Booth, 66 N Y 62

34. Ind - McOsker v Burrell, 55 Ind 425

35. N Y—Thompson v Allen, 7 Lans 459

36. Iowa—Schofield v Cooper 102 N W 110, 126 Iowa 334
N Y—Thompson v Allen, 7 Lans 459

37. N H—Groton v Haines, 36 N H 388

38. Wis—Knapp v Deer Creek, 155 N W 940, 162 Wis 168
29 C J p 593 note 29

39. Ill—Francis v Galbreath, 278 Ill App 389
Ky—Department of Highways v McKinney, 162 S W 2d 179, 291 Ky 1
Mich—Sweeney v Bird, 292 N W 506, 293 Mich 624
29 C J p 593 note 30, p 592 note 11

Facility interfering with access

(1) In view of conflicting evidence, it was not error as a matter of law for the trial judge to grant an interlocutory injunction restraining defendants from maintaining within a state highway a ditch which deprived an abutting owner of access to his property.—State Highway Board v Baxter, 144 S E. 796, 167 Ga 124

is clearly improper.[40] The courts ought not as a rule control by injunction the action of highway officials in deciding on the necessity of a change of drainage and the mode of doing it.[41]

In general an injunction will not be granted to prevent the flowing of surface water from a highway onto abutting or adjacent land,[42] or to prevent the establishment or maintenance of a drainage system which facilitates such flowing,[43] where the surface water naturally flows onto such land, and in some jurisdictions an injunction will not be granted merely because drainage facilities divert the natural flow of drainage water so as to turn it onto abutting or adjacent land.[44] The diversion of sur-

(2) Right of abutting owner to injunction to protect rights with respect to highway in general see supra § 143

Want of compensation for injury

Evidence that landowner refused to sign a right of way deed for part of a reconstructed highway until the fiscal court agreed that a projected culvert which would divert water across landowner's land would be eliminated and the highway commissioner and the highway engineer agreed to recommend elimination thereof to the highway commission established that the cash consideration in the agreement was not intended to include damages resulting from placing the culvert at the point designated in the plat, as bearing on the right of landowner to an injunction to effect the elimination of the culvert.—Department of Highways v McKinney, 162 S.W.2d 179, 291 Ky. 1

Showing as to damage or injury held sufficient

Overruling of a motion to dissolve a temporary injunction, restraining highway ditching and culvert work on the ground of damage to plaintiff's adjoining land in that the work would change the natural flow of water on the land, was not error, as against defendant's contention that plaintiff had failed to show substantial damage.—Francis v. Galbreath, supra

No showing of substantial injury

Injunction has been denied because of lack of showing of substantial injury to plaintiff's land.—Hassinger v. Kramer, 162 N.E. 752, 28 Ohio App. 449

Modification of decree

Where a permanent injunction against the maintenance of certain drains was so modified as not to prevent the construction of a culvert, without fixing the size of the culvert, the size was within the discretion of the highway officials.—Ehler v. Stier, 216 N.W. 637, 205 Iowa 678

Evidence held sufficient

(1) To show that principal object of ditch was drainage of private lands and not roads, so that construction thereof was beyond authority of highway commissioner and grant of injunction was proper.—Dunn v. Meyer, 235 N.W. 254, 253 Mich. 563

(2) To show that proposed drainage facilities for highway would change the natural flow of water over land of plaintiff, with resultant damage to such land, so as to warrant denial of motion to dissolve temporary injunction.—Francis v. Galbreath, 278 Ill.App. 389

Evidence held insufficient to warrant injunction

Evidence that overflow of plaintiff's land was due to blocking and reducing of drainage outlets by remodeling of highway was not sufficiently definite to warrant mandatory injunction commanding highway commission to enlarge openings across highway.—Murff v. Louisiana Highway Commission, La.App., 146 So. 328, rehearing denied 146 So. 767

40. Ill.—Hotz v. Hoyt, 25 N.E. 753, 135 Ill. 388

Mich.—Kilev v. Bond, 72 N.W. 253, 114 Mich. 417

N.D.—Davenport Tp. v. Leonard Tp., 133 N.W. 56, 22 N.D. 152

Tex.—Nussbaum v. Bell County, 76 S.W. 430, 97 Tex. 86

29 C.J. p. 593 note 32, p. 591 note 4

Existence of natural watercourse not shown

Plaintiff by turning surface water from its original course, and running it in an artificial channel to a highway, and thence through a ditch along the highway, and maintaining it for more than forty years, did not make the ditch a natural watercourse so as to entitle him to obtain an injunction to prevent the highway authorities from interfering therewith within the limits of the highway.—Worth v. Town of Salamanca, 130 N.Y.S. 449, 72 Misc. 513

Injury or threatened injury not shown

In a suit for injunction against threatened injury to a landowner from a ditch on a state highway, evidence showed that plaintiff was not only not injured, but was not in danger of any injury, by reason of the ditch placed therein, so that defendants were not required to take proceedings under Rev.Code 1919 §§ 8598–8604, to drain an adjoining basin from which plaintiff claimed water would flow through the ditch onto his land.—Schmidt v. Norbeck, 189 N.W. 524, 45 S.D. 557

Removal of débris

County could not be compelled to remove débris which lodged against a bridge over a stream because of barrier to stream wrongfully erected within the lines of the highway by the owner of abutting land.—Adams County v. Rider, 218 N.W. 60, 205 Iowa 137.

Evidence held sufficient

In suit for mandatory injunction to require town to fill drainage ditch, evidence supported finding that town adopted reasonable and proper method of draining highway, and that plaintiff's land was not appreciably injured.—Sandmeier v. Town of St. James, 205 N.W. 634, 165 Minn. 31

Evidence held insufficient to warrant decree requiring state highway commission to install a culvert larger than the one already constructed.—Schwartzenberg v. Louisiana Highway Commission, 168 So. 125, 184 La. 989

41. Ind.—Patoka Tp. v. Hopkins, 30 N.E. 896, 131 Ind. 142, 31 Am.S.R. 417

Pa.—Warfel v. Cochran, 34 Pa. 381

29 C.J. p. 591 note 94

42 Mich.—Tower v. Somerset Tp., 106 N.W. 874, 143 Mich. 195

29 C.J. p. 591 note 4, p. 593 note 32

Civil-law rule granting superior rights as to surface water to upper proprietor of rural lands in general see the C.J.S. title Waters § 114, also 67 C.J. p. 864 note 45–p. 866 note 59

Right to drain surface water from highway onto abutting or adjacent land in general see supra § 186.

43. Iowa.—Herman v. Drew, 249 N.W. 277, 216 Iowa 315.—Schwartz v. Wapello County, 227 N.W. 91, 208 Iowa 1229

Mich.—Tower v. Somerset Tp., 106 N.W. 874, 143 Mich. 195.

44. Neb.—Churchill v. Beethe, 66 N.W. 992, 48 Neb. 87, 35 L.R.A. 442

29 C.J. p. 591 note 4

Diverting of water of pond

Where public authorities in constructing drains along the side of highways, necessary to render the road passable, divert the waters of a pond out of the natural course of drainage and upon the lands of one not consenting to the work, ordinarily they will not be enjoined if the work is done in good faith.—Lindberg v. Challburg, 194 N.W. 733, 110 Neb. 626.—Wachter v. Lange, 143 N.W. 207, 94 Neb. 290

Common-law or common-enemy rule as to surface waters on rural

face water by the construction or maintenance of a highway or of drainage facilities has been regarded, however, as a ground for an injunction under some circumstances [45]

The right of a landowner to relief depends on his own injury, and not on his neighbor's advantage [46] Conversely, the highway commissioners cannot plead the rights of adjacent owners who are not parties nor asking relief [47]

In some jurisdictions, where the facts are in dispute, an injunction will not be granted until they are established by a jury [48]

In a proper case public authorities are entitled to an injunction against the maintenance, on abutting land, of an obstruction to the natural flow of surface water,[49] against the maintenance by an abutting owner of a dam in a ditch along the highway where such dam prevents such natural flow,[50] or against the maintenance of a barrier to a stream over which a highway passes, erected within the lines of the highway [51] A mandatory injunction requiring an owner of land abutting on a highway, who has, without authority, made a change in the mode of draining the highway in front of his premises, to restore the highway to its condition prior to the change has been denied on the ground that the change did not injure plaintiff and actually improved the condition of the highway [52]

The burden is on plaintiff to prove the allegations of his complaint [53]

Estoppel. Landowners may be estopped to enjoin maintenance of drains,[54] as by failure to make timely complaint,[55] or by actively assisting in the work [56]

§ 190. —— Drainage Districts

Some statutes which provide for the organization of highway drainage districts have for their purpose the improvement of highways and are not predicated primarily on the theory of benefits to land in an agricultural sense.

Some statutes which provide for the organization of highway drainage districts have reference to the improvement of the highway,[57] they are not predicated primarily on the theory of benefits to land in an agricultural sense but are intended to benefit a public highway and to promote the welfare of the public generally [58]

property in general see the C J S title Waters § 114, also 67 C J p 866 note 61–p 868 note 68

45. Cal—Robinson v San Diego County, 300 P 971, 115 Cal App 153
29 C J p 593 note 11

Proposed grading which would cause diversion

Where grading of highway by public officials in manner contemplated would divert surface water from its natural course and onto plaintiffs' land, and such diversion was not necessary in order to improve the highway it was proper to enjoin the grading planned—Estes v Anderson, 213 N W 566, 204 Iowa 288

Evidence sufficient to support grant of injunction

(1) Evidence held to sustain finding that contemplated drainage system was different from natural drainage of highway, and would increase flow over adjoining property, so as to warrant grant of injunction—Ogden v Police Jury of East Baton Rouge Parish, 118 So 65, 166 La 869

(2) Where land of a dominant estate was separated by a highway from land of a servient estate, in an action by the dominant owner to enjoin the servient owner from obstructing the natural flow of surface water, and to compel highway authorities to maintain proper openings in the highway for escaping water, evidence was sufficient to warrant a decree enjoining the servient owner from diverting the natural flow and directing the highway authorities to maintain the highway so as not to divert water from its natural course—Pate v Rogers, 187 N W 451, 193 Iowa 726

46. Mich—Dean v Millard, 115 N W 739, 151 Mich 582
29 C J p 593 note 35

47. Ill—Jewett v Sweet, 52 N E 962, 178 Ill 96, affirming 77 Ill App 641

48. Pa—Woodroffe v Hagerty, 35 Pa Super 576

49. Iowa—Herman v Drew, 249 N W 277, 216 Iowa 315

50 Iowa—Hayes v Over, 146 N W 857, 161 Iowa 697

51. Iowa—Adams County v Rider, 218 N W 60, 205 Iowa 137

52 Pa—Township of Industry v Lee, 193 A 71, 127 Pa Super 469

Nuisance or continuing trespass

Reconstruction of drainage on side of highway by substitution of terra cotta pipe with level surface for deep open gutter by abutting property owners was not enjoinable as nuisance or continuing trespass—Township of Industry v Lee, supra

Costs imposed on defendants

Notwithstanding the injunction was denied, costs of the bill were imposed on defendants in view of the unwarranted act in making the change—Township of Industry v Lee, supra

53. Ohio—Hassinger v Kramer, 162 N E 752, 28 Ohio App 449.

Ind—Harrod v Littell, 99 N E 817, 51 Ind App 118

54. Neb—Wachter v Lange, 143 N W 207, 94 Neb 290

55. Neb—Wachter v. Lange, supra

56. Neb—Wachter v Lange, supra

57. Iowa—Great Northern Ry Co v Board of Sup'rs of Plymouth County, 196 N W 284, 197 Iowa 903

Land included

(1) Under statute as first enacted, Supplemental Supplement to Code tit 10 c 2 b, the board of supervisors did not have power to include railroad rights of way in establishing a highway drainage district—Great Northern Ry Co v Board of Sup'rs of Plymouth County, supra

(2) Code § 7643 subd 3 now expressly includes rights of way of railway companies

(3) Property subject to assessment for benefits see infra § 297

Separate from general drainage statute

Statute as to organization of highway drainage districts, Supplemental Supplement to Code, tit 10 c 2 b, [see Code 1931 § 7638 et seq], is separate and distinct from, and is not amendatory of, the general drainage statute—Great Northern Ry Co v Board of Sup'rs of Plymouth County, supra.

58. Iowa—Great Northern Ry Co. v Board of Sup'rs of Plymouth County, supra.

As to drainage districts generally see Drains §§ 5–14.

§ 191. Lighting and Lighting Districts

The scope and extent of authority to provide for the artificial lighting of highways under statutory provisions depend on the terms of the particular statute

Under some statutes the county board of supervisors and the county highway authorities may make provision for the artificial lighting of county roads in congested and dangerous localities [59]

Some statutes authorizing township boards to provide for the artificial lighting of highways are applicable only to township highways[60] and do not include county highways [61]

§ 192. Proceedings for Improvement of Highways and for Construction of Free Gravel Roads or Turnpikes

Proceedings for the improvement of highways must be in accordance with statutory requirements

Statutory provision is usually made for the procedure to be followed for the improvement of highways, and the proceedings under such statutes must be in substantial compliance therewith [62] Although under some statutes a highway board or commission may act on its own initiative,[63] where the statute so requires, proceedings for the improvement of highways must be initiated by a petition,[64] accompanied by affidavit,[65] with a specified board or officer,[66] signed by a specified number of persons interested,[67] describing properly the con-

59. Mich —Hatch v Board of Sup'rs of Muskegon County, 236 N W 777, 254 Mich 255

60. Mich —Hatch v Board of Sup'rs of Muskegon County, supra

61. Mich —Hatch v Board of Sup'rs of Muskegon County, supra

62. Pa —Township of Luzerne v Fayette County 199 A 327, 330 Pa 247
29 C J p 593 note 42

Board of chosen freeholders

Authority to improve road being entirely derived from statute, acts of board of chosen freeholders required to be done before commencing improvement of road must be done formally and at properly constituted meetings —Hokke v Passaic County, 127 A 813, 3 N J Misc 245

County auditor's failure to file certificate that money for road improvement to be paid for by sale of bonds, is in treasury or being collected was fatal —Thomas v Board of Com'rs of Butler County, 162 N E 430, 28 Ohio App 8

Notice

A nonresident mortgagee of land on which public road had been dedicated and improved was not entitled to actual notice of improvement, but notice by publication which was properly given was sufficient —Kentucky Joint Stock Land Bank of Lexington Ky, v Jewett, 9 N E 2d 915, 55 Ohio App 422

63. Ind —McClure v Franklin County, 24 N E 741, 124 Ind 154

Certificate of town officers

(1) In lieu of a petition a certificate of certain town officers that the improvement is proper and for the public interest may be filed in some states —Skelly v New York, 141 N Y S 955, 157 App Div 233, affirmed 107 N E 1085, 213 N Y 634—29 C J p 594 note 51.

(2) Where a resolution of the county board of supervisors provided that a road should be constructed through a town under the direct personal supervision of the county superintendent of highways, or some person designated by him, as permitted by Highway L § 320-a it was not necessary to obtain the certificate of the town superintendent of highways —Pilbeam v Sisson, 198 N Y S 834, 204 App Div 762

Unanimous vote

Under some statutes road improvements can be initiated by a unanimous vote of the board of county commissioners without the presentation of a petition Only the preliminary resolution requires such a unanimous vote —Thomas v Board of Com'rs of Butler County, 162 N E 430, 28 Ohio App 8

In Washington, the county commissioners have no power, of themselves, to initiate an improvement under the Donohue Road Law, Remington Rev Stat § 6603 —Elston v King County, 31 P 2d 906, 178 Wash 210

64 Mo —State ex rel Melvin v Hackmann, 243 S W 337, 295 Mo 14
29 C J p 593 note 45

Abandonment

County commissioners' acceptance of a second improvement petition held to constitute an abandonment of a prior one —Hines v Board of Com'rs of Barton County, 202 P 77, 109 Kan 783

Application of municipality

Under some statutes, the application of the municipality to the board of chosen freeholders for an improvement to be made and the agreement between the municipality and the county as to the portion of the cost of the improvement to be borne by the municipality are conditions which must be performed prior to action by the board of chosen freeholders awarding contracts for the improvements and the creation of an issue of bonds to pay for such improvements —Chamber of Commerce of City of Newark v Essex County, 114 A 426, 96 N J Law 238

Order of action

Petitions for highway construction must be acted on in order of filing only when tax district is bonded to limit —Bleumel v State, 184 N E 173, 204 Ind 544, rehearing denied 185 N E 113, 204 Ind 544

65. Ind —Myers v White, 105 N E 775, 182 Ind 108
29 C J p 593 note 46

66. Ind —Todd v Crail, 77 N E 402, 167 Ind 48—Switzerland County v Reeves, 46 N E 995, 148 Ind 467

67. Ill —Merritt v Kewanee, 51 N E 867, 175 Ill 537
29 C J p 594 note 48

Landowners

(1) Under some statutes the owners of a certain per cent of the abutting property must sign the petition before the board can act on the petition
Fla —Webb v Scott, 176 So 442, 129 Fla 111
Wash —Elston v King County, 34 P. 2d 906, 178 Wash 210

(2) In the absence of a statute so requiring petition need not describe the land owned by each of the petitioners —State ex rel Melvin v Hackmann, 243 S W 337 295 Mo 14

(3) If more than one person owns a parcel of abutting property, all the owners must sign the petition in order to be counted as petitioning owners —Webb v Scott, supra—29 C J p 593 note 48 [a] (4)

(4) Signature of syndicate which had only beneficial interest in land could not be counted on petition for highway improvement, since, having neither legal nor equitable title, syndicate was not a "freeholder"—Elston v King County, supra

(5) Signatures on petition for highway improvement, of two corpo-

struction or improvement proposed,[68] and containing all other matters required by the statute.[69] A provision of a road petition that the improvement shall be made according to plans approved by the secretary of agriculture, if federal aid is granted, makes such approval necessary for only that portion of the road which receives federal aid.[70]

Notice of the filing of the petition,[71] stating the character of the improvement asked for,[72] is also sometimes required, but in the absence of any such provision it is not necessary.[73]

Where a statute so requires, an itemized statement of the cost of the road is required to be made and filed with the county clerk,[74] with plans and specifications definitely and with certainty describing the nature and extent of the work to be done.[75] If the statute requires a detailed or itemized estimate of the cost, an estimate of the gross cost is not sufficient.[76]

Bond. Under some statutes no jurisdiction to proceed exists until a bond is executed and filed.[77]

Deviation from improvement requested. Under some statutes, neither the viewers nor the board of commissioners has any power to lay out, estab-

rations by their vice president and president, respectively, which were not shown to have been authorized by resolutions of boards of trustees, could not be counted—Elston v King County, supra

(6) Resolution of college board of trustees authorizing signing of petition for the college lands held sufficient—Johnson v Underwood, 24 S W 2d 133, 324 Mo 578

(7) Corporation's ratification of the act of its agent in signing the petition held valid—Webb v Scott, supra

(8) Trustees under will authorizing conveyance of property were authorized to sign petition—Johnson v Underwood, supra

(9) In the absence of a showing of fraud, a property owner whose signature appears on the petition cannot deny that he placed his signature thereon for the purpose intended by the petition—Webb v Scott, supra

(10) Under some statutes, wherever a paving district is created which includes property belonging to the state, the officers in charge of state institutions are authorized to sign a petition requesting the board to proceed with the improvements. A petition signed, "Board of Commissioners of State Institutions, by H G chairman," is sufficient—Brown Real Estate Co v Lancaster County, 188 N W 247, 108 Neb 514, followed in Loos v Lancaster County, 188 N E 253, 108 Neb 531

(11) Certification by county engineer as to sufficiency of petition for highway improvement respecting lineal frontage and ownership thereof which was requested by board of county commissioners merely for convenience, and resolution of commissioners to same effect, were not conclusive and could be shown to be untrue—Elston v King County, 34 P 2d 906, 178 Wash 210

(12) Other cases see 29 C J p 593 note 48 [a]

Withdrawal

The board of commissioners, having once acquired jurisdiction to contract for road improvements, is not ousted thereof by withdrawal of any number of petitioners for the election authorizing such improvements, so long as one remains—Wilson v Board of Com'rs of Warrick County, 137 N E 783, 79 Ind App 250

68. Mo—State ex rel Melvin v Hackmann, 213 S W 337, 295 Mo 14
29 C J p 594 note 49

Amendment

Where petition for highway improvement over a named distance was referred to the county engineer and viewers, with directions to examine the proposed improvement, and their report eliminated the westerly two miles of such improvement, in view of a statute authorizing amendments to the petition, and the petitioners acquiesced in the omission of part of the road described in the petition from the order directing the improvement the petition will be considered as amended so as to conform to the order—Cole v Board of Com'rs of Noble County, 138 N E 859, 82 Ind App 640, rehearing denied 140 N E 418, 82 Ind App 640

Changes in highway with or without authority of the district made subsequent to the filing of a petition for improvement on the highway could not affect the character of the improvement to be made in pursuance of such petition—State ex rel Melvin v Hackmann, 213 S W 337, 295 Mo 14

More than one road

Where paving improvement is proposed there is no legal objection to including in the petition more than one road where the improvement contemplates one connected system or unit of paving—Brown Real Estate Co v Lancaster County, 188 N W 247, 108 Neb 511, followed in Loos v Lancaster County, 188 N E 253, 108 Neb 531

In Mississippi a petition, as provided for in Hemingway Code Suppl 1921 §§ 7158-7178c, does not provide any power in the electors to prescribe roads to be built or improved out of a bond issue petitioned for. The only authority the electors have is to petition for the law to be adopted and the bond issue to be voted and any extraneous or surplus matter therein is not binding on the supervisors—Board of Sup'rs of Quitman County v Self, 125 So 528, 156 Miss 273

69. N J—Cottrell v Middlesex County, 26 A 94, 55 N J Law 238
29 C J p 594 note 50

70 Kan—State v Board of Com'rs of Leavenworth County, 245 P 1051, 121 Kan 148, motion denied 279 P 10, 128 Kan 453

71. Ind—Tucker v O'Neal 30 N E 533, 130 Ind 597—Tucker v Sellers, 30 N E 531, 130 Ind 514
29 C J p 594 note 52

72. Ind—Gipson v Heath, 98 Ind 100
N J—Boynton Real Est Co v Woodbridge Tp, 109 A 514, 94 N J Law 226
29 C J p 594 note 53

73. Ohio—Thompson v Love, 42 Ohio St 61

74. Okl—Pine v Baker, 184 P 445, 76 Okl 62

75 Cal—Clark v Welch, 178 P 516, 179 Cal 816
29 C J p 594 note 56

Approval of plans

Acts Extra Sess 1920 No 183, creating road district No 16 of Woodruff County, does not require that plans and specifications be approved by the county court, although they are required to be filed with the county clerk by the commissioners—McKnight v Mitchell, 256 S W 368, 161 Ark 385

76 Okl—Pine v Baker, 184 P 445, 76 Okl 62

77. Ind—Scott v Vermillion County Comrs, 101 Ind 42

Bond held unnecessary

Pa—In re Delaware Tp Road, 35 Pa. Co 300, 24 Montg Co. 198.

lish, or construct any improvement except as petitioned for by a sufficient number of properly qualified freeholders [78] Under some statutes, however, in improving roads, they may be changed whenever necessary in order to avoid bluffs, hills, ravines, or other obstacles, for a distance of not more than one-half mile,[79] and under some statutes the board of county commissioners has power to review, change, and modify the plans for the proposed improvement on a public hearing after the report of the appraisers has been received [80] If part of the road described in the petition has already been improved so as to conform to the proposed work, the board may omit that part from the order and direct the balance of the road improved [81] Under some statutes, where the county commissioners have allowed a petition for the hard surfacing of a road over a definite route, making appropriate findings and orders, they cannot, on a new petition, make a substantial change in the route,[82] although, where authorized by statute to do so, before a contract for construction of the road has been made, the commissioners may order, under a subsequent proper petition therefor, a road built of different material on a location largely identical with that ordered in the first petition [83]

Reply or remonstrance. Pleadings in reply should be according to the statute [84] The grounds of objections by parties filing a remonstrance and motions in the proceedings must be set forth specifically, and not in general terms, or no question is presented [85] Errors cannot be taken advantage of by persons who are not injuriously affected thereby [86] The legislature may limit the right to protest by granting it only to owners of record [87] This limitation does not prevent all interested persons, including those not owners of record, from appearing before the board of supervisors and voicing their objections.[88]

The minority who do not sign the petition and who are bound by the proceedings instituted by the majority have the same right to insist that proceedings shall be in accordance with the petition as has any of the signers thereof.[89]

Resolution of intention Under some statutes empowering county boards of supervisors to order the construction or improvement of highways, the board is required to pass a resolution of intention to order such work to be done, and a resolution of intention in substantial compliance with the statute is sufficient [90]

§ 193. —— Submission of Question to Vote

Where a statute so requires, the question of improving roads must be submitted to a vote The election must be conducted in substantial compliance with the law

In the absence of a statute so requiring, the proposition of improving the roads need not be submitted to a vote of the landowners or voters [91] In some jurisdictions the question of improving roads must be submitted to the voters of the town or taxing district at a regular election, or at a special election called for that purpose [92] If the petition is

78 Ind —Cincinnati, I & W R Co v Board of Com'rs of Fayette County, 134 N E 782, 192 Ind 1

79. **Straightening of road** in order to eliminate a dangerous curve did not render the proceedings void — Cole v Board of Com'rs of Noble County, 138 N E 859, 82 Ind App 640, rehearing denied 140 N E 448, 82 Ind App 649

80. Wash —Hansen v Harris, 212 P 171, 123 Wash 109

81. Ind —Cole v. Board of Com'rs of Noble County, 138 N E 859, 82 Ind App 640, rehearing denied 140 N E 448, 82 Ind App 640

82. Kan —State v. Board of Com'rs of Leavenworth County, 245 P 1051, 121 Kan 148, motion denied 279 P 10, 128 Kan. 453

Inability to obtain federal aid

Where county commissioners have allowed petition for hard surfacing road over definite route, they cannot abandon part of route because federal aid cannot be obtained therefor —State v Board of Com'rs of Leavenworth County, supra.

83. Kan —State v Hess, 204 P 695, 110 Kan 596

84. Cal —Thomas v Pridham, 153 P 933, 171 Cal 98
Ind —Kemp v Goodnight, 80 N E 160, 168 Ind 174
29 C J. p 594 note 59

85. Ind — Chanley v Zimmer, 108 N E 769, 183 Ind 222—Conrad v Hansen, 85 N E 710, 171 Ind 43

86. Ind —Conrad v Hansen, supra

87. Cal —Thomas v Pridham, 153 P 933, 171 Cal 98

88. Cal —Thomas v Pridham, supra

89. **Cost**

Landowner not signing can insist that cost shall not exceed that named in the petition —Hines v Barton County, 189 P 368, 106 Kan 682

90. Cal —Pierce v Solano County, 217 P 545, 62 Cal App 465

91. **Overruling remonstrance**

County board of commissioners, under the Three Mile Gravel Road Law, need not call election on highway construction when they overrule remonstrance against it —Ward v Board of Com'rs of Lake County, 157 N E 721, 199 Ind 467—29 C J p 595 note 65 [c]

92. Ill —People v Myers, 100 N E 211 256 Ill 529
Ind —Lowe v White County, 59 N E 466, 156 Ind 163
29 C J p 595 note 65

Applicability of statute

(1) Statute providing for election held inapplicable to improvement district whose commissioners had entered into construction contracts and issued bond before passage of act — Massey v Arkansas & Missouri Highway Dist in Pulaski County, 259 S. W 387, 163 Ark 63—Walker v Culbertson, 258 S W 990, 163 Ark 345

(2) Such statute is applicable to an improvement consisting of laterals annexed to original road, as it must be treated as a new project and the creation of a new district — Road Improvement Dist No 2 of Lonoke County v Shifflett, 273 S W. 1034, 169 Ark 179

(3) Statute held not to prohibit commissioners of road improvement district from graveling laterals — Swan v. Ozark Trail Road Improve-

on its face regular and conforms to the statute, it is the duty of the clerk to call the election.[93]

Under some statutes the petitioners have the right to determine the kind of road on which they will ask for the vote[94] If they see fit, they may petition for a vote on levying a tax for gravel, rock, macadam, or other hard roads in the language of the statute, thus leaving the character of the road to be determined by the highway commissioners[95] On the other hand, they may petition for a vote on a particular kind of hard road, in which event the vote must be had on that proposition and cannot be extended to other kinds of roads[96] The improvement of more than one road in the district may be petitioned for and voted on as a unit[97]

The petition must contain the statements required by the statutes[98] and be signed by persons having the required qualifications[99] Where the statute so requires, it must contain a description of the road sufficient to inform the voters what road is to be improved[1] Unless the statute so requires, the fact that the signers possess the necessary qualifications is not required to be stated[2]

The order calling the election may describe the road to be improved so as to inform the voters of its location[3] Reasonable notice of the election must be given[4]

Unless so provided the election need not be by ballot[5] Where required, however, the ballot must be in the form prescribed by the statute,[6] and a failure to comply with the law in that respect renders an election void[7] A substantial compliance with the statute as to the form of the ballot is all that is required[8] A ballot in the form prescribed by the statute in force at the time of the election is sufficient,[9] and need not specify in detail the matters set forth in the petition[10] The notice and ballot should follow and agree with the petition,[11] and should not permit a vote on a different question,[12] but there is no objection to the generality of a ballot, if it directs the attention of the voter to the proposition on which he is to vote[13] The omission of the negative of the proposition to be voted on will invalidate the election[14]

The returns of the election should be canvassed by the persons designated in the statute, but disregard of such requirement is a mere irregularity,

ment Dist, 277 S W 342, 169 Ark 987

(4) Statute held inapplicable to a district where the act creating the district or amendments to it provided for an election—Bost v Road Improvement Dist No 4 of Pope County, 260 S W 721, 163 Ark 607, dissenting opinion 261 S W. 659, 163 Ark 607

93. Ill—Wood v Road Dist No 6, 129 N E 774, 296 Ill 405
Ind—Smyth v State, 62 N E 449, 158 Ind 332

94. Ill—People v Illinois Cent R Co, 107 N E 253, 266 Ill 240—People v Kankakee & S R Co, 93 N E 773, 248 Ill 114

95. Ill—People v Illinois Cent R Co, 107 N E 253, 266 Ill 240—People v Cleveland, C C & St L R Co, 107 N E 251 266 Ill 98—People v Kankakee & S R Co, 93 N E 773, 248 Ill 114

96. Ill—Martin v Hart, 129 N E 693, 296 Ill 149
29 C J p 595 note 68

97. Ind—Lowe v White County, 59 N E 466, 156 Ind 163

98. Ill—People v Kankakee & S R Co, 93 N E 773, 248 Ill 114

99. Ill—People v Scott, 104 N E 160, 262 Ill 91
29 C J p 595 note 72.

On separate sheets

A bond election for hard surfaced roads will not be invalidated because names of all voters petitioning are not contained on same paper, if they are attached and filed as a single petition—Hale v Martin County Fiscal Court, 261 S W 1094, 203 Ky 156

1. Ill—People v Worley, 103 N E 579, 260 Ill 536
29 C J p 595 note 73.

2. Ill—People v Kankakee & S R Co, 93 N E 773, 248 Ill 114

3. Tex—Newman v. Biggs, Civ App, 68 S W 2d 632

Order held sufficient

An order calling bond election for hard surfaced roads and advertisement although not fixing definite point for beginning or terminus of road, sufficiently described the road as running from point on certain trail through county seat to point on state line, thus indicating it was to cross the county—Hale v Martin County Fiscal Court, 261 S W 1094, 203 Ky 156

4. Large participation in election

Failure to give notice of special election on question of adoption of county road unit system was not waived by large participation in election—State ex rel Beck v Board of Com'rs of Allen County, 57 P 2d 150, 143 Kan 898

Requirement implied

The fact that the statute requiring the question to be submitted to the voters makes no provision for the nature or length of the notice to be given does not relieve the board from giving reasonable notice, as such notice is necessarily implied in statutes providing for special elections—State ex rel Beck v Board of Com'rs of Allen County, supra

5 Ind—Strebin v Lavengood, 71 N E 491, 163 Ind 478
29 C J p 595 note 76

6 Ill—Martin v Hart, 129 N E 693, 296 Ill 149—People v Worley, 103 N E 579, 260 Ill 536—People v Myers, 100 N E 211, 256 Ill 529
29 C J p 595 note 77

7. Ill—People v Worley, 103 N E 579, 260 Ill 536—People v Myers, 100 N E 211, 256 Ill 529

8. Ill—People v Chicago & E I R Co, 129 N E 846 296 Ill 246
Miss—Love v Yazoo County, 72 So 230, 111 Miss 802
29 C J p 595 note 79

9. Ill—People v Illinois Cent R Co, 129 N E 697, 296 Ill 196

10. Ill—People v Illinois Cent R Co, supra—Martin v Hart, 129 N E 693, 296 Ill 149

11. Ill—Martin v Hart, supra—People v Cleveland C C & St L R Co, 107 N E 251, 266 Ill 98—People v Myers, 100 N E 211, 256 Ill 529—People v Kankakee & S R Co, 93 N E 773, 248 Ill 114

12. Ill—Martin v Hart, 129 N E 693, 296 Ill 149

13. Ill—Martin v Hart, supra.

14. Ill—People v Worley, 103 N E 579, 260 Ill 536—People v Myers, 100 N E 211, 256 Ill 529.

not affecting the validity of the tax levied.[15] Under some statutes the canvass of the votes cast at the election must be submitted to the county board of commissioners, and it must find as to the result of the election.[16] The board is authorized to go behind the votes as returned by the election officers, and any person may appear before the board at the proper time, and present any proper objections to the result as returned.[17] Where the board finds the election to be invalid, it may order a valid election.[18] In some states provision is made for a formal contest of the election.[19]

The improvement ordered or contracted for by the court or county commissioners must, as a general rule, be that authorized by the election,[20] although, unless restricted by the order submitting the question to a vote, the court or board of commissioners has a wide discretion as to the location of the roads to be improved,[21] and the order of their improvement,[22] but they cannot substitute one type of road material for another expressly approved at the election.[23] Where the submission order follows the petition, the court will ascertain the purposes of the petition and require conformity to its order of construction.[24]

Resubmission Under some statutes, where the question of hard surfacing the road system of the county has been determined and the question of issuing bonds therefor has been favorably acted on by an election, there is no authority for calling another election to resubmit the question to the voters.[25]

§ 194. —— Commissioners or Viewers

Some statutes provide for the appointment of commissioners or viewers who are to make a report on the proposed highway.

Where the statutes provide for the appointment of commissioners or viewers, they must be appointed in accordance therewith,[26] and they must duly meet[27] and make a report[28] which forms the basis of further proceedings.[29]

Under some statutes to authorize the improvement it is necessary for the county commissioners to make an absolute and unconditional finding of its public utility.[30] Under some statutes, where the

15. Ill—People v Green, 106 N E 504, 265 Ill 39 Ann Cas 1916A 707
29 C J p 595 note 86

16 Ind—Wilson v Board of Com'rs of Warrick County, 137 N E 783, 79 Ind App 250

17. Ind—Monroe County v Conner, 58 N E 828, 155 Ind 481

18. Ind—Wilson v Board of Com'rs of Warrick County, 137 N E 783, 79 Ind App 250

19. Ind—Strebin v Lavengood, 71 N E 494, 163 Ind 478
29 C J p 596 note 90

20 Authorization to change

Where, at the time of the adoption by vote at election of an act creating a road improvement district the act contained a provision authorizing the county court to change the route, and the act contained no provision for another election in case the route was changed, it was not necessary, after change of the route, to hold another election - Bulloch v Dermott-Collins Road Improvement Dist., 244 S W 327, 155 Ark 176 reversed on other grounds 14 S Ct 457, 265 U S 570, 68 L Ed 1184

Contract

County commissioners' court's preelection orders, locating road proposed to be constructed, constitute contract between voters and court, controlled by general principles of law of contracts—Newman v Biggs, Tex Civ App., 68 S W 2d 632

Designation by highway number

The designation of a road by its highway number, where it is located on the ground, operated, and maintained by that number, is a sufficient description to require the commissioners' court in constructing the new road, to conform to the location of the old road—Newman v Biggs, supra

Immaterial changes

When the road to be improved is specifically designated on the ground by a particular description given in the election order, the commissioners' court must construct the road in substantial compliance with the location as thus designated and it has discretion to make only such changes as would not amount to a material or substantial change from the route designated—Newman v Biggs, supra

Less than whole system

Where the board of commissioners is authorized by the result of the election to construct a system of roads as one road, it cannot contract for the construction of any one or more of the roads less than the whole—Wilson v Board of Com'rs of Warrick County, 137 N E 783, 79 Ind App 250

21. W Va—Chrystal v Preston County commissioners' court's pre-County Ct., 97 S E 606, 83 W Va 111—Brown v Preston County Ct., 90 S E 166, 78 W Va 644

Control points

When only control points of proposed public road are named in order for election on question of constructing it, county commissioners' court may locate road according to its discretion—Newman v Biggs, Tex Civ App., 68 S W 2d 632

22. W Va—Chrystal v Preston County Ct., 97 S E 606, 83 W Va 114
29 C J p 596 note 92

23 W Va—Brown v Preston County Ct., 90 S E 166, 78 W Va 644

24 W Va—Goodman v Fayette County Ct., 101 S E 264, 86 W Va 669

25 Iowa McLeland v Marshall County, 201 N W 401, 199 Iowa 1232, modified on other grounds 203 N W 1, 199 Iowa 1232

26. Ind—Fulton v Cummings, 30 N E 949, 132 Ind 453
29 C J p 596 note 95

27 Ind—Black v Thomson, 7 N E 184, 107 Ind 162
29 C J p 596 note 96

28. Ind—Metsker v Whitsell, 103 N E 1078, 181 Ind 126, followed in 103 N E 1085, 181 Ind 704
29 C J p 596 note 97

Number signing

The three viewers are of equal rank, and a report signed by two of them is sufficient even if one of those signing was appointed as an engineer—Board of Com'rs of Crawford County v State, 132 N E 680, 191 Ind 335

29 Ohio—Makemson v Kauffman, 35 Ohio St 444—Robinson v Logan, 31 Ohio St 466—Burgett v. Norris, 25 Ohio St 308

30. Finding on condition

Finding by county commissioners that road was of public utility on the condition that the road receive federal aid to specified extent was not rendered effective to authorize the

viewers disagree on the public utility of the highway, the proper practice is to reject their report, and refer the petition back to them for another report,[31] unless it plainly appears that it is not possible for them to agree, in which case new viewers should be appointed.[32] If the desired improvement or construction is decided on, the commissioners or viewers should make an order[33] which must follow the petition.[34] Notice of the filing of the report or of the order is unnecessary unless specially required.[35] The order may be vacated for sufficient reasons.[36] A failure to file a remonstrance, as permitted by statute, to the viewer's report has been held to constitute acquiescence in the report.[37]

Disqualification The members of the highway board have been held to be subject to the rule disqualifying a judge from acting when directly interested in the litigation,[38] unless such irregularity is waived.[39] An exception to this rule has been held to exist where the disqualification would destroy the only legal tribunal for hearing the question in issue,[40] but such exception is not applicable except in cases of imperative necessity.[41]

It has been held that the fact that a county commissioner owns real estate within the assessable area for the improvement does not of itself disqualify him from acting in proceedings relative to laying out and making the road.[42]

§ 195. —— Hearing and Record

There must be substantial compliance as to a hearing and the records to be kept

The hearing on the petition must be in accordance with the statute,[43] and can be held only after the notice prescribed by statute has been given.[44] The right of all persons to a hearing is a valuable right and, where the cost of the improvement is charged against the property benefited, the persons who are to pay that cost cannot be denied their day in court.[45] Formal errors in the proceedings do not affect their regularity,[46] nor does delay in

improvement, under statute requiring an absolute and unconditional finding of public utility, by the subsequent fulfillment of the condition when the federal aid asked was set aside without further action by the commissioners.—Herrmann v Larkin, 204 P 768, 110 Kan 607, overruling motion Herrmann v Larkin, 202 P 980, 110 Kan 168

31. Ind.—Metsker v Whitsell, 103 N E 1078, 181 Ind 126

Loss of jurisdiction

The county commissioners would not be deprived of jurisdiction because only one of the two viewers report that the proposed improvement would be of public utility, the other refusing to sign, the proper procedure being to refer the matter back to such viewers for further consideration, or to appoint other viewers.—Board of Com'rs of Crawford County v State, 132 N E 680, 191 Ind 335

32. Ind.—Metsker v Whitsell, 103 N E 1078, 181 Ind 126

33. Ind.—Ralston v Beall, 30 N E 1095, 171 Ind 719.—Lowe v White County, 59 N E 466, 156 Ind 163
La.—West Baton Rouge Police Jury v Crosely, 14 La Ann 164
Pa.—In re Pitt Tp Public Road, 1 Pa 356
Tenn.—Pope v Dykes, 93 S W 85, 116 Tenn 230.

34. Kan.—Hines v Barton County, 189 P 368, 106 Kan 682
29 C J p 596 note 3

35. Ind.—Wise v McKeever, 112 N E 765, 184 Ind 686

36. Ind.—Cass County v Logansport & Rock Creek Gravel Road Co., 88 Ind 199.
Ohio.—Makemson v Kauffman, 35 Ohio St 444
29 C J p 596 note 5.

37. Ind.—Cole v Board of Com'rs of Noble County, 140 N E 448, 82 Ind App 640, denying rehearing 138 N E 859, 82 Ind App 640

38. Ind.—Metsker v Whitsell, 103 N E 1078, 181 Ind 126
29 C J p 596 note 7

39. Ind.—Carroll County v Justice, 30 N E 1085, 133 Ind 89, 36 Am S R 528
Mass.—Tolland v Berkshire County, 13 Gray 12

40. Ind.—Whitesell v Metsker 119 N E 865, 188 Ind 1, superseding 114 N E 753, 187 Ind 451.—Metsker v Whitsell, 103 N E 1078, 181 Ind 126

41. Ind.—Metsker v. Whitsell, supra
29 C J p 596 note 10

42. Ohio.—Hamilton v Board of Com'rs of Hardin County, 141 N E 684, 108 Ohio St 566.—State v Shuff, 152 N E 300, 20 Ohio App 432

43. Ind.—Anderson v Claman, 24 N E 175, 123 Ind 471
29 C J p 597 note 11

44. Ind.—Conrad v Hansen, 85 N E 710, 171 Ind 43
29 C J p 597 note 12

Board held to have jurisdiction

Where residents of county filed with the county auditor their petition for construction of a highway and a date for hearing was set by the auditor and legal notice published and posted, and on the date set the county commissioners met and received proof of notice and adjudged the petition and notice legally sufficient, the board had full jurisdiction.—Hull v Board of Com'rs of La Porte County, 143 N E 589, 159 Ind 150

By publication

The fact that notice was given by publication does not negative the fact that sufficient notice was given, and, where all of the members of the county council appeared in response to the notice, if there was an irregularity in the character of the notice given, it would not invalidate the action taken.—Kelly v Herbst, 170 N E 853, 202 Ind 55

Order illegal

An order of the county commissioners approving resident taxpayers' petition for construction of an improved highway, made without giving to the petitioners and others interested ten days' published notice of the time and place when the petition would be considered, is illegal.—Atchison, T & S F Ry v Board of Com'rs of Barton County, 203 P 698, 110 Kan 310, denying rehearing 202 P 78, 109 Kan 787

Statutory exception of reconstruction and repair from requirement of notice of resolution declaring necessity for road improvement will be construed strictly in favor of citizen taxpayers.—Thomas v Board of Com'rs of Butler County, 162 N E 430, 28 Ohio App 8

45. Wash.—Hansen v Harris, 212 P 171, 123 Wash 109

46. Ind.—Switzerland County v Reeves, 46 N E 995, 148 Ind 467.—Stoddard v Johnson, 75 Ind 20
Me.—Woodman v. Somerset County, 25 Me 300.

acting on the petition,[47] without entering a formal continuance,[48] render the proceedings void.

Under some statutes it is the duty of the board of commissioners to determine whether the petition for the improvement contains the requisite number of qualified petitioners,[49] and whether a remonstrance is sufficient to stop all further proceedings.[50] In making this determination the board acts judicially.[51]

Under some statutes as a preliminary to the construction of proposed road improvements the county board must find them to be of public utility.[52]

Record In the absence of a statute to the contrary, it is not necessary that the record expressly show that the board made a finding of the facts necessary to give it jurisdiction over the subject matter, as it is sufficient that the board acted on the matter presented to it.[53] The record need not show that the improvement was necessary,[54] unless the statute so requires,[55] and the adoption of the order may be a sufficient statement of necessity.[56] The evidence of notice need not be spread on the record.[57] The mere failure of the county auditor at the proper time to perform the clerical act of copying a record made by the proper officer, when acting as clerk of a joint session of county boards, does not relieve him of a statutory duty to copy it into the record at some time.[58]

§ 196. —— Appeal and Certiorari

Where the statutes so provide, an appeal to some court may be taken from the decision of a highway board or officer as to the necessity and propriety of highway improvements

The necessity and propriety of the improvements, their kind, character, and extent, and the matter of their execution or construction are confided to such boards, officers, or agencies as the legislature has provided for that purpose, and, in the absence of any provision for the review of their action on appeal or otherwise, their findings and decision are final, and not subject to review, as long, at least, as they act in good faith and within the scope of the authority conferred on them.[59] However, the statutes usually expressly give to any person aggrieved by any decision of the board of commissioners a right of appeal therefrom to some court.[60]

County court's order, directing road improvement according to plans and specifications, referred to last preceding specifications filed—Johnson v. Underwood, 24 S.W.2d 133, 321 Mo. 578

47. Ind.—Hobbs v. Tipton County, 3 N.E. 263, 103 Ind. 575—Stoddard v. Johnson, 75 Ind. 20

48. Ind.—Osborn v. Sutton, 9 N.E. 110, 108 Ind. 443—Stoddard v. Johnson, 75 Ind. 20

49 Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467

50 Number of signers

The sufficiency of the remonstrance, if questioned, on the ground that it was not signed by a greater number of freeholders than the petition must be determined by the board.—Ward v. Board of Com'rs of Lake County, supra

51. Ind.—Ward v. Board of Com'rs of Lake County, supra

52 Conditional finding

Where an entry reciting that it was found that the improvements asked are of public utility is made on the commissioners' journal and the improvements are ordered on condition that the road connect with others outside of the county and that federal aid should be received, this language is to be construed as attaching conditions to the findings as well as the order and such a conditional finding is insufficient to authorize the improvements.—Hermann v. Larkin, 202 P. 980, 110 Kan. 168, motion for rehearing overruled Herrmann v. Larkin, 204 P. 768, 110 Kan. 607

53. Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467

54. N.C.—Raleigh v. Peace, 14 S.E. 521, 110 N.C. 32, 17 L.R.A. 330

55. Mich.—Hoyt v. East Saginaw, 19 Mich. 39, 2 Am.R. 76

Pa.—In re Delaware River Road, 5 Pa.Dist. 694, 18 Pa.Co. 165

56. Mass.—Commonwealth v. Abbott, 35 N.E. 782, 160 Mass. 282

Mo.—State v. Engelmann, 17 S.W. 759, 106 Mo. 628

Tex.—Connor v. Paris, 27 S.W. 88, 87 Tex. 32

57. Ark.—Pulaski County Road Improv. Dist. No. 2 v. Winkler, 145 S.W. 209, 102 Ark. 553

58. Ind.—Board of Com'rs of Crawford County v. State, 132 N.E. 680, 191 Ind. 335

59. Iowa.—Pillings v. Pottawattamie County, 176 N.W. 314, 188 Iowa 567
29 C.J. p. 597 note 21

60. Ark.—House v. Road Improvement Dist. No. 2, Conway County, 251 S.W. 12, 158 Ark. 330 error dismissed House v. Road Improvement Dist. No. 2 of Conway County, Ark., 45 S.Ct. 60, 266 U.S. 175, 69 L.Ed. 229

Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467—Hamilton v. McMahel, 141 N.E. 469, 80 Ind.App. 473

Pa.—In re Proposed County Road in Sugarloaf and Black Creek Tps., 85 Pa.Super. 119
29 C.J. p. 597 note 23

Board having jurisdiction

If the board, having jurisdiction, makes an erroneous decision of a question that comes before it, or is guilty of an irregularity not justified by the facts, the remedy is by appeal to the circuit court.—State v. Board of Com'rs of Dubois County, 148 N.E. 198, 196 Ind. 271, denying rehearing 146 N.E. 852, 196 Ind. 271

Change in plans

Circuit court was not deprived of jurisdiction to consider highway improvement appeal, where change in the plans by highway commission's engineer, made after appeal, did not affect essential character.—Kelly v. Herbst, 170 N.E. 853, 202 Ind. 55

Plan abandoned

Where after an appeal has been taken the plans for the improvement are abandoned and new plans are filed and approved without objection, objections to the new plan cannot be raised on the appeal taken from the original plans.—McGehee v. Road Improvement Dist. No. 2 of Desha County, 242 S.W. 808, 154 Ark. 442

Record

That transcript on appeal from board of county commissioners did not contain plans for road improvements was no ground to dismiss proceedings in circuit court, such report having been sent to engineer of state highway commission as required by statute.—Kelly v. Herbst, 170 N.E. 853, 202 Ind. 55.

A remonstrator has a right to appeal,[61] and under some statutes such right is not confined to parties to the procedure,[62] but anyone not a party may show his interest by affidavit and have the appeal.[63] Such an appeal must be taken within the time limited by statute [64] On such an appeal a case is usually tried de novo,[65] and only such questions can be determined as were presented to the board of commissioners,[66] or as may, by leave of court, be put in issue by amended pleadings [67] Under some statutes the decision of the court on questions which it is authorized to review is conclusive and is not subject to review by appeal [68]

Certiorari. Matters relating to the jurisdiction of the road commission to act in ordering the improvement may be reviewed on certiorari,[69] but certiorari will not lie to review legislative acts of the county board [70] It has been held that a statute providing for review by certiorari must be strictly construed and that the remedy by which the proceedings may be attacked must be confined to certiorari [71] If petitioners are not parties interested in such a sense as to permit them to question the proceedings by direct appeal, it has been held that they have no such interest as to permit them to sue out a writ of certiorari to review such proceedings [72]

Proceedings by certiorari have been held not to be personal actions in which the prosecutor may insist on a personal right, he is rather to be regarded as amicus curiæ, and the court should determine the public rights he represents on grounds that substantially affect them, and not on sharp questions and verbal criticisms [73]

§ 197. —— Collateral Attack

The proceedings for improvement of highways, if not void, are not subject to collateral attack

The proceedings of boards of commissioners or viewers for the improvement of highways are presumed to be regular, in the absence of a contrary showing,[74] and cannot be collaterally attacked,[75] as by injunction,[76] unless they are absolutely void,[77] or fraud or its equivalent appears [78] Unless otherwise provided by statute,[79] the rule against collateral attack applies as well where there is no appeal or other remedy as where an appeal is allowable [80] Persons other than the owners of the land on which a public road runs are not entitled collaterally to attack an order assuming jurisdiction thereof [81]

61. Ind –Ward v Board of Com'rs of Lake County, 157 N E 721, 199 Ind 467

Sole party

Remonstrator in county highway improvement proceedings was held to be the sole appellant to, and from circuit court and was held not required to give notice to coparties —Kelly v Herbst, 170 N E 853, 202 Ind 55

62. Ind --Strebin v Lavengood, 71 N E 494, 163 Ind 478

63. Ind --Strebin v Lavengood, supra—Fleming v Hight, 95 Ind 78 29 C J p 597 note 25

Parties

Such affidavit is not required of parties — Whitsell v Metsker, 119 N E 865, 188 Ind 1—Metsker v Whitsell, 103 N E 1078, 181 Ind 126 —Strebin v Lavengood, 71 N E 494, 163 Ind 478

64. Order dismissing exceptions, erroneously taken to order refusing petition does not extend time within which appeal must be perfected — In re Proposed County Road in Sugarloaf and Black Creek Tps, 85 Pa Super 119

65. Ind —Souder v Tyner, 127 N E 273, 189 Ind 386—Thompson v Ferguson, 102 N E 965, 180 Ind 312

66. Ind —Fisher v Blumhardt, 107 N E 466 182 Ind 603
29 C J p 597 note 28

67. Ind —Wilkinson v Lemasters, 23 N E 688, 122 Ind 82.

68 Ind —Moody v Irwin, 104 N E 10, 181 Ind 197—Stockton v Halstead 100 N E 82, 179 Ind 701—Stockton v Yeoman 100 N E 2, 179 Ind 61

69 N Y —People ex rel Van Rensselaer v Van Alstyne, 32 Barb 131

70 N Y —People v Queens County, 30 N E 488, 131 N Y 468
29 C J p 597 note 32

71 Mich —Anderson v Board of Road Com'rs of Oakland County, 256 N W 578, 268 Mich 643– Heliker v Oakland County, 185 N W 842, 216 Mich 595

Adequate and complete remedy

Statute providing for review by certiorari of the proceedings of road commissioners provide a full adequate and complete remedy —Cummings v Garner, 182 N W 9, 213 Mich 408

72 Ill –Sampson v Commissioners of Highways of Chestnut Tp, 115 Ill App 443

73. N J —McCarty v Hudson County Boulevard Commn, 106 A 219, 91 N J Law 137 affirmed 106 A 891 92 N J Law 519

74. Ind –Todd v Crail, 77 N E 402, 167 Ind 48
29 C J p 597 note 33

75. Ind —Board of Com'rs of Crawford County v State, 132 N E 680, 191 Ind 335—Hull v Board of Com'rs of La Porte County, 143 N E 589 159 Ind 150—Cole v Board of Com'rs of Noble County, 138 N E 859 82 Ind App 640, rehearing denied 140 N E 448, 82 Ind App 640– Wilson v Board of Com'rs of Warrick County 137 N E 783, 79 Ind App 250
Mich —Heliker v Oakland County, 185 N W 842 216 Mich 595
29 C J p 597 note 34

76. Ind –Monroe County v Conner 58 N E 828 155 Ind 484
29 C J p 598 note 35

Irregularities

Fact that a specification of paving material is too indefinite for competitive bidding and favors some bidders as against others cannot be asserted in a suit to enjoin the commissioners from proceeding with the improvement, being a collateral attack – –Wilson v Board of Com'rs of Warrick County, 137 N E 783, 79 Ind App 250

77. Ind —Cole v Board of Com'rs of Noble County 138 N E 859, 82 Ind App 640, rehearing denied 140 N E 448 82 Ind App 640
29 C J p 598 note 36

78. Kan —Stevenson v Shawnee County, 159 P 5, 98 Kan 671

79. Ind —Craw v Dunn, 92 N E 655, 174 Ind 615
Mich —Cummings v Garner, 182 N W 9, 213 Mich 408
29 C J p 598 note 38

80. Ind —Loesnitz v Seelinger, 25 N E 1037 127 Ind 422, rehearing denied 26 N E 887, 127 Ind 422

81. Ark –Pulaski County Road Impr Dist No 2 v Winkler, 145 S W 209, 102 Ark 553

§ 198. Compelling Construction, Improvement, or Repair and Remedies for Breach of Duty

Ordinarily the construction, improvement, or repair of highways is a matter of administrative discretion and cannot be compelled by legal proceedings

The necessity for the construction, improvement, or repair of highways, being an administrative matter, must be left largely to the judgment and discretion of the officers who are charged with the performance of the duty involved,[82] and, ordinarily, in the absence of fraud or its equivalent, their determination is final.[83] Various statutory proceedings, however, are provided for enforcing the construction and repair of roads,[84] and, where, after proper proceedings, an order for an improvement has become a finality, it is the duty, under some statutes, of the board of county commissioners to proceed without delay in making the improvement, and, on its refusal to do so, it may be compelled, by appropriate proceedings, to proceed.[85] An injunction compelling the construction of a highway should not be too broad or include matters which should not be compelled by injunction.[86]

§ 199. Restraining Construction, Improvement, or Repair

Illegal construction or improvement of highways may be enjoined

Courts will not, by restraining the construction, improvement, or repair of highways control the discretion of the proper highway authorities, except in so far as the action is shown to be capricious, unreasonable, oppressive, or unlawful.[87] On the other hand, construction or improvement in violation of, or noncompliance with, law may be restrained by injunction,[88] if the acts done, or threatened to be done, to the property would be ruinous or cause irreparable injury,[89] or, according to some decisions, although the injury is not irreparable, and defendant is not insolvent,[90] if the just enjoyment of the property in the future would be impaired.[91] Landowners have no right to interfere with the construction of a lawful improvement unless it affects some

82. Okl.—Board of Com'rs of Harmon County v. Oklahoma State Highway Commission, 23 P.2d 681, 163 Okl. 207.—Board of Com'rs of Grant County v. Comstock, 17 P.2d 501, 161 Okl. 43.
29 C.J. p. 598 note 44

Denial of application

Where such officers find that the repair of a highway is not required by public necessity and convenience they may deny an application therefor.—Goodspeed's Appeal, 53 A. 728, 75 Conn. 271.

83. Md.—Willis v. Milling, 194 A. 584, 173 Md. 28.
29 C.J. p. 598 note 45

84. Minn.—In re Highway of Fillmore and Houston Counties, 197 N.W. 741, 158 Minn. 302.
29 C.J. p. 598 note 41

Appeal to county board

Ordinarily, exclusive remedy to compel town board to repair town highway is appeal to county board.—State v. Fadden, 242 N.W. 899, 209 Wis. 1.—State v. Rossier, 238 N.W. 825, 205 Wis. 634.

Damages not proper remedy

When road, although no longer kept in repair, has not been discontinued, the remedy of one aggrieved is not by action for damages, but by mandamus to require its repair.—Shellnut v. Carroll County, 117 S.E. 333, 30 Ga. App. 200.

Mandamus to compel construction, improvement, or repair of highways see the C.J.S. title Mandamus §§ 175-177, also 38 C.J. p. 750 note 3-p. 756 note 12.

Whether road is public highway may be determined in a proceeding to compel a town to repair it.—Anderson v. New Canaan, 38 A. 944, 70 Conn. 99.

85. Kan.—State v. Board of Com'rs of Johnson County, 260 P. 985, 124 Kan. 511.

Limitations

A statute relating to petitions for benefit district roads where construction has not been begun within three years after approval does not apply so as to bar proceedings to compel construction where a survey has been made and several culverts constructed within the time limited.—State v. Board of Com'rs of Leavenworth County, 268 P. 837, 126 Kan. 571, motion denied 279 P. 10, 126 Kan. 453.

86. Route

Injunction mandatorily requiring highway commission to build road on designated route was too broad, as precluding commission from thereafter building road on different route if authorized by legislature.—State Highway Commission v. Mitchell, 44 S.W.2d 533, 241 Ky. 553.

87. Ga.—Ward v. State Highway Board, 157 S.E. 328, 172 Ga. 414.—Town of Camak v. State Highway Board, 143 S.E. 367, 166 Ga. 359.

Injunction properly denied

N.C.—Leaksville Cotton Mills v. Board of Com'rs of Rockingham County, 114 S.E. 172, 184 N.C. 227.

Lawful construction

The fact that the board of commissioners of one of the counties has a contract with the state highway commission to build a certain highway in the county does not give the board any right to enjoin the state highway commission from constructing any other highway in the county, where none of the county funds is used in building such other highway.—Board of Com'rs of Harmon County v. Oklahoma State Highway Commission, 23 P.2d 681, 163 Okl. 207.

88. Kan.—Hines v. Board of Com'rs of Barton County, 202 P. 77, 109 Kan. 783.

Mich.—Hoyt v. Roscommon County Road Commission, 267 N.W. 587, 276 Mich. 19.
29 C.J. p. 598 note 49

Compliance with statute held sufficient

Tex.—Willcox v. Jackson, Civ. App., 124 S.W.2d 189, error dismissed, judgment correct.

Disregard of maximum cost

Where a petition for highway improvement is presented to county commissioners and conditioned on the improvement's not costing more than a certain sum per mile, such limitation is valid, and the commissioners may be enjoined from constructing at a greater expense.—Atchison T. & S. F. Ry. Co. v. Board of Com'rs of Barton County, 202 P. 78, 109 Kan. 787, rehearing denied 203 P. 698, 110 Kan. 310.

89. Ind.—Erwin v. Fulk, 94 Ind. 235.

N.Y.—Prospect Park & C. I. R. Co. v. Williamson, 24 Hun 216, reversed on other grounds 91 N.Y. 552.

90. Mo.—Harris v. Gomer Tp. Bd., 22 Mo. App. 462.

91. Ind.—Erwin v. Fulk, 94 Ind. 235.
29 C.J. p. 599 note 53

personal or property right belonging to them or to some of them,[92] and injunction will not lie to prevent construction if the damage by reason thereof is merely consequential.[93] It has also been held that an injunction will not lie where the injury would be slight,[94] or where there is an adequate remedy at law[95] The usual defenses to an injunction are available[96] An injunction will be granted only on joining the proper parties[97] An injunction against county commissioners who have failed to comply with certain requirements of law, to restrain the opening of a road, cannot be final and perpetual, but only until they comply with such requirements[98]

Venue Where the state board of highway commissioners is not a corporate body, a proceeding to enjoin it from abandoning one road as a state-aid road and taking over another in lieu thereof is properly brought in the county in which one or more of the commissioners reside[99]

Time to sue The action must be commenced within the time limited after the making of the order directing the improvement[1] The right to oppose an improvement may also be lost by laches[2] In the absence of any evidence of an illegal act done or intended to be done, the action is prematurely commenced[3]

Pleading On proceedings to enjoin changes in the state highway, allegations that the proposed changes are substantial and are not being made in the interests of public safety must be considered in conjunction with allegations which give a description of the road and of the proposed changes in its location[4]

§ 200. Criminal Responsibility for Neglect

In some jurisdictions and under some statutes neglect of highways is a criminal offense

In some jurisdictions and under some statutes towns may be proceeded against criminally for failure to repair[5] or to open[6] highways or town ways,[7]

92 Md—Murphy v Uhl, 119 A 566, 159 Md 7
Tex—Heathman v Singletary, Com App, 12 S W 2d 150, affirming Singletary v Heathman Civ App, 300 S W 242—Patricio County v Maxwell, Civ App, 56 S W 2d 295—Allison v Sutton County, Civ App, 278 S W 928

A landowner who is not denied ingress to, and egress from, his land cannot, after a state highway has been relocated in accordance with the procedure fixed by law and a railroad highway crossing eliminated, enjoin the vacation of the old highway and the closing of the railroad crossing—Gantz v Board of Com'rs of Jefferson County, 282 P 265, 129 Kan 66

Failure to state cause of action

An application for a temporary injunction should be denied where the complaint does not show a cause of action and the defects cannot be supplied by affidavit Thus the construction of highway through farm on section line between house and barns was not enjoinable although seven-foot grade would be built as approach to overpass across railroad track, which would inconvenience farmer—King v Stark County, 266 N W 654, 66 N D 467

Strangers

"If the land-owners whose lands are affected, and the public authorities, see fit to recognize the proceedings as valid, so far as they affect the lands of the owners, mere strangers have no right to complain"—Sunderland v Martin, 15 N E 689, 691, 113 Ind 411

93. N M—Gallegos v Conroy, 29 P 2d 334, 38 N M 154

94. Mich—Brown v Gardner, Harr 291

95 Kan—Rice v Ard, 143 P 418, 93 Kan 165
29 C J p 599 note 55

96. Ind—Stewart v Beck, 90 Ind 458
29 C J p 599 note 56

Answer held sufficient

In petition to enjoin change of highway route, answer alleging that engineering difficulties and financial costs rendered construction on statutory route inadvisable was held sufficient—Crichton v Louisiana Highway Commission, 136 So 43, 172 La 1033

Rights of public must be considered in suit to enjoin improvement—Pitcairn v Stuart, 153 A 896 302 Pa 199

97. Cal—Myers v Daubenbiss, 23 P 1027, 84 Cal 1
Mo—Carpenter v Grisham, 59 Mo 247
29 C J p 599 note 59

The state highway commission is not a necessary party to an injunction against county authorities to prevent them from entering into a contract with the highway commission for the improvement of an alternate state highway route—Alexander v Singleton, Tex Civ App, 50 S W 2d 893 error refused

98. Nev—Champion v Sessions, 2 Nev 271

99. Ga—State Highway Department of Georgia v Marks, 145 S E 866, 167 Ga 397

1. Kan—Atchison, T & S F Ry Co v Board of Com'rs of Barton County, 202 P 78, 109 Kan 787, rehearing denied 203 P 698, 110 Kan 310—Norton v Montgomery County, 199 P 388 109 Kan 559

Attempt to resuscitate

Thirty-day limit for challenging validity of improvement petition or orders and proceedings is inapplicable to an attempt to resuscitate proceedings which had been abandoned—Hines v Board of Com'rs of Barton County 202 P 77, 109 Kan 783

2 N C—Town of Newton v State Highway Commission, 138 S E 601, 194 N C 159, petition dismissed 139 S E 613, 194 N C 803

Almost completed alteration

Where plaintiffs knew of the proposed changes between three and four months before the work was begun, and saw it being done from the time it was commenced yet gave no notice that they intended to oppose its completion, until all the grading and more than two thirds of the concreting had been done, they were barred from relief by laches An offer to restore the road to the original grade is not sufficient to excuse such laches where such offer will not repay expenses incurred—Pitcairn v Stuart, 153 A 896, 302 Pa 499

3. N Y—Tinker v O Dell, 118 N Y S 876, 134 App Div 272

4. Kan—State v Kansas State Highway Commission, 299 P 955 133 Kan 357

5. N J—Lodi Tp v State, 21 A 457, 53 N J Law 259
29 C J p 599 note 63

6. Me—State v Kittery, 5 Me 254
N H—State v Landaff, 22 N H 588
29 C J p 599 note 61

7. Mass—Commonwealth v. Boston, 16 Pick 412
29 C J p 599 note 65.

and, where a highway is located on the divisional line between two towns, one of the two towns may be indicted for failure to keep such highway in repair,[8] but they cannot be jointly indicted.[9] The same remedy is available against a private person or corporation charged with the duty of repair.[10]

A highway officer failing to work or repair a highway under his charge is frequently made subject to criminal liability[11] or to a statutory penalty.[12] While in some cases it is assumed apparently that there is such a criminal liability apart from special statute, on the ground that leaving a road in an improper condition constitutes a nuisance,[13] it is generally imposed by express statute,[14] and the liability of the officer is generally restricted to cases in which his neglect to repair is willful.[15] Where the officer has a discretion in the matter,[16] where the work was rendered impossible by facts not attributable to his fault,[17] or where the legislature has prescribed no penalty and fixed no punishment for neglect on the part of a road officer,[18] he is not liable to indictment. However long a road may have been out of repair before the indictment, it is but one offense, but if, after conviction, it still continues out of repair, the officer may again be indicted.[19]

Defenses Particular matters have been held not to be available as a defense in a prosecution for not building the highway after it has been laid out,[20] or for failure to repair.[21]

Indictment and information Offenses of this nature may usually be proceeded against either by indictment or information,[22] or, under some statutes, by presentment.[23] As in the case of other offenses, an indictment for maintaining a defective highway should be definite and certain in its averments,[24] and must charge all the essential elements of the offense.[25] Duplicity in case of such indictments, ac-

8. Mass—Com v Stockbridge, 13 Mass 294—Middleborough v Taunton, 2 Cush 410

9. Me—State v. Thomaston, 74 Me 198

10. Ga - Patillo v. Cutliff, 56 Ga 689
29 C J p 599 note 68

11. Pa—Commonwealth v Engle, 9 Pa Dist & Co 333, 3 Som Leg J 81
29 C J p 599 note 69

12. Pa—Commonwealth v Johnson, 5 Pa Dist & Co 769, 39 York Leg Rec 9
29 C J p 600 note 70

13. Miss--State v Adams County Public Road Comrs, 1 Miss 368
Pa—Griffins v Com, 3 Penr & W 502
S C—State v Chappell, 20 S C L 391
Tenn—Hill v State, 4 Sneed 443

14. Statutory remedy exclusive
Where a statute provides a remedy against township supervisors for failure to keep roads in repair, they cannot be indicted at common law for such failure—Commonwealth v Johnson, 5 Pa Dist & Co 769, 39 York Leg Rec 9

15. N C—State v Miller, 5 S E 925, 100 N C 543
29 C J p 600 note 73

16. Pa—Commonwealth v Thompson, 17 A 754, 126 Pa 614
Tex—State v Jones, 18 Tex 874

17. Tex—Parker v State, 16 S W 186, 29 Tex App 372
29 C J p 600 note 75

18. Ill—Zorger v Peo, 25 Ill 193

19. S C—State v Chappell, 20 S C L 391

20. Particular matters
(1) The impossibility of making the road—State v Brookfield, 2 Vt 518

(2) Irregularities in the proceedings to lay it out—State v Weare, 38 N H 314

(3) Opening of the road on a different location—Commonwealth v Johnson, 19 A 803, 134 Pa 635

21. Particular matters
(1) That the original layout was defective
N H—State v Raymond, 27 N H 388 - State v Richmond, 26 N H 232—State v Gilmanton, 11 N H 467
Vt—State v Alburgh, 23 Vt 262

(2) That the road is within the limits of a toll bridge corporation—State v Madison, 59 Me 548

(3) That the highway is but little used--Hill v State, 4 Sneed, Tenn, 443

(4) That no injury or inconvenience has resulted to the public
Ala—McCullough v State, 63 Ala 75
N H—State v. Canterbury, 40 N H 307

(5) That the road is in a bad condition—Ward v State, Ala, 39 So 923

(6) That the character of the soil is such as to prevent permanent repairs—McCullough v State, 63 Ala 75

(7) That the destruction of a bridge beyond the town limits has made the road of no immediate practical use—Commonwealth v Deerfield, 6 Allen, Mass, 449

(8) That a new road has been made and the old road discontinued—State v Fletcher, 13 Vt 124

(9) That the town had no notice of the defect—Bragg v. Bangor, 51 Me 532.

(10) The omission of the apportioner to furnish defendant with a list of the hands apportioned to him—Ward v State, Ala, 39 So 923

22. N H—State v. Concord, 20 N H 295
29 C J p 600 note 92

23. Ga—Blankenship v. State, 40 Ga 680
Ky—Commonwealth v. Caldwell, Litt Sel Cas 168
29 C J p 600 note 93

24. Mass—Commonwealth v Play, 13 Pick 359
29 C J p 600 note 95

25. N C—State v Dickson, 32 S E 961, 124 N C 871
29 C J p 600 note 96

Duty to repair
(1) The indictment must charge that it was the duty of defendant to repair the highway complained of
Vt—State v Brookfield, 2 Vt 518
Wis—Biron v State, 35 Wis 313
29 C J p 601 note 1

(2) Where such duty is imposed by a private statute, facts must be alleged showing in what it consists, and how it is imposed—State v Miller, 5 S E 925, 100 N C 543—29 C J. p 601 note 2

(3) This particularity is unnecessary where the liability arises by reason of a public statute—State v Miller, supra—State v McDowell, 84 N C 798

Election or appointment of officer
In some cases it has been held necessary to set forth the facts in regard to the election or appointment of defendant as a highway officer—State v Collier, 86 N E 1015, 171 Ind 606—29 C J. p 601 note 4

cording to the decisions, is fatal[26] Where offense is purely statutory, the indictment must conclude against the form of the statute[27] At common law it has been held that an indictment against supervisors of roads for not keeping them in repair must conclude "to the common nuisance of the citizens," etc[28]

As in other cases, the proof must support the averments of the indictment, and a material variance is fatal[29]

Evidence The indictment must be supported by sufficient evidence[30] Defendants may introduce any competent evidence tending to show freedom from guilt[31]

Fine. The fine to be imposed on conviction is a matter of statutory regulation[32] Where the obstruction complained of has ceased to exist at the time of trial, a nominal fine and costs may be imposed[33]

§ 201. Expenses

The constitutions and statutes of the various jurisdictions determine on whom the cost of constructing, repairing, and maintaining highways and roads falls, by whom expenditures may or must be made, the limits on such expenditures, and the mode and manner of making them.

While the state may assume liability for the cost and expense involved in the construction, maintenance, and repair of highways and roads,[34] it may, within constitutional limits, impose the costs on any agency of the state it sees fit,[35] or, as discussed infra § 207, it may apportion the costs

Stated broadly, the power and authority to make expenditures and incur indebtedness in connection with the construction, maintenance, and repair of highways and roads, and the limitations thereon, as well as the mode and manner of incurring such indebtedness and making payment, are generally determined by the constitutions and statutes of the various jurisdictions, the provisions of which must

Neglect of duty and necessity for repairs

(1) It is generally necessary to set forth facts showing what specific duty imposed on defendant has been neglected
Ind—State v Brown 8 Blackf 69
N C—State v Halifax, 15 N C 345
29 C J p 601 note 5

(2) It is also necessary to show that defendant had time and opportunity to repair Elmore v State, 33 So 225, 81 Miss 422- Cain v State, 33 So 222 81 Miss 420—Burkett v. State, Miss, 33 So 221

(3) The fact that the particular highway complained of is out of repair must, of course, be charged, and the defects therein should be described with reasonable certainty—Howell v State, 16 S W 533, 29 Tex App 592
29 C J p 601 note 8

Description of highway

(1) The indictment should show by its averments that the highway complained of is within the town, county, or district sought to be charged with its repair—Howell v State, supra—29 C J p 601 note 9

(2) It is not necessary to state the width of the road—State v Madison, 63 Me 546

(3) It is not necessary to set out the termini
Ind—State v Harsh, 6 Blackf 346
Mass—Commonwealth v Newbury, 2 Pick 51
29 C J p 601 note 11

(4) It is not necessary to set out the courses and distances—State v Newfane, 12 Vt 422—State v Brookfield, 2 Vt 548—29 C J p 601 note 12

(5) A sufficient local description of the place out of repair must be given—State v Harsh, supra

(6) The proceedings by which the highway was laid out need not be set forth
Ind—Tate v State, 5 Blackf 73
Me—State v Madison, 63 Me 546
N H—State v Raymond, 27 N H 388

(7) It is not necessary to name the owners of the land over which the highway passes, provided its course is sufficiently described—State v Dover, 10 N H 394
29 C J p 602 note 15

Means to repair

(1) In some jurisdictions it is necessary to aver that defendant has funds or labor under his control sufficient to enable him to repair the road
Ill—Lequat v People, 11 Ill 330
N Y—People v Adsit, 2 Hill 619
Tex—Massure v State, 36 Tex 377
29 C J p 602 note 16

(2) In other jurisdictions the lack of such means constitutes matter of defense which need not be negatived in the indictment—State v Harsh, 6 Blackf, Ind, 346—Tate v State, 5 Blackf, Ind, 73

Willfulness

Where willfulness is made an element of the offense by statute, it must be alleged in the indictment
Mo—State v Levens, 22 Mo 469
N C—State v. Miller, 5 S E 925, 100 N C 543

26. Tenn—Greenlow v. State, 4 Humphr 25
29 C J p 600 note 97.

27. Mass—Commonwealth v Springfield, 7 Mass 9.
29 C J p 601 note 98

28 Pa—Griffins v Commonwealth, 3 Penr & W 502

29. Ark—Dormar v State, 31 Ark 49
29 C J p 602 notes 19–22

30. Ala—Ward v State, 39 So 923
29 C J p 602 note 23

31. Ala—Ward v State, supra
29 C J p 602 note 24

32 Me—State v Bangor, 41 Me 533
29 C J p 602 note 26

33. Me—State v Fryeburg, 15 Me 105

34. Cost of right of way

Tenn—Phillips v State ex rel Polk County, 148 S W 2d 369, 177 Tenn 265
State aid see infra § 207

35 Kan—Dunham Stock Farm Co v County Com'rs of Pottawatomie County, 226 P 781, 116 Kan 315
Mass—Tuckerman v Moynihan, 185 N E 2, 282 Mass 562
Neb—State v Steffen, 236 N W 141, 121 Neb 39
Pa—Greene County v Center Tp, 157 A 777, 305 Pa 79

County

(1) The legislature has power to tax the cost and expense thereof on the county without the approval of the people of the county, or to put on the county the cost of rights of way for such road—Lee County v City of Smithville, 115 S E 107, 154 Ga 550

(2) The state legislature may require a county to improve, at its own expense, roads within the territorial limits of the county—State v Babcock, 186 N W 688, 151 Minn 321.

be complied with in order that they may be valid charges or expenditures.[36]

A town has been held to have the power to expend money raised for the development and maintenance of its highways in material, equipment, and work appropriate to such end.[37]

§ 202. —— Liability of Municipality to Laborers and Materialmen in General

As a general rule the municipality is liable for work done and material supplied on road work properly authorized.

The power to purchase materials for road construction or repair may be either express[38] or implied from the power to condemn lands having such materials.[39] The power to purchase materials for road construction is not excluded by the grant of power to purchase materials for repair of roads,[40] or the grant of power to obtain materials by the condemnation of real estate.[41] However, the purchase of material at a specified price is not authorized under a statute allowing the overseer to take such materials under the county's power of eminent domain.[42] Ordinarily the municipality is responsible to one who furnishes labor or material for road work properly authorized,[43] but persons

36. Ark.—Leonard v. State ex rel. Norwood, 50 S.W.2d 598, 185 Ark. 998.
Cal.—Sharp v. Joint Highway Dist. No. 6, 295 P. 811, 111 Cal. App. 81.
Ill.—Standard Oil Co. v. Town of Patterson, 21 N.E.2d 12, 300 Ill. App. 385.—Deyo v. Commissioner of Highways of Sheridan, 256 Ill. App. 3.
Mich.—Board of County Road Com'rs of Wayne County v. Lingeman, 291 N.W. 879, 293 Mich. 229.
Miss.—Simpson County v. Panther Oil & Grease Co., 188 So. 566, 185 Miss. 506.
Pa.—Greene County v. Center Tp., 157 A. 777, 305 Pa. 79.

Approval of highway superintendent.
Under a statute requiring the approval of the county highway superintendent to authorize expenditures in excess of a specified amount, purchases on an open running account, no single purchase of which exceeded the specified amount, were proper without the approval of the highway superintendent.—Standard Oil Co. v. Town of Patterson, 21 N.E.2d 12, 300 Ill. App. 385.

Attorney's fees.
(1) Fees of an attorney hired by petitioner to advise the board are not part of the expenses.
Ind.—Overmeyer v. Cass County, 86 N.E. 77, 43 Ind. App. 403.
N.Y.—Eppig v. New York, 68 N.Y.S. 41, 57 App. Div. 114.

(2) However, a fee for legal services in connection with a township road bond issue, authorized at an election ordered by the county court is a part of the cost of holding the election and constructing or improving the roads.—State ex rel. Wammack & Welborn v. Affolder, 257 S.W. 493, 214 Mo. App. 500.

Cost of survey.
Under the statute, the county treasurer was held required to pay highway commission for survey involving one road, regardless whether act designated two roads for project.—Parrott v. Coggins, 155 S.E. 317, 171 Ga. 342.

Warning signals and road markers.
The expenditures by department of highways for warning signals, danger signals, and road markers to promote the safety and convenience of the traveling public are uniformly recognized as legitimate expenses and are properly chargeable to "construction and maintenance" of the highway.—Grauman v. Department of Highways, 151 S.W.2d 1061, 286 Ky. 850.
Availability of funds as limitation on the authority and duty to construct or repair roads see supra § 178.
Enforcement of liability see infra § 211.
Fund created by sale of liquor licenses used to repair roads see the C.J.S. title Intoxicating Liquors § 188 also 33 C.J. p. 570 note 85 [d].
Funds out of which payable see supra § 176.
Powers of highway.
Boards and commissions with respect to expenditures generally see supra § 158.
Officers with respect to expenditures generally see supra § 169.

37. Mich.—Webb v. Wakefield Tp., 215 N.W. 43, 239 Mich. 521.

38. Ill.—Townsend v. Gash, 108 N.E. 744, 267 Ill. 578.

39. Ky.—Cherry v. Christian County, 142 S.W. 726, 146 Ky. 330.

40. Ill.—Townsend v. Gash, 108 N.E. 744, 267 Ill. 578.

41. Ill.—Townsend v. Gash, supra.
29 C.J. p. 588 note 44.

42. Tex.—N. A. Matthews Lumber Co. v. Van Zandt County, Civ. App., 77 S.W. 960.
29 C.J. p. 588 note 45.

43. Ala.—Morgan County v. Money, 189 So. 773, 28 Ala. App. 514, certiorari denied 189 So. 775, 238 Ala. 149.
Ill.—Standard Oil Co. v. Town of Patterson, 21 N.E.2d 12, 300 Ill. App. 385.
Mich.—Webb v. Wakefield Tp., 215 N.W. 43, 239 Mich. 521.
Okl.—Board of Com'rs of Carter County v. Landrum, 21 P.2d 736, 163 Okl. 199.
Pa.—Swaney v. Georges Tp., 97 Pa. Super. 144.
29 C.J. p. 603 note 39.

Implied agreement to pay.
Where gasoline and supplies were purchased by commissioner of highways of township under numerous purchases and were received and used in operating road machinery at various places in improvement, repair, and maintenance of highways by the commissioner and where sufficient taxes had been levied to meet amount of obligation during years in which respective purchases were made, an implied contract existed on part of commissioner to pay therefor.—Standard Oil Co. v. Town of Patterson, 21 N.E.2d 12, 300 Ill. App. 385.

Issuance of invalid tax anticipation warrants.
The issuance of tax anticipation warrants by commissioner of highways of township not in conformity with statutory requirements did not relieve township of its obligations to pay for gasoline, oil, and tires for payment of which the warrants were issued, and the acceptance of the void warrants did not estop the seller to maintain suit on its account.—Standard Oil Co. v. Town of Patterson, supra.

Premature filing of claim immaterial.
The failure of county board of revenue to make notes or minutes of its purchase of road material, except to sign order therefor, and seller's premature filing of account or claim for value thereof, did not absolve county from liability to pay therefor, in absence of misappropriation, misapplication, or fraud.—Morgan County v. Money, 189 So. 773, 28 Ala. App. 514, certiorari denied 189 So. 775, 238 Ala. 149.

Presentment of account for payment.
Road overseer's presentment of individual account to county court including items for teams furnished by third persons, was held improper under statute requiring all persons who have furnished teams to present their

who improve roads or furnish materials therefor without authority or without complying with applicable statutory requirements may not recover,[44] although in some cases authority may be presumed.[45] A claim based on an unauthorized purchase cannot be approved or allowed even though the purchase was made in good faith and used for a good purpose.[46]

Assignments to road officers of claims against the county for road work are valid,[47] provided, of course, they are not fraudulent.[48]

§ 203. —— Road Machinery and Appliances

Authority to purchase machinery and appliances required for road building and repair usually is conferred on particular boards or officers, who may act subject to limitations of the statutes involved

The statutes usually confer authority on highway commissioners or other local officers to purchase such machinery and appliances for road building or repairing as in their discretion seem necessary.[49] Statutory limitations and restrictions on such authority must be observed in the exercise thereof.[50]

Authority to purchase has been held to include the power to lease[51] or to accept donations.[52]

In some jurisdictions previous authorization by the voters of the municipality,[53] or a petition by the taxpayers,[54] or a request by the overseers of a highway district,[55] is essential, in others this is not necessary.[56]

The mode of making payment, and the enforcement of it, depend entirely on the statute.[57]

individual accounts—Woodruff County v White, 11 S W 2d 478, 178 Ark 606.

Liability on quantum meruit in case of unauthorized contract see infra § 208

Materials suitable for construction and repair of roads see supra § 180

44. Ky—Muscovalley v Morris, 65 S W 2d 452, 251 Ky 475

Miss—Simpson County v Panther Oil & Grease Co, 188 So 566, 185 Miss 506

Or—Wilson v Gilliam, 222 P 298, 110 Or 165

29 C J p 604 note 40

Officers authorized

(1) Member of county board of supervisors had no power to purchase goods for use on public roads without authorization by board, in absence of emergency requiring repairs within three days—Simpson County v Panther Oil & Grease Co, 188 So 566, 185 Miss 506

(2) A road overseer is not an agent of the county to bind it for the price of supplies—N A Matthews Lumber Co v Van Zandt County, Tex Civ App, 77 S W 960

45. Ill—Harris v Carson, 40 Ill App 147

29 C J p 604 note 41

Receipt of benefits

Town having received benefit of services and trucks furnished in connection with sanding of roads, persons furnishing trucks and services were held entitled to payment without further delay—Bradner v Funkhouser, 291 N Y S 895, 249 App Div 751

46. Ark—McCord v Little River County, 244 S W 415, 155 Ark 402

47 Wash—Robertson v King County, 55 P 52, 20 Wash 259

48. Wis—Webster v Douglas County, 77 N W 885, 78 N W 451, 102 Wis 181, 72 Am S R 870

49. Ill—Deyo v Commissioner of Highways of Sheridan, 256 Ill App 3

29 C.J. p 604 note 44.

Extent of authority

(1) The exercise of discretion is not unlimited—Mitchell v Walden Motor Co, 177 So 151, 235 Ala 34

(2) Statute authorizing board of supervisors to purchase and hire teams, implements, and materials and employ labor and work to build and maintain public roads and bridges was held to intend that the board of supervisors should have power to purchase any equipment or implements or working appliances customarily used and useful in performing such work—Mississippi Road Supply Co v Hester, 188 So 281 185 Miss 839, 124 A L R 574

Expenses incident to purchase

Expenditure by county court commissioners from county funds of reasonable and necessary expenses for its members and county road engineer to attend a road exhibition to inform themselves as to different types of road machinery, to enable county engineer with approval of county court to purchase the best machinery obtainable for use in an extensive roadbuilding program, was held not unlawful—Painter v Heironimus, 125 S E 525 97 W Va 579

"Implements" defined

"Implements," as used in statute empowering board of supervisors to purchase and hire teams, implements, and materials and employ labor and work in the construction and maintenance of highways, is a term broad enough to embrace machines such as tractors, graders, etc—Mississippi Road Supply Co v Hester, 188 So 281, 185 Miss 839, 124 A L R 574

Materials for operating machinery

Under the statute, commissioner of highways of township was held to have prima facie power to purchase materials for use in operating road machinery at various places in improvement, repair, and maintenance of highways, where purchases were in nature of open running accounts of separate sales and delivery and no single purchase exceeded sum of two hundred dollars—Standard Oil Co v Town of Patterson, 21 N E 2d 12, 300 Ill App 385

Automobile improper purchase

An automobile to be used for inspecting the work done on a road was held not to come within statutes authorizing the purchase of implements to be used in constructing and maintaining roads—McCord v Little River County, 244 S W 415, 155 Ark 402

Upkeep of machinery

Road machinery purchased from county highway fund belongs to county as whole, and county as whole is responsible for its upkeep—Board of Com'rs of Carter County v Landrum, 21 P 2d 736, 163 Okl 199

50. Ill—Deyo v Commissioner of Highways of Sheridan, 256 Ill App 3

51. Ark—Galloway v Prairie County Road Impr Dist No 4, 220 S W 450, 143 Ark 338

29 C J p 604 note 45

52. Ark—Galloway v Prairie County Road Impr Dist No 4, supra

53. S D—F C Austin Mfg Co v Twin Brooks Tp, 91 N W 470, 16 S D 126

54. N Y—People v Montgomery Highway Com'rs, 62 N Y S 993, 48 App Div 550

Wis—Siegel v Liberty, 95 N W 402, 118 Wis 599

55. Mich—Pape v Benton Tp, 103 N W 591, 140 Mich 165

56. N D—Park River Bank v Norton, 104 N W 526, 14 N D 143

57. Mich—Power v Gray, 153 N W 37, 186 Mich 646—Power v Balitz, 153 N W 39, 186 Mich 652

29 C.J p 604 note 51.

§ 204. —— Improvement Bonds or Certificates

Payment of the costs of road construction and repair is sometimes made by means of improvement bonds or certificates.

Under some statutes payment of the cost of building, improving, or repairing highways and roads may be made by means of improvement bonds[58] or certificates[59] Under some of these statutes the local officers are not limited to the bare giving or refusing of consent to an issue of bonds, but may impose proper conditions, in the interest of the town,[60] with reference to the making of the contract for the construction of the highway and the doing of the work[61]

Such bonds[62] or certificates[63] are not binding obligations of the county or township issuing them, since they are payable out of the particular fund derived from the assessment of adjacent lands, and from no other source[64]

§ 205. —— Work or Material on Credit

Whether the credit of a municipality may be pledged in connection with the construction and repair of its highways and roads depends on the statutes

Under some statutes the authorities involved have no power to pledge the credit of the town or county in connection with the construction and repair of its highways and roads,[65] at least beyond funds on hand or appropriated[66] or taxes levied[67] Other statutes authorize the furnishing of road work or material on credit,[68] after all the money voted for this purpose by the town has been spent[69]

§ 206. —— Recovery of Advances Made by Highway Officer

Highway officers may recover advances made for authorized expenditures in the repair of roads within their district.

Highway officers may recover advances made by them of the amount necessary to put roads in repair,[70] only, however, where the expenditures were within their authority,[71] and for work within their district.[72]

State aid The constitutions and statutes of some jurisdictions make provision for the reimbursement of counties or other municipalities constructing or improving highways or roads covered thereby for the cost and expense incurred in such work[73] For a county to be entitled to reimbursement by the state, the work involved must have been on a state-aid road within the meaning of the provisions[74]

The county is entitled to reimbursement for expenditures made in acquiring a right of way for a state highway where the statute imposes liability for such costs on the state[75]

58. Ind—Overmeyer v Ciss County, 86 N E 77, 43 Ind App 403
29 C J p 604 note 53
Road district bonds generally see supra § 158

59 Pa—Commonwealth v Thompson, 86 Pa 442—In re Porter Tp Road, 1 Walk 10

60. N Y—People v McIntyre, 49 N E 70, 154 N Y 628

61. N Y—People v McIntyre, supra

62. Ind—Strieb v Cox, 12 N E 481, 111 Ind 299
29 C J p 605 note 57

63. U S—First Nat Bank of Lansdale v Board of Com'rs of Wyandotte County, Kan, 68 F 878, 16 C C A 56

Effect of invalidity of certificates
Fact that invalid statute under which road construction contracts were executed and certificates of indebtedness issued provided that no liability should rest on county and provided means of realizing on certificates against abutting owners was held not to affect county's liability for value of work done and materials furnished—Webb v Hillsborough County, 175 So 874, 128 Fla 471

64. Ind—Strieb v Cox, 12 N E 481, 111 Ind 299.

65 N Y—People v Burrell, 35 N Y S 608 11 Misc 217
29 C J p 605 note 60

66 Ark—Wiegel v Pulaski County, 32 S W 116 61 Ark 74
29 C J p 605 note 61

67. Ill—Deyo v Commissioner of Highways of Sheridan, 256 Ill App 3
29 C J p 605 note 62

Payments extending over several years
Contract of commissioner of highways for town's purchase of tractor was held against public policy, where payments extended over two-year period and beyond term of his office—Deyo v Commissioner of Highways of Sheridan, supra

68. Mass—Banchard v Ayer, 19 N E 209, 148 Mass 174
29 C J p 605 note 63

69. N H—Wells v Goffstown, 16 N H 53

70. Ind—Clark Civil Tp v Brookshire, 16 N E 132, 114 Ind 437
29 C J p 605 note 65

71. Me—Wiley v Windham, 50 A 281, 95 Me 482
29 C J p 605 note 66

72. Mass—Jones v Lancaster, 4 Pick 149
29 C J p 605 note 67.

73 Ga—State Highway Department of Georgia v Richmond County, 177 S E 501 179 Ga 642
S C—Little v Town of Conway, 171 S E 447, 171 S C 27

Improvement included
Statute held not to require state highway commission to pay half of municipal street improvement district's outstanding bonds for temporary use of street as continuation of state highway—Paving Dist Nos 76 and 52 of Pine Bluff v State Highway Commission, 52 S W 2d 623, 186 Ark 68

Reimbursement of payments to city or village
Under some constitutional provisions the state legislature may require a county to reimburse a city or village for expenditures made by such city or village in carrying out the road building program and may reimburse the county for the amount so paid—State v Babcock, 186 N W 688, 151 Minn 321

74. Ga—State Highway Department of Georgia v Richmond County, 177 S E 504, 179 Ga 642

75. Tenn—Phillips v State ex rel Polk County, 148 S W 2d 369, 177 Tenn 265.

§ 207. —— Apportionment

Provision is frequently made for apportionment of the cost of constructing and improving highways and roads among the various municipalities involved

While, as discussed supra § 201, the state may impose the costs of roads and highways on any agency of the state it sees fit, it may also permit the instrumentalities of the state to agree on a division of the costs among them[76] The statutes of some jurisdictions contemplate that each county shall construct and bear the expense of such portions of a highway as are within its limits, no county being required to contribute to the expense of a highway within the limits of another county[77] However, other statutes frequently provide that the expense of road work shall be apportioned among the districts, towns, or counties benefited,[78] or among cities and counties,[79] or between the state and counties or towns,[80] the manner of apportionment differing widely under the various statutes A town not in the district in which the road exists may under some statutes be forced to contribute toward it,[81] if greatly benefited,[82] even though not adjoining,[83] or even though not in the same county[84]

The statutes specify by whom the apportionment is to be made, and in order to be valid the apportionment must be made by the officers or court

76. Pa —Greene County v Center Tp, 157 A 777, 305 Pa 79— In re State Highway Construction Through Municipalities, 12 Pa Dist & Co 523

Agreements binding

(1) Under the statutes of some jurisdictions, adjacent townships may enter into agreements for the sharing of the cost of maintaining and repairing their highways, such agreements validly entered into being binding on the parties thereto — Bangor Tp v Hartford Tp, 193 N W 785, 223 Mich 374

(2) County taking over and improving road under contract with township may recover from township proportionate cost of partial construction —Greene County v Center Tp, 157 A 777, 305 Pa 79

Adoption of resolution as contract

(1) Resolution of county commissioners directing steps necessary to take over and improve road where adopted subsequent to township resolution petitioning county to improve highway, and agreeing to pay one-half expense thereof, and where accompanied by application for court's approval was held to create "contract" binding on township —Greene County v Center Tp, 157 A 777, 305 Pa 79

(2) This resolution for improvement of road need not specifically refer to township resolution to render township liable for proportion of cost —Greene County v Center Tp, supra

(3) That county commissioners, after securing court's approval for improvement of highway and after expiration of time for filing exceptions, notified township of proceedings to secure correction of construction contract inadvertently providing for county's bearing entire cost did not affect township's liability — Greene County v Center Tp, supra

(4) Resolutions of former township and county officials for highway improvement were held binding on township and county, where highway was completed under terms of resolution —Greene County v Center Tp, supra

(5) Question of township's liability for proportion of expense of improving township roads should be viewed from standards of practice adopted in highway construction by state department —Greene County v Center Tp, supra

77. Minn —Petition of Klossner, 195 N W 284, 156 Minn 440

78. Wis —Kewaunee County v Door County, 250 N W 438, 212 Wis 518
29 C J p 602 note 29

County aid to township

(1) Where county agreed to contribute to cost of improvement of highway on presentation of petition by township and application was approved by state highway department, pursuant to which bid was taken but rejected township supervisors should have filed new petition or amendment to original petition in accordance with statutory procedure in order to consummate new plan consisting of elimination of part of highway under original project and substitution therefor of connecting highway — Township of Luzerne v Fayette County, 199 A 327, 330 Pa 247

(2) Where township petition for county aid in road improvement is favorably acted on by appropriation or proper resolution of acceptance, petition and resolution fasten legal obligations on parties, and express contract between township and county is unnecessary —Township of Luzerne v Fayette County, supra

Liability over of road contractor

Pa —Luzerne County v Township of Hanover, 33 Luz Leg Reg 98.

79. Road "alongside" city

Under statute providing that, when a benefit district hard-surfaced road is constructed alongside the corporate limits of any city, the city shall pay fifty per cent of the cost of construction thereof, etc, a city of the second class is liable for fifty per cent of the cost of construction of a hard-surfaced road alongside the corporate limits, where the corporate limits extend to the middle of such road, "alongside" being defined as adjacent to and adjoining —Board of County Com'rs of Mitchell County v City of Beloit, 220 P 1020, 114 Kan 825

Reimbursement

Under statutes it was held that the county, if receiving payment for highway improvement from state highway department, must reimburse city for amount paid county by city for paving under contract —Wilkes County v City of Washington, 145 S E 47, 167 Ga 181

80. Kan —State v Board of Com'rs of Johnson County, 292 P 921, 131 Kan 403
Pa —Commonwealth v Dallas Tp, 18 Pa Dist & Co 525
29 C J p 603 note 30

Effect of prior agreement

Under a statute imposing a portion of the costs of improving and maintaining highways on the towns and counties, the state may recover the specified portion of the costs from a township in which the highway involved lies notwithstanding the existence of a prior agreement, under a statute subsequently repealed providing for a different proportion in the sharing of the costs —Commonwealth v Delaware Tp, 18 Pa Dist & Co 447, 36 Dauph Co 60

81. N Y —People v Queens County, 20 N E 549 112 N Y 585
29 C J p 603 note 31

82. N H —O'Neil v Walpole, 66 A. 119, 74 N H 197
29 C J p 603 note 32

83. N H —Langley v Barnstead, 63 N H 246
N Y —People v Queens County, 20 N E 549, 112 N Y 585

84. N H —Hodgson v New Hampton, 56 N H 332
Vt —State v Woodbury, 27 Vt. 731.

specified,[85] in the manner and on the proceedings specified in the statute[86]

The apportionment can be attacked only by parties interested in a direct proceeding for that purpose[87]

The board of commissioners of one county cannot vacate its own proceedings, or the proceedings of the boards of the two counties in joint session[88]

The statutes of some jurisdictions require a county to reimburse a city or village or other municipality within its confines for expenditures made by them in carrying out a road building program outlined by such statutes[89]

§ 208. Contracts for Road Work

a Constitutional and statutory provisions
b Authority to contract
c Requisites and validity of contract
d Modification and abrogation
e Assignment
f Construction and operation generally
g Effect of invalidity or irregularity

a. Constitutional and Statutory Provisions

Statutes regulating contracts for, or relating to, road construction or maintenance are construed in accordance with general rules

Contracts for, or relating to, the construction, maintenance, or repair of highways are to a considerable extent governed by constitutional or statutory provisions,[90] some of which regulate public contracts generally, while others deal specifically with highway contracts[91] To the extent that the two types of statute conflict, the statutes dealing specifically with highway contracts control[92] Whether a general statute is applicable to the contracts of a special road district should be determined in the light of the statutes under which the district was organized[93] Statutes dealing with highway contracts are to be construed in accordance with the general rules governing the construction of statutes[94] considered generally in the C J S title Statutes

Agreements between governmental authorities for aid or cooperation in the construction or improvement of highways are considered supra § 177

b. Authority to Contract

No person or body has power to make a contract for road work so as to bind the state or a municipality except in so far as such power is granted by statute

No person or body has power to enter into a contract for, or relating to, the construction, maintenance, or repair of highways, so as to bind the state or a municipality or road district, except in so far as such power is granted by[95] statute, and where

85 N J —In re Newark Plank Road & Bridges, 53 A 5 63 N J Eq 710
29 C J p 603 note 35

86 Idaho —Baker v Gooding County, 138 P 342, 25 Idaho 506
29 C J p 603 note 36

Acceptance by county
Resolution of quarterly county court was held sufficient acceptance of state highway department's proposal to furnish part of cost of construction of road —White v Jefferson County, 11 S W 2d 863, 157 Tenn 652, rehearing denied 16 S W 2d 24, 157 Tenn 652

Opinion of commissioners
Vt —Town of Weybridge v Towns of Addison, Bridport and Cornwall, 57 Vt 569
46 C J p 1118 note 11 [a]

87. Wash —Seanor v Whatcom County, 42 P 552, 13 Wash 48
29 C J p 603 note 37

88 Ind —State ex rel Board of Com'rs of Hendricks County v Board of Com'rs of Marion County, 85 N E 513, 170 Ind 595, superseding 82 N E 482

89. Minn —State v Babcock, 186 N W 688, 151 Minn 321

Statute held valid
Minn —State v Babcock, supra

90. Pa —Wagner v Hazle Tp 64 A 405, 215 Pa 219
29 C J p 605 note 71

91. Tenn —Pan American Petroleum Corporation v McQuary, 51 S W 2d 854, 164 Tenn 646

92 Tenn —Pan American Petroleum Corporation v McQuary, supra

93. Mo —Bixler v Special Road Dist No 1, Newton County, App, 156 S W 2d 950

94. N D —Rolette State Bank v Rolette County, 218 N W 637, 56 N D 571
29 C J p 605 note 71

Statutes in pari materia should be construed together —Penniman v Bennett, 224 Ill App 53

Statute transferring liabilities to highway commission
(1) Under statute, the state highway commission has assumed the rights and liabilities of the various counties on existing contracts for construction, improvement, reconstruction, or maintenance of state highways and bridges, and the counties are no longer liable on such contracts —Verdigris River Drainage Dist No 1 v City of Coffeyville, 97 P 2d 105, 150 Kan 765

(2) Where drainage district permitted county to cut levee and install drainage and floodgate under agreement that drainage district could make proper repairs at expense of county and at time agreement was entered into there was substantial amount of county road that was benefited by the new drain the floodgate was constructed for benefit of county road system so that when state highway commission took over the road as part of the state highway system, the commission became liable on the contract for money expended by the drainage district in repairing the floodgate --Verdigris River Drainage Dist No 1, in Montgomery County v State Highway Commission, 125 P 2d 387, 155 Kan 323

(3) County's contract for improvement of fully completed state highway, except that payment had not been fully made when highway commission was created, was held an "existing contract" within statute requiring commission to assume liabilities —McCandliss Const Co v Board of Com'rs of Neosho County, 296 P 720, 132 Kan 651

95. Ill —Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1
Me —Williams v Inhabitants of Town of Vinalhaven, 124 A 213, 123 Me 505
29 C J p 605 notes 69–72

the power is so granted it may be exercised only within the limits of the grant.[96] Subject to such limitations, various statutes and constitutional provisions in the several jurisdictions have been held to authorize the making of such contracts by state functionaries, such as the state board of administration,[97] or the state highway department[98] or commission,[99] by counties[1] through their representative bodies, such as the county court, commissioners, or supervisors,[2] by townships[3] through their representative officers or bodies,[4] and by highway com-

Right of boards or commissions to bind road districts by contracts generally see supra § 158

Contract by, and in behalf of, individuals

Where individuals, styling themselves the 'State Highway Board," which board was no longer in existence, entered into a contract for the construction of a road, there being no fraud or attempt to bind the state the contract was valid, since there was no law prohibiting private citizens from contributing to the expansion of the state highway system—State ex rel Missouri State Highway Board to Use of Fredonia Portland Cement Co, v Cox, 1 S W 2d 787, 318 Mo 387, quashing Missouri State Highway Board for Use and Benefit of Fredonia Portland Cement Co v Southern Surety Co App, 290 S W 652

96 Ark —Taylor v Rogers, 2 S W 2d 56, 176 Ark 156
Ill —Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1
29 C J p 605 note 71

97. Ala —Consolidated Indemnity & Insurance Co v Texas Co 140 So 566, 224 Ala 349

98. U S — Standard Accident Ins Co of Detroit, Mich, v Federal Nat Bank of Shawnee, Okl, C C A Okl, 115 F 2d 31, adhering to 112 F 2d 692

Department's chief of accounts has no authority to act for the commission and make a contract—Standard Accident Ins Co of Detroit Mich, v Federal Nat Bank of Shawnee, Okl, supra

Temporary officers appointed to operate department

Under act authorizing certain officers to operate and control highway department for sixty days, such officers could approve contracts that had been awarded by highway department through highway engineer but which lacked approval of chief highway commissioner, could proceed to award project contracts to low bidders who had been designated as low bidders by state highway commission but had not been awarded contracts, could make tabulation of bids and submit result to bureau of public roads and proceed to award contracts in regular manner, and could proceed with bids, contracts, and construction work on projects which had been approved but not let to contract before regularly constituted state highway commissioners and chief highway commissioner were suspended—Ex parte William son, 183 S E 505, 178 S C 531

99 Ark —Leonard v State, 50 S W 2d 598, 185 Ark 998
Ind —State v Wright, 175 N E 666 97 Ind App 660
Okl —Green-Boots Const Co v State Highway Commission 25 P 2d 783, 165 Okl 288—Leininger v H L Cannady Co, 282 P 474, 139 Okl 301—Leininger v Ward-Beckman & Brooks, 282 P 467 139 Okl 292

Supervision by another commission

Making of contracts for constructing state highways is under control of commission of administration and finance, and commission can disapprove contract made by highway department—State v Babcock, 222 N W 287, 175 Minn 590 State v Babcock, 222 N W 285 175 Minn 583

1 Ala—Herbert v Perry, 177 So 561 235 Ala 71
29 C J p 605 note 71 [b]

2 U S —Greene County v Tennessee Eastern Electric Co, C C A Tenn, 10 F 2d 184
W Va —Miller v Barbour County Court 180 S E 140, 116 W Va 380
29 C J p 605 note 71

On acceptance of dedication

County which exercised authority to accept dedication of subdivision highways, thereby becoming liable for injuries from defective condition thereof was held authorized to contract for improvement thereof and to require surety bond for performance of contract—Los Angeles County v Margulis, 44 P 2d 608, 6 Cal App 2d 57

On refusal of county highway commission to authorize rebuilding of road county court acted within its authority in letting a contract for such work—County Board of Highway Com'rs v Wilde Tenn, 163 S W 2d 329

Delegation of power

(1) In the absence of express authorization, no one but the county court or board of commissioners acting as a body, can make a binding contract for road work
N D —Rolette State Bank v Rolette County, 218 N W 637, 56 N D 571
Tex —Orange County v Hogg, Civ App, 269 S W 225
Wyo —George W Condon Co v Board of Com'rs of Natrona County, 103 P 2d 401, 56 Wyo 38

(2) Such body may, however, appoint or authorize an agent to act for it in making such a contract—Corvell County v Burke & Corbett, Tex Civ App, 4 S W 2d 283 error dismissed—Orange County v Hogg, supra

The police jury has authority to let contracts for road work and the power of the board of supervisors of road districts to call for bids, award contracts, and supervise construction of road is to be performed merely as agent of police jury —Donaldson v Police Jury of Tangipahoa Parish, 109 So 34 161 La 471

A member of the board of supervisors has no authority to contract for road repair or maintenance except in case of an emergency requiring repairs to be made or begun within three days —Simpson County v Panther Oil & Grease Co 188 So 566 185 Miss 506

Where state highway commission has exclusive control of the road in question, it being part of the state highway system a county has no authority to contract for road work thereon, in the absence of authorization, consent or approval by the state highway commission Iverson v Dallas County Tex Civ App, 110 S W 2d 255

3. Neb - State v Bone Creek Tp, Butler County 190 N W 586 109 Neb 202 rehearing denied 193 N W 767, 109 Neb 202

Effect of appointment of highway surveyor

The statute permitting a town to appoint a highway surveyor who will have exclusive control of the ordinary repair of public ways and who may be authorized to make contracts for repairs, does not deprive the town of its authority to contract for road work with anyone even where such a surveyor is appointed —Tuckerman v Moynihan, 185 N E 2, 282 Mass 562

Not state-aid highways

Me —Williams v Inhabitants of Town of Vinalhaven, 121 A 213, 123 Me 505

4 Pa —Swaney v Georges Tp, 97 Pa Super 144
Wis —Employers Mut Liability Ins Co v Industrial Commission 281 N W 678, 229 Wis 121

Employment of superintendents and roadmasters does not relieve supervisors of responsibility, or deprive them of authority to employ persons and hire teams to repair

missioners of towns or road districts[5] Contracts which particular bodies may make may be limited as to amount[6] and as to the length of time for which they are to operate[7]

The authority and duty to construct or repair highways generally are considered supra § 177.

c. Requisites and Validity of Contract

(1) In general
(2) Preliminary requirements generally
(3) Competitive bidding
(4) Form and execution of contract
(5) Contents

(1) In General

Contracts relating to road work must comply with applicable statutory and constitutional provisions They may be made only in accordance with the authority granted, for the purposes authorized, with the proper persons, and in the manner prescribed

Contracts relating to road work must comply with applicable statutory and constitutional provisions[8] They must be made in accordance with the authority granted,[9] and may be entered into only for the purposes for which such authority is granted,[10] with the persons entitled to accept such contracts,[11] and in the manner prescribed by law[12] Contracts

township roads—Swaney v Georges Tp 97 Pa Super 144

Agents

(1) A town board had no authority to delegate power to negotiate a contract for road repairs to its own chairman or to the chairman of a neighboring town or to the neighboring town itself—Employers Mut Liability Ins Co v Industrial Commission, 281 N W 678, 229 Wis 121

(2) Road foreman appointed by state highway commissioner is agent of town by virtue of such appointment and bound it by his agreement involving purchase of stone wall for state-aid highway purposes—Stalbird v Town of Washington, 172 A 623, 106 Vt 213

5 Ark—Higginbotham v Road Improvement Dist No 3 of Lonoke County, 241 S W 866, 154 Ark 112
Ill—Euziere v Highway Com'r of Town of Rockville, 178 N E 397, 346 Ill 131, affirming 260 Ill App 29—Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1
Contra Town of Hutton v Ingram, 255 Ill App 97

Preliminary work

A statute creating a highway district, and authorizing the commissioners to do the preliminary work in establishing the district and to appoint an engineer, impliedly empowered the commissioners to make a contract for the preliminary work—Bowman Engineering Co v Arkansas & Missouri Highway Dist, 235 S W 399, 151 Ark 47

State highways

A road district has no authority under the statute to contract for improvement of state highways—Taylor v Rogers, 2 S W 2d 56, 176 Ark 156

6. Tenn—Woodard v Haywood County, 13 Tenn App 332

In absence of highway superintendent's approval, a highway commissioner of a town or road district may not make any contract for road work to exceed a stated amount—Euziere v Highway Com'r of Town of Rockville, 178 N E 397, 346 Ill 131, affirming 260 Ill App 29—Brownell Improvement Co v Highway Commissioner of Town of Sumner, 280 Ill App 43—29 C J p 605 note 72 [b]

As dependent on available funds

(1) County court may legally contract for construction of county district road where it has at its disposal from bond issue authorized for that work and from county road fund sufficient fund to meet requirements of contract—Miller v Barbour County Court, 180 S E 140, 116 W Va 380

(2) A township highway commissioner is without power to incur any indebtedness against the township for materials furnished for, and used in, the construction or repair of its ordinary roads and bridges, except to the extent of the tax funds on hand or the tax levies made—Austin-Western Road Mach Co v Wetzel, 261 Ill App 254

(3) Validity of contract as dependent on availability or establishment of funds see infra subdivision c (2) of this section

7. Ala—Herbert v. Perry, 177 So 561, 235 Ala 71

8 Okl—Austin-Western Road Machinery Co v Board of Com'rs of Carter County, 11 P 2d 117, 160 Okl 232

Circumstances held not to affect validity of contract

(1) Road construction contract held not dependent for validity on county's contracts with others relative to funds—Coryell County v Burke & Corbett, Tex Civ App, 4 S W 2d 283, error dismissed

(2) Other circumstances—Owen v Fleming-Stitzer Road Building Co, Tex Civ App, 250 S W 1038

9. Mo—Sager v State Highway Commission, 160 S W 2d 757—Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647—Sandy Hites Co v State Highway Commission, 149 S W 2d 828, 347 Mo 954, transferred, see, App, 128 S W 2d 646

Contract held within authority

Mich—Gogebic Nat Bank v. Ironwood Tp, 214 N W 143, 239 Mich 369

Tex—Coryell County v Burke & Corbett, Civ App, 4 S W 2d 283, error dismissed

Extension of road into another district

A contract for construction of road extending into district of county not authorizing or approving contract is void—Southern Surety Co v Ft Smith Dist of Sebastian County, C C A Ark 17 F 2d 63

Highway illegally laid out

A contract for work on a highway not laid out is required by statute is invalid—Beyer v Crandon, 73 N W 771, 98 Wis 306

10 Mass—Bean v Hyde Park, 9 N E 638, 143 Mass 245
29 C J p 606 note 77

Contract of guaranty

A contract by a county guaranteeing payment for materials furnished to a contractor for use on county roads is valid—Holston Corporation v Wise County, 109 S E 180, 131 Va 112

11. Ariz—Bone v. Bowen, 185 P 133, 20 Ariz 592
29 C J p 606 note 78

Beneficial interest of authorities

(1) Under a statute to such effect, where the officers contracting are personally interested the contract is void—Bone v Bowen, supra—29 C J p 606 note 78 [a]

(2) But a contract in which the officer has some interest is not void if the statute does not apply to the particular contract or in the circumstances of the particular case—Liggett v Shriver, 161 N W 611, 181 Iowa 260—29 C J p 606 note 78 [a]

(3) So it has been held that a road contract was not voidable merely because the county commissioner became surety or guarantor for the contractor, where the work was done accepted, and worth the contract price—O'Connor v Murray, 278 P 176, 152 Wash 519

12. Colo—McRoberts v Ammons, 88 P 2d 958, 104 Colo 96.

which are not within the bounds of the authority granted or not made in the manner prescribed are void[13] or at least voidable[14] The statutes are notice to the world of the limitations on the power of the authorities to make contracts, and persons dealing with the authorities are bound by such notice[15]

Bond Failure to conform sufficiently to the statutory requirements in executing the contractor's bond invalidates the contract[16]

(2) Preliminary Requirements Generally

Preliminary conditions required to be satisfied before a contract for road work may be let must be satisfied in accordance with the statutory directions Requirements as to approval of the contract or the existence or appropriation of funds must be observed

Preliminary conditions required by statute to be satisfied before a contract for road work may be let must be satisfied in accordance with the statutory directions[17] Where approval of the contract by some public official,[18] such as the governor,[19] or state chief engineer,[20] or county superintendent of highways,[21] is required, a contract which lacks such approval is invalid, but such a provision does not invalidate a supplemental agreement lacking such approval, where the original contract, which was approved, provided that supplemental agreements should be part thereof[22] However, if a provision relating to preliminary matters is not mandatory, and the requirements are not conditions precedent to the letting of the contract, failure to comply before letting the contract does not vitiate the contract[23] There need be no compliance with the provisions of statutes that are inapplicable to the contract in question[24]

Existence of or provisions for raising funds Under some constitutional or statutory provisions,

Ill —Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1
Ohio —Ray v Board of Trustees of Trenton Tp, Delaware County, 195 N E 707, 49 Ohio App 172
29 C J p 606 note 73

13. Ill —Folkers v Butzer, 13 N E 2d 624 294 Ill App 1
Ohio —Ray v Board of Trustees of Trenton Tp, Delaware County, 195 N E 707, 49 Ohio App 172

14. Ark —Leonard v State, 50 S W 2d 598, 185 Ark 998

15. Ill —Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1
Ohio —Ray v Board of Trustees of Trenton Tp, Delaware County, 195 N E 707 49 Ohio App 172
29 C J p 608 note 85

16. U S —Southern Surety Co v Ft Smith Dist of Sebastian County, C C A Ark, 17 F 2d 63
Ark - Burt v Road Improvement Dist No 11, 253 S W 1, 159 Ark 275
Requisites and sufficiency of bond see infra § 210

Bond not required
County's contract for construction of road was not void because bond was not required, where contractor was to be paid out of state-aid fund and county was to retain amount due contractor from such fund until work was completed —Corvell County v Burke & Corbett, Tex Civ App, 4 S W 2d 283, error dismissed

17. Iowa —State v Garretson, 223 N W 390, 207 Iowa 627
Okl —Board of Pontotoc County Com'rs v Witherspoon, 116 P 2d 719, 189 Okl 277
29 C J p 606 note 79

Survey, plans, and specifications by board
Where, with regard to improvement of certain county road, board of chosen freeholders did not cause survey, have plans and specifications prepared, or designate kind of material, as required by statute, all steps, other than award of contract, being taken by county engineer by authority of informal action of road committee of board award of contract was held illegal —Hokke v Passaic County 127 A 813, 3 N J Misc 245

Estimate and report
A road construction contract with a county was void where the engineer failed to have the estimate of the cost made and reported to and approved by the road commissioners and the board of supervisors, and spread on the minutes as required by statute --Amite County v Mills, 102 So 465, 138 Miss 222 suggestion of error dismissed 102 So 737, 138 Miss 222

Filing of plans, specifications, etc, is required under some statutes —Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1

Action by salary board
Employment of day laborers for ordinary repairs by county commissioners is proper without prior affirmative action by county salary board —Brislin v Hendershot, 66 Pa Super 536

18. Pa —Blayney v Donegal Tp, 12 Pa Dist & Co 250, 9 Wash Co 1

Advisory committee
County court's contract for permanent road improvement pursuant to bond issue voted in district is not void because an advisory committee of citizens provided for by such election and appointed by court was not consulted —Chrystal v Preston County Ct, 97 S E 606, 83 W Va 114

19. Ill —Parrish v Miller, 168 N E 671, 336 Ill 630
Wis —State ex rel Lathers v Smith, 299 N W 43, 238 Wis 291.

20. Wis —State ex rel Lathers v Smith, supra

21. Ill —Brownell Improvement Co v Highway Commissioner of Town of Sumner 280 Ill App 43
29 C J p 605 note 72 [b]

22 Wis —State ex rel Lathers v Smith 299 N W 43, 238 Wis 291

23. N Y —People v Karr 148 N E 546, 240 N Y 348, reversing People v Troy Contracting Co, 207 N Y S 351, 211 App Div 633

Filing of road map
The state highway commission's failure to file official state road map, showing location of county road as part of state highway with county clerk and recorder before letting contract for construction of such road with federal aid, does not vitiate contract —State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, 69 P 2d 112, 105 Mont 44

Acquisition of title to land
The statute providing that, where a highway is to be improved and where it deviates from line of existent highway, 'the board of supervisors of the county where such highway is located shall acquire land for the requisite right of way prior to the advertisement for proposals," is not mandatory, and a contract entered into with contractor before such requirement had been met was not thereby rendered void — People v Karr, 148 N E 546, 240 N Y 348, reversing People v Troy Contracting Co, 207 N Y S 351, 211 App Div 633 —People v Rockwood, 214 N Y S 129, 126 Misc 542.

24. Ga —Waters v Hall County, 163 S E 609, 174 Ga 596
Okl —Board of Com'rs of Carter County v Landrum, 21 P 2d 736, 163 Okl. 199.

before a valid contract for or relating to road work may be entered into, it is variously required that the funds available for such purpose together with such sums as will become available by taxation during the current year be sufficient to retire the liability to be created by the contract,[25] that a district undertaking further improvements be free of any indebtedness for earlier improvements,[26] that there shall have been a proper appropriation of funds for the kind of work covered in the contract,[27] that the records in the county clerk's office show an unexpended balance in such appropriation at least equal to the amount of the contract,[28] and that there be a certification of such fact by the county clerk[29] The effect of some statutes is to preclude the consummation of a valid contract for highway construction until the bonds for the construction are approved by the taxing authorities[30] A provision forbidding the issuance of state bonds or other evidences of state indebtedness is not violated by a highway construction contract providing for payment for the work as it is done[31] A contract based on a false certificate of the existence of funds to support it may be declared invalid, at least where the contractor has made no expenditures and incurred no liabilities thereunder[32] In at least one jurisdiction a contract for road work is ineffective until an assessment of benefits has been made,[33] and while in some circumstances the invalidity will be deemed to extend to the provisions for preliminary as well as for permanent work, as where the contract is not separable or divisible,[34] in other circumstances the invalidity is held to extend only to the provisions for permanent work[35]

(3) Competitive Bidding

(a) Necessity or propriety
(b) Essentials generally
(c) Advertisement for bids

25. Ga —Spain v Hall County, 165 S E 612, 175 Ga 600
29 C J p 606 note 76

Bids conditioned on raising of funds

Where bid for road contract was conditioned on county's raising funds from proceeds of bond issue to be immediately submitted to voters, no binding contract resulted until funds were made available in such manner, but when they were so made available the contract was not invalid on ground that "debt" was incurred without providing for retirement thereof at time of its creation —W L Pearson & Co v Hutchinson County Tex Civ App, 52 S W 2d 509, error refused

Work to be done in subsequent years

That unpaid accounts of state road department may illegally exceed revenue for year does not render illegal construction contracts to be performed subsequently --Hathaway v Munroe, 119 So 149, 97 Fla 28

Estimating prospective revenues

The state highway commission, being obliged to contract in advance against uncertain amount of revenues, is authorized to estimate amount thereof, in doing so it has the discretion of adopting reasonable methods, standards, and criteria which in its judgment are sound and appropriate, and need not limit its estimates to amounts received in previous years —Johnson v Ferguson, Tex Civ App, 55 S W 2d 153, error dismissed

26. Cal —Municipal Improvement Co v Thompson, 258 P 955, 201 Cal 629

27. Okl —Board of Pontotoc County Com'rs v Witherspoon, 116 P 2d 719, 189 Okl 277—Kansas City Southern Ry Co v Marathon Oil Co, 46 P 2d 356 172 Okl 371—Clarence L Boyd Co v Blachly, 43 P 2d 462 171 Okl 626—Austin-Western Road Machinery Co v Board of Com'rs of Carter County, 11 P 2d 117, 160 Okl 232
29 C J p 606 note 76

Depletion or other disposition of fund

Where at the time the contract was made there were sufficient funds appropriated for it, the fact that the funds were afterward depleted or disposed of for other purposes does not impair the validity of the contract

Neb —State v Marsh, 196 N W 130, 111 Neb 185

Okl —Board of Com'rs of Carter County v Landrum, 21 P 2d 736, 163 Okl 199

28. Ark —Austin-Western Road Machinery Co v Board of Com'rs of Carter County, 11 P 2d 117, 160 Ark 232

Okl —Board of Pontotoc County Com'rs v Witherspoon 116 P 2d 719, 189 Okl 277—Kansas City Southern Ry Co v Marathon Oil Co, 46 P 2d 356, 172 Okl 371—Clarence L Boyd Co v Blachly, 43 P 2d 462, 171 Okl 626

29. Okl —Board of Pontotoc County Com'rs v Witherspoon, 116 P 2d 719, 189 Okl 277—Kansas City Southern Ry Co v Marathon Oil Co, 46 P 2d 356, 172 Okl 371--Clarence L Boyd Co v Blachly, 43 P 2d 462, 171 Okl 626—Austin-Western Road Machinery Co v Board of Com'rs of Carter County, 11 P 2d 117, 160 Okl 232

30. Ind —O'Connor v Board of Com'rs of Allen County, 142 N E 858, 194 Ind 386

31. Fla —Hathaway v Munroe, 119 So 149, 97 Fla 28

32. Ohio —State v Schlesinger, 152 N E 799 21 Ohio App 162

33. U S —Filbert v Arkansas & Missouri Highway Dist, D C Ark, 2 F 2d 114, Arkansas law

Ark —Meek v Christian, 270 S W 614, 168 Ark 313—Elkins v Huntington-Midland Highway Dist, 256 S W 835 161 Ark 556—Pritchett v Road Improvement Dist No 4 of Van Buren County 250 S W 515 158 Ark 285—Kern v Booneville & Sanatorium Highway Dist 241 S W 873 154 Ark 107--White-Jackson Road Improvement Dist No 1 v Blackshire & Mercer, 241 S W 386 153 Ark 581—Carter v Road Improvement Dist No 2 of Franklin County, 238 S W 69 152 Ark 302—Gould v Toland 232 S W 434, 947, 149 Ark 476

Mode of assessment see infra § 298

34. Ark —Meek v Christian, 270 S W 614, 168 Ark 313 –Pritchett v Road Improvement Dist No 4 of Van Buren County, 250 S W 515, 158 Ark 285—Kern v Booneville & Sanatorium Highway Dist, 241 S W 873, 154 Ark 107—White-Jackson Road Improvement Dist No 1 v Blackshire & Mercer, 241 S W 386, 153 Ark 581- Carter v Road Improvement Dist No 2 of Franklin County, 238 S W 69, 152 Ark 302—Gould v Toland, 232 S W 434, 947 149 Ark 476

Recovery on quantum meruit for preliminary work see infra subdivision g of this section

35. Ark —Bowman Engineering Co v Arkansas & Missouri Highway Dist, 235 S W 399, 151 Ark 47

(d) Sufficiency and conclusiveness of bids
(e) Deposit on making bids
(f) Award of contract or rejection of bids

(a) Necessity or Propriety

Statutory or constitutional provisions requiring road contracts to be let on competitive bidding must be complied with

Under statutory or constitutional provisions in most jurisdictions, a contract for road work, at least in certain cases, may be let only on the basis of competitive bidding[36] Such a provision, when applicable, is mandatory,[37] unless it is complied with the contract is void[38] or at least unenforceable,[39] even though the transaction results in no actual financial disadvantage to the state[40] Provisions for public notice, request, or advertisement for bids, see infra subdivision c (3) (c) of this section, and for the letting of the contract to the lowest bidder, see infra subdivision c (3) (f) of this section, have been held to have the object of producing competitive bidding,[41] the object of which, in turn, is the protection of those who will be called on to pay for the work[42] However, the letting of a contract for road work on competitive bidding is not necessary when not required by statute or constitutional provision[43] Competitive bidding statutes do not apply to contracts for the employment of persons whose services are required because of special training, skill, and scientific or technical knowledge necessary to the object to be accomplished[44] Where

36 Ark - Leonard v State, 50 S W 2d 598, 185 Ark 998
Cal - Sittig v Raney, 200 P 824, 53 Cal App 709
Colo --McRoberts v Ammons, 88 P 2d 958, 104 Colo 96
Ill --Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1—Brownell Improvement Co v Highway Commissioner of Town of Sumner, 280 Ill App 43
Iowa --Monona County v O'Connor, 215 N W 803, 205 Iowa 1119
Mo —Hanick v Marion County, 278 S W 730, 312 Mo 73
Okl --Leininger v Ward, 258 P 863, 126 Okl 114—Flynn Const Co v Leininger, 257 P 374, 125 Okl 197
Pa —Commonwealth v Jones, 129 A 635, 283 Pa 582—Commonwealth v Rosser, 156 A 751, 102 Pa Super 78—Shireman v Scott, 53 Dauph Co 19
Tex —East Texas Const Co v Liberty County, Civ App, 139 S W 2d 669—Williams v De Fee, Civ App, 77 S W 2d 729
Wash —Besoloff v Whatcom County, 248 P 381, 140 Wash 180

37. Ark —Leonard v State, 50 S W 2d 598, 185 Ark 998
Fla —Willis v Hathaway, 117 So 89, 95 Fla 608
Ill - Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1—Brownell Improvement Co v Highway Commissioner of Town of Sumner, 280 Ill App 43
Pa -- Commonwealth v Rosser, 156 A 751, 102 Pa Super 78

38. Ark —Leonard v State, 50 S W 2d 598, 185 Ark 998

Subdividing contract to avoid requirement

Where contracts involving more than a stated sum may be let only on competitive bidding, the requirement may not be avoided by subdividing the contract into a number of contracts each of which involves less than such sum
Ill —Brownell Improvement Co. v Highway Commissioner of Town of Sumner, 280 Ill App 43
Iowa - State v Garretson, 223 N W 390 207 Iowa 627
Tex -Kelly v Cochran County, 82 S W 2d 641, 125 Tex 424, reversing, Civ App 50 S W 2d 818

39. Colo —Roberts v Ammons, 88 P 2d 958, 104 Colo 96
Ill --Brownell Improvement Co v Highway Commissioner of Town of Sumner 280 Ill App 43
Mo —Hanick v Marion County, 278 S W 730, 312 Mo 73
Pa —Commonwealth v Jones, 129 A 635 283 Pa 582
Wash - Besoloff v Whatcom County, 248 P 381, 140 Wash 180

40. Colo —McRoberts v Ammons, 88 P 2d 958, 104 Colo 96

41. Fla —Finley Method Co v Standard Asphalt Co of Florida, 139 So 795, 101 Fla 126
Ill —Folkers v Butzer 13 N E 2d 624 294 Ill App 1
Ind —Putman v Murden, 181 N E 796, 97 Ind App 313
Okl —Leininger v Ward, 258 P 863, 126 Okl 114—Flynn Const Co v Leininger, 257 P 374, 125 Okl 197
Pa —Gari v Fuls, 133 A 150, 286 Pa 137
Va —Ragland v Commonwealth, 200 S E 601, 172 Va 186

42. Ill —Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1

43 Cal --Entremont v Whitsell, 89 P 2d 392, 13 Cal 2d 290—Sittig v Raney, 200 P 824, 53 Cal App 709
Ky —Hanlon v Cleary, 133 S W 953, 142 Ky 46
Neb —Cheney v Board of Sup'rs of Buffalo County, 243 N W 881, 123 Neb 624
Ohio —Shafer v Streicher, 138 N E 65, 105 Ohio St 528
Tex —Gulf Bitulithic Co v Nueces County, Com App, 11 S W 2d 305, reversing, Civ App, 297 S W 747 --Shelby County v Caldwell, Civ App, 48 S W 2d 761—Jackson v. Noel, Civ App, 37 S W 2d 787, error dismissed
Wyo —George W Condon Co v Board of Com'rs of Natrona County, 103 P 2d 401, 56 Wyo 38

Contract sublet by county

A valid contract to improve and construct a section of a state aid road established by the highway department may be sublet by the county to a competent contractor without advertising and letting to the lowest bidder under code provision
Ga —Jones v Graham, 15 S E 2d 420, 192 Ga 383—Spain v Hall County, 165 S E 612, 175 Ga 600 Waters v Hall County, 163 S E 609, 174 Ga 596
Tex —Coryell County v Burke & Corbett Civ App, 4 S W 2d 283, error dismissed

Contracts for ordinary repairs need not be let on competitive bidding -- Commonwealth v Rosser, 156 A 751, 102 Pa Super 78

Optional

Commissioners' court had option as to whether county road work should be submitted to competitive bidders - Jackson v Noel, Tex Civ App, 37 S W 2d 787, error dismissed

44. Tex --Gulf Bitulithic Co v Nueces County, Civ App, 297 S W 747, 754, reversed on other grounds Com App, 11 S W 2d 305

Reason for rule

"The value of such services is not to be measured by a mere matching of dollars, so to speak, it is not to be determined upon the irrational assumption that all men in the particular class are equally endowed with skill, knowledge, training, and efficiency, nor are such services rendered more desirable because offered more cheaply in a competitive bidding contest"—Gulf Bitulithic Co v Nueces County, supra

A contract for supervision of road construction work done directly by the county, where such supervision

additional work, amounting to considerably more than merely incidental additions, is contracted for without competitive bidding, the contract is unenforceable [45]

Whether or not the requirement of competitive bidding applies to a particular contract depends largely on the language of the statute as properly construed [46] Thus a statute requiring competitive bids for contracts to "improve" highways does not apply to contracts for work in the nature of "repair" [47] Repair of a road by the state highway commissioner does not come within a provision requiring competitive bidding for contracts for improvements instituted by the authorities of a county or municipality [48]

(b) Essentials Generally

Any scheme which prevents or restricts fair competition among prospective bidders is a violation of the requirement of competitive bidding; all bidders must be given an opportunity to bid on the same thing under the same terms and conditions

Provisions requiring the letting of contracts for road work on competitive bidding are violated by any scheme or device which prevents,[49] or tends to prevent[50] or restrict,[51] competition among persons who may desire to become bidders In order to comply with provisions requiring competitive bidding it is essential that all bidders be given an opportunity to bid on the same thing under the same terms and conditions [52] Permitting each bidder to name a different time for completing the contract is a violation of this rule and is improper [53] A col-

requires a high degree of technical knowledge, skill, and business judgment, requires no competitive bidding —Gulf Bitulithic Co v Nueces County, Tex Com App, 11 S W 2d 305, reversing, Civ App, 297 S W 747

45. Pa —Commonwealth v Jones, 129 A 635, 283 Pa 582—Commonwealth v Rosser, 156 A 751, 102 Pa Super 78
Wash —Besoloff v Whatcom County, 233 P 284, 133 Wash 109

46. Ohio -Shafer v Streicher, 138 N E 65, 105 Ohio St 528

Rules of construction

Laws requiring public contracts to be let to lowest responsible bidders should receive construction that will effectuate their purpose -- Finley Method Co v Standard Asphalt Co of Florida, 139 So 795, 101 Fla 126

"Renting of motor vehicles"

A contract between truck owner and department of public works, whereby owner was to furnish, at an hourly rate, trucks, drivers, operating supplies, and necessary repairs, and was to carry compensation insurance and assume liability for damage was not "renting of motor vehicles" within the statute calling for competitive bidding — Entremont v Whitsell, 89 P 2d 392, 13 Cal 2d 290

Work done by "state forces", within statute dispensing with competitive bidding if the work is done by such forces, means use of labor in state's employ under state's supervisors and engineers with state equipment and materials —Leonard v State, 50 S W 2d 598, 185 Ark 998

47. Neb —Chenev v Board of Sup'rs of Buffalo County, 243 N W 881, 123 Neb 624

Resurfacing or reconstructing does not come within a provision requiring competitive bidding for contracts for "improvement" of highways — Shafer v Streicher, 138 N E 65, 105 Ohio St 528.

48. Ohio —Shafer v Streicher, supra

49. Minn —Regan v Babcock, 247 N W 12, 188 Minn 192
Okl —Flynn Const Co v Leininger, 257 P 374, 125 Okl 197

Provision for purchase of bonds by contractor

A provision in a notice to bidders for a road improvement contract that it would be let subject to the contractor's purchasing or furnishing a purchaser for bonds issued to pay for the improvement, did not make the notice void and subject to collateral attack, in the absence of averment and proof that it caused bidders to increase the amount of their bids or not bid at all, thereby preventing competitive bidding and resulting in the sale of the bonds for less than par in violation of the statute —Wilson v Board of Com'rs of Warrick County, 137 N E 783, 79 Ind App 250

50 Okl —Flynn Const Co v Leininger, 257 P 374, 125 Okl 197

51. Fla -- Finley Method Co v Standard Asphalt Co of Florida, 139 So 795, 101 Fla 126

52. Iowa —Monona County v O'Connor, 215 N W 803, 205 Iowa 1119
Okl —State ex rel Sanders v Grisso 87 P 2d 155, 184 Okl 348—Leininger v Ward, 258 P 863, 126 Okl 114 --Flynn Const Co v Leininger, 257 P 374, 125 Okl 197
Pa —Shireman v Scott, 53 Dauph Co 19

Monopoly of material or patented articles

(1) If the specifications call for the use of material of which one bidder has a monopoly, the award of the contract to such bidder will not be sustained —Standard Highway Co v Police Jury of Tangipahoa Parish, 103 So 819, 158 La 294.

(2) But the specification of the use of materials exclusively produced or controlled does not necessarily violate statutory provisions for competitive bidding, where the owner or producer of such material is not himself a bidder on the project and is ready and willing to sell his product to any bidder at the same price - -Eckerle v Ferris, 51 P 2d 766, 175 Okl 107

(3) Further, under an appropriate statute, patented articles, materials, or processes may be specified provided the specifications also allow for alternative methods of construction so that competition may be had —Penniman v Bennett, 224 Ill App 53

Material accessible to all

A specification that paving material consist of clean Ohio River gravel, as free from sand as could be found, in the absence of any showing that such gravel was under the control of any one person or not equally accessible to all did not prevent competitive bidding —Wilson v Board of Com'rs of Warrick County, 137 N E 783, 79 Ind App 250

Plan particularly suited to one bidder

The state highway commission, in adopting plans and specifications for highway work, need not submit a particular plan because some prospective bidder considers himself especially qualified or equipped to construct according to that plan —State ex rel Sanders v Grisso, 87 P 2d 155, 184 Okl 348

53. Okl —Leininger v. Ward, 258 P 863, 126 Okl 114

A provision for stipulated damages for each day's delay in completing the work after the expiration of the time agreed on does not render such freedom to name the time proper — Flynn Const Co v Leininger, 257 P 374, 125 Okl 197.

lusive arrangement among all bidders, as a result of which the accepted bid is exorbitant and unreasonable, vitiates the letting of the contract [54] In a number of jurisdictions, the authorities may,[55] and under some circumstances must,[56] prepare alternate plans and specifications, each calling for a different kind of work or material, and thus place in competition the various types of work or material as well as the bids on each. The specifications must not be too indefinite to permit of competitive bidding [57] The authorities may require bids at unit prices for excavation of different types of material [58]

(c) Advertisement for Bids

Mandatory provisions requiring public notice or advertisement for bids must be complied with when applicable

As a general rule a constitutional or statutory provision requiring public notice or advertisement inviting or soliciting bids for a road contract is mandatory,[59] and a compliance therewith is a condition precedent to the award of the contract,[60] a lack of sufficient compliance renders the contract void[61] or at least unenforceable [62] However, even in cases where advertising is required, there may be circumstances which will dispense with the necessity,[63] as where, competitive bidding being impossible under the circumstances, advertising would only cause unnecessary delay and idle expenditure of money [64] Some statutes are deemed to be directory rather than mandatory,[65] and, advertising is not necessary unless the applicable provisions require it [66] Whether or not the requirement applies to a particular contract depends, of course, on the language of the statutory provision as properly construed [67]

The advertisement must state with sufficient definiteness the character and amount of work to be done or materials to be furnished,[68] and, under some

54. Minn—Regan v Babcock, 247 N W 12 188 Minn 192

55. Or—De Neffe v. Duby, 239 P 109, 115 Or 511

56. Cal—Landsborough v Kelly, 37 P 2d 93, 1 Cal 2d 739, 96 A L R 707

Physical conditions alone controlling

Highway officials abused discretion in failing to call for alternate bids for highway paving as required by statute when conditions do not require use of particular type of pavement, in view of showing that either of approved types would be successful their action not being justified because of honest opinion that one type will cost more than another, since physical conditions alone are committed to their discretion, the question of cost being the very thing to be determined by the competitive bidding—Landsborough v Kelly, supra

57. Cal—City St Impr Co v Kroh, 110 P 943, 158 Cal 308
29 C J p 607 note 81 [a]

"Ohio River gravel"

A specification requiring the use of clean Ohio River gravel as free from sand as could be found was not too indefinite—Wilson v Board of Com'rs of Warrick County, 137 N E 783, 79 Ind App 250

58. Wis—State ex rel Lathers v Smith, 299 N W 43, 238 Wis 291

59. Ill—Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1—Brownell Improvement Co v Highway Commissioner of Town of Sumner, 280 Ill App 43
Miss—Board of Sup'rs of Hancock County v Cooper, 112 So 682, 147 Miss 57
Ohio—State v Kuhner, 140 N E 344, 107 Ohio St 406—State v Cleveland Trinidad Paving Co, 171 N E 837, 35 Ohio App 118
Pa—Garr v. Fuls, 133 A. 150, 286 Pa 137
S C—Pennell & Harley v Hearon 168 S E 188, 169 S C 16
Va—Ragland v Commonwealth, 200 S E 601, 172 Va 186—Trinkle v Commonwealth, 196 S E 652, 170 Va 429
Wash—Reimer v Clarke County, 241 P 973, 137 Wash 194—Wyant v Independent Asphalt Paving Co, 203 P 961, 118 Wash 345

60. Iowa—State v Carretson, 223 N W 390, 207 Iowa 627
Pa—Garr v Fuls, 133 A 150, 286 Pa 137
29 C J p 606 note 80

61. Cal—Henry Cowell Lime & Cement Co v Williams, 189 P 838, 182 Cal 691
Ill—Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1
Miss—Russell v Copiah County, 121 So 133, 153 Miss 459—Board of Sup'rs of Hancock County v Cooper, 112 So 682, 147 Miss 57
S C Pennell & Hailey v Hearon, 168 S E 188, 169 S C 16.

62 Ill—Brownell Improvement Co v Highway Commissioner of Town of Sumner, 280 Ill App 43
Mo—Spiteaufsky v State Highway Commission of Missouri, 159 S W 2d 647
Pa—Garr v Fuls, 133 A 150, 286 Pa 137—Commonwealth v. Jones, 129 A 635, 283 Pa 582

63. Pa—Garr v. Fuls, 133 A. 150, 286 Pa. 137.

64. Cal—Sittig v. Raney, 200 P 824, 53 Cal App 709
Pa—Garr v. Fuls, 133 A. 150, 286 Pa 137.

65. Minn—State v Anding, 155 N W 1048, 132 Minn 36
29 C J p 606 note 80 [b]

66. Neb—Cheney v Board of Sup'rs of Buffalo County, 243 N W 881, 123 Neb 624
Va—Good v Board of Sup'rs of Augusta County 125 S E 321, 140 Va 399
29 C J p 606 note 80 [i]-[k]

Substituted contract after default

Where contractor defaulted a substituted contract could be made with the consent of the surety requiring construction of the road in accordance with the original contract and it was unnecessary to readvertise—Howard County Com'rs v Matthews, 127 A 118, 146 Md 553

Contract involving stated amount

(1) Where the statute requires advertising in the case of contracts involving not less than a stated amount the requirement cannot be obviated by subdividing the contract into a number of contracts each involving less than the stated amount—Brownell Improvement Co v Highway Commissioner of Town of Sumner, 280 Ill App 43

(2) But where a number of transactions are actually separate and distinct and each is below the stated amount, advertising is not required—Sittig v Raney, 200 P 824, 53 Cal App 709

67. Neb—Cheney v Board of Sup'rs of Buffalo County, 243 N W 881, 123 Neb 624
Va—Good v Board of Sup'rs of Augusta County, 125 S E 321, 140 Va 399
29 C J p 606 note 80 [d]

68. Tex—Wyatt Metal & Boiler Works v Fannin County, Civ App, 111 S W 2d 787, error dismissed

statutes, the place where bidders may examine the plans and specifications.[69] Under some statutes the advertisement must in certain cases call for bids on different types of highways [70]

Manner of advertising Provisions as to the time of publication of notice or advertisement must be complied with [71] Under some statutes provision is made for posting notices in a prescribed manner, where publication in a newspaper in accordance with statutory directions is impossible,[72] or in addition to publication [73]

Readvertisement Where the plans or specifications recited in the notice are changed after advertisement has begun, readvertisement is essential [74]

(d) Sufficiency and Conclusiveness of Bids

Bids should be honest, and should conform to the notice or advertisement for bids In proper cases, the withdrawal of bids may be barred

Bids for road work should be honest and free from any taint of suspicion or fraud [75] In order to be considered, bids must conform to the notice or advertisement for bids,[76] and to statutory provisions which will become part of the contract and in contemplation of which the bids are solicited [77] It has been held that, where only one bid for the

Complete plans and specifications need not be adopted before advertisement and a notice that the county commissioners' court would receive bids for the construction of approximately fifty miles of sand clay road was held sufficient to enable prospective bidders to submit bids for such construction where it was shown that such bids were to be made on the basis of removal of dirt gravel etc by the cubic yard, grubbing the roadway for so much per acre, digging ditches, etc, and not for the construction of a completed road —Gibson v Davis, Tex Civ App, 236 S W 202

Name of manufacturer

A notice for bids on a truck of stated specifications need not name the manufacturer of a particular truck desired to be purchased, and the purchase need not be made from bids with respect to such kind of truck —Mitchell v Walden Motor Co, 177 So 151, 235 Ala 34

Definiteness

An advertisement for bids for stone for the repair of roads is sufficiently definite when it specifies approximately the quantity thought to be necessary, and states that delivery is to be made at the railroad station nearest the work in progress, the advertisement need not state what amount of stone is required for repairs and what amount for improvements —Middle Valley Trap Rock Min Co v Morris County, 60 A 358 71 N J Law 333, affirming 57 A 258, 70 N J Law 625

69. Tex —Wyatt Metal & Boiler Works v Fannin County, Civ App, 111 S W 2d 787, error dismissed
Va —Ragland v Commonwealth 200 S E 601, 172 Va 186—Trinkle v Commonwealth, 196 S E 652, 170 Va 429

General specifications subject to change

Where specifications for road contracts are on file in the department of highways, and are made applicable to particular contracts and advertisements for bids by reference, such specifications may be changed from time to time —Trinkle v Commonwealth, supra

70. Applicability of requirement

Work of tearing up road, changing grade, width, and in some places, location thereof, and paving with puddled macadam or other materials held "construction" project, not "improvement" project, and hence required advertising for bids —Putman v Murden, 184 N E 796, 97 Ind App 313

Advertisement insufficient

The phrase "three distinct types of highways" in statute regarding bids on highway contracts must be given its ordinary meaning, and an advertised notice for bids on puddled macadam surface, bituminous retread surface, and bituminous coated aggregate surface pavement was not for "three distinct types of highways" within that meaning —Putman v Murden, supra

71 Ill —Folkers v Butzer, 13 N E 2d 624 294 Ill App 1
Ohio —State v Kuhner, 140 N E 344, 107 Ohio St 406—State v Cleveland Trinidad Paving Co, 171 N E 837, 35 Ohio App 118
Wash —Reiner v Clarke County, 241 P 973, 137 Wash 194—Wyant v Independent Asphalt Paving Co, 203 P 961, 118 Wash 345

72. Miss —Board of Sup'rs of Hancock County v Cooper, 112 So 682, 147 Miss 57
Tex —W L Pearson & Co v Hutchinson County, Civ App, 52 S W 2d 509, error refused

73 Ill —Folkers v Butzer, 13 N E 2d 624, 294 Ill App 1

74. Miss —Board of Sup'rs of Hancock County v Cooper, 112 So 682, 147 Miss 57

75. Cal —Hunter v Santa Barbara County, 294 P 1082, 110 Cal App 698

Enlargement to cover purchase of bonds

Addition to contractor's bid for highway construction to save bank purchasing highway bonds from loss because of difference between par and market value of bonds vitiated bid and subsequent proceedings —Hunter v Santa Barbara County, supra

Bid on behalf of highway official

A contract for the performance of certain work on a highway is illegal and prohibited by statute where the person making the bid was a person interposed, acting in behalf of a member of the police jury and the chairman of the board of supervisors or road commission of the road district —Hankins v Police Jury Natchitoches Parish, 95 So 102, 152 La 1000

76 Bids contingent on acceptance of several bids

That bids were contingent on separate bids on each unit of road construction being accepted as whole held not to vitiate contract, where commissioners' court found aggregate was lowest and best bid, even though no other bidders, submitted similarly contingent bids —W L Pearson & Co v Hutchinson County, Tex Civ App, 52 S W 2d 509, error refused

Time of performance

Where the advertisement makes time of performance an essential part of the bid its omission renders the bid incomplete, and in such event the bid cannot be filled out, or the time of performance inserted, after it is opened and received by the county board, and an award to such bidder is invalid —Root v Douglas County, 180 N W 46, 105 Neb 262

77. National Industrial Recovery Act

Bids for public corporation's highway improvement contracts must comply with provisions of National Industrial Recovery Act, where statute creating corporation to make self-liquidating county highway improvements authorized loan agreements with federal governments and referred to Recovery Act —Tranter v Allegheny County Authority, 173 A. 289, 316 Pa. 65.

work is made, it is not a competitive bid within the meaning of the statute [78]

Withdrawal of bids A statute empowering the commissioner of highways to regulate bidding, etc, authorizes a rule preventing the withdrawal of bids once deposited,[79] and such a regulation is binding on both the commissioner and the contractor [80]

Relief from bid One bidding on public work may be given equitable relief from his bid, if it failed to express his real intent at the time he offered it [81]

(e) Deposit on Making Bids

Deposits accompanying bids as security that the bidder, if successful, will accept the contract and furnish bond may properly be forfeited if the successful bidder fails to furnish bond

Where, in accordance with statutory provisions and the notice or advertisement for bids, bids must be accompanied by certified checks as security that, if successful, the bidder will accept the contract and file bond as provided, on failure of the successful bidder to furnish the bond, his check may properly be forfeited [82] Inability to secure a bond will not preclude forfeiture [83] However, it has been held that, if the contractor is allowed to enter on the performance of the contract without having first furnished bond, the deposit may not be forfeited [84] If the bid is withdrawn before its acceptance, the deposit is not forfeited and the bidder is entitled to its return [85]

(f) Award of Contract or Rejection of Bids

The successful bidder is entitled to the contract, the decision of the authorities as to the best bidder is quasi-judicial and will not be disturbed in the absence of fraud or abuse of discretion Under many statutes the contract must be awarded to the lowest responsible bidder.

The successful bidder has a legal right to the execution of a contract [86] The decision of the authorities in awarding contracts to the best bidder has been said to be quasi-judicial, and conclusive on the contractor,[87] and will not be upset by the courts unless fraud[88] or abuse of discretion[89] is shown In the absence of statute, the authorities are not authorized to give preference to the bid of a resident over that of a nonresident [90]

Lowest responsible bidder Under provisions for competitive bidding, the authorities generally are required to award the contract to the lowest responsible bidder [91] Such statutes are as a rule

78. Ill—Parrish v Miller, 168 N E 671 336 Ill 630

79. N Y—E W Foley Contracting Corp v Greene, 177 N Y S 779, 108 Misc 520

80. N Y—E W Foley Contracting Corp v Greene supra

81. N Y—E W Foley Contracting Corp v Greene, supra

82. Ark—Burt v Road Improvement Dist No 11, 253 S W 1, 159 Ark 275

Kan—Marquette Gravel & Construction Co v Bengtson, 274 P 253, 127 Kan 492

Wash—Hilstad v Kitsap County 215 P 12 124 Wash 595

Extension of time

Where bidder on highway contract was required to and did make deposit as guaranty that it would execute the contract and give bond within ten days after notice of award of contract, if an order by the board of supervisors after expiration of the ten days that it file the bond "forthwith" amounted to extension for reasonable time more than ten days additional was not reasonable, and bond filed thereafter was properly rejected and the deposit properly forfeited—Jackson County v Galloway & Bonnabel, 96 So 106, 132 Miss 208

83. Wash—Hilstad v Kitsap County, 215 P 12, 124 Wash 595

Knowledge of defect in proceedings

Where bidder on a federal-aid highway contract, who was required to and did deposit a certified check as guaranty that if awarded the contract it would execute the contract and give bond within ten days knew that the federal authorities had not approved the plans, this fact did not relieve it of the requirement to file the bond within the time agreed or excuse delay the real reason of which was difficulty in securing sufficient sureties—Jackson County v Galloway & Bonnabel, 96 So 106, 132 Miss 208

84. Ark—Burt v Road Improvement Dist No 11, 253 S W 1, 159 Ark 275

85 Ga—State Highway Department v MacDougald Const Co, 187 S E 734, 54 Ga App 310

86. Or—Pyle v Kernan, 36 P 2d 580, 148 Or 666

Effect of failure to file bond

Parties awarded highway resurfacing contract by state highway commission, which did not withdraw award because of their failure to file bond within required time had vested rights in nature of property rights in award at time of their assignment thereof to another, notwithstanding such failure—Pyle v Kernan, 36 P 2d 580 148 Or 666

Rebidding and reletting

Where county commissioners let contract and the tax commissioners, on petition, disapproved the issuance of the bonds, the county commissioners had authority to receive bids for reletting the work, the acceptance of the first bid having failed through the act of the tax commissioners in disapproving the proposed issue of bonds—O'Connor v Board of Comrs of Allen County, 142 N E 858 194 Ind 386

87. N Y—Standard Bitulithic Co v Carlisle, 146 N Y S 386 161 App Div 191, resettled 147 N Y S 1143 affirmed 105 N E 967, 212 N Y 179

88. Ill—People v Kent, 43 N E 760, 160 Ill 655

29 C J p 608 note 87

89. Fla—Suburban Inv Co v Hyde, 55 So 76, 61 Fla 809

29 C J p 608 note 88

90. Wash—Reiner v Clarke County, 241 P 973 137 Wash 191

91. La—Donaldson v Police Jury of Tangipahoa Parish, 109 So 34 161 La 471.

Minn—State v Babcock, 222 N W 287, 175 Minn 590—State v Babcock 222 N W 285, 175 Minn 583

Mo—Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647

Pa—McNichol Paving & Construction Co v Hughes, 53 Dauph Co 167

The purpose of the statute requiring highway construction work to be let to lowest responsible bidder is to obtain the best results at the lowest cost—Leininger v H L Cannady Co, 282 P 474, 139 Okl 301—Leininger v Ward-Beekman & Brooks, 282 P. 467, 139 Okl 292.

mandatory[92] Of course, if the statute is inapplicable to the contract in question and no competitive bidding is required, it is not necessary to let the contract to the lowest bidder,[93] and, even under some statutes requiring competitive bidding, letting the contract to the lowest responsible bidder is not required[94] In choosing the lowest responsible bidder the authorities are not required to select the one whose bid is lowest in dollars and cents,[95] they may take into consideration the comparative qualities of different materials offered for the money, as well as their adaptability to the particular use required[96] So too they may reject the lowest bid if made by one who is not responsible,[97] but they may not reject the lowest bid by a responsible bidder on the ground that such bidder, while responsible, is not the most responsible of the bidders[98] In determining the lowest bidder, the authorities may not adopt a formula or standard other than, or different from, that on which the bids were submitted[99]

Rejection of all bids Under an appropriate statutory provision, the highway authorities may reject all bids on certain projects and do the work by day labor, but they must in such case follow the statutory directions as to the filing of the plans, specifications, and bids, and the reasons for rejecting the bids[1]

(4) Form and Execution of Contract

Statutory provisions as to the form or manner of executing the contract must be complied with. The contract must be in writing, if the statute so requires, and must be executed by one who has such authority.

Statutory provisions as to the form or manner of executing contracts of the character under consideration must be complied with[2] If there is no prescribed statutory form of contract, the form may be determined by the contracting authorities subject to the statutes under which they act[3] Where a statute dispenses with competitive bidding in the case of work done by the municipality and paid for by the day, a formal contract entered on the minutes of the commissioners' court is not required for work so done[4] A statute providing that the contract shall be executed within a stated time after award does not invalidate a contract executed by both parties after the expiration of such time[5]

Under the express provisions of some statutes, contracts for road work, at least where they involve more than a stated amount, must be in writing[6] However, it has been held that a contract for ordinary repairs, when the employment of laborers is necessary, need not be in writing[7] Where the signing of a formal contract is required, ordinarily there can be no contract until this is done[8] Under some

92 Ark—Leonard v State, 50 S W 2d 598, 185 Ark 998

93. Neb—Cheney v Board of Sup'rs of Buffalo County, 243 N W 881, 123 Neb 624

94. Ala—Mitchell v Walden Motor Co 177 So 151, 235 Ala 34

95. Ala—Mitchell v Walden Motor Co, supra
29 C J p 606 note 80 [f]

96. Ala—Mitchell v Walden Motor Co supra

Where materials offered are the same
Board of supervisors was held not justified in rejecting bid of lowest bidder on contract for graveling of highway and awarding contract to next lowest bidder on ground that such bidder would furnish a better grade of gravel from his pits, where board was fully protected by specifications for kind and quality of gravel, and it was not stipulated in contract let to such bidder that gravel should come from his pits or any particular place—Standard Highway Co v Police Jury of Tangipahoa Parish, 103 So 819, 158 La 294

97. Fla—Willis v. Hathaway, 117 So 89, 95 Fla 608

How responsibility determined
In determining responsibility of bidder for contract, state road department should ascertain degree of experience, reputation, possession of facilities, outstanding obligations, obligations assumed or to be assumed, integrity of credit and other matters—Willis v Hathaway, supra

98. La—Standard Highway Co v Police Jury of Tangipahoa Parish, 103 So 819, 158 La 294

99. N Y—Standard Oil Co of New York v Morris, 272 N Y S 442, 151 Misc 345

Pa—Shireman v Scott, 53 Dauph Co 19

1. Mich—Board of Road Com'rs of Wayne County v Lingeman 291 N W 879, 293 Mich 229

2. Miss—State v Vice, 15 So 129, 71 Miss 912
29 C J p 606 note 73

Separate contracts for material and construction work
Ariz—Bone v Hackett, 185 P 131, 20 Ariz 587

3 Ind—State v Wright, 175 N E 666, 97 Ind App 660

4. Tex—Williams v De Fee, Civ App, 77 S W 2d 729

5. N J—Black v Atlantic County, 79 A 888, 81 N J Law 444, reversing 76 A 339, 80 N J Law 29

6. Ga—Ward v State Highway Board, 157 S E 328, 172 Ga 414—Favel v City of Washington, 126 S E 464, 159 Ga 568

Ill—Parrish v Miller 168 N E 671, 336 Ill 630

Ind—State v Wright, 175 N E 666, 97 Ind App 660

La—Police Jury of Parish of Avoyelles v Gaspard, 108 So 128, 161 La 70

7. Pa—Swaney v Georges Tp, 97 Pa Super 144

Hiring at fixed compensation
In hiring plaintiff at fixed compensation for purpose of maintaining and repairing highways in special road district, board of such district was discharging "mandatory" duty of maintaining and keeping roads in repair, and was not required to contract in writing for such hiring in order that expenses so incurred should be paid—Bixler v Special Road Dist No 1, Newton County, Mo App 156 S W 2d 950

8. Conn—Kelley v Torrington, 68 A 855, 80 Conn 378

Binding agreement to execute formal contract
If a statute makes the execution of a formal contract a prerequisite to a binding agreement for the construction of a highway, the exchange of promises between the proposed contractor and the commission for

statutes the contract must be recorded.[9]

A contract executed by one without authority is invalid.[10] In making the contract, the members of the board or body authorized to do so must act as a body and not as individuals,[11] but if the board or body appoints or authorizes an agent to act for it a contract entered into by such agent is valid.[12] The action of the board must be taken by proper vote.[13] Under some provisions it is held that a recorded aye and nay vote of the board is essential,[14] but under others it has been held that the absence of the formal minutes of the board's action is not fatal.[15]

Whether or not the dealings of the parties have resulted in a contract is determined by the rules applicable to contracts generally.[16]

(5) Contents

If the contract is unreasonable or recklessly improvident it will not be enforced against the state or municipality. The provisions of the contract must conform to all applicable statutes, to the bond election notice, and to the specifications on which the bids were had.

The provisions of the contract must conform to all applicable statutory regulations.[17] In the absence of express statutory provisions the conditions of the contract may be determined by the highway authorities within the requirements of the statutes under which they are acting.[18] If the contract is unreasonable or recklessly improvident it will not be enforced against the state or municipality.[19] While it has been held that a contract for or relating to the construction, maintenance, or repair of highways must be definite as to what is authorized and required to be done,[20] it has also been held that

the performance of the work on agreed terms makes a binding agreement to execute the formal contract, for breach of which the contractor can recover against the state—Belmar Contracting Co v State, 185 N Y S 734, 194 App Div 69

9. La—Police Jury of Parish of Avoyelles v Gaspard, 108 So 128, 161 La 70

10. Ky—Floyd County v Allen 126 S W 124, 137 Ky 575, 27 L R A N S, 1125
29 C J p 605 note 72
Authority to contract see supra subdivision b of this section

11. Okl—Board of Pontotoc County Com'rs v Witherspoon, 116 P 2d 719, 189 Okl 277—Board of County Com'rs of Pontotoc County v Carey, Lombard, Young & Co, 61 P 2d 736, 178 Okl 13
Tex—Williams v De Fee, Civ App, 77 S W 2d 729
29 C J p 605 note 72 [a].

Contract held valid

Absence of one of three county commissioners at time of signing contract with contractor for construction of county road did not render contract invalid—Garr v Fuls, 133 A 150, 286 Pa 137

Contract held invalid

Contract of road improvement district, signed by two commissioners only, at different times and places signatures not being obtained as result of action of board of commissioners at meeting at which all were present or of which all had notice, was held invalid—McCrory v Richland Tp Road Improvement Dist, 284 S W 727, 171 Ark 460

Custom of honoring contracts by individuals

The fact that it has been the custom of the county commissioners as a body to honor contracts made by its members as individuals in excess of their authority cannot validate the transaction—Goss v Fannin County, Tex Civ App, 244 S W 204

12. Tex—Coryell County v Burke & Corbett, Civ App 4 S W 2d 283, error dismissed—Orange County v Hogg, Civ App, 269 S W 225

13. N J—Ruby v Hudson County, 97 A 289, 88 N J Law 481
29 C J p 607 note 84

14. Ohio—State v Hahn Const Co, 19 Ohio App 255

15. Pa—Garr v Fuls, 133 A 150, 286 Pa 137

Directions as to prosecution of work

Where there is a valid contract between a board of county commissioners and a contractor for the construction of a public road which contract reserves to the commissioners and their engineer the direction supervision, and control of the work in a manner specifically detailed in the contract itself directions given by the board or its engineer, under such reserved power are not required to be entered on the minutes, or to be in writing, in the absence of express provisions in the statute or the contract to that effect—Putnam v Board of Com'rs of Paulding County, 130 N E 165, 102 Ohio St 45

16. U S—Jonesboro-Nettleton Road Improvement Dist v Klyce, C C A Ark, 15 F 2d 918
Cal—Burr v Pacific Indemnity Co, App, 133 P 2d 21, prior opinion 128 P 2d 26

Contracts held to exist

(1) Letter offering to furnish equipment and labor to remove bridge for stated sum and highway contractor's acceptance written thereon was held to constitute complete contract—State ex rel Concrete & Steel Const Co v Southern Surety Co, 294 S W 123, 221 Mo App 67

(2) Written offer, accepted in writing by offeree, to furnish materials needed on specified highway construction project at prices quoted constituted binding contract sufficient to sustain judgment against offeree for price of such materials, regardless of offeree's intention—Verschoyle v Holifield, Civ App, 90 S W 2d 907, modified on other grounds 123 S W 2d 878, 132 Tex 516

Contract held not to exist

Where contractors for construction of a road by a road improvement district, for which they gave a bond, signed as sureties by citizens of the county, were orally promised by the county judge, on their threat to abandon the contract, that if they would perform he would allow them "all he could" or "whatever the county could pay" out of the county funds such promise did not create a contract, being too indefinite, and also gratuitous, in that the road district alone was bound to pay under the contract—Echols & Helton v Lincoln County, 241 S W 881, 154 Ark 142

17. Cal—Southern California Roads Co v McGuire 39 P 2d 412, 2 Cal 2d 115

18. Ind—State v Wright, 175 N E 666, 97 Ind App 660
Pa—Commonwealth v Eastern Paving Co, 136 A 853, 288 Pa 571

19. Ark—McCrory v Richland Tp Road Improvement Dist, 284 S W 727, 171 Ark 460—Bowman Engineering Co v Arkansas & Missouri Highway Dist, 235 S W 399, 151 Ark 47

20. Mo—Sandy Hites Co v State Highway Commission, 149 S W 2d 828, 347 Mo 954, transferred, see, App, 128 S W 2d 646
Tex—Owen v Fleming-Stitzer Road Building Co., Civ App., 250 S.W 1038.

such definiteness is not entirely indispensable,[21] and that in the exercise of a proper discretion the contract may be written on a unit basis, that is, an agreed sum to be paid for each unit completed, without any stipulation as to the number of units that will be required or the total amount to be paid[22]

The contract must provide for the construction or improvement of that road contemplated and described in the proceedings authorizing the work[23] So a material variance in the route of a road from that prescribed in the act creating the road district renders the contract void[24] Where, after the contract is entered into, material changes respecting the roads to be improved are made by statute, the contract becomes ineffective and cannot bind the contractor.[25] The contract must conform to the bond election notice[26] and to the engineer's estimate.[27] It must also conform at least substantially to the specifications on which the bids were had,[28] it is invalid if it contains new specifications beneficial to the contractor,[29] and the specifications cannot be altered without new advertisement and new bids[30] The contract must be the one offered by the advertisement, and any material departure therefrom invalidates the contract[31]

The validity or necessity of particular provisions in road contracts have been considered by the courts,[32] among them being provisions dealing with the effect of the contractor's failure to complete the work,[33] provisions as to payment,[34] a provision

21. Okl—Leininger v H L Cannady Co, 282 P 474, 139 Okl 301—Leininger v Ward-Beekman & Brooks, 282 P 467, 139 Okl 292

Reason for rule

The nature of the work involved in the construction of a state highway system is such that no definite contract can be agreed upon, and a contract for such work must be sufficiently elastic to provide for the correction of engineering errors and changes in plans"--Green-Boots Const Co v State Highway Commission, 25 P 2d 783, 786, 165 Okl 288

22 Okl—Green-Boots Const Co v State Highway Commission, supra—Leininger v H L Cannady Co, 282 P 474, 139 Okl 301—Leininger v Ward-Beekman & Brooks, 282 P 467, 139 Okl 292

23. Mo—Platte City Ben Assessment Special Road Dist of Platte County v Couch, 8 S W 2d 1003 320 Mo 489

24. Ark—Averitt v Dodd, 265 S W 70, 165 Ark 553

25. Ark—Southern Surety Co v Dardanelle Road Improvement Dist No 1, 276 S W 1014, 169 Ark 755, 42 A L R 299

26. Cal—Hunter v Santa Barbara County, 294 P 1082, 110 Cal App 698

27. N Y—Harvey v Duffey, 168 N Y S 814, 101 Misc 641, affirmed 168 N Y S 1124, 182 App Div 903

28. La—Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La 471

Pa—Garr v Fuls, 133 A 150, 286 Pa 137

29 C J p 607 note 81

29. La—Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La 471

Mo—Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647.

30 La—Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La 471

Miss—Board of Sup'rs of Hancock County v Cooper, 112 So 682, 147 Miss 57

Va—Ragland v Commonwealth, 200 S E 601, 172 Va 186

31. La—Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La 471

Miss—Board of Sup'rs of Hancock County v Cooper, 112 So 682 147 Miss 57

Mo—Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647

N J—Godfrey v Atlantic County, 99 A 843, 89 N J Law 511

Pa—Garr v Fuls, 133 A 150, 286 Pa 137

32. Wash—Coyle Const Co v Skagit County, 32 P 2d 106, 177 Wash 520

Provisions held valid

(1) A provision in a government contract that the contractor "will make no claim against the United States by reason of estimates, tests, or representations of any officer or agent of the United States" is valid and binding—Southern Surety Co v U S, 75 Ct Cl 47

(2) In view of the statute as to bond of highway contractors, a highway construction contract dividing the work into sections of three miles each, to be paid for in full as completed, was not invalid as insufficiently safeguarding the county's interests—Owen v Fleming-Stitzer Road Building Co, Tex Civ App, 250 S W 1038

33. Provisions held valid

(1) Provision of highway construction contract that, if contractor did not properly perform contract, state highway engineer should give notice in writing to contractor and his surety of such delay, neglect, or default, and that, if contractor did not within ten-day period proceed in accordance with contract, then state highway commission should have authority, without violating contract, to take prosecution of work out of contractor's hands and enter into agreement for completion of the contract was reasonable and valid—Fort Worth Nat Bank v State, Tex Civ App, 158 S W 2d 885, error refused

(2) Where a road improvement contract provided that, if the contractor's conduct should result in annulment of the contract, the road district could complete the work and charge the cost to the contractor but reciprocally provided that, if the cost of doing the work by the district was less than the contract price, the contractor could recover the difference, such provision was held a valid stipulation as to measure of damages—Perdue & Hill v Road Improvement Dist No 1 of Cross County, 251 S W 886, 159 Ark 117

(3) Other provisions—Duncan v. Clary 254 P 386, 123 Kan 24

34. Provisions held valid

(1) Highway pavement contract providing that contractor's unit contract price would be considered as full compensation for all materials and other items entering into the construction of pavement, and that no additional compensation would be allowed for any excess thickness was neither prohibited nor illegal—Sandy Hites Co v State Highway Commission, 149 S W 2d 828, 347 Mo 954, transferred, see, App, 128 S W 2d 646

(2) Contract under which highway commission extended highway construction contract at unit prices, faithfully complied with by contractor, was approved by court—Leininger v H L Cannady Co, 282 P. 474, 139 Okl 301—Leininger v Ward-Beekman & Brooks, 282 P 467, 139 Okl 292

(3) Other provisions—Gulf Bitulithic Co v Nueces County, Tex.Com.

requiring the contractor to purchase bonds,[35] a provision obligating the contractor to pay for labor and material,[36] a provision requiring the contractor to carry public liability insurance,[37] a provision for the retention of a percentage of the contract price to satisfy liens,[38] a provision prohibiting assignment of the contract or of moneys payable thereunder,[39] a provision for arbitration,[40] and a provision requiring the county to pay the premium on the contractor's bond[41]

d. Modification and Abrogation

A contract for road work may be canceled by mutual consent An agreement to modify the contract must be supported by consideration, and may be required to be in writing Under a reservation of power to change plans and specifications, only such changes may be made as do not change the essential terms of the contract

A contract for road work may be canceled by mutual consent[42] Such a cancellation terminates the contract,[43] and no liability of either party can be predicated thereupon[44] A reservation in a contract of a right to annul it on the occurrence of a stated contingency may be waived[45] Where a contract fails to obtain the required approval, and a new contract is executed following the former in most essentials, the first contract is unenforceable[46]

Modification In the absence of a provision authorizing it to do so, neither the board of commissioners nor the person appointed by it to superintend the actual work of construction has power to change the terms of the contract after its execution by the parties, so as to bind the county[47] Where a statute requires that public contracts be in writing, and a road contract provides that modifications shall be in writing, such provisions are mandatory and oral changes in the contract are ineffectual[48] An agreement to modify the contract must be supported by consideration[49]

Provision for changes in plans and specifications Under a contract so providing, changes may be made in the specifications by the person or body designated, and such changes are binding on all parties[50] Such changes, however, may not be ar-

App, 11 S W 2d 305, reversing, Civ App, 297 S W 747

Provisions held invalid

(1) Under a statute providing that construction of highways shall be under contract to the lowest responsible bidder after thirty days' advertising, or under a wage system by the board of supervisors without a contract, a provision of a road construction contract that extra work, which could not be covered by the various items, or combination of items for which there was a contract unit price, was to be paid for on a cost plus basis was invalid —Greenlee County v Webster, 215 P 161 25 Ariz 183

(2) Contract by county to finance project and pay percentage of profits to contractor was held unenforceable —Hanick v Marion County, 278 S W 730, 312 Mo 73

35 Tex —Owen v Fleming-Stitzer Road Building Co, Civ App, 250 S W 1038

36. Or —Fitzgerald v Neal, 231 P 645, 113 Or 103

Provisions held compulsory

Iowa —Nebraska Culvert & Mfg Co v Freeman 198 N W 7, 197 Iowa 720

37. U S —U S Fidelity & Guaranty Co v Doheny, C C A Mont, 123 F 2d 746, affirming, D C, Doheny v U S Fidelity & Guaranty Co, 34 F Supp 888, and certiorari denied 62 S Ct 905, 315 U S 817, 86 L Ed 1215

38. Wash —Maryland Casualty Co v Washington Nat Bank, 159 P 689, 92 Wash 497

39. Mass —Old Colony Crushed Stone Co v Cronin 176 N E 801, 276 Mass 221

40. **Provisions held valid**

(1) Clause for conclusive arbitration in contracts with department of highways was valid so as to prevent contractor from presenting claim to auditor and treasurer - Commonwealth v Union Paving Co, 136 A 856, 288 Pa 577—Commonwealth v Eastern Paving Co, 136 A 853, 288 Pa 571

(2) The validity of such a clause is not affected by designation of commissioner of highways as arbitrator —Commonwealth v Eastern Paving Co, 136 A 853, 288 Pa 571

(3) Provision in contract between state road commission and highway contractor that made commission's engineer arbiter of differences which might arise as to materials or work would be upheld as valid as against contention that it was unwise policy to invest employee of one of contracting parties with such broad powers —Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

(4) Other cases —Owen v Fleming-Stitzer Road Building Co, Tex Civ App 250 S W 1038

Provision affirmed by suit on contract

Road contractors suing the state on construction contract must be held to have affirmed provision in state highway department's standard specifications, which were attached to and made part of the contract, giving engineer broad powers to decide questions arising under the contract —Martin Bros v State, Civ App, 146 S W 2d 782, reversed on other grounds State v Martin Bros 160 S W 2d 58 138 Tex 505

41. **Provisions held not invalid**

Tex —Owen v Fleming-Stitzer Road Building Co, Civ App, 250 S W 1038

Contractor's bonds generally see infra § 210

42. N Y —People v Rockwood, 214 N Y S 129 126 Misc 542

43. N Y —People v Rockwood, supra

Where a new agreement is substituted by consent for an old contract, the latter is abrogated —Johnson v Gila County, 185 P 929, 21 Ariz 136

44. N Y —People v Rockwood, 214 N Y S 129, 126 Misc 542

45. U S —A R Young Const Co v Road Improvement Dist No 2 Johnson County, Ark, C C A Ark, 297 F 127

46. U S —Federal Bridge Co v Hanson County S D, C C A S D, 298 F 924

47. Ind —Board of Jackson County Com'rs v Branaman, 82 N E 65, 169 Ind 80, superseding App, 79 N E 923

48. Ky —Clark County Const Co v State Highway Commission, 58 S W 2d 388, 248 Ky 158

49. U S —Jonesboro-Nettleton Road Improvement Dist v Klyce, C C A Ark, 15 F 2d 918

Or —State v American Surety Co of New York, 300 P 511, 137 Or 394, rehearing denied 2 P 2d 1116, 137 Or 394

50. Or —Pyle v Kernan, 36 P 2d 580, 148 Or 666

Tex —Brammer & Wilder v. Lime-

bitrary,[51] or fraudulent or grossly erroneous,[52] or such as would substantially alter the terms of the contract or require the contractor to discharge burdens which he did not contract to assume.[53] It is within the power of the highway commission to provide in its specifications and contracts for supplemental agreements to take care of price adjustments found necessary in the course of the work.[54] Changes which do not materially alter the contract do not require readvertisement[55] or approval by the persons or bodies whose approval is essential to the validity of the contract in the first instance.[56]

Ordinarily a highway contractor who has received the benefit of a change in plans and specifications by receiving the award of the contract will not be heard to complain of the invalidity thereof,[57] but this principle of estoppel will not apply where the change is against public policy.[58]

e. Assignment

The assignee of a road contract acquires no greater rights than the contractor had

Where the statute or contract so provides, an assignment of a road contract is not valid unless filed with, and consented to in writing by, the highway department,[59] but such a provision may be waived by the state.[60] The assignee acquires no greater rights than the contractor had.[61] In the absence of any provision to such effect in the assignment, an assignee is not liable for money borrowed by his assignor, the contractor.[62]

f. Construction and Operation Generally

A contract relating to work on public highways is to be construed and given effect in accordance with the rules governing contracts generally

A contract between the state or a municipality and individuals for road work must be construed, and the liabilities thereunder determined, by the same rules as govern contracts between individuals.[63] Thus it has been held that it will be construed strictly against the party preparing it,[64] that it will be construed with reference to the law under which it was written[65] and which thus becomes a part of it,[66] and that it will be construed in accordance with the construction given it by the parties.[67] In an action on the contractor's bond, the contract should be construed most strongly against the surety company.[68] Particular provisions in road contracts should be reasonably construed in view of all the circumstances.[69] An administrative con-

stone County, Civ App, 24 S W 2d 99, error dismissed

51. Ind—State v Wright 175 N E 666, 97 Ind App 660
Wis—State ex rel Lathers v Smith 299 N W 43, 238 Wis 291

52. Wis—State ex rel Lathers v Smith, supra

53. Ariz—Greenlee County v Webster, 215 P 161, 25 Ariz 183
Tex—Martin Bros v State, Civ App, 146 S W 2d 782, reversed on other grounds State v Martin Bros, 160 S W 2d 58, 138 Tex 505

When rule strictly applied

Rule requiring substantial conformity to highway contract plans and specifications originally proposed should be applied more strictly where right to enter into contract is challenged at inception of proceedings than where no question of substantial conformity was raised before completion of work—Pyle v Kernan, 36 P 2d 580, 148 Or 666

54. Tex—State v Martin Bros 160 S W 2d 58, 138 Tex 505, reversing Martin Bros v State, Civ App, 146 S W 2d 782
Wis—State ex rel Lathers v Smith, 299 N W 43, 238 Wis 291

55. Or—Pyle v Kernan, 36 P 2d 580, 148 Or 666

56. Wis—State ex rel Lathers v Smith, 299 N W 43, 238 Wis 291

57. Or—Pyle v Kernan, 36 P 2d 580, 148 Or 666.

58. Or—Pyle v Kernan, supra

59. N Y—Cooper-Snell Co v State 211 N Y S 811, 125 Misc 715

60. Nev—Leech v Armstrong, 283 P 396 52 Nev 125 rehearing denied 287 P 174, 52 Nev 125

61. U S—Southern Surety Co v U S, 75 Ct Cl 47
Iowa—Monona County v O'Connor, 215 N W 803 205 Iowa 1119

62. Ark—Norton v Maryland Casualty Co, 32 S W 2d 172, 180 Ark 609

63. Iowa—Monona County v O'Connor, 215 N W 803, 205 Iowa 1119
Mass—Inhabitants of Town of Newbury v Lincoln, 177 N E 614, 276 Mass 415
N C—North Carolina Highway Commission v Rand, 143 S E 851, 195 N C 799
Wis McDonald v State, 235 N W 1, 203 Wis 649

64. Ga—MacDougald Const Co v State Highway Department, 2 S E 2d 197, 59 Ga App 708, reversed on other grounds State Highway Department v MacDougald Const Co, 6 S E 2d 570, 189 Ga 490, 137 A L R 520, mandate conformed to MacDougald Const Co v State Highway Department, 7 S E 2d 292, 61 Ga App 672

65. Iowa—Monona County v O'Connor, 215 N W 803, 205 Iowa 1119—Nebraska Culvert & Mfg Co v Freeman, 198 N W 7, 197 Iowa 720
La—Lane v E J Deas Co, 125 So 514, 12 La App 382
N C—Hughes v Robert G Lassiter & Co, 137 S E 806, 193 N C 651

66. Tex—Winder Bros v Sterling 12 S W 2d 127, 118 Tex 268, affirmed 14 S W 2d 802, 118 Tex 268

67. Ind—State v Scott Const Co, 174 N E 429, 97 Ind App 652
Ohio—State v Harlan, 174 N E 366, 37 Ohio App 222, error dismissed Harlan v State 177 N E 636, 123 Ohio St 665

68. Ark—Norton v Maryland Casualty Co, 32 S W 2d 172, 180 Ark. 609
Contractor's bonds and actions thereon see infra § 210

69. Mo—Webb-Boone Paving Co v State Highway Commission, 169 S W 2d 336
Pa—Shireman v Scott, 53 Dauph Co 19
Tex—W L Pearson & Co v Hutchinson County, Civ App, 52 S W 2d 509 error refused
29 C J p 608 note 2

Covenant as to right of way

Highway contract held to contain implied covenant requiring state to provide right of way to enable contractor to prosecute work to utmost advantage—State v Feigel, 178 N E 135, 204 Ind 438

"Aggregate"

A contract between the state highway department and construction company, which required company

struction of a similar contract may be considered, but it cannot be followed if it is contrary to the law[70] Other instruments, such as plans and standard specifications, blueprints, notices to contractors, etc, should be read into the contract,[71] at least where the contract[72] or the advertisement for bids[73] refers to them as being part of the contract, but standard specifications and provisions will yield to, and be superseded by, specific provisions in the contract[74] A provision in a contract that the decision of a designated highway official on any question connected with the execution of the contract should be final and conclusive authorizes such official to construe the contract along with the specifications considered as part of it in determining any such questions[75]

Operation and effect. The operation and effect of a contract for road work are governed by the rules applicable to contracts generally[76]

to use a certain amount of "aggregate" in constructing highway, was construable as authorizing company to use stone aggregate, and not slag aggregate which was more expensive—MacDougald Const Co v State Highway Department 2 S E 2d 197, 59 Ga App 708, reversed on other grounds, State Highway Department v MacDougald Const Co, 6 S E 2d 570, 189 Ga 490 137 A L R 520, mandate conformed to MacDougald Const Co v State Highway Department, 7 S E 2d 292, 61 Ga App 672

Whether contract one of sale

That highway construction contract requiring construction company to furnish certain road building materials in the quantities specified and to do the work and to turn over to commonwealth a completed highway, fixed specific price for gravel furnished thereunder did not make the contract a "divisible contract," part of it for the sale of gravel where such price was not for the gravel furnished alone but for gravel supplied complete in place, and fixing of price of gravel was method adopted in conjunction with fixing unit prices for other materials and for finished portions of work to determine total compensation to which company would be entitled on completion of work—Town of Saugus v B Perini & Sons, 26 N E 2d 1, 305 Mass 403

70 Mo—Cameron, Joyce & Co v State Highway Commission, 166 S W 2d 458

71. Ga—MacDougald Const Co v State Highway Department, 2 S E 2d 197, 59 Ga App 708, reversed on other grounds State Highway Department v MacDougald Const Co, 6 S E 2d 570 189 Ga 490, 137 A L R 520, mandate conformed to MacDougald Const Co v State Highway Department, 7 S E 2d 292, 61 Ga App 672

Wis—State ex rel Lathers v Smith, 299 N W 43, 238 Wis 291

Where the contract is inconsistent with the notice to bidders, the contract is controlling—Good Roads Engineering & Contracting Co v State, 29 N Y S 2d 848, 176 Misc 1012

Unofficial estimate

Although the highway department made preliminary estimates as to the nature of the work for the purpose of advertising for bids for the construction of a highway on a "classified" basis and engineers in department told an excavation contractor that he could rely on estimation notice, before contractor made his bid, requiring bids to be made on an "unclassified" basis amounted to express notice to contractor that he acted at his own risk, regardless of estimates—Powell v State, Tex Civ App 118 S W 2d 960, error refused

Estimate not relied on

Where figures were submitted to a government contractor of the several amounts of rock and common to be excavated, but it was stated that they were estimates only and that bidders were required to examine carefully the site of the work, and the contractor made a very cursory examination thereof and then certified that it understood that the figures submitted were approximate only, and that it had "personally" examined the site, and thereafter it developed that there was a materially greater amount of rock in proportion to the common than disclosed by the estimates, defendant could not be held for a misrepresentation amounting to a warranty—Southern Surety Co v U S, 75 Ct Cl 47

72. Va—Ragland v Commonwealth, 200 S E 601, 172 Va 186
29 C J p 609 note 3

Contract and bond, included by reference, is but one transaction to be considered together
Ala—Citizens' Bank of Guntersville v Pearson, 116 So 350, 217 Ala 391
Mont—Garv Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P 722, 79 Mont 111

"Weighted time tables" which showed average percentages of a year's work done on each calendar day of a year on various classes of highway construction work, thus allowing for average seasonal changes and weather conditions, although constituting a separate document, could be incorporated in highway construction contract by reference—Spitcaufsky v State Highway Commission of Missouri, Mo, 159 S W 2d 647.

Contractor charged with knowledge

A contractor for a highway project who intends to bid thereon should examine specifications at the place indicated in advertisement for bids, since statute places such burden on him and highway department is not required to ascertain, before accepting proposal, that bidder has read and understands the specifications under which he is bidding—Ragland v Commonwealth, 200 S E 601, 172 Va 186

73. Va—Trinkle v Commonwealth, 196 S E 652 170 Va 429

Other specifications excluded

Where advertisement for a highway project stated that plans and specifications were on file in the department of highways for examination by prospective bidders they were the authentic and binding specifications and were superior to any others consulted by any bidder, and, if for accommodation of prospective bidders literature purporting to set forth specifications is permitted to be sent from the office of the highway department, the bidder takes the literature at his risk unless such information is furnished by a proper official of that department duly authorized so to do—Trinkle v Commonwealth, supra

74. Ga—MacDougald Const Co v State Highway Department 2 S E 2d 197, 59 Ga App 708, reversed on other grounds State Highway Department v MacDougald Const Co, 6 S E 570, 189 Ga 490, 137 A L R 520 mandate conformed to MacDougald Const Co v State Highway Department, 7 S E 2d 292, 61 Ga App 672

75. Ga—State Highway Department v MacDougald Const Co, 6 S E 2d 570, 189 Ga 490, 137 A L R 520 reversing MacDougald Const. Co v State Highway Department, 2 S E 2d 197, 59 Ga App 708, mandate conformed to 7 S E 2d 292, 61 Ga App 672
29 C J p 609 note 4

76. Contract awarded to one of joint bidders

State highway contract, awarded one of two joint bidders, precluded him from asserting that other bidder had interest therein as against state, but did not prevent different

g. Effect of Invalidity or Irregularity

As a general rule a contractor who furnishes labor or material under a road contract which, without being immoral or prohibited, is irregular or ineffective, may recover the reasonable value thereof. An unauthorized contract may be ratified by the board or body having authority to make such a contract.

Although there is authority to the contrary,[77] it is generally held that where a contractor furnishes labor or material under a contract which, while not immoral or prohibited, is irregular or ineffective he is nevertheless entitled to recover on quantum meruit for the reasonable value of such labor or material[78] Thus, where a contract between an engineer and the district for both preliminary work and supervision of the actual construction never becomes effective because no assessment of benefits is made, and the project is abandoned after performance of the preliminary work, the engineer, although not entitled to recover for the preliminary work under the contract, is entitled to payment on quantum meruit,[79] provided he acted in good faith.[80] So too, where a contract for road work is let and the work completed and certificates issued to the contractor, and the statute under which these things were done is then declared invalid, the contractor, although not entitled to recover on the contract or certificates, is entitled to the value of the work done and the materials fur-

arrangement between bidders —McDonald v Schaefer, 243 N W 451, 208 Wis 414

Release from liability on guaranty

Where a quarry company contracts with a county to furnish crushed stone to contractors on the roads of the county, the county guaranteeing payment for the stone, the contract embraced all the stone which the quarry company might supply to any and all contractors, and an agreement between the quarry company and a contractor that in no way increased the liability of the county did not operate to release the county —Holston Corporation v Wise County, 109 S E 180, 131 Va 142

77. Miss —Amite County v Mills, 102 So 465 138 Miss 222, suggestion of error dismissed 102 So 737, 138 Miss 222

78. Ark —Road Improvement Dist No 2, Johnson County, v Burkett, 260 S W 718, 163 Ark 578
Fla —Hillsborough County v Highway Engineering & Construction Co, 199 So 499 145 Fla 83
Mich —Webb v Wakefield Tp, 215 N W 43, 239 Mich 521
Minn —Lindgren v Town of Algoma, 244 N W 70, 187 Minn 31
Nev —Leech v Armstrong, 283 P 396, 52 Nev 125, rehearing denied 287 P 174 52 Nev 125
Va Trinkle v Commonwealth, 196 S E 652 170 Va 429
29 C J p 608 note 92

Failure to furnish bond

(1) It has been held that a contractor may recover on quantum meruit against a road improvement district where he is permitted to perform the work within the knowledge of the commissioners of the district although he does not execute a bond for its faithful performance as required by statute —Burt v Road Improvement Dist No 11, 253 S W 1, 159 Ark 275

(2) On the other hand, it has been held that, under a statute providing for the letting of the work to improve highways to the lowest bidder, who must enter into a contract for the work and give bond for its faithful performance, etc, the lowest bidder for a highway improvement cannot by entering on the work without signing a contract therefor and giving a bond for its performance make the town liable on implied contract for work performed, whether he entered on the work with or without the consent of the selectmen —Kelley v Torrington 68 A 855, 80 Conn 378

Where county sought to be charged not benefited

Where contractor was verbally authorized to construct a road by members of board of county commissioners individually and not as a board and the road was not established by the county commissioners as a county road, county was not liable for the cost of construction of the road on theory of implied contract based on benefits received and retained since, the road not being a county road, county had no authority to expend money on it —George W Condon Co v Board of Com'rs of Natrona County, 103 P 2d 401, 56 Wyo 38

Necessity of acceptance

Where the persons authorized to enter into a contract had no knowledge that a contractor was performing work under an unauthorized contract until the bills for services were presented, and, since they had no choice as to acceptance or rejection of the services, never accepted them the county was not liable in quasi contract —Rolette State Bank v Rolette County, 218 N W 637, 56 N D 571

In Texas

(1) It has been held that a county which allegedly accepted gravel for construction of a road would be liable for the reasonable value of the benefits received although the contract, because made without competitive bids, was unauthorized —East Texas Const Co v Liberty County, Tex Civ App, 139 S W 2d 669

(2) On the other hand, it has been held that a contractor who performs work and furnishes material under a contract entered into by a commissioner without the advice and consent of the court of commissioners, as required by statute, cannot recover the reasonable value of the services and material —Goss v Fannin County, Tex Civ App, 244 S W 204

79. Ark —Arkansas State Highway Commission v Keaton, 59 S W 2d 481, 187 Ark 306—Meek v Christian, 270 S W 614, 168 Ark 313—Pritchett v Road Improvement Dist No 4 of Van Buren County, 250 S W 515, 158 Ark 285—Kern v Booneville & Sanatorium Highway Dist, 241 S W 873, 154 Ark 107—Carter v Road Improvement Dist No 2 of Franklin County, 238 S W 69 152 Ark 302—Gould v Toland, 232 S W 434, 947, 149 Ark 476

Determination of amount recoverable

(1) In a suit on quantum meruit by an engineer to recover for services in preparing plans for a road district, the value of his plans was properly determined by the reasonable cost of the work necessary to prepare them —Road Improvement Dist No 2, Johnson County v Burkett 260 S W 718, 163 Ark 578

(2) A road improvement district cannot be made to pay on a quantum meruit basis more than the value of a part of the work done when it received the benefit thereof —Burt v Road Improvement Dist No 11, 253 S W 1, 159 Ark 275

Failure to keep account of expenses

Failure of the engineers to keep a separate account of the amounts paid out by them as expenses, except as to the amount of time and number of men used in the work, does not defeat their recovering compensation —White-Jackson Road Improvement Dist No 1 v Blackshire & Mercer, 241 S W 386, 153 Ark 581

80. Ark —Kern v Booneville & Sanatorium Highway Dist, 241 S W 873, 154 Ark 107.

nished,[81] and the liability therefor may be apportioned between the county and the de facto improvement district created by the invalid statute.[82] It has also been held that in an exceptional case the contractor may recover according to the terms of such a contract, as where the contract was entered into in good faith and in the belief that it was valid, and the contractor has spent substantial funds in full compliance with the contract.[83] If, in the course of performing a valid contract, additional work is done pursuant to an ineffective agreement with the authorities, the contractor may recover the reasonable value of such additional work.[84] However, it has been held that if the contract is void as imposing on the municipality an indebtedness not sanctioned by law, the contractor cannot recover on quantum meruit and thus accomplish by indirection what could not be done directly,[85] and if the contract is contrary to public policy the highway authorities cannot lawfully stipulate for its performance even for a reduced consideration.[86] A statute authorizing recovery of the reasonable value of labor and material furnished under a contract irregular for failure to follow the "form" of proceedings described by law does not apply to a contract entered into without compliance with the prescribed procedure leading up to the making of the contract.[87] Under a statute so providing, any money paid by the state in consideration of a contract void for noncompliance with statutory provisions as to the letting of contracts may be recovered in an action by the state.[88]

Ratification and estoppel A contract made by one without authority in behalf of a board or body having authority to make such contract may be ratified by the latter.[89] A contract which is illegal because the question of increasing the municipality's debt was not first submitted to the vote of the electors may be ratified by a subsequent election,[90] but a contract which is wholly illegal and void cannot be ratified,[91] and the municipality cannot be estopped to set up its invalidity.[92] In order to constitute ratification, the act must be accompanied by a manifestation of intent to ratify,[93] or must be of such nature as to be utterly inconsistent with any other course of conduct.[94]

Partial invalidity If some provision in a contract is invalid, but is severable from the remainder of the contract, as incidental and collateral thereto, the contract as a whole is not invalidated.[95]

81. Fla.—Hillsborough County v Highway Engineering & Construction Co., 199 So. 499, 145 Fla. 83—Gulf Life Ins. Co. v Hillsborough County, 176 So. 72, 129 Fla. 98—Webb v Hillsborough County, 175 So. 874, 128 Fla. 471—Harwell v Hillsborough County, 149 So. 547, 111 Fla. 361

Determination of amount recoverable

(1) The contractor's recovery is limited to funds, labor, and material expended on a public project for which the county is authorized to contract and the fruits of which the county is enjoying.—Gulf Life Ins. Co. v Hillsborough County, 176 So. 72, 129 Fla. 98—Webb v Hillsborough County, 175 So. 874, 128 Fla. 471

(2) But the value of the work done and materials furnished is not necessarily limited to manual labor and physical materials furnished but may comprehend the cost of engineering, superintending, or any necessary expense that goes into, and becomes a part of, modern highway construction.—Webb v Hillsborough County, supra

(3) Where there is no applicable statute providing for the payment of interest, the contractor is not entitled to payment of interest on the amount found to be due.—Hillsborough County v Highway Engineering & Construction Co., 199 So. 499, 145 Fla. 83

82. Fla.—Webb v Hillsborough County, 175 So. 874, 128 Fla. 471.

83. Okl.—Flynn Const. Co. v Leininger, 257 P. 374, 125 Okl. 197

84. Ariz.—Greenlee County v Webster, 246 P. 543, 30 Ariz. 245

Wash.—Besoloff v Whatcom County, 248 P. 381, 140 Wash. 180—Besoloff v Whatcom County, 233 P. 284, 133 Wash. 109

Measure of amount recoverable

Where the contractor excavated materials falling into the roadway, which work was outside the contract, neither the amount agreed to by the county engineer to be paid for such work nor the unit price provided in the contract for common excavation was the measure of the amount the contractor could recover, the contractor was entitled to the reasonable value of the extra work.—Strong & MacDonald v King County, 267 P. 436, 117 Wash. 678

85. S.D.—Huston v Sioux Falls Tp., 96 N.W. 88, 17 S.D. 260

Wis.—Bever v Crandon, 73 N.W. 771, 98 Wis. 306

86. Minn.—Regan v Babcock, 247 N.W. 12, 188 Minn. 192

87. Mo.—Scott v St. Louis County, 111 S.W.2d 186, 341 Mo. 1084

Petition for improvement

One to whom construction company assigned tax bills, issued to it by county for street improvements made on petitions not signed by majority of property owners residing on improved portion of street, cannot recover reasonable value of labor and materials furnished from county.—Scott v St. Louis County, supra

88. Idaho.—State ex rel. Parsons v Bunting Tractor Co., 77 P.2d 464, 58 Idaho 617

89. Tex.—Corvell County v Burke & Corbett, Civ. App., 4 S.W.2d 283, error dismissed

Vt.—Stalbird v Town of Washington, 172 A. 623, 106 Vt. 213

Va.—Holston Corporation v Wise County, 109 S.E. 180, 131 Va. 142

29 C.J. p. 608 note 89

90. Pa.—Borough of Southmont v Upper Yoder Tp., 131 A. 281, 284 Pa. 287

91. U.S.—Filbert v Arkansas & Missouri Highway Dist., D.C.Ark., 2 F.2d 114

Me.—Williams v Inhabitants of Town of Vinalhaven, 124 A. 213, 123 Me. 505

Tex.—Wyatt Metal & Boiler Works v Fannin County, Civ.App., 111 S.W.2d 787, error dismissed

92. Ill.—Brownell Improvement Co. v Highway Commissioner of Town of Sumner, 260 Ill.App. 43

93. Wyo.—George W. Condon Co. v Board of Com'rs of Natrona County, 103 P.2d 401, 56 Wyo. 38

29 C.J. p. 608 note 90

94. Wash.—Tukwila v King County, 169 P. 824, 99 Wash. 439

95. Tex.—Owen v Fleming-Stitzer Road Building Co., Civ.App., 250 S.W. 1038

§ 209. —— Performance and Payment

a In general
b Strict or substantial performance
c. Time for performance
d. Acceptance or rejection of work
e Extra work or compensation
f Deductions
g Assignment of moneys due or to become due
h. Allowance and payment of claims
i. Rescission or abandonment
j. Rights, remedies, and liabilities of subcontractors, materialmen, and laborers

a. In General

(1) Performance or breach
(2) Compensation or damages

(1) Performance or Breach

(a) By contractor
(b) By public agency

(a) By Contractor

The nature and extent of the work to be performed by the contractor are to be determined by a proper construction of the contract He must perform the contract as he has agreed, and is liable in damages for failure to do so

The nature and extent of the work to be performed by the contractor under a highway construction contract are to be determined by a proper construction of the provisions of the contract.[96] He is bound by all the conditions of the contract,[97] and must perform it as he has agreed[98] Failure to perform in compliance with the terms of the contract constitutes a breach of contract,[99] and subjects him to liability in damages therefor[1] The contractor is not liable, however, for the breach of a contract, to which he was not a party, whereby the highway

96. Particular contracts construed

(1) Not to require riprap to be handplaced —State v Clausen, 223 P 591, 128 Wash 532

(2) Not to require contractor to remove material exceeding quantity required by contract, at his own cost to grade bank to proper slope — Strong & MacDonald v King County, 267 P 436, 147 Wash 678

(3) Not to require contractor, who agreed to furnish "engineer's help," to pay for running of levels, setting slope stakes, and inspecting materials or for help employed by engineer —Connelly v Parkes, 255 S W 22, 160 Ark 496

(4) Not to require contractor to protect subbase laid by previous contractor —People v Greylock Const Co, 217 N Y S 868, 128 Misc 61

Construction of highway construction contracts generally see supra § 208

Performance or breach by subcontractor see infra subdivision j (1) of this section

97. Tex —Fort Worth Nat Bank v State, Civ App, 158 S W 2d 885, error refused

Va —Trinkle v Commonwealth, 196 S E 652, 170 Va 429

Honest mistake in specifications

Where proposal of state highway contractor recited that it had personally inspected sources of supply, and that it waived all right to plead any misunderstanding, and, where contract recited that contractor was fully informed regarding all conditions affecting work, and would make no claim by reason of estimates, tests, or representations of any officer of state, contractor could not thereafter complain of honest mistake in state's specifications as to location of sandstone ledge — Fred E Gross & Son v State, 212 N Y S 222, 214 App Div 386 affirmed, appeal dismissed 154 N E 634, 243 N Y 629

98. Ind —Pass v State, 147 N E 287, 83 Ind App 598

N Y —J W Brennan Const Co v State, 191 N Y S 253, 117 Misc 816

Tex —Fort Worth Nat Bank v State, Civ App, 158 S W 2d 885, error refused

Wis —McDonald v State, 235 N W 1, 203 Wis 649

Unsound improvement

A contractor undertaking a highway improvement must perform according to the plans and specifications furnished and he can neither change the plans nor quit the work because he believes the improvement as projected is bad from an engineering standpoint —Engler v Aldridge, 75 P 2d 290, 147 Kan 43

Compliance with engineers' requirements

(1) Under a contract providing that the quantities used are to be determined by the engineers' estimates of the finished concrete in place, the contractor must comply with fair and just requirements of the engineers governing construction, such as their directions as to the constituents of concrete to go into the mixer and the proportions thereof —Maine Sand & Gravel Co v Green & Wilson, 177 A 185, 133 Me 313

(2) Where a contract leaves a detail of the work to the determination of the engineer, and the contractor performs the work in respect thereof as directed by the engineer, and uses a material which the engineer directs him to use, and executes that detail of the work, in such case neither the engineer nor the county can be heard to say, after the work has been performed, that the material was defective or the work improper —Spokane County v Pacific Bridge Co, 213 P 151, 106 Or 550

Statute releasing contractors held unconstitutional

Statute releasing highway contractors from obligations under their contracts by reason of conditions arising out of war held invalid — Hays v Board of Com'rs of Owen County, 136 N E 13, 192 Ind 287— Board of Com'rs of Dubois County v Cave, 132 N E 631, 192 Ind 152— Davis Const Co v Board of Com'rs of Boone County, 132 N E 629, 192 Ind 144, 21 A L R 557

99. Mass —New Haven Road Const Co v Long, 168 N E 161, 269 Mass 16

1. N Y —Gordon v. State, 134 N E 698, 233 N Y 1, 21 A L R 562, reversing 190 N Y S 107, 196 App Div 589

Liquidated damages

A contractor abandoning the contract on refusal of the county to pay exorbitant claims is not relieved from liability for liquidated damages —L Romano Co v Skagit County, 268 P 898, 148 Wash 367

Retention of reserved percentages

On contractor's abandonment of highway contract, county has right to retain reserved percentages — Southern Surety Co v Merchants' & Farmers' Bank of Avilla, 176 N E 846, 203 Ind. 173, rehearing denied 179 N E 327, 203 Ind 173.

department agreed to purchase the material required by the paving contract [2]

In the absence of provisions to the contrary, the contractor is required to furnish at his own expense the machinery and implements necessary to perform the work he has contracted to do [3]

The manner in which the contractor performs the work does not change the contract with respect to classification of disputed excavation.[4]

(b) By Public Agency

A highway improvement contract must be carried out in good faith by the contracting public agency, which is ordinarily liable to the contractor for damages resulting from a breach thereof On default of the contractor, the public agency may take over and complete the work at the expense of the contractor, provided conditions precedent are complied with

The nature and extent of the duties of the public agency contracting for the construction or improvement of a highway are to be determined by a proper construction of the provisions of the contract [5] A contract lawfully entered into must be carried out in good faith,[6] and, while there can be no recovery on the theory of breach of contract in the absence of a valid contract,[7] ordinarily the public agency is liable in damages to the contractor for a breach, on its part, of a valid contract,[8] such as a refusal to make payments according to the terms of the contract [9] In the absence of waiver by the contractor,[10] while the contract remains in force, the public agency is bound to permit the contractor to perform the work covered by the contract,[11] and is liable to him in damages for improperly preventing him from completing such work,[12] or for losses occasioned to him by its unreasonable interference [13]

2. S C—Pennell & Harlev v Hearon, 168 S E 188, 169 S C 16

3. La—Louisiana Highway Commission v McCain, 1 So 2d 545, 197 La 359

4. Mo—Webb-Boone Paving Co v State Highway Commission, 169 S W 2d 336

5. Particular contracts construed

(1) To give government right to use equipment but not to impose duty on government to use it—G T Fogle & Co v U S, C C A W Va, 135 F 2d 117

(2) Not to give contractor absolute right to pile brick on a city street—Peter F Connolly Co v State, 198 N Y S 882, 120 Misc 854

(3) Not to require district to supply contractors with sufficient gravel to keep the contractor's employees steadily employed—Brown & Frolev v Monroe County Road Improvement Dist, 241 S W 39, 153 Ark 606

(4) To impose no duty on highway commissioner to close highway—Kent Const Co v State, 208 N Y S 531 212 App Div 197

(5) Not to authorize cancellation of rental contract prior to expiration of agreed term—Makofsky v Department of Highways, La App, 12 So 2d 485

(6) To entitle county court merely to make alterations necessary or desirable satisfactorily to complete construction of roadway as contemplated in contract, and not a reduction in length of roadway except as may be necessary for grades and alignments—Miller v Barbour County Court, 180 S E 440, 116 W.Va 380

Interdependent provisions

Provisions of the contract requiring the contractor to do the work and the county to pay the contract price in monthly installments as the work progresses are not separable but are interdependent—Marshall County v Callahan, 94 So 5, 130 Miss 271, overruling suggestion of error 93 So 194

Deduction of amount due for materials

Failure of state's engineer to make final estimate after highway contractor completed work did not release state from contractual obligation to deduct amount due it for materials furnished from amount paid contractor—Fidelity Union Casualty Co v State, Tex Civ App, 54 S W 2d 1079

6. La—Makofsky v Department of Highways App, 12 So 2d 485

Tex—Fort Worth Nat Bank v State, Civ App, 158 S W 2d 885, error refused

Wis—McDonald v State, 235 N W 1, 208 Wis 619

7. Ark—McCrory v Richland Tp Road Improvement Dist, 284 S W 727, 171 Ark 460

N Y—Colarusso v State, 202 N Y S 510, 122 Misc 191

Tex—Goss v Fannin County, Civ App, 244 S W 204

Recovery on quantum meruit where contract invalid see supra § 208

8. La—Makofsky v Department of Highways App, 12 So 2d 485

Miss—State Highway Commission v Wunderlich, 11 So 2d 437, overruling suggestion of error 10 So 2d 453—Wunderlich v State Highway Commission, 184 So 456, 183 Miss 428

N Y—Cuzner Const Co v State, 202 N Y S 179, 121 Misc 704

N C—North Carolina Highway Commission v Rand, 143 S E 851, 195 N C 799

Tex—Gulf Bitulithic Co v Nueces County, Com App, 11 S W 2d 305, reversing Civ App, 297 S W 747

9. Miss—Wunderlich v State Highway Commission, 184 So. 456, 183 Miss 428

10. U S—Chandler v State Highway Board of Georgia, C C A Ga, 61 F 2d 601

11. N C—North Carolina Highway Commission v Rand, 143 S E 851, 195 N C 799

12. N C—North Carolina Highway Commission v Rand, supra

Tex—Gulf Bitulithic Co v Nueces County, Com App, 11 S W 2d 305 reversing Civ App 297 S W 747—Corvell County v Burke & Corbett, Civ App, 4 S W 2d 283, error dismissed

Contractor's default was held due to insufficient finances, and not because work was rendered impossible of completion by highway commission—State v Smith, 119 So 56, 167 La 301

13. N Y—Nugent v State, 40 N Y S 2d 361, 265 App Div 519—Cuzner Const Co v State, 202 N Y S 179, 121 Misc 704—Schunnemunk Const Co v State, 189 N Y S 569, 116 Misc 770

N C—North Carolina Highway Commission v Rand, 143 S E 851, 195 N C 799

Utah—Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

Held no interference

(1) County engineer's instruction to highway contractor's superintendent not to waste any more material was held not interpretable as order not to remove slide material so as to authorize contractor's recovery of extracontractual compensation for removal of slide material on theory that engineer prevented its removal in dry weather.—Coyle Const Co v. Skagit County, 32 P 2d 106, 177 Wash. 520

(2) A state paving contractor could not recover from the state for damages claimed because water, sew-

So, where it fails to fulfill a contractual obligation to furnish rights of way, it is liable in damages to the contractor,[14] but provisions requiring the public agency contracting for the construction of the highway to furnish the requisite right of way must be read in conjunction with other provisions of the contract requiring approval of other agencies.[15] Under a contract provision authorizing the highway district to suspend the work temporarily because of unfavorable conditions, a suspension made in the good faith belief that conditions were unfavorable to continue the work is not a breach of the contract, and, if the contractor refuses to resume work when requested to do so thereafter, he is not entitled to recover for anticipated profits. Moreover, if the contractor intends to treat a suspension as a breach, he should so state at the time thereof.[16] The public agency is liable for material furnished pursuant to the contract but which was wrongfully rejected.[17] A discretion vested in the agent of the public authority charged with supervising and directing the work must be exercised in a fair, honest, and reasonable manner,[18] and requirements of the government consulting engineer that the contractor depart materially from specifications in matters substantially increasing his expenses constitute a breach of the contract.[19] Specifications by the public agency are binding on it, and loss resulting therefrom must be borne by it;[20] it is only where uncertainty is indicated in representation of facts relating to the work that the contractor is bound to satisfy himself as to existing conditions or suffer the penalty imposed by the contract for failure to do so.[21]

On default of the contractor the public agency may take over the work and complete it[22] at the expense of the contractor,[23] and for this purpose may appropriate the entire fund withheld on the contract if necessary.[24] In exercising the right to take over, the public agency must comply with the conditions precedent provided for in the contract,[25] such as a provision requiring notice.[26] A contract giving the county the right to take over the equipment and material on the project and use them in completion thereof on default of the contractor gives the county a contractual lien on the machinery and equipment which is enforceable in equity against the contractor or anyone who purchased the property with notice of the contract provision, and machinery and equipment sold to the contractor, after the contract was executed, by one knowing they were to be used on the project were subject to such lien.[27]

A stipulation in the contract that the public agency would retain a percentage of the amount earned by the contractor until completion and acceptance

er, and gas mains were being laid by a city in a street constituting a part of a state highway and because there was no place for him to pile his brick, where it appears that there was abundant space in the street which he might have utilized for such purpose with the city's consent and without interference.—Peter F. Connolly Co. v. State, 198 N.Y.S. 882, 120 Misc. 854.

14. Miss.—State Highway Commission v. Wunderlich, 10 So.2d 453.—Wunderlich v. State Highway Commission, 184 So. 456, 183 Miss. 428.
N.Y.—Madison County Const. Co. v. State, 31 N.Y.S.2d 883, 177 Misc. 777.
Damages for delay see infra subdivision c of this section.

15. U.S.—Frank v. Allegheny County, C.C.A.Pa., 119 F.2d 614.

16. Ark.—Perdue & Hill v. Road Improvement Dist. No. 1 of Cross County, 251 S.W. 886, 154 Ark. 117.

17. Kan.—Roberts v. Board of Com'rs of Nemaha County, 298 P. 754, 133 Kan. 15.

18. Or.—Feldschau v. Clatsop County, 244 P. 528, 117 Or. 482.

19. U.S.—Merrill Engineering Co. v. U.S., D.C.Miss., 47 F.2d 932.

20. Wis.—McDonald v. State, 235 N.W. 1, 203 Wis. 649.

Elevations shown on contour map

Where company, in submitting bids for reconstruction of a state highway, involving erection of cofferdams, relied on under-water elevations shown on contour map constituting a part of plans submitted to bidders and cofferdam operation was more costly than contemplated because elevations shown were erroneous, the elevations shown amounted to a material representation on part of state, which thereby became liable to company for damage sustained by it, notwithstanding provision of contract that no claim was to be made by reason of representation of any officer or agent of state and the fact that company failed to take soundings to ascertain whether or not elevations shown were correct did not preclude it from recovering.—Young Fehlhaber Pile Co. v. State, 30 N.Y.S.2d 192, 177 Misc. 204 affirmed 37 N.Y.S.2d 928, 265 App.Div. 61.

21. N.Y.—Young Fehlhaber Pile Co. v. State, supra.

22. Ark.—Mullins & Kyte v. Road Improvement Dist. No. 5, 258 S.W. 639, 162 Ark. 427.

Authorized abandonment

Where provision of road construction contract giving contractor right to abandon contract provided that, in such event, liability of county to contractor should be determined as provided in other paragraphs, one of which gave county privilege of terminating contract and to take possession of and utilize in completion of the project, the materials which were on the site of the work in completing the project the county was entitled to appropriate the contractor's materials even though the contractor had properly exercised his option to terminate the contract.—Frank v. Allegheny County, C.C.A.Pa., 119 F.2d 614.

23. Va.—Jones v. Nelson County, 120 S.E. 140, 137 Va. 612.

24. S.C.—Sumter Trust Co. v. Sumter County, 134 S.E. 209, 136 S.C. 15.

25. Va.—Jones v. Nelson County, 120 S.E. 140, 137 Va. 612.

26. Va.—Jones v. Nelson County, supra.

Requirement of notice held applicable to provision of contract requiring contractor to maintain detours.—Fort Worth Nat. Bank v. State, Tex.Civ.App., 158 S.W.2d 885, error refused.

27. Kan.—Duncan v. Clary, 254 P. 386, 123 Kan. 24.

of the work is for the benefit of both the surety of the contractor and the public agency, and the latter's premature payment of the retained fund renders it liable to the surety for the amount it should have retained to the extent of unpaid claims for labor and materials used in the project for which the surety was responsible [28]

Failure of the public body to perform a contractual duty will not render it liable for damages not attributable to such breach of duty,[29] and the contractor cannot recover for damages which would not have resulted had he completed the work by the date required in the contract [30] A town is not liable for costs and allowance which the commissioners were directed to pay as a result of personal dereliction [31]

(2) Compensation or Damages

(a) In general

(b) Unit prices, measurements, and estimates

(a) In General

The right to, and amount of, compensation to be paid the contractor depends on the terms of the contract, and, if the work is performed in compliance with the contract, he is entitled to the amount agreed to therein. If he is excused from further performance after he has partly performed, he is entitled to recover for the work done and materials furnished, but, if the public agency completes the work after a breach by the contractor, the latter's recovery is offset by the damages sustained by the former The measure of damages for breach on account of defective work is the reasonable cost of remedying the defect

The right to, and amount of, compensation to be paid to the contractor on his completion of the work is regulated by the terms of the construction contract [32] The contractor is entitled to the amount of compensation agreed to in the contract if the work is performed in compliance therewith,[33] but not otherwise [34] There can be no recovery for loss of anticipated profits resulting from an authorized change of the construction plans where the contract contained specific provisions against such recovery,[35] and, where changed specifications were assented to by the contractor, he is not entitled to re-

28. W Va —State v Webb, 166 S E 281 112 W Va 622

29. U S —Frank v Allegheny County, C C A Pa , 119 F 2d 611

30. Va Trinkle v Commonwealth 196 S E 652 170 Va 429

31. N Y —Coyne v Town of Greenburgh 135 N E 893, 233 N Y 503 modifying 185 N Y S 670, 194 App Div 861, reversing 182 N Y S 230, 110 Misc 598

32. Ariz —State v Kisselburg, 233 P 580, 27 Ariz 336

Ark —Connelly v Road Improvement Dist No 2, 13 S W 2d 751, 181 Ark 1193—Lewelling & Price-Williams v St Francis Road Improvement Dist No 1, 250 S W 1, 158 Ark 91

Cal —McGillivray Const Co v Hoskins, 202 P 677, 54 Cal App 636

La - State v Smith, 119 So 56, 167 La 301—Makofsky v Department of Highways, App , 12 So 2d 485

Miss —Stowell v Clark, 118 So 370, 152 Miss 32- Benton County v Oliver Const Co 105 So 856, 141 Miss 335

Mo —Sager v State Highway Commission, 160 S W 2d 757, 349 Mo 341

Neb —Peterson v State, 209 N W 221, 114 Neb 612 reversing 203 N W 1002, 113 Neb 516

N Y —Kniffin v State, 12 N Y S 2d 422, 257 App Div 43, modified on other grounds 28 N E 2d 853, 283 N Y 317, reargument denied 29 N E 2d 668, 281 N Y 593 certiorari denied Kniffin v State of New York, 61 S Ct 621, 312 U S 690, 85 L Ed 1127—Marshall Const Co v State 231 N Y S 345, 133 Misc 131

Tex —McClung Const Co v Ely 50 S W 2d 791, 121 Tex 584

Va —Ragland v Commonwealth, 200 S E 601 172 Va 186

Wash —Coyle Const Co v Skagit County, 32 P 2d 106, 177 Wash 520 —L Romano Co v Skagit County, 268 P 898 148 Wash 367

W Va —T Towles & Co v County Court of Summers County, 121 S E 93 95 W Va 310

Allowance and payment of claims see infra subdivision h of this section

Rights, remedies, and liabilities of subcontractors see infra subdivision j (1) of this section

Term "freight rates" within highway construction contract may apply to cost of transportation by truck — Lyman-Richey Sand & Gravel Co v State, 243 N W 891, 123 Neb 674, 83 A L R 1301

Work done in accordance with specifications

A provision in the contract that the contractor will in all cases be paid for the actual amount of work performed in accordance with specifications applies only to work done in accordance with the terms of the contract, the specifications being a part of the contract — Joyce v Sauk County, 246 N W 413, 210 Wis 243

Mistaken belief as to basis for compensation

Where road construction contract contemplated compensation for filling stump holes, compensation should not be denied merely because contractor believed it was payable under oral agreement outside of contract —Road Improvement Dist No 5 of Crittenden County Ark, v Roach C C A Ark , 18 F 2d 755

Interest

(1) Where town highway commissioners contract for purchase of road oil contained no provision for interest, provision in commissioner's order for payment of interest was void -American Mexican Refining Co v Wetzel 183 N E 593 350 Ill 575, reversing 264 Ill App 220

(2) Recovery of interest or damages for delay see infra subdivision c (2) of this section

33. Cal - Coulter v Pool, 201 P 120, 187 Cal 181—Bates v Hoskins, 202 P 679 54 Cal App 643

Okl —Leininger v Ward-Beckman & Brooks, 282 P 467, 139 Okl 292, followed in Leininger v H L Cannady Co , 282 P 474 139 Okl 301

Substantial performance see infra subdivision b of this section

Set-off

Commissioner's court could offset claim to county from contractor in settling amount payable to him under contract —Eastland County v Davisson, Tex Civ App , 290 S W 196, reversed on other grounds, Com App , 298 S W 268

34. Mich —Hull v Board of Road Com'rs of Lapeer County, 203 N W 474, 230 Mich 685

29 C J p 609 note 5

35. N Y —Hopkins v State, 225 N Y.S 665, 131 Misc. 11.

cover profits he would have made if such specifications had not been changed [36]

Where the contractor, after part performance, has been excused from further performance by prevention, or by the repudiation or abandonment of the contract by the public authority, he may recover at the contract rates the value of the services rendered or bring action on the contract for damages [37] Thus, where the contractor after partial performance has rightfully repudiated or abandoned the contract, he is entitled to recover for the work done [38] and materials furnished, [39] the expense necessarily incurred in preparing for further performance, [40] and, in a proper case, prospective profits, [41] but not for payments to employees or expense incurred in retaining his machinery and organization after the abandonment of the work in the expectation that work might be resumed [42] Acts which might justify the contractor in abandoning his contract, and enable him to recover for work already done, are not necessarily sufficient, however, to allow him to recover for prospective profits, [43] and the contractor is not entitled to recover on a quantum meruit where complete performance was not prevented or waived by the other party, although the abandonment by the contractor was authorized by the terms of the contract [44] The contractor is entitled to compensation for the use of his equipment which was taken over by the district after the latter had breached the contract and the contractor had abandoned work thereunder, but the rental price should in no event exceed the value of the property. Where the use of the equipment was pursuant to an agreement made after the breach and in contemplation of the lawsuit which resulted from such breach, the taking over of the equipment was not wrongful, and the compensation should be limited to legal interest on the value of the property regardless of what it brought on a subsequent mortgage foreclosure sale, particularly in the absence of evidence showing the proper rental value of the property [45]

Where the contractor fails to complete his contract, and the county takes over the work, the contractor is entitled to recover at the contract rates for the work he has done less any damages sustained by the county because of his failure to complete the contract, [46] but a contractor piling logs on the right of way without burning them as required is not entitled to the cost of removing them [47] Under a statute or contract authorizing the state or municipality to complete the work at the expense of the contractor, the former may recover the actual cost of completing the contract, where it has acted diligently and in good faith, and there is no evidence of fraud or negligence, [48] but there can be no recovery prior to the completion of the work where the work of

36 Increase in width and decrease in length of road

Where changed specifications increasing width and decreasing length of road were assented to by contractor, he could not recover profits he would have made if such road of greater width had been of length originally agreed on, particularly where it appears that he was paid more than he would have been if the specifications had not been changed Connelly v Road Improvement Dist No 2, 43 S W 2d 751, 184 Ark 1193

37. Or—Feldschau v Clatsop County 208 P 761 105 Or 237

38. Cal—Burr v Pacific Indemnity Co 133 P 2d 24 56 Cal App 2d 352 prior opinion 128 P 2d 26
Conn—Kelley v Torrington, 71 A 939, 81 Conn 615
N Y—Luciano v State 287 N Y S 768 248 App Div 642—Marshall Const Co v State, 231 N Y S 845, 133 Misc 131—Colarusso v State, 202 N Y S 510, 122 Misc 191
Or—Feldschau v Clatsop County, 214 P 528, 117 Or 482
Rescission or abandonment of contract generally see infra subdivision I of this section

39. Cal—Burr v Pacific Indemnity Co, 133 P 2d 24, 56 Cal App 2d 352, prior opinion 128 P 2d 26.
N Y—Luciano v State, 287 N Y S 763 248 App Div 642
Or—Feldschau v Clatsop County, 214 P 528, 117 Or 482

40. U S v A R Young Const Co v Road Improvement Dist No 2, Johnson County, C C A Ark 297 F 127

41. U S—A R Young Const Co v Road Improvement Dist No 2, Johnson County, supra—Holmes County v Burton Constr Co, C C A Miss 267 F 769
29 C J p 609 note 11

42. U S—A R Young Const Co v Road Improvement Dist No 2 Johnson County C C A Ark 297 F 127

43 U S - Holmes County v Burton Constr Co, C C A Miss 267 F 769 29 C J p 612 note 12

44. U S—Frank v Allegheny County, C C A Pa, 119 F 2d 614

45. Ark—Lewelling & Price-Williams v St Francis Road Improvement Dist No 1, 250 S W 1, 158 Ark 91

46. Or—Feldschau v Clatsop County 208 P 761, 105 Or 237

Comparative cost of completed and uncompleted work

Where road district took over contract for road construction on account of contractors' delay in completion of job, on difference as to comparative cost of the completed and uncompleted parts of the work, view of the district thereon was held to prevail, it being the more reasonable one—Mullins & Kyte v Road Improvement Dist No 5, 258 S W 639 162 Ark 427

Profit on unfinished work

Where contract for highway provided that, if road district took over the work, and the expense incurred should be less than sum payable under the contract if completed by contractors, contractors would be entitled to difference but if such expense exceeded the sum so payable, contractors would be liable for excess on taking over contract because of contractors' delay, a profit of ten cents a yard in embankment unfinished by contractors was held properly credited to them—Mullins & Kyte v Road Improvement Dist No 5, supra

47. Wash—L Romano Co v Skagit County 268 P 898 148 Wash 367

48. Wis—Bayfield County v Ogren, 177 N W 591, 172 Wis 169

Contract as enlarging rights

Provision that highway district could notify contractor to discontinue all work or any part thereof, and

completion was done under a contract such that the cost of completion could not be determined before completion,[49] although the rule is otherwise where the uncompleted work was relet for a definite sum.[50] In the absence of waiver, by taking over without compliance with conditions precedent provided for by the contract, the state or municipality voluntarily divides the entire contract and entitles the contractor to compensation for the value of the work and material furnished.[51] Where the contract gives the public agency the right, in the event of the contractor's default, to complete the contract at his expense or charge him a fixed amount per day as liquidated damages for delay, and a similar provision is made in the contract between the contractor and the subcontractor, the election of the public agency to complete the contract precludes it from charging the contractor liquidated damages and likewise precludes the contractor from making such a charge against the subcontractor.[52]

The measure of damages for breach of a highway contract on account of defective work is the reasonable cost of remedying the defects.[53]

Joint bidders Where two contractors have put in a joint bid for highway improvement work, and the contract is awarded by the state in the name of one of them, and both jointly proceed with the work, the equities against the state of the one not named in the contract must be worked out in the contractor's name by assignment or making a claim under the contract, but as between themselves accounts should be stated as if they were independent contractors. The assumption of liability to the state for completion of the highway by the one to whom the contract was awarded did not make him liable to the other respecting the latter's share in the enterprise, and, where the latter has defaulted, he is liable to the former for the amount by which his reasonable expenses of doing the work necessitated by the default exceeded the contract price.[54]

(b) Unit Prices, Measurements, and Estimates

Under some contracts the amount of the compensation to be paid is determined by applying specified unit prices to actual measurements or estimates of the work done, and, where it is provided that an estimate, certificate, or determination of a designated officer or board with respect to the performance of, or amount due under, the contract is conclusive, the parties are bound by such determination in the absence of fraudulent or arbitrary action or gross mistake

Frequently the contract is so worded and construed as to provide for the payment, not of a lump sum, but rather of a sum to be determined by applying specified unit prices to actual measurements of the work done,[55] and in such case the contractor is entitled to recover the amount agreed to be paid as determined from a computation of the units of work performed,[56] and cannot recover damages because of an authorized change in plans which increased the number of units of one class and decreased the number in another.[57] In measuring the

thereupon complete the work in stipulated manner with stipulated rights to recover excessive expense, contemplated contingencies in which the district could take the initiative and compel contractor to discontinue and hence did not limit the district's rights but rather enlarged them, and did not require district to follow indicated procedure for completing work — Six Companies of California v Joint Highway Dist No 13 of California, C C A Cal 110 F 2d 620 affirming D C, 24 F Supp 346, certiorari granted Six Companies of California v Joint Highway Dist No 13 of State of California, 61 S Ct 36, 311 U S 631 85 L Ed 401, and reversed on other grounds 61 S Ct 186 311 U S 180 85 L Ed 114, rehearing denied 61 S Ct 438, 311 U S 730 85 L Ed 475

49. N Y — Fred E Gross & Son v State 212 N Y S 222, 214 App Div 386, affirmed, appeal dismissed 151 N E 634 243 N Y 629

50. U S — Six Companies of California v Joint Highway Dist No 13 of California, C C A Cal, 110 F 2d 620 affirming, D C, 24 F Supp 346, certiorari granted Six Companies of California v. Joint Highway Dist No 13 of State of California, 61 S Ct 36, 311 U S. 631, 85 L Ed 401 and reversed on other grounds 61 S Ct 186, 311 U S 180, 85 L Ed 114 rehearing denied 61 S Ct 438, 311 U S 730, 85 L Ed 475

51. Held no waiver

Va — Jones v Nelson County, 120 S E 110, 137 Va 612

52. Va — Fidelity & Casualty Co of New York v Copenhaver Contracting Co, 165 S E 528, 159 Va 126

53. La — Goldberg v Banta Bros, 162 So 786, 183 La 10

54. Wis — McDonald v Schaefer, 243 N W 451 208 Wis 414

55 Ariz — Greenlee County v Webster, 215 P 161, 25 Ariz 183

N Y — Kent Const Co v State, 208 N Y S 534, 212 App Div 197 — Marshall Const Co v State, 231 N Y S 345, 133 Misc 131

Ohio — State v Harlan, 174 N E 366, 37 Ohio App 222, error dismissed Harlan v State, 177 N E 636, 123 Ohio St 665

What constitutes "unit"

Where unit price highway resurfacing contract called for specific dimensional yardage with minimum content of bituminous concrete of particular brand, each yard with such minimum content constituted "unit" within contemplation of contract — State ex rel S Monroe & Son Co v Tracy, 196 N E 650, 129 Ohio St 550

56. Okl — Leininger v Ward-Beckman & Brooks 282 P 467 139 Okl 292, followed in Leininger v H L Cannady Co, 282 P 474, 139 Okl 301

Error in estimate as to minimum tonnage

If after completion of unit price highway resurfacing contract, it is discovered that error was made in estimate prepared by engineer and carried into contract, with result that dimensions provided for did not take minimum tonnage specified saving inured to benefit of state and not contractor — State ex rel S Monroe & Son Co v Tracy, 196 N E 650, 129 Ohio St 550

57. Wash — Coyle Const Co v Skagit County, 32 P 2d 106, 177 Wash 520 — Brewster v State, 16 P 2d 813, 170 Wash. 422.

work done, specific provisions of the contract should be followed,[58] and measurements made according to the contract method will prevail over measurements otherwise made.[59]

Provision is sometimes made for an estimate, certificate, or determination of the highway engineer or other designated officer or board of the amount or quantity of work done or materials furnished, or for a determination by him of all questions involving the amount earned under the contract. Such provisions are enforceable[60] and, in the absence of fraudulent or arbitrary action or gross mistake, the estimate, certificate, or determination is conclusive where made so by agreement of the parties,[61] but not in the absence of such agreement.[62] Such an agreement will be construed in harmony with the expressed intention of the parties,[63] but plain language in the contract is required to make the determination conclusive,[64] and even where a provision for conclusiveness exists, the decision is not

58. Provision for shrinkage

(1) Under contract for road construction providing that amount of material excavated will be measured in its original position by cross-sectioning unless engineer elects to cross-section embankments after material has been placed, in which event he shall provide for shrinkage of ten per cent, where measurements were made while earth was fresh and newly placed, finding that ten per cent should be subtracted was consonant with common observation and experience that fresh earth packs and shrinks.

U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.

Ark.—Mullins & Kyte v. Road Improvement Dist. No. 5, 258 S.W. 639, 162 Ark. 427.

(2) On remeasurement, more than year after excavation of material placed in road embankment no deduction should be made for shrinkage under contract provision.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, supra.

Practical construction of contract

Where road district's engineers had adopted one construction of clearing and grubbing contract as to computation of acreage in beginning they could not, after plaintiff had dealt with subcontractor on such basis, adopt a changed construction to plaintiff's prejudice.—C. A. Rees & Co. v. Road Improvement Dist. No. 1 of Clark County, 267 S.W. 770, 167 Ark. 383.

Capacity of borrow pits in measuring material taken for highway was held determinable by area not flooded, not area including flooded portion partially filled causing shrinkage in pits.—Atkinson v. State, 275 P. 412, 206 Cal. 617.

59. N.Y.—Dowd v. State, 267 N.Y.S. 358, 239 App.Div. 141.

Actual measurements held to control estimate

Engineer's final estimates of quantity of material used to fill stump holes, made after fills were covered by road, cannot stand against actual measurements by former engineer.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.

Customary use of spread stakes

Where highway construction contract required payment for base course materials according to quantities computed from truck loads delivered on road way, highway engineer's failure either to measure contractor's stock pile or give rock tickets as receipts for truck loads delivered therefrom would not require that state accept contractor's estimate of rock in stock pile and make payment in accordance with such estimate, notwithstanding alleged accuracy of contractor's estimate as to amount of rock which had been in stock pile, particularly where it had been custom in that highway district to use spread stakes and not rock tickets, and where state established that road was correctly staked for a theoretical top width of thirty feet and was constructed in reasonable accordance with the staking, although subsequent measurement showed a top or surface width of thirty-three and nine-tenths feet; contractor could not use width measurement of surface subsequent to completion of construction as foundation for computation of additional quantities over contract requirements which it claimed were actually placed on road at time of construction.—L. Romano Engineering Corporation v. State, 113 P.2d 549, 8 Wash.2d 670, opinion adhered to 120 P.2d 1008, 12 Wash.2d 736.

60. Mo.—Sager v. State Highway Commission, 160 S.W.2d 757, 349 Mo. 341.

Held not to deprive contract of mutuality

Provision of contract that chief engineer's estimate in case of dispute is a condition precedent to right of contractor to receive any money under contract cannot be interpreted so broadly as to deprive contract of mutuality.—Spitcaufsky v. State Highway Commission of Missouri, 159 S.W.2d 647, 349 Mo. 117.

61. U.S.—Bay County, Fla., v. Nixon-Smith Const. Co., C.C.A.Fla., 294 F. 898.

Ark.—Connelly v. Parkes, 255 S.W. 22, 160 Ark. 496.—Brown & Froley v. Monroe County Road Improvement Dist., 241 S.W. 39, 153 Ark. 606.

Ga.—State Highway Department v. MacDougald Const. Co., 6 S.E.2d 570, 189 Ga. 490, 137 A.L.R. 520, reversing MacDougald Const. Co. v. State Highway Department, 2 S.E.2d 197, 59 Ga.App. 708, mandate conformed to 7 S.E.2d 292, 61 Ga.App. 672.

Neb.—Appeal of Roadmix Const. Corporation, 9 N.W.2d 741.

N.Y.—Dowd v. State, 267 N.Y.S. 358, 239 App.Div. 141.

N.C.—Lacy v. State, 141 S.E. 886, 195 N.C. 284.

Or.—United Contracting Co. v. Duby, 292 P. 309, 134 Or. 1.

Tex.—State v. Martin Bros., 160 S.W.2d 58, 138 Tex. 505, reversing Martin Bros. v. State, Civ.App., 146 S.W.2d 782.—Fort Worth Nat. Bank v. State, Civ.App., 158 S.W.2d 885, error refused.—Neyland v. State, Civ.App., 151 S.W.2d 331, error dismissed, judgment correct.—Moller & Roberts v. Harris County, Civ.App., 54 S.W.2d 213.

Wash.—Coyle Const. Co. v. Skagit County, 32 P.2d 106, 177 Wash. 520.

Wis.—State ex rel. Lathers v. Smith, 299 N.W. 43, 238 Wis. 291.

29 C.J. p. 609 notes 4, 7 [c] (2).

Inexperience of engineer

The plain mandate of the contract making the engineer's final estimate conclusive will not be disregarded because the engineer was inexperienced.—Road Improvement Dist. No. 5 of Crittenden County, Ark., v. Roach, C.C.A.Ark., 18 F.2d 755.

Final estimate accepted by contractor as correct in arriving at balance due subcontractor is binding on contractor in accounting with highway department.—Miller v. Bonner, 111 So. 776, 163 La. 332.

62. W.Va.—T. Towles & Co. v. County Court of Summers County, 121 S.E. 93, 95 W.Va. 310.

29 C.J. p. 609 note 7 [c] (1).

63. Tex.—Craven v. Davison Com. App., 276 S.W. 193, affirming, Civ.App., 260 S.W. 1100.

64. U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark., v. Roach, C.C.A.Ark., 18 F.2d 755.

conclusive if it is made fraudulently[65] or in bad faith,[66] or if it goes beyond the scope of the matter submitted to the officer for determination,[67] or is not made in the manner required by the contract,[68] although, if made in accordance with any method provided in the contract, the contractor must abide the result.[69] Furthermore, an estimate is not so conclusive as to preclude the subsequent correction of a gross and palpable mistake therein,[70] but, if the decision of the engineer, even if erroneous, is not so clearly and manifestly wrong as to imply fraud, bad faith, or failure to exercise an honest judgment, it is final and conclusive.[71] Although the right of the road district to change engineers during the life of the contract is not limited by the contract making the engineer's estimates final, such right cannot be exercised to secure a fraudulent or unfair advantage.[72] The provisions of the applicable contract must be looked to in determining whether a particular determination is conclusive.[73] An agreement to abide by the decision of the engineer as arbiter does not confer authority

Or.—Spokane County v. Pacific Bridge Co., 213 P. 151, 106 Or. 550.

65. U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.
Cal.—Vaughan v. Tulare County, 205 P. 21, 56 Cal.App. 261.
Tex.—W. L. Pearson & Co. v. Hutchinson County, Civ.App., 52 S.W.2d 509, error refused—Brammer & Wilder v. Limestone County, Civ.App., 24 S.W.2d 99, error dismissed.
29 C.J. p. 609 note 7 [c] (3).

Local engineer employed by chief engineer.

A road improvement district letting a road building contract providing that the engineer's decisions of disputes shall be final and conclusive is not bound by estimates made by the chief engineer, from reports resulting from fraud or gross mistake by a local engineer employed by him.—Gage & Spencer v. Road Improvement Dist. No. 3 of Newton County, 252 S.W. 922, 159 Ark. 642.

66. U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.

67. Ga.—State Highway Department v. MacDougald Const. Co., 6 S.E.2d 570, 189 Ga. 490, 137 A.L.R. 520, reversing MacDougald Const. Co. v. State Highway Department, 2 S.E.2d 197, 59 Ga.App. 708, mandate conformed to 7 S.E.2d 292, 61 Ga.App. 672.
Or.—Spokane County v. Pacific Bridge Co., 213 P. 151, 106 Or. 550.
Tex.—Fort Worth Nat. Bank v. State, Civ.App., 158 S.W.2d 885, error refused.—W. L. Pearson & Co. v. Hutchinson County, Civ.App., 52 S.W.2d 509, error refused.

68. Wis.—Joyce v. Sauk County, 216 N.W. 413, 210 Wis. 213.

Combination of approved methods.

If the contract provides two alternative methods of estimating the amount of work done, a final estimate based on a compromise between or a combination of the two methods cannot stand.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.
La.—Lane v. E. J. Deas Co., 125 So. 514, 12 La.App. 382.

69. U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.

70. U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.—Road Improvement Dist. No. 4 of Conway County, Ark. v. Wilkerson, C.C.A.Ark., 5 F.2d 416.
Ark.—Gage & Spencer v. Road Improvement Dist. No. 3 of Newton County, 252 S.W. 922, 159 Ark. 642.
Or.—North Pac. Const. Co. v. Wallowa County, 249 P. 1100, 119 Or. 565.—Baker v. Multnomah County, 246 P. 352, 118 Or. 143.
29 C.J. p. 609 note 7 [c] (3).

Held gross mistake.

Mistaken omission of nearly twenty-five per cent of the yardage on a big contract.—Vaughan v. Tulare County, 205 P. 21, 56 Cal.App. 261.

71. Ga.—State Highway Department v. MacDougald Const. Co., 6 S.E.2d 570, 189 Ga. 490, 137 A.L.R. 520, reversing MacDougald Const. Co. v. State Highway Department, 2 S.E.2d 197, 59 Ga.App. 708, mandate conformed to 7 S.E.2d 292, 61 Ga.App. 672.
Or.—Baker v. Multnomah County, 246 P. 352, 118 Or. 143.

72. U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.

73. U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, supra.

Statements by county engineer to prospective bidders for excavation work as to what would be allowed as "intermediate excavation" did not affect written contract between bidder and county.—Baker v. Multnomah County, 246 P. 352, 118 Or. 143.

Particular contracts construed.

(1) The decision of the engineer as to whether detours required to be maintained by the contractor, were properly maintained was conclusive, where the contract provided that work should be done under the direct supervision of the engineer and that he was to decide all questions as to the quality or acceptability of the work performed and as to the manner of performance and all questions as to the acceptable fulfillment of the contract on the part of the contractor.—Fort Worth Nat. Bank v. State, Tex.Civ.App., 158 S.W.2d 885, error refused.

(2) Current monthly estimates are not conclusive where, under a proper construction of the contract, the final estimate is only estimate made conclusive.
U.S.—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755.
W.Va.—T. Towles & Co. v. County Court of Summers County, 121 S.E. 93, 95 W.Va. 310.

(3) A provision that all disputes arising under the contract were to be finally determined by the engineer does not make his decision binding on issues of law such as the legal meaning of a contract, but the provision refers only to issues of fact, such as the quantity and quality of the work.—State v. Kisselburg, 233 P. 580, 27 Ariz. 336, 29 C.J. p. 609 note 7 [c] (4).

(4) A contract between a road district and a contractor providing that the decision of an engineer as to the meaning of all specifications shall be final, refers only to controversies arising between the district and the contractor as to the meaning of the specifications in the contract and has no reference to the interpretation of the provisions of the contract, or the determination of any issue between the contractor and the engineer, growing out of their respective contracts with the district that being a question for the courts.—Connelly v. Parkes, 255 S.W. 22, 160 Ark. 496.

(5) Provision in contract that highway director's decision should be final will be upheld in so far as mechanics of contract are concerned but does not give director exclusive power to interpret contract.—State ex rel. S. Monroe & Son Co. v. Tracy, 196 N.E. 650, 129 Ohio St. 550.

(6) A provision that the opinion of the engineer as to the meaning or intent of the contract shall be final and binding requires only that the contractor perform the work in accordance with the engineer's decision in order to avoid delay, and a decl-

on him to change the contract or to refuse allowances based on plain and ambiguous terms of the contract [74] Where the engineer is appointed by the state highway commission, his authority to bind the county by alterations in the plans must be found in the contract and exercised in the manner prescribed [75] A statute providing for payment from time to time on estimates and orders of the highway commission implies that the commission shall use judgment and discretion and does not limit its function to acceptance of the contractor's estimates [76]

b. Strict or Substantial Performance

A substantial performance of the contract is generally sufficient, but there must be at least substantial compliance.

A substantial compliance with the contract in good faith is generally sufficient [77] Each case presenting the issue of substantial performance must be determined on its own particular facts [78] Under a contract giving the state the right to require the removal and replacement of any part of the work which was not performed in accordance with the contract, the state can order the removal of any part of the pavement which was substantially defective [79] irrespective of the average character of the entire pavement, [80] and in such case the contractor cannot recover the amount expended for removing and relaying such parts of the pavement, [81] but, where the contractor was required to replace pavement substantially conforming to the contract, he was entitled to reimbursement from the state [82]

c. Time for Performance

(1) By contractor
(2) By public agency

(1) By Contractor

The contractor must perform within the time fixed in the contract or an extension lawfully granted, and is liable for failure to do so unless the delay is excused or waived

Public necessity requires that highway contracts be prosecuted to completion promptly [83] The contract must generally be performed within the time fixed therein [84] or within the time of an extension lawfully granted, [85] otherwise the contractor may be held liable in damages for the delay [86] or, where provision therefor is made in the contract, it may be canceled after notice to the contractor [87] The judgment of the highway department that there has been unreasonable delay should not be lightly set aside by courts [88] Court orders granting an extension of time for the work and finally accepting it on its completion have the legal effect of vacating and abrogating prior orders adjudging the contractor in default [89] A provision that an extension beyond the date fixed for completion shall be on terms fixed by the highway department which may include a charge for engineering and inspection expenses does not mandatorily require such charges as a condition to granting an extension, but the power to impose such charges is discretionary and should not be exercised arbitrarily [90]

A substantial addition to the work added by a change order nullifies the provision in the original

sion of the engineer that certain work be performed without compensation, as being incidental to other work, will not prevent recovery therefor —McGillivray Const Co v Hoskins, 202 P 677, 54 Cal App 636

74. Ark —Lewelling & Price-Williams v St Francis Road Improvement Dist No 1, 250 S W 1, 158 Ark 91
29 C J p 609 note 7 [c] (5)

75. Wis —Joyce v Sauk County, 246 N W 413 210 Wis 243

76. Wis —State v Nemachek, 225 N W 170, 199 Wis 13

77. Ind —Dipert v Bacon, 149 N E 64, 196 Ind 485
N Y —Foote v State, 245 N Y S 565, 138 Misc 341—Chambers v State, 218 N Y S 375, 128 Misc 227, modified on other grounds 222 N Y S 783, 220 App Div 797, affirmed 159 N E 671, 246 N Y 608
29 C J p 609 note 8
Substantial performance by subcontractor see infra subdivision j (1) of this section

78 N Y —Foote v State, 245 N Y S 565 138 Misc 341—Chambers v State, 218 N Y S 375, 128 Misc 227, modified on other grounds 222 N Y S 783, 220 App Div 797 affirmed 159 N E 671, 246 N Y 608
Held not substantial compliance
Pa —Commonwealth v R L Bonham Co, 147 A 611, 297 Pa 514—Shireman v Scott, 53 Dauph Co 19

79. N Y —Foote v State, 245 N Y S 565, 138 Misc 341

80. N Y —Foote v State, supra

81. N Y —Foote v State, supra

82. N Y —Foote v State, supra—Chambers v State 218 N Y S 375, 128 Misc 227, modified on other grounds 222 N Y S 783, 220 App Div 797, affirmed 159 N E 671, 246 N Y 608

83. Va —Trinkle v Commonwealth, 196 S E 652, 170 Va 429

84. Held no breach of contract
Miss —Weaver & Co v Phares, 188 So 12, 185 Miss 224, suggestion of error overruled 188 So 570, 185 Miss 224

85. Mo —St Louis County to Use of Mississippi Valley Trust Co v Menke, App, 95 S W 2d 818

86. Damages recoverable
(1) Cost of keeping engineers on job longer than necessary —Maryland Casualty Co v Ballard County, 289 S W 316 217 Ky 343
(2) Liquidated damages for each day of delay after date for completion of road work —Maryland Casualty Co v Ballard County, supra

87. Ky —Maryland Casualty Co v Ballard County, supra

88. Va —Trinkle v Commonwealth, 196 S E 652, 170 Va 429

89. Mo —St Louis County, to Use of Mississippi Valley Trust Co v Menke, App, 95 S W 2d 818

90. N Y —Good Roads Engineering & Contracting Co v State, 29 N Y S 2d 848, 176 Misc 1012—Delaware Paving Co v State, 31 N Y S 2d 51, affirmed 37 N Y S 2d 769, 265 App Div. 889.

contract setting the time for completion, and, in the absence of an agreement by the contractor to complete by a certain date, he is entitled to a reasonable time in which to complete the entire work [91]

Excuse for delay A delay in completing the work may be excused when it is unavoidable [92] There is an implied promise in the contract that the engineer designated to supervise the contractor's work would do so in a manner which would not hinder the contractor in the performance of his obligations,[93] and, where the engineer arbitrarily hindered the contractor in the completion of the work, equity will not permit the state to withhold any part of the contract price, either as penalties or damages for delay [94] Furthermore, the state cannot avoid liability in an action to recover penalties thus withheld on the theory that the engineer's tortious acts were not chargeable to the state, and it is immaterial that the contract provided that the engineer's decisions on questions arising thereunder should be final [95] Where the delay was caused by the contractor's own acts, and cave-ins resulted from his incompetence, the fact that the work was stopped for a time by the state industrial accident commission does not make a statute excusing nonperformance or delay in performance applicable, nor is delay excused under the doctrine of impossibility of performance where the ground conditions encountered in the work were not vitally different from those which the contractor should reasonably have anticipated Where the contract commits to the judgment of the engineer the question of whether delays were unavoidable, the engineer's judgment can be impeached only for fraud or mistake so gross as to amount to fraud [96]

Waiver Where the supervising engineer acquiesces in the suspension of the work because of unfavorable weather conditions, this constitutes a waiver of a provision for liquidated damages on failure to complete the contract at a certain date [97] After a breach on the part of the contractor has occurred, the time of completion cannot be waived to the prejudice of taxpayers, even though an extension might have been granted had the contractor asked for it during the course of performance [98]

(2) By Public Agency

In the absence of consent or waiver, the contractor is entitled to recover compensatory damages for delay caused wholly by unwarranted action of the public agency

If a delay is caused wholly by unwarranted action of the highway commission the contractor is entitled to recover compensatory damages therefor,[99] and this right is not affected by constitutional

91. Mo—Christeson v State Highway Commission App, 46 S W 2d 906 transferred, sec, Sup, 40 S W 2d 615

92. Unprecedented rainfall and change of location

In contractors' suit to enjoin road district from canceling contract for road construction, refusal to charge contractors liquidated damages for delay on finding that it was caused by unprecedented rainfall and change of location of the road will not be disturbed—Mullins & Kyle v Road Improvement Dist No 5, 258 S W 639 162 Ark 127

Contractor's delay held not justified

(1) By county's failure to build culverts, which he also contracted to build—Maryland Casualty Co v Ballard County, 289 S W 316, 217 Ky 343

(2) Where delay was caused by obstructions which it was not the duty of the contracting public agency to remove—Nevland v State, Tex Civ App, 151 S W 2d 331, error dismissed, judgment correct

93 Tex—Goodrum v State, Civ App, 158 S W 2d 81, error refused

94. Neb—Appeal of Roadmix Const Corporation, 9 N W 2d 741

Tex—Goodrum v State, Civ App, 158 S W 2d 81, error refused

95. Tex—Goodrum v. State, supra.

96. U S—Six Companies of California v Joint Highway Dist No 13 of California, C C A Cal, 110 F 2d 630, affirming, D C 24 F Supp 346, certiorari granted Six Companies of California v Joint Highway Dist No 13 of State of California 61 S Ct 36 311 U S 631, 85 L Ed 401, and reversed on other grounds 61 S Ct 186, 311 U S 180, 85 L Ed 114, rehearing denied 61 S Ct 438, 311 U S 730, 85 L Ed 475

97. Ark—Brown & Froley v Monroe County Road Improvement Dist, 241 S W 39, 153 Ark 606

98. Fla—Hillsborough County v Pal Mere, Inc, 135 So 525, 101 Fla 736

99. Mo—Spitcaufsky v State Highway Commission, 159 S W 2d 647, 349 Mo 117

Directions by state's division engineer to highway contractor not to commence work on street until later in summer were acts and directions of state—John Johnson Const Co v State, 207 N Y S 570, 211 App Div 512

Failure to provide right of way

(1) The public agency is liable for breach of contract for expenses incurred by the contractor as result of agency's delay in procuring a right of way

Miss—State Highway Commission v Wunderlich, 10 So 2d 453, suggestion of error overruled 11 So 2d 437.

N Y—Madison County Const Co v State, 31 N Y S 2d 883, 177 Misc 777—J W Brennan Const Co v State, 191 N Y S 253, 117 Misc 816

Utah—Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

29 C J p 610 note 15 [b]

(2) Whether there is negligence is immaterial—Campbell Bldg Co v State Road Commission, supra—29 C J p 610 note 15 [b]

(3) Activities of government officials in assisting state in acquiring highway right of way do not preclude contractor from recovering from state for delay in acquiring such way on ground that state was performing governmental function—State v Feigel, 178 N E 435, 204 Ind 438

(4) Where landowners recovered judgment for trespass against construction company engaged in building a highway under contract with state on land staked out for that purpose by state engineer, and by injunction restrained company's operations under contract pending determination of title to land involved, construction company was entitled to recover from the state, which, although given notice of landowners' action, failed to come in and defend,

or statutory provisions forbidding the payment of extra compensation or forbidding payment of a claim under an illegal contract [1] So a contractor who is delayed in commencing work may nevertheless undertake it and complete within a period determined by the contract plus the time of the delay,[2] and he may then sue for damages occasioned by the original delay [3] A contractor is, however, obliged to take all reasonable means to minimize or obviate damage due to delay caused by wrongful acts of the state or highway officers [4] A contractor who was required by the engineer to do work outside the requirements of the contract is not entitled to damages for delays allegedly resulting from doing the extra work where such work did not unduly interfere with the progress of construction [5] Where the statute requires the execution of a formal written contract, the state may not be held liable for any delays prior to its execution, however inequitable the state's conduct might have been [6] If the state, in such case, unreasonably delays executing a written contract, the contractor is at liberty to withdraw his bid and recover his deposit, but, if he chooses to complete the contract after its execution, he cannot recover from the state on the theory of a quasi contract for additional expense incurred as a result of the delay,[7] the delay of the comptroller in approving the contract being a personal fault not chargeable to the state [8] The public agency may be relieved of responsibility for delay by express provision in the contract[9] or by consent of the contractor,[10] and the contractor may waive his claim for damages by entering into supplemental agreements after the contract has been fully performed and accepting the amount due thereunder without reserving his claim,[11] but the mere receipt by the contractor of the stipulated price for performance of the contract is not a waiver of his claim for damages for delay [12] The fact that the contract provides for extension of time where the delay is without fault of the contractor does not preclude his suit for damages where the delay was caused by the public body without right [13]

Interest or damages for delay Damages not based on direct consequences of the default are not recoverable [14] In an action for damages for delay in delivering the site of the highway, the contractor may recover the increased cost of labor and materials [15] A contractor suing for the balance due on the contract is not entitled to interest thereon in the absence of a statute or contract providing therefor,[16] or where no time is fixed by the contract for the payment of the claim for services,[17] but inter-

the damages caused by such delay the amount of judgment against company in landowners action, and the fair and reasonable compensation and disbursements of counsel employed by the company to defend such action —Madison County Const Co v State, supra

Action held not unwarranted

(1) Contractor was not entitled to extracontractual compensation for removal of slide material because removal was allegedly delayed by county's failure to provide place to dump material where contract imposed no such obligation on county —Coyle Const Co v Skagit County, 32 P 2d 106, 177 Wash 520

(2) The state road commission was not liable for extra expense caused by delay in furnishing culverts, where contract was executed on September 19, culverts were received October 1 and October 6, and contract did not fix date when culverts should be on hand —Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

1. Mo —Spiteaufsky v State Highway Commission, 159 S W 2d 647, 349 Mo 117

2. N Y —Belmar Contracting Co v State, 185 N Y S 734, 194 App Div 69

3. N Y —John Johnson Const Co. v State, 207 N Y S 570, 211 App Div 512
29 C J p 610 note 15

4. N Y —Stanton v State, 175 N Y S 568, 569 103 Misc 221, affirmed 174 N Y S 922, 187 App Div 963
29 C J p 610 note 16

Removal of equipment not required

Where highway contractor was unable to continue work because culvert over ravine had not been constructed pursuant to the contract, and where contractor was repeatedly assured by the state that culvert would soon be in place, the contractor was not required to expend considerable sum and effort to make detour, in order to resume work on other side of ravine, but was justified in keeping his steam shovel on completed side of ravine, in position to resume work when culvert was completed —J W Brennan Const Co v State, 191 N Y S 253, 117 Misc 816

5. N Y —Delaware Paving Co v State, 31 N Y S 2d 51, affirmed 37 N Y S 2d 769, 265 App Div 889

6. N Y —Belmar Contracting Co v State, 135 N E 240 233 N Y 189, reversing 185 N Y S 734, 194 App Div 69—Peter F Connolly Co v State, 198 N Y S 882, 120 Misc 854

7. N Y —Belmar Contracting Co v State, 135 N E 240, 233 N Y. 189, reversing 185 N Y S 734, 194 App Div 69

8. N Y —Belmar Contracting Co v State, supra

9 La —J Devereux O'Reilly & Co v Police Jury of St Tammany Parish, 97 So 296 154 La 57
Pa —Acchione v Commonwealth, 53 Dauph Co 271

10. N Y —Peter F Connolly Co v State, 198 N Y S 882, 120 Misc 854

11 N Y —Peter F Connolly Co v State supra

12. Ind —State v Feigel, 178 N E 435, 204 Ind 438

13. Ind —State v Feigel, supra

14. Or —North Pac Const Co v Wallowa County 249 P 1100 119 Or 565

15. N Y —John Johnson Const Co v State, 207 N Y S 570, 211 App Div 512—Beskin v State, 195 N Y S 951, 119 Misc 209

16. Ind —State v Wright, 175 N E 666 97 Ind App 660
Iowa —Southern Surety Co v Jenner Bros, 237 N W 500, 212 Iowa 1027
Neb —Appeal of Roadmix Const Corporation, 9 N W 2d 741
29 C J p 610 note 15 [c]

17. Ark —Bowman Engineering Co v Arkansas & Missouri Highway Dist, 235 S W 399, 151 Ark 47

est may be recovered when authorized by statute,[18] or where there is a breach of an agreement to pay for everything furnished under the contract promptly on the completion and acceptance of the work[19] Where interest is recoverable on the amount due, it is properly computed from the date on which the work was accepted as completed[20] or when the amount was payable[21] Only simple, and not compound, interest on the amount of plaintiff's recovery is to be allowed[22]

d. Acceptance or Rejection of Work

Acceptance of the work by certain designated officers or boards is generally required as a condition precedent to payment, and their determination is conclusive in the absence of fraud

Where the contract or controlling statute provides for approval or acceptance of the work or certification of its completion by a designated officer or board, payment should be made only on acceptance of the work,[23] in accordance with the decision of the officer named,[24] but substantial compliance with the statutes setting forth the procedure for obtaining such approval is sufficient,[25] and after the statutory time for objecting has elapsed it is too late for a property owner to take advantage of any error which may have occurred in the course of the proceedings[26] The mere fact that the work was not performed strictly in the manner required by contract does not deprive the board of power to accept the highway where there has been substantial performance[27] The acceptance of the work is a judicial[28] or quasi-judicial[29] act, and, likewise in hearing remonstrances and ordering annulment of a former order approving the work, the board acts in a judicial capacity[30] The acceptance of the work is conclusive on all parties in the absence of fraud,[31] but it may be attacked for fraud by one who has not waived the fraud,[32] and an appeal may be taken when authorized by statute[33] In accepting the work, the board merely determines compliance with the contract by the contractor and carries into effect the result of its judgment[34] The acceptance on a false affidavit of the contractor that all claims of subcontractors and materialmen have been paid does not affect the rights of an unpaid materialman except to commence the running of the statutory period for proceeding against the surety on the contractor's bond,[35] and, where such materialman knew of the acceptance prior to the expiration of the statutory period but took no steps against the surety, he has no standing in equity to set aside the acceptance[36] Where the board has accepted the improvement and made payment so that there was nothing else for it to do, it has completed its function and cannot maintain suit in equity to va-

18. Or—North Pac Constr Co v Wallowa County, 249 P 1100 119 Or 565

19 Neb—Appeal of Roadmix Const Corporation 9 N W 2d 741

20. Minn—Foley Bros v St Louis County, 197 N W 763, 158 Minn 320

Neb—Appeal of Roadmix Const Corporation, 9 N W 2d 741

21 Or—North Pac Const Co v Wallowa County, 249 P 1100 119 Or 565

22. N Y—Coyne v Town of Greenburgh 135 N E 893 233 N Y 503, modifying 185 N Y S 670 194 App Div 861, reversing 182 N Y S 230, 110 Misc 598

23. Conn—Jones v Marlborough, 40 A 460, 70 Conn 583
29 C J p 609 note 6

24. Mo—Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647 349 Mo 117
29 C J p 609 note 7

25. Error in contractor's name
Notice of final hearing in matter of road improvement in which "Inc" was left off contractor's name was held substantial compliance with statute—Title Insurance & Trust Co v Bean, 293 P 802, 109 Cal App 711

26. Cal—Title Insurance & Trust Co v Bean, supra.

27 Ind—Dipert v Bacon, 149 N E 64, 196 Ind 485
Strict or substantial performance generally see supra subdivision b of this section

28. Ind—State v Martin, 154 N E 284 198 Ind 516

29 U S—Kosmos Portland Cement Co v D A Y Const Co C C A Ind 101 F 2d 893

30 Ind—Meredith v Crowder, 142 N E 876, 81 Ind App 221
Rights and remedies of taxpayers generally see infra § 311

31. U S—Kosmos Portland Cement Co v D A Y Const Co, C C A Ind, 101 F 2d 893
Tex—Davisson v Eastland County, Civ App, 6 S W 2d 782 affirmed, Com App, 13 S W 2d 673

Acceptance held conclusive as against contention that facts were otherwise than found by commissioners that contractor concealed facts from board of commissioners, and that contractor was guilty of fraud in procurement of testimony—State v Martin, 154 N E 284, 198 Ind 516

32 U S—Kosmos Portland Cement Co v D A Y Const Co, C C A Ind, 101 F 2d 893—A R Young Const Co v Road Improvement Dist No 2, Johnson County, C C A Ark 297 F 127

33 Right to appeal
Auditor's failure to make out, certify and file transcript on appeal from order of county commissioners accepting road did not deprive appellants of their rights or oust circuit court of jurisdiction, and appeal should not be dismissed, because no exception was taken to action of commissioner in accepting the road and no appeal was then prayed Auditor, drawing warrant in payment for road work during time for appeal from commissioners' order accepting road, acted at his peril and did not deprive objectors of right to appeal—Layne v Hoover, 151 N E 352, 85 Ind App 399

Submission to jury
There being no provision in the law for trial by jury in such case, circuit court on appeal from county commissioners' order accepting road as completed erred in submitting cause to jury—Layne v Hoover, supra

34. Ind—State v, Martin, 154 N E 284, 198 Ind 516

35 U S—Kosmos Portland Cement Co v D A Y Const Co, C C A Ind, 101 F 2d 893

36. U S—Kosmos Portland Cement Co v D A Y Const Co, supra.

cate its order of acceptance on the ground of fraud [37]

Approval, and payment during progress of the work may be deprived of the effect of an acceptance or waiver of a claim for damages for defective work by so providing in the contract,[38] but notwithstanding such a provision, acceptance of obviously defective work constitutes a waiver of damages therefor [39]

e. Extra Work or Compensation

Extra compensation cannot be allowed for work included in the contract, but the contractor may recover for the performance, under proper authority, of work which was not covered by the plans and specifications on which his bid was proposed, his right being determined by the provisions of the contract as originally made or lawfully modified

Extra compensation within a constitutional provision prohibiting the legislature from granting extra compensation to a contractor is compensation over and above that fixed by the contract for the work agreed to be done, and is in the nature of a gratuity [40] A highway contractor is legally and equitably bound to perform his contract for the consideration specified therein, however onerous the burden by reason of increased costs of labor and materials,[41] consequently, extra compensation cannot be allowed for work included in the contract,[42] and a contractor cannot recover for extras unless he shows that such work was not covered by the plans and specifications on which his bid was proposed [43] On the other hand the contractor may be entitled to compensation for extra work necessitated

37. Ind —Sullivan v Board of Com'rs of Miami County 149 N E 94, 85 Ind App 287

38. Or Spokane County v Pacific Bridge Co, 213 P 151, 106 Or 550
Measure of damages for defective work see supra subdivision a (2) (a) of this section

39 Or —Spokane County v Pacific Bridge Co, supra

40. N Y —Weston v State, 186 N E 197, 262 N Y 46, 88 A L R 1219 affirming 260 N Y S 911 236 App Div 873 reargument denied 263 N Y S 122, 237 App Div 785

41. N Y —Gordon v State 134 N E 698 233 N Y 1, 21 A L R 562 reversing 190 N Y S 107, 196 App Div 589

42. U S —Gray County, Tex, v Hamer, C C A Tex, 277 F 155, certiorari denied Hamer v Gray County Tex 42 S Ct 317, 258 U S 624, 66 L Ed 796
Kan —Scherrer v State Highway Commission of Kansas 80 P 2d 1105, 148 Kan 357
Mo —Sager v State Highway Commission, 160 S W 2d 757, 349 Mo 341
N Y —Paladino-Natanson Co v State, 199 N E 650, 269 N Y 133, reversing 282 N Y S 250, 245 App Div 797—Kent Const Co v State, 208 N Y S 531 212 App Div 197—Hopkins v State, 225 N Y S 665 131 Misc 11—Hogeboom & Campfield v State, 208 N Y S 648, 124 Misc 559—Hendrickson-McCabe Const Co v State, 199 N Y S 668, 120 Misc 818—Peter F Connolly Co v State, 198 N Y S 882 120 Misc 854—Delaware Paving Co v State, 31 N Y S 2d 51, affirmed 37 N Y S 2d 769, 265 App Div 889—C B Whitmore Co v State, 29 N Y S 2d 559
Va —Ragland v Commonwealth, 200 S E 601, 172 Va 186
Wash —L Romano Co v Skagit County, 268 P 898 148 Wash 367
29 C J p 610 note 18

Implied warranty

Where contract provided for pavement seven inches thick, but plainly contemplated that it would average both more and less and specifically provided what was to be done in either, or both, situations, there was no implied warranty that the specifications would produce pavement exactly seven inches thick and therefore contractor could not recover cost of excess thickness on ground of breach of implied warranty—Sandy Hites Co v State Highway Commission 119 S W 2d 828 347 Mo 954 transferred, see, App, 128 S W 2d 646

Hazard of contract

Highway contractor was held not entitled to recover for extra excavation necessitated by heavy rains washing down sand and gravel, this being an actual hazard of the contract Hopkins v State 225 N Y S 665, 131 Misc 11

Mutual mistake

To warrant recovery of reasonable value of work performed in excess of amount covered by written contract to gravel highway, on theory that plaintiff mistook amount included because of error in estimate in notice to bidders it must be shown that mistake was mutual, that minds of contracting parties met, that they agreed on a certain thing which was to have been embodied in their contract, and that by mistake it was either fraudulently or inadvertently omitted or inadequately expressed and the reasons why plaintiff did not discover the mistake must also be shown —Ariss-Knapp Co v Sonoma County, 238 P 752, 73 Cal App 262

43. Mo —Sandy Hites Co v State Highway Commission, 149 S W 2d 828, 347 Mo 954, transferred, see, App, 128 S W 2d 646
29 C J p 610 note 19
Right of subcontractor to compensation for extra work see infra subdivision j (1) of this section

Necessity of understanding plans and specifications

As respects right to extra compensation a contractor for a highway project should thoroughly satisfy himself in detail as to the specifications and plans on file in the office of the highway department, and, if there be any doubt as to the interpretation or construction there should be a clarification before bids are submitted and contracts executed —Trinkle v Commonwealth, 196 S E 652, 170 Va 429

Risk of relying on preliminary estimate

Contractors bidding on highway contract, if relying on preliminary estimate showing percentage of earth and rock on contract site did so at their own risk, and could only require good faith on part of state, and when they were caused large additional expense because of unforeseen rock condition encountered in excavating, they were not entitled to additional compensation from state
N Y —Weston v State, 186 N E 197, 262 N Y 46, 88 A L R 1219, affirming 260 N Y S 914, 236 App Div 873, reargument denied 263 N Y S 122 237 App Div 785
Tex —Powell v State, Civ App, 118 S W 2d 960, error refused
Wis —Wussow v State, 267 N W 56, 222 Wis 118

Foreseeable expenses

(1) A highway contractor was not entitled to extra compensation for increased expense in excavating with labor instead of machinery, where contractor was paid for excavating on basis provided in contract, and

by acts of the public agency,[44] such as changes in the plans and specifications,[45] work done to mitigate damages,[46] or extra work done or material furnished at the direction of properly authorized officers.[47] A statute authorizing the state highway commissioner to terminate contracts entered into before the war and authorizing awards to contractors for increased costs incurred in the completion of the contracts violates a constitutional provision forbidding the grant of any extra compensation to any public contractor.[48]

To be entitled to compensation for additional costs of the construction, the contractor must show a loss and a right to compensation therefor.[49] Thus, in order that compensation may be allowed for extra work, it must be provided for in a legal contract,[50] either in the original contract[51] or in a supplemental contract,[52] or authorized in writing

condition necessitating labor could have been seen on examination of site—Sager v. State Highway Commission, 160 S.W.2d 757, 349 Mo. 341.

(2) Where sheets, on which were listed minimum highway construction wages paid in localities of proposed pavement, which were submitted to bidders together with specifications, expressly stated that listed wages were as of a certain date and further notified bidders that payment of higher wages might be necessary, successful bidder could not recover from highway commission amount it was compelled to pay for wages more than the listed minimum wages.—Cameron, Joyce & Co. v. State Highway Commission, Mo., 166 S.W.2d 458.

Smoothing of shoulders

Contract price for paving road was held to include smoothing of shoulders, hence smoothing of shoulders was not "extra work".—Moller & Roberts v. Harris County, Tex.Civ.App., 54 S.W.2d 213.

44. Utah.—Campbell Bldg. Co. v. State Road Commission, 70 P.2d 857, 95 Utah 242.
Wis.—McDonald v. State, 235 N.W. 1, 203 Wis. 649.

Breach of contract

(1) Where contract provided that contractor could secure all the fill necessary from a certain borrow, and such borrow failed to furnish sufficient earth fill, contractor was entitled to recover from the state the reasonable value of additional work and additional fill which contractor was required to purchase.—Manstin Engineering Corporation v. State, 21 N.Y.S.2d 169, 259 App.Div. 1096, affirmed 42 N.E.2d 747, 288 N.Y. 657.

(2) So assignee of contract had right to rely on state's contract that excavated earth could be used as fill, and hence was not precluded from recovering for removal of certain earth and bringing in of extra filling by reason of fact that assignor had looked over site of work before execution of contract.—Dolomite Products Co. v. State, 17 N.Y.S.2d 48, 258 App.Div. 294, affirming 13 N.Y.S.2d 10, reargument denied 18 N.Y.S.2d 752, 259 App.Div. 787, appeal denied.

45. Mo.—Spitcaufsky v. State Highway Commission of Missouri, 159 S.W.2d 647, 347 Mo. 117.

Arbitrary and capricious changes

The fact that contract provided that any alterations in plan not involving material changes should not constitute basis for claim for damages, did not preclude contractor's recovery for arbitrary and capricious material changes in plan on which the contractor had placed its bid which were made after work was commenced.—Davis Const. Co. v. State Highway Commission, Mo.App., 141 S.W.2d 214.

Actual change of plan

A provision in contract relating to material changes in original plans necessitated by exigencies of work resulting in unforeseen alterations of contractor's costs, meant actual changes of original plan and not a mere increase in grade or width requiring only more excavation.—Sager v. State Highway Commission, 160 S.W.2d 757, 349 Mo. 341.

46. N.Y.—Hogeboom & Camfield v. State, 208 N.Y.S. 648, 124 Misc. 559.

47. N.Y.—Delaware Paving Co. v. State, 31 N.Y.S.2d 51, affirmed 37 N.Y.S.2d 769, 265 App.Div. 889.

Excess over estimated quantities

Under road resurfacing contract, not specifying thickness of subbase but merely requiring its laying as directed by engineer, contractor was entitled to recover for excess of stone used over estimated quantities.—Kent Const. Co. v. State, 208 N.Y.S. 541, 215 App.Div. 197.

Demurrage

Where state's representative prevented unloading of material for pavement and bridges from scows rented by contractor, but finally accepted the material for use nearby, contractor was entitled to additional compensation for demurrage on the scows.—Kniffin v. State, 12 N.Y.S.2d 422, 257 App.Div. 43, modified on other grounds 128 N.E.2d 853, 283 N.Y. 317, reargument denied 29 N.E.2d 668, 284 N.Y. 593, certiorari denied Kniffin v. State of New York, 61 S.Ct. 621, 312 U.S. 690, 85 L.Ed. 1127.

48. N.Y.—Gordon v. State, 134 N.E. 698, 233 N.Y. 1, 21 A.L.R. 562, reversing 190 N.Y.S. 107, 196 App.Div. 589.

49. N.Y.—Weston v. State, 186 N.E. 197, 262 N.Y. 46, 88 A.L.R. 1219, affirming 260 N.Y.S. 914, 236 App.Div. 873, reargument denied 263 N.Y.S. 122, 237 App.Div. 785.

No right to extra compensation

Contractor held not entitled to extra compensation for making roadway flat, instead of crowned.—Road Improvement Dist. No. 5 of Crittenden County, Ark., v. Roach, C.C.A.Ark., 18 F.2d 755.

50. Mo.—Sager v. State Highway Commission, 160 S.W.2d 757, 349 Mo. 341.—Spitcaufsky v. State Highway Commission of Missouri, 159 S.W.2d 647, 347 Mo. 117.
N.Y.—Marshall Const. Co. v. State, 231 N.Y.S. 345, 133 Misc. 131.
Pa.—Commonwealth v. R. L. Bonham Co., 147 A. 611, 297 Pa. 514.

51. Cal.—City St. Impr. Co. v. Kroh, 110 P. 933, 158 Cal. 308.
29 C.J. p. 610 note 20.

Liability held to arise under contract and not from postponement of completing work.—Cunningham v. State, 182 N.E. 95, 95 Ind.App. 434.

52. S.D.—England v. State, 246 N.W. 628, 61 S.D. 132.
29 C.J. p. 610 note 21.

Right to supplemental contract

In proposals for bids and in contract with low bidding contractor which provided for supplemental agreement for alterations in quantities involving increase or decrease of more than twenty-five per cent of "the total cost of the work calculated from the original proposal quantities and the contract unit prices," word 'original" related to "proposal quantities" and "contract unit prices" as against contention of contractor whose additional expense was allegedly over twenty-five per cent of total cost of work calculated from original proposal quantities, that word "original" related only to "proposal quantities".—Wussow v. State, 267 N.W. 56, 222 Wis. 118.

Resolution not spread on minutes

Road contractor is not precluded from recovering additional compensation for change of route because resolution providing for supplemental contract was not spread on minutes of county commissioners.—London v. Board of Com'rs for Yancey County, 136 S.E. 356, 193 N.C. 100.

Incidental changes

Road contract, providing that extra work or extra materials fur-

by the proper authorities,[53] and the right to such compensation is determined by the provisions of the contract as originally made or as lawfully modified.[54] The authority to perform such work must be given in the manner and in accordance with the terms of the contract,[55] and a state engineer has no authority to waive on behalf of the state a requirement of the original contract that extra work, before it can be paid for, must have been authorized by a written work order.[56] The fact that the engineer and the county highway committee were frequently on the work and could have seen that more work was being done than was required by the plans and specifications did not give rise to an implied agreement on the part of the county committee to pay for such extra work which the contractor did without requiring a written order signed, as required by the contract.[57] A contract providing that a fair and equitable sum be agreed on in writing before changes productive of increased cost to the contractor be begun does not require that the writing be signed by the contracting parties, and a written order of the engineer authorized or ratified is sufficient.[58] A contract requiring the contractor to do such additional work as might be necessary in the engineer's opinion to complete the improvement planned does not authorize the engineer, by issuing extra work orders, to change the improvement or plan set forth in the contract.[59] A contractor may be estopped from recovering for changed work on a basis other than that stipulated in the change order.[60] Where, at the request of the contractor a change is made in the course of the road subsequent to executing the contract, which change results in the expenditure of more money than was originally estimated by the contractor, he is estopped from claiming payment for extra work performed by reason of such change.[61] A contractor is not precluded, however, from recovering for extra work performed by a subcontractor by the fact that he had paid the subcontractor only what he had received from the public agency for performance of the subcontractor's part of the contract.[62] The use of the improved way by the public or the implied acceptance of the work by the payment of the sums due under the contract does

nished shall be covered by supplemental contract approved as required by statute merely requires supplemental contract where original contract was modified and does not apply to incidental changes—Kent Const Co v State, 208 N Y S 534, 212 App Div 197

Contract made after completion of work

Supplemental contract covering changes in resurfacing contract requiring extra material and made after work is completed, is without consideration, if additional work was done gratuitously, and if not, adds nothing to existing obligation, and hence is unnecessary—Kent Const Co v State, supra

53. N C—London v Board of Com'rs for Yancey County, 136 S E 356 193 N C 100

Utah—Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

W Va—T Towles & Co v County Court of Summers County, 121 S E 93, 95 W Va 310

Wis—Joyce v Sauk County, 246 N W 413, 210 Wis 243

29 C J p 610 note 22

Requirement held not to defeat recovery

U S—Merrill Engineering Co v U S, D C Miss, 47 F 2d 932

Want of authority

(1) Inspectors and engineers of state highway department had no authority to vary terms and specifications of written contract for pavement of highway—Sandy Hites Co v State Highway Commission, 149 S W 2d 828, 347 Mo 954, transferred see, App, 128 S W 2d 616

(2) Engineer was not authorized to increase width of road so as to entitle contractor to pay therefor under contract provision for extra work on engineer's orders Pike County v Waugh 1 S W 2d 1066, 222 Ky 598

(3) But where contract provided that authorized alterations would be indorsed on approved plans or shown on supplementary sheets, but work was performed in accordance with changes made orally or by means of oral or written instructions of the engineer the variation was a "deviation" from the contract rather than an "abrogation" thereof within the rule that although deviations do not necessarily cause a failure of performance or an abrogation they may entitle the parties to extra compensation or damages—Nevland v State, Tex Civ App, 151 S W 2d 331, error dismissed judgment correct

54. Basis for recovery

Highway contractor's remedy for damages from delay and extra work occasioned by state's change in plans was held under contract to be action for services, if change exceeded twenty per cent, and not for damages for delay—Cunningham v State, 182 N E 95, 95 Ind App 434

Held not "extra work" within contract

Where a contract provided that the contractor's compensation was to be determined on a fixed unit price basis, and the engineer during the course of construction made substantial changes in the route which greatly increased the expense of construction because of the increased rock excavation of a harder formation required a provision that all alterations and changes in plans and specifications should be classed as "extra work" to be paid on a cost plus basis where not covered by the various unit prices, did not give the contractor the right to compensation on the cost plus basis for such changes merely because of the increased cost where all of the work done was covered by the unit prices, as such work could only be classed as extra work, if not covered by the unit prices—Greenlee County v Webster, 215 P 161, 25 Ariz 183

55. S D—England v State, 246 N W 628, 61 S D 132

56. Utah—Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

57. Wis—Joyce v Sauk County, 246 N W 413, 210 Wis 243

58. Md—Howard County Com'rs v Matthews, 127 A 118, 146 Md 553

59. Md—Howard County Com'rs v Matthews supra

60. Mo—Sager v State Highway Commission, 160 S W 2d 757, 349 Mo 341

61. Idaho—Whiteway v State, 113 P 98, 19 Idaho 322

62. N Y—Dolomite Products Co v State, 17 N Y S 2d 48, 258 App Div 294, affirming 13 N Y S 2d 10, reargument denied 18 N Y S 2d 752, 259 App Div 787, appeal denied

not of itself constitute an acceptance of material or labor furnished outside the contract without authority [63] Where the contract provided that acceptance of work or part payment would not operate as a waiver of the contract or any power reserved therein, approval of estimates subsequent to a modification of the contract did not estop the district from denying that the contractor had reorganized his forces so as to be entitled to additional payment for work previously done [64]

Where no agreement is made regarding the price thereof, or payment therefor, the law implies an agreement to pay the reasonable value of the extra work,[65] but where the contract fixes a certain rate of payment it is unnecessary to resort to proof of the reasonable value of the work [66] Since it would be inequitable to compel a contractor to do extra work and not pay for it,[67] one required to do more than the contract calls for has the right to continue under protest and recover the value of the extra work on a quantum meruit as the measure of damages for the breach of contract,[68] and although the contract provides for compensation for extra work on a cost plus basis, in the absence of a written order therefor which is required by the contract, the contractor can recover only the reasonable value of the labor and materials furnished [69]

f. Deductions

Reasonable deductions from the contract price should be made if authorized changes have materially lessened the amount and cost of the work required by the original contract

The public agency is entitled to a reasonable deduction from the contract price, if changes made by authority or consent have materially lessened the amount and cost of the work required by the original contract,[70] and such deduction should be made at the contract rate for the work omitted, so far as practicable [71]

g. Assignment of Moneys Due or To Become Due

Moneys due or to become due to the contractor may be validly assigned, but the assignment must conform to statutory requirements, and the assignee takes subject to all conditions of the contract and prior assignments

Moneys due and to become due under a highway construction contract may be validly assigned [72] An assignment of moneys due creates no lien, according to one view,[73] although there is authority holding that a written assignment of funds to be paid operates as an equitable assignment and effects the transfer of title in the funds to the assignee when they become due and owing to the assignor [74] The assignee is bound to take notice of

63 Me —Williams v Inhabitants of Town of Vinalhaven, 124 A 213, 123 Me 505
Acceptance of work generally see supra subdivision d of this section

64 U S —Pickens County v National Surety Co, CCA SC, 13 F 2d 758

65 Cal —City St Impr Co v Kroh, 110 P 933 158 Cal 308

66 Or —Sweeney v Jackson County, 178 P 365 93 Or 96, rehearing denied and opinion adhered to 182 P 380 93 Or 96
Wash —Coyle Const Co v Skagit County, 32 P 2d 106 177 Wash 520

67 N Y —Dolomite Products Co v State, 17 N Y S 2d 48, 258 App Div 294, affirming 13 N Y S 2d 10, reargument denied 18 N Y S 2d 752 259 App Div 787, appeal denied

68 N Y —Nugent v State, 40 N Y S 2d 361, 265 App Div 549—Schroeder v State, 293 N Y S 814, 162 Misc 105 reversed on other grounds 297 N Y S 632, 252 App Div 16 affirmed 12 N E 2d 609, 276 N Y 627 Marshall Const Co v State, 231 N Y S 345, 133 Misc 131

69 Ariz Greenlee County v Webster, 215 P 161, 25 Ariz 183

70 Cal —City St Impr Co v Kroh, 110 P 933, 158 Cal 308
29 C J p 610 note 26

71 Cal —City St Impr Co v Kroh, supra

72 U S —Hartford Accident & Indemnity Co v Coggin, C C A N C, 78 F 2d 471, reversing, D C Coggin v Hartford Accident & Indemnity Co 9 F Supp 785, certiorari denied 56 S Ct 141 296 U S 620, 80 L Ed 472 rehearing denied 56 S Ct 169, 296 U S 663, 80 L Ed 440
Kan —Citizens' State Bank of St Francis v Board of Com'rs of Cheyenne County 252 P 228, 122 Kan 302
N C —Independence Trust Co v Porter & Boyd 132 S E 806, 191 N C 672
S D —Central Tractor & Equipment Co v Betz 260 N W 269, 63 S D 435
Assignment of contract generally see supra § 208

Consent of surety
Failure of subcontractor's creditor to have approval of construction company's surety indorsed on instrument reassigning to creditor construction company's assignment to subcontractor of money due under contract with county did not invalidate reassignment in absence of any such requirement in contract or any prejudice resulting to surety, which had approved original assignment —Indiana Truck Co v Standard Accident Ins Co 89 S W 2d 97, 232 Mo App 63

Effect of nonassignability clause
As between owner and contractor a nonassignability clause in a road construction contract is for the benefit of the owner only, and when the work is completely performed without any default by the contractor, the owner's interest ceases and an assignment by the contractor of moneys due him under the contract is not affected by such clause —Bridgeton Nat Bank v Commercial Casualty Ins Co, 175 A 801, 117 N J Eq 371, reversed on other grounds 180 A 832, 119 N J Eq 39

Transaction held not to constitute assignment
Kan —Brewer v Harris, 75 P 2d 287, 147 Kan 197

Assignment to surety held supported by consideration
Mass —Federal Nat Bank v Commonwealth, 185 N E 9, 282 Mass 442

73 N Y —W E Peets Motors v State, 263 N Y S 762, 147 Misc. 218

74 Okl —McCoy & Son v First Nat. Bank, 252 P 404, 123 Okl 170
Effect of payment to contractor after notice of assignment see infra subdivision h (2) of this section

the conditions of the contract, of the fact that the highway commission was authorized to withhold a portion of the price, and of the terms of the bond given to pay claims of laborers and materialmen,[75] and the assignment is subject to all the conditions of the contract, performance thereof, and the contractor's liabilities and obligations thereunder.[76] The acceptance of an assignment requiring the assignee to pay all lawful claims growing out of performance of the work constitutes a contract, and renders the assignee liable to the claimants for the payment of such claims.[77] The assignment must conform to statutory requirements.[78] In the absence of a statute requiring it, the assignment need not be recorded,[79] and the consent of the highway department need not be obtained[80] unless required by the contract;[81] but under some statutes, and under the terms of some contracts, the assignment must be filed with a specified officer.[82] A statute requiring the filing of an assignment within a certain period after the date of such assignment refers to the actual date when the assignment was made, and not to the date which is inserted in the instrument of assignment,[83] and where an assignment was timely filed, instruments thereafter executed by the assignee to carry out the purpose of the assignment and fix the rights of the parties to the moneys previously assigned do not constitute new assignments within the meaning of the statute.[84] An assignment not filed within the required time is void as against subsequent lienors.[85] Reserved percentages covering work which had been performed before the

Work done by subcontractor

Under highway construction contracts, county was held to have become indebted to contractor for work done by subcontractor the moment subcontractor's work was performed, and hence contractor's assignment to subcontractor of money due under contracts assigned right thereto even though payment was not then due and contractor's surety was thereafter forced to complete work under contracts.—Indiana Truck Co. v. Standard Accident Ins. Co., 89 S.W.2d 97, 232 Mo.App. 63.

75. Okl.—Fidelity Nat. Bank of Oklahoma City v. U. S. Casualty Co., 131 P.2d 75.

Convict labor

Materialmen in whose favor highway contractor drew order accepted by county "under the terms of employment" could not question county's deduction for labor of convicts which county agreed to furnish contractor at specified rate, on ground that hiring of convicts was illegal.—Eatonton Oil & Auto Co. v. Greene County, 185 S.E. 296, 53 Ga.App. 115, conforming to certified question 181 S.E. 758, 181 Ga. 47.

76. Ky.—Southern Exchange Bank v. American Surety Co. of New York, 144 S.W.2d 203, 284 Ky. 251.

Right to pay claims

(1) Where road contract empowered highway commission to retain portion of amount due contractor for payment of claims against contractor, contractor's assignment to third party of portion of amount due was subject to commission's right to apply funds in payment of such claims.—Yancey v. Stark, 129 S.E. 81, 132 S.C. 171.

(2) Where the contract authorizes the withholding of a specified percentage of the contract price to pay claims filed with the public agency, the contractor cannot give his assignee, who had not filed his claim, any right to such reserved funds if the claims properly filed were more than sufficient to exhaust the fund.—Maryland Casualty Co. v. Shafer, 208 P. 194, 57 Cal.App. 585.—Maryland Casualty Co. v. Shafer, 208 P. 192, 57 Cal.App. 580.

Right to complete work

Where county had right under contract to withhold compensation to be paid for proposed improvement, and, if abandoned by contractor, to use any money due or to become due thereon to complete work that was left undone, contractor could not make any assignment of any funds due to him at time of abandonment that would affect county's right to use funds in payment of expenses of completing work.—Castro v. Malcolm, 226 P. 976, 66 Cal.App. 635.

77. Ark.—Southern Surety Co. v. Phillips, 24 S.W.2d 870, 181 Ark. 14.

78. **Effect of noncomformance**

(1) Omission in assignment of covenant that assignor would receive any moneys advanced by assignee as a trust fund would render assignment ineffective as against those only who were entitled to invoke priority or preferential payment under the section of the Lien Law relating to priorities, and assignment was a valid common-law assignment.—Amiesite Const. Corporation v. Luciano Contracting & Building Co., 30 N.E.2d 483, 284 N.Y. 223, affirming 18 N.Y.S.2d 873, 259 App.Div. 826.

(2) Omission of recital held fatal.—Lanna v. C. L. Gates, Inc., 254 N.Y.S. 97, 142 Misc. 171.

Construction of statute

The subdivisions of the section of the Lien Law relating to priorities and requiring assignment to contain a certain covenant must be considered and given effect with regard to the other provisions of that section and with regard to other pertinent provisions of the Lien Law.—Amiesite Const. Corporation v. Luciano Contracting & Building Co., 30 N.E.2d 483, 284 N.Y. 223, affirming 18 N.Y.S.2d 873, 259 App.Div. 826.

Effective date of statute

Provisions of amended act regulating assignments of moneys due under contracts for public improvement were applicable to assignment made after effective date of amendment, although contract was entered into before effective date, but after passage. One who contracted for public improvement between passage and effective date of amendment regulating assignments contracted in contemplation of the amendment.—Lanna v. C. L. Gates, Inc., 254 N.Y.S. 97, 142 Misc. 171.

Statute held applicable notwithstanding provision making it inapplicable to assignment of contracts for improvement of real property.—Lanna v. C. L. Gates, Inc., supra.

79. Ky.—National Surety Corporation v. Massachusetts Bonding & Insurance Co., 134 S.W.2d 611, 280 Ky. 785.

80. N.Y.—W. E. Peets Motors v. State, 263 N.Y.S. 762, 147 Misc. 218.

81. Ohio.—Cincinnati Quarries Co. v. Hess, 26 Ohio N.P.,N.S., 1.

82. **Assignment held properly filed.**

U.S.—Blue v. Herkimer Nat. Bank, D.C.N.Y., 276 F. 559.

Mo.—Indiana Truck Co. v. Standard Accident Ins. Co., 89 S.W.2d 97, 232 Mo.App. 63.

83. N.Y.—J. E. Carroll Sand Co. v. Earl C. Jones, Inc., 175 N.E. 528, 256 N.Y. 99, affirming 246 N.Y.S. 8, 231 App.Div. 121.

Contra Glens Falls Portland Cement Co. v. Van Wirt Const. Co., 232 N.Y.S. 410, 225 App.Div. 159 modifying 228 N.Y.S. 289, 132 Misc. 95.

84. N.Y.—J. E. Carroll Sand Co. v. Earl C. Jones, Inc., 175 N.E. 528, 256 N.Y. 99, affirming 246 N.Y.S. 8, 231 App.Div. 121.

85. N.Y.—Amiesite Const. Corporation v. Luciano Contracting &

contractor defaulted and the work was completed by his surety were covered by the contractor's assignment of moneys due and to become due the contractor for advances made by the assignee with the surety's consent, as against the contention of the surety that because of the contractor's default the contractor never became entitled to the retained percentages, the right of the government not being involved [86]

The acceptance of an assignment by the public agency gives rise to an independent contract between the agency and the assignee obligating the former to pay the latter and cutting off defenses of the agency against the contractor, but to be effective as such, the acceptance must have been clearly intended, it must be more than a mere acknowledgment of notice of the assignment, and it must have been made by one having authority to bind the agency [87]

Priorities In the absence of statutes providing otherwise, priorities among assignees depend on the date of assignment,[88] but consent by a prior assignee to a subsequent assignment may estop him to set up his assignment as against that of the subsequent assignee,[89] and it has been held that a subsequent assignee showing that funds loaned or advanced by him were used in the actual construction of the road is entitled to a priority over other assignees [90]

In the absence of contract or statute providing otherwise,[91] assignees under a valid common-law assignment of money due or to become due under the contract have rights superior to those of labor and material claimants having neither a prior nor subsequent valid lien,[92] although it has been held that a laborer or materialman who presents his claim in time is entitled to payment out of funds due the contractor in preference to the assignee of such contractor [93] The rights of the assignee as against laborers and materialmen may be waived [94]

The equitable lien of the assignee of money to become due under the contract is superior to the

Building Co, 30 N E 2d 483, 284 N Y 223 affirming 18 N Y S 2d 873, 259 App Div 826—Glens Falls Portland Cement Co v Van Wirt Const Co, 232 N Y S 410, 225 App Div 159 modifying 228 N Y S 289, 132 Misc 95

86. Or—First Nat Bank v U S Fidelity & Guaranty Co, 271 P 57 127 Or 147

87. U S--Standard Accident Ins Co of Detroit, Mich, v Federal Nat Bank of Shawnee, C C A Okl, 115 F 2d 34 adhering to 112 F 2d 692

Acceptance held not binding

Highway contractor's orders on county in favor of materialmen were not binding on county and could not be made binding by commissioners' acceptance thereof or by entry of order on minutes of county board, although such orders were held not objectionable on the ground that the county commissioners were stockholders in materialmen, since the purchases involved were made by the contractor, not by the county officer—Eatonton Oil & Auto Co v Greene County, 185 S E 296, 53 Ga. App 145, conforming to certified question 181 S E 758, 181 Ga 47

88. Ala—Citizens' Bank of Guntersville v Pearson, 116 So 350, 217 Ala 391

Mass—Federal Nat Bank v Commonwealth, 185 N E 9, 282 Mass 442

Mo—Indiana Truck Co v Standard Accident Ins Co, 89 S W 2d 97, 232 Mo App 63

N.Y.—Klinger v. New York State Nat Bank, 271 N Y S 252, 151 Misc 903

89. S C—Stewart & Kernaghan v Fidelity & Deposit Co of Maryland, 169 S E 434, 169 S C 516

90. Kan—Citizens' First Nat Bank v Board of Com'rs of Jefferson County, 267 P 12, 126 Kan 90

91. Proviso required by highway commission

Under statutes conferring broad powers of regulation, the state highway commission properly refused a road contractor's absolute assignment of money to become due from state and required a proviso excepting claims for labor and material from assignment, and hence assignee's claim was subject to a claim for board furnished contractor's employees, although assignee had no knowledge of proviso because of fault of party representing contractor—Bank of California Nat Ass'n v Scott, 78 P 2d 342, 159 Or 70

Statutory protection of "related claims"

Under a statute constituting moneys paid to, or to become due to, the contractor a trust fund in the hands of the contractor, for the protection of persons who furnish services or materials, in order to enable the contractor to carry out his contract, the contractor cannot by assignment release funds in the hands of the public agency from the obligation to pay claims of laborers and materialmen which, although not lienable, are classified as "related claims"—Morris F Fox & Co v State, 281 N. W. 666, 229 Wis. 44

Unaccepted order to pay materialman

Where the contract authorizes the town to retain moneys due thereunder until labor and material claims are settled, the contractor has no right to the moneys retained until settlement of the claims, and an order of the contractor directing the town treasurer to pay a materialman, which is not accepted by the town gives the materialman no greater right to the money than the contractor had—Inhabitants of Town of Newbury v Lincoln, 177 N E 614, 276 Mass 445

92. N Y—Amiesite Const Corporation v Luciano Contracting & Building Co, 30 N E 2d 483, 284 N Y 223 affirming 18 N Y S 2d 873, 259 App Div 826

Rights of labor and material claimants generally see infra subdivision j (1) (b) of this section

Where town raises no objection to assignment to a surety who has paid the claim of the only subcontractor who filed notice thereof, notwithstanding provision of contract requiring town's consent to assignment, the assignee is entitled to priority over a materialman subsequently attempting to attach the retained fund—Commercial Casualty Ins Co of Newark, N J, v Murphy, 184 N E 434, 282 Mass 100

93. Kan—Citizens' First Nat Bank v Board of Com'rs of Jefferson County, 267 P 12, 126 Kan 90

94. Ind—City Nat Bank v Board of Com'rs of De Kalb County, 172 N.E 201, 91 Ind App 564.

claim of a general creditor [95] Under a statute giving an assignment precedence of liens subsequently filed, the assignee of moneys due under the contract, when brought into court at the suit of lienors, is on a parity with them in respect of the remedies available, even though the contractor, unlike materialmen and laborers, is not a lienor under the statute,[96] and the assignee acquires an interest superior to subsequent lienors,[97] the order of priority being determined by the order of the filing of the liens and assignment [98] A statute providing that liens against the state shall be enforced in the same manner as mechanics' liens generally means that there shall be cross-remedies between defendants claiming derivative interests in the fund by succession to the contractor [99] Where the statute gives the assignee priority only to the extent of advances made on such assignment before the filing of the notice of lien or assignment next subsequent to his assignment, a prior assignee is precluded from claiming priority over liens subsequently filed to the extent that his advances were made after the filing of subsequent liens or assignments [1] Parties to whom the contractor assigned moneys earned under the contract for debts accruing before the assignments, cannot be treated as lienors, such prior debts not being advances on the assignments within the statute [2] A materialman who has an equitable lien on the money retained is entitled to be paid therefrom on default of the contractor in preference to a creditor who, on completion of the work, has obtained from the contractor an assignment of a part of the fund to pay for money loaned the contractor to be used by him in performing the contract [3]

Under a contract authorizing the state to apply any money due or to become due to the completion of the work, earned moneys in the hands of the state on default of the contractor are not due or payable to the contractor, and the right of the state to apply them to the completion of the contract is superior to the rights of an assignee of the contractor [4]

h. Allowance and Payment of Claims

(1) In general
(2) Effect of payment

(1) In General

Claims arising under a highway construction or improvement contract must be determined and paid in the manner provided by contract or statute Arbitration proceedings must conform to the requirements of the statute or contract providing for the submission to arbitration.

Where the work covered by a contract for the construction or improvement of a highway has been performed, and conditions precedent, if any, to payment have been fulfilled, compensation must be paid in the manner provided by contract or statute [5] Under the requirements of some statutes, where the

95. Okl—McCoy & Son v First Nat Bank, 252 P 404 123 Okl 170
SD—Central Tractor & Equipment Co v Betz, 260 NW 269, 63 SD 435

96. NY—Anderson v John L Hayes Const Co, 243 NY 140, 153 NE 28, reversing 213 NYS 513, 215 App Div 109, motion denied 154 NE 619 243 NY 593
Rights of lienors generally see infra subdivision j (2) of this section

97 NY—J E Carroll Sand Co v Earl C Jones, Inc, 246 NYS 8 231 App Div 121, affirmed 175 NE 528, 256 NY 99

Assignment held prior to laborers' liens
NY—Giant Portland Cement Co v State, 134 NE 322, 232 NY 395, affirming Grant Portland Cement Co v Barber Asphalt Paving Co, 177 NYS 408, 187 App Div 581

98. NY—Lee v William Bailey Corporation, 196 NE 9, 267 NY 161, modifying 269 NYS 1, 240 App Div 65

99 NY—Anderson v John L Hayes Const Co, 243 NY 140, 153 NE 28, reversing 213 NYS 513, 215 App Div 109, motion denied 154 NE 619, 243 NY 593

1. NY—W E Peets Motors v State 263 NYS 762, 147 Misc 218

2. NY—Lee v William Bailey Corporation 196 NE 9, 267 NY 161, modifying 269 NYS 1, 240 App Div 65—Lanna v C L Gates, Inc 254 NYS 97, 142 Misc 171

3. W Va—State v Coda, 138 SE 324, 103 W Va 676

4. NY—Slattery v National Commercial Bank & Trust Co 286 NYS 337, 247 App Div 221

5. Pa—Commonwealth v Eastern Paving Co, 136 A 853, 288 Pa 571
Right to and amount of compensation see supra subdivision a (2) of this section

Proceedings in appropriating money held authorized by statute
Ohio—State v Harlan, 174 NE 366, 37 Ohio App 222, error dismissed Harlan v State, 177 NE 636, 123 Ohio St 665

Statute held inapplicable
Statute relating to payment by town, is not applicable where the county, with state aid, is bearing all the expense of constructing the road, and the town is not directly paying any part of such expense—Pilbeam v Sisson, 198 NYS 834, 204 App Div. 762.

Illegal issuance of warrant
Where there was evidence that county court issued warrants illegally on claims for bridge and road work, circuit court might determine claims due—Prairie County v Gray, 295 SW 363, 174 Ark 377

Issuance of bond
Judgment against highway commission for value of labor and materials used in construction of bridges having been rendered by competent court before passage of act relating to issuance of bonds for maintenance of highway system, and judgment being affirmed by supreme court refunding board had only ministerial duty of certifying claim for allowance for exchange for state bond—Arkansas State Highway Commission v Keaton, 59 SW 2d 481, 187 Ark 306

Order of payment
Creditors of a road district are paid from the district's funds in the order of the execution of the contracts under which debts arise, and when one makes a contract for work on the roads of a district, he at once acquires a vested interest in the district's funds to the full extent of his contract, and the commissioners' court has no power to impair such right by paying out the funds to sub-

contractor files a complicated claim for compensation and expenses, the highway commission must thoroughly audit the claim and allow it in such part as is found to be correct,[6] and if any part is disallowed, the reason for disallowance should be set forth in detail.[7] An order making an allowance must conform to the statutory requirements[8] and is void if it fails to do so.[9] The mere fact that claims allowed were not itemized or verified does not establish fraud in allowance.[10] Where a voucher for an excessive amount is issued, refusal to issue a warrant is proper.[11] Warrants issued without any compliance with the controlling statutes are void.[12] The right to a hearing on an appeal from disallowance of a claim is not defeated by the fact that the proceeds of bonds for the improvement were exhausted before the claim was filed.[13] The contractor cannot disregard a clause requiring arbitration and present his claim as an ordinary creditor.[14] In the absence of a lien or contractual authority for so doing, the county has no right to withhold, for the purpose of paying claims of laborers, materialmen, or subcontractors, payments required by the contract to be made to the contractor.[15] Funds owing to the contractor which were retained by order of the county board for the benefit of the persons legally entitled thereto cannot be paid out except with the consent of the contractor or his assignee, or pursuant to a decree barring the contractor from demanding payment thereof again by the board.[16]

Under a statute authorizing an action against the highway commissioner for the recovery of specified claims so far as they may be judicially determined to be legal claims against the highway fund, before the amounts appropriated may be paid there must be a judicial determination of liability therefor.[17]

Submission to arbitration A statute providing for submission of controversies arising out of any contract for construction or repair of highways to arbitration is inapplicable where the contract is void.[18] No right to institute proceedings under such a statute with respect to a claim for damages for delay arises until the work covered by the contract has been completed and accepted,[19] and no arbitration proceedings may be had unless commenced within the time limited by the statute.[20] The statutory period cannot be extended by the highway commission,[21] and the court has no jurisdiction to enter judgment on an award of arbitrators to whom the controversy was submitted by agreement, although the proceedings were not instituted within the statutory period.[22] Where the contract provides for arbitration of disputes, and a dispute arises regarding disallowance of the contractor's claim, the highway commission, on demand of the contractor, must submit the question to arbitration and accord the contractor a full and fair hearing thereon.[23] A conclusive arbitration clause in the contract prevents further action by claimant after an adverse decision of the arbitrators.[24]

sequent contractors or creditors—Austin Bros Bridge Co v Road Dist No 3 of Liberty County, Tex Civ App 247 S W 674

6. Okl—Green-Boots Const Co v State Highway Commission, 25 P 2d 783, 165 Okl 288

In Texas in dealing with contractors doing work on a road district the commissioners' court has jurisdiction to make contracts, audit the accounts and approve or reject claims, but it has no authority to decree a preference—Austin Bros Bridge Co v Road Dist No 3 of Liberty County, Civ App, 247 S W 674

7. Okl—Green-Boots Const Co v State Highway Commission, 25 P 2d 783, 165 Okl 288

8. Miss—Smith v Covington County, 158 So 919, 171 Miss 879

9. Miss—Smith v Covington County, supra

Unauthorized order decreeing preference is void—Austin Bros Bridge Co v Road Dist No 3 of Liberty County, Tex Civ App, 247 S W 674

10. Ark—Prairie County v Gray, 295 S W 363, 174 Ark 377.

11. Ohio—State ex rel S Monroe & Son Co v Tracy, 196 N E 650, 129 Ohio St 550

12. Ill—Austin-Western Road Mach Co v Wetzel 264 Ill App 254

13. Ind—Pulse v Board of Com'rs of Decatur County, 163 N E 609, 200 Ind 376

14. Pa—Commonwealth v Eastern Paving Co, 136 A 853, 288 Pa 571

15. Miss—First Nat Bank v Monroe County, 95 So 726, 131 Miss 828

Rights, remedies, and liabilities of subcontractors, materialmen, and laborers see infra subdivision j of this section

Statute held not to postpone final payment to contractor until he furnished sworn proof that all debts incurred in prosecuting work were paid—Oregon Surety & Casualty Co v U S Nat Bank of Eugene, 300 P 336, 136 Or 573

Contract held to postpone final payment until contractor furnished satisfactory evidence that all just debts for labor, materials, and equipment and property damage had been paid—Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

16. Miss—Excello Feed Milling Co v Warren County, 131 So 270, 159 Miss 167

17. Minn—International Harvester Co of America v Elsberg, 268 N W 421, 197 Minn 360

18. Minn—Regan v Babcock, 247 N W 12, 188 Minn 192

19. N D—Lamb v Northern Imp Co, 3 N W 2d 77, 71 N D 481

20. N D—Lamb v Northern Imp Co, supra

21. N D—Lamb v Northern Imp Co, supra

22. N D—Lamb v Northern Imp Co, supra

23. Okl—Green-Boots Const Co v State Highway Commission, 25 P 2d 783, 165 Okl 288

24. Pa—Commonwealth v Union Paving Co, 136 A 856, 288 Pa 577

Court held without jurisdiction of proceeding to vacate arbitration award

Pa—Seaboard Surety Co v Commonwealth, 51 Dauph Co 203

(2) Effect of Payment

The obligation under a contract is discharged by payment in full or by a valid settlement, but acceptance of an amount less than that due does not of itself release the public agency from further obligations

The obligation or indebtedness under the contract is discharged by payment in full in the medium provided for in the contract[25] or by a valid settlement.[26] Payment to the contractors under a contract prohibiting assignment of any money payable thereunder after notification of an assignment operates as a discharge, notwithstanding the assignment.[27] A settlement without undue influence, fraud, or mistake is not subject to attack by one of the parties thereto,[28] and where the county supervisors and expert engineers consider the specifications of the contract as understandable and definite, the act of the board in approving, accepting, and paying for the work done thereunder should not be disturbed by the court on the ground that the specifications were not sufficiently definite.[29] Acceptance of an amount less than the final estimate does not release the public agency under a contract providing that payment of the final estimate releases it from further obligations.[30] A release of all claims against the state, signed by a federal aid highway contractor, has been construed as not a release in full but as contemplating payment, by the federal government, of the balance claimed.[31]

Amounts wrongfully paid to an assignee of the contractor cannot be deducted from the amount due a surety completing the work on the contractor's abandonment.[32]

i. Rescission or Abandonment

A contractor may rescind or abandon the contract for failure of the highway district to comply therewith in a matter going to the substance of the contract.

The contractor may rescind or abandon the contract for failure of the highway district to comply therewith in a matter going to the substance of the contract.[33] Thus a contractor has a right to refuse to proceed with the performance of his contract where he is authorized by the contract to do so because of a delay not due to his fault,[34] where he has been wrongfully prevented from completing his contract,[35] or where he is required to do more than the contract calls for,[36] although it has been held that the mere fact that the contractor was required to put dirt on the highway not called for in the contract did not abrogate it.[37] Refusal to make payments as they come due under the contract absolves the contractors from further performance,[38] but a

25 Ill.—Cosgrove v. Highway Commissioner of Town of Rockville, 281 Ill. App. 406.

La.—Louisiana Oil Refining Corporation v. Williams, App., 160 So. 811.

26 Ark.—Bradley & Carr v. Road Improvement Dist. No. 9, 254 S.W. 817, 161 Ark. 665.

Acceptance of reduced rate

Highway contractor who expressly accepted reduced rate for rock excavation was not entitled after making settlements to rescind and recover on quantum meruit on ground of mutual mistake as to quantity of rock.—Blassingame v. Greenville County, 147 S.E. 848, 150 S.C. 167.

Settlement construed

Statement in settlement between road district and contractors that if subcontractor recovered against contractors, then contractors have not * * * released their right to sue the road district" for such amount as they were required to pay subcontractor, was held not agreement by district to pay any amount which subcontractor might recover against contractors.—C. A. Rees & Co. v. Road Improvement Dist. No. 1 of Clark County, 267 S.W. 770, 167 Ark. 383.

27. Mass.—Old Colony Crushed Stone Co. v. Cronin, 176 N.E. 804, 276 Mass. 221.

Assignment of moneys due or to become due generally see supra subdivision g of this section.

28. Mich.—Gogebic Nat. Bank v. Ironwood Tp., 214 N.W. 143, 239 Mich. 369.

29. Miss.—Robertson v. Southern Bitulithic Co., 97 So. 482.

30. Or.—U. S. Fidelity & Guaranty Co. v. Klamath County, 23 P.2d 133, 143 Or. 471.

31. Mont.—State v. State Highway Commission of State of Montana, 267 P. 499, 82 Mont. 382.

32. Or.—U. S. Fidelity & Guaranty Co. v. Klamath County, 23 P.2d 133, 143 Or. 471.

Completion by surety generally see infra § 210.

33. U. S.—Pickens County v. National Surety Co., C.C.A.S.C., 13 F.2d 758.

N.Y.—Luciano v. State, 287 N.Y.S. 768, 248 App. Div. 642.

Right to compensation after abandonment of contract see supra subdivision a (2) (a) of this section.

Held not material breach

Failure of highway district to continue center lines into drifts, under contract for construction of highway tunnels to cost over three million dollars, was not such material breach as would justify rescission by contractor, in view of magnitude of the project and honest dispute between parties concerning extent of district's duty.—Six Companies of California v. Joint Highway Dist. No. 13 of California, C.C.A.Cal., 110 F.2d 620, affirming, D.C., 24 F.Supp. 346, certiorari granted Six Companies of California v. Joint Highway Dist. No. 13 of State of California, 61 S.Ct. 36, 311 U.S. 631, 85 L.Ed. 401, reversed on other grounds 61 S.Ct. 186, 311 U.S. 180, 85 L.Ed. 114, rehearing denied 61 S.Ct. 438, 311 U.S. 730, 85 L.Ed. 475.

34. U.S.—Frank v. Allegheny County, C.C.A.Pa., 119 F.2d 614.

35. U.S.—A. R. Young Const. Co. v. Road Improvement Dist. No. 2, Johnson County, Ark., C.C.A.Ark., 297 F. 127.—Winston v. Wyoming County Ct., C.C.A.W.Va., 266 F. 686.

N.Y.—Luciano v. State, 287 N.Y.S. 768, 248 App. Div. 642.

36. N.Y.—Marshall Const. Co. v. State, 231 N.Y.S. 345, 133 Misc. 131.

37. Ind.—Cunningham v. State, 182 N.E. 95, 95 Ind. App. 431.

38. Ark.—Lewelling & Price-Williams v. St. Francis Road Improvement Dist. No. 1, 250 S.W. 1, 158 Ark. 91.

Cal.—Burr v. Pacific Indemnity Co., 133 P.2d 24, 56 Cal. App. 2d 352, prior opinion, App., 128 P.2d 26.

Miss.—Marshall County v. Callahan, 94 So. 5, 130 Miss. 271, overruling suggestion of error 93 So. 194.

withholding of certain sums due under the contract is not a breach authorizing rescission or abandonment where the contractor had received on other estimates more than he was entitled to even including the balance withheld[39] A contractor is not released from his contract by the fact that the public agency, in ordering suspension of work under other contracts, mistakenly used language including his contract where the mistake was corrected before he changed his situation in any way[40] In the absence of a mandatory statute requiring the county board to acquire the right of way prior to the letting of the contract, the contractor is not entitled to abandon work or rescind the contract for failure to provide a right of way without giving the county a reasonable opportunity to make good[41]

j. Rights, Remedies, and Liabilities of Subcontractors, Materialmen, and Laborers

(1) In general
(2) Liens

(1) In General

(a) Subcontractors
(b) Materialmen and laborers

(a) Subcontractors

A subcontractor is liable to the principal contractor for breach of the subcontract, but where he has fully or substantially performed, he may, in a proper case, recover from the principal contractor, from the public agency, from another subcontractor, or out of funds retained for his benefit, the amount due him under the subcontract or damages for its breach.

A subcontractor has implied authority to do what is reasonably necessary and incidental to the work committed to him,[42] but he is bound by the terms of the subcontract[43] and liable for a breach thereof,[44] nor is his liability affected by the terms of the principal contractor's bond.[45] Where no demand was made on the subcontractor to remedy the defects, and a substantial sum had been paid him in compromise of all matters in controversy between the parties, the contractor cannot claim damages for defects in work performed by the subcontractor,[46] and he cannot recover the excess cost of completing the work on the subcontractor's default where he has not given the notice required by the subcontract[47]

The subcontractor is bound to take notice of rights under the principal contract incorporated in the subcontract by reference,[48] and cannot claim the benefits of a clause in the contract between the

NY—Luciano v State, 287 N Y S 768, 248 App Div 642

Default of subdivision of state

Where obligation to pay was on the state although it was the county's duty to contribute its prescribed quota of the cost thereof county treasurer's refusal to pay drafts for work done on contract justified rescission by contractor, where state did not offer to make drafts good—Anderson v John L Haves Const Co, 153 N E 28 243 N Y 140, reversing 213 N Y S 513, 215 App Div 109 motion denied 154 N E 619, 243 N Y 593

39. U S—Pickens County v National Surety Co, C C A S C, 13 F 2d 758

40. U S—Wyoming County Court v Winston C C A W Va, 282 F 472

41. N Y—People v Karr, 148 N E 516 240 N Y 318, reversing People v Troy Contracting Co, 207 N Y S 351, 211 App Div 633

42 Ala—Thomas v Saulsbury & Co, 102 So 115, 212 Ala 245

43. Wash—Adams County v Sloane, 215 P 356, 125 Wash 211

44 Wash—Adams County v Sloane, supra

Measure of damages

(1) In an action by the contractor against a subcontractor for damages sustained by the contractor for failure of the subcontractor to deliver all of the material called for under the contract and subcontract, the contractor is entitled to recover the difference between what he would have received from the state highway department and what he would have paid the subcontractor had the latter fully performed according to the terms of the contract—Leech v Armstrong, 283 P 396 52 N v 125, rehearing denied 287 P 174, 52 Nev 125

(2) Subcontract for embankment work in connection with county highway, designating minimum quantity of earth to be moved permits damages for breach thereof only on basis of such minimum quantity, and damages for failure to complete subcontract providing payment on basis of yardage with ten per cent additional must be determined by allowing subcontractor ten per cent on work completed—Walker v. Quinn, 133 S E 441, 134 S C 510

Excuse for delay

Highway subcontractors' failure to complete work within time specified was held excused by contractor's acts in renting to subcontractors defective power shovel—Whitty v Fidelity & Deposit Co of Maryland, 11 P 2d 84, 123 Cal App 334

45. Wash—Adams County v Sloane, 215 P 356 125 Wash 211
Contractor's bond see infra § 210.

46. Ark—Philpot v Shelby, 289 S W 781, 172 Ark 1177

47. Wash—Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214.

48. La—Miller v Bonner, 111 So 776, 163 La 132
Wash—Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214

Suspension of work

Where the subcontract incorporates by reference the original contract, plans, and specifications and makes them binding on the subcontractor the latter and his assignee are bound by provisions in the specifications for suspension of work on account of unsuitable conditions—Browne & Billings v Rouse & Hely Const Co 253 S W 7, 159 Ark 677

Change in plans

Provisions in a contract which were incorporated in the subcontract and which required changes in plans to be written and signed by the engineer in order to entitle the contractor to extra compensation are intended to protect the state against any unwarranted claims of the contractor, and are not available to the subcontractor against the principal contractor Such provisions may be waived or modified by oral contract, and a subcontractor who continued work after changes in the route and accepted payments on the basis of unit prices in the original contract and compensation for loss of time while the changes were being made was bound by the changes, even though they were not made in the manner required by the contract, and could not, on the theory of breach of contract, recover from the original contractor for loss of anticipated

contractor and the district without being subject to its restrictions [49] A provision in the contract between the subcontractor and the general contractor that decisions of the state highway commission on any question connected with the execution of the contract should be final does not deprive the subcontractor of the right to a judicial determination of the compensation to which he is entitled, however [50] Where, on the subcontractor's failure to perform, the contractor informed the subcontractor that he had taken charge of the work himself and intended to charge the cost thereof to the subcontractor, who acquiesced therein, this constituted a new contract by which both parties are bound [51] One to whom the contract has been sublet contrary to the regulations of the highway department is charged with all knowledge which could properly be charged against the contractor who sublet the contract [52] A provision in the principal contract requiring written consent to a subcontract may be waived, however [53]

A subcontractor who has performed his contract in accordance with its terms is entitled to payment from the principal contractor of the amount due him,[54] and the contractor cannot escape liability because no allowance was made to him by the district for the work, where he is entitled to credit for it in his settlement with the district [55] Where the subcontractor discontinues the work because of the contractor's default in not furnishing materials promptly, as required by contract, he is entitled to be paid for the work actually done under the contract,[56] and the contractor has the right to be credited for the payments made to the subcontractor and for materials used by him [57] So the contractor is entitled to an allowance on the amount due from him to the subcontractor for damages caused by breach of the subcontract,[58] although such breach does not entitle him to avoid liability for the work performed by the subcontractor and accepted by the contractor [59] If damage to a road partly constructed by a subcontractor is such as is required to be repaired at the expense of the district, as where it was caused by unusually heavy rains, the principal contractor is not entitled to credit on the account due the subcontractor for the expense of making such repairs [60] Subcontractors who fail to perform their subcontracts cannot recover on them[61] or on quantum meruit [62]

A subcontractor is entitled to a judgment in rem against,[63] or to garnishee,[64] the funds due the prin-

profits resulting therefrom—Snowball v Maney Bros & Co, 270 P 167, 39 Wyo 84, 61 A L R 199, rehearing denied 271 P 875, 39 Wyo 84, 61 A L R 199

49 Ariz—State, for the Use and Benefit of Pierson, v C G Willis & Sons, 50 P 2d 20, 46 Ariz 217

50. U S—Wunderlich v National Surety Corporation, D C Minn, 24 F Supp 640, reversed on other ground, C C A, National Surety Corporation v Wunderlich, 111 F 2d 622

51. Ark—Lynch v Stephens, 14 S W 2d 257, 179 Ark 118

52. Va—Trinkle v Commonwealth, 196 S E 652, 170 Va 429

53. La—R B Tyler Co v Merrill Engineering Co, 159 So 319, 181 La 191

Mo—Wilkey v Rouse Const Co, 28 S W 2d 674, 224 Mo App 495

54. Ark—Oliver Const Co v East Bros & Hardin, 268 S W 613, 167 Ark 410

La—Goldberg v Banta Bros, 162 So 786, 183 La 10

Agreement between county and principal contractor fixing quantity of stone to be used in highway construction work was not binding on contractor in determination of claim of subcontractor furnishing stone to balance of unpaid contract price where subcontractor acted under separate agreement—Unger v. A G Brumfield & Son, 190 N E 893, 99 Ind App 103

Basis of recovery

A subcontractor who was to be paid for full amount of yardage for unclassified excavation as shown in the final estimate allowed by the state highway department, but who was to be paid only for quantity of work performed was entitled to payment for only such yardage as he actually did up to the limiting figures in the highway department's final estimate—Wunderlich v National Surety Corporation, D C Minn, 24 F Supp 640, reversed on other grounds, C C A, National Surety Corporation v Wunderlich, 111 F 2d 622

Contract provisions as to payment construed

Mo—State ex rel Union Indemnity Co v Shain, 66 S W 2d 102, 334 Mo 153, quashing certiorari Chernus v Kennedy-Coats Const Co, 55 S W 2d 744, 227 Mo App 582

55. Ark—Kerby v Road Improvement Dist No 4 of Saline County, 251 S W 356, 159 Ark 21

When contractor's liability ends

Liability of original contractor to subcontractor on public work ends on paying subcontractor for the cost of labor and materials used in his work—State v Johnson Contract Co, 253 P 520, 120 Or 633

56. Md—Fisher v Vandevanter, 112 A 296, 137 Md 249

57. Md—Fisher v Vandevanter, supra

58. Failure to pay for materials furnished by contractor

La—Goldberg v Banta Bros, 162 So 786, 183 La 10

Failure to obtain liability insurance

Mass—Baccari v B Perini & Sons, 199 N E 912, 293 Mass 297

59. Mass—Baccari v B Perini & Sons, supra

60. Ark—Oliver Const Co v East Bros & Hardin, 268 S W 613, 167 Ark 410

61. Wash—Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214

62. Wash—Rachow v Philbrick & Nicholson, supra

63. Iowa—Commercial State Bank of Independence v Broadhead, 235 N W 299, 212 Iowa 688

Filing of claim

Where highway had been completed and accepted and highway commission had paid balance of purchase price into registry of the court, assertion of subcontractor's claim to payment, by preference out of such fund, to contractor's claims was timely, although not filed until after lapse of forty-five days after acceptance of the work—Goldberg v Banta Bros, 162 So 786, 183 La 10

64. Ark—Henslee v Mobley, 230 S W 17, 148 Ark. 181

cipal contractor and retained under the contract until completion of the work, where it appears that the work has been completed and that the district has no claim against the contractor. A subcontractor of an insolvent contractor, who failed to finish his contract, is not, however, entitled to be paid from the retained amount until the roads covered by the contract have been completed,[65] and the fact that the subcontractor furnished labor and materials does not give rise to an equitable claim to sums retained by the public agency under the contract with the original contractor as security for completion of the entire work.[66] Acceptance by the public agency of a refunding bond and release of the retained funds to the contractor, pursuant to statutory authority therefor, absolves such agency from liability for claims of a subcontractor against the retained funds.[67]

The subcontractor may also sue the principal contractor for damages for an abandonment or breach of the subcontract,[68] but the subcontractor, suing for breach of an agreement to reimburse him for expenses, cannot recover payments contrary to public policy.[69] The contractor is not liable to the subcontractor for delays caused by third persons,[70] particularly where the contract expressly relieves him from liability for such delay.[71] A subcontractor who proceeds with his work without the approval of the engineer knowing that such approval is required by the principal contract merely has the right to proceed so long as the engineer does not object,[72] and on demand of the engineer that the principal contractor take over and complete the work himself, the subcontractor is not entitled to recover against the principal contractor for loss of future profits.[73]

Where a contractor's work has been stopped by a breach of the contract by the road district, a subcontractor is entitled, according to one view, to recover loss of anticipated profits from the district[74] but not from the contractor;[75] but there is authority directly to the contrary holding that the district is not liable even though it consented to the subcontract.[76] Where a subcontractor performed work under the supervision of the engineer for which the district received the benefit, and for which he was not paid and for which the district did not pay the principal contractor, the district is liable to the subcontractor on a quantum meruit,[77] and may turn over to him the proceeds of a certified check which the principal contractor had deposited with the district pending the delivery of a bond which was never delivered.[78] The state is liable to the subcontractor for material owned by the latter and appropriated by the state, notwithstanding the state paid the principal contractor, the contractor having defaulted and become a bankrupt without paying the subcontractor.[79]

A subcontractor of a subcontractor who has faithfully performed his contract is entitled to recover

Garnishment of debts due for public works generally see Garnishment § 85

65. Tex.—Johnston v. Cobb, Civ. App., 313 S.W. 354

66. Tex.—Austin Bros. Bridge Co. v. Love, Com. App., 34 S.W.2d 574, reversing Love v. Austin Bros. Bridge Co., Civ. App., 5 S.W.2d 570

67. Tenn.—Campbell v. Cresap, 59 S.W.2d 523, 166 Tenn. 75

Refunding bonds generally see infra § 240

68. Utah.—Bracken v. Dahle, 251 P. 16, 68 Utah 486

Damages and interest

(1) Judgment for subcontractor for agreed price less cost of hauling and spreading gravel he would have hauled and spread before quitting, had contractor furnished material as agreed was held not erroneous, as allowing profits on entire contract, or prejudicial to the contractor, and the fact that subcontractor was to pay two of four truck drivers the full amount per yard mile payable to him for hauling and spreading gravel did not limit his recovery against the contractor, failing to furnish materials, to one half of amount awarded.—Bracken v. Dahle, 251 P. 16, 68 Utah 486

(2) Where fund in hands of highway commission was impounded because there were liens against it, contractor was liable for interest on amount owed subcontractor.—Goldberg v. Banta Bros., 162 So. 786, 183 La. 10

(3) Matter of interest on claims against highway contractor was discretionary with chancellor, and chancellor properly allowed interest on such claims from date of filing original petition, although claimants were then in default as to privilege taxes.—Atlas Powder Co. v. Detroit Fidelity & Surety Co., 51 S.W.2d 841, 164 Tenn. 605

Subcontract held not breached

Or.—State v. Cornwall, 201 P. 1072, 102 Or. 220

S.D.—Kampeska Materials Co. v. Bone, 219 N.W. 244, 52 S.D. 559

69. Miss.—Chas. Weaver & Co. v. Phares, 188 So. 12, 185 Miss. 224, suggestion of error overruled, 188 So. 570, 185 Miss. 224

70. Wash.—Rachow v. Philbrick & Nicholson, 268 P. 876, 148 Wash. 214

71. Wash.—Thomas v. S. A. Moceri, Inc., 13 P.2d 414, 169 Wash. 219

72. Tex.—Craven v. Davison, Civ. App., 260 S.W. 1100, affirmed, Com. App., 276 S.W. 193

73. Tex.—Craven v. Davison, Com. App., 276 S.W. 193, affirming, Civ. App., 260 S.W. 1100

74. U.S.—A. R. Young Const. Co. v. Road Improvement Dist. No. 2, Johnson County, Ark., C.C.A.Ark., 297 F. 127

75. U.S.—A. R. Young Const. Co. v. Road Improvement Dist. No. 2, Johnson County, Ark., supra

76. Ark.—Road Improvement Dist. No. 1 v. Mobley Const. Co., 286 S.W. 878, 171 Ark. 585, 48 A.L.R. 156

77. Ark.—Burt v. Road Improvement Dist. No. 11, 253 S.W. 1, 159 Ark. 275

78. Ark.—Burt v. Road Improvement Dist. No. 11, supra

79. N.Y.—Lackawanna Steel Const. Corporation v. State, 279 N.Y.S. 293, 244 App. Div. 831, affirming 273 N.Y.S. 895, 152 Misc. 604, and affirmed 199 N.E. 666, 269 N.Y. 552

from the latter his retained percentage after the state has finally settled with the original contractor, although the original contractor has not settled with defendant.[80]

Substantial performance. Where the work done by the subcontractor is done substantially in compliance with the subcontract, he is entitled to recover the contract price less the fair cost of remedying any defects in the work.[81]

Extra work and compensation The subcontractor is entitled to an allowance for extra work made necessary by acts of the contractor,[82] and even though he did not complete the subcontract he may recover for work done outside the contract on quantum meruit [83]

(b) Materialmen and Laborers

A laborer or materialman is entitled to recover the amount due him from the contractor to whom he supplied the labor or furnished the material, and under some circumstances he may recover from the public agency contracting for the highway improvement, or out of funds owing to the contractor, and by statute or contract the principal contractor may be liable to creditors of a subcontractor

A person who has performed labor for, or furnished material to, a highway contractor generally has a cause of action against the contractor for the amount due him,[84] and where a subcontractor assumes the contractor's obligation for labor and materials, each is bound in solido for the amounts for which each may be liable personally [85] The public agency cannot defeat claims of laborers and materialmen by arbitrarily refusing to sell road bonds.[86] Claims for labor and material furnished the contractor may be assigned [87] A mere contract provision that the amount paid the contractor included payment for labor and material does not show an intention to compel payment to those who furnish materials [88]

The public agency is not liable to a materialman for materials furnished the contractor which were incorporated into the highway accepted by such agency,[89] but under some statutes requiring the contractor to pay claims of laborers and materialmen, the state is authorized to pay them if the contractor does not [90]

Claims of laborers and materialmen are payable out of the funds owing to the contractor and retained by the public agency pending completion of the work, under the provisions of some statutes[91]

80 Tenn—Kortgardner Trucking Co v Crippen Const Co, 12 Tenn App 141

Contract construed in view of general custom among contractors that the retained percentage should not be paid until final settlement was made with the state—Kortgardner Trucking Co v Crippen Const Co, supra

81. Ark—Ætna Casualty & Surety Co v Henslee, 260 S W 414, 163 Ark 492

82. Mass—Baccari v B Perini & Sons 199 N E 912, 293 Mass 297

83. Wash- Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214

84. La—Miller v Bonner, 111 So 776, 163 La 932

85. La—Miller v Bonner supra

86 Tex Caldwell v Crosser, Civ App, 20 S W 2d 822, error refused

87. Neb—West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 511

Rights of assignee

Bank's claim against fund deposited in court, bank being assignee of laborers' and materialmen's claims, was not defeated because of application of payment from highway department to contractor's unsecured debt--State v Miller, 126 So 422 169 La 914

88. Ky—Mason Const Co v Kosmos Portland Cement Co, 59 S W 2d 1016, 248 Ky 782—Standard Oil Co of New Jersey v National Surety Co, 29 S W 2d 29, 234 Ky 764

89 W Va—Hohmann v Wetzel County Court, 156 S E 86, 109 W Va 734

90. Claim for "services"

Or—Bank of California Nat Ass'n v Scott, 78 P 2d 342 159 Or 70

91. Statutory trust

(1) Under statute, trust attaches to money due on contract to public improvement contractor for benefit of contractor's creditors whose claims arise out of that contract—Leonard D Sylvester, Inc v Giovannone Const Co 171 A 582 116 N J Eq 515—Stulz-Sickles Co v Fredburn Const Corporation 169 A 27 114 N J Eq 475

(2) General state highway contractor is not entitled to any payment out of highway contract proceeds which might impair rights of persons for whose benefit statutory trust in proceeds was created—Leonard D Sylvester, Inc, v Giovannone Const Co, supra

Nonlienable claims

The term "claim" as used in statutes dealing with "claims" against moneys due highway contractors from the state, is more comprehensive than "lien" and includes nonlienable items so long as they are germane to performing contracts on public work—Morris F Fox & Co v State 281 N W 666 229 Wis 44

Filing of claims

(1) If under the provisions of the statute claims must be filed by the laborer or materialman with a designated officer within a specified time, the public authority is not liable to one who has not complied with the statute, and where the statute further provides that any claimant may sue on the claim within a designated time it refers to claimant who has complied with the statute by giving proper notice—Equitable Casualty & Surety Co v Jackson 44 S W 2d 899, 163 Tenn 54

(2) Claimants not filing claims with state auditor within statutory period are not entitled to retained portion of highway contract price, and where no claims have been filed within the statutory period, retained portion loses its identity as such, and claimants are entitled only to balance of contract price remaining after work has been completed—Southern Surety Co v Jenner Bros, 247 N W 500, 212 Iowa 1027

(3) Act setting time limit of six months from completion of work for presenting claims for material and labor furnished highway contractor was held prospective and inapplicable since highway construction was completed when work was done and not when final estimate was made—Overman & Co v Maryland

and contracts,[92] and in some jurisdictions it is held that laborers and materialmen have an equitable right to payment from such funds in preference to general creditors,[93] and that a statutory requirement of a bond to protect them is not inconsistent with such equitable right,[94] although there is authority to the effect that in the absence of a controlling statute or provision in the contract for the creation of a trust fund for their benefit, laborers and materialmen have no right to recover such retained funds as against the public authority taking over the contract and completing the work in accordance with express provision therefor in the contract.[95] Filing a transcript of a judgment against the con-

Casualty Co., 136 S.E. 250, 193 N.C. 86

(4) Where the highway has been completed and accepted, the assertion of a claim to payment out of funds owing to the contractor and retained by the highway commission or deposited in court is timely whether filed within or after the period fixed by statute therefor—Goldberg v. Banta Bros., 162 So. 786, 183 La. 10—R. B. Tyler Co. v. Merrill Engineering Co., 159 So. 319, 181 La. 191

(5) A statute designating the officer with whom claims are to be filed must be strictly construed—Missouri Gravel Co. v. Federal Surety Co., 237 N.W. 635, 212 Iowa 1322

(6) Under statute requiring claims to be filed with public officer through whom payment is to be made subcontractor's claim for materials furnished in construction of road should be filed with county auditor. Fuller & Hiller Hardware Co. v. Shannon & Willfong, 215 N.W. 611, 205 Iowa 104

(7) Under statute requiring filing of claims with the officer authorized by law to issue warrants in payment of the improvement, claims for material and labor furnished for primary road construction under contracts made by state highway commission should not be filed with county auditor or state highway commission, but should be filed with state auditor—Missouri Gravel Co. v. Federal Surety Co., supra—Southern Surety Co. v. Jenner Bros., 237 N.W. 500, 212 Iowa 1027

(8) The provision as to notice contained in Acts 1899 c. 182, Thompson Shannon Code § 1135a et seq. was impliedly repealed by Acts 1917 c. 74, and under the later statute public officers must take the initiative and advertise for claims against general contractor before making final settlement, and notice of such claims is not due to be filed until after such advertisement is made—Southern Const. Co. v. Halliburton, 258 S.W. 409, 149 Tenn. 319

Priority

(1) Distribution of highway contract price retained should be made for court costs including attorneys' fees, for labor claims in order filed, and for material demands in order filed—Southern Surety Co. v. Jenner Bros., 237 N.W. 500, 212 Iowa 1027.

(2) Claims of those who have furnished services or materials in order to enable a contractor to carry out his public contract, where related but not lienable, have priority over totally unrelated claims, and where there were in existence, to the knowledge of the state highway commission, claims of the former class, contractor's creditor's claim, which arose out of purchase of securities by contractor and which was not related to highway improvement, was not payable out of the fund in the commission's hands when project was completed, or until such time as all related claims and expenses had been paid—Morris F. Fox & Co. v. State, 281 N.W. 666, 229 Wis. 44

Title to retained funds

Under Tennessee law, money retained by Tennessee highway commissioner from payments to highway contractor for unsatisfied laborers and materialmen was property of state and was in custody of state until such time as it should be determined that there was a surplus belonging to contractor—Dannel v. Wilson-Weesner-Wilkinson Co., C.C.A.Tenn., 109 F.2d 364

Claim for rent of power shovel to highway subcontractor was held payable from highway contract proceeds as claim for "implements or machinery" used or consumed in construction, although there was no showing that contractor's bond complied with requirements of newly adopted statute for protection of those furnishing "implements or machinery"—Leonard D. Sylvester, Inc., v. Giovannone Const. Co., 174 A. 582, 116 N.J.Eq. 515

Interest is not paid to fund retained for laborers and materialmen, and where portion of highway contract price retained was insufficient to pay all claims court properly denied interest—Southern Surety Co. v. Jenner Bros., 237 N.W. 500, 212 Iowa 1027

In California, Code Civ. Proc. § 1184, requiring owner to withhold amount due contractor on service of stop notice, and making fund withheld subject to claims of laborers and materialmen by whom notice was given, is inapplicable to claims of laborers and materialmen against contractor constructing a public highway, who is required to give bond under St. 1919 p. 487—McMorry v. Superior Court of California in and for Sutter County, 201 P. 797, 54 Cal.App. 76

92. Ind.—City Nat. Bank v. Board of Com'rs of De Kalb County, 172 N.E. 201, 91 Ind.App. 564
S.C.—Sumter Trust Co. v. Sumter County, 134 S.E. 209, 136 S.C. 15

93. U.S.—U.S. Fidelity & Guaranty Co. v. Sweeney, C.C.A.Mo., 80 F.2d 235
Ind.—Southern Surety Co. v. Merchants' & Farmers' Bank of Avilla, 176 N.E. 846, 203 Ind. 173, rehearing denied 179 N.E. 327, 203 Ind. 173—City Nat. Bank v. Board of Com'rs of De Kalb County, 172 N.E. 201, 91 Ind.App. 564
Priorities as between assignees of moneys due under the contract and labor and material claimants generally see supra subdivision g of this section

Claims not within bond

Creditors who furnished material and rented equipment to contractor were held entitled to pro rata share of fund retained by state highway commission until road was accepted although their claims were not within the terms of the bond of the contractor's surety—U.S. Fidelity & Guaranty Co. v. Macksville Gravel Co., 150 N.E. 390, 84 Ind.App. 129

Effect of cancellation of contract

Materialman's right to recover for materials used in highway project cannot be defeated by cancellation without his knowledge of contract between original contractor and person contracting to furnish materials—Pigeon Thomas Iron Co. v. Drew Bros., 111 So. 182, 162 La. 836

Subcontractors on other contracts

That bridge work was partly financed by money from other contracts after subcontractors on such contracts had receipted without payment for sums due them did not entitle subcontractors' claims to priority over those of laborers and materialmen as respected funds retained by state roads commission under completed bridge contracts, in absence of any assignments to subcontractors of proceeds of such contracts—Carney v. U.S. Guarantee Co., 177 A. 157, 168 Md. 134

94. U.S.—U.S. Fidelity & Guaranty Co. v. Sweeney, C.C.A.Mo., 80 F.2d 235

95. Wash.—Beyer v. Zindorf, 198 P. 977, 116 Wash. 199

tractor is a sufficient basis for payment to the judgment creditor of moneys owed the contractor, under a statute authorizing payment by the state to the judgment creditor on the filing of a certified copy of the judgment [96]

Liability of principal contractor to creditors of subcontractor Generally the liability of the principal contractor to the subcontractor determines the right of the latter's laborer to recover from the fund due the former [97] In the absence of an applicable statute or contract, the contractor is not liable to persons dealing with a subcontractor,[98] nor is he made liable by his failure to exact a bond which the statute does not require him to exact from such subcontractor [99] It has been said that one dealing with a subcontractor can claim rights against the principal contractor only under the Lien Law, which gives to laborers and materialmen dealing with the subcontractor the necessary contractual relationship or privity of contract between them and the principal contractor,[1] but the contractor may also be liable by reason of a promise, supported by consideration, to pay the claim,[2] and liability of the contractor may be fixed by his contract with the public agency,[3] as where that contract makes the subcontractor the agent of the contractor[4] or provides that the contractor pay promptly for all work and labor done and material used in the work,[5] although a claimant is not entitled to the benefit of such a provision where his claim is not included within its terms [6] Where the laborer constitutes the subcontractor his agent in the collection of his wages, payment to the subcontractor releases the general contractor [7] A statute imposing liability on the original contractor for material and labor furnished includes material and labor furnished to a subcontractor [8]

(2) Liens

Although, in the absence of statute or contract providing therefor, no lien exists for labor and material furnished in the construction and improvement of a highway, such a lien is given, under some statutes, on the money due the contractor, but it may be claimed only for labor or materials which come within the terms of the statute, and may be waived by the creditor.

The construction of roads is a public work, and laborers and materialmen have no lien for labor and material furnished,[9] unless expressly given by statute[10] or contract,[11] but are simple contract credi-

96 Wis—McDonald v State, 235 N W 1 203 Wis 649

97. N Y—Glens Falls Portland Cement Co v Van Wirt Const Co, 228 N Y S 289 132 Misc 95, modified on other grounds 232 N Y S 410 225 App Div 159

98. Ga—Southern Crushed Stone & Granite Co v Dorn, 141 S E 59, 37 Ga App 564
Ky Mason Const Co v Kosmos Portland Cement Co, 59 S W 2d 1016 248 Ky 782
La—Brooks v Byrd & Clopton, 122 So 287 168 La 450
Ohio—Appleman v Southern Surety Co 27 Ohio N P,N S, 158

99. La—Brooks v Byrd & Clopton 122 So 287, 168 La 450

1. Iowa—Nebraska Culvert & Mfg Co v Freeman, 198 N W 7, 197 Iowa 720

2. Ill—Backs v Nelson Const Co, 271 Ill App 137

3. Ark—Oliver Const Co v Williams, 238 S W 615, 152 Ark 414

4. Wash—Maeder Steel Products Co v Brewster, 281 P 14, 154 Wash 120—Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214

5. Ark—Miller v Roetzel Bros, 245 S W 33, 155 Ark 620—Oliver Const Co v Williams, 238 S W 615, 152 Ark 414

6. Ark—Oliver Construction Co v Erbacher, 234 S W 631, 150 Ark 549
Ky—Laurel Grocery Co v Myers Bros, 90 S W 2d 693, 262 Ky 523

7. Ark—Miller v Roetzel Bros, 245 S W 33 155 Ark 620

8 Miss—Arkansas Fuel Oil Co v Trinidad Asphalt Mfg Co, 198 So 41, 189 Miss 366

9. U S—In re Gilmore, D C Ohio, 28 F Supp 1010
Ala—Wade v Brantley & Crawley Const Co, 161 So 101, 230 Ala 345
Miss—First Nat Bank v Monroe County 95 So 726, 131 Miss 828
Nev—Union Indemnity Co v A D Drumm, Jr, Inc, 62 P 2d 698, 57 Nev 242, modified on other grounds on rehearing 70 P 2d 767, 57 Nev 242
29 C J p 611 note 32
Mechanics' liens on public improvements generally see the C J S title Mechanics' Liens § 10, also 40 C J p 57 note 43-p 59 note 73

No lien on highway

U S—Pratt Lumber Co v T H Gill Co, D C N C, 278 F 783
Ky—Steele & Lebby v Ayer & Lord Tie Co, 55 S W 2d 52, 246 Ky 379
La—Miller v Bonner, 111 So 776, 163 La 332—Pigeon-Thomas Iron Co v Drew Bros, 111 So 182, 162 La 836
Nev—Union Indemnity Co v A D Drumm, Jr, Inc, 70 P 2d 767, 57 Nev 242, rehearing 62 P 2d 698, 57 Nev 242
40 C J p 59 note 63

In West Virginia

Materialman creditor of road contractor bonded to pay for material, has equitable lien on money retained by state road commission—State v Coda, 138 S E 124, 101 W Va 676

10. U S—In re Gilmore, D C Ohio, 28 F Supp 1010
N Y—Shultz v C H Quereau Co, 104 N E 621 210 N Y 257 L R A 1915E 986, Ann Cas 1915B 965
29 C J p 611 note 33

What statutes govern

The right of laborers and materialmen to liens under a contract for the construction of highways made and to be performed in North Carolina depends on the statutes of that state—Pratt Lumber Co v T H Gill Co, D C N C, 278 F 783

In Iowa, under statute, liens attach in order of filing claims on amounts retained from payments due contractor under contract, but no liens exist on installment payments beyond retained percentages—Federal Surety Co v De Moines Morris Plan Co, 239 N W 99, 213 Iowa 464

In Virginia

Mechanics' lien statutes have no application to contracts with commonwealth or political subdivisions thereof for construction of public improvements, and do not give subcontractor any lien on sums due to contractor for construction of public highway—Bowers v Town of Martinsville, 159 S E 196, 156 Va. 497

11 Contracts held not to create liens

Ky—Mason Const Co v Kosmos

tors, having no right of priority in respect of the amount due on the contract superior to other creditors,[12] nor is there a trust created by law in their favor in respect of funds paid to the contractor[13] Their remedy is on the personal responsibility of the contractor and his sureties[14] The same rules have been applied with respect to one who loans money[15]

Under some statutes, however, such a lien is given on the money due, or funds raised for the payment of the contractor,[16] provided the statute is complied with in respect of giving notice to the proper officials[17] It has been variously held that

Portland Cement Co, 59 S W 2d 1016, 248 Ky 782
Nev —Union Indemnity Co v A D Drumm, Jr, Inc, 70 P 2d 767, 57 Nev 242, rehearing 62 P 2d 698, 57 Nev 242

12. U S —Pratt Lumber Co v T H Gill Co, D C N C, 278 F 783
Nev —Union Indemnity Co v A D Drumm, Jr, Inc, 62 P 2d 698, 57 Nev 242, modified on other grounds on rehearing 70 P 2d 767, 57 Nev 242

13. Ala —Wade v Brantley & Crawley Const Co, 161 So 101, 230 Ala 345

Statute held inapplicable to create trust
Wis —Theiler v Wilson Const Co, 250 N W 433, 213 Wis 171

14 Cal —Slayden v O'Dea, 189 P 1066, 182 Cal 500—Hunt v Continental Nat Bank, 188 P 300, 45 Cal App 578
Remedy against sureties see infra § 210

15. Wash —American Sav Bank & Trust Co v National Surety Co, 177 P 646, 104 Wash 663

16. Ill —Backs v Nelson Const Co, 271 Ill App 137—Siemer Milling Co v C J Moritz, Inc, 227 Ill App 459
Ky —Steele & Lebby v Ayer & Lord Tie Co, 55 S W 2d 52, 246 Ky 379
La —Pigeon-Thomas Iron Co v Drew Bros, 111 So 182, 162 La 836—Police Jury of Parish of Avoyelles v Gaspard, 108 So 128, 161 La 70
N Y —Moribella v Depew Paving Co, 29 N Y S 2d 297, 176 Misc 866
Tenn —Walters v Frank, 106 S W 2d 857, 171 Tenn 599
Tex —Smith v Jacksboro Stone Products Co Civ App, 41 S W 2d 347 affirmed Com App, 53 S W 2d 780
Wis —Rusk v Perry, 201 N W 762, 185 Wis 451
29 C J p 611 note 33 [b]

Applicability of statute
The Ohio supreme court having declared statute providing for establishment of liens on public funds for materials and labor applicable to state highway construction contracts, such contracts were included from effective date of statute, so that materialmen and laborers failing to file claims with director of highways as provided by statute have no liens against amount due contractor, although Ohio court of appeals had declared statute inapplicable to such contracts at time within which liens should have been perfected —In re Gilmore, D C Ohio, 28 F Supp 1010

Where no money is due contractor, as where he abandoned work before completion, materialman is not entitled to a lien
Ill —Eastwood v Road Dist No 5, 230 Ill App 281
N Y —Slattery v National Commercial Bank & Trust Co, 286 N Y S 337, 247 App Div 221

Test as to when work is completed to preserve lien is determined by whether work necessary to be done to complete the job is part of original contract with which it is necessary to comply —Citizens' First Nat Bank v Board of Com'rs of Jefferson County, 267 P 12, 126 Kan 90

Held not "materialman" within statute
Seller of metal road forms, which were used in the construction of a concrete roadway and afterward removed from the job for use in connection with other work —New York Trap Rock Corporation v National Bank of Far Rockaway, 32 N Y S 2d 443, 177 Misc 954

Interest
Furnisher of provisions and supplies to state highway contractor was entitled to interest from date of filing of lien claim with director of highways —U S Fidelity & Guaranty Co v Feenaughty Machinery Co, 85 P 2d 1085, 197 Wash 569

17. U S —In re Gilmore, D C Ohio, 28 F Supp 1010
29 C J p 611 note 33 [c]

Unverified notice held invalid
N Y —Liberty Bank of Buffalo v Peckham Const Co, 263 N Y S 495, 147 Misc 165

"Notice in writing" in statute is notice showing that charges arose in furnishing material, etc for which lien is named —Winder Bros v Sterling, 12 S W 2d 127, 118 Tex 268, opinion adhered to 14 S W 2d 802, 118 Tex 268

Statement sworn before claimant's attorney
Itemized statement was held sufficient as basis for lien on public funds, although notary public before whom statement was sworn was lien claimant's attorney —Boyd v Royal Indemnity Co, 185 N E 422, 126 Ohio St 322

Statements sworn to by claimant's attorney
Statements of account covering materials and feed furnished highway subcontractor, sworn to and filed by claimants' attorney, were held sufficient to create lien —Perry v J M Lewis & Co, 129 So 406, 14 La App 90

Contents of notice
(1) Lien claimants to preserve right against balance due highway contractor need not record itemized statement of amount due, statute being satisfied if statement gives notice of nature and character of indebtedness, and sworn and recorded statement that lien claimant supplied subcontractor with gasoline and oil of specified value used on highway was sufficient —Williams & Gray v Stewart, La App, 147 So 103

(2) Where statute authorizing filing of lien claim with highway department did not specifically designate its contents, court would exercise liberality respecting form thereof, and bank's lien claim showing advancements to subcontractor to pay laborers and materialmen was held sufficient, although not reciting that bank was subcontractor's assignee and subrogee —Southern Surety Co of New York v First State Bank of Marquez, Tex Civ App, 54 S W 2d 888, error refused

Service by mail held insufficient, although notice of claim was actually received —Eastwood v Road Dist. No 5, 230 Ill App 281

Who may file
(1) Road district or county may file claim against public highway contractor under statute —Winder Bros v Sterling, 12 S W 2d 127, 118 Tex 268, opinion adhered to 14 S W 2d 802, 118 Tex 268

(2) Where laborer's lien on funds due contractor from state or claim for wages is assigned before having been matured by notice to proper state officer, assignee may give notice and perfect the lien —Martin-Glover Co v Mays, C C A Tex, 74 F 2d 104

Time for filing
(1) In statute requiring claimants of lien with respect to construction of public improvement to file claims within sixty days after the passage of the statute or within sixty days from the last labor performed, the word "passage" was used in the

such statutes should be construed strictly[18] or liberally, to accomplish their end without doing violence to the language used[19] The lien being a right of subrogation to the contractor's cause of action rather than a lien on a specific res in the possession of the state, enforceability of liens on funds due the contractor is not affected because they exceed, in the aggregate, moneys in the state treasury appropriated to the contract[20] Where the statute provides for the withholding of sufficient sums to pay claims in case they are established by judgment, a contractor who becomes dissatisfied with the procrastination of claimant may himself have the claim adjudicated[21]

A lien may be claimed only for labor or materials which come within the terms of the statute[22] as

broad sense, referring to time when the act became effective as a law, and not in the narrow sense of passage by the house and senate —Western Wheeled Scraper Co v Scott Const Co, 27 N E 2d 879, 217 Ind 408

(2) Notice of claim for labor or material furnished for public improvements may be given before last or any installment remains to be paid contractor under statute providing for notice before "any" payment is made, and need not be filed with proper official before payment of any money to contractor in order to fix lien on fund due him —Huddleston & Work v Kennedy, 53 S W 2d 1009, 122 Tex 182, answering certified questions, Civ App, 57 S W 2d 255—Smith v Texas Co, Tex Com App, 53 S W 2d 774, modifying Texas Co v Schriewer, Civ App, 38 S W 2d 141, and followed in Smith v G B Johnson Hardware Co, Com App, 53 S W 2d 779 and Smith v Jacksboro Stone Products Co, Com App, 53 S W 2d 780, which affirmed Civ App, 41 S W 2d 347—Pierce Petroleum Corporation v Smith, Tex Civ App, 42 S W 2d 88, modified on other grounds Smith v Pierce Petroleum Corporation, Com App, 53 S W 2d 780

(3) Time for filing feed claims under highway contract begins to run from date on which authority having work done files notice of acceptance or contractor's default, and contractor's acceptance of subcontractor's work on latter's default is not acceptance necessary to commence running of time —Perry v J M Lewis & Co, 129 So 406, 14 La App 90

When lien attaches

Lien attaches to balance due contractor when notice of claim is given to official obligated to pay contractor —Smith v Jacksboro Stone Products Co, Tex Civ App, 41 S W 2d 347, affirmed, Com App, 53 S W 2d 780

Lis pendens

Under statute, providing that the lien for labor on a public improvement shall not continue for a longer period than three months from notice of lien, unless action is commenced and the notice of pendency of such action filed, the fact that one lienor commenced suit in due time and joined other lienors as defendants did not excuse such other lienors from filing a lis pendens within the time provided by statute although it might have obviated the necessity for commencing suit — Giant Portland Cement Co v State, 134 N E 322, 232 N Y 395, affirming Giant Portland Cement Co v Barber Asphalt Paving Co, 177 N Y S 408, 187 App Div 581

With whom filed

(1) Filing notices with county engineer was held sufficient filing with "head of department or bureau," as required by statute —Fireproof Products Co v Nassau County, 246 N Y S 282, 138 Misc 357

(2) Filing of notice of claim for price of materials furnished highway subcontractor with state highway commission was held strict compliance with statutory requirement that notice be filed with official bound to pay original contractor —Smith v Texas Co, Tex Com App, 53 S W 2d 774 modifying Texas Co v Schriewer, Civ App, 38 S W 2d 141 and followed in Smith v G B Johnson Hardware Co, Com App, 53 S W 2d 779 and Smith v Jacksboro Stone Products Co, 53 S W 2d 780 which affirmed, Civ App, 41 S W 2d 347— Pierce Petroleum Corporation v Smith, Tex Civ App, 42 S W 2d 88, modified on other grounds Smith v Pierce Petroleum Corporation, Com App, 53 S W 2d 780—Smith v Jacksboro Stone Products Co, Tex Civ App, 41 S W 2d 347, affirmed, Com App, 53 S W 2d 780

Discharge of notice

Court cannot discharge notice of lien, filed by public improvement contractor, on summary application — In re Paladino Engineering Co, 215 N Y S 173, 126 Misc 873

In New Hampshire

Notice of the lien is of importance to preserve it, but its creation and existence are not dependent on notice, and a subcontractor's failure to notify state of intention to claim lien before commencement of performance or during or after completion of contract does not deprive him of lien —Guard Rail Erectors v Standard Surety & Casualty Co of New York, 168 A 903, 86 N H 349

18. La —H R Hayes Lumber Co v McConnell, 146 So 14, 176 La 431 —Red River Const Co v Pierce Petroleum Corporation, 6 La App 633

"Ordinary meaning" of word "material" in act relating to material for public improvements refers to well established judicial interpretation — Ætna Casualty & Surety Co of Hartford, Conn, v Kimball, 222 N W 31, 206 Iowa 1251

19. Tex —Texas Co v Schriewer, Civ App, 38 S W 2d 141, modified on other grounds Smith v Texas Co, Com App, 53 S W 2d 774, followed in Smith v G B Johnson Hardware Co, Com App, 53 S W 2d 779 and Smith v Jacksboro Stone Products Co, Com App, 53 S W 2d 780, affirming, Civ App, 41 S W 2d 347

20. N Y —Anderson v John L Hayes Const Co, 153 N E 28, 243 N Y 140, reversing 213 N Y S 513, 215 App Div 109, motion denied 154 N E 619, 243 N Y 593

21. Tex —Winder Bros v Sterling, 12 S W 2d 127, 118 Tex 268, opinion adhered to 14 S W 2d 802, 118 Tex 268

22. Ill —Manhattan State Bank v C. J Moritz, Inc, 238 Ill App 103
Iowa —Rainbo Oil Co v McCarthy Improvement Co, 236 N W 46, 212 Iowa 1186—Standard Oil Co v Marvill, 206 N W 37, 201 Iowa 614
Tex —Thurber Const Co v Kemplin Civ App, 81 S W 2d 103—Foust v Smith & Helms, Civ App, 246 S W 106

Held not within statute

(1) Claim of person drilling blasting holes in quarry of seller of crushed rock to county for use in highway, entitled to personal judgment against seller —Nolan v Larimer & Shaffer, 254 N W 45, 218 Iowa 599

(2) Demands for labor and materials entering into production and transportation of material furnished to principal highway contractor, up to time it is delivered such as claims of men who drove trucks, and of companies who sold gas to trucker, agreeing to haul sand for another who had subcontract with seller whose sales agreement provided for delivery at highway contractor's stock piles —Forsberg v Koss Const. Co, 252 N W 258, 218 Iowa 818.

it existed at the time when the labor or materials were furnished[23] In the absence of an indication of any intent to the contrary, the statute will be held to relate to goods which enter into and become part of the completed improvement,[24] and under some statutes it is held that a lien will be given only for such labor and materials as are actually incorporated into the improvement[25] It is not necessary, however, that the material furnished become a part of the completed improvement under a statute providing that any person who furnishes material to a contractor may have a lien,[26] or under a statute specifically including the thing in question[27] or authorizing relief with respect to materials furnished

(3) Claim for gasoline sold to subcontractor for use in trucks hauling gravel for road construction—Red River Const Co v Pierce Petroleum Corporation, 6 La.App 633

(4) Coal used in boiler in highway construction work, although ashes became part of road bed—W E Peets Motors v State, 263 N Y S 762, 147 Misc 218—29 C J p 611 note 33 [a]

(5) Claim for shoeing horses—Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214

(6) Charges for cigarettes, sugar, matches, gravel tickets, and care of mules and for various articles for personal use, such as clothing, tobacco, candy, and envelopes, together with files, rakes, wire, etc., also for blacksmith's repairs to harness vehicles, plows, etc.—Williams & Gray v Stewart La App 147 So 103

(7) Dry goods, groceries, axes, wheelbarrow, and harness—Perry v J M Lewis & Co, 129 So 406, 14 La App 90

(8) Pipe not entering into construction of road—W E Peets Motors v State, 263 N Y S 762, 147 Misc 218

(9) Loan of money to road-paving contractor to purchase material and pay labor—Lane v E J Deas Co, 125 So 514, 12 La App 382

(10) Rent or value of use of machinery, tools and equipment

Kan—Road Supply & Metal Co v Bechtelheimer, 240 P 846 119 Kan 560

Ohio—Ohio Savings & Trust Co v Schneider 159 N E 338, 25 Ohio App 259

(11) Furnishing trucks and drivers to road contractor—Cramer v Board of Chosen Freeholders of Salem County, N J, 147 A 639

(12) Amount of depreciation of machinery as result of subcontractor's violation of contract to keep machinery in repair—Prues v A J Henkel Const Co, 197 N E 386, 49 Ohio App 501

(13) Unpaid workmen's compensation or public liability insurance premiums—In re John J O'Rourke, Inc, 273 N Y S 1020, 152 Misc 575

(14) Tires used on subcontractor's trucks—Hamblen Motor Co v Miller & Harle, 266 S W. 99, 150 Tenn 602.

Held within statute

(1) Account for cement and lumber—Williams & Gray v Stewart, La App, 147 So 103

(2) Charges for gasoline, oil, and accessories for machinery such as trucks and concrete mixers used in constructing highway—Williams & Gray v Stewart, supra

(3) Claim by one who furnished paving mixer and operator—Cincinnati Quarries Co v Hess, 26 Ohio N P, N S, 1

(4) Claim of materialman employed to furnish posts and construct fence included in specifications—Anderson v Harvey & Jones, La App, 154 So 495

(5) Claim of timekeeper and bookkeeper for subcontractor—Leathers & Martin v Conley, La App, 157 So 607

(6) Lien filed by individual who was employed by subcontractor to deliver materials used by contractor—Moribella v Depew Paving Co, 29 N Y S 2d 297, 176 Misc 866

Credit applicable to debt covered by lien

Where a materialman furnished cement to a contractor to be used in the construction of a public road, and recovered from the contractor a quantity of empty cement bags for which it was entitled to a credit under the contract, such credit was properly applied on the part of the indebtedness which was secured by the materialman's lien—Giant Portland Cement Co v State, 134 N E 322, 232 N Y 395 affirming Giant Portland Cement Co v Barber Asphalt Paving Co, 177 N Y S 408, 187 App Div 581

Test of lienability

The lienability is to be tested and determined on the same standard as similar claims would be under the general mechanics' lien law—Muller v Wohlust, 233 N W 88, 203 Wis 203—Southern Surety Co v Hotchkiss, 201 N W 986, 187 Wis 227

23. Iowa—Monona County v O'Connor, 215 N W 803, 205 Iowa 1119

24. Iowa—Ætna Casualty & Surety Co of Hartford, Conn v Kimball, 222 N W 31, 206 Iowa 1251

Wash—U S Fidelity & Guaranty Co v Feenaughty Machinery Co, 85 P 2d 1085, 197 Wash 569

29 C J p 611 note 33 [a].

25. Held not within statute

(1) Claim for lumber and nails used in constructing forms for concrete, none of which remained part of completed structure—H R Hayes Lumber Co v McConnell, 146 So 14, 176 La 431

(2) Claim for lumber furnished contractor for use in camp and on works, which after being taken down had value for future use, except as to depreciated value of such lumber, also items furnished in connection with contractor's plant and tools rather than the work itself or for food and other supplies furnished boarding camp maintained by contractor for workmen—Southern Surety Co v Hotchkiss, 201 N W 986, 187 Wis 227

(3) Claim for renting engine to subcontractors, even though operated by claimant or his employees, or for manual labor furnished in running engine—Muller v Wohlust, 233 N W 88, 203 Wis 203

(4) Claim for oil and gasoline furnished to subcontractor—Southern Surety Co v Hotchkiss, supra

26 Statute held to authorize lien for

(1) Coal for engines—Siemer Milling Co v C J Moritz, Inc, 227 Ill App 459

(2) Feed for work animals

Ill—Backs v Nelson Const Co, 271 Ill App 137—Siemer Milling Co v C J Moritz, Inc, supra

Tex—Thurber Const Co v Kemplin, Civ App, 81 S W 2d 103

(3) Gasoline, oil, and grease which contractor used in operating trucks and machinery in construction of road—Standard Oil Co of Indiana v Vanderboom, 158 N E 151, 326 Ill 418, affirming 238 Ill App 635 and followed in Acker v Vanderboom, 158 N E 476, 327 Ill 267, which affirmed 235 Ill App 417

(4) Gasoline and kerosene used in subcontractor's trucks and machinery—Hamblen Motor Co v Miller & Harle, 266 S W 99 150 Tenn 602

(5) Claim for rental of machinery used by contractor—New Erie Coal Co v H McMullen & Sons, 247 Ill. App 515

27 Fuel furnished to contractor

Iowa.—Standard Oil Co v Marvill, 206 N W. 37, 201 Iowa 614.

"in the construction"[28] or material furnished "to be used or consumed in making such public improvement."[29] If such things are entirely consumed in the course of construction, although they do not become a physical part of the finished product, they are "supplies" within a statute giving a lien to furnishers of "supplies"[30] The right to a lien is not lost because the contractor without the knowledge or consent of the materialman diverts the material to some other purpose,[31] but there can be no lien with respect to material delivered to the contractor but retaken by the materialman under an agreement with the contractor before it was used[32] Liens for work and material furnished prior to abandonment of the contract attach only to moneys due the original contractor,[33] and forfeiture of the contract does not impair the lien,[34] even though the cost of completing it exceeded the price fixed by the original contract[35] Money spent by the state in protecting the work done after the contractor's default is not deductible from the balance due the contractor in computing the fund available for liens[36] Lienors of a defaulting contractor are not entitled to money saved by the state in reletting the contract after default[37]

A statute creating an equitable lien on the proceeds of a highway contract in the hands of the contractor has been held to secure only claims on which the contractor is liable by reason either of an express contract to pay or of action taken by claimant under a statute requiring the contractor's bond to contain a condition for their benefit,[38] and parties furnishing labor or material to a subcontractor but failing to take action under the latter statute are not entitled to a lien on the contract price in the contractor's hands[39] Moreover the statute gives a lien only for labor or materials furnished after it took effect[40] The statutory lien of a subcontractor's assignee is subject to reduction to the extent of claims of the subcontractor's materialmen and laborers, which are a prior charge on that part of the fund which would otherwise go to the subcontractor[41]

A claimant who furnished material or labor to a subcontractor is entitled to a lien against the unpaid balance due the principal contractor under the provisions of some statutes[42] So an act creating a lien in favor of any persons who furnish material or labor to contractors who contract for public improvements applies to those furnishing material or labor to subcontractors, and accordingly such materialmen or laborers may enforce their lien on funds due the original contractor[43] to the extent of any

Feed consumed by mules used in construction

La —Alexandria Contracting Co v Standard Oil Co of Louisiana, App, 157 So 611—Leathers & Martin v Dermott Grocery & Commission Co, App, 157 So 610—Whittington v Nelson Bros Const Co, App 141 So 491

Held not "feed," "provisions," or "fuel"

Kerosene for lighting and oils and greases for tractors, etc, used in constructing highway —Aetna Casualty & Surety Co of Hartford, Conn, v Kimball, 222 N W 31, 206 Iowa 1251

28. **Gasoline, oils, and greases** used in hauling other material actually going into improvement constitute materials furnished in construction of public improvement —Rainbo Oil Co v McCarthy Improvement Co, 236 N W 46, 212 Iowa 1186

29. **Held lienable under statute**

Value of portion of useful life of machinery contributed to, and exhausted by, project, measure of lien being reasonable rental or use value —Osgood Co v Peterson Const Co, 286 N W 54, 231 Wis 541

30. **"Timken bits,"** entirely used up in drilling operations through rock are "supplies," as distinguished from "equipment"—U S Fidelity & Guaranty Co v Feenaughty Machinery Co, 85 P 2d 1085, 197 Wash 569

31. N Y —Giant Portland Cement Co v State, 134 N E 322, 232 N Y 395, affirming Giant Portland Cement Co v Barber Asphalt Paving Co, 177 N Y S 408, 187 App Div 581

32. N Y —Giant Portland Cement Co v State, supra

33. N Y —W E Peets Motors v State, 263 N Y S 762, 147 Misc 218

34. N Y —Schuessler v Mack, 270 N Y S 287, 240 App Div 449, affirmed Schuessler v Metropolitan Casualty Ins Co of New York, 193 N E 427 265 N Y 648

35 N Y —Schuessler v Mack, supra

36. N Y —W E Peets Motors v State, 263 N Y S 762, 147 Misc 218

37 N Y —International Harvester Co of America v Whelan, 8 N E 2d 319, 274 N Y 162, modifying 286 N Y S 844, 247 App Div 215, appeal dismissed in part 6 N E 2d 420, 273 N Y 496, motion denied 11 N E 2d 739, 275 N Y 538

38. N J —Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, 171 A 382, 115 N J Eq 470, affirmed 176 A 341, 117 N J Eq 440

39. N J —Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, supra

40. N J —Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, supra

41. N J —Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, supra

42. La —Leathers & Martin v Conley, App, 157 So 607—Perry v J M Lewis & Co, 129 So 406 14 La. App 90

Rights as between materialman and subcontractor

Where materialman had claim for materials against highway subcontractor and subcontractor had claim with privilege on fund due contractor, but materialman was subcontractor's surety, amount due materialman was held payable out of amount due subcontractor, and only remainder was payable to subcontractor out of contract fund —Temple v Forgy Hanson & McCorkle, La App, 151 So 435

43. Tex —Huddleston & Work v Kennedy, 53 S W 2d 1009, 122 Tex 182, answering certified questions, Civ App, 57 S W 2d 255—Smith v Texas Co, Com App, 53 S W 2d 774, modifying Texas Co v, Schriewer, Civ App, 38 S W 2d 141, and followed in Smith v G B Johnson Hardware Co, Com App, 53 S W 2d 779 and Smith v Jacksboro

unpaid balance due the subcontractor,[44] and likewise a subcontractor can fix a lien on the funds due the original contractor for labor and materials furnished by such subcontractor,[45] but a materialman who furnishes material to another materialman supplying material to the contractor is not entitled under the statute to a lien on the money due the contractor.[46] A subcontractor paying laborers and materialmen and perfecting his lien under such a statute may assign the lien,[47] and, where he has obtained advances from a bank for laborers and materialmen and assigned to the bank funds due him from the contractor and subrogated the bank to his rights, the bank, as assignee, can perfect the lien,[48] but, in the absence of an assignment of his lien or an agreement that the bank should be subrogated to his rights, the bank is not entitled to a lien.[49]

Where a special fund was set aside by court order for the benefit of lienors, other lienors who filed subsequently to the time when such fund was set aside were not entitled to any part of it.[50] Under a contract authorizing the state to apply any money due or to become due to the completion of the work, earned moneys in the hands of the state on default of the contractor are not due or payable to the contractor, and the right of the state to apply them to the completion of the contract is superior to the rights of parties filing liens for labor and materials.[51] Priorities as between lien claimants and assignees of moneys due or to become due under the contract are treated supra subdivision g of this section.

Waiver or discharge. A lien may be released[52] or waived[53] by the creditor, and, as shown infra § 210, it may be discharged, under statutes so providing, by the execution of a bond or undertaking for the purpose. The mere fact that a lien has been filed does not preclude the lienor and the contractor from compromising, settling, or adjusting the claim or extending the time of payment without consent of the custodian of the fund.[54]

§ 210. —— Contractors' Bonds

a. In general

b. For performance of contract

Stone Products Co., Com.App., 53 S.W.2d 780, which affirmed Civ.App., 41 S.W.2d 347—Austin Bridge Co. v. Drake, Civ.App., 79 S.W.2d 677—Metropolitan Casualty Ins. Co. of New York v. Texas Sand & Gravel Co., Civ.App., 68 S.W.2d 551, error dismissed—Smith v. Jacksboro Stone Products Co., Civ.App., 41 S.W.2d 347, affirmed Com.App., 53 S.W.2d 780—Pierce Petroleum Corporation v. Smith, Civ.App., 42 S.W.2d 88, modified on other grounds, Smith v. Pierce Petroleum Corporation, Com.App., 53 S.W.2d 780—B. F. Brooks Const. Co. v. First State Bank of Marquez, Civ.App., 39 S.W.2d 83.

Duty of contractor to protect himself.
Under road contract obligating contractor to provide all machinery and do all work, general contractor must provide for own protection in subletting work, and laborers and materialmen need not determine subcontractor's solvency.—Huddleston & Work v. Kennedy, Civ.App., 57 S.W.2d 255, certified questions answered 53 S.W.2d 1009, 122 Tex. 182.

Necessaries related to improvement.
(1) Lien for supplies furnished subcontractor for laborers exists only for necessaries proximately related to improvements, and, if items in account for necessaries furnished were not furnished for improvement for which moneys were due, no lien could exist on funds.—Foty v. Rotchstein, Tex.Civ.App., 60 S.W.2d 892, error dismissed.

(2) So, claim of seller supplying subcontractor with groceries and supplies for laborers was not lienable where neither pleading nor proof indicated necessity requiring highway subcontractor to furnish such supplies.—Thurber Const. Co. v. Kemplin, Tex.Civ.App., 81 S.W.2d 103.—Foty v. Rotchstein, supra.

44. Tex.—Thurber Const. Co. v. Kemplin, Civ.App., 81 S.W.2d 103.

45. Tex.—Southern Surety Co. of New York v. First State Bank of Marquez, Civ.App., 54 S.W.2d 888, error refused.

Claimant held subcontractor within rule.
Tex.—Thurber Const. Co. v. Kemplin, Civ.App., 81 S.W.2d 103.

46. **Held materialman of materialman.**
Firm furnishing operator of quarry, who sold rock to road contractor with dynamite fuses, and shovels was materialman of materialman within rule of text.—Huddleston v. Nisbit, Tex.Civ.App., 72 S.W.2d 959, error refused.

47. Tex.—Southern Surety Co. of New York v. First State Bank of Marquez, Civ.App., 54 S.W.2d 888, error refused.

48. Tex.—De Montel v. Brance, Civ.App., 151 S.W.2d 859—Southern Surety Co. of New York v. First State Bank of Marquez, Civ.App., 54 S.W.2d 888, error refused.

49. Tex.—Thurber Const. Co. v. Kemplin, Civ.App., 81 S.W.2d 103—B. F. Brooks Const. Co. v. First State Bank of Marquez, Civ.App., 39 S.W.2d 83.

50. N.Y.—International Harvester Co. of America v. Whelan, 8 N.E.2d 319, 274 N.Y. 162, modifying 286 N.Y.S. 844, 247 App.Div. 215, appeal dismissed in part 6 N.E.2d 420, 273 N.Y. 496, and motion denied 11 N.E.2d 739, 275 N.Y. 538.

51. N.Y.—Slattery v. National Commercial Bank & Trust Co., 286 N.Y.S. 337, 247 App.Div. 221.

52. Tex.—Verschoyle v. Holifield, 123 S.W.2d 878, 132 Tex. 516, modifying Civ.App., 90 S.W.2d 907.

Acceptance of notes held not to extinguish lien.
N.Y.—Yonkers Builders Supply Co. v. Petro Luciano & Son, 199 N.E. 45, 269 N.Y. 171, 102 A.L.R. 759, reversing 277 N.Y.S. 648, 243 App.Div. 783.
Tenn.—Hamblen Motor Co. v. Miller & Harle, 266 S.W. 99, 150 Tenn. 602.

53. Tex.—Verschoyle v. Holifield, Civ.App., 90 S.W.2d 907, modified on other grounds, 123 S.W.2d 878, 132 Tex. 516.

Failure to foreclose.
Lien of towing company, not instituting foreclosure proceedings within four months, was lost.—Nemah River Towboat Co. v. Brewster, 278 P. 694, 152 Wash. 672, modified on other grounds 279 P. 1107, 152 Wash. 672.

54. N.Y.—Yonkers Builders Supply Co. v. Petro Luciano & Son, 199 N.E. 45, 269 N.Y. 171, 102 A.L.R. 759, reversing 277 N.Y.S. 648, 243 App.Div. 783.

c For payment of claims for labor and material, etc.
d. Other conditions or bonds of contractor
e Subcontractors' bonds
f Bonds to obtain release of funds
g Actions on bonds

a. In General

On the letting of a contract for road work the highway authorities may require a bond of the contractor

Where a board, commission, or other public body is authorized to contract for the performance of highway work, it may, by virtue of its incidental powers and without express statutory authority, require of the contractor the execution of a bond with surety, conditioned for the proper performance of the work and other matters properly related thereto[55] Usually, however, statutes require a bond of a highway contractor, this obligation frequently being imposed by statutes applicable to public works or improvements generally.[56] Sometimes the bond is dual in character[57] in that it contains two obligations, one to the state, board, or district for the performance of the contract, see infra subdivision b of this section, and the other to laborers and materialmen to pay them for labor and material supplied, see infra subdivision c of this section, each obligation being independent of the other[58]

What law governs The law of the state where the bond is executed has been held to govern[59]

Consideration and acceptance The award of a contract for road work is a sufficient consideration for the promise of the contractor and his surety[60]

The surety's contract is complete and binding without any notice of acceptance, either by the original contractor or by persons entitled to the benefit of the bond[61]

Amount of bond The bond of a road contractor should be in the amount prescribed by the statute[62]

55. Ind—Title Guaranty & Surety Co of Scranton, Pa v State ex rel Leavenworth State Bank, 109 N E 237, 111 N E 19, 61 Ind App 268
N M—Southwestern Portland Cement Co v Williams, 251 P 380, 32 N M 68, 49 A L R 525
Wash—Western Steel Casting Co v Edland 61 P 2d 155, 187 Wash 666
Wyo—Franzen v Southern Surety Co, 246 P 30, 32 35 Wyo 15 46 A L R 496 citing **Corpus Juris.**

56. Ark—Burt v Road Improvement Dist No 11, 253 S W 1, 159 Ark 275
Iowa—Southern Surety Co v Jenner Bros, 237 N W 500, 212 Iowa 1027
29 C J p 611 note 37
Contractors' bonds
Counties see Counties § 201
Municipal corporations see the C J S title Municipal Corporations §§ 1171–1181, also 44 C J p 351 note 73 et seq
States see the C J S title States §§ 117–119, also 59 C J p 178 note 30 et seq
United States see the C J S title United States §§ 107–116, also 65 C J p 1323 note 63 et seq
Bonds for other public works and improvements see particular titles of this work

Statutes held valid
Wyo—Franzen v Southern Surety Co, 246 P 30, 35 Wyo 15, 46 A L R 496
29 C J p 611 note 37 [a]

Statute is mandatory and bond cannot be waived
Ark—Burt v Road Improvement Dist No 11, 253 S W. 1, 159 Ark 275.
Conn—Kelley v Torrington, 71 A 939, 81 Conn 615
29 C J p 611 note 45

State road commission is included in phrase "other legal bodies" as used in statute requiring public improvement contractor's bond—Rhodes v Riley, 169 S E 525, 113 W Va 679

Bond as contract of insurance
Bond is contract of insurance on conditions nominated therein and is not strictly a contract of surety—Missouri State Highway Board, for Use and Benefit of Fredonia Portland Cement Co v Southern Surety Co, Mo App, 9 S W 2d 92

Authority of insurance agent to sign bond
When insurance agent signed highway contractors' bond as "attorney in fact," board of commissioners and parties connected with transaction were chargeable with notice that agent depended on authority limited and special in nature, delegated by written instrument—Massachusetts Bonding & Insurance Co v Bankers' Surety Co, 179 N E 329, 96 Ind App 250

Reexecution of bond on making new contract
(1) Statutory bond, given by engineers contracting for road work, treated as being in force after making substituted contract, was sufficient without necessity of reexecution—Jonesboro-Nettleton Road Improvement Dist v Klyce, C C A Ark, 15 F 2d 918

(2) Where contractor, under road construction contract made pursuant to Acts 1910 c 217, defaulted, a substituted contract could be made with surety's employee with consent of surety, requiring construction in accordance with original contract and it was unnecessary to require new bond of contractor—Howard County Comrs v Matthews, 127 A 118, 146 Md 553

57. U S—Kosmos Portland Cement Co v D A Y Const Co, C C A Ind, 101 F 2d 893—Maryland Casualty Co v Dulaney Lumber Co, C C A Miss 23 F 2d 378 certiorari denied Bank of Ruleville v Maryland Casualty Co, 48 S Ct 560, 277 U S 598, 72 L Ed 1007
Ark—Aetna Casualty & Surety Co v Hensley, 260 S W 414, 163 Ark 492
Fla—Fulghum v State, 109 So 644, 92 Fla 662
La—State v Miller, 126 So 422, 169 La 914
N C—Independence Trust Co v Porter & Boyd, 132 S E 806, 191 N C 672

58. Ga—Seibels Bruce & Co v National Surety Corporation, 11 S E 2d 705 63 Ga 520—Whitley v Bryant, 200 S E 317, 59 Ga App 58

59 U S—First Nat Bank v Caples, C C A Tex, 17 F 2d 87

60. Or—Clatsop County v Feldschau 199 P 953, 101 Or 369, 18 A L R 1221
S D—Dennis v Great Northern Const Co, 222 N W 269, 53 S D 646

61. S D—Dennis v Great Northern Const Co, supra

62. Or—Fitzgerald v Neal, 231 P 645, 113 Or 103
29 C J p 611 note 39 [b].

Sufficiency; approval The bond required of a contractor must run to the proper obligee,[63] but, where it is clear that the proper obligee was intended, a mere mistake will not invalidate the bond.[64] The statutory bond required of the contractor must embody the requirements specified in the statute,[65] although mere informalities in the bond or in its execution will not necessarily avoid it.[66] A bond may be sufficient although it is not in the exact words of the statute.[67] The validity of a bond may not be questioned after the district and the contractor have substantially performed.[68]

When required by statute the bond must be approved by the public officer designated.[69] In the absence of statutory directions, the sufficiency of the surety is a matter solely for the determination of the public officials in the exercise of their discretion.[70] The officers charged with the duty of approving or disapproving a bond are performing a duty that is discretionary, and the courts will not compel them to make any particular decision as far as the question of the sufficiency of the surety is concerned and their determination will not be disturbed in the absence of a showing that their action was arbitrary, oppressive or fraudulent.[71] Where a bond has been given and approved, but proves to be invalid, a second bond may be given without further approval.[72]

Construction General rules pertaining to the construction of bonds usually are applicable to contractors' bonds for highway work.[73] The bond must be construed as a whole[74] and in connection with the highway contract.[75] The terms of the bond should be construed liberally to effect the purpose for which it was given,[76] but its provisions should not be extended beyond the reasonable in-

Conflict of statutes

General Code § 2365-2 providing that bond shall be "in an amount equal to at least fifty per cent (50%) of the contract price" is not in irreconcilable conflict with Gen Code § 6917 requiring a "sum equal to one-half of the estimated cost of the work," but they can be and are to be read and construed together so as to give effect to both.—Southern Surety Co v Standard Slag Co, 159 N E 559, 117 Ohio St 512

63. Agency of state

State board of administration not being separate from state, a bond made payable to board is payable to state.—Consolidated Indemnity & Ins Co v Texas Co, 140 So 566, 224 Ala 349

64. Mo.—State ex rel and to Use of Missouri Mine Tailings Co v Southern Surety Co, App, 14 S W 2d 677

Bond naming state highway board instead of state highway commission, the highway commission being successor to the highway board, is not invalid where it is evident that the state highway commission was intended and the use of the word "board" instead of "commission" was a mere inadvertence.—State ex rel and to Use of Missouri Mine Tailings Co v Southern Surety Co, supra

Good as common-law bond

Although Rev St 1919 § 1040 contemplates that bond of road contractor shall run to state where bond was made to state highway commission it was good as a common-law bond.—Missouri State Highway Commission ex rel and to Use of Licking State Bank v Coopers Const Service Co, 286 S W 736, 220 Mo App 401

65. U S.—Southern Surety Co v. Ft Smith Dist of Sebastian County, C C A Ark, 17 F 2d 63

Ga.—Yancey Tractor Co v Southern Surety Co, 157 S E 298, 172 Ga 110

29 C J p 611 note 38

66. Cal.—Byrne v Luning Co, 38 P 454, 4 Cal Unrep Cas 895

Ind.—Larned v Maloney, 49 N E 278, 19 Ind App 199

29 C J p 611 note 39

67. Fla.—Fulghum v State, 109 So 644, 92 Fla 669

Test of sufficiency of contractor's bond is whether statutory "obligation" has been created or imposed and not formula of words used.—Fulghum v State, supra

68. U S.—Jonesboro-Nettleton Road Improvement Dist v Klyce, C C A Ark 15 F 2d 918

69 U S.—Southern Surety Co v Ft Smith Dist of Sebastian County, C C A Ark, 17 F 2d 63

70. Kan.—Marquette Gravel & Construction Co v Bengtson, 274 P 253, 127 Kan 492

Financial worth

Sufficiency of surety on contractor's statutory bond may depend on other considerations than financial worth above debts, liabilities, and exemptions.—Marquette Gravel & Construction Co v Bengtson, supra

Surety company or personal bond

The public authorities may require a surety company bond instead of a personal bond.—Marquette Gravel & Construction Co v Bengtson, supra

71. Kan.—Marquette Gravel & Construction Co v Bengtson, supra

72. Ind.—Massachusetts Bonding & Ins Co v State 127 N E 223, 76 Ind App 16, followed in 127 N E 226, 76 Ind App 692

73. Ark.—New Amsterdam Casualty Co v Detroit Fidelity & Surety Co, 58 S W 2d 418, 187 Ark 97—Norton v Maryland Casualty Co, 32 S W 2d 172, 180 Ark 609

Construction of bonds generally see Bonds §§ 38–61

74. Ark.—New Amsterdam Casualty Co v Detroit Fidelity & Surety Co, 58 S W 2d 418, 187 Ark 97

75. N C.—Overman & Co v Great American Indemnity Co, 155 S E 730, 199 N C 736

S C.—American Hardware & Equipment Co v Detroit Fidelity & Surety Co, 156 S E 770, 159 S C 263

Va.—Fidelity & Deposit Co of Maryland v Bailey, 133 S E 797, 145 Va 126

Bond as essential part of contract

U S.—Maryland Casualty Co v Dulaney Lumber Co, C C A Miss 23 F 2d 378, certiorari denied Bank of Raleville v Maryland Casualty Co, 48 S Ct 560, 277 U S 598, 72 L Ed 1007

Court may consider character of contract to cover which the application for the bond was made.—Southern Surety Co v J A Perdue & Co, 203 S W 576, 134 Ark 458

Incorporation by reference

(1) The terms of the contract may be incorporated into the bond by an express reference in the bond.—Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666

(2) Where contract between state and highway contractor was, in effect, made part of surety's bond, contract and bond were to be construed together.—Eubanks v Schwalbe, 55 S W 2d 906, modified on other grounds U S Fidelity & Guaranty Co v Eubanks, 87 S W 2d 248, 126 Tex 405

76. Ky.—Standard Oil Co of New

tent gathered from the purpose and language of the bond, and construed in connection with the proposals, plans and specifications and contract.[77]

Statute as part of bond The statute requiring and regulating bonds of highway contractors is deemed to be a part of every statutory bond given by a contractor for road work[78] Such bonds are to be construed in connection with, and in the light of, the statute requiring them,[79] as though the provisions of the statute were written into them[80] However, there is authority that the statute fixing the terms of a bond will not be read into the bond[81]

Extrastatutory conditions. Where a statute requires that a bond be taken, conditioned as specified by such statute, it has been held that the board or other public officials may take a bond more broadly conditioned than is required by the statute, provided the statute does not prohibit the taking of such a bond, and if the matter of the additional provisions is properly related to the work of the improvement,[82] and if such a bond is voluntarily given in consideration of the contract it may be enforced according to its terms,[83] even when the condition is for the benefit of third persons[84] However, it has

Jersey v National Surety Co, 29 S W 2d 29, 234 Ky 764

77. N C—John L Roper Lumber Co v Lawson, 143 S E 847, 195 N C 840, 67 A L R 984

78 Ark—New Amsterdam Casualty Co v Detroit Fidelity & Surety Co, 58 S W 2d 418, 187 Ark 97
Cal—Cooley v Freeman, 266 P 545, 204 Cal 59
Ind—Ohio Oil Co v Fidelity & Deposit Co of Maryland, App, 42 N E 2d 406—Metropolitan Casualty Ins Co of New York v Natural Rock Asphalt Corporation, 6 N E 2d 739, 103 Ind App 687
Iowa—Monona County v O'Connor, 215 N W 803, 205 Iowa 1119
Neb—Peter Kiewit Sons' Co v National Casualty Co, Neb, 8 N W 2d 192
Ohio—Standard Oil Co v Detroit Fidelity & Surety Co, 157 N E 418, 24 Ohio App 237
Or—Multnomah County v U S Fidelity & Guaranty Co, 180 P 104, 92 Or 146
Tex—Foust v Bibb, Civ App, 258 S W 921 reversed on other grounds, Com App, 272 S W 445

That which is not expressed in bond but which should have been incorporated is included in the bond—Williamson v Williamson, 247 N W 704, 262 Mich 401, 89 A L R 442

Cashier's check in lieu of bond
Obligations, affecting cashier's check deposited in lieu of statutory bond for public work, are determined by statute—State v Storm, 287 P 689, 49 Idaho 246

79. Del—State v Ætna Casualty & Surety Co, 145 A 172, 4 W W Harr 158
Iowa—Southern Surety Co v Jenner Bros, 237 N W 500, 212 Iowa 1027
La—Louisiana Highway Commission v McCain, 1 So 2d 545, 197 La 359—Lane v E J Deas Co, 125 So 514, 12 La App 382
Va—C S Luck & Sons v Boatwright, 162 S E 53, 157 Va 490
Wyo—Franzen v Southern Surety Co, 246 P 30, 35 Wyo 15, 46 A L R 496

Reference to wrong statute
In highway contractors' bond, reference in the plans and specifications to Complete Tex St 1920 art 5623a (Vernon Civ St Annot Suppl 1918 art 5623a), relating to private contractors, was incidental and obvious error, and should be disregarded and the contract and bond construed by the terms of art 6394f (Vernon's Sayles Civ St Annot 1914 art 6394f)—U S Fidelity & Guaranty Co v Henderson County, 253 S W 835, affirmed, Com App, 276 S W 203, in which motion is overruled 276 S W 1119

80 Ind—Ohio Oil Co v Fidelity & Deposit Co of Maryland, App, 42 N E 2d 406
Mich—Williamson v Williamson, 247 N W 704, 262 Mich 401, 89 A L R 442
Mo—State ex rel and to Use of Winebrenner v Detroit Fidelity & Surety Co, 32 S W 2d 572, 326 Mo 684, 71 A L R 1131, affirming, App, 300 S W 833

81. Pa—Commonwealth to Use of Howard W Read Corporation v A Stryker, Inc, 167 A 459, 109 Pa Super 137

82. Ind—Southern Surety Co v Merchants' & Farmers Bank of Avilla, 176 N E 846, 203 Ind 173, rehearing denied 179 N E 327 203 Ind 173—Massachusetts Bonding & Insurance Co v State, 149 N E 377, 82 Ind App 377
Or—Clatsop County v Feldschau, 199 P 953, 101 Or 369, 18 A L R 1221
Wash—Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666
29 C J p 611 note 42

Corpus Juris cited collaterally on the proposition that the state may require a bond from a bridge contractor conditioned more broadly than is required by statute—Foster v Kerr & Houston, 179 A 297, 133 Me 389
Bonds of bridge contractors see Bridges § 23

State highway commission
(1) A bond other than that prescribed by statute may not be exacted from the contractor by the state highway commission—State v Ætna Casualty & Surety Co, 265 P 782, 125 Or 194—State v U S Fidelity & Guaranty Co, 265 P 775, 125 Or 13

(2) However, it has been stated that the state highway commissioner may, like other municipal bodies of the state, require public contractor to execute bond containing provisions making it responsible for payment of claims in excess of those provided for by statute—Fitzgerald v Neal, 231 P 645, 113 Or 103

83. U S—American Surety Co of New York v James A Dick Co, C C A N M, 23 F 2d 464, certiorari denied 49 S Ct 26, 278 U S 624, 73 L Ed 545
Ind—Massachusetts Bonding & Insurance Co v State, 149 N E 377, 82 Ind App 377—Title Guaranty & Surety Co of Scranton, Pa v State, ex rel Leavenworth State Bank 109 N E 237, 111 N E 19, 61 Ind App 268
Or—Clatsop County v Feldschau, 199 P 953, 101 Or 369, 18 A L R 1221
Wis—Hunter Mach Co v C C Vanderbloom & Sons, 214 N W 613, 193 Wis 218
29 C J p 613 note 69 [a]

Common-law obligation
The undertaking as to such additional condition is a common law obligation, which, having been voluntarily assumed, is valid if in harmony with, and not prohibited by, statute—Fitzgerald v Neal, 231 P 645, 113 Or 103

Contractor and surety promising more than fixed by requirements of statute could not complain of such excessive promises—C S Luck & Sons v Boatwright, 162 S E 53, 157 Va. 490

84. Kan—Road Supply & Metal Co v Kansas Casualty & Surety Co, 246 P 503, 121 Kan 299
Condition for benefit of laborers, materialmen, etc, see infra subdivision c (1) of this section

also been held that extrastatutory conditions are without force or effect,[85] and whatever is written in the bond which is not required by statute must be read out of it.[86]

Premiums on bonds Where the highway construction contract and bond were never legally binding or effective, and no work was done under the contract, the highway authorities who had advanced the premiums on the surety bond may recover of the surety company the amount of premiums paid.[87] Where the surety company has been released from liability under the bond, the highway contractor is entitled to a recovery of the unearned premium.[88] Where the bond is canceled, the surety company may not recover premiums for a period postdating the cancellation.[89]

Liability of surety. General rules pertaining to the liability of sureties ordinarily apply to sureties on highway contractor's bonds.[90] The sureties are liable for a breach of the conditions of the bond[91] and the extent of their liability is measured by the terms of the bond[92] read in connection with the statute requiring the bond,[93] and liability cannot be extended beyond its terms;[94] the sureties' obliga-

85. Iowa—Monona County v O'Connor, 215 N W 803, 205 Iowa 1119—Schisel v Marvill 197 N W 662, 198 Iowa 725

Tex—U S Fidelity & Guaranty Co v Eubanks, Com App, 87 S W 2d 248, modifying Eubanks v Schwalbe, Civ App, 55 S W 2d 906—Page v Schlortt, Civ App, 89 S W 2d 219

86. La—Louisiana Highway Commission v McCain, 1 So 2d 545, 197 La 359—Miller v Bonner, 111 So 776, 163 La 332—Interstate Wholesale Grocer Co v Prutsman, 1 La App 731

87. Ark—Southern Surety Co v Dardanelle Road Improvement Dist No 1 276 S W 1014, 169 Ark 755 42 A L R 299

Matters rendering contract void

(1) Where construction contract was entered into before assessment of benefits became final, and benefits as finally determined were less than cost of improvements contract was never legally effected and no liability on surety bond ever attached—Southern Surety Co v Dardanelle Road Improvement Dist No 1, supra

(2) Where Acts Spec Sess 1920 No 63, enacted after a construction contract was entered into, made material changes in roads to be improved, the construction company could not be bound by such changes so that its contract and surety bond protecting it were not legally effective—Southern Surety Co v Dardanelle Road Improvement Dist No 1, supra

Defense of illegality

(1) In action by road district on abandonment of project to recover premiums paid by it on contractor's surety bond, it is no defense that road district was a party to illegal contract, since it is not fault of district composed of taxpayers that illegal contract was entered into, but fault of commissioners—Southern Surety Co v Dardanelle Road Improvement Dist No 1, supra

(2) Action to recover premiums by road district on surety bond was not defeated on ground that district was in pari delicto to illegal contract covered by bond, under rule that doctrine of pari delicto has no application to corporate contracts void merely because malum prohibitum or ultra vires—Southern Surety Co v Dardanelle Road Improvement Dist No 1, supra

Although company did not receive all of premiums because of action of its agent, total amount of premiums paid to agent may be recovered, where agent acted within apparent authority—Southern Surety Co v Dardanelle Road Improvement Dist No 1, supra

88. Tenn—Southern Construction Co v Southern Surety Co, 10 Tenn App 506

89. Receiver appointed for surety company

Where applications for road contractor's bonds provided for separate premiums while bond served purposes of bid construction and maintenance bonds, respectively and stated that construction was not to commence until improvement bonds were sold and there was a general custom that construction bond premiums should not accrue until after sale of improvement bonds, receiver of surety company appointed before sale of improvement bonds thereby canceling contractor's bond could not recover premiums for construction period—Denny v Carpenter Const Co 168 N E 242 91 Ind App 241

90. Ky—Massachusetts Bonding & Insurance Co v C B Duff & Co, 87 S W 2d 363, 261 Ky 255

Scope and extent of liability of surety as to creditor or obligee generally see the C J S title Principal and Surety §§ 90 115 also 50 C J p 71 note 89 et seq

91. Wyo—Franzen v Southern Surety Co 246 P 30 34, 35 Wyo 15, 46 A L R 496, citing **Corpus Juris.**

29 C J p 612 note 57

92. Ark—Gage & Spencer v Road Improvement Dist No 3 of Newton County, 252 S W 922, 159 Ark 642

Ky—Massachusetts Bonding & Insurance Co v C B Duff & Co, 87 S W 2d 363 261 Ky 255

All liabilities naturally arising from bond must be deemed to have been contemplated by the contractor and surety—Fidelity & Deposit Co of Maryland v Arenz, Or, 54 S Ct 16 290 U S 66, 78 L Ed 176, reversing, C C A, 61 F 2d 607, certiorari granted 53 S Ct 403, 288 U S 597, 77 L Ed 974

Proper interpretation of expressions incident to purpose for which bond was executed will be resorted to for ascertainment of extent of obligation—Employers' Casualty Co v Rockwall County, Civ App, 300 S W 118 modified on other grounds 35 S W 2d 690, 120 Tex 441, reformed 38 S W 2d 1098, 120 Tex 441

Obligations are measured by terms of main contract and things done thereunder—Slattery v National Commercial Bank & Trust Co, 286 N Y S 337, 247 App Div 221

93. Va—C S Luck & Sons v Boatwright 162 S E 53, 157 Va 490

94. Ark—New Amsterdam Casualty Co v Detroit Fidelity & Surety Co, 58 S W 2d 418, 187 Ark 97

Fla—Fulghum v State, 109 So 644, 92 Fla 662

N J—Skillman v U S Fidelity & Guaranty Co, 130 A 564, 101 N J Law 511

Pa—Greene County v Southern Surety Co, 141 A 27, 292 Pa 304 29 C J p 612 note 58

Compensated surety

(1) Under some authorities the rule that liability of surety shall not be extended beyond precise terms of his contract is not applicable to compensated surety company, in action on an undertaking given by a public contractor for improvement of public highway—Fitzgerald v Neal 231 P 645, 113 Or 103

(2) The rule that a bond should be construed most strongly against the surety company does not mean that the bond shall be construed so as to impose burdens not within its terms—Norton v Maryland Casualty Co, 32 S W 2d 172, 180 Ark 609

tion is usually coextensive with, and does not exceed, the liability of the contractor.[95]

Discharge of surety General rules governing the discharge of sureties usually apply to sureties on bonds of highway contractors.[96] The court may not release the sureties on the bond unless the power is conferred by statute and action is taken in accordance with its terms,[97] and in the absence of statutory authority a county board as obligee of the bond is without power to release the surety on the giving of a new bond.[98] Further, where a board of county commissioners refuses to relieve a highway contractor and his surety from liability, it is without authority in the absence of statute to reverse its order.[99]

Rights of surety General rules regulating the rights of sureties usually are applicable to sureties on highway contractors' bonds.[1] The rights of the surety relate back to the date of the bond.[2]

b For Performance of Contract

(1) In general

(2) Rights, liabilities, and discharge of surety; defenses

(3) Completion of work by surety

(1) In General

On the letting of a contract for road work the highway contractor may be required to execute a bond conditioned for the faithful performance of the contract, which bond is primarily intended to indemnify the highway authorities for expense incurred in completing the work on default of the contractor

Highway contractors ordinarily are required by statute to give a bond for the faithful performance of the contract,[3] and, as shown infra subdivision c of this section, the statute may, in addition, require an obligation in the bond for the payment of claims due laborers, materialmen, etc

Construction Where a highway contractor's bond is given for the performance of the contract, the bond is made with relation to the contract and as a part of it and the two are to be construed together.[4] An undertaking given by a compensated surety to guarantee the faithful performance of a con-

95. U S--National Surety Co of New York v Ulmen C C A Mont, 68 F 2d 330, certiorari denied Ulmen v National Surety Co of New York, 54 S Ct 629, 292 U S 624, 78 L Ed 1479

Ariz--State for Use and Benefit of Pierson v C G Willis & Sons, 50 P 2d 20, 46 Ariz 217

Minn--Lucas v Ganley Bros, 206 N W 934, 166 Minn 7

Mont--Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P 722, 79 Mont 111

Va--C S Luck & Sons v Boatwright 162 S E 53, 157 Va 490

Wash--Lidral-Wiley, Inc v U S Fidelity & Guaranty Co, 38 P 2d 346, 179 Wash 631

When cause of action against contractor is barred, right of action against surety on bond ceases to exist State v American Surety Co of New York, 300 P 511, 137 Or 391, rehearing denied 2 P 2d 1116, 137 Or 394

96. Tenn--Southern Construction Co v Southern Surety Co, 10 Tenn App 506

Wash Maryland Casualty Co v Philbrick & Nicholson, 266 P 142, 147 Wash 277

Discharge of surety generally see the C J S title Principal and Surety §§ 116-211, also 50 C J p 92 note 28 et seq

Conspiracy between insolvent road contractor and other beneficiaries under bond to shift greater burden to surety than would arise under bona fide operations is illegal --Union Indemnity Co v Ricks, 140 So 597, 224 Ala 514.

Where entirely different contract was substituted for contract under which bond was given, surety was released --Police Jury of Parish of Avoyelles v Gaspard, 108 So 128, 161 La 70

97. Ind--Foulkes Contracting Co v U S Fidelity & Guaranty Co, 130 N E 831, 75 Ind App 393

98. Ind--Massachusetts Bonding & Insurance Co v State, 149 N E 377, 82 Ind App 377

Powers of county boards see Counties § 82

99. Ind--Pass v State, 147 N E 287, 83 Ind App 598

1. N J--Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation 171 A 382, 115 N J Eq 470, affirmed 176 A 341, 117 N J Eq 440

Rights and remedies of sureties generally see the C J S title Principal and Surety §§ 286-312, also 50 C J p 230 note 74 et seq

Compelling contractor to pay debt

Highway contractor's sureties, on bill quia timet may require contractor to pay debt and obtain decree generally against him for creditor but not decree directing payment out of contract price or other particular part of contractor's estate on which neither sureties nor creditor has lien --Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, supra

Rights against contractor on payment of debt

Highway contractor's sureties paying contractor's debt for which sureties are liable stand in creditor's position and may sue contractor for amount paid, but do not acquire lien on contract price --Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, supra

2. U S--Maryland Casualty Co v Dulaney Lumber Co, C C A Miss, 23 F 2d 378, certiorari denied Bank of Rulevile v Maryland Casualty Co 48 S Ct 560, 277 U S 598, 72 L Ed 1007

3. Ark--Burt v Road Improvement Dist No 11, 253 S W 1, 159 Ark 275--Oliver Const Co v Williams, 238 S W 615, 152 Ark 414

Nature of bond

Bond of compensated surety guaranteeing faithful performance of contract for construction of road is in nature of insurance contract --West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544

Priority of state's claim

In the absence of a provision in the statute the state has no priority over other claims against the bond --New York Indemnity Co v. Niven, 133 So 261, 222 Ala 562

4. U S--Standard Accident Ins Co v Simpson C C A S C 64 F 2d 583, certiorari denied Carolina Contracting Co v Standard Acc Ins Co 54 S Ct 123, 290 U S 688, 78 L Ed 593

Mont--Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P 722, 79 Mont 111

N C--Asheville Supply & Foundry Co v Catawba Const Co, 151 S E 93, 198 N C 177.

tract for the improvement of a public highway stands on the same footing as a contract affecting the public interest, and should, it has been said, be construed liberally in favor of the public [5]

Persons secured. A bond for the faithful performance of the contract is primarily for the benefit of the highway authorities and is intended to indemnify them for expense necessarily incurred by them in completing the work contracted for in the event the contractor quits the work before it is completed.[6] Whether a faithful performance bond inures to the benefit of third persons, such as laborers, materialmen, and the like, depends on the intention of the parties as expressed in the bond, construed in connection with the contract and the statute pursuant to which the bond has been given [7] A performance bond is not for the benefit of laborers and materialmen where a separate bond for their benefit is executed by the contractor,[8] and in such cases they may not claim the benefit of the performance bond merely because they have lost their rights under the bond given for their benefit by failing to perfect their claim in the manner prescribed[9] or by failing to bring suit on their bond within the time prescribed [10] However, a performance bond may inure to the benefit of laborers and materialmen where there is a provision in the contract binding the contractor to pay for labor and material,[11] and, as shown infra subdivision c (1) of this section, where the statute directs that the contractor's bond shall contain a condition for the benefit of laborers and materialmen, such persons may be protected under the statute although the condition is omitted from the bond Nevertheless where the contract simply obligates the contractor to furnish the material and to perform the work, it has been held that the bond for performance does not embrace payment of claims for labor and material [12]

(2) Rights, Liabilities, and Discharge of Surety, Defenses

The rights, liabilities, and discharge of sureties on highway contractors' performance bonds are usually controlled by general rules

General rules regulating the liability of sureties usually apply to sureties on highway contractors' bonds conditioned for the faithful performance of the contract [13] On default of the contractor the surety becomes liable for the performance of the contract,[14] and consent to the completion of the

5. Or—Fitzgerald v Neal, 231 P 645, 113 Or 103

6. Kan—Road Supply & Metal Co v Bechtelheimer 240 P 846, 119 Kan 560
La—Miller v Bonner, 111 So 776, 163 La 332
R I—Glens Falls Indemnity Co v American Awning & Tent Co 180 A 367, 55 R I 284 reargument denied 181 A 297, 55 R I 308
29 C J p 612 note 48

7. Cal—Maryland Casualty Co v Shafer, 208 P 192 57 Cal App 580
Kan—Shannon v Abrams 157 P 449, 98 Kan 26, Ann Cas 1918E 502
Ky—Standard Accident Ins Co v Commonwealth, 35 S W 2d 22 237 Ky 170
La—Miller v Bonner, 111 So 776, 163 La 332
Pa—Montgomery County v Ambler-Davis Co, 153 A 621, 302 Pa 333—Davis v Southern Surety Co, 153 A 119, 302 Pa 21—Greene County v Southern Surety Co, 141 A 27, 292 Pa 304
Contract for benefit of third persons generally see Contracts § 519

Absence of lien on public improvement does not determine right of third persons—Standard Oil Co of New Jersey v National Surety Co, 29 S W 2d 29, 234 Ky 764

Incidental beneficiaries

Even though referred to in bond, stranger to highway contract or bond securing performance thereof cannot recover against surety in absence of specific promise to pay such third person, mere statement of duties to be discharged by highway contractor which may incidentally benefit third person or class to which latter belongs without more, does not make surety liable to third person for contractor's failure to discharge duty—National Surety Co of New York v Ulmen C C A Mont 68 F 2d 330 certiorari denied Ulmen v National Surety Co of New York, 54 S Ct 629, 292 U S 624, 78 L Ed 1479

Person injured on highway is not covered by the bond
U S—National Surety Co of New York v Ulmen, C C A Mont, 68 F 2d 330, certiorari denied Ulmen v National Surety Co of New York 54 S Ct 629, 292 U S 624, 78 L Ed 1479
Miss—Redditt v Wall, 55 So 45, 34 L R A,N S, 152

8. Cal—Maryland Casualty Co v Shafer, 208 P 192, 57 Cal App 580
Kan—Cavanaugh v Globe Indemnity Co, 44 P 2d 216, 141 Kan 774

9. Cal—Maryland Casualty Co v Shafer 208 P 192, 57 Cal App 580

10. Kan—Cavanaugh v Globe Indemnity Co, 44 P 2d 216, 141 Kan 774

11. U S—American Surety Co of New York v James A Dick Co, C C A N M, 23 F 2d 464, certiorari denied 49 S Ct 26, 278 U S 624, 73 L Ed 545—Southwestern Portland Cement Co v O C McElrath Const Co, D C N M, 11 F 2d 910
Ky—Blair & Franse Const Co v Allen, 65 S W 2d 78, 251 Ky 366
Mont—Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland 255 P 722 79 Mont 111
N M—Southwestern Portland Cement Co v Williams 251 P 380, 32 N M 68, 49 A L R 525
N C—State Prison v Massachusetts Bonding & Insurance Co, 135 S E 125 192 N C 391
What constitutes labor and material etc see infra subdivision c (3) of this section

12. Ky—Standard Accident Ins Co v Commonwealth 35 S W 2d 22 237 Ky 170—Standard Oil Co of New Jersey v National Surety Co, 29 S W 2d 29, 234 Ky 764
R I—Glens Falls Indemnity Co v American Awning & Tent Co, 180 A 367 55 R I 284 reargument denied 181 A 297, 55 R I 308
Scope and extent of liability of surety as to creditor or obligee generally see C J S title Principal and Surety §§ 90 115, also 50 C J p 71 note 89 et seq

13. Mont—Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P 722, 79 Mont 111

14. Ind—Montgomery v Southern Surety Co of Iowa, 162 N E 31, 96 Ind App 472

Defaulted contractors' surety cannot complain of increased cost of work due to damage by elements during negotiations with contractor proposed by surety and original faul-

work by the contractor's surety is a waiver of damages occasioned by the default of the principal [15] When the construction contract has been fully performed, there can be no liability on a faithful performance bond [16] In an action by the highway authorities for failure of the contractor to complete the work it is no defense that the surety is also liable on a bond to labor and material claimants who are not parties to the action [17]

Discharge of sureties General rules controlling the discharge of sureties ordinarily apply to sureties on highway contractors' bonds conditioned for the faithful performance of the contract [18] The surety may be released where the highway authorities breach the contract [19] The surety is released where the highway authorities make material changes in the contract which were not authorized to be made under the terms of the contract [20] or where the authorities fail to withhold the percentage required to be withheld under the terms of the contract [21] or bond [22] Where the contractor abandons the contract and the surety tenders an acceptable contractor who is willing to complete the contract in accordance with the original plans and specifications, and requests and urges the authorities to make such a contract and agrees as surety to be bound thereby, and to indemnify against any loss for failure of the new contractor to complete the contract, and the highway authorities refuse to make such contract, but instead make with the same contractor a more onerous contract, the surety is released from all liability over and above that which it would have incurred had the authorities made the contract tendered [23]

Rights of surety The rights of a surety on a bond of a highway contractor conditioned for the performance of the contract usually are controlled by general rules [24]

ty construction —Detroit Fidelity & Surety Co v Moberly, Civ App, 52 S W 2d 298, modified on other grounds Detroit Fidelity & Surety Co v State, 76 S W 2d 492, 124 Tex 145

Liability of surety for loan to contractor

Surety is liable for amount of money lent by the county at its request —Maryland Casualty Co v Ballard County, 289 S W 316, 217 Ky 343

Liability for excess payments by county

Bond executed by county highway engineers did not cover liability by reason of county having advanced amount in excess of that due —Hill County v Bryant & Huffman 16 S W 2d 513 118 Tex 359, affirming in part and reversing in part, Civ App, 264 S W 520

15. Tex —Paris First Nat Bank v O'Neil Engineering Co, Civ App, 176 S W 74

16 Kan —Road Supply & Metal Co v Bechtelheimer, 240 P 846, 119 Kan 560

17. **Surety can protect itself against liability to pay more than amount of bond** by petition in the court, after notice to all known claimants, for leave to pay the amount into court for distribution among those entitled thereto —Commonwealth v Neff, 114 A 267, 271 Pa 312—Commonwealth v Bader, 111 A 266, 271 Pa 308

18. La —State v Smith, 119 So 56, 167 La 301

Discharge of surety generally see the C J S title Principal and Surety §§ 116-244, also 50 C J p 92 note 28 et seq

Premature payment to road contractor does not release surety where it was not injured or prejudiced —Pickens County v National Surety Co, C C A S C 13 F 2d 758

Impossibility of performance

(1) In a suit upon a contractor's bond an affidavit of defense, alleging that at the outbreak of the war the United States assumed control of transportation, labor, and materials, that it declared road work nonessential, and substantially stopped all progress thereon, of which facts the court should take judicial knowledge, but without alleging what materials required the contractor was unable to obtain by reason thereof, or the points from which such materials were to be transported and without expressly alleging that the contractor could not procure the transportation of such materials, merely alleges difficulty, not impossibility, of performance of the contract, and is insufficient —Commonwealth v Neff, 114 A 267, 271 Pa 312

(2) In an action on the bond of a road contractor, an affidavit of defense alleging that the government declared road work unnecessary for the prosecution of the war, and that as a result it was impossible for the contractor to obtain in the county labor for his enterprise, and that workmen assembled by him would almost immediately be employed by others at advanced wages, only alleges a local impossibility of procuring and retaining labor, and is insufficient to show impossibility of performance of the contract —Commonwealth v Bader, 114 A 266, 271 Pa 308

Surety, beseeching county to let contractor continue work after date for completion, and receiving money paid thereon, cannot complain of county's overindulgence of contractor —Maryland Casualty Co v Ballard County, 289 S W 316, 217 Ky 343

19. **Refusal to estimate and pay items due** was breach of contract discharging the surety —Lewelling & Price-Williams v St Francis Road Improvement Dist No 1, 250 S W 1, 158 Ark 91

20. Tex —Detroit Fidelity & Surety Co v Pippins & Clarkson, Civ App 47 S W 2d 886—Brammer & Wilder v Limestone County, Civ App, 24 S W 2d 99, error dismissed

21. Tex —Brammer & Wilder v Limestone County, supra

Retention of price of materials furnished

Surety on highway contractor's bond was discharged from liability for price of materials furnished by highway authorities because of latter's failure to retain sufficient amount out of contract price

Tex —Fidelity Union Casualty Co v State, Civ App, 54 S W 2d 1079

Wash - Lewis County v Ætna Accident & Liability Co, 191 P 146, 111 Wash 333

22. Ind —National Surety Co of New York v State, 153 N E 421, 93 Ind App 435

23. Tex —Detroit Fidelity & Surety Co v Pippins & Clarkson, Civ App, 47 S W 2d 886

24. N Y Slattery v National Commercial Bank & Trust Co, 286 N Y S 337, 247 App Div 221

Rights of surety completing contract see infra subdivision b (3) of this section

Right to equipment of contractor

(1) Since road contractors' bond to

(3) Completion of Work by Surety

A surety on a highway contractor's bond who completes the work on default of the contractor has certain rights and liabilities, including the right to funds remaining in the hands of the highway authorities

The surety on a highway contractor's bond who takes over the work on default of the contractor puts himself in the place of the contractor[25] and assumes, it has been held, the obligation to complete the work according to specifications and to pay claims for labor and material.[26] However, the surety does not become obligated to pay the personal debts incurred by the contractor during the progress of the work, except such as are properly chargeable against the contract under the law.[27] The surety on the bond of the original contractor who has defaulted remains liable to laborers, materialmen, and subcontractors where he contracts with the highway authorities to complete the work and the original bond conditioned for the payment of labor and material claims is made a part of its contract for completion.[28] The surety, by reason of his status as surety, may succeed to certain rights under principles of subrogation.[29]

Letting of contract by surety, bond The surety taking over the work may engage a contractor to complete the work.[30] For his protection the surety may require a bond of the new contractor,[31] and such a bond usually is a private, as distinguished from a statutory, undertaking.[32] The bond inures to the benefit of persons performing labor and furnishing material where it contains a condition for their protection similar to the condition found in statutory bonds running to the highway authorities.[33]

Right of surety to payments Under the rules stated in the C.J.S. title Subrogation § 59, also 60

county did not cover indebtedness to materialmen; surety's seizure for indemnity on erroneous supposition of liability, of equipment of contractors who failed to pay materialmen, was unauthorized.—Davis v. Southern Surety Co., 153 A. 119, 302 Pa. 21.

(2) In action to recover equipment of road contractors wrongfully seized by their surety on erroneous theory of liability to materialmen amount paid under mistake of law on materialmen's judgments against surety was unimportant.—Davis v. Southern Surety Co., supra.

25. Ala.—U. S. Fidelity & Guaranty Co. v. Yielding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.

Completion of work by highway authorities see supra § 209.

26. La.—Lane v. E. J. Deas Co., 125 So. 514, 12 La. App. 382.

Liability for attorney's fee in action for wages

On abandonment by road contractor surety taking over job and completing, it becomes subject to statutory liability of contractor for reasonable attorney's fee in action for wages.—Carlson v. New Amsterdam Casualty Co., 217 P. 804, 118 Or. 542.

27. La.—Lane v. E. J. Deas Co., 125 So. 511, 12 La. App. 382.

28. Ind.—Montgomery v. Southern Surety Co. of Iowa, 162 N.E. 31, 96 Ind. App. 472.

29. U.S.—Maryland Casualty Co. v. Morgan County Court, C.C.A.W.Va., 59 F.2d 114, certiorari denied 53 S. Ct. 115, 287 U.S. 653, 77 L.Ed. 561.

Subrogation of surety to rights of creditor and principal generally see the C.J.S. title Subrogation §§ 16-62, also 60 C.J. p. 740 note 4 et seq.

Right to use of equipment

(1) Acts W.Va.1921, c. 112, § 25 provides that the state road commission, before construction of a road, shall file with the clerk of the county court of the county a copy of the specifications and notice of its intended construction. Where specifications so filed provided that on default by the contractor the commission might take over and complete the work and might use materials and equipment on the ground, it was held that where the commission took over the work on default of the contractor and turned it over to his surety for completion, the surety was entitled to the use of any materials and equipment on the ground and in use by the contractor, as against a chattel mortgage thereof, whose mortgage was taken after filing of the specifications.—Maryland Casualty Co. v. Davis Trust Co., D.C.W.Va., 294 F. 573.

(2) Where a contract for the construction of a state highway provided that, if the contractor failed in any respect to prosecute the work with promptness etc., the state might take possession of all the road-building equipment and supplies, and complete the construction of the highway, the state was in no sense obliged to take over such equipment and supplies, for the benefit of the contractor's surety on the default of the contractor, but the state could abandon its right and look solely to the contractor's surety to complete the contract, and therefore the surety was not subrogated to any right of the state as obligee of the bond to appropriate and use the equipment as against the trustee in bankruptcy of the contractor.—U. S. Fidelity & Guaranty Co. v. Ryan, 214 P. 433, 124 Wash. 329, 39 A.L.R. 109.

30. **New contractor in position of subcontractor**

Ala.—U. S. Fidelity & Guaranty Co. v. Yielding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.

Improvident contract

Surety's reletting of highway clearing contract taken over by it was improvident to extent new contract involved cost of burning logs of merchantable value.—Metropolitan Casualty Ins. Co. of New York v. Platts, 291 P. 1092, 159 Wash. 1.

31. Ind.—Montgomery v. Southern Surety Co. of Iowa, 162 N.E. 31, 96 Ind. App. 472.

32. Ala.—American Employers' Ins. Co. of Boston, Mass. v. Lee & Kincaid Coal Co., 146 So. 408, 226 Ala. 262.

33. Ala.—American Employers' Ins. Co. of Boston, Mass. v. Lee & Kincaid Coal Co., supra.

Bond for payment of labor, material, etc., see infra subdivision c of this section.

Persons supplying subcontractor

Where by terms of bond furnished by contractor completing highway project after original contractor defaulted materialmen were given all protection provided in statutory bond, such protection extended to persons furnishing material to subcontractor.—American Employers' Ins. Co. of Boston, Mass., v. Lee & Kincaid Coal Co., supra.

Fraud of surety as affecting materialman

Materialman not party to fraud by surety completing the contract who furnishes material on basis of credit by bond made part of highway construction contract, is not mere donee.—American Employers' Ins. Co. of Boston, Mass. v. Lee & Kincaid Coal Co., supra.

C.J p 777 note 60 et seq, a surety on a highway contractor's bond who completes the work on default of the contractor has an interest in unpaid sums due under the contract to the extent necessary to reimburse it for its loss [34] The right of the surety to deferred payments has been held superior to that of an assignee of the funds,[35] including an assignee, such as a bank, which has lent money to the contractor [36] The surety is not entitled to share in the fund where it is less than the amount due laborers and materialmen and the surety is liable under the bond for the excess which will remain due them [37]

c. For Payment of Claims for Labor and Material, Etc.

(1) In general
(2) Person secured
(3) Claims secured
(4) Rights, liabilities, and discharge of surety; defenses

(1) In General

The highway authorities, on letting a contract for highway work, may require of the contractor a bond conditioned for the payment of claims for labor, material, etc

In the absence of statutory restrictions, it has been held that on letting a contract for road work the highway authorities may require a bond for the protection of laborers, materialmen, and the like, although such a bond or condition is not required by statute [38] Under various statutes, many of which apply to public works or improvements generally, persons contracting to do highway work are required to give bond for the payment of claims for labor, material, and the like, the obligation required for the payment of claims for labor and material sometimes being an undertaking additional to the obligation to perform the contract [39] The fed-

34. U S —Hartford Accident & Indemnity Co v Coggin, C C A N C, 78 F 2d 471, reversing, D C, Coggin v Hartford Accident & Indemnity Co 9 F Supp 785 certiorari denied 56 S Ct 141, 296 U S 620 80 L Ed 472 rehearing denied 56 S Ct 169, 296 U S 663 80 L Ed 440—Maryland Casualty Co v Morgan County Court C C A W Va, 59 F 2d 414, certiorari denied 53 S Ct 115, 287 U S 653, 77 L Ed 564
Mo —Lincoln County v E I Du Pont De Nemours & Co, 32 S W 2d 292 224 Mo App 1183
N Y —Slattery v National Commercial Bank & Trust Co, 286 N Y S 337, 247 App Div 221
Tex —Paris First Nat Bank v O'Neil Engineering Co, Civ App, 176 S W 74
Assignment to surety of deferred payments see supra § 209

The interest of the surety under principles of subrogation has been recognized in a case wherein the right of the surety was based on an express assignment of such unpaid sums —Central Tractor & Equipment Co v Betz, 260 N W 269, 63 S D 435

35. Iowa —Monona County v O'Connor, 215 N W 803, 205 Iowa 1119

36. U S —Maryland Casualty Co v Dulaney Lumber Co, C C A Miss, 23 F 2d 378, certiorari denied Bank of Ruleville v Maryland Casualty Co, 48 S Ct 560, 277 U S 598, 72 L Ed 1007
Ala —Citizens' Bank of Guntersville v Pearson, 116 So 350, 217 Ala 391
N Y —Slattery v National Commercial Bank & Trust Co, 286 N Y S 337, 247 App Div 221

37. La —State v Miller, 126 So 122, 169 La 914

38. U S —First Nat Bank v Caples, C C A Tex, 17 F 2d 87
Kan —Road Supply & Metal Co v Kansas Casualty & Surety Co, 246 P 503, 121 Kan 299
Mont —Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P 722 79 Mont 111
N M —Southwestern Portland Cement Co v Williams, 251 P 380, 32 N M 68 49 A L R 525
Wash —Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666
W Va —State v Royal Indemnity Co, 128 S E 439, 99 W Va 277, 43 A L R 552
Subcontractors' bonds for payment of labor and material see infra subdivision e (2) of this section

"Satisfactory bond"

Under statute requiring successful bidder "to furnish satisfactory bond in such amount as may be determined by state highway commission" commission may require bond for protection of laborers and materialmen —Southwestern Portland Cement Co v Williams, 251 P 380, 32 N M 68, 49 A L R 525

Bond for faithful performance

Where statute requires bond "conditioned upon the faithful performance of the work in strict conformity with the plans and specifications," state highway department was vested with power to include provision obligating surety to pay for all labor and materials furnished —Fidelity & Deposit Co of Maryland v Mason, 133 S E 793 145 Va 138— Ætna Casualty & Surety Co v Earle-Lansdell Co, 129 S E 263 142 Va 435, rehearing denied 130 S E 235, 142 Va 435

39. Ark —Ætna Casualty & Surety Co v Henslee, 260 S W 414, 163 Ark 492
Colo —Continental Casualty Co v Rio Grande Fuel Co, 119 P 2d 618 108 Colo 472
Fla —Fulghum v State, 109 So 644, 92 Fla 662
Ga —Yancey Tractor Co v Southern Surety Co, 157 S E 298, 172 Ga 110
Ind —Republic Creosoting Co v Foulkes Contracting Co, 8 N E 2d 416 103 Ind App 457
Iowa —Nebraska Culvert & Mfg Co v Freeman, 198 N W 7, 197 Iowa 720
Mich —Williamson v Williamson, 247 N W 704, 262 Mich 401, 89 A L R 412
Neb —Peter Kiewit Sons' Co v National Casualty Co, 8 N W 2d 192
Or —Fitzgerald v Neal, 231 P 645, 113 Or 103
Pa —Greene County v Southern Surety Co, 141 A 27, 292 Pa 304— H H Robertson Co v Globe Indemnity Co, 77 Pa Super 422
Tex —Love v Austin Bridge Co, Civ App, 5 S W 2d 570 reversed on other grounds Austin Bros Bridge Co v Love Com App, 34 S W 2d 571
29 C J p 612 notes 65–67
Bond
For performance of contract see supra subdivision b of this section
To release lien on funds retained by highway authorities see infra subdivision f of this section

Validity of statutes

Statute requiring bond of contractors engaged in public work is not

eral statute, 40 U S C A. § 270, requiring any contractor on a public work of the United States to give bond with the additional obligation for the payment of persons supplying labor and material, discussed in the C J S title United States §§ 107–116, also 65 C J. p 1323 note 63 et seq, applies in the case of highway contractors under contract with the United States [40]

The statutes requiring a bond or condition for the protection of laborers and materialmen are remedial in their nature,[41] the purpose being to insure payment to persons who supply labor or material, and to render it impossible for any contractor performing such work, whether insolvent or dishonest, to fail to pay for the labor and material supplied and for which the contractor has himself been paid,[42] and also to give protection to the public through the security afforded by the bond which has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance *that claims will be paid* [43] The bond is intended to provide an equivalent of, or substitute for, a mechanics' or materialmen's lien which laborers, materialmen, etc., ordinarily do not possess in the case of public property such as highways.[44]

Where the statute directs that the bond shall contain a condition for the payment of claims for labor and material, or requires a broader condition than is inserted in the bond, such persons are protected under the statute although the condition is omitted from the bond, or the condition is narrower than the one which is required by the statute,[45] although it has also been held that the words of the statute will not be read into the bond,[46] and that a bond payable to the highway authorities which omits the statutory condition for the payment of labor and material is invalid and of no effect [47] Laborers, materialmen, etc, are entitled to the benefit of a condition inserted in the bond for their protection although it is in excess of the conditions required

unconstitutional because making surety liable for materials furnished but not bodily entered into permanent structure —Franzen v Southern Surety Co 246 P 30, 35 Wyo 15, 46 A L R 496

Repeal of statute

Act requiring highway contractor's bond to state to pay for material and labor was not repealed by statute requiring bond for prompt completion of work —State ex rel Concrete & Steel Const Co v Southern Surety Co, 294 S W 123, 221 Mo App 67

Highway as "structure" within statute requiring bond

County district highway, permanently constructed and improved by use of cement and stone by county court, under authority of Code c 43 § 104, is a "structure," within chapter 75 § 12, providing that court shall require bond for completion of contract containing condition requiring payment by contractor for materials, labor, machinery and equipment, used in construction of public building or other "structure" to be used for public purposes —State v Royal Indemnity Co, 128 S E 439, 99 W Va 277, 43 A L R 552

Bond adds nothing to obligation of contractor

Ark —Pierce Oil Corporation v Parker, 271 S W 24, 168 Ark 400—Oliver Const Co v Williams, 238 S W 615, 152 Ark 414

Kan —Wolfe Tire Corporation v Stanton, 3 P 2d 650, 133 Kan 713

Bond of supervisor of road construction

Statute requiring execution of a labor and material bond for highway work does not apply to one contracting to supervise county road construction work.—Gulf Bitulithic Co v Nueces County, Tex Com App, 11 S W 2d 305, reversing, Civ App, 297 S W 747

40 U S —American Surety Co of New York v U S ex rel Barrow-Agee Laboratories, C C A La, 76 F 2d 67—U S to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, D C Idaho, 4 F Supp 211

41. Neb —Peter Kiewit Sons' Co v National Casualty Co, 8 N W 2d 192

42. Or —Fitzgerald v Neal, 231 P 645, 113 Or 103

43. N M —Silver v Fidelity & Deposit Co of Maryland, 53 P 2d 459, 40 N M 33

44. Ark — Etna Casualty & Surety Co v Henslee, 260 S W 414 163 Ark 492—Oliver Const Co v Williams, 238 S W 615, 152 Ark 414

Fla —Fulghum v State, 114 So 367, 94 Fla 274—Fulghum v State, 109 So 644, 92 Fla 662

Ga —Motor Supply Co v St Paul Mercury Indemnity Co 19 S E 2d 737, 67 Ga App 236—Whitley v Bryant, 200 S E 317, 59 Ga App 58

N J —Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, 171 A 332, 115 N J Eq 470, affirmed 176 A 341, 117 N J Eq 440

N C —John L Roper Lumber Co v Lawson, 143 S E 847, 195 N C 840 67 A L R 984—Standard Sand & Gravel Corporation v McClay, 131 S E 754, 191 N C 313

Ohio —Lingler v Andrews, 10 N E 2d 1021, 56 Ohio App 487

Or —State v U S Fidelity & Guaranty Co, 265 P 775, 125 Or 13

W Va —Rhodes v Riley, 169 S E 525, 113 W Va 679—Hibner v. Ebersbach, 157 S E 178, 110 W Va 177—Morton Motor Co v Fidelity & Casualty Co of New York, 152 S E 860 109 W Va 67

Public property as subject to mechanics' liens see the C J S title Mechanics' Liens § 10, also 40 C J p 57 note 42 et seq

45. Ind —Indiana Asphalt Paving Co v Bergen, 11 N E 2d 68, 105 Ind App 250

Mich —Williamson v Williamson, 247 N W 704, 262 Mich 401, 89 A L R 442

Ohio Standard Oil Co v Detroit Fidelity & Surety Co, 157 N E 418, 24 Ohio App 237

Tex —Austin Bros Bridge Co v Love, Com App, 34 S W 2d 574, reversing Love v Austin Bros Bridge Co, Civ App, 5 S W 2d 570 —Employers' Casualty Co v Rockwall County, Civ App, 300 S W 148, modified on other grounds 35 S W 2d 690, 120 Tex 441 reformed 38 S W 2d 1098, 120 Tex 441

W Va —Rosenbaum v Price Const Co, 184 S E 261, 117 W Va 160—Julian v Cavin, 162 S E 318, 111 W Va 395—Hicks v Randich, 144 S E 887, 106 W Va 109

Contractor and surety could not restrict liability on bond for materialmen's protection by employing or omitting terms of statute—Detroit Fidelity & Surety Co v Yaffe Iron & Metal Co, 44 S W 2d 1085, 184 Ark 1095

46. Pa —Commonwealth to Use of Howard W Read Corporation v A Stryker, Inc, 167 A 459, 109 Pa Super 137

47. Ga —Yancey Tractor Co v Southern Surety Co, 157 S E 298, 172 Ga 110.

by statute,[48] although under some authorities an extrastatutory condition for their protection is of no effect[49]

Sufficiency The bond is sufficient as a statutory bond where the language used, in its legal effect, imposes the obligation required by the statute for the benefit of those furnishing labor and material although the language is not identical with the wording of the statute[50] Where the statute requiring the bond is valid, the bond is not void for duress notwithstanding the parties executed it pursuant to a statute which has been declared unconstitutional[51]

Construction General rules pertaining to the construction of bonds usually apply in construing a highway contractor's bond or obligation to pay laborers, materialmen, and the like[52] In construing statutes requiring the execution of a bond conditioned for the payment of labor, material, and the like, it is proper to consider the object the legislature intended to accomplish by its enactment[53] A statutory bond must be construed in the light of the statute requiring it[54]

A bond conditioned for the payment of claims for labor and material, and the statute under which it usually is given, should be liberally construed,[55] although in some cases the undertaking of the surety with respect to labor and material claims has been strictly construed[56] At any rate, liberality of construction cannot justify an extension of meaning beyond the limits of the statute's clearly expressed terms[57]

Liability for failure to require bond In some jurisdictions statutes impose liability on the highway authorities for failure to require a bond or to take a sufficient bond conditioned for the payment of claims for labor, material, and the like,[58] under some statutes the authorities are expressly made

48. Or—Fitzgerald v Neal, 231 P 645, 113 Or 103—Clatsop County v Feldschau, 199 P 953, 101 Or 369, 18 A L R 1221
Wash—Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666
29 C J p 611 note 42
Validity of extrastatutory conditions generally see supra subdivision a of this section

49 U S—Hochevar v Maryland Casualty Co, C C A Ohio, 114 F 2d 948
Iowa—Monona County v O'Connor, 215 N W 803, 205 Iowa 1119—Nebraska Culvert & Mfg Co v Freeman, 198 N W 7, 197 Iowa 720
La—Long Bell Lumber Co v S D Carr Const Co, 133 So 438, 172 La 182—Miller v Bonner, 111 So 776, 163 La 332
Pa—Portland Sand & Gravel Co v Globe Indemnity Co, 151 A 687, 301 Pa 132

50 Fla—Fulghum v State, 114 So 367, 94 Fla 274—Fulghum v State, 109 So 641, 92 Fla 662

51. Tex—U S Fidelity & Guaranty Co v Henderson County, Com App, 276 S W 203, affirming, Civ App, 253 S W 835, and motion overruled, Com App, 276 S W 1119

52. Iowa—Nebraska Culvert & Mfg Co v Freeman, 198 N W 7, 197 Iowa 720

That balance remains due on highway contract sufficient to pay claimants furnishing materials to highway contractor does not affect rights in construing bond—Monona County v O'Connor, 215 N W 803, 205 Iowa 1119

53. Or—Fitzgerald v Neal, 231 P 645, 113 Or 103

54. Iowa—Nebraska Culvert & Mfg Co v Freeman, 198 N W 7, 197 Iowa 720
La—Red River Const Co v Pierce Petroleum Corporation, 115 So 752, 165 La 565

55. U S—Southern Surety Co v People's State Bank of South Carolina, C C A S C, 47 F 2d 93—Maryland Casualty Co v Ohio River Gravel Co, C C A W Va 20 F 2d 514, rehearing denied C C A 21 F 2d 744, certiorari denied 48 S Ct 157, 275 U S 570, 72 L Ed 431
Ala—State, for Use of Wadsworth, v Southern Surety Co, 127 So 805, 221 Ala 113, 70 A L R 296
Ark—Detroit Fidelity & Surety Co v Yaffe Iron & Metal Co 44 S W 2d 1085, 184 Ark 1095—Oliver Const Co v Williams, 238 S W 615, 152 Ark 414
Del—State v Ætna Casualty & Surety Co, 145 A 172, 4 W W Harr 158—Warner Co v Schoonmaker 174 A 449, 20 Del Ch 165
Ga—Motor Supply Co v St Paul Mercury Indemnity Co, 19 S E 2d 737, 67 Ga App 236
Mo—State ex rel and to Use of Winebrenner v Detroit Fidelity & Surety Co, 32 S W 2d 572, 326 Mo 684, 71 A L R 1131, affirming, App, 300 S W 833
Neb—Peter Kiewit Sons' Co v National Casualty Co, 8 N W 2d 192
N C—Overman & Co v Great American Indemnity Co, 155 S E 730, 199 N C 736—Wiseman v Lacy, 138 S E 121, 193 N C 751
Or—State for Use and Benefit of Stater Motor Co v Metropolitan Casualty Ins Co of New York, 26 P 2d 1094, 145 Or 367—State v American Surety Co of New York, 300 P 511, 137 Or 394, rehearing denied 2 P 2d 1116, 137 Or 394—State v Ætna Casualty & Surety Co, 265 P 782, 125 Or 194—State v U S Fidelity & Guaranty Co, 265 P 775, 125 Or 13—Fitzgerald v Neal, 231 P 645, 113 Or 103
S C—Molony & Carter Co v Pennell & Harley, 169 S E 283, 169 S C 462
S D—Western Material Co v Enke, 228 N W 385, 56 S D 302
Tex—U S Fidelity & Guaranty Co v Henderson County, Com App, 276 S W 203, affirming Civ App, 253 S W 835, and motion overruled, Com App, 276 S W 1119
Wyo—Franzen v Southern Surety Co, 246 P 30, 33, 35 Wyo 15, 46 A L R 496, citing **Corpus Juris.**
29 C J p 611 note 10

Reason for rule
Laborers and materialmen ordinarily have no lien on public property—John L Roper Lumber Co v Lawson, 143 S E 847, 195 N C 840, 67 A L R 984

56. Iowa—Coon River Co-op Sand Ass'n v McDougall Const Co of Sioux City, 244 N W 847, 215 Iowa 861
La—Rester v Moody & Stewart, 134 So 690, 172 La 510, reversing 130 So 251, 16 La App 177—Red River Const Co v Pierce Petroleum Corporation, 115 So 752, 165 La 565
N J—Skillman v U S Fidelity & Guaranty Co, 130 A 564, 101 N J Law 511

57. Del—Warner Co v Schoonmaker 174 A 449, 20 Del Ch 165
Miss—Oliver Const Co v Crawford, 107 So 877, 142 Miss 490

58. Ga—Yancey Tractor Co v Southern Surety Co, 157 S E 298, 172 Ga 110

Liability of county
Ga—Eatonton Oil & Auto Co v Greene County, 185 S E 296, 53 Ga.

liable to the same extent as the surety would have been had a bond been taken or had the surety been solvent [59] The highway authorities may not avoid liability under the statute by giving claimants notice that they will not be responsible for labor or material furnished to the contractor [60]

The liability of highway officers and agents for failure to require a bond of the contractor is discussed supra § 171

(2) Person Secured

Whether a particular person is secured by a highway contractor's bond conditioned for the payment of claims for labor, material, etc, depends on the terms of the bond and of the statute

Whether a particular person is entitled to the benefit and protection of a highway contractor's bond conditioned for the payment of claims for labor, material, and the like depends on whether he is within the terms of the bond and of the statute where the statute is regarded as part of the bond [61] In determining who is secured, the bond and the statute under which it may have been given ordinarily are construed liberally,[62] although in some cases the undertaking of the surety has been strictly construed [63]

Highway contractors' bonds conditioned for the payment of claims for labor, material, and the like, usually inure to the benefit of such persons as those who perform labor for, or supply material to, the contractor[64] or, according to the deci-

App 145, conforming to certified question 181 S E 758 181 Ga 47

Waiver

Materialman's taking of county's acceptance of order by highway contractor authorizing county to pay materialman certain sum and collection of part of such sum from county did not constitute waiver of materialman's right to hold county liable for loss on materials subsequently furnished to contractor through county's failure to require contractor to furnish statutory bond —Eatonton Oil & Auto Co v Greene County, supra

59. La —R B Tyler Co v Merrill Engineering Co, 159 So 319 181 La 191—Guess & Albin v Worman, App 162 So 662 rehearing 160 So 162—Albin v Harvey & Jones App, 162 So 658, rehearing 160 So 163

Time of solvency

That surety on highway contractor's bond was solvent at time bond was signed did not absolve highway commission from personal responsibility to materialman on failure of surety since requirement was that surety should be solvent at time of assertion of claims against commission—R B Tyler Co v Merrill Engineering Co, 159 So 319, 181 La 191—Albin v Harvey & Jones, La App 162 So 658, rehearing 160 So 163

Duty of claimant to provoke concursus proceeding

Where materialman's suit against highway contractor and highway commission for material furnished highway contractor was first judicial proceeding in which materialman could have registered objections to solvency of surety commission having failed to provoke a concursus, objections to solvency of surety raised in such suit for first time by materialman was timely and sufficient to preserve materialman's right to hold commission personally liable, notwithstanding materialman had not himself provoked a concursus, as he was not required but only given right, to provoke a concursus —Albin v Harvey & Jones supra

60 Ga - Eatonton Oil & Auto Co v Greene County, 185 S E 296 53 Ga App 145 conforming to certified question 181 S E 758, 181 Ga 47

61. Del —Warner Co v Schoonmaker, 174 A 449, 20 Del Ch 165 Or —State v U S Fidelity & Guaranty Co 244 P 872, 117 Or 616 Tex —U S Fidelity & Guaranty Co v Eubanks, Com App 87 S W 2d 218 modifying Eubanks v Schwalbe Civ App 55 S W 2d 906

Bond for performance as securing laborers materialmen and subcontractors see supra subdivision b (1) of this section

Claims secured by bond see infra subdivision c (3) of this section

Persons entitled to sue on bond for payment of labor and material see infra subdivision g of this section

Statute as part of bond see supra subdivision a of this section

Provision of bond guaranteeing payment of expense and costs and attorney's fees that might be incurred in the enforcement of contract or obligations of the bond inures to the benefit of laborers and materialmen Day v Royce Kershaw, Inc 187 So 221, 185 Miss 207

Persons not secured by bond

(1) Under disclosure that highway subcontractor purchased material from dealer that dealer ordered claimant to ship material to certain destination, that claimant charged it to dealer, and that the subcontractor paid the dealer in full, claimant could not recover from general contractor and bondsman for material furnished Republic Creosoting Co v Foulkes Contracting Co, 8 N E 2d 116, 103 Ind App 457

(2) Under a bond conditioned to "pay all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply such laborers, mechanics or subcontractors with material, supplies or provisions for carrying on such work," where buyer of products supplied laborers mechanics, and subcontractors of highway contractor, payment by buyer to seller was not covered by the contractor's bond since seller was not a person "who shall supply such laborers, mechanics or subcontractors"—State v U S Fidelity & Guaranty Co, 241 P 872, 117 Or 616

62. Ala —U S Fidelity & Guaranty Co v Yelding Bros Co Department Stores, 143 So 176, 225 Ala 307

Although bond is not required by statute it should nevertheless be construed liberally —Molony & Carter Co v Pennell & Harley, 169 S E 283, 169 S C 462

63. N J —Skillman v U S Fidelity & Guaranty Co, 130 A 564, 101 N J Law 511

64 U S —Southwestern Portland Cement Co v O C McElrath Const Co, D C N M, 11 F 2d 910 Ala —U S Fidelity & Guaranty Co v Yelding Bros Co Department Stores, 143 So 176 225 Ala 307 Del —State v Ætna Casualty & Surety Co 115 A 172, 4 W W Harr 158 N M —Southwestern Portland Cement Co v Williams 251 P 380 32 N M 68 49 A L R 525 N C —Independence Trust Co v Porter & Boyd, 132 S E 806, 191 N C 672 Ohio —U S Fidelity & Guaranty Co v Allied Products Co, 187 N E 83, 45 Ohio App 270 S D —Central Tractor & Equipment Co v Betz, 260 N W 269, 63 S D 435 Va —Fidelity & Deposit Co of Maryland v Mason, 133 S E 793 145 Va 138

Corporation supplying labor

Surety on bond of contractor for

sions on the question, to his assignee,[65] subcontractors,[66] and persons who perform labor for, or furnish material to, the subcontractor.[67] However, under some bonds containing provisions for the pay-

federal public work, involving construction of roads from clay, sand, and gravel was liable to corporation employed by contractor to test gravel as required by federal engineer even though testing involved some experience and skill as well as considerable physical labor, corporation being "person supplying labor in prosecution of work" within statute, 40 U S C A § 270, and bond—American Surety Co of New York v U S ex rel Barrow-Agee Laboratories, C C A La, 76 F 2d 67

Existence of contract between materialman and contractor

Contractor's surety cannot avoid liability to materialman on ground that the contract for the stone was not made with such materialman, but was made with a third person where the latter wrote the contractor that it had been acting for such materialman and after having been so informed the contractor treated the contract as one made with the materialman—Producers' Stone & Gravel Co v Chicago Bonding & Surety Co, 185 N W 703, 216 Mich 644

65 Okl—Fuller v Brooks, 246 P 369, 117 Okl 252

66 Ark—Etna Casualty & Surety Co v Henslee 260 S W 414, 163 Ark 192
Fla—Fulghum v State 109 So 644, 92 Fla 662
Ga—Whitley v Bryant, 200 S E 317, 59 Ga App 58
Ky Trinity Universal Ins Co v Coker, 150 S W 2d 640, 286 Ky 261
La Silver v Harriss, 115 So 380, 165 La 94—Silver v Harriss 115 So 376, 165 La 83
Mont—Lanstrum v Zumwalt, 237 P 205 73 Mont 502
Neb—Peter Kiewit Sons' Co v National Surety Co, 8 N W 2d 192
Tenn—Pan American Petroleum Corporation v McQuary, 51 S W 2d 851 164 Tenn 616
Tex—Royal Indemnity Co v Goodbar & Page, Civ App, 48 S W 2d 1021

Subcontractor supplying labor

(1) In some cases the benefit of the bond has been held to extend to subcontractors who supply labor
Ark—Kerby v Road Improvement Dist No 4 of Saline County, 251 S W 356 159 Ark 21
Fla—Fulghum v State, 109 So 644, 92 Fla 662
Ohio—Metropolitan Casualty Ins Co of New York v Dill 180 N E 47 124 Ohio St 536, 79 A L R 1249

(2) In other cases it has been held that a subcontractor who merely supplies the labor is not secured by the bond.—Lincoln County v E I Du Pont De Nemours & Co, 32 S W 2d 292, 224 Mo App 1183

Labor furnished by state prison to contractor for construction of road was within road contractor's bond—State Prison v Massachusetts Bonding & Insurance Co, 135 S E 125, 192 N C 391

Work performed before contractor's default

Where highway contractor had theretofore indicated no dissatisfaction with subcontractor's performance, subcontractor could recover on contractor's bond for work performed before highway commission took over job because of contractor's default—Fidelity & Casualty Co of New York v Copenhaver Contracting Co, 165 S E 528, 159 Va 126

That subcontractor pays part of premium for bond does not exclude him from benefits of bond—Whitley v Bryant, 200 S E 317, 59 Ga App 58

Subcontractors expressly included in bond

A bond conditioned for payment of claims for labor and material inures to the benefit of subcontractors when they are expressly included—Tidewater Const Co v Monroe County, 116 So 209, 107 Fla 648

Priority as between subcontractor and laborers and materialmen

Claims of laborers and materialmen against subcontractor take precedence over claim of subcontractor against contractor in chief in respect to obligations of bond—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

Law imposes no obligations on subcontractor toward surety except those arising out of contract—Union Indemnity Co v Ricks, 140 So 597, 224 Ala 514

67. U S—Standard Accident Ins Co v Simpson, C C A S C, 64 F 2d 583, certiorari denied Carolina Contracting Co v Standard Acc Ins Co 54 S Ct 123, 290 U S 688, 78 L Ed 593
Ala—U S Fidelity & Guaranty Co v Simmons, 133 So 731, 222 Ala 669—Memphis Milling Co v Southern Surety Co 133 So 43, 222 Ala 502—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622 222 Ala 429—State for Use of Wadworth v Southern Surety Co, 127 So 805, 221 Ala 113 70 A L R 296—Pettus v State, 137 So 166, 24 Ala App 525
Ark—Arkansas Road Const Co v Evans, 239 S W 726, 153 Ark 142—Oliver Const Co v Williams, 238 S W 615, 152 Ark 414
Cal—Associated Oil Co. v. Commary-Peterson Co, 163 P 702, 32 Cal App 582
Ga—Western Casualty & Surety Co v Fulton Supply Co, 4 S E 2d 690 60 Ga App 710—Whitley v Bryant, 200 S E 317, 59 Ga App 58
Ind—Indiana Asphalt Paving Co v Bergen, 11 N E 2d 68, 105 Ind App 250
Mich—Smith v Oosting, 203 N W 141, 230 Mich 1
Miss—Shuptrine v Jackson Equipment & Service Co, 150 So 795, 168 Miss 464—Oliver Const Co v Dancy, 102 So 568 137 Miss 474
Mo—State ex rel Kingsley v Carterville Const Co, 284 S W 150, 220 Mo App 244
N C—Overman & Co v Great American Indemnity Co, 155 S E 730, 199 N C 736
Okl—Standard Accident Ins Co v Deep Rock Oil Corporation, 68 P 2d 808, 180 Okl 260—Standard Accident Ins Co v Basolo, 68 P 2d 801, 180 Okl 261
Pa—Beaver County v Franklin, 18 Pa Dist & Co 635
S C—Miller v Cornell-Young Co, 171 S E 790, 171 S C 228—Molony & Carter Co v Pennell & Hartley, 169 S E 283 169 S C 462
Tenn—Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319—Rambo v Naylor Engineering Co 10 Tenn App 203
Tex—Hannah v Stephens, Civ App 101 S W 2d 823
Va—Fidelity & Casualty Co of New York v Copenhaver Contracting Co 165 S E 528, 159 Va 126—C S Luck & Sons v Boatwright, 162 S E 53, 157 Va 490
W Va—Hibner v Ebersbach, 157 S E 178 110 W Va 177
29 C J p 613 note 75

Mechanic, employed by highway subcontractor to repair and keep in working condition fleet of trucks used in performing subcontract was an employee on the job protected by statutory bonds given by contractor and subcontractor—General Motors Truck Co v Phillips, 254 N W 580, 191 Minn 467

Although not ordered by contractor, surety on highway contractor's bond is liable for price supplies sold to subcontractor—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores 113 So 176, 215 Ala 307

Fact that repairman contracted with husband of subcontractor did not prevent recovery on road contractor's bond—Standard Accident Ins Co v Dodd, 142 So 574, 225 Ala 285

Surety is chargeable with notice whether road contractor possesses

ment of labor and material, it has been held that one not named as obligee in the bond who performed work for the contractor is not entitled to assert any rights under the bond,[68] and in some cases it has been held that persons performing labor for or furnishing material to a subcontractor are not protected.[69] A subcontractor of a subcontractor[70] and a materialman of a subcontractor of a subcontractor[71] have been excluded from the terms of some bonds, although under other bonds laborers of a subcontractor of a subcontractor have been included.[72] One who furnishes material to a materialman has been held to be outside the protection of the bond.[73]

Persons supplying material to a contractor engaged by the surety to complete the contract on default of the original contractor have been held to be within the protection of the bond,[74] although it has been held that the bond of the general contractor does not inure to the benefit of the contractor of the surety of a defaulted subcontractor.[75]

Who is subcontractor. A subcontractor with respect to persons secured by a highway contractor's bond is one to whom the principal contractor has for a consideration let the right to do the work or a part thereof which the principal has contracted to do.[76]

financial ability and necessary plant and equipment, or will be compelled to sublet portion of contract—Overman & Co v Great American Indemnity Co, 155 S E 730, 199 N C 736

Township supplying material

A township owning a gravel pit, from which gravel was taken by a subcontractor and placed on a state road built by the principal contractors, who collected their full pay from the state, was entitled to recover the reasonable value thereof, not exceeding the amount agreed to be paid, in an action on the contractors' bond given under Pub Acts 1905 No 187 (Comp L 1915 § 14827 et seq), although no contract approved by the town board was executed and the township had no power so to contract, payment to the contractors sufficiently showing conversion of the gravel into money, if it were necessary to waive the tort and sue in assumpsit—Rolland Tp v Pakes, 197 N W 525, 226 Mich 284

Contractor as surety for subcontractor

Highway contractor by virtue of statutory bond is surety for subcontractors, sureties named in bond being supplemental sureties—Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, 171 A 382, 115 N J Eq 470, affirmed 176 A 341 117 N J Eq 440

Subcontractor's bond as protection against claims

Contractor may obtain protection against such claims by requiring a bond from the subcontractor—State for Use of Wadsworth v Southern Surety Co, 127 So 805, 221 Ala 113, 70 A L R 296

Bond of subcontractor see infra subdivision e of this section

68. Mass—Inhabitants of Town of Newbury v Lincoln, 177 N E 614, 276 Mass 445

N J—Skillman v U S Fidelity & Guaranty Co, 130 A 564, 101 N J Law 511

69. Ind—Miller v State, 74 N E 260, 35 Ind App 379.

Foreman or superintendent employed by subcontractor

Mo—Missouri State Highway Commission to Use of Onstad v Coopers Const Service Co, App, 268 S W 701

Tenn—Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319

Cost accountant, commissary clerk, and superintendent of entire subcontractors of a highway subcontractor were not such laborers or employees as were entitled to recover arrearages of salary due them from the general contractor and surety, under Acts 1917 c 71 § 6—Southern Const Co v Halliburton, supra

70. Tenn—Pan American Petroleum Corporation v McQuary, 51 S W 2d 854, 164 Tenn 646—Southern Const Co v Halliburton 258 S W 409, 149 Tenn 319

71. Ky—Mason Const Co v Kosmos Portland Cement Co, 59 S W 2d 1016 218 Ky 782

72 Mich—Williamson v Williamson 247 N W 704, 262 Mich 401, 89 A L R 442

73 U S—Northwest Roads Co v Clyde Equipment Co, C C A Or, 79 F 2d 771

La—J Watts Kearny & Sons v Perry 141 So 13, 174 La 411

One who supplies meat and provisions to a caterer who furnished meals to the contractor's employees is not secured by the bond—State v Warren Const Co, 276 P 260, 129 Or 58

74. Ala—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307

75. W Va—Rosenbaum v Price Const Co, 184 S E 261, 117 W Va 160

76. Or—Fitzgerald v Neal, 231 P 645, 650, 113 Or 103

S C—Miller v Cornell-Young Co, 171 S E 790, 171 S C 228

"Subcontractor" defined

Generally see Contracts §§ 1, 11 Mechanics' lien statutes see the C J S title Mechanics' Liens § 98, also 40 C J p 140 note 15 et seq

Claimant merely hiring out teams and equipment was not subcontractor, and could not recover against surety on highway contractor's bond—A L Mays & Sons v Rickerson, La App, 142 So 183

Joint adventurer or subcontractor

(1) Corporation contracting to do oiling work for contractor constructing roads for county was "subcontractor" within bond to pay labor and material claims, not "joint adventurer," notwithstanding contract provision for sharing of profits—Tidewater Const Co v Monroe County, 146 So 209, 107 Fla 648

(2) Agreement by which bank officers were to obtain financial backing for highway contractor in connection with construction job in consideration of contractor's award of bridge work to one of officers at certain price and of division of net profits from construction job did not create partnership or joint enterprise, but was unilateral contract to share profits for financial assistance, as regards right of assignee of officer to whom bridge work was awarded to enforce subcontractor's claim against surety on contractor's bond, and failure of bank officers to obtain financial backing did not deprive assignee of officer to whom bridge work was awarded of right to enforce subcontractor's claim against surety on contractor's bond—Barry v Duffin, 195 N E 511, 290 Mass 398

Materialman or subcontractor

(1) The test as to whether one who sues on a contractor's bond for stone furnished to the contractor was a materialman or a subcontractor is whether he undertook to perform any part of the contractor's contract—Producers' Stone & Gravel Co v Chicago Bonding & Surety Co, 185 N W 703, 206 Mich 644

(2) Company contracting to furnish all sand to be used by contractor in construction of paved highway for state was a "subcontractor,"

(3) Claims Secured
- (a) In general
- (b) Equipment, tools, and appliances
- (c) Other claims

(a) In General

What claims are covered by a highway contractor's bond conditioned for the payment of claims for labor, material, and the like depends on the terms of the bond and statute

The courts are not entirely in accord as to what claims are covered by a bond of a highway contractor conditioned for the payment of claims for labor, material, and the like.[77] Whether a particular claim is covered by the bond depends on the terms of the bond and of the statute where the statute is regarded as part of the bond.[78] It is to be noted that the terms of the statutes and the bonds given pursuant thereto vary in the different jurisdictions, and that cases from other states, or even cases within the same jurisdiction under a prior and different statute or bond, are not necessarily controlling.[79]

In determining whether a particular claim is covered by the bond, some courts adopt a liberal construction of the statute and bond,[80] while others construe the undertaking of the surety strictly.[81] Where the particular claims for which the surety is liable are specified by the statute, items not enumerated by the legislature should not be included by the courts under the guise of giving the statute a liberal construction.[82]

Materials, supplies, etc., generally The word "materials," as used in the statutes and bonds of highway contractors, has been held to signify things furnished to a workman or artisan to be used in his work.[83] "Materials" is a narrower term than the

as well as a materialman, notwithstanding sand was sold at a certain rate per square yard of pavement—Standard Accident Ins Co v Deep Rock Oil Corporation, 68 P 2d 808, 180 Okl 260—Standard Accident Ins Co v Basolo, 68 P 2d 804, 180 Okl 261

(3) Person contracting with contractor to furnish crushed rock, needed in performance of county road construction contract, was not "subcontractor" but "materialman," regardless of whether rock was available as commodity in open market—Northwest Roads Co v Clyde Equipment Co, C C A Or, 79 F 2d 771

Superintendent or subcontractor

Person in charge of concrete work on highway construction job was a "subcontractor" and not a 'superintendent", and hence such person's claim for labor was covered by contractor's bond guaranteeing full payment of claims of persons supplying labor and materials in prosecution of work, notwithstanding such person was paid thirty-five dollars per week during period consumed in completing contract, and that balance of his compensation was to be a percentage of contractor's net profits—Trinity Universal Ins Co v Coker 150 S W 2d 640, 286 Ky 261

Subcontractor as contractor's agent

After execution, and county commissioner's approval, of contract between corporation, previously awarded contract by county for construction of highway, and person for whom corporation acted in bidding therefor, that he should do all work and furnish materials necessary to perform construction contract, take it over, and assume all obligations thereunder, he was not contractor's "agent" within provision thereof that subcontractor should be considered contractor's agent, so that his employee could not recover, as third party beneficiary under such provision, from contractor and surety on its bond for hauling and spreading gravel—Hazard v C E O'Neill Co, 108 P 2d 660, 6 Wash 2d 667

77. Ala—Union Indemnity Co v Handley 121 So 876, 220 Ala 292

"Conflict of opinion in a great measure is due to the different standards of interpretation applied to the contract of the surety Some courts have construed the contract strictly in favor of the surety, others have applied the rule appropriate to mechanic's lien statutes, while a greater number, especially in later cases, have adopted the rule that such contracts should be liberally construed in favor of the persons for whose benefit the bond was given"—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 612, 77 Utah 226

Authorities exhaustively reviewed

Wyo—Franzen v Southern Surety Co, 246 P 30, 35 Wyo 15, 46 A L R 496

78. N D—Yarger v Dakota Trust Co, 215 N W 209, 55 N D 535

Pa—Commonwealth v Union Indemnity Co, 149 A 170, 299 Pa 143

Statute as part of bond see supra subdivision a of this section

Fundamental test must be what the parties may be fairly held to have had in contemplation at the time of the execution of the contract and bond—Western Material Co v Enke, 228 N W 385, 56 S D 302—Dennis v Enke, 224 N W 925, 55 S D 15

Form of bond may be considered to determine legislative intent in providing that bond should cover materials furnished in construction—Lingler v Andrews, 10 N E 2d 1021, 56 Ohio App 487

79. Minn—General Motors Truck Co v Phillips, 254 N W 580, 191 Minn 467—Clifton v Norden, 226 N W 940, 178 Minn 288, 67 A L R 1227

Ohio—Standard Oil Co v Detroit Fidelity & Surety Co, 157 N E 418, 24 Ohio App 237

W Va—Julian v Cavin, 162 S E 318, 111 W Va 395

80. Ala—State, for Use of Wadworth v Southern Surety Co 127 So 805, 221 Ala 113 70 A L R 296

Cal—A L Young Machinery Co v Cupps, 2 P 2d 321, 213 Cal 210—McCormick Saeltzer Co v Haidlen, 6 P 2d 255, 119 Cal App 96

Ga—American Surety Co of New York v Koehring Co, 162 S E 840, 44 Ga App 769

N C—Overman & Co v Maryland Casualty Co, 136 S E 250, 193 N C 86

Ohio—Lingler v Andrews, 10 N E 2d 1021, 56 Ohio App 487

Federal statute

U S—American Surety Co of New York v U S ex rel Barlow-Agee Laboratories, C C A La, 76 F 2d 67

81. Iowa—Coon River Co-op Sand Ass'n v McDougall Const Co of Sioux City, 244 N W 847, 215 Iowa 861

La—Rester v Moody & Stewart, 134 So 690, 172 La 510, reversing 130 So 254, 16 La App 177

82. Mo—State ex rel and to Use of Worthmann v Gilliox, App, 60 S W 2d 696

83. La—Interstate Wholesale Grocer Co v Prutsman, 1 La App 731

'Material" defined generally see the C J S definition Material, also 39 C J p 1385 note 14 et seq

"A comprehensive definition of material is found in Fulp and Linville v Power Co, 72 S E 869, 157 N C 154 The court held that material

word "supplies"[84] and both terms are to be distinguished from the machinery, tools, and appliances constituting the general or permanent plant of the contractor[85]

The bond does not cover all articles or materials furnished to the highway contractor or subcontractor[86] The materials must be necessary to the proper performance of the contract[87] or at least reasonably regarded as within the contemplation of the parties,[88] and must be furnished for use in the execution of the contract[89] which the bond purports to cover[90] A claim for material furnished to the contractor prior to the execution of the contract for the construction or improvement of the highway usually is not within the bond,[91] although a bond may cover claims for materials furnished prior to its execution[92]

While there is authority holding that a claim for material does not come within the bond unless the material is used in the construction of the road in a physical sense,[93] as a general rule materials, supplies, etc, need not be actually incorporated into the

'is something that is consumed in the use, as coal, for instance, or labor performed or is such material as goes into and makes part of the realty, or the product, in such a way as to be indistinguishable from the mass as timber put into a building, or cotton that is manufactured'"—Jenkins Hardware Co v Globe Indemnity Co, 170 S E 643, 644, 205 N C 185

Definition by parties

(1) The parties in their contract may define the word 'material" as including articles not usually classified as materials or supplies and by an express incorporation by reference the broadened definition may be carried into the bond--Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666

(2) Validity of extrastatutory conditions generally see supra subdivision a of this section

84. Mont--Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P 722 79 Mont 111
S D—Finch v Enke 222 N W 657, 54 S D 164—March v Butler, 220 N W 461 53 S D 170

85. Fla—Murphy v State ex rel Gem City Builders' Supply Co, 155 So 122 115 Fla 162
Equipment, tools and appliances see infra subdivision c (3) (b) of this section

Determination of nature of article

(1) The test of whether a given thing constitutes a "supply" or "equipment" within statutes relating to public contractors' bonds is whether the article forms a part of the finished structure, and in addition if, although such things do not become a physical part of the finished product, structure, or improvement they are entirely consumed in the course of the construction they are "supplies" and not "equipment"—U S Fidelity & Guaranty Co v Fecnaughty Machinery Co, 85 P 2d 1085, 197 Wash 569

(2) "There are certain definite principles which aid in determining whether given articles are to be classified as materials or tools, implements or equipment The decisions in this state seem to proceed upon the theory that material consists of such articles as (1) are necessary and indispensable to the performance of the contract, (2) which the parties must reasonably contemplate will be incorporated into the work or be consumed in the performance of the contract, and (3) which lose their identity in the finished product, so as to be indistinguishable from the mass"—Jenkins Hardware Co v Globe Indemnity Co, 170 S E 643, 644, 205 N C 185

(3) Whether particular articles constitute 'materials and supplies" within the bond or "equipment" must be determined according to their inherent nature and the purpose for which they were procured and not by the circumstance alone that they do or do not outlast the job
Ala—United States Fidelity & Guaranty Co v Benson Hardware 132 So 622 222 Ala 429
Fla—Murphy v State ex rel Gem City Builders' Supply Co, 155 So 122, 115 Fla 162

(4) Good faith, as well as the inherent nature of permanent articles purchased by highway contractor, must be considered in determining whether they are "supplies" within contractor's bond or 'equipment"—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176 225 Ala 307

86 Ariz—National Surety Co v Arizona Grocery Co, 259 P 401 259 Ariz 399

Material furnished subcontractor free of charge

Highway contractor and surety were not liable for rock furnished to subcontractor and used in the work, where it appeared that subcontractor had contract with claimant under the terms of which the rock was given to the subcontractor free of charge, notwithstanding the subcontractor breached its contract in other particulars and is liable for damages—Southern Const Co v Halliburton, 258 S W 409 149 Tenn 319

87. N C—Overman & Co v Maryland Casualty Co, 136 S E 250, 193 N C 86
Pa--Commonwealth v R L Bonham Co, 147 A 611 297 Pa 514

88. S D—Finch v Enke, 222 N W 657, 54 S D 164

89 Ind—Ohio Oil Co v Fidelity & Deposit Co of Maryland, App, 42 N E 2d 406
Or—State v Johnson Contract Co, 253 P 520, 120 Or 633—Fitzgerald v Neal 231 P 645, 113 Or 103

"In and about the construction"

Tenn—Rambo v Naylor Engineering Co, 10 Tenn App 203

Shipping material to third person to replace material borrowed

Firm selling material to highway contractor and shipping it to another to replace materials contractor borrowed was not protected by contractor's bond protecting those supplying labor and materials - R L Snelson & Co v R G Hill & Co, 146 S E 135, 196 N C 494

If the materials furnished are necessary, liability is established—State for Use and Benefit of Slater Motor Co v Metropolitan Casualty Ins Co of New York, 26 P 2d 1094 115 Or 367

Subsequent agreement or extension

Where the contract provided that it should include the proposal, plans, specifications and contract bond also any and all supplemental agreements required to complete the construction of the road, the bond covered all agreements for the construction and completion, including extensions and enlargements, of the project—U S Fidelity & Guaranty Co v Andalusia Mfg Co, 131 So 18, 222 Ala 637

90. Pa—Commonwealth, to Use of Sgarlat, v Blockberger, 188 A 523, 324 Pa 370—Commonwealth v Hartford Accident & Indemnity Co, 160 A 113, 306 Pa 513—Commonwealth v R L Bonham Co, 147 A 611, 297 Pa 514

91 Wash—Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666

92. Pa—Mt Lebanon Tp, Allegheny County v Metropolitan Casualty Ins Co of New York, 161 A 632, 106 Pa Super 209

93. U S—Hochevar v Maryland Casualty Co, C C A Ohio, 114 F 2d 948

"In the construction of the road"

Where the condition of the bond

completed work in order to be covered by the bond,[91] but it is sufficient if the materials necessary to the performance of the contract contribute to the improvement directly by physically going into the construction, or indirectly, by being consumed or used in the construction.[95] The materials generally must be consumed in the performance of the contract[96] or practically consumed,[97] although it has been stated that it is not necessary that the materials or supplies be totally used or consumed.[98] Where the materials and supplies are not used on the job but are otherwise disposed of, a claim for the price is not within the bond,[99] although it has been stated that where material, reasonably fit and ordinarily required for the performance of the contract, is sold and delivered to the contractor in good faith, to be used and consumed in the work, liability on the bond attaches notwithstanding the contractor does not

as prescribed by statute is to pay for material furnished "in the construction of the road,' the material must be incorporated into the highway in the physical sense—Standard Oil Co v Detroit Fidelity & Surety Co, 157 N E 418, 24 Ohio App 237

94. Ala—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307
Del—Warner Co v Schoonmaker, 171 A 449, 20 Del Ch 165
Idaho—State v Storm, 287 P 689, 49 Idaho 246
N C—Standard Sand & Gravel Corporation v McClay, 131 S E 751, 191 N C 313
Or—State for Use and Benefit of Southern Pac Co v American Surety Co of New York 44 P 2d 1079, 150 Or 236—State, for Use and Benefit of State Motor Co v Metropolitan Casualty Ins Co of New York, 26 P 2d 1094, 145 Or 367
Tenn—Rambo v Naylor Engineering Co 10 Tenn App 203
29 C J p 613 note 74

In Pennsylvania

(1) Under Act of June 26 1931, P L 1388 36 P S § 142, the bond is conditioned for the prompt payment of all material furnished and labor supplied or performed "in the prosecution of the work, whether or not the said material or labor enter into and become component parts of the work or improvement contemplated"—Commonwealth to Use of Atlantic Refining Co v Ciccone, 173 A 642, 316 Pa 111

(2) Under former statutes a claim for materials furnished did not come within the bond unless such materials became a component part of the visible work contracted to be done—Commonwealth v Union Indemnity Co, 149 A 170, 299 Pa 143—Commonwealth to Use of Garman v A Stryker, Inc 171 A 298, 112 Pa Super 449—Commonwealth v Ætna Casualty & Surety Co, 101 Pa Super 311—H H Robertson Co v Globe Indemnity Co, 77 Pa Super 422—29 C J p 613 notes 70-73

(3) The words "prosecution of the work" in Act of June 26, 1931 are broader in their implication than the words "construction of the highway" used in former statutes—Commonwealth to Use of Atlantic Refining Co v Ciccone, 173 A 642, 316 Pa 111—Pennsylvania Turnpike Commission for Use of Eidemuller, 89 Pittsb Leg J 477

95. Ala—State, for Use of Wadsworth v Southern Surety Co 127 So 805, 221 Ala 113, 70 A L R 296—Union Indemnity Co v Handley, 124 So 876, 220 Ala 292
Ariz—National Surety Co v Arizona Grocery Co, 259 P 404, 259 Ariz 399
Cal—A L Young Machinery Co v Cupps 2 P 2d 321, 213 Cal 210—McCormick Saeltzer Co v Haidlen, 6 P 2d 255, 119 Cal App 96
La—Louisiana Highway Commission v McCain, 1 So 2d 545, 197 La 359
Mo—Wiss v Royal Indemnity Co, 282 S W 164, 219 Mo App 568, followed in Canton Co-operative Elevator Co v Royal Indemnity Co, 282 S W 169, and Hetzler v Royal Indemnity Co 282 S W 169
Mont—Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P 722, 79 Mont 111
Okl—Fuller v Brooks, 216 P 369, 117 Okl 252—W R Pickering Lumber Co v Fuller, 244 P 760, 117 Okl 53
Or—State for Use and Benefit of State Motor Co v Metropolitan Casualty Ins Co of New York, 26 P 2d 1094, 145 Or 367
Tex—U S Fidelity & Guaranty Co v Henderson County, Com App 276 S W 203, affirming, Civ App, 254 S W 835, and motion overruled, Com App, 276 S W 1119
Wash—U S Fidelity & Guaranty Co v Feenaughty Machinery Co, 85 P 2d 1085, 197 Wash 569
Wyo—Franzen v Southern Surety Co 216 P 30 35 Wyo 15, 46 A L R 496

In Massachusetts St 1922 c 416, amending Gen L c 30 § 39, by interpolating the words "or employed" after the words "materials used" had as its purpose a broadening of the words "materials used" so as to include materials which were not incorporated as a part of the finished work but which were necessary to the prosecution of the work and when "used" were consumed or made so worthless as to lose their identity—American Casting Co v Commonwealth, 174 N E 174, 274 Mass 1

96. U S—Maryland Casualty Co v Dulaney Lumber Co, C C A Miss, 23 F 2d 378 certiorari denied Bank of Ruleville v Maryland Casualty Co, 48 S Ct 560, 277 U S 598, 72 L Ed 1007
Miss—McElrath & Rogers v W G Kimmons & Sons, 112 So 161, 146 Miss 775, suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons, 112 So 680, 146 Miss 775
Or—State v Johnson Contract Co, 253 P 520, 120 Or 633
Equipment, tools, and appliances see infra subdivision c (3) (b) of this section

Mere temporary use of articles on highway project will not render bondsmen on highway contractor's bond liable therefor—Singer v Anniston Hardware Co, 133 So 910, 222 Ala 620

97. Del—Warner Co v Schoonmaker, 174 A 449, 20 Del Ch 165

98. S C—American Hardware & Equipment Co v Detroit Fidelity & Surety Co, 156 S E 770, 159 S C 263

Whether or not articles are worn out on the job they are secured by the bond where they have been purchased for use on the job and are primarily so used—Singer v Anniston Hardware Co, 133 So 910, 222 Ala 620

99 Mich—People v Boyes & Blandford Co 192 N W 787, 222 Mich 8
Or—State v Johnson Contract Co, 253 P 520 120 Or 633
Pa—H H Robertson Co v Globe Indemnity Co 77 Pa Super 422
Tex—U S Fidelity & Guaranty Co v Texas Powder Co Civ App 85 S W 2d 772, error refused

Materials used also on other project

La—Tennessee-Arkansas Gravel Co v Harvey & Jones App, 147 So 739 amended 151 So 133

Materialman permitting materials furnished to be sold at public sale to contractor's execution creditor could not recover therefor under bond—Commonwealth v Ætna Casualty & Surety Co of Hartford, Conn, 163 A 530, 309 Pa 263.

use or consume the material wholly or exclusively, in the performance of the contract.[1]

Labor claims generally In some cases the word "labor," as used in the statute and bonds of highway contractors, has been held to mean physical or common labor,[2] although services performed by a laborer may constitute "labor" notwithstanding he combines his labor with his own equipment.[3] In other cases the courts have declined to confine the term to physical or manual labor,[4] and include labor performed with the aid of horses, tractors, and other mechanical equipment.[5]

The labor performed must be necessary to the performance of the contract[6] and must be performed in furtherance thereof.[7] The bond should not be interpreted so as to cover labor claims arising after the work is abandoned, although under special facts and circumstances liability on the bond may arise.[8]

It is not necessary generally that the labor go directly into the work,[9] but it is sufficient if labor necessary to the completion of the work materially contributes to its progress and completion.[10] A claim for labor performed may come within the bond although it was performed at some distance from the site of the work.[11]

Mechanics' lien statutes as affecting claims. In determining whether a claim is covered by a bond for the payment of claims for labor, material, and the like, the bond may be held to embrace at least such claims as are lienable in the case of private construction,[12] and it has been said that the bond should afford no greater security than the mechanics' lien statute gives in the case of a private construction.[13] However, it has also been held that claims under the bond are not limited to such claims as are lienable under the statute.[14]

(b) Equipment, Tools, and Appliances

A claim for the price of machinery and appliances constituting the general equipment of the contractor ordinarily is not within a labor and material bond of a highway contractor, although some courts have allowed claims for rental of equipment and for incidental repairs to the equipment

A highway contractor's bond conditioned for the payment of labor, material, and the like, ordinarily does not include a claim for the price of tools, implements, and machinery constituting the general or permanent equipment of the contractor or subcontractor,[15] which are not consumed or worn out in

1. NC—Wilson-Stamey Grocery Co v Ross, 138 S E 537, 194 N C 109
Subrogation to claims of laborers
Tire company could recover on subrogation theory against statutory bond entered into by surety of highway contractor with state which was conditioned on performance of contract, defining materials as including equipment or materials used or consumed in performance of work, for tires sold to contractor for employees although tires were not used on work where cost of tires was charged against employees' wages since employees had right of recourse for wages on bond—Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666

2. Mo—Lincoln County v E I Du Pont De Nemours & Co., 32 S W 2d 292, 224 Mo App 1183—Missouri State Highway Commission to Use of Onstead v Coopers Const Service Co., App., 268 S W 701
Okl—Green Const Co v Chorn, 46 P 2d 499 173 Okl 85
"Labor" defined generally see the C J S definition Labor also 35 C J p 922 note 86 et seq.

3. Mo—State ex rel and to Use of Winebrenner v Detroit Fidelity & Surety Co., 32 S W 2d 572, 326 Mo 684, 71 A L R 1131, affirming, App., 300 S W 833

4. **Architect or other skilled person** who actually superintends the work is performing labor.—American Surety Co of New York v U S ex rel Barrow-Agee Laboratories, C C A La., 76 F 2d 67

5. Fla—Feighum v State, 109 So 641, 92 Fla 662

6. N C—Overman & Co v Maryland Casualty Co., 136 S E 250, 193 N C 86

7. Or—Fitzgerald v Neal, 231 P 645, 113 Or 103

8. Minn—Hansen v Remer, 200 N W 839, 160 Minn 453
Extrastatutory compensation for failure to pay wages
A highway contractor's surety was not bound to pay a laborer wages for fifteen days after he ceased to work, merely because his wages were not paid when demanded for the provisions of L 1919 c 175 cannot be read into the bond, and only the contractor employing the laborer is liable for the extra compensation, which is in the nature of a penalty imposed for his failure to pay wages as required by law—Hansen v Remer, supra

9. U S—American Surety Co of New York v U S, ex rel Barrow-Agee Laboratories, C C A La., 76 F 2d 67
Or—State to Use of Jones v. Feak, 18 P 2d 203, 141 Or 481

10. Del—State v Ætna Casualty & Surety Co., 145 A 172, 4 W W Harr 158.

11. Del—State v Ætna Casualty & Surety Co., supra

12. Ohio—Lingler v Andrews, 10 N E 2d 1021, 56 Ohio App 487

13. W Va—Rosenbaum v Price Coal Co., 184 S E 261, 117 W Va 160—Marton Motor Co v Fidelity & Casualty Co of New York, 152 S E 860 109 W Va 67

14. Idaho—State v Storm, 287 P 689 49 Idaho 246
Md—London & Lancashire Indemnity Co of America v State 138 A 231, 153 Md 308
Okl—Eagle Oil Co v Altman 263 P 666, 129 Okl 98—Fuller v Brooks, 246 P 369, 117 Okl 252
Wyo—Franzen v Southern Surety Co., 246 P 30, 35 Wyo 15, 46 A L R 496
Guide to interpretation
The presence or absence of a right to assert a mechanic's or materialman's lien is no more than a guide to interpretation—Massachusetts Bonding & Insurance Co v C B Duff & Co., 87 S W 2d 363, 261 Ky 255

15. U S—American Liability & Surety Co v. Bluefield Supply Co., C C A W Va., 70 F 2d 187—Maryland Casualty Co v Ohio River Gravel Co., C C A W Va., 20 F 2d 514, rehearing denied 21 F 2d 744, certiorari denied 48 S Ct 157, 275 U S 570, 72 L Ed 431
Ala.—U. S Fidelity & Guaranty Co

the performance of the work and which are available for work on other projects,[16] although the fact that the general equipment is partially or totally worn out, or consumed on the particular work, is not the test[17] A claim for the purchase price of permanent equipment does not come within the bond, although the bond is conditioned for the payment of claims for furnishing tools, machinery, or equipment as well as for labor and material[18]

According to some decisions a claim for the purchase price of equipment is allowable under the bond where the equipment was purchased for the particular job,[19] at least where it is entirely consumed on the job except for normal salvage val-

v Andalusia Mfg Co, 134 So 18, 222 Ala 637

Ariz —National Surety Co v Arizona Grocery Co, 259 P 404, 259 Ariz 399

Cal —A L Young Machinery Co v Cupps, 2 P 2d 321, 213 Cal 210

Del —Warner Co v Schoonmaker, 174 A 449, 20 Del Ch 165

Ind —Montgomery v Southern Surety Co of Iowa, 162 N E 31, 96 Ind App 472

Iowa —Monona County v O'Connor, 215 N W 803, 205 Iowa 1119

Mass —American Casting Co v Commonwealth, 174 N E 174, 274 Mass 1

Miss —McElrath & Rogers v W G Kimmons & Sons, 112 So 164, 146 Miss 775 suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons 112 So 680, 146 Miss 775—U S Fidelity & Guaranty Co v Yazoo County, 110 So 780, 145 Miss 378

N C —Jenkins Hardware Co v Globe Indemnity Co, 170 S E 643, 205 N C 185

Tex Employers' Casualty Co v Rockwall County, 35 S W 2d 690, 120 Tex 441 modifying, Civ App, 300 S W 148 and reformed 38 S W 2d 1098, 120 Tex 441

Utah — J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

Wash —Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666

W Va —National Equipment Corporation v Pinnell, 172 S E 790, 114 W Va 558—Rhodes v Riley, 169 S E 525, 113 W Va 679—Morton Motor Co v Fidelity & Casualty Co of New York, 152 S E 860, 109 W Va 67

Contractor must furnish at his own expense the machinery and implements necessary to perform the work he has contracted to do

La —Louisiana Highway Commission v McCain, 1 So 2d 545, 197 La 359

Tex —Employers' Casualty Co v Rockwall County, 35 S W 2d 690, 120 Tex 441, modifying, Civ App, 300 S W 148, and reformed 38 S W 2d 1098, 120 Tex 441

Automobile sold subcontractor

Highway contractor or surety is not liable for price of automobile sold subcontractor and used to transport laborers —Brooks v Byrd & Clopton, 122 So 287, 168 La 450

Grading equipment sold subcontractor

Iowa —Nebraska Culvert & Mfg Co v Freeman, 198 N W 7, 197 Iowa 720

"Material and supplies"

A bond conditioned to pay claims for "material and supplies" does not cover a claim for articles of equipment ordinarily provided by contractor in performance of contract —U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

What constitutes equipment

If consumption of material or its value in public improvement depends on period of time and extent of use, it falls within classification of "equipment," and recovery cannot be had on builder's bond for such material or equipment —W R Pickering Lumber Co v Fuller, 244 P 760, 117 Okl 53

Material to construct and repair equipment is not within the bond — Piper-Howe Lumber Co v Padgett, 215 N W 468, 55 N D 811 followed in North Dakota Metal Culvert Co v American Surety Co of New York, 215 N W 556, 55 N D 841

Seller of steel road rails, angle face rails, patented pedestals, flat stakes, and stake pullers to subcontractor, for use in construction of road was not entitled to recovery on bond of principal contractor — Heltzel Steel Form & Iron Co v Fidelity & Deposit Co, 271 S W 325, 168 Ark 728

Surety taking possession of equipment

Surety on bond of public road contractor which took possession of equipment of contractor in default on contract under indemnity agreement with contractor was not liable to vendor of equipment who did not retain lien thereon for purchase price, since taking possession of such equipment vested title in surety — American Liability & Surety Co v Bluefield Supply Co, C C A W Va, 70 F 2d 187

16. U S —U S, to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, D C Idaho, 4 F Supp 211

Cal —A L Young Machinery Co v Cupps, 2 P 2d 321, 213 Cal 210

La —Louisiana Highway Commission v McCain, 1 So 2d 545, 197 La. 359

17. Ala —U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

Miss —U S Fidelity & Guaranty Co v Yazoo County, 110 So 780, 145 Miss 378

"If the contract is sufficiently large, covering a long period, the heaviest machinery, such as steam shovels and dredging machines, costing many thousands of dollars, may be entirely worn out, but we know of no case holding that the surety would be liable for the purchase price of such equipment If the surety should be held to be liable for the plant or equipment of the contractor because the same is worn out or rendered valueless on the work then it necessarily follows that the surety must be held liable for the depreciation in the value of the machinery and equipment which is caused by its use on the work for, to the extent of the depreciation caused by such use, the equipment has been consumed in that work

We do not think such is the intention or meaning of the statute requiring this bond"—McElrath & Rogers v W G Kimmons & Sons, 112 So 164, 165, 146 Miss 775, suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons, 112 So 680, 146 Miss 775—U S Fidelity & Guaranty Co v Yazoo County, 110 So 780, 781, 154 Miss 378

18. Ga —Moore v Standard Accident Ins Co, 173 S E 481, 48 Ga App 508

Minn — Mack International Motor Truck Corporation v Western Surety Co, 260 N W 869, 194 Minn 484—Motor Power Equipment Co v Park Transfer Co 247 N W 244, 188 Minn 370—Clifton v Norden, 226 N W 940, 178 Minn 288, 67 A L R 1227

S D —Western Material Co v Enke 228 N W 385, 56 S D 302—Dennis v Enke, 224 N W 925, 55 S D 15

The term "machinery" does not mean machinery forming a part of the contractor's equipment to be used on any and all jobs which he might thereafter undertake —Moore v Standard Accident Ins Co, 173 S E 481, 48 Ga App 508

19. Ark —Detroit Fidelity & Surety Co v Yaffe Iron & Metal Co, 44 S W 2d 1085, 184 Ark 1095

Pipe

Surety on state highway contrac-

ue,[20] and the purchase price of machinery is a proper claim against a bond conditioned for payment to persons furnishing tools, machinery, and equipment, where the machinery was necessary to do the particular work and was not merely equipment used or available on other projects,[21] and where the machinery, except for salvage value, was consumed in the work.[22] Claims for small tools and appliances[23] worn out or consumed on the job,[24] or which may or may not have outlasted the work,[25] have been held to come within the bond. However, it has also been held that tools which are not consumed or destroyed in the work are not covered by the bond.[26]

Where the parties in their contract define the word "materials," as including equipment, and such definition is carried into the bond by an express incorporation by reference, it has been held that the bond covers a claim for the price of equipment.[27]

Camp equipment. Highway contractors' bonds conditioned for the payment of labor, material, and the like, have been held to cover claims for camp equipment,[28] where it is necessary to establish a camp in order to furnish the workmen with living quarters conveniently near to the work.[29] There are, however, cases in which such a claim has been

tor's bond was liable for price of pipe used in highway construction work and purchased for the particular job although pipe could thereafter be used on other construction work—Detroit Fidelity & Surety Co v Yaffe Iron & Metal Co, supra

20. Cal—A L Young Machinery Co v Cupps, 2 P.2d 321, 213 Cal 210—McCormick Saeltzer Co v Haidlen, 6 P.2d 255, 119 Cal App 96

Bucket elevator, screen, one-yard drag scraper, pulleys, belts, lanterns, hose and extension for elevator furnished for and consumed on particular highway job, are "materials" and "supplies" covered by contractor's statutory bond—A L Young Machinery Co v Cupps, 2 P.2d 321, 213 Cal 210

21. Ga—Moore v Standard Accident Ins Co, 173 S.E. 481, 48 Ga App 508

Price exceeding rental value

Purchase price may not exceed the reasonable rental value—Moore v Standard Accident Ins Co, 173 S.E. 481, 48 Ga App 508

Bond to pay claims for apparatus, machinery, etc

A bond conditioned to pay all sums of money due for labor, material, apparatus, fixtures or machinery furnished to such contractor ... renders the surety liable for machinery which was furnished the contractor for the particular job on a conditional sales contract and which was repossessed by seller in depreciated condition—Hunter Mach Co v C C Vanderbloom & Sons, 214 N.W. 613, 193 Wis 218

22. S.D.—Dennis v Enke, 221 N.W. 925, 55 S.D. 15

"In order to create liability on the part of the surety for the purchase price of tools and appliances under these contract bonds, at least the following elements we think must be present. First, the tool or appliance must be purchased specifically and particularly for use in the performance of the particular contract, second the use of such tool or appliance must be at least proper, if not reasonably necessary, in connection with and about the carrying out of the contract, third, the tool or appliance must be used in or about the performance of the contract, fourth, the tool or appliance must be such that it is reasonably to be expected in the natural course of events that its normal life for the purpose for which it was designed will be practically consumed by its use in and about the performance of the contract, and in this connection the facts of each particular case must be taken into consideration."

Cal—A L Young Machinery Co v Cupps, 2 P.2d 321, 323, 213 Cal 210

S.D.—Dennis v Enke, 224 N.W. 925, 928, 55 S.D. 15

23. "Equipment"

Contractor's bond guaranteeing payment for "all materials, equipment teams and labor" furnished in construction of highway, includes hardware such as nails, machine bolts, washers, etc. used in work such items constituting "equipment"—Fidelity & Deposit Co of Maryland v Parks-Spencer Hardware Co, 133 S.E. 799, 145 Va 133

"Materials and supplies"

A bond conditioned for payment of claims for "materials and supplies" covers small tools

Ala—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So. 622, 222 Ala. 429—Union Indemnity Co v Handley, 121 So. 876, 220 Ala. 292

Fla.—Murphy v State ex rel. Gem City Builders' Supply Co, 155 So. 122, 115 Fla. 162

24. U.S.—American Liability & Surety Co v Bluefield Supply Co, C.C.A.W.Va., 70 F.2d 187

Cal.—McCormick Saeltzer Co v Haidlen, 6 P.2d 255, 119 Cal App 96

25. Ala.—Singer v Anniston Hardware Co, 133 So. 910, 222 Ala. 620—U S Fidelity & Guaranty Co v. Benson Hardware Co, 132 So. 622, 222 Ala. 429

Fla.—Murphy v State ex rel. Gem City Builders' Supply Co, 155 So. 122, 115 Fla. 162

26. Idaho—State v Storm, 287 P. 689, 49 Idaho 246

27. Wash.—Western Steel Casting Co v Edland, 61 P.2d 155, 187 Wash. 666

Validity of extrastatutory conditions generally see supra subdivision a of this section

28. U.S.—U S to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, D.C.Idaho, 4 F. Supp. 211

Ala.—Union Indemnity Co v Handley, 121 So. 876, 220 Ala. 292

Tex.—Employers' Casualty Co v Rockwall County, Civ.App., 300 S.W. 148, modified on other grounds 35 S.W.2d 690, 120 Tex. 411, reformed 38 S.W.2d 1098, 120 Tex. 441

Small tools, tents, and mattresses used by men while in a camp, which was essential and maintained by the contractor, were covered by the bond—Fidelity & Casualty Co of New York v Copenhaver Contracting Co, 165 S.E. 528, 159 Va. 126

Soap, and washing and cleansing compounds used in boarding camp for workmen are within bond—March v Butler, 220 N.W. 461, 53 S.D. 170

Materials used in constructing camphouses were proper charge against bond—U S Fidelity & Guaranty Co v Simmons, 133 So. 731, 222 Ala. 669

Bond conditioned for payment of camp supplies

Where bond was conditioned for payment by contractor of claims for camp supplies and equipment furnished him surety is liable for value of such supplies when furnished to subcontractor at his request in which contractor joined—Hansen v Remer, 200 N.W. 839, 160 Minn. 453

29. S.D.—March v Butler, 220 N.W. 461, 53 S.D. 170.

rejected[30] A claim for camp equipment may be disallowed where it does not appear that it was necessary for the contractor to maintain a camp for the men[31]

Rental of equipment The courts are not agreed on the question whether a bond of a highway contractor, conditioned for the payment of labor, material, and the like, covers the rental value of machinery or equipment used in the work,[32] the disagreement being in part a result of the varying terms of the statutes, pursuant to which the bonds have been executed[33] In some cases it has been held that a claim for the rental value of equipment or machinery used in performance of the contract is covered by the bond,[34] whether the equipment is leased to the contractor[35] or subcontractor[36]

Va —Fidelity & Casualty Co of New York v Copenhaver Contracting Co, 165 S E 528, 159 Va 126

30. Miss —McElrath & Rogers v W G Kimmons & Sons, 112 So 164, 146 Miss 775 suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons, 112 So 680, 146 Miss 775– U S Fidelity & Guaranty Co v Yazoo County, 110 So 780, 115 Miss 378

Furniture, bedding, and utensils to equip the camp are not "materials" within the bond —State v Smith, 119 So 56, 167 La 301

Knives, forks, and dishes, not necessarily being consumed or destroyed in the prosecution of the work, are not within the bond – Clatsop County v Feldschau 196 P 379, 99 Or 680

31. N C – Jenkins Hardware Co v Globe Indemnity Co, 170 S E 643, 205 N C 185

32. Ga —American Surety Co of New York v Koehring Co, 162 S E 840 44 Ga App 769

33. W Va —Julian v Cavin, 162 S E 318, 111 W Va 395

34. Ala —John E Ballenger Const Co v Joe F Walters Const Co, 184 So 275 236 Ala 548 modifying 184 So 270 28 Ala App 353
N D —Yarger v Dakota Trust Co, 215 N W 209, 55 N D 535
Or —Multnomah County v U S Fidelity & Guaranty Co 170 P 527 87 Or 198, L R A 1918C 685
Tenn —Nicks v W C Baird & Co, 52 S W 2d 147, 165 Tenn 89
Va —Fidelity & Casualty Co of New York v Copenhaver Contracting Co, 165 S E 528, 159 Va 126—C S Luck & Sons v Boatwright, 162 S E 53, 157 Va 490

Hire of horses and mules
Ark —Terry v Little, 18 S W 2d 916, 179 Ark 954
Cal —Bricker v Rollins, 173 P 592, 178 Cal 347
N D —Yarger v Dakota Trust Co, 215 N W 209, 55 N D 535—Payseno v Padgett Co, 212 N W 836, 55 N D 154
Wash —Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214
29 C J p 612 note 65 [a] (1)

Camp site rented to highway contractor with houses thereon is not permanent equipment, but "supply" within statute requiring bond —U S Fidelity & Guaranty Co v Yelding Bros Co Department Stores, 143 So 176, 225 Ala 307

Steam shovel and boiler
N C —Wiseman v Lacy, 138 S E 121, 193 N C 751

Bond conditioned for use of furnishers of machinery, etc.

A claim for rental of machinery is within a bond conditioned for use of all "persons doing work or furnishing skill tools, machinery, or materials under for the purpose of such contract"—Moore v Standard Accident Ins Co, 173 S E 481, 48 Ga App 508—American Surety Co of New York v Koehring Co, 162 S E 840, 44 Ga App 769

Bond for payment of "equipment"

Rental due for use of a crane is covered under a statute providing for payment of all persons "furnishing labor, material, equipment and supplies," the word "equipment" being sufficient to embrace the claim for rental —Shuptrine v Jackson Equipment & Service Co, 150 So 795, 168 Miss 464

Bond for payment of supplies, tools, and appliances, etc.

Under covenant "to pay all just claims for materials, supplies, food tools appliances and labor and all other just claims incurred by him or any of his subcontractors ," surety is liable for rental of equipment used in construction of highway —Western Material Co v Deltener 264 N W 207, 64 S D 62

Bond for "provisions and supplies" covers claims for rental of machinery —U S Fidelity & Guaranty Co v Feenaughty Machinery Co, 85 P 2d 1085 197 Wash 569

After abandonment of work

When surety has taken assignment of contractor's interest in his equipment to become effective if contractor defaults in performance of contract, he is liable for rental value of horses hired by contractor and retained in his possession with knowledge of surety, after work has ceased —Hansen v Remer, 200 N W 839 160 Minn 453

Amount of rental

(1) Claim can be made against surety only for reasonable value of use of rented machinery, not exceeding contract price, and for time during which proof clearly showed machinery to have been used by contractor in work —Lidral Wiley, Inc v U S Fidelity & Guaranty Co, 38 P 2d 346, 179 Wash 631

(2) Under contract for hiring of wagons and tractors by road construction contractor, providing for payment of monthly rentals aggregating one thousand two hundred dollars with six hundred dollars additional should equipment be used double shift and that contractor guaranteed rental for sixty days, obligation of contractor for use of equipment less than sixty days, for which actual rentals aggregated two thousand one hundred eighty dollars was discharged by payment of two thousand four hundred dollars as guaranteed rentals, as against contention that contractor and surety on his bond were liable for total rental for both single and double shift for sixty days under terms of guaranty —Mead v Seaboard Surety Co, 270 N W 563, 198 Minn 476

Lease or conditional sale

Highway contractor's agreement to pay stipulated monthly rental for use of tractor with option to renew agreement or purchase tractor at price reduced by such rental was lease" and not "conditional sale" and within contractor's bond notwithstanding installments of rent under renewals of contract amounted substantially to price of tractor —Western Material Co v Deltener, 264 N W 207, 64 S D 62

Waiver of claim

Company, which rented crane for use in construction of state highway to subcontractor of contractor, under contract whereby rental was to be paid out of first moneys becoming due to subcontractor from contractor, did not thereby waive protection of contractor's statutory bond – Shuptrine v Jackson Equipment & Service Co, 150 So 795, 168 Miss 464

35 Ga —American Surety Co of New York v Koehring Co, 162 S E 840 44 Ga App 769
Neb —Peter Kiewit Sons' Co v National Casualty Co, 8 N W 2d 192
S D — Western Material Co v Enke 228 N W 385, 56 S D 302

Surety is charged with notice of whether contractor must rent equipment —Wiseman v Lacy, 138 S E 121, 193 N C 751

36. Ind —Middle West Roads Co v

In other cases a claim for rental of equipment or machinery has been held not to be within the bond,[37] whether the equipment is leased to the contractor[38] or subcontractor[39]

In some jurisdictions, the statutes expressly include claims for the renting or hiring of teams or implements or machinery used in the work[40] The statutes apply, notwithstanding the equipment leased is not consumed in the work[41]

Repairs on equipment A bond of a highway contractor for the payment of labor, material, and the like, usually does not include major repairs on the equipment of the contractor or subcontractor,[42] at least in the absence of proof that the new parts were consumed in the work covered by the bond,[43] and it has been held that repairs which become a

Gradmont Haulage Co, 7 N E 2d 528, 103 Ind App 297
Miss—Shuptrine v Jackson Equipment & Service Co, 150 So 795, 168 Miss 464

Estoppel of owner

Owner of shovel was not estopped to recover on highway contractor's bond for use of shovel by subcontractor, where subcontractor represented to contractor that he owned shovel, evidence conflicted as to owner's knowledge of representations and contractor had negligently failed to require bond of subcontractor—Excavating Equipment Dealers v Ætna Casualty & Surety Co, 24 P 2d 896, 134 Cal App 161

37. Iowa—Monona County v O'Connor, 215 N W 803, 205 Iowa 1119—Nebraska Culvert & Mfg Co v Freeman, 198 N W 7, 197 Iowa 720
Mo—State ex rel Kingsley v Carterville Const Co, 284 S W 150, 220 Mo App 244.

Hire of teams

La—Long Bell Lumber Co v S D Car Const Co, 133 So 438, 172 La 182
Okl—Green Const Co v. Chorn, 46 P 2d 499, 173 Okl 85

Camp site

Under Acts 1917 c 74, general highway contractor and surety were not liable for rent of a camp site where a subcontractor installed claimants' teaming outfit for a time, location for a camp site not being material furnished—Southern Const Co v. Halliburton, 258 S W 409, 149 Tenn 319

In Pennsylvania rental charges for equipment are not covered by the bond, even if the Act of May 7, 1929, providing for payment of labor and material claims "whether or not the said labor or materials enter into and become component parts of the structure, work or improvement contemplated," is read into the bond Such charges are neither for labor nor for material—Commonwealth to Use of Garman, v A Stryker, Inc, 171 A 298, 112 Pa Super 449—Commonwealth to Use of Howard W Read Corporation v A Stryker, Inc, 167 A 459, 109 Pa Super 137

In West Virginia

(1) A claim for rental of machinery which is a part of the contractor's general equipment is not covered by the bond.

U S—American Liability & Surety Co v Bluefield Supply Co, C C A W Va, 70 F 2d 187
W Va—National Equipment Corporation v Pinnell, 172 S E 790, 114 W Va 558—Rhodes v. Riley, 169 S E 525, 113 W Va 679

(2) Formerly, it was held that a bond for payment of "materials, machinery, equipment and labor" covered rental of a roller—Julian v. Cavin, 162 S E 318, 111 W Va 395

38. Del—Warner Co v Schoonmaker, 174 A 449, 20 Del Ch 165
Ky—Thew Shovel Co v Massachusetts Bonding & Insurance Co, 88 S W 2d 960, 261 Ky 712

39. Mo—State to Use of Potts v Davis, App, 24 S W 2d 1047
N J—Stein v J T Stout Co, 155 A 457, 9 N J Misc 685
Okl—Green Const Co v Chorn, 46 P 2d 499, 173 Okl 85

Company furnishing trucks with drivers to subcontractor could not recover on contractor's bond as one "performing labor or furnishing materials"—Stein v J T Stout Co, 155 A 457, 9 N J Misc 685

Claim for rental, depreciation, and cost of redelivery of steam shovel let to subcontractors is not for labor or material used in construction of road—State v National Surety Co 128 A 916, 148 Md 221

That proportion of premium on contractor's bond was charged to subcontractors in their account with the principal contractor is not sufficient reason for extending liability to include rentals—State v National Surety Co, supra

40. Cal—Gurley Lord Tire Co v Newgard, 50 P 2d 1043, 10 Cal App 2d 38

Tires and tubes rented to subcontractor and used by him on trucks employed in public highway construction job, are within statute—Gurley Lord Tire Co v. Newgard, supra

Estoppel of owner

That employee of tire company which rented tires and tubes to subcontractor to be used on trucks employed in public highway construction job remarked to contractor's employee that tire company might "take a chance" on subcontractor's ability to pay did not estop tire company to recover against contractor and bondsmen, where no change of position or injury from any act of tire company was shown—Gurley Lord Tire Co v Newgard, supra

41. Cal—Gurley Lord Tire Co v Newgard, supra

42. Ala—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429
Ga—Western Casualty & Surety Co v Fulton Supply Co, 4 S E 2d 690, 60 Ga App 710
Minn—Clifton v Norden, 226 N W 940, 178 Minn 288, 67 A L R 1227, followed in Thoelke v Norden, 226 N W 943, 178 Minn 295

Bond for payment of "equipment", etc.

Major repairs not shown to have been worn out on the job are not included, although the bond is broadly conditioned for the payment "of all just claims for such work, tools, machinery, skill, materials, insurance premiums, equipment and supplies, for the completion of the contract"—Clifton v Norden, 226 N W 940, 178 Minn 288, 67 A L R 1227, followed in Thoelke v Norden, 226 N W 943, 178 Minn 295

What constitutes major repairs

Differential and transmission assemblies furnished by materialmen for repair of motortrucks used in highway construction jobs are major repairs and are not covered by bond—Mack International Motor Truck Corporation v Western Surety Co, 260 N W 869, 194 Minn 484

In West Virginia under the statute which requires that the bond be conditioned for 'all materials, machinery, equipment and labor used by him" in the performance of the work, the surety on the bond is liable for repairs to the contractor's or subcontractor's equipment, although, it would seem, the repairs are not small or incidental and outlast the work—National Equipment Corporation v Pinnell, 172 S E 790, 114 W Va 558—Hicks v Randich, 144 S E 887, 106 W Va 109

43. Ga.—Western Casualty & Surety Co v Fulton Supply Co, 4 S E 2d 690, 60 Ga App 710
Minn—Mack International Motor Truck Corporation v Western Surety Co, 260 N W 869, 194 Minn 484—Clifton v Norden, 226 N W. 940, 178 Minn. 288, 67 A L R 1227,

permanent part of the machinery or equipment, or which add materially to the value of the equipment, and which survive the contract and are available for use on other contracts are not within the bond [44] Small and incidental repairs on equipment made necessary by ordinary wear and tear have been included,[45] although the equipment is owned or operated by the subcontractor,[46] and although the repairs are not wholly consumed in fulfilling the contract [47] Some courts, however, have excluded claims for repairs to equipment [48]

Repairs on machines are not covered under a statute providing that the bond shall be conditioned for the payment of all material or supplies furnished for use "in" machines [49]

followed in Thoelke v Norden, 226 N W 943, 178 Minn 295

44 La—Rester v Moody & Stewart 134 So 690, 172 La 510, reversing 130 So 254, 16 La App 177
Mass—Brogna v Leo, 4 N E 2d 295, 295 Mass 520
Okl—Fuller v Brooks, 246 P 369, 117 Okl 252
Or—State for Use and Benefit of Stater Motor Co v Metropolitan Casualty Ins Co of New York, 26 P 2d 1094, 145 Or 367—Fitzgerald v Neal 231 P 645 113 Or 103

Labor performed by blacksmith in sharpening drills for subcontractor constructing public highway which were sharpened at specified price for each drill and not on time basis, were not liable claim under statute—Brogna v Leo, 4 N E 2d 295, 295 Mass 520

45 U S—American Liability & Surety Co v Bluefield Supply Co, C C A W Va, 70 F 2d 187—Maryland Casualty Co v Ohio River Gravel Co, C C A W Va, 20 F 2d 514, rehearing denied 21 F 2d 744, certiorari denied 48 S Ct 157, 275 U S 570 72 L Ed 431
Ala—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429
Ga—Western Casualty & Surety Co v Fulton Supply Co, 4 S E 2d 690, 60 Ga App 710—Moore v Standard Accident Ins Co, 173 S E 481, 48 Ga App 508
Idaho—State v Storm, 287 P 689, 49 Idaho 246
Minn—Mack International Motor Truck Corporation v Western Surety Co, 260 N W 869, 194 Minn 484
Or—State, for Use and Benefit of Stater Motor Co v Metropolitan Casualty Ins Co of New York, 26 P 2d 1094, 145 Or 367
S D—Western Material Co v Enke, 228 N W 385, 56 S D 302
Utah—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226
Va—C S Luck & Sons v Boatwright, 162 S E 53, 157 Va 490
29 C J p 612 note 65 [a] (6)

What constitutes incidental repairs

(1) Small and incidental repairs have a relative meaning and bear relation to the value of the machinery repaired—Standard Accident Ins Co v Dodd, 142 So 574, 225 Ala 285

(2) Repair of tractor and steam shovel, amounting to a total cost of one hundred eighty-eight dollars including sixty-five dollars for replacement of axle, as compared to the total value of the machine of sixteen thousand dollars is incidental and comes within the contractor's bond—Standard Accident Ins Co v Dodd, supra

(3) Cost of repair parts, consisting of axle shafts, sliding shafts, bumper steering tubes, and other smaller parts, furnished in repairing fleet of trucks used by subcontractor in road work, could be recovered under bonds of contractor and subcontractor—General Motors Truck Co v Phillips, 254 N W 580, 191 Minn 467

Failure to show equipment used on job

Parties furnishing minor repairs to highway subcontractor were not entitled to recover from the general contractor and surety, where subcontractor had his own automobile in which he rode around over the work and elsewhere, and also had a contractor's outfit belonging to it and not consumable in the work, where it does not appear from the proof for what purpose the materials were sold or to be used—Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319

Parties defining "materials" as including "equipment"

Materialman could recover, against statutory bond entered into by surety of highway contractor with state, which was conditioned on performance of contract defining materials as including equipment or materials used or consumed in performance of work, for parts that went into trucks or other equipment used in construction work—Western Steel Casting Co v Edland, 61 P 2d 155, 187 Wash 666

In Texas

(1) Labor performed in necessary repair work on automobiles and trucks used by highway contractors came within highway contractors' bond covering "labor furnished on or incident to performance of contract"—Employers' Casualty Co v Rockwall County, 35 S W 2d 690, 120 Tex 441, modifying, Civ App, 300 S W 148, and reformed 38 S W 2d 1098, 120 Tex 441.

(2) In action on highway contractors' bond, wherein certain materialmen filed interventions, surety was not liable on claim for blacksmith labor in repairing tools and machinery used on the work—U S Fidelity & Guaranty Co v Henderson County, Civ App, 253 S W 835, affirmed, Com App, 276 S W 203, motion overruled 276 S W 1119

48. Ala—Standard Accident Ins Co v Dodd, 142 So 574, 225 Ala 285
Minn—General Motors Truck Co v Phillips, 254 N W 580, 191 Minn 467

47. Idaho—State v Storm, 287 P 689, 49 Idaho 246
Minn—General Motors Truck Co v Phillips, 254 N W 580, 191 Minn 467

48. Del—Warner Co v Schoonmaker, 171 A 449 20 Del Ch 165
Ind—Montgomery v Southern Surety Co of Iowa, 162 N E 31, 96 Ind App 472
Miss—McElrath & Rogers v W G Kimmons & Sons 112 So 164, 146 Miss 775 suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons, 112 So 680, 146 Miss 775
Mo—State ex rel Hernleben v Detroit Fidelity & Surety Co 21 S W 2d 494, 496, 224 Mo App 22
"It is plaintiff's contention in the Gratz Case that in the repair of the machinery and tools work and some materials were expended and that such items are within the purview of the guaranty We are not impressed with this argument, for as we rule on this point, it is the contractor's duty not only to furnish the necessary implements and machinery for the proper execution of the work, but to keep them in order It follows therefore, that the time and material expended in keeping in repair the implements and machinery of the contractor are not expended in the construction of the road"—State ex rel Hernleben v Detroit Fidelity & Surety Co, supra

Repairing track of railroad to handle supplies

Claim for railroad ties and labor in repairing spur track of railroad to facilitate handling of supplies and materials for highways was not recoverable against surety on highway contractor's bond—Long Bell Lumber Co v S D Carr Const Co, 133 So 438, 172 La 182

49. La—Rester v Moody & Stewart, 134 So 690, 172 La 510 reversing 130 So 254, 16 La App 177.

(c) Other Claims

Various particular claims against labor and material bonds of highway contractors have been allowed or disallowed under the circumstances of particular cases such as claims for board and groceries, clothing, medicines, tobacco, feed for animals, fuel, insurance premiums, loans, explosives, etc

Various and miscellaneous claims have been held to come within the terms of highway contractors' bonds conditioned for the payment of claims for labor, material, and the like,[50] such as a claim for a bonus agreed to be paid the subcontractor on completion of the work[51] or for wages of a foreman or superintendent[52] Other claims have been disallowed,[53] such as a claim for telephone service,[54] for traveling expenses of the contractor's foreman,[55] and for services as foreman or superintendent of the subcontractor[56]

Board, groceries, and provisions Highway contractors' bonds conditioned for the payment of claims for labor, material, and the like, have been held to include groceries and provisions for feeding or boarding workmen on the job,[57] although they

50. Claim for blacksmith's services
Or—Columbia County v Consolidated Contract Co, 163 P 438 83 Or 251

Claim for small items of hardware, cement, sand, and other consumable articles was within road contractor's bond—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 129

Claim for reinforcing steel used on road project was recoverable as against contractor's bond regardless of small discrepancy in estimate by highway department—U S Fidelity & Guaranty Co v Benson Hardware Co, supra

Claims of highway subcontractor for clearing, grubbing, excavating, and shouldering, based on agreed unit price, although subcontractor used steam shovels, tractors wagons, and other machinery operated by comparatively few employees, and no separate account was presented covering employees' wages, were lienable claims for which surety on highway contractor's bond was liable—Theiler v Wilson Const Co, 250 N W 433, 213 Wis 171

Cost incurred by railroad to protect its property
Recovery could be had on highway contractor's bond on contractor's promise to pay to railroad cost of furnishing flagmen linemen, and equipment necessary to protect adjoining property of railroad from blasting involved in highway construction, where contractor was required by contract to protect property of railroad so that trains could be operated safely - State, for Use and Benefit of Southern Pac Co, v American Surety Co of New York, 44 P 2d 1079, 150 Or 236

Dishonored checks drawn by subcontractor for payment of claims for labor and materials and transferred to a third person are covered by the bond—Finch v Enke, 222 N W 657, 54 S D 164

Galvanized road fabric furnished for use on road project was within road contractor's bond although substituted for galvanized cable—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

Pipe used in road project
Ala—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

Profits made by materialman are covered by bond and contract for construction of road between state and contractor requiring contractor to pay all claims for labor and materials—Blair & Franse Const Co v Allen, 65 S W 2d 78, 251 Ky 366

"Timken bits" furnished state highway contractor for drilling rock and used up in construction work were "supplies" within the bond as distinguished from "equipment"—U S Fidelity & Guaranty Co v Feenaughty Machinery Co, 85 P 2d 1085 197 Wash 569

51. Miss - Stowell v Clark, 118 So 370, 152 Miss 32

52 La—Silver v Harriss, 115 So 376, 165 La 83
N C - R L Snelson & Co v R G Hill & Co, 146 S E 135, 196 N C 494
Va - Fidelity & Deposit Co of Maryland v Mason, 133 S E 793, 145 Va 138

53 La—Dewil v Union Indemnity Co, 120 So 654, 10 La App 224
29 C J p 612 note 65 [b]

Allowance given subcontractor by contractor to keep him in good spirits is not a proper claim—Dewil v Union Indemnity Co, supra

Subcontractor's expenses in removing oversized gravel without help of contractor's employees was not within bond covering wages to laborers—Kamperska Materials Co v Bone, 219 N W 244, 52 S D 559

Conversion by contractor after assignment of contract
Where after highway contractor assigned his contract to materialman, assignee failed to give notice of the assignment to the highway commission or the board of supervisors, and, because of such failure to give notice, a payment was made by the authorities to the original contractor, part of which he retained in disregard of his assignment, such defalcation could not be recovered by the assignee materialman from the contractor's surety—Sibley Lumber Co v Madsen, 200 N W 425, 198 Iowa 880

54 Del—Warner Co v Schoonmaker, 174 A 449, 20 Del Ch 165

55. La—Silver v. Harriss, 115 So 376, 165 La 83

56. Tenn—Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319

"Labor"
Road contractor's bond under Rev St 1919 §§ 1040, 1041, conditioned for the payment of claims for labor," did not include services of foreman of subcontractor, acting as the subcontractor's alter ego in employing labor, purchasing material and directing the performance of subcontractor's contract—Missouri State Highway Commission, to Use of Onstad v Coopers Const Service Co, Mo App 268 S W 701

Expense of automobile
Highway contractor and surety were not liable for use of an automobile by the superintendent of the entire subcontractors of a subcontractor under Acts 1917 c 74, the expense of the automobile being an expense of superintendence—Southern Const Co v Halliburton, 258 S W 409 149 Tenn 319

57 U S—American Surety Co of New York v James A Dick Co, C C A N M, 23 F 2d 464, certiorari denied 49 S Ct 26 278 U S 624, 73 L Ed 545—U S to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, D C Idaho, 4 F Supp 211
Ariz—National Surety Co v Arizona Grocery Co, 259 P 404 259 Ariz 199
Cal—McCormick Saultzer Co v Haidlen, 6 P 2d 255, 119 Cal App 96
N C - Overman & Co v Maryland Casualty Co, 136 S E 250, 193 N C 86—Plyler v Elliott, 131 S E 306, 191 N C 54
Or—Clatsop County v Feldschau, 196 P 379, 99 Or 680
Tenn—Carter County v Oliver-Hill Constr. Co, 228 S.W 720, 143 Tenn 649.

are sold and charged to the subcontractor,[58] at least where the location of the work makes it necessary to board the men or to furnish them with food[59] and the boarding house or commissary of the contractor is not operated for a profit.[60] However, it has also been held that a claim for groceries and provisions for the workmen does not come within the bond,[61] notwithstanding the contractor deducts the board of each employee from his wages.[62] A claim for groceries and provisions may be rejected where it appears that there were no circumstances of necessity which required the contractor to furnish board or provisions[63] or it appears that the boarding house or commissary of the contractor was operated for a profit,[64] although it has been held that necessity or indispensability is not an absolute test, and if the provisions supplied can be reasonably regarded as within the contemplation of the parties and contribute to the work and are consumed in its prosecution the surety is liable.[65]

In some jurisdictions statutes have been enacted which require that the bond be conditioned for payment of claims for food and groceries furnished laborers on the job.[66]

"Materials and supplies"

A claim for groceries and provisions is within a bond conditioned for payment of claims for "materials and supplies."

Ala.—U. S. Fidelity & Guaranty Co. v. Yeilding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307—U. S. Fidelity & Guaranty Co. v. Benson Hardware Co., 132 So. 622, 222 Ala. 429—Union Indemnity Co. v. Handley, 124 So. 876, 220 Ala. 292.

Fla.—Union Indemnity Co. v. State, 127 So. 307, 99 Fla. 656, followed in Union Indemnity Co. v. State, 127 So. 308, 99 Fla. 661.

S.D.—Finch v. Enke, 222 N.W. 657, 54 S.D. 164—March v. Butler, 220 N.W. 461, 53 S.D. 170.

29 C.J. p. 612, note 66 [a] (4).

Bond does not cover groceries for contractor and family, although meals were furnished to certain employees on job.—U. S. Fidelity & Guaranty Co. v. Benson Hardware Co., 132 So. 622, 222 Ala. 429.

Presumption that sufficient premium was charged

Where bond of highway contractor was made after decision requiring surety under similar bond to pay for food stuffs furnished contractor's crew, it would be presumed that surety fixed its premiums accordingly.—Pyler v. Elliott, 131 S.E. 306, 191 N.C. 54.

58. Ala.—U. S. Fidelity & Guaranty Co. v. Simmons, 133 So. 731, 222 Ala. 669.

Fla.—Walter J. Bryson Paving Co. v. State, for Use of Lewis Bear Co., 149 So. 563, 111 Fla. 394, followed in Walter J. Bryson Paving Co. v. State for Use of Pace Co., 149 So. 565, 111 Fla. 402.

S.D.—Finch v. Enke, 222 N.W. 657, 54 S.D. 164.

59. Colo.—Southern Surety Co. v. Ft. Lupton Mercantile Co., 249 P. 263, 80 Colo. 80.

Fla.—Union Indemnity Co. v. State, 127 So. 307, 99 Fla. 656.

Or.—Clatsop County v. Fidelity & Deposit Co., 189 P. 207, 96 Or. 2.

Tex.—U. S. Fidelity & Guaranty Co. v. Henderson County, Com. App., 276 S.W. 203, affirming Civ. App., 253 S.W. 835, and motion overruled Com. App., 276 S.W. 1119—Southern Surety Co. v. Guaranty State Bank of De Leon, Civ. App., 275 S.W. 436.

Va.—Fidelity & Deposit Co. of Maryland v. Bailey, 133 S.E. 797, 145 Va. 126.

"Leading case is Brogan v. National Surety Co., Mich., 246 U.S. 257, 38 S.Ct. 250, 252, 62 L.Ed. 703, L.R.A. 1918D, 776."—Bowling v. Julian Const. Co., 158 S.E. 165, 166, 110 W.Va. 275.

60. Miss.—McElrath & Rogers v. W. G. Kimmons & Sons, 112 So. 164, 146 Miss. 775, suggestion of error overruled McElwrath & Rogers v. W. G. Kimmons & Sons, 112 So. 680, 146 Miss. 775.

61. Ill.—Lake County v. Southern Surety Co., 265 Ill. App. 286.

Iowa.—Monona County v. O'Connor, 215 N.W. 803, 205 Iowa 1119.

La.—Silver v. Harriss, 115 So. 376, 165 La. 83—Interstate Wholesale Grocer Co. v. Pruitsman, 1 La. App. 731.

Minn.—Standard Oil Co. v. Remer, 212 N.W. 460, 170 Minn. 298.

Mo.—State ex rel. and to Use of Worthmann v. Gilliom, App., 60 S.W.2d 696—Lillard v. Royal Indemnity Co., 252 S.W. 168, 219 Mo. App. 584.

Claim for meals furnished by cafe owner to drivers of highway contractor was not within statute requiring bond by contractor for materials furnished.—Coon River Co-op. Sand Ass'n v. McDougall Const. Co. of Sioux City, 244 N.W. 847, 215 Iowa 861.

Groceries purchased by employee for family

Claim for meats and groceries purchased by employee of highway contractor for employee and family was not within statute requiring bond by contractor for materials furnished.—Coon River Co-op. Sand Ass'n v. McDougall Const. Co. of Sioux City, supra.

Board and labor furnished subcontractor

Under a bond conditioned that the contractor shall pay to all persons furnishing material or performing labor all and every sum of money due him for all such labor and material "for which the contractor is liable," the contractor's surety is not liable on a claim for board and services rendered to subcontractors.—Warner Co. v. Schoonmaker, 174 A. 449, 20 Del. Ch. 165.

Equitable assignment of wages

Road contractor's orders to merchant on basis of which latter furnished groceries to employees was not equitable assignment pro tanto of wages so as to subrogate merchant to employees' rights against surety on contractor's bond.—Bowling v. Julian Const. Co., 158 S.E. 165, 110 W.Va. 275.

62. Ky.—Massachusetts Bonding & Insurance Co. v. C. B. Duff & Co., 87 S.W.2d 363, 261 Ky. 255.

63. Ill.—Lake County v. Southern Surety Co., 265 Ill. App. 286.

Miss.—Watkins v. U. S. Fidelity & Guaranty Co., 103 So. 224, 138 Miss. 388.

Mont.—Gary Hay & Grain Co. v. Fidelity & Deposit Co. of Maryland, 255 P. 722, 79 Mont. 111.

N.C.—Wilson-Stamey Grocery Co. v. Ross, 138 S.E. 537, 194 N.C. 109.

Tenn.—Southern Const. Co. v. Halliburton, 258 S.W. 409, 149 Tenn. 319.

W.Va.—Bowling v. Julian Const. Co., 158 S.E. 165, 110 W.Va. 275.

Room and board furnished by claimant to contractor's employees were not "provisions and supplies" within the meaning of the statute where the board and room were of the men's own selection and there were a number of places from which they might choose and the work was not being performed in an inaccessible place.—Rogers v. Rowland, 10 P.2d 988, 168 Wash. 148.

64. Miss.—Watkins v. U. S. Fidelity & Guaranty Co., 103 So. 224, 138 Miss. 388.

65. S.D.—Finch v. Enke, 222 N.W. 657, 54 S.D. 164.

66. Minn.—Clifton v. Norden, 226 N.W. 940, 178 Minn. 288, 67 A.L.R.

Clothing, medicines, tobacco, etc Highway contractors' bonds conditioned for the payment of claims for labor, material, and the like, have been held to include claims for clothing furnished laborers on the job,[67] although the clothing is charged to the account of the subcontractor[68] In some cases, however, such a claim has been rejected[69]

A claim for tobacco and cigarettes sold to the contractor and furnished to the men on the job has been allowed against the bond,[70] although in some cases a claim for such items has been rejected[71] Claims for similar items have been allowed[72] and disallowed[73]

Feed, etc, for animals A claim for feed furnished for horses and mules employed in the construction or repair of a highway ordinarily is regarded as within a highway contractor's bond conditioned for the payment of claims for labor, material, and the like,[74] and this is true although the feed is sold to the subcontractor[75] However, there

1227 followed in Thoelke v Norden, 226 N W 943, 178 Minn 295

67. Minn —Hansen v Remer, 200 N W 839, 160 Minn 453

"Materials and supplies"

(1) Bond conditioned for payment of "materials and supplies" covers clothing furnished laborers on the job —Union Indemnity Co v Handley, 124 So 876 220 Ala 292

(2) Overalls shirts pants, and other clothing furnished road contractor for employees were covered by bond for payment of claims for "materials and supplies"- U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

68. Fla —Walter J Bryson Paving Co v State for Use of Lewis Bear Co, 149 So 563 111 Fla 394, followed in Walter J Bryson Paving Co v State, for Use of Pace Co, 149 So 565, 111 Fla 402

69. U S —U S, to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, D C Idaho, 4 F Supp 211

Miss —McElrath & Rogers v W G Kimmons & Sons 112 So 164, 146 Miss 775 suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons, 112 So 680, 146 Miss 775

Clothing not consumed or destroyed in construction of highways was not covered by highway contractor's bond —State v Storm, 287 P 689, 49 Idaho 246

Cost of overshoes furnished highway contractors and their men was not recoverable of surety under contractor's bond guaranteeing payment of labor and material furnished in execution of contract —Franzen v Southern Surety Co, 246 P 30, 35 Wyo 15, 46 A L R 496

70. **"Materials and supplies"** as used in bond covers tobacco and cigarettes —Union Indemnity Co v Handley 124 So 876 220 Ala 292

"Camp supplies" as used in bond covers tobacco sold by contractor to men at "wanigans"—Hansen v Remer, 200 N W 839, 160 Minn 453

71. Miss —McElrath & Rogers v W G Kimmons & Sons, 112 So 164 146 Miss 775, suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons, 112 So 680, 146 Miss 775

N C —Overman & Co v Maryland Casualty Co, 136 S E 250, 193 N C 86

"Supplies or provisions"

Tobacco, cigars and cigarettes are not within a bond conditioned for payment of "supplies or provisions" —Clatsop County v Feldschau, 196 P 379, 99 Or 680

72. **Medicines**

Minn —Hansen v Remer 200 N W 839, 160 Minn 453

Effect of assignment of wages

Where merchants furnished goods to laborers employed by highway contractor and subcontractors on orders given by them to their men, the amount thereof being deducted from wages due the men the indorsement and delivery of such orders to the merchants furnishing the goods operated as an assignment of the amount of the laborers claims represented by the orders — Hansen v Remer, supra

73. **Merchandise sold to laborers for personal use**

La —State v Miller, 126 So 422, 169 La 914

Candies and soft drinks furnished highway contractor are not covered by contractor's bond — Overman & Co v Maryland Casualty Co, 136 S E 250, 193 N C 86

Snuff, pipes, candy, and similar items furnished boarding camp for workmen were not within highway contractor's bond —Murch v Butler 220 N W 461, 53 S D 170

Stationery, clock, pens, and pencils furnished road contractor's subcontractor are not covered by contractor's bond -U S, to Use and Benefit of Taylor, v Fidelity & Deposit Co of Maryland, D C Idaho, 4 F Supp 211

74. U S —American Surety Co of New York v James A Dick Co, C C A N M, 23 F 2d 464 certiorari denied 49 S Ct 26, 278 U S 624, 73 L Ed 545—Maryland Casualty Co v Gottsche, C C A Mass, 18 F 2d 582—Early & Daniel Co v American Surety Co of New York, C C A N C, 5 F 2d 670

N C —Overman & Co v Maryland Casualty Co, 136 S E 250, 193 N C 86—Chappell v National Surety Co 133 S E 21, 191 N C 703—Plyler v Elliott 131 S E 306, 191 N C 54

S C — Molony & Carter Co v Pennell & Harley, 169 S E 283, 169 S C 462

Tenn —Carter County v Oliver-Hill Constr Co, 228 S W 720, 143 Tenn 649

Tex — U S Fidelity & Guaranty Co v Henderson County, Com App, 276 S W 203, affirming, Civ App 253 S W 835 and motion overruled Com App 276 S W 1119

Va — Fidelity & Deposit Co of Maryland v Bailey 143 S E 797, 799, 145 Va 126, citing **Corpus Juris.**

Wyo - Franzen v Southern Surety Co 246 P 30, 35 Wyo 15, 46 A L R 496

"Materials and supplies"

A bond conditioned for payment of 'materials and supplies' covers feed for animals —U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores 143 So 176, 225 Ala 307—Memphis Milling Co v Southern Surety Co 133 So 43, 222 Ala 502 - Union Indemnity Co v Handley 124 So 876, 220 Ala 292—29 C J p 612 note 66 [a] (2)

"Supplies or provisions"

Feed for horses is included in bond for payment of supplies and provisions' Clatsop County v Feldschau, 196 P 379 99 Or 680

"Camp supplies," as used in bond, comprehends feed for horses kept at the contractor's camp —Hansen v Remer, 200 N W 839, 160 Minn 453

75. U S —U S, to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, D C Idaho, 4 F Supp 211

Ind - Federal Paving Co v Raschka, 141 N E 644, 82 Ind App 416

Okl —U S Fidelity & Guaranty Co v McCrackin, 298 P 264, 148 Okl 198—Hyde Const Co v Fricken schmidt, 284 P 34, 140 Okl 290

Arrangement by contractor with different dealer

Highway contractor's liability on bond for stock feed furnished to subcontractor was not affected by fact that contractor made arrangements

is authority that a claim for feed for animals is not within the bond.[76] In some jurisdictions statutes expressly require that the bond shall be conditioned for the payment of claims for furnishing feed for animals.[77]

A claim for harness and other equipment for horses and mules has been held to come within the bond,[78] although some courts have refused to allow a claim for harness,[79] and where the harness is purchased with the intention of using it on other jobs and it is actually so used the claim is not within the bond.[80] A claim for shoeing horses has been held to be outside the bond.[81]

A claim for veterinary services has been allowed against the bond,[82] and, although the work has ceased, a claim for wages of men in caring for horses and other property may, under particular circumstances, be allowed.[83]

Fuel, coal, oil, gasoline, etc The courts are not in accord on the question whether a bond of a highway contractor conditioned for the payment of claims for labor and material and the like includes oil, gasoline, kerosene, lubricants, etc., used in operating trucks and machinery employed in the construction or repair of the road.[84] Some courts have held that such items are covered by the bond,[85]

with another dealer to furnish stock feed to subcontractor, where dealer furnishing feed had no knowledge of such arrangement—Molony & Carter Co v Pennell & Harley, 169 S E 283, 169 S C 462

76. Ark—Goode v Ætna Casualty & Surety Co., 13 S W 2d 6, 178 Ark 451

La - State v Miller, 126 So 422, 169 La 914

Mo - Wiss v Royal Indemnity Co., 282 S W 164, 219 Mo App 568, followed in Canton Co-operative Elevator Co v Royal Indemnity Co., 282 S W 169 and Hetzler v Royal Indemnity Co., 282 S W 169

77. La—Whittington v Nelson Bros Const Co App 141 So 491—Interstate Wholesale Grocer Co v Prutsman, 1 La App 731

78 "Materials and supplies"

A bond conditioned for payment of claims for "materials and supplies" covers harness for horses and mules used in the work—Murphy v State ex rel Gem City Builders' Supply Co 155 So 122, 115 Fla 162

"Equipment"

A bond for the payment of claims for all materials, "equipment," teams, and labor covers harness, mule shoes, etc—Fidelity & Deposit Co of Maryland v Bailey-Spencer Hardware Co, 133 S E 799, 145 Va 133

Claim for horseshoes, horseshoe nails, calks, and clevises furnished road contractor's subcontractor and used on work was covered by contractor's bond, where work was located some distance from any settlement where supplies could be secured—U S, to Use and Benefit of Taylor, v Fidelity & Deposit Co of Maryland D C Idaho, 4 F Supp 211

79. U S—U S, to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, supra

80. Ala—Singer v Anniston Hardware Co., 133 So 910, 222 Ala 620

81. "Provisions and supplies," as used in bond, does not cover claim for shoeing horses for subcontractor, since the shoes may not be consumed on the particular job—Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214

82. Ala—U S Fidelity & Guaranty Co v Benson Hardware Co., 132 So 622, 222 Ala 429

83. Minn—Hansen v Remer, 200 N W 839, 160 Minn 453

84. Mich—Smith v Oosting, 203 N W 131, 230 Mich 1

85. U S—Maryland Casualty Co v Ohio River Gravel Co., C C A W Va., 20 F 2d 514, rehearing denied 21 F 2d 744, certiorari denied 48 S Ct 157, 275 U S 570, 72 L Ed 431—Maryland Casualty Co v Gottsche, C C A Miss., 18 F 2d 582

Ala—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307—U S Fidelity & Guaranty Co v Benson Hardware Co., 132 So 622, 222 Ala 429—Benson Hardware Co v Taylor, 136 So 863, 24 Ala App 480

Cal—Associated Oil Co v Commary-Peterson Co., 163 P 702, 32 Cal App 582

Del—Warner Co v Schoonmaker, 174 A 449, 20 Del Ch 165

Mass—Barry v Duffin, 195 N E 511, 290 Mass 398

Minn—Bartles Scott Oil Co v Western Surety Co., 200 N W 937, 161 Minn 169

Miss—McElrath & Rogers v W G Kimmons & Sons 112 So 164, 146 Miss 775, suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons, 112 So 680, 146 Miss 775

Mo—State ex rel Penn Lubric Oil Co v Lyle, 5 S W 2d 453, 222 Mo App 676

N C—Overman & Co v Maryland Casualty Co., 136 S E 250, 193 N C 86

Okl—Fuller v Brooks, 246 P. 369, 117 Okl 252

Va—C S Luck & Sons v Boatwright 162 S E 53, 157 Va 490

"The contract by which defendants undertook the work of building the highway contemplated that the gravel should be transported from the railway cars to the highway. It required power to do this, and the gasoline in question furnished the power. It is true that the gasoline was not visible after the highway was finished, but it was as visible as the labor which was bestowed upon it. It was used directly upon and for the highway, and was instrumental in producing the final result. In most jurisdictions powder and dynamite used for blasting have been regarded as 'materials furnished.' The use of gasoline to convey materials with which to build this highway contributed to and enhanced its value in the same way that powder and dynamite do in blasting for highways. Neither is physically incorporated into the highway, but both are wholly consumed in aid of the work. The gasoline contributed to and enhanced the value of the highway as much as though the gravel had been moved by man power or horse power. The statute contemplates that labor and materials used in constructing, repairing or ornamenting a building improvement or works shall be protected by the bond. As the gasoline in question materially aided in the construction and building of the highway, and enhanced its value it should be regarded as 'materials furnished' within the meaning of the statute."—Smith v Oosting 203 N W 131, 132, 230 Mich 1

Coal oil used in lighting camp

Wyo—Franzen v Southern Surety Co 216 P 30, 35 Wyo 15, 46 A L R 196

Oil, gasoline etc., as "supplies"

(1) Gasoline and oil are 'supplies" within meaning of statute and bond conditioned to pay indebtedness incurred for "supplies, materials or labor furnished or consumed in connection with the construction of said road"—Wolfe Tire Corporation v Stanton, 3 P 2d 650, 133 Kan 713

(2) Gasoline, oil, and lubricating outfit are "materials and supplies" for which surety under original contractor's bond is liable—State for Use of Wadsworth, v Southern Surety Co, 127 So 805, 221 Ala. 113, 70 A L R 296

whether they are supplied to the contractor[86] or to the subcontractor.[87] However, it has also been held that the bond does not cover oil, gasoline, kerosene, etc, although they are used to operate trucks or machinery engaged in the construction or repair of the highway,[88] whether such products are furnished to the contractor[89] or to the subcontractor[90] At any rate, a claim for the price of oil, gasoline, etc, has been disallowed where it did not appear that such products were furnished for use in the performance of the highway contract[91] or where it appeared that such products furnished to a subcontractor were diverted to other uses[92]

Coal used in the prosecution of the work has been held to come within the terms of the bond,[93] although some courts have declined to adopt this view[94]

Electric power furnished for rock crusher and cable cars is not mere instrumentality or tool, but "labor" within road contractors' bond to pay therefor—Town of Cornelius v Lampton, 128 S E 334, 189 N C 714

In Pennsylvania

(1) Under Act of June 26, 1931, P L 1388, 36 P S § 142, which provides that the bond shall be conditioned for the payment of claims for labor and material supplied or performed in the prosecution of the work, "whether or not the said material and labor enter into and become component parts of the work or improvement contemplated" gasoline and heavy oil, supplied to state highway contractor for operation of trucks, rollers, etc, and ravolight oil, used to furnish light in danger signals, are covered by the bond—Commonwealth, to Use of Atlantic Refining Co v Ciccone, 173 A 642, 316 Pa 111

(2) Under Act of May 16, 1921, P L 650, the condition of the bond that the contractor "shall well and truly pay for all material furnished and labor performed in and about the construction," did not include gasoline and oil—Commonwealth v Union Indemnity Co, 149 A 170, 299 Pa 143

86 Ind—George T Miller Const Co v Standard Oil Co, 185 N E 639, 205 Ind 509, 91 A L R 1025
Mass—American Casting Co v Commonwealth, 174 N E 174, 274 Mass 1
Mo—State ex rel Penn Lubric Oil Co v Lyle, 5 S W 2d 453, 222 Mo App 676
Okl—Southern Surety Co v Corbit, 285 P 949, 142 Okl 103
Tex—Employers' Casualty Co v Rockwall County, 35 S W 2d 690, 120 Tex 441 modifying, Civ App, 300 S W 148 and reformed 38 S W 2d 1098, 120 Tex 441

Dispensation to haulers

Claim for gasoline and oil delivered by materialman to highway contractor and furnished by contractor to haulers for use in trucks hauling road materials was within contractor's bond, although contractor deducted value of such gasoline and oil, slightly in excess of cost price, from amount due haulers—George T Miller Const Co v Standard Oil Co, 185 N E 639, 205 Ind 509, 91 A L R 1025

87. Ala—State, for Use of Wadsworth v Southern Surety Co, 127 So 805, 221 Ala 113, 70 A L R 296
Kan—Wolfe Tire Corporation v Stanton, 3 P 2d 650, 133 Kan 713
Mich—Smith v Oosting, 203 N W 131, 230 Mich 1
Mont—H Earl Clack Co v Staunton, 72 P 2d 1022, 105 Mont 375
Okl—Standard Accident Ins Co v Deep Rock Oil Corporation, 68 P 2d 808, 180 Okl 260—Eagle Oil Co v Altman, 263 P 666, 129 Okl 98
Tenn—Rambo v Naylor Engineering Co, 10 Tenn App 203

88. Ark—Pierce Oil Corporation v Parker, 271 S W 24, 168 Ark 400
La—State v Smith, 119 So 56, 167 La 301
N D—Yarger v Dakota Trust Co, 215 N W 209, 55 N D 525
"Clearly, the purpose of the oil is to lubricate the mechanism of the truck so that it will preserve the parts and render locomotion possible The gasoline is used because it is the power which operates the truck and makes it possible to transport the material to be incorporated in the public improvement When the parts are lubricated and the gasoline tank filled, the purposes of both are achieved and then and there end Thus there is no direct relationship between the component parts of the improvement and the oil and gasoline in the truck There is no nexus between these elements contained in the truck and the ingredients composing the improvement Hence they do not enter into the construction thereof, and it cannot be said that the Legislature in the language used in the statute ever intended that the power necessary to move the truck and transport the materials was material that entered into the construction of the improvement"—Standard Oil Co v Detroit Fidelity & Surety Co 157 N E 418, 419, 24 Ohio App 237

89. U S—Standard Oil Co v Federal Surety Co, C C A Kan, 28 F 2d 489
La—State v Miller, 126 So 422, 169 La 914

90. Ark—Pierce Oil Corporation v Parker, 271 S W 24, 168 Ark 400
La—Red River Const Co v Pierce Petroleum Corporation 115 So 752, 165 La 565—Red River Const Co v Pierce Petroleum Corporation, 6 La App 633
Ohio—Standard Oil Co v Detroit Fidelity & Surety Co, 157 N E 418, 24 Ohio App 237

91. Ind—Montgomery v Southern Surety Co of Iowa, 162 N E 31, 96 Ind App 472

Sale to subcontractor

Ind—Ohio Oil Co v Fidelity & Deposit Co of Maryland, App, 42 N E 2d 406
Tenn—Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319

92. Ind—Ohio Oil Co v Fidelity & Deposit Co of Maryland, App 42 N E 2d 406

93. U S—U S, to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, D C Idaho, 4 F Supp 211
Cal—McCormick Saeltzer Co v Haidlen, 6 P 2d 255, 119 Cal App 96
Ind—Smiley v State, 110 N E 222, 60 Ind App 507
Mass—American Casting Co v Commonwealth, 174 N E 174, 274 Mass 1
Miss—McElrath & Rogers v W G Kimmons & Sons, 112 So 164, 146 Miss 775 suggestion of error overruled McElwrath & Rogers v W G Kimmons & Sons, 112 So 680, 146 Miss 775
Wyo—Franzen v Southern Surety Co 246 P 30, 35 Wyo 15, 46 A L R 496

Coal furnished to heat asphalt to make it possible to spread asphalt on highway as top surface, is "material furnished" within coverage of highway contractor's statutory bond, covering materials furnished in "carrying forward performing or completing contract"—Lingler v Andrews, 10 N E 2d 1021, 56 Ohio App 487

Coal used in rock-crusher engine employed by subcontractor—Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319

94. Ark—Southern Surety Co v. Simon, 290 S W 960, 172 Ark. 924

In some jurisdictions the statutes requiring bonds of highway contractors direct that the bond shall contain a condition which covers fuel,[95] or expressly require a condition for the payment of oil, gasoline and lubricants used in or consumed in the work,[96] or define "material" as including gasoline, oil, kerosene, etc[97]

Insurance premiums. A highway contractor's bond for the payment of claims for labor and material and the like ordinarily does not cover a claim for insurance premiums,[98] such as premiums on a workmen's compensation policy,[99] or a claim for premiums on a surety bond[1]

Loan or advancement of money. A labor and material bond given by a highway contractor ordinarily does not cover loans or advances made to the contractor[2] or subcontractor,[3] even though the money is lent to the contractor[4] or subcontractor[5] for the

95. Oil, gas and lubricants are within a statute requiring a bond conditioned for payment of claims for material, including fuel—Standard Oil Co v Marvill, 206 N W 37, 201 Iowa 614

Material furnished for use "in" machines

A statute imposing an obligation on surety to pay for all material and supplies furnished for use "in" machines would cover coal, oil, or gasoline used in the machines—Rester v Moody & Stewart, 134 So 690, 172 La 510 reversing 130 So 254, 16 La App 177—General Lumber & Supply Co v Hunter, 134 So 759, 17 La App 71

96. Mo—State ex rel and to Use of Worthmann v Gilliox, App, 60 S W 2d 696—State ex rel Hernleben v Detroit Fidelity & Surety Co, 21 S W 2d 494, 224 Mo App 22—State ex rel Kingsley v Carterville Const Co, 284 S W 150, 220 Mo App 244

97. Iowa—Coon River Co-op Sand Ass'n v McDougall Const Co of Sioux City, 244 N W 847, 215 Iowa 861

98. Liability insurance policy

Ark—New Amsterdam Casualty Co v Detroit Fidelity & Surety Co, 58 S W 2d 418, 187 Ark 97

99 Del—Warner Co v Schoonmaker, 174 A 449, 20 Del Ch 165

Ga—Seibels, Bruce & Co v National Surety Corporation, 11 S E 2d 705, 63 Ga 520

N D—State v Padgett 209 N W 388, 54 N D 211

Okl—Employers' Liability Assur Corporation, Limited, of London England, v Cannon, 49 P 2d 103, 173 Okl 493, 102 A L R 131

Wis—Employers' Mut Liability Ins Co of Wisconsin v Ferd H Grahl Const Co, 234 N W 326, 203 Wis 315

1. Del—Warner Co v Schoonmaker, 174 A 449, 20 Del Ch 165

2. Ala—U S Fidelity & Guaranty Co v First Nat Bank, 140 So 755, 224 Ala 370

Ind—Smiley v State, 110 N E 222 60 Ind App 507

Minn—First Nat Bank v O'Neil, 223 N W 298, 176 Minn 258

Or—U S Fidelity & Guaranty Co v Klamath County, 23 P 2d 133, 143 Or 471—State v U S Fidelity & Guaranty Co, 265 P 775, 125 Or 13, followed in State v Ætna Casualty & Surety Co, 265 P. 782, 125 Or 194

29 C J p 613 note 79

What constitutes loan

(1) Payments by foreman for repairs to machinery, materials, and freight thereon amount to loans and are not covered by highway contractor's bond protecting persons supplying "labor and materials"—R L Snelson & Co v R G Hill & Co, 146 S E 135, 196 N C 494

(2) Where a person buys materials on his own account and they are delivered to the contractor, the transaction is not a loan of money and the surety is liable for the materials furnished—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307

Surety's agreement, authorizing contractors to use monthly estimates as security for payment of loans made necessary to complete road construction contract to enable creditor making loans to have first lien on such estimates was not breached by award of portion of such estimates to lien claimants, where creditor failed to assert its lien on monthly estimates while under its control and money which it failed to furnish to complete contract was more than sufficient to pay lien claimants—Indiana Nat Bank of Indianapolis Ind, v U S Fidelity & Guaranty Co, C C A Ind, 8 F 2d 144

3. Ark—Ayres & Graves v Ellis 49 S W 2d 1056, 185 Ark 818

4. Ark—Norton v Maryland Casualty Co, 32 S W 2d 172, 180 Ark 609

Md State v National Surety Co, 94 A 916, 126 Md 290

Minn—First Nat Bank v O'Neil, 223 N W 298, 176 Minn 258

N C—Wachovia Bank & Trust Co v J F Mulligan Const Co, 156 S E 491 200 N C 304—R L Snelson & Co v R G Hill & Co, 146 S E 135 196 N C 494

Or—State v U S Fidelity & Guaranty Co, 265 P 775, 125 Or 13, followed in State v Ætna Casualty & Surety Co, 265 P 782, 125 Or 194

Tex—Employers' Casualty Co v Rockwall County, 35 S W 2d 690, 120 Tex 441 modifying, Civ App, 300 S W 148, reformed 38 S W 2d 1098, 120 Tex 441

Utah—J F Tolton Inv Co v. Maryland Casualty Co, 293 P 611, 77 Utah 226

Wash—Maryland Casualty Co v. Philbrick & Nicholson, 266 P 142, 147 Wash 277

"The authorities are practically uniform that a bond to secure the payment of claims for labor and material does not inure to the benefit of one who loans or advances funds for the payment of such claims"—First Nat Bank v O'Neil, 223 N W 298, 300, 176 Minn 258

Lender does not become a subcontractor because contractor used money for labor and material—Norton v Maryland Casualty Co, 32 S W 2d 172, 180 Ark 609

Bank lending money to foreman of contractor to pay claims against highway contractor for labor and material, without taking assignment, is not within bond protecting person supplying 'labor and materials"—R L Snelson & Co v R. G Hill & Co, 146 S E 135, 196 N C 494

"Upon the condition" to pay claims for material

Where one lent money to a state road contractor "upon the condition" that money so lent was to be used to pay for material used in construction of road, and money was so used, but agreement was made without knowledge of materialmen or surety on bond, lender cannot recover against contractor's surety, on contractor's failure to repay money so borrowed, where bond contained provision, required by Code art 91 § 33, that contractor shall pay every person furnishing material and performing labor on construction of roadway, money due him therefor—New Amsterdam Casualty Co v State, 128 A. 641, 147 Md 554

5 Miss—Oliver Const Co v Crawford, 107 So 877, 142 Miss 490

Subcontractor of a subcontractor

Ark—Ayres & Graves v Ellis, 49 S W 2d 1056, 185 Ark 818.

purpose of paying claims for labor and material and is actually used for such purpose, and in some jurisdictions statutes have been enacted which expressly exclude persons who have lent or advanced money to the contractor, subcontractor, or other person[6] However, it has also been held that a labor and material bond covers a loan to the contractor made for the purpose of paying labor and material claims[7]

In some jurisdictions a person advancing money directly to the workmen or materialmen and taking an assignment of their claims is entitled, as assignee, to recover against the surety on the bond the amount advanced[8] In the absence of an assignment of the claims it has been held that one who cashes in merchandise pay checks of the contractor's employees has no recourse on the bond,[9] although there is authority that where money is advanced directly to the workmen they are parties to the transaction which results in an equitable assignment of their claims[10]

Lumber. A claim for lumber has been allowed under a highway contractor's bond conditioned for the payment of claims for labor and material and the like[11] However, some courts have declined to view a claim for lumber as one within the bond[12] where it is not consumed on the job[13]

Powder, dynamite, etc A highway contractor's bond conditioned for the payment of claims for labor and material and the like has been held to include powder, dynamite, caps, fuses, etc, used in the prosecution of the work,[14] although some courts

Joint maker of note on which money was lent by bank to subcontractor and who was compelled to pay the note could not recover against the surety on the bond since the bank had no such right--Oliver Const Co v Crawford, 107 So 877, 142 Miss 490

Order accepted by contractor as binding surety

Surety on highway contractor's bond conditioned for payment of claims for work and material was not liable for amount of order accepted by contractor to pay to bank money coming to subcontractor on estimate for work done on subcontract which order was executed to repay loan which subcontractor used to pay laborers and materialmen, where surety was not party and did not consent to order, bank did not take assignments from laborers or materialmen, and it was not shown that surety received or retained any part of particular fund --Farmers State Bank of Waubun v Anderson, 263 NW 413 195 Minn 475

6. Wash --Maryland Casualty Co v Philbrick & Nicholson, 266 P 142, 147 Wash 277

Purchase of workmen's claims for labor is not a loan or advancement to the contractor within the ban of the statute --Maryland Casualty Co v Philbrick & Nicholson, supra

7. SC --Stewart & Kernaghan v Fidelity & Deposit Co of Maryland, 169 SE 434, 169 SC 516

8. Ala --U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307

Wash --Maryland Casualty Co v Philbrick & Nicholson, 266 P 142, 147 Wash 277

Money due or to become due as assignable see Assignments §§ 15-22

Right of assignee to sue on bond see infra subdivision g (5) of this section.

9. Tenn --Carter County v Oliver-Hill Constr Co, 228 S W 720 143 Tenn 649

10 Utah --J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

Advancements for wages as equitable assignment generally see Assignments § 58

11. NC --Aderholt v Condon, 128 S E 337, 189 N C 748

Lumber for building camps, store rooms, etc --American Surety Co of New York v James A Dick Co, C C A N M, 23 F 2d 464, certiorari denied 49 S Ct 26 278 U S 624, 73 L Ed 545

12. Material "for use in any machine"

Lumber and supplies furnished to contractor and used by him in constructing pile driver were not material furnished "for use in any machine used in the construction" of road under Acts 1926 No 271, amending Acts of 1918 No 224 --General Lumber & Supply Co v Hunter, 134 So 759, 17 La App 71

13. Okl --W R Pickering Lumber Co v Fuller, 244 P 760, 117 Okl 53

Tex --U S Fidelity & Guaranty Co v Henderson County, 253 S W 835 affirmed, Com App 276 S W 203, in which motion is overruled, 276 S W 1119

Only to extent lumber is actually consumed may a claim against the bond be allowed --National Surety Co v Arizona Grocery Co, 259 P 404, 259 Ariz 399

"Materials used or employed in such construction"

In suit on state highway contractor's bond, one furnishing lumber which was used to make concrete forms was not entitled to lien, although forms were used on project until they were unfit for further use and were given away as scrap since lumber still preserved its identity and could have been used for fuel, and so was not "materials used or employed in such construction" within Gen L [Ter Ed] c 30 § 39 --Carter v Commonwealth, 194 N E 915, 290 Mass 97

Sale to subcontractor

A company supplying lumber used for rock beds to highway subcontractor was not entitled to recover from general contractor and surety in the absence of a showing that the lumber was consumed in such use, or whether it could be used again --Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319

Possession of lumber by surety

Where road contractors abandoned work and surety completed it, surety was liable for lumber furnished contractors although evidence failed to show exactly how much of lumber was used to destruction, where surety was shown to have taken over all the lumber left, and used it in completion of work --Southern Surety Co v Guaranty State Bank of De Leon, Tex Civ App, 275 S W 436

14. Ariz --National Surety Co v Arizona Grocery Co, 259 P 404, 259 Ariz 399

La --Long Bell Lumber Co v S D Carr Const Co, 133 So 438, 172 La 182

Furnished to subcontractor

La --Long Bell Lumber Co v. S D Carr Const Co, supra.

"Equipment"

Bond for payment of materials, "equipment," teams, and labor includes explosives --Fidelity & Deposit Co of Maryland v Bailey-Spencer Hardware Co, 133 S E 799, 145 Va 133

"Supplies"

Such items are "supplies" within the bond --Bricker v Rollins, 173 P. 592, 178 Cal 347

Highway contractor's improper use of blasting powder would not absolve

have disallowed claims for such items[15] At any rate, it has been held that the bond does not cover explosives which are not employed in the performance of the contract but are diverted to other uses.[16]

Tort liability; damages for breach of contract. A bond of a highway contractor conditioned for the payment of claims for labor and material and the like usually does not cover claims for damages for personal injuries suffered by an employee of the contractor while working on the job,[17] or claims for personal injuries suffered by third persons from the tortious or negligent acts of the contractor or his employees,[18] or because of the tortious acts of the subcontractor[19]

It has been held that such a bond does not cover a claim for damages, including loss of profits, suffered by a subcontractor who has been prevented by the contractor from completing the work under the subcontract[20] or because of the contractor's refusal to take all the materials contracted for[21]

Transportation, charges for freight and demurrage A bond of a highway contractor conditioned for the payment of claims for labor and material and the like has been deemed to include claims for transportation of the contractor's employees from one place to another during the day's work,[22] and claims for transportation of the contractor's equipment to or from the job[23] and for the hauling of materials[24] The transportation of materials for a contractor in order that he may have them on hand for incorporation into the work has been held to constitute "labor" within the bond[25] However, it has been held that a claim for hauling and transporting materials in, on, and about the job is not covered by the bond[26]

Freight charges on material shipped to the contractor for use on the highway, and for which the contractor is liable, ordinarily are covered by the bond in favor of the seller of the material,[27] wheth-

surety on his bond from liability for cost of powder purchased—Randanite Co v Smith, 20 P 2d 33, 172 Wash 390

15. Pa—Commonwealth v Union Indemnity Co 149 A 170, 299 Pa 143

Furnished to subcontractor

Ohio—Appleman v Southern Surety Co, 27 Ohio N P,N S, 158

16. Tex—U S Fidelity & Guaranty Co v Texas Powder Co Civ App, 88 S W 2d 532, error refused

Sold to subcontractor

Or—State v Johnson Contract Co, 253 P 520, 120 Or 633

17. Tex—Page v Schlortt, Civ App, 89 S W 2d 249

18. Iowa—Schisel v Marville, 197 N W 662 198 Iowa 725

Damages resulting from fire negligently set out by contractor or employees cannot be recovered in action on bond—John L Roper Lumber Co v Lawson 143 S E 847, 195 N C 810, 67 A L R 981

Extrastatutory condition for payment for injuries

(1) Surety on highway contractor's bond executed under statute requiring bond for use and benefit of state highway fund, and expressly making laborers and materialmen beneficiaries thereunder to full amount of bond over amount of claim of state or municipality was not liable for death of motorist caused by contractor's alleged negligence, notwithstanding bond contained an extrastatutory condition for payment of all liabilities for injuries incurred in and about construction—U S Fidelity & Guaranty Co v Eubanks, 87 S W 2d 248, 126 Tex 405, modifying Eubanks v Schwalbe, Civ App, 55 S W 2d 906

(2) Validity of extrastatutory conditions generally see supra subdivision a of this section

19. Tenn—Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319

20 Pa—McKenzie Co v Fidelity & Deposit Co of Maryland, 50 Dauph Co 158

Wash—Terry v U S Fidelity & Guaranty Co, 82 P 2d 532, 196 Wash 206, 119 A L R 1276

21. **Condition to pay all claims for material "furnished"** does not cover a claim for damages for refusal to take the material—Kampeska Materials Co v Bone, 219 N W 244, 52 S D 559

22. Ala—U S Fidelity & Guaranty Co v Benson Hardware Co, 142 So 622, 222 Ala 429—Benson Hardware Co v Taylor, 136 So 863 24 Ala App 480

Subcontractor's employees

Tenn—Lambo v Naylor Engineering Co, 10 Tenn App 203

23. Neb—Peter Kiewit Sons' Co v National Casualty Co, 8 N W 2d 192

Claim for unloading, dismantling, and hauling steam shovel ninety miles and reassembling it was within bond—State to Use of Jones v Feak, 18 P 2d 203, 141 Or 451

24 Md—London & Lancashire Indemnity Co of America v State, 138 A 231, 153 Md 308

Claim for rental of equipment see supra subdivision c (3) (b) of this section

Subcontractor

Hauling dirt for state highway under subcontract constituted "labor performed" in carrying forward contract, bringing subcontractor's claim within contractor's bond—Metropolitan Casualty Ins Co of New York v Dill, 180 N E 47, 124 Ohio St 536, 79 A L R 1249

25. Del—State v Ætna Casualty & Surety Co, 145 A 172, 4 W W Harr 158

26 Wis—White v U S Fidelity & Guaranty Co, 256 N W 694 216 Wis 173

Subcontractor

Claim by subcontractors for hauling material by means of trucks and drivers furnished by them was not "labor performed" within contractor's bond—Lincoln County v E I Du Pont De Nemours & Co, 32 S W 2d 292 224 Mo App 1183

27. U S—U S, to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland D C Idaho, 4 F Supp 211

Such charges are part of purchase price of the material

U S—Maryland Casualty Co v Ohio River Gravel Co, C C A W Va 20 F 2d 514, rehearing denied 21 F 2d 744 certiorari denied 48 S Ct 157, 275 U S 570, 72 L Ed 431

Kan—Road Supply & Metal Co v Kansas Casualty & Surety Co, 246 P 503 121 Kan 299

"Indebtedness" on account of materials furnished

Amount of freight prepaid by company furnishing highway contractor with rock asphalt was "indebtedness" within statute providing that contractor's bond should be conditioned for payment by contractor "of all indebtedness which may accrue . . on account of any . . .

er the seller prepays the freight charges[28] or they are exacted of him under his liability as consignor[29]

In the case of a common carrier, a claim for freight for carrying material consigned to the contractor for use in the performance of the contract, and demurrage charges, has been allowed in some jurisdictions under a labor and material bond, in such jurisdictions the fact that the carrier had a lien on the goods does not deprive it of a remedy on the bond[30] Claims for water transportation, carried on over short distances at frequent or irregular intervals, where the practice may not be to pay for such transportation on delivery of the materials, or to assert the carrier's lien, are within the bond[31]

(4) Rights, Liabilities, and Discharge of Surety, Defenses

General rules governing the rights, liabilities, and discharge of sureties ordinarily apply to sureties on highway contractors' bonds conditioned for the payment of claims for labor, material, and the like

General rules governing the liability of sureties usually are applicable to sureties on highway contractors' bonds conditioned for the payment of claims for labor, material, and the like[32] The liability of the sureties is to be measured by the terms of the bond[33] read in conjunction with the statute requiring the bond,[34] and not by the terms of the contract between the contractor and highway authorities[35] The surety is liable notwithstanding the contractor assigns[36] or sublets[37] the contract A notice by the general contractor disclaiming liability for debts incurred by his subcontractor will not relieve the surety of liability for labor or material

materials furnished" in highway construction, so as to make surety on contractor's bond liable for such amount —Metropolitan Casualty Ins Co of New York v Natural Rock Asphalt Corporation, 6 N E 2d 739, 103 Ind App 687

Return freight on equipment leased by contractor is not within the bond —Dawson v Northwestern Constr Co, 163 N W 772, 137 Minn 352

28 Ind —Metropolitan Casualty Ins Co of New York v Natural Rock Asphalt Corporation, 6 N E 2d 739, 103 Ind App 687

29. U S —Maryland Casualty Co v Ohio River Gravel Co C C A W Va 20 F 2d 514 rehearing denied 21 F 2d 744 certiorari denied 48 S Ct 157, 275 U S 570, 72 L Ed 431

Freight charges for unpaid balance of the freight resulting from an error in the original charge are a valid claim —American Liability & Surety Co v Bluefield Supply Co, C C A W Va, 70 F 2d 187

30. **Railroad claimants**
Ala —Central of Georgia Ry Co v U S Fidelity & Guaranty Co, 137 So 36 223 Ala 458
Del —State v Ætna Casualty & Surety Co 145 A 172, 4 W W Harr 158
Ga —Sommers Const Co v Atlantic Coast Line R Co 7 S E 2d 429, 62 Ga App 23

31. Wash —Mader Steel Products Co v Brewster 281 P 14, 151 Wash 120—Nemah River Towboat Co v Brewster, 278 P 694, 152 Wash 672, modified on other grounds 279 P 1107, 152 Wash 672

32. Ky — Massachusetts Bonding & Insurance Co v C B Duff & Co, 87 S W 2d 363, 261 Ky 255
Scope and extent of liability of surety as to creditor or obligee generally see the C J S title Principal and Surety §§ 90–115, also 50 C J p 71 note 89 et seq

Liability of sureties on different bonds
Where contractor giving bond to highway commission hired convicts and gave bond to the state prison to secure the contract of hiring, the surety on each bond was liable to the state in proportion to the penalties of the bonds and liability of one was not primary and liability of other secondary —State Prison v Massachusetts Bonding & Insurance Co, 135 S E 125, 192 N C 391

Highway contractor acting as his own surety by depositing cash or securities is charged with same degree of liability to materialman as is chargeable to surety on bond — Molony & Carter Co v Pennell & Harley, 169 S E 283, 169 S C 462

33 Ky - Massachusetts Bonding & Insurance Co v C B Duff & Co, 87 S W 2d 363, 261 Ky 255

Bond of partnership and bond of successor corporation
Where surety was liable on successive bonds of partnership and its successor corporation, fact that person furnishing goods to partnership and corporation could not specify what part of labor and material went into construction of either of two projects would not absolve the surety of liability — Southern Surety Co v Ft Lupton Mercantile Co, 249 P 263 80 Colo 80

Bond executed after completion of work in lieu of deposit
Where a cashier's check was deposited to secure the performance of the contract and payment of labor and material claims, and the claims are enforceable against the fund evidenced by the check, the sureties on a bond executed after the completion of the work and in substitution of the cashier's check are liable for such claims —State v Storm, 287 P 689, 49 Idaho 216

34 Cal —Cooley v Freeman, 266 P 515 204 Cal 59
Iowa — Southern Surety Co v Jenner Bros, 237 N W 500, 212 Iowa 1027

35. Cal —Cooley v Freeman, 266 P 515 204 Cal 59

36 Okl —Fuller v Brooks, 246 P 369 117 Okl 252

37. Miss —Oliver Const Co v Dancy 102 So 568 137 Miss 474
Persons performing labor for, and furnishing material to subcontractor as secured by bond see supra subdivision c (2) of this section

Effect of provision against subletting
Fact that the general contractor sublet a part of the contract without the consent of the highway authorities in violation of a provision in the contract does not prevent recovery by one who performs labor for or furnishes material to the subcontractor
Pa —Beaver County v Franklin, 18 Pa Dist & Co 635
S C —Miller v Cornell-Young Co, 171 S E 790, 171 S C 228

Accepting duebills from subcontractor
Claimants for labor performed and material furnished in construction of public road did not waive protection of contractor's bond furnished under L 1918 c 217 by contractor to whom contract was let, by accepting from subcontractors to whom such contractor sublet the contract, duebills constituting merely statements of amounts due for such labor and material — Oliver Const Co v. Dancy, 102 So 568, 137 Miss 474

furnished to the subcontractor[38] The surety on the principal contractor's bond is not liable to the subcontractor for material furnished to the subcontractor where it does not appear that the subcontractor either paid the claim or bound itself to do so and the material claimants were proceeding directly against the surety[39]

Various matters urged have been held not to constitute a defense to the surety's liability on the bond[40] The surety by his conduct may be estopped to deny liability for labor and material furnished[41]

Discharge of surety General rules relating to the discharge of sureties ordinarily apply to sureties on bonds of highway contractors conditioned for the payment of claims for labor and material and the like.[42] The surety has been held to be released on various grounds[43] Thus it has been held that the surety of the principal contractor is released from liability to a claimant where the contractor, without the surety's consent, assigns to the claimant the money to become due under the principal contract.[44] On the other hand, various grounds urged for the release of the surety have been held insufficient[45] It has been held that the surety is not released from liability to a claimant for labor or material because the contractor executes notes to the claimant,[46] or because the claimant voluntarily and without consideration delays the

38. Ala—Pettus v State, 137 So 466, 24 Ala.App 525

Cash deposit in lieu of surety

Where highway contractor's bond covered materials furnished to subcontractor, contractor depositing cash and securities could not escape liability by notifying materialman that contractor would not pay for supplies furnished subcontractor—Moloney & Carter Co v Pennell & Harley, 169 S E 283, 169 S C 462

39. U S—Consolidated Indemnity & Insurance Co v Salmon & Cowin, Mining Engineers and Contractors, C C A Ala, 64 F 2d 756

40 **Defense of negligence** is not available—Continental Casualty Co v Rio Grande Fuel Co, 119 P 2d 618, 108 Colo 472

Breach of alleged agreement by township to take road bonds at par to expedite construction of a state road was no defense to its action on the contractors' bond for the reasonable value of gravel taken from its pit by a subcontractor and used on the road, as showing that it gave the gravel to save defendants from discount loss on the bonds, such agreement being ultra vires and of no benefit to the township—Rolland Tp v Pakes, 197 N W 525, 226 Mich 284

41. **Sureties paying accounts for labor and material and promising to pay balance,** were estopped to contest items of account sued on—State v Storm, 287 P 689, 49 Idaho 246

42 Ky—National Union Indemnity Co v Standard Oil Co, 90 S W 2d 375, 262 Ky 392

Tex—Detroit Fidelity & Surety Co v Moberly, Civ App, 52 S W 2d 298, modified on other grounds Detroit Fidelity & Surety Co v State, 76 S W 2d 492, 124 Tex 145

Discharge of surety generally see the C J S title Principal and Surety §§ 116–244, also 50 C J p 92 note 28 et seq

Surety could buy its release from liability from the party to whom it was liable on the bond for the contractor's default—Illinois Steel Bridge Co v Mullins, 118 S W 2d 579, 196 Ark 651

Application of payments

(1) According to some authorities payments received by labor or material claimants or their assignee must be applied in satisfaction of the claim and may not be applied on the contractor's general indebtedness—Fulghum v State, 114 So 367, 94 Fla 274

(2) Where contractor owed cement company under several contracts, including a highway construction contract secured by a bond, surety on the bond had the legal right to have payments by contractor from funds derived from the highway contract applied to the indebtedness thereunder and was not liable to the cement company which, knowing the source of the funds applied them in payment of indebtedness under other contracts, although cement company was directed to make such application by the contractor—Ash Grove Lime & Portland Cement Co v Moran Const Co, 296 N W 761, 139 Neb 176

(3) Contractor's payment of sight draft for invoice price of goods shipped estopped materialman from contending in suit against surety that payment was not for goods shipped—Jackson v Federal Surety Co, 228 N W 400, 56 S D 335

43. **Repayment by claimant of money paid**

Materialman which unknown to highway contractor's surety procured assignment of moneys due under contract with county and received thereunder but returned to principal contractor sum much greater than amount of claim, without satisfying it, could not hold surety—U S Fidelity & Guaranty Co v Allied Products Co, 187 N E 83, 45 Ohio App 270

44. Ohio—U S Fidelity & Guaranty Co v Allied Products Co, supra

45. Mo—State ex rel Concrete & Steel Const Co v Southern Surety Co, 294 S W 123, 221 Mo App 67

Dissolution of contractor partnership

The surety on the bond of a partnership is not released by reason of the dissolution of the partnership, although the indebtedness for material was incurred after dissolution by one of the members acting individually and not in the name of the old firm—Excello Feed Milling Co v U S Fidelity & Guaranty Co, 111 So 94 145 Miss 599

Payment of claims by highway commission

Where the highway commission was without authority to pay certain claims, payment by the commission did not extinguish the liability of the surety—American Surety Co of New York v James A Dick Co, C C A N M, 23 F 2d 464, certiorari denied 49 S Ct 26, 278 U S 624, 73 L Ed 545

Subletting contract without highway commission's written consent was not such material alteration of highway construction contract as to discharge surety on contractor's bond—State ex rel Concrete & Steel Const Co v Southern Surety Co, 294 S W 123, 221 Mo App 67

46. Ala—U S Fidelity & Guaranty Co v Simmons 133 So 731, 222 Ala 669

Mo—Missouri State Highway Board, for Use and Benefit of Fredonia Portland Cement Co v Southern Surety Co, App, 9 S W 2d 92

Assignee of claimant

Mere fact that assignee of claim for labor and material furnished in construction of highway accepts note of contractor does not affect such claimant's rights against surety on contractor's bond—Southern Surety Co v People's State Bank of South Carolina, C C A S C, 47 F 2d 93

enforcement of his claim against the contractor[47] Where the subcontractor perfects a lien against funds in the hands of the highway authorities, it has been held that the voluntary release of the lien by the subcontractor without notice to, or knowledge of, the surety on the principal contractor's bond discharges the surety from liability to the subcontractor for the amount covered by the lien,[48] although it has also been held that the surety is liable notwithstanding a claimant fails to file his claim with the highway authorities[49] or acquiesces in the contractor's request not to file his claim[50]

A county as payee of the bond cannot release the sureties of their liability to laborers and materialmen[51]

Rights of surety General rules pertaining to the rights of sureties ordinarily apply to sureties on highway contractors' bonds conditioned for the payment of claims for labor, material, and the like[52] The surety is entitled to have money due on the highway contract applied to the payment of labor and material claims for which it is liable under the bond[53] and before any portion of it is paid to an assignee of the fund[54]

d. Other Conditions or Bonds of Contractor

Various other conditions have appeared in highway contractors' bonds, and the contractor may be required to execute an indemnity bond or a maintenance bond

Various other conditions may appear in highway contractors' bonds,[55] such as a condition to indemnify all holders of just claims against the principal arising out of the performance of the contract,[56]

That drafts drawn by materialman on highway contractor were accepted did not bar materialman's right to recover on bond—Bank of Wadesboro v Northwestern Casualty & Surety Co, 162 S E 236, 202 N C 148

Contract providing for payment in notes

Where the contract between the contractor and materialman provided for payment, one half in cash and balance in notes materialman's acceptance of notes for more than half did not discharge surety from liability on notes properly taken, but materialman could not recover for notes improperly taken—Piel Const Co v Commonwealth of Pennsylvania to Use of Hendricks, C C A Pa, 35 F 2d 265

Execution of notes and mortgages by subcontractor as security and not as payment does not release the surety—McRae Grocery Co v Independence Indemnity Co, C C A S C, 33 F 2d 491, 66 A L R 338

47. Pending determination of litigation

Where general highway contractor requested materialman not to press claim pending outcome of litigation between general contractor and subcontractor and materialman granted such indulgence, such forbearance, being purely voluntary without consideration and for no definite time, did not constitute such "extension of time" as to release surety on contractor's bond—Fidelity & Casualty Co of New York v Lackland, 8 S E 2d 306, 175 Va 178

48. Ohio—Boyd v Royal Indemnity Co, 185 N E 422, 126 Ohio St 322

49. Colo—Continental Casualty Co v Rio Grande Fuel Co, 119 P 2d 618, 108 Colo 172

Failure of subcontractor to preserve lien for work furnished to improve public road did not bar subcontractor from suing surety on contractor's bond securing those entitled to liens—Guard Rail Erectors v Standard Surety & Casualty Co of New York, 168 A 903, 86 N H 319

50. Ky—National Union Indemnity Co v Standard Oil Co, 90 S W 2d 375, 262 Ky 392

51. Tex—Austin Bros Bridge Co v Love, Com App, 34 S W 2d 574, reversing Love v Austin Bros Bridge Co, Civ App, 5 S W 2d 570

52. N J—Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, 171 A 382, 115 N J Eq 470, affirmed 176 A 341, 117 N J Eq 440

Rights and remedies of sureties generally see the C J S title Principal and Surety §§ 286-342, also 50 C J p 230 note 74 et seq

Contribution

Agreement to guarantee payment of highway contractor's accounts for supplies was "absolute guaranty" not contract of cosuretyship with surety on contractor's bond so as to entitle surety to contribution—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307

53. N J—Stulz-Sickles Co v Fredburn Const Corporation, 169 A 27, 114 N J Eq 475

Surety not entitled to custody or control of money

N J—Stulz-Sickles Co v Fredburn Const Corporation supra

Where contractor paid labor and material claims, and took assignments of claims to bank, bank could not recover from surety by reason of assignments—Maryland Casualty Co v Dulaney Lumber Co, C C A Miss, 23 F 2d 378, certiorari denied Bank of Ruleville v Maryland Casualty Co, 48 S Ct 560, 277 U S 598, 72 L Ed 1007

54. Mont—Lanstrum v Zumwalt, 237 P 205, 73 Mont 502

W Va—State v Coda, 138 S E 324, 103 W Va 676

Contractor's agreement to reimburse his surety for attorney's fees and to confess judgment therefor does not create lien against money due contractor, and directing payment of surety's attorney's fees from money due contractor in preference to contractor's assignee without notice was error—State v Coda supra

55. S C—Cantey v Newell Contracting Co, 178 S E 312, 175 S C 71

Bond to obtain release of funds see infra subdivision f of this section

Condition to pay attorney's fees

Attorney's fees are recoverable under a bond conditioned to pay all of the expense and costs and attorney's fees that may be incurred "in the enforcement of the conditions and obligations of this bond"—Stowell v Clark, 118 So 370, 152 Miss 32

Condition to pay insurance premiums

(1) Some statutes expressly require that the bond shall contain a condition for the use of persons furnishing insurance premiums—Kunz Ins Agency v Phillips, 255 N W 90, 191 Minn 626

(2) Premiums on a workmen's compensation policy are covered—Kunz Ins Agency v Phillips, supra

(3) However, a claim for premiums for insurance which is for the sole benefit of the contractor, such as public liability, collision, or property damage insurance, is not within the statute—Kunz Ins Agency v Phillips, supra

(4) Insurance premiums as within bond conditioned for payment of labor and material see supra subdivision c (3) (c) of this section

56. Persons and claims secured

One lending money to highway contractor does not have claim arising out of performance of contract

to pay all debts incurred by the contractor in the prosecution of the work,[57] or all debts pertaining to the work,[58] or all just debts, dues, and demands incurred in the performance of such work,[59] to pay other obligations or liabilities incurred in the doing of such work or performance of the things necessary thereunder,[60] or to pay or discharge all liabilities for injuries which have been incurred in and about such construction[61]

Indemnity bond A highway contractor may be required to give a bond to indemnify the highway authorities against liability to third persons with respect to matters arising out of the prosecution of the work[62]

Maintenance bond A highway contractor may be required to give a bond guaranteeing the quality of the work and materials for a specified period of time and binding him, during that period, to make all repairs rendered necessary by poor workmanship or materials[63]

—People v Southern Surety Co, 230 P 397, 76 Colo 141

57. Validity of extrastatutory condition

(1) A bond conditioned to pay all debts contracted by the contractor in the prosecution of the work is valid, although the condition is broader than is required by statute—Southern Surety Co v Merchants' & Farmers' Bank of Avilla 176 N E 846, 203 Ind 173, rehearing denied 179 N E 327, 203 Ind 173

(2) Validity of extrastatutory condition generally see supra subdivision a of this section

Persons and claims secured

(1) Surety on highway contractor's bond conditioned on payment of all debts contracted by principal is liable for money loaned contractor and actually expended on road work, unless lender released surety—Southern Surety Co v Merchants' & Farmers' Bank of Avilla 176 N E 846 203 Ind 173 rehearing denied 179 N E 327 203 Ind 173—Massachusetts Bonding & Insurance Co v Bankers' Surety Co, 179 N E 329, 96 Ind App 250

(2) Surety on bond given by two persons as road contractors conditioned that contractors should pay all debts incurred by "them" was not liable to one who advanced money to one of such contractors on his individual credit, after he knew that other had withdrawn and was out of deal—Massachusetts Bonding & Insurance Co v State, 149 N E 377, 82 Ind App 377

(3) Surety on bonds covering two highway contracts was not liable for proportionate part of premium for contractor's workmen's compensation and liability insurance—Southern Surety Co v State, 165 N E 444, 90 Ind App 309

Discharge of surety

Conduct of bank in placing to contractor's credit road funds assigned to it as collateral security and in permitting contractor to draw checks against funds in payment of other obligations, relieved contractor's surety from liability to bank under bond requiring payment of debts contracted by principal—Southern Surety Co v Merchants' & Farmers' Bank of Avilla, 176 N E 846, 203 Ind 173, rehearing denied 179 N E 327, 203 Ind 173

58. Word "debt" includes any form of claim against contractor which could be legally established, since word "debt" is most inclusive word known to law with reference to obligations—Cantey v Newell Contracting Co, 178 S E 342, 175 S C 74

Claims secured

Highway contractor's surety, agreeing to be responsible for payment of "all debts" pertaining to work, was liable for purchase price of small movable gas engine pump with accessories—American Hardware & Equipment Co v Detroit Fidelity & Surety Co, 156 S E 770 159 S C 263

59. Or—Clatsop County v Feldschau 199 P 953 101 Or 369 18 A L R 1221

Validity of extrastatutory condition

Where the bond required by a county of a contractor doing improvement work provided for payment of "all just debts dues and demands incurred in performance of the work," although the statute merely required the bond to be conditioned for the payment of labor and materials, such provision is valid and binding on the surety—Clatsop County v Feldschau, supra

Claims secured

Camp equipment and utensils are covered by the bond Clatsop County v Feldschau, supra

60. Kan—Shannon v Abrams 157 P 449, 98 Kan 26, Ann Cas 1918E 502

61. S C—Cantey v Newell Contracting Co, 178 S E 342, 175 S C 74

Persons and claims secured

(1) The condition covers a claim for personal injuries suffered by a third person as a result of an assault by a servant or agent of the contractor—Cantey v Newell Contracting Co, supra.

(2) Highway contractor's surety was not liable for unpaid premiums of workmen's compensation insurance as "liability for injuries which have been incurred in the said construction"—Employers' Mut Liability Ins Co of Wisconsin v Ferd H Grahl Const Co, 234 N W 326, 203 Wis 315

62 U S—American Surety Co v James A Dick Co, C C A N M 23 F 2d 461, certiorari denied 49 S Ct 26 278 U S 624, 73 L Ed 545

Persons secured

Indemnity bond executed by general highway contractor for payment of damages to property caused by negligence in execution of contract with commonwealth was executed in part for benefit of town as owner of damaged property—Bowers v Town of Martinsville 159 S E 196, 156 Va 197

Claims secured

The surety on road contractors' bond binding it to indemnify the improvement district against loss from their negligence in prosecuting the work and failing to pay bills or to complete it within time specified, is not liable for money overpaid the contractors through the fraud or gross mistake of the engineer—Gage & Spencer v Road Improvement Dist No 3 of Newton County, 252 S W 922 159 Ark 642

63 Okl—Gibson v Okfuskee County 189 P 745, 78 Okl 203

Defects resulting from insufficient plans and specifications

Maintenance bonds of contractor, guaranteeing work performed under certain plans and specifications, and guaranteeing that at the end of the specified period contractors would "deliver the work to the district in as good condition as when accepted, ordinary wear and tear excepted," required repair work done as to defects due to unskillful and insufficient plans and specifications prepared by the engineer of the improvement district, as well as defects due to insufficient workmanship or materials supplied—White Const Co v Arkansas Louisiana Highway Improvement Dist, 254 S W 820, 160 Ark 452.

e. Subcontractors' Bonds

(1) In general

(2) For payment for labor and material, etc

(1) In General

On subletting a highway contract, the principal contractor may require a bond of the subcontractor

A highway contractor who sublets the contract or a portion thereof may require the subcontractor to furnish a bond for his protection [64] When the bond is not required by statute, it is to be construed as a common-law obligation rather than a statutory bond [65] Such a bond is primarily for the protection of the principal contractor,[66] and, when he or his surety pays claims for which the subcontractor is liable, recovery may be had on the subcontractor's bond [67] The bond does not inure to the benefit of other persons, unless it also contains a condition or clause which can be construed as having been inserted for their benefit [68]

General rules relating to the discharge of sureties usually apply to the surety on a subcontractor's bond, who asserts that he has been released from liability to the principal contractor [69]

64. Ala —State for Use of Wadsworth v Southern Surety Co, 127 So 805, 221 Ala 113, 70 A L R 296
Bond by subcontractor to obtain release of funds see infra subdivision f of this section

65 Tex —Metropolitan Casualty Ins Co of New York v Texas Sand & Gravel Co, Civ App, 68 S W 2d 551, error dismissed

Conventional obligation
La —Bickman v Womack, 160 So 431, 181 La 837—Miller v Bonner, 111 So 776 163 La 332

66. La —Miller v Bonner, supra
Tex —Metropolitan Casualty Ins Co of New York v Texas Sand & Gravel Co, Civ App, 68 S W 2d 551, error dismissed

67. Mo —Chernus v Kennedy-Coats Const Co 55 S W 2d 744 227 Mo App, 582 certiorari quashed State ex rel Union Indemnity Co v Shain, 66 S W 2d 102, 331 Mo 153

Feedstuffs and supplies
Where the subcontractor was liable to pay for feedstuffs and supplies the surety on the general contractor's bond having paid such claim may recover the amount paid from the subcontractor's surety —Levy v U S Fidelity & Guaranty Co, C C A Ala, 68 F 2d 329

Surety's claim for extras
Surety on subcontractor's bond securing performance of highway grading contract was not entitled to allowance, as against contractor, of claim for extras which were no part of grading contract —Chernus v Kennedy-Coats Const Co, 55 S W 2d 741 227 Mo App 582, certiorari quashed State ex rel Union Indemnity Co v Shain, 66 S W 2d 102, 331 Mo 153

68. Ind —Fidelity & Casualty Co v Sinclair Refining Co 156 N E 169 94 Ind App 92, rehearing denied 157 N E 13, 94 Ind App 92
Tex —Metropolitan Casualty Ins Co of New York v Texas Sand & Gravel Co, Civ App, 68 S W 2d 551, error dismissed
Bonds and contracts for benefit of third persons generally see Bonds § 106, Contracts § 519
Condition for benefit of laborers and materialmen see infra subdivision e (2) of this section

Privity of contract or right of action by materialman supplying subcontractor must appear on face of subcontractor's bond for former to sue surety thereon —Fidelity & Casualty Co v Sinclair Refining Co, 156 N E 169, 94 Ind App 92 rehearing denied 157 N E 13, 94 Ind App 92

Materialmen by suing principal road contractor instead of subcontractor could not bring themselves within statutes regarding contracts for public work, where their petitions showed that materials were furnished to subcontractor and that bond sued on was subcontractor's bond — U S Fidelity & Guaranty Co v Dedeaux, 152 So 271 168 Miss 794

Claim for insurance premiums
(1) A surety on faithful performance bond of subcontractor doing highway construction work was not liable to an insurance agency for premiums on public and employers' liability policies by reason of provision in subcontract which required subcontractor to "carry" such policies for protection of public and subcontractor's employees since protection intended was fully complied with when subcontractor "carried" insurance during progress and until completion of the work and insurance agencies issuing the policies were merely "incidental beneficiaries" —Hartford Accident & Indemnity Co v Hewes 199 So 93, 190 Miss 225 modified on other grounds on suggestion of error 199 So 772, 190 Miss 225

(2) However, where surety bond guaranteed performance of highway subcontract and all duly authorized modifications thereof and original subcontract only required subcontractor to carry liability insurance, oral promise of subcontractor to principal contractor not only to carry but to "pay" for liability insurance was a "modification" contemplated by the bond and imposed liability on surety to pay the insurance agency for premiums on the liability policies —Hartford Accident & Indemnity Co v Hewes, 11 So 2d 309, 193 Miss 850

(3) Premiums for public liability, collision, and property damage insurance procured by subcontractor are not included in the term "insurance" as used in statute requiring bond of public contractor for the use "of all persons doing work or furnishing insurance premiums" and recovery for the premiums may not be had by an insurance agency —Kunz Ins Agency v Phillips, 255 N W 90, 191 Minn 626

69. Loan by contractor to subcontractor
Sureties on subcontractors' bond were not released by subsequent agreement of contractor to finance subcontractors, such being no material alteration of contract —Highway Iron Products Co v Phillips, 169 N E 878, 91 Ind App 283

Payment to subcontractor before receiving estimate
Fact that contractor made payments for labor and materials to subcontractor under grading contract before receiving estimate of highway engineer did not release surety on subcontractor's bond where no overpayments resulted — Chernus v Kennedy-Coats Const Co, 55 S W 2d 744, 227 Mo App 582, certiorari quashed State ex rel Union Indemnity Co v Shain, 66 S W 2d 102, 331 Mo 153

Rescission of subcontract
Diminishing of work to be performed under highway construction subcontract by supplemental contract between contractor and state was not rescission of subcontract, so as to relieve from liability surety on subcontractor's bond, which authorized alterations in terms of contract, or in work done thereunder where subcontract provided that performance should be subject to specifications of highway department and contract with highway department provided that specifications were subject to

(2) For Payment for Labor and Material, Etc.

A subcontractor may be required by the principal contractor to give a bond conditioned for the payment of claims of laborers and materialmen

In the absence of a statutory requirement the principal contractor is under no obligation to take a bond for the protection of laborers and materialmen,[70] although bonds of highway subcontractors running to the principal contractor sometimes contain a condition for the payment of claims for labor, material, and the like[71] Such bonds have been liberally construed[72]

Persons secured Whether a particular person is entitled to the protection of a labor and material bond of a subcontractor depends on the terms of the bond[73] Such bonds have been held to inure to the benefit of persons performing labor for,[74] or supplying materials to,[75] the subcontractor However, it has also been held that a subcontractor's bond payable to the contractor does not inure to the benefit of labor and material claimants, although it is conditioned that the subcontractor shall pay all claims for, labor and material furnished[76]

Claims secured The question what claims are covered by a bond of a highway subcontractor conditioned for the payment of labor and material and the like depends on the terms of the bond[77] Such bonds have been held to cover various claims,[78] such as a claim for services of a foreman of the subcontractor,[79] for groceries and provisions consumed by the subcontractor's employees,[80] and for gasoline,

change—Jones v Kelley, Tex Civ App 91 S W 2d 969 error dismissed

Variations of terms of subcontract for highway grading in matter of payments to subcontractor must be prejudicial to surety on subcontractor's bond in order to release surety Chernus v Kennedy-Coats Const Co 55 S W 2d 744, 227 Mo App 582, certiorari quashed State ex rel Union Indemnity Co v Shain 66 S W 2d 102, 334 Mo 153

Surety held not released

(1) Fact that subcontractor under highway grading contract, on receipt of anticipated payments from contractor for labor and materials, transferred such payments to corporation which advanced money to subcontractor, was not prejudicial to surety on subcontractor's bond so as to release surety—Chernus v Kennedy-Coats Const Co, supra

(2) Fact that subcontractor under highway grading contract, on receipt from general contractor of payment for labor and material used part of payments to pay rental on power shovel used on another job jointly undertaken with contractor, was not prejudicial to subcontractor's surety so as to release surety—Chernus v Kennedy-Coats Const Co, supra

70. Tex.—Hannah v Stephens, Civ App, 101 S W 2d 823

71. Cal—Christie v Commercial Casualty Ins Co, 45 P 2d 263, 6 Cal App 2d 710
La—Bickham v Womack, 160 So 431, 181 La 837—Miller v Bonner, 111 So 776, 163 La 332
Neb—West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544
Bond of principal contractor for payment of labor and material claims see supra subdivision c of this section

72. Cal—Christie v Commercial Casualty Ins Co, 45 P 2d 263, 6 Cal App 2d 710
Utah—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

73. Cal—Christie v Commercial Casualty Ins Co, 45 P 2d 263, 6 Cal App 2d 710

74. Ky—Century Indemnity Co of Chicago, Ill, v Shunk Mfg Co, 68 S W 2d 772 253 Ky 50

Foreman of subcontractor is entitled to the protection of the bond, and the fact that he received share of stock in corporation holding subcontract and thereafter acted as vice president thereof did not preclude him from recovering amount of his wages, where he was paid and claimed no compensation as officer and continued to perform duties as foreman—Christie v Commercial Casualty Ins Co, 45 P 2d 263, 6 Cal App 2d 710

75. Ky—Century Indemnity Co of Chicago, Ill, v Shunk Mfg Co, 68 S W 2d 772, 253 Ky 50
W Va—Standard Oil Co of New Jersey v Smith 178 S E 281, 116 W Va 16

76. Tex—Metropolitan Casualty Ins Co of New York v Texas Sand & Gravel Co, Civ App, 68 S W 2d 551, error dismissed
Wash—Spokane Merchants' Assoc v Pacific Surety Co, 150 P 1054, 86 Wash 489

Effect of such condition

Where provision in highway subcontractor's bond that, if subcontractor shall pay claims for labor and material, obligation is to be void is necessary to protect named payee, bond is generally construed as "indemnity bond" for payee's protection only, but, if provision is unnecessary for protection of payee then bond may be construed as inuring to benefit of laborers and materialmen—Metropolitan Casualty Ins Co of New York v Texas Sand & Gravel Co, Tex Civ App, 68 S W 2d 551, error dismissed

77. Utah—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

"Work done"

A bond to secure payment for "any work done thereunder of any kind" includes work which is not as well as work which is manual labor—Christie v Commercial Casualty Ins Co, 45 P 2d 263 6 Cal App 2d 710

78. **Claims for hauling** coal, oil, and grease from railroad to highway construction camp are properly charged against highway subcontractor's surety under bond—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

Claims for teams and labor were within subcontractor's bond for performance in accordance with original contract designating labor and teams as supplies—Miller v Bonner, 111 So 776, 163 La 332

Feed for horses or mules
La—Miller v Bonner, supra

Treating sick animals
La—Miller v Bonner, supra

79. Cal—Christie v Commercial Casualty Ins Co, 45 P 2d 263, 6 Cal App 2d 710

80. Neb—West v Detroit Fidelity & Surety Co, 225 N W 673 118 Neb 544
Utah—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

"Supplies" furnished foreman's wife operating cook shack on order of contractor were proper charges against surety on highway contractor's bond—West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544

oil, grease, etc,[81] and to exclude various other claims,[82] such as a claim for the purchase price of equipment tools and machinery constituting the plant of the subcontractor[83] or owned by drivers employed by the subcontractor[84] A claim for repairs to equipment has been held to be within the bond[85] at least where such repairs are minor and incidental,[86] but such a claim has also been denied,[87] particularly where the repairs are of a permanent nature[88] A claim for the rental value of machinery used by the subcontractor has been allowed[89] and rejected[90]

Money lent to the subcontractor, although for the purpose of paying labor and material claims ordinarily is not covered by the bond,[91] although it has been held that, where money is advanced directly to the workmen, the lender becomes an equitable assignee of their labor claims[92]

Liability and discharge of surety General rules governing the liability[93] and discharge[94] of sureties ordinarily apply to sureties on the bond of highway subcontractors conditioned for the payment of labor and material and the like

f. Bonds to Obtain Release of Funds

By executing a sufficient bond a highway contractor may secure the release of funds retained by the highway authorities

In some jurisdictions a contractor is permitted by statute to execute a bond, variously termed a release, replevin, or refunding or withdrawal bond, in order to obtain highway funds due him and retained or impounded by the highway authorities[95]

81. Claims for gasoline, lubricating oil, and grease furnished subcontractor and used in subcontractor's machinery employed in construction of highway was chargeable against surety under bond—J F Tolton Inv Co v Maryland Casualty Co, 293 P 311, 77 Utah 226

Gasoline and oil furnished drivers of own trucks on coupons furnished by highway subcontractor were supplies" chargeable against surety on subcontractor's bond—West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544

82. Freight paid by lessor of machinery shipped to subcontractor is not "materials" or "supplies" within bond—Century Indemnity Co of Chicago, Ill, v Shunk Mfg Co, 68 S W 2d 772, 253 Ky 50

83. Utah—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611 77 Utah 226

84. Neb—West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544

85. La—Miller v Bonner, 111 So 776, 163 La 332

Labor and materials used in repairing trucks hauling gravel for road at stated price per yard were "supplies" within meaning of bond—West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544

86. Utah—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

87. Repairs to machinery rented by subcontractor and damaged by his employees are neither 'materials" nor "supplies" within the bond—Century Indemnity Co of Chicago, Ill v Shunk Mfg Co, 68 S W 2d 772, 253 Ky 50

88. Neb—West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544

89. Utah—J F Tolton Inv Co. v Maryland Casualty Co, 293 P 611, 77 Utah 226

90. Ky—Century Indemnity Co of Chicago, Ill v Shunk Mfg Co, 68 S W 2d 772, 253 Ky 50

91. La—Miller v Bonner, 111 So 776 163 La 332

Utah—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

Money loaned to subcontractor for repair of road machinery was not supplies furnished under bond—Miller v Bonner, 111 So 776, 163 La 332

92. Utah—J F Tolton Inv Co v Maryland Casualty Co, 293 P 611, 77 Utah 226

93 Waiver of defense by surety

In action by foreman for wages surety on subcontractor's bond waived defense based on foreman's having acted as vice president of corporation holding subcontract, where surety, with knowledge of change of foreman's relationship, orally promised to pay foreman's claim in return for bills of sale from subcontracting corporation—Christie v Commercial Casualty Ins Co, 45 P 2d 263, 6 Cal App 2d 710

94. Neb—West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544

Disavowal of liability

Surety on subcontractor's bond claiming release because of alteration of instrument or changed relationship of claimant for wages must disavow liability promptly, or within reasonable time—Christie v Commercial Casualty Ins Co, 45 P.2d 263, 6 Cal App 2d 710

Payment by highway commission of amount due under contract in scrip, or certificate of indebtedness, did not release compensated surety on bond of subcontractor—Bickham v Womack, 160 So 431, 181 La. 837

Recordation of document intended as acceptance of highway as far as completed, but erroneously stating that highway had been finally accepted was insufficient to release surety on bond of subcontractor where surety suffered no injury—Bickham v Womack, supra

95. Cal—H G Fenton Material Co v Noble 15 P 2d 884, 127 Cal App 338

N Y—Yonkers Builders Supply Co v Petro Luciano & Son 199 N E 45, 269 N Y 171 102 A L R 759 reversing 277 N Y S 648, 243 App Div 783

Tenn—Campbell v Cresip 59 S W 2d 523, 166 Tenn 75—Standard Oil Co of Louisiana v Jamison Bros, 59 S W 2d 522 166 Tenn 53

Tex—Brown & Root v Durland 84 S W 2d 1073 126 Tex 20

Purpose of statute which provided for execution of bond by contractor conditioned on payment of claims established as lien against moneys, bonds, and warrants due contractor from highway department was to release such moneys, bonds, and warrants from liens or claims of liens and to substitute bond as security to protect claimants in event that claims were established as liens—Brown & Root v Durland supra

Bond as common-law obligation

A bond given by a highway contractor to obtain release of highway funds is not available as a common-law obligation, recovery may not be had irrespective of the statutes under which it was executed, or without compliance with the provisions of the statutes—Employers' Liability Assur Corporation v Young County Lumber Co, 64 S W 2d 339, 122 Tex 647

Bond given by subcontractor

Tex—Employers Liability Assur Corporation v Young County Lumber Co, supra.

This bond serves to release the statutory lien on the funds in the hands of the highway authorities,[96] and is to be distinguished from the bond given by the contractor, as considered supra subdivisions a–d of this section, at the time of the letting of the contract.[97] Unless required by the statute, a surety is not required on the bond.[98] Such bonds are to be liberally construed.[99]

These bonds have been held to inure to the benefit of persons performing labor for, or furnishing materials to, the contractor,[1] subcontractors,[2] and persons performing labor or supplying materials to a subcontractor.[3]

Where the bond is conditioned to pay such claims as are liens on the fund in the hands of the highway authorities, the bond does not within itself create a liquidated liability, but only becomes security for the payment of such claims as are proved to be liens against the funds.[4]

g. Actions on Bonds

(1) In general
(2) Jurisdiction and venue
(3) Process
(4) Conditions precedent, filing of claims

Reference in bond to unrelated statute

Replevin bond substantially in language of statute providing for giving bond by public improvement contractor payable to labor and material claimants to secure release of retained moneys should be construed as statutory bond notwithstanding mistaken reference therein to unrelated statute—Employers' Liability Assur Corporation v Young County Lumber Co, supra

Provisions in bond as admission

Provision in release bond that state highway department was withholding money due contractor was admission that money stipulated therein was due contractor, but it did not establish that highway department was indebted to contractor in any sum on particular contract involved in suit—B F Brooks Const Co v First State Bank of Marquez, Tex Civ App, 39 S W 2d 83

Ordinary suretyship distinguished

N Y Yonkers Builders Supply Co v Petro Luciano & Son, 199 N E 45, 269 N Y 171, 102 A L R 759, reversing 277 N Y S 648, 243 App Div 783

Surety presumed to know nature and purpose of undertaking, and that undertaking takes place of fund subject to lien—Yonkers Builders Supply Co v Petro Luciano & Son, supra

Discharge of surety

Where liens against highway contracts were discharged by court order on filing of undertaking, surety was not discharged by materialman's taking contractor's mortgage notes and stipulating with contractor for adjournment of lien foreclosure actions—Yonkers Builders Supply Co v Petro Luciano & Son, supra

96. Tex—Brown & Root v Durland, 84 S W 2d 1073, 126 Tex 20
Lien on funds in hands of highway authorities see supra § 209

Bond is substitute for lien or becomes the subject of the lien
N Y—Yonkers Builders Supply Co v Petro Luciano & Son, 199 N E 45, 269 N Y 171, 102 A L R 759, reversing 277 N Y S 648, 243 App Div 783—Schuessler v Mack, 270 N Y S 287, 240 App Div 449, affirmed Schuessler v Metropolitan Casualty Ins Co of New York, 193 N E 427, 265 N Y 648
Tex—Brown & Root v Durland, 84 S W 2d 1073, 126 Tex 20

Reinstatement of lien or further security

Under Civ Pract Act § 149 court could vacate order discharging liens for highway improvements, and reinstate liens or require further security where surety furnishing undertakings to discharge liens subsequently became insolvent—In re B Lindner & Bro, 262 N Y S 821, 147 Misc 51

97. Tex—Employers' Liability Assur Corporation v Young County Lumber Co, 64 S W 2d 339, 122 Tex 647

98. Tenn—Campbell v Cresap, 59 S W 2d 523, 166 Tenn 75

Bond by surety completing contract

Highway commissioner need not require surety on refunding bond executed by highway contractors' surety completing contract and receiving retainage—Campbell v Cresap, supra

Lienor lacks right to compel justification by surety and is not entitled to personal service of copy of undertaking—Yonkers Builders Supply Co v Petro Luciano & Son, 199 N E 45, 269 N Y 171, 102 A L R 759, reversing 277 N Y S 648, 243 App Div 783

99. Cal—H G Fenton Material Co v Noble, 15 P 2d 884, 127 Cal App 338

1 Tex—Detroit Fidelity & Surety Co v Pippins & Clarkson, Civ App, 47 S W 2d 886

Agreed price or reasonable value

Materialman may recover agreed price, not merely reasonable value, of materials from surety on highway contractor's release bond—H G Fenton Material Co v Noble, 15 P 2d 884, 127 Cal App 338

2. Tenn—Campbell v Cresap, 59 S W 2d 523, 166 Tenn 75

3. Tex—Powell v Republic Portland Cement Co Civ App, 91 S W 2d 467, error dismissed—Huddleston & Work v Kennedy, Civ App, 57 S W 2d 255, certified questions answered 53 S W 2d 1009, 122 Tex 182

Estoppel of materialman

Materialman, having lien for material furnished highway construction subcontractor, which presented to contractor bill for only part of material furnished, stating that it was net balance due, was not estopped in action on withdrawal bond executed by contractor to enable withdrawal of funds owed contractor by highway commission from enforcing lien for entire bill—Powell v Republic Portland Cement Co, Tex Civ App, 91 S W 2d 467, error dismissed

Bond operating as estoppel against contractor

Where after learning correct amount owed by subcontractor to materialman, highway contractor filed bond to enable withdrawal from highway commission of funds on which lien in favor of materialman existed highway contractor was estopped to claim estoppel against subcontractor's materialman which had previously rendered erroneous bill to contractor—Powell v Republic Portland Cement Co, supra

Value of materials claimant paid for but did not furnish and amount he paid to subcontractors' laborers for labor on construction work could not be allowed on general contractor's release bond—Huddleston & Work v Kennedy, Civ App, 57 S W 2d 255, certified questions answered 53 S W 2d 1009, 122 Tex 182

4. Tex—Brown & Root v Durland, 84 S W 2d 1073, 126 Tex 20—Foty v Rotchstein, Civ App, 60 S W 2d 892, error dismissed
Claims secured by lien on funds in hands of highway authorities see supra § 209

(5) Parties; persons entitled to sue
(6) Time to sue, laches, and limitations
(7) Pleadings
(8) Evidence
(9) Trial
(10) Judgment, damages, and amount of recovery

(1) In General

Subject to the limitation that an exclusive statutory procedure must be followed, an action may be maintained to recover for the breach of a highway contractor's bond

The breach of a highway contractor's bond constitutes in general a cause of action [5] The fact that claimant could have enforced payment of his claim by virtue of a lien on the materials delivered, which lien was surrendered, does not prevent recovery for the claim on the contractor's bond [6]

It has been held that where a statute provides a definite procedure to be followed in bringing action on a bond executed by a road contractor, the statutory requirements must be observed in all essential respects in order to recover thereunder [7] A statutory remedy for enforcing liability on a construction bond which is not exclusive does not preclude a claimant from proceeding to enforce his claim by another available remedy,[8] but where a claimant elects to take the statutory remedy he is limited to its provisions [9] A provision that a statute, creating new remedies for existing rights of laborers and materialmen on contractor's bonds, should not affect pending suits does not apply to a suit brought after the act went into effect on a cause of action accruing before such time [10]

A suit on a highway contractor's bond may be a statutory action, equitable in nature [11] In some jurisdictions, when the covenant in the bond provides security for a class not a party to the bond, a member of the class may sue in equity on the bond,[12] but a beneficiary of a highway contractor's bond, not a party to the bond, cannot sue thereon in a court of law unless the bond was made for his sole benefit [13]

Under some statutes suit on the bond may be joined with a suit of a claimant to establish his claim [14] Some statutes contemplate that only one suit shall be brought on a contractor's bond in which all parties are entitled to be present and be heard [15]

(2) Jurisdiction and Venue

In the absence of a statute to the contrary, the jurisdiction of an action on a highway contractor's bond is determined by the general laws of the state The venue of such actions is primarily a matter of statutory regulation.

Where no attempt is made by statute to confer jurisdiction over the subject matter of suits on contractors' bonds on any particular court, the jurisdiction of a court depends on the general laws of the state [16] Where the statute contemplates but

5. Complaint held to base liability on bond rather than on the assumption of liability when surety took over the assets of the contractor—Southern Surety Co v Simon, 290 S W 960, 172 Ark 924

Since benefits of mechanics' lien act do not apply to projects constructed by governmental agencies, for protection of those furnishing supplies or material therefor, statute providing for contractors' bonds and action thereon is provided as a similar remedy—Continental Casualty Co v Rio Grande Fuel Co, 119 P 2d 618, 108 Colo 472

Theory of recovery

One who furnishes material for a highway is allowed recovery on the bond required in lieu of lien on the theory that to the extent of the value of the material which he furnishes he adds to the value of the completed work—Maryland Casualty Co v Ohio River Gravel Co, C C A W Va, 20 F 2d 514, rehearing denied 21 F 2d 744, certiorari denied 48 S Ct 157, 275 U S 570, 72 L Ed 431

6. Ga—Sommers Const Co v Atlantic Coast Line R Co, 7 S E 2d 429, 62 Ga App 23

7. Miss—U S Fidelity & Guaranty Co v Mobley, 108 So 501, 143 Miss 512

8. Ind—Eagle Indemnity Co v McGee, 175 N E 663, 92 Ind App 537—Natural Rock Asphalt Corporation v Highways Improvement Corporation, 173 N E 330, 96 Ind App 120—Million v Metropolitan Casualty Ins Co, 172 N E 569, 95 Ind App 628, followed in Metropolitan Casualty Co of New York v W Q O'Neal Co, 174 N E 926, 96 Ind App 712

Tex—Foust v Bibb, Civ App, 258 S W 921, reversed on other grounds American Surety Co of New York v Foust, Com App, 272 S W 445

Suit on rejection of claim

Where plaintiff's claim for stipulated rental of tractor used by highway contractor was rejected by county commissioners, plaintiff could sue in circuit court on contractor's bond for reasonable rental value of tractor, and an appeal from the order rejecting his claim is not plaintiff's exclusive remedy—Western Material Co v Deltener, 264 N W 207, 64 S D 62

9. Ind—Million v Metropolitan Casualty Ins Co, 172 N E 569, 95 Ind App 628, followed in Metropolitan Casualty Co of New York v W Q O'Neal Co, 174 N E 926, 96 Ind App 712

10. N C—Chappell v National Surety Co, 133 S E 21, 191 N C 703

11. Ala—Sherrill Oil Co v. Taylor, 137 So 295, 223 Ala 457, followed in 137 So 296, 223 Ala 458

12. W Va—Standard Oil Co of New Jersey v Smith, 178 S E 281, 116 W Va 16

13. W Va—State v Royal Indemnity Co, 128 S E 439, 99 W Va 277, 4 A L R 552

14. Tex—Brown & Root v Durland, 84 S W 2d 1073, 126 Tex 20

15. Ala—U S Fidelity & Guaranty Co v Yielding Bros Co Department Stores, 143 So 176, 225 Ala. 307

Miss—U S Fidelity & Guaranty Co v Mobley, 108 So 501, 143 Miss 512

Tex—American Surety Co of New York v Foust, Com App, 272 S W 445, reversing Foust v Bibb, Civ App, 258 S W. 921

16. Tex—Foust v Bibb, Civ App, 258 S W 921, reversed on other grounds American Surety Co of

a single suit on a contractor's bond in which all parties are entitled to be present and be heard, it has been held that the surety's liability under the bond, as measured by the penalty named therein, determines the jurisdiction of the court, where the jurisdiction of a court of limited jurisdiction is involved, rather than the amount of any individual claim or the aggregate of all claims [17] Where the statute under which the bond was given provides a special remedy, an action on the bond is local and maintainable only in the state wherein the bond was given [18]

The venue of an action on a highway contractor's bond is primarily a matter of statutory regulation [19]

(3) Process

Statutory requirements relating to process in actions on highway contractors' bonds must be observed.

Where the statute requires that there be but one suit on a contractor's bond and that the necessary parties are to be brought in by publication of notice, failure to make such publication as required by statute is fatal [20] It has been held, where all other creditors may be cited by publishing a lis pendens notice of the suit, that the principal and surety on the bond will be required to take notice of the filing of such creditors' claims, and that service of citation on the principal by such creditors is unnecessary [21]

Notice of claim as a condition precedent to maintaining suit is considered infra subdivision g (4) of this section.

(4) Conditions Precedent; Filing of Claims

There must be a compliance with statutory conditions precedent to bringing suit on highway contractors' bonds

The right of a person other than the obligee to sue on a highway contractor's bond is usually entirely statutory, and does not come into existence in the absence of a substantial compliance with conditions stated in the statute [22] Where the contractors and their surety are primarily liable to all who furnished material required to complete the work, the holders of claims for furnishing such materials are not first required to exhaust their remedy against subcontractors who purchased such material before proceeding against the contractors and their surety [23] Where the condition of the bond is to save harmless the obligee from all cost and damage, the obligee has been held to be entitled to recover against the surety for the nonpayment of labor and material claims agreed to be paid, without

New York v Foust, Com App, 272 S W 445

17. Tex—American Surety Co of New York v Foust, Com App, 272 S W 445, reversing Foust v Bibb, Civ App, 258 S W 921

Suit not on bond

Where claimant, who seeks to intervene in a suit on a release bond is not bringing suit on the bond but only against the principal, his intervention will not be allowed where his claim is below the court's jurisdictional amount—Huddleston & Work v Kennedy, Civ App, 57 S W 2d 255, certified questions answered 53 S W 2d 1009, 122 Tex 182

18. N Y—Commonwealth of Pennsylvania, for use of Beals, v Beals, 249 N Y S 232, 139 Misc 785

19. **Bond given state highway commission**

A statute providing that actions on contractor's bonds given to municipal corporations shall be brought in the county in which the building, road, or street is located does not apply to an action on a bond given to the state highway commission, which is not a municipal corporation—Independence Trust Co v Porter & Boyd, 130 S E 547 (first case), 190 N C 680—Independence Trust Co v Porter & Boyd, 130 S E. 547 (second case), 190 N C 680.

Bond given to obtain release of withheld funds

Under some statutes, where money is withheld from a highway contractor to secure the payment of claims filed with the state highway commission, the contractor may obtain the release of such funds on filing bond conditioned on the payment of such claims as may be proved to have been liens A provision in such statute that an obligee named in such bond may maintain a separate suit thereon in "any court and in any jurisdiction" does not change the venue or jurisdiction of a suit on the bond from that to establish a claim and lien, but leaves the matter exactly as it was before the statute providing for such bond was enacted Accordingly it was held that such a suit could not be maintained in a court of the county of plaintiff's residence which was not the domicile of either the principal or surety on the bond—Brown & Root v Durland, 84 S W 2d 1073, 126 Tex 20—Brown & Root v Durland, Tex Civ App, 56 S W 2d 516

County of contracting

Surety domiciled within state was suable in parish in which it entered into contract of suretyship and where principal was building road—Rester v Moody & Stewart, 134 So 690, 172 La 510, reversing 130 So 254, 16 La App. 177

20. Miss—U S Fidelity & Guaranty Co v Mobley, 108 So 501, 143 Miss 512

Subcontractor's bond

Statute held inapplicable to suit on subcontractor's bond—U S Fidelity & Guaranty Co v Dedeaux, 152 So 274, 168 Miss 794

21. Tex—Royal Indemnity Co v Goodbar & Page, Civ App, 48 S W. 2d 1021

22. U S—Kosmos Portland Cement Co v D A Y Const Co, C C A Ind, 101 F 2d 893—Southern States Steel Corporation v Fidelity & Deposit Co of Maryland, C C A Tex., 80 F 2d 466

Pa—Pennsylvania Turnpike Commission v Baldwin Bros, 90 Pittsb Leg J 219

Where statute was included by reference in highway contractor's bond as containing conditions of procedure to be followed in materialman's suit on bond, meaning attaching to words of statute must be assumed to apply. —Commonwealth, to Use of Concrete Steel Co, v Globe Indemnity Co, 167 A 576, 312 Pa 244.

23. Tex—U S Fidelity & Guaranty Co v Henderson County, Civ App, 253 S W 835, affirmed, Com App, 276 S W 203, motion overruled 276 S W. 1119.

first having paid such claims.[24] A surety on a highway contractor's bond, who does not execute notes evidencing a debt to a materialman, is liable to the materialman without a surrender or tender of the notes.[25]

Filing of notice generally A filing of a proper notice of claim is under some statutes a prerequisite to a recovery on a highway contractor's bond.[26] In a case between claimants who have furnished labor and material for a highway and the surety on a nonstatutory bond, given to secure the performance of the principal contract, the rights of such claimants are contractual, and, as between them and the surety, a statute requiring claims to be filed within a fixed time and in a prescribed form is not applicable.[27] Under a statute providing that each claimant shall file a sworn statement of claim within a specified time after the claimant ceases to perform labor or furnish labor, work done under a new and independent agreement, made with the contracts after the original agreement had ended, does not set the time running so as to preserve a claim for earlier work for which proper notice was not filed.[28] Where a filing of notice is required, but no time is specified it must be filed within a reasonable time.[29]

Where a claimant has optional remedies, a failure to file claim as required if he elects to follow one remedy does not deprive him of his right to pursue his alternative remedy where such filing is not required.[30]

A statute imposing a limitation after the acceptance of public works for filing of claims on the contractor's bond has been held to mark the time beyond which claims may not be filed, and not to

24. U S —Metropolitan Casualty Ins Co v Smith & Smith, C C A Wash 58 F 2d 699

25. Mo —Missouri State Highway Board, for Use and Benefit of Fredonia Portland Cement Co v Southern Surety Co, App, 9 S W 2d 92

26. Cal —A L Young Machinery Co v Cupps 2 P 2d 321, 213 Cal 210
Mass —Mario Pandolf Co v Commonwealth, 21 N E 2d 221, 303 Mass 251—Carter v Commonwealth, 194 N E 915, 290 Mass 97 —Federal Nat Bank v Commonwealth 185 N E 9, 282 Mass 442—Inhabitants of Town of Newbury v Lincoln, 177 N E 611, 276 Mass 445
Minn —Shandorf v Sampson, 268 N W 841, 198 Minn 92
Tex —Texas Co v Schriewer, Civ App, 38 S W 2d 141, modified on other grounds Smith v Texas Co, Com App, 53 S W 2d 774, followed in Smith v G B Johnson Hardware Co, 53 S W 2d 779 and Smith v Jacksboro Stone Products Co, 53 S W 2d 780, affirming, Civ App, 41 S W 2d 347

Assignment of claim

(1) Filing by subcontractor of claim against surety on highway contractor's bond for excavation work performed by subcontractor was proper, notwithstanding subcontractor assigned his claim to third person since statute allowing filing of claim did not prohibit assignment —Barry v Duffin, 195 N E 511, 290 Mass 398

(2) Filing of claim against highway contractor's surety by assignor after assignment was sufficient when assignment for collection only —Rachow v Philbrick & Nicholson, 268 P 876, 148 Wash 214

Authority of attorney

Whether attorney filing sworn statement of corporate subcontractor's claim against surety on highway contractor's bond had authority to sign statement was immaterial, since the subsequent petition to enforce claim impliedly ratified act of attorney —Barry v Duffin, 195 N E 511, 290 Mass 398

Excessive claim

That materialman filed notice with state, claiming excessive amount due from road contractor did not preclude recovery on bond, where no prejudice resulted —Niemi v Brewster, 281 P 488, 154 Wash 181

Statute held repealed

Ark —Consolidated Indemnity & Insurance Co v Fischer Lime & Cement Co, 58 S W 2d 928, 187 Ark 131

Subsequent statute

Where contract and bond were executed prior to enactment of statute requiring presentation of claims, it was inapplicable —State Prison v Massachusetts Bonding & Insurance Co, 135 S E 125, 192 N C 391

Sworn statement as to amount due for labor and material used in construction of highway was not invalid because sworn to by contractor, and claim of assignee of amount due laborers for work in construction of highway was not defeated because sworn statements were not filed until after transfer —State v. Miller, 126 So 422, 169 La 914

In Iowa

(1) A surety is liable on a statutory bond for such amount of the claims not satisfied out of the portion of the contract price which the public corporation is required to retain until completion of the public improvement, but surety is not liable unless the claims of such claimants against such portion of the contract price shall have been established as provided by law Where no claims are filed within a thirty-day period, the portion of the contract price need not be retained, and surety is not liable for claims not filed within such thirty days —Missouri Gravel Co v Federal Surety Co, 237 N W 635, 212 Iowa 1322 -Southern Surety Co v Jenner Bros, 237 N W 500, 212 Iowa 1027

(2) Where, however, claims are filed against the retained portion of the contract price, further claims may be filed after the thirty-day period, and after action has been brought they may be filed with leave of court, and such claims are "established as provided by law"—Cities Service Oil Co v Longerbone, Iowa, 6 N W 2d 325

(3) Filing of claim within thirty days with the district court is insufficient, where the statute requires filing with the state auditor —Southern Surety Co v Jenner Bros, supra

27. Iowa —Monona County v O'Connor, 215 N W 803, 205 Iowa 1119

28. Mass —Mario Pandolf Co v Commonwealth, 21 N E 2d 221, 303 Mass 251

29. Wash —Hazard v C E O'Neill Co, 108 P 2d 660, 6 Wash 2d 667

30. Ind —Metropolitan Casualty Ins Co of New York v France Limestone Co, 193 N E 686, 100 Ind App 240—Eagle Indemnity Co v McGee, 175 N E 663, 92 Ind App 537—Natural Rock Asphalt Corporation v Highways Improvement Corporation, 173 N E 330, 96 Ind App 120—Million v Metropolitan Casualty Ins Co, 172 N E 569, 95 Ind App 628, followed in Metropolitan Casualty Co of New York v W Q O'Neal Co., 174 N E 926, 96 Ind App 712.

prohibit the filing of claims before an acceptance of the work[31] On the other hand, under other statutes, the statement furnished the surety, to be effective, must be furnished after the acceptance of the improvement.[32] The acceptance of the work which will start the running of the limitation period must be some positive, affirmative action marking a definite and certain time[33] Use of the highway by the public for purposes of travel, without official approval thereof, before the completion of the highway does not amount to an acceptance of the highway[34]

Notice to principal or surety Under some statutes no action may be maintained on a statutory bond unless claimant serves on, or furnishes to, the principal and his sureties, or to the sureties, within a designated time, a written notice of claim[35] A statute requiring the filing of notice of claim is remedial and should be liberally construed,[36] and substantial compliance with the requirement is sufficient[37] The sufficiency of notice depends on whether the notice given conveys the information which the statute intends all interested persons shall have[38] Such notice is not judicial process designed to confer jurisdiction over the person of the sureties,[39] and any deficiency in the notice may

31. Mont—Kirkpatrick v Ætna Casualty & Surety Co, 65 P 2d 1169, 104 Mont 212

Wyo—National Surety Co v W H Holliday Co, 295 P 913, 42 Wyo 407, followed in National Surety Co v Sandgren, 295 P 915, 42 Wyo 416

Claim held timely filed

N J—Commonwealth Quarry Co v Metropolitan Casualty Ins Co of New York, 158 A 443, 108 N J Law 518

32. Ohio—Southern Surety Co v Schmidt, 158 N E 1, 117 Ohio St 28

33. By board of county commissioners

Acceptance of work done under county highway construction contract by resolution of board of county commissioners after partial completion of project started running of limitation period for filing of claims against contractor's bond, and acceptance of work by state was unnecessary to start running thereof—Hazard v C E O'Neill Co, 108 P 2d 660, 6 Wash 2d 667

Engineer's certificate for final payment, on the basis of which a warrant for payment was issued bearing the words "is not a final acceptance in this case," is not a final acceptance so as to start the running of the period of limitation—Commonwealth Quarry Co v Metropolitan Casualty Ins Co of New York, 158 A 443, 108 N J Law 518

"The custom and practice of the commission to rely upon the acceptance of its engineer cannot override the positive mandate of the statute requiring affirmative action of the commission, except as it may serve to preclude it from questioning the conclusion of the engineer as between the state and the contractor"—Kirkpatrick v Ætna Casualty & Surety Co, 65 P 2d 1169, 1174, 104 Mont 212

34. Ohio—Southern Surety Co v Schmidt, 158 N E 1, 117 Ohio St 28

35. Minn—Benson v Barrett, 214 N W 47, 171 Minn 305

Ohio—Atkinson v Orr-Ault Const Co, 177 N E 40, 124 Ohio St 100

General agent

Under some statutes in the event the surety is a corporation the statement of claim is to be filed with the general agent of the corporation within the state—Bank of Wadesboro v Northwestern Casualty & Surety Co, 162 S E 236, 202 N C 148

Posting and publishing notice

Action on highway contractor's bond, under statute which requires claimant to serve notice of claim on principal and sureties within sixty days after highway department causes to be "published" in newspaper "and" also "posts" notice of payment of final estimates, is maintainable where notice is served within sixty days after both publishing and posting are completed, although notice is served more than sixty days after one or the other is completed, since both posting and publication are required—Texas Co v Maloney, 44 P 2d 903, 48 Wyo 280

Principal, surety, and obligee

Under some statutes written notice of claim must be served on the principal, the surety, and the obligee—American Surety Co of New York v Gilmore Oil Co, C C A N M, 83 F 2d 249

36. U S—American Surety Co of New York v Gilmore Oil Co, supra

37. N M—Silver v Fidelity & Deposit Co of Maryland, 53 P 2d 459, 40 N M 33

"It was not expected that such a notice of claim as provided by this statute should be framed by a lawyer It should be sufficient if it give substantially the information prescribed, so that the contractor and surety may readily investigate and ascertain its validity"—Standard Oil Co v Enebak, 222 N W 573, 574, 176 Minn 113

Information, casually acquired, that plaintiff had made a claim to a fund in the hands of the highway commission was not sufficient as notice that plaintiff intended to claim under the bond—Walsh & McGee Steel Co v Fidelity & Deposit Co of Maryland, 184 N E 67, 260 N Y 496, reversing 257 N Y S 743, 236 App Div 22

Letters, referring to each other, must be construed together in determining their sufficiency as notice to sureties on state highway contractor's bond of claim for labor performed in constructing highways—American Surety Co of New York v Gilmore Oil Co, C C A N M, 83 F 2d 249

38 Copy of letter stating merely that highway department had received claim covering materials and supplies under contractor's bond was insufficient to justify recovery on bond as notice to surety of subcontractor's claim for labor furnished contractor—Silver v Fidelity & Deposit Co of Maryland, 53 P 2d 459, 40 N M 33

Date of furnishing last item must be given in the notice under some statutes—Silver v Fidelity & Deposit Co of Maryland, supra

Nature and amount of claim

(1) Under some statutes the notice must apprise the interested persons of the nature and amount of the claim—Silver v Fidelity & Deposit Co of Maryland supra

(2) Stating that the claim or account was for deliveries made by plaintiff to the project sufficiently specified the nature of the claim—Standard Oil Co v Enebak, 222 N W 573, 176 Minn 113

Particularity of detail

The statement required to be furnished surety need not be prepared with the particularity of detail required in a statement of account It is sufficient if the statement advises surety of the amount due and that it is for labor performed or material furnished in the construction of the improvement for which the bond is given—Southern Surety Co v Schmidt, 158 N E 1, 117 Ohio St 28

39. U S—American Surety Co of New York v Gilmore Oil Co, C C A N M, 83 F 2d 249.

be waived by the surety retaining and acting on it without suggesting any defect therein [40] It is not necessary that service be had on an agent appointed in a particular manner or in a prescribed way, such as by the designation of an agent of a foreign corporation on whom judicial process may be served [41] Whether an agent is clothed with authority to receive such notice is a question of fact [42] In the absence of a provision in the statute to the contrary, the notices which are required to be given to the principal, surety, and obligee need not be identical [43] Under some statutes a materialman furnishing supplies to a subcontractor cannot recover on the bond of the principal contractor unless within a certain time after the date of the first delivery he notifies the principal contractor in writing that he is furnishing supplies to a subcontractor and that the contractor and his bond will be held for the payment for such supplies [44] Where the highway contract provides that the contractor shall not let or assign the contract or any part thereof without the consent of the state highway engineer, and that subcontractors should be considered agents of the contractor, a statute requiring persons furnishing supplies and materials to subcontractors to give notice to the contractor is inapplicable, and a failure to give such notice does not prevent a recovery on the contractor's bond [45]

Under some statutes a claimant is required to furnish the surety with a statement of the amount due within a certain time after the acceptance of the highway, and the furnishing of such statement within the prescribed time is a condition precedent to his right to bring action on the bond [46] The provisions of such a statute are for the benefit of sureties, and, when the notice given serves the purpose of the statute, the surety may not complain of technical irregularities [47]

Itemized and sworn statement There must be a compliance with a statutory requirement that claims be itemized and sworn to and filed with the county clerk within a designated time [48] The fact that the nature of the work made it difficult to determine the amount of work done does not postpone the commencement of the period for filing claims [49] A substantial compliance with statutory requirements as to the contents of the sworn statement is essential [50] A failure to state in the affidavit that the

Mailing of notice

Where the statute is silent as to the manner of service of such notice notice mailed to surety at its home office in another state is sufficient, where there is no question that the surety received the notice mailed as the purpose of requiring service of notice is thereby accomplished - Benson v Barrett 214 N W 47, 171 Minn 305

40 Minn —Standard Oil Co v Eneback, 222 N W 573, 176 Minn 113

41 U S — American Surety Co of New York v Gilmore Oil Co C C A N M, 83 F 2d 219

42. Evidence held to support finding of authority

U S - American Surety Co of New York v Gilmore Oil Co, supra

43. U S -- American Surety Co of New York v Gilmore Oil Co, supra

44 Wash —Niemi v Brewster, 281 P 188 154 Wash 181

45. Mont — H Earl Clack Co v Staunton, 72 P 2d 1022, 105 Mont 375

Wash —Rachow v Philbrick & Nicholson 268 P 876, 148 Wash 214

46. U S - Kosmos Portland Cement Co v D A Y Const Co, C C A Ind, 101 F 2d 893

Ky —Maryland Casualty Co v Newport Culvert Co, 126 S W 2d 468, 277 Ky 320

Amendment changing time for furnishing statement of claim to surety on highway contractor's bond and time for commencement of suit as applied to bond executed prior to amendment, was not objectionable as imposing liability on surety without its consent —Igoe Bros v National Surety Co 169 A 841, 112 N J Law 213, 96 A L R 1422

Before acceptance

Notice of materialman's claim may be served on contractor's surety before or within year after acceptance of highway - Fidelity & Casualty Co v Sinclair Refining Co 156 N E 169, 94 Ind App 92 rehearing denied 157 N E 13, 94 Ind App 92

47 Ind Fidelity & Casualty Co v Sinclair Refining Co, supra

48. U S Southern States Steel Corporation v Fidelity & Deposit Co of Maryland C C A Tex, 80 F 2d 166

Tex —Detroit Fidelity & Surety Co v State, 76 S W 2d 492, 124 Tex 145, modifying, Detroit Fidelity & Surety Co v Moberly, Civ App, 52 S W 2d 298—Metropolitan Casualty Ins Co of New York v Texas Sand & Gravel Co Civ App, 68 S W 2d 551, error dismissed—Suggs v Smithers Civ App 66 S W 2d 750—Huddleston & Work v Kennedy, Civ App, 57 S W 2d 255, certified questions answered 53 S W 2d 1009, 122 Tex 182—O'Connor v Metropolitan Casualty Ins Co, Civ App, 56 S W 2d 686, error dismissed — Texas Co v Schriewer, Civ App, 38 S W 2d 141 modified on other grounds Smith v Texas Co, Com App, 53 S W 2d 774, followed in Smith v G B Johnson Hardware Co, 53 S W 2d 779 and Smith v Jacksboro Stone Products Co, 53 S W 2d 780, affirming, Civ App, 41 S W 2d 347

Replevin bond

Failure to file claims for labor or material with county clerk did not prevent recovery by claimants on replevin bond executed by contractor under public improvement contract to secure release of retained moneys —Employers' Liability Assur Corporation v Young County Lumber Co, 64 S W 2d 339, 122 Tex 647—Detroit Fidelity & Surety Co v Pippins & Clarkson, Tex Civ App, 47 S W 2d 886

49. Tex —O'Connor v Metropolitan Casualty Ins Co Civ App, 56 S W 2d 686, error dismissed

50 Tex - Detroit Fidelity & Surety Co v State, 76 S W 2d 492, 124 Tex 145 modifying Detroit Fidelity & Surety Co v Moberly, Civ App, 52 S W 2d 298

Release bond

(1) To establish liability on a contractor's bond given to secure the release of money due on the contract on which liens are claimed, itemization of the necessaries furnished is essential —Foty v Rotchstein, Tex Civ App, 60 S W 2d 892, error dismissed

(2) Failure properly to itemize the claim filed with the county clerk does not prevent a recovery on the release bond —Austin Bridge Co v Drake, Tex Civ App, 79 S W 2d 677

prices charged are just and reasonable, as required by statute, has been held to be fatal [51]

(5) Parties; Persons Entitled to Sue

As a general rule a beneficiary of a highway contractor's bond may maintain an action thereon.

As a general rule persons to whom the benefit of a highway contractor's bond inures may maintain an action thereon,[52] either in their own name,[53] or in the name of the state for their use [54] Some statutes providing that such persons shall have a right

51. Statement that account is just is insufficient—Detroit Fidelity & Surety Co v State, 76 S W 2d 492, 124 Tex 145, modifying Detroit Fidelity & Surety Co v. Moberly, Civ App, 52 S W 2d 298

52. U S—Kosmos Portland Cement Co v D A Y Const Co, C C A Ind, 101 F 2d 893
La—Bickham v Womack 160 So 431, 181 La 837
Or—Clatsop County v Feldschau, 199 P 953, 101 Or 369, 18 A L R 1221
S C—Molony & Carter Co v Pennell & Harley, 169 S E 283, 169 S C 462
Va—Fidelity & Deposit Co of Maryland v Mason, 133 S E 793, 145 Va 138 Ætna Casualty & Surety Co v Earle-Lansdell Co 129 S E 263, 142 Va 435, rehearing denied 130 S E 235, 142 Va 435
W Va—Standard Oil Co of New Jersey v Smith, 178 S E 281, 116 W Va 16
Persons secured by highway contractor's bond see supra subdivision c (2) of this section
Persons entitled to sue on bonds generally see Bonds § 106

Assignor

One furnishing supplies to contractor but assigning accounts in exchange for note and mortgage, cannot recover from surety on contractor's bond—McRae Grocery Co v Independence Indemnity Co, C C A S C, 33 F 2d 194, 66 A L R 338

Bond given pursuant to statute

(1) Where a bond is given for public work in pursuance of a statute or ordinance for the protection of laborers and materialmen, those who come within the protected class may sue the surety on the bond It must appear, however, that the bond was given under such ordinance or statute for the protection of third persons—Commonwealth v R L Bonham Co, 147 A 611, 297 Pa 514—Greene County v Southern Surety Co 141 A 27, 292 Pa 304

(2) A statute authorizing materialman to sue in name of commonwealth on bond given it by state highway contractor does not authorize suit on bond given county by one contracting therewith to improve state highway
U S—Warren County, Pa, to Use of Skinner, v Southern Surety Co, D C Pa, 34 F 2d 168
Pa—Greene County v Southern Surety Co, supra

(3) Where, under the statute, the authority to bring suit is limited to the person or persons supplying the contractor with labor and materials, a right of action is given only to those who furnish material actually incorporated in the highway—Commonwealth v Ætna Casualty & Surety Co of Hartford, Conn, 163 A 530, 309 Pa 263

(4) Materialmen may sue on the bond where they were made parties to the contract and expressly given the right to sue—Portland Sand & Gravel Co v Globe Indemnity Co, 151 A 687 301 Pa 132

Common-law bond

"A bond to the state, conditioned for the performance by a highway contractor of the obligations of his contract, one of which obligations is to pay for materials used, may be sued on by a materialman, though the same bond indemnifies the state, and though no statute authorizes exacting such a contract or bond"—Southwestern Portland Cement Co v Williams 251 P 380, 32 N M 68, 49 A L R 525

Laborers and materialmen

(1) Where the contractor's bond is given, not only for the protection of the state under the contract but equally for the protection of the laborers and the materialmen, such persons have a right of action, irrespective of whether the express language of the bond gives it to them—Rolland Tp v Pakes, 197 N W 525, 527 226 Mich 284, quoting **Corpus Juris** 29 C J p 612 notes 49, 50

(2) "In order for the laborer or materialman to recover, there must not only be an intent to secure some benefit to him but there must also be a legally enforceable promise for his benefit"—Glens Falls Indemnity Co v American Awning & Tent Co, 180 A 367, 372 55 R I 284, reargument denied 181 A 297, 55 R I 308

Protection of state

Where the purpose of the bond is to protect the state, the cause of action is in favor of the state only
La—State v C S Jackson, 69 So 751, 137 La 931
N Y—Fosmire v National Surety Co 127 N E 472, 229 N Y 44, reversing 177 N Y S 810, 189 App Div 14
29 C J p 612 note 48

Subcontractor's bond

Contractor for construction of the highway and materialmen had a cause of action on a bond executed by a subcontractor, expressly naming contractor as obligee, and also in favor of laborers and materialmen—Miller v Bonner, 111 So 776, 163 La 332

Where several claimants sue in name of district each person nevertheless has a separate and distinct cause of action over which he has control—Gage v Road Improvement Dist No 3 of Newton County, 240 S W 427, 183 Ark 321

53. U S—Southwestern Portland Cement Co v O C McElrath Const Co, D C N M, 11 F 2d 910
Ala—American Employers' Ins Co of Boston, Mass, v Lee & Kincaid Coal Co 146 So 408, 226 Ala 262
Cal—Christie v Commercial Casualty Ins Co, 45 P 2d 263, 6 Cal App 2d 710
Colo—Southern Surety Co v Ft Lupton Mercantile Co, 249 P 263, 80 Colo 80
Kan—Road Supply & Metal Co v Kansas Casualty & Surety Co, 246 P 503 121 Kan 299
Mich—Smith v Oosting, 203 N W 131 230 Mich 1
Mo—Wiss v Royal Indemnity Co, 282 S W 164, 219 Mo App 568, followed in Canton Cooperative Elevator Co v Royal Indemnity Co, 282 S W 169 and Hetzler v Royal Indemnity Co, 282 S W 169
Neb—Peter Kiewit Sons' Co v National Casualty Co, 8 N W 2d 192—West v Detroit Fidelity & Surety Co, 225 N W 673 118 Neb 544
N C—Asheville Supply & Foundry Co v Catawba Const Co, 151 S E 93 198 N C 177
Pa—Earle Gear & Machine Co v Fidelity & Casualty Co of New York, 21 A 2d 652, 148 Pa Super 147—Clydesdale Brick & Stone Co v Globe Indemnity Co, 79 Pa Super 462
Va—Bowers v Town of Martinsville, 159 S E 196, 156 Va 497
29 C J p 612 note 51

Where contract contains promise on the part of the contractor to pay for labor and materials and the bond contains a condition based on such promise, those falling within that class may sue directly in their own names—Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P 722, 79 Mont 111

54. Pa—H H Robertson Co v Globe Indemn Co, 112 A 50, 268 Pa 309—Commonwealth v National Surety Co, 97 A 1034, 253 Pa 5
29 C J p 612 note 52

State highway commission

Where the bond is made to the state

of action and shall be authorized to bring suit in the name of the district for their use against the contractor and his surety are permissive, and do not prevent such persons from suing in their own names [55] On the other hand, it has been held that, except as provided otherwise by statute, a beneficiary under a bond, who is not named therein as an obligee, cannot sue thereon in his own name [56] General creditors of the contractor have been held to have no right to join in the proceedings brought to establish rights under the statute [57]

Assignee In the absence of a provision prohibiting assignments,[58] the claims of persons entitled to bring suit on a highway contractor's bond are assignable, and it is generally held that the assignment carries the security and the right of action thereon [59] On the other hand, in some jurisdictions it is held that the statutory right of a beneficiary to sue on the bond to which he is not a party is a mere nonassignable personal privilege, and that, in the absence of a statute empowering an assignee to maintain such a suit, he cannot sue on the contractor's bond [60] In Louisiana it has been held that an assignee of claims against a subcontractor, who paid nothing for the assignments, could not recover against the subcontractor's surety [61]

Proper and necessary parties The usual rules as to proper and necessary parties to a civil action apply to actions on a highway contractor's bond [62] Surety on a statutory undertaking given by a highway contractor to secure the release of funds on which a materialman files a lien has been held not to be a necessary party to an action to foreclose the lien [63] A claimant named in a highway contractor's refunding bond, expressly authorizing suit thereon, may sue notwithstanding the bond runs to the state,[64] and the state is not a necessary party to such a suit [65] Where the highway commissioner has no interest in the suit, he is neither a necessary nor a proper party [66]

(6) Time to Sue, Laches, and Limitations

Suit must be brought on a highway contractor's bond within the time limited by statute

Suit on a highway contractor's bond must be brought within the time limited by statute for such proceedings [67] Where surety brings suit against the contractor, the county, and the materialmen and

highway commission, an action should be brought in the name of the state highway commission to the use of relator The state is not a proper party to such a suit but a suit brought in the name of the state is merely a defect of parties plaintiff, and is waived by a failure to demur —State ex rel Concrete & Steel Const Co v Southern Surety Co, 294 S W 123 221 Mo App 67

55. Ark—Etna Casualty & Surety Co v Henslee, 260 S W 411, 163 Ark 492

56. Mass—Federal Nat Bank v Commonwealth, 185 N E 9 282 Mass 442—Inhabitants of Town of Newbury v Lincoln, 177 N E 614 276 Mass 445

Where bond creates no obligation in favor of a materialman of the contractor he may not enforce bond in his own name in an action either at law or in equity—Federal Surety Co v Minneapolis Steel & Machinery Co C C A Minn, 17 F 2d 212

57 Mass—Old Colony Crushed Stone Co v Cronin, 176 N E 804, 276 Mass 221

58 Mass—Barry v Duffin, 195 N E 511, 290 Mass 398

59 U S—Southern Surety Co v People's State Bank of South Carolina C C A S C, 47 F 2d 93

N C—Bank of Wadesboro v Northwestern Casualty & Surety Co, 162 S E 236 202 N C 148

Ohio—Citizens' Sav Bank of Pemberville v Hocker, 170 N.E 377, 34 Ohio App 169.

Or—Columbia County v Consolidated Contract Co 163 P 438, 83 Or 251

Wash Maryland Casualty Co v Philbrick & Nicholson 266 P 142, 147 Wash 277

Actions by assignee generally see Assignments §§ 123–128

Purchaser of "labor tickets" issued by highway contractor became assignee of claims, with right to enforce demand against contractor's surety—Sherrill Oil Co v Taylor, 137 So 295, 223 Ala 457, followed in 137 So 296 223 Ala 458

Excessive demand

Demand of assignee of subcontractor, to whom highway contractor awarded bridge work, of several thousand dollars more in statement of claim than was found to be due did not deprive assignee of claim against surety on contractor's bond —Barry v Duffin, 195 N E 511, 290 Mass 398

Where assignor and assignee united in the suit a demurrer to complaint on the ground that the assignment was oral and invalid was properly overruled—Maryland Casualty Co v People's Lumber & Supply Co, 27 S W 2d 1023 181 Ark 761

60. Mo—Missouri State Highway Commission ex rel and to Use of Licking State Bank v Coopers Const Service Co, 286 S W 736, 220 Mo App 401

61. La—Miller v Bonner, 111 So 776, 163 La. 332

62. Tenn—T J Moss Tie Co v Newsom, 51 S W 2d 477, 164 Tenn 515

63. N Y—Yonkers Builders Supply Co v Petro Luciano & Son, 199 N E 45, 269 N Y 171 102 A L R 759 reversing 277 N Y S 648, 243 App Div 783

Tex—Austin Bridge Co v Drake Civ App, 79 S W 2d 677

64. Tenn—Standard Oil Co of Louisiana v Jamison Bros, 59 S W 2d 522, 166 Tenn 53

Where bond is conditioned to pay all such claims duly filed and prosecuted, unpaid laborers and materialmen may sue on the bond—Campbell v Cresap, 59 S W 2d 523 166 Tenn 75

65. Tex—Smith v Smith, Civ App, 58 S W 2d 1063

66. Tenn—T J Moss Tie Co v Newsom, 51 S W 2d 477, 164 Tenn 515

Suit on refunding bond

Highway commissioner and surety on highway contractor's original bond were not necessary parties to claimant's suit on contractor's refunding bond—Standard Oil Co of Louisiana v Jamison Bros, 59 S W 2d 522, 166 Tenn 53

67. Ala—Consolidated Indemnity & Insurance Co v Texas Co, 140 So 566, 224 Ala 349

Ark—Southern Surety Co v Simon, 290 S W 960, 172 Ark 924

Minn—Shandorf v Sampson, 268 N W 841, 198 Minn 92

Tex—Employers' Liability Assur

laborers to have the interests of the parties determined, the appearance of materialmen and laborers in the action must be regarded as though made at the time the complaint was filed, although their cross complaints are not filed within the time limited by statute for bringing suit on such claims.[68] Where it is the apparent legislative intent to provide a lien on funds held by the highway board for a certain period, and that a failure to bring action within such time will constitute a loss of the remedy provided for reaching impounded funds, a failure to bring action within such time does not preclude suit on the contractor's bond.[69] A failure to sue on the bond within a reasonable time will not constitute laches so as to estop a claimant to sue thereon where surety was not prejudiced thereby.[70] A statute merely limiting the time within which notice of claim may be filed does not limit the time within which suit may be instituted on the bond after a proper notice has been filed.[71]

Under some statutes the time for bringing suit is limited to a certain time after complete performance of the contract and final settlement thereof.[72] The words "final settlement" under such statutes refer to the time when the amount due under the contract is determined by the appropriate administrative authority.[73]

Corporation v Young County Lumber Co., 64 S.W.2d 339, 122 Tex. 647—Detroit Fidelity & Surety Co. v Pippins & Clarkson, Civ.App., 47 S.W.2d 886—Southern Surety Co. v Guaranty State Bank of De Leon, Civ.App., 275 S.W. 136

After filing of notice of claim

Under some statutes a claimant has ninety days after the acceptance of the highway to file notice of claim and one year after the filing of such notice within which to bring suit. Under such a statute the prescriptive period does not begin to run from the date of the acceptance of the highway but from the date of filing notice.—Shandorf v. Standard Surety & Casualty Co. of New York, 268 N.W. 843, 198 Minn. 96.

Amended petitions

Filing of original petition held to toll running of statute so as to permit filing of amended petition.—Southern Surety Co. of New York v. First State Bank of Marquez, Tex.Civ.App., 54 S.W.2d 888, error refused.

Construction of statute

Statute providing that no action shall be brought on a release bond after the expiration of six months from the date of the filing thereof is a statute of limitation and is governed by the rules of construction applicable to a limitation statute.—Southern Surety Co. of New York v. First State Bank of Marquez, supra.

Date of acceptance

Under some statutes suits on the bond must be commenced within a certain time from the date of acceptance of the highway.

U.S.—Kosmos Portland Cement Co. v. D. A. Y. Const. Co., C.C.A.Ind., 101 F.2d 893.

Ind.—Metropolitan Casualty Ins. Co. of New York v. France Limestone Co., 193 N.E. 686, 100 Ind.App. 240.

Reasonable time

Where suit must be brought within a reasonable time, suit not brought until after three years is not brought within a reasonable time.—Hurst v. Dawson Bros. & Beaver, 72 S.W.2d 767, 167 Tenn. 572.

Refiling of claims

Where persons furnishing materials to subcontractors filed their claims with the state highway department, and within thirty days after completion and acceptance of the work again filed substantially the same claims, actions on contractor's bond, commenced within four months after the last filing were in time, although more than the statutory period had elapsed since the date of the first filing.—Rachow v. Philbrick & Nicholson, 268 P. 876, 148 Wash. 214.

Suit held timely filed

Colo.—Southern Surety Co. v. Ft. Lupton Mercantile Co., 249 P. 263, 80 Colo. 80.

68. Cal.—Maryland Casualty Co. v. Shafer, 208 P. 197, 57 Cal.App. 585.

69. Colo.—Continental Casualty Co. v. Rio Grande Fuel Co., 119 P.2d 618, 108 Colo. 472.

Tenn.—Atlantic Refining Co. v. Standard Accident Ins. Co., 120 S.W.2d 687, 174 Tenn. 11.

70. Ky.—Blair & Franse Const. Co. v. Allen, 65 S.W.2d 78, 251 Ky. 366.

71. Or.—State, for Use and Benefit of Southern Pac. Co. v. American Surety Co. of New York, 44 P.2d 1079, 150 Or. 236.

72. Ala.—John E. Ballenger Const. Co. v. Joe F. Walters Const. Co., 184 So. 270, 28 Ala.App. 353, modified on other grounds 184 So. 275, 236 Ala. 518.

Application for copy of bond

Statutory provision that materialmen shall make application for copy of road contractor's bond within sixty days after completion of contract does not extend time to sue if copy is not furnished.—Consolidated Indemnity & Insurance Co. v. Texas Co., 140 So. 566, 224 Ala. 349.

Statute is not retroactive and does not apply to bond given under earlier act.—Commonwealth v. National Surety Co., 93 Pa.Super. 285.

73. Ala.—U. S. Fidelity & Guaranty Co. v. Benson Hardware Co., 132 So. 622, 222 Ala. 429.

Tex.—Austin Bros. Bridge Co. v. Love, Com.App., 34 S.W.2d 574, reversing Love v. Austin Bros. Bridge Co., Civ.App., 5 S.W.2d 570.

Amount due is so "determined" when the final estimate of the highway department is approved by the governor.—Union Indemnity Co. v. Ricks, 140 So. 597, 224 Ala. 514.

Approval by examiner of public accounts and by the governor constitutes final settlement.—Consolidated Indemnity & Insurance Co. v. Southern G.-F. Co., 116 So. 383, 216 Ala. 214; U. S. Fidelity & Guaranty Co. v. Yeilding Bros. Co. Department Stores, 113 So. 176, 215 Ala. 307—U. S. Fidelity & Guaranty Co. v. Andalusia Mfg. Co., 134 So. 18, 222 Ala. 637.

Certification, audit, and allowance

Final settlement" within such a statute is contingent on compliance with statute requiring construction expense to be certified, audited, and allowed.—Commonwealth of Pennsylvania, to Use of General Crushed Stone Co. v. Ætna Casualty & Surety Co., C.C.A.Pa., 63 F.2d 941.

Certified copy of auditor's warrant ostensibly for final estimate was evidence of final settlement, respecting question whether suit on road contractor's bond was premature.—Union Indemnity Co. v. Ricks, 140 So. 597, 224 Ala. 514.

Final estimate

A statute providing that all suits to enforce claims on bonds shall be commenced within six months from the date of final estimate to the contractor means the conclusion and determination of the person having final authority to make that finding.—Consolidated Indemnity & Insurance Co. v. Fischer Lime & Cement Co., 58 S.W.2d 928, 187 Ark. 131.

Not final payment

Final settlement is computation by proper governmental authority of

A provision in the bond limiting the period of suretyship does not establish a prescriptive period for bringing suit on the bond [74] Surety on a bond given by a subcontractor to the contractor, which is an indemnity against loss, has been held not to have a right to invoke as a defense a time limitation fixed in the bond where it was not reasonably possible, under the circumstances of the case, to determine the liability on the bond within the limitation of time provided [75]

Interventions Where the statutes provide for only one action on a contractor's bond and provide for intervention in such suit by other creditors, in the absence of an express limitation on the time in which creditors may intervene,[76] creditors need not intervene in the suit within the time within which the original suit could have been brought,[77] and the court may properly fix a time in which creditors may intervene extending beyond such time,[78] and it is within the discretion of the trial court to permit the filing of interventions while the suit is still pending, even though the time fixed in the order has expired [79] A general statute providing that, when service has been perfected on him as required by law, defendant shall appear and plead, answer, or demur within thirty days or be in default, does not limit the time within which interventions may be filed to thirty days before the trial [80] Where the statute does not prohibit the filing of more than one suit on the bond, it has been held that the filing of pleas in intervention must be treated as the filing of suits, and that they must be filed within the time limited for the filing of suits [81]

Premature suits Suit on a highway contractor's statutory bond before the time fixed by statute for an accrual of a cause of action thereon is premature [82]

Waiver Surety is not entitled to rely on a failure to sue on the bond within the statutory time where it was expressly agreed in a written forbearance agreement that the defense of limitations would not be pleaded [83] Failure properly to raise the question that the suit was prematurely brought may operate as a waiver thereof [84]

(7) Pleadings

The general rules of pleading apply in actions on a highway contractor's bond

The declaration, complaint, or petition in an action on a highway contractor's bond, as in other civil cases, should set forth clearly and distinctly all the material facts constituting plaintiff's cause of action [85] It is sufficient to set out the substance of

amount finally owing under the contract, and it is not final payment thereon —Commonwealth to Use of Concrete Steel Co, v Globe Indemnity Co, 167 A 576, 312 Pa 244

74. La —Reynolds v Bonner, 110 So 756, 162 La 562

75. Wash —Thomas v S A Mocerl, Inc, 13 P 2d 444, 169 Wash 219

76. The federal statute differs from the Alabama statute in that the federal statute limits the time for filing interventions —U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

77. Ala —U S Fidelity & Guaranty Co v Simmons, 133 So 731, 222 Ala 669

78. Ala —U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

79. Ala —Union Indemnity Co v Ricks, 140 So 597, 224 Ala 514

80. Ala —U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307

81. Tex —Employers' Liability Assur Corporation v. Young County Lumber Co, 64 S W 2d 339, 122 Tex 647

82. Tex —Employers' Liability Assur Corporation v Young County Lumber Co, 64 S W 2d 339, 122 Tex 647

Abandonment of contract

Under some statutes if a contractor quits or abandons the contract before its consummation, suit may be instituted by creditors on the bond of the contractor within one year after the abandonment, and a suit begun within such time is not premature —Detroit Fidelity & Surety Co v State, 76 S W 2d 492, 124 Tex 115, modifying Detroit Fidelity & Surety Co v Moberly, Civ App, 52 S W 2d 298

Final settlement

Where suit is premature if brought before final settlement, the tacit acceptance by the commissioner's court of the final estimate of the engineer as fixing the amount due under the contract is not a final settlement as contemplated by the statute The commissioner's court may be compelled, at the instance of a creditor in a proper proceeding for that purpose, to proceed to make a final settlement of the contract —Austin Bros Bridge Co v Love, Tex Com App, 34 S W 2d 574, reversing Love v Austin Bros Bridge Co, Civ App, 5 S W 2d 570

Suits held premature

(1) Suit before final settlement
Pa —Commonwealth v Piel Const Co, 130 A 261, 284 Pa 64
Tex —Austin Bros Bridge Co v Love, Tex Com App, 34 S W 2d 574, reversing Love v Austin Bros Bridge Co, Civ App, 5 S W 2d 570

(2) Suit before publication of notice of final settlement —Royce Kershaw, Inc, v State, to Use of Day, 169 So 690, 176 Miss 757

83. Tenn —Standard Oil Co of Louisiana v Jamison Bros, 59 S W 2d 522 166 Tenn 53

84. Tex —Detroit Fidelity & Surety Co v Pippins & Clarkson, Civ App, 47 S W 2d 886

Issue concerning premature filing of suit on road contractor's bond should be promptly raised, question involving procedure rather than substantive law, and surety, after agreed judgments were entered for numerous intervening claimants, could not, as against other interveners, claim that suit was premature —Union Indemnity Co v Ricks, 140 So 597, 224 Ala. 514

85. Amount of bond

Where the statute requires that the bond shall be conditioned on the payment of claims for all labor performed in such work, a petition alleging, in effect, that the bond was executed and delivered pursuant to the laws of the state alleges by implication that it is in an amount sufficient to cover plaintiff's claim, and is not insufficient for failure to plead the amount of the penalty of the bond —State ex rel. Concrete & Steel

the condition of the bond in general terms.[86] A breach must be so assigned as to show that the condition of the bond has been broken.[87] In declaring on a statute, use of the words of the statute is usually sufficient.[88] Where the statute requires the taking of certain steps before suit is brought as a general rule the pleadings must aver that such steps were taken,[89] and in some jurisdictions the complaint must show that suit was brought within the time limited by statute.[90] Where the original petition states a cause of action, permitting an amendment to clarify an ambiguity is proper.[91]

Where surety's complaint in an action to determine the interests of the various parties is sufficient to disclose materialmen's right to recover on the bond, it has been held that it is not necessary for such materialmen to file a counterclaim or cross complaint.[92]

Plea or answer A plea showing no more than the letting of a subcontract by the principal is insufficient to show a release of surety by the prin-

Const Co v Southern Surety Co, 294 S W 123, 221 Mo App 67

Assignment

An allegation that certain interveners were assignees of claims for material sold by other parties to the contractors was sufficient, in the absence of exceptions demanding a more particular statement of the nature and character of the assignments, their date, and whether oral or in writing—U S Fidelity & Guaranty Co v Henderson County, Tex Civ App, 253 S W 835, affirmed, Com App, 276 S W 203 in which motion is overruled, 276 S W 1119.

Pleadings held sufficient

Ga—Motor Supply Co v St Paul Mercury Indemnity Co, 19 S E 2d 737, 67 Ga App 236—Moore v Standard Accident Ins Co, 173 S E 481, 48 Ga App 508

Ind—Massachusetts Bonding & Insurance Co v State, 149 N E 377, 82 Ind App 377

Minn—Benson v Barrett, 214 N W 47, 171 Minn 305

Mo—State ex rel Missouri State Highway Board, to Use of Fredonia Portland Cement Co, v Cox, 1 S W 2d 787, quashing Missouri State Highway Board for Use and Benefit of Fredonia Portland Cement Co v Southern Surety Co, App, 290 S W 652

N C—Bank of Wadesboro v Northwestern Casualty & Surety Co, 162 S E 236, 202 N C 148

Or—Fitzgerald v Neal, 231 P 645, 113 Or 103

Pa—Commonwealth v Seaboard Surety Co, 89 Pittsb Leg J 255

Publication of notice of suit

Where the purpose of a statute requiring publication of notice of the suit is to notify all persons who may have similar claims so that they may take the necessary steps to protect their interests, and where publication cannot be made until after the declaration has been filed, the sufficiency of the declaration is not dependent on the publication of the notice—Excello Feed Milling Co v U S Fidelity & Guaranty Co, 111 So 94, 145 Miss 599

Special contract

Petition held to declare on special contract with contractor, not quantum meruit—State ex rel Concrete & Steel Const Co v Southern Surety Co, 294 S W 123, 221 Mo App 67

Supplies to subcontractor

Items of material, etc, supplied by plaintiff to subcontractors should be claimed as such, and not by way of assignment to plaintiff by the subcontractors without a showing that such amounts are due to the subcontractors and that such claims were duly assigned to plaintiff—U S Fidelity & Guaranty Co v Benson Hardware Co, 132 So 622, 222 Ala 429

Uncertainty

Where it is impossible for plaintiff to amend the complaint so as to cure a defect of uncertainty as to the date materials were furnished, due to the fact that the uncertainty appeared in the notice of claim, it is proper to sustain a demurrer to the complaint—A L Young Machinery Co v Cupps, 2 P 2d 321, 213 Cal 210

Withdrawal bond

In materialman's action on contractor's withdrawal bond given to secure payment of liens proved against money due contractor from highway commission, materialman was required only to allege and prove amount of debt, that material was actually used in the highway work, and that the lien had been proved—Powell v Republic Portland Cement Co, Tex Civ App, 91 S W 2d 467, error dismissed

86. Conclusion

Since a written instrument should be pleaded according to its legal meaning and effect, a statement that surety "agreed and bound itself to pay for all material and supplies furnished and labor performed in or upon or about the construction of said highway under said contract" is sufficient, and is not objectionable as a mere conclusion of law—State ex rel Concrete & Steel Const Co v Southern Surety Co, 294 S W. 123, 221 Mo App 67

87. Allegation held sufficient

An allegation that the work and labor were performed and material furnished, for which the principal failed and refused to pay, sufficiently alleges a breach of the conditions of the bond—State ex rel. Concrete & Steel Const Co v Southern Surety Co, supra

88. Idaho—State v Storm, 287 P 689, 49 Idaho 246

89. Pa—Greene County v Southern Surety Co, 141 A 27, 292 Pa 304

Mode of raising objection

It has been held that a failure of the complaint to state that notice of claim was filed as required by statute may be taken advantage of by answer, but not by demurrer—State Prison v Massachusetts Bonding & Insurance Co, 135 S E 125, 192 N C 391

90. Ala—Consolidated Indemnity & Insurance Co v Texas Co, 140 So. 566, 224 Ala 349

Reason for rule

"The time in which suit must be brought is not a statute of limitation, but is of the essence of the action, and the complaint must show that it is begun within that time"—John E Ballenger Const Co v Joe F Walters Const Co, 184 So 275, 276, 236 Ala 548, modifying 184 So 270, 28 Ala App 353

Exact date

It is not necessary to allege the exact date of the final settlement if its date is approximately shown and it is shown that it occurred within the time limited before suit was commenced—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307.

Interveners

If the suit is timely begun, the status of it is fixed, and it is not necessary that interveners shall make such averment in their petitions of intervention—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307

91. Ga—Moore v Standard Accident Ins Co, 173 S E 481, 48 Ga App 508

92. Cal—Maryland Casualty Co v Shafer, 208 P. 197, 57 Cal App 585

cipal's entering into a new contract with a third person to do the work releasing the principal [93] Where the complaint discloses a cause of action duly acquired under the bond, a plea of fraud as against plaintiff must set forth facts showing his connection with the fraud, or from which he is chargeable with the fraud [94] An affidavit of defense raising questions of law will be overruled when an issue of fact is presented [95]

Issues, proof, and variance Such matters may be considered on the trial as are properly put in issue by the pleadings [96] To be sufficient, the proof adduced must correspond with the cause of action set forth in the petition, and there cannot be a recovery on a cause of action other than that pleaded [97] An immaterial variance, however, is not fatal as a failure of proof [98] Where there is prima facie evidence that there has been compliance with statutory provisions, a failure to prove an allegation of one of the statutory requirements is not fatal [99]

(8) Evidence

As in other civil actions, plaintiff has the burden of proving his case by a preponderance of the evidence, and competent, relevant, and material evidence is admissible.

In an action on a highway contractor's bond, plaintiff has the burden of establishing his case by a fair preponderance of the evidence,[1] and this burden of proof remains on plaintiff throughout the trial [2] Accordingly plaintiff has the burden of showing the extent and validity of his claim [3] It is not necessary for a materialman to prove by direct evidence that his supplies sold for the construction of the highway, being reasonably suitable and appropriate to it, were in fact so used, if this may be inferred from the circumstances [4] If, however, the contractor is engaged in several projects under separate contracts and bonds, and the materials and supplies are sold indiscriminately without reference to one or the other job, and they are suitable for use on either, and there is nothing on which to predicate an inference that they were used on the one or the other, the materialman has the burden of proving that his supplies were used on the project covered by defendant's bond [5] The burden of overcoming a prima facie case of liability,[6] and of proving affirmative defensive matter,[7] rests on defendant

93. Ala—American Employers' Ins Co of Boston, Mass v Lee & Kincaid Coal Co, 116 So 408, 220 Ala 262

94 Ala—American Employers' Ins Co of Boston Mass v Lee & Kincaid Coal Co, supra

95. Pa—Pennsylvania Turnpike Commission for Use of, v Eidemiller, 89 Pittsb Leg J 477

96. Estoppel

Allegations that labor or materials were furnished at request of sureties on highway contractor's bond not demurred to were sufficient to admit evidence of estoppel against sureties State v. Storm, 287 P 689 49 Idaho 216

97. Va—C S Luck & Sons v Boatwright, 162 S E 53, 157 Va 190

98. Mo State ex rel Ray & Son v Kelly App 131 S W 2d 371

99. Completion and acceptance

Under statute providing that, on furnishing of affidavit by person entitled to protection of highway contractor's bond that work covered by bond has been completed and accepted person entitled to protection of bond shall be furnished with certified copy of bond on which he shall have right of action against contractor and surety on bond, in action on a highway contractor's bond certified copy of bond was prima facie evidence that provisions of statute had been complied with and materialman was not required to prove an allegation of completion and acceptance of work—Western Casualty & Surety Co v Fulton Supply Co, 4 S E 2d 690, 60 Ga App 710

1. U S—Lake County, for Use of Baxley, v Massachusetts Bonding & Insurance Co C C A Fla, 84 F 2d 115

Ind—Fidelity & Deposit Co of Maryland v Standard Oil Co, 199 N E 169, 101 Ind App 301

N C—Wilson-Stamey Grocery Co v Ross, 138 S E 537, 194 N C 109

Wash—Niemi v Brewster, 281 P 488, 154 Wash 181

After answer of non est factum, parties claiming under alleged highway contractors' bond had burden of proving that insurance agent had authority to execute bond for surety—Massachusetts Bonding & Insurance Co v Bankers' Surety Co, 179 N E 329, 96 Ind App 250

2. Judgment against principal

The introduction of a judgment against the principal establishes prima facie the amount of the indebtedness against surety, but it does not cast on surety the burden of overthrowing it—Lake County, for Use of Baxley v Massachusetts Bonding & Insurance Co, C C A Fla, 84 F 2d 115

3. U S—Hochevar v Maryland Casualty Co, C C A Ohio, 114 F 2d 948

La—Silver v Harriss, 115 So 376, 165 La 83—Dewil v Union Indemnity Co, 120 So 654, 10 La App 224

Tex—Metropolitan Casualty Ins. Co of New York v Texas Sand & Gravel Co Civ App 68 S W 2d 551, error dismissed

Release bond

Tex Brown & Root v Durland, 84 S W 2d 1073, 126 Tex 20

4. Ala—U S Fidelity & Guaranty Co v Benson Hardware Co 132 So 622, 222 Ala 129

5. U S—Hochevar v Maryland Casualty Co, C C A Ohio, 114 F 2d 948

Ala—U S Fidelity & Guaranty Co v Benson Hardware Co 132 So 622, 222 Ala 429

La—Silver v Harriss 115 So 376 165 La 83

Mont H Earl Clack Co v Staunton, 72 P 2d 1022, 105 Mont 375

6. Ala—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307—U S Fidelity & Guaranty Co v Simmons, 133 So 731, 222 Ala 669

7. Ala—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307—U S Fidelity & Guaranty Co v Simmons, 133 So 731, 222 Ala 669

Cal—Gurley Lord Tire Co v Newgard, 50 P 2d 1013, 10 Cal App 2d 88

Release from liability

(1) Original highway contractor's indebtedness to subcontractor being admitted burden was on original contractor's surety to establish that indebtedness had been discharged—

The usual presumptions arising in civil actions generally will be indulged in actions of this character,[8] but nothing will be presumed which is not warranted by the circumstances of the case[9]

Competent evidence which is relevant and material to the issues is admissible,[10] but incompetent, irrelevant, or immaterial evidence should be excluded[11]

The rules as to the weight and sufficiency of evidence in civil actions generally apply in actions on bonds of highway contractors.[12]

Southern Surety Co v Mobile Nat Bank, 137 So 297, 223 Ala 463

(2) Corporation surety on road contractor's bond, to avoid liability in subcontractor's suit must show it has suffered harm from material change in performance alleged to release it from liability—Piel Const Co v Commonwealth of Pennsylvania, to Use of Hendricks, C C A Pa, 35 F 2d 265

8. Extension of time

Where bond permitted extension of time to principal without notice to surety and contractor was allowed to continue after expiration of time for performance it will be presumed that county granted extension, and hence surety is liable on bond for gravel furnished after expiration of originally stated time for performance—Sommers v National Surety Co, 201 N W 443, 229 Mich 422

Truth of contract

Written contract for building highway and providing for bondsman under contract will be presumed to represent truth—Sarrett v Globe Indemnity Co, 6 La App 385

9. Ill—Lake County v Southern Surety Co, 265 Ill App 286

10 Preliminary foundation

In action against surety on road contractors' bond to recover funds advanced to the contractors before checks or other proofs of payment by plaintiff relator are admissible, it must be shown that such checks or payments were for construction of road involved—Massachusetts Bonding & Insurance Co v State, 149 N E 377, 82 Ind App 377

Order striking out testimony held proper—Hansen v Romer, 200 N W 839, 160 Minn 153

Evidence held admissible

(1) Acknowledgment by contractor of correctness of claims—U S Fidelity & Guaranty Co v Simmons, 137 So 731, 222 Ala 669

(2) Decree obtained in the chancery court by subcontractor against contractor

Ark—Ætna Casualty & Surety Co v Henslee, 260 S W 414, 163 Ark 492

Mich—Sommers v National Surety Co, 201 N W 443, 229 Mich 422

(3) Evidence of settlement between highway contractor and commonwealth—Piel Const Co v Commonwealth of Pennsylvania, to Use of Hendricks, C C A Pa, 35 F 2d 265

(4) That changes in specifications of roads were at engineer's direction—Brammer & Wilder v Limestone County, Tex Civ App, 24 S W 2d 99, error dismissed.

(5) In action on bond by subcontractor, contract between state and contractor although not filed with pleading—Miller v State, 159 N E 551, 87 Ind App 264

(6) Other evidence

Ind—Montgomery v Southern Surety Co of Iowa, 162 N E 31, 96 Ind App 472

Ky—Trinity Universal Ins Co v Coker, 150 S W 2d 640, 286 Ky 261

11. Ala—Memphis Milling Co v Southern Surety Co, 133 So 43, 222 Ala 502

Cal—Excavating Equipment Dealers v Ætna Casualty & Surety Co, 21 P 2d 896, 131 Cal App 161

Md—American Fidelity Co v State, 109 A 99, 135 Md 326

Minn—Lucas v Ganley Bros, 206 N W 934, 166 Minn 7

Tex—U S Fidelity & Guaranty Co v Henderson County, Civ App, 253 S W 835, affirmed Com App, 276 S W 203, motion overruled 276 S W 1119

12. Admissions of indebtedness

In an action by a subcontractor against a highway contractor and surety, surety was not bound by books of contractor admitting indebtedness, where contractor had defaulted on contract, and where surety under bond was not bound to pay debts of contractor but was bound only to pay for work, labor, material, etc, used in construction of work—Dewil v Union Indemnity Co, 120 So 654, 10 La App 224

Evidence held sufficient

(1) As to percentage of work done in section of road covered by bond and percentage on remainder of road—U S, to Use and Benefit of Taylor v Fidelity & Deposit Co of Maryland, D C Idaho, 4 F Supp 211

(2) To establish prima facie claim—Central of Georgia Ry Co v U S Fidelity & Guaranty Co, 137 So 36, 223 Ala 458

(3) To establish, prima facie, that materials were used in construction of highway covered by bond—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307—U S Fidelity & Guaranty Co v Andalusia Mfg Co, 134 So. 18, 222 Ala. 637

(4) To establish that suit was timely brought—Consolidated Indemnity & Insurance Co v Fischer Lime & Cement Co, 58 S W 2d 928, 187 Ark 131

(5) To support finding that timely notice was given

Mo—Chernus v Kennedy - Coats Const Co, 55 S W 2d 744, 227 Mo App 582, certiorari quashed State ex rel Union Indemnity Co v Shain, 66 S W 2d 102, 331 Mo 153

N J—Collins v Metropolitan Casualty Ins Co of New York, 176 A 130, 114 N J Law 93

(6) To sustain denial of recovery—Ohio Oil Co v Fidelity & Deposit Co of Maryland, Ind App, 42 N E 2d 406

(7) To sustain plaintiff's or claimant's recovery

Ala—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307—Southern Surety Co v State, 130 So 776, 222 Ala 83—Benson Hardware Co v Taylor, 136 So 863, 24 Ala App 480

Ark—Ætna Casualty & Surety Co v Henslee, 260 S W 414, 163 Ark 492

Mich—Sommers v National Surety Co, 201 N W 443, 229 Mich 422—Producers' Stone & Gravel Co v Chicago Bonding & Surety Co, 185 N W 703, 216 Mich 644

Minn—Benson v Barrett, 214 N W 47, 171 Minn 305

Mo—State ex rel Penn Lubric Oil Co v Lyle, 5 S W 2d 453, 222 Mo App 676—State ex rel Concrete & Steel Const Co v Southern Surety Co, 294 S W 123, 221 Mo App 67

Tex—Powell v Republic Portland Cement Co, Civ App, 91 S W 2d 467, error dismissed—Southern Surety Co v Guaranty State Bank of De Leon, Civ App, 275 S W 136

Wash—U S Fidelity & Guaranty Co v Feenaughty Machinery Co, 85 P 2d 1085, 197 Wash 569—Macder Steel Products Co v Brewster, 281 P 14, 154 Wash 120

(8) Other particular matters

Cal—Los Angeles County v Margulis, 41 P 2d 608, 6 Cal App 2d 57

Mo—State ex rel Ray & Son v Kelly, App, 131 S W 2d 371

Okl—Southern Surety Co v Sparlin, 26 P 2d 738, 166 Okl 89—Southern Surety Co v Gilkey Duff Hardware Co, 26 P 2d 144, 166 Okl 84, 89 A.L R 888

(9) Trial

Disputed questions of fact should be left to the determination of the jury under proper instructions from the court.

Disputed questions of fact are for the determination of the jury or the trial court sitting without a jury,[13] but, where there is no substantial conflict in the evidence, the question becomes one of law, and a direction of the verdict is proper[14] The instructions to the jury, or declarations of law in trials without a jury, must state the law correctly,[15] and erroneous instructions or declarations requested are properly refused[16] The verdict must be responsive to, and sustained by, the evidence adduced at the trial[17] The verdict should not be for an amount greater than that shown by the evidence to be due plaintiff or claimant[18] The granting of a new trial is governed by the usual rules applicable thereto.[19]

Mode and conduct of trial Where the statute contemplates one proceeding on a contractor's bond in which all parties are entitled to be present and be heard, the orderly presentation of the evidence and argument touching each claim and the rendition of verdicts and judgments are largely within the discretion of the court[20]

(10) Judgment, Damages, and Amount of Recovery

General rules apply as to the judgment or decree. Subject to the limitation of the amount of the penalty of the bond, amounts shown to be due on claims within the

SC—Molony & Carter Co v Pennell & Harley, 169 SE 283, 169 SC 462
Tex—Detroit Fidelity & Surety Co v Moberly, Civ App, 52 SW 2d 298, modified on other grounds Detroit Fidelity & Surety Co v State, 76 SW 2d 492, 124 Tex 145
Wyo—Sims v Southern Surety Co, 265 P 450, 38 Wyo 165

Evidence held insufficient

(1) To establish discharge of contractor's liability so as to release surety
Ala—Southern Surety Co v Mobile Nat Bank, 137 So 297, 223 Ala 463
Ky—Maryland Casualty Co v Ballard County, 289 SW 316, 217 Ky 343
Mo—Missouri State Highway Board for Use and Benefit of Fredonia Portland Cement Co v Southern Surety Co App, 9 SW 2d 92

(2) To make prima facie case of insurance agent's authority, signing as attorney in fact, to execute highway contractors' bond—Massachusetts Bonding & Insurance Co v Bankers' Surety Co, 179 NE 129, 96 Ind App 250

(3) To show necessity of contractor's purchase
NC—Wilson-Stamey Grocery Co v Ross, 138 SE 537, 194 NC 109
SD—Dennis v Enke, 224 NW 925, 55 SD 15

(4) To show which proportion of materials furnished contractor was used on particular project covered by bond—H Earl Clack Co v Staunton, 72 P 2d 1022, 105 Mont 375

(5) To sustain defense of fraud—Empire Sand & Material Co v Smith 259 P 697, 124 Kan 274

(6) To sustain defense of payment—State v Traylor, 173 NE 461, 98 Ind App 290

(7) To sustain finding that repairs to truck were minor, representing only the ordinary wear and tear—Mack International Motor Truck Corporation v Western Surety Co, 260 NW 869, 194 Minn 484

(8) Other particular matters
Mich—People v Boyes & Blandford Co, 192 NW 787, 222 Mich 8
Tex—Metropolitan Casualty Ins Co of New York v Texas Sand & Gravel Co, Civ App, 68 SW 2d 551, error dismissed—Southern Surety Co v Guaranty State Bank of De Leon, Civ App, 275 SW 436

13. US—Lake County, for Use and Benefit of Baxley v Massachusetts Bonding & Insurance Co, CCA Fla, 75 F 2d 6
Pa—Earle Gear & Machine Co v Fidelity & Casualty Co of New York, 21 A 2d 652, 148 Pa Super 147
Tex—Employers' Casualty Co v Rockwall County, Civ App, 300 SW 148 modified on other grounds 35 SW 2d 690, 120 Tex 441, reformed on other grounds 38 SW 2d 1098, 120 Tex 441—US Fidelity & Guaranty Co v Henderson County, Civ App, 253 SW 835, affirmed, Com App, 276 SW 203, in which motion is overruled, 276 SW 1119
Wash—Terry v US Fidelity & Guaranty Co, 82 P 2d 532, 196 Wash 206, 119 ALR 1276

Nonsuit properly denied

NC—Overman & Co v Maryland Casualty Co, 136 SE 250, 193 NC 86
Or—Prineville Warehouse Co v Johnson, 5 P 2d 713, 138 Or 324—State v American Surety Co of New York, 300 P 511, 137 Or 394, rehearing denied 2 P 2d 1116, 137 Or 394

Questions held for jury

(1) Necessity of furnishing board to employees and amount due for feed stuffs furnished contractor's mules—Plyler v Elliott, 131 SE 306, 191 NC 54

(2) Whether articles are "materials" within surety bond conditioned on contractor paying those furnishing materials in construction of roadway—Jenkins Hardware Co v Globe Indemnity Co, 170 SE 643, 205 NC 185

(3) Whether materials and supplies were used on project covered by bond—Langston Const Co v Hillsborough County, 143 So 771, 106 Fla 834

(4) Other questions
Okl—Fuller v Brooks, 246 P 369, 117 Okl 252
Or—Collins Concrete Pipe Co v Union Indemnity Co, 21 P 2d 779, 143 Or 288
Tex—Brammer & Wilder v Limestone County, Civ App, 24 SW 2d 99, error dismissed

14. Ala—Memphis Milling Co v Southern Surety Co, 133 So 43, 222 Ala 502
Ark—Southern Surety Co v Simon, 290 SW 960, 172 Ark 924
La—Silver v Harriss, 115 So 376, 165 La 83

15. Okl—Fuller v Brooks, 246 P 369, 117 Okl 252

Instruction held not erroneous

Tex—US Fidelity & Guaranty Co v Henderson County Tex Com App, 276 SW 203 affirming, Civ App, 253 SW 835, motion overruled, Com App, 276 SW 1119

16. Mo—State ex rel Concrete & Steel Const Co v Southern Surety Co, 291 SW 123, 221 Mo App 67

17. **Evidence held insufficient** to sustain verdict in excess of a certain amount—Eagle Indemnity Co v McGee, 175 NE 663, 92 Ind App 537

18. **Verdict held not excessive**

Cal—Excavating Equipment Dealers v Ætna Casualty & Surety Co, 24 P 2d 896, 134 Cal App 161

19. Pa—Commonwealth, for Use of, v Ferguson, 86 Pittsb Leg J 32

20. Ala—US Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307.

protection of the bond may be recovered, and, in a proper case, interest and attorney's fees may also be recovered.

The judgment or decree in an action on a highway contractor's bond is governed by the usual rules applicable in civil actions generally, and, in accordance with such rules, it must be responsive to, and supported by, the evidence adduced at the trial [21] Where the aggregate of claims proved exceeds the penalty of the bond, and the surety is directed to deposit the amount of the penalty with the court, it has been held that the surety has no interest in the manner of distribution of the fund [22]

Subject to the rule that recovery, as a general rule, cannot exceed the penalty of the bond,[23] the amount of recovery in an action on a highway contractor's bond is the net amount found to be due plaintiff arising from claims within the protection of the bond [24] The surety is not liable for payments by the county to the contractor which were not paid under the terms and provisions of the contract covered by the bond.[25] Permitting recovery on items which are not shown to have been entirely consumed in the course of the construction of the road project has been held to be improper.[26] Where a subcontractor's bond is made in favor of the contractor as obligee, the contractor may recover against the subcontractor and his surety in solido for all sums for which the subcontractor may be personally responsible in connection with the performance of his subcontract.[27] When a subcontractor sues on the bond for the full amount due him as such from the principal in the bond, it has been held that the surety is entitled to deductions for claims of laborers and materialmen of the subcontractor, for which the surety is directly liable [28] The amount of the claim filed with the county commissioners is not binding on a claimant suing on the contractor's bond, where he is not proceeding under an alternative statutory procedure which required the filing of claim [29]

Where the contractor abandoned the work and refused to complete it, the proper measure of damages is the difference between the original contract

21. Ala.—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307

Iowa.—Cities Service Oil Co v Longerbone, 6 N W 2d 325

Evidence held to sustain judgment

Cal.—Farish v Pacific Indemnity Co, 100 P 2d 775, 38 Cal App 2d 167

22. Va.—Fidelity & Casualty Co of New York v Copenhaver Contracting Co, 165 S E 528, 159 Va 126

23. Cal.—Los Angeles County v Margulis, 44 P 2d 608, 6 Cal App 2d 57

Va.—Ætna Casualty & Surety Co v Earle-Lansdell Co, 130 S E 235, 142 Va 435, denying rehearing 129 S E 263, 142 Va 432

Prorating

Under a statute providing that, if the recovery on the bond should be inadequate to pay the amounts found due to all creditors, judgment shall be given to each creditor pro rata of the amount of the recovery, the item of net cost to the surety for completing the project must be considered as one more claim against the penalty of the bond.—New York Indemnity Co v Niven, 133 So 261, 222 Ala 562

24. La.—Silver v Harriss, 115 So 380, 165 La 91.—Reynolds v Bonner, 110 So 756, 162 La. 562

Mass.—Barry v Duffin, 195 N E 511, 290 Mass 398

Award held not excessive

Minn.—Lucas v Ganley Bros, 206 N W 934, 166 Minn 7

Deductions

(1) Wages due employees of subcontractor could not be reduced, in action on contractor's bond, by amount due from laborers to wife of member of firm of subcontractors, for board.—Williamson v Williamson, 247 N W 704, 262 Mich 401, 89 A L R 442

(2) Where highway contractor and subcontractor agreed on damages for delay, contractor's surety could recover no higher damages from subcontractor.—Fidelity & Casualty Co of New York v Copenhaver Contracting Co, 165 S E 528, 159 Va 126

Freight

One furnishing material to a contractor under an agreement for sale at a certain price in addition to freight charges, which were to be advanced by the seller, is entitled to recover against surety for freight charges paid thereon, since freight charges became in effect a part of the purchase price fixed by the contract Whether the freight charges were paid in advance under agreement, or whether exacted of claimant under his liability as consignor, makes no difference.—Maryland Casualty Co v Ohio River Gravel Co, C C A W Va, 20 F 2d 514, rehearing denied, C C A, 21 F 2d 744, certiorari denied 48 S Ct 157, 275 U S 570, 72 L Ed 431

Set-offs

(1) When the contractor is indebted to a subcontractor and pays a debt of the latter for which, as surety, he is liable, he can offset the amount so paid against that which he owes the subcontractor The sureties on the contractor's bond, as supplemental sureties, may avail themselves of this equitable right of set-off.—Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, 171 A 382, 115 N J Eq 470, affirmed 176 A 341, 117 N J Eq 440.

(2) The liability of the contractor and his sureties to the assignee of money due a subcontractor may be offset by debts of the subcontractor for which the contractor is secondarily liable and which he pays, provided the assignment was made before the subcontractor had fully performed his contract.—Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, supra

25. Tex.—Brammer & Wilder v. Limestone County, Civ App, 24 S W 2d 99, error dismissed

26. Okl.—Fuller v Brooks, 246 P 369, 117 Okl 252

27. La.—Miller v Bonner, 111 So 776, 163 La 332

28. **"The subcontractor being primarily liable** for such bills, the surety may recoup the amount of his liability to the subcontractor to the amount of his liability to such laborers or materialmen."—Union Indemnity Co v Ricks, 140 So 597, 599, 224 Ala 514

This does not prevent transactions in good faith in course of the performance of the contract from fixing the primary liability for such bills as between the principal and subcontractor.—Union Indemnity Co v Ricks, 140 So 597, 224 Ala 514

29. Ind.—Eagle Indemnity Co v McGee, 175 N E 663, 92 Ind App 537.

price and the cost of completion,[30] which may be the cost of completion under a second contract,[31] although such amount is greater than the reasonable value of the work, where there is no evidence of fraud or negligence,[32] or, as it has been held, the difference between the original contract price and what it would cost to complete the work according to the contract specifications, although, as completed, it cost less.[33]

Attorney's fees Where the contractor's bond or a statute so provides, a successful claimant who has been required to bring action to obtain payment is entitled to an allowance of attorney's fees,[34] and an express agreement in the bond to pay a reasonable attorney's fee for the obligee does not limit the right to recover such fee to the obligee to the exclusion of beneficiaries under the bond.[35] Where the right to recover attorney's fees is based on statute, there must be a compliance with statutory conditions before such fees may be recovered.[36] Where surety is justified in resisting claims presented, it should not be charged with attorney's fees.[37]

30. Cal.—Los Angeles County v Margulis, 44 P.2d 608, 6 Cal.App.2d 57

W.Va.—State v Smith, 114 S.E. 375, 92 W.Va. 12

31. Ind.—Donaldson v State ex rel. Ripley County Com'rs, 90 N.E. 132, 46 Ind.App. 273, modified on other grounds and petition overruled 91 N.E. 718, 46 Ind.App. 273

Actual completion of work

The measure of damages in an action on a bond for breach of a road construction contract is based on the actual cost, not the reasonable cost, of completing the work, in the absence of any showing that the advertisement and letting of the new contract was not fairly and honestly done, and it is not necessary to show that the work actually had been completed and the contract price at which it was relet actually paid.—Jackson v State, 142 N.E. 1, 194 Ind. 130

Cost occasioned by delay

Surety on bond of highway contractor which abandoned work was liable for amount expended by state in completing contract under subsequent contract made more than three months thereafter, when work, on account of delay and wintry weather, cost more than if it had been begun promptly after abandonment, where state acted with reasonable promptness.—Detroit Fidelity & Surety Co. v State, 76 S.W.2d 492, 124 Tex. 115, modifying Detroit Fidelity & Surety Co. v Moberly, Civ.App., 52 S.W.2d 298

32. Wis.—Bayfield County v Ogren, 177 N.W. 591, 172 Wis. 169

33. N.C.—Mitchell County v Abee, 96 S.E. 31, 175 N.C. 701.

34. Ala.—U. S. Fidelity & Guaranty Co. v Yeilding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.

La.—State v Smith, 119 So. 56, 167 La. 301.—Tennessee - Arkansas Gravel Co. v Harvey & Jones, App., 151 So. 133, amending 147 So. 739.—Rester v Moody & Stewart, 130 So. 254, 16 La.App. 177, reversed on other grounds 134 So. 690, 172 La. 510.

Or.—State v American Surety Co. of New York, 300 P. 511, 137 Or. 394, rehearing denied 2 P.2d 1116, 137 Or. 394.—Carlson v New Amsterdam Casualty Co., 247 P. 804, 118 Or. 542

Wash.—Nemah River Towboat Co. v Brewster, 279 P. 1107, 152 Wash. 672, modifying 278 P. 694, 152 Wash. 672

Allowance held reasonable

Wash.—U. S. Fidelity & Guaranty Co. v Feenaughty Machinery Co., 85 P.2d 1085, 197 Wash. 569

Payment before trial

Materialman suing on statutory highway contractor's bond was not entitled to recover attorney's fees where defendants paid full claim with taxable costs prior to trial.—Schutz v Interstate Contracting Co., 265 N.W. 296, 196 Minn. 426

Payment into court of amount of surety's liability under the terms of the bond does not prevent a judgment for attorney's fees when the surety continued litigation and caused delay and expense to claimants in order that they might establish their claims.—Goodspeed v Duby, 283 P. 6, 131 Or. 275

Subcontractors' cross complaints for judgments against contractors' surety were within statute authorizing attorney's fees.—Halleran v Sander, 1 P.2d 847, 163 Wash. 619

Subsequent statute

Successful materialman, in suit on highway contractor's bond, was entitled to reasonable attorney's fee taxable as costs under statute enacted subsequent to execution of bond, but prior to rendition of judgment against surety.—Igoe Bros. v National Surety Co., 169 A. 841, 112 N.J.Law 213, 96 A.L.R. 1422

Where surety appeals and thereby delays claimants and compels claimants to incur additional expense, allowance of attorney's fees to prevailing claimants on appeal is proper.—Goodspeed v Duby, 283 P. 6, 131 Or. 275

35. U.S.—Standard Accident Ins. Co. v Simpson, C.C.A.S.C., 64 F.2d 583, certiorari denied Carolina Contracting Co. v. Standard Acc. Ins. Co., 54 S.Ct. 123, 290 U.S. 688, 78 L.Ed. 593

36. Amicable demand

(1) Under some statutes claimant must have made a timely amicable demand on both the contractor and surety in order that he may be allowed attorney's fees.—Long Bell Lumber Co. v S. D. Carr Const. Co., 133 So. 438, 172 La. 182.—State v. Miller, 126 So. 422, 169 La. 911.—Silver v. Harriss, 115 So. 380, 165 La. 94

(2) Presumption that demand on contractor would be without avail does not dispense with necessity of demand as condition to recovery of attorney's fees against surety.—State v. Miller supra

(3) Attorney's fees recoverable against surety on highway contractor's bond are in nature of penalty and should not be imposed without literal compliance with statute.—Long Bell Lumber Co. v. S. D. Carr Const. Co. supra

Time of commencing suit

A statute permitting the recovery of attorney's fees but providing that no such fees shall be allowed in any suit or action brought before the expiration of thirty days following the date of filing notice should not be literally read, and recovery of such fees may be permitted in a suit brought before the expiration of thirty days where contested litigation ensues.—Niemi v. Brewster, 281 P. 488, 134 Wash. 181

37. U.S.—Standard Accident Ins. Co. v Simpson, C.C.A.S.C., 64 F.2d 583, certiorari denied Carolina Contracting Co. v Standard Acc. Ins. Co., 54 S.Ct. 123, 290 U.S. 688, 78 L.Ed. 593

Full recovery

Under some statutes a claimant must recover the full amount of his recorded claim to be entitled to attorney's fees.—Louisiana Highway Commission v. McCain, 1 So.2d 545, 197 La. 359

Claimant who is not prevailing party as against surety is not entitled to judgment against surety for attorney's fees.—Goodspeed v. Duby, 283 P. 6, 131 Or. 275.

Costs. Where the surety is justified in resisting claims, it should only be charged with such part of the costs as would have been a proper charge against it if there had been no controversy over the amount of its liability.[38]

Expenses of litigation. Apart from the sums allowable and taxed as costs, there can, as a general rule, be no recovery as damages of the costs and expenses of litigation, or expenditures for counsel fees.[39] Where, however, it was necessary for claimants to coerce the state highway department into publishing notice of completion of the highway, which was a condition precedent to bringing suit on the bond, claimant is entitled to recover attorney's fees incurred in securing the publication of the notice under a bond providing for the payment of all attorney's fees that might be incurred in the enforcement of the obligations of the bond, notwithstanding a tender of the amount due claimant after the publication of notice but before suit could be brought.[40]

Interest. Where the penalty of the bond is sufficient, plaintiff is entitled to recover such interest as might have been recovered against the principal.[41] It has been held that allowed claims draw interest at least from the time suit is brought.[42] In some cases interest has been allowed from the time the accounts became due,[43] and under some statutes a claimant suing on an open account is entitled to recover interest from the date of the last item furnished.[44] Where the allowance of interest is discretionary, an allowance of interest from the date of the decree has been held not to be unreasonable.[45] A principal contractor has been held to be entitled, in an action on a subcontractor's bond, to interest on the amount of money he was required to use in the completion of the subcontract over and above the amounts he received in current payments.[46]

§ 211. —— Actions

a. Action by or against contractor in general
b. Action to enforce lien or impound funds

a. Action by or against Contractor in General

(1) Right of action
(2) Conditions precedent
(3) Defenses
(4) Jurisdiction
(5) Who may sue and be sued; parties
(6) Pleading
(7) Evidence

38. U S —Standard Accident Ins Co v Simpson, C C A S C, 64 F 2d 583 certiorari denied Carolina Contracting Co v Standard Acc Ins Co, 54 S Ct 123, 290 U S 688, 78 L Ed 593

39. U S —Zumsteg v Ætna Casualty & Surety Co, C C A Colo, 31 F 2d 65
Ark —Ætna Casualty & Surety Co v Hensiee, 260 S W 414, 163 Ark 492
Premature suit
Where suit on bond of state highway contractor was prematurely brought, no attorneys' fees should be allowed materialmen in respect of such suit in a subsequent suit on the bond —Day v Royce Kershaw, Inc, 187 So 221, 185 Miss 207

40. Miss —Day v Royce Kershaw, Inc, supra

41. **Claimants held entitled to interest**
U S —Ætna Casualty & Surety Co v American Surety Co of New York, C C A W Va, 64 F 2d 577
Tex —Detroit Fidelity & Surety Co v Moberly, Civ App, 52 S W 2d 298, modified on other grounds Detroit Fidelity & Surety Co v State, 76 S W 2d 492 124 Tex. 145
Interest from date of filing lien notice was allowable on subcontractors' claims filed against contractors under lien laws —Halleran v Sander, 1 P 2d 847, 163 Wash 619
Judgment
A claimant who obtained a judgment against a subcontractor which was allowed as a claim against the original contractor was entitled to the allowance of interest on the judgment —Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319
Law applicable
In determining interest against surety of road contractor, law of state is controlling where bond was executed and work was to be performed —Union Indemnity Co v State, 127 So 204, 221 Ala 1
Recovery from subcontractor.
In an action brought against all persons interested to settle all matters of dispute between them arising from the construction contract, the principal contractor and his surety were held not to be entitled to recover interest and costs allowed materialmen and laborers on claims arising from the subcontract where the delay and refusal to pay were on the part of the principal contractor —Halleran v Sander, 1 P 2d 847, 163 Wash 619

42. Ala —New York Indemnity Co v Niven, 133 So 261, 222 Ala 562
Clear liability
Where it was clear that surety was liable on the claims for the full penalty of the bond, interest has been allowed from the time of the institution of the suit —Standard Accident Ins Co v Simpson, C C A S C, 64 F 2d 583 certiorari denied Carolina Contracting Co v Standard Acc Ins Co, 54 S Ct 123, 290 U S 688, 78 L Ed 593

43. **Completion of work**
Where, after highway contractor's default, state completed road, highway contractor's surety was chargeable with interest on state's claim from time work was completed —Fidelity & Casualty Co of New York v Copenhaver Contracting Co, 165 S E 528, 159 Va 126
Where only surety's liability, and not the amount of the claim, was disputed, interest was allowed from the time the accounts became due —American Liability & Surety Co v Bluefield Supply Co, C C A W Va, 70 F 2d 187

44. Or —State v Johnson Contract Co, 253 P 520, 120 Or 633

45. Tenn —Southern Const Co v Halliburton, 258 S W 409, 149 Tenn 319

46. U S —New Amsterdam Casualty Co v W T Taylor Const Co, C. C A Ala, 21 F 2d 1002, certiorari denied 48 S Ct 208, 276 U.S 616, 72 L Ed. 733

(8) Trial
(9) Judgment or relief

(1) Right of Action

A contractor entitled to payment for work done under a highway construction or improvement contract, or to damages for breach thereof, may enforce his right by proper action, and an action will lie against a contractor to enforce the rights of the public agency, or of subcontractors, laborers, and materialmen.

A contractor entitled, under the principles stated supra § 209, to payment for work done under a contract to construct or improve a public highway, or to damages for the breach thereof, may enforce his right by proper action,[47] such as an action on a warrant given in payment of the contract price,[48] an action for the reasonable value of necessary work done on the roads,[49] or a suit to set aside an engineer's erroneous estimate of work to be paid for[50] A road overseer, however, cannot obtain specific performance of his contract to keep county roads in repair for one year,[51] and an action will not lie against the state for representations by division and county engineers which induced the contractor to drop injunction proceedings to prevent a town's contractors from tearing down a bridge during the construction of the highway[52] Where the action is based on a contract, any recovery must be by virtue of the contract,[53] and in the absence of a valid express contract or an implied agreement to pay, plaintiff cannot recover[54] A contractor, by resuming work after suspension, does not waive his right to recover for the work done under the contract, and for damages for breach thereof, where, on resuming work, he made statements of his losses and was assured by the district that he would be indemnified therefor[55]

The public officials should enforce the contracts as made,[56] or avoid them when illegal[57] So an action will lie to recover money paid out by the public agency under a void contract employing defendant to supervise road construction[58] A statute fixing the procedure by which persons furnishing labor or materials to a highway contractor may recover the value thereof from the contractor applies to contracts made before the passage of the act as well as those made after, if suit thereon is brought after the approval of the act[59] No recovery will be allowed, in an action against the contractor for work and materials furnished, for an item exacted as a result of a supposed ability to interfere with defendant's business in obtaining road contracts[60] A subcontractor is not barred from recovering the balance due and enforcing a lien by the fact that he abandoned the work and necessitated completion thereof by the principal contractor, in the absence of a specific showing of damages sufficient to offset the amount earned under the contract[61]

(2) Conditions Precedent

In the absence of waiver, plaintiff must comply with statutory or other conditions precedent.

Before commencement of an action by the contractor to recover compensation due under the contract,[62] or damages arising out of its breach,[63]

47. Ala—U S Fidelity & Guaranty Co v Yeilding Bros Co Department Stores, 143 So 176, 225 Ala 307
29 C J p 613 notes 80, 89
Submission to arbitration see supra § 209 h (1)

48. U S—Neld v Commissioner of Highways of Town of Bond, D C Ill, 9 F Supp 999
Tenn—Choctaw Culvert & Machinery Co v Henderson County, 89 S W 2d 753, 169 Tenn 559

49. Tex—Shelby County v Caldwell, Civ App, 48 S W 2d 761

50. Or—North Pac Const Co v Wallowa County, 249 P 1100, 119 Or 565—Baker v Multnomah County, 246 P 352, 118 Or 153
Finality of estimate generally see supra § 209 a (2) (b)

51. Ark—Rhoden v Johnston, 181 S W 128, 121 Ark 317

52. N Y—Hogeboom & Campfield v State, 208 N Y S 648, 124 Misc 559

53. Tex—State v Martin Bros, 160 S W 2d 58, 138 Tex 505, reversing Martin Bros v State, Civ App, 146 S W 2d 782

54. Ala—McKee v Chilton County, 97 So 610, 19 Ala App 392
Ill—Brownell Improvement Co v Highway Commissioner of Town of Sumner, 280 Ill App 43
Mo—Carter-Waters Corporation v Buchanan County, 129 S W 2d 914

55. U S—Louisiana Highway Commission v Farnsworth, C C A La., 74 F 2d 910, affirming, D C, Farnsworth v Louisiana Highway Commission, 8 F Supp 11, certiorari denied Louisiana Highway Commission v Farnsworth, 55 S Ct 638, 294 U S 729, 79 L Ed 1259

56. Idaho—Corker v Elmore County, 77 P 633, 10 Idaho 255
Mass—Middlefield v Church Mills Knitting Co, 35 N E 780, 160 Mass 267
29 C J p 613 note 87

57. Ind—Monroe County v Conner, 58 N E 828, 155 Ind 484
Mich—Buckeye Tp v Clark, 51 N W 528, 90 Mich 432

58. Tex—Gulf Bitulithic Co. v. Nueces County, Civ App, 297 S W 747, reversed on other grounds Com App, 11 S W 2d 305
29 C J p 613 note 85 [a]

59. Pa—Commonwealth v New Amsterdam Casualty Co, 3 Pa Dist & Co 77, 26 Dauph Co 95

60. Fla—Finley Method Co v Standard Asphalt Co of Florida, 139 So 795, 104 Fla 126

61. Ind—Western Wheeled Scraper Co v Scott Const Co, 27 N E 2d 879, 217 Ind 408
Enforcement of lien see infra subdivision b of this section

62. La—Spencer Bros v McBride, 120 So 114, 9 La App 284
Prerequisites to suit
Commissioner's warrant on treasurer of road fund and countersigning by town clerk and presentation for payment were held not prerequisites to suit—Euziere v Highway Com'r of Town of Rockville, 178 N E 397, 346 Ill 131, affirming 260 Ill App 29

63. W.Va.—Williams v. Lincoln

there must be a compliance with conditions precedent imposed by the contract or applicable statute, such as conditions relating to presentation of claim,[64] certification of the amount due,[65] or the provocation of concursus.[66] So where provisions of the contract requiring performance and payment are interdependent, one party to the contract cannot sue the other for a breach thereof without showing performance or tender of performance on his part as well as ability to perform.[67] A demand that the district perform its contract is not a condition precedent to a contractor's recovery of damages for the district's breach of contract, however, where the district has, in writing, acknowledged its inability to make the payments called for by the contract.[68] Although presentation of the claim to designated officers is a condition precedent to a suit on it, the contractor may bring his action without appealing from an order rejecting a claim thus presented.[69] Noncompliance with conditions precedent may be waived by the public agency,[70] and the effect of such waiver is to place the contractor in the position of having complied with the contract.[71]

Compensation for extra work Protest against erroneous directions of the engineer necessitating extra work is a condition precedent to the contractor's recovery of compensation therefor.[72]

(3) Defenses

In an action by or against a highway contractor, defendant may interpose any proper defense which goes to defeat plaintiff's right of action.

What constitutes a defense depends on local law.[73] Where presentment of the claim is a condition precedent to the maintenance of the action, nonpresentment is a matter of defense.[74] A contract between the contractor and the broker who purchased the highway district's bonds, providing that the contractor would waive damages if the district could not obtain money to complete its contract made for the benefit of the broker and not the district, is not available to the district as a defense,[75] and the contractor is not estopped from asserting the liability of the district in the absence of knowledge by the district of such agreement.[76] Where defendant has accepted material from an assignee of the contract, it is no defense to an action therefor that the requisite written consent to the assignment has not been obtained.[77] Where the contract was invalid and the contractor sues on a quantum meruit, defendant may not resort to a defense of estoppel which might be available to it in a controversy with property owners who are not parties to the action.[78]

It is no defense to an action against the contrac-

County Court, 110 S E 486, 90 W Va 67

Special damages

A provision of the contract that, as a condition precedent to the filing by either party of an action arising out of the contract, written notice of all claims of any character shall be given the other party within a specified time, bars recovery, in the event of noncompliance therewith, for special damages caused by material changes in the original plans, and does not apply merely to damages naturally flowing from a breach of the contract.—Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647, 349 Mo 117

64. Mo.—Spitcaufsky v State Highway Commission of Missouri, supra
W Va.—Williams v Lincoln County Court, 110 S E 486, 90 W Va 67
Wis.—Joyce v Sauk County, 239 N W 439, 206 Wis 202

Verified statement of account filed by road contractor with board of supervisors was held sufficient basis for action for reasonable value of services and materials, and failure to file claim for reasonable value of work and materials after filing of verified account on contract, if error, will be overlooked.—Greenlee County v Webster, 246 P 543, 30 Ariz 245

65. Mo.—Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647, 349 Mo 117

66. La.—Spencer Bros v McBride, 120 So 114, 9 La App 284

67. Miss.—Marshall County v Callahan, 91 So 5, 130 Miss 271, overruling suggestion of error 93 So 194

68. U S.—Louisiana Highway Commission v Farnsworth, C C A La., 74 F 2d 910, affirming, D C., Farnsworth v Louisiana Highway Commission, 8 F Supp 11, certiorari denied Louisiana Highway Commission v Farnsworth, 55 S Ct 638, 294 U S 729, 79 L Ed 1259

69. S D.—Roberts v Lawrence County, 207 N W 104, 49 S D 281

70. U S.—Merrill Engineering Co v U S D C Miss., 47 F 2d 932

Who may waive

Where specifications, which were part of state highway construction contract, made the state highway commission's chief engineer the final administrative authority on interpretation of the specifications, the contract requirement of sixty-day notice as to condition precedent to maintenance of an action might be waived by the chief engineer who would have the right in writing to accept a letter from contractor as notice of his claim.—Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647, 349 Mo 117.

Acts held not to constitute waiver

Mo.—Spitcaufsky v State Highway Commission of Missouri, supra

71. U S.—Merrill Engineering Co v. U S., D C Miss., 47 F 2d 932

72. N Y.—Marshall Const Co v State, 231 N Y S 345, 133 Misc 131

73. U S.—Gravelle Const Co v Board of Com'rs of Maintenance Dist No 1, of Bassett-Wardell Road Improvement Dist No 3 of Mississippi County, C C A Ark., 82 F 2d 391

74. Mont.—French v Lewis and Clark County, 288 P 455, 87 Mont 418

75. U S.—Gravelle Const Co v Board of Com'rs of Maintenance Dist No 1, of Bassett-Wardell Road Improvement Dist No. 3 of Mississippi County, C C A Ark., 82 F 2d 391

76. U S.—Gravelle Const. Co. v. Board of Com'rs of Maintenance Dist No 1, of Bassett-Wardell Road Improvement Dist No 3 of Mississippi County, supra

77. Ill.—American Mexican Refining Co v Wetzel, 183 N E 593, 350 Ill 575, reversing 264 Ill App 220

78. Fla.—Hillsborough County v. Highway Engineering & Construction Co., 199 So 499, 145 Fla. 83.

tor for damages for breach of the contract that by reason of war conditions the costs of labor and materials has increased rendering the contract a loss to him [79] Plaintiff's failure to acquire a right of way is a defense only if such failure substantially interfered with defendant's work [80] In an action against contractors for damages for breach of the contract, it is a complete defense that the contract was invalid,[81] but in an action against highway engineers to recover excess commissions paid under their contract with plaintiff, defendants are estopped to question the validity of the contract [82] Although a statute makes the presentation of claims a condition precedent to the institution of an action thereon, such claims may be interposed as a setoff to an action by the public agency for breach of contract even though they were not presented [83]

(4) Jurisdiction

The action must be brought in a court having cognizance of the proceeding and jurisdiction of the person

An action arising out of the breach of a highway construction or improvement contract must be brought in a court having cognizance of such proceeding [84] An action by the contractor against the road improvement district for the recovery of money can be brought in a court of a county outside of the residence of the district,[85] and the district may confer jurisdiction of the person on such court by its voluntary appearance [86]

(5) Who May Sue and Be Sued; Parties

The assignee of a claim may ordinarily bring action thereon, and the public agency constructing a highway may under some statutes be sued on the contract, although the immunity of a state from suit for its torts extends to such agencies. The real parties in interest should be joined in the action.

The assignee of a claim against the public agency for building a road may maintain an action thereon,[87] but the assignee of a nonassignable contract, whom the highway commission treated as an agent of the contractor, cannot maintain an action against the commission on the ground that the commission breached its contract with the contractor [88] Under some statutes the public agency constructing a highway is subject to suit[89] and stands in a suit by the contractor in all matters respecting performance of its contract and as to breaches thereof as if it were a private party [90] The immunity of a state from suit for its torts extends to its agencies, so as to preclude an action by a paving contractor, to whom invalid certificates of indebtedness were delivered, for breach of an alleged duty to deliver valid certificates [91] A suit by a highway contractor should be against the real parties in interest [92]

The assignee of claims for labor and material furnished a contractor may bring an action thereon in his own name [93] A subcontractor stipulating to be bound by the provisions of the principal contract with the state as respects the work to be done by him did not waive his right to sue the contractor by a provision in the subcontract giving the contractor all the rights and privileges that the state had under the principal contract [94] A statute requiring that the highway commissioner be made a defendant in claimants' suits against highway contractors applies only where the commissioner's or the state's interest may be affected [95] In an action arising from failure to pay for labor and material furnished to a subcontractor, the subcontractor, the principal contractor, and the latter's surety are proper par-

79. N Y —Gordon v State, 134 N E 698, 233 N Y 1, 21 A L R 562, reversing 190 N Y S 107, 196 App Div 589

80. N Y —People v Rockwood, 214 N Y S 129, 126 Misc 512

81. Ohio —State v Kuhner, 140 N E 341, 107 Ohio St 406

82. Tex —Hill County v Bryant & Huffman, 16 S W 2d 513, 118 Tex 359 affirming in part and reversing in part, Civ App, 264 S W 520

83. W Va —State v Smith, 114 S E 375, 92 W Va 12

84. Court held to have jurisdiction
S C —Ross v Pickens County, 143 S E 366, 146 S C 21

85. Ark —Road Improvement Dist No 4 of Saline County v Ball, 281 S W 5 170 Ark 522

86. Ark —Road Improvement Dist No. 4 of Saline County v. Ball, supra.

87. Kan —Citizens' State Bank of St Francis v Board of Com'rs of Cheyenne County, 252 P 228, 122 Kan 302

88. La —Bickham v Womack, 160 So 431, 181 La 837

89. Miss —State Highway Commission v Wunderlich, 11 So 2d 437, overruling suggestion of error 10 So 2d 453—Wunderlich v State Highway Commission, 184 So 456, 183 Miss 428
Utah —Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

90. Miss —Wunderlich v. State Highway Commission, 184 So 456, 183 Miss 428

91. Fla —Harwell v Hillsborough County, 149 So 547, 111 Fla 361
Liability and consent of state to be sued generally see the C J S title States §§ 214–216, also 59 C J. p 300 note 31–p 315 note 9.

92. Ill —American Mexican Refining Co v Wetzel 183 N E 593, 350 Ill 575, reversing 264 Ill App 220
Or —United Contracting Co v Duby, 232 P 309, 134 Or 1
29 C J p 613 note 81
Concursus
Under statute requiring claims to be tried in concursus, highway contractor making lienholders parties could not maintain suit for indebtedness due, where surety on bond was not party —Spencer Bros v McBride, 120 So 114, 9 La App 284

93. Neb —West v Detroit Fidelity & Surety Co, 225 N W 673, 118 Neb 544

94. Utah —Bracken v. Dahle, 251 P. 16, 68 Utah 486

95. Tenn —Standard Oil Co of Louisiana v Jamison Bros, 59 S W 2d 522, 166 Tenn. 53.

ties defendant.[96] In the absence of a decree holding such statute unconstitutional, a right of action for overcharges paid out by the highway commission belongs, after passage of an act creating a highway department as the commission's successor, to the statutory successor, and the state is not a necessary party plaintiff, and if it were, it could properly be represented by the attorney general who is also the proper representative of the highway department in the action.[97]

(6) Pleading

(a) Requisites and sufficiency in general

(b) Issues, proof, and variance

(a) Requisites and Sufficiency in General

The petition or complaint in an action by or against the contractor must state a cause of action; and defendant must properly plead such defense as he desires to assert.

In an action by the contractor against the public agency, the petition or complaint must state a cause of action.[98] It need not allege that at the time the indebtedness was incurred defendant had sufficient funds on hand or taxes levied to discharge it,[99] that the claim sued on was filed,[1] or that there was a demand for payment,[2] but where a statute prohibits full payment until the road is received as completed, the complaint in an action for the balance due must allege such receipt.[3] An allegation that defendant "cared for and maintained" the road as a public road is equivalent to a statutory requirement that it be "worked and maintained" as such.[4] It is incumbent on defendant properly to plead such defense as it desires to assert.[5]

The general rule that plaintiff must allege all

96. Okl—Meshek v Cordes, 22 P 2d 921, 164 Okl 40

97. La—Department of Highways v Thomas 7 So 2d 619, 200 La 73

98. Ind—Jackson County v Branaman, 39 Ind App 193, 76 N E 1030, rehearing denied 78 N E 356, 39 Ind App 193

In action for labor and materials furnished for construction of county roads under contracts which were invalid by reason of invalidity of statute pursuant to which they were executed, declaration must show that roads in question were public county roads, that county is enjoying fruits of labor and materials furnished by contractor, and that county was fully authorized to pay for work and materials—Gulf Life Ins Co v Hillsborough County, 176 So 72, 129 Fla 98

Allegations held sufficient

(1) To render complaint good as against demurrer

Ind State v Wright, 161 N E 839, 89 Ind App 244, rehearing denied 162 N E 695, 89 Ind App 244—Center Tp v Davis, 57 N E 283, 24 Ind App 603

Mont—French v Lewis and Clark County, 288 P 455, 87 Mont 448

(2) To state cause of action, based on quantum meruit, by contractor abandoning contract because of alleged arbitrary and unfair conduct of defendant's roadmaster—Feldschau v Clatsop County, 244 P. 528, 117 Or 482

(3) In suit to set aside contract executed as result of mutual mistake—Blassingame v Greenville County, 132 S E 616, 134 S C 324

(4) In action by plaintiff holding valid assignment of money due contractor from state highway commission—Independence Trust Co v Porter & Boyd, 132 S E 806, 191 N C 672

(5) In action by contractor under contract to haul and distribute a certain quantity of shell over four miles of county's road for a certain sum, payable on engineer's estimates and based on given schedule providing a different amount per cubic yard for each mile—Orange County v Hogg, Tex Civ App, 269 S W 225

(6) In action by road superintendent to recover sums advanced by him for repairing roads—Clark Civil Tp v Brookshire, 16 N E 132, 114 Ind 137

Allegations held insufficient

(1) In petition to recover added cost resulting from satisfying engineer's requirements in disputed matter—State Highway Department v MacDougald Const Co, 6 S E 2d 570, 189 Ga 490, 137 A L R 520, reversing MacDougald Const Co v State Highway Department, 2 S E 2d 197, 59 Ga App 708, mandate conformed to 7 S E 2d 292, 61 Ga App 672

(2) In action for reasonable value of benefits received to warrant recovery at a rate in excess of that paid for under contract—East Texas Const Co v Liberty County, Tex Civ App, 139 S W 2d 669

(3) To warrant recovery for force account items—State v Wright, 161 N E 839, 89 Ind App 244, rehearing denied 162 N E 695, 89 Ind App 244

(4) To excuse completion of contract by contractor—Feldschau v Clatsop County, 208 P 764, 105 Or 237.

(5) To show such departure from contract as to warrant abandonment—Feldschau v Clatsop County, 244 P 528, 117 Or 482

(6) In contractor's declaration, because of apparent repugnancy as to whether the declaration purported to set up quantum meruit claim for value of work, labor, and materials furnished, or for relief on implied promise to pay face amount of invalid certificates per se—Harwell v Hillsborough County, 149 So 547, 111 Fla 361

Test of sufficiency of declaration against county for breach of road construction contract executed under invalid statute was whether cause of action was in quantum meruit for value of labor and materials furnished—Webb v Hillsborough County 175 So 871, 128 Fla 471

99. Ill—Euziere v Highway Com'r of Town of Rockville, 178 N E 397, 346 Ill 131 affirming 260 Ill App 29

1. Mont—French v Lewis and Clark County, 288 P 455, 87 Mont 448

Wis—Joyce v Sauk County, 239 N W 439, 206 Wis 202

2. Ill—Euziere v Highway Com'r of Town of Rockville, 260 Ill App 29, affirmed 178 N E 397, 346 Ill 131

3. Ind—Jackson County v Branaman, 76 N E 1030, 39 Ind App 193, rehearing denied 78 N E 356, 39 Ind App 193

4. Mont—French v Lewis and Clark County, 288 P. 455, 87 Mont 448

5. Tex—McDonald v. Axtell, Civ App, 218 S W 563

29 C J p 613 note 82 [c]

Plea of offset held sufficient

Va—Luck Constr Co v Russell County, 79 S E 393, 115 Va 335

29 C.J p 613 note 82 [d].

issuable facts necessary to warrant the relief prayed for has been applied in an action for the price of material and supplies sold the contractor [6] In an action against the contractor for breach of contract, pleas tendered which present an erroneous construction of a paragraph of the contract should be rejected [7]

(b) Issues, Proof, and Variance

Evidence tending to support the pleadings is admissible, and the pleadings and proofs must conform, but minor discrepancies will be disregarded.

Evidence tending to support the pleadings is admissible thereunder [8] When necessary to establish the indebtedness and the legality of the contract alleged in the complaint, plaintiff must show that defendant either had funds on hand or that there was a tax levy which could be anticipated [9] Where the contractor claims recovery of the extra cost due to deviation from the survey on which the contract was based he must prove what the extra cost amounted to [10] There can be no recovery for extra work where plaintiff fails to show a supplemental agreement therefor which was required by the contract, or estoppel of defendant [11] To escape the binding effect of a decision of the engineer under the contract, the contractor must allege and prove that the decision was based on partiality, fraud, misconduct, or gross error [12] Minor variances between the pleadings and proof will be disregarded [13]

In an action by a materialman of a subcontractor whose obligation defendant, the principal contractor, had assumed when the subcontract was canceled, defendant, without having pleaded it, is entitled to show a different contract with the subcontractor than that set up by the petition [14] Where an action against the contractor by assignees of claims for labor rendered for the subcontractor was based on a contract with the subcontractor as agent of defendants and the evidence showed the subcontractor was an independent contractor, there can be no recovery [15] In an action by the public agency against the contractor for failure to proceed with the work under a contract requiring plaintiff to pay monthly installments, plaintiff must allege and prove ability to meet defendant's monthly installments [16]

(7) Evidence

(a) Presumptions and burden of proof
(b) Admissibility
(c) Weight and sufficiency

(a) Presumptions and Burden of Proof

In actions by or against a highway construction contractor, the burden is on plaintiff to establish the facts constituting a prima facie case, and on defendant to overcome it, or establish his affirmative defenses.

As in other civil actions, the burden rests on the contractor seeking to recover compensation or damages for breach of the contract to establish the facts constituting his cause of action,[17] and the burden is on defendant to establish its affirmative defenses.[18] So the burden is on the contractor relying thereon to show fraud or bad faith on the part of the district in changing engineers,[19] and a principal contractor seeking, on cross complaint, to recover from the subcontractor a penalty imposed by the state has the burden of showing that the penalty arose by reason of the subcontractor's default [20] Where the contractor has proved a valid claim to

6 Allegations held sufficient
Colo—Nebraska Bridge Supply & Lumber Co v Deakin, 125 P 2d 962, 109 Colo 367

7. W Va—State v Smith, 114 S E 375, 92 W Va 12

8. Performance
Under a petition for the amount due under a contract fixing a price dependent on the quantity of work, to which was attached an estimate, plaintiff can show that the work called for by the estimate was done —Childers v Police Jury of Parish of Ouachita, 121 So 248, 9 La App 490

9. Ill—Austin-Western Road Mach Co v Wetzel, 261 Ill App 254

10. U S—Southern Surety Co v U S, 75 Ct Cl 47

11. Tex—State v Martin Bros, 160 S W 2d 58, 138 Tex 505, reversing Martin Bros v State, Civ App, 146 S W 2d 782

12. Tex—State v Martin Bros, supra

Error in award
Where the engineer as referee under the contract had made an award of damages against the contractor, in an action by the contractor he must prove error in the award—Neyland v State, Tex Civ App, 151 S W 2d 331, error dismissed, judgment correct

13. Variance held not fatal
Complaint on contract and proof showing only part performance—Downs v Atkinson, 277 P 723, 207 Cal 259

14. Ky—Laurel Grocery Co v Myers Bros, 90 S W 2d 693, 262 Ky 523

15. Tex—Fleming - Stitzer Road Bldg Co v Boyett, Civ App, 253 S W 561

16. Miss—Marshall County v Callahan, 94 So 5, 130 Miss 271, overruling suggestion of error 93 So 194

17. U S—Wyoming County Court v Winston, C C A W Va, 282 F 472
Ark—Lynch v Stephens, 14 S W 2d 257, 179 Ark 118
Ind—Cunningham v State, 182 N E 95, 95 Ind App 434
Minn—Royal Indemnity Co v Island Lake Tp of Mahnomen County, 225 N W 291, 177 Minn 408
Wash—L Romano Engineering Corporation v State, 113 P 2d 549, 8 Wash 2d 670, opinion adhered to 120 P 2d 1008, 12 Wash 2d 736
29 C J p 613 note 83 [a]

18. Ill—Hudson v Walters, 266 Ill App 242
Mo—Christeson v State Highway Commission, App, 46 S W 2d 906, transferred, see, Sup, 40 S W 2d 615

19. U S—Road Improvement Dist No 5 of Crittenden County, Ark, v Roach, C C A Ark, 18 F 2d 755

20. Wash—Thomas v S A Mocerl, Inc, 13 P 2d 444, 169 Wash 219

the fund held by defendant to be distributed in payment of the construction of the highway, the burden is on defendant to prove the existence of other claims of equal or greater priority [21] On proof that the tax funds allocated to highways were always expended, and that there was a deficit at all times, there is a presumption, in the absence of any other showing, that all payments made out of the fund were for bona fide bills incurred during the current year [22] Where it appears that defendant refused to permit plaintiff to use certain material under a contract requiring material equal to an accepted sample, it will be presumed that the material was rejected because it was inferior to the sample, and the burden is on the contractor, seeking damages for refusal to permit its use, to rebut the presumption [23] In an action by successful bidders to be relieved of their bid on the ground of a mistake therein, and to recover judgment in the amount of the deposit made by them which was declared forfeited by the public authority, the burden is on plaintiffs to show that they had made a mistake in their bid [24] The mere fact that subcontractors contracted to perform other comparatively small jobs does not raise a presumption that they thereby disabled themselves from performing their subcontract [25]

In an action against the contractor the burden is on plaintiff to establish the facts constituting the cause of action[26] and on defendant to establish his defense [27]

(b) Admissibility

Any relevant and competent evidence material to the issues of the case is admissible

Under the rules applicable to civil actions generally, evidence in an action by or against the contractor must be competent and relevant to the issues [28] Subject to this rule evidence is admissible to establish the contract,[29] performance in good faith as directed by defendant,[30] the amount of work completed,[31] the amount due the contractor,[32] the value of services and material furnished by a subcontractor,[33] the manner in which a subcontractor was to be paid,[34] waiver of notice of claim,[35] reasons for the contractor's delay,[36] ratification of the contract,[37] and the reasonable cost of the work, as bearing on the question of prospective profits [38] In an action to set aside the estimate of the engineer in charge for defendant, engineers who measured plaintiff's work in an attempt to reach a settlement as to the amount due may testify to facts thus ascertained [39] In an action by the contractor to recover overpayments to a subcontractor pursuant to a resurvey of the work, testimony relevant on the issue of the correctness of the resurvey is admissible [40] In an action by a road supervisor to recover compensation for his service, evidence that the road was not constructed according to specifications is admissible as going to the value of the services rendered [41]

(c) Weight and Sufficiency

General rules apply in determining the weight and sufficiency of the evidence.

General rules have been applied in determining the weight and sufficiency of the evidence to support a verdict or judgment,[42] or with respect to such

21. Conn —Commercial Discount Co v Town of Plainfield, 180 A 311, 120 Conn 274

22. Ill —Austin-Western Road Mach Co v Wetzel, 264 Ill App 254

23. N Y —J W Brennan Const Co v State, 191 N Y S 253, 117 Misc 816

24. Wash —Harrington v State, 213 P 449, 124 Wash 138

25. U S —Wyoming County Court v Winston, C C A W Va, 282 F 472

26. N Y —People v Greylock Const Co, 217 N Y S 868, 128 Misc 61

27. Ark —Crow Creek Gravel & Sand Co v Hays Const Co, 81 S W 2d 416, 190 Ark 1177

28. U S —Wyoming County Court v Winston, C C A W Va, 282 F 472
Ind —Western Wheeled Scraper Co v Scott Const Co, 27 N E 2d 879, 217 Ind 408
La —Warren v Police Jury of Washington Parish, App, 12 So 2d 643
Mo —Davis Const Co v State Highway Commission, App, 141 S W 2d 214—Christeson v. State Highway Commission, App, 46 S W 2d 906, transferred, see, Sup, 40 S W 2d 615
Neb —Appeal of Roadmix Const Corporation, 9 N W 2d 741
Pa —McDermott v Laporte Tp, 3 A 437 2 Pa Cas 105
Tex —Neyland v State, Civ App, 151 S W 2d 331, error dismissed, judgment correct

29. Mo —Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647, 349 Mo 117.

30. Mass —Snow v. Ware, 13 Metc 42

31. Kan —Reynolds v. Stimson, 247 P 847, 121 Kan 422

32. Neb —Peterson v State, 209 N W 221, 114 Neb 612, reversing 203 N W 1002, 113 Neb 546

33. Mass —Baccari v B Perini & Sons, 199 N E 912, 293 Mass 297 29 C J p 613 note 83 [b]

34. Ark —Newkirk v Shirley, 21 S W 2d 174, 180 Ark 294.

35. Mo —Spitcaufsky v. State Highway Commission of Missouri, 159 S W 2d 647, 349 Mo 117

36. Mo —Spitcaufsky v State Highway Commission of Missouri, supra

37. Vt —Stalbird v Town of Washington, 172 A 623, 106 Vt 213

38. Ark —McCrory v Richland Tp Road Improvement Dist, 284 S W. 727, 171 Ark 460

39. Or —North Pac Const Co v Wallowa County, 249 P. 1100, 119 Or 565

40. S C —Newell Contracting Co v. J F & J D Blankenship, 125 S E. 420, 130 S C 131

41. Ind —Board of Com'rs of Wabash County v Mason, 146 N E 768, 82 Ind App 511

42. **Evidence held sufficient**
Ala —Bank of Hickory Flat v Burt & Croley, 121 So 93, 219 Ala 100
Kan —Reynolds v Stimson, 247 P 847, 121 Kan 422.
Mo —Davis Const Co v. State Highway Commission, App., 141 S W.2d 214.

issues as the validity of the contract,[43] construction of the contract,[44] performance of the contract,[45] the amount of work done,[46] or, likewise, with re-

N.Y.—Delaware Paving Co v State, 37 N Y S 2d 769, 265 App Div 889, affirming 31 N Y S 2d 51—John H Hayes Const Co v State, 5 N Y S 2d 698, 254 App Div 915, affirmed 18 N E 2d 695, 279 N Y 755

Pa.—Blair v. Morgan, 88 Pa Super 123

Tex.—Goodrum v State, Civ App 158 S W 2d 81, error refused—Smith v Smith, Civ App, 58 S W 2d 1063—Shelby County v Caldwell, Civ App, 48 S W 2d 761

Utah—Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

Va.—Phillips & Neal v Baker, 131 S E 129, 144 Va 138

Wash.—Thomas v S A Moceri, Inc, 13 P 2d 444, 169 Wash 219—L Romano Co v Skagit County, 268 P 898, 148 Wash 367

29 C J p 613 note 83 [c]

Evidence held insufficient

La.—Warren v Police Jury of Washington Parish, App, 12 So 2d 643—Williams & Gray v Stewart, App, 147 So 103—Cutler Bros v Farmer, App, 144 So 744

Miss.—Smith v Covington County, 158 So 919, 171 Miss 879

Pa.—McNichol Paving & Construction Co v Hughes, 53 Dauph Co 167

43. Evidence held sufficient

(1) To sustain finding that contract was invalid.—McCrory v Richland Tp Road Improvement Dist, 281 S W 727, 171 Ark 460

(2) To support finding that parties never entered into binding written contract.—Burr v Pacific Indemnity Co 133 P 2d 21, 56 Cal App 2d 352

Evidence held insufficient

(1) To show contract.—Smith v Vernon Tp, 54 Pa Super 141

(2) To prove that contracts made by commissioners of district with engineers and with assessor were unreasonable.—Bowman Engineering Co v Arkansas & Missouri Highway Dist, 215 S W 399, 151 Ark 47

(3) To establish mutual mistake or failure of the minds to meet, so as to authorize recovery on quantum meruit.—Trinkle v Commonwealth, 196 S E 652, 170 Va 429

44. Evidence held sufficient

(1) To show that two thousand eight hundred pounds of gravel constituted a yard under the contract.—Perdue & Hill v Road Improvement Dist No 1 of Cross County, 251 S W 886, 159 Ark 117

(2) To support finding as to duty of subcontractor.—Skousen v Herz 26 P 2d 498, 135 Cal App 116

Evidence held insufficient to support finding that producer agreed to pay contractor for unloading sand and gravel at shipping destination.—Crow Creek Gravel & Sand Co v Hays Const Co, 81 S W 2d 416, 190 Ark 1177.

45. Evidence held sufficient

(1) To show that subcontractor had been discharged.—Philpot v Shelby, 289 S W 781, 172 Ark 1177.

(2) To warrant finding that engineer required contractor to depart materially from specifications.—Merrill Engineering Co v. U. S., D C Miss, 47 F 2d 932.

(3) To establish that subcontractor acted in good faith and did not intentionally depart from contract.—Baccari v. B Perini & Sons, 199 N E 912, 293 Mass 297

(4) To authorize findings that delays were not attributable to act of God or to inclement weather, or were not unavoidable.—Six Companies of California v Joint Highway Dist No 13 of California, C C A Cal, 110 F 2d 620, affirming, D C, 24 F Supp 346, certiorari granted Six Companies of California v Joint Highway Dist No 13 of State of California, 61 S Ct 36, 311 U S 631, 85 L Ed 401, and reversed on other grounds 61 S Ct 186, 311 U S 180, 85 L Ed 114, rehearing denied 61 S Ct. 435, 311 U S 730, 85 L Ed 475

(5) To support findings as to reason for subcontractors' failure to complete contract within time specified.—Whitty v Fidelity & Deposit Co of Maryland, 11 P 2d 84, 123 Cal App 334

(6) To sustain finding that the grade stakes were set.—Brown & Froley v Monroe County Road Improvement Dist., 241 S W. 39, 153 Ark 606

(7) To sustain finding that concrete base complied with the contract.—Vaughan v Tulare County 205 P 21, 56 Cal App 261

(8) To show that contractor's delay in commencing work was due to state's withholding site and not to contractor's failure to procure brick in preceding fall, and that it would have cost more to purchase brick in fall and store it over winter than increased cost of brick at time work was commenced.—John Johnson Const Co v State, 207 N Y S 570, 211 App Div 512

(9) To show that contractor did not resurface road in halves under compulsion by commissioner of highways.—Kent Const Co v State, 208 N Y S 531, 212 App Div 197

(10) To sustain finding that break in bulkhead was caused by contractor's negligence.—Strong & MacDonald v King County, 267 P 436, 147 Wash 678

(11) To support finding that contractors did not excavate borrow pits so that they would drain.—Mullins & Kyte v Road Improvement Dist No 5, 258 S W 639, 162 Ark 427

Evidence held insufficient

(1) To show that commissioners did not act in good faith in ordering a suspension or that they breached the contract.—Perdue & Hill v Road Improvement Dist No 1 of Cross County 251 S W 886, 159 Ark 117.

(2) To establish plaintiff's compliance with conditions.—Raisch v Monterey County, 35 P 2d 587, 140 Cal App 627

(3) To prove any interference with contractor's work, or that any delay was occasioned thereby.—Peter F Connolly Co v State, 198 N Y S 882, 120 Misc 854

(4) To show that engineer's refusal to accept the work was based on fraud, gross mistake, or failure to exercise an honest judgment.—Appeal of Roadmix Const Corporation, Neb, 9 N W 2d 741

(5) To prove that material used was defective

N Y.—General Constr Co v State, 175 N Y S 576, 101 Misc 293

Wash.—Brown v Benton County, 197 P 7, 115 Wash 373

(6) To show that government did not act in good faith in failing to use equipment.—C T Fogle & Co v U S, C C A W Va, 135 F 2d 117.

46. Evidence held sufficient

(1) To show honesty and good faith of resurvey made by engineer as basis for final estimate.—Road Improvement Dist No 5 of Crittenden County Ark, v. Roach, C C A Ark, 18 F 2d 755

(2) To prove no error in estimates of the quantities of grading.—Brown & Froley v Monroe County Road Improvement Dist, 241 S W 39, 153 Ark 606

(3) To show that estimate was not made arbitrarily or on fundamentally wrong basis.—Coyle Const Co v Skagit County, 32 P 2d 106, 177 Wash 520

(4) To sustain finding that so-called correction for curvatures was a part of method of measuring quantity by average end areas, where the center line is on a curve.—Caletti v State, 114 P 2d 9, 45 Cal App 2d 302

(5) To sustain findings as to quantity of dirt removed and amount of macadam placed.—Durrett Const Co v Caldwell County, 244 S W 409, 196 Ky 158

(6) To establish gross and palpable errors in classifying and estimating amount of work performed.—Sweeney v. Jackson County, 93 Or 96,

spect to such issues as the amount due,[47] or other | matters.[48] Evidence of fraud on the part of the

178 P 365, opinion adhered to 182 P 380, 93 Or 96

(7) To sustain finding that there was no extra work in excavation — Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

(8) To sustain recovery for additional solid rock excavation —L Romano Engineering Corporation v State, 113 P 2d 549, 8 Wash 2d 670, opinion adhered to 120 P 2d 1008, 12 Wash 2d 736

(9) To support finding that weights of sand and gravel shipped as certified by railroad were substantially correct —Crow Creek Gravel & Sand Co v Hays Const Co, 81 S W 2d 416, 190 Ark 1177

Evidence held insufficient

(1) To show that changes in final estimate were arbitrary and unjustifiable —Miller v Bonner, 111 So 776, 163 La 332

(2) To sustain findings that highway had been constructed to a width in excess of that required by plans —L Romano Engineering Corporation v State, 113 P 2d 549 8 Wash 2d 670 opinion adhered to 120 P 2d 1008 12 Wash 2d 736

47. Evidence held sufficient

(1) To sustain allowance of claims —Prairie County v Harris, 295 S W 725 173 Ark 1182

(2) To justify findings as to amounts due contractor —Prairie County v Gray, 295 S W 363, 174 Ark 377

(3) To support finding as to amount earned in preliminary work by engineers -White-Jackson Road Improvement Dist No 1 v Blackshire & Mercer, 241 S W 386, 153 Ark 581

(4) To sustain verdict as to amount due from contractor to subcontractor — Lynch v Stephens, 14 S W 2d 257, 179 Ark 118

(5) To prove that engineer was entitled to an allowance of two thousand dollars —Carter v Road Improvement Dist No 2 of Franklin County, 238 S W 69, 152 Ark 302

(6) To entitle subcontractor to recover the balance due under his contract less deduction of an amount which was reasonably necessary to be expended by contractor to complete work —Campbell v Snyder, 151 S W 2d 724, 287 Ky 596

(7) To support finding that reasonable value of work performed by highway subcontractor was exact sum specified in contract to be paid for it —Whitty v Fidelity & Deposit Co of Maryland, 11 P 2d 84, 123 Cal App 334

(8) To sustain finding that complainant was entitled to no additional compensation —Western Const Co v North Arkansas Highway Improvement Dist No 2, 21 S W 2d 612, 180 Ark 1168

(9) To justify finding that plaintiff was employed to complete portion of road for contractor, and was to be paid certain amount —Lucas v Ganley Bros, 206 N W 934, 166 Minn 7

(10) To show that material excavated was "intermediate excavation," for which contractor was entitled to a higher rate, and was not "common excavation"—Baker v Multnomah County, 246 P 352, 118 Or 143

(11) To establish claim for additional compensation —Sweeney v Jackson County, 178 P 365 93 Or 96, opinion adhered to 182 P 380, 93 Or 96

(12) To show implied assent to accept two dollars and fifty cents per day theretofore received —Netterville v Police Jury of Baton Rouge, 6 La App 512

Evidence held insufficient

(1) To sustain allowance made to engineers for preliminary work — Bowman Engineering Co v Arkansas & Missouri Highway Dist, 235 S W 399 151 Ark 47

(2) To prove amount of claim against county or liability for claim or any other fact recited in void orders —Smith v Covington County 158 So 919, 171 Miss 879

(3) To sustain recovery for additional base course material, for additional selected roadway borrow or for additional filler or top course surfacing —L Romano Engineering Corporation v State 113 P 2d 549 8 Wash 2d 670 opinion adhered to 120 P 2d 1008, 12 Wash 2d 736

(4) To show that nothing was due subcontractor —Western Wheeled Scraper Co v Scott Const Co, 27 N E 2d 879, 217 Ind 408

48 Evidence held sufficient

(1) To show that at time of written contract covering payment for outstanding estimates and those to be made for next two months there was oral contemporaneous independent-like contract as to payment of estimates to be made after that period -Newell Contracting Co v Elkins 257 S W 54, 161 Ark 625

(2) To show that the uncompleted portion of contract was eliminated by mutual agreement —Benson v Kern County, 208 P 141, 58 Cal App 137

(3) To support finding that changes in plans were authorized by contract, and were reasonably made —Cunningham v State, 182 N E 95, 95 Ind App 434

(4) To show that there was enough other work to keep contractor's teams busy notwithstanding delay in delivery of gravel — J Devereux O'Reilly & Co v Police Jury of St Tammany Parish, 97 So 296, 154 La 57

(5) To show that commonwealth had not waived provision in contract prohibiting contractor's assignment of moneys payable thereunder without consent —Federal Nat Bank v. Commonwealth, 185 N E 9, 282 Mass. 442

(6) To show that contractor had sufficiently protested changes in location and grade of road --Nugent v State, 40 N Y S 2d 361, 265 App Div 549

(7) To support findings that contract between contractor and road commission was executed on date when written contract was executed —Campbell Bldg Co v State Road Commission, 70 P 2d 857, 95 Utah 242

(8) To establish contractor's knowledge of amendment by highway department of specifications —Trinkle v Commonwealth, 196 S E 652 170 Va 429

(9) To support findings that the purchase of rock for which payment was sought was a transaction separate and distinct from the purchase by the supervisor of other rock at other times for other roads —Sittig v Raney, 200 P 824 53 Cal App 709

(10) To show that plaintiff was not indebted —Terrebonne v Abernathy 135 So 690 17 La App 517

(11) To justify finding of negligence by subcontractor in operation of tractor —Burt v Pacific Indemnity Co 133 P 2d 24, 56 Cal App 2d 352

(12) To support finding that contractor agreed to pay plaintiff direct —Neal v Hagedorn Const Co, 135 S E 120, 192 N C 816

(13) To authorize findings that highway district made no misrepresentations concerning rock structures, that contractor assumed the risk of unfavorable ground conditions, and that contractor waived any misrepresentation of the facts--Six Companies of California v Joint Highway Dist No 13 of California, C C A Cal 110 F 2d 620 affirming D C, 24 F Supp 346, certiorari granted Six Companies of California v Joint Highway Dist No 13 of State of California, 61 S Ct 36, 311 U S 631 85 L Ed 401 and reversed on other grounds 61 S Ct 186, 311 U S 180, 85 L Ed 114, rehearing denied 61 S Ct 438, 311 U S 730, 85 L Ed 475

(14) To sustain a finding that further advances not indorsed on the

district in changing engineers must be more than a mere preponderance; it must be overwhelming [49]

(8) Trial

The order of proof is largely within the discretion of the court, the issues should be submitted together with proper instructions, questions of fact should be determined by the jury, and questions of law, by the court; and the verdict must conform to the issues and proof.

In actions by or against highway contractors, the order of proof is largely within the discretion of the trial court.[50] The parties are entitled to have their theories presented to the jury under correct instructions,[51] and instructions which respond to the issues made by the pleadings and the evidence and correctly submit those issues to the jury are properly given [52] However, in accordance with the well settled rules of practice, the instructions must be strictly confined to the issues and proof [53] It is the province of the jury to determine disputed questions of fact,[54] but it is the province of the court, and not the jury, to construe unambiguous provisions of the contract [55] If there is no material question of fact for submission to the jury on which there is any substantial controversy, the court may direct a verdict [56] The verdict and findings must conform to the issues and proof [57] Where the contract on which the claim is based is invalid, a finding of the jury that plaintiff performed services and furnished material worth the amount sued for furnishes no basis requiring a judgment for plaintiff [58] In an action by a subcontractor against the contractor for extra expense in the performance of the subcontract, the cost to the subcontractor may be found

contract were not secured by the bonds, in action between contractor's creditors, one of whom had a lien on certain bonds for advances made to the contractor —Slayden v O'Dea, 218 P 395, 191 Cal 785

Evidence held insufficient

(1) To sustain counterclaim for damages for defective construction —Durrett Const. Co v Caldwell County, 244 S W 409, 196 Ky 158

(2) To overcome presumption that sand was rejected because it was inferior to accepted sample —J W Brennan Const Co v State, 191 N Y S 253, 117 Misc 816

(3) To support findings that work had been completed "according to contract," and that a certain yardage of clay was not "necessary" at a certain point —Arkansas Const Co v Thomas & Ratliff, Tex Civ App, 245 S W 743

(4) To sustain contractor's recovery from subcontractor of penalty for delay —Thomas v S A Moceri, Inc, 13 P 2d 444, 169 Wash 219

(5) To show that contractor verbally agreed to pay for engineering help, or that he was estopped from resisting payment of claim —Connelly v Parkes, 255 S W 22, 160 Ark 496

(6) To establish defense —Hedges v. Scott & Salter, 8 La App 569

(7) To show that execution of contract respecting payment for construction work was authorized by contractors and duly executed, in action between assignees —First State Bank of Garrison v Commercial State Bank of Nacogdoches, Tex Civ App, 34 S W 2d 297, error dismissed

49. U S — Road Improvement Dist No 5 of Crittenden County, Ark v. Roach C C A Ark, 18 F 2d 755

50 Held not error

In highway contractor's action for damages caused by subcontractor's alleged wrongful failure to complete contract, refusal to admit evidence as to whether certain materials were appropriate to the performance of the subcontract until evidence had been adduced to show that the work had in fact been done by the general contractor, was held not to be error —James Beraidino & Sons v Great American Indemnity Co, 174 A 563, 113 N J Law 313

51. Ark —Newkirk v Shirley, 21 S W 2d 174, 180 Ark 294

52. Kan —Reynolds v Stimson, 247 P 847, 121 Kan 422

Mo —Wilson v Buchanan County, 298 S W 842, 318 Mo 64

Burden of proof

Instruction that burden was on highway contractors to show that subcontractor, suing for estimate due and retained percentages, broke contract, was held proper —Lynch v Stephens, 14 S W 2d 257, 179 Ark 118

53. Ala — Newell Contracting Co v Glenn, 107 So 801, 214 Ala 282

W Va — T Towles & Co v County Court of Summers County, 121 S E 93 95 W Va 310

29 C J p 613 note 85 [a]

54. Tex — Arkansas Road Const Co v Thomas & Ratliff, Civ App, 245 S W 743

29 C J p 613 note 86 [a]

Questions of fact for jury

(1) What was reasonable amount of attorneys' fees, to be awarded county tendering the amount due under highway contract into court — Employers Casualty Co v Rockwell County, Civ App, 300 S W 148, modified on other grounds 35 S W 2d 690, 120 Tex 441, reformed on other grounds 38 S W 2d 1098, 120 Tex 441

(2) Cause of defective condition of pavement — Spokane County v Pacific Bridge Co, 213 P 151, 106 Or 550

(3) Classification of material — State v Wright, 175 N E 666, 97 Ind App 660

(4) Fraud in orders accepting roads discharging contractor, and directing delivery of bonds to him — Davisson v Eastland County, Tex Civ App, 6 S W 2d 782, affirmed, Com App, 13 S W 2d 673

(5) Responsibility for delay — Spitcaufsky v State Highway Commission of Missouri 159 S W 2d 647, 349 Mo 117

(6) Whether contractors were overpaid through the engineer's fraud or gross mistake —Gage & Spencer v Road Improvement Dist No 3 of Newton County 252 S W 922, 159 Ark 642

(7) Whether gross and palpable mistake was made in measurement of work —Wilson v Buchanan County, 298 S W 842, 318 Mo 64

(8) Whether material necessitated by contract changes was ordered and authorized —Atkinson v State, 275 P 412, 206 Cal 617

55. Mo —Webb-Boone Paving Co v State Highway Commission, 169 S W 2d 336

56. Fla —Hillsborough County v. Highway Engineering & Construction Co, 199 So 499, 145 Fla 83

29 C J p 613 note 85 [b]

Verdict held erroneously directed

Tex —Fort Worth Nat Bank v State, Civ App, 158 S W 2d 885, error refused

57. Ark —Pritchett v Road Improvement Dist No 4 of Van Buren County, 250 S W 515, 158 Ark 285

58. Tex —Goss v Fannin County, Civ App, 244 S W 204.

fair and reasonable for such work, where the method of performance was that used by the subcontractor on other highways without objection by the contractor [59] On the trial of an appeal from an award to a landowner for the removal of gravel for the repair of a highway, all pleadings and papers in the transcript on appeal are a part of the record and may be considered by the jury without being formally introduced in evidence.[60]

(9) Judgment or Relief

The judgment and the relief awarded should conform to the issues, proof, and findings, and a decree not procured by fraud or collusion is conclusive where no appeal was taken.

As in other civil actions the judgment should conform to the issues, proof, and findings [61] Where a contractor's suit for the balance due is dismissed on exception his right, if any, to resort to other proceedings should be reserved [62] In an action by successful bidders to be relieved of their bid on the ground of a mistake therein, and to recover judgment in the amount of the deposit made by them which was declared forfeited by the public agency, where plaintiffs had made a larger deposit than was required by statute, an attempted forfeiture of the entire deposit is improper, and a judgment dismissing the action on findings for defendant is improper, plaintiff being entitled to recover the amount of the deposit in excess of the amount required to be deposited [63] A decree not procured by fraud or collusion is conclusive where no appeal was taken [64] A claimant against a highway contractor who is not entitled to protection of the bond has been permitted, in a concursus proceeding, to recover personal judgment against the contractor, rather than to require a separate action to obtain such judgment.[65]

Review. In the absence of evidence as to correct engineering practices, a reviewing court cannot conclude, from the fact that numerous changes in plans were made, that they were unwarranted and the result of caprice or ill will on the part of the engineer.[66]

b. Action to Enforce Lien or Impound Funds

An action to enforce a lien on funds owing to a highway contractor or to impound such funds in the hands of the public agency will lie when it has been authorized by statute and when there has been a compliance with statutory conditions precedent, and in such an action, general rules as to parties, pleading, evidence, and relief awarded are applicable

An action to establish a lien on moneys due or to become due to the contractor is a species of garnishment [67] It will not lie in the absence of compliance with conditions precedent imposed by statute,[68] such as conditions relating to the filing of notice [69] In the absence of statute, a suit in equity will not lie to impound funds in the hands of the public agency for the benefit of parties furnishing labor or material to a defaulting road contractor,[70] the reason for the rule being that in the absence of statute such funds are not subject to garnishment [71] To assert a statutory right to impound such funds, plaintiff must proceed in the statutory manner,[72] and within the time specified in the statute after service of notice of the claim,[73] and failure of plaintiff to allege that the claim was disputed by the contractor does not render the statute of limitations inapplicable although the statute expressly provides

59. Mass—Baccari v B Perini & Sons, 199 N E 912, 293 Mass 297

60. Ind—Bell v Pavey, 33 N E 1011, 7 Ind App 19

61. La—J Devereux O'Reilly & Co v Police Jury of St Tammany Parish, 97 So 296, 154 La 57—Hankins v Police Jury, Natchitoches Parish, 95 So 102, 152 La 1000

Judgment held proper

Kan—Roberts v. Board of Com'rs of Nemaha County, 298 P 754, 133 Kan 15

Recovery held not barred under pleadings and evidence

Wash—Strong & MacDonald v King County, 267 P. 436, 147 Wash 678

Parties

Highway subcontractor, not employed by principal contractor, cannot recover personal judgment or costs against principal contractor, nor can he recover costs of action against subcontractor employing him, but who was not made party to proceeding—Commercial State Bank of Independence v Broadhead, 235 N W 299, 212 Iowa 688

Decree construed

Decree rejecting or reducing claims of laborers and materialmen meant, as respected surety, that claimants could not share in distribution of balance due on contract—State v Miller, 126 So 422, 169 La 914

62. La—Spencer Bros v McBride, 120 So 114, 9 La App 284

63. Wash—Harrington v State, 213 P 449, 124 Wash 138

64. Ark—Tri-County Highway Improvement Dist v Vincennes Bridge Co, 278 S W 627, 170 Ark 22

Decree held not to have been procured by fraud or collusion

Ark—Tri-County Highway Improvement Dist v. Vincennes Bridge Co, supra

65. La—State v Smith, 119 So 56, 167 La 301

66. Tex—Neyland v State, Civ. App, 151 S W 2d 331, error dismissed, judgment correct

67. Tex—F C Crane Co v Chas C Bellar Co, Civ App, 135 S W 2d 167—Huddleston & Work v Kennedy, Civ App, 57 S W 2d 255, certified questions answered 53 S W 2d 1009, 122 Tex 182—De Montel v Biance, Civ App, 151 S W 2d 859

68. N Y—Amiesite Const Corporation v Luciano Contracting & Building Co, 30 N E 2d 483, 284 N Y 223, affirming 18 N Y S 2d 873, 259 App Div 826

69 N Y—Amiesite Const Corporation v Luciano Contracting & Building Co, supra

70. Wis—Rusk v Perry, 201 N W. 762, 185 Wis 454

71. Wis—Rusk v Perry, supra.

72. Wis—Rusk v Perry, supra.

73. Wis.—Rusk v. Perry, supra.

for the remedy where the contractor disputes such claim, since the fact that it is necessary to bring the action shows that there is a dispute within the meaning of the statute[74] The proceeding must be brought in a court having cognizance thereof[75] The rights of the surety on the contractor's bond are not involved in a suit to establish a lien;[76] but in an action to foreclose a lien filed against moneys in the hands of the general contractor belonging to a subcontractor, which lien arose out of a contract between the lienor and the subcontractor, the general contractor and the subcontractor are proper parties defendant[77] Plaintiff must allege all issuable facts necessary to warrant the relief prayed for[78] In proceedings to charge retained percentages, a petition setting up a claim on notes and facts showing that notes were given for material and equipment is a suit on the notes alone rather than a suit on the original cause of action[79] Under pleadings to enforce a lien for particular work, the question whether machinery was used in work for which no lien can be claimed cannot arise[80] The general rules of evidence are applicable[81] The court will grant such relief as is appropriate,[82] but the relief granted should not extend beyond that prayed for in the pleadings,[83] nor will the court grant relief to which the petitioner has not shown himself to be entitled[84]

§ 212. Liability for Damages

a In general
b Particular political division or agency; contractors

a. In General

In general, under or apart from statute, a county or other political subdivision or governmental agency may be liable for damage to property rights resulting from construction or maintenance of highways, but it will not be liable, in the absence of statute, for damage resulting from tortious acts

Apart from the duty to compensate landowners for property taken for public highways under the constitutional right of eminent domain, and the corresponding liability for damages for injury to rights of ownership and use of property so taken, see Eminent Domain §§ 110–135, it has been held, under or apart from statute to that effect, that a county or other political subdivision or governmental agency may be liable for damage to property rights resulting from the construction, improvement, or repair of

74. Wis—Rusk v Perry, supra

75. Court held to have jurisdiction
Ill—Backs v Nelson Const Co, 271 Ill App 137

76. Ill—Acker v Vanderboom, 235 Ill App 417, affirmed 158 N E 476, 327 Ill 267, which followed Standard Oil Co of Indiana v Vanderboom, 158 N E 151, 326 Ill 418, affirming 238 Ill App 635

77. N Y—Becker v Romanzo, 281 N Y S 317, 245 App Div 185

78. Allegations held sufficient
Ill—Backs v Nelson Const Co, 271 Ill App 137

Allegations held insufficient
Ill—Manhattan State Bank v C J Moritz, Inc, 238 Ill App 103
Wis—Osgood Co v Peterson Const Co, 286 N W 54, 231 Wis 541

Allegations held necessary
(1) In suit to establish lien for excavating machinery on state funds owing highway contractor buying the machinery allegation of reasonable use value of machinery on the job—Osgood Co v Peterson Const Co, 286 N W 54, 231 Wis 541

(2) In suit based on a claim for the rental of machinery used, allegation showing to what extent machinery was used—Byers Mach Co v Iowa State Highway Commission, 242 N W 22, 214 Iowa 1347

79. Tex—Verschoyle v Holifield, 123 S W 2d 878, 132 Tex 516, modifying, Civ App, 90 S W 2d 907.

80. Ill—New Erie Coal Co v H McMullen & Sons 247 Ill App 515

81. Evidence held sufficient to sustain findings as to reasonable rental value of elevating grader and caterpillar tractor furnished to subcontractor under lease-sale contract—Thurber Const Co v Kemplin, Tex Civ App, 81 S W 2d 103

82. Attorney's fees
(1) Creditors suing to assert lien on funds due general contractors in hands of highway commission were not entitled to attorney's fees on theory that suit was class suit in nature of creditors' bill, where money due was paid into court, nothing was added to fund available to creditors, fund was not in danger of being lost or misappropriated and interests of some of creditors were adverse Where plaintiffs' interests were conflicting, fees of attorneys representing certain class of creditors, if recoverable out of such funds, should be chargeable only against that portion of fund in which such class of creditors was entitled to participate Statute relating to suit on contractor's bond given for release of lien on money due on public contract, which provided for taxing attorney's fees as costs, did not authorize charging attorney's fees against funds claimed in suit asserting lien—Thurber Const Co v Kemplin, Tex Civ App, 81 S W 2d 103

(2) In proceeding to charge retained percentage due state highway subcontractor, claimant on notes providing for attorney's fees of ten per cent was entitled to stipulated attorney's fees where claim on notes was allowed—Verschoyle v Holifield, 123 S W 2d 878 132 Tex 516, modifying, Civ App 90 S W 2d 907

(3) In suit for benefit of highway contractor's creditors counsel was held entitled to fees notwithstanding highway commissioner was authorized to pay retained percentage into court on receiving notice that suit was brought—Atlas Powder Co v Detroit Fidelity & Surety Co, 51 S W 2d 841 164 Tenn 605

(4) Subcontractor who recovered in concursus proceeding less than his recorded claim for work done on public highway was held not entitled to recover attorney's fee—Goldberg v Banta Bros, 162 So 786, 183 La 10

Refusal to impound funds held proper in suit to enjoin road district from canceling contract to construct road and impound funds, where improvement was not completed when relief was asked—Mullins & Kyte v Road Improvement Dist No. 5, 258 S W 639, 162 Ark 427

83 Tex—Verschoyle v Holifield, 123 S W 2d 878, 132 Tex 516, modifying, Civ App, 90 S W 2d 907

84. Iowa—Rainbo Oil Co v McCarthy Improvement Co., 236 N W 46, 212 Iowa 1186.

highways,[85] provided such governmental subdivision or agency had authority to undertake such work.[86] While it is generally held that, in the absence of an applicable statute to that effect, there is no liability for damage resulting from a change of grade,[87] in many jurisdictions, under statutes to that effect, damages are recoverable for injury to property so caused[88] However, in at least one jurisdiction it has been held that highway authorities will not be liable for consequential damages to one who has conveyed to the authority a right of way to be used for highway purposes, where the construction work was prudently and properly done, since the consideration for the conveyance is deemed to embrace such injury.[89] Liability for damages for acts or omissions connected with the drainage of highways is discussed in §§ 186, 187 supra

If property is on the right of way,[90] even though with the permission of the proper authorities,[91] the owner cannot recover for damage thereto in the construction or improvement of the highway.

It has been held that a county taking property for the construction of a road, without following the statutory provisions as to the acquisition of the property, is liable in trespass for damages for the

85. Miss —Campbell v Covington County, 147 So 111, 161 Miss 374
W Va —Sun Sand Co v County Court of Fayette County, 122 S E 536, 96 W Va 213

Dependent on statute

Damages for injuries from construction of roads cannot be awarded, unless given by statute and procedure therein followed —Lenhart v Wright, 133 A 495, 286 Pa 351

Breach of promise

A property owner who executed a right of way deed to state highway commission could assume that commission would do the things which it promised to do so as to make expected benefits to owner from construction of highway mean something to owner and his property, and commission would be liable in damages for failure to build fences on right of way lines as agreed —Green v Louisiana Highway Commission, La App, 3 So 2d 236

Use of irrigation ditch impaired

County agreeing to maintain ditch, changed or disturbed by construction of road was liable for damage as result of enforced nonuse of ditch - Langton v Board of County Com'rs of Eagle County, 300 P 745, 89 Colo 285

The parking of heavy highway machinery on the land of an abutter over the owner's protest while it was not being used on highway work may impose liability on the state highway commission for damages and the person in charge of operations on highways involving use of machinery possessed implied, ever though he did not have actual, authority to arrange for the parking of such machinery —State Highway Commission v Mason, 4 So 2d 345 192 Miss 576 suggestion of error overruled 6 So 2d 468, 192 Miss 576

Injury to health

Adjacent landowner cannot recover from county for damages to health of persons on account of construction or maintenance of public road — Harris County v Gerhart, 283 S W 139, 115 Tex 449, affirming Gerhart v Harris County, Civ App, 244 S W 1103

86. Tex —Smith v Tarrant County, Civ App, 44 S W 2d 499

Approval of highway department necessary

If county could not lawfully construct state highway, it could not be liable to landowner for damages resulting from construction of such highway, but a statute requiring the county to enter into an agreement with, and to secure the approval of, the highway department prior to the construction does not deprive the county of authority to construct roads, so that the county will be liable for damage caused by such construction —Smith v Tarrant County, supra

That a town assumed supervision of changes in a road would not render it liable for the resulting damages where the taking of property is beyond their powers and ultra vires —Falkner v Winfield Tp, 12 Pa Dist & Co 23, 43 York Leg Rec 51

87. N Y —Hollman v State, 13 N Y S 2d 857, 171 Misc 768
Liability for change of grade of city streets see the C J S title Municipal Corporations §§ 1227–1232, also 44 C J p 427 note 86–p 435 note 72

Statutes held inapplicable

(1) The statutory provision concerning liability of cities for damages caused by changes in the established grade of streets has no application to country highways —Liddick v City of Council Bluffs, Iowa, 5 N W 2d 361

(2) A town is liable to landowners under statute for damage occasioned by change of highway grade only when change is made by town authorities, and not when change is made by state —Hollman v State, 13 N Y S 2d 857, 171 Misc 768

88. Conn —Gorham v New Haven, 58 A 1, 76 Conn 700
29 C J p 614 note 97

89. Ky —Perry County v Riley, 104 S W 2d 1090, 268 Ky. 325—Snyder v Shelby County, 87 S W 2d 90, 261 Ky 118

Change of grade

Ky —Bader v Jefferson County, 119 S W 2d 870, 274 Ky 486—Fallis v Mercer County, 33 S W 2d 12, 236 Ky 315

Loss of lateral support

Ky -- Snyder v Whitley County, 75 S W 2d 373, 255 Ky 741

90. Ky —Laurel County v Hubbard, 92 S W 2d 359, 263 Ky 381

91. Ky —Laurel County v Hubbard, supra

License subject to revocation

Lot owner could not recover from county for destruction of sewer pipe under road by road improvement, although lot owner had obtained privilege to construct pipe from former county overseer since overseer possesses no authority to grant such license, and such licenses, although properly granted by county court, are subject to alteration or revocation for benefit of public — Laurel County v Hubbard, supra

Liability for destruction without notice

(1) It has also been held that since a city, maintaining water pipes beneath a county highway, does so subject to the rights of the public in the highway, it must remove the pipes at its own expense after notice is given that the road is to be repaired or improved, and, while the state will be responsible for the destruction of such pipes without notice, it will not be liable for the value of pipes which were disconnected without other disturbance, nor is it liable for the cost of relaying the pipes —City of Chadron v State, 214 N W 297, 115 Neb 650, rehearing denied 215 N W 137, 115 Neb 650

(2) Necessity of notice for removal of property interfering with road construction or alteration see supra § 181.

land so taken,[92] but a township which agreed with the county to pay a share of the expenses of the road construction and which adopted the county's agreement with a contractor would not be liable for such trespass.[93]

Liability for torts While it has been held that a county or town or other political subdivision or governmental agency will be liable for damages resulting from its trespass or negligence in the construction, repair, or improvement of highways,[94] it is generally held that since, in the performance of such work, the political subdivision is performing a governmental function,[95] it shares the state's immunity from suit, see the C J S title States § 214, also 59 C J. p 300 note 31–p 302 note 38, and cannot be held liable for such acts,[96] or for the negligence or tortious acts of its agents,[97] in carrying on such work, unless such liability is imposed by statute[98]

Liability for unauthorized acts generally A political subdivision or governmental agency is not lia-

92. Pa —Horn v Northampton County, 159 A 187, 105 Pa Super 171

93. Reason for rule
The township had the right to assume that the county would proceed in a lawful manner to have the work done —Horn v Northampton County, 159 A 187, 105 Pa Super 171

94. La —Marbury v. Louisiana Highway Commission, App , 153 So 590
Liability for torts generally of
Highway districts, boards, or commissions see supra § 160
Counties see Counties §§ 215–221
Towns see the C J S title Towns § 112, also 63 C J p 173 note 99–p 176 note 23

Liability for trespass
(1) In general —Newman v St Louis County, 176 N W 191, 145 Minn 129—29 C J p 614 note 98 [b]
(2) Highway commission, while being agency of state, enjoys no sovereign immunity when it commits trespass on property rights of citizen of state, and is of same status as corporations and individuals – Marbury v Louisiana Highway Commission, La App , 153 So 590

Liability for negligence
Minn —Newman v St Louis County, 176 N W 191, 145 Minn 129
29 C J p 614 note 93

95. Mich —Moross v Hillsdale County, 218 N W 683, 242 Mich 277, certiorari denied 49 S Ct 32, 278 U S 635, 73 L Ed 552
Tex —Gotcher v State, Civ App , 106 S W 2d 1104
W Va —Douglass v Roane County Court, 110 S E 439, 90 W Va 47, 22 A L R 585

96. Mich —Moross v Hillsdale County, 218 N W 683, 242 Mich 277, certiorari denied 49 S Ct 32, 278 U S 635, 73 L Ed 552
N C —Latham v State Highway Commission, 131 S E 385, 191 N C 141
Tex —Stevens v Jim Wells County, Civ App , 32 S W 2d 889

Special road districts are not liable for negligence in the building and construction of public roads in the absence of legislation making them liable —Sharp v Kurth, Mo App , 215 S W 636

No funds for tort claims
Under statute creating road improvement district, such district is exempt from liability for torts, it having no money or power to raise any by assessments, from which a judgment for tort could be paid —Lawson v Road Improvement Dist No 7, 259 S W 747, 163 Ark 303

97. Mich —Moross v Hillsdale County, 218 N W 683, 242 Mich 277, certiorari denied 49 S Ct 32, 278 U S 635, 73 L Ed 552
Tex —Gotcher v State, Civ App , 106 S W 2d 1104—Southern Surety Co v McGuire Civ App , 275 S W 845
W Va —Douglass v Roane County Court, 110 S E 439, 90 W Va 47, 22 A L R 585
63 C J p 174 note 8 [c] (2), (4), (5), (7), (10)

Failure to follow statutes in building highway, or do something that should have been done, is "negligence" and wrong as much as affirmative act, but county is not liable therefor, where the act is that of the board of county commissioners — Isham v Board of Com'rs of Montgomery County, 266 P 655, 126 Kan 6

Liability of state
(1) Where it was alleged that department of public works cut grass and weeds along state highway and negligently left them at side of highway, and grass and weeds caught fire, as result of which adjoining landowner's growing and matured grass and fence posts were destroyed, state was not liable in view of rule that state is not liable for damages for negligent acts of its officers and employees performed in the discharge of a mandatory, governmental duty —Nordby v Department of Public Works, 92 P 2d 789, 60 Idaho 475
(2) Where notice of motion for judgment against state highway commissioner, in his official capacity, and others, as individuals, for damages to plaintiffs' lands by alleged negligent construction of highway expressly charged commissioner with committing negligent acts in violation of duty as officer of state and specific acts of alleged negligence were enumerated, alleged acts of commissioner were "torts," with respect to determining liability of state for such acts —Wilson v State Highway Commissioner, 4 S E.2d 746, 174 Va 82

Loss of use of pasture
Township was not liable to owner of realty through which road was being relocated, for loss of use of pasture on the realty because of the alleged culpable negligence of the township in throwing down and leaving open wire gates so that it was unsafe for owner of realty to place cattle in pasture —Township of Deerhead v Fritz, 102 P 2d 1035, 152 Kan 110

Wrongful death
A county is not liable for wrongful death caused by negligence of officers or agents in construction of highways —Lowry v Carbon County, 232 P 908, 64 Utah 555

98. W Va —Douglass v Roane County Court, 110 S E 439, 90 W Va 47, 22 A L R 585

Liability for destruction of improvements
A statute providing for compensation for injury or destruction of improvements does not entitle a landowner to damages for the cost of building new fences, as distinguished from damages for the destruction of the old fences, necessitated by the location of the highway —Allison v Police Jury of Bienville Parish, 7 La App 345

Highway commission
Under statute expressly authorizing suit against the highway commission, the commission will be held liable for the negligence of its employees in the construction of the highway —Varnado v State, 136 So 771, 18 La App 624

Township
Under statute providing that township shall be liable for damages resulting from its negligence, township will be liable for damage resulting from negligent operation of machinery in construction of road —Ferber v Board of Trustees of Berlin Tp, 191 N E 444, 47 Ohio App 449

ble for damages caused by its officers acting without authority,[99] unless the work is accepted and ratified,[1] or was done with the implied knowledge of the authorities.[2]

Liability of individuals While liability generally rests on the municipality, yet individuals also may be liable under some circumstances for damages caused by road work.[3] However, hands employed in opening a road, present in response to a summons from the overseer which required their attendance, are not personally liable to an owner trespassed on by the opening of the road.[4] The liability of contractors is considered infra subdivision b of this section.

b. Particular Political Division or Agency; Contractors

The particular political subdivision or governmental agency liable for damages caused by construction or maintenance of highways depends on constitutional or statutory provision. As between the contractor and the highway authority, liability generally depends on whether the contractor properly performed the work in accordance with the contract.

The particular political subdivision or agency liable for damages caused by the construction, improvement, or repair of a highway,[5] and the particular fund from which such damages are payable,[6] depend on the applicable constitutional or statutory provisions. Where, by statute, the jurisdiction of counties over highways has been transferred to another governmental agency, such as the highway commission or department, such agency, and not the counties, will be liable for damage resulting from the construction and maintenance of highways.[7] Moreover, a county or other political subdivision which is, under statute so providing, liable for the cost of acquiring a right of way for a highway, and for damages incurred in that connection, is not thereby rendered liable for damages resulting from the construction work which another agency plans and performs,[8] as where such other agency,[9] or its

99. Mass.—Pinkerton v. Randolph, 85 N.E. 892, 200 Mass. 24. 29 C.J. p. 614 note 98.

1. N.H.—Carpenter v. Nashua, 58 N.H. 37.

2. Knowledge of one commissioner

Where county employees with knowledge and consent of county commissioner and engineer and road superintendent of county precinct wrongfully removed gravel from property of railroad company and used it on county roads, the county was liable to railroad company on quantum meruit for the reasonable value of gravel, and county could not avoid liability on ground that by statute all road materials must be purchased by commissioners' court and that the commissioners' court did not sanction appropriation and all commissioners did not have knowledge of it, since the commissioners' court was charged with knowledge where one commissioner had actual knowledge of appropriation and daily work-reports showing source of the gravel used on roads were filed with county, nor could liability be avoided on the ground that knowledge was acquired only after the gravel had been used in the road, since they could have returned an equivalent amount of gravel similar to that appropriated.—Harris County v. Texas & N.O.R. Co., Tex.Civ.App., 131 S.W.2d 109, error dismissed, judgment correct.

3. Mass.—Hollenbeck v. Rowley, 8 Allen 473.

Liability of highway officers and agents for negligent or unauthorized acts see supra § 171.

Liability as trespasser

Thus a private individual may be liable as a trespasser to the owner of land over which there is a highway for injury done in widening or repairing the highway outside the traveled part, even though a highway surveyor might properly have done the same acts.—Hollenbeck v. Rowley, supra.

4. Ark.—McNairn v. Gilliland, 224 S.W. 947, 145 Ark. 578.

5. Pa.—Woodward v. Fayette County, 102 A. 26, 258 Pa. 375. 29 C.J. p. 614 note 1.

Borough or county

Under statute to that effect, if a borough approves the new lines of a road, it, and not the county, will be liable for consequential damages resulting therefrom.—Miles v. Milesburg Borough, 13 Pa.Dist. & Co. 416.

Road district or county

Statute providing that road districts shall not be liable for torts, imposes liability on county to make compensation for injuries to private property caused by building of road.—Southern Surety Co. v. McGuire, Tex.Civ.App., 275 S.W. 845.

6. Neb.—Sittler v. Custer County, 135 N.W. 441, 91 Neb. 111. 29 C.J. p. 614 note 2.

7. Pa.—Hawkins v. Department of Highways, 21 Pa.Dist. & Co. 471. Tex.—Iverson v. Dallas County, Civ.App., 110 S.W.2d 255.

County primarily liable

Under statute requiring the state highway board to defend the suit and be responsible for damages awarded against any county with respect to highways over which the board has assumed jurisdiction, the county's liability for damaging private property for state-aid roads is primary and that of the board is ultimate.—Taylor v. Richmond County, 196 S.E. 37, 185 Ga. 610, certified question conformed to 196 S.E. 303, 57 Ga.App. 586.—Felton Farm Co. v. Macon County, 175 S.E. 29, 49 Ga.App. 239.

Where location of stream is changed to protect the highway, the highway department, and not the county, is liable, the liability of the county being limited by statute to damages arising from the taking of land necessary for the road itself.—Hawkins v. Department of Highways, 21 Pa.Dist. & Co. 471.

8. La.—Dick v. Police Jury of Bienville Parish, 7 La.App. 331.—Reidheimer v. Police Jury of Bienville Parish, 7 La.App. 319.

No guaranty of indemnity

Liability cannot be based on the county's duty to furnish the right of way, since that duty does not carry a guaranty of indemnity against damages except for the taking of property for the purpose of the right of way.—Breathitt County v. Hudson, 95 S.W.2d 1132, 265 Ky. 21.

9. Ky.—Hopkins County v. Rodgers, 122 S.W.2d 743, 275 Ky. 778.—Bader v. Jefferson County, 119 S.W.2d 870, 274 Ky. 486.—Perry County v. Riley, 104 S.W.2d 1090, 268 Ky. 325.—Barass v. Ohio County, 41 S.W.2d 928, 240 Ky. 149.—Jones v. Louisville & N.R. Co., 25 S.W.2d 31, 233 Ky. 152.

Federal agency

A county is not liable for damage to house and lot in city as result of negligent blasting by works progress administration employees in constructing abutting county road under either respondeat superior doctrine or statute requiring county to pay

contractor,[10] causes damage by its negligence Under statute providing that the county shall be liable for damages as to property taken by the secretary of highways in accordance with plans to which the county authorities agree, a county will not be liable for damages for the taking of property where the county's agreement was not acquired in accordance with the statutory provisions[11]

Liability of contractors. Whether the contractor can be held responsible for damage resulting from road construction work depends on the nature of the act causing the damage[12] Generally, where a contractor performs the construction work in accordance with its contract with, and the plans of, the highway authorities, the highway authorities,[13] and not the contractor,[14] are liable for damage to property resulting from the construction. Thus, the highway authority is liable for damage resulting from improper method of construction when manner in which work is done is under the direction of the county;[15] and this is so even though the injury might have been avoided by the exercise of due care on the part of the contractor[16] Moreover, the highway authority will be liable for damage caused by acts of the contractor which, although not specifically provided for by the contract, were necessary and not tortious[17]

However, the contractor, and not the highway authority,[18] is liable for damages resulting from his own tortious acts in the performance of the contract, as where he is negligent,[19] or commits an unauthorized trespass on the property off the right of

damages incurred in construction of road by state highway commission — Perry County v Tyree, 139 S W 2d 721, 282 Ky 708

10. Ky —Bader v Jefferson County, 119 S W 2d 870, 274 Ky 486— Breathitt County v Hudson, 95 S W 2d 1132, 265 Ky 21

11. Pa —Farmers Trust Co v Cumberland County Com'rs, 20 Pa Dist & Co 271

12. Ky —Breathitt County v Hudson, 95 S W 2d 1132, 265 Ky 21

13. W Va —Sun Sand Co v County Court of Fayette County, 12? S E 536, 96 W Va 213

"If the damages alleged and proven be such as would naturally flow from the building of the road, and may have been reasonably expected as a consequence of the work to be done in accordance with the plans and specifications, the county court cannot escape liability therefor because it has let the contract to a construction company alleged to be an independent contractor"— Sun Sand Co v County Court of Fayette County, supra

Liability for contractor's trespass

Highway commission was liable in trespass to property owners for trespass committed by highway independent contractor, notwithstanding contractor was not instructed to enter on plaintiffs' inclosure, where blueprint and road specifications which were part of contract authorized contractor to go on plaintiffs' land, since contractor could assume that highway commission secured right to enter on abutting land, where blueprint of profile of highway included such land —Marbury v Louisiana Highway Commission, La App, 153 So 590

14. Kan —Engler v Aldridge, 75 P 2d 290, 147 Kan 43

Ky —H H Miller Const Co v Collins, 108 S W 2d 663, 269 Ky 670— Adkins v Harlan County, 82 S W 2d 425, 259 Ky 400—Combs v Codell Const Co, 52 S W 2d 719, 244 Ky 772—Hall v Ellis & Brantley, 36 S W 2d 850, 238 Ky 114

Effect of contract provisions

(1) The provision in a contract for construction of state highway, which provided that contractor should take every precaution to protect and preserve pipe lines from injury or damage during construction operations, in no way enlarged liability of contractor for damage to pipe lines, but made contractor liable for failure to use ordinary care in performance of contract work —Marin Municipal Water Dist v Peninsula Paving Co, 94 P 2d 404, 34 Cal App 2d 647

(2) Contractor lowering grade of highway pursuant to contract with state, thereby preventing landowners from passing between their land and highway, was not liable to landowners under contractor's agreement with state to repair damage to adjacent property injured by process of construction, "process" meaning method of operation incident to accomplishment of result —Panhandle Const Co v Shireman, Tex Civ App, 80 S W 2d 461

Removal of lateral support

Road contractor following highway department's plans was held not negligent in not building retaining wall and not notifying landowner that it was removing lateral support to land and was therefore not liable —Hunt-Forbes Const Co v Robinson, 12 S W 2d 303, 227 Ky 138

No right lost by construction

Landowner having conveyed strip of land without reservation, for public highway, and having no natural or artificial waterways to convey irrigation waters from upper to lower side of roadbed, had no cause of action against contractor for damages for failure to leave waterway under roadbed —De Montoya v. Lee-Moor Contracting Co, 9 P 2d 140, 36 N M 109

15. Tex —Southern Surety Co v McGuire, Civ App, 275 S W 845

16. Tex —Southern Surety Co v McGuire, supra

17. **Digging pits**

Under statute authorizing road improvement district to build road and providing for assessment of benefits, and contract between district and contractors providing that 'the land for borrow pits shall be furnished by the district," the district was liable for damage to particular land on which contractors dug borrow pits, where the plans did not contemplate the taking of such lands for borrow pits at the time notice of filing of plans was given, and notice of assessment of benefits was given, if the taking of the land for such purpose was necessary to the making of the improvement and was authorized by the district, the taking of land for such purpose not constituting a tort for which the contractors and not the district was liable —North Arkansas Highway Improvement Dist No 1 v Greer, 259 S W 380, 163 Ark 111

18. La —Harper v Police Jury of Bienville Parish, 2 La App 21

19. Ky —H H Miller Const Co v Collins, 108 S W 2d 663, 269 Ky 670—Breathitt County v Hudson 95 S W 2d 1132, 265 Ky 21— Adkins v Harlan County 82 S W 2d 425, 259 Ky 400—Combs v Codell Const Co, 52 S W 2d 719, 244 Ky 772

29 C J p 615 note 8

Negligence in blasting

That contractors acted under contract with highway commission did not relieve them from responsibility of using due care in blasting rock — Schamahorn v Gehlhausen, 163 N E 289, 88 Ind App 93.

way [20] Even though the highway authority may be immune from liability for damage, such immunity is not shared by the contractor [21] The contractor has been held not to be liable for injury occurring after he has completed the work and turned it over to the highway authorities, even though the injury resulted from his failure properly to carry out the contract [22]

It has been held that where the damage results from the negligence of the contractor or his employees acting in the scope of their authority and employment, both the contractor and the county are liable therefor,[23] and the highway authority and the contractor may both be liable as joint tort-feasors, where the contractor knowingly commits a trespass at the direction of the authority [24] It has also been held that the contractor may be secondarily liable for performance of the work in accordance with the plans or directions of the highway authority, as where the authority directs him to go on, or take possession of, land which it had no right to take or enter [25]

Where the negligence of the county and of the contractor caused the damage, it is incumbent on the county to segregate the amount of damage caused by each in order to relieve itself from liability for the entire damage [26]

§ 213. Damages

Liability for damages for injury resulting from the construction, improvement, or maintenance of highways is considered supra § 212, and payment or assessment of damages as a prerequisite to beginning road work, the measure of damages, and actions or proceedings to recover damages, are considered infra §§ 214, 215, 216, respectively.

Examine Pocket Parts for later cases.

§ 214. —— Payment or Assessment as Prerequisite to Road Work

Under some statutes road work may not be begun until the payment, tender, or assessment of damages, or other arrangement with the landowner.

Under statutes so providing, road work may not be begun until the landowner is protected, as by payment,[27] tender,[28] or assessment,[29] unless there has been a release,[30] or agreement,[31] as to damages, or the owner has conveyed the property to the town for a road, and expressed a willingness to relinquish his right thereto [32]

§ 215. —— Measure of Damages; Deduction of Benefits

In general, the measure of damages for injury to property is the difference between the market value of the land before and after the injury.

In general, the measure of damages for injury to property in connection with the construction, improvement, and repair of highways is the difference between the market value of the land before and after the injury [33] Where a leasehold was damaged, it was held that the measure of damages is the amount reasonably necessary to put the property in substantially as good condition as it was immediately before the injuries occurred [34] In computing damages for the destruction of property interfering with road construction or alteration, re-

20. Ky —Breathitt County v Hudson, 95 S W 2d 1132, 265 Ky 21—Adkins v Harlan County, 82 S W 2d 425, 259 Ky 400—Hall v Ellis & Brantley, 36 S W 2d 850, 238 Ky 114

29 C J p 615 note 7

Contractors tearing down gates and using private land to haul gravel were liable to owner for damages Harper v Police Jury of Bienville Parish, 2 La App 21

21. U S —Asheville Const Co v Southern Ry Co, C C A N C, 19 F 2d 32

N C —Broadhurst v Blythe Bros Co, 17 S E 2d 646, 220 N C 464

22. Kan —Engler v Aldridge, 75 P 2d 290, 147 Kan 43

23. S C —Caldwell v Carroll, 137 S E 444, 139 S C 163

24. S C —Little v Robert G Lassiter & Co, 153 S E 128, 156 S C 286

25. Ky —Breathitt County v Hudson, 95 S W 2d 1132, 265 Ky 21

26. Tex —Southern Surety Co v McGuire, Civ App, 275 S W 815

Contractor's surety, succeeding to contractors' liabilities, would not be held liable for contractor's damage, unless county showed the extent of damage caused by his negligence —Southern Surety Co v McGuire, supra

27. Cal —Brady v Bronson, 45 Cal 640

29 C J p 615 note 11

Prepayment and security for payment for property taken under right of eminent domain see Eminent Domain §§ 186–190

28. N H —Rossiter v Russell, 18 N H 73

29 C J p 615 note 12

29. Wis —McKee v. Hull, 35 N W 49, 69 Wis 657

29 C J p 615 note 13

30. Ill —Norton v Studley, 17 Ill 556

N Y —People v Griswold, 2 Thomps & C, 351, affirmed 67 N Y 59

31. Ill —Norton v Studley, 17 Ill 556

29 C J p 615 note 15

32. Mo —In re Essex Ave, 25 S W 891, 121 Mo 98

33. Ark —North Arkansas Highway Improvement Dist No 1 v Greer, 259 S W 380, 163 Ark 141

Measure of damages as to property taken or injured in exercise of right of eminent domain see Eminent Domain §§ 136 176, 446–448

Value for most favorable purpose

In determining the amount of damages to be awarded, the court will consider the availability of the land for any use to which it was plainly adapted, as well as the most favorable purpose for which it could be used and which would bring the most in the market —North Arkansas Highway Improvement Dist No 1 v. Greer, 259 S W 380, 163 Ark 141

34. W Va —Sun Sand Co v County Court of Fayette County, 122 S E 536, 96 W Va. 213.

covery should be limited to the reasonable value of the property damaged, as of the date of destruction.[35]

It has been held in an action for damages resulting from the excavation on adjoining property, in order to secure material for the building of the road, that in assessing damages the jury would not consider the benefits accruing to the land by reason of the building of the road,[36] but there is much authority to the contrary in the analogous case of the measurement of damages where property is taken or injured under right of eminent domain, see Eminent Domain §§ 177–184, 446, and in proceedings for damages against a municipality for injury caused by municipal improvements, see the C J S title Municipal Corporations § 1252, also 44 C J p 443 note 15–p 444 note 38

§ 216. —— Actions or Proceedings to Recover

a In general
b Arbitration or compromise

a. In General

Subject to statutory exception, rules governing procedure in civil actions and proceedings generally apply in actions or proceedings to recover damages for injury resulting from construction, improvement, or repair of highways.

Where the remedy for damage resulting from the construction, improvement, or repair of highways is provided by statute, the statutory method of procedure is exclusive[37] Apart from statute, the remedies available to an owner for the recovery of his damages include an action at law,[38] such as trespass,[39] or mandamus[40]

The analogous remedies and proceedings where property is taken or injured under the right of eminent domain are considered in Eminent Domain §§ 389–448, and remedies and proceedings where damages are sought against a municipal corporation for injury resulting from the construction or improvement of public works are considered in the C J S title Municipal Corporations §§ 1280–1289, also 44 C J p 470 note 20–p 480 note 93 Remedies and proceedings for damages for injury in connection with the drainage of highways are considered supra §§ 186, 187

Conditions precedent Under statutes so providing, it is a condition precedent to suit against a county or other political subdivision or agency that the claim be presented to the proper authorities in accordance with the statutory requirements[41]

Limitations. Damages must be claimed within the

35 Neb —City of Chadron v State, 214 N W 297, 115 Neb 650, rehearing denied 215 N W 137, 115 Neb 650

36. Ark —North Arkansas Highway Improvement Dist No 1 v Greer, 259 S W 380, 163 Ark 141

37. N C —Latham v State Highway Commission, 131 S E 385, 191 N C 141

In Georgia

(1) Under statute requiring state highway board to defend suit and be responsible for damages awarded against any county whenever cause of action originates on highways over which board has assumed jurisdiction, the remedy is suit against county in the local courts for the whole damage, and county may vouch board into court as provided by statute, whereupon board must defend suit and be liable for damages recovered against county —Taylor v Richmond County, 196 S E 37, 185 Ga 610, certified question conformed to 196 S E 303, 57 Ga App 586—Felton Farm Co v Macon County, 175 S E 29, 49 Ga App 239—Page v Washington County, 173 S E 568, 48 Ga App 791

(2) Under this statute, landowners suggesting vouching into court of highway board could sue county for damages to land from construction of state-aid road by county authorities under contract with highway board, notwithstanding state highway department had title, control, and supervision of road and its construction —Felton Farm Co v Macon County, supra

(3) However, where state highway board took rock from land not on a highway and used rock in construction of a road, landowner's cause of action for damages for taking of the rock did not originate "on highways" within statute making state highway department responsible for all damages awarded against any county whenever cause of action originates on highways, and hence landowner properly brought suit against highway board in county of residence of a member thereof at time suit was instituted —State Highway Board of Georgia v Hall, 20 S E 2d 21, 193 Ga 717, affirming Hall v State Highway Board, 17 S E 2d 291, 66 Ga App 190

38. Ga – State Highway Board of Georgia v Hall, supra

39. Pa —Skokut v Washington County, Pa, 21 Wash Co 49

40. Ga.—State Highway Board of Georgia v Hall, 20 S E 2d 21, 193 Ga. 717, affirming Hall v State Highway Board, 17 S E 2d 291, 66 Ga App 190

41. Wash —Holmquist v Queen City Const Co, 27 P 2d 1066, 175 Wash 681

Manner of presentation

Under statute requiring the presentation of claims, claims for damages resulting from negligent construction of highways may be presented orally in commissioners' court —Southern Surety Co v McGuire, Tex Civ App, 275 S W 845

Time of presentation

Under statute requiring presentation and filing of claim before board of county commissioners within sixty days after claim accrued, as condition precedent to action against the county, where property owners filed damage claims against county after nonnegligent construction of city's pipe line in highway, but more than six months before county performed improvement work which deprived abutting owners of access to highway damage actions were not maintainable against county —Holmquist v Queen City Const Co, 27 P 2d 1066, 175 Wash 681

Statute held inapplicable

Statute requiring filing of all claims with county auditor when construed in connection with another provision limiting auditor's authority to approve claims resulting from contracts, did not apply to claims for damages —Southern Surety Co v McGuire, Tex Civ App, 275 S W 845

period fixed by law[42] after layout[43] and entry.[44]

Jurisdiction and venue. The jurisdiction and venue of proceedings for damages generally depend on local statutes[45]

Parties No one except the parties entitled to receive the amount of the damages may maintain any form of action requiring the payment thereof[46] In an action against a township the supervisors are not necessary parties[47] Where the highway authority and the contractor are jointly liable, either or both may be made parties defendant at the election of the injured party[48]

Notice In a statutory proceeding to assess damages seasonable notice thereof must be given to all persons interested,[49] and also, it has been held, to the town,[50] unless the town is not interested[51]

Pleading. Rules governing pleadings in civil actions generally have been applied in actions for damages for injury resulting from the construction, improvement, or repair of highways[52] A declaration or complaint for consequential injuries must allege a physical invasion of or trespass on the property, or malice or negligence in the prosecution or management of the work,[53] and also the negligent act of omission or commission that proximately caused the injury complained of,[54] and it should allege the availability of funds for the payment of damages[55] A complaint against a town for certain acts of trespass committed by the highway officers must allege that the town authorized the acts, or ratified them after commission[56] The pleading must conform to the proof[57]

Evidence. Rules of evidence governing civil actions generally have been applied in actions for damages for injury resulting from the construction, improvement, or repair of highways[58]

Trial Rules governing the trial of civil cases

42. Mass—Everett v Fall River, 75 N E 946, 189 Mass 513
29 C J p 616 note 45

43. Mich—People v Scio, 8 Mich 121

44. Mass—Goulding v Concord, 112 N E 645, 224 Mass 292
29 C J p 616 note 47

45. Ark—Arkansas Highway Commission v Holt, 81 S W 2d 929, 190 Ark 868
29 C J p 615 note 23

Highway commission

Under statute so providing, suits against the state highway commission, and certain other persons and agencies, must be brought in the county designated by the statute, and courts in other counties have no jurisdiction over such a suit, notwithstanding land was located in such county and act of negligence occurred therein, and notwithstanding commission, through its attorney, signed waiver of summons and entered an appearance—Arkansas Highway Commission v Holt, supra

Highway board

Where the domicile of a highway board is fixed by statute, court was without jurisdiction of suit against highway district in county other than statutory domicile, at least in absence of voluntary appearance by commissioners—Home Telephone Co v North Arkansas Highway Improvement Dist No 2, 19 S W 2d 1014, 179 Ark 875

46. Ind—Rudisill v State, 40 Ind 485

47. Minn—Koeper v Louisville, 118 N W 1025, 106 Minn 269.
29 C J p 616 note 37

48. Not within judge's discretion

Whether to make state highway department, authorizing trespass, party defendant with highway contractors, sued for trespass was not within presiding judge's discretion—Little v Robert G Lassiter & Co, 153 S E 128, 156 S C 286

49. Mass—In re Central Turnp Corp, 7 Pick 13
29 C J p 615 note 33

50. Vt—Thetford v Kilburn, 36 Vt 179

51. N H—Jewell v. Holderness, 41 N H 161

52. Pleading jurisdictional facts

To confer jurisdiction to have damages suffered by an abutting landowner assessed, the petition or complaint must contain allegations bringing the application within the provisions of the statute authorizing it—Matter of Baynes, 126 N Y S 132, 140 App Div 735

53. Fla—Crum v Sumter County, 66 So 723, 68 Fla 122

Complaints held sufficient

(1) In general—Skokut v Washington County, 21 Wash Co, Pa, 49

(2) Complaint founded on contractor's negligent acts in performing highway construction work outside work contract with county required, injuring plaintiff's property, stated cause of action—Northwestern Pac R Co v Currie, 279 P 1057, 100 Cal App 173

(3) Petition alleging that buildings were burned because of sparks emitted from township's road roller which was negligently operated by township's agent within scope of his employment, followed by specific allegations of negligence, was held to state cause of action for damages against township—Ferber v Board of Trustees of Berlin Tp, 191 N E 414, 47 Ohio App 449

54. Minn—Newman v. St. Louis County, 176 N W 191, 145 Minn 129
29 C J p 616 note 42

55. La—State ex rel Varnado v Louisiana Highway Commission, 147 So 361, 177 La 1

56. R I—Briggs v Allen, 52 A 679, 24 R I 80

57. Variance held not fatal

In landowner's action against highway construction contractors for value of timber cut from right of way on his land, declaration alleging that state highway commission had breached contract for conveyance of right of way, and that contractors cut timber and removed it for their use, notwithstanding their knowledge of landowner's claim thereto, without referring to any agreement between landowner and contractors, was not fatally variant from proof that contractors kept timber after cutting it pursuant to agreement whereby landowner was to have the timber—Young v Wilson, 183 So 387, 183 Miss 127

58. Admissibility

(1) Evidence showing the approximate amount necessary to repair the damage cannot be rejected on the theory that the damages are speculative, indefinite, and remote—Sun Sand Co v County Court of Fayette County, 122 S E 536, 96 W Va 213

(2) In action against county and state highway department for damage by road construction, resolutions of county commissioners indicating highway department was agent of county were properly excluded, the department, under statute creating the state highway system, being the principal—Norris v State Highway Department, 157 S E 382, 42 Ga App 699.

generally have been applied in actions for damages for injury resulting from the construction, improvement, or repair of highways.[59]

Review Rules governing proceedings for review in civil actions generally have been applied in actions for damages for injury resulting from the construction, improvement, or repair of highways[60]

Costs In statutory proceedings, the right to costs depends on the wording of the act providing for such proceeding[61] As between the parties costs need not follow an award for damages,[62] unless it is so specially provided by the statute.[63]

b. Arbitration or Compromise

Claims for damages may be submitted to arbitration or compromised.

The proper officers may submit claims for damages for injury resulting from the construction, improvement, or repair of highways to arbitration,[64] or may make agreements of compromise thereof.[65]

VIII. OBSTRUCTION AND ENCROACHMENT

§ 217. As Nuisance

An unauthorized obstruction of, or encroachment on, a highway is unlawful, and constitutes a nuisance.

The public has the right to the exclusive use of highways for public purposes,[66] and any unauthorized obstruction thereof, or encroachment thereon,

(3) In property owner's suit against state highway commission for damages from construction of a highway, property owner should have been permitted to show that he suffered damages because of commission's failure to build fences on right of way lines, regardless of whether fraud was alleged or proved, where right of way deed executed by property owner stated that commission was to remove and replace fences on right of way lines, and petition alleged that such was not done—Green v Louisiana Highway Commission, La App, 3 So 2d 236

Evidence held sufficient to sustain the verdict of the jury as to damage resulting from the digging of pits, and as to the amount of damage—North Arkansas Highway Improvement Dist No 1 v Greer, 259 S W 380, 163 Ark 111

Evidence held insufficient

In water district's action against highway contractor to recover for damages to pipeline resulting from alleged negligence of contractor in forcing mud against pipe line during construction of state highway across a mud area under evidence that contractor constructed highway across mud area under direction of state engineer, that district was informed of proposed construction and furnished plans, and that district's engineer knew of day by day progress of work, a finding of negligence of contractor was not warranted—Marin Municipal Water Dist v Peninsula Paving Co, 91 P 2d 404, 34 Cal App 2d 647

59. Ark—North Arkansas Highway Improvement Dist No 1 v Greer, 259 S W 380, 163 Ark 141

Questions of law and fact

In an action against road improvement district and road contractors, for damages to plaintiff's land sustained by reason of borrow pits dug thereon by the contractors, the question of whether the land had been damaged by the digging of the borrow pits, and the amount of damage, if any, were questions for the jury—North Arkansas Highway Improvement Dist No 1 v Greer, supra

Nonsuit

Where there is no evidence to establish the cause of action a nonsuit is properly allowed—Latham v State Highway Commission, 131 S E 385, 191 N C 141

Instructions

Where the complaint alleged that the highway commission agreed to pay for all damages to plaintiff's crops and land, and the answer alleged that the agreement between the parties was to pay plaintiff a specified price per acre for damages to his crops and nothing for the soil removed, a charge that the only issue was the amount of damages or compensation, that plaintiff was entitled to some compensation because defendant had admitted that much, was correct—Haddon v Spartanburg County Highway Commission, 114 S E 856, 122 S C 35

60. Determination and disposition

The determination and disposition of the case on appeal depends on the facts in the particular case, and where the facts warrant it, the proceedings may be referred back to the viewers—Appeal of Gallagher, 35 Luz Leg Reg, Pa, 39

61. Pa—Dollman v Allegheny County, 12 Pa Dist 535, 27 Pa Co 536

62. N Y—Matter of David, 89 N Y S 812, 44 Misc 192
29 C J p 616 note 56

63. Mass—Hamblin v. Barnstable County, 16 Gray 256.
Or—McCall v Marion County, 73 P 1030, 43 Or 536, rehearing denied 75 P 140, 43 Or 536.

64. Conn—Mallory v Huntington, 29 A 245, 61 Conn 88
29 C J p 616 note 51

65. Ill—Brown v Robertson, 15 N E 30, 123 Ill 631, affirming 23 Ill App 461
29 C J p 616 note 52

66. Kan—State v Paul, 214 P 425, 113 Kan 412
29 C J p 616 note 2
Injuries to travelers from defects or obstructions see infra §§ 248–282
Mandamus to compel removal see the C J S title Mandamus § 179, also 38 C J p 755 notes 91–1
On city streets see the C J S title Municipal Corporations §§ 1744–1756, also 44 C J p 1006 note 54–p 1026 note 32
On private roads see the C J S title Private Roads § 16, also 50 C J p 396 note 60–p 397 note 95
On toll roads see the C J S title Turnpikes and Toll Roads § 52, also 65 C J p 1164 notes 36–45
Use of highway by
Electrical companies see Electricity § 5
Gas companies see Gas § 54
Railroad companies see the C J S title Railroads §§ 140–167 190, 191, also 51 C J p 647 note 36–p 698 note 70, p 735 note 82–p 740 note 81
Telegraph and telephone companies see the C J S title Telegraphs and Telephones § 40, also 62 C J p 53 note 38–p 54 note 46

Sovereign interest

The state's rights in a public highway differ in no material respect from any other of its manifold sovereign interests and concerns—State v Paul, 214 P 425, 113 Kan 412

The purpose of the statute declaring it a public nuisance to obstruct or render dangerous the exercise of the public right of passage on a highway is to secure to every one an enjoyment of a public right—Hanson v. Hall, 279 N.W. 227, 202 Minn. 381.

is unlawful,[67] and constitutes a nuisance.[68] Where such power is conferred by statute, the highway commission has authority to preserve the highways from destruction or deterioration, and the authority also to forestall and prevent encroachment that would prove deleterious to the highways, or detrimental to the use thereof by the general public.[69]

One tearing up or cutting through a highway must ordinarily restore it to as good condition as before, unless relieved from such duty by contract, judgment, or otherwise.[70]

§ 218. What Constitutes

An unlawful obstruction or encroachment may consist of anything rendering the highway less commodious or convenient for public use, even though located outside of the traveled part, but incidental or partial obstructions may not be illegal, depending on the particular circumstances of the case, if they do not unreasonably interfere with the rights of the public and are not unduly prolonged.

Not every obstruction to the use of a highway is illegal. Public highways are subject to such incidental or partial obstructions as necessity requires provided they do not unreasonably interfere with the rights of the public and are not unduly prolonged.[71] As to what is a proper obstruction, as being based on a reasonable and necessary use, it is impossible to lay down any general rule, each case depending on its own particular circumstances,[72]

67. Ky.—Illinois Cent. R. Co. v. Ward, 35 S.W.2d 863, 237 Ky. 478.
N.C.—Colvin v. Tallassee Power Co., 154 S.E. 678, 199 N.C. 353.

Statutes held constitutional

(1) Statute authorizing corporation commission to order removal of obstructions to view at highway crossings is not unconstitutional.—Gibbons v. Missouri, K. & T. R. Co., 285 P. 1040, 142 Okl. 146.

(2) Statutes relating to cutting of weeds, brush, and hedges on highways are not unconstitutional.
Kan.—Chaput v. Demars, 243 P. 311, 120 Kan. 273, rehearing denied 244 P. 1042, 120 Kan. 612.
Ky.—Commonwealth v. Watson, 3 S.W.2d 1077, 223 Ky. 427, 58 A.L.R. 212.

(3) Statute authorizing boards of supervisors to enact special legislation to protect roads and bridges from encroachment or obstruction or from any improper or exceptionally injurious use is valid.—Standard Oil Co. v. Commonwealth, 109 S.E. 316, 131 Va. 830.

Outdoor advertising

(1) Legislature has extensive control over highways, as regards regulation of outdoor advertising.—General Outdoor Advertising Co. v. Department of Public Works, 193 N.E. 799, 289 Mass. 149, appeal dismissed General Outdoor Advertising Co. v. Callahan, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, General Outdoor Advertising Co. v. Hoar, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, and Brink v. Callahan, 56 S.Ct. 496, 297 U.S. 725, 80 L.Ed. 1008.

(2) The rules and regulations promulgated by department of public works regarding maintenance of billboards must be construed only according to ordinary meaning of words used.—Town of Milton v. Donnelly, 28 N.E.2d 438, 306 Mass. 451.

68. Ala.—Alabama Great Southern R. Co. v. Denton, 195 So. 218, 239 Ala. 301.
Cal.—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742.
Fla.—Marion County v. Ray, 144 So. 845, 107 Fla. 124.
Ky.—Solar Coal Co. v. Hoskins, 295 S.W. 989, 220 Ky. 693.
Md.—Johnson v. Town of Oakland, 129 A. 648, 148 Md. 432.
Mo.—Carson v. Baldwin, 144 S.W.2d 134, 346 Mo. 984.
N.H.—State v. Scott, 132 A. 685, 82 N.H. 278.
N.Y.—Khoury v. Saratoga County, 277 N.Y.S. 3, 243 App.Div. 195, affirmed 196 N.E. 299, 267 N.Y. 384.—Town of Albion v. Ryan, 194 N.Y.S. 261, 201 App.Div. 717.
N.C.—Brooks v. Henrietta Mills, 110 S.E. 96, 182 N.C. 719.
Okl.—State v. McCurdy, 43 P.2d 124, 128, 171 Okl. 445, citing **Corpus Juris.**
Va.—Standard Oil Co. v. Commonwealth, 109 S.E. 316, 131 Va. 830.
Wash.—State v. Camp Lewis Service & Garage Co., 234 P. 584, 129 Wash. 166.
29 C.J. p. 616 note 3.

"Purpresture"

Any encroachment on a public street or highway is a "purpresture," and, if the public use is impeded or rendered less commodious, such encroachment is generally not only a purpresture, but also technically a "public nuisance," regardless of the degree of interference with the common enjoyment, but not every "purpresture" is a "public nuisance," and whether or not it is such a nuisance will be determined according to the particular facts.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E.2d 753, 192 Ga. 817.

69. U.S.—Postal Telegraph Co. v. State Highway Commission, D.C.Or., 276 F. 958.

70. Ind.—State v. Douglas, 144 N.E. 548, 196 Ind. 207.

Proper crossing must be furnished and maintained by person or corporation cutting through highway for his or its benefit.—Henderson County v. Chicago, B. & Q. R. Co., 151 N.E. 542, 320 Ill. 608.

71. Cal.—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742.
Del.—Massey v. Worth, 197 A. 673, 676, 9 W.W.Harr. 211, citing **Corpus Juris.**
Idaho.—Rief v. Mountain States Telephone & Telegraph Co., 120 P.2d 823.
Mass.—Jones v. Hayden, 37 N.E.2d 243, 310 Mass. 90.
N.H.—State v. Scott, 132 A. 685, 82 N.H. 278.
N.Y.—Town of Albion v. Ryan, 194 N.Y.S. 261, 201 App.Div. 717.
Ohio.—H. E. Culbertson Co. v. Warden, 175 N.E. 205, 123 Ohio St. 297.
29 C.J. p. 617 note 5.
Intent as element of criminal offense see infra § 230.

Improvements and repairs

The county officials have a lawful right temporarily to obstruct highways under their jurisdiction for purpose of making improvements and repairs, and this right, when properly exercised, is paramount to the right of the public to free and unobstructed travel.—Shepard v. Utah Light & Traction Co., 184 P. 542, 55 Utah 186.

Sidewalk

A public road or sidewalk is primarily intended for public travel and the right to obstruct it even temporarily and in part must be exercised in a reasonable manner, and with due regard to the paramount rights and safety of the public.—Massey v. Worth, 197 A. 673, 9 W.W.Harr., Del., 211.

72. Mass.—Jones v. Hayden, 37 N.E.2d 243, 310 Mass. 90.
Vt.—Le Febvre v. Central Vermont Ry. Co., 123 A. 211, 97 Vt. 342.
29 C.J. p. 617 note 6.

Barriers on public highway can be maintained only for time required to restore road to condition making it safe for public travel.—State v.

and the question being as a rule determinable by the jury.[73]

In general it may be said that an unlawful obstruction or encroachment may consist of anything which renders the highway less commodious or convenient for the use of the public,[74] such as buildings or other structures,[75] projections over the highway,[76] ditches and excavations under or across highways,[77] fences,[78] gates,[79] walls,[80] or untrimmed hedges or brush growing on the highway.[81]

Fences or gates may be so situated, however, as not to constitute obstructions.[82] Also, if the highway officer in opening the highway removes fences off the line of the survey, the landowner is not liable to indictment for replacing them.[83] Such owner may move his fence to correspond with the proper line of the highway;[84] but after the highway has been used with the fence on a particular line for a sufficient length of time to give prescriptive rights to the public, the owner cannot move his fence forward so as to narrow the road.[85] The failure to remove a fence or other obstruction which was in the highway at the time it was established has been held not to be unlawful,[86] at least until notice to remove has been given by the proper officers.[87]

One is not justified in obstructing a highway because he leaves sufficient room for the passage of the public.[88] An obstruction placed anywhere within the highway limits,[89] although outside of the traveled part,[90] may constitute a nuisance. The

Schloemer, 228 N W 487, 200 Wis 350

Transportation of coal across and above road, where it was continued for many years without danger to public, was not nuisance per se—Clay County Court v Adams, 155 S E 174, 109 W Va 421

Removal of stone

An owner of land abutting on the highway is not entitled to obstruct the highway for the length of time which would be required to enable him to remove from thereunder a large quantity of stone even though he provided a different route for public travel—Town of Albion v Ryan, 194 N Y S 261, 201 App Div 717

73. Vt—Le Febvre v Central Vermont Ry Co, 123 A 211, 97 Vt 342
29 C J p 617 note 7.

74. Ind—Indianapolis Water Co v Schoenemann, 20 N E 2d 671, 107 Ind App 308
Mass—Newburyport Turnpike Corp v Eastern R Co, 23 Pick 326
Okl—State v Friar, 25 P 2d 620, 622, 165 Okl 145, citing **Corpus Juris.**
Pa—Commonwealth v Erie & N E R Co, 27 Pa 339, 355, 67 Am D 471, 2 Pittsb Leg J 81, 106
Va—Standard Oil Co v Commonwealth, 109 S E 316, 131 Va 830
29 C J p 617 note 8

Any unlawful act or omission which interferes with, obstructs, or renders dangerous for passage, street or highway, constitutes public nuisance—Gleason v Hillcrest Golf Course, 265 N Y S 886, 148 Misc 246

Standing crowd

One making speech from box in highway and thereby gathering standing crowd of people in highway is guilty of obstructing public way—Commonwealth v Surridge, 164 N E 480, 265 Mass 425, 62 A L R 402

75 D C—Capital Transit Co v Hazen, 93 F.2d 250, 68 App D C 91
N Y—Town of Mt Pleasant v City of New York, 191 N Y S 741, 199 App Div 315
O J—State v Friar, 25 P 2d 620, 165 Okl 145
9 C J p 618 note 9

Necessity of franchise

Right to conduct business which permanently occupies and obstructs highway by erection of building or laying of car tracks can be granted only by franchise—People ex rel Foley v Begole, 56 P 2d 931, 98 Colo 354

76. Kan—National Sign Co v Board of Com'rs of Douglas County, 266 P 927, 126 Kan 81
29 C J p 618 note 10

77. N Y—Town of Albion v Ryan, 194 N Y S 261, 201 App Div 717
29 C J p 618 note 11

Pitfalls in highways are intrinsically dangerous and are nuisances—Smith v City of Baton Rouge, 117 So 559, 166 La 472

78. Ill—Rogers v Hess, 156 N E 811, 325 Ill 603
Iowa—Dickson v Davis County, 205 N W 456, 201 Iowa 741
Tex—Spradley v Hall, Civ App, 54 S W 2d 1054, rehearing denied 57 S W 2d 182
29 C J p 618 note 12

Extent of obstruction

Fence extending nearly across traveled bed of road was material and substantial interference with use thereof, warranting judgment ordering removal of obstruction, although sufficient space was left for travelers to go around it—Spradley v Hall, Tex Civ App, 57 S W 2d 182, denying rehearing 54 S W 2d 1054

79. Ill—Hansen v Green, 113 N E 982, 275 Ill 221
29 C J p 618 note 13

80. Pa—Commonwealth v Marshall, 20 A 580, 137 Pa 170
29 C J p 618 note 14

81. Ill—Town of Ellison v Brent, 228 Ill App 438
Ky—Commonwealth v Watson, 3 S W 2d 1077, 223 Ky 427, 58 A L R 212

82. Wis—Konkel v Pella, 99 N W 453, 122 Wis 143
29 C J p 618 note 15

83 Tenn—Ward v State, 12 Lea 469

84. Iowa—State v Chismore, 169 N W 50, 184 Iowa 677
29 C J p 618 note 17

85. Pa—Commonwealth v Marshall, 20 A 580, 137 Pa 170
29 C J p 619 note 18

86. Va—Martin v Commonwealth, 165 S E 425, 159 Va 894
29 C J p 619 note 19

87. Ill—Sweeney v People, 28 Ill 208
N H—State v Reed, 38 N H 59
Necessity of notice generally see infra § 224

88 Kan—National Sign Co v Board of Comrs of Douglas County, 266 P 927, 126 Kan 81
Tex—El Paso Electric Co v Leeper, Civ App, 42 S W 2d 863, 866, citing **Corpus Juris.**
29 C J p 619 note 21

Meaning of term "obstruct"

The word 'obstruct" does not necessarily mean render impassable, when used of a public way—Overhouser v American Cereal Co, 92 N W 74, 118 Iowa 417

89 Ind—Indianapolis Water Co v Schoenemann, 20 N E 2d 671, 107 Ind App 308
29 C J p 619 note 22

A paved alley entrance lying within street as dedicated was part of 'highway" on which it was unlawful to place foreign substance injurious to vehicles, such as broken glass—Poyer v State, 3 N W 2d 369, 240 Wis 337

90. Ind—Indianapolis Water Co v Schoenemann, 20 N E 2d 671, 107 Ind App 308.

same is true of any object placed close to the roadway, constituting a present[91] source of danger.[92]

On the other hand, trees and shrubs,[93] log chutes,[94] hitching posts and horse blocks,[95] and other objects,[96] placed on the side of the road so as not to interfere with the use of the highway, are not unlawful obstructions. Interference with a drainage system or other acts causing water to flow over a highway constitute unlawful obstruction or encroachment,[97] although it has been held that the obstruction of the mouth of a slough is not an obstruction of a road, even though it results in washing out the road at high water.[98] A person is not guilty of obstructing a highway because, by threats, he causes a road officer to desist from removing an obstruction.[99]

§ 219. Existence or Legality of Highway

To render the obstruction of a road a public offense or nuisance it must be shown that the road is an actually existing public highway, and an obstruction is not unlawful if the highway was never actually opened or was legally discontinued or abandoned; but, if the highway has a legal existence, it is ordinarily immaterial how it was established, and the proceedings for establishment are not subject to collateral attack unless entirely void for want of jurisdiction.

In order to render the obstruction of a road a public offense or nuisance it must be shown that the road is an actually existing public highway.[1] If the highway has a legal existence it is immaterial, in the absence of a statutory limitation,[2] how it was

Kan—City of Emporia v. Humphrey, 297 P 712, 715, 132 Kan 682, citing **Corpus Juris**—National Sign Co v Board of Com'rs of Douglas County, 266 P 927, 126 Kan 81

Okl—State v Friar, 25 P 2d 620, 165 Okl 145

Pa—Penn Builders v Blair County, 153 A 433, 302 Pa. 300, 75 A L R 850

Va—Standard Oil Co v Commonwealth, 109 S E 316, 131 Va 830

Wis—Druska v Western Wisconsin Telephone Co, 189 N W 152, 177 Wis 621

29 C J p 619 note 23.

Reason for rule

When a turnpike or highway is laid out for a certain width, entire space becomes devoted to public use for all purposes of a highway, and the right of public to use such highway extends to whole breadth thereof and not merely to the part which is worked or actually traveled—Miller v Pennsylvania-Reading Seashore Lines, 198 A 848, 120 N J Law 172

Signboards

A statute regulating commercial or other outdoor advertising by means of signboards along highways and designating as a nuisance signboards erected within a certain distance of the boundary of a highway was held constitutional—Hav-A-Tampa Cigar Co v Johnson, 5 So 2d 433, 149 Fla 148—John H Swisher & Son v Johnson, 5 So 2d 441, 149 Fla 132

91. N Y—People v Eckerson, 117 N Y S 418, 133 App Div 220
29 C J p 619 note 24

92. Kan—Davies v Shawver, 8 P 2d 953, 955, 134 kan 772, quoting **Corpus Juris**—National Sign Co v Board of Com'rs of Douglas County, 266 P 927, 126 Kan 81

Ky—Lipscomb v Cincinnati, N & C St Ry Co, 39 S W 2d 991, 992, 239 Ky 587, citing **Corpus Juris.**

Okl—State v. Friar, 25 P.2d 620, 165 Okl 145.

Tex—El Paso Electric Co v Leeper, Civ App, 42 S W 2d 863, 866, citing **Corpus Juris.**

Va—Price v Travis, 140 S E 644, 149 Va. 536, 56 A L R 209—Standard Oil Co v Commonwealth, 109 S E 316, 131 Va 830

29 C J p 619 note 25

Signs possibly obstructing view of motorist

Kan—National Sign Co v Board of Com'rs of Douglas County, 266 P 927, 126 Kan 81.

93. Pa—Breinig v Allegheny County, 2 A 2d 842, 332 Pa 474
29 C J p 619 note 26

94. Pa—Haines v Barclay Tp, 37 A 560, 181 Pa 521

95. Ind—Weinstein v Terre Haute, 46 N E 1004, 147 Ind 556
29 C J p 619 note 28

96. Mo—State v. Campbell, 80 Mo App 110

Particular objects

(1) An owner of land abutting a highway can erect steps, cellar doors, awnings, projecting windows cornices, balconies, and the like—Breinig v Allegheny County, 2 A 2d 842, 332 Pa 474

(2) Gas arm is vehicle for transportation and not 'encroachment," within statute prohibiting encroachments on or over highways—State v Scott, 132 A 685, 82 N H 278

97. N C—Colvin v Tallassee Power Co, 154 S E 678, 199 N C 353

Pa—Commonwealth v Stephens, 21 Pa Dist & Co 180

29 C J p 619 note 30

Basis of liability

Where damages to bridge and highways by water which escaped through a break in embankment of a dam constructed by defendant with consent of railroad commission were allegedly caused by manner in which dam was constructed or maintained, basis of defendant's liability, if any, was negligence, and there was no absolute liability under statute—Town of Wausaukee v Lauerman, 3 N W 2d 362, 240 Wis 320

98. Ark—Roberts v State, 106 S W 938, 84 Ark 477

99. Tex—Chaffin v State, Cr, 24 S W 411

1. Ala—Rodgers v Commercial Casualty Ins Co, 186 So 684, 237 Ala 301

Okl—Dolese v State, 212 P 610 23 Okl Cr 81

Or—Gentner v Kern, 103 P 2d 721, 164 Or 615

Tex—Varner v State, 145 S W 2d 198 140 Tex Cr 403

Va—Martin v Commonwealth, 165 S E 425, 159 Va 894

29 C J p 619 note 34

Affecting liability for penalty see infra § 229

Estoppel

The fact that a person, for the purpose of laying the foundation for a more formal controversy as to the existence of a highway had himself indicted for obstructing such highway and was convicted, will not estop him from denying the legal existence of the highway in a subsequent suit to enjoin him from obstructing it—Halliday v Smith, 54 S W 970, 67 Ark 310

2. Ariz—Curtis v Southern Pac Co, 8 P 2d 1078, 39 Ariz 570
29 C J p 620 note 35
Penalties see infra § 229

Prescription

Where statute provides that public way may not be acquired by prescription, closing of way so acquired is not an unlawful obstruction which may be removed—Curtis v Southern Pac Co, 8 P 2d 1078, 39 Ariz 570

Retroactive effect

A statute providing that highways not laid out according to statute shall not be deemed highways is not retroactive as to highways theretofore lawfully existing by dedication so as to bar a prosecution already commenced—State v. Atherton, 16 N H. 203.

established,[3] whether by statutory proceedings,[4] by dedication,[5] provided the dedication has been accepted,[6] or by recognition, user, or prescription[7]

It is no defense that the highway is less than the statutory width,[8] and one is not justified in obstructing a highway as opened and traveled merely because it does not correspond with the road as established[9] On the other hand the fact that the road was traveled for a greater width than laid out has been held not to subject a person to a penalty for obstructing the extra width[10] It is immaterial that there is a dispute as to the existence of the highway[11] or that the person causing the obstruction had no actual notice that the highway existed[12]

Abandonment or nonuser If the road,[13] or the portion obstructed,[14] has been legally discontinued or abandoned, there is no liability The burden of proof, however, is on one charged with obstructing a highway to show vacation or abandonment thereof[15]

The fact that the road is little used,[16] or that travel is diverted elsewhere,[17] does not authorize the obstruction of a highway if it has not been legally surrendered or vacated, although it has been held that, where a penalty is provided for obstructing a road "to the hindrance or inconvenience of travellers," defendant can show that there was another road shorter than the one obstructed which travelers might have used and did use without inconvenience[18]

Vacation. An obstruction is not justified by a proceeding for vacation which was absolutely void,[19] or by an order of vacation which did not become effective,[20] or was subsequently revoked[21]

Defects in statutory proceedings In the case of a highway established by statutory proceedings the general rule prohibiting a collateral attack thereon applies, and consequently on an issue as to one's liability for obstructing a highway it is not permissible to question the validity of the establishment,[22] unless the proceedings were entirely void for want of jurisdiction[23]

It may, it seems, be shown that the establishment was on a condition which has not been complied with,[24] and one who is alleged to have obstructed a highway laid out across his land may show that he

3. Fla - Couture v Dade County, 112 So 75, 93 Fla 342

4. Ill—Rodgers v Hess, 156 N E 811 325 Ill 603
29 C J p 620 note 36

5. Ark—Finney v State, 287 S W 741 172 Ark 115
Mo—Borders v Glenn App, 232 S W 1062, transferred, see, Sup, 226 S W 915
N J - Cline v State Highway Commission, 141 A 577 6 N J Misc 331
29 C J p 620 note 37
Dedication generally see Dedication §§ 1-9

Dedication not shown
Mo - Mayo v Schumer App, 256 S W 549

6. Mo—Borders v Glenn, App 232 S W 1062 transferred, see, Sup, 226 S W 915
29 C J p 620 note 38

7. Ala—Beverly v State, 185 So 768, 28 Ala App 451
Fla Dade County v Snyder, 191 So 185 140 Fla 135
Ga—Hyde v Chappell 22 S E 2d 313
Ky—Tolliver v Louisville & N R Co, 10 S W 2d 623 226 Ky 142
Mo - Borders v Glenn App 232 S W 1062, transferred, see, Sup, 226 S W 915
Wash State v Camp Lewis Service & Garage Co 224 P 584, 129 Wash 166
29 C J p 620 note 39

Portion not used for period
Landowner may not close road which was used uninterruptedly for prescriptive period, although portion of road not in controversy was not used required time - Thorstenson v Largaud, 284 P 92, 155 Wash 341

True location of obstructed road supposedly on disputed boundary between adjoining lands, is controlling in suit to open it Spradley v Hall Tex Civ App 57 S W 2d 182, denying rehearing 51 S W 2d 1054

8. Iowa—State v Robinson, 28 Iowa 514

9 Kan—State v Hayes 263 P 782 125 Kan 375
29 C J p 621 note 43

10 Ill—Harding v Hale 61 Ill 192

11. Kan—State v Hayes 263 P 782 783 125 Kan 375 quoting **Corpus Juris.**
Minn -State v Eisele 33 N W 785, 37 Minn 256

12. Ill—Ferris v Ward, 9 Ill 499

13. Iowa—Ward v Butcher, 18 S W 2d 963, 203 Iowa 359
Ky -Jones v Rudd, 92 S W 2d 814 263 Ky 552
29 C J p 621 note 47

Obstruction of road through farm so as to prevent access to a new road beyond a discontinued road placed at the intersection of the farm road and the discontinued road, does not impose liability—Pine Mountain R Co v Finley Ky, 117 S W 413

Legal abandonment not shown
N C—Colvin v Tallassee Power Co, 154 S E 678, 199 N C 353

14. Ind—Hamilton v State, 7 N E 97 106 Ind 361

15 N C—Long v Melton, 10 S E 2d 699, 218 N C 94
S D—Lowe v East Sioux Falls Quarry Co, 126 N W 609 25 S D 393

16. Ill—Rogers v Hess 156 N E 811, 325 Ill 603—Dumoss v Francis, 15 Ill 543

Actual use by traffic
Having acquired road by user public has right to continue its use unobstructed although it could not actually be used by traffic - California Special Road Dist v Bueker 282 S W 71 221 Mo App 435

17. Mass—Commonwealth v Belding, 13 Metc 10
Mo - Phelps v Pacific R Co, 51 Mo 477

18. Ohio - Ingersoll v Herider, 12 Ohio 527

19. U S - Felton v Ackerman, Tenn, 61 F 225 9 C C A 457
29 C J p 621 note 53

20 Mo—State v Faith, 166 S W 649, 180 Mo App 484
29 C J p 621 note 54

21. Tex—Wheeler v. McVey, Civ App, 164 S W 1100

22. Ind—Curless v State, 87 N E 129, 88 N E 339 172 Ind 257
29 C J p 621 note 56

23. S C—State v Kendall, 32 S E 300, 54 S C 192
29 C J p 621 note 57.

24. Iowa—State v Glass, 42 Iowa 56—State v Ratliff, 32 Iowa 189

received no notice of the proceedings for establishment,[25] or that his property was never condemned for highway purposes.[26] However, the defense of want of notice cannot be raised by a grantee of the person who owned the land when the highway was established,[27] or by a subsequent occupant of the land,[28] or by a person having no interest in the land taken for the road.[29]

A landowner has been held liable for obstructing a road established without compensating him,[30] although there is authority to the contrary.[31] However, a grantee cannot defend on the ground that no compensation was made to his grantor.[32]

It has been held sufficient prima facie evidence of the existence of the highway to produce the order establishing the road together with evidence that it has been used as such,[33] and this is undoubtedly the rule where there is a statutory provision to such effect.[34]

Highways not opened It is generally held that an illegal obstruction of a highway cannot occur unless the highway has been actually opened and rendered passable for travelers,[35] a partial opening, however, is apparently sufficient,[36] and a few cases hold or imply that the opening of the highway is immaterial.[37]

§ 220. Defenses

Generally, an unlawful obstruction is not justified on the ground of custom, convenience or necessity, ownership of the fee, existence of another road, or mere lapse of time; but an obstruction may be authorized by act of legislature or by the municipality affected, although such authority is strictly construed and cannot be exercised in such a manner as to constitute a source of danger to the public or to prevent the ordinary use of the highway.

An unlawful obstruction is not justified on the ground of convenience or necessity,[38] or that it is the custom of the neighborhood to create such obstructions,[39] or that there are other similar obstructions on the same road.[40] So, in a proceeding to recover a fine for damaging a highway by its unusual use in hauling, and refusing to repair it, it is no defense that hauling by others also damaged the road, unless the particular damage alleged in the petition was caused by such other hauling,[41] nor is one estopped to complain of an obstruction by the fact that he himself has obstructed another part of the road.[42]

Ownership of the fee by the person creating an obstruction is no defense,[43] although, as appears supra § 142, he has the full right to use the land provided he does not obstruct travel. It is no defense that another road exists,[44] so that an obstruction is not justified by the fact that defendant has opened a new road equally convenient.[45]

Authorized obstructions Obstructions in a highway may be authorized by act of legislature,[46] or

25 Iowa—State v Welmer, 20 N W 171, 64 Iowa 243
29 C J p 621 note 59

26. Mo—Golahar v Gates, 20 Mo 236

27 Tex—Dodson v State, Cr, 49 S W 78

28. Mass—Commonwealth v Weiher, 3 Metc 445.

29 Conn—Ingham v Brooks, 111 A 209, 95 Conn 317
29 C J p 621 note 63

30 N Y—Beisheim v People, 39 N Y S 2d 333
29 C J p 621 note 64

31. Tex—Lewis v State, 141 S W 532, 64 Tex Cr 110
29 C J p 621 note 65

32 N Y—Chapman v Gates, 54 N Y 132
Tex—Dodson v State, Cr, 49 S W 78

33. Ill—Rodgers v Hess, 156 N E 811, 325 Ill 603
29 C J p 621 note 67

34. Mo—State v Ramsey, 76 Mo 398—State v Gilbert, 73 Mo 20

35. La—O'Neill v Hemenway, 3 So 2d 210, 213, quoting **Corpus Juris.**

Mont—Peasley v Trosper, 64 P 2d 109, 103 Mont 401
29 C J p 622 note 70
Obstruction of untraveled part see supra § 218

36 Pa—Calder v Chapman, 8 Pa 529
29 C J p 622 note 71

37. Pa—Commonwealth v McNaugher, 18 A 934, 131 Pa 55
29 C J p 622 note 72

38. Ala Still v Lovelady, 117 So 481, 218 Ala 19
29 C J p 622 note 74

Relative damage
In suit to enjoin obstruction of public highways based on claim of grant from owner, relative amount of damage caused by road to defendants and expense of another road to plaintiff are irrelevant—Nicolas v Grassle, 267 P 196, 83 Colo 536

39. Pa—Commonwealth v Northern Cent R Co, 7 Pa Super 234
29 C J p 622 note 75

40. Okl—State v Friar, 25 P 2d 620, 165 Okl 145
29 C J p 622 note 76

41. Ky—Commonwealth v. Prall, 139 S W 798, 144 Ky 577.

42. Iowa—Miller v Schenck, 43 N W 225, 78 Iowa 372
29 C J p 622 note 78

43. Ark—Sullivant v Clements, 24 S W 2d 320, 180 Ark 1107
29 C J p 622 note 79

Consent to use
Owner of alleged public road having expressly consented to use was bound to show that something occurred to terminate use before obstructing it—Sullivant v Clements, supra

44 Ky—Golden v Louisville & N R Co, 14 S W 2d 379, 228 Ky 134

45. S C—State v Allen, 96 S E 401, 110 S C 278
29 C J p 622 note 81

46. Miss—Mississippi Power Co v Sellers, 133 So 594, 160 Miss 512
Neb—World Realty Co v City of Omaha, 203 N W 574, 113 Neb 396, 40 A L R 1313
Okl—Yunker v State, 7 P 2d 916, 53 Okl Cr 82
S C—State v Hughes, 145 S E 297, 147 S C 452
29 C J p 622 note 82

Pipe line
Statute was not intended absolutely to prohibit pipe line above highway, if reasonably elevated, and if permit was obtained, respecting like-

by the municipality in which the road lies.[47] Such authority, however, must be strictly construed[48] and cannot lawfully be exercised in such a manner as to constitute a source of danger to the public,[49] or prevent the ordinary use of the highway.[50]

Highway officers have no power to surrender the use of the highway for private purposes,[51] or to authorize a nuisance on the highway.[52] If the public authorities, in authorizing an obstruction, exceed their powers, such obstruction will be illegal,[53] nor can an illegal obstruction be justified by matters occurring thereafter and subsequent to the commencement of a prosecution therefor.[54] Although a dam authorized by the legislature is not a public nuisance for which indictment or injunction will lie, a county

lihood of obtaining statutory permit, if requested, maintenance of pipe line twelve and one half feet above highway for seventeen years without protest or accident conclusively showed that elevation was reasonably sufficient—Rossville Commercial Alcohol Corporation v Dennis Sheen Transfer Co, 138 So 183, 18 La App 725

Opening without approval

The word "town," as used in a statute requiring written permission from the department of public works to make openings in a state highway but permitting town to dig up state highway without the department's approval in case of immediate necessity, includes "city"—Sloper v City of Quincy, 16 N E 2d 14, 301 Mass 20

Stock driveway

Allegations of answer in action to enjoin obstruction of road across defendant's stock-raising homestead, that stock driveway established pursuant to statute was in lieu of all routes or trails previously used in vicinity of defendant's lands, stated good defense—Rozman v Allen, 68 P 2d 440, 100 Colo 503

Statute held not to afford authority for obstruction

Ky—Illinois Cent R Co v Ward, 35 S W 2d 863, 237 Ky 478

Wis—Town of Marion v Southern Wisconsin Power Co, 208 N W 592, 189 Wis 499

47. Cal—Jones v Hedges, 12 P 2d 111, 123 Cal App 742
29 C J p 622 note 83

Delegation by legislature

The legislature has the power of control over encroachments into or over public highways, from house line to house line, and this control may be delegated to municipalities—Commonwealth v Trimmer, 53 Dauph Co, Pa, 91, 34 Mun L R 37

County court

(1) County court alone had jurisdiction to permit gates across county road, notwithstanding suit to prevent such obstruction was previously commenced in circuit court—Mack v Leavell, 47 S W 2d 1067, 243 Ky 275

(2) Under some statutes, the county court is without jurisdiction, power, or authority to regulate, control, or designate the location of service utilities on state highways, and such power is vested in the state highway commission—Postal Telegraph Co v State Highway Commission, D C Or, 276 F 958

Person doing road work under lawful permit has right to use road in performance of his contract, he is not a trespasser and is chargeable with negligence only—Jones v Hedges, 12 P 2d 111, 123 Cal App 742

Construction of new way

Where dam constructed by power company under L 1907 c 189 caused flooding of portion of town road, agreement between power company and town, pursuant to which power company constructed new causeway above high-water mark, according to specifications furnished by town and acceptable to it, was held valid, and a discharge of company from further liability—Town of Dekorra v Wisconsin River Power Co, 205 N W 423, 188 Wis 501

48. Wis—Town of Marion v Southern Wisconsin Power Co, 208 N W 592, 189 Wis 499
29 C J p 622 note 84

Operation of dam

Legislative intent to relieve power company from liability for damage to highways by operation of dam will not be inferred, unless it is necessary implication of words and purpose of grant—Town of Marion v Southern Wisconsin Power Co, supra

Date obstruction authorized

County court order permitting gates was effective only from date thereof—Mack v Leavell, 47 S W 2d 1067, 243 Ky 275

Alienation of way

One who encroaches on a public way is chargeable with knowledge that the way belongs to the public, and that the local authorities can neither directly nor indirectly alien the way—U S Gypsum Co v Christenson, 197 N W 497, 226 Mich 347

49 N J—Adams v Atlantic City Electric Co, 199 A 27, 120 N J Law 357
29 C J p 622 note 85

A permit of state highway commission cannot authorize the construction and maintenance on highway of a structure dangerous to ordinary travel—Adams v Atlantic City Electric Co, supra

Public nuisance

The legislature cannot vest county authorities with power to permit the installation of a structure in a public highway which amounts to a public nuisance—Sharp v Chicago, B & Q R Co, 193 N W 150, 110 Neb 34

50. S C—Powell v Spartanburg County, 134 S E 367, 136 S C 371
29 C J p 622 note 86

County cutting off portion of highway in course of straightening and eliminating grade crossing is not authorized to close either end of old road so cut off, thereby depriving owners of property on it from using it in reaching new portion in either direction—Powell v. Spartanburg County, supra

Discrimination

Ordinance of state highway commission which prohibits obstruction except by permission of commision is not invalid as enabling commission to discriminate between property owners—North Carolina State Highway Commission v. Young, 158 S E 91, 200 N C 603

51. N Y—Driggs v Phillips, 8 N E 514, 103 N Y 77
29 C J p 622 note 87

52. Mich—U S Gypsum Co v Christenson, 197 N W 497, 226 Mich 347

N Y—Town of Mt Pleasant v City of New York, 191 N Y S 741, 199 App Div 315
29 C J p 622 note 88

53. Fla—Dade County v Snyder, 191 So 185, 140 Fla 135

Wash—State v Camp Lewis Service & Garage Co, 224 P 584, 129 Wash 166
29 C J p 622 note 89

Improper assumption of authority

(1) Where only the board of county commissioners is authorized to change and discontinue roads, single member of board has no authority to permit one to close road and obstruct highway—Dade County v Snyder, 191 So 185, 140 Fla 135

(2) Permit under ordinance authorizing making of speech in highway afforded defendant no protection for obstructing highway in this manner since it was beyond ordinance making power—Commonwealth v Surridge, 164 N E 480, 265 Mass 425, 62 A L R 402

54. Okl—Duncan v State, 181 P. 736, 16 Okl Cr 175.
29 C J p 623 note 90.

whose highway is flooded may nevertheless sue for damages.[55]

Prescriptive right. No right to maintain an encroachment on or obstruction in a highway by an individual can be gained by mere lapse of time, and acquiescence,[56] unless by statute,[57] and a statute under which an individual may acquire such a right will be strictly construed.[58]

§ 221. Persons Liable

Anyone who causes or permits an obstruction to be placed on a public highway or who maintains an obstruction placed there by someone else is liable therefor.

Anyone who causes or permits an obstruction to be placed on a public highway,[59] or who maintains an obstruction placed there by someone else,[60] is liable therefor Thus the owner is liable where a contractor abandons a contract to move a building or material and leaves it in the road,[61] and a landowner is similarly liable for the acts of his licensee[62] So one may be guilty of obstructing a highway where he orders or consents to the felling of timber on his property which falls so as to obstruct the highway, and he makes no attempt to remove such obstruction[63] One cannot, however, excuse his obstruction of the highway by showing that the person who owned the particular articles told him to place them in the highway.[64]

Corporations are liable in the same manner as natural persons,[65] and a township may itself be liable[66]

§ 222. Remedies

The legislature may provide remedies for the removal of obstructions on highways but generally such remedies are the concern of the public authorities and may not be exercised by private individuals unless they suffer special injury to their rights not common to the public.

The legislature may validly require the removal of obstructions and encroachments on highways and provide remedies for carrying out such object[67] As a general rule, the unlawful obstruction of a public highway is a matter for the public authorities and not a matter of which private individuals may complain unless they suffer some direct and special injury to their rights, not common to the public[68]

55. S C—Edgefield County v Georgia-Carolina Power Co, 88 S E 801, 104 S C 311
Wis—Town of Marion v Southern Wisconsin Power Co, 208 N W 592, 189 Wis 499

56. Ala—Alabama Great Southern R Co v Denton, 195 So 218, 239 Ala 301
Colo—Nicolas v Grassle, 267 P 196, 83 Colo 526
Iowa—Richardson v Derry, 284 N W 82, 226 Iowa 178
Ky—Breeding v Bentley, 10 S W 2d 842, 226 Ky 238
Md—Huebschmann v Grand Co, 172 A 227, 166 Md 615
Ohio—Lane v Kennedy 13 Ohio St 42
29 C J p 623 note 92

Other statement of rule
Where highway was established with a legal width, encroachments thereon by adjoining landowners, regardless of time highway was so occupied, did not give party so encroaching any right within limit of highway, either through doctrine of estoppel, laches, or adverse possession—Dickson v Davis County, 205 N W 456, 201 Iowa 741

Loss immaterial
Public must be allowed to resume its rights at any distance of time disregarding loss to those who have appropriated and erected improvements on public highway—Cline v State Highway Commission, 141 A 577, 6 N J Misc 331

The purpose of statute providing that an occupant cannot acquire title to a public way by adverse possession after a certain date and that any obstructions encroaching on the way should be removed on written notice was to prevent an abutting owner from encroaching on a public way—Henry v City of Melrose, 23 N E 2d 110, 304 Mass 205

57. Me—Farnsworth v. Rockland, 22 A 394, 83 Me 508
29 C J p 623 note 93

58. Me—Farnsworth v Rockland, supra

59. Ark—Sullivant v Clements, 24 S W 2d 320, 180 Ark 1107
N J—Howard v Lehigh Valley R Co, 150 A 356, 106 N J Law, 466, reversing 146 A 587, 7 N J Misc 581
29 C J p 623 note 96
Liability for injuries to travelers see infra §§ 248–253

Estoppel
One who participated as a marker in the establishment of a road, and who leased lands that were accessible by means of the use of the road, is estopped from asserting a right to obstruct the road—Taylor v Betts Naval Stores Co, 91 So 126, 83 Fla 242

Closing of road
Property owner's right to have road opened is against road board and police jury closing road—Dyer v Alexander, 5 La App 633

60. N J—Gainfort v 229 Raritan Avenue Corporation, 22 A 2d 893, 127 N J Law 409
29 C J p 623 note 97.

61. N Y—Lawton v Olmstead, 58 N Y S 36, 40 App Div 544
29 C J p 623 note 98

62. Mass—Rockport v Rockport Granite Co, 58 N E 1017, 177 Mass 246, 51 L R A 779

63. Ark—Sanders v. State, 18 Ark 198
Ohio—Nagle v Brown, 37 Ohio St 7

64. N Y—McDermott v. Conley, 11 N Y S 403

65. Mass—Rockport v Rockport Granite Co, 58 N E 1017, 177 Mass 246, 51 L R A 779
29 C J p 623 note 3

66. Pa—Lamb v Pike Tp, 64 A. 671, 215 Pa 516
Injuries to travelers from defects or obstructions see infra § 250

67. Ky—Commonwealth v Watson, 3 S W 2d 1077, 223 Ky 427, 58 A L R 212

Alternative remedies
Statute was held to provide alternative methods for removal of obstructions on highway by highway surveyor—Jarvis v Town of Claremont, 139 A 747, 83 N H 176

68. U S—Carolina Power & Light Co v South Carolina Public Service Authority, C C A S C, 94 F 2d 520, affirming, D C, 20 F Supp 854 certiorari denied 58 S Ct 1048, 304 U S 578, 82 L Ed 1541, South Carolina Power Co v South Carolina Public Service Authority, 58 S Ct 1048, 304 U S 578, 82 L Ed. 1541, and South Carolina Electric & Gas Co v. South Carolina Public

§ 223. —— Actions and Proceedings to Compel Removal in General

When authorized by statute, the removal of an obstruction may be sought in a civil action or proceeding maintained by a public officer or by an individual injuriously affected, such a proceeding should include proper notice to parties interested, and should be tried on sufficient pleadings and on competent and sufficient evidence, and the decision reached is subject to proper review.

When authorized by statute, a civil action lies to compel the removal of obstructions in a highway[69] Such action may be brought by the proper officer acting for the state, county, or municipality having rights in the highway,[70] or in a proper case by individuals injuriously affected[71] Ejectment by a township will lie against those encroaching on a highway[72]

In a number of jurisdictions the statutes provide for special proceedings of a summary nature,[73] where the location of a highway is not in question[74]

Proceedings to compel removal of obstructions should include proper notice to parties interested,[75] should be tried by the tribunal appointed by statute,[76] on sufficient pleadings,[77] describing the obstruction and its location,[78] and on competent[79] and

Service Authority, 58 S Ct 1049 304 U S 578, 82 L Ed 1541
Fla —Marion County v Ray, 144 So 845, 107 Fla 124

69. Ala —Fuller v Knight, 2 So 2d 605, 241 Ala 257, 135 A L R 760
Cal —Averill v Superior Court in and for Madera County, 73 P 2d 1247, 23 Cal App 2d 621
Pa —Lenhart v Wright 133 A 495 286 Pa 351—Summerhill Borough v Sherbine, 88 Pa Super 419, reversing 7 Pa Dist & Co 389
29 C J p 623 note 6
Remedies of abutting owners see supra § 143
Mandamus to compel removal of obstruction see the C J S title Mandamus § 179, also 38 C J p 755 notes 91–1
Removal of obstructions from city streets see the C J S title Municipal Corporations §§ 1751–1753, also 44 C J p 1015 note 38–1022 note 52
"The unlawful obstruction of a public highway is a public nuisance that may be redressed by appropriate judicial proceedings at the suit of proper governmental authorities"—Marion County v Ray, 144 So 845, 846, 107 Fla 124

Title to road
County may try question of its title to road in action to abate obstructions therein as public nuisance —Okanogan County v Johnson, 287 P 15, 156 Wash 515

Municipalities have power to maintain such actions at law or in equity as may be appropriate to prevent and abate nuisances obstructing highways or rendering them useless —Standard Oil Co v Commonwealth 109 S E 316, 131 Va 830

70. Ill —Stephens v Chicago, B & Q R Co, 135 N E 68 303 Ill 49 reversing 217 Ill App 1
Kan —State Highway Commission of Kansas v Puskarich, 83 P 2d 132, 148 Kan 388
29 C J p 623 note 7

Impairment of common right
Where common or public right, such as use of a highway, has been invaded or impaired, private injury merges in common nuisance and injury to all citizens, and the right is to be vindicated at law by public prosecution, and in equity by information by attorney general, or other officer of commonwealth —Warner v City of Taunton, 148 N E 377, 253 Mass 116

Highway commission
Kan —State Highway Commission of Kansas v Puskarich, 83 P 2d 132, 148 Kan 388

District attorney
Cal —Averill v Superior Court in and for Madera County, 73 P 2d 1247, 23 Cal App 2d 621—People v Power, 175 P 803, 38 Cal App 181

Superintendent of public works
Unless private road across a state highway is constructed under conditions prescribed by superintendent of highways person constructing such road is subject to a fine and removal of private road by superintendent on petition to county or supreme court —Delaware County v Wakeman, 6 N Y S 2d 166, 168 Misc 644

71. Conn —Tress v Pivorotto, 133 A 35, 104 Conn 389

Necessity of special damage
Where common or public right which the people generally may exercise and enjoy such as use of highways, has been invaded or impaired, mere deprivation or obstruction of such use affecting all persons alike, but not causing special or peculiar damage to anyone, does not furnish valid cause of action to an individual —Warner v City of Taunton, 148 N E 377, 253 Mass 116

72. N J —Riverside Tp v Pennsylvania R Co, 66 A 433 74 N J Law 476

73. Kan —Chaput v Demars, 243 P 311, 120 Kan 273, rehearing denied 244 P 1042, 120 Kan 612
Va —Tower v Farrar, 135 S E 811, 146 Va 211
29 C J p 623 note 10

Equipment used in transporting coal over road was not subject to summary destruction, where transportation was not nuisance per se —Clay County Court v Adams, 155 S E 174, 109 W Va 421

Court may not control discretion of town board in determining, in statutory proceeding, what hedges and trees shall be cut down within township highway limits —Wagner v Town Board of Carlos Tp, 235 N W 27, 182 Minn 571—Powell v. Township of Carlos, 225 N W 296, 177 Minn 372

74. Mich —Gregory v Knight, 14 N W 700 50 Mich 61
29 C J p 624 note 11

75. N J —State v Pierson, 37 N J. Law 216—Vantilburgh v Shann, 24 N J Law 710
Preliminary notice to remove obstruction see infra § 224

76. N Y —Pugsley v. Anderson, 3 Wend 468
29 C J p 624 note 13

77. Cal —People v Covell, 62 P 2d 602, 17 Cal App 2d 627.
29 C J p 624 note 14

Rule to show cause
Statute relative to removal of gates from public road can be treated as part of supervisors rule to show cause in proceeding thereunder —Tower v Farrar, 135 S E 811, 146 Va 211

Conformity with judgment
Judgment opening portion of road was not erroneous as granting different right of way than that pleaded and prayed for —Spradley v Hall, Tex Civ App, 57 S W 2d 182, denying rehearing 54 S W 2d 1054

78. Cal —People v Power, 175 P. 803, 38 Cal App 181

Allegations held insufficient to establish that alleged obstruction existed within lines of highway as originally established —People v. Covell, 62 P 2d 602, 17 Cal App 2d 627

79. Tex —Saunders v Zumwalt, Civ. App., 52 S W 2d 955, error dismissed
29 C J. p 624 note 16.

sufficient[80] evidence. The findings should be specific,[81] and will be binding on the parties[82]

The decision as to removal may usually be reviewed by appeal[83] or by certiorari[84] The allowance of costs is generally a matter of statutory regulation[85]

§ 224. —— Preliminary Notice or Order to Remove

Under statutes governing proceedings by officers, it is required, in cases covered by the statute, that the person creating the obstruction be given proper and sufficient preliminary notice or order to remove the obstruction before action may be instituted against him for removal, or to recover a penalty, or before indictment or summary removal

The statute, in providing for proceedings by the officers, frequently requires a preliminary notice or order to the person creating the obstruction, requiring him to remove it[86] Such notice may be necessary before action for removal,[87] or to recover a penalty,[88] or before indictment[89] or summary removal[90]

However, the requirement is limited to the cases covered by the statute, and under the circumstances of the particular case notice has been held unnecessary[91] before summary removal,[92] indictment,[93] or suit to remove,[94] or before an action for a penalty.[95]

The order or notice to remove obstructions in highways should be issued by the proper court[96] and served on the party interested,[97] and must be in the form required by statute,[98] containing a specific description of the encroachment,[99] stating the legal width of the highway,[1] allowing a proper length of time for removal,[2] and ordering the removal to be made at the proper time[3] However, the fact that the notice is not sufficiently definite will not, it seems, make the highway officer removing an obstruction a trespasser[4]

§ 225. —— Summary Removal without Legal Formality

As a general rule, public highway authorities have power to effect the summary removal of obstructions, and their decision that a structure is a nuisance is ordinarily conclusive, although they are liable for an abuse of authority A traveler actually hindered, or one specially injured, may personally remove an obstruction, but decisions differ as to whether one not specially injured may personally abate an obstruction

Highway officers or other public authorities whose duty it is to keep highways in repair and free from

80 Cal —People v Covell, 62 P 2d 602 17 Cal App 2d 627
Tex —Saunders v Zumwalt Civ App, 52 S W 2d 955, error dismissed
Va —Tower v Farrar, 135 S E 811, 146 Va 211
Wis —Town of Hustisford v Knuth, 209 N W 687, 190 Wis 495
29 C J p 624 note 17

Order held authorized
Fact that signboard obstructed view at railroad and highway crossing of trainmen and travelers authorized order requiring removal thereof —Gibbons v Missouri, K & T R Co 285 P 1040, 142 Okl 146

State's ownership of highway held sufficiently proved
Wash —State v Camp Lewis Service & Garage Co, 224 P 584, 129 Wash 166

Evidence held insufficient to support judgment
Cal —People v Covell, 62 P 2d 602, 17 Cal App 2d 627

81 Mich —Gregory v Knight, 14 N W 700, 50 Mich 61
29 C J p 624 note 18

82. N J —Amerman v Briggs, 11 A 423, 50 N J Law 114
29 C J p 624 note 19

83. Cal —Hall v Kauffman, 39 P 756, 106 Cal 451
29 C J p 624 note 20

84. N J —Darby v Nash, 18 A 682, 52 N J Law 127
29 C J p 624 note 21.

85. Mich —Gregory v Knight, 14 N W 700, 50 Mich 61
29 C J p 624 note 22

Taxing costs equally between parties in suit involving defendants' right to close public road was not abuse of discretion —Spencer v Johns, 21 S W 2d 961, 180 Ark 441

86. Iowa —Harbacheck v Moorland Telephone Co, 226 N W 171, 208 Iowa 552
29 C J p 624 note 23

87. Mich —Le Blanc v Kruger, 42 N W 980 75 Mich 561
29 C J p 624 note 24

88. Ill —Seidschlag v Antioch 69 N E 949, 207 Ill 280 affirming 109 Ill App 291
29 C J p 624 note 25

89. Va —Martin v Commonwealth, 165 S E 425, 159 Va 894
29 C J p 624 note 26

90. Iowa —Harbacheck v Moorland Telephone Co, 226 N W. 171, 208 Iowa 552
29 C J p 624 note 27

91. Wis —Mineral Point v Kealy, 160 N W 63, 164 Wis 351
29 C J p 624 note 28

92. Mich —De Boer v Adams, 124 N W 540, 159 Mich 560
29 C J p 624 note 29

93. Mo —State v Craig, 79 Mo App 412
Pa —Kelly v Commonwealth, 11 Serg & R 345

94. Ind —Epler v Niman, 5 Ind 459

95. Ill —Seidschlag v Antioch 69 N E 949 207 Ill 280, affirming 109 Ill App 291
29 C J p 624 note 32

96. Ky —Churchill v Commonwealth 13 B Mon 333

97. Iowa —Harbacheck v Moorland Telephone Co, 226 N W 171, 208 Iowa 552
29 C J p 625 note 34

Service of notice by registered mail on landowner to remove fence from highway was insufficient and ineffective where statute required personal service —Harbacheck v Moorland Telephone Co, 226 N W 171, 208 Iowa 552

98. Kan —Chaput v Demars, 244 P 1042, 120 Kan 612, denying rehearing 243 P 311, 120 Kan 273
29 C J p 625 note 35

99. Kan —Chaput v Demars, supra.
29 C J p 625 note 36

Description held sufficient
Kan —Chaput v Demars, supra

1. N Y —Cook v Covil, 18 Hun 288.
29 C J p 625 note 37

2. Iowa —Cook v Gaylord, 59 N W. 30, 91 Iowa 219
29 C J p 625 note 38

3. Wis —Mineral Point v Kealy, 160 N W 63, 164 Wis 351
29 C J p 625 note 39

4. N Y —Hathaway v Jenks, 22 N Y S 421, 67 Hun 289

obstructions have authority under their general powers or by express statutory provisions summarily to remove obstructions,[5] notwithstanding the statute gives a remedy by action for a penalty.[6] However, such authority does not exist where the road is not open and legal,[7] or where the obstruction is not a nuisance.[8]

While the decision of highway officers that a structure is an obstruction is generally conclusive,[9] nevertheless they are liable for an abuse of authority or wanton acts in the exercise thereof.[10] Such liability will not attach, however, to the person who notified the officer to remove the obstruction, but did not participate in its actual removal.[11]

Statutes sometimes provide that, on receiving notice to remove, the landowner may prevent summary action by serving on the road officers a notice of his claim of right,[12] but failure to give the notice will not estop the owner from setting up his title.[13]

By private person. A traveler actually hindered may personally remove an obstruction in a highway,[14] as may anyone else if specially injured,[15] but it is a condition to the exercise of the right that the removal does not involve a breach of the peace, and that due care is exercised in effecting the removal.[16]

It has been held, on the other hand, that a private citizen not impeded in his progress traveling on the highway and not showing any special interest or injury may not personally abate an obstruction.[17] In such circumstances, the statutory remedy must be followed, and an individual has no right to take the law into his own hands.[18] However, there are cases which uphold the doctrine that special damage is not necessary to permit one to remove an obstruc-

5. Kan.—National Sign Co. v. Board of Com'rs of Douglas County, 261 P. 927, 126 Kan. 81—Chaput v. Demars, 243 P. 311, 120 Kan. 273, rehearing denied 244 P. 1042, 120 Kan. 612.
N.H.—Jarvis v. Town of Claremont, 139 A. 747, 83 N.H. 176.
N.Y.—Bolton v. State, 4 N.Y.S.2d 53, 54, 167 Misc. 444, citing **Corpus Juris.**
Pa.—Orton v. Dalrymple, 92 Pa. Super. 336—Shryock v. Lower Merion Tp., 21 Pa.Dist. & Co. 411—In re Roadside in Lower Swatara Tp., Dauphin County, 53 Dauph. Co. 235.
29 C.J. p. 625 note 43.
Necessity of notice to remove see supra § 224.

Duty

Where highway fences of abutting owner project into highway, county officials are charged with duty of removing such obstructions therefrom.—Richardson v. Derry, 284 N.W. 82, 226 Iowa 178.

Trespass

The entry by state highway department employee on private property for the purpose of removing a defective tree which constituted a hazard to traffic on a public highway would not be a "trespass".—Inabinett v. State Highway Department, 12 S.E.2d 848, 196 S.C. 117.

Necessities of case

The power of superintendent of public works to remove obstruction from state highway is ordinarily confined to doing only what necessities of case justify.—Bolton v. State, 4 N.Y.S.2d 53, 167 Misc. 444.

6. Ky.—Hurst v. Cassiday, 5 Ky.L. 771.
N.Y.—Cook v. Harris, 61 N.Y. 448.

7. Pa.—Brake v. Crider, 107 Pa. 210.
29 C.J. p. 625 note 45.
Existence and legality of highway generally see supra § 219.

Pending appeal

Where county had obtained judgment vesting title to land therein for public road, from which judgment landowner had appealed, an ex parte order of commissioners' court directing sheriff to tear down fences and barns on land in controversy and open road, without process on judgment was not authorized.—Moore v. McLennan County, Tex.Civ.App., 275 S.W. 478.

8. Wis.—Konkel v. Polla, 99 N.W. 453, 122 Wis. 143.
29 C.J. p. 625 note 46.

9. Mass.—Bay State Brick Co. v. Foster, 115 Mass. 431.
Okl.—Patillo v. Moore Bros. Ice & Milling Co., 73 P.2d 842, 181 Okl. 318.

10. Okl.—Patillo v. Moore Bros. Ice & Milling Co., supra.
29 C.J. p. 625 note 48.

Negligent removal of tank

Where officer charged with duty of removing obstructions on highway had tank obstructing highway moved by use of pry poles, so that tank rolled over into ditch and was damaged, he was liable to owner of tank.—Patillo v. Moore Bros. Ice & Milling Co., supra.

Liability not established

The state was not liable for alleged wrongful destruction of house by state employees in course of removing it from state highway where evidence did not establish that it would have been feasible to construct detour into adjoining bank or that equipment was available to move house or to cut it into sections so that it could have been reassembled after removal.—Bolton v. State, 4 N.Y.S.2d 53, 167 Misc. 444.

11. Pa.—Crouse v. Miller, 19 Pa. Super. 384.

12. Mich.—Osborn v. Longsduff, 37 N.W. 923, 70 Mich. 127.
29 C.J. p. 626 note 50.

13. Conn.—Brownell v. Palmer, 22 Conn. 107.
N.Y.—Borries v. Horton, 16 Hun 139.

14. Ky.—Shaheen v. Dorsey, 270 S.W. 452, 208 Ky. 89.
Utah.—Muir v. Kay, 244 P. 901, 906, 66 Utah 550, quoting **Corpus Juris.**
29 C.J. p. 626 note 53.

15. Utah.—Muir v. Kay, supra, quoting **Corpus Juris.**
29 C.J. p. 626 note 54.

16. Utah.—Muir v. Kay, 244 P. 901, 66 Utah 550.

17. Utah.—Muir v. Kay, 244 P. 901, 906, 66 Utah 550, quoting **Corpus Juris.**
29 C.J. p. 626 note 55.

18. Utah.—Muir v. Kay, 244 P. 901, 906, 66 Utah 550, quoting **Corpus Juris.**
29 C.J. p. 626 note 58.
"There are circumstances where at common law a private subject had the right to abate a public nuisance in a public highway . . . but, unless the private subject had occasion to make use of the highway or if the obstruction did not impede his progress traveling on the highway, he was required to leave the public injury to be redressed by the public authorities. It was the existence of an emergency which justified interference by the individual, and the right of a private citizen to abate the obstruction or encroachment was limited by the necessities of the case".—Muir v. Kay, 244 P. 901, 906, 66 Utah 550.

tion,[19] and which hold that a statute providing for removal of obstructions by the highway officers is merely cumulative, and does not prevent their removal by an individual.[20]

§ 226. —— Injunction in General

a. In general
b By private person

a. In General

On suit by the proper public authority, injunction will commonly lie to compel the removal of an unauthorized obstruction from a legally existing public highway on showing special damage, an irreparable injury, and the nonexistence of an adequate remedy at law; in a proper case, injunction will also lie to restrain the unlawful removal of an alleged obstruction or encroachment.

Injunction will commonly lie to compel the removal of an obstruction[21] from a legally existing public highway,[22] on showing special damage,[23] an irreparable injury,[24] and the nonexistence of an adequate remedy at law,[25] although in some cases injunction has been held to be a cumulative remedy.[26] However, the court cannot restrain the maintenance of an obstruction authorized by statute[27] Where an injunction has issued, further litigation in respect of the public rights may be enjoined.[28]

The rule applicable to nuisances generally, that when the question of right is not clear it must usually be first established at law before a resort to equity, see the C J S title Nuisances § 117, also 46 C J. p 773 note 25–p 775 note 54, applies in suits to enjoin obstructions in highways,[29] unless there is some statutory provision to the contrary.[30]

Who may sue The suit for injunction may be brought at the instance of the public authority charged with the power and duty to establish and maintain public highways,[31] or, in a proper case, by a private individual specially damaged by the obstruction, as discussed infra subdivision b of this section So suit may be brought on behalf of the state,[32] either by the attorney general[33] or by or on

19. Conn —Burnham v Hotchkiss, 14 Conn 311
29 C J p 626 note 56

20 Mich —Neal v Gilmore, 104 N W 609, 141 Mich 519
29 C J p 626 note 57

21. U S —Lamp v Irvine, D C Md, 41 F Supp 685
Ala —Alabama Great Southern R Co v Denton, 195 So 218 239 Ala 301 —Still v Lovelady, 117 So 481, 218 Ala 19
Conn —Taylor v Cooke, 154 A 349, 113 Conn 162
Fla —Marion County v. Ray, 144 So 845, 107 Fla 124
Ill —Ginter-Wardein Co v City of Alton, 17 N E 2d 976, 370 Ill 101— Stephens v Chicago, B & Q R Co, 135 N E 68, 303 Ill 49, reversing 217 Ill App 1
Md —County Com'rs of Carroll County v Rickell, 126 A 711, 146 Md 463
N Y —Town of Albion v Ryan, 194 N Y S 261, 201 App Div 717—Town of Mt Pleasant v City of New York, 191 N Y S 741, 199 App Div 315
Okl —State ex rel State Highway Commission v Gillam, 105 P 2d 773, 188 Okl 10
Pa —Borough of Midland v Steubenville, East Liverpool & Beaver Valley Traction Co, 150 A 300, 300 Pa 134—Orton v Dalrymple, 92 Pa Super 336—Commonwealth ex rel Reno v. Smith, 48 Dauph Co 217
29 C J p 626 note 60.
Defenses generally see supra § 220
Preliminary order or notice to remove obstruction see supra § 224.

Doubtful claim
County suing to compel removal of obstruction in public highway is not entitled to relief where its claims are reasonably doubtful —Marion County v Ray, 144 So 845, 107 Fla 124

22. Ark —Harrison v Harvey, 150 S W 2d 758, 202 Ark 486
29 C J p 626 note 61
Existence and legality of highway generally see supra § 219

Location and width
County commissioners, before applying for mandatory injunction were not required to have location and width of street determined, allegations of bill being positive as to location and width of street —County Com'rs of Carroll County v Rickell, 126 A 711, 146 Md 463

Where alleged obstruction was not within limits of highway, injunction will be denied
Ark —Arkansas State Highway Commission v Anderson, 43 S W 2d 356, 184 Ark 763.
R I —Macari v Marandola, 9 A 2d 21, 63 R I 369

23. Conn —Taylor v. Cooke, 154 A 349, 113 Conn 162
Tenn —Day-Evans Iron Works v Louisville & N R Co, 32 S W 2d 1038, 161 Tenn 649
29 C J p 626 note 62.

24. Conn —Taylor v. Cooke, 154 A 349, 113 Conn 162
29 C J p 626 note 63.

25. Fla —Marion County v. Ray, 144 So 845, 107 Fla. 124
Md —Sieling v. Uhl, 153 A. 614, 160 Md 407
29 C.J. p 627 note 64.

Other statement of rule
Courts of equity are as a rule loath to interfere to enjoin encroachments on public highways in a proceeding by the attorney general, where the law makes other remedies available. —Wiley v Murray, 196 N W 446, 225 Mich 170

26. Iowa —Clayton County v Herwig, 69 N W 1035, 100 Iowa 631
29 C J p 627 note 65

27. Wis —Town of Marion v Southern Wisconsin Power Co, 208 N W 502 189 Wis 499

28 W Va —Weston v Ralston, 36 S. E 446, 48 W Va 170

29. N J —Swinley v Hall, 92 A 586, 83 N J Eq 349
29 C J p 627 note 67

30. Wis —Neshkoro v. Nest, 55 N. W 176, 85 Wis 126
29 C J p 627 note 68

31. Ala —Alabama Great Southern R. Co v Denton, 195 So 218, 239 Ala 301
Ill —Stephens v Chicago, B & Q R Co, 135 N E 68, 303 Ill. 49, reversing 127 Ill App 1.

Intervening petition
Public officers may be entitled to a judicial determination of the right to enjoin interference with a highway on an intervening petition as well as in an independent suit — Leach v Manhart, 43 P 2d 959, 96 Colo 397

32. Okl —State v Friar, 25 P 2d 620, 165 Okl 145
29 C J p 627 note 69

33. Okl —State v Friar, 25 P 2d 620, 623, 165 Okl. 145, citing **Corpus Juris.**

the relation of the prosecuting attorney of the county in which the highway is located [34]

Such suit may also be brought by a county,[35] although it has been held that county commissioners cannot maintain such suit in the absence of statutory authority,[36] especially where the obstruction is on a road under the supervision and control of some governmental agency other than the county [37] The suit may also be brought by a township,[38] or by road officers,[39] although there is authority to the contrary [40] The United States has an interest in a highway built with federal aid entitling it to sue for an injunction [41]

The removal of obstructions and encroachments may be restrained by injunction where it appears that the legal existence of the highway is in doubt, or that the obstruction complained of is maintained under a valid statute, or that officers are proceeding in an unlawful manner [42]

b. By Private Person

A private individual is entitled to an injunction against encroachments or obstructions on an existing public highway, in a plain case, when, and only when, he shows that he has sustained special damage, that there is no adequate remedy at law, that injunction is necessary to preserve his rights from irreparable injury, and that he is not estopped by his actions from securing relief.

Where a road is shown to be an existing public highway,[43] a private individual is entitled to an injunction against encroachments or obstructions thereon when, and only when, he has sustained special damage,[44] different not merely in degree but in kind from that suffered by the public at large,[45]

Pa - A Wishart & Sons Co v Erie R Co, 128 A 730, 283 Pa 100
29 C J p 627 note 70

34. Pa --A Wishart & Sons Co v Erie R Co, supra
29 C J p 627 note 71

35. Colo —Leach v Manhart, 43 P 2d 959, 96 Colo 397
Md —County Com'rs of Carroll County v Rickell, 126 A 711, 146 Md 463
29 C J p 627 note 72

36. Ohio —Trumbull County v Pennsylvania Co, 24 Ohio Cir Ct 550

37. N D —Morton County v Hughes Electric Co, 208 N W 108, 53 N D 742

Obstruction on township road
Ohio -Low v Leichty, 25 Ohio Cir Ct 210
29 C J p 627 note 74

38. Pa —Orton v Dalrymple, 92 Pa Super 336
29 C J p 627 note 75

39. Iowa - Myers v Priest, 123 N W 913, 145 Iowa 81
29 C J p 627 note 76

40 Ill — Stephens v Chicago, B. & Q R Co, 135 N E 68, 303 Ill 49, reversing 217 Ill App 1
29 C J p 627 note 77

Town highway commissioners
Where, under statute, authority to order the removal of obstructions from a state aid road is vested in the state highway commission, the state highway engineer, or the county superintendent of highways, the town highway commissioners have no authority to order such removal — Stephens v Chicago, B & Q R Co, 135 N E 68, 303 Ill 49, reversing 217 Ill App 1

41. U S —Babcock v U S, C C A Ind, 9 F 2d 905, modifying, D C, U. S. v Babcock, 6 F 2d 160.

42. Iowa —Davelaar v Marion County, 277 N W 744, 224 Iowa 659
32 C J p 253 notes 34, 35

Presumptions and evidence
In such a proceeding, a statute providing that proceedings by officers shall be presumed regular is inapplicable, and the highway officers must establish their jurisdiction to establish the highway, but, if they do so, the suit should be dismissed evidence held to establish location of fence as within legal width of highway —Davelaar v Marion County, 277 N W 744, 224 Iowa 659

Instructions held proper
Ga —Hyde v Chappell, 22 S E 2d 313

43. Mo — Mavo v Schumer, App, 256 S W 519—Borders v Glenn App, 232 S W 1062, transferred, see, Sup, 226 S W 915
29 C J p 627 note 81
Suit by abutting owner see supra § 143
Existence and legality of highway generally see supra § 219

Where change of location of highway is properly effected in accordance with statute, obstruction of discontinued highway will not be enjoined —Jones v Rudd, 92 S W 2d 811, 263 Ky 552

44. U S —Carolina Power & Light Co v South Carolina Public Service Authority, C C A S C, 94 F 2d 520, 521, citing **Corpus Juris** — Lamp v Irvine, D C Md 41 F Supp 684
Ala - - Alabama Great Southern R Co v Denton, 195 So 218, 239 Ala 301 —Hanna v Harman, 162 So 109, 110, 230 Ala 620, citing **Corpus Juris.**
Fla —Marion County v Ray, 144 So 845, 107 Fla 124
Ill —Stephens v Chicago, B & Q R Co, 135 N E 68, 303 Ill 49, reversing 217 Ill App 1
Ky —East Cairo Ferry Co v Brown, 25 S W 2d 730, 233 Ky 299
N M —Tomlin v Town of Las Cruces, 31 P 2d 258, 38 N M 247, 97 A L R 185
Okl —Mackey v Aycock, 201 P 365, 83 Okl 175
Pa —Feldman v Empire Oil & Grease Co, 6 Pa Dist & Co 47—Variano v Rose, 2 Fay L J 119
Tenn —Day-Evans Iron Works v Louisville & N R Co, 32 S W 2d 1038 161 Tenn 649, citing **Corpus Juris**
Utah - -Muir v Kay 244 P 901, 905 66 Utah 550, quoting **Corpus Juris.**
Vt —Pilgrim Plywood Corporation v Melendy, 1 A 2d 700, 703 110 Vt 12, quoting **Corpus Juris.**
29 C J p 628 note 82

One parting with ownership of land adjoining strip in which easement was claimed could not enjoin interference with strip as public highway —Rider v Narigon, 215 N W 497, 204 Iowa 530

Remote and contingent damages
Damages to plaintiffs from obstruction of public way was too remote and contingent to furnish basis for injunction to abate public nuisance —Taylor v Cooke, 154 A 349, 113 Conn 162

Burden of repair
A private corporation having a contract to make and keep in repair all the roads in a township may sue to restrain an obstruction which may increase the burden of repair or add to the difficulty of suitable supervision —Lehigh Coal & Navigation Co v Inter-County St R. Co., 31 A. 471, 167 Pa 75

45. Ind - -Burton v Sparks, 36 N E 2d 962, 109 Ind App 531
Ky —East Cairo Ferry Co v Brown, 25 S W 2d 730 233 Ky 299
Mass —Loring v Bryant, 183 N E. 757, 281 Mass. 372.

but the rule requiring proof of special injury does not apply where plaintiff, in a prior suit, was adjudged to have an easement in the highway.[46]

Where an obstruction cuts off access to property used for business or other purposes, injunction will lie on the ground of special damage.[47] So, where a property owner by reason of such obstruction is compelled to take a more circuitous route in order to reach his property, he sustains a special injury different from that suffered by the general public, and may maintain an action to have the obstruction removed.[48] On the other hand it has been held that a property owner has no right of action where the obstruction does not prevent access to his land but merely causes him personal inconvenience in being compelled to take a more circuitous route in going from his property to necessary points.[49] A mere traveler on the highway cannot bring an action to abate an obstruction unless he shows some injury greater than personal inconvenience suffered by the necessity of taking a more circuitous route in reaching his destination.[50]

In addition to proving special damage plaintiff must show that he has no adequate remedy at law,[51] and that the injunction is necessary to preserve his rights[52] from irreparable injury[53] in a plain case,[54] having due regard to the public interest.[55] It has been held that recovery will be denied where plaintiff is estopped to complain of the obstruction,[56] as where he himself is an obstructor,[57] or has delayed applying for relief,[58] but it has also been held that one cannot be estopped from insisting on the maintenance of a road by the fact that he has permitted another to improve the land covered by the road.[59] The complaining party is not required first to apply to the municipal authorities for relief before bringing suit.[60]

§ 227. —— Proceedings to Enjoin

An action to enjoin the obstruction of a highway is within the jurisdiction of a court of general equity jurisdiction. The bill must join all necessary parties, and allege all facts necessary to establish the right to relief, and the proceedings must conform with general rules in respect of burden of proof, admissibility, weight, and sufficiency of evidence, and trial, judgment, and review.

Jurisdiction and parties. A court of general eq-

Mont.—State ex rel. Babcock v. Lensman, 99 P.2d 492, 110 Mont. 51, citing **Corpus Juris.**
Pa.—A. Wishart & Sons Co. v. Erie R. Co., 128 A. 730, 283 Pa. 100.
Tenn.—Day-Evans Iron Works v. Louisville & N. R. Co., 32 S.W.2d 1038, 1039, 161 Tenn. 649, quoting **Corpus Juris.**
Vt.—Pilgrim Plywood Corporation v. Melendy, 1 A.2d 700, 703, 110 Vt. 12, quoting **Corpus Juris.**
29 C.J. p. 628 note 83.

46. Tex.—Santa Fé Town-site Co. v. Norvell, Civ.App., 187 S.W. 978.
29 C.J. p. 629 note 85.

47. Mo.—Mayo v. Schumer, App., 256 S.W. 549.
Okl.—Mackey v. Aycock, 201 P. 365, 83 Okl. 175.
Or.—Whitney v. Crittendon, 229 P. 378, 112 Or. 278.
Tenn.—Thornton v. Connelly, 15 Tenn. App. 436.
Vt.—Pilgrim Plywood Corporation v. Melendy, 1 A.2d 700, 703, 110 Vt. 12, quoting **Corpus Juris.**
29 C.J. p. 629 note 86.

48. Ky.—Stephens v. Hubbard, 27 S.W.2d 665, 234 Ky. 115.
Mo.—Borders v. Glenn, App., 232 S.W. 1062, transferred see, Sup., 226 S.W. 915.
Okl.—Mackey v. Aycock, 201 P. 365, 83 Okl. 175.
29 C.J. p. 629 note 87.
Rights of abutting owners see supra §§ 141-143.
Steep approach.
Where a new road had been built to take the place of an old road, but complainants could not reach the new road because of a steep approach, they were entitled to restrain interference with their use of the old road.—Blake v. Skelton, 5 Tenn. App. 539.

49. Mont.—State ex rel. Babcock v. Lensman, 99 P.2d 492, 110 Mont. 51.
29 C.J. p. 629 note 88.

50. Ky.—Husband v. Cotton, 188 S.W. 380, 171 Ky. 177, L.R.A.1917A 1150.
29 C.J. p. 629 note 89.

51. Ala.—Hanna v. Harman, 162 So. 109, 110, 230 Ala. 620, citing **Corpus Juris.**
Vt.—Pilgrim Plywood Corporation v. Melendy, 1 A.2d 700, 110 Vt. 12.
29 C.J. p. 629 note 90.
Remedy held inadequate.
Where dam would flood the only road leading to plaintiff's valuable timberland, plaintiff was entitled to injunctive relief as against contention that plaintiff had adequate remedy at law by petitioning town to lay out a highway giving access to the property.—Pilgrim Plywood Corporation v. Melendy, 1 A.2d 700, 110 Vt. 12.

52. U.S.—U. S. v. Rindge, D.C.Cal., 208 F. 611.
29 C.J. p. 629 note 91.

53. Conn.—Taylor v. Cooke, 154 A. 349, 113 Conn. 162.
29 C.J. p. 629 note 92.

54. Ill.—Fors v. Anderson, 110 N.E. 361, 270 Ill. 45.
29 C.J. p. 629 note 93.

55. W.Va.—Wees v. Coal & Iron R. Co., 46 S.E. 166, 54 W.Va. 421.
29 C.J. p. 629 note 94.

56. Pa.—Philadelphia Tapestry Mills, Inc. v. Philadelphia Battery Co., 11 Pa. Dist. & Co. 153.
29 C.J. p. 629 note 95.

57. Iowa.—Brutsche v. Bowers, 97 N.W. 1076, 122 Iowa 226.
Pa.—Philadelphia Tapestry Mills, Inc. v. Philadelphia Battery Co., 11 Pa. Dist. & Co. 153.

58. Ill.—Richeson v. Richeson, 8 Ill. App. 204.

59. Ky.—Mills v. Dawson, 247 S.W. 764, 766, 197 Ky. 518.
Reason for rule.
"If [plaintiff's] action could be given the effect contended for, he could estop himself from using the road while others who were not guilty of the estoppel could insist on its maintenance, and, if all the members of the public should become so estopped, except the constituted road authorities of the county, then it would be possible for the members of the public to close up and abandon a public road contrary to the wishes of those authorities, as well as contrary to the forms prescribed by law."—Mills v. Dawson, supra.

60. Tenn.—Day-Evans Iron Works v. Louisville & N. R. Co., 32 S.W.2d 1038, 161 Tenn. 649.

uity jurisdiction has jurisdiction of an action to enjoin the obstruction of a highway [61]

The bill for an injunction must join all interested parties [62] The joinder as complainants of persons not specially injured by the obstruction is erroneous, but such error is not fatal where the other complainants are entitled to the relief sought [63] Where the bill seeks relief on the ground that the highway was never lawfully closed, it will not be dismissed because an adjoining owner was not made a party [64] Where the obstruction was created by one of two coowners of adjoining property, the other coowner is not a necessary party [65]

In a suit by a township, the state, at the instance of the attorney general, need not be made a party, [66] but defendant cannot litigate the question of the legal boundaries of the highway without impleading all parties in interest, including the county and abutting landowner [67] In order that there may be someone responsible for the costs, a person with a private interest in the public right may be made relator in a suit brought by the attorney general, [68] but the solicitor general is not authorized to act on the information of private citizens where the petition does not allege more than a bare purpresture and does not show a public nuisance [69] The proceedings may be amended on motion by striking out the name of one not a proper party [70]

Pleading The bill for injunction must show that the obstruction complained of is unlawful, [71] and allege all other facts which may be necessary to establish plaintiff's right to the relief sought [72] The fact that the way is an existing public highway must be alleged, [73] but the manner in which it became such need not be stated [74] Where the bill is filed by a private individual it must set forth facts which show that plaintiff has suffered special injury different in kind from that suffered by the general public [75]

An answer founded on prescription must allege actual possession [76] An insufficient answer is demurrable [77] Amendments [78] not inconsistent with the original bill [79] may properly be allowed

The evidence must conform to the pleadings [80]

61. Ala —Alabama Great Southern R Co v Denton, 195 So 218, 239 Ala 301
Ill —Stephens v Chicago, B & Q R Co, 135 N E 68, 303 Ill 49, reversing 217 Ill App 1
Ind - Eads v Kumley 119 N E 219, 67 Ind App 361

62. Pa —Borough of Midland v Steubenville East Liverpool & Beaver Valley Traction Co, 150 A 300 300 Pa 134
Who may sue see supra § 226

63. Ill —Fois v Anderson, 110 N E 361, 270 Ill 45

64. Tenn —Hill v Hoffman Ch App 58 S W 929

65. Cal —Sherwood v Ahart 169 P 240, 35 Cal App 84

66. Pa — North Manheim Tp's Appeal, 14 A 137, 10 Pa Cas 261

67. Iowa —Phillips v Crawford, 179 N W 937, 191 Iowa 443

68. Del — Reinhardt v Chalfant, 110 A 663, 12 Del Ch 214
29 C J p 630 note 10

If private person conveys his interest the grantee is properly substituted as relator —Reinhardt v Chalfant, supra

69. Ga — Southeastern Pipe Line Co v Garrett ex rel Le Sueur, 16 S E 2d 753, 192 Ga 817

70. Mich —Babcock v Heenan, 159 N W 494, 193 Mich 229

71. Vt —Pilgrim Plywood Corporation v Melendy, 1 A 2d 700, 110 Vt 12
29 C J p 630 note 13

Violation of public right
County suing to compel removal of highway obstruction must allege and prove violation of some specific public right and that relief of permanent character should be awarded —Marion County v Ray, 144 So 845, 107 Fla 121

Allegation held sufficient
Vt —Pilgrim Plywood Corporation v Melendy, 1 A 2d 700, 110 Vt 12

72 Tenn Day-Evans Iron Works v Louisville & N R Co 32 S W 2d 1038 161 Tenn 649
Tex Miller v Moravietz, Civ App, 59 S W 2d 242
29 C J p 630 note 14

Petition held to state cause of action
La —Dyer v Alexander, 5 La App 633
Md —Smith v Shiebeck, 24 A 2d 795 180 Md 412
Tex —Seabrook Cemetery Ass'n v Rice Civ App, 295 S W 296

Petition held not to state cause of action
Ariz —Curtis v Southern Pac Co, 8 P 2d 1078, 39 Ariz 570

Restoration of highway
Complaint by town against power company flooding highway did not state cause of action in equity for mandatory relief, where there was no allegation that restoration of highway was feasible, reasonable, or desirable —Town of St Joseph v Willow River Power Co, 237 N W 83, 205 Wis 231

73. Conn —Tress v Pivorotto, 133 A 35, 104 Conn 389
29 C J p 630 note 15

Pleading existence of highway generally see supra § 93

Allegation held sufficient
Md Smith v Shiebeck, 24 A 2d 795, 180 Md 412
Pa —Commonwealth v Pardee Bros. & Co, 165 A 396, 310 Pa 353

74 Hawaii —Ideta v Kuba, 22 Hawaii 28
Minn —Buffalo v Halling, 52 N W 931 50 Minn 551

75 Conn - Taylor v Cooke, 154 A 349 113 Conn 162
Tenn Day Evans Iron Works v Louisville & N R Co 32 S W 2d 1038, 161 Tenn 649
29 C J p 630 note 17

Allegations held sufficient
Md - Smith v Shiebeck, 21 A 2d 795, 180 Md 412
29 C J p 630 note 17 [a]

Allegations held insufficient
Tenn —Day-Evans Iron Works v Louisville & N R Co, 32 S W 2d 1038, 161 Tenn 649
29 C J p 630 note 17 [b]

76. Ky —Newcome v Crews, 32 S W 947 98 Ky 339, 17 Ky L 899

77. Ky —Mack v Leavell, 47 S W 2d 1067, 243 Ky 275

78. Mich —Babcock v Heenan, 159 N W 494, 193 Mich 229

79. Tenn —Hill v Hoffman, Ch App, 58 S W 929
29 C J p 630 note 20

80. Iowa —Long v Wilson, 173 N W 76, 186 Iowa 834
Utah —Farr v Wheelwright Constr Co, 163 P. 256, 49 Utah 274.

Thus evidence of dedication of the alleged highway is inadmissible unless pleaded [81] Such evidence is not admissible under a petition alleging a highway formally established under the statute,[82] although it has been held that an allegation that the way obstructed was "a public street or highway duly and legally established" authorizes evidence of a highway by dedication [83] Where the allegations under a videlicet as to the number of feet a fence encroaches on the highway are denied by the answer, complainant can only be required to prove that the fence in some appreciable distance over the road line [84] A defense not pleaded will not be considered [85]

Evidence The burden is on plaintiff to show[86] by a clear preponderance of proof[87] that the road alleged to be obstructed is a legally existing public highway, and that the alleged obstructions are within its right of way [88] Any competent evidence which is relevant to show such facts is admissible [89] So evidence is admissible as to the effect a continuance of the obstruction would have in diminishing the value of plaintiff's land [90]

The general rules as to the weight and sufficiency of evidence are applicable in determining whether plaintiff has made out a case entitling him to relief.[91]

Trial, judgment, and review. Depending on whether plaintiff has proved his case, a motion for nonsuit should be granted[92] or denied [93] Where the evidence as to whether the road obstructed is a public highway is conflicting, the issue should be submitted to the jury [94]

Instructions which are sufficient to enable the jury to answer accurately the issues submitted are sufficient,[95] but instructions assuming facts in issue, or presenting issues not raised by the pleadings or which are confused and misleading, are erroneous [96] Where legal terms are used in an instruction, the court should, on request, explain their meaning [97]

As in other civil actions, the judgment must conform to the issues,[98] and to the findings thereon [99] So the rule that a judgment or decree must be definite and certain applies to the description of a highway in a judgment or decree enjoining an obstruc-

81. Utah—Farr v Wheelwright Constr Co, supra

82. Iowa—Long v Wilson, 173 N W 76, 186 Iowa 834

83. Conn—Hartford v New York & N E R Co, 22 A 37, 59 Conn 250

84 Ill—Manteno v Surprenant, 210 Ill App 438

85. Or—Gentner v Kern, 103 P 2d 721, 164 Or 645

86. Ind—Stringham v Chicago, I & L Ry Co 141 N E 247, 81 Ind App 20
Tex—Evans v Scott, 83 S W 874, 37 Tex Civ App 373

Validity of proceedings
Every presumption will be indulged in favor of validity of proceedings to establish road in suit to enjoin obstruction thereof—Cottman v Lochner 278 P 71, 40 Wyo 378

Discontinuance of road
Where defendants introduced order of road commissioner discontinuing the road, burden was on plaintiff to rebut presumption that commissioner lawfully discharged his duties—White v McCroskey, 8 S E 2d 827 122 W Va 261

87 Md—Easter v Overlea Land Co, 99 A 893 129 Md 627
Or—Gentner v Kern, 103 P 2d 721, 164 Or 645

88. Or—Gentner v Kern, supra
Pa—Bartholomew v Baker, 17 A 2d 724, 143 Pa Super 149

89. Tex—Evans v Scott, 83 S W 874, 37 Tex Civ App 373.
29 C J p 631 note 29.
Evidence of highway generally see supra § 94

Evidence held inadmissible
Kan—Campbell v McDonald, 15 P 2d 462, 136 Kan 280
Tex—Haby v Hicks Civ App, 61 S W 2d 871, error dismissed

90. Ind—Martin v Marks, 57 N E 249, 154 Ind 549

91. Ga—Southeastern Pipe Line Co v Garrett ex rel Le Sueur, 16 S E 2d 753 192 Ga 817
La—Police Jury of Parish of St James v Borne, 5 So 2d 301 198 La 959
Mo—State ex rel Pulley v Thompson, App, 277 S W 56—Phelps v Dockins, App, 234 S W 1022
Or—Gentner v Kern, 103 P 2d 721, 164 Or 645
Pa—Commonwealth ex rel Fox v Faux, 95 Pa Super 482
Tex—Spradley v Hall, Civ App, 51 S W 2d 1054, rehearing denied 57 S W 2d 182—Harrell v Hill County, Civ App 31 S W 2d 686, error dismissed—Ladies' Benev Soc of Beaumont v Magnolia Cemetery Co, Civ App, 268 S W 198, affirmed Com App, 288 S W 812
Utah—Marazzani v U S Fuel Co, 231 P 531, 65 Utah 123
Wash—Stevens County v Burrus, 40 P 2d 125, 180 Wash 120
W Va—White v McCroskey, 8 S E 2d 827, 122 W Va 261
29 C J p 631 note 32

Finding held justified
Mo—State ex rel Adams v. Hann, 30 S.W 2d 15

92 N C—Cohoon v Roughton, 1 S E 2d 362 215 N C 116

93. N C—Merrell v Bridges 195 S E 374, 213 N C 123—Russell v Garner, 172 S E 405, 205 N C 791

94 N C—Russell v Garner, 172 S E 405 406 205 N C 791, citing **Corpus Juris.**
Tex—Davis v Meckel, Civ App, 57 S W 2d 622
29 C J p 631 note 33
Questions for jury as to what constitutes obstruction see supra § 218

95. Tex—Miller v Moravietz, Civ App 59 S W 2d 242

96. Tex—Evans v Scott, 83 S W 874 37 Tex Civ App 373

97. Tex—Evans v Scott, supra

98 Cal—People v Quong Sing, 127 P 1052, 20 Cal App 26
Tex—Santa Fé Town-Site Co v Norvell Civ App, 207 S W 960

99. Cal—Hitchcock v Lovelace, 119 P 2d 151, 47 Cal App 2d 818

Judgment held warranted by findings
Minn—Carpenter v Gantzer, 204 N W 550, 164 Minn 105

Judgment not supported by findings
The finding that for more than thirty-five years the general public, including plaintiffs, and their predecessors in interest, had used and traveled a certain cattle trail did not support the conclusion and judgment that an easement existed by virtue of dedication by owner as a public highway or by virtue of prescription—Hitchcock v Lovelace, 119 P.2d 151, 47 Cal App 2d 818.

tion thereon.[1]

The court should issue such an order as is warranted by the circumstances of the case.[2] Where the encroachment complained of consists of growing shrubbery, the decree should allow a sufficient time in which to remove it at a proper season so that it may not be unnecessarily injured.[3] Where it is reasonably apparent that the facts shown require a final result contrary to complainant's theory, a preliminary injunction will be dissolved.[4] Under a preliminary injunction in a suit to remove an obstruction, plaintiff county, where unsuccessful, will not be required to take up road surfacing on the disputed area, and defendant if damaged thereby has a remedy on the injunction bond.[5]

The general rule that appellate courts will not consider objections which were not raised on the trial applies to actions of this nature.[6]

§ 228. —— Action for Damages

a Right of action
b Proceedings
c Damages

a. Right of Action

A county, town or township, road officer, or private individual sustaining special damage may maintain an action for damages against one who obstructs or encroaches upon a road shown to be an existing public highway.

A county[7] or a town or township[8] may maintain an action for damages against one who injures a public highway. The statute sometimes provides, however, that the action shall be brought by particular officers.[9]

The right of action by a township accrues when the injury has been consummated.[10] A township being a political subdivision of the state, and its officers public agents, it cannot, when suing for injury to a highway, be charged with contributory negligence because of the failure of the trustee to exercise reasonable care to prevent such injury.[11]

Private persons. As a general rule, an action for damages for obstructing a highway may be brought by a private person, only if he has sustained special damage differing not merely in degree, but in kind, from that suffered by the community at large,[12] but it is immaterial whether such special damage is direct or only consequential.[13] What constitutes special or particular damage within this rule depends, in large measure, on the facts of each particular case.[14] Generally there is no right of recov-

1. Cal—Hitchcock v Lovelace, supra
29 C J p 631 note 41

2. U S—Babcock v U S, C C A Ind, 9 F 2d 905, modifying, D C, U S v Babcock, 6 F 2d 160

Modification

Permanent injunction against digging of drainage ditch across highway was modified so as to continue in force only until arrangements for bridge were made—Babcock v U S, supra

3. Pa—Wickham v. Twaddell, 25 Pa Super 188

4. Ala—Williams v Prather, 196 So 118, 239 Ala 521

5. Fla—Marion County v Ray, 144 So 845, 107 Fla. 124

6. N Y—Wakeman v Wilbur, 42 N E 341, 147 N Y 657
29 C J p 631 note 44

7. Ind—Steuben Tp v Lake Shore & M S R Co, 108 N E 545, 58 Ind App 529
29 C J p 631 note 46
Defenses generally see supra § 220

8. N Y—Booth v Orleans, 123 N Y S 700, 66 Misc 339, affirmed 131 N Y S 1088, 147 App Div 240
Vt—Town of Sharon v Anahma Realty Corporation 123 A 192, 97 Vt 336
Wis—Town of Marion v. Southern Wisconsin Power Co, 208 N W 592, 189 Wis 499
29 C J p 631 note 47

Penalty not exclusive remedy

The right of a town to recover for injuries to its highways is not affected by penalty provided by statute, as such right was available before the enactment of the statute—Town of Sharon v Anahma Realty Corporation, 123 A 192, 97 Vt 336

9. N Y—Bidelman v State, 18 N E 115, 110 N Y 232, 1 L R A 258
29 C J p 631 note 48

Commissioner of highways

An action for willful and reckless injury to the highways of a town may be brought by the commissioner of highways, notwithstanding the election of a commissioner of roads because of the adoption of the township system, under Pub Acts 1895 No 230—Struble v Republic Motor Truck Co, 185 N W 792, 216 Mich 299

10. Ind—Pittsburgh, C, C & St L R Co v Iddings, 62 N E 112, 28 Ind App 504

11. Ind—Pittsburgh, C, C & St L R Co v Iddings supra

12. Ala—Gulf States Steel Co v Beveridge, 96 So 587, 209 Ala. 473
Ky—Solar Coal Co v Hoskins, 295 S W 989, 220 Ky 693
Md—Johnson v Town of Oakland, 129 A 648, 148 Md 432.
Minn—Hanson v Hall, 279 N W 227, 202 Minn 381
N C—Elizabeth City v Gregory, 164 S E 354 355, 202 N C 759, citing **Corpus Juris**—Colvin v Tallassee Power Co, 154 S E 678 681 199 N C 353, quoting **Corpus Juris.**
Tex—Travelers Ins Co v Key, Civ App, 146 S W 2d 813
29 C J p 632 note 52–11 C J p 9 note 91
Action by abutting owner see supra § 143

Negligence immaterial

Whoever obstructs highway rendering its use hazardous is liable to one sustaining special damages, irrespective of negligence—Johnson v Hoffman, 284 P 567, 132 Or 46

13. Wyo—Cottman v Lochner, 278 P 71, 40 Wyo 378

14. Wyo—Cottman v Lochner, supra

Special injury warranting recovery

(1) Loss of plaintiff's sheep and shrinkage of others and lost time of employees, due to delay caused by defendant's obstruction of highway—Cottman v Lochner, supra

(2) Where complainants had entered into a contract to improve the road, and, because of the obstruction to the road by reason of its being flooded with water, they were unable to pursue the work.—Brewer v. Mis-

ery by one who, in common with the general public, is merely deprived of the use of a highway through defects or obstructions therein [15] So also mere personal inconvenience to a landowner in going to and from his property is not a special injury entitling him to damages,[16] where the obstruction does not come into physical contact with his property or is not on that portion of the road abutting on such property [17]

On the other hand, special injury affording a right of action exists where access to plaintiff's property is cut off [18] It has also been held that a person is specially injured where, because of the obstruction, he is compelled to pursue a circuitous route in reaching his property[19] or in performing a contract [20] Under some statutes a town is liable to all persons who may "in any wise" suffer injury from such defects or obstructions [21]

Existence of public highway As in other proceedings involving obstructions and encroachments, it must appear that the thoroughfare is an existing public highway [22]

b. Proceedings

In actions for damages for the obstruction of a highway, general rules of procedure apply with respect to jurisdiction, venue, parties, pleading, evidence, trial, judgment, review, and costs In addition to the recovery of damages plaintiff may, in a proper case, have judgment for the abatement of the obstruction

Jurisdiction, venue, and parties Actions for damages caused by unlawful obstructions are governed by the ordinary rules as to jurisdiction [23] A statute giving justices of the peace jurisdiction of such actions does not necessarily deprive the circuit court of jurisdiction in like cases [24] It has been held that actions of this nature are local and should be brought in the county where the road lies [25]

Under statutes authorizing an action to be brought by the trustee of an express trust, a township trustee may sue in his official capacity without joining the township with him [26]

Pleading The ordinary rules of pleading govern the sufficiency of the declaration or complaint in an action for damages resulting from the wrongful obstruction of a highway [27] The pleading must show that the road obstructed is a public highway,[28] although the manner in which it came into existence need not be alleged [29] The fact that the highway has been unlawfully obstructed[30] in violation of plaintiff's legal rights[31] must also be alleged, and the highway be described[32] sufficiently to notify defendant of the cause of action [33]

The length and breadth of the obstruction need not be charged,[34] but a complaint which fails to locate it in such a manner as to enable the court to order its abatement, in a case where such an order is sought, is defective [35] Failure to designate the points of obstruction with sufficient particularity is not ground for demurrer but must be taken advantage of by motion to make the pleading more specific [36]

souri Pac R Co 257 S W 53, 161 Ark 525

(3) Other illustrations — Johnson v Town of Oakland, 129 A 648 148 Md 432—29 C J p 632 note 52 [b]

15 Minn —Hanson v Hall, 279 N W 227 202 Minn 381
29 C J p 632 note 54

16 Ala — Walls v Smith, 52 So 320, 167 Ala 138, 140 Am S R 24
29 C J p 632 note 56

17. Fla — Jacksonville, T & K W R Co v Thompson, 16 So 282, 34 Fla 346 26 L R A 410

18. Ark —Sullivant v Clements, 24 S W 2d 320, 180 Ark 1107
N C —Elizabeth City v Gregory, 164 S E 354, 355, 202 N C 759, citing **Corpus Juris**—Colvin v Tallassee Power Co 154 S E 678, 681, 199 N C 353, quoting **Corpus Juris.**
29 C J p 632 note 53

19. Wash —Ingalls v Eastman, 112 P 372, 61 Wash 289
29 C J p 633 note 58

20. Wash —Sholin v Skamania Boom Co, 105 P 632, 56 Wash 302, 28 L R A,N S, 1053
29 C J p 633 note 59

21. R I —Williams v Tripp, 11 R I 447

22. Ala —Dunn v Gunn, 42 So 686, 149 Ala 583
Ind —Cleveland, C, C & St L R Co v Christie, 100 N E 299, 178 Ind 691
Existence or legality of highway generally see supra § 219

23. La —Allard v Lobau, 2 Mart N S 317

24. Mich — Knorr v Macomb Cir Judge, 43 N W 1099, 78 Mich 168

25. Md —Crook v Pitcher, 61 Md 510

26 Ind —Pittsburgh, C, C & St L R Co v Iddings, 62 N E 112, 28 Ind App 504

27. Ark —Brewer v Missouri Pac R Co, 257 S W 53, 161 Ark 525
29 C J p 633 note 70

28. Ga —Hillside Cotton Mills v Ellis, 97 S E 459, 23 Ga App 45
29 C J p 633 note 71

29. Cal —Leverone v Weakley, 101 P 304, 155 Cal. 395
Ind —Cincinnati, R & M R Co v Miller, 72 N E 827, 36 Ind App 26, petition overruled 73 N E 1001, 36 Ind App 26

30 N Y —Ennis v Myers, 51 N Y S 550, 29 App Div 382

31. Ark —Brewer v Missouri Pac R Co, 257 S W 53, 161 Ark 525
29 C J p 633 note 74
Duty of care and maintenance
A declaration by a town for injuries to its highways is prima facie sufficient to show that plaintiff town was charged by statute with their proper care and maintenance, and hence not vulnerable to demurrer on the ground that it failed to allege such duty on the part of plaintiff town —Town of Sharon v Anahma Realty Corporation, 123 A 192, 97 Vt 336

32. Cal —Leverone v Weakley, 101 P 304, 155 Cal 395
29 C J p 633 note 75

33. Ala —Goggans v Myrick, 31 So 22, 131 Ala 286

34. Mass —Snow v Adams, 1 Cush 443

35. Iowa —Sloan v Rebman, 23 N W 274, 66 Iowa 81

36. Ky —Leslie County v Southern

Where the action is brought by a private individual, the special and peculiar damages suffered by him beyond that sustained by the public being the gist of the action, the facts showing such damage must be alleged in the complaint [37]

As in other actions, the pleading and proof must correspond, and a material variance is fatal [38]

Evidence. The burden is on plaintiff to show the existence of a public highway,[39] and that he was injured by the obstruction [40] Any evidence relevant to plaintiff's right of action,[41] and the damages sustained,[42] or to the defense pleaded by defendant,[43] is admissible if otherwise competent under the general rules of evidence in civil actions.

The general rules governing the weight and sufficiency of evidence apply to actions of this kind [44] The evidence of the highway commissioner should be considered as that of any other witness, and his opinions are not binding [45]

Trial, judgment, and review; costs. As in civil actions generally, questions of fact on conflicting evidence are for the jury;[46] but issues without any evidence to support them should not be submitted to the jury.[47] Whether a person is required by statute to remove an obstruction is a question for the court [48]

The court should instruct on all the issues,[49] and should conform such instructions to the pleadings and the evidence [50] So an instruction which excludes or ignores matters in evidence is erroneous [51]

The verdict should cover all the issues presented by the pleadings.[52] It has been held, however, that, where a paragraph for obstructing a private way is joined with one for obstructing a public highway, a verdict for plaintiff is good, although it fails to specify whether the way is public or private.[53]

In addition to the recovery of damages plaintiff may, in a proper case, have judgment for the abatement of the obstruction,[54] but such relief cannot be given where the complaint and verdict are uncertain with respect to the location of the obstruction [55]

The general rules that objections not raised in the trial court cannot be availed of on appeal,[56] and

Lumber Co, 89 S W 242, 28 Ky L 335

37. Md—Johnson v Town of Oakland, 129 A 648, 148 Md 432
Minn—Erspamer v Oliver Iron Mining Co, 229 N W 583, 179 Minn 475
Tex—Travelers Ins Co v Key, Civ App, 146 S W 2d 813
29 C J p 633 note 81

Pleadings held sufficient
Ark—Brewer v Missouri Pac R Co, 257 S W 53, 161 Ark 525
29 C J p 633 note 81 [d]

38. Minn—Village of Benson v St Paul, M & M R Co, 64 N W 393, 62 Minn 198
29 C J p 634 note 83

39. Ind—Matlock v Hawkins, 92 Ind 225

40. Cal—Lewiston Turnpike Co v Shasta & Weaverville Wagon Road Co, 41 Cal 562

41. Ala—Central of Georgia Ry Co. v Faulkner, 114 So 686, 217 Ala 82
29 C J p 634 note 86

Negligence
Where basis of liability, if any, of owner of dam for damages to bridge and highways by water escaping through a break in embankment of dam was owner's negligence, question as to character of rainfall at time of break in dam was simply one of circumstances bearing on issue of owner's negligence—Town of Wausaukee v Lauerman, 3 N W 2d 362, 240 Wis 320.

42. Ky—Golden v. Louisville & N R Co, 14 S W 2d 379, 228 Ky 134
29 C J p 634 note 87

43. Ohio—Bisher v Richards, 9 Ohio St 495
Pa—Mellick v Pennsylvania R Co, 53 A 340, 203 Pa 457

44 Ala—Gulf States Steel Co v Beveridge, 96 So 587, 209 Ala 473
Tex—Travelers Ins Co v Key, Civ App, 146 S W 2d 813
29 C J p 634 note 91

45 Mich—Parkey v Galloway, 111 N W 348, 147 Mich 693

46 Ala—Central of Georgia Ry Co v Faulkner, 114 So 686, 217 Ala 82
N C—Russell v Garner, 172 S E 405, 406, 205 N C 791 citing **Corpus Juris**—Colvin v Tallassee Power Co, 154 S E 678, 199 N C. 353
29 C J p 634 note 94
Question for jury as to what constitutes obstruction see supra § 218

Issues properly submitted
In action by municipality to recover from dam owner for damages to bridge and highways by water which escaped through a break in embankment of dam, where issue was whether owner was negligent in construction or maintenance of dam, submitting of question whether rainfall at time of break was greater than an ordinarily prudent and intelligent owner of a dam ought reasonably to anticipate was improper as constituting a splitting of issue of owner's negligence but, having been submitted, it was proper to assign plaintiff burden of proof with respect to it—Town of Wausaukee v Lauerman, 3 N W 2d 362, 240 Wis 320

Motion for nonsuit denied
N C—Colvin v Tallassee Power Co, supra

47. Ky—Turner Elkhorn Mining Co v Spencer, 124 S W 2d 772, 276 Ky 473
Pa—Hershey v Kerbaugh, 88 A 1009, 242 Pa 227

48. S C—Smith v Gilreath, 48 S C 262, 69 S C 353

49. Conn—Beardslee v French, 7 Conn 125, 18 Am D 86

Instruction held erroneous
Ky—Golden v Louisville & N R Co, 14 S W 2d 379, 228 Ky 134

50. Ky—Solar Coal Co v Hoskins, 295 S W 989, 220 Ky 693

51. Ky—Louisville & N R Co. v Whitley County Ct, 49 S W 332, 20 Ky L 1367
29 C J p 634 note 98

52. Ind—Fossion v Landry, 24 N E 96, 123 Ind. 136

53. Ind—Ross v Thompson, 78 Ind 90

54. Iowa—Platt v Chicago, B & Q R Co, 37 N W 107, 74 Iowa 127.

55. Ind—American Furniture Co v. Batesville, 38 N E 408, 139 Ind 77.

56. Cal—Hall v Kauffman, 39 P. 756, 106 Cal 451
29 C J p 634 note 4.

that a verdict on conflicting evidence will not be disturbed,[57] apply to actions for the obstruction of highways. In such actions the general rules with regard to the allowance of costs are applicable.[58]

c. Damages

The damages recoverable are such as proximately result from the wrong complained of and may consist of the impairment in value of plaintiff's land, or the cost of removal of the obstruction if less than the value of the land, or, in the case of action by a governmental subdivision, of the amount that has been or will be necessarily expended in making repairs. Punitive damages are sometimes allowed for willful obstructions.

In an action against one who has wrongfully obstructed a highway, the damages recoverable are such as proximately result from the wrong complained of[59] and may consist of the difference between the rental[60] or fair market[61] value of plaintiff's land with and without the nuisance. The length of time the obstruction remained may be taken into account.[62] However, if the obstruction may be removed at a trifling cost[63] or at a cost less than the value of the land,[64] the measure of damages is the cost of removal. A person who unlawfully occupies a portion of a public road is not liable for rents or for the value of its use or occupation.[65]

Punitive damages may be allowed for willful obstructions.[66] Some statutes expressly authorize the recovery of double or treble damages in case of a willful obstruction,[67] but recovery of such damages may not be had in the case of an obstruction which is not willful and unlawful but which has been authorized by the public authorities.[68] Where the entire claim is for damages peculiar to plaintiff and no recoverable damages are alleged in the complaint, the existence of nominal or general damages cannot be presumed from the mere wrongful act alleged.[69]

On the question of damages in an action by a private person a road is not to be considered a public way unless actually in condition for use.[70] Where the action is brought by a town or other governmental subdivision, the measure of damages is the amount which has been or will be necessarily expended in making repairs,[71] and if the injury requires the building of a new road in a different location the additional expense of maintaining such road is an element of damages.[72] However, in such

57. Me.—Bradford v. Hume, 38 A. 143, 90 Me. 233.

58. Mich.—Knorr v. Macomb Cir. Judge, 43 N.W. 1099, 78 Mich. 168.
29 C.J. p. 634 note 7.

59. Ky.—Solar Coal Co. v. Hoskins, 295 S.W. 989, 220 Ky. 693.
La.—Plantiago v. Snell, 123 So. 192, 11 La. App. 191.
29 C.J. p. 634 note 8.

Cost of improving road

Where complainants were under contract to improve highway and they could not get across the flooded part of the road to complete their work on the other side, the true measure of damages was the extra cost of improving the flooded part of the road by the cheapest method practicable, either by building it up or draining it.—Brewer v. Missouri Pac. R. Co., 257 S.W. 53, 161 Ark. 525.

Taxes worked out by taxpayer

Town, in suit against power company for damage to highways in operation of dam, can recover amount for repairs represented by highway taxes worked out by taxpayer, as well as taxes paid in cash.—Town of Marion v. Southern Wisconsin Power Co., 208 N.W. 592, 189 Wis. 499.

Loss of profits

In action for obstruction of highway, one whose business was interrupted may recover lost profits, if ascertainable with reasonable certainty.
Ky.—Solar Coal Co. v. Hoskins, 295 S.W. 989, 220 Ky. 693.
N.Y.—Barnes v. Midland R. Terminal Co., 112 N.E. 926, 218 N.Y. 94, modifying 131 N.Y.S. 750, 147 App. Div. 89, and reversing 146 N.Y.S. 1033, 161 App. Div. 621.

60. Colo.—Jackson v. Kiel, 22 P. 504, 13 Colo. 378, 16 Am.S.R. 207, 6 L.R.A. 251.

61. Ky.—Golden v. Louisville & N.R. Co., 14 S.W.2d 379, 228 Ky. 134.
29 C.J. p. 634 note 10.

Existence of other equally good roads may be considered as affecting the amount of depreciation resulting from the obstruction but does not of itself preclude recovery of damages for depreciation of market value of land.—Golden v. Louisville & N.R. Co., supra.

62. Ky.—Louisville & N.R. Co. v. Whitley County Ct., 49 S.W. 332, 20 Ky.L. 1367.

63. Pa.—Mellick v. Pennsylvania R. Co., 53 A. 340, 203 Pa. 457, reversing 17 Pa.Super. 12.

Part of loss

Where plaintiff, suing for obstruction of road, could have avoided part of loss at reasonable expense, such expense is measure of recovery for that part of loss.—Solar Coal Co. v. Hoskins, 295 S.W. 989, 220 Ky. 693.

64. Pa.—Hershey v. Kerbaugh, 88 A. 1009, 242 Pa. 227.

65. La.—New Basin Canal & Shell Road v. H. Weston Lumber Co., 33 So. 923, 109 La. 925.

66. Ala.—Tutwiler Coal, Coke & Iron Co. v. Nail, 37 So. 634, 141 Ala. 374.

67. Ky.—Wood Mosaic Co. v. Britt, 150 S.W. 355, 150 Ky. 357.

68. Wis.—Oconto County v. Union Mfg. Co., 208 N.W. 989, 190 Wis. 44.

Raising of dam

Power company damaging highway by raising dam with permission of railroad commission was not liable under statute for treble damages.—Oconto County v. Union Mfg. Co., supra.

69. Ala.—Walls v. Smith, 52 So. 320, 167 Ala. 138, 140 Am.S.R. 24.

70. Mich.—Wicks v. Ross, 37 Mich. 464.

71. Wis.—Town of Marion v. Southern Wisconsin Power Co., 208 N.W. 592, 189 Wis. 499.
29 C.J. p. 635 note 19.

Future damage

Town must repair damage partially caused by overflow of dam, from year to year, and bring separate and successive actions against dam owner to recover amount attributable to it.—Town of Marion v. Southern Wisconsin Power Co., 208 N.W. 592, 189 Wis. 499.

Town having incurred no expense in restoration of highways flooded by power company could not sue power company for damages.—Town of St. Joseph v. Willow River Power Co., 237 N.W. 83, 205 Wis. 231.

72. N.H.—Monroe v. Connecticut River Lumber Co., 39 A. 1019, 68

action inconvenience or injury to the traveling public cannot be considered.[73]

§ 229. —— Penalties and Actions Therefor

a Liability
b Proceedings

a. Liability

Under statutes in many jurisdictions, a penalty may be imposed, after notice or order to remove, for willful obstruction of, or encroachment on, a legally laid out public highway, or in some instances on a highway by user, but recovery may be denied where the obstruction is slight or does not interfere with travel.

It is frequently provided by statute that a penalty may be imposed, after notice or order to remove, for encroachments and obstructions[74] made willfully,[75] on a public highway[76] legally laid out,[77] but not generally on a highway by user,[78] although under some statutes roads by prescription are held to be included[79]

Such statutes, being penal, must be strictly construed[80] Recovery may be denied where the obstruction is slight[81] or does not interfere with travel[82] Where the statute imposes a penalty on one who injures a road by its unusual use, and fails to repair it after notice, it is not necessary that the road should have been a good road before it was injured.[83] Under a statute imposing a penalty for willfully obstructing a ditch constructed for draining a highway, the fact that the ditch was improperly laid out is no defense,[84] but it may be shown that the acts complained of did not interfere with the drainage[85]

b. Proceedings

(1) In general
(2) Trial, judgment, and review; costs

(1) In General

Actions to recover statutory penalties for the obstruction of highways are generally considered civil, and not criminal, proceedings, and are within the jurisdiction of the courts designated by statute. Such actions must be timely brought, in the name of the state or other governmental agency or private individual given a right of action by the statute, and must be based on proper pleadings and competent and sufficient evidence.

Nature and form. In most jurisdictions actions to recover statutory penalties for the obstruction of highways are civil and not criminal proceedings[86] Such penalty cannot be recovered in an action for an injunction,[87] although under some statutes causes of action to abate an encroachment and to recover a penalty for its maintenance may be united[88] A qui tam information will not lie to recover a penalty under a statute providing that one half the penalty shall go to the informer, to be recovered on warrant, petition, or action[89]

Jurisdiction and limitations The jurisdiction of the court is governed by local law,[90] and in many states it is conferred on justices of the peace,[91] but since issues concerning the title to real property are not generally triable before justices of the peace, a removal of the action to a higher court sometimes becomes necessary if such issue is properly raised,[92] although it has been held that the action is within the justice's jurisdiction, where title is only incidentally involved[93]

N H 89—Troy v Cheshire R Co, 23 N H 83, 55 Am D 177

73. Ky—Big Sandy R Co v Floyd County, 101 S W 354, 31 Ky L 17

74. N Y—Delaware County v Wakeman, 6 N Y S 2d 166, 168 Misc 644
29 C J p 635 note 26
Necessity of preliminary notice or order to remove see supra § 224
Defenses generally see supra § 220
What constitutes obstruction or encroachment see supra § 218.

Statute held constitutional
Mo—Washington Tp Road Dist No 1 v Robbins, 262 S W 46

Deprivation of right to penalty
A town which has become entitled to a penalty is not deprived of its right thereto by the fact that after the suit was brought that portion of its territory which includes the place where the obstruction exists was set off and incorporated as a village—Canteen v Weber, 199 Ill App 24

75. Wis—State v Smith, 8 N W 870, 52 Wis 134
29 C.J. p 635 note 27.

76. Wis—State v Halvorson, 205 N W 426, 187 Wis 611
29 C J p 635 note 28
Existence and legality of highway generally see supra § 219

77. Wis—State v Halvorson, supra
29 C J p 635 note 29

78. Cal—Freshour v Hihn, 34 P. 87, 9 Cal 443
29 C J. p 635 note 30

79. Ill—Menard County Road Dist No 1 v Beebe, 83 N E. 131, 231 Ill 147
29 C J p 635 note 31.

80. Mo—Boonville Spec Road Dist v Fuser, 171 S W 962, 184 Mo App 634

81. Ill—Lovington Tp v Adkins, 83 N E 1043, 232 Ill 510

82. Ohio—Higgins v Grove, 40 Ohio St 521

83. Ky—Commonwealth v. Prall, 139 S W 798, 144 Ky 577

84. Mich—Hines v Darling, 57 N. W 1081, 99 Mich 47.

85. Pa—Commonwealth v. Lucas, 23 Pa Co 277

86. Wis—State v Smith, 8 N W 870, 52 Wis 134
29 C J p 636 note 39

87. Cal—Sierra County v. Butler, 69 P 418, 136 Cal 547

88. Cal—Bailey v Dale, 11 P 804, 71 Cal 34

89. Va—Hendrick v. Andrick, 1 Va. Cas 267, 3 Va 267

90. Ill—Brushy Mound v McClintock, 35 N E 159, 146 Ill 643.
29 C J p 636 note 43

91. Ky—Cincinnati, N O & T P R Co v Baughman, 76 S W 351, 116 Ky 479, 25 Ky L 705.
29 C J p 636 note 44

92. Minn—State v. Cotton, 12 N.W. 529, 29 Minn 187
29 C J p 636 note 46

93 Ill—Dolton v. Dolton, 66 N E 323, 201 Ill 155.
Ohio—Burton Tp v. Tuttle, 30 Ohio St. 62.

Where there are repeated violations of the statute whereby separate penalties are incurred, the offense is a continuing one, and a recovery may be had for the penalties incurred within the statutory period before the commencement of the action, although those incurred previous to that period are barred [94] However, where the act for which the penalty is incurred is not in its nature a continuing one, the period of limitation is not extended.[95]

Parties. Where the statute does not provide who shall bring an action for a penalty, it is properly instituted in the name of the state [96] It is frequently provided, however, that the penalty may be recovered by the highway officers of the district,[97] although under such a statute commissioners of highways of two towns cannot join as plaintiffs, even though the highway encroached on is on the dividing line between the towns [98] So, also, the statute may authorize a recovery of the penalty by the trustees of the township,[99] or by any private person who shall sue for the same [1] Where, after notice by a road overseer to remove an obstruction, the road district was consolidated with another district, an action for a penalty was properly brought by the overseer in the name of the latter district [2]

Where several persons are named in an order and notice to remove an encroachment, an action to recover the penalty for failure to do so will lie against them severally as well as jointly,[3] and the fact that they occupied the land opposite the encroachment in common is immaterial [4]

Pleading. The declaration or complaint in an action to recover a penalty for an obstruction or encroachment on a highway must allege facts showing a violation of the statute or ordinance under which the action is brought.[5] Thus it must be alleged that the obstruction or encroachment was willful[6] and that notice to repair the highway was given,[7] where the statute makes willfulness and notice essential elements of the offense It has been held, however, that an allegation that the road officer notified defendant to remove an obstruction and that he failed to do so is tantamount to an allegation that he willfully or knowingly obstructed the road.[8]

The complaint, if otherwise sufficient, is not defective because of a mere clerical error in setting out the section of the statute under which the penalty has accrued [9] Provisos and exceptions in the statute need not be negatived unless they are contained in the enacting clause [10]

Any general description of the highway[11] with a clear statement of the location of the obstruction[12] is sufficient. The description of the highway should be the same as that given in the order to remove,[13] and it must be made to appear that the encroachment complained of is within the limits of the road [14] In some jurisdictions no formal complaint is necessary in an action for a penalty brought before a justice of the peace [15]

The general rules regarding variance between the pleading and proof apply to actions of this kind,[16]

94. Mo—Boonville Spec Road Dist v Fuser, 171 S W 962, 184 Mo App 634
29 C J p 636 note 48
Limitation of actions for penalties generally see the C J S title Limitations of Actions § 120, also 37 C J p 899 note 80–p 900 note 91

95. Conn—Wallingford v Hall, 30 A 47, 64 Conn 426
29 C J p 636 note 49

96. Del—Dover v Tawressey, 43 A 170 16 Del 285
Ill—People v Young, 72 Ill 411

97. Cal—Bailey v Dale, 11 P 804, 71 Cal 34
29 C J p 636 note 52
Waiver of defect
If the action is improperly instituted in the individual names of the highway commissioners rather than in the name of the district in which the offense was committed, the defect is waived by defendant proceeding to trial on the merits—Road Dist Comrs v Swain, 168 Ill App 674

98. N Y—Bradley v Blair, 17 Barb 480

99. Ohio—Burton Tp v Tuttle, 30 Ohio St 62

1. Minn—State v Galvin, 6 N W 380 27 Minn 16.
29 C J p 636 note 55.
Substitution on appeal
Under some statutes giving a private person a right of action in the name of the town, plaintiff, on appeal from justice's court to the circuit court, may, on giving bond for costs, have the town substituted as plaintiff
Ill—Samuel v Sherman, 48 N E 576, 170 Ill 265
Ohio—Sell v Ernsberger, 8 Ohio Cir Ct 449, 4 Ohio Cir Dec 100

2. Mo—Boonville Spec Road Dist v Fuser, 171 S W 962, 184 Mo App 634—Boonville Spec Road Dist v Fuser, 161 S W 583, 174 Mo App 573

3. Wis—State v Babcock, 42 Wis 138

4. Wis—State v Babcock, supra

5. Mo—Boonville Spec Road Dist v Fuser, 161 S W 583, 174 Mo App 573
29 C J p 637 note 61

6. Ky—Letcher County v. Wisconsin Steel Co, 140 S W 305, 145 Ky 323

7. Ky—Letcher County v Wisconsin Steel Co, supra
29 C J p 637 note 63

8. Mo—Boonville Spec Road Dist v Fuser, 161 S W. 583, 174 Mo App 573.

9. Wis—State v Schwin, 26 N W. 568, 65 Wis 207

10. N J—McGear v Woodruff, 33 N J Law 213

11. Cal—Bailey v Dale, 11 P. 804, 71 Cal 34
29 C J. p 637 note 67

12. Ill—Lovington Tp v Adkins, 83 N E 1043, 232 Ill 510—People v Young, 72 Ill 411

13. Mich—Le Blanc v Kruger, 42 N W 980, 75 Mich 561

14. Mich—Varden v Ritchie, 48 N W 1085, 86 Mich 197
29 C J p 637 note 70

15. Wis—State v Childs, 85 N W. 374, 109 Wis 233
29 C J p 637 note 71

16. Ill—Bethel v Pruett, 74 N E. 111, 215 Ill 162
29 C J p 637 note 73.

and there cannot be recovery where the proof as to the nature[17] or location[18] of the obstruction, or the description of the highway,[19] does not materially conform to the allegations of the declaration or complaint.

Under a plea of estoppel in pais defendant in an action by a town may show that the fence complained of as an obstruction was erected on the boundary line of a resurvey of the highway ordered by the highway commissioners[20] In an action in a justice's court defendant cannot, under a general denial, show that the locus in quo was not a lawful highway, but can controvert only the public user and his obstruction thereof[21]

Evidence The burden is on plaintiff to prove the facts on which he relies to establish his right to recover,[22] such as the existence of a public highway[23] and its obstruction[24] If the statute authorizes an action by an elector of a town, plaintiff must show that he is such elector[25]

The ordinary rules governing the admissibility[26] and the weight and sufficiency[27] of evidence are applicable to actions of this kind Plaintiff must establish his case by a preponderance of the evidence,[28] but proof beyond a reasonable doubt is unnecessary[29]

(2) Trial, Judgment, and Review, Costs

General rules of procedure apply in actions for the recovery of a penalty, as with respect to submission of issues of fact to the jury, the giving of proper and sufficient instructions, the judgment, appellate review, and costs.

As in other actions controverted questions of fact on conflicting evidence are for the jury[30] If there is no evidence fairly tending to prove the guilt of one of defendants, it is error for the court to direct a verdict of guilty[31] Where the statute does not provide who shall fix the amount of the penalty, such question is for the jury[32]

Instructions The general rules which govern the requisites and sufficiency of instructions given or requested in court actions are applicable to actions of this kind[33] Instructions which ignore or exclude issues or evidence,[34] or are based on incompetent evidence,[35] or are misleading[36] or which are not applicable to the issues,[37] are erroneous, and the same is true of instructions which require too high a degree of proof on the part of plaintiff[38] An instruction is erroneous which purports to state the elements of a highway by prescription or user but fails to mention the length of time during which the road must be used,[39] or to state that the public user must be under a claim of right[40]

Judgment Where the action is under a statute which imposes a penalty for the obstruction of a highway only, and not for the continuance of an obstruction, plaintiff cannot have judgment on a verdict which finds defendant guilty of continuing an obstruction[41] The amount of the penalty is estimated in accordance with the statute,[42] and is some-

17. Ill—Bethel v Pruett, supra
29 C J p 637 note 74

18. Ill—East Nelson v Leeds, 158 Ill A 227

19. Ill—Farlow v Camp Point, 57 N E 781, 186 Ill 256
29 C J p 637 note 76

20. Ill—Mattoon v Elliott, 102 N E 251, 259 Ill 72

21. N Y—Little v Denn, 34 N Y 452

22. Wis—State v Halvorson, 205 N W 426, 187 Wis 611
29 C J p 637 note 79

23. Wis—State v Halvorson, supra
29 C J p 637 note 80

24. Ill—Gruge v. Nichols, 36 Ill 92
29 C J p 637 note 81

25. Ill—Waddle v Duncan, 63 Ill 223

26. Mo—California Special Road Dist v Bueker, 282 S W 71, 221 Mo App 435
29 C J p 638 note 85 [a], [b]

Width at other places
Defendant cannot prove that the highway on which he is charged with encroaching was after his encroachment still as wide as at other places—Whitney Tp v Linville, 51 N E 832, 174 Ill 579

27. Evidence held sufficient
Mo—California Special Road Dist v Bueker, App, 256 S W 98, transferred, see 231 S W 71 and remanded, Sup, 248 S W 927
29 C J p 638 note 85 [c]

Evidence held insufficient
Ill—See Town of Magnolia v Kays, 205 Ill App 152
Wis—State v Halvorson, 205 N W 426, 187 Wis 611
29 C J p 638 note 85 [d]

28. Ill—Lewiston v Proctor, 27 Ill 414—Pleasant View v Day, 155 Ill App 126

29. Ill—Lewiston v Proctor, 27 Ill 414

30. Ill—Harmony v. Clark, 95 N E 47, 250 Ill 57
29 C J p 638 note 89
Question for jury as to what constitutes obstruction see supra § 218

31. Ill—McEnlry v Canoe Creek, 28 Ill App 483

32. Mich—Hines v Darling, 57 N W 1081, 99 Mich 47

33 Ill—Town of Ellison v Brent, 228 Ill App 438
29 C J p 638 note 93

34. Ill—Wheatfield v Grundmann, 45 N E 164, 164 Ill 250
29 C J p 638 note 94

35. Mo—California Special Road Dist v Bueker, 282 S W 71, 221 Mo App 435

36. Wis—Neale v State, 120 N W 345, 138 Wis 484
29 C J p 638 note 95

37. Wis—Neale v State, 120 N W 345, 138 Wis 484

38. Ill—Lewiston v. Proctor, 27 Ill 414
29 C J p 638 note 97

39 Ill—Canteen v Weber, 188 Ill App 405

40. Ill—Bethel v Pruett, 74 N E 111, 215 Ill 162

41. Ill—Crosby v Gipps, 19 Ill 309

42. Mich—Shepard v Gates, 15 N W 878, 50 Mich 495
29 C.J. p 638 note 2.

times required by the statute to be paid into the road fund [43]

Review. Proceedings to recover statutory penalties for the obstruction of, or encroachment on, highways are generally subject to appeal,[44] on compliance with the necessary requirements;[45] but the case must be tried in the appellate court on the issues joined below [46] The general rules of appellate practice that objections not raised in the trial court will not be considered,[47] that defects in instructions cannot be complained of where instructions given at the request of the party complaining contain like errors,[48] and that a verdict on conflicting evidence will not be disturbed,[49] apply to appeals in these proceedings

Costs The right to costs in an action to recover a penalty for obstructing a highway, as in other actions, is dependent on the provisions of statute [50] Where judgment is rendered for defendant, the town is not liable for costs,[51] unless the statute so provides [52] A statute exonerating highway commissioners from the payment of costs, in suits prosecuted by them in their official capacity, applies to actions by such officers to recover penalties for the obstruction of highways [53]

§ 230. —— Criminal Responsibility

Both at common law and under statutes, it is a criminal offense to obstruct or injure a public highway, and generally a prosecution is proper notwithstanding the existence of other civil remedies. Where so provided by statute, a willful intent is a necessary element of the offense, but authorities differ as to whether such an intent is required in the absence of statute.

In most jurisdictions it is a criminal offense to obstruct or injure a public highway,[54] and this is so both at common law, where the obstruction constitutes a public nuisance,[55] and by statute [56]

The fact that mandamus will lie for an obstruction does not bar an indictment [57] Also, statutes providing for a civil action for a penalty and for prosecution by indictment have been held to furnish cumulative remedies [58] It has been held, however, that, when a civil remedy by way of an action for damages,[59] or for a penalty,[60] is provided by statute, there cannot be a prosecution as for a nuisance at common law, although other authorities hold that such prosecution is not barred by the existence of the statutory civil remedy [61]

Intent The general rule of criminal law that a criminal intent is a necessary element of an offense has been held to apply to the crime of obstructing a highway,[62] although a majority of cases hold the

43. Cal —Bailey v. Dale, 11 P 804, 71 Cal 34

44. Ill —Foeller, for Use of Town of Shiloh Valley v Griffin, 32 N E 2d 938, 309 Ill App 238
29 C J p 638 note 4

45. Ill —Partridge v Snyder, 78 Ill 519
29 C J p 638 note 5

46. Mich —Graham v Langston, 31 N W 613, 65 Mich 45
29 C J p 638 note 6

47. N Y —Cooper v. Bean, 5 Lans 318
29 C J p 639 note 7.

48. Ill —East Nelson v. Leeds, 158 Ill App 227

49. Ill —Foeller, for Use of Town of Shiloh Valley, v Griffin, 32 N E 2d 938, 309 Ill App 238
29 C J p 639 note 9

50. Vt —Barre v Jerry, 37 A 230, 69 Vt 63
29 C J p 639 note 11.

51. Ill —Canteen v Weber, 188 Ill App 405—Meacham v Lacey, 133 Ill App 208

52. Ill —Anchor v. Stewart, 158 Ill App 205

53. Ohio —Carter v Hawley, Wright 74—Bittle v Hay, 5 Ohio 269

54. Kan —State v. Hayes, 263 P 782, 125 Kan 375
Mass —Commonwealth v Surridge, 164 N E 480, 265 Mass. 425, 62 A. L.R. 402.
Pa —Lenhart v Wright, 133 A 495, 286 Pa 351—Orton v Dalrymple, 92 Pa Super 336
Wis —State ex rel Young v Maresch, 273 N W 225, 225 Wis 225
29 C J p 635 note 16
Notice to remove obstruction as prerequisite to liability see supra § 224
Defenses generally see supra § 220
Existence and legality of highway see supra § 219
What constitutes offense see supra § 218
Liability for obstruction of city streets see the C J S title Municipal Corporations § 1756, also 44 C J p 1024 note 94–p 1026 note 32
Liability of railroads see the C J S title Railroads §§ 194 196, also 51 C J p 736 note 19–p 740 note 81

Offense held not to have been committed
Okl —Yunker v State, 7 P 2d 916, 53 Okl Cr 82
Pa —Commonwealth v Lowry, 18 Pa Dist & Co 527, 33 Lack Jur 85—Commonwealth v Kennedy, 16 Pa Dist & Co 564, 35 Dauph Co 242, 46 York Leg Rec 26
S C —State v Hughes, 145 S E 297, 147 S C 452

Unreasonable interference
One causing change of natural flow of stream was not criminally liable for obstructing ford, unless it had unreasonably interfered with travel for unreasonable length of time —Louisville v N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554

A landlord is not criminally liable for the act of his tenant —State v Pollok, 26 N C 303—Commonwealth v Switzer, 19 A. 681, 134 Pa 383

55. Ky —Louisville & N R Co v. Commonwealth, 21 S W 2d 981, 231 Ky 554
Md —O'Brecht v. State, 125 A. 539, 145 Md 171
29 C J p 639 note 17.

56. Ark —Finney v State, 287 S W 741, 172 Ark 115
29 C J p 639 note 18

57. Ind —State v Baltimore & O & C R Co, 22 N E 307, 120 Ind 298

58. Ark —St Louis, A & T R Co v State, 11 S W 1035, 52 Ark 51
29 C J p 640 note 20

59. Colo —Eaton v People, 70 P 426, 30 Colo 345

60. Conn —State v Hyde, 11 Conn 541
29 C J p 640 note 22

61. Ky —Commonwealth v Illinois Cent R Co, 92 S W 944, 29 Ky L 102
29 C J p 640 note 23

62. Ala —Freeman v State, 6 Port. 372
Tex —Lensing v. State, Cr, 45 S W. 572.

intent of the obstructor immaterial in the absence of a statute to the contrary.[63] In some jurisdictions the statutes specifically require that willfulness be proved,[64] and under such a statute there can be no legal conviction where the circumstances negative the existence of a willful intent,[65] as where defendant acted under the advice of an expert surveyor,[66] or under the direction of the highway commissioner.[67]

It has been held that one is not liable under such a statute if he was justifiably ignorant of the existence of the highway, or of its proper location.[68] On the other hand it has been held that a highway is "wilfully" and "knowingly" obstructed if accused does the act intentionally, knowing that it will obstruct or lessen the facilities for travel, although he does not know that the road is a legal highway,[69] and an obstruction maintained in direct disobedience to orders of the road officers is willful within the meaning of the statutes,[70] although defendant believes in good faith that the locus in quo is not a public road.[71] The obstructor is not excused by the fact that he acts under ignorance or mistake of law.[72]

§ 231. —— Prosecution and Punishment

a In general
b Issues, proof, and variance, evidence
c. Trial, review, and punishment

a. In General

The jurisdiction of the offense depends on the local statute. The indictment should properly charge all the elements of the crime and must properly allege the existence and nature of the obstruction and the existence and legality of the highway, but matters of defense or mitigation need not be alleged. In some jurisdictions, although not in others, special defenses must be specially pleaded.

The jurisdiction of the offense depends on local statute,[73] and is commonly given to justices of the peace.[74] If the title to real estate is directly involved the jurisdiction of the justice is ousted,[75] but not where title comes in issue incidentally.[76]

Requisites and sufficiency of indictment generally. The indictment should charge all the elements of the crime,[77] and if framed under a statute it should follow the language thereof, or use equivalent terms in charging the offense.[78] The indictment should be confined to one crime,[79] and be founded on proper affidavit.[80]

That the act complained of was done knowingly and willfully must be alleged if the statute makes that an element of the offense,[81] but where the act itself constitutes an offense, without reference to the intent with which it is done, an allegation of criminal intent is not necessary.[82] Notice to remove the obstruction need not be alleged where the statute does not require such notice as a condition precedent to liability,[83] but if such notice is re-

63. Wis.—State v. Dehn, 105 N.W. 795, 126 Wis. 168
29 C.J. p. 640 note 27

64. Tex.—Hill v. State, 291 S.W. 914, 106 Tex.Cr. 255
29 C.J. p. 640 note 28

Meaning of term
Act punishing removal of part of road knowingly or willfully requires that act be willfully as well as knowingly done. Interference with highway is willful only if committed with evil intent, legal malice, and without reasonable ground for believing act lawful.—Hill v. State, supra

65. Tex.—Hill v. State, supra.
29 C.J. p. 640 note 29

66. Tex.—Johnson v. State, App., 14 S.W. 396

67. N.Y.—People v. Crounse, 4 N.Y.S. 266, 51 Hun 489, 7 N.Y.Cr. 11
Tex.—Hill v. State, 291 S.W. 914, 106 Tex.Cr. 255

68. Mo.—State v. Hardy, App., 21 S.W.2d 229
29 C.J. p. 640 note 32

69. Mo.—State v. White, 69 S.W. 684, 96 Mo.App. 34
29 C.J. p. 641 note 33.

70. Kan.—State v. Raypholtz, 4 P. 851, 32 Kan. 450
Wis.—State v. Castle, 44 Wis. 670

71. Wis.—State v. Castle, supra

72. Tex.—Crouch v. State, 45 S.W. 578, 39 Tex.Cr. 145
29 C.J. p. 641 note 36

73. S.C.—State v. Wolfe, 39 S.E. 179, 61 S.C. 25
29 C.J. p. 641 note 37.

74. Pa.—Commonwealth v. Stephens, 21 Pa.Dist. & Co. 180
29 C.J. p. 641 note 38

75. Minn.—State v. Sweeney, 21 N.W. 847, 33 Minn. 23.—State v. Cotton, 12 N.W. 529, 29 Minn. 187

76. Ill.—Dolton v. Dolton, 66 N.E. 323, 201 Ill. 155
Ind.—Miller v. State, 72 Ind. 421

77. Neb.—Gilbert v. State, 111 N.W. 377, 78 Neb. 636, motion overruled 112 N.W. 293, 78 Neb. 637.
29 C.J. p. 641 note 42

Indictments held sufficient
Md.—O'Brecht v. State, 125 A. 539, 145 Md. 171.
29 C.J. p. 641 note 42 [c].

78. Iowa.—State v. Finney, 68 N.W. 568, 99 Iowa 43
29 C.J. p. 641 note 43

Language negativing offense
An indictment for the unlawful obstruction of a road in the language of the statute is insufficient, where it also employs descriptive language negativing the offense covered by the statute.—State v. Massie, 78 S.E. 382, 72 W.Va. 414, 47 L.R.A.,N.S., 679

79. N.J.—State v. Middlesex & Somerset Traction Co., 50 A. 354, 67 N.J.Law 14
29 C.J. p. 643 note 69

80. Ind.—Jeffries v. McNamara, 49 Ind. 142.—State v. Buxton, 31 Ind. 67

Information and indictment held not variant
Pa.—Commonwealth v. Mock, 23 Pa.Super. 51

81. Fla.—Savannah, F. & W.R. Co. v. State, 3 So. 204, 23 Fla. 579
29 C.J. p. 641 note 44

82 Mass.—Commonwealth v. Derby, 38 N.E. 440, 162 Mass. 183
29 C.J. p. 641 note 45

83. Mo.—State v. Craig, 79 Mo.App. 412.

quired, the indictment or information must allege it, and state by whom it was given.[84]

Existence and nature of obstruction. The indictment must charge facts which show the existence[85] and nature[86] of the obstruction, but its particular location need not be alleged,[87] unless a judgment of abatement is sought[88]

Existence and legality of highway. While it must be alleged that the road is a public highway,[89] a general averment to that effect is sufficient without setting forth at length facts to show that it is such;[90] and the state is not required to elect whether it will rely on prescription, user, dedication, or legal establishment to show the existence of the highway[91] In states where highways are divided into different classes or grades, it is generally held to be unnecessary to charge the particular class to which the highway alleged to have been obstructed belongs[92]

The highway must be so described that it may be identified,[93] but it is not necessary to set out the termini of the road,[94] although there is authority to the contrary[95]

Continued maintenance of obstruction Where the continued maintenance of an obstruction, which has been created either by defendant or a third party, is the gist of the offense, facts showing such continuance must be averred in the indictment,[96] especially where a judgment of abatement is sought[97] It has been held, however, that the information need not contain a continuando where the prosecution is not for levying a nuisance sought to be abated.[98]

Matters of defense or mitigation, as that the obstruction was material,[99] or that the road has been laid out by the proper authorities,[1] need not be alleged; nor need the indictment negative the right of defendant to place the obstruction in the highway,[2] unless defendant is authorized by statute to do the act complained of in a certain manner,[3] in which case it must be alleged that the statutory authority has been exceeded[4]

Plea to indictment In some jurisdictions special defenses should be specially pleaded,[5] while in others the statute allows all matters of defense, except that of former jeopardy, to be proved under a plea of "not guilty"[6]

b. Issues, Proof, and Variance; Evidence

In prosecutions for the obstruction of a highway, a material variance between the allegations of the indictment and the proof ordinarily is fatal. The burden is on the prosecution to prove every essential element of the offense charged. General rules of criminal procedure as to the admissibility of and sufficiency of evidence are applicable

Issues, proof, and variance. The rule that a material variance between the allegations of the indictment or information and the proof is fatal applies to prosecutions for the obstruction of highways[7] An indictment for creating an obstruction is not supported by proof of continuing one[8] So material variances between the pleading and the proof as to the location of the obstruction,[9] or its

84. Mo—State v Blakely, 115 S W 483, 135 Mo App 290

85. Ind—State v Baker, 58 Ind 417

86. Ala.—Johnson v State, 32 Ala 583
29 C J p 641 note 50
Allegations held sufficient
Ky—Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554
29 C J p 641 note 50 [d]

87. Ind—State v Buxton, 31 Ind 67
29 C J p 642 note 51

88. Ind—Wood v State, 5 Ind 433—Cox v State, 3 Blackf 193

89. Ky—Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554
29 C J p 642 note 53

90. Ky—Louisville & N R Co v Commonwealth, supra
29 C J p 642 note 54

91. Md—O'Brecht v State, 125 A 539, 145 Md 171
Wash—State v Horlacher, 47 P 748, 16 Wash. 325.

92. Tex—Conner v State, 17 S W 157, 21 Tex App 176
29 C J p 642 note 56

93 Ky—Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554
29 C J p 642 note 57
Description held sufficient
Ky—Louisville & N R Co v Commonwealth supra
29 C J p 642 note 57 [a]

94 Or—State v Hume, 6 P 427, 12 Or 133
29 C J p 642 note 58

95. N C—State v Crumpler, 88 N C 647
Pa—Commonwealth v McCormick, 5 Pa Dist 535, 6 Del Co 367, 9 York Leg Rec 205, 13 Lanc L Rev 270

96. Ark—State v Lemay, 13 Ark 405
29 C J p 642 note 60

97. Md—Wroe v State, 8 Md 416
29 C J p 642 note 61

98. Mo—State v. Bradley, 31 Mo App 308

99. Tex—State v. Collins, 38 Tex. 189

1. Tex—State v Collins, supra

2. W Va—State v Dry Fork R Co., 40 S E 447, 50 W Va 235
29 C J p 643 note 66

3. Me—State v Webb's River Impr Co, 55 A 495, 97 Me 559
29 C J p 643 note 67

4. Me—State v Webb's River Impr Co, supra
29 C J p 643 note 68

5. Ky—Commonwealth v American Tel & Tel Co, 84 S W 519, 27 Ky L 29
29 C J p 643 note 71

6. Okl—Duncan v State, 181 P 739, 16 Okl Cr 683

7. Tex—Carney v State, 175 S W 155, 76 Tex Cr 379
29 C J p 643 note 75

8. Ill—Lowe v People, 28 Ill 518.
29 C J p 643 note 76

9. Ky—Illinois Cent R Co v Commonwealth, 47 S W 255, 104 Ky. 362, 20 Ky L 748
29 C J p 643 note 77.

nature,[10] or as to the nature[11] or location[12] of the highway obstructed, are fatal.

If the thoroughfare alleged to have been obstructed is described simply as a "highway," proof of a public road established by any of the recognized methods is sufficient,[13] but where some particular mode of establishment is charged it must be proved as laid.[14] While it is not necessary to set out the termini of the highway, see supra subdivision a of this section, yet where they are set out they must be proved as alleged[15] Where a local description sufficient to identify and fix the precise point of obstruction is given, as well as the termini of the road, the latter may be disregarded, and proof of the existence of a road at the place of obstruction is sufficient[16] The time of the obstruction as set out in the indictment is not material, and a conviction may be sustained by proof of the commission of the offense at any other time within the period of limitations[17]

Evidence. According to the rule applicable in criminal cases generally, the burden is on the prosecution to prove every essential element of the offense charged,[18] and no single fact put in evidence by the prosecution is to be taken as true merely because it is not disputed.[19] The burden is on the prosecution to prove that the road alleged to have been obstructed is an existing public highway[20] either by statutory proceedings,[21] dedication,[22] or user,[23] and that defendant maintained an obstruction thereon[24] Where a specific intent is an element of the offense it must be proved as a fact, and it will not be presumed from the obstruction.[25]

It is incumbent on defendant to prove any defense which he may have to the prosecution,[26] and, where he sets up as a defense an order of the court to change the road, the burden of proving that he conformed to such order is on him, and it is not for the prosecution to prove that he varied from it.[27]

The general rules of criminal procedure as to the admissibility[28] and sufficiency[29] of evidence, including the necessity of establishing defendant's guilt beyond a reasonable doubt,[30] are applicable to prosecutions for the obstruction of highways. A statute providing that in a prosecution for obstructing a road it shall be sufficient to prove that it is used and worked as such does not render such proof conclusive, but merely prima facie, evidence of the existence of the highway[31]

c. Trial, Review, and Punishment

General rules of criminal practice govern the trial of prosecutions for the obstruction of highways, as with respect to the submission to the jury of issues of fact, and the giving of proper and correct instructions, and such general rules also govern with respect to the form and sufficiency of the verdict, and the scope and extent of review. The punishment must accord with

10. NC—State v Roanoke R & Lumber Co 13 S E 719, 109 N C 860
29 C J p 643 note 78

11. Ga—McGowan v State, 52 S E 738, 124 Ga 422
29 C J p 643 note 79

12. Ohio—State v Carman, Tapp 162
Tex—Carney v State, 175 S W. 155, 76 Tex Cr 379

13. Iowa—State v Teeters, 66 N W 754, 97 Iowa 458
29 C J p 644 note 81

14. Iowa—State v Snyder, 25 Iowa 208
29 C J p 644 note 82

15. Or—State v. Hume, 6 P 427, 12 Or 133
29 C J p 644 note 84

16 Or—State v Hume, supra.
29 C J p 644 note 85

17. Del—State v. Southard, 66 A 372, 22 Del 247.
29 C J p 644 note 86

18. Iowa—State v Chismore, 169 N W 50, 184 Iowa 677
Ky—Ewen v Commonwealth, 39 S W.2d 969, 239 Ky 492

19. Iowa—State v Chismore, 169 N W. 50, 184 Iowa 677.

20. Va—Martin v Commonwealth, 165 S E 425, 159 Va 894
29 C J p 644 note 91

21. Kan—State v Cipra, 81 P 488, 71 Kan 714
29 C J p 644 note 92

22. Mo—State v Hood, 126 S W 992, 143 Mo App 313
Neb—Barden v State, 152 N W 330, 98 Neb 180

23. Neb—Barden v State, supra

24. Ky—Ewen v Commonwealth, 39 S W 2d 969, 239 Ky 492

25. Tex—Lensing v. State, Cr, 45 S W 572

26. Ky—Commonwealth v. Cornell, 2 Dana 136
29 C J p 644 note 97.

27. Ky—Commonwealth v. Cornell, supra

28. Ky—Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554
Pa—Commonwealth v. Dennison, 48 Pa Super 293
29 C J p 644 note 99
Evidence held admissible
Ky—Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky. 554.
Pa—Commonwealth v Greybill, 17 Pa Super 514
29 C J p 644 note 99 [a]

29 Va—Martin v Commonwealth, 165 S E 425, 159 Va 894
29 C J. p 644 note 1.
Evidence held sufficient
(1) To show existence of highway—Currier v State, 182 So 478, 28 Ala App 286—29 C J p 644 note 1 [a] (1)
(2) To warrant conviction—Town of Littleton v Martin, 234 Ill App 219—29 C J p 644 note 1 [a] (5)
Evidence held insufficient
(1) To show establishment of highway by prescription or user—Clark v State, 140 So 178, 25 Ala App. 30—29 C J p 644 note 1 [b] (5)
(2) To warrant conviction
Ky—Ewen v Commonwealth, 39 S W 2d 969, 239 Ky 492
Va—Martin v Commonwealth, 165 S E 425, 159 Va 894
29 C J p 644 note 1 [b] (7).

30. Ky—Ewen v Commonwealth, 39 S W 2d 969, 239 Ky. 492.
29 C J p 645 note 2.
Existence of highway
Va—Martin v Commonwealth, 165 S E 425, 159 Va 894
29 C J p 645 note 2 [a]

31. Ind—Johns v. State, 4 N.E. 153, 104 Ind 557.

that fixed by the statute, and abatement of the obstruction may be required as part of the sentence.

The general rules of criminal practice govern the trial of prosecutions for the obstruction of highways [32] It is the duty of the court to submit to the jury all questions of fact arising on conflicting evidence[33] without expressing any opinion as to its weight, where instructions on the weight of evidence are improper,[34] and give correct and proper[35] instructions on every essential issue presented by the evidence [36]

However, instructions which are not applicable to[37] or ignore[38] evidence or issues should not be given Where willfulness is an essential element of the offense, or where the defense is based on the ground that the obstruction was not willful, it is error for the court to refuse to define the word "willful" if so requested [39] In determining the sufficiency of instructions they must be considered as a whole [40]

Form and requisites of verdict. The rules governing the form and requisites of the verdict in criminal prosecutions generally are, in the main, applicable to prosecutions of this nature [41] A general verdict of guilty is erroneous where the indictment alleges a continuance of the obstruction, but the proof does not show such continuance [42] A special verdict in order to support a judgment of conviction must find all the essential elements of the offense [43]

In some jurisdictions the jury are authorized to assess the amount of the fine;[44] and it has been held that such authority exists even though there is no statutory provision to the effect [45] In other jurisdictions an assessment by the jury has been held unauthorized; but that part of the verdict may be rejected as surplusage [46]

Review In some jurisdictions appeals are allowed in this class of prosecutions,[47] the practice therein being governed by the local law [48] As in other criminal cases a verdict based on conflicting evidence will not be disturbed unless manifest error appears,[49] nor can a reversal be had for errors which are not prejudicial to the party complaining [50]

Punishment At common law the obstruction of a highway is punishable by fine and imprisonment,[51] but where the punishment is regulated by express statutory provisions it must accord with such provisions [52] Although the extent of the punishment is left to the discretion of the court or jury within specified limits, it should not be excessive or unreasonable [53]

Judgment of abatement An abatement of the obstruction may be required as a part of the sentence on conviction [54] However, a person cannot be required to abate an obstruction which he, as agent, erected on the land of his principal,[55] although there is apparent authority to the contrary [56] Where a party has a right to erect the obstruction

32. Ala —Rather v State, 1 Port 132
29 C J p 645 note 5

33. Ky —Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554
29 C J p 645 note 6
Question for jury as to what constitutes obstruction see supra § 218

34. N C —State v Cardwell, 44 N C 215

35. Kan —State v Hayes, 263 P 782, 125 Kan 375
29 C J p 645 note 9
Instructions held proper
Kan —State v Hayes, 263 P 782, 125 Kan 375
Ky —Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554
29 C J p 645 note 9 [a]

36. Kan —State v Hayes, 263 P 782, 125 Kan 375
29 C J p 645 note 10

37. Ala —Knuckols v State, 34 So 375, 136 Ala 108
29 C J p 645 note 11.

38. S C —State v Kerdall, 32 S E 300, 54 S C 192

39. Tex —Carney v State, 175 S W 155, 76 Tex Cr 379
29 C J p 645 note 13

40 S C —State v Tyler, 32 S E 422, 54 S C 294
29 C J p 645 note 14

41. Pa —Commonwealth v Milliman 13 Serg & R 403
Va —Justice v Commonwealth, 2 Va Cas 171, 4 Va 171

42. N Y —People v. Livingston, 27 Hun 105

43. N C —State v. Stewart, 91 N C 566
29 C J p 645 note 18

44. Ind —Hoch v State, 50 N E 93, 20 Ind App 64
Ky —Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554

45. Va —McClintic v Commonwealth, 1 Rob 727, 40 Va 727

46. Ill —Gilbert v People, 121 Ill App 423.

47. Ky —Commonwealth v Feriel, 75 S W 231, 25 Ky L 314
29 C J p 646 note 23

48 Tex —Conner v State, 17 S W 157, 21 Tex App 176

49. Ill —Bolo Tp v Liszewski, 116 Ill App 135

50. S C —State v Tyler, 32 S E 422, 54 S C 294
29 C J p 646 note 27

51. Ky —Commonwealth v Enders, 8 Ky L 522
N Y —Syracuse & Tully Plank Road Co v People, 66 Barb 25

52. Tex —Brown v State, 166 S W. 508, 73 Tex Cr 571
29 C J p 646 note 30

53. Ky —Louisville & N R Co v Commonwealth, 21 S W 2d 981, 231 Ky 554
29 C J p 646 note 31

54. S C —State v Floyd, 17 S E 505, 39 S C 23
29 C J p 646 note 33

55. N Y —People v Livingston, 27 Hun 105

56 S C —State v. Floyd, 17 S E 505, 39 S.C. 23.

complained of and the nuisance consists in exceeding his authority, the proper sentence is not to remove the obstruction altogether but to make it conform to such authority.[57]

IX. USE OF HIGHWAY AND LAW OF THE ROAD

§ 232. Power to Control and Regulate Generally

a In general

b Delegation of power

a. In General

The state has the power to control and regulate the public highways and their use

As the highways of the state are public ways, see supra § 1, they are subject to public control.[58] Thus, subject to constitutional restrictions,[59] the state, through its legislature, has primarily the power to control and regulate public highways and the use thereof,[60] subject only to limitations of reason-

57. Pa—Taggart v Commonwealth, 21 Pa 527

58. N H—State v Cox, 16 A 2d 508, 91 N H 137 affirmed Cox v State of New Hampshire, 61 S Ct 762, 312 U S 569, 85 L Ed 1049, 133 A L R 1396

Okl—Ex parte Sales, 233 P 186, 108 Okl 29—Ex parte Tindall, 229 P 125, 102 Okl 192

59. Ala—City of Birmingham v Hood-McPherson Realty Co, 172 So 114, 233 Ala 352, 108 A L R 1140

Ark—Adkins v Harrington, 261 S W 626, 164 Ark 280

Ill—Stark County v Henry County, 158 N E 116, 326 Ill 535, 54 A L R 777—City of Mascoutah v Donner, 245 Ill App 233

Mass—In re Opinion of the Justices, 147 N E 681, 251 Mass 569

N Y—Town of Waterford v L B Brockett Lumber Co, 237 N Y S 436, 227 App Div 122—Decker v Goddard, 249 N Y S 381, 139 Misc 824, reversed on other grounds 251 N Y S 440, 233 App Div 139

Pa—Maurer v Boardman, 7 A 2d 466, 336 Pa 17, affirmed Maurer v Hamilton, 60 S Ct 726, 309 U S 598, 84 L Ed 969, 135 A L R 1347

Tex—State v Hale, 146 S W 2d 731, 136 Tex 29, modifying Civ App, 96 S W 2d 135

Vt—Valcour v Village of Morrisville, 184 A 881, 108 Vt 242

Va—Savage v Commonwealth, 147 S E 262, 152 Va 999

29 C J p 646 note 39

As affected by requirement of due process see Constitutional Law § 704

60. U S—Sproles v Binford, D C Tex, 52 F 2d 730, followed in J H McLeaish & Co v Binford 52 F 2d 737, J H McLeaish & Co v Binford, D C Tex, 52 F 2d 151, affirmed Binford v J H McLeaish & Co, 52 S Ct 207, 284 U S 598, 76 L Ed 513—Southern Motorways v Perry D C Ga, 39 F 2d 145—Sanger v Lukens, D C Idaho, 24 F 2d 226, reversed on other grounds, C C A, 26 F 2d 855

Ala—Lashley v State, 180 So 717, 719, 236 Ala. 1, citing **Corpus Juris**—City of Birmingham v Hood-McPherson Realty Co, 172 So 114, 233 Ala 352, 108 A L R 1140—Lashley v State, 180 So 720, 723, 28 Ala App 86, citing **Corpus Juris.**

Colo—Public Utilities Commission v Manley, 60 P 2d 913, 99 Colo 153

Conn—Silver v Silver, 143 A 240, 108 Conn 371, 65 A L R 943, affirmed 50 S Ct 57, 280 U S 117, 74 L Ed 221, 65 A L R 939

Fla—Carlton v Mathews, 137 So 815, 103 Fla 301

Ga—Mayor and Aldermen of City of Savannah v V C Ellington Co, 170 S E 38, 177 Ga 149, followed in Mayor and Aldermen of City of Savannah v Hood Coach Lines, 170 S E 196, 177 Ga 315—Georgia Public Service Commission v Saye & Davis Transfer Co, 154 S E 439, 170 Ga 873

Ill—Chicago Park Dist v Canfield, 19 N E 2d 376, 370 Ill 447, 121 A L R 557—Chicago Motor Coach Co v City of Chicago, 169 N E 22, 337 Ill 200, 66 A L R 834—Stark County v Henry County, 158 N E 116, 326 Ill 535, 54 A L R 777—City of Mascoutah v Donner, 245 Ill App 233

Ind—House-Wives League v City of Indianapolis 185 N E 511, 204 Ind 685—Baldwin v State 141 N E 343, 194 Ind 303

Iowa—Iowa Ry & Light Corporation v Lindsey, 231 N W 461, 211 Iowa 544, followed in State v Central States Electric Co, 231 N W 467, and Central States Electric Co v Pocahontas County, 231 N W 468

Mass—Neu v McCarthy, 33 N E 2d 570, 309 Mass 17, 133 A L R 1291—City of Boston v A W Perry, Inc, 22 N E 2d 627, 304 Mass 18—In re Opinion of the Justices, 8 N E 2d 179, 297 Mass 559—In re Opinion of the Justices, 147 N E 681, 251 Mass 569

Mich—Jacobson v Carlson, 4 N W 2d 721, 302 Mich 448—Smith v Behrendt, 270 N W 227, 278 Mich 91

Mont—State ex rel Thompson v District Court of Fourth Judicial Dist in and for Missoula County, 91 P 2d 422, 108 Mont 362—State ex rel Charette v District Court of Second Judicial Dist in and for Silver Bow County, 86 P 2d 750, 107 Mont 489

N H—In re Opinion of the Justices, 129 A 117, 81 N H 566, 39 A L R 1023

N Y—Town of Waterford v L B Brockett Lumber Co, 237 N Y S 436, 227 App Div 422—Town of Albion v Ryan 194 N Y S 261, 201 App Div 717—Gaynor v Town of Hempstead, 275 N Y S 562, 153 Misc 321—Decker v Goddard, 249 N Y S 381, 139 Misc 824 reversed on other grounds 251 N Y S 440, 233 App Div 139—People v Baxter, 32 N Y S 2d 320, motion denied 32 N Y S 2d 325, affirmed 36 N Y S 2d 1020, 178 Misc 625, appeal dismissed 37 N Y S 2d 489

Or—Willett v City of West Linn, 19 P 2d 1098, 142 Or 662—State v Phipps, 299 P 1009, 136 Or 454—Cole v Seaside, 156 P 569, 80 Or 73

Pa—Maurer v Boardman 7 A 2d 466, 336 Pa 17, affirmed Maurer v Hamilton, 60 S Ct 726, 309 U S 598, 84 L Ed 969, 135 A L R 1347—Commonwealth v Funk, 186 A 65, 323 Pa 390—Appeal of Klepeis 20 Lehigh Co L J 59

Tenn—Marshall v State 171 S W 2d 269—Southeastern Greyhound Lines v Dunlap, 160 S W 2d 418—Johnson Freight Lines v Davis 123 S W 2d 820, 174 Tenn 51—Lewis v Nashville Gas & Heating Co, 40 S W 2d 409, 162 Tenn 268

Tex—State v Hale, 146 S W 2d 731, 136 Tex 29, modifying, Civ App, 96 S W 2d 135—Britton v Smith, Civ App 82 S W 2d 1065—Fry v Jackson Civ App, 264 S W 612

Vt—Valcour v Village of Morrisville 184 A 881, 108 Vt 242

Va—Godwin v Board of Supr's of Nansemond County, 171 S E 521, 161 Va 494

Wash—Elkins v Schaaf, 102 P 2d 230, 4 Wash 2d 12

W Va—Nulter v State Road Commission of West Virginia 194 S E 270, 119 W Va 312—Nulter v State Road Commission of West Virginia, 198 S E 549, 119 W Va 312

Wyo—Western Auto Transports, Inc v. City of Cheyenne, 120 P 2d 590,

ableness and equality[61] and to the requirement that regulations do not unreasonably interfere with the right of travel or other proper public uses of the highways,[62] although the power cannot be restricted within too narrow bounds.[63] This power is an exercise of the police power of the state to protect the highways, and promote the safety, peace, health, morals, and general welfare of the public.[64]

593, 57 Wyo 351, citing **Corpus Juris.**
29 C J p 646 note 40
"Any restriction on [unobstructed] use [of public highways] can be imposed only by the sovereign power"—Robia Holding Corporation v Walker, 239 N Y S 659, 661, 136 Misc 358, affirmed 246 N Y S. 210, 230 App Div 666, affirmed 178 N E 747, 257 N Y 431

Plenary power
Ariz—Keller v State, 47 P 2d 442, 46 Ariz 106—Clayton v State, 297 P 1037, 38 Ariz 135
Fla—State ex rel Parker v Frick, 7 So 2d 152—Roney Inv Co v City of Miami Beach, 174 So 26, 127 Fla 773
Va—Nusbaum v City of Norfolk, 145 S E 257, 151 Va 801

Power is extensive
Cal—Watson v State Division of Motor Vehicles, 298 P 481, 212 Cal 279

Highways included
Every public way whatever is brought within the provisions of the vehicle and traffic law by statutory definitions of public highway and the Hutchinson River Parkway, forming a connecting link in a chain of through public highways, cannot be excluded therefrom although the legislature in creating the Westchester County park commission conferred on it the exclusive power to adopt and enforce regulations and ordinances notwithstanding the provisions of any general or special law to contrary governing the use of parks and traffic in and through that county—People v Westchester County, 15 N Y S 2d 365, 257 App Div 769, affirmed 26 N E 2d 27, 282 N Y 224

Filing report of accident
Under statute requiring chief of state highway police to furnish forms for accident reports requiring driver of vehicle involved in accident resulting in injuries, death, or property damage to certain extent, to forward report of accident, authorizing chief to require drivers to file supplemental reports on forms furnished by him, and making reports admissible solely to prove compliance with statute, reports must be in writing—Lawyerson v Nadeau, 10 A 2d 357, 136 Me 361

Patrolling highways
Statute for patrolling of highways was held intended to regulate traffic, protect against reckless driving, robberies, and other unlawful acts on or near highways—Martin v Follis, 271 P 672, 133 Okl 162

Effect of federal aid statutes
Federal aid statutes do not impair police power of state concerning its highways
U S—Barnwell Bros v South Carolina State Highway Department, D C S C, 17 F Supp 803, reversed on other grounds South Carolina State Highway Department v Barnwell Bros, 58 S Ct 510, 303 U S 177, 625, 82 L Ed 734—Liberty Highway Co v Michigan Public Utilities Commission, D C Mich, 294 F 703
S C—State ex rel Daniel v John P Nutt Co, 185 S E 25, 180 S C 19, certiorari denied Jno P Nutt Co v State of South Carolina ex rel Daniel 56 S Ct 668, 297 U S 724, 80 L Ed 1007

Local legislation
Control of the roads of a particular county is regarded as an appropriate subject for local legislation—State ex rel Horner v Atkinson, 152 S W 2d 620, 177 Tenn 660
Appointment of deputy sheriffs to patrol highways see the C J S title Sheriffs and Constables § 22, also 57 C J p 763 notes 7-12
Particular regulations see infra §§ 233-235
Power
Over city streets see the C J S title Municipal Corporations §§ 1686-1695, also 44 C J p 925 et seq
To regulate use of highway for transmission of electricity see Electricity § 5 b
Regulation
By congress of interstate commerce over highways see Commerce § 71 a
Of motor vehicles on highways see the C J S title Motor Vehicles §§ 14-57, also 42 C J p 616 et seq
State regulatory power over highways as subject to power of congress over interstate commerce see Commerce § 71 a

61. N H—In re Opinion of the Justices, 129 A 117, 81 N H 566, 39 A L R 1023

62 Ky—Ashland Transfer Co v State Tax Commission, 56 S W 2d 691 247 Ky 144, 87 A L R 534
N Y—Decker v Goddard, 249 N Y S 381, 139 Misc 824, reversed on other grounds 251 N Y S 440, 233 App Div 139.
29 C J p 646 note 41

63. Wash—Elkins v Schaaf, 102 P 2d 230, 4 Wash 2d 12

64. U S—Hodge Drive-It-Yourself Co v City of Cincinnati, 52 S Ct 144, 284 U S 335, 76 L Ed 323, affirming 175 N E 196, 123 Ohio St 284, 77 A L R 889, which affirmed 174 N E. 613, 38 Ohio App 29—Louis v Boynton, D C Kan, 53 F. 2d 471—Johnson Transfer & Freight Lines v Perry, D C Ga, 47 F 2d 900—Butler-Newark Bus Line v Sinclair, D C N J, 34 F 2d 780—Barnwell Bros v South Carolina State Highway Department, D C S C, 17 F Supp 803, reversed on other grounds South Carolina State Highway Department v Barnwell Bros, 58 S Ct 510, 303 U S 177, 625, 82 L Ed 734
Ala—Lashley v State, 180 So 717, 236 Ala 1—Lashley v State, 180 So 720, 28 Ala App 86
Colo—Public Utilities Commission v Manley, 60 P 2d 913, 99 Colo 153
Fla—State ex rel Parker v Frick, 7 So 2d 152
Idaho—Packard v O'Neil, 262 P 881, 45 Idaho 427, 56 A L R 317
Ill—People v Linde, 173 N E 361, 341 Ill 269, 72 A L R 997
Ind—Andrews v City of Marion, 47 N E 2d 968
Ky—Ashland Transfer Co v State Tax Commission, 56 S W 2d 691, 247 Ky 144, 87 A L R 534—Reo Bus Lines v Southern Bus Line Co, 272 S W 18, 209 Ky 40
Mass In re Opinion of the Justices, 147 N E 681 251 Mass 569
Miss—Hudson v Stuart, 145 So 611, 166 Miss 339
Mont—State ex rel Thompson v District Court of Fourth Judicial Dist in and for Missoula County, 91 P 2d 422, 108 Mont 362—State ex rel Charette v District Court of Second Judicial Dist in and for Silver Bow County, 86 P 2d 750, 107 Mont 489
Okl—Collins-Dietz-Morris Co v State Corporation Commission 7 P 2d 123, 154 Okl 121, 80 A L R 561
Tex—Ford v Tyson, Civ App, 43 S W 2d 619
Vt—State v Gamelin, 13 A 2d 204, 111 Vt 215
Wyo—Weaver v Public Service Commission of Wyoming, 278 P 542 40 Wyo 462
"The power of the state over its highways is police power, and in the exercise of that power those who suffer loss or inconvenience have no ground of complaint on the basis of nuisance." Town of Oyster Bay v Moses, 287 N Y S 826, 827, 248 App Div 598, affirmed 7 N E 2d 729 273 N Y 631 reargument denied 8 N E 2d 619, 274 N Y 493

Protection against accidents on highways is primarily a state function—Maurer v Boardman, 7 A 2d 466, 336 Pa 17, affirmed Maurer v

The power to regulate the use of public highways extends to their use by nonresidents as well as residents [65]

In exercising such control the legislature may consider the convenience of the majority and the burdens in the construction and maintenance of the highways [66]

Local authorities In the absence of a delegation of power, discussed infra subdivision b of this section, local authorities have no right of control or regulation over the highways of the state,[67] any power of the local authorities to regulate traffic on the highways within their jurisdiction being subordinate to the state legislature and subject to the general laws of the state dealing with such matters,[68] unless the general law expressly makes local regulations paramount [69] Thus, where by statute the power to control and supervise state highways has been vested in a state highway commission, local authorities have no such power over such highways within the confines of the locality [70]

Classification The state has a broad discretion to classify persons and property, in the exercise of its power to regulate the public highways,[71] provided there is a rational basis therefor, an arbitrarily discriminatory regulation being invalid [72] This applies with respect to the privilege of using the highways,[73] and may even extend to the prohibition of the use of the highway for some purposes [74]

b. Delegation of Power

Within constitutional limits the power of the state over the public highways may be delegated to local authorities or conferred on particular agencies

Within constitutional limits, the power of the state to control and regulate the highways and their use may be delegated[75] to local authorities[76] or con-

Hamilton, 60 S Ct 726, 309 U S 598, 84 L Ed 969, 135 A L R 1347

Protection of life or property

The state, as owner of highways and roads, may make any regulation necessary for protection of life or property thereon—Maurer v Boardman, supra

Conservation of highway

State can prescribe regulations adapted to conserve its highways as to cost of construction and maintenance—State ex rel Daniel v John P Nutt Co, 185 S E 25, 180 S C 19, certiorari denied Jno P Nutt Co v State of South Carolina ex rel Daniel, 56 S Ct 668, 297 U S 724, 80 L Ed 1007

Police powers generally see Constitutional Law §§ 174–198

65. U S—Hess v Pawloski, Mass, 47 S Ct 632, 274 U S 352, 71 L Ed 1091

Mont—State ex rel Thompson v District Court of Fourth Judicial Dist in and for Missoula County, 91 P 2d 422, 108 Mont 362—State ex rel Charette v District Court of Second Judicial Dist in and for Silver Bow County, 86 P 2d 750, 107 Mont 489

66. N Y—Town of Waterford v L B Brockett Lumber Co, 237 N Y S 436, 227 App Div 422

67. Pa—Pennsylvania R Co v Montgomery County Pass R Co, 31 A 468, 167 Pa 62, 46 Am S R 659, 27 L R A 766

29 C J p 616 note 47

68. Cal—Lindenbaum v Barbour, 2 P 2d 161, 213 Cal 277—Atlas Mixed Mortar Co v City of Burbank, 262 P 334, 202 Cal 660

State taking over highways assumed sole supervision to exclusion of townships.—Cheltenham Tp v Philadelphia Rapid Transit Co, 141 A 259, 292 Pa 384

69. Cal—Lindenbaum v Barbour, 2 P 2d 161, 213 Cal 277

70. N D—Morton County v Hughes Electric Co, 208 N W 108, 53 N D 742

71. U S—Smith v Cahoon, Fla, 51 S Ct 582, 283 U S 553, 75 L Ed 1264

Mo—Park Transp Co v Missouri State Highway Commission, 60 S W 2d 388, 332 Mo 592

Or—Purple Truck Garage Co v Campbell, 250 P 213, 119 Or 484, 51 A L R 816

"We do not think it can be said that persons and property, even with respect to their transportation for hire must be treated as falling within the same category for purposes of highway regulation"—Sproles v Binford, Tex, 52 S Ct 581, 588, 286 U S 374, 76 L Ed 1167, affirming, D C, 56 F 2d 189

72. Mo—Park Transp Co v Missouri State Highway Commission, 60 S W 2d 388, 332 Mo 592

"That some incidental or accidental result in keeping with the lawful purpose may flow will not save the act if its real purpose, as tested by its effect and operation, is to accomplish the imposition of oppressive discrimination on a business using the roads"—J H McLeaish & Co v Binford, 52 F 2d 151, 155, affirmed Binford v J H McLeaish & Co, 52 S Ct 207, 284 U S 598, 76 L Ed 513

Statutes held invalid

Statute prohibiting operation of vehicles carrying over specified number of bales of uncompressed cotton on public highways—J H McLeaish & Co v Binford, supra

Regulation of highways as affected by the requirement of equal protection of the laws see Constitutional Law § 534

73. Public interest

"If some may, and others may not, enjoy the privilege, the distinction must be one which the public interest permits"—State v Moore, 13 A 2d 143, 146, 91 N H 16

Arbitrary discrimination improper

The use of highways is a privilege, but the privilege may not be granted arbitrarily and bestowed at will and pleasure as a favor to some groups of travelers while imposing a deprivation of use upon others—State v Moore, supra

74. Or—Purple Truck Garage Co v Campbell, 250 P 213, 119 Or 484, 51 A L R 816

75. Ill—Chicago Motor Coach Co v City of Chicago, 169 N E 22, 337 Ill 200, 66 A L R 834—Mitchell v Lowden, 123 N E 566, 288 Ill 327—City of Mascoutah v Donner, 245 Ill App 233

Limitations on power to delegate

(1) The state in its sovereign capacity can intrust control of its highways to political subdivisions or to other bodies, but its police power can be exercised only through bodies possessing governmental powers—Breinig v Allegheny County, 2 A 2d 842, 332 Pa 474

(2) Power to regulate traffic, or to exclude it, may be delegated as a part of the state's police powers, where its exercise bears some relation to public health and safety and makes for public welfare—Chicago Park Dist v Canfield, 19 N E 2d 376, 370 Ill 447, 121 A L R 557

Surrender of control must come from legislature—Willett v City of West Linn, 19 P 2d 1098, 142 Or 662

76. Ariz—Keller v State, 47 P 2d 442, 46 Ariz 106—Clayton v State,

ferred on such agency or agencies as it sees fit [77]

The power so delegated will be strictly construed,[78] and the authorities to whom it is delegated must keep within the limits of the grant,[79] and cannot exercise it beyond what is necessary to facilitate travel [80]

The state may exercise its paramount authority over the highways by legislative act whenever it

297 P 1037, 1039, 38 Ariz 135, quoting **Corpus Juris.**

Ind —Andrews v. City of Marion, 47 N E 2d 968

Iowa —Iowa Ry & Light Corporation v Lindsey, 231 N W 461, 211 Iowa 544, followed in State v Central States Electric Co, 231 N W 467, and Central States Electric Co v Pocahontas County, 231 N W 468

Mass —City of Boston v A W Perry, Inc, 22 N E 2d 627, 304 Mass 18

N Y —People v Baxter, 32 N Y S 2d 320, motion denied 32 N Y S 2d 325, affirmed 36 N Y S 2d 1020, 178 Misc 625, appeal dismissed 37 N Y S 2d 439

Tenn —Lewis v Nashville Gas & Heating Co, 40 S W 2d 409, 162 Tenn 268

Wyo —Western Auto Transports, Inc v City of Cheyenne, 120 P 2d 590, 593, 57 Wyo 351, citing **Corpus Juris.**

29 C J p 646 note 43

As agents of public or state

The control of highways is a governmental function and counties and towns in discharging their duties with reference thereto act as agents of the public or of the state —New Paltz, H & P Traction Co v Ulster County, 195 N Y S 623, 202 App Div 234

Under common law power to control roads was in local authorities —Dickison v Clark, 2 N E 2d 91, 363 Ill 258

County roads

In at least one jurisdiction all public roads of county are under exclusive supervision and control of county commission or board —Holmes v Upton, 134 S E 401, 192 N C 179—Lassiter v Board of Com'rs of Wake County, 124 S E 738, 188 N C 379

Neighborhood roads

N C —State v Hughes, 145 S E 297, 147 S C 452

77. Ga —Georgia Public Service Commission v Saye & Davis Transfer Co 154 S E 439, 170 Ga 873

Ill —Chicago Motor Coach Co v City of Chicago, 169 N E 22, 337 Ill 200, 66 A L R. 834

Iowa —Iowa Ry & Light Corporation v Lindsey, 231 N W 461, 211 Iowa 544, followed in State v Central States Electric Co, 231 N W 467, and Central States Electric Co v Pocahontas County, 231 N W 468

Mass —In re Opinion of the Justices, 147 N.E. 681, 251 Mass 569

Tenn —Marshall v State, 171 S W 2d 269—Southeastern Greyhound Lines v Dunlap, 160 S W 2d 418—Johnson Freight Lines v Davis, 123 S W 2d 820, 174 Tenn 51—Lewis v Nashville Gas & Heating Co, 40 S W 2d 409, 162 Tenn 268

Tex —State v Malone, Civ App, 168 S W 2d 292, error refused—Fry v Jackson, Civ App, 264 S W 612.

"Unless prohibited by the Constitution, the Legislature may confer on such agency as it may deem best the power of supervision and control"—Adkins v Harrington, 261 S W 626, 627, 164 Ark 280

Agency to control highways may be established, within constitutional limits —Shapera v Allegheny County, 25 A 2d 566, 344 Pa 473—Greene County v Center Tp, 157 A 777, 305 Pa 79—Westmoreland Chemical & Color Co v Public Service Commission, 144 A 407, 294 Pa 451, followed in 144 A 412, 293 Pa 333, following 142 A 867, 293 Pa 326

State and county highways distinguished

Constitutional provision conferring exclusive original jurisdiction on county courts in matters relating to roads and ferries extends only to county roads and county bridges and does not confer exclusive original jurisdiction over state roads and state bridges, so that corporation commission is not thereby precluded from regulating the operation of vehicles on public highways of the state —Morgan v Fielder, 109 S W 2d 922, 194 Ark 719

State departments

(1) Under some statutes the state highway commissioner has power to make rules and regulations governing the use of state highways —Commonwealth v Esbenshade, 30 Pa Dist 142, 37 Lanc L Rev 181, 34 York Leg Rec 36

(2) Under some statutes only public highways outside of corporate limits of municipality are to be taken over by state department of public works and to remain under its sole control and jurisdiction —Village of Glencoe v Hurford, 148 N E 69, 317 Ill 203, followed in Village of Glencoe v. Olson, 148 N E 78, 317 Ill 263

(3) In creating a highway department it was held that the general purpose of the constitution was to provide for a uniform trunk highway system covering the entire state under one supervision —Automatic Signal Advertising Co v Babcock, 208 N W 132, 166 Minn 416.

Part of highway included

(1) Supervision and control by highway commissioner over highway was not limited to traveled portion only, but extended to entire right of way —Otten v Big Lake Ice Co, 270 N W 133, 198 Minn 356

(2) Shoulder of highway is part of highway under control of the state highway commissioner —Griffith v Town of Berlin, 32 A 2d 56, 130 Conn 84

Location of stop signs

(1) The statute requiring that stop sign at intersection on through highway be placed as near as practicable to traveled portion of such highway permits location of such sign without regard to position of property line, and elements to be considered in determining where it is practicable to place such sign include proper regard to giving of reasonable notice of intersection to drivers approaching it —Olson v Musselman, 15 A 2d 879, 127 Conn 228

(2) Under some statutes, private person may not place stop and go signals in or upon trunk highway without permit to do so from commissioner of highways, notwithstanding approval of local authorities —Automatic Signal Advertising Co v Babcock, 208 N W 132, 166 Minn 416

78. Ariz —Keller v State, 47 P 2d 442, 46 Ariz 106—Clayton v State, 297 P 1037, 1039, 38 Ariz 135, quoting **Corpus Juris.**

29 C J p 646 note 44

79. Ariz —Keller v State, 47 P 2d 442, 46 Ariz 106—Clayton v State, 297 P 1037, 1039, 38 Ariz 135, quoting **Corpus Juris.**

29 C J p 646 note 45

Private road

Under statute providing for the supervision of all county roads by the county commissioners, commissioners had no authority to take charge and control of a private road on behalf of the county, since its power is limited to county roads —George W Condon Co v Board of Com'rs of Natrona County, 103 P 2d 401, 56 Wyo 38

80. Ariz —Keller v State, 47 P 2d 442, 46 Ariz 106—Clayton v State, 297 P 1037, 1039, 38 Ariz 135, quoting **Corpus Juris.**

Cal —Gurnsey v Northern California Power Co., 94 P. 858, 7 Cal App 534.

sees fit,[81] although it has by silence acquiesced in local regulation of the highways,[82] and it may, at its will, reassume the power if delegated.[83]

§ 233. Right and Mode of Use

a By public generally

b. Regulation

c. Use for business purposes

d Grant of right to use highways

a. By Public Generally

The public, and each member thereof, has a common and equal right to make reasonable use of the highways for ordinary travel and transportation, such use being the primary purpose for which the highways are established.

The primary or usual and ordinary use which the public has the right to make of the public highways is for passage, or, as it is otherwise said, for travel and transportation,[84] with all the powers and privileges incidental to the exercise of that right,[85] in any

81. Ga—Mayor and Aldermen of City of Savannah v V C Ellington Co, 170 S E 38, 177 Ga 149, followed in Mayor and Aldermen of City of Savannah v Hood Coach Lines, 170 S E 196, 177 Ga 315

82. Ga—Mayor and Aldermen of City of Savannah v V C Ellington Co, supra.

83. Wyo—Western Auto Transports, Inc v City of Cheyenne, 120 P 2d 590, 593, 57 Wyo 351, citing **Corpus Juris.**
29 C J p 647 note 48

In absence of constitutional restriction the legislature may take from boards of county commissioners their powers of supervision and control of public roads and bridges, and lodge such powers elsewhere, since the control of all public highways is vested in the state absolutely—State v Fearnside, 100 So 256, 87 Fla 349

Reserve right
State has reserve right over highways by which it may enlarge, reduce, or take away any powers conferred—Iowa Ry & Light Corporation v Lindsey, 231 N W 461, 211 Iowa 544, followed in State v Central States Electric Co, 231 N W 467, and Central States Electric Co v Pocahontas County, 231 N W 468

84. Ariz—Pearson & Dickerson Contractors v Harrington, 137 P 2d 381,
Ark—Wilkerson v Gerard, 138 S W 2d 76, 200 Ark 125
Colo—McKay v Public Utilities Commission, 91 P 2d 965, 104 Colo 402
Ky—Bell Bros Trucking Co v Kelley, 127 S W 2d 831, 277 Ky 781
Md—State for Use of Hoffman v Potomac Edison Co, 170 A 568, 166 Md 138
Mass.—City of Boston v A W Perry, Inc, 22 N E 2d 627, 629, 304 Mass 18—In re Opinion of the Justices, 8 N E 2d 179, 297 Mass 559—Commonwealth v Surridge, 164 N E 480, 265 Mass 425, 62 A L R 402
Miss—Scott v Hart, 91 So 17, 128 Miss 353
Neb—Brenning v Remington, 287 N W 776, 136 Neb 883
N H—State v Cox, 16 A 2d 508, 91 N H. 137, affirmed Cox v State of New Hampshire, 61 S Ct 762, 312 U S 569, 85 L Ed 1049, 133 A L R 1396
N Y—Robia Holding Corporation v Walker, 239 N Y S 659, 136 Misc 358, affirmed 246 N Y S 210, 230 App Div 666, affirmed 178 N E 747, 257 N Y 431—Good Humor Corporation v City of New York 33 N Y S 2d 905, affirmed 36 N Y S 2d 85, 264 App Div 620, affirmed 49 N E 2d 153, 290 N Y 312
Ohio—Cambridge Home Telephone Co v Harrington, 186 N E 611, 127 Ohio St 1
R I—Allen & Reed v Presbrey, 144 A 888, 50 R I 53, appeal dismissed 50 S Ct 66, 280 U S 518, 74 L Ed 588
29 C J p 647 notes 50, 52
"The use is limited to the right of the public generally to pass and repass, to travel on foot or with any kind of vehicle"—Hildebrand v Southern Bell Telephone & Telegraph Co, 14 S E 2d 252, 255, 219 N C 402

Necessity that highway be public
Until road has become a public highway, the public has no easement of travel, unless given or consented to by owners—Couture v Dade County, 112 So. 75, 93 Fla 342

Constitutional basis of right
(1) The right to travel on the public highways is a constitutional right—Teche Lines v Danforth, Miss, 12 So 2d 784, 787

(2) "The right of a citizen to travel upon the public highways and to transport his property thereon in the ordinary course of life and business is a common right which he has under his right to enjoy life and liberty, to acquire and possess property, and to pursue happiness and safety"
Miss—Teche Lines v Danforth, supra
Va—Thompson v Smith, 154 S E 579, 155 Va 367, 71 A L R 604

Right to travel defined
The right to "travel" means the right to go from one place to another, which includes the right to start, to go forward on the way, and to stop when the traveler's destination has been reached, and also the right to stop on the way, temporarily for a legitimate or necessary purpose when that purpose is an immediate incident to travel
Miss—Teche Lines v. Danforth, 12 So 2d 784
Va—Thompson v Smith, 154 S E 579, 155 Va 367, 71 A L R 604.

Use for travel is first right
Iowa—Dennier v Johnson, 240 N W 745, 214 Iowa 770
Ohio—Cambridge Home Telephone Co v Harrington, 186 N E 611, 127 Ohio St 1

Use for other than public travel is not unlawful, if travelers' rights are not unnecessarily or unreasonably interfered with—Allen v New York Cent R Co, 239 N Y S 140, 228 App Div 382, reversing 233 N Y S 445, 133 Misc 618
Rights of public in highway generally see supra § 139
Use of
City streets as public highways see the C J S title Municipal Corporations §§ 1757–1801, also 44 C J p 1026 et seq
Highway
By
Electrical companies see Electricity § 11
Motor vehicles see the C J S title Motor Vehicles § 10, also 42 C J p 613 note 78–p 614 note 87
Public service water companies see the C J S title Waters § 256, also 67 C J p 1190 note 50–p 1192 note 74
Telegraph or telephone companies see the C J S title Telegraphs and Telephones §§ 23–41, also 62 C J p 29 note 82–p 54 note 52
For transmission of electricity and analogous uses see Electricity § 5
Private roads see the C J S title Private Roads § 17, also 50 C J p 397 note 96–p 398 note 1.

85. Mass—City of Boston v A W Perry, Inc, 22 N E 2d 627, 304 Mass 18—In re Opinion of the Justices, 8 N E 2d 179, 297 Mass 559—Commonwealth v Surridge, 164 N E 480, 265 Mass 425, 62 A. L R 402
N H—State v Cox, 16 A 2d 508, 91 N H 137, affirmed Cox v State of Hampshire, 61 S Ct 762, 312 U S 569, 85 L Ed 1049, 133 A L R. 1396—Reed v Nashua Buick Co, 147 A. 898, 84 N.H. 156—Langevin v

reasonable manner, not interfering with the rights of other travelers.[86] However, an unreasonable use is a trespass.[87] Under this right, a person may use the highway for the purpose of leading or driving cattle,[88] and, as stated in Animals § 187 b note 76, if the cattle stray upon adjoining unfenced land the landowner has no right of action for injury if reasonable care has been used by those in charge of the cattle So the highway may be used for moving houses[89] or hauling logs,[90] or even for sports and diversions,[91] although as to the last there is authority to the contrary.[92]

The right of passage includes the right to reasonably safe passage,[93] which may be enforced through the police power.[94]

Except as modified by valid regulation,[95] the right to use the highways for passage extends to any part of the highway[96] and is coextensive with the limits thereof[97]

In whom right lies. As the roads and highways of the state belong to the people or public, see su-

Twin State Gas & Electric Co, 128 A 681, 81 N H 446—Manning v Manchester St Ry, 118 A 386, 80 N H 404—Lydston v Rockingham County Light & Power Co, 70 A 385, 75 N H 23, 21 Ann Cas 1236

Incidents distinguished from travel

(1) The right to travel imparts the right of communication from one while a traveler to others, and travel may be by persons congregated in a group, but, while the reasonable incidents of travel are a part of it, the incidents do not themselves create or imply the right to travel—State v Cox, 16 A 2d 508, 91 N H 137, affirmed Cox v State of New Hampshire, 61 S Ct 762, 312 U S 569, 85 L Ed 1049, 133 A L R 1396

(2) Hence, while the right of "speech" is an incident of the right of 'highway travel," the right of "highway travel" is not inherent in the right of "speech"—State v Cox, supra

Bathing and picnicking on highway limits do not constitute a proper viatic use of the highway—McDonough Point Corporation v Field, 192 A 19, 109 Vt 25

86. Md—State for Use of Hoffman v Potomac Edison Co, 170 A 568, 570 166 Md 138, citing **Corpus Juris**
N Y—People v Arko, 199 N Y S 402, 40 N Y Cr 149
S D—State v Staley, 223 N W 943, 54 S D 552, reversed on other grounds 229 N W 373, 56 S D 495
29 C J p 647 note 53
'The use of the highway by the public for transit is free from restriction by . others"—Breinig v. Allegheny County, 2 A 2d 842, 846, 332 Pa 474

There is no absolute right to use highways in unreasonable manner so as to endanger life or injure highway—Town of Waterford v L B Brockett Lumber Co, 237 N Y S 436, 227 App Div 422

Due regard to rights of others must be had in use of highways
Ariz—Pearson & Dickerson Contractors v Harrington, 137 P 2d 381, 384
Iowa—Dennier v Johnson, 240 N W 745, 214 Iowa 770

Restriction to needs of traveler
S D—State v Staley, 223 N W 943, 54 S D 552, reversed on other grounds 229 N W 373, 56 S D 495

What included

(1) "The easement of travel includes every reasonable means of passage and transportation for persons and commodities and of transmission of intelligence"—In re Opinion of the Justices, 8 N E 2d 179, 181, 297 Mass 559—Commonwealth v Surridge, 164 N E 480, 481, 265 Mass 425, 62 A L R 402

(2) Public easement in highway includes every reasonable means for transmission of intelligence and transportation of persons and commodities which advance of civilization may render suitable for highway—McCullough v Interstate Power & Light Co, 300 P 165, 163 Wash 147

87. **Use of loud and obscene language** after stopping on the public highway constitutes a trespass—State v Davis, 80 N C 351, 30 Am R 86

88. U S—Jones v Brim, 17 S Ct 282, 165 U S 180, 41 L Ed 677, affirming 39 P 825, 11 Utah 200, 29 L R A 97
And see infra note 61.
29 C J p 648 note 60

89. N Y—Rice v Buffalo Steel House Co, 45 N Y S 277, 17 App Div 462
29 C J p 648 note 62
Moving buildings on city streets see the C J S title Municipal Corporations § 1773, also 44 C J p 1038 note 91—p 1041 note 32

90. Miss—Brahan v Meridian Light & R Co, 83 So 467, 121 Miss 269
29 C J p 648 note 63

91. Iowa—Roennau v Whitson, 175 N W 849, 188 Iowa 138
29 C J p 648 note 64

92. Miss—Brahan v Meridian Light & R Co, 83 So 467, 121 Miss 269
29 C J p 648 note 65

93 Pa—Breinig v Allegheny County, 2 A 2d 842, 332 Pa 474

94. Pa—Breinig v Allegheny County, supra
As affected by rights of abutting owners see supra § 141.

95. **Use by vehicle**
User of vehicle is not, as a matter of law, entitled to entire highway from property line to property line, for highway not only serves needs of traveling public, but also lawfully serves public by furnishing public the conveniences afforded by public utility companies—Clayborn v Tennessee Electric Power Co, 101 S W 2d 492, 20 Tenn App 574

96. N Y—Robia Holding Corporation v Walker, 239 N Y S 659, 136 Misc 358, affirmed 246 N Y S 210, 230 App Div 666, affirmed 178 N E 747, 257 N Y 431
Ohio—Cambridge Home Telephone Co v Harrington, 186 N E 611, 127 Ohio St 1
29 C J p 647 note 51

At common law driver of vehicle had right to drive on any part of highway—Boyer v North End Drayage Co, Mo App, 67 S W 2d 769

Shoulder

(1) The shoulders of a highway, while not designed for ordinary vehicular traffic, are intended for use when need arises and are a part of the wrought portion of state highway—Griffith v Town of Berlin, 32 A 2d 56, 130 Conn 84

(2) Shoulder of a highway is part of the 'highway" and may be used for travel—La Rue v Borrman, 22 N Y S 2d 209, 260 App Div 337, affirmed 33 N E 2d 239, 285 N Y 550

(3) The portion of highway between roadway and property line, if paved and available for vehicular travel, is "highway," and can be used by vehicles in making turns and other maneuvers incident to use of roadway or for access to alley—Boyer v State, 3 N W 2d 369, 240 Wis 337
Right to travel on left side of road see infra §§ 236c, 237

Use of old road
Before vacation or abandonment of an old road as a public way, the right to the use thereof by the public continues notwithstanding construction of a new highway serving similar needs—Blake v Skelton, 5 Tenn App 539

97. Mass—In re Opinion of the Justices, 8 N E 2d 179, 297 Mass 559

pra § 137, the right to make the ordinary, customary, and reasonable use thereof is in the public,[98] there being no such thing as a rightful, private, permanent use of a public highway.[99] It is a right common to all,[1] not confined to citizens, but extending to strangers and foreigners.[2] It exists in each individual of the public equally with the others,[3] and, in the absence of a valid modifying statute or other regulation,[4] pedestrians have the same right as drivers of vehicles,[5] to be exercised with due regard to the rights of each other.[6] A user of a vehicle is not, as a matter of law, entitled to the entire highway from property line to property line.[7]

Methods of travel. The public easement in a highway includes all reasonable modes of travel and transportation not incompatible with the proper use of the highway by others.[8] It is not restricted to transportation of persons and property in movable vehicles.[9] The question of what is a lawful and reasonable use is in the nature of things affected by changes in methods of transportation[10] and the needs of those who must be served by the ways.[11] Thus, when new means of locomotion come into general use, which are not dangerous when properly managed, and which do not interfere with the proper use of the highway in other modes, such new use will not be deemed unlawful in itself.[12]

98. U S—Barnwell Bros v South Carolina State Highway Department, D C S C, 17 F Supp 803, reversed on other grounds South Carolina State Highway Department v Barnwell Bros, 58 S Ct 510, 303 U S 177, 625, 82 L Ed 734

Ill—Brewster v Rockford Public Service Co, 257 Ill App 182

Ky—Consolidated Coach Corporation v Kentucky River Coach Co, 60 S W 2d 127, 249 Ky 65—Reo Bus Lines v Southern Bus Line Co, 272 S W 18, 209 Ky 40.

Right is paramount

N Y—Gleason v Hillcrest Golf Course, 265 N Y S 886, 148 Misc 246

Under prevailing conditions

There is a common right in all alike to the use of public highways with as little hindrance and interference as is possible under prevailing traffic conditions—People v Arko, 199 N Y S 402, 40 N Y Cr 149

99. Ala—Nashville, C & St L R Co v Hulgin, 121 So 62, 219 Ala 56

1. Idaho—Foster's, Inc, v Boise City, 118 P 2d 721

Ind—House-Wives League v City of Indianapolis, 185 N E 511, 204 Ind 685

Ky—Bell Bros Trucking Co v Kelley, 127 S W.2d 831, 277 Ky 781

Miss—Teche Lines v Danforth, 12 So 2d 784—Scott v Hart, 91 So 17, 128 Miss 353

Va—Thompson v Smith, 154 S E 579, 155 Va 367, 71 A L R 604

"The public is entitled to a proper viatic use of a highway"—Furlong v A N Deringer, Inc, 13 A 2d 186, 187, 111 Vt 220

2. La—Barbin v Police Jury, 15 La Ann 544

S D—Hyde v Minnesota, D & P R Co, 136 N W 92, 29 S D 220, 40 L R A, N S, 48

29 C J p 647 note 55

"A public highway is free to all persons who choose to travel over it, whether they be abutting property owners, residents of the municipality, the county, the state, or of a foreign state"—Foster's, Inc, v Boise City, Idaho, 118 P 2d 721, 725

3. Ariz—Pearson & Dickerson Contractors v Harrington, 137 P 2d 381

Fla—Masters v Duval County, 154 So 172, 114 Fla 205, certiorari denied 55 S Ct 70, 293 U S 559, 79 L Ed 660

Iowa—Solberg v Davenport, 232 N W 477, 211 Iowa 612

Ky—Reo Bus Lines v Southern Bus Line Co, 272 S W 18, 209 Ky 40

N Y—Town of Waterford v L B Brockett Lumber Co, 237 N Y S 436, 227 App Div 422

Pa—Commonwealth v Funk, 186 A 65, 323 Pa 390—Lowers v Zuker, 157 A 339, 102 Pa Super 581

Va—Prichard v Battle, 17 S E 2d 393, 178 Va 455—Commonwealth v Ellett, 4 S E 2d 762, 174 Va 403

Wash—Frowd v Marchbank, 283 P 467, 154 Wash 634

29 C J p 648 note 56

Age or physical condition is no bar to use of highway by all—Mahan v State, to Use of Carr, 191 A 575, 172 Md 373

4. Pa—Lowers v Zuker, 157 A 339, 102 Pa Super 581

Federal troops or militia

Statute providing that federal forces or the militia should have right of way in street or highway was intended to establish prior right to use streets and highways between persons each of whom would otherwise have right to use and occupy them, but was not intended to confer on anyone a right to proceed against the absolute prohibition of some other law—Neu v McCarthy, 33 N E 2d 570, 309 Mass 17, 133 A L R 1291

5. Ariz—Pearson & Dickerson Contractors v Harrington, 137 P 2d 381

29 C J p 648 note 57

Pedestrians may travel anywhere on a public highway—Hatzakorzian v Rucker-Fuller Desk Co, 239 P 709, 197 Cal 82, 41 A L R 1027.

6. Ariz—Pearson & Dickerson Contractors v Harrington, 137 P 2d 381

Pa—Lowers v Zuker, 157 A 339, 102 Pa Super 581

7. Miss—Mississippi Power Co v Sellers, 133 So 594, 160 Miss 512

Reason for rule

The highway may also lawfully serve the public by furnishing the public the conveniences afforded by public utility companies—Jafek v. Public Service Co of Oklahoma, 79 P 2d 813, 183 Okl 32

8. N H—State v Scott, 132 A 685, 82 N H 278

Prohibition of structures not regulation of viatic use

Statute declaring structures over highways to be a nuisance is intended for preservation of public rights and forbids encumbrances and encroachments, but does not regulate viatic or vehicular use as "highway"—State v Scott, supra

9. N H—State v Scott, supra

Gas arm

Gas arm used by owner of gasoline filling station to fill tanks of automobiles on highway is a vehicle for transportation of gasoline—State v Scott, supra

10. Md—State for Use of Hoffman v Potomac Edison Co, 170 A 568, 166 Md 138

11. Md—State for Use of Hoffman v Potomac Edison Co, supra

12. Neb—Omaha & Council Bluffs St Ry Co v City of Omaha, 208 N W 123, 114 Neb 483

29 C J p 647 note 54

"A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them, and if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established"—Macomber v Nichols, 34 Mich 212, 217, 22 Am R 522

"It [right to travel] includes the

Stopping, standing, or parking. As an incident of the right to travel on the public highways,[13] travelers may within reason stop temporarily on the highway,[14] but not unreasonably, or to such an extent as to interfere with other travelers or to prevent the free use of the road.[15] The question of how long a traveler may stop or stand on the highway is one of reasonable use[16]

Parking a vehicle within the highway limits has been held not to be a proper viatic use of the highway[17]

Injury to highway. Travelers are not liable for injuries to the highway resulting from its ordinary use.[18] However, there is no absolute right on the part of any person to use the highways in an unreasonable manner which may cause injury to the highway,[19] and statutes exist in some jurisdictions which impose liability on persons using the highways in a prohibited manner causing injury thereto[20] Actions for injuries to highways are considered supra § 228

Care required of motor vehicles with respect to injuring highways is considered in the C.J.S title Motor Vehicles §§ 422, 423, also 42 C.J. p 1073 note 34–p 1074 note 48.

b. Regulation

The right to the use of the highways for ordinary and usual purposes is subject to reasonable regulation within constitutional limits.

While the right of the public to use the highways for ordinary purposes and general traffic has been said to be permissive, a mere privilege,[21] and not an inherent or natural right[22] or a vested right,[23] the right being subject to any proper condition not forbidden by the constitution,[24] it has also been said to be an inherent right,[25] a right which cannot ordinarily be denied to the public or members thereof[26] In any event, the right to the use of the highways is not absolute or unrestricted,[27] but is subject to reasonable regulations by the state through the legislature or other authorized agency,[28] in the interest of and in the furtherance

right in so doing to use the ordinary and usual conveyances of the day, and under the existing modes of travel includes the right to drive a horse-drawn carriage or wagon thereon, or to operate an automobile thereon, for the usual and ordinary purposes of life and business"
Mich—Teche Lines v Danforth, 12 So 2d 784, 787
Va—Thompson v Smith, 154 S E 579, 583, 155 Va. 367, 71 A L R 604
Use by motor vehicles see the C J S title Motor Vehicles § 10, also 42 C J p 613 note 79-p 614 note 87

13. R I—Allen & Reed v Presbrey, 144 A 888, 50 R I 53, appeal dismissed 50 S Ct 66, 280 U.S 518, 74 L Ed 588

14. Neb—Brenning v Remington, 287 N W 776, 779, 136 Neb 883, citing **Corpus Juris.**
R I—Allen & Reed v Presbrey, 144 A 888, 50 R I 53, appeal dismissed 50 S Ct 66, 280 U S 518, 74 L Ed 588
29 C J p 648 note 74
"The right of passage . . . includes the right, as against other members of the traveling public, to stop temporarily for business necessity, accident, or the ordinary exigencies of travel"—Breinig v Allegheny County, 2 A 2d 842, 846, 332 Pa 474

Stop to inspect load

A vehicle operator may stop on highway to inspect load on vehicle only where he has reason to believe and does believe that load is insecure—Ceccacci v. Garre, 76 P 2d 283, 158 Or 466.

15. Md—Turner v Holtzman, 54 Md 148, 39 Am R 361
N J—Lippincott v Lasher, 14 A. 103, 44 N J Eq 120
29 C J p 649 note 75.

16. N H—Langevin v Twin State Gas & Electric Co, 128 A 681, 81 N H 446

17. Vt—MacDonough Point Corporation v Field, 192 A. 19, 109 Vt 25

18. Ky—Winston v Clark County, 199 S W 51, 178 Ky 447

19. N Y—Town of Waterford v L B Brockett Lumber Co, 237 N Y S 436, 227 App Div 422

20. **Willfulness immaterial**
Question of willfulness is immaterial in action to recover treble damages for injury to highway by transporting excessive load or any other act—Town of Waterford v. L B Brockett Lumber Co, supra.

21. Iowa—Solberg v Davenport, 232 N W 477, 211 Iowa 612
N H—State v Cox, 16 A 2d 508, 91 N H 137, affirmed Cox v State of New Hampshire, 61 S Ct 762, 312 U S 569, 85 L Ed 1049, 133 A L R 1396

22. Iowa—Solberg v Davenport, 232 N W 477, 211 Iowa 612

23. N H—State v Cox, 16 A 2d 508, 91 N H 137, affirmed Cox v State of New Hampshire, 61 S Ct 762, 312 U S 569, 85 L Ed 1049, 133 A L R 1396

24. N H—State v Cox, supra

25. Fla—Florida Motor Lines v Ward, 137 So 163, 102 Fla 1105

26. Fla—Florida Motor Lines v. Ward, supra
Ill—Chicago Motor Coach Co v City of Chicago, 169 N E 22, 337 Ill 200, 66 A L R 834
Neb—Brenning v Remington, 287 N W 776, 136 Neb 883

27. Ga—Schlesinger v City of Atlanta, 129 S E 861, 161 Ga 148
Ill—People v Linde, 173 N E 361, 341 Ill 269, 72 A L R 997
Iowa—Solberg v Davenport, 232 N. W 477, 211 Iowa 612

Use for travel or transportation of merchandise

Pa—Appeal of Klepeis, 20 Lehigh Co L J 59.

28. Colo—McKay v Public Utilities Commission, 91 P 2d 965, 104 Colo 402
Fla—Florida Motor Lines v Ward, 137 So 163, 102 Fla 1105
Ga—Schlesinger v City of Atlanta, 129 S E 861, 161 Ga 148
Idaho—Foster's, Inc, v. Boise City, 118 P 2d 721—Packard v O'Neil, 262 P 881, 45 Idaho 427, 56 A L R 317
Iowa—Solberg v Davenport, 232 N W 477, 211 Iowa 612
Ky—City of Ashland v Ashland Supply Co, 7 S W 2d 833, 225 Ky 123—Reo Bus Lines v Southern Bus Line Co, 272 S W 18, 209 Ky 40
Mass—In re Opinion of the Justices, 8 N E 2d 179, 297 Mass 559
Mich—Jacobson v Carlson, 4 N W 2d 721, 302 Mich 448
Miss—Teche Lines v Danforth, 12 So 2d 784
N Y—People v Ritter, 200 N Y.S. 816, 120 Misc 852.

of the public or general good,[29] preserving the highways,[30] and securing the safety and convenience of the public in their use of the highways.[31] While the regulation of the use of the highways is based on a broad power and is a matter of discretion,[32] such regulations must give due regard to inviolable private and constitutional rights.[33] They must be reasonable, not arbitrary or capricious,[34] must operate with equality,[35] and must have some tendency to accomplish the proper end in view.[36] An arbitrary interference with, or unreasonable restriction on, the fundamental rights with respect to the use of the highways is unjustified.[37] Regulations reasonably restricting the use of the highways to normal traffic[38] and prohibiting any exceptional or unusual use thereof[39] are proper, as are such

Pa.—Commonwealth v. Funk, 186 A. 65, 323 Pa. 390.

29. C.J. p. 648 note 66—12 C.J. p. 917 note 10.

"Public roads are laid out and opened for use, on equal terms, of all persons who comply with the reasonable regulations of duly constituted authority."—Goulter v. Huse, 84 P.2d 126, 196 Wash. 652.

"Since the preservation and the safety of highways is a matter of public concern . . . users of the highway must submit to reasonable rules and regulations adapted to attain these ends regardless of the character of the vehicle . . . or purpose for which it is being used."—Commonwealth v. Abell, 122 S.W.2d 757, 760, 275 Ky. 802.

Construction of regulations.

(1) The general principles governing interpretation and construction of police regulations generally are applicable to regulations governing use of highways.—State ex rel. Parker v. Frick, Fla., 7 So.2d 152.

(2) Statutes regulatory of highway traffic must have a practical or workable interpretation and not an arbitrary or unreasonable construction.—Teche Lines v. Danforth, Miss., 12 So.2d 784.

Large discretion is vested in legislature under the police power.—Jacobson v. Carlson, 4 N.W.2d 721, 302 Mich. 448.

Regulation of traffic.

Ill.—Chicago Park Dist. v. Canfield, 19 N.E.2d 376, 370 Ill. 447, 121 A.L.R. 557.

Ind.—Andrews v. City of Marion, 47 N.E.2d 968.

Va.—Savage v. Commonwealth, 147 S.E. 262, 152 Va. 992.

Use by nonresidents.

U.S.—Wuchter v. Pizzutti, 48 S.Ct. 259, 276 U.S. 13, 72 L.Ed. 446, 57 A.L.R. 1230, reversing Pizzutti v. Wuchter, 134 A. 727, 103 N.J.Law 130.

N.Y.—Freedman v. Poirier, 236 N.Y.S. 96, 134 Misc. 253, affirmed 237 N.Y.S. 618, 227 App.Div. 820.

Permanent lines of travel.

Statutes designed to govern traffic upon highways are applicable only to permanent lines of travel.—Parrish v. Smith, 78 P.2d 629, 102 Colo. 250, followed in Parrish v. Fey, 78 P.2d 633, 102 Colo. 258.

Right to make improvements.

Right to public use of highway, while road work is being done, is subordinate to right of public authorities to have improvements made.—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742.

29. Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105.

Relation of restrictions to benefits.

The restrictions on the use of a highway are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations.

Mich.—Macomber v. Nichols, 34 Mich. 212, 22 Am.R. 522.

Neb.—Omaha & Council Bluffs St. Ry. Co. v. City of Omaha, 208 N.W. 123, 114 Neb. 483.

30. Tenn.—Hoover Motor Express Co. v. Fort, 72 S.W.2d 1052, 167 Tenn. 628, appeal dismissed 55 S.Ct. 149, 293 U.S. 529, 79 L.Ed. 638.

31. U.S.—Schwartzman Service v. Stahl, D.C.Mo., 60 F.2d 1034.

Cal.—Watson v. State Division of Motor Vehicles, 298 P. 481, 212 Cal. 279.

Colo.—Parrish v. Smith, 78 P.2d 629, 102 Colo. 250, followed in Parrish v. Fey, 78 P.2d 633, 102 Colo. 258.

S.C.—State ex rel. Daniel v. John P. Nutt Co., 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007.

"Unreasonable restriction of public travel not based on safety or public welfare cannot be sanctioned."—Chicago Park Dist. v. Canfield, 19 N.E.2d 376, 379, 370 Ill. 447, 121 A.L.R. 557.

Use of highways "is subject to such reasonable and impartial regulations . . . as are calculated to secure to the general public the largest practical benefit . . . and to provide for the safety of the public."—People v. Linde, 173 N.E. 361, 363, 341 Ill. 269, 72 A.L.R. 997.

"Where a restriction of the use of highways . . . is designed to promote the public convenience in the interest of all it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection."—Cox v. State of New Hampshire, 61 S.Ct. 762, 765, 312 U.S. 569, 85 L.Ed. 1049, 133 A.L.R. 1396, affirming State v. Cox, 16 A.2d 508, 91 N.H. 137.

Exercise of police power.

A citizen's right to travel on public highways is a common right, but exercise thereof may be regulated or controlled in interest of public safety under the state's "police power."—Prichard v. Battle, 17 S.E.2d 393, 178 Va. 455.—Commonwealth v. Ellett, 4 S.E.2d 762, 174 Va. 403.

32. Miss.—Teche Lines v. Danforth, 12 So.2d 784.

Mont.—Barney v. Board of Railroad Com'rs, 17 P.2d 82, 93 Mont. 115.

N.H.—State v. Moore, 13 A.2d 143, 91 N.H. 16.

Wash.—State ex rel. Scott v. Superior Court for Thurston County, 24 P.2d 87, 173 Wash. 547.

33. Miss.—Teche Lines v. Danforth, 12 So.2d 781.

N.H.—State v. Moore, 13 A.2d 143, 91 N.H. 16.

34. Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 174.

Wyo.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 40 Wyo. 462.

35. Wyo.—Weaver v. Public Service Commission of Wyoming, supra.

36. Wyo.—Weaver v. Public Service Commission of Wyoming, supra.

37. Miss.—Teche Lines v. Danforth, 12 So.2d 781.

Relief from highway congestion may not be accomplished by unfair discriminatory measures.—State v. Moore, 13 A.2d 143, 91 N.H. 16.

38. S.C.—State ex rel. Daniel v. John P. Nutt Co., 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007.

39. Tex.—City of Dallas v. Harris, Civ.App., 157 S.W.2d 710, error refused.

Wyo.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 140 Wyo. 462.

Nonpublic use.

N.Y.—Good Humor Corporation v. City of New York, 33 N.Y.S.2d 905, affirmed 36 N.Y.S.2d 85, 264 App.

regulations forbidding any particular form of travel[40] So regulations imposing terms and conditions within constitutional bounds on particular forms of travel are proper[41] On the other hand, the right to travel upon the highways and transport his property in the ordinary course of his business or pleasure cannot be denied to a citizen.[42]

Such regulations may be imposed as the requirement of a license[43] for the carrying of passengers,[44] for hauling logs or other timber,[45] or that the person using the highway in an unusual manner shall repair any damage caused thereby[46]

Use by vehicles. Under its police powers, the state may in the public interest regulate vehicular operation on the public highways[47] The character of vehicles using the highways may be regulated,[48] and unnecessary vehicles,[49] or vehicles which are injurious to the highways[50] or dangerous to travelers,[51] may be excluded.

The authorities may limit the speed of vehicles,[52] or require lights to be placed thereon at night[53]

Stopped, standing, or parked vehicles. The right to stop on the highways is subject to reasonable regulation under the police powers,[54] as is the park-

Div 620, affirmed 49 N E 2d 153, 290 N Y 312

Traffic of certain kinds may be prohibited—Sanger v Lukens, D C Idaho, 24 F 2d 226, reversed, C C A, on other grounds 26 F 2d 855

Use for other than passage may be prohibited—State v Cox 16 A 2d 508, 91 N H 137, affirmed Cox v State of New Hampshire, 61 S Ct 762, 312 U S 569, 85 L Ed 1049, 133 A L R 1396

40. N H—State v Cox, supra.

41. **The state is in position of a landowner** in control of the use of a highway, except that discrimination must be fair and that no essential rights be impaired—State v Cox, supra

42 Fla—Florida Motor Lines v. Ward 137 So 163, 102 Fla 1105
Ill—Chicago Motor Coach Co v City of Chicago, 169 N E 22, 337 Ill 200, 66 A L R 834

Power restricted to regulation
Idaho—In re Public Utilities Commission's Investigation, 1 P 2d 627, 51 Idaho 56

Obstructing right of travel is improper except under exceptional circumstances—Dennier v Johnson, 240 N W 745, 214 Iowa 770

43. Ind—Kelly v Finney, 194 N E 157 207 Ind 557
29 C J p 648 note 67

44. N J—Combs v Lakewood Tp, 53 A 697, 68 N J Law 582

45 N C—Road Trustees v Geo C Brown & Co, 75 S E 40, 159 N C 175, 42 L R A,N S, 506
29 C J p 648 note 68

46 Ky—Winston v Clark County, 199 S W 51, 178 Ky 447
Miss—Hudson v Stuart, 145 So 611, 166 Miss 339

47. Idaho—Packard v O'Neil, 262 P 881, 45 Idaho 427, 56 A L R 317
W Va—Nulter v State Road Commission of West Virginia, 193 S E 549, 119 W Va 312, dissenting opinion 194 S E. 270, 119 W Va 312

Conduct of owners and drivers of vehicles may be regulated—Packard v O'Neil, 262 P 881, 45 Idaho 427, 56 A L R 317

48. Ky—Reo Bus Lines Co v Southern Bus Line Co, 272 S W 18, 209 Ky 40

49. U S—Butler-Newark Bus Line v Sinclair, D C N J, 34 F 2d 780

50. **Vehicles excluded**

(1) A statute prohibiting vehicles in specified categories, the purpose of which was to prohibit vehicles that would be injurious to highways, was held to cover implements of husbandry with tires having protuberances of any material other than rubber projecting beyond tread on traction surface of the tire except those having protuberances which would not in the opinion of the state highway department injure the highway as provided in one section notwithstanding provision in another section excepting implements of husbandry—People v Rapini, 112 P 2d 551, 107 Colo 363, 134 A L R 545

(2) A binder was held to be a "vehicle" within statute prohibiting moving of a vehicle over highway having protuberances of any material other than metal on wheels—People v Rapini, supra

Close of highway to particular vehicles

(1) Authority has sometimes been conferred on local authorities to temporarily close a highway to certain kinds of vehicles, such as lumber, logging, and freight trucks when use of such highway by such vehicles would greatly damage it—State v Jones, 243 P 1, 137 Wash 556.

(2) A statutory requirement of notice of closing was held not violated—State v Jones, supra

(3) Validity of regulation under the equal protection clause see Constitutional Law § 531 note 30

51. N Y—Town of Waterford v L B Brockett Lumber Co, 237 N Y S 436, 227 App Div 422

52. Neb—Schultz v State, 130 N W 972, 89 Neb 34, 33 L R A,N S, 403, Ann Cas 1912C 495
29 C J p 648 note 70
Bicycles see infra § 235

53. Conn—Hale v Resnikoff, 111 A. 907, 95 Conn 603—Gargan v. Harris, 96 A. 940, 90 Conn 188

Purpose of regulation
Mandates that vehicles be equipped with lights are intended to aid in making highway travel safe—Eastman v Herrick, 173 A. 807, 87 N H 58

Light visible under normal conditions
Statute requiring lights visible ahead and behind to be attached to horse-drawn vehicle requires only "reasonable light" and one visible under normal conditions so that others traveling properly may see it in time to avoid collision is sufficient—Eastman v Herrick, supra

Substitutes improper

(1) Where the statute requires attached lights on horse-drawn vehicles at night, no substitutes, whatever their equivalence, meet such demand—Eastman v Herrick, supra

(2) Use of flashlight by occupant of horse-drawn vehicle was held not substantial compliance with statute requiring vehicle to have "attached to it a light . . . visible from the front and rear."—Eastman v. Herrick, supra.

54. **Stopping on "traveled portion"**
Under statute providing that no vehicle shall be permitted to remain stationary upon traveled portion of any highway except on the right hand side in the direction in which the vehicle is headed the "traveled portion" of the highway comprises only that portion intended for normal travel and not the shoulders of the road—Nichols v Williams, 16 A 2d 605, 127 Conn 337

Statutes construed
Under statute providing that when vehicle is stopped on highway an unobstructed width of at least twenty feet shall be left and a clear view of stopped vehicle shall be available from distance of two hundred feet the vehicle must turn as far to the right as practical, but must not stop upon any part of traveled highway until at least two hundred feet clear

ing of vehicles on the highways.[55]

It has been held that regulations prohibiting one from leaving a vehicle on the main traveled or improved portion of a highway except under specified conditions must be given a reasonable or not too literal construction.[56] Such regulations are not violated if there is a proper excuse or necessity for stopping a vehicle on the highway, and a reasonable effort is made to get it entirely off the traveled portion of the road or as nearly so as circumstances will permit.[57]

Use by federal government While the federal government may use the highways of a state for all purposes necessary or reasonably incidental to the carrying out of the powers delegated to it,[58] and is not to be thwarted or hampered in the execution of such powers by state regulation,[59] the general control of the highways remains in the state and may be exercised by it as far as it may be done without interference with any function of the federal government.[60]

c. Use for Business Purposes

(1) In general
(2) Transportation for hire

(1) In General

There is no absolute right to the use of the highways as a place of business for gain. Such a use may be entirely prohibited, or may be conditioned and regulated.

The general right of the public to use the highways does not carry with it the right to use a highway as a place of business for gain.[61] Such a use is of an extraordinary nature,[62] and differs radically from the right of travel and transportation in the ordinary course of life.[63] It is said to be a priv-

view is available in each direction, save when vehicle is disabled or when on account of obstructions or equivalent conditions ahead, it is impossible to proceed so as to leave the two hundred feet of clear view—Teche Lines v Danforth, Miss, 12 So 2d 784

Parts of highway included

The statutory provision that a street or roadway shall include part of the highway intended for vehicular travel is for the purpose of excluding sidewalks which are generally constructed within the limits of the highway, and does not exclude the shoulder of the highway which may also be used for travel--La Rue v Borrman, 22 N Y S 2d 209, 260 App Div 337, affirmed 33 N E 2d 239, 285 N Y 550

55. Purpose of regulations

The purpose of the statute prohibiting the parking of vehicles except with front and rear right wheels within one foot of right-hand side of improved portion of the road, and correlated sections, is to create uniform rules to be followed by those who use the public highways and contemplates in its major aspect, traveling vehicles as counterdistinguished from nonmoving vehicles or those parked for temporary purposes—Townley v Union Fork & Hoe Co, 22 N E 2d 211, 60 Ohio App 544, appeal dismissed 19 N E 2d 511, 135 Ohio St 96

Regulations with respect to parking of motor vehicle see the C J S title Motor Vehicles § 28, also 42 C J p 627 note 65-p 628 note 83

56. Wash—Grubbs v Grayson, 5 P 2d 1033 165 Wash 548

When "practical"

"Practical" within statute against stopping vehicle on main traveled part of highway when it is "practical" to stop vehicle off such part of the highway is not to be given too literal a construction and does not necessarily mean that which is physically impossible or mechanically practical but rather that which is possible of reasonable performance including the element of reasonable safety under existing circumstances—Locklear v Southeastern Stages, 8 S E 2d 321, 193 S C 309

"Park" and "parked" are defined to mean to stop and keep standing for a time on a public way, or to leave temporarily on a public way or in any open space—Hartwell v Progressive Transp Co, 270 N W 570, 573, 198 Minn 488, quoting Webster New Int D

"Live parking" is keeping a vehicle standing with a driver in his place—Hartwell v Progressive Transp Co, 270 N W 570, 573, 198 Minn 488, quoting Webster New Int D

"Dead parking" is keeping a vehicle standing without a driver—Hartwell v Progressive Transp Co, 270 N W 570, 573, 198 Minn 488, quoting Webster New Int D

57. Wash—Grubbs v Grayson, 5 P 2d 1033, 165 Wash 548

58. Mass—Neu v McCarthy, 33 N E 2d 570, 309 Mass 17, 133 A L R 1291

59. Mass—Neu v McCarthy, supra

60. Mass—Neu v McCarthy, supra

61. Iowa—Solberg v Davenport, 232 N W 477, 211 Iowa 612

62. U S—Stephenson v Binford, Tex, 53 S Ct 181, 287 U S 251, 77 L Ed 288, 87 A L R 721, affirming, D C, 53 F 2d 509

Ky—Bell Bros Trucking Co v Kelley, 127 S W 2d 831, 277 Ky 781

Md—Parlett Co-operative v Tidewater Lines, 165 A. 313, 164 Md 405

Miss—Scott v Hart, 91 So 17, 128 Miss 353

Mont—Board of Railroad Com'rs v. Reed 58 P 2d 271, 102 Mont 382—Barney v Board of Railroad Com'rs, 17 P 2d 82, 93 Mont 115

Pa.—Commonwealth v Guseman, 35 Pa Dist & Co 637, 2 Fay L J 128

Tex—Railroad Commission of Texas v Smith, Civ App, 57 S W 2d 290, followed in Railroad Commission of Texas v Bradberry, Civ App, 57 S W 2d 294

Wash—Pacific Inland Tariff Bureau v Schaaf, 95 P 2d 781, 1 Wash 2d 213—State ex rel Scott v Superior Court for Thurston County, 24 P 2d 87, 173 Wash 547

Wis—State v Railroad Commission of Wisconsin, 220 N W 390, 196 Wis 410

63. Fla—Seaboard Air Line R Co v. Wells, 130 So 587, 100 Fla 1027

Ky—Bell Bros Trucking Co v Kelley, 127 S W 2d 831, 277 Ky 781

Miss—Scott v Hart, 91 So 17, 128 Miss 353

Or—Warren v. Bean, 115 P 2d 167, 167 Or 116

"Highways primarily are for the benefit of the traveling public and are only incidentally for the benefit of those who are engaged in business along its way"—State Highway Commission v Humphreys, Tex Civ App, 58 S W 2d 144, 145, error refused

Distinctions

The right of a citizen to use the highway for travel and transportation in the ordinary course of life and business is the usual and ordinary right common to all, while the right to use the highway for business and private gain is special, unusual, and extraordinary. As to the former the extent of legislative power is regulation, but as to the lat-

ilege rather than an inherent or vested right,[64] subordinate at all times to the ordinary use of the highways by the public.[65]

Vending or peddling merchandise. The vending or peddling of merchandise on the highways is a common and traditional lawful use of the highways[66] recognized by the statutes of some jurisdictions.[67]

Regulation. Within constitutional limits,[68] the state, through the legislature or other governing body, may, generally, entirely prohibit or deny the use of the highways for such purposes,[69] or permit such use to some and deny it to others,[70] or regulate, control, condition, or restrict such use when permitted,[71] as long as the regulation or condition

ter the power is broader, the legislature having the right to wholly deny it, or permit it to some and deny it to others
Ky—Bell Bros Trucking Co v Kelley, 127 S W 2d 831, 277 Ky 781
Miss—Scott v Hart, 91 So 17, 128 Miss 353

Secondary use of highway
Colo—McKay v Public Utilities Commission, 91 P 2d 965, 104 Colo 402

64. Fla—Seaboard Air Line R Co v Wells, 130 So 587, 100 Fla 1027
Mich—Smith v Behrendt, 270 N W 227, 278 Mich 91
Or—Warren v Bean, 115 P 2d 167, 167 Or 116
Tex—Railroad Commission v McDonald, Civ App, 90 S W 2d 581
Vt—Kelbro, Inc, v Myrick, 30 A 2d 527, 531
Wash—Robertson v Department of Public Works, 39 P 2d 596, 180 Wash 133
W Va—Darnall Trucking Co v Simpson, 12 S E 2d 516 122 W Va 656, appeal dismissed 61 S Ct 1121, 313 U S 549, 85 L Ed 1514

No person has an inherent or vested right to use the highways as a place of business or for gain
Iowa—Towns v Sioux City, 241 N W 658, 214 Iowa 76
Ky—Eastridge v Southeastern Greyhound Lines, 133 S W 2d 95, 280 Ky 392
Tenn—Dooley v City of Cleveland, 135 S W 2d 649, 175 Tenn 439—State v Harris, 76 S W 2d 324, 168 Tenn 159—Hoover Motor Express Co v Fort 72 S W 2d 1052, 167 Tenn 628, appeal dismissed 55 S Ct 149, 293 U S 529, 79 L Ed 638
Tex—Ex parte Sepulveda, 2 S W 2d 445, 108 Tex Cr 533

65. Tex—Railroad Commission v McDonald, Civ App, 90 S W 2d 581

66. N Y—Good Humor Corporation v City of New York, 49 N E 2d 153, 290 N Y 312, affirming 36 N Y S 2d 85, 264 App Div 620, affirming 33 N Y S 2d 905

67. N Y—Good Humor Corporation v City of New York, supra

68. Va—Savage v Commonwealth, 147 S E 262, 152 Va. 999

69. U S—Stephenson v. Binford, Tex, 53 S Ct 181, 287 U S 251, 77 L Ed 288, 87 A L R. 721, affirming, D C, 53 F 2d 509—Sage v Baldwin, D C Tex, 55 F 2d 968
Fla—Seaboard Air Line R Co v Wells, 130 So 587, 100 Fla 1027
Ga—Georgia Public Service Commission v. Saye & Davis Transfer Co, 154 S E 439, 170 Ga 873
Idaho—In re Public Utilities Commission's Investigation, 1 P 2d 627, 51 Idaho 56
Ill—Chicago Motor Coach Co v City of Chicago, 169 N E 22, 337 Ill 200, 66 A L R 834
Iowa—Towns v Sioux City, 241 N W 658, 214 Iowa 76
Ky—Bell Bros Trucking Co v Kelley, 127 S W 2d 831, 277 Ky 781
Md—Parlett Co-operative v Tidewater Lines, 165 A 313, 164 Md 405
Miss—Scott v Hart, 91 So 17, 128 Miss 353
Mont—Barney v Board of Railroad Com'rs, 17 P 2d 82, 93 Mont 115
Or—Warren v Bean, 115 P 2d 167, 167 Or 116
Pa—Commonwealth v. Guseman, 35 Pa Dist & Co 637, 2 Fay L J 128
Tex—New Way Lumber Co v Smith, 96 S W 2d 282, 128 Tex 173, affirming Smith v New Way Lumber Co, Civ App, 84 S W 2d 1104—City of Dallas v Harris, Civ App, 157 S W 2d 710, error refused—Railroad Commission of Texas v Inter-City Forwarding Co, Civ App, 57 S W 2d 290, followed in Railroad Commission of Texas v Bradberry, Civ App, 57 S W 2d 294
Vt—Kelbro, Inc v Myrick, 30 A 2d 527
Va—Savage v Commonwealth, 147 S E 262, 152 Va 992
Wash—Pacific Inland Tariff Bureau v Schaaf, 95 P 2d 781, 1 Wash 2d 210—Robertson v Department of Public Works, 39 P 2d 596, 180 Wash 133
"The power is plenary and may extend even to exclusion because the regulation of the business is the regulation of a privilege permitted and controlled by the state"—In re Public Utilities Commission's Investigation, 1 P 2d 627, 629, 51 Idaho 56

Unnecessary use
As state may withhold privilege of using highways as place of business for private gain, it may also prohibit unnecessary use of highways for private gain—Barney v Board of Railroad Com'rs, 17 P 2d 82, 93 Mont 115.

70. Ky—Bell Bros Trucking Co v. Kelley, 127 S W 2d 831, 277 Ky 781
Miss—Scott v. Hart, 91 So 17, 128 Miss 353
Vt—Kelbro, Inc v. Myrick, 30 A. 2d 527

71. U S—Stephenson v Binford, Tex, 53 S Ct 181, 287 U S 251, 77 L Ed 288, 87 A L R 721, affirming, D C, 53 F 2d 509
Cal—Morel v Railroad Commission of California, 81 P 2d 144, 11 Cal 2d 488
Fla—Seaboard Air Line Ry Co v. Wells, 130 So 587, 100 Fla 1027
Ga—Georgia Public Service Commission v Saye & Davis Transfer Co, 154 S E 439, 170 Ga 873
Iowa—Towns v Sioux City, 241 N W 658, 214 Iowa 76
Md—Parlett Co-operative v Tidewater Lines, 165 A 313, 164 Md 405
Mont—Board of Railroad Com'rs v Reed, 58 P 2d 271, 102 Mont 382—Barney v Board of Railroad Com'rs, 17 P 2d 82, 93 Mont 115
Or—Warren v Bean, 115 P 2d 167, 167 Or 116
Pa—Commonwealth v Guseman, 35 Pa Dist & Co 637, 2 Fay L J 128.
Tenn—Marshall v State, 171 S W 2d 269—Johnson Freight Lines v Davis, 123 S W 2d 820, 174 Tenn 51
Tex—New Way Lumber Co v. Smith, 96 S W 2d 282, 128 Tex 173, affirming Smith v New Way Lumber Co, Civ.App, 84 S W 2d 1104—Railroad Commission of Texas v Inter-City Forwarding Co, Civ App 57 S W 2d 290, followed in Railroad Commission of Texas v Bradberry, Civ App, 57 S W 2d 294
Wash—Pacific Inland Tariff Bureau v Schaaf, 95 P 2d 781, 1 Wash 2d 210—Robertson v Department of Public Works, 39 P 2d 596, 180 Wash 133—State ex rel Scott v Superior Court for Thurston County, 24 P 2d 87, 173 Wash 547—Northern Pac Ry Co v Schoenfeldt 213 P 26, 123 Wash 579
Wis—State v Railroad Commission of Wisconsin, 220 N W 390, 196 Wis 410

Basis for regulation
State's right to regulate use of public highway is based on nature of business and use of highways in connection therewith—Barney v.

is not arbitrary or capricious,[72] it being the duty of the legislature so to regulate the use of the highways for private gain that such use does not materially impair or destroy the usefulness of the highways for the proper private purposes of all.[73] While this power to regulate the use of the highways for private gain has been said to be a valid exercise of the police power of the state,[74] it has also been said to be broader than with respect to the common right of all to use the highway for travel and transportation.[75]

(2) Transportation for Hire

There is no absolute right to the use of the highways for transportation of persons and property for hire. Such a use may be entirely prohibited, or may be conditioned and regulated

Public vehicular highways are designed primarily for general public transportation and not for conducting thereon the business of transporting persons or property for compensation.[76] The use of the highways by a private or common carrier is an extraordinary one,[77] enjoyed as a mere privilege or license,[78] and revocable at the will of the legislature.[79] The state through the legislature or other authorized agency may wholly prohibit or deny such use to be made of the highways,[80] or it may permit such use to some and deny it to others,[81] provided no unjust discrimination is practiced,[82] no monopoly created,[83] or due process denied,[84] or it may generally permit, limit, condition, and regulate such use.[85]

Board of Railroad Com'rs, 17 P.2d 82, 93 Mont. 115

Effect of federal aid

The fact that the United States contributes to or assists states in building of roads does not deprive state or limit exercise of its police power or other right to control and regulate use of its roads for commercial purposes.—Whitney v. Fife, 109 S.W.2d 832, 270 Ky. 434

72. Wash.—Pacific Inland Tariff Bureau v. Schaaf, 95 P.2d 781, 1 Wash.2d 210

73. Md.—Parlett Co-operative v. Tidewater Lines, 165 A. 313, 317, 164 Md. 405

"It is not only within the power of the state, but its imperative duty to so regulate their use for private gain, that it may not materially impair or destroy their usefulness as avenues of communication adequate and available for the use of all citizens for their own proper and private purposes. Certainly the people who pay for the roads are not to be excluded from the use thereof, in order that a few may profit by converting them into motor ways for the transportation of freight and passengers for gain."—Parlett Co-Operative v. Tidewater Lines, supra.

74. Wash.—Northern Pac. Ry. Co. v. Schoenfeldt, 213 P. 26, 123 Wash. 579

75. Ky.—Bell Bros. Trucking Co. v. Kelley, 127 S.W.2d 831, 277 Ky. 781

Miss.—Scott v. Hart, 91 So. 17, 128 Miss. 353

76. Fla.—Florida Motor Lines v. State Railroad Commission, 132 So. 851, 101 Fla. 1018

Mo.—State v. Dixon, 73 S.W.2d 385, 335 Mo. 478

Vt.—State v. Gamelin, 13 A.2d 204, 111 Vt. 245

77. U.S.—Stephenson v. Binford, D.C.Tex., 53 F.2d 509, affirmed 53 S.Ct. 181, 287 U.S. 251, 77 L.Ed. 288, 87 A.L.R. 721—Buck v. Kuykendall, D.C.Wash., 295 F. 197, reversed on other grounds 45 S.Ct. 324, 267 U.S. 307, 69 L.Ed. 623, 38 A.L.R. 286

Fla.—Riley v. Lawson, 143 So. 619, 106 Fla. 521

Ind.—Kelly v. Finney, 194 N.E. 157, 207 Ind. 557

Tex.—Ex parte Sterling, 53 S.W.2d 294, 122 Tex. 108

Vt.—State v. Gamelin, 13 A.2d 204, 111 Vt. 245

78. U.S.—Stephenson v. Binford, D.C.Tex., 53 F.2d 509, affirmed 53 S.Ct. 181, 287 U.S. 251, 77 L.Ed. 288, 87 A.L.R. 721

R.I.—Gizzarelli v. Presbrey, 117 A. 359, 44 R.I. 333

Tex.—Ex parte Sterling, 53 S.W.2d 294, 122 Tex. 108—Box v. Newsom, Civ.App., 43 S.W.2d 981

Inferior to inherent right

Inherent right of citizen to use highways is in degree superior to right of common carrier.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105

79. Tex.—Ex parte Sterling, 53 S.W.2d 294, 122 Tex. 108

80. U.S.—Stephenson v. Binford, D.C.Tex., 53 F.2d 509, affirmed 53 S.Ct. 181, 287 U.S. 251, 77 L.Ed. 288, 87 A.L.R. 721

Fla.—Riley v. Lawson, 143 So. 619, 106 Fla. 521—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105—Florida Motor Lines v. State Railroad Commission, 132 So. 851, 101 Fla. 1018

Ga.—Georgia Public Service Commission v. Saye & Davis Transfer Co., 154 S.E. 439, 170 Ga. 873

Idaho.—Smallwood v. Jeter, 244 P. 149, 42 Idaho 169

Ind.—Kelly v. Finney, 194 N.E. 157, 207 Ind. 557

Mo.—State v. Dixon, 73 S.W.2d 385, 335 Mo. 478

Tex.—Shupee v. Railroad Commission of Texas, 73 S.W.2d 505, 123 Tex. 521, affirming Railroad Commission of Texas v. Shupee, Civ.App., 57 S.W.2d 295—Thompson v. Harrison, Civ.App., 86 S.W.2d 1093

Vt.—State v. Gamelin, 13 A.2d 204, 111 Vt. 245

81. Vt.—State v. Gamelin, supra

82. Fla.—Florida Motor Lines v. State Railroad Commission, 132 So. 851, 101 Fla. 1018

83. Ga.—Georgia Public Service Commission v. Saye & Davis Transfer Co., 154 S.E. 439, 170 Ga. 873

84. Ga.—Georgia Public Service Commission v. Saye & Davis Transfer Co., supra

85. Fla.—Riley v. Lawson, 143 So. 619, 106 Fla. 521—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105—Florida Motor Lines v. State Railroad Commission, 132 So. 851, 101 Fla. 1018

Ind.—Kelly v. Finney, 194 N.E. 157, 207 Ind. 557

Mass.—In re Opinion of the Justices, 14 N.E.2d 462, 300 Mass. 602

Mo.—State v. Dixon, 73 S.W.2d 385, 335 Mo. 478

Tenn.—Marshall v. State, 171 S.W.2d 269—Southeastern Greyhound Lines v. Dunlap, 160 S.W.2d 418, 178 Tenn. 546—Johnson Freight Lines v. Davis, 123 S.W.2d 820, 174 Tenn. 51

Tex.—Shupee v. Railroad Commission of Texas, 73 S.W.2d 505, 123 Tex. 521, affirming Railroad Commission of Texas v. Shupee, Civ.App., 57 S.W.2d 295—Thompson v. Harrison, Civ.App., 86 S.W.2d 1093—Box v. Newson, Civ.App., 43 S.W.2d 981

Wyo.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 40 Wyo. 462.

Common carriers

U.S.—Buck v. Kuykendall, D.C.Wash., 295 F. 197, reversed on other grounds 45 S.Ct. 324, 267 U.S. 307, 69 L.Ed. 623, 38 A.L.R. 286—Liberty Highway Co. v. Michigan Pub-

The power of regulation with respect to use of the highways by a common carrier has been said to be broader than that with respect to the ordinary use of the highways,[86] and to be derived from a source other than the police power.[87]

Users of the highway for transportation of persons and property for hire may be subjected to special regulations not applicable to those using the highways for public purposes[88] if the regulation bears a relation to highway conservation[89] The state may require suitable protection for the public against injuries through the operations of carriers for hire, whether common or private[90]

While, as has been discussed supra § 232, the legislature may in the exercise of the police power prohibit the use of the highways for some purposes, if based on a reasonable classification, the legislature cannot lawfully make an otherwise proper use of the highway depend on the compulsion of the user unwillingly to assume the role of common carrier and devote his property to public use[91]

d. Grant of Right to Use Highways

No one can acquire a right to a special use of the highways not common to all except by grant of the sovereign power The state has power to grant a franchise for such a use, within constitutional limits.

The primary and preferred use of the highways of the state is for private purposes of the public,[92] and no one can acquire a right to a special or exceptional use of a public highway not common to all the citizens of the state except by grant from the sovereign power.[93]

The power to grant a franchise for a special use of a public highway rests in the state,[94] acting through the legislature,[95] although the power is often delegated to local authorities[96] Where the power to control and supervise state highways has been vested in a state highway commission, local authorities have no power to confer a right of way to a public service corporation over or upon such a highway within the limits of the locality[97] Where, however, the power has been delegated by statute to both state and local officers, reasonable harmony as to their powers should be given within the general scheme.[98] A statute restricting the authority of local authorities in granting franchises for the use of the highways except under specified conditions has been held to refer to cases where the power to grant or withhold a franchise exists[99]

While the duty to serve the public has been said to go hand in hand with the privilege of exercising a special franchise by occupation of the public highways,[1] such duty and privilege are not fully inter-

lic Utilities Commission, D C Mich, 294 F 703

Ohio—Motor Transport & Truck Co v Public Utilities Commission of Ohio, 181 N E 665, 125 Ohio St 374, followed in Bradley, D B A Wolverine Motor Freight Lines v Public Utilities Commission of Ohio, 181 N E 668, 125 Ohio St 381 affirmed Bradley v Public Utilities Commission of Ohio, 53 S Ct 577, 289 U S 92, 77 L Ed 1053, 85 A L R 1131

W Va—Ex parte Dickey, 85 S E 781, 76 W Va 576, L R A 1915F 840

Interstate commerce as a factor see Commerce § 71

86. Idaho—In re Public Utilities Commission's Investigation, 1 P.2d 627, 51 Idaho 56.

87. Idaho—In re Public Utilities Commission's Investigation, supra.

88. Ind—Richmond Baking Co v Department of Treasury, 18 N E 2d 778, 215 Ind 110

89. Pa—Commonwealth v Guseman, 35 Pa Dist & Co 637, 2 Fay L J 128

90. U S—Smith v Cahoon, Fla, 51 S Ct 582, 283 U S 553, 75 L Ed 1264

91. Or—Purple Truck Garage Co v Campbell, 250 P 213, 119 Or 484, 51 A L R 816.

Use by private carrier cannot be made to depend on his assumption, against his will, of the duties and burdens of a common carrier—Michigan Public Utilities Commission v Duke Mich, 45 S Ct 191, 266 U S 570, 69 L Ed 445, 36 A L R 1105

92. U S—Stephenson v Binford, Tex, 53 S Ct 181, 287 U S 251, 77 L Ed 288, 87 A L R 721, affirming, D C, 53 F 2d 509

Ind—Kelly v Finney, 194 N E 157, 207 Ind 557

Md—Parlett Co-operative v Tidewater Lines, 165 A 313, 164 Md 405

Pa—Commonwealth v Guseman, 35 Pa Dist & Co 637, 2 Fay L J 128

Tenn—State v Harris, 76 S W 2d 324, 168 Tenn 159—Hoover Motor Express Co v Fort, 72 S W 2d 1052, 167 Tenn 628, appeal dismissed 55 S Ct 149, 293 U S 529, 79 L Ed 638

Tex—City of Dallas v Harris, Civ App, 157 S W 2d 710, error refused—Railroad Commission of Texas v Smith, Civ App, 57 S W 2d 290, followed in Railroad Commission of Texas v Bradberry, Civ App, 57 S W 2d 294

Wash—Pacific Inland Tariff Bureau v Schaaf, 95 P 2d 781, 1 Wash 2d 210—State ex rel Scott v Superior Court for Thurston County, 24 P 2d 87, 173 Wash 547

93. Mo—State ex inf Shartel ex rel City of Sikeston v Missouri Utilities Co, 53 S W 2d 394, 331 Mo 337, 89 A L R 607

N J—Jersey City Gas Co v Dwight, 29 N J Eq 242

Vt—State v Gamelin, 13 A 2d 204, 111 Vt 245

No vested right

Tex—Ex parte Sepulveda, 2 S W 2d 445, 108 Tex Cr 533

Grant of right to use city streets see the C J S title Municipal Corporations §§ 1716-1743, also 44 C J p 972 et seq

94. N Y—Penn-York Natural Gas Corporation v Maltbie, 299 N Y S 1004, 164 Misc 569

95. Vt—Valcour v Village of Morrisville, 184 A 881, 108 Vt 242

96. N Y—Penn-York Natural Gas Corporation v Maltbie, 299 N Y S 1004, 164 Misc 569

97. N D—Morton County v Hughes Electric Co, 208 N W 108, 53 N D 742

98. N Y—Penn-York Natural Gas Corporation v Maltbie, 299 N Y S 1004, 164 Misc 569.

99. Md—West v Maryland Gas Transmission Corporation, 159 A. 758, 162 Md 298

1. N Y—Penn-York Natural Gas Corporation v Maltbie, 299 N Y.S 1004, 164 Misc 569

dependent where there is an express delegation of the power to grant the franchise on the one hand and an ultimate public benefit to be obtained on the other,[2] the permission to make a special use of the highway when properly granted not, in general, being subject to a requirement that the use be in the exercise of a public service.[3]

Exclusive private easement No lawful grant of an exclusive private easement in a public highway can be made.[4]

§ 234. —— Traction Engines and Other Heavy Vehicles or Equipment

The use of the highways by traction engines or other heavy vehicles, or by vehicles of excessive weight, size, length, or load, may be reasonably limited, regulated, or prohibited.

Traction engines or other heavy equipment,[5] such as steam rollers,[6] or a heavy truck and trailer loaded with a gasoline shovel,[7] may be used on highways under proper regulations,[8] such as the requirement of a license,[9] or that the person using such equipment shall repair damages to the highway,[10] or that the engine be accompanied by a flagman to warn travel.[11] The latter regulation is applicable even where horses are going in the same direction as the engine,[12] but not where horses are standing,[13] or to machines not in motion.[14]

The use must be reasonable,[15] and not to the inconvenience of other means of travel or to the damage of the road.[16]

Size, weight, and load of vehicle The weight, size, length, and load of vehicles using the highways may be limited,[17] and the use of the highway by vehicles of excessive weight, size, length, and load may be regulated, limited, or even prohibited, such a use being calculated to result in injury to the highway as well as to those using it.[18] Such

2. N Y—Penn-York Natural Gas Corporation v Malthie, supra

3. N Y—Penn-York Natural Gas Corporation v Malthie, supra

4. N Y—Finch, Pruyn & Co v State, 203 N Y S 165, 122 Misc 404

5. Md—State v Potomac Edison Co, 170 A 568, 570, 166 Md 138, citing **Corpus Juris.**
29 C J p 649 note 77
"In rural territory such ways must be used for the passage of traction engines, threshers, and well-drilling machines for in no other convenient or practical way could persons in such areas secure the mechanical utilities essential to the reasonable and convenient use of their respective properties, and the use of the public highways for the passage of such engines and machines in a reasonably careful and prudent manner is neither unreasonable nor unlawful"—State v Potomac Edison Co, 170 A 568, 570 166 Md 138

6. N Y—Kelley v New York State R Co, 100 N E 1115, 207 N Y 342

7. N J—Township of Livingston v Parkhurst, 7 A 2d 627, 122 N J Law 598

8. Pa—Commonwealth v Doughty, 55 Pa Super 88
29 C J p 649 note 79

9. Pa—In re Highways, 22 Pa Dist 1019

10. Ky—Winston v Clark County, 199 S W 51 178 Ky 447
29 C J p 649 note 81

11. Iowa—State v Kowolski, 65 N W 306, 96 Iowa 346
N Y—Buchanan v Cranford Co 98 N Y S 378, 112 App Div 278

12. Iowa—State v Kowolski, 65 N W 306, 96 Iowa 346

13. Wis—Cudd v Larson, 93 N W 810, 117 Wis 103

14. Pa—Keeley v Shanley, 21 A 305, 140 Pa 213

15. Tenn—Sumner County v Interurban Transp Co, 213 S W 412, 141 Tenn 493, 5 A L R 765
29 C J p 649 note 86

16. Pa—Commonwealth v Allen, 23 A 1115, 148 Pa 358, 33 Am S R 830 16 L R A 118
29 C J p 649 note 87

Reasonable care not to damage highway must be taken—Township of Livingston v Parkhurst, 7 A 2d 627 122 N J Law 598
Frightening horses see infra § 243

17. U S—Sproles v Binford D C Tex, 52 F 2d 730, followed in J H McLeaish & Co v Binford, D C Tex, 52 F 2d 737
Ky—City of Ashland v Ashland Supply Co, 7 S W 2d 833, 225 Ky 123

18. U S—Sproles v Binford, D C Tex, 52 F 2d 730, followed in J H McLeaish & Co v Binford, D C Tex 52 F 2d 737—Barnwell Bros v South Carolina State Highway Department, D C S C, 17 F Supp 803, reversed on other grounds South Carolina State Highway Department v Barnwell Bros, 58 S Ct 510, 303 U S 177, 625, 82 L Ed 734
Ky—Ex parte Lawrence, 265 S W 287, 201 Ky 568
Miss—Hudson v Stuart, 145 So 611, 166 Miss 339
"The legislature may prescribe maximum loads that may be carried by motor vehicles, or otherwise, over the state highways"—State ex rel Parker v Frick, Fla, 7 So 2d 152, 154

Purpose of regulation
One of the purposes, if not the primary purpose, of statutes relating to size, weight, and load of vehicles, is to make travel on the highways as safe as it can reasonably be made, consistent with efficient use—Wood Bros Thresher Co v Eichet, 1 N W 2d 655, 231 Iowa 550

Extent of right
State, in protecting its investment in public highways is not subject to the same restrictions as when dealing with private property not affected with public use—State ex rel Rice v Evans-Terry Co 159 So 658, 173 Miss 526, affirmed Evans-Terry Co v State of Mississippi ex rel Rice, 56 S Ct 126, 296 U S 538, 80 L Ed 383, rehearing denied 56 S Ct 177, 296 U S 663, 80 L Ed 473

Effect of agreement for federal aid
Agreement between national and state government for construction and maintenance of rural post road does not require that the weight of truck and load permitted on such highway by state when agreement was made bind state contractually to continue such permission since conserving limitations rest with road supervising authorities of state, and regulation cannot be interfered with, unless it is so arbitrary and unreasonable as to defeat purpose for which Congress has contributed to bettering highway systems—Morris v Duby, Or, 47 S Ct 548, 274 U S 135, 71 L Ed 966

To prevent wear and hazards due to excessive size of vehicles and weight of loads is proper purpose of legislation—Sproles v Binford, Tex, 52 S Ct 581, 286 U S 374, 76 L Ed 1167, affirming, D C 56 F 2d 189—Whitney v Johnson, D C Ky, 37 F Supp 65, affirmed 62 S Ct 117, 314 U S 574, 86 L Ed 465.

regulations must be reasonable and not arbitrary and must be based on the power to exercise police powers for the promotion or protection of the public safety and welfare.[19]

As to vehicles and loads which do not destroy the roads and bridges but yet severely wear them and impose additional burdens of maintenance on them, the state may demand compensation for the special facilities it has provided, in addition to the power of regulating the use of its highways to promote the public safety The amount of the charges and the method of collection are for the legislature to determine, as long as they are reasonable and conform to some fair and practical standard The state may graduate the compensation demanded according to the weight of the vehicle and the load carried[20]

§ 235. —— Bicycles

Bicycles may be used on the highways subject to reasonable regulation

A bicycle is a vehicle which has a right to a reasonable use of the highway equally with other vehicles,[21] subject to legislative or municipal regulation,[22] such as excluding them from bridges to avoid frightening horses,[23] or restricting the rate of speed,[24] or requiring them to be equipped with lights at night[25]

§ 236. Law of Road

a. In general
b. To what roads applicable
c. To whom and to what modes of travel applicable
d. Reliance on observance
e Effect of violation
f. Justification for violation of rule

a. In General

The law of the road consists of rules based on custom governing travel on the public highways, the rules frequently being embodied in statutes or other governmental regulations

In the absence of statute, the law of the road are customs or practices that have become crystallized into an accepted system of rules regulating travel on the highways[26] It relates to the safety of travel, and has been said to be an adjustment of the rights of travelers using a highway at the same time[27] The rules are said to be so generally known that everyone is presumed to know them[28]

The law of the road is recognized in some jurisdictions by statute, many statutes and other governmental regulations having been adopted concerning the use of the highways by travelers thereon[29]

Statutes held valid

(1) Statutes limiting the sizes of vehicles and of loads hauled--State v Ferguson, 125 S W 2d 272, 133 Tex 60

(2) Statute prohibiting transportation of loads over certain weight—People v Linde, 173 N E 361, 341 Ill 269, 72 A L R 997

(3) Statute limiting length of single vehicles or combination of tractor and semitrailer or vehicle and trailer
U S—Contract Cartage Co v Morris, D C Ill, 59 F 2d 437
Wis—State v Wetzel, 243 N W 768, 208 Wis 603 86 A L R 274

(4) Statute limiting weight of load, without limiting weight of vehicles —Sproles v Binford, D C Tex, 56 F 2d 189 affirmed 52 S Ct 581, 286 U S 374, 76 L Ed 1167

(5) An act of the legislature, which prohibits the transportation, over a specified plank road, of any load of iron or iron ore of more than two tons' weight, unless it be upon a vehicle with wheels having a tire of at least six inches in width—Seward v Beach, 29 Barb (N Y) 239

Oil wagon

Under statute prohibiting hauling a load of more than two thousand five hundred pounds on a broad-tired wagon over graveled roads when they are thawing, etc, the word "wagon" should be construed so that where an oil wagon had the front and rear wheels held together by side bars between which rested an iron tank bolted permanently to the side bars by iron straps, there being no coupling bolt to the wagon the tank would be construed as a part of the load and not of the wagon—Hamilton v State, 52 N E 419, 420, 22 Ind App 479

19. Fla—State ex rel Parker v Frick Fla, 7 So 2d 152

20. Miss—Hudson v Stuart, 145 So 611, 166 Miss 339

21. Iowa—Westman v Bingham, 300 N W 525, 230 Iowa 1298
Mich- Stockfisch v Fox, 267 N W 754, 275 Mich 630
29 C J p 649 note 90
Application of law of the road see infra § 236

22. Wash—Simpson v City of Whatcom, 74 P 577, 33 Wash 392, 99 Am S R 961
29 C J p 649 note 91—12 C J p 917 note 10

23. Md—Twilley v Perkins, 26 A 286, 77 Md 252, 39 Am S R 408, 19 L R A 632

24. Pa—Radnor Tp v. Bell, 27 Pa. Super 1.

25 Purpose of regulations

(1) The purpose of the statutory provision requiring that every bicycle at night shall be equipped with a lighted lamp on the front thereof visible in normal atmospheric conditions from a distance of at least five hundred feet in front of bicycle is to protect bicyclist from being run down or run into by an automobile approaching from the front or side—Cardarelli v Simon, 27 A 2d 250 141 Pa Super 364

(2) The statutory provision requiring bicycles to be equipped with a red reflector or lamp in the rear, exhibiting or reflecting a red light visible in normal atmospheric conditions from a distance of at least five hundred feet to rear of bicycle is to protect bicyclist from being run down or into by an automobile coming from the rear--Cardarelli v Simon, supra

26. Ky—Short v Robinson, 134 S W 2d 594, 280 Ky 707
Tenn—Davis v Farris, 1 Tenn App. 114
29 C J p 649 note 95

27. N H—Cofran v Griffin, 153 A. 817, 85 N H 29

28. Tenn—Davis v Farris, 1 Tenn App 144

29. Iowa—Riepe v. Elting, 56 N W.

b. To What Roads Applicable

The law of the road applies to all public highways, however created.

The law of the road extends to all public highways, however created,[30] and may also be applicable to roads not public highways, if used for travel.[31] However, statutory rules of the road for public highways have been held inapplicable to roads which have not been opened to the public.[32]

The rules of the law of the road have been held applicable only to permanent lines of travel,[33] and under some statutes, only to the traveled portion of the highway.[34]

It has been held that the law does not apply to a speedway in a park, elliptical in shape, used for exercising and racing horses.[35]

c. To Whom and to What Modes of Travel Applicable

The law of the road applies to vehicles of all kinds using the highways.

The law of the road applies to all vehicles,[36] including bicycles,[37] and motor vehicles, as discussed in the CJS title Motor Vehicles §§ *266–273*, also 42 CJ p 899 note 15–p 902 note 50. It has also been held applicable to a lawn mower pushed along the highway.[38] On the other hand, the rule has been held not to apply to a building which is being moved along the road,[39] or to a meeting of teams left unattended.[40] Except as the statute may otherwise provide,[41] the rule has been held not to be applicable to a horseman meeting another horseman or vehicle,[42] and not to be strictly applicable as between vehicles and pedestrians,[43] the latter having the right to walk on any part of the road, see infra § 241, and to pass on either side of a vehicle.[44] However, a pedestrian should not compel a vehicle to leave the beaten track.[45]

Common carriers. When a common carrier is authorized to use a public highway for profit it becomes a fellow traveler subject to the rules of the road.[46]

d. Reliance on Observance

All travelers on the public highways have a right to assume that other travelers will observe the law of the road and comply with regulations.

All travelers on the public highways have the right to assume that other travelers will observe the law of the road[47] and comply with regulations prescribed for the protection and safety of others.[48] Thus each traveler has the right to assume that the driver of the other vehicle will obey the law and

285, 89 Iowa 82, 48 Am S R 356, 26 L R A 769
29 C J p 649 note 96

30. Idaho—Crossler v Safeway Stores, 6 P 2d 151, 154, 51 Idaho 413, citing **Corpus Juris.**
Miss—Palotta v Jackson Light & Traction Co, 64 So 938, 107 Miss 61
City streets see the C J S title Municipal Corporations § 1779, also 44 C J p 1048 note 7–p 1053 note 2

31. Idaho—Crossler v Safeway Stores, 6 P 2d 151, 154, 51 Idaho 413, citing **Corpus Juris.**
29 C J p 650 note 98

32. Road closed to public travel
Wis—Petersen v Jansen, 295 N W 30, 236 Wis 292.

33 Colo—Parrish v Smith, 78 P 2d 629, 102 Colo 250, followed in Parrish v Fey, 78 P 2d 633, 102 Colo 258

34. Shoulder of road
The hardened surface of a highway is the portion intended for travel and the dirt shoulder is intended for emergency use only, and is not a part of the highway intended for ordinary travel, as respects meaning of "traveled portion of highway" as used in rules of the road statute—Minacci v **Logudice**, 11 A 2d 354, 126 Conn 345—Mylnar v A H Merriman & Sons, Inc, 159 A 658, 114 Conn 617—Kurtz v Morse Oil Co, 158 A 906, 114 Conn 336

35. Conn—Eckert v. Levinson, 99 A 699, 91 Conn 338

36. Ala—Morrison v. Clark, 72 So 305, 196 Ala 670
29 C J. p 650 note 2.

37. Ala—Morrison v Clark, supra
29 C J p 650 note 2.

38. Ill—Fahrney v O'Donnell, 107 Ill App 608

39. N H—Graves v Shattuck, 35 N H 257, 69 Am D 536

40. Mass—Broult v Hanson, 32 N E. 900, 158 Mass 17.

41. Iowa—Hubbard v Bartholomew, 144 N W 13, 163 Iowa 58, 49 L R A, N S, 443
Wash—Marton v Pickrell, 191 P 1101, 112 Wash 117
29 C J p 650 note 7.

42. Ky—Payne v. Nelson, 16 Ky L 239
N Y—Dudley v. Bolles, 24 Wend 465
29 C J p 650 note 8
Rights and duties of horseman meeting other horseman or vehicle see infra § 237 c

43. Ind—Apperson v Lazro, 87 N E 97, 44 Ind App 186, petition overruled 88 N E 99, 44 Ind App 186
29 C J p 650 note 10
Care required generally between vehicles and pedestrians see infra § 241

44. N Y—Savage v Gerstner, 55 N Y S 306, 36 App Div 220
29 C J p 650 note 12

45. Pa—Beach v Parmeter, 23 Pa 196
Care required as between vehicles and pedestrians see infra § 241

46. Fla—Florida Motor Lines v Ward, 137 So 163, 102 Fla 1105

47. Fla—Walker v Smith, 161 So 551, 119 Fla. 430—Florida Motor Lines v Ward, 137 So 163, 102 Fla 1105
Or—Schassen v Columbia Gorge Motor Coach System, 270 P. 530, 126 Or 363
Pedestrians have right to rely on presumption that drivers of vehicles will observe the law of the road
Mass—Foster v Curtis, 99 N E 961, 213 Mass 79, 42 L R A, N S, 1188, Ann Cas 1913E 1116
Mo—Collins v Leahy, App, 102 S W 2d 801, 806, citing **Corpus Juris.**
Tenn—Foreman v. Ozment, 6 Tenn App 536

48. Fla—Walker v Smith, 161 So 551, 119 Fla. 430.

turn to the right, and to act on such assumption,[49] until it appears, or reasonably should appear, to the contrary,[50] in which case he must exercise due care and take reasonable precautions to avoid a collision.[51] So also a driver of a vehicle having the right of way at a highway intersection may assume that drivers of other vehicles about to enter the highway will obey the law,[52] until the contrary appears or should appear to a reasonable man in his position.[53]

e. Effect of Violation

Unjustified failure to observe the law of the road may constitute negligence with resulting liability for injuries proximately caused thereby

It has been held that one who fails to observe the law of the road cannot, in the absence of special circumstances discussed infra subdivision f of this section, escape liability for injury caused thereby to the other, or recover in case he himself is injured,[54] even though he had no time to turn out after discovering the other.[55] The person at fault is liable for injury sustained by the other, even though no actual collision between the vehicles occurs.[56]

In some jurisdictions the fact that one of the meeting travelers is on the wrong side of the road or fails to turn to the right does not show that he was negligent, as a matter of law, and is not conclusive of contributory negligence on his part preventing recovery against the other,[57] although, as stated infra § 246 c (1), it raises a presumption of negligence. In others, if no overruling necessity for noncompliance with the law of the road appears, it is assumed that the one failing to comply was negligent,[58] and that such negligence was the proximate cause of the injury suffered.[59]

One may not be liable even though he drove to the left,[60] or failed to yield one half of the road, as required by statute,[61] if that was not the proximate cause of the accident. On the other hand, one may recover, although he drove to the left, if his act was not the proximate cause of the injury,[62] and even though defendant was on the wrong side of the road plaintiff cannot recover if he failed to use ordinary care, and the injury was proximately caused by his own negligence.[63]

Persons liable. Although the statute limits the responsibility in damages to the person who is actually guilty of the offense of failing to drive to the right,[64] this does not prevent an action based on the common-law liability against the master of the driver for negligence.[65]

Overtaking and passing vehicle. A violation of a rule of the road requiring a vehicle overtaking another to pass on the right or left of the vehicle in front has been held not to be conclusive evidence of negligence,[66] since, as discussed infra subdivision f of this section, circumstances may justify a passing on the wrong side.

f. Justification for Violation of Rule

Special circumstances or the requirement of due care may justify a violation of a rule of the road

Since rules of the road, even when statutory, are underlaid by the general rules of ordinary care,[67] due care may require one to violate traffic rules if necessary to avoid injury to another who may be violating such rules provided in so doing he does not injure any other who may be traveling where he has a right to be.[68]

Vehicles meeting on highway. Notwithstanding the law of the road, special circumstances may justi-

49. Fla.—Walker v. Smith, supra
Vt.—Dumont v. Cromie, 130 A. 679, 99 Vt. 208
Wash.—Thomson v. Schirber, 2 P.2d 664, 666, 164 Wash. 177, citing **Corpus Juris.**
W.Va.—Parks v. Tillis, 164 S.E. 797, 798, 112 W.Va. 295, citing **Corpus Juris.**
29 C.J. p. 651 note 28

50. Vt.—Dumont v. Cromie, 130 A. 679, 99 Vt. 208

51. Wash.—Thomson v. Schirber, 2 P.2d 664, 164 Wash. 177
W.Va.—Parks v. Tillis, 164 S.E. 797, 112 W.Va. 295

52. Neb.—Klaus v. Soloman Valley Stage Lines Co., 264 N.W. 747, 130 Neb. 325

53. Neb.—Klaus v. Soloman Valley Stage Lines Co., supra

54. Vt.—Dumont v. Cromie, 130 A. 679, 99 Vt. 208
Wash.—Benson v. Anderson, 223 P. 1063, 129 Wash. 19
29 C.J. p. 652 note 30

55. N.Y.—Simmonson v. Stellenmerf, 1 Edm.Sel.Cas. 191

56. Mo.—Roy v. North Kansas City Dev. Co., App., 226 S.W. 965
29 C.J. p. 652 note 32

57. Okl.—Tulsa Ice Co. v. Wilkes, 153 P. 1169, 54 Okl. 519
29 C.J. p. 652 note 33

58. Tenn.—Elkin Motor Co. v. Ragland, 6 Tenn.App. 166

59. Tenn.—Elkin Motor Co. v. Ragland, supra

60. Cal.—Hagenah v. Bidwell, 189 P. 799, 46 Cal.App. 556
29 C.J. p. 652 note 35

61. Iowa.—Needy v. Littlejohn, 115 N.W. 483, 137 Iowa 704

62. Iowa.—Riepe v. Elting, 56 N.W. 285, 89 Iowa 82, 48 Am.S.R. 356, 26 L.R.A. 769
29 C.J. p. 652 note 37

63. N.Y.—Heffernan v. Barber, 55 N.Y.S. 418, 36 App.Div. 163
29 C.J. p. 652 note 38

64. Mass.—Goodhue v. Dix, 2 Gray 181
29 C.J. p. 653 note 39

65. Mass.—Reynolds v. Hanrahan, 100 Mass. 313

66. Mass.—Smith v. Conway, 121 Mass. 216
Wash.—Hartley v. Lasater, 165 P. 106, 96 Wash. 407

67. Minn.—Olson v. Duluth, M. & I. R. Ry. Co., 5 N.W.2d 492, 213 Minn. 106
Care required in use of road see infra §§ 240–245

68. S.C.—Sims v. Eleazer, 106 S.E. 854, 116 S.C. 41.

fy, or even require, a vehicle meeting another to turn to the left,[69] as where the right side is obstructed or is otherwise not in proper condition for safe passage,[70] and the roadway is of sufficient width to permit use of the left-hand side without danger to others,[71] although it has been held that the mere roughness of the right side of the road is no excuse for failing to turn out[72] Some authorities have held, however, that, where it is impracticable to turn to the right, a traveler may hold his position, but is not justified in turning to the left in violation of the statute[73]

One compelled to turn to the left in order to avoid a collision, because of another's violation of the law of the road, is not negligent[74] On the contrary, a driver is negligent if he keeps to the right of the road when he could avoid an accident by turning to the left[75] In turning to the left, however, the driver must exercise due care as regards others using the highway in the immediate vicinity[76]

One driving on the wrong side of the road is not justified in crossing to his proper side, if this is already occupied by another vehicle, merely in order to assert the rule of the road,[77] and a driver who is injured by a horse ridden recklessly toward him may be guilty of contributory negligence in crossing over to the proper side of the road[78]

Where a collision would not have occurred had not plaintiff turned to the left, he cannot recover because of his mistaken belief that defendant was not going to turn out[79]

Overtaking and passing vehicle. Special circumstances may justify a vehicle overtaking another to violate the rule as to the side on which the overtaking vehicle must pass.[80]

§ 237. —— Meeting

a Keeping or turning to right generally
b Meeting at crossroads or intersections
c Horseman or light vehicle passing heavier vehicle

a. Keeping or Turning to Right Generally

The law of the road requires vehicles meeting on a highway to turn to the right, the rule frequently being embodied in statutes

While in England[81] the law of the road requires vehicles on meeting to turn to the left, the general rule in the United States is that in such case each shall turn to the right,[82] and there is generally a statutory provision to this effect requiring each vehicle to turn to the right of the other, or to the right of the center line of the highway or of the traveled part thereof[83] A statute providing that the vehicle shall go to the right of the "centre of the road" has been construed to mean the center of the worked part thereof,[84] and the same meaning has been given to the words "center of traveled part" in this connection[85] It has been held that, where the worked part is hidden by snow, and the traveled and beaten path is on one side of the center of the worked part, the center of such beaten path is the line to be regarded[86] So, where the traveled track of a road is to one side of the center, it is not neg-

69. La —Potter v Glassell, 83 So 898, 146 La 687
29 C J p 653 note 58
Congested traffic no excuse
Rules of the road applicable to normal traffic conditions are not abrogated by reason of congested traffic or unusual crowds, in absence of proof of presence of police officers directing such change —Warwick v Blackney, 261 N W 310, 272 Mich 231
Requirements of rules of road see infra § 237
Turning to left in order to stop on that side of road see infra § 239

70. Miss —Public Service Corporation v Watts 150 So 192 194, 168 Miss 235, citing **Corpus Juris.**
29 C J p 653 note 59

71. Cal —Raymond v Hill, 143 P 743, 168 Cal 473

72. N Y —Earing v Lansingh, 7 Wend 185

73. Idaho —Cupples Mercantile Co v Bow, 189 P 48, 32 Idaho 774

74. La —Potter v Glassell, 83 So 898, 146 La. 687.

75. Wis —Neanow v Uttech 1 N W 221, 46 Wis 581—O'Malley v Dorn, 7 Wis 236, 73 Am D 403
29 C J p 654 note 63

76 Miss —Public Service Corporation v Watts, 150 So 192, 168 Miss 235

77. Mich —Tyler v Nelson, 66 N W 671, 109 Mich 37
N H —Brooks v Hart, 14 N H 307

78 N Y —Tompkins v Barnes 130 N Y S 320, 145 App Div 637

79. Wash —Lloyd v Calhoun 143 P 458, 82 Wash 35, rehearing 139 P 231, 78 Wash 438

80. Pa —Wright v Mitchell, 97 A 478, 252 Pa 325
29 C J p 654 note 74
Side on which vehicle must pass see infra § 238

81. La —Schick v Jenevein, 82 So 360, 145 La 333
29 C J p 650 note 14

82. Ga —Eubanks v Mullis, 181 S E 604, 605 51 Ga App 728, citing **Corpus Juris.**
29 C J p 650 note 16.
Effect of violation of rule see supra § 236 c

83 Conn —Kurtz v Morse Oil Co, 158 A 906 114 Conn 336
Ga —Eubanks v Mullis, 181 S E 604, 51 Ga App 728
Tenn —Elkin Motor Co v Ragland, 6 Tenn App 166
Vt —Dumont v Cromie, 130 A 679, 99 Vt 208
29 C J p 650 note 17
Road closed for repair
Statute requiring one to turn to right of center when meeting vehicle was held inapplicable, where half of road was closed because of bridge repairs —Hoen v Haines, 154 A 129, 85 N H 36

84 N Y —Earing v Lansingh, 7 Wend 185

85. R I —Winter v Harris, 49 A. 398, 23 R I 47, 54 L R A 643
29 C J p 651 note 19

86. Mass —Commonwealth v Allen, 11 Metc 403—Jaquith v Richardson, 8 Metc 213
N Y —Smith v Dygert, 12 Barb 613

ligence as a matter of law to drive therein even though it be to the left side of the road taken in its entirety.[87]

While, as stated infra § 247, it has been held that the fact that sufficient room was left for others to pass is no defense to a criminal prosecution for failing to comply with the statutory requirement to keep to the right of the center of the road, it is generally held that one need not go to the extreme right of the part of the road which is practicable for travel, but is bound to leave merely sufficient room for the other vehicle[88]

The law of the road does not, however, require a traveler to keep to the right or right of center at all times but applies only to the meeting and passing of traffic,[89] one having the right in the absence of statute or traffic regulations to travel on any part of the road if there are no other travelers having the occasion or desire to pass[90] It has been held, however, that one driving on the wrong side of the road must exercise more care and keep a better lookout than would be necessary on the proper side,[91] and this applies to a person driving cattle along the highway[92]

At night It has been held that, in driving at night, the rule to keep to the right of the road should be strictly adhered to as being the only mode of avoiding an accident[93] It has, on the other hand, also been held that one is not bound to travel on the right side of the road merely because it is dark[94]

What part of a highway one conducting an animal thereon at night should use depends on the circumstances[95]

Pedestrians Statutes in some jurisdictions have modified the usual rule about keeping to the right and require pedestrians to travel on the left side of the highway[96]

b. Meeting at Crossroads or Intersections

Subject to the requirement that due care be exercised at all times, one of two or more travelers approaching a highway intersection on different roads first to reach the intersection has the right of way If they reach the intersection at about the same time, the traveler approaching from the right usually has the right of way

The requirement of turning to the right does not usually apply to travelers approaching each other at right angles at the intersection of two roads,[97] although the contrary is the rule in some jurisdictions[98] The rights of travelers so meeting are correlative,[99] each being required to use due care,[1] and approaching at speed a turn without ability to see up the crossroad is commonly negligence[2]

In the absence of, or subject to, statutory provisions,[3] due care generally requires that the trav-

87. Minn—Keane v Butner, 1 1 N W 571, 150 Minn 90

88. Mich—Buxton v Ainsworth, 101 N W 817, 138 Mich 532, 5 Ann Cas 146
29 C J p 651 note 22

89. Ga—Eubanks v Mullis, 181 S E 604 51 Ga App 728
S C—Oglesby v Rhea, 117 S E 303, 124 S C 57—Sims v Eleazer, 106 S E 851 116 S C 44
29 C J p 651 note 23.
Justification for violation of rule see supra § 236 f

90. Neb—Klaus v Soloman Valley Stage Lines Co, 264 N W 747, 130 Neb 325
29 C J p 651 note 23

91. Neb—Hackett v Alamito Sanitary Dairy Co, 133 N W 227, 90 Neb 200, 41 L R A,N S, 337, Ann Cas 1913A 829
29 C J p 651 note 24

92. Conn—Andrews v Dougherty, 112 A 700, 96 Conn 40

93. Del—Shockley v Shepherd, 32 A 173, 14 Del 270
R I—Angell v Lewis, 39 A 521, 20 R I 391, 78 Am S R 881
29 C J p 651 note 26

94. Me.—Dunham v. Rackliff, 71 Me 345.

95 Mo—Yerger v Smith, 89 S W 2d 66 338 Mo 140

96. Pushing bicycle
A person pushing a bicycle is a "pedestrian" within the meaning of statute requiring pedestrians at night to travel along the left side of a highway, and on meeting an oncoming vehicle to step off the traveled portion thereof—Penson v Anderson, 223 P 1063 129 Wash 19

97. Iowa—Wagner v Kloster, 175 N W 840, 188 Iowa 174
29 C J p 653 note 47

98. Ind—Reitz v Hodgkins 112 N E 386, 185 Ind 163—F W Cook Brewing Co v Ball, 52 N E 1002, 22 Ind App 656

99. Ill—Hilton v Iseman, 212 Ill App 255

1. Iowa—Wagner v Kloster, 175 N W 840, 188 Iowa 171
29 C J p 653 note 50

2. R I—Nelson v Braman, 47 A 696, 22 R I 283
29 C J p 653 note 51
Care required of drivers of vehicles generally see infra § 240

3. Pa—Weber v Greenebaum, 113 A 413, 270 Pa 382
29 C J p 653 note 52.

Favored or nonfavored highways
(1) Under some statutes, right of way privileges on arterial highway are same as on nonfavored streets, except as modified by stop requirement—McCulley v Anderson, 227 N W 321, 119 Neb 105

(2) Under other statutes vehicles on favored roads are given the right of way over vehicles on intersecting highways nonfavored—Maxwell v Kirkpatrick, 116 S W 2d 340, 22 Tenn App 21

(3) Under the statute, a highway was held not to become a favored or preferred highway until signs notifying drivers of vehicles to come to a full stop before entering or crossing have been erected at the highway's intersections with other highways—Maxwell v Kirkpatrick, supra

(4) The fact that a highway connected county seats and was a much-traveled highway did not constitute such highway a "favored highway" within the statute delegating to the highway department and local authorities power to designate, as favored highways, state or main-traveled or through highways—Maxwell v Kirkpatrick, supra

(5) A new road which was not put into service as a part of highway

eler first reaching the crossing be given the opportunity to clear it,[4] and a traveler on a public road has the same right of way over one coming out of a private way.[5] The statutes and other governmental regulations frequently provide that when vehicles approach an intersection at about the same time, the vehicle approaching from the right shall have the right of way.[6] Other regulations give the right of way to vehicles traveling in easterly or westerly directions over those proceeding north and south when they meet at an intersection.[7]

The right of way given to one vehicle over another by regulations or law of the road does not relieve the drivers from the duty to use reasonable care at all times to avoid injury to others.[8]

Turning corner. It has been held that one turning a corner should keep away from the left curb.[9]

Some statutes require a vehicle turning to the left at a highway intersection to keep to the right of the intersection of the centers of the highways.[10]

Effect of traffic signals or lights Where traffic

system and was only used locally and more or less permissively was not an "arterial highway," especially where sign on new road warned travelers of crossroad and there was no sign on crossroad calling attention to intersection with new road—Staatz v Tucker, 71 P 2d 401, 191 Wash 404

(6) Under some statutes the right of way at intersection of two arterial highways is determined by county supervisors, by erection of signs—Arends v De Bruyn, 252 N W 249, 217 Iowa 529

(7) In absence of any signs at intersection of county trunk roads, the general statute relating to preference at intersecting points would apply—Rogers v Jefferson, 275 N W 874 224 Iowa 324

(8) However, where signs erected on county trunk roads by county board of supervisors conflict with general statute relating to preference at intersections, such signs govern—Rogers v Jefferson, supra

(9) Regardless of superiority of intersecting roads, stop sign established by authority, is imperative—Shoniker v English, 235 N W 866, 254 Mich 76

(10) Thereunder, traffic on arterial highways has right of way over traffic on local county roads at intersections therewith—Arends v De Bruyn, supra

(11) At intersection of arterial and local county road, traffic on local county road shall stop or proceed cautiously as county supervisors may determine—Arends v De Bruyn, supra

4. Wash—Hull v Crescent Mfg Co 186 P 322, 109 Wash 129
29 C J p 653 note 53

5. La—Neddam Lumber Co v Baker, 6 La App 229
Puerto Rico—Castle v Zorilla, 8 Puerto Rico Fed 491

6. Iowa—Dikel v Mathers, 238 N W 615 213 Iowa 615
Pa—Weber v Greenebaum, 113 A 413, 270 Pa 382

What constitutes intersection

(1) Intersection of two highways within statute giving right of way to vehicle approaching from right when two vehicles approach intersection at approximately the same time means the space common to both highways—Mathis v Bzdula, 188 A 264, 122 Conn 202—Rohde v Nock, 126 A 335, 101 Conn 439—Neuman v Apter, 112 A 350, 95 Conn 695, 21 A L R 970

(2) In determining the space within an "intersection," regard must be had to the course which traffic passing in the various directions through it may normally be expected to take—Beck v Sosnowitz, 7 A 2d 389, 125 Conn 553—Mathis v Bzdula, supra

(3) When the highways run substantially at right angles to each other and their bounds are straight lines, the intersection is the space included within the lines of both extended to cross each other—Mathis v Bzdula, supra—Rohde v Nock supra—Bettilyon v C E Smith & Son, 112 A 649, 96 Conn 16

(4) A charge that edges of paved portion of highway will be considered as limits of intersection wherever such limits are coincident with boundaries of highway, rather than any other part of highway such as the shoulders or grass portions, if any, was a proper reference as to what constituted 'portion of highways intended for normal travel," and, by qualification excluding any part of highways at intersection in question where shoulder or grass abutted, accurately defined limits of intersection's area, where edge of the paved road and of the highway were coincidental—Beck v Sosnowitz, supra.

(5) A charge which defined the "line of an intersection" as a straight line substantially at right angles to the bounds of the highway at a point where, to the reasonable perception of a driver, the highway starts to widen as the result of the outcurving of its bounds to form the junction, was proper—Beck v Sosnowitz, supra

(6) Where highways intersected in general shape of Y but with all of highway bounds curved and with point of intersection enlarged and containing at its center a circular area not open to traffic, beginning of intersection of highway constituting right upper arm of Y with highway constituting base of Y was a line commencing at point on bottom side of circumference of circular area substantially opposite entrance of highway constituting base of Y into intersection and running in a generally downward direction in a curve along right edge of that course which vehicles proceeding up along base of Y to left arm might normally be expected to take until line met highway boundary on right—Mathis v Bzdula, supra

(7) Where two roads intersected in shape of a Y with triangular area in center not open to traffic the triangular area in effect created three separate highways—Beck v Sosnowitz, supra

7. Ky—Miller v Weck, 217 S W 904 186 Ky 552

Local regulation without extraterritorial effect

Ky—Miller v Weck 217 S W 904 186 Ky 552

8. U S—Snider v Sand Springs Ry Co, C C A Okl, 62 F 2d 635
Wis—Day v Pauly, 202 N W 363, 186 Wis 189
29 C J p 653 note 56

9. N Y—Henning v Rothschild, 68 N Y S 840, 34 Misc 773
Pa—Foote v American Product Co, 45 A 934 195 Pa 190, 78 Am S R 806, 49 L R A 764

10. What constitutes

(1) Under statute requiring vehicle at an intersection to keep to the right of the intersection of the centers of the highways when turning to the left, where each of two intersecting highways has parallel sides and so is of uniform width, the point of "intersection of their centers" is the place where the midline of one drawn parallel to its sides crosses the similarly drawn midline of the other—Decker v Roberts, 12 A 2d 541, 126 Conn 478

(2) In the case of a dirt road where there is nothing in the nature of its construction or surface to in-

at an intersection is controlled by traffic signals or lights, travelers must obey such signals or lights, and may assume that others will likewise obey them, but due care under the circumstances must nevertheless be exercised.[11]

c. Horseman or Light Vehicle Passing Heavier Vehicle

Generally horsemen and light vehicles are under a duty to avoid heavier vehicles

It is a customary rule for horsemen[12] to avoid vehicles, and for light vehicles to avoid heavier vehicles.[13] This rule applies to bicycles,[14] but a bicycle need not avoid an ordinary team under a statute providing that light vehicles must give way to heavily laden wagons.[15]

On the other hand it is the duty of heavy vehicles to keep well to one side to allow lighter vehicles to pass, and failure to do so will render the former liable for accidents directly attributable thereto.[16] When it is difficult or unsafe for the heavier vehicle to turn to the right it should stop and wait a reasonable time for the lighter vehicle to pass.[17]

§ 238 —— Overtaking and Passing

Ordinarily in the absence of a statute prescribing the side on which a vehicle overtaking another may pass, the overtaking vehicle may pass on either side of the vehicle overtaken. Due care must be exercised by a vehicle in so passing

If two persons in separate vehicles are traveling in the same direction, neither is compelled to travel behind the other, nor has either the exclusive right to precede the other, and the rear traveler may pass to the front when he can do so with safety.[18] In the absence of any statute to the contrary, the overtaking vehicle may as a rule pass the preceding one on either side.[19] In some jurisdictions, however, the overtaking vehicle is required by statute to pass to the left,[20] and in other jurisdictions to the right,[21] of the one ahead of it. Even in the absence of statute it has been held in some jurisdictions that the law of the road requires an overtaking vehicle to pass on the left.[22]

The overtaking vehicle must use proper caution in passing,[23] and in keeping a safe distance behind when not passing,[24] and the fact that the law requires a driver to pass the preceding vehicle on the left does not relieve him from the duty to watch for vehicles coming from the opposite direction.[25] If, as the result of an attempt to pass, injury results, without fault on the part of the driver of the vehicle in front, the latter may recover if he did not contribute to the injury,[26] and this is the case, although the team in advance was standing still.[27] The question of ordinary care varies with the width of the highway practicable for travel, the season of the year, and other circumstances.[28]

Requirements as to leading vehicle. In some jurisdictions the statute requires the leading team to move to the right so as to allow a following vehicle to pass on the left,[29] although generally the

dicate that other than its entire width is open to travel, the edges of the worked road constitute the "bounds of the highway" which are to be regarded in determining what is the "center" of such highway at an intersection, since such edges are significant of the limits of normal course of travel thereon.—Decker v. Roberts, supra.

(3) In the case of a hard-surface road, the edges of the hardened surface constitute the "bounds of the highway" in so far as these are of significance in determining "center" of such highway at an intersection since it is the hardened surface which is intended for travel and the dirt shoulder is for emergency use only.—Decker v. Roberts, supra.

11. N Y.—Foley v. State, 41 N Y S 2d 256, 265 App Div 682, reversing 30 N Y S 2d 998, 177 Misc 443.
Statute not a command.
Statute respecting traffic signal lights and providing that red shall mean that traffic shall stop and remain standing and that green shall mean that traffic shall move cannot be interpreted as a command.—Foley v. State, 30 N Y S 2d 998, 177 Misc 443, reversed on other grounds 41 N Y S 2d 256, 265 App Div 682.

12. Tex.—Landa v. McDermott, 16 S W 802.
29 C J p 653 note 41.

13. Conn.—Peltier v. Bradley, 34 A 712, 67 Conn 42, 32 L R A 651.
29 C J p 653 note 42.

14. Pa.—Howland v. Wanamaker, 7 Pa 249, 20 Pa Co 621.

15. Pa.—Foote v. American Product Co., 45 A 934, 195 Pa 190, 78 Am S R 806, 49 L R A 761.

16. Md.—Standard Oil Co. v. Hartman, 62 A 805, 102 Md 563.

17. Me.—Kennard v. Burton, 25 Me 39, 43 Am D 249.

18. N H.—Clifford v. Tyman, 61 N H 508.
Vt.—Mochler v. Shaftsbury, 46 Vt 580, 14 Am R 634.

19. Pa.—Wright v. Mitchell, 97 A 478, 252 Pa 325, 329.
29 C J p 654 note 70.

20. Ark.—Temple v. Walker, 192 S W 200, 127 Ark 279.
29 C J p 654 note 71.

21. Wash.—Hartley v. Lasater, 165 P 106, 96 Wash 407.

22. Cal.—Raymond v. Hill, 143 P 713, 168 Cal 473.
La.—Avegno v. Hart, 25 La Ann 235, 13 Am R 133.
29 C J p 654 note 75.

23. Ky.—Cook v. Gillespie, 82 S W 2d 347, 348, 259 Ky 281, citing **Corpus Juris.**
29 C J p 654 note 76.
Care required of drivers of vehicles generally see infra §§ 240-245.

24. Mass.—Adams v. Swift, 52 N E 1068, 172 Mass 521.
29 C J p 654 note 77.

25. N J.—Smith v. Barnard, 81 A 734, 82 N J Law 468.

26. Del.—McLane v. Sharpe, 2 Del 481.
29 C J p 654 note 79.

27. S C.—Smoak v. Martin, 94 S E 869, 108 S C 472.
29 C J p 654 note 80.

28. N Y.—Burnham v. Butler, 31 N Y 480.

29. Tenn.—Young v. Cowden, 40 S W 1088, 98 Tenn 577.
29 C J p 655 note 82.

leading team may travel anywhere it pleases,[30] using, however, due care.[31]

A driver is bound to yield way enough for one behind him to pass when it is practicable, and he is requested to do so, and when by keeping his place the one desiring to pass is prevented from so doing.[32] However, he is not bound to turn out where there is room for the following vehicle to pass without way being given,[33] or where it is impracticable to turn out,[34] or no request to pass is made.[35] A driver is not bound either to turn aside or look behind him before stopping,[36] but if he suddenly slows up or stops, knowing that another is so close behind that such action will probably cause injury, and an injury in fact results, he is guilty of contributory negligence.[37]

§ 239. —— Turning Across Road

One desiring to stop at premises on the left side of the road may do so, the rule of keeping to the right not being applicable in such a case However, he must exercise due care in so turning across the road.

The law requiring meeting vehicles to turn to the right does not apply to vehicles crossing from one side of the road to the other,[38] and one desiring to stop at premises on the left side of the road may cross over to that side without violating such law,[39] notwithstanding the statute requires vehicles to turn to the right on stopping.[40] In such case the driver must use due care,[41] if he has reason to believe that another is behind him or at his side,[42] but he need not under all circumstances look behind him or sideways before crossing the street,[43] or necessarily anticipate that a team is behind,[44] or give a signal,[45] and he may recover from another whose carelessness causes a collision.[46]

It has been held that, where a vehicle traveling on the right side of the road meets another traveling on the same side, the latter must turn to the right notwithstanding he desires to keep to the left in order to turn conveniently into premises on the other side.[47]

§ 240. Care Required in Use of Road

a. In general
b Statutory or other governmental regulations

a. In General

Persons using the public highways must exercise due care to avoid injury to others also using them

The rights of persons using a highway for travel are mutual and coordinate, and it is the duty of each so to exercise his right of passage as not to cause injury to another having a like right.[48] To avoid such injury each one is under the obligation of exercising ordinary or reasonable care,[49]

30. Minn —Dunkelbeck v Meyer, 167 N W 1034, 140 Minn 283
29 C J p 655 note 83

31. Wash —Abby v Wood, 86 P. 558, 43 Wash 379
29 C J p 655 note 84

32. N Y —Adolph v Central Park, North & East River R Co, 76 N Y 530, affirming 43 N Y Super 199, 65 N Y 554, reversing 33 N Y Super 186—Burnham v. Butler, 31 N Y 480

33. Iowa —Elenz v Conrad, 99 N W 138, 123 Iowa 522
29 C J p 655 note 86

34. N Y —Adolph v Central Park, North & East River R Co, 76 N Y 530, affirming 43 N Y Super 199, 65 N Y 554, reversing 33 N Y Super 186

35. N Y —Adolph v Central Park, North & East River R Co, supra

36 Iowa —Strever v Woodard, 141 N W 931, 160 Iowa 332, 46 L R A, N S, 644

37. Iowa —Strever v Woodard, 158 N W 504, 176 Iowa 30
N Y —Maas v Fauser, 74 N Y S 861, 36 Misc 813

38. Minn —Lyford v Jacob Schmidt Brewing Co, 124 N W 831, 110 Minn 158
29 C.J. p 655 note 91.

39. Tenn —Young v Cowden, 40 S W 1088, 98 Tenn 577
29 C J. p 655 note 92

40. Tenn —Young v Cowden, 40 S W 1088, 98 Tenn 577

41. Ala —Overton v. Bush, 56 So 852, 2 Ala App 623
29 C J p 655 note 94
Care required by drivers of vehicles generally see infra §§ 240–245

42. Mass —Rand v Syms, 38 N E 196, 162 Mass 163

43 Ky —Cook v Gillespie, 82 S W 2d 347, 348, 259 Ky 281, citing **Corpus Juris.**
Mass —Rand v Syms, 38 N E 196, 162 Mass 163

44. Ky —Cook v Gillespie, 82 S W 2d 347, 348, 259 Ky 281, citing **Corpus Juris.**
29 C J p 655 note 97

45. U S —Bierbach v Goodyear Rubber Co, C C Wis, 14 F 826
Ky —Cook v Gillespie, 82 S W 2d 347, 348, 259 Ky 281, citing **Corpus Juris**

46. N Y —Northridge v Atlantic Ave R Co, 36 N Y S 263, 15 Misc 66—Dater v Fletcher, 35 N Y S 686, 14 Misc 288

47. N Y —Heffernan v Barber, 55 N Y S 418, 36 App Div 163.

48. Ala —Harbin v Moore, 175 So 264, 234 Ala 266—Berry v Dannelly, 145 So 663, 226 Ala 151
Ariz —Pearson & Dickerson Contractors v Harrington, 137 P 2d 381
Md —Lashley v Dawson, 160 A 738, 162 Md 549
Mass —Coates v Bates, 164 N E 448 265 Mass 444
Pa —Lowers v Zuker, 157 A 339, 102 Pa Super 581
R I —Collette v Page, 114 A 136, 44 R I 26, 18 A L R 74
29 C J p 655 note 3
Motor vehicles see the C J S title Motor Vehicles § 246, also 42 C J p 877 notes 65–68

49. Ala —Harbin v Moore, 175 So 264, 234 Ala 266—Cooper v Agee, 132 So 173, 222 Ala 334
Ky —Short v Robinson, 134 S W 2d 594, 596, 280 Ky 707, citing **Corpus Juris.**
Md —Fotterall v Hilleary, 13 A 2d 358, 178 Md 335—Lashley v Dawson, 160 A 738, 162 Md 549
Mont —Fulton v Chouteau County Farmers' Co, 37 P 2d 1025, 98 Mont 48
29 C J p 655 note 4
Traveler on highway "is under legal duty to use the care of an ordinarily prudent man to avoid collision with others exercising their law-

even as to one using the highway unlawfully,[50] to anticipate or discover the presence of another on the highway,[51] and not to injure him after his presence becomes known[52]

Although a traveler on a public highway assumes the risks incident to travel in a reasonable and lawful manner,[53] until he learns or should learn to the contrary,[54] he may assume that others also having the use of such highways will observe the law,[55] and he has a right to expect due care to be exercised by others and to rely on this in determining his own manner of using the road[56] In some jurisdictions a traveler properly using a highway is not bound to keep a lookout for others who may violate the law[57] Nevertheless the right to rely on the other's due care must be exercised within reasonable limits;[58] and where two persons are driving on lines that visibly intersect, the general obligation of ordinary care becomes for each a definite duty, and if, as they approach, their contiguity and movements suggest a probable or even possible collision, neither is entitled to act on the assumption that the other will give way[59]

The duty of drivers of vehicles not to drive recklessly but to use due care to prevent injury to others in the highway,[60] and to avoid collisions,[61] extends to bicyclists,[62] and to persons operating motor vehicles, discussed in the C J S title Motor Vehicles §§ 247–249, also 42 C J p 878 note 69–p 884 note 44, traction engines,[63] or steam rollers[64]

What constitutes due care depends on the circumstances of each particular case[65] and, as stat-

ful rights in use of highway"—Berry v Dannelly, 145 So 663, 665, 226 Ala 151

Defined under common law

(1) For "ordinary care," common law with respect to travelers on highways, adopts as its standard such care as persons of common prudence generally exercise—Tomlinson v Clement Bros, 154 A 355, 130 Me 189

(2) One driving on public highway must exercise care of reasonable and prudent man under like circumstances to avoid injuring others—People v McMurchy, 228 N W 723, 249 Mich 147

Police officer in using highway must use same care as reasonably prudent person—Heimer v Salisbury, 142 A 749, 108 Conn 180

Warning of danger

(1) One creating a situation on the highway which becomes a menace to traffic using highway in ordinary and customary manner is held to the strict responsibility of giving proper warning of danger involved—Broussard v Krause & Managan La App, 186 So 384

(2) Duty of one engaged in lawful occupation on highway to onlooker see the C J S title Negligence § 61, also 45 C J p 840 note 73

As between pedestrians

The law of negligence is applicable to situations such as where one pedestrian collides with another pedestrian—Bernstein v Western Union Telegraph Co, 18 N Y S 2d 856, 174 Misc 74

City streets see the C J S title Municipal Corporations §§ 1780–1786, also 44 C J p 1053 note 4–p 1061 note 11

Motor vehicles see the C J S title Motor Vehicles §§ 247–249, also 42 C J p 878 note 69–p 884 note 44

50. Fla—Atlantic Coast Line R Co v Weir, 58 So 641, 63 Fla 69, 41 L R A, N S, 307, Ann Cas 1914A 126
29 C J p 648 note 72

51. Ala—Francis v Imperial Sanitary Laundry & Dry Cleaning Co, 2 So 2d 388, 241 Ala 327
"We know of no rule of law or logic which justifies [traveler] in assuming that [public] highway is not occupied by other vehicles or travelers"—Berry v Dannelly, 145 So 663, 665, 226 Ala 151

Duty to keep lookout

The obligation to keep a lookout so as not to injure others on public highways is continuing, and no one has right to act as though he were the only person thereon or entitled to be thereon—Pearson & Dickerson Contractors v Harrington, Ariz, 137 P 2d 381

Right to assume absence of obstruction in highway see infra § 268

52. Ala—Francis v Imperial Sanitary Laundry & Dry Cleaning Co, 2 So 2d 388, 241 Ala 327

53. Miss—Teche Lines v Bateman, 139 So 159, 162 Miss 404

54. Iowa—Gookin v Guy W Baker & Son, 276 N W 418, 224 Iowa 967
S C—Oakman v Ogilvie, 193 S E 920, 185 S C 118

55. Iowa—Gookin v Guy W Baker & Son, 276 N W 418 224 Iowa 967
Or—Schassen v Columbia Gorge Motor Coach System, 270 P 530, 126 Or 363

56. Fla—Walker v Smith, 161 So 551, 119 Fla 430—Florida Motor Lines v Ward, 137 So 163, 102 Fla 1105
S C—Oakman v Ogilvie, 193 S E 920, 185 S C 118
W Va—Fielder v Service Cab Co, 11 S E 2d 115, 122 W Va 522.
29 C J p 656 note 5

Reliance on observance of law of the road see supra § 236 d.

57. Or—Schassen v Columbia Gorge Motor Coach System, 270 P 530, 126 Or 363

58. Mass—Crimmins v Armstrong Transfer Express Co, 104 N E 457, 217 Mass 155
29 C J p 656 note 6

59. Ill—Campbell v Chicago City R Co, 212 Ill App 344

60. Okl—Abbott v Dingus, 145 P 365, 44 Okl 567
29 C J p 656 note 8

61. Ala—Berry v Dannelly, 145 So 663, 226 Ala 151
29 C J p 656 note 9

62. R I—Pick v Thurston, 54 A. 600 25 R I 36
29 C J p 656 note 10

63. Md—Miller v Addison, 54 A 967, 96 Md 731
Mich—Macomber v Nichols, 34 Mich 212, 22 Am R 522
29 C J p 656 note 12

64. N Y—Kelley v New York State R Co, 100 N E 1115, 207 N Y 342

65. Md—Fotterall v Hilleary, 13 A. 2d 358, 178 Md 335
Mich—People v McMurchy, 228 N. W 723, 249 Mich 147
Pa—Lowers v Zuker, 157 A. 339, 102 Pa Super 581
29 C J p 656 note 14

Acts constituting negligence

(1) Dragging long chain behind wagon over which a horse tripped—Bueck v Lindsay, 31 N W 768, 65 Mich 105

(2) Backing vehicle up against the sidewalk so as to knock down a structure thereon—Wolff Mfg Co v Wilson, 38 N E 694, 152 Ill 9, 26 L R A 229

(3) Running down boy on hand sled attached to wagon—Post v Olmsted, 66 N W 828, 47 Neb 893

Lights on vehicles

Failure to display lights on horse-

ed infra § 247, is generally a question for the jury There is no liability for the effects of an unavoidable accident,[66] and plaintiff can recover when,[67] and only when,[68] defendant's wrongful act or negligence is the proximate cause of the injury

Equipment A driver is in general negligent if he fails to have proper equipment,[69] but he is not bound to furnish appliances which will render an accident impossible or to use the highest degree of care to make it safe, but only such care as a person of ordinary prudence would exercise under the circumstances[70] The breaking of the harness or vehicle does not necessarily show negligence,[71] nor does it, as stated infra § 426 c (1), raise any presumption of negligence

Leading animals Leading horses in the highway may be done in such a negligent manner as to render the owner liable for accidents[72] It is not negligence per se, however, to drive domestic animals unhaltered on the highway[73]

In the absence of applicable statute or regulation, whether one leading animals along the highway at night should use lights depends on the circumstances[74]

Soundness of horse A driver is not required to have a horse absolutely sound and free from defects, but only to use ordinary care in this respect[75]

Vehicle meeting dog Where one driving at a moderate pace is confronted by a dog, he is not bound to stop or turn aside, but may assume that the dog will get out of the way[76]

Persons liable Responsibility for an accident falls on the person whose negligence caused it,[77] and all persons engaged in it are jointly liable[78] A person is not liable for injuries caused by the negligence of his wife,[79] or son,[80] in the absence of evidence that the wife or son was acting under his direction or with his knowledge or consent A town is ordinarily not liable for the manner of use of a way by travelers[81]

Recovery by owner of property The owner of a horse and vehicle injured on a highway by the negligence of another may recover damages therefor, regardless of the person in charge of the property at the time[82]

Liability for injury to highway is considered supra § 228

b. Statutory or Other Governmental Regulations

Care required in use of highway is sometimes regulated by statute or other governmental regulation

In its exercise of power and control over the public ways, the state through the legislature may enact laws prescribing the standard of care required, and governing the liability, of travelers on the highways, where the purpose to be served is the safety of travelers generally on the roads[83] Under some of these statutes persons using the

drawn vehicle is not negligence, in absence of statute requiring lights — Lange v Bedell, 212 N W 351, 203 Iowa 1194

66. Del - Lemmon v Broadwater, 108 A 273, 30 Del 472
29 C J p 657 note 34

67. Iowa — Roennau v Whitson, 175 N W 849, 188 Iowa 138
29 C J p 657 note 35
Runaways and horses left unhitched see infra § 244

68. Me — Smith v French, 21 A. 739, 83 Me 108, 23 Am S R 761.
29 C J p 657 note 36
Frightening horses see infra § 243

69. Okl — Abbott v Dingus, 145 P 365, 44 Okl 567
29 C J p 657 note 21

70. N Y — Unger v Forty-second St & Grand St Ferry R Co, 51 N Y 497, affirming 29 N Y Super 237 — Rattagliata v Hubbell, 27 N Y S 409, 7 Misc 103
29 C J p 657 note 23

71. N Y — Unger v Forty-second St & Grand St Ferry R Co, 51 N Y 497

72. N Y — Crozier v Read, 41 N Y S 1110, 10 App Div. 626, 78 Hun 181, 28 N Y S 911 — Grinnell v Taylor, 32 N Y S 681, 85 Hun 85, affirmed 49 N E 1097, 155 N Y 653
Ohio — Pickens v Decker, 21 Ohio St 212, 8 Am R 55

73 Ill — Fitzsimmons v Snyder, 181 Ill App 70

74 Mo Yerger v Smith, 89 S W 2d 66, 338 Mo 140

Common-law rule
In the absence of an applicable statute or regulation, whether one driving animals along the highway at night should use lights is determined by the common law — Yerger v Smith, supra

Not negligence per se
Ohio — Webster v Pollock, 15 Ohio App 102

75. Tenn — Young v Cowden, 10 S W 1088, 98 Tenn 577
29 C J p 657 note 30

76. Pa - Clement v Adams Express Co, 43 Pa Super 25, 28

Reason for rule
"To drive to the right or left serves no useful purpose as the dog can change his position more quickly than can the horse" - Clement v Adams Express Co, supra.

77. Conn — Camp v Rogers, 44 Conn 291
Ill — Coursen v Ely, 37 Ill 338
Me — Foster v Goddard, 40 Me 64

78. Mass — Vosburgh v Moak, 1 Cush 453, 48 Am D 613
N Y - Burnham v Butler, 31 N Y 480

79 Mich — Ricci v Mueller, 2 N W 23, 41 Mich 214

80 Mich — Brohl v Lingeman, 3 N W 199, 41 Mich 711

81. Me — Davis v Bangor, 42 Me 522
N H — Ray v Manchester, 46 N H 59, 88 Am D 192

82 Ala - Mullins v Lemley, 88 So 831, 205 Ala 593

83. Idaho — Packard v O'Neil, 262 P 881, 45 Idaho 427, 56 A L R 317

Exclusive prerogative
It is the exclusive prerogative of legislative assembly to enact laws prescribing the standard of care required of travelers on public highways and the power cannot be delegated to commissions — Wright v Des Moines Ry Co., 1 N.W.2d 259, 231 Iowa 410.

highways are required to comply with the reasonable directions of traffic officers or with lawful traffic regulations or signals displayed on the highways[84] That a regulation exists dealing with the use of the highways under specified conditions does not do away with the necessity for use of due care under the general rules of negligence, in addition to compliance with the regulation[85]

Effect of violation The authorities are not in accord on the question of the effect of a violation of a traffic statute or regulation as negligence In some jurisdictions such a violation is considered to be merely evidence of negligence and not conclusive on such issue[86] In others, the exercise of ordinary care has been held to require observance of regulations governing the use of the road, a failure to comply therewith constituting negligence per se,[87] and if evidence of such violation is not disputed, it may constitute negligence as a matter of law.[88] Violation of statute or ordinance as constituting negligence generally is considered in the C J S title Negligence § 19, also 45 C J p 714 note 91–p 725 note 67

§ 241. —— Vehicles and Persons on Foot

a In general
b Pedestrians crossing highway

a. In General

Pedestrians or other persons on foot using the highways must exercise due care to avoid accidents, while on the other hand, drivers or operators of vehicles must exercise due care not to injure persons on foot using the highways

Although pedestrians have no right of way over vehicles,[89] except as otherwise provided by statute,[90] they may walk on any part of the road,[91]

As to residents and nonresidents alike
U S —Hess v Pawloski Mass 47 S Ct 632, 274 U S 352 71 L Ed 1091
Mont State ex rel Thompson v District Court of Fourth Judicial Dist in and for Missoula County, 91 P 2d 422 108 Mont 362—State ex rel Charette v District Court of Second Judicial Dist in and for Silver Bow County, 86 P 2d 750, 107 Mont 489

Control of vehicle
(1) A statute providing that persons in a state of intoxication are deemed conclusively to be unable to control and operate vehicles on the public highways has been held a reasonable regulation within the police power - Packard v O'Neil 262 P 881, 45 Idaho 427 56 A L R 317

(2) The purpose of such a statute has been held to make intoxicated persons liable for damages resulting from their acts while using the highways, and thereby minimize the danger of injury to others —Packard v O Neil supra

(3) Such a statute should be given common sense interpretation —Packard v O Neil supra
Delegation of legislative functions as to public highways see Constitutional Law § 138 b (8)

84 Stop sign
By common usage term 'stop sign' has acquired meaning of legally erected and maintained traffic signal under Highway Law —Meadows v Lewis 257 N Y S 137, 235 App Div 243

85 Reason for rule
Statute, relating to driving of cattle on public highway, does not include all law on subject --Olden v Babicora Development Co, 290 P 1062, 107 Cal App 399

86. Ark —Duckworth v Stephens, 30 S W 2d 840, 182 Ark 161

Light on vehicle
Violation of statute requiring lights on horse-drawn vehicles at night is not evidence of negligence, although act is made a wrong —Eastman v Herrick, 173 A 807, 87 N H 58

Wrongful parking
Where vehicle is rightfully on public way but for time being is in position thereon in violation of some ordinance or binding regulation its presence is not commonly as matter of law a proximate cause of a collision since presence may be circumstance and not a cause —Stowe v Mason 194 N E 671 289 Mass 577—Wall v King, 182 N E 855 280 Mass 577—Falk v Finkelman 168 N E 89 268 Mass 524

87. Cal —Joseph v Vogt, 95 P 2d 917, 35 Cal App 2d 439 —Pouch v Werner 279 P 183, 99 Cal App 557
La —Harper v Holmes, App, 189 So 463
Wash —Frowd v Marchbank 283 P 167, 154 Wash 634

Cutting corner in making left turn on highway in violation of statute is negligence per se —Day v Pauly, 202 N W 363 186 Wis 189

Lights on vehicle
(1) Driver of vehicle is negligent where he violates a statute requiring lights on vehicles —Gargan v Harris, 96 A 940, 90 Conn 188

(2) Thus failure to conform to statutory requirement that one operating bicycle on highway between half hour after sunset and half hour before sunrise have such vehicle equipped with lamp emitting white light visible under normal atmospheric conditions for three hundred feet in front of it, constitutes negligence per se —Joseph v Vogt, 95 P 2d 947, 35 Cal App 2d 439
Contributory negligence see infra § 245

88 Cutting corner at highway intersection
Wis —Day v Pauly, 202 N W 363, 186 Wis 189

89. Ala —City of Birmingham v Andrews 172 So 681 684 27 Ala App 377 quoting **Corpus Juris**
Cal --Taylor v Oakland Scavenger Co App, 103 P 2d 605
29 C J p 657 note 11

90 Cinder path or crosswalk
Under statute providing that where crosswalks or cinder paths parallel public road or highway pedestrians shall not walk in along or upon the vehicular traveled portion of such public road or highway except at crossings and crosswalks a "crosswalk" is only found at an intersection and not at another place along the highway since crosswalks are specially paved or marked paths crossing a street or road for the use of persons on foot —Sprung v E I Dupont De Nemours & Co, App, 31 N E 2d 41, appeal dismissed 23 N E 2d 947 136 Ohio St 94

91 Ala —City of Birmingham v Andrews 172 So 681 684, 27 Ala App 377, quoting **Corpus Juris.**
29 C J p 657 note 45

Left side of road
(1) Pedestrian has a right to walk on the left side of the highway — Cannon v Kemper 73 P 2d 268, 23 Cal App 2d 239 White v Davis 284 P 1086 103 Cal App 531

(2) Left side of road facing vehicular traffic was held proper side for pedestrians Haines v Fitzgerald, 165 A 52, 108 Pa Super 290

and, as stated infra subdivision b this section, need not cross at a regular crossing While a pedestrian exercising his right to travel anywhere on a public highway is not guilty of negligence in so doing,[92] he must nevertheless exercise ordinary or reasonable care, in proportion to the danger, to avoid accidents,[93] and, as stated infra § 245, contributory negligence on his part, or on the part of a person working on the highway will bar a recovery, if such negligence is the proximate cause of the injury. However, a laborer is not bound to neglect his occupation in order to avoid injury from the want of ordinary care on the part of drivers of vehicles,[94] and a pedestrian is not, as a matter of law, required to look back for approaching vehicles,[95] or otherwise to be continuously looking and listening for approaching vehicles,[96] although he might be bound so to do in the case of a crowded city street,[97] and the circumstances of his being in the street might render this necessary, as when he alights from a vehicle in front of a moving horse or team[98]

Drivers or operators of vehicles Persons driving or operating vehicles must use ordinary care not to run down a pedestrian walking either along or across a highway,[99] or standing thereon,[1] and the pedestrian has a right, to a certain extent, to rely on the presumption that the driver will exercise such care.[2] So drivers and riders must exercise due care to avoid injury to children,[3] or persons working in the highway[4]

As a general rule one is bound to look where he is going,[5] and is negligent if he suddenly starts his horse without looking[6] However, a driver is not, it seems, under any duty of looking out for persons approaching a vehicle from the rear or the sides thereof, to prevent their falling under the wheels,[7] although he may be liable in case one nearby is injured by the fall of an article from the vehicle;[8] nor is it the driver's duty to keep a lookout behind to see whether persons are riding on the rear of the vehicle[9]

b. Pedestrians Crossing Highway

Both pedestrians and drivers of vehicles crossing a highway must exercise due care as to each other in order to avoid accidents

Neither foot passengers nor vehicles have a prior right of way at a highway crossing They have such right of way in common, in the exercise of which they are bound to use reasonable care[10]

A pedestrian may cross a highway at any point,

92. Cal—Hatzakorzian v Rucker-Fuller Desk Co, 239 P 709, 197 Cal 82, 41 A L R 1027
Md—Mahan v State, to Use of Carr, 191 A 575, 172 Md 373
R I—Banewicz v Sullivan, 20 A 2d 273, 66 R I 494

93. Wis—Seitz v Ott, 182 N W 333, 174 Wis 60
29 C J p 658 note 58
"In the protection of his person or property when about to emerge from a position of security and step onto a traveled highway, a pedestrian must exercise due care"—Cooper & Co v American Can Co, 153 A 889, 890, 130 Me 76
What constitutes due care
(1) "Due or ordinary care depends upon the attending circumstances, among others being the time, place, amount of traffic, and conditions of light and weather"—Banewicz v Sullivan, 20 A 2d 273, 275, 66 R I 494
(2) Pedestrian stepping into traveled highway from position of security must do what ordinarily intelligent and prudent person in like situation would do—Cooper & Co v American Can Co, 153 A 889, 130 Me 76.

94. N Y—Smith v Bailey, 43 N Y S 856, 14 App Div 283—Anselment v Damell, 23 N Y S 875, 4 Misc 144

95. Minn—Pettygrove v Hecht, 198 N.W. 809, 159 Minn 260.
Neb—Nichols v Havlat, 7 N W 2d 84, 94, citing **Corpus Juris.**
29 C J p 658 note 62

96. Tenn—Foreman v Ozment, 6 Tenn App 536

97. Minn—Undhejem v Hastings, 38 N W 488, 38 Minn 485
29 C J p 658 note 63

98. Mass—Messenger v Dennie, 137 Mass 197, 50 Am R 295
29 C J p 658 note 64

99. Mich—Shock v Cooling, 141 N W 675, 175 Mich 313
29 C J p 657 note 47
Liability for injuries by automobiles see the C J S title Motor Vehicles §§ 382–389, also 42 C J p 1031 note 4–p 1039 note 75

1. Mich—White v Edwards, 192 N W 560, 222 Mich 321
Neb—Grantham v Watson Bros Transp Co, 9 N W 2d 157, denying rehearing 6 N W 2d 372, 142 Neb 362

2. Md—Mahan v State, to Use of Carr, 191 A 575, 172 Md 373
Mo—Collins v Leahy, App, 102 S W 2d 801, 806, citing **Corpus Juris.**
29 C J p 658 note 48
Pedestrian on left side of road
A pedestrian walking on left side of highway had right to assume that other persons using highway would obey the law and keep a proper lookout and avoid hitting him—Cannon v Kemper, 73 P 2d 268, 23 Cal App 2d 239
Contributory negligence of pedestrian see infra § 245
Reliance on observance of law of road see supra § 236 d

3. Ind—McNamara v Beck, 52 N E 707, 21 Ind App 483
29 C J p 658 note 50
Contributory negligence of child see infra § 245

4. Wash—Jones v Swift, 70 P. 1109, 30 Wash 462
29 C J p 658 note 51

5. Cal—Sutter v Omnibus Cable Co, 40 P 484, 107 Cal 369
29 C J p 658 note 52

6. Vt—Thompson v National Express Co, 29 A 311, 66 Vt 358
29 C J p 658 note 53

7. N Y—Rice v Buffalo Steel House Co, 45 N Y S 277, 17 App Div 462
29 C J p 658 note 55

8. Ill—Cook v Piper, 79 Ill App 291
Pa—Ledig v Germania Brewing Co, 25 A. 870, 153 Pa 298

9. Ill—Hebard v Mabie, 98 Ill App 543—Chicago Cons Bottling Co v McGinnis, 51 Ill App 325
29 C J p 658 note 57

10. Tex—Vesper v Lavender, Civ. App, 149 S W 377.
29 C J p 659 note 71.

and is not bound to wait until he reaches a regular crossing,[11] although one so doing should exercise a higher degree of care than when he crosses at a regular crossing,[12] and wherever he crosses he may recover for injuries sustained if he has not been guilty of contributory negligence,[13] as where he is run down and injured by a team recklessly driven by defendant or by one for whom defendant is answerable[14]

A person about to cross a public highway at a dangerous place must use care commensurate with the known danger, and a failure to use such ordinary precaution constitutes negligence[15] The degree of care required at crossings is not the same as at railroad crossings, since the vehicles thereon travel at much less speed than railroad trains and are much more under the immediate control of those in charge[16] Ordinary care under the circumstances is all that is required[17] However, the obligation to exercise care and attention is just as imperative, although the standard is less fixed and exacting, and one who steps into the roadway is bound to remember that horses and vehicles have also a right of way there, and he must give due attention thereto[18] Failure to stop, look, and listen for approaching vehicles before attempting to cross a highway is not necessarily negligence,[19] although it may be ground for a finding of negligence,[20] nor is one negligent in crossing merely because he sees vehicles approaching, provided he has ample time to cross if they are reasonably driven.[21] He may assume that the vehicle will approach at a reasonable speed,[22] or in conformity with laws limiting the speed of vehicles[23] However, as stated infra § 245, he cannot recover if he is injured through a mistaken estimate as to the possibility of avoiding an accident

Driver or operator of vehicle. On arriving at a crossing a driver is bound to notice foot passengers and take reasonable care not to injure them,[24] and the fact that a pedestrian is crossing at a place other than a regular crosswalk does not affect the duty to look out for him[25]

§ 242. —— Reckless Driving or Racing

Driving at an immoderate or excessive rate of speed may constitute negligence.

It has been held that driving or riding at a rapid speed in a highway is not necessarily negligence in fact or in law,[26] although such speed is to be considered in determining the question of negligence[27] In other cases it is said or intimated that an immoderate or excessive rate of speed,[28] especially at night,[29] in itself constitutes negligence, and if the speed is such that the driver is unable properly to control the horse so as to avoid injury to others, a finding of negligence on his part is justified[30] Driving at a speed calculated to frighten other

Effect of fog

The presence of a fog necessitates the exercise of greater vigilance on the part of both parties to avoid the risk of accident —McManus v Woolverton, 19 N Y S 545, affirmed 34 N E 513, 138 N Y 648

11. Ala —City of Birmingham v Andrews, 172 So 681, 27 Ala App 377
29 C J p 660 note 74

Statute as to place for walking

The statute relating to use of sidewalks or use of left hand side of highway as a walkway in absence of sidewalk is not applicable to pedestrian crossing highway at intersection —Tiffany v Shipley, 161 S W 2d 373, 25 Tenn App 539

12. Ky —Weidemann Brewing Co v Parmlee, 180 S W 350, 167 Ky 303
29 C J p 660 note 75

13. Ky —Weidemann Brewing Co v Parmlee, 180 S W 350, 167 Ky 303
29 C J p 660 note 76

14. Ga —Orr v Garabold, 11 S E 778, 85 Ga 373
29 C J p 660 note 77

15. Ill —Russell v Richardson, 31 N E 2d 427, 308 Ill App. 11.

16. Tenn —Emert v Wilkerson, 7 Tenn App 269
29 C J p 660 note 78

17. Tenn —Emert v Wilkerson, supra

18. Pa —Harris v Commercial Ice Co, 25 A 1133, 153 Pa 278

19. Tenn —Emert v Wilkerson, 7 Tenn App 269
29 C J p 660 note 80

"Usually when about to step from a country road margin on a highway to cross or traverse it, a pedestrian is not charged with the duty to look and listen"—Cooper & Co v American Can Co, 153 A 889, 891, 130 Me 76

As matter of law

Ala —Government Street Lumber Co v Ollinger, 94 So 177, 18 Ala App 518, certiorari denied Ex parte Ollinger, 94 So 922, 208 Ala 699

20. Mass —Murphy v Armstrong Transfer Co, 45 N E 93, 167 Mass 199

21. Minn —Stallman v Shea, 109 N W 824, 99 Minn 422
29 C J p 660 note 82

22. Mich —Stroub v Meyer, 92 N.W 779, 132 Mich 75

N Y —Schwartz v London, 90 N Y S 449

Reckless driving see infra § 242

23. Iowa —Eaton v Cripps, 62 N W. 687, 94 Iowa 176
29 C J p 660 note 84

24. N Y —Birkett v Knickerbocker Ice Co, 18 N E 108, 110 N Y 504
29 C J p 660 note 72

25. Pa —Anderson v Wood, 107 A. 658 264 Pa 98
29 C J p 660 note 73

26. Mich —Denman v Johnston, 48 N W 565, 85 Mich 387
29 C J p 661 note 88

Speed of automobiles see the C J S. title Motor Vehicles §§ 290–299, also 42 C J p 920 note 4–p 934 note 62

27. Ind —Stringer v Frost, 19 N E 331, 116 Ind 477, 9 Am S R 875, 2 L R A 614
29 C J p 661 note 89

28. Mich —Post v U S Express Co, 43 N W 636, 76 Mich 571
29 C J p 661 note 90

29. N C —Crampton v Ivie, 32 S E 968, 124 N C 591
29 C J p 661 note 91

30 Del —Ford v Whiteman, 45 A. 543, 18 Del 355
29 C J p 661 note 92.

horses of ordinary gentleness on the highway is likewise actionable,[31] and the urgent necessity of one's errand will not excuse careless and reckless driving.[32]

The fact that one was riding or driving at a rate of speed greater than that prescribed by law is not, it is generally held, conclusive of negligence on his part, but is merely evidence thereof, to be considered by the jury,[33] although some authorities have treated this as itself showing negligence.[34]

Racing on highway Racing on the highway has been regarded as a ground of liability for injuries to one resulting therefrom,[35] and when such use of the highway is illegal, both the persons whose teams participated therein are liable, although only one of them may have actually come in contact with the person injured.[36] A statute forbidding racing on a highway has no application to coasting with a double runner.[37]

§ 243. —— Frightening Horses

Damage or injury caused by the negligent frightening of a horse is actionable

A person frightening horses on a highway is not liable for injury resulting therefrom if he has been guilty of no wrong or negligence.[38] An action lies, however, for negligently frightening horses, and so causing damage.[39] If one uses a highway for transportation of extraordinary objects, he is bound to take precautions to warn travelers and to aid them in passing with safety.[40]

Although, where new modes of locomotion come into general use on the highways, effective means must be taken to prevent injury to others by the frightening of horses, the means to be taken depending on the circumstances,[41] persons making use of horses as the means of travel or traffic on the highways have no rights therein superior to those who make use of the ways in other permissible modes.[42] Hence, if a bicyclist,[43] or one operating a steam roller, traction engine, or other like instrumentality on the highway,[44] is not negligent, he is not liable for injuries caused by frightening horses, the mere use of such instrumentalities not constituting negligence per se.[45] However, failure to use due care in operating such appliances will render the operator liable for injuries,[46] if such failure is the proximate cause of the accident.[47]

Persons liable A person other than the one in charge of a team, who does some act calculated to frighten the horses, is liable for resulting injuries to persons on the highway.[48]

One whose servants drive cattle along the highway, although he does not own the cattle, may be

31 Ky.—Thomas v. Royster, 32 S.W. 613, 98 Ky. 206, 17 Ky.L. 783
29 C.J. p. 661 note 93
Frightening horses generally see infra § 243

32 Ind.—Green v. Eden, 56 N.E. 240, 24 Ind.App. 583
Iowa—Eaton v. Cripps, 62 N.W. 687, 94 Iowa 176
29 C.J. p. 661 note 94

33. Iowa—Osborn v. Jenkinson, 69 N.W. 548, 100 Iowa 132
29 C.J. p. 661 note 95

34. Tex.—Foley v. Northrup, 105 S.W. 229, 47 Tex.Civ.App. 277
29 C.J. p. 661 note 96
Criminal liability for reckless driving see infra § 247

35 Mich.—Mahnke v. Freer, 85 N.W. 1099, 126 Mich. 572
29 C.J. p. 661 note 97
Automobile racing on public highway see the C.J.S. title Motor Vehicles § 297, also 42 C.J. p. 932 notes 46-51
Racing on highway as a crime see infra § 247

36. N.Y.—Burnham v. Butler, 31 N.Y. 480.—Hanrahan v. Cochran, 12 N.Y.S. 1031, 12 App.Div. 91

37. Iowa.—Roennau v. Whitson, 175 N.W. 849, 188 Iowa 138.

38. Mich.—Pigott v. Lilly, 20 N.W. 879, 55 Mich. 150
29 C.J. p. 661 note 2

Cattle at large

(1) Cattle driver who keeps cattle carrying lights on right of road is not liable for injuries caused by frightening a horse.—Torres v. Rubert, 6 Puerto Rico Fed. 701

(2) Under the common law of some jurisdictions, the owner of a bull running at large on the highway is liable for injury caused by the frightening of a horse by such bull without a showing that the bull was at large by permission or fault of the owner, the owner of cattle being required to keep them on his own land at his peril.—Farrell v. Crawford, 222 Ill.App. 499

39. Ill.—Farrell v. Crawford, supra
29 C.J. p. 661 note 3
Placing in road objects calculated to frighten horses see infra § 259
Reckless driving see supra § 242

40. N.J.—McCann v. Consolidated Tract Co., 36 A. 888, 59 N.J.Law 481, 38 L.R.A. 236
R.I.—Bennett v. Lovell, 12 R.I. 166, 34 Am.R. 628

41. Tex.—Patton-Worsham Drug Co. v. Drennon, 133 S.W. 871, 104 Tex. 62, reversing, Civ.App., 123 S.W. 705
Fright caused by motor vehicle see the C.J.S. title Motor Vehicles §§ 411-421, also 42 C.J. p. 1064 note 53-p. 1072 note 28

42 Me.—Simonds v. Maine Tel. & Tel. Co., 72 A. 175, 104 Me. 440, 443, 28 L.R.A.N.S. 942
29 C.J. p. 662 note 7

43. Minn.—Thompson v. Dodge, 60 N.W. 545, 58 Minn. 555, 49 Am.S.R. 533, 28 L.R.A. 608
N.J.—Haines v. Moore, 10 N.J.L.J. 122

44. N.Y.—Rector v. Syracuse Rapid Transit R. Co., 72 N.Y.S. 745, 66 App.Div. 395
Va.—Lane Bros. Co. v. Barnard, 69 S.E. 969, 111 Va. 680, 31 L.R.A.,N.S., 1209
29 C.J. p. 662 note 9

45. Md.—Miller v. Addison, 54 A. 967, 96 Md. 731
29 C.J. p. 662 note 10

46. N.Y.—Buchanan v. Cranford Co., 98 N.Y.S. 378, 112 App.Div. 278
29 C.J. p. 662 note 11

47. Ind.—Cleveland, C., C. & I.R. Co. v. Wynant, 17 N.E. 118, 114 Ind. 525, 5 Am.S.R. 644
29 C.J. p. 662 note 12

48. Mo.—Forney v. Geldmacher, 75 Mo. 113, 42 Am.R. 388
N.Y.—McCahill v. Kipp, 2 E.D.Smith 413.

liable for frightening a horse.[49]

The bailee, not the bailor, of a bull running at large on the public highway is liable for injuries resulting from the frightening of a horse by such bull.[50]

§ 244. —— Horses Not under Control, and Runaways

a In general
b Character of horse
c Leaving horse unhitched and unattended

a. In General

Injury or damage caused by a runaway horse is not actionable unless the escape of the horse from control is due to negligence proximately causing such injury or damage

The fact that a horse, while being driven or ridden, escapes from control or runs away, and, as a result thereof, causes injuries to persons on the highway, does not render the owner or driver thereof liable, unless there was negligence on his part,[51] and the same rule applies where a horse escapes from private premises.[52] So one is not liable because his horse makes a sudden and unexpected movement which results in injury to another person on the highway.[53]

If the escape of a horse from control is due to the driver's failure to exercise ordinary or reasonable care,[54] and such failure is the proximate cause of an accident,[55] the driver is liable, although as stated infra § 246, it is for the jury to determine the cause of the runaway, and the question of contributory negligence.

Due care must be exercised to keep a vehicle in a roadworthy condition, and, if from want of such care the vehicle breaks, causing the horses to run away, the driver is liable for injuries caused thereby.[56] The use of a spur on a horse while near a pedestrian, causing the horse to kick out and injure him, is ground for the imposition of liability.[57] Liability also arises in case the driver fails to exercise reasonable precautions to stop the horse after it starts to run away.[58] The owner is not relieved from liability by the fact that persons trying to stop the horse caused it to take the direction of the person injured,[59] although, on the other hand, he is not liable merely because the driver by pulling on the lines gives it that direction.[60]

It is commonly not negligent to fail to avoid runaways,[61] or to attempt to stop them,[62] unless the effort is rash and reckless.[63] A person driving on the highway has the right to assume that a team approaching from the rear is in the hands of a competent driver,[64] and, as stated infra § 245, he is not guilty of contributory negligence in failing to turn and look.

b. Character of Horse

Greater care to avoid injuries to others using the highway is required of one going on the highway with a wild or unruly horse

It is negligence to go on the highway with a wild or unruly animal not harnessed with reasonable security,[65] or to place the animal in charge of a driver who does not exercise reasonable care to control him.[66] It is not necessary, however, in order to render the owner, or other person responsible for control of the horse, liable for injuries to others, that the horse be of a vicious nature, provided he fails to take proper precautions to prevent accidents.[67] Thus entrusting a horse ordi-

49. Puerto Rico—Torres v Rubert, 6 Puerto Rico Fed 701

50. Ill—Farrell v Crawford, 222 Ill App 499
Liability of bailor and bailee of animal for injuries to third persons generally see Animals §§ 13 b, 14 b

51. Conn—Button v Frink, 51 Conn 342, 50 Am R 24
29 C J p 662 note 16
Liability for injuries by domestic animals negligently running at large generally see Animals § 149
Liability for involuntary trespass by animals when on, or when being driven along, highway see Animals § 187 b
Liability of livery-stable keepers for injuries to hirer of horse see the C J S title Livery-Stable Keepers § 17, also 38 C J p 92 note 53–p 93 note 62

52. Me—Briggs v Lake Auburn Crystal Ice Co, 92 A 185, 112 Me 344

53. N Y—Haines v Keahon, 61 N Y S 757, 46 App Div 164
29 C J p 662 note 18

54. Del—Ford v Whiteman, 45 A 543, 18 Del 355
29 C J p 663 note 22

55. Minn—Griggs v Fleckenstein, 11 Minn 81, 100 Am D 199
29 C J p 663 note 23

56. Ind—Birdsell Mfg Co v Loughman, 59 N E 872, 26 Ind App 359

57. Eng—North v Smith, 10 C B N S 572, 100 ECL 572, 142 Reprint 576

58. Pa—Whissler v Walsh, 30 A 981, 165 Pa 352

59. Ga—Phillips v Dewald, 7 S E 151, 79 Ga 732, 11 Am S.R 458

Mass—Turner v Page, 72 N E 329, 186 Mass 600

60. N Y—Benoit v Troy etc, R Co, 48 N E 524, 154 N Y 223

61. Mass—Greenwood v Callahan, 111 Mass 298
29 C J p 663 note 31

62. N Y—Manthey v Rauenbuehler, 75 N Y S 714, 71 App Div 173

63. N Y—Manthey v Rauenbuehler, supra
29 C J p 663 note 33

64. Ind—Seofield v Myers, 60 N E 1005, 27 Ind App 375

65. Tenn—Peete v Jackson, 4 Tenn Civ App 678

66. Tenn—Peete v Jackson, supra

67. Mass—Woodman v Haynes, 193 N E 570, 289 Mass 114
29 C J p 659 note 68.

narily harmless to an incompetent driver, to be driven on the highway, may constitute negligence on the part of the person responsible for the control of the horse for which he may be held liable,[68] even though such driver is not his agent or servant[69]

A greater degree of care is required of one driving a horse having a reputation for running away than is required of the driver of a horse known to be gentle and reliable[70]

While the owner or driver is liable if he knew that the horse was so unruly as to be unfit to use on the public highway,[71] he is bound to exercise only ordinary care and diligence in procuring a suitable horse[72] Knowledge on the part of the owner or driver that a horse is vicious and unmanageable is essential to liability,[73] and in the absence of such knowledge the fact that he has just bought it does not render the owner liable[74] Such unfitness for use is not shown by the fact that the horse once ran away when frightened by the conduct of third persons,[75] nor by the fact that it is balky,[76] or that it has occasionally shied,[77] although such fact in connection with other circumstances may show negligence[78] The mere fact that horses which have previously been gentle and easily controlled show signs of being unruly on being driven does not impose on the driver the obligation to discontinue the drive and refrain from driving the horses home[79]

c. Leaving Horse Unhitched and Unattended

Leaving a horse untied and unattended on the highway may constitute negligence under the circumstances.

Leaving a horse unhitched and unattended on the public highway,[80] especially where the horse is high spirited,[81] or the driver knows the horse is likely to run away,[82] or leaving it improperly hitched,[83] or attended only by one incapable of controlling the horse,[84] has been held to be negligence Such conduct has also been held not to be negligence per se under all circumstances,[85] but only to be prima facie evidence of negligence,[86] which, as stated infra § 246 d (1), is for the consideration of the jury, in view of the character of the horse and the particular circumstances under which it was left

The fact that the act of a third person or some independent agency caused horses when unhitched and unattended to run away does not excuse the person so leaving them, if the accident would not have happened had they been properly fastened[87] There is no liability, however, where the horse was properly fastened and was caused to run away by some agency over which defendant had no control[88]

As stated infra § 246 c (1), a presumption of negligence arises from the unexplained presence on the highway of a runaway horse unattended by any person, and it is not necessary to show that the horse was vicious to the knowledge of the owner[89]

Reason for rule
The law regards a horse as ordinarily a harmless animal, but as an animal of such natural propensities as to require some control on the highway —Woodman v Haynes, supra

68. Mass —Woodman v Haynes, supra

69. Reason for rule
Ground of liability is not driver's negligence, but person's own negligence in intrusting horse to incompetent driver —Woodman v Haynes, supra

70. Wash —Lynch v Kineth 78 P 923, 36 Wash 368, 104 Am S R 958

71. Mass —Corliss v Keown, 93 N E 143, 207 Mass 149
29 C J p 663 note 37

72. Tenn —Young v Cowden, 40 S W 1088, 98 Tenn 577
29 C J p 663 note 38

73. N H —Ferrall v Youlden 85 A 786, 76 N H 548
N Y —Goldschneider v J Rheinfrank Co, 132 N Y S 401
29 C J p 663 note 39
Scienter as to viciousness of domestic animal as element of liability for injury by animals generally see Animals § 148

74. Eng —Hammack v White, 11 C B N S 588, 103 E C L 588, 142 Reprint 926

75. Md —Vonderhorst Brewing Co v Amthim, 56 A 833, 98 Md 406
29 C J p 663 note 41

76. N Y —Chamberlain v Wheatland, 7 N Y S 190 1 Silv Sup 165

77 Tenn —Young v Cowden, 40 S W 1088 98 Tenn 577

78. R I —Fleming v Anawomscott Mills 47 A 215, 22 R I 211
29 C J p 661 note 41

79. Md —Creamer v Mellvain, 43 A 935, 89 Md 343 73 Am S R 186, 45 L R A 531

80. N J —Marshall v Suburban Dairy Co, 114 A 750, 96 N J Law 81
29 C J p 664 note 46
Statute inapplicable
Statute as to leaving horses untied and unattended on the streets was held to apply only to cities and towns, and not to highways in general —Marshall v Suburban Dairy Co, 114 A 750, 96 N J Law 81
In city streets see the C J S title Municipal Corporations § 1783, also 44 C J p 1056 note 49–p 1057 note 65

81. Colo —Pierce v Conners, 37 P 721, 20 Colo 178, 46 Am S R 279

82. N J —Marshall v Suburban Dairy Co, 114 A 750, 96 N J Law 81

83. Mich —Le Baron v Joslin, 2 N W 36, 41 Mich 313
Wis —Strup v Edens, 22 Wis 432

84. Neb —Miller v Strivens, 67 N W 458, 48 Neb 158
29 C J p 664 note 49

85. Kan —Lawson v Brokmann, 226 P 252, 116 Kan 102

86. Ill —Devine v Pfaelzer, 195 Ill App 221
Iowa —Migliaccio v Smith Fuel Co, 130 N W 720 151 Iowa 705

87. Colo —Pierce v Conners, 37 P 721, 20 Colo 178, 46 Am S R 279

88. La —Shawhan v Clarke, 24 La Ann 390

89. N J —Francois v Hanff, 71 A 1128, 77 N J Law 364
Necessity of scienter as to domestic animals generally see Animals § 148 b.

§ 245. —— Contributory Negligence

Contributory negligence by one injured on a public highway through the negligence of another will ordinarily bar recovery for such injury if proximately caused thereby

Persons traveling on, or otherwise using, the public highways must exercise reasonable care under the circumstances to avoid injury by other users of the highways.[90] Failure to exercise such care by one injured through the negligence of another constitutes contributory negligence,[91] which, if proximately causing the injury, will bar recovery by him,[92] even though he is a child,[93] or is a passenger in a vehicle driven by another, as discussed in the C.J.S. title Negligence §§ 150–156, 168, also 45 C.J. p. 1016 note 64–p. 1019 note 18, p. 1029 note 15–p. 1036 note 95, and the C.J.S. title Motor Vehicles §§ 486–493, also 42 C.J. p. 1169 note 34–p. 1182 note 57. However, negligence on the part of the person injured, not proximately contributing to the injury, is no defense.[94]

That defendant's negligence is gross does not ordinarily affect the rule,[95] although if such gross negligence consists in willfully running into plaintiff, the latter's contributory negligence will not bar recovery.[96] So there may be a recovery notwithstanding contributory negligence if plaintiff's peril was discovered by defendant, or could by ordinary care have been discovered, in time to avoid the injury.[97]

Acts in emergencies. The mere fact that the injured person made a wrong choice in an emergency caused by defendant's negligence is not contributory negligence.[98]

Persons under disability. A person under disability must use care in proportion to his infirmity,[99] although it is not negligence as a matter of law for a blind person to walk unattended on a public highway.[1] One riding on a highway is under no duty constantly to look back, even though he is deaf.[2]

Violation of regulations or rules of road. It has been held that, if one seeking to recover for injuries suffered on a highway through another's negligence was injured while he himself was violating a statutory rule of the road, he must show that such violation in no way contributed to his injury.[3]

A violation of a statutory rule of the road has been held both to be[4] and not to be[5] contributory

90. S.D.—Descombaz v. Klock, 235 N.W. 502, 58 S.D. 173, affirmed 240 N.W. 495, 59 S.D. 461.
Wash.—Haaga v. Saginaw Logging Co., 14 P.2d 55, 169 Wash. 547, affirming 5 P.2d 505, 165 Wash. 367, petition granted 15 P.2d 655, 170 Wash. 93.

Use of senses
Pa.—Clee v. Brinks, Inc., 5 A.2d 387, 135 Pa.Super. 345—Newman v. Reimish, 163 A. 58, 106 Pa.Super. 351—Wescott v. Geiger, 92 Pa.Super. 80—Waldman v. Weiner, 29 North.Co. 17.
Care required in use of highway see supra §§ 240–244.

91. U.S.—Waldman v. Weiner, 29 North.Co. 17.
29 C.J. p. 664 note 57.

Standing on highway
One momentarily standing on the highway is not per se guilty of contributory negligence.
Mich.—White v. Edwards, 192 N.W. 560, 222 Mich. 321.
Neb.—Grantham v. Watson Bros. Transp. Co., 9 N.W.2d 157, denying rehearing 6 N.W.2d 372.

Failure to turn and look
One driving on a highway is not guilty of contributory negligence in failing to turn and look, although he might thereby ascertain that the team behind is running away.
Ind.—Scofield v. Myers, 60 N.E. 1005, 27 Ind.App. 375.
Kan.—Moulton v. Aldrich, 28 Kan. 300.
Wash.—Abby v. Wood, 86 P. 558, 43 Wash. 379.

92. Pa.—Clee v. Brinks, Inc., 5 A.2d 387, 135 Pa.Super. 345—Newman v. Reimish, 163 A. 58, 106 Pa.Super. 351—Westcott v. Geiger, 92 Pa.Super. 80—Waldman v. Weiner, 29 North.Co. 17.
Wash.—Martin v. Seymour, 212 P. 556, 123 Wash. 478.
Wis.—Day v. Pauly, 202 N.W. 363, 186 Wis. 189.
29 C.J. p. 664 note 57, 658 notes 59, 60.

Pedestrian crossing highway
Pedestrian injured by vehicle when crossing highway cannot recover if he is injured through a mistaken estimate as to the possibility of avoiding an accident.—Douglas v. Faust, 36 So. 850, 112 La. 1050—29 C.J. p. 660 note 85.

Absence of light
Iowa.—Cook v. Fogarty, 72 N.W. 677, 103 Iowa 500, 39 L.R.A. 488.
29 C.J. p. 664 note 64.

93. N.Y.—Dehmann v. Beck, 70 N.Y.S. 29, 61 App.Div. 505.
29 C.J. p. 661 note 58.
Contributory negligence of parent or custodian of child injured at highway see the C.J.S. title Parent and Child § 46, also 45 C.J. p. 1014 note 42–p. 1015 note 56.

94. N.Y.—Martin v. Herzog, 126 N.E. 814, 228 N.Y. 164.
29 C.J. p. 665 note 66.

Absence of lights
Mo.—Hannah v. Butts, 14 S.W.2d 31, 222 Mo.App. 1098.

95. N.Y.—Mangam v. Brooklyn City R. Co., 36 Barb. 230, affirmed 38 N.Y. 455, 98 Am.D. 66.

96. Mich.—Luckhurst v. Schroeder, 149 N.W. 1009, 183 Mich. 487.

97. Cal.—Schenck v. Rountree, 265 P. 971, 90 Cal.App. 443.
29 C.J. p. 665 note 68.
Last clear chance doctrine generally see the C.J.S. title Negligence §§ 136–139, also 45 C.J. p. 984 note 82–p. 995 note 41.

98. Cal.—Slaughter v. Goldberg, Bowen & Co., 147 P. 90, 26 Cal.App. 318.
29 C.J. p. 665 note 67.

99. Cal.—Furtado v. Bird, 146 P. 58, 26 Cal.App. 152.
29 C.J. p. 664 note 62.

1. Mass.—Neff v. Wellesley, 20 N.E. 111, 148 Mass. 487, 2 L.R.A. 500.

2. Cal.—Furtado v. Bird, 146 P. 58, 26 Cal.App. 152.

3. Wash.—Benson v. Anderson, 223 P. 1063, 129 Wash. 19.

4. Absence of required lights
La.—Harper v. Holmes, App., 189 So. 463.
Wash.—Benson v. Anderson, 223 P. 1063, 129 Wash. 19.

5. Absence of required lights
Mo.—Hannah v. Butts, 14 S.W.2d 31, 222 Mo.App. 1098.

negligence per se In any event such a violation is a circumstance from which contributory negligence may be inferred,[6] and if proximately causing the injury will bar recovery [7] On the other hand, even if such a violation is considered contributory negligence per se, it will not bar recovery if it is not a proximate cause of the injury [8]

§ 246. Actions for Injuries

a In general
b Pleading
c Evidence
d Trial
e Damages

a. In General

In accordance with the rules discussed supra §§ 236–245, a cause of action in damages may lie for injuries caused by an improper or negligent use of the highway Actions for damages to the highway are considered supra § 228 Prosecutions arising out of wrongful use of the highway are considered infra § 247

Examine Pocket Parts for later cases

b Pleading

General rules govern the pleadings in actions for injuries suffered on a public highway

In accordance with general rules, the declaration or complaint in an action for an injury on a highway must show a breach of duty owed by defendant to plaintiff,[9] specifying the negligence relied on[10] and in some jurisdictions the facts stated must either relieve plaintiff of wrongdoing or show defendant's negligence after discovery of plaintiff's peril [11]

A declaration on a statute must set out all the requirements of the statute [12]

A pleading which sets out facts showing wanton and reckless disregard of plaintiff's rights justifies the submission of the question of exemplary damages, although defendant's acts are not characterized as wanton or malicious [13]

Matters of evidence,[14] such as the rate of speed of the vehicle causing the injury,[15] need not be pleaded

A plea of contributory negligence should state the facts constituting such negligence, rather than mere conclusions [16]

Issues, proof, and variance The evidence must substantially conform to and support the pleadings [17]

c. Evidence

(1) Presumption and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumption and Burden of Proof

In actions for injuries sustained on a public highway, the injured person seeking to recover generally has the burden of establishing that defendant's negligence proximately caused the injury

In the absence of evidence to the contrary it will be presumed that defendant's use of the highway was lawful [18]

The mere happening of an accident does not raise a presumption of negligence,[19] nor warrant invocation of the doctrine of res ipsa loquitur,[20]

Walking on wrong side of road
N J Mursky v Brody 181 A 273, 13 N J Misc 725

6. Walking on wrong side of road
N J Mursky v Brody, 181 A 273 13 N J Misc 725

7. Violation of requirements as to lights
Pa —Cardarelli v Simon, 27 A 2d 250, 141 Pa Super 364
29 C J p 665 note 65

8 La —Harper v Holmes App 189 So 463

9 Ala —Dozier v Woods 67 So 283 190 Ala 279—Stewart v Smith 78 So 724 16 Ala App 461
29 C J p 665 note 72

Essential facts
In action of trespass on the case for negligence arising out of highway collision the essential facts, with reference to negligence, are plaintiff's right in the highway in the exercise of due care and defendant's interference with plaintiff's right by running into him —Reichwein v United Electric Rys Co, R I 27 A 2d 845

10 Md Cecil Paper Co v Nesbitt 83 A 251 117 Md 59
29 C J p 665 note 73

11 Ala - Stewart v Smith, 78 So 721 16 Ala App 461

12 Conn —Rowell v Crothers 52 A 818 75 Conn 124—Stevens v Kelley 34 A 502 66 Conn 570
29 C J p 666 note 75

13. Kan —Flynn v Hollenbuck, 173 P 925, 103 Kan 418

14 N Y —Lachenbruch v Cushman 87 N Y S 476

15. N Y —Lachenbruch v Cushman, supra

16. Ala —Cook v Stardard Oil Co, 73 So 763, 15 Ala App 448

17. Ky —Prestonburg Coal Co v Wallen, 167 S W 395, 159 Ky 369
29 C J p 666 note 80

18. Del —Mills v Wilmington City R Co 10 A 1114 15 Del 269
29 C J p 666 note 82

19 Kan —Lawson v Brokmann, 226 P 252, 116 Kan 102
Mass —Glaser v Schroeder, 168 N E 809 269 Mass 337
Mich —Warwick v Blackney, 261 N W 310 272 Mich 231
29 C J p 666 note 83

Breaking of harness
N Y —Gottwald v Bernheimer, Daly 212
29 C J p 657 note 25

Runaway horse
No presumption of negligence, as a rule, arises from the fact that one's horse, while being driven or ridden, becomes unmanageable and runs away —Coller v Knox, 71 A 539, 222 Pa 362, 23 L R A, N S, 171—29 C J p 663 note 20

20. Mass —Glaser v Schroeder, 168 N E 809, 269 Mass 337
Doctrine of res ipsa loquitur gen-

the burden being on plaintiff to prove that defendant was negligent,[21] and that such negligence was the proximate cause of the injury.[22]

However, where plaintiff establishes a prima facie case, as where there has been a violation of the law of the road with respect to the side of the road to which travelers meeting on the road must keep,[23] or in a case of the unexplained presence on the highway of a runaway horse unattended by any person,[24] the burden of explanation is on defendant.[25] By statute, in some jurisdictions, a violation of a statutory rule of the road constitutes prima facie evidence of negligence,[26] the effect thereof being to shift the burden of the evidence to the violator to at least counterbalance the prima facie case made out by proof of the violation.[27]

In those states which, in actions for negligence, require plaintiff to negative contributory negligence, the burden is on plaintiff to prove the absence of such negligence,[28] although the rule is otherwise and the burden of proving contributory negligence is on defendant where contributory negligence is considered an affirmative defense.[29]

The burden is on defendant to show that the driver of the vehicle in which he rode was not his agent or servant.[30]

(2) Admissibility

General rules govern the admissibility of evidence in actions for injuries on the public highways

General rules govern the admissibility of evidence in actions for injuries on highways.[31]

The disposition and habits of plaintiff's or defendant's horse may be shown,[32] unless the accident was due to some other cause.[33] The fact that a driver was a careful driver is inadmissible, however.[34]

The general rules of evidence, particularly those applicable to negligence cases, as discussed in the C J S. title Negligence § 234, also 45 C J. p. 1245 note 34–p. 1251 note 90, relative to the admissibility of proof of similar acts or occurrences, govern in actions for injuries on highways.[35] Thus it is not competent to show negligence of defendant by proof of similar acts of negligence at other times.[36] Under certain circumstances, however, other accidents from the same cause may be shown,[37] and where the injury was caused by frightening a horse, it is competent to prove that other horses were frightened by the same object.[38]

As in other civil cases, acts and declarations are admissible if part of the res gestæ.[39]

The law of the road is admissible.[40]

(3) Weight and Sufficiency

General rules govern the weight and sufficiency of the evidence in actions for injuries on the public highways

erally see the C J S. title Negligence § 220 also 45 C J. p. 1193 note 54–p. 1228 note 91.

21. Kan.—Lawson v. Brokmann, 226 P. 252, 116 Kan. 102.
29 C J. p. 666 note 84.

Runaway horse.
R I.—Fleming v. Anawomscott Mills, 47 A. 215, 22 R I. 211.
29 C J. p. 662 note 19.

22. Ala.—Morrison v. Clark, 72 So. 305, 196 Ala. 670.
N Y.—Martin v. Herzog, 126 N E. 814, 228 N Y. 164.
29 C J. p. 666 note 85.

23. La.—Potter v. Glassell, 83 So. 898, 146 La. 687.
29 C J. p. 652 note 34.

24. Tenn.—Thane v. Douglass, 52 S W. 155, 102 Tenn. 707.
Wis.—Strup v. Edens, 22 Wis. 432.
29 C J. p. 664 note 54.

25. La.—Potter v. Glassell, 83 So. 898, 146 La. 687.
Mich.—Myers v. Hinds, 68 N W. 156, 110 Mich. 300, 64 Am S R. 345, 34 L R A. 356.
29 C J. p. 666 note 87.

26. Minn.—Olson v. Duluth, M. & I. R. Ry. Co., 5 N W. 2d 492, 213 Minn. 106.

Distinguished from conclusive presumption.
The statute providing that in civil actions a violation of provisions of the Highway Traffic Regulation Act by either party shall be only prima facie evidence of negligence evinces an intention only to relieve violator of conclusive force of his violation and to permit him to rebut it, and under the statute the legislature intended to change the existing effect of a violation only to that extent.—Olson v. Duluth, M. & I. R. Ry. Co., supra.

27. Minn.—Olson v. Duluth, M. & I. R. Ry. Co., supra.

28. N Y.—Moody v. Osgood, 54 N Y. 488.
29 C J. p. 666 note 88.
Burden of proof as to contributory negligence generally see the C J S. title Negligence §§ 210–212, also 45 C J. p. 1170 note 33–p. 1184 note 25.

29. Md.—Standard Oil Co. v. Hartman, 62 A. 805, 102 Md. 563.

30. Md.—Vonderhorst Brewing Co. v. Amrhine, 56 A. 833, 98 Md. 406.

31. Mass.—Perlstein v. American Express Co., 59 N E. 194, 177 Mass. 530, 52 L R A. 959.
29 C J. p. 666 note 91.

32. Md.—Fletcher v. Dixon, 68 A. 875, 107 Md. 120.
29 C J. p. 667 note 92.

33. Pa.—Whissler v. Walsh, 30 A. 981, 165 Pa. 352.
29 C J. p. 667 note 93.

34. Mich.—Lorck v. Bissell, 45 N W. 55, 80 Mich. 260.
29 C J. p. 667 note 94.

35. Mass.—Whitney v. Gross, 5 N E. 619, 140 Mass. 232.
29 C J. p. 667 note 97.

36. Mass.—Whitney v. Gross, supra.
29 C J. p. 667 note 98.

37. Mich.—Ainworth v. Hover, 127 N W. 325, 162 Mich. 135.
29 C J. p. 667 note 99.

38. Mo.—McGoldrick v. Wabash R. Co., 200 S W. 74, 200 Mo. App. 436, certiorari quashed State v. Ellison, 204 S W. 396.
Pa.—Potter v. Natural Gas Co., 39 A. 7, 183 Pa. 575.
29 C J. p. 667 note 1.

39. Mass.—Adams v. Swift, 52 N E. 1068, 172 Mass. 521.
29 C J. p. 667 note 3.

40. Mo.—Burns v. Polar Wave Ice & Fuel Co., App., 187 S W. 145.
29 C J. p. 667 note 4.
Judicial notice of road and highway matters see Evidence § 94.

The general rules governing the weight and sufficiency of evidence[41] are applicable to actions for injuries on the public highways, with respect to the cause of the injury[42] and the questions of negligence,[43] contributory negligence,[44] and defendant's ownership of the vehicle causing the injury[45]

d. Trial

(1) In general
(2) Questions for jury
(3) Instructions
(4) Verdict and findings

(1) In General

The trial of actions based on negligence generally is considered in the C J S title Negligence §§ 251-305, also 45 C J p 1278 note 2–p 1371 note 14 For a consideration of the trial in actions for injuries from the operation of motor vehicles see the C J S title Motor Vehicles §§ 521–558, also 42 C J p 1239 note 52–p 1287 note 12.

Examine Pocket Parts for later cases.

(2) Questions for Jury

In actions for injuries on the public highways, questions of fact, such as those relating to negligence, contributory negligence, and proximate cause are ordinarily for determination by the jury

In accordance with general rules, questions of fact arising on conflicting evidence in actions for injuries on the public highways are for the determination of the jury,[46] under proper instructions from the court,[47] while questions of law are for the court,[48] as where because of the absence of essential evidence or the presence of undisputed facts but one conclusion can be drawn[49] Thus, except where the evidence is insufficient to go to the jury,[50] or is so clear and undisputed as to make the question one of law for the court,[51] the question of defendant's negligence is ordinarily one of fact for the jury,[52] as is the question of contributory

41. Va —Lane Bros Co v Barnard, 69 S E 969, 111 Va 680, 31 L R A, N S, 1209
29 C J p 667 note 7

42. Mo —De Maet v Fidelity Storage, Packing & Moving Co, 96 S W 1045, 121 Mo App 92
29 C J p 667 note 8

43. Cal —Roche v Redington, 57 P 890, 125 Cal 174
29 C J p 667 note 9

Res ipsa loquitur doctrine
Evidence was sufficient to warrant inference of negligence under res ipsa loquitur doctrine —Schenck v Rountree 265 P 971, 90 Cal App 443

44 La —Lee v Foley, 37 So 594 113 La 663
29 C J p 668 note 10

45. N Y —Kelly v Adelmann, 76 N Y S 574, 72 App Div 590
29 C J p 668 note 11

46. Vt —Dumont v Cromie, 130 A 679, 99 Vt 208
Wis —Cartmill v Whiting-Plover Paper Co, 198 N W 726, 183 Wis 651
29 C J p 668 note 13

Road open to public
Whether road on which accident occurred was open to the public is a question for the jury —Dennis v Stukey, 294 P 276, 37 Ariz 299, rehearing denied 295 P 971, 37 Ariz 510

Use of highway for viatic purposes
Whether one is making a viatic use of a way is generally a question of fact to be determined by the trier of the facts —Manning v Manchester St Ry, 118 A 386, 80 N H 404

Reasonable use of highway
What constitutes a reasonable use of highway by heavy vehicles is ordinarily a question of fact for the jury —Macomber v Nichols, 34 Mich 212, 22 Am R 522

Standing on highway
N H - Langevin v Twin State Gas & Electric Co, 128 A 681, 81 N H 446

Care taken by policeman
Whether police officer in using highway used same care as reasonably prudent person is jury question —Heimer v Salisbury, 142 A 749 108 Conn 180

Damages
Iowa — Kleihauer v Shedd, 102 N W 197
Kan —Flynn v Hollenback, 173 P 925, 103 Kan 448

47. Vt — Dumont v Cromie 130 A 679, 99 Vt 208

48. Statute invading judicial function
Statute providing that, in event of damage to person or property resulting from collision of vehicles in which both parties were violating laws pertaining to the operation of vehicles the question of who shall be held for damages is for the jury, was held to be invalid as invading the judicial power —Bielecki v United Trucking Service, 226 N W 675, 247 Mich 661

49. Proper use of highway
If the use made of a highway is in no way incident to a traveler's use of the highway, and there is no purpose or intent to make such use, there is no question of fact presented as to reasonable use —Manning v Manchester St Ry, 118 A 386, 80 N H 404

50. Evidence sufficient to go to jury
(1) Driving quickly over a car track with an overloaded wagon from which an article was liable to fall —Ledig v Germania Brewing Co, 25 A 870, 153 Pa 298

(2) Failure to place a brake on a heavy wagon —Hurley v New York & Brooklyn Brewing Co, 43 N Y S 259 18 App Div 167

(3) Failure to chain wheels in going down a hill as was customary —Aldrich v Monroe, 60 N H 118

(4) Failure to block a wagon stopped on a hill —Newcomb v Van Zile, 34 Hun N Y 275

51. Minn —Olson v Duluth, M & I R Ry Co 5 N W 2d 492, 213 Minn 106

52. Iowa —Carruthers v Campbell, 192 N W 138, 195 Iowa 390, 28 A L R 949
Vt — Dumont v Cromie, 130 A 679, 99 Vt 208
29 C J p 668 note 13 [a]

Due care in use of road generally
Cal —Hagenah v Bidwell, 189 P 799, 46 Cal App 556
29 C J p 656 note 15

Leaving horse unattended
Whether leaving a horse on the highway untied and unattended constitutes negligence is, together with the surrounding circumstances, a question for the jury — Lawson v. Brokmann, 226 P 252, 116 Kan 102—
29 C J p 664 note 51

Negligence in frightening horse
Ala -Rodgers v Harper, 54 So 199, 170 Ala 647
29 C J p 661 note 4

Negligence of driver injuring pedestrian
Mich — Boick v Bissell, 45 N W. 55, 80 Mich 260
29 C J p 659 note 69.

negligence,[53] and the question whether such negligence or contributory negligence is the proximate cause of the injury.[54] In some jurisdictions, when a prima facie case of actionable negligence has been established, but is unopposed by explanatory evidence, the court may direct a verdict against the party guilty of such negligence.[55]

(3) Instructions

Instructions in actions for injuries on the public highways should clearly and correctly state the applicable law, be confined to the issues raised by the pleadings and evidence, and not ignore issues or evidence

In accordance with the rules governing instructions in civil actions generally, as discussed in the C J S title Trial §§ 266–448, also 64 C J p 510 note 1–p 1008 note 15, in actions for injuries on the public highways, the court should give proper instructions as to the general principles of law applicable,[56] as to the rights of the parties,[57] as to negligence[58] and contributory negligence,[59] as to proximate cause,[60] as to the burden of proof,[61] and as to what is pertinent evidence.[62]

The charge should be confined to the evidence,[63] and to the issues raised by the pleadings,[64] and should cover all the circumstances, not ignoring issues or evidence,[65] or setting out only isolated facts,[66] although pertinent questions may be submitted.[67] The province of the jury must not be invaded,[68] nor should the court assume the existence of material facts in dispute,[69] or give undue

Night driving of cattle without lights
Ohio—Webster v Pollock, 15 Ohio App 102

Runaway horse
N Y—West v Woodruff, 97 N Y S 1054, 112 App Div 133
29 C J p 663 note 25

53. Iowa—Carruthers v Campbell, 192 N W 138, 195 Iowa 390, 28 A L R 919
Mo—Hannah v Butts, 14 S W 2d 31, 222 Mo App 1098
Vt—Dumont v Cromie, 130 A 679, 99 Vt 208
Wis—Cartmill v Whiting-Plover Paper Co, 198 N W 726, 183 Wis 651
29 C J p 665 note 69, p 668 note 13 [b]

Injury by frightening of horse
Ky—Bromley v Langhorne, 139 S W 949, 144 Ky 761
Pa—Stonecipher v Booth, 51 Pa Super 50

Character of horse
It has been held not to be the law that in order that one might recover for injuries resulting from the frightening of his horse on the public highway by a bull running at large he was required to drive an "ordinary horse," which under like circumstances, would not have become unruly—Farrell v Crawford, 222 Ill App 499

Look around on alighting from vehicle
U S—Garside v New York Transp Co, C C N Y, 146 F 588, modified on other grounds 157 F 521, 85 C C A 285
29 C J p 659 note 70 [b]

Night driving without lights
Mo—Hannah v Butts, 14 S W 2d 31, 222 Mo App 1098

Pedestrian injured by vehicle
(1) Contributory negligence of pedestrian injured by vehicle is a question for the jury—Garside v New York Transp Co, C C N Y, 146 F. 588, modified on other grounds 157 F 521, 85 C C A 285—29 C J p 659 note 70

(2) Whether plaintiff should have known the relative speed of two vehicles approaching was a question for the jury—Belton v Baxter, 58 N Y 411

54. Iowa—Needy v Littlejohn, 115 N W 483, 137 Iowa 704
Mo—Hannah v Butts, 14 S W 2d 31, 222 Mo App 1098
N J—Mursky v Brody, 181 A 273, 13 N J Misc 725
Ohio—Stockberger v Ames Shovel & Tool Co, 35 Ohio Cir Ct 376, 1 Ohio App 135

Cause of runaway
N Y—Lynch v Brooklyn City R Co, 25 N E 955, 123 N Y 657

55 Statutory violation
Under statute providing that in civil actions a violation of provisions of the Highway Traffic Regulation Act by either party shall be only prima facie evidence of negligence, the prima facie provision is a rule against the violator, and, if evidence of violation stands unopposed by evidence tending to show a reasonable ground for such violation, the trial court should direct a verdict against the violator—Olson v Duluth, M & I R Ry Co, 5 N W 2d 492, 213 Minn 106

56. Ala—Morrison v Clark, 72 So 305, 196 Ala 670
29 C J p 668 note 15

Erroneous instructions
(1) In an action for injuries resulting from the frightening of a horse by a bull running at large on the highway, an instruction requiring plaintiff to prove that the bull was on the highway without the permission and fault of defendant is erroneous—Farrell v Crawford, 222 Ill App 499

(2) Other cases see 29 C J p 668 note 15 [b]

57. Tenn—Foreman v Ozment, 6 Tenn App 536
29 C J p 668 note 16

58. Utah—Russell v Watkins, 164 P 867, 49 Utah 598
29 C J p 668 note 17

59. N Y—Moebus v Herrmann, 15 N E 115, 108 N Y 349, 2 Am S R 440 affirming 38 Hun 370
29 C J p 668 note 18

Instructions held proper or correct
Tenn—Foreman v Ozment, 6 Tenn App 536
29 C J p 668 note 18 [a]

60 Mich—Ainsworth v Hover, 127 N W 325, 162 Mich 135
Pa—Mastel v Walker, 92 A 63, 246 Pa 65
29 C J p 668 note 19

61. Mich—Ainsworth v Hover, 127 N W 325, 162 Mich 135
29 C J p 669 note 20

62. Pa—Henry v Klopfer, 23 A 337, 338, 147 Pa 178
29 C J p 669 note 21

63. Tenn—Foreman v Ozment, 6 Tenn App 536
29 C J p 669 note 22

64. Ky—Illinois Cent R Co v. Smith, 118 S W 933, 133 Ky 732
29 C J p 669 note 23

65. Mass—McDonough v Vozzela, 142 N E 831, 247 Mass 552
29 C J p 669 note 24

66. Conn—Nesbit v Crosby, 51 A. 550, 74 Conn 554
29 C J p 669 note 25

67. Iowa—Eaton v Cripps, 62 N. W 687, 94 Iowa 176
Mass—Wrinn v Jones, 111 Mass 360

68. Ill—Christy v Elliott, 74 N E 1035, 216 Ill 31, 108 Am S R 196, 1 L R A, N S, 215
Wash—Wolf v Hemrich Bros Brewing Co, 68 P 440, 28 Wash 187
29 C J p 669 note 27

69. Md—American Straw Board Co v. Smith, 50 A. 414, 94 Md 19.

prominence to particular matters [70]

Instructions must not be conflicting or confusing,[71] but they must be considered as a whole,[72] and a mistake may generally be cured by an additional charge [73]

(4) Verdict and Findings

The verdict and findings in actions for injuries on the public highways must be consistent and supported by the evidence

In actions for injuries on the public highways, the findings, as well as the verdict and findings, must be consistent[74] and supported by the evidence,[75] and should be reasonably construed [76]

A special verdict in order to support a judgment for plaintiff must find all the facts essential to defendant's liability [77]

e. Damages

Although punitive damages may sometimes be recovered, in general recovery in actions for injuries on the public highways is confined to the damage suffered by the injured party

In general recovery in actions for injuries on the public highways is confined to the damage suffered by the injured party [78] Thus a mere servant having no special property interest in property damaged as a result of another's negligence in the use of the highway cannot recover for the damage to the property [79]

Punitive damages In a proper case punitive damages may be imposed for inflicting an injury through improper use of a highway,[80] but only where the negligence manifests a wanton disregard for the lives or safety of others, or is willful or malicious [81] The owner of a horse which ran away, injuring plaintiff, is not liable for punitive damages, although it was in the habit of running away, and was negligently left by the driver unhitched in the street, the owner not having authorized, approved, or ratified this [82]

§ 247. Penal and Criminal Proceedings

Penalties and criminal liabilities are frequently imposed on persons using the highways in a prohibited manner

In many jurisdictions a misuse of the highway is a misdemeanor,[83] and criminal liability is often imposed by statute for prohibited conduct on the highway,[84] such as racing,[85] reckless driving,[86] appearing on the highway in a drunken or intoxicated

SD—Davis v C & J Michel Brewing Co, 140 N W 691, 31 S D 281

70. N Y—McManus v Woolverton 19 N Y S 545, affirmed 34 N E 513, 138 N Y 648
29 C J p 669 note 29

71. Cal—Slaughter v Goldberg, 147 P 90, 26 Cal App 318
29 C J p 669 note 30

72. Ky—Bromley v Langhorne 139 S W 949, 144 Ky 761
29 C J p 669 note 31

73. N Y—Manthey v Rauenbuehler 75 N Y S 711 71 App Div 173—Brennan v Richardson, 56 N Y S 428, 38 App Div 463
29 C J p 669 note 32

74 Kan—Mann v Northeast Kansas Tel Co, 111 P 181, 83 Kan 266
29 C J p 669 note 35

General and special findings held not inconsistent—Cady v Sanford 207 P 45 57 Cal App 218

75. N Y—Berman v Schultz, 84 N Y S 292

Evidence held sufficient

(1) To sustain finding of negligence—Schenck v Rountree, 265 P 971, 90 Cal App 443

(2) To warrant finding of wanton negligence—Pettygrove v Hecht, 198 N W 809, 159 Minn 260

76. Tex—McGee v West, Civ App, 57 S W. 928
29 C.J p 669 note 37.

77 Ind—Walkup v May, 36 N E 917, 9 Ind App 409
29 C J p 669 note 34

78. Vt—Dumont v Cromie, 130 A 679 99 Vt 208

79 Vt—Dumont v Cromie supra

80 Iowa—Kleihauer v Shedd 102 N W 197
Kan—Flynn v Hollenback, 173 P 925, 103 Kan 418

81. Ky—Moore v Hart, 188 S W 861, 171 Ky 725

82. Conn—Haywood v Hamm, 58 A 695 77 Conn 158

83 Ala—Pullum v State, 7 So 118 88 Ala 190
29 C J p 670 note 45

84. Stop at through highway
Failure to stop vehicle before entering a through highway at an intersection where a duly installed stop signal device is set against such vehicle is an offense under some statutes—Coffran v Griffin, 153 A 817, 85 N H 29
Disorderly conduct on highway see Disorderly Conduct § 1 b (2) (c)
Shooting firearms along or across or within a specified distance of a public road or highway as offense see the C J S title Weapons § 20, also 68 C J p 67 notes 17–22

85. Ind—State v New, 76 N E 400, 165 Ind 571, reversing 76 N.E 181, 36 Ind App 521
29 C J p 670 note 46.

86 N D—State v Sullivan, 227 N W 230 58 N D 732
29 C J p 670 note 47

"Common traveling pace" construed
R I—State v Smith 69 A 1061, 29 R I 245 followed in State v McCabe, 69 A 1064
12 C J p 210 notes 19–21

Evasion of red light by passing through private property across a corner, thereby securing the benefit of the green light of the intersecting street, is not prohibited by law, and is not in itself reckless driving—People v Sweet, 225 N Y S 182, 183, 130 Misc 612

Presence of property or other persons essential

(1) Where there were neither persons nor property on the highway to be injured, there cannot be a conviction for reckless driving solely on proof of speeding—People v Carrie, 204 N Y S 759, 763, 122 Misc 753

(2) "There should be evidence of other facts and circumstances showing that the person or property of others was being endangered"—People v Sweet, 225 N Y S 182, 130 Misc 612—People v Carrie, supra.

Violation of law of road
Reckless driving may be based entirely on violation of the rules of the road and negligence, although all cases of such violation or of negligence may not be reckless driving—State v Sullivan, 227 N W. 230, 58 N.D. 732.

condition,[87] driving while under the influence of intoxicating liquor or narcotic drugs,[88] heavy hauling,[89] driving a specified or other vehicle on a hard-surfaced road, which was likely to damage the road beyond ordinary wear and tear,[90] or willfully driving on a closed highway[91] Unless the statute so provides, a criminal intent need not be shown[92]

Negligently driving on the left side of the road is not a violation of a statute making any "willful" act which seriously injures the property of another, and for which no other punishment is expressly prescribed, a misdemeanor,[93] nor is it a nuisance under a statute making a public nuisance a crime[94]

It has been held that the fact that sufficient room was left for others to pass was no defense to a criminal prosecution for failing to comply with the statutory requirement to keep to the right of the center of the road[95]

Penalties Statutory penalties for not turning to the right are sometimes imposed,[96] although under some statutes willfulness must be shown[97] In some jurisdictions a penal statute is ineffective unless it vests in some person the right to sue for the penalty, and provides for the disposition of the proceeds[98]

Liability at common law If one by driving recklessly in the highway kills another, he is liable for murder or manslaughter as in other cases of acts resulting in death[99] So a person who injures another by intentionally, wantonly, or recklessly driving a vehicle on him may be prosecuted for assault and battery[1]

Indictment, affidavit, or complaint The indictment, affidavit, or complaint should plainly set forth the offense charged,[2] without duplicity,[3] and allege facts bringing defendant within the statute,[4]

87. Ark—Bridgman v State, 280 S W 982, 170 Ark 709

88. "Any vehicle"
In statute making it a misdemeanor to drive any vehicle while under influence of intoxicating liquor or narcotic drugs "vehicle" includes not only all animal-drawn vehicles, but even ridden animals and bicycles, notwithstanding that the statute appears in chapter of compiled Code entitled "Motor Vehicles"—State v Stewart, 111 P 2d 70, 57 Ariz 82

Reckless driving not included
The offense of reckless driving is not included within the crime of driving while under the influence of intoxicating liquor—People v McGrath, 271 P 549, 94 Cal App 520

89. Fla—Bell v Gregory, 103 So 832, 89 Fla 293
29 C J p 670 note 48

90. Fla—Baker v Hayes, 7 So 2d 590

91 Applicability of statute
Statute making it an offense willfully to drive on a highway which has been closed or to deface or disregard a barricade or detour sign erected in connection therewith applies only where the highway has actually been closed and a detour established, so that a prosecution cannot be brought thereunder for driving on a highway which was being oiled, in disregard of instructions of the men doing the work, if the road had not been closed, the traffic thereon being merely regulated—Commonwealth v Lingenfelter, 33 Pa Dist & Co 615

92. Ind—Hamilton v State, 52 N E 419, 22 Ind App 479
29 C J p 670 note 49.

93 N Y—People v Martinitis, 153 N Y S 791, 168 App Div 446
29 C J p 670 note 50

94. N Y—People v Martinitis, supra

95. Mass—Commonwealth v Allen, 11 Mete 403

96. N Y—People v Martinitis, 153 N Y S 791, 168 App Div 446
29 C J p 669 note 42

97. N Y—Earing v Lansingh, 7 Wend 185

98. N Y—Stamford v Calhoun, 125 N Y S 910, 69 Misc 558
29 C J p 669 note 44
Effect of absence of provision as to who may enforce penalty generally see the C J S title Penalties § 5, also 25 C J p 1189 notes 56–62

99 Ill—Belk v People, 17 N E 744 125 Ill 584
Tenn—Lee v State 1 Coldw 62
29 C J p 670 note 60

1. Ga—Tift v State, 88 S E 41, 17 Ga App 663
29 C J p 671 note 61

2. Fla—Baker v Hayes, 3 So 2d 590
29 C J p 670 note 52

Charge in language of statute
(1) In accordance with the rule discussed in the C J S title Indictments and Informations § 139 also 31 C J p 704 note 96 requiring a statutory offense to be charged in the letter or substance of the language of the statute, a count charging defendant with running a horse on a public road "so as to interrupt travelers" was held to be bad because it did not allege that the running was done so as to interrupt travelers thereon"—State v Fleetwood, 16 Mo 448

(2) Charging violation of statute in language of statute is sufficient—Hunt v State, 146 N E 329, 195 Ind 585

Heavy hauling
(1) Under statute prohibiting hauling certain loads on highways to be designated by county commissioners except by complying with regulations to be prescribed by them information not alleging that roads were so designated and that regulations were adopted is insufficient in stating that particular road was used in forbidden way without having complied with rules and regulations made therefor—Bell v Gregory 103 So 832, 89 Fla 293

(2) Other instances see 29 C J p 670 note 52 [c]

3 Iowa—State v Kowolski, 65 N W 306, 96 Iowa 346
29 C J p 670 note 53

4. Fla—Bell v Gregory, 103 So 832, 89 Fla 293

Description of prohibited vehicle
A warrant predicated on a violation of the statute against operating on any hard surfaced road a log cart, tractor, well machine, or any steel tired vehicle other than the ordinary farm wagon or buggy, or any other vehicle or machine that is likely to damage a hard-surfaced road except ordinary wear and tear, but which charged only that defendant did operate on a hard-surfaced road in a named county a steel tired vehicle, same not being an ordinary farm wagon or buggy, was held fatally defective for failure sufficiently to describe the vehicle, since an affidavit based on the statute should allege the type of vehicle in specific terms and that operation thereof would cause an injury greater than ordinary wear and tear—Baker v Hayes, Fla, 3 So 2d 590

it should allege the time[5] and place[6] of the offense

Issues, proof, and variance The proof must conform substantially to the allegations of the indictment [7]

Evidence. The rules governing the admissibility and sufficiency of evidence in other criminal prosecutions apply to prosecutions for violation of highway laws [8]

X. INJURIES FROM DEFECTS OR OBSTRUCTIONS

§ 248. Persons and Governmental Bodies Liable

The liability of the state for injury resulting from defects or obstructions in the highways is considered infra § 249, that of counties, towns, and other political subdivisions of the state is considered infra § 250, that of highway officers, infra § 251, that of the persons causing the defect or obstruction, infra § 252, and that of abutting owners, infra § 253 The liability of a municipal corporation for defects or obstructions in its streets or other public ways is considered in the C J S title Municipal Corporations §§ 781–872, also 44 C J p 974 note 42–p 1124 note 60 Injuries from defects or obstructions in private roads are discussed in the C J S title Private Roads § 18, also 50 C J p 398 notes 3–5 Injuries to motor vehicles or their occupants by reason of defects or obstructions in highways or other public places are discussed in the C J S title Motor Vehicles §§ 168–233, also 42 C J p 833 note 43–p 875 note 21 Injuries by motor vehicles because of defects or obstructions in the highways are considered in the C J S title Motor Vehicles §§ 234–245, also 42 C J p 875 note 26–p 877 note 64

Examine Pocket Parts for later cases.

§ 249. —— State

The state is not, in the absence of a constitutional or statutory waiver of its immunity from suit, liable for damage resulting from defects or obstructions in its highways, but it may assume such liability and it may modify or withdraw such assumption

The construction and repair of highways is a governmental duty belonging to the state, which can be performed only by agents designated for that purpose, or by municipal corporations on which the performance of such duty is imposed by law,[9] and, in either case, travelers using the highway have no legal right, in the absence of statute, to recover from the state or its officers for injuries caused by defects in the highway [10] Liability must be predicated on an affirmative constitutional or legislative assumption,[11] but it may be assumed,[12] as by con-

5. Ind —State v New 76 N E 400 165 Ind 571 reversing 76 N E 181, 36 Ind App 521
29 C J p 670 note 54

6. Ind - State v New, supra
29 C J p 670 note 55

7. Ala Parker v State, 55 So 430, 1 Ala App 244
Mo —State v Wagster, 75 Mo 107
29 C J p 670 note 56

8. Ind —Lucas v State 90 N E 305, 173 Ind 302
29 C J p 670 note 59

Evidence held sufficient
(1) To sustain conviction for appearing on highway while intoxicated —Bridgman v State, 280 S W 982, 170 Ark 709

(2) To sustain conviction for hauling excessive load —Lucas v State 90 N E 305, 173 Ind 302

9. Conn —Seidel v Woodbury, 70 A 58, 81 Conn 65
Md —Engle v Mayor and City Council of Cumberland 25 A 2d 446, 180 Md 465

Agency on which duty imposed
If agency on which legislature imposes the duty of maintaining public highways is acting solely in public interest, such agency is entitled to immunities from liability which inhere in the performance of a governmental function —De Capua v City of New Haven, 13 A 2d 581, 126 Conn 558

10 Ky —Taylor v Westerfield, 26 S W 2d 557, 233 Ky 619 69 A L R 482
Md —Engle v Mayor and City Council of Cumberland, 25 A 2d 446, 180 Md 465
N Y —Isaac v Town of Queensbury, 288 N Y S 113 247 App Div 263, reversed on other grounds 12 N E 2d 785, 277 N Y 37 reargument denied 15 N E 2d 73, 278 N Y 483—Belair v State 208 N Y S 470, 213 App Div 206, affirmed 150 N E 551, 241 N Y 552
29 C J p 671 note 64

State highway agency
N C —Pickett v Carolina & N W Ry, 158 S E 398, 200 N C 750
29 C J p 671 note 64 [a]

11. N Y —Seelye v State, 34 N Y S 2d 205, 178 Misc 278

Unless there is statutory waiver of immunity from liability by the state for damages, because of injuries caused by defective highway, there can be no recovery —King v State, 194 N Y S 420, 118 Misc 689

Waiver not implied
Statutes merely placing the duty of supervision and administration of roads in a state highway commissioner, and vesting him with power of control, do not waive the sovereign immunity against suit and under such a statute the commissioner is not liable, as such, for injuries resulting from defects in the highway occasioned by his negligence —Longstreet v Mecosta County, 200 N W 248, 228 Mich 542

12. N Y —Torrey v State, 23 N Y S 2d 370 175 Misc 259—Wolf v State 202 N Y S 754, 122 Misc 381
S C —Fann v State Highway Department, 165 S E 785, 167 S C 84
29 C J p 671 note 65

Negligence of state engineer in connection with a highway under reconstruction rendered the state liable for resultant damage —Miller v State, 244 N Y S 547, 137 Misc 768, affirmed 247 N Y S 399, 231 App Div 363

Work let to independent contractor
The state may not evade liability for breach of its duty as to a road being constructed under supervision of the state engineer by letting the work to an independent highway

ferring a right of action against the state highway commission for injuries caused by defects in state highways[13] The right of action is wholly constitutional or statutory[14] and in some cases is not based on the law of negligence,[15] but is rather an action for a breach of a statutory duty[16] The liability of the state is limited by the terms of the statute under which it is assumed[17] and by the conditions prescribed,[18] the statutes being subject to strict construction[19]

Since the right to sue the state for injuries or damage resulting from highway defects and obstructions is purely statutory, such right may be withdrawn or modified by the state whenever it sees fit,[20] and such withdrawal or modification may affect pending suits[21] So where a later act supersedes an earlier one and expressly repeals all prior acts or parts thereof inconsistent with the later act, the later act has been held controlling as to suits begun after its passage[22] But where a statute changing the state's liability contains no retroactive language and is clearly so phrased as to apply only to prospective actions, a retroactive effect will not be implied and such a statute will be held inapplicable to cases occurring before its passage[23]

Patrol system A statute providing that the state shall not be liable for damages suffered by any person from defects in state and county highways except such highways as are maintained by the state by the patrol system is an affirmative grant sanctioning causes of action which could not otherwise arise[24] In the absence of a definition in the statute of the term "patrol system," it must be construed as meaning any system adopted by the commissioner of highways under another section of the statute authorizing the commissioner of highways "to adopt such other system as may seem expedient so that each section of such highways shall be under constant observation, and be effectively and economically preserved, maintained and repaired"[25] Under the statute the state is liable for damages suffered by any person from defects in a highway maintained under the patrol system[26] The defects furnishing the cause of action must in some

contractor —Miller v State, 247 N Y S 399, 231 App Div 363, affirming 214 N Y S 547, 137 Misc 768

13 Conn —Pape v Cox, 28 A 2d 10, 129 Conn 256
29 C J p 671 note 68

Duties previously laid on towns
Under statute state highway commissioner, as respects highways taken over by him, has same duties and burdens which were theretofore laid on towns —Dunn v MacDonald, 147 A 26, 110 Conn 68

14. Kan —Blessman v State Highway Commission, 121 P 2d 267, 154 Kan 704—Gorges v State Highway Commission, 10 P 2d 834, 135 Kan 371

15 **Not based on law of negligence**
Kan —Blessman v State Highway Commission, 121 P 2d 267, 154 Kan 704 —Gorges v State Highway Commission, 10 P 2d 834, 135 Kan 371
N Y – Minshell v State, 204 N Y S 472, 123 Misc 177

16. Conn —McManus v Jarvis, 22 A 2d 857, 128 Conn Appendix—Shiblock v MacDonald, 186 A 562, 121 Conn 611

17. Mass —Lemon v Commonwealth, 129 N E 382, 236 Mass 599
N Y —Belair v State 208 N Y S 470, 212 App Div 206 affirmed 150 N E 551, 241 N Y 552—Best v State, 186 N Y S 459, 114 Misc 272
What constitutes defect or obstruction see infra § 257

Structural defects and inert obstructions
Under Highway L § 176, as amended by L 1922 c 371, duty of state to keep its highways free from defects is performed when highways are free from structural defects and inert obstructions, and liability cannot be established by unlawful or negligent use of such highway —Minshell v State, 204 N Y S 472, 123 Misc 177

18. Kan —Parsons v State Highway Commission, 72 P 2d 75, 146 Kan 476
29 C J p 671 note 70

19. S C —Fann v State Highway Department 165 S E 785, 167 S C 84
29 C J p 671 note 66

20. Md —Engle v Mayor and City Council of Cumberland, 25 A 2d 446, 180 Md 465
S C —McCoy v State Highway Department of South Carolina, 169 S E 174, 169 S C 436—Bynum v State Highway Dept, 154 S E 165, 156 S C 232 —United States Casualty Co v State Highway Dept, 151 S E 887, 155 S C 77
Modification and revocation of state's consent to be sued generally see States § 215 also 59 C J p 306 note 68–p 307 note 70

21. S C —McCoy v State Highway Department of South Carolina, 169 S E 174, 169 S C 436

22 S C —U S Casualty Co v State Highway Department of South Carolina 151 S E 887, 155 S C 77

Damage occurring before passage
Action against state highway department was governed by act of 1928, notwithstanding injury from defects in highway occurred while 1925 statute was in force, where the action was begun after passage of the 1928 act which superseded the earlier statute —U S Casualty Co v State Highway Department of South Carolina, supra

23 S C —McCoy v State Highway Department of South Carolina, 169 S E 174, 169 S C 436

Act to further define duties and responsibilities
Where a statute which exempted the state highway department from liability for injuries or damages from highway defects or markings where the department exercised its best judgment, contained no retroactive language, and was entitled "An Act to Further Define the Duties and Responsibilities" of the department, the very title of the act showed that its operation was limited to prospective actions and the statute would not be given a retroactive effect by implication —McCoy v State Highway Department of South Carolina, supra

24 N Y —Belair v State, 208 N Y S 470, 212 App Div 206 affirmed 150 N E 551, 241 N Y 552

25. N Y —Belair v State, supra

26. N Y —Easterbrook v State, 202 N Y S 896 122 Misc 397

State is under like liability with towns for injuries due to defects in highways – Karl v State, 7 N Y S 2d 131, 255 App Div 825, reversed on other grounds 18 N E 2d 852, 279 N Y 555 motion granted 20 N E 2d 22, 280 N Y 574—Best v State, 197 N Y S 69, 203 App Div 339, affirming 186 N Y S 359, 114 Misc 272, and affirmed 142 N E 325, 236 N Y 662—

way, as to their causation or continuance, be referable to a fault in administering a patrol system, or system of constant observation, which has actually been inaugurated,[27] and no one can have a cause of action under the statute unless it appears both that his damages are directly attributable to "defects" in the highways named, and that there was negligence in respect of the cause or continuance of such defects[28]

Particular time of year Where the statute so provides, the state assumes liability for damages caused by misfeasance or negligence of its officers or employees without regard to the time of year at which such damages were sustained,[29] but the waiver of immunity from liability may be expressly limited to injuries occurring between specific dates in the year[30]

§ 250. —— Counties, Towns, and Other Political Subdivisions

a In general
b Lack of means or funds

a. In General

A county, town, or other minor political subdivision of the state is not ordinarily, in the absence of statute, regarded as liable for injuries resulting from defects or obstructions in its highways; statutes, however, frequently impose such liability.

In some jurisdictions it is held that municipal corporations proper, such as cities and incorporated villages, are not liable for injuries caused by defects or obstructions in the highway, unless such liability is imposed by statute, while in others a contrary rule obtains, based on the theory that, being invested with the exclusive control of highways within their limits, it is their duty to keep them in a reasonably safe condition These rules are discussed at length in the C J S title Municipal Corporations §§ 782, 783, also 43 C J p 974 note 42–p 979 note 83 It is generally held with reference to quasi municipal corporations or minor political

Martias v State, 232 N Y S 192, 133 Misc 326

Facts bringing road under patrol system

Under Highway L § 176 as amended by L 1922 c 371 § 17, limiting recovery of damages against the state for injuries on defective highway between May 1 and November 15 and on such highways as are maintained by the state by the patrol system, the written acceptance of a contract for construction of a highway, and the turning of the road over to the maintenance division for care under its then existing patrol system, marked the road from that time as one so maintained —King v State 194 N Y S 420, 118 Misc 689

27. N Y--Belair v State 208 N Y S 470 212 App Div 206 affirmed 150 N E 551, 241 N Y 552

Highway not patrolled

Where highway had been designated as one to be patrolled under Highway Law § 170, but patrolman resigned without having patrolled highway and no other was appointed until after accident from defect, highway was not maintained under "patrol system," within § 176, and defect having existed for long time prior to appointment of any patrolman was not attributable to negligence in maintaining patrol —Belair v State, supra

28. N Y —Belair v State, supra

29. N Y —Torrey v State, 23 N Y S 2d 370, 175 Misc 259 reversed on other grounds 42 N Y S 2d 567, 266 App Div 900.

Limitation to misfeasance or negligence

(1) A section of the highway law having reference to claims for damages caused by defects in state or county highways, requiring such damages to have been suffered between May 1 and November 15 in order that the state may be liable, is not irreconcilable with the provision of the court of claims act concerning claims for damages for injuries to persons or property by reason of misfeasance or negligence of officers and employees of the state, and if damages are caused by a defect in the highway as distinguished from the negligence of the state officers or employees, the state is not responsible between November 15 and May 1 but if the damages are suffered by reason of the misfeasance or neglect of state officers or employees the state waives its immunity whether such damages are sustained on a highway or otherwise and at any time Miller v State, 244 N Y S 547, 137 Misc 768, affirmed 247 N Y S 899, 231 App Div 863

(2) Failure to give warning of a defect is not a defect —Belair v State, 208 N Y S 470, 212 App Div 206 affirmed 150 N E 551, 241 N Y 552

(3) The presence of a state truck on a highway is not a defect —Minschell v State, 204 N Y S 472, 123 Misc 177

(4) An accident because of failure to give warning or erect barriers on a road being constructed is not the result of highway defects but of negligence —Miller v State, supra.

(5) The state is liable for injury to travelers due to a fall of rock from state-owned mountains on the highway during the thawing period, although prior to May —Shaknis v State, 295 N Y S 663, 251 App Div 767, affirmed Doulin v State, 13 N E 2d 472, 277 N Y 558

(6) There being no finding that superintendent of public works was negligent in the performance of his duty of maintaining highways court of claims would not hold that statute authorizing superintendent to repair any unpaved shoulder outside of pavement maintained by the state, where necessary to protect such pavement was a "waiver" of sovereign immunity, even though read with statute whereby state assumed liability and consented to have liability determined by the same rules of law as applied to actions against individuals and corporations -- Seelye v State, 34 N Y S 2d 205, 178 Misc 278

30. N Y —Karl v State, 7 N Y S 2d 131, 255 App Div 825, reversed on other grounds 18 N E 2d 852 279 N Y 555 motion granted 20 N E 2d 22 280 N Y 571

State is not liable, under a statute imposing liability for injuries from defects in state highways between the 1st of May and the 15th of November for injuries sustained by plaintiff by reason of the existence of a defect in the highway on November 20 —Karl v State, 7 N Y S 2d 131, 255 App Div 825, reversed on other grounds 18 N E 2d 852, 279 N Y 555 motion granted 20 N.E 2d 22, 280 N Y. 574.

subdivisions of the state,[31] such as counties,[32] towns,[33] townships,[34] and road districts,[35] that they are not liable for injuries from defects in highways unless liability is imposed by statute There is, however, some authority to the contrary,[36] and it has been held in some jurisdictions that counties and towns are liable, even in the absence of statute, for defects which they are under an obligation to repair,[37] although all control over the repairs is put into the hands of a contractor[38]

A distinction has been made by some authorities between acts of misfeasance and nonfeasance, it being held that the county or other governmental subdivision is not liable, unless made so by special statute, for injuries caused by its nonfeasance, as failure to repair the highway, although it is liable for direct acts of misfeasance on the part of its officers or employees which create a nuisance in the highway,[39] but this distinction has been denied by other authorities.[40]

Liability imposed by statute. Where the statute so provides, a county,[41] and, likewise, according to

31. Cal—Barnett v Contra Costa County, 7 P 177, 67 Cal 77
29 C J p 671 note 75

Although perhaps quasi-municipal in character, a public subdivision of a state is not liable to a tort action for injuries caused by a defect in a public highway at common law or in the absence of an express statutory provision imposing liability—Gilmore v Commissioners of Rehoboth, 189 A 284, 8 W W Harr (Del) 124

Parish police jury

A police jury acts under the governmental authority granted to it by the state in constructing, maintaining, and repairing roads and in the absence of express statute imposing liability may not be held responsible for damage arising even from its misfeasance in connection therewith—Barbee v Claiborne Parish, 130 So 660, 14 La App 652

32. U S—Hardin v Southern Ry Co, D C Ga, 300 F 417—Thompson Caldwell Const Co v Young, C C A N C 294 F 145
Ala—Holms v Houston County, 117 So 633, 218 Ala 114—Barbour County v Reeves, 116 So 119, 217 Ala 415
Cal—Hennessy v San Bernardino County, 117 P 2d 715, 47 Cal App 2d 183
Del—Gilmore v Commissioners of Rehoboth, 189 A 284, 8 W W Harr 124
Iowa—Swartzwelter v Iowa Southern Utilities Corporation, 250 N W 121, 216 Iowa 1060—Renner v Buchanan County, 183 N W 320, 192 Iowa 184
Ky—Taylor v Westerfield, 26 S W 2d 557 233 Ky 619, 69 A L R 482
Mich—Longstreet v Mecosta County, 200 N W 248, 228 Mich 542
Neb—Franck v Butler County, 254 N W 489, 126 Neb 797, reversed on other grounds 257 N W 235, 127 Neb 852
N M—Murray v Board of Com'rs of Grant County, 210 P 1067, 28 N M 309
N C—Holmes v Upton, 134 S E 401, 192 N C 179
S D—Vesely v Charles Mix County 287 N W 51, 66 S D 570—Cain v Meade County, 223 N W 734, 54 S D 540
Tenn—Weakley County v Carney, 14 Tenn App 688
Tex—T J Mansfield Const Co v Gorsline, Com App, 288 S W 1067, reversing, Civ App, 278 S W 485, and rehearing denied, Com App, 292 S W 187
Wis—Lickert v Harp, 252 N W 296 213 Wis 614—Larsen v Kewaunee County, 211 N W 578, 209 Wis 204—Stoehr v Town of Red Springs 219 N W 98, 195 Wis 399 reversing 216 N W 487, 195 Wis 399
29 C J p 671 note 76

Function from which revenue received

Rule imposing liability on municipality for negligence in performing partly governmental function from which revenue is received does not apply to liability of county for injuries from highway defect—McCoy v Kenosha County, 218 N W 348, 195 Wis 273, 57 A L R 412

Subordinate powers of sovereignty

A county, being a political subdivision of the state, and having subordinate powers of sovereignty, is not liable at common law for negligence in improving or maintaining a public road—Stitzel v Hitchcock County, 298 N W 555, 139 Neb 700—Franck v Butler County, 257 N W 235 127 Neb 852, reversing 254 N W 489, 126 Neb 797

33. Mass—Smith v Wakefield, 105 Mass 473—Walcott v Swampscott, 1 Allen 101
N Y—Isaac v Town of Queensbury, 288 N Y S 113, 247 App Div 263, reversed on other grounds 12 N E 2d 785, 277 N Y 37, reargument denied 15 N E 2d 73, 278 N Y 483—Graham v Town of Urbana, 257 N Y S 109, 235 App Div 275, affirmed 185 N E 752, 261 N Y 592—Gaynor v Town of Hempstead, 275 N Y S 562, 153 Misc 321
Wis—Stoehr v Town of Red Springs 219 N W 98, 195 Wis 399, reversing 216 N W 487, 195 Wis 399
29 C J p 672 note 77

As a civil division of the sovereign state, a town is not liable at common law for faulty conditions arising even in town highways—Graham v Town of Urbana, 257 N Y S 109, 235 App Div 275, affirmed 185 N E 752, 261 N Y 592

34. Neb—Pester v Holmes 191 N W 709, 109 Neb 603—Wilson v Ulysses Tp of Butler County 101 N W 986, 72 Neb 807

35 Mo—Lamar v Bolivar Special Road District, 201 S W 890
29 C J p 672 note 78

36 Hawaii—Halawa Plantation, Ltd v Hawaii County, 22 Hawaii 753, affirmed 239 F 836 152 C C A 622—Kumazo Matsumura v Hawaii County, 19 Hawaii 18, 21 Ann Cas 1138

37. Conn—Flynn v Town of West Hartford, 118 A 517 98 Conn 83
29 C J p 672 note 80

Unguarded pile of sand

A town would be liable under the rule at common law for an injury proximately resulting from a pile of sand which it left in the highway improperly guarded—Flynn v Town of West Hartford, supra

38. Pa—Scholly v Mahanoy Tp, 1 Leg Rec 4

39 Tenn—Chandler v Davidson County 218 S W 222, 142 Tenn 265
29 C J p 673 note 81

40 La—Barbee v Road Dist No 1, Claiborne Parish, 130 So 660, 14 La App 652
29 C J p 673 note 85

41. Kan—Snyder v Board of Com'rs of Pottawatomie County, 245 P 162, 120 Kan 659—Story v Board of Com'rs of Brown County, 226 P 772, 116 Kan 300
Neb—Franck v Butler County, 257 N W 235, 127 Neb 852, reversing 254 N W 489, 126 Neb 797—King v Douglas County 208 N W 120, 114 Neb 477
S D—Clementson v Union County, 256 N W 794, 63 S D 104
Wash—Boggess v King County, 274 P 188 150 Wash 578
Wis—Sippel v Fond du Lac County, 200 N W 459, 184 Wis 607
29 C J p 673 note 87.

the decisions on the subject, town,[42] township,[43] or other minor political subdivision of the state[44] may be held liable by one injured through a defect or obstruction in its highways. Where such liability is not regarded as existing at common law, it must rest entirely on constitutional or statutory provisions,[45] beyond which it will not be extended;[46] nor will the scope of the statutes be extended by construction.[47] In the absence of an express imposition of liability, liability will not be imposed on counties or similar political subdivisions by statutes committing to them the construction,[48] the maintenance, or the repair of highways.

Counties to which statute applies

(1) Statute taking away sovereign immunity of county from liability for negligence in failing to maintain public highway is, except as otherwise provided, applicable, when enacted, alike to all counties—Franek v Butler County, 257 N W 235, 127 Neb 852, reversing 254 N W 489, 126 Neb 797

(2) County under township organization is liable for negligence in improving road which county is under duty to keep in repair—Franek v Butler County, supra

42. U S—Coen v Town of Boscawen C C A N H, 3 F 2d 421
Conn—Bacon v Town of Rocky Hill, 11 A 2d 399, 126 Conn 402
29 C J p 673 note 88

43. Kan—Nelswender v Township of Topeka, 79 P 2d 839, 148 Kan 113
Ohio—Gause v Peeler, 180 N E 384, 41 Ohio App 192
Wis—Jensen v Town of Oconto Falls, 202 N W 676, 186 Wis 386

Civil township

Although under Rev Code 1919 §§ 8589, 8590 an organized civil township was liable for defective maintenance of county highways, since L 1919 c 333 a civil township no longer has any power or duty with respect to maintenance of county highway system, and § 29 places such duty on county board, so that a civil township may not be held to respond in damages for injuries from highway defects—Hanigan v Minnehaha County, 201 N W 522, 47 S D 606

44. Legislative intent as controlling

Municipality's liability for failure to maintain and repair roads and streets is matter of legislative intention—Brunacci v Plains Tp, 173 A 329, 315 Pa 391

New duties not imposed

Under statutes relating to erecting guards and making repairs on highways, culverts, and bridges, legislature did not intend to charge any political subdivision with new and independent duties, but intended to amplify and render explicit the duties assigned by other primary statutes dealing with maintenance and repair and through a waiver of sovereignty to grant a right of action against the named subdivisions for negligence—Waller v Edmunds County, 290 N W 484, 67 S D 165

45. Ga—Purser v Dodge County, 3 S E 2d 574, 188 Ga 250, answers to certified questions conformed to App, 3 S E 2d 744, 60 Ga App 316—Knight v Floyd County, 144 S E 318, 38 Ga App 515
Mich—Goodrich v Kalamazoo County, 8 N W 2d 130—Braun v Wayne County, 6 N W 2d 744, 303 Mich 454—Longstreet v Mecosta County, 200 N W 248, 228 Mich 542
N Y—Graham v Town of Urbana, 257 N Y S 109, 235 App Div 275, affirmed 185 N E 752, 261 N Y 592—Millens v Town of Greenport, 249 N Y S 655, 139 Misc 555
N D—Mayer v Studer, 262 N W 925, 66 N D 190

True municipal corporations distinguished

Cities and villages being true municipal corporations operating under charters, their duties and liabilities respecting sidewalks differ somewhat from those of counties and towns which are mere divisions of state, though made municipal corporations by statute—Gaynor v Town of Hempstead, 275 N Y S 562, 153 Misc 321

Liability based on defect and not negligence

(1) Where suit is brought against a county under a statute imposing liability on it for damage arising from a defective highway the liability of the county is not coextensive with the common-law liability for negligence, and the issue of responsibility turns not on the question of the county's due diligence but on the existence of a defect and its causal connection with the damage—Sell v McPherson Tp, 107 P 2d 670, 152 Kan 731—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343

(2) The basis of the statutory liability of a town under legislation imposing responsibility for defect or insufficiency of a highway rests on the existence of a defect, and the question whether the town exercised reasonable care to keep its roads in a reasonably safe condition is merely the test by which to determine whether the highway was defective—Bacon v Town of Rocky Hill, 11 A 2d 399, 126 Conn 402

(3) Such statutes are designed to cover situations rendering a highway defective, whether the condition falls within the ordinary field of negligence or within that of nuisance where the fault lies in a political body's failure to guard against conditions not created by it—Bacon v. Town of Rocky Hill, supra

Liability dependent on negligence

(1) Liability for damages for failure to maintain and repair highway arises only where the defendant subdivision is named in statutes, where it is primarily responsible under other statutes for maintenance and repair of highway, and where it is negligent—Waller v Edmunds County, 290 N W 484, 67 S D 165

(2) Under statutes providing that a county board shall be liable in its official capacity for damages received by reason of its negligence in not keeping a road in proper repair, the negligence creating the liability consists in failure to keep the road in proper repair for travel, and to permit recovery it must appear that the road was out of repair and that such condition was caused by defendant's negligence—Sheley v Swing, 29 N E 2d 364, 65 Ohio App 109

(3) A town is not liable for damages to person or property because of defects in highways unless its superintendent of highways was guilty of negligence rendering him liable to town for amount of judgment against latter, and his negligence rendering town liable because of defects in highways is omission, constituting proximate cause of injuries, to use ordinary care in performance of his legal duties—Gaynor v Town of Hempstead, 275 N Y S 562, 153 Misc 321

Liability dependent on nuisance

Long-continued omission to repair or correct a defect in a highway may amount to a nuisance imposing an absolute liability on a subordinate political body for resultant damage—Khoury v Saratoga County, 277 N Y S 3 243 App Div 195, affirmed 196 N E 299, 267 N Y 384

46. Kan—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343—Cunningham v Board of Com'rs of Rice County, 246 P 526, 121 Kan 269
N Y—Graham v Town of Urbana, 257 N Y S 109, 235 App Div 275, affirmed 185 N E 752 261 N Y 592
S D—Honigan v Minnehaha County, 201 N W 522, 47 S D 606
29 C J p 674 note 89

47. Mich—Goodrich v Kalamazoo County, 8 N W 2d 130

48 Ga—Purser v Dodge County, 3 S E 2d 744, 60 Ga App 316, conforming to answers to certified questions 3 S E 2d 574, 188 Ga. 250.

nance and repair,[49] or the general supervision[50] of highways, or by statutes imposing on county officials the duty to remove highway obstructions and punishing them for their knowing failure to do so.[51] However, where the statutes broadly impose on counties liability for injuries arising from their wrongful acts or omissions, and other statutes confer on counties the right and duty to construct and maintain highways, it has been held that the county may be held responsible for damage arising from a defect or obstruction in a highway due to its default[52] The right of action being purely statutory, the legislature may abridge or abolish it,[53] but a clear expression of legislative intention is necessary[54]

Delegation of duties, joint liability A county may not avoid a statutory liability for damages arising from a defect or obstruction in a highway by delegating the upkeep of the highway or a portion thereof to another,[55] and in the case of injuries arising in such a case the county and the person or corporation erecting the obstruction may be held jointly responsible[56] Where a political subdivision is under a statutory duty to maintain a highway, it may not escape liability for failure to do so by reason of the failure of another political agency also charged with the duty to keep the road in repair,[57] or by contracting with a private corporation to execute its duty of maintenance[58]

Defects created by others Whether the liability of the political subdivision is or is not based on an express statute, yet if it has notice of the defect in time to repair it, under principles discussed infra § 263, it is not relieved from liability by the fact that the defect was created by third persons,[59] such as an independent contractor,[60] or by the neglect of a highway officer who is personally liable,[61] or by failure of a railroad company authorized to construct its road over a highway to repair any portion of the highway occupied by it,[62] although it may have a remedy over against the person or corporation primarily liable[63] The fact that defects or obstructions in a highway were created by a railroad company acting under due authorization in constructing its road on or across a highway does not exonerate the political body charged with

49. N M —Murray v Board of Com'rs of Grant County, 210 P 1067, 28 N M 309
Ohio —Robinson v Swing, 36 N E 2d 880 70 Ohio App 83
Wis —Lickert v Harp 252 N W 296, 213 Wis 614

50. Ala —Helms v Houston County, 117 So 633, 218 Ala 114

51. Iowa —Swartzwelter v Iowa Southern Utilities Corporation, 250 N W 121, 216 Iowa 1060

52. Wash —Simmons v Cowlitz County, 120 P 2d 479, 12 Wash 2d 84—Berglund v Spokane County, 103 P 2d 355, 4 Wash 2d 309—Barton v Spokane County, 69 P 2d 151, 190 Wash 519

Maintaining defect

A county, which constructed, in town and beside street which was part of county highway, a pit which extended about three inches into street and two feet into pathway along street, by constructing pit and permitting it to be maintained would be considered to have maintained pit so as to be liable for injuries sustained by woman in fall into pit —Barton v Spokane County, 69 P 2d 151, 190 Wash 519

Liability as that of municipal corporation

The liability is the same as that which would in a similar case be imposed on a conventional municipal corporation —Simmons v Cowlitz County, 120 P 2d 479, 12 Wash 2d 84 —Berglund v Spokane County, 103 P 2d 355, 4 Wash 2d 309

53. Mich —Westgate v Adrian Tp, 126 N W 422, 161 Mich 333—McKeller v Monitor Tp, 44 N W 412, 78 Mich 485
N H —Miner v Hopkinton, 60 A 433, 73 N H 232
29 C J p 674 note 90

54. Md —Howard County Com'rs v Leaf, 8 A 2d 756, 177 Md 82

Implied repeal

(1) Act authorizing suit against county does not invalidate proceedings against county on claim against highway department as authorized by prior act —Lincoln County v Gazzaway, 158 S E 647, 43 Ga App 358

(2) Pub Acts 1909 No 283 c 4 § 21 (Comp L 1915 § 1367), declaring Comp L 1915 § 4584, imposing liability for injuries resulting from failure to keep roads, bridges, etc., reasonably safe shall apply to counties adopting county road system, was not impliedly repealed by Pub Acts 1919 No 19, or other provisions of Highway Law, especially as provisions of earlier act were reenacted by same legislature —Longstreet v Mecosta County, 200 N W 248, 228 Mich 542

Express repeal of statute

W Va —Clayton v Roane County Court, 123 S E 189, 96 W Va 333
29 C J p 674 note 90 [a]

55. Neb —Sharp v Chicago, B & Q R Co, 193 N W 150, 110 Neb 34

56 Neb —Sharp v Chicago, B & Q R Co, supra

57. Md —Howard County Com'rs v Leaf, 8 A 2d 756, 177 Md 82.

Breach of duty by state commission

Under statute providing for allocation of gasoline tax by state roads commission to counties of state and conferring powers and duties on state roads commission with regard to repair and maintenance of county highways, the agency of state roads commission is for benefit of county as principal, and is not to the exclusion of county's duty and power to keep county highways safe for public travel, and failure of state roads commission to perform its duty with regard to repair and maintenance of county highways did not relieve county commissioners of duty in such regard which statute imposed on them or their liability for injuries to traveler on county highway caused by highway being out of repair —Howard County Com'rs v Leaf, supra

58. Md —Howard County Com'rs v Leaf, supra

59. R I —Foley v Ray, 61 A 50, 27 R I 127
29 C J p 675 note 92

60. Mass —Bigelow v Weston, 3 Pick 267
Pa —Mahanoy Tp v Scholly, 84 Pa. 136

61. N H —Hardy v Keene, 52 N H. 370
29 C J p 675 note 94

62. N Y —Bryant v Town of Randolph, 30 N E 657, 133 N Y 70
29 C J p 675 note 95

63. Me —Frost v Portland, 11 Me 271
29 C J p 675 note 96.

proper maintenance of the highway from liability for damage resulting from breach of its own duty of care,[64] but the governmental agency will not be held accountable where it has fully met its legal duty in the premises,[65] and where the railroad makes its construction in proper manner, and portions of the construction of which complaint is made are essential to operation of the road, the political body is not liable as for defects or obstructions in the highway even though such authorized portions of the construction may present obstacles to travel or dangers to travelers.[66]

The governmental agency is not liable for defects or obstructions in highways as to which it has no duty of maintenance or repair, as where the road is located within the territorial limits of a different political body, under principles discussed infra § 255 c, nor will it be liable for injuries from defects caused by the elements or by third persons unless in the exercise of due care it could and should have discovered and remedied such defects.[67] A township is not liable for injuries caused by the use of structures on adjoining land, in the absence of any power or duty on its part to enter upon the land and remove or prevent the use of such structures.[68] The fact that a town directs a property owner to improve a sidewalk in a manner not intrinsically dangerous does not render him the agent of the town so as to charge the latter with his negligence.[69] No liability exists for a defect in a district assigned to another town.[70]

Acts of agents A town or similar body must, under statutes imposing liability for defects in its highways, answer in damages to those injured through the negligence of its officials and employees engaged in maintenance of a highway for public travel.[71]

b. Lack of Means or Funds

Lack of funds to make necessary repairs may, under some circumstances, excuse a political body from liability for damages arising from highway defects in cases where it would otherwise be responsible, but not where the duty of maintenance or repair is absolute or where the funds could have been procured

The fact that a political body is without means to make repairs may exempt it from liability for failure to make them,[72] but this rule has been held not to apply where the statute makes the duty to keep the roads in repair absolute,[73] nor will the existence of indebtedness sufficient to consume all the available funds excuse a failure to make a small repair of a pressing nature.[74] So the lack of funds at the time of the accident is no excuse if the defect existed for a long time to the knowledge of the highway commissioner, and he had sufficient funds within that time.[75] There must be not only a lack of funds for the work, but also a lack of ability to procure them[76] or to have the work done in any way, and it has accordingly been held that such lack is no defense if it arose merely from failure to levy proper taxes,[77] or if the abutting prop-

64. Me.—Phillips v. Veazie, 10 Me. 96
Mass.—Davis v. Leominster, 1 Allen 182
Vt.—Patty v. Town of Duxbury, 24 Vt. 154; Willard v. Newbury, 22 Vt. 458

Railroad's breach of duty as not relieving town of liability

Town is liable for injuries occasioned by an unguarded excavation in the highway created by the railroad in connection with its authorized construction to cross highway even though the town had previously notified the railroad of the necessity of erecting barriers as protection against the excavation and received the promise of the railroad to do so.—Currier v. Lowell, 16 Pick. Mass., 170
Liability of municipality for defects, obstructions or dangerous conditions in its streets resulting from acts or omissions of railroad company, see Municipal Corporations § 797 also 43 C.J. p. 992 note 58-p. 993 note 65

65. Mass.—Jones v. Waltham, 4 Cush., Mass., 299, 50 Am.D. 783

Taking all permissible precautions as to cattle guard

Where the proprietors of a railroad acting within the scope of their lawful authority construct a cattle guard in their road at a place where it crosses the highway on the same level and the town erects and maintains a sufficient barrier against such cattle guard up to the railroad and as far as can be done without impeding the passage of cars, the town is not liable for injuries sustained by a traveler who falls into the cattle guard without neglect on his part since the town did all that it was required or permitted to do by law.—Jones v. Waltham, supra

66. Mass.—Fowler v. Gardner, 48 N.E. 619, 169 Mass. 505

67. N.H.—Monroe v. Town of Deerfield, 147 A. 111, 81 N.H. 144

68. Pa.—Haines v. Barclay Tp., 37 A. 560, 181 Pa. 521

69. Ind.—Dooley v. Sullivan, 14 N.E. 566, 112 Ind. 451, 2 Am.S.R. 209

70. N.Y.—Jones v. Utica, 16 Hun 441

71. N.Y.—Rose v. Town of Richmond, 211 N.Y.S. 721, 214 App.Div. 142.—Gaynor v. Town of Hempstead, 275 N.Y.S. 562, 151 Misc. 421

Road engineer as county's agent

With respect to county's liability for injuries resulting from bad condition of public roads, road engineer will be regarded as agent of county.—Kent County Comrs. v. Pardee, 134 A. 33, 151 Md. 68

72. N.Y.—Young v. Macomb, 42 N.Y.S. 351, 11 App.Div. 480
29 C.J. p. 681 note 84

73. N.H.—Winship v. Enfield, 42 N.H. 197
Wis.—Burns v. Elba, 32 Wis. 605

74. N.Y.—Rhines v. Royalton, 15 N.Y.S. 911

75. N.Y.—Whitlock v. Brighton, 37 N.Y.S. 333, 2 App.Div. 21, affirmed 49 N.E. 1106, 154 N.Y. 781

76. Ill.—Mt. Vernon v. Brooks, 39 Ill.App. 426
29 C.J. p. 681 note 88

77. Mich.—Lombar v. East Tawas, 48 N.W. 947, 86 Mich. 14
Miss.—Whitfield v. Meridian, 6 So. 244, 66 Miss. 570, 14 Am.S.R. 596, 4 L.R.A. 834
29 C.J. p. 681 note 89.

erty owners may be assessed for the expense,[78] or where the governmental agency has power to call on individuals to make the repairs.[79] A town cannot defend on this ground if it has power to have the expense imposed on the county.[80] The commissioners have discretion to apply the funds in making repairs according to what they consider the comparative urgency of such repairs, and the town is not liable for an error of judgment in this respect,[81] but their discretion must be reasonably exercised, and they cannot, by determining to spend the money otherwise, excuse the failure to make a necessary repair at a trifling expense.[82]

§ 251. —— Highway Officers

According to some authorities, highway officials with funds available for the work are personally liable for damages resulting from their negligent failure to keep highways in proper condition, but other authorities deny liability for mere nonfeasance, as distinguished from misfeasance, unless created by statute. Highway officials may not escape individual liability by instructions to others or by acceptance of the advice of others, but they will not be held for damage resulting from causes beyond their knowledge or duty of knowledge.

In some jurisdictions, highway officers and other officers charged with the duty of keeping highways in repair have been held liable for injuries caused by their negligent failure properly to make repairs, on the ground that such duty is ministerial in its nature,[83] provided they have had sufficient funds in their hands for that purpose or the means of procuring them,[84] and they have been held not liable because, in the exercise of discretion, they have applied all the funds to certain repairs and left others unattended to.[85] This requirement of the sufficiency of funds as a condition of liability, however, does not apply where the injuries are caused by an act of misfeasance on the part of the officer, and not of nonfeasance.[86] In other jurisdictions, however, it is held that, except where the statute so provides, highway officers and the officers of the municipality whose duty it is to look after the roads are not personally liable for injuries arising from defective highways,[87] or for mere nonfeasance or failure to perform an official duty,[88] unless, as is held in some jurisdictions, they are guilty of willful or malicious negligence,[89] liability being denied particularly where the officer is liable to a penalty,[90] such decisions being based on the fact that the particular officer in question was not at liberty to refuse the appointment,[91] or that the duty in respect to repairs is quasi judicial and discretionary rather than ministerial,[92] and is a duty owed to the public generally rather than to individuals.[93] It has been said that statutes imposing on county commissioners the obligation to keep highways in repair cast on them a public duty as a board, such duty inhering in their official status, and do not render them individually liable for breach thereof.[94]

Where highway officials are regarded as individually liable, they may be held liable regardless of the liability of a town,[95] or the fault of an abutting owner,[96] and the fact that highway officials are public employees performing governmental acts does not exempt them from liability for negligent misfeasance.[97] Officials charged with the power and duty

78 Ind—New Albany v McCulloch, 6 N E 1071, 127 Ind 500
Ohio—Shelby v Clagett, 22 N E 407, 46 Ohio St 549, 5 L R A 606

79 N Y—Weed v Ballston Spa, 76 N Y 329

80 N H—Winship v Enfield, 42 N H 197
Pa—Glaub v Goshen Tp, 7 Kulp 292

81. N Y—Monk v New Utrecht, 11 N E 268, 104 N Y 552

82 N Y—Ivory v Deerpark, 22 N E 1080, 116 N Y 476

83. Md—Walter v Board of Com'rs of Montgomery County, 22 A 2d 472, 179 Md 665—Willis v Milling, 191 A 584, 173 Md 28
N H—Robertson v Monroe, 116 A 92, 80 N H 258
Okl—See Lowe v Storozyszyn, 83 P 2d 170, 172, citing **Corpus Juris.**
29 C J p 675 note 6

84. N Y—Monk v New Utrecht, 11 N E 268, 104 N Y 552
29 C J p 676 note 7

85 N Y—Monk v New Utrecht, supra

86 N Y—Bennett v Whitney, 94 N Y 302—Rector v Pierce, 3 Thomps & C 116

87. Colo—Richardson v Belknap, 213 P 335, 73 Colo 52
Mich—Longstreet v Mecosta County, 200 N W 248, 228 Mich 542
Neb—Pester v Holmes, 191 N W 709, 109 Neb 603
29 C J p 676 notes 10, 11

88 Minn—Stevens v North States Motor, 201 N W 435, 161 Minn 345, 40 A L R 36
Tenn—Binkley v Hughes, 73 S W 2d 1111, 168 Tenn 86

"Nonfeasance" and "misfeasance" distinguished

As regards liability of county highway commissioners to third parties for injury caused by their conduct in performance or nonperformance of official duty, 'nonfeasance' is doing nothing, and "misfeasance" is failure to use in performance of duty owing to individual that degree of care, skill, and diligence which circumstances reasonably demand—Binkley v Hughes, supra

89. U S—Thompson Caldwell Const Co v Young C C A N C, 294 F 115
29 C J p 676 note 12

90 Tex—Thornton v Springer, 5 Tex 587
29 C J p 676 note 13

91. Vt—Dimick v Hathaway, 26 A 970, 65 Vt 217, 21 L R A 377
29 C J p 677 note 14

92 Minn—Stevens v North States Motor, 201 N W 435, 161 Minn 345, 40 A L R 36
29 C J p 677 note 15

93 Colo—Richardson v Belknap, 213 P 335, 73 Colo 52
29 C J p 677 note 16

94. Colo—Richardson v Belknap, supra

95 N H—Robertson v Monroe, 116 A 92, 80 N H 258

96. N H—Robertson v Monroe, supra

97 Vt—Palmer v Marseille, 175 A 31, 106 Vt 500

to control highways may not relieve themselves of responsibility merely by issuing instructions to a road supervisor,[98] nor are they necessarily excused from liability because they acted on the advice of an engineer.[99] They may be held responsible whether they were in office at the time of the creation of the original defect or only afterward and during a time when they were under a duty to remedy such defect, and the close of their term of office does not terminate their liability so long as their own negligence or default remains the proximate cause of the accident or damage.[1]

The duty of such officials extends to all those with whom the situation brought them into contact, including all travelers whom they should have anticipated might be affected by their conduct.[2] In the absence of knowledge or of facts charging them with knowledge of the defective conditions causing the damage, highway officials are not personally liable therefor,[3] and where they do not participate in performance of work on a highway and they exercise due care in the selection of persons to carry it on, highway officials may not be held responsible in the absence of actual knowledge of negligence.[4] In any event an officer is not liable if he is under no obligation to make repairs.[5]

In some jurisdictions, even where the rule of nonliability for failure to repair obtains, it is held that the officer is liable for injuries occurring during the progress of repairs by positive acts of negligence on his part,[6] or by acts creating a nuisance.[7]

§ 252. —— Persons Causing Defect

a. In general
b Highway contractors

a. In General

Broadly speaking, any person or corporation creating defects or obstructions in a highway and wrongfully causing damage to users may be held liable therefor, such obstructions in some cases being regarded as nuisances

A person causing a defect or obstruction in a highway,[8] although outside the traveled way,[9] is liable for injury resulting therefrom, and the fact that the highway was not legally established,[10] or that governmental agency is also liable,[11] or that

98. Mont—Becker v Chapple, 232 P 538, 72 Mont 199

99 N H—Robertson v Monroe, 116 A 92, 80 N H 258

Advice as defense to selectmen

The advice of a division engineer to the selectmen, solicited by them under L 1905 c 35 § 6, is not equivalent to an order to the selectmen, but requires them still to exercise their own judgment, so that acting on such advice does not relieve them from liability for injuries resulting therefrom, regardless of what the rule would be if the improvements were such as were required to be made on the advice of the state engineer by § 3—Robertson v Monroe, supra

1. N H—Robertson v Monroe, supra

Cause as question of fact

How remotely the relationship between selectmen and travelers on the highway shall be traced and how far the chain of causation as to an injury shall be followed as a matter of legal liability are questions of fact—Robertson v Monroe, supra

2. N H—Robertson v Monroe, supra

Liability to anyone injured

Any member of board of county commissioners who neglects to perform board's duty under Rev Codes 1921 § 1627, to remove defects and obstructions in highway after notice, is liable, under § 4520, to anyone who is injured thereby—Becker v Chapple, 232 P 538, 72 Mont 199

3. Mont—Laird v Berthelote, 206 P 445, 63 Mont 122

Lack of actual knowledge

County commissioner, attending three meetings of board after washout in highway and before accident, without being notified thereof by associate commissioners who knew of condition, could not be held personally liable for resulting injuries, in absence of actual knowledge of washout before accident—Becker v Chapple, 232 P 538, 72 Mont 199

Notice as individuals sufficient

Notice of washout in highway, or of road supervisor's failure to erect or maintain suitable barriers, to county commissioners convened as a board, is unnecessary to render members thereof liable for resulting injuries, it is sufficient if they know the facts as individuals—Becker v Chapple, supra

4. Idaho—Strickfaden v Green Creek Highway Dist 248 P 456, 42 Idaho 738, 49 A L R 1057

5 Iowa—Theulen v Viola Tp, 117 N W 26, 139 Iowa 61
Md—Baltimore County v Wilson, 54 A 71, 56 A 596, 97 Md 207
29 C J p 677 note 17

6. Tenn—Binkley v Hughes, 73 S W 2d 1111, 168 Tenn 86
29 C J p 677 note 18

7. Tenn—Chandler v Davidson County, 218 S W 222, 142 Tenn 265

8. Ark—Arkansas Fuel Oil Co v Downs, 168 S W 2d 419, 421, quoting **Corpus Juris**
Neb—Swinford v Finck, 299 N.W 227, 139 Neb 886—Simonsen v Thorin, 234 N W 628, 120 Neb 684, 81 A L R 1000
Pa—Geiger v Dowdy, 170 A 420, 111 Pa Super 485
Tex—Buchanan v Rose, 159 S W 2d 109, 138 Tex 390, affirming Rose v Buchanan, Civ App, 140 S W 2d 203—West Texas Utilities Co v Haynes, Civ App, 20 S W 2d 236
Va—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468
Wash—Nicholson v Postal Telegraph Cable Co 299 P 397, 399, 162 Wash 603, quoting **Corpus Juris.**
29 C J p 677 note 21, p 678 notes 26–28 41

Duty to remove or use due care to prevent injury

Neb—Simonsen v Thorin, 234 N W 628, 120 Neb 684, 81 A L R 1000

9. Ark—Arkansas Fuel Oil Co v Downs, 168 S W 2d 419, 421, quoting **Corpus Juris.**
Wash—Nicholson v Postal Telegraph Cable Co, 299 P 397 399, 162 Wash 603, quoting **Corpus Juris.**
29 C J p 677 note 22
Liability for defects outside traveled way generally see infra § 255 b

10. Wash—Nicholson v Postal Telegraph Cable Co, supra, quoting **Corpus Juris.**
29 C J p 677 note 23

11. Wash—Nicholson v Postal Telegraph Cable Co, supra, quoting **Corpus Juris.**
29 C.J p 677 note 24.

some other person is under a legal liability to remove the obstruction,[12] is no defense However, temporary obstructions of a character not constituting a nuisance are permissible under some circumstances for the benefit or convenience of an individual and will not necessarily constitute ground for liability if damage to another ensues[13] Likewise, an independent contractor for the erection of a building is liable for defects in, or obstructions on, the highway caused by him,[14] as may also be the owner[15] Failure within a reasonable period to clear a highway of dangerous articles or obstructions left thereon by one's self, or reasonably to warn of such a condition, constitutes actionable negligence[16] The mere failure of one person to remove an obstruction placed in the highway by another does not render him liable for injuries caused thereby,[17] but, if he adopts and maintains a nuisance created by another, he will be liable[18] So, where one person's property is made an obstruction by another, the former, if not a party to the wrong, is not liable[19] If the owner permits the property to remain in the road, however, he is liable, although it was placed there by a trespasser[20]

Private corporation Where the duty of maintaining a highway is imposed on, and accepted by, a private corporation, as an incident of its franchise, the corporation may be held liable for damage resulting from breach of its duty to keep the highway in proper repair[21]

Acts under license. A license to make a particular use of the highway, otherwise unlawful, while it exempts the licensee from the liability which would otherwise exist for injuries irrespective of the question of his negligence,[22] does not exempt him from the duty of taking proper precautions to prevent injuries therefrom to persons using the highway,[23] and he is bound, after completing the work, to restore the highway to a condition of reasonable safety,[24] but a lawful act performed on the highway in a lawful manner does not give rise to an action in tort[25]

Defect or obstruction regarded as nuisance The liability of an individual who without authority of law creates a dangerous condition in the highway, to a person injured thereby, is generally based on the theory that the defect or obstruction constitutes a nuisance,[26] and accordingly it has been decided that the liability of such person is not affected by the question whether he was actually negligent,[27] but, where the obstruction, although resulting from negligence, does not constitute a nuisance, the question of contributory negligence is not excluded from consideration[28]

12. Wash—Nicholson v Postal Telegraph Cable Co, supra, quoting **Corpus Juris.**
29 C J p 678 note 25

13. Ala—Shelby Iron Co v Morrow, 95 So 370, 209 Ala 116

Wrecked vehicle

The measure of duty to remove a wrecked vehicle alongside a public highway depends on the conditions and the question whether or not it is a nuisance per se depends on the nature of the object, the condition in which it is left, and whether a reasonable time necessary for its removal has elapsed—Shelby Iron Co v Morrow, supra

14. N Y—Jones v Chantry, 4 Thomps & C 63
Wis—Hundhausen v Bond, 36 Wis 29

15. Ohio—Ohio Southern R Co v Morey, 24 N E 269, 47 Ohio St 207, 7 L R A 701
Wis—Hundhausen v Bond, 36 Wis 29

16 Neb—Swinford v Finck, 299 N W 227, 139 Neb 886

17. Okl—Robinson Oil Corporation v Davis, 43 P 2d 754, 757, 171 Okl 557, quoting **Corpus Juris.**
29 C J p 679 note 49

18. Mo—Lucas v St Louis & S R Co, 73 S W 589, 174 Mo 270, 61 L R A 452.
Okl—Robinson Oil Corporation v Davis, 43 P 2d 754, 757, 171 Okl 557 quoting **Corpus Juris**

19. Ind—Davis v Williams, 31 N E 204, 4 Ind App 487
Okl—Robinson Oil Corporation v Davis supra, quoting **Corpus Juris.**

20. Okl—Robinson Oil Corporation v Davis, supra, quoting **Corpus Juris.**
29 C J p 679 note 52

21. Conn—De Capua v City of New Haven, 13 A 2d 581, 126 Conn 558
Liability of electric companies for damage on highways from wires, poles and appliances see Electricity § 42
Railroad's liability for damages arising from its construction work in highways see the C J S title Railroads § 987, also 52 C J p 760 note 37-p 761 note 46

22. N Y—Tinker v New York, O & W R Co, 51 N E 1031, 157 N Y 312

23. Ind—Indiana Utilities Co v Wareham, 118 N E 572, 66 Ind App 542
29 C J p 679 note 46

24. Ala—Houston v Town of Waverly, 142 So 80, 86, 225 Ala 98, citing **Corpus Juris.**
Tenn—Radnor Water Co v Draughon, 89 S W 2d 186, 189, 19 Tenn App 371, citing **Corpus Juris.**
29 C J. p 679 note 47

25. Ga—Bagwell v Georgia R & Power Co, 99 S E 712, 24 Ga App 15
Utah—Shepard v Utah Light & Traction Co, 184 P 542, 55 Utah 186
29 C J p 679 note 48.

26. Va—Appalachian Power Co v Wilson 129 S E 277, 142 Va 468
29 C J p 678 note 39

Sidewalk

A sidewalk is primarily intended for public travel and in most cases a dangerous condition, defect, or obstruction therein, not caused by ordinary, reasonable, and usual use of the sidewalk as such, and which unnecessarily, materially, and unreasonably interferes with sidewalk's being used for purpose for which it was intended, is a "nuisance," and may make the person causing the dangerous condition liable in damages to a pedestrian injured thereby—Massey v Worth, 197 A 673, 9 W W Harr, Del, 211

27. N Y—Congreve v Smith, 18 N Y 79
29 C J p 678 note 40

28. N Y—Francis v Gaffey, 105 N. E 96, 211 N Y 47.

Joint liability Where damage is caused by an obstruction negligently permitted to continue by a county and some person or corporation, the county and such other party may be held jointly liable.

b Highway Contractors

An independent highway contractor is denied the immunity from liability for damages resulting from highway defects and obstructions, which is sometimes granted the sovereign or public body, and, having a primary and nondelegable duty to keep the highway in safe condition during work thereon, a highway contractor must respond in damages for injuries due to his negligence or other breach of duty. Liability is predicated on breach of duty to the public and sounds in tort and not in contract

The presumption is heavily against anyone who sets up the sovereign prerogative as the reason why he should not be held answerable for his own wrongdoing, as in connection with defects and obstructions in highways,[29] and the immunity of a state, county, or the like from liability for damage occasioned by highway defects or obstructions, as discussed supra §§ 249, 250, does not extend to an independent highway contractor,[30] and the latter may not escape responsibility on the plea that he was performing a public work.[31] In other words, where an independent contractor is prosecuting highway work under a contract with the state or any subordinate arm thereof, he is responsible in damages to injured third persons for his negligence just as though he had been engaged in work under contract with a private person.[32] The basis of the contractor's liability is not contractual but in tort.[33]

The primary duty rests on a highway contractor to exercise reasonable care for the safety of the general public while it is traveling over a road on which he is working, as shown infra § 254 a, which duty is nondelegable,[34] and he may be held respon-

29. U S —Thompson Caldwell Const Co v Young, C C A N C, 294 F 145

30. U S —Thompson Caldwell Const Co v Young, supra

Miss —Wade v Gray 61 So 168 104 Miss 151, 43 L R A,N S, 1046

N D —Solberg v Schlosser 127 N W 91 20 N D 307, 30 L R A,N S, 1111

Va —Boyd, Higgins & Goforth v Mahone, 128 S E 259 142 Va 690

Negligence in performance of ministerial duties

Although municipalities are not liable for negligence of their agents in discharge of ministerial duties, such rule does not exonerate an independent road contractor from duty to exercise reasonable care and, where injury arose from contractor's negligence in performance of ministerial and specified duties in connection with work for which it received a valuable consideration, as contradistinguished from errors of judgment in planning by state engineer, the road contractor alone is liable —Boyd, Higgins & Goforth v Mahone, 128 S E 259, 142 Va 690

Contract with state highway commission

One constructing a roadway under contract with a state highway commission did not share the immunity given that body by N C Pub L 1921 c 2 § 50, against liability for damages resulting from defective condition of the highway —Thompson Caldwell Const Co v Young, C C A N C 294 F 145

In Kentucky

(1) Earlier decisions extended the sovereign immunity from liability for damage arising from defective highways to independent contractors on the theory that, if the contractor were held liable, the real burden would fall on the public body because of the excessive price it would be forced to pay for its highway work —Ockerman v Woodward, 178 S W 1100, 165 Ky 752, L R A 1916 A 1005—29 C J p 678 notes 33, 34

(2) These decisions have been adversely criticized by the courts of other jurisdictions

U S - Thompson Caldwell Const Co v Young, C C A N C 294 F 145

Tex —Overstreet v McClelland, Civ App, 13 S W 2d 990, error dismissed

Va —Boyd, Higgins & Goforth v Mahone 128 S E 259, 142 Va 690

(3) All of them have been expressly overruled on the point by a later Kentucky decision —Taylor v Westerfield, 26 S W 2d 557, 233 Ky 619, 69 A L R 482

31. N J —Sadlon v Jannarone, 132 A 719, 102 N J Law 343

32. Ky —Codell Const Co v Steele, 56 S W 2d 955, 247 Ky 173—Taylor v Westerfield, 26 S W 2d 557, 233 Ky 619 69 A L R 482

Agency for state

(1) Independent contractors constructing highway under contract with state highway commission do not act as state's agents, but are liable for negligence resulting in injury to third party —Codell Const Co v Steele, 56 S W 2d 955, 247 Ky 173

(2) Defendant road contractor was held to be an independent contractor, notwithstanding engineer was put in charge to see that work was done according to plans and specifications furnished by state highway commission, where such engineer had no control over means of execution of work, but looked only for results.—Boyd, Higgins & Goforth v Mahone, 128 S E 259, 142 Va 690

33. Iowa —Kehm v Dilts, 270 N W 388 222 Iowa 826

Breach of duty to public

The liability of a highway contractor for injuries to persons lawfully using the way does not depend on contract but arises out of a legal duty devolving on contractor as well as on the public in general not to obstruct or make the highway dangerous for ordinary use under the circumstances and such duty being to the public generally may be enforced by anyone if damages occur on account of failure to perform that duty —Toler v Hawkins, 105 P 2d 1041, 188 Okl 58

34 N Y —Boylhart v Di Marco & Reimann 200 N E 793 270 N Y 217, reversing 280 N Y S 781, 244 App Div 785

Duty of state to maintain detours

Where both the general state law and the highway contractor's contract imposed on him a duty to use due care in connection with construction work and the safeguarding of the highway, he could not escape liability for damages arising from breach of such duty by pleading a particular provision of the contract casting on the state highway commission the duty of maintaining all detours for strictly through traffic, and was liable for damage suffered on an improperly maintained detour, as he could not shirk his duty and cast it on another —Hughes v Robert G Lassiter & Co, 137 S E 806, 193 N C 651

Liability for negligence of subcontractor

N Y —Boylhart v Di Marco & Reimann, 200 N E 793, 270 N Y 217,

sible for damage resulting from his negligence or malfeasance in connection with defects and obstructions in the highway,[35] as in the case of his negligence in respect of barriers, railings, and other guards or danger signals, considered infra § 262, the liability of the contractor being enforceable irrespective of whether or not some public agency or other individual may also have been guilty of a dereliction of duty.[36] The contractor will be responsible for damage resulting from defects or obstructions originally caused by him, even though he has assumed no duty to maintain or keep the highway in repair,[37] but an independent contractor may not be held responsible for damages arising from defects or obstructions in a highway where he was guilty of no negligence or other breach of duty.[38] To recover against the highway contractor plaintiff must show both that there was a failure to exercise proper care in performance of some legal duty that the contractor owed plaintiff and that such negligent breach of duty was the proximate cause of the damage.[39]

Completion and acceptance of work The liability of an independent contractor for negligence subsists as long as the road is under his charge,[40] and he is bound to leave the highway in a reasonably safe condition for travel on completion of his work.[41] It has been held, however, that, after completion of the work and its acceptance by the governmental body, the contractor's liability ceases and he may not be held responsible for damage thereafter occurring,[42] since on termination of his control of the road the contractor owes no further duty to the traveling public.[43] Liability of the contractor has been denied where the damage took place after completion and a factual acceptance of the work, but before there had been a formal acceptance.[44]

§ 253. —— Abutting Owners

An abutter may be liable for damage arising from defects or obstructions on a highway where the instrumentality proximately causing the damage was under his control, but not otherwise

Broadly speaking, the liability of an abutting owner for damage to one using the highway adjacent to his premises depends on control of the instrumentality causing the injury.[45] The abutter is under an obligation to use reasonable care to keep

reversing 280 N Y S 781, 244 App Div 785

Liability for independent subcontractor

Contractor for construction of county road letting work to independent contractor was not liable for damages arising from impassable condition during construction by latter—Montgomery v Garza, Tex Civ App, 290 S W 210

35. Cal—Breithaupt v Jahn & Bressi Const Co, 47 P 2d 339, 8 Cal App 2d 181
Ga—Davis v Smiley, 126 S E 904, 33 Ga App 508
Iowa—Kehm v Dilts, 270 N W 388, 222 Iowa 826
La—Stafford v Nelson Bros, 130 So 234, 15 La App 51—Hyde v Nelson Bros, 130 So 237, 15 La App 90
Okl—Toler v Hawkins, 105 P 2d 1041, 188 Okl 58
Tenn—Westmoreland Heights v Martin, 13 Tenn App 142
Tex—Overstreet v McClelland Civ App, 13 S W 2d 990, error dismissed
29 C J p 678 notes 37, 38

36. Cal—Folkins v Johnston, 12 P 2d 153, 124 Cal App 169

Although state engineer also failed to discharge duty in respect of maintaining barriers and furnishing proper warnings to travelers on a highway undergoing construction work this fact, while it made the engineer liable, did not excuse the independent contractor from responsibility for his own negligence in such respects—Folkins v Johnston, supra

Contractor liable irrespective of county's responsibility

One engaged in construction work on public highway, and in control of it, who erected substantial barricade to close road and continued to control barricade while it remained in roadway, was under duty to maintain it with due care and diligence to avoid damage from its maintenance to traveler irrespective of whether there was liability by county employing him—Davis v Smiley, 126 S E 904, 33 Ga App 508

37. Fla—Price v Parks, 173 So 903, 127 Fla 744

Accumulation of materials dropped from contractor's vehicles

Right of action of person harmed by dangerous condition of highway kept open for public travel may be enforced against contractor shown to have occasioned dangerous condition by allowing materials from his vehicles to fall and negligently to accumulate on highway, even though contractor has assumed no duty to maintain or keep highway in repair—Price v Parks, supra

38. U S—C C Moore Const Co v Hayes, C C A Miss, 119 F 2d 742, certiorari denied Hayes v C C Moore Const Co, 62 S Ct 82, 314 U S 642, 86 L Ed 515
Ind—Mahoney v Sharp, 156 N E 566, 86 Ind App 180
Utah—Hansen v Clyde, 56 P 2d 1366, 89 Utah 31, 104 A L R 943—Romney v Lynch, 199 P 974, 58 Utah 479
29 C J p 678 note 36

39. N C—Evans v Shea Bros Const Co, 138 S E 411, 194 N C 31

40. N C—Furlough v Nash County Highway Commission, 144 S E 693, 196 N C 160, denying rehearing 142 S E 230, 195 N C 365
Tex—Brown & Root v Weldy, Civ App, 75 S W 2d 915

41. Iowa—Kehm v Dilts, 270 N W 388, 222 Iowa 826

42. Tex—T J Mansfield Const Co v Gorsline, Com App, 288 S W 1067, reversing, Civ App, 278 S W 485, and rehearing denied, Com App, 292 S W 187

43. Tex—T J Mansfield Const Co v Gorsline, Com App, 292 S W 187, denying rehearing 288 S W 1067, which reversed, Civ App, 278 S W 485

44. Minn—Rongstorf v Winston Bros Co, 208 N W 995, 167 Minn 290

Practical acceptance as sufficient

Acceptance of work by supervising engineer and opening of highway to traffic will relieve road building contractor of liability for injuries to third persons after the acceptance, since only practical acceptance after completion of work and not formal acceptance is necessary—Donaldson v Jones, 61 P 2d 1007, 188 Wash 46

45. Mass—Nichols v Donahoe, 34 N E 2d 681, 309 Mass 241

his premises in such condition as not to create defects or obstructions in the adjacent highway endangering travelers in their lawful use of the road, as considered infra § 254 a, and, if he fails to do so and thereby renders the highway unsafe for travel, he makes himself liable for resultant damage,[46] and he is liable for an injury caused by a defect or obstruction created by him in the highway,[47] including those originating on his own land.[48] He is not liable, however, for harm caused to travelers by dangerous conditions originating on the highway,[49] or for damage resulting from obstructions near his property but not created by him,[50] and, where he has exercised ordinary care in the use of his property, he is not liable for injuries incidentally resulting to a traveler on the highway,[51] or for injuries occurring in the highway not caused by his affirmative act,[52] or for a proper temporary use of the highway,[53] or for injuries sustained through an instrumentality under the control of others.[54] An abutter will not be held to have assumed general responsibility for the surface and safety of a highway by reason of his making repairs thereon.[55]

Highway established by prescription or user The liability of the owner of land abutting on a highway established by prescription or user is confined to the beaten or traveled track, and does not extend to that portion not subject to the right of way.[56]

46. Conn.—Ruocco v. United Advertising Corporation, 119 A. 48, 98 Conn. 241, 30 A.L.R. 1237.
Tenn.—City of Knoxville v. Baker, 150 S.W.2d 224, 25 Tenn.App. 36.
Tex.—Skelly Oil Co. v. Johnston, Civ.App., 151 S.W.2d 863, error refused.
Liability of abutter for injuries received on abandoned road see infra § 255.
Liability of abutter for negligence endangering highway travelers generally see the C.J.S. title Negligence §§ 77–80, also 45 C.J. p. 859 note 58–p. 862 note 14.

47. Conn.—Kane v. New Idea Realty Co., 133 A. 686, 104 Conn. 508.
Pa.—Falco v. Bryn Mawr Trust Co., 10 Pa.Dist. & Co. 115, 43 Montg.Co. 41.
29 C.J. p. 679 note 55.

Owner supervising work

Where owner of building had notice of the existence of a nuisance in a highway, caused by independent contractor employed to do work adjacent to the highway but conducting the work under the supervision of the owner, failure to correct the danger created by the nuisance created liability on part of owner to injured third persons.—Schwartz v. Merola Bros. Const. Corporation, 34 N.Y.S.2d 220, 263 App.Div. 631, motion denied 46 N.E.2d 157, 289 N.Y. 756, affirmed 48 N.E.2d 299, 290 N.Y. 145.

48. Tex.—Skelly Oil Co. v. Johnston, Civ.App., 151 S.W.2d 863, error refused.
29 C.J. p. 679 note 56.

Water coming on oil-surfaced road

A county's exercise of its right to surface highway with oil does not change duty of person owning or operating property adjacent to highway to exercise reasonable care not to jeopardize or endanger safety of persons lawfully using highway as a means of passage or travel, and, where an oil company engaged in the manufacture of gasoline so managed its plant that water was blown onto the highway and rendered it slippery, such company was liable to a traveler sustaining damage by reason of the slippery condition of the highway caused by the water on the oil-surfaced road.—Skelly Oil Co. v. Johnston, supra.

49. Cal.—Galiano v. Pacific Gas & Electric Co., 67 P.2d 388, 20 Cal.App.2d 534.
Conn.—Muratori v. Stiles & Reynolds Brick Co., 25 A.2d 58, 128 Conn. 674.
Minn.—Zacharias v. Nesbitt, 185 N.W. 295, 150 Minn. 369, 19 A.L.R. 1016.

50. Mass.—O'Keefe v. William J. Barry Co., 42 N.E.2d 267, 311 Mass. 517.

Stone not shown to have fallen from abutter's truck

Where stone which caused pedestrian to fall when she stepped on it was on public driveway, leading from abutting owner's quarry to highway, through no proved negligence of defendant whose trucks were using the highway, defendant had no obligation to remove such stone on which pedestrian could base action for her injuries, and defendant's employment of watchman to remove stones from such driveway was not an "admission" of negligence by defendant.—O'Keefe v. William J. Barry Co., supra.

51. Cal.—Black v. Southern Pac. Co., 12 P.2d 981, 986, 124 Cal.App. 321, citing **Corpus Juris.**
N.D.—Rozell v. Northern Pac. R. Co., 167 N.W. 489, 39 N.D. 475.
S.C.—Morris v. Mills, 113 S.E. 632, 121 S.C. 200.

Failure to protect traveler from falling into pond

An abutting owner is not guilty of actionable negligence merely in maintaining a pond in close proximity to a highway, and, since the highway is wholly under control of the public authorities they, and not the abutter, are liable for such damage as may be caused by reason of a child's falling off the highway and into the pond because of absence of adequate protection at the point of the fall.—Morris v. Mills, supra.

52. Cal.—Black v. Southern Pac. Co., 12 P.2d 981, 124 Cal.App. 321.

Obstruction by licensees of ball ground

When a mill company gratuitously maintained a ball ground on its premises for its employees, without direction or supervision, it is manifest that the relation of licensor and licensee without pecuniary compensation existed between them, and it is not liable for an injury caused by obstruction of an adjoining highway by a rope intended to exclude spectators who did not pay for admission, there being no evidence that it had actual or implied knowledge thereof.—Brooks v. Henrietta Mills, 110 S.E. 96, 182 N.C. 719.

53. Mo.—Davis v. Thompson, 114 S.W. 550, 134 Mo. 13.
29 C.J. p. 679 note 58.

54. Minn.—Otten v. Big Lake Ice Co., 270 N.W. 133, 198 Minn. 356.

Tunnel

Where a tunnel was constructed by an ice company for use in taking ice under the highway, but the company had the right to and did proceed only under authority of a contract with county authorities pursuant to plans and specifications approved by the state highway department, and a traveler fell into an uncovered portion of the tunnel, the ice company was not liable, inasmuch as the manner of construction was under the control of the public authorities and not under the control of the company.—Otten v. Big Lake Ice Co., supra.

55. S.D.—Fenton v. Ackerman, 285 N.W. 516, 66 S.D. 465.

56. N.Y.—Harlow v. Humiston, 6 Cow. 189.

Sidewalk Ordinarily an abutting owner is not liable for the condition of a sidewalk constituting a part of the highway in front of the premises in the absence of a duty created by statute or ordinance,[57] such as for defective conditions which resulted from causes not traceable to him and which he had no legal duty to correct.[58] It has been held that the abutter is not liable for defects in an adjacent sidewalk caused by his own lawful use thereof, although he may be held responsible for damage resulting from such defects where they originate from artificial causes on his own property.[59]

§ 254. Care and Duty as to Condition of Highway Generally

a In general
b Sufficiency and safety of highway

a. In General

The state or subordinate governmental unit on which liability for defects or obstructions in the highways may be imposed is not held to the liability of an insurer but is required only to exercise reasonable care. A similar rule ordinarily extends to private individuals although in some instances they may be liable as insurers. In determining the question of reasonable care such matters as the extent of the highways and the available resources may be factors.

Even in cases where they may be held responsible for damage arising from defects or obstructions in highways, under principles discussed supra §§ 249, 250, the states,[60] counties,[61] towns,[62] or other governmental authorities[63] are not insurers of the safety of their highways or of travelers thereon. This rule applies also with regard to the liability of contractors as to travelers on the highways which they are engaged in constructing or on which they are working.[64] It has, however, been held that one who unlawfully obstructs the use of a highway for his own ends is charged as an insurer against accident of one lawfully traveling on the highway,[65] but the rule does not apply to a case where a contractor is engaged in taking down a building, and there is no excavation or obstruction in the highway by reason of such work.[66]

State or its officers Ordinarily the state is bound only to the use of reasonable care in the construction and maintenance of its highways,[67] and although the case may be one wherein the state has waived its immunity from suit no recovery will be

ND—Rozell v. Northern Pac. R. Co., 167 N.W. 489, 39 N.D. 175

57. Ala.—City of Birmingham v. Wood, 197 So. 885, 890, 240 Ala. 138, citing **Corpus Juris.**
29 C.J. p. 679 note 59

58. Del.—Massey v. Worth, 197 A. 673, 9 W.W.Harr. 211
Abutter's liability for damage caused by snow and ice see infra § 258

59. Del.—Massey v. Worth, supra

60. Kan.—Parsons v. State Highway Commission, 72 P.2d 75, 146 Kan. 476
Ky.—Commonwealth v. Dever, 143 S.W.2d 1065, 284 Ky. 150
N.Y.—Tucker v. State, 35 N.Y.S.2d 689, 178 Misc. 643—Denby v. State, 262 N.Y.S. 333, 146 Misc. 420—Worden v. State, 236 N.Y.S. 505, 134 Misc. 818, affirmed 239 N.Y.S. 769, 228 App.Div. 739—Elansky v. State, 231 N.Y.S. 671, 133 Misc. 331, affirmed 233 N.Y.S. 744, 226 App.Div. 713—Reuther v. State, 211 N.Y.S. 783, 126 Misc. 773, affirmed 216 N.Y.S. 902, 217 App.Div. 801—Monahan v. State, 41 N.Y.S.2d 642—Louden v. State, 41 N.Y.S.2d 455
Vt.—Zeno's Bakery v. State, 166 A. 379, 105 Vt. 370
The state highway department is not an insurer of the safety of travelers over its highways
Ky.—Commonwealth v. Dever, 143 S.W.2d 1065, 284 Ky. 150
S.C.—Bunton v. South Carolina State Highway Department, 196 S.E. 188, 186 S.C. 463—Cooper v. South Carolina Highway Department, 190 S.E. 199, 183 S.C. 155

61. Cal.—Beckley v. Vezu, 73 P.2d 296, 23 Cal.App.2d 371
Md.—Mayor and City Council of Baltimore v. Thompson, 189 A. 822, 825, 171 Md. 460, citing **Corpus Juris.**
Miss.—Mississippi Power Co. v. Sellers, 133 So. 594, 160 Miss. 512
Neb.—Brooks v. Thayer County, 254 N.W. 413, 126 Neb. 610
Pa.—Nelson v. Duquesne Light Co., 12 A.2d 299, 303, 338 Pa. 37, quoting **Corpus Juris.**
S.C.—Fann v. State Highway Department, 165 S.E. 785, 787, 167 S.C. 84, quoting **Corpus Juris.**
Wash.—Berglund v. Spokane County, 103 P.2d 355, 4 Wash.2d 309—Fritch v. King County, 102 P.2d 249, 4 Wash.2d 87—Boskovich v. King County, 61 P.2d 1299, 188 Wash. 63, 107 A.L.R. 591
29 C.J. p. 680 note 63

62. N.Y.—Hooker v. Town of Hanover, 288 N.Y.S. 290, 247 App.Div. 623
29 C.J. p. 680 note 63

63. Wis.—Buckley v. Washington County, 207 N.W. 558, 189 Wis. 176
Municipal corporation see the C.J.S. title Municipal Corporations § 802, also 43 C.J. p. 999 note 28

Negligence with respect to excavation
"Negligence" on part of highway district with respect to excavation in highway is failure to perform act or do thing which reasonably prudent person under like circumstances would do or perform.—Strickladen v. Green Creek Highway Dist., 248 P. 456, 42 Idaho 738, 49 A.L.R. 1057

64. Miss.—Dunn Const. Co. v. Nail, 7 So.2d 881, 192 Miss. 793
Wis.—Buckley v. Washington County, 207 N.W. 558, 189 Wis. 176
Liability of highway contractors generally see supra § 252 b

65. Cal.—Stockton Auto Co. v. Confer, 97 P. 881, 154 Cal. 402
Liability of persons causing defects generally see supra § 252 a

66. N.Y.—Eccles v. Darragh, 46 N.Y.Super. 186

67. Ky.—Commonwealth v. Dever, 143 S.W.2d 1065, 284 Ky. 150
N.Y.—Warren v. State, 219 N.Y.S. 530, 219 App.Div. 124—Killoran v. State, 278 N.Y.S. 659, 155 Misc. 26—Elansky v. State, 231 N.Y.S. 671, 133 Misc. 331, affirmed 233 N.Y.S. 744, 226 App.Div. 713—Reuther v. State, 214 N.Y.S. 783, 126 Misc. 773, affirmed 216 N.Y.S. 902, 217 App.Div. 801—French v. State, 198 N.Y.S. 878, 120 Misc. 867—Monahan v. State, 41 N.Y.S.2d 642
Failure to use ordinary care
State is liable to one injured because of highway defects for its failure to use ordinary care and reasonable caution in maintaining and repairing highway.—Marttas v. State, 232 N.Y.S. 192, 133 Misc. 326.

allowed if there was no breach of duty on the part of the state,[68] liability depending on the nature of the alleged defect or obstruction[69] and on whether the highway was reasonably safe for travel under the principles discussed infra subdivision b of this section Under statutes imposing on the state a duty to keep highways and culverts in repair, the duty of the state is to keep them in a reasonably safe condition and it must pay damages for defects arising from breach of its statutory duty, its duty in such respects not being measured by the exercise of ordinary care and diligence in respect of repair, but by the statutory obligation to keep the highway or culvert in good and sufficient repair[70]

Counties, towns, or other political subdivisions The duty of a county, town, or similar subordinate political body is limited to the exercise of reasonable care in respect of its roads,[71] but, where assuming responsibility under principles discussed supra § 250, such bodies must use, and are liable to any one injured by their failure to use, at least ordinary or reasonable diligence[72] at all times,[73] when practicable,[74] to keep the road reasonably safe under reasonably anticipated traffic conditions as discussed infra subdivision b of this section Under some statutes, however, it is no defense that the governmental agency used ordinary care, where, after notice of a defect, the road is not made reasonably safe[75] So, where the statute requires towns to keep their highways safe, their duty is not limited to the expenditure of a reasonable sum on the maintenance thereof[76]

Highway contractors The primary duty rests on an independent contractor to exercise reasonable care for the safety of the general public traveling over a road on which he is working,[77] or to take suitable measures to indicate to the public that a road or portion thereof is closed during construction,[78] and while engaged in improving the highway he is bound to exercise reasonable care in performing the work[79] The liability of a highway contractor is, however, limited to the exercise of reasonable care and diligence[80]

Abutting owners An abutting owner is under a duty to use reasonable care to keep his premises in such condition that nothing originating on such premises creates a defect or obstruction in the adjacent highway endangering travelers,[81] but he is

68. NY—Seelye v State 34 N Y S 2d 205, 178 Misc 278—Stebbins v State 288 N Y S 611, 159 Misc 478 affirmed 6 N Y S 2d 150, 254 App Div 815

Duty to repair not shown

Where claimant for damages from alleged defective condition of a gravel shoulder alongside state's right of way within an incorporated village did not show the existence of a duty on the state to maintain and repair the shoulder claimants were not entitled to recover—Seelye v State, 34 N Y S 2d 205, 178 Misc 278

69 NY—White v State 185 N Y S 237, 113 Misc 595—Short v State, 179 N Y S 539, 109 Misc 617

70. Vt—Zeno's Bakery v State, 166 A 379 105 Vt 370

71. Mich—Goodrich v Kalamazoo County, 8 N W 2d 130

Wash—Boskovich v King County, 61 P 2d 1299, 188 Wash 63, 107 A L R 591

72. NY—James v Delaware, L & W R Co, 251 N Y S 558 233 App Div 617, affirmed 182 N E 202, 259 N Y 609

Pa—Nelson v Duquesne Light Co, 12 A 2d 299 303, 338 Pa 37 quoting **Corpus Juris**—Wensel v Township of North Versailles, 7 A 2d 590 136 Pa Super 485

S C—Fann v State Highway Department, 165 S E 785, 787, 167 S C 84, quoting **Corpus Juris.**

29 C J p 680 note 64

73. Pa—Nelson v. Duquesne Light Co, 12 A 2d 299 303 338 Pa 37, quoting **Corpus Juris**

S C—Fann v State Highway Department, 165 S E 785, 787, 167 S C 84 quoting **Corpus Juris.**

29 C J p 680 note 65

Continuous character of duty

County having control of highways has positive and continuous duty to use reasonable care to keep highway safe for public—Simmons v Cowlitz County 120 P 2d 479 12 Wash 2d 84—Barton v Spokane County 69 P 2d 151 190 Wash 519—Boggess v King County, 274 P 188, 150 Wash 578

74. Pa—Nelson v Duquesne Light Co 12 A 2d 299 303, 338 Pa 37, quoting **Corpus Juris.**

S C—Fann v State Highway Department, 165 S E 785 787 167 S C 84, quoting **Corpus Juris.**

29 C J p 680 note 66

75. Kan—Cunningham v Clay Tp, 76 P 907 69 Kan 373

29 C J p 680 note 70

76. R I—Stone v Langworthy, 40 A 832 20 R I 602

77. Cal—Folkins v Johnston, 12 P 2d 154, 121 Cal App 169

Tenn—Finchem v Oman, 72 S W 2d 564, 18 Tenn App 40

Creation of nuisance

The fact that an independent contractor was engaged in work incidental to separation of the grades of intersecting highways under a grant of authority from the state highway commission does not relieve him of his obligations to the traveling public, as he is nevertheless under a duty to exercise the degree of care commensurate with the risks involved and not privileged to create or maintain a nuisance in the highway—Hallett v Wm Eisenberg & Sons, 183 A 143, 116 N J Law 201

Duty to protect public

Obligation rests on contractor to safeguard traveling public from impending danger, if any arising out of construction work on road—Tri-State Engineering Co v Graham, 148 A 439 158 Md 398

78. Colo—Lewis v La Nier 270 P 656, 84 Colo 376

79. N H—Burroughs v Lane Constr Corp 88 A 1001, 77 N H 121

Okl—Toler v Hawkins, 105 P 2d 1041, 188 Okl 58

Tex—Brown & Root v Weldy, Civ App 75 S W 2d 915—Eubanks v Schwalbe, Civ App, 55 S W 2d 906 908 citing **Corpus Juris,** and modified on other grounds U S Fidelity & Guaranty Co v Eubanks 87 S W 2d 248 126 Tex 405—Overstreet v McClelland, Civ App, 13 S W 2d 990, error dismissed

80. Miss—Dunn Const Co v Nail, 7 So 2d 884, 192 Miss 793

81. Conn—Kane v New Idea Realty Co, 133 A 686, 104 Conn 508—Ruocco v United Advertising Co, 119 A 48, 98 Conn 241

Mass—Nichols v Donahoe, 34 N E 2d 681, 309 Mass 241.

under no obligation to keep the adjacent highway free of defects and obstructions originating from sources other than his own premises,[82] and, as shown supra § 253, his liability for damage sustained on an adjacent highway will in general depend on whether or not he had control of, and responsibility for, the instrumentality causing the damage

One working in or using highway. Anyone undertaking work in a public highway which, unless carefully done, will create conditions dangerous to members of the public using the highway in the ordinary manner is under a duty to use requisite care,[83] and where one engaged in the lawful use of a highway causes an obstruction therein which may endanger others he must use ordinary care to prevent injury to travelers[84]

Factors determining reasonable care It has been held that, in determining whether reasonable care has been taken by the authorities to keep the highway reasonably safe, it is proper to consider the total extent of the highways within the jurisdiction,[85] and the probable expense of doing the particular work under consideration as compared with the resources of the governmental agency to meet such expense[86] A town is not, as a matter of law, free from liability on account of a loose plank in a sidewalk, merely because the town contains a population of only five or six hundred people[87]

b. Sufficiency and Safety of Highway

In general the duty imposed is to construct and maintain a highway which is reasonably safe for public travel of the usual kind, having in view the character and location of the road and the amount and nature of the traffic

In general the duty imposed on the highway authorities is to maintain the highways in a condition reasonably safe for travel,[88] having in view the probable traffic[89] and the character of the road and

Tex —Skelly Oil Co v Johnston, Civ App 151 S W 2d 863 error refused
Negligence of abutting owner in respect of highway travelers generally see the C J S title Negligence §§ 77–80 also 45 C J p 859 note 58–p 862 note 14

82. Cal —Galiano v Pacific Gas & Electric Co, 67 P 2d 388 20 Cal App 2d 534
Conn —Muratori v Stiles & Reynolds Brick Co, 25 A 2d 58 128 Conn 674
Minn – Zacharias v Nesbitt, 185 N W 295, 150 Minn 369, 19 A L R 1016

83. N Y —Boylhart v Di Marco & Reimann, Inc , 200 N E 793 270 N Y 217—Satre v City of New York 38 N Y S 2d 640

84 Neb —Grantham v Watson Bros Transp Co 9 N W 2d 157, denying rehearing 6 N W 2d 372—Simonsen v Thorin, 234 N W 628, 120 Neb 684, 81 A L R 1000

85 Mass —Sanders v Palmer, 28 N E 778 154 Mass 175
29 C J p 681 note 81

86. Mass —Sanders v Palmer, supra
29 C J p 681 note 82
Lack of funds of political subdivision generally see supra § 250 b

87. Iowa —Graham v Oxford, 75 N W 473, 105 Iowa 705

88. Cal —Galiano v Pacific Gas & Electric Co, 67 P 2d 388, 20 Cal App 2d 534
Conn —Albright v MacDonald, 183 A 389, 121 Conn 88—Dunn v MacDonald, 147 A 26, 110 Conn 68
Md —Willis v Milling, 194 A 584, 173 Md 28
Mass —Tuckerman v Moynihan, 185 N E 2, 282 Mass 562.
Neb —Boomer v Lancaster County 218 N W 751 116 Neb 718
N Y —Shaknis v State 295 N Y S 663 251 App Div 767 affirmed Doulin v State, 13 N E 2d 472, 277 N Y 558—Warren v State, 219 N Y S 530 219 App Div 124—Wenzel v State 36 N Y S 2d 943 178 Misc 932—Louden v State, 41 N Y S 2d 455
Pa —Nelson v Duquesne Light Co 12 A 2d 299, 303 338 Pa 37, quoting **Corpus Juris** –Five v Washington Tp 139 A 871, 291 Pa 240 —Bearman v Allegheny County 21 A 2d 112, 145 Pa Super 330
S C —Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155—Fann v State Highway Department 165 S E 785, 787 167 S C 84 quoting **Corpus Juris**—Morris v Mills, 113 S E 632 121 S C 200
Wash —Simmons v Cowlitz County 120 P 2d 479, 12 Wash 2d 84
29 C J p 671 note 71, p 680 note 67

Changing conditions of travel

(1) While the general principles covering liability for highway accidents remain the same, changing conditions of travel require precautions and road conditions different from those than heretofore standard and each case on a factual basis of care must be judged in the light of conditions as now prevailing rather than on the basis of old cases decided under the different factual conditions of a former age —Huston v Chenango County, 1 N Y S 2d 252, 253 App Div 56, affirmed 16 N E 2d 301, 278 N Y 646

(2) Although degree of care required of towns in maintaining highways is commensurate with modern traffic conditions, duty is to use merely ordinary care under existing conditions, and negligence can be based only on omitting reasonably to foresee and anticipate danger and to take necessary precautions to avert it —Rigby v Town of Gerry, 204 N Y S 769 209 App Div 391

If the traveled track of a town road is in such a state of repair as to be reasonably safe for travelers, the town has complied with its obligations —Wisniewski v Town of Belmont, 250 N W 859, 213 Wis 34

Safeguards at danger points

(1) Those charged with maintenance of highways may in proper case be held negligent on failure to provide safeguards at dangerous points
Md —Kent County Com'rs v Pardee, 134 A 33 151 Md 68
N Y —Sporborg v State, 234 N Y S 476, 226 App Div 114
Wash —Fritch v King County, 102 P 2d 249, 4 Wash 2d 87

(2) The rule of duty in such cases is one of reasonableness and sufficient protection for travel generally
Mason v Town of Andes, 25 N Y S 2d 738, 261 App Div 351, reversing 15 N Y S 2d 834, affirmed 39 N E 2d 262

Safe use not conclusive

The fact that teams are driven safely over a highway does not conclusively show that it is reasonably safe for public travel —Hunt v Lincoln Tp, 92 N W 288, 131 Mich 637

89. Pa —Nelson v Duquesne Light Co, 12 A 2d 299, 303, 338 Pa 37, quoting **Corpus Juris.**
S C —Fann v State Highway Department, 165 S E 785, 787, 167 S C 84, quoting **Corpus Juris.**
29 C J p 680 note 68

the use reasonably to be anticipated[90] So, in determining whether a highway is in a reasonable state of repair, its location and character and the extent of travel thereon are to be considered[91]

The duty to keep the highway in a reasonably safe condition means safe for general or ordinary travel,[92] or use for any lawful and proper purpose,[93] including use for both pedestrians[94] and vehicles,[95] such as bicycles[96] and motor vehicles, the duty and liability of highway authorities and others in respect of motor vehicles being discussed in the C J S title Motor Vehicles §§ 168–212, also 42 C J p 833 note 45 p 862 note 71, but a highway which is reasonably safe for ordinary travel is not defective merely because no special provision is made for its use by bicycles[97]

Reciprocal duty of care The duty is to keep a highway safe for a traveler himself exercising ordinary care,[98] and a highway will be deemed safe within the usual requirements if it may be negotiated successfully by all but the most reckless and careless drivers,[99] as there is no obligation so to construct and maintain highways as to insure the safety of reckless drivers,[1] and, as respects travel by horse, it is required merely to keep the highway in a reasonably safe condition for the ordinary horse[2]

Absence of reasonable safety as defect Under principles of law imposing liability for defects in highways, any road not reasonably safe for the reasonable use of the traveling public will be deemed defective,[3] a "defective road" within the meaning of statutes permitting civil actions for recovery of damages for injuries sustained by means of a de-

90. Pa—Frye v Washington Tp, 139 A 871, 291 Pa 240

91. Pa—Nelson v Duquesne Light Co, 12 A 2d 299, 303, 338 Pa 37, quoting **Corpus Juris.**
S C—Fann v State Highway Department, 165 S E 785, 787, 167 S C 84, quoting **Corpus Juris**—Morris v Mills, 113 S E 632, 121 S C 200
29 C J p 681 note 79

Amount of travel

(1) Greater obligation rests on town or county with respect to much-traveled thoroughfare in city or thickly settled portion of community than exists where road runs through an isolated section of the country—Hooker v Town of Hanover, 288 N Y S 290, 247 App Div 623

(2) When a township became one of the first class, under Act April 28, 1899, § 7 (P L 104) it became the duty of the commissioners thereof to cause all public highways in use as such to be effectually opened, kept in repair, and free of all impediments, but such highways were not required to be kept in as smooth and convenient condition for travel as is necessary in localities where there is much travel and a thickly settled population—Shaw v Plains Tp, 119 A 289, 275 Pa 289, 27 A L R 1101

(3) Rule applicable to maintenance of streets in towns and cities does not apply to roads in rural districts, but a township must provide a reasonably safe highway for usual and ordinary travel and must repair dangerous holes or other irregularities in highway with suitable material—Willetts v Butler Tp, 15 A 2d 392, 141 Pa Super 394

92. Md—Board of Com'rs for Anne Arundel County v Vanskiver, 171 A 705, 166 Md 481
Mich—Goodrich v Kalamazoo County, 8 N W 2d 130
Miss—Mississippi Power Co v Sellers, 133 So 594, 160 Miss 512
N Y—Roberts v Town of Eaton 141 N E 667, 238 N Y 420, 36 A L R 411, reversing 202 N Y S 360, 207 App Div 56
Pa—Wensel v Township of North Versailles 7 A 2d 590, 136 Pa Super 485
S C—Fann v State Highway Commission, 165 S E 785, 787, 167 S C 84, quoting **Corpus Juris.**
Wash—Fritch v King County, 102 P 2d 249, 4 Wash 2d 87—Boskovich v King County, 61 P 2d 1299, 188 Wash 63, 107 A L R 591
29 C J p 671 note 71, p 680 note 72

Accident not reasonably to be anticipated

The requirement that the state maintain its highways in a reasonably safe condition does not mean that it has to guard against accidents which in the ordinary course of events may not reasonably be expected to happen—Fletcher v State, 256 N Y S 756 143 Misc 457

Night driving in fog

The state does not assume any insurance liability to travelers on the highway attempting to proceed through a fog, but when it has provided necessary precautions for those using the highway under ordinary conditions at night, exclusive of fog the state has done all that it is required to do—Elansky v State, 231 N Y S 671 133 Misc 331, affirmed 233 N Y S 744, 226 App Div 713

93. Mass—Gregory v Adams, 14 Gray 242
Wis—Johnson v Highland, 102 N W 1085, 124 Wis 597
29 C J p 681 note 73

94. N Y—Wager v State, 10 N Y S 2d 310, 170 Misc 357, modified on other grounds 14 N Y S 2d 29, 257 App Div 580—Gaynor v Town of Hempstead, 275 N Y S 562, 153 Misc 321

Separate walk

Highway being for use of pedestrians, as well as vehicles, town superintendent of highways must maintain highway in reasonably safe condition for both classes of travelers in absence of special provision for use thereof by pedestrians, or keep separate walk within highway limits for pedestrians' use in reasonably safe condition—Gaynor v Town of Hempstead, supra

95 Mass—Dupuis v Town of Billerica, 157 N E 339, 260 Mass 210
N Y—Gaynor v Town of Hempstead, 275 N Y S 562, 153 Misc 321
Pa—Geiger v Dowdy, 170 A 420, 111 Pa Super 485
29 C J p 681 note 74

96. N H—Hendry v North Hampton, 56 A 922, 72 N H 351, 101 Am S R 681, 64 L R A 70
29 C J p 681 note 74

97. R I—Fox v Clarke, 57 A 305, 25 R I 515, 65 L R A 234, 1 Ann Cas 548
29 C J p 681 note 75

98. Neb—Frickel v Lancaster County, 213 N W 826, 115 Neb 506
Wash—Berglund v Spokane County, 103 P 2d 355, 4 Wash 2d 309

99. La—Becker v Illinois Cent R Co, 147 So 378

1. Miss—Graves v Johnson, 176 So 256, 179 Miss 465, followed in Graves v Hamilton, 177 So 360—Mississippi Power Co v Sellers 133 So 594, 160 Miss 512

2. Pa—Bitting v Maxatawny Tp, 35 A 715, 177 Pa 213—Trexler v Greenwich Tp, 31 A 1090, 168 Pa 214—Russell v Westmoreland County, 26 Pa Super 425
29 C J p 681 note 76

3 Conn—Dunn v MacDonald, 147 A 26, 110 Conn 68.

fective road being defined as one not reasonably safe for travel in view of the purposes for which it is needed and used [4] Conversely, a road claimed to be defective must be not reasonably safe for public travel [5] Omission to supply statutory safeguards on a highway constitutes a defect within the meaning of statutes of this character [6]

Erosion and wear When a highway becomes dangerous through action of the elements and wear from use, a duty rests on the body charged with its maintenance to repair it and put it into a reasonably safe condition [7]

Removal of obstructions In the exercise of ordinary care those charged with the maintenance of highways must remove obstructions and defects which would naturally or probably cause injury to persons having occasion to travel over the road [8] In removing an obstruction placed in the highway by an individual, a town is bound to exercise a higher degree of care than in removing equally dangerous objects which are incident to the nature of the soil or to the construction of the road, since a traveler has reason to expect that the highway will have some natural obstructions [9]

Conditions due to defective plan of construction In some jurisdictions it has been held that a highway authority is not liable for injuries resulting from conditions due to a defective plan of construction,[10] but such exemption cannot be set up by a township on which the statute imposes the duty of keeping the highways reasonably safe for travel,[11] and it has been held that a county's duty to "maintain" a highway may cast on it the obligation to cure defects in the original construction [12] The rule has been asserted that, while the state or its highway commissioner cannot be held liable for error in the adoption of a plan of highway construction, it will be liable for the continued maintenance of the defect after notice thereof [13]

Road under construction Where a highway under construction has not been completed or accepted, the contractor during such period is obligated only to keep the road in reasonably safe condition for travelers vigilant to observe obstructions incident to the construction work in progress [14]

§ 255. Roads and Portions Thereof to Which Duty Extends

a. In general
b Particular portions of highway and limitation of liability to highway lines
c Existence of duty to maintain

a. In General

If liable under waiver of sovereign immunity, an agency charged with the duty of maintaining public roads or highways is responsible for injuries received on a regular highway, but not for those received on a road not public, not yet opened to traffic, or closed before the occurrence of the accident

If subject to any liability under the rules considered supra §§ 249, 250, an agency charged with the duty of maintaining public roads is liable for injuries received on a regular public highway, however established,[15] from the time it is regularly opened for travel,[16] but it is not liable for injuries received on a road not public[17] or on one designat-

4. Conn—Horton v MacDonald, 135 A 442, 105 Conn 356
What constitutes a defect or obstruction generally see infra § 257

5. Conn—Krooner v City of Waterbury, 136 A 93, 105 Conn 476

6. Kan—Arnold v Board of Com'rs of Colley County, 291 P 762, 131 Kan 343
Lack of warnings on road under construction as a "defect" see infra § 262

7. N Y—Peck v State, 244 N Y S 543, 137 Misc 840

Asphalt patch made slippery by sun and elements

State was negligent in not attending for three years to patch on highway, where ninety per cent of patch contained pure asphalt and only ten per cent had mixture of coarse aggregate, it being almost common knowledge and well known in highway department that sun and elements cause asphalt to come to top forming slippery surface, especially when wet—Killoran v State, 278 N Y S 659, 155 Misc 26
Defects caused by elements generally see infra § 258

8. Pa—Winegardner v Springfield Tp, 102 A 134, 258 Pa 496—Wensel v Township of North Versailles, 7 A 2d 590, 136 Pa Super 485

Leaving obstruction as negligence

After placing obstruction in highway, leaving obstruction there in dangerous situation constitutes negligence—Simonsen v Thorin, 234 N W 628 120 Neb 684, 81 A L R 1000

9. Vt—Morse v Richmond, 41 Vt 435, 98 Am D 600

10. N Y—Monk v New Utrecht, 11 N E 268 104 N Y 552
29 C J p 682 note 96

11. Mich—La Due v Lebanon Tp, 192 N W 636, 222 Mich 301—Malloy v Walker Tp, 43 N W 1012, 77 Mich 448, 6 L R A 695

12. Wash—McClung v King County, 204 P 1064, 119 Wash 14, affirmed 212 P 144, 123 Wash 702

13. Conn—Perrotti v Bennett, 109 A 890, 94 Conn 533

14. Miss—Dunn Const Co v Nail, 7 So 2d 881 192 Miss 793—Myers v Sanders 194 So 300, 189 Miss 198
Neb—Miller v Abel Const Co, 300 N W 405 140 Neb 482

15. N Y—Gaynor v Town of Hempstead 275 N Y S 562, 153 Misc 321
29 C J p 682 note 1

Dead-end street

Evidence held to support finding that dead-end street in outlying section of town was a public highway by dedication and acceptance by use by the public at large, at point where pedestrian struck his foot against water gate which protruded above surface of street, rendering town liable for injuries to pedestrian—Levine v Town of West Haven, 179 A 841, 120 Conn 207

16. Wash—Tait v King County, 148 P 586, 85 Wash 491
29 C J p 682 note 2

17. Mich—Ryan v. Township of

ed as a highway without being opened to travel,[18] or dedicated without acceptance,[19] or one abandoned or discontinued,[20] unless the road is apparently still open.[21] The town may deny the existence of the road as a public highway,[22] even though it has repaired it,[23] although in some cases it has been held that a town is estopped by repairs to deny that the road is public.[24] Mere irregularities in the layout cannot be set up.[25] An abutting owner is not liable for injuries occasioned by an obstruction placed thereon received by one using an abandoned highway running through his premises.[26]

b. Particular Portions of Highway and Limitation of Liability to Highway Lines

Liability of the highway authorities does not as a rule extend to defects or obstructions beyond the boundaries of the highways except as they may endanger travelers within such boundaries. The traveled way must be kept safe, as must other portions of the highway, for such use as should reasonably be anticipated.

Under statutes imposing on a highway authority or agency, such as county commissioners, the duty of keeping roads in repair, they are responsible for the condition of the whole road, including a gravel improved strip contiguous to the hard surfaced portion,[27] but ordinarily no liability exists for an injury occurring beyond the highway lines,[28] although the line of the highway is not marked.[29] However, where a condition exists immediately adjoining the highway which constitutes a nuisance and which renders travel on the highway dangerous, it has been held that the duty of supervisors to safeguard the highway requires them to abate such a nuisance under liability for consequent damage if they fail to take the proper steps,[30] and, where the boundary line is not indicated by visible objects and a traveler while keeping within the general course of travel and close to the highway, and within what he believes to be the highway, is injured by a defect outside thereof, the highway authorities will be liable as if the defect existed within the highway,[31] although such rule has not always been applied in the case of sidewalks.[32] A county which uses and repairs a certain space on a road and invites the public to use it will be liable for failure to repair or guard against a defect suddenly created across it, although such defect is outside the limits of the road to which the county holds the legal title.[33] Where defects outside of the highway combine with defects within the highway to cause an accident, liability has been denied.[34]

Royal Oak, 286 N W 793, 289 Mich 469
29 C J p 682 note 4

Driveway

Plaintiff injured when wagon overturned because of defective condition of driveway was held not entitled to recover against township on ground that driveway was used because another driveway which township had duty to maintain had become impassable, as the town was liable only for defects in its highway or at a point near the driveway it was obligated to keep open, and a defect in the latter place did not cause injury in a different driveway—Cowan v Town of Rockford, 52 P 2d 623, 142 Kan 698

18. Kan—Payne v State Highway Commission, 16 P 2d 509, 136 Kan 561

19. Md—Cox v Board of Com'rs of Anne Arundel County, 31 A 2d 179
Mich—Ryan v Township of Royal Oak, 286 N W 793, 289 Mich 469

Mere user of a road in a platted subdivision of a township is not sufficient to render the road a public highway" within statute imposing duty on townships to keep public highways and streets in reasonable repair but the dedication to the township must be accepted by proper public authorities or control assumed by them before they may be held responsible in damages for injuries sustained through defects or obstructions—Ryan v Township of Royal Oak, supra

20. Mass—Tinker v. Russell, 14 Pick 279
29 C J p 683 note 5

21. Ala—Dunn v Gunn, 42 So 686, 149 Ala 583
29 C J p 683 note 6

22. N H—Tilton v Pittsfield, 58 Vt 327
29 C J p 683 note 7

23. Conn—Reed v Cornwall, 27 Conn 48
Wis—Bogie v Waupun, 43 N W 667, 75 Wis 1, 6 L R A 59
29 C J p 683 note 8

24. Wis—Hopfe v Fulton, 34 Wis 608, 17 Am R 463
29 C J p 683 note 9

25. N H—Norris v Haverhill, 18 A 85, 65 N H 89
29 C J p 683 note 10

26. Ga—Calfee v Jones, 188 S E 307, 54 Ga App 481
Liability of abutting owner for
Defects and obstructions generally see supra § 253
Negligence in use of premises endangering highway travelers generally see the C J S title Negligence §§ 77–80, also 45 C J p 859 note 58–p 862 note 14

27. Ohio—Starling v Board of Com'rs of Portage County, 4 N E 2d 921, 53 Ohio App 293

28. S C—Fann v. State Highway Department, 165 S E 785, 787, 167 S C 84, quoting **Corpus Juris.**

Wis—Hawes v Fox Lake, 33 Wis 438
29 C J p 683 note 12

29. S C—Fann v State Highway Department, 165 S E 785, 787, 167 S C 84, quoting **Corpus Juris.**
29 C J p 683 note 13

30. Pa—Lengle v North Lebanon Tp., 117 A 403, 274 Pa 51

Private lane below highway level

While an abutting property owner has the right to connect his premises with the highway by means of a lane, if he does so under conditions creating danger because of a difference in levels and creates a precipitous decline adjacent to the highway the supervisors of highways have the right and the duty to compel the filling of the lane or to guard the spot by suitable barriers, and may be held responsible in damages for injuries sustained at such spot failing their taking of appropriate action—Lengle v North Lebanon Tp., supra

31. S C—Fann v State Highway Department, 165 S E 785, 787, 167 S C 84, quoting **Corpus Juris.**
29 C J p 683 note 14

32. S C—Fann v State Highway Department, supra, quoting **Corpus Juris.**

33. Wash—Neel v King County, 102 P 396, 53 Wash 490

34. Mass—Richards v Enfield, 13 Gray 344—Rowell v Lowell, 7 Gray 100, 66 Am D 464.

Traveled way The state or other highway body should maintain in a reasonably safe condition for travel that portion of its roadbed which is set aside and maintained so as to invite its use for travel by the public,[35] whether the road is paved or unpaved,[36] and the duty of maintenance and liability for defects extends to unimproved portions of the highway[37] It will also be liable if it suffers the traveled part to be widened or extended by the work of others, or by travel, so as to lead travelers to go on any part within the limits as so widened, and an injury arises from a defect within such limits[38] There may be circumstances under which a highway authority will be liable for injuries occurring outside the traveled way,[39] as where obstructions are so close to that portion of the highway as to be dangerous to travelers thereon[40] Subject to such considerations, however, it may be stated that the duty of the highway authority is fulfilled if it properly maintains the traveled way, and that it is not, as a general rule, liable for defects or obstructions outside of such portion,[41] if it is reasonably straight[42] and wide enough[43] for passing[44]

"Shoulders" The shoulders of a highway are an integral part thereof and should be maintained in a reasonably safe condition,[45] and in the case of highways under the state's control the shoulders may also be regarded as under its control so as to impose liability on it for damage from defects in the shoulder rendering it unsuitable for such use as may reasonably be contemplated for that portion of the highway[46] The shoulders of a highway are not, however, ordinarily regarded as a part of the traveled portion within the contemplation of the law imposing duty of maintenance and liability for damage from defects,[47] and where a highway authority paves and curbs a highway to a reasonable width it thereby clearly designates that as the portion to be used for vehicular traffic, and a macadamized shoulder is obviously not intended for vehicular travel in the same way but for use merely for parking or emergency, so that the highway authority is not liable to one injured by an obstruction while driving along the shoulder of the road[48] Statutes authorizing a state official to repair any unpaved shoulder of a highway outside the pavement maintained by the state where necessary for the protection of such pavement confer on such official a right or privilege and not a mandatory duty,[49] the matter resting in his discretion,[50] and, in the absence of proof that the duty of repair has fallen on the state under exercise of the official's discretion or otherwise under applicable statutes, the state is not liable for damage sustained as a result of a defect in the shoulder[51] Where, however, the state has assumed the duty of construction and maintenance in respect of shoulders, it may be held responsible for damages resulting from defects[52]

35. S C —Livingston v South Carolina State Highway Department, 183 S E 8, 178 S C 323
29 C J p 684 note 23

36. S C —Livingston v South Carolina State Highway Department, supra

37. Ohio —Stuart v Board of Com'rs of Cuyahoga County, 165 N E 53, 30 Ohio App 283

Defect or obstruction between curb and improved portion of a highway or road imposes liability for resultant damage under a statute broadly imposing the duty to keep the "road" in repair —Stuart v Board of Com'rs of Cuyahoga County, supra

38 Mass —Tilton v Wenham, 52 N E 514, 172 Mass 407
N H —Stark v Lancaster, 57 N H 88
29 C J p 684 note 25

39. Ala —City of Tuscaloosa v Fair, 167 So 276, 279, 232 Ala 129, citing **Corpus Juris.**
Conn —Levine v Town of West Haven, 179 A 841, 120 Conn 207
29 C J p 683 note 18

40. Mich —Wakeham v St Clair Tp, 51 N W 696, 91 Mich 15
29 C J p 684 note 24

41 Me —Morse v Belfast, 77 Me 44
Mich —Goodrich v Kalamazoo County 8 N W 2d 130
Vt —Rive v Montpelier 19 Vt 470
Wis —Wisniewski v Town of Belmont 250 N W 859, 213 Wis 34—Goeltz v Ashland, 44 N W 770, 75 Wis 642
29 C J p 683 note 19

Surface within legal limits of lay-out Duty to keep way reasonably safe for travel is performed if surface within legal limits of lay-out is sufficiently extensive for traffic although other parts are left unworked or insufficiently prepared —Dupuis v Town of Billerica, 157 N E 339 260 Mass 210
Liability of private persons causing defect outside traveled way see supra § 252 a

42 Wis —Wheeler v Westport, 30 Wis 392

43. Mont —Howard v Flathead Independent Tel Co, 141 P 153, 49 Mont 197
29 C J p 684 note 21

44. U S —Hull v Richmond, C C R I, 12 F Cas No 6,861, 2 Woodb & M 337
29 C J p 684 note 22

45. N Y —Wager v State, 14 N Y S 2d 29 257 App Div 580 modifying 10 N Y S 2d 310, 170 Misc 357

Pedestrian stepping onto shoulder to avoid passing car did what any prudent person would have done under the circumstances and could recover against the state for injuries sustained through a defect in the shoulder of the road which shoulder formed an integral part thereof that should have been maintained in a reasonably safe condition — Wager v State supra

46 Conn Griffith v Town of Berlin 32 A 2d 56 130 Conn 84

47 Mich —Goodrich v Kalamazoo County 8 N W 2d 130

48. Tenn —Clayborn v Tennessee Electric Power Co 101 S W 2d 492, 20 Tenn App 574

49. N Y —Seelye v State, 34 N Y S 2d 205 178 Misc 278

50 N Y —Seelye v State supra

51. N Y —Seelye v State, supra

52. N Y —Wilke v State, 36 N Y S 2d 455 178 Misc 765

Drain under shoulder causing dangerous condition
Where highway, bituminous shoulder, and subsurface tile drain were

Sidewalks. A sidewalk has been regarded as a part of the highway so as to render highway authorities charged with the duty of maintaining a highway liable for defects in the sidewalk along such highway,[53] and both counties[54] and towns[55] may be held responsible for defects in sidewalks which they are obligated to maintain, although in the absence of a duty of maintenance no such liability will exist,[56] as where, in the absence of statute specifically imposing the duty of care of such sidewalks on towns, a town is held not liable for injuries from a defect in a sidewalk along a highway which has ceased to be a town way and become a county or state road.[57] It is immaterial to the liability of the highway authority that the walk was built by private persons if it is used by the traveling public,[58] if the authority has expended money for its maintenance and repair,[59] and, even where an abutting property owner has constructed a sidewalk without the consent of a town, the town may be liable for defects therein if it has failed in its duty either to remove such sidewalk or render it safe for use.[60] This liability extends to a sidewalk constructed by a township on a turnpike road with the consent of the turnpike company,[61] but a highway authority,[62] such as a state,[63] is not liable for injuries from defective sidewalks the construction and maintenance of which are purely private enterprises, nor is it liable for defects on a part of the sidewalk outside the line of the highway, although such line is not marked.[64]

c. Existence of Duty to Maintain

A highway body can be held liable for damages arising from a defect or obstruction in the highway only where the highway is one as to which it has a duty of maintenance and which is located within its territorial limits

The liability for an injury resulting from a defect or obstruction in the highway, as a general rule, rests on the agency or governmental subdivision which has the duty to maintain and repair such highway,[65] and, conversely, a particular agency or

located within state's right of way passing through a village and were constructed by and had been repaired by the state, and terminating the drain underneath the shoulder was bound to result in a dangerous situation, state was liable to pedestrian injured when stepping into hole in shoulder created by defective construction of drain—Wilke v State supra

53. N Y—Strauch v Town of Oyster Bay, 31 N Y S 2d 534, 263 App Div 833—Southworth v Oswego County, 300 N Y S 166 252 App Div 916—Southworth v Oswego County, 300 N Y S 165 252 App Div 916—Bogan v Town of Riverhead, 283 N Y S 959, 246 App Div 752—Gaynor v Town of Hempstead 275 N Y S 562, 153 Misc 321

54. N Y—Southworth v Oswego County, 300 N Y S 165, 252 App Div 916
Wash—Bullock v Yakima Valley Transp Co, 184 P 611, 187 P 410, 108 Wash 413

55. N Y—Strauch v Town of Oyster Bay, 25 N Y S 2d 809
Pa—Brunacci v Plains Tp, 173 A 329 315 Pa 391
29 C J p 684 note 27

Sidewalk along county highway

Under statute, a town superintendent of highways is liable for negligence in performance of statutory duty to maintain all sidewalks in town constructed by county adjacent to county roads—Strauch v Town of Oyster Bay, 25 N Y S 2d 809

Sidewalk along state highway

Ordinarily there is no duty on part of township to maintain sidewalks along state highway, but such duty may be imposed by statute—Brunacci v Plains Tp, 173 A 329, 315 Pa 391

Duty of town superintendent

Under statutes, duty to repair sidewalks in town or keep them reasonably safe for travel rests on town superintendent of highways—Gaynor v Town of Hempstead 275 N Y S 562, 153 Misc 321

56. N Y—Strauch v Town of Oyster Bay, 31 N Y S 2d 534, 263 App Div 833
Pa—Shaw v Plains Tp, 119 A 289 275 Pa 289, 27 A L R 1101

Dirt path not a sidewalk which town was under duty of keeping in repair under statutory provisions, so that no liability rested on town for damages resulting from its defective condition—Shaw v Plains Tp, supra

57. Pa—Brunacci v Plains Tp, 173 A 329, 315 Pa 391

58 N H—Lambert v Pembroke, 23 A 81 66 N H 280
N Y—Gaynor v Town of Hempstead, 275 N Y S 562 153 Misc 321
Wis—McHugh v Minocqua, 78 N W 478, 102 Wis 291

59. Mich—Welton v Crystal Tp, 116 N W 390, 152 Mich 486

60. N Y—Gaynor v Town of Hempstead, 275 N Y S 562, 153 Misc 321

Notice as imposing duty and liability

Town is liable for injuries to pedestrian because of defective condition of sidewalk, constructed by abutting property owner without consent of town or its superintendent of highways, after he or town knew, or by lapse of time should have known, of existence and condition of walk—Gaynor v Town of Hempstead, supra

61. Pa—Gaughens v Lower Merion Tp 46 Pa Super 63

62. N Y—Van Buren v Bethlehem, 164 N Y S 964, 178 App Div 254—Kibner v State 186 N Y S 654, 114 Misc 444

63. N Y—Marino v State, 15 N Y S 2d 610, 257 App Div 734 reversing 10 N Y S 2d 295 170 Misc 341—Kibner v State, 186 N Y S 654, 114 Misc 444

64. Mass—Stone v Attleborough 4 N E 570 110 Mass 328
29 C J p 681 note 32

65 Kan—Gratney v Board of Com'rs of Wyandotte County 207 P 209, 11 Kan 160
Pa—Brunacci v Plains Tp, 173 A 329, 315 Pa 391
S D—Robinson v Minnehaha County, 277 N W 324 65 S D 628
Wash—McClung v King County 204 P 1064, 119 Wash 14, affirmed 212 P 141
W Va—Clayton v Roane County Court, 123 S E 189, 96 W Va 333

County road within village

Statutes imposing liability on a county for damages arising from its failure to repair roads do not create a substantive obligation of repair, but merely impose liability where such an obligation may otherwise exist, and where under other and controlling statutes the obligation to repair a county road within a village rests on the village and not on the county, and where under other and controlling statutes the obligation to repair a county road within a village rests on the village and not on the county, and the county lacks power to repair such a road without consent of the village, there is no liability resting on the county for damages arising from negligence in re-

governmental subdivision is not liable where the highway is one as to which it has no such duty[66] or where it is beyond its territorial jurisdiction.[67] Hence a county[68] or township,[69] or other local body,[70] is, as a rule, not liable for the negligent maintenance of a highway which has been taken over by the state, and a township is not liable for a highway which has been taken over by the county.[71] Conversely, the county is liable for an injury because of a defect or obstruction in a township road which it has taken over.[72] However, liability may be imposed on a county with respect to a state highway where the county has contracted to keep such highway in repair[73] although there is author-

spect of repair of the road—Sroka v Green Cab Co, 172 N E 531, 35 Ohio App 438, error dismissed Smith v New York Cent R Co, 170 N E 637, 122 Ohio St 45

Detour

Statute authorizing recovery of damages arising from defects in state highway does not authorize recovery for damage caused by defect on county road used as detour while state highway was being repaired --Summerville v State Highway Commission, 32 P 2d 224, 139 Kan 530

66. U S—Tioga County, Pa, v Bohnert, C C A Pa, 299 F 103
Kan--Gratney v Board of Com'rs of Wyandotte County 207 P 209, 111 Kan 160
Neb—Stitzel v Hitchcock County, 298 N W 555, 139 Neb 700—Porter v Lancaster County, 266 N W 584, 130 Neb 705
Ohio—Sroka v Green Cab Co, 172 N E 531, 35 Ohio App 438, error dismissed Smith v New York Cent R Co, 170 N E 637, 122 Ohio St 45--Robinson v Swing, 36 N E 2d 880, 70 Ohio App 83
S D—Waller v Edmunds County, 290 N W 484 67 S D 165--Robinson v Minnehaha County, 277 N W 324, 65 S D 628
29 C J p 673 note 82

Established road

Under statute making board of county commissioners liable for its negligence or carelessness in keeping in proper repair any public, state or county road "established" by such board the use of the quoted word implied that some affirmative act on part of the commissioners should intervene before liability on the part of a county is created—Robinson v Swing 36 N E 2d 880, 70 Ohio App 83

67. Kan—Cunningham v Board of Com'rs of Rice County, 246 P 526, 121 Kan 269

Road in another county

Recovery cannot be had from county for damages caused by defective highway located in another county—Cunningham v Board of Com'rs of Rice County, supra

68. Neb—Porter v Lancaster County, 266 N.W 584, 130 Neb 705
Ohio—Weiher v Phillips, 133 N E 67, 103 Ohio St 249—Bellard v Board of Com'rs of Erie County, 167 N E 404, 31 Ohio App 224
S D—Robinson v Minnehaha County, 277 N W 324, 65 S D 628

Neglect of state officers

Under a statute making a county liable for injuries resulting from defective maintenance of highways and having the effect of allowing recovery for the negligence of county officers in maintaining a highway, and under a later statute transferring to the state the maintenance of county highways, it has been held that the later statute does not repeal the earlier one, but that under a proper construction of both statutory provisions there can be no liability imposed on a county for neglect of state officers in maintaining a county highway taken over for maintenance purposes by the state—Cain v Meade County, 223 N W 734, 54 S D 540

State control of highway work

Where the statute imposes the duty of maintenance of a highway on the state, as by providing that work on the highway is to be performed under directions, rules, and regulations of the state the county is not liable for injuries arising from defects and obstructions in such a highway—Osborne v Galusha, 251 P 1086 143 Wash 127

69. Pa—Brunacci v Plains Tp, 173 A 329 315 Pa 391

70. Ohio—Younts v Avon Lake Village, 19 Ohio App 182

71. Kan—Gratney v Board of Com'rs of Wyandotte County, 207 P 209, 111 Kan 160
Pa—Brunacci v Plains Tp, 173 A 329, 315 Pa 391

Expenditure of county funds on town road relieved the town of the burden of financing such work, but did not relieve the town of liability for insufficiency or want of repair—Stochr v Town of Red Springs, 219 N W 98, 195 Wis 399, reversing 216 N W 487, 195 Wis 399

72. Neb—Franek v Butler County, 257 N W 235, 127 Neb 852, reversing 254 N W 489, 126 Neb 797
Wis—Sippel v Fond du Lac County, 200 N W 459, 184 Wis 607

Original liability of township continued to county

Where a prior statutory mandate imposes on a township the duty to repair a road which is subsequently taken over by a county the liability is continued to the county for injuries occasioned by breach of the duty to repair—Shaw v Plains Tp, 119 A 289, 275 Pa 289, 27 A L R 1101

Road not formally designated as county road

Where a county under township organization improves a highway without designating it as a county road, the failure so to designate the road does not of itself relieve the county of liability for damages resulting from negligence—Franek v Butler County 257 N W 235, 127 Neb 852 reversing 254 N W 489, 126 Neb 797

Test of liability

Under statutes imposing liability for damages, resulting from insufficiency or want of repair of any road, on the town wherein the road is located unless such insufficiency or want of repair is on a road adopted as a county road or on a road which the county is by law bound to keep in repair if the county is liable the town is not and if the county is not liable the town is—Stochr v Town of Red Springs 219 N W 98, 195 Wis 399 rehearing 216 N W 487, 195 Wis 399

73 **Basis of liability**

It may be held either that the county acts in a sovereign capacity with its immunity waived by the statute imposing liability on counties maintaining highways, or that, if there is no immunity because the duty of maintenance arose from contract, then the county may be held liable on common-law principle as an independent contractor--Cain v Meade County, 223 N W 734, 54 S D 540

Duty of state assumed

Where, however under statutory authority, the county contracts with the state to maintain highways, the county assumes not only a contractual obligation to the state, but also a duty to the public and is charged with the same degree of care in maintaining state highways within the county as the state would have been charged with, and under such circumstances the county may be held liable in tort to a member of the public suffering damage as a result of its negligence, whether or not acting in a sovereign capacity—Cain v. Meade County, supra

ity to the contrary[74] If the highway or defective part is under the control of the particular agency it is immaterial that it was constructed by another[75] Where a town in making a road deviates from the true location, it is estopped to deny its liability to maintain the road as constructed[76]

Effect of state aid The fact that the state contributes to the maintenance and repair of highways does not in itself, in the absence of express provision, relieve the local authorities who are aided, such as the county,[77] town,[78] or township,[79] from liability for defects and obstructions[80] Under a statute of this character, it has been held that the test of exemption of a town from liability for the defective condition of a highway is the existence of relief from the duty of maintaining such highway afforded by withdrawal of control from the town, in whole or in part, and local control of the highway, with consequent liability, continues until use of state money for its improvement[81] In other words, state control follows use of state money, and where only part of the road is improved under state money town liability continues as to the portion not so improved[82] Where statutory liability for damage arising from defects or obstructions in highways is imposed on counties and a statutory provision requires counties to maintain the whole of a state highway system lying within the county, the latter may not avoid liability for damage arising from a defect or obstruction in such a highway by the plea that the state and federal governments furnished the money for the construction work being done at the time of the accident[83]

Roads under construction Where the state undertakes construction of a highway within a town or village, and the work is done by a highway contractor under contract with the state, the town or village is not liable for injuries sustained during the period of construction[84]

A highway contractor may not be held responsible for damages resulting from a defect or obstruction in a road not under his supervision[85]

§ 256 —— Roads under Repair

Those in control of, or charged with, maintenance of a highway under repair are charged with the duty of making adequate provision for the safety of the traveling public, but they are not held to an insurer's liability nor

74. Necessity of duty imposed by law

Under statutes imposing on counties liability for damages resulting from defects or obstructions in highways which they are "by law bound" to maintain, a county may not be held liable for such damages occurring on a highway which it was not 'by law bound' to maintain even though under agreement with the state it was by contract bound to maintain the highway.—Larsen v Kewaunee County, 244 N W 578 209 Wis 204

75. Wash.—Tait v King County, 148 P 586 85 Wash 491
29 C J p 682 note 3

76. Mass.—Williams v Cummington 18 Pick 312

77. Mich.—Longstreet v Mecosta County, 200 N W 218 228 Mich 542

78. U S - Coen v Town of Boscawen C C A N H 3 F 2d 121
Pa.—O'Brien v Borough of Jeannette 194 A 811 128 Pa Super 443
R I.—Duffney v Clarke, 119 A 370 44 R I 495

79. Mich.—Fidler v Lafayette Tp, 198 N W 262 226 Mich 635

80. Street coinciding with road

Where a street of a town coincided at places with different state roads, the state's maintenance of such portions was held not to make the whole street a state road, and thereby relieve the town of responsibility for its maintenance.—Duffney v Clarke 119 A 370, 44 R I 495

81. N H.—Pridgham v Town of Effingham, 174 A 769 87 N H 103
—Pridgham v Effingham 168 A 904 86 N H 332

82. N H - Pridgham v Town of Effingham, 174 A 769 87 N H 103
—Bridgham v Effingham 168 A 904 86 N H 332

Accident beyond end of state aid construction

That accident happened within third of mile of end of state-aid construction did not relieve town from liability.—Bridgham v Effingham 168 A 904, 86 N H 332

Insufficiency of state appropriations

Where highway was intended to receive state aid for entire length, but annual appropriations were insufficient to improve more than a part and application of town for use of annual joint fund for improvement of such highway was approved by state commissioner, state control extended only to distance of actual improvement already made, and town was not exempt from liability to traveler injured on unimproved portion.—Bridgham v Town of Effingham, 174 A 769 87 N H 103

83. Neb.—Saltzgaber v Morrill County, 196 N W 627 111 Neb 392

84. N Y.—Farrell v Town of North Salem, 98 N E 760, 205 N Y 457

Suspension of liability

Duties and liabilities of village were suspended during improvement by state's contractor of highway through village, including incidental terrain necessarily involved, and village was not liable under doctrine of respondeat superior for injuries on county highway during construction, nor could it be held on the theory of a nondelegable duty to the public since its duty was suspended.—Allen v Village of Holley 234 N Y S 471, 226 App Div 291

85. Utah - Romney v Lynch 199 P 971 58 Utah 479

Detour over county highway

Although a contractor with the state road commission for construction of hard-surface roadbed on a state road stipulated that, if impossible to maintain it in condition for traffic during construction a reasonable detour should be maintained and kept in good condition, and that dragging or scraping of the detour to make or keep it possible should be done at his expense as directed by the engineer, and that he should at all times provide and maintain a safe passageway for traffic and take all other precautions to prevent accident he, having indicated as a detour a road, which under Comp L 1917 § 2800, and § 5848, subd 15, is deemed a public highway, and which therefore, under § 2823, as amended by L. 1919 c 55, it was the duty of the county commissioners to keep clear of obstructions and in good repair, was not liable for injury to a traveler thereon from defects therein.—Romney v Lynch, supra.

liable for damage sustained without fault attributable to them.

Those charged with the maintenance of highways are under a duty to safeguard the traveling public while a highway is undergoing repair,[86] and anyone making repairs or engaged in extraordinary use of a highway is under a duty to observe proper precautions,[87] as by the erection of suitable barriers or warning devices, under principles discussed infra § 262. A county charged with the maintenance of highways may not evade its responsibility to keep them reasonably safe while undergoing repairs by delegation of the work to another.[88] Those in control of roads under repair are not charged with an insurer's liability, and where they have exercised reasonable care to safeguard the traveling public so far as circumstances require or permit, they are absolved from liability for damage sustained.[89] Reasonable obstructions for repair work are not defects on which liability can be predicated,[90] nor will defects in a temporary road cause liability.[91]

§ 257. Defects and Obstructions Causing Injury

An actionable defect or obstruction in a highway is in general any condition of the highway or object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for traveling, or which from its nature and position would be likely to produce that result by impeding, embarrassing, or opposing passage along the road

A defect or obstruction in a roadway subjecting the state, municipality, board, or officer to liability is in general any condition of the highway or object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling, or which from its nature and position would be likely to produce that result by impeding, embarrassing, or opposing passage along the road,[92] anything in the state or condition of the highway which renders it unsafe or inconvenient for ordinary travel.[93] Such defect or obstruction may consist of the omission of a statutory duty imposed for the purpose of making the highway safer,[94] a slippery condition of the highway, caused by the application of oil,[95]

86 Conn.—Bacon v. Town of Rocky Hill, 11 A.2d 399, 126 Conn. 402.
Idaho—Strickfaden v. Green Creek Highway Dist., 248 P. 456, 42 Idaho 738, 49 A.L.R. 1057.
N.Y.—Miller v. State, 244 N.Y.S. 547, 137 Misc. 768, affirmed 247 N.Y.S. 399, 231 App.Div. 363.
Pa.—Mickey v. Georges Tp., 96 Pa.Super. 437.
Tenn.—Finchem v. Oman, 72 S.W.2d 564, 18 Tenn.App. 40.
Wis.—Prubaker v. Iowa County, 183 N.W. 690, 174 Wis. 574, 18 A.L.R. 303.
29 C.J. p. 685, note 34.

Standard of reasonable care

County must use reasonable and ordinary care under circumstances in inspecting highway and executing repairs which it finds necessary or undertakes to make.—Boomer v. Lancaster County, 218 N.W. 751, 116 Neb. 718.

State not relieved of duty by use of contractor

That highway was being reconstructed and repaired by contractor did not relieve state from duty of exercising reasonable care to protect travelers against accidents.—Miller v. State, 244 N.Y.S. 547, 137 Misc. 768, affirmed 247 N.Y.S. 399, 231 App.Div. 363.

87 Ala.—Carter v. Franklin, 173 So. 861, 863, 234 Ala. 116, citing **Corpus Juris.**
Pa.—Geiger v. Dowdy, 170 A. 420, 111 Pa.Super. 485.

88. Neb.—Frickel v. Lancaster County, 213 N.W. 826, 115 Neb. 506.

89. Neb.—Boomer v. Lancaster County, 218 N.W. 751, 116 Neb. 718.—Frickel v. Lancaster County, 213 N.W. 826, 115 Neb. 506.

90 N.J.—Symons v. Warren, 97 A. 60, 88 N.J.Law 466.
29 C.J. p. 685, note 38.

91. Mass.—Nicodemo v. Southbourgh, 53 N.E. 887, 173 Mass. 455.
Pa.—Brewer v. Sullivan County, 49 A. 259, 199 Pa. 594.

92 Kan.—Bohm v. Racette, 236 P. 811, 118 Kan. 670, 42 A.L.R. 571.
29 C.J. p. 685, note 41.

"Defect" in highway

(1) To come within statute imposing liability against state for damages 'defect' must be condition which affects highway as means of transit.—Payne v. State Highway Commission, 16 P.2d 509, 136 Kan. 561.—29 C.J. p. 685, note 41 [b].

(2) Under statute wherein the state assumes liability for defects in highways maintained by it, it must be assumed that 'defect" was intended to be given the same interpretation as had been given to it in holding towns liable for defects in highways.—Woll v. State, 202 N.Y.S. 754, 122 Misc. 381.

Other than defects in surface

The defects may consist of other than mere defects in the surface of the highway.—Wood v. State, 202 N.Y.S. 340, 122 Misc. 860.

Negligence of a town in constructing an aqueduct, whereby water escapes and undermines the highway to the injury of a traveler, renders the town liable.—Hand v. Brookline, 126 Mass. 324.

93 Mass.—Adams v. Town of Bolton, 9 N.E.2d 562, 297 Mass. 459, 111 A.L.R. 856.—Gregoire v. City of Lowell, 118 N.E. 376, 253 Mass. 119.—Barber v. Roxbury, 11 Allen 318.

94 Kan.—Story v. Board of Com'rs of Brown County, 226 P. 772, 116 Kan. 300.

Duty imposed by new statute

Where a statute is enacted making counties liable for injuries caused by defective highways and thereafter the legislature passes a new statute imposing additional duties on counties in respect of highways, for the purpose of making highways safer, omission of a county to perform such new duty creates a defect within the meaning of the earlier statute for which the county may be held to respond in damages for resultant injuries.—Story v. Board of Com'rs of Brown County, 226 P. 772, 116 Kan. 300.

95. N.Y.—Sporborg v. State, 234 N.Y.S. 476, 226 App.Div. 113.—Kirchner v. State, 228 N.Y.S. 718, 223 App.Div. 543.

An oil company maintaining gasoline manufacturing plant near highway must exercise reasonable care to prevent injury to travelers on highway as result of manner in which company utilizes its equipment and plant and can be held responsible for damage resulting from slippery condition of highway caused by water blowing from company's

a "fat spot," or potentially slippery surface;[96] an insufficient or defective culvert,[97] although it may have been adequate when it was constructed,[98] an unguarded ditch beside or along the highway,[99] or a hole in the roadway,[1] or so near the traveled way that travelers are likely to fall into it in avoiding another obstruction,[2] although there is no liability where the depression or defect is slight or its location and character are such that there can be no reasonable likelihood of an accident therefrom.[3] An uneven surface may also constitute such a defect as will impose liability for injury caused thereby,[4] although no liability exists where the unevenness is not such as to endanger ordinary travel.[5]

Liability has been imposed for injuries resulting from projections across the highway,[6] objects falling upon the road[7] except where liability is predicated on peculiar local statutes not covering such cases,[8] structures in the highway,[9] poles or posts,[10] trees,[11] fences,[12] bridges over ditches or excavations,[13] piles of material,[14] or other objects upon the roadway.[15]

Defects or obstructions not actionable Actionable defects or obstructions do not include objects or constructions placed in the highway to serve some necessary and convenient purpose, and not in such a position as to interfere unreasonably with travel,[16] the narrowness and crookedness of a high-

towers onto highway—Skelly Oil Co v Johnston, Tex Civ App, 151 S W 2d 863, error refused

96. N Y—Karl v State, 18 N E 2d 852, 279 N Y. 555, reversing 7 N Y S 131, 255 App Div 825, and motion granted 20 N E 2d 22, 280 N Y 574

97. N H—Roberts v Town of Lisbon, 149 A 508, 84 N H 266

Culvert is "insufficient" if danger therefrom is such that ordinary men would recognize it and take precautionary measures—Monroe v Town of Deerfield, 147 A 411, 84 N H 144

Inadequate length of culvert may constitute as serious defect as excessive height—Roberts v Town of Lisbon, 149 A 508, 84 N H 266

Repair of a defective culvert implies making the highway safe from the proximate results of defect—Chapman v Town of Lee, 119 A 440, 80 N H 484

Culverts held not defects

Kan—Sell v McPherson Tp, 107 P 2d 670, 152 Kan 731—Houdashelt v State Highway Commission, 21 P 2d 343, 137 Kan 485—Watson v Parker Tp, 213 P 1051, 113 Kan 130

Weeds at the end of a culvert are not such a defect as to impose a duty on the township of cleaning them out, as long as their presence does not obstruct or hinder the culvert's purpose of facilitating the draining of water off the road or roadside—Sell v McPherson Tp, 107 P 2d 670, 152 Kan 731

98. N H—Monroe v Town of Deerfield, 147 A 411, 84 N H 144

99. Neb—Beebe v Scott's Bluff County, 138 N W 757, 92 Neb 501
Tenn—Chandler v Davidson County, 218 S W 222, 142 Tenn 265
29 C J p 685 note 43

1. Kan—Williams v Kansas State Highway Commission, 8 P 2d 946, 134 Kan 810
N Y.—Worden v. State, 236 N Y S 505, 134 Misc 848, affirmed 239 N Y S 769 228 App Div 739
29 C J p 685 note 44

Pitfall

La—Smith v City of Baton Rouge, 117 So 559, 166 La 472

2. Mich—Wakeham v St Clair Tp, 51 N W 696, 91 Mich 15

3. Kan—Snyder v State Highway Commission, 30 P 2d 102, 139 Kan 150
N Y—Hogan v State, 199 N Y S 275, 120 Misc 582—French v State, 198 N Y S 878
29 C J p 685 note 46

4. Mass—Pratt v Cohasset, 59 N E 79, 177 Mass 488
29 C J p 685 note 47

Rut in dirt shoulder of concrete highway

Kan—Collins v State Highway Commission, 5 P 2d 1106, 134 Kan 278, 80 A L R 488

5 Mass—Rust v Essex, 65 N E 397, 182 Mass 313
Pa—Brader v Lehman Tp, 34 Pa Super 125
29 C J p 685 note 48

Irregularities in shoulder of paved state highway are not "defects" in highway or 'menace to the traveling public," as respects state's liability—Gould v State, 225 N Y S 299, 130 Misc 776, affirmed Ellis v State, 230 N Y S 831, 224 App Div 773

6. Me—Beverage v Rockport, 76 A 677, 106 Me 223
29 C J p 685 note 49

7. Pa—Davis v Stowe Tp, 100 A 529, 256 Pa 86
29 C J p 686 note 51

8. R I—Taylor v Peckham, 8 R I 349, 91 Am D 235, 5 Am R 578
S D—Robinson v Minnehaha County, 277 N W 324, 65 S D 628
29 C J p 686 note 52

9. Wis.—State v Leaver, 22 N W 576, 62 Wis 387
29 C J p 686 note 53

10. R I—Yeaw v Williams, 23 A 33, 15 R I 20
29 C J p 686 note 54

11. Iowa—Patterson v Vail, 43 Iowa 142
Mass—Tilton v Wenham, 52 N E 514, 172 Mass 407

12. Neb—Vanderveer v Moran, 112 N W 581, 79 Neb 431
29 C J p 686 note 56

13. Mass—Perley v Chandler, 6 Mass 454, 4 Am D 159
29 C J p 679 note 41

14. Conn—Flynn v Town of West Hartford, 118 A 517, 98 Conn 83
Ohio—Bales v Board of County Com'rs, 164 N E 791, 30 Ohio App 249
Wis—Berg v Auburn, 122 N W 1041, 140 Wis 492
29 C J p 686 note 57

15. Pa—Munley v Sugar Notch Borough, 64 A 377, 215 Pa 228, affirming 13 Luz Leg Reg 44
29 C J p 686 note 58

16 Ill—Bennett v Illinois Power & Light Corporation 189 N E 899, 355 Ill 564, reversing 271 Ill App 182
La—O'Neill v Hemenway, App, 3 So 2d 210
N Y—Licata v City of New York, 292 N Y S 524, 249 App Div 848—Wood v State, 202 N Y S 340, 122 Misc 860
Ohio—H E Culbertson Co v Warden, 175 N E 205, 123 Ohio St 297
Pa—Perry v Thomas Cronin Co, 123 A 771, 279 Pa 1
29 C J p 686 note 60

Poles of power line

Miss—Mississippi Power Co v Sellers, 133 So 594, 160 Miss 512

Sloping for drainage

The fact that pavement on county road sloped toward either edge of road for drainage purposes did not show negligent construction on part of county—Goodrich v Kalamazoo County, 8 N W 2d 130

Placing stones in road to block

way duly located,[17] or windings and divergences from the normal roadway, made by the town officers after a heavy snowfall.[18] There is no liability for injuries caused by objects while being moved by human direction, and which are neither fixed to nor stationary in one position within the highway;[19] and accordingly the municipality has been held free from liability for injuries by sleds on which persons were coasting,[20] or for injuries to one struck by a locomotive on a railroad track illegally laid on the highway,[21] although it has been held that, where an employee of a county causes a motor truck to strike another vehicle, the county is liable under a statute imposing liability for defects in highways.[22]

A municipality, or person causing the defect, generally is not liable for a latent defect in the road,[23] unless the defect should have been known of and repaired,[24] or for obstructions casually placed there,[25] or for extraordinary conditions or events,[26] or for mere accidents.[27] An object or structure upon abutting property which results in injuries to one on the highway is not, it has been decided, an insufficiency or want of repair of the highway within a statute rendering the municipality liable for injuries caused thereby,[28] and, even apart from statute, a structure so erected for a legitimate business purpose has been held not to be ground of liability to one injured thereby, the municipality having no power to remove it.[29] The mere fact that a highway is under construction is not a defect on which liability for injuries can be predicated.[30]

Overhanging or falling branches or trees At common law a municipality is not liable for injuries caused by decayed limbs or trees falling across the highway,[31] and it has been held that a statute requiring municipalities to keep the public highways in safe condition applies only to the surface of the passageway, and does not extend to falling trees or branches.[32] Under other statutes, however, a municipality, or the highway officers, having due knowledge of the defect, may be held liable for injuries caused by the branches of trees overhanging the highway,[33] or by defective limbs or trees falling on the highway,[34] even though the tree stood beyond the limits of the highway.[35] An abutting owner generally cannot be held liable for defective trees growing within the limits of the highway,[36]

wheels of wagon is not an unlawful use of the highway, and the failure to remove the stones from the highway, while constituting negligence, did not create a nuisance, so as to exclude consideration of contributory negligence on the part of a person sustaining injury—Francis v Gaffey, 105 N E 96, 211 N Y 47

17. Mass—Smith v Wakefield, 105 Mass 473
29 C J p 686 note 61

18. N Y—Robinson v Somers, 179 N Y S 107, 189 App Div 792

19. Mass—Pratt v Weymouth, 17 N E 538, 147 Mass 245, 9 Am S R 691—Barber v Roxbury, 11 Allen 318
N H—Ray v Manchester, 46 N H 59, 88 Am D 192

20. Vt—Hutchinson v Concord, 41 Vt 271, 98 Am D 584
29 C J p 686 note 64

21. Mass—Vinal v Dorchester, 7 Gray 421

22. S C—Moss v. Aiken County, 103 S E 520, 114 S C 147

23. Pa—Murdaugh v Oxford Borough, 63 A 696, 214 Pa 384
29 C J p 686 note 67

24. Mass—Burt v Boston, 122 Mass 223
Vt—Ozier v Hinesburgh, 44 Vt 220
Wis—Ward v Jefferson, 24 Wis 342

25. Me—Farrell v Oldtown, 69 Me 72
N H—Johnson v. Haverhill, 35 N.H 74.

Town is not liable for obstruction or nuisance created in highway by another, unless obstruction amounts to defect in the highway—Skiris v City of Port Washington, 269 N W 556, 223 Wis 51, 109 A L R 599

26. Tenn—Clayborn v Tennessee Electric Power Co, 101 S W 2d 492, 20 Tenn App 574
29 C J p 686 note 70

Highway that is in suitable condition for ordinary travel, conducted in an ordinary manner, does not become defective because some extraordinary unforeseen condition arises, in consequence of which highway is momentarily too rough or too narrow to meet all exigencies of the situation—Clayborn v Tennessee Electric Power Co, 101 S W 2d 492, 20 Tenn App 574

27. Conn—Seidel v Woodbury, 70 A 58, 81 Conn 65
N Y—Lane v Hancock, 37 N E 473, 142 N Y 510, reversing 22 N Y S 470, 67 Hun 623
R I—Elsceck v Capwell, 67 A 421

28. Wis—Hubbell v Viroqua, 30 N W 847, 67 Wis 343, 58 Am R 866
29 C J p 687 note 72

Hedge on adjoining property obstructing view
Kan—Bohm v Racette, 236 P 811, 118 Kan 670, 42 A L R 571

29. Pa—Haines v Barclay Tp, 37 A 560, 181 Pa 521
29 C J p 687 note 73

30. Kan—Eastman v Kansas State Highway Commission, 10 P 2d 854, 135 Kan 302

31. Ala—Helms v Houston County, 117 So 633, 218 Ala 114
S D—Robinson v Minnehaha County, 277 N W 324, 65 S D 628

32. S D—Robinson v Minnehaha County, supra
W Va—Watkins v County Court of Preston County, 5 S E 654, 30 W Va 657

33. N Y—Embler v Town of Wallkill, 10 N Y S 797, 57 Hun 384, affirmed 30 N E 404, 132 N Y 222

34. Conn—Muratori v Stiles & Reynolds Brick Co, 25 A 2d 58, 128 Conn 674

35. S C—Inabinett v State Highway Department, 12 S E 2d 848, 196 S C 117

Defective tree growing just off the right of way and in close proximity thereto falling on the road—Inabinett v State Highway Department, supra

Statutory duty of highway officials to remove dead timber standing within fifty feet of highway—Chambers v Whelen, C C A W Va, 44 F 2d 340, 72 A L R 611

36. Conn—Muratori v Stiles & Reynolds Brick Co, 25 A 2d 58, 128 Conn. 674
Minn—Zacharias v Nesbitt, 185 N W 295, 150 Minn. 369, 19 A L R 1016

There is no legal duty resting on the servient fee owner, on whose

unless he is regarded as the owner of the tree[37]

§ 258. —— Defects Caused by Elements; Snow and Ice

Defects or dangerous conditions of a highway arising from the action of the elements, such as ice and snow, generally are actionable only where they exist because of some fault or act of negligence of the state, municipality, or highway board, or of an abutting owner.

The state, municipality, or highway board responsible for the condition of the highway, if otherwise liable, as discussed supra §§ 249–251, will be liable, although the defect is caused, or the danger from a defect is increased, by the elements, if it knew or should have known of the condition[38] It will be liable where a way is defective from the presence upon it of snow and ice in large quantities, negligently permitted to remain by the municipal authorities[39] after the lapse of sufficient time to clear the way,[40] and for injuries caused by ice which would not have formed but for a structural defect in the highway preventing water thereon from flowing off[41] Liability for negligently permitting snow or ice to remain on the highway is unaffected by the fact that the snow was piled up by a snow plow[42] or that objects placed on the road by individuals caused a snowdrift,[43] but it has been held that town officers are excused from taking action by the existence of a custom among the inhabitants of the town to join and break paths through the snow[44]

However, as in other cases, the state, municipality, or board is bound merely to exercise reasonable care to render the highway safe,[45] and is not liable for dangerous highway conditions which are due solely to the weather,[46] such as a swampy and miry condition of the road resulting entirely from the weather and the nature of the soil,[47] or a slippery condition due to a thaw softening the surface[48] A municipality ordinarily is not liable for injuries resulting from mere slipperiness from ice on a properly constructed highway or sidewalk,[49] nor is it bound to take precautions against an extraordinary flood or storm[50] Under the provisions

land is a duly established county road, to safeguard the traveler thereon against dangers from defects in trees growing within the limits of the road, and where the town board anticipating the grading of a roadway on a right of way over the defendant's land gave him notice to remove trees on such right of way, such order did not place him under legal duty to do so, or render him liable for injury to travelers from the falling trees—Zacharias v Nesbitt supra
Liability of abutting owner for negligence as to falling limbs or trees from his own land see the C J S title Negligence § 79 also 45 C J p 862 note 3

37. Pa—Falco v Bryn Mawr Trust Co, 10 Pa Dist & Co 115, 43 Montg Co 41

At common law, if shade trees in a highway became nuisances, the owner could be held liable for failing to trim them or keep them safe—Muratori v Stiles & Reynolds Brick Co, 25 A 2d 58 128 Conn 674

38. N Y—Sporborg v State, 234 N Y S 476, 226 App Div 113—Le Boeuf v State, 7 N Y S 2d 621, 169 Misc 372 affirmed 12 N Y S 2d 640, 256 App Div 798, affirmed 23 N E 2d 550 281 N Y 737
Vt—Zeno's Bakery v State, 166 A 379, 105 Vt 370
29 C J p 687 note 76

39. Pa—McCracken v Curwensville Borough, 163 A 217, 219, 309 Pa 98, quoting **Corpus Juris.**
29 C J p 687 note 78

County undertaking snow removal from highway must exercise reasonable care—James v Delaware, L & W R Co, 254 N Y S 558 233 App Div 617, affirmed 182 N E 202 259 N Y 609

40. Pa—McCracken v Curwensville Borough 163 A 217, 309 Pa 98
29 C J p 687 note 79

41 Pa—McCracken v Curwensville Borough, supra

42. N Y—Schrank v Rochester R Co, 31 N Y S 922, 83 Hun 290

43. Me—Rogers v Newport, 62 Me 101

44. Conn—Seeley v Litchfield 49 Conn 134, 44 Am R 213

45. Kan—Gorges v State Highway Commission, 10 P 2d 834 135 Kan 371
N Y—Robinson v Somers, 179 N Y S 107 189 App Div 792
29 C J p 687 note 84

46. N Y—Sporborg v State 234 N Y S 476 226 App Div 113—Le Boeuf v State, 7 N Y S 2d 621 169 Misc 372 affirmed 12 N Y S 2d 640, 256 App Div 798, affirmed 23 N E 2d 550, 281 N Y 737

Accumulation of ice and snow due to the action of the elements—Gorges v State Highway Commission, 20 P 2d 486, 137 Kan 340—Gorges v State Highway Commission, 10 P 2d 834, 135 Kan 371

47. Pa—Brendlinger v New Hanover Tp, 23 A 1105, 148 Pa 93

48. Wis—Wisniewski v Town of Belmont, 250 N W 859, 213 Wis 34

49. Conn—Griffith v Town of Berlin, 32 A 2d 56, 130 Conn 84
Mass—Stone v Hubbardston, 100 Mass 49
Pa—Bell v Mount Pleasant Tp, 21 West Co L J 285
29 C J p 687 note 85

To render a township liable for injury to a pedestrian falling on a sidewalk on account of ice the duty of keeping the sidewalk clear from ice must be pointed out, and the sidewalk must have been built as such within the contemplation of the law—Shaw v Plains Tp 119 A 289, 275 Pa 289, 27 A L R 1101

Liability for icy condition of shoulder of highway

A town is not liable to pedestrian injured by icy condition in shoulder of state highway where shoulder is not divided from rest of roadway and control over state highways is in highway commissioner, and a statute authorizing highway commissioner to construct sidewalks along state trunk line highways, and placing responsibility for removing snow or ice therefrom on the town, does not make town liable for injuries sustained by pedestrian where injury occurred prior to effective date of statute and state had not constructed any sidewalk at place of accident—Griffith v Town of Berlin, 32 A 2d 56, 130 Conn 84

50. Ohio—Oak Harbor v Kallager, 39 N E 144, 52 Ohio St 183
Vt—Zeno's Bakery v State, 166 A 379, 105 Vt 370
Wis—Jenewin v Irving, 99 N W 346, 903, 122 Wis 228, rehearing denied 122 Wis 237
29 C J p 687 note 86.

of some statutes, no actionable defect exists unless something besides the snow and ice contributed to cause it [51]

Abutting owner An owner or occupant of property abutting on a sidewalk along a public highway may be held liable at common law for injuries caused by his wrongful act in accumulating snow or ice on the sidewalk However, he is not liable, in the absence of statute, for injuries caused by the natural accumulation of snow or ice on the sidewalk, although the hazardous condition is created by his lawful use of the sidewalk, as such an accumulation does not prevent his use of the sidewalk as a means of access to his property, and does not require him to guard against accident by sprinkling ashes or taking other like precautions for the protection of the public [52]

§ 259. —— Objects Frightening Horses

Objects improperly and negligently placed or allowed to remain in or near the highway which are calculated to frighten horses generally constitute defects in the highway and render the highway authority, or person causing the defect, liable for injuries caused thereby

In some states it is held that highway authorities are not liable for an injury caused by the presence in the highway of an object frightening a horse, if the horse or vehicle does not actually come in contact with such object and it is not an obstruction to travel,[53] although there may be liability where the injury is caused by the horse shying at one defect and the vehicle hitting that or some other defect [54] As a general rule, however, objects improperly and negligently allowed to remain in or near the highway which are calculated to frighten horses constitute defects in the highway and impose liability for injuries caused thereby.[55] The liability is in some states limited to cases in which the object is within the traveled part of the highway,[56] and in others this is as far as the actual decisions go,[57] but generally the fact that the object is in the untraveled rather than the traveled part does not relieve the highway authorities from liability [58] To render them liable, however, it must appear that the object was one naturally calculated to frighten horses of ordinary gentleness and that the horse frightened was of such a character.[59] A town has been held not liable for injuries caused by a horse taking fright at a moving train,[60] at the noise of blasting by a highway officer engaged in repairing the road,[61] at a noise made by the falling on a trestle over the road of a rope used in drawing mining cars,[62] or at water flowing over the highway[63] unless the town has caused such overflowing [64]

Liability of individual An individual who wrongfully places or permits to remain in the highway objects calculated to frighten horses is liable for injuries resulting from a horse taking fright,[65] although he owns the fee in the highway,[66] if such use of the highway involves an unreasonable interference with the rights of the public,[67] and if the object is a nuisance per se it is immaterial how long it has been permitted to remain [68] Such liability, however, does not attach if the object is lawfully on the highway and does not unreasonably interfere with traffic,[69] and it may be lawfully al-

51. Mass.—Newton v. Worcester, 48 N.E. 274, 169 Mass. 516
29 C.J. p. 687 note 87

52. Del.—Massey v. Worth, 197 A. 673, 9 W.W.Harr. 211

Artificial discharge of water from owner's premises to the sidewalk at a time when it would naturally freeze and make such sidewalk slippery and dangerous for public travel may render him liable for injuries caused thereby.—Massey v. Worth, supra

Ice caused by vehicles crossing sidewalk

The owner or property abutting on a sidewalk whose driveway leading to public highway crossed the sidewalk is not liable for injuries to pedestrian who slipped and fell on sidewalk at point of driveway because of icy condition of sidewalk resulting from fact that owner and others crossed sidewalk, at that point with vehicles, since no duty to pedestrian was violated even though hazardous condition was created by owner's lawful use of the sidewalk.—Massey v. Worth, supra

53. Mass.—Cook v. Montague, 115 Mass. 571
29 C.J. p. 687 note 89

54. Mass.—Cushing v. Bedford, 125 Mass. 526
29 C.J. p. 687 note 90

55. Me.—York v. Athens, 58 A. 418, 99 Me. 82
Mich.—Fidler v. Lafayette Tp., 198 N.W. 262, 226 Mich. 635
29 C.J. p. 687 note 91

56. Mich.—Beall v. Athens Tp., 45 N.W. 1014, 81 Mich. 536
29 C.J. p. 688 note 92

57. Me.—Farrell v. Oldtown, 69 Me. 72.—Nichols v. Athens, 66 Me. 402.—Card v. Ellsworth, 65 Me. 547, 20 Am.R. 722

58. N.H.—Chamberlain v. Enfield, 43 N.H. 356
Pa.—North Manheim Tp. v. Arnold, 13 A. 444, 119 Pa. 380, 4 Am.S.R. 650
29 C.J. p. 688 note 94

59. Wis.—Bloor v. Delafield, 34 N.W. 115, 69 Wis. 273
29 C.J. p. 688 note 95

60. Conn.—Lee v. Barkhampstead, 46 Conn. 213

61. N.H.—Downes v. Hopkinton, 40 A. 433, 67 N.H. 456

62. Pa.—Tobin v. New Castle Tp., 94 A. 250, 248 Pa. 608.—Hilbert v. New Castle Tp., 59 Pa.Super. 565

63. Mich.—Fidler v. Lafayette Tp., 198 N.W. 262, 226 Mich. 635

64. Mich.—Fidler v. Lafayette Tp., supra

65. Tex.—West Texas Utilities Co. v. Haynes, Civ.App., 20 S.W.2d 236
29 C.J. p. 678 note 26

66. N.Y.—Tinker v. New York, O. & W.R. Co., 51 N.E. 1031, 157 N.Y. 312, affirming 36 N.Y.S. 672, 92 Hun 269

67. N.Y.—Tinker v. New York, O. & W.R. Co., supra
29 C.J. p. 678 note 27

68. Ala.—Shelby Iron Co. v. Morrow, 95 So. 370, 209 Ala. 116

69. Ill.—Bennett v. Illinois Power & Light Corporation, 189 N.E. 899,

lowed to remain there until its reasonable use is no longer necessary [70]

§ 260. Precautions

Reasonable precaution must be exercised to prevent travelers using an abandoned or temporary road.

The municipality must use reasonable precaution to prevent travelers from passing over an abandoned[71] or temporary[72] path or road

§ 261. —— Lighting Highway

Failure to light a highway generally is not actionable

Failure to light a highway is not actionable,[73] except at dangerous places, as discussed infra § 262

§ 262. —— Barriers, Railings, and Other Guards or Danger Signals

Neglect to place proper barriers, railings, and other guards or danger signals at obstructions and dangerous places in a highway, when necessary for the safety of travelers, is actionable, as against the state, governmental body, or individual responsible therefor

The duty of maintaining a highway in a safe condition, as discussed supra § 254, includes the duty of providing proper safeguards or giving adequate warning of dangerous conditions in the highway,[74] and this duty is applicable to pedestrians as well as to travelers in vehicles [75] Accordingly, subject to the rules discussed supra §§ 248-253 relating to the liability of persons and governmental bodies for injuries from defects or obstructions in the highway, the state[76] or governmental body or officer charged with the maintenance of the highway is liable for neglect to guard, place lights around, or otherwise give warning of, obstructions and dangerous points in a highway,[77] or for neglect to fur-

355 Ill 564, reversing 271 Ill App 182

Pa —Perry v Thomas Cronin Co, 123 A 771, 279 Pa 1

Objects not actionable

(1) A steam roller standing within the bounds of a highway under construction, where ample room left for public travel —Perry v Thomas Cronin Co, supra

(2) Spools of electric transmission wire alongside road —Bennett v Illinois Power & Light Corporation, 189 N E 899, 355 Ill 564, reversing 271 Ill App 182

70 Ill —Bennett v Illinois Power & Light Corporation, 189 N E 899, 355 Ill 564, reversing 271 Ill App 182

Finding of negligence against a contractor cannot be sustained from the mere fact of his leaving a steam roller standing for a considerable time within the bounds of a highway under construction, where ample room was left for public travel although a horse became frightened and tipped over vehicle drawn by it —Perry v Thomas Cronin Co, 123 A 771, 279 Pa 1

71. W Va —Daniels v Randolph County Ct, 72 S E 782, 69 W Va 676 37 L R A,N S, 1158

29 C J p 688 note 1

72. Vt —Bates v Sharon, 45 Vt 474 —Batty v Duxbury, 24 Vt 155

Roads under repair see supra § 256

73. Mass —Randall v Eastern R Co, 106 Mass 276, 8 Am R 327—Macomber v Taunton, 100 Mass 255

Minn —Rengstorf v Winston Bros, 208 N W 995, 167 Minn 290

74. Cal —Galiano v Pacific Gas & Electric Co, 67 P 2d 388, 20 Cal App 2d 534

Pa —Wensel v Township of North Versailles, 7 A 2d 590, 136 Pa Super 485

S D —Waller v Edmunds County, 290 N W 484 67 S D 165

Wash —Fritch v King County, 102 P 2d 249, 4 Wash 2d 87

Irrespective of statute, it is the duty of a town to maintain barriers along a highway, where necessary to render it reasonably safe and fit for travel —Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635

Statutes not charging new duties

Statutes relating to erecting guards on highways held not to charge new and independent duties, but, to amplify and render explicit the duties assigned by other primary statutes dealing with maintenance and repair —Waller v Edmunds County, 290 N W 484, 67 S D 165

Statute making state liable for defects in highways maintained by it under patrol system held not to excuse state from duty of exercising reasonable care in providing and maintaining proper guards and barriers, even though their location should be outside of state's portion of roadway —Countryman v State, 288 N Y S 612, 159 Misc 846

75. N Y —Marino v State, 10 N Y S 2d 295 170 Misc 341, reversed on other grounds 15 N Y S 2d 640, 257 App Div 734

76. Conn —Dunn v MacDonald, 147 A 26, 110 Conn 68

N Y —Cotriss v State, 228 N Y S 593, 223 App Div 520—Torrey v State, 23 N Y S 2d 370, 175 Misc 259, reversed on other grounds 42 N Y S 2d 567, 266 App Div 900—Treman v State, 201 N Y S 835, 121 Misc 862

State held liable

(1) For absence of barriers and warning signs at place obviously dangerous and made slippery by rain —Sporborg v State, 234 N Y S 476, 226 App Div 113

(2) For failure to warn traffic adequately of icy condition of highway —Goldfarb v State, 33 N Y S 2d 656 178 Misc 180, affirmed 37 N Y S 2d 246, 264 App Div 976

(3) For failure to warn properly that road open to traffic was being reconstructed and dangerous —Miller v State, 214 N Y S 547 127 Misc 768 affirmed 247 N Y S 399, 231 App Div 363

(4) For negligence of state patrolman in failing to warn of or guard against hole in sidewalk adjoining state highway —Marino v State, 10 N Y S 2d 295, 170 Misc 341, reversed on other grounds 15 N Y S 2d 640, 257 App Div 734

Steam roller without lights or barrier

A steam roller, permitted to stand in the highway without any barrier or lights on it in the nighttime, is a "defect" within a statute making the state liable for defects causing damage to persons on highways maintained by the state —Treman v State 201 N Y S 835, 121 Misc 862

77. Cal —Rubell v Santa Clara County, 80 P 2d 1022, 27 Cal App 3d 7

Conn —Dunn v MacDonald, 147 A 26, 110 Conn 68

Kan —Eastman v Kansas State Highway Commission, 10 P 2d 854 135 Kan 302—Rosebaugh v Board of Com'rs of Allen County 243 P 277, 120 Kan 266

Pa —Wensel v Township of North Versailles, 7 A 2d 590, 136 Pa Super 485

S C —Fann v State Highway Department, 165 S E 785, 787, 167 S C 84, quoting **Corpus Juris.**

S D —Waller v Edmunds County, 290 N W 484, 67 S D 165—Hermandson v City of Canton, 244 N W 525, 528, 60 S D 367, quoting **Corpus Juris.**

29 C J p 688 note 10.

nish suitable barriers or guard rails,[78] as where the road is undergoing repair,[79] wherever necessary for the reasonable safety of travelers, but not otherwise.[80] Such liability of the state or governmental body exists notwithstanding the failure to provide the safeguards or warnings is due to the neglect of an independent contractor, to whom the work of providing them has been let.[81]

The duty of maintaining barriers, railings, or other guards or signs, and the consequent liability for a failure to do so, may arise where such duty is imposed by statute,[82] and to the extent, or under the conditions, prescribed by the statute.[83] In the absence of such a statute, or under conditions to which the statute does not apply, the duty and liability arise only where the situation is inherently dangerous, or of such an unusual character as to mislead a traveler exercising reasonable care,[84] and

Highway district has duty of giving reasonable warning to public of excavation on highway, being made under its direction—Strickfaden v Green Creek Highway Dist., 248 P 456, 42 Idaho 738, 49 A.L.R. 1057

78. Cal.—Folkins v Johnston, 12 P 2d 153, 124 Cal App 169
Kan.—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343
Mich.—Fidler v Lafayette Tp., 198 N W 262, 226 Mich 635
N.Y.—Mason v Town of Andes, 25 N Y S 2d 738, 261 App Div 354 reversing 15 N Y S 2d 834, affirmed 39 N E 2d 262—Cotriss v State, 228 N Y S 593, 223 App Div 520
Pa.—Frye v Washington Tp., 139 A 871, 291 Pa 240—Wensel v Township of North Versailles, 7 A 2d 590, 136 Pa Super 485
S.C.—Fann v State Highway Department, 165 S E 785, 787, 167 S C 84—Morris v Mills, 113 S E 632, 121 S C 200
S.D.—Hermandson v City of Canton, 241 N W 525, 528, 60 S D 367 citing **Corpus Juris.**
Vt.—Widham v Town of Brattleboro, 166 A 22, 105 Vt 210, followed in 166 A 25, 105 Vt 219
Wis.—Keller v City of Port Washington, 227 N W 284, 200 Wis 87
29 C.J. p. 688 note 11

Lack of suitable guard rail may constitute "insufficiency or want of repair" of culvert within statute fixing liability of town for damages.—Widham v Town of Brattleboro, 166 A 22, 105 Vt 210, followed in 166 A 25, 105 Vt 219

Failure to erect barriers is not defect in the plan of the highway, for which the commissioners designated by statute to lay out and construct the road, and not the municipality, are responsible.—Monk v Town of New Utrecht, 11 N E 268, 104 N Y 552—29 C.J. p. 682 note 96 [a]

79 Mich.—Speck v Bruce Tp., 132 N W 114, 166 Mich 550, 35 L.R.A., N.S., 203
29 C.J. p. 685 note 35

80. Mich.—Fidler v Lafayette Tp., 198 N W 262, 226 Mich 635
S.C.—Fann v State Highway Department, 165 S E 785, 787, 167 S C 84
29 C.J. p. 689 note 12.

Necessity as question for jury, see infra § 281

81. N.Y.—Miller v State, 247 N Y S 399, 231 App Div 363, affirming 244 N Y S 547, 137 Misc. 768

82. Wash.—Johanson v King County, 109 P 2d 307, 7 Wash 2d 111—Tyler v Pierce County, 62 P 2d 32, 188 Wash. 229—Lyle v Fiorito, 60 P 2d 709, 187 Wash. 537

At curve
Wash.—Tyler v Pierce County, 62 P 2d 32, 188 Wash. 229

"May" as "must"
In statute providing that department of roads or its contractor may erect suitable barriers where highway is under construction word "may" is construed as "must."—Folkins v Johnston, 12 P 2d 153, 124 Cal App 169

83 Conn.—Albright v MacDonald, 183 A 389, 121 Conn 88—Dunn v MacDonald, 147 A 26, 110 Conn 68
Mich.—Fidler v Lafayette Tp., 198 N W 262, 226 Mich 635
Ohio.—Wyandot County v Boucher, 120 N E 700, 98 Ohio St. 263—Kerr v Bougher, 16 Ohio App. 434
Vt.—Moody v Bristol, 45 A 1038, 71 Vt 473
29 C.J. p. 690 note 28

Limited liability
Statute authorizing recovery from the state of damages for failure to maintain railing or fence on elevated road does not confer right of action for damage suffered on state highways.—Dunn v MacDonald, 147 A 26, 110 Conn 68

Statute not applicable where ditch or watercourse
A statutory provision that, where a highway is reduced to a width of less than fifty feet, it shall be the duty of the commissioners to lay out a highway to the width of fifty feet or to erect and maintain in good order a substantial railing or fence does not apply to a highway in which a ditch or other artificial water course exists.—Fidler v Lafayette Tp., 198 N W 262, 226 Mich 635

"Wash bank"
Under a statute requiring guard rails at perpendicular wash banks more than eight feet high, in immediate connection with or adjacent to a public highway in an unprotected condition, the words "wash bank," mean a bank composed of such substance that it is liable to be washed away by the action of the water thereon so as to become unsafe to travelers on such highway, and such guard rails are not required unless the bank of such a nature has a perpendicular drop of more than eight feet from the surface of the highway.—Kerr v Bougher, 16 Ohio App. 434

Failure to give warning not defect
Claim for damages resulting from failure to give warning of dangerous condition is not recoverable from state under statute as claim for damages suffered from "defect in highway."—Miller v State, 247 N Y S 399, 231 App Div 363, affirming 244 N Y S 547, 137 Misc. 768

Statutory liability for negligence in not keeping a road in proper repair does not apply to negligence in blockading a road so as to exclude the public from its use or in failing to warn that the road is impassable.—Shuley v Swing, 29 N E 2d 364, 65 Ohio App. 109

84 Md.—Roth v Baltimore County Highway Commn., 80 A 1031, 115 Md 469
N.Y.—Countryman v State, 297 N Y S 771, 251 App Div 509 affirmed 13 N E 2d 782, 277 N Y 586—Donnelly v State, 228 N Y S 579, 131 Misc. 909
Pa.—Frye v Washington Tp., 139 A 871, 291 Pa 240—Wensel v Township of North Versailles, 7 A 2d 590, 136 Pa Super 485
S.C.—Fann v State Highway Department, 165 S E 785, 787, 167 S C 84
Wash.—Johanson v King County, 109 P 2d 307, 7 Wash 2d 111—Tyler v Pierce County, 62 P 2d 32, 188 Wash. 229

"Liability does not arise from any failure of a general duty to light the highways, but from a failure to exercise reasonable care to guard the traveling public against some special condition of which the municipality had sufficient notice which an ordinarily prudent person might reasonably anticipate would endanger travelers on the highway while in the exercise of reasonable care."—Mayor and City Council of Baltimore v

the accident must, in order to be actionable, have been such that the presence of the guard or signal would have prevented its occurrence.[85] There is no duty to fence a road or to provide barriers merely to prevent travelers from straying off the highway.[86] The necessity of a barrier depends on the circumstances of the particular case,[87] and in determining such necessity the proximity of the danger with reference to the highway as traveled,[88] the width and general character of the road,[89] the location of the road, whether in a thinly settled or a well populated portion of the state,[90] the amount and character of travel,[91] and the presence of other objects serving as guards[92] may be considered, as may be the presence of some object or agent liable to frighten a horse.[93] Where the condition of a highway is such as in itself to give notice that the way is not open to public travel, it is not necessary to place barriers there.[94]

Ordinary care is the measure of duty required in guarding, or warning of, dangerous places,[95] it is not necessary to guard against rare and un-

Thompson, 189 A. 822, 825, 171 Md. 460, citing **Corpus Juris.**

85. N.Y.—Stacy v. Phelps, 47 Hun 54.
29 C.J. p. 690 note 22.
Proximate cause generally see infra § 264.

86. N.H.—Clark v. Town of Hampton, 145 A. 265, 83 N.H. 524, 61 A.L.R. 1171.
S.C.—Fann v. State Highway Department, 165 S.E. 785, 787, 167 S.C. 84.
Tenn.—City of Knoxville v. Baker, 150 S.W.2d 224, 25 Tenn. App. 36.
29 C.J. p. 689 note 14.

87. Conn.—Albright v. MacDonald, 183 A. 389, 121 Conn. 88.
N.Y.—Huston v. Chenango County, 1 N.Y.S.2d 252, 253 App. Div. 56, affirmed 16 N.E.2d 301, 278 N.Y. 646.
S.C.—Fann v. State Highway Department, 165 S.E. 785, 787, 167 S.C. 84.
29 C.J. p. 689 note 15.

Each case judged by itself.

In determining duty of county with respect to warnings or barriers along county highway, each case must be judged by itself and in light of prevailing conditions, rather than on basis of conditions which obtained when previous decisions were made.—Huston v. Chenango County, 1 N.Y.S.2d 252, 253 App. Div. 56, affirmed 16 N.E.2d 301, 278 N.Y. 646.

Between highway and sidewalk.

Where line of demarcation between highway and sidewalk erected by individuals for private purposes was clearly defined by different elevation the sidewalk being some five or six inches higher than roadway, and it could not be said that break in the outer edge of sidewalk created a dangerous condition for vehicles or travelers upon the highway, state was under no obligation to erect barrier between outer edge of highway proper and the sidewalk.—Marino v. State, 15 N.Y.S.2d 640, 257 App. Div. 734, reversing 10 N.Y.S.2d 295, 170 Misc. 341.

Duty to guard against traveler's going over unrailed embankment includes exercise of reasonable foresight regarding probable causes for such fall.—Clark v. Town of Hampton, 145 A. 265, 83 N.H. 524, 61 A.L.R. 1171.

Where the road passes through deep cuts below original surface of ground there is no duty to fence or barricade such cuts so as to prevent persons or animals from falling therein from abutting property.—Shuptrine v. Herron, 180 So. 620, 182 Miss. 315.

88. Neb.—King v. Douglas County, 208 N.W. 120, 114 Neb. 477.
Pa.—Wensel v. Township of North Versailles, 7 A.2d 590, 136 Pa. Super. 485.
S.C.—Fann v. State Highway Department, 165 S.E. 785, 787, 167 S.C. 84.
Tenn.—City of Knoxville v. Baker, 150 S.W.2d 224, 25 Tenn. App. 36.
29 C.J. p. 689 note 16.

The proper test for determining the necessity for a barrier or liability for injury, is whether the way would be dangerous to a traveler so using it, rather than the distance from it of the dangerous object or place.—City of Knoxville v. Baker, supra.

Proximity of precipice.

If a public road through a township is so dangerous by reason of its proximity to a precipice that common prudence requires extra precaution in order to secure safety to travelers, township is bound to use such precaution and omission to do so is negligence.—Wensel v. Township of North Versailles, 7 A.2d 590, 136 Pa. Super. 485.

89. Mich.—Vose v. Richland Tp., 217 N.W. 784, 242 Mich. 46.
29 C.J. p. 689 note 17.

New concrete highway, curving from old road at less than half right angle does not present inherently dangerous situation requiring barriers.—Donnelly v. State, 228 N.Y.S. 579, 131 Misc. 909.

90. S.D.—Wyant v. Faith Tp. in Meade County, 207 N.W. 87, 49 S.D. 220.

"In thinly settled portions of the state the revenues may not permit the furnishing of guard rails and other safeguards found upon highly improved roads. To hold that townships cannot maintain roads in the hilly and thinly settled portions of the state without protecting ordinary hillside declivities by guard rails in many cases would be equivalent to saying that no township roads can be maintained in such localities."—Wyant v. Faith Tp. in Meade County, supra.

91. N.H.—Seeton v. Dunbarton, 56 A. 197, 72 N.H. 269.
Vt.—Maynard v. Westfield, 90 A. 504, 87 Vt. 532.

92. N.Y.—Monk v. New Utrecht, 11 N.E. 268, 104 N.Y. 552.—Hubbell v. Yonkers, 10 N.E. 858, 104 N.Y. 434, 58 Am.R. 522.

93. Pa.—Plymouth Tp. v. Graver, 17 A. 219, 125 Pa. 24, 11 Am.S.R. 867.
29 C.J. p. 690 note 20.

94. Mass.—Compton v. Revere, 60 N.E. 931, 179 Mass. 413.
Tex.—City of Beaumont v. Kane, Civ. App., 83 S.W.2d 234, 240, citing **Corpus Juris.**

95. Colo.—Lewis v. La Nier, 270 P. 656, 81 Colo. 376.
Iowa.—Weirs v. Jones County, 45 N.W. 883, 80 Iowa 351.
Md.—Mayor and City Council of Baltimore v. Thompson, 189 A. 822, 828, 171 Md. 460, citing **Corpus Juris.**
Neb.—Miller v. Abel Const. Co., 300 N.W. 105, 140 Neb. 482.—Simonsen v. Thorin, 234 N.W. 628, 120 Neb. 684, 81 A.L.R. 1000.—King v. Douglas County, 208 N.W. 120, 114 Neb. 477.
N.H.—Ahern v. Concord, 132 A. 570, 82 N.H. 246.
N.Y.—Countryman v. State, 288 N.Y.S. 612, 159 Misc. 846.
Pa.—Camp v. Allegheny County, 106 A. 314, 263 Pa. 276.
"Cases dealing with the question do not permit the formulation of any general rule applicable to all cases as to the duty of a municipality or other agency in control of public highways to protect travelers thereon from danger incident to obstruction within the lines of the highway except that where the obstruction is of such a character as to seriously imperil the safety of travelers on the highway, there is a duty upon the municipality or other agency to exercise reasonable care to warn by adequate means the traveling public

foreseen accidents.[96] A lack of railing commonly gives no right of action to the owner of a horse running away or beyond the control of the driver[97] unless the statute providing for railings clearly contemplates protection even against the fright of horses,[98] and it has been held that the action of an ordinarily safe and tractable horse, suddenly becoming frightened, in backing over an unguarded precipice is not always to be regarded as one of those extraordinary occurrences against which the public authorities cannot reasonably be expected to guard.[99]

Duty and liability of individuals The duty of guarding against, or warning of, danger from a defect or obstruction, and liability for a failure to do so, are also on an individual who has caused a defect or placed an obstruction on the highway.[1] A highway contractor who negligently fails to guard, or maintain proper barriers, lights, or other warning signals, at unsafe places near the work of construction or repair of a highway may be held liable for injuries resulting therefrom,[2] even though he acted without negligence in creating the dangerous situation,[3] and this liability exists regardless of the requirements of his contract with the highway authorities,[4] and irrespective of any liability on the part of the governmental body employing the contractor.[5] Under some statutes, however, the contractor is not so liable unless he has been di-

while using the highway under reasonably foreseeable conditions"—Mayor and City Council of Baltimore v Thompson, 189 A 822, 828, 171 Md 460

Permitting undergrowth to obscure "curve" sign is not actionable negligence where such a situation is common to most of the highways in the state.—Tyler v Pierce County, 62 P 2d 32, 188 Wash 229

96. N Y—Hubbell v Yonkers, 10 N E 858, 104 N Y 434, 58 Am R 522, 29 C J p 690 note 24

97. Ga.—Corley v Cobb County, 93 S E 1015, 21 Ga App 219, 29 C J p 690 note 24½
Proximate cause of injury see infra § 264

98 Conn—Upton v Windham, 53 A 660, 75 Conn 288, 96 Am R 197—Ward v North Haven, 43 Conn 148

99. N Y—Wallace v New Albion, 105 N Y S 524, 121 App Div 66, affirmed 84 N E 1122, 192 N Y 544, 29 C J p 690 note 27

1. Ala.—Thomas v Saulsbury & Co., 102 So 115, 212 Ala 245
Neb.—Simonsen v Thorin, 234 N W 628, 120 Neb 684, 81 A L R 1000
Pa.—Geiger v Dowdy, 170 A 420, 111 Pa Super 485
Railroad company's duty to fence and maintain cattle guards in connection with highway see the C J S title Railroads § 573, also 52 C J p 44 note 56-p 46 note 90

2. U S—C C Moore Const Co v Hayes, C C A Miss., 119 F 2d 742, certiorari denied Hayes v C C Moore Const Co, 62 S Ct 82, 314 U S 642, 86 L Ed 515
Cal.—Breithaupt v Jahn & Bressi Const Co., 47 P 2d 339, 8 Cal App 2d 181—Folkins v Johnston, 12 P 2d 153, 124 Cal App 169—Alameda County v Tieslau, 186 P 398, 44 Cal App 332
Ga.—Davis v Smiley, 126 S E 904, 33 Ga App 508
Mo.—Howard v Knutson, 77 S W 2d 158, 229 Mo App 267
N C.—Furlough v Nash County Highway Commission, 142 S E 230, 195 N C 365, rehearing denied 141 S E 693, 196 N C 160—Evans v Shea Bros. Const Co., 138 S E 411, 194 N C 31
Tenn.—Finchem v Oman, 72 S W 2d 564, 18 Tenn App 40
Tex.—Buchanan v Rose, 159 S W 2d 109, 138 Tex 390, affirming Rose v Buchanan, Civ App., 140 S W 2d 203—Eubanks v Schwalbe, Civ App., 55 S W 2d 906, modified on other grounds, U S Fidelity & Guaranty Co v Eubanks, 87 S W 2d 218, 126 Tex 405—Overstreet v McClelland, Civ App., 13 S W 2d 990, error dismissed
Utah—Metcalf v Mellen, 192 P 676, 57 Utah 41
29 C J p 678 note 38

Both contractor and supervising engineer owe duty to public to warn travelers of existing hazard during construction of highway.—Folkins v Johnston, 12 P 2d 153, 124 Cal App 169

Failure to mark or give warning of detours
Mo.—Howard v Knutson, 77 S W 2d 158, 229 Mo App 267
N C.—Hughes v Robert G Lassiter & Co., 137 S E 806, 193 N C 651

Highway closed
Road contractor must exercise "due care" to warn traveling public that highway is closed.—Lewis v La Nier, 270 P 656, 84 Colo 376

Railroad crossing signs
Failure of highway contractor to erect warning signs on new highway at railroad crossing was not negligence so far as it affected train conductor killed in collision between backing train and automobile at such crossing.—Hilton v Southern Ry Co., 7 S E 2d 161, 192 S C 476

Warning to use new way
A contractor making a cut across highway or across well-defined and generally used roadway, whether public or private, or even across pathway so commonly used and so well defined as to amount to a roadway must display lights or erect barriers or must make safe entrance from intersected road at point of intersection or so near thereto or in such manner as that those who formerly used intersected roadway or any other traveler will readily see that he is to use the new way.—Shuptrine v Herron, 180 So 620, 182 Miss 315

Right to place barricade at certain point
A road contractor engaged in constructing a road had right to place an effective barricade at the point where the usable portion of the road ended and the unusable portion began.—Graves v Hamilton, 184 So 56, 184 Miss 239

In New Hampshire it has been held that a contractor engaged in improving and reconstructing a highway under a contract with the state and a town is not liable either by the common law or under a statute making any person liable for injuries caused by defects or obstructions due to his carelessness or negligence, for a failure to erect a railing at a culvert, although he has widened the worked part of the highway at that point, since the duty of keeping the highway in suitable repair is on the town or highway district, and the contractor performs his duties as far as travelers are concerned by exercising reasonable care and prudence in performing his work so as not to injure travelers in the exercise of due care.—Burroughs v Lane Constr Corp., 88 A 1001, 77 N H 124

3 Tex.—Buchanan v Rose, 159 S W 2d 109, 138 Tex 390, affirming Rose v Buchanan, Civ App., 140 S W 2d 203

4 Utah—Hansen v Clyde, 56 P 2d 1366, 89 Utah 31, 104 A L R 943

5. Ga.—Davis v Smiley, 126 S E 904, 33 Ga App 508

rected to install such barriers or lights.[6] The duty to maintain such guards and warnings, and the consequent liability for a failure to do so, do not attach to the contractor after he has finished his work and it has been accepted by the municipality,[7] or, as has been held, after satisfactory completion of the work, but before formal acceptance.[8] Where the situation is such that the highway should be closed, if the contractor permits it to remain open for traffic he is not excused from liability for negligence by the fact that he has placed warning signs along the highway.[9] A possessor of land over which a public highway passes is not liable for his failure to warn travelers of a dangerous condition, not created by him, but known to him and not likely to be discovered by such travelers.[10]

Sufficiency of barrier, guard, or signal The barriers, railings, guards, or signals should be sufficient reasonably to warn and protect travelers on the highway, in the exercise of reasonable care,[11] and when so required by statute should be of a particular kind or character,[12] or should be such as are specified by the state highway department as standard.[13] Where the power of providing precautionary devices is in the highway commissioner, whether such a device is necessary and of the type best suited for the particular purpose rests with such commissioner,[14] and where an excavation is constructed through the commissioners for the use of an abutting owner, such owner is under no duty to take precautionary measures for the safety of the traveling public,[15] and he has no right to construct or maintain such signal devices without official supervision or approval,[16] and is under no obligation to initiate proceedings for the construction of such devices.[17]

A barrier or guard railing should be so constructed that it may be readily seen at a safe distance by ordinary observation,[18] if a wire rope or cable is used, other signals or warnings should be provided to make known its presence.[19] It should be such a barrier or railing as an ordinary man would maintain to make the road reasonably safe for the reasonable use of the traveling public under the circumstances,[20] but it need not be heavy enough to stop frightened animals[21] or to withstand a team and wagon coming in violent contact with it,[22] although a municipality has been held liable where

6. Ind—Mahoney v Sharp, 156 N E 566, 86 Ind App 180

7. Tex—T J Mansfield Const Co v Gorsline, Com App, 288 S W 1067, reversing, Civ App, 278 S W 485 and rehearing denied, Com App, 292 S W 187

8. Minn—Rengstorf v Winston Bros Co, 208 N W 995, 167 Minn 290

9. La—Stafford v Nelson Bros, 130 So 234, 15 La App 51, followed in Hyde v Nelson Bros 130 So 237, 15 La App 90

10. Cal—Galiano v Pacific Gas & Electric Co, 67 P 2d 388, 20 Cal App 2d 534

11. Conn—Albright v MacDonald, 183 A 389, 121 Conn 88—Horton v MacDonald, 135 A 442, 105 Conn 356
N H—Kelsea v Town of Stratford, 118 A 9, 80 N H 148
N Y—Countryman v State, 297 N Y S 771, 251 App Div 509, affirmed 13 N E 2d 782, 277 N Y 586
S C—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155
Wash—Tyler v Pierce County, 62 P 2d 32, 188 Wash 229
29 C J p 690 note 29

Warning signals held insufficient
(1) "Slow" sign three quarters of a mile away from dangerous condition—Goldfarb v State, 33 N Y S 2d 656, 178 Misc 180 affirmed 37 N Y S 2d 246, 264 App Div 976

(2) The posting of signs on a road which is being repaired, stating that it is closed for travel, where there are no barriers and the signs are not such as would warn an ordinarily prudent traveler, and to the knowledge of the county authorities, the road is being used by the public—Brubaker v Iowa County 183 N W 690, 174 Wis 574, 18 A L R 303
Sufficiency as question for jury see infra § 281

That an opening had been left in barrier across public highway warning of an excavation thereon, and which could be seen permitting passage through one side of barrier could not be construed as an invitation to general public to travel on highway in face of positive and absolute warning conveyed by barrier itself with red lantern and sign thereon—Shawano County v Froemming Bros, 202 N W 186, 186 Wis 491

12. **In New Jersey,** under Traffic Act § 42 Comp St Suppl § 179-715 R (1242), an obstruction on a highway may be marked either by alternate lines or by checker-board squares, and this applies also to lawful obstructions—Hill Const Co v Central R Co of New Jersey, supra

13. N H—Cozzi v Hooksett, 153 A 317, 84 N H 530, affirmed 155 A 41, 84 N H 530

14. Minn—Otten v Big Lake Ice Co, 270 N W 133, 198 Minn 356

15. Minn—Otten v Big Lake Ice Co, supra

16. Minn—Otten v Big Lake Ice Co, supra

17. Minn—Otten v Big Lake Ice Co supra

18. Ala—Thomas v Salisbury & Co, 102 So 115, 212 Ala 245
Miss—Graves v Hamilton, 184 So 56, 184 Miss 239

19 Ala—Carter v Franklin, 173 So 861, 231 Ala 116
Tenn—Westmoreland Heights v Martin 13 Tenn App 142

20 Conn—Dunn v MacDonald 147 A 26, 110 Conn 68
N H—Kelsea v Town of Stratford, 118 A 9, 80 N H 148

A barrier has been held insufficient which consists of two rails two inches thick, nailed to posts six to eight inches in diameter on elevated highway above adjoining land—Dunn v MacDonald, 147 A 26, 110 Conn 68

If a particular type of barricade is found to be ineffective, another may be adopted—Graves v Hamilton, 184 So 56, 184 Miss 239

A railing or fence which is adequate merely to serve as a warning or guide is not sufficient to satisfy a statute requiring sufficient railing or fence on elevated road to make the road reasonably safe—Dunn v MacDonald, 147 A 26, 110 Conn 68

21. Mass—Adams v Natick, 13 Allen 429

22. Wash—Tyler v Pierce County, 62 P 2d 32, 188 Wash 229.

control of a horse was only momentarily lost, and the accident would not have occurred had the barrier been of sufficient height.[23] It is not required that barricades should be placed around or in front of obstructions or other like situations of danger within the space included between other nearby barricades which are sufficient of themselves as a warning of danger.[24] If a contractor maintains warning signals and barricades at the termini of a highway under construction, and the condition of the highway itself shows that it is uncompleted, he need not place signals or flares at intermediate places on the highway,[25] neither is he required to keep lights during the daytime on all piles of road material needed during the construction[26] or to construct effective barricades around such materials.[27] The improvement of a portion of a highway is not notice or a warning to the public that the unimproved portion, if fit for travel, cannot be used for that purpose.[28]

Removal of barrier, guards, or danger signals. The municipality is not liable for injuries resulting from the removal of the barriers, guards or danger signals without its knowledge or consent[29] unless it has reasonable notice of such removal[30] and fails to replace them,[31] or has ground for anticipating the removal and fails to take action accordingly.[32]

Traffic signals. Where by statute the direction, maintenance, and control of traffic control signals and lights on state highways are placed under the supervision of the state, through its traffic commission, and the state has waived its immunity from liability therefor, it is liable for the negligence of its officers and employees charged with the duty of maintaining such signals or lights,[33] and it is not excused from liability for a negligent failure to maintain a proper signal device by the fact that the one in operation was proper and conformed to approved standards when erected,[34] nor does the fact that the legislature has failed to appropriate moneys for the reconstruction of a traffic signal system exonerate the state from liability for maintaining a dangerous signal device and failing to warn travelers thereof, where other similar signals have been removed without such appropriation.[35] Under a statute giving a town, through its town board, power to erect and maintain traffic control signals on the town roads,[36] the town superintendent of high-

23 Mass.—Hinckley v. Somerset, 11 N.E. 166, 145 Mass. 326.

24. Miss.—Gordon v. Illinois Cent. R. Co., 1 So. 2d 772, 190 Miss. 789.

Rule applicable to pedestrian.
Miss.—Gordon v. Illinois Cent. R. Co., supra.

No special duty is owing to persons who find their way around barricades and use highway with knowledge that it is lawfully withdrawn from public use, to safeguard them from injuries due to conditions attending construction work and injuries directly resulting from such use are chargeable under same principles of law applicable to trespassers.—Carter v. Franklin, 173 So. 861, 234 Ala. 116.

25. Neb.—Miller v. Abel Const. Co., 300 N.W. 405, 140 Neb. 482.

26. Miss.—Myers v. Sanders, 191 So. 300, 189 Miss. 198.

27. Miss.—Myers v. Sanders, supra.

28. Ohio.—Stuart v. Board of Com'rs of Cuyahoga County, 165 N.E. 53, 30 Ohio App. 283.

29. Mass.—Doherty v. Waltham, 4 Gray 596.
29 C.J. p. 690 note 33.

30. Mass.—Doherty v. Waltham, supra.

31. Wash.—Lyle v. Fiorito, 60 P.2d 709, 187 Wash. 537.

County had duty to replace warning and stop signs which had been removed by paving contractor at intersection with arterial highway and had not been replaced.—Lyle v. Fiorito, supra.

32. Mass.—Howard v. Mendon, 117 Mass. 585.

33. N.Y.—Foley v. State, 41 N.Y.S. 2d 256, 265 App. Div. 682, reversing 31 N.Y.S.2d 63, 30 N.Y.S.2d 998, 177 Misc. 443 and 30 N.Y.S.2d 1005, 177 Misc. 450—Dulmak v. State, 30 N.Y.S.2d 796, 177 Misc. 368.

Location of "flasher".
A signaling device known as a "flasher" should be so located that it promotes safety in the ordinary use of the highway, but the state is not under a duty in locating such device to guard against accidents not reasonably to be anticipated.—Fletcher v. State, 256 N.Y.S. 756, 143 Misc. 457.

State chargeable with constructive notice and negligence.
Where the state traffic commission had taken over control of traffic signal lights on a state highway in a town and was thereby under the duty of maintaining signals and a red light on one of the signals had not operated properly for approximately twenty-one hours because a bulb had burned out, the state was chargeable with "constructive notice" that light was out of order and was negligent in its duty of maintenance, and, if such neglect resulted in injury to travelers on highway, the state was bound to respond to them in damages.—Foley v. State, 30 N.Y.S.2d 998, 177 Misc. 413, reversed on other grounds 41 N.Y.S.2d 256, 265 App. Div. 682.

Reliance on patrolmen not performance of duty.
Where the state traffic commission had the duty of maintaining traffic signal lights on a state highway in a town, the commission did not meet its duty in such regard by relying on police patrolmen of the town.—Foley v. State, supra.

34. N.Y.—Wenzel v. State, 36 N.Y.S. 2d 913, 178 Misc. 932.

Traffic stanchion.
The fact that a traffic stanchion as originally erected was proper and conformed to standards approved for traffic control devices will not exonerate the state from consequences of conditions which changing circumstances render hazardous and, but for the state's negligent omission, could be avoided.—Wenzel v. State, supra.

A fixed base type traffic signal in center of highway, which was three feet in diameter, blended in color with pavement and was the only remaining stanchion on the highway, all others having been replaced by centrally suspended light panels, was a "nuisance", and failure of state to warn highway users of its existence was negligence.—Wenzel v. State, supra.

35. N.Y.—Wenzel v. State, supra.

36. **In New York,** under Town L. §§ 138-d, 141-c, subd. 1, town boards in erecting and maintaining traffic signal at intersection of state and coun-

ways may represent or affect the town with respect to such traffic signals only to the extent provided by the statute.[37]

§ 263. Notice of Defect or Obstruction

Liability for injuries caused by a defect or obstruction in a highway generally exists only where the municipality, officer, or person responsible for or causing the defect or obstruction had actual or constructive notice thereof. Notice to an authorized officer or agent is generally sufficient.

A municipality,[38] or highway officers having charge of the maintenance of the highway,[39] or a person causing defects or obstructions in the highway[40] are as a rule liable for injuries caused thereby to travelers only where they have actual or constructive notice of the defect or obstruction Where, however, the defect was caused by the direct act of the municipality or its authorized agent, the municipality is liable irrespective of notice,[41] and the fact that notice as a condition precedent to liability is expressly provided for by statute is immaterial[42] Where the municipality could not have *prevented the accident if notified, notice is not essential*[43] *Another exception to the requirement of* notice may exist in the case of statutes imposing in terms absolute liability for injuries from defects in highways,[44] and under such statutes the fact that the defect was latent is immaterial.[45]

The notice necessary is of the condition of things which constitutes a defect, and it is immaterial that the municipal authorities do not consider it a defect.[46] The notice also should be of the particular defect which caused the accident,[47] and not merely of conditions naturally productive of such defect and subsequently in fact producing it,[48] and should be notice not only that the defect existed but that it might become dangerous,[49] and that the object complained of is unnecessarily in the highway,[50] but the fact that the authorities have no reason to expect that the stoppage of water in a highway will render the road unsafe will not relieve them from liability for failure to exercise diligence after the defect has developed[51] The notice need not be in writing[52]

Implied or constructive notice Unless actual notice is required by statute,[53] constructive or implied notice is sufficient,[54] as where the defect was no-

ty highways acted under statute authorizing towns to enact ordinances and regulations relating to peace and good order generally, as well as under statute authorizing installation and maintenance of traffic standards —Cleveland v Town of Lancaster, 267 N Y S 673, 239 App Div 263, affirmed 191 N E 568, 264 N Y 568

37. N Y —Cleveland v Town of Lancaster, supra

Negligence of town superintendent of highways in installing or maintaining traffic signal at intersection of county and state highways is not negligence of towns under statute making towns liable for defective highways —Cleveland v Town of Lancaster, supra

Town not liable for negligence as to traffic signals on state highway

N Y —Cleveland v Town of Lancaster, supra

38. Mass —Taylor v Town of Sterling, 145 N E 40, 250 Mass 123
Pa —Otto Tp v Wolf, 106 Pa 608— Mickey v Georges Tp, 96 Pa Super 437
Va —Tyler v City of Richmond, 191 S E 625, 626, 168 Va 308, citing **Corpus Juris**
29 C J p 690 note 37
Notice of claim for injury see infra § 275

39. Conn —Pape v Cox, 28 A 2d 10, 129 Conn 256
Ohio —Starling v Board of Com'rs of Portage County, 4 N E 2d 921, 53 Ohio App 293
S C —Inabinett v State Highway Department, 12 S E 2d 848, 196 S C 117

40. Pa —Truschine v Fayette Mfg Co, 63 Pa Super 124
S C —Smith v Gilreath, 48 S E 262, 69 S C 353

41. U S —Snohomish County v Great Northern Ry Co, C C A Wash, 130 F 2d 996
Cal —Ohran v Yolo County 104 P 2d 700 40 Cal App 2d 298
Va —Tyler v City of Richmond, 191 S E 625, 626, 168 Va 308, citing **Corpus Juris.**
29 C J p 691 note 39

Where the condition is caused by the doing of work on the road, the question of notice of defects is immaterial —Mickey v. Georges Tp, 96 Pa Super 437

42. Me —Holmes v Paris, 75 Me 559

43. N H —Chamberlain v Enfield, 43 N H 356

44. W Va —Warth v Jackson County Ct, 76 S E 420, 71 W Va 184
29 C J p 691 note 43

45. W Va —Burke v Jackson County Ct, 73 S E 304, 70 W Va 171

46. Kan —Cunningham v Clay Tp, 76 P 907, 69 Kan 373
Mass —Hinckley v Somerset, 14 N E 166, 145 Mass 236

47. Conn —Pape v Cox, 28 A 2d 10, 129 Conn 256
Kan —Bacon from v Ogallah Tp in Trego County, 88 P 2d 1026, 149 Kan 553
29 C J p 691 note 47.

48. Conn —Pape v Cox, 28 A 2d 10, 129 Conn 377

49. Kan —Cunningham v Clay Tp, 76 P 907, 69 Kan 373

50 Me —Bartlett v Kittery, 68 Me 538

51. Vt —Brown v Swanton 37 A 280, 69 Vt 53

52. Kan —McGuire v Board of Com'rs of Ellis County, 299 P 945 133 Kan 235—Erie Tp v Beamer, 79 P 1070, 71 Kan 182

53. Me —Hurley v Bowdoinham, 34 A 72 88 Me 293
29 C J p 691 note 52

"Actual notice," in this connection means something more than an opportunity to acquire notice by the exercise of due care and diligence — Hurley v Bowdoinham, supra

Prior to statute in Maine knowledge of individual inhabitants of a town of a defect in a highway was held notice to the town —Ham v Wales, 58 Me 222—29 C J p 693 note 73

54. Cal —Ohran v Yolo County, 104 P 2d 700 40 Cal App 2d 298
N Y —Foley v State, 30 N Y S 2d 998, 177 Misc 443, reversed on other grounds 41 N Y S 2d 256, 265 App Div 682
S D —Clementson v Union County, 256 N W 794, 63 S D 104
Wis —Brubaker v Iowa County, 183 N W 690, 174 Wis 574, 18 A L R 303
29 C J p 691 note 53.

torious or had existed for such a period that the authorities, by the exercise of ordinary care, could have discovered and remedied it,[55] although under some statutes it has been held that, while notice need not be in any particular form, the authorities must have actual knowledge or notice as distinguished from notice implied from the long continuance or notoriety of the defect,[56] and that such actual knowledge or notice must be acquired at least a designated period of time prior to the damage sustained.[57]

In determining whether notice should be implied, the character of the highway as to frequency of use,[58] the nature of the defect as being plainly visible or the reverse,[59] the nature of construction, as being such that a defect may reasonably be expected to develop,[60] and that similar accidents had happened at the same place[61] will be taken into consideration, and, if the defect is latent, notice of its existence will not, in the absence of special circumstances, be imputed.[62] Notice that the highway at a particular point is generally defective will affect the municipality with notice of particular defects at that point.[63] So notice of a defect is sufficient to charge the municipality with notice of a particular danger arising therefrom.[64]

Notice to officers or agents. The notice need not be to the state or municipality in its corporate capacity,[65] but may be to any officer or employee in charge of or having some duties with respect to the removal of defects or obstructions.[66] The municipality is charged with notice if knowledge of the

Work ordered by county authorities

Where as part of the permanent construction of a state trunk highway a culvert and grading were ordered by the county authorities, and the work was performed under the supervision of the state authorities, the county had notice of a defect due to the making of the repairs, so as to be liable for an injury—Brubaker v Iowa County, supra

55. Conn—Pape v Cox, 28 A 2d 10, 129 Conn 256—Shirlock v MacDonald, 186 A 562, 121 Conn 611
Md—Howard County Com'rs v Leaf, 8 A 2d 756, 177 Md 82
Mass—Taylor v Town of Sterling, 145 N E 40, 250 Mass 123
N Y—Goldfarb v State, 33 N Y S 2d 676, 178 Misc 180, affirmed 37 N Y S 2d 246, 264 App Div 976
Ohio—Starling v Board of Com'rs of Portage County, 4 N E 2d 921, 53 Ohio App 293
Pa—Mickey v Georges Tp, 96 Pa Super 437
Wis—Swiergul v Town of Suamico, 235 N W 548, 204 Wis 114
29 C J p 692 note 54

Time of existence imputing notice

(1) Two months—Howard County Com'rs v Leaf, 8 A 2d 756, 177 Md 82

(2) Other times imputing notice see 29 C J p 692 note 54 [a]

Time of existence not imputing notice

(1) Five days—Martias v State, 232 N Y S 192, 133 Misc 326

(2) Other times not imputing notice see 29 C J p 692 note 54 [b]

Latent defects

Liability of towns for defects in ways is not limited to those which are open and visible, but includes those which are beneath surface or concealed, if municipality has had notice or in exercise of reasonable diligence could have known of their existence, and failed to make necessary repairs—Taylor v Town of Sterling, 145 N E 40, 250 Mass 123

Town was bound to anticipate danger which might result from hole in highway which had existed for some time and obviously was so large as to be dangerous to travelers—Swiergul v Town of Suamico, 235 N W 548, 204 Wis 114

56. Kan—Backstrom v Ogallah Tp in Trego County, 88 P 2d 1026, 149 Kan 553—Williams v Kansas State Highway Commission, 8 P 2d 946, 134 Kan 810—McGuire v Board of Com'rs of Ellis County, 299 P 945, 133 Kan 225—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343
29 C J p 692 note 55

57. Kan—Kinzie v New Gottland Tp, 107 P 2d 707, 152 Kan 725—Backstrom v Ogallah Tp, in Trego County, 88 P 2d 1026, 149 Kan 553—Williams v Kansas State Highway Commission, 8 P 2d 946, 134 Kan 810—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343—Wagner v Board of Com'rs of Edwards County, 176 P 140, 103 Kan 719—Hart v Ohio Tp, 62 P 1010, 62 Kan 315

Showing of proper officer's actual knowledge of specific defects in highway which caused injury for which damages are sought, as much as five days before injury is essential to liability of township for injuries sustained by defective bridge, culvert or highway on township road—Backstrom v Ogallah Tp in Trego County, 88 P 2d 1026, 149 Kan 553

58. Cal—Wurzburger v Nellis, 130 P 1052, 165 Cal 48
Wash—Mead v Chelan County, 191 P 825, 112 Wash 97
29 C J p 692 note 56

59. Mass—Noyes v Gardner, 18 N E 423, 147 Mass 505, 1 L R A 354
29 C J p 692 note 57

60 N H—Monroe v Town of Deerfield, 147 A 411, 84 N H 144

Culvert

Town is bound to anticipate defect where culvert, although safe when built, is so constructed that defect may reasonably be expected to develop—Monroe v Town of Deerfield, supra

61. Cal—Rubell v Santa Clara County, 80 P 2d 1023, 27 Cal App 2d 377

62. Mass—Stoddard v Winchester, 27 N E 1014, 154 Mass 149, 26 Am S R 223
29 C J p 692 note 58

63. Mass—Noyes v Gardner 18 N E 423, 147 Mass 505, 1 L R A 354
29 C J p 692 note 59

Same condition existing previously as actual notice

In an action against a township for death when decedent's horse, frightened by water which had overflowed the highway, plunged into a drain parallel thereto, if the water ran over the road in previous years requiring repairs by the township, then it had actual notice of the cause, if occasioned by a bridge throat—Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635

64. Vt—Brown v Swanton, 37 A 280, 69 Vt 53
29 C J p 692 note 60

65 Me—French v Brunswick, 21 Me 29, 38 Am D 250

66. Kan—Williams v Kansas State Highway Commission, 8 P 2d 946, 134 Kan 810
N Y—Karl v State 18 N E 2d 852, 279 N Y 555, reversing 7 N Y S 2d 131, 255 App Div 825, and 7 N Y S 2d 132, 255 App Div 825, and motion granted 20 N E 2d 22, 280 N Y 574—Torrey v State, 23 N Y S 2d 370, 175 Misc 259, reversed on other grounds 42 N Y S 2d 567, 266

defect is brought home to the board of county commissioners,[67] the highway supervisor,[68] or a highway officer,[69] or even a highway officer de facto, acting under color of authority.[70] However, notice to one commissioner of a board of commissioners of highways,[71] or to an individual member of a town council,[72] or to a town clerk,[73] has been held insufficient; but, under some statutes, actual knowledge by the chairman of the board of commissioners is sufficient.[74] The knowledge of a deputy appointed by the town superintendent without authority is not imputable to the superintendent, and will not render the town liable.[75]

§ 264. Proximate Cause

Liability for an injury resulting from a defect or obstruction in a highway exists only where such defect or obstruction was the proximate cause of the injury.

To recover for an injury resulting from a defect or obstruction in a highway the defect or obstruction must have been the proximate cause of the injury.[76] To recover for injuries caused by a defective culvert, the accident must have occurred while the injured person was passing over the culvert, and its insufficiency must have directly caused the injuries.[77]

App Div 900—Pierce v State, 41 N Y S 2d 602
29 C J p 693 note 63

County engineer
N Y—Karl v State, 18 N E 2d 852, 279 N Y 555, reversing 7 N Y S 2d 131, 255 App Div 825 and 7 N Y S 2d 132, 255 App Div 825, and motion granted 20 N E 2d 22, 280 N Y 574

A selectman
Conn—Davis v Guilford, 11 A 350, 55 Conn 351

State traffic commission, as to traffic signal—Foley v State, 30 N Y S 2d 998, 177 Misc 443, reversed on other grounds 41 N Y S 2d 256, 265 App Div 682

Township trustee
Kan—Kinzie v New Gottland Tp, 107 P 2d 707, 152 Kan 725

It is a prerequisite of liability of state for damage caused by defect in highway that officer charged with maintenance shall have had actual or constructive notice of defect—Shirlock v MacDonald, 186 A 562, 121 Conn 611

67. Iowa—Morgan v Fremont County, 61 N W 231, 92 Iowa 644—Waud v Polk County, 55 N W 528, 88 Iowa 617
Kan—McGuire v Board of Com'rs of Ellis County, 299 P 945, 133 Kan 225

68 Cal—Ohran v Yolo County, 104 P 2d 700, 40 Cal App 2d 298—Rubell v Santa Clara County, 80 P 2d 1023, 27 Cal App 2d 377
29 C J p 693 note 65

The county superintendent of highways is a "county officer," but he is under the supervision of the superintendent of public works and he is the person to whom complaints are made of defects in highways—Karl v State, 18 N E 2d 852, 279 N Y 555, reversing 7 N Y S 2d 131, 255 App Div 825 and 7 N Y S 2d 132, 255 App Div 825, and motion granted 20 N E 2d 22, 280 N Y 574

69. Cal—Rubell v. Santa Clara County, 80 P 2d 1023, 27 Cal App 2d 377
29 C J p 693 note 67

70. Me—Pease v Parsonsfield, 42 A 502, 92 Me 345

71. N Y—Malloy v Pelham, 4 N Y St 828

72. R I—Whitford v Palmer, 100 A 312, 40 R I 196—Jordan v Peckham, 31 A 305, 19 R I 28

73. N Y—Flansburg v Elbridge, 98 N E 750, 205 N Y 423, 41 L R A N S 546—Hobart v Tully, 136 N Y S 1137, 152 App Div 902

74. Kan—McGuire v Board of Com'rs of Ellis County, 299 P 945, 133 Kan 225—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343

Statutory notice to chairman of board necessary
Kan—Arnold v Board of Com'rs of Coffey County, supra

Knowledge by agent of county as not actual notice to chairman of board—Wagner v Board of Com'rs of Edwards County, 176 P 665, 103 Kan 719, denying rehearing 176 P 140, 103 Kan 719

75 N Y—Lynch v Rhinebeck, 103 N E 888, 210 N Y 101, reversing 133 N Y S 739, 149 App Div 921

76. Kan—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343
Mich—Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635
N H—Chapman v Town of Lee, 119 A 440, 80 N H 481
N Y—Stebbins v State, 288 N Y S 614, 159 Misc 478, affirmed 6 N Y S 2d 150, 254 App Div 815—Louden v State, 41 N Y S 2d 455
Ohio—Sheley v Swing, 29 N E 2d 364, 65 Ohio App 109
Pa—Frye v Washington Tp, 139 A 871, 291 Pa 210
29 C J p 693 note 75

To hold state liable for injuries to passenger in wagon which slipped from road into canal state must have omitted duty to passenger which was proximate cause of accident—Stebbins v State, 288 N Y S 614, 159 Misc 478, affirmed 6 N Y S 2d 150, 254 App Div 815

Defects held proximate cause
(1) Bleeding tar patch producing slippery surface causing bicycle to skid—Louden v State, 41 N Y S 2d 455

(2) Pole permitted to remain on highway by power company—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468

(3) Other defects held to be proximate cause see 29 C J p 693 note 75 [c]

Defects held not proximate cause
(1) Open ditch across highway, delaying fire apparatus, as not proximate cause of loss of house by fire—Sheley v Swing, 29 N E 2d 364, 65 Ohio App 109

(2) Other defects held not proximate cause of injury see 29 C J p 75 note [f]

Construction of statutory liability
A statute providing that board of county commissioners shall be liable in its official capacity for damages received by reason of its negligence in not keeping a road in proper repair, is not intended to impose a liability on a county to respond for all damage, no matter how far removed from defective road, provided only that by a chain of reasoning, no matter how tenuous, defect could be connected with damage—Sheley v Swing, supra

77. N H—Chapman v Town of Lee 119 A 440, 80 N H 481
Vt—Widham v Town of Brattleboro 166 A 22, 105 Vt 210, followed in 166 A 25, 105 Vt 219—Ford v Town of Braintree, 23 A 633, 64 Vt 144

One travels on a culvert, within a statute making a town liable for injury to a traveler on a defective culvert, when he travels on the surface of the roadbed supported by the culvert—Chapman v Town of Lee, 119 A 440, 80 N H 481.

If the negligence of plaintiff was the proximate cause of the injury, as discussed infra §§ 268–274, or the injury was the direct consequence of such negligence as well as the defect in the highway, since it is impossible to determine what portion of the injury was caused by either, or that any substantial injury would have been sustained but for plaintiff's negligence,[78] the municipality is not liable However, the defect in the highway may be the proximate cause of an accident, notwithstanding the traveler's unconscious act or attempt in an emergency to avoid injury[79] By the weight of authority, where two causes combine to produce an injury, both of which are in their nature proximate, one being a culpable defect in the highway and the other some intervening occurrence for which neither party is responsible, and the injury would not have been sustained but for such defect, the municipality is liable,[80] and this rule has been applied where the negligent or wrongful act of a third person cooperates with a defect in the highway to cause the injury[81] In some states, however, it is held that the defect must be the sole cause of the injury in order to render the municipality liable,[82] and that, where there are two efficient, independent causes, the primary cause being one for which the municipality is not responsible, and the other a defect in the highway, the injury must be referred to the former[83] Under this rule the municipality is not liable where the wrongful or negligent act of a third person intervenes between the defect and the injury and is a contributing cause of such injury,[84] unless such intervening or concurring cause was pure accident, without fault or negligence on plaintiff's part,[85] or was due to the innocent act of a third person[86] Negligence of a person in leaving objects on a private way is not the proximate cause of injuries by such objects on a public road to which they had been removed by an unknown agency, which removal could not have been reasonably anticipated[87]

Escape of horses from control Although there is no duty to keep a highway safe for horses which have escaped from control or are running away,[88] yet where damage ensues from the fright or loss of control of a traveler's horse, caused by a defect in a highway, the municipality or person causing the defect is liable if plaintiff was not at fault,[89] unless some direct efficient cause intervened between the fright of the horse and the subsequent injury[90] Even where the horse is frightened by some cause other than a defect in the highway, plaintiff is entitled to recover provided the accident would not have happened but for the defect[91] or the circumstances were such that the authorities were bound to anticipate that accidents arising from the fright of horses might result from the ordinary use of the highway for purposes of travel[92] In some states, however, the loss of control of a horse, not due to the misconduct of the municipality, is regarded as the primary cause of the injury, for which the municipality is not liable, although the defect may have contributed to the injury,[93] unless the injury would have occurred even if the

78. Mass - Horrigan v Clarksburg, 22 N E 897, 150 Mass 218 5 L R A 609 — Murdock v Warwick, 4 Gray 178

79. Or - Nosler v Coos Bay R Co, 64 P 644, 39 Or 331
29 C J p 694 note 78

80. Neb — King v Douglas County 208 N W 120, 114 Neb 477
S C — Livingston v South Carolina State Highway Department 183 S E 8, 12 178 S C 323, quoting **Corpus Juris.**
29 C J p 694 note 79

81. S C — Livingston v South Carolina State Highway Department, 183 S E 8, 178 S C 323
29 C J p 694 note 80

82. Mass — Conary v Boston & M R R 147 N E 883, 252 Mass 397
29 C J p 694 note 81

83. Me — Moulton v Sanford, 51 Me 127
29 C J p 694 note 82

84. Conn — Roth v Macdonald, 200 A 725, 124 Conn 461.
29 C J p 694 note 83.

85. Mass — Block v Worcester, 72 N E 77, 186 Mass 526
29 C J p 695 note 84

86. Mass — McMahon v Harvard, 99 N E 458, 213 Mass 20
29 C J p 695 note 85

87. Tex — Magnolia Petroleum Co v Cocke, Civ App, 3 S W 2d 139, error refused

Negligence of pipe line company's employees in leaving iron rings by company's right of way — Magnolia Petroleum Co v Cocke, supra

88. Pa — Thubron v Diavo Contracting Co, 86 A 292, 238 Pa 443, 44 L R A, N S, 699, Ann Cas 1914C 252
29 C J p 695 note 86
Duty to erect railing or barrier see supra § 262

89. Mich — Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635
29 C J p 695 note 87

Lack of barriers
In an action for death when decedent's horse, frightened by water flowing over the road, plunged into a drain parallel to a highway, if barriers should have been erected and maintained and the horse was frightened by a condition of the highway existing by reason of defendant's negligence and had barriers been there they would have prevented the accident, then the want of barriers was a proximate cause thereof, but if the horse was not frightened by a negligent condition of the highway although the barrier would have prevented the accident, the lack of barriers was not a proximate cause thereof — Fidler v Lafayette Tp, supra

90 Pa — West Mahanoy Tp v Watson, 9 A 430, 116 Pa 341, 2 Am S R 604
29 C J p 695 note 88

91. Mich — Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635
29 C J p 695 note 89

92. Pa — Yoders v Amwell Tp, 33 A 1017, 172 Pa 447, 51 Am S R 750
29 C J p 695 note 90

93. Mich — Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635
Wis — Swiergul v Town of Suamico, 235 N W 548, 204 Wis 114
29 C J p 696 note 91.

horse had not been uncontrollable,[94] but even in the states in which such rule obtains it is held that a momentary loss of control caused by the horse suddenly swerving or shying will not relieve the municipality from liability[95] and the rule is the same where a horse has momentarily escaped from the barn or inclosure of the owner[96]

§ 265. Persons Entitled to Redress

A person traveling on a highway in a usual and ordinary manner may recover for an injury sustained from a defect or obstruction.

A traveler on the highway[97] in a usual and ordinary manner,[98] whatever the purpose of the travel,[99] may recover for injury from a defect or obstruction, although such injury occurs during a temporary stop[1] It has been held, however, that if a person stops his horse outside the highway limits, and the horse gets loose and runs upon the highway, no recovery can be had for resulting injury,[2] although there is also authority to the contrary[3] One who is not in any sense a traveler usually cannot recover for defects,[4] as where he is using the highway for horseracing[5] A person leaning against or sitting upon a fence or barrier erected on the side of the road has been held not to be a traveler entitled to protection,[6] but there is also authority to the contrary.[7]

§ 266. —— Persons Violating Law

A person doing some act on the highway in violation of the law may nevertheless recover for an injury caused by a defect or obstruction, unless such unlawful act contributed proximately to the injury

A person may recover for an injury caused by a defect or obstruction in the highway, although he was at the time doing some unlawful act, if the commission of the offense did not contribute proximately to the injury[8] Unless the violation of law contributed directly to the injury, a recovery may be had, although the person injured was, at the time of the accident, traveling at an illegal rate of speed[9] or was violating the law by driving on the wrong side of the road[10] Under some statutes no recovery can be had if the load carried is heavier than permitted by law, notwithstanding the injury results from a defect in the road[11]

§ 267. —— Persons Bound to Repair

Officers or persons bound to repair a highway cannot recover for injuries from defects which they should have repaired

94. Mass—Titus v Northbridge, 97 Mass 258 93 Am D 91

95. Me—Morsman v Rockland, 39 A 995, 91 Me 264
29 C J p 696 note 93

96. Iowa—Nocks v Whiting, 102 N W 109, 126 Iowa 405, 106 Am S R 371

97. Vt—Sykes v Pawlet, 43 Vt 446 5 Am R 595
29 C J p 696 note 96

98. Pa—Berman v Allegheny County, 21 A 2d 112, 145 Pa Super 330
Contributory negligence see infra §§ 268–274

99. Wis—Schatz v Pfeil, 14 N W 628, 56 Wis 429
29 C J p 696 note 97

1. Mass—Smethurst v Barton Square Independent Cong Church, 19 N E 387, 148 Mass 261, 12 Am S R 550 2 L R A 695
29 C J p 696 note 98

2. Mass—Richards v Enfield, 13 Gray 344
N H—Cummings v Center Harbor, 57 N H 17

3. Conn—Ward v North Haven, 43 Conn 148
29 C J p 696 note 1

4. Me—Brown v Skowhegan, 19 A 399, 82 Me 273
29 C J p 696 note 2
Leaving traveled path see infra § 272.

Railroad employees
A highway contractor did not fail in any legal duty to train conductor, killed in collision between backing train and automobile at highway crossing, by permitting traffic to enter on and travel along highway which had been recently opened but was incomplete with knowledge that no warning signs had been erected at such crossing—Hilton v Southern Ry Co, 7 S E 2d 161, 192 S C 176

5. Me—McCarthy v Portland 67 Me 167, 24 Am R 23—Leslie v Lewiston 62 Me 468

6. Me—Orcutt v Kittery Point Bridge Co, 53 Me 500—Stinson v Gardiner 42 Me 248, 66 Am D 281
Mass—Stickney v Salem, 3 Allen 374

7. Pa—Kessler v Berger 54 A 887 205 Pa 289, 61 L R A 611
29 C J p 697 note 4

8. Kan—City of Atchison v Acheson 57 P 248, 9 Kan App 33
Mass—Damon v Scituate, 119 Mass 66 20 Am R 315
29 C J p 697 note 9

In New York
(1) Pedestrian's violation of Vehicle and Traffic L § 85 subd 6, relating to manner in which pedestrian should walk on traveled portion of highway, did not constitute defense to actions against state for damages resulting from injuries sustained by pedestrian who fell when she stepped from concrete of highway to dirt shoulder to allow automobile to pass, on ground of pedestrian's contributory negligence, the state not being member of class for whose protection the statutory safeguard was designed—Wager v State, 10 N Y S 2d 310, 170 Misc 357 modified on other grounds 14 N Y S 2d 29, 257 App Div 580

(2) Under Vehicle and Traffic L § 88 subd 3, defense to action for personal injuries that plaintiff violated provision of vehicle and traffic law forbidding person to allow any part of his body to protrude from vehicle is inapplicable, where plaintiff was not riding on rear of vehicle—Morris v Town of Stafford, 274 N Y S 595, 242 App Div 809, affirmed 195 N E 217, 266 N Y 597
Recovery for injuries from defects or obstructions while traveling on Sunday see the C J S title Sunday § 39, also 60 C J p 1131 note 98–p 1133 note 2

9. R I—Blair v Grainger, 51 A. 1042, 24 R I 17
29 C J p 697 note 10

10. Conn—O'Neil v East Windsor, 27 A 237, 63 Conn 150
29 C J p 697 note 12
Collision with other vehicles see supra § 237

11. Vt—Howe v. Castleton, 25 Vt. 162.

Highway officers or persons bound to repair a road cannot recover for injuries from defects which they should have remedied,[12] but anything less than a duty to repair will not bar plaintiff[13]

§ 268. Contributory Negligence

A person traveling on a public highway must exercise such care as an ordinarily prudent person would use to avoid injury from defects or obstructions, and if his failure to do so contributes materially to, or is the proximate cause of, his injury he cannot recover, notwithstanding such defects or obstructions

A person traveling on the highway is bound to exercise due care, such as an ordinarily prudent person would use, under the circumstances, to avoid injury from defects or obstructions,[14] and where his negligence contributes materially to, or is the proximate cause of, his injury he cannot recover, although the way may have been defective or obstructed,[15] as where the traveler is injured by a defect which is visible and patent,[16] unless he did not in fact see it and was not negligent in not seeing it[17] However, recovery may be had where the injured person's own fault did not contribute to the injury,[18] although he may himself have been in some degree negligent[19]

Right to assume safe condition In the absence of notice to the contrary, a traveler on a highway open to the public ordinarily has a right to rely on the assumption that the highway is in a reasonably safe condition for travel and free from obstructions,[20] and he need not keep his eyes constantly

12. Mass—Todd v Rowley, 8 Allen 51—Wood v Waterville, 5 Mass 294—Wood v Waterville, 4 Mass 422

13. Ark—Arkansas Fuel Oil Co v Downs, 168 S W 2d 419
29 C J p 697 note 22

Owner of abutting premises
The fact that pedestrian injured by fall in hole left on right of way by former owner of adjoining premises when removing underground fuel tanks, owned premises at time of injury would not preclude recovery, since duty did not rest on such subsequent owner to go upon right of way and remove an obstruction negligently left thereon—Arkansas Fuel Oil Co v Downs supra

14. Del—Philadelphia & R Ry Co v Dillon 114 A 62, 1 W W Harr 247, 15 A L R 894
Ky—Jackson's Adm'r v Rose, 40 S W 2d 343, 239 Ky 754
La—Fallin v Town of Jonesboro App 2 So 2d 516
Miss—McWhorter v Draughn 98 So 597, 134 Miss 247
Pa—Bearman v Allegheny County, 21 A 2d 112, 145 Pa Super 330
S C—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155
29 C J p 698 note 24

Extraordinary care or highest degree of precaution not required
La—Fallin v Town of Jonesboro, App, 2 So 2d 516

Pedestrian
(1) Pedestrian using highways must use ordinary care for his own safety—Jackson's Adm'r v Rose, 40 S W 2d 343, 239 Ky 754

(2) He may walk on any part of the road using due care to avoid defects or obstructions
Ala—City of Birmingham v Andrews, 172 So 681, 684, 27 Ala App 377, citing **Corpus Juris.**
Use of highway and law of the road see supra § 245
Violation of law see supra § 266

15. Conn—Roth v Macdonald, 200 A 725, 124 Conn 461
La—Fallin v Town of Jonesboro, App 2 So 2d 516
Pa—Kelly v Northampton County Agr Soc, 132 A 832, 286 Pa 97
S C—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155
29 C J p 698 note 25

16. Conn—Hill v Way, 168 A. 1, 117 Conn 359
La - Bamburg v Standard Oil Co of Louisiana, App, 199 So 411
Pa—Bilheimer v City of Bethlehem, 4 A 2d 564, 135 Pa Super 1
29 C J p 698 note 26

Pedestrian seeking to recover for injury sustained when she fell into an excavation made near public highway was held to have seen that which she should have seen—Bamburg v Standard Oil Co of Louisiana, La App, 199 So 411
Effect of knowledge of defect generally see infra § 270

17. N Y—Embler v Wallkill, 30 N E 401, 132 N Y 222
29 C J p 699 note 27

18. N J—Opdycke v Public Service R Co, 76 A 1032, 78 N J Law 576, 29 L R A, N S, 71
Va—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468
29 C J p 699 note 28

19. Wis—Bloor v Delafield, 34 N W 115, 69 Wis 273
29 C J p 699 note 29

20. U S—Robison v Northern Pac Ry Co, D C Wash, 49 F Supp 632
Ala—Birmingham v Smith, 200 So 880, 883 241 Ala 32, citing **Corpus Juris**—Berry v Dannelly, 145 So 663, 226 Ala 151—Walker County v Davis, 128 So 144, 221 Ala 195—City of Birmingham v Andrews, 172 So 681, 683, 27 Ala App 377, citing **Corpus Juris.**
Cal—Breithaupt v Jahn & Bressi Const Co, 47 P 2d 339, 8 Cal App 2d 181
Del—Philadelphia & R Ry Co v Dillon, 114 A 62, 1 W W Harr 247, 15 A L R 894
Ga—Dixon v Johnson, 109 S E 519, 27 Ga App 699
Iowa—Hatfield v White Line Motor Freight Co, 272 N W 99, 104, 223 Iowa 7, quoting **Corpus Juris.**
Md—Lashley v Dawson, 160 A 738, 162 Md 519
Miss—Graves v Johnson, 176 So 256, 260, 179 Miss 465, quoting **Corpus Juris,** and followed in Graves v Hamilton, 177 So 360
Neb—Miller v Abel Const Co 300 N W 405, 140 Neb 482- King v Douglas County, 208 N W 120, 114 Neb 477
N H—Cullen v Town of Littleton, 150 A 809, 84 N H 373
N J—Hill Const Co v Central R Co of New Jersey 167 A 757 11 N J Misc 622, affirming 163 A 429, 10 N J Misc 1240—Doherty v Romano, 135 A 62 4 N J Misc 940
Ohio—Shelley v Swing, 29 N E 2d 364, 65 Ohio App 109
29 C J p 699 note 30

A traveler, having no knowledge of the condition of a public highway other than that which is apparent to him, may use it in the ordinary and usual way in the belief that no obstructions have been placed therein without adequate warning of their presence—Robison v Northern Pac Ry Co, D C Wash, 49 F Supp 632

Traveler may assume absence of dangerous impediment or obstruction of temporary nature in highway unless properly warned thereof by person responsible for its presence—Doherty v Romano, 135 A 62, 4 N J Misc 940

Well-traveled track, in recent use, situated within regularly established rural highway and connecting with public highway open to travel, with no barriers and no warning signs,

fixed on the road or path of the highway,[21] or look far ahead for defects which should not exist,[22] nor is he required to exercise such extreme vigilance as in all events to see defects or obstructions in the road ahead,[23] such as a chain stretched across the road.[24] The right to assume that the highway is reasonably safe, however, is subject to the qualification that the traveler must use ordinary care,[25] and it has been held that he must take notice of a legalized obstruction when lawfully maintained,[26] and must assume some of the risks and inconveniences inseparable from travel on a highway.[27]

In emergency The fact that a traveler when confronted with danger did not act in the best way or exercise that presence of mind required of a prudent person under ordinary circumstances will not preclude recovery,[28] although he is still bound to exercise such care as a person of ordinary discretion would exercise under similar circumstances.[29]

§ 269. —— Competency of Person Injured

A traveler on the highway who is under some physical or mental incompetency must exercise reasonable care, considering the nature or extent of his incompetency, to avoid injury from defects or obstructions.

A traveler on the highway who is under some physical or mental incompetency must exercise reasonable care, considering the nature and extent of his incompetency, to avoid injury from defects or obstructions in the highway.[30] The use of the highway by a person suffering under some physical incapacity,[31] such as blindness[32] or intoxication,[33] is not contributory negligence as a matter of law, but if the intoxication contributes proximately to the injury it bars recovery.[34] Permitting a woman[35] or a child[36] to drive a horse on the highway is not conclusive evidence of negligence. It is suf-

justifies assumption that portion of highway occupied by such tracks is reasonably safe for public.—King v Douglas County, 208 N.W. 120, 114 Neb. 477

Assumption that county has performed duty

Under statute providing that board of county commissioners shall be liable in its official capacity for damages received by reason of its negligence in not keeping a road or bridge in proper repair, as long as road remains open and public is invited impliedly to use it, those using it have a right to assume that county has performed its duty to them and that road is reasonably safe for travel in ordinary mode.—Sheley v Swing, 29 N.E.2d 364, 65 Ohio App. 109

Knowledge of defects see infra § 270

21. Ala.—Birmingham v Smith, 200 So. 880, 883, 241 Ala. 32.—City of Birmingham v Andrews, 172 So. 681, 27 Ala. App. 377

Iowa.—Hatfield v White Line Motor Freight Co., 272 N.W. 99, 223 Iowa 7

La.—Bamburg v Standard Oil Co. of Louisiana, App., 199 So. 411

Miss.—Graves v Johnson, 176 So. 256, 179 Miss. 465, followed in Graves v Hamilton, 177 So. 360

N.H.—Cullen v Town of Littleton, 150 A. 809, 84 N.H. 373

29 C.J. p. 700 note 31

22. Ala.—Birmingham v Smith, 200 So. 880, 241 Ala. 32.—Walker County v Davis, 128 So. 144, 221 Ala. 195.—City of Birmingham v Andrews, 172 So. 681, 27 Ala. App. 377

Iowa.—Hatfield v White Line Motor Freight Co., 272 N.W. 99, 223 Iowa 7.

Mass.—Thompson v Bridgewater, 7 Pick. 188

Miss.—Graves v Johnson, 176 So. 256, 260, 179 Miss. 465, followed in Graves v Hamilton, 177 So. 360

29 C.J. p. 700 note 32

23. Ala.—Birmingham v Smith, 200 So. 880, 241 Ala. 32

Miss.—Graves v Johnson, 176 So. 256, 179 Miss. 465, followed in Graves v Hamilton, 177 So. 360

24. Miss.—Graves v Johnson, 176 So. 256, 179 Miss. 465, followed in Graves v Hamilton, 177 So. 360.—McWhorter v Draughn, 98 So. 597, 134 Miss. 247

25. Ala.—Birmingham v Smith, 200 So. 880, 883, 241 Ala. 32

Cal.—Breithaupt v Jahn & Bressi Const. Co., 47 P.2d 339, 8 Cal. App. 2d 181

Del.—Philadelphia & R. Ry. Co. v Dillon, 114 A. 62, 1 W.W. Harr. 247, 15 A.L.R. 894

La.—Bamburg v Standard Oil Co. of Louisiana, App., 199 So. 411

Miss.—Graves v Johnson, 176 So. 256, 260, 179 Miss. 465 citing **Corpus Juris,** and followed in Graves v Hamilton, 177 So. 360

Neb.—Miller v Abel Const. Co., 300 N.W. 405, 140 Neb. 482

Wis.—Vollmer v Fairbanks, 132 N.W. 542, 146 Wis. 630

26. N.J.—Hill Const. Co. v Central R. Co. of New Jersey, 163 A. 429, 10 N.J. Misc. 1240, affirmed 167 A. 757, 11 N.J. Misc. 622

"Ditches or gutters with walks or bridges built across them for the use of abutting owners cannot be considered defects in the highway, and users of the highway are ordinarily charged with notice of their presence."—Martin v Borough of Moscow, 31 A.2d 124, 125, 346 Pa. 475

27. S.D.—Wyant v Faith Tp. in Meade County, 207 N.W. 87, 49 S.D. 220

The risk from falling trees located on rural highways must be assumed by the travelers, since the authorities charged with the duty of the maintenance of such road act only in a governmental capacity.—Zacharias v Nesbitt, 185 N.W. 295, 150 Minn. 369, 19 A.L.R. 1016

28. Cal.—Alameda County v Tieslau, 186 P. 398, 44 Cal. App. 332

29 C.J. p. 700 note 34

Proximate cause of injury see supra § 264

29. Mass.—Brooks v Petersham, 16 Gray 181

30. N.Y.—Kaloneczyk v State, 285 N.Y.S. 623, 158 Misc. 431

Seven year old boy held contributorily negligent, when drowned in canal at foot of roadway embankment as result of stepping beyond line of posts along edge of roadway at point where sod was broken.—Kaloneczyk v State, supra

31. Mass.—Ryerson v Abington, 102 Mass. 526

32. N.H.—Sleeper v Sandown, 52 N.H. 244

Vt.—Glidden v Town of Reading, 38 Vt. 52, 88 Am.D. 639

33. Pa.—Dannals v Sylvania Tp., 99 A. 475, 255 Pa. 156, 4 L.R.A. 409

29 C.J. p. 700 note 44

34. Ind.—Woods v Tipton County, 27 N.E. 611, 128 Ind. 289

29 C.J. p. 700 note 45

35. Me.—Cobb v Standish, 14 Me. 198

29 C.J. p. 700 note 37

36. Conn.—Bronson v. Southbury, 37 Conn. 199.

ficient if the child uses reasonable care in view of his age,[37] and the woman such degree of care as a person of ordinary prudence of plaintiff's sex would use,[38] although it has been held that the care required is that which mankind in general, and not a particular class thereof, would use[39]

§ 270. —— Knowledge of Defect or Obstruction

A traveler's previous knowledge of a defect or obstruction does not of itself establish contributory negligence, but imposes on him the duty of using reasonable care to avoid injury, and is a circumstance to be considered in determining whether he was guilty of contributory negligence

A traveler's previous knowledge of a defect does not conclusively establish contributory negligence on his part[40] He is not required to refrain from using the highway in order to be free from contributory negligence, and a traveler is not necessarily negligent where, although knowing of a defect or obstruction, he fails to bear it in mind at the time of approaching it,[41] or is mistaken as to its location,[42] or fails to realize its dangerous nature[43] However, knowledge of a defect or obstruction imposes on a traveler the duty to exercise ordinary or reasonable care, considering the nature and extent of the defect or obstruction, to avoid injury,[44] and, although it does not require the exercise of extraordinary care,[45] it does require the exercise of greater care than when traveling on other parts of the highway,[46] and may require constant vigilance,[47] as where barricades and warning signals are placed at a point where the highway is under construction or is undergoing repairs[48] A traveler having knowledge of a defect or obstruction has no right to act on the usual assumption that the highway is safe,[49] although it has been held that he may assume that an obstruction of which he has knowledge is not dangerous, unless he is warned to the contrary, or the danger is apparent on a casual inspection,[50] and in some cases, after the lapse of a reasonable time, there may be a presumption that the defect has been repaired[51]

It follows that knowledge of a defect or obstruction is to be considered with other circumstances in determining whether plaintiff was guilty of contributory negligence,[52] and may in connection therewith establish such negligence[53] If the danger arising from a known defect is obviously of such a character that no one in the exercise of ordinary care would attempt to use the highway at that place, the use of such highway is contributory negligence and will bar recovery by the person injured[54] It has been held that the injured person

Wis—Parish v Eden, 22 N W 399, 62 Wis 272

37. Conn—Bronson v Southbury, 37 Conn 199

38. Mass—Snow v Provincetown, 120 Mass 580

39. N H—Tucker v Henniker, 41 N H 317

40. Ky—Codell Const Co v Steele, 56 S W 2d 955, 247 Ky 173
Mo—Megson v City of St Louis 264 S W 15
Wash—Blankenship v King County, 122 P 616, 68 Wash 84 40 L R A, N S, 182
29 C J p 700 note 47
Choice of ways see infra § 271
Traveling at night see infra § 273

41. Ala—City of Birmingham v Andrews, 172 So 681, 684, 27 Ala App 377, quoting **Corpus Juris.**
Wash—Blankenship v King County, 122 P 616, 68 Wash 84, 40 L R A N S, 182
29 C J p 701 note 48

42. Ala—City of Birmingham v Andrews, 172 So 681, 27 Ala App 377
Mass—Blood v Tyngsborough, 103 Mass 509
Pa—Millcreek Tp v Perry, 12 A 149, 8 Pa Cas 474
Wis—Coppins v Town of Jefferson, 105 N W 1078, 126 Wis 578

43. Iowa—Kehm v Dilts, 270 N W 388, 222 Iowa 826

44 U S—Wunderlich v Franklin C C A Ala, 100 F 2d 164 certiorari denied Franklin v Wunderlich, 59 S Ct 834, 307 U S 631, 83 L Ed 1514
Md—Kent County Com'rs v Pardee 134 A 33, 151 Md 68
N H—Cullen v Town of Littleton, 150 A 809, 84 N H 373
Pa—Kelly v Northampton County Agr Soc 132 A 832, 286 Pa 97
29 C J p 701 note 50

One driving on a road known to be slippery must observe surrounding conditions as he drives and exercise ordinary prudence to avoid threatened harm—Frye v Washington Tp, 139 A 871, 291 Pa 240

45 Kan—Cunningham v Clay Tp, 76 P 907 69 Kan 373
29 C J p 701 note 51

46. Neb—Miller v Abel Const Co, 300 N W 405, 140 Neb 482

47. Neb—Miller v Abel Const Co supra

48. U S—Wunderlich v Franklin, C C A Ala, 100 F 2d 164, certiorari denied Franklin v Wunderlich, 59 S Ct 834, 307 U S 631, 83 L Ed 1514
Miss—Gordon v Illinois Cent R Co, 1 So 2d 772, 190 Miss 789
Neb—Miller v Abel Const Co, 300 N W 405, 140 Neb 482.

49. Ala—Walker County v Davis, 128 So 111 221 Ala 195
N J—Doherty v Romano, 135 A 62, 4 N J Misc 910
29 C J p 701 note 52

50 Kan—Atchison v Plunkett, 55 P 677, 8 Kan App 308, reversed on other grounds 59 P 646, 61 Kan 297

51 W Va—Daniels v Randolph County Ct, 72 S E 782, 69 W Va 676, 37 L R A N S, 1158
29 C J p 701 note 54

52. Md—Kent County Com'rs v Pardee, 134 A 33, 151 Md 68
29 C J p 702 note 55

53. Pa—Kelly v Northampton County Agr Soc, 132 A 832, 286 Pa 97
29 C J p 702 note 56

If portion of public highways has been roped off, individual using portion apparently left open, and failing to use proper care for his protection, cannot recover for injury—Kelly v Northampton County Agr Soc, 132 A 832, 286 Pa 97

54. Ark—Arkansas Fuel Oil Co v Downs, 168 S W 2d 419
Mich—McTiver v Grant Tp, 91 N W 736, 131 Mich 456
Mo—Megson v City of St Louis, 264 S W 15
Pa—Kelly v Northampton County Agr Soc, 132 A 832, 286 Pa 97—

cannot recover in such a case on the ground that he assumed the risk of injury,[55] but, on the other hand, other authorities have held that the doctrine of assumption of risk, as something apart from that of contributory negligence, has no application to highway cases[56]

§ 271. —— Choice of Ways

A traveler's use of an unsafe way when a safer one is available does not establish contributory negligence, unless the danger is so obvious that his use thereof, in view of his knowledge of a safer way, constitutes lack of due care

The mere fact that a person injured might have used another road safely does not conclusively establish contributory negligence,[57] but if he voluntarily travels on a route which to his knowledge is impassable, or so obviously dangerous that a person of ordinary prudence would avoid it, knowing the existence of another safe and accessible road, he cannot recover for resulting injury[58] unless the danger of which he has knowledge is not the proximate cause of the injury[59]

§ 272. —— Leaving Traveled Way

A traveler's deviation from the traveled part of the highway generally is contributory negligence unless the circumstances are such that his use of the untraveled or unwrought part of the road is justified or excused.

One who voluntarily and unnecessarily deviates from the traveled part of a highway and in so doing meets with an accident from some cause outside the traveled way cannot, as a general rule, recover for injuries sustained[60] The circumstances, however, may be such as to authorize recovery for injuries occurring on the untraveled or unwrought part of the road,[61] as where the traveled part is obstructed or otherwise unsafe,[62] or the deviation is accidental,[63] or it is necessary to turn out in order to pass another vehicle[64] A higher degree of care, however, is required of one going outside the traveled part[65]

§ 273. —— Traveling at Night

Traveling on the highway at night is not necessarily negligence, and only ordinary care, as determined by the particular circumstances, is required of such a traveler

It is not necessarily negligence to travel at night,[66] and a traveler in the nighttime may assume

Willetts v Butler Tp, 15 A 2d 392, 141 Pa Super 394
Wis —Keller v City of Port Washington, 227 N W 284, 200 Wis 87
29 C J p 702 note 57

Disregarding an official notice that the road is closed is contributorily negligent as matter of law —Fenske v Kramp Const Co, 241 N W 349, 207 Wis 397
Choice of ways see infra § 274

55. W Va —Shriver v Marion County Ct, 66 S E 1062, 66 W Va 685, 26 L R A,N S, 377
29 C J p 702 note 58

A traveler who uses a highway which has been officially withdrawn from public travel, as shown by a warning sign, does so at his own peril —Fenske v Kramp Const Co, 241 N W 349, 207 Wis 397—Shawano County v Froemming Bros, 202 N W 186, 186 Wis 491

56. U S —Chicago & N W Ry Co v Prescott, Iowa, 59 F 237, 8 C C A 109, 23 L R A 654
Vt —Maynard v Westfield, 90 A 504, 87 Vt 532

57. Md —Kent County Com'rs v Pardee, 134 A 33, 151 Md 68
Pa —Willetts v Butler Tp, 15 A 2d 392, 141 Pa Super 394
Tex —Houston & T C R Co v Dunn, 42 S W 250, 53 S W 607, 17 Tex Civ App 687
29 C J p 702 note 61

58. Pa —Frye v Washington Tp, 139 A 871, 291 Pa 240—Willetts v Butler Tp, 15 A 2d 392, 141 Pa Super 394—Mickey v Georges Tp, 96 Pa Super 437
29 C J p 702 note 62

59. Vt —Templeton v Montpelier, 56 Vt 328

Danger of frightening horse
Where a traveler chooses a route which he knows will expose his horse to the danger of fright, and such fright results, but the proximate cause of the injury is a defect in the highway of which he has no knowledge, he may recover —Templeton v Montpelier, supra
Proximate cause generally see supra § 264

60 Cal —Galiano v Pacific Gas & Electric Co, 67 P 2d 388, 392, 20 Cal App 2d 534, citing **Corpus Juris.**
Kan —Arnold v Board of Com'rs of Coffey County, 11 P 2d 729, 730, 135 Kan 551 quoting **Corpus Juris.**
La —Booth v Louisiana & A Ry Co, App, 187 So 138
Pa —Martin v Borough of Moscow, 31 A 2d 124, 346 Pa 475
29 C J p 703 note 66

Reason for rule
'The traveler knows that a highway is not constructed for use to its full legal width and when he passes beyond the traveled portion he is bound to be on his guard"—Martin v Borough of Moscow, 31 A 2d 124, 125, 346 Pa 475
Right to deviate from established way generally see supra § 140

61. N Y —Wilke v State, 36 N Y S 2d 455, 178 Misc 765
29 C J. p 703 note 67.

Where there were no other facilities for pedestrian travel, pedestrian was not contributorily negligent so as to bar recovery from state for injuries sustained when she stepped into hole in a highway shoulder because she had not been forced onto the shoulder by traffic, but was walking there voluntarily —Wilke v State supra

62. Wis —Coppins v Jefferson, 105 N W 1078, 126 Wis 578
29 C J p 703 note 68

63. Vt —Cassedy v Stockbridge, 21 Vt 391
Wis —Boltz v Sullivan, 77 N W 870, 101 Wis 608
29 C J p 703 note 69

64. U S —Hull v Richmond, C C R I 12 F Cas No 6,861, 2 Woodb & M 337
Vt —Mochler v Shaftsbury, 46 Vt 580, 14 Am R 634
29 C J p 703 note 70

65. Wash —Blankenship v King County, 122 P 616, 68 Wash 84, 40 L R A,N S, 182

66. Ala —City of Birmingham v Andrews, 172 So 681, 683, 27 Ala App 377, quoting **Corpus Juris.**
Mich —Carpenter v Bloomingdale Tp, 198 N W 912, 227 Mich 355
Wash —Barton v Spokane County, 69 P 2d 151, 190 Wash 519.
29 C J p 703 note 73

Pedestrian falling into pit
A pedestrian, who, while walking at night on pathway, fell into pit maintained by county, which extended about two feet into pathway and

that the highway is in a reasonably safe condition [67] Only ordinary care and prudence, as determined by the particular circumstances, is required of such traveler,[68] although such care may call for greater vigilance on his part than in the daytime,[69] and failure to use such ordinary care may bar recovery [70] Failure to carry a light while traveling at night is not contributory negligence as a matter of law,[71] although the circumstances may render it such [72] Recovery is not prevented by the fact that the person injured was running instead of walking,[73] or that he was riding or driving at night faster than a walk.[74] The fact that one traveling at night had previous knowledge of the defect will not render him guilty of contributory negligence as a matter of law,[75] but such knowledge requires the traveler to exercise the reasonable care of an ordinarily prudent man with like knowledge [76]

§ 274. —— Suitableness of Horses, Vehicles, and Harness

A person riding or driving on the highway must exercise reasonable care to provide himself with a reasonably safe horse and suitable harness and equipment, and if he does so and is injured by reason of defects in the highway he is not precluded from recovering because of defects in the harness or equipment, or vices in the horse, which existed without his knowledge or fault

Although it has been held that there can be no recovery for injuries caused by a defective highway if any deficiency in the horse, vehicle, or harness contributed to the injury, even though the person injured had no knowledge of the deficiency and was not at fault for want of such knowledge,[77] it is the general rule that defects in harness or vehicle, or vices in the horse, contributing to the injury will not preclude recovery if such defects existed without plaintiff's knowledge or fault,[78] or if the horse was one which plaintiff might reasonably drive on an ordinarily safe highway [79] However, plaintiff must exercise ordinary care to provide a safe horse and suitable harness and equipment,[80] although this rule does not require him to use the safest form of vehicle [81] One is not, as a matter of law, barred from recovery because he was driving a colt,[82] or a balky horse,[83] or a horse which was partially or totally blind,[84] unless he failed to use due care [85] Recovery for injuries caused by a defect in the highway and a horse shying or running away will not be precluded merely because the horse had shied or run away before,[86] but a person driving a horse which is timid or inclined to shy is bound to exercise more than ordinary care in passing obstructions [87]

§ 275 Notice of Claim for Injury

a Necessity
b By whom given
c Form and contents
d Service or filing

which was not discernible at night, was not contributorily negligent and did not assume risk so as to be precluded from recovering from county for injuries sustained in fall —Barton v Spokane County, 69 P 2d 151, 190 Wash 519

67 Ala —City of Birmingham v Andrews, 172 So 681, 27 Ala App 377
Del —Philadelphia & R Ry Co v Dillon, 114 A 62, 1 W W Harr 247, 15 A L R 894
Mich —Carpenter v Bloomingdale Tp, 198 N W 912, 913, 227 Mich 355, citing **Corpus Juris.**

Law prohibiting obstruction of highway unless marked by light may be relied on by those using public highway at night —Morris v Sells-Floto Circus, C C A N C 65 F 2d 782

68. Del —Philadelphia & R Ry Co v Dillon, 114 A 62, 1 W W Harr 247, 15 A L R 894
Mich —Carpenter v Bloomingdale Tp, 198 N W 912, 227 Mich 355
29 C J p 704 note 75

69. Ala —City of Birmingham v Andrews, 172 So 681, 27 Ala App 377
Iowa —Hall v Manson, 58 N W 881, 90 Iowa 585
29 C J p 704 note 76

70. Mass —Wood v Westport, 70 N E 1018, 185 Mass 567
29 C J p 704 note 77

71. Md —Alleghany County v Broad Waters, 16 A 223 69 Md 533
29 C J p 704 note 78

72. Pa – Conrad v Upper Augusta Tp, 49 A 770, 200 Pa 337

73. Ind —Noblesville Gas & Imp Co v Loehr, 24 N E 579, 124 Ind 79

74. Mass —Bly v Haverhill, 110 Mass 520
Wis —Bills v Kaukauna, 68 N W 992, 94 Wis 310
29 C J p 704 note 81

75. Mich —Rohlfs v Fairgrove Tp, 140 N W 908, 174 Mich 555
29 C J p 704 note 83

76. Mich —Rohlfs v Fairgrove Tp, supra
29 C J p 704 note 84

77. Me —Anderson v Bath, 42 Me 346
29 C J p 704 note 86

78. Conn —Stedman v O'Neil, 72 A 923, 82 Conn 199, 22 L R A, N S, 1229
Ill —Joliet v Shufeldt, 32 N E 969, 144 Ill 403, 36 Am S R. 453, 18 L R A 450
29 C J p 704 note 87

Horse escaping from control as proximate cause see supra § 264

79. Mass —Murdock v Warwick, 4 Gray 178

80 N H —Tucker v Henniker, 41 N H 317
29 C J p 705 note 89

81. Pa —Fry v Perkiomen Tp, 1 Montg Co 25

82. N Y —Wood v Gilboa 27 N Y S 586, 76 Hun 175 affirmed 42 N E 544, 146 N Y 383

83. N Y —Chamberlain v Wheatland, 7 N Y S 190 4 Silv Sup 165
Pa —Glaub v Goshen Tp, 7 Kulp 292

84. Iowa —Clark v Sioux County, 159 N W 664, 178 Iowa 176
Mass —Cutting v Shelburne, 78 N E 752, 193 Mass 1—Wright v Templeton, 132 Mass 49

85. Iowa —Clark v Sioux County, 159 N W 664, 178 Iowa 176
Me —Whitman v Fisher, 57 A 895, 98 Me 575
29 C J p 705 note 94

86. Ill —Centralia v Scott, 59 Ill 129
Mass —Woods v Groton, 111 Mass 357

87. Conn —Dimock v. Suffield, 30 Conn. 129.

a. Necessity

As required by statute in many states, in order that a person injured by a defect or obstruction may maintain an action to recover therefor he must file or present to the proper governmental body or authority a notice of his claim, in the time and manner prescribed by the statute.

In many states, under statutory provisions which have been held constitutional,[88] in order that a person who has been injured by reason of a defect or obstruction in the highway may maintain an action to recover therefor he must file or present to the municipality or person charged by law with the duty of keeping the highways in repair a notice of his claim, in the time and manner prescribed by the statute,[89] and, under such a statute, no matter how meritorious a claim for injuries may be, the court cannot entertain an action therefor unless the statutory requirements as to the notice of claim have been complied with.[90] Such statutory notice need be given only to the governmental bodies or persons included in the statute,[91] and except in cases where it is required by the statute[92] notice of the claim need not be given to a property owner or individual who caused the defect, as a condition to maintaining an action against him for the injury.[93] Such a requirement of notice has been held not to apply when death results from the injury.[94]

Waiver of notice. This statutory notice of claim cannot, as a general rule, be waived,[95] and it has

88. Conn—Crocker v Hartford, 34 A 98, 96 Conn 387
N Y—Strauch v Town of Oyster Bay, 25 N Y S 2d 809

89. Cal—Cooper v Butte County, 61 P 2d 516, 17 Cal App 2d 43—Thompson v Los Angeles County, 35 P 2d 185, 140 Cal App 73
Conn—Main v Town of North Stonington, 16 A 2d 356, 127 Conn 711
Kan—Bohrer v Kansas State Highway Commission, 22 P 2d 470, 137 Kan 925
Mass—Anderson v Inhabitants of Town of Billerica, 36 N E 2d 393, 309 Mass 516
Mich—Braun v Wayne County, 6 N W 2d 744, 303 Mich 454
N Y—Brothers v Town of Leon, 189 N Y S 590, 198 App Div 144—Millens v Town of Greenport, 249 N Y S 655, 139 Misc 555—Strauch v Town of Oyster Bay, 25 N Y S 2d 809
Pa—McBride v Rome Tp, 32 A 2d 213, 347 Pa 228
S C—Ancrum v State Highway Department, 161 S E 98, 162 S C 504—Fann v State Highway Department, 152 S E 429, 155 S C 219—United States Casualty Co v State Highway Department of South Carolina, 151 S E 887, 155 S C 77
29 C J p 705 note 99

Failure to file notice of claim is a complete defense against one having a cause of action against a town under the highway law—Brothers v Town v. Leon, 189 N Y S 590, 198 App Div 144

Action against town for nuisance on account of defective condition of highway arising out of negligence is barred by failure to give statutory notice of claim—Millens v Town of Greenport, 249 N Y S 655, 139 Misc 555

Presupposes completed highway

Statute requiring filing of claim arising from defect in highway within six months after accident presupposes a finished or completed highway thrown open to the public without restrictions, and not one in course of construction or under repair—Fernbach v State, 265 N Y S 881, 148 Misc 446

Construction of statute

In New York, County L § 6 a, providing that any claim against county, not specified in § 6, making county liable for injuries to person or property caused by defective highways and bridges, for death or for injury to person or property caused by negligent or wrongful act of county or any of its agents, officers or employees must be presented in writing within three months was not intended to apply only to actions other than those pertaining to defective highways, the use of the word "or" instead of "and" in the phrase "damages for death or injury to person or property" indicating an intention to differentiate—Hawkins v Oneida County, 38 N Y S 2d 844

General and special statutes

(1) Compliance with general statutory requirements relating to filing of claims against counties by claimants for damages for death of person allegedly caused by negligence of county in allowing dangerous condition in highway to exist is insufficient where specific statute relating to filing of claims for injuries to persons resulting from dangerous condition of highway and requiring filing of verified claim therefor controls—Cooper v Butte County, 61 P 2d 516, 17 Cal App 2d 43—Thompson v Los Angeles County, 35 P 2d 185, 140 Cal App 73

(2) General law, however, requiring that claim against county for personal injuries resulting from defective highway shall be presented to board of supervisors within ninety days after accident occurred controls where county charter contains no provision for filing of such claim before bringing action—Thompson v. Los Angeles County, supra.

Pleading giving of notice see infra § 279

90. Conn—Main v Town of North Stonington, 16 A 2d 356, 127 Conn 711

91. Mich—McIntyre v Grant Tp, 172 N W 564, 206 Mich 223
29 C J p 705 note 98 [a]

Requirement of notice to town not applicable to superintendent

Under statute requiring notice of defect in sidewalk as basis of action against town for resulting injuries, no preliminary notice of defect in sidewalk is necessary to maintain action against town superintendent of highways for injuries received through such defect, since statute refers only to actions against town—Weinberg v Town of Hempstead, 34 N Y S 2d 718, 264 App Div 738

92. Mass—Baird v Baptist Soc, 94 N E 296, 208 Mass 29
29 C J p 705 note 2

93. Mass—Stevenson v Joy, 25 N. E 78, 152 Mass 45—Fisher v. Cushing, 134 Mass 374

The common-law liability for injury to a traveler on a defective highway resting on a person by whose acts, positive or negligent, the defect was created may be enforced without notice of the time, place, and cause of the injury—Baird v Baptist Society, 94 N E 296, 208 Mass 229

94. Me—Perkins v Oxford, 66 Me 545
N H—Knight v Haverhill, 93 A 663, 77 N H 487—Jewett v Keene, 62 N H 701—Clark v Manchester, 62 N H 577
Notice of claim for death generally see Death § 30

95. Cal—Cooper v Butte County, 61 P 2d 516, 17 Cal App 2d 43
29 C J p 705 note 6

County cannot be estopped by its action to set up a failure to comply with the statute as to notice as a defense—Cooper v Butte County, supra

In Kansas it has been held that, where an action for death has re-

been held that a vote of a town to pay damages, passed before notice given, or after the person injured has lost his rights by failure to give notice, is a mere gratuity on which no action can be brought.[96] Even if the requirement of notice can be waived, a mere expression by a town officer of a willingness to do what is right, together with a request to the injured person to make no expense about it, does not constitute a waiver,[97] nor is a denial of the claim made by a husband a waiver of notice of a claim by the wife.[98] The fact that the highway authorities, shortly after the accident which caused the injury, had knowledge of and repaired the defect is not equivalent to the statutory notice, although it may have a bearing on the right to relief.[99]

b. By Whom Given

The notice of claim should be given in the name of the person claiming damages

The notice of claim should be in the name of the person claiming damages.[1] A requirement that "any person" injured shall give notice includes minors,[2] and a father may give notice for his minor child when the statute provides that notice shall be given by a person injured or by another person "in his behalf."[3] Notice may be given by the administrator of a deceased person,[4] or by an agent or representative of the deceased,[5] but it should appear in whose behalf the claim is made,[6] although it has been held that a notice presented by the person injured, but signed by his attorneys who did not describe themselves as such, is sufficient.[7]

Husband or wife. A notice by a married woman alone is sufficient,[8] and a notice by a husband does not include a claim by the wife,[9] and, conversely, notice by a wife does not include a claim by the husband.[10] A notice, however, in the name of the husband, claiming damages for injuries to both,[11] or stating that the husband holds the town liable for injuries to his wife,[12] is sufficient.

c. Form and Contents

The notice ordinarily should be in writing, and should comply with the statutory requirements as to the matters to be described or stated therein.

The notice ordinarily is required to be in writing,[13] and, when written notice is required, defects therein cannot be supplied by oral statements to municipal officers.[14] The bringing of a suit within the time fixed for the service of notice has been held to be a sufficient compliance with the statute,[15] although there is also authority to the contrary.[16]

The notice should set out the claim distinctly,[17] showing that it is intended as a notice for the purpose of fixing the right of action,[18] although it need not, unless required by statute, expressly state the intention to hold the municipality liable.[19] It should describe, with reasonable certainty, the nature of the injury[20] and should describe with rea-

sulted in a judgment for plaintiff, it was not ground for reversal that defendant pleaded and proved want of the required notice.—Leisenring v Pleasant Hill Tp., 193 P. 893, 108 Kan. 29

96. Me.—Clark v. Tremont, 22 A. 378, 83 Me. 426
Vt.—Gregg v. Weathersfield, 55 Vt. 385

97. Conn.—Hoyle v. Putnam, 46 Conn. 56

98. Me.—Hubbard v. Fayette, 70 Me. 121

99. Pa.—McBride v. Rome Tp., 32 A.2d 212, 347 Pa. 228

1. N.H.—Sargent v. Gilford, 27 A. 306, 66 N.H. 543
29 C.J. p. 705 note 11

2. Cal.—Hennessy v. San Bernardino County, 117 P.2d 745, 47 Cal.App.2d 183.—Phillips v. Los Angeles County, 35 P.2d 187, 140 Cal.App. 78
Kan.—Bohrer v. Kansas State Highway Commission, 22 P.2d 470, 137 Kan. 925
Mass.—Madden v. Springfield, 131 Mass. 441

3. Mass.—Taylor v. Woburn, 130 Mass. 494.

4. U.S.—Dodge v. North Hudson, C.C.N.Y., 188 F. 489
Wis.—Parish v. Eden, 22 N.W. 399, 62 Wis. 272
29 C.J. p. 706 note 19

5. Mass.—Harris v. Newbury, 128 Mass. 321
N.H.—Ayer v. Somersworth, 30 A. 1119, 66 N.H. 476
Wis.—Carpenter v. Rolling, 83 N.W. 953, 107 Wis. 559

6. Mass.—Roach v. Somerville, 131 Mass. 189
29 C.J. p. 706 note 21

7. Wis.—Teegarden v. Caledonia, 6 N.W. 875, 50 Wis. 292

8. Vt.—Church v. Westminster, 45 Vt. 380

9. Me.—Keller v. Winslow, 24 A. 796, 84 Me. 147.—Hubbard v. Fayette, 70 Me. 121

10. N.H.—Sargent v. Gilford, 27 A. 306, 66 N.H. 543

11. Mass.—Carberry v. Sharon, 43 N.E. 912, 166 Mass. 32
29 C.J. p. 706 note 15

12. Mass.—Higgins v. North Andover, 47 N.E. 85, 168 Mass. 251

13. Kan.—Bohrer v. Kansas State Highway Commission, 22 P.2d 470, 137 Kan. 925
Me.—Sawyer v. Naples, 66 Me. 453
N.Y.—Hawkins v. Oneida County, 38 N.Y.S.2d 844
29 C.J. p. 706 note 23

14. Mass.—Roberts v. Douglas, 2 N.E. 775, 140 Mass. 129

15. Ga.—Mitchell County v. Dixon, 92 S.E. 405, 20 Ga.App. 21

16. Ill.—Erford v. Peoria, 82 N.E. 374, 229 Ill. 546

17. Me.—Beverage v. Rockport, 76 A. 677, 106 Me. 223
29 C.J. p. 706 note 29

18. Mass.—Mooney v. Salem, 130 Mass. 402.—Kenady v. Lawrence, 128 Mass. 318

19. Mass.—Savory v. Haverhill, 132 Mass. 324.—Taylor v. Woburn, 130 Mass. 494

20. U.S.—Elson v. Waterford, C.C. Conn., 138 F. 1004, affirmed 149 F. 91, 78 C.C.A. 675
29 C.J. p. 706 note 32.

A notice that woman "got hurt" and that defective condition of road was cause of her "getting hurt" does not describe injury, as required by statute, to authorize recovery of damages for her resulting death, since word "hurt" might include any injury, whether very trivial or very

sonable certainty the cause[21] of the injury, the time[22] and place[23] of the accident, and the damages claimed,[24] although it has been held that the amount of damages in dollars and cents need not be set forth[25]

The purpose of the notice is to put the local authorities in possession of the facts on which the claim is founded, with such reasonable certainty as will enable them to investigate such facts and thereby ascertain whether the claim is just, so that they may make either an appropriate settlement of the claim or an effective and intelligent defense to the action,[26] and where a notice is couched in such terms as are sufficient to enable an ordinarily intelligent person to find the place and understand how and when the injury occurred it constitutes a sufficient compliance with the statute,[27] and the fact that the municipal officers had seen the defect or obstruction may be considered in determining the sufficiency of the notice[28]

Waiver of defects in notice Failure to object to the notice when offered in evidence is not a waiver of material defects therein or of the right to take advantage of such defects later in the course of the trial.[29]

Saving clause. Under a saving clause in some statutes the notice is not invalid because of inaccuracy in stating the time, place, or cause of the injury, if there was no intention to mislead, and provided defendant was not misled thereby.[30] Such a provision, however, obviates only inaccuracies in the description of the injury and does not supply a lack of any description[31]

Amendment of the notice after the bringing of suit ordinarily will not be allowed[32]

d. Service or Filing

The notice must be served on or filed with the governmental body or officer authorized to receive it in the manner and within the time prescribed by the statute, unless, under the circumstances, a delay is justified or excused

The notice must be served on the governmental body or officer, as prescribed in the statute[33] It must be served, filed, or received within the time prescribed,[34] but under exceptional circumstances not attributable to the fault of claimant a notice given later than provided for in the statute has

serious, and of whatever nature—Main v Town of North Stonington, 16 A 2d 356, 127 Conn 711

21. N Y—Clark v Town of Copake, 126 N Y S 982 142 App Div 202
29 C J p 706 note 33

22. Conn—Lilly v Woodstock, 22 A 40 59 Conn 219
29 C J p 707 note 34

23 Vt—Law v Town of Fairfield, 16 Vt 425
29 C J p 707 note 35

"Place," as used in statute requiring the giving of a notice stating the time when and the place where an injury received on a highway was sustained, is intended to be confined to a locality less extensive than the entire highway in the town and means a locality sufficiently narrow and particular as to inform the officers of the town of the whereabouts of the place of injury—Law v Town of Fairfield, supra—29 C J p 707 note 35 [d]

24. N H—Noble v Portsmouth, 30 A 419, 67 N H 183
S C—Ancrum v State Highway Department, 161 S E 98, 162 S C 504

25. Me—Marcotte v Lewiston, 47 A 137, 94 Me 233
29 C J p 707 note 37

26. U S—Elson v Waterford, C C Conn, 138 F 1004, affirmed 149 F 91, 78 C C A 675
S C—Fann v State Highway Department, 165 S E 785, 167 S C 84
29 C J p 707 note 38

27. U S—Elson v Waterford, C C Conn, 138 F 1004, affirmed 149 F 91, 78 C C A 675
29 C J p 707 note 39

Claim held in substantial compliance with statute, and sufficient to notify highway officers that the claims were being presented against them, notwithstanding the claims were headed "claim for damages against County," which was also joined as a defendant—Hennessy v San Bernardino County, 117 P 2d 745, 47 Cal App 2d 183
Sufficiency of notice of claim as question of law or fact see infra § 281
Variance between notice and proof see infra § 279 d

28. Mass—Taylor v Woburn, 130 Mass 494
Wis—Redepenning v Rock 117 N W 805, 136 Wis 372—Salladay v Dodgeville, 55 N W 696, 85 Wis 318, 20 L R A 541

29. Vt—Parker v Pittsfield, 92 A 24, 88 Vt 155

30. Conn—Main v Town of North Stonington, 16 A 2d 356, 127 Conn 711
29 C J p 708 note 52
Burden of proving that defendant was not misled as being on plaintiff see infra § 280 a

31. Conn—Main v Town of North Stonington, 16 A 2d 356, 127 Conn 711

32. N H—Leonard v Bath, 61 N H 67

33. Mass—Anderson v Inhabitants of Town of Billerica, 36 N E 2d 393, 309 Mass 516
Mich—Braun v Wayne County, 6 N W 2d 744, 303 Mich 454
N Y—Millens v Town of Greenport, 249 N Y S 655, 139 Misc 555—Hawkins v Oneida County, 38 N Y S 2d 844
29 C J p 708 note 54

Notice to town clerk of name and residence of person injured because of defect in public way and time, place and cause of injury must actually be received by such officer to authorize recovery of damages from town for such injury—Anderson v Inhabitants of Town of Billerica, 36 N E 2d 393, 309 Mass 516

Requirement mandatory
The statutory requirement that no county shall be liable for damages sustained by any person upon any county road unless notice is served within sixty days after injury on county clerk or deputy is "mandatory," and statute is not satisfied by service of notice on county board of road commissioners, although county clerk is its clerk—Braun v Wayne County, 6 N W 2d 741, 303 Mich 454

34. Cal—Phillips v Los Angeles County, 35 P 2d 187, 140 Cal App 78
Kan—Bohrer v Kansas State Highway Commission, 22 P 2d 470, 137 Kan 925
Mich—Braun v Wayne County, 6 N W 2d 744, 303 Mich 454
N Y—Fernbach v State, 265 N.Y.S 881, 148 Misc 446
29 C J p 708 note 55.

been held good,[35] as where claimant was bereft of reason by the injury.[36] Death is no excuse where the injured person lived for ten days in a condition in which he might have given notice.[37] Under some statutes a petition for leave to file a claim may be brought after the time limited has expired if the injured person was unavoidably prevented from filing his claim, and manifest injustice would otherwise be done,[38] and such leave ordinarily will not be denied unless it appears conclusively from the admitted facts, or plaintiff's petition, that he has and can have no claim against defendant.[39]

A statute relating to the time of filing a notice of claim ordinarily is not retroactive and does not, unless plainly so intended, apply to a claim accruing before, but not filed until after, the statute went into effect.[40] This does not dispense with the necessity of filing a claim before suit,[41] but such claim will be governed by the statute in existence at the time it accrued,[42] and it has been held that it is sufficient that the claim is filed before the institution of the suit, which is brought in due time.[43] The cause of action accrues at the time of the injury, within the meaning of a statute providing for the filing or presentation of the claim within a specified time after the accrual of the cause of action.[44]

§ 276. Actions

To recover for injuries to the person or to personal property caused by a defective highway the procedure designated by statute must be followed. An action to recover for such an injury is in some cases regarded as a private action for a public nuisance.

The procedure designated by statute as that to be followed in order to recover for injuries caused by a defective highway must be followed,[45] and, where alternative methods are authorized, a party cannot combine procedural steps of both methods, but must wholly pursue one or the other.[46]

An action for damages for bodily injury caused by an obstruction to a highway has been held to be a private action for a public nuisance.[47]

§ 277. —— Time to Sue, Jurisdiction, and Venue

Actions to recover for injuries to the person or to personal property, caused by defective highways, must be instituted after the cause of action has arisen and within the period of a controlling statute of limitations. At common law and under some statutes such actions are transitory, but under other statutes they are local.

Conformably to the rule applicable in civil actions generally, see Actions §§ 127, 128, an action to recover for injuries caused by a defective highway must be instituted after the cause of action therefor arises[48] and within the period of a controlling statute of limitations.[49] Under the statutes

35. Mass.—Welch v. Gardner, 133 Mass. 529.
29 C.J. p. 708 note 56.

36. Vt.—Eames v. Town of Brattleboro, 54 Vt. 471.—Gonveau v. Town of Milton, 48 Vt. 172.

37. Mass.—Nash v. South Hadley, 13 N.E. 376, 145 Mass. 105.

38. N.H.—Bridgham v. Effingham, 168 A. 904, 86 N.H. 332.
29 C.J. p. 709 note 59.

Filing nunc pro tunc.
Under a statute permitting a filing on leave of court where there was a reasonable excuse for failure to file sooner, where failure to give timely required notice occurred either through counsel's negligence or ignorance of the law, and township commissioners learned of accident within a few days after accident and repaired road within two weeks, the court should allow notice to be filed "nunc pro tunc" on the ground that petitioners had shown a reasonable excuse within the meaning of the statute.—McBride v. Rome Tp., 32 A. 2d 212, 347 Pa. 228.

39. N.H.—Bridgham v. Effingham, 168 A. 904, 86 N.H. 332.

Denial of leave to file claim is not erroneous where the facts found did not conclusively establish that road at place of accident was state-aided road so as to relieve town of liability therefor.—Bridgham v. Effingham, supra.

40. Pa.—Skokut v. Washington County, 21 Wash.Co. 49.
S.C.—Fann v. State Highway Department, 152 S.E. 429, 155 S.C. 219.
Wash.—Horner v. Pierce County, 191 P. 396, 111 Wash. 386.

41. S.C.—Fann v. State Highway Department, 152 S.E. 429, 155 S.C. 219.—United States Casualty Co. v. State Highway Department, 151 S.E. 887, 155 S.C. 77.

In California it has been held that a general law requiring that claim against county for personal injuries resulting from defective highway shall be presented to board of supervisors within ninety days after accident occurred requires one so injured before act took effect to file such claim and not thereby to impair injured party's right to recover since act merely prescribes procedure for enforcement of such right.—Thompson v. Los Angeles County, 35 P.2d 185, 140 Cal.App. 73.

42. Wash.—Horner v. Pierce County, 191 P. 396, 111 Wash. 386.

43. S.C.—Fann v. State Highway Department, 165 S.E. 785, 167 S.C. 84.

44. U.S.—Dodge v. North Hudson, C.C.N.Y., 188 F. 489.
Wash.—Horner v. Pierce County, 191 P. 396, 111 Wash. 386.

45. Mich.—Braun v. Wayne County, 6 N.W.2d 744, 303 Mich. 454.

46. Mich.—Braun v. Wayne County, supra.

47. Iowa.—Ryan v. City of Emmetsburg, 4 N.W.2d 435.

48. Cal.—Walton v. Kern County, 102 P.2d 531, 39 Cal.App.2d 32.
Time to sue and limitations of action for injury in city street see the C.J.S. title Municipal Corporations § 931, also 43 C.J. p. 1208 notes 24–30, p. 1213 note 14–p. 1215 note 33.

49. Cal.—Walton v. Kern County, supra.

Controlling statute.
(1) Where statutes permitting the filing of actions against counties on claims arising from defective or dangerous condition of public streets and highways and providing for filing of a verified claim within ninety days after the accident contained no provision relating to the time within which an action on such claims may be filed, time within which such actions must be filed is governed by general statutes which must be construed with statutes authorizing filing of such actions.—Hennessy v. San Bernardino County, 117 P.2d 745, 47 Cal.App.2d 183.

in force in some jurisdictions such an action cannot be maintained until the municipality, board, or person charged by law with the duty of keeping the highways in repair has rejected the claim,[50] or has been served with notice thereof,[51] but under other statutes there need be no delay in bringing suit after notice of the injury has been given and claim for compensation has been made to the proper parties.[52]

Venue At common law actions for injuries to the person or to personal property resulting from defective highways were transitory,[53] and the same rule prevails under the statutes of some of the states,[54] while in others they have been made local.[55]

§ 278. —— Parties, Right of Action

The proper party to bring an action for injuries caused by a defective highway is the party injured, and all persons interested may be joined as defendants. The liability of different persons for the same injury is not joint where it arises from a violation of different duties. Under some statutes the cause of action does not arise until the claim has been rejected.

In case of injury to property from a defective highway the owner of the property is generally the proper party to bring the action.[56] All persons interested may be joined as defendants.[57] Under statutes which make a town, county, or other political subdivision liable for the neglect of the highway commissioner or other officer charged with the duty of keeping the highways in repair, but which do not prevent suit against such highway commissioner or other officer in his individual capacity, the fact that plaintiff in an action against the commissioner added defendant's title to his name, and alleged that he was commissioner, does not make the action one against the commissioner in his individual capacity.[58]

Where an individual and a political body are both liable for an injury caused by a defective highway, the individual as the author of the defect and the political body for neglect of its statutory duty to repair it, their liability is not that of joint tortfeasors, they are collaterally liable by reason of distinct, although related, torts for the same injury, and, therefore, an unsatisfied judgment against one will not bar an action against the other.[59] Liability as the basis for a tort action against both a contractor and subcontractor for injuries caused by barriers erected by the subcontractor cannot be predicated on the theory of a joint enterprise where each is engaged in a different work at separate points on a common project.[60]

Under the statutes in force in some jurisdictions the cause of action does not arise until the municipality, board, or person charged by law with the duty of keeping the highways in repair has rejected the claim.[61]

(2) Act granting right to institute suit against state highway department for death of motorist killed in automobile collision created a right of action, and any period of limitation fixed by the act governs—Cox v Louisiana Department of Highways, La App, 11 So 2d 409

(3) Where suit against department of highways for wrongful death of motorist killed in automobile collision was filed more than one year after death of motorist but less than one year after effective date of act granting right to institute suit, the suit was not barred by limitations in view of fact that the act creating the right of action did not prescribe a period of limitation—Cox v Louisiana Department of Highways, supra

(4) Action for death from negligence of county road contractor engaged in highway construction work, not repair work, is not barred by thirty-day limitation period applicable to action for damages for insufficiency or want of repairs of highway—Pratt v Western Bridge & Construction Co, 218 N W 397, 116 Neb 553, 58 A L R 527

50. Cal—Walton v Kern County, 102 P 2d 531, 39 Cal App 2d 32

Notice or presentment of claim for injury as condition precedent to action for damages suffered by reason of defective highway see supra § 275

Notice or presentment of claim for injury as condition precedent to action against municipality for damages suffered by reason of defective streets see the C J S title Municipal Corporations § 923, also 43 C J p 1184 note 25

51. Mich—Braun v Wayne County, 6 N W 2d 744, 303 Mich 454

52. Mass—Harris v Newbury, 128 Mass 321

53. Me—Haskell v Woolwich, 58 Me 535
29 C J p 709 note 67

54. Md—Gunther v Dranbauer, 38 A 33, 86 Md 1
29 C J p 709 note 68

55. Ga—Lincoln County v Gazzaway, 158 S E 647, 43 Ga App 358
29 C J p 709 note 69

56. Wis—Welsh v Argyle, 55 N W 412, 85 Wis 307
29 C J p 709 note 71

Husband's right of action for injury to wife from defective highway see the C J S title Husband and Wife § 400, also 30 C J p 962 notes 26–28, and 29 C J p 709 note 76

Parents' right of action for injury to child from defect in highway see the C J S title Parent and Child § 41, also 46 C J p 1295 note 98 [a], and 29 C J p 709 note 76

Whether action or cause of action for injuries resulting from defective highway survives the death of injured person see Abatement and Revival § 145 h

57. Cal—Doeg v Cook, 58 P 707, 126 Cal 213, 77 Am S R 171
29 C J p 709 note 72

58. N Y—Campbell v Powers, 140 N Y S 675, 155 App Div 862

Liability of counties, towns, and other political subdivisions for injuries caused by defects or obstructions in highways see supra § 250

Individual liability of highway officers see supra § 251

59. R I—Bennett v Fifield, 13 R I. 139, 43 Am R 17

60 Ala—Thomas v Saulsbury & Co, 102 So 115, 212 Ala 245

61. Cal—Walton v Kern County, 102 P 2d 531, 39 Cal App 2d 32.

§ 279. —— Pleading

a. General rules
b Declaration or complaint
c. Plea or answer
d Issues, proof, and variance

a. General Rules

The general rules of pleading govern.

The general rules of pleading governing civil cases generally, considered in the C J S title Pleading, also 49 C J p 30 note 1–p 886 note 58, particularly those applicable in negligence cases, see the C J S title Negligence §§ 183–202, also 45 C J p 1056 note 85–p 1145 note 25, apply to actions for injuries from defects in highways [62]

b. Declaration or Complaint

(1) In general
(2) Care on plaintiff's part
(3) Existence, nature, and location of defect
(4) Notice of defect or obstruction
(5) Notice of claim for injury

(1) In General

Plaintiff in his petition, declaration, or complaint must allege a cause of action in his favor and against defendant. Plaintiff may amend his pleadings in a proper case

The petition, declaration, or complaint should fully and clearly set out the facts which constitute plaintiff's cause of action [63] It should contain a full, clear statement of the grounds of defendant's liability [64] They should set out facts showing the existence and nature of the defect, and its location, as discussed infra subdivision b (3) of this section, defendant's negligence [65] at the time the injury occurred, [66] or its liability for the negligence of its officers, if the negligence of such officers is alleged, [67] the nature of injuries sustained by plaintiff, [68] that the negligence averred was the proximate cause of the injury, [69] and the damages claimed [70] Where the general duty of keeping highways in repair is imposed on defendant by a public statute, such duty need not be alleged, [71] or, at most, a general allegation as to such duty is sufficient, [72] without stating that it was imposed by statute [73] However, if the liability imposed is spe-

62. S C —Harrison v Moragne, 25 S E 2d 742
29 C J p 709 note 80

63. R I —Stone v Pendleton, 43 A 643, 21 R I 332
29 C J p 709 note 81

64. Wis —Bodah v Deer Creek, 75 N W 75, 99 Wis 509
29 C J p 709 note 81

Pleading held sufficient

(1) Generally

Ill —Darmody v Kroger Grocery & Baking Co, 280 Ill App 253, affirmed 1 N E 2d 56, 362 Ill 554
W Va —Clayton v Roane County Court, 123 S E 189, 96 W Va 333
29 C J p 709 note 81 [a]

(2) Complaint, specifying mismanagement and defects in the repair of a highway in enumerated particulars, and that such acts were willful and negligent and the proximate cause of plaintiff's injury, stated a cause of action against highway contractor —Harrison v Moragne, S C, 25 S E 2d 742

(3) Complaint in action for wrongful death against county commissioners, alleging that defendants were actually engaged in constructing and grading road and negligently caused explosion which resulted in decedent's death, was held to state cause of action against defendant commissioners —Lowry v Carbon County, 232 P 908, 64 Utah 555

65. Ala —Shelby Iron Co v Morrow, 95 So 370, 209 Ala 116
29 C J p 710 note 82.

Allegations of negligence held sufficient

(1) Allegation that defendant's overturned tractor was naturally calculated to frighten a mule of ordinary gentleness was a sufficient averment showing negligence in leaving the tractor in that position, since very general averments, little short of mere conclusions of a want of care, meet the requirements of the law — Shelby Iron Co v Morrow, 95 So 370, 209 Ala 116

(2) For other cases see 29 C J p 710 note 82 [b]

Allegations as to barriers or lights

In action for injuries caused by washout in highway, complaint alleging that there were no barriers, lights, or any warning at or near approach to excavation at time of injury was held sufficient without allegation that proper barriers were not erected and maintained by road supervisor —Becker v Chapple, 232 P 538, 72 Mont 199

66. Cal —Cotter v Lindgren, 39 P 950, 106 Cal 602, 46 Am S R 255
Ind —Bluffton Corp v Mathews, 92 Ind 213

67. Ind —Abbett v Johnson County, 16 N E 127, 114 Ind 61
N H —Edgerly v Concord, 59 N H 341

68. Mich —Shadock v Alpine Plank-Road Co, 44 N W 158, 79 Mich 7
29 C J p 710 note 87

69. Ala —Shelby Iron Co v Morrow, 95 So 370, 209 Ala 116.

Sufficiency of allegation

(1) A count charging defendants with negligently leaving a tractor overturned by the roadside in a position which would naturally frighten a reasonably gentle animal being driven along the highway and that plaintiff's mule, which was reasonably gentle, was frightened thereby, and shied, throwing plaintiff from the buggy and injuring him, alleges facts from which the injury may be inferred as the unbroken sequence of cause and effect, and was not demurrable for failure to allege that the negligence proximately caused the injury —Shelby Iron Co v Morrow, 95 So 370, 209 Ala 116

(2) A count alleging negligence in failing to give warning of the presence of a tractor overturned alongside a highway, which was calculated to frighten animals of ordinary gentleness, was held not demurrable for failure to allege that the negligence was the proximate cause of plaintiff's injuries when his mule was frightened at the tractor and threw him from the buggy —Shelby Iron Co v. Morrow, supra

70. Wis —Barney v Hartford, 40 N W 581, 73 Wis 95
29 C J p 710 note 88

71. Mass —Read v Chelmsford, 16 Pick 128

72. Conn —Griswold v Gallup, 22 Conn 208
Mass —Read v Chelmsford, 16 Pick. 128

73. Conn —Griswold v. Gallup, 22 Conn 208.

cial and defined by statute, it is necessary in addition to set forth the facts which show the existence of such liability.[74] The declaration or complaint should also allege facts showing that it was duty of defendant to have kept the highway in repair at the time when the injury was sustained,[75] and it must allege that it was a highway erected or established[76] and maintained[77] by defendant political subdivision. The lack of sufficient funds to pay for repair of the highway is a matter of defense, and plaintiff need not allege that defendant possessed sufficient funds or the means of obtaining them.[78]

Amendment. An amendment of the declaration, not changing the cause of action, may be allowed in a proper case.[79]

Presumption after verdict After verdict plaintiff's pleadings will be presumed sufficient.[80]

(2) Care on Plaintiff's Part

As a general rule, although there is authority to the contrary, plaintiff, in his pleadings in an action based on negligence, need not negative contributory negligence; but a complaint which shows contributory negligence is bad.

Although it is held in some jurisdictions that plaintiff must show by direct averments or by the facts stated that he was not guilty of contributory negligence,[81] and that an allegation that plaintiff was free from fault is sufficient unless the facts specifically stated clearly show negligence on his part,[82] the weight of authority is to the effect that contributory negligence is a matter of defense and need not be negatived,[83] unless other matters stated by plaintiff show negligence on his part.[84] The fact that the existence of a defect or obstruction was unknown to plaintiff need not be alleged,[85] even in jurisdictions where contributory negligence must be negatived, an averment that plaintiff was without fault being equivalent to an averment that he had no knowledge of the defect,[86] and could not by reasonable diligence have discovered it,[87] and a general allegation that plaintiff was without fault is not overcome by facts pleaded showing such knowledge, unless these other averments are of such a nature that contributory negligence is necessarily inferable therefrom.[88] However, a complaint which on its face clearly shows contributory negligence is bad.[89]

(3) Existence, Nature, and Location of Defect

The petition, declaration, or complaint should allege clearly and with reasonable certainty the existence, nature, and location of the defect which caused the injury complained of.

The declaration or complaint should show the existence and nature of the defect,[90] and that the in-

74. Ala—Barbour County v. Horn, 41 Ala 114
29 C J p 710 note 92

75. Neb—Stitzel v Hitchcock County, 298 N W 555, 139 Neb 700
N.Y—Scott v North Salem, 122 N Y S 497, 138 App Div. 25.
29 C J p 710 note 93

Allegation held sufficient
Allegation that road was under the care and control of defendant and kept and maintained by it for travel, and that defendant was charged with the duty of keeping it in repair and free from dangerous obstructions, is sufficient without a further allegation that the road was a county-district road, as that conclusion will be drawn from the averments where such road is the only one which defendant controls and has the duty to repair and maintain—Clayton v Roane County Court, 123 S E 189, 96 W Va 333

Demurrer
Petition against board of county commissioners for injury by defect in street within village was held demurrable for failure to show duty of commissioners to repair street—Sroka v Green Cab Co, 172 N E 531, 35 Ohio App 438, error dismissed Smith v New York Cent R Co, 170 N E. 637, 122 Ohio St 45.

76. Neb—Stitzel v Hitchcock County, 298 N W 555, 139 Neb 700

77. Neb—Stitzel v. Hitchcock County, supra

78. Mont—Smith v Zimmer, 125 P 420, 45 Mont 282
29 C J p 710 note 94

79. Colo—Missouri Pac Ry. Co v. Atkinson, 129 P 566, 23 Colo App 357
29 C.J p 710 note 95

80. Mass—Raymond v Lowell, 6 Cush 524, 53 Am D 57.
29 C J p 710 note 96

81. S C—Bunton v South Carolina State Highway Department, 196 S E 188, 186 S C. 463
29 C J p 710 note 97

82. Ind—Elkhart v Witman, 23 N E 796, 122 Ind 538—Bloomington v Rogers, 83 Ind 261

83. La—Bamburg v Standard Oil Co of Louisiana, App, 199 So 411
Nev—City of Las Vegas v. Schultz, 83 P 2d 1040, 1043, 59 Nev 1, citing **Corpus Juris.**
29 C J p 710 note 99.

84. Mont—Snook v Anaconda, 66 P. 756, 26 Mont. 128

85. Nev—City of Las Vegas v Schultz, 83 P 2d 1040 1043, 59 Nev 1, citing **Corpus Juris.**
29 C J. p 711 note 2

86. Ind—Bloomington v Rogers, 83 Ind 261—Elwood v Laughlin, 65 N. E 18, 29 Ind App 667

87. Ind—Washington v. Small, 86 Ind 462

88. Ind—Evansville & T H R. Co v Crist, 19 N E 310, 116 Ind 446, 9 Am S R 865, 2 L R A 450
29 C J p 711 note 5

89. La—Bamburg v Standard Oil Co of Louisiana, App, 199 So 411.
29 C J p 711 note 6

90. Wash—Leber v King County, 124 P 397, 69 Wash 134, 42 L.R. A,N S, 267
29 C J p 711 note 7
Amendment of defective pleading see supra subdivision b (1) of this section

Statement of defect held sufficient
(1) Petition alleging that defendant negligently permitted gravel on highway charged violation of statutory duty to keep roads in proper repair without an independent allegation that defendant failed to keep the road in proper repair—Bales v. Board of County Com'rs, 164 N E. 791, 30 Ohio App. 249.

(2) Other cases see 29 C.J. p 711 note 7 [b]

Negligence based on obstructions held not charged
Where complaints in action for per-

jury resulted therefrom,[91] although, according to some decisions, a general description of the defect is sufficient,[92] at least when objection is not raised until after judgment.[93] The complaint should also describe with reasonable certainty the location of the defect,[94] as within a duly established public highway[95] in defendant political subdivision,[96] describing such highway,[97] and, if defendant desires a more accurate description of the place of the accident, his remedy is by motion to have the complaint made more definite and certain, or that a bill of particulars be rendered.[98] If a temporary obstruction caused the injury, an averment that it was there an unreasonable length of time is required.[99]

(4) Notice of Defect or Obstruction

In general, unless liability exists regardless of notice, the complaint must allege that defendant had notice of the defect or obstruction which caused the injury. If actual knowledge of such defect is essential to liability, it must be alleged

Where the facts show that the defect or obstruction was caused by the direct act of the municipality or its officers, the municipality is liable irrespective of notice, as appears supra § 263, and hence such notice need not be pleaded.[1] However, where the complaint shows that defendant municipality did not cause the defect or obstruction, it must allege that defendant had notice thereof, or must state facts from which such notice can fairly be inferred,[2] unless the statute imposes absolute liability on the municipality regardless of notice,[3] and a general allegation of negligence on defendant's part has been held to imply that it had notice of the defect.[4] In jurisdictions where actual knowledge or notice is required, as considered supra § 263, the petition or complaint must allege such actual knowledge,[5] and an allegation that defendant "knew" and could by the exercise of ordinary care have known of the defect has been held insufficient.[6] In an action against a member of a highway commission for injuries resulting from the negligence of highway employees while engaged in repair of the highway, a complaint which fails to allege that the commission knew of the condition of the road or had an opportunity to know is insufficient.[7]

(5) Notice of Claim for Injury

As a general rule service of a required statutory notice of claim for injury must be alleged

The declaration or complaint must, in most jurisdictions, allege that the statutory notice of claim for injury was served on defendant,[8] although some authorities have held that, since such notice is no part of the cause of action, service thereof need

sonal injuries resulting when plaintiff's horse became frightened from noises of defendant's stonecrushing plant were subject to construction that negligence based on obstructions in highway was not charged, trial court's ruling based on such construction was not disturbed.—Johnson v Wells-Lamson Quarry Co, 153 A 203, 103 Vt 178

91. N J—South v West Windsor Tp, Mercer County, 82 A 852, 82 N J Law 262
29 C J p 711 note 8

92. N H—Corey v Bath, 35 N H 530
29 C J p 711 note 9

93. Vt—Powers v Woodstock, 37 Vt 44

94. Ala—Goggins v Myrick, 31 So 22, 131 Ala 286
29 C J p 711 note 11
Amendment of defective pleading see supra subdivision b (1) of this section

95. Wis—Washburn v. Chicago & N W Ry Co, 32 N W 234, 68 Wis 474
29 C J p 711 note 12

96. Pa—Powell v East Union Tp, 26 Pa Dist 924
29 C J p 711 note 13

97. N H—Palmer v Portsmouth, 43 N H 265
29 C J p 711 note 14

98. N Y—Dougherty v Trustees of Village of Horseheads, 26 N Y S 642, 73 Hun 443
29 C J p 711 note 15

99. Ala—Shelby Iron Co v Morrow, 95 So 370, 209 Ala 116
Reason for averment
Temporary obstructions are permissible under certain circumstances for the benefit or convenience of an individual, unless of such character as to be a nuisance per se.—Shelby Iron Co v Morrow, supra
Averment held sufficient
A count of a declaration, charging the negligent leaving of a tractor overturned by a roadside "for an unreasonable length of time to wit, three hours," in such a manner as to frighten a reasonably gentle animal, was held not demurrable for failure to allege that the tractor was left in the position complained of for an unreasonable length of time, reasonableness of such time being a jury question.—Shelby Iron Co v Morrow, supra

1. Ind—City of Goshen v Alford, 55 N E 27, 154 Ind 58
29 C J p 711 note 17

2. Mich—Moody v Shelby Tp, 68 N W 259, 110 Mich 396
29 C J p 712 note 18
Allegations held sufficient
(1) Averment that defendants, as board of county commissioners and individuals, had actual knowledge of washout and condition of highway sufficiently alleged notice thereof to board.—Becker v Chapple, 232 P 538, 72 Mont 199
(2) Other cases see 29 C J p 712 note 18 [a]

3. W Va—Chapman v Milton, 7 S E 22, 31 W Va 384
29 C J p 712 note 19

4. R I—Carroll v Allen, 37 A 704, 20 R I 144

5. Kan—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343

6. Ky—Reusch v Licking Rolling Mill Co, 80 S W 1168, 118 Ky 369, 26 Ky L 249
29 C J p 712 note 22

7. Or—Corliss v Van Duzer, 285 P. 253, 132 Or 265

8. S C—U S Casualty Co v State Highway Department of South Carolina, 151 S E 887, 155 S C 77
29 C J p 712 note 23
Variance between notice of claim for injury and pleadings see infra subdivision d (2) of this section

not be alleged.[9] The notice need not be set out in full, a general allegation that the required notice was given being sufficient,[10] nor need the place of delivery be stated[11]

c. Plea or Answer

The general rules governing the plea or answer in civil actions generally apply. Matters of affirmative defense must be pleaded.

Under the general rules governing the plea or answer in civil actions generally, considered in the C.J.S. titles Pleading §§ 99–183, also 49 C.J. p. 179 note 58–p. 322 note 86, and Negligence §§ 196–198, also 45 C.J. p. 1113 note 37–p. 1124 note 4, which apply to actions of this nature, defendant, if he relies on matters of affirmative defense, must clearly state facts sufficient to constitute such a defense[12] In some jurisdictions defendant, if he relies on the contributory negligence of plaintiff, must allege it[13] The existence of the road as a public highway may be denied, as considered supra § 255 a, but such existence is not put in issue by a denial of a legal layout[14] An admission in the answer that some notice was served is not an admission that the required notice was duly served[15]

d. Issues, Proof, and Variance

(1) In general

(2) Variance between notice of claim for injuries and pleadings and proof

(1) In General

The proof must conform to the pleadings and all material allegations necessary to establish plaintiff's cause of action must be proved. Evidence competent to prove the various matters put in issue by the pleadings is admissible.

As in other actions, see the C.J.S. title Pleading §§ 520–523, also 49 C.J. p. 785 note 53 p. 791 note 13, all the material allegations of the pleadings necessary to establish plaintiff's cause of action must be proved,[16] unless admitted by the answer[17] Matters required by statute as a prerequisite to liability must be proved[18] In some jurisdictions proof of defendant's actual knowledge of the specific defect which caused the injury is essential to liability[19]

The evidence must conform to the pleadings,[20] and a material variance is fatal[21] However, slight and immaterial variances which do not mislead or prejudice the adverse party may be disregarded[22] Where plaintiff's injury may have resulted from several possible wrongs of defendant, he is entitled to present all of such wrongs as grounds for recovery in one suit and recover on one or another as the proof shows the facts to be[23]

9. Vt.—Herrick v. Holland, 77 A. 6, 83 Vt. 502
29 C.J. p. 712 note 24

10. Wis.—Cairncross v. Pewaukee, 47 N.W. 13, 78 Wis. 66, 10 L.R.A. 473

11. Me.—Smiley v. Merrill Plantation, 24 A. 872, 84 Me. 322

12. S.C.—McCoy v. State Highway Department of South Carolina, 169 S.E. 174, 169 S.C. 436
29 C.J. p. 712 note 31
Defenses admissible under general issue see infra subdivision d of this section

Statutory exemption from liability
State highway department, to avail itself of statutory exemption from liability for injuries or property damage given by statute, must plead facts giving rise to exemption.—McCoy v. State Highway Department of South Carolina, 169 S.E. 174, 169 S.C. 436

13. Kan.—Arnold v. Board of Com'rs of Coffey County, 11 P.2d 729, 135 Kan. 551.—Arnold v. Board of Com'rs of Coffey County, 291 P. 762, 131 Kan. 343

Answer held sufficient
Kan.—Knox v. Board of Com'rs of Stevens County, 276 P. 84, 128 Kan. 22

14. Wis.—Carpenter v. Rolling, 83 N.W. 953, 107 Wis. 559

15. Wis.—Berry v. Wauwatosa, 58 N.W. 751, 87 Wis. 401

16. R.I.—Potts v. Town of Warwick, 34 A. 993, 19 R.I. 489
S.C.—Bunton v. South Carolina State Highway Department, 196 S.E. 188, 186 S.C. 463.—Cooper v. South Carolina Highway Department, 190 S.E. 499, 183 S.C. 155
29 C.J. p. 712 note 37

17. Or.—Buttle v. Douglas County, 168 P. 1180, 87 Or. 105
29 C.J. p. 713 note 38

18. Kan.—Arnold v. Board of Com'rs of Coffey County, 291 P. 762, 131 Kan. 343

19. Kan.—Arnold v. Board of Com'rs of Coffey County, supra

20. Ky.—Dawkins Lumber Co. v. Row, 276 S.W. 493, 210 Ky. 666
R.I.—Potts v. Town of Warwick, 34 A. 993, 19 R.I. 489

21. R.I.—Potts v. Town of Warwick, supra
29 C.J. p. 713 note 40
Variance between notice of claim for injury and pleadings and proof see infra subdivision d (2) of this section

22. Kan.—Story v. Board of Com'rs of Brown County, 226 P. 772, 116 Kan. 300
29 C.J. p. 713 note 41.

Variances held immaterial
(1) Allegation that, by reason of failure of county to provide any warning of a deep excavation across the road except a board close to its edge, plaintiff ran his car into the excavation, and proof that in seeking to avoid the excavation he turned quickly, and in doing so ran off a temporary bridge, are not in material variance, in absence of showing that defendant was actually misled.—Story v. Board of Com'rs of Brown County, supra

(2) Other cases see 29 C.J. p. 713 note 41 [a]

23. Conn.—Ashborn v. Waterbury, 40 A. 458, 70 Conn. 551
N.H.—Robertson v. Monroe, 116 A. 92, 80 N.H. 258

Negligence in creating danger or in failing to provide guards
A person injured by the dangerous approach to a highway, created by act of the selectmen some time before, may allege both the original negligence in creating the danger and the negligent failure to erect barriers or place lights, and may recover for whichever negligence the proof shows was the proximate cause of the injury, although a finding that failure to guard was the cause would preclude recovery for the original wrong.—Robertson v. Monroe, supra.

In determining what evidence of particular injuries is admissible, the complaint, notice of injury, and claim for damages should be construed together.[24] Plaintiff must generally prove the specific defect alleged,[25] but proof of defects not expressly mentioned may be admissible where their existence can fairly be inferred from the allegations.[26] Evidence that plaintiff properly filed his claim for injuries is relevant and admissible where plaintiff alleged that fact in his complaint and defendant denied it.[27] Under the general issue the usual defenses may be shown, as that the highway had no legal existence,[28] that the accident happened on the unwrought portion of the highway,[29] that plaintiff was guilty of contributory negligence,[30] or was illegally traveling on Sunday,[31] or that no notice of claim was given,[32] or, if given, was defective.[33] As before stated, see supra subdivision b (1), of this section, plaintiff need not allege the possession of funds by defendant for repairs, but, if he does, defendant may, under a general denial, show the lack of such funds, and need not plead that defense affirmatively.[34] Evidence admissible under the pleadings of one party will not be excluded because offered by the adverse party.[35]

Under the common-law practice, the injury should not be laid with a continuando, and, if it is so laid, it seems that plaintiff may, on objection by defendant, be confined in his proof to a single injury.[36]

(2) Variance between Notice of Claim for Injuries and Pleadings and Proof

The pleadings and proof must substantially correspond to the notice of claim for injury.

Plaintiff cannot recover for injuries not specified in the notice,[37] although he is not confined in his declaration and proof to the precise statement of his injuries contained in the notice.[38] The allegations of the complaint as to the cause and place of the injury, etc., should correspond with those of the statutory notice of claim,[39] but an immaterial variance will not affect the sufficiency of the pleading.[40] The notice and proof must be in substantial accord in respect of the cause[41] and time[42] of the injury, and the place where the accident occurred.[43]

§ 280. —— Evidence

a Presumptions and burden of proof
b Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

Plaintiff has the burden of proving the essentials of his cause of action, but the burden of proving an affirmative defense rests on defendant. Circumstances may raise a presumption as to the existence of an essential fact.

Plaintiff has the burden of proving allegations which are essential to his right of recovery.[44] The burden is on him to prove the right of the public to use the highway,[45] that it is one which defendant has the duty to maintain and repair,[46] the de-

24. Wis.—Dralle v. Reedsburg, 122 N.W. 771, 140 Wis. 319

25. Conn.—Ashborn v. Waterbury, 40 A. 458, 70 Conn. 551
29 C.J. p. 713 note 43

26. Mass.—Alger v. Lowell, 3 Allen 402
29 C.J. p. 713 note 44

27. S.C.—Fann v. State Highway Department, 165 S.E. 785, 167 S.C. 84

28. Ala.—Dunn v. Gunn, 42 So. 686, 149 Ala. 583
N.H.—Hall v. Manchester, 39 N.H. 295

29. R.I.—Foley v. Ray, 61 A. 50, 27 R.I. 127.

30. Ind.—New Albany v. McCulloch, 26 N.E. 1074, 127 Ind. 500
Iowa.—Fernbach v. Waterloo, 41 N.W. 370, 76 Iowa 598

31. Mass.—Jones v. Andover, 10 Allen 18

32. Vt.—Matthie v. Barton, 40 Vt. 286
Wis.—Eron v. Stevens Point, 55 N.W. 410, 85 Wis. 379

33. Me.—Low v. Windham, 75 Me. 113.

34. N.Y.—Bryant v. Randolph, 6 N.Y.S. 438, 2 Silv. Sup. 381

35. Wis.—Carlon v. Greenfield, 110 N.W. 208, 130 Wis. 342
29 C.J. p. 713 note 45

36. Vt.—Baxter v. Winooski Turnp. Co., 22 Vt. 114, 52 Am.D. 84

37. Me.—Beverage v. Rockport, 76 A. 677, 106 Me. 223
29 C.J. p. 708 note 49

38. Me.—Wadleigh v. Mt. Vernon, 75 Me. 79
Vt.—Fassett v. Roxbury, 55 Vt. 552

39. N.D.—Trost v. Casselton, 79 N.W. 1071, 8 N.D. 534
29 C.J. p. 712 note 27.

40. Wis.—Barrett v. Hammond, 58 N.W. 1053, 87 Wis. 654
29 C.J. p. 712 note 28

41. Mass.—McDougall v. Boston, 134 Mass. 149
29 C.J. p. 708 note 46

42. Me.—Marcotte v. Lewiston, 47 A. 137, 94 Me. 233
29 C.J. p. 708 note 47

43. R.I.—Beebe v. Greene, 82 A. 796, 34 R.I. 171
29 C.J. p. 708 note 48

44. Mich.—Johnson v. Board of Road Com'rs of Ontonagon County, 235 N.W. 221, 253 Mich. 465

Defendant acting under contract for profit

Plaintiff, claiming county not entitled to claim exemption from liability for injury caused by negligent operation of snowplow on the ground that at the time of the accident it was engaged in the performance of a governmental function because it was acting under a contract for a consideration and a resulting profit, has the burden of proving its allegations that the contract of the county with the state highway commissioner for the maintenance of the highway was on a profitable consideration.—Johnson v. Board of Road Com'rs of Ontonagon County, supra

45. R.I.—Williams v. Allen, 114 A. 138, 44 R.I. 11

46. Kan.—Irvin v. Fant, 206 P. 874, 111 Kan. 336
Neb.—Stitzel v. Hitchcock County, 298 N.W. 555, 139 Neb. 700
R.I.—Williams v. Allen, 114 A. 138, 44 R.I. 14

Township road

In an action against a township for injuries caused by a defect in a pub-

fect therein,[47] that defendant had notice of the defect,[48] or actual knowledge thereof,[49] in jurisdictions where that is essential to liability, considered supra § 263, that the defect existed through defendant's negligence,[50] and that it proximately contributed to the injury[51] Plaintiff must prove his injury,[52] and, in jurisdictions where it is required, as considered supra § 275, due notice of his claim therefor to the defendant political subdivision[53] Under a statute providing that a notice of claim is not invalid because of an inaccuracy therein, if defendant was not misled, the burden of proving that defendant was not misled is on plaintiff[54]

The burden of proving any affirmative defense,[55] such as the lack of funds for repair,[56] rests on defendant

Contributory negligence. In conformity with the rules adopted in the particular jurisdiction, considered generally in the C J S. title Negligence §§ 210–212, also 45 C J. p 1170 note 33–p 1184 note 25, in some jurisdictions contributory negligence is a matter of defense which defendant must prove,[57] unless such negligence is disclosed by the testimony on the part of plaintiff[58] In other jurisdictions the burden is on plaintiff to show absence of negligence on his part,[59] although this is not necessary where defendant, by demurring to the declaration, admits the allegations therein of due care[60]

Violation of law Plaintiff must prove that he was lawfully traveling on the highway[61] It has been held under a statute providing that no person

lic road, plaintiff was required to prove the road a township road, although prior action against the county had been dismissed for failure of plaintiff to prove the road a county road—Irvin v Fant, 206 P 871, 111 Kan 336

Sidewalk

In action for injuries sustained in fall on sidewalk which was constructed about a foot from the macadam portion of the highway, burden was on claimant to prove that sidewalk had been constructed by the state or had been constructed on state's property—Marino v State, 15 N Y S 2d 640, 257 App Div 734 reversing 10 N Y S 2d 295, 170 Misc 341

Control over particular portion of highway

Where statute providing for appointment of commissioners of improvements and giving them power and authority over highways and streets in a town does not abridge the powers of the highway commissioners of the town but they are still bound to keep the highways in a safe condition for public travel, a person suing for injuries from a defect in a highway undergoing repairs under the commissioners of improvements need not prove that the defect was at a place in the possession of the commissioners of highways, from which they had not been ousted by the commissioners of improvements, as plaintiff is entitled to recover if he is injured in any part of the highway which is dangerous—McGuinness v Town of Westchester, 21 N Y S 290, 66 Hun 356

47 Kan—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343
29 C J p 713 note 61

48. Mich—Cavanaugh v Riverside Tp, 99 N W 876, 136 Mich 660
29 C J p 714 note 62 [a].

Constructive notice

A presumption of knowledge of the existence of dangerous conditions in highway by officers charged with its repair may arise from length of time they have been allowed to continue—Howard County Com'rs v Leaf, 8 A 2d 756, 177 Md 82

When proof of notice dispensed with

Claimants, having established that negligent construction and maintenance of culvert and fill under paved highway proximately caused accident, were not required to show that state had notice of washout—Timerson v State, 260 N Y S 489, 145 Misc 613

49. Kan—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343

50. Mass—O'Keefe v William J Barry Co, 42 N E 2d 267, 311 Mass 517
S C—Bunton v South Carolina State Highway Department 196 S E 188, 186 S C 463—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155
29 C J p 714 note 62

Defects for which defendant must be shown to be responsible

In an action against highway contractor for injuries occurring when plaintiff's horse became frightened at curtains flapping on steam roller left on roadside, the burden was on plaintiff to show defendant's responsibility for the loose curtains—Perry v Thomas Cronin Co, 123 A 771, 279 Pa 1

51. Kan—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343
S C—Bunton v South Carolina State Highway Department, 196 S E 188, 186 S C 463—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155
29 C J p 714 note 63

52. Vt—Lester v Pittsford, 7 Vt 158.

53. Wis—Berry v Town of Wauwatosa, 58 N W 751, 87 Wis 401
29 C J p 714 note 66

54. Mass—Tobin v Brimfield, 65 N E 28, 182 Mass 117

55. S C—McCoy v State Highway Department of South Carolina, 169 S E 174, 169 S C 436
29 C J p 714 note 68

Statutory exemption from liability

To avail itself of a statutory exemption from liability defendant must prove the facts giving rise to the exemption, and the mere assertion thereof does not give immunity—McCoy v State Highway Department of South Carolina, supra

56 Mont—Smith v Zimmer, 125 P 420, 45 Mont 282
29 C J p 714 note 69

57. Kan—Arnold v Board of Com'rs of Coffey County, 11 P 2d 729 135 Kan 551—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343—Wagner v Board of Com'rs of Clay County, 276 P 71, 128 Kan 127—Heck v Quindaro Tp in Wyandotte County, 216 P 293, 113 Kan 647
29 C J p 714 note 70

58. Wis—Conrad v Ellington, 80 N W 456, 104 Wis 367

59. S C—Bunton v South Carolina State Highway Department, 196 S E 188, 186 S C 463—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155
29 C J p 714 note 72
Duty of plaintiff to plead due care see supra § 279 b (2)

60. Conn—Daniels v Saybrook, 34 Conn 377

61. Or—Buttle v Douglas County, 168 P 1180, 87 Or 105
Burden of proof that automobile in which plaintiff was riding was registered see the C J S title Motor Vehicles § 223, also 42 C J p 865 notes 20, 21

shall travel on the Lord's day, except from necessity or charity, that, when it appears that plaintiff was traveling on Sunday, the burden is on him to show that such travel was not in violation of the statute [62]

Presumption as to defect. A defect in the highway will not be presumed from the mere happening of an accident,[63] nor, on the other hand, can it be inferred from the mere existence of a highway, that it was wide enough to be safe and convenient for travel [64] A warning in the highway does away with the presumption that it, in accordance with law, is reasonably safe for public use [65] The circumstances may be such as to justify a presumption that the negligent act complained of was done by or under the direction of defendant [66] Where the unsafe condition of the highway is caused directly by the act of defendant or its employees, it will be conclusively presumed to have had notice of the defect [67]

b. Admissibility

(1) In general
(2) Condition of highway at other times and places, and subsequent repairs
(3) Similar accidents or absence thereof

(1) In General

Material and relevant evidence, competent under the general rules of evidence, is admissible in proof of the facts in issue.

The general rules as to the admissibility of evidence in civil actions, as considered in Evidence §§ 158–1015, particularly those governing negligence cases, as considered in the C J S title Negligence §§ 221–242, also 45 C J. p 1228 note 96–p 1260 note 91, are applicable to actions of this nature [68] Any relevant and material evidence, if competent under the general rules, is admissible on the questions of negligence[69] and contributory negligence;[70] the legal existence[71] and character[72] of the highway, the existence and nature of the defect,[73] and its location,[74] and the cause of the injury[75] and the damages arising therefrom [76] Defendant's actual knowledge of the specific defect which caused the injury complained of may be shown by any competent evidence, direct or circumstantial [77] The declarations of a highway commissioner made before the injury are admissible to show his knowledge of the defect,[78] also, the fact that defendant paid another claim arising from the same accident may be shown as his admission [79]

As a general rule, evidence of the custom or practice as to the care or condition of highways in the

62. Mass—Bosworth v Swansey, 10 Metc 363, 43 Am D 441

63 Me—Church v Cherryfield, 33 Me 460

64. Me—Hunt v Rich, 38 Me 195

65 Wis—Shawano County v Froeming Bros, 202 N W 186, 186 Wis 191

66. N Y—Gulliver v Blauvelt, 43 N Y S 935, 14 App Div 523
29 C J p 714 note 64

67. S C—Livingston v South Carolina State Highway Department, 183 S E 8, 178 S C 323

68 Pa—Lengle v North Lebanon Tp, 117 A 403, 274 Pa 51
29 C J p 715 note 79

Evidence held admissible

(1) Evidence as to wagon tracks a week after the accident, identified as made by the wagon in which injured person was driving at the time of the accident—Lengle v North Lebanon Tp, supra

(2) Other cases see 29 C J p 715 note 79 [a]

69. Vt—Brown v Swanton, 37 A 280, 69 Vt 53
29 C J p 715 note 80

Advice

Solicited advice of state engineer is material in determining whether defendant acted with reasonable care—Robertson v Monroe, 116 A 92, 80 N H 258

70 N H—Guertin v Hudson 53 A 736, 71 N H 505
29 C J p 715 note 81

71. Ga—Calfee v Jones, 188 S E 307 54 Ga App 481
29 C J p 715 note 82

Evidence held admissible

(1) The existence of a highway must be proved by the record if there is a record of its layout, but if there is no record, its existence may be proved by proof of immemorial use and repair by the political subdivision, or by proof of dedication and acceptance—Stone v Langworthy, 40 A 832, 20 R I 602

(2) Deed from county board of commissioners of roads and revenues to landowner's predecessor in title and subsequent deed from him to landowner, conveying highway and reciting that it had been abandoned, is admissible to show abandonment of road by county and color of title under which landowner could claim adverse possession—Calfee v Jones, 188 S E 307, 54 Ga.App 481

(3) Other cases see 29 C J p 715 note 82 [a]

72. Ind—Porter County v Dombke, 91 Ind 72

73. N H—Seeton v Dunbarton, 56 A 197, 72 N H 269
29 C J p 715 note 84

Evidence held inadmissible

(1) Fact that the apron was dangerous and covered with ice and snow and the tendency is to cause pedestrians and vehicles using it to slip and that the steepness of the grade constituted a dangerous condition is inadmissible, as the grade of the apron approach had been established by competent engineers' testimony There is nothing in the law which required construction at any particular grade—Bell v Mount Pleasant Tp, 21 West Co L J, Pa 285

(2) Other cases see 29 C J p 715 note 84 [b]

74 Me—Chapman v Nobleboro, 76 Me 427
29 C J p 715 note 85

75. R I—Stone v Langworthy, 40 A 832, 20 R I 602
29 C J p 715 note 86

76. Mich—Langworthy v Green Tp, 50 N W 130, 88 Mich 207
29 C J p 715 note 87

77. Kan—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343

78. N Y—Shaw v Potsdam, 42 N Y S 779, 11 App Div 508

79. N H—Coffin v Plymouth 49 N H 173—Grimes v Keene, 52 N H 330

neighborhood or in other towns is incompetent,[80] although even such evidence has been admitted in some cases[81]

The fact that plaintiff was commonly a careful driver cannot be shown to prove the exercise of due care at the time of the injury,[82] nor can the opinions of a witness as to plaintiff's habits on other occasions be admitted to establish his negligence on the particular occasion;[83] but it has been held that plaintiff's previous habit of riding his bicycle on the sidewalk was admissible to show that he was riding it there at the time of the accident[84] Evidence of the character and habits of plaintiff's horse, and its behavior before and after the accident, is competent on the question whether plaintiff's negligence in driving a vicious or unsuitable horse was the cause of the injury,[85] but such evidence is inadmissible where there is no evidence that any misbehavior by plaintiff's horse caused or contributed to cause the accident,[86] and, where plaintiff was injured by the team of a third person, which had run away as a result of a defect in the highway, evidence that such team was in the habit of running away was inadmissible[87]

The opinions of witnesses as to the existence[88] or sufficiency[89] of the highway, or as to the negligence of plaintiff,[90] are incompetent, but it has been held that a witness testifying from knowledge and observation may give his opinion as to whether the particular object in the highway was calculated to frighten an ordinarily gentle horse[91]

In determining whether defendant town has used reasonable care to prevent or remedy defects, it is competent to show the population of the town, the extent of its highways, the amount of travel thereon, and the cost of repairing the particular defect.[92] In some jurisdictions it has also been held competent on such issue to show the assessed valuation of the town,[93] but in other jurisdictions such evidence has been held inadmissible[94]

Funds sufficient to make repairs Evidence as to the possession by the defendant political subdivision of funds sufficient to make necessary repairs is admissible where the lack of funds is a defense,[95] otherwise it is irrelevant[96] However, such evidence must be confined to the time of the accident,[97] and the possession of funds at such time cannot be shown by evidence of subsequent repairs[98]

Resolutions or reports as to the necessity of repairs Resolutions or reports of the municipal authorities bearing on the necessity of repairs at a particular point, or ordering them to be made, have been held competent to show notice of a defect at that point[99] On the other hand it has been held that the acceptance by the municipality of a report of a committee as to the condition of the highway was not competent as an admission that the highway was defective[1]

(2) Condition of Highway at Other Times and Places, and Subsequent Repairs

Evidence as to the condition of the highway at other times is admissible, provided it is shown to be the same as at the time of the accident, and evidence as to its condition and the existence of similar defects at other places has been held competent for certain purposes The authorities differ as to the admissibility of evidence of subsequent changes or repairs to show the defective condition of the highway.

80. Mich—Langworthy v Green Tp, 50 N W 130, 88 Mich 207
29 C J p 715 note 95

81. N J—Cumming v T A Gillespie Co, 41 A 693, 868, 62 N J Law 370
29 C J p 716 note 96

82. Mass—McDonald v Savoy, 110 Mass 49
Mich—Langworthy v Green Tp, 50 N W 130, 88 Mich 207

83. Mich—Langworthy v Green Tp, supra

84. N H—Kennev v Hampton, 58 A 1046, 73 N H 45

85. N H—Judd v Claremont, 23 A 427, 66 N H 418
29 C J p 716 note 1

86. Mich—Carpenter v Bloomingdale Tp, 198 N W 912, 227 Mich 355

87. Vt—Cheney v Ryegate, 55 Vt 499.

88. R I—Perry v Sheldon, 75 A 690, 30 R I 426—Stone v Langworthy, 40 A 832, 20 R I 602

89. Mich—Langworthy v Green Tp, 50 N W 130, 88 Mich 207
29 C J p 716 note 6

90. Pa—Card v Columbia Tp, 43 A 217, 191 Pa 254

91. Conn—Clinton v Howard, 42 Conn 294

92. Mass—Weeks v Needham, 31 N E 8, 156 Mass 289
29 C J p 715 note 88

93. Mass—Weeks v Needham, 31 N E 8, 156 Mass 289—Sanders v Palmer, 28 N E 778, 154 Mass 475

94. N Y—Madigan v Schaghticoke, 143 App Div 887, 128 N Y S 800

95. N Y—Clapper v Waterford, 30 N E 240, 131 N Y 382, reversed on other grounds 62 Hun 170, 16 N Y S 640
Lack of means or funds to make necessary repairs as excusing a political body from liability for damages arising from highway defects see supra § 250

96. N H—Winship v Enfield, 42 N H 197

97. N Y—Bryant v Randolph, 6 N Y S 438, 2 Silv Sup 381
29 C J p 715 note 93

98. N Y—Clapper v Waterford, 30 N E 240, 131 N Y 382, reversing 16 N Y S 640, 62 Hun 170
29 C J p 715 note 94
Subsequent repairs as evidence of antecedent negligence see infra subdivision b (2) of this section

99. Iowa—Butler v Malvern, 59 N W 50, 91 Iowa 397
Mich—Thompson v Quincy, 47 N W 114, 83 Mich 173, 10 L R A 734

1. Mass—Collins v Dorchester, 6 Cush 396
29 C J p 716 note 4.

It is competent to show the condition of the highway at other times, before or after the injury,[2] where it is shown that the condition was the same as at the time of the accident,[3] or, as stated by some authorities, in the absence of evidence that the condition had changed[4] However, such evidence is not admissible where it appears that material changes have been made between the time of the accident and the conditions sought to be shown,[5] unless the changes are so explained that the jury cannot be misled,[6] or where considerable time has elapsed[7] and there is no evidence that the conditions were substantially the same[8] Evidence of the condition of the highway and the existence of similar defects at other places in the vicinity has been held competent for certain purposes,[9] such as to show due care on plaintiff's part,[10] but such evidence is not admissible to show contributory negligence in the absence of evidence that plaintiff was familiar with the conditions at the other places[11] In some cases the evidence has been limited to the condition of the highway at the defective place, and each way therefrom, only so far as it had any bearing on the sufficiency of such place and the safety or danger in passing it[12] Due care on defendant's part may be shown by evidence of the ordinary condition of like portions of similar highways in the same[13] or other[14] towns. So evidence of other similar defects in the vicinity is competent on the question of constructive notice of the particular defect,[15] as well as to prove on behalf of defendant that the particular defect did not present an unusual appearance[16] Defendant cannot, in order to evade liability, prove that a large portion of the roads in the town had similar defects.[17]

Subsequent repairs In some jurisdictions evidence is admissible to show that repairs were made to the highway immediately after the accident.[18] In other jurisdictions evidence of subsequent changes or repairs is incompetent to show the defective condition of the highway at the time of the injury,[19] especially in the absence of evidence that defendant town voted for the repairs or ratified them[20] However, such evidence may be admitted under special circumstances,[21] as where the fact that changes have been made appears only incidentally in the evidence by which the condition of the highway at the time of the injury is sought to be established,[22] or where it is admitted to show that evidence submitted of the present condition of the highway does not show its condition at the time of the accident,[23] or where evidence of a change is

2. Mich—La Due v Lebanon Tp, 192 N W 636, 222 Mich 301
29 C J p 716 note 11

To show notice

(1) For purpose of establishing constructive notice to township officers, condition of its highway for several months before an accident thereon may be shown in action for consequential damage to the traveler—La Due v Lebanon Tp, supra

(2) Other cases see 29 C J p 716 note 11 [b]

3. Mich—Long v Weare Tp, 162 N W 332, 195 Mich 706
29 C J p 716 note 12

4. N Y—Clapper v Waterford, 16 N Y S 640, 62 Hun 170, reversed on other grounds 30 N E 240, 131 N Y 382
Va—Shenandoah Valley Loan & Trust Co v Murray, 91 S E 740, 120 Va 563

5. Wis—Prahl v Waupaca, 85 N W 350, 109 Wis 299
29 C J p 716 note 14.

6. S D—Bordwell v Mission Hill Tp, 166 N W 229, 40 S D 78

7. Pa—Cobb v Bradford Tp, 81 A 199, 232 Pa. 198
29 C J p 716 note 16

8. Mich—Langworthy v Green Tp, 50 N W 130, 88 Mich 207
S D—Bordwell v Mission Hill Tp., 166 N W 229, 40 S D 78.

9. Kan—Cunningham v Clay Tp, 76 P 907, 69 Kan 373
29 C J p 716 note 18

10. Me—Verrill v Minot, 31 Me 299
29 C J p 717 note 19

11. Mass—Schoonmaker v Wilbraham 110 Mass 134—Hinckley v Barnstable, 109 Mass 126

12. Vt—Coats v Canaan, 51 Vt 131
29 C J p 717 note 21

13. Mass—Packard v New Bedford, 9 Allen 200

14. Mass—Packard v New Bedford, supra—Raymond v Lowell, 6 Cush 524, 53 Am D 57

15. Wis—Kortendick v Waterford, 125 N W 945, 142 Wis 413

16. Kan—Cunningham v. Clay Tp, 76 P 907, 69 Kan 373
29 C J p 717 note 25

17. Me—Tripp v. Lyman, 37 Me 250

18. Kan—Heck v Quindaro Tp in Wyandotte County, 216 P 293, 113 Kan 647.

19. Mich—La Due v Lebanon Tp, 192 N W 636, 222 Mich 301
29 C J p 717 note 29

Not an admission

Evidence of state highway department's action in providing for guard rails in road construction contract, and placing thereof accordingly after fatal accident, was held not admission by county, sued for death, that highway was not reasonably safe for travel at time of accident—White v Livingston County, 200 N W 973, 229 Mich 153

Not admissible as tending to disprove general custom

Where in an action for injuries received from driving into an alleged unguarded bridge excavation, the defense was that the placing of lumber and sand along the highway was a sufficient warning to travelers, defendant's testimony on cross-examination as to subsequent precautions in barricading the road was not admissible as tending to disprove the general custom, when it was not offered for that purpose, and its apparent purpose was to prove a subsequent fact at variance with the general custom, which tended to show that such custom was negligent—Whitten v McClelland, 120 S E 146, 137 Va 726

20. Mass—Spooner v Freetown, 29 N E 662, 139 Mass 235

21. Wis—Redepenning v Rock, 117 N W 805, 136 Wis 372
29 C J p 717 note 31.
Subsequent repairs as evidence of ability to repair at time of injury see supra subdivision b (1) of this section

22. N Y—Stone v Poland, 81 Hun 132, 30 N Y S 748

23 Mich—La Due v Lebanon Tp, 192 N W 636, 222 Mich 301

introduced to rebut evidence on the part of defendant that there had been no material change [24]

(3) Similar Accidents or Absence Thereof

In some jurisdictions, but not in others, evidence of similar accidents at the place plaintiff was injured, or the absence of other accidents at that place, has been held admissible to show that the highway was, or was not, defective Evidence of accidents caused by defects at other places is not admissible, unless the places are so close and the conditions so similar they can be considered as substantially the same

Evidence of similar accidents at the place where plaintiff was injured, and under the same conditions, has been held admissible to show the defective condition of the highway at the time of plaintiff's injury [25] In a few jurisdictions, however, evidence of other accidents has been held inadmissible,[26] especially where the other accident occurred long after the injury to plaintiff,[27] or long before such injury and under dissimilar conditions [28] Other authorities have held that evidence of what happened to other persons after the injury is inadmissible,[29] and that evidence of prior accidents is admissible only to show that defendant had constructive notice of the defect [30] That other persons have passed over the same defect at other times without accident has been held admissible in some jurisdictions,[31] but in other jurisdictions it has been held that evidence of the absence of other accidents is inadmissible,[32] at least where the conditions were dissimilar, or the accident to plaintiff was so peculiar as to put the highway to a test not furnished by ordinary travel.[33] Evidence of other accidents caused by defects on another part of the same highway is inadmissible [34] However, evidence of a similar accident on the day following plaintiff's injury, although a short distance from the place of such injury, is admissible where it appears there was no substantial variation in the condition of the road for the whole distance [35]

Fright of other horses Evidence that other horses were,[36] or were not,[37] frightened by the same object has generally been held admissible on the question whether such object was calculated to frighten horses, except where the conditions were not the same.[38] Some authorities, however, have held that the fact that other horses or animals were[39] or were not[40] frightened is inadmissible

c. Weight and Sufficiency

The general rules as to the weight and sufficiency of the evidence apply

In determining the sufficiency of the evidence in actions to recover for injuries from defects or obstructions in a highway, the general rules of evidence in civil actions, see Evidence §§ 1016-1050, are applicable [41] Under such general rules of evi-

24. Wis—Salladay v Dodgeville 55 N W 696 85 Wis 318, 20 L R A 541

25 N H—Dow v Weare, 44 A 489, 68 N H 345
29 C J p 717 note 35

26 Wis—Jensen v Town of Oconto Falls, 202 N W 676 186 Wis 386
29 C J p 717 note 36

27. Or—West v Marion County, 188 P 181, 95 Or 529

28. N Y—Flansburg v Elbridge, 98 N E 750 205 N Y 423 41 L R A, N S, 546
29 C J p 717 note 38

29. Mich—Boos v Northfield Tp 152 N W 1042, 186 Mich 386

30 Mich—Lamb v Clam Lake Tp, 140 N W 1009, 175 Mich 77
Neb—Cromwell v Fillmore County, 239 N W 735 122 Neb 114

31 N Y—Lane v Hancock, 37 N E 173, 142 N Y 410 reversing 22 N Y S 170, 67 Hun 623
29 C J p 717 note 41

32. Mich—La Due v Lebanon Tp, 192 N W 636, 222 Mich 301
29 C J p 717 note 42

Negative testimony by others than defendant

Negative testimony by others than defendant that they had never heard of prior accidents on the highway at the place of the accident is not admissible to show absence of negligence—La Due v Lebanon Tp, supra

33 Conn—Smith v Milford, 92 A 675, 89 Conn 24
29 C J p 718 note 43

34. R I—Whitford v Palmer, 100 A 312, 40 R I 196

35 Conn—Bailey v Trumbull, 31 Conn 581

36 Mich—Smith v Sherwood Tp 28 N W 806, 62 Mich 159
29 C J p 718 note 46

37 N H—Gould v Hutchins, 58 A 1046, 73 N H 69
N Y—Kent v Patterson, 141 N Y S 932, 80 Misc 560

38 Mich—Boos v Northfield Tp, 152 N W 1042, 186 Mich 386
29 C J p 718 note 49

39. Wis—Jensen v Town of Oconto Falls, 202 N W 676, 186 Wis 386

40. Wis—Bloor v Delafield, 34 N W 115, 69 Wis 273

41. Kan—Watson v Parker Tp, 213 P 1051, 113 Kan 130
29 C J p 718 note 51

Evidence held sufficient

(1) To warrant recovery by plaintiff
Ark—Arkansas Fuel Oil Co. v Downs, 168 S W 2d 419
N Y—Spencer v State, 232 N Y S 306, 133 Misc 239
Wis—Swiergul v Town of Suamico, 235 N W 548, 204 Wis 114
29 C J p 718 note 51 [a] (1)

(2) To support verdict for defendant
Mich—White v Livingston County, 200 N W 973, 229 Mich 153
Tex—Smith v Texas Power & Light Co, Civ App 206 S W 119

(3) To show duty to repair—Williams v Allen, 114 A 138, 44 R I 14

(4) To show that the highway was a township road—Watson v Parker Tp, 213 P 1051, 113 Kan 130

(5) To show that the roadway where the accident occurred was not an approach to the bridge, for which the town would be liable, but part of the highway, which the state was bound to maintain and protect—Deyoe v State, 201 N Y S 651, 207 App Div 97

(6) To establish alleged defect
Kan—Watson v Parker Tp, supra
Mich—Burns v Van Buren Tp 187 N W 276, 218 Mich 40
N Y—Wager v State, 10 N Y S 2d 310, 170 Misc 357, modified on other grounds 14 N Y S 2d 29, 257 App Div 580
29 C J p 718 note 51 [a] (4)

(7) To show highway in a condi

dence, plaintiff must prove and establish his case,[42] which includes proof of defendant's negligence,[43] and that it was the proximate cause of the injury,[44] by a preponderance of the evidence

The negligence of defendant,[45] actual notice to defendant of the defect in the highway,[46] and the absence of contributory negligence on the part of plaintiff[47] may be established by circumstantial evidence In determining whether or not defendant had assumed to maintain a highway so as to be liable for damages resulting from its lack of repair, the significance of such repairs as were made on it should be judged with reference to the nature and extent of repairs customarily made by it on similar highways at different times[48] To establish a nuisance where a highway has been disturbed and to recover on that theory for injuries sustained, it must be shown there was improper construction in the first instance, or that a dangerous condition was known and permitted to exist for so long a period that it became a nuisance[49] It is not necessary to have expert testimony in order to determine whether the highway is unsafe for travel, but the court can reach its own conclusion on proof of the conditions or by personal observation, or both[50]

§ 281. —— Trial

a Questions of law or of fact
b Instructions
c Verdict and findings

tion reasonably safe and fit for public travel—White v Livingston County, 200 N W 973, 229 Mich 153

(8) To show negligence of defendant

N Y —Wager v State, supra—Timerson v State, 260 N Y S 489, 145 Misc 613—Spencer v State, 232 N Y S 306, 133 Misc 239

Wis —Jensen v Town of Oconto Falls, 202 N W 676, 186 Wis 386

29 C J p 718 note 51 [a] (6)

(9) To show that the defect in the highway, from want of barriers, if there was a defect, was the fault of the state and not of town authorities—Doyoc v State, 189 N Y S 640, 197 App Div 716, reversing 183 N Y S 126, 112 Misc 423

(10) To show defendant's knowledge or notice of defect

Kan—Joyce v Quindaro Tp of Wyandotte County, 212 P 68, 112 Kan 513

R I —Williams v Allen, 114 A 138, 44 R I 14

29 C J p 718 note 51 [a] (7)

(11) To show notice to defendant for requisite period that highway was defective—Gratney v Board of Com'rs of Wyandotte County, 233 P 795, 118 Kan 101—Story v Board of Com'rs of Brown County 226 P 772, 116 Kan 300—Heck v Quindaro Tp in Wyandotte County, 216 P 293, 113 Kan 647—Watson v Parker Tp, 213 P 1051, 113 Kan 130

(12) To show that defendant knew or could have known of location of pole in highway and knowingly permitted it to remain there until the time of the injury therefrom of which he complained—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468

(13) To show contributory negligence

Kan—Arnold v Board of Com'rs of Coffey County, 11 P 2d 729, 135 Kan 551—Knox v Board of Com'rs of Stevens County, 276 P 84, 128 Kan 22—Hall v Board of Com'rs of Linn County, 237 P 923, 119 Kan 88

Mich—White v Livingston County, 200 N W 973, 229 Mich 153

Tex—Smith v Texas Power & Light Co, Civ App, 206 S W 119

(14) Other cases see 29 C J p 718 note 51 [a]

Evidence held insufficient

(1) To warrant recovery by plaintiff—Marino v State, 15 N Y S 2d 640, 257 App Div 734, reversing 10 N Y S 2d 295, 170 Misc 341—Hill v Town of Russell, 279 N Y S 793, 244 App Div 863—29 C J p 718 note 51 [b] (1)

(2) To show full control by county of maintenance and repair of highway and liability for defects therein—Robinson v Minnehaha County, 277 N W 324, 65 S D 628

(3) To show existence of defect in highway—Wisniewski v Town of Belmont, 250 N W 859, 213 Wis 34

(4) To show defect caused by defendant—Darmody v Kroger Grocery & Baking Co, 280 Ill App 253, affirmed 1 N E 2d 56, 362 Ill 554

(5) To show negligence of defendant—Darmody v Kroger Grocery & Baking Co, supra—29 C J p 718 note 51 [b] (3)

(6) To show negligence of commissioners of defendant town—Lane v Hancock, 37 N E 473, 142 N Y 510, reversing 22 N Y S 470, 67 Hun 623

(7) To show that defendant was negligent in not discovering defect—Taylor v Town of Sterling, 145 N E 40 250 Mass 123

(8) To show defendant's knowledge or notice of defect

N Y—Hill v Town of Russell, 279 N Y S 793, 244 App Div 863

Pa—Perry v Thomas Cronin Co, 123 A 771, 279 Pa 1

29 C J p 718 note 51 [b] (4)

(9) Other cases see 29 C J p 718 note 51 [b]

42. N Y—Marino v State, 15 N Y S 2d 640, 257 App Div 734, reversing 10 N Y S 2d 295, 170 Misc 341

S C—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155

Proof held insufficient

Where there was no proof as to the distances between the right of way lines of highway or that sidewalk on which pedestrian sustained injuries as result of fall was within legal limits of highway and it was conceded that sidewalk was constructed by private individuals for their own convenience, claimants did not discharge burden of showing that sidewalk had been constructed by the state or had been constructed on state property, as respects liability of state for injuries sustained by pedestrian—Marino v State, 15 N Y S 2d 640, 257 App Div 734, reversing 10 N Y S 2d 295 170 Misc 341

43. S C—Bunton v South Carolina State Highway Department, 196 S E 188 186 S C 463

44. S C—Bunton v South Carolina State Highway Department supra

45. Pa—Dannals v Sylvania Tp, 99 A 475, 255 Pa 156, 1 A L R 409—Rockefeller Tp v Rhodes, 4 Walk 410

46. Kan—Story v Board of Com'rs of Brown County, 226 P 772, 116 Kan 300

47. Me—Foster v Dixfield, 18 Me 380

N Y—Newell v Stony Point, 69 N Y S 583, 59 App Div 237

48. R I—Williams v Allen, 114 A 138, 44 R I 14

49. N Y—Dirrane v City of New York, 270 N Y S 128, 240 App Div 368

50. Conn—Albright v MacDonald, 183 A 389, 121 Conn 58

a. Questions of Law or of Fact

In conformance with the rules applicable in the trial of civil actions generally, questions of law are for the court and questions of fact are for the jury; and where the evidence on an issue is conflicting or such that different inferences may be drawn therefrom, it must be submitted to the jury.

In conformance with the rules applicable in civil actions generally, see the C J S title Trial §§ 203–224, also 64 C J. p 296 note 48–p 371 note 99, where the evidence is conflicting or different inferences may reasonably be drawn from the facts shown, the issue is for the jury or other trier of the facts.[51] However, where the facts are such that only one conclusion can be drawn by reasonable minds,[52] or the evidence is so insufficient that a finding thereon would not be sustained,[53] the question becomes one of law for the court; and where no proof is offered to sustain an allegation essential to plaintiff's right of recovery, defendant's motion for a directed verdict, made at the close of the proofs, should be granted.[54] Thus it is usually for the jury to determine the sufficiency of the highway and

51. Mich—La Due v Lebanon Tp., 192 N W 636, 222 Mich 301—Burns v Van Buren Tp, 187 N W 276, 218 Mich 40
Pa—Willetts v Butler Tp, 15 A.2d 392, 141 Pa Super 394
S C—Morris v Mills, 113 S E 632, 121 S C 200
Va—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468
Wash—Brengman v King County, 181 P 861, 107 Wash 306
29 C J p 718 note 56

Conflict in testimony of plaintiff

In action for injuries from defective highway, alleged conflict in plaintiff's testimony when examined before trial and that at trial merely created a jury question—Swiergul v Town of Suamico, 235 N W 548, 204 Wis 114

Case for jury

(1) Evidence held to make case for jury—Hoffman v Bynum, Tex Civ App, 101 S W 2d 600

(2) In jurisdictions where contributory negligence is always a question of fact for the jury, if defendant's negligence caused the injury sued for, defendant's liability is a question for the jury regardless of evidence of plaintiff's contributory negligence—Salt River Valley Water Users' Ass'n v Berry, 250 P 356, 31 Ariz 39

Particular questions for jury

(1) Whether road was public road—Hoffman v Bynum, Tex Civ App, 101 S W 2d 600

(2) The question of where the line of the highway ran—Steverson v Orangeburg County, 121 S E 789, 128 S C 335

(3) Whether a sidetrack appeared to have been traveled to a considerable extent as a part of the public highway and was reasonably accessible—Hebbe v Maple Creek, 99 N W 442, 121 Wis 668

(4) Whether highway had been finished by contractor at time of accident resulting in death—Furlough v Nash County Highway Commission, 144 S E 693, 196 N C 160, denying rehearing 142 S E 230, 195 N C 365

(5) Whether water which overflowed a highway, as alleged, because of the obstruction of a stream by a bridge, constituted an extraordinary flood—Fidler v Lafayette Tp, 198 N W. 262, 226 Mich 635

(6) Whether closing of road to public travel by subcontractor was a necessary incident to performance of his work—Thomas v Saulsbury & Co, 102 So 115, 212 Ala 245

(7) Whether road subcontractor was an employee of contractor with implied authority to procure order closing road from board of revenue, and to proceed to close the road—Thomas v Saulsbury & Co, supra

(8) Whether plaintiff's horses, while momentarily uncontrolled, pulled sulky rake into hole in highway, distance of approximately twenty feet—Swiergul v Town of Suamico, 235 N W 548, 204 Wis 114

(9) Other cases see 29 C J p 718 note 56 [a]

Use of highway by children to play in

While county authorities are not bound to anticipate dangers arising from negligent use of highway, they are bound to take notice that children of tender years may lawfully use the highway, and because of their lack of discretion and childish sportiveness are subject to dangers not besetting travelers of mature years, and hence the use by children of a highway for purposes of play is not as a matter of law an illegitimate use not to be anticipated by authorities required to keep highways in a reasonably safe condition—Morris v Mills, 113 S E 632, 121 S C 200

52. S C—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155
Tenn—Battis v City of Nashville, 123 S W 2d 1099, 22 Tenn App 418
29 C J p 719 note 57

53. Mass—Berri v B Perini & Sons, 13 N E 2d 406, 299 Mass 477
29 C J. p 719 note 58

Evidence held to authorize directed verdict for defendant

In action against contractor for injuries to fourteen year old girl who fell into trench, which was part of construction work in charge of contractor, when board over trench broke while girl was attempting to cross trench from road to residence, evidence, failing to establish that contractor was not authorized to dig trench, that road was open, that existence of trench was not obvious, or that contractor was responsible for placing of board over trench or was required to provide access to residence or to remove board or to guard against injury to those crossing trench, authorized directed verdict for contractor—Berri v B Perini & Sons, supra

54. Mich—Johnson v Board of Road Com'rs of Ontonagon County, 235 N W 221, 253 Mich 465

Nonsuit or directed verdict for defendant held proper

(1) In action by pedestrian for injuries received in fall when she stepped on stone in public driveway, in absence of evidence that stone on which pedestrian stepped fell from defendant's truck or came from trucks over which defendant had some control, denial of defendant's motion for directed verdict was error—O'Keefe v William J Barry Co, 42 N E 2d 267, 311 Mass 517

(2) Nonsuit was properly granted where it appeared that plaintiff, while standing on the edge of a public road and awaiting the passage of a street car, slipped and slid down the icy surface of a steep concrete apron along the side of the road, under the wheels of a passing street car, the surface of which apron was smooth concrete but covered with ice and snow, for the reason that there was no proof of negligence on the part of the defendant, either in the construction or maintenance of the portion of the road involved and that the proximate cause of plaintiff's injuries was merely that he slipped on the icy surface of the highway—Bell v Mount Pleasant Tp, 21 West Co L J, Pa, 285

Direction of verdict refused

(1) Town's motion for directed verdict was denied rightly, where it admitted traveler's injuries were received on a way that it was obliged

what constitutes a defect or obstruction therein,[55] the negligence of defendant,[56] including the question of actual[57] or constructive[58] notice[59] of the defect; and the proximate cause of the injury.[60]

to repair—Dupuis v. Town of Billerica, 157 N E 339, 260 Mass 210

(2) Evidence that plaintiff's horse and mule were injured by a defective pipe furnished by the county, and placed in the ditch of a county highway at the intersection of the highway and a neighborhood road, was held to authorize the refusal to direct a verdict for the county—Steverson v Orangeburg County, 121 S E 789, 128 S C. 335

(3) In an action for injuries caused by the negligent leaving of a tractor overturned by the roadside in a manner that frightened plaintiff's mule, where the declaration was broad enough to constitute a complaint of the manner in which the tractor was left, as well as the length of time which it was left, refusal of a requested general charge for defendant on the ground that the tractor could not have been removed within the time alleged in the declaration was held not error—Shelby Iron Co v Morrow, 99 So 643, 211 Ala 125

55. Kan—Watson v Parker Tp, 213 P 1051, 113 Kan 130
Mich—Carpenter v Bloomingdale Tp, 198 N W 912, 227 Mich 355—Burns v Van Buren Tp, 187 N W 276, 218 Mich 40
Neb—Cromwell v Fillmore County, 239 N W 735, 122 Neb 114
29 C J p 719 note 59

Questions held for jury

(1) Whether defect in highway is actionable—Batts v City of Nashville, 123 S W 2d 1099, 22 Tenn App 418

(2) Whether road is defective within statute rendering highway commission liable—Houdashelt v State Highway Commission, 21 P 2d 343, 137 Kan 485

(3) Whether there was a defect in the highway—Dupuis v Town of Billerica, 157 N E 339, 260 Mass 210

(4) Whether object is in its nature calculated to frighten horses of ordinary gentleness—West Texas Utilities Co v Haynes, Tex Civ App, 20 S W 2d 236—29 C J p 719 note 59 [c]

(5) Whether or not defect was in the traveled way—Dupuis v Town of Billerica, 157 N E 339, 260 Mass 210

(6) Whether culvert was defective because of capstone placed within customary line of travel—Roberts v. Town of Lisbon, 149 A 508, 84 N H 266

(7) What warning should be given of dangerous condition, created by necessary obstruction of highway, under circumstances of particular case—Geiger v Dowdy, 170 A. 420, 111 Pa Super 485

(8) Necessity of barriers or guard rails
Mich—White v Livingston County, 200 N W 973, 229 Mich 153—Mazzolini v Kalamazoo County, 199 N W 648, 228 Mich 59—Carpenter v Bloomingdale Tp, 198 N W. 912, 227 Mich 355—Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635
Wis—Keller v City of Port Washington, 227 N W 284, 200 Wis 87
29 C J p 719 note 59 [a]

Sufficiency of barriers or warnings

(1) Sufficiency of barriers or warnings is usually a question of fact for the jury
Ala—Thomas v Saulsbury & Co, 102 So 115, 212 Ala 245
N Y—Cotriss v State, 228 N Y S 593, 223 App Div 520
Wis—Bowen v Town of Osceola, 200 N W 766, 185 Wis 11
28 C J p 719 note 59 [b]

(2) Sufficiency of barriers or warnings is not always a question of fact—Cotriss v State, 228 N Y S 593, 223 App Div 520

Questions of law

(1) Whether alleged defect comes within purview of statute rendering highway commission liable is question of law for court—Moore v State Highway Commission, 92 P 2d 29, 150 Kan 314—Phillips v State Highway Commission, 68 P 2d 1087, 146 Kan 112—Douglas v State Highway Commission, 46 P 2d 890, 142 Kan 222—Houdashelt v State Highway Commission, 21 P 2d 343, 137 Kan 485

(2) A court will declare nonliability as a matter of law, where it is unreasonable to charge a town with the duty of maintaining barriers on highways sufficient to prevent all accidents—Roberts v Town of Eaton, 144 N E 667, 238 N Y 420, 36 A L R 411, reversing 202 N Y S 360, 207 App Div 56

(3) Evidence that chuckholes or whipped-out places in sand and gravel highway, not obstructed from view, were defects within statute imposing liability on state highway commission, which did not show condition different from that of ordinary sand and gravel road during protracted drought, was held insufficient for jury—Espey v Kansas State Highway Commission, 57 P 2d 424, 143 Kan 873

Omission to provide statutory safeguards

The omission of responsible county officials to provide statutory safeguards, such as substantial guard rails at each end of culverts, as required by statute, constitutes a defect as a matter of law—Arnold v Board of Com'rs of Coffey County, 291 P 762, 131 Kan 343

56. Ky—Codell Const Co v Steele, 56 S W 2d 955, 247 Ky 173
Me—Ansur v Peakes, 144 A. 677, 127 Me 554
Mich—Carpenter v Bloomingdale Tp, 198 N W 912, 227 Mich 355—La Due v Lebanon Tp, 192 N W 636, 222 Mich 301
N J—Muller v George M Brewster & Son, 11 A 2d 749, 124 N.J Law 417
N Y—Rafferty v State, 24 N Y S 2d 689, 261 App Div 80, affirming 16 N Y S 2d 685, 172 Misc 870
Pa—Mickey v Georges Tp, 96 Pa Super 437—Morris v North Sewickley Tp, 86 Pa Super 55
S C—Morris v Mills, 113 S E 632, 121 S C 200
Tenn—Marion Const Co v Steepleton, 14 Tenn App 127
Tex—Hoffman v Bynum, Civ App, 101 S W 2d 600—West Texas Utilities Co v Haynes, Civ App, 20 S W 2d 236
Va—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468
Wis—Jensen v Town of Oconto Falls, 202 N W 676, 186 Wis 386—Bowen v Town of Osceola, 200 N W 766, 185 Wis 11
29 C J p 719 note 60

Particular questions of negligence

(1) Whether state highway department, which graded shoulder of road thus impliedly inviting travel thereon by the public, was negligent in leaving post hole sixteen feet from paved part of road—Livingston v South Carolina State Highway Department, 183 S E 8, 178 S C 323

(2) Where the evidence disclosed that the road had been closed by the highway department, but the evidence further disclosed that parties occasionally traveled it, it was held that it became a question for the jury as to whether defendant should have seen and warned plaintiff before setting off a charge of dynamite—Marion Const Co v Steepleton, 14 Tenn App 127

(3) Other cases see 29 C J p 719 note 60 [b]

57. N H—Ledoux v Nashua, 76 A. 249, 75 N H 481

58. Mich—Burns v Van Buren Tp, 187 N W 276, 218 Mich 40
29 C J p 720 note 62

59. Mass—Dupuis v Town of Billerica, 157 N E 339, 260 Mass 210

60. Me—Ansur v Peakes, 144 A 677, 127 Me 554
Tenn—Marion Const Co v. Steepleton, 14 Tenn App 127.

So it is generally the province of the jury to determine whether plaintiff, at the time of the injury, was a traveler on the highway so as to be entitled to relief,[61] whether the horse and vehicle were suitable for use,[62] whether plaintiff had notice of the defect or obstruction,[63] and whether plaintiff was otherwise in the exercise of due care or was guilty of contributory negligence[64] However, where the controlling facts are uncontradicted, the contributory negligence of plaintiff becomes one of law for the court[65]

Where two possible causes of the injury are alleged, only one of which would render defendant liable, plaintiff cannot recover if the verdict is based on contradictory evidence[66]

Tex—Hoffman v Bynum, Civ App, 101 S W 2d 600
29 C J p 720 note 63

Proximate cause held not matter of law

In an action for personal injuries resulting from being thrown from a buggy, alleged to have been due to a defect in a highway, evidence was held not to show, as a matter of law, that plaintiff's injuries were caused by her horse running away, as claimed by defendant—Burns v Van Buren Tp, 187 N W 276, 218 Mich 40

Failure to comply with statutory law of road

Whether proximate cause of injury to pedestrian, who was injured when she stepped from concrete highway into depression to avoid automobile was her failure to comply with statute requiring pedestrians to keep to left center of line of highway and turn to left instead of right was a question of fact—Wager v State, 14 N Y S 2d 29, 257 App Div 580, modifying 10 N Y S 2d 310, 170 Misc 357

61. Wis—Strong v Stevens Point, 22 N W 425, 62 Wis 255
29 C J p 720 note 64.

62. Mich—Malloy v Walker Tp, 43 N W 1012, 77 Mich 448, 6 L R A 695
29 C J p 720 note 65

63. Ala—Thomas v Saulsbury & Co, 102 So 115, 212 Ala 245

64. Ark—Arkansas Fuel Oil Co v Downs, 168 S W 2d 419
Kan—Arnold v Board of Com'rs of Cottey County, 11 P 2d 729, 135 Kan 551—Knox v Board of Com'rs of Stevens County, 276 P. 84, 128 Kan 22—Heck v Quindaro Tp in Wyandotte County, 216 P 293, 113 Kan 647—Watson v Parker Tp, 213 P 1051, 113 Kan 130
Me—Ansur v Peakes, 144 A 677, 127 Me 554
Mass—Sonia v Inhabitants of Town of Billerica, 30 N E 2d 901, 307 Mass 611
Mich—La Due v Lebanon Tp, 192 N W 636, 222 Mich 301
Pa—Mickey v Georges Tp, 96 Pa Super 437
Tenn—Marion Const Co v. Steepleton, 14 Tenn App 127.
29 C J p 720 note 66.

Rule to determine whether jury question

The question of contributory negligence cannot be treated as one of law unless the facts and the inferences from them are free from doubt If there is doubt as to either, the case is for the jury—Willetts v Butler Tp, 15 A 2d 392, 141 Pa Super 394

Contributory negligence not shown as matter of law

(1) Evidence that defendant was acquainted with the road, that it was close to his place of residence, and that he went on it knowing its condition did not make him guilty of contributory negligence as a matter of law—Heck v Quindaro Tp in Wyandotte County, 216 P 293, 113 Kan 647

(2) Evidence that tongue of surrey became detached from breast yoke and dropped to ground did not show plaintiff to be contributorily negligent as matter of law, in view of evidence as to good condition of harness, and that plaintiff had driven over steeper hills than the one on which the accident occurred the same day without accident—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468

(3) Other cases see 29 C J p 720 note 66 [b]

Failure to use alternative route

It is only when the danger is so great and apparent that an ordinarily prudent person would regard it as dangerous, and therefore avoid it, that a trial court can say, as a matter of law, that the person using the more dangerous of two possible routes is guilty of contributory negligence—Willets v Butler Tp, 15 A 2d 392, 141 Pa Super 394

Person traveling at night

(1) Whether plaintiff traveling at night was guilty of contributory negligence is ordinarily a question for the jury
Mich—Carpenter v Bloomingdale Tp, 198 N W 912, 227 Mich 355
N Y—Allen v Village of Holley, 234 N Y S 471, 226 App Div 294
Pa—Morrow v North Sewickley Tp, 86 Pa Super 55
R I—Duffney v Clarke, 119 A 370, 44 R I 495
Va—Whitten v McClelland, 120 S E 146, 137 Va 726
29 C J p 720 note 66 [c].

(2) Whether pedestrian walking on roadway in the evening, who failed to comply with statute requiring pedestrians to keep to left of center line of highway and who was injured when she stepped from concrete onto dirt shoulder to avoid approaching automobiles, was guilty of contributory negligence was question of fact—Wager v State, 14 N Y S 2d 29, 257 App Div 580, modifying 10 N Y S 2d 310, 170 Misc 357

Use of highway known to be defective

If one is injured in the use of a highway known by him to be defective and the danger was imminent and immediate, the court as a matter of law may declare him guilty of negligence, but when the testimony shows defects of such character that the highway can be used with safety by the exercise of reasonable care, notwithstanding its defective condition the question of contributory negligence is for the jury—Willets v Butler Tp, 15 A 2d 392, 141 Pa Super 394

Always a jury question

Under some constitutional provisions, contributory negligence is a question of fact which must at all times be left to the jury—Salt River Valley Water Users Ass'n v Berry, 250 P 356, 31 Ariz 39

Evidence held insufficient to present jury question as to equestrian's negligence in attempting to cross temporary culvert in highway under construction—Codell Const Co v Steele, 56 S W 2d 955, 247 Ky 173

65. Pa—Frye v Washington Tp, 139 A 871, 291 Pa 240

66. Ky—Dawkins Lumber Co v Row, 276 S W 493, 210 Ky 666

Defendant entitled to peremptory instruction

Where petition alleged that defendant had practically destroyed highway on bank of creek and had thrown debris into creek, thus obstructing it, and that plaintiff, on account of destruction of highway, was using creek bed as passway, which before being obstructed had contained loose and dangerous stones, and that his mule stepped on loose stone, causing him to be injured, defendant was entitled to peremptory instruction—Dawkins Lumber Co v. Row, supra.

Notice of claim for injury. The sufficiency of the notice of claim for injury is a question of law for the court,[67] but whether what it describes is a defect is a question of fact for the jury,[68] as is the question whether the injury was received at the place described,[69] or caused by the defect described.[70] Also, whether plaintiff's failure to give the notice within the time required by statute was because of inability to do so is a question of fact for the jury.[71]

b. Instructions

Instructions are governed by the general rules and should clearly and consistently state the law as to the burden of proof and the various issues existing in the particular case

The general rules governing instructions to the jury in civil actions, see the C.J.S. title Trial §§ 266–448, also 64 C.J. p 510 note 3–p 1008 note 99, are applicable to actions for injuries resulting from defective highways.[72] Proper instructions should be given as to the burden of proof,[73] what constitutes a defective road or highway,[74] on the issue of negligence,[75] including questions as to defendant's duty with regard to the maintenance and repair of the highway,[76] the necessity and sufficiency of railings or barriers,[77] and whether objects were calculated to,[78] and did,[79] frighten horses, and on the questions of contributory negligence,[80] provided they are requested by defendant and the evidence authorizes them,[81] and proximate cause.[82]

The instructions should be confined to the evidence[83] and to the issues[84] raised by the plead-

67. Conn—Main v Town of North Stonington, 16 A 2d 356, 127 Conn 711.
29 C J p 708 note 40

68 Me—York v Athens, 58 A 418, 99 Me 82

69. N H—Robin v Bartlett, 13 A 645, 64 N H 426

70 Me—Hignett v Norridgewock, 73 A 1086, 105 Me 189

71. Mass—Welch v Gardner, 133 Mass 529
N H—Page v Campton, 63 N H 197

72 Ala—Shelby Iron Co v Morrow, 99 So 643, 211 Ala 125
Va—Appalachian Power Co v Wilson, 129 S E 277 142 Va 468
29 C J p 722 note 69

Instructions held correct

(1) Generally—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468—29 C J p 722 note 69 [a]

(2) Charge held not to permit recovery for defect not in "traveled way"—Dupuis v Town of Billerica, 157 N E 339, 260 Mass 210

73. Wis—Schillinger v Verona, 60 N W 272, 88 Wis 317
29 C J p 722 note 70

74 Kan—Watson v Parker Tp, 213 P 1051, 113 Kan 130

75. Mich—Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635
29 C J p 722 note 71

Instructions held correct

(1) Instruction to jury that, in determining question of reasonable care, with respect to warnings of excavation, they should consider kind of travel and probable speed of vehicles was correct—Strickfaden v Green Creek Highway Dist, 248 P 456, 42 Idaho 738, 49 A L R 1057.

(2) Other cases see 29 C J p 722 note 71 [a]

Instructions held erroneous

(1) Instruction which made test of township's negligence depend on the condition of the road the day before the accident—Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635

(2) Requested charge that if people who used highway failed to notice a defect therein it could be presumed the state highway department had no notice of it was erroneous and properly refused—Livingston v South Carolina State Highway Department, 183 S E 8, 178 S C 323

(3) Other cases see 29 C J p 722 note 71 [b]

76. Mich—Carpenter v Bloomingdale Tp, 198 N W 912, 227 Mich 355
Wash—Fichtenberg v Lincoln County, 273 P 178, 150 Wash 459

Instructions held correct

(1) An instruction that the town was not required to work a road to its full width, but only to keep it safe and convenient for travelers for a suitable width, and that it was for the jury to decide whether in the particular case the way had been maintained for a sufficient width, was correct—Williams v Allen, 114 A 138, 44 R I 14

(2) In an action for damages against a township for injuries sustained by a traveler because of a defective highway an instruction declaring it to be the duty of the township not to permit any conditions to exist in the road of which the township board had notice, which would render the use of the road dangerous to the public traveling thereon, was not erroneous as giving the jury the impression that plaintiff had a right to presume that the road was suitable for travel throughout the entire width—Watson v Parker Tp, 213 P 1051, 113 Kan 130

77. Mich—Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635
Wash—Fichtenberg v Lincoln County, 273 P 178, 150 Wash 459
29 C J p 722 note 72

Instructions held sufficient

Mich—Fidler v Lafayette Tp, 198 N W 262, 226 Mich 635

78. Wis—Laird v Otsego, 62 N W 1012 90 Wis 25
29 C J p 722 note 73

79 N Y—Lewis v Ballston Terminal R Co, 60 N Y S 1035, 45 App Div 129
29 C J p 722 note 74

80 Kan—Watson v Parker Tp, 213 P 1051 113 Kan 130
29 C J p 722 note 75

Instructions held correct

(1) Instruction is not erroneous because of the use of the word "materially" in instruction to the effect that for plaintiff's negligence to prevent recovery it must have contributed materially to his injury—Watson v Parker Tp, supra

(2) Other cases see 29 C J p 722 note 75 [a]

81. Ky—Codell Const Co v Steele, 56 S W 2d 955, 247 Ky 173

82. Md—Kennedy v Cecil County 14 A 524, 69 Md 65
29 C J p 722 note 76

83. Mich—Handy v Meridian Tp, 72 N W 251 111 Mich 454
29 C J p 722 note 77

Instructions held correct

(1) In pedestrian's action to recover for injuries resulting from being struck by a stone allegedly projected by steam compression drill, a charge invoking doctrine of res ipsa loquitur was not objectionable on ground of insufficiency of evidence to establish that pedestrian's injuries were caused by contractor where evidence presented jury question as to negligence of contractor—Muller v George M Brewster & Son 11 A 2d 749, 124 N J Law 417.

(2) Other cases see 29 C J. p 722 note 77 [b]

84. Neb—Nielson v Cedar County, 97 N W 826, 70 Neb 637.
29 C J p 723 note 78.

ings,[85] and should cover all material questions, not ignoring any issue or fact in evidence.[86] The province of the jury should not be invaded,[87] as by assuming the existence of facts in dispute.[88]

Instructions which are misleading,[89] indefinite,[90] or conflicting[91] should not be given. In determining the sufficiency of the instructions they should be construed as a whole,[92] and an erroneous instruction may be cured by a direction to the jury to disregard it,[93] or may be rendered immaterial by a finding on another ground.[94] Instructions which cover the point with more elaboration than necessary, but not inexactly, are not erroneous.[95]

It is not error to fail to instruct in the absence of request,[96] or to refuse instructions which correctly state the law, where the instructions granted sufficiently instruct the jury on the law of the case,[97] and a request for an instruction already substantially given,[98] or incorrect in part,[99] is properly refused.

c. Verdict and Findings

The rules pertaining to verdicts and findings in civil actions generally apply. Special findings may be made, but where made they must be consistent with each other and be supported by the evidence and support the judgment.

The rules pertaining to the verdict and findings in other civil actions, see the C J S title Trial §§ 485–573, also 64 C J p 1053 note 53–p 1189 note 61, are applicable to actions of this nature.[1] Special findings may be made,[2] but it is not the right of a party to have special findings on issues not material to, or decisive of, the main issue in the case,[3] and where a question in a special verdict fairly submits the issuable facts the court may refuse to submit a further question.[4] It is error to submit a question containing two issuable propositions disjunctively connected, so that an affirmative answer could not be said to affirm either proposition.[5] The verdict or findings must conform to the issues[6] and be supported by the evidence.[7] The special findings must be consistent with each other[8] and with the general

85. Mich—Johnston v Muskegon County, 162 N W 341, 195 Mich 722
29 C J p 723 note 79

86. Ohio—Brown v Schunk, 191 N E 886, 47 Ohio App 344
29 C J p 723 note 80

Issues requiring instruction
Evidence that plaintiff, meeting friend and desiring ride home, mounted friend's bicycle, with both grasping handlebars, and that plaintiff suing county commissioners was injured when bicycle left highway, required instruction concerning joint enterprise—Brown v Schunk, supra

87. S C—Livingston v South Carolina State Highway Department, 183 S E 8, 178 S C 323
29 C J p 723 note 81

88. Me—Colby v Wiscasset, 61 Me 304
29 C J p 723 note 82

89. R I—Whitford v Palmer, 100 A 312, 40 R I 196
29 C J p 723 note 83

90. Va—Shenandoah Valley Loan & Trust Co v Murray, 91 S E 740, 120 Va 563
29 C J p 723 note 84

91. Neb—Nielson v Cedar County, 97 N W 826, 70 Neb 637
29 C J p 723 note 85

92. Mich—Carpenter v Bloomingdale Tp, 198 N W 912, 227 Mich 355—Fidler v Lafayette Tp., 198 N W 262, 226 Mich 635
29 C J p 723 note 86

93. Wash—Gallagher v Buckley, 72 P 79, 31 Wash 380

94. Mass—Spurr v Shelburne, 131 Mass 429
Wis—Goldsworthy v Linden, 43 N W 656, 75 Wis 24.

Degree of causation of injury from contributory negligence
Regardless of whether or not criticism of the use of the word "materially" in instruction to the effect that for plaintiff's negligence to prevent recovery it must have contributed materially to his injury was justified, the use of such adverb became immaterial where the jury found specifically that plaintiff was guilty of no contributory negligence—Watson v Parker Tp, 213 P 1051, 113 Kan 130

95 Kan—Watson v Parker Tp, supra

96. Ky—Codell Const Co v Steele, 56 S W 2d 955, 247 Ky 173
29 C J p 723 note 89

97. Va—Appalachian Power Co v Wilson, 129 S E 277, 142 Va 468

98. Ala—Shelby Iron Co v Morrow, 99 So 643, 211 Ala 125
29 C J p 723 note 90

99. Me—Larrabee v Sewall, 66 Me 376

1. Mich—La Due v Lebanon Tp, 192 N W 636, 222 Mich 301

2. R I—Williams v Allen, 114 A 135, 44 R I 14
29 C J p 723 note 95

3 R I—Williams v Allen, supra
29 C J p 723 note 96

4. Wis—Maxwell v Wellington, 120 N W 505, 138 Wis 607

5. Wis—Du Cate v Brighton, 114 N W 103, 133 Wis 628
29 C J p 723 note 98

6. Mich—Schelske v Orange Tp, 110 N W 506, 147 Mich. 135.
29 C J. p 724 note 99

7. Conn—Perrotti v Bennett, 109 A 890, 94 Conn 533

Evidence held sufficient to support finding
(1) To support jury's finding that notice of injury, sent by registered mail to town clerk, was actually received by him, although return receipt was signed in town tax collector's handwriting—Anderson v Inhabitants of Town of Billerica, 36 N E 2d 393, 309 Mass 516

(2) To support finding that railroad wreck was caused by county's negligence in its road construction, and not by failure of railroad to furnish adequate lateral support to substituted county road—Snohomish County v Great Northern Ry Co, C C A Wash, 130 F 2d 996

(3) Finding that highway was not in a condition reasonably safe and fit for public travel held not so contrary to the evidence as to justify the court in setting it aside—Burns v Van Buren Tp, 187 N W 276, 218 Mich 40

Evidence held not to support finding
(1) Evidence held sufficient so that finding that county commissioners did not have actual notice of defect in bridge rails should be set aside—McGuire v Board of Com'rs of Ellis County, 299 P 945, 233 Kan 225

(2) Verdict and judgment held against the weight of the evidence on the issue of contributory negligence—Brown v Schunk, 191 N E 886, 47 Ohio App 344

8. Conn—Nichols v Manchester, 74 A 935, 82 Conn 619.
29 C J p 724 note 2.

verdict,[9] and must support the judgment.[10] To support a judgment for plaintiff, a special verdict should embrace all the facts essential to defendant's liability,[11] and if such facts are not shown judgment should be for defendant notwithstanding a general verdict for plaintiff[12] However, a finding which includes the facts necessary to be averred in the declaration is sufficient without negativing any possible qualification of the facts found[13] After judgment the verdict will be aided by all reasonable intendments[14]

§ 282. —— Damages

Damages are governed by the general rules, except as modified by express statutory provisions, and ordinarily should be compensatory only and not punitive.

The general rules of damages, subject, of course, to the provisions of a controlling statute, apply to actions for injuries from defective highways[15] The damages should as a rule be compensatory only[16] Punitive or exemplary damages are allowed only in exceptional cases,[17] as in the cases of gross negligence, when the expenses of the suit may be included[18] In some jurisdictions it has been held that a statute providing for recovery of damages to plaintiff's person or "property" does not authorize recovery for loss of services and expenses incurred because of injury to plaintiff's wife[19] or minor child,[20] but in other jurisdictions such damages have been held to be recoverable,[21] especially where the statute provides for recovery for any damage[22]

Loss of use of property. Under a statute allowing recovery for damages to property, recovery has been allowed in some jurisdictions for loss of the use of the property injured.[23] Other authorities have held such loss not a proper element of damages.[24] Still others have held that loss of use is not recoverable for injury to an animal which died because of the injury; but if the animal died because of careless treatment after the injury recovery may be had for loss of its use, or, in case the injury was permanent, to the amount its value was diminished by reason of the injury[25]

Limitation by notice of claim In general damages are confined to recovery for the injuries stated in the notice of claim,[26] and cannot exceed the amount stated therein[27] In some jurisdictions, however, plaintiff may recover damages not only for the injury described in his notice of claim, but also for all the directly resultant injurious conse-

9. Ind—Jeffersonville v. Gray, 74 N E 611, 165 Ind 26
29 C J p 724 note 3

10. Tex—West Texas Utilities Co v Haynes, Civ App, 20 S W 2d 236
Findings held to support judgment
Findings which, although they do not state that the acts described constitute negligence, contain the elements of negligence and plainly imply a finding of negligence are sufficient to support judgment for plaintiff as against contention that they do not find defendant guilty of negligence—West Texas Utilities Co v Haynes, supra

11. Mich—Schelske v Orange Tp, 110 N W 506, 147 Mich 135
29 C J p 724 note 4

12. Ind—Buscher v Lafayette, 36 N E 371, 8 Ind App 590

13 Mich—Schelske v Orange Tp, 110 N W 506, 147 Mich 135
29 C J p 724 note 6

14. Mich—Schelske v Orange Tp, supra

15. Conn—Burr v. Plymouth, 48 Conn 460

16 S C—Cooper v South Carolina Highway Department, 190 S E 499, 183 S C 155
29 C J p 724 note 11
Actual damages
Words "actual damage" in statute permitting recovery from state highway department of actual damage to person or property resulting from defect in state highway means such damage as can actually be shown to have been suffered—Cooper v South Carolina Highway Department, supra
Items for which recovery allowed
(1) Trouble and expense for treatment of injured animal—Page v Sumpter, 11 N W 60, 53 Wis 652
(2) Other cases see 29 C J p 724 note 11 [a]
Mental suffering
(1) Under a statute allowing recovery for an injury to the person, recovery cannot be had for mere mental suffering caused by the risk and peril incurred, but where an actual injury to the person is sustained, however small, mental suffering caused thereby is a part of the injury for which recovery is authorized—Canning v Williamstown, 1 Cush, Mass, 451
(2) Other cases see 29 C J p 724 note 11 [a] (7), (9)

17. N H—Woodman v Nottingham, 49 N H 387, 6 Am R 526
29 C J p 724 note 12.
Case overruled
The case of Whipple v Walpole, 10 N H 130, as authority for the allowance of vindictive or exemplary damages in actions of this nature, has been expressly overruled.—Woodman v Nottingham, 49 N H 387, 6 Am R 526

18 Conn—Wilson v Granby, 47 Conn 59, 36 Am R 51

19. Conn—Lounsbury v Bridgeport, 34 A 93, 66 Conn 360
29 C J p 724 note 17

20 Me—Reed v Belfast, 20 Me 246
29 C J p 724 note 18

21. N H—Wheeler v Troy, 20 N H. 77
29 C J p 724 note 19

22 Wis—Hunt v Winfield, 36 Wis 154, 17 Am R 482

23. Conn—Brown v Southbury, 1 A 819, 53 Conn 212
29 C J p 724 note 21

24. Me—McLaughlin v. Bangor, 58 Me 398

25 Wis—Page v Sumpter, 11 N W 60, 53 Wis 652

26. Vt—Boyd v Readsboro, 55 Vt 163

27. S C—Ancrum v State Highway Department, 161 S E 98, 162 S C 504
Amendment of claim not prevented
Limitation of recovery to amount of verified claim filed with department does not preclude a revision or amendment of the claim within the period allowed by statute therefor—Ancrum v State Highway Department, supra.

quences, although they may not appear until long afterward;[28] and he may recover a sum greater than that claimed in the notice if the evidence shows that he underestimated his damages.[29]

XI. TAXES AND ASSESSMENTS

§ 283. Highway Taxes

The construction and maintenance of highways is a public purpose which may be effected by general taxation

The construction and maintenance of serviceable roads is a public purpose which may be effected by general taxation,[30] and since public roads usually benefit both the state at large and the county in which they are located, the cost thereof may be such by either state or local taxation, or both[31]

Acts and duties of local authorities Where the legislature imposes certain duties on local authorities with reference to highway taxes, such duties must be performed in the manner prescribed by statute[32] Thus when the legislature requires a highway tax to be levied by certain local authorities, such tax must be levied, see § 289 infra, and compliance must be had with statutes requiring such local authorities to make annual reports of the amount of road taxes levied and collected[33] In proceedings to improve highways by taxation, the local authorities act as the agents of the taxpayers within the taxing district[34]

§ 284. —— Power to Impose

The power to impose highway taxes is vested in the legislature which may grant such power to local authorities, such as county boards

Subject to constitutional restrictions, it is within the power of the legislature to impose, or to provide for the imposition of, taxes for highway purposes[35] Thus the legislature may determine the character and location of the property that shall be subject to assessment, see infra § 288, the purposes for which the tax is to be levied,[36] the time of

28. N H—Noble v Portsmouth, 30 A 419, 67 N H 183—Robin v Bartlett, 13 A 615, 64 N H 426

29. N H—Noble v Portsmouth, 30 A 419, 67 N H 183

30. U S—Memphis & C Ry Co v Pace, 51 S Ct 108, 282 U S 241, 75 L Ed 315, 72 A L R 1096, affirming 121 So 826, 154 Miss 536—Browning v Hooper Tex, 46 S Ct 141, 269 U S 396, 70 L Ed 330, reversing, D C, 3 F 2d 160—Missouri Pac R Co v Western Crawford Road Improvement Dist, 45 S Ct 31, 266 U S 187, 69 L Ed 237, affirming Western Crawford Road Improvement Dist v Missouri Pac R Co, 248 S W 563, 157 Ark 304

Cal—Joint Highway Dist No 13 v Hinman, 32 P 2d 144, 220 Cal 578

Tex—Tom Green County v Moody, 289 S W 381, 116 Tex 299

31. Fla—Amos v Mathews, 126 So 308, 99 Fla 1, 65, 115

32. Pa—In re Fear, 26 A 2d 457, 344 Pa 624

Power of local authorities to levy highway taxes see infra § 284

33. Mandatory duty

The provision of Second Class Township Law that board of township supervisors "shall" make sworn statement of amounts of road taxes levied and collected to state department of highways on or before certain day in each year are "mandatory"—In re Fear supra

34. Ind—Pulse v Board of Com'rs of Decatur County, 163 N E 609, 200 Ind 376

35. U S—St Louis & S W Ry Co v Nattin, D C La, 27 F 2d 766, affirmed 48 S Ct 438, 277 U S 157, 72 L Ed 830

Cal—Joint Highway Dist No 13 v Hinman, 32 P 2d 144, 220 Cal 578

La—Guaranty Bank & Trust Co v Ward Lumber Co, 109 So 496, 161 La 803

S C—Evans v Beattie, 135 S E 538, 137 S C 496

29 C J p 725 note 30

Taxation according to benefits not required

(1) While the legislature may provide that money for the construction improvement or maintenance of highways shall be raised in whole or in part by means of special assessments on the property benefited, as appears in § 294 infra, it is not required to adopt this means of raising money for highway purposes but it may provide that money for such purposes shall be raised by general taxation

U S - Missouri Pac R Co v Western Crawford Road Improvement Dist, 45 S Ct 31 266 U S 187, 69 L Ed 237, affirming Western Crawford Road Improvement Dist v Missouri Pac R Co, 248 S W 563, 157 Ark 304– Browning v Hooper, Tex, 3 F 2d 160, reversed on other grounds 46 S Ct 141, 269 U S 396, 70 L Ed 330

Fla—Taylor v Williams, 195 So 175, 142 Fla 402, rehearing denied 195 So 184 142 Fla 562, and 196 So 214, 142 Fla 756

(2) Thus the legislature may provide that, in the event a contemplated road improvement is not undertaken the preliminary expenses shall be paid according to the value of the property in the taxing district and not according to anticipated benefits —Southern Crawford Road Improvement Dist v Brown, 245 S W 821, 156 Ark 267—Netterer v Dickinson & Watkins, 239 S W 722, 153 Ark 5

(3) A statute providing for a tax on all property in a taxing district according to its value imposes a general tax as distinguished from a special assessment—Golden Gate Bridge and Highway Dist v Felt, 5 P 2d 585, 214 Cal 308—29 C J p 726 note 52

(4) The validity of such a tax does not depend on the receipt of some special benefit by the property taxed

U S—Memphis & C Ry Co v Pace, 51 S Ct 108, 282 U S 241, 75 L Ed. 315 72 A L R 1096, affirming 121 So 826, 154 Miss 536

Fla—Lee v Atlantic Coast Line R Co, 194 So 252, 141 Fla 545

La—Hulin v Road Dist No 4, Parish of Vermilion, 115 So 650, 165 La 443

29 C J p 726 note 55

As to ordinary township roads, involuntary taxation should not be imposed on the township taxpayers except in rare emergencies and for great public benefit— Austin-Western Road Mach Co v Wetzel, 264 Ill App 254

36. Wash—State ex rel Cruikshank v Baker, 97 P 2d 638, 2 Wash 2d 145

Purposes of tax generally see infra § 286.

levy;[37] the amount or rate of taxation;[38] the method of collection;[39] the distribution or apportionment of the taxes when collected, see § 292 infra, and the relief to be given from taxes theretofore imposed.[40] So also the legislature may determine what shall be the territorial subdivisions of the state for the purposes of highway taxation,[41] and it is within its power to determine the methods of taxation by which funds for road purposes shall be raised,[42] which methods may vary in the different counties and localities,[43] and two different systems may be in effect at the same time.[44]

In the absence of contrary statute, the qualified voters of a taxing district have no power to impose taxes for highway purposes.[45]

Power of local authorities Subject to constitutional restrictions,[46] the legislature may, and frequently does, grant to, or vest in, local authorities,[47] such as county,[48] township,[49] or road district[50] boards or officials, the power to impose highway taxes, and in some jurisdictions such power is conferred on local authorities by constitutional provisions.[51] Such power may be conferred on local

37. Mo—State v Burton, 182 S W 746, 266 Mo 711
Time of levy generally see infra § 289

38. Mo—State v Burton, 182 S W 746, 266 Mo 711
29 C J p 725 note 33
Limitations as to amount or rate see infra § 287

39 Ark—Northern Road Improvement Dist v Mevermann, 275 S W 762 169 Ark 383

40 Mich—Clearwater Tp v Kalkaska County, 153 N W 824, 187 Mich 516

41. Cal—Anaheim Sugar Co v Orange County, 183 P 809, 181 Cal 212
29 C J p 725 note 38

Boundaries

(1) The fixing of a highway taxing district is a purely legislative function, such a district may be fixed as the legislature sees fit, unless the nature of the tax conclusively fixes the district—Cummins v Pence, 91 N E 529, 174 Ind 115

(2) The boundaries of existing political subdivisions of the state need not be followed—State v Marion County, 85 N E 513, 170 Ind 595
29 C J p 725 note 40

42. "It is for the legislative department to prescribe by what method the roads shall be worked and kept in repair, whether by labor, by taxation on property, or by funds raised from license taxes, or by a mixture of two or more of these methods"—State v Kelly, 119 S E 755, 759, 186 N C 365

43. N C—State v Kelly, 119 S E 755, 186 N C 365

44 N C—State v Kelly, supra
29 C J p 726 note 57

45. **Statute held not to confer power**
Tex—Tom Green County v Moody, 289 S W 381, 116 Tex 299
Submission of question of levy to voters see infra § 289 b

46. Mo—State ex inf Hales ex rel Walker v Harper, 256 S W 469, 301 Mo 115

Legislature cannot give county power to levy taxes solely in highway district, not uniform throughout county—Idaho County v Fenn Highway Dist, 253 P 377, 43 Idaho 233

Road districts

General powers of taxation cannot be conferred by the legislature on road improvement districts since they do not constitute subordinate political agencies of the state for the purpose of taxation under the constitution—State v Berry, 249 S W 572, 158 Ark 84—Whaley v Northern Road Improvement Dist of Arkansas County, 240 S W 1, 152 Ark 573, 24 A L R 934

47. U S—St Louis & S W Ry Co v Nattin D C La, 27 F 2d 766 affirmed 48 S Ct 438, 277 U S 157, 72 L Ed 830
Colo—Milheim v Moffat Tunnel Improvement Dist, 211 P 649, 72 Colo 268

48. Fla—Whitney v Hillsborough County, 127 So 486, 99 Fla 628
Mo—State ex rel and to Use of Kersey v Pemiscot Land & Cooperage Co, 295 S W 78, 317 Mo 41

County excise boards are authorized to impose highway taxes—Prince v Atchison T & S F Ry Co, 271 P 245, 133 Okl 90—Schaff v Borum, 200 P 191, 82 Okl 284

On creation of new county

Under L 1920 p 48 § 2, and Civ Code § 844, relative to new counties, and Alternative Road Law § 11, where such act was by recommendation of the grand jury put in force in a county, it became of force in a new county wholly created from the territory of the county first mentioned, and the ordinary of the new county could levy the tax provided thereby—Parker v Smiley, 113 S E 150, 153 Ga 786

Purpose of grant of power

The purpose and intendments of Acts 1925 c 10110, authorizing certain counties to improve highways, to pay costs thereof by special assessments and to issue bonds and levy taxes were that entire estimated expense of road construction should ultimately be paid by tax assessments of ad valorem taxes, even though county bonds were issued on certificates representing liens of the special assessments the special assessment certificate liens as well as county's taxing power being pledged to secure payment of bonds—Hillsborough County v Bregenzer, Fla, 10 So 2d 498

49 Mich—Webb v Wakefield Tp, 215 N W 43, 239 Mich 521
Neb—State v Bone Creek Tp, Butler County, 190 N W 586, 109 Neb 202, rehearing denied 193 N W 767, 109 Neb 202

50. Cal—Joint Highway Dist No 13 v Hinman, 32 P 2d 144, 220 Cal 578—Golden Gate Bridge and Highway Dist v Felt, 5 P 2d 585 214 Cal 308
Mo—Hawkins v Cox, 66 S W 2d 539, 334 Mo 610—State ex rel Little Prairie Special Road Dist of Pemiscot County v Thompson, 285 S W 57, 315 Mo 56—State ex inf Hales ex rel Walker v Harper, 256 S W 469, 301 Mo 115

Where city is organized as road district, its city council under the statutes in some jurisdictions, acts in a dual capacity—as a city council and as highway commissioner, as highway commissioner it has the power to levy road taxes, but its powers as highway commissioner are separate and distinct from its duties as a city council and are to be exercised independently of any duties imposed on it as a city council—People ex rel Koehler v Cleveland, C, C & St L Ry Co, 188 N E 473, 354 Ill 342—People v Cleveland C C & St L Ry Co, 182 N E 616, 319 Ill 476

51. Mo—Wilson v Washington County, 247 S W 185
29 C J p 725 note 42

Discretionary power

Where the constitution grants discretionary power to county courts to levy special road taxes, the legislature cannot regulate the manner in which this discretion is to be exercised, the word "discretion," within the constitutional provision, meaning freedom to decide or to act ac-

authorities by implication,[52] but it exists only when clearly conferred,[53] and the extent of the power depends on, and is limited by, the terms of the statute conferring it.[54] Where the power to impose road taxes is conferred on a township and a city embraced within the township's territorial limits, each may exercise its taxing power within its own territorial limits without reference to the exercise of the power by the other.[55] A taxing district, however, cannot effectually exercise the power conferred unless it is properly organized.[56]

Validity of statutes. In order to be valid, road tax statutes must not violate either state or federal constitutional provisions,[57] such as provisions directing that the statute imposing the tax shall distinctly state the tax and the object to which it is to be applied,[58] or provisions fixing an equation between the tax on the poll and the tax on property.[59] If a statute authorizing the levy of a road tax provides no method for carrying its provisions into effect it is void.[60] A statute is not invalid, however, merely because it imposes no limitation on the amount of the levy.[61]

§ 285. —— Construction, Amendment, and Repeal of Statutes

General rules governing the construction, amendment, and repeal of statutes apply to road tax statutes.

General rules governing the construction of statutes ordinarily apply to the construction of statutes imposing or providing for the imposition of highway taxes.[62] While such statutes should be strictly construed,[63] they must nevertheless be given a reasonable construction,[64] and not an unnatural construction which will defeat the tax.[65] As in the case of statutes generally, a road tax statute must be construed as a whole,[66] and, if possible, effect should be given to all portions of the statute.[67] Where the statute is open to two interpreta-

cording to one's own judgment, and unrestrained exercise of choice or will—State ex rel and to Use of Kersey v Pemiscot Land & Cooperage Co, 295 S W 78, 317 Mo 41, overruling State ex rel Johnson v Atchison, T & S F Ry Co, 275 S W 932, 310 Mo 587

52. Ill—People v Kankakee & S R Co, 107 N E 218, 265 Ill 497

Where power is given to local authorities to issue road bonds, it necessarily follows that authority is given to levy sufficient taxes to pay such bonds and the accruing interest thereon

Fla—State ex rel Atlantic-Gulf Special Road and Bridge Dist v Bass, 118 So 212, 96 Fla 478

N C—Ellis v Greene, 133 S E 395, 191 N C 761

53. Ill—People v Kankakee & S R R Co, 107 N E 218, 265 Ill 497
29 C J p 726 note 60

54. U S—Kimama Highway Dist v Oregon Short Line R Co, C C A Idaho, 298 F 431, affirming, D C, Oregon Short Line R Co v Kimama Highway Dist, 287 F 734

Ill—People v Cleveland, C, C & St L Ry Co, 137 N E 478, 305 Ill 460

Ky—Rockcastle County v Louisville & N R Co, 23 S W 2d 276, 232 Ky 439

29 C J p 726 note 59 [a], p 727 note 61

55. Mont—State ex rel Siegfried v Carbon County, 92 P 2d 301, 108 Mont 510, 123 A L R 1456

56. La—State ex rel Casagne v Police Jury of St Tammany Parish, 106 So 837, 160 La 230

Road district, in order to levy taxes effectually, must be created by legislature or under properly delegated legislative authority—Twing v Rhodes, 16 S W 2d 258, 118 Tex 410, answering certified questions, Civ App, 24 S W 2d 728 reversed on other grounds Rhodes v Twing Com App, 41 S W 2d 13, appeal dismissed 53 S Ct 5, 287 U S 561, 77 L Ed 495

57. Fla—Amos v Mathews, 126 So 308, 99 Fla 1, 65, 115
29 C J p 725 note 43 [a]

Statutes held valid

U S—Memphis & C Ry Co v Pace, 51 S Ct 108, 282 U S 241, 75 L Ed 315, 72 A L R 1096, affirming 121 So 826, 154 Miss 536

Cal—Joint Highway Dist No 13 v Hinman, 32 P 2d 144, 220 Cal 578—Golden Gate Bridge and Highway Dist v Felt, 5 P 2d 585, 214 Cal 308—Municipal Improvement Co v Thompson, 258 P 955, 201 Cal 629

Fla—Whitney v Hillsborough County, 127 So 486, 99 Fla 628—State v Brevard County, 126 So 353, 99 Fla 226

Ill—People v Millard, 139 N E 113, 307 Ill 556—People v Cleveland, C, C & St L Ry Co, 137 N E 478, 305 Ill 460—People v New York Cent R Co, 137 N E 473, 305 Ill 434

Kan—State v State Highway Commission, 286 P 244, 130 Kan 456

Mo—Wilson v Washington County, 247 S W 185

N Y—Raquette Falls Land Co v State, 207 N Y S 750, 124 Misc 687

N C—Hill v Board of Com'rs of Gates County, 129 S E 154, 190 N C 123

Okl—Protest of Oklahoma Pipe Line Co, 296 P 406, 147 Okl 163

Or—MacVeagh v Multnomah County, 262 P 248, 123 Or 345, modified 270 P 502, 126 Or 417—City of Astoria v Cornelius, 240 P 233, 119 Or 264

29 C J p 725 note 43 [b]

Statutes held invalid

Idaho—Idaho County v Fenn Highway Dist, 253 P 377, 43 Idaho 233

Tex—Commissioners' Court of Navarro County v Pinkston, Civ App, 295 S W 271

29 C J p 725 note 43 [c]

58. Kan—State v Board of Com'rs of Saline County, 278 P 54, 128 Kan 437

Okl—Turner v Cox, 280 P 568, 138 Okl 225—Missouri-Kansas-Texas R. Co v Washington County, 276 P 769, 136 Okl 191

29 C J p 726 note 46

59. N C—State v Godwin, 31 S E 221, 123 N C 697

60. Idaho—Cunningham v Thompson, 108 P 898, 18 Idaho 149

29 C J p 727 note 64

61. Colo—Milheim v Moffat Tunnel Improvement Dist, 211 P 649, 72 Colo 268

29 C J p 725 note 41

62. Ariz—Hunt v Callaghan, 257 P. 648, 32 Ariz 235

N Y—Raquette Falls Land Co v State, 207 N Y S 750, 124 Misc 687.

63. Cal—Golden Gate Bridge and Highway Dist v Felt, 5 P 2d 585, 214 Cal 308

29 C J p 727 note 62

64. Cal—Golden Gate Bridge and Highway Dist v Felt, supra

65. Cal—Golden Gate Bridge and Highway Dist v Felt, supra

66. Va—Godwin v Board of Sup'rs of Nansemond County, 171 S E 521, 161 Va 494

67. Kan—State v State Highway Commission, 286 P. 244, 130 Kan. 456.

tions, one of which will invalidate and the other uphold it, it will be given the latter construction if reasonably possible.[68] In the absence of anything in the statute to the contrary, a road tax statute will be construed as prospective only, and not retrospective, in its operation.[69] A statute specifically providing for the manner of raising funds for highways is exclusive, and must be read as an exception to another statute covering the same and other subjects in general terms.[70]

Amendment and repeal. Subject to constitutional limitations, it is within the power of the legislature to change,[71] amend,[72] or repeal[73] road tax statutes, such as statutes conferring the power of taxation on local authorities,[74] and a tax is invalid if levied under a statute which has been repealed[75] by a valid act.[76] A road tax statute may be repealed by implication by a later act,[77] such as a general revenue law,[78] inconsistent therewith. Likewise a general law may be repealed by a later special act,[79] and the later of two conflicting general acts passed at the same session of the legislature impliedly repeals the earlier act, especially where the later act contains an emergency clause.[80] However, repeals by implication are not favored,[81] and unless the two statutes are irreconcilably inconsistent, or an intent to repeal is otherwise clearly shown, they will both stand.[82] No repeal takes place where the later act expressly declares that it shall not be construed to repeal any prior act.[83] An earlier statute is repealed only so far as the later act is inconsistent with it,[84] the new act in such case being regarded in effect as an amendment of the former statute.[85] Where the law is revised, only the provisions of the former statute which are omitted from the revised act are repealed.[86]

§ 286 —— Purpose

Highway taxes may be levied only for public purposes authorized by the constitution and statutes conferring the power to levy

Highway taxes may be levied only for public purposes[87] authorized by the constitution[88] and statutes conferring the power to levy.[89] In some ju-

68. Kan—State v State Highway Commission, supra

69. Ill—People v Pittsburgh, C., C & St L Ry Co, 147 N E 492, 316 Ill 410
29 C J p 727 note 63

70. Ohio—State v Zangerle, 126 N E 413, 100 Ohio St 414

71. N C—State v Kelly, 119 S E 755, 186 N C 365

72. Ill—People v Illinois Cent R Co, 145 N E 719, 314 Ill 339

Statutes held amended
Mont—State v Mills, 261 P 885, 81 Mont 86
Okl—Alford v Bonaparte, 256 P 935, 125 Okl 164

73. Ill—People v Illinois Cent R Co, 145 N E 719, 314 Ill 339

74. Wash—Great Northern Ry Co v Glover, 77 P 2d 598, 194 Wash 146
29 C J p 727 note 65

75. Wash—Great Northern Ry Co v Glover, 77 P 2d 598, 194 Wash 146
29 C J p 727 note 66, p 731 note 23 [b]

76. Ky—McIntire v Powell, 125 S W 1087, 137 Ky 477
29 C J p 727 note 67

77. Ill—People v Illinois Cent R Co, 145 N E 719, 314 Ill 339
29 C J p 727 note 69

Statutes empowering townships to levy road taxes held repealed by later inconsistent statutes—Great Northern Ry Co v Glover, 77 P 2d 598, 194 Wash 146

78. Mich—Port Huron Engine, etc., Co v Port Huron, 158 N W 19, 191 Mich 590
29 C J p 727 note 70

79 Va—Bertha Zinc Co v Pulaski County, 13 S E 740, 88 Va 371

80. Wash—Hardin v Klickitat County, 203 P 383, 115 Wash 389, reversing 197 P 644, 115 Wash 389

However, it has been held that where two inconsistent acts are passed at the same session of the legislature amending a former road act, the one first approved will prevail—People v Illinois Cent R Co, 129 N E 66, 295 Ill 408

81. Or—State v Phipps, 299 P 1009, 136 Or 454

82. Ill—People v Illinois Cent R Co 145 N E 719, 314 Ill 339—People v Cleveland, C, C & St L Ry Co, 138 N E 196, 306 Ill 459
29 C J p 727 note 74

83. Ala—Hudgens v State, 72 So 605, 15 Ala App 156

84 Ky—Durrett v Kenton County, 87 S W 1070, 27 Ky L 1173

85. Ky—Durrett v Kenton County, supra
Mont—State v Mills, 261 P 885, 81 Mont 86

86. Ill—People v Cleveland, C, C & St L R Co, 107 N E 251, 266 Ill 98

87. Ind—State v Marion County, 85 N E 513, 170 Ind 595
29 C J p 727 note 80

88. Payment of bonds
After roads have been completed as local projects, payment of local bonds issued therefor cannot constitute dual purpose necessary under constitution to imposition of state taxes for payment thereof—Amos v Mathews, 126 So 308, 99 Fla 1, 65, 115

89 Ill—People v Cairo & T R Co, 149 N E 824, 319 Ill 118
29 C J p 727 note 81

Particular purposes for which road taxes may be levied
(1) To pay road bonds
Fla—W J Howey Co v Williams, 195 So 181, 142 Fla 415, rehearing denied 195 So 184, 142 Fla 562, and 196 So 214, 142 Fla 756
N C—Ellis v Greene, 133 S E 395, 191 N C 761

(2) To pay judgment for materials furnished in improving roads—People ex rel Euzelie v Rice, 190 N E 681, 356 Ill 373—Brown v Ellis, 219 Ill App 540

(3) To acquire a building for highway purposes—People ex rel Hempen v Baltimore & O R Co, 42 N E 2d 69, 379 Ill 543

(4) To provide a fund for the payment of highway administrative expenses—People ex rel Hempen v Baltimore & O R Co, supra

(5) To pay special drainage assessments against a road district—People v New York, C & St L R Co, 182 N E 778, 349 Ill 633—People v Missouri Pac R Co, 150 N E 288, 319 Ill 433

(6) To pay for lighting county roads—Hatch v Board of Sup'rs of Muskegon County, 236 N W 777, 254 Mich 255

Particular purposes for which road taxes may not be levied
(1) To provide a sinking fund for

risdictions counties may levy highway taxes only for county purposes,[90] and under the statutes in some jurisdictions such taxes may be levied only for existing roads[91] legally laid out[92] A levy may not be made for highways which do not exist and which are not even in contemplation[93] A levy, however, may be made for highways actually used as such, even though the use of the land has never been legally acquired from the owners[94] So county authorities must include in a tax levy for maintenance of highways for the ensuing year, a sum for maintaining highways accepted by the authorities, even though notice of acceptance is not given until after the levy[95] Where taxes previously collected for highway purposes have been lost through bank failures, a tax may be levied to replace the funds lost[96]

§ 287. —— Amount or Rate

The amount or rate of taxation must be within the limits prescribed by statutory or constitutional provisions.

The amount or rate of taxation is commonly limited by constitutional[97] or statutory[98] provisions,

the payment of road bonds—Cooper v Board of Com'rs of Franklin County, 111 S E 521, 183 N C 231, rehearing dismissed 113 S E 569, 184 N C 615

(2) To acquire a building for other than highway purposes—People ex rel Hempen v Baltimore & O R Co, 42 N E 2d 69, 379 Ill 543

Raising money for state highways

(1) Under Road and Bridge Act § 126, a county has authority to levy a tax for the purpose of buying and improving a highway, even though such highway is one proposed to be improved and taken over by the state highway department, such right continuing until the state highway department actually takes over the road for the purpose of improvement—People v Cleveland C, C & St L Ry Co, 137 N E 478, 305 Ill 460

(2) The town commissioners have no authority to levy a tax for widening of roads that have been taken over by the state as part of the system of state highways—People v Chicago & E I Ry Co, 149 N E 743, 319 Ill 163—People v Chicago, T H & S E Ry Co, 146 N E 532, 315 Ill 589

In Georgia

(1) A county which has adopted the alternative road law has power to levy a tax for the purpose of raising funds for working, improving, and repairing the public roads of the county—Spain v Hall County, 165 S E 612, 175 Ga 600

(2) Where a county levies a tax under one of the alternative road laws, it may not levy an additional tax for the expense of maintaining, keeping, and equipping convicts employed in work on the public roads—Central of Georgia Ry Co v Wright, 125 S E 520, 33 Ga App 96

(3) The authorities of a county in which none of the alternative road laws are in force have no power to levy a tax solely for improving or working public roads—Haisten v Glower, 41 S E 48, 114 Ga 992—Central of Georgia Ry Co v Wright, 125 S E 520, 33 Ga App 96

(4) In such a county, however, the authorities may levy a tax to maintain, keep, and equip convicts employed in work on public roads—Central of Georgia Ry Co v Wright, supra

(5) A tax levy "to pay for improvements of the public roads and for maintenance of the chain gang for said county" is a levy for two purposes where the county in which such levy is made has not adopted any of the alternative road laws, the part of the levy "for improvements of the public roads" is unauthorized, and, the amount of the tax for this purpose not being given, the remainder of the levy is rendered illegal for uncertainty—Central of Georgia Ry Co v Wright, supra

(6) Proceeding by the county authorities to remove the warden in charge of convicts in the county is not an exercise of any power incident to road building, within a constitutional provision allowing taxation for such purpose, or laws passed in pursuance thereof—Humber v Dixon, 94 S E 565 147 Ga 480

(7) Power of counties to levy taxes for the construction and maintenance of state-aid highways is limited by statute Faver v City of Washington, 126 S E 464, 159 Ga 568

90. What constitutes county purposes

(1) As a general rule a public road within a county constitutes a county purpose for taxation—State v Brevard County, 126 So 353, 99 Fla 226—Jackson Lumber Co v Walton County 116 So 771, 95 Fla 632, appeal dismissed 49 S Ct 338, 73 L Ed 1011

(2) Even though by statute the construction or maintenance of a road in a district in a county may be a district purpose, it may by statute be made a county purpose—State v Brevard County, supra

(3) Failure of public road benefiting county as whole or any substantial part thereof to benefit property in other part of county does not prevent its construction from being county purpose for which ad valorem property tax may be levied—Jackson Lumber Co v Walton County, supra

91. Me—Philbrook v Kennebec County, 17 Me 196
29 C J p 728 note 82

92. Me—Pierce v Franklin County, 63 Me 252
Mich—Flint & Pere Marquette R Co v Auditor-Gen, 2 N W 835, 41 Mich 635

93. Mich—Michigan Land & Iron Co v L'Anse Tp, 30 N W 331, 63 Mich 700
29 C J p 728 note 84

94. Mich—Peninsula Iron & Lumber Co v Crystal Falls Tp, 27 N W 666, 60 Mich 510

95. N Y—Carlisle v Onondaga County 146 N Y S 665, 84 Misc 511, affirmed 149 N Y S 1103, 164 App Div 922

96. Tex—Henson v Commissioners' Court of Henderson County, Civ App, 56 S W 2d 240, error refused

97. Ill—People v Missouri Pac R Co, 116 N E 567 316 Ill 137
Mich—Cooper, Wells & Co v City of St Joseph, 205 N W 86, 232 Mich 255
Okl—Empire Pipe Line Co v Excise Board of Oklahoma County, 34 P 2d 585, 168 Okl 485—Schaff v Borum, 200 P 191, 82 Okl 284
29 C J p 728 note 87

Abolition of limitation

Constitutional amendment abolished ten-mill constitutional limitation on taxes to pay public improvement bonds, whether bonds were issued before or after its adoption—Tremont Lumber Co v Winn Parish Police Jury, 122 So 862, 168 La 597, appeal dismissed and certiorari denied Tremont Lumber Co v Police Jury of the Parish of Winn, 50 S Ct 66, 280 U S 517, 74 L Ed 587

98. Ga—Central of Georgia Ry Co v Wright, 125 S E 520, 33 Ga App 96
Ill—People ex rel Singer v Illinois Cent R Co, 26 N E 2d 840, 373 Ill 523—People ex rel McDonough v Mills Novelty Co, 192 N E 236, 357 Ill. 285—People v Cleveland, C C.

and any tax assessed exceeding that authority is void[99] as to the excess[1] A further or additional levy, however, is sometimes provided for under certain circumstances,[2] and on specified proceedings,[3] as by the submission of the question to a vote of the taxpayers, see § 289 b infra, but statutes authorizing taxes in excess of the prescribed limitation will be strictly construed[4] and must be strictly complied with in order to authorize the additional levy.[5]

Consent of town auditors to higher rate. Under the statutes in some jurisdictions a road tax in excess of the rate prescribed by statute may be levied on town property where the board of highway commissioners obtains the consent of the board of town auditors to the additional levy[6] The consent, in order to authorize the additional levy, must be secured in the manner prescribed by statute.[7] It must be given by a majority of the members of the board of

& St L Ry Co, 182 N E 616, 349 Ill 476—People v Missouri Pac R Co, 173 N E 816 342 Ill 226
Minn—State v Keyes, 246 N W 547, 188 Minn 79
Mo—State ex rel and to Use of Covington v Wabash Ry Co, 3 S W 2d 378, 319 Mo 302—State ex rel Johnson v Atchison, T & S F Ry Co, 275 S W 932, 310 Mo 587
N C—Board of Road Com'rs of Davidson County v County Com'rs of Davidson County, 119 S E 206, 186 N C 202
N D—Great Northern Ry Co v Ward County, 208 N W 768, 54 N D 75
Okl—Empire Pipe Line Co v Excise Board of Oklahoma County, 34 P 2d 585, 168 Okl 485—Going v Carter Oil Co, 214 P 922, 88 Okl 222—Going v Atchison, T & S F Ry Co, 213 P 84, 88 Okl 283
Wis—Stamper v Hopkins, 197 N W 929, 184 Wis 129
29 C J p 728 note 88

County having adopted alternative road law embodied in Civ Code 1910 § 694 et seq, and after having levied the maximum rate of four dollars per thousand for the maintenance of such system, cannot levy an additional tax under Acts 1908 p 1119, for the support of a chain gang to be used on the public roads—Carter v Shingler Realty Co, 120 S E 784, 157 Ga 118—Wright v Southern Ry Co, 112 S E 171, 28 Ga App 545

Limitation held not to apply
(1) In general
Ga—Central of Georgia R Co v Jones County, 142 S E 301, 37 Ga App 763
Ill—People ex rel Browne v Chicago & E I R Co, 133 N E 212, 300 Ill 467
29 C J p 728 note 88 [c]

(2) Pub Acts 1909 No 283, as amended by Pub Acts 1921 No 367, Comp L 1915 § 4287 et seq, providing for highway improvements by counties and road districts and limiting taxes therefor, is not construable as limiting tax which may be levied for road purposes under authority of subsequent acts—Cooper, Wells & Co v City of St Joseph, 205 N W 86, 232 Mich 255

Statutes limiting amount or rate held valid
Mo—State ex rel Johnson v Atchison, T & S F Ry Co, 275 S W 932, 310 Mo 587

99. U S—C N Nelson Lumber Co v Loraine, C C Wis, 24 F 456
29 C J p 729 note 89

1. Ga—Central of Georgia Ry Co v Wright, 125 S E 520, 33 Ga App 96
Ill—People ex rel Hempen v Baltimore & O R Co, 42 N E 2d 69, 379 Ill 543
29 C J p 729 note 90

Method of reduction
Where the road and bridge taxes certified to the county clerk exceeded the maximum rate, it was necessary, in view of L 1921 p 763, providing that, in determining the amount of maximum tax to be levied, the assessed valuation of the property in each taxing district as equalized by the state taxing commission shall be used, to reduce the maximum rate, so that the amount of tax extended on the county value should not exceed the amount of tax derived by extending the rate against the state value—People v Illinois Cent R Co, 141 N E 822, 310 Ill 212

2. Mo—State ex rel and to Use of Covington v Wabash Ry Co, 3 S W 2d 378, 319 Mo 302
N C—Township Road Commission of Gold Mine Tp v Board of Com'rs of Franklin County, 124 S E 743, 188 N C 362
Wis—Oconto Co v Town of Townsend, 241 N W 761, 210 Wis 85 supplemented 246 N W 410, 210 Wis 85
29 C J p 729 note 91

In Oklahoma county excise board may levy additional tax for county highway fund not exceeding, together with maximum for current expenses, eight mills—Turner v Pitts, 19 P 2d 563, 162 Okl 246—Grubb v Smiley, 285 P 38, 142 Okl 19—Prince v Oklahoma Natural Gas Co, 281 P 795, 139 Okl 185—Turner v Cox, 280 P 568, 138 Okl 225—Missouri-Kansas-Texas R Co v Washington County, 276 P 769, 136 Okl 191—Prince v Atchison, T & S. F Ry Co, 271 P 245, 133 Okl 90—St Louis-San Francisco Ry Co v Bailey, 257 P 784, 125 Okl 183—Alford v Bonaparte, 256 P 935, 125 Okl 164—Franklin v Ryan, 256 P 932, 125 Okl 161—Simmons v Stuckey, 241 P 124, 113 Okl 200.

3. Pa—In re Gregg Tp Roads, 2 Pa Dist & Co 515, 5 Northumb Leg J 444—Application of Supervisors of Washington Tp, 28 North Co 51
29 C J p 730 note 92

4. Ohio—State v Zangerle 115 N E 498, 95 Ohio St 1

5. Ill—People v Chicago & E I Ry Co, 149 N E 743, 319 Ill 163

6. Ill—People v New York, C & St L R Co, 155 N E 358, 324 Ill 510—People v Chicago M & St P Ry Co, 152 N E 560, 321 Ill 199—People v Chicago & E I Ry Co, 149 N E 743, 319 Ill 163—People v Chicago, M & St P Ry Co 141 N E 827, 310 Ill 428—People v Cleveland, C, C & St L Ry Co, 138 N E 663, 307 Ill 162
29 C J p 729 note 91 [b]

Consent of board of auditors is condition precedent to the levy of an additional tax—O'Neill v Skeeters, 154 N E 126, 323 Ill 317—People v Wabash Ry Co, 149 N E 739, 319 Ill 183—People v Wabash Ry Co, 143 N E 488, 311 Ill 579—People v Cleveland, C, C & St L Ry Co, 142 N E 465, 311 Ill 26—People v Illinois Cent R Co, 141 N E 822, 310 Ill 212

Where no excess rate is to be imposed, the consent of the board of town auditors need not be procured—People ex rel Ward v Illinois Cent R Co, 28 N E 2d 106, 371 Ill 92

Statute requiring consent of board held valid
Ill—People ex rel Witte v Franklin, 186 N E 137, 352 Ill 528

7. Ill—People v Chicago & N W Ry Co, 181 N E 637, 349 Ill 216—People v Chicago & E I Ry Co, 149 N E 743, 319 Ill 163—People v Wabash Ry Co, 149 N E 739 319 Ill 183—People v Chicago, M & St P Ry Co, 145 N E 725, 314 Ill 378

auditors,[8] in their official capacity,[9] and at a regular[10] and official[11] meeting[12] of the board held on the date prescribed by statute.[13] The consent must be in writing[14] and signed by a majority of the

8. Ill—People v Chicago, B & Q R Co, 154 N E 468, 323 Ill 536—People v Chicago, B & Q R Co, 152 N E 507, 321 Ill 566—People v Wabash Ry Co, 151 N E 601 321 Ill 39—People v Wabash Ry Co, 149 N E 739, 319 Ill 183—People v Chicago, M & St P Ry Co, 145 N E 86, 313 Ill 249—People v Wabash Ry Co, 143 N E 488, 311 Ill 579—People v Chicago & E I Ry Co, 141 N E 824, 310 Ill 257—People v Cleveland, C, C & St L Ry Co, 138 N E 663, 307 Ill 162—People v Chicago & E I Ry Co, 138 N E 127, 306 Ill 402

What constitutes majority

Membership of board of town auditors was not raised from three to four when assessor acted instead of absent member, and certificate of levy of road and bridge taxes signed by two was signed by a majority, within Revenue Act pars 117, 118—O'Neill v Skeeters, 154 N E 126, 323 Ill 347

9. Ill—People v Chicago & E I Ry Co, 157 N E 472 326 Ill 354—People v Chicago, B & Q R Co, 152 N E 507, 321 Ill 566—People v Wabash Ry Co, 143 N E 488, 311 Ill 579—People v Cleveland, C, C & St L Ry Co, 138 N E 663, 307 Ill 162—People v Chicago & E I Ry Co, 138 N E 127, 306 Ill 402

10. Ill—People v Chicago, B & Q R Co, 154 N E 468, 323 Ill 536

Reading and approval, at regular meeting, of minutes of special meeting, at which consent was given to additional tax, was not action taken at regular meeting, as required by statute—People v Chicago M & St P Ry Co, 151 N E 340, 322 Ill 78

11. Ill—People v Chicago & E I Ry Co, 157 N E 472, 326 Ill 354—People v Chicago, B & Q R Co, 154 N E 468, 323 Ill 536—People v Chicago, B & Q R Co, 152 N E 507, 321 Ill 566—People v Wabash Ry Co, 143 N E 488, 311 Ill 579—People v Cleveland, C, C & St L Ry Co, 138 N E 663, 307 Ill 162—People v Chicago & E I Ry Co, 138 N E 127, 306 Ill 402

12. Ill—People v Chicago, B & Q R Co, 152 N E 507, 321 Ill 566—People v Chicago, M & St P Ry Co, 145 N E 86, 313 Ill 249—People v Chicago & E I Ry Co, 141 N E 824, 310 Ill 257

Place of meeting

Statutory provision that meeting of town auditors shall be held at office of town clerk is merely directory, and fact that meeting at which consent to additional levy of road and bridge tax was given was held at town hall, rather than at place where clerk was employed and kept his books, was insufficient to invalidate such consent, or levy pursuant thereto—People v Chicago, B & Q R Co, 145 N E 729, 314 Ill 544

Manner of calling meeting

(1) To render the consent given at a meeting valid, the meeting must have been called in the manner prescribed by statute—People v Chicago & E I Ry Co, 145 N E 722, 314 Ill 596

(2) The record of the meeting must show that it was so called—People v Chicago & E I Ry Co, 146 N E 440, 315 Ill 536—People v Chicago & E I Ry Co, 145 N E 716, 314 Ill 352

Consent not obtained at meeting

Where written consents were obtained from the individual members of the board of town auditors at their respective places of business, there was not a compliance with the statute which would authorize levy of the additional rate—People v Cleveland, C, C & St L Ry Co, 142 N E 465, 311 Ill 26

13. On first Tuesday in September

(1) Even though the Road and Bridge Act § 56 requires that the consent of the board of town auditors be given "before the first Tuesday in September," the consent may be given at a meeting of the board held on the first Tuesday in September, in view of the statutes regulating the dates for meetings of the board—People v Chicago L S & E R Co, 153 N E 628, 323 Ill 159—People v Wabash Ry Co, 145 N E 733, 314 Ill 513—People v Chicago, B & Q R Co, 145 N E 729, 314 Ill 544—People v Chicago, M & St P Ry Co, 145 N E 725, 314 Ill 378—People v Chicago & E I Ry Co, 145 N E 722 314 Ill 596

(2) This established judicial interpretation of the Road and Bridge Act was not changed by Smith-Hurd Rev St 1923 c 139 § 119, amending Township Organization Act art 13 § 3, and authorizing special meetings of boards of town auditors—People v Chicago, M & St P Ry Co, 152 N E 560, 321 Ill 499—People v Chicago & E I Ry Co, 146 N E 440, 315 Ill 536—People v Cleveland, C, C & St L Ry Co, 145 N E 806, 315 Ill 129—People v Illinois Cent R Co, 145 N E 731, 314 Ill 373—People v Wabash Ry Co, 145 N E 730, 315 Ill 91—People v Cleveland, C, C & St L Ry Co, 145 N E 727, 314 Ill 455—People v Chicago, M & St P Ry Co, 145 N E 725, 314 Ill 378—People v Chicago & I R Co, 145 N E 724, 315 Ill 128—People v Wabash Ry Co, 145 N E 724, 314 Ill 432—People v Illinois Cent R Co, 145 N E 719, 314 Ill 339—People v Chicago & E I Ry Co, 145 N E 716, 314 Ill 352

(3) Indeed, the required consent can be given only at the meeting on the first Tuesday in September—People v Chicago & N W Ry Co, 181 N E 637, 349 Ill 216—People v Chicago, B & Q R Co, 154 N E 468, 323 Ill 536—People v Chicago, M & St P Ry Co, 152 N E 560, 321 Ill 499—People v Chicago, B & Q R Co, 152 N E 507, 321 Ill 566—People v Wabash Ry Co, 151 N E 601, 321 Ill 39—People v Chicago, M & St P Ry Co, 151 N E 340, 322 Ill 78—People v Wabash Ry Co, 149 N E 739, 319 Ill 183—People v Chicago, M & St P Ry Co, 145 N E 86, 313 Ill 249—People v Wabash Ry Co, 143 N E 488, 311 Ill 579—People v Chicago & E I Ry Co, 141 N E 824, 310 Ill 257—People v Cleveland, C, C & St L Ry Co, 138 N E 663, 307 Ill 162—People v Chicago & E I Ry Co, 138 N E 127, 306 Ill 402

(4) A consent given prior to that time is insufficient to justify the levy of the additional tax—People v Cleveland, C, C & St L Ry Co, 152 N E 538, 321 Ill 496—People v Chicago, B & Q R Co 152 N E 507, 321 Ill 566—People v Baltimore & O R Co, 151 N E 561, 320 Ill 560—People v Chicago, M & St P Ry Co, 151 N E 340 322 Ill 78—People v Chicago & E I Ry Co, 143 N E 464, 312 Ill 216—People v Eastern Illinois & St L Ry Co, 143 N E 431, 312 Ill 134—People v Cleveland, C, C & St L Ry Co, 142 N E 465, 311 Ill 26—People v Chicago, M & St P Ry Co, 141 N E 827, 310 Ill 428—People v Illinois Cent R Co, 141 N E 822, 310 Ill 212

(5) Cahill's Rev St 1925 c 139, par 119, amending Township Organization Act art 13 § 3, and authorizing special meetings of the board of town auditors does not confer power on the board of auditors to consent to the levy of an additional road tax at a special meeting held before the first Tuesday in September—People v Chicago, M & St P Ry Co, 152 N E 560, 321 Ill 499—People v Wabash Ry Co, 151 N E 601, 321 Ill 39—People v Chicago, M & St P Ry Co, 150 N E 247, 319 Ill 415—People v Chicago & E I Ry Co, 149 N E 743, 319 Ill 163—People v Chicago & E I Ry Co, 149 N E 742, 319 Ill 171.

14. Ill—People v Chicago, B & Q R Co, 154 N E 468, 323 Ill 536—People v Chicago, B & Q R Co, 152 N E 507, 321 Ill 566—People v Wabash Ry Co, 151 N E 601, 321 Ill 39—People v Wabash Ry Co., 149 N E 739, 319 Ill 183—

board,[15] and it must specify the excess in the rate consented to[16] The requisite consent cannot be supplied by a curative statute,[17] and the action of the board can be shown only by the record of its proceedings[18]

What rate controls The rate of taxation authorized at the time the levy is made controls as to its validity,[19] and not the rate permitted at the time the taxes are extended[20] In the absence of anything in the statute to the contrary, a statutory limitation of the rate or amount of taxation is prospective only, and not retrospective, in its operation[21]

Determination of amount or rate of taxation is considered infra § 289.

§ 288. —— Persons and Property Liable

In the absence of constitutional restrictions the legislature may determine what persons and property shall be subject to highway taxes

The legislature has power, in the absence of constitutional limitations, to determine what persons and property shall be subject to highway taxes[22] and to apportion such taxes among the different political subdivisions,[23] such power being subject, however, to the qualification that one of such subdivisions cannot be taxed for the exclusive benefit of another[24] The legislature may provide for a tax on all property within a taxing district,[25] for the construction or improvement of a road lying entirely within one part of it[26] So the legislature may authorize the levy of a highway tax on all the property in a county or township, including property situated in a city or incorporated town,[27] even though the highways to be constructed or repaired are outside the limits of such city or incorporated town[28] The legislature may, however, and frequently does, exempt cities and incorporated towns in whole or in part from such taxes,[29] and such ex-

People v Chicago, M & St P Ry Co, 145 N E 86, 313 Ill 249—People v Wabash Ry Co, 143 N E 488, 311 Ill 579—People v Cleveland, C, C & St L Ry Co, 142 N E 465 311 Ill 26—People v Chicago & E I Ry Co, 141 N E 824 310 Ill 257—People v Illinois Cent R Co, 141 N E 822, 310 Ill 212—People v Cleveland C C & St L Ry Co, 138 N E 663, 307 Ill 162

15 Ill —People v Chicago B & Q R Co, 154 N E 468, 323 Ill 536—People v Chicago B & Q R Co, 152 N E 507, 321 Ill 566—People v Wabash Ry Co, 143 N E 488, 311 Ill 579

16. Ill —People v Chicago, B & Q R Co, 152 N E 507, 321 Ill 566—People v Chicago, M & St P Ry Co, 151 N E 340 322 Ill 78—People v Chicago & E I Ry Co, 145 N E 722, 314 Ill 596—People v Chicago & E I Ry Co, 138 N E 127, 306 Ill 402

Amount of excess tax to be raised by the levy of the additional rate consented to need not be stated in the consent —People ex rel Batman v Illinois Cent R Co, 17 N E 2d 25, 369 Ill 432

17. **Reason for rule**

The legislature cannot, by a curative act, make valid proceedings which were absolutely void —People v Wabash Ry Co, 143 N E 488, 311 Ill 579

Particular curative statute

The requisite consent cannot be supplied by L 1923 p 566, a curative act to validate certain township taxes, such statute being unconstitutional —People v Wabash Ry Co, 143 N E 488, 311 Ill 579—People v Chicago & N W Ry Co, 143 N E 460, 312 Ill 58—People v Toledo, St L & W. R Co, 143 N E 417, 312 Ill 201—People v Illinois Cent R Co, 142 N E 473, 311 Ill 113—People v Cleveland C, C & St L Ry Co, 142 N E 465, 311 Ill 26—People v Chicago, M & St P Ry Co, 141 N E 827, 310 Ill 428—People v Chicago & E I Ry Co, 141 N E 824, 310 Ill 257—People v Illinois Cent R Co, 141 N E 822, 310 Ill 212

18. Ill —People v Chicago B & Q R Co, 152 N E 507, 321 Ill 566—People v Cleveland, C, C & St L Ry Co, 138 N E 663, 307 Ill 162—People v Chicago & E I Ry Co, 138 N E 127, 306 Ill 402

Record may be amended in a proper case to show the consent of the board — People v Chicago, B & Q R Co, 154 N E 468 323 Ill 536—People v Chicago, M & St P Ry Co 145 N E 725, 314 Ill 378

Recitals in record controlling

Recital in highway commissioner's certificate of levy of additional tax of erroneous date of town auditors' consent does not invalidate tax, official record controlling —People v Chicago & E I Ry Co, 157 N E 472, 326 Ill 354

19. Ill —People v Wabash Ry Co, 176 N E 767, 344 Ill 606—People v Cook, 168 N E 275, 336 Ill 330

20. Ill —People v Wabash Ry Co, 176 N E 767, 344 Ill 606—People v Cook, 168 N E 275, 336 Ill 330

21. Ill —People v Pittsburgh, C., C & St L Ry Co, 147 N E 492, 316 Ill 410

22. Ky —Jones v Citizens' Bank of Hartford, 15 S W 2d 468, 228 Ky 699

Mont —State ex rel Siegfried v Carbon County, 92 P 2d 301, 108 Mont 510, 123 A L R 1456

Va —Dickinson v Board of Sup'rs of Albemarle County, 135 S E 826, 146 Va 46

29 C J p 730 note 96

Construction of statutes

N Y —Read v Board of Com'rs of City of Newark, 132 A 314, 4 N J Misc 203 affirmed 134 A 757, 103 N J Law 60

29 C J p 730 note 96 [a]

23. Idaho —Oliver v Wendell Highway Dist of Gooding County, 224 P 81, 38 Idaho 635

Mont —State ex rel Siegfried v Carbon County 92 P 2d 301, 108 Mont 510, 123 A L R 1456

29 C J p 730 note 97

24. N C —Reeves v Buncombe County, 167 S E 452, 204 N C 45

29 C J p 730 note 98

25. Mont —State ex rel Siegfried v Carbon County, 92 P 2d 301, 108 Mont 510, 123 A L R 1456

Tex —Tom Green County v Moody, 289 S W 381, 116 Tex 299

29 C J p 730 note 99

26. Mont —State ex rel Siegfried v Carbon County, 92 P 2d 301, 108 Mont 510, 123 A L R 1456

29 C J p 730 note 1

27. Kan —Emporia v Griffith, 122 P. 1053, 86 Kan 976

29 C J p 730 note 2

28. Mont —State ex rel Siegfried v Carbon County, 92 P 2d 301, 304, 108 Mont 510, 123 A L R 1456, citing **Corpus Juris.**

29 C J p 730 note 3

29 Or —Johnson v Jackson County, 136 P 874 68 Or 432

29 C J p 726 note 58, p 730 note 4.

Extent of exemption

(1) Code 1919 § 1987, and other statutes exempting property in incorporated towns maintaining their own streets from regular levy for district road taxes, do not apply to

emption is not unconstitutional where an equivalent burden is imposed on them for the maintenance of their streets,[30] although in the absence of such equivalent burden a constitutional provision requiring uniform taxation would be violated.[31] The local authorities cannot exempt any property not exempt under the statute.[32] Where the statute makes land outside of certain designated cities liable to a road tax, land not within any city at the time the act was passed, but afterward annexed to one of the cities designated, is not subject to the tax,[33] but land subject to a tax to meet outstanding highway bonds of a road district adjoining a city remains subject to such tax, although subsequently annexed to the city,[34] since its exemption from liability would impair the obligation of a contract.[35]

The tax can be levied only on property which the statute authorizes to be taxed[36] at the time the levy is made,[37] and which is described in the tax proceedings.[38] The nonresidence of the owner does not affect the liability of his land within the designated district,[39] and personal property of resident owners may be made liable.[40] So also rolling stock and intangible assets of a railroad company may be made liable for road taxes.[41]

The legislature may exempt from road taxes particular property or persons in a taxing district,[42] unless there is an implied restriction arising from the constitutional requirement that all property shall be taxed by a uniform rule according to its value.[43] The legislature may also provide for a rebate of taxes in certain cases,[44] but an exemption from working on roads does not exempt one from paying a road tax on his assessable property.[45] Where a county purchases lands at a tax sale, and such lands are not redeemed, but are subsequently sold by the county, the county is not liable to a township for road taxes charged against the lands while the title was held by the county.[46]

a road bond tax imposed by Acts Extra Sess 1919 c 28, and subsequent acts on all town property liable for county or district taxes—Town of Falls Church v Board of Sup'rs of Fairfax County, 144 S E 870, 151 Va 672—Dickinson v Board of Sup'rs of Albemarle County, 135 S E 826, 146 Va 46

(2) The only exemption accorded to city property by Rev Codes 1935 § 1617 is exemption from the five-mill levy therein provided for—State ex rel Siegfried v Carbon County, 92 P 2d 301, 108 Mont 510, 123 A L R 1456

Inconsistent statutes; repeal

(1) A statute or charter provision exempting town property from road taxes may be repealed by implication, as by a subsequent inconsistent statute—Town of Falls Church v Board of Sup'rs of Fairfax County, 144 S E 870, 151 Va 672—Dickinson v Board of Sup'rs of Albemarle County, 135 S E 826, 146 Va 46

(2) To constitute a repeal by implication, there must be a direct and irreconcilable conflict between the two statutes—State v Phipps, 299 P 1009, 136 Or 454

(3) A statute exempting town property from road taxes prevails over prior conflicting statutes—Town of Falls Church v Board of Sup'rs of Fairfax County, supra

30. Or—Johnson v Jackson County, 136 P 874, 68 Or 432
29 C J p 731 note 5

31. Colo—Gunnison County v Owen, 1 P 795, 7 Colo 467
29 C J p 731 note 6

32. Mich—Auditor-Gen v Duluth, S S & A R Co, 74 N W 505, 116 Mich 122.

33. Ky—Donnelly v Carpenter, 47 S W 336, 20 Ky L 675

34. Pa—Boas v Ft Hunter Road Commn, 20 Pa Co 482

35. Pa—Boas v Ft Hunter Road Commn supra

36. N Y—Ne-Ha-Sa-Ne Park Assoc v Lloyd, 55 N Y S 108, 25 Misc 207 affirmed 61 N Y S 1143, 45 App Div 631
29 C J p 731 note 11

37. Ky—Jones v Citizens' Bank of Hartford, 15 S W 2d 468, 228 Ky 699

38 N Y—Ne-Ha-Sa-Ne Park Assoc v Lloyd, 60 N E 741, 167 N Y 431
29 C J p 731 note 12

39. N Y—Ensign v Barse, 14 N E 400, 15 N E 101, 107 N Y 329, affirmed 10 S Ct 1067, 136 U S 636, 34 L Ed 558
29 C J p 731 note 13

40. Ind—Harmon v Gephart, 90 N E 890, 173 Ind 391
Mich—Deerfield Tp v Harper, 74 N W 207, 115 Mich 678

41. Statutes held to authorize tax on such property

Fla—Lee v Atlantic Coast Line R Co, 200 So 71, 145 Fla 618
Tex—State v Texas & P Ry Co, Com App, 62 S W 2d 81, reversing Texas & P R Co v State, Civ App 43 S W 2d 628—Bell County v Hines, Civ App, 219 S W 556

Situs for purposes of taxation

(1) Under Comp Gen L 1927 §§ 960, 2687, 2688, rolling stock of a railroad not actually situated within a special road and bridge district may be constructively allocated thereto for purpose of being subjected to ad valorem debt service taxes levied for such a district—Lee v Atlantic Coast Line R Co, 200 So 71, 145 Fla 618

(2) Situs of rolling stock and intangible assets of railroad for road bond tax purposes is in county at large to which value is apportioned, and not in any particular portion of county—State v Texas & P Ry Co, Tex Com App, 62 S W 2d 81, reversing Texas & P R Co v State, Civ App, 43 S W 2d 628

42 Mo—State v Hannibal & St J R Co, 13 S W 406, 101 Mo 120
29 C J p 731 note 16

Manufacturing plant

Statutory exemption of manufacturing plant from taxation for all county purposes for limited period covers road tax—Crow v General Cable Corporation, 137 So 657, 223 Ala. 611

Exemption statutes held valid

(1) In general—Crow v General Cable Corporation, 137 So 657, 223 Ala 611

(2) Law withdrawing bank stocks in part from local taxation was not invalid as affecting special levy for benefit of road bonds issued prior to its enactment—Jones v Citizens' Bank of Hartford, 15 S W 2d 468, 228 Ky 699

43. Ohio—Fields v Highland County, 36 Ohio St 476

44. Pa—Newton Tp v Taylor, 16 Pa Dist 589
29 C J p 731 note 18.

45. Ill—McDonald v Madison County, 43 Ill 22

46. Pa—Rush Tp v Schuylkill County, 2 Leg Rec 117, 257.

§ 289. —— Levy and Assessment

a. In general
b. Submission of question to voters

a. In General

Local authorities may levy and assess highway taxes only in accordance with, and in the manner prescribed by, the provisions of the constitution and statutes conferring the power.

Local authorities may levy and assess highway taxes only in accordance with the provisions of the constitution and statutes conferring the power[47] In the absence of contrary statute, such taxes may be levied only when necessary[48] and only for the current year[49] To be valid, the levy and assessment must be made by the proper local authorities,[50] and where the levy is made by a board, it must be made by at least a majority of the board acting as such, particularly where the statute so provides[51]

A levy and assessment of highway taxes must be made in the manner or mode,[52] and within the

47. Fla—W J Howey Co v Williams, 195 So 181, 142 Fla 415, rehearing denied 195 So 184, 142 Fla 562 and 196 So 214, 142 Fla 756
Ga—J G McCrory Co of Georgia v Board of Com'rs of Roads and Revenues of Fulton County, 170 S E 18, 177 Ga 242
Ill—People ex rel Wangelin v Illinois Cent R Co, 198 N E 694 361 Ill 590—Natural Products Co v Du Page County, 145 N E 298, 314 Ill 74—People v Louisville & N R Co 138 N E 656, 307 Ill 173
La—Forest Lumber Co v Police Jury of Sabine Parish, 90 So 673, 150 La 346
Mo—Rolla Special Road Dist of Phelps County v Phelps County, 116 S W 2d 61, 342 Mo 459
Or—City of Pendleton v Umatilla County, 241 P 979, 117 Or 110
Tex—Commissioners' Court of Navarro County v Pinkston, Civ App, 295 S W 271
29 C J p 731 notes 22, 23

Provisions held directory

Provisions of statute requiring designation of dragable roads and appointment of township superintendent are directory and not prerequisite to right of county excise board to levy road drag tax—In re St Louis San Francisco Ry Co, 2 P 2d 941, 151 Okl 126—Protest of Missouri-Kansas-Texas R Co, 300 P 713, 149 Okl 166—Protest of St Louis-San Francisco Ry Co 299 P 190 149 Okl 53—Protest of St Louis-San Francisco Ry Co, 299 P 184, 149 Okl 45

Levy must be made under proper statute

Fla—State v Northeast Tampa Special Road and Bridge Dist of Hillsborough County, 3 So 2d 181, 148 Fla 14
29 C J p 731 note 23 [a]

48. Fla—W J Howey Co v Williams, 195 So 181 142 Fla 402, rehearing denied 195 So 184, 142 Fla 562, and 196 So 214, 142 Fla 756—Lee v Atlantic Coast Line R Co, 194 So 252, 141 Fla 545
Ill—People ex rel Toman v 110 South Dearborn Street Bldg Corporation, 24 N E 2d 373, 372 Ill 459
Va—Godwin v Board of Sup'rs of Nansemond County, 171 S E 521, 161 Va 494
29 C J p 732 note 24

Funds ample to satisfy needs

(1) Where there is ample surplus and estimated income from miscellaneous sources to satisfy the needs of the county highway fund, no tax levy is necessary—Sinclair Prairie Pipe Line Co v Excise Board of Tulsa County, 49 P 2d 114, 173 Okl 375—Protest of Oklahoma Pipe Line Co, 296 P 406 147 Okl 163—In re Monsell, 285 P 836, 142 Okl 130—Adjustment Realty Co v Excise Board of Muskogee County, 284 P 27, 141 Okl 130

(2) And a levy made under such circumstances is void—St Louis-San Francisco Ry Co v Bonaparte, 286 P 343, 142 Okl 177—In re Murray 285 P 80, 140 Okl 210

49. Ill—Ohio & M R Co v People, 15 N E 276 123 Ill 648
29 C J p 732 note 25

50 Ill—People v Baltimore & O R Co 153 N E 697 322 Ill 623
Mo—State ex rel Guerrant v South western Bell Telephone Co, 139 S W 2d 500, 345 Mo 1217
Tex—Security State Bank of San Juan v State, Civ App, 146 S W 2d 313
29 C J p 732 note 26

Delegation of power

County commissioners authorized by statute to "cause to be assessed and collected" a district road tax may by resolution require the county tax assessor to assess the tax—Taylor v Williams, 195 So 175 142 Fla 402, rehearing denied 195 So 184, 142 Fla 562 and 196 So 214, 142 Fla 756

51. Ill—People ex rel Koehler v Cleveland, C, C & St L Ry Co, 188 N E 473, 354 Ill 342
Mich—Baird v Board of Sup'rs of Saginaw County, 197 N W 222, 226 Mich 80

52. Ill—People v Cleveland, C, C & St L Ry Co, 182 N E 616, 349 Ill 476
Ohio—Union County v Greene, 40 Ohio St 318
Okl—Grubb v Smiley, 285 P 38, 142 Okl 19

Manner of levy

In some jurisdictions a levy for a county highway fund must be made in the same manner as that for the general fund—Adjustment Realty Co v Excise Board of Muskogee County, 284 P 27 141 Okl 130

Form of levy

Statute requiring tax levy to be made in dollars and cents is applicable to special tax levy of road district—Clark & Wilson Lumber Co of Delaware v Weed, 2 P 2d 12, 137 Or 186

Separation of levies

(1) Township road drag levy must be separate from levy authorized for current expenses—Albrecht v Jones, 267 P 270, 130 Okl 277

(2) Amounts sufficient for payment of interest and maturing principal of highway bonds issued under special laws may properly be included in levy for general road fund—Weilbrenner v Commissioners of Baltimore County, 159 A 600, 162 Md 240

(3) Single tax levy on town property for redemption of bonds issued under different acts for improvement of roads was not illegal—Dickinson v Board of Sup'rs of Albemarle County, 135 S E 826, 146 Va 46

(4) In levying taxes the county commissioners may make a levy for road purposes separate and distinct from that made for general county purposes—Los Angeles & S L R Co v Richards 172 P 474, 52 Utah 1

Steps not required to be taken

(1) No recommendation by the grand jury is necessary to the levy of a road tax—Central of Georgia Ry Co v Wright, 142 S E 288, 165 Ga 623, affirming Wright v Central of Georgia Ry Co, 137 S E 93, 36 Ga App 382

(2) Neither appropriation ordinance nor filing of certified copy of tax levy ordinance with county clerk was necessary where road district was within city—People v Cleve-

time,[53] prescribed by the constitution and statutes Thus statutes requiring the preparation[54] and publication[55] of a certificate, estimate, or report as to the amount of taxes to be raised must be observed, and statutes regulating the time[56] and manner or mode[57] of determining and fixing the rate or amount of taxation must be followed, such statutes being mandatory[58] The rate or amount of taxation determined on must not be in excess of the constitutional or statutory limitations considered supra § 287, and it must not be in excess of the needs of the taxing district[59] After the rate or amount of taxa-

land, C, C & St L Ry Co, 182 N E 616, 349 Ill 476

Statutes providing for the levy of special assessments are inapplicable to the levy of a general tax for road purposes —Joint Highway Dist No 13 v Hinman, 32 P 2d 144, 220 Cal 578

Review of levy by county commissioners

A levy properly made by the trustees of a road district is not subject to review by the county commissioners —State v Helseth, 138 So 477, 103 Fla 864—State ex rel Atlantic-Gulf Special Road and Bridge Dist v Bass, 118 So 212, 96 Fla 478

53. Ill —People ex rel Euziere v Rice, 8 N E 2d 683, 290 Ill App 514

29 C J p 733 note 30 [a]

Statute held merely directory

Statute providing for levy on or before a certain date held merely directory —State ex rel Henry v State Auditor, 118 S W 2d 19, 342 Mo 797 —29 C J p 733 note 31

54. Okl —Board of Com'rs of Carter County v Landrum, 21 P 2d 736, 163 Okl 199—Adjustment Realty Co v Excise Board of Muskogee County, 299 P 207, 149 Okl 70—Adjustment Realty Co v Excise Board of Muskogee County, 284 P 27, 141 Okl 130

29 C J p 732 note 27 [a]

Conditions precedent to making of certificate

State comptroller's notice to county officials of estimated amount available for sinking fund or principal and interest on improvement district's certificates of indebtedness is statutory prerequisite to duty of district's bond trustees to certify estimate of tax required to meet obligations —State ex rel Urquhart v Johnson, 145 So 880, 107 Fla 624

Itemization

The statement of estimated needs for road purposes must be itemized in the manner prescribed by statute —Adjustment Realty Co v Excise Board of Muskogee County, 299 P 207, 149 Okl 70—In re Gypsy Oil Co, 285 P 67, 141 Okl 291—Aaronson v Smiley, 285 P 59 142 Okl 29 —C D Coggeshall & Co v Smiley, 285 P 48, 142 Okl 8—Grubb v Smiley 285 P 38, 142 Okl 19

55. Okl —In re Bliss, 285 P 73, 142 Okl 1—In re Gypsy Oil Co, 285 P 67, 141 Okl 291

56. Cal —Golden Gate Bridge and Highway Dist v Felt, 5 P 2d 585, 214 Cal 308

29 C J p 732 note 29

Provision directory

A provision that the amount of the tax should be determined on or before a specified date has been held merely directory, no hearing on the question being contemplated —Fay v Wood, 32 N W 614, 65 Mich 390

57. Idaho —Murtaugh Highway Dist v Twin Falls Highway Dist, 42 P 2d 1007, 55 Idaho 400

Ill —People v New York, C & St L R Co, 182 N E 778, 349 Ill 633

Okl —Protest of Bledsoe 17 P 2d 979, 161 Okl 227—St Louis-San Francisco Ry Co v Dickey, 238 P 858, 113 Okl 72

29 C J p 732 notes 27, 28

Determination by highway commissioner

Under Roads and Bridges Act §§ 50, 56, the highway commissioner must annually determine the amount necessary to be raised by taxation for road purposes and the rate of taxation —People ex rel Preisel v New York Cent R Co, 32 N E 2d 167, 375 Ill 574—People ex rel Ward v Illinois Cent R Co, 28 N E 2d 106, 374 Ill 92—People v Illinois Cent R Co, 179 N E 879, 347 Ill 377—29 C J p 732 note 28

Appropriations

(1) In some jurisdictions appropriations are made by the excise board for highway purposes as a preliminary step in determining the amount or rate of taxation to be imposed —In re Gypsy Oil Co, 285 P 67, 141 Okl 291

(2) Appropriations may be made for only those items for which estimates have been made and published —In re Bliss, 285 P 73, 142 Okl 1—In re Gypsy Oil Co, supra

(3) The appropriations must be itemized in the manner prescribed by statute —In re Gypsy Oil Co, supra—Aaronson v Smiley, 285 P 59 142 Okl 29—C D Coggeshall & Co v Smiley 285 P 48, 142 Okl 8—Grubb v Smiley, 285 P 38, 142 Okl 19

(4) A drag fund appropriation made for a township, however, need not be itemized —In re Protest of Chicago, R I & P Ry Co, 294 P 169, 146 Okl 23

(5) Under Comp L 1915 § 4366, as amended, an appropriation without the terms of the budget submitted by the board of county road commissioners to the board of supervisors is not because of such fact void, the budget being advisory and not conclusive on the board of supervisors —Baird v Board of Sup'rs of Saginaw County, 197 N W 222, 226 Mich 80

Allowance for interest on warrants

Inclusion of sum in county highway corporate tax levy for estimated interest on tax anticipation warrants to be issued against levy was proper, in view of statutory provisions —People ex rel Gill v Otis, 10 N E 2d 672, 367 Ill 136

Allowance for cost of collection and delinquencies

(1) In fixing the rate or amount of taxation an allowance may be made for loss and cost of collection that is, for uncollected taxes, commissions of tax collectors, and anticipated delinquencies

Cal —Joint Highway Dist No 13 v Hinman, 32 P 2d 144 220 Cal 578

La —Tremont Lumber Co v Police Jury of Winn Parish 113 So 839, 164 La 257

(2) In the absence of contrary statutes, the amount allowable in a tax levy for loss and cost of collecting highway taxes usually rests in the sound discretion of the taxing authorities —People ex rel Gill v Otis, 10 N E 2d 672, 367 Ill 136—People ex rel Clark v Baltimore & O S W Ry Co, 187 N E 163, 353 Ill 492

(3) When a tax levy is necessary, an addition of ten per cent for delinquencies is required under some statutes —Sinclair Prairie Pipe Line Co v Excise Board of Tulsa County 49 P 2d 114, 173 Okl 375—Protest of Oklahoma Pipe Line Co, 296 P 406, 147 Okl 163—In re Monsell, 285 P 836, 142 Okl 130—Adjustment Realty Co v Excise Board of Muskogee County, 284 P 27 141 Okl 130

Advertising increase

The county excise board may not increase the estimate made by a township for a road drag tax unless the proposed increase is first advertised in the manner prescribed by statute —Chicago, R I & P Ry Co v Pourron, 246 P 835, 118 Okl 80

58. Ill —People ex rel Preisel v New York Cent R Co, 32 N E 2d 167, 375 Ill 574—People v Illinois Cent R Co, 179 N E 879, 347 Ill 377

29 C J p 733 note 30

59. Ill —People ex rel Clark v Bal-

tion has been determined, there must be at least a substantial compliance with a statute requiring a certificate of the amount of taxes determined on to be made[60] and filed with the proper officer[61] for approval by designated authorities[62] Where the statute so requires, the purposes for which the tax is levied[63] and the amount levied for each purpose[64] must be distinctly specified Compliance must also

timore & O S W Ry. Co, 187 N E 463, 353 Ill 492
La.—Tremont Lumber Co v Police Jury of Winn Parish, 113 So 839, 164 La 257
Okl.—Protest of Bledsoe, 17 P 2d 979, 161 Okl 227

Levy held void because excessive and beyond needs of taxing district --People ex rel Toman v 110 South Dearborn Street Bldg Corporation, 24 N E 2d 373, 372 Ill 459

60. Ill.—People ex rel Preisel v New York Cent R Co, 32 N E 2d 167, 375 Ill 574—People v New York, C & St L R. Co, 182 N E 778, 349 Ill 633
29 C J p 733 note 32

Necessity of certificate

(1) Under Smith-Hurd St c 121 § 62, the board of highway commissioners in each town or road district must annually certify to the board of supervisors or board of county commissioners the amount necessary to be raised by taxation for road purposes.- People ex rel Preisel v New York Cent R Co, 32 N E 2d 167, 375 Ill 574—People v Illinois Cent R Co, 179 N E 879, 347 Ill 377—29 C J p 733 note 32

(2) The filing of a proper certificate is jurisdictional.—People ex rel Kochler v Cleveland, C C & St L Ry Co, 188 N E 473, 354 Ill 342

(3) The clerk cannot extend a tax without such certificate.—People ex rel Kochler v Cleveland C, C & St L Ry Co, supra

Execution of certificate

(1) The certificate must be properly executed.-People ex rel Kochler v Cleveland, C, C & St L Ry Co, 188 N E 473, 354 Ill 342

(2) Failure of the highway commissioners to sign the certificate invalidates a tax extended on the authority of such certificate.—People ex rel Preisel v New York Cent R Co, 32 N E 2d 167, 375 Ill 574—People v Chicago & E I R Co, 94 N E 18, 248 Ill 596

(3) Persons constituting city council in which statute vested road district highway commissioner's powers, including levy of road and bridge taxes had no authority to delegate power to execute certificate of tax levy to mayor and clerk.—People ex rel Kochler v Cleveland, C, C & St L Ry Co, supra

Requisites of certificate

(1) The certificate must state the amount to be raised by taxation for road purposes, a certificate of the rate only is not sufficient.- People v Chicago, B & Q R Co, 142 N E 176, 310 Ill 495—29 C J p 733 note 32 [a] (6)

(2) Under Road and Bridge Act §§ 50, 56, the separate purposes for which a road tax is levied and the amount levied for each purpose must be stated in the highway commissioner's certificate of levy a statement thereof in the commissioner's records alone is insufficient, and a failure to comply with this requirement is not a mere irregularity, but a fatal omission, which makes the tax levy invalid.—People ex rel Ward v Illinois Cent R Co, 28 N E 2d 106, 371 Ill 92--People ex rel Brittain v Outwater, 196 N E 835, 360 Ill 621—People v Chicago, M & St P R Co, 154 N E 472, 324 Ill 43.-People v Chicago, B & Q R Co, 154 N E 468, 323 Ill 536—People v Chicago L S & E R Co, 153 N E 628, 323 Ill 159—People v Chicago, M & St P Ry Co, 150 N E 247 319 Ill 415—People v Chicago, T H & S E Ry Co, 147 N E 459, 317 Ill 53—People v New York Cent R Co, 147 N E 158, 316 Ill 526—People v Wabash Ry Co, 147 N E 455 316 Ill 403—People v Chicago, B & Q R Co 147 N E 371, 316 Ill 182—People v Chicago T H & S E Ry Co, 146 N E 532 315 Ill 589—People v Illinois Cent R Co 145 N E 731, 314 Ill 373—People v Cleveland C C & St L Ry Co 145 N E 727 314 Ill 455—People v Cleveland C C & St L Ry Co 145 N E 671, 314 Ill 532—Deyo v Commissioner of Highways of Sheridan, 256 Ill App 3

(3) The certificate, however need not recite the action taken by the highway commissioner preliminary to the ascertainment of the rate or amount of taxation.—People v Chicago & E I Ry Co, 157 N E 472, 326 Ill 554 -People v New York, C & St L R Co 155 N E 358, 321 Ill 510—29 C J p 733 note 32 [a] (1)

(4) Other decisions relating to the requisites of the certificate are considered in 29 C J p 733 note 32 [a]

61. Ill.- People ex rel Stoutenburgh v Cleveland C, C & St L R Co, 111 N E 556, 272 Ill 158
29 C J p 733 note 34

Filing of certificate

Under Smith-Hurd St c 121 § 62, the certificate must be filed in the office of the county clerk, and by that officer presented to the county board at the regular September meeting for its consideration.--People ex rel Preisel v New York Cent R Co, 32 N E 2d 167, 375 Ill 574—People v Chicago L & Q R Co, 154 N E 468, 323 Ill 536

62. Approval by county board

(1) Under the Illinois Road and Bridge Law the amount determined and certified by the highway commissioners must be approved by the county board before it can be extended.—People ex rel Preisel v New York Cent R Co, 32 N E 2d 167, 375 Ill 574—People ex rel Frick v Chicago & E I Ry Co, 198 N E 212, 361 Ill 470—People v Chicago, B & Q R Co 154 N E 468, 323 Ill 536 —29 C J p 733 note 33 [a]

(2) To obtain such approval it is essential that the board have a valid certificate presented to it.—People ex rel Preisel v New York Cent R Co, supra

63. Ill.—People ex rel Gill v Otis, 10 N E 2d 672, 367 Ill 136
29 C J p 731 note 23 [c]

Statement held sufficient

A levy providing a certain sum for "administration" sufficiently specifies the purpose of the levy.—People ex rel Hempen v Baltimore & O R Co 42 N E 2d 69 379 Ill 543

Statement held insufficient

An item in a levy for general road taxes providing a specified sum for buildings was improper because of failure to sufficiently describe or identify it as a road purpose, where it was not apparent that building would be acquired for a highway purpose.—People ex rel Hempen v Baltimore & O R Co, supra

64. In Illinois

(1) Under Revenue Act § 121 as amended the amounts levied by county boards for different purposes must be separately stated.--People v New York Cent R Co, 137 N E 473, 305 Ill 431

(2) Thus a county road and bridge levy must designate separately the amounts required for each purpose --People v Missouri Pac R Co, 163 N E 348, 332 Ill 53—People v Chicago M & St P Ry Co, 142 N E 167 310 Ill 508—People v Chicago M & St P Ry Co, 134 N E 744, 302 Ill 317

(3) And a county board's resolution levying a highway tax of a certain percentage of the assessed valuation of the taxable property, without stating the amount of the tax, is insufficient.—People ex rel Walker v New York C & St L R Co 186 N E 487, 352 Ill 603

(4) But a county tax levy for the purpose of improving maintaining, and repairing state-aid roads and for the payment for lands, quarries, pits, or other deposits of road material required for such purposes is not

be had with statutory provisions as to the apportionment[65] and extension[66] of the tax, the valuation of the property to be taxed,[67] the particular valuation on which the levy is to be made,[68] and the making of an assessment roll or list,[69] and a proper record of the proceedings must be kept.[70] Failure to comply with the material requirements of the statute will render the proceedings void,[71] but mere irregularities or informalities not affecting the substantial justice of the tax will not invalidate it,[72] and a defect through informality may in some instances be cured by amendment,[73] or the proceed-

one for several separate purposes so as to require the amount for each purpose to be stated separately — People v Wabash Ry Co, 140 N E 10, 308 Ill 604—People v Chicago, B & Q R Co, 138 N E 664, 307 Ill 298—People v Louisville & N R Co, 138 N E 656, 307 Ill 173—People v Chicago, B & Q R Co, 138 N E 135, 306 Ill 529—People v Chicago & E I Ry Co, 137 N E 476, 305 Ill 454—People v New York Cent R Co, 137 N E 473, 305 Ill 434

(5) That two attempted tax levies for road purposes were ineffective, because of failure to comply with Revenue Act § 121 does not affect the validity of a subsequent levy pursuant to the same authority — People v Chicago, M & St P Ry Co, 142 N E 167, 310 Ill 508

65. Mich — Baird v Board of Sup'rs of Saginaw County, 197 N W 222, 226 Mich 80
29 C J p 734 note 37
Apportionment and distribution of proceeds see infra § 292

66. Ill — People v Ross, 133 N E 17, 302 Ill 328
29 C J p 734 note 35

Fraction of a cent extended as one cent

In the extension of taxes a fraction of a cent is to be extended as one cent where the statute so provides — People v Chicago & E I Ry Co, 147 N E 457, 316 Ill 458

Extension in excess of amount fixed and certified

(1) A road tax extended in excess of either the rate fixed, the amount determined, or the amount certified by the highway commissioner is invalid as to such excess — People v Wabash Ry Co, 151 N E 601, 321 Ill 39—People v Baltimore & O R Co, 151 N E 561, 320 Ill 560

(2) Accordingly road taxes cannot be legally extended at a greater rate than that fixed by the highway commissioner even though such higher rate is necessary to produce the amount certified by the commissioner to the county clerk — People v Baltimore & O R Co supra—29 C J p 734 note 35 [a] (4)

(3) For the purpose of extending a proper tax, however the highway commissioner may make a second determination as to the rate to be levied — People v Baltimore & O R Co, supra

67. Mich — Mills v Richland Tp, 40 N W 183, 72 Mich 100
29 C J p 734 note 38

68. Wis — Bigelow v Washburn, 74 N W 362, 98 Wis 553
29 C J p 734 note 38

Last adjusted valuation

A levy for road tax must be made on the last adjusted valuation for county purposes. The levy must be based on the assessed valuation as revised and equalized by the county commissioners, and not on the return of the assessors to the commissioners. If, at the time the tax must be levied for the particular year, it is impossible to secure the adjusted valuation, which is based on the assessor's return for that year, the levy must be on the adjusted valuation of the last year in which there was an adjusted valuation — Quemahoning Coal Co v Jenner Tp, 83 Pa Super 577

Valuation as equalized by tax commission

Levy of road taxes on assessed valuation of railroad property as equalized by county board instead of tax commission, is void — People v Chicago, M & St P Ry Co, 145 N E 86, 313 Ill 249

69. Tex — Dallas Joint Stock Land Bank of Dallas v State, Civ App, 118 S W 2d 941
29 C J p 734 note 39

Sufficiency of roll or list

Township road assessments need not be extended on assessment roll in separate column from other township taxes — Royal Oak Tp v Oakland County, 256 N W 837, 269 Mich 153

70. Ill — People v Illinois Cent R Co, 179 N E 879, 347 Ill 377
29 C J p 734 note 36

Necessity of record

No tax levy to pay damages allowed, awarded, or agreed on for laying out roads, etc, can be made unless the highway commissioners' record shows that damages have previously been agreed on, allowed, or awarded to the property owners — People v Missouri Pac R Co, 163 N E 348, 332 Ill 53—People v Chicago & E I R Co, 118 N E 2, 281 Ill 177—People v Cleveland, C, C & St L R Co, 118 N E 1, 281 Ill 152

Requisites and sufficiency of record

(1) Record must show that meetings of highway commissioners were held in accordance with the statute — People v Illinois Cent R Co, 179 N E 879, 347 Ill 377—29 C J p 734 note 36 [b] (2)

(2) Record held insufficient — People v Illinois Cent R Co, supra

71. Ill — People ex rel Frick v Chicago & E I Ry Co 198 N E 212, 361 Ill 470—People ex rel Brittain v Outwater, 196 N E 835, 360 Ill 621—People v Missouri Pac R Co, 163 N E 348, 332 Ill 53—People v Chicago, M & St P R Co, 151 N E 472, 324 Ill 43—People v Chicago, T H & S E Ry Co, 147 N E 459, 317 Ill 53—People v New York Cent R Co, 147 N E 458, 316 Ill 526—People v Wabash Ry Co, 147 N E 455, 316 Ill 403—People v Chicago, B & Q R Co, 147 N E 371, 316 Ill 482—People v Chicago T H & S E Ry Co, 146 N E 532, 315 Ill 589
29 C J p 735 note 40

72. Fla — Lee v Atlantic Coast Line R Co 191 So 25, 141 Fla 545
Ill — People ex rel Gill v Otis 10 N E 2d 672, 367 Ill 136—People v Chicago M & St P R Co, 154 N E 472, 324 Ill 43
Tex — Victory v State, Civ App 134 S W 2d 477 affirmed 158 S W 2d 760 138 Tex 285
29 C J p 735 note 41

Rule statutory

Mich — Royal Oak Tp v Oakland County, 256 N W 837, 269 Mich 153

Failure to extend assessments on rolls

The mere fact that assessor failed to calculate road district taxes and extend them on annual tax rolls did not render the assessment invalid — Dallas Joint Stock Land Bank of Dallas v State, Tex Civ App, 118 S W 2d 941

73. Ill — People v Payne, 129 N E 759, 296 Ill 236
29 C J p 735 note 42

When amendment proper in general

(1) Amendments may properly be allowed under Smith Hurd St c 120 §§ 716 717, where there has been an attempt to comply with the law but the attempt is ineffective because of some informality or clerical error, but such amendments cannot be allowed where they add matter which is essential as a basis for the levy of the tax — People ex rel Preisel v New York Cent R Co, 32 N E 2d 167, 375 Ill 574—People v New York C & St L R Co, 150 N E 707, 320 Ill. 148.

ings may be cured by a subsequent statute,[74] unless the matter attempted to be accomplished by the validating act could not have been done primarily because of constitutional limitations.[75] Highway taxes will be presumed to have been levied in accordance with the requirements of the law,[76] although it has been held that an excess in such a tax would not be treated as a labor tax for the purpose of upholding it.[77]

Duty to make levy and assessment Except where the language of the statute is merely permissive,[78] the action of the local authorities in levying and assessing highway taxes is not generally discretionary, but it is an imperative duty,[79] and where the local authorities fail or refuse to perform their duty a court of competent jurisdiction may compel them to do so.[80]

Validity of statutes Statutes regulating the levy and assessment of highway taxes, to be valid, must not violate either state or federal constitutional provisions and limitations,[81] but when subjected to this test various statutes,[82] including statutes validating assessments previously made,[83] have been held valid

(2) That which was not in fact done by the taxing authorities cannot by amendment be shown to have been done—People ex rel Frick v Chicago & E I Ry Co, 198 N E 212 361 Ill 470—People v New York C & St L R Co, supra—People v Wabash Ry Co, 147 N E 455, 316 Ill 403

Record may be amended

(1) To speak the truth—People ex rel Frick v Chicago & E I Ry Co, 198 N E 212 361 Ill 470—29 C J p 735 note 42 [a]

(2) To show an approval of the levy by the county board—People ex rel Frick v Chicago & E I Ry Co supra

(3) To show the amounts agreed on and allowed as damages for widening roads, ditching to drain roads, etc—People v Louisville & N R Co, 133 N E 340, 300 Ill 312

Evidence to amend record must be clear and satisfactory—People ex rel Frick v Chicago & E I Ry Co 198 N E 212 361 Ill 470—People v New York C & St L R Co, 150 N E 707 320 Ill 148—29 C J p 735 note 42 [d]

The certificate of levy cannot be amended after the levy

(1) So as to add the requisite signatures thereto—People ex rel Preisel v New York Cent R Co, 32 N E 2d 167 375 Ill 574

(2) So as to itemize the tax levied thereunder—People v Chicago, M & St P Ry Co, 150 N E 247, 319 Ill 415

(3) So as to include an amount for the payment of a judgment against the highway commissioner—People ex rel Euziere v Rice 8 N E 2d 683, 290 Ill App 514

74. Ill—People v Cleveland, C, C & St L Ry Co, 182 N E 616, 349 Ill 476—People v Missouri Pac R Co, 141 N E 717, 310 Ill 424
Tex—Twing v Rhodes, Com App, 16 S W 2d 258, answering certified questions, Civ App, 24 S W 2d 728, reversed on other grounds Rhodes v Twing, Com App, 41 S W 2d 13, appeal dismissed 53 S Ct 5, 287 U S 561, 77 L Ed 495—Henson v Commissioners' Court of Henderson County, Civ App, 56 S W 2d 240, error refused
29 C J p 735 note 43

Failure to itemize levy held cured by validating act—People v Chicago, M & St P R Co, 151 N E 472, 324 Ill 43—People v Chicago B & Q R Co, 154 N E 468, 323 Ill 536

Excessive levy held not cured by validating act—People ex rel Tomin v 110 South Dearborn Street Bldg Corporation, 24 N E 2d 373, 372 Ill 459

75. U S—Wight v Parish Police Jury of Parish of Avoyelles C C A La, 264 F 705

76. Ga—Southern Ry Co v Whitfield County, 145 S E 668 38 Ga App 703
Ill—People v Wabash Ry Co, 176 N E 767 341 Ill 606—People ex rel Krebs v Jacksonville & St L R Co, 107 N E 237 265 Ill 550
29 C J p 735 note 45

77. Mich—Peninsular Sav Bank v Ward, 76 N W 161, 79 N W 911, 118 Mich 87

78. A statute providing that local authorities "may levy" a highway tax is directory only—City of Pendleton v Umatilla County, 241 P 979, 117 Or 140—City of Astoria v Cornelius, 240 P 233, 119 Or 264

79. Where levy specifically required

Where the legislature has specifically required the levy of a highway tax by the local authorities, the law is mandatory and such tax must be levied
Fla—State ex rel Atlantic-Gulf Special Road and Bridge Dist v Bass, 118 So 212, 96 Fla 478
Ill—Lincoln-Lansing Drainage Dist v Stone, 2 N E 2d 885 364 Ill 41
Mo—Rolla Special Road Dist of Phelps County v Phelps County, 116 S W 2d 61, 342 Mo 459
Or—City of Pendleton v Umatilla County, 241 P 979, 117 Or 140—City of Astoria v Cornelius, 240 P 233, 119 Or 264

Levy to pay bonds

(1) When county road commissioners have issued township road bonds, county commissioners are required to levy taxes to pay them—Ellis v Greene, 133 S E 395, 191 N C 761

(2) The levy of a rate sufficient to pay the principal and interest of bonds issued under the roads and bridges act, as they mature, is mandatory under the constitution—People ex rel Singer v Illinois Cent R Co 26 N E 2d 810, 373 Ill 523

(3) The county commissioners' court, having levied taxes intended in part but inadequate for the servicing of road district refunding bonds, had the power and duty to make good the default by levying additional taxes, as required by decrees of the federal court in bondholders' suits—Security State Bank of San Juan v State, Tex Civ App, 146 S W 2d 313

(4) Unless authorized by valid statutory enactments, administrative officials cannot legally levy taxes to provide for payment of special road and bridge district refunding bonds or interest thereon to exclusion or prejudice of payments on original bonds of same nature when statutes require interest and sinking fund payments for all such bonds to be provided for—State ex rel Georgia Bond & Mortgage Co v Conn, 189 So 47 137 Fla 412

80. Allowance of costs

Taxpayers unsuccessfully seeking to compel levy of special tax for road bonds could not have counsel fees allowed—Godwin v Board of Sup'rs of Nansemond County, 171 S E 521, 161 Va 494

81 Cal—Joint Highway Dist No 13 v Hinman, 32 P 2d 144, 220 Cal 578

82. Cal—Joint Highway Dist No 13 v Hinman, supra—Golden Gate Bridge and Highway Dist v Felt, 5 P 2d 585, 214 Cal 308—Municipal Improvement Co v Thompson, 258 P 955, 201 Cal 629

83. U S—Charlotte Harbor & Northern Ry Co v Welles, 43 S Ct 3, 260 U S 8, 67 L Ed 100, affirming 82 So 770, 78 Fla 227.

Time of determination of validity of levy. The validity of a levy of highway taxes is to be determined as of the time the levy is made.[84] Accordingly constitutional provisions do not affect taxes levied but not collected before the provisions took effect.[85]

b. Submission of Question to Voters

Where the constitution or statutes so require, the question of levying a road tax must be submitted to the voters of the taxing district.

Under the constitution and statutory provisions in some jurisdictions the question of levying a road tax must be submitted to the voters of the taxing district or municipal subdivision[86] where the tax sought to be levied is for a special purpose[87] or in excess of a certain rate or amount of taxation.[88] Where such a submission is required, every essential requirement of the constitution or statutes with regard to the manner of submitting the question to the voters and the manner of conducting the election must be substantially complied with.[89] Thus, where required, there must be a proper petition or application by the taxpayers for an election,[90] an approval of the petition by the proper authorities,[91] a proper order or call for the election,[92] and a proper notice or warning thereof.[93] The election must be held at the time prescribed by the consti-

84. Ill.—People v. Wabash Ry. Co., 176 N.E. 767, 344 Ill. 606—People v. Cook, 168 N.E. 275, 336 Ill. 330.

85. Neb.—Burlington & M. R. Co. v. Saunders County, 4 N.W. 240, 9 Neb. 507—Burlington & M. R. Co. v. York County, 7 Neb. 487.

86. U.S.—Thompson v. State of Arkansas ex rel. Erwin, C.C.A.Mo., 114 F.2d 351.
Ark.—Missouri Pac. R. Co. v. McCracken, 117 S.W.2d 315, 196 Ark. 311—Wallace v. Kansas City Southern Ry. Co., 279 S.W. 1, 169 Ark. 905—Watts v. Bryan, 240 S.W. 405, 153 Ark. 313.
29 C.J. p. 736 note 48.

87. Ill.—People ex rel. Hempen v. Baltimore & O. R. Co., 42 N.E.2d 69, 379 Ill. 513.
29 C.J. p. 736 note 48 [1].

88. Ill.—People v. Cleveland, C. C. & St. L. Ry. Co., 171 N.E. 126, 339 Ill. 300—People v. Missouri Pac. R. Co., 146 N.E. 567, 316 Ill. 137—People v. Chicago, M. & St. P. Ry. Co., 142 N.E. 167, 310 Ill. 508.
La.—Talley v. Police Jury, 102 So. 522, 157 La. 454.
Or.—Calder v. Orr, 209 P. 179, 105 Or. 223.
29 C.J. p. 736 note 48.

89. U.S.—Thompson v. State of Arkansas ex rel. Erwin, C.C.A.Mo., 114 F.2d 351.
Ky.—Rockcastle County v. Louisville & N. R. Co., 23 S.W.2d 276, 232 Ky. 439.
Or.—Calder v. Orr, 209 P. 179, 105 Or. 223.
29 C.J. p. 736 note 48.

Making question clear to voters

To create an additional county highway tax in excess of the maximum tax allowed for all county purposes, notice of election or ballot, must make clear to the voters that the additional tax authorized is to be levied in excess of the maximum tax for all county purposes then allowed by law, the mere use of the word "additional" in connection with the tax not meaning that the tax is to be levied in excess of the rate allowed for all county purposes.—People v. Missouri Pac. R. Co., 146 N.E. 567, 316 Ill. 137.

Opening and closing of polls

Ill.—Natural Products Co. v. Du Page County, 145 N.E. 298, 314 Ill. 74.
29 C.J. p. 736 note 48 [a].

90. Or.—Calder v. Orr, 209 P. 479, 105 Or. 223.
29 C.J. p. 736 note 48 [1].

Requisites of petition

(1) The petition need not state that the proposed tax is an annual tax nor need it show when the period of years for which it is to be levied is to begin.—Harris v. Gordley, 137 N.E. 526, 305 Ill. 442.

(2) The petition need not state the particular amount of the proposed tax in dollars and cents or exact millage.—Clark & Wilson Lumber Co. of Delaware v. Weed, 2 P.2d 12, 137 Or. 186.

91. Approval held sufficient

Indorsement by county court of word "approved" on petition for district road meeting to vote special tax was sufficient approval within statute.—Clark & Wilson Lumber Co. of Delaware v. Weed, supra.

Approval held insufficient

County court's preparing and signing notices of meeting was not equivalent to indorsement of approval on petition for road district meeting to vote additional tax.—Stevens v. Tillamook County, 273 P. 716, 128 Or. 339.

Effect of failure to approve petition

Where county court did not indorse approval on petition for road district meeting to vote additional tax, there was no authority to vote tax.—Stevens v. Tillamook County, supra.

92. La.—William T. Joyce Co. v. Tangipahoa Parish Police Jury, 83 So. 587, 146 La. 322.
29 C.J. p. 736 note 48 [b].

Necessity of duly passed resolution

(1) In some jurisdictions the election may be called by the county board by an ordinance or resolution duly passed by it.
Ill.—People v. Chicago, M. & St. P. Ry. Co., 142 N.E. 167, 310 Ill. 508.
La.—Talley v. Police Jury, 102 So. 522, 157 La. 454.

(2) The lack of such an ordinance or resolution is a jurisdictional defect.—Talley v. Police Jury, supra.

(3) The presumption is that such an ordinance was regularly adopted when it is signed by the president and secretary of the police jury but this presumption may be overcome by producing the minutes of the police jury.—Talley v. Police Jury, supra.

Contents of resolution calling election

(1) All matters required by the statutes should be set out in the resolution calling the election.
Ill.—People v. Chicago, M. & St. P. Ry. Co., 142 N.E. 167, 310 Ill. 508.
La.—Talley v. Police Jury, 102 So. 522, 157 La. 454.

(2) The resolution need not specify how much of the road tax to be voted on is to be used for roads and how much for bridges.—People v. Chicago, M. & St. P. Ry. Co., supra.

93. Cal.—Anaheim Sugar Co. v. Orange County, 183 P. 809, 181 Cal. 212.
Ill.—People v. Cleveland, C., C. & St. L. Ry. Co., 174 N.E. 832, 343 Ill. 30.
Or.—Du Bois Lumber Co. v. Clatsop County, 145 P. 653, 74 Or. 409.
29 C.J. p. 736 note 48 [1].

Requisites of notice

(1) Notice of special town election on proposed road tax must specify rate per cent to be levied annually.—People v. Cleveland, C., C. & St. L. Ry. Co., 174 N.E. 832, 343 Ill. 30.

(2) A notice of a special election for the purpose of voting on a proposition to levy a special road tax for a period of five years need not show when such period is to begin.—Harris v. Gordley, 137 N.E. 526, 305 Ill. 442.

tution or statutes,[94] and statutes prescribing the form for the submission of the question must be followed.[95] The particular vote required to carry such an election depends on the constitutional and statutory provisions relating thereto.[96] Where the requisite vote is obtained, such vote does not constitute a levy of the tax,[97] nor does it constitute a contract between the taxpayers and the municipality so as to prevent the legislature, during the period for which the tax is to be extended, from changing the basis for fixing the assessed valuation of the property to be taxed.[98]

Failure or refusal to vote tax Under the statutes in some jurisdictions the town or highway authorities have power to impose highway taxes only when the electors have failed to do so after the matter has been brought to their attention.[99]

§ 290. —— Payment, Collection, and Enforcement

The payment, collection, and enforcement of highway taxes are matters which generally are governed by statutory provisions

The payment, collection, and enforcement of highway taxes are matters which generally are governed by statutory provisions,[1] both as to the particular officer or officers who are authorized to receive or enforce payment[2] and the manner of pay-

Notice by publication

Ill—People v Cleveland, C, C & St L Ry Co, 174 N E 832, 343 Ill 30

Effect of failure to give proper notice

(1) The people may not be deprived of their right of suffrage because of the failure of officials to perform their ministerial duties with reference to the giving of notice of an election on the question of levying a road tax—Thompson v State of Arkansas ex rel Erwin, C C A Mo, 114 F 2d 351

(2) The purpose of statutes requiring certain county officers to publish notice of time and place of elections and questions submitted to electors is to apprise electors of issues that will confront them on election day, and if there is compliance with statutes, election on question of road tax is valid, irrespective of number of votes cast and, if statutes are not complied with, election is valid if there is a sufficient number of votes cast to show that electors were sufficiently informed to cast their votes freely and intelligently

U S—Thompson v State of Arkansas ex rel Erwin, supra

Ark—Missouri Pac R Co v McCracken, 117 S W 2d 345, 196 Ark 311

(3) Statutes requiring the giving of notice of an election are directory and not mandatory if the proceeding is to attack the result of an election that has been held—Thompson v State of Arkansas ex rel Erwin, supra

94. Ky—Rockcastle County v Louisville & N R Co, 23 S W 2d 276, 232 Ky 439

At general election

(1) In the absence of contrary constitutional or statutory provision, the election need not be held at the time fixed for general elections—People v Cleveland, C C & St L Ry Co, 171 N E 126, 339 Ill 300.

(2) But a constitutional provision that the tax must be voted on at a general election is mandatory—Wallace v Kansas City Southern Ry Co, 279 S W 1, 169 Ark 905—29 C J p 736 note 48 [a]

95. **Form of ballot**

(1) The ballot must comply with statutory requirements as to form—People ex rel Hempen v Baltimore & O R Co, 42 N E 2d 69, 379 Ill 543—People v Illinois Cent R Co, 131 N E 624 298 Ill 516—29 C J p 736 note 48 [1]

(2) The statutory provision that it is county election commissioners' duty to place words, "For road tax" and "Against road tax" on ticket at election of county officers must be held mandatory, where failure to do so resulted in casting of only two votes on such subject out of fifteen hundred votes cast at such election—Missouri Pac R Co v McCracken 117 S W 2d 345, 196 Ark 311, overruling Wallace v Kansas City Southern Ry Co 279 S W 1, 169 Ark 905

(3) A ballot in statutory form, submitting question of levying "additional tax" for payment of road bonds, sufficiently indicated that the additional tax was in addition to the constitutional limitation of seventy-five cents—People v Missouri Pac R Co, 111 N E 717, 270 Ill 421

Rate or amount of taxation

The voting by the voters of a road district of an additional tax of four thousand dollars is not invalid because expressed as a lump sum rather than as so many mills on the dollar—Calder v Ott, 209 P 479, 105 Or 223

96. **Majority of those voting on question**

Const Amend No 3, authorizing a public road tax to be levied "if a majority of the qualified electors" of a county shall have voted it, requires only a majority of those voting on the question, not a majority of the highest number of votes cast at the election, nor a majority of all persons in the county entitled to vote

U S—Thompson v State of Arkansas ex rel Erwin, C C A Mo, 114 F 2d 351

Ark—Missouri Pac R Co v McCracken, 117 S W 2d 345, 196 Ark 311—Watts v Bryan, 240 S W 405, 153 Ark 313

Votes cast on subject of road tax by only two of fifteen hundred electors voting at election of county officers cannot be accepted as meeting constitutional requirement that majority of qualified electors of county vote for such tax before county court may levy it—Missouri Pac R Co v McCracken, 117 S W 2d 345, 196 Ark 311

97. **Vote merely authorizes tax**

A favorable vote on the question does not constitute a levy of the tax, it simply authorizes the taxing board to levy the tax by an appropriate resolution—People v Chicago, M & St P Ry Co, 142 N E 167, 310 Ill 508

98. Ill—People ex rel Correll v Cairo, V & C R Co, 93 N E 402, 247 Ill 327
29 C J p 737 note 51

99. Mich—F & F Lumber Co v Thompson Tp, 103 N W 188, 139 Mich 698
29 C J p 737 note 50

1. Ark—Northcutt v North Arkansas Highway Improvement Dist No 2 295 S W 48 174 Ark 315

Ky Bailey v Magoffin County, 38 S W 2d 923, 238 Ky 805

Payment of delinquent taxes by county

Mich—Waterford Tp v Willson, 241 N W 833, 257 Mich 619

Discharge of levy

Fla—Lee v Atlantic Coast Line R. Co, 194 So 252, 141 Fla 545

2. Ark—Northcutt v North Arkansas Highway Improvement Dist. No 2, 295 S W 48, 174 Ark 315
29 C J p 737 note 54.

ing and collecting the tax.[3] Such taxes are due and payable at the time fixed by the statute,[4] and a penalty may be imposed, where the statute so provides, for a failure to pay the taxes at such time.[5]

The statutes variously provide for collection by action,[6] distress,[7] sale,[8] arrest,[9] and by warrant to collect.[10] Such proceedings must be brought by the proper officers[11] at the proper time,[12] and within the statutory period.[13] The usual rules as to pleadings[14] and evidence[15] apply in such proceedings, and where a prima facie case of the validity of the tax is made the burden is on the objecting taxpayer to establish his objection.[16] Such proceedings are open to the usual defenses,[17] but liability cannot be avoided by proof that defendant relied on the promise of another to pay the tax[18] or that other landowners defaulted in the payment of the taxes for prior years.[19] Payment of the tax for the first year of the period for which it is levied will not prevent the taxpayer from objecting to the validity of a similar tax the following year.[20] Under some statutes, on application for judgment and order of sale for delinquent highway taxes, the judgment should not be against the taxpayer, but against his property[21] in the township which levied the tax, and should not include all of defendant's property in the county in which the town is located,[22] since the lien for road taxes is confined to property within the taxing district.[23] The property to be sold should be described in the proceedings[24] and in the judgment[25] with such clearness as to identify it. On appeal from the judgment general rules as to appeal and error apply.[26] After the property has been sold by decree of court in

Collection by county collector

County commissioners authorized by statute to "cause to be assessed and collected" a district road tax may by resolution require the county tax collector to collect the tax levied —Taylor v Williams, 195 So 175 142 Fla 402, rehearing denied 195 So 184, 142 Fla 562, and 196 So 214, 142 Fla 756

3. Ark —Northcutt v North Arkansas Highway Improvement Dist No 2, 295 S W 48, 174 Ark 315
29 C J p 737 note 53

4. **Where invalid taxes are validated,** the taxpayer must pay the taxes at the time the validating act goes into effect —People v Chicago, B & Q R Co, 154 N E 468, 323 Ill 536

5. Ill —People v Chicago, B. & Q R Co, supra

Invalid assessment

Taxpayer must pay penalty for failure to pay assessment under invalid law, where assessment was later validated and taxpayer had waived right to object to payment of tax — Louisiana Ry & Nav Co v State, Tex Civ App, 298 S W 462, affirmed Com App, 7 S W 2d 71, rehearing denied 17 S W 2d 457

6. Ark —Northcutt v North Arkansas Highway Improvement Dist No 2, 295 S W 48, 174 Ark 315
29 C J p 737 note 57

7. N H —Mason v. Thomas, 36 N H 302

8. Ark —Toler v Fischer, 148 S W 2d 159, 201 Ark 1107
Kan —Beth v State Highway Commission of Kansas, 41 P 2d 721, 141 Kan 512
Tex —Broocks v State, Civ App, 41 S W 2d 714, 719, two cases
29 C J p 737 note 59, p 738 note 70

Reimbursement of purchaser of invalid title

Me —Emerson v Washington County, 9 Me 88

9 N H —Marshall v Wadsworth, 10 A. 685, 64 N H 386

10. N H —Thompson v Fellows, 21 N H 425
29 C J p 737 note 61.

11. Pa —Stephens v Wilkins, 6 Pa 260
29 C J p 737 note 64

12. Vt —Lane v James, 25 Vt 481
29 C J p 737 note 62

13. Pa —Rush Tp v Schuylkill County, 100 Pa 356
Vt —Wells v Austin, 10 A 405, 59 Vt 157

14. Ark —Northcutt v North Arkansas Highway Improvement Dist No 2, 295 S W 48 174 Ark 315
Tex —Victory v State, Civ App, 134 S W 2d 477, affirmed 158 S W 2d 760, 138 Tex 285

Petition held insufficient

Tex —Broocks v State, Civ App, 41 S W 2d 714, 719 (two cases)

15. Tex —Victory v State, Civ App, 134 S W 2d 477, affirmed 158 S W 2d 760, 138 Tex 285
29 C J p 737 note 65

Weight and sufficiency of evidence

Ill —People ex rel Clark v Baltimore & O S W Ry Co, 187 N E 463, 353 Ill 492.

16 Ill —People ex rel Gill v Otis, 10 N E 2d 672, 367 Ill 136—People ex rel Clark v Baltimore & O S W Ry Co, 187 N E 463, 353 Ill 492—People v Chicago & E I Ry Co, 145 N E 716, 314 Ill 352.
29 C J p 737 note 66

17. Ill —People ex rel Yakel v. Toledo, St L & W R Co, 107 N E 227, 266 Ill. 112
29 C J p 737 note 67.

That a tax is invalid is a good defense for nonpayment —People v Chicago, B & Q R Co, 154 N E 468, 323 Ill 536—29 C J p 737 note 67 [a]

18. Ga —Fanning v Wilkes County, 46 S E 410, 119 Ga 315

19. Ark —Northcutt v North Arkansas Highway Improvement Dist No 2, 295 S W 48, 174 Ark 315

20. Ill —People ex rel Tarmin v Cincinnati, I & W R Co, 104 N E 252, 261 Ill 582

21. Ill —People ex rel Herron v Cleveland, C, C & St L R Co, 110 N E 841, 271 Ill 189—People ex rel Herron v Cincinnati, L & C R Co, 110 N E 839, 270 Ill 516

22. Ill —People v Illinois Cent R Co, 111 N E 522, 272 Ill 116
29 C J p 738 note 72

23. Ill —People ex rel Lusk v Cairo, V & C R Co, 107 N E 779, 266 Ill 557—People ex rel Martin v Cairo, V & C R Co, 107 N E 256, 265 Ill 495

24. **Description held insufficient**
Ark —Toler v Fischer, 148 S W 2d 159, 201 Ark 1107

25. Ill —People v Wabash R Co, 111 N E 111, 271 Ill 327
29 C J p 738 note 74

26. **Joint appeal** from joint judgment against lands of all road tax objectors must be taken in strict conformity with order allowing it —People v Carroll, 180 N E 785, 348 Ill 347

Security

Appeal by road tax objector not making required deposit with county collector must be dismissed —People v Carroll, supra

Objection made in trial court held sufficient to raise on appeal question of

(1) Sufficiency of certificate of levy —People v New York Cent R Co, 147 N E 458, 316 Ill 526

(2) Excessiveness of levy.—People ex rel Toman v. 110 South Dearborn

accordance with the statute, actual payment of taxes cannot avail on collateral attack.[27]

Except where the property is sold at the tax sale to the state or an instrumentality thereof,[28] the right to redeem from the sale is governed by the statute in force at the time of the sale,[29] and a subsequent statute extending the time for redemption will not operate retroactively so as to interfere with the vested rights of the purchaser at the sale,[30] whether such statute goes into effect before[31] or after[32] the time to redeem under the former act has expired. In the absence of a saving clause, the limitation as to the time for redemption applies to minors[33] and other persons under disability.[34]

A settlement of a claim for a highway tax, made in good faith between the taxpayer and township authorities, is valid.[35]

Recovery or set-off of taxes paid Illegal taxes paid under protest may be recovered back,[36] but not those voluntarily paid,[37] nor can taxes voluntarily paid after the repeal of the statute under which they were levied be credited to or set off against an assessment subsequently levied under the repealing act.[38] Where a statute so provides, taxpayers are entitled to reimbursement from the state or county highway fund for road taxes previously paid by them.[39]

Restraining misapplication of taxes wrongfully collected A highway officer has no right of action in his official capacity to restrain the misapplication of taxes wrongfully collected by another, since such wrongful act, however illegal with respect to taxpayers, could not hinder plaintiff from collecting the amount due from them without regard to the collections made by defendant.[40]

§ 291. —— Remedies for Erroneous Taxation

Various remedies are available to a taxpayer for erroneous taxation, such as certiorari, injunction, or an action for damages.

The validity of a levy and assessment of highway taxes may be questioned not only by objections raised in the proceeding to enforce the tax, as has been seen supra § 290, but the taxpayer may also seek relief by certiorari,[41] by application for abatement,[42] by petition to reduce the amount of the levy,[43] or by petition to declare a special tax election void.[44] As has been seen supra § 290, the taxpayer may also bring an action to recover illegal taxes paid under protest, and in a proper case

Street Bldg Corporation, 24 N E 2d 373, 372 Ill 459

27. Ark.—Collier v Smith, 200 S W 1008, 132 Ark 309
29 C J p 739 note 99

28. Ark.—Gossett v Fordyce Lumber Co, 28 S W 2d 57, 181 Ark 848

29. Ark.—Hogg v Nichols, 204 S W 211, 134 Ark 280

30 Ark.—Hogg v Nichols, supra—Collier v Smith, 200 S W 1008, 132 Ark 309

31 Ark.—Hogg v Nichols, 204 S W 211, 134 Ark 280

32 Ark.—Collier v Smith, 200 S W 1008 132 Ark 309

33 Ark.—Collier v Smith, supra

34. Ark.—Hogg v Nichols, 204 S W 211, 134 Ark 280
29 C J p 738 note 80

35. Mich.—Feily v Bay View Campground Assoc, 177 N W 485, 210 Mich 197

36. Ala.—Adams v Southern R Co, 58 So 397, 176 Ala 320
Miss.—Illinois Cent R Co v Carroll County, 196 So 242, 189 Miss 206
Okl.—Chicago, R I & P Ry Co v Pourron, 246 P 835, 118 Okl 80
Wis.—State ex rel City of Sheboygan v Board of Sup'rs of Sheboygan County, 216 N W 144, 194 Wis 456
29 C J p 738 note 82

37 La.—Louisiana Land & Improvement Co v Police Jury of Grant Parish, 101 So 241, 156 La 849
29 C J p 738 note 83

38 Ill.—People ex rel Wysong v Chicago & E I R Co, 110 N E 825, 270 Ill 594
29 C J p 738 note 84

39 Who are taxpayers under statute

Neither the holder of a void tax deed nor a bank which furnished the money to procure such deed, nor the agent of a landowner who pays taxes from the rents he has collected on the property of his principal can qualify as the "taxpayer" contemplated by a statute authorizing reimbursement to taxpayers of road taxes previously paid.—Beth v State Highway Commission of Kansas, 41 P 2d 721, 141 Kan 512

Reimbursements optional with county board where proceedings for construction of state road in accordance with federal aid specifications are pending.—Thompson v Board of Com'rs of Reno County, 275 P 205, 127 Kan 863

40 Or.—Pettyjohn v Parmenter, 10 Or 341

41. N J.—United New Jersey R & Canal Co v Gummere, 54 A 520, 69 N J Law 111—Essex Public Road Bd v Speer, 9 A 197, 48 N J Law 372

When remedy not available

Matter having passed beyond control of county board, validity of tax assessed for highway purposes, could not be determined by certiorari addressed to county board and county clerk.—State ex rel City of Sheboygan v Board of Sup'rs of Sheboygan County, 216 N W 144, 194 Wis 456

Scope of relief

In certiorari action to determine validity of highway tax court had no authority to provide that tax found to be illegal should be refunded to taxpayer.—State ex rel City of Sheboygan v Board of Sup'rs of Sheboygan County, supra

42. Me.—Treat v Orono, 26 Me 217

43 Pa.—Appeal of Lower Nazareth Tp Sup'rs, 9 A 2d 545, 336 Pa 250

Statute restraining taxpayer's right to contest assessment is inapplicable to suit to reduce amount of levy.—Tremont Lumber Co v Police Jury of Winn Parish, 113 So 839, 164 La 257

44. La.—Tremont Lumber Co v Winn Parish Police Jury, 81 So 249, 144 La 678
29 C J p 738 note 89

Statute limiting time within which petition may be filed held not invalid.—St Louis & S W Ry Co v Nattin, D C La, 27 F 2d 766, affirmed 48 S Ct 438, 277 U S 157, 72 L Ed 830

he may bring an action against the taxing officials for damages resulting from an illegal collection of void highway taxes[45] Except in some jurisdictions where a contrary rule prevails,[46] the assessment may be attacked by injunction[47] if there is no adequate remedy at law[48] and the proceedings are brought within the prescribed time;[49] but injunction will not lie if there is another adequate remedy,[50] or unless in addition to illegality, hardship, or irregularity with respect to the tax there is some recognized ground for equitable interference[51] Under some statutes a town may petition to be relieved from an assessment which has been levied for highways wholly within other towns[52]

In actions by taxpayers and towns to contest the validity of a levy and assessment of highway taxes, general rules as to parties,[53] pleadings,[54] evidence,[55] costs,[56] and appeal and error[57] generally apply

§ 292. —— Disposition of Proceeds

Road taxes collected must be paid over to the officers or political subdivisions designated by statute to receive such funds.

Road taxes collected must be paid over to the officers designated by statute to receive and disburse highway funds,[58] and, as appears supra § 176, such funds must be used in the manner and for the purposes prescribed by the constitution or statutes, or designated by the voters, and cannot be diverted to any other purpose A road tax, however, is not invalidated by the fact that the proceeds thereof are misappropriated[59]

The mode of apportioning the funds derived from road taxes among the municipalities and other political subdivisions interested is regulated by statute,[60] the legislature having power, in the absence of constitutional inhibition, to provide for such ap-

45. Mass —Eames v Johnson, 4 Allen 382
29 C J p 738 note 90

Liability of highway officer

(1) If a highway officer, under color of his office, seizes and sells property to satisfy a road tax void either because it was raised for an illegal object or because it was not voted for in a legal manner, he is liable in damages to the extent of the value of the property so sold —Grafton Bank v Kimball, 20 N H 107

(2) But a highway officer, acting under a valid statute, has been held not liable in damages for a mistake in the assessment roll —Hampton v Hamsher, 26 N E 540, 124 N Y 634, affirming 46 Hun 144

46 In Wisconsin no action will lie by a taxpayer in behalf of himself and other taxpayers to restrain the levy and collection or to set aside the taxes of a municipality generally on his own and all other property therein, but such person, if aggrieved by any error in the assessment, is left to his appropriate legal remedy —State ex rel City of Sheboygan v Board of Sup'rs of Sheboygan County, 216 N W 144, 194 Wis 456—29 C J p 739 note 97

47. Or —Stevens v Tillamook County, 273 P 716, 128 Or 339
Pa —Quemahoning Coal Co v Jenner Tp, 83 Pa Super 577
29 C J. p 738 note 91

48. U S —Lancaster v Police Jury, Parish of Sabine, State of Louisiana, D C La, 254 F 187
29 C J p 739 note 95

49. U S —St Louis & S W Ry Co v Nattin, D C La, 27 F 2d 766 affirmed 48 S Ct 438, 277 U S 157, 72 L Ed 830
29 C J p 739 note 96.

50. Pa —H C Frick Coke Co v Mt Pleasant Tp, 71 A 930, 222 Pa 451
29 C J p 739 note 97

51. Ala —Adams v Southern R Co, 58 So 397 176 Ala 320
29 C J p 739 note 98

52. Vt —Grand Isle v Milton, 35 A 71, 68 Vt 234

53 Ill —Lenhart v Miller, 31 N E 2d 781, 375 Ill 346

Parties plaintiff

(1) A suit to set aside a road tax must be brought by the real party in interest —State ex rel City of Sheboygan v Board of Sup'rs of Sheboygan County, 216 N W 144, 194 Wis 456

(2) A city has no interest in the validity of a tax assessed for highway purposes authorizing it to maintain certiorari to set the tax aside —State ex rel City of Sheboygan v Board of Sup'rs of Sheboygan County, supra

Parties defendant

In an action by a town to be relieved from an assessment levied for highways wholly within other towns, only those towns to which the assessment is paid need be made parties defendant —Grand Isle v Milton, 35 A 71, 68 Vt 234

54. La —Tremont Lumber Co v Winn Parish Police Jury, 81 So 249, 144 La 678

The petition must show the existence of a cause of action in favor of plaintiff —State ex rel City of Sheboygan v Board of Sup'rs of Sheboygan County, 216 N W 144, 194 Wis 456

55. The burden is on the taxpayer to prove the invalidity of the tax —Grimm v Bayfield County, 182 N W 166, 174 Wis 43

56. Allowance improper

Judgment condemning plaintiff to pay attorney's fee and costs in successful suit to reduce road tax levy was erroneous —Tremont Lumber Co v Police Jury of Winn Parish, 113 So 839, 164 La 257

57. Fact findings of the trial court, if adequately supported by the evidence and not clearly erroneous, are regarded as conclusive and binding on appeal —Appeal of Lower Nazareth Tp Sup'rs, 9 A 2d 545, 336 Pa 250

58 Ga —Cureton v Wheeler, 159 S E 283 172 Ga 879
29 C J p 739 note 4

Where the roads of a district are taken over by the state, taxes collected by the district must be turned over to the state where the statute so provides —State ex rel Holt v Little Rock-Highland Paving Dist No 24, 133 S W 2d 878, 199 Ark 430

Invalidity of assessment no defense

Commissioners of city and county treasurer are unauthorized to refuse to pay proceeds of highway tax to state treasurer because method of valuing property assessed violated constitutional provision therefor —Read v Board of Com'rs of City of Newark, 134 A 757, 103 N J Law 60 affirming 132 A 314, 4 N J Misc 203

59. Unauthorized contract

A road tax is not invalidated because the officers have contracted to expend the proceeds for purposes different from those for which it was levied, although such misappropriation will subject the disbursing officers to the penalties provided in such cases —Spokane, P & S Ry Co v Franklin County, 179 P 113, 106 Wash 21

60 Ark —Burrow v Floyd, 99 S.W. 2d 573, 193 Ark. 220.

portionment[61] and to direct the agency through which the fund shall be expended.[62] The statutes frequently require a certain proportion of that part of a county or township road tax levied on property within the limits of a city or village in the county or township to be paid over to the city or village,[63]

Idaho—Golden Gate Highway Dist of Canyon County v Canyon County, 262 P 1048, 45 Idaho 406
Okl—Board of Com'rs of Carter County v Landrum, 21 P 2d 736, 163 Okl 199
29 C J p 739 note 14

Apportionment among road districts

(1) Under the statutes in some jurisdictions a special road district is entitled to certain road taxes levied by the county on property within the district—Rolla Special Road Dist of Phelps County v Phelps County, 116 S W 2d 61, 342 Mo 459—Hawkins v Cox, 66 S W 2d 539, 334 Mo 640—State ex rel Wainwright-Steedman Special Road Dist of Callaway County v Holman, 264 S W 908, 305 Mo 195—State ex rel Monett Special Road Dist v Barry County, 258 S W 710, 302 Mo 279—Little Prairie Special Road Dist v Pemiscot County, 249 S W 599, 297 Mo 568—29 C J p 739 note 14

(2) A timely and proper application should be made by the commissioners of the road district for its proportion of the county revenue—Little Prairie Special Road Dist v Pemiscot County, supra—Holloway v Howell County, 144 S W 860, 240 Mo 601

(3) If no application is made for several years for the special road district's proportion of taxes to which it is entitled under Rev St 1919 § 10818, such district is not entitled to recover the proportion of taxes for such years expended on roads in other road districts where there were no special road district debts outstanding for those years—Little Prairie Special Road Dist v Pemiscot County, supra

(4) A payment to different special road districts of surplus county taxes accumulating as a result of failure of a special road district to demand its share of taxes collected on property in its district is not prohibited by Rev St 1919 § 12866—Little Prairie Special Road Dist v Pemiscot County, supra

(5) Cities of the second class are road districts within Comp St 1922 § 2795, and as such are entitled to have expended within their corporate limits, for the purposes prescribed in the statute, one half of all moneys arising from township road taxes on property situate within their corporate limits—State v Kelly, 189 N W 967, 109 Neb 113

(6) Statute allocating "due proportion" of county road tax to special road and bridge district has reference to proportion which in discretion of county commissioners should be used in district, and does not entitle district to receive all road taxes collected on property therein—Escambia County v State ex rel City of Pensacola, 156 So 134, 115 Fla 385

(7) A road district to which have been annexed certain lands detached from another district, after the levy of taxes against the lands detached, but before collection thereof, is not entitled to enjoin the tax collector from paying such taxes when collected to the old district, and to a division of such taxes, in the absence of any legislative provisions for such division—Road District No 6 v Tygett, 226 Ill App 95

(8) The court cannot restrain a road district from receiving taxes to which it is entitled—Hawkins v Cox, 66 S W 2d 539, 334 Mo 640

Levy not invalidated by improper distribution

Fact that special road tax was not properly distributed among districts of county as contemplated did not invalidate assessment and levy—Southern Ry Co v Rowland, 276 S W 638, 152 Tenn 243

61. Ark—Burrow v Floyd, 99 S W 2d 573, 193 Ark 220—Adkins v Harrington, 261 S W 626, 164 Ark 280
Ill—Road District No 6 v Tygett, 226 Ill App 95
Mo—State ex rel and to Use of Kersey v Pemiscot Land & Cooperage Co, 295 S W 78, 317 Mo 41
29 C J p 725 note 34, p 740 note 15

62. Ark—Adkins v Harrington, 261 S W 626, 164 Ark 280
29 C J p 740 note 16

63. Ark—City of Conway v Summers, 4 S W 2d 19, 176 Ark 796
Fla—Pinellas County v City of St Petersburg, 156 So 523, 116 Fla 582
29 C J p 740 note 17

Operation of statutes in general

(1) Such statutes are mandatory—City of Astoria v Cornelius, 240 P 233, 119 Or 264

(2) They do not create a separate purpose for levying road taxes, but only provide for a division of taxes levied—People ex rel Hempen v Baltimore & O R Co, 12 N E 2d 69, 379 Ill 543

(3) The benefits conferred on municipalities under such statutes are not to be nullified by administrative devices or by any argument respecting inconvenience—Town of Purvis v Lamar County, 137 So 323, 161 Miss 454

(4) The fact that a city has been incorporated into a special road and bridge district does not deprive it of the benefits of the statute—Escambia County v State ex rel City of Pensacola, 156 So 134, 115 Fla. 385

(5) Under some statutes only cities maintaining their own streets are entitled to the benefits of the statute—State, to Use of City of Aberdeen, v Board of Sup'rs of Monroe County, 196 So 649, 188 Miss 636, overruling suggestion of error 196 So 253, 188 Miss 636

Conditions precedent

(1) A municipality to be entitled to its proportionate part of ad valorem road taxes collected on property within municipality should file with county board of supervisors an ordinance or some other appropriate record showing that the municipality works its streets at its own expense, since such showing is jurisdictional to board's power to make the allowance—State, to Use of City of Aberdeen, v Board of Sup'rs of Monroe County, 196 So 649, 188 Miss 636 overruling suggestion of error 196 So 253, 188 Miss 636

(2) Municipality, prior to adoption of Code 1930, before entitled to claim one half of road taxes from county, was required to pass valid resolution declaring such intention and formally to notify county board of supervisors thereof—Board of Sup'rs of Neshoba County v City of Philadelphia, 160 So 730, 172 Miss 326—City of Okolona v Chickasaw County, 157 So 690, 171 Miss 424—Town of Ackerman v Choctaw County, 128 So 757, 157 Miss 594—Board of Sup'rs of Lauderdale County v City of Meridian, 114 So 803, 149 Miss 139

(3) Such a resolution and notice had no retroactive effect—City of Okolona v Chickasaw County, supra

(4) Since the adoption of the Code of 1930, such resolution and notice is no longer necessary—State, to Use of City of Aberdeen, v Board of Sup'rs of Monroe County, 196 So 649, 188 Miss 636, overruling suggestion of error 196 So 253, 188 Miss 636—Board of Sup'rs of Neshoba County v City of Philadelphia, 160 So 730, 172 Miss 326—City of Okolona v Chickasaw County, 157 So 690, 171 Miss 424—Gully v Board of Sup'rs of Copiah County, 147 So 300, 167 Miss 562

Funds subject to apportionment

(1) In general

Ark—City of Conway v Summers, 4 S W 2d 19, 176 Ark 796
Miss—City of Okolona v Chickasaw County, 157 So 690, 171 Miss 424—Town of Ackerman v Choctaw County, 128 So 757, 157 Miss 594—Board of Sup'rs of Lauderdale

and statutes of this character have generally been held valid.[64] Under some statutes all, instead of a portion of the tax collected by county or township authorities on property within a city or village is required to be turned over to the municipal authorities for street purposes.[65] A statute providing that in cities having more than a stated population all of the tax required to be levied therein shall be paid over to the city authorities, whereas in other cities only a part of the tax is required to be so paid over, has been held invalid.[66] A municipality entitled to highway funds collected by county officers may sue at law to recover such funds,[67] or bring an equitable suit for an accounting,[68] or it may apply for a writ of mandamus to compel the county authorities to issue a warrant for the amount due.[69] A writ of review, however, is not an appropriate remedy,[70] and, where the statute leaves it to the discretion of the county commissioners to apportion among the towns in a county a tax levied by them, no action lies against the commissioners to compel them to make the apportionment.[71] Where county officers have levied a tax on the inhabitants of a city for city streets, in excess of the amount authorized by law, the city cannot recover from the county that portion of the tax illegally levied.[72] Road taxes paid by township authorities to a city under an invalid statute[73] or mistake of law[74] may be recovered back by the township, and it is no defense to such action that the funds were derived from an invalid levy.[75] Mere defects in the disbursement proceedings will not entitle a county to

County v City of Meridian, 114 So 803, 140 Miss 139
Or—City of Pendleton v Umatilla County, 241 P 979, 117 Or 140
Wash—State v McKay, 254 P 847, 143 Wash 95
29 C J p 740 note 17 [b]

(2) Where the statute requires a county to pay a city one half of the money collected as road taxes on property within the city, the term "one-half of the money collected" refers to the net amount after deducting statutory commissions for assessment and collection—Jefferson County v City of Birmingham, 129 So 48, 221 Ala 476

(3) Short notes, made for road purposes in anticipation of current taxes, are not "bonds" so as to relieve county from duty to pay town portion of taxes collected to pay notes—Town of Purvis v Lamar County, 137 So 323, 161 Miss 454

(4) Taxes levied to repay money borrowed for purchase of road machinery, gas, and oil for operation thereof for employment of labor and materials, and for straightening and grading existing roads are levied for 'road purposes" within statute requiring county's division with municipality of taxes collected for road purposes within municipality—City of Winona v Montgomery County, 155 So 169, 170 Miss 824

Method of apportionment

Or—Oregon City v Clackamas County, 247 P 772 118 Or 546

Repeal of statutes

(1) In general—Leonard v Sink, 150 S E 813, 198 N C 114

(2) Law requiring taxes for certain improved roads to be used solely therefor repeals, as affects such taxes, previous law granting municipality half of taxes collected within its limits—Board of Sup'rs of Lauderdale County v City of Meridian, 114 So 803, 140 Miss 139

(3) Law authorizing county to construct sea wall did not impliedly repeal law requiring county to pay one half of ad valorem road taxes to municipality—Board of Sup'rs of Hancock County v City of Bay St Louis, 128 So 331, 157 Miss 459

64. Ill—People v Cairo & T R Co, 140 N E 824 319 Ill 118

Statutes held invalid

(1) It has been held that such division of the fund is invalid under a constitutional provision forbidding taxes levied by a township for roads and bridges to be diverted to any other purpose—Lamar Tp v Lamar, 169 S W 12, 261 Mo 171 Ann Cas 1916D 740—Green City v Martin, 141 S W 879 237 Mo 474

(2) A statute authorizing a township to pay over to a city therein taxes levied and collected within the corporate limits of the city violates a constitutional provision prohibiting the legislature from making a grant of public money to a municipal corporation—Lamar Tp v Lamar supra—State v St Louis County Ct 44 S W 734, 142 Mo 575

65 Kan—Ellis v Jacobs, 140 P 856, 92 Kan 152
29 C J p 740 note 21

66. Ill—Bloomington Tp Highway Comrs v Bloomington 97 N E 280, 253 Ill 164 Ann Cas 1913A 471—People v Fox, 93 N E 302 247 Ill 402

67. Or—Oregon City v Clackamas County, 247 P 772, 118 Or 546
29 C J p 741 note 23

Suit by state tax collector

Under some statutes the suit may be brought, under certain circumstances, by the state tax collector in behalf of the city—City of Biloxi v Gully, 193 So 786, 187 Miss 664—Gully v Board of Sup'rs of Copiah County, 147 So 300, 167 Miss 562

Petition

(1) The petition, to be sufficient, must state all the facts necessary to constitute a cause of action—Gully v Board of Sup'rs of Copiah County, supra

(2) Petition held insufficient—Board of Sup'rs of Neshoba County v City of Philadelphia, 160 So 730, 172 Miss 326

Defenses

(1) It is no defense to such an action that the taxes were illegally collected by the county—Town of Purvis v Lamar County, 137 So 323, 161 Miss 454

(2) Neither is it a defense that the taxes were levied and collected to repay money borrowed by the county without authority—Town of Purvis v Lamar County, supra

Directed verdict held proper

Mo—Rolla Special Road Dist of Phelps County v Phelps County, 116 S W 2d 61, 342 Mo 459

68. Md—Carroll County v Westminster, 91 A 412, 123 Md 198
29 C J p 741 note 24

69. Neb—Crawford v Darrow, 127 N W 891, 87 Neb 494

70. Reason for rule

County court in apportioning road taxes due city under Or L § 4660, exercises no judicial function reviewable by writ of review under § 605—Oregon City v Clackamas County, 247 P 772 118 Or 546

71. Colo—Fairplay v Park County, 67 P 152, 29 Colo 57

72 Or—Tillamook City v Tillamook County, 107 P 482, 56 Or 112

73. Ill—Bloomington Tp Highway Comrs v Bloomington, 97 N E 280, 253 Ill 164, Ann Cas 1913A 471
29 C J p 741 note 28

74 Mo—Lamar Tp v Lamar, 169 S W 12, 261 Mo 171, Ann Cas 1916D 740

75. Ill—Bloomington Tp Highway Comrs v Bloomington, 97 N E 280, 253 Ill 164, Ann Cas.1913A 471.
29 C J p 741 note 30.

recover from a city road taxes paid it by the county,[76] and in an action by a city against a county to recover its share of the taxes collected it has been held that a set-off cannot be interposed by the county for overpayments made in previous years.[77]

Tax anticipation warrants. Where tax anticipation warrants are issued by a road district, it is the duty of the district to see that taxes, when collected, are set apart for payment of the warrants.[78]

§ 293. Local Assessments

Funds for the construction, improvement, or repair of roads may be raised by special assessments on the property benefited.

Funds for the construction, improvement, or repair of roads may be raised by "special assessments,"[79] which term, as commonly used in connection with highway taxation, refers to assessments specially made to raise funds for the construction or improvement of certain highways within a particular district, and assessed against the property specially benefited as an equivalent for the benefit incurred,[80] and which differ in their essential characteristics from ordinary or general taxation for road purposes,[81] considered supra §§ 283-292.

§ 294. —— Power to Levy in General

The legislature may provide that the cost of construction, improvement, or maintenance of a highway shall be defrayed in whole or in part by assessments on the property specially benefited.

Although the public also receives a benefit, the legislature may provide that the cost of construction, improvement, or maintenance of a highway shall be defrayed[82] in whole[83] or shall be defrayed

76. Invalid resolution

Where county made payments of share of road taxes to municipality and subsequently it was discovered that resolution of municipality claiming such taxes was improperly passed, county was, nevertheless, not entitled to recover back moneys paid over to city under invalid resolution —City of Okolona v Chickasaw County, 157 So 690, 171 Miss 424

77. Ala.—Jefferson County v City of Birmingham, 129 So 48, 221 Ala 476

78. Nature and effect of warrants

Tax warrant is not a promise to pay, but merely order to pay amount specified from taxes levied when they are collected, being in effect an assignment of a certain sum from a specified fund to be paid when collected, and only obligation of road district issuing such warrant is to see that taxes are set apart for payment of warrants and properly applied —O B Avery Co for Use of Allis-Chalmers Mfg Co v Highway Commissioner of Road District No 8-J, Williamson County, 281 Ill App 272 affirmed 2 N E 2d 77, 363 Ill 279

79. U S —Browning v Hooper, Tex, 46 S Ct 141, 269 U S 396 70 L Ed 330, reversing D C, 3 F 2d 160

Drainage assessments see Drains §§ 55 87

Special assessments for city streets see the C J S title Municipal Corporations §§ 1290-1580, also 44 C J p 481 et seq

80. La —Guaranty Bank & Trust Co v Ward Lumber Co, 109 So 496, 161 La 803

Such assessments are "taxes"

U S —Road Improvement Dist No 7 of Poinsett County, Ark v Guardian Savings & Trust Co, C C A Ark, 298 F 272, certiorari granted Guardian Savings & Trust Co v Road Improvement Dist No 7, of Poinsett County, Ark, 44 S Ct 637, 265 U S 578, 68 L Ed 1188, reversed on other grounds Guardian Savings & Trust Co v Road Improvement Dist No 7 of Poinsett County, Ark, 45 S Ct 201, 267 U S 1, 69 L Ed 487, modified on other grounds 45 S Ct 351, 267 U S 580, 69 L Ed 798

Assessment held special

(1) Under Complete Tex St 1920 or Vernon's Sayles Tex Civ St Annot 1911 art 631, burdens imposed on lands on road district were held special assessments, rather than general taxes, which commissioners' court could levy under art 2242 and Tex Const art 8 § 9 —Browning v Hooper Tex, 46 S Ct 141, 269 U S 396, 70 L Ed 330, reversing, D C, 3 F 2d 160

(2) Tax levied under Coastal Highway Act for payment of bonds of highway district issued to advance money to highway commission is special assessment," and not general taxation —Evans v Beattie, 135 S E 538 137 S C 496

81. U S —Commissioners of Road Improvement Dist No 2 of Lafayette County, Ark, v St Louis Southwestern Ry Co Ark, 42 S Ct 250, 257 U S 547, 66 L Ed 364, affirming, C C A, St Louis Southwestern Ry Co v Commissioners of Road Improvement Dist No 2 of Lafayette County, Ark, 265 F 524

S C —Evans v Beattie, 135 S E 538, 137 S C 496

29 C J p 742 note 13

82. U S —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark, 45 S Ct 136, 266 U S 379, 69 L Ed 335 affirming 246 S W 113, 156 Ark 116—Oregon Short Line R Co v Clark County Highway Dist, D C Idaho, 22 F 2d 681—Miller County Highway & Bridge Dist v Standard Pipe Line Co, C C A Ark, 19 F 2d 3, certiorari granted Standard Pipe Line Co v Miller County Highway & Bridge Dist, 48 S Ct 122 275 U S 520, 72 L Ed 404, reversed on other grounds 48 S Ct 441 277 U S 160, 72 L Ed 831, 58 A L R 126—Browning v Hooper, D C Tex, 3 F 2d 160 reversed on other grounds 46 S Ct 141, 269 U S 396 70 L Ed 330

Fla —Whitney v Hillsborough County, 127 So 486 99 Fla 628

Ohio —Rogers v Johnson, 153 N E 167 21 Ohio App 292

Pa —Spring Garden Tp v Logan, 52 York Leg Rec 21

Tex - Foxworth-Galbraith Lumber Co v Realty Trust Co, Civ App, 110 S W 2d 1164 error dismissed

"The function of making or providing for the making of such assessments is legislative in character '— Mudd v Wehmeyer, 19 S W 2d 891, 894 323 Mo 704

Power not limited by constitutional amendment relating to plan of assessment in two counties —Evans v Beattie, 135 S E 538, 137 S C 496

83. U S —Missouri Pac R Co v Western Crawford Road Improvement Dist, 45 S Ct 31 266 U S 187, 69 L Ed 237, affirming Western Crawford Road Improvement Dist v Missouri Pac R Co, 218 S W 563, 157 Ark 304

Ark —Green v Williams, 278 S W 5, 169 Ark 1198

29 C J p 741 note 33

Purpose of statutes

"Legislative enactments authorizing special assessments against abutting property for the entire cost of road or street improvements are obviously designed to secure the improvement of public highways that are essential to the development and beneficial uses of abutting and contiguous property, the improvement

in part[84] by local assessments on property specially benefited by such construction or improvement Such local assessments are not prohibited by the constitutional requirements that taxes be uniform,[85] or that property be taxed according to its value,[86] since, as appears supra § 293, they are not "taxes" in the ordinary sense of the term Neither are they within a constitutional provision limiting the amount of indebtedness which public corporations may incur,[87] but the assessment provided for must not be arbitrary or unreasonable,[88] or such as constitutes confiscation under color of assessment[89] The power of assessment can be exercised by subordinate bodies only when authority so to exercise it is clearly conferred by the legislature[90]

§ 295. —— Construction and Repeal of Statutes

The existence and extent of the power to levy special assessments depend on a proper construction of the statute purporting to confer it Repealing statutes will be construed in accordance with general rules

The existence and extent of the power to levy special assessments depend on a proper construction of the statute purporting to confer it,[91] and such

of the highways being only secondarily or incidentally for the beneficial use of the public"—Parrish v Hillsborough County, 123 So 830, 831, 98 Fla 430, 436

If the improvement is primarily for benefit of abutting property, the entire cost may be assessed against such property- Smith Bros v Williams, 126 So 367 100 Fla 642 followed in Smith Bros Const Co v Hart, 126 So 373, 101 Fla 653, affirmed 136 So 399 101 Fla 653 and followed in Hillsborough County v Jeffords, 126 So 373 101 Fla 654 Parrish v Hillsborough County, 123 So 830, 98 Fla. 130, 436

84. U S—Missouri Pac R Co v Western Crawford Road Improvement Dist, 45 S Ct 31, 266 U S 187, 69 L Ed 237, affirming Western Crawford Road Improvement Dist v Missouri Pac R Co, 248 S W 563, 157 Ark 304
Ohio—Theobald v Board of Com'rs of Fayette County, 162 N E 268 119 Ohio St 54 error dismissed Theobald v Board of Comrs of Fayette County Ohio, 49 S Ct 93, 278 U S 572, 73 L Ed 513
S C—Evans v Beattie, 135 S E 538, 137 S C 496
29 C J p 741 note 34

Improvement not primarily for benefit of abutting property

(1) If the improvement is not primarily for the benefit of abutting property, but is primarily for the benefit of the public, the entire cost may not be assessed against the abutting property, and, if the improvement is for the benefit of the public and the abutting property the cost should be apportioned between the public and the abutting owners —Smith Bros v Williams 126 So 367, 100 Fla 642 followed in Smith Bros Const Co v Hart 126 So 373, 101 Fla 653, affirmed 136 So 399 101 Fla 653 and followed in Hillsborough County v Jeffords, 126 So 373, 101 Fla 654— Parrish v Hillsborough County, 123 So 830, 98 Fla 430 436

(2) In so apportioning the costs between county and adjacent owner, the main consideration that should actuate the court is the extent to which the highway serves the public or private persons while increase in value of abutting property is secondary - Webb v Hillsborough County 175 So 874, 128 Fla 471

Charging percentage of costs to county fund

Under a statute providing that in the creation of a road district the county commissioners shall fix the proportion of the total cost of the contemplated improvements that shall be paid out of the county paving fund the remaining portion to be paid by funds raised by special assessments on the property within the district, the county commissioners are not required to fix a percentage of estimated cost as the amount to be paid out of the paving fund, since at the time of creating the district the cost had not been estimated and there might not be enough in the paving fund to pay a fixed percentage of the cost when it is finally determined The board can only carry out the provisions of the statute intelligently by fixing a specific sum that the paving fund should contribute to the whole improvement, or a specific amount per mile - State v Lancaster County, 191 N W 807, 110 Neb 635

Abandoned project

A statute providing that preliminary expenses of road improvement district in case of abandonment of project should be raised by levy on assessed value, is valid—Missouri Pac R Co v Sears 265 S W 653, 166 Ark 104

85. Ark—Road Improvement Dists Nos 1, 2, and 3 of Dallas County v Crary, 237 S W 441, 151 Ark 484
Fla—Whitney v Hillsborough County, 127 So 486 99 Fla 628
S C—Evans v Beattie, 135 S E 538, 137 S C 496
29 C J p 742 note 41

86. Miss—Locke v L N Dantzler Lumber Co, 81 So 175, 119 Miss 783

37 Mo—Embree v Kansas City-Liberty Boulevard Road Dist, 166 S W 282 257 Mo 593 affirmed 36 S Ct 317, 240 U S 242 60 L Ed 624
S C—Evans v Beattie 135 S E 538 137 S C 496

83 U S Road Improvement Dist No 1 of Franklin County Ark v Missouri Pac R Co Ark 47 S Ct 563 274 U S 188 71 L Ed 992, modifying C C A, 2 F 2d 340
29 C J p 742 note 46
Mode of assessment and apportionment of benefits see infra § 298

89. Ohio—Rogers v Johnson, 153 N E 167, 21 Ohio App 292

90 Fla—Hillsborough County v Temple Terrace Assets Co, 149 So 473, 111 Fla 368
29 C J p 742 note 48

91. Ark—Neteer v Dickinson & Watkins 239 S W 722 153 Ark 5
S C—Evans v Beattie 135 S E 538 137 S C 496
29 C J p 742 note 49

Particular statutes or provisions construed

Ark—Massey v Arkansas & Missouri Highway Dist in Pulaski County, 259 S W 387 163 Ark 63
Neb—Brown Real Estate Co v Lancaster County, 194 N W 897 110 Neb 665
N J—Paterson, N & N Y R Co v Town of Belleville 197 A 902 120 N J Law 1
Wash Hardin v Klickitat County 203 P 383 115 Wash 389 overruling 197 P 641, 115 Wash 384

Provision for reassessment

Where a statute authorizing issuance of bonds of a district for road improvement fixes a maximum amount which may be assessed on the district a further provision giving a receiver appointed to collect assessments power to make reassessments is not to be construed as authorizing assessments beyond the limit fixed but only within that limit —Guardian Savings & Trust Co v Road Improvement Dist No 2 of Benton County, C C A Ark, 290 F 152.

statutes must be strictly construed,[92] but the power once given includes all the incidents of the principal power.[93] Statutes relating to special road assessments should be so construed as to effectuate the purpose of the legislature in enacting them,[94] as determined from the plain and obvious meaning of the statute itself,[95] and, where a general law and a special act are inconsistent, they must, if possible, stand together, the former as the general law of the land, and the latter as the law of the particular case.[96]

Unless a contrary intention is manifest, the repeal of an assessment statute does not prevent proceedings theretofore commenced from being continued pursuant to the repealed statute,[97] and the courts will not imply a more extensive repeal than is contained in the repealing statute.[98] The question of whether or not a statute has the effect of repealing another statute or a provision therein is to be determined by the general rules of construction of statutes with reference to other statutes,[99] which are considered in the C J S. title Statutes §§ 365–370, also 59 C J. p. 1041 note 10–p. 1065 note 63. Provisions of the statute for the protection of the taxpayers are mandatory, whereas provisions for the guidance of the officers are generally held to be merely directory.[1]

§ 296. —— Amount and Purposes of Assessment

The assessment should be only for the amount needed to pay the cost of the improvement, including necessary incidental expenses, it may not exceed the amount authorized by statute, or the amount of the benefits. Assessments may be made only for purposes authorized by statute

The assessment should be only for the amount needed,[2] and must not exceed the amount authorized by statute,[3] although an assessment in excess of

92. Minn.—Sperry v. Flygare, 83 N. W. 177, 80 Minn. 325, 81 Am. St. R. 261, 49 L. R. A. 757.
N. Y.—Nehasane Park Ass'n v. Lloyd, 60 N. E. 741, 167 N. Y. 431.

93. Conn.—Cone v. Hartford, 28 Conn. 363.
N. C.—Raleigh v. Peace, 14 S. E. 521, 110 N. C. 32, 17 L. R. A. 330.

94. Ark.—Mitchell v. Jimmerson, 251 S. W. 490, 160 Ark. 248.

95. Ark.—Southern Surety Co. v. Dardanelle Road Improvement Dist. No. 1, 276 S. W. 1014, 169 Ark. 755, 42 A. L. R. 299.
Kan.—State v. Board of Com'rs of Shawnee County, 252 P. 466, 122 Kan. 514.

Statute held not retroactive
Ark.—Crowe v. Security Mortg. Co., 5 S. W. 2d 316, 176 Ark. 1130.

96. U. S.—Thornton v. Road Imp. Dist. No. 1 of Clark County, C. C. A. Ark., 291 F. 518, appeal dismissed, Road Imp. Dist. No. 1 of Clark County, v. Thornton, 46 S. Ct. 12, 269 U. S. 592, 70 L. Ed. 429.

97. N. J.—Anderson v. Cortelyou, 68 A. 118, 75 N. J. Law 532, reversing 63 A. 1095, 73 N. J. Law 427.
29 C. J. p. 742 note 52.

98. Cal.—Houston v. McKenny, 22 Cal. 550.
Ohio.—Cincinnati v. Seasongood, 21 N. E. 630, 46 Ohio St. 296.

99. Ark.—Arkansas-Louisiana Highway Improvement Dist. v. Parrish, 275 S. W. 898, 169 Ark. 549.

Statutes or provisions held repealed
(1) General statutory limit as to liability which could be created by improvement district was held repealed in so far as it was inconsistent with special act applicable to particular road district.—Road Improvement Dist. No. 4 of Saline County v. Ball, 281 S. W. 5, 170 Ark. 522.

(2) The right to appeal from an assessment for road improvements was repealed by a statute amending the section giving the right.—Adams County v. Scott, 200 P. 1112, 117 Wash. 85.

Statutes held not repealed
(1) Statute relating to delinquent taxes was held not to repeal statute providing procedure for collection of delinquent taxes in road improvement districts.—Beasley v. Hornor, 292 S. W. 130, 173 Ark. 295.

(2) Act requiring notice to landowner of road maintenance assessment was not repealed by act limiting amount assessable against lands in improvement district.—Turley v. Owen, 69 S. W. 2d 882, 188 Ark. 1067.

1. U. S.—Lyon v. Alley, D. C., 9 S. Ct. 180, 130 U. S. 177, 32 L. Ed. 899.
Mass.—Torrey v. Millbury, 21 Pick. 64.

2. Ind.—Locsnitz v. Seelinger, 25 N. E. 1037, 127 Ind. 422, petition overruled 26 N. E. 887, 127 Ind. 422.
29 C. J. p. 742 note 56.

Amount fixed by popular election
Where a road district is created under a petition of property owners and an election authorizing the issuance of bonds to pay for particular highway construction within the district, the duties of the county commissioners as respects the amount to be raised by assessment are purely ministerial.—Browning v. Hooper, Tex., 46 S. Ct. 141, 269 U. S. 396, 70 L. Ed. 330, reversing D. C., 3 F. 2d 160.

Improvements for which taxing authority not liable
Where county and state paved roadway twenty feet wide through street of city and paid cost thereof from state and federal funds, and where city paved remaining portions of streets, it was unlawful for city, under power granted in its charter to assess two thirds of cost of paving its streets against abutting property or owners to enforce in assessments against owners and property cost of paving roadway city not having paid such cost or being liable therefor.—City of Camilla v. Cochran, 128 S. E. 194, 160 Ga. 424.

For payment of obligations due next year
Where the interest on bonds of a road district was payable semiannually on the first days of March and September of each year the district's levy of a tax on the 1926 assessment to pay the interest of bonds falling due March 1, 1927, was not in violation of the statute limiting the amount to be collected to sums sufficient to discharge the obligations maturing for the current year, in view of the practice of assessing in the spring and collecting in the fall.—St. Louis & S. W. Ry. Co. v. Nattin, D. C. La., 27 F. 2d 766, affirmed 48 S. Ct. 438, 277 U. S. 157, 72 L. Ed. 830.

3. U. S.—Guardian Savings & Trust Co. v. Road Improvement Dist. No. 2 of Benton County, C. C. A. Ark., 290 F. 152.
Ohio.—Haughton v. Southard, 182 N. E. 652, 13 Ohio App. 25.
29 C. J. p. 712 note 57.

Annual levy of percentage of cost
Under a statute, creating road improvement district and authorizing the inclusion of interest on deferred installments of assessments at the rate of six per centum per annum, and another statute, limiting the assessment to four per centum for any one year, the annual levy of five per

the amount prescribed is invalid only as to the excess.[4] The estimate may be made so as to yield enough to pay not merely the actual cost of the improvement, but also the necessary incidental expenses of the proceedings[5] and interest on bonds sold to raise road funds.[6] In the absence of any legal limitation an assessment is not invalid because the estimate of benefits exceeds the cost of the improvement, including interest on bonds and necessary expenses, although there cannot be a collection of funds in excess of such cost.[7] In view of the rule discussed infra § 298, however, that assessments must be proportionate to the benefits, in no case may the assessment exceed the benefits[8] or the estimated benefits,[9] at least where the excess is so great as to make the assessment arbitrary and unreasonable.[10] Even for the purpose of paying interest on bonds, an assessment may not be made to exceed the benefits,[11] although interest on postponed assessments may be authorized in addition to assessed benefits.[12] A provision that the cost of the improvement or a stated percentage thereof shall be raised by the assessment does not authorize an assessment in excess of the benefits.[13] In the absence of a contrary provision, an assessment is not invalid because it exceeds the assessed[14] or market[15] value of the property before its increase in value by the improvement. The fact that the funds raised by an assessment prove insufficient to complete the improvement is not of itself a ground for setting aside the assessment.[16] The legislature may provide that, where an improvement already made is found to be available as part of the contemplated improvement as a whole, the assessment of benefits accruing from the prior improvement shall be deducted from the assessment of benefits accruing from the whole improvement,[17] such a statute not operating as an exemption of any part of the property in the district from taxation.[18]

centum of the cost of the improvement was valid, since the five per centum would not amount to more than the principal at four per centum and the interest for the installment of a given year—Massey v Arkansas & Missouri Highway Dist in Pulaski County, 259 S W 387, 163 Ark 63

Percentage of assessed valuation

Where the assessment may not exceed a stated percentage of the assessed valuation of the property, a provision that the cost of the improvement shall be raised by the assessment does not authorize an assessment which constitutes a greater percentage of the assessed valuation than that permitted—Haughton v Southard 182 N E 652, 43 Ohio App 25

4. Ark—McKee v English, 228 S W 43, 147 Ark 449
29 C J p 742 note 58

5. Ark—Kansas City Southern R Co v Road Impr Dist No 6, 215 S W 656, 217 S W 773, 139 Ark 424
29 C J p 713 note 61

6. Ark—Phillips v Tyronza and St Francis Road Improvement Dist, 224 S W 981, 145 Ark 487
29 C J p 743 note 62

7. Ark—Kansas City Southern R Co v Road Impr Dist No 6, 215 S W 656 139 Ark 424 dissenting opinion 217 S W 773, 139 Ark 424

8. Fla—Smith Bros v Williams, 126 So 367, 100 Fla 642, followed in Smith Bros Const Co v Hart, 126 So 373, 101 Fla 653, affirmed 136 So 399 101 Fla 653, and followed in Hillsborough County v Jeffords, 126 So 373 101 Fla 654
Ohio—Haughton v Southard 182 N E 652 43 Ohio App 25—Dix v Shoemaker, 24 Ohio N P,N S, 321 Tex—Foxworth-Galbraith Lumber Co v Realty Trust Co, Civ App, 110 S W 2d 1161, error dismissed
29 C J p 745 note 1

9. U S—Road Improvement Dist No 1 of Franklin County, Ark, v Missouri Pac R Co, Ark 47 S Ct 563 274 U S 188, 71 L Ed 992, modifying C C A 2 F 2d 340
Neb—State v Lancaster County, 194 N W 807 110 Neb 635
29 C J p 743 note 63

Where the project is abandoned, the statute permits taxes for payment of the preliminary expenses to be levied according to value of the property, provided the taxation does not exceed the anticipated benefits, and in such case an assessment that exceeds the amount of the assessed benefits is invalid only to the extent of the excess—Missouri Pac R Co v Walnut Ridge-Alicia Road Improvement Dist, 254 S W 1065 160 Ark 297, affirmed 45 S Ct 463, 267 U S 587, 69 L Ed 800

Assessment exceeding actual benefits

The fact that the anticipated benefits are not realized from the improvement is not of itself a ground for setting aside the assessments made—Hunt v Road Improvement Dist No 12 of Woodruff County, 270 S W 961, 168 Ark 266

Effect of legislative determination

While the assessment for preliminary expenses of an abandoned road improvement under a special act creating a district must not exceed the anticipated benefits, the legislative determination as to the amount of the benefits or its provision for the method of determining benefits is conclusive unless shown to be arbitrary—Western Crawford Road Improvement Dist v Missouri Pac R Co, 248 S W 563, 157 Ark 304 affirmed Missouri Pac R Co v West Crawford Road Imp Dist 45 S Ct 31, 266 U S 187, 69 L Ed 237

10. U S—Standard Pipe Line Co v Miller County Highway and Bridge Dist, Ark 48 S Ct 441, 277 U S 160, 72 L Ed 831, 58 A L R 126, reversing C C A Miller County Highway & Bridge Dist v Standard Pipe Line Co 19 F 2d 3, certiorari granted Standard Pipe Line Co v Miller County Highway & Bridge Dist 48 S Ct 122 275 U S 520, 72 L Ed 404

11. Ark—Summers v Cole 223 S W 721, 144 Ark 494—Pumphrey v Road Impr Dist No 1, 189 S W 59, 125 Ark 122

12. Ark—Phillips v Tyronza and St Francis Road Impr Dist, 224 S W 981 145 Ark 487—Summers v Cole, 223 S W 721 141 Ark 491

13. Neb—Brown Real Estate Co v Lancaster County, 191 N W 897 110 Neb 665
Ohio—Haughton v Southard, 182 N E 652 43 Ohio App 25

14. Cal—Municipal Improvement Co v Thompson, 258 P 955, 201 Cal 629

15. Cal—San Francisco Sulphur Co v Contra Costa County, 276 P 570, 207 Cal 1

16. Ark—Hunt v Road Improvement Dist No 12 of Woodruff County, 270 S W 961, 168 Ark 266

17. Ark—Sebastian County Road Impr Dist v Hocott, 217 S W 258, 141 Ark 301—Bennett v Johnson, 197 S W 1148, 130 Ark 507

18. Ark—Sebastian County Road Impr Dist v Hocott, 217 S W 258 141 Ark 301.

Purposes Assessments may be made only for purposes authorized by the statute[19] Special assessments may not be resorted to in order to meet ordinary governmental charges for construction and maintenance of roads,[20] or to pay for a highway not legally located[21] An elimination by the commissioners of a road specifically described in the statute creating the district as one of the roads to be improved is a usurpation of legislative power which will render the assessment void[22]

§ 297. —— Property Liable

The legislature, or local authorities to whom the power has been properly delegated, may determine what property will be benefited; and only property benefited may be assessed Personal property is not generally subject to local assessments.

In addition to, or as an incident of, the power to create road districts embracing the property benefited, as considered supra § 146, the legislature has power to determine, for purposes of assessment, what lands will be benefited by a proposed improvement,[23] and the power to make such a determination may be exercised by local authorities to whom the legislature has properly delegated it[24] Such

19. Iowa—Swayne v Board of Sup'rs of Polk County, 199 N W 329, 198 Iowa 100

Unapproved expenditures

The commissioners of a road improvement district of a county could not issue vouchers or levy tax to pay for services of attorney for district and for supervisor and keeper of district's records, where statute requiring annual approval of expenditures by county court and filing of annual commissioners' report with court was not complied with—Parkin Road Improvement Dist of Cross County v English, 136 S W 2d 190, 199 Ark 702

Substituted road

(1) Where the statute authorizing assessments contemplated the construction of the specific roads authorized by the preliminary proceedings a verbal arrangement by the road commissioners with the state highway commission for the substitution of a state highway in place of the road originally contemplated was unauthorized hence there was no foundation for the tax bills issued to pay the cost of the highway constructed pursuant to such arrangement—Platte City Ben Assessment Special Road Dist of Platte County v Couch, 8 S W 2d 1003, 320 Mo 489

(2) However, it has been held that the validity of an assessment of benefits of a road improvement district is not affected by the fact that the route had been materially changed without notice where the act creating the district in express terms authorized the county court to change the route—Bulloch v Dermott-Collins Road Improvement Dist 244 S W 327, 155 Ark 176 reversed on other grounds 44 S Ct 457 265 U S 570, 68 L Ed 1181

Road designated state highway

Assessment of special road district was not invalid as gift to state-wide road fund merely because the highway commission might designate the road to be constructed as part of the state highway system, where the state was only obliged to build a narrow, cheaper road—Johnson v Underwood 24 S W 2d 133, 324 Mo 578

New construction

Rebuilding of macadamized highway was held not "new construction," but repair of road, as regards assessment for cost thereof—Savage v Board of Com'rs of Hardin County, Ohio, 163 N E 34 29 Ohio App 1

Change of "type of road"

Rebuilding of macadamized road and construction of new culverts did not change "type of road" so as to authorize assessment for repair—Savage v Board of Com'rs of Hardin County, Ohio supra

After abandonment of project

(1) Tax bills issued after admitted abandonment of road improvement contemplated, are invalid—Platte City Ben Assessment Special Road Dist of Platte County v Couch, 8 S W 2d 1003, 320 Mo 489

(2) But the levy of an assessment to pay the preliminary expenses is proper—Missouri Pac R Co v Walnut Ridge-Alicia Road Improvement Dist, 254 S W 1065, 160 Ark 297 affirmed 45 S Ct 463, 267 U S 587 69 L Ed 800—Bulloch v Dermott-Collins Road Improvement Dist, 244 S W 327, 155 Ark 176, reversed on other grounds 44 S Ct 457, 265 U S 570, 68 L Ed 1184—Steele v Buchanan 232 S W 12, 149 Ark 91

20 La—Guaranty Bank & Trust Co v Ward Lumber Co, 109 So 496, 161 La 803

21. Me—Pierce v Franklin County 63 Me 252

22. Ark—Phillips v Tyronza and St Francis Road Impr Dist, 224 S W 981, 145 Ark 487

23. U S—Browning v Hooper, 46 S Ct 141, 269 U S 396, 70 L Ed 330 reversing, D C 3 F 2d 160
Ark—Green v Williams, 278 S W 5, 169 Ark 1198
29 C J p 744 note 79

Constitutionality of statute

A statute creating road improvement districts was not invalid as against contention that it violated constitution in that it authorized the taxation of homesteads—Road Improvement Dists Nos 1, 2 and 3 of Dallas County v Crary, 237 S W 444, 151 Ark 484

Conclusiveness

While such a declaration is not conclusive on the court, it will be regarded as highly persuasive, and to be rejected only in case it is palpably false—Milheim v Moffat Tunnel Improvement Dist, 211 P 649, 72 Colo 268

Information which legislature may use

State legislature, in determining what lands will be benefited by local public improvement and proportion in which lands will share in benefits may avail itself of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having same object—Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark 45 S Ct 136, 266 U S 379 69 L Ed 335 affirming 216 S W 113 156 Ark 116

Reestablishment of district

An order of the county court creating a road improvement district and declaring in the order that certain described land was not benefited and should not be assessed which order was not appealed from did not prevent the legislature from directing the reestablishment of the district as one under the general statutes, under which the exempt lands were assessed for benefits by a new assessment—Payne v Road Imp Dist No 1 of Howard County 232 S W 943, 149 Ark 491

24 Ohio—Spaulding v Wickham 138 N E 70, 105 Ohio St 434
Wash—Hardin v Klickitat County, 203 P 383, 115 Wash 389, overruling 197 P 644 115 Wash 384
29 C J p 744 note 80

Boundaries held proper

Police jury's determination of boundaries of road district where not including entire parish did not invalidate tax proceedings—St Louis & S W Ry Co v Nattin, D C La,

determination may not, however, be arbitrary or confiscatory [25]

Special assessments can be justified only on the ground that the contemplated improvement is local in its nature, and that the property taxed will be specially and peculiarly benefited [26] It is not essential, however, that the benefits to a particular tract sought to be assessed be direct or immediate,[27] although it is essential that they have a better basis than mere speculation or conjecture [28] Thus any lands in the territory tributary to a highway which is to be constructed or improved may be assessed, since they may be deemed to be specially benefited by the improvement,[29] whether or not such lands abut on the highway [30]

Under a statute subjecting abutting owners to assessment, where a strip of land abutting on the highway is occupied by a railroad having only a right of way, the owner of the fee in such strip is liable to assessment [31] An interurban railroad, however, operating its road along a highway under grant from the county is not assessable as an owner of property abutting on the highway,[32] nor is the owner of land on the side of a highway an abutting owner, where such land is separated from the highway by a canal, the fee of which is in the city [33] A statute authorizing assessment of lots fronting on the highway does not authorize assessment of a lot which is separated from a highway by a railroad running along the side of the highway [34] The fact that part of a road, as improved, extends over the line of an abutting tract of land does not invalidate the assessment of such land [35]

Particular types of property Personal property is not generally subject to local assessments,[36] even when it is classified by the legislature as real estate, the power to make such classification existing only when the character of the property is doubtful [37] Railroad property benefited by a highway may be assessed therefor the same as other property,[38] but an assessment of a railroad based in

27 F 2d 766, affirmed 48 S Ct 438, 277 U S 157, 72 L Ed 830

Right to change area

Under a statute to such effect the area or lands to be assessed may be changed on due notice thereof at any time before the assessment is made —Maxfield v Brooks, 144 N E 725, 110 Ohio St 566

District created under popular election

Where a road district is created under a petition of property owners and an election authorizing the issuance of bonds to pay for particular highway construction, the duties of the commissioners' court as to the lands to be subjected to the charge are purely ministerial, and confined to carrying out will of petitioners —Browning v Hooper, Tex, 46 S Ct 141, 269 U S 396, 70 L Ed 330, reversing, D C 3 F 2d 160

As dependent on ratio of total assessment to cost

To assess property not abutting for improvement of intercounty highway, it is unnecessary that amount of total assessment be greater than ten per cent of cost —Matthews v Huwe 19 Ohio App 113, error dismissed 111 N E 610, 109 Ohio St 628

25 U S — Branson v Bush Ark, 40 S Ct 113, 248 U S 377, 64 L Ed 215, reversing 248 F 377, 160 C C A 387

Ark —Swepston v Avery, 177 S W 424, 118 Ark 294

Action held not unreasonable or arbitrary

(1) Statute providing for assessment of district within mile of road improvement was held fair and reasonable —Rogers v Johnson, 153 N E 167, 21 Ohio App 292

(2) Other cases —Marshall v Baugh 201 S W 808, 133 Ark 64— 29 C J p 714 note 81 [a]

Separate improvements grouped together

(1) Separate and distinct improvements cannot be grouped together so as to tax lands affected by one improvement for the purpose of paying the cost of another improvement —Road Improvement Dists Nos 1 2, and 3 of Dallas County v Crary 237 S W 411 151 Ark 484

(2) Thus the legislature may not form practically all of a county into a highway district and authorize special assessments to pay for any roads that the commissioners may deem it advisable to improve, since such assessments would manifestly not be confined to single improvements — Swepston v Avery, 177 S W 424, 118 Ark 294

26. Colo —Milheim v Moffat Tunnel Improvement Dist 211 P 649, 72 Colo 268

29 C J p 713 note 78

27. U S - Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark, 45 S Ct 136, 266 U S 379, 69 L Ed 335, affirming 246 S W 113, 156 Ark 116

Ark —Standard Pipe Line Co v Index-Sulphur Drainage Dist 293 S W 1021 173 Ark 372, error dismissed Standard Pipe Line Co v Commissioners of Index Sulphur Drainage Dist, 48 S Ct 17, 72 L Ed 1015, and 48 S Ct 323, 276 U S 601 72 L Ed 725, and certiorari granted 48 S Ct 420, 276 U S 614, 72 L Ed 732, certiorari dismissed 49 S Ct 17, 278 U S 558, 73 L Ed 504

28. U S —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark 45 S Ct 136, 266 U S 379 69 L Ed 335, affirming 246 S W 113, 156 Ark 116

29 Minn - Murray v Smith 136 N W 5 117 Minn 490, 40 L R A ,N S, 173 Ann Cas 1913D 518—Sperry v Flygare 83 N W 177, 80 Minn 325, 81 Am S R 261 49 L R A 757

29 C J p 742 note 39

30. Cal —McCray v Manning, 133 P 17, 22 Cal App 25

31. Ohio - Licking County v Bolin, 124 N E 45 99 Ohio St 117

32 Ohio — Dayton & Troy Electric R Co v Scott 126 N E 879, 101 Ohio St 13

33. Ohio —Licking County v Bolin, 124 N E 15 99 Ohio St 117

34. Pa —Philadelphia v Eastwick, 45 Pa 75

35. N Y — Oak Hill Country Club v Town of Pittsford, 190 N E 321 264 N Y 133 reversing 266 N Y S 995 240 App Div 802 affirming 252 N Y S 101, 140 Misc 863, and reargument denied 191 N E 620, 264 N Y 672

36. Ark —Whaley v Northern Road Improvement Dist of Arkansas County 240 S W 1, 152 Ark 573, 24 A L R 931

Kan Schaff v Roberts, 215 P 447, 113 Kan 423

29 C J p 743 note 70

37. Ark —Arkansas Natural Gas Co v Hope Fulton & Emmet Road Impr Dist Com'rs, 218 S W 664, 142 Ark 351

38. U S --Road Improvement Dist No 1 of Franklin County, Ark, v Missouri Pac R. Co, C C A Ark.,

part on rolling stock and other personalty is invalid as discriminatory where all other assessments are confined to real property [39] A railroad's right of way has been held not to be "real estate" so as to be subject to special assessment as such,[40] but, on the other hand, it has been held subject to special assessment within the phrase "real property and the improvements thereon"[41] A pipe line has, on the one hand, been held subject to special assessment,[42] and on the other hand not to be subject thereto [43] Coal in place owned separately with right of way on and under the land for mining is subject to assessment as "realty"[44] Under some statutes public property is exempt from local assessment,[45] while under others it is not [46] Exemption from taxation under a general law does not necessarily exempt from local assessments [47] Under an appropriate statute a municipality may agree in writing with the owner of land taken for a road that it will assume any betterments assessed on the remainder of his land [48]

§ 298. —— Mode of Assessment; Apportionment of Benefits

Assessments must be proportionate to the benefits, and assessments on different tracts proportionate to each other, and any method of assessment or apportionment of the benefits which is arbitrary, discriminatory, or confiscatory is invalid

The legislature may itself determine in what proportions the lands within the district will share in the benefits,[49] or the power may be exercised by

2 F 2d 340 modified on other grounds 47 S Ct 563, 274 U S 188 71 L Ed 992

Kan Atchison, T & S F Ry Co v Board of Com'rs of Anderson County, 213 P 282, 120 Kan 240 rehearing denied 215 P 157, 120 Kan 610—Union Pac R Co v Board of Com'rs of Jefferson County, 217 P 315 114 Kan 156 Schaff v Roberts 215 P 447, 113 Kan 423

29 C J p 713 note 72

Increased traffic as benefit

Benefits to railroad property to warrant assessment may consist of gains from increased traffic reasonably expected to result from improvement—Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County Ark, 45 S Ct 136, 266 U S 379, 69 L Ed 335 affirming 246 S W 113, 156 Ark 116

Creation of competition as negativing benefits

It cannot be said as a matter of law that, because a paved road parallels a railway for a few miles, and because of the possibility that motor trucks and omnibuses may use the paved road as competitors of the railway, the latter can derive no special benefit from the construction of the paved road—Union Pac R Co v Board of Com'rs of Jefferson County, 217 P 315, 114 Kan 156

39. U S—Road Improvement Dist No 1 of Franklin County, Ark, v Missouri Pac R Co, Ark, 47 S Ct 563 274 U S 188, 71 L Ed 992, modifying, C C A, 2 F 2d 340

Kan Schaff v Roberts, 215 P 447, 113 Kan 423

40 Iowa—Chicago, M & St P Ry Co v Board of Sup'rs of O Brien County, 202 N W 370, 199 Iowa 457

Under a former Iowa statute, a railroad's right of way was not subject to assessment for highway drainage district improvements—Great Northern Ry Co v Board of Sup'rs of Plymouth County, 196 N W 284, 197 Iowa 903

41. Kan—Schaff v Roberts, 215 P 447, 113 Kan 423

42. U S—Miller County Highway & Bridge Dist v Standard Pipe Line Co, C C A Ark, 19 F 2d 3, certiorari granted Standard Pipe Line Co v Miller County Highway & Bridge Dist, 48 S Ct 122, 275 U S 520, 72 L Ed 401 reversed on other grounds 48 S Ct 411, 277 U S 160, 72 L Ed 831, 58 A L R 126

Ark—Standard Pipe Line Co v Index-Sulphur Drainage Dist, 293 S W 1031, 173 Ark 372, error dismissed Standard Pipe Line Co v Commissioners of Index Sulphur Drainage Dist, 48 S Ct 17, 72 L Ed 1015, and 48 S Ct 323, 276 U S 601, 72 L Ed 725 and certiorari granted 48 S Ct 420, 276 U S 614 72 L Ed 732, certiorari dismissed 49 S Ct 17, 278 U S 558, 73 L Ed 504

43. Ark—Arkansas Natural Gas Co v Hope, Fulton & Emmet Road Impr Dist Comrs, 218 S W 664, 142 Ark 351

44. Ohio—Ross v Short Creek Coal Co, 159 N E 583, 117 Ohio St 599

45. Colo—Moffat Tunnel Improvement Dist v Housing Authority of City and County of Denver, 125 P 2d 138, 109 Colo 357

29 C J p 713 note 74

Property belonging to the United States at the time of road improvement cannot be assessed for such improvement even after it has been alienated—Lee v Osceola & Little River Road Improvement Dist No 1, of Mississippi County, Ark, 45 S Ct 620, 268 U S 643, 69 L Ed 1133 reversing Lee v Osceola & Little River Road Improvement Dist, 257 S W 370, 162 Ark 4

Mandatory of the federal government

An irrigation corporation was held not a "mandatory of the federal government" within a statute exempting land belonging to United States or mandatory of government thereof from assessments for improvements—Billings Bench Water Ass'n v Yellowstone County, 225 P 996, 70 Mont 401

46 U S—Warner v City of New Orleans, La, 87 F 829, 31 C C A 238, certiorari granted City of New Orleans v Warner, 19 S Ct 884, 172 U S 648, 43 L Ed 1179, affirmed 20 S Ct 280, 176 U S 92, 44 L Ed 385

29 C J p 743 note 75

47 U S—Illinois Cent R Co v Decatur, Ill 13 S Ct 293, 147 U S 190, 37 L Ed 132

29 C J p 743 note 76

Homesteads in special assessment districts are not exempt from taxation for payment of salaries, maintenance, and upkeep of such special assessment districts under constitutional provision exempting homesteads from all taxation other than special assessments for benefits—State ex rel Ginsberg v Dreka, 185 So 616, 135 Fla 463

48 Mass—Janvrin v Poole 63 N E 1066, 181 Mass 463

49 U S—Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark, 45 S Ct 136, 266 U S 379, 69 L Ed 335, affirming 246 S W 113, 156 Ark 116—Browning v Hooper, D C Tex, 3 F 2d 160, reversed on other grounds 46 S Ct 141, 269 U S 396, 70 L Ed 330

Wash—Hardin v Klickitat County, 203 P 383, 115 Wash 389 overruling 197 P 644, 115 Wash 384

Conclusiveness of determination

A legislative provision for the method of assessment is conclusive of the fact that assessments made thereunder are proportionate to the benefits, unless the method is shown on its face to be arbitrary and unreasonable—Western Crawford Road

local authorities to whom it has been delegated[50] A fundamental requirement of a special assessment is that it be proportionate to the benefits,[51] and any special assessment which ignores or violates this principle is invalid.[52] Further, an assessment of benefits to particular property must be proportionate to assessments of benefits to other property,[53] hence the same standard or method of estimating the benefits must be applied to all property within the same category[54] In general, any method of assessment or apportionment which is arbitrary, unreasonable, discriminatory, or confiscatory is invalid[55] However, the mode of assessment and the rule of apportioning it are largely matters of dis-

Improvement Dist v Missouri Pac R Co, 248 S W 563, 157 Ark 304, affirmed Missouri Pac R Co v West Crawford Road Imp Dist, 45 S Ct 31, 266 U S 187, 69 L Ed 237

Right or duty

Although permissible, it is not essential that a statute creating a road improvement district specify a basis for assessment of property, it being sufficient to provide for assessment according to benefits—Davis v Road Improvement Dist No 7 of Little River County, 257 S W 724, 162 Ark 98

50 Ark—Davis v Road Improvement Dist No 7 of Little River County, 257 S W 724, 162 Ark 98
Pa—Township of Spring Garden v Logan, 52 York Leg Rec 21

51. U S—Standard Pipe Line Co v Miller County Highway & Bridge Dist, Ark, 48 S Ct 441, 277 U S 160, 72 L Ed 831, 58 A L R 126, reversing C C A Miller County Highway & Bridge Dist v Standard Pipe Line Co, 19 F 2d 3, certiorari granted Standard Pipe Line Co v Miller County Highway & Bridge Dist 48 S Ct 122, 275 U S 520, 72 L Ed 404—Oregon Short Line R Co v Clark County Highway Dist, D C Idaho, 22 F 2d 681—Missouri Pac R Co v Road Improvement Dist No 1 of Hot Spring County, C C A, Ark, 288 F 502
Fla—Parrish v Hillsborough County, 123 So 830 98 Fla 430, 436
Mich—Hatch v Michigan Cent R Co, 212 N W 950, 238 Mich 381
Ohio—Rogers v Johnson, 153 N E 167, 21 Ohio App 292

52. U S—Thornton v Road Imp Dist No 1 of Clark County C C A Ark, 291 F 518, appeal dismissed Road Imp Dist No 1 of Clark County v Thornton, 46 S Ct 12, 269 U S 592, 70 L Ed 429
Fla—Smith Bros v Williams, 126 So 367 100 Fla 642, followed in Smith Bros Const Co v Hart, 126 So 373, 101 Fla 653, affirmed 136 So 399, 101 Fla 653, and followed in Hillsborough County v Jeffords 126 So 373, 101 Fla 654—Parrish v Hillsborough County, 123 So 830, 98 Fla 430, 436
Iowa—Crouse v Mackey, 185 N W 906, 192 Iowa 926
Mich—Hatch v Michigan Cent R Co, 212 N W 950, 238 Mich 381
29 C J p 745 note 98

53. U S—Kansas City Southern Ry Co v May, C C A Ark, 2 F 2d 680—Thornton v Road Imp Dist No 1 of Clark County, C C A Ark, 291 F 518, appeal dismissed Road Imp Dist No 1, of Clark County v Thornton, 46 S Ct 12, 269 U S 592, 70 L Ed 429
Fla—Parrish v Hillsborough County, 123 So 830, 98 Fla 430 436

Properties assessed for separate improvements

The fact that, in constructing a highway, the highway is divided into separate sections, each of which constitutes a separate improvement, so that the benefits assessed against property abutting on one section might be disproportionate to the benefits assessed against property abutting on another section, although actually the benefits were equal and similar, does not invalidate the assessment—Theobald v Board of Com'rs of Fayette County, 162 N E 268, 119 Ohio St 54, error dismissed Theobald v Board of Com'rs of Fayette County, Ohio, 49 S Ct 93, 278 U S 572, 73 L Ed 513

54. U S—Road Improvement Dist No 1 of Franklin County, Ark, v Missouri Pac R Co, C C A Ark, 2 F 2d 340, modified on other grounds 47 S Ct 563, 274 U S 188, 71 L Ed 992
Kan—Atchison, T & S F Ry Co v Board of Com'rs of Anderson County, 243 P 282, 120 Kan 240, rehearing denied 245 P 157, 120 Kan 610—Schaff v Roberts 215 P 447, 113 Kan 423—Missouri Pac R Co v Board of Com'rs of Mitchell County, 204 P 729, 110 Kan 582

55. U S—Standard Pipe Line Co v Miller County Highway & Bridge Dist, Ark, 48 S Ct 441, 277 U S 160, 72 L Ed 831, 58 A L R 126, reversing, C C A, Miller County Highway & Bridge Dist v Standard Pipe Line Co, 19 F 2d 3, certiorari granted Standard Pipe Line Co v Miller County Highway & Bridge Dist, 48 S Ct 122, 275 U S 520, 72 L Ed 404—Road Improvement Dist No 1 of Franklin County, Ark v Missouri Pac R Co, Ark, 47 S Ct 563, 274 U S 188, 71 L Ed 992, modifying, C C A, 2 F 2d 340—Kansas City Southern Ry Co v May, C C A Ark, 2 F 2d 680—Thornton v Road Imp Dist No 1 of Clark County, C C A Ark, 291 F 518, appeal dismissed (1925) Road Imp Dist No 1, of Clark County v Thornton, 46 S Ct 12, 269 U S 592, 70 L Ed 429—Missouri Pac R Co v Road Improvement Dist No 1 of Hot Spring County, C C A Ark, 288 F 502—Road Improvement Dist No 2 of Conway County v Missouri Pac R Co, C C A Ark, 275 F 600
Ark—Road Improvement Dist No 6 of Lawrence County v St Louis-San Francisco Ry Co, 262 S W 26, 164 Ark 442
Fla—Smith Bros v Williams, 126 So 367, 100 Fla 642, followed in Smith Bros Const Co v Hart, 126 So 373, 101 Fla 653, affirmed 136 So 399, 101 Fla 653, and followed in Hillsborough County v Jeffords, 126 So 373, 101 Fla 654—Parrish v Hillsborough County, 123 So 830, 98 Fla 430, 436
Mich—Hatch v Michigan Cent R Co, 212 N W 950, 238 Mich 381
29 C J p 745 note 99

Assessment held valid

A statute containing a legislative finding that lands along a particular road improvement project which were in both the road district and in a subdistrict, would receive no greater benefit per acre than lands in other part of the district equally distant from the approved road was held not arbitrary, the obvious purpose being to relieve landowners whose lands were in both districts from paying more than others whose lands were not and were no nearer the road—Thompson v Mann, 252 S W 4, 159 Ark 391

Assessments held invalid

(1) Assessment by road district of entire cost of road twenty-six miles long against land lying along the east eleven miles, with no assessment of benefits on lands along the west fifteen miles is invalid—Thornton v Road Imp Dist No 1 of Clark County, C C A Ark, 291 F 518, appeal dismissed 46 S Ct 12, 259 U S 592, 70 L Ed 429

(2) Where the chairman of the county board testified that in assessing the railroad company's property for cost of hard-surfaced road the board considered that the company had received several thousand dollars for hauling material for its construction, that many thousand tons of alfalfa raised in the past could not be marketed by reason of the public road conditions, and that the construction of the road would en-

cretion,[56] and the mere fact that the mode of assessment or apportionment is not altogether fair[57] or does not achieve absolute equality[58] does not render it invalid; it is not invalid unless it is palpably arbitrary or a plain abuse of discretion[59]

As a general rule, special assessments are valid when, and only when, imposed proportionally on the whole of the land benefited,[60] in the district indicated[61] Thus the omission of some of the land benefited will ordinarily invalidate the assessment,[62] but a landowner cannot complain because only a part of a tract belonging to him is assessed, so long as the assessment does not exceed the benefits[63] Where other lands are benefited, a statute providing that the entire cost of improving a rural highway shall be assessed against abutting property will be held invalid,[64] but, under a statute so providing, the entire cost of additional improvements in a district may be assessed to lands newly added to the district to the exclusion of lands included in the original district which had been assessed for the earlier improvements.[65]

Subject to the foregoing rules, it is proper, and in some instances essential, in apportioning the benefits to give due consideration to such elements as the value of the respective tracts[66] as enhanced

hance the railroad company's earnings for freight charges, it was held that an assessment based on these grounds when applied to the railroad property alone was arbitrary and unjust —Missouri Pac R Co v Board of Com'rs of Mitchell County, 204 P 729, 110 Kan 582

56. Cal —Municipal Improvement Co v Thompson, 258 P 955, 201 Cal 629
Ohio —Rogers v Johnson, 153 N E 167, 21 Ohio App 292
Wash —Elston v King County, 34 P 2d 906, 178 Wash 210
29 C J p 744 note 89

57 U S —Miller County Highway & Bridge Dist v Standard Pipe Line Co, C C A Ark, 19 F 2d 3, certiorari granted Standard Pipe Line Co v Miller County Highway & Bridge Dist, 48 S Ct 122, 275 U S 520, 72 L Ed 404, reversed on other grounds 48 S Ct 441, 277 U S 160 72 L Ed 831, 58 A L R 126

58 Colo — Milheim v Moffat Tunnel Improvement Dist, 211 P 649 72 Colo 268
Mich —Hatch v Michigan Cent R Co, 212 N W 950, 238 Mich 381

59 U S —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark, 45 S Ct 136, 266 U S 379, 69 L Ed 335, affirming 246 S W 113, 156 Ark 116 —Miller County Highway & Bridge Dist v Standard Pipe Line Co C C A Ark, 19 F 2d 3, certiorari granted Standard Pipe Line Co v Miller County Highway & Bridge Dist, 48 S Ct 122, 275 U S 520, 72 L Ed 404, reversed on other grounds 48 S Ct 441, 277 U S 160, 72 L Ed 831, 58 A L R 126—Oregon Short Line R Co v Clark County Highway Dist, D C Idaho, 22 F 2d 681—Browning v Hooper, D C Tex, 3 F 2d 160, reversed on other grounds 46 S Ct 141, 269 U S 396, 70 L Ed 330—Gulf & S I R Co v Ducksworth, C C A Miss, 286 F 645, affirming, D C, Gulf & S I R Co v Duckworth, 280 F 733
Cal — Municipal Improvement Co v Thompson, 258 P 955, 201 Cal 629
Ohio —Theobald v Board of Com'rs of Fayette County, 162 N E 268 119 Ohio St 54, error dismissed Theobald v Board of Com'rs of Fayette County, Ohio, 49 S Ct 93, 278 U S 572, 73 L Ed 513—Rogers v Johnson, 153 N E 167, 21 Ohio App 292

60. U S —Oregon Short Line R Co v Clark County Highway Dist, D C Idaho, 22 F 2d 681
Fla —Whitney v Hillsborough County, 127 So 486, 99 Fla 628
29 C J p 744 note 90

61. Ind —Goodrich v Winchester & Deerfield Turnp Co, 26 Ind 119
29 C J p 744 note 91

62. N J —Kilburn v Essex Public Road Bd, 37 N J Law 273

Government-owned property

Statute charging entire highway improvement cost against abutting property other than government-owned property, where the latter would be considerably benefited, is invalid —Parrish v Hillsborough County 123 So 830, 98 Fla 430, 436

Property exempt from general taxation

Assessments of benefits by road improvement district on railroad property, which were made on the basis of a per cent of the assessed value for general taxation, instead of on the basis of benefits, were held void in view of the constitutional provision exempting public property, churches, etc, from general taxation, since such property not being assessed for general taxation, would, on the assessed valuation basis, be relieved of its just share of the cost of the improvement —Missouri Pac R Co v Road Improvement Dist No 1 of Hot Spring County, C C A Ark, 288 F 502

Separate improvement

Assessments against abutting property on one side of railroad tracks for improvements on that side were not invalid because county commissioners neglected their duty by failing properly to assess property on other side of railroad tracks for the improvement on that side —Webb v Scott, 176 So 442, 129 Fla 111

63. N J —State v Essex Public Road Bd, 46 N J Law 126

64. Ky —Conger v Graham, 11 S W 467, 11 Ky L 12
29 C J p 741 note 38

65. U S —Thornton v Road Imp Dist No 1 of Clark County, C C A Ark, 291 F 518, appeal dismissed Road Imp Dist No 1 of Clark County v Thornton, 46 S Ct 12, 269 U S 592, 70 L Ed 429

66. U S —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark, 45 S Ct 136, 266 U S 379, 69 L Ed 335, affirming 246 S W 113, 156 Ark 116—Oregon Short Line R Co v Clark County Highway Dist, D C Idaho, 22 F 2d 681—Gulf & S I R Co v Ducksworth, C C A Miss 286 F 645, affirming, D C, 280 F 733
Mo —Mudd v Wehmeyer, 19 S W 2d 891, 323 Mo 704
29 C J p 744 note 92

Evaluation of railroad property

(1) Improvements on land constituting a railroad right of way such as grading, ballast, rails and ties in place, culverts, signal posts, fences, and the like, are properly included in determining the value of railway real property and improvements thereon —Union Pac R Co v Board of Com'rs of Jefferson County, 217 P 315, 114 Kan 156—Schaff v Roberts, 215 P 447, 113 Kan 423

(2) The fact that in assessing railroad property the value of the franchises is taken into consideration is not an adding of personal property value to the value of the real property so as to invalidate the assessment —Branson v Bush, Ark, 40 S Ct 113, 251 U S 182, 64 L Ed 215, reversing 248 F 377, 160 C C A 387

(3) But it has been held that, where all railroad property real, personal, and mixed, is classed as personal property for the purpose of general taxation, the state tax commission's valuation of all such prop-

by the improvement,[67] or their position or location,[68] area,[69] or frontage[70]

Classification and zoning An assessment is not arbitrary or unreasonable because a district is divided into zones and the lands in each zone assessed at a sum per acre or percentage of valuation different from that assessed in the other zones, if such system is adopted on a proper consideration of the various elements affecting the benefits[71] So, too, an assessment may be based on a combination of the zone and area methods, whereby each parcel in a zone is assessed according to the relation of its area to the whole area of the zone, instead of in proportion to the benefits to each parcel in such zone[72] Provided it is not arbitrary or discriminatory, a classification of the various kinds of property as a basis on which to assess benefits is permissible[73] Thus it is not necessarily improper to provide different bases for assessment on urban and rural lands,[74] and still another basis for assessment of roads, telegraphs, and telephones[75]

Assessed valuation as basis The fact that a special assessment is made the whole or a percentage of the value of the property as assessed for general taxation does not imply that it is not also according to the benefits to be derived, and does not of itself render the assessment invalid,[76] and a legislative direction for such method of assessment is deemed

erty constructively within the limits of a road benefit district is not a proper basis for fixing the valuation of a railway company's 'real property and improvements thereon' —Atchison, T & S F Ry Co v Board of Com'rs of Anderson County, 243 P 282, 120 Kan 210, rehearing denied 245 P 157, 120 Kan 610—Schaff v Roberts, 215 P 117, 113 Kan 423

67. Ark—Patterson v Road Improvement Dist No 3, 219 S W 341, 143 Ark 44

Kan—Hamm v Board of Com'rs of Jefferson County, 214 P 105, 113 Kan 301

68. U S—Oregon Short Line R Co v Clark County Highway Dist, D C Idaho, 22 F 2d 681

Kan—Hamm v Board of Com'rs of Jefferson County, 214 P 105, 113 Kan 301

29 C J p 744 note 94

Distance from particular terminal

A plan of apportionment was not objectionable because failing to assess landowners remote from the main market center more heavily than those nearer the center, on the theory that the remote owners used a longer sector of the road in traveling to and from the center, for roads are not merely to connect one center, but to connect with the whole interminable system of highways, and the words "location," "proximity," and "accessibility," in the statute declaring what matters should be considered in apportioning benefits, refer to the improvement as a whole, and not to an assumed terminal point or base or destination, either within or without the line of highway—Crouse v Mackey, 185 N W 906, 192 Iowa 926

Distance from road

Where the statute required the assessments to be made on due consideration of proximity and accessibility to the improvement, a plan of apportionment where lands a mile and a half from the improvement were assessed at the same rate as lands abutting on the highway, was erroneous—Crouse v Mackey, supra

69. U S—Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark, 46 S Ct 136, 266 U S 379, 69 L Ed 335 affirming 246 S W 113, 156 Ark 116—Oregon Short Line R Co v Clark County Highway Dist, D C Idaho, 22 F 2d 681

Mo—Mudd v Wehmeyer, 19 S W 2d 891, 323 Mo 701

29 C J p 744 note 95

Uniform tax per acre

The fact that a special highway tax is assessed in the same amount on each acre within the taxing district does not make it invalid—Columbia Inv Co v Long Branch and Lakeside Special Road and Bridge Dist, D C Fla, 281 F 342

70 U S—Oregon Short Line R Co v Clark County Highway Dist, D C Idaho, 22 F 2d 681

Fla—Evans v Hillsborough County, 186 So 193, 135 Fla 471

Mo—Mudd v Wehmeyer, 19 S W 2d 891, 323 Mo 701

29 C J p 745 note 96

Express authorization required

Assessments by the 'front foot' rule are void when not expressly authorized by statute

Conn—Clapp v Hartford, 35 Conn 66

N J—Reynolds v Paterson, 5 A 896, 48 N J Law 435

Applicability to rural or agricultural lands

An act providing for assessing the cost of highway construction solely on the basis of the front-foot rule might not be capable of constitutional application to rural or agricultural lands by reason of the great diversity in shape, area, character, use, value and quantum of benefits conferred, although it might be capable of application to lands outside municipal boundaries, which have been subdivided and platted into blocks and lots fronting on streets or highways, or otherwise possess some such uniformity, in shape, width, and depth as usually characterizes property within city limits—Parrish v Hillsborough County, 123 So 830, 98 Fla 430, 436

71. Ark—Selz v McGehee East & West Highway Dist, 284 S W 733, 171 Ark 423—Ford v Plum Bayou Road Improvement Dist, 258 S W 613, 162 Ark 475—Sale v Road Improvement Dist No 16 of Woodruff County, 246 S W 843, 156 Ark 501—Bulloch v Dermott-Collins Road Improvement Dist, 244 S W 327, 155 Ark 176, reversed on other grounds 44 S Ct 457, 265 U S 570, 68 L Ed 1184—Desha Road Improvement Dist No 2 v Stroud, 241 S W 882, 153 Ark 587—Road Improvement Dists Nos 1, 2, and 3 of Dallas County v Crary, 237 S W 444, 151 Ark 484

29 C J p 745 note 2

72 Wash—Kaufman v McMillan, 175 P 309, 103 Wash 690—Lindstrom v McMillan, 168 P 463, 98 Wash 608

73 Ark—Bulloch v Dermott-Collins Road Improvement Dist, 244 S W 327, 155 Ark 176, reversed on other grounds 44 S Ct 457, 265 U S 570, 68 L Ed 1184

Iowa—Crouse v Mackey, 185 N W 906, 192 Iowa 926

74 Ark—Selz v McGehee East & West Highway Dist, 284 S W 733, 171 Ark 423

29 C J p 745 note 3

75. Ark—Bulloch v Dermott-Collins Road Improvement Dist, 244 S W 327, 155 Ark 176, reversed on other grounds 44 S Ct 457, 265 U S 570, 68 L Ed 1184

76. Ark—Standard Pipe Line Co v Index-Sulphur Drainage Dist, 293 S W 1031, 173 Ark 372, error dismissed Standard Pipe Line Co v Commissioners of Index Sulphur Drainage Dist, 48 S Ct 17, 72 L Ed 1015, and 48 S Ct 323, 276 U S 601, 72 L Ed 725, and certiorari granted 48 S Ct 420, 276 U S 614,

to be a determination that it will effect a just apportionment of the benefits.[77] However, if an assessment resulting from such method is disproportionate to the benefits, arbitrary, and discriminatory, it is invalid.[78]

§ 299. —— Proceedings for Assessment

Proceedings for the levy of an assessment must conform to the requirements of the governing statute.

Proceedings for the levy of an assessment must conform to the requirements of the governing statute,[79] such as, for example, requirements pertaining to the petition[80] and consent[81] of landowners. The assessment must be made on proper authority,[82] by disinterested[83] commissioners, viewers, or assessors.[84] In the making of the assessment a

72 L Ed 732, certiorari dismissed 49 S Ct 17, 278 U S 558, 73 L Ed 504—Selz v McGehee East & West Highway Dist, 284 S W 733, 171 Ark 423

For preliminary expenses on abandonment

(1) Where an improvement project in a road improvement district was abandoned, it was proper for the chancery court in proceedings by creditors to ascertain their claims to levy the assessment for preliminary expenses, in accordance with the provision of the statute under which the district was created, on the valuation assessed for county purposes —Missouri Pac R Co v Walnut Ridge-Alicia Road Improvement Dist, 251 S W 1065, 160 Ark 297, affirmed 45 S Ct 463, 267 U S 587, 69 L Ed 800—Western Crawford Road Improvement Dist v Missouri Pac R Co 248 S W 563 157 Ark 304, affirmed Missouri Pac R Co v West Crawford Road Imp Dist, 45 S Ct 31, 266 U S 187, 69 L Ed 237

(2) In such a situation, levying an assessment not on the basis of assessed valuation for county purposes, but on the basis of benefits is error —Neteer v Dickinson & Watkins, 239 S W 722, 153 Ark 5

(3) But, where construction of road improvement had proceeded beyond preliminary work before abandonment, preliminary expenses were merged into general cost of improvement, so that the statute providing for payment of such expenses by levy of tax on assessed value of all property in district for county and state taxation no longer applied, and only taxes based on benefits could be levied —Wofford v Bettis, 275 S W 903, 169 Ark 487

In same manner as ordinary taxes

A provision that a special tax be levied and collected in the same manner as ordinary taxes is not unconstitutional —Municipal Improvement Co v Thompson, 258 P 955, 201 Cal 629

77. Ark —Standard Pipe Line Co v Index-Sulphur Drainage Dist, 293 S W 1031, 173 Ark 372, error dismissed Standard Pipe Line Co v Commissioners of Index Sulphur Drainage Dist, 48 S Ct 17, 72 L Ed 1015, and 48 S Ct 323, 276 U S 601, 72 L Ed 725, and certiorari granted 48 S Ct 420, 276 U S 614 72 L Ed 732, certiorari dismissed 49 S Ct 17, 278 U S 558, 73 L Ed 501—Western Crawford Road Improvement Dist v Missouri Pac R Co, 248 S W 563 157 Ark 304, affirmed Missouri Pac R Co v West Crawford Road Imp Dist, 45 S Ct 31, 266 U S 187, 69 L Ed 237

78. U S —Missouri Pac R Co v Road Improvement Dist No 1 of Hot Spring County, C C A Ark, 288 F 502

Implied admission of fairness of valuation

Where property owner did not complain of assessed valuation of its property for state and county purposes, it must be assumed to have considered it just and reasonable, hence it could not complain that such valuation was discriminatory when used as basis for assessment for road districts —Standard Pipe Line Co v Index-Sulphur Drainage Dist, 293 S W 1031, 173 Ark 372, error dismissed Standard Pipe Line Co v Commissioners of Index Sulphur Drainage Dist, 48 S Ct 17, 72 L Ed 1015, and 48 S Ct 323, 276 U S 601, 72 L Ed 725, and certiorari granted 48 S Ct 420 276 U S 614, 72 L Ed 732, certiorari dismissed 49 S Ct 17, 278 U S 558, 73 L Ed 504

79. Fla —Parrish v Hillsborough County, 123 So 830, 98 Fla. 430, 436
29 C J p 745 note 8

Strict observance is required, however worthy the project —Platte City Ben Assessment Special Road Dist of Platte County v Couch, 8 S W 2d 1003, 320 Mo 489

Separate assessment for lateral roads

Where property in a road improvement district contiguous to lateral roads was separately assessed, as required by the statute creating the road improvement district, and the taxes could be separated, assessment was not invalidated by inclusion of all lands in a single assessment list —Davis v Road Improvement Dist No 7 of Little River County, 257 S W 724, 162 Ark 98

80. Ind —Ludlow v Union Tp Gravel Road Co, 77 Ind 409.
29 C J p 745 note 9

Presumption of sufficiency

Finding of county commissioners that owners of fifty-two and eight tenths per cent of lineal frontage had signed petition for highway improvement created presumption of sufficiency of petition, which presumption was not conclusive —Elston v King County, 34 P 2d 906, 178 Wash 210

81 N Y —Jones v Tonawanda, 53 N E 280, 158 N Y 438, reversed on other grounds 55 N Y S 115, 35 App Div 151
29 C J p 745 note 10

82 Ohio —Lewis v Laylin, 23 N E 288, 46 Ohio St 663

Effect of court order

Where the court in one county decreed that a road improvement district was indebted to the contractor for the balance due on the contract and ordered it to levy additional assessments to pay it, the validity of additional assessments made by the district in accordance with the statutes and pursuant to the order of the court of the county in which it was located was not affected by the decree of the other county court establishing the indebtedness —Road Improvement Dist No 4 of Saline County v Ball, 281 S W 5, 170 Ark. 522

83 N J —State v Bergen County Cir Ct, 45 A 981, 64 N J Law 536
29 C J p 745 note 12

84. Ind —Williams v Little White Lick Gravel Road Co, Wils 7
29 C J p 745 note 13

Necessity of action by fiscal authorities

Road construction statute was violative of constitution in not requiring levy of taxes by fiscal authorities of road district, "levy," as used in constitution, not referring to creation of tax but merely to its collection —Evans v Beattie, 135 S E 538, 137 S C 496

Substituted assessor

Assessment of benefits on property sought to be annexed to road improvement district was not invalidated because some assessors were appointed by county court on resignation of predecessors, in view of a statute evincing an intention to vest in the county court power to fill vacancies, although there is no power of removal —Gregg v. Road Im-

majority of the persons authorized may act [85] The proceedings must correctly and properly identify the land to be assessed,[86] but, if taken together, they do identify the land, inadvertencies and irregularities in the description will not affect their validity or operation [87] The assessment must be made at the proper time[88] and place[89] after fulfillment of such statutory prerequisites as entry of the assessment of benefits in a book,[90] and proper entry of the order of assessment [91]

Requirements as to the giving of notice and an opportunity to be heard must be complied with [92]

provement Dist No 2 of Jackson County, 277 S W 515, 169 Ark 671

Qualification

Legal qualifications of assessors of road improvement district cannot be questioned collaterally, and the failure of assessors to take the prescribed oath before a proper officer does not invalidate the assessment—Gregg v Road Improvement Dist No 2 of Jackson County, supra.

Change of residence

An assessment was not void, as levied by an illegal board, in that a commissioner who resided in Drew County when the district was created removed to a point within the district in Chicot County, before the assessment, where it was undisputed that he acted with the other commissioners in making the assessment, and that no proceeding was brought to oust him, as he acted in the capacity of either a de jure or de facto officer, in either of which events his acts would be binding—Bulloch v Dermott-Collins Road Improvement Dist, 244 S W 327, 155 Ark 176, reversed on other grounds 44 S Ct 457, 265 U S 570, 68 L Ed 1184

Territorial limitations

Assessors appointed in one county to assess lands for road construction have no power to assess lands lying in another county—Pendleton & Eden Turnp Co v. Barnard, 40 Ind 146

85. Ind—Williams v. Little White Lick Gravel Road Co, Wils 7—Baldwin v Biersdorfer, Wils 1

86. U S—Hillsborough County v Highway Engineering & Construction Co, C C A Fla, 94 F 2d 419, certiorari denied Highway Engineering and Construction Co v Hillsborough County, 58 S Ct 942, 304 U S 560, 82 L Ed 1527, rehearing denied 58 S Ct 1037, 304 U S 589, 82 L Ed 1549

87. U S—Hillsborough County v Highway Engineering & Construction Co, supra

Kan—Missouri Pac R Co v Board of Com'rs of Mitchell County, 201 P 729 110 Kan 582

Property placed in wrong zone

Where assessments of land in a road improvement district were made by zones, and clerical errors in placing some lands in the wrong zones were corrected, and the corrected copy of the assessment list certified before extending the taxes on the tax books, the original errors did not invalidate the assessment—Davis v Road Improvement Dist No 7 of Little River County, 257 S W 724, 162 Ark 98

88. Mass—Janvrin v. Poole, 63 N E 1066, 181 Mass 463.

29 C J p 745 note 15

Necessity that improvement be first completed

(1) Under some statutes assessments cannot be made until completion of the improvement—Chase v Springfield, 119 Mass 556

(2) But, under a statute so providing, a levy may be made for a stated percentage of the district's share of the total cost of the improvement, on completion of specified portions of the project.—Hamm v Board of Com'rs of Jefferson County, 214 P 105, 113 Kan 301

Time of making order

In the absence of express statutory authority for the county court to be opened at any time for the purpose of making an order levying an assessment against the property of a road improvement district, the order cannot be made, except during the regular term, and a vacation order would be void—Carl-Lee v Road Improvement Dist No 16 of Woodruff County, 217 S W 1056, 157 Ark 134

89. Me—Mansur v Aroostook County, 22 A 358, 83 Me 514

29 C J p 745 note 16

Assessment by county court sitting in one district, of lands situated in another district, was not improper—McKnight v Mitchell, 256 S W 368, 161 Ark 385

90. Ark—Davis v Road Improvement Dist No 7 of Little River County, 257 S W 724, 162 Ark 98—Capps v Judsonia Steprock Road Improvement Dist, 242 S W 72, 154 Ark 46

Certificate showing entire assessment for all years

In view of a provision that, if the portion of the assessment of benefits first levied is not sufficient to complete improvements commissioners may make additional levies, it is not a jurisdictional requirement that there be filed along with assessment of benefits a commissioner's certificate showing the entire assessment for all years during which assessments would be collected—House v Road Improvement Dist No 2, Conway County, 251 S W 12, 158 Ark 330, error dismissed House v Road Improvement Dist No 2 of Conway County, Ark, 45 S Ct 60, 266 U S. 175, 69 L Ed 229

91. Ark—American Inv Co v Hill, 292 S W 675, 173 Ark 468

Time of entry

Under the statute providing that the order of the county court levying an assessment on the property of a road improvement district may be made at the time the assessment of benefits is filed or at any time subsequent, the court can enter an order at any time after the list has been filed, and can be compelled by mandamus to do so if it refuses, the entry of the order being ministerial, involving no discretion—Carl-Lee v Road Improvement Dist No 16 of Woodruff County 217 S W 1056, 157 Ark 134

92. U S—Road Improvement Dist No 2 of Conway County v Missouri Pac R Co, C C A Ark, 275 F 600

Ark—Turley v Owen, 69 S W 2d 882, 188 Ark 1067

Fla—Smith Bros v Williams 126 So 367, 100 Fla 642, followed in Smith Bros Const Co v Hart 126 So 373 101 Fla 653, affirmed 136 So 399 101 Fla 653, and followed in Hillsborough County v Jeffords 126 So 373, 101 Fla 654

29 C J p 746 note 17

Test of sufficiency with respect to time

In passing on the sufficiency of a notice to property owners of an assessment of benefits to constitute due process of law, an act is tested by a consideration of the shortest time under which the notice could be given pursuant to the requirements—House v Road Improvement Dist No 2, Conway County 251 S W 12 158 Ark 330, error dismissed, 1924 House v Road Improvement Dist No 2 of Conway County, Ark 45 S Ct 60 266 U S 175, 69 L Ed 229

Notices held sufficient

(1) Where a road improvement district was of legislative creation, and the creating act gave it a name and designated the boundaries, a published notice was sufficient which referred to it by its official name and which gave the time and place and when and where assessment of betterments in the district would be heard—House v Road Improvement Dist No 2, Conway County, supra

(2) Notice of road district improvement assessment referring to plans, specifications, and estimates

Where, however, the district is not created by the legislature, and there is no legislative determination that the property will be benefited, notice to property owners and an opportunity to be heard are essential to due process[93] It has been held that a statute creating a road improvement district and delegating to subordinate agencies or tribunals the power to make assessments should provide for the giving of proper notice,[94] and that, if it fails to do so, it is void,[95] but other authorities have held that a statute is not invalid because it contains no provision for notice, if there is nothing in it which prevents such notice[96]

§ 300. —— Defective or Invalid Assessments and Remedies Therefor in General

Various remedies are available to landowners aggrieved by an improper assessment A special statutory remedy is usually exclusive, but, if there is no other adequate remedy, the landowner may obtain relief in equity.

Unless it is void on its face, the courts will not interfere with an assessment levied by, or in accordance with the directions of, the legislature in the exercise of its authority,[97] at least on a collateral attack[98] They will not disturb an assessment made under a fair and reasonable rule of apportionment, or review for mere errors of judgment on questions of fact in the decision of which different conclusions may be drawn[99] An assessment, however, may always be inquired into when it is tinctured with fraud,[1] or where it is shown to be arbitrary, unreasonable, or confiscatory[2]

Mode of attack An assessment for highway purposes may be attacked in the manner provided by statute,[3] as by objection or remonstrance,[4] or ap-

filed with county clerk describing district's boundaries was sufficient, such notice need not set out property owner's right to remonstrate or file damage claim—MacVeagh v Multnomah County, 270 P 502, 126 Or 417, modifying 262 P 248, 123 Or 345

(3) Fact that notice of letting of contracts for construction of roadway in unincorporated residence district in county was published over signature of county highway engineer under order of county court and not in name of county court did not render subsequent issuance of tax bill void—St Louis County, to Use of Mississippi Valley Trust Co v Menke, Mo App, 95 S W 2d 818

(4) Other cases

Ark—Meehan v Road Improvement Dist No 7, 22 S W 2d 904, 180 Ark 606

Ohio—Matthews v Huwe, 19 Ohio App 113, error dismissed 144 N E 610, 109 Ohio St 628

Notice held insufficient

A notice of assessments for a road improvement, given to the property owners 'along" the road that is being improved, is not sufficient to charge notice to all property owners within a one-mile district on either side of such road, to which the assessment area had been enlarged—Maxfield v Brooks, 144 N E 725, 110 Ohio St 566

Tenants in common

Jurisdiction of only one of two tenants in common being obtained on hearing regarding establishment of road district is insufficient to authorize board of supervisors to levy assessment against property as a whole—In re Secondary Road Dist No 11 of Clay County, 238 N W 66, 213 Iowa 988

93. U S—Browning v. Hooper, supra.

Reason for rule

When a legislature delegates to a board or to commissioners the determination of the question what lands will be benefited by a road improvement, or what the amount of benefits to such lands will be, the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing, or an opportunity to be heard, after notice, before these questions are determined—Road Improvement Dist No 2 of Conway County v Missouri Pac R Co, C C A Ark, 275 F 600

94. Fla—Smith Bros v Williams 126 So 367, 100 Fla 642, followed in Smith Bros Const Co v Hart, 126 So 373, 101 Fla 653 affirmed 136 So 399, 101 Fla 653, and followed in Hillsborough County v Jeffords, 126 So 373, 101 Fla 654

95. Ark—Massey v Arkansas & Missouri Highway Dist in Pulaski County, 259 S W 387, 163 Ark 63

96. Kan—Stevenson v Shawnee County, 159 P 5, 98 Kan 671, 704—Hill v Johnson County, 109 P 163, 82 Kan 813

97 Ark—Steele v Buchanan, 232 S W 12, 149 Ark 91

"The question of benefits is not a judicial one 'unless the court can plainly see that no benefit can exist and this absence of benefit is so clear as to admit of no dispute or controversy by evidence'"—Rogers v Johnson, 153 N E 167, 171, 21 Ohio App 292

98. Ark—Massey v Arkansas & Missouri Highway Dist in Pulaski County, 259 S W 387, 163 Ark 63—House v Road Improvement Dist No 2, Conway County, 251 S W 12, 158 Ark 330, error dismissed House v Road Improvement Dist No 2 of Conway County, Ark, 45 S Ct 60, 266 U S 175, 69 L Ed 229—Road Improvement Dists Nos 1, 2, and 3 of Dallas County v Crary, 237 S W 444, 151 Ark 484

Cal—San Francisco Sulphur Co v Contra Costa County, 276 P 570, 207 Cal 1

Conclusiveness

On collateral attack, an assessment is conclusively presumed correct, unless it is arbitrary on its face—Henderson v Road Improvement Dist No 1 of Hot Spring County, 283 S W 39, 171 Ark 8

99. Ark—Road Improvement Dist No 6 of Lawrence County v St Louis-San Francisco Ry Co, 262 S W 26, 164 Ark 442

Kan—Hamm v Board of Com'rs of Jefferson County, 214 P 105, 113 Kan 301

Ohio—Rogers v Johnson 153 N E 167 21 Ohio App 292

Wash—Adams County v Scott, 200 P 1112, 117 Wash 85

1. Ohio—Rogers v Johnson, 153 N E 167 21 Ohio App 292

2. Ark—Road Improvement Dist No 6 of Lawrence County v St Louis-San Francisco Ry Co, 262 S W 26, 164 Ark 442

Kan—Missouri Pac R Co v Board of Com'rs of Mitchell County 204 P 729, 110 Kan 582

3. Ark—Green v Williams, 278 S W 5, 169 Ark 1198

Wash—Adams County v Scott, 200 P 1112, 117 Wash 85

29 C J p 746 note 19

Issues

Validity of corrections made by commissioners on tracts of land in road improvement district was not involved in suits by owners to have their assessments lowered, where owners of such tracts were not made parties—Boyd v Ozark Trail Road Improvement Dist, 269 S W 989, 168 Ark 255

4. Ark—Wimberly v. Road Im-

peal[5] by parties interested[6] from the assessment or from a judgment confirming it. The assessment may also in a proper case be reviewed by certiorari,[7] and, under some statutes, assessment disputes are settled by arbitration.[8] A special remedy given by statute to the landowner to attack the assessment is commonly exclusive,[9] although the rule is otherwise where the method of assessment adopted amounts to a fraud on the landowner,[10] or where the assessment is void on its face.[11] The failure of a road improvement statute to provide a tribunal for determining the validity of an assessment does not render it void,[12] particularly where the statute expressly grants the right to any person aggrieved to apply to any court of competent jurisdiction for relief.[13]

In a proper case an assessment may be attacked by a suit in equity for an injunction[14] or to set

provement Dist No 7 in Polk County, 255 S W 556, 161 Ark 79
Ohio—Bashore v Brown, 140 N E 489, 108 Ohio St 18
29 C J p 746 note 20

5. U S—Kansas City Southern Ry Co v May C C A Ark, 2 F 2d 680—Missouri Pac R Co v Conway and Vilonia Road Dist of Faulkner County C C A Ark, 280 F 401
Ark—Road Improvement Dis No 4 of Saline County v Ball, 281 S W 5, 170 Ark 522—Davis v Road Improvement Dist No 7 of Little River County, 257 S W 724 162 Ark 98 Missouri Pac R Co v Manson-O'Kean Road Improvement Dist, 254 S W 659, 160 Ark 230—Davis v Cook, 245 S W 11, 155 Ark 613
Iowa—Paul v Marshall County, 216 N W 736, 204 Iowa 1114
29 C J p 746 note 21

Statute held not to confer right

The General Appeal Act, providing for appeals from decisions of the board of county commissioners, does not authorize appeals when the board acts under a special law for a special purpose, and so does not confer a right to appeal from the board's approval of a road improvement assessment in proceeding under the Donohue Road Law—Adams County v Scott, 200 P 1112, 117 Wash 85

Bond

Written notice of appeal from board of supervisors' assessment against realty does not confer jurisdiction, without landowner's filing bond signed by surety within fifteen days—In re Secondary Road Dist No 11 of Clay County, 238 N W 66, 213 Iowa 988

Jurisdiction of appellate court

Where one section of a statute provided for an appeal in chancery as a method of attacking the whole assessment of benefits, another section providing for appeal to the circuit court was intended to limit the jurisdiction of such court to attacks on assessments against particular tracts—Road Improvement Dist No 9 of Sevier County v Bennett, 231 S W 552 149 Ark 138

Scope of review

(1) Correctness of claims for expenses incurred before abandonment of road improvement and validity of decree allowing them, which was not appealed from, were not involved on appeal from decree directing assessment to pay off such claims—Wofford v Bettis, 275 S W 903, 169 Ark 487

(2) On appeal from an order of a lower court passing on the correctness of an assessment the appellate court will not consider questions not presented to, or considered by the court below, nor will it consider or reverse on account of harmless error—Crouse v Mackey, 185 N W 906 192 Iowa 926

(3) On such an appeal the only question for determination is whether the evidence is legally sufficient to sustain the findings of the trial court—Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, 216 S W 113, 156 Ark 116

(4) Other decisions—White v City of Williamsburg, 280 S W 486 213 Ky 90—29 C J p 746 note 21 [b]

6. Ark—Wapponocca Outing Club v Road Impr Dist No 3, 204 S W 840 135 Ark 196
29 C J p 746 note 22

7. Mich—Altermatt v Dillman, 256 N W 846 269 Mich 177—Anderson v Board of Road Com'rs of Oakland County 256 N W 578, 268 Mich 643—Fuller v Union Lake Land Co, 214 N W 412, 239 Mich 437
29 C J p 746 note 23

8. N J—Essex Public Road Board v Skinkle 6 A 435, 49 N J Law 65, affirmed 10 A 379, 49 N J Law 641
29 C J p 746 note 27

9. U S—Missouri Pac R Co v Conway and Vilonia Road Dist of Faulkner County, C C A Ark, 280 F 401
Ark—Road Improvement Dist No 4 of Saline County v Ball 281 S W 5, 170 Ark 522—Davis v Road Improvement Dist No 7 of Little River County, 257 S W 724, 162 Ark. 98—Wimberly v Road Improvement Dist No 7 in Polk County, 255 S W 556 161 Ark 79—Davis v Cook, 251 S W 691, 159 Ark 84—House v Road Improvement Dist No 2, Conway County, 251 S W 12, 158 Ark 330 error dismissed House v Road Improvement Dist No 2 of Conway County, Ark, 45 S Ct 60, 266 U S 175, 69 L Ed 229—Road Improvement Dists Nos 1, 2 and 3 of Dallas County v Crary, 237 S W 444, 151 Ark 484
Ohio—Bashore v Brown, 140 N E. 489, 108 Ohio St 18
29 C J p 747 note 28

Before statute effective

Where a statute had not become effective by a valid election thereunder, a section thereof providing when a party may not complain of assessments thereunder and suits attacking their validity shall not be brought, is not available in defense to a suit to restrain the collection of assessments, selling bonds, and construction of improvements thereunder—Gaster v Dermott-Collins Road Improvement Dist, 218 S W 2, 156 Ark 507

10. Mich—Hatch v Michigan Cent R Co, 212 N W 950 238 Mich 381.
Or—St Benedict's Abbey v Marion County, 93 P 231 50 Or 411

11. Ark—Green v Williams, 278 S. W 5, 169 Ark 1198

12. Ark—Schueller v Road Improvement Dist No 4 of Conway County, 231 S W 615, 149 Ark 670

13. Ark—Wimberly v Road Improvement Dist No 7 in Polk County 255 S W 556, 161 Ark 79

14. U S—Kansas City Southern Ry. Co v May C C A Ark 2 F 2d 680
Ark—Gaster v Dermott-Collins Road Improvement Dist, 248 S W 2 156 Ark 507- Schueller v Road Improvement Dist No 4 of Conway County, 234 S W 615, 149 Ark 670
29 C J p 746 note 24

Attack on whole or particular assessment

(1) In view of the taxpayer's right to appeal from an assessment the collection thereof will be enjoined only when the action of assessing body is wholly void—Paul v Marshall County, 216 N W 736, 204 Iowa 1114

(2) While the statute giving owners of property in a road improvement district thirty days after completion of assessments to commence an action challenging the correctness thereof is primarily for the benefit of the individual owners in the correction of their own assessments nevertheless, where the whole assessment

aside the assessment.[15] If the landowner has, or had and failed to avail himself of, an adequate remedy at law, he cannot collaterally attack the assessment in equity,[16] at least for mere irregularities and defects not affecting the jurisdiction of the assessing officers or tribunal,[17] but, if the assessment is void for want of jurisdiction, it is generally held that a suit for injunction will lie.[18]

Time for commencement of proceedings Proceedings to contest an assessment,[19] whether by appeal,[20] whether by injunction,[21] or whether by

is on the wrong basis, each owner may, by a suit for injunction, have it canceled —Desha Road Improvement Dist No 2 v Stroud, 241 S W 882, 153 Ark 587

Bond

The statute providing that no injunction shall issue to stay work on any road or collection of any tax, unless party applying therefor shall first give a prescribed bond, applies to suits seeking to stay the construction of an improvement or which question the general right to collect taxes due an improvement district, but does not apply to an injunction suit by an individual property owner who seeks a correction of his own assessment —Road Improvement Dist No 3 v Morris, 241 S W 389, 153 Ark 635

Prematurity

(1) The suit is premature when brought before assessment is made —Stanfield v Road Impr Dist No 2, 219 S W 753, 142 Ark 439—Bush v Delta Road Impr Co, 216 S W 690 141 Ark 247

(2) Where the reassessment of benefits of a road improvement district has not been made, advertised, revised and confirmed as in the case of the original assessment and with like effect, an order enjoining the collection of the original assessment is premature —Road Improvement Dist No 3 v Morris, 241 S W 389, 153 Ark 635

(3) Until the property owner's rights are affected by some illegal proceeding, he has no right to maintain an action to enjoin an assessment —Missouri Pac R Co v Board of Comrs of Mitchell County, 204 P 729, 110 Kan 582

Complaint held sufficient

Complaint of property owner, alleging that highway district was improperly formed, that tax was levied for indebtedness not due, and that plaintiff was discriminated against and denied hearing, was held sufficient to permit urging of defense

US—St Louis & S W Ry Co v Nattin, DC La, 27 F 2d 766, affirmed 48 S Ct 438, 277 U S 157, 72 L Ed 830

Ohio —Green v Carter, 162 N E 814, 28 Ohio App 492

Parties

Holder of special and limited warrants was a necessary party to suit to enjoin collection of assessments to pay warrants —Johnson v Berg, 265 P 473, 147 Wash 57

15. Neb —Tomblink v Sarpy County, 231 N W 783, 120 Neb 160.

16 Ohio —Maxfield v Brooks, 144 N E 725, 110 Ohio St 566
29 C J p 746 note 25
Estoppel of landowner and laches see infra § 301

Objections

(1) In an action, to enjoin the commissioners of a road improvement district from constructing the improvement, brought before the day fixed in the notice of the assessors for hearing of complaints against the assessment of benefits, attacks on such assessments cannot be heard such attacks should be presented by the property owners at the time and place designated —Wimberly v Road Improvement Dist No 7 in Polk County, 255 S W 556, 161 Ark 79

(2) It has also been held that an injunction suit will not be even after the time for making objections has expired, if complainant failed to make objections as required —Bashore v Brown, 140 N E 489, 108 Ohio St 18

Remedy by appeal in equity

US —Missouri Pac R Co v Conway and Vilonia Road Dist of Faulkner County, C C A Ark, 280 F 401

Iowa —Paul v Marshall County, 216 N W 736, 204 Iowa 1114

Loss of remedy through fraud

Where road district commissioners, after making compromise agreement with railroad as to its assessment, by trickery and fraud led railroad to believe that other assessments would not be reduced until time for appeal was past and assessment as whole was grossly arbitrary and discriminatory, it cannot be contended by commissioners that remedy by appeal from final assessment is complete and adequate —Kansas City Southern Ry Co v May, C C A Ark, 2 F 2d 680

17. Mich —Altermatt v Dillman, 256 N W 846, 269 Mich 177
29 C J p 716 note 26

18. Mich —Altermatt v Dillman 256 N W 846, 269 Mich 177

19. Ark —Boyd v Ozark Trail Road Improvement Dist, 269 S W 989, 168 Ark 255—House v Road Improvement Dist No 2, Conway County, 251 S W 12 158 Ark 330, error dismissed House v Road Improvement Dist No 2 of Conway County, Ark, 45 S Ct 60, 266 U S 175, 69 L Ed 229

Late attack as collateral

Where the statutory proceedings to contest an assessment are not brought within the prescribed period, any attack made subsequently is collateral rather than direct, within the rule that an assessment will not be disturbed on a collateral attack unless it is shown on its face to be arbitrary —Henderson v Road Improvement Dist No 1 of Hot Spring County, 283 S W 39 171 Ark 8—Road Improvement Dist No 4 of Saline County v Ball, 281 S W 5, 170 Ark 522—Massey v Arkansas & Missouri Highway Dist in Pulaski County 259 S W 387, 163 Ark 63—Road Improvement Dists Nos 1, 2 and 3 of Dallas County v Crary, 237 S W 444, 151 Ark 484

Time allowed held due process

A statute which required publication of notice of the assessment of benefits and a hearing on filed protests to be held no sooner than eighteen days after the first publication and further allowed ten days from the date of determination of such protests for the filing of a complaint attacking the assessment allowed a total of at least twenty-eight days in which the landowner could take action and this constituted due process —House v Road Improvement Dist No 2, Conway County, 251 S W 12 158 Ark 330, error dismissed House v Road Improvement Dist No 2 of Conway County Ark, 45 S Ct 60, 266 U S 175 69 L Ed 229

Attack on jurisdictional grounds, as well as for mere irregularities held barred after expiration of statutory period —Oak Hill Country Club v Town of Pittsford, 190 N E 321, 264 N Y 133, reversing 266 N Y S 995 240 App Div 802 affirming 252 N Y S 101 140 Misc 863, and reargument denied 191 N E 620, 264 N Y 672

20. Ark - Missouri Pac R Co v Manson-O Kean Road Improvement Dist, 254 S W 659 160 Ark 230—Davis v Cook, 251 S W 691, 159 Ark 84—Davis v Cook, 245 S W 11 155 Ark 613
29 C J p 717 note 30

21. Ark —Nettles v Hazelwood Road Impr Dist No 2, 223 S W 397, 144 Ark 632
29 C J p 747 note 31

When time starts running

In a railroad company's action to

certiorari,[22] must be brought within the time prescribed by statute

Pleadings The complaint must allege sufficient facts to entitle complainant to relief.[23]

Evidence The landowner has the burden of proving the invalidity of the assessment,[24] and the assessment will not be set aside unless it is clearly shown to be erroneous[25] or arbitrary or discriminatory,[26] or made in bad faith [27] Where the presumption of the validity of a legislative determination of benefits obtains, the landowner must overcome such presumption [28]

Relief awarded Relief may be granted only to those entitled thereto [29] If the assessment as a whole is made on a correct basis, individual assessments may be corrected without declaring the whole assessment void [30] Thus, on objections to assessments, a determination that the zone system of apportioning benefits was equitable does not deprive the court of power to reduce assessments on particular tracts which were not benefited to the same degree as other property in the same zone [31] Where an assessment properly based on the assessed valuation of the property exceeds the assessed benfits to such property, the whole assessment is not rendered invalid, but merely a reduction of the assessment down to the amount of the assessed benefits is called for [32]

Costs are awarded in accordance with statute [33]

§ 301. —— Estoppel of Landowner

Landowners may be estopped to object to or obtain relief from a defective or irregular assessment

Landowners may, by their acts or omissions, be estopped to object to a defective or irregular assessment,[34] but such estoppel does not arise unless

enjoin a special assessment to pay for the cost of hard surfaced road on the sole ground that the assessment is arbitrary, capricious and discriminatory against plaintiff's rights the action may be brought within thirty days from the final order making the special assessment, and, where the board made an order establishing the proportionate cost in the different zones and fixed a date for hearing objections, and plaintiff appeared and objected, and the board refused to make changes, the first order was merely tentative, and the final order was made on the date when the landowners' complaints were passed on, and the action was not barred if brought within thirty days from that date —Missouri Pac R Co v Board of Com'rs of Mitchell County, 204 P 729, 110 Kan 582

Joining in suit seasonably instituted

Owners of land cannot directly attack the validity of assessments by joining in a suit to enjoin proceedings thereunder after statutory limit of thirty days from the completion of the assessments, although such suit was instituted within such period —Desha Road Improvement Dist No 2 v Stroud, 241 S W 882, 153 Ark 587

22. N J —United New Jersey R & Canal Co v Gummere, 54 A 520, 69 N J Law 111—Bergen County Sav Bank v Union Tp, 44 N J Law 599

23. Ark —Newberry v Road Improvement Dist No 1, 245 S W 824, 156 Ark 276

24. Mo —Mudd v Wehmeyer, 19 S W 2d 891, 323 Mo 701
29 C J p 747 note 33

25. Ark —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, 246 S W 113 156 Ark 116
29 C J p 747 note 34

Where the evidence is conflicting as to the fairness or reasonableness of the assessments, the findings of the board of commissioners and the trial court will not be disturbed —Gregg v Road Improvement Dist No 2 of Jackson County, 277 S W 515, 169 Ark 671 Ford v Plum Bayou Road Improvement Dist, 258 S W 613, 162 Ark 475

Reduction of assessment by lower court held to achieve more equitable result —Held v Board of Sup'rs of Plymouth County, 205 N W 529, 201 Iowa 418

Evidence held insufficient to show error —Massey v Arkansas & Missouri Highway Dist in Pulaski County, 259 S W 787 163 Ark 63

Evidence held sufficient to support finding of trial court —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, 246 S W 113, 156 Ark 116

26. Wash —Wise v Garrett, 221 P 312, 127 Wash 536

Evidence held sufficient

U S —Kansas City Southern Ry Co v May, 2 F 2d 680

Kan —Atchison, T & S F Ry Co v Board of Com'rs of Anderson County, 245 P 157, 120 Kan 610, denying rehearing 243 P 282, 120 Kan 240—Missouri Pac R Co v Board of Com'rs of Mitchell County, 204 P 729, 110 Kan 582

Evidence held insufficient

U S —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark, 45 S Ct 136, 266 U S 379, 69 L Ed 335, affirming 246 S W 113, 156 Ark 116

Kan —Union Pac R Co v Board of Com'rs of Jefferson County, 217 P 315, 114 Kan 156

27. Wash —Adams County v Scott, 200 P 1112, 117 Wash 85

28. U S —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, Ark 45 S Ct 136, 266 U S 379 69 L Ed 335, affirming 246 S W 113, 156 Ark 116

29. Persons "similarly situated"

Highway improvement assessment could not be invalidated in action to set aside assessments, as to those owners who accepted benefits of improvement and paid assessments thereon because of insufficiency of petition for improvement, since such parties were not "similarly situated" within statute providing that, when question is of common interest to many persons, one or more may sue or defend for benefit of the whole —South Seattle Land Co v King County, 48 P 2d 251, 183 Wash 284—Elston v King County, 34 P 2d 906, 178 Wash 210

30 Ark —Desha Road Improvement Dist No 2 v Stroud, 241 S W 882, 153 Ark 587

31. Ark —Payne v Howard County Road Impr Dist No 1, 232 S W 943, 149 Ark 491

32. Ark —Missouri Pac R Co v Walnut Ridge-Alicia Road Improvement Dist 254 S W 1065 160 Ark 297 affirmed 15 S Ct 463 267 U S 587, 69 L Ed 800

33. Ind —Montgomery County v. Fullen, 20 N E 771, 118 Ind 158
29 C J p 747 note 37

34. Wash —South Seattle Land Co v King County, 48 P 2d 251, 183 Wash 284
29 C J p 747 note 38

Mortgagee whose mortgage was re-

the landowner had knowledge of the defect,[35] and his conduct was such that the party setting up the estoppel had a right to, and did, rely on it to his detriment,[36] in accordance with the general rule stated in Estoppel Where the assessment is void, mere delay in seeking relief will not work an estoppel,[37] nor will such estoppel arise from the fact that the landowner signed a petition for the improvement,[38] or acquiesced in the doing of the work[39] A suit in equity may be barred by laches,[40] but laches cannot be urged as a defense by persons whose fraud caused the delay resulting in complainant's loss of his remedy at law[41] or by persons not prejudiced by the delay[42] A property owner is not barred from attacking an assessment by reason of his having entered into a compromise agreement under which he was defrauded[43]

§ 302. —— Curative Statutes

Provided they are not arbitrary, defective assessments may generally be cured by subsequent legislation

Defective assessments may generally be cured by subsequent legislation,[44] but arbitrary assessments cannot be so cured[45] A statute validating assess-

newed after party who was estopped to deny validity of paving assessment had acquired property, and mortgagee's successor, were held estopped from complaining of assessments made against the property — Webb v Scott, 176 So 442, 129 Fla 111

Defective petition

Where a new road has been constructed and assessments levied on property specially benefited, abutting owners, having enjoyed all the benefits of the construction for five years, cannot thereafter restrain the collection of such assessment on the ground that the commissioners were without jurisdiction to proceed to construct the road because the petition was not signed by the owners of two thirds of the lineal feet of frontage – Carlson v Kitsap County, 213 P 930, 124 Wash 155

Noncompliance with statutory rather than constitutional requirement

(1) Where the defect or irregularity complained of consists only of a noncompliance with a statutory requirement with which the legislature could have dispensed, and no constitutional provision is violated failure to resort to the statutory remedy for contesting or correcting the assessment bars any other attack — Anderson v Board of Road Com'rs of Oakland County, 256 N W 578, 268 Mich 643

(2) So, where the statute required both posting and publication of notice although the constitution required only one notice, objection cannot be taken to the assessment six years after completion of the improvement, where proper notice was posted, although published notice was defective — Fuller v Union Lake Land Co, 214 N W 412, 239 Mich 437

Facts held to show estoppel

(1) Owner of property assessed for paving purposes, who signed petition for paving of highway and made no objections to pavement or assessments, was estopped later to complain about assessment — Webb v Scott, 176 So 442, 129 Fla 111

(2) Other facts — Elston v King County, 34 P 2d 906, 178 Wash 210— 29 C J p 747 note 38 [b]

Facts held not to show estoppel

Abutting property owner and those represented by her and all others similarly situated who have not slept too long on their rights, and who have not ratified highway improvement proceedings by paying assessments without protest, cannot be estopped to attack validity of petition on jurisdictional grounds because of lack of statutory requisite number of signatures — Elston v King County, supra

35 N Y — Oak Hill Country Club v Town of Pittsford 252 N Y S 101, 140 Misc 863 affirmed 266 N Y S 995 240 App Div 802 reversed on other grounds 190 N E 321, 264 N Y 133, reargument denied 191 N E 620, 264 N Y 672
29 C J p 747 note 39

36. U S — Bush v Branson, Ark, 248 F 377 160 C C A 387, reversed on other grounds 40 S Ct 113, 251 U S 182, 64 L Ed 215

37. N Y — Speir v Utrecht, 24 N E 692 121 N Y 420
Ohio — Lewis v Symmes 56 N E 194, 61 Ohio 471, 76 Am S R 428

Failure to give notice held jurisdictional defect so that landowner was not estopped to object to assessment after completion of work — Billings Bench Water Ass'n v Yellowstone County, 225 P 996, 70 Mont 401

38 Ohio — Dawson v Barron 9 Ohio S & C P 706, 8 Ohio N P 354
29 C J p 747 note 43

39. Fla — Hillsborough County v Memorial Heights Development Co 154 So 188, 114 Fla 251
29 C J p 747 note 44

40. Neb — Tombrink v Sarpy County, 231 N W 783 120 Neb 160

41. U S — Kansas City Southern Ry Co v May, C C A Ark, 2 F 2d 680

42. U S — Kansas City Southern Ry Co v May, supra

43. U S — Kansas City Southern Ry Co v May, supra

44. U S — Road Improvement Dist No 1 of Franklin County, Ark, v Missouri Pac R Co, Ark, 47 S Ct 563, 274 U S 188, 71 L Ed 992, modifying, C C A, 2 F 2d 340—Hillsborough County v Highway Engineering & Construction Co, C C A Fla, 94 F 2d 419 certiorari denied Highway Engineering & Construction Co v Hillsborough County, 58 S Ct 912, 304 U S 560, 82 L Ed 1527 rehearing denied 58 S Ct 1037, 304 U S 589, 82 L Ed 1549— U S Fidelity & Guaranty Co v Highway Engineering & Construction Co, C C A Fla, 51 F 2d 894, certiorari denied 52 S Ct 43, 284 U S 669, 76 L Ed 566
Fla — Webb v Scott 176 So 442, 129 Fla 111—Smith Bros v Williams, 126 So 367, 100 Fla 642, followed in Smith Bros Const Co v Hart, 126 So 373, 101 Fla 653, affirmed 136 So 399 101 Fla 653 and followed in Hillsborough County v Jeffords, 126 So 373, 101 Fla 654
29 C J p 747 note 45

When statute may be enacted

(1) After filing of assessment list with county court — Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, 246 S W 113, 156 Ark 116

(2) During pendency of litigation — Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, supra

(3) During pendency of appeal — Road Improvement Dist No 6 of Lawrence County v St Louis-San Francisco Ry Co, 262 S W 26, 164 Ark 112

Extent of validation

Validation of road districts created by commissioners' courts and bonds issued by them relates back to first step taken in the creation of the districts and includes all subsequent steps and proceedings taken including assessments made thereunder — Louisiana Ry & Nav Co v State, Tex Civ App, 298 S W 462, affirmed, Com App, 7 S W 2d 71, rehearing denied 17 S W 2d 457

45. U S — Road Improvement Dist No 1 of Franklin County, Ark, v Missouri Pac R Co, C C A Ark, 2

ments "notwithstanding any irregularity in form and substance in the making thereof" does not apply to fraud in the proceedings and cannot cure defects of such character[46] Where the legislature, by validating act, ratifies and adopts assessments not spread by it, but which it could have originally spread, the assessments become legislative assessments[47] Whether or not a statute is intended to cure particular defective assessments is a matter of construction[48]

§ 303. —— Reassessment and Additional Assessments

Where authority to do so exists, new or additional assessments may be levied to correct prior irregular or defective assessments, or to apportion the benefits more equitably, or to meet increases in the cost of the improvement Proceedings for reassessment are substantially the same as those for original assessment.

Except in so far as it is granted by constitutional or statutory provisions, a county court has no authority to change assessments[49] Authority usually exists to reassess,[50] when prior assessments are invalid or irregular,[51] or have become inequitable by reason of the construction of the road,[52] or at stated intervals,[53] and statutes authorizing such assessments are valid[54] So a reassessment or an additional levy may be made when the amount raised by the original assessment proves inadequate,[55] as in the case of a change in the plans of the road increasing the value of the lands assessed[56] Conversely, where the prior assessment is rendered excessive by reason of contributions by the state, the assessments may be required to be reduced, although not below a sum sufficient, when added to the state's contribution, to pay the district's currently maturing obligations[57] The omission in an assessment of lands benefited may be subsequently corrected[58] Where, however, the statute requires all lands benefited to be assessed, the assessment establishes the fact that the designated lands are benefited to the extent indicated, and a further assessment cannot be levied on other lands of the same owners as long as the original assessment stands[59] The power to appoint new

F 2d 340, modified on other grounds 47 S Ct 563, 274 U S 188, 71 L Ed 992

Ark —Gibson v Spikes, 220 S W 56 143 Ark 270

Assessment held not incurable

Ark —Road Improvement Dist No 6 of Lawrence County v St Louis-San Francisco Ry Co, 262 S W 26, 164 Ark 442

46. N Y —Tallman v Voorhis, 81 N Y 622

29 C J p 747 note 47

47 U S —U S Fidelity & Guaranty Co v Highway Engineering & Construction Co, C C A Fla 51 F 2d 894, certiorari denied 52 S Ct 43, 284 U S 669 76 L Ed 566

Ark Road Improvement Dist No 6 of Lawrence County v St Louis-San Francisco Ry Co 262 S W 26, 164 Ark 442 —Kansas City Southern Ry Co v Road Improvement Dist No 3 of Sevier County, 246 S W 113, 156 Ark 116

Fla —Webb v Scott 176 So 442, 129 Fla 111- Smith Bros v Williams, 126 So 367, 100 Fla 642 followed in Smith Bros Const Co v Hart, 126 So 373, 101 Fla 653, affirmed 136 So 399 101 Fla 653, and followed in Hillsborough County v Jeffords, 126 So 373 101 Fla 654

48. U S —Hillsborough County v Highway Engineering & Construction Co, C C A Fla, 94 F 2d 419 certiorari denied Highway Engineering & Construction Co v Hillsborough County, 58 S Ct 942, 304 U S 560, 82 L Ed 1527 rehearing denied 58 S Ct 1037, 304 U S 589, 82 L Ed 1549—U S Fidelity & Guaranty Co v. Highway Engineering & Construction Co, C C A Fla, 51 F 2d 894 certiorari denied 52 S Ct 43 284 U S 669, 76 L Ed 566

Ark —Road Improvement Dist No 6 of Lawrence County v St Louis-San Francisco Ry Co, 262 S W 26, 164 Ark 442

49. U S —Kansas City Southern Ry Co v May, C C A Ark 2 F 2d 680

Ark —Boyd v Ozark Trail Road Improvement Dist, 269 S W 989, 168 Ark 255

50. Ark —Southern Surety Co v Dardanelle Road Improvement Dist No 1, 276 S W 1014, 169 Ark 755 42 A L R 299

29 C J p 747 note 48

Where issue of bonds or tax bills delayed

Under a statute so providing, whenever the issuing of special tax bills or bonds is delayed for at least six months and it appears that the original estimate of costs was excessive, the county court may order a new estimate of costs which shall be the basis of the new tax bills —Johnson v Underwood, 21 S W 2d 134, 321 Mo 578

51. U S —Kansas City Southern Ry Co v May, C C A Ark, 2 F 2d 680

29 C J p 747 note 49

Prior assessment excessive

Where the county and the state paved a roadway through a city street and paid the cost thereof, so that the original assessment by the city against the abutting property for the total cost of the improvement was invalid, the city was entitled to make a new assessment for various items of cost incurred by the city in connection with the improvement —City of Camilla v Cochran 128 S E 194, 160 Ga 424

52. Ark —Higginbotham v Road Improvement Dist No 3 of Lonoke County, 241 S W 866 154 Ark 112

53. Ark -Road Improvement Dist No 3 v Morris, 241 S W 389, 153 Ark 635

54. Ark —Arkansas-Louisiana Highway Improvement Dist v Pickens, 276 S W 355, 169 Ark 603— Earle Road Impr Dist v Johnson, 224 S W 965, 145 Ark 438

55. Ark Arkansas-Louisiana Highway Improvement Dist v Pickens, 276 S W 355, 169 Ark 603

29 C J p 747 note 51

56. Ark —Road Impr Dist No 1 v Toler 197 S W 702, 130 Ark 410

57. U S -Guardian Savings & Trust Co v Dillard, C C A Ark, 15 F 2d 996

58 Ind —Spaulding v Mott, 76 N E 620 167 Ind 58

29 C J p 748 note 53

Land formerly owned by United States

A statute, if construed as permitting reassessment of road improvement benefits, so as to include land owned by United States at time of road improvement, but subsequently alienated, is unconstitutional -Lee v Osceola & Little River Road Improvement Dist No 1 of Mississippi County, Ark, 45 S Ct 620, 268 U S 643, 69 L Ed 1133, reversing Lee v Osceola & Little River Road Improvement Dist, 257 S W 370, 162 Ark 4

59. N J —Aldridge v Essex Public Road Board, 16 A 695, 51 N J Law 166

assessors continues until a valid assessment is made[60] It has been held that, where an assessment has been adjudged void, and canceled by order of court, no right of reassessment exists in the absence of statutory authority[61]

Where a statute gives property owners the right to petition for a reassessment, the remedy of an owner against an allegedly inequitable assessment is by such petition, rather than by a proceeding to restrain construction of the road[62] On refusal of such an application, a landowner may compel a reassessment by mandamus[63] or, in a proper case, by a suit in equity[64]

The additional levy or reassessment, like the original assessment, can be justified only on the theory of benefits to the property,[65] and such benefits must not be exceeded[66] Under statutory provisions to such effect, the total amount of benefits assessed must not be diminished[67] below the amount of the district's obligation[68] A reassessment must be made in such a manner as to leave undisturbed contractual rights of third persons, which have intervened[69]

The proceedings on reassessment are substantially the same as those provided for levying the original assessment[70] Such reassessment is usually required to be on notice[71] to persons interested,[72] and on the hearing no question is involved which would not be pertinent if made against the original assessment[73] In the absence of a statutory requirement, a second order by the county court levying the taxes is not necessary on reassessment[74] The proceeding is not one for the recovery of money within the statute of limitations[75]

§ 304. —— Collection, Enforcement, and Lien

a In general
b Proceedings for enforcement or collection
c Sale of property

a. In General

Assessments are liens on the property assessed and must be paid in accordance with the statutory requirements, and collected by authorized officers Pursuant to statutory authority, payments made by a landowner may be recovered back to the extent that they were illegally demanded of him.

60. N J —Aldridge v Essex Public Road Board, 46 N J Law 126

61. Neb —Young v Bennett, 169 N W 438, 102 Neb 740

62. Ark —Higginbotham v Road Improvement Dist No 3 of Lonoke County, 241 S W 866, 154 Ark 112

63. Ark —Road Improvement Dist No 3 v Morris, 211 S W 389, 153 Ark 635

64 Ark —Road Improvement Dist No 3 v Morris, supra

Bond

A statute, providing that no injunction shall issue to stay work on any road or collection of any tax, unless party applying therefor shall first give a prescribed bond, applies to suits seeking to stay the construction of an improvement or which question the general right to collect taxes due an improvement district, but does not apply to a suit of an individual property owner, who seeks a correction of his own assessment or an adjustment or reassessment of general benefits, but where suit is prematurely brought, there is no occasion for a bond, even though the statute does apply in the latter case —Road Improvement Dist No 3 v Morris 241 S W 389, 153 Ark 635

65. Ark —Road Impr Dist No 1 v Toler, 197 S W 702, 130 Ark 410
29 C J p 748 note 58
Benefits as basis of assessment see supra §§ 297, 298.

66. Ark —Road Impr Dist No 1 v Toler, supra
29 C J p 748 note 59
Amount of assessments see supra § 296

Raising amount of installments

The commissioners have power to increase the percentage of the assessed benefits that shall be paid annually, if such increase will not result in total payments exceeding total benefits —Arkansas-Louisiana Highway Improvement Dist v Pickens, 276 S W 355, 169 Ark 603

67. Ark —Hunt v Road Improvement Dist No 12 of Woodruff County, 270 S W 961, 168 Ark 266

68. U S —Kansas City Southern Ry Co v May, C C A Ark, 2 F 2d 680
Ark —Road Improvement Dist No 3 v Morris, 211 S W 389, 153 Ark 635

69. Ark —Road Improvement Dist No 3 v Morris, supra

70. Ind —Montgomery County v Fullen, 12 N E 298, 111 Ind 410, petition overruled 13 N E 571, 111 Ind 410
29 C J p 748 note 60.

Notice to clerk

Notice by attorney of road improvement district to county clerk of reduction of taxes by commissioners held proper —Meehan v Road Improvement Dist No 7, 22 S W 2d 904, 180 Ark 606

71. Ind —Manor v Board of Com'rs of Jay County, 34 N E 959, 137 Ind 367, petition overruled 36 N E. 1101, 137 Ind 367
29 C J p 748 note 61

Increasing percentage of benefits payable

Resolution of commissioners of highway improvement district increasing the percentage of the assessed benefits that shall be paid annually is proper without notice since there is no constitutional requirement of such notice, it being sufficient that notice and opportunity to be heard on amount of assessed benefits were given —Arkansas-Louisiana Highway Improvement Dist v. Pickens, 276 S W 355, 169 Ark 603

Provision for notice in statute

A revised assessment is not invalid on the ground that the statute under which it was made did not provide for notice, where the provision in the statute for notice of the original assessment necessarily applies to notice of revised assessments as well —Wimberly v Road Improvement Dist No 7 in Polk County, 255 S W 556 161 Ark 79

72. Ind —Goodwin v Warren County, 44 N E 1110, 146 Ind 164
29 C J p 748 note 62

73. Ind —Goodwin v Warren County, supra
29 C J p 748 note 63

74 Ark —Meehan v Road Improvement Dist No 7, 22 S W 2d 904, 180 Ark 606

75. Ind —Kline v Huntington County, 51 N E 476, 152 Ind 321

Assessments constitute liens on the property assessed,[76] and do not create a personal liability against the landowner,[77] in the absence of a statute to that effect,[78] and in some jurisdictions it has been held that the legislature has no power to impose any personal liability.[79] The time when the lien attaches,[80] and its priority over other liens,[81] are matters of statutory regulation. It has been held that to the extent that an assessment is valid, its lien is superior to a mortgage which predates it.[82] Under a statute authorizing counties to pay the cost of highway improvements by special assessments and to issue bonds and levy taxes, the lien of the special assessment certificates held by the county and against which the bonds are issued is not extinguished by payments on such bonds,[83] and the county cannot, and cannot be authorized legally to, release the liens of such certificates until the bonds are fully paid or full payment is satisfactorily provided for.[84]

Payment. Local assessments for highways must be paid in the mode provided by statute,[85] and within the time limited.[86] Payment of an assessment is void unless made to the proper officer.[87] Where the statute provides for the issuance of certificates for work done, which shall constitute liens on the property assessed and be assignable as promissory notes, payment of a certificate sought to be foreclosed by an assignee thereof is no defense unless made before the assignment or before notice thereof,[88] and a mere plea of payment, without more, is insufficient.[89]

Collecting officers. Road improvement assessments should be collected by the officers designated by statute,[90] as, for example, the county collector[91] or treasurer,[92] and it has been held to be the duty of the district commissioners to see that delinquent taxes are collected.[93] For failure of the collector to turn over the amount collected to the person entitled thereto or to account for it, the collector[94] and his sureties[95] are liable. In a proper case, a federal court has jurisdiction to appoint a receiver

76. Ark.—Northern Road Improvement Dist. of Arkansas County v. Zimmerman, 67 S.W.2d 197, 188 Ark. 627—Tallman v. Board of Com'rs of Northern Road Improvement Dist. of Arkansas County, 49 S.W.2d 1039, 185 Ark. 851.
Mo.—Mudd v. Wehmeyer, 19 S.W.2d 891, 323 Mo. 704.
Ohio—Chapman v. Sollars, 38 Ohio St. 378.
Pa.—Township of Spring Garden v. Logan, 52 York Leg. Rec. 21.
29 C.J. p. 748 note 67.

Record of lien

A special assessment lien which has been entered of record may be amended by adding averments omitted by mistake, even after the time for filing such liens has expired. On a rule to strike a paving lien from the record the question as to whether or not the property owner has been assessed for the proper proportion of the entire expense cannot be considered, such questions must be raised by affidavit of defense to a scire facias on the lien.—Mt. Lebanon Tp. v. Robinson, 83 Pa. Super. 539.

77. Ohio.—Chapman v. Sollars, 38 Ohio St. 378.
29 C.J. p. 748 note 69.

78. Or.—Ivanhoe v. Enterprise, 45 P. 771, 29 Or. 245, 35 L.R.A. 58.
29 C.J. p. 748 note 70.

79. N.C.—Raleigh v. Peace, 14 S.E. 521, 110 N.C. 32, 17 L.R.A. 330.
29 C.J. p. 748 note 71.

80. Ark.—Sanders v. Brown, 47 S.W. 461, 65 Ark. 498.
29 C.J. p. 748 note 74.

81. Ind.—Murphy v. Beard, 38 N.E. 33, 138 Ind. 560.
29 C.J. p. 748 note 75.

82. Ohio.—Kentucky Joint Stock Land Bank of Lexington, Ky., v. Jewett, 9 N.E.2d 915, 55 Ohio App. 422.

83. Fla.—Hillsborough County v. Bregenzer, 10 So.2d 498.

84. Fla.—Hillsborough County v. Bregenzer, supra.

85. Wis.—Baier v. Hosmer, 83 N.W. 645, 107 Wis. 380.
29 C.J. p. 748 note 65.

86. Wash.—State v. Hills, 186 P. 295, 109 Wash. 175.
29 C.J. p. 748 note 66.

87. Wis.—Baier v. Hosmer, 83 N.W. 645, 107 Wis. 380.

88. Ind.—Farmers' Bank v. Orr, 55 N.E. 35, 25 Ind. App. 71.

89. Ind.—Farmers' Bank v. Orr, supra.

90. Ky.—Bailey v. Magoffin County, 38 S.W.2d 923, 238 Ky. 805.

91. Ark.—Missouri Pac. R. Co. v. Sears, 265 S.W. 653, 166 Ark. 653.
Fla.—State ex rel. Atlantic-Gulf Special Road and Bridge Dist. v. Bass, 118 So. 212, 96 Fla. 478.

Sheriff and collector

While the constitution and statutes make the sheriff ex officio collector of taxes, special assessments are not within the purview of these provisions, and, in the absence of any other statute, the sheriff will be under no duty to collect special assessments, but, where a statute expressly provides that special assessments shall be collected by the collector, one who holds the office of sheriff and collector is bound to collect the assessments.—Moose v. Bartlett, 277 S.W. 340, 169 Ark. 963.

92. Colo.—Moffat Tunnel Improvement Dist. v. City and County of Denver, 25 P.2d 735, 93 Colo. 317.

Liability for costs as between district and county

Where a statute designated the county treasurer as the officer to collect improvement district taxes, without any provision as to payment of the costs of such collection, the expenses of such collection must be borne by the district and not by the county.—Moffat Tunnel Improvement Dist. v. City and County of Denver, supra.

93. Ark.—North Arkansas Highway Improvement Dist. No. 2 v. Rowland, 282 S.W. 990, 170 Ark. 1168.

94. Ark.—South Miller County Highway Dist. v. Dorsey, 297 S.W. 833, 174 Ark. 553—Moose v. Bartlett, 277 S.W. 340, 169 Ark. 963.

95. Ark.—South Miller County Highway Dist. v. Dorsey, 297 S.W. 833, 174 Ark. 553—Moose v. Bartlett, 277 S.W. 340, 169 Ark. 963.

Taxes after abandonment of district

Where the highway district was abandoned and a receiver appointed to wind up its affairs, and the chancery court decreed a levy on the property within the district to pay preliminary expenses, and directed the county collector to collect such levy, the collection of such taxes by the collector was "by virtue of office" within the terms of his fidelity bond, so as to render his sureties liable for his failure to turn over or account for the sums collected, and the receiver

of a road improvement district to collect assessments to the extent necessary to pay outstanding bonds, in accordance with the provision of the statute creating the district that in case of default of such bonds the assessments should be collected by a receiver [96]

Penalties, interest, and attorney's fees. In the absence of an applicable statutory provision, a penalty for delinquency in the payment of the taxes may not be collected,[97] but such penalties may be imposed where there is authority therefor [98] Under some statutes, interest[99] at the rate permitted by statute,[1] and a charge for attorney's fees,[2] may also be imposed

Release from liability Under a statute providing for the payment of a road district's debts by the state, but not providing for reimbursement of landowners who had paid their assessments, the district may waive the collection of delinquent assessments, and is not required to enforce their collection by sale of the properties and to distribute the proceeds among the landowners of the district [3]

Recovery back of payments Pursuant to statutory authority, a landowner who has paid a special assessment may recover back as much of the payment as he shows to have been illegally, inequitably or unjustly demanded of him,[4] and the right to recover excessive payments has been held to exist even in the absence of express statutory provisions [5] So, where a statute requires a reduction of assessments within certain limits in proportion to contributions received from the state toward the cost of an improvement, a property owner whose assessment was not so reduced and who had paid the original assessment under protest may recover the amount by which the assessment was excessive [6] Under a statute so providing, county and state road funds may be applied to the reimbursement of owners of designated classes of property who have paid benefit assessments for the construction of state highways,[7] but the mere fact that the district has

was a proper plaintiff to maintain an action against them —South Miller County Highway Dist v Dorsey, 297 S W 833, 174 Ark 553

96 U S —Guardian Savings & Trust Co v Road Improvement Dist No 7 of Poinsett County, Ark, 45 S Ct 201, 267 U S 1, 69 L Ed 487, modified on other grounds 45 S Ct 351, 267 U S 580, 69 L Ed 798, and reversing, C C A, Road Improvement Dist No 7 of Poinsett County, Ark v Guardian Savings & Trust Co, 298 F 272 certiorari granted Guardian Savings & Trust Co v Road Improvement Dist No 7, of Poinsett County, Ark, 44 S Ct 637, 265 U S 578, 68 L Ed 1188

Although receiver could not levy assessments as an original act, he could collect assessments levied in accordance with a resolution previously passed by the district commissioners —Guardian Savings & Trust Co v Dillard, C C A Ark, 15 F 2d 996

97. **A defunct road district** cannot collect a penalty for delinquent taxes where the statute authorizing such penalty applies only to going districts —McPherson v Board of Com'rs of Hazelwood Road Imp Dist, 10 S W 2d 876, 178 Ark 289—Missouri Pac R. Co v Sears, 265 S W. 653, 166 Ark 104

98. Ark —Hires v Douglas, 129 S W 2d 959, 198 Ark 559—Tallman v Board of Com'rs of Northern Road Improvement Dist of Arkansas County, 49 S W 2d 1039, 185 Ark 851—McPherson v Board of Com'rs of Hazelwood Road Improvement Dist, 10 S W 2d 876, 178 Ark 289 —Missouri Pac R Co v Sears, 265 S W 653, 166 Ark 104

99. Ark —Hires v Douglas, 129 S W 2d 959, 198 Ark 559

1. Ohio —Matthews v Huwe, 19 Ohio App 113, error dismissed 144 N E 610, 109 Ohio St 628

2. Ark —McPherson v Board of Com'rs of Hazelwood Road Imp Dist, 10 S W 2d 876, 178 Ark 289

3. Ark —Tri-County Highway Improvement Dist v Taylor, 43 S W 2d 231, 184 Ark 675

Purpose of such a statute is to relieve delinquent landowners from payment of any debts incurred by the district prior to its enactment —Todd v Denton, 64 S W 2d 331, 188 Ark 29—Tri-County Highway Improvement Dist v Taylor, 43 S W 2d 231, 184 Ark 675

Effect on power to enforce

The refunding of county road bonds and the making of contributions by state under act of 1941, authorizing the refunding to counties of moneys expended in building roads taken over by state, did not affect authority of county to collect delinquent tax liens in amounts due under special assessments pursuant to act of 1925, authorizing certain counties to pay cost of improving highways by special assessment, but, in view of the refunding act, the present enforcement of such special assessment liens may be deferred by court on reasonable conditions until legislature perfects its purpose with reference to securing payment or satisfaction of bonds for which special assessment ad valorem taxes are pledged —Hillsborough County v Bregenzer, Fla, 10 So 2d 498

4. Neb —Brown Real Estate Co v Lancaster County, 188 N W 247 108 Neb 514, followed in Loos v Lancaster County, 188 N W 253, 108 Neb 531

Ohio —Crawford v Zangerle, 184 N E 290, 126 Ohio St 121

5. Ohio —State v Board of Com'rs of Mercer County, 164 N E 755, 119 Ohio St 504

6. U S —Guardian Savings & Trust Co v Dillard C C A Ark, 15 F 2d 996

7. Kan —State v Board of Com'rs of Shawnee County, 252 P 466, 122 Kan 514

Assessments payable in installments; payment in full

Where the assessment is payable in annual installments, a landowner paying the assessment in full is limited to reimbursement annually as one paying assessment in installments, and a taxpayer cannot receive a refund of assessment for hard surfaced roads and also be relieved from paying the assessment due in such year —State v Horn, 270 P 597, 126 Kan 591

Limitation of landowners entitled to reimbursement

(1) Limiting reimbursement to those whose land is situated within one mile of highway is not ineffectual —State v Horn, supra

(2) Act authorizing reimbursement of certain towns for paving and providing for abutting property owners' sharing in reimbursement in one specific town did not authorize abutting owners to share in reimburse-

been reimbursed from such funds does not require reimbursement of the landowners in the absence of statutory provision therefor.[8] Taxes paid by property owners in a city under assessments erroneously levied against their property instead of against property in the township outside of the city cannot be recovered after the lapse of many years, where to permit such recovery and to assess the property that should have been assessed would result in even greater inequities.[9] Under some statutes, a payment cannot be recovered unless it was made involuntarily;[10] and a mere protest against the validity of the assessment with notice that the taxpayer intends to bring suit to recover the payment is not enough.[11] Under some statutes, where the taxpayer has paid the assessment, he may obtain a refund of the amount paid on certificate of the road supervisor that he has worked out his tax,[12] and, where such refund has been made in reliance on a fraudulent certificate, the county may sue to recover such refund.[13] Conditions precedent to the maintenance of an action to recover payments must be complied with,[14] and such compliance must be alleged in the petition.[15]

b. Proceedings for Enforcement or Collection

Proceedings for enforcing the payment of delinquent special assessments are governed by statutory provisions and general rules.

Proceedings for enforcing the payment of delinquent special assessments are largely governed by special statutory provisions.[16] Even though the assessment is a lien, such lien can be enforced and the bills collected only by an action in court.[17] The common method of enforcing collection is by a proceeding to foreclose the assessment lien, which is in the nature of a proceeding in rem.[18] More than one system for enforcement may, however, be available,[19] and some statutes provide not only that the assessment shall be a lien on the land, enforceable by sale, but that it shall also be collectable by action against the owner.[20]

Who may sue Under appropriate statutory provisions, proceedings to enforce the collection of delinquent taxes, as by foreclosure of the lien, may be brought by the road district[21] or by the commissioners thereof.[22]

Time to sue Proceedings for the collection of delinquent taxes must be brought within the time prescribed by statute.[23] An action commenced aft-

ment to another town—Little v Town of Conway, 171 S E 447, 171 S C 27

Interest

Highway commission in making reimbursement for assessments was held not authorized to pay interest on assessments or on bonds issued on deferred payment of assessments—State v State Highway Commission, 281 P 855, 129 Kan 192

8. S C—Little v Town of Conway, 171 S E 447, 171 S C 27

9. Mich—City of Farmington v Township of Farmington, 293 N W 911, 294 Mich 693

10. Ohio—State v Board of Com'rs of Mercer County, 164 N E 755, 119 Ohio St 504

When payment involuntary

In the absence of acts amounting to duress or coercion, where there is no legal compulsion, or at least proceedings legally instituted by the officials, or threatened to be instituted, for distraint, or to subject the property on which the assessment was made to sale for the collection of such assessment, or amounting to a threat to institute such proceedings and thus subject the relator to costs and expenses, a payment cannot be said to be involuntary—State v Board of Com'rs of Mercer County, supra

11. Ohio—State v Board of Com'rs of Mercer County, supra

12. Wash—Walla Walla County v. Oregon R & Nav Co, 82 P 716, 40 Wash 398

13. Wash—Walla Walla County v Oregon R & Nav Co, supra

14. Neb—Brown Real Estate Co v Lancaster County, 188 N W 247, 108 Neb 514, followed in Loos v Lancaster County, 188 N W 253, 108 Neb 531

15. Neb—Brown Real Estate Co v Lancaster County, 188 N W 247, 108 Neb 514, followed in Loos v Lancaster County, 188 N W 253, 108 Neb 531

Petition held sufficient

A petition to recover as much of special assessments as is illegal, inequitable, and unjust, alleging that plaintiffs had made complaint before the board of equalization for the county of the matters now complained of, and had paid assessments under protest, giving notice of intention to sue to recover them, stating the alleged grievance and ground therefor, and that the suit had been brought within the time prescribed, stated a cause of action—Sawyer v Lancaster County, 188 N W 253, 108 Neb 530

16. Ark—Northern Road Improvement Dist of Arkansas County v Zimmerman, 67 S W 2d 197, 188 Ark 627—McPherson v Board of Com'rs of Hazelwood Road Improvement Dist, 10 S W 2d 876, 178 Ark 289—Missouri Pac R Co v Sears, 265 S W 653, 166 Ark 653. 29 C J p 748 note 65

17. Mo—Mudd v Wehmeyer, 19 S W 2d 891, 323 Mo 704

18. Ark—Northern Road Improvement Dist of Arkansas County v Zimmerman, 67 S W 2d 197, 188 Ark 627

19. Ind—Robinson v Rippey, 12 N E 141, 111 Ind 112

N J—Fairfield Dairy Co v Peer, 77 A 1077, 80 N J Law 649

Defunct or going district

Ark—Missouri Pac R Co v Sears, 265 S W 653, 166 Ark 104

20. N J—Fairfield Dairy Co v Peer, 77 A 1077, 80 N J Law 649—Aldridge v Essex Public Road Board, 16 A 695, 51 N J Law 166

21. Mo—Platte City Ben Assessment Special Road Dist of Platte County v Couch, 8 S W 2d 1003, 320 Mo 489

22. Ark—Tallman v Board of Com'rs of Northern Road Improvement Dist of Arkansas County, 49 S W 2d 1039, 185 Ark 851

23. Ark—Meehan v Road Improvement Dist No 7, 22 S W 2d 904, 180 Ark 606

Wash—Seattle v O'Connell, 48 P 412, 16 Wash 625

If the land has been sold to the state for nonpayment of general taxes, the lien for improvement taxes is not suspended, and the district must institute proceedings to enforce it within the statutory period after the taxes become delinquent—Tallman v. Board of Com'rs of Northern Road

er the tax has become delinquent is not premature.[24]

Defenses. The availability of various matters as defenses to proceedings to enforce collection of delinquent taxes has been considered by the courts[25]

Pleadings The complaint or petition for the enforcement of the collection of benefit assessments must contain all the necessary allegations, such as allegations as to the organization of the district, nonpayment of the taxes, a description of the lands proceeded against, the amount chargeable to each tract, and a prayer for foreclosure[26]

Evidence In an action to collect taxes due for a road improvement project, general rules of evidence are applicable.[27]

Judgment. The judgment may properly include a charge for attorney's fees where it is authorized[28] Under a statute so providing, the judgment must include the amount of taxes, the statutory penalty, interest, and costs[29] The imposition of an unauthorized penalty is error[30]

Review. On appeal from a judgment in a suit to enforce the collection of delinquent taxes, the appellate court will not consider any questions not properly within the issues of the case.[31]

c. Sale of Property

The lien may be enforced by a sale of the land in accordance with statutory provisions.

The lien of a special highway assessment may be enforced and foreclosed by a sale of the property[32]

Property subject. Land, title to which rests in the district by virtue of the district's purchase of it on a tax sale, is exempt from sale for taxes assessed for the period during which title is so held. A decree authorizing such a sale, although valid on its face, is not conclusive, and a deed executed pursuant to such a decree and sale is invalid[33] Where, after a special assessment had become a lien on certain lots, a city purchased them for school purposes, the land was regarded as being used by a state agency for state governmental purposes, and hence was exempt from sale for the delinquent taxes[34] It has also been held, however, that, where

Improvement Dist of Arkansas County, 49 S W 2d 1039, 185 Ark 851

24. Ark —Meehan v Road Improvement Dist No 7, 22 S W 2d 904, 180 Ark 606

25. Defenses held available

(1) Where excessively disproportionate assessment for highway improvement was fraudulently and intentionally made against railroad, it may defend action for assessment on that ground —Hatch v Michigan Cent R Co, 212 N W 950, 238 Mich 381

(2) Determination by county court on facts in ordering improvement does not preclude property owner from asserting contrary, when sued on tax bill —Mudd v Wehmeyer, 19 S W 2d 891, 323 Mo 704

(3) An owner of land abutting on a public road in county could question correctness of paving certificate issued by county either on ground that certificate was based on front footage greater than that occupied by abutting land involved, or that cost of improvement was less than amount on which certificate was based —Evans v Hillsborough County, 186 So 193, 135 Fla 471

(4) As respects the contention that defense of invalidity of assessment could not be set up in suit to enforce tax bills on the ground that the tax bills had been sold to innocent purchasers, an allegation in the answer that plaintiff road district was not owner of tax bills sued on was not an admission of sale thereof —Platte City Ben Assessment Special Road Dist of Platte County v Couch, 8 S W 2d 1003, 320 Mo 489

(5) Other defenses —Rodgers v Hanchett Bond Co, 116 So 15, 94 Fla 1238

Defenses held not available

(1) Property owners, given opportunity to challenge correctness of assessments when list was filed and notice published, cannot challenge them in suit to enforce tax lien — Henderson v Road Improvement Dist No 1 of Hot Spring County, 283 S W 39, 171 Ark 8

(2) In an action by a road improvement district against delinquent lands for unpaid assessments, allegations of the property owners that the sale of bonds with which the improvement was made was void as a sale for less than par is no defense where the improvement was constructed as provided by statute, since the district, having received the benefit of the construction, must pay for it, even though the bonds were illegally sold —Road Improvement Dist No 1 of Independence County v Delinquent Lands, 249 S W 367, 158 Ark 58

26. Ark —Beasley v Hornor, 292 S W 130, 173 Ark 295

27. Ark —Missouri Pac R Co v Sears, 265 S W 653, 166 Ark 104

Paving certificates issued against realty abutting on public road in county for its proportionate share of cost of grading, paving, and curbing road could be received as prima facie evidence of a correct assessment of benefits —Evans v. Hillsborough County, 186 So 193, 135 Fla. 471

28. Amount held not excessive

In suit to collect delinquent taxes for indebtedness of abandoned road district ten per cent attorney's fee was held not excessive —McPherson v Board of Com'rs of Hazelwood Road Imp Dist, 10 S W 2d 876, 178 Ark 289

29. Ark —Hires v Douglas, 129 S W 2d 959, 198 Ark 559

Purpose of statute concerning proceedings if an assessment of a road improvement district is not paid within time provided by law for payment of county taxes was to include, in a single suit, all items properly chargeable against delinquent lands —Hires v Douglas, supra

30. Ark —Missouri Pac R Co v Sears, 265 S W 653, 166 Ark 104

31. Ark —Road Improvement Dist No 1 of Independence County v Delinquent Lands, 249 S W 367, 158 Ark 58

32 Ark —Vietz v Hazen-Lagrue and Slovak Road Impr Dist, 214 S W 50, 139 Ark. 567
29 C J p 748 note 68

33. Ark —Crowe v Wells River Sav Bank, 32 S W 2d 617, 182 Ark 672

A suit to redeem from such a sale is not necessarily a recognition of the validity thereof, but may be treated as a tender of the taxes due —Crowe v. Wells River Sav Bank, supra

34. Mich —King v School Dist No. 5, of Warren Tp, Macomb County, 247 N.W. 66, 261 Mich 605.

the land has been sold to the state for nonpayment of general taxes, a sale thereof for delinquent improvement taxes is subject to the paramount right of the state [35]

Proceedings for sale. Statutory provisions regulating the procedure for the sale of lands for delinquent taxes[36] as, for example, provisions as to the giving or publication of notice,[37] or as to the description of the land in the warning order, decree, or notice of sale, must be complied with,[38] if they are not, the decree and sale are void [39]

Manner of sale Only the land proceeded against may be sold [40] Where benefits are assessed severally against lands, and such lands are sold for delinquencies, each tract must be sold for the taxes separately assessed, and multiple descriptions severally assessed cannot be grouped and sold in solido [41] Under a statute providing that lands sold for delinquent assessments be sold for "taxes, penalty, interest, and costs," it is improper to order a sale for less than the entire indebtedness as so fixed by law,[42] and a purchaser is charged with notice that his bid must include all such items in order to make the purchase effective [43]

Confirmation, correction, or setting aside While ordinarily a decree confirming a sale will be presumed to be valid and is not subject to collateral attack, where the recitals in the decree affirmatively show that the statutory prerequisites to a valid sale were not complied with, the presumption of validity falls and the decree may be collaterally attacked [44] A sale may be collaterally attacked and set aside where it appears on the face of the report that, contrary to the statutes, several tracts of land, separately assessed, were sold in solidum, or for less than the total obligation, including taxes, penalty, interest, and costs [45] Where land has been properly decreed to be sold and a valid sale has been had, subsequent clerical errors or misprisions may be corrected. Thus, if the sale was valid, a clerical error of the court commissioner incorrectly describing the land sold in his report of sale and in the execution of the deed may be corrected, but, if the land was insufficiently described in either the warning order, the decree of sale, or the notice of sale, no confirmation can cure the invalidity of the sale.[46] Under a statute so providing, where the sale proves invalid because of any irregularity in the proceedings, the purchaser may recover from the owner the amount of taxes, interest, and penalty due at the time of the sale with interest from that time, and any additional taxes paid by the purchaser thereafter [47]

Purchase and resale by district. The district may itself purchase the land on foreclosure sale, and, when such sale is confirmed, the district becomes the absolute owner of the land, although no credit can be claimed toward the indebtedness for the improvement until revenue is raised by the resale of the land [48] The purchase by the district does not destroy the uniformity of assessment on the lands benefited, since the land remains subject to sale for the amount of the assessments on it,[49] and it has been held that the land may and should be resold, so that it may again be placed on the tax books and bear its proportionate share of the cost of the improvement, thus avoiding the imposition of a disproportionate share of the burden on the nondelinquent lands [50] On a resale of the land by the district, the purchaser acquires no better title than the district has[51] at the time the deed is executed [52]

35. Ark.—Tallman v. Board of Com'rs of Northern Road Improvement Dist. of Arkansas County, 49 S.W.2d 1039, 185 Ark. 851

36. Ark.—Giese v. Jones, 48 S.W.2d 232, 185 Ark. 548

37. Ark.—Giese v. Jones, supra.

38. Ark.—Northern Road Improvement Dist. of Arkansas County v. Zimmerman, 67 S.W.2d 197, 188 Ark. 627

39. Ark.—Northern Road Improvement Dist. of Arkansas County v. Zimmerman, supra—Giese v. Jones, 48 S.W.2d 232, 185 Ark. 548

40. Ark.—Northern Road Improvement Dist. of Arkansas County v. Zimmerman, 67 S.W.2d 197, 188 Ark. 627

41. Ark.—Hires v. Douglas, 129 S.W.2d 959, 198 Ark. 559

42. Ark.—Hires v. Douglas, supra

43. Ark.—Hires v. Douglas, supra.

44. Ark.—Giese v. Jones, 48 S.W.2d 232, 185 Ark. 548

45. Ark.—Hires v. Douglas, 129 S.W.2d 959, 198 Ark. 559

46. Ark.—Northern Road Improvement Dist. of Arkansas County v. Zimmerman, 67 S.W.2d 197, 188 Ark. 627

47. Ohio.—Chapman v. Sollars, 38 Ohio St. 378

48. Ark.—Arkansas-Louisiana Highway Improvement Dist. v. Pickens, 276 S.W. 355, 169 Ark. 603

49. Ark.—Arkansas-Louisiana Highway Improvement Dist. v. Pickens, supra

50. Ark.—Crowe v. Security Mortg. Co., 5 S.W.2d 346, 176 Ark. 1130

Assignment of certificate

Road improvement district could assign certificate of purchase under decree foreclosing lien of district for unpaid taxes.—Crowe v. Security Mortg. Co., supra

51. Ark.—Crowe v. Wells River Sav. Bank, 32 S.W.2d 617, 182 Ark. 672

Property bought in, and resold by, several districts

Where a lot, conveyed to drainage and road improvement districts by commissioner in proceeding to foreclose such districts' assessment liens thereon, was conveyed by such districts to trustee under trust deed thereon after expiration of time for redemption, one to whom such trustee subsequently conveyed lot acquired title paramount to that of one to whom lot was previously conveyed by levee district and drainage district after purchasing it at sale on foreclosure of liens for assessments due them.—Riddle v. Williams, 166 S.W.2d 893, 204 Ark. 1047

52. Ark.—McIver Abstract Co. v. Slaton, 11 S.W.2d 447, 178 Ark. 632,

So, where a sale to the district is void because the district had title to the land by virtue of a prior tax sale at the time the taxes for which the second sale was had were assessed, a purchaser from the district acquires no title.[53]

Rights of purchaser. The purchaser at the foreclosure sale becomes a party to the proceeding and is entitled to the benefit of such assistance from the court as is necessary to make its decree effective.[54] Thus, after the expiration of the period of redemption, the purchaser may obtain a writ of possession.[55]

Redemption. The existence of the right of redemption and the duration of such right are governed by applicable statutory provisions.[56] A statute extending the time for redemption may apply to a sale held theretofore where the district was the purchaser,[57] and, if it becomes applicable while the district has title, it continues to apply after the district resells the land to another.[58] A statute diminishing the period of redemption may be applied to any subsequent sale proceedings, even in a district created before its enactment.[59] Where a district acquires title at a tax sale, it should require the payment of all subsequent taxes on redemption.[60]

§ 305. —— Disposition of Proceeds

The proceeds of special assessments must be expended as directed by statute

The money collected by special or local assessments must be expended in accordance with the provisions of the statute.[61] One who has been a party to the mismanagement of the funds cannot take advantage of such misapplication.[62]

§ 306. Poll Taxes

Poll taxes for highway purposes are imposed by statute in a number of jurisdictions

Poll taxes for road purposes are sometimes imposed by statute,[63] with specified exemptions,[64] on able-bodied men[65] who are residents of the taxing district,[66] and under some statutes an employer, after notice or demand, is made liable for a tax imposed on his employee,[67] provided the employer is indebted to the employee at the time of notice or subsequently becomes indebted to him.[68] Statutes of this character are generally held to be valid.[69]

followed in Becker v Bell, 11 S W 2d 449, 178 Ark 1199—Walker v Ferguson, 3 S W 2d 694, 176 Ark 625

After title reverts to the owner the district can convey no title, and its deed to a purchaser may be canceled—Todd v Denton, 64 S W 2d 331, 188 Ark 29

53 Ark—Crowe v Wells River Sav Bank, 32 S W 2d 617, 182 Ark 672

54. Ark—Northern Road Improvement Dist v Meyermann, 275 S W 762, 169 Ark 383

55. Ark—Northern Road Improvement Dist v Meyermann, 275 S W 762, 169 Ark 383

56. Ark—Walker v Ferguson, 3 S W 2d 694, 176 Ark 625

Who may redeem

A statute providing that the "owner" of property sold for taxes could redeem was held to include any person having interest that would be foreclosed—Wyatt v Beard, 15 S W 2d 990, 179 Ark 305

Sufficiency of tender

Tender and offer to redeem after sale of land for improvement district taxes were sufficient, although tender was made to clerk as commissioner—Wyatt v Beard, supra

57. Ark—McIver Abstract Co v Slaton, 11 S W 2d 447, 178 Ark 632, followed in Becker v Bell, 11 S W 2d 449, 178 Ark 1199—Walker v Ferguson, 3 S W 2d 694, 176 Ark 625.

58. Ark—McIver Abstract Co v Slaton, 11 S W 2d 447, 178 Ark 632, followed in Becker v Bell, 11 S W 2d 449, 178 Ark 1199—Walker v Ferguson, 3 S W 2d 694, 176 Ark 625

Statute taking effect after expiration of shorter period does not extend time for redemption—Crowe v Security Mortg Co, 5 S W 2d 346, 176 Ark 1130

59 Ark—Northern Road Improvement Dist v Meyermann, 275 S W 762, 169 Ark 383

60. Ark—Crowe v Wells River Sav Bank 32 S W 2d 617, 182 Ark 672

61. U S—State Bank of Wellston, Mo v Mississippi Valley Trust Co, C C A Ark, 297 F 563

Mo—Platte City Ben Assessment Special Road Dist of Platte County v Couch, 8 S W 2d 1003, 320 Mo 189

29 C J p 749 note 82

62. Ill—Austin-Western Road Mach Co v. Wetzel, 264 Ill App 254

63. Ark—Harper v Brooksher, 240 S W 729, 153 Ark 480

29 C J p 749 note 84

Liability to road labor as constituting poll tax see infra § 307

64. **Residents of cities of the first class** are exempt from highway poll taxes under some statutes—City of Topeka v Wasson, 168 P 902, 101 Kan 824—Shane v City of Hutchinson, 127 P 606, 88 Kan 188

65. Mo—Johnson v Scott, 114 S W 45, 133 Mo App 689

29 C J p 749 note 85

66. Wash—Mason County v Simpson, 43 P 33, 13 Wash 250

29 C J p 749 note 86

67. Idaho—Kootenai County v Hope Lumber Co, 89 P 1054, 13 Idaho 262

Wash—Mason County v Simpson, 43 P 33, 13 Wash 250

68. Idaho—Kootenai County v Hope Lumber Co, 89 P 1054, 13 Idaho 262

69. **Particular statutes held valid**

(1) A statute imposing a road tax of four dollars on persons between the ages of twenty-one and twenty-five years, without privilege of doing road work in lieu thereof, is not violative of Const Amendm 3 limiting the taxes which may be levied for road purposes to three mills, this not being strictly a tax but rather an exercise of the police power, and neither is it violative of other constitutional provisions—Harper v Brooksher, 240 S W 729, 153 Ark 480

(2) A statute exempting from a state-wide poll tax residents of cities of the first class is not invalid—City of Topeka v Wasson, 168 P 902, 101 Kan 824—Shane v City of Hutchinson, 127 P 606, 88 Kan 188

(3) The fact that the tax is imposed on men only does not violate a constitutional provision that male and female citizens shall enjoy equal-

A poll tax, however, cannot be imposed without statutory authority,[70] and, where such authority is conferred, it can be exercised only in accordance with the constitution.[71] The statutes prescribe the method of levying poll taxes,[72] and the remedies for collecting and enforcing them.[73] The statutory remedy is exclusive,[74] but, where the statute provides two methods of enforcement, either may be pursued.[75] A provision that a prosecution for nonpayment shall be brought within a specified time has been held to be merely directory.[76] The usual rules as to parties,[77] pleadings,[78] and other matters of practice[79] are applicable to proceedings to enforce poll taxes. The statute may impose a fine or penalty for nonpayment of the tax,[80] or, in lieu thereof, require the debtor to work on the road.[81]

Collector's bond. Under statutes requiring him to do so, a collector of road capitation taxes should give a bond with sureties conditioned for the faithful performance of his duties.[82]

§ 307. Work on Roads by Taxpayers

In some jurisdictions the statutes give the taxpayer the right to pay road taxes in labor on the highways, or subject citizens to highway labor with the privilege of commuting such duty in money.

A road tax is not payable in labor unless the statutes so provide,[83] nor can the authorities of a town or other political subdivision compel citizens to work on the highways unless they are given power to do so by the legislature,[84] and such power will not be implied from a mere delegation of power to control and regulate highways,[85] although there is authority to the contrary.[86] In many jurisdictions, however, the statutes give the taxpayer the right to pay road taxes in labor on the highway,[87] or subject citizens to highway labor, with the privilege of commuting such duty in money;[88] and such statutes are valid.[89] The provision found in some statutes requiring citizens to furnish, for a limited time, teams, wagons, and implements suitable for road work has also been held valid,[90] although in some jurisdictions such requirement has been held to violate a constitutional provision forbidding the taking of property for public use without just compensation,[91] and, even where such provision has been held valid, a requirement that owners of teams shall furnish the necessary feed there-

ly all civil and political rights—Salt Lake City v. Wilson, 148 P 1104, 46 Utah 60

Particular statutes held invalid

(1) A statute exempting persons within the limits of cities or incorporated villages from a highway poll tax is invalid—Town of Dixon v. Ide, 108 N E 750, 267 Ill 445

(2) Where the legislature imposes a poll tax for general purposes up to the maximum amount authorized by the constitution, a statute providing an additional poll tax for highway purposes is void

Nev—Hassett v. Walls, 9 Nev 387.

N C.—Dixon v Board of County Com'rs, 156 S.E. 852, 200 N.C 215.

70. N Y—Plattekill v Lounsbery, 106 N Y S. 139, 54 Misc. 492, affirmed 116 N Y.S 1149, 132 App Div. 939
29 C J p 749 note 90.

71. Nev.—Hassett v. Walls, 9 Nev. 387.

72. Miss—Hays v State, 137 So. 489, 162 Miss. 5
Mo—Road Dist. No 41, Henry Tp, Vernon County v Jackson, 231 S W. 1043, 208 Mo App. 194

73. Mo—Road Dist. No 41, Henry Tp, Vernon County v Jackson, supra
29 C J p 749 note 95

74. Wash—Mason County v Simpson, 43 P 33, 13 Wash 250
29 C J p 749 note 96

75. Idaho—Kootenai County v Hope Lumber Co., 89 P. 1054, 13 Idaho 262
29 C J. p 749 note 97.

76. Ill—Kinney v. People, 52 Ill App 359.

77. Mo—Vernon County Road Dist No 41 v. Jackson, App, 231 S W 1043
29 C J p 749 note 99

78. Wash—Mason County v Simpson, 43 P 33, 13 Wash. 250.
29 C.J. p 749 note 1

79. Wash—State v. Lamping, 72 P 476, 31 Wash 652
29 C J p 749 note 2

80. Kan—State v Simons, 136 P 320, 90 Kan 793.
29 C J p 749 note 3.

81. La—State v Cox, 28 So 356, 52 La Ann 2049

Statute held valid

Tex—Bluitt v State, 121 S W. 168, 56 Tex Cr 525

82. **Liability of sureties**

The sureties on the general bond of an assessor are not relieved of liability for road capitation taxes collected by him because of a statutory requirement that he give an additional bond for the faithful performance of his duties as such collector—State v Sparks, 155 S E 172, 109 W Va 394

83. Ill—People v Suppiger, 103 Ill 434
Pa—Ferguson v Moore, 5 Pa Super. 349

84. Fla—Galloway v. Tavares, 19 So 170, 37 Fla 58.

85. Fla—Galloway v. Tavares, supra.
29 C J p 749 note 8

86. N C—State v Halifax, 15 N.C 345
29 C J p 749 note 9.

87. Miss—Hays v. State, 137 So 489, 162 Miss 5.
29 C J p 749 note 10.

88. Ala—Lawrence v State, 161 So 260, 26 Ala App 365, certiorari denied 161 So 261, 230 Ala 378
Ark—Harper v Brooksher, 240 S W 729, 153 Ark 480
N C—State v Kelly, 119 S E 755, 186 N.C 365—State v Taylor, 86 S E 787, 788, 170 N C. 693.
29 C J p 750 note 11.

Origin of system

"The system of working roads by conscription of labor was handed down to us from the English law, . . . and was the system among the Romans . . . Working roads by conscription of labor was the system in France, where it was known as 'corvees,' and was one of the great grievances which were swept away by their revolution"—State v. Taylor, supra.

89. N C—State v Kelly, 119 S E 755, 186 N C. 365—State v. Taylor, 86 S E 787, 170 N C 693
29 C J. p 750 note 12

90. Tenn—Williams v State, 293 S W 757, 155 Tenn 364—Galoway v. State, 202 S W. 76, 139 Tenn. 484, L R A 1918D 970

91. Ala—Toone v State, 59 So. 665, 178 Ala. 70, 42 L R A,N.S, 1045

for has been held to constitute an unlawful appropriation.[92] The statutory liability to road work does not, according to the weight of authority, constitute a poll or capitation tax[93] within constitutional and statutory provisions relating to such taxes,[94] nor is it, indeed, a tax at all in the proper sense of the word,[95] but it is a public duty analogous to military or jury service.[96] Some authorities, however, have held that whether a statute requires labor, commutable in money, or levies a money tax which may be paid in labor, it imposes a poll or capitation tax, subject to constitutional limitations in respect of such taxes.[97] Persons employed in opening a road in response to a summons from the highway officer are not personally liable to one whose lands are trespassed on in the doing of the work.[98]

Irregularities in the doing of the work may be waived by the proper highway authorities,[99] and, if nonresident owners of land in a township have worked out their road taxes, it is too late for the authorities to object that such owners had no right to pay their taxes in labor.[1]

Construction of statutes. General rules governing the construction of statutes apply to the construction of statutes which subject citizens to highway labor.[2] Such statutes, however, are to be strictly construed in favor of the citizen whose labor is sought to be taken for a public use.[3]

Liability and exemption. Generally the statutes impose liability to perform road labor only on able-bodied[4] male[5] residents,[6] between specified ages,[7] with specified exemptions,[8] such as men engaged in work of a public nature.[9] A member of a fire company is exempt under some statutes,[10] but the exemption cannot be claimed under a statute exempting firemen from military or jury service and from the payment of a poll tax;[11] and a constitutional provision prohibiting local laws exempting from road duty repeals an existing local act exempting firemen.[12] No person within the terms of the statute can avoid road duty in the absence of some provision expressly or impliedly exempting him.[13] Thus, where there is no exemption, a person cannot excuse himself on the ground of age,[14] or of physical inability,[15] or on the ground that he has no occasion to use the road,[16] or has been previously assigned to another highway.[17] A person employed on a railroad is not exempt from road duty in the absence of a statute so providing,[18] and in some jurisdictions an exemption of such employees has been held unconstitutional as class legislation,[19] although there is authority to the con-

92. Tenn.—Galoway v. State, 202 S.W. 76, 139 Tenn. 484, L.R.A.1918D 970
29 C.J. p. 750 note 15

93. N.C.—State v. Taylor, 86 S.E. 787, 170 N.C. 693
29 C.J. p. 750 note 16

94. N.C.—Dixon v. Board of County Com'rs, 156 S.E. 852, 200 N.C. 215
29 C.J. p. 750 note 17

95. Ark.—Harper v. Brooksher, 240 S.W. 729, 153 Ark. 480
N.C.—Dixon v. Board of County Com'rs, 156 S.E. 852, 200 N.C. 215—State v. Kelly, 119 S.E. 755, 186 N.C. 365—State v. Taylor, 86 S.E. 787, 170 N.C. 693.
29 C.J. p. 750 note 18

96. N.C.—Dixon v. Board of County Com'rs, 156 S.E. 852, 200 N.C. 215—State v. Kelly, 119 S.E. 755, 186 N.C. 365—State v. Taylor, 86 S.E. 787, 170 N.C. 693
29 C.J. p. 750 note 19.

97. Nev.—Hassett v. Walls, 9 Nev. 387
Va.—Proffit v. Anderson, 20 S.E. 887

98. Ark.—McNairn v. Gilliland, 224 S.W. 947, 145 Ark. 578.

99. Ala.—Hall v. De Kalb County, 92 So. 641, 207 Ala. 275

1. Pa.—Commonwealth v. Colley Tp., 29 Pa. 121.

2. **"And" read as "or"**
Within a rule of the commissioners' court providing as to work in lieu of a wheel tax that failure of road duty "may be excused by the overseer and proceeded against as a road defaulter," the word "and" is clearly shown by the context to mean "or" and it can be given such meaning when the context shows that it was used in the disjunctive instead of the conjunctive.—Hall v. De Kalb County, 92 So. 641, 207 Ala. 275

3. Ala.—Lawrence v. State, 161 So. 260, 26 Ala. App. 365, certiorari denied 161 So. 261, 230 Ala. 378

4. N.C.—State v. Kelly, 119 S.E. 755, 186 N.C. 365
29 C.J. p. 750 note 22

5. N.C.—State v. Kelly, supra.
Tenn.—State v. Hurst, 247 S.W. 97, 147 Tenn. 296
29 C.J. p. 750 note 23

6. Tenn.—State v. Hurst, supra.
29 C.J. p. 750 note 24

7. N.C.—State v. Kelly, 119 S.E. 755, 186 N.C. 365
Tenn.—State v. Hurst, 247 S.W. 97, 147 Tenn. 296
29 C.J. p. 751 note 25.

8. Tex.—Walling v. State, 232 S.W. 1115, 89 Tex.Cr. 613.
29 C.J. p. 751 note 26.

9. Tenn.—Jackson v. State, 46 S.W. 450, 101 Tenn. 138
29 C.J. p. 751 note 27

10. Ind.—Leedy v. Bourbon, 40 N.E. 640, 12 Ind. App. 486
29 C.J. p. 751 note 28

11. Ind.—Leedy v. Bourbon, supra.

12. Miss.—Chidsey v. Scranton, 12 So. 545, 70 Miss. 449

13. N.C.—State v. Gillikin, 19 S.E. 152, 114 N.C. 832
29 C.J. p. 751 note 33
Mail carriers and justices of the peace held not exempt.—State v. Kelly, 119 S.E. 755, 186 N.C. 365

14. Ill.—Fox v. Rockford, 38 Ill. 451

15. Ill.—Macomb v. Twaddle, 4 Ill. App. 254

16. N.C.—State v. Gillikin, 19 S.E. 152, 114 N.C. 832.

17. N.C.—State v. Yoder, 44 S.E. 689, 132 N.C. 1111
29 C.J. p. 751 note 37

18. N.C.—State v. Kelly, 119 S.E. 755, 186 N.C. 365
29 C.J. p. 751 note 38.

19. Tenn.—Neely v. State, 4 Lea 316, overruling Hawkins v. Small, 7 Baxt. 193
29 C.J. p. 751 note 39.

trary.[20] The right to exemption must exist at the time of the summons,[21] and must clearly appear.[22] The determination of the question of exemption may be intrusted to the court,[23] or may lie in the exclusive determination of some specified officer or board.[24] Under some statutes a certificate of exemption is required,[25] in which case the certificate is prima facie evidence of the facts stated therein.[26]

Under some statutes the inhabitants of incorporated towns and cities cannot be forced to work the roads outside the town or city limits,[27] and one who has paid a highway tax in one municipality as a substitute for road duty is not liable in another municipality during the same year.[28] The fact that the county is indebted to one liable to the county for road duty will not excuse him from such duty.[29] Under some statutes the obligation to perform road labor is confined to work on the road and does not include work outside the right of way.[30]

Proceedings to compel work on the highway must comply substantially with all the statutory prerequisites[31] as to the assessment,[32] the roads to be worked,[33] and the assignment and apportionment of labor,[34] and it is not for the taxpayer to dictate the kind of work or the time and place of performance.[35] An assessment is not invalid, however, because the authorities require less work than they may lawfully require under the statute.[36]

Notice[37] for the requisite time,[38] and in the prescribed form,[39] naming a proper place and time for the appearance of the person called to labor on the highway,[40] and properly served,[41] is commonly essential to the validity of the levy, although want of notice[42] or defects therein[43] may be waived. In some jurisdictions it has been held that failure to give notice to work out a road tax will not release land from the lien of the tax,[44] and that the statutory requirement of notice to residents only will not invalidate the tax assessed on lands of nonresidents.[45] So it has been held that lack of notice to work out part of the tax is no reason for restraining collection of the entire tax.[46] The fact that the notice calls for a longer period of labor than defendant is liable for will not excuse his failure to work for the lawful time.[47]

§ 308. —— Civil Liability for Failure or Refusal to Work

Failure to work the roads may subject the delinquent to a fine or penalty which may be collected by civil action.

Failure to work the roads may subject delinquent to a fine or penalty[48] which may be collected by civil action,[49] or imprisonment for nonpayment

20. N.C—State v Womble, 17 S E 491, 112 N C 862, 19 L R A. 827
29 C J p 751 note 40

21. Ala—Lewin v State, 77 Ala. 45—Hill v Birmingham, 73 Ala 74

22. Alaska—U S v. Naylon, 3 Alaska 88

23. Mo—Moore v Vaughan, 30 S W 162, 127 Mo 538
29 C J p 751 note 43

24. Ind—Winfield Tp v Wise, 73 Ind 71.
S C—State v Lancaster Dist Road Comrs, 21 S C L 314

Statute held valid
Provisions of special road act taking away from quarterly county court power to exempt from road duty male inhabitants unable to perform manual labor and conferring power jointly on quarterly court and county road commission are not invalid—Crockett County v Walters, 95 S W 2d 305, 170 Tenn 337

25. Mo—Johnson v Scott, 114 S W. 45, 133 Mo App. 689.
29 C J p 751 note 45

26 Ind—Shideler v Clinton Tp, 23 Ind 479

27. Tex—Ex parte Roberts, 11 S W 782, 28 Tex App 43
Tenn—De Tavernier v Hunt, 6 Heisk. 599

28. Ala—Whitt v Gadsden, 49 So 682, 160 Ala 271.

29. Ala—Martin v State, 106 So 207, 21 Ala App 170

30. Work in gravel pit
Under statute making all persons liable to work on public roads, citizen cannot be required to dig gravel for road in pit two miles distant from road on which he was liable to work—Lawrence v State, 161 So 260, 26 Ala App 365, certiorari denied 161 So 261, 230 Ala 378

31. Me—Sumner v Gardiner, 34 A. 524, 88 Me 584
29 C J p 751 note 48.

32. Mich—Hoffman v Lynburn, 62 N W 728, 104 Mich 494
29 C.J p 751 note 49

33. S C—St Bartholomew's Parish Lower Road Comrs v. Murray, 30 S C L 335
29 C J p 752 note 50

34. Tex—Walling v State, 232 S W 1115, 89 Tex Cr 613
29 C J p 752 note 51.

35. Ga—Herndon v Colquitt County, 64 S E 60, 132 Ga. 343.
29 C J p 752 note 52

36. Kan—In re Hagan, 68 P. 1104, 65 Kan 857

37. N M—State v. Byers, 134 P. 234, 18 N M 92
29 C J p 752 notes 54, 64, 65

38. Tenn—State v Hurst, 247 S W 97, 147 Tenn 296
29 C J p 752 note 55.

39. Tenn—State v Hurst, supra.
29 C J p 752 note 56

40. Tenn—State v Hurst, supra
29 C J p 752 note 57

41. Ala—Lawrence v State, 161 So 260, 26 Ala App 365, certiorari denied 161 So 261, 230 Ala 378
29 C J p 752 note 58

42. Ala.—James v State, 72 So 585, 15 Ala App 89, certiorari denied 73 So 1000, 198 Ala 691.
29 C J p 752 note 59

43 Ark—Washington v State, 227 S W 28, 147 Ark 135
29 C J p 752 note 60

44. Neb—Burlington & Missouri River R Co v Lancaster County, 4 Neb 293.

45. Neb—Burlington & Missouri River R Co. v. Lancaster County, supra

46. Iowa—Sioux City & St P R Co v Osceola County, 45 Iowa 168

47. N C—State v Yoder, 44 S E 689, 132 N C 1111

48. Ala—Geneva County v Hall, 9 So 727, 93 Ala 488.
29 C J p 753 note 67

49. S C—Prince William's Parish Lower Road Comrs v. Trescot, 39 S C L 278
29 C.J p 753 note 68.

of the fine may be imposed.[50] Defendant may show in defense of the action want of legal qualification on the part of the commissioners to act[51] or failure of the authorities to prescribe the amount to be paid in lieu of labor,[52] but it is no defense that the place where defendant was ordered to work was not a legal highway.[53] The statute of limitations begins to run against an action to recover the penalty from the day of the default.[54] Questions of jurisdiction,[55] the party plaintiff,[56] the pleadings,[57] notice,[58] and hearing[59] are governed by statute. The presumption in favor of official acts obtains in actions of this nature,[60] as does the rule governing civil actions generally, that the burden of proof is on the party having the affirmative.[61]

§ 309. —— Criminal Responsibility for Failure or Refusal to Work

In a number of jurisdictions, the statutes make the failure or refusal to do road work a criminal offense.

In a number of jurisdictions, the statutes make the failure or refusal to do road work a criminal offense,[62] and such statutes are not unconstitutional as providing for imprisonment for debt.[63] To constitute the offense under some statutes the failure to work must have been willful.[64] Accused may defend by showing any legally sufficient excuse for his delinquency,[65] as that the road on which he was warned to work was not a public highway,[66] or that an appeal by defendant from the order establishing the road was pending at the time he was summoned to work,[67] or that he was not liable to road duty.[68] A tender of payment in lieu of work, however, made to a person not authorized to receive it, is no defense.[69]

In some jurisdictions the state may elect whether to prosecute under the criminal statutes or under ordinances of the county commissioners' court.[70] The prosecution must be brought by the proper officer[71] before a tribunal having jurisdiction,[72] and must be based on a sufficient complaint, information, or affidavit,[73] warrant,[74] or indictment,[75] and

50 Ga—Sims v Hutcheson, 72 Ga 437—Singleton v Holmes, 70 Ga 407

51 Me—Sumner v Gardiner, 34 A 524, 88 Me 564
29 C J p 753 note 70

52. Ala—Baader v Cullman, 22 So 19, 115 Ala 539

53. Ill—Reynolds v Foster, 89 Ill 257

54. S C—St Paul's Parish Road Comrs v Morris, 31 S C L 320

55 Ala—Geneva County v. Hall, 9 So 727, 93 Ala 488
29 C J p 753 note 74

56. N C—Duffy v Averitt, 27 N C 455
29 C J p 753 note 75

57. N C—Duffy v Averitt, supra
29 C J p 753 note 76

58. S C—Glover v Simmons, 15 S C L 67
29 C J p 753 note 77

59 Ga—Sims v Hutcheson, 72 Ga 137
29 C J p 753 note 78

60 Ill—Fenton v Peters, 50 Ill App 41
29 C J p 753 note 80

61. Ill—Fenton v Peters, supra.
29 C J p 753 note 82

62 Ala—Carver v State, 105 So. 424 21 Ala App 76.
Miss—Evans v State, 105 So 501, 140 Miss 147.
N C—State v Kelly, 119 S E 755, 186 N C 365
Tex—Sheffield v State, 280 S W. 786, 103 Tex Cr 224
29 C J p 753 note 83

Failure to furnish team
A statutory requirement that the owner of a team shall work it on the highways is not a requirement for the furnishing of road labor within the provision of a statute making it a misdemeanor to refuse to perform honestly labor on the highways and, since there is no provision making failure to furnish the team a misdemeanor, an indictment for such failure was properly quashed—State v Hurst, 247 S W 97, 147 Tenn 296

63 Fla—Mashburn v State, 62 So 586, 65 Fla 470
Kan—In re Dassler, 12 P 130, 35 Kan 678

64. Ala—Jones v State, 62 So 306, 7 Ala App 180

65. N C—State v Yoder, 40 S E 3, 129 N C 544
29 C J p 753 note 86

66. Ark—Washington v State, 227 S W 28, 147 Ark 135
29 C J p 753 note 87

67. N C—State v Davis, 74 S E 916, 159 N C 455

68. Tex—Walling v State, 232 S W 1115, 89 Tex Cr 613
Liability to perform road labor generally see supra § 307

69 Tex—Gross v State, 4 Tex App 249
29 C J p 753 note 90

70. Ala—Goolsby v State, 132 So 914, 24 Ala App 639—Goolsby v State, 132 So 604, 24 Ala App 294 certiorari denied 135 So 919, 223 Ala 700

71. Okl—Gourley v State, 129 P 684, 8 Okl Cr 598
29 C J p 754 note 91.

72. Ga—Lewis v Turner, 76 S E 999, 139 Ga 174
29 C J p 754 note 92

73. Ala—Carver v State, 105 So 424 21 Ala App 76
29 C J p 754 note 93

Allegations held sufficient
Ala—Martin v State, 106 So 207, 21 Ala App 170
Fla—Butler v Perry, 66 So 150, 67 Fla 405, affirmed 36 S Ct 258, 240 U S 328 60 L Ed 672

Allegations held insufficient
(1) In general—Sheffield v State, 280 S W 786 103 Tex Cr 224—29 C J p 754 note 93 [c]

(2) An information charging that defendant failed to work the public roads as provided by the rules of the court of county commissioners was void and insufficient to support a conviction, as not averring the authoritative ordination of the rules and regulations passed by the court of county commissioners—Sullivan v State 98 So 323 19 Ala App 484

Complaint in county court held sufficient to support appeal from conviction to circuit court—Martin v State, 106 So 207, 21 Ala App 170

In Mississippi a list containing the names of delinquent road hands, sworn to by the road overseer and filed with the justice of peace, takes the place of an affidavit, and the justice has no jurisdiction to try a person whose name is not on such list—Evans v State, 105 So 501, 140 Miss 147—Bishop v State, 52 So 690, 97 Miss 498

74. N C—State v Green, 66 S E 564, 151 N C 729
29 C J p 754 note 94

75. Ala—Bynum v State, 57 So 1024, 3 Ala App 117
29 C J p 754 note 95—31 C J p 704 note 96 [a] (2)

the proof must conform to the facts charged.[76] Exceptions in the statute which form a part of the description of the offense,[77] such as the payment of money in discharge of the liability,[78] must be negatived; but it is not necessary to negative defensive matters which are not part of the definition of the offense.[79] If willfulness is not an element of the offense it need not be alleged.[80] Any evidence relevant to the issues, if otherwise competent, is admissible.[81] As in other criminal prosecutions, the burden of proof is on the prosecution to establish defendant's guilt[82] beyond a reasonable doubt.[83] Questions of fact arising on conflicting evidence,[84] such as defendant's physical capacity,[85] are for the jury, and questions of law are for the court.[86] Constitutional provisions limiting the right of appeal in criminal prosecutions are applicable to prosecutions under the road law.[87]

§ 310. —— Collection of Taxes Not Worked Out

Taxes not worked out may be collected in money if the taxpayer has been given an opportunity to work out his taxes.

In those jurisdictions in which the taxpayer is allowed to work out his taxes, opportunity to do so must commonly be given to him.[88] Unless such opportunity is given, an injunction will lie to restrain collection of the taxes in money,[89] or, if the tax is collected, the taxpayer may sue to recover the amount paid.[90] Where opportunity has been given to work out the tax and there is a failure to do the work, such tax may be collected in money by the supervisors or collector of taxes,[91] on demand,[92] and notice of time and place for payment,[93] and in an action to recover for the amount of work required to be done, the petition must allege facts showing defendant's liability under the statute;[94] but a refusal to work, based on the failure of the authorities to comply with the statute, will not authorize the collection of the tax in money.[95]

§ 311. Rights and Remedies of Taxpayers

Generally taxpayers may invoke the protection of the courts against illegal acts of the highway authorities adversely affecting their interests as taxpayers. In a proper case they may sue on behalf of the highway district or intervene in a pending suit.

While taxpayers as such cannot sue in respect of acts of the highway authorities, even though unauthorized or illegal, which do not affect their rights, or injure them, as taxpayers,[96] as a general rule, subject to statutory qualifications,[97] they are entitled to invoke the protection of the courts against illegal and unauthorized acts of the highway authorities adversely affecting their interests as taxpayers.[98] Thus an interested taxpayer may bring

76. Tex.—Wynn v. State, Cr., 42 S W 289
29 C J p 754 note 96

77. Minn.—State v Tracy, 84 N W 1015, 82 Minn 317

78. N C.—State v Green, 66 S E 564, 151 N C 729
29 C J p 754 note 98

79. Fla.—Butler v Perry, 66 So 150, 67 Fla 405, affirmed 36 S Ct 258, 240 U S 328, 60 L Ed 672
29 C J p 754 note 98 [a]

80. N C.—State v Covington, 34 S E 272, 125 N C 641

81. Ala.—Golden v State, 64 So 517, 10 Ala App 235
29 C J p 754 note 1
Evidence held inadmissible
Ala.—Carver v State, 105 So 424, 21 Ala.App 76
29 C J. p 754 note 1 [b]

82. Ala.—Smith v State, 123 So 283, 23 Ala App 266
Tex.—Sheffield v. State, 280 S W. 786, 103 Tex Cr 224

83. Ala.—Smith v State, 123 So 283 23 Ala App 266
29 C J p 754 note 3
Evidence held insufficient
(1) To sustain conviction.—Lawrence v State, 161 So. 260, 26 Ala App 365, certiorari denied 161 So. 261, 230 Ala 378—Smith v State, 123 So 283, 23 Ala App 266
(2) To show that defendant was liable for road duty.—Kirkham v State, 93 So 56, 18 Ala App 426

84. Ala.—Martin v State, 106 So 207, 21 Ala App 170
29 C J p 754 note 4

85. Ala.—Moss v State, 39 So 198, 143 Ala 86
Tex.—Walling v State, 232 S W 1115, 89 Tex Cr 613

86. **Directed verdict held improperly refused**
Ala.—Smith v State, 123 So 283, 23 Ala App 266

87. La.—State v. Wikoff, 28 La Ann 654
29 C J p 754 note 6

88. Mo.—Schwaner v Hayes, 125 S W 519, 142 Mo App 100
29 C J p 754 note 7
Notice generally see supra § 307

89. Pa.—Miller v Gorman, 38 Pa 309—Coxe v Sweeney, 10 Pa Co 289

90. Wis.—Biss v. New Haven, 42 Wis 605

91. Pa.—Cumru Tp v Phillips, 19 Pa Dist 836
29 C J p 754 note 10

92. U S.—On Yuen Hai Co v Ross, C C Or., 14 F 338, 8 Sawy 384.

93. Me.—Dearing v Heard, 15 Me 247

94. Ohio.—Lanter v Lathrop, 6 Ohio Dec., Reprint, 1137, 10 Am L R 569
29 C J p 754 note 13

95. Me.—Sumner v Gardiner, 34 A. 524, 88 Me 584

96. **Taxpayer affected only as member of public**
As a general rule taxpayers cannot sue to redress public wrongs by which they are affected only as members of the public generally
Ind.—Sunderland v Martin, 15 N E. 689, 113 Ind 411
Kan.—Ruff v Board of Com'rs of Shawnee County, 272 P 189, 127 Kan 188
Or.—De Neffe v Duby, 239 P 109, 115 Or 511
Wash.—State v Superior Court, Thurston County, 289 P 28, 157 Wash 429

97. **Location of state highway**
Under the statutes in some jurisdictions a taxpayer may not maintain an action against the state highway commission to determine the location of a state highway.—Parker v State Highway Commission, 143 S E 871, 195 N C 783

98. Fla.—Hillsborough County v. Pal Mere, Inc., 135 So. 525, 101 Fla. 736.

a suit to cancel illegal road bonds,[99] to annul an unauthorized waiver of damages by the highway authorities,[1] or to declare invalid or to set aside an illegal highway contract involving the payment of public funds,[2] such as a contract for road work.[3] In a proper case a taxpayer may also sue for the highway district's benefit on a cause of action belonging to it where the proper highway authorities refuse to assert such cause of action;[4] and, whenever a taxpayer has an interest in the subject matter of a suit in which the highway authorities are parties, he may intervene to protect that interest.[5] Under the statutes in some jurisdictions a taxpayer may appeal to the proper court from an allowance of claims for road work;[6] and in a proper case he may be entitled to have a receiver appointed for a highway contracting firm.[7] In the absence of fraud or abuse, a taxpayer, however, cannot interfere with the exercise of the discretionary powers of the highway authorities.[8]

Injunction. As a general rule, where there is no adequate remedy at law,[9] a taxpayer may maintain an action to restrain highway authorities from performing illegal or unauthorized acts adversely affecting his interest as a taxpayer.[10] Thus an interested taxpayer may bring an action to restrain a

Ga —McGinty v Pickering, 179 S.E 358, 180 Ga. 447
Ill —Miller v Hale, 139 N E 411, 308 Ill 275
Ind —Sullivan v Board of Com'rs of Miami County, 149 N E 94, 85 Ind App 287
Mo —Special Road Dist No 4 of Bolinger County v Stepp, 4 S W 2d 480, 222 Mo App 1216
Tex —Anderson v Houts, Civ App, 240 S W 647
Remedies of highway taxpayer for erroneous taxation see supra § 291
Right of taxpayer to be made party to proceedings for vacation of highway see supra § 118
Right of taxpayer to appeal from judgment in respect of vacation of highway see supra § 126

Excessive expenditure

Any attempt of a board of county commissioners to disregard a valid limitation as to the maximum cost of a proposed road and to incur an expenditure of public funds in excess thereof, although such road improvement is otherwise lawfully projected and undertaken, gives rise to a cause of action in behalf of a taxpayer aggrieved thereby —Atchison, T & S F Ry Co v Board of Com'rs of Barton County, 202 P 78, 109 Kan 787, rehearing denied 203 P 698, 110 Kan 310

99. Tex —Twing v Williams, Civ App, 24 S W 2d 732—Twing v Rhodes, Civ App, 24 S W 2d 728, certified questions answered 16 S W 2d 258, 118 Tex 410, and reversed on other grounds Rhodes v Twing, Com App, 41 S W 2d 13, appeal dismissed 53 S Ct 5, 287 U S 561, 77 L Ed 495

1. Damages for delay in completing contract

A taxpayer is entitled to object to county commissioners' unauthorized waivers of damages for paving contractor's delay in completing contract —Hillsborough County v Pal Mere, Inc, 135 So 525, 101 Fla. 736

2. As far as its terms will increase his tax burdens illegally, a taxpayer may question the validity of a contract providing for the lease of railroad property for highway purposes, but he has no right to provoke litigation over details of the lease contract of no more concern to him than to the public in general —Ruff v Board of Com'rs of Shawnee County, 272 P. 189, 127 Kan 188

3. Ark —Sikes v Douglas, 227 S W 988, 147 Ark 469
La —Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La. 471
Minn —Regan v Babcock, 247 N W 12, 188 Minn 192

Motive of taxpayer in suing is immaterial —Hokke v Passaic County, 127 A 813, 3 N J Misc 245

4. Suit to obtain compensation

Where the proper officers of a road district refused to institute a suit against county commissioners' court to obtain compensation to which district was entitled under statute, plaintiffs, as citizens of such district were entitled to prosecute the suit in the name, and for the benefit, of such district —Maroney v Feagin, Tex Civ App, 264 S W 105

Recovery of district funds

(1) A taxpayer may sue on behalf of a highway district to recover money paid to a commissioner thereof on a claim which is illegal and void, in case of refusal of the board of commissioners, after demand, to institute action —Sanborn v Pentland, 208 P 401, 35 Idaho 639

(2) Recovery by taxpayers of excessive payments made to commissioners of road improvement district inures to benefit of district —Goldsmith v Wright, 282 S W 970, 170 Ark 1116

5. Authority of road district board to defend litigation affecting acts done within its authority will not preclude taxpayers affected from intervening in suit involving location of road —Tyree v. Road Dist No 5, Navarro County, Tex Civ App, 199 S W 644, error refused

6. Ark —Prairie County v. Gray, 295 S W 363, 174 Ark 877.
Ind —McCoy v Snapp, 140 N E 65, 80 Ind App 583

7. Receivership held not warranted

In taxpayers' suit attacking a county road construction contract, a receivership for the contracting firm was not authorized, where the firm was not shown to be insolvent, although one of the partners therein had become by purchase from the other partners the sole owner of the construction contract and had failed to give a rendition of his property —Owen v Fleming-Stitzer Road Building Co, Tex Civ App, 250 S W. 1038

8. Wash —In re Assessment Roll for Paving of Dupont and Elm Streets and Northwest Ave in City of Bellingham, 12 P 2d 589, 168 Wash 439

9. Ark —White v Miller, 1 S W 2d 814, 175 Ark 1078
Ohio —State ex rel Shafer v Merrell, 185 N E 815, 44 Ohio App 347

10. Fla —Hillsborough County v Pal Mere, Inc, 135 So 525, 101 Fla 736
Ill —Gregor v Miller, 154 N E 707, 324 Ill 113
Ind —Sparling v Dwenger, 60 Ind 72
Kan —Ruff v Board of Com'rs of Shawnee County, 272 P 189, 127 Kan 188
La —Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La 471
Miss —Trahan v State Highway Commission, 151 So 178, 169 Miss. 732
S C —Gaston v State Highway Department of South Carolina, 132 S E 680, 134 S C 402
Tex —Anderson v Houts, Civ App, 240 S W 647

Location of highway

Taxpayers could sue to enjoin highway commission from constructing highway not a part of higher type roads so as to miss towns through which statute specified road should run —Logan v Matthews, 52 S W 2d 989, 330 Mo. 1213.

wrongful and illegal appropriation, expenditure, or disbursement of highway funds,[11] the entering into,[12] or the performance of,[13] an illegal highway contract involving payments from public funds to which he has contributed; or the issuance of illegal road bonds[14] or paving certificates[15] An injunction, however, will not be granted where it is not shown that the act or transaction sought to be enjoined is in fact unauthorized, illegal, or otherwise wrongful,[16] where the taxpayer does not point out some threatened legal wrong,[17] or where the matter complained of will not work any substantial legal injury to taxpayers as such[18] Moreover, on the application by a taxpayer for an injunction, discretionary powers of the highway authorities will not be interfered with in the absence of fraud, mistake, or abuse of discretion,[19] and this is particularly true where the relief sought is a manda-

11. Ark —Burrow v Floyd, 99 S W 2d 573, 193 Ark 220—White v Miller, 1 S W 2d 814, 175 Ark 1078
Ill —MacGregor v Miller, 154 N E 707, 324 Ill 113
Ind —Putman v Murden, 184 N E 796, 97 Ind App 313
Iowa —Scharnberg v Iowa State Highway Commission, 243 N W 334, 214 Iowa 1041
Kan —Atchison, T & S F Ry Co v Board of Com'rs of Barton County, 202 P 78, 109 Kan 787, rehearing denied 203 P 698, 110 Kan 310
Mo —Castilo v State Highway Commission of Missouri, 279 S W 673, 312 Mo 244
Okl —Hawks v Seay, 1 P 2d 148, 150 Okl 160
Pa —Garr v Fuls, 133 A 150, 286 Pa 137
Tenn —White v Jefferson County, 16 S W 2d 24, 157 Tenn 652, denying rehearing 11 S W 2d 863, 157 Tenn 652
Tex —Fletcher v Ely, Civ App, 53 S W 2d 817, error refused—Twing v Williams, Civ App, 21 S W 2d 732—Twing v Rhodes Civ App 24 S W 2d 728, certified questions answered 16 S W 2d 258 118 Tex 410, and reversed on other grounds Rhodes v Twing Com App 41 S W 2d 13, appeal dismissed 53 S Ct 5, 287 U S 561, 77 L Ed 495—Sherman v Cage, Civ App, 279 S W 508—Anderson v Houts, Civ App, 240 S W 617
29 C J p 741 note 31.

Reason for rule

The right of taxpayers to resort to equity to prevent misapplication of road funds is based on the taxpayers' equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation —Miller v Hale, 139 N E 411, 308 Ill 275

Funds paid to county by highway department as compensation for state road construction work performed by county under contract with highway department were, in equity, county funds, illegal disposition of which taxpayer could sue to enjoin, whether or not funds were deposited in name of county, where all parties concerned knew of their source —McGinty v Pickering, 179 S E 358, 180 Ga. 447.

Payment of automobile license fees and state gasoline tax entitled taxpayers to maintain suit to restrain payment of such funds on void highway construction contracts —Regan v Babcock, 247 N W 12, 188 Minn 192

12. Fla —Hathaway v Munroe, 119 So 149, 97 Fla 28
La —Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La 471

13. La —Donaldson v Police Jury of Tangipahoa Parish supra
Minn —Regan v Babcock, 247 N W 12, 188 Minn 192
Okl —Pine v Baker, 184 P 445, 76 Okl 62
Pa —Garr v Fuls, 133 A 150 286 Pa 137—Shireman v Scott, 53 Dauph Co 19

As far as he is damaged peculiarly and differently from the general public by its performance, a taxpayer may maintain an action to restrain the performance of an illegal highway contract —Ruff v Board of Com'rs of Shawnee County, 272 P 189, 127 Kan 188

14. Tex —King v Falls County, Civ App, 42 S W 2d 481

15. Fla —Hillsborough County v Memorial Heights Development Co, 154 So 188, 111 Fla 251

16. Ga —Burns v Decatur County, 173 S E 127 178 Ga 275
Ill —Natural Products Co v Du Page County, 145 N E 298, 314 Ill 74
Kan —Sandburg v Board of Com'rs of Wyandotte County, 245 P 1029, 121 Kan 26
Miss —Trahan v State Highway Commission, 151 So 178, 169 Miss 732—Board of Sup'rs of Lauderdale County v Wilson, 114 So 609, 148 Miss 316
Mont —State ex rel State Highway Commission v District Court of First Judicial Dist in and for Lewis and Clark County, 69 P 2d 112, 105 Mont 44
N D —Cummings v City of Minot, 271 N W 421, 67 N D 214
Okl —Simpkins v Curtiss, 243 P 188, 116 Okl 104
S C —Thayer v State Highway Department, 155 S E 832, 158 S C 488
Tenn —White v Jefferson County, 16 S W 2d 24, 157 Tenn 652, denying rehearing 11 S W 2d 863, 157 Tenn 652
Tex —Quisenberry v Mitchell 292 S W 160, 116 Tex 378—Willcox v Jackson, Civ App, 124 S W 2d 189 error dismissed, judgment correct

17. Ark —Burrow v Floyd, 99 S W 2d 573, 193 Ark 220
Pa —Garr v Fuls, 133 A 150, 286 Pa 137

Enjoining authorized construction of highway

Authorized construction of state highway over town streets will not be enjoined pending determination of validity of town bond issue for constructing water and sewerage system on streets —Padgett v State Highway Commission, 148 S E 548, 150 S C 538

Waste of funds

Where a town board appropriated money for the construction of a road, but the money was never used for such purpose, and the construction was later authorized by the county board of supervisors as a state and county charge, there was no waste or threatened waste of the town's money, and the citizens of the town were not entitled to injunctive relief to prevent construction of the road by the county on the ground of waste of town funds —Pilbeam v Sisson, 198 N Y S 834, 204 App Div 762

18. Kan —Young v Board of Com'rs of Washington County, 273 P 398, 127 Kan 227
Miss —Hinds County v. Johnson, 98 So 95, 133 Miss 591
Ohio —State ex rel Shafer v Merrell, 185 N E 815, 44 Ohio App 347
Or —De Neffe v. Duby, 239 P 109, 115 Or 511
Tex —Murray v Williamson, Civ App, 32 S W 2d 863—Singeltary v Heathman, Civ App, 300 S W 242, affirmed Heathman v Singletary, Com App, 12 S W 2d 150

Personal inconvenience

Taxpayer cannot enjoin lease contract between county commissioners and railroad for relocation of public road on railway right of way despite inconvenience to him from vacation of railroad property —Ruff v Board of Com'rs of Shawnee County, 272 P 189, 127 Kan 188

19. Iowa —Scharnberg v Iowa State

tory injunction.[20] As in suits for injunctions generally, unless an absolute right is given by statute, an injunction to restrain the acts of highway authorities cannot be sought as a matter of right, but its granting or refusal rests in the sound discretion of the court[21]

Under proper circumstances a temporary injunction may issue in a taxpayer's suit to preserve the status quo until the final hearing on the merits[22]

Estoppel or waiver. Taxpayers may by acquiescence in the acts complained of be precluded from obtaining relief[23]

Conditions precedent Unless excused or waived, conditions precedent to the maintenance of a taxpayers' action must ordinarily be performed or complied with before the action may be instituted[24]

Actions or proceedings Taxpayers' actions or proceedings must be timely brought[25] In the absence of contrary statute, such actions or proceedings are governed by the usual rules relating to parties,[26] and are governed by the usual rules relat-

Highway Commission, 243 N W 334, 214 Iowa 1041

Tex —Johnson v Ferguson, Civ App, 55 S W 2d 153, error dismissed—Cannon v McComb, Civ App, 268 S W 999

20. Court cannot by mandatory injunction compel expenditure of funds derived from sale of county primary road bonds by highway commission, and taxpayer cannot by suit for mandatory injunction control discretionary action of highway commission in relocating highway and expending state primary road funds thereon — Scharnberg v Iowa State Highway Commission, 243 N W 334, 214 Iowa 1041

21 Denial of injunction held not abuse of discretion

Kan —True v McCoy, 241 P 249, 119 Kan 824

Tex —Hughes v Commissioners' Court of Harris County, Civ App 35 S W 2d 818

22 Refusal of temporary injunction

(1) Held proper

Ga Spain v Hall County, 165 S E 612, 175 Ga 600

N C —Peters v Pasquotank Highway Commission, 113 S E 567, 184 N C 30

Tex —Willcox v Jackson, Civ App, 106 S W 2d 766, error dismissed

(2) Held improper —Crowell v Cammack, Tex Civ App, 40 S W 2d 259

Continuance of temporary injunction held proper

N C —Morris v Board of Com'rs of Henderson County, 114 S E 827, 184 N C 519

23. Ill —Department of Public Works and Buildings v Challand, 181 N E 405, 348 Ill 385

Wash —Travis v Ward, 25 P 908, 2 Wash 30

24. Obtaining permission to sue

(1) Under the statutes in some jurisdictions a taxpayer seeking to enjoin a state officer from disbursing public funds for highway purposes must, by a petition, show that there is reasonable ground for filing the bill and obtain leave for that purpose —Hill v La Salle County, 158 N E 112, 326 Ill 508

(2) Petition for leave to file bill to enjoin county construction of public road held improperly denied —Hill v La Salle County, supra

Exhausting other remedies

Taxpayers showing no special legal injury to themselves by highway commission's changing location of highway could not restrain expenditure of public funds before applying to all officers having duty to interfere — Trahan v State Highway Commission, 151 So 178, 169 Miss 732

Particular matters held not conditions precedent

(1) A suit by citizens of road district against commissioners' court to compel defendants to compensate district for bonds voted by latter and made void by county election, being a suit, not against the county, but to enforce a ministerial act, it was not necessary that plaintiffs file with commissioners' court a statement of their demand prior to instituting suit —Maroney v Feagin, Tex Civ App, 264 S W 105

(2) Demand on state officials to sue to annul alleged void highway construction contracts was not necessary, to entitle taxpayers to sue, where state officials' alleged participation in collusive arrangement was such that their prosecution of action could not reasonably be expected —Regan v Babcock, 247 N W 12, 188 Minn 192

25. Kan —Atchison, T & S F Ry Co v Board of Com'rs of Barton County, 202 P 78 109 Kan 787, rehearing denied 203 P 698 110 Kan 310.

Laches

(1) Suit to enjoin construction of highway held barred by laches — Stratton v Henkel Const Co, 151 N E 546, 320 Ill 526

(2) Suit to enjoin issuance of paving certificates was held not barred by laches —Hillsborough County v Memorial Heights Development Co, 154 So 188, 114 Fla 251

Petition opposing bond issue

Under Burns St Annot Suppl 1921 § 10139t7, petition opposing highway bond issue must be filed within fifteen days after determination to issue bonds to give state board of tax commissioners jurisdiction on appeal - State v Leonard, 153 N E 777, 198 Ind 356—Inskeep v State, 153 N E 411, 198 Ind 224

Suit held not premature

Tex —Wright v Allen, Civ App, 257 S W 980

26. Mo —Castilo v State Highway Commission of Missouri, 279 S.W 673, 312 Mo 244

Proper parties

Ill —Hill v La Salle County, 158 N E 112, 326 Ill 508

State is necessary party in suit by taxpayers to cancel contract of state highway commission, and omission was not cured by appearance of attorney general for highway commission —Sherman v Cage, Tex Civ App, 279 S W 508

County as necessary party

(1) In a suit to restrain the performance and execution of a contract between the county commissioners' court and a construction company for road construction work, the county, being materially affected by the suit, was a necessary party, under Rev St art 1835, providing that all suits brought by or against any of the counties, or incorporated cities, towns, or villages shall be by or against it in its corporate name — Allison v Ellis, Tex Civ App, 248 S W 814

(2) In suit by citizens of road district to compel commissioners' court to compensate district for bonds voted by it and made void by a county election, county was not a necessary party, act of compensating district being purely ministerial one - Maroney v Feagin, Tex Civ App, 264 S W 105

United States secretary of agriculture was proper and necessary, but not indispensable, party in taxpayers' suit to enjoin county supervisors from acquiring right of way in furtherance of road contract with secretary —Board of Sup'rs of Apache County v Udall, 1 P 2d 344, 38 Ariz 497.

ing to pleadings,[27] burden of proof,[28] admissibility of evidence,[29] weight and sufficiency of evidence,[30]

27. Ariz—Board of Sup'rs of Apache County v Udall, supra.
La—Williams v Police Jury of Concordia Parish, 107 So. 126, 160 La. 325
Tex—Camp v Thomas, Civ.App., 26 S W 2d 470, error refused.

Requisites of bill, complaint, or petition

(1) The bill, complaint, or petition must state all facts necessary to authorize the relief demanded
Ky.—Conrad v Pendleton County, 273 S W 57, 209 Ky 526
Tex—Cannon v McComb, Civ App., 268 S.W 999.

(2) Matters not essential to plaintiff's cause of action need not be alleged—Maroney v Feagin, Tex Civ App., 264 S W 105

(3) The allegations must be clear and specific—Johnson v Ferguson, Tex Civ App., 55 S W 2d 153, error dismissed—Cannon v McComb, supra

(4) Issuable facts and not mere general conclusions must be alleged in the bill or complaint—Johnson v Ferguson, supra—Cannon v McComb, supra.

(5) The allegations should show that plaintiff's interests as a taxpayer are or will be affected or prejudiced by the act complained of—Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La 471

(6) But it has been held in some jurisdictions that the bill or complaint in a suit for injunction need not allege special or peculiar injury to complainants
Ind—Putman v Murden, 184 N.E. 796, 97 Ind App 313
S C—Gaston v State Highway Department of South Carolina, 132 S E 680, 134 S C 402

(7) A complaint shows an injury where it alleges facts necessarily leading to the conclusion that the unlawful act complained of will injuriously affect plaintiff—Donaldson v Police Jury of Tangipahoa Parish, supra

(8) On applications for injunction, the averments of material and essential elements must be sufficiently certain to negative every inference of the existence of facts under which petitioner would not be entitled to relief—Johnson v Ferguson, Tex Civ App., 55 S W 2d 153, error dismissed—Cannon v McComb, Tex Civ App., 268 S W 999

Bill, complaint, or petition held sufficient

(1) In general
Ill—Miller v Hale, 139 N E 411, 308 Ill 275
Tex—Sherman v Cage, Civ App., 279 S W 508

(2) Petition to restrain awarding of highway construction contract.—State v Morgan, 229 P. 309, 131 Wash 145.

(3) Bill or petition to have highway construction contract declared void
La—Donaldson v Police Jury of Tangipahoa Parish, 109 So 34, 161 La. 471
Minn.—Regan v Babcock, 247 N W 12, 188 Minn 192.

(4) Petition to restrain issuance of road bonds—King v Falls County, Tex Civ App., 42 S W 2d 431.

(5) Petition to restrain construction of road—Gaston v State Highway Department of South Carolina, 132 S E 680, 134 S C 402

Bill, complaint, or petition held insufficient

(1) In general—Arkansas-Louisiana Highway Improvement Dist v Pickens, 276 S W 355, 169 Ark 603

(2) Bill or petition to restrain the expenditure of highway funds
Ga—Sigman v Newton County, 147 S E 586, 168 Ga 122
Tex—Cannon v McComb, Civ.App., 268 S W 999

(3) Bill or petition to restrain relocation of road—MacGregor v Miller, 154 N E 707, 324 Ill 113

(4) Petition to restrain highway authorities from making further contracts—Johnson v Ferguson, Tex Civ App., 55 S W 2d 153, error dismissed

Verification

Under statute requiring verification of injunction petition, verification must be direct and so positive as to sustain a charge of perjury or false swearing, if false—Johnson v Ferguson, Tex Civ App., 55 S W 2d 153, error dismissed

Questions raised by demurrer to petition

(1) In taxpayer's injunction suit against highway commission, general demurrer raised question of sufficiency of taxpayer's interest in matter to maintain suit—Trahan v State Highway Commission, 151 So 178, 169 Miss 732

(2) Authority of highway commission to comply with requirements made by federal government to secure federal aid was raised by demurrer to petition, in suit to enjoin such compliance—Logan v Matthews, 52 S W 2d 989, 330 Mo 1213

Proof

Only those allegations necessary to a recovery need be supported by proof—Putman v Murden, 184 N E. 796, 97 Ind App 313

28. The taxpayer has the burden of proving the essential elements of his cause of action
Ark—Goldsmith v Wright, 282 S.W 970, 170 Ark 1116.
Tenn—Cheatham County v Baker, 64 S W 2d 31, 16 Tenn App 1
Tex—Ferguson v Johnson, Civ App., 57 S W 2d 372, error dismissed

29. Tex—Twing v Williams, Civ App., 24 S W.2d 732—Owen v Fleming-Stitzer Road Building Co., Civ App., 250 S W 1038

Evidence held admissible

N C—Oliver v Board of Com'rs of Johnston County, 139 S E 767, 194 N C 380
Tex—Wright v. Allen, Civ App., 257 S W. 980.

30. N Y—Pilbeam v Sisson, 198 N Y S 834, 204 App Div 762
Okl—Simpkins v Curtiss, 243 P. 188, 116 Okl. 104

Clear evidence

The determination of the county commissioners' court that certain bids for the construction of roads were the best obtainable will not be set aside in an action to enjoin the execution of the contract made in pursuance thereof in the absence of clear evidence that such bids were not the best obtainable and that the court fraudulently awarded the contracts—Gibson v Davis, Tex Civ App., 236 S W 202

Evidence held sufficient

(1) In general
Ind—Smith v Hill, 165 N E 911, 200 Ind 616
La—Crichton v Louisiana Highway Commission, 136 So 43, 172 La. 1033
N C—Smith v State Highway Commission, 139 S E 606, 194 N C 333
Tex—Fletcher v Ely, Civ App., 53 S W 2d 817, error refused

(2) To warrant order refusing injunction—Newman v Biggs, Tex Civ App., 68 S W 2d 632

(3) To show that a formal paving contract as finally executed was invalid—Dunn Const Co v White, 96 So 444, 209 Ala 460

(4) To show absence of fraud—Mitchell v State Highway Commission, 56 S W 2d 991, 247 Ky 188

Evidence held insufficient

(1) In general
Ark—Goldsmith v Wright, 282 S W 970, 170 Ark 1116
Tex—Twing v Williams, Civ App., 24 S W.2d 732.

(2) To show that highway authorities were guilty of fraud, conspiracy, willful abuse of power, or intentional favoritism in selecting route of road—Stratton v Henkel Const Co., 151 N E 546, 320 Ill. 526.

questions of law and fact,[31] findings of fact,[32] and scope of relief.[33] Where the taxpayer has no right to relief in respect of a certain question, the court will not determine such question, even though all parties to the controversy request a determination thereof.[34]

HIGHWAYS BY WATER. See Highways § 1.

HIGLER. In English law, a hawker or peddler; a person who carries from door to door, and sells by retail, small articles of provisions and the like.[1]

HIIS TESTIBUS. Literally "These being witnesses." The name of the concluding or attestation clause in ancient deeds and charters, which contained the names of the witnesses; so-called from the words with which it commenced.[2]

HI-JACKER or HIGH-JACKER. Said to be but another name for "robber."[3] More specifically, one who holds up, and steals booze from, the vehicles of others[4]

HIJASTRO. In Spanish law, stepson.[5]

HIJO. In Spanish law, son; it is derived from the Latin, "filius"; and has been said to be the equivalent of the English word "junior," after the name of a person.[6]

In the plural, it may mean children, either male or female.[7]

HIJUELA. In Spanish law, the list or inventory of an heir's portion; also the property constituting the estate[8]

HIKENILD STREET. One of the four great Roman roads of Britain[9]

HILARIOUS. Merry, mirthful, or noisy.[10] In its

31. Tex.—Ferguson v. Johnson, Civ App., 57 S.W.2d 372, error dismissed

Power to change location of road

Whether highway commission has power to change location of road presents a question of law only, to be determined by the court.—Johnson v. Board of Com'rs of Wake County, 135 S.E. 618, 192 N.C. 561.

32. **Findings held immaterial**

N.C.—Coburn v. Board of Com'rs of Swain County, 131 S.E. 372, 191 N.C. 68

33. N.C.—Morris v. Board of Com'rs of Henderson County, 114 S.E. 827, 184 N.C. 549

34. **Reason for rule**

A decision on such a question would be purely advisory.—Trahan v. State Highway Commission, 151 So. 178, 169 Miss. 732.

1. Black L.D.

2. Burrill L.D.

Attestation of deeds generally see Deeds § 35

Sometimes written "his testibus"

Black L.D.

The words have fallen into disuse since the time of Henry VIII.—Black L.D.

3. Tex.—Franklin v. State, 283 S.W. 802, 803, 104 Tex.Cr. 240

4. Iowa.—State v. One Certain Buick Sedan, 229 N.W. 173, 176, 209 Iowa 791

"Booze" defined see 11 C.J.S. p. 524 note 74

5. Escriche Diccionario

6. Mo.—Roussin v. Parks, 8 Mo. 528, 535.

Classification

(1) "Hijo adoptivo"—an adopted son, or child.—Escriche Diccionario

(2) "Hijo adulterino"—a child of an adulterous union, one of the classes of illegitimate children, incapable of being legitimated.—Escriche Diccionario

(3) "Hijo de benedición"—literally "child of blessing," another phrase for legitimate child.—Escriche Diccionario

(4) "Hijo de familias"—a son, or child, under the patria potestas.—Escriche Diccionario

(5) "Hijo de ganancia"—the child of a concubine.—Escriche Diccionario

(6) "Hijo emancipado"—an emancipated son, or child, that is, one freed from the patria potestas.—Escriche Diccionario

(7) "Hijo espurio"—a spurious child, in a strict sense, a child of an adulterous or incestuous union; and, more broadly, the child of a widow or an unmarried woman by an unascertained father, hence in either case one of the classes of children incapable of being legitimated.—Escriche Diccionario.

(8) "Hijo ilegitimo"—an illegitimate son or child generally, such a child might be either "hijo natural," that is, a natural child, or "hijo espurio," "hijo adulterino," or "hijo incestuoso."—Escriche Diccionario

(9) "Hijo incestuoso"—a child of an incestuous union, incapable of being legitimated since the parents were precluded from intermarriage.—Escriche Diccionario

(10) "Hijo legitimado"—a natural child, who has been legitimated either by the marriage of his parents or by royal concession.—Escriche Diccionario

Philippine.—Serrano v. Aragon, 22 Philippine 10, 12

(11) "Hijo legitimo"—a legitimate son or child.—Escriche Diccionario

(12) "Hijo mancer"—the child of a common prostitute.—Escriche Diccionario

(13) "Hijo natural"—a natural child, one born out of wedlock, but of parents who were not precluded from marrying, hence such a child was capable of being legitimated.—Escriche Diccionario

(14) "Hijo póstumo"—a posthumous child.—Escriche Diccionario

(15) "Hijo sacrilego"—the child of a priest, nun, or other person who is forbidden by his religion to marry.—Escriche Diccionario

(16) "Hijos de traidores"—sons of traitors who were under perpetual disability, not unlike the English corruption of the blood.—Escriche Diccionario

7. Escriche Diccionario.

8. Escriche Diccionario

Less properly spelled "higuela" and defined as a receipt given by an heir of a decedent setting forth what property he has received from the estate.—Black L.D.

9. Black L.D.

"Ikenild street" is the name more commonly used, and supposed to be so called from "Iceni."—Black L.D.

10. Webster New Int.D.

ordinary meaning the word does not imply a drunken condition.[11]

HILARY RULES. A collection of orders and forms extensively modifying the pleading and practice in the English superior courts of common law, established in Hilary term, 1834.[12]

HILARY TERM. In England, one of the law terms of court which began on the eleventh and ended on the thirty-first of January of each year; it was superseded in 1875 by Hilary sittings, which begin January 11, and end on the Wednesday before Easter.[13]

HILL. A natural elevation of land of local area and well defined outline;[14] a more or less rounded elevation, as contrasted with a peaked or precipitous one.[15] The term does not include the slopes of bottom lands or of valleys,[16] and has been compared, or contrasted, with "bluff" see Bluff 11 C J S p 368 note 63 in Pocket Parts

HIM. See He, Him and His 39 C J S p 804 note 32–p 805 note 46

HIMSELF. An emphasized form of the pronoun for the third person singular masculine.[17]

Under particular circumstances "himself" has been held applicable to a corporation,[18] and interchangeable with "his family."[19]

HIND or HINE. In old English law, a husbandry servant.[20]

HINDENI HOMINES or HINDMEN. Among the Saxons, a society of men, their wives being termed "hindas."[21]

HINDER. The word is said to be derived from the Anglo-Saxon "hind," as in "behind" and "hindmost," it implies action, and to some extent, effectiveness,[22] it imports resistance and obstruction of rights,[23] and it has been defined as meaning to block, to check, to clog, to counteract, to debar, to delay, to embarrass, to impede, to interrupt, to obstruct, to oppose, to retard, to stop, or to thwart,[24] also to delay and defraud;[25] to do an act of interference,[26] or be guilty of an unreasonable omission,[27] to interpose obstacles or impediments,[28] to prevent,[29] and to pull back.[30]

Under some circumstances, "hinder" has been held equivalent to, or synonymous with, "defraud" see 26 C J S p 683 note 10, "delay" see 26 C J S p 687 note 8, "impede,"[31] "obstruct," and "prevent,"[32] "hindered" may be equivalent to "blocked" see 11 C J S p 365 note 1, and "hindering" equivalent to "restraining."[33] Under other circumstances, "hinder" has been compared with, or distinguished from, "defeat" see 26 C J S p 669 note 48, "defraud" see 26 C J S p 683 note 14, "obstruct," and "prevent."[34]

11. Idaho—In re Crocheron, 101 P 741, 747, 16 Idaho 441, 33 L R A,N S 868

12. Black L D

"Regulæ generales" commonly called "Hilary Rules," were made pursuant to the statute 3 & 4 Wm IV c 42 § 1, and they may be found in 5 B & Ad appendix 1 et seq, 27 E C L p 470 et seq

13. Black L D

14. Ky—Lexington & Eastern Ry Co v Williams, 209 S W 59, 62, 183 Ky 343
Or—Columbia City Land Co v Ruhl 141 P 208, 210, 70 Or 246

15. Or—Columbia City Land Co v Ruhl, supra

Phrases construed

(1) "Foot of a hill" defined as the beginning of an abrupt rise
Ky Lexington & Eastern Ry Co v Williams, 209 S W 59, 62 183 Ky 343
Or—Columbia City Land Co v Ruhl 141 P 208, 210 70 Or 246—Kerr v Duvall, 125 P 830, 832 62 Or 470

(2) "Hill land" as contrasted with "bottom land" see 11 C J S p 531 note 61

(3) "Hill seam" see the C J S title Mines and Minerals § 3

16. Or—Columbia City Land Co v Ruhl, 134 P 1035, 141 P 208, 210, 70 Or 246—Kerr v Duvall, 125 P 830, 832, 62 Or 470

17. Webster New Int D

"Addressed to himself" has been construed as referring to a letter self-addressed under a fictitious name—Andrews v U S, Cal, 16 S Ct 798, 799, 162 U S 420, 40 L Ed 1023

18. Miss—Ellzey v Smith, 132 So 92, 93, 159 Miss 57

19. Ga—Central of Georgia R Co v Henson, 49 S E 278, 121 Ga 462

20. Black L D

21. Black L D

Classification

The Saxons ranked men into three classes, and valued them, as to satisfaction for injuries, etc, according to their class The highest class were valued at twelve hundred shillings, and were called 'twelf hindmen," the middle class at six hundred shillings and called "sexhindmen," the lowest at two hundred shillings, called "twyhindmen"—Black L D

22. U S—U S v Williams, D C Pa., 28 F Cas No 16,705

23. Ky—Reid v Hamilton 18 S W 770, 771 92 Ky 619, 13 Ky L 849
29 C J p 755 note 22

24. Utah—Petrovitzky v Brigham, 47 P 666 667, 14 Utah 472

25. Utah—Petrovitzky v Brigham, supra
29 C J p 755 note 29

26. U S—Driskell v Parish C C Ohio, 7 F Cas No 4 088, 5 McLean 64 71

27. Mass—Blanchard v Blackstone, 102 Mass 343, 347

28. Ky—Walker v Sayers, 5 Bush 579, 582

29. U S—U S v Williams D C Pa, 28 F Cas No 16,705
Utah—Petrovitzky v Brigham, 47 P 666 667, 14 Utah 472

30. U S—U S v Williams, D C Pa, 28 F Cas No 16,705

31. N J—Erie R Co v Board of Public Utility Commissioners, 98 A 13, 19, 89 N J Law 57

32. U S—U S v Williams, D C Pa, 28 F Cas No 16,705

33. Conn—Whitlock v West, 26 Conn 406, 413

34. U S—U S v Williams, D C Pa., 28 F Cas No 16,705

Phrases in which the word occurs are set out in the note.[35]

HINDERMOST. Farthest from the front.[36]

HINDRANCE. Act of hindering, state of being hindered or that which hinders. Its synonyms are: Check, delay, interruption, obstacle, obstruction, or restraint, and its antonyms are advantage, aid, or help[37] Under particular circumstances, the term may relate to some obstacle which it is not within one's power to overcome by reasonable effort on his own part, something more than a mere increased difficulty which might have been anticipated[38]

HINDU LAW. The system of native law prevailing among the Gentoos, and administered by the government of British India.[39]

HINEFARE. In old English law, the departure of a servant from his master, or the loss of a servant by a master[40]

HINEGELD. A ransom for an offense committed by a servant[41]

HINGE. An artificial movable joint, a device for joining two pieces together in such manner that one may turn upon the other[42]

HINT. As a verb to suggest in an indirect manner, to indicate by allusion or implication, to give a hint of[43] The term has been distinguished from "designate" see 26 C J S p 1239 note 29

HIPOTECA. In Spanish law, a mortgage, usually of real property[44]

HIPOTECABLE. In Spanish law, that which is capable of hypothecation or pledge by the contract known as hipoteca.[45]

HIPOTECAR. In Spanish law, to hypothecate, to mortgage, or to pledge[46]

HIPOTECARIO. In Spanish law, as a noun, the mortgagee, pledgee, or creditor; and as an adjective, pertaining or referring to the contract of hipoteca, pledge, or mortgage, as the debt itself or the proceeding by which it is enforced[47]

HIPPED ROOF. A roof running up from all four sides of a building to a peak or ridge at an elevated point in the center, the equivalent of "peaked" roof[48]

HIRCISCUNDA. See Herciscunda 39 C J.S p 890 note 56

HIRE.

As a Noun

The word "hire" is said to be associated rather with the act of employment than the reward for services done, and in the latter connection is more on the plane of wages than of salary, although in a sense it comprehends both[49] It may apply to the price for service of a lease,[50] and is not inconsist-

35. Phrases construed

(1) 'Hinder and delay" and "hinder or delay" defined in similar terms as to do something, with an intent to defraud or which is an attempt to defraud, rather than a successful fraud, to put some obstacle in the path or interpose something unjustifiably, before the creditor can realize what is owed out of his debtor's property

N Y —Burdick v Post 12 Barb 168, 180—Burnham v Brennan, 42 N Y Super, 49 63, 79

Utah —Petrovitzky v Brigham, 47 P 666 667 11 Utah 472

(2) "Hinder, delay, and defraud" as distinguished from 'hinder, delay, or defraud"—Crow v Beardsley, 68 Mo 435, 439

(3) "Hinder, delay, or defraud creditors" and other similar expressions see such C J S titles as Assignments for Benefit of Creditors §§ 85, 86, Attachment §§ 35, 36 43, 44 50–52, Bankruptcy §§ 76, 228 et seq, Corporations §§ 1377–1382, Conspiracy § 9 b, Exemptions § 118 b, Fraudulent Conveyances §§ 99–114, and Insolvency §§ 6, 11, also 32 C J p 829 note 57–p 830 note 66, p 844 notes 27–33

(4) 'Not to hinder,' as the equivalent of 'to suffer"—State v Jamieson 300 N W 809 810 211 Minn 262

(5) Obstruct or hinder"—Walker v Savers, 5 Bush Ky 579, 582

36. Standard D

"Hindermost platform"

Eng—Monkman v Stickney, [1913] 2 K B 377 380, 381

37. Webster New Int D

Phrases construed

(1) "If prevented or obstructed by combinations, strikes, hindrances, turnouts, accidents, or delays"—Thomas Iron Co v Jackson Iron Co, 91 N W 137, 138, 131 Mich 130

(2) "Without let or hindrance," a tautological expression, meaning without obstacle or obstruction—Gustafson v Ursales, 20 Ohio Cir Ct, N S, 275, 278, 3 Ohio App 136

38. Mich —Thomas Iron Co v Jackson Iron Co, 91 N W 137, 138, 131 Mich 130

39. Black L D

It is not the law of India or of any defined region, but is the law of castes class, orders and even families which the Hindus carry about with them—Black L D

40. Black L D

41. Black L D

42. U S —Griswold v Wagner, Ohio, 68 F 494 497, 15 C C A 525

43. Century D

44. Escriche Diccionario

45. Escriche Diccionario

46 Escriche Diccionario

47 Escriche Diccionario

"Ley hipotecaria"

The law of mortgages, the law governing the recording of instruments like the hipoteca—Escriche Diccionario Suplemento

48. Minn—Hannem v Pence, 41 N W 657 40 Minn 127, 129, 12 Am S R 717

49. U S —Wilkes-Barre First Nat Bank v Barnum, D C Pa, 160 F 245, 248, 20 Am Bankr 439

Md —Baughman v Sterrett Operating Service, 173 A 38, 39, 167 Md 50, quoting **Corpus Juris.**

50. Or—Grimberg v Columbia Packers' Assoc, 83 P 194, 197, 47

ent with the idea of a covenant or agreement for freighting accommodations aboard ship.[51] It has been defined as a reward or compensation paid for the possession or use of personalty;[52] also the price or compensation for labor and services;[53] the price, reward, or compensation paid, or contracted to be paid, for personal service or for labor;[54] and is always construed as referring to payment or receipt of compensation, as distinguished from a gratuitous service or nonremunerative service.[55]

The noun has been held equivalent to, or synonymous with, "compensation," see Compensation 15 C.J.S. p 654 in Pocket Parts, "salary,"[56] and "wages."[57] It has also been compared with, or distinguished from, "compensation" see 15 C.J.S. p 655 note 62, "salary,"[58] and "wages"[59]

Phrases in which the word occurs are set out in the note.[60]

As a Verb

Applied to persons, the verb means to engage a man to temporary service for wages, or to engage in service for a stipulated reward;[61] and sometimes, although perhaps less accurately, it is applied to the securing of professional services, as where one is said to hire a lawyer, a doctor, or a person of that class.[62] It is also properly applied to engaging the use of property;[63] and has then been defined as meaning to lend property, other than money, for a compensation;[64] to procure the temporary use of an article for compensation; and, in its secondary meaning, to grant the temporary use of an article for compensation.[65] In a particular connection it is the correlative of "let"[66]

"Hire" has been held equivalent to, or synonymous with, "appoint" see 6 C.J. p 87 note 8; and "hire" and "hired" have both been held equivalent to, and also distinguished from, "employ" and "employed," respectively see 30 C.J.S. p 224 notes 71, 72, p 225 notes 98, 99.

Phrases employing the word are set out in the note.[67]

Hiring. It has been said that the term implies a request and a contract for a compensation;[68] and

Or 257, 114 Am S R 927, 8 Ann Cas 491
29 C J p 756 note 57

51. Or—Grimberg v Columbia Packers' Assoc, 83 P 194, 197, 47 Or 257, 114 Am S R 927, 8 Ann Cas 491

52. Ala—Learned-Letcher Lumber Co v Fowler, 19 So 396, 398, 109 Ala 169
29 C J p 756 note 58

53. Okl—State v Welch & Brown, 103 P 2d 533, 534, 187 Okl 470, quoting **Corpus Juris.**
Tex—State v Kenyon, Inc, Civ App, 153 S W 2d 195, 197, quoting **Corpus Juris.**
29 C J p 756 note 59

54. Md—Baughman v Sterrett Operating Services, 173 A 38, 39, 167 Md 50
Ohio—Coviello v. Industrial Commission of Ohio, 196 N E 661, 662, 129 Ohio St 589
Okl—State v Welch & Brown, 103 P 2d 533, 534, 187 Okl 470, citing **Corpus Juris.**
Tex—State v. Kenyon, Inc, Civ App, 153 S W 2d 195, 197, citing **Corpus Juris.**

55. Tex—State v Kenyon, Inc, supra, citing **Corpus Juris.**

56. Cal—Reynolds v Reynolds, 58 P 2d 660, 661, 14 Cal.App 2d 481.
54 C J p 1123 note 59

57. La—Swain v Kirkpatrick Lumber Co., 78 So 140, 141, 143 La. 30, 20 A L R 665
67 C J p 285 note 77

58. Tenn—State v. Duncan, 1 Tenn Ch A. 334, 339.

59. The words compared

(1) The words "wages" and "hire" have so nearly the same meaning that it is not easy to discriminate between them—In re Yoder, D C Pa, 127 F 894, 895

(2) "These three words, 'wages,' 'salary,' and 'hire,' although varying perhaps in their scope, nevertheless express one idea common to them all—compensation for services of some kind"—Shriver v Carlin & Fulton Co, 141 A 434, 438, 155 Md 51, 58 A L R 767

60. Phrases construed

(1) "Contract of hire" necessarily presupposes remuneration for services rendered
Okl—State v Welch & Brown, 103 P 2d 533, 534, 187 Okl 470
Tex—State v Kenyon, Inc, Civ App, 153 S W 2d 195, 197

(2) "For compensation or hire"—People v Montgomery, 19 P 2d 205, 207, 92 Colo 201

(3) "Hire or compensation" and "hire or compensation, either directly or indirectly" see 15 C J S p 657 notes 9, 10

61 N Y—McClusky v. Cromwell, 11 N Y 593, 605
Tex—Carter-Mullaly Transfer Co v Angell, Civ App, 181 S W 237, 238

62. U S—Wilkes-Barre First Nat Bank v Barnum, D C Pa, 160 F. 245, 248, 20 Am Bankr 439.

63. U S—Wilkes-Barre First Nat Bank v Barnum, supra
Md—Baughman v. Sterrett Operating Service, 173 A 38, 39, 167 Md. 50, quoting **Corpus Juris.**

64. Wyo—Kinney v Hynds, 49 P 403, 404, 52 P 1081, 7 Wyo 22

65. N J—Harris v Atlantic City, 62 A 995, 996, 73 N J Law 251

Similar expressions

(1) "To purchase the temporary use of a thing"—Union Indemnity Co v State, 118 So 148, 151, 218 Ala. 132, citing **Corpus Juris.**

(2) "To hire property involves the idea of passing of the possession, management, and control of the thing hired into the hands of the hirer"—Giroud v New Jersey Mfrs Casualty Ins Co, 148 A 790, 791, 106 N J Law 238

66. Tex—Francis v Holmes, 118 S W 881, 883, 54 Tex Civ App 608

67. Phrases construed

(1) "Hired and to freight taken"—Christie v Lewis, 2 B & B 410, 428, 6 E C L 214, 129 Reprint 1025

(2) "Hired man" as synonymous with "farm laborer" see 35 C J S p 750 note 14

(3) "Hired or salaried"—In re Balensi, C C N Y, 120 F 864

(4) "Hired out"—Kirkham v Wheller-Osgood Co, 81 P 869, 870, 39 Wash 415, 4 Ann Cas 532

(5) "Hired person," as not applicable to an independent contractor
Miss—Heard v Crum, 18 So 934, 935, 73 Miss 157, 55 Am S R 520.
Wis—Lang v Lang, 25 N W 650, 652, 64 Wis 525

(6) "Hired to the defendant"—Brown v Garnier, 6 Taunt 389, 1 E C L 667, 128 Reprint 1085

68. Iowa—Mousseau v. City of

as a verbal noun has been defined as a contract by which one gives to another the temporary possession and use of property, other than money, for reward and the latter agrees to return the same to the former at a future time;[69] hence a species of bailment, but one always for reward or compensation, never gratuitous.[70]

"Hiring" has been compared with, or distinguished from, "borrowing" see 11 C.J.S. p 528 note 77, "employing" see 30 C.J.S. p 224 note 72.1 in Pocket Parts, and "employment" see 30 C.J.S. p 234 note 72.

HIRELING. A servant.[71]

HIREMAN. A subject.[72]

HIRER. One who hires a thing, or the labor or services of another person,[73] and, more specifically, in a particular connection, one who by contract acquires the right to use a thing belonging to another.[74]

HIRST or HURST. In old English law, a wood[75]

HIS. See He, Him and His 39 C.J.S. p 804 note 32–p 805 note 46

HIS QUÆ SIMULATE GERENTUR PRO INFECTIS HABITIS.[76]

HISSA. A lot or portion; a share of revenue or rent.[77]

HISTORICAL. Containing, or relating to, history or the relation of facts.[78]

HISTORY. The branch of knowledge that records and explains past events as steps in human progress.[79] It has been said to consist largely, if not wholly, of the records, narratives, and statements of others;[80] and to be embraced in the term "literature."[81]

HIT. To bring into violent contact; to come into contact forcibly; to strike or touch, usually with force[82] The term has been compared with "strike."[83]

HITCH. To harness a horse or horses to a vehicle, to make ready for driving; it is used colloquially as in the expression "to hitch up."[84]

Hitched. Harnessed for the purpose of hauling and not merely tied[85]

HITHERTO. To this time, until now.[86]

HIWISC. In old English law, a hide of land; also a household.[87]

Sioux City, 84 N W 1027, 1028, 113 Iowa 246
N Y —McCluskey v Cromwell, 11 N Y 593, 599
Tex —Carter-Mullaly Transfer Co v Angell, Civ App, 181 S W. 237, 238

69. N D —Schlosser v Great Northern R Co, 127 N W 502, 503, 20 N D 406

"General or indefinite hiring"
A hiring at will to be terminated at any time by either party —National Cash Register Co v Remington Arms Co, 209 N Y S 40, 49, 212 App Div 343

70. Ala —Learned-Letcher Lumber Co v Fowler, 19 So 396, 398, 109 Ala 169
See also Bailments § 8

71. Ark —St Louis, I M & S R Co v Yonley, 13 S W 333, 334, 53 Ark. 503, 505

72. Black L D.

73. Black L D

74. Tex —Turner v Cross, 18 S W 578, 579, 83 Tex 218, 15 L R A 262

"The proprietor, owner, charterer, or hirer of any railroad"
Tex —Turner v Cross, supra

75. Black L D

76. A maxim meaning "Anything done in simulation is void"—Hernandez v Fernandez, 17 Porto Rico 103, 107

77. Black L D.

78. N Y —Carpenter v Historical Society, 2 Dem Surr 574, 576
Okl —Watton v Cruce, 143 P 1152, 1153, 44 Okl 186

Phrases construed
(1) "Historical factors" of vacancy or continued nonuse of business property, and of profitable rental or conduct of a profitable business therein as affecting its value —City of Tampa v Colgan, 163 So 577, 581 note, 582, 121 Fla. 218

(2) "Historical facts" as subject of judicial notice see Evidence §§ 58–63

(3) "Historical society," as preeminently a literary society —Carpenter v Historical Society, 2 Dem Surr, N Y, 574, 577

(4) "Historical value," as a factor in determining intrinsic value of property, defined as meaning those factors that inevitably tend to appreciate or diminish the value of particular property —City of Tampa v Colgan, supra

79. Webster New Int. D.

"History" of the country
The separation of the Methodist Episcopal churches, the one north and the other south of a common boundary line, was an event that connected itself with, and formed a part of the "history" of the country —Malone v Lacroix, 41 So. 724, 725, 143 Ala. 657.

As subject of judicial notice see Evidence §§ 58–60

80. Tex —Atchison, T & S F. R Co v Madden, 103 S W 1193, 1195, 46 Tex Civ App 597

81. N Y —Carpenter v Historical Society, 2 Dem Surr 574, 576
Okl —Watton v Cruce, 143 P 1152, 1153, 44 Okl 186

82. Mo —Salmons v Dun & Bradstreet, 162 S W 2d 245, 251

83. Mo —Salmons v. Dun & Bradstreet, supra.

84. Century D

85. La —Meredith v Kidd, App, 147 So 539, 541

Held not "hitched"
Mules being led along the highway by means of ropes tied to the rear of a vehicle are not hitched thereto. —Meredith v Kidd, supra.

"Animals not hitched to a vehicle"
La —Meredith v Kidd, supra.

86. Century D

Restrictive effect
The term qualifies and limits what otherwise might appear either general or uncertain, and restrains the matter referred to that period of time then elapsed, and prevents its reaching the future —Mason v. Jones, 13 Barb, N Y, 461, 479.

87. Black L D.

H. L. See Abbreviations 1 C.J.S. p 276 note 5.

HLAF ÆTA. Saxon, a servant fed at his master's cost.[88]

HLAFORD. Saxon, a lord[89]

HLAFORDSOCNA. Saxon, a lord's protection[90]

HLAFORDSWICE. In Saxon law, the crime of betraying one's lord, corresponding to the Latin, "proditio domini;" hence, treason.[91]

HLASOCNA. Saxon, the benefit of the law[92]

HLOTHBOTE. In Saxon law, a fine for being present at an unlawful assembly[93]

HLOTHE. In Saxon law, an unlawful assembly of persons from eight to thirty-five in number[94]

HOARD. To amass and deposit in secret, to collect and lay up, to store secretly, as to hoard grain or provisions, to hoard silver and gold,[95] to amass and put away anything valuable for preservation, security or for use, to treasure up, especially money or wealth[96]

The term may be equivalent to "amass", "put by," "save," "store away," "store up," and "treasure up"[97]

Hoarding Act of one who hoards; also that which is hoarded[98] It is the action of the verb "to hoard," especially the accumulation and hiding of money[99] Also a secret storing away and collecting and laying up of necessaries not then needed, thus taking them out of the channels of trade and commerce[1]

In a different sense, a fence inclosing a house and materials while builders are at work, or any similar inclosure of boards;[2] hence a billboard.[3]

HOASTMEN. In English law, an ancient gild or fraternity who dealt in sea coal, at Newcastle-upon-Tyne[4]

HOBBIT or HOBBETT. In Wales, a term generally used to express a quantity made up of four Welsh pecks, each peck weighing forty-two pounds[5]

HOBBLERS. In old English law, light horsemen or bowmen, also certain tenants, bound by their tenure to maintain a light horse to be used for giving notice of an invasion, or any similar peril[6]

HOBSON'S CHOICE. See 14 C J S p 1112 note 48

HOC. Latin, literally "This"[7]

HOC QUIDEM PERQUAM DURUM EST, SED ITA LEX SCRIPTA EST.[8]

HOC SERVABITUR QUOD INITIO CONVENIT.[9]

HOCCUS SALTIS. A hoke, hole, or lesser pit of salt[10]

HOCKETTOR or HOCQUETEUR. A knight of the post, a decayed man, a basket carrier[11]

HOCK-TUESDAY MONEY. A duty given to the landlord that his tenants and bondmen might solemnize the day on which the English conquered the Danes, being the second Tuesday after Easter week[12]

88. Black L D.
89. Black L D.
90. Black L D
91. Black L D
92. Black L D
93. Black L D
94. Black L D
95. U S - U S v Swedlow, D C Col, 264 F 1016, 1018
96. U S—Campbell v Chase Nat Bank of New York City, D C N Y, 5 F Supp 156, 177
97. U S - U S v Swedlow, D C Colo, 264 F 1016, 1018
98. Webster New Int D
99. U S—Campbell v Chase Nat Bank of New York City, D C N Y, 5 F Supp 156, 177
1. U S—U S v Swedlow, D C Colo, 264 F 1016, 1018
2. Eng—Metropolitan Assoc. v. Petch 5 C B N S 504 509, 94 E C L 504 141 Reprint 204
3. Webster New Int D
4. Black L D
5. Eng—Hughes v Humphreys, 8 E & B 951, 955, 26 Eng L & Eq 131, 77 E C L 954, 118 Reprint 1399
6. Black L D
7. Black L D

Phrases construed

(1) "Hoc intuitu"—with this expectation—Black L D

(2) "Hoc loco"—in this place—Black L D

(3) "Hoc nomine"—in this name—Black L D

(4) "Hoc paratus est verificare"—this he is ready to verify—Black L D

(5) "Hoc titulo"—under this title—Black L D

(6) "Hoc vobis ostendit"—literally This shows to you" The form in which plaintiff's count (or intentio) in some real actions commenced in the time of Bracton—Burrill L D

(7) "Hoc [or hac] voce"—under this word—Black L D

8. An observation or maxim meaning literally "This indeed is exceedingly hard but so the law is written, such is the written or positive law." It is quoted by Blackstone as used by Ulpian in the civil law, and applied to cases where courts of equity have no power to abate the rigor of the law—Black L D

9. A maxim meaning "This shall be preserved which is useful in the beginning"—Black L D.

10. Black L D.

11. Black L D.

12. Black L D.

HOCUS. To stupefy or render insensible by means of drugged drink for the purpose of cheating or robbing [13]

HOC VOLO, SIC JUBEO, SIT PRO RATIONE VOLUNTAS.[14]

HODGE-PODGE ACT. A name applied to a statute which comprises a medley of incongruous subjects [15]

HODGKIN'S DISEASE. See 27 C J S. p 144 note 93

HOG. A generic term,[16] defined as a domestic swine, a pig, sow, or boar, especially an adult animal suitable for market,[17] and, in a particular connection, presumably referring to a live animal [18]

Used in the generic sense, the term includes any animal of the hog kind irrespective of its age[19] or sex [20] It has been included in, and held synonymous with, the term "swine"[21] Depending on the circumstances, the term may or may not be included in "cattle" see 14 C J S p 37 note 90

Keeping hogs or pigs as nuisance see the C J S title Nuisances §§ 32, 33, also 46 C J p 711 note 73–p 712 note 87, and regulation thereof by municipality see the C J S title Municipal Corporations § 213, also 43 C J p 314 note 52–p 315 note 72

Phrases employing the word are set out in the note.[22]

HOGA. In old English law, a hill or mountain; a how, as "grene hoga," grenehow [23]

HOGASTER. In old English law, a sheep of the second year; also a young hog [24]

HOG-DRESSED. See Dress 28 C J S p 490 note 73

HOGGUS or HOGIETUS. A hog or swine.[25]

HOGHENHYNE. In Saxon law, a house-servant; also the name given to any stranger who lodged three nights or more at a man's house in a decennary, since the host became responsible for his acts as for those of his servant [26]

HOGSHEAD. See the C J S title Weights and Measures § 1, also 29 C J p 758 note 35

HOIST. As a noun, that by which anything is hoisted, a lifting apparatus, especially an elevator or lift for raising heavy loads, a machine for raising ore, merchandise, passengers, etc [27]

It may be synonymous with "lift"[28]

As a verb, to elevate, to lift, to raise, especially, to raise or lift by means of tackle, as a sail or a heavy weight [29]

13 Century D

14 A maxim meaning "This I will, this I command let my will take the place of reason"—Cook's Estate, 10 Pa Co 465, 466

15 Black L D

16 Neb—Brown v State 171 N W 906, 103 Neb 270—Clark v State, 169 N W 271, 102 Neb 728

17 Webster New Int D

18. Ark—Hutchinson v State, 83 S W 331, 332, 72 Ark 640

19. N C—State v Godet, 29 N C 210, 211

Held to include

A pig four or five months old—Lavender v State, 60 Ala 60, 61

20. May be of either sex

(1) The word 'hog' means swine of either sex"—Matson v Aiona, 7 Hawaii 158, 160

(2) The word may include a sow—Shubrick v State, 2 S C 21, 22

21. Tex—Rivers v State, 10 Tex App 177, 179

22. Phrases construed

(1) "Corn fed hogs" or "hard fed hogs" see 18 C J S p 283 note 68

(2) "Gross hog" a term recognized and well understood among hog dealers as referring to the live hog, in contradistinction to "net hog"—Whitson v Culbertson, 7 Ind 195, 196

(3) "Hog around price" or "hog round price" of cotton construed as meaning that buyer takes cotton without inspection—McKinnon v Monarch Loan Co, 239 P 170, 171, 172 111 Okl 213

(4) "Hog fuel" see Fuel 37 C J S p 1391 note 74 in Pocket Parts

(5) "Hog pens," or "hog ranches" as constituting a nuisance see the C J S title Nuisances § 33, also 46 C J p 711 note 73–p 712 note 79

(6) "Hog serum plants" as nuisances see the C J S title Nuisances § 32, also 46 C J p 712 note 87

(7) 'Hog stealing," as referring to the theft of live animals

Ga—Moses v State, 69 S E 575 576, 8 Ga App 446 Paulk v State, 67 S E 659, 661, 5 Ga App 567

S C—State v McLain, 4 S C L 443, 444

See also the C J S title Larceny § 3, also 36 C J p 740 notes 27 29–35

(8) "Net hog," well understood as referring to the dead hog, without blood hair, or entrails, and ready for cutting up, in contradistinction to "gross hog"—Whitson v Culbertson, 7 Ind 195, 196

(9) "Pork hogs"—Alexander v Dunn, 5 Ind 122 124

(10) "Slop-fed hogs," as meaning hogs fattened at a still and distinguished from "corn-fed hogs," "hard fed hogs," "scalawags" and "soft hogs"—Bartlett v Hoppock, 34 N Y 118, 119, 88 Am D 428

(11) "Soft hogs," as meaning hogs fed on mast, such as beechnuts and acorns—Bartlett v Hoppock supra

(12) "Stock hogs," hogs used for breeding and so including a brood sow but not spayed sows and barrows, incapable of reproduction—Byous v Mount, 17 S W 1037, 1038, 89 Tenn 361

23 Black L D

24. Black L D

25 Black L D

26 Black L D

27. Pa—Williams v Rheas Incorporated, 99 Pa Super 438, 442

Held not to include

A jack used in raising a railroad car to permit making repairs on the trucks—Corbett v New York Cent & H R R Co, 135 N Y S 137, 139, 151 App Div 159

28. Pa—Williams v Rheas Incorporated, 99 Pa Super 438, 442

29. Webster New Int D.

Phrases in which the word occurs are set out in the note.[30]

HOISTWAY. A passageway through or along which something may be hoisted, as an opening in a floor [31]

Duty of master to servant with regard to hoists and hoistways see the C J.S title Master and Servant § 221, also 39 C J. p 359 note 5–p 361 note 14

HOKE DAY or **HECK DAY.** A day of feasting or mirth kept formerly in England on the second or third Tuesday after Easter; or, according to a recent authority, on the first Sunday after Easter [32]

HOLD.

As a Noun

In old law, tenure, a word constantly occurring in conjunction with others, as freehold, leasehold, copyhold, etc, but rarely met with in the separate form [33]

As a Verb

——**In General.** It has been said that there are innumerable legal definitions of the word and that obviously its meaning depends on the context or its relation to other parts of the whole instrument in which it is used.[34] In its primary sense, the word means to confine, to keep fast, to restrain from escape, or to stop;[35] to detain,[36] to hold back, to withhold;[37] to retain,[38] to retain in one's keeping;[39] also to have,[40] to keep,[41] to reserve [42]

In a derived sense, when spoken of a court, to adjudge or decide, particularly to declare the conclusions of law reached by the court as to the legal effect of the facts disclosed [43]

——**Technical Sense.** As a technical term, "hold" embraces two ideas, that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession,[44] and, while it imports ownership and time of ownership,[45] the interpretation of the word may be so controlled by the context as to require that it be construed to signify to have in possession or under control merely,[46] and so it may be employed as meaning to be in possession of,[47] to have exclusive control, direction, and superintendence;[48] to maintain possession of or authority over; not to give up or relinquish;[49] or to occupy;[50] also to derive title to,[51] to own, or have title to,[52] and to possess by lawful title [53]

With reference to real estate, the word "hold" has a well defined meaning,[54] but in seeking its mean-

30. Phrases construed

(1) "Hoisting apparatus," as including a block and fall—McNeill v Bottsford-Dickinson Co, 112 N Y S 867, 869, 128 App Div 544

(2) "Hoisting machine," a term of broad significance, being the designation of a class, inclusive of elevators, lifts, and similar devices, and applying to all mechanical contrivances used for lifting, but not necessarily referring to any particular machine—Williams v Rheas Incorporated, 99 Pa Super 438, 441

(3) "Scaffolding, hoists, stays, or other mechanical contrivances"—Corbett v New York Cent & H R R Co, 135 N Y S 137, 139, 151 App Div 159

31. Mass—Simpson v. Phillipsdale Paper Mill Co, 116 N E 828, 830, 227 Mass 430

32. Black L D

It is suggested that originally it was the great spring festival of the preRoman Britons—Black L D

33. Black L D

34. Ky—Combs v Combs, 166 S W 2d 969, 971, 292 Ky 115, citing **Corpus Juris.**

35. U S—Griffin's Case, C C Va, 11 F Cas No 5,815, Chase 364

36. Ind—Gould v O'Neal, 27 N E 307, 1 Ind App 144, 145

37. Dak—Lloyd v Powers, 22 N W 492, 493, 4 Dak 62, 63

38. Md—Stansbury v Hubner, 20 A 904, 73 Md 228, 231, 25 Am S R 584, 11 L R A 204
29 C J p 758 note 58

In contradistinction to the first act of seizing or falling on—Griffin's Case, C C Va, 11 F Cas No 5,815, Chase 364

39. Ill—Ure v Ure, 56 N E 1087, 185 Ill 216, 217
Ky—Hopkins v Howard's Ex'x, 99 S W 2d 810, 812, 266 Ky 685

40. N Y—Osgood v New York, 4 N Y Super 378

41. Md—Stansbury v Hubner, 20 A 904, 73 Md 228 231, 25 Am S R 584, 11 L R A 204

42. W Va—Hurst v Hurst, 7 W Va 289, 298

43. Black L D

44. Ky—Combs v Combs, 166 S W 2d 969, 971 292 Ky 445, quoting **Corpus Juris.**
29 C J p 758 notes 41, 42

45. Ill—Gregory v Gregory, 175 N E 804, 809, 343 Ill 630—Chicago Home for Girls v Carr, 133 N E 344, 346, 300 Ill 478

46. U S—Jack v Walker, C C Ohio, 79 F 138, 140, 141
Mo—Phipps v Doak, 145 S W 2d 167, 168, 235 Mo App 659
29 C J p 758 note 43

Particular applications

(1) In an agreement to hold in trust a sum of money and to pay interest thereon, the word "hold" implies a defensive possession, consistent with that of a trustee, in contradistinction from a promised payment of a loan or indebtedness—Gutch v Fosdick, 22 A 590, 591, 48 N J Eq 353, 356, 57 Am S R 473—Tucker v Linn, N J Ch, 57 A 1017, 1019

(2) The actual holding essential to a common-law lien on personal property does not exist in the case of statutory liens, the latter imply a holding in contemplation of law only—Willingham v Rushing, 31 S E 130, 132, 105 Ga 72

47. Ill—Ure v Ure, 56 N E 1087, 185 Ill 216, 217
29 C J p 758 note 44

48. Mo—Phipps v Doak, 145 S W 2d 167, 168, 235 Mo App 659
N C—Rountree v Dixon, 11 S E 158 159, 105 N C 350

49. Ky—Hopkins v Howard's Ex'x, 99 S W 2d 810, 812, 266 Ky 685

Similarly expressed

To maintain authority over—Ure v Ure, 56 N E 1087, 185 Ill 216, 217

50. Ill—Ure v Ure, supra

51. Ill—Ure v Ure, supra

52. U S—Jack v Walker, C C Ohio, 79 F 138, 140
29 C J p 758 note 54

53. U S—Jack v Walker, supra

54. Ind—Lehman v State, 88 N E 365, 368, 45 Ind App 330

ing it must be looked at in connection with the context.[55] In its primary significance, it means to enjoy and possess;[56] and includes the twofold idea of actual possession of the property and being invested with the legal title.[57] It has to do with the duration or tenure of the estate rather than with the mode of acquisition;[58] and sometimes is not designed to measure the character of the possession.[59] The term has been held equivalent to "own"[60]

Held The preterit or past participle,[61] or the perfect participle,[62] of "hold." It has been said to have no primary or legal technical meaning,[63] but the meaning to be given it is to be determined largely by the connection in which it is used,[64] that is, not simply from its form, but from its relation to other parts of the instrument, and it must be construed, if possible, so as to give force and effect to all its parts[65] The term is constantly applied to cases of possession had of anything that is the subject of property[66] It has been said, however, that, while the word implies ownership, it does not always imply possession.[67]

In a different sense, it has been defined as meaning construed, deemed, or interpreted,[68] and, with reference to the decision of a court, "decided"[69]

"Held" has been said to be equivalent to, or synonymous with, "acquired" or "acquired and held" see Acquire 1 C.J.S. p 919 note 43.1, p 920 note 71.1 in Pocket Parts, "detained" see Detain 26 C.J.S. p 1249 note 15 1 in Pocket Parts, and "owned."[70]

Holden. Earlier form of the past participle of "hold," defined as meaning beholden, bound, or under obligation,[71] as in the phrases set out in the note[72]

Holding The act of keeping or retaining; also that which is held, hence a tenure.[73] The term describes and implies an act, an event, and circumstance,[74] and is said to embrace any tenure involving title[75]

In English law, a piece of land held under a lease or similar tenancy for agricultural, pastoral, or similar purposes.[76]

In Scotch law, the tenure or nature of the right given by the superior to the vassal[77]

Phrases The following notes contain phrases which have received judicial construction, some employing "hold,"[78] others, "held,"[79] and others, "holding"[80] For other phrases as to which more recent

55. N M —Corn v Hyde, 188 P 1102, 1103, 26 N M 36

56. Pa.—Cooke v Doron, 64 A 595 597, 215 Pa 393, 7 L R A,N S 659, 7 Ann Cas 502

57. Md —Stansbury v Hubner, 20 A 904, 73 Md 228, 25 Am S R 584, 11 L R A 204
N Y — In re Crofoot's Will, 137 N Y S 430, 431

58. Ind —Lehman v State, 88 N E 365, 368, 45 Ind App 330

59. N M —Corn v Hyde, 188 P 1102, 1103, 26 N M 36

60. Ill —Gregory v Gregory, 175 N E 804, 809, 343 Ill 630—Chicago Home for Girls v Carr, 133 N E 344, 346, 300 Ill 478
Nev — State v Leete, 16 Nev 242, 249

61. Century D

62. Iowa —Starr v Case, 13 N W 645, 647, 59 Iowa 491

63. Ill —Gregory v Gregory, 175 N E 804, 809, 343 Ill 630—Chicago Home for Girls v Carr, 133 N E 344, 346, 300 Ill 478

64. Ill —Gregory v Gregory, 175 N E 804 809, 343 Ill 630—Chicago Home for Girls v Carr, 133 N E 344, 346 300 Ill 478

65. Iowa —Starr v Case, 13 N W 645, 647, 59 Iowa 491

66. S C —Witsell v Charleston, 7 S C 88, 99

67. U S —Mount Tivy Winery v Lewis, D C Cal, 42 F Supp 636, 641

68. La —Jackson v Unity Industrial Life Ins Co, App, 142 So 207, 211

69. Black L D

70. Ill —Chicago Home for Girls v Carr, 133 N E 344, 346, 300 Ill 478

71. Century D

72. **Illustrative phrases**
(1) "Holden by such person by virtue of a possession and improvement"—Treat v. Strickland, 23 Me 234 238

(2) "Holden to account for" held to mean 'not merely to 'render an account of,' but, 'to be responsible for,' it stands in opposition to the right of appropriation to one's own use and benefit"
U S —Port of Seattle v Fidelity & Deposit Co of Maryland, D C Wash, 24 F Supp 434, 436
Me —Thomas v Mahan, 4 Me 513, 520

73. Century D

74. Cal —Wells v McCarthy, 90 P 203, 206, 5 Cal App 301

75. Ga —Thompson v. Sandford, 13 Ga 238, 241

76. Black L D

77. Black L D

78. **Phrases construed**
(1) "Have, hold, and enjoy" and "hold, possess, and enjoy"—Phipps v Doak, 145 S W 2d 167, 168, 235 Mo App 659

(2) "Hold, control, and use"—Hopkins v Howard's Ex'x, 99 S W 2d 810, 812, 266 Ky 685

(3) "Hold office under this state"—Leymel v Johnson, 288 P 858, 859, 105 Cal App 694

(4) "Hold out," as meaning to lead the world to believe by language and conduct — U S v Snow, 9 P 697, 705, 4 Utah 313

(5) "Hold property in trust" means having in possession and under control property, not owned but held for other persons — In re Security Bank & Trust Co, 224 N W 235, 236, 178 Minn 209

(6) "Hold up" as meaning to rob see the C J S title Robbery § 1, also 29 C J p 760 note 36 [a]

79. **Phrases construed**
(1) "Held by," as indicating ownership and equivalent to "owned"—Gregory v Gregory, 175 N E 804, 809, 343 Ill 630—Chicago Home for Girls v Carr, 133 N E 344, 346, 300 Ill 478

(2) "To be held for" as implying a trust, or fiduciary, relationship in the holder rather than a beneficial interest in him —Combs v Combs 166 S W 2d 969, 971, 292 Ky 445, citing **Corpus Juris.**

80. **Phrases construed**
(1) "Holding company" or "holding corporation" see the C J S title Mo-

adjudications have not been found see 29 C.J. p 759 notes 69–80, notes 87–8 and p 760 notes 17–21.

HOLD-DOWN. In the shoe machinery art, the vertical movable member of a lasting machine that governs the vertical position of the shoe in the machine during the process of "heel seat lasting."[81]

HOLDER. Popularly, one who holds,[82] and, more specifically, one who holds lands, etc., under another, hence, a tenant; the person in possession, actual or constructive, of real estate.[83]

As meaning one who is legally in possession of a negotiable instrument see Bills and Notes § 9 note 71; and cancellation of negotiable instrument by holder as discharge see Bills and Notes § 475 a.

The word may imply possession legally acquired,[84] or ownership.[85] In the following notes examples are given of entities or persons held included by the term,[86] and others held not included.[87]

"Holder" is often used as equivalent to, or synonymous with, "bearer,"[88] and "owner" see the C.J.S. title Property § 13, also 29 C.J. p 760 note 27. With reference to negotiable instruments, it has been held not to be synonymous with "holder in due course" see Bills and Notes § 301.

Phrases in which the word occurs are set out in the note[89] For other phrases as to which more

nopolies § 1, also 41 C.J. p 84 notes 27, 28

(2) "Holding court" see the C.J.S. titles Courts § 150, as to time for holding terms generally, and Sunday § 51, also 60 C.J. p 1143 note 28–p 1146 note 56, holding on Sunday

(3) "Holding money" does not necessarily imply physical retention of it in kind, but it is sufficient if one retains control of and keeps it subject to the payment of orders —Hunt v. Hopley, 95 N.W. 205, 206, 120 Iowa 695

(4) "Holding of an office," construed as requiring that there must be the concurrence of two wills—that of the appointing power and that of the person appointed —People v. Whitman, 10 Cal. 38, 44

(5) "Holding out," as the act of leading others to rely on, or believe, something from one's conduct or language —U.S. v. Snow, 9 P. 697 705, 4 Utah 313

(6) "Holding out a person as agent" see Agency § 23

(7) "Holding out a person as partner" see the C.J.S. title Partnership §§ 31–35, also 47 C.J. p 709 note 88–p 713 note 26

(8) "Holding over" see the C.J.S. titles Landlord and Tenant §§ 73–77, 136, 148, 285, 471, 505, 506, 514, also 35 C.J. p 1027 note 43–p 1037 note 37, p 1101 note 77–p 1105 note 28 p 1108 note 61–p 1109 note 74, p 1254 notes 93–96, 36 C.J. p 293 note 22–p 295 note 41, p 349 note 17–p 350 note 37, p 364 note 42; Officers § 48, also 46 C.J. p 968 note 53–p 971 note 2, by officers generally See also 29 C.J. p 760 note 14 and consult Descriptive-Word Index for references to holding over by particular officers or persons

(9) "Holding up" as a form of robbing see the C.J.S. title Robbery § 1, also 29 C.J. p 760 note 36 [b]

(10) "Holding up the hand," in criminal practice, a formality observed in the arraignment of prisoners, although it has been held to be not absolutely necessary —Black L.D.

81. U.S.—Williams Mfg. Co. v. United Shoe Mach. Corporation, C.C.A. Ohio, 121 F.2d 273, 274.

82. Nev.—State v. Wheeler, 44 P. 430, 432, 23 Nev. 143
29 C.J. p 760 note 24

83. Nev.—State v. Wheeler, supra.

84. Kan.—Campbell v. Wilcoxen, 7 P.2d 46, 48, 134 Kan. 500

85. Ill.—Melick v. Metropolitan Casualty Ins. Co. of New York, 4 N.E. 2d 769, 287 Ill.App. 613

86. **Held included**

(1) One whose title vests in him the right to the immediate possession of land and who could at any time, without let or hindrance, take actual possession —State v. Wheeler, 44 P. 430, 23 Nev. 143.

(2) The person who has an interest in a contract, as of insurance, rather than merely in the proceeds, in other words, the person who is paying the premium —Kovacs v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 193 A. 529, 536, 15 N.J. Misc. 616

(3) The person to whom an insurance policy is by its terms payable, the owner thereof —Travelers' Ins. Co. v. Healey, 33 N.Y.S. 911, 921, 86 Hun 542

(4) Trustee for creditors —Fletcher v. Bonnet, 28 A. 601, 603, 51 N.J. Eq. 615

87. **Held not included**

(1) Escrow holder of an instrument —Campbell v. Wilcoxen, 7 P. 2d 46, 48, 134 Kan. 500

(2) One having mere physical possession of a check for collection — Security Commercial & Savings Bank v. Southern Trust & Commerce Bank, 241 P. 945, 953, 74 Cal.App. 734

(3) A bank which pays a check drawn upon it does not become the "holder" of such check —National Bank of Commerce v. Farmers' & Merchants' Bank, 128 N.W. 522, 523, 87 Neb. 841.

88. Ga.—Jordan Mercantile Co. v. Brooks, 99 S.E. 289, 290, 149 Ga. 157
S.C.—Putnam v. Crymes, 26 S.C.L. 9, 36 Am.D. 250
See also Bearer 10 C.J.S. p. 219 in Pocket Parts

89. **Phrases construed**

(1) "Holder in due course" see Bills and Notes §§ 301–342

(2) "Holder of real estate for investment" as distinguished from "dealer in real estate" see 25 C.J.S. p. 1046 note 57

(3) "Holder of the policy," as describing the person who takes out the policy on his life and pays the premiums —Zeigler v. Kansas Life Ins. Co., 243 P. 272, 273, 120 Kan. 252

(4) "Lawful holder of negotiable paper," as including one who holds the paper merely as trustee for the real owner, for the purpose of collecting the same —Thompson v. Cartwright, 1 Tex. 87, 88, 46 Am.Dec. 95

(5) "Lawful holder of the bill of lading," as meaning the person to whom the carrier shall be liable for any loss, damage, or injury to property caused by it, or the one beneficially entitled to recover for such loss or injury, hence the owner of the property transported
U.S.—Pennsylvania R. Co. v. Olivit Bros., N.J., 37 S.Ct. 468, 471, 243 U.S. 574, 61 L.Ed. 908
Tex.—Pecos & N.T. Ry. Co. v. Meyer, Civ.App., 155 S.W. 309, 312
Va.—Norfolk Southern R. Co. v. Norfolk Truckers' Exchange, 88 S.E. 318, 320, 118 Va. 650

(6) "Lawful holder of the certificate," the words referring to the lawful holders of tax-sale certificates, mean the person who in law is the owner of the certificate and entitled to the rights and benefits which may accrue under it.

recent adjudications have not been found see 29 C.J. p 760 notes 28–32.

HOLDES. In Saxon law, a military commander.[90]

HOLDMAN. One who works within the hold of a ship.[91]

HOLDUP. See the C.J.S. title Robbery § 1, also 29 C J. p 760 note 36.

HOLE. An aperture of any sort, whether a natural orifice or an artificial perforation, an opening into or through anything;[92] a hollow place or cavity.[93]

The term has been held equivalent to, or synonymous with, "cavity," see Cavity 14 C.J.S. p 57 note 9 in Pocket Parts, "depression" see 26 C.J.S. p 977 note 61, and "hollow."[94]

Phrases in which the word occurs are set out in the note.[95]

HOLGAZÁN. In Spanish law, an idler, a lazy person; hence a vagrant.[96]

Iowa—Swan v Whaley, 35 N W 440, 442, 75 Iowa 623
N M—Territory v Perea, 30 P 928, 930, 6 N M 531

(7) "Prospective holder of a concession" as distinguished from "debtor" see 26 C J S p 31 note 23

90. Black L D

91. U S—Union Stevedoring Corporation v Norton, C C A Pa, 98 F 2d 1012, 1014

92. Webster New Int D
In England it has been said that a "goit" is not a "hole"—Wilson v Halifax, L R, 3 Exch 114, 118

93. Mo—Rice v Kansas City, App, 16 S W 2d 659, 661

94. U S—Maxim Mfg Co v Imperial Mach Co, C C A Ill, 286 F 79, 83
Mo—Rice v Kansas City, App, 16 S W 2d 659, 661

95. Phrases construed

(1) "Digging out the tapping hole," described, as digging the loam, dolomite, and magnesite out of the channel or tapping hole so as to open a passage through which the molten metal may escape from the furnace—Illinois Steel Co v Coffey, 68 N E 751, 752, 205 Ill 206

(2) "Good clean hole," a hole free from things which would render it incapable of the uses for which it was designed—Bain v White, C C A Tex, 256 F 428, 432

(3) "Lamp holes," in sewer construction, small openings to permit lowering of a lamp for the purpose of inspection—Comstock v City of Eagle Grove, 111 N W 51, 52, 133 Iowa 589

(4) "Missed hole," in blasting, a hole charged with dynamite which has failed to explode—Stearns v Reidy, 25 N E 762, 135 Ill 119

(5) "Pop holes," in quarrying, holes drilled into irregular fragments of rock, to receive a charge of explosive to blow them to pieces, when they are too large to be loaded onto cars and transported to the crusher—Harper v Iola Portland Cement Co, 93 P 179, 76 Kan. 612

(6) "Tapping hole," in an open-hearth furnace, the opening at the bottom of the channel through which the molten liquid is drawn or let out of the furnace—Illinois Steel Co. v Coffey, supra

96. Escriche Diccionario.

HOLIDAYS

This Title includes days designated by law, other than Sunday, for suspension of ordinary business or judicial or other official proceedings; and effect of violations of such laws on validity of acts, transactions, and proceedings affected, and on the rights and remedies of persons engaged therein.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

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See also descriptive word index in the back of this Volume

§ 1. Definitions and Distinctions

The terms "holiday" is used to designate a consecrated day, or a day of recreation or amusement and of cessation from work.

The term "holiday" is sometimes used as meaning a consecrated day, or a religious festival,[1] but it may also mean a day on which the ordinary occupations are suspended, or a day of exemption or cessation from work or of festivity, recreation, or amusement,[2] and not a day of rest and religious devotion,[3] and a legal holiday is a day designated and set apart by legislative enactment for one or more of such purposes[4]

General and special holidays A day set apart by the governor of a state as a legal holiday therein to be observed by all people generally is a general holiday,[5] and not a mere special holiday within the meaning of statutes defining a special or limited holiday as one applying only to special classes of business or persons.[6]

Ecclesiastical and state holidays The distinction between ecclesiastical and state holidays, recognized in England, does not obtain in this country[7]

"Dies non juridicus" or "nonjudicial day" are terms which were used originally to describe Sundays and some particular festivals which the church by proclamation ordained should not be profaned by the tumult of forensic litigation,[8] but today they mean simply those days on which process cannot ordinarily issue or be executed or returned, and on which courts do not usually sit[9] The expression "legal holiday" has been held to import a dies non juridicus,[10] and as used in some constitutional provisions the term "nonjudicial day" or "dies non juridicus" has been held equivalent to the expression "legal holiday,"[11] but, as shown infra § 5, a legal holiday, as such, is not necessarily a dies non juridicus.

§ 2. Creation and Designation

Holidays are ordinarily created by legislative act or executive proclamation.

Holidays may be created and designated as such by statute, and ordinarily a day cannot become a legal holiday without statutory sanction,[12] although it has been held that a holiday, at least a holiday

1. Cal—Vidal v Backs, 21 P 2d 952, 955, 218 Cal 99, 86 A L R 1134, quoting **Corpus Juris.**
29 C J p 761 note 1.

2. Cal—Vidal v Backs, 21 P 2d 952, 955, 218 Cal 99, 86 A L R 1134, quoting **Corpus Juris.**
Ky—Moore v Hagan, 2 Duv. 437.
29 C J p 761 note 1

Scope of term generally

The term "has reference to a day set apart for worship, for reference to the memory of a great leader and benefactor of humanity, to rejoice over some great national or historical event, or rekindle the flame of an ideal"—Vidal v Backs 21 P 2d 952, 955, 218 Cal 99, 86 A L R 1134

3. Ky—Moore v Hagan, 2 Duv 437

4. Cal—Vidal v Backs, 21 P 2d 952, 955, 218 Cal 99, 86 A L R. 1134, quoting **Corpus Juris.**
Ind—State v Shelton, 77 N E 1052, 38 Ind App 80

5. Cal—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54

6. Cal—Stanislaus Lumber Co. v Pike, supra.

7. Ind—Hadley v Musselman, 3 N E 122, 104 Ind 459, 462
29 C J p 761 note 6

8. Cal—Vidal v Backs, 21 P 2d 952, 218 Cal 99, 86 A L R 1134

9. Cal—Vidal v Backs, supra
Or—Whitney v Blackburn, 21 P 874, 17 Or 564, 11 Am S R 857

10. Or—Whitney v. Blackburn, supra.
Wis—Lampe v. Manning, 38 Wis. 673

11. Cal—Vidal v. Backs, 21 P 2d 952, 218 Cal 99, 86 A L R 1134

12. La.—State v. Duncan, 43 So.

in the general sense as distinguished from a legal or statutory holiday, may be created by general acceptance and observance,[13] or observance amounting to a common-law custom.[14] Under some statutory provisions a holiday may be created by declaration or proclamation of the governor of a state[15] or the president of the United States.[16]

Saturday half holidays Under the statutes in some jurisdictions Saturday afternoon is a holiday.[17]

Monday following holiday on Sunday Where a holiday designated by statute falls on Sunday, the following Monday is, according to some authorities, a holiday,[18] but according to other authorities the following Monday is not a holiday,[19] in the absence of express statutory provision to that effect.[20]

§ 3. Operation and Effect of Designation

The legal status of holidays differs from that of Sundays, holidays have effect only as to those transactions set forth in the statute establishing them, and all other acts performed on holidays are fully effective.

Under some statutes certain holidays are given the legal status of Sunday for all purposes;[21] but in the absence of statutes of this nature the legal status of a holiday is not of necessity the same as that of a Sunday, and the mere declaration that a certain day shall be a legal holiday does not indicate an intent on the part of the legislature to assimilate the status of that day to the status of Sunday.[22] A legal holiday other than Sunday has effect as a holiday as to those acts and transactions which are designated in the statute establishing the day,[23] but no others,[24] and accordingly it is held that, with the exception of matters concerning which the statute provides that the day shall be treated as Sunday, any act done on that day is as effective as though done on any other day.[25] Statutes having for their object the suspension of business on holidays are sometimes construed as permissive and not mandatory as to acts falling within the terms of the statutes.[26] The establishment of a holiday does not operate retroactively so as to ren-

283, 118 La. 702, 10 L R A ,N S , 791, 11 Ann Cas 557
29 C J p 762 notes 8, 10

13. U S —Schwaner v Kerr, D C Or , 170 F 92, 100 affirmed 177 F 659, 101 C C A 285
29 C J p 761 note 7

14. Tex —St Louis, B & M R Co v Hicks, Tex Civ App , 158 S W 192
29 C J p 762 note 9

15. Cal —Reyburn v Young, 28 P 2d 353, 219 Cal 536—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54.

16. Miss —Anthony v Bank of Wiggins, 184 So 626, 183 Miss 885

Period of presidential power
The president was without power to declare a bank holiday on March 6, 1933 under the Trading with the Enemy Act which was limited in its application to the period of the first World War, and he did not acquire this power until March 9, 1933, when his authority to act was extended to include other periods of national emergency —Anthony v Bank of Wiggins, 184 So 626, 183 Miss 885

17. Cal —McGrath v Langford, 169 P 424, 35 Cal App 215
29 C J p 762 note 16

18. Ohio —Puritan Choclate Co v Samuel, 182 N E 322, 42 Ohio App 376

19. Neb —Reid v Keys, 199 N W 533, 112 Neb 242
29 C J p 762 note 17.

20. Utah.—Davidson v. Munsey, 74 P 431, 27 Utah 87.
29 C J p 762 note 18

21. Ohio.—Cincinnati Traction Co v Krauss, 161 N E 563, 28 Ohio App 205
Scope and extent of Sunday laws in general see the C J S title Sunday § 4, also 60 C J p 1041 note 27 p 1042 note 34

22. Ky —Moore v Hagan, 2 Duv 437
N Y —Page v Shainwald, 62 N E 356, 169 N Y 246, 57 L R A 173
Tex —Hammick v Gilbert, 144 S W 2d 5, 6, 24 Tenn App 330, citing **Corpus Juris.**
Wash —Kelliher v Investment & Securities Co , 30 P 2d 985, 177 Wash 82 appeal dismissed 55 S Ct 105, 293 U S 519, 79 L Ed 633
Wis —Manning v Young, 247 N W 61, 210 Wis 588
29 C J p 761 note 3

23. La —State ex rel Graham v Republican State Central Committee of Louisiana, 192 So 374, 193 La 863—Woodard v Bienville Parish School Board, 126 So 207, 208, 169 La 831, citing **Corpus Juris.**
Excluding holiday in computing time for performance of an act see the C J S title Time § 14, also 62 C J p 1005 note 69–p 1006 note 79

24. Ark —Sullivan v State, 258 S W 980, 163 Ark 353
Cal —Ex parte Heckman, 266 P 585, 90 Cal App 700
Kan —Smith v. Robertson, 128 P 2d 260, 264, 155 Kan 706, citing **Corpus Juris.**
La.—State ex rel Graham v Republican State Central Committee of Louisiana, 192 So 374, 193 La 863 —Woodard v Bienville Parish School Board, 126 So 207, 208, 169 La 831, citing **Corpus Juris.**
Ohio —King v Pavlor, 43 N E 2d 313, 69 Ohio App 193—Morgan v The Fashion Co , 29 Ohio N P N S , 334, 335, quoting **Corpus Juris.**
Okl —Garner v Tulsa Building & Loan Ass'n, 268 P 722, 723, 131 Okl 232, 58 A L R 1269, quoting **Corpus Juris.**
Pa —Baker v Spector, 90 Pa Super 163
Wyo —Sterling Lumber Co v Thompson, 41 P 2d 264, 268, 47 Wyo 552, quoting **Corpus Juris,** and followed in U S Fidelity & Guaranty Co v Thompson, 41 P 2d 269, 47 Wyo 519.
29 C J p 762 note 20

Statutory sanctity
A legal holiday has only the sanctity attached to it by statute —State v Duncan, 43 So 283, 118 La. 702, 10 L R A ,N S , 791, 11 Ann Cas 557—
29 C J p 761 note 5

25. La —Woodard v Bienville Parish School Board, 126 So 207, 208, 169 La 831, citing **Corpus Juris.**
Md —Havre De Grace Banking & Trust Co v Mitchell, 199 A 843, 175 Md 68
Okl —Garner v Tulsa Building & Loan Ass'n, 268 P 722, 723, 131 Okl 232, 58 A L R 1269, quoting **Corpus Juris.**
Wyo —Sterling Lumber Co v. Thompson, 41 P 2d 264, 268, 47 Wyo 552, quoting **Corpus Juris,** and followed in U S Fidelity & Guaranty Co v Thompson, 41 P 2d 269, 47 Wyo 519
29 C J p 762 note 21

26. Tenn —Hammick v Gilbert, 144 S W 2d 5, 24 Tenn App 330
29 C J p 763 note 22.

der illegal a transaction performed previously and at a time when the day in question was not a legal holiday.[27]

A half holiday frequently differs in its operation and effect from a holiday,[28] and the fact that the performance of certain acts on holidays is prohibited or excused does not necessarily prohibit or excuse the performance of such acts on a half holiday.[29]

A local holiday which is confined to a particular municipality is not operative elsewhere.[30]

§ 4. —— Private Acts and Transactions

Private transactions are not invalid merely by reason of being performed on a holiday, except as to those transactions specifically enumerated by the governing statute. A prohibition against public business will not affect private business

As a general rule it is not compulsory to refrain from the transaction of private business on a holiday in the absence of statutory provision to that effect.[31] Where a statute enumerates the private acts which may not be performed on designated holidays, all transactions not within the statutory prohibitions may be carried on as on any other day,[32] but acts within the statutory ban are unlawful.[33] In determining whether particular acts can be performed on certain holidays the courts have made adjudications as to the meaning of terms employed in the statute or proclamation declaring the holiday.[34] A prohibition against the transaction of public business, or the transaction of business in the public offices of the state or counties, on certain holidays, does not prevent the transaction on such day of private business,[35] such as the acknowledgment by a notary public of the execution of a deed.[36] The failure of a bank to carry out instructions given to it is not excused by the procla-

27. Miss.—Anthony v Bank of Wiggins, 184 So 626, 183 Miss 885

28. N Y —Andes Co-op Dairy Co v Commercial Casualty Ins Co, 201 N Y S 664, 207 App Div 102—Van Orden v Simpson, 153 N Y S 134, 90 Misc 322—Cole v Phelps, 248 N Y S 655, 139 Misc 431

29. N Y —Andes Co-op Dairy Co v. Commercial Casualty Ins Co, 201 N Y S 664, 207 App Div 102—Van Orden v. Simpson, 153 N Y S 134, 90 Misc 322

29 C J p 762 note 21 [a] (3).

Inclusion of half holiday in computing time see the C J S title Time § 14, also 62 C J p 1006 notes 80–84

30. La —Lewis v. Police Jury of Rapides Parish, 1 La App 441

29 C J p 762 note 16 [a]

31. Pa —Marcus Bros v Director General of Railroads, 79 Pa Super 197

Tenn —Hammick v Gilbert, 144 S W 2d 5, 24 Tenn App 330

29 C J p 763 note 23

"The modern spirit of holidays confers a privilege to refrain from labor, rather than a command to desist from work in accordance with the doctrine of dies non juridicus"—People v Browning, 22 P 2d 784, 788, 132 Cal App 136

Exclusion of holidays in computing
Days of grace as to commercial paper see Bills and Notes §254
Time of protest see Bills and Notes § 376

Mortgage foreclosure sale, under power of sale, on holiday see the C J S title Mortgages § 569, also 41 C J p 965 notes 71, 72

Foreclosure of a chattel mortgage by advertisement pursuant to a power of sale in the mortgage is not rendered invalid by the fact that the foreclosure sale is held on a legal holiday —Sterling Lumber Co v Thompson, 41 P 2d 264, 47 Wyo 552, followed in U S Fidelity & Guaranty Co v Thompson, 41 P 2d 269, 47 Wyo 519

32. Pa —Baker v. Spector, 90 Pa Super 163

29 C J p 763 note 27

Intent of proclamation

It has been held not the intention of a proclamation declaring a bank holiday to deny to banks the privileges permitted to others in the matter of foreclosures —Security-First Nat Bank of Los Angeles v Bennett, 62 P 2d 798, 17 Cal App 2d 641

33. Mass —Commonwealth v Moriarty, 40 N E 2d 307, 311 Mass 116

Prohibition against sale of intoxicants on holidays see the C J S title Intoxicating Liquors § 256, also 33 C J p 600 note 94, p 601 note 96

A municipal ordinance prohibiting dealing in certain products on holidays may validly be enacted for the purpose of protecting the health of the people —Justesen's Food Stores v City of Tulare, 84 P 2d 140, 12 Cal 2d 324

34. Banking transactions or business

(1) The terms "banking transaction" and "banking business" as used in a presidential proclamation declaring a bank holiday and prohibiting banking transactions and banking business during the period of the holiday should be given their generally accepted meaning and should not be liberally construed except to prevent the evils sought to be avoided by the proclamation, and the insertion of newspaper advertisements for the purpose of conserving bank assets has been held not to constitute a banking transaction or banking business within the meaning of the proclamation —Bailey v Orange Nat Bank, D C N J, 26 F Supp 949

(2) Steps taken by a bank holding a deed of trust to bring about the sale of property on default of payment have been held not to constitute banking business within the meaning of such a proclamation —Security-First Nat Bank of Los Angeles v. Bennett, 62 P 2d 798, 17 Cal App 2d 641

Retail stores

As used in a statute requiring retail stores to be kept closed during certain hours on a designated holiday, the word "store" refers to a place where traffic is carried on in goods, wares, or merchandise, and the word "retail" imports primarily that the sales carried on in such store shall be in small quantities, and a tavern in which alcoholic beverages are served to customers to be drunk on the premises constitutes a retail store within the meaning of such a statute —Commonwealth v Moriarty, 40 N E 2d 307, 311 Mass 116

Sale

The fact that an alcoholic beverage is served to be drunk on the premises does not preclude the transaction from being a "sale" within the meaning of a statute prohibiting certain sales on holidays —Commonwealth v Moriarty, supra

35. S D —Carr v Wakonda Independent Cons School Dist No 1 of Clay County, 182 N.W. 626, 44 S D 103

29 C J p 763 note 26.

36. Minn —Slater v. Schack, 43 N W. 7, 41 Minn 269

29 C J. p 763 note 25.

mation of a bank holiday where such instructions had been received in sufficient time before the holiday to enable it to comply therewith prior to the time when the proclamation took effect.[37]

§ 5. —— Judicial Proceedings

a. In general
b. Issuance and service of process, writs, or notices
c. Trial
d Verdicts, judgments, and sentences

a. In General

Judicial functions may be performed on holidays in the absence of statute otherwise providing, and statutes prohibiting judicial functions on such days will not bar the performance of ministerial acts. The parties may by their actions waive any right to question the validity of proceedings conducted on a holiday

As a general rule, legal holidays are not, as such, dies non juridicus in the absence of statute so providing, and judicial business may be transacted on such days,[38] but in some jurisdictions the transaction of judicial business on legal holidays is, subject to prescribed qualifications in some cases, forbidden by statute or by constitution.[39] Judicial acts are not invalidated by a statute which is permissive and not mandatory.[40] There is authority holding that a holiday cannot become dies non juridicus by implication,[41] but there is also authority holding to the contrary where the implication is clear.[42]

The statutory designation of a day as a holiday for commercial purposes[43] or a provision that holidays shall be considered as Sundays for all purposes relating to the transaction of business "in public offices"[44] does not prohibit the transaction of judicial business on that day. A prohibition against the transaction of judicial business on holidays does not affect the legality of ministerial acts performed on such days,[45] such as the filing, by the clerk, of a motion for a new trial[46] or the docket transcript of a judgment,[47] the entry of an appeal,[48] or the holding of a preliminary examination by a justice in a criminal proceeding.[49] Unless expressly prohibited by statute, judicial sales are not invalid by reason of being held on a holiday.[50] A statute prohibiting

37. N Y —Doty v Baltimore Trust Co, 265 N Y S 66, 147 Misc 868

38 Ala —Smith v State, 9 So 2d 122, 123, citing **Corpus Juris**—Spence v Spence, 195 So 717, 239 Ala 480
Ga —Freeman v Beneficial Loan Soc of Macon, 155 S E 786, 42 Ga App 294
Ind —Bowser v Tobin, 18 N E 2d 773, 215 Ind 99
Kan —Smith v Robertson, 128 P 2d 260, 155 Kan 706
Ohio —Norman v State, 142 N E 234, 109 Ohio St 213
29 C J p 763 note 29
Taking deposition on holiday see Depositions § 60

Court does not lose jurisdiction of the person of a litigant or of a cause by the mere intervention of a holiday in the midst of a trial —People v. Browning, 22 P 2d 784, 132 Cal App 136

Preparation of an appeal bond can be performed on a legal holiday in the absence of statute otherwise providing —Carter v Ætna Casualty & Surety Co, of Hartford, Conn, 115 So 662, 165 La 478

Saturdays

(1) Under some statutory provisions Saturday is a legal day open for all legal proceedings, including the filing and recording of suits — O'Reilly Engineering Co v Buckner, 5 La App 661—Hendren v Crescent City Seltzer & Mineral Water Co, 1 La App 25

(2) However, under other provisions Saturday afternoon is a nonjudicial day on which the courts, except the supreme court, are prohibited from transacting any judicial business other than that expressly excepted by certain sections —Ex parte Dal Porte, 244 P 355, 198 Cal 216— 29 C J p 764 note 30 [e]

39. Ariz —Bryant v Bryant, 14 P 2d 712, 40 Ariz 519
29 C J p 764 note 30
Exclusion of holiday in determining last day for performing an act see the C J S title Time § 14, also 62 C J p 1005 note 69–p 1006 note 84

40. Tenn —Elrod v Gray Lumber Co, 22 S W 2, 92 Tenn 476
29 C J p 764 note 35

41. Ga —Wood v State, 78 S E 140, 12 Ga App 651

42. Kan —Smith v Robertson, 128 P 2d 260, 155 Kan 706—Canaday v Hull, 181 P 121, 104 Kan 785

43. Ala —Smith v State, 9 So 2d 122, 123, citing **Corpus Juris.**
Ill —Metropolitan Life Ins Co v Shattas, 18 N E 2d 560, 298 Ill App 336
Ohio —King v Taylor, 43 N E 2d 313, 69 Ohio App 193
29 C J p 764 note 32.

44. N Y —Berthold v Wallach, 35 N Y S 208, 14 Misc 55

45. U S —In re Worthington, C C Wis, 30 Fed Cas No 18,051, 7 Biss 455, reversing, D C, 30 F Cas No 18,052
Ariz —Bryant v Bryant, 14 P.2d 712, 40 Ariz 519
Cal —Ex parte Heckman, 266 P 585, 90 Cal App 700
29 C J p 764 notes 36, 38

Distinction between ministerial and judicial acts

As far as concerns the rule stated in the text, "the general distinction between ministerial and judicial acts seems to be that, where the duty to be performed is described by law with such certainty that nothing is left to the exercise of discretion or judgment, the act is ministerial, but, where it requires discretion or judgment to determine whether the duty to act exists or not, it is judicial In other words, the necessity of the exercise of judgment or discretion is generally held to be the distinguishing test"—Bryant v Bryant, 14 P 2d 712, 713, 40 Ariz 519

46. Neb —Tulley v Grand Island Tel Co, 128 N W. 508, 87 Neb 822

47. U S —In re Worthington, C C Wis, 30 F Cas No 18,051, 7 Biss 455, reversing, D C, 30 F Cas No 18,052

48. Pa —Patterson v Gallitzin Bldg & Loan Assoc, 23 Pa Super 54— Worthington v Hobensack, 8 Pa. Co 65

49. Mich —Hamilton v People, 29 Mich 173

50. Ala —Spence v Spence, 195 So 717, 239 Ala 480
R I —Tillinghast v Horton, 170 A 70, 54 R I. 100.

the transaction of judicial business by the courts on legal holidays does not apply to official acts of a judicial or quasi-judicial nature other than those performed by the courts.[51]

The irregularity of proceeding with judicial transactions on a holiday may be waived[52] by the consent of the parties or their failure to urge a timely objection;[53] and if defendant had actual knowledge of the holiday before the verdict was rendered it is immaterial that he may not have had that information at the time the case was argued and the jury instructed.[54]

Grand jury proceedings. An indictment found by a grand jury that was impaneled and sworn on a legal holiday is valid,[55] and an indictment otherwise legally returned will not be quashed because it was returned on a legal holiday.[56]

b. Issuance and Service of Process, Writs, or Notices

Although service of process on a holiday is invalid where the statutes so provide, in the absence of such provision it is generally held that process, including writs of attachment or execution, may be issued and served on holidays.

The issuance of a summons, process, or writ is a ministerial act, and is not prohibited by a statute which merely forbids judicial proceedings on legal holidays[57] In the absence of a statute to the contrary, summons or process may be made returnable on a legal holiday,[58] and such process is not invalidated merely because on that day the court is precluded from transacting business, it being held that the return day will be the first day thereafter on which the court may legally transact business.[59]

As a general rule, the service of legal process may be made on a legal holiday in the absence of express statute making the day in question a dies non for the purpose of serving process[60] Under express statute in some jurisdictions, however, the service of civil process on legal holidays has been held to be invalid,[61] and process so served does not confer jurisdiction,[62] but such a statutory prohibition has been held not to apply to service by publication.[63] Where a party accepts and admits due and legal service of a summons on a holiday, he is estopped from questioning the legality of such service[64]

It has been held that a notice,[65] such as a notice to produce papers at a trial,[66] or a notice of opening depositions,[67] or a notice of an election contest as the foundation of a suit[68] is not invalid, although given on a holiday

Saturday; half holidays Under some statutory provisions it is lawful to issue and serve process on Saturday,[69] and a statute providing that a summons shall not be returnable on a holiday does not invalidate a summons which is returnable on a half holiday[70]

Execution sales see infra subdivision b of this section
Sheriff's sales see infra § 6

51. Cal—Ex parte Heckman, 266 P. 585, 90 Cal App 700
29 C J p 764 note 42

52. Ariz—Bryant v Bryant, 14 P 2d 712, 40 Ariz. 519

53. Cal—People v Browning, 22 P 2d 784, 132 Cal App 136
La—State v Duncan, 43 So 283, 118 La 702, 10 L R A,N S, 791, 11 Ann Cas 557
Utah—State v Estes, 176 P. 271, 52 Utah 572
Estoppel
"A defendant is estopped from participating and acquiescing in legal proceedings on a holiday, speculating on the recovery of a favorable verdict, and then challenging the validity thereof, for the first time after the verdict has been rendered"—People v Browning, 22 P 2d 784, 787, 132 Cal App 136

54. Cal—People v Browning, supra

55. Ohio—State v Thomas, 56 N E 276, 61 Ohio St 444, 48 L R A 459.
29 C J p 765 note 43.

56. Mo—State v Soper, 49 S W 1007, 148 Mo 217
29 C J. p 765 note 44.

57. Neb—Whipple v. Hill, 55 N.W 227, 36 Neb 720, 724, 38 Am S R 742, 20 L R A 313
29 C J p 765 note 45

58. Pa—Parisian Novelty Co v Student Klothes Shop, 13 Northumb L J. 141, 51 York Leg Rec 141
29 C J p 765 note 54

59. W Va—Pritchard v McGraw Oil Co, 66 S E 366, 66 W Va. 300
29 C J p 766 note 55

60. Ariz—Bryant v Bryant, 14 P. 2d 712, 40 Ariz 519
Cal—Strange v Coryell, 40 P 2d 289, 290, 3 Cal App 2d 635, quoting **Corpus Juris.**
Tex—Buchanan v Hart, Civ App, 250 S W 765
29 C J p 765 note 49.

61. Minn—Chapman v Foshay, 238 N W 637, 184 Minn 318
29 C J p 765 note 50

62. Minn—Farmers' Impl Co v. Sandberg, 157 N W 642, 132 Minn 389
Tex—Michael v. Michael, Civ App, 100 S W. 1018.

63. Minn—Malmgren v Phinney, 52 N W 915, 50 Minn 457, 463, 18 L R A 753
29 C J p 765 note 52

64. Wash—McClellan v Gaston, 51 P 1062, 18 Wash 472

65. Ky—Stephens v Hume, 1 Litt 6—Boone v Gleason, 4 Ky L. 1001
Or—Ferrari v Beaver Hill Coal Co, 94 P 181, 95 P 498, 102 P 175, 1016, 54 Or 210
Statutory notice of appeal from the probate court to the district court is not "process" within the meaning of a statute which prohibits the service of process on a holiday—In re Dahmen's Estate, 273 N W. 364, 200 Minn 55

66. Or—Sugar Pine Lumber Co v Garrett, 42 P 129, 28 Or 168

67. N C—Latta v Catawba Electric Co, 59 S E 1028, 146 N C 285

68. Or—Whitney v. Blackburn, 21 P. 874, 17 Or 564, 11 Am S R 857

69. La—O'Reilly Engineering Co v. Buckner, 5 La App 661—Hendren v Crescent City Seltzer & Mineral Water Co, 1 La App 25.
29 C J p 765 note 49 [b] (1)

70. N Y—Cole v Phelps, 248 N Y.S. 655, 139 Misc 431.

Attachments. There is authority holding that an attachment may issue on a legal holiday;[71] however, there is also authority holding that an order allowing an attachment cannot issue on a legal holiday where its issuance is a judicial act,[72] but it may issue where its issuance is a ministerial act[73] It has been held proper for an attachment to be executed or served on a legal holiday.[74]

Executions An execution may be issued on a legal holiday,[75] and in the absence of statute otherwise providing, neither an execution sale[76] nor the publication of notice thereof[77] is invalid by reason of being made on a holiday.

c. Trial

The mere designation of a day as a legal holiday does not necessarily prevent the trial of cases, including the arguments of counsel and instructions to the jury, on such day, but in some jurisdictions the statutes prohibit trials on holidays.

The mere statutory declaration that a particular day is a legal holiday, or shall constitute a holiday so far as concerns the performance of certain acts or transactions, does not make it a dies non juridicus, so as to prevent the trial of causes on that day;[78] but in some jurisdictions the trial or hearing of causes on a legal holiday is prohibited by virtue of statutory provision[79] The fact that testimony has been taken on a legal holiday or a nonjudicial day has been held not to render the proceedings void or require a reversal on appeal where timely objection thereto has not been taken,[80] and the verdict of the jury and the judgment of the court have been entered on a judicial day;[81] but it has also been held that where the court is without authority to hear causes and render judgment on a legal holiday, an appeal from a trial had on such a day does not waive the objection to the trial.[82]

Adjournment or continuance. There is authority holding that, when a court by mistake or inadvertence adjourns its term to a day which is a legal holiday, the term does not lapse and the court may on such legal holiday adjourn to the following day, when it may legally proceed with the transaction of its business.[83] However, under a statute prohibiting the transaction of judicial business on a legal holiday it has been held that, where a case in a justice's court is adjourned to a day subsequently proclaimed a legal holiday, the court cannot on the legal holiday adjourn the case and render judgment on the following day,[84] and it has also been held, under a similar statute, that while an order of adjournment on a legal holiday is a nullity,[85] the court does not lose jurisdiction, and the case is continued until the next day as business undisposed of[86] A hearing on a demurrer set for a holiday has been held to be continued by operation of law to the next secular day[87]

Arguments A judgment is not invalid merely because the cause was argued to the jury by counsel on a holiday where the complaining party ac-

71. La—Strawberry Growers' Selling Co v Lewellyn, 103 So. 823, 158 La 303, 39 A L R 1502

72. Neb—Merchants' Nat Bank of Omaha v Jaffray, 54 N W 258, 36 Neb 218, 19 L.R A 316

73. Neb—Whipple v Hill, 55 N W 227, 36 Neb 720, 38 Am S R 742, 20 L R A 313
6 C.J p 179 note 31

74. La—Strawberry Growers' Selling Co v Lewellyn, 103 So 823, 158 La. 303, 39 A L R 1502
N Y—Doty v Baltimore Trust Co, 265 N Y.S 66, 147 Misc 868.

Attachment of deposit during bank holiday

Attachment of a bank deposit is not inconsistent with the proclamation of a banking holiday, for the purpose of such proclamation is to suspend banking transactions and withdrawals of funds whereas the attachment does not transfer title to the funds attached but serves merely to protect plaintiff against withdrawal of the funds—Doty v Baltimore Trust Co, supra.

75. Pa—Paine v. Fesco, 1 Pa Co 562, 17 Wkly N C 502.
23 C.J. p 377 note 87.

76. Okl—McLaughlin v Houston-Hudson Lumber Co, 120 P 659, 31 Okl 182, 38 L R A,N S, 248
23 C J p 625 note 12
Judicial sales see supra subdivision a of this section
Sheriff's sale see infra § 6

77. N D—Finch, Van Slyck & McConville v. Jackson, 220 N W 130, 57 N D 17

78. Ark—Sullivan v State, 258 S W 980, 163 Ark 353.
Ind—Bowser v Tobin, 18 N E 2d 773, 215 Ind 99
Ohio—Norman v State, 142 N E 234, 109 Ohio St 213
29 C J p 766 note 56

79. Utah—Davidson v. Munsey, 74 P 431, 27 Utah 817
29 C J p 766 note 57

Commencement of trial

(1) Under the Louisiana statutes a trial may not be commenced on a holiday—State v Rogers, 91 So 518, 150 La 1080

(2) However, a trial has been held begun before the Saturday half holiday although the actual taking of testimony was delayed until after the noon hour, where the case had been at issue and assigned for trial on Saturday morning and plaintiff had announced himself ready for trial, and where the delay was caused by the dilatory tactics of defendant—State ex rel Russell v Richardson, 152 So 748, 178 La. 1029

80. La—State v Brownfield, 106 So 734, 160 La 171, 43 A L R 475
Ohio—Norman v. State, 142 N E 234, 109 Ohio St 213
Wash—State v Whitman County Super Ct, 94 P 665, 49 Wash 1, 17 L R A,N S, 257

81. Cal—Ex parte Murphy, 248 P 1044, 79 Cal App 64

82. Wis—Lampe v. Manning, 38 Wis 673

83. Ohio—Jones v. State, 14 Ohio Cir Ct. 35, 7 Ohio Cir Dec 305

84. Wis—Milwaukee Harvester Co. v Teasdale, 64 N W. 422, 91 Wis 59

85. Neb—Moore v Herron, 24 N.W 425, 451, 17 Neb. 697, 703

86. Neb—State v. King, 37 N W 310, 23 Neb 540
29 C J. p 766 note 64.

87. Cal—McGrath v Langford, 169 P. 424, 35 Cal.App. 215.

quiesced in the proceedings, failed to object, and thereby waived his rights [88]

Instructions Under some statutes the court may give instructions on a legal holiday[89] at the request of a jury who are deliberating on a verdict,[90] and may on such request give new instructions which have not been previously given [91] The fact that instructions were given on a holiday does not render the judgment invalid where the parties have consented to such procedure, either expressly, or tacitly by failure to object [92]

d. Verdicts, Judgments, and Sentences

In the absence of statute it is generally considered that verdicts and judgments may be rendered on a legal holiday; but sentence cannot be pronounced or a judgment rendered on a holiday on which the transaction of judicial business is forbidden

A verdict may be lawfully received and recorded on a legal holiday [93]

In the absence of statute otherwise providing, it is the general rule that a judgment rendered on a legal holiday is valid [94] There is, however, authority holding that judgments obtained on a legal holiday are void,[95] at least in a jurisdiction where the statutes forbid the transaction of judicial business on holidays [96] Where the statute suspending business and transactions generally on legal holidays is permissive merely and not mandatory, a judgment is not void by reason of having been rendered on a legal holiday [97]

A sentence pronounced on a legal holiday is void in a jurisdiction in which the statutes prohibit the transaction of judicial business on such a day.[98]

§ 6. —— Official Acts

Official acts may be performed on holidays in the absence of statutory prohibition, and statutes on the subject are construed as proscribing only those acts which are expressly or by clear implication forbidden

In the absence of statutory prohibition, either express or reasonably implied, official acts or business, such as the meeting or transaction of business by a public board, commission, municipality, or legal subdivision of the state, may validly take place on a holiday [99] Where there is a statute governing the matter the validity vel non of official acts performed on a legal holiday depends on the terms of the statute,[1] and statutes having for their object the suspension of official transactions on holidays will be construed as prohibiting such acts, and only such acts, as are in express terms or by clear implication proscribed [2] A statute providing that all public offices may be closed on legal holidays indicates a purpose to make it optional with the public officials whether or not to close their offices on such days [3] A prohibition against keeping courts open for the transaction of judicial business on holidays does not apply to boards or commissioners exercising quasi-judicial functions [4] Under some provisions the transaction of public business on holidays is

88. Cal—People v Browning, 22 P 2d 781 132 Cal App 136

89. Mass—McCoy v Jordlan, 69 N E 358 184 Mass 575
29 C J p 766 note 57 [a]

90. Cal—Brooks v City of Monterey, 290 P 540, 106 Cal App 649

91. Cal—Brooks v City of Monterey, supra

92. Cal—People v Browning, 22 P 2d 784, 132 Cal App 136

93 Cal—People v Browning, 22 P 2d 784, 132 Cal App 136
Colo—Carr v People, 63 P 2d 1221, 99 Colo 477, followed in O'Toole v People, 63 P 2d 1224, 99 Colo 483
La—State v Varnado, 52 So 1006, 126 La 722—State v Atkinson, 29 So 279, 104 La 570
Ohio—Norman v State, 142 N E 234, 109 Ohio St 213

94. Ind—Bowser v Tobin, 18 N E 2d 773 215 Ind 99
Mo—Diesing v Reilly, 77 Mo App 450
29 C J p 766 notes 66, 68 [a], p 764 note 30 [a] (2)

95. Wis—Lampe v Manning, 38 Wis 673
29 C J p 766 note 67

96. Cal—Ex parte Dal Porte, 244 P 355, 198 Cal 216—People v Browning 22 P 2d 784, 132 Cal App 136
29 C J p 766 note 68

Bank holiday

It has been held that a bank holiday is not a special holiday within the meaning of a provision prohibiting the transaction of judicial business on special holidays and that a judgment obtained during the period of the bank holiday is therefore valid—Vidal v Backs, 21 P 2d 952, 218 Cal 99, 86 A L R 1134

97. Pa—Paine v Fesco, 1 Pa Co 562, 17 Wkly N C 502
Tenn—Elrod v Gray Lumber Co, 22 S W 2, 92 Tenn 476

98. Cal—Ex parte Steiger, 271 P 201, 205 Cal 408—Ex parte Dal Porte, 244 P 355 198 Cal 216.
29 C J p 766 note 71

99. Cal—Cuffield v Board of Dental Examiners of California, 55 P 2d 522, 12 Cal App 2d 446—Ex parte Heckman, 266 P 585, 90 Cal App 700
La—Woodard v Bienville Parish School Board, 126 So 207, 169 La 831
N D—Federal Land Bank of St Paul v Steele, 231 N W 892, 59 N D 723.

Tax sale on holiday see the C J S title Taxation § 801, also 61 C J p 1191 note 56, 29 C J p 767 note 73

Order of legislature

The fact that an order of the United States senate directing a document to be printed was made on a holiday occurring while the senate was regularly in session, but which was not dies non, does not affect the admissibility of the document as a public document—U S v Aluminum Co of America, D C N Y, 1 F R D 71

1. Kan—Smith v Robertson, 128 P 2d 260, 264, 155 Kan 706, quoting **Corpus Juris.**
Okl—Garner v Tulsa Building & Loan Ass'n, 268 P 722, 724, 131 Okl 232, 58 A L R 1269, quoting **Corpus Juris.**

2. Kan—Smith v Robertson, 128 P 2d 260, 264, 155 Kan 706, quoting **Corpus Juris.**
N D—Federal Land Bank of St Paul v Steele, 231 N W 892, 59 N D 723
29 C J p 767 note 75

3. Tenn—Hammick v Gilbert, 144 S W 2d 5, 24 Tenn App 330

4. Cal—Ex parte Heckman, 266 P. 585, 90 Cal App 700.

lawful in cases of necessity,[5] and in the absence of a showing to the contrary the fact of necessity will be presumed.[6]

A prohibition against the transaction of public business in the public offices of the state or the counties of the state on a legal holiday has been held not to apply to municipal legislation,[7] an executive act of the governing body of a municipality,[8] a hearing before county commissioners on a petition for a public road,[9] the making of a return by surveyors of a public road,[10] the publication of a law in an official journal or newspaper,[11] or the publication of notice of a school bond election.[12] The mere designation of a day as a holiday does not invalidate a sheriff's sale,[13] or an order adjourning the sale made on such day.[14]

HOLLO. A word used in calling;[1] to call out or exclaim, to shout aloud.[2]

HOLLOW. As a noun, a cavity, a concavity, a depression or an excavation below the general level, as of the ground, or in the substance of anything, an empty space in anything.[3]

As an adjective, not solid, having an empty space or cavity, natural or artificial, within a solid substance, concave, depressed or sunken; also empty.[4]

The term is synonymous with "concave" see 15 C J S p 792 note 52, "cup,"[5] "depression" see 26 C J S p 977 note 59, "dimple" see 26 C J S p 1314 note 40, "hole" see ante p 409 note 94, and "pocket."[6]

HOLM. An island in a river or the sea, also plain grassy ground at the water side or in the water, or low ground intersected by streams.[7]

HOLMES NOTE. A promissory note whereby title to the thing for which it is given is reserved in the seller [payee] until the note is paid.[8] It is a name sometimes given to a conditional sales agreement;[9] and, being an agreement to sell rather than a sale, it conveys no title.[10]

HOLOGRAFO. In Spanish law, holographic; applied to instruments, especially wills, which are both written and executed by the same hand.[11]

HOLOGRAPH or OLOGRAPH. A term which signifies that an instrument is wholly written by the executing party; and has been defined as meaning that which is written with one's own hand; a document, as a letter, deed, or will, wholly in the handwriting of the person from whom it proceeds and whose act it purports to be,[12] an instrument written entirely in the hand of one person, as by a grantor, or testator.[13]

HOLOGRAPHIC WILL. See the C J S title Wills §§ 200–207, also 68 C J p 714 note 2–p 725 note 68

HOLT. Saxon, in old English law, a wood or grove.[14]

5. Minn—Ingelson v Olson, 272 N W 270, 199 Minn 422, 110 A L R 167
6. Minn—Ingelson v Olson, supra
7. N J—Mueller v Egg Harbor City, 26 A 89, 55 N J Law 245
29 C J p 767 note 76
8. Cal—Coffey v Way, 14 P 2d 143, 126 Cal App 43
9. Kan—Canaday v Hull, 181 P 121, 101 Kan 785
10. N J—Lord v Gifford, 50 A 903, 67 N J Law 193
11. La—State v Bertrand, 48 So 302, 122 La 856
Minn—St Paul v Robinson, 152 N W 777, 129 Minn 383, Ann Cas 1916E 845
12. S D—Carr v Wakonda Independent Cons School Dist No 1, 182 N W 626, 44 S D 103
13. Kan—Smith v Robertson, 128 P 2d 260, 264, 155 Kan 706, quoting **Corpus Juris.**
Okl—Garner v Tulsa Building & Loan Ass'n, 268 P 722, 724, 131 Okl 232, 58 A L R 1269, quoting **Corpus Juris**
29 C J p 767 note 72
Judicial or execution sales see supra § 5
14. Kan—Smith v Robertson, 128 P 2d 260, 264, 155 Kan 706, quoting **Corpus Juris.**
N J—White v Zust, 28 N J Eq 107
1. Ala—Brilliant Coal Co v Barton, 81 So 828, 829, 203 Ala 38
2. Webster New Int D
3. Century D
Hollow or cavity" see 14 C J S p 57 note 10
4. Webster New Int D
"Hollow wares"
Vessels of hollow ware made of cast iron—Strausky v Erhardt, C C N Y, 52 F 808, 809
5. U S—Maxim Mfg Co v Imperial Mach Co, C C A Ill, 286 F 79, 83
6. U S—Maxim Mfg Co v Imperial Mach Co, supra
7. Black L D
8. Me—Pulsifer v D'Estimauville, 29 A 945, 946, 86 Me 96
9. Me—Gould v Huff, 154 A 574, 575, 130 Me 226
10. Me—De Laval Separator Co v. Jones, 102 A 968, 969, 117 Me 95
11. Escriche Diccionario
12. U S—Lovskog v American Nat Red Cross, C C A Alaska, 111 F 2d 88, 91
See also Allograph 3 C J S p 887 note 35, Autograph 7 C J S p 1296 note 76
Effect
In the civil law and the systems based on it, a holographic writing need not be attested by subscribing witnesses, notarial seal, etc, but is said to prove itself This is the case in Scotland, Quebec, Louisiana, and generally on the continent of Europe, but at common law, holographic documents have no superior validity —Lovskog v American Nat Red Cross, supra
13. Anderson L D
14. Black L D.

HOLY ORDERS. See the C.J.S. title Religious Societies § 1.

HOMAGE. In feudal law, a service which a tenant was bound to render to his lord on receiving investiture of a fee, or succeeding to it as heir, in acknowledgment of the tenure; it was considered the most honorable service of reverence that a free tenant might perform, also the accompanying ceremony[15] "Homage" is sometimes distinguished from "fealty" see 35 C J.S. p 757 note 49

HOMAGER. One who does, or is bound to do, homage[16]

HOMAGIO RESPECTUANDO. Literally "Respecting of homage."[17] A writ to the escheator commanding him to deliver seizin of lands to the heir of the king's tenant, notwithstanding his homage not done.[18]

HOMAGIUM. Law Latin, homage[19]

HOMAGIUM, NON PER PROCURATORES NEC PER LITERAS FIERI POTUIT, SED IN PROPRIA PERSONA TAM DOMINI QUAM TENENTIS CAPI DEBET ET FIERI.[20]

HOMAGIUM REPELLIT PERQUISITUM.[21]

HOMBRE. In Spanish law, man, derived from the Latin, "homo"[22]

HOME. A relative term,[23] whose meaning must often necessarily depend on the intent as determined by the context,[24] and which may be, and is, often used in different senses, as indicated in the footnote.[25] It has been defined as meaning domi-

15. Black L D.

Brief description of ceremony

Black L D

Phrases

(1) "Homage ancestral"—the tenure wherein a man and his ancestors had immemorially held of another and his ancestors by the service of homage, which bound the lord to warrant the title, and also to hold the tenant clear of all services to superior lords, but if the tenant aliened in fee, his alienee although a tenant by homage ancestral Black L D

(2) "Homage jury"—a jury in a court-baron, consisting of tenants that do homage who are to inquire and make presentments of the death of tenants, surrenders, admittances, and the like—Black L D

(3) 'Homage liege" that kind of homage which was due to the sovereign alone as supreme lord, and which was done without any saving or exception of the rights of other lords Black L D

(4) "Liege homage"—homage intended to include fealty—Black L D, sub verbo Homage

(5) 'Simple homage"—acknowledgment of tenure without the solemn oath of fidelity—Black L D, sub verbo Homage

16. Black L D

17. Wharton L Lex.

18. Black L D

19. Black L D

Phrases

(1) "Homagium ligium"—liege homage, that kind of homage which was due to the sovereign alone as supreme lord, and which was done without any saving or exception of the rights of other lords, so called from "ligando," binding, because it could not be renounced like other kinds of homage—Black L D

(2) "Homagium planum"—plain homage, a species of homage which bound him who did it to nothing more than fidelity, without any obligation either of military service or attendance in the courts of his superior—Black L D

(3) "Homagium reddere"—to renounce homage, this occurred when a vassal made a solemn declaration of disowning and defying his lord for which the feudal laws prescribed a set form and method—Black L D

(4) "Homagium simplex"—simple homage, that kind of homage which was merely an acknowledgment of tenure, with a saving of the rights of other lords—Black L D

20. A maxim meaning "Homage cannot be done by proxy, nor by letters, but must be paid and received in the proper person, as well of the lord as the tenant"—Black L D

21. A maxim meaning "Homage repels perquisition"—Peloubet Leg Max

22. Escriche Diccionario

"Hombre bueno"

Literally 'good man," applied to the regular judge of the locality—Escriche Diccionario

23. Ga—Bramblett v Trust Co of Georgia, 185 S E 72, 75, 182 Ga 87

24. Ga—Bramblett v Trust Co of Georgia, 185 S E 72, 75, 182 Ga 87, quoting **Corpus Juris.** 29 C J p 768 note 15

25. Various connotations of the word

(1) The word "home" suggests relations differing in breadth and strength, although not in kind, when applied, on the one hand, to a farmer who has resided since his birth, and expects to reside until his death, on the same spot, and on the other hand, to the clergyman whose home may change in two years, or to the railroad laborer, whose home may change in two months Langhammer v Munter, 31 A 300, 301, 80 Md 518, 27 L R A 330

(2) "The term 'home' is not an arbitrary one It may mean one thing under certain conditions and another under different circumstances Whether it is to be limited to simply a domicile or abiding place or whether it embraces not only shelter but food, clothing, education and medical attendance in case of sickness, must all be determined by the circumstances existing at the time'—In re Burr's Estate 141 N Y S 926, 927 928, 83 Misc 240

(3) The term may mean merely the use of sufficient room in a house where one is living Bramblett v Trust Co of Georgia, 185 S E 72, 75 182 Ga 87

(4) The word "home," not only in its true etymology, but in its ordinary acceptation, means something more genial than a mere privilege to perambulate a dreary room Md—Willett v Carroll, 13 Md 159, 468

N Y—In re Burr's Estate supra

(5) It may mean the entire hotel where one lives, not merely the sleeping room but the place where one eats, bathes, reads, visits, and rests—Jakeway v John V Bauer Co, 218 N Y S 193, 195, 218 App Div 302

(6) It may mean not merely the dwelling house but the entire residence estate, including household furniture and utensils and all other chattels used by the family in the home Kan—Mann v Haines, 73 P 2d 1066, 1072, 146 Kan 988

cile see Domicile § 1 notes 5, 6; a dwelling house, or dwelling place;[26] a household,[27] the house in which one lives, especially the house in which one lives with his family, the habitual abode of one's family,[28] the place of constant or permanent residence,[29] the place to which, when weary, one can go and rest,[30] the place where one and his family habitually dwell, which they may leave for temporary purposes, and to which they return when the occasion for absence no longer exists,[31] the place where one permanently resides, and to which he intends to return when away from it,[32] residence;[33] some permanent abode or residence where the person residing intends to remain[34] The following notes contain examples of what, in specific connections, the term has been held to include,[35] and not

N J —Chase National Bank v Deichmiller, 152 A 697, 698, 107 N J Eq 379

(7) The term may imply maintenance and support in addition to living quarters —Bramblett v Trust Co of Georgia, 185 S E 72 75 182 Ga 87—29 C J p 768 note 15 [d]

(8) In construing a direction that a testator's home be maintained, the court said that the term "home" may mean something under certain conditions, and another thing under different conditions, but, in the instant case, it means home the same as had previously existed, embracing not only shelter, but food, clothing, and medical attention, in case of sickness In re Gabler's Will, 251 N Y S 211, 218, 140 Misc 581

(9) Designation of temporary abiding place as "home" is not unusual and many officials many students so refer to the places where their temporary duties require them to be although in point of fact their home may be at remote distances therefrom —In re Dunlap's Estate, 87 P 2d 225, 229, 161 Or 93

(10) As meaning "home port" of a ship and not the private domestic abode of a seaman see In re Ah Tie C C Cal, 13 F 291, 293 7 Sawy 542

(11) "An Englishman permanently settled in one of the English colonies may without impropriety speak of going home when he is paying a visit to England If asked to explain himself he would probably say that he used the term in reference to the mother country from which he and his brother colonists emigrated or originally sprung, and that his own true home was in the colony So in familiar conversation or in familiar letters the term may be used in a sense (varying more or less according to the accuracy of the speaker or writer from the ordinary popular sense) of the place where a man has his abode or is settled When a traveller speaks of returning home he uses the term in the ordinary popular sense"—In re Craignish, [1892] 3 Ch 180, 191

26 Kan—Mann v Haines, 73 P 2d 1066, 1072 146 Kan 988
Me —North Yarmouth v West Gardiner, 58 Me 207, 210, 4 Am R 279
29 C J p 768 notes 16, 17.

Similarly expressed

(1) "Home" is one's own dwelling place —Mann v Haines, 73 P 2d 1066, 1072, 146 Kan 988

(2) A "home" is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place, and whether a dwelling place is a person's "home" must be determined by consideration of its physical characteristics, the time he spends, and the things he does therein, the persons and things therein, his mental attitude toward the place, his intention when absent to return to the place and elements of other dwelling places of the person concerned —Coca-Cola International Corporation v New York Trust Co, Del Ch, 8 A 2d 511, 524

27 N C —Manning v Woff, 22 N C 11, 12

28 Kan —Mann v Haines, 73 P 2d 1066 1072, 146 Kan 988

Similar definitions

(1) The primary meaning of "home" is the house in which one lives with his family —Rhode Island Hospital Trust Co v Egan, 161 A 124, 126, 52 R I 381

(2) The house or place in which one resides —Shuttleworth v Shuttleworth, 11 S E 714, 716, 34 W Va 17—29 C J p 768 note 21

(3) The place of abode —Fowler v Mosher, 7 S E 512, 513, 85 Va 421—29 C J p 768 note 22

29 Ohio Nelson v Nelson, 19 Ohio 282 284
W Va —Shuttleworth v Shuttleworth, 11 S E 711, 716, 34 W Va 17
29 C J p 768 note 24

30 Ky — Johnson v Harvey, 88 S W 2d 42, 46, 261 Ky 522

31. Md Thomas v Warner, 34 A 830, 831, 83 Md 14

Similarly expressed

(1) The place to which a person turns for social life, where his family, if he has one, usually dwells and to which his mind turns when away, and where he has the present purpose of returning and remaining —Tyler v Murray, 57 Md 418, 441

(2) The place where one keeps his effects, his chest, etc - Barton v Irasburgh, 33 Vt 159, 162

32. Pa —Frey's Election Case, 71 Pa 302, 307, 10 Am R 698—Commonwealth v Devine, 14 Pa Dist 1 3, 31 Pa Co 108

33. Conn —Coit v Comstock, 51 Conn 352, 382, 50 Am R 29
29 C J p 768 note 19

34. Me —Warren v Thomaston, 43 Me 406, 418, 69 Am D 69
29 C J p 768 note 20

As involving right or possession

(1) Home is a place where the person has a right to be The idea of a right to be and remain at a particular place is inseparable from the conception of home —Jericho v Burlington, 29 A 801, 802, 66 Vt 529—Berlin v Worcester, 50 Vt 23, 26

(2) "A man's home is his abiding place—a place of which, out of necessity, he is possessed"—Birmingham R, etc, Co v Abbott 60 So 970, 972, 6 Ala App 643, 648

35. "Home" held to include

(1) A testator's home at the time of his death, rather than a new home then under construction for him —National Shawmut Bank of Boston v Reardon, 6 N E 2d 430, 431, 296 Mass 445

(2) The curtilage surrounding a dwelling house, the area of land surrounding a house, and actually or by legal construction forming one inclosure with it —Ratzell v State, 228 P 166, 168, 27 Okl Cr 340

(3) A person's home includes his inclosed lands —Allen v State, 29 S W 2d 247, 161 Tenn 71

(4) In holding the term includes the whole house, the court said "The home is not confined to the particular bed-room in which the master of the house sleeps, for it may include his rooms for guests and apartments he never enters So too it may properly embrace a schoolroom for he may teach in his parlor, where many physicians and dentists practice their professions'—Hoope's App 1 Brewst (Pa) 462, 461, 100 Am D 562

(5) A provision that beneficiaries should be provided with a "home" while they lived included everything necessary to maintain the home, such as paying of taxes and keeping it in proper repair, but not the purchasing of supplies —Long v Mayes, 48 So 523, 530, 94 Miss 735.

to include.[36]

Under particular circumstances, the term has been held equivalent to, or synonymous with, "asylum" see Asylums § 1, "domicile" see Domicile § 1 notes 5, 6, "premises,"[37] and "residence."[38] Under others, it has been compared with, or distinguished from, "curtilage" see 25 C.J.S. p 67 note 25, "domicile" see Domicile § 1 note 5, "house,"[39] "residence,"[40] "settlement,"[41] and "temporary abode."[42]

Home rule. A term with a well-defined meaning,[43] which, as descriptive of a policy, is significant and appropriate, but as descriptive of a right is indefinite, for it is coextensive with the right of local regulation or control and its extent must always be tested by the constitution.[44] It may be briefly defined as the right of self-government in local affairs.[45]

"Home rule" in connection with constitutional provisions and delegation of power to local authorities generally see Constitutional Law § 140; with particular reference to counties see Counties § 6; to municipalities see the C J S title Municipal Corporations §§ 13, 108, 115–117, 124, 147, 187, 188, 1980–1983, also 43 C.J. p 85 notes 3–18, p 176 note 9–p 179 note 50, p 186 note 89–p 194 note 79, p 199 note 51–p 200 note 64, p 221 note 69–p 222, note 82, p 275 note 79–p 277 note 22 and 44 C J. p 1263 note 21–p 1268 note 98; and to taxation see the C. J S title Taxation § 17, also 61 C.J. p 96 note 15–p 98 note 36.

Other phrases employing the word are set out in the note.[46] For still other phrases as to which more

(6) A covenant to furnish a "home" upon the premises for a named person construed as requiring the furnishing of board and lodging—Day v Towns, 81 A 405, 406, 76 N H 200

(7) May include provision for maintenance and support, necessary food and fuel and the comforts of a home—Denfield v Smith, 30 N E 1018, 1020, 156 Mass 265

36. Held not to include

(1) The contents of the home—Mann v Haines, 73 P 2d 1066, 1072, 146 Kan 988

(2) Provision that a beneficiary be provided with a "home" held not to include the furnishing of her clothing—Denfield v Smith, 30 N E 1018 1020, 156 Mass 265.

37. "Premises" has practically the same meaning—Ratzell v State, 228 P. 166, 168, 27 Okl Cr 340

38. Ala—Birmingham R, Light & Power Co v Abbott, 60 So 970, 972, 6 Ala App 643, 647.

Colo—Sharp v McIntire, 46 P 115, 116, 23 Colo 99

Iowa—State v Savre, 105 N W 387, 129 Iowa 122, 3 L R A, N S, 455, 113 Am S R 452

Me—Inhabitants of Friendship v Inhabitants of Bristol, 170 A 496, 497, 132 Me 285—Inhabitants of Brewer v Inhabitants of Linnaeus, 36 Me 428, 430

Md—Tyler v Murray, 57 Md. 418, 442.

Minn—State v Clay County Dist Ct, 139 N W 135, 137, 120 Minn 99

Ohio—Lehman v McBride, 15 Ohio St 573, 601

R I—State v. Aldrich, 14 R I 171, 175

54 C J p 710 note 73

"Home" and "residence" may be synonymous in connection with paupers' statutory acquisition of settlement see the C J S title Paupers § 32, also 48 C J p 468 note 46.

39. Hawaii—Matter of Henderson, 21 Hawaii 104, 112

40. Hawaii—Matter of Henderson, supra

Me—West Gardiner v Farmingdale, 36 Me 252, 254

Minn—State v Clay County Dist Ct, 139 N W 135, 137, 120 Minn 99

R I—Connly v McElroy, 125 A 206, 208, 46 R I 93

41. Me—Phillips v Kingfield, 19 Me 375, 381, 36 Am D 760

29 C J. p 767 note 14 [a]

42. Md—Tyler v Murray, 57 Md 418, 442

Mass—Thayer v. Boston, 124 Mass 132, 147, 26 Am R 650

43. Colo—People v Johnson, 86 P. 233, 238, 34 Colo 143

44. Mich—Attorney General v Lowrey, 92 N W 289, 290, 131 Mich 639

Of ancient origin

The principle of home rule existed before we had a constitution Even prior to Magna Charta, some cities, boroughs and towns had various customs and liberties, which had been granted by the crown or had subsisted through long user, and among them was the right to elect certain local officers from their own citizens and, with some restrictions, to manage their own purely local affairs—People v State Tax Commissioners, 67 N E 69, 70, 174 N Y 417, 105 Am S R 674, 63 L R A 884

45. N Y—People v State Tax Commissioners, supra

46. Phrases construed

(1) "Actually dwells and/or has his home" see 1 C J S p 1446 notes 72, 73

(2) "Dwells and has his home," construed as intended to designate some permanent abode, a residence with an intention to remain, or at least without an intention of removal, something more than the habits and life of a wanderer, who has no place where he has a right to continue, and call it and claim it as his rightful home—Turner v Buckfield, 3 Me 229, 231.

(3) "Federal Home Loan Bank" see Banks and Banking § 928

(4) "Furniture of home" see 37 C J S p 1415 note 6 (5)

(5) "Home brew" see Brew 11 C J S p 837 note 79 1 in Pocket Parts, also the C J S title Intoxicating Liquors § 13.

(6) "Home factor" see Factors § 1 b (1)

(7) "Home for the aged," as not included by the term "hospital," see the C J S title Hospitals § 1, and construed to mean a place where persons of advanced years may go to live—Frax Realty Co, Inc v Kleinert, 205 N Y S 728, 729, 123 Misc 455

(8) "Home market," distinguished from "foreign market" see 36 C J S p 1247 note 56.

(9) "Home missions," see the C J S title Religious Societies § 1, also 29 C J p 768 notes 30–34

(10) "Home missionary society," as not constituting a church or a religious denomination see the C J S. title Religious Societies § 4, also 54 C J p 11 note 90 [c]

(11) "Home office," with reference to a corporation, its principal office within the country or state where it was incorporated or formed, and in England, the department of state through which the sovereign administers most of the internal affairs of the kingdom, especially the police, and by which he communicates with the judicial functionaries—Black L. D

(12) "Home plate," in baseball, is the spot at which the batter stands—Lorino v. New Orleans Baseball &

recent adjudications have not been found see 29 C.J. p 769 notes 43–56.

HOME. In French, a variant form of "homme," q. v.

HOMELESS. Lacking a home, without a home.[47]

HOMEMADE. Made at home; also of domestic manufacture.[48]

HOMENAJE. In the feudal Spanish law, homage, the act of acknowledging allegiance to another, sometimes written in its Latin root-form, "homagio"[49]

HOME NE SERA PUNY PUR SUER DES BRIEFES EN COURT LE ROY, SOIT IL A DROIT OU A TORT.[50]

HOMEOPATHIC and HOMEOPATHIC SPECIFIC. See the C.J.S. title Physicians and Surgeons § 1, also 29 C.J. p 769 notes 62–64.

HOMESOKEN or HOMSOKEN. See Haimsucken, Hamesecken, or Hamesucken 39 C J.S. p 764 notes 60, 61.

HOMESTALL. A term used in ancient law to designate the mansion house.[51]

Amusement Co, 133 So 408, 16 La App 95

(13) "Home port," see the C J S title Shipping § 3, also 29 C J p 768 note 35–p 769 note 38

(14) "Home ranch," as used in the range country, the headquarters of the range, that is, the place from which the riders start on their rounds to rodeo and brand the stock, and to which they return when through, for the time being it is their home
Nev—State v Shaw, 29 P. 321, 21 Nev 222, 229
S D—Holcomb v Kelliher, 59 N W 227, 228, 5 S D 438

(15) "Home range."—Holcomb v. Kelliher, supra

(16) "Home rule or freeholders' charter" see the C J S title Municipal Corporations § 13, also 43 C J p 85 notes 3–18

(17) "Home trade," the exchange or buying and selling of goods within a country—In re Roofing and Sheet Metal Contractors' Association, 9 Pa Dist 569, 570

(18) "Home-trade ship," distinguished from "foreign-going ship" see 36 C J S p 1248 note 83 (13)

(19) "Maintain my home," the phrase has been held to embrace whatever is requisite to give security from want, and furnish reasonable physical, mental, and spiritual enjoyment—In re Gabler's Will, 251 N Y S 211, 218, 140 Misc 581

(20) "Orphans' home" see the C J S titles Asylums § 1, also 46 C J p 1111 notes 80, 81; and Infants § 100, also 31 C J p 1111 note 84 [b]

(21) "Rest home" as referring to a place in the country where working girls of limited means may board at low rates—Sherman v Congregational Home Missionary Soc, 57 N E. 702, 703, 176 Mass. 349.

(22) "Used by me and my family in said home"—Chase National Bank v Deichmiller, 152 A 697, 698, 107 N J Eq 379

47. Century D

"Destitute or homeless"
Construed to mean not possessing the necessaries of life, and without a place of abode—Ex parte Label, Mo App, 156 S W.2d 37, 39

48. Webster New Int D

"Homemade beer"
Vt – State v Kibling, 22 A 613, 616, 63 Vt 636

49. Escriche Diccionario

50. A maxim in old law French meaning "A man shall not be punished for suing out writs in the king's court, whether he be right or wrong"—Black L D

51. Tenn—Dickinson v. Mayer, 11 Heisk 515, 521

HOMESTEADS

This Title includes exemption from forced sale, for payment of debts, of real property of debtors, as constituting the family residence; constitutional and statutory provisions for such exemption; nature, grounds, and extent thereof in general; who are entitled to benefit of such exemptions; acquisition, selection, declaration, and establishment of homestead, quantity or value of property exempt, as to what liabilities homesteads are exempt; waiver or forfeiture of right of exemption, abandonment, alienation, devise, or descent of homestead; rights of devisees, heirs, or surviving members of family, and duration and termination of exemption; and protection and enforcement of the right.

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I. NATURE, ACQUISITION, AND EXTENT

A NATURE, CREATION, AND DURATION OF ESTATE OR RIGHT IN GENERAL

§ 1. Definition

A homestead is the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected therewith.

A homestead is the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected therewith[1] The term "homestead" has both a popular and a legal signification,[2] but its popular and legal meanings are the same.[3] In common acceptance of the term it means the residence of the family, the place where the home is[4] Usually the term imports not only the residential house occupied as a home but also the adjacent land necessarily used in connection therewith, but the term is sometimes used to designate either the house or the land separately.[5] As used in the various statutes relating to homestead exemptions, the term "homestead" means not only the property occupied as a home but also the right to have it exempted from levy and forced sale[6]

There are various kinds of homesteads,[7] such as constitutional homesteads;[8] rural and urban homesteads, see infra § 53, business homesteads, see infra § 40, and probate homesteads, see infra § 239

The term "homestead farm" is sometimes used[9] It is not one, however, which has acquired a defi-

1. Ky—Brannon v Bohannon, 96 S W 2d 1036, 265 Ky 394
Mass—Frazer v Weld, 59 N E 118, 177 Mass 513
Neb—First Trust Co of Lincoln v Bauer, 260 N W 194, 128 Neb 725
29 C J p 781 note 1
"A homestead necessarily includes the idea of a house for a residence, or mansion house The dwelling may be a splendid mansion, a cabin, or tent If there be either, it is under the protection of the law, but there must be a home residence before it, and the land on which it is situated, can be claimed as a homestead"—Garret v Getzendaner, 242 P 525, 526, 115 Okl 12--29 C J p 781 note 1

Other definitions

(1) "The home place—the home and the adjoining land"—In re Trammell, D C Ga, 5 F 2d 326, 327, petition denied, C C A, Clark v Nurenbaum, 8 F 2d 451, certiorari denied Powell v Anderson, 46 S Ct 349, 270 U S 649, 70 L Ed 780

(2) "The house and land where the family dwells"—Berggren v Bliss, 211 N W 544, 545, 122 Neb 801—Meisner v Hill, 138 N W. 583, 92 Neb 435

(3) "That tract of land which, being within the statutory limitations as to quantity and value, is owned and occupied as a homestead"
Okl—Miller v Farmers' State Bank of Temple, 279 P 351, 352, 137 Okl 183—Finerty v First Nat Bank 218 P 859, 92 Okl 102, 32 A L R 1326
Wis—Northwestern Securities Co v Nelson, 211 N W 798, 799, 191 Wis 580
29 C J p 781 note 1 [a] (5)

(4) "The house and parcel of land where the family reside and which is to them a home"- Engen v Union State Bank of Harvard, 236 N W 741, 741, 121 Neb 257, certiorari denied 52 S Ct 33, 284 U S 655, 76 L Ed 555—Anderson v Schertz, 143 N W 238, 94 Neb 390—29 C J p 781 note 1 [a] (4)

(5) "A home place or place of the home, and is designed as a shelter of the homestead roof, and not as a mere investment in real estate, or the rents and profits derived therefrom"—Griffin v Ayers, 165 So 593, 595, 231 Ala 493—29 C J p 781 note 1 [a] (3)

(6) The term "homestead" necessarily includes the idea of a house for residence, either constructed or in contemplation of construction, accompanied by acts of preparation therefor—Vaden v Collier, Tex Civ App, 253 S W 889

In specialized meaning, the term "homestead" designates the tract of public land which may be acquired from the government as a homestead on compliance with certain conditions specified in the public laws—Young v Olivares, 41 Philippine 391
Homestead grants of public land generally see the C J S title Public Lands §§ 45–53, also 50 C J p 933 note 7–p 939 note 91

2. Ky—Brannon v Bohannon, 96 S W 2d 1036 265 Ky 394
Okl—Preston v Ottawa County Nat Bank, 280 P 581, 138 Okl 133—McCray v Miller, 184 P 781, 78 Okl 16, application denied 186 P 1089, 78 Okl 16

3. Okl—Preston v Ottawa County Nat Bank, 280 P 581, 138 Okl 133—McCray v Miller, 184 P 781, 78 Okl 16 application denied 186 P 1089, 78 Okl 16

4. U S—In re Wineland, D C Okl, 3 F Supp 796
Neb—Engen v Union State Bank of Harvard, 236 N W 741, 121 Neb 257, certiorari denied 52 S Ct 33 284 U S 655, 76 L Ed 555.
Okl—Preston v Ottawa County Nat Bank, 280 P 581, 138 Okl 133—McCray v Miller, 184 P 781, 78 Okl 16, application denied 186 P 1089, 78 Okl 16
Tex—Wallingford v Bowen, Civ App, 104 S W 2d 188

5. Philippine—Young v Olivares, 41 Philippine 391, 393

Homestead as land

As used in the constitution, "a 'homestead' is the land itself, and not the buildings thereon The 'homestead right' is the right to occupy and live upon the land rather than the right to occupy and live in the buildings thereon"—Miller v Farmers' State Bank of Temple, 279 P 351, 352, 137 Okl 183—In re Gardner's Estate, 250 P 490, 491, 122 Okl 26

6. Ky—Brannon v Bohannon, 96 S W 2d 1036, 265 Ky 394

7. **Long, short, and pony homesteads**

(1) In Georgia the "statute allows a debtor to take either the constitutional or 'long homestead, or the statutory or 'short' homestead"—Darlington v Belt, 77 S E 653, 654, 12 Ga App 522—29 C J p 817 note 74 [a]

(2) The statutory homestead is also known as the "pony" homestead—Bennett v State Trust Co, 32 S E 625 106 Ga 578

8 **Constitutional homestead** is the homestead exemption given to the head of a family by the constitution It is to be distinguished from the probate homestead of a surviving spouse or minor children—Ringer v Byrne, 80 P 2d 212, 183 Okl 46
Probate homestead defined see infra § 239

9. N H—Locke v Powell, 17 N H. 46, 51
25 C J p 673 note 39.

nite signification in the law.[10] It may have a broader signification than the word "homestead"[11]

Distinctions. A homestead is to be distinguished from an estate by entirety.[12] Homestead and dower are distinguished in Dower § 6 b; and the distinction between a homestead and an exemption is considered in Exemptions § 1.

§ 2. Origin of Homestead Right and Purpose of Homestead Laws

Homestead rights have their origin in constitutional and statutory provisions and not in the common law. Such rights have been created to shelter the family and to provide it a refuge from the stresses and strains of financial misfortune.

Laws exempting the homestead from liability for debts of the owner are strictly of American origin.[13] At common law there was no such thing as a homestead right,[14] although under the early common law a man's dwelling house and the land contiguous to it were inalienable and indefeasible except when required by the sovereign, or for the defense of the state,[15] and, as appears in Executions § 33, no real estate could be reached by execution for the payment of debts Homestead rights, therefore, exist only by virtue of constitutional and statutory provisions creating them[16] Such provisions have been enacted in nearly every state of the Union, the earliest being that enacted by the republic of Texas in 1839.[17]

Purpose Homestead laws are not founded on the principles of equity,[18] but are enacted as a matter of public policy in the interest of humanity[19] Their purpose is to provide a home for each citizen of the government, where his family may be sheltered and live beyond the reach of financial misfortune,[20] and, likewise, their purpose is to encour-

10. Mass—Taylor v. Mixter, 11 Pick 341, 347

11. "'Homestead farm' may have a broader signification than homestead Perhaps it would be putting too narrow a construction upon the term, to say that it must be the dwellinghouse or land actually contiguous to it, or to the land on which it stands It may be detached and yet be so intimately connected with the dwellinghouse as in effect to constitute part of it"—Taylor v Mixter, supra

12. Estate by entirety is not analogous to homestead; such an estate is not limited in amount or value and is not protected by constitutional provisions or considerations of public policy—Way v Root, 140 N W. 577, 174 Mich 418

13 N H—Barney v Leeds, 51 N H 253

14. Ariz—Weller v City of Phoenix, 4 P 2d 665, 39 Ariz 148
Ky—Covington Bros & Co v Byrns, 18 S W 2d 870, 871, 230 Ky 66, citing **Corpus Juris.**
Mont—In re Trepp's Estate, 227 P 1005, 71 Mont 151
Okl—Barnett v Sanders, 247 P. 55, 121 Okl 14
Utah—Zuniga v Evans, 48 P 2d 513, 521, 87 Utah 198, 101 A L R 532, quoting **Corpus Juris.**
29 C J p 782 note 7, p 783 note 18
"The common law had no analogous interest or estate"—Barney v Leeds, 51 N H 253, 261

15. Mich—Kleinert v Lefkowitz, 259 N W 871, 271 Mich 79

16. Ariz—Weller v City of Phoenix, 4 P 2d 665, 39 Ariz 148
Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434
Ky—Brandenburg v. Petroleum Exploration, 291 S W 757, 218 Ky 557.
Mont—In re Trepp's Estate, 227 P 1005, 71 Mont 154
Okl—Barnett v Sanders, 247 P 55, 121 Okl 14
Tenn—State v Clayton, 38 S W 2d 551, 162 Tenn 368
29 C J p 783 note 18

17. Historical note
(1) The earliest homestead statute was that enacted by the republic of Texas, Jan 26, 1839, 1 Paschal Dig L art 3798 The first constitutional guaranty of homestead exemption was that of the constitution of Texas in 1845, which was followed by Vermont in 1849 Since the latter date, nearly every state and territory in the Union has adopted similar laws, which recognize the general right of homestead, but differ radically in their details—Zuniga v Evans, 48 P 2d 513, 522, 87 Utah 198, 101 A L R 532, quoting **Corpus Juris**

(2) For a discussion of the development of homestead law see Barney v Leeds, 51 N H 253, 261

18. Mich—Kleinert v Lefkowitz, 259 N W 871, 271 Mich 79
Utah—Volker-Scowcroft Lumber Co v Vance, 88 P 896, 32 Utah 74, 125 Am S R 828

19. Colo—Duling v Salaz, 26 P 2d 1069, 1070, 93 Colo 453, citing **Corpus Juris.**
Fla—Bigelow v Dunphe, 197 So 328, 143 Fla 603, rehearing denied 198 So 13, 144 Fla 330
La—Hammond State Bank & Trust Co v Broderick, 154 So 739, 179 La 693—Reymond v Louisiana Trust & Savings Bank, 148 So 663, 177 La 409
Mich—Bartold v Lewandowska, 8 N W 2d 133
Ohio—Ohio Savings & Trust Co v Schumacher, 172 N E 662, 36 Ohio App. 65, affirmed Schumacher v Ohio Savings & Trust Co, 169 N E 442, 121 Ohio St. 446
Or—In re Banfield's Estate, 296 P 1066, 1067, 137 Or 167, citing **Corpus Juris,** and modified on other grounds 298 P 905, 137 Or 167
Tex—Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253, 256, 121 Tex 409, 83 A L R 44, citing **Corpus Juris,** and reversing Security Nat Bank of Wichita Falls v Andrews, Civ App, 24 S W 2d 509
Utah—Panagopulos v Manning, 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215
29 C J p 782 note 10

20. U S—In re Miller, D C Cal, 27 F Supp 999—In re Sterling, D C Cal, 20 F Supp 924—In re Wineland, D C Okl, 3 F Supp 796—In re Buie, D C Tex, 287 F 896, affirmed, C C A, Rockhold v Buie, 293 F 1021, certiorari denied 44 S Ct 402, 264 U S 588, 68 L Ed 864
Ark—City Nat Bank v Johnson, 96 S W 2d 482, 484, 192 Ark 945, quoting **Corpus Juris**—Bunting v Rollins, 70 S W 2d 40, 43, 189 Ark 12, quoting **Corpus Juris.**
Cal—In re Kachigian's Estate, 128 P 2d 865, 20 Cal 2d 787, prior opinion, App, 121 P 2d 869—Yager v Yager, 60 P 2d 422, 7 Cal 2d 213, 106 A L R 664—Marelli v Keating, 282 P 793, 208 Cal 528
Fla—Bigelow v Dunphe, 197 So 328 143 Fla 603, rehearing denied 198 So 13, 144 Fla 330—Anderson Mill & Lumber Co v Clements, 134 So 588, 101 Fla 523
Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434
Iowa—Magel v Hunt, 265 N W 119, 121, 221 Iowa 199, quoting **Corpus Juris.**
Kan—Anderson v Shannon 73 P 2d 5, 146 Kan 704, 114 A L R 200

age and provide home ownership,[21] to inculcate in individuals those feelings of independence which are essential to the maintenance of free institutions,[22] to protect society from the danger of citizens becoming paupers,[23] and, in general, to promote the stability and welfare of the state.[24] These laws are based on the theory that the preservation of the homestead is of greater importance than the payment of debts,[25] and their purpose is to protect the family as a whole,[26] and not merely the individual who for the time being is the head of the family.[27] It is not their purpose, however, to enable one to escape just liabilities or to perpetrate a fraud or injustice.[28]

§ 3. Nature of Interest Created

The homestead interest depends entirely on organic or statutory provisions. It is a right and not a mere

Ky.—First Nat. Bank of Jackson v. Oliver, 150 S.W.2d 894, 286 Ky. 286—Brewer v. Brewer, 105 S.W.2d 582, 268 Ky. 625—Brannon v. Bohannon, 96 S.W.2d 1036, 265 Ky. 394—Brandenburg v. Petroleum Exploration, 291 S.W. 757, 218 Ky. 557.

Mich.—Kleinert v. Lefkowitz, 259 N.W. 871, 271 Mich. 79.

Neb.—Bliss v. White, 272 N.W. 769, 132 Neb. 651.

Okl.—Hensley v. Fletcher, 44 P.2d 63, 172 Okl. 19—Hensley v. Maxwell, 44 P.2d 60, 172 Okl. 21—Thompson v. Marlin, 243 P. 950, 116 Okl. 159.

Tex.—Cocke v. Conquest, 35 S.W.2d 673, 120 Tex. 43, affirming, Com. App., 13 S.W.2d 348, which affirmed, Civ. App., 2 S.W.2d 992.

Utah.—Panagopulos v. Manning, 69 P.2d 614, 93 Utah 198, rehearing denied 72 P.2d 456, 93 Utah 215—Utah Builders' Supply Co. v. Gardner, 42 P.2d 989, 86 Utah 257, 102 A.L.R. 932, denying rehearing 39 P.2d 327, 86 Utah 250, 103 A.L.R. 932.

Wis.—Schwitzke v. American Nat. Bank, 8 N.W.2d 303.

29 C.J. p. 782 note 12.

"The purpose of the homestead is to shelter the family and provide it a refuge from the stresses and strains of misfortune."—Collins v. Collins, 7 So.2d 443, 444, 150 Fla. 374.

Other similar statements of purpose.

(1) To protect the homestead interest.—Brooks v. Butler, 87 P.2d 1092, 184 Okl. 414.

(2) "To provide a margin of safety to the family."—In re McClain's Estate, 262 N.W. 666, 669, 220 Iowa 638.

(3) To protect property against existing debts.—Parker v. Riddell, 108 P.2d 88, 41 Cal.App.2d 908.

21. Fla.—Bigelow v. Dunphe, 197 So. 328, 143 Fla. 603, rehearing denied 198 So. 13, 144 Fla. 330.

Mich.—Kleinert v. Lefkowitz, 259 N.W. 871, 271 Mich. 79.

Okl.—Hensley v. Fletcher, 44 P.2d 63, 172 Okl. 19—Hensley v. Maxwell, 44 P.2d 60, 172 Okl. 21.

Tex.—Standard Savings & Loan Ass'n v. Davis, Civ. App., 85 S.W.2d 333, error refused.

22. Fla.—Bigelow v. Dunphe, 197 So. 328, 143 Fla. 603, rehearing denied 198 So. 13, 144 Fla. 330.

Tex.—Franklin v. Coffee, 18 Tex. 413, 70 Am.D. 292.

23. Kan.—Anderson v. Shannon, 73 P.2d 5, 146 Kan. 704, 114 A.L.R. 200.

Ohio.—Troutman v. Eichar, 28 N.E.2d 953, 64 Ohio App. 415.

29 C.J. p. 783 note 16.

24. Fla.—Bigelow v. Dunphe, 197 So. 328, 143 Fla. 603, rehearing denied 198 So. 13, 144 Fla. 330.

Iowa.—In re McClain's Estate, 262 N.W. 666, 220 Iowa 638.

Okl.—Hensley v. Fletcher, 44 P.2d 63, 172 Okl. 19—Hensley v. Maxwell, 44 P.2d 60, 172 Okl. 21.

Tex.—Andrews v. Security Nat. Bank of Wichita Falls, 50 S.W.2d 253, 121 Tex. 409, 83 A.L.R. 44, reversing Security Nat. Bank of Wichita Falls v. Andrews, Civ. App., 24 S.W.2d 509.

25. Colo.—Duling v. Salaz, 26 P.2d 1069, 1070, 93 Colo. 453, citing **Corpus Juris.**

Iowa.—Magel v. Hunt, 265 N.W. 119, 121, 221 Iowa 199, quoting **Corpus Juris.**

Ky.—Covington Bros. & Co. v. Byrns, 18 S.W.2d 870, 230 Ky. 66.

La.—Reymond v. Louisiana Trust & Savings Bank, 148 So. 663, 177 La. 409.

Mich.—Kleinert v. Lefkowitz, 259 N.W. 871, 271 Mich. 79.

Utah.—Panagopulos v. Manning, 69 P.2d 614, 93 Utah 198, rehearing denied 72 P.2d 456, 93 Utah 215.

29 C.J. p. 982 note 11.

"The whole theory and policy of the homestead exemption is founded on the principle that there is a natural moral obligation on the head of the family to provide for the support of his wife and children, which is, if not paramount, equal to his obligation to pay his debts."—Hammond State Bank & Trust Co. v. Broderick, 154 So. 739, 741, 179 La. 693.

26. N.D.—Conlon v. City of Dickinson, 5 N.W.2d 411, 142 A.L.R. 525.

Okl.—Glaze v. Drawver, 117 P.2d 544, 189 Okl. 402—Williams v. Watkins, 219 P. 643, 93 Okl. 112.

29 C.J. p. 783 note 14.

"The spirit of the homestead is to protect the wife and family against improvidence of the head of the family, and also to protect the head of the family against the demands of urgent creditors."—Japp v. Sapulpa State Bank of Sapulpa, Okl., 215 P. 1059, 90 Okl. 56.

Protection of each member of family intended.

The "homestead" right must be regarded not as mere privilege accorded head of family for benefit of family as a whole, but as an estate created for protection of each constituent member of family unit.—Woods v. Alvarado State Bank, 19 S.W.2d 35, 118 Tex. 586—Reconstruction Finance Corporation v. Burgess, Tex. Civ. App., 155 S.W.2d 977, error refused—W. T. Rawleigh Co. v. Blackwell, Tex. Civ. App., 48 S.W.2d 754, error dismissed.

27. Cal.—Yager v. Yager, 60 P.2d 422, 7 Cal.2d 213, 106 A.L.R. 664.

Kan.—Anderson v. Shannon, 73 P.2d 5, 146 Kan. 704, 114 A.L.R. 200.

Minn.—Tomlinson v. Kandiyohi County Bank, 202 N.W. 494, 162 Minn. 230.

Ohio.—Ohio Savings & Trust Co. v. Schumacher, 172 N.E. 682, 36 Ohio App. 65, affirmed Schumacher v. Ohio Savings & Trust Co., 169 N.E. 442, 121 Ohio St. 446.

29 C.J. p. 783 note 15.

"The homestead exemption is not a law for the husband and his protection but [is] for the benefit of the wife and children as well."—Hammond State Bank & Trust Co. v. Broderick, 154 So. 739, 741, 179 La. 693.

"The controlling object of these laws is not alone to benefit the debtor, but also and mainly to protect the family in the possession of a home as a fixed abode."—Swift v. Reasonover, 77 S.W.2d 809, 168 Tenn. 305.

Not personal privilege of debtor.

A homestead exemption is not a personal privilege of the debtor, but is for the benefit of the debtor's family and the general public.—Troutman v. Eichar, 28 N.E.2d 953, 64 Ohio App. 415.

28. Fla.—Anderson Mill & Lumber Co. v. Clements, 134 So. 588, 101 Fla. 523.

Okl.—Glaze v. Drawver, 117 P.2d 544, 189 Okl. 402.

29 C.J. p. 782 note 11 [a] (2).

privilege. Generally it is not regarded as an estate in land.

The homestead interest depends entirely on organic or statutory provisions,[29] nothing like it being known at common law, see supra § 2, and there can, of course, be no greater right in the homestead property than is created by these provisions.[30] Because of the difference in the wording of the homestead laws in the various jurisdictions, the interest created thereby differs widely.[31]

A homestead is not a conveyance,[32] it is merely a right or privilege given by constitutional or statutory provisions.[33] It is a purely personal right[34] which can be exercised only for the benefit of the debtor and his family,[35] and which does not pass by succession.[36] The homestead estate is dependent on some title or interest in real property, and it does not exist as a separate estate in property independently of such title or interest.[37]

Effect on title to property. The homestead provisions do not create a new title,[38] or disturb the fee simple title or equitable title in the land itself;[39] nor do they strengthen or enlarge the title already existing.[40] Only the use of the property is changed, and not the title itself.[41] They do not create any interest in the property where the parties claiming homestead have no title or interest therein,[42] nor do they constitute a defense to an action to quiet title,[43] or to an action of ejectment.[44]

Whether an estate or mere exemption. In some jurisdictions the view is taken that the homestead interest is not an estate at all, but merely an exemption,[45] which operates to prevent the use of the process of the court to sell certain property for the

29. U S—In re Goetz, D C Ky, 28 F Supp 689
Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434
Iowa—First Nat Bank v. Phillips, 212 N W 678 203 Iowa 372
Ky—First Nat Bank of Jackson v Oliver, 150 S W 2d 894 286 Ky 286—Brannon v Bohannon, 96 S W 2d 1036, 265 Ky 394—Brandenburg v Petroleum Exploration, 291 S W 757, 218 Ky 557
Mich—Kleinert v Lefkowitz, 259 N W 871, 271 Mich 79
Mo—Stanton v Leonard, 130 S W 2d 487, 344 Mo 998
Ohio—Ohio Savings & Trust Co v Schumacher 172 N E 682, 36 Ohio App 65, affirmed Schumacher v Ohio Savings & Trust Co, 169 N E 442, 121 Ohio St 446
S D—State ex rel Bottum v Knudtson, 276 N W 150, 65 S D 547
Tenn—State v Clayton, 38 S W 2d 551, 162 Tenn 368
Tex—Whiteman v Burkey, 282 S W 788 115 Tex 400 answer conformed to, Civ App, 286 S W 350
Utah—Zuniga v Evans, 48 P 2d 513, 521, 87 Utah 198, 101 A L R 532, quoting **Corpus Juris.**
29 C J p 783 note 18

30. Or—Mansfield v Hill, 107 P 471, 56 Or 400, modified on other grounds 108 P 1007, 56 Or 400
S C—Dorn v Stidham, 137 S E 331, 334, 139 S C 66, quoting **Corpus Juris.**

31. Neb—McLain v Maricle, 83 N W 85 60 Neb 353
Utah—Zuniga v Evans, 48 P 2d 513, 521, 87 Utah 198, 101 A L R 532, quoting **Corpus Juris.**

32. Idaho—Burbank v Kirby, 55 P 295, 6 Idaho 210, 213, 96 Am S R 260
29 C J p 783 note 21

33. Idaho—Burbank v Kirby, supra
29 C J p 783 note 22

34. Ark—Jones v Thompson, 166 S W 2d 1036
Ga—S J Winkles & Co v Simpson Grocery Co, 75 S E 640, 138 Ga 482
N W Terr—Purdy v Colter, 6 Terr L 294

35 N W Terr—Purdy v Colter, supra
Tex—Maxey v Patterson, Civ App, 82 S W 2d 386, error dismissed

36. S D—In re Clouse's Estate, 257 N W 106, 63 S D 147

37. Tex—Rutledge v Mitchell, Civ App, 91 S W 2d 1135 error dismissed

38. S C—Ex parte Cothran, 121 S E 556, 128 S C 122
29 C J p 784 note 24

39. Tenn—Flatt v Stadler, 16 Lea 371—Gilbert v Cowan, 3 Lea 203

Existing estates not disturbed

The homestead provisions do not invest estates already existing with any new qualities or subject them to any restrictions—Ex parte Cothran, 121 S E 556, 128 S C 122—Davis v Milady, 75 S E 363, 92 S C 135, Ann Cas 1914B 267—Stewart v Blalock, 22 S E 774, 45 S C 61

40. Cal—Snodgrass v Parks, 21 P 429, 79 Cal 55
N D—First State Bank of Gackle v Fischer, 272 N W 752, 67 N D 400, 110 A L R 878
Okl—Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 524
Tex—Sayers v Pyland, 161 S W 2d 769, 139 Tex 57, 140 A L R 1164 reversing Pyland v Sayers, Civ App, 148 S W 2d 450—Federal Land Bank of Houston v King, 122 S W 2d 1061, 132 Tex 481, reversing King v Plainview Nat Farm Loan Ass'n, Civ.App, 100 S W 2d 434
Wis—Papenthien v Coerper, 198 N W 391, 184 Wis 156

41. Ga—Wardlaw v Woodruff, 165 S E 557, 175 Ga 515—Yeates v Donalson, 94 S E 465, 147 Ga 335

42. Cal—Snodgrass v Parks, 21 P 429, 79 Cal 55

43. Cal—Snodgrass v Parks, supra

44. Cal—Snodgrass v Parks, supra

45. U S—In re Gibson, D C Ky, 33 F Supp 838
Ky—Wilson's Adm'r v Wilson, 156 S W 2d 832, 288 Ky 522—First Nat Bank of Jackson v Oliver, 150 S W 2d 894 286 Ky 286—Howard v Mitchell, 105 S W 2d 128, 268 Ky 429—Brannon v Bohannon, 96 S W 2d 1036, 265 Ky 394—Lear v Lear 28 S W 2d 32, 234 Ky 369—Brandenburg v Petroleum Exploration, 291 S W 757, 218 Ky 557
Okl—Mercer v McKeel, 108 P 2d 138, 188 Okl 280—Thompson v Marlin, 243 P 950, 116 Okl 159
Or—Marvin & Co v Plazza, 276 P 680, 129 Or 128
Philippine—Young v Olivares, 41 Philippine 391
S D—In re Clouse's Estate, 257 N W 106, 63 S D 147
Utah—Utah Builders' Supply Co v Gardner, 42 P 2d 989, 86 Utah 257, 102 A L R 932, denying rehearing 39 P 2d 327, 86 Utah 250, 103 A L R 932
29 C J p 784 note 31

In Tennessee

(1) It has been held that the right of homestead does not constitute an estate, but is merely a right of occupancy and use—Carev v Carev, 43 S W 2d 498, 163 Tenn 486—29 C J p 784 note 31

(2) But it has also been held that the homestead right is a joint estate in the husband and wife for life, and on the death of either it vests in the survivor—Beard v Beard, 14 S W 2d 745, 158 Tenn 437.

payment of debts.[46] In other jurisdictions, the homestead right is considered an estate in land, vested in the person designated by law,[47] and is variously characterized as a "fee,"[48] a "freehold estate,"[49] a "life estate,"[50] and a joint tenancy with the right of survivorship as between husband and wife.[51]

Whether a right or mere privilege. The homestead interest is something more than a mere privilege and amounts to a right.[52] While perhaps not a new estate transferable by a conveyance, the homestead right is an interest or right in the home indeterminate in duration and so far vested in the owner as to be beyond the reach of the legislature to repeal the law creating it.[53]

Nature of interest of surviving spouse, children, or heirs The nature of the estate or interest transmitted to the surviving spouse, children, or heirs, on the death of the owner of the homestead is considered infra § 265

§ 4. —— Interest of Spouse or Children during Life of Person Acquiring Homestead

As a general rule, during the lifetime of the owner of the homestead, the owner's spouse and children have no estate or vested interest in the homestead With respect to the spouse, however, there is authority to the contrary.

In most jurisdictions it is held that the spouse[54] and children[55] of the owner of a homestead have no estate or vested interest in the property during the owner's lifetime Their rights consist in the right of occupancy jointly with the owner of the homestead,[56] and, on the part of the wife, the statutory right of veto against alienation and encumbrances.[57] The right of the wife has been likened

46. Ky —Foreman v Cook, 127 S W 2d 856, 277 Ky 812
S C —Ex parte Cothran, 121 S E 556, 128 S C 122
29 C J p 784 note 32

47. Ill —Beaty v Calliss, 128 N E 547, 294 Ill 124
29 C J p 784 note 33

In Texas
(1) The rule now prevails that the homestead right is an estate in land and not a mere privilege of exemption or possession
U S —Evans v Mills, C C A Tex , 67 F 2d 840
Tex —Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253, 256, 121 Tex 409, 83 A L R 44, citing **Corpus Juris,** and reversing Security Nat Bank of Wichita Falls v Andrews, Civ App , 24 S W 2d 509—Cocke v Conquest, 35 S W 2d 673, 120 Tex 43 affirming, Com App , 13 S W 2d 348, which affirmed, Civ App , 2 S W 2d 992—Woods v Alvarado State Bank, 19 S W 2d 35, 118 Tex 586, reversing, Civ App , 275 S W 187—Hargadine v Whitfield, 9 S W 475, 71 Tex 482—Mikulenka v Mikulenka, Civ App , 168 S W 2d 517—Reconstruction Finance Corporation v Burgess, Civ App , 155 S W 2d 977, error refused—Cates v Greene, Civ App , 114 S W 2d 592—W T Rawleigh Co v Blackwell, Civ App , 48 S W 2d 754, error dismissed—Parker v Schrimsher, Civ App , 172 S W 165

(2) Formerly the contrary had been held —Sargeant v Sargeant, Civ App , 19 S W 2d 382, certified questions answered 15 S W 2d 589, 118 Tex 343—Jones v Dewbre Civ App , 13 S W 2d 233—Middleton v Johnston, Civ App , 110 S W 789

(3) The homestead right partakes of the nature of an estate for life or a term of years in that the use, fruits, and occupancy of the property inhere in the holder of the homestead right during the homestead period —Jones v Dewbre, supra

48. U S —Hirsch v Prescott, C C Va , 89 F 52
29 C J p 784 note 34

49. Ill —Ketcham v Ketcham, 109 N E 1025, 269 Ill 584
29 C J p 784 note 35

50. N H —Barney v Leeds, 51 N H 253
29 C J p 784 note 36

51. Ark —Johnston v. Turner, 29 Ark 280

In California
(1) The homestead estate is a sort of "joint tenancy" with right of survivorship as between husband and wife —Tooley v Commissioner of Internal Revenue, C C A , 121 F 2d 350—29 C J p 784 note 37 [a]

(2) The rule that the homestead interest is not an estate, but merely an exemption, however, has been recognized —Arighi v Rule & Sons, 107 P 2d 970, 41 Cal App 2d 852

52. Mich —Kleinert v Lefkowitz, 259 N W 871, 271 Mich 79
Minn —Ryan v Colburn, 241 N W 388, 185 Minn 347—Tomlinson v Kandiyohi County Bank, 202 N W 494, 162 Minn 230
Utah —Panagopulos v Manning, 69 P 2d 611, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215—Utah Builders' Supply Co v Gardner, 42 P 2d 989, 86 Utah 257, 102 A L R 932, denying rehearing 39 P 2d 327, 86 Utah 250, 103 A L R 932
29 C J p 784 note 38

53. Neb —Gallagher v Smiley, 44 N W 187, 28 Neb 189, 26 Am S R 319

54. Ala —Thomas v Blair, 93 So 704, 208 Ala 48
Ky —Lear v Lear, 28 S W.2d 32, 234 Ky 369
La —Abshire v Comeaux, 106 So 574, 159 La 1087
29 C J p 785 note 42
Nature of interest of surviving spouse see infra § 265

Right of wife to rents and profits
(1) The wife has been held not entitled to recover the rents where the homestead property is rented by the husband —Whitford v Kinzel, 138 N W 597, 92 Neb 373—29 C J p 785 note 42 [c]

(2) But there is authority to the contrary where the homestead is regarded as for the use and benefit of the family —Wood v Wood, 155 S E 678, 171 Ga 389

55. Mo —Hall v Hall, 145 S W 2d 752 346 Mo 1217
29 C J p 785 note 42
Nature of interest of surviving children see infra § 265

Statutory limitation of rule
Ala —Cofer v Scroggins, 13 So 115, 98 Ala 343, 39 Am S R 54
29 C J p 785 note 40 [a]

Children have no rights to the homestead, during the life of their parents, which can be asserted against the parents' acts Demarest v Allen, 224 S W 458, 189 Ky 32

Declaration of homestead neither created nor vested any present interest in minor son at time declaration was made —Gerlach v Copeland, 300 P 818, 212 Cal 758

56 Ala —Winkles v Powell, 55 So 536, 173 Ala 46
29 C J p 785 note 43

57. Ala —Winkles v Powell, supra
29 C J p 785 note 44
Consent and joinder of husband and wife generally see infra §§ 129–132

to the wife's right of dower at common law.[58] The right of the homestead owner's spouse and children is inchoate during the life of the owner and becomes consummate on his or her death.[59] The homestead exemption runs to the owner of the homestead,[60] and the right of the owner's spouse and children is a derivative and not a direct one[61] So long as both parents are living, the rights of the children are necessarily under the control of the parents and may be lost by abandonment or conveyance[62]

Minority rule In some jurisdictions the view is taken that the husband's or wife's right in a homestead owned by the other is not merely a possessive right or a right to occupy the premises but is a vested right in the land itself,[63] and is an estate,[64] although it may be difficult to define the exact character of the estate which he or she possesses[65]

§ 5. What Law Governs Right

The value and extent of the homestead exemption as against creditors is determined by the law in force when the debt was created. As exemption laws affect only the remedy, those of the place of enforcement control.

The value and extent of the homestead exemption as against creditors is determined by the law in force when the debt was created or contract entered into[66] As exemption laws affect only the remedy, those of the place of enforcement control[67]

§ 6. Constitutional and Statutory Provisions in General

State constitutional provisions creating homestead exemptions, to be valid, must not violate any of the provisions of the federal constitution. Homestead laws are remedial in character

State constitutional provisions creating homestead exemptions, to be valid, must not violate any of the provisions of the federal constitution[68] Where such provisions of the state constitution are valid, there is no power in either the state legislature, see infra § 7, or in the courts,[69] to restrict, defeat, or in any way impair the homestead rights granted by the organic provisions The question whether constitutional provisions as to homestead exemptions are self-executing is considered in Constitutional Law § 51

58. Vt—Davis v Andrews 30 Vt 678

59. Mo—Bushnell v Loomis, 137 S W 257, 234 Mo 371, 36 L R A, N S, 1029
29 C J p 785 note 46

Contingent interest

(1) Child's homestead rights do not attach prior to the death of the parents, because until then the child has no possessory interest, but only an expectancy or contingent interest which may be lost through the acts of his parents—Shambaugh v Scofield, C C A Tex, 132 F 2d 345—29 C J p 785 note 46 [a]

(2) The spouse of the owner of the homestead has a contingent interest during coverture in the homestead which vests in him or her on the owner's death - Snortum v Snortum, 193 N W 304, 155 Minn 230

60 Ala—Sims v Gunter, 78 So 62, 201 Ala 286
Ky—Lear v Lear 28 S W 2d 32, 234 Ky 369

61. Ky—Lear v Lear, supra
29 C J p 785 note 48

62. U S—Shambaugh v Scofield, C C A Tex 132 F 2d 345
29 C J p 785 note 49

63 Tex—Hibbs v City Nat Bank of Wichita Falls, Civ App, 293 S W 350
29 C J p 785 note 50

Wife's right as real estate

The homestead right of a wife in lands owned by the husband and occupied by the family as a home is "real estate"—Mead v Polly, 228 N W 369, 119 Neb 206

64. Tex—Mikulenka v Mikulenka, Civ App, 168 S W 2d 517—Glasgow v John Hancock Mut Life Ins Co, Civ App, 117 S W 2d 888, affirmed John Hancock Mut Life Ins Co v Glasgow, 141 S W 2d 912, 135 Tex 170
29 C J p 785 note 51

65 Kan—Coughlin v Coughlin, 26 Kan 116

Nature of husband's estate

"The interest that the husband has in the homestead of the wife is a different estate from that by the curtesy-initiate, but in some respects at least, it is analogous It is probably a greater and more definite estate under our homestead law than given by the common law of England under the name of the 'estate by curtesy' It is at least a life estate, conditioned upon his occupying the premises during his life time and not executing a conveyance thereof The interest of the husband in the homestead owned by his wife, while they jointly occupy it, makes the husband during their marriage and occupancy a freeholder"—Hughes v Milligan, 22 P 313, 314, 42 Kan 396

66. Neb—Jackson v Creighton, 45 N W 638, 29 Neb 310
29 C J p 789 notes 9, 10
What law governs
Establishment of homestead rights see infra § 207.
Rights of surviving wife, husband, children, or heirs see infra § 240
Transfer or encumbrance of homestead see infra § 128

67. U S—Sanders v Armour Fertilizer Works, Tex 54 S Ct 677, 292 U S 190, 78 L Ed 1206, 91 A L R 950, affirming, C C A, Armour Fertilizer Works v Sanders, 63 F 2d 902, certiorari granted Sanders v Armour Fertilizer Works 54 S Ct 345, 290 U S 623, 78 L Ed 543, and rehearing denied 54 S Ct 855 292 U S 612, 78 L Ed 1472—National Fire Ins Co v Sanders, D C Tex, 33 F 2d 157 reversed on other grounds, C C A 48 F 2d 212
Ky—Pinson v Murphy, 295 S W 442, 444, 220 Ky 464, citing **Corpus Juris.**
29 C J p 789 note 12

68. Ga—Herrington v Godbee, 121 S E 312, 157 Ga 313
La Daniel v Thigpen, 194 So 6, 194 La 522
Constitutional provisions relating to homestead exemptions as violative of federal prohibition of laws impairing obligation of contracts see Constitutional Law § 390 b

69. Utah—Panagopulos v Manning, 69 P 2d 614, 93 Utah 198 rehearing denied 72 P 2d 456, 93 Utah 215—Utah Builders' Supply Co v Gardner, 42 P 2d 989, 86 Utah 257, 102 A L R 932, denying rehearing 39 P 2d 327, 86 Utah 250, 103 A L R 932—Volker-Scowcroft Lumber Co v Vance, 88 P 896, 32 Utah 74, 125 Am S R 828

Nature of homestead laws Homestead laws are remedial in character[70] They are not in derogation of the common law[71]

§ 7. —— Character of Legislation Permissible under Organic Law in General

Subject to constitutional limitations, the legislature may exempt a debtor's homestead from liability for seizure and sale for the satisfaction of his debts subject to such restrictions as it may see fit to impose.

Subject to the inhibitions or limitations of the state or federal constitution, a state legislature may exempt the homestead of a debtor from liability for seizure and sale for the satisfaction of his debts, subject to such restrictions as it may see fit to impose,[72] and, where congress has enacted no legislation declaring whether exemptions shall exist or not, in respect of executions issuing out of the courts of the United States, these laws will operate with full force and effect to prevent the levying of an execution of a judgment in favor of the United States against a citizen of a state on property which the state laws have declared exempt as a homestead[73] State constitutions relating to homestead exemptions are ordinarily a limitation and not a grant of power,[74] and legislatures have no power to restrict, defeat, or in any way impair the homestead right granted by the organic provisions[75] Nevertheless, they may regulate the claim of the right so that its exact limits may be known,[76] and enact supplementary legislation in particulars wherein they are not as complete as may be desirable,[77] and where the constitution so provides, the legislature may alter the homestead provisions of the constitution itself[78]

Persons entitled to exemption If the constitution requires that at least heads of families shall be protected, the legislature may extend the homestead privileges to other persons,[79] and according to some decisions the legislature may even confer homestead rights on classes of persons not specifically mentioned in the constitution,[80] but according to others, if the beneficiaries are specially designated by the constitution, the legislature has no power to extend the homestead rights to classes of persons not so designated[81]

Amount of exemption. Where the constitution authorizes the legislature to enact reasonable exemption laws or to exempt a reasonable amount of property, it is for the legislature to say what amount of property may reasonably be exempted[82] Also

70. U S —In re Miller, D C Cal , 27 F Supp 999—In re Sterling, D C Cal , 20 F Supp 924
Ark —Yadon v Yadon, 151 S W 2d 969, 202 Ark 634—Franklin Fire Ins Co v Butts, 42 S W 2d 559, 184 Ark 263
Cal —Parker v Riddell, 108 P 2d 88, 41 Cal App 2d 908—Favello v Bank of America Nat Trust & Savings Ass'n, 74 P 2d 1057, 24 Cal App 2d 342
Or —In re Banfield's Estate, 298 P 905, 137 Or 167, modifying 296 P 1066, 137 Or 167
Wash —Kelley v Butler, 47 P 2d 664, 182 Wash 310—State ex rel Van Doren v Superior Court for King County, 37 P 2d 215, 179 Wash 241

71. Ky —Covington Bros & Co v Byrns, 18 S W 2d 870, 230 Ky 66
But it has been said that such laws are in derogation of common rights —Kinder v Lyons 38 La Ann 713—29 C J p 788 note 91
Homestead right as unknown to common law see supra § 2

72. U S —In re Goetz, D C Ky , 28 F Supp 689
Ga —Herrington v Godbee, 121 S E 312, 157 Ga 343
La —Daniel v Thigpen, 194 So 6, 194 La 522
Minn —Dimke v Finke, 295 N W 75, 209 Minn 29
Miss —McCreight v W W Scales & Co , 99 So 257, 134 Miss. 303.
Wash —Magnolia Milling Co v Rommel, 297 P 191, 161 Wash 398
29 C J p 786 note 55
Statutory exclusion of negroes from benefit of homestead act as denial of equal protection of the laws see Constitutional Law § 538
Validity of homestead statutes under
Due process clause see Constitutional Law § 614
Obligation of contracts clause see Constitutional Law § 390 b
Vested right see Constitutional Law §§ 236, 260

73. U S —Salentine v Fink, C C Wis , 21 F Cas No 12,250, 8 Biss 503, affirmed 1 S Ct 325, 106 U S 272, 27 L Ed 196
29 C J p 786 note 56

74. Kan —Sawin v Osborn, 126 P 1074, 87 Kan 828, Ann Cas 1914A, 647—Towle v Towle, 107 P 228, 81 Kan 675, 27 L R A ,N S , 550
Extent of limitation
Constitutional provision for protection of homestead did not limit power of legislature to laws in force at time constitution was adopted —Magnolia Milling Co v Rommel, 297 P 191, 161 Wash 398

75. Utah —Panagopulos v Manning, 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215 —Utah Builders' Supply Co v Gardner, 42 P 2d 989, 86 Utah 257, 103 A L R 928, denying rehearing 39 P 2d 327, 86 Utah 250, 103 A L R 928
Wash —Spencer v Pacific Mercantile Agency Collectors, 281 P 482, 154 Wash 191
29 C J p 786 note 58

76. Utah —Volker-Scowcroft Lumber Co v Vance, 88 P 896, 32 Utah 74, 125 Am S R 828

77. Utah —Volker-Scowcroft Lumber Co v Vance, supra
29 C J p 786 note 60
Statute requiring selection of homestead before judgment is not unconstitutional as to one who occupied premises and had opportunity to file declaration of homestead before judgment was entered —Magnolia Milling Co v Rommel, 297 P 191, 161 Wash 398—Spencer v Pacific Mercantile Agency Collectors, 281 P 482, 154 Wash 191

78. Okl —Kerr v Garrison, 223 P 609, 101 Okl 101—Armstrong v Independent Oil & Gas Co , 219 P 353, 95 Okl 231

79. Cal —Hohn v Pauly, 106 P 266, 11 Cal App 724

80. Va —Helm v Helm, 30 Gratt 404, 71 Va 404
29 C J p 786 note 62

81. Ga —Calhoun v. McLendon, 42 Ga. 405
29 C J p 786 note 63

82. Cal —Pfeiffer v Riehn, 13 Cal 643
Va.—Wray v. Davenport, 79 Va. 19.

if the constitution does not fix the amount of the exemption, the legislature may determine the amount of property which shall be exempt[83] and may increase or diminish such amount from time to time,[84] and if the constitution merely limits the minimum of exemption the legislature may increase it.[85] On the other hand, if the amount of the exemption is fixed by the constitution any legislation which attempts to enlarge or diminish it is unconstitutional.[86]

Debts as to which exemption operates Where the constitution provides for, or directs an exemption against, all debts, or against particular specified debts, the legislature has no power to except any debt, or a debt specified in the constitution, as the case may be, from the operation of the homestead exemption law[87] On the other hand, if the constitution excepts a particular debt, the legislature cannot exempt as against that debt[88] The legislature, however, may except from the operation of the homestead exemption laws such debts as are authorized by the constitution[89]

Alienation of homestead Where the constitution declares that the legislature shall protect from forced sale a certain portion of the homestead of all heads of families, the legislature need not, in addition to giving a right of homestead exemption, restrain the voluntary alienation thereof[90] However, in the absence of constitutional provisions to the contrary, the legislature may require the wife's joinder in a conveyance or encumbrance of the homestead[91] If the constitution expressly prohibits alienation of the homestead, or if such an intention on the part of the people clearly appears from the scheme of the homestead exemption as established by the constitution, the legislature has no power to allow alienation,[92] unless the constitution expressly authorizes the legislature to alter the homestead provisions in the constitution itself.[93]

Allowing waiver of exemption A statute authorizing a waiver of the homestead exemption is not in conflict with a constitutional provision giving to debtors the right to a homestead exemption, without expressly prohibiting a waiver thereof.[94]

§ 8. —— Construction of Homestead Laws

a In general
b Liberal or strict construction

a. In General

Homestead laws are subject to the established rules of construction applicable to laws in general.

Homestead statutes are subject to the established rules of construction applicable to statutes in general[95] Thus in the construction of a homestead statute, as in the construction of statutes in general, the court must, if possible, ascertain and give effect to the intention of the legislature[96] The statute must be fairly and reasonably construed[97] Effect must be given, if possible, to the whole statute and every part thereof,[98] and the court should not read into the statute conditions or provisions omitted therefrom by the legislature[99] If possible, the statute must be construed so as to give effect

83. Minn —Dimke v Finke, 295 N W 75, 209 Minn 29—Coleman v Ballandi, 22 Minn 144
Wis —In re Wickesberg's Estate, 244 N W 561, 209 Wis 92

84. Minn —Dimke v Finke, 295 N W 75, 209 Minn 29—Coleman v Ballandi, 22 Minn 144
Wis —In re Wickesberg's Estate, 244 N W 561, 209 Wis 92

85. Ala —Miller v Marx, 55 Ala 322

86. S C —Appeal of Lucas Bank, 119 S E 18, 125 S C 446
29 C J p 786 note 68

87 Utah —Volker-Scowcroft Lumber Co v Vance, 88 P 896, 32 Utah 74, 125 Am S R 828
29 C J p 786 note 71

88. Nev —Dunker v Chedic, 4 Nev 378
29 C J p 787 note 72

89. Utah —McMurdie v Chugg, 107 P 2d 163, 99 Utah 403, 132 A L R 435

Statutes held not invalid

(1) Statute imposing a lien in favor of state or county on homestead of recipient of old age pension benefits
Kan —Hawkins v State of Kansas Social Welfare Board, 84 P 2d 930, 148 Kan 760
Minn —Dimke v Finke, 295 N W 75, 209 Minn 29
Wis —In re Wickesberg's Estate, 244 N W 561, 209 Wis 92

(2) Statute authorizing judicial sale of homestead property to enforce payment of rates and charges for sewer connections —Jernigan v Harris, 62 S W 2d 5, 187 Ark 705

90. Cal —Gee v Moore, 14 Cal 472

91. Miss.—Massey v Womble, 11 So 188, 69 Miss 347
29 C J p 787 note 74
Consent and joinder of husband and wife generally see infra §§ 129–132

92. Ga —Roberts v Trammell, 55 Ga. 383

93. In Oklahoma, const art 12 § 2, prohibiting the sale of the homestead by the owner, if married, without the consent of the spouse, may be altered by the legislature together with the method of conveyance under the express provision therefor contained in § 3 —Kerr v Garrison, 223 P 609, 101 Okl 101—Armstrong v Independent Oil & Gas Co, 219 P 353, 95 Okl 231

94. Va —Reed v Union Bank, 29 Gratt 719, 70 Va 719

95. Or —In re Banfield's Estate, 296 P 1066, 137 Or 167, modified on other grounds 298 P 905, 137 Or 167

96. U S —In re Goetz, D C Ky, 28 F Supp 689— In re Wineland, D C Okl, 3 F Supp 796
Or —In re Banfield's Estate, 298 P 905, 137 Or 167, modifying 296 P 1066, 137 Or 167—Allison v Breneman, 254 P 201, 121 Or 102
Utah —Panagopulos v Manning, 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215

97. Cal —Favello v Bank of America Nat Trust & Savings Ass'n, 74 P 2d 1057, 24 Cal App 2d 342

98. Or —In re Banfield's Estate, 298 P 905, 137 Or 167, modifying 296 P 1066, 137 Or 167
27 C J p 787 note 79

99. U S —In re Wineland, D C Okl, 3 F Supp 796

to mandatory provisions of the constitution requiring the legislature to protect the homestead [1] When there are several statutes in the same state, enacted at different times, they are all to be construed together as if they were one act, in accordance with the rule that all acts of the legislature in pari materia are to be taken together as if they were one act [2]

Construction of constitutional provisions General rules apply in the construction of homestead provisions contained in state constitutions [3] Where such provisions do not define terms used therein, it is the right and duty of the legislative or judicial department to provide or apply a reasonable definition or construction of such terms [4] A constitutional provision that the legislature shall provide by law for homestead exemptions is mandatory [5]

b. Liberal or Strict Construction

As a general rule, homestead laws must be liberally construed in favor of the debtor and his family

Since, as has been seen supra § 6, homestead laws are remedial in character and are not in derogation of the common law, the rule, supported by the great weight of authority, is that such laws must be liberally construed in favor of the debtor and his family,[6] especially where the homestead exemption is

1. Wash—Spencer v Pacific Mercantile Agency Collectors, 281 P 482, 154 Wash 191

2. Cal—Quade v Whaley, 31 Cal 526
29 C J p 788 note 96

3. **Provision read with supplementary statute**
Constitutional provision for waiver of homestead must be read with supplementary statute—Reymond v Louisiana Trust & Savings Bank, 153 So 529, 179 La 104—Reymond v Louisiana Trust & Savings Bank, 148 So 663, 177 La 409

4. **"Family"**
There being no provision in the constitution defining the term "family" as used in provision respecting homestead, it was intention of framers of constitution to leave to legislative or judicial department the duty of providing reasonable definition or construction of such term—Reconstruction Finance Corporation v Burgess, Tex Civ App, 155 S W 2d 977, error refused

5. Utah—McMurdie v Chugg, 107 P 2d 163, 99 Utah 403, 132 A L R 435
Wash—Spencer v Pacific Mercantile Agency Collectors, 281 P 482, 154 Wash 191

6. U S—In re David, D C Fla 54 F 2d 140—In re Jarrell, D C Cal, 34 F 2d 970—In re Vincent, D C La, 28 F 2d 396—In re Shepardson, D C Cal, 28 F 2d 353—In re Hawthorne, D C Tex, 15 F Supp 374—In re Goetz, D C Ky, 28 F Supp 689—In re Sterling, D C Cal, 20 F Supp 924—In re Booth, D C Okl, 18 F Supp 79—In re Wineland, D C Okl 3 F Supp 796—In re Stump, C C A Idaho, 284 F 199, certiorari granted White v Stump 43 S Ct 251 260 U S 720, 67 L Ed 480, and reversed on other grounds 45 S Ct 103, 266 U S 310, 69 L Ed 301
Ala—W T Rawleigh Co v Patterson 195 So 729, 239 Ala 309—Roy v Roy, 172 So 253 233 Ala 440—Boyte v Perkins, 99 So 652, 211 Ala 130
Ariz—First Nat Bank v Reeves, 234 P 556, 27 Ariz 508
Ark—Yadon v Yadon, 151 S W 2d 969, 202 Ark 634—Bank of Hoxie v Graham, 44 S W 2d 1099, 184 Ark 1065—Franklin Fire Ins Co v Butts, 42 S W 2d 559, 184 Ark 263
Cal—In re Kachigian's Estate, 128 P 2d 865, 20 Cal 2d 787, prior opinion, App, 121 P 2d 869—Greenlee v Greenlee, 61 P 2d 1157, 7 Cal 2d 579—Yager v Yager, 60 P 2d 422, 7 Cal 2d 213, 106 A L R 664—Marelli v Keating, 282 P 793, 208 Cal 528—Feintech v Weaver 122 P 2d 606, 50 Cal App 2d 181—Parker v Riddell, 108 P 2d 88, 41 Cal App 2d 908—Vincenzini v Fiorentini, 38 P 2d 876, 2 Cal App 2d 739—McNabb v Byrnes, 268 P 428, 92 Cal App 337
Fla—Hillsborough Inv Co v Wilcox, 13 So 2d 148—Bishop v First Old State Bank 194 So 488 142 Fla 190—Kohn v Coats, 138 So 760, 103 Fla 264—Jones v Carpenter, 106 So 127, 90 Fla 407, 43 A L R 1409
Ill—Scogin v Scogin 169 N E 201, 337 Ill 427
Iowa—Magel v Hunt, 265 N W 119, 121, 221 Iowa 199, quoting **Corpus Juris**—In re McClain's Estate 262 N W 666, 220 Iowa 638—Elliott v Till, 259 N W 160 219 Iowa 649—Hunt, Hill & Betts v Moore, 258 N W 111 219 Iowa 151—American Sav Bank of Marengo v Willenbrock 228 N W 295 209 Iowa 250—Smith v Andrew, 227 N W 587 209 Iowa 99—Poffinbarger v Administrator of Poffinbarger's Estate, 221 N W 550, 206 Iowa 961—Solnar v Solnar, 216 N W 288, 205 Iowa 701—Fardal v Satre, 206 N W 22, 200 Iowa 1109
Kan—In re Dittemore's Estate, 106 P 2d 1056, 152 Kan 571—Hawkins v State of Kansas Social Welfare Board 84 P 2d 930, 148 Kan 760—Anderson v Shannon, 73 P 2d 5, 146 Kan 704 114 A L R 200
Ky—Brewer v Brewer 105 S W 2d 582, 268 Ky 625—Richardson v Richardson 67 S W 2d 7, 252 Ky 235—Williams v Evans' Adm'r, 56 S W 2d 710, 247 Ky 105—Covington Bros & Co v Byrns, 18 S W 2d 870, 230 Ky 66, citing **Corpus Juris.**
Mich—Bartold v Lewandowska, 8 N W 2d 133—Miller v Detroit Sav Bank, 286 N W 803, 289 Mich 494
Minn—Ryan v Colburn 241 N W. 388, 185 Minn 347—Mulroy v Sioux Falls Trust & Savings Bank of Sioux Falls, 206 N W 461, 165 Minn 295—Tomlinson v Kandiyohi County Bank, 202 N W 494, 162 Minn 230
Miss—Gardner v Cook, 158 So 150, 173 Miss 244
Mo—Brennecke v Riemann, 102 S W 2d 874, 109 A L R 1214—In re Clute's Estate, App, 161 S W 2d 705—Prouty v Hall, App, 31 S W 2d 103
Mont—De Fontenay v Childs, 19 P 2d 650, 93 Mont 480—Oregon Mortg Co v Dunbar, 289 P 559, 87 Mont 603, 73 A L R 113—Esterly v Broadway Garage Co, 285 P. 172, 87 Mont 64
Neb—Bliss v White, 272 N W 769, 132 Neb 651
Nev—McGill v Lewis 116 P 2d 581, rehearing denied 118 P 2d 702
N C—Miller v Little, 194 S E 92, 212 N C 612
N D—Conlon v City of Dickinson, 5 N W 2d 411, 142 A L R 525—First State Bank of Gackle v Fischer, 272 N W 752, 67 N D 400, 110 A L R 878
Ohio—New Martinsville Grocery Co v Hannibal Store Co, 29 N E 2d 226, 65 Ohio App 50—Troutman v Eichar, 28 N E 2d 953, 64 Ohio App 415—Ohio Savings & Trust Co v Schumacher 172 N E 682, 36 Ohio App 65, affirmed Schumacher v Ohio Savings & Trust Co, 169 N E 112 121 Ohio St 446
Okl—Enosburg Falls Sav Bank & Trust Co v McKinney, 41 P 2d 987 172 Okl 298—Hensley v Maxwell, 14 P 2d 60, 172 Okl 21—First Nat Bank v Burnett 254 P 95, 122 Okl 255—Farmers' Exch Bank of Lindsay v Cutler, 229 P 186, 100 Okl 193
Or—In re Laughlin's Estate, 134 P 2d 961—In re Baker's Estate, 20 P 2d 1069, 142 Or 559—In re Ban-

restricted within moderate limits[7] However, this rule does not require a strained construction to favor the debtor, but a natural construction of the act, effecting the purposes of its enactment without departing from the obvious meaning of its terms,[8] nor can the court, in the application of this rule of construction, go beyond the intent of the legislature[9] or ignore other statutory provisions[10] The homestead provisions are not to be so construed as to protect those not meant to be protected,[11] or to dispense with the necessity of parties bringing themselves within the purpose of the laws unaided by judicial construction,[12] or to make them an instrument of fraud and imposition on creditors[13] and a cloak for wrongdoing.[14] It is only where there is a substantial compliance with the homestead provisions that the rule of liberal construction can be applied[15]

The rule of liberal construction has been held to apply to the statutes only in so far as they allow the exemption[16] It does not apply to exceptions

field's Estate, 298 P 905, 137 Or 167, modifying decree 296 P 1066, 137 Or 167—De Haven & Son Hardware Co v Schultz, 259 P 778, 122 Or 493

S C —Baker v De Witt, 138 S E 626, 140 S C 114

Tenn —Hinds v Buck, 150 S W 2d 1071, 177 Tenn 444

Tex —Woods v Alvarado State Bank, 19 S W 2d 35, 118 Tex 586, citing **Corpus Juris,** and reversing, Civ App, 275 S W 187—Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253, 256, 121 Tex 409, 83 A L R 44, citing **Corpus Juris,** and reversing Security Nat Bank of Wichita Falls v Andrews, Civ App, 24 S W 2d 509—Wallace v First Nat Bank, 35 S W 2d 1036, 120 Tex 92 reversing First Nat Bank v Wallace, Civ App, 13 S W 2d 176—Cocke v Conquest, 35 S W 2d 673, 678, 120 Tex 43, citing **Corpus Juris**—Whiteman v Burkey 282 S W 788, 115 Tex 400 answer to certified question conformed to, Civ App, 286 S W 350—Reconstruction Finance Corporation v Burgess, Civ App, 155 S W 2d 977, error refused—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—Standard Savings & Loan Ass'n v Davis Civ App, 85 S W 2d 333, error refused —First Nat Bank v Jeffress, Civ App 71 S W 2d 298 error refused —Farm & Home Savings & Loan Ass'n of Missouri v Muhl Civ App 37 S W 2d 316, error refused —Connelly v Johnson, Civ App, 259 S W 634

Utah —In re Peterson's Estate, 93 P 2d 445 97 Utah 324—In re Mower's Estate, 73 P 2d 967 93 Utah 390 Panagopulos v Manning 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215

Wash —State ex rel White v Douglas 107 P 2d 593, 6 Wash 2d 356—Kelley v Butler 47 P 2d 664, 182 Wash 310—State ex rel Van Doren v Superior Court for King County 37 P 2d 215, 179 Wash 241—Spencer v Pacific Mercantile Agency Collectors, 281 P 482, 484 154 Wash 191 citing **Corpus Juris**—Traverso v Cerini, 263 P 184, 146 Wash 273

Wis —Sheldon v Johnston, 8 N W 2d 269—In re McKenzie's Estate, 287 N W 695, 232 Wis 425—In re Bresnehan's Will, 265 N W 93, 221 Wis 51—Eaton Center Co-op Cheese Co. v Heintz, 244 N W 620, 209 Wis 170—Northwestern Securities Co v Nelson, 211 N W 798, 191 Wis 580 —Truelsch v Northwestern Mut Life Ins Co, 202 N W 352, 186 Wis 239, 38 A L R 914—Papenthien v Coerper, 198 N W 391, 184 Wis 156

Wyo —Altman v Schuneman, 273 P 173, 39 Wyo 414

29 C J p 787 note 82

Conversely, homestead laws must be strictly construed against the creditor —Home Owners Loan Corporation v Reese, 196 S E 625, 170 Va 275

Doubtful questions are construed favorably to the homesteader —Dogan v Cooley, 185 So 783, 184 Miss 106

Homestead exemption is favorite of law and will be sustained whenever possible

Ala —W T Rawleigh Co v Patterson 195 So 729 239 Ala 309

N C —Pence v Price, 192 S E 99, 211 N C 707

Tenn —Hinds v Buck, 150 S W 2d 1071, 177 Tenn 444

Tex —Farm & Home Savings & Loan Ass'n of Missouri v Muhl, Civ App, 37 S W 2d 316, error refused

Wash —State ex rel White v Douglas 107 P 2d 593 6 Wash 2d 356

Homestead statute is to be construed strongly to protect the homestead, and right of a creditor to take homestead on forced sale will be strictly limited to the instances specified therein —Arlight v Rule & Sons, 107 P 2d 970, 41 Cal App 2d 852

Homesteads within rule

The rule that homestead laws must be liberally construed to effectuate their purpose is applicable to both residence homestead and business homestead —Panhandle Const Co v Head, Tex Civ App, 134 S W 2d 779, error refused

Reason for rule

The paramount purpose of homestead laws being to afford protection to the home against creditors, that purpose is accomplished only by extending execution or forced sale immunity to the limit of the law —In re Miller, D C Cal, 27 F Supp 999

Purpose of homestead laws generally see supra § 2

Rule limited

Laws creating homestead are liberally construed except as to provisions relating to residence at time declaration is filed —McNabb v Byrnes, 268 P 428, 92 Cal App 337

7. Mich —Barber v Rorabeck, 36 Mich 399

8. Iowa —Smith v Andrew, 227 N W 587, 209 Iowa 99

29 C J p 788 note 85

9. N D —Sexton v Sutherland, 174 N W 214, 42 N D 509

29 C J p 788 note 86

10. N D —First State Bank of Gackle v Fischer, 272 N W 752, 67 N D 400, 110 A L R 878

11. Okl —Enosburg Falls Sav Bank & Trust Co v McKinney, 44 P 2d 987 172 Okl 298

29 C J p 788 note 87

12. Mo —Regan v Ensley, 222 S W 773, 283 Mo 297

13 U S —Croker v Croker C C A Fla, 51 F 2d 11

Cal —Marelli v Keating, 282 P 793, 208 Cal 528

Fla —Hillsborough Inv Co v Wilcox, 13 So 2d 148—Jones v Carpenter, 106 So 127, 90 Fla 407, 43 A L R 1409

Ohio —Ohio Savings & Trust Co v Schumacher 172 N E 682 36 Ohio App 65, affirmed Schumacher v Ohio Savings & Trust Co, 169 N E 412 121 Ohio St 446

S C —Baker v De Witt, 138 S E 626, 140 S C 114

Tex —Goodrich v Second Nat Bank of Houston Civ App, 151 S W 2d 276, error refused—Farm & Home Savings & Loan Ass'n of Missouri v Muhl Civ App 37 S W 2d 316 error refused

29 C J p 788 note 89

14. Cal —McClellan v Lewis, 169 P 436, 35 Cal App 64

15. Nev —McGill v Lewis, 116 P 2d 581, rehearing denied 118 P 2d 702

16. Ill —Epps v Epps, 17 Ill App 196.

and provisos in a statute by which a general allowance of property as exempt is qualified or restricted;[17] nor does it apply to a proviso which declares that the statute shall not apply as against certain debts or liabilities[18]

Minority rule In some jurisdictions the homestead laws are deemed to be in derogation of the common right and are subject to strict construction.[19]

§ 9. —— Retroactive Operation

A homestead statute will not be construed as retroactive unless the intention that it shall so operate is clearly apparent

A statutory provision on the subject of homesteads will not be construed as retroactive unless the intention that it shall so operate is clearly apparent,[20] particularly where such construction would invalidate the statute,[21] as where it would make the statute violative of constitutional provisions forbidding laws impairing the obligation of contracts[22]

The retroactive operation of a constitutional provision as to homesteads is considered in Constitutional Law § 40 a.

§ 10. —— Change or Repeal of Homestead Exemption

Subject to constitutional limitations, the legislature may change or repeal homestead exemption laws at will

Subject to constitutional limitations, the legislature may change homestead exemption laws at will[23] Although there is some authority to the contrary,[24] according to the weight of authority the statutes in force when a debt is contracted constitute terms of the obligation and a repeal of such statutes cannot affect the previous right of exemption[25] Repealing laws frequently preserve homestead rights previously existing, whether accruing or accrued; and in such cases the repeal does not affect the debtor's privileges arising under prior statutes[26] Whether a prior homestead law is repealed by implication in whole or in part by a subsequent statute or constitutional provision is determined by ascertaining if there is a necessary inconsistency between them[27]

§ 11. Right as Affected by Change in Form of Debt or New Promise

The right to claim a homestead privilege as affected by a change in the form of the debt or a new promise is considered infra §§ 96, 103.

Examine Pocket Parts for later cases.

§ 12. Right as Affected by Ownership of Other Property

Generally a debtor's right to claim a homestead is not affected by the fact that he owns other property In some jurisdictions, however, his right may be affected by the fact that his wife owns other property

In the absence of constitutional or statutory provisions to the contrary, a debtor is not precluded from claiming a homestead by the fact that he owns other property, real or personal[28] Accordingly the alleged fact that a debtor owned other property than his homestead and has fraudulently disposed of such property is immaterial and irrelevant to the question of his homestead exemption[29] Under the homestead provisions in some jurisdictions, however, there must be deducted from the benefit of the homestead exemption allowed a married man the value of property or means owned and enjoyed by his wife[30]

17. Ill—Epps v Epps, supra

18 Ill—Epps v Epps, supra

19. La—Kinder v Lyons, 38 La Ann 713
29 C J p 788 note 91
However, they should not be too strictly construed—Hebert v Mayer, 20 So 170, 48 La Ann 938

20 Statute held retroactive
N C—Leak v Gay, 12 S E 312, 107 N C 468

21. N C—Leak v. Gay supra

22. N C—Leak v Gay supra
Rights of creditors as governed by law in force when debt was created see supra § 5
Rights of owner of homestead as governed by law in force when debt was created see infra § 10

23. U S—In re Goetz, D C Ky, 28 F Supp 689.

24. Ala—Carlisle v Godwin, 68 Ala 137
29 C J p 789 note 3

25. Iowa—Bridgman v Wilcut, 4 Greene 563
29 C J p 789 note 4

26. S D—Nichols & Shepard Co v Cunningham, 94 N W 389, 16 S D 475
29 C J p 789 note 6

27. Cal—In re Carraghar, 183 P 161, 181 Cal 15
29 C J p 789 note 7

Homestead law held not repealed by implication
Minn—Bowers v Norton, 218 N W 108, 173 Minn 576
S D—Jensen v Griffin, 190 N W 319, 46 S D 55

28. La—Commercial Bank of Arcadia v Simmons 101 So 126, 156 La. 743—H G Smith & Sons v. Succession of Jenkins, 85 So 68, 147 La 437
Tex—Furtner v Edgewood Distilling Co., 41 S W 184, 16 Tex Civ App 359
Utah—In re Petersen's Estate, 93 P 2d 445, 449, 97 Utah 324, citing **Corpus Juris.**
29 C J p 790 notes 18, 19
Ownership by widow of other property as affecting her right to homestead see infra § 247
Personal property exemption in lieu of homestead see Exemptions § 7

Exemption of personalty may be supplemented by a homestead of realty—Dickinson v Haralson, 61 Ga 526—Eckols v. Reeves, 61 Ga 214

29. La—Abramson v Larabee, 74 So 162, 140 La 825

30. In Louisiana
(1) This is the rule under Const

§ 13. Existence of More than One Homestead

No claimant of homestead rights is entitled to two homesteads at the same time.

No claimant of homestead rights is entitled to two homesteads at the same time[31] Thus he cannot claim both a rural homestead and an urban homestead,[32] and, as appears infra § 40, he can claim but one business homestead If he already resides on a homestead acquired under the federal laws, he cannot claim another under the state laws[33] Further, where a husband has claimed a homestead, the wife cannot claim another in a separate property during his life,[34] nor can a husband who has a homestead in his wife's land claim another homestead in his own land[35] Claimant cannot retain the option of choosing between two homes, when either is seized by creditors[36]

Second homestead claimable Where the first homestead has ceased to be exempt because of abandonment[37] or the invalidity of the statute securing it,[38] or has been sold,[39] or has become liable for the owner's debts by dissolution of the family and the owner has remarried,[40] a second homestead may be claimed by him; and if a widow to whom a homestead has been set apart out of her deceased husband's estate afterward marries, she may claim a second homestead out of her second husband's property[41]

Other exemption not inconsistent. An exemption secured by bankruptcy proceedings will not interfere with the bankrupt claiming a homestead, as the former is for his own benefit, and the latter for the benefit of his family[42] Similarly it has been held that the exemption from execution of a miner's dwelling and mining claim not exceeding a certain value granted by statute does not conflict with a homestead claimed in the same property, although the property protected as a homestead exceeds in amount that exempted under such statute[43]

1921 art 11 § 1 par 3—Prudential Ins Co v Slagle, 166 So 673, 184 La 556—Commercial Bank of Arcadia v Simmons, 101 So 126, 156 La 743

(2) In the constitution of 1898 and of 1913, the stipulation was that a married man should not have the benefit of a homestead exemption if his wife owned and enjoyed property or means to the amount of two thousand dollars—Commercial Bank of Arcadia v Simmons, supra—29 C J p 790 note 21

(3) But a husband was not required as a condition precedent to his right to an allowance of homestead to prove that his wife did not own property exceeding that amount—Garner v Freeman, 12 So 767 118 La 184, 118 Am S R 361—Garnier v Joffrion, 2 So 897, 39 La Ann 884.

31. Ill—Rasmussen v Rasmussen, 13 N E 2d 166, 368 Ill 137
Mich—Kleinert v Lefkowitz, 259 N W 871, 271 Mich 79
Mo—Palmer v Omer, 295 S W 123, 316 Mo 1188
Neb—Hawley v Arnold, 288 N W 823, 137 Neb 238—Berggren v Bliss, 241 N W 544, 122 Neb 801—Hair v Davenport, 103 N W 1042, 74 Neb 117
N D—Ruble v Grafton Nat Bank of Grafton, 250 N W 784, 64 N D 129
Okl—Glaze v Drawver, 117 P 2d 544, 189 Okl 402—Preston v Ottawa County Nat Bank, 280 P 581, 138 Okl 133—Cooper v Long, 220 P 610, 93 Okl 239
S C—Lanham v Glover, 24 S E 49, 46 S C 65
Tex—Silvers v Welch, 91 S W 2d 686, 127 Tex 58, affirming Welch v Silvers, Civ App, 59 S W 2d 879—Tide Water Oil Co v Ross, Civ App, 123 S W 2d 479, affirmed Ross v Tide Water Oil Co, 145 S W 2d 1089, 136 Tex 66—Panhandle Const Co v Continental Southland Savings & Loan Ass'n, Civ App, 110 S W 2d 632, error dismissed—Wallingford v Bowen, Civ App, 104 S W 2d 188—Rockett v Williams, Civ App, 78 S W 2d 1077—Evans v Galbraith-Foxworth Lumber Co, Civ App, 51 S W 2d 831, error dismissed—Purdy v Grove, Civ App, 35 S W 2d 1078, error refused—Wilson v Levy, Civ App, 13 S W 2d 971—First Nat Bank v Wallace, Civ App, 13 S W 2d 176, reversed on other grounds Wallace v First Nat Bank, 35 S W 2d 1036, 120 Tex 92—Grimes v Cline, Civ App, 300 S W 235 Elliott Lumber Co v Mitchell, Civ App, 241 S W 221, modified on other grounds Clem Lumber Co v Elliott Lumber Co, Com App, 251 S W 935
Vt—In re Wolff's Estate, 182 A 187, 108 Vt 54
29 C J p 790 note 23

Business and residential homestead

There can be but one homestead which is a unit, but it may consist of a business homestead and a residential homestead—Scarborough v Home Owners' Loan Corporation, Tex Civ App, 161 S W 2d 886, error refused—29 C J p 790 note 26
Business homestead generally see infra § 40

32. U S—In re Eikel, D C Tex, 283 F 285, reversed on other grounds, C C A Robinson v Eikel, 285 F 732, certiorari denied Eickel v Robinson, 43 S Ct 702, 262 U S 754, 67 L Ed 1216
Tex—Wallingford v Bowen, Civ App, 104 S W 2d 188—Realty Trust Co v Koger, Civ App., 70 S W 2d 448, error refused—First Nat Bank v Wallace, Civ App, 13 S W 2d 176, reversed on other grounds Wallace v First Nat Bank, 35 S W 2d 1036, 120 Tex 92—Ran v City Nat. Bank of Decatur, Civ App, 272 S W 510
29 C J p 790 note 24
Rural and urban homesteads generally see infra § 53

33. S D—Hesnard v Plunkett, 60 N W 159, 6 S D 73

34. Ga—Neal v Sawyer, 62 Ga 352

35. Neb—Berggren v Bliss, 241 N W 544, 122 Neb 801
29 C J p 790 note 29

36. Neb—Berggren v Bliss, supra—Hair v Davenport, 103 N W 1042, 74 Neb 117
29 C J p 791 note 30

37. Necessity of abandonment

Abandonment of an existing homestead in actual use is a condition precedent to the acquisition of another separate homestead—Covel v Mortgage Bond Co of New York, Tex Civ App, 124 S W 2d 204—Yates v Home Building & Loan Co, Tex Civ App, 103 S W 2d 1081—Neece v King, Tex Civ App, 73 S W 2d 550

38. Ga—Whittington v Colbert, 50 Ga 584

39. Ark—Gibbs v Adams, 89 S W 1008, 76 Ark 575

40. Ga—Shore v Gastley, 75 Ga. 813

41. Cal—Higgins v Higgins, 46 Cal 259
Ill—Smith v Rittenhouse, 103 N E 569, 260 Ill 599, L R A 1916A, 997

42. Ga—Holland v Withers, 76 Ga 667

43. Cal—Gaylord v Place, 33 P 484, 98 Cal. 472

§ 14. Separate Homesteads in Same Tract

Two separate homesteads cannot exist in the same land at one and the same time.

Two separate homesteads cannot exist in the same land at one and the same time[44] Thus an heir entitled to the reversion cannot acquire a homestead interest in the land during the existence of the widow's homestead therein[45] Where a widow was entitled to a homestead in the land of her husband, her son who did not live on the land had no such right[46]

§ 15. Duration and Termination

The homestead exemption is temporary and exists only so long as the conditions prevail under which it is allowed by the homestead laws

The homestead exemption is temporary and exists only so long as the conditions prevail under which it is allowed by the homestead laws[47] Generally, where the homestead right has once attached to property, this characteristic continues to adhere to the land until it is lost by death,[48] abandonment, see infra §§ 163–178, alienation,[49] dissolution of the family relationship, see infra §§ 158–161, estoppel, see infra §§ 191–195, or waiver, see infra §§ 179–186 The right to exemption may also be terminated when claimant ceases to be a bona fide resident of the state[50] If the exemption attaches to any estate less than a fee, it will not last beyond the termination of such estate[51] However, a homestead right acquired by one in land occupied by him as a tenant is not destroyed by his acquisition of the fee,[52] and a mere temporary loss of status as head of a family may not affect the homestead right[53]

The duration and termination of survivors' rights in the homestead are considered infra §§ 271–277.

B PERSONS ENTITLED TO HOMESTEAD

§ 16. In General

Such, and only such, persons as are within the contemplation of the constitutional or statutory provisions relating to a homestead are entitled to the benefit of such provisions

The benefit of the homestead provisions is available to,[54] and only to,[55] such persons as are within the contemplation of the constitutional or statutory

44. Ill—Johnson v Muntz, 4 N E 2d 826, 364 Ill 482
Neb—Luenenborg v Luenenborg, 259 N W 649, 128 Neb 624
Tex—Johnson v Prosper State Bank, Civ App, 125 S W 2d 707, affirmed 138 S W 2d 1117, 134 Tex 677—Turner v Miller, Civ App, 255 S W 237
29 C J p 791 note 39
But where a son and his family lived with his mother in a house belonging to the latter under an agreement by which the mother agreed to will the property to her son, it was held, in a suit by the mother to set aside the agreement, that the property was as much the homestead of the son and his family as of the mother—Smith v Smith, 201 P 75, 109 Kan 584
Husband's right of homestead in property owned by wife see infra § 90
Lessee's right of homestead in property occupied by lessor as a homestead see infra § 85

45. Ill—Brokaw v Ogle, 48 N E 394, 170 Ill 115
Ky—Merrifield v Merrifield, 82 Ky 526

46. Ky—People's Nat Bank v Kulmer, 159 S W 809, 155 Ky 359

47. Ala—People's Bank of Red Level v Barrow & Wiggins, 94 So 600, 208 Ala 433
Fla.—Fidelity & Casualty Co of New York v Magwood, 145 So 67, 107 Fla 208
S D—In re Clouse's Estate, 257 N W 106, 63 S D 147
29 C J p 791 note 43

"Pony" homestead
Homestead exemption being to family as unit, five additional acres allowed for each child under sixteen merely increases allowance to family, and homestead right in entire homestead tract is not terminated until every child has reached majority—Rogers v Kimsey, 171 S E 707, 177 Ga 839

48. Tex—Posey v Commercial Nat Bank Com App, 55 S W 2d 515, reversing Commercial Nat Bank of San Antonio v Posey, Civ App, 34 S W 2d 678

49. U S—Evans v Mills, C C A Tex, 67 F 2d 840
Okl—Marathon Oil Co v Western Oil & Drilling Co, 89 P 2d 939, 185 Okl 53—Lane v Amis Bros, 43 P 2d 73, 171 Okl 593—Brunhoeber v Davis, 30 P 2d 669, 167 Okl 484—German State Bank of Elk City v Ptachek, 169 P 1094, 67 Okl 176
Tex—Posey v Commercial Nat Bank, Com App, 55 S W 2d 515, reversing Commercial Nat Bank of San Antonio v Posey, Civ App 34 S W 2d 678
Conveyance as abandonment of homestead see infra § 168
Transfer or encumbrance of homestead generally see infra §§ 123–156

50. Ala—Cofer v Scroggins, 13 So 115, 98 Ala 342, 39 Am S R 54

51. Ill—Berry v Heiser, 111 N E. 99, 271 Ill 264
29 C J p 791 note 45

52. Acquisition of fee on death of owner
Homestead right, acquired by one occupying his father's farm with his family, was not destroyed by his acquisition of fee on father's death—Wallace v First Nat Bank 35 S W 2d 1036, 120 Tex 92, reversing First Nat Bank v Wallace, Civ App, 13 S W 2d 176—First Nat Bank v Jones, Tex Civ App, 59 S W 2d 1103

53. La—Hebert v Mayer, 20 So 170, 48 La Ann 938
29 C J p 791 note 46

54. La—Milliken & Farwell v Rivet, 6 La App 457
Utah—Zuniga v Evans, 48 P 2d 513, 87 Utah 198

55. La—Washington Bank & Trust Co v Carrier, 152 So 560, 178 La. 902
Miss—Kimbrough v Powell, 108 So 498, 143 Miss 498
Utah—Zuniga v Evans, 48 P 2d 513, 87 Utah 198, 101 A L R 532
29 C J p 791 note 49

One of the conditions which must coexist with others, such as those relating to the ownership, occupan-

provisions. One of the objects of the homestead provisions being the protection of the family, see supra § 2, it is generally held that a homestead can be reserved only for the benefit of a family,[56] but usually the right to claim the exemption is given in terms, not to a family, but to the head of a family, or to a householder or housekeeper with or having a family, see infra § 24, and a few homestead provisions are so worded and construed as to extend the homestead privilege to a person irrespective of whether or not he has a family or dependents, see infra §§ 25, 27, 28

§ 17. Citizenship

Unless expressly required by constitutional or statutory provision, citizenship is not necessary to entitle a resident of the state to the benefit of a homestead exemption

Where the constitution or statute requires residence, see infra § 18, but is silent as to political status, all residents of the state are entitled to the benefit of the homestead exemption, whether or not entitled to the political and civil rights of citizens,[57] and nonresident aliens are not so entitled[58] Under express provisions that the right shall be extended only to those who are both residents and citizens, citizens only are entitled to the benefit of the exemption[59] It has been held that the term "citizens of the state" is not broad enough to include all residents or inhabitants of the state,[60] but there is also contrary authority[61]

§ 18. Residence

It is agreed that, to obtain the benefit of a homestead exemption provided for by the laws of a particular state, a debtor must be an actual resident of that state; but, owing to a difference in statutory provisions, there is a lack of agreement as to the necessity of residence or actual presence of the wife or family of the debtor in the state.

Residents of the state only are entitled to the benefit of the homestead exemption created by its laws, whether or not these laws expressly limit it to residents[62] Residence, under the homestead laws, requires actual presence within the state, constructive residence will not suffice,[63] nor will mere intention to become a resident and to abandon a residence in another state give to a person the right to claim the homestead exemption.[64] On the other hand, daily residence is not essential,[65] nor is a temporary absence with intent to return precluded,[66] and it has been held that an intention to remain permanently within the jurisdiction is not required,[67] provided the debtor actually occupies the premises as his home[68] In any event, permanent residence in the state is sufficient whether or not, under nice distinctions, the place where the home owner lives is called his domiciliary residence or merely his residence[69] So too it is held in some states that actual residence in the state is sufficient, notwithstanding legal domicile is in another state,[70] and, conversely, that legal domicile in the state is insufficient where actual residence at the time is in another state,[71] but in other states the distinction between domicile and actual residence is not recognized in applying the homestead laws[72]

Although citizenship is not essential, see supra § 17, it is one of the factors to be considered in de-

ency and limited value of the property, at the very time the claim for homestead exemption is propounded is that the debtor must have a family or person or persons dependent on him for support —Brantley v Pruitt, 111 So 601, 175 La 879

Corporation may not claim a homestead —Sugg v Pollard, 115 S E 153, 184 N C 494

Elderly persons

The fact that judgment debtors claiming a homestead right in land levied on were elderly persons could not be considered in determining the rights of the parties —Cabler v Alexander, 224 P 1076, 111 Or 257

56. Utah —Zuniga v Evans, 48 P 2d 513, 87 Utah 198, 101 A L R 532
29 C J p 791 note 52

57. U S —Croker v Croker, C C A Fla, 51 F 2d 11
Neb —Engen v Union State Bank of Harvard, 236 N W 741, 121 Neb 257, certiorari denied 52 S Ct 33, 284 U S 655, 76 L Ed 555.
29 C J p 792 note 80.

58. Neb —Engen v Union State Bank of Harvard, supra

59 Miss —Meyer Bros Drug Co v Fly 63 So 227, 105 Miss 752
29 C J p 792 note 82

60 Va —Lindsay v Murphy, 76 Va 428

61. Ark —McKenzie v Murphy, 24 Ark 155

62. U S —Croker v Croker, C C A Fla, 51 F 2d 11
Mich —Leonetti v Tolton, 250 N W 512, 513, 264 Mich 618, 92 A L R 1050 quoting **Corpus Juris.**
S C —Ex parte Morrow, 190 S E 506, 183 S C 170, 110 A L R 898—Dorn v Stidham, 137 S E 331, 139 S C 66
Utah —U S Building & Loan Ass'n v Midvale Home Finance Corporation, 46 P 2d 672, 86 Utah 522, denying rehearing 44 P 2d 1090, 86 Utah 506
29 C J p 792 note 58
Residence as sole requisite see infra § 28

63 S C —Ex parte Morrow, 190 S E 506, 183 S C 170, 110 A L R 898
29 C J p 792 note 57

64. Mich —Leonetti v Tolton, 250 N W 512, 513, 264 Mich 618 92 A L R 1050, quoting **Corpus Juris.**
29 C J p 792 note 59

65 Fla —Collins v Collins, 7 So 2d 443, 150 Fla 374

66. Fla —Collins v Collins, supra
29 C J p 792 note 58 [c]

67. Cal —Dawley v Ayers, 23 Cal 108

68. Cal —Dawley v Ayers, supra

69. U S —Croker v Croker, C C A Fla, 51 F 2d 11

70. N C —Fulton v Roberts, 18 S E. 510, 113 N C 421
29 C J p 792 note 62 [a] (2)

71. N C —Fulton v Roberts, supra —Lee v Moseley, 7 S E 874, 101 N C 311, 2 L R A 106

72. Va —Lindsay v. Murphy, 96 Va 428.

termining the question of permanent residence vel non within the state [73]

Removal from the state as an abandonment of a homestead is discussed infra §§ 165, 166, occupancy of the property claimed as exempt infra §§ 32–41, and the necessity of use for residential purposes of property claimed as exempt infra § 54

Residence of wife Under some statutes a nonresident wife acquires no interest whatever in premises occupied by her husband as a homestead,[74] and this is true even though she intends to become a resident of the state where the intent is not carried out by actual removal to the state [75] Under other statutes she acquires only such homestead rights as result from and rest on the homestead rights of her husband, and if he acquires none she has none [76] It has been held that if a woman who resides in one state marries a man who resides and continues to reside in another state, but retains her actual residence in her own state, she does not cease to be a resident of the latter state, so as to prevent her claiming the benefit of the homestead laws [77] Whether consent or joinder of a nonresident wife is essential to the conveyance or encumbrance of a homestead by her husband is discussed infra § 130, and the rights of a surviving wife as dependent on her residence, or the residence of her deceased husband, in the state infra § 243

Residence of family It has been held that the actual personal presence of the debtor's family in the state as residents with him upon the land is not necessary to perfect the right in him, as his domicile ordinarily is deemed to be theirs,[78] but under some statutes if he leaves his family in another state, with no intention of bringing them to him, he is not entitled to the benefit of the homestead laws,[79] nor is he so entitled if the future removal of his family into the state of his residence is wholly uncertain,[80] and intent alone to bring the family into the state within a reasonable time is insufficient to bring the claimant within either the letter or spirit of the homestead laws [81]

§ 19. Ownership and Occupancy of Land

The occupancy of property claimed as a homestead is discussed infra §§ 32–41, and the ownership of, or estate or interest in, such property infra §§ 78–92

Examine Pocket Parts for later cases.

§ 20. Insolvency

Insolvency is not necessary to entitle a person to claim a homestead exemption.

In order that a person may be entitled to claim a homestead exemption, he need not be insolvent [82] A bankrupt's right to exemption of his homestead is considered in Bankruptcy § 498

§ 21. Moral Character of Claimant

No moral qualifications are required of a claimant of a homestead exemption

No personal qualifications touching the moral character of the claimant are prescribed by the homestead constitutional and statutory provisions and even those who are vicious, criminal, or immoral are not for that reason deprived of the protection given by these provisions [83] The unlawful use of premises is discussed infra § 39

§ 22 Particular Statutory Designations

The construction and application of constitutional and statutory designations of the particular person or persons who may claim the benefit of a homestead are considered infra §§ 23–28

Examine Pocket Parts for later cases

§ 23. —— Family

Under any of the homestead provisions employing the word "family," the homestead right cannot originate without the existence of a family, and there is no family, within the meaning of such provisions, unless two or more persons, lawfully and otherwise than under a mere contract relation, live together under one head or manager, and there is a legal or moral obligation on the part of one to support the others or some of them, and a corresponding dependence, partial or total, on the part of such others

When applicable, constitutional or statutory provisions exempting the homestead of a family from

73. U S —Croker v Croker, C C A Fla, 51 F 2d 11

74. Mich —Leonetti v Tolton, 250 N W 512, 264 Mich 618, 92 A L R 1050

29 C J p 792 note 65

75. Mich —Leonetti v Tolton, supra

76. Kan —Koons v Rittenhause, 28 Kan 359

S D —Clark v. Evans, 60 N.W. 862, 6 S D. 244.

77. Kan —Fish v Street, 27 Kan 270

78. Ark —Johnston v Turner, 29 Ark 280

Iowa —Williams v Swetland, 10 Iowa 51

Whether family must live with debtor on premises to make him head of family see infra § 24 c

79. Ill — Rock v Haas, 110 Ill 528

Kan —Farlin v Sook, 26 Kan 397

80. N D —Tromsdahl v Nass, 146 N W 719, 27 N D 441, 52 L R A,N S, 746

29 C J p 792 note 76

81. N D —Tromsdahl v Nass, supra

82. U S —In re Henkel, D C Cal, 11 F Cas No 6 362, 2 Sawy 305, reversing 11 F Cas No 6,361, 2 Nat Bankr Reg 546

83. Cal —Harlan v Schulze, 94 P. 379, 7 Cal App 287.

29 C J p 793 note 91.

forced sale will be accorded effect.[84] As such provisions do not confer the exemption on the head of the family as such, who is the head of the family is not the vital question,[85] but in some homestead cases decided in states where such provisions exist reference is made to the head of a family,[86] as in stating what is necessary to constitute a family, as discussed in this section, or in giving effect to a statute conferring the right to select the homestead on the head of the family, as discussed infra § 47 While a majority of the homestead provisions do not confer the exemption directly on the family, but rather on the head of a family, or a householder or housekeeper with or having a family, see infra § 24 a, nevertheless, under any of the homestead provisions in which the word "family" is used, the homestead right, with its exemptions from forced sale, cannot originate without the existence of a family[87] or a family relationship or status.[88] It is said that the word "family" is used in such provisions in a restricted, rather than in a general, sense,[89] but it is also said that, while originally the word was used in a very restricted sense, it has, by gradual evolvement, come to have a much broader and more comprehensive meaning in the interpretation and application of homestead laws[90] Except where it is otherwise provided, and the case is within such provision,[91] to constitute a "family" within the meaning of the homestead laws, there must be a group or collection of persons living together under one head or manager,[92] but this alone is not sufficient,[93] there must be a legal or moral obligation on the part of some one of such persons,[94] such as the one who occupies the position of head of the house[95] or family,[96] to support the others or some of them, and on the part of such others

84. Iowa—Solnar v Solnar, 216 N W 288, 205 Iowa 701
Okl—Oklahoma State Bank v Van Hassel, 114 P 2d 912, 189 Okl 48—State Nat Bank v Lokey, 240 P 101, 112 Okl 82
Tex—Crowder v Union Nat Bank of Houston, 261 S W 375, 114 Tex 34, answering certified questions, Civ App, 264 S W 791—Hutchenrider v Smith, Com App, 242 S W 204, reversing, Civ App, 228 S W 989

85. Iowa—Solnar v Solnar, 216 N W 288, 205 Iowa 701

86 Iowa—American Nat Bank of Alamosa, Colo v Wetherell, 200 N W 221, 198 Iowa 648
Tex—Robertson v Home Owners' Loan Corporation, Civ App, 147 S W 2d 949, error dismissed, judgment correct—Standard Paving Co v Tolson, Civ App 86 S W 2d 789—United Fidelity Life Ins Co v Plainview Building & Loan Ass'n, Civ App, 81 S W 2d 1092—Tanton v State Nat Bank of El Paso, Civ App, 43 S W 2d 957, affirmed 79 S W 2d 883, 125 Tex 16, 97 A L R 1093—Commercial Nat Bank v Posey Civ App, 34 S W 2d 678, reversed on other grounds Posey v Commercial Nat Bank, Com App, 55 S W 2d 515- Jeter v Jeter, Civ App, 281 S W 598
29 C J p 797 notes 40, 41, p 799 note 74

87. Miss—Kimbrough v Powell, 108 So 498, 143 Miss 498
Okl—Oklahoma State Bank v Van Hassel, 114 P 2d 912, 189 Okl 48—Greenshaw v Brown, 219 P 934, 96 Okl 11
Tenn—Hinds v Buck, 150 S W 2d 1071, 177 Tenn 444—Whitfield v People's Union Bank & Trust Co, 73 S W 2d 690, 168 Tenn. 24
Tex—Tanton v State Nat Bank of El Paso, Civ App, 43 S W 2d 957, affirmed 79 S W 2d 883, 125 Tex. 16, 97 A L R 1093—Woods v Alvarado State Bank, Civ App, 275 S W 187, reversed on other grounds 19 S W 2d 35, 118 Tex 586
29 C J p 795 notes 94, 95

Debtor must have family
Ky—Deboe v Brown, 22 S W 2d 111, 231 Ky 682

Widow
It has been said that a "family," in eyes of homestead law, continues to exist as long as widow lives and remains a widow—Miers v Miers, 133 So 133, 160 Miss 746
Necessity of householder having family see infra § 24

88. Tex—Plough, Inc, v Moore, Civ App, 56 S W 2d 681
Whether dissolution of family relationship terminates homestead right see infra §§ 158–161

89 Utah—Zuniga v Evans, 48 P 2d 513, 87 Utah 198, 101 A L R 532

90. Ky—Owens v Altsheller & Co 93 S W 2d 844, 263 Ky 727

91. Iowa—Richman v Ady, 232 N W 813, 211 Iowa 101
29 C J p 793 note 97 [a]

92 Iowa—Solnar v Solnar, 216 N W 288, 205 Iowa 701
Utah—Zuniga v Evans, 48 P 2d 513, 87 Utah 198, 101 A L R 532
29 C J p 793 note 98

Necessity of head
(1) Word "family," as used in homestead law, does not mean mere aggregation of individuals occupying same home, but there must be one whom law designates or recognizes as head of family—Owens v Altsheller & Co, 93 S W 2d 844, 263 Ky 727

(2) To constitute "family" within homestead statute, there must be a head who has right, at least in limited way, to direct and control those gathered into household.

Ariz—Lobban v Vander Vries Realty & Mortgage Co, 60 P 2d 933, 48 Ariz 180
Okl—Union Trust Co v Cox, 155 P 206, 55 Okl 68, L R A 1917C, 356

93 Ill—Logue v Von Almen, 40 N E 2d 73, 379 Ill 208, 140 A L R 251—Rock Island Bank & Trust Co v Lamont, 198 N E 430, 361 Ill 432
Head of family or householder or housekeeper with or having family see infra § 24

94. Iowa—Poffinbarger v Administrator of Poffinbarger's Estate, 221 N W 550, 206 Iowa 961—Sheeby v Scott, 104 N W 1139, 128 Iowa 551, 4 L R A, N S, 365
Tex—L E Whitham & Co v Brigg's Estate, Com App, 58 S W 2d 49, reversing L E Whitham & Co v Briggs, Civ App, 41 S W 2d 150—Elliott v Texas, Pacific Coal & Oil Co, Civ App, 19 S W 2d 442, affirmed, Com App, 29 S W 2d 982

95. Ill—Logue v Von Almen, 40 N E 2d 73, 379 Ill 208, 140 A L R 251—Rock Island Bank & Trust Co v Lamont, 198 N E 430, 361 Ill 432

96. Ariz—Lobban v Vander Vries Realty & Mortgage Co, 60 P 2d 933, 48 Ariz 180
Ky—Owens v Altsheller & Co, 93 S W 2d 844, 263 Ky 727
Okl—Union Trust Co v Cox, 155 P 206, 55 Okl 68, L R A 1917C, 356.
Tex—Roco v Green, 50 Tex 488—United Fidelity Life Ins Co v Plainview Building & Loan Ass'n, Civ App, 81 S W 2d 1092

Family relation exists where there is legal or moral obligation on head of family to support the other members, and there is dependence on such members for support—Standard Paving Co v Tolson, Tex Civ App, 86 S W 2d 789.

a corresponding state of dependence,[97] which dependence, however, need not be total or absolute.[98] The term does not embrace a single man or woman, without any person dependent on him or her,[99] a person living with a child he or she has taken to raise but which he or she is under no obligation of any character to support,[1] a widower living with a married daughter not legally separated from her husband and receiving some support from him,[2] a mother and adult son where each contributes to their common support,[3] or persons lawfully residing together, but without being related or in any wise connected,[4] and it has been held that a family cannot be comprised of cousins [5]

Number of persons While there must be at least two persons,[6] there need not be more than two persons [7]

Good faith and legality of relation. A person to be a member of a family must be a member in good faith [8] A family cannot consist of a man and a woman unlawfully married, or living together in adultery [9]

Social or contractual status or relation A social,[10] rather than a contractual,[11] status is essential to the existence of a family within the meaning of a homestead law, a collection of persons who sustain a mere contract relation toward each other is not a family, although the persons may live together and be under one head [12]

Particular classes of persons included Where the requisites of a family, within the meaning of a homestead law, exist, a family may be composed of, or a family relation may exist between a brother and sister,[13] a divorced man and his chil-

Necessity of obligation to support others, and dependence of others, to constitute person head of family, or householder or housekeeper with or having family see infra § 24

97. Ariz—Lobban v Vander Vries Realty & Mortgage Co, 60 P 2d 933, 48 Ariz 180
Ill—Logue v Von Almen, 40 N E 2d 73, 379 Ill 208, 140 A L R 251
Iowa—Poffinbarger v Administrator of Poffinbarger's Estate, 221 N W 550, 206 Iowa 961—Sheeby v Scott, 101 N W 1139, 128 Iowa 551, 4 L R A,N S, 365
Tex—Roco v Green, 50 Tex 488—L E Whitham & Co v Briggs' Estate, Com App, 58 S W 2d 49, reversing L E Whitham & Co v Briggs, Civ App, 41 S W 2d 150—United Fidelity Life Ins Co v Plainview Building & Loan Ass'n, Civ App, 81 S W 2d 1092 Plough, Inc, v Moore, Civ App, 56 S W 2d 681
29 C J p 793 note 98 [a], [b]

Corresponding state of at least partial dependence is essential—Union Trust Co v Cox, 155 P 206 55 Okl 68, L R A 1917C, 356

Living together without dependence Where relatives live together because such arrangement is more convenient or economical, or for reasons of friendship or affection, such relation does not constitute them a family within a homestead law, since there must be element of dependence—Rock Island Bank & Trust Co v Lamont, 198 N E 430, 361 Ill 432

98. Iowa—In re McClain's Estate, 262 N W 666, 220 Iowa 638—Poffinbarger v Administrator of Poffinbarger's Estate, 221 N W 550, 206 Iowa 961.
Tex—Central Life Assur Soc (Mutual) v Gray, Civ App, 32 S W 2d 259, error refused

99. Tex—Keltner v Glenn, Civ App, 81 S W 2d 1051
29 C J p 793 note 99

1. Tex—Mullins v Looke, 27 S W 926, 8 Tex Civ App 138

Mere verbal gift of child to another will not create legal or moral obligation to support child entitling such other to homestead exemption—Elliott v Texas Pacific Coal & Oil Co, Tex Civ App, 19 S W 2d 442, affirmed, Com App 29 S W 2d 982

2. Ky—Louisville Banking Co v Anderson, 44 S W 636, 19 Ky L 1839

3. Tex—L E Whitham & Co v Briggs' Estate, Com App, 58 S W 2d 49, reversing L E Whitham & Co v Briggs, Civ App, 41 S W 2d 150

4. U S—Bailey v Comings, C C Mo, 2 F Cas No 733
29 C J p 793 note 3

5. Okl—Union Trust Co v Cox, 155 P 206, 55 Okl 68, L R A 1917C, 356
29 C J p 793 note 5

6. Fla—Moorhead v Yongue, 183 So 804, 134 Fla 135, 118 A L R 1377 Whidden v Abbott, 168 So 253, 124 Fla 293—Jordan v Jordan, 132 So 466, 100 Fla 1586—Davis v Miami Beach Bank & Trust Co, 128 So 817, 99 Fla 1282—Johns v Bowden, 66 So 155, 68 Fla 32
Miss—Patrick v Bank of Tupelo, 152 So 838, 169 Miss 157
Okl—Oklahoma State Bank v Van Hassel, 114 P 2d 912, 189 Okl 48—Greenshaw v Brown, 219 P 934, 96 Okl 11
Utah—Zuniga v Evans, 48 P 2d 513, 87 Utah 198, 101 A L R 532

7. Fla—Miller v Finegan, 7 So 140, 26 Fla 29, 6 L R A 813.
29 C J p 793 note 7

8. Fla—Adams v Clark, 37 So 734
Ga—Blackwell v Broughton, 56 Ga 390

9 Tex—Lane v Phillips, 6 S W 610, 69 Tex 240, 241, 5 Am S R 41
29 C J p 793 note 11

Bigamous marriage
Marriage before divorce from first husband, being void, conferred no rights on bigamous husband in property on which wife, to whom conveyed after second marriage, declared homestead for his and her joint benefit—Clendenning v Parker, 231 P 765, 69 Cal App 685

10. Ariz—Lobban v Vander Vries Realty & Mortgage Co, 60 P 2d 933, 48 Ariz 180
Okl—Union Trust Co v Cox, 155 P 206, 55 Okl 68, L R A 1917C, 356
Tex—Roco v Green, 50 Tex 488—United Fidelity Life Ins Co v Plainview Building & Loan Ass'n, Civ App, 81 S W 2d 1092

11. Tex—Roco v Green, 50 Tex 488—United Fidelity Life Ins Co v Plainview Building & Loan Ass'n, Civ App, 81 S W 2d 1092

12. Tex—Plough Inc, v Moore, Civ App, 56 S W 2d 681
29 C J p 794 note 61

13 Tex—Central Life Assur Soc (Mutual) v Gray, Civ App, 32 S W 2d 259, error refused
29 C J p 793 notes 98 [b], 14

Sister and dependent brother
Sister, owning property, and semi-invalid brother, who was cared for and supported by sister and younger sister, who contributed to household expenses, constituted family within homestead provision of constitution—Real Estate Land Title & Trust Co v Street, Tex Civ App, 85 S W 2d 341, error dismissed.

dren living with him,[14] a father and his child or children,[15] a father and his dependent adult daughter, who has been abandoned by her husband,[16] or who has abandoned her vocation to live with, and keep house for, her father;[17] a father-in-law and his dependent daughter-in-law,[18] a grandfather[19] or grandmother[20] and his or her grandchild or grandchildren, a guardian and his ward,[21] a husband and his children, deserted by the wife and mother,[22] a husband and wife,[23] a husband and wife and infant children,[24] a married woman and her dependent child or children, living apart from her husband but undivorced from him,[25] a mother and her children,[26] although the children are all of age,[27] a parent and an adopted child,[28] although there is also authority to the contrary,[29] a single man and his sister;[30] a single woman and two minor children of a deceased sister whom she supports at the request of the latter,[31] sisters living together,[32] a son and his mother and sister,[33] a son and his widowed mother,[34] an unmarried grandson and his aged grandmother,[35] an unmarried man and his dependent brother,[36] or his mother,[37] or his widowed mother and infant brothers and sisters,[38] or his widowed mother and sisters,[39] or his widowed sister and her children,[40] an unmarried woman and her dependent relatives,[41] a widow and her children,[42] or stepchildren,[43] or grandchildren,[44] or nephews or nieces,[45] or her son, his wife and children,[46] or the orphan children of a sister of her deceased husband,[47] or a widower and his dependent relative or relatives[48]

14. Tex—Sykes v Speer, Civ App, 112 S W 422

Divorced man and minor children living with him

Tex—Woods v Alvarado State Bank, Civ App, 275 S W 187, reversed on other grounds 19 S W 2d 35, 118 Tex 586

Divorced man and minor unmarried son

U S—In re Rhodes, D C Ohio, 109 F 117

Ohio—Kunkle v Reeser, 5 Ohio S & C P 422, 5 Ohio N P 401

15 Tenn—Hinds v Buck, 150 S W 2d 1071, 177 Tenn 411

29 C J p 794 note 17

Father and his illegitimate offspring

Ohio—In re Zerkle's Estate, 42 N E 2d 204 68 Ohio App 480

29 C J p 794 note 20

Father and dependent crippled adult son

Iowa—Poffinbarger v Administrator of Poffinbarger's Estate, 221 N W 550, 206 Iowa 961

Father and daughters caring for and supporting him

Tex—Hutchenrider v Smith, Com App, 242 S W 204, reversing, Civ App, 228 S W 989

16. Ky—Louisville Banking Co v Anderson, 44 S W 636, 19 Ky L 1839

17. Iowa—Fox v Waterloo Nat Bank, 102 N W 424, 126 Iowa 481

29 C J p 794 note 19

18. Ky—Ragsdale v Watkins, 76 S W 45, 25 Ky L 506

19. Fla—Adams v Clark, 37 So 734

29 C J p 794 note 17

20. Tex—Wolfe v Buckley, 52 Tex 641

29 C J p 794 note 22

21. Ga—Roundtree v Dennard, 59 Ga 629, 27 Am R 401—Roff v Johnson, 40 Ga 555

22. Ohio—Weber v Beier, 14 Ohio Cir Ct 277, 7 Ohio Cir Dec 381.

Tex—Dinwiddie v Tims, 114 S W 400, 52 Tex Civ App 72

23. Fla—Bigelow v Dunphe, 198 So 13, 144 Fla 330, denying rehearing 197 So 328 143 Fla 603

Tenn—Hinds v Buck, 150 S W 2d 1071, 177 Tenn 414

29 C J p 794 note 25

24. Ky—Holburn v Pfanmiller, 71 S W 940, 114 Ky 831, 24 Ky L 1613

25. Ky—Lee v Hughes, 77 S W 386, 25 Ky L 1201

After husband's disappearance

Iowa—Solnar v Solnar, 216 N W 288, 205 Iowa 701

26. Fla—Caro v Caro, 34 So 309, 45 Fla 203

27. Fla—Caro v Caro, supra

Mother and adult son living with her and contributing to her support

Okl—Carle v Bamberger, 158 P 599, 53 Okl 777

28 Tex—Chesnut v Specht, Civ App, 272 S W 830

29 C J p 794 note 31

29. U S—In re Lambson, C C S C, 14 F Cas No 8 029, 2 Hughes 233

30. Mo—January v Marler, 203 S W 817, 274 Mo 543

31 Iowa—Arnold v Waltz, 6 N W 40, 53 Iowa 706, 36 Am R 248

32. Tex—Standard Paving Co v Tolson, Civ App, 86 S W 2d 789—Texas Bank & Trust Co v Teich, Civ App, 287 S W 666

29 C J p 794 note 35

33. Ark—Baldwin v Thomas, 72 S W 53, 71 Ark 206

29 C J p 794 note 36

34. S C—Scott v Moseley, 32 S E 450, 54 S C 375

Utah—Bunker v Coons, 60 P 549, 21 Utah 164, 81 Am S R 680

35. Cal—Lakas v Archambault, 176 P 180, 38 Cal App 365

36. N D—Webster v McGauvran, 78 N W 80, 8 N D 274.

37. Mo—State v Kane, 42 Mo App 253

Utah—Bunker v Coons, 60 P 549, 21 Utah 164, 81 Am S R 680

38 U S—In re Morrison, D C Ark, 110 F 734, 6 Am Bankr 488

Mo—Broyles v Cox, 54 S W 488 153 Mo 242, 77 Am S R 714

39 Mo—Spengler v Kaufman, 46 Mo App 644

40. Mo—Wade v Jones, 20 Mo 75, 61 Am D 584

Tex—Horton v Gibson, Civ App 274 S W 292

41. Cal—Ellis v White, 17 Cal 73

29 C J p 794 note 47

Invalid sister

S C—Chamberlain v Brown, 11 S E 439, 33 S C 597

Nephews or nieces

Iowa—Arnold v Waltz, 6 N W 40 53 Iowa 706, 36 Am R 248

42. Ill—McNichols v McNichols, 132 N E 448, 299 Ill 362

Widow and her dependent child or children

Iowa—In re McClain's Estate, 262 N W 666 220 Iowa 638

29 C J p 794 note 48

Widow and partially dependent adult daughter

Ark—Yadon v Yadon, 151 S W 2d 969, 202 Ark 634

43 Ga—Holloway v Holloway, 12 S E 943, 86 Ga 576, 22 Am S R 481 11 L R A 518

44. Tex—Orange First Nat Bank v Sokolski, Civ App, 150 S W 312

45. Tenn—Ex parte Brien, 2 Tenn Ch 33

Tex—American Nat Bank v Cruger, 71 S W 784, 31 Tex Civ App 17

46. Ky—Riley v Smith, 5 S W 869, 9 Ky L 615

47. Tenn—Ex parte Brien, 2 Tenn Ch 33.

48. U S—In re Mussey, D C Tex, 179 F 1007

29 C J p 794 note 56.

§ 24. —— Head of Family, or Householder or Housekeeper with or Having Family

a. In general
b. Obligation to support and condition of dependence
c. Living together on premises claimed
d. Inclusion or exclusion of particular classes of persons

a. In General

Proper construction and effect will be accorded constitutional or statutory provisions designating the person entitled to a homestead exemption as the head of a family, a householder, a housekeeper, a householder having a family, or a housekeeper with a family. These designations are usually, although not always, considered synonymous to the extent of requiring a householder or housekeeper to be the head of a family.

Under the constitutional or statutory provisions of a number of states, it is necessary[49] and sufficient,[50] in so far as personal status is concerned, that the claimant of a homestead be the head of a family, under others it is necessary[51] and sufficient[52] that the claimant be a householder having a family, and under still others it is necessary[53] and sufficient[54] that the claimant be an actual bona fide housekeeper with a family. The necessity of the existence of a family is discussed supra § 23, and the construction and application of a statute designating a debtor having a family infra § 28.

To constitute a person a head of a family or a householder or a housekeeper, within the meaning of the homestead provisions, it is not necessary that such person should be a husband, wife, or parent,[55] or a husband, or father, or of the masculine gender,[56] but where the relation of husband and wife or parent and child does not exist it is said that the relation should be one in which a continuing personal authority and obligation rests on one for the welfare of the others who in law should, or in fact do, recognize him as the head of the family.[57]

Head of family. Who is the head of a family within the meaning of a homestead provision must be determined from the facts of each case.[58] The expression has been considered to mean the person who controls, supervises, and manages the affairs about the house,[59] and to refer to a person who

Mother-in-law
Ky.—Scholl v. Laurenz, 13 Ky.L. 971, 14 Ky.L. 228

Informally adopted niece
S.C.—Fant v. Gist, 15 S.E. 721, 36 S.C. 576

Unmarried daughter
Ohio.—Boettger v. Fischer, 8 Ohio Dec. (Reprint) 776, 9 Cinc.L.Bul. 337

Son and son's wife
Iowa.—Tyson v. Reynolds, 3 N.W. 169, 52 Iowa 431

49. U.S.—In re Beals, D.C.Idaho, 1 F.Supp. 27—In re Dendwiler & Fortson, D.C.Ga., 293 F. 762
Ariz.—Loblan v. Vander Vries Realty & Mortgage Co., 60 P.2d 933, 48 Ariz. 180
Fla.—Moorehead v. Yongue, 183 So. 804, 134 Fla. 135, 118 A.L.R. 1377—Whidden v. Abbott, 168 So. 253, 124 Fla. 293—Davis v. Miami Beach Bank & Trust Co., 128 So. 817, 99 Fla. 1282
S.C.—Ex parte Morrow, 190 S.E. 506, 183 S.C. 170, 110 A.L.R. 898—Dorn v. Stidham, 137 S.E. 331, 139 S.C. 66—Ex parte Sams, 119 S.E. 798, 126 S.C. 245
Wash.—Morley v. Morley, 230 P. 645, 131 Wash. 540
29 C.J. p. 795 note 71

Alternative requirement
(1) In Louisiana, under the constitution, it is essential to the exemption of a homestead that the debtor be the head of a family or a person having a mother or father or a person or persons dependent on him or her for support.—Washington Bank & Trust Co. v. Carrier, 152 So. 560, 178 La. 902—Prudential Ins. Co. of America v. Guillory, 145 So. 6, 175 La. 1058—Planters' Bank & Trust Co. v. Savant, 134 So. 394, 172 La. 464—Bank of Lafayette & Trust Co. v. Fabre, 126 So. 916, 169 La. 1185

(2) Application of provision relating to dependents see infra § 28

(3) Under the constitution of another state, it is essential to the acquisition of a homestead right or, after abandonment, the reacquisition thereof, that claimant be married or the head of a family.—Beeson v. Byars, 63 S.W.2d 540, 187 Ark. 966

50. U.S.—In re Bordelon, D.C.La., 2 F.2d 164, adhered to on rehearing 4 F.2d 285
Fla.—Osceola Fertilizer Co. v. Sauls, 123 So. 780, 98 Fla. 339
S.C.—In re Snoddy's Estate, 21 S.E.2d 198, 201 S.C. 11
Utah.—Allred v. Wood, 270 P. 1089, 72 Utah 427

Ceasing to be, but again becoming, head of family
Where creditors failed to enforce their claims against a debtor at a time when he had ceased to be the head of a family they cannot enforce their claims against his homestead after he has again become the head of a family.—Chafee v. Rainey, 21 S.C. 11
Statutory right of head of family to select homestead see infra § 47

51. Ill.—Logue v. Von Almen, 40 N.E.2d 73, 379 Ill. 208, 140 A.L.R. 251—Johnson v. Muntz, 4 N.E.2d 826, 364 Ill. 482—Rock Island Bank & Trust Co. v. Lamont, 198 N.E. 430, 361 Ill. 432
Miss.—Moore v. Sykes' Estate, 149 So. 789, 167 Miss. 125—Kimbrough v. Powell, 108 So. 498, 143 Miss. 498
29 C.J. p. 795 notes 74, 94

Under provisions conferring exemption on householder or head of a family, the householder must have a family.—Calhoun v. Williams, 32 Gratt. 18, 73 Va. 18, 34 Am.R. 759—29 C.J. p. 795 note 95

52. Ill.—Logue v. Von Almen, 40 N.E.2d 73, 379 Ill. 208, 140 A.L.R. 251

53 Ky.—Davis v. Dean, 33 S.W.2d 340, 236 Ky. 362
29 C.J. p. 795 note 71

54. Ky.—First Nat. Bank of Jackson v. Oliver, 150 S.W.2d 894, 286 Ky. 286—Owens v. Allsheller & Co., 91 S.W.2d 811, 263 Ky. 727

55 Mo.—Ridenour-Baker Grocery Co. v. Monroe, 43 S.W. 633, 142 Mo. 165
29 C.J. p. 795 note 76

56. S.C.—Dorn v. Stidham, 137 S.E. 331, 139 S.C. 66

57. Fla.—Whidden v. Abbott, 168 So. 253, 124 Fla. 293—Davis v. Miami Beach Bank & Trust Co., 128 So. 817, 99 Fla. 1282—Johns v. Bowden, 66 So. 155, 68 Fla. 32

58. Fla.—Hillsborough Inv. Co. v. Wilcox, 13 So.2d 448

59. Mo.—Ridenour-Baker Grocery Co. v. Monroe, 43 S.W. 633, 142 Mo. 165

keeps house and has living with him and is supporting some person or persons[60] whom it is his legal or moral duty to support, see infra subdivision b of this section The term means one of the persons composing the family and not two or more[61]

Householder or householder having a family While the ordinary meaning of "householder" is that such person is the head of a family, on whom the other members are dependent,[62] and hence usually does not embrace subordinate members of the family,[63] it has been held that the term "householder having a family" does not necessarily require a householder to be the head of a family[64] and that the exemption is given to a married woman in her separate property when occupied as a homestead by herself and her husband and children[65] As used in provisions conferring the exemption on a householder or head of a family, the term "householder" is held to mean the head of a family[66]

Housekeeper or housekeeper with a family As used in a statute conferring a homestead exemption on a housekeeper or head of a family, the word "housekeeper" is synonymous with "head of a family"[67] To be entitled to a homestead under a statute allowing a homestead to a "housekeeper with a family," a person must keep house in the state[68]

b. Obligation to Support and Condition of Dependence

In order to constitute a person a head of, or a householder having, or a housekeeper with, a family, there must be a condition of dependence on the part of the other members of the family on him and an obligation on his part to support them, but the support furnished may be partial and the obligation to furnish it may be moral or natural, rather than legal.

While there is some contrary authority,[69] and it is said that dependency is not the sole test,[70] it is generally considered that, in order to constitute one a head of a family, or a householder or housekeeper with or having a family, within the homestead provisions, there must be a condition of dependence on the part of the other members on him, and either a legal or a moral obligation on his part to support them, and a mere aggregation of persons living together under one head is not enough,[71] although it is not necessary for them to receive all of their support from the debtor,[72] and the extent to which contributions are made to dependents need not be considered,[73] especially in a state where the constitution makes a distinction between the head of a family and a person having another person or persons dependent on him or her for support, the head of a family being entitled to the exemption under such provision regardless of how much or little he contributes to the support of dependents[74] If the persons living with the debtor receive no support from him they are not dependents,[75] and a person who is himself a dependent is not entitled to a homestead as the head of a family or a householder having, or a housekeeper with, a family[76] A person who keeps a boarding house is not the head of a family, where there are no other persons besides the boarders, that is, no other persons dependent on him or her for support[77]

Neb —Weatherington v Smith, 112 N W 566, 77 Neb 369

Person in authority

Under liberal construction of homestead laws, "head of a family" is one in authority where the status or relationship of the family exists —Yadon v Yadon, 151 S W 2d 969, 202 Ark 634

60. U S —In re Morrison, D C Ark, 110 F 734
29 C J p 795 note 79

61. Miss —Patrick v Bank of Tupelo, 152 So 838, 839, 169 Miss 157

62. Ill —Brokaw v Ogle, 48 N E 394 170 Ill 115

Similar statement

"Householder," in statute allowing homestead exemption to householder having a family, means a person who has a family whom he keeps together and provides for, and of which he is the head and master —Moore v Sykes' Estate, 149 So 789, 167 Miss 125

"Householder" and "head of a family" used interchangeably

Miss —Holsomback v Slaughter, 171 So 542, 177 Miss 553.

63. Ill —Brokaw v Ogle, 48 N E 394, 170 Ill 115

64. Ill —McNichols v McNichols, 132 N E 448, 299 Ill 362 -Zander v Scott, 46 N E 2, 165 Ill 51

65. Ill —Zander v Scott, supra

66. Va —Calhoun v Williams, 32 Gratt 18 73 Va 18, 34 Am R 759

67 Mo —Gammon v McDowell, 298 S W 34, 317 Mo 1336

68. Ky —Rasco v Sheet, 8 Ky L 703
29 C J p 795 note 96

69. Iowa —Tyson v Reynolds, 3 N W 469, 52 Iowa 431
29 C J p 798 note 65

70. Miss —Holsomback v Slaughter 171 So 542, 177 Miss 553

There is no invariable test based solely on dependence —Hillsborough Inv Co v Wilcox Fla, 13 So 2d 448

71. Ky —Deboe v Brown, 22 S W 2d 111, 231 Ky 682
29 C J p 798 note 67

Importance of dependency

In determining whether one who claims a homestead exemption was the head of a family, importance is attached to the question of dependency —McGookey v Winter, 46 N E 2d 84, 381 Ill 516

Obligation to support, and corresponding condition of dependence as necessary to existence of family see supra § 23

72. U S —In re Bordelon, D C La, 2 F 2d 164, adhered to on rehearing 4 F 2d 285
29 C J p 799 note 68

73. La —Thompson v Succession of Gow 125 So 588 169 La 546— Thompson v Succession of Gow, 123 So 616, 168 La 909

74. La —Garner v Freeman, 42 So 767, 118 La 184, 118 Am S R 361

75 Ill —Holnback v Wilson, 42 N E 169, 159 Ill 148
29 C J p 799 note 69

76. Ill —Logue v Von Almen 10 N E 2d 73, 379 Ill 208, 140 A L R 251
Ky —Deboe v Brown, 22 S W 2d 111, 231 Ky 682

77. Tex —Roco v Green, 50 Tex 483 —Whitehead v Nickelson, 48 Tex 517.

Sufficiency of natural or moral obligation In a few cases it has been held, or said, that there must be a legal obligation to support on the part of a person to constitute him the head of a family, as in the case of the relation of husband and wife or parent and child,[78] but the weight of authority is in favor of the rule that a mere moral or natural obligation to support and a condition of dependence and actual support are sufficient[79]

c. Living Together on Premises Claimed

Under some, but not other, homestead provisions, it is essential to a successful claim of a homestead interest in certain premises, by reason of being the head of a family or within some similar statutory designation, that the dependents of the claimant live with him on such premises

While under some homestead laws actual occupancy of the premises by the family of the debtor with him may not be required to entitle him, as the head of a family, to a homestead,[80] provided the incidents of the family relation exist,[81] the general rule is that to qualify as a homesteader, by reason of being the head of a family or within some similar statutory designation, it is essential that the dependents of the claimant should live with him on the premises claimed as a homestead,[82] and hence one who does not maintain a home and live with those who are dependent on him is not entitled to a homestead[83]

A mere temporary separation or absence of the family will not take away the homestead character of the premises[84] Occupation by the wife and family in the absence of the husband is equivalent to occupation by the husband[85] It has been held that the owner of a house does not cease to be the head of a family because he has rented the house and farm to a tenant, and the tenant lives therein with his family, when the owner also lives there[86]

As appears infra subdivision d of this section, wherein applications of the foregoing rules to particular classes of persons are stated, the necessity of dependents living with the claimant of the homestead exemption is of more importance where the claimant is unmarried than where he is a husband obligated to support his wife or a divorced husband obligated to support minor children The necessity of the residence of the family within the state is discussed supra § 18

d. Inclusion or Exclusion of Particular Classes of Persons

(1) Husband or father
(2) Wife or mother
(3) Widower or widow
(4) Unmarried persons
(5) Other persons

(1) Husband or Father

A husband is usually considered to be the head of a family or to be within a similar statutory designation of the person entitled to a homestead, but whether or not a father or divorced husband is the head of a family within the meaning of homestead laws depends on the circumstances and the law in the particular jurisdiction, the most important circumstance generally being the existence or nonexistence of minor children for whose support he is liable

A husband is usually the head of a family, within the meaning of exemption laws,[87] and it is held

78. U S —In re Taylor, D C Ga , 23 F Cas No 13,755, 3 Nat Bankr Reg 157
29 C J p 799 note 75

79. La —Thompson v Succession of Gow, 125 So 588, 591, 169 La 546, quoting **Corpus Juris**—Thompson v Succession of Gow, 123 So 616, 617, 168 La 909, quoting **Corpus Juris**
Miss —Holsomback v Slaughter, 171 So 542, 177 Miss 553
29 C J p 799 note 76

80. U S – In re Bordelon, D C La , 2 F 2d 164, adhered to on rehearing 4 F 2d 285
Tenn —Hinds v Buck, 150 S W 2d 1071 177 Tenn 144
29 C J p 800 note 78 [a], [b]
Occupancy generally see infra §§ 32–41

81. Iowa —Linton v Crosby, 9 N W 311, 56 Iowa 386, 41 Am R 107
Living together as element of family relation see supra § 23
Necessity of occupancy by wife
(1) A "homestead" right may attach although the wife may never move upon the property, but it becomes a homestead from the time of its designation as such by the head of the family, and the homestead estate exists when the husband resides on the property even though the wife absents herself therefrom as long as the husband discharges his obligation to support her —First State Bank of Hubbard v Zeanon, Tex Civ App , 169 S W 2d 735
(2) Wife need not join husband in occupancy of land in order to complete dedication as family homestead —Borough v Pause, Tex Civ App , 21 S W 2d 69

82. Fla —Moorhead v Yongue, 183 So 804, 131 Fla 135, 118 A L R 1377
29 C J p 800 note 80

83. Mo —Elliot v Thomas, 143 S W 563, 161 Mo App 441
29 C J p 800 note 81

84. Miss —Roberts v Thomas, 48 So 408, 94 Miss 219, 136 Am S R 573
29 C J p 800 note 85

85 U S —Bartholomew v West C C Neb 2 F Cas No 1 071, 2 Dill 290
N H —Avery v Davis, 128 A 332 81 N H 414

86 Mo —Brown v Brown, 68 Mo 388

87 Fla —Nelson v Franklin, 12 So 2d 771
La —Reymond v Louisiana Trust & Savings Bank, 148 So 663, 177 La 409
Miss – Patrick v Bank of Tupelo, 152 So 838 169 Miss 157
Tenn —Whitfield v People's Union Bank & Trust Co , 73 S W 2d 690, 168 Tenn 24
29 C J p 795 note 5
Notwithstanding his reduced importance as a domestic factor, the husband is still the head of the family
Ga —Broome v Davis, 13 S E 749, 87 Ga 584
Miss —Patrick v Bank of Tupelo, 152 So 838, 839, 169 Miss 157, citing **Corpus Juris.**
Statutory right of husband, as head

that this is so although his wife, who constituted his family, has deserted him,[88] or lives apart from him,[89] or although he fails to support her and their children,[90] or even where he lives apart from her and fails to support her,[91] as the marital relation and his duty to support her still exist,[92] and it has been said he is still the head of the family although he is an invalid and she supports him.[93] Also a householder having a wife,[94] or a husband living and residing with his family,[95] is a householder having a family within the meaning of a homestead statute. Furthermore, a statute designating the person entitled to a homestead as a housekeeper with a family comprehends one who in good faith occupies premises as a homestead with his wife or wife and children,[96] or one who, having a wife and infant child, and a house which he has occupied as a homestead, induces a daughter, because of the infirmities of himself and wife, and their inability to provide for themselves, to move into the house with them, and to assume its expense and care.[97] One who lives with his wife on land is not deprived of his right to a homestead therein merely because he is on bad terms with her and does not cohabit with her,[98] or merely because he may leave home temporarily from time to time,[99] and, where his minor children live with him, a husband may acquire a homestead regardless of the enforced absence of the wife through her confinement in an asylum.[1]

A father may be entitled to a homestead exemption as the head of a family,[2] but a limit must necessarily be set to a claim of such exemption;[3] he is not allowed the exemption merely because he has children who have attained majority and left the paternal roof or have married and established homes of their own,[4] and he ceases to be the head of a family when the members of the family disperse and the husband and wife separate, each maintaining a separate existence independent of the other's authority.[5]

A divorced husband may be the head of a family under proper circumstances,[6] as where he has minor children who are actually living with him, notwithstanding their custody has been awarded to the divorced wife,[7] or, except under statutes contemplating residence of the minor child on the premises with him,[8] where he has a minor child for whose support he is liable, regardless of the custody of the child[9] or whether or not the child lives with him.[10] However, a man is not entitled to a homestead exemption where a divorce leaves him without a family of which he remains the head,[11] as where his only child is married and is a member of another family residing elsewhere.[12] One whose wife has secured a divorce because of his delinquencies cannot thereafter select a homestead in her land.[13]

of family, to select homestead see infra § 47

88. Ark.—Gates v. Steele, 4 S.W. 53, 48 Ark. 539
29 C.J. p. 796 note 6

89. Mo.—Brown v. Stratton, 8 Centr. L.J. 16

90. Mont.—Barry v. Western Assur. Co., 49 P. 148, 19 Mont. 571, 61 Am.St.R. 530
29 C.J. p. 796 note 8

91. S.C.—Appeal of Brookland Bank, 100 S.E. 156, 112 S.C. 400
29 C.J. p. 796 note 10

92. S.C.—Appeal of Brookland Bank, supra
29 C.J. p. 796 note 10 [a]

93. S.C.—Appeal of Brookland Bank, supra

94. Ill.—Kitchell v. Burgwin, 21 Ill. 40

95. Ill.—Johnson v. Muntz, 4 N.E.2d 826, 364 Ill. 482

96. Ky.—Stults v. Sale, 17 S.W. 148, 92 Ky. 5, 13 Ky.L. 337, 36 Am.St.R. 575, 13 L.R.A. 743
29 C.J. p. 796 note 14

97. Ky.—Holburn v. Pfanmiller, 71 S.W. 940, 114 Ky. 831, 24 Ky.L. 1613

98. Mont.—Barry v. Western Assur. Co., 49 P. 148, 19 Mont. 571, 61 Am.St.R. 530

99. Ky.—Carrington v. Herrin, 4 Bush 624
29 C.J. p. 800 note 84

1. Tenn.—Hinds v. Buck, 150 S.W.2d 1071, 177 Tenn. 444

2. Tenn.—Whitfield v. People's Union Bank & Trust Co., 73 S.W.2d 690, 168 Tenn. 21

Father of minor child, who, under the law of the state, has the right to support from him, is the head of a family, within the homestead exemption article of the state constitution, whether the child lives with him or not, and regardless of whether he contributes the whole or only a part of its support.—In re Bordelon, D.C.La., 2 F.2d 164, adhered to on rehearing 4 F.2d 285

3. La.—Washington Bank & Trust Co. v. Carrier, 152 So. 560, 178 La. 902

4. La.—Washington Bank & Trust Co. v. Carrier, supra

Father who lives with married son in a house built and controlled by the son, although on land owned by the father, and who contributes only as much of the family support as is necessary to his own maintenance, is not entitled to a homestead.—Powers v. Sample, 16 So. 293, 72 Miss. 187

5. Fla.—Jordan v. Jordan, 132 So. 466, 100 Fla. 1586

6. U.S.—In re Rhodes, D.C.Ohio, 109 F. 117
29 C.J. p. 796 note 15

7. Mont.—De Fontenay v. Childs, 19 P.2d 650, 93 Mont. 180
29 C.J. p. 796 note 15 [a]

8. N.D.—Holcomb v. Holcomb, 120 N.W. 547, 18 N.D. 561, 21 Ann.Cas. 1115

9. Fla.—Osceola Fertilizer Co. v. Sauls, 123 So. 780, 98 Fla. 339
Tex.—Commercial Nat. Bank v. Posey, Civ.App., 34 S.W.2d 678, reversed on other grounds Posey v. Commercial Nat. Bank, Com.App., 55 S.W.2d 515.—Jeter v. Jeter, Civ.App., 281 S.W. 598

10. U.S.—In re Bordelon, D.C.La., 2 F.2d 164, adhered to on rehearing 4 F.2d 285

11. Tex.—Tanton v. State Nat. Bank of El Paso, Civ.App., 43 S.W.2d 957, affirmed 79 S.W.2d 883, 125 Tex. 16, 97 A.L.R. 1093

12. Tex.—Tanton v. State Nat. Bank of El Paso, supra

13. Neb.—Klamp v. Klamp, 79 N.W. 735, 58 Neb. 748

(2) Wife or Mother

A wife or mother may or may not, according to the circumstances and the law of the particular state, be entitled to a homestead exemption as the head of a family, a householder having a family, or an actual bona fide housekeeper with a family

Inasmuch as the husband usually is deemed the head of the family, see supra subdivision d (1) of this section, as a rule, in the absence of constitutional or statutory provisions permitting a different conclusion, the wife, as long as her husband is living and there has been no separation, cannot claim a homestead in his property[14] This, it has been held, is the rule even though he fails to support her[15] She may not, under the circumstances, be entitled to a homestead exemption as the head of a family,[16] as where the family is supported by the husband[17] and she is living with him[18] or he has moved to another place for business reasons,[19] and she is not entitled to claim property in one county as a homestead where the residence and domicile of the husband and members of the family, other than herself, are in another county, and husband and wife are not legally separated[20] However, some constitutional or statutory provisions contemplate that the wife may in fact be the head of a family and as such head be entitled to homestead exemption rights[21] in realty owned by her, see infra § 90, and on which she lives with her husband and children,[22] or that the wife is entitled to such rights in property owned by her where she is an actual bona fide housekeeper with a family[23] Under the construction placed on some statutes a wife is entitled to interpose all claims of homestead which the husband could have interposed, where the husband has absconded,[24] has abandoned his family,[25] has become a fugitive from justice,[26] is imprisoned for crime,[27] or is under a disability,[28] provided the wife is otherwise qualified as a head of the family, a householder, or housekeeper, within the meaning of the homestead provisions[29] After a permanent separation of husband and wife,[30] even by agreement,[31] and his refusal or neglect to furnish her with a home or support, the wife will have the right to acquire and hold property in the same manner as though she were sole or had been divorced,[32] and if she purchases land and occupies it by herself and family as a homestead, she will be protected, under the statutes, in the same manner as any other householder[33] A married woman living with her minor son, apart from her husband but undivorced from him, is a "housekeeper with a family."[34] The homestead rights of a wife as such are discussed infra § 26, and the selection of a homestead by a wife infra § 47

A mother may be entitled to a homestead exemption where, in fulfillment of a natural or moral obligation, she is supporting adult children living with her[35] or temporarily confined in a hospital for the insane,[36] but not where she is separated from her husband, no other person resides with her, and no person is dependent on her[37]

(3) Widower or Widow

A widower or widow may be entitled to a homestead exemption as head of a family or as a householder hav-

14 U S—Rosenberg v. Jett, C C Ark, 72 F 90
29 C J p 796 note 21

15. Mont—Barry v Western Assur Co, 49 P 148, 19 Mont 571, 61 Am S R 530

16. Fla—Jones v. Federal Farm Mortg Corporation, 188 So 804, 138 Fla 65
29 C J p 796 note 21 [a]

17. La—Planters' Bank & Trust Co v Savant 134 So 394, 172 La 164—Bank of Lafayette & Trust Co v Fabre, 126 So 916 169 La 1185
29 C J p 796 note 21 [c] (1).

18. La—Payne v Phillips, 115 So 129 164 La 1015.

19. Fla—Jones v Federal Farm Mortg Corporation, 188 So 804, 138 Fla 65

20. Miss—Patrick v Bank of Tupelo, 152 So 838, 169 Miss 157

21. Fla—Nelson v Franklin, 12 So 2d 771—Bigelow v Dunphe, 198 So 13, 144 Fla 330, denying rehearing 197 So 328, 143 Fla 603—Jones v. Federal Farm Mortg Corporation, 188 So 804, 138 Fla. 65.

In Utah the husband is no more designated the head of the family than is the wife—Volker-Scowcroft Lumber Co v Vance, 88 P 896, 32 Utah 74, 125 Am S R 828

22. Fla—Bigelow v Dunphe 198 So 13, 144 Fla 330, denying rehearing 197 So 328, 143 Fla 603

Wife engaged in business in her own name
U S—Richardson v Woodward, Va, 104 F 873, 44 C C A 235, 5 Am Bankr 94
29 C J p 800 note 93

23. Ky—Brewer v Brewer, 105 S W 2d 582, 268 Ky 625

24. Ala—Cofer v Scroggins 13 So 115, 98 Ala 342, 39 Am S R 54

25. Utah—Thompson v Reynolds, 204 P 516, 59 Utah 416
29 C J p 796 note 25

26. Ark—Hollis v State, 27 S W 73, 59 Ark 211, 43 Am S R 28

27. Ala—Cofer v Scroggins, 13 So 115, 98 Ala 342, 39 Am S R 54

28. Ala—Cofer v Scroggins, supra

29. Ala—Cofer v Scroggins, supra Ark—Hollis v State, 27 S W 73, 59 Ark 211 43 Am S R 28

30 Ill—Kenley v Hudelson, 99 Ill 493, 39 Am R 31

31. Utah—Thompson v Reynolds, 204 P 516 59 Utah 416

32. Ill—Kenley v Hudelson, 99 Ill 493 39 Am R 31

Wife may purchase property and dedicate it to use as homestead where the husband has provided no other homestead for her use and, although husband and wife are not living together they are not divorced and the marital relation still exists between them—Texas Employers' Ins Co v Moore, Tex Civ App, 102 S W 2d 439, error dismissed

33. Ill—Kenley v Hudelson, 99 Ill 493, 39 Am R 31

34. Ky—Lee v Hughes, 77 S W 386, 25 Ky L 1201

35. Miss—Holsomback v Slaughter, 171 So 542, 177 Miss 553

36. Miss—Holsomback v Slaughter, supra

37. Ill—McGookey v Winter, 46 N E 2d 84, 381 Ill 516.

ing, or a housekeeper with, a family, but not where he or she has no child or other relative dependent on him or her for support.

A widower may be entitled to a homestead exemption as a head of a family or a householder or housekeeper with or having a family, as the case may be, within the meaning of the homestead provisions, where he has a child or children or other relatives dependent on him,[38] but not where he has no child or other relative dependent on him for support,[39] whether he is living alone[40] or with another person or persons.[41] So also a widow may be the head of a family within the meaning of homestead provisions,[42] as where she has children living with, and dependent on, her,[43] or she supports other dependent relatives, such as grandchildren,[44] grandchildren of her deceased husband by a former wife,[45] nephews or nieces,[46] nephews or nieces of her deceased husband,[47] or stepchildren.[48] A fortiori, a widow, when she is the head of a family, can claim a homestead in her own separate property.[49] However, a widow cannot claim a homestead as the head of a family unless she has a child or some other relative dependent on her for support,[50] and she is not entitled to a homestead under some statutes where she is not an actual bona fide housekeeper with a family[51] or a householder having a family.[52] The continuance of a homestead exemption in favor of a surviving spouse is considered infra §§ 243, 259.

(4) Unmarried Persons

An unmarried person is entitled to a homestead exemption as a head of, a householder having, or a housekeeper with, a family when, and only when, there is living with such person someone who is dependent on him or her for support and whom he or she is under a legal or natural duty to support.

Under statutes restricting the right to the head of a family or to a householder or housekeeper with or having a family, an unmarried man is not entitled to homestead exemption if there is no one dependent on him whom he is legally or morally bound to support,[53] or if persons whom he supports do not live with him,[54] but it is otherwise if he maintains a home and has living with him and supports persons who are dependent on him, and whom he is under such a duty to support, as a father, mother, sister, illegitimate child, or the like.[55] Likewise an unmarried woman is not entitled to a homestead as a head of a family or a householder or housekeeper with or having a family, if she has no person living with her who is dependent on her for support and whom she is under a legal or natural duty to support,[56] but it is otherwise if she has living with her and supports such a person, as a mother, an illegitimate minor child, or the like.[57]

(5) Other Persons

A son, grandson, grandmother, guardian, or imprisoned convict may, under proper circumstances, be the head of a family within the meaning of the homestead laws, but it is otherwise as to a person living in a house with servants only and having no dependent

38. U S—In re Mussey, D C Tex., 179 F 1007
29 C J p 797 note 37

39. La—Washington Bank & Trust Co v Carrier, 152 So 560, 178 La 902
Wash—Morley v Morley, 230 P 645, 131 Wash 540
29 C J p 797 note 46.

40. Mo—Gammon v McDowell, 298 S W 34, 317 Mo 1336

41. Miss—Powers v Sample, 16 So 293, 72 Miss 187
29 C J p 797 note 46 [b], p 798 note 67 [b] (8), (9)

42. Iowa—American Nat Bank of Alamosa, Colo, v Wetherell, 200 N W 221, 198 Iowa 648
La—Doucet v Fontenot, 115 So 655, 165 La 458, certiorari denied 49 S Ct 28, 278 U S 561, 73 L Ed 506
Tenn—Whitfield v People's Union Bank & Trust Co, 73 S W 2d 690, 168 Tenn 24

43. Ark—Yadon v Yadon, 151 S W 2d 969, 202 Ark 634
La—Thompson v Succession of Gow, 125 So 588, 169 La 546—Thompson v Succession of Gow, 123 So 616, 168 La 909
29 C J p 797 note 38

44. Tex—Orange First Nat Bank v Sokolski, Civ App, 150 S W 312

45. Tex—Wolfe v Buckley, 52 Tex 641

46. Tenn—Ex parte Brien, 2 Tenn Ch 33
Tex—American Nat Bank v Cruger, Civ App, 71 S W 784

47. Tenn—Ex parte Brien, 2 Tenn Ch 33

48. Ga—Holloway v Holloway, 12 S E 943, 86 Ga 576, 22 Am S R 484, 11 L R A 518

49. N D—O'Hare v Bismarck Bank, 178 N W 1017, 45 N D 641
29 C J p 797 note 45

50. Ariz—Lobban v Vander Vries Realty & Mortgage Co, 60 P 2d 933, 48 Ariz 180
29 C J p 797 note 46, p 798 note 67 [b] (7)

51. Ky—Davis v Dean, 33 S W 2d 340, 226 Ky 362

Widow living alone upon land in which a homestead is claimed is not a "housekeeper"—Elliot v Thomas, 143 S W 563, 161 Mo App 441

52. Miss—Kimbrough v Powell, 108 So 498, 143 Miss 498

53. Ark—Gibson v Denton, 79 S W 2d 732, 190 Ark 569
Tenn—Whitfield v People's Union Bank & Trust Co, 73 S W 2d 690, 168 Tenn 24
29 C J p 797 note 49 p 798 note 67 [b] (3)

Contention held not supported by facts
Tex—Talamantes v Flores, Civ App, 290 S W 791

54. Fla—Moorhead v Yongue, 183 So 804, 134 Fla 135, 118 A L R 1377
29 C J p 800 note 80 [a] (3)

55. Ky—Owens v Altsheller & Co, 93 S W 2d 844, 263 Ky 727
29 C J p 798 note 50

56. Ky—Robinson v Turner, 14 Ky L 79
29 C J p 798 notes 55, 67 [b] (5), (6)

57. S C—Chamberlain v Brown, 11 S E 439, 33 S C 597
29 C J. p 798 note 56.

A son living with his widowed mother and supporting her may be the head of the family,[58] as may also a grandson who is the sole support of his aged grandmother.[59] Also a grandmother who has living with her and supports a grandchild is the head of a family,[60] or a housekeeper with a family,[61] within the meaning of the homestead laws.

A guardian may, under some provisions, be considered the head of a family of minor children.[62]

Imprisoned convict. A man does not necessarily cease to be the head of a family by reason of his being incarcerated in a state prison.[63]

Master. A man or woman who lives in a house with servants only, having no relative or other person dependent on him or her, is not the head of a family so as to be entitled to claim a homestead exemption,[64] but a person so living has been held to be a housekeeper entitled to a homestead.[65]

§ 25. —— Unmarried Person

An unmarried person may be within a statutory designation of the persons entitled to a homestead

Homestead laws, although not in terms designating an unmarried person, contemplate that such a person may, under certain circumstances, be entitled to a homestead.[66] The application of other designations to an unmarried person is discussed supra §§ 23, 24 d (4), infra § 28

§ 26. —— Wife

A wife has such homestead rights as are accorded her by constitutional or statutory provisions of the particular state

The property in which a wife may have a homestead is considered infra §§ 90–92, and whether a wife is entitled to a homestead as the head of, a householder having, or a housekeeper with, a family is discussed supra § 24 d (2). Under the express provisions of some statutes, a wife living with her husband may have a homestead.[67] Under other constitutional or statutory provisions, she has valuable and substantial rights in the homestead[68] of the family[69] or husband[70] during his lifetime, as well as after his death, see infra §§ 243-254, and in certain cases may select, see infra § 47, or claim, see infra § 211, the homestead, but she has no title to her husband's homestead during his life,[71] and her interest is dependent on his[72] and is not adverse to him except in so far as she is given the right to prevent alienation.[73] The necessity of consent to, and joinder in, a transfer or encumbrance is discussed infra § 130

§ 27. —— Guardian or Infant

Under a few homestead provisions, the guardian of a family of minor children or the minors themselves may have a homestead.

The right to a homestead has sometimes been bestowed by constitution or statute on the guardian

58. S C—Scott v Moseley, 32 S E 450, 54 S C 375
Utah—Bunker v Coons, 60 P 549, 21 Utah 164, 81 Am S R 680

59. Cal—Lakas v Archambault, 176 P 180, 38 Cal App 365

60. Mont—Esterly v Broadway Garage Co, 285 P 172, 87 Mont 64

61. Ky—Riley v Smith, 5 S W 869, 9 Ky L 615
29 C J p 799 note 76 [a]

62. Ga—Rountree v Dennard, 59 Ga 629, 27 Am R 401—Rolf v Johnson, 40 Ga 555

63. Tenn—Bryant v Freeman, 183 S W 731, 134 Tenn 169, Ann Cas. 1917E, 111
29 C J p 796 note 27, p 798 note 60

64. Tenn—Whitfield v People's Union Bank & Trust Co, 73 S W 2d 690, 691, 168 Tenn 24, citing **Corpus Juris.**
29 C J p 798 note 61

65. Vt—Pierce v Kusic, 56 Vt 418
29 C J p 798 note 62

66. S D—Hesnard v Plunkett, 60 N W. 159, 6 S D 73
29 C J p 800 note 90

67. Ohio—Ohio Savings & Trust Co v Schumacher, 172 N E 682, 36 Ohio App 65, affirmed Schumacher v Ohio Savings & Trust Co, 169 N E 442, 121 Ohio St 446

68. Neb—Alston v Alston, 184 N W 82, 106 Neb 623
Tex—Wingart v Baxter, Civ App, 30 S W 2d 522, error refused—Medearis v Buratti, Civ App, 275 S W 617
29 C J p 800 note 92 [a]

Vested right

Where husband fails or refuses to claim homestead exemption, wife, otherwise destitute, who files and records homestead declaration, has a vested right or interest in homestead which cannot be divested without her consent—Reymond v Louisiana Trust & Savings Bank, 148 So 663, 177 La 409

Assertion of rights

Wife who filed and recorded statutory homestead declaration is entitled to assert her rights in homestead against husband's mortgagee, as dependent wife, in default of husband's exercise of homestead exemption in wife's behalf, regardless of whether amount she recovered would have to be turned over to husband as head of community—Reymond v Louisiana Trust & Savings Bank, supra

Right to rents

(1) Where head of family rented land set apart as exemption after abandoning wife and moving, wife could collect rent without liability of either tenant or wife to husband—Wood v Wood, 155 S E 678, 171 Ga 389

(2) Tenant procured by husband for homestead exemption of which wife was sole beneficiary was tenant of wife, rule prohibiting attornment by tenant to another claimant not being applicable—Wood v Wood, supra

(3) If wife is sole beneficiary of exempt land, renting of land by head of family is for wife's benefit—Wood v Wood, supra

69. Tex—Wallingford v Bowen, Civ App, 104 S W 2d 188

70. Right of occupancy with husband

Ala—People's Bank of Red Level v Barrow & Wiggins, 94 So 600, 208 Ala 433
29 C J p 800 note 92 [b]

71. Ala—Fies & Sons v Lowery, 147 So 136, 226 Ala 329

72. U S—In re Marshall, D C Fla, 287 F 187, petition to supplement and revise denied, C C A, 296 F 685

73. U S—In re Marshall, supra

or trustee of a family of minor children[74] or on the minors themselves[75] The right of an adopted child to a homestead is discussed in Adoption of Children § 59 a.

§ 28. —— Other Designations

Various constitutional and statutory designations of the person entitled to a homestead exemption, some requiring, and others not requiring, the claimant to have a family or dependents, have been construed by the courts.

Constitutional or statutory provisions which do not require a person claiming a homestead exemption to have, or be the head of, a family or to have dependents include those which extend the homestead right or privilege to any person[76] or to any resident of the state[77] or which simply provide that the homestead must be the actual abode of, and occupied by, the owner, his or her spouse, parent, or child[78] Under such provisions an unmarried person may have a homestead[79] However, provisions exempting a homestead occupied as a residence by the family of the owner does not confer a homestead exemption on an adult unmarried person who is the owner of the property and a member of her father's family, but does not have a family of her own[80] An unmarried debtor who supports his minor illegitimate children and lives with them on the premises claimed as exempt is within a statute conferring a homestead exemption on a debtor having a family.[81] Such a statute is enlarged, rather than restricted, by another statute which declares husband and wife living together, and a widow or widower living with an unmarried daughter or unmarried minor son, entitled to the homestead exemption,[82] and the latter statute is not exclusive[83]

Person having dependents A constitutional provision allowing a homestead exemption to a person having a person or persons dependent on him or her for support is applicable when,[84] and only when,[85] the requisite condition of dependency exists It must appear that the persons claimed to be dependents, or who are actually being supported by the homestead claimant, are legally entitled to support by such claimant,[86] and the title to the homestead, and the obligation to support, creating the dependency, must occur in the same person[87] Persons who are able to earn a living are not dependents within the provision,[88] but it is otherwise as to infant children who do not own property sufficient to maintain them, although they work and earn their own living in part[89]

Under another constitutional provision giving a homestead exemption not only to the head of a family, but also to any person having the care and support of dependent females of any age, who is not the head of a family, any person occupying such a position, whether married or single, or male or female, is entitled to the exemption[90]

74. Ga—Rountree v Dennard, 59 Ga 629 27 Am R 401
29 C J p 795 note 70 [a], p 800 note 94

75. Ala—Cofer v Scroggins, 13 So 115, 98 Ala 342, 39 Am S R 54

76. Cal—Hohn v Pauly, 106 P 266, 11 Cal App 724
29 C J p 801 note 4

77 Mich—Fitzsimons v Kane, 222 N W 111, 112, 245 Mich 246, quoting **Corpus Juris.**
29 C J p 801 note 2

78. Or—Smith v Kay, 54 P 2d 1160, 153 Or 80, rehearing denied 55 P 2d 794, 153 Or 80

79. Or—Smith v Kay, supra
Wis—In re Fish's Estate, 253 N W 387, 214 Wis 464

80. Kan—Protection State Bank v Baker, 53 P 2d 469, 143 Kan 201, rehearing denied and opinion supplemented 55 P 2d 818, 143 Kan 526

81. Ohio—In re Zerkle's Estate, 42 N E 2d 204, 68 Ohio App 480

82. Ohio—**In re Zerkle's Estate, supra.**

83. Ohio—In re Zerkle's Estate, supra.

84. La—Milliken v Roger, 70 So 848, 138 La 823
29 C J p 796 note 21 [c] (3), p 798 note 67 [c], p 799 note 75 [a] (2)
Illegitimate or adulterine dependent children are sufficient to satisfy the requirements
U S—In re Bennett, D C La, 33 F 2d 335
La—Farmers' Mercantile Co v Guillory, 90 So 222, 149 La 858

85. La—Washington Bank & Trust Co v Carriel, 152 So 560, 178 La 902—Prudential Ins Co of America v Guillory 145 So 6, 175 La 1058
Persons otherwise supported
(1) It cannot properly be said that the wife has a person or persons dependent on her for support where the family is being supported by the husband, as head and master of the community, with the aid of other members of the family, although the community, in providing this support, uses the separate property of the wife—Bank of Lafayette & Trust Co v Fabre, 126 So 916, 169 La 1185
(2) Also a wife does not have a person dependent on her for support where her children are of age and self-supporting and there is no proof that her husband is unable to support himself and her or has not done so—Planters' Bank & Trust Co v Savant 134 So 394, 172 La 464
Foster children are not dependents within the meaning of the provision—Prudential Ins Co of America v Guillory, 145 So 6, 175 La 1058

86 La—Askew v Parker, 60 So 233, 131 La 753
29 C J p 799 note 75 [a] (1)

87. La—Planters' Bank & Trust Co v Savant, 134 So 394, 172 La 464.

88. La—Gallagar v Payne, 31 La Ann 1057—Decuir v Benker, 33 La Ann 320
29 C J p 799 note 71

89. La—Woods v Perkins, 9 So 48, 43 La Ann 347

90. Ga—Johnson v. Little, 17 S E. 294, 90 Ga 781.

C. ACQUISITION AND ESTABLISHMENT

§ 29. In General

The establishment of a homestead is a matter of constitutional or statutory provision Use of the premises with intent to create a homestead is ordinarily required, ownership alone being insufficient

The acquisition or establishment of a homestead is a matter of statutory[91] or constitutional[92] provision, and the mode and proceedings prescribed are usually exclusive of all other methods of acquisition, establishment, or selection[93] The elements entering into the acquisition or establishment of a homestead have been variously stated to be a claim that the property is exempt as a homestead and its use as such,[94] the act of selection and the fact of residence,[95] possession and use of real estate by one who owns it, and who, with his family, resides upon it,[96] an actual intention to reside on the property as a permanent place of residence, coupled with the fact of residence,[97] and an intent to establish a homestead, evidenced by bona fide preparations to improve the land, coupled with its occupation[98] Ownership alone is not sufficient to constitute premises a homestead[99]

§ 30. Intent

To acquire a homestead there must be an intent to make the premises a homestead, and occupancy without such intent is insufficient Acquisition of a homestead is not defeated by the fact that the owner thereby intends to prevent his creditors from subjecting the property to their claims

The acquisition or existence of the homestead depends largely,[1] although not entirely,[2] on the intent of the parties, which has been said to be the prime factor in impressing property with the homestead character,[3] at least in cases where there has been no actual occupancy[4] There must be a bona fide intention of making the premises a homestead or permanent residence and occupying it as such,[5] exclusive of any other dwelling place,[6] and mere occupancy without such intention will not suffice[7] One cannot impress a homestead character on a tract of land which he has bought for speculation and which he has never intended to improve and occupy as a homestead[8]

The question of intent is to be determined by all

91. Cal—Palen v Palen, 83 P 2d 36, 28 Cal App 2d 602
Homestead interest as dependent entirely on organic or statutory provisions see supra § 3

92 Under the Florida constitution, where a head of a family acquires title to land and with his family makes his home thereon, the land thereupon is impressed with the character of a homestead, and no action of the legislature, or declaration or other act on his part, is required to make the land his homestead—Hutchinson Shoe Co v Turner, 130 So 623, 100 Fla 1120

93. Cal—Rosenthal v Merced Bank, 42 P 640, 110 Cal 198
S C—Myers v Hum, 20 S C 522

94 Tex—McFarlane v First Nat Bank, Civ App, 97 S W 2d 754, error refused

95. Neb—Berggren v Bliss, 241 N W 544, 545, 122 Neb 801

96. Tex—Bell v Crabb, Com App, 211 S W 871, reversing Crabb v Bell, Civ App, 220 S W 623—Panhandle Const Co v Wiseman, Civ App, 110 S W 2d 615, error dismissed

Farm on which owner has actually resided with his wife and children for considerable time constitutes a homestead—Bank of Erath v Broussard 109 So 347, 161 La 657

97. Fla—Hillsborough Inv Co v Wilcox, 13 So 2d 418—Lanier v Lanier, 116 So 867, 95 Fla 522.

98 Tex—Sammons v Davie, Civ App, 15 S W 2d 707

99 Okl—Jefferson v Henderson, 282 P 677, 140 Okl 86
Tex—Silvers v Welch, 91 S W 2d 686 127 Tex 58 affirming Welch v Silvers, Civ App 59 S W 2d 879
29 C J p 802 note 23

1. Tex—Ray v Metzger, Civ App, 165 S W 2d 207, affirmed, Sup, 172 S W 2d 480
Vt—In re Wolff's Estate, 182 A 187, 108 Vt 54
29 C J p 801 note 7

2. Tex—Connelly v Johnson, Civ App, 259 S W 634, 636
"The question of homestead or not is to be determined by the obvious facts and use and not alone by the intention"—Connelly v Johnson, supra.

3. S D—Harter v Davison, 220 N W 862, 53 S D 399
Tex—Roberson v Home Owners' Loan Corporation, Civ App, 147 S W 2d 949, error dismissed, judgment correct—Brown v Logan, Civ App, 7 S W 2d 189

4. Okl—McKoy v Keel 18 P 2d 277, 161 Okl 258—Jefferson v Henderson, 282 P 677, 140 Okl 86
29 C J p 801 note 7 [a]

5. U S—Croker v Croker, C C A Fla, 51 F 2d 11—In re Kays, D C Wash, 49 F 2d 345
Fla—Lanier v Lanier, 116 So 867, 95 Fla 522
Okl—Garret v Getzendaner, 242 P 525, 115 Okl 12
Tex—Wallingford v Bowen Civ App, 104 S W 2d 188 Farmers' Nat Bank of Seymour v Coffman Civ App 79 S W 2d 905—Triad v Califa, Civ App 61 S W 2d 102 error refused Ewing v Riley, Civ App, 246 S W 94
Wash—Traverso v Cerini 263 P 184, 146 Wash 273—Canadian Bank of Commerce v Kellough, 253 P 124, 142 Wash 335
Wis—Sheldon v Johnston 8 N W 2d 269
29 C J p 801 note 11

All other things combined cannot give property the homestead character in the absence of intention to dedicate it to the uses of a home Roberson v Home Owners Loan Corporation, Tex Civ App, 147 S W 2d 949, error dismissed, judgment correct

Establishment contrary to debtor's intent
The homestead character will not attach to land against the will and contrary to the intention and purpose of the debtor—Youngblood v Youngblood, Civ App 46 S W 2d 390, modified on other grounds 76 S W 2d 759, 124 Tex 184

6. Okl—Garret v Getzendaner, 242 P 525, 115 Okl 12

7. Tex—Grimes v Cline, Civ App, 300 S W 235
Wis—Roche v Du Bois, 271 N W 84, 85, 223 Wis 438
29 C J p 801 note 11 [b]

8. Tex—Ewing v. Riley, Civ App, 246 S W 94

the surrounding facts and circumstances,[9] and not necessarily by the representations of the parties,[10] although proof of representations may show the intent[11] It has been said that perhaps the best evidence of an intention of an owner to establish a homestead is his occupancy and use of the premises,[12] and that, for this reason, further investigation of intention need not be made when the land is actually put to homestead uses[13]

Intent to prevent creditors from collecting debts In accord with the object of homestead provisions to permit one to place his family beyond the reach of financial misfortune, see supra § 2, if the intention of the debtor when he occupies land as a homestead is to make it his present home the exemption may nevertheless be secured, although he also intends thereby to prevent his creditors from subjecting the property to the collection of their debts[14] However, homestead intentions cannot be used as a shield for fraud[15] In a jurisdiction in which the law permits the mortgaging of a homestead, there is no fraud in claiming a homestead in property on which the claimants live at the time and continue to live, although at the time of making claim they intend to mortgage the property for the purpose of preferring the mortgagee over other creditors[16]

§ 31. —— Mere Intent to Occupy

A homestead in land cannot be created by a mere intent to occupy it in the future, such intent consisting only of a mental attitude and being otherwise unmanifested

A mere intent to occupy land at some future time as a homestead is never sufficient of itself to impress land with a homestead character,[17] as shown infra § 33 the general rule, subject to the limitations considered in subdivision b of that section, is that the intent to occupy must be accompanied by actual occupancy Something more overt is required than an intention consisting of a secret uncommunicated purpose,[18] or a mere mental attitude, based only on something in the mind of a

9. Wis—Zolandek v First Nat Bank, 250 N W 391, 212 Wis 632

10 S D—Smith v Allmendinger, 169 N W 512, 41 S D 144

29 C J p 801 note 8

11 S D—Smith v Allmendinger, 169 N W 512, 41 S D 144

12. Tex—Ray v Metzger, Civ App, 165 S W 2d 207, error granted

13. Tex—Youngblood v Youngblood, 76 S W 2d 759, 124 Tex 184, modifying, Civ App, 46 S W 2d 390

14. U S—In re Chakos, C C A Wis, 21 F 2d 482

Mich—Klement v Lefkowitz, 259 N W 871, 874, 271 Mich 79, quoting **Corpus Juris.**

Wash—Canadian Bank of Commerce v Kellough, 253 P 124 142 Wash 335

29 C J p 802 note 17

"There can be no such thing as the fraudulent acquisition of a homestead, for the law permits it, regardless of the rights of creditors"—Christian v Arkansas Bank & Trust Co 249 S W 1, 2, 157 Ark 423

15 Okl—Hensley v Maxwell, 44 P 2d 60, 172 Okl 21

Acquisition of title to homestead property by fraud see infra § 55

16. Cal—Santa Barbara Lumber Co v Ross, 192 P 436, 183 Cal 657

17. U S—Bryson v Provident Nat Bank of Waco, Tex, C C A Tex, 2 F 2d 831

Ala—Pace v Wainwright, 10 So 2d 755—W T Rawleigh Co v Patterson, 195 So 729, 239 Ala 309

Ark—Bank of Quitman v Mahar, 104 S W 2d 800, 193 Ark 1111—Chastain v Arkansas Bank & Trust Co, 249 S W 1, 157 Ark 423

Fla—First Nat Bank v Peel, 145 So 177, 107 Fla 413

Iowa—Fardal v Satre, 206 N W 22, 200 Iowa 1109—Schaffer v Campbell, 199 N W 334, 198 Iowa 43

Ky—Cooper v Cooper, 20 S W 2d 734, 230 Ky 696

Mich—Lemerise v Robinson, 217 N W 911, 241 Mich 528

Okl—The Maccabees v Montgomery 45 P 2d 695, 172 Okl 500—Enosburg Falls Sav Bank & Trust Co v McKinney, 44 P 2d 987, 172 Okl 298—McKoy v Keel, 18 P 2d 277 161 Okl 258—Interstate Mortg Trust Co v Weber, 219 P 150, 121 Okl 185—Bowman v Lamb, 224 P 688, 98 Okl 201

S D—Eagle Feather v McHenry 190 N W 328, 46 S D 20

Tex—Gilmore v Dennison, 115 S W 2d 902, 131 Tex 398 reversing Civ App, 91 S W 2d 371—L E Whitham & Co v Briggs' Estate, Com App, 58 S W 2d 49, reversing L E Whitham & Co v Briggs, Civ App, 41 S W 2d 150—Major v Loy, Civ App, 155 S W 2d 617—Roberson v Home Owners' Loan Corporation, Civ App, 147 S W 2d 949, error dismissed, judgment correct—Sipe v Sayer, Civ App, 140 S W 2d 297, 1112—Karr v Cockerham, Civ App, 107 S W 2d 719, error dismissed—Wallingford v Bowen, Civ App, 104 S W 2d 188—Yates v Home Building & Loan Co, Civ App, 103 S W 2d 1081—Adcock v National Loan & Investment Co, Civ App, 96 S W 2d 530—Hinton v Uvalde Paving Co, Civ App, 77 S W 2d 733, error refused—Rodriguez v Saegert, Civ App, 74 S W 2d 171—Guajardo v Emery, Civ App, 73 S W 2d 615, error refused—Karr v. Cockerham, Civ App, 71 S W 2d 905, error dismissed—Trad v Califa Civ App, 64 S W 2d 402, error refused—Pickard v Reed, Civ App, 52 S W 2d 274, error refused - Elliott v Texas, Pacific Coal & Oil Co, Civ App, 19 S W 2d 442, affirmed Com App, 29 S W 2d 982—Simmons v Davie, Civ App, 15 S W 2d 707 First Nat Bank v Wallace, Civ App, 13 S W 2d 176 reversed on other grounds Wallace v First Nat Bank, 35 S W 2d 1036 120 Tex 92—Benzel v Commercial Nat Bank of Sherman Civ App, 1 S W 2d 695, error dismissed—Gillette v Davis Civ App, 296 S W 658—Cocke v Espinoza, Civ App, 265 S W 1103 reversed on other grounds Espinoza v Cocke, Com App, 276 S W 1095—Vaden v Collier Civ App 253 S W 889

29 C J p 801 note 14

Necessity of putting intention into effect

"In order to establish his right to a homestead, one must put his intention into effect by actually making it his residence, and maintaining it by conduct as well as by intention"—Tyler's Ex'r v Williamson, 36 S W 2d 34, 36, 237 Ky 579

Manifest intention

There must be a manifest intention to occupy it immediately as a homestead, and in this connection "manifest" means apparent by examination, open, or visible, there must be an act by which the intention of the owner may be apparent to others and which will constitute evidence of such intention—First Nat Bank v Peel, 145 So 177, 107 Fla 413

18. Ala - W T Rawleigh Co v Patterson, 195 So 729, 239 Ala 309

person,[19] and amounting only to a hope or vague intention to use the property as a homestead at some future time,[20] and, as shown infra § 33 b, even in jurisdictions where homestead rights may be acquired prior to actual occupancy the intent to occupy must be manifested by overt acts

§ 32 Occupancy

The homestead character does not attach to property which the debtor has neither occupied nor intended to occupy

A homestead right does not extend to premises which the debtor has neither occupied as a home or residence, nor manifested any intention of so doing.[21] The mere fact of occupancy does not, however, ipso facto establish a homestead,[22] for the requisite intent must be shown to exist, see supra § 30, and certain formal steps are sometimes required, see infra §§ 42–47

§ 33 —— Necessity of Actual Occupancy

a General rule
b Limitations of rule

a. General Rule

Except in jurisdictions where the statute or constitution otherwise expressly provides, the general rule is that actual occupancy is necessary to acquire a homestead exemption

Subject to some exceptions by reason of express organic and statutory provisions,[23] and to the limitations considered infra subdivision b of this section, the premises must be actually occupied and used by the debtor as a residence or home for himself and his family in order to entitle him to the homestead exemption.[24] In a jurisdiction where the limitations considered infra subdivision b of this section are not recognized, constructive occupation of the premises is insufficient,[25] and the purchase or improvement of land with the intention of occupying it as a family home, even in the near future, is not enough,[26] nor is the requirement of occupancy satisfied by mere cultivation of the premises[27] marking and platting the premises as a homestead,[28] fencing and improving the land,[29] or placing a portion of the household goods on the premises.[30] The mere filing of a declaration or claim of homestead does not exempt the property so claimed, unless it is actually occupied as a home,[31] although

19 Kan - Bush v Adams, 84 P 122, 72 Kan 556, 558
Okl—McKoy v Keel, 18 P 2d 277, 16 Okl 258
Wis – Sheldon v Johnston, 8 N W 2d 269—In re Arndt's Estate, 225 N W 131, 100 Wis 1

20 Wis—Sheldon v Johnston 8 N W 2d 269 -In re Robers, 265 N W 578, 220 Wis 547

21 Ky—Cooper v Cooper 20 S W 2d 734, 230 Ky 696 -Covington Bros & Co v Byrns, 18 S W 2d 870, 230 Ky 66
Okl—Jefferson v Henderson, 282 P 677 140 Okl 86
Tex – Silvers v Welch, 91 S W 2d 686 127 Tex 58, affirming Welch v Silvers Civ App, 59 S W 2d 879—Alexander v Waggoman, Civ App, 287 S W 144

Where the homestead consists of more than one tract of land, there must be occupancy or intention to occupy one tract with the intention to make it a home, and the actual use or intention to use the other tract or tracts in connection with the one occupied—Garret v Getzendaner, 242 P 525 115 Okl 12

22 Tex—Roberson v Home Owners' Loan Corporation, Civ App 117 S W 2d 919, error dismissed, judgment correct

23. Ariz—Schreiber v Hill, 95 P 2d 566, 54 Ariz 315
Tenn – Hinds v Buck, 150 S W 2d 1071, 177 Tenn 444
Utah—In re Petersen's Estate, 93 P 2d 445, 97 Utah 321—Zumpfe v Evans, 18 P 2d 513 87 Utah 198 101 A L R 532

29 C J p 802 note 21

24 U S—Croker v Croker, C C A Fla, 51 F 2d 11—In re Kays, D C Wash, 49 F 2d 315—Lyon v Arnold, C C A Fla, 46 F 2d 451
Ala—Frazier v Espalla, 125 So 611 220 Ala 416
Ark –Keese v Bushart, 158 S W 2d 915 203 Ark 668—Bank of Quitman v Mahar 101 S W 2d 800 193 Ark 1111 Starr v City Nat Bank, 267 S W 581 167 Ark 241—Chastain v Arkansas Bank & Trust Co 249 S W 1, 157 Ark 123
Fla Anderson Mill & Lumber Co v Clements, 134 So 588, 101 Fla 523 Lanier v Lanier, 116 So 867, 95 Fla 522
Iowa—Kramer v Hofmann, 257 N W 361, 218 Iowa 1269—Berner v Dellinger, 222 N W 370 206 Iowa 1382—Ferdal v Satre 206 N W 22, 200 Iowa 1109—Harris v Carlson, 205 N W 202, 201 Iowa 169—Dolan v Newberry, 202 N W 515 200 Iowa 511 petition overruled 205 N W 205 200 Iowa 511
Kan—Blitz v Metzger, 241 P 259, 119 Kan 760 rehearing denied 245 P 161 120 Kan 555
Ky—Williams v Evans' Adm'r, 56 S W 2d 710 247 Ky 105
La—Brantley v Pruitt 144 So 604, 175 La 879
Miss - Meyers v American Oil Co 5 So 2d 218—Patrick v Bank of Tupelo, 152 So 838, 169 Miss 157 - Chrismand v Mauldin, 94 So 1, 130 Miss 259—Mounger v Gandy, 69 So 817 110 Miss 133
Okl—Standard v Eckert, 249 P 278, 119 Okl 194—Garret v Getzendaner, 242 P 525, 115 Okl 12- Kerns v Warden 213 P 70 88 Okl 297
Or—In re Potter's Estate, 59 P 2d 253 154 Or 167
Tex—Yates v Home Building & Loan Co, Civ App, 103 S W 2d 1081

29 C J p 802 note 24, p 803 note 25, p 804 note 29

Surrender of portion of land

Actual residence cannot exist on the part of an owner of land as to a portion of it which he has surrendered to another to be built on and occupied by that other—Anderson Mill & Lumber Co v Clements 134 So 588, 101 Fla 523

25 Miss—Chrismand v Mauldin, 94 So 1, 130 Miss 259

26 Ark—Shell v Young, 95 S W 798, 78 Ark 479

29 C J p 804 note 30

27. Iowa—Harris v Carlson, 205 N W 202, 201 Iowa 169
Ky—Tyler's Ex'r v Williamson, 36 S W 2d 34, 237 Ky 579

29 C J p 804 note 32

28. Iowa - Cole v Gill 11 Iowa 527

29. Iowa—Charless v Lamberson, 1 Iowa 435, 63 Am D 457

30 Miss – Chrismand v Mauldin, 94 So 1, 130 Miss 259

31. Wash—In re Leupp's Estate, 279 P 579 153 Wash 218

29 C J p 804 note 38

the occupancy may, it has been held, follow the declaration in point of time under certain circumstances [32]

b. Limitations of Rule

(1) In general
(2) Nature of preparatory acts
(3) Time of occupancy or preparatory acts

(1) In General

In some jurisdictions homestead rights may be acquired prior to actual occupancy where there exists a bona fide intent to occupy in the future, coupled with appropriate and timely acts manifesting such intent.

In some jurisdictions a homestead right may be impressed on property in advance of, or as of a time prior to, actual occupancy[33] if there is a bona fide and clearly defined intention to occupy the premises at some future time as a homestead, accompanied or evidenced by overt preparatory acts in connection with the property definitely tending to show such intention,[34] and followed by actual occupancy at an appropriate time in the future.[35] Conversely, in order to impress the homestead character on property which has not been actually occupied, there must be a bona fide intent to occupy it and establish a homestead thereon, coupled with sufficient and timely acts of preparation evidencing that intention, and mere intention without the preparatory acts will not suffice.[36] Premises do

32. Wash.—Canadian Bank of Commerce v. Kellough, 253 P. 124, 142 Wash. 335

Dispossession of tenant

One who has inherited or purchased premises upon which there is a tenant who cannot be dispossessed except by the notices provided by law may avail himself of the benefit of the homestead statute by declaring that he intends to use the premises for a home and by taking such other steps as are necessary to dispossess the tenant.—Canadian Bank of Commerce v. Kellough, supra

33. Mich.—Haight v. Reynolds, 239 N.W. 880, 257 Mich. 11

N.C.—Equitable Life Assur. Soc. of U. S. v. Russos, 185 S.E. 632, 210 N.C. 121

Okl.—Chennault v. Glenn, 109 P.2d 811, 188 Okl. 408—Morey v. James, 248 P. 594, 118 Okl. 277

S.D.—Harter v. Davison, 220 N.W. 862, 53 S.D. 399

Tex.—Broadland v. City Nat. Bank of Corpus Christi, Civ.App., 15 S.W.2d 112.—Brown v. Logan, Civ.App., 7 S.W.2d 189—Gillette v. Davis, Civ.App., 296 S.W. 658

29 C.J. p. 802 note 24 [d]

Time of acquisition of homestead see infra § 49

34. Mich.—Haight v. Reynolds, 239 N.W. 880, 257 Mich. 11

Okl.—Davis v. Flowers, 51 P.2d 534, 174 Okl. 557—Bradley v. Flowers, 49 P.2d 803, 174 Okl. 554.—Lane v. Flowers, 48 P.2d 1076, 173 Okl. 413—McMullen v. Carlis, 271 P. 665, 133 Okl. 204—Interstate Mortg. Trust Co. v. Weber, 249 P. 150, 121 Okl. 185—Morey v. James, 248 P. 594, 118 Okl. 277—Foster v. Vickery, 239 P. 141, 111 Okl. 231—Storm v. Garnett, 227 P. 417, 99 Okl. 284.—Osmon v. Payton, 223 P. 382, 98 Okl. 194—State v. Brown, 218 P. 816, 92 Okl. 137—Sharpe v. Wright, 211 P. 70, 88 Okl. 16

Tex.—W. R. Thompson & Sons Lumber Co. v. Clifton, 124 S.W.2d 106, 132 Tex. 366, affirming Clifton v. W. R. Thompson & Sons Lumber Co., Civ.App., 100 S.W.2d 392—Skiles v. Shropshire, 77 S.W.2d 872, 124 Tex. 462, modifying Civ.App., 50 S.W.2d 402—Espinoza v. Cocke, Com.App., 276 S.W. 1095, reversing Cocke v. Espinoza, Civ.App., 265 S.W. 1103—Stevenson v. Wilson, Civ.App., 130 S.W.2d 317, error refused—Towery v. Plainview Building & Loan Ass'n, Civ.App., 99 S.W.2d 1039, error refused—Guarjardo v. Emery, Civ.App., 73 S.W.2d 615, error refused.—Anderson v. Byrum, Civ.App., 73 S.W.2d 571—Bartels v. Huff, Civ.App., 67 S.W.2d 411, error refused.—L. E. Whitham & Co. v. Kemp, Civ.App., 66 S.W.2d 162—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 313, error refused.—L. E. Whitman & Co. v. Stout, Civ.App., 11 S.W.2d 317, 319, error refused, citing **Corpus Juris**—L. E. Whitham & Co. v. Briggs, Civ.App., 41 S.W.2d 150, reversed on other grounds, L. E. Whitham & Co. v. Briggs' Estate, Com.App., 58 S.W.2d 49.—Burton v. Schwartz, Civ.App., 36 S.W.2d 1066, error dismissed—Brodland v. City Nat. Bank of Corpus Christi, Civ.App., 15 S.W.2d 112—Brown v. Logan, Civ.App., 7 S.W.2d 189—Jolesch & Chaska Co. v. Hampton, Civ.App., 297 S.W. 271—Teller v. Fitch, Civ.App., 281 S.W. 893.—Atkinson v. Jackson Bros., Civ.App., 259 S.W. 280, modified on other grounds, Com.App., 270 S.W. 818, 38 A.L.R. 1377

29 C.J. p. 804 note 41.

Reason for rule

If the rule were otherwise, "it would be almost impossible for the head of a family who might be embarrassed with debt to acquire a homestead, since it often happens that in the acquisition of property intended for use as a home an unavoidable interval occurs between the acquisition and the actual use or occupancy for such purpose"—Vaughan v. Sterling Nat. Bank & Trust Co. of New York, Tex.Civ.App., 124 S.W.2d 410, 415, error refused

35. Okl.—Davis v. Flowers, 51 P.2d 534, 174 Okl. 557—Bradley v. Flowers, 49 P.2d 803, 174 Okl. 554—Lane v. Flowers, 48 P.2d 1076, 173 Okl. 413.—Foster v. Vickery, 239 P. 141, 111 Okl. 231

S.D.—Home Lumber Co. v. Heckel, 293 N.W. 549, 67 S.D. 429

Wis.—Schwitzke v. American Nat. Bank, 8 N.W.2d 303

29 C.J. p. 804 note 41, p. 805 note 45

36. Ala.—W. T. Rawleigh Co. v. Patterson, 195 So. 729, 239 Ala. 309

Mich.—Lemerise v. Robinson, 217 N.W. 911, 241 Mich. 528

Okl.—Bradley v. Flowers, 49 P.2d 803, 174 Okl. 554—Enosburg Falls Sav. Bank & Trust Co. v. McKinney, 44 P.2d 987, 172 Okl. 398—Jefferson v. Henderson, 282 P. 677, 140 Okl. 86—Preston v. Ottawa County Nat. Bank, 280 P. 581, 138 Okl. 133.—Greenwood v. Wilkinson, 256 P. 46, 124 Okl. 300—Interstate Mortg. Trust Co. v. Weber, 249 P. 150, 121 Okl. 185

S.D.—Eagle Feather v. McHenry, 190 N.W. 328, 46 S.D. 20

Tex.—Gilmore v. Dennison, 115 S.W.2d 902, 131 Tex. 398, reversing Civ.App., 91 S.W.2d 371, Silvers v. Welch, 91 S.W.2d 686, 127 Tex. 58, affirming Welch v. Silvers, Civ.App., 59 S.W.2d 879—Barnes v. White, 53 Tex. 628—Stewart v. Adams, Civ.App., 171 S.W.2d 180—Major v. Lox, Civ.App., 155 S.W.2d 617—Sipe v. Sayer, Civ.App., 140 S.W.2d 297, 1112—Stevenson v. Wilson, Civ.App., 130 S.W.2d 317, error refused—Barnes v. Jones, Civ.App., 118 S.W.2d 647—Adcock v. National Loan & Investment Co., Civ.App., 96 S.W.2d 530—Farmers' Nat. Bank of Seymour v. Coffman, Civ.App., 79 S.W.2d 905.—Karr v. Cockerham, Civ.App., 71 S.W.2d 905, error dismissed—Trad v. Califa, Civ.App., 64 S.W.2d 402, error refused—Guaranty Bond State

not become impressed with the character of a homestead merely by reason of intention to occupy and acts of preparation if the intention is abandoned prior to actual residence thereon[37] To bring land within the homestead exemption when not actually occupied as such at the time of a levy, it must appear that the intention to occupy existed prior to, and at the time of, the levy[38]

(2) Nature of Preparatory Acts

While the precise nature of the acts is not defined, they must nevertheless be of a physical overt character rather than mere declarations, and they must unequivocally manifest an intent to reside on the land as a home

There is no hard and fast rule as to the precise extent or nature of the specific acts of preparation necessary to show or accompany the required intent to occupy[39] The acts of preparation should be of a physical, visible, overt character, or something equivalent thereto,[40] and not mere declarations of intention to occupy the premises as a homestead,[41] particularly if the declarations are contradicted by the conduct of the person claiming the homestead,[42] but they need not consist of actually making improvements on the premises selected[43] The acts must be unmistakable[44] and sufficient to give rea-

Bank v Banks, Civ App 56 S W 2d 1102- Elliott v Texas Pacific Coal & Oil Co, Civ App, 19 S W 2d 442, affirmed, Com App 29 S W 2d 982 —Ewing v Riley, Civ App, 246 S W 94

Wis - Sheldon v Johnston, 8 N W 2d 269—In re Arndt's Estate, 225 N W 134 100 Wis 1

29 C J p 804 note 41

Declarations and preparation

Neither proof of declarations of intention alone nor of acts of preparation alone is sufficient to establish a homestead, but bona fide intention must be shown by both such declarations and preparation—Farmers' Nat Bank of Seymour v Coffman, Tex Civ App, 79 S W 2d 905

Rural or urban homestead

"Occupancy, such as is required in order to impress urban property with a homestead character, is not absolutely essential [to so impress rural property], yet where the element of occupancy, either actual or constructive, is absent, then, in order to impress rural land with a homestead character there must be a fixed intention manifested by overt acts of preparation to actually occupy the land as a home without unreasonable delay"—The Maccabees v Montgomery, 45 P 2d 695, 696, 172 Okl 500

37. Tex—Kempner v. Comer, 11 S W 194, 73 Tex 196

29 C J p 805 note 50

38. Mich—Bowles v Hoard, 39 N W 21, 71 Mich 150

29 C J p 805 note 49

39. Tex—Espinoza v Cocke, Com App, 276 S W 1095 reversing Cocke v Espinoza Civ App, 265 S W 1103- Atkinson v Jackson Bros, Civ App 259 S W 280, modified on other grounds, Com App, 270 S W 818, 38 A L R 1377

Acts held sufficient

(1) Causing a house to be built on the land fencing the land, and putting a part of it into cultivation—McMullen v. Carlis, 271 P. 665, 133 Okl 204

(2) Clearing the land, drilling wells, and planting trees—Bartels v Huff, Tex Civ App, 67 S W 2d 411 error refused

(3) Survey of a lot, preparations of plans and specifications in accordance with the survey, and seeking competitive bids on said plans and specifications—Atkinson v Jackson Bros, Tex Civ App, 259 S W 280, modified on other grounds, Com App, 270 S W 818, 38 A L R 1377

(4) Other acts—Espinoza v Cocke Tex Com App, 276 S W 1095, reversing, Cocke v Espinoza, Civ App, 265 S W 1103—29 C J p 805 note 42 [a] 43 [a]-[c]

Acts held insufficient

(1) Mere preparation of a sketch for a building to be erected—Barnes v Jones, Tex Civ App, 118 S W 2d 647

(2) Placing a barbed wire fence around lots, planting corn one year and cane another year Rodriguez v Saegert, Tex Civ App, 74 S W 2d 171

(3) Erection of a tenant house renting the property in greater part for two years, and then making arrangements to build a family residence—W T Rawleigh Co v Patterson, 195 So 729, 239 Ala 309.

(4) Other acts

Okl -The Maccabees v Montgomery, 45 P 2d 695 172 Okl 500

Tex—Guajardo v Emery, Civ App, 73 S W 2d 615, error refused—Trout v Wichita State Bank & Trust Co, Civ App, 93 S W 2d 871 —Vaden v Collier, Civ App, 253 S W 889 29 C J p 805 note 42 [b], 43 [d]

40. Ala -W T Rawleigh Co v Patterson, 195 So 729, 239 Ala 309

Okl—The Maccabees v Montgomery, 45 P 2d 695, 172 Okl 500—McKoy v Keel, 18 P 2d 277, 161 Okl 258—Jefferson v Henderson, 282 P 677, 140 Okl 86 Storm v Garnett, 227 P 417, 99 Okl 284

Tex—Roberson v Home Owners' Loan Corporation, Civ App, 147 S W 2d 949, error dismissed, judgment correct

Wis—Sheldon v Johnston, 8 N W 2d 269—In re Arndt's Estate, 225 N W 134, 100 Wis 1

29 C J p 805 note 43

Open evidence

Law requires open evidence of intention to occupy lands as homestead in order to prevent fraud—Jefferson v Henderson, 282 P 677, 140 Okl 86

41. Okl—Davis v Flowers, 51 P 2d 534 174 Okl 557

Tex—Pearson v Felps Civ App, 53 S W 2d 195, error refused

Wash - Traverso v Cerini, 263 P 184, 146 Wash 273

Wis—In re Arndt's Estate, 225 N W 134 199 Wis 1

29 C J p 805 note 42 [b] (1), 43 [e]

42 Okl—Lane v Flowers 48 P 2d 1076 173 Okl 413—Foster v Vickery, 239 P 141, 111 Okl 231—Shipley v Thompson, 231 P 717, 106 Okl 41

Purchase and occupation of other property

Where an expressed intention to occupy unimproved rural lands at some future time is contradicted by the act of the owner in purchasing and occupying as a home urban property in no way connected, or used in conjunction, with the rural property, the positive acts overcome the expressed intention as to the rural lands—Davis v Flowers 51 P 2d 534, 174 Okl 557—Enosburg Falls Sav Bank & Trust Co v McKinney, 44 P 2d 987, 172 Okl 298

43. Tex—Teller v. Fitch, Civ App, 281 S W 893

44. Okl—McKoy v Keel, 18 P 2d 277, 161 Okl 258

S D—Eagle Feather v McHenry, 190 N W 328, 46 S D 20

Tex—Rodriguez v Saegert, Civ App, 74 S W 2d 171—Benzel v Commercial Nat Bank of Sherman, Civ App, 1 S W 2d 695, error dismissed —Markum v Markum, Civ App, 210 S W. 835.

sonable notice of the intention,[45] or, it has been held, sufficient to manifest beyond doubt an intent to reside on the land as a home,[46] and they are not sufficient if they are as consistent with improvement of the premises for rental purposes as for homestead purposes, at least where the owner resides on another and different piece of property[47]

(3) Time of Occupancy or Preparatory Acts

Preparatory acts and occupancy must follow within a reasonable time after the property has been acquired and the intent to occupy formed, the precise time allowable depending on the circumstances A delay caused by a temporary obstacle in the way of occupancy will not destroy the right

Although the homestead claimant need not occupy the property immediately after acquiring it,[48] the delay in occupancy or in taking appropriate preparatory steps must not be an unnecessary one or exceed a reasonable time[49] after the property has been acquired or the intention to claim it as a homestead has been formed[50] What is a reasonable time must depend on the circumstances of each particular case,[51] and it has been held that a homestead may be acquired, even though a considerable period of time may elapse before actual occupancy of the premises if the delay is not unreasonable under the circumstances[52] The delay in occupancy must be only for the time necessary to effect removal to the premises, or to build needed improvements or repairs, or to complete a dwelling house in process of construction, or the like[53]

Temporary obstacle in way of occupancy A mere temporary obstacle to occupancy will not prevent the owner of the land from acquiring a homestead therein where he intends in good faith to establish his home on the land as soon as the temporary obstacle is removed, and does so within a reasonable time[54] This rule has been held applicable where occupancy is prevented temporarily by an outstanding tenancy,[55] where intended improvements and occupancy are prevented by litigation,[56] and where the intended occupation is delayed by illness in the claimant's family[57] Where a debtor buys lands and commences the erection of a dwelling house thereon, intending in good faith to occupy the house as his residence, the fact that he is compelled to discontinue building for a time because of lack of means does not defeat his right to claim the land as his homestead[58]

Occupancy after repeal of homestead law An intention of the owner of land to make it his home-

45 Okl—McKoy v Keel, 18 P 2d 276, 161 Okl 258—Jefferson v Henderson, 282 P 677, 140 Okl 86—Kerns v Warden, 213 P 70, 88 Okl 297

Tex—Stevenson v Wilson, Civ App, 130 S W 2d 317, error refused—Guaranty Bond State Bank v Banks, Civ App, 56 S W 2d 1102—Postal Saving & Loan Ass'n v Powell, Civ App, 47 S W 2d 343, error refused

46 Tex—Ewing v Riley, Civ App, 246 S W 94

29 C J p 805 note 44

47 Okl—Lane v Flowers, 48 P 2d 1076, 173 Okl 413—Foster v Vickery, 239 P 141, 111 Okl 231

48. Tex—Booth v H P Drought & Co Civ App, 89 S W 2d 432, error dism

49. U S—Bryson v Provident Nat Bank of Waco, Tex, C C A Tex, 2 F 2d 831

Okl—Davis v Flowers, 51 P 2d 534, 174 Okl 557—Bradley v Flowers, 49 P 2d 803, 174 Okl 554—Lane v Flowers, 48 P 2d 1076, 173 Okl 413—Enosburg Falls Sav Bank & Trust Co v McKinney, 44 P 2d 987, 172 Okl 298—Ottawa County Nat Bank, 280 P 581, 138 Okl 133—Storm v Garnett, 227 P 417, 99 Okl 284—Osmon v Payton, 223 P 382, 98 Okl 194—State v Brown, 218 P 816, 92 Okl 137—Sharpe v Wright, 211 P 70, 88 Okl 16

S D—Eagle Feather v McHenry, 190 N W 328, 46 S D 20

Tex—Kutt v Cockerham, Civ App, 71 S W 2d 905, error dismissed—Guaranty Bond State Bank v Banks, Civ App 56 S W 2d 1102—Scottish American Mortg Co v Milner, Civ App, 30 S W 2d 582, error refused

Wis—Schwitzke v American Nat Bank, 8 N W 2d 303

29 C J p 804 note 41, p 805 notes 45, 47

50. Tex—Gillette v Davis, Civ App, 296 S W 658

51. U S—Bryson v Provident Nat Bank of Waco, Tex, C C A Tex, 2 F 2d 831

Mich—Deville v Widoe, 31 N W 533, 64 Mich 593, 8 Am S R 852

Tex—L E Whitham & Co v Briggs, Civ App 41 S W 2d 156, reversed on other grounds L E Whitham & Co v Briggs' Estate, Com App, 58 S W 2d 49

Improvements held made within reasonable time

Tex—L E Whitham & Co v Briggs, supra

52 N D—Mandan Mercantile Co v Sexton, 151 N W 780, 29 N D 602, Ann Cas 1917A 67

29 C J p 805 note 48

53. Ala—W T Rawleigh Co v Patterson, 195 So 729, 239 Ala 309

29 C J p 804 note 41

Joining two houses

One who has purchased land on which are situated two houses which he intends to join and use as a single building is entitled to a reasonable time after the purchase to take over the actual occupancy of one of the houses by joining it with the other in which he has lived—Scottish American Mortg Co v Milner Tex Civ App 30 S W 2d 582 error refused

54. Okl—Chennault v Glenn, 109 P 2d 811, 188 Okl 408

Wis—Eaton Center Co-op Cheese Co v Heintz 241 N W 620, 622, 209 Wis 170 citing **Corpus Juris.**

29 C J p 805 note 52

55. Wis—Eaton Center Co-op Cheese Co v Heintz, supra, citing **Corpus Juris.**

29 C J p 806 note 53

56 Tex—Foley v Holtkamp, 66 S W 891, 28 Tex Civ App 123

Absence of legal process preventing use as homestead

The failure to occupy is not excused by litigation as to the property where no legal process has been issued or contemplated which would prevent the appropriation of the property to the use of a homestead—Gillette v Davis, Tex Civ App, 296 S W 658

57. Tex—White v Wadlington 14 S W 296, 78 Tex 159—Hardin v Neal, 74 S W 334, 32 Tex Civ App 335

58 Tex—Dobkins v Kuykendall, 16 S W 743, 81 Tex 180

stead, formed while the homestead act is in force, but carried into effect by moving on to the premises after the repeal of the homestead act, is not sufficient to exempt the property as a homestead [59]

§ 34. —— Effect of Occupancy of Other Property

Ordinarily, a person occupying one piece of property cannot acquire a homestead in another, but exception has been made, under certain circumstances, in the case of a man occupying land owned by his wife

In applying the rule requiring actual occupancy of the premises claimed as a homestead, it is generally held that claimant cannot exempt one piece of property as a homestead while he occupies other premises,[60] and that this is so, although the land on which he resides is leased [61] Even in a jurisdiction where homestead rights can be acquired in advance of actual occupancy, see supra § 33 b, one who occupies certain premises as a homestead cannot impress other premises with the homestead character by intention to occupy, coupled with preparatory acts,[62] or, a fortiori, by a mere intention to use the unoccupied premises in the future [63] Under some homestead laws, however, the fact that a debtor is living with his family on land owned by his wife does not necessarily debar him from the right to claim a homestead exemption in his own land [64] Thus, it has been held that, where a husband and wife own adjoining tracts of land which are cultivated as one farm, the fact that the dwelling house in which they reside is located on the wife's part of the land does not deprive the husband of the right to homestead exemption out of that part of the land owned by him,[65] since they are to be regarded as residing on his land within the meaning of the homestead law,[66] but the principle under which a husband may have a homestead in other land, although the habitation is on his wife's land, is confined to cases where the two farms are practically one and so cultivated and used as to constitute in contemplation of the state the family homestead,[67] and a husband living with his wife on her property is not entitled to a homestead in a distant farm not occupied as a homestead, and used by him purely as an investment or source of income [68]

A homestead right in urban property to which the owner has moved, intending to live there with his family, is not defeated by the fact that he continues to spend a large or the major, portion of each year in cultivating crops and attending to livestock on rural property formerly constituting his homestead [69]

§ 35. —— Character and Mode of Occupancy in General

The general rule, subject to some exceptions, is that the premises must be occupied as a bona fide home, and not, for example, as a temporary lodging place

Ordinarily, it is the use to which the property is put that determines the homestead character of the property,[70] and in jurisdictions or under circum-

59. Iowa—Charless v Lamberson, 1 Iowa 435, 63 Am D 457

60. Ala—Wildman v Means, 94 So 823, 208 Ala 487
Ky—Neel v Compton, 255 S W 840, 201 Ky 1, 30 A L R 765
Tex—Tide Water Oil Co v Ross, Civ App, 123 S W 2d 479, 484, affirmed Ross v Tide Water Oil Co, 145 S W 2d 1089 136 Tex 66, citing **Corpus Juris.**
29 C J p 806 note 58

61. Tex—Johnston v Martin, 16 S W 550, 81 Tex 18—Silvers v. Welch 91 S W 2d 686, 127 Tex 58, affirming Welch v Silvers, Civ App, 59 S W 2d 879

62. Tex—Tide Water Oil Co v Ross, Civ App, 123 S W 2d 479, affirmed Ross v Tide Water Oil Co, 145 S W 2d 1089, 136 Tex 66—Towery v Plainview Building & Loan Ass'n, Civ App, 99 S W 2d 1039, error refused—Neece v King, Civ App, 73 S W 2d 550—Elliott Lumber Co v Mitchell, Civ App, 241 S W 221, modified on other grounds Clem Lumber Co v Elliott Lumber Co, Com App, 254 S W 935—Pierce v Langston, Civ App, 193 S W 745
29 C J p 806 note 58 [a] (2)

63. Tex—Wallingford v Bowen, Civ App, 104 S W 2d 188—Gibraltar Sav & Bldg Ass'n v Harper, Civ App, 41 S W 2d 130, error refused

64. U S—In re Baker, Ky, 182 F 392, 104 C C A 602
Ky—Spratt v Allen 50 S W 270, 106 Ky 274, 20 Ky L 1822

65. Ky—Mason v Columbia Finance, etc, Co, 35 S W 115, 99 Ky 117, 18 Ky L 40, 59 Am S R 451—Mann v Jenkins, 110 S W 387, 33 Ky L 589

66. Ky—Mann v Jenkins, 110 S W 387, 33 Ky L 589

67. Ky—Forsythe v Morgantown Deposit Bank, 68 S W 2d 14, 252 Ky 680

68. Ky—Forsythe v Morgantown Deposit Bank, supra

69. Tex—Panhandle Const Co v Wiseman, Civ App, 110 S W 2d 615, error dismissed

70. U S—Croker v Croker, C C A Fla, 51 F 2d 11—In re Jarrell, D C Cal, 34 F 2d 970
Ala—Wolcott v Titus, 191 So 383 238 Ala 342
Kan—In re Casey's Estate, 134 P 2d 665, 156 Kan 590
N D—Burks v Globe International Protective Bureau, 218 N W 864, 56 N D 613
Or—Smith v Kay, 54 P 2d 1160, 153 Or 80, rehearing denied 55 P 2d 794, 153 Or 80
Tex—Yates v Home Building & Loan Co, Civ App 103 S W 2d 1081—Mays v Mays, Civ App, 43 S W 2d 148, error refused—Citizens' State Bank of Lindale v Jeffries, Civ App, 2 S W 2d 317, error refused
Capability of use as residence see infra § 54

Style; value as business place

It has been said that the question of whether a building is a residence does not depend on the style in which it is built, or that it would be more valuable as a place of business than a dwelling house, but on the fact of whether it is actually used as the residence of the family—Anderson v Shannon, 73 P 2d 5, 146 Kan 704, 114 A L R 200—Bebb v. Crowe, 18 P 223, 39 Kan 342.

stances where occupancy of the premises is required, the occupancy must be of such a nature as will stamp the premises with the character of the residence or home of the person claiming the homestead [71] Conversely, if the premises are used solely or principally as a home they may be claimed exempt as a homestead, within the limitations as to extent and value prescribed by law [72] Residential occupancy is not required in all jurisdictions or in all cases, however,[73] as, for example, in the case of business homesteads, see infra § 40

Occupancy, where required, must be bona fide and not a sham,[74] and the fact that premises are occasionally occupied as a lodging place or temporary residence will not impress the homestead character thereon,[75] especially where the actual and permanent residence of the debtor and his family is elsewhere [76] Occupancy may be of separate buildings on the same tract [77]

§ 36. —— Use for Other Purposes than Residence

a In general
b Use for hotel

a. In General

The homestead cannot be claimed in property used

Exemption of one block

The fact that one block is the maximum quantity that can be claimed as exempt in a city or town does not mean that homestead claimant may assert a right to have an entire block exempt regardless of the use to which the property is put —Smith v Kay, 54 P 2d 1160, 153 Or 80, rehearing denied 55 P 2d 794, 153 Or 80

71. U S —Croker v Croker, C C A Fla, 51 F 2d 11—In re Chakos, C C A Wis, 24 F 2d 482
Ill —Logue v Von Almen, 40 N E 2d 73, 379 Ill 208, 140 A L R 251
Kan —Anderson v Shannon, 73 P 2d 5, 146 Kan 704, 114 A L R 200
La —Brantley v Pruitt, 144 So 604, 175 La 879
Mich —Fox v Brannan, 290 N W 353, 292 Mich 126, 128 A L R 1424
Miss —Bank of Cruger v Hodge, 198 So 26, 189 Miss 356
Tex —Adams v Security Finance Corporation, Civ App, 77 S W 2d 770—Pearson v Felps, Civ App, 53 S W 2d 495, error refused—First Nat Bank v Wallace, Civ App, 13 S W 2d 176, 183, reversed on other grounds Wallace v First Nat Bank, 35 S W 2d 1036, 120 Tex 92 quoting **Corpus Juris**—Connelly v Johnson, Civ App, 259 S W 634
Vt —In re Wolff's Estate, 182 A 187, 108 Vt 54
29 C J p 806 note 65, p 823 note 9
Necessity of actual occupancy see supra § 33

"To be a homestead, therefore, it must be used or set apart and kept for a fixed, permanent home and principal establishment, to which, whenever the owner is absent, he has the intention of returning"—In re Wolff's Estate, 182 A 187, 189, 108 Vt 54

"Abode," as used in a statute requiring the homestead to be an actual abode, signifies habitation, dwelling, or place of residence —In re Barklow, D C Or, 282 F 892

Rural homestead

Notwithstanding expressions in some of the decisions which seem to indicate that a rural homestead need not be used for home purposes, the better authorities show unmistakably that it must be so used —Cocke v Conquest 35 S W 2d 673, 678, 120 Tex 43, affirming, Com App, 13 S W 2d 348, affirming, Civ App, 2 S W 2d 992

Occupancy under lessee

Where an owner of land, before occupying it, leased it for a period of years, without any reservations as to occupancy and the lessee took possession under the lease and thereafter employed the lessor as a hired hand and permitted him and his wife to live on the premises as a hired hand for a short period of time, such occupancy was held not to impress the land with a homestead character —Garret v Getzendaner, 242 P 525, 115 Okl 12

72. N D —Birks v Globe International Protective Bureau, 218 N W 864, 56 N D 613
Tex —C D Shamburger Lumber Co v Delavan, Civ App, 106 S W 2d 351, error refused
29 C J p 806 note 67

73. U S —In re Forbes, Ariz, 186 F 79, 108 C C A 191
29 C J p 823 note 7

Money as real exemption

The real exemption afforded by a statute exempting to the extent of four thousand dollars the dwelling house and land on which it is situated, or other land designated by claimant, has been held to be the sum of four thousand dollars rather than the particular tract of land on which the family lives as a home —Schreiber v Hill, 95 P 2d 566, 54 Ariz 345

74. Ark —Bank of Quitman v Mahar, 104 S W 2d 800, 193 Ark 1111
Tex —First Nat Bank v Wallace, Civ App, 13 S W 2d 176, 183 reversed on other grounds Wallace v First Nat Bank, 35 S W 2d 1036, 120 Tex 92, quoting **Corpus Juris**
Wash —Canadian Bank of Commerce v Kellough, 253 P 124, 142 Wash 335
29 C J p 806 note 67

Purpose of inquiry into good faith

"The good faith of the occupancy may be inquired into for the purpose, not of determining whether the occupant is entitled to impress the property as a homestead, but of determining whether the occupancy was to actually establish a home"— Chastain v Arkansas Bank & Trust Co, 249 S W 1, 2, 157 Ark 423

Temporary occupancy to evade creditors

An occupancy is insufficient where it is temporary to evade creditors, and not in good faith to establish a homestead —Chastain v Arkansas Bank & Trust Co, supra

75. Tex —First Nat Bank v Wallace, Civ App 13 S W 2d 176, 183, reversed on other grounds Wallace v First Nat Bank, 35 S W 2d 1036, 120 Tex 92 quoting **Corpus Juris.**
Vt - In re Wolff's Estate, 182 A 187, 108 Vt 54
29 C J p 806 note 68

76. Ark —Bank of Quitman v Mahar, 104 S W 2d 800, 193 Ark 1111
Miss —Bank of Cruger v Hodge, 198 So 26, 189 Miss 356
Tex —First Nat Bank v Wallace, Civ App, 13 S W 2d 176, 183, reversed on other grounds Wallace v First Nat Bank, 35 S W 2d 1036, 120 Tex 92 quoting **Corpus Juris.**

Summer residence

(1) Summer cottage where claimants, who lived in apartment in city most of year lived during July and August each year, and which was not habitable during winter, was not a homestead —In re Wolff's Estate, 182 A 187, 108 Vt 54

(2) Homestead right did not attach to land on which family lived one summer, where they maintained a house in town which the husband claimed as a homestead in bankruptcy proceedings — Schnaubert v Tippett, C C A Tex, 29 F 2d 230

77. Ill —Bartholomae & Roesing Brewing & Malting Co v Schroeder, 67 Ill App 560
Tex —Tenney v. Wessell, Civ App, 26 S W 436.

solely for purposes other than residence; but the right of homestead in property used primarily and in good faith as a residence is not lost by the fact that it is used incidentally for other purposes

Occupancy such as will stamp the place claimed as a homestead with the character of a residence of claimant being necessary ordinarily, see supra § 35, a debtor cannot claim as his homestead premises used by him solely for purposes unconnected with residence, as for example, solely for a place of business.[78] However, if premises are in fact used by the owner as a residence for himself and his family, the right to claim them as a homestead is not necessarily defeated by the fact that they are not all required for such purpose, and that they are partly used for other purposes, such as business purposes,[79] and particularly where the constitution or statute exempts a certain quantity of land owned and occupied by a debtor, the whole quantity specified is exempt if occupied as the residence of the debtor and his family, without regard to the use to which he may put that part of the land on which his dwelling is not physically situated, or the business he may pursue thereon.[80] Thus if a building is the actual bona fide residence of a party, he may establish a homestead right therein, although a part thereof is used for purposes other than as the party's family residence, such as for business purposes.[81] The fact that a debtor resides on a portion of certain land does not of itself constitute the entire land a homestead, whether it be in one tract or separate parcels,[82] and only such part will be acquired as a homestead as is intended by the owner as a part of his homestead and is used in connection with his place of residence, together with such part as the owner evinces by overt acts an intention to use immediately as part of such homestead.[83] In the case of an urban homestead, it has been held that only that part of the tract occupied as the family residence,[84] or constituting the actual residence and business house of the owner,[85] exclusive of other buildings, can be claimed.

Use for agricultural purposes Under some statutory provisions a specified quantity of rural land used for agricultural purposes is specifically made exempt, in addition to the dwelling house and appurtenances situated thereon,[86] and the word "agricultural" in such a statute has been construed to have been used merely to distinguish rural from city or village property, rather than in a technical sense.[87]

Extent of use for other purposes Consideration is often given by the authorities to the comparative extent to which the property is used for residence and business purposes, these authorities holding that, in determining the homestead character of property, it is the principal use to which the property is subjected that must be looked to,[88] and that any use of the property for business purposes should be of an incidental character,[89] so that, while the homestead character attaches to property occupied mainly as a residence and only incidentally for business purposes,[90] no exemption will be allowed

78. Ky.—Covington Bros. & Co. v. Byrns, 18 S.W.2d 870, 230 Ky. 66.
29 C.J. p. 807 note 73.
Business homestead see infra § 40.

79. U.S.—In re Booth, D.C.Okl., 18 F.Supp. 79.
Ark.—Chastain v. Arkansas Bank & Trust Co., 219 S.W. 1, 157 Ark. 423.
Kan.—Iola Wholesale Grocery Co. v. Johnson, 216 P. 828, 111 Kan. 89.
Mich.—Fox v. Branman, 290 N.W. 353, 292 Mich. 126, 128 A.L.R. 1121.
Wis.—In re McKenzie's Estate, 287 N.W. 695, 232 Wis. 425.
29 C.J. p. 807 notes 74, 78.
Renting premises claimed as homestead see infra § 37.

Share cropping; general store
"The farmer, who farms personally and through hired help and share cropper, and who runs a general store out of which come provisions and clothing and implements for those who work on his farms is entitled to his rural exemptions, as much so as is the farmer who runs a gin or blacksmith shop or a tanyard."—In re Buie, D.C.Tex., 287 F. 896, 901, affirmed, C.C.A., Rockhold v. Buie, 293 F. 1021, certiorari denied 44 S.Ct. 402, 264 U.S. 588, 68 L.Ed. 864.

80. Fla.—Fort v. Rigdon, 129 So. 847, 100 Fla. 398.
29 C.J. p. 807 note 76.

81. Cal.—Coca Cola Bottling Co. v. Feliciano, 114 P.2d 604, 45 Cal.App.2d 680.—Schmidt v. Denning, 3 P.2d 32?, 117 Cal.App. 36.
Mich.—Fox v. Branman, 290 N.W. 353, 292 Mich. 126, 128 A.L.R. 1121.
Or.—In re Baker's Estate, 20 P.2d 1069, 142 Or. 559.
29 C.J. p. 807 note 79.

82. Okl.—Orwig v. Cloud, 233 P. 1085, 109 Okl. 299.—Harris v. Watts, 226 P. 40, 102 Okl. 36.—Kerns v. Warden, 213 P. 70, 88 Okl. 297.

83. Okl.—Orwig v. Cloud, 233 P. 1085, 109 Okl. 299.—Harris v. Watts, 226 P. 40, 102 Okl. 36.—Kerns v. Warden, 213 P. 70, 88 Okl. 297.
Use of adjoining tract of land in connection with residence see infra § 64.

84. Okl.—Standard v. Eckert, 249 P. 278, 119 Okl. 124.

85. Fla.—Jordan v. Jordan, 132 So. 466, 100 Fla. 1586.

86. Mont.—De Fontenay v. Childs, 19 P.2d 650, 93 Mont. 180.

87. Wis.—Roche v. Du Bois, 271 N.W. 84, 223 Wis. 138.
Lands used for grazing horses is "used for agricultural purposes" within homestead exemption statute, although horses are not kept for use in tilling soil or other agricultural pursuits.—De Fontenay v. Childs, 19 P.2d 650, 93 Mont. 480.

88. Tex.—Benzel v. Commercial Nat. Bank of Sherman, Civ.App., 1 S.W.2d 695.—Walker v. Darby, Civ.App., 290 S.W. 813.

89. Kan.—Anderson v. Shannon, 73 P.2d 5, 146 Kan. 704, 111 A.L.R. 200.

90. U.S.—In re Shepardson, D.C.Cal., 28 F.2d 353.
Alaska.—Wendler v. Brenneman, 7 Alaska 13.
Cal.—Coca Cola Bottling Co. v. Feliciano, 114 P.2d 604, 45 Cal.App.2d 680.
Renting summer cottages
The fact that part of the premises are used for the maintenance of summer cottages thereon for renting to tourists does not warrant exclud-

as to property used primarily and chiefly for commercial purposes, and only incidentally as the place of residence of the debtor and his family [91] Where the part of a building used for homestead purposes greatly exceeds in value the amount which is exempted by statute, and the sale thereof will not unreasonably interfere with the use of the owner of those parts of the building occupied as a residence, the part used for business is not exempt [92]

b. Use for Hotel

According to the weight of authority an owner who resides on property with his family does not lose his homestead exemption therein by the fact that the premises are also used as a hotel or lodging house

While there is some authority to the contrary,[93] according to the weight of authority, premises which are used by the owner for the purpose of a hotel or lodging house may be exempt as his homestead where he also resides there with his family [94] However, the mere sharing in the profits of a hotel conducted by another will not enable the owner who does not reside therein to claim it as a homestead,[95] and even where the owner of a hotel resides therein he does not acquire a homestead right if his residence is not of such a character as to meet the homestead requirements [96]

Previous use for hotel purposes Where it appears that a property owner at the time of filing a declaration of homestead was, with his family, using the place as a home and that it was at that time being used for no other purpose, proof of previous use for hotel and other purposes does not prevent the property from being impressed with the character of a homestead [97]

§ 37. —— Occupancy by Tenant

As a general rule a debtor cannot claim a homestead in property or a separate building which he has entirely leased to tenants, but the weight of authority holds that a building used by the owner as a residence may be exempt notwithstanding he has leased a portion of it to others

While the circumstances connected with the occupancy of the tenant may be such that the occupancy of the tenant will, in contemplation of law, be an occupancy by the owner entitling him to a homestead,[98] the general rule is that the occupancy contemplated by the homestead law is a personal occupancy and not an occupancy by tenant,[99] and that one who has granted a lease as to the entire property and is not occupying it as a residence has no right of homestead therein,[1] although the revenues therefrom are used for the support of the owner's family,[2] and although the owner has no other dwelling house and may contemplate living on the premises at a future time [3] On the other hand, although there is authority to the contrary,[4] the weight of authority is to the effect that, if a building is used by a debtor as his family residence, it may be his homestead, and exempt as such, notwithstanding a part of it may be leased to others for residence or business purposes [5] The fact that

ing the portions so used from the homestead where it appears that the business of renting the cottages is conducted for the purpose of maintaining a home rather than that the occupancy of the premises is incidental to the purpose of carrying on the business of renting cottages—Roche v Du Bois, 271 N W 84, 223 Wis 438

91 U S—In re Shepardson D C Cal, 28 F 2d 353
Kan—Anderson v Shannon, 73 P 2d 5, 146 Kan 704 114 A L R 200
29 C J p 808 note 82

92. Iowa—Johnson v Moser, 24 N W 32, 66 Iowa 536

93 Ala—Turner v Turner, 18 So 210, 107 Ala 465, 466, 54 Am S R 110
29 C J p 808 note 83

94 Or—In re Baker's Estate, 20 P 2d 1069 142 Or 559 quoting **Corpus Juris.**
Tex—Postal Savings & Loan Ass'n v Powell, Civ App, 47 S W 2d 343, 351 error refused, quoting **Corpus Juris.**
29 C J p 808 note 84

95. U S—May v International L & T Co, Tex, 92 F 145, 34 C C A 448

96 Wis—Green v Pierce 19 N W 427 60 Wis 372

Residence contrary to lease
Where a hotel is erected on leased land and the terms of the lease are such as to exclude any right of the owner of the hotel to occupy it as a residence such owner does not acquire a homestead right in the hotel by residing therein, notwithstanding his residence therein is with the tacit consent of his lessor—Green v Pierce, supra

Residence under lessee
Where a divorced woman acquired hotel property by exchanging other land therefor, and lived in the hotel which was rented to another person, but her children resided in another county, and where she, on borrowing money, gave a lien on the hotel property to secure the same designating other property as her homestead, the hotel property could not be considered her homestead—Ward v Baker, Tex Civ App, 135 S W 620

97. Cal—Lima v San Luis Obispo County Bank, 75 P 846, 142 Cal 245

98 Ky—Derickson v Gillespie 32 S W 1084 17 Ky L 892
29 C J p 808 note 90

99 Ky—Tyler's Ex'r v Williamson 36 S W 2d 34, 237 Ky 579
29 C J p 808 note 91

1 Tex Walker v Dailey Civ App, 290 S W 813
29 C J p 808 note 92

Access to leased premises
Where landowners fenced off one lot from land used as their home erected store building thereon and leased the premises, the fact that their chickens had free access to unoccupied portions of the leased lot did not make such lot their homestead—Archer v Youngblood Tex Civ App 129 S W 2d 382, error refused

2 Okl—Powell v Powell, 116 P 2d 889 189 Okl 255
Tex—Mays v Mays, Civ App 13 S W 2d 118 error refused—Nance v Rucker Civ App, 291 S W 291

3 Vt—True v Morrill, 28 Vt 672

4 Fla Smith v Guckenheimer, 27 So 900, 42 Fla 1
29 C J p 809 note 98

5. Cal—Vincenzini v Fiorentini, 38 P 2d 876, 2 Cal App 2d 739

land is worked by a tenant does not bar the owner of the right to select the land as a homestead where the owner resides in the dwelling house situated on the land.[6]

Where two separate houses stand on real property sought to be impressed with a homestead, only one of which is occupied as a dwelling by the person claiming a homestead, the other being rented to tenants, an attempt to establish both as a homestead is inoperative.[7] Under this rule, the weight of authority is to the effect that, although the owner actually occupies a house on the premises claimed to be exempt as a homestead, yet if he leases another house or building located on the premises which is wholly distinct from the one occupied by him, no exemption exists in his favor in the premises leased, the view being taken that the homestead laws do not contemplate the exemption of buildings used mainly as a source of revenue.[8] A contrary view has been taken, however,[9] and it has been held that the renting of one of two houses does not defeat the owner's homestead rights in the house rented where the renting is temporary and without intent to discontinue or abandon the use of the house for homestead purposes,[10] although in such a case an unreasonable delay in occupying the rented house will defeat a homestead claim thereto.[11] Under the construction of some homestead provisions, if a house and the whole lot on which it stands are adapted to use as a homestead, and are actually used as such at the time of the dedication, the subsequent erection of an additional dwelling on the lot, for whatever purpose used, will not vitiate and affect the homestead as an entirety or render any part of it subject to seizure and sale under execution,[12] except where the second house increases the value of the homestead beyond the statutory limit.[13]

§ 38. —— Joint Occupancy

Persons other than joint tenants or tenants in common cannot occupy land jointly so as to give both occupants a right of homestead in the same tract.

The establishment of a homestead in property by joint tenants or by tenants in common is considered infra § 88. In the case of other persons, such as persons having successive estates in the property, property cannot be occupied jointly so as to give both occupants estates of homestead in the same land.[14]

§ 39. —— Unlawful Use of Premises

The authorities are in conflict as to the right to acquire a homestead in property used to conduct an unlawful business. The right is not lost by failure to obtain a certificate of occupancy.

It has been held that the fact that the homestead claimant conducts an unlawful business on the premises does not affect his right to their exemption as a homestead,[15] but there is authority for a contrary view.[16] A homestead exemption is not lost by the fact the premises have been occupied without first obtaining the required official certificate stating that the dwelling is suitable for human

Mich.—Bartold v. Lewandowska, 8 N. W. 2d 133, 304 Mich. 450—Fox v. Brannan, 290 N. W. 353, 355, 292 Mich. 126, 128 A. L. R. 1424, quoting **Corpus Juris.**

Neb.—Hawley v. Arnold, 288 N. W. 823, 137 Neb. 238.

Or.—In re Potter's Estate, 59 P. 2d 753, 154 Or. 167—Smith v. Kay, 54 P. 2d 1160, 153 Or. 80, rehearing denied 55 P. 2d 794, 153 Or. 80.

Tex.—Thomas v. Tyler, Com. App., 6 S. W. 2d 350, reversing Tyler v. Thomas, Civ. App., 297 S. W. 609.

29 C. J. p. 809 note 99.

6. Mont.—Oregon Mortg. Co. v. Dunbar, 289 P. 559, 87 Mont. 603, 73 A. L. R. 113.

7. Cal.—Vincenzini v. Fiorentini, 38 P. 2d 876, 2 Cal. App. 2d 739.

8. Ala.—Griffin v. Ayers, 165 So. 593, 231 Ala. 493.

Fla.—O'Neal v. Miller, 196 So. 478, 143 Fla. 171, 129 A. L. R. 295—McEwen v. Larson, 185 So. 866, 136 Fla. 1.

Or.—Smith v. Kay, 54 P. 2d 1160, 153 Or. 80, rehearing denied 55 P. 2d 794, 153 Or. 80.

29 C. J. p. 809 note 95.

9. Ill.—Stevens v. Hollingsworth, 74 Ill. 202.

29 C. J. p. 808 note 94.

Smaller houses incidental to use of property

"When the residence is primarily the home of the family and there are smaller houses upon the same property used for rental purposes the smaller residences are only incidental to the use of the property and cannot bar a valid homestead by a declaration upon the whole property." In re Jarrell, D. C. Cal., 34 F. 2d 970, 972.

Worker's residence on land

An owner may establish a homestead right to the land on which he lives, notwithstanding his son farms a portion thereof as a renter and lives with his own family in another set of buildings situated on the land.—Luenenborg v. Luenenborg, 259 N. W. 649, 128 Neb. 624.

Occupancy held not to destroy requisite possession

Where a debtor owned, and resided with her family on, a lot, and leased a separate building situated on the lot for business purposes, it was held that the occupancy of the separate building did not so deprive the owner of the possession of the building and the ground underneath it as to cause it to lose its character as part of the homestead.—Barten v. Martin, 299 P. 614, 133 Kan. 329.

10. Tex.—Scottish American Mortg. Co. v. Milner, Civ. App., 30 S. W. 2d 582, error refused.

11. Tex.—Scottish American Mortg. Co. v. Milner, supra.

12. Cal.—Lubbock v. McMann, 22 P. 1145, 83 Cal. 236, 16 Am. S. R. 108.

29 C. J. p. 809 note 2.

13. Cal.—Lubbock v. McMann, supra.

14. Ill.—Brokaw v. Ogle, 48 N. E. 394, 170 Ill. 115.

29 C. J. p. 809 note 4.

Separate homesteads in same tract see supra § 14.

15. Wis.—Prince v. Hake, 11 N. W. 825, 75 Wis. 638, 641.

29 C. J. p. 809 note 5.

16. Iowa.—Arnold v. Gotshall, 32 N. W. 508, 91 Iowa 572.

29 C. J. p. 809 note 6.

Legality of business as affecting business homestead see infra § 40.

habitation.[17] Where a statute renders premises liable for the payment of all fines and costs assessed, or judgments rendered, against any person for the illegal sale of intoxicating liquors on the premises with the owner's consent and knowledge, an owner who has consented to such illegal sale cannot prevent the property from being subjected to the statutory liability by asserting a homestead right therein,[18] but general creditors whose claims are not based on any violation of the intoxicating liquor statute cannot reach the premises.[19]

§ 40. —— Business Homestead

In Texas an urban homestead may be acquired in property used for business purposes While the business homestead need not be adjacent to the residence, and may consist of more than one lot, it must be in the same urban community as the residence. Only one business homestead may be claimed

Under the Texas constitution and statutes a homestead exemption may be had with respect to the property on which the head of a family exercises his calling or business,[20] and the constitutional provision affording such exemption is to be liberally construed.[21] These provisions have no application except to urban property.[22]

In order to acquire a business homestead, claimant must have a calling or business[23] to which the property is adapted and reasonably necessary.[24] The kind or character of business, if legitimate, is not restricted,[25] for the words "calling" and "business," although not synonymous,[26] are used in the applicable provisions in a very broad sense,[27] and, when taken together, embrace every legitimate avocation in life by which an honest support for a family may be obtained.[28] Although there is no right to an exemption if the building is devoted to an illegal business,[29] if the real business which the debtor conducts on the property is legitimate, the business homestead exemption is not lost by the fact that the owner has incidentally used the property for an illegal purpose, such as gaming.[30] The failure to pay a license tax does not render the business illegal so as to deprive the owner of the exemption,[31] nor does the fact that the business is conducted in fraud of creditors affect the right to the exemption.[32]

While the head of the family must have an intent to dedicate the property as a place to exercise his calling or business,[33] ordinarily the use made of the premises determines whether they con-

17. Minn.—Ryan v. Colburn, 241 N.W. 388, 185 Minn. 347

18. Iowa.—McClure v. Braniff, 39 N.W. 171, 75 Iowa 38—Arnold v. Gotshall, 32 N.W. 508, 71 Iowa 572

19. Iowa.—Groneweg v. Beck, 62 N.W. 31, 93 Iowa 717

20. Tex.—Thomas v. Creager, Civ.App., 107 S.W.2d 705, error dismissed
29 C.J. p. 810 note 10

21. Tex.—C. D. Shamburger Lumber Co. v. Delavan, Civ.App., 106 S.W.2d 351, error refused

22. Tex.—Exall v. Security Mortg. & Trust Co., 39 S.W. 959, 15 Tex.Civ.App. 643
29 C.J. p. 810 note 12

23. Tex.—Clem Lumber Co. v. Elliott Lumber Co., Com.App., 254 S.W. 935, modifying Elliott Lumber Co. v. Mitchell, Civ.App., 241 S.W. 221

Renting of property for dwelling purposes

(1) It has been held that the renting of rooms or tenant houses for the purpose of deriving revenue is not a calling or business, within the meaning of provisions exempting a business homestead.—Mays v. Mays, Tex.Civ.App., 43 S.W.2d 148, error refused.—29 C.J. p. 810 note 10 [a]

(2) However, it has also been held that conducting a rooming house or hotel is the exercise of a calling or business rendering the property exempt as a business homestead.—Postal Savings & Loan Ass'n v. Powell, Tex.Civ.App., 47 S.W.2d 343, error refused

(3) A family head owning and operating tourist camp, is entitled to business homestead exemption, operation of such camp being a business.—C. D. Shamburger Lumber Co. v. Delavan, Tex.Civ.App., 106 S.W.2d 351, error refused

(4) Where husband and wife occupied one apartment in apartment house and neither husband nor wife had any other occupation than that of operating apartment house, the apartment house property was held the homestead of husband and wife.—Person v. Levenson, Tex.Civ.App., 143 S.W.2d 419.

24. Tex.—Clem Lumber Co. v. Elliott Lumber Co., Com.App., 254 S.W. 935, modifying Elliott Lumber Co. v. Mitchell, Civ.App., 241 S.W. 221.—Thomas v. Creager, Civ.App., 107 S.W.2d 705, error dismissed.—De Guire v. Title Realty Co., Civ.App., 98 S.W.2d 249, error dismissed.—Farmers' Nat. Bank of Dublin v. Carmony, Civ.App., 62 S.W.2d 1115.—Mays v. Mays, Civ.App., 43 S.W.2d 148, error refused.—Spence v. State Nat. Bank of El Paso, Civ.App., 294 S.W. 618, affirmed, Com.App., 5 S.W.2d 754
29 C.J. p. 810 note 18

25. Tex.—C. D. Shamburger Lumber Co. v. Delavan, Civ.App., 106 S.W.2d 351, error refused.

26. Tex.—Thomas v. Creager, Civ.App., 107 S.W.2d 705, error dismissed

Terms distinguished

A "business" is that which occupies the time, labor, and efforts of its owner or operator, whereas a "calling" may exist as a fact whether it be practiced or not.—C. D. Shamburger Lumber Co. v. Delavan, Tex.Civ.App., 106 S.W.2d 351, error refused

27. Tex.—C. D. Shamburger Lumber Co. v. Delavan supra.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 343, error refused

28. Tex.—First State Bank of Memphis v. Seago, Civ.App., 120 S.W.2d 951, error refused.—C. D. Shamburger Lumber Co. v. Delavan, Civ.App., 106 S.W.2d 351, error refused.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 343, error refused

29. Tex.—Tillman v. Brown, 64 Tex. 181

30. Tex.—Tillman v. Brown, supra

31. Tex.—Gassoway v. White, 8 S.W. 117, 70 Tex. 475

32. Tex.—Gassoway v. White, supra.—King v. Harter, 8 S.W. 308, 70 Tex. 579

33. Tex.—Clem Lumber Co. v. Elliott Lumber Co., Com.App., 254 S.W. 935, modifying Elliott Lumber Co. v. Mitchell, Civ.App., 241 S.W. 221.

stitute a business homestead[34] The head of the family must use the premises as a place where he exercises his calling or business,[35] or in case there is not an actual occupancy there must be a bona fide intention to occupy the premises for business accompanied by acts amounting to a reasonable notice of such purpose,[36] in which case the same principles govern as in the creation of a residence homestead in advance of actual occupancy[37] In the case of one who has more than one business, the place must be that in which he exercises his principal, main, or chief business[38] The fact that but little, if any, business is actually transacted is immaterial, if the premises are in good faith occupied for business purposes[39] Where a building is an entirety, occupancy sufficient to exempt any part of it as a business homestead operates to exempt the whole,[40] but the use of an insignificant part of a building by a firm for business purposes does not render the premises a business homestead where the main portion is rented out to tenants[41]

Right as affected by residence. Although the business homestead exemption extends to property which is not used for the purpose of a home,[42] there may not be two homesteads, one of residence and another of business,[43] the business homestead is but a part of the one urban homestead exempted by law,[44] or, in other words, the business and residence homestead in a city, town, or village constitutes a unit, namely the one urban homestead[45] The business homestead exemption may be established in property which is not adjacent to the residence homestead,[46] but it must be located within the same urban community as the residence homestead, and not in a widely separated city, town, or village,[47] and one cannot claim both a rural residence homestead and an urban business homestead[48]

Limitation to one business homestead, election A debtor can claim only one place as a business homestead,[49] notwithstanding he has several places of business,[50] in which he engages in different lines

34. Tex.—Mays v. Mays, Civ.App., 43 S.W.2d 118, error refused.—Spence v. State Nat. Bank of El Paso, Civ.App., 294 S.W. 618, affirmed, Com.App., 5 S.W.2d 754

Estoppel to assert business homestead

Where property is actually a business homestead, the owner's use of it may be so open and unequivocal that no representations to the contrary can form the basis of an estoppel.—Thomas v. Creager, Tex.Civ.App., 107 S.W.2d 705, error dismissed.

35. Tex.—Clem Lumber Co. v. Elliott Lumber Co., Com.App., 254 S.W. 935, modifying Elliott Lumber Co. v. Mitchell, Civ.App., 241 S.W. 221.—De Guire v. Title Realty Co., Civ.App., 98 S.W.2d 249, error dismissed.—Mays v. Mays, Civ.App., 43 S.W.2d 118, error refused.
29 C.J. p. 810 note 22

Incidental use

A use which is merely incidental or in aid of the business of the owner is not sufficient.—Thomas v. Creager, Tex.Civ.App., 107 S.W.2d 705, error dismissed.

Apartments in which no office room was located have been held not to constitute a business homestead of the owner.—Spence v. State Nat. Bank of El Paso, Tex.Civ.App., 294 S.W. 618, affirmed, Com.App., 5 S.W.2d 754.

36. Tex.—Clem Lumber Co. v. Elliott Lumber Co., Com.App., 254 S.W. 935, modifying Elliott Lumber Co. v. Mitchell, Civ.App., 241 S.W. 221.
29 C.J. p. 810 note 23

37. Tex.—Hufstedler v. Glenn, Civ.App., 82 S.W.2d 733.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 313, error refused.
Limitations of rule requiring actual occupancy see supra § 33 b

Renewal of lease

Property owner's renewal of lease and failure to take possession of and dedicate property to business homestead purposes when old lease thereon expired defeated homestead exemption.—Pickard v. Reed, Tex.Civ.App., 52 S.W.2d 274, error refused.

Homestead character impressed

Where lender had notice of borrowers' intention to make property a business homestead, declaration of purpose coupled with erection of building and occupation thereof by borrowers as business homestead after building was completed impressed the property with homestead character.—Hufstedler v. Glenn, Tex.Civ.App., 82 S.W.2d 733.

38. Tex.—Thomas v. Creager, Civ.App., 107 S.W.2d 705, error dismissed.

Reason for rule

Such a construction permits a more certain application of the provision to the various factual situations, and more completely accomplishes the purpose of the exemption.—Thomas v. Creager, Tex.Civ.App., 107 S.W.2d 705, error dismissed.

Use of building by cattle rancher

The business homestead exemption was not available to owner of lots whose principal business was that of cattle rancher, but who used the building on the lots as a garage on first story and an office for various business operations on second story.—Thomas v. Creager, Tex.Civ.App., 107 S.W.2d 705, error dismissed.

39. Tex.—Gresoway v. White, 8 S.W. 117, 70 Tex. 475.

40. Tex.—Billings v. Mattioe, 82 S.W. 805, 36 Tex.Civ.App. 619.

41. Tex.—Van Slyke v. Barrett, 16 S.W. 902.

42. Tex.—Waggener v. Haskell, 35 S.W. 1, 89 Tex. 135.
29 C.J. p. 810 note 15

43. Tex.—Rockett v. Williams, Civ.App., 78 S.W.2d 1077.

44. Tex.—Rockett v. Williams, supra.—Purdy v. Grove, Civ.App., 35 S.W.2d 1078, error refused.

45. Tex.—Rockett v. Williams, Civ.App., 78 S.W.2d 1077.—Purdy v. Grove, Civ.App., 35 S.W.2d 1078, error refused.

46. Tex.—Shryock v. Latimer, 57 Tex. 674.
29 C.J. p. 810 note 16

47. Tex.—Rockett v. Williams, Civ.App., 78 S.W.2d 1077.—Purdy v. Grove, Civ.App., 35 S.W.2d 1078, error refused.

48. Tex.—White v. Dozier Const. Co., Civ.App., 70 S.W.2d 210.
29 C.J. p. 810 note 14

49. Tex.—Thomas v. Creager, Civ.App., 107 S.W.2d 705, error dismissed.—Gates v. Pitts, Civ.App., 2 S.W.2d 307.—Bowman v. Stark, Civ.App., 185 S.W. 921.
Existence of more than one homestead generally see supra § 13

50. U.S.—Gulbransen Co. v. Couch, C.C.A.Tex., 61 F.2d 932.—Spence v. State Nat. Bank of El Paso, Civ.App., 294 S.W. 618, affirmed, Com.App., 5 S.W.2d 754.

of business[51] The head of the family or owner of a business may have the right to elect, if he is engaged in two businesses, which he will hold as a business homestead.[52]

More than one lot, parts of lots The business homestead may consist of more than one lot if the lots are so used as to make them, all together, a place for transacting business,[53] and if a part of a lot or lots is occupied for business, the remaining portions thereof are exempt,[54] unless put to some use not connected with such business[55] However, in order for several lots to constitute a business homestead it is necessary that all the lots together constitute one place of business,[56] and where one lot constitutes the place of business, other lots are not exempt, notwithstanding they are in some manner connected with the conduct of the business,[57] for the constitution does not permit the use of different lots "for the purpose or in aid of" the business of the head of the family[58] A warehouse situated on a different lot from that on which the business is conducted and not adjacent thereto is not exempt,[59] but a warehouse or other auxiliary building on the same lot with the regular business house and attached to it as an enlargement thereof is a part of the business homestead and exempt[60]

Addition to building If property constitutes a business homestead, an addition to the building[61] to be used in increasing the volume of business[62] will also be exempt.

§ 41. —— Time and Continuity of Occupancy

Occupancy of the proper character suffices although it is of short duration; nor is the homestead right lost by brief temporary absences from the property.

It has been held immaterial whether the occupancy is for a long or a short period,[63] although, as shown supra § 35, occasional occupancy of premises as a lodging place or temporary residence will not impress the homestead character thereon A homestead exemption has been denied where claimant resided on the property for a short time, but soon abandoned the idea of occupying it and returned to a former dwelling and real home before the seizure of the property on execution[64]

Time of occupancy as affecting the enforceability of debts antedating the establishment of the homestead is considered infra § 97

Continuity of occupancy Continuous and actual occupation of land claimed as exempt is unnecessary, provided the homestead character has once attached thereto,[65] especially under statutes providing that there can be no abandonment of a homestead except by a declaration of abandonment or a grant thereof[66] Brief temporary absences will not affect the right[67] A change of occupancy

51. Tex.—Parrish v. Frey, 44 S.W. 322, 18 Tex.Civ.App. 271

52 U.S.—Gulbransen Co. v. Couch, C.C.A.Tex., 61 F.2d 912
Tex.—Campbell v. First Nat. Bank, Civ.App., 88 S.W.2d 1084, error refused—Bowman v. Stark, Civ.App., 185 S.W. 921

Judgment of foreclosure against one of two business homesteads amounts to a finding that the owner has elected to hold the property not covered by the judgment.—Campbell v. First Nat. Bank, Tex.Civ.App., 88 S.W.2d 1084, error refused

53 Tex.—Rock Island Plow Co. v. Allen, 116 S.W. 1144, 102 Tex. 366, reversing, Civ.App., 111 S.W. 973
29 C.J. p. 810 note 24

54. Tex.—Lavell v. Lapowski, 19 S.W. 1004, 85 Tex. 168—Hargadene v. Whitfield, 9 S.W. 475, 71 Tex. 482

55. Tex.—Pyland v. Sayers, Civ.App., 148 S.W.2d 450, reversed on other grounds Sayers v. Pyland, 161 S.W.2d 769, 139 Tex. 57, 140 A.L.R. 1164
29 C.J. p. 810 note 26

56 Tex.—Rock Island Plow Co. v. Allen, 116 S.W. 1144, 102 Tex. 366, reversing Civ.App., 111 S.W. 973
29 C.J. p. 810 note 28

57. Tex.—Farmers' Nat. Bank of Dublin v. Carmony, Civ.App., 62 S.W.2d 1115

Renting of tenant houses
Where a debtor resides on one lot and maintains tenant houses on contiguous lots, the tenant houses and lots on which they are situated are not exempt, notwithstanding the debtor's only business is that of building tenant houses, collecting the rents, and using them for the support of his family, where it does not appear that any of the tenant houses are used as a place to conduct the business.—Mays v. Mays, Tex.Civ.App., 43 S.W.2d 148, error refused

58. Tex.—Rock Island Plow Co. v. Allen, 116 S.W. 1144, 102 Tex. 366, 368
29 C.J. p. 811 note 29

59 Tex.—McDonald v. Campbell, 57 Tex. 614—Hinzie v. Moody, 30 S.W. 769, 1 Tex.Civ.App. 26

60. Tex.—Hargadene v. Whitfield, 9 S.W. 475, 71 Tex. 482
29 C.J. p. 811 note 32

61. Tex.—Mays v. Mays, Civ.App., 43 S.W.2d 148, error refused

62. Tex.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 343, error refused

63 U.S.—In re Chakos, C.C.A.Wis., 21 F.2d 482

64. La.—Bossier v. Raines, 37 La.Ann. 263

65 Alaska.—Williams v. Thompson, 7 Alaska 601
"It is obvious that a man and his family do not have to use and occupy premises the year round to impress it with a homestead character."—Fain-Townsend Co. v. Barker, Tex.Civ.App., 109 S.W.2d 1101, 1102

66. Wash.—Washburn v. Wilen, 165 P. 102, 96 Wash. 480
Removal from premises as constituting abandonment see infra §§ 164–167

67 Iowa.—Beiner v. Dellinger, 222 N.W. 370, 206 Iowa 1382.—Harris v. Carlson, 205 N.W. 202, 201 Iowa 169
Ky.—Williams v. Evans' Adm'r, 56 S.W.2d 710, 247 Ky. 105
29 C.J. p. 811 note 39

Constructive occupancy exists where property occupied as a homestead has been temporarily vacated without abandonment and with a bona fide and subsisting intention to return.—Davis v. Kelly, 87 N.W. 347, 62 Neb. 642—12 C.J. p. 1301 note 86.

from one house to another, both houses being situated on the same tract of land, does not destroy a right of homestead as to the tract [68]

§ 42. Dedication and Selection

The necessity of a dedication or selection of property as a homestead and the proceedings therefor are considered infra §§ 43–46 immediately following, and the question of who may select the homestead is treated infra § 47 The necessity of, and the proceedings for, making a claim of homestead pending or in anticipation of proceedings by creditors are considered infra §§ 209–215, and the necessity of, and proceedings for, the selection of the homestead by surviving spouse, children, or heirs infra §§ 279–282

Examine Pocket Parts for later cases

§ 43. —— Necessity, Requisites, and Sufficiency in General

Selection of the homestead is for the purpose of identifying and defining the property to which the exemption applies Whether formal acts are necessary depends on the statutes

The purpose for which selection of homestead is required is merely to identify and define the property to which the exemption applies so as to define that which is exempt from that which may be sold at the instance of creditors [69] The right of selection of homestead, residing in the owner, may, except as the statute may otherwise provide, be exercised whenever the necessity therefor arises [70] If the homestead laws specifically require the doing of designated formal acts as a condition precedent to the acquisition of a homestead, a compliance with these requirements is necessary [71] In the absence of such specific requirements, no formal acts are necessary for the selection or dedication,[72] and the question of a selection sufficient to impress the homestead character on property without actual occupancy thereof as a home must depend on the facts and circumstances of each particular case [73] The situation of a part of a tract may give adequate notice of intention to claim it as a portion of a homestead,[74] and, where the owner of a tract sells a part and retains the balance which is sufficient in value and extent to constitute a homestead, the owner thereby elects to treat the part retained as a homestead [75]

Registration of deed Under some statutes to that effect, where land is acquired by deed, registration of the deed is essential in order to give the property a homestead character,[76] in addition to the requirement that the premises be occupied as a homestead [77]

Property which may be selected as homestead It has been held that in selecting a homestead the owner of property is not bound to select the prop-

68. Iowa—Berner v Dellinger, 222 N W 370 206 Iowa 1382

69. Nev Ely First Nat Bank v Meyers 161 P 929 40 Nev 281

Adjoining tracts of husband and wife
In selecting homestead wife's separate eighty-acre tract, worth four thousand five hundred dollars, occupied as homestead will not be considered part of husband's two adjoining tracts containing two hundred forty acres – Birks v Globe International Protective Bureau, 218 N W 861, 56 N D 613

70. Okl – Exchange Nat Bank of Tulsa v Rose 103 P 2d 196, 187 Okl 481 – Marathon Oil Co v Western Oil & Drilling Co, 89 P 2d 939 185 Okl 53 – Elliott v Bond, 176 P 242, 991, 72 Okl 3

Where family residence is on tract
of land exceeding one hundred sixty acres, owned by husband, who also owned additional land some distance away, all of which was cultivated for family's benefit homestead may be selected by owner at any time prior to levy due regard for rights of judgment creditors being had—Morey v James 298 P 594, 118 Okl 277

Time for selection
Judgment debtors who did not select homestead within thirty days after written notice of entry of judgment thereby lost their right to claim homestead against such property and hence declaration of homestead filed after judgment debtors' redemption of property from sheriff's sale was invalid Bonded Adjustment Co v Helgerson 61 P 2d 1267, 188 Wash 176

71. Ariz—MacRae v MacRae, 294 P 280 37 Ariz 307
Cal – Carey v Douthitt, 35 P 2d 632, 140 Cal App 409
Colo – Crawford v Felkey, 216 P 520 73 Colo 141
Miss—Robert G Bruce Co v Spears 181 So 333 181 Miss 786
Wash – U S Fidelity & Guaranty Co v Alloway 23 P 2d 108, 173 Wash 404
29 C J p 811 note 44

72. U S—Gulbransen Co v Couch, C C A Tex, 61 F 2d 932
Neb—Meyer v Platt, 291 N W 86, 137 Neb 711
29 C J p 811 note 45

73. Okl—Enosburg Falls Sav Bank & Trust Co v McKinney, 44 P 2d 987, 172 Okl 298

Manifestations of intention
"The act of selecting is an act of choosing and presupposes an intention formed in the mind based upon reason to do or not to do a thing, and has for its object some definite result The act of selecting as an attribute of the will might exist in the abstract but for all practical purposes it is attended with the manifestations of intention, as spoken declarations ownership possession, occupancy use in connection with the home place etc and where a contest arises over the claim of different parcels or tracts making up the homestead, the facts may be depended upon to reveal the intent of the selecting mind"—Williams v Watkins, 219 P 613, 615, 93 Okl 112

74. Tex – Crockett v Templeton, 65 Tex 134

75. Ala—Williams v Kilpatrick 70 So 742, 195 Ala 563
Iowa – Hall v Gottsche, 86 N W 257, 114 Iowa 117

76. Mo—Crary v Standard Inv Co, 285 S W 459, 330 Mo 448—Tennent v Pruit, 7 S W 23, 94 Mo 145
29 C J p 819 note 20

77. Mo—Crary v Standard Inv Co, 285 S W 459, 330 Mo 448

erty on which he actually resides,[78] but it has also been held that in making the selection, whether by declaration, designation, or otherwise, the place of residence cannot be excluded[79] The fact that a mortgage had been foreclosed does not preclude the filing of a declaration of homestead on the property to the extent of declarant's equity therein until title finally passes[80] It has been held that a dedication as a homestead may be made of property of which the fee has not yet passed to claimant, or, subject to the vendor's lien, of which the entire purchase price has not yet been paid[81]

Dedication of separate tracts Where tracts are separated, there must be a dedication of each to homestead use, and the dedication of one tract will not dedicate any portion of tracts separated therefrom[82]

§ 44 —— Occupancy as Selection

In some jurisdictions mere ownership and occupancy of the property may impress it with the homestead character, at least if its area and value do not exceed the statutory limit, unless the intention of the parties is to the contrary or is ambiguous

In some jurisdictions, when a debtor occupies such a status as entitles him to a homestead, his mere ownership of the land and occupancy of it may be sufficient to impress it with the character of a homestead,[83] especially when the property is within the extent and value limited by law for a homestead[84] Even in jurisdictions where a selection is required, when the premises are of greater quantity or value than the statutory limit, no selection is necessary, in the absence of express requirement to that effect, if the area and value of the property occupied as a homestead do not exceed such statutory limit, and if it is no part or parcel of a larger portion of land[85]

However, occupancy will not operate as a selection where the use and occupation are ambiguous, as where the debtor resided on his mother's land before her death, and after title vested in him as heir continued to use the land as before,[86] nor will occupancy operate as a selection where there has been an express contrary selection,[87] although it has been held immaterial that the parties declared to the contrary[88] The occupation by a husband and his family after he had executed a valid deed of the premises to his wife will not indicate their selection by him as a homestead[89]

78 Okl—Morey v James, 276 P 707, 136 Okl 174
29 C J p 823 note 7 [b] (2)
Requirement that property must be occupied to constitute homestead see supra § 33
Property which may constitute homestead generally see infra §§ 52–92

79 Tex—Wade v First Nat Bank, Civ App 263 S W 654
29 C J p 813 note 77
Requirement as limitation on husband's right of selection see infra § 47

Rejection of part of dwelling
Where the debtor owns premises which include his dwelling and a business block, he cannot, in selecting his homestead, reject part of the dwelling in order to include the block - Shakopee First Nat Bank v How, 63 N W 632, 61 Minn. 238

80. Wash—Paramount Securities Co v Tasker, 29 P 2d 920, 176 Wash 523

81. Tex—Hughes v Groshart, Civ App, 150 S W 2d 827

82 Tex—Farmers' Nat Bank of Seymour v Coffman, Civ App, 79 S W 2d 905

83. Ark—Bank of Hoxie v Graham, 44 S W 2d 1099, 184 Ark 1065
Fla - Hutchinson Shoe Co v Turner, 130 So 623, 100 Fla 1120
Iowa—Commercial Sav Bank of Lohrville v McLaughlin, 214 N W 512, 203 Iowa 1368
La—Hammond State Bank & Trust Co v Broderick, 154 So 739, 179 La 693
Neb—Meyer v Platt, 291 N W 86, 137 Neb 714—In re Nielsen's Estate, 280 N W 246 135 Neb 110
N D—Birks v Globe International Protective Bureau, 218 N W 864, 867 56 N D 613, citing **Corpus Juris.**
Tex—Schulz v L E Whitham & Co, 27 S W 2d 1093, 119 Tex 211, modifying L E Whitham & Co v Schulz, Civ App, 14 S W 2d 881
29 C J p 812 note 53

No other notice required
(1) Occupancy by owner is evidence of election to treat property as homestead, and no other or further notice of selection is necessary —Kleinert v Lefkowitz, 259 N W 871, 271 Mich 79

(2) Under constitutional and statutory homestead provisions, where land is owned and occupied by judgment debtor and his family, such ownership and occupancy are notice to all the world of their homestead rights—Panagopulos v Manning, 69 P 2d 611, 93 Utah 198, rehearing denied 72 P 2d 156, 93 Utah 215

Occupancy and use of rural homestead
A "rural homestead" exemption comprehends a residence and business homestead exemption, and therefore dedication of a "rural homestead" consists of the use of a part of a tract for a residence and use of the balance for support of the family — J R Watkins Co v Dawson, Tex Civ App, 145 S W 2d 901

84. Mo—Peake v Cameron, 15 S W 70, 102 Mo 568

85 Ala—Majors v Killian, 162 So 289, 230 Ala 531- Davis v Harris, 101 So 458 211 Ala 679
N D—Birks v Globe International Protective Bureau, 218 N W 864, 867, 56 N D 613
29 C J p 812 note 61

Contiguous tracts
"When tracts of land, not exceeding in the aggregate, in quantity and value, the homestead exemption are contiguous, although not wholly within the bounds of a legal subdivision, and are used and occupied in common as a homestead by the owner, such use and occupancy themselves evidence the selection by the owner of all of such contiguous lands as his homestead, and constitute notice to all of its character as his homestead, and of his selection thereof as such, without his giving any other notice"—Larson v State Bank of Ogema, 230 N W 132, 134, 201 Wis 313

86. Tex—Crabtree v Whiteselle, 65 Tex 111

87 Wis Larson v State Bank of Ogema, 230 N W 132, 201 Wis 313

88. Tex—Schulz v L E Whitham & Co, 27 S W 2d 1093, 119 Tex 211, modifying L E Whitham & Co v Schulz, Civ App, 14 S W 2d 881

89. Mich—Meigs v Dibble, 40 N W 935, 73 Mich 101.

§ 45. —— Entry on Record of Title

Under statute so providing, a homestead may be established only by a proper entry of the word "homestead" on the margin of the record of title.

Under statute so providing a homestead exemption may be established only by entering the word "homestead" on the margin of the record of title,[90] which entry must have been signed by the owner and attested by the clerk and recorder.[91] The statutory requirement must be strictly performed, as the provision exists for the protection of the public, and is mandatory.[92] A creditor's actual notice that the premises are occupied as a residence is, in the absence of such entry, immaterial.[93] Merely causing the word "homestead" to be written on the deed itself is not sufficient.[94]

§ 46. —— Declaration or Certificate

a In general
b Form and contents
c Execution, filing, and recording
d Construction and operation

a In General

In some jurisdictions, before a homestead can be acquired, a declaration or certificate of intention to claim a homestead is required, at least under certain circumstances

While in the absence of any statutory requirement no formal declaration is necessary, as considered supra § 43, under some homestead laws to that effect a written declaration or certificate of intention to claim a homestead is required as a prerequisite to the acquisition of a homestead exemption.[95] Under some statutes a compliance with the statute is in all cases indispensable,[96] and mere occupancy of the premises without making the required declaration will not make the homestead exemption available.[97] Under other statutes to that effect it has been held that a declaration is necessary only where the property is not actually occupied as a homestead,[98] under such a statute, occupation by a tenant will not obviate the necessity of the declaration.[99] Under still other statutes a declaration or designation is necessary only where the extent and value of the homestead exceed those fixed by the statute,[1] and the statute is merely intended to provide means whereby the homestead right of the family in a definite part of a large tract on which the family resides may be fixed,[2] but it has been held that, even though the statute provides a mode of making the designation, it does not pre-

90 Colo.—Howell v. Burch Warehouse & Transfer Co., 67 P.2d 73, 100 Colo. 247—Crawford v. Felkey, 216 P. 520, 73 Colo. 144
29 C.J. p. 812 note 64

91 Colo.—Crawford v. Felkey, supra

92. U.S.—Goodwin v. Colorado Mortgage & Investment Co., Colo., 3 S. Ct. 173, 110 U.S. 1, 28 L.Ed. 47
29 C.J. p. 812 note 64

93 U.S.—Goodwin v. Colorado Mortgage & Investment Co., supra
29 C.J. p. 812 note 64

94 Colo.—Leppel v. Kus, 88 P. 448, 38 Colo. 292
29 C.J. p. 812 note 66

95 Cal.—Carey v. Douthitt, 35 P.2d 632, 140 Cal.App. 109
Nev.—McGill v. Lewis, 116 P.2d 581, rehearing denied 118 P.2d 702—Ely First Nat. Bank v. Meyers, 161 P. 929, 40 Nev. 284, affirming 150 P. 308, 39 Nev. 235
Wash.—State v. Superior Court of Chelan County, 266 P. 731, 147 Wash. 574
29 C.J. p. 813 note 70

Superseding statute

Homestead statute, providing that homestead could be created only by filing a declaration in form provided by statute, is complete in itself to the extent that although it contains no repealing clause it must be regarded as having been intended to supersede, as far as possible, previous statutes on the subject providing that homestead could be created by mere occupancy.—Davies v. Metropolitan Life Ins. Co., 71 P.2d 552, 191 Wash. 159, appeal dismissed 59 S.Ct. 465, 306 U.S. 665, 83 L.Ed. 1061

Rights acquired prior to statute

(1) Where no declaration was required under an earlier law a subsequent eviction of such declaration will not affect rights acquired under the former statute.—Garnier v. Jolliffon, 2 So. 797, 39 La.Ann. 881

(2) Owners of homestead acquired by mere occupancy pursuant to statute in force prior to passage of statute requiring filing of declaration could not be compelled to file declarations of homestead as required by that statute because their rights were already vested, but wife who married husband subsequent to enactment of statute requiring that declaration of homestead be filed did not acquire an unrecorded homestead right to property in which husband had acquired homestead by mere occupancy under former statute.—Davies v. Metropolitan Life Ins. Co., 71 P.2d 552, 191 Wash. 459, appeal dismissed 59 S.Ct. 465, 306 U.S. 665, 83 L.Ed. 1061

Under the Virginia statute relating to homestead exemptions, the exemption is not absolute but exists only when and after the debtor has claimed it and perfected it by the recordation in the clerk's office of an instrument setting forth the claim and giving a description and valuation of the property claimed as a homestead.—In re Robinette, D.C.Va., 31 F.Supp. 518

96 Wash.—State v. Superior Court of Chelan County, 266 P. 731, 147 Wash. 574
29 C.J. p. 813 notes 70, 72

97. Wash.—State v. Superior Court of Chelan County, supra
29 C.J. p. 813 note 72

98 N.D.—Sexton v. Sutherland, 174 N.W. 214, 42 N.D. 509

99 N.D.—Sexton v. Sutherland, supra

1. N.D.—Farmers Bank v. Knife River Lumber & Grain Co., 163 N.W. 1053, 37 N.D. 371
29 C.J. p. 813 note 75

Rural homesteads only

It has been held that such a statute has application to rural homesteads only.—First Nat. Bank v. Zarafonetis, Tex.Civ.App., 15 S.W.2d 155, error refused

Sale of excess

Debtor's failure to plat homestead by metes and bounds and to have plat recorded was not material where debtor sold all but forty acres having dwelling house thereon.—Berner v. Dellinger, 222 N.W. 370, 206 Iowa 1382

2. Tex.—Morris v. Platt, 116 S.W. 646, 53 Tex.Civ.App. 181.
29 C.J. p. 813 note 76.

clude a designation in some other manner,[3] such as by a provision in a conveyance, mortgage, or trust deed, if the homestead is sufficiently described.[4]

It has been held that, even though designations of homesteads are not ordinarily required, a designation would be proper where the parties occupy two residences under such circumstances that either may be his homestead according to his intention,[5] and it has also been held to be a convenient form of giving notice of the purpose to return when the parties are not actually residing thereon.[6] In any event, a declaration of homestead is not necessary to preserve property, title to which is in the wife in her separate estate, against the judgment debt of her husband.[7]

Although a declaration of homestead is required, a person entitled to homestead is not compelled to claim it, and if he does not do so, the court cannot and will not declare it a homestead,[8] except, in some jurisdictions, in the case of the administration of decedent's estates, as considered infra § 279.

Property reacquired. Under statutes requiring a declaration, where property is reacquired after the abandonment, waiver, or forfeiture of the right of homestead, as considered infra §§ 157–200, a new declaration of homestead must be filed to protect the homestead rights.[9]

Prerequisite qualifications. There are certain qualifications necessary under the statute to enable a person to select a homestead, such as, ordinarily, that declarant be the head of a family,[10] or that declarant be a resident of the property.[11] These qualifications must exist in the person making the declaration at the time the declaration is filed,[12] and cannot rest on any preexisting right,[13] but such qualifications have been held not essential to the continuance of such right.[14]

Who may select the homestead generally is considered infra § 47.

b. Form and Contents

Provisions as to the form and contents of a declaration or certificate of homestead must be substantially complied with. Matters which have been held necessary include a statement of facts showing that the declarant is entitled to a homestead, a description of the premises, and an estimate of the value of the property.

The constitutional or statutory provisions prescribing what shall be contained in a declaration of homestead are mandatory and a compliance therewith is essential to the acquisition of the homestead exemption,[15] but a declaration which follows the

3 Tex.—Dodson v. Dickey, Civ.App., 264 S.W. 586
29 C.J. p. 813 note 76

4 Tex.—American State Bank & Trust Co. v. Johnston, Civ.App., 58 S.W.2d 880, error refused—Reed v. Mahone, Civ.App., 281 S.W. 277—Dodson v. Dickey, Civ.App., 264 S.W. 586

Designation held sufficient

Mortgagors' acknowledgment of extension agreement providing that stipulations in original deed of trust should remain in force was held, in view of recital in original deed of trust that homestead was described in designation of even date sufficient to constitute valid selection, where selected parcels were at time of extension a part of homestead, even though on date of original designation they were not. Booth v. H. P. Drought & Co., Tex.Civ.App., 89 S.W.2d 132, error dismissed

5 Tex.—Glaser v. Henderson, Civ.App., 2 S.W.2d 987—Wootton v. Jones, Civ.App., 286 S.W. 680

6. Miss.—Ritter v. Whitesides, 176 So. 728, 179 Miss. 706

7. Wash.—First Nat. Bank v. Galloway, 232 P. 270, 132 Wash. 355

8. Ariz.—First Nat. Bank v. Reeves, 234 P. 556, 27 Ariz. 508

9. **Mortgagors,** to protect their homestead rights when they again became owners of property after foreclosure sale, were required to file new declaration of homestead. White v. Rosenthal, 35 P.2d 154, 140 Cal.App. 184

10 Wash.—In re Borrow, 158 P. 735, 92 Wash. 143

11. Cal.—Greenlee v. Greenlee, 61 P.2d 1157, 7 Cal.2d 579
Nev.—McGill v. Lewis, 116 P.2d 581, rehearing denied 118 P.2d 702

Residence of deserted wife

Declaration of homestead by wife after her desertion by husband and his removal from premises was valid, as against contention that legal residence of wife followed residence of husband and that therefore she was not resident of property when declaration was made as required by statute, where wife was in fact occupying premises when she made declaration.—Greenlee v. Greenlee, 61 P.2d 1157, 7 Cal.2d 579

During imprisonment

Since persons under legal disability or restraint are incapable of losing or gaining a residence by acts performed by them under the control of others, a husband, confined in penitentiary, was competent to declare homestead in premises constituting former home.—Nelsen v. McKeen, 5 P.2d 333, 165 Wash. 274

Premises occupied by tenant

It has been held that where one acquires property on which there is a tenant, it is sufficient if declarant, declaring his intention to make the property his homestead, takes steps to dispossess the tenant.—Canadian Bank of Commerce v. Kellough, 253 P. 121, 142 Wash. 335

12. Wash.—Moe v. Becher, 262 P. 144, 146 Wash. 128
29 C.J. p. 813 note 78

13. Wash.—In re Borrow, 158 P. 735, 92 Wash. 143
29 C.J. p. 813 note 78

14. **Intent to occupy as home**

Statutes providing that premises must be actually intended and used as a home, and that declaration shall state that declarant intends to reside there have reference only to the qualifications of claimant to assert a homestead right at the time of filing the declaration and not to the continuing of such right thereafter.—Moe v. Becher, 262 P. 144, 146 Wash. 128

15 Mont.—McCarthy v. Kelley, 206 P. 782, 63 Mont. 233
Wash.—Shemilt v. Sturos, 66 P.2d 1169, 190 Wash. 30—U.S. Fidelity & Guaranty Co. v. Alloway, 23 P.2d 108, 173 Wash. 404
29 C.J. p. 813 note 79

"The sufficiency of a declaration of homestead must be determined from the statements expressly made therein, and cannot be affected by any secret intentions which may have been in the mind of the claimant."—Carey

constitution or statute will be sufficient, since the court cannot enlarge the requirements thereof.[16] A substantial compliance with these requirements is sufficient,[17] and mere technical objections will be disregarded[18]

The statute in existence at the time the declaration was made is controlling as to the form and contents of the declaration[19]

Statement of facts showing claimant entitled All the facts necessary as a basis for the allowance of a homestead must appear on the face of the declaration and the omission of any one of them is fatal to the declaration of homestead[20] The declaration should show the right of claimant to the exemption under the law,[21] as, that claimant is the head of a family,[22] or is entitled to a homestead exemption as wife, guardian, or trustee of minor children, etc.;[23] and that claimant is residing on the premises claimed as a homestead,[24] or has purchased the property for a homestead, and intends to reside thereon, and claims it as a homestead.[25] If the statutory exemption relates to debts contracted after a fixed date, the certificate should show that immunity is sought from such debts as the statute covers[26]

Description of premises A description of the premises is essential to a valid declaration of homestead,[27] but the description need not be more particular than is required in the case of a deed[28] However, it has also been held that the declaration must contain an accurate statement of the area of the premises, to show that the premises are within the statutory limit as to area[29]

Estimate of value Under some statutes to that effect it is required that the declaration shall contain an estimate of the actual cash value of the property,[30] and its omission renders the declaration void, as it constitutes no notice to creditors

v Douthitt, 35 P 2d 632, 633, 140 Cal App 409

16. Idaho—Mellen v. McMannis, 75 P 98, 9 Idaho 418
29 C J p 813 note 80

17 Wash—John Hancock Mut Life Ins Co v Wagner, 24 P 2d 420, 422, 174 Wash 185, citing **Corpus Juris,** and affirmed 27 P 2d 1118, 174 Wash 185
29 C J p 813 note 82

Rights of declarant liberally construed
Wash—John Hancock Mut Life Ins Co. v Wagner, 24 P 2d 420, 174 Wash 185, affirmed 27 P 2d 1118, 174 Wash 185

18. Cal—Southwick v Davis, 21 P 121, 78 Cal 504
29 C J p 813 note 83

19. Cal—McNabb v Byrnes, 268 P 428, 92 Cal App 337
Idaho—Oylear v Oylear, 208 P. 857, 35 Idaho 732

20. Cal—Jones v Gunn, 87 P 577, 149 Cal 687
29 C J p 813 note 84

21. Idaho—Wilcox v Deere, 51 P 98, 5 Idaho 515
29 C J p 813 note 85

Cure by extrinsic evidence
A declaration, defective for failure to show on its face the right of claimant to a homestead, cannot be aided by extrinsic evidence—Olds v Thorington, 190 P. 496 47 Cal App 355—29 C J p 814 note 3

22. Cal—Jones v. Waddy, 6 P. 92, 66 Cal 457
Idaho—Mellen v McMannis, 75 P 98 9 Idaho 418

Statements held sufficient
(1) Declaration that plaintiff was head of family was sufficient "showing"—Esterly v. Broadway Garage Co, 285 P 172, 87 Mont 64—29 C J p 813 note 86 [a].

(2) A joint declaration of homestead reciting that parties were husband and wife, and executed by both, was sufficient, although not reciting specifically that husband was head of the family, since husband was head of the family by statutory definition—Parker v Riddell, 108 P 2d 88, 41 Cal App 2d 908

Statement held insufficient
Where the statute provides that "said declaration shall state that they or either of them are married, or if not married, that he or she is the head of the family," a declaration of homestead made by a married person must state that he is married and a statement merely that he is the head of a family is not sufficient—Morand v Hoyerdahl, 175 P 483, 38 Cal App. 76

23. Cal—Reid v Englehart-Davidson Mercantile Co, 58 P 1063, 126 Cal 527, 77 Am S R 206

24. U S—In re Kays, D C Wash, 49 F 2d 345
29 C J p 813 note 88

Declaration held sufficient
A homestead declaration, stating that claimant was residing on certain premises and claimed them as homestead, was sufficient, although not also stating that he intended to reside thereon—In re Finch's Estate, 89 P 2d 218, 198 Wash 567

Averments held insufficient
(1) A declaration of homestead, stating that claimants "are the owners as a home of the premises hereinafter described, and that it is their intention to use and claim the same as a homestead" was not in compliance with statute requiring that the declaration of homestead "shall state" that the husband and wife are, at the time of making the declaration residing with their family on the premises—McGill v Lewis, Nev, 116 P 2d 581, rehearing denied 118 P 2d 702

(2) Other averments see 29 C J p 813 note 88 [a]

25. U S—In re Kays, D C Wash 49 F 2d 345

26. Lawton v Bruce, 39 Me 484

27. Ariz—Wheeler Perry Co v Mortgage Bond Co of New York, 17 P 2d 331, 332, 41 Ariz 247, quoting **Corpus Juris.**
Cal—Carey v Douthitt, 35 P 2d 632, 140 Cal App 409
29 C J p 811 note 92

28. Ariz—Wheeler Perry Co v Mortgage Bond Co of New York, 17 P 2d 331, 332, 41 Ariz 247, quoting **Corpus Juris.**
29 C J p 811 note 93

Identification of property as test
"Any description is sufficient by which the identity of the premises can be established or which furnishes the means of identification"—Wheeler Perry Co v Mortgage Bond Co of New York, 17 P 2d 331, 332, 41 Ariz 247

Description held sufficient
Description of land in homestead declaration as lots 13 and 14 in named tract and property on which declarants reside was sufficient, although omitting block number—Wheeler Perry Co v Mortgage Bond Co of New York, 17 P 2d 331, 41 Ariz 247

29. Mont—McCarthy v Kelley, 206 P 782, 63 Mont 233

30. Cal—Jones v Gunn, 87 P. 577, 149 Cal 687
29 C J p 814 note 94.

who might desire to contest the claim for exemption.[31] The requirements of the statute are satisfied if the value of the premises is computed with reasonable certainty,[32] and it has been held that a mere overestimate of the value will not vitiate the declaration,[33] although there is authority to the contrary.[34]

That husband has not made declaration If the statute requires the declaration by a wife to show that her husband has not already made it, and that she claims the homestead for their joint benefit, a failure to state these facts renders the declaration invalid.[35] However, where the declaration shows that it was filed for the husband and wife jointly, and that the husband had not made it, it is sufficient without showing expressly why the wife made it,[36] and it is sufficient to state generally that the husband has not made a declaration of homestead.[37]

Amendment of declaration It has been held that a defective declaration may not be cured by amendment at a later time when declarant would no longer be entitled to claim a homestead on the property.[38]

c. Execution, Filing, and Recording

Statutory requirements as to execution, acknowledgment, filing, and recording of the declaration must be complied with.

The requirements of the statute as to execution, acknowledgment, filing, and recording of the declaration must be complied with.[39] It has been held that a declaration of homestead must be executed in the same manner as a grant of real estate.[40] The declaration should be made and verified by one of the persons designated in the statute,[41] and, where it is made and verified by one other than those designated in the statute, it is invalid.[42] Under statute to that effect, where the property selected is part of the wife's separate estate, the wife must make, or must join with the husband in the making, of the declaration.[43] However, where, as is usually the case, the husband may designate the homestead without the knowledge or consent of the wife, it is of course unnecessary for her to join in or acknowledge the declaration,[44] although her doing so will not affect its validity.[45]

Acknowledgment Where the provisions require acknowledgment of the declaration, this requirement must be complied with and the declaration must show this fact on its face,[46] or the declara-

"The purpose of setting forth the value of the premises is to give notice to the world whether or not the value was within the statutory limit, and, if not, the excess above such limit"—John Hancock Mut Life Ins Co v Wagner, 24 P 2d 420 421, 174 Wash 185, affirmed 27 P 2d 1118, 174 Wash 185

31. Cal—Knock v Bunnell, 21 P 961, 3 Cal Unrep Cas 105—Ashley v Olmstead, 54 Cal 616

32. Cal—Southwick v Davis, 21 P. 121 78 Cal 504
29 C J p 814 note 96

The declaration is not invalidated by a failure accurately to set forth the value of the premises claimed as exempt—McCarthy v Kelley, 206 P 782, 63 Mont 233

Statements held sufficient

(1) Declaration of homestead was not void for failure to estimate actual cash value of premises, where declaration declared value in excess of encumbrances of record did not exceed one thousand dollars and court found value was one thousand dollars in excess of encumbrances—John Hancock Mut Life Ins Co v Wagner, 24 P 2d 420, 174 Wash 185, affirmed 27 P 2d 1118, 174 Wash 185

(2) Other statements see 29 C J p 814 note 96 [a]

33. Cal—King v Gotz, 11 P 656, 70 Cal 236—Ham v Santa Rosa Bank, 62 Cal 125, 45 Am R 654

34. Ala—Block v George, 4 So 836, 83 Ala 178

35. Wash—Shemilt v Sturos, 66 P 2d 1169, 190 Wash 30
29 C J p 814 note 99

36. Cal—Farley v Hopkins, 21 P 737, 79 Cal 203

37. Cal—Santa Barbara Lumber Co v Ross, 192 P 436 183 Cal 657

38. Cal—Carey v Douthitt, 35 P 2d 632, 140 Cal App 109
Time when property may be made homestead see infra § 49

39. U S—Coopman v Citizens State Bank of Omak, C C A Wash, 83 F 2d 815, rehearing denied and opinion supplemented 85 F 2d 799, certiorari denied 57 S Ct 431, 300 U S 655, 81 L Ed 865

Strict compliance

A homestead declaration is a nullity under California law, unless all statutory conditions precedent are strictly complied with—In re Grodzins, D C Cal, 27 F Supp 521

40. U S—In re Kays, D C Wash, 49 F 2d 345

41. Ariz—First Nat Bank v. Reeves, 234 P 556, 27 Ariz 508

42. **Attorney in fact**

A declaration of a homestead is invalid where the declaration was verified by the attorney in fact of husband and wife instead of personally by either spouse, and the fact that absence from state of husband and wife precluded a personal verification was held not to affect its invalidity where there was nothing to prevent them from making and filing a proper declaration after they became the owners of the land several years prior to the filing of the invalid declaration—First Nat Bank v Reeves, supra

43. Cal—Parker v Riddell, 108 P 2d 88 41 Cal App 2d 908
Nev—In re Cook, 117 P 27, 34 Nev 217

Wife's interest as tenant in common

Husband's declaration of homestead, although protecting his interest did not protect wife's separate property as tenant in common where she did not join in declaration—Isom v Larson, 255 P 1019, 78 Mont 395

44. Tex—McGaughey v American Nat Bank, 92 S W 1003, 41 Tex Civ App 191—Pickett v Gleed, 86 S W 946, 39 Tex Civ App 71

45. Cal—Simonson v Burr, 54 P 87, 121 Cal 582

46. Wash—Covert v Burger, 136 P. 675, 76 Wash 454
29 C J p 814 note 12

Acknowledgment held sufficient

Where certificate of acknowledgment of declaration of homestead and its recitals established that mark of declarant, who was unable to write, was made in presence of two witnesses, one of whom wrote his name near mark, that declarant was duly sworn, deposed, and stated that he was declarant making annexed declaration

tion will be invalid[47] It has been held that the declaration must be acknowledged in the same manner as a grant of real estate[48] If the acknowledgment is by a married woman, the declaration may be invalid unless the certificate of the officer taking the acknowledgment recites that she was examined apart from her husband.[49]

Filing and recording. Statutory provisions as to filing the declaration must be strictly complied with,[50] and the declaration must be recorded, if the statute so stipulates[51]

Where the land is located in different counties, the declaration may be executed in duplicate and recorded in each county[52] However, it has been held that, where a homestead in community property is mainly situated in one county, a homestead declaration recorded in such county only is not void merely because a part of the premises covered by the homestead is claimed to be located in another county wherein no homestead declaration has been made[53]

Cure of defects in execution or acknowledgment. It has been held that a declaration of homestead, being an instrument affecting title to real property, is within the meaning of a curative act providing that any instrument duly recorded for a specified period imparts notice of its contents notwithstanding any defect, omission, or informality in the execution, or certificate of acknowledgment, thereof, so that such defect would not render the declaration invalid after the specified period[54]

d. Construction and Operation

The declaration must be liberally construed; but it is conclusive as to the right of homestead in the claimed property only if all the statutory conditions exist

The homestead declaration must be liberally construed,[55] and a declaration which is sufficient in other respects will not be held invalid because of improper statements which are mere surplusage[56]

of homestead, and that declarant signed that statement with his mark before two witnesses, one of whom again wrote his name near mark, acknowledgment substantially complied with statute so as to render declaration of homestead valid—Favello v Bank of America Nat Trust & Savings Ass'n, 74 P 2d 1057, 24 Cal App 2d 342

47. Wash—Covert v Burger, 136 P 675, 76 Wash 454

Notary lacking commission

(1) Where the commission of the notary public who took the acknowledgment had expired prior to the taking of the acknowledgment, the declaration was ineffective—Coopman v Citizens State Bank of Omak, CCA Wash, 83 F 2d 815, rehearing denied and opinion supplemented 85 F 2d 799, certiorari denied 57 S Ct 431, 300 U S 655, 81 L Ed 865

(2) Declaration of homestead signed and acknowledged, and to which subsequently was affixed notarial seal which evidenced commission for term beginning subsequent to date of acknowledgment, was invalid U S Fidelity & Guaranty Co v Alloway, 23 P 2d 408, 173 Wash 404

48. U S—In re Kays, D C Wash, 49 F 2d 315

Wash U S Fidelity & Guaranty Co v Alloway, 23 P 2d 408, 173 Wash 404

Notary's certificate

Where notary's certificate of acknowledgment by homestead claimant, in addition to stating that claimant was known to notary, contained parenthetical statement, "or proved to me on the oath of himself," the inclusion of parenthetical statement did not render declaration of homestead defective for failure to show acknowledgment by claimant in the same manner as a grant of realty is acknowledged, and, where homestead declarant appeared before notary and formally acknowledged that declaration of homestead was his act, the statute was complied with and validity of declaration was not affected by ambiguity if any, in notary's certificate of acknowledgment—Thomas v Speck, 118 P 2d 365, 47 Cal App 2d 512

49. Cal—Kennedy v Gloster, 32 P 941, 98 Cal 143

29 C J p 815 note 14

50. Wash—Hookway v Thompson, 105 P 153, 56 Wash 57

29 C J p 815 note 15

51. U S—Coopman v Citizens State Bank of Omak, C C A Wash, 83 F 2d 815, rehearing denied and opinion supplemented 85 F 2d 799 certiorari denied 57 S Ct 431, 300 U S 655, 81 L Ed 865—In re Kays D C Wash, 19 F 2d 345

Wash—U S Fidelity & Guaranty Co v Alloway, 23 P 2d 408, 173 Wash 404

29 C J p 815 note 16

Effect of Torrens Act

The California Torrens Act, which does not purport to amend or repeal California homestead laws, does not dispense with need for strict compliance, and failure to record declaration renders it a nullity—In re Grodzins, D C Cal, 27 F Supp 521

What constitutes sufficient recording

A homestead declaration, deposited in county recorder's office with proper officer for record, was "filed for record," which is tantamount to actual recording under California law, and filing for record is complete when it is deposited with proper officer, whether he actually notes and indorses filing thereon or not as his indorsement is not part of filing Moreover, the words 'filed for record" on county recorder's official stamp relate to instruments required or allowed to be recorded, such as homestead declarations, and imply filing and recording of original instrument and return thereof to person requesting recordation and where those words are placed on declaration, by deputy recorder who is also deputy registrar of Torrens titles it means that it was left with him and that he had it for purpose of recording and further notation of his capacity as registrar does not defeat such purpose—In re Grodzins supra

52. Cal Kennedy v Gloster, 32 P 941, 98 Cal 143

53. Cal—Votypka v Valentine, 182 P 76 41 Cal App 74

54. Defect in acknowledgment

Where notary's certificate in addition to stating that homestead claimant was personally known to notary contained parenthetical statement "or proved to me on the oath of himself," notwithstanding such defect, declaration, having been of record for one year, imported 'notice" under the Curative Act—Thomas v Speck, 118 P 2d 365, 47 Cal App 2d 512

55. Cal—Feintech v Weaver, 122 P 2d 606, 50 Cal App 2d 181

56. Wife executing blank for head of family

Where claimant attempted to homestead property on which she was living with an adult son by executing declaration of homestead on a printed blank designed for five thousand dol-

The use of the plural pronoun in a declaration by husband and wife has been construed as the personal declaration of each under a statute to that effect.[57]

The right to claim a homestead is not an absolute right in the sense that a declaration of homestead shuts off judicial inquiry,[58] since, unless all the statutory conditions exist,[59] the filing of a declaration of homestead does not conclusively establish the property as a homestead,[60] being merely prima facie correct,[61] although it is conclusive unless impeached because of some evasion of law.[62] It has similarly been held that, since mere intent to occupy property as a homestead is not sufficient to impress property with the homestead character, see supra § 31, a designation as a homestead of property not occupied as a homestead is not controlling.[63] However, the homestead, after it has been properly declared, stands impregnable against every assault, and can be changed in character only by the voluntary act of claimant, and his wife, if married.[64] Moreover, the filing of a proper declaration creates a vested interest in the property,[65] and once it is duly executed and filed and is not contested as allowed by law, it protects the property from forced sale, under an execution thereafter issued, except for debts not exempted by the homestead statute.[66] Where part of a tract exceeding the statutory limit is designated as the homestead, claimant would be limited in his claim to the land so designated.[67] An estimate of the value of the premises, contained in the declaration has been held not to be conclusive on either declarant, the court, or interested parties.[68]

Unauthorized declaration Where no manner of formal dedication is required or prescribed by statute, the filing for record of a selection of homestead will have no legal effect, and is not conclusive as against creditors or purchasers.[69] Declaration in cases not covered by the statute will not be effective for any purpose.[70] Thus a statute covering rural property has no application to urban property,[71] and property which is not subject to homestead cannot be made so by a declaration of homestead.[72] However, where the declaration seeks to exempt land not capable of being claimed as a homestead, the filing for record of such a declaration will not destroy the right of exemption as to other property actually occupied as a residence, and which could have been claimed, at least as against parties with notice of such occupancy.[73]

Defects or irregularities as to property claimed. A declaration of homestead is effective to create an exemption only to the extent of declarant's interest in the property,[74] but the fact that a homestead declaration included property which was not owned by declarant would not invalidate the homestead as to the remaining property which declarant did own.[75] A declaration may be insufficient as to a portion of the land designated as a homestead, yet valid as to another part which is properly claimed.[76] If the declaration describes and claims a tract larger than the statutory exemption, the declaration is not thereby rendered invalid, since the excess will not be exempted from execution sale and can be set aside as provided by law in cases of

lars homestead provided for head of family and declaration contained all recitals relative to homesteads of person not head of a family under liberal construction of the homestead declaration, recital that claimant was head of the family was 'surplusage' and instrument was sufficient to secure to claimant valid homestead which defeated attempt of judgment creditor to take title at execution sale.—Feintech v Weaver, supra

57. Cal.—Simonson v Burr, 54 P 87, 121 Cal 582

58. Wash.—Stewart v Fitzsimmons, 119 P 659, 86 Wash 55

59. Wash.—Traverso v Cerini, 263 P 184, 146 Wash 273

60. Wash.—Traverso v Cerini, supra

61. Ala.—Warley v Patterson, 185 So 891, 237 Ala 126

62. Tex.—Wade v First Nat Bank, Civ App, 263 S W 654

63. Tex.—Connelly v Johnson, Civ App, 259 S W 634

64. Ariz.—First Nat Bank v Reeves, 231 P 556, 27 Ariz 508

65. Wash.—State ex rel White v Douglas, 107 P 2d 593, 6 Wash 2d 356

Status as "family home" fixed

A proper declaration definitely fixes the status of the property as a 'family home'.—Smith v Marino, La App, 12 So 2d 71

66. U.S.—Nevada Bank v Treadway, C C Nev 17 F 887, 8 Sawy 456
29 C J p 815 note 20

67. Tex.—Wade v First Nat Bank, Civ App, 263 S W 654

68. Wash.—John Hancock Mut Life Ins Co v Wagner 24 P 2d 120, 174 Wash 185, affirmed 27 P 2d 1118, 174 Wash 185

69. Cal.—Cook v McChristian, 4 Cal 23

70. Tex.—Equitable Mortg Co v Norton 10 S W 301, 71 Tex 683

71. Tex.—First Nat Bank v Zarafonetis, Civ App, 15 S W 2d 155, error refused
29 C J p 815 note 28

72. Cal.—Rosenthal v Merced Bank, 42 P 640, 110 Cal 198
29 C J p 815 note 29

73. Tex.—Pellit v Decker 10 S W. 696, 72 Tex 578

74. Property held in joint tenancy

Under California law declaration of homestead executed by bankrupt, but not by bankrupt's wife, covering real property acquired by bankrupt and his wife and owned by them in joint tenancy was ineffective as to the interest of his wife, but was valid to extent of bankrupt's own interest in property.—In re Sterling, D C Cal, 20 F Supp 924

75. Mont.—Oregon Mortg Co v. Dunbar, 289 P 559, 87 Mont 603, 73 A L R 113

76. Va.—Williams v Watkins, 24 S E 223, 92 Va 680
29 C J p 815 note 21.

levy.[77] A formal declaration by husband and wife that their homestead consists of fewer acres than are exempted from forced sale has no force for that purpose, as the statute does not authorize the head of the family to contract but simply to define the homestead.[78]

§ 47. —— Who May Select Homestead

With some exceptions the husband, as head of the family, has the right to select the homestead, although the wife may do so where the husband fails or refuses. The husband's selection is binding on the wife if it is made in good faith

The right to select a homestead is in the person designated by the statute, generally the husband as the head of the family,[79] although under some statutes no distinction is made between a husband and his wife in this respect.[80] Under some statutes so providing, where the husband as head of the family has failed to select a homestead, the wife may for their joint benefit make the same selection that he could have made,[81] although it has been held that the wife's selection must be limited to community property.[82]

Also, as head of the family, the father has the right and authority, as between himself and the other members of the family, to select the homestead.[83]

Husband's selection as binding on wife When the husband has the right and exercises it, he may select the homestead without regard to the wishes of his wife,[84] and she is bound by his selection if it is made in good faith and not for the purpose of defeating her rights,[85] but he must exercise

77. Tex.—Smith v. Van Slyke, Civ. App., 139 S.W. 619.
29 C.J. p. 815 note 22.

78. Tex.—Ridford v. Lyon, 65 Tex. 471.

79. U.S.—Adams v. Walcek, C.C.A. Tex., 9 F.2d 26, denying petition, D.C., In re Walcek, 4 F.2d 265.
Iowa.—Evans v. Evans, 210 N.W. 561, 202 Iowa 493.
Miss.—Clett v. First Nat. Bank, 181 So. 713, 182 Miss. 560—Ritter v. Whitesides, 176 So. 728, 179 Miss. 706.
Tex.—Skiles v. Shropshire, 77 S.W.2d 872, 124 Tex. 462, modifying, Civ. App., 50 S.W.2d 402—Korn v. Korn, Com. App., 15 S.W.2d 1017, reversing, Civ. App., 7 S.W.2d 177, and motion dismissed, Com. App., 29 S.W.2d 1075—Odom v. Empire Building & Loan Ass'n, Civ. App., 134 S.W.2d 1053, error dismissed, judgment correct.—First Coleman Nat. Bank of Coleman v. Childs, Civ. App., 113 S.W.2d 602, error refused.—Wallingford v. Bowen, Civ. App., 104 S.W.2d 188.—Continental Southland Savings & Loan Ass'n v. Palmer, Civ. App., 92 S.W.2d 1053, error dismissed.—Sanders v. Life Ins. Co. of Virginia, Civ. App., 57 S.W.2d 327.—Sanders v. Crump, Civ. App., 23 S.W.2d 850.—Reed v. Malone, Civ. App., 281 S.W. 277.—Dodson v. Dickey, Civ. App., 264 S.W. 586.
Wis.—Krueger v. Groth, 209 N.W. 772, 190 Wis. 387.
29 C.J. p. 815 note 31.

Occupancy by husband alone

Property may become the homestead by dedication by the husband, as head of the family, even though the wife may never move on the property.—Schulz v. L. E. Whitham & Co., 27 S.W.2d 1093, 119 Tex. 211, modifying L. E. Whitham & Co. v. Schulz, Civ. App., 14 S.W.2d 881.

Consent of husband to selection by wife

Where the title to the land is in the husband, the wife living with him as his spouse cannot without his approval and consent determine that the homestead shall be located on his land, and impress his land with that character.—Hensley v. Fletcher, 14 P.2d 63, 172 Okl. 19.—Hensley v. Maxwell, 41 P.2d 60, 172 Okl. 21.—Jefferson v. Henderson, 282 P. 677, 140 Okl. 86.—Tiger v. Ward, 158 P. 941, 60 Okl. 36.

Widow after remarriage

When widow who owned her own home remarried, she automatically lost power to designate family homestead.—Fain-Townsend Co. v. Barker, Tex. Civ. App., 109 S.W.2d 1101.

80 Utah.—Volker-Stowcraft Lumber Co. v. Vance, 88 P. 986, 32 Utah 74, 125 Am.S.R. 828.
29 C.J. p. 815 note 32 [a].

Selection as binding on husband

Where a wife living apart from her husband selects a homestead in lands owned by her, her selection will not, in the absence of bad faith on her part, be set aside and the selection of her husband adopted although the wife's selection was from the roughest and most unproductive portion of the tract and cut off from convenient access to a highway.—Ehrck v. Ehrck, 76 N.W. 793, 106 Iowa 611, 68 Am.S.R. 330.

81. Cal.—Spencer v. Stewart, 262 P. 331, 202 Cal. 695.—MacLeod v. Morgan, 105 P. 932, 11 Cal.App. 622.
29 C.J. p. 814 note 5.

Wife abandoned by husband

Under statute providing that wife, living with husband, may assert her right to the homestead exemption where the husband fails or refuses to do so a wife who continues to live in the homestead premises after abandonment by husband is living with him within the intendment of the statute and is entitled to file a declaration of homestead.—Raymond v. Louisiana Trust & Savings Bank, 153 So. 529, 179 La. 101.—Raymond v. Louisiana Trust & Savings Bank, 148 So. 663, 177 La. 409.

From husband's separate property

Married woman residing with family on husband's separate property whose husband has not filed declaration of homestead has right to select homestead from husband's separate property and make declaration thereon, and husband is not entitled to cancel wife's declaration of homestead, although as a result thereof mortgage on property would be foreclosed due to failure of husband to procure loan to cancel existing indebtedness.—Clark v. Clark, 17 P.2d 914, 56 Idaho 6.

82. La.—Smith v. Marino, App., 12 So.2d 71.

83 Tex.—Tyner v. La Coste, Com. App., 13 S.W.2d 685, affirming, Sedcrholm v. City of Port Arthur, Civ. App., 3 S.W.2d 925, and followed in Tyner v. Keith, Com. App., 13 S.W.2d 687, affirming, Sedcrholm v. City of Port Arthur, Civ. App., 3 S.W.2d 927.

84 U.S.—Adams v. Walcek, C.C.A. Tex., 9 F.2d 26, denying petition, D.C., In re Walcek, 4 F.2d 265.
Tex.—Reed v. Malone, Civ. App., 281 S.W. 277.—Dodson v. Dickey, Civ. App., 264 S.W. 586.
29 C.J. p. 816 note 35.

Wife's concurrence not necessary

Tex.—Skiles v. Shropshire, 77 S.W.2d 872, 124 Tex. 462, modifying, Civ. App., 50 S.W.2d 402.—Continental Southland Savings & Loan Ass'n v. Palmer, Civ. App., 92 S.W.2d 1053, error dismissed.

85 U.S.—Adams v. Walcek, C.C.A. Tex., 9 F.2d 26, denying petition, D.C., In re Walcek, 4 F.2d 265.
Tex.—Sanders v. Life Ins. Co. of Vir-

this right in good faith and so as substantially to secure for himself and family the benefit of the exemption [86] Thus the husband cannot exclude the dwelling and the appurtenances and the property indispensable to the home [87]

§ 48. Proceedings for Allotment

a In general
b In Georgia

a. In General

In some jurisdictions the homestead may, be set apart by allotment in accordance with statutory provisions

In some jurisdictions, particularly in Georgia, as appears in subdivision b of this section, a homestead may be allotted or set apart by proceedings in accordance with the statutory provisions [88]

The allotment and appraisal of homestead after, or in anticipation of, creditor's proceedings are considered infra §§ 216–221.

b. In Georgia

(1) Constitutional or "long" homestead
(2) Statutory or "short" or "pony" homestead

(1) Constitutional or "Long" Homestead

To acquire a constitutional homestead an actual allotment must be made in proceedings, in accordance with the statutory provisions, held before the ordinary

In Georgia there are two classes of exemptions, acquired by essentially different proceedings,[89] the "long" or constitutional homestead, and the "short" or "pony" or statutory homestead [90] The provisions providing for the constitutional homestead contemplate an actual allotment of homestead to the debtor or his family in proceedings had before the ordinary in order to impress property with the homestead character [91] The method prescribed by statute for setting apart a homestead must be strictly followed by the court on which jurisdiction is conferred and, if the court prescribes a method to suit its own convenience, it is acting without authority and its action in setting apart the homestead is illegal and void [92]

Who may apply or compel application No one can prosecute or compel the prosecution of a homestead application except the head of a family or the statutory beneficiaries [93] If the husband refuses to apply for the exemption, the wife or any person acting as her next friend may do so,[94] but his refusal to apply is a condition precedent to his wife's right to make the application,[95] and mere failure on his part is not enough [96]

Requisites of application The application for allotment must conform in all respects to the requirements of the statute providing what it shall contain,[97] and disclose affirmatively all the facts necessary to entitle applicant to the exemption [98] It must show either expressly[99] or by natural implication[1] that claimant possesses such a status as entitles him to claim a homestead, but an averment in terms of ownership is unnecessary [2] Residence is sufficiently stated by describing applicant

ginia, Civ App, 57 S W 2d 327—Sanders v Crump, Civ App, 23 S W 2d 850 - Broadland v City Nat Bank of Corpus Christi, Civ App, 15 S W 2d 112—Glaser v Henderson Civ App, 2 S W 2d 987—Wootton v Jones Civ App 286 S W 680—Reed v Malone, Civ App, 281 S W 277 Dodson v Dickey Civ App, 264 S W 586
29 C J p 816 note 36

86 Tex—First Coleman Nat Bank of Coleman v Childs Civ App, 113 S W 2d 602 error refused—Skiles v Shropshire, Civ App, 50 S W 2d 102 modified on other grounds 77 S W 2d 872, 121 Tex 462 Dodson v Dickey Civ App, 264 S W 586—McGaughey v American Nat Bank, 92 S W 1003, 41 Tex Civ App 191

87. U S—Adams v Wallcek, C C A Tex, 9 F 2d 26, denying petition, D C, In re Wallcek 4 F 2d 265
Tex—Dodson v Dickey, Civ App, 264 S W 586
Requirement that homestead selection must include place of residence generally see supra § 43.

As between two homes
However, where there are two properties which are used as homes by declarant, he can select either and exclude the other in selecting part of a tract larger than the statutory exemption as his homestead Adams v Wallcek C C A Tex, 9 F 2d 26 denying petition, D C, In re Wallcek, 4 F 2d 265

88 Scope of review
On appeal from a decree allotting homestead and partitioning shares of heirs, it was held that questions of accounting for rents and profits by claimant could not be reviewed—Ketcham v Ketchan, 109 N E 1025, 269 Ill 584

89. Ga—Marcrum v Washington 34 S E 585, 109 Ga 296

90 Ga—Darlington v Belt, 77 S E 653, 12 Ga App 522
29 C J p 817 note 74 [a]

91. Ga - Sharp v American Freehold Land Morts Co, 22 S E 633, 95 Ga 415

92. Ga—Roberts v Atlanta Cemetery Ass'n, 91 S E 675, 146 Ga 490
29 C.J p 816 note 46

93 Creditor holding a homestead waiver, or a transfer of a homestead right, cannot apply or compel application—In re Martin Bros D C Ga, 294 F 368

94. Ga—Hughes v Purcell, 68 S E 1111 135 Ga 174
29 C J p 816 note 48

95 Ga—Hughes v Purcell, supra
29 C J p 816 note 49

96. Ga—Hughes v Purcell, supra
29 C J p 816 note 48

97. Ga—Peterson v Calhoun, 68 S E 1022, 135 Ga 103

98 Ga Davis v Lumpkin, 32 S E 626 106 Ga 582
29 C J p 816 note 52

99 Ga—Roberts v Cook, 68 Ga 324
29 C J p 816 note 53

1. Ga—Skinner v Roberts, 17 S E 353, 92 Ga 366
29 C J p 816 note 54

2. Ga—McWilliams v McWilliams 68 Ga 459—Wilder v Frederick, 67 Ga 669.

as being "of said county."[3] The application must contain a schedule giving a description of all claimant's real and personal property as required by statute,[4] and this is so whether all or only a part of the estate is to be exempted,[5] but the application need not fix the value of the property sought to be set apart.[6] A provision which requires applicant for the exemption to make a full and fair disclosure of everything which he has, and provides that, if he is guilty of fraud in failing to do so, he shall not be entitled to the exemption is not in violation of a constitutional provision granting the right of exemption.[7]

Where the application is made by the wife, it should state out of whose property the homestead is to be carved,[8] and should further allege that the husband has failed or refused to make the application,[9] although it has also been held that it must be stated that the husband refused, failure or neglect to do so being insufficient.[10]

The application may be signed by an attorney if sworn to by the debtor,[11] and, after approval by the ordinary, it must be recorded in accordance with the statutory provisions.[12]

Amendments Should the facts disclosed on the hearing of the application differ from those alleged, amendments may be made at any time, with the permission of the officer passing on the application,[13] and the schedule being a part of the pleadings is amendable at any time prior to judgment,[14] but an amendment of the application is not permissible where the original proceedings are absolutely void.[15]

Fixing time and place of hearing. Where the court fixes the time and place for hearing the application and on the date set was absent from the county and no provision for a continuance was made, the court cannot subsequently, without further notice or order, approve the application and grant the homestead,[16] and the setting of the hearing on the application and the approval of the homestead at a date earlier than the court is by law authorized to do constitutes a defect in the proceedings fatal to the jurisdiction, and the approval and setting apart of the homestead are void.[17] Where the time to be fixed by the notice when the court would act on an application for setting apart the homestead is not more than thirty days from the date of the order of the court to the surveyor, if more than thirty days intervened the conveyance is void.[18]

Hearing No question of title can be adjudicated at the hearing of an application for the allotment of a homestead.[19] A receiver may be appointed on the hearing of the application for an allotment of a homestead,[20] but cannot be delayed until final adjudication.[21]

Conclusiveness and effect of decrees and allotments A liberal presumption is indulged in favor of the regularity of homestead proceedings, and the judgment of the officer allowing the exemption cannot ordinarily be collaterally attacked,[22] as by objecting to the description contained in the debtor's schedule of property,[23] or to the want of regularity in the petition or in the acts of the surveyor who laid off the homestead,[24] and the debtor can-

3. Ga.—Wilder v. Frederick, supra

4. Ga.—Peterson v. Calhoun, supra

5. Ga.—Blackstone v. Kritzer, 47 S.E. 585, 120 Ga. 78

6. Ga.—Wood v. Collins, 36 S.E. 423, 111 Ga. 32

7. Ga.—McNally v. Mulheim, 4 S.E. 332, 79 Ga. 614
29 C.J. p. 802 note 20

8. Ga.—Pegram v. Hancock, 31 S.E. 419, 105 Ga. 185
29 C.J. p. 816 note 60

9. Ga.—Jones v. Newsome, 142 S.E. 112, 165 Ga. 812

10. Ga.—Hughes v. Purcell, 68 S.E. 1111, 135 Ga. 174
29 C.J. p. 816 note 61

11. Ga.—Roberts v. Cook, 68 Ga. 321

12. **Homestead consisting of personalty**
Under statutory provision requiring a homestead to be recorded in a county other than applicant's residence only where land outside of the county of applicant's residence is exempted, where no property except personal property was allowed under a homestead exemption, a record thereof in the county of applicant's residence alone was sufficient.—McLamb & Co. v. Lambertson, 62 S.E. 107, 4 Ga.App. 553

13. Ga.—Hardin v. McCord, 72 Ga. 239

14. Ga.—Davis v. James, 89 S.E. 203, 145 Ga. 325

Limitation on amendment of schedule
A petition for homestead may be amended by adding to the schedule something which had been omitted but not by striking therefrom any article of property therein set forth, and, if applicant has by mistake inserted property belonging to another, and not to him, he should dismiss his application and file another one, omitting such property not belonging to him as was in the previous schedule.—Smith v. Exchange Bank of Rome, 103 S.E. 99, 25 Ga.App. 278.

15. Ga.—Bennett v. Georgia Trust Co. 32 S.E. 625, 106 Ga. 578
29 C.J. p. 817 note 65

16. Ga.—Brady v. Brady, 67 Ga. 268

17. Ga.—King v. King, 85 S.E. 95, 143 Ga. 385.—West v. McWhorter 81 S.E. 859, 141 Ga. 590

18. Ga.—Roberts v. Atlanta Cemetery Ass'n, 91 S.E. 675, 146 Ga. 490

19. Ga.—Home Bldg. & Loan Ass'n v. Cherry, 62 Ga. 269

20. Ga.—Landrum v. Chamberlin, 73 Ga. 727

21. Ga.—Landrum v. Chamberlin, supra

22. Ga.—Dunagan v. Stadler, 29 S.E. 440, 101 Ga. 474
29 C.J. p. 817 note 75

23. Ga.—Bartlett v. Russell, 41 Ga. 196

24. Ga.—Timothy v. Chambers, 11 S.E. 598, 85 Ga. 267, 21 Am.S.R. 163.—Brown v. Driggers, 62 Ga. 354

not claim a right to a reallotment on the ground of irregularity in the former proceedings, where he has enjoyed the benefits secured by them for a considerable period of time [25] The husband of claimant will be deemed to have assented to setting apart the homestead, where he fails to object to his wife's petition [26] If a first application is denied, on the hearing of a second application claimant may show that new homestead rights have accrued since the former adjudication, which prevent its being a bar [27] Where there is absolutely no right to a homestead as a matter of law, proceedings for the setting apart of a homestead are void and of no effect [28] A homestead in a man's own lands cannot be thrust on him if he objects by plea [29]

Estoppel The debtor, by acquiescence, may estop himself from thereafter objecting to the validity or regularity of the proceedings [30]

Notice to creditors. Creditors must be given notice and an opportunity to present objections to the application, or they will not be concluded by its approval [31] Where there is a misnomer in the notice, a judgment granting a homestead is of no force as against a creditor [32] The requirement as to notice being intended for the benefit of the creditors of the person out of whose estate the homestead is to be set apart, a defect in the advertisement would not avail one for whose benefit the publication was not made [33]

Appraisal If the debtor acquiesces in the amount of an appraisal of the homestead, he cannot object to it thereafter [34]

Survey and return Since the statute requires that before the application can be granted the land must be surveyed, if the homestead is set apart before the return made by the surveyor the proceeding secures no exemption to claimant.[35] The surveyor's return should be verified if this is required by statute,[36] but mere clerical errors in the affidavit will not vitiate it [37] It is also necessary that the ordinary should approve the return of the surveyor by order[38] or otherwise.[39] It is further necessary to the validity of the homestead that the survey should be recorded[40] within such time after the application as the statute provides.[41] When, on appropriate application by the wife, land has been laid off by the county surveyor and platted, and the plat has been duly returned, filed, and recorded by the ordinary, the family becomes the beneficiary of the homestead and is entitled to possession of the land [42]

Objections of creditors. Under provisions to that effect, any creditor is entitled to raise objections to the application and subsequent proceedings on specified grounds [43]

Review The remedy for an adverse adjudication of the ordinary is appeal to the superior court [44]

On appeal from the officer making the original allotment, the entire case is brought before the appellate tribunal, and either party may raise any objection or make any motion or amendment which would be permissible in appealed cases [45] The question of value has been held triable de novo on appeal,[46] as is also the fact whether claimant is in good faith the head of a family, and whether the alleged members are legitimately such [47] However, an appeal does not lie to the superior court from a judgment rendered by the ordinary sustaining a demurrer to an application for a homestead,[48] and in such a case the exclusive remedy for reviewing the judgment is by certiorari [49]

25. Ga —Torrance v. Boyd, 63 Ga 22
29 C J p 818 note 97.

26. Ga —Bowen v Bowen, 55 Ga 182

27. Ga —Young v Brown, 45 Ga 552

28. Ga —Williams v Webb, 25 S E 654, 99 Ga 301
29 C J p 817 note 80

29. Ga —Bowen v Bowen, 55 Ga 182

30. Ga —Torrance v. Boyd, 63 Ga 22—Thrasher v Bettis, 53 Ga 407

31. Ga —Weekes v Edwards, 28 S E 853, 101 Ga 314
29 C J p 817 note 84, p 972 notes 1, 2

32. Ga —Smith v Lord, 60 Ga 462—Gann v McGee, 90 S E 976, 19 Ga App 13

33. Ga —Gann v McGee, supra

34. Ga —Thrasher v Bettis, 53 Ga 407

35. Ga —Branch v Ford, 26 S E 759, 99 Ga 761—Falls v Crawford, 76 Ga 35

36. Ga —Mabry v Johnson, 11 S E 771, 85 Ga 340
29 C J p 817 note 91

37. Ga —Baldwin Fertilizer Co v Merritt, 29 S E 18, 101 Ga 387

38. Ga —King v King, 85 S E 95, 143 Ga 385.

39. Ga —King v King, supra.
29 C J p 817 note 94

40. Ga —Pritchard v Ward, 64 Ga 446

41 Plat held recorded in time
Ga —Rogers v Kimsey, 135 S E 497, 163 Ga 146

42. Ga —Hughes v Purcell, 68 S E 1111, 135 Ga 174—Gresham v Johnson, 70 Ga 631

43. Ga —Alday v Spooner, 134 S E 343, 35 Ga App 611

44. Appeal by objecting creditor
Where creditor objected to schedule for want of sufficiency because applicant omitted personalty, and where ordinary set apart homestead applied for, appeal to superior court was remedy of creditor —Alday v Spooner, supra

45. Ga —Burns v Chandler, 61 Ga 385
29 C J p 818 note 98

46 Ga —Crawford v Ward, 49 Ga 40

47. Ga —Blackwell v. Broughton, 56 Ga 390

48. Ga —Cunningham v U S Savings & Loan Co, 34 S E 1024, 109 Ga 616

49. Ga —Cunningham v U S Savings & Loan Co, supra.

(2) Statutory or "Short" or "Pony" Homestead

To acquire a statutory homestead, it is merely necessary to file with the ordinary a schedule of the property claimed to be exempt The exemption so acquired may be collaterally attacked

Under provisions to that effect with respect to the statutory or "short" or "pony" homestead, which is the second of the two types of homesteads in Georgia, the first or constitutional type having been discussed supra § 48 b (1), no application for homestead is required, it being merely necessary to file with the ordinary a schedule of the property claimed to be exempt [50]

Conclusiveness of exemption The act of the ordinary in receiving and recording the schedule is ministerial only,[51] and the validity of such exemption may, in a proper case, be collaterally attacked [52]

Requisites of schedule The existence of facts necessary to constitute a valid exemption need not affirmatively appear from the face of the schedule of exempt property,[53] but such prerequisite facts must actually exist [54] On the other hand, where it does not affirmatively appear from the schedule that the facts do not meet the statutory requirements, the exemption cannot be held void as a matter of law [55] In determining the sufficiency of the description of the property in the schedule, the rule applicable to the sufficiency of the description in conveyances of land does not apply [56]

§ 49. Time of Acquisition of Homestead

a. In general
b. When property may be made homestead

a. In General

The time when homestead rights attach or property acquires the character of a homestead depends on the constitutional and statutory provisions of the particular jurisdiction

Homestead rights attach to property ordinarily when a dedication or selection thereof is made for that purpose in accordance with the statutory requirements prevailing in the jurisdiction [57] A homestead cannot be acquired prior to the acquisition of title or a possessory interest in the property.[58]

The date of acquisition of a homestead is not changed by reason of the fact that the homesteader improves his homestead and adds to its value,[59] and the fact that the homesteader, after his right of exemption had accrued, paid for the property or paid off liens on it, does not bring forward the date from which his right of exemption to the tract accrues [60]

Selection by occupancy Where mere occupancy is sufficient, see supra § 44, the time at which a party commenced occupation of land as a homestead will constitute the time of acquiring the homestead in the land,[61] notwithstanding the property was

50. Ga.—Clark v Kinney, 171 S E 763, 177 Ga 864—McNair v Fortner, 101 S E 772, 149 Ga 654
"Short" or "pony" homestead defined see supra § 1

51. Ga.—Kimsey v Rogers, 142 S E 667, 166 Ga 176—Marcrum v Washington, 34 S E 585, 109 Ga 296

52. Ga.—Kimsey v Rogers, 142 S E 667, 166 Ga 176—Marcrum v Washington, 34 S E 585, 109 Ga 296—Gann v McGee, 90 S E 976, 19 Ga App 13

53. Ga.—Wood v Wood, 143 S E 770, 166 Ga 519—Kimsey v Rogers, 142 S E 667, 166 Ga 176

54. Ga.—Wood v Wood, 143 S E 770, 166 Ga 519

Particular facts

One of the necessary facts is that the head of a family can exempt land not in a city town, or village, only when the improvements thereon do not exceed two hundred dollars in value.—Kimsey v Rogers, 142 S E 667, 166 Ga 176

55. Value of property

Exemption of property was not void as matter of law, on ground that property exceeded five hundred dollars in value when schedule was filed where excess did not affirmatively appear.—Wood v Wood, 143 S E 770, 166 Ga 519

56. Ga.—Clark v Kinney, 171 S E 763, 177 Ga 864

Descriptions held sufficient

(1) A description of property by acreage, general location, and value is sufficient to validate exemption and, in connection with other circumstances, to operate as constructive notice to grantee of security deed from head of family.—Clark v Kinney, supra—McNair v Fortner, 101 S E 772 149 Ga 654

(2) Where schedule of property exempted as pony homestead described land as one-third interest in lot, in named district and section of county containing fifty-three and one-third acres of such lot, land claimed was sufficiently described to validate exemption and to operate as constructive notice to grantee of security deed thereto after exemption was set apart.—Powell v Powell, 127 S E 117, 159 Ga 837

57. Tex.—Hughes v Groshart, Civ App., 150 S W 2d 827

When homestead exemption acquired in
New homestead where homestead selection is changed see infra § 50
Property exchanged for homestead see infra § 72

58. Ark.—Keesee v Bushart, 158 S W 2d 915, 203 Ark 668
Interest in property which will support homestead claim see infra §§ 78–92

59. Iowa.—Rutledge v Wright, 171 N W 28, 186 Iowa 777

60. Iowa.—American Sav Bank of Marengo v Willenbrock, 228 N W 295, 209 Iowa 250

61. Iowa.—Lennert v Cross 241 N W 787, 215 Iowa 551 rehearing denied and supplemented 244 N W 693, 215 Iowa 551.—Commercial Sav Bank of Lohrville v McLaughlin, 214 N W 542, 203 Iowa 1368
Ky.—First Nat Bank of Jackson v Oliver, 150 S W 2d 891 286 Ky 286
La.—Hammond State Bank & Trust Co v Broderick, 154 So 739, 179 La 693
N D.—Birks v Globe International Protective Bureau, 218 N W 864, 56 N D. 613.

owned jointly with another [62]

Selection by intention coupled with appropriate acts. In those jurisdictions where intent to occupy, coupled with appropriate preparatory acts, is sufficient, see supra § 33, it has been held that homestead character is impressed on the property as of the date of an oral declaration of intention, if followed by overt acts and occupancy,[63] but it has also been held that the exemption attaches when definite acts are performed in furtherance of the intention [64]

Selection by filing declaration Where the filing and recording of a declaration is necessary, see supra § 46, the homestead character dates from the due performance of these acts,[65] and not from mere occupancy of the premises [66]

Selection by registration of deed Under homestead laws requiring that where the premises are acquired by deed the deed be registered or filed for record, the homestead rights attach when the deed is so registered or filed,[67] provided the premises are actually occupied as a homestead at that time,[68] or at a subsequent time, if it is within the period when the property may be rendered exempt [69]

Property acquired as homestead If the householder is actually occupying the premises as his home when he acquires title or a sufficient interest to support a claim of homestead, his right of exemption usually arises at the moment he acquires title or such interest,[70] provided the owner is a bona fide housekeeper with a family,[71] but if he merely holds a bond for a deed and is not in possession, the estate of homestead does not relate to the date of the bond, but begins when the deed is delivered [72] In some jurisdictions it is not always necessary that occupation follow immediately after acquisition of title, but the premises become a homestead at the time of acquisition if purchased for the purpose of using it as a homestead, as evidenced by overt acts in fitting it for such a purpose, and if actually occupied within a reasonable time,[73] but it has also been held that the exemption dates from the time of performance of the overt acts evidencing such intention [74]

b. When Property May Be Made Homestead

The right to claim a homestead on property arises on the purchase and occupancy of the premises. While in some jurisdictions property may be made exempt as homestead at any time prior to forced sale, in others it must be done before the rendition of judgment against the debtor

The right to impress property with the homestead exemption in accordance with the required formalities attaches immediately on the purchase and oc-

Tex—Schulz v L E Whitham & Co, 27 S W 2d 1093, 119 Tex 211, modifying L E Whitham & Co v Schulz, Civ App, 14 S W 2d 881
29 C J p 818 note 10

62. Iowa—Rutledge v Wright, 171 N W 28, 186 Iowa 777

63. Okl—Foster v. Vickery, 239 P 141, 111 Okl 231

64 Tex—Burton v Schwartz, Civ App, 36 S W 2d 1066, error dismissed—Cocke v Espinoza, Civ App, 265 S W 1103, reversed on other grounds Espinoza v Cocke, Com App, 276 S W 1095—Atkinson v Jackson Bros, Civ App, 259 S W 280, modified on other grounds, Com App, 270 S W 848, 38 A L R 1377—Vaden v Collier, Civ App, 253 S W 889—Republic Guaranty & Surety Co v Wm Cameron & Co, Civ App, 143 S W. 317
29 C J. p 818 note 13

65. U S—In re Kays, D C Wash., 49 F 2d 345
Ariz—Strahan v Haynes, 262 P 995, 33 Ariz 128
Wash—State ex rel Union Savings & Loan Ass'n v Kay, 26 P 2d 1045, 175 Wash 151—State v Superior Court of Chelan County, 266 P 731, 147 Wash 574
29 C J p 815 note 15 [a] (2), p 818 note 16.

66. Wash—Washburn v Wilen, 165 P 403, 96 Wash 480

67. Mo—Crary v Standard Inv Co, 285 S W 459 330 Mo 448—Tennent v Pruitt, 7 S W 23, 94 Mo 145
29 C J p 819 note 20

Legal fiction

In a case in which the debtor had abandoned the homestead and subsequently reoccupied it, it was held that in the statutory provision that the "homestead shall be subject to attachment and levy of execution upon all causes of action existing at the time of the acquiring such homestead, except as herein otherwise provided," and that "for this purpose such time shall be the date of the filing in the proper office for the records of deeds, the deed of such homestead," the latter clause is not an independent exception or a contrary provision, but is a legal fiction in aid of the stated exception and whether or not this fiction applies in a given state of facts is a judicial question—Palmer v Omer, 295 S W 123, 316 Mo 1188

68. Mo—Crary v Standard Inv Co, 285 S W 459, 330 Mo 148

69. Mo—Finnegan v Prindeville, 83 Mo 517
Vt—Lamb v Mason, 45 Vt 500

70. Tex—Hughes v Groshart, Civ App, 150 S W 2d 827—Farmers' & Mechanics' Trust Co v Perry, Civ App, 56 S W 2d 501.
29 C J p 818 note 18.

Property inherited

Where the judgment debtor was living on the property with his family at the time he inherited it, the homestead right attached simultaneously with his inheritance—Maines v Sistrunk, 129 So 158 170 La 768

71. Ky—First Nat Bank of Jackson v Oliver, 150 S W 2d 894, 286 Ky 286

72. Mass—Thurston v Maddocks, 6 Allen 427

73. Okl—City Nat Bank of Wellington, Tex, v Bounds, 235 P 168, 109 Okl 254
Tex—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—L E Whitham & Co v Briggs, Civ App, 41 S W 2d 150, reversed on other grounds L E Whitham & Co v Briggs' Estate, Com App, 58 S W 2d 49—Harkrider Keith-Cooke Co v Smith, Civ App, 284 S W 612—Evans v Daniel, 60 S W 1012, 25 Tex Civ App 362
Wis—Schwitzke v American Nat Bank, 8 N W 2d 303
29 C J p 804 note 41, p 819 note 23

74. Neb—Tyrrell v Kelley, 178 N W 206, 104 Neb 555
29 C J p 818 note 14.

cupancy of the premises[75] Under or apart from statutes to that effect, it has been held that property may be impressed with the right of homestead in the manner prescribed or contemplated by law, and thereby rendered exempt, at any time before forced sale,[76] even though the homestead is sought for the express purpose of passing a clear title to the property, free of creditors' liens,[77] but the property will not be exempt where it is not dedicated in accordance with statutory requirements until after the sale[78]

Under other statutes to that effect it has been held that property may be made a homestead at any time prior to the rendition of judgment against him, even though the purpose of impressing the property with a homestead character was to defeat the judgment, and even though the property had been held out as a possible asset in obtaining credit,[79] but the property may not be exempted as a homestead after the rendition of a judgment which becomes a lien on the property[80]

§ 50. Change of Homestead

Subject to limitations for the protection of third persons and of the debtor's wife, a debtor may change his homestead, and is entitled to a reasonable time to accomplish the change, but the abandonment of an existing homestead is a prerequisite.

Subject to the limitations herein considered, the general rule is, under or apart from the statute to that effect, that a debtor may change his homestead by moving from one tract of land to another and claiming the new homestead as exempt[81] The

75 Iowa—Berner v Dellinger, 222 N W 370, 206 Iowa 1382

76. U S—Myers v Matley, Nev, 63 S Ct 780, 318 U S 622, 87 L Ed —, affirming, C C A, 130 F 2d 775, affirming, D C, In re Matley 47 F Supp 558, certiorari granted 63 S Ct 435, 317 U S 621, 87 L Ed —
Ariz—Schreiber v Hill, 95 P 2d 566, 54 Ariz 345

In Washington

(1) Under an amendment to that effect in 1931, a homestead can be selected at any time before sale, unless notice of entry of judgment is filed, in which case the selection must be made within thirty days of such notice—Bonded Adjustment Co v Heden, 105 P 2d 44, 5 Wash 2d 250—Bonded Adjustment Co v Helgerson, 61 P 2d 1267, 188 Wash 176—State ex rel Van Doren v Superior Court for King County, 37 P 2d 215, 179 Wash 241—State ex rel Union Savings & Loan Ass'n v. Kay, 26 P 2d 1045, 175 Wash 151

(2) Prior thereto, and under an amendment to that effect in 1927, a homestead could be selected at any time before rendition of judgment—State v Superior Court of Chelan County 266 P 731, 147 Wash 574

(3) Under the 1927 amendment it was held that the provision could not deprive a judgment debtor who acquired property after the judgment from declaring it his homestead, that if the provision so operated it was unconstitutional, and that, in the absence of a valid provision as to the time of selecting property as a homestead, the rule that selection may be made at any time before sale would apply—Spencer v Pacific Mercantile Agency Collectors, 281 P. 482, 154 Wash 191

(4) Prior to the 1927 amendment it was held under provision to that effect, that the exemption could be obtained by the selection of a homestead at any time before the sale—State v Superior Court of Chelan County, supra—First Nat Bank v Galloway, 232 P 270, 132 Wash 355

(5) A declaration after judgment but before sale was valid under this provision, even though the declaration was made after the 1927 amendment became effective, where the judgment had been rendered prior thereto—Bilyeu v First Nat Bank, 283 P 169, 151 Wash 514

(6) Under this rule it was held that it is unnecessary, in defense of creditor's bill to set aside husband's deed to wife, to plead that property is homestead, when it is not, or that defendant intends to file declaration of homestead in order to avoid rule of res adjudicata, and realty, selected as homestead, after judgment canceling husband's deed to wife was not subject to sale under execution on judgment against husband, although second judgment provided that part or all of property be sold to satisfy it—First Nat Bank v Galloway, supra

(7) It was also held, without reference to statute, that homestead property is exempt even though it is dedicated after the rendition of judgment, which it is said becomes a lien on the property subject to the right of the owner to defeat execution sale by filing a homestead declaration—Snelling v. Butler, 119 P 3, 66 Wash 165

29 C J. p 818 note 5.

Even after levy

U S—Myers v Matley, C C A Nev, 130 F 2d 775 affirming, D C, In re Matley, 47 F Supp 558 Certiorari granted Myers v Matley, 63 S Ct 435, 317 U S 621, 87 L Ed —, and affirmed 63 S Ct 780, 318 U S 622 87 L Ed —
Ariz—First Nat Bank v Reeves, 234 P 556, 27 Ariz 508
29 C J p 818 note 7

77. **After execution of deed**

Where judgment debtors, after transcript of judgment was recorded executed and acknowledged a deed to certain premises and left it with trust company with oral instructions to deliver it to purchaser when he was satisfied with respect to title he would receive, a declaration of homestead thereafter executed and recorded by debtors rendered premises exempt from execution on judgment whether or not delivery of deed to company was a true escrow—Schreiber v Hill, 95 P 2d 566 54 Ariz 345

78. U S—Myers v Matley C C A Nev, 130 F 2d 775 affirming D C, In re Matley 47 F Supp 558 certiorari granted Myers v Matley 63 S Ct 435 317 U S 621 87 L Ed —— and affirmed 63 S Ct 780, 318 U S 622, 87 L Ed —
Mo—Tennent v Pruit, 7 S W 23, 94 Mo 115
29 C J p 815 note 15 [a] (1)

Property not used as homestead

It has been held that where real estate not used as a homestead may become exempt by selection such selection cannot be made after the sale of the property Stewart v Stewart, 65 Mo App 663

79 Fla—Heddon v Jones, 154 So 891, 115 Fla 19

80 Cal—Carey v Douthitt, 35 P 2d 632, 140 Cal App 109

81 U S—Thomason v Shaw, C C A Tex, 67 F 2d 611
Iowa—Elliott v Till, 259 N W 460, 219 Iowa 619
Miss—Chett v First Nat Bank 181 So 713, 182 Miss 560—Ritter v Whitesides, 176 So 738, 179 Miss 706
29 C J p 819 note 27
Change from rural to urban homestead see infra § 53
Enforceability against homestead of liabilities existing prior to change of homestead see infra § 99
Homestead exemption as applicable to property received in exchange for homestead, proceeds of sale of

owner of the homestead is entitled to a reasonable time to accomplish the change,[82] and the fact that immediate possession is not taken of the new property may not affect the validity of a claim of homestead thereon.[83] Furthermore, the owner of the homestead is not limited to one change of homestead but may make the change several times[84]

Since a person cannot possess two homesteads at the same time, see supra § 13, abandonment of an existing homestead is a condition precedent to the acquisition of another[85] However, the mere intention to change, and the performance of certain acts to effect such intention, have been held not sufficient to impress the new property as a homestead prior to occupancy thereof[86]

Limitations on rule A limitation on the right is that if the homestead has once been designated or set apart, a change cannot be effected if this would work a fraud on the rights of third parties,[87] as by invalidating security taken on land which was not exempt when the security was given[88]

Who may make change. It has been held that, subject to certain limitations in favor of the wife,[89] the husband may change the homestead,[90] without the consent of the wife.[91] However, it has also been held that, while the husband may change a designation of homestead without the wife's consent if the property previously designated has not been impressed with the homestead exemption by occupancy,[92] if the designated property has once become occupied as a home he cannot designate another without the consent of the wife[93] At any rate, where the homestead is part of a larger tract of land, the husband, as head of the family, may eliminate one part and designate another, so long as he acts in good faith and with fairness to his family and retains the amount of acreage required by law, including the dwelling and its appurtenances[94]

homestead, or property purchased with proceeds of sale see infra §§ 71–77

Manner of making change

A homestead may be changed by changing physical limits or by acquiring new homestead with old or its proceeds —American Sav Bank of Marengo v Millenbrock, 228 N W 295 209 Iowa 250

Pending foreclosure

Homestead claimants, who were about to lose their homestead as result of foreclosure proceedings, could abandon it and establish a new homestead on other property —Hawley v Arnold 258 N W 823, 137 Neb 238

82 Iowa —Vittengl v Vittengl, 135 N W 63, 156 Iowa 41
29 C J p 819 note 28

83 Ark —Dyer Trading Co v Harrison, 208 S W 794 137 Ark 434
29 C J p 819 note 29

84 Ky —Collins v Collins, 99 S W 653, 30 Ky L 816
29 C J p 819 note 30

85 Okl —Preston v Ottawa County Nat Bank, 280 P 581, 138 Okl 133
Tex —Karr v Cockerham, Civ App, 71 S W 2d 905, error dismissed—Crawford v Grand Saline Lumber & Supply Co, Civ App, 281 S W 592
Abandonment of homestead generally see infra §§ 163–178

Second selection

Unless the homestead laws provide for the taking of an additional homestead a second selection is not permitted —Powers v Palmer, 81 S W 817, 36 Tex Civ App 212—29 C J p 819 note 31

86 Tex —Jefferson County Inv & Bldg Ass'n v Gaddy, Civ App, 90 S W 2d 295, error refused.
Intent to remove without actual removal as abandonment see infra § 167

Erection of new building

Husband and wife who had fixed homestead rights on certain property long prior to executing contract to build on other property did not acquire homestead rights in other property at time of execution of building contract and erection of building thereunder, even if they had formed intention of acquiring different homestead and purchase of other property and improvements thereon was to comply with such intention, where they continued to occupy homestead until after date of contract —Towery v Plainview Building & Loan Ass'n, Tex Civ App, 99 S W 2d 1039, error refused

Enforceability of lien

The fact that paving lien attached to premises after defendant made an executory contract to sell his homestead, decided to move to premises, notified tenant on premises to vacate, and placed some junk on premises, did not show that a new homestead had been acquired, so as to preclude contractor's suit to foreclose paving lien —Panhandle Const Co v Continental Southland Savings & Loan Ass'n, Tex Civ App, 110 S W 2d 632, error dismissed

87. Miss —Richie v Duke, 12 So 208 70 Miss 66
29 C J p 819 note 31

Prejudice to creditors

Homestead may not be changed where such change would be to prejudice of creditors after their rights had accrued —Thomason v Shaw, C C A Tex, 67 F 2d 641

88. Iowa — Thompson v Pickel, 20 Iowa 490

89. Miss —Cliett v First Nat Bank, 181 So 713, 182 Miss 560

90. Miss —Ritter v Whitesides, 176 So 728, 179 Miss 706

91 Iowa —Williams v Swetland, 10 Iowa 51

92. Tex —Continental Southland Savings & Loan Ass'n v Palmer, Civ App, 92 S W 2d 1053, 1055 error dismissed

Vacant lot on which a house is being constructed does not assume character of "homestead" so as to deprive husband of right to designate another piece of common property suitable for home, without concurrence of wife, or over her protest —Continental Southland Savings & Loan Ass'n v Palmer, supra

93. U S —Continental Southland Savings & Loan Ass'n v Palmer, supra
"When the designated property has once become occupied as a home it may be said that the husband cannot designate another without the consent of the wife, in the manner provided by law, but when the property does not assume the character of a homestead by occupancy as in this case, the acts and deeds of the husband relative thereto are valid, thus binding on the wife"—Continental Southland Savings & Loan Ass'n v Palmer, supra

However, it has also been held without reference to such limitation that the husband may change the homestead without the consent of the wife —Holliman v Smith, 39 Tex 357

94. Tex —Booth v H P Drought & Co, Civ App, 89 S W 2d 132, error dismissed.

Time of application of exemption. The new homestead is a continuance of the old one and the exemption dates from the acquisition and occupancy of the old one [95]

§ 51. Evidence and Questions for Jury

a. Evidence
b Questions for jury

a. Evidence

(1) Presumptions and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumptions and Burden of Proof

The homestead claimant has the burden of establishing all facts essential to entitle him to the exemption; but all reasonable presumptions consistent with good faith will be indulged in his favor

In accordance with rules governing the burden of proof in civil actions generally, see Evidence §§ 103–113, the party claiming a homestead exemption in land has the burden of proving all the facts essential to entitle him to such exemption,[96] such as, that premises were duly set apart as a homestead,[97] that there was such occupancy as was sufficient to establish a homestead,[98] or that he was the head of a family [99]

In actions in which the homestead claimant is not involved, the burden of proving the existence of the homestead right is on the party asserting it [1]

Presumptions. In accordance with rules governing presumptions in civil cases generally, see Evidence §§ 114–157, all reasonable presumptions will be indulged in favor of the homestead right of exemption, where the facts are consistent with good faith [2] Thus, it will be presumed, in favor of a claim of homestead, that the court which took cognizance of the original proceedings had jurisdiction, where the homestead rights are collaterally attacked after the lapse of a considerable time,[3] that, where property is purchased to be used as a homestead, the intention was to use the entire lot therefor,[4] that the whole of the building or tract, of which part is occupied as a home, constitutes the

95. Iowa—American Sav Bank of Marengo v Millenbrock, 228 N W 295, 209 Iowa 250

96. Ark—Bank of Quitman v Mahar, 104 S W 2d 800, 193 Ark 1111
Cal—McNabb v Byrnes, 268 P 428, 92 Cal App 337
Ga—Kimsey v Rogers, 142 S E 667, 166 Ga 176
La—Thompson-Ritchie & Co v Graves, 120 So 634, 167 La 1024, 63 A L R 1283
Okl—Glaze v Drawver, 117 P 2d 514, 189 Okl 402—Hensley v Maxwell, 44 P 2d 60, 172 Okl 21—Hensley v Fletcher, 44 P 2d 63, 172 Okl 19—Garret v Getzendaner, 242 P 525, 115 Okl 12
Tex—Galloway v Moeser, Civ App, 82 S W 2d 1067- Himes v Himes, Civ App, 55 S W 2d 181
29 C J p 819 note 43, p 988 notes 74, 75
"The purpose of the exemption is a favored one but, in order to effectuate it the debtor must bring himself within the letter and spirit of the provision"—Tyler's Ex'r v Williamson, 36 S W 2d 31, 36, 237 Ky. 579
Burden of proving abandonment, waiver, or forfeiture of homestead see infra § 196
Burden of proof in proceedings to
Avoid homestead conveyance see infra § 154
Enforce claim against homestead see infra § 117
Enforce rights of purchasers and mortgagees under homestead conveyance see infra § 151
Enforce and protect homestead rights see infra § 233

Particular matters

(1) The homestead claimant has the burden of proving that the homestead was in existence at the time in issue
Ala—Metropolitan Life Ins Co v Estes, 155 So 79, 228 Ala 582
Cal—Williams v Nieto, 277 P 513, 98 Cal App 615
Tex—Sanders v Crump, Civ App, 23 S W 2d 850 Taylor v First Nat Bank, Civ App, 288 S W 235

(2) Homestead claimant had burden to show its purchase with proceeds from sale of prior homestead —Harm v Hale, 221 N W 582, 206 Iowa 920

(3) In action by homestead claimant to enjoin threatened sale of property under decree foreclosing a mortgage, on ground that he had such equitable title in property as to permit his claim of homestead homestead claimant had burden of proving such equitable title—Hoyt v First Nat Bank, 77 P 2d 538, 182 Okl 350

(4) In suit to foreclose mortgage lien on land which mortgagors claimed was part of their homestead when mortgage was given, burden was on them to prove that their designation of other lands as homestead included land not then or afterward used for homestead purposes—Wade v First Nat Bank, Tex Civ App, 263 S W 654

(5) Other matters see 29 C J p 819 note 43 [a], [b]

97. Ga—Darsey v Mumpford, 58 Ga 119
Ky—Forth v Lightfoot, 38 S W 1071, 18 Ky L 993

98. Ark—Chastain v Arkansas Bank & Trust Co, 219 S W 1, 157 Ark 423

99. Ill—Rock Island Bank & Trust Co v Lamont, 198 N E 430, 361 Ill 432

1 Fla—Dania Bank v Wilson & Toomer Fertilizer Co, 172 So 476, 127 Fla 45
Mich—Huber v Shav, 270 N W 731, 278 Mich 411
N D—Ruble v Grafton Nat Bank of Grafton 250 N W 784, 64 N D 129
Tex—L E Whitham & Co v Schulz Civ App, 14 S W 2d 881 modified on other grounds Schulz v L E Whitham & Co, 27 S W 2d 1093, 119 Tex 211
29 C J p 927 notes 6 7

2. N D—Mandan Mercantile Co v Sexton, 151 N W 780, 29 N D 602, Ann Cas 1917 A 67
Presumptions as to abandonment, waiver or forfeiture of homestead see infra § 196
Presumptions in proceedings to
Avoid homestead conveyance see infra § 154
Enforce claim against homestead see infra § 117
Enforce rights of purchasers and mortgagees under homestead conveyance see infra § 151
Enforce and protect homestead rights see infra § 233

3. Ga—McDonald v Williams, 19 S. E 830, 94 Ga 515

4. Tex—Scottish American Mortg Co v Milner, Civ App, 30 S W 2d 582, error refused

homestead,[5] unless it is proved that a portion of it has not that legal character;[6] and that the legal subdivision of land, on which the dwelling house stands, and which equals the statutory measure of the homestead right, has been selected by the owner as his homestead,[7] although there is authority to the contrary of this last proposition.[8] It will also be presumed that the husband of claimant consents to her application for homestead where only his creditors object.[9] However, that certain property was designated a homestead in an Indian allotment of land creates no presumption that such land constitutes a homestead within the constitutional and statutory provisions as to homesteads in the state.[10] It is presumed that a state of facts which entitles one to a homestead continues until the contrary is established.[11]

While it has been held that actual use of property for the purposes of a home will be deemed a designation of such premises as a homestead,[12] and that residence is prima facie evidence of an intent to dedicate premises to the purposes of a homestead,[13] such presumption is not conclusive, but is rebuttable by facts and circumstances aliunde.[14]

(2) Admissibility

Rules governing the admissibility of evidence in civil actions generally have been applied in actions and proceedings in which the acquisition and establishment of a homestead was an issue.

In accordance with rules governing the admissibility of evidence in civil actions generally, the admissibility of evidence to prove the acquisition and establishment of a homestead has been determined with regard to the relevancy, materiality, and competency of the evidence in the particular case.[15] In order to prove the acquisition or establishment of a homestead, or the intent to do so, on which the creation or existence of the homestead largely depends, see supra § 30, circumstantial evidence has been held admissible,[16] such as evidence of the actions of claimants,[17] of the entire transaction relative to the purchase of property,[18] and of the circumstances attending the occupancy of the land claimed as homestead.[19] Records of prior suits involving the property are admissible to show whether the property was regarded as a homestead.[20] It has been held not error to exclude evidence which is merely cumulative.[21]

It has been held that the declarations of a claimant are admissible to prove intent,[22] but not for other purposes.[23] However, the recitals in a declaration of homestead are mere ex parte statements of declarant, and are not legitimate proof of the truth of the facts recited, and the truth of the recitals must be proved aliunde, whenever the validity of the homestead is attacked.[24]

5. Iowa—Rhodes v McCormick, 4 Iowa 368, 68 Am D 663
29 C J p 820 note 48

6. Iowa—Rhodes v McCormick, supra

7. Wis—Martin v Aultman, 49 N W 749, 80 Wis 150—Kent v Lasley, 4 N W 23, 48 Wis 257

8. N D—Foogman v Patterson, 83 N W 15, 9 N D 254

9. Ga—Connally v Hardwick, 61 Ga 501

10. Okl—Jefferson v Henderson, 282 P 677, 140 Okl 86—Garret v Getzendaner, 242 P 525, 115 Okl 12
Homesteads allotted to Indians see the C J S title Indians § 40, also 31 C J p 527 note 98–p 528 note 5

11. Ala—Powers Clothing Co v. Smith, 81 So 576, 202 Ala. 634
29 C J p 988 note 73

12. Tex—McGregor First Nat Bank v Rice-Stix Dry Goods Co, Civ App, 213 S W 344
29 C J p 820 note 58

13. Okl—Thomason v Martin, 222 P 511, 97 Okl 17
29 C J p 820 note 60

14. Tex—Grimes v Cline, Civ App, 300 S W 235
29 C J p 820 note 60

15. Tex—Chesnut v Specht, Civ App, 272 S W 830.
Admissibility of evidence as to abandonment, waiver, or forfeiture of homestead see infra § 197
Admissibility of evidence in proceedings to
Avoid homestead conveyance see infra § 154
Enforce claim against homestead see infra § 117
Enforce rights of purchasers and mortgagees under homestead conveyance see infra § 151
Enforce and protect homestead rights see infra § 233

Evidence held admissible

(1) Articles of adoption are admissible to establish that claimant was the head of a family and therefore entitled to a homestead—Chesnut v Specht, supra.

(2) Evidence of the intention of the owner of property is admissible to establish what property was included within the homestead—Scottish American Mortg Co v Milner, Tex Civ App, 30 S W 2d 582, error refused

(3) Other cases see 29 C J p 989 notes 92–94, 96–98

Evidence held not admissible

Where the property is not proved to be a homestead, evidence as to notice to third parties of the homestead character of the land is immaterial—Amerson v Cox, 160 S E 506, 173 Ga 477.

16. Tex—Harkrider-Keith-Cooke Co. v Smith, Civ App, 284 S W 612

17. S D—Clark v. Evans, 60 N W 862, 6 S D 244
29 C J p 819 note 37

18. Tex—Harkrider-Keith-Cooke Co. v Smith, Civ App, 284 S W 612

19. U S—Woodward v Sanger Bros, Tex, 246 F 777, 159 C C A 79, certiorari denied 38 S Ct 425, 246 U. S 674, 62 L Ed 932
29 C J p 819 note 39

20. Ga—Amerson v Cox, 160 S E. 506, 173 Ga 477

21. **Prior use of property**

Excluding evidence of property owner's use of property prior to his ownership, which was merely cumulative on issue of owner's intention in purchasing property for business homestead, was held not error—Pickard v Reed Tex Civ App, 52 S. W 2d 274, error refused

22. Cal—Lakas v Archambault, 176 P 180, 38 Cal App 365
29 C J p 819 note 38

23. Jacobs v Hawkins, 63 Tex 1.
29 C J p 962 note 81

24. Cal—Apprate v. Faure, 53 P. 917, 121 Cal 466.

(3) Weight and Sufficiency

Rules governing the weight and sufficiency of evidence in civil actions generally have been applied in actions and proceedings in which the acquisition or establishment of homesteads was an issue.

In accordance with rules governing the weight and sufficiency of evidence in civil actions generally, see Evidence §§ 1016–1050, that property was impressed with a homestead character must be established by a fair preponderance of the evidence [25] The mere claim by the owner that the property is his homestead does not establish that fact [26] It has been said that whenever there is serious doubt as to whether property is, or is not, a homestead, the doubts should be solved in favor of the exemptionist, sustaining instead of defeating the estate which is created by a sound legal policy [27] Stronger evidence is required to establish a homestead in unoccupied property where it would be a deception or a fraud on a creditor who had extended credit on the faith or ownership of property in which debtor did not reside [28]

Evidence of intent Acts indicating an intention to constitute premises a homestead may be sufficient evidence to establish the character of the premises as a homestead [29] However, the declarations of the interested parties are not conclusive, as to the intent to establish a homestead, either in favor of or against the claim of homestead,[30] although there is some authority for the view that declarations of no intention to claim property as a homestead are direct and positive proof that there was no such intention and that the property was not exempt as homestead [31] Acts of claimants after suit to foreclose lien was filed are not of sufficient probative force to establish a bona fide intention to make certain property a homestead [32] Evidence of place of voting usually has a strong bearing on the question of intent, but is not absolutely controlling [33]

In particular cases the sufficiency or insufficiency of the evidence to show a bona fide intention to use the property as the homestead,[34] to show bad faith in filing a declaration of intention,[35] to show that the old homestead was sold with the intention of using the proceeds of the sale in the acquisition

25. Okl —Hensley v Maxwell, 44 P 2d 60, 172 Okl 21—Hensley v Fletcher, 44 P 2d 63, 172 Okl 19
Tex —L E Whitham & Co v Schulz, Civ App, 14 S W 2d 881, modified on other grounds Schulz v L E Whitham & Co, 27 S W 2d 1093, 119 Tex 211.
Weight and sufficiency of evidence as to abandonment, waiver, or forfeiture of homestead see infra § 198
Weight and sufficiency of evidence in proceedings to
Avoid homestead conveyance see infra § 154
Enforce claim against homestead see infra § 117
Enforce rights of purchasers and mortgagees under homestead conveyance see infra § 151
Enforce and protect homestead rights see infra § 233

26 Or —Stewart v Black, 22 P 2d 336 143 Or 291

27. Miss —Levis-Zukoski Mercantile Co v McIntyre, 47 So 435, 93 Miss. 806

28. Ky —Brewer v Brewer, 105 S W 2d 582, 268 Ky 625—Williams v Evans' Adm'r 56 S W 2d 710, 247 Ky 105 -Conway v Reed, 235 S W 747, 193 Ky 287

29 Tex —Vaughan v Sterling Nat Bank & Trust Co of New York, Civ App 124 S W 2d 410, error refused—Harkrider-Keith-Cooke Co v Smith, Civ App, 281 S W 612
29 C J p 820 note 57

Evidence of overt acts

Evidence that shortly after judgment debtor acquired an interest in lot purchased by his wife for homestead, they negotiated with builder regarding plans for a home but were unable to obtain necessary money until some two years thereafter, and that they demonstrated intention to use the premises as their homestead by doing certain overt acts, warranted holding that premises constituted the "homestead" of judgment debtor and his wife and hence were exempt from judgment lien —Schwitzke v American Nat Bank, Wis, 8 N W 2d 303

30. Cal —Johnston v De Bock, 244 P 330, 198 Cal 177
S D —Harter v Davison, 220 N W 862, 53 S D 399
29 C J p 820 note 56

"Intent must be shown by something more than mere declarations" —Traverso v Cerini, 263 P 184, 185, 146 Wash 273

31. Tex —McFarlane v First Nat Bank, Civ App, 97 S W 2d 754, error refused

32. Tex —Third Nat Bank v McClung, Civ App, 281 S W 281

33. Wis —Roche v Du Bois, 271 N W 84, 223 Wis 438

34. Evidence held sufficient

(1) In general
Mich —Haight v Reynolds, 239 N W 880, 257 Mich 11
Tex —Stevenson v Wilson, Civ App, 130 S W 2d 317, error refused—Teller v Fitch, Civ App, 281 S W 893
Wash —Nelsen v McKeen, 5 P 2d 333, 165 Wash 274
Wis —Roche v Du Bois, 271 N W 84, 223 Wis 438

(2) Evidence was held sufficient to support a finding in a mortgage foreclosure suit, that defendants, while dwelling on an adjoining tract, had so cultivated and improved the mortgaged property as to manifest a present and sustained intention of further improving it and residing thereon as a homestead —Lilly v Lewis, Tex Civ App, 249 S W 1095

Evidence held insufficient

(1) In general —Third Nat Bank v McClung, Tex Civ App, 281 S W 281

(2) Evidence that property claimed by plaintiff in trespass to try title suit was unimproved woodland when deeded to him, that only a small portion thereof had been cleared before execution by plaintiff of deed of trust which he sought to avoid, and that he and his family never lived on premises, was insufficient to establish intent to make property a homestead —Rudolph v Hanes, Tex Civ App, 111 S W 2d 1189

35. Evidence held insufficient

(1) In general Moe v Becher, 262 P. 144, 146 Wash 128

(2) Evidence that widower, filing homestead declaration, had said he was not going to reside on premises claimed and listed property for sale, did not establish bad faith in making declaration where testimony showed that he was excluded from premises after his wife's death by executrix of her estate and there was no testimony that he ever claimed residence elsewhere —In re Finch's Estate, 89 P 2d 218, 198 Wash 567.

of a new homestead,[36] or to show an abandonment of an intention to establish a homestead,[37] has been adjudicated.

Applications of rules. Applying the general rules of evidence, the courts have adjudicated the sufficiency or insufficiency of the evidence to establish particular matters relating to the acquisition and establishment of homesteads,[38] such as that certain premises were impressed with a homestead character at the time in issue,[39] that the premises were

36. Iowa—Elliott v. Till, 259 N.W 460, 219 Iowa 649—Fardal v Satre, 206 N W 22, 200 Iowa 1109

37. Evidence held insufficient

That judgment debtor and his wife were considering possibility of trading in a lot which wife had purchased for a homestead for another house shortly before they began construction of house on such lot did not indicate that they had "abandoned" their intention to claim such lot as their "homestead"—Schwitzke v American Nat Bank, Wis, 8 N W 2d 303

38 Evidence held sufficient

(1) To show that claimant had acquired a homestead—Taylor v Ullmann, Tex Civ App, 188 S W 746

(2) To show that claimant had previously acquired another homestead—Bayless v Guthrie, Tex Civ App, 218 S W 131

(3) To show that defendant's husband was the head of a family and had established his residence elsewhere than on the homestead claimed by his wife—Bullis v Staniford, 171 P 1064, 178 Cal 40

(4) To show that plaintiffs, partner's heirs, had no homestead rights in partnership land in controversy sold under mortgage foreclosure—Tyner v La Coste Tex Com App, 13 S W 2d 685, affirming Sederholm v City of Port Arthur, Civ App, 3 S W. 2d 925, and followed in Tyner v Keith Tex Com App, 13 S W 2d 687, affirming Sederholm v City of Port Arthur, Civ App, 3 S W 2d 925

(5) To show insufficient overt acts to impress premises with homestead character—Preston v Ottawa County Nat Bank, 280 P 581, 138 Okl 133

(6) To show that alleged homesteader did not reside within the state and could therefore not acquire a homestead—Croker v Croker, C C A Fla 51 F 2d 11

(7) To sustain finding that lands described in a declaration of homestead as bounded on three sides by the lands of mere squatters could not be identified with reasonable certainty—Howard v Howard, 226 P. 984, 67 Cal App 56

(8) To establish prima facie homestead character of premises alleged to have been fraudulently conveyed—Peck v Peck, 212 N W 872, 51 S D 157

(9) To support finding that alleged homestead was urban property and exceeded the statutory limitations as to value and area of such property which could be made homestead—Kahre v McCourtney, 162 S W 2d 41, 204 Ark 272

(10) To show that there was no unreasonable delay in asserting claim to homestead—Robinson v Burnett, 192 S W 871, 174 Ky 766

Evidence held insufficient

(1) To show that claimant had a sufficient equitable title to support a claim of homestead—Hoyt v First Nat Bank, 77 P 2d 538, 182 Okl 350

(2) To show that the premises claimed had been used primarily for immoral purposes—Harlan v Schulze, 94 P 379, 7 Cal App 287

(3) To sustain claim to homestead exemption of proceeds on ground of intended use in another homestead—Phoenix Trust Co v Vaught, 205 N W 792, 201 Iowa 450

(4) Uncontradicted evidence that defendants occupied village residence was held not to support contrary finding by jury or to warrant setting apart rural homestead—Paris Grocer Co v Pirtle, Tex Civ App, 280 S W 854

(5) That execution debtors recorded redesignation of abandoned homestead after failing to negotiate postponement of sheriff's sale negatived rather than supported, homestead claim—Welch v Silvers, Civ App, 59 S W 2d 879, affirmed Silvers v Welch, 91 S W 2d 686, 127 Tex 58

39. Evidence held sufficient

(1) In general

U S—In re Kays, D C Wash, 49 F 2d 345

Cal—Thatcher v Van Bever, 34 P 2d 740, 139 Cal App 658

Fla—Hillsborough Inv Co v Wilcox, 13 So 2d 448 Jahn v Purvis, 199 So 340, 145 Fla 354—Brown v Jones, 192 So 188, 140 Fla 506—Davis v Miami Beach Bank & Trust Co, 198 So 817 99 Fla 1282

Iowa—Hagge v Gonder, 270 N W 371, 222 Iowa 954

Kan—Williams v Roberts, 32 P 2d 229, 139 Kan 460—Hammond v Neely, 28 P 2d 726, 138 Kan 885—Farmers' State Bank of Belvue v Weeks, 26 P 2d 262, 138 Kan 376

Minn—Gussman v Rodgers, 251 N W 18, 190 Minn 153

N C—Overton v Highsmith, 131 S E 712, 191 N C 376

Okl—Gross v Belvin, 17 P 2d 382, 158 Okl 259—Clay v Brown, 17 P 2d 378, 158 Okl 259—Farmers' Exch Bank of Lindsay v Cutler, 229 P 186, 100 Okl 193

Or—In re Laughlin's Estate, 134 P 2d 961

S D—McConnell v Johnson, 221 N W 255, 53 S D 533—Harter v Davison, 220 N W 862, 53 S D 399—Farmers' & Merchants' Nat. Bank of Milbank v Bank of Commerce of Milbank, 206 N W 691, 49 S D 130

Tex—Bell v. Crabb, Com App, 244 S W 371—J R. Watkins Co v Dawson, Civ App, 145 S W 2d 901—Fain-Townsend Co v Barker, Civ App, 109 S W 2d 1101—Richardson v Hendricks, Civ App, 109 S W 2d 363—Dillard v Duke, Civ App, 107 S W 2d 414—Mayfield Co v Pepper, Civ App, 76 S W 2d 216, reversed on other grounds 103 S W 2d 737, 129 Tex 307—L E Whitham & Co v Kemp, Civ App, 66 S W 2d 462—Trad v Califa, Civ App, 64 S W 2d 402, error refused—McClendon v Brown, Civ App, 63 S W 2d 746, error dismissed—Ingram v Summers, Civ App 29 S W 2d 447, error dismissed—Hamm v Brown & Horn, Civ App, 29 S W 2d 431—Stout v Sommers, Civ App 28 S W 2d 247, affirmed Sommers v Stout Com App, 44 S W 2d 901—Dorough v Panse, Civ App, 24 S W 2d 69—First Nat Bank v Ervin, Civ App, 12 S W 2d 269—Brown v Logan, Civ App, 7 S W 2d 189—Walker v Dailey, Civ App, 290 S W 813—Atkinson v Jackson Bros, Civ App, 259 S W 280 modified on other grounds Com App, 270 S W 848 38 A L R 1377—Tucker v Dodson, Civ App, 245 S W 728

Wash—Nelsen v McKeen, 5 P 2d 333, 165 Wash 274

29 C J p 821 note 64, p 990 note 19

(2) Business homestead—Crockett v Atkinson Tex Civ App, 107 S W 2d 591, error dismissed—Lubbock Nat Bank v Nickels, Tex Civ App, 63 S W 2d 764—Shaw v Head Tex Civ App, 55 S W 2d 190—First Nat Bank v Dismukes, Tex Civ App, 241 S W 199—Cooper Grocery Co v Peter, 80 S W 108, 35 Tex Civ App, 49

(3) Evidence held sufficient to establish that property was claimant's homestead even though he did not occupy it as a residence—Boone v Bassham, Tex Civ App, 51 S W 2d 1065, error refused—Jolesch & Chaska Co v Hampton, Tex Civ App, 297 S W 271

Evidence held insufficient

(1) In general

Ark—Bank of Quitman v Mahar 104 S W 2d 800, 193 Ark 1111—Freer v Less, 252 S W 354, 159 Ark 509

not impressed with a homestead character,[40] that particular property was part of the homestead,[41] that particular property was not part of the homestead,[42] that claimant was the head of a family, so as to be entitled to a homestead exemption,[43] that claimant was not the head of a family,[44] that the

Mich—Huber v Shay, 270 N W. 731, 278 Mich 414
Miss—Wright v Wright, 134 So 197, 160 Miss 235
Tex—Gilmore v Dennison, 115 S W. 2d 902, 131 Tex 398, reversing, Civ. App., 91 S W 2d 371—Gillette v Davis, Civ App., 296 S W 655—Ragley-McWilliams Lumber Co v Davidson, Civ App., 178 S W 785
29 C J p 821 note 71, p 990 note 25

(2) Business homestead—Galloway v Moeser, Tex Civ App., 82 S W 2d 1067—Gibbs v Hartenstein, Tex Civ App., 81 S W 59

(3) Contradicted testimony of plaintiff and his wife was insufficient to establish his homestead claim—Hillier v Howard, Tex Civ App., 131 S W 2d 1002, error refused

(4) Evidence was held insufficient to establish that unoccupied property was impressed with homestead character—Guaranty Bond State Bank v Banks, Tex Civ App., 56 S W.2d 1102

(5) A mere statement by owner of property that it was his homestead since time of purchase in 1928, and evidence that house thereon was occupied about June 1, 1931, was held not to establish homestead character of property as of August 13, 1929, where owner could not remember when house was built nor when he moved into house—Glenn v Panhandle Const Co, Tex Civ App., 110 S W 2d 1217

(6) Evidence was held not to establish homestead character of land at time of execution of oil contract as regards necessity, if any, of wife's signature and acknowledgment—Gibson & Johnson v Waid, Tex Civ App., 35 S W 2d 824, error dismissed, followed in Gibson v Canon, Tex Civ App., 35 S W 2d 828 and Gibson & Johnson v Axe, Tex Civ App., 35 S W 2d 828

40. Evidence held sufficient

(1) In general
Ala—Wolcott v Titus, 191 So 383, 238 Ala 342
Ark—Nolen v J B Duncan Co, 273 S W 18, 168 Ark 1168
Fla—Giddens v McFarlan, 10 So 2d 807
Ga—Amerson v Cox, 160 S E 506, 173 Ga 477
Kan—Anderson v Shannon 73 P 2d 5, 146 Kan 701, 114 A L R 200
Mich—Van Benennaam v Reverse, 215 N W 389, 240 Mich 454
Okl—Hensley v Maxwell, 44 P 2d 60, 172 Okl 21—Hensley v Fletcher, 44 P 2d 63 172 Okl 19—Lena v Clinkenbeard 44 P 2d 2, 172 Okl 6—Clay v First Nat Bank, 39 P 2d 64, 170 Okl 225
Tex—Hampton v C D Shamburger Lumber Co, Civ App., 127 S W 2d 245, error dismissed, judgment correct—Netter v Coleman, Civ App., 63 S W 2d 903, error refused—Underwood v Jefferson Bank & Trust Co, Civ App., 35 S W 2d 766—Gates v Pitts, Civ App., 2 S W 2d 307—Walker v Dailey, Civ App., 290 S W 813—Taylor v. First Nat Bank, Civ App., 288 S W 235
Wis—In re Robers, 265 N W 578, 220 Wis 547
29 C J p 821 note 65, p 990 note 21

(2) Business homestead
U S—Collier v. Union Central Life Ins Co, C C A Tex, 100 F 2d 411
Tex—Flynn v J M Radford Grocery Co, Civ App., 174 S W 902

(3) Evidence that one homestead had not been abandoned is sufficient to establish that another property was not a homestead—Griffay v Robbins, Tex Civ App., 91 S W 2d 1160, error dismissed

41. Evidence held sufficient

(1) In general—Spencer v Stewart, 262 P 331, 205 Cal 695—Davis v Lockwood, 293 P 631, 110 Cal App 114.

(2) Evidence was held to support finding that homestead exemption extended to lot purchased after establishment of homestead claim to other lots—McKenzie v Mayer, Tex Civ App., 20 S W 2d 238

(3) Evidence that plaintiff had selected eighty acres in one county, building a dwelling house on it, occupying it with his family part of the time, farming it and using it in part with eighty acres in another county in making a living and adding to the comfort and well-being of his family, was sufficient to sustain a judgment finding it part of homestead—Williams v Watkins, 219 P 643, 93 Okl 112

(4) Evidence supported implied finding that improved structure, consisting of dwelling and addition thereto made to provide accommodation for owner's daughter and husband who occupied it as tenants at will without rent, except for period when it was rented to others was essentially but one building, which was dedicated as a homestead, and therefore improved structure was exempt from attachment—Vincenzini v Fiorentini, 38 P 2d 876, 2 Cal App 2d 739

42. Evidence held sufficient

Tex—Sanders v Crump, Civ App., 23 S W 2d 850

43. Evidence held sufficient

(1) In general
Cal—Connell v Crawford, 281 P 442, 101 Cal App 162
Fla—Hillsborough Inv Co v Wilcox, 13 So 2d 448
S C—Kaminski Hardware Co v Holden Trunk & Bag Co, 147 S E 874, 150 S C 244
29 C J. p 990 note 23

(2) Evidence that school teacher supported and cared for widowed sister who was advanced in years, homeless and penniless and without earning capacity was held to support finding that moral obligation rested on school teacher to support and care for her sister and justified conclusion that school teacher and sister constituted "family" of which school teacher was legal head, and that house which they occupied was "homestead" and exempt from levy of paving assessment—Standard Paving Co v Tolson, Tex Civ App., 86 S W 2d 789

Evidence held insufficient

(1) In general—Elliott v Texas Pacific Coal & Oil Co, Tex Com App., 29 S W 2d 982, affirming, Civ App., 19 S W 2d 442

(2) Evidence that judgment debtor was sole support of his parents at time of acquisition of realty claimed as homestead was insufficient to establish that judgment debtor was entitled to homestead exemption as "head of a family" prior to his marriage, where judgment debtor's parents did not reside on property involved, but lived in a separate home belonging to judgment debtor's mother which was the homestead of the parents--Moorhead v Yongue, 183 So 804, 134 Fla 135, 118 A L R 1377

(3) Evidence that son of owner of land and son's family, after leaving premises on death of owner's wife, returned, at owner's request, to take care of him and that son exercised personal authority over household and that son did not abdicate his position as head of the family was held insufficient to show that owner was the "head of a family" so as to be entitled to claim homestead as against levy of attachment made after return of son and family—Dania Bank v Wilson & Toomer Fertilizer Co, 172 So 176, 127 Fla 45

44. Evidence held sufficient

Evidence disclosing that defendant was widow, that all her children were married and of legal age, that none of children except son lived with her on lands, and that son farmed lands and paid rent by means of portion of crops established that defendant was not "head of family" within exemption statute--Lena v Clinkenbeard, 44 P 2d 2, 172 Okl 6.

homestead was in a town or village,[45] that the property was the actual bona fide residence of claimant,[46] or that defendant had,[47] or did not have,[48] a residence on the premises when the declaration of homestead was made and recorded.

b. Questions for Jury

Rules governing the province of the court and the jury in trials in civil actions generally have been applied in actions or proceedings in which the acquisition or establishment of homesteads was an issue.

In accordance with the general rules governing trials in civil actions, see the C.J S. title Trial §§ 203–265, also 64 C J p 296 note 48–p 510 note 64, questions which are matters of law or on which the evidence is not conflicting are for the court,[49] except where the credibility of witnesses is involved,[50] but the jury or trial court must determine questions of fact on conflicting evidence,[51] such as whether the debtor's property was impressed with the homestead character at the time in issue,[52] whether particular property is part of the homestead,[53] whether claimant is the head of a family so as to be entitled to the homestead exemption,[54] whether the land was used and occupied as a homestead,[55] whether the property is a rural or urban homestead,[56] whether claimant intended to make the premises a homestead,[57] and whether the acts performed by claimant to enable him to occupy the property, in connection with his intention to occupy it, were sufficient to impress the premises with the homestead character[58]

In determining whether the evidence warrants the submission of the case to the jury, the test is whether reasonable minds could differ on the con-

45. Evidence held sufficient
Tex —Paris Grocer Co v Pirtle, Civ App, 280 S W 854

46. Evidence held sufficient
Cal —Coca Cola Bottling Co v Feliciano, 114 P 2d 604, 45 Cal App 2d 680

47. Cal —Michels v Burkhard, 190 P 370, 47 Cal App 162

48. Cal —Johnston v De Bock, 244 P 330, 198 Cal 177

49. Tex —Baxter v Crow, Civ App, 133 S W 2d 187, error dismissed, judgment correct
Questions for jury as to abandonment of homestead see infra § 199
Questions for jury in proceedings to. Enforce claim against homestead see infra § 117
Enforce and protect homestead rights see infra § 235

Matter of law
(1) A homestead may be shown to exist as a matter of law —Texas Pac Coal & Oil Co v Guthrie, Civ App, 100 S W 2d 125, modified on other ground, Guthrie v Texas Pac Coal & Oil Co, 122 S W 2d 1049, 132 Tex 180

(2) Where, as a matter of law, certain lots could not have been part of the homestead, the issue should not be submitted to the jury —Baxter v Crow, Tex Civ App, 133 S W 2d 187, error dismissed, judgment correct

50. Tex —Wade v First Nat Bank, Civ App, 263 S W 654

Interested witnesses
Testimony of interested witnesses even though uncontradicted raises an issue of fact for jury —Himes v Himes, Tex Civ App, 55 S W 2d 181—Wade v First Nat Bank, Tex Civ App, 263 S W 654

51. Permanence of renting
Whether renting, thus defeating claim to homestead rights, was intended to be temporary, was held for jury.—Scottish American Mortg Co v Milner, Tex Civ App, 30 S W 2d 582, error refused

52. Okl —Glaze v Drawver 117 P 2d 544, 189 Okl 102—Exchange Nat Bank of Tulsa v Rose, 103 P 2d 496, 187 Okl 481 Morey v James, 276 P 707, 136 Okl 171—Garret v Getzendaner, 242 P 525, 115 Okl 12—Orwig v Cloud, 233 P 1085, 109 Okl 299—Weitz v Richardson, 222 P 977, 101 Okl 81—Kerns v Warden, 213 P 70, 88 Okl 297
Tex —Rutland Sav Bank v Seeger, Civ App, 125 S W 2d 1113, error dismissed, judgment correct—Wentworth v Collins, Civ App, 115 S W 2d 142, error dismissed—Alamo Lumber Co v Walker Civ App, 103 S W 2d 792—Lubbock Nat Bank v Nickels, Civ App, 63 S W 2d 764 - Davis v Cicero-Smith Lumber Co, Civ App, 55 S W 2d 130, error dismissed—Broadland v City Nat Bank of Corpus Christi, Civ App, 15 S W 2d 112
29 C J p 991 note 37

Regardless of amount of property
Whether particular tract has been selected and impressed with homestead character is question of fact to be determined by the court or jury, whether the family owns more than one hundred sixty acres of land or less —Harris v. Watts, 226 P 40, 102 Okl 36

53. Tex —Pickett v Riley, Civ App, 149 S W 2d 990—L E Whitham & Co v Kemp, Civ App, 66 S W 2d 462

Property adjoining dwelling
Whether tract or piece of land adjoining dwelling in which homestead estate has been acquired is part of homestead is fact question —Continental Inv Co v Schmeich, Tex Civ App, 145 S W 2d 219, error refused—29 C J p 991 note 41

Property not resided on
Whether tract of one hundred acres on which owner did not live, but which he mostly rented out, but used to some extent to pasture cattle and for storage purposes, and of which he had cultivated one acre for two years, was part of homestead, under Const art 16 § 51, was a question for the jury —Reed v Crump, Tex Civ App, 277 S W 737

Segregated tracts of land
Whether segregated tracts of land constitute part of homestead generally is fact question to be determined from all evidence — Youngblood v Youngblood, Civ App, 46 S W 2d 390, modified on other grounds 76 S W 2d 759, 124 Tex 184

54. Tex —Central Life Assur Soc. (Mutual) v Gray, Civ App, 32 S W. 2d 259, error refused
29 C J p 991 note 38

Wife
Whether wife is head of family so as to be entitled to homestead exemption is a question of fact —Jones v. Federal Farm Mortg Corporation, 188 So 804, 138 Fla 65

55. Tex —Weisel v Travis Cotton Seed Products Co, Civ App, 63 S W 2d 246, error refused—Benzel v Commercial Nat Bank of Sherman, Civ App, 1 S W 2d 695, error dismissed

56. Tex —Commerce Farm Credit Co v Sales, Com App, 288 S W 802, reversing Commerce Farm Credit Co v Sayles, Civ App, 279 S W. 567
29 C J p 991 notes 39, 40

57. Property not occupied
Where occupancy of premises cannot be had or is not advisable and premises are used for purpose of home, intention of parties to make premises homestead is usually for jury —Anderson v Byrum, Tex Civ App, 73 S W 2d 571

58. Tex —Jolesch & Chaska Co v Hampton, Civ App, 297 S W 271

clusions to be drawn from the evidence[59] In particular cases the evidence has been held sufficient,[60] or insufficient,[61] to make out a case or raise an issue to go to the jury Slight evidence of use of the property has been held sufficient to raise an issue of dedication of a tract as a rural homestead[62] Where the evidence is sufficient to present a question of fact, as to whether the land was impressed with the homestead character, it is error for the court to sustain a demurrer to the evidence[63]

D PROPERTY CONSTITUTING HOMESTEAD

§ 52. Nature and Character

The right of homestead is generally regarded as incidental to an interest in land, rather than to buildings considered apart from the soil, but it attaches to the structure erected on exempt premises and to fixtures permanently annexed to the realty.

While there is authority to the effect that the homestead exemption may attach to a building erected by one who has no interest or estate in the land on which it stands,[64] or by a tenant on leased land,[65] it is generally considered that the right of homestead is incidental to an interest in land rather than to buildings located thereon and considered apart from the soil,[66] but it attaches to the structure erected on premises which are exempt and to

59. Rural or urban homestead
Even though the evidence established that the property was outside the corporate limits of the city, whether the homestead was a rural one or an urban one is a question for the jury where reasonable minds may differ as to that point—Commerce Farm Credit Co v Sales, Tex Com App, 288 S W 802 reversing Commerce Farm Credit Co v Sayles, Civ App, 279 S W 567

60. Tex—French v Coleman, Civ App, 13 S W 2d 469

Whether property was homestead
Tex—Wallace v First Nat Bank, 35 S W 2d 1036, 120 Tex 92 reversing First Nat Bank v Wallace Civ App, 13 S W 2d 176—Anderson v Byrum, Civ App, 73 S W 2d 571
29 C J p 820 note 63

Evidence as to abandonment
Where evidence raises issue as to abandonment of former homestead the same evidence raises the question of homestead character of property actually occupied at time of execution of mortgage thereon—Haile v Federal Land Bank of Houston, Tex Civ App, 135 S W 2d 1024, error refused

Evidence held not conclusive
In trespass to try title to three lots, evidence that defendant and his wife designated one of lots as their homestead in trust deed thereof and erected house thereon, in which they lived with their children until sale thereof to corporation under execution, and that other lots, which were not completely fenced were used for gardening purposes, as chicken yard, and probably as cow lot was insufficient to warrant holding that such other lots were part of defendant's homestead as matter of law when trust deed was executed—Calvert v Hanna, Tex Civ App 140 S W 2d 976

61. Tex—Glaser v Henderson, Civ App, 2 S W 2d 987

Business homestead
Evidence whether vacant lot was business homestead by virtue of mortgagor's alleged use for a time of a little frame building thereon as place in which he conducted business of drawing plans and making estimates for other persons and conducting real estate business was held insufficient for jury—De Guire v Title Realty Co, Tex Civ App, 98 S W 2d 249, error dismissed

Fraud in designation
Evidence that husband, in procuring loan on tract of land designated as homestead place situated on public highway and near school, which children attended and which was no less desirable as location or less valuable than another place on same tract in which husband and wife formerly resided, was held not to raise an issue of fraud by him as against wife, in so designating homestead—Dodson v Dickey, Tex Civ App, 264 S W 586

62. Tex—J R Watkins Co v Dawson, Civ App, 145 S W 2d 901

63. Okl—Kerns v. Warden, 213 P 70, 88 Okl 297

64. Tex—Medearis v Buratti, Civ App 275 S W 617
29 C J p 821 note 75

Vendor's lien
Homestead exemption was held to attach to a house erected by a purchaser of land in which a vendor's lien has been retained, in a jurisdiction in which the vendor has the superior right or title to the land as against the purchaser—Hartell v Tulsa Rig, Reel & Mfg Co, Tex Civ App, 64 S W 2d 804, 805, citing **Corpus Juris**

65. U S—In re Vincent D C La, 28 F 2d 396, 397, citing **Corpus Juris**—In re Wineland, D C Okl, 3 F Supp 796
Tex—Medearis v Buratti, Civ App, 275 S W 617—First Nat Bank v Dismukes Civ App, 241 S W 199
29 C J p 821 note 75, p 847 note 69 [b], [d]

Privilege of removing buildings on the expiration of the term does not affect the homestead right—Miller v Farmers' State Bank of Temple, 279 P 351 137 Okl 183—29 C J p 821 note 75 [c], p 847 note 69 [b] (1)

66. Mich—Michigan Mut Life Ins Co v Cronk, 52 N W 1035, 93 Mich 49
29 C J p 821 note 76
Definition of "homestead" see supra § 1

"The chief characteristic or attribute of the homestead is—what indeed the word itself implies—that it is the land where is situated the dwelling of the owner and family"—In re McKenzie's Estate 287 N W 695 698 232 Wis 125—Bunker v Locke 15 Wis 635 638

In Oklahoma, "as defined by section 1, art 12, of the Constitution a 'homestead' is the land itself and not the buildings thereon The homestead right is the right to occupy and live upon the land rather than the right to occupy, and live in the buildings thereon
Where the head of a family selects one-quarter of an acre or less as a homestead, and elects to live upon same as a homestead, then, so long as he has no creditor, owes no financial obligation of any character, his right to live upon the land is absolute, though he may have any number of buildings thereon and occupy a different one each day"—In re Gardner's Estate, 250 P 490, 491, 122 Okl 26

Homestead held not restricted to rooms actually occupied, but includes the lot or tract of land on which the building stands, if that is owned by the homestead claimant who owns the house—Kelly v. Nowlin, Tex.Civ. App, 227 S W 373.

fixtures permanently annexed to the realty.[67] It does not attach to chattels not affixed to the freehold,[68] or not, under the circumstances, a part of the realty,[69] or to structures and buildings which have been removed from the premises, although exempt before their removal,[70] although it has been held that such structure or building is not liable to an execution while in transit, if it was exempt before removal,[71] and of course buildings which have been removed from the land are not exempt if they were not exempt before removal[72]

Whether particular property was the homestead of persons executing an instrument involving the property has been required to be determined by the facts as they existed at the time of execution[73]

It has been held that where property is used as a homestead for the support of the family, the fact that an excess is produced above their actual and necessary support and maintenance will not change the homestead character[74]

The property which is subject to appropriation by surviving husband, wife, or children is considered infra §§ 266–270

Indivisible unit. In connection with the statement that the homestead includes the land with the dwelling and improvements thereon, the homestead has been said to be necessarily an indivisible unit,[75] however, whether separate and detached parcels of land may constitute a homestead is discussed infra § 65

§ 53. —— Rural or Urban Homestead

An urban homestead is ordinarily one within, and a rural homestead is ordinarily one outside of, the boundaries of a city, town, or village; and the general rule is that a homestead cannot be part rural and part urban. A rural homestead may in some circumstances become an urban one

An "urban homestead" has been defined as the residence or dwelling place of the family in a city, claimed or set apart as a homestead, including the principal house and lot and such lots as are used in connection therewith, contributing to its enjoyment, comfort, and convenience[76] "Rural homestead," in contradistinction to the term "urban homestead," is a term usually applied to a homestead claimed in premises outside the boundaries of a town, city, or village,[77] but under some circum-

67. Iowa—Shafer v Chernyk, 107 N W 801 130 Iowa 686
29 C J p 821 note 77

68 Tex—Cullers v James, 1 S W 311, 66 Tex 494—Taylor v Prendergast, Civ App, 29 S W 87

69 Kan—Marshall v Bachcldor, 28 P 168 47 Kan 442
29 C J p 821 note 79

70 Ark—Curtis v Des Jardins, 17 S W 709, 55 Ark 126
29 C J p 821 note 80

71 Mich—Bunker v Paquette, 37 Mich 79
29 C J p 821 note 81

72 Mich—Michigan Mut Life Ins Co v Cronk, 52 N W 1035, 93 Mich 49
29 C J p 821 note 82

73 Tex—Person v Levenson, Civ App, 113 S W 2d 419

74. Tex—Cocke v Conquest, Civ App, 2 S W 2d 992, affirmed, Com App, 13 S W 2d 348, affirmed 35 S W 2d 673, 120 Tex 43

75 Fla—Yowell v Rogers, 175 So 772, 128 Fla 881

Common fence around lot and farm Where mortgagor lived in main dwelling on city lot and the lot and adjoining farm were inclosed by a common fence, the entire property constituted his homestead—Federal Land Bank of New Orleans v Williams, 186 So 689, 237 Ala 318

76. Tex—Harris v Matthews, 81 S W 1198, 36 Tex Civ App 424—Ford v Fosgard, Civ App, 25 S W 447
Meaning of "lot" see infra § 57

"City," "town," or "village" construed

(1) Under a provision in the Oklahoma constitution for homesteads within or not within, a "city, town, or village," the "word [village] seems to imply an assemblage of houses and businesses, or both, less than a city or town, occupied usually by farmers or laboring people"—Pennington v Bigbie, 260 P 481, 485, 127 Okl 203

(2) Under a provision of the Texas constitution for a homestead in a "city, town, or village," those terms mean "an aggregation of inhabitants and a collection of occupied dwellings and other buildings"—Rockett v Williams, Tex Civ App, 78 S W 2d 1077 1078—Purdy v Grove, Tex Civ App, 35 S W 2d 1078, 1082, error refused

(3) Term "village," in such provision, embraces all communities where, "not as matter of law, but as matter of fact, village life is carried on," and community which had name and twelve or fourteen houses with several stores and filling stations, post office, churches, and school, and at which railroad maintained flag station, was held to be a "village," although persons living there were mostly engaged in farming—Buttram v Harris, C C A Tex, 73 F 2d 679

(4) Settlement of about one hundred thirty people which contained forty or fifty homes, several stores, two churches and railroad station, but which was not laid off in lots not incorporated, and which had no public utilities was held a 'town" or 'village' within meaning of such provision—Woolf v Smith, Tex Civ App, 86 S W 2d 67

(5) A community composed of seventeen persons grouped around a cross road to which a name had been applied by the proprietor of a general store, but all of whom were engaged in farming either exclusively or in connection with the operation of a general store, blacksmith shop, etc, in which community there was no post office, school or other improvements except the stores, shop and residences was not a village, within such provision In re Bute, D C Tex, 287 F 896 affirmed C C A, Rockhold v Bute, 293 F 1021, certiorari denied 44 S Ct 402, 264 U S 588, 68 L Ed 864

77. Ark—Stuckey v Horn, 200 S W 1025, 132 Ark 357
29 C J p 822 note 89

"The foundation of the rural homestead is the dwelling or 'mansion' house in which the family finds shelter . . . The land, the crops, the other improvements thereon constitute a part of the homestead only because they are incident to the mansion house, and yield sustenance, and comfort and pleasure, to the family dwelling therein"—Ewing v Riley, Tex Civ App, 246 S W 94, 95

stances, where the premises are not urban in character but wholly rural, a rural homestead may be located wholly or in part within the territorial limits of a municipality,[78] and the mere fact that land lies within the corporate limits of a city, town, or village does not necessarily stamp it with the character of an urban homestead.[79]

Whether a claimant is entitled to a rural or an urban homestead is to be determined on the facts of each case, bearing in mind the constitutional or statutory purpose and intent.[80] The occupation in which the owner is engaged does not conclusively establish the character of the homestead.[81] It is, in general, the place of the homestead that gives it its character as rural or urban,[82] although the use made of the land is material in determining the question.[83]

From its definition and nature, as above stated, an urban homestead generally must be confined to premises within a town, city, or village,[84] and cannot be claimed in land outside of the boundaries of the municipality.[85] It may be required that the town, city, or village in which the premises claimed as an urban homestead are situated shall be an incorporated municipality,[86] but under some provisions incorporation is not essential.[87] Under some provisions the premises must be within the laid-out or platted portions of the municipality,[88] which have been laid out or platted for urban purposes,[89] but under some provisions this is not absolutely

78. Minn—Klewert v Anderson, 67 N W 1031, 65 Minn 491, 60 Am S R 487
29 C.J. p 822 note 90

79. Tex—Jones v First Nat Bank, Com App, 259 S W 157, reversing First Nat Bank of McAllen v Jones, Civ App, 244 S W 1057—Boerner v Cicero Smith Lumber Co, Civ App, 293 S W 632, reversed on other grounds, Com App, 298 S W 545, motion granted 9 S W 2d 1105
29 C J p 822 note 90 [b]

80. U S—Buttram v Harris, C C A Tex, 73 F 2d 679

In Louisiana

(1) "Under article 244 of the Constitution of 1898, a homestead may be rural or urban"—Crawford-Jenkins & Booth, Ltd v Rogers, 56 So 904, 905, 129 La 832

(2) Prior to the Constitution of 1879 it was held that a statute merely exempting one hundred and sixty acres of land, together with certain enumerated property of the kind usually attached to a farm, did not create a homestead right in urban property—Poole v Cook 34 La Ann 331
29 C J p 821 note 86 [a] (2).

81. Tex—Commerce Farm Credit Co v Sales, Com App, 288 S W. 802, reversing Commerce Farm Credit Co v Sayles, Civ App, 279 S W 567—Woolf v Smith, Civ App, 86 S W 2d 67

82. Tex—Posey v Bass, 14 S W 156, 77 Tex 512—Commerce Farm Credit Co v Sales Com App, 288 S W 802, reversing Commerce Farm Credit Co v Sayles, Civ App, 279 S W 567—Woolf v Smith, Civ App, 86 S W 2d 67—First Nat Bank v Jones, Civ App, 244 S W 1057, reversed on other grounds Jones v First Nat Bank, Com App, 259 S W 157

83. Tex—Commerce Farm Credit Co v. Sales, Com App, 288 S W 802, reversing Commerce Farm Credit Co v Sayles, Civ App, 279 S W 567—Jones v First Nat Bank, Com App, 259 S W 157, reversing First Nat Bank v Jones, Civ App, 244 S W 1057—Connelly v Johnson, Civ App, 259 S W 634

84. Mich—Bouchard v Bourassa, 23 N W 152, 57 Mich 8
29 C J p 822 note 95

85. Okl—Pumroy v Buck, 126 P. 735, 33 Okl 456
29 C J p 822 note 96

Mere platting of land into lots, blocks, and streets, does not constitute such land urban property unless the officers of the town or village extend its boundary so as to include the lands—Tittle v Garrett, 232 P 437, 105 Okl 266—Pumroy v Buck, 126 P 735, 33 Okl 456

"The terms 'town or city lot or lots' do not embody farm lots where they lie beyond the limits of the town proper, although within the jurisdictional limits of the town"—Connelly v Johnson, Tex Civ App, 259 S W 634, 636.

Land not adjacent to city

Land occupied and used as a homestead, and near, but not adjacent to, the boundaries of a city, is not within a charter provision that tracts of land laid off into town lots adjoining the boundaries of a city are to be considered parts of the city—Truax v Pool, 46 Iowa 256

"Property may be without the corporate limits of the city and constitute an urban homestead"—Boerner v Cicero Smith Lumber Co, Tex Civ App, 293 S W 632, 636, reversed on other grounds, Com App, 298 S W 545, motion granted 9 S W 2d 1105

86 Minn—Mintzer v St Paul Trust Co, 47 N W 973, 45 Minn 323—Baldwin v Robinson, 39 N W 321, 39 Minn 244

87. Tex—Jones v First Nat Bank, Com App, 259 S W 157, reversing First Nat Bank v Jones Civ App, 244 S W 1057—Woolf v Smith, Civ App, 86 S W 2d 67—Connelly v Johnson, Civ App, 259 S W 631
29 C J p 822 note 99

"Where the home . . is located within or adjacent to an unincorporated town or village, the question of whether it is a rural or urban homestead is to be determined from the location of the premises with reference to the settled portions of the town, the nature and character of the property, the uses to which it is put, and like considerations . whereas, if the home, when acquired, is adjacent to or within the defined limits of an incorporated town or city, the character of the homestead is determined by the location of the corporate limits If the home is without such limits, it constitutes a rural homestead, if within, it is an urban homestead"—Ewing v Riley, Tex Civ App, 246 S W 94, 95

88. Minn—Mintzer v St Paul Trust Co, 47 N W 973, 45 Minn 323
29 C J p 823 note 1

In Iowa, in order to constitute land an urban homestead within a statute limiting a homestead to a half acre if within a town plat, the land must be actually platted, the statute does not apply to land within the limits of a municipality but not platted—Hatter v Icenbice, 223 N W 527, 207 Iowa 702—29 C J p 823 note 1 [a]

89. Minn—In re Smith, 53 N W 711, 51 Minn 316
29 C J p 823 note 2

"Mere subdivision is not platting . The platting must be such as in the circumstances to show an intention to devote the land to the purposes for which the lands in a municipality are ordinarily used"—Hatter v Icenbice, 223 N.W 527, 529, 207 Iowa 702.

essential,[90] as where the owner has performed acts of actual subdivision, with reference to the premises, which are equivalent to a laying out or platting,[91] or where, the property being strictly urban in character, the court will carry out the intention of the legislature, by subdividing the land into lots for homestead purposes.[92] However, whether lands which have never been platted, but which lie within the laid-out portion of the city, are to be considered rural or urban depends on whether they are within a rural or an urban portion of the city.[93] The fact that a locality is without a map or plat has been held not controlling.[94]

Homestead partly urban and partly rural While there is some authority apparently to the contrary,[95] the general rule is that a homestead cannot be part rural and part urban,[96] but it has been said that this does not mean that a homestead never can be such, and that the question at last must depend on proof.[97]

Change from rural to urban homestead A rural homestead may be changed into an urban one,[98] as by an act of the legislature without the consent of the owner,[99] or it may become urban as a result of the acts and conduct of the owner,[1] or the facts and circumstances may be such as to show such a change in the character of the property.[2]

§ 54. —— Necessity of Use for Residential Purposes

A homestead, it has been held, cannot exist in premises which are incapable of use for residence although it may exist in any structure capable of such use

As a general rule, as discussed supra §§ 32–37, a homestead cannot be acquired or claimed in property which is not actually occupied by the debtor as a home, hence it has been held that premises which are incapable of use as a residence cannot constitute a homestead.[3] The particular kind of dwelling or house is not material if the premises are actually intended and used for a home.[4] Any structure which is sufficient for a debtor and his family actually to live in is sufficient for the purpose,[5] and the fact that a house is small and in a dilapidated condition will not prevent its occupants from acquiring a homestead.[6]

§ 55. —— Manner of Acquisition as Affecting Right to Homestead

Where the title to homestead property has its incep-

90. Ark.—Owatonna First Nat Bank v Wilson, 34 S W 544, 62 Ark 140
29 C J p 823 note 3

91. Minn.—Mintzer v St Paul Trust Co, 47 N W 973, 45 Minn 323
29 C J p 823 note 4

92. Minn.—Republic Nat Bank v Banholzer, 71 N W 919, 69 Minn 24
29 C J p 823 note 5.

93. Minn.—Heidel v Benedict, 63 N W 490, 61 Minn 170, 172, 52 Am S R 592, 31 L R A 422
29 C J p 823 note 6

94. Tex.—Woolf v Smith, Civ App, 86 S W 2d 67

95 Miss.—Fitzgerald v Rees, 7 So 341, 67 Miss 473
29 C J p 822 note 91.

96. Okl.—Pennington v. Bigbie, 260 P 481, 127 Okl 203
Tex.—Connelly v Johnson, Civ App, 259 S W 634—First Nat Bank v Jones, Civ App, 244 S W 1057, reversed on other grounds Jones v First Nat Bank, Com App, 259 S W 157—Taylor v Ullmann, Civ App, 188 S W 746
29 C J p 822 note 92
Claim of both rural homestead and urban homestead see supra § 13

Location of dwelling as controlling
"If the land claimed as a homestead lies partly within and partly without the city limits, then the location of the dwelling or 'mansion house' determines the character of the homestead, and that portion of the land lying upon the opposite side of the line from the home site constitutes no part of the homestead since no homestead may be invested with the dual character"—Ewing v Riley, Tex Civ App, 246 S W 94, 95

One owning farm and residing on urban lot cannot claim both lot and farm as homestead.—Commerce Farm Credit Co v Sales, Tex Com App, 288 S W 802, reversing Commerce Farm Credit Co v Sayles, Civ App, 279 S W 567

97. Tex.—Connelly v Johnson, Civ App, 259 S W 634

98. Tex.—Ayres v Patton, 111 S W 1079, 1081, 51 Tex Civ App 186

Effect of change
"After such change has been accomplished that portion of the rural homestead which is not situated within the town or which is not actually used for homestead purposes loses its homestead character"—Ayres v Patton, supra

99. Tex.—Boerner v Cicero Smith Lumber Co, Civ App, 293 S W 632, 636, reversed on other grounds, Com App, 298 S W 545, motion granted 9 S W 2d 1105
"The Constitution exempts the homestead as it is, but does not guarantee that its character as a rural or urban homestead shall continue in the future"—Wilder v McConnell, 45 S W 145, 147, 91 Tex 600
Change of homestead generally see supra § 50
Extension of city limits as changing character from rural to urban see infra § 58

1 Tex.—Boerner v Cicero Smith Lumber Co, Civ App, 293 S W 632, reversed on other grounds, Com App, 298 S W 545, motion granted 9 S W 2d 1105

2. Tex.—Boerner v Cicero Smith Lumber Co, supra

3. Ala.—McConnaughy v Baxter, 55 Ala 379
29 C J p 804 note 35
Vacant land see infra § 63

A church pew cannot be claimed as exempt by the head of a family which occupies it.—True v Morrill, 28 Vt 672

4. U S.—In re Thompson D C Wash, 140 F 257
House used for business or other purposes see supra § 36

5. Tex.—Franklin v Coffee, 18 Tex 413, 70 Am D 292
29 C J p 803 note 27.

A cottage which was fully furnished for housekeeping and living contained heating and kitchen coal stoves, and was sufficient and suitable for year-round living has been held to constitute the homestead of one who had established no other home, as against the contention that it was only a summer cottage.—Gussman v Rodgers, 251 N W 18, 190 Minn 153

6 Ark.—Gibbs v Adams, 89 S W 1008, 76 Ark 575.

tion in fraud, the offender can acquire no rights therein paramount to those of persons defrauded

It has been held that a homestead may be acquired in land a part of which was acquired by preemption and part as a desert claim [7]

Homestead in property acquired by adverse possession, or by gift, descent, or devise, is considered infra § 78

Effect of fraud Where the title to homestead property has its inception in fraud, the offending party can acquire no rights therein paramount to those of persons whom he has defrauded [8] Hence, no exemption is secured for land wrongfully purchased by a guardian with his ward's funds,[9] by a partner with misappropriated assets of the firm,[10] by an administrator who fraudulently misapplies moneys of the estate,[11] or by an insolvent debtor who, to avoid creditors then pressing him, exchanges personal property for real estate and claims the latter as exempt [12] The declaration of a homestead by a bankrupt is not operative as against creditors when made in fraud of their rights,[13] but if the debtor, knowing his insolvency, merely buys real estate with proceeds of nonexempt assets, he may still claim his exemption [14]

§ 56. Amount and Extent

The amount and extent of the homestead, as fixed by law, cannot be exceeded, if more land than is allowed is occupied and claimed as a homestead, the whole tract is not subject to execution, but the excess, if severable, may be sold

The amount and extent of the homestead, as fixed by constitution or statute, cannot be exceeded,[15] but a homestead already acquired may be enlarged or increased to the maximum allowed, the addition becoming a part of the homestead [16] The limitation of the extent has been said to be a part of the definition of the homestead,[17] but the contrary has also been stated [18] The amount or extent is sometimes made to vary according to the value of the tract,[19] or the number of the children of the debtor,[20] although under the homestead laws of some states the area alone is restricted and no limit placed on the value of the homestead [21] The fact

7. Cal—Payne v Cummings, 80 P 620, 146 Cal 426, 106 Am S R 47

8. Neb—Bell v Dingwell, 136 N W 1128, 91 Neb 699
29 C J, p 824 note 16
Intent in acquisition of property see supra §§ 30–31

9. Ala—Thompson v Hartline, 16 So 711, 105 Ala 263
29 C J p 824 note 17

10 U S—In re Sauthoff D C Wis, 21 F Cas No 12 380, 8 Biss 35
29 C J p 824 note 18

11. Mich—Pierce v Holzer, 32 N W 431, 65 Mich 263

12. Kan—Long v Murphy, 27 Kan 375
Insolvency as affecting persons entitled to homestead see supra § 20
Intent to prevent creditor from collecting debts see supra § 30

13. U S—In re Henkel, D C Cal, 11 F Cas No 6 361

14 Minn—Jacoby v Parkland Distilling Co, 43 N W 52, 41 Minn 227
29 C J p 824 note 22

15. S D—Edelman v Scandrett, 293 N W 817, 67 S D 453
Tex—Whiteman v Burkey, 282 S W 788, 115 Tex 400, answer to certified question conformed to Civ App, 286 S W 350 Wallingford v Bowen, Civ App 104 S W 2d 188—Crow v First Nat Bank Civ App, 64 S W 2d 377, error refused—Panhandle Lumber Co v Farey, Civ App, 3 S W 2d 941
29 C J p 824 note 28
Homestead allotted to surviving husband, wife, or children see infra §§ 266–270.

In Arkansas "the homestead . . to the extent of one-quarter of an acre is exempt from the indebtednesses"—Starr v City Nat Bank, 252 S W 356, 358, 159 Ark 409

In Florida "the homestead includes the land (not more than one-half acre in an incorporated town and not more than 160 acres in a contiguous body outside a municipal corporation) with the dwelling and improvements thereon"—Yowell v Rogers, 175 So 772, 773, 128 Fla 881

In Iowa, head of family having four minor children living with him on farm had homestead right in forty-acre tract—Commercial Sav Bank of Lohrville v McLaughlin, 214 N W 542, 203 Iowa 1368

In Michigan "the owner is entitled to take for a homestead the property upon which the home is situated, and any adjoining land, not to exceed forty acres"—Boman v Wolverine Power Co, 255 N W 613, 615, 268 Mich 59

In Mississippi householder claiming exemption of rural land sought to be subjected to payment of his debts was held limited to one hundred sixty acres—Clegg v Federal Reserve Bank, 153 So 812, 169 Miss 578

In Nebraska rural homestead must not exceed one hundred and sixty acres of land—Engen v Union State Bank of Harvard, 236 N W 741, 121 Neb 257, certiorari denied 52 S Ct 33, 284 U S 655, 76 L Ed 555

In Oklahoma

(1) The lands designated as a homestead cannot exceed in area one hundred sixty acres—Cooper v Long, 220 P 610 93 Okl 239

(2) The clause in the homestead law "and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value,' by implication provides that such homestead may be reduced to one-quarter of an acre, having regard to value" and where an urban homestead is owned and occupied as a residence only, in quantity fifty-nine hundredths of an acre and of the value of forty-five thousand dollars it exceeds in quantity the homestead protected from forced sale by the homestead law—Finerty v First Nat Bank 218 P 859, 92 Okl 102, 32 A L R 1326

16. Tex—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App 111 S W 2d 1172, error dismissed

17. Neb—Clare v Fricke, 167 N W 727, 102 Neb 486
Value as not entering into definition see infra § 59

18 Tex—Hargadene v Whitfield, 9 S W 475, 71 Tex 482

19. Ariz—Union Oil Co v Norton-Morgan Commercial Co, 202 P 1077, 23 Ariz 236
29 C J p 824 note 30

20. Ga—Pinkerton v Tumlin, 22 Ga 165

21. U S—In re Barde, Or, 225 F 715, 140 C C A 589
29 C J p 824 note 32

Constitutionality

Statutes providing for homesteads limited in area but not in value have been held constitutional—Barton v.

that the net value of property claimed as a homestead is diminished by reason of a mortgage thereon does not authorize the claim of a greater quantity of land than could otherwise be claimed [22]

The fact that more land than is allowed by law is occupied and claimed as a homestead does not render the whole tract subject to execution, but the excess, if severable, may be sold [23]

Where a homestead statute contains no limitation as to quantity, but provides that the homestead shall consist of the dwelling house in which claimant resides and the land on which it is situated, only so much of the land surrounding the dwelling will be allowed as is reasonably necessary for the use of the dwelling as a home [24]

The permissibility, under organic laws, of legislation as to the amount of exemption is considered supra § 7

Streets and highways Under a statute providing an exemption of a stated area of land, in a city or town, owned and occupied by claimant, streets[25] and alleys[26] are not included, but it has been held that, in determining the quantity of land which may be selected as a homestead in rural areas, one half the area of abutting highways and the whole area of traversing highways are to be included [27]

§ 57. —— In City, Town, or Village

As used in statutes allowing one lot as an urban homestead, the term "lot" has been construed by some courts to mean a lot according to the survey or plat of the municipality, and by others to mean the actual lot or parcel occupied, whether including one or more lots according to the recorded plat and survey

A general statute providing that the word "village" imports only a municipal corporation organized by some special act or under some general law has been held to limit the word, as used in a statute fixing the quantity of land for a homestead in a village, to incorporated villages [28]

In at least one jurisdiction, a homestead in a city or town consists of the lot or lots on which the family resides and which it uses for the purposes of a home [29] In statutes allowing one lot as an urban homestead, the term "lot" has been construed by some courts as meaning one lot according to the survey or plat of the city, town, or village,[30] and the proper extent of the lot is to be determined by comparison with other platted portions of the town or city [31] However, in other jurisdictions, where a town or city lot is exempted, it has been held to embrace the actual lot or parcel of ground on which the debtor resides, whether including one or more lots according to the recorded plat and survey [32]

Drake 21 Minn 299---29 C J p 826 note 59 [a]

In Nebraska, as between mortgagor and mortgagee of a real estate mortgage 'the statutory homestead is unlimited as to value and is properly described as a 'quantity of land not exceeding 160 acres not included in any incorporated town city or village, or a quantity of land, not exceeding in amount two lots being within an incorporated town, city, or village' '—Evans v First Nat Bank of Fairbury, 297 N W 151, 157, 138 Neb 727—Storz v Clarke, 221 N W 101, 117 Neb 488

In North Dakota, homestead not within town plat is limited 'to 160 acres, regardless of value'—Procfrock v American Nat Bank of St Paul, Minn, 258 N W 482, 485, 65 N D 308

In Oklahoma, where an urban homestead is owned and occupied as a residence only there is no limitation as to value, but the limitation is as to quantity only—Finerty v First Nat Bank, 218 P 859, 92 Okl 102, 32 A L R 1326

In Texas, "the rural home is not limited by value, but by acreage"—Connelly v Johnson, Tex Civ App, 259 S W 634 635—29 C J p 824 note 32 [a]

22. Miss—Bennett v Dempsey 18 So 901, 94 Miss 406, 136 Am S R 584

23. N D—Procfrock v American Nat Bank of St Paul Minn, 258 N W 482 65 N D 308—Farmers' State Bank of Anselm v Weisenhaus, 198 N W 673, 50 N D 949
Tex—Whiteman v Burkey, 282 S W 788 115 Tex 400, answer to certified question conformed to Civ App, 286 S W 350—Clement v First Nat Bank, 282 S W 558, 115 Tex 342, reversing, Civ App, 215 S W 719—Panhandle Lumber Co v Fancy, Civ App 3 S W 2d 941
29 C J p 825 note 34
However it has been held that if the owner entitled to twenty acres for himself and five acres additional for each of his three children under fifteen years of age selects and lays off fifty acres as the homestead the whole may be sold by the sheriff—Crow v Whitworth, 20 Ga 38
Undivided interest
Where head of family claims homestead in undivided interest in land and such interest exceeds in area limit fixed by statute, judgment creditor may, on partition, subject excess to payment of judgment, but where such interest is less in extent than the limit fixed it is exempt as a homestead—Procfrock v American Nat Bank of St Paul, Minn, 258 N W 482, 65 N D 308

24. Wash—John Hancock Mut Life Ins Co v Wagner 24 P 2d 420 171 Wash 185 affirmed 27 P 2d 1118 171 Wash 185

25. Ark—Starr v City Nat Bank, 267 S W 581 167 Ark 241
Wis—Weisbrod v Daenicke 36 Wis 73

26 Ark—Starr v City Nat Bank, 267 S W 581, 167 Ark 241

27 Wis - Eaton Center Co-op Cheese Co v Heintz 244 N W 620 209 Wis 170
Division of lot or tract by highway or street generally see infra § 66

28. Wis—In re McKenzie's Estate, 287 N W 695, 232 Wis 125

29 Tex—Wallingford v Bowen Civ App 104 S W 2d 188

30. Neb—Norfolk State Bank v Schwenk, 70 N W 970, 51 Neb 146
29 C J p 825 note 36

31. Minn—Ford v Clement, 71 N W 672, 68 Minn 484
29 C J p 825 note 37

32. Mich—King v Welborn, 47 N W 106, 83 Mich 195 9 L R A 803
29 C J p 825 note 38

The Texas statute allowing the head of a family whose homestead is part of a larger tract than is exempt the privilege of designating a certain part of the homestead has been held to have no application to homesteads in cities or towns[33]

§ 58. —— Effect of Extension of Municipal Limits

In most jurisdictions, the limits of a municipality may be extended so as to include what was formerly a rural homestead and to afford the owner only the amount available as an urban homestead, but for this result the land may be required to be actually impressed with an urban character, as by laying out and platting for urban purposes

While there is authority to the contrary,[34] in most jurisdictions where the question has been raised it has been held that, even without the owner's consent and against his wishes, the limits of a city, town, or village may be extended so as to include what was formerly a rural homestead and to afford the owner only the amount available as an urban homestead[35] Where the mere fact that land lies within the boundaries of the city, town, or village, is not regarded as necessarily stamping it with the character of urban property for homestead purposes, as discussed supra § 53, it is necessary, in order that the owner shall lose the right to a rural homestead and be restricted to the right to an urban homestead, that the land, in addition to being embraced within the extended municipal limits, shall be otherwise actually impressed with an urban character[36] Thus, depending on the provisions of the particular urban homestead law, it may be necessary, as discussed supra § 53, that the municipality whose limits have been extended shall be an incorporated one, and that the land shall be within the laid-out and platted portions of the municipality, and, further, that it shall be laid out and platted for urban purposes[37] On the other hand, where the mere inclusion of land in a city, town, or village is all that is necessary to impress it with an urban character for the purpose of an urban homestead exemption, a rural homestead will become urban property and subject to the provisions governing urban homesteads merely by being brought within the corporate limits of the city, town, or village by legislative enactment,[38] although the owner may continue to use it for agricultural purposes[39]

Where a city is authorized to extend its corporate limits so as to include agricultural lands, a homestead right in such lands must be determined by the conditions existing when such right is questioned, and not at the time when such property was acquired[40]

§ 59. Value

A constitutional or statutory limitation as to the value of a homestead cannot be exceeded

Value has been said not to enter into the definition of a homestead, but to be merely a limitation on the exemption when established[41] While under some statutes there is no limit of value,[42] the homestead exemption within the limits of value specified by constitutional or statutory provision may be complete,[43] unless, as considered supra § 56,

33 U S Thomason v Shaw, C C A Tex 67 F 2d 641

34 In Florida

(1) "No homestead acquired under the Constitution of the state of Florida shall be reduced in area on account of its being subsequently included within the limits of an incorporated city or town without the consent of the owner Section 5, art 10 Const of Fla" Morgan v Bailey, 105 So 113 90 Fla 47

(2) Under Florida constitution extension of limits of incorporated city, taking part of homestead into city limits, does not affect right of owner to add to homestead up to limit fixed therefor —Croker v Croker, D C Fla, 7 F 2d 218

In Nebraska it was held that a person who acquires a right of homestead exemption has a vested right to such an exemption as is given by the then existing laws, and that this right cannot be diminished by a subsequently enacted law in accordance with this view it was held that, where the owner of a tract of land near a city had acquired a homestead right therein, such right could not be diminished by the subsequent enactment of a law, without his consent or procurement, bringing the land within the corporate limits of the city —Gallagher v Smiley, 14 N W 187, 28 Neb 189 26 Am S R 319

35. Tex - Jones v First Nat Bank, Com App, 259 S W 157 reversing, First Nat Bank v Jones, Civ App, 214 S W 1057—Gates v Pitts, Civ App, 2 S W 2d 307
29 C J p 825 note 12
Change from rural to urban homestead generally see supra § 53
Homestead exemption not a vested right see Constitutional Law § 236

36. Iowa —Hatter v Icenbice 223 N W 527 207 Iowa 702
Tex —Schultz v Schultz, Civ App, 45 S W 2d 312
29 C J p 825 note 46

37 Iowa —Hatter v Icenbice, 223 N W 527, 207 Iowa 702
Tex -Schultz v Schultz, Civ App, 45 S W 2d 312
29 C J p 825 note 50

38. Wis —Parker v King, 16 Wis 228—Bull v Conroe 13 Wis 233

39 Wis- Parker v King 16 Wis 228—Bull v Conroe, 13 Wis 233

40. Tex —Lauchheimer v Saunders 65 S W 500, 27 Tex Civ App 481

41. Tex —Hargadene v Whitfield 9 S W 175, 71 Tex 482— Person v Levenson Civ App 143 S W 2d 419
Limitation of extent as part of definition see supra § 56
Property allotted to surviving husband, wife, or children see infra § 270

42. Iowa —Rhodes v McCormick, 4 Iowa 368, 68 Am D 663
29 C J p 824 note 32

In South Dakota "there is no limitation as to value upon a homestead, although it is true that if the homestead is worth more than $5,000, over and above incumbrances, such excess in value is not by law exempt from the claims of execution creditors"—Peck v Peck, 212 N W 872 875, 51 S D 157

43. Miss Stevens v Wilbourn, 41 So 66, 88 Miss 514
29 C J p 826 note 58

the maximum quantity of land is indicated by the homestead law. A limitation as to value cannot be exceeded [44]

If the lot on which the homestead is located equals or exceeds in value the sum allowed by statute, an adjoining lot, used in connection with the former cannot be included in the exemption,[45] nor can two half lots be claimed by the debtor where one of them exceeds in value the sum exempted by law [46]

§ 60. —— Effect of Excess in Value

An excess in the value of property occupied as a homestead, over the allowed value, is subject to levy and sale

A limitation of value is for the purpose of fixing the rights of the homestead claimants and the creditors respectively.[47] Excess in value of the homestead selected over the statutory exemption does not invalidate the selection if it is otherwise valid,[48] but where the premises occupied as a homestead exceed the statutory value, exemption can be claimed only to such value, and all the excess is subject to levy and sale on execution [49] If the property is subject to division, it may be reduced in quantity so as to bring it within the required value, provided it can be so reduced as to leave a homestead consisting of the dwelling house with the outbuildings and appurtenances necessary to its ordinary use as such [50] Where the property has been reduced as far as it is possible and still exceeds the statutory value, in some jurisdictions no

Limitation held applicable to rural and urban homesteads

Ala —Miller v Marx 55 Ala 322

In Texas, "an urban homestead is determined not by the size or number of the lots, but by the value of the lots themselves used for the purposes of the home"—Connelly v Johnson Tex Civ App, 259 S W 631 635

44 La —Brantley v Pruitt, 141 So 604, 175 La 879
Mich —McCaslin v Schouten, 292 N W 696 294 Mich 180
Miss —Clegg v Federal Reserve Bank, 153 So 812, 169 Miss 578
N D —Procfrock v American Nat Bank of St Paul, Minn, 258 N W 482 65 N D 308
Tex —White v Dozier Const Co, Civ App, 70 S W 2d 240
29 C J p 826 notes 60 63

Expression of legislative intent

"The limitation of homesteads to premises of $5,000 or less value which was enacted into the homestead statute by ch 269, Laws of 1901 expresses the legislative intent to exempt property up to that value"—In re McKenzie's Estate, 287 N W 695, 698, 232 Wis 425

In Nebraska

(1) A rural homestead "exempt from judgment liens and from execution or forced sale," must not exceed two thousand dollars in value —Engen v Union State Bank of Harvard, 236 N W 741, 744, 121 Neb 257, certiorari denied 52 S Ct 33, 284 U S 655, 76 L Ed 555

(2) However, "the statutory homestead as between mortgagors and mortgagees, is not limited to a value of $2 000 but covers the value of the entire 160 acres"—Evans v First Nat Bank of Fairbury, 297 N W 154, 155, 138 Neb 727

45. Ill —Hay v Baugh, 77 Ill 500—Herdman v Cooper, 39 Ill App 330

46. Tex - Hirshfeld v Brown, Civ App 30 S W 962

47. Neb —Meisner v Hill, 138 N W 584, 92 Neb 135

In suit to subject to debt property occupied as a homestead there can, of course, be no recovery unless the value of the property exceeds the amount exempted by statute - Yale State Bank v Fletcher 139 N W 1028 173 Mich 585

48 Tex Hargadene v Whitfield 9 S W 175, 71 Tex 482
29 C J p 826 note 66

49 U S —In re Rohl, C C A S D, 34 F 2d 268
Mich —Fox v Brannan, 290 N W 353, 292 Mich 126 128 A L R 1124
Mo —Daniels v Peck, 288 S W 84 221 Mo App 877
N D Procfrock v American Nat Bank of St Paul Minn, 258 N W 482 65 N D 308—Farmers State Bank of Anselm v Weisenhaus, 198 N W 673, 50 N D 949
Or —Stewart v Black, 22 P 2d 336 143 Or 291
S D Peck v Peck, 212 N W 872 51 S D 157
Tex —Whitman v Burkey 282 S W 788 115 Tex 400, answer to certified question conformed to, Civ App 286 S W 350—Clement v First Nat Bank, 282 S W 558, 115 Tex 342 reversing, Civ App, 215 S W 719—Engbrock v Haidusek, Civ App, 95 S W 2d 520, error refused—Panhandle Lumber Co v Farrey, Civ App, 3 S W 2d 941
29 C J p 826 note 67

Petition in nature of creditor's bill to subject excess of homestead of one fourth of an acre of land to payment of debts was held sufficient as against demurrer —Bell Oil & Gas Co v Brown, 230 P 244, 104 Okl 11

Creditor must allege existence of excess

Tex —Cooper Co v Werner, Civ App, 111 S W 2d 823—Engbrock v Haidusek Civ App 95 S W 2d 520, error refused

Burden of proof

If a creditor desires to subject a homestead to his claim on the theory that its value is in excess of the statutory limit he has the burden of proving such value, or that there is an excess —Cooper v Werner, Tex Civ App 111 S W 2d 823- Engbrock v Haidusek, Tex Civ App 95 S W 2d 520 error refused—29 C J p 962 note 66 p 989 note 84

Proceedings to establish excess

(1) Under statutes giving to a householder and the head of a family a homestead exemption not exceeding two thousand dollars, and providing that a creditor, on filing an affidavit that the homestead is of greater value than two thousand dollars, may proceed against it as in ordinary cases the filing of such affidavit is a necessary prerequisite to the validity of an execution against the homestead of a debtor who has taken the statutory steps to claim his exemption —Whitlock v Alliance Coal Co 214 P 516 73 Colo 205—Copeland v Colorado State Bank of Durango 59 P 70, 13 Colo App 189

(2) Where land in which a homestead was claimed by declaration of homestead duly recorded prior to entry of judgment, was sold at execution sale without proceedings pursuant to statute with a view to ascertaining any possible surplus value in the property over the value allotted by statute to one with a valid right of homestead, judgment creditors, who procured issuance of execution and sale thereunder, thereby forfeited all rights they had under their judgment to pursue the property —Thomas v Speck, 118 P 2d 365, 47 Cal App 2d 512

50. Iowa —Helfenstein v Cave, 3 Iowa 287
Mich —Beecher v Baldy, 7 Mich 488

exemption can be claimed;[51] but in other jurisdictions the premises can be sold only on paying to the owner the amount of his statutory exemption,[52] or the entire premises may be sold and the proceeds distributed in the manner prescribed by statute.[53]

The right of a judgment creditor to subject the excess to the payment of his judgment is lost by his failure to exercise the right before the owners had parted therewith.[54]

Allowance to debtor. Where it appears that the homestead premises are in excess of the statutory amount, that they are chargeable with the debt in question, and that it is impracticable to divide them so as to assign the homestead in the land itself, the sale of the whole tract may be ordered and an allowance of the statutory amount in lieu of homestead made to the owner out of the proceeds, irrespective of the rights of creditors whose claims are subject to the homestead exemption;[55] but this may be done only after paying such of his debts as have precedence over his homestead exemption.[56] The proceeds allotted in lieu of the homestead are subject to the same liabilities,[57] and may be protected to the same extent,[58] as was the original home tract.

§ 61. —— Effect of Increase or Depreciation in Value

a. In general
b Making additions to homestead
c Placing improvements on homestead

a. In General

Authorities differ as to whether an increase in the value of a homestead, over the statutory amount, occurring after the homestead has been set aside or allotted, is subject to the claims of creditors.

In some jurisdictions, where, after a homestead has been set apart or allotted, an increase takes place in its value, so as to render the premises of greater value than is protected by the statute, the owner has no exemption in the excess;[59] but in other jurisdictions an appreciation in value over the statutory amount, after allotment, is not subject to the claims of creditors.[60] It has been held that land, dedicated under a prior law, and increasing in value not to exceed the limit fixed for exemption by a later statute, may still be claimed as a homestead.[61] A debtor, after acceptance of a homestead, cannot have a reallotment on the ground that the premises have depreciated in value since the final appraisement.[62]

b. Making Additions to Homestead

If a homestead is of less value than the legal maximum, other land may be added to it, and become exempt, up to the statutory limit.

If the homestead, when set apart, is of less value than the maximum allowed by law, other land may be added to it and become exempt if the statutory limit is not thus exceeded.[63] It has been held that a homestead set apart under a former constitutional provision, which was not of as much value as the homestead allowed by the existing constitutional provision, may, after the adoption of the latter, be supplemented and increased to an amount not exceeding that provided for by the last constitution.[64] The owner of a homestead of the maximum value cannot buy adjacent lots and thereby increase his exemption,[65] and if the value of the homestead as originally designated has increased to or beyond the statutory limit, there can be no second designation including additional property, for the value at the date of the second designation is the test.[66]

51. Mich—McBride v Putnam, 58 N W 357, 99 Mich 469
29 C J p 826 note 69.

52. La—Jefferson v Herold, 81 So 711 141 La 1064
29 C J p 827 note 70

53 Cal—In re Herbert, 54 P. 1109, 122 Cal 329
29 C J p 827 note 71.
Applicability of statute
Statute relating to transfer or sale of homestead which cannot be occupied in severalty applies only to proceedings in circuit court—Daniels v. Peck, 288 S W 84, 221 Mo App 877.

54. Wash—Meikle v Cloquet, 87 P 841, 44 Wash 513.

55. Tex—Clement v First Nat Bank, 282 S W 558, 561, 115 Tex 342, reversing, Civ App, 245 S.W. 719, citing **Corpus Juris**—White v. Glenn, Civ App, 138 S W 2d 914
29 C J p 882 note 87

56. Tex—Clement v First Nat Bank, 282 S W 558, 115 Tex 342, reversing, Civ App, 245 S W 719
29 C J p 882 note 88

57. Ohio—Van Thornley v Peters, 26 Ohio St 471

58. Neb—Corey v Plummer, 67 N W 445, 48 Neb 481
29 C J. p 882 note 90

59. N C—Chadbourn Sash, Door & Lumber Co. v Parker, 69 S E 1, 153 N C 130
29 C J p 827 note 73

60. Ky—Wilson v Newberry, 38 S W 2d 695, 238 Ky 635
29 C J p 827 note 74
In Illinois
(1) The present rule is in accordance with the text—Garwood v Garwood, 91 N E 672, 241 Ill 580 - 29 C J p 827 note 74 [a] (3)

(2) Earlier decisions see 29 C J p 827 note 74 [a] (1), (2)

61. Tex—Raylor v San Antonio Bank, 28 Tex 448

62. Ky—Wilson v Newberry, 38 S W 2d 695, 238 Ky 635

63. U S—Thomason v. Shaw, C C A Tex, 67 F 2d 641
29 C J p 827 note 76.

64. Ga—Johnson v Redwine, 33 S E 676, 105 Ga 449

65. U S—Thomason v Shaw, C C A Tex, 67 F 2d 641
Tex—Richards v Nelms, 38 Tex 445

66. Tex—Lake v Boulware, 35 S W. 24, 12 Tex Civ App 660.

c. Placing Improvements on Homestead

Authorities differ as to whether the excess of value, over the statutory limit, created by the placing of improvements on a homestead is subject to the claims of creditors.

The mere fact that, by reason of improvements placed on a homestead which is within the constitutional or statutory value when selected or laid off, its value is enhanced beyond the constitutional or statutory limits does not vitiate or affect the homestead as an entirety[67] Under some decisions the excess of value over the homestead exemption thus created is subject to the claims of creditors,[68] especially where the homestead claimant erects buildings on the premises which greatly increase their value[69] On the other hand, there is authority to the effect that the excess over the homestead exemption caused by the addition of improvements cannot be reached by creditors,[70] especially where such improvements are incidental and necessary to keeping the premises in repair.[71]

§ 62. —— Determination of Value

Authorities differ as to whether the value of premises claimed to be a homestead is to be determined from their fee-simple value or from the value of the claimant's interest therein, as in the case of a life estate, and also as to whether improvements on the land are to be considered It is generally held that in determining the value legal encumbrances are to be deducted.

The value of premises claimed to be a homestead is to be determined, according to some authorities, not from the fee-simple value of the land, but from the value of the homestead claimant's interest therein,[72] and this rule has been applied where the right of the debtor in the lands is only a life estate[73] On the other hand, it has been held that the value of the homestead is the value of the tract, not that of the debtor's interest in it,[74] thus, according to other decisions, the market value of the fee simple is estimated in setting aside the homestead, and not merely the value of the life estate[75] If the premises are held by husband and wife, as tenants in common, the interests of both will be considered in arriving at the value of the husband's exemption[76]

The exemption is determined by the value at the time the homestead claim is tried, rather than at the time of levy and filing of the exemption claim[77] The homesteader's affidavit has been regarded as prima facie evidence of the value of the premises[78]

Deducting encumbrances While there is some authority to the contrary,[79] it is generally held that, in ascertaining the value of premises claimed as a valid and subsisting homestead, legal encumbrances are to be deducted,[80] unless the encumbrance is

67. Cal—Lubbock v McMann, 22 P 1145, 82 Cal 226, 16 Am S R 108

68. Cal—Lubbock v McMann, supra
29 C J p 827 note 81.

69. N C—Vanstory v Thornton, 14 S E 637, 110 N C 10

70. Iowa—Ebersole v Moot, 84 N W 696 112 Iowa 596
Tex—Englbrock v Haidusek, Civ App, 95 S W 2d 520, error refused
29 C J p 827 note 84

71 Iowa—Shaffer v. Chernyk, 107 N W 801, 130 Iowa 686

72. Ala—Brock Candy Co v Elson, 100 So 94, 211 Ala 244
Neb—Connor v McDonald, 233 N W 894, 120 Neb 503—Morrill v Skinner, 77 N W 375, 57 Neb 164—Corey v Plummer, 67 N W 445, 48 Neb 481
N D—Proefrock v American Nat Bank of St Paul, Minn, 258 N W. 482, 65 N D 308
S D—Simunek v Millay, 195 N W. 507, 46 S D 620
Wash—John Hancock Mut Life Ins Co v Wagner, 24 P 2d 420, 174 Wash 185, affirmed 27 P 2d 1118, 174 Wash 185
Allotment to survivors see infra § 270

Mortgagors' equity must be considered in determining whether homestead rights in proceeds of sale by them exceed statutory limitations of value—Northwestern Securities Co v Nelson, 211 N W 798, 191 Wis 580

73. S C—Columbia Bank v Gibbes, 32 S E 690, 54 S C 579
29 C J p 828 note 94

74. Iowa—American Sav Bank of Marengo v Willenbrock, 228 N W 295, 209 Iowa 250—Yates v McKibbin, 23 N W 752, 66 Iowa 357

75. Ky—Wilson v Devasher, 264 S W 1057, 204 Ky 408
29 C J. p 828 note 93

76. Ill—Herdman v Cooper, 29 Ill App 589.

77. Ala—Moore v Scharf, 17 So 933, 110 Ala 518
29 C J p 827 note 86

78. Ill—Moore v Titman, 33 Ill 358

Absence of steps to appraise value That reasonable cash value of land declared on as homestead was the sum estimated by declarant and found by court must be held conclusively established in absence of steps to appraise value of homestead or to determine if appraised value exceeded homestead exemption—John Hancock Mut Life Ins Co v Wagner, 24 P 2d 420, 174 Wash 185, affirmed 27 P 2d 1118, 174 Wash 185.

79. Cal—In re Herbert, 54 P 1109, 122 Cal 329

80. U S—In re Rohl, C C A S D 34 F 2d 268
Mich—Bartold v Lewandowska, 8 N W 2d 133
Miss—Dogan v Cooley, 185 So 783, 784, 184 Miss 106 citing **Corpus Juris,** and overruling Clark v Edwards 177 So 361, 180 Miss 97
Mo—Farmers' Bank of Higginsville v Handly, 9 S W 2d 880 320 Mo 754—Claywell v Spradling, App, 255 S W 960
Neb—Connor v McDonald, 233 N W 894, 120 Neb 503
S D—Peck v Peck, 212 N W 872, 51 S D 157
Wash—John Hancock Mut Life Ins Co v Wagner, 24 P 2d 420, 422, 174 Wash 185, quoting **Corpus Juris,** and affirmed 27 P.2d 1118, 174 Wash 185
29 C J p 828 note 88

Execution of new mortgages Where two new mortgages executed by the owner of a homestead to take the place of previous mortgages took effect contemporaneously with, or prior to, the discharge of such old mortgages, and owner's interest after deducting incumbrances never exceeded the statutory amount, a judgment lien did not attach—Brock

subject to, or inferior to, the homestead right, in which case it should not be deducted.[81]

Deducting value of improvements. While there is authority directly to the contrary,[82] according to some decisions, if there are improvements on the land, their value is to be considered in determining the value, as the homestead statutes do not contemplate a homestead of land to the maximum value and also the buildings thereon [83]

Old and new homesteads. Under a statute providing that a new homestead, to the extent in value of the old, is exempt from execution wherever the former one would have been, as much of the value of a prior homestead as goes into a new one determines the amount of exemption of the new as regards indebtedness incurred after the acquisition of the old homestead and prior to the acquisition of the new [84] In determining the value of the old homestead, for this purpose, improvements on the new homestead cannot be considered,[85] nor can the creditor use the encumbrances on the old one to reduce its value,[86] since such value is the value of the tract and not of the debtor's interest therein [87]

§ 63. Form and Physical Characteristics

a In general
b Government subdivisions

a. In General

The general view is that, subject to requirements as to a showing of intention to occupy, homestead rights may attach to vacant land. A claimant cannot lay off a homestead in an arbitrary or unreasonable shape, so as to occasion loss to his creditors.

There is authority to the effect that vacant or unimproved land cannot constitute a homestead,[88] although claimant has made preparations for building on it,[89] and has filed and recorded a statement claiming the land as a homestead,[90] but other decisions hold that, subject to requirements as to a showing of intention to occupy, as discussed supra § 33, homestead rights may attach to vacant land [91] The principles governing parcels of land separate and detached from the parcel on which the dwelling is situated, as constituting part of the homestead, are considered infra § 65 Land is not excluded from the homestead exemption because unenclosed or uncultivated [92]

While it is not necessary that a tract of land, to be available as a homestead exemption, shall be in any particular shape,[93] a debtor claiming a homestead exemption will not be permitted to lay off the homestead in an arbitrary, capricious, or unreasonable shape,[94] so as to occasion loss to his credi-

Candy Co v Elson, 100 So 94, 211 Ala 244

In North Dakota

(1) "In ascertaining the value of the homestead the rule has been (applicable in this case) that existing mortgages should not be deducted"—Farmers' State Bank of Anselm v Weisenhaus, 198 N W. 673, 674, 50 N D 949
29 C J p 828 note 87.

(2) "This rule has now been changed by statute Chapter 229, Laws 1923"—Farmers' State Bank of Anselm v Weisenhaus, supra.

81. Ala —Franklin v Comer, 54 So 130, 170 Ala 229
Neb —Baker v Grand Island Banking Co, 93 N W 428, 4 Neb (Unoff) 100

82. U S —Thomason v Shaw, C.C A. Tenn, 67 F 2d 641
29 C J p 828 note 90.

83. Cal —Lubbock v McMann, 22 P. 1115 82 Cal 226, 16 Am S R. 108.
29 C J p 828 note 91

84. Iowa —American Sav Bank of Marengo v Willenbrock, 228 N W 295, 299, 209 Iowa 250

85. Iowa —American Sav Bank of Marengo v Willenbrock, supra

86. Iowa —American Sav Bank of Marengo v Willenbrock, supra

Payment by creditor

A creditor cannot "reduce in extent the homestead interest by himself paying the encumbrance"—American Sav Bank of Marengo v Willenbrock, supra

87. Iowa —American Sav Bank of Marengo v Willenbrock, supra

Payments on purchase price made after acquisition of homestead exemption may not be deducted from value of homestead tract, although made after debt to which it is sought to subject the homestead was incurred —American Sav Bank of Marengo v Willenbrock, supra

88. Fla —Porter-Mallard Co v Dugger, 157 So 429, 117 Fla 137
29 C J p 804 note 35, p 828 note 96
Capability of use for residential purposes see supra § 54
Necessity of actual occupancy see supra § 33

89. Fla —Porter-Mallard Co v. Dugger, 157 So 429, 117 Fla 137—Drucker v Rosenstein, 19 Fla. 191

90. Fla —Drucker v Rosenstein, supra.

91. N C —Equitable Life Assur Soc of U. S v Russos, 185 S E 632, 210 N C 121
Tex —Espinoza v Cocke, Com App, 276 S W. 1095, reversing Cocke v Espinoza, Civ App, 265 S W. 1103—Bartels v Huff, Civ App, 67 S W. 2d 411, error refused—L E Whitman & Co v Stout, Civ App, 41 S W 2d 317, error refused—L E Whitham & Co v Briggs, Civ App, 41 S W 2d 150, reversed on other grounds L E Whitham & Co v Briggs' Estate, Com App, 58 S W 2d 49—Lilly v Lewis, Civ App, 249 S W 1095 Ewing v Riley, Civ App, 246 S W 94
29 C J p 823 note 7 [b] (1), (3)
Vacant land
Bought with proceeds of former homestead see infra § 77
Taken in exchange for homestead see infra § 72

92. Tex — Massillon Engine & Thresher Co v Barrow, Com App, 231 S W 368
29 C J p 807 note 71

93. Fla —Shone v Bellmore, 78 So 605, 75 Fla 515
29 C J p 828 note 99

94. Ark —Clements v. Crawford County Bank, 40 S W 132, 64 Ark 7, 62 Am S R 149
29 C J p 828 note 1.

"Selection of a corner lot and a part of an adjoining lot which does not exceed one-fourth of an acre in area cannot be characterized as an arbitrary and capricious selection"—Starr v City Nat Bank, 267 S.W. 581, 582, 167 Ark. 241.

tors;[95] and this is especially so where other rights have intervened and attached to the property and an irregular selection would operate to the injury of such right.[96]

Location of property at place of residence. It has been declared that the idea of a homestead carries with it a place of residence, and that all property used in connection with the residence must be located at the place of residence.[97]

b. Government Subdivisions

A debtor is not required to select his homestead with reference to governmental surveys or subdivisions.

While there is authority apparently to the contrary,[98] a debtor is commonly not required to select his homestead with reference to governmental or legal subdivisions or surveys, but may claim the quantity allowed by law, from such portion of the tract as includes his dwelling,[99] provided the selected portion is of reasonable shape;[1] but it has also been held that government subdivisions may be ignored and the area platted in any shape or form and from any part of the whole tract.[2] The government surveys are not of controlling importance.[3]

§ 64. —— Adjoining Lots or Tracts

Adjoining tracts or lots not exceeding the extent or value allowed by law for homesteads may be selected as a homestead. In order that a lot or tract adjoining that on which the dwelling is situated may be claimed as part of the homestead, it must be used in good faith for homestead purposes.

Adjoining tracts or lots not exceeding in total extent or value the limit fixed by constitutional or statutory provision may be selected as a homestead,[4] although the family residence is on one lot or tract only.[5] The divisions of the different lots or tracts have no controlling effect, and claimant may select one or more parts of several lots or tracts not embracing more than the statutory limitation and may exclude such parts thereof not so selected.[6] Of course adjoining land cannot be claimed as a part of the homestead where, if it were included, the whole would exceed the statutory quantity or value,[7] and a homestead cannot consist of adjoining tracts some of which are within a city, town, or village and some of which are not.[8] The different parcels should be so connected that they can be used as one tract,[9] and, as will appear in this section, they must all be used for homestead purposes.

Use in connection with homestead. Generally, in order that a lot or tract of land adjoining that on which the dwelling house is situated may be claimed as a part of the homestead, it must be used in good faith for homestead purposes,[10] but there is some authority to the contrary.[11] A tract or lot has been held to be used for homestead purposes, so as to be exempt as a part of the homestead, where it is used for the purpose of a garden[12] and, likewise, where

95. Ark.—Starr v. City Nat. Bank, supra
Okl.—McGaffey v. Mulky, 241 P. 480, 115 Okl. 44
29 C.J. p. 828 notes 1, 3

96. Mich.—Hanchett v. McQueen, 32 Mich. 22

97. Tex.—Rockett v. Williams, Civ. App., 78 S.W.2d 1077

98. U.S.—Kerr v. South Park Com'rs, C.C.Ill., 14 F.Cas.No.7,733, 8 Biss. 276
29 C.J. p. 829 note 7.

99. Iowa.—Berner v. Dellinger, 222 N.W. 370, 206 Iowa 1382
Neb.—Davis v. Davis, 199 N.W. 113, 112 Neb. 178
Wis.—Eaton Center Co-op. Cheese Co. v. Heintz, 244 N.W. 620, 209 Wis. 170
29 C.J. p. 829 note 8

1. Iowa.—Schlarb v. Holderbaum, 45 N.W. 1051, 80 Iowa 394
Wis.—Kent v. Agard, 22 Wis. 150

2. Iowa.—Berner v. Dellinger, 222 N.W. 370, 206 Iowa 1382

3. Neb.—Tindall v. Peterson, 98 N.W. 688, 71 Neb. 160, 8 Ann.Cas. 721, modified on other grounds 99 N.W. 659, 71 Neb. 160, 8 Ann.Cas. 721

4. Kan.—Meech v. Grigsby, 113 P. 2d 1091, 153 Kan. 784.—Karr v. Lawrence, 287 P. 621, 130 Kan. 552
Okl.—Williams v. Watkins, 219 P. 643, 93 Okl. 112
Wis.—In re McKenzie's Estate, 287 N.W. 695, 232 Wis. 425
29 C.J. p. 829 note 11

Homestead in city or town
Ala.—Griffin v. Ayers, 165 So. 593, 231 Ala. 493

5. Ariz.—Hooker v. Head, 236 P. 714, 28 Ariz. 308
Wis.—In re McKenzie's Estate, 287 N.W. 695, 232 Wis. 425
29 C.J. p. 829 note 11 [b]

6. Tex.—Watkins Land Mortg. Co. v. Temple, 119 S.W. 728, 56 Tex.Civ.App. 65

Subdividing into lots
(1) "The subdividing of the land into lots, although the dwelling occupied but one lot, would not limit the right of selection to the one lot, unless its value combined with that of the dwelling equaled or exceeded $4000."—Hooker v. Head, 236 P. 714, 715, 28 Ariz. 308.

(2) The fact that property has been platted and laid off into a number of lots is not of itself sufficient to deprive it of its character as a homestead.—Griffin v. Ayers, 165 So. 593, 231 Ala. 493

7. Ill.—Stocker v. Curtis, 106 N.E. 441, 264 Ill. 582
29 C.J. p. 829 note 13

8. Okl.—Pennington v. Bigbie, 260 P. 481, 127 Okl. 203
Tex.—Foust v. Sanger, 35 S.W. 404, 13 Tex.Civ.App. 410
Homestead partly urban and partly rural see supra § 53

9. Minn.—Brixius v. Reimringer, 112 N.W. 273, 101 Minn. 347, 118 Am.St.R. 629.—Phelps v. Northern Trust Co., 73 N.W. 842, 70 Minn. 516
Separate and detached parcels of land see infra § 65

10. Cal.—Lorenz v. Hunt, 266 P. 617, 91 Cal.App. 78
Mich.—Lemerise v. Robinson, 217 N.W. 911, 241 Mich. 528
Okl.—Williams v. Watkins, 219 P. 643, 93 Okl. 112
Tex.—Walker v. Dailey, Civ.App., 290 S.W. 813
Wis.—In re McKenzie's Estate, 287 N.W. 695, 232 Wis. 425
29 C.J. p. 830 note 19

11. Nev.—Clark v. Shannon, 1 Nev. 568

12. Or.—In re Potter's Estate, 59 P. 2d 253, 154 Or. 167
Tex.—Budde v. Drawhorn, Civ.App., 110 S.W.2d 929.—Seidemann v. New

it is used for the purpose of an orchard[13] by the family, for a playground,[14] for furnishing water for the use of the family,[15] for the purpose of drying clothes,[16] for access to the street,[17] for a stable,[18] for a garage,[19] for a barn,[20] for an oil tank serving the residence,[21] or for a business,[22] but under a statute providing that a homestead shall consist of the dwelling house and the land on which it is situated, conducting a public dance hall on an adjoining lot has been declared entirely foreign to the conception of a home[23]

The use of a portion of an urban homestead for purposes of mere convenience or ornament,[24] and the purchase and holding of a tract to prevent its use for purposes detrimental to a homestead,[25] have been sanctioned. On the other hand, an adjoining lot which merely provides a driveway to reach the dwelling has been held not exempt[26]

Adjoining land leased to others. A lot or tract which adjoins premises occupied as a homestead, but which is leased to others and used only as a source of revenue, has been held to form no part of the homestead, and not to be exempt.[27]

Residence on leased land as affecting right. According to some decisions a debtor who lives on leased land and owns adjoining land which he uses in connection with his home and for homestead purposes may claim such land as his homestead,[28] but there is authority to the contrary.[29]

Parcels cornering on each other. While the opposite view has been taken,[30] it has been held that two parcels of land which corner on each other are contiguous within the rule that contiguous lots and tracts not exceeding in extent or value the limit fixed by constitutional or statutory provisions may be selected as a homestead,[31] and when occupied or cultivated as one piece or parcel of land, may constitute a homestead,[32] although the residence and appurtenances are all located on one tract.[33]

§ 65. —— Separate and Detached Parcels of Land

In some jurisdictions, although not in others, a debtor may claim, as his homestead, in addition to the tract of land on which his dwelling house is situated, separate and detached parcels, provided the legal limit of acreage or value is not exceeded, and the detached parcels are used in good faith as part of the homestead

In some jurisdictions a debtor is allowed to claim as his homestead, in addition to the particular tract or lot of land on which his dwelling house is situated, separate and detached parcels or lots, so long as the statutory or constitutional limit of acreage or value is not exceeded,[34] and if, as will appear in this section, the separate and detached lot or tract

Braunfels State Bank, Civ App, 75 S W 2d 167, error refused
29 C J p 830 note 21

13. Tex—Budde v Drawhorn, Civ App, 110 S W 2d 929

14. Tex—Budde v. Drawhorn, supra

15. Cal—Arendt v. Mace, 18 P 376, 76 Cal 315, 9 Am S R 207

16. Cal—Englebrecht v Shade, 47 Cal 627

17. Cal—Englebrecht v Shade, supra

18. Tex—Blum v. Whitworth, 1 S W 108, 66 Tex 350

19. Cal—Thatcher v Van Bever, 34 P 2d 740, 139 Cal App 658
Tex—Budde v Drawhorn, Civ App, 110 S W 2d 929

20. Cal—Thatcher v. Van Bever, 34 P 2d 740, 139 Cal App 658

21. Or—In re Potter's Estate, 59 P 2d 253, 154 Or 167.

22. Wis—In re McKenzie's Estate, 287 N W 695, 232 Wis 425
Use for other purposes than residence generally see supra § 36

23. Cal—Lorenz v. Hunt, 266 P 617, 91 Cal App 78

24. Tex—Seidemann v New Braunfels State Bank, Civ App, 75 S W 2d 167, error refused.
29 C J p 830 note 26.

25. Tex—Little v Baker, 11 S.W 549

26. Mich—Lemerise v Robinson, 217 N W 911, 241 Mich 528

27. Tex—Walker v Dailey, Civ App, 290 S W 813
29 C J p 830 note 28

28. Miss—Hinds v Morgan, 23 So 35, 75 Miss 509
29 C J p 830 note 29

29. Kan—Hay v Whitney, 51 P 896

30. Kan—Commercial Nat Bank v Carnahan, 276 P 57, 128 Kan 87, 73 A L R 110
29 C J p 829 note 16
Oral privilege of use of gate across corner of neighbor's land did not make cornering parcels contiguous for homestead purposes—Commercial Nat Bank v. Carnahan, supra

31. Mont—Oregon Mortg Co v Dunbar, 289 P 559, 87 Mont 603, 73 A L R 113
29 C J p 829 note 17.

32. Minn—Brixius v. Reimringer, 112 N W 273, 101 Minn 347, 118 Am S R 629
Mont—Oregon Mortg Co v Dunbar, 289 P 559, 87 Mont 603, 73 A L R 113.

33. Minn—Brixius v Reimringer, 112 N W. 273, 101 Minn. 347, 118 Am S R. 629

34. U S—Giles v Robinson, C C A Tex, 38 F 2d 228—In re Buie D C Tex, 293 F. 896, affirmed C C A Rockhold v Buie 293 F 1021, certiorari denied 44 S Ct 402, 264 U S 588, 68 L Ed 864
Ky—Bishop v Simpson, 6 S W 2d 253, 224 Ky 289
Mo—Overfield v Overfield, 30 S W 2d 1073, 326 Mo 83
Okl—Powell v Powell, 116 P 2d 889, 189 Okl 255—Morey v James 276 P 707, 136 Okl 174—Morey v James, 248 P 594, 118 Okl 277—Cooper v Long, 220 P 610, 93 Okl 239—Williams v Watkins, 219 P 643, 93 Okl 112
S D—Farmers' & Merchants' Nat Bank of Milbank v Bank of Commerce of Milbank, 206 N W 691, 49 S D 130
Tex—Cocke v Conquest, 35 S W 2d 673, 120 Tex 43 affirming, Com App, 13 S W 2d 318, which affirmed, Civ App, 2 S W 2d 992—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—Booth v H P Drought & Co, Civ App, 89 S W 2d 432, error dismissed—Panhandle Const Co v. Flesher, Civ App, 87 S W.2d 273, error dismissed—Rockett v Williams, Civ App, 78 S W 2d 1077—Mayfield Co v Pepper, Civ App, 76 S W 2d 216, reversed on other grounds 103 S W 2d

is used in connection with, and as part of, the homestead or home place, but the selection must be reasonable and not purely arbitrary,[35] and it has been required that title to the separate tracts, or some interest therein, be vested in some member of the family.[36] One who occupies a tract otherwise than as a homestead cannot acquire a homestead right in another tract not contiguous merely by cultivating it.[37]

A contrary view has been taken in some jurisdictions where it has been held that the exempted premises must comprise adjoining or contiguous tracts or lots if an exemption in more than one tract or lot is claimed,[38] and it is immaterial that the use of one of them may be convenient for the procuring of articles, such as fuel and timber, essential to the enjoyment of the other on which the dwelling is situated.[39] In this view, noncontiguity has been held to mean absolute disconnection by intervening land of another, and not mere separation by surveyor's lines such as lots in a block, or by streets or alleys.[40]

Use in connection with homestead In those jurisdictions in which a debtor residing on one tract or lot of land as his home may claim as his homestead a detached lot or tract, it is essential to this right that he shall use the detached lot or tract in good faith, in connection with, and as part of, the homestead,[41] or, at least, that some act shall be done evincing an intention to use the detached

737, 129 Tex 307—Weiser v Travis Cotton Seed Products Co, Civ App, 63 S W 2d 246, error refused—Connelly v Johnson, Civ App, 259 S W 634—Vaden v Collier, Civ App, 253 S W 889—Ewing v Riley, Civ App, 246 S W 94

29 C J p 823 note 7 [b] (4), p 830 note 32

Rule not applicable to urban homestead

Okl—Standard v Eckert, 249 P 278, 119 Okl 124

Conveyance of three separate pieces of land from homestead, thereby separating portions of homestead lands from other portions, did not destroy homestead character of parts separated from main body by pieces conveyed—Croker v Croker, D C Fla, 7 F 2d 218

Nature of title to land; leasehold

(1) "This rule obtains regardless of the extent or nature of the defendant's title to the land upon which he resides and [which he] uses as a homestead, that is, a leasehold or rental interest will suffice

Tyler v Jewett, 2 So 905, 82 Ala 93"—J A Sloan & Co v Fields, 127 So 816, 817, 221 Ala 54

(2) Leasehold as supporting homestead claim generally see infra § 85

35. Ala—Jaffrey v McGough, 7 So 133, 88 Ala 648

Arbitrary selection generally see supra § 63

36. Tex—Vaden v Collier, Civ App, 253 S W 889

37. Ky—Hall v. Casebolt, 188 S W 470, 171 Ky 477, Ann Cas 1917C 1012

38. Ariz—Hooker v Head, 236 P 714, 28 Ariz 308

Ark—Pulse v McGregor, 17 S W.2d 888, 179 Ark 712

Kan—Meech v Grigsby, 113 P 2d 1091, 153 Kan 784—Commercial Nat Bank v Carnahan, 276 P 57, 128 Kan 87, 73 A L R 110

Or Cabler v Alexander, 224 P. 1076, 111 Or 257

Wis—Eaton Center Co-op Cheese Co v Heintz, 244 N W 620, 209 Wis 170

29 C J p 831 note 36

"Land on which . . [dwelling] is situated"

As used in a statute providing that "the homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated" the words, "'and the land on which the same is situated,' admit of no construction which will permit the inclusion of a wholly isolated tract, no matter how much of the family livelihood is garnered from such tract"—Voita v Buhre, 5 P 2d 500, 502, 165 Wash 384

Mere parol license or privilege to use land for particular purpose is not an interest in land making it capable of being contiguous for homestead purposes—Commercial Nat Bank v Carnahan, 276 P 57, 128 Kan 87, 73 A L R 110

Parcels abutting on same road

The fact that parcels separated by intervening lands of another abut on the same street or road does not constitute such a physical connection as to make parcels "contiguous"—Cabler v Alexander, 224 P 1076, 111 Or 257

39. Wis—Bunker v Locke, 15 Wis 635

40. Or—Cabler v Alexander, 224 P 1076, 111 Or 257

Division of tract by street, etc, generally see infra § 66

41. Ala—J A Sloan & Co v Fields, 127 So 816, 221 Ala 54

Okl—Powell v Powell, 116 P 2d 889, 189 Okl 255- Exchange Nat Bank of Tulsa v Rose, 103 P 2d 496, 187 Okl 481—Morey v James, 276 P 707, 136 Okl 174—Morey v James, 248 P 591, 118 Okl 277—Williams v Watkins, 219 P 643, 93 Okl 112

S D—Farmers' & Merchants' Nat Bank of Milbank v Bank of Commerce of Milbank, 206 N W 691, 49 S D 130

Tex—Cocke v Conquest, 35 S W 2d 673, 120 Tex 43, affirming, Com App, 13 S W 2d 348, which affirmed, Civ App, 2 S W 2d 992—Achilles v Willis, 16 S W 746, 81 Tex 169—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—Booth v H P Drought & Co, Civ App, 89 S W 2d 432, error dismissed—Rockett v Williams, Civ App, 78 S W 2d 1077—Weiser v Travis Cotton Seed Products Co, Civ App, 63 S W 2d 246, error refused—Pearson v Felps, Civ App, 53 S W 2d 495, error refused—Youngblood v Youngblood, Civ App 46 S W 2d 390, modified on other grounds 76 S W 2d 759, 124 Tex 184—Vaden v Collier, Civ App, 253 S W 889—Ewing v Riley, Civ App, 246 S W 94

29 C J p 831 note 39

Necessity of actual occupancy generally see supra § 33

"The nucleus must be the lot upon which the dwelling is situated This lot will draw to it such others as may be conveniently near to it and may be used in connection with it for the comfort and convenience of the family"—Panhandle Const Co v Flesher, Tex Civ App, 87 S W 2d 273, 274, error dismissed

Principal use

It is essential to the acquisition of the homestead that the principal use of the detached tract should be in connection with the home and for the comfort and convenience of the family—Benzel v Commercial Nat Bank of Sherman, Tex Civ App, 1 S W 2d 695, error dismissed—29 C J p 831 note 39 [c]

Particular uses held sufficient

(1) Use as children's playground—Panhandle Const Co v Flesher, Tex Civ App, 87 S W 2d 273, error dismissed

(2) Use for farming and grazing—Cocke v Conquest, 35 S W 2d 673, 120 Tex 43, affirming, Com App, 13

parcel in some way in connection with the home place for the comfort, convenience, support, or benefit of the family.[42] However, it has been held that, if a detached lot is actually used for homestead purposes, an open claim to it as a part of the homestead is not necessary.[43]

Lots or tracts leased to others. Separate and detached lots or tracts of land which are not only not used in connection with the home place, but are leased to others, cannot be claimed as parts of the homestead.[44]

Noncontiguous parcels lying within and without limits of municipality. Even in jurisdictions where noncontiguous tracts may be claimed as a homestead, it is not permissible to claim a lot within the limits of a municipality and a tract lying outside the limits thereof,[45] for as appears supra § 53, one is not entitled to a mixed homestead, part urban and part rural.

§ 66. —— Division of Lot or Tract by Highway, Street, or Alley, Railway, Stream of Water, Fence, or Garden

Where the legal limit of value is not exceeded, and the whole is used for homestead purposes, a landowner is commonly allowed to claim a homestead in a lot or tract divided by a highway, street, or alley, railroad right of way, stream, quarter-section line, fence, or garden.

Both in jurisdictions where a homestead may be claimed in noncontiguous tracts and in jurisdictions where it may not,[46] it is commonly held that an owner of land may claim a homestead in a lot or tract divided by a highway, street, or alley,[47] railroad right of way,[48] stream of water,[49] quarter-section line,[50] fence,[51] or garden,[52] provided the value does not exceed the limit fixed by constitutional or statutory provision,[53] but it is essential, for this purpose, that the whole shall be used for purposes of a homestead,[54] and hence if a part is used merely for purposes of profit by renting it to tenants, the part so rented cannot be considered as within the homestead exemption.[55] The contiguity

S W 2d 348, which affirmed, Civ App, 2 S W 2d 992—White v Blackman, Tex Civ App, 168 S W 2d 531

(3) Use for pasturing animals—Browning v Paschal, Tex Civ App, 23 S W 2d 818

(4) Use for growing crops to feed owner's animals—Engbrock v Haidusek, Tex Civ App, 95 S W 2d 520, error refused

(5) Use of six tracts of land, on two of which owner had his residence and a general store and blacksmith shop, and the others of which he farmed, either personally or through hired help or share croppers—In re Buie, D C Tex, 287 F 896, affirmed, C C A Rockhold v Buie, 293 F 1021, certiorari denied 44 S Ct 402, 264 U S 588, 68 L Ed 864

Sale of products and use of money to support family

The mere fact that the products of the detached tract were sold and the money used to support the family will not support the homestead claim—Farmers' Nat Bank of Seymour v Coffman, Tex Civ App, 79 S W 2d 905—29 C J p 831 note 39 [d]

Corpus Juris statement cited in connection with holding as to parcels cornering on each other—Commercial Nat Bank v Carnahan, 276 P 57, 58, 128 Kan 87, 73 A L R 110

42. Okl—Powell v Powell, 116 P 2d 889, 189 Okl 255—Exchange Nat Bank of Tulsa v Rose, 103 P 2d 496, 187 Okl 481—Williams v Watkins, 219 P 643, 93 Okl 112
Tex—Booth v H P Drought & Co, Civ App, 89 S W 2d 432, error dismissed
29 C J p 831 note 40.

43. Tex—Jacobs v Hawkins, 63 Tex 1

44. Tex—Blair v Park Bank & Trust Co, 130 S W 718, 61 Tex Civ App 441
29 C J p 831 note 43

45. Tex—Alexander v Wilson, 77 S W 2d 873, 124 Tex 392, 128 A L R 412, reversing Wilson v Alexander, Civ App, 50 S W 2d 440—First Coleman Nat Bank of Coleman v Childs, Civ App, 113 S W 2d 602, error refused
29 C J p 832 note 45.

46. Ariz—Hooker v Head, 236 P 714, 715, 28 Ariz 308, quoting **Corpus Juris.**
Separate and detached parcels of land generally see supra § 65

47. Ariz—Hooker v Head, supra, quoting **Corpus Juris.**
Neb—Davis v Davis, 199 N W 113, 112 Neb 178
Or—Cabler v Alexander, 224 P 1076, 111 Or 257
Tex—Youngblood v Youngblood, 76 S W 2d 759, 124 Tex 184, modifying, Civ App, 46 S W 2d 390—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—Engbrock v Haidusek, Civ App, 95 S W 2d 520, error refused—Panhandle Const Co v Flesher, Civ App, 87 S W 2d 273, error dismissed
Wis—Hainz v Kurth, 278 N W 413, 227 Wis 260—Eaton Center Co-op Cheese Co v Heintz, 241 N W 620, 209 Wis 170
Contra Meech v Grigsby, 113 P 2d 1091, 153 Kan 784
29 C J p 832 note 48

48. S D—Edelman v Scandrett, 293 N W 817, 67 S D 453
Tex—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed
29 C J p 832 note 49

49. Wis—Bunker v Locke, 15 Wis 635

50. Ill—Darby v Dixon, 4 Ill App. 187

51. Tex—Little v Baker, Civ App, 26 S W 305, rehearing 25 S W 113

52 La—Farmers' Mercantile Co, Ltd v Guillory, 90 So 222, 149 La 858

53. Ariz—Hooker v Head 236 P. 714, 715, 28 Ariz 308, quoting **Corpus Juris.**
S D—Edelman v Scandrett, 293 N. W 817, 67 S D 453
29 C J p 832 note 54

54. Ariz—Hooker v Head, 236 P 714, 715, 28 Ariz 308, quoting **Corpus Juris.**
S D—Edelman v Scandrett, 293 N W 817, 67 S D 453
Tex—Youngblood v Youngblood, 76 S W 2d 759, 124 Tex 184, modifying, Civ App, 46 S W 2d 390
29 C J p 832 note 55

Cultivation of crop for sale was held not homestead use—Benzel v Commercial Nat Bank of Sherman, Tex Civ App, 1 S W 2d 695, error dismissed

Owners' intent to use tract as part of homestead was held insufficient to make it such—Benzel v Commercial Nat Bank of Sherman, supra

55. Miss—Rhyne v Guevara, 6 So 736, 67 Miss 139
29 C J p 832 note **56.**

or compactness of tracts is commonly regarded as not affected by division of lands in the modes previously set forth,[56] except where the fee of streets, alleys, and other public grounds which have been dedicated to the public use is regarded as vested in the public and not in the abutting owners.[57]

§ 67. —— Part of Lot, Tract, or Building

Subject to limitations as to area, and the requirement that the dwelling house be included, a homestead may be carved out of a larger tract. A portion of a building may constitute a homestead.

A homestead may be claimed on the fractional part of a lot,[58] and may be carved out of a larger tract providing no more is set off than is allowed by the homestead provisions,[59] and provided it is set off so as to include the debtor's dwelling house.[60]

A portion of a building, as in the case of an apartment in an apartment house, may constitute a homestead.[61] Where a part of a building abandoned as a part of a business or residence homestead could not be separated, divided, or partitioned from the main building, but was a part of the same structure, the homestead exemption was extended thereto.[62]

§ 68. —— Appurtenances

A homestead includes everything appurtenant to the dwelling which may be, and is, used for the more perfect enjoyment of the home; but property cannot be considered appurtenant unless it is used principally and in good faith for homestead purposes.

Unless there is some express provision to the contrary, a homestead includes not only the dwelling house and the land on which it stands, but everything appurtenant thereto which may be, and is, used for the more perfect enjoyment of the home.[63] It includes lots or parcels of land used by the homestead claimant and his family for purposes immediately connected with their residence and the enjoyment of their homestead exemption,[64] outbuildings,[65] yards,[66] a playground,[67] family orchards,[68] a garden,[69] unless its use is merely occasional and incidental and not primarily for securing products for home consumption,[70] or unless the garden is a rural tract and the residence property urban,[71] a farm, if the homestead is situated in the country,[72] an irrigation canal on a farm;[73] a storehouse erected on a lot purchased with the proceeds of the sale of a homestead,[74] fixtures permanently annexed to the soil, as appears supra § 52, and easements.[75]

What are not appurtenances within rule Property cannot be considered appurtenant if it is not used principally and in good faith for homestead purposes.[76] The homestead must center in and about the dwelling house, and does not extend to any part of the real estate beyond that portion of

56 Ariz—Hooker v Head, 236 P 714, 28 Ariz 308
Or—Cabler v Alexander, 224 P 1076, 111 Or 257
Tex—Youngblood v Youngblood, 76 S W 2d 759, 124 Tex 184, modifying, Civ App, 46 S W 2d 390
29 C J p 832 notes 48 [a], 49 [c]

Fee in highway
"The two tracts are separated by a public highway, but are nevertheless contiguous, since the fee to public highways remains in the landowner, the public having but an easement" —Davis v Davis, 199 N W 113, 114, 112 Neb 178

57. Kan—Meech v Grigsby, 113 P 2d 1091, 153 Kan 784

58 Tex—General Bonding & Casualty Ins Co v Trabue, Civ App, 174 S W 689
29 C J p 832 note 58

59. Okl—Morey v James, 276 P 707, 136 Okl 174
29 C J p 832 note 59
Amount and extent see supra §§ 56–58

60. Iowa—Berner v Dellinger, 222 N W 370, 206 Iowa 1382

61. Or—In re Potter's Estate, 59 P 2d 253, 154 Or 167—Smith v Kay, 54 P 2d 1160, 153 Or 80, rehearing denied 55 P 2d 794, 153 Or 80—Moody v Baker, 20 P 2d 1069, 142 Or 559
Wash—State ex rel Van Doren v Superior Court for King County, 37 P 2d 215, 179 Wash 241
Occupancy by tenant generally see supra § 37

62 Tex—Bente v Sullivan, 115 S W 350, 52 Tex Civ App 454

63. U S—In re Jarrell, D C Cal, 34 F 2d 970—In re Buie D C Tex, 287 F 896, affirmed, C C A, Rockhold v Buie, 293 F 1021, certiorari denied 44 S Ct 402, 264 U S 588, 68 L Ed 861
N H—Avery v Davis, 128 A 332, 81 N H 414
Or—Smith v Kay, 54 P 2d 1160 1164, 153 Or 80, quoting **Corpus Juris,** and rehearing denied 55 P 2d 794, 153 Or 80
29 C J p 833 note 61.

Leading case
Cal—Gregg v Bostwick, 33 Cal 220, 91 Am D 637

"Necessary farming implements" includes a pumping plant—First Nat Bank v Labit, 109 So 400, 161 La 719

64. U S—In re Jarrell, D C Cal, 34 F 2d 970
29 C J p 833 note 62

65. U S—In re Jarrell, supra.
29 C J p 833 note 63

66. Kan—Ashton v Ingle, 20 Kan 670, 27 Am R 197

67. Tex—C D Shamburger Lumber Co v Delavan, Civ App, 106 S W 2d 351, error refused

68. Tex—Brin v Anderson, 60 S W 778 25 Tex Civ App 323

69 Tex—C D Shamburger Lumber Co v Delavan Civ App, 106 S W 2d 351, error refused
29 C J p 833 note 66

Homestead situated in the county
U S—In re Jarrell, D C Cal, 34 F 2d 970

70. Tex—Blum v Rogers, 15 S W 115 78 Tex 530
29 C J p 833 note 67

71. Tex—George v Ryon, Civ App, 61 S W 138

72. U S—In re Jarrell, D C Cal, 34 F 2d 970

73. La—First Nat Bank v Labit, 109 So 400 161 La 719

74. Ky—Green v Pennington, 97 S W 766, 123 Ky 837, 30 Ky L 203

75. Cal—Payne v Cummings, 80 P. 620, 146 Cal 426, 106 Am S R 47
29 C J p 833 note 71

76. Iowa—Van Law v Waud, 272 N W 523, 223 Iowa 208.
29 C J p 833 note 72

the dwelling and land used in connection therewith and within the value fixed by the statute,[77] or to buildings used as a source of revenue.[78] A debtor cannot cover his premises with trade buildings and claim all as exempt.[79] Appurtenances will not include a building used for a storehouse and an occasional working place,[80] woodland not adjoining the home tract from which the debtor obtains fuel,[81] a grist mill, not inclosed with the main homestead,[82] a stable used in carrying on the business of a hotel where the homestead is established in the hotel,[83] or a building on the premises in which claimant operated an illegal business.[84]

Permissive statute A statute providing that a shop, store, or other building situated on a homestead and used and occupied by the owner in the transaction of his ordinary business may be deemed appurtenant to the homestead is permissive and not mandatory.[85]

§ 69. —— Improvements, Additions, and Materials Therefor

Except as inconsistent with legal limitations as to the extent or value of the homestead, the exemption may extend to improvements made on the premises. Materials purchased for use in erecting or repairing the dwelling house are generally held exempt if the residence itself would be.

Except in so far as inconsistent with constitutional or statutory limitations as to the extent, see supra §§ 56–58, or the value, see supra § 61, of the homestead, the exemption may extend to the improvements made on the premises,[86] the right of exemption as to such improvements dating from the acquisition of the homestead;[87] but the improvements must be physically connected with the residence or business.[88] Similarly, unless prevented by limitations as to the extent or the value of the homestead, the owner of a homestead may purchase a fraction of the same lot on which the homestead is situated and impress it with a homestead character where he fears that it may be used for purposes detrimental to his homestead,[89] but he cannot for that purpose acquire lots separate and distinct from the one on which the homestead is situated.[90] An owner cannot build an unnecessary addition to his residence and claim it and the ground on which it stands as a part of his homestead where such addition is practically an independent structure and might be detached without interfering with the use of the homestead.[91]

An addition to the homestead, purchased partly with profits from the homestead itself and partly with other funds, may be equitably apportioned so as to exempt the part represented by the former funds.[92]

77. Ala.—Moseley v. Neville, 129 So. 12, 221 Ala. 429
Iowa.—Van Law v. Waud, 272 N.W. 523, 223 Iowa 208
Vt.—Lee v. Follensby, 85 A. 915, 86 Vt. 401

78. Ala.—Moseley v. Neville, 129 So. 12, 221 Ala. 429

79. Iowa.—Shafter v. Chernyk, 107 N.W. 801, 130 Iowa 686

80. Vt.—True v. Morrill, 28 Vt. 672

81. Mo.—Meyer v. Nickerson, 13 S.W. 904, 100 Mo. 599
Vt.—True v. Morrill, 28 Vt. 672

82. Kan.—Mouriquand v. Hart, 22 Kan. 594, 31 Am.R. 200

83. Iowa.—Cass County Bank v. Weber, 48 N.W. 1067, 83 Iowa 63, 32 Am.S.R. 288, 12 L.R.A. 477

84. S.D.—Henry v. Meade County Bank, 148 N.W. 626, 34 S.D. 369
29 C.J. p. 834 note 80
Unlawful use of premises see supra § 39

85. S.D.—Henry v. Meade County Bank, supra
29 C.J. p. 834 note 81

86. Tex.—Thomas v. Tyler, Com.App., 6 S.W.2d 350, reversing Tyler v. Thomas, Civ.App., 297 S.W. 609.—Lewis v. Lindsley, Civ.App., 68 S.W.2d 548, reversed on other grounds Lindsley v. Lewis, 84 S.W.2d 994, 125 Tex. 630
29 C.J. p. 834 note 84
House
Tex.—Thomas v. Tyler, Com.App., 6 S.W.2d 350, reversing Tyler v. Thomas, Civ.App., 297 S.W. 609
Enlargement of building occupied by owner of residence homestead, as business homestead will be exempt.—Mays v. Mays, Tex.Civ.App., 43 S.W.2d 148, error refused
Effect of assignment of rent
That part of rent realized from parts of urban homestead had been assigned to owner's creditors to discharge particular debt was held not to deprive rented properties of "homestead" character, within constitutional provision that exemption "shall not extend to more improvements or buildings than the residence and business house of the owner."—Cowdery v. Herring, 144 So. 348, 106 Fla. 567, denying rehearing 143 So. 433, 106 Fla. 567
Burden of showing excessive improvements
Under constitutional provision that "exemption shall not extend to more improvements or buildings than the residence and business house of the owner," burden is on judgment creditor to show clearly that there were more improvements on the land than such residence and business house.—Cowdery v. Herring, 144 So. 348, 106 Fla. 567, denying rehearing 143 So. 433, 106 Fla. 567

87. Iowa.—American Sav. Bank of Marengo v. Willenbrock, 228 N.W. 295, 209 Iowa 250

88. Fla.—Smith v. Guckenheimer, 27 So. 900, 42 Fla. 1
"Business house"
Paintshop and garage, erected on urban homestead land, and revenue of which constituted widowed homesteader's principal means of livelihood, was held exempt from execution as "business house" within constitutional provision extending exemption "to no more improvements or buildings than the residence and business house of the owner."—Cowdery v. Herring, 143 So. 433, 434, 106 Fla. 567, rehearing denied 144 So. 348, 106 Fla. 567

89. Tex.—Little v. Baker, 11 S.W. 549
29 C.J. p. 834 note 88

90. Tex.—Little v. Baker, 11 S.W. 549.—Little v. Baker, Civ.App., 26 S.W. 305, reversing 25 S.W. 143

91. Iowa.—Groneweg v. Beck, 62 N.W. 31, 93 Iowa 717

92. Ga.—Kiser v. Dozier, 30 S.E. 967, 102 Ga. 429, 66 Am.S.R. 184—

While there is some authority to the contrary,[93] it is usually held that materials purchased with the design of using them in erecting or repairing the dwelling house are exempt if the residence itself would be,[94] the exemption relating back to the time of purchase of the premises with intent to make them a homestead.[95]

§ 70. Rents, Profits, and Products of Homestead

a Rents and profits
b Products

a. Rents and Profits

It is generally held that rents and profits arising from the homestead estate, so long as it retains its character as such, are exempt; but authorities differ as to whether property purchased by the head of a family with homestead income is to be treated as exempt as being part of the homestead estate.

While there is authority to the contrary,[96] it is very generally held that rents and profits arising from the homestead estate, so long as it retains its character as such, are exempt,[97] but the general rule has not been applied to rents from a business homestead.[98]

Property purchased with profits. In some jurisdictions property purchased by the head of a family and paid for exclusively out of the income of the homestead is regarded and treated as an addition to the corpus of the homestead estate, and is exempt as a part thereof,[99] although the head of the family may have contributed his labor in managing the homestead estate,[1] but in other jurisdictions a contrary view is maintained.[2]

Where a conveyance of the homestead is set aside, the homestead claimant will not be entitled to rents during the time that he was voluntarily out of possession by reason of his conveyance.[3]

b. Products

The exemption extends to crops growing on the homestead premises, or matured but ungathered, but authorities differ as to whether crops are exempt after severance. Underlying strata of coal are exempt as part of the homestead.

The exemption extends to crops growing on the homestead premises, or matured but ungathered,[4] and, according to some decisions, to crops which have been severed therefrom,[5] but other decisions hold that the crops are exempt only so long as they are not severed from the soil.[6] Underlying strata

Vining v Officers of Ct, 8 S E 185, 82 Ga 222

Profits of homestead generally see infra § 70

93 N H—Carkin v Babbitt, 58 N H 579

94 Wis—Schwitzke v American Nat Bank, 8 N W 2d 303
29 C J p 834 note 93

95 Wis—Schwitzke v American Nat Bank, supra—Scofield v Hopkins, 21 N W 259, 61 Wis 370

96 N C—Citizens' Nat Bank v Green, 78 N C 247
29 C J p 834 note 94

97. Kan—C C Isely Lumber Co v Kitch, 256 P 133, 134, 123 Kan 441, quoting **Corpus Juris.**

Mich—Bartold v Lewandowska, 8 N W 2d 133

Tex—W E Thomas Lumber Co v McClain Civ App, 294 S W 250, 251 quoting **Corpus Juris.**
29 C J p 834 note 95

Interests in oil and gas

(1) An obligation under oil and gas lease to pay deferred rentals in the future is an "interest in realty" and hence subject to wife's homestead rights—Cates v Greene, Tex Civ App, 114 S W 2d 592

(2) When, after giving of oil and gas lease, royalty interest remains joined with title of those owning and using land as homestead, homestead use continues to extend to and protect, and right of homestead owner continues to include, such interest—Evans v Mills, C C A Tex, 67 F 2d 840

Physician's use of articles included in his homestead, in earning fees through the exercise of his skill, does not exempt such earnings as "arising from" his homestead—Staples v Keister, 8 S E 421, 422, 81 Ga 772

98. Tex—Sargeant v Sargeant, Civ App, 19 S W 2d 382, certified questions answered 15 S W 2d 589, 118 Tex 313
29 C J p 834 note 96

99. Ga—Kiser v Dozier, 30 S E 967, 102 Ga 429, 66 Am S R 184
29 C J p 834 note 97

1. Ga—Kiser v Dozier, supra—Kupferman v. Buckholts, 73 Ga 778

2. N C—Citizens' Nat Bank v Green, 78 N C 247
29 C J p 835 note 99

3. Ky—Wing v Hayden, 10 Bush 276

4. Kan—C C Isely Lumber Co v Kitch, 256 P 133, 134, 123 Kan 441, quoting **Corpus Juris.**

Tex—First Nat Bank v Solis, Civ App, 137 S W 2d 142, error refused—Rutherford v Vandygriff, Civ App, 73 S W 2d 569—McIntyre v Oliver Motor Co, Civ App, 20 S W 2d 241, error dismissed—West v U S Fidelity & Guaranty Co, Civ App, 298 S W 652—Collett v Brokaw, Civ App, 296 S W 333, reversed on other grounds Brokaw v Collett, Com App, 1 S W 2d 1090—Cry v J W Bass Hardware, Civ App, 273 S W 347—Stephens v Cox, Civ App, 255 S W 241, rehearing denied 256 S W 643
29 C J p 835 note 2

Reason for rule

"Ungathered crops on a homestead [are] a part of the realty"—First Nat Bank v Cooper, Tex Civ App, 12 S W 2d 271, 274, error refused

Crop on unnecessarily large area

Entire crop, grown on land which is larger in area than is necessary for use and occupancy by homestead claimant as dwelling, cannot be held by claimant during year of redemption, exempt from lien for interest and taxes paid by mortgagee purchasing premises at foreclosure—John Hancock Mut Life Ins Co v Wagner, 24 P 2d 420, 174 Wash 185, affirmed 27 P 2d 1118, 174 Wash 185

5. Va—Noblett v Shackleton, 69 S E 946, 111 Va 707, 32 L R A, N S, 577, Ann Cas 1912A 117.
29 C J p 835 note 3.

6. Tex—First Nat Bank v Solis, Civ App, 137 S W 2d 142, error refused—Rutherford v Vandygriff, Civ App, 73 S W 2d 569—McIntyre v Oliver Motor Co, Civ App, 20 S W 2d 241 error dismissed—Collett v Brokaw, Civ App, 296 S W 333, reversed on other grounds Brokaw v. Collett, Com App, 1 S

of coal are a part of the homestead and, as such, exempt [7]

§ 71. Proceeds of Voluntary Sale or Mortgage

a. In general
b. Proceeds given to wife

a. In General

As determined by the statutory provisions, the proceeds of a voluntary sale of a homestead may be exempt in all circumstances, or not exempt, or unconditionally exempt for a designated period, or exempt, for a designated or reasonable period, if intended for reinvestment in another homestead

A statute providing for the exemption of the proceeds of an execution sale of a homestead, up to a stated sum, has no application to a voluntary sale [8]

Statutes giving absolute right of exemption Under the statutes of some states the proceeds of a voluntary sale of a homestead are exempt in all circumstances; the exemption is in no way dependent on the vendor's continuing to be a housekeeper, or on his intention to acquire another homestead, or on the intent with which he keeps the proceeds [9]

Statutes giving no right of exemption. Under the statutes of some states it has been held that on a voluntary sale of the homestead the benefit of the homestead law is lost and that the proceeds of the sale are not exempt,[10] except to the extent of exemptions allowed a debtor in personal property [11]

Statutes giving unconditional protection for designated period Under the statutes of some states, proceeds of the sale of a homestead are protected absolutely for a designated period after the sale,[12] unless the owner abandoned the homestead before the proceeds were paid over,[13] no condition attaches to this exemption, not even that the sale shall be made for the purpose of investing in another homestead [14] After the expiration of the time fixed by statute, the proceeds of the sale are liable for the seller's debts,[15] and the transfer

W 2d 1090—Cry v J W Bass Hardware, Civ App, 273 S W 347
29 C J p 835 note 4

Proceeds of crops are not exempt after severance, and such proceeds are subject to a garnishment levied while crops were ungathered—West v U S Fidelity & Guaranty Co, Tex Civ App, 298 S W 652

In Oklahoma "crops grown on the homestead, when matured and severed from the soil, are not exempt from forced sale, unless same come within the provisions of section 6595, C O S 1921, subd 15 exempting 'all provisions and forage on hand, or growing for home consumption, and for the use of exempt stock for one year'"—Jones v First Nat Bank, 228 P 992 102 Okl 185

7. Ark—Butler v Butler, 2 S W 2d 63, 176 Ark 126—Russell v Berry, 67 S W 864, 70 Ark 317

8. S D—Smith v Hart, 207 N W 657, 49 S D 582 46 A L R 811, followed in 207 N W 659, 49 S D 587
Proceeds of judicial or execution sale see infra § 75

9. Vt—Locke v Post, 45 A 226, 71 Vt 343, 76 Am S R 778
29 C J p 835 note 9

In Florida "if a permissible conveyance of a homestead for a proper consideration is made, the consideration takes the place of the exempted property"—Norman v Kannon, 182 So 903, 905, 133 Fla 710

In Georgia, "in a suit by the judgment creditor against the debtor to subject to the plaintiff's debt funds arising from the sale of the property . . . exempted [as a homestead], a verdict for the defendant was authorized"—Kirkpatrick Hardware Co v Rogers, 134 S E 806, 35 Ga App 790

In Kentucky

(1) Some decisions seem to hold without qualification that the proceeds of a voluntary conveyance of a homestead are exempt—Mason v Southern Deposit Bank, 17 S W 2d 1022, 229 Ky 728—29 C J p 835 note 9 [c] (3)

(2) Other decisions hold that the proceeds, to be exempt, must be invested in another homestead, or in other exempt property—Marcum v Edwards, 205 S W 798, 181 Ky 683—29 C J p 835 note 9 [c] (2), p 836 notes 24 25

(3) Other Kentucky decisions see 29 C J p 835 note 9 [c] (1), (4)

In Mississippi, purpose of statutes providing for homestead exemption and that exemption shall not be lost by disposal of property is "to give the right to retain the proceeds of the sale of the homestead, should it be best to sell it"—Bank of Myrtle v Garrison, 184 So 291, 293, 183 Miss 526

In Oregon, "by the express provision of the Homestead Act, the exemption is not impaired by the sale of the property"—Stewart v Black, 22 P 2d 336, 338, 143 Or 291

10. S C—People's Bank of Campobello v O'Shields, 166 S E 351, 167 S C 296
Tenn—Timothy Dry Goods Co v Hyde, 5 Tenn App 491
29 C J p 835 notes 7, 8

11. Ark—Tucker v Stell, 272 S W 864, 169 Ark 1

12. Tex—Henry v Boedker, Civ App, 141 S W 811
29 C J p 835 note 10

Proceeds "not exceeding the amount of the exemption"
Neb—Meyer v Platt, 291 N W 86, 89, 137 Neb 714

Only homestead within state held contemplated by statute Wm Cameron & Co v Abbott, Tex Civ App 258 S W 562

Transactions not constituting sale

(1) Where lessor placed oil lease covering homestead in escrow and received forfeit money on lessee's failure to perform, the transaction was held not "sale" of homestead, so as to make proceeds exempt from garnishment—Norman v Wilson, Tex Civ App, 41 S W 2d 331, error refused

(2) An agreement by owner of homestead for sale of caliche from homestead to state highway department at royalty price per cubic yard for acceptable material was not a conveyance of "minerals in place," and hence proceeds from the sale did not constitute proceeds from sale of "homestead," or any portion thereof in such manner as to be exempt from garnishment—Cooper v Cocke, Tex Civ App, 145 S W 2d 275

13. Tex - Ingram v Summers, Civ App, 29 S W 2d 447, error dismissed

14. Neb—Corey v Plummer, 67 N W 445, 48 Neb 481

15. Tex—Simmons-Newsome Co. v Malin, Civ App, 196 S W 281

thereof, within the period fixed by statute for reinvestment, to a third person without consideration will not exempt the proceeds from seizure by creditors of the seller if not invested within the statutory period[16] The statutes do not apply where the conveyance is in effect a gift, although for an expressed consideration, and there are no proceeds to be exempted[17] The term "proceeds" as used in these statutes has been said to mean some tangible thing which is the subject of manual delivery and receipt[18]

A partial payment made to the owner of the homestead sold by him is part of the proceeds of a sale to the same extent as the remainder constitutes part of such proceeds[19]

Statutes protecting proceeds intended to be reinvested in new homestead Under the statutes of several jurisdictions, the proceeds of a sale of his homestead by a debtor for the purpose of investing in another homestead are protected prior to such reinvestment[20] Under these statutes the money arising from the sale is not exempt unless the sale was in pursuance of a design to purchase another homestead; the intent to invest the proceeds in another homestead must be formed at or before the time of the sale.[21] As the matter of intention lies peculiarly within the knowledge of the debtor, the burden of proof of intent to reinvest in another homestead is on him[22] One who abandons all homestead rights in property before selling it cannot claim to have acquired exempt proceeds for reinvestment in another homestead.[23]

In the absence of a statutory provision fixing the period within which investment in a new homestead must be made,[24] a reasonable time will be allowed, for the purpose of protecting the proceeds, or a new homestead in which the proceeds are invested, from the claims of creditors,[25] and what will be a reasonable time must depend on the facts of each particular case[26] Other authority has required a sale for immediate reinvestment[27]

Where the statute authorizes an entire change of homestead by the owner, the exemption has been held not lost because of the debtor's intention to invest the proceeds in another state[28] However, there is authority requiring the reinvestment of the proceeds to be in a homestead in the same state, in order for the exemption to apply[29]

16. Tex—Simmons-Newsome Co v Malin, supra

17. Ill—Slattery v Keafe, 66 N E 365, 201 Ill 483

18. Utah—Christensen v Beebe, 91 P 129, 32 Utah 406
29 C J p 836 note 15
"Proceeds" as meaning property taken in exchange see infra § 72

19 Utah—Giesy-Walker Co v Briggs, 162 P 876, 49 Utah 205

20. Iowa—Elliott v Till, 259 N W 460, 219 Iowa 649
Kan—First Nat Bank v Dempsey, 11 P 2d 735, 135 Kan 608
Okl—Farmers' State Bank of Newkirk v Hess, 251 P 73, 120 Okl 210—State v Brown, 218 P 816, 92 Okl 137
29 C J p 836 note 18

Homestead and other property
Where agreed sale price of land was twenty-two thousand dollars, and homestead included therein was worth eight thousand dollars, four-elevenths of net proceeds should be allowed as exempt proceeds of homestead—First Nat Bank v Neve, 235 N W 561, 213 Iowa 344

Sale for cash is not necessary, the sale may be on credit, and if the intention is to invest the proceeds, when realized, in a new homestead, and they are not put to any intervening use, they will be exempt—Fardal v Satre, 206 N W 22, 200 Iowa 1109—29 C J p 836 note 18 [a]

Right of assignee of husband's interest
Proceeds of note given to husband and wife on sale of homestead by them held not exempt from claim of assignee of husband's interest in note—Aaby v Kaupanger, 221 N W 417 197 Wis 56

Deed held not to show reinvestment of proceeds of homestead land—Aspinwall v Latimer, 164 S E 50, 174 Ga 712

21. Ark—Stone v Bowling, 87 S W 2d 49, 191 Ark 671
Kan—First Nat Bank v Dempsey, 11 P 2d 735, 135 Kan 608
Okl—Farmers' State Bank of Newkirk v Hess, 251 P 73, 120 Okl 210 State v Brown, 218 P 816, 92 Okl 137
29 C J p 836 notes 19, 22
"It appears to be required as a condition precedent to any such exemption that the claimant must clearly and affirmatively establish that at the time of selling the first homestead there existed and has ever since continued, a definite, actual, and bona fide intention to reinvest the proceeds in a second homestead in the same state"—Smith v Hart, 207 N W 657, 658, 49 S D 582, 46 A L R 811, followed in 207 N W 659, 49 S D 587

22. Iowa—Huskins v Hanlon, 33 N W 352, 72 Iowa 37
Mo—State v Hull, 74 S W 888, 99 Mo App 703

23. Ark—Stone v Bowling, 87 S W 2d 49, 191 Ark 671.
Iowa—Crail v Jones, 221 N W 467, 206 Iowa 761

24. Wis—Bailey v Steve, 35 N W. 735, 70 Wis 316
29 C J p 836 note 23

25. Iowa—Elliott v Till, 259 N W. 460, 219 Iowa 649—Blakeslee v. Paul, 238 N W 447, 212 Iowa 1385—Crail v Jones, 221 N W 467, 206 Iowa 761—Fardal v Satre, 206 N. W 22, 200 Iowa 1109
Kan—First Nat Bank v Dempsey, 11 P 2d 735, 135 Kan 608
Okl State v Brown, 218 P 816, 92 Okl 137
29 C J p 836 note 24

26. Iowa—Robinson v Charleton, 73 N W 616, 101 Iowa 296
29 C J p 836 note 25
"We think it would be improper for the court to attempt to specifically determine what might constitute a reasonable time"—State v. Brown, 218 P 816, 820, 92 Okl 137

Period of owner's illness, during which he was not in condition to make investment, should not be considered in determining whether reasonable time has elapsed—State v Brown, supra

27. S D—Schuler v Johnson, 261 N W 905, 63 S D 542

28. Iowa—Schuttloffel v Collins, 67 N W 397, 98 Iowa 576, 60 Am S R 216
29 C J p 836 note 21

29. S D—Smith v Hart, 207 N W 657, 49 S D 582, 46 A L R 811,

Voluntary surrender to assignee for creditors. Where a debtor makes an assignment for the benefit of creditors, reserving his homestead, and afterward agrees with his assignee and creditors to surrender his homestead for sale with the other land, in consideration of the payment to him of money in lieu of the homestead, the money thus paid to him is exempt as against any of the creditors who have consented to its payment to him in lieu of his homestead, and they cannot reach and subject it even after he has lent it out to another.[30] Where, at a sale of a homestead by an assignee for the benefit of creditors, the debtor announced that he relinquished his homestead, and purchased the land, and received a credit to the extent of the homestead exemption on his notes for the purchase money, it was held that he could not again claim a homestead when it was sought to collect the balance due on the notes.[31]

b. Proceeds Given to Wife

Where the proceeds of the sale or mortgage of a homestead are given to a wife, they have been held to be beyond the reach of the husband's creditors

It has been held that, where a homestead is sold, and the proceeds, whether money or property, are given or conveyed directly to the wife as her separate property and in consideration of her consent to the sale of the homestead, such proceeds are not liable to be reached by her husband's creditors,[32] and the same holding has been made as to money received by a wife as proceeds of a mortgage upon a homestead.[33]

§ 72. Exchange of Homestead

If the general requirements for homesteads are conformed to, a person exchanging his homestead for other realty acquires a homestead therein. Where there is no unreasonable delay in occupying the new property, the homestead exemption exists between the acquisition and the occupancy thereof.

Under the statutes of most jurisdictions, where an exchange of real estate is made, and either of the parties is entitled to a homestead in the property, the same right attaches immediately to the premises received in exchange,[34] up to the statutory limit.[35] Land acquired by exchange of homestead must be intended for a homestead,[36] and may consist of vacant land.[37] Where occupancy is necessary to the acquisition of a homestead, as considered supra § 33, the land acquired by exchange of a homestead must be subject to the same rules of occupancy which apply to the original homestead.[38]

A reasonable time must be allowed for the debtor to make the change from the old homestead to the new one,[39] and, where there is no unreasonable delay, the homestead exemption will exist during

followed in 207 N.W. 659, 49 S.D. 587

30. Ky.—Goodin v. Elizabethtown First Nat. Bank, 15 Ky.L. 208
29 C.J. p. 837 note 28

31. Ky.—Whitesides v. Cushenberry, 8 Ky.L. 590

32. Tex.—Blum v. Light, 16 S.W. 1090, 81 Tex. 414
29 C.J. p. 836 note 26

33. Kan.—Citizens' Bank v. Bowen, 25 Kan. 117

34. Iowa.—American Sav. Bank of Marengo v. Willenbrock, 228 N.W. 295, 299, 209 Iowa 250, citing **Corpus Juris**—Fardal v. Satre, 206 N.W. 22, 200 Iowa 1109
Neb.—Meyer v. Platt, 291 N.W. 86, 89, 137 Neb. 714, citing **Corpus Juris.**
Tex.—Skiles v. Shropshire, Civ.App., 50 S.W.2d 402, 404, quoting **Corpus Juris,** and modified on other grounds, 77 S.W.2d 872, 124 Tex. 462—Woods v. West, Civ.App., 21 S.W.2d 1090, reversed on other grounds, Com.App., 37 S.W.2d 129
29 C.J. p. 837 note 31
Change of homestead generally see supra § 50

Right can be asserted against purchaser with notice
Ga.—Amerson v. Cox, 160 S.E. 506, 173 Ga. 477.

Statute exempting proceeds of sale
(1) Statutes providing that the proceeds of the voluntary sale of a homestead shall be accorded the same protection as a homestead, or providing that such proceeds shall be protected for a stated period after the sale, have been held to apply where a homestead is exchanged for other property
Iowa.—Fardal v. Satre, 206 N.W. 22, 200 Iowa 1109
Neb.—Meyer v. Platt, 291 N.W. 86, 137 Neb. 714
Tex.—Witt v. Teat, Civ.App., 167 S.W. 302
Wash.—Vojta v. Buhre, 5 P.2d 500, 165 Wash. 384

(2) The statute exempting from liens for one year after their receipt proceeds from sale of property occupied as a homestead did not entitle plaintiff to homestead rights in property received in exchange for a homestead, as against creditors who obtained judgment more than a year after the exchange.—Rawlins v. Launer, 17 N.E.2d 330, 369 Ill. 494

Exchange for property to raise money
Where the debtor removes from the homestead upon other land which he intends buying, and exchanges the original homestead for a house and lot which he proposes to use in raising money to pay for the homestead, the latter house and lot are not exempt.—Whittenberg v. Lloyd, 19 Tex. 633

35. Ark.—Campbell v. Jones, 12 S.W. 1016, 52 Ark. 493, 6 L.R.A. 783
Neb.—Meyer v. Platt, 291 N.W. 86, 137 Neb. 714

Exemption up to value of old homestead
Iowa.—American Sav. Bank of Marengo v. Willenbrock, 228 N.W. 295, 209 Iowa 250

36. Tex.—Andrews v. Security Nat. Bank of Wichita Falls, 50 S.W.2d 253, 257, 121 Tex. 409, 83 A.L.R. 44, quoting **Corpus Juris.**
29 C.J. p. 837 note 36

37. Iowa.—Fardal v. Satre, 206 N.W. 22, 200 Iowa 1109
29 C.J. p. 842 note 92
Homestead in vacant land generally see supra § 63

38. Tex.—Andrews v. Security Nat. Bank of Wichita Falls, 50 S.W.2d 253, 257, 121 Tex. 409, 83 A.L.R. 44, quoting **Corpus Juris.**
29 C.J. p. 837 note 38

39. Tex.—Andrews v. Security Nat. Bank of Wichita Falls, supra, quoting **Corpus Juris.**
29 C.J. p. 838 note 39.

the time between the acquisition and the occupancy of the new homestead.[40] The death of the homesteader before carrying out his intention to occupy the new home does not prevent the homestead right from attaching.[41]

Successive exchanges. The owner of a homestead acquired by successive exchanges is entitled to the same homestead rights in the one so acquired that he had in the original one[42]

Exchange of homestead in different state. Land obtained by exchange of, or purchase with, the proceeds of a homestead in another state may be subject to the claims of creditors, although in the foreign state it was free from such claims under the homestead laws of that state[43]

Exchange of a homestead for personalty does not of itself entitle the debtor to claim the personalty as exempt, and it is exempt only if within the laws governing exemption of personalty[44]

§ 73. Proceeds of Involuntary Conversion

The general rule is that after an involuntary disposition of the homestead property the exemption continues in any surplus proceeds remaining after satisfaction of the claim or lien to satisfy which the disposition was compelled

Subject to certain limitations appearing infra § 75, the general rule is that after an involuntary disposition or conversion of the homestead property, that is, one forced on the owner by judicial action or legal process, the fund realized from the sale represents and stands in the place of the land,[45] and the exemption continues in any surplus proceeds remaining after the satisfaction of the claim or lien to satisfy which the disposition was compelled.[46] The debtor may assert this exemption right at any time before there is a final order disposing of such proceeds.[47]

§ 74. —— Proceeds of Insurance

The general rule is that funds realized from the insurance of homestead premises are themselves exempt.

While there is some authority to the contrary,[48] the view which has been said to be that of the great weight of authority[49] is that funds realized from the insurance of homestead premises are themselves exempt, as they do not represent a mere personal contract of indemnity, but the homestead itself, the money taking the place of the property destroyed,[50] except, it has been held, as against a creditor whose indebtedness is secured by a lien on the homestead[51] The majority view is based on the ground that the homestead statutes are to be liberally construed,[52] and that a different view

40. Tex —Andrews v Security Nat Bank of Wichita Falls, supra, quoting **Corpus Juris.**
29 C J p 838 note 40

41. Mo —Goode v Lewis, 24 S W 61, 118 Mo 357

42. Mo —Goode v Lewis supra—Creath v Dale, 84 Mo 349

43 Mo — Steele v Reid, 223 S W 881, 284 Mo 269
29 C J p 838 note 40½

44. Ariz —Mack v Boots, 239 P 794, 29 Ariz 116

45. Tenn —Hutcheson v Hutcheson, 143 S W 2d 886, 176 Tenn 468—White v Fulghum, 10 S W 501, 87 Tenn 281
29 C J p 838 note 43

46. Ky —First Nat Bank v Duncan, 276 S W 848, 210 Ky 777
Tenn —Timothy Dry Goods Co. v Hyde, 5 Tenn App 491
29 C J p 838 note 42
"The mere fact that the land has been [involuntarily] converted into money, and that money as such cannot be enjoyed as a homestead, cannot destroy the right of homestead after it has once attached to the land The fund realized from the sale of the land represents the land itself, and is subject to the same liens and rights"—White v Fulghum, 10 S W 501, 502, 87 Tenn 281

47. Ky —First Nat Bank v Duncan, 276 S W 848, 210 Ky 777

48. Miss —Smith v Ratcliff, 6 So 460, 66 Miss 683, 14 Am S R 606
29 C J p 838 note 44

49. Fla —Kohn v Coats, 138 So 760, 103 Fla 264

50. Ark —Franklin Fire Ins Co v Butts 42 S W 2d 559, 563, 184 Ark 263, citing **Corpus Juris.**
Fla - Kohn v Coats, 138 So 760, 103 Fla 264
La —Thompson-Ritchie & Co v Graves 120 So 631, 635, 167 La 1024 63 A L R 1283, citing **Corpus Juris.**
29 C J p 838 notes 46, 47

"Two of the outstanding cases on the subject are Chase v Swayne, 30 S W 1049, 88 Tex 218, 53 Am S R 742–751, and Ellis v Pratt City, 20 So 649, 111 Ala 629, 33 L R A 264, 56 Am S R 76"—Thompson-Ritchie & Co v Graves, 120 So 634, 635, 167 La 1024, 63 A L R 1283

Exemption for six months
Tex — Sorenson v City Nat Bank, 49 S W 2d 718, 121 Tex 478

Proceeds intended for investment in improvements for new homestead already paid for but of less value than old, held not subject to garnishment —Blakeslee v Paul, 238 N W 447, 212 Iowa 1385

Rights of husband and wife attach to claim for insurance of homestead —Hovle v Republic Ins Co, Tex Com App, 14 S W 2d 816, reversing Republic Ins Co v Hoyle, Civ App, 5 S W 2d 602.

51. Okl —Booker v First Nat Bank, 245 P 881, 117 Okl 179

Purchase-money mortgage
Under a statute providing that "no property exempted by the provisions of this section shall be exempt from execution for the recovery of the whole or any part of the purchase-money of the same property," insurance money on burned homestead property was held garnishable in action on mortgage note and for foreclosure where mortgage involved was purchase-money mortgage —Cavadini v Larson, 248 N W 209, 211 Wis 200

52. Ala —Ellis v Pratt City, 20 So 649, 111 Ala 629, 56 Am S R 76, 33 L R A 264
Ark —Franklin Fire Ins Co v Butts, 42 S W 2d 559, 184 Ark 263
La —Thompson-Ritchie & Co v Graves, 120 So 634, 635, 167 La. 1024, 63 A L R 1283, citing **Corpus Juris.**
Liberal construction generally see supra § 8
"To hold that creditors could seize the proceeds of the insurance policy would give them an advantage they

would pervert their object and spirit;[53] and, further, that the owner may rightfully insure the property to protect himself and his family from loss[54] The general rule has been said to apply whether or not there is a statute so providing,[55] and whether the property destroyed is personalty or realty[56]

An assignment of the policy for the purpose of collection and under an agreement that the assignee should apply part of the sum collected on a debt due from the insured does not destroy the exempt character of the balance[57] So, since insurance money received for the loss of a homestead is personalty, its transfer is not subject to the restrictions placed on the alienation of a homestead[58]

§ 75. —— Judicial and Execution Sales of Homestead

Generally a debtor may claim exemption in the surplus remaining after judicial or execution sale of the homestead for a debt as against which it is not exempt, but the rule is limited by some statutes, as by a provision limiting it to cases in which he intends to use the surplus in redeeming the homestead or in purchasing another.

Generally, where a homestead is sold at a judicial or execution sale for a debt as against which it is not exempt, and a surplus remains, the debtor may claim his homestead exemption in such surplus,[59] although under some provisions he may claim the exemption for a limited time only[60] Under some homestead laws the rule is limited to cases in which the debtor intends to use the surplus in redeeming the homestead or in purchasing another homestead,[61] and without such intention he is entitled only to the claim under the statute exempting personalty,[62] but it has been held that, if he claims the excess proceeds, the chancellor must award them to him and has no right to inquire of him whether it is his purpose to invest it in another homestead or not, and that thereafter if he deals with it so as to show an intention not to invest it the creditor may seize it[63]

The rule as to judicial sales above stated, with its limitations, has been applied to money paid by way of damages awarded in condemnation proceedings for a right of way over the homestead premises,[64] to the proceeds of a sale under foreclosure of a mortgage or deed of trust of the homestead premises,[65] and to the proceeds of a partition sale of the homestead premises[66] where, as considered infra § 88, a tenant in common is allowed to assert the right of exemption

§ 76. —— Judgment for Unlawful Sale, Trespass, or Injury

If a homestead is wrongfully taken from the owner by proceedings in invitum, or is impaired through another's wrongful act, a judgment recovered in an action

never contemplated [and] would deprive the insured of the means provided to take the place of and restore his homestead"—Kohn v Coats, 138 So 760, 761 103 Fla 264

53. Ala—Ellis v Piatt City 20 So 619 111 Ala 629, 56 Am S R 76 33 L R A 264
Ark—Franklin Fire Ins Co v Butts, 42 S W 2d 559, 184 Ark 263
Fla—Kohn v Coats, 138 So 760, 103 Fla 264

54. Ark—Franklin Fire Ins Co v Butts 42 S W 2d 559, 184 Ark 263
Fla—Kohn v Coats, 138 So 760 103 Fla 264
29 C J p 838 note 46 [a]

55. Fla—Kohn v Coats, supra

56. Fla—Kohn v Coats, supra

Value of furniture saved from fire cannot be deducted from homestead exemption in determining whether insurance due is sufficient to pay balance of homestead claim, since furniture "forms no part of the homestead"—Thompson-Ritchie & Co v Graves, 120 So 634 636, 167 La 1024, 63 A L R 1283

57. Tex—Jones v Whiteselle, Civ App, 29 S W 177.

58. Tex—Johnson v Hall, Civ App, 163 S.W. 399
Alienation of homestead see infra §§ 123–156

59. N C—Miller v Little, 194 S E 92, 212 N C 612
Tenn—White v Fulghum, 10 S W 501, 87 Tenn 281
29 C J p 838 note 50

Allowance out of proceeds of sale of husband's moiety

Where a husband and wife owned, as tenants in common, individual moieties in premises, and only the husband's moiety was sold at judicial sale the husband and wife continuing to occupy the premises as a homestead, neither could claim an allowance in lieu of homestead out of the proceeds of the sale—Schumacher v Ohio Savings & Trust Co, 169 N E 412, 121 Ohio St 446, affirming Ohio Savings & Trust Co v Schumacher, 172 N E 682, 36 Ohio App 65

60 Ill—Walsh v Horine, 36 Ill 238
29 C J p 838 note 51

61. Kan—Gilworth v Cody, 21 Kan 702
29 C J p 838 note 52

62. Mo—State v Hull, 74 S W 888, 99 Mo App 703
29 C J p 838 note 52

63. Ky—Schmidt v Oliges, 6 Ky L 297, 12 Ky Op 753

64. Iowa—Kaiser v Seaton, 17 N W 664 62 Iowa 463
29 C J p 839 note 57

65 N C—Miller v Little, 194 S E 92 212 N C 612
29 C J p 839 note 58

Mortgage containing waiver of homestead

(1) The text rule has been applied to a sale under a mortgage containing a waiver of homestead, such waiver applying only to secured debts—Whitfield v People's Union Bank & Trust Co, 73 S W 2d 690, 168 Tenn 24

(2) Mortgage waiving exemption generally see infra § 183

66. U S—In re Goetz, D C Ky, 28 F Supp 689
29 C J p 839 note 59

The purpose of the Kentucky statute "which authorizes sale of a debtor's indivisible homestead property where it is of greater value than $1,000 for the payment of his debts subject to the provision that one thousand dollars ($1 000) of the money arising from the sale shall be paid to the debtor is not to enhance or enrich the personal estate of the debtor, but by express provision is 'to enable him to purchase another homestead'"—In re Gibson, D C Ky., 33 F Supp 838, 840.

for the wrong, or the money collected thereunder, is exempt to the same extent as the homestead would have been.

If an exempt homestead is wrongfully sold or otherwise taken from the owner by proceedings in invitum, as on execution or attachment, or is lost to him or impaired through any other wrongful act of another, a judgment recovered by him in an action for the wrong, or the money collected under such judgment, is exempt to the same extent as the homestead itself would have been [67] Thus damages recovered for causing a fire upon the homestead are exempt,[68] as are damages or rents recovered against a trespasser on a homestead for unlawful seizure and detention thereof [69]

§ 77. Property Purchased with Proceeds of Sale

a In general
b Homestead sold in foreign state

a. In General

With some limitations, and subject to the usual requirements as to occupancy, the rule in several jurisdictions is that a homestead in which the proceeds of the sale of a former homestead are invested is exempt, as was the former To be exempt, the new tract must have been purchased within a reasonable time after the sale of the old one

In a number of jurisdictions the proceeds of the sale of a homestead may be reinvested in a new homestead, which thereupon becomes exempt, as was the former,[70] the purchase of the new homestead is regarded as merely the continuance of the old homestead and not the formation of a new one [71] This rule is subject to limitations appearing infra this section and §§ 97–115, and it has no application if in fact the first homestead had been abandoned before the purchase of the second [72] Where only a part of the proceeds is invested in a new homestead, it is pro tanto exempt [73]

Time for making reinvestment In order to preserve the homestead right in the land acquired with the proceeds of the old homestead, it is essential that the new tract should have been purchased within a reasonable time after the sale of the old homestead,[74] but a reasonable time must be allowed [75] What will be a reasonable time must, to a great extent, depend on the circumstances of the particular case [76]

Occupancy of new homestead Generally speaking, the same occupancy or intent to occupy the new homestead is necessary as in the case of the acquisition of the original homestead,[77] subject, of course, to the same limitations and exceptions, as

67. Fla —Hill v Marianna First Nat Bank, 84 So 190, 79 Fla 391
29 C J p 840 note 62

68 Iowa — Mudge v Lanning 27 N W 793, 68 Iowa 611

69 Tex —La Master v Dickson, 43 S W 911, 17 Tex Civ App 473
29 C J p 840 note 62 [c]

70. Cal —Conkley v Swim, 23 P 2d 518 218 Cal 340
Ky Clolinger v Callahan, 263 S W 700 204 Ky 33
Neb —Meyer v Platt, 291 N W 86, 137 Neb 711
Tex —Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253, 257 121 Tex 409, 83 A L R 11, citing **Corpus Juris**—Skiles v Shropshire, Civ App, 50 S W 2d 402, 404, quoting **Corpus Juris,** and modified on other grounds 77 S W 2d 872 124 Tex 462
Wis Kopf v Engelke, 1 N W 2d 760, 240 Wis 10, rehearing denied 2 N W 2d 846, 240 Wis 10
29 C J p 840 note 64
Change of homestead generally see supra § 50

Reason for rule

Creditors, having had no right to resort to the old homestead, cannot be injured by the exemption of the new one to the extent of the value of the old —Fardal v Satre, 206 N W 22, 200 Iowa 1109—29 C J p 840 note 64 [a]

The exact proceeds, or precise moneys, received from the sale need not be segregated and applied to the purchase of the new homestead —Harm v Hale, 221 N W 582 206 Iowa 920— White v Kinley 61 N W 176 92 Iowa 598 Benham v Chamberlain, 39 Iowa 358

Successive investments

This rule applies where successive investments are made, the property in each case being used as a homestead and being paid for out of the proceeds of the prior sale
Iowa — American Nat Bank of Alamosa, Colo v Wetherell, 200 N W 221 198 Iowa 618
Ky —Robinson v Burnett, 192 S W 871 174 Ky 766

Filing of declaration and deed

(1) Where the exemption does not attach until a declaration of homestead is filed the new residence purchased with proceeds from the sale of the old is not protected until such filing
Cal - Eby v Foster 61 Cal 282
Idaho —Wright v Westheimer, 28 P 130 2 Idaho, Hasb, 232, 35 Am S R 269

(2) The delivery of the deed to the new homestead and the filing thereof for record, together with the declaration of homestead constitute one transaction and the moment the title to the premises vests the homestead right attaches, and the premises are not subject to the lien of existing judgment - Eby v Foster, supra

(3) Filing of declaration generally see supra § 46

71. Tex —Skiles v Shropshire, Civ App 50 S W 2d 402 404 quoting **Corpus Juris,** and modified on other grounds 77 S W 2d 872, 124 Tex 462
29 C J p 840 note 65

72 Ky —Louisville Tobacco Warehouse Co v Calvert, 293 S W 567, 180 Ky 718

73 Mo —Rose v Smith, 66 S.W 910, 167 Mo 81

74 U S —In re Gibson, D C Ky, 33 F Supp 838
Iowa —Blakeslee v Paul, 238 N W 417, 212 Iowa 1385—Fardal v Satre, 206 N W 22 200 Iowa 1109
29 C J p 841 note 78

75. Mo —Goode v Lewis, 24 S W 61, 118 Mo 357
29 C J p 841 note 79

76 Iowa —Fardal v Satre, 206 N W 22, 200 Iowa 1109
Mo -Goode v Lewis, 24 S W 61, 118 Mo 357

77. Iowa —Blue v Heilprin 75 N W 642 105 Iowa 608
29 C J p 841 note 87
Mere intent to occupy see supra § 31
Necessity of occupancy see supra § 33.

claimed,[4] and the extent or duration thereof,[5] are not material, and that any estate or interest in land coupled with the requisite occupancy is sufficient to support a homestead exemption [6]

While ordinarily it is essential that there be at least a sufficient right to justify occupancy,[7] a perfect and complete legal title is not necessary [8] Mere permissive residence in the family of a landowner will not give rise to homestead rights in the premises, however long such residence continues,[9] but a head of a family has been held entitled to a homestead exemption even though he resides in a house, and on land, owned by his parent [10]

A homestead right has been said to be founded on ownership of some assignable interest in the land,[11] but according to other authority it is not necessary that the debtor's interest shall be an assignable one[12] or one subject to registration [13]

Title in husband or wife Under some constitutional or statutory provisions, a homestead is reserved for the benefit of the family whether the title to the property is in the husband or the wife [14] Homestead in property of which husband and wife are joint owners is considered infra § 88, a husband's or a wife's right to homestead in a wife's separate property infra § 90, and homestead in community property infra § 92

Subsequent acquisition of outstanding title Where a debtor has sufficient interest in land to support a homestead exemption, the fact that he subsequently acquires an outstanding title in the same property will not in any way affect his right of exemption [15]

b. Property Held in Trust

One who holds a mere naked legal title in land in trust for another has no interest therein in which a homestead right will attach A cestui que trust who occupies his property may have a homestead therein.

A person who holds a mere naked legal title in land in trust for another has no interest therein in which the right to a homestead will attach,[16] es-

4. Ala—Booker v Booker, 125 So 212, 220 Ala 367
Ky—Howard v Mitchell 105 S W 2d 128, 268 Ky 429
N D—First Nat Bank v Zook, 196 N W 507, 50 N D 423
29 C J p 843 note 21 [a] (3)

5. Okl—Hein v Wahl, 40 P 2d 683, 684, 170 Okl 402, quoting **Corpus Juris.**
29 C J p 842 note 6

6 Ala—Murphy v Vaughan, 147 So 404, 226 Ala 461—Booker v Booker, 125 So 212, 220 Ala 367
Neb—Fisher v Kellogg, 258 N W 404, 128 Neb 248
Okl—Mercer v McKeel, 108 P 2d 138, 188 Okl 280 Lehman v Tucker, 55 P 2d 62, 176 Okl 286
Tex—Evans v Galbraith-Foxworth Lumber Co, Civ App, 51 S W 2d 831, error dismissed—Grimes v Cline, Civ App 300 S W 235
Utah—Panagopulos v Manning, 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 156 93 Utah 215
"It is hard to conceive of an interest that is not subject"—Howard v Mitchell, 105 S W 2d 128, 134, 268 Ky 429

7. Iowa—Rutledge v Wright, 171 N W 28, 186 Iowa 777
Occupancy and contract to purchase see infra § 81
Possessory interest see infra § 80

8. Iowa—Lennert v Cross, 241 N W 787, 215 Iowa 551, rehearing denied and opinion supplemented 244 N W 693, 215 Iowa 551
Okl—Hein v Wahl 40 P 2d 683 685, 170 Okl 402, quoting **Corpus Juris.**
29 C J p 842 note 4

Entire estate; beneficial interest
"It is not necessary that the entire estate be vested in one occupying land as a homestead before such property may be impressed as homestead in character The homestead exemption under the Constitution applies to the beneficial interest owned by the head of the family"—Morgan v Bailey 105 So 143, 90 Fla 47

Defective deed
A husband and wife occupying land purchased at guardian's sale may assert their homestead rights in such land as against creditors and all other persons except owners of superior title notwithstanding guardian's deed is so defective that it may be set aside in timely action by the ward—Mercer v McKeel 108 P 2d 138 188 Okl 280
Equitable estates and interests see infra § 81

9 Neb—Howard v Raymers 89 N W 1004, 61 Neb 213
Tenancy at will or by sufferance see infra § 86

10. S C—Kaminski Hardware Co v Holden Trunk & Bag Co 147 S E 871 150 S C 244
Head of family as entitled to homestead generally see supra § 24

11. Miss—Clark v Edwards, 177 So 361, 180 Miss 97—Jones v Lamensdorf, 167 So 624 175 Miss 565—Berry v Dobson, 10 So 45, 68 Miss 483

12. Tex—Lewis v Lindsley, Civ App, 68 S W 2d 548, reversed on other grounds Lindsley v Lewis 84 S W 2d 994, 125 Tex 630
29 C J p 842 note 9
Contra Ellis v Bingham, Tex Civ App, 150 S W 602

13. Tex—Lewis v Lindsley, Civ App, 68 S W 2d 548, reversed on other grounds Lindsley v Lewis, 84 S W 2d 994, 125 Tex 630

14. Okl—Mitchell v Quinton, 116 P 2d 995, 189 Okl 329- Oklahoma State Bank v Van Hassel, 114 P 2d 912, 189 Okl 48—Lehman v Tucker 55 P 2d 62, 176 Okl 286—McMullen v Cullis, 271 P 665 133 Okl 204—Gooch v Gooch, 133 P 242, 38 Okl 300, 47 L R A,N S, 480
Tex—Crowder v Union Nat Bank of Houston 261 S W 375, 114 Tex 34, answering certified questions, Civ App, 264 S W 791—Person v Levenson Civ App, 143 S W 2d 419—Logan v Aiken, Civ App, 123 S W 2d 401, error dismissed judgment correct—Gillespie v Gillespie, Civ App, 110 S W 2d 89, error dismissed
29 C J p 824 note 12, p 853 notes 53 [c], [d], 67 [a], [c]

Wife may obtain homestead in husband's separate property
Cal—Magneson v Pacific Mfg Co, 116 P 69, 26 Cal App 52
Tex—Logan v Aiken, Civ App, 123 S W 2d 401, error dismissed, judgment correct—Medearis v Buratti, Civ App 275 S W 617

15. Cal Spencer v Geissman, 37 Cal 96, 99 Am D 248
Minn—Kaser v Haas, 7 N W 824, 27 Minn 406

16. Cal—Oree v Gage, 175 P 799, 38 Cal App 212
29 C J p 854 note 84

A wife can acquire no homestead interest in property held by her husband, equitable title to which is in another—First State Bank of Ellinger v Zelesky, Tex Civ App., 262 S W. 190.

pecially where the cestui que trust is in the actual possession thereof[17] The rule applies with the same force and effect to resulting trusts as to express trusts,[18] to trusts which have all the qualities and effects of a resulting trust proper,[19] and to constructive trusts[20] Nevertheless, a trustee having not only actual possession of land which was subject to a trust but a beneficial interest therein is entitled to protect not only that interest but any other interest which he may have in the land as against creditors, by impressing the entire parcel with a homestead declaration[21] Inasmuch as an equitable title to property may be sufficient basis for a homestead right, see infra § 81, a cestui que trust who occupies his property is entitled to a homestead therein[22]

c. Property Acquired by Gift, Descent, or Devise

The homestead exemption may be claimed in land acquired by gift A provision for homestead in land "owned" and occupied by the debtor applies to land acquired by descent or devise

The homestead exemption may be claimed by a debtor in land acquired by gift, and occupied by him as a home, to the same extent as though he had acquired the land by purchase[23]

The effect of a particular statute may be to extend a homestead exemption only to lands acquired by deed and not to lands acquired by will or by descent cast,[24] but where the constitution or statute is general, and exempts land "owned" and occupied by the debtor, it is clear that the exemption may be claimed in land acquired by descent or devise,[25] and a devisee's vested interest in land devised has been held an estate within a statute providing for a homestead for the owner of a fee or less estate[26]

The manner of acquiring property as affecting the right to a homestead is considered generally supra § 55.

d. Property Acquired by Adverse Possession

One who has acquired title to property by adverse possession may have a homestead therein.

Where title to property has been acquired by adverse possession, the owner is entitled to a homestead in the property the same as though title had been acquired by deed,[27] but no homestead rights can attach to property which has not been adversely held for the statutory period, in a jurisdiction where mere possession gives no right of homestead[28]

e. Property in Hands of Receiver or Agent Appointed by Court

A debtor cannot claim a homestead exemption in property which has passed to a receiver or to a trustee appointed to recover and administer property fraudulently conveyed by the debtor

It has been held that, after property has passed to a duly qualified receiver[29] or a trustee appointed to recover and administer property fraudulently conveyed by the debtor,[30] the debtor cannot claim a homestead exemption in the premises, especially where he has not legal, actual, or constructive possession of the premises,[31] and even though he may still occupy the premises as a tenant of the receiver[32]

§ 79. —— Estate Subject to Sale on Execution

Under some authorities a homestead exemption may be claimed in any estate or interest which would be lia-

17. Kan—Osborn v Strachan, 3 P 767, 32 Kan 52

18. Mo—Evans v Morris, 136 S W 408 234 Mo 177
29 C J p 854 note 86

19. Tenn—Preston v Moore, 180 S W 320, 133 Tenn 247, L R A 1916C 578
29 C J p 854 note 87

20 Tex—First State Bank of Ellinger v Zelesky, Civ App, 262 S W 190

21. Cal—Furman v Brewer, 177 P 495, 38 Cal App 687

22 Minn—Jelinek v Stepan, 43 N W 90, 41 Minn 412

23. Ky—Holcomb v Hood, 1 S W 401, 12 Ky L 240, 8 Ky L 255
Mich—Holliday v Mathewson, 109 N W 669, 146 Mich 336

Parol gift

(1) "A homestead interest cannot be claimed under parol gift unless the facts exist which would vest title in the donee"—Webb v City of Fort Worth Tex Civ App, 23 S W 2d 791, 793, error dismissed

(2) "A conveyance by parol gift accompanied or followed by occupancy coupled with valuable improvements on the part of the grantee is as valid as any other"—Tucker v Dodson, Tex Civ App, 245 S W 728 730

(3) Debtor acquired homestead exemption on land occupied as home under father's parol gift with reservation of "rent," notwithstanding father retained legal title until his death—Lennert v Cross, 241 N W 787, 215 Iowa 551, rehearing denied and opinion supplemented 244 N W 693, 215 Iowa 551

24. In Missouri this was the case prior to the amendment of the Homestead Act in 1887, Acts 1887 p 197—Schneiderheinze v Berg, 190 S W 593, 269 Mo 263—29 C J p 824 note 25, p 855 note 93

25. Ark—Robson v Hough, 20 S. W 523, 56 Ark 621
29 C J p 855 note 91

26. Ala—Murphy v Vaughan, 147 So 404, 226 Ala 461

27. Tex—Bridges v Johnson, 7 S. W 506, 69 Tex 714

28. Ill—Jones v Jones, 72 N E 695, 213 Ill 228
Possessory interest see infra § 80

29. Ark—Murphy v Booker, 214 S. W 63 139 Ark 469

30. Ohio—Stafford v Smith, 11 Ohio Dec (Reprint) 884, 30 Cinc L Bul. 288

31. Ohio—Stafford v Smith, supra.
Possessory interest see infra § 80

32. Ark—Murphy v Booker, 214 S. W 63, 139 Ark 469.
29 C J p 855 note 2.

ble to seizure and sale on execution for the payment of debts, or in any realty that could be seized under an execution.

According to some authorities, a homestead exemption may be claimed in any interest which the debtor may have and which would be liable to seizure and sale on execution for the payment of debts if the property were not occupied as a homestead,[33] but, as will appear infra § 80, in some jurisdictions mere naked possession is sufficient. It has also been held that the homestead right may attach to any real property, susceptible of present occupation, that could be seized under an execution.[34]

§ 80. —— Possessory Interest

A claim of homestead exemption must be supported by some possessory interest in the land; there must be at least a present right of possession or occupancy In some jurisdictions mere naked possession of the premises occupied as a home is sufficient, while in others mere occupancy is insufficient.

To entitle a debtor to a homestead exemption he must have some possessory interest in the land claimed,[35] there must be at least a present right of possession[36] or occupancy,[37] and an exclusive possessory right has been required[38] Occupancy of premises by a debtor, although he claims them as a homestead, will give him no rights as against either the holder of a paramount title or one who would otherwise be entitled to possession,[39] thus an intruder or trespasser has no such right[40] No case, it is said, has gone to the extent of holding that a homestead right can attach even inchoately to premises in which the occupant neither owned nor claimed to own any right or interest[41]

Sufficiency of mere possession. In some jurisdictions the necessary possessory interest may consist in mere naked possession of the premises by the debtor occupying it as his home, without title or other interest,[42] at least as against all but the true owner[43] In other jurisdictions mere occupancy is insufficient as a possessory interest on which to base a claim of homestead exemption, even against creditors[44] Thus it has been held that an owner of land who conveys it but remains in possession can claim a homestead therein,[45] while other authorities hold the contrary[46]

33. Wyo—Altman v Schuneman, 273 P 173, 39 Wyo 414.
29 C J p 843 notes 13, 15

34. Ky—Howard v. Mitchell, 105 S W 2d 128, 268 Ky 429

35. Cal—Snyder v Pine Grove Lumber Co, 105 P 2d 369, 40 Cal App 2d 660.
Tex—Johnson v Prosper State Bank, Civ App, 125 S W 2d 707, affirmed 138 S W 2d 1117, 134 Tex 677—Greenawalt v Cunningham, Civ. App, 107 S W 2d 1099.
29 C J p 843 note 16

"Any possessory interest . . . coupled with the requisite occupancy by the husband and his family, is sufficient to support a homestead claim"—First Nat Bank v Dismukes, Tex Civ App, 241 S W. 199, 200

Constructive possession of claimant with title is sufficient—Panagopulos v Manning, 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215

36. Neb—Fisher v Kellogg, 258 N. W 404, 128 Neb 248
Tex—Gulf Production Co v Continental Oil Co, Civ App, 61 S W 2d 185, affirmed 164 S W 2d 488, 139 Tex 183
29 C J p 843 note 16.
Future or contingent estates see infra § 82

Possessory right under United States homestead laws held sufficient—First Nat Bank v. Zook, 196 N W 507, 50 N D 423

Business homestead
Possessory right to support claim of business homestead held sufficiently shown—Cooper Co v Werner, Tex Civ App, 111 S W 2d 823

37. Ala—Murphy v Vaughan, 147 So 404, 226 Ala 461
Ark—Field v Tyner, 261 S W. 35, 163 Ark 373
Neb—Fisher v Kellogg, 258 N W 404, 128 Neb 248
Tex—Rettig v Houston West End Realty Co, Com App, 254 S W 765—Johnson v Prosper State Bank, Civ App, 125 S W 2d 707, affirmed 138 S W 2d 1117, 134 Tex 677—Greenawalt v Cunningham, Civ App, 107 S W 2d 1099
29 C J p 843 note 16
Temporary obstacle in way of occupancy see supra § 33

An owner who leases the premises without reserving the right of present occupancy can have no homestead therein, although he lives thereon with the lessee as a member of the lessee's family—In re Fish's Estate, 253 N W 387, 214 Wis 464

Occupation under oral agreement between all parties in interest held sufficient—Riggs v First Nat Bank, Tex Civ App, 24 S W 2d 454

38. Ark—Keesee v Bushart, 158 S W 2d 915, 203 Ark 668

39. Tex—Cleveland v Milner, Com App, 170 S W 2d 172, reversing, Civ App, 166 S W 2d 351
Wis—In re Fish's Estate, 253 N W 387, 214 Wis 464
29 C J p 843 note 18

40. Miss—King v Sturges, 56 Miss 606.

41 Ala—Winston v Hodges, 15 So 528, 102 Ala 304

42. U S—In re Wineland, D C Okl, 3 F Supp 796, stating Oklahoma law
Tex—First Nat Bank v Jones, Civ App, 59 S W 2d 1103
29 C J p 843 note 21
"It is immaterial in whom the bare legal title is vested so long as it is the actual home of the family"—Altman v Schuneman, 273 P 173, 175, 39 Wyo 414

Reasons for rule
(1) "A right of sufficient value to be coveted by creditors is of value to the debtor sufficient to be protected"—Panagopulos v Manning, 69 P 2d 614, 619, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215
(2) Other reasons see 29 C J p 843 note 21 [a]

43. Okl—Zahr v May, 169 P 1077 67 Okl 97, L R A 1916C 431
Utah—Panagopulos v Manning, 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215

44. Ill—Kitterline v Milwaukee Mechanic's Mut Ins Co, 25 N E 772, 134 Ill 647, 10 L R A 220
Mich—Rentchler v Lawton, 71 N. W 330, 113 Mich 11
29 C J p 843 note 22

45. Ga—Pendleton v Hooper, 13 S E 313, 87 Ga 108, 27 Am S R 227

46. N H—Gerrish v Hill, 19 A. 1001, 66 N H 171
29 C J p 843 note 22 [a]

§ 81. —— Equitable Estates and Interests

a. In general
b. Mortgaged premises; equity of redemption
c. Land held under contract of purchase

a. In General

The general rule is that any equitable ownership or title, together with the requisite occupancy, is sufficient basis for a homestead exemption.

With a few exceptions which will appear in this section, it has been uniformly held that any equitable ownership or title, together with possession and occupancy as a home, is sufficient basis for a homestead exemption.[47]

Possession as notice When an equitable owner of land is in actual possession thereof as his homestead, all persons are chargeable with notice of his homestead interest.[48]

Title taken in another's name. In a jurisdiction in which mere occupancy is insufficient to support a claim of homestead exemption, see supra § 80, and in which there is a statute declaring that, where one person pays the consideration for land, and the land is conveyed to another, no trust results in favor of the former because of his payment of the consideration, no homestead can be claimed by a person who pays the consideration for land and takes the title in another's name, although he occupies the land as a homestead, since he has no interest therein, legal or equitable.[49] The contrary has been held, however, in the absence of such a statute, on the ground that the person paying the consideration has such an equitable interest as will support a homestead.[50]

b. Mortgaged Premises; Equity of Redemption

A homestead may be allotted in mortgaged premises; and the owner of an equity of redemption in property mortgaged or conveyed by deed of trust is entitled to a homestead therein.

A homestead may be allotted in mortgaged premises.[51] The owner of an equity of redemption in property mortgaged or conveyed by deed of trust is entitled to a homestead therein,[52] even though the mortgage contains a release of homestead rights.[53]

c. Land Held under Contract of Purchase

The general rule is that one who occupies land under an executory contract to purchase is entitled to a homestead exemption therein, except as against his liability for the unpaid purchase money, but the rule is subject to qualifications, as where the contract provides that he shall not have possession until the price has been paid.

Subject to qualifications which will appear in this subdivision of this section, the general rule is that one who occupies land under an executory contract to purchase is entitled to a homestead exemption therein[54] except as against his liability under

47. Ala—Murphy v Vaughan, 147 So 404, 226 Ala 461
Ark—Watson v Poindexter, 5 S W 2d 299, 176 Ark 1065
Iowa—Kleinsorge v Clark, 4 N W 2d 433—Clark v Chapman, 239 N W 797, 213 Iowa 737
Kan—Southern v Linville, 33 P 2d 123, 139 Kan 850
Neb—Fisher v Kellogg, 258 N W 401, 128 Neb 248
N D—Burks v Globe International Protective Bureau, 218 N W 864, 56 N D 613
Okl—Mercer v McKeel, 108 P 2d 138, 188 Okl 280—Hoyt v First Nat Bank, 77 P 2d 538, 182 Okl 350
Or—Marvin & Co v Plaza, 276 P 680 682, 129 Or 128, citing **Corpus Juris.**
Tex—Hughes v Groshart, Civ App, 150 S W 2d 827—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—Thurman v First State Bank of Carbon, Civ App, 300 S W 123, 127, citing **Corpus Juris,** and reversed on other grounds First State Bank of Carbon v Thurman, Com App, 12 S W 2d 146
29 C J p 844 note 24
Dictum Altman v Schuneman, 273 P 173, 175, 39 Wyo. 414, citing **Corpus Juris.**

"The well-nigh universal holding is that an equitable title is sufficient to support a homestead"—Radford v Kachman, 160 N E 875, 877 27 Ohio App 86, not following Robinett v Doyle, 2 Ohio Dec (Reprint) 391, 2 West L Month 585

48. Kan—Tucker v Vandermark, 21 Kan 263—Moore v Reaves, 15 Kan 150

49. Minn—Sumner v Sawtelle, 8 Minn 309
29 C J p 845 note 51
Property held in trust see supra § 78

50. Ala—Reeves v. Peterman, 19 So 512, 109 Ala 366
29 C J p 846 note 52.

51. Ala—Murphy v Vaughan, 147 So 404, 226 Ala 461—Booker v. Booker, 125 So 212, 220 Ala 367
Kan—Blitz v Metzger, 241 P 259, 119 Kan 760, rehearing denied 245 P 161, 120 Kan 555.
N C—Cleve v Adams, 22 S E 2d 567, 222 N C 211.
Exemption in surplus proceeds of foreclosure sale see supra § 75

52. Ala—Howell v. Ward, 161 So 487, 230 Ala 379
N C—Miller v Little, 194 S E 92, 212 N C 612—Crow v Morgan, 185 S E 668 210 N C 153—Farris v Hendricks, 146 S E 77, 196 N C 439—Cheek v Walden, 143 S E 465, 195 N C 752
29 C J p 844 note 27

53. Mo—Elstroth v Young, 83 Mo App 253
N H—Fellows v Dow, 58 N H 21

54. U S—Le Blanc v Watson, C C A La, 13 F 2d 76, certiorari denied Watson v Le Blanc, 47 S Ct 113, 273 U S 724, 71 L Ed 860, construing Louisiana statutes
Ark—Watson v Poindexter, 5 S W 2d 299, 176 Ark 1065
Iowa—Brunsdon v Brunsdon, 200 N W 823, 199 Iowa 1099
Kan—Southern v Linville, 33 P 2d 123, 139 Kan 850
Mich—Klement v Lefkowitz, 259 N W 871, 271 Mich 79—Ter Keurst v Zinkewicz, 235 N W 191, 253 Mich 383
Ohio—Radford v. Kachman, 160 N E. 875, 27 Ohio App 86
Contra Robinett v Doyle, 2 Ohio Dec (Reprint) 391, 2 Cinc L Bul 585
Tex—Hughes v Groshart, Civ App, 150 S W 2d 827—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed
Wash—Swanson v Anderson, 38 P.

contract for the unpaid purchase money,[55] and the fact that a lien is retained for all of the purchase money, instead of a part only, does not alter the legal status of the purchaser or defeat his homestead rights.[56] In order that a case may come within this rule there must be a contract by which the premises are sold, and not merely preliminary negotiations or agreements looking to a contract of sale to be entered into at some future time.[57]

Oral contracts. In the application of the general rule it makes no difference whether the contract of sale is in writing, as required by the statute of frauds, or oral, if the price has been partly paid and possession has been given thereunder, for in such a case a court of equity would decree specific performance by the vendor,[58] but, where the contract rests wholly in parol and the purchaser has done nothing to remove it from the operation of the statute of frauds,[59] as where he has failed to pay the consideration, take possession, or make valuable improvements,[60] it has been held that he has no title to sustain a claim of homestead.

Right to possession. If, under a contract for the purchase of land, the purchaser is not entitled to possession until the price has been paid, his right of homestead will not ordinarily attach until such payment,[61] but the provision as to possession may be waived.[62]

Purchase of public lands. The general rule applies to public lands occupied as a homestead under a contract to purchase them from the state,[63] the fact that the purchase has not been completed and the fee still remains in the state does not prevent a claim of homestead therein.[64]

Forfeiture or abandonment of contract. The homestead right is lost with the loss of the rights of the purchaser under his contract for the purchase of land.[65] It may be lost by a forfeiture of the vendee's rights under the contract of purchase and ejectment for failure to make the several payments stipulated in the agreement,[66] or where the contract not only has not been complied with, but has been abandoned.[67]

Payment of price by creditor. Where a person occupying land under a bond for a deed or a contract of purchase claims a homestead therein as against a levying creditor, his right will not be defeated by the fact that the creditor has paid the obligor the balance due from the obligee on the price fixed in the bond.[68]

§ 82. —— Future or Contingent Estates

The general rule is that a future estate, whether vested or contingent, will not support a claim of homestead exemption during the continuance of the prior estate

While it has been held that one having a vested remainder in fee in land may claim a homestead therein,[69] by the great weight of authority[70] a future estate, whether vested or contingent, will not support a claim of homestead exemption during the continuance of the prior estate,[71] there being no

2d 1064, 1065, 180 Wash 284, quoting **Corpus Juris**—Perkins v La Varne, 17 P 2d 857, 171 Wash 210—Desmond v Shotwell 252 P 692, 142 Wash 187, citing **Corpus Juris**
29 C J p 844 notes 30 [b], 31
Time of acquisition of homestead see supra § 49

Assignees of contract

Tex —Standard Lumber & Mfg Co v Looper, Civ App, 4 S W 2d 180

Where the purchaser resold his equity to the vendor and occupied the land as a tenant at will, he was not entitled to claim a homestead in the land, although he married before the last payment on the repurchase was made to him —Bolen v Bolen, 87 So 797, 205 Ala 114

55. Ill —Rewerts v Johnson, 113 N E 137, 311 Ill 594
Iowa —Utley v Boone 299 N W 137 140 230 Iowa 979, citing **Corpus Juris.**
Tex —Laubhan v Alliance Life Ins Co, Civ App, 134 S W 2d 788
Wash —Swanson v Anderson, 38 P 2d 1064, 180 Wash 284
29 C J p 844 note 31
Debts or obligations for purchase money generally see infra §§ 100–104

56. Tex —Johnson v Smith, Civ App, 234 S W 939

57. Mich —Rentchler v Lawton, 71 N W 330 113 Mich 11

58. N D - Helgebye v Dammen, 100 N W 215 13 N D 167
29 C J p 845 note 36

59. Tex —Doak v Casner, Civ App, 101 S W 2d 1033, error refused

60. Tex —Doak v Casner supra—Page v Vaughan, Civ App, 173 S W 541

61. Iowa —Johnson County Sav Bank v Carroll, 78 N W 247

62. Iowa —Johnson County Sav Bank v Carroll, supra

63 Mich —Allen v Cadwell, 20 N W 692, 55 Mich 8
29 C J p 845 note 42

64. Mo - State v Diveling, 66 Mo 375
29 C J p 845 notes 42, 43

65. Iowa —Utley v Boone, 299 N W 137, 140, 230 Iowa 979, citing **Corpus Juris.**
O'kl —Montgomery v Wise, 62 P 2d 647, 179 Okl 247
Wash —Swanson v Anderson, 38 P 2d 1064 1065 180 Wash 284, quoting **Corpus Juris.**
29 C J p 845 note 14

66. Wash —Swanson v Anderson, supra, quoting **Corpus Juris.**
29 C J p 845 note 45

67. Okl —Montgomery v Wise, 62 P 2d 647, 179 Okl 247
Wash —Swanson v Anderson, 38 P 2d 1064, 1065 180 Wash 284, quoting **Corpus Juris.**
29 C J p 845 note 46

68. Iowa —American Sav Bank of Marengo v Willenbrock, 228 N W 295, 299, 209 Iowa 250, citing **Corpus Juris.**
29 C J p 845 note 47

69. Okl —Lehman v Tucker, 55 P 2d 62 176 Okl 286
29 C J p 846 note 53

70. Neb —Fisher v Kellogg, 258 N W 404, 128 Neb 248

71. U S —Shambaugh v Scofield, C C A Tex, 132 F 2d 345, stating Texas law
Ark —Jones v Thompson, 166 S W 2d 1036—Keesee v Bushart, 158 S W 2d 915, 203 Ark 668—Smith v Watkins, 62 S W 2d 41, 187 Ark.

sufficient right of present occupancy or possession.[72] The rule applies even though the owner of the remainder or reversionary right is permitted to live on the premises with the holder of the prior estate,[73] or is in possession, with such holder, by virtue of his ownership in fee of a portion of the premises, undivided,[74] but a remainderman having exclusive possession and occupancy under a lease from the life tenant has been held entitled to claim a homestead.[75] When the particular estate is determined, and the remainderman is entitled to immediate possession, he may claim his homestead in the premises, if his contingent interest has not been sold in the meantime by his creditors.[76]

§ 83. —— Property Held by Different Titles

The fact that various portions of the premises are held under different titles will not prevent acquisition of a homestead in the entire tract.

The circumstance that various portions of the premises are held under different titles will not prevent the acquisition of a homestead in the entire tract.[77] Hence, if a part of the land is owned in fee and another part is held under a lease,[78] if part is owned in fee and part is held under contract of purchase,[79] if part is owned by the husband and the rest by his wife, see infra § 91, or if the equitable interest is in the husband and the wife holds the legal title, see infra § 90, the exemption may attach to the entire tract.

§ 84. —— Life Estates

The right of homestead attaches to property in which claimant has a life estate.

The right of homestead attaches to property in which claimant has a life estate,[80] whether for his own life or that of another,[81] and the right of a debtor to a homestead in land in which he has such an estate terminates only when his estate determines.[82] Consequently, a surviving husband may exempt his estate by curtesy,[83] and a widow her dower,[84] even before it has been assigned to her.[85] Where a husband devised his homestead, not exceeding the statutory limitation as to value, to his

852—Field v Tyner, 261 S W 35, 163 Ark 373
Iowa—Solnar v Solnar, 216 N W 288, 290, 205 Iowa 701, citing **Corpus Juris.**
Kan—Caple v Warburton 264 P 47, 49, 125 Kan 290, quoting **Corpus Juris.**
Neb—Fisher v Kellogg, 258 N W 404, 406, 128 Neb 248 citing **Corpus Juris.**
Tex—Rettig v Houston West End Realty Co, Com App, 254 S W 765, affirming Rettig v West End Realty Co, Civ App, 241 S W 614—Greenawalt v Cunningham, Civ App, 107 S W 2d 1099—Gulf Production Co v Continental Oil Co, Civ App, 61 S W 2d 185, affirmed 164 S W 2d 488, 139 Tex 183—Turner v Miller, Civ App, 255 S W 237
Wis—Qualley v Zimmerman, 285 N W 735, 231 Wis 341
29 C J p 846 note 54

Effect of preparation to occupy

"Future estates . . . whether vested or contingent, will not support a claim of homestead, irrespective of intention and preparation of one out of possession to occupy the land when and if the right of possession and occupancy become a reality"—Johnson v Prosper State Bank, Civ App, 125 S W 2d 707, 709, affirmed 138 S W 2d 1117, 134 Tex 677

72. U S—Shambaugh v Scofield, C C A Tex, 132 F 2d 345, stating Texas law
Ark—Keesee v Bushart, 158 S W 2d 915, 203 Ark 668—Smith v Watkins, 62 S W 2d 41, 187 Ark 852—Field v Tyner, 261 S W. 35, 163 Ark 373.
Kan—Caple v Warburton, 264 P 47, 125 Kan 290
Neb—Fisher v Kellogg, 258 N W 404, 128 Neb 248
Tex—Johnson v Prosper State Bank, Civ App, 125 S W 2d 707, affirmed 138 S W 2d 1117, 134 Tex 677—Greenawalt v Cunningham, Civ App, 107 S W 2d 1099—Gulf Production Co v Continental Oil Co, Civ App, 61 S W 2d 185 affirmed 164 S W 2d 488, 139 Tex 183—Turner v Miller, Civ App, 255 S W 237
Wis—Qualley v Zimmerman, 285 N W 735, 231 Wis 341
29 C J p 846 note 54
Requirement of possessory interest generally see supra § 80

73. Ark—Jones v Thompson, 166 S W 2d 1036—Keesee v Bushart, 158 S W 2d 915, 203 Ark 668—Smith v Watkins, 62 S W 2d 41, 187 Ark 852
Iowa—Solnar v Solnar, 216 N W 288, 205 Iowa 701
Kan—Caple v Warburton, 264 P 47, 125 Kan 290
Neb—Fisher v Kellogg, 258 N W 404, 128 Neb 248
Wis—Qualley v Zimmerman, 285 N W 735, 231 Wis 341
29 C J p 846 note 55
Separate homesteads in same tract see supra § 14

74. Tex—Turner v Miller, Civ App, 255 S W 237

75. Utah—Panagopulos v Manning, 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 456, 93 Utah 215
Homestead in leasehold estates generally see infra § 85

76 Tex—Greenawalt v Cunningham Civ App, 107 S W 2d 1099
29 C J p 846 note 56

77. Cal—Bell v Wilson, 155 P 625, 172 Cal 123
29 C J p 846 note 57

78. Ala—Bailey v D R Dunlap Mercantile Co, 35 So 451, 138 Ala 415—Tyler v Jewett, 2 So 905, 82 Ala 93

79. Ill—Kilmer v Garlick, 56 N E 1103, 185 Ill 406

80. Ala—Murphy v Vaughan, 147 So 404, 226 Ala 461
Cal—Arighi v Rule & Sons, 107 P 2d 970, 41 Cal App 2d 852
Ky—Wilson v Devasher, 261 S W 1057, 204 Ky 408
Okl—Mercer v McKeel, 108 P 2d 138, 188 Okl 280
Or—In re Banfield's Estate, 296 P 1066, 137 Or 167, modified on other grounds 298 P 905, 137 Or 167
Tex—Turner v Miller, Civ App, 255 S W 237
29 C J p 846 note 62

81. Ill—Deere v Chapman, 25 Ill 610, 79 Am D 350

82. Ill—Kitterlin v Milwaukee Mechanic's Mut Ins Co, 25 N E 772, 131 Ill 647, 10 L R A 220
Kan—Goodman v Malcolm, 48 P 439, 5 Kan App 285
Loss or relinquishment of right in general see infra §§ 157–162

83. U S—In re Kaufmann, D C Wis, 142 F 898
29 C J p 846 note 63

84. Ky—Wilson v Devasher, 264 S. W 1057, 204 Ky 408

85. Mo—Murdock v. Dalby, 13 Mo App 41.

wife for life, with a remainder to his son, it was held that the widow was entitled to claim the homestead free from liability for any of her debts [86]

§ 85. —— Leasehold Estates

The general rule is that a homestead right may attach to property held under a leasehold, or to rented premises.

The general rule is that a homestead right may attach to property held under a leasehold, or to rented premises [87] However, it has been said that a tenant's homestead right in the premises he occupies cannot, of necessity, be absolute,[88] or as broad as that of the owner of a fee title;[89] and it does not survive the termination of the leasehold estate [90] The homestead right has been held to be no defense whatever in an action by the lessor to recover the premises,[91] but other authority holds that this is true only after the term expires, and not before [92]

Occupancy by both lessor and lessee. Since, as appears supra § 14, there cannot be two separate homesteads in the same land at the same time, a lessee of land, although he may live on it with his family, has no homestead exemption therein where the lessor also occupies the land under a reservation of a right of occupancy in the lease, and resides thereon with his family as his homestead.[93]

Stipulation against use as residence Where, under a lease stipulating against occupation of the premises as a residence, the lessee actually occupies and uses the premises for residence purposes, it has been both asserted[94] and denied[95] that he can acquire homestead rights in the premises.

§ 86. —— Tenants at Will or by Sufferance

Authorities differ as to whether a tenant at will or by sufferance is entitled to homestead exemption

A tenant at will of land containing a dwelling is, under some authorities, entitled to the homestead exemption,[96] but other authorities are op-

86. Ky —Pendergest v Heekin, 22 S W 605, 94 Ky 384, 15 Ky L 180

87. U S —In re Wineland, D C Okl, 3 F Supp 796, stating Oklahoma law
Ala —Murphy v Vaughan, 147 So 404, 226 Ala 461—J A Sloan & Co v Fields, 127 So 816, 221 Ala 54
Iowa —Kramer v Hofmann, 257 N W 361 218 Iowa 1269
La —Milliken & Farwell v. Rivet, 6 La App 457
Okl —Mercer v McKeel, 108 P 2d 138, 188 Okl 280
Tex —Davis v Lund, Com App, 41 S W 2d 57, reversing, Civ App, 26 S W 2d 434—Beckner v Barrett, Civ App, 81 S W 2d 719, error dismissed—Sterling Nat Bank & Trust Co of New York v Ellis, Civ App, 75 S W 2d 716, error dismissed—Weiser v. Travis Cotton Seed Products Co, Civ App, 63 S W 2d 216, error refused—Evans v Galbraith-Foxworth Lumber Co, Civ App, 51 S W 2d 831, error dismissed—Wingart v Baxter, Civ App, 30 S W 2d 522, error refused—Webb v City of Fort Worth, Civ App, 23 S W 2d 791, 792, error refused, citing **Corpus Juris**—Young v Hollingsworth Civ App, 16 S W 2d 844, error refused—Grimes v Cline, Civ App, 300 S W 235—Collett v Brokaw, Civ App, 296 S W 333, reversed on other grounds Brokaw v Collett, Com App, 1 S W 2d 1090—Medearis v Buratti, Civ App 275 S W 617—Cry v J W Bass Hardware, Civ App, 273 S W 347—Stephens v Cox, Civ App, 255 S W 241, rehearing denied 256 S W 643—McCullough Hardware Co v Coll, Civ App, 155 S W 718
Utah —Panagopulos v Manning, 69 P 2d 614, 93 Utah 198, rehearing denied 72 P 2d 156, 93 Utah 215
29 C J p 847 note 69

Rule under express statutory provision
Ill —Wike v Garner, 53 N E 613, 179 Ill 257, 70 Am S R 102
29 C J p 847 note 68

Requirement of "estate"
"In order for a leasehold interest in realty to form the basis of a homestead right, it must amount to an estate in the premises."—Ellis v Bingham, Tex Civ App, 150 S W 602, 603

Business homestead
(1) A business homestead may be had in rented premises
U S —In re Simpson, D C Tex, 299 F 866
Tex —First Nat Bank v Dismukes, Civ App, 241 S W 199
(2) Business homestead generally see supra § 40

Length of term is immaterial —First Nat Bank v Dismukes, supra

Well-considered case
Okl —Miller v Farmers' State Bank of Temple, 279 P 351, 353, 137 Okl 183, citing **Corpus Juris.**

88. Tex —Stephens v Cox, Civ App, 256 S W 643, denying rehearing 255 S W 241

89. Tex —Stephens v Cox, supra

Dependence on contract
"The tenant's homestead rights are both created by and limited by his contract. They expire when his term expires, and are lost when he breaches his contract and becomes subject to eviction They necessarily depend upon the terms of the contract itself."—Stephens v Cox, supra.

90. Okl —Miller v Farmers' State Bank of Temple, 279 P 351, 353, 137 Okl 183, quoting **Corpus Juris.**
Tex —Stephens v Cox, Tex Civ App, 256 S W 643, denying rehearing 255 S W 241
29 C J p 847 note 72
Loss or relinquishment of right in general see infra §§ 157–162

91. N C —Abbott v. Cromartie, 72 N C 292, 21 Am R 457

92. Ill —Kuttner v Haines, 35 Ill App 307, affirmed 25 N E 752, 135 Ill 382, 25 Am S R 370
Iowa —Wright v Flattrich, 281 N. W 221, 225 Iowa 750

93 Kan —Hay v Whitney, 51 P 896, 897
29 C J p 847 note 73

94. Minn —In re Emerson, 60 N W 23, 58 Minn 450
29 C J p 847 note 74

95. Wis —Green v Pierce, 19 N W 427, 60 Wis 372
29 C J p 847 note 75

96. Miss —Jones v Lamensdorf, 167 So 624, 175 Miss 565—King v Sturges 56 Miss 606
Okl —Mercer v McKeel, 108 P 2d 138, 188 Okl 280
Tex —Lewis v Lindsley, Civ App, 68 S W 2d 548, reversed on other grounds Lindsley v Lewis, 84 S W 2d 994, 125 Tex 630—Evans v Galbraith-Foxworth Lumber Co, Civ App, 51 S W 2d 831, error dismissed—Young v Hollingsworth, Civ App, 16 S W 2d 844, error refused—Grimes v Cline, Civ App, 300 S W 235—Birdwell v. Burleson, 72 S W 446, 31 Tex Civ App 81.
Contra Webb v City of Fort Worth, Tex Civ App, 23 S W 2d 791, error

posed.[97] Similarly it has been both held[98] and denied[99] that a tenant by sufferance has such interest as will support a claim of homestead exemption.

§ 87. —— Croppers

One occupying land as a mere cropper has no such interest in the land or the ungathered crop as will entitle him to a homestead

One occupying land as a mere cropper has no such interest in the land as will entitle him to a homestead therein,[1] nor can he claim the ungathered crop as exempt to him as being on his homestead,[2] but, where one occupies as a tenant, his right to homestead is not affected by the fact that the rental is to take the form of a portion of the crop.[3]

§ 88. —— Property Held in Joint Tenancy or by Tenants in Common

Under the great weight of authority, there may be a homestead right in property held jointly or in common, or in an undivided interest in property, with the qualification that one joint tenant or tenant in common cannot acquire such a homestead right as will prejudice his cotenant's rights or interests.

There is a conflict of authority as to the existence of homestead rights in property held jointly or in common, or in an undivided interest in property.[4] On the theory that homestead laws are to be liberally construed,[5] and that, as so construed, their policy is to protect the debtor and his family in their possession of a home, irrespective of the character or extent of the estate owned by the debtor,[6] provided he is not a mere intruder,[7] one view is that such an owner, on satisfying requirements as to occupancy and use of the property, may acquire a homestead in the premises.[8] This

dismissed—Hampton v Gilliland, 56 S W 572, 23 Tex Civ App 87
Croppers see infra § 87

Tenancy from month to month

U S —In re Wineland, D C Okl, 3 F Supp 796, construing Oklahoma law

Question considered but not decided

Tex —Cleveland v Milner, Com App, 170 S W 2d 472, reversing Civ App, 166 S W 2d 351

97. Ill —Jones v Jones, 72 N E 695, 213 Ill 228
29 C J p 847 note 77
Dictum Thurston v Maddocks, 6 Allen, Mass, 427

98 Okl —Mercer v McKeel, 108 P 2d 138, 188 Okl 280
Tex —Lewis v Lindsley Civ App, 68 S W 2d 548, reversed on other grounds Lindsley v Lewis, 84 S W 2d 991, 125 Tex 630—Birdwell v Burleson, 72 S W. 446, 31 Tex Civ App 31

99. Iowa —Solnar v Solnar, 216 N W 288, 205 Iowa 701
29 C J p 848 note 78

1. Tex —Ellis v Bingham, Civ App, 150 S W 602
29 C J p 848 note 79

2. Tex —Watson v Schultz, Civ App, 208 S W 958

3. Tex —Cry v J W Bass Hardware, Civ App, 273 S W 347
Homestead in leasehold estates generally see supra § 85

4 Ky —Hensley v Lovely, 64 S W 2d 157, 250 Ky 832, citing **Corpus Juris.**
Joint occupancy see supra § 38
Partnership property see infra § 89

5. U S.—In re Sterling, D C Cal, 20 F Supp 924
Cal —In re Kachigian's Estate, 128 P 2d 865, 20 Cal 2d 787, prior opinion, App, 121 P 2d 869
Ohio —New Martinsville Grocery Co v Hannibal Store Co, 29 N E 2d 226, 65 Ohio App 50
Okl —Hein v Wahl, 40 P 2d 683, 170 Okl 402—Baker v Grayson, 207 P 301, 86 Okl 159.
29 C J p 848 note 85
Liberal construction generally see supra § 8

6. U S —In re Sterling, D C Cal, 20 F Supp 924, 926, citing **Corpus Juris.**
Or —Marvin & Co v Piazza, 276 P. 680, 681, 129 Or 128, citing **Corpus Juris.**
"A homestead may be fixed in lands held in cotenancy because justice and reason will not countenance the deprivation of that interest which a party has on the ground that he has not the whole"—Atkins v Schmid, Tex Civ App, 129 S W 2d 412, 414—Tucker v Dodson, Tex Civ App, 245 S W 728, 730
Ownership, estate, or interest in property generally see supra § 78

7. Or —Marvin & Co v Piazza, 276 P 680, 681, 129 Or 128, citing **Corpus Juris**
Necessity of possessory interest see supra § 80

8. Ala —Alabama Power Co v Cornelius, 100 So 207, 211 Ala 245
Alaska —Wendler v Brenneman, 7 Alaska 13
Iowa —Kramer v Hofmann, 257 N W 361, 218 Iowa 1269—Arispe Bank v Werner, 207 N W 578, 201 Iowa 484
Ky —Hensley v Lovely, 64 S W 2d 157, 250 Ky 832
Mich —Fitzsimons v Kane, 222 N W 111, 245 Mich. 246
Mont —Wall v. Duggan, 245 P 953, 954, 76 Mont 239, citing **Corpus Juris.**
Neb —Connor v McDonald, 233 N W. 894, 120 Neb 503
N D —Procfrock v American Nat Bank of St Paul, Minn, 258 N W 482, 65 N D 308
Ohio —Schumacher v Ohio Savings & Trust Co, 169 N E 442, 121 Ohio St 446 affirming Ohio Savings & Trust Co v Schumacher, 172 N E 682, 36 Ohio App 65 - New Martinsville Grocery Co v Hannibal Store Co, 29 N E 2d 226, 65 Ohio App 50
Okl - Lehman v Tucker 55 P 2d 62, 176 Okl 286—Hein v Wahl 40 P 2d 683 170 Okl 402—Cooper v Long 220 P 610, 93 Okl 249—Baker v Grayson, 207 P 301 86 Okl 159
Or —Marvin & Co v Piazza, 276 P 680, 681, 129 Or 128, citing **Corpus Juris.**
Tex —Sayers v Pyland 161 S W 2d 769, 139 Tex 57, 140 A L R 1164, reversing Pyland v Sayers, Civ App, 148 S W 2d 450 - W R Thompson & Sons Lumber Co v Clifton, 124 S W 2d 106, 132 Tex 366, affirming Clifton v W R Thompson & Sons Lumber Co, Civ App, 100 S W 2d 392—Rettig v Houston West End Realty Co, Com App, 254 S W 765—Hughes v Groshart, Civ App, 150 S W 2d 827 —J R Watkins Co v Dawson, Civ App, 145 S W 2d 901—Sipe v Sayer, Civ App, 140 S W 2d 297, 1112- Stevenson v Wilson, Civ App, 130 S W 2d 317, error refused—Atkins v Schmid Civ App, 129 S W 2d 412—Cooper Co v Werner, Civ App, 111 S W 2d 823 —Dillard v Duke, Civ App 107 S W 2d 414—Adams v Security Finance Corporation, Civ App 77 S W 2d 770—Weiser v Travis Cotton

rule has been said to be in force in the majority of the jurisdictions[9] and to be supported by the great[10] or overwhelming[11] weight of authority and the more recent authorities.[12] Exclusive possession of the premises by claimant is not required for its application.[13] It is held especially applicable where the tenants in common or joint owners are husband and wife,[14] in which case they have been extended by statute to a tenant in common having a homestead on the land with the consent, express or implied, of his cotenant.—Bartle v Bartle, 112 N.W. 471, 132 Wis. 392—Zimmer v Pauley, 8 N.W. 219, 51 Wis. 282

(2) The cotenant's acquisition under such circumstances as raise a presumption of consent is sufficient, proof of consent directly given, orally or in writing, is unnecessary.—Bartle v Bartle, supra

(3) Husband and wife contracting to purchase land became joint tenants and could select homestead from such land.—Eaton Center Co-op Cheese Co. v Heintz, 244 N.W. 620, 209 Wis. 170

(4) Earlier cases denying homestead right see 29 C.J. p. 850 note 3

Seed Products Co., Civ.App., 63 S.W.2d 246, error refused—Hamm v Brown & Horn, Civ.App., 29 S.W.2d 431—Riggs v First Nat. Bank, Civ.App., 24 S.W.2d 454—Johnson v Echols, Civ.App., 21 S.W.2d 382, error refused—Young v Hollingsworth, Civ.App., 16 S.W.2d 844, error refused—Nance v Rucker, Civ.App., 294 S.W. 294—Kerens Nat. Bank v Stockton, Civ.App., 281 S.W. 580, reversed on other grounds 40 S.W.2d 7, 120 Tex. 546, 77 A.L.R. 362—Boone v McBee, Civ.App., 280 S.W. 295—Medearis v Buratti, Civ.App., 275 S.W. 617—Gordon-Sewall & Co. v Walker, Civ.App., 258 S.W. 233—Tucker v. Dodson, Civ.App., 245 S.W. 728

Wyo.—State Bank of Wheatland v Bagley Bros., 11 P.2d 572, 44 Wyo. 241, rehearing denied 13 P.2d 564, 44 Wyo. 456

29 C.J. p. 848 note 85

Necessity of actual occupancy see supra § 33

Possessory interest see supra § 80

Contribution by moieties; indivisible right of occupancy

"A homestead may exist in lands held by joint tenants or by tenants in common. Each moiety must contribute to the homestead and the right of occupancy is indivisible."—Johnson v Muntz, 4 N.E.2d 826, 828, 364 Ill. 482

That claimants hold in cotenancy with a stranger is not a valid objection to a claim of homestead.—In re Petersen's Estate, 93 P.2d 445, 97 Utah 324

Consent of cotenant

(1) "A tenant in common occupying with the consent of his cotenant is entitled to [homestead] exemption. McGrath v Sinclair, 55 Miss. 89."—Jones v Lamensdorf, 167 So. 624, 626, 175 Miss. 565

(2) "The consent of the cotenants to the occupancy of the homestead claimed is not essential to the successful maintenance of the homestead exemption in a contest with creditors of the homestead exemptionist."—Lewis v White, 13 So. 349, 350, 69 Miss. 352, 30 Am.S.R. 557, explaining McGrath v Sinclair, 55 Miss. 89

Payment or receipt of rent

(1) The tenant in common's paying rent on the portion he occupies and receiving his pro-rata share of the rent on all the common property is immaterial."—Hein v Wahl, 40 P.2d 683, 684, 170 Okl. 402

(2) One who is owner, subject to mortgage executed by him, of undivided one-half interest in real property the whole of which he occupies as residence, is not precluded from claiming as against creditors homestead right therein by paying rent to his cotenant.—Blitz v Metzger, 241 P. 259, 119 Kan. 760, rehearing denied 245 P. 161, 120 Kan. 555

Effect of administration of estate

"An heir in possession of real estate, in which he owns an undivided interest may assert that the same constitutes his homestead even though the estate of the person from whom he inherited is in the process of administration."—Davis v Morgan, 95 P.2d 856, 858, 186 Okl. 30

In California

(1) "Prior to 1929 it was well settled in California that, with certain exceptions where the owners were husband and wife, land owned by persons as tenants in common or joint tenants could not be subject to a homestead."—In re Kachigian's Estate, 128 P.2d 865, 866, 20 Cal.2d 787, prior opinion, App., 121 P.2d 869.—29 C.J. p. 850 notes 3, 5-8, 11 [a]

(2) This rule was changed by the 1929 amendment of § 1238 of the Civil Code. St.1929, p. 339, providing that "property, within the meaning of this section [providing as to the property from which homestead may be selected] includes any freehold title interest, or estate which vests in the claimant the immediate right of possession, even though such right of possession is not exclusive."

U.S.—In re Miller, D.C.Cal., 27 F.Supp. 999—In re Sterling, D.C.Cal., 20 F.Supp. 924

Cal.—In re Kachigian's Estate, supra—Watson v Peyton, 73 P.2d 906, 10 Cal.2d 156

(3) Prior to the amendment, a husband could not select a homestead out of property held by him and his wife as joint tenants, unless the wife joined in executing the declaration.—In re Gordon's Estate, D.C.Cal., 44 F.2d 810, explained in In re Sterling, supra.—29 C.J. p. 850 note 11 [a] (3)

(4) California decisions and legislation summarized

U.S.—In re Sterling, supra

Cal.—In re Kachigian's Estate, 128 P.2d 865, 20 Cal.2d 787, prior opinion, App., 121 P.2d 869

(5) Whether debtor and wife were joint tenants or tenants in common held immaterial respecting their right to declare homestead.—Lucci v United Credit & Collection Co., 31 P.2d 369, 220 Cal. 492

In Wisconsin

(1) The homestead exemption has

9. Kan.—Nelson v Stocking, 121 P.2d 215, 154 Kan. 675

10. Ohio—Ohio Savings & Trust Co. v Schumacher, 172 N.E. 682, 36 Ohio App. 65, affirmed Schumacher v Ohio Savings & Trust Co., 169 N.E. 442, 121 Ohio St. 446

Or.—Marvin & Co. v Piazza, 276 P. 680, 129 Or. 128

11. Mont.—Wall v Duggan, 215 P. 953, 76 Mont. 239

12. Ohio.—Ohio Savings & Trust Co. v Schumacher, 172 N.E. 682, 36 Ohio App. 65, affirmed Schumacher v Ohio Savings & Trust Co., 169 N.E. 442, 121 Ohio St. 446

13. Ark.—Robson v Hough, 20 S.W. 523, 56 Ark. 621

29 C.J. p. 849 note 90

California statute

'Since the 1929 amendment to § 1238 of the California Civil Code, the 'property' from which a husband could select a homestead has been that estate' which vests in the claimant the immediate right of possession, even though such right of possession is not exclusive. Watson v Peyton, 10 Cal.2d 156, 73 P.2d 906."—In re Miller, D.C.Cal., 27 F.Supp. 999, 1001

14. Ky.—Hensley v Lovely, 64 S.W. 2d 157, 250 Ky. 832

Ohio.—Schumacher v Ohio Savings & Trust Co., 169 N.E. 442, 121 Ohio St. 446, quoting **Corpus Juris**, and affirming judgment Ohio Savings & Trust Co. v Schumacher, 172 N.E. 682, 36 Ohio App. 65—New Martinsville Grocery Co. v Hannibal Store Co., 29 N.E.2d 226, 65 Ohio App. 50

Okl.—Mitchell v. Quinton, 116 P.2d

been said to be jointly seized of an estate of homestead in the land,[15] but the latter proposition has been questioned [16]

The rule is subject to the qualification that one tenant in common or joint tenant cannot acquire rights superior to those of the other owners,[17] and cannot obtain such homestead right or interest as will prejudice or interfere with the rights or interests of his cotenant or any person rightfully claiming under the latter,[18] such as the right to partition[19] or an accounting [20] Thus it is held that one joint owner of property cannot claim a homestead as against the other joint owners, but may against creditors,[21] and that one tenant in common cannot, as against his cotenant, establish a homestead on the whole property, but can only establish a homestead as to creditors on his separable interest or title [22]

Claim by both tenants Two joint owners of a tract of land, upon which both live with their families, are each entitled to a homestead,[23] even before any partition has been made [24]

Property exceeding statutory limit. It has been held that a homestead right will not attach to an undivided interest in a tract of land which, as a whole, exceeds the homestead limit in acreage,[25] or in both acreage and value where there has been no separation of the undivided interest,[26] and that, where the value of the property exceeds the statutory limit of value, each tenant in common can claim only his fractional interest in the maximum, and not the full exemption [27] In some states, where a tenant in common is entitled to a homestead, and the entire property exceeds in quantity the statutory limit as to the number of acres, his right of homestead extends to an undivided interest of the statutory number of acres out of the interest owned [28] In other states it is held that if the entire property exceeds the number of acres allowed by statute as exempt, the debtor can claim as exempt only land occupied by him not exceeding the number of acres and value fixed by the statutes, to be allowed to him just as though he owned the

995 189 Okl 329—Cooper v Long 220 P 610 93 Okl 239
29 C J p 848 note 86
Community property see infra § 92

Estate by entireties

(1) There may be a homestead in which husband and wife have an estate by the entireties—Coleman v Williams, 200 So 207 146 Fla 45—Harkins v Holt, 169 So 481, 124 Fla 771—Oates v New York Life Ins Co, 152 So 671, 113 Fla 678, 116 Fla 253

(2) Such homestead is subject to the wife's right of survivorship in the estate—Coleman v Williams, supra

(3) "In the property of the husband not held as husband and wife by entireties with the right of survivorship the husband cannot, under Consol St § 1667 [providing as to alimony without divorce], claim homestead exemptions"—Holton v Holton 119 S E 751, 753, 186 N C 355

Character of ownership

Where property claimed as homestead is held by husband and wife as joint tenants, intention and acts of parties at time of taking conveyance of the property should determine character of ownership thereof in determining validity of homestead declaration, rather than subsequent declarations of one of the parties—In re Jarrell, D C Cal, 34 F 2d 970

15. Ill—Hitchcock v Hitchcock, 26 N E 2d 108, 373 Ill 352, certiorari denied 61 S Ct 22, 311 U S 651, 85 L Ed 417
29 C J p 849 note 87.

16 Ill—Johnson v Muntz, 4 N E 2d 826 364 Ill 482

17. Tex—Savers v Pyland, 161 S W 2d 769, 139 Tex 57 140 A L R 1164, reversing, Civ App, Pyland v Savers 148 S W 2d 450
29 C J p 849 note 93 [b]

18 Okl—Cooper v Long, 220 P 610 612, 93 Okl 239, quoting **Corpus Juris.**
Tex—Savers v Pyland 161 S W 2d 769, 773, 139 Tex 57 140 A L R 1164, citing **Corpus Juris,** and reversing Pyland v Savers, Civ App, 148 S W 2d 450—Rettig v Houston West End Realty Co, Com App 251 S W 765—J R Watkins Co v Dawson Civ App, 145 S W 2d 901—Atkins v Schmid, Civ App 129 S W 2d 412 - Medearis v Buratti, Civ App, 275 S W 617—Tucker v Dodson, Civ App, 245 S W 728
29 C J p 849 note 93

Setting aside improvements

"Any cotenant may build and establish his homestead upon the common property, and his homestead rights in such improvements will be protected even to the extent of setting aside the ground upon which they are placed, if it can be done without injury or detriment to the interests of his cotenants"—Gose v Burnett, Tex Civ App, 60 S W 2d 886, 887, error refused

19. S C—Peets v Wright 109 S E 649, 117 S C 409 following Tedder v Tedder, 104 S E 318, 115 S C 91
Tex Cooper Co v Werner, Civ App, 111 S W 2d 823
Partition of homestead property between cotenants see the C J S title Partition § 33, also 29 C J p 849 notes 94-97

In Georgia, debtor cannot have his undivided one-third interest in tract of land set apart as exemption under pony homestead law without obtaining partition—Tattnall Bank v Powell, 183 S E 562, 181 Ga 562

20. S C—Peets v Wright 109 S E 649, 117 S C 409, following Tedder v Tedder, 104 S E 318, 115 S C 91

21 Kan—Blitz v Metzger, 241 P 259 119 Kan 760 rehearing denied 245 P 161, 120 Kan 555

22. Kan—Banner v Welch, 225 P 98 115 Kan 868

23. Alaska—Wendler v Brenneman 7 Alaska 13
Ky—Meguiar v Burr 81 Ky 32, 4 Ky L 659

24. Alaska—Wendler v Brenneman 7 Alaska 13
Ky—Meguiar v Burr, 81 Ky 32, 4 Ky L 659

25. Mont—McCarthy v Kelley, 206 P 782 63 Mont 233

26 Mich—Hooper v McAllister, 73 N W 133, 115 Mich 174

27. Ala—Alabama Power Co v Cornelius, 100 So 207, 211 Ala 245

28. Kan—Nelson v Stocking, 121 P 2d 215, 216, 154 Kan 676, quoting **Corpus Juris.**
N D—Proefrock v American Nat Bank of St Paul, Minn 258 N W 482, 65 N D 308
Tex—Gordon-Sewall & Co v Walker, Civ App, 258 S W 233.
29 C J p 849 note 98.

entire tract,[29] and the fact that the value of his interest in the statutory acreage constituting the homestead happens to be less than the statutory limit of value does not entitle him to an exemption in the remainder of the estate.[30]

View that homestead cannot be acquired In some jurisdictions, on the theory that the exemption contemplated is of property to which the debtor has an exclusive right, and which could be set off to him by ascertained boundaries, it has been held that, except in particular instances named in a statute or constitution,[31] a cotenant, or holder of an undivided interest, has no right to homestead in property held jointly or in common.[32] It has been held that this is so even in case of a tenant holding and claiming the entire estate, or a tenant in exclusive possession without objection by his cotenant,[33] or although the tenants in common are husband and wife.[34]

§ 89. —— Partnership Property

a In general
b Individual property or homestead of partner

a. In General

In jurisdictions not allowing a homestead in property held by tenants in common or joint tenants, there is no homestead right in partnership property. Where a homestead is allowed in property so held, a partner may, in general, claim a homestead in partnership property, but this privilege is frequently made subject to the consent of his copartners, especially where the firm is indebted, and some courts do not permit such a claim as against creditors even with such consent.

As partners own the partnership property in common, see the C.J.S. title Partnership § 72, also 47 C.J. p. 758 notes 73, 74, it is clear that in jurisdictions in which homestead rights may be acquired in property held by tenants in common or joint tenants, as discussed supra § 88, a partner may claim a homestead in partnership property,[35] with limitations to be stated in this section, but he cannot assert his right of homestead in the entire property owned by the firm, as against his copartners or creditors of the firm, his right being limited to his interest.[36] In those jurisdictions in which a homestead cannot be claimed in property owned by tenants in common or joint tenants, a homestead cannot be claimed in partnership property,[37] and the same holding has been based on the ground that the partners do not hold as common or joint tenants.[38]

Where partnership property is withdrawn from the partnership assets and the partners become owners as tenants in common only, their right to claim a homestead is governed by the rule relating to tenants in common, and not by that relating to partners.[39]

If partnership property is conveyed to the partners individually, each may acquire a right of homestead in the property conveyed to him, for it is no longer partnership property.[40]

Consent of copartners In a jurisdiction in which homestead rights may be acquired in property held by tenants in common, a homestead right can be claimed in partnership property if the partners consent.[41] A member of a firm which is indebted cannot acquire a right of homestead exemption in partnership property without the consent of his copartner,[42] express or implied,[43] especially after the property has been seized or assigned to satisfy firm debts.[44] Some courts hold that a partner, at

29. Miss.—Kimbrough v. Powell, 108 So. 498, 143 Miss. 498
29 C.J. p. 849 note 99

30. Miss.—Kimbrough v. Powell, 108 So. 498, 143 Miss. 498

31. La.—Roque v. Henry, App., 189 So. 358

32. La.—Roque v. Henry, supra
Tenn.—Savage v. Savage, 4 Tenn. App. 277
29 C.J. p. 850 note 3

Property held half in full ownership and half in usufruct is not held in undivided ownership rule that homestead cannot be predicated on property held in indivision.—Doucet v. Pontchot, 178 So. 655, 165 La. 458, certiorari denied 59 S.Ct. 28, 278 U.S. 561, 73 L.Ed. 506.

33. Tenn.—Simmons v. Leopard, 36 S.W. 816.

34. Tenn.—Keller v. Keller, 221 S.W. 189, 142 Tenn. 514.

35. Tex.—Cooper Co. v. Werner, Civ. App., 111 S.W.2d 823—Inman v. Inman, Civ. App., 80 S.W.2d 1103—Egan v. American State Bank, Civ. App., 67 S.W.2d 1081, error refused.

"Interest in undivided partnership property" may constitute homestead.—In re Deidwiler & Fortson, D.C. Ga., 293 F. 762, 763, stating Georgia law.

Claim as against debt to copartner
A partner is entitled to an exemption in the partnership property on a settlement of the partnership as against a debt due from him individually to his copartner.—Evans v. Bryan, 95 N.C. 171, 59 Am.R. 233.

36. Tex.—Smith v. Chenault, 46 Tex. 155
29 C.J. p. 852 note 45

37. Miss.—Holmes v. Winchester, 138 Miss. 542
29 C.J. p. 850 note 11

38. Mich.—Michigan Trust Co. v. Chapin, 61 N.W. 334, 106 Mich. 384, 58 Am.S.R. 490

39. Mont.—Lindley v. Davis, 11 P. 717, 7 Mont. 206
29 C.J. p. 851 note 12

40. Cal.—Bishop v. Hubbard, 23 Cal. 514, 83 Am.D. 132

41. Wyo.—State Bank of Wheatland v. Bigley Bros., 11 P.2d 572, 586, 44 Wyo. 244, citing **Corpus Juris**, and rehearing denied 13 P.2d 564, 44 Wyo. 456

42. Tex.—Egan v. American State Bank, Civ. App., 67 S.W.2d 1081, error refused
29 C.J. p. 850 note 18

43. Tex.—Egan v. American State Bank, supra

44. Ark.—Richardson v. Adler, 46 Ark. 13
29 C.J. p. 851 note 19.

least before dissolution of the firm, cannot claim a homestead exemption in the partnership property, as against partnership creditors, even with the consent of his copartners,[45] although he may make such a claim after the partnership debts have been paid,[46] but others hold that a homestead exemption may be allowed to members of a firm as against partnership creditors if all the copartners consent or if they do not object[47]

Where consent of a copartner has been given, it may be withdrawn at any time before the homestead is claimed or allotted[48]

Solvent firms, business homestead In Texas a member of a solvent partnership may designate his interest in partnership realty as part of his homestead,[49] more precisely, if a firm is solvent when one of the members files a designation of the firm real estate as a homestead, and is solvent also on final settlement of the firm's affairs, such partner may have a homestead,[50] subject only to equitable partition between the partners[51]

The rule in Texas that a partner may claim a homestead in the partnership property applies to the business homestead allowed by the laws of that state,[52] especially if, at the time the property becomes a business homestead, the partnership is solvent[53]

Dissolution of partnership It has been held that after the division of partnership property the individual owners may claim a homestead exemption out of such property, even though the firm was insolvent when the division was made and the purpose of the dissolution was to enable the former partners to exempt the property from partnership debts[54] So, where the members of a firm, acting in good faith, dissolve the partnership, and one member sells his interest in the partnership property to the other, the latter will not be deprived of the right to hold such property exempt as a homestead from the payment of a debt thereafter asserted against him, on the ground that such debt was a partnership debt at the time of the dissolution,[55] even though the partners knew the firm to be insolvent at the time of such dissolution[56]

b. Individual Property or Homestead of Partner

A partner's individual homestead cannot be subjected to the firm's debts or his indebtedness to the firm or copartners, nor is his exemption affected by occupation of his homestead for use in the firm's business

A partner's individual homestead, acquired during the existence of the partnership, cannot be subjected either to the partnership debts or to his indebtedness to the partnership or to his copartners[57] Occupation of a homestead, owned by one of the partners in a firm, for use in the partnership business, not being inconsistent with use as homestead, will not affect the homestead exemption attached to the property before such use[58]

Partnership property in name of partner If property, the title to which has been taken in the name of one of the partners individually, is in fact partnership property, the partner having title cannot claim a homestead therein[59]

Erection of house with partnership funds It has been held that, if a member of a firm uses partnership funds in erecting a house upon his separate property, the house becomes a part of the land itself, the firm having merely the right to reimbursement, so that if he occupies the premises as a home he may claim a homestead exemption therein,[60] but there is also authority to a different effect[61]

§ 90. —— Property in Which Wife Has Title or Wife's Separate Estate

a Husband's right to homestead
b Wife's right to homestead

45 Miss —Hamilton v Halpin 8 So 739, 68 Miss 99
29 C J p 851 note 20

46. S C —Ex parte Karish 11 S E 298, 32 S C 437, 17 Am S R 865

47 Mont —Ferguson v Speith, 34 P 1020, 13 Mont 487, 40 Am S R 459
29 C J p 851 note 21

48. N C —Stout v McNeill, 3 S E 915, 98 N C 1

49 Tex —Postal Savings & Loan Ass'n v Powell, Civ App, 47 S W 2d 313, error refused
29 C J p 851 note 26

50. Tex —Gordon v McCall, 48 S W 1111, 20 Tex Civ App 283

51. Tex —Gordon v McCall supra
29 C J p 851 note 26

52. Tex —Watson v McKinnon 11 S W 197 73 Tex 210—Hall v Morton Civ App, 39 S W 2d 903, error refused
Business homestead generally see supra § 40

53. Tex —Hall v Morton, Civ App, 39 S W 2d 903, error refused

54. U S —In re David, D C Fla, 54 F 2d 140

55. Ohio —Mortley v Flanagan, 38 Ohio St 401, distinguishing Gaylord v Imhoff, 26 Ohio St 317, 20 Am R 762
29 C J p 851 note 33

56 Ohio —Mortley v Flanagan 38 Ohio St 401
29 C J p 851 note 34

57 Ark —Pipkin v Williams 21 S W 133 57 Ark 242, 38 Am S R 241
29 C J p 852 note 39

58. Tex —Smith v Chenault, 48 Tex 455
Business homestead generally see supra § 40

59 Iowa Drake v Moore, 23 N W 263 66 Iowa 58

60 U S —In re Parks, D C Mich, 18 F Cas No 10,765

61. Nev —Rhodes v Williams, 12 Nev 20
29 C J p 852 note 42

a. Husband's Right to Homestead

The weight of authority holds that a husband may have a homestead in his wife's property; but the consent of the wife may be required.

In some jurisdictions a husband is not entitled to a homestead in his wife's property during her life,[62] but land paid for with homestead land is homestead property, although the deed is taken in the name of the wife when it should have been taken in the name of the husband.[63] In other jurisdictions, and according to what has been declared the weight of authority,[64] a husband is entitled to a homestead in his wife's property, if it is the family residence and conforms in other respects to the requirements prescribed by statute,[65] especially where the purchase price was paid by the husband[66] or where the wife executes an agreement to hold the land subject to his disposal,[67] or the consent of the wife may be required for the selection of the homestead from her property.[68]

b. Wife's Right to Homestead

In some jurisdictions a wife may have a homestead in her separate property, while in others she may not, unless she is otherwise qualified, as by being head of a family

Under the statutes of some states, a wife is entitled to a homestead in her separate property,[69] although she lives with her husband[70] and is not the head of a family.[71] In other jurisdictions her right to homestead is denied,[72] unless she is otherwise entitled to claim the exemption.[73] Thus a

62. Ga.—Luke v. Cook, 116 S.E. 37, 29 Ga.App. 492
Ky.—Forsythe v. Morgantown Deposit Bank, 68 S.W.2d 14, 252 Ky. 680—Covington Bros. & Co. v. Byrns, 18 S.W.2d 870, 871, 230 Ky. 66, citing **Corpus Juris.**
La.—Bank of Lafayette & Trust Co. v. Fabre, 126 So. 916, 169 La. 1185
29 C.J. p. 852 note 47
Effect of conveyance of homestead property to wife see infra § 173
Family homestead where title is in husband or wife see supra § 78
Rights of surviving husband see infra §§ 259–260

Hypothetical union with husband's land

A husband "may not unite [his wife's] homestead hypothetically with his land to give it a character it does not of itself possess"—Forsythe v. Morgantown Deposit Bank, 68 S.W.2d 14, 252 Ky. 680—Covington Bros. & Co. v. Byrns, 18 S.W.2d 870, 871, 230 Ky. 66

63. Ga.—Broome v. Davis, 13 S.E. 749, 87 Ga. 584

64. Wyo.—Altman v. Schuneman, 273 P. 173, 175, 39 Wyo. 414, citing **Corpus Juris.**

65. Kan.—Monroe v. May, 9 Kan. 466
Okl.—Mitchell v. Quinton, 116 P.2d 995, 189 Okl. 329—Oklahoma State Bank v. Van Hassel, 114 P.2d 912, 189 Okl. 48
Tex.—Elliott Lumber Co. v. Mitchell, Civ.App., 241 S.W. 221, modified on other grounds, Clem Lumber Co. v. Elliott Lumber Co., Com.App., 254 S.W. 935
Wyo.—Altman v. Schuneman, 273 P. 173, 39 Wyo. 414
29 C.J. p. 852 notes 49, 52

Premises in which husband has only equitable interest may be protected as homestead, although legal title is in wife.—Kleinert v. Lefkowitz, 259 N.W. 871, 271 Mich. 79—Orr v. Shraft, 22 Mich. 260

66. Ill.—Cipperly v. Rhodes, 53 Ill. 346
29 C.J. p. 852 note 49

Husband held "beneficial owner"

Fla.—Coleman v. Williams, 200 So. 207, 208, 146 Fla. 45

67. Ala.—Reeves v. Peterman, 9 So. 512, 109 Ala. 366

68. Neb.—Connor v. McDonald, 233 N.W. 894, 120 Neb. 503—Zeng v. Jacobs, 164 N.W. 656, 101 Neb. 645—Tekamah First Nat. Bank v. McClanahan, 120 N.W. 185, 83 Neb. 706

"Such consent may be evidenced by acts as well as by words."—Burks v. Globe International Protective Bureau, 218 N.W. 864, 56 N.D. 613

Presumption of consent from use as home

Such consent may, until the contrary is shown, be presumed from the use and occupancy of the property as the family home
Neb.—In re Nielsen's Estate, 260 N.W. 246, 135 Neb. 110—Hobson v. Huxtable, 112 N.W. 658, 79 Neb. 334
N.D.—Burks v. Globe International Protective Bureau, 218 N.W. 864, 56 N.D. 613

Joining in homestead declaration; California statute

(1) In California the homestead cannot be selected from the wife's separate property without her making, or joining in making, the declaration of homestead.—In re Miller, D.C.Cal., 27 F.Supp. 999, 1001—29 C.J. p. 853 note 53 [a]

(2) "This is a protective statute to be invoked by the wife for the benefit of herself and her family for the preservation of the home. The fundamental purpose behind homestead legislation is frustrated if creditors may step into the shoes of the wife and enjoy the benefits which § 1239 [Civil Code] reposes in her."—In re Miller, supra

69. Wyo.—Bachman v. Hurtt, 184 P. 709, 26 Wyo. 332
29 C.J. p. 853 note 54
Wife as person entitled to homestead generally see supra § 26

Effect of equitable conversion

Where testator's realty was converted into personalty under equitable conversion doctrine, married women who, under South Carolina law, were entitled to homestead exemption out of their share of testator's estate would, in interest of expedition, be allowed a homestead in remaining real estate of the testator, but their right of homestead therein was legally limited to a homestead in personalty.—Dixon v. Davis, D.C.S.C., 31 F.Supp. 912

70. Ky.—Herring v. Johnston, 72 S.W. 793, 24 Ky.L. 1940
29 C.J. p. 853 note 55

71. Ky.—Moody v. Barker, 222 S.W. 89, 188 Ky. 101

72. Tenn.—Producers' Nat. Bank v. Cumberland Lumber Co., 45 S.W. 981, 100 Tenn. 389
29 C.J. p. 853 note 57

73 In Georgia

(1) A married woman, not living separate and apart from her husband, is not the head of the family and is not as such entitled to have a homestead set apart to herself out of her separate property.—Bennett v. Georgia Trust Co., 32 S.E. 625, 106 Ga. 578—29 C.J. p. 853 note 59 [a] (1)

(2) She may, however, be allowed a homestead out of such property as a person having the care and support of dependent females, if such be the case.—Sparks v. Shelnutt, 25 S.E. 853, 99 Ga. 629—29 C.J. p. 853 note 59 [a] (2), (3)

In Louisiana

(1) Where the wife is separated in property and the husband owns no property, the wife may be allowed the exemption of her separate property from seizure and sale for her debts.—Ginsberg v. Groner, 41 So.

wife who has been deserted by her husband and who has the care and maintenance of a family has been held entitled to a homestead in her separate property as head of the family,[74] as has the wife after a permanent separation of a husband and wife by agreement, and his refusal or failure to furnish her with a home and support,[75] but it has been held that a wife does not become the head of a family, and as such entitled to a homestead exemption in her separate property, where her husband is disabled, or for any other reason is unable to support the family, and she is compelled to do so[76]

§ 91. —— Separate Tracts Owned by Husband and Wife

Under most authorities a husband and wife may claim as a homestead land of which each separately owns a part

Subject to statutory limitations as to amount and value, see supra §§ 56-62, a husband and wife may, under most authorities, claim as a homestead land of which each separately owns a part,[77] but there is also authority opposed[78]

§ 92. —— Community Property

A homestead may be selected from community property, whereupon the property selected ceases to be community property.

In those states in which the system of community property is recognized, as discussed in the C.J.S. title Husband and Wife, § 462, also 31 C.J. p. 12 notes 44-51, a homestead may be selected from the community property of husband and wife,[79] or partly from the community property and partly from the wife's separate property[80] Where a homestead in community property has been once lawfully claimed, it continues as such, although the children have attained their majority and left the parental roof[81]

Cessation of community interest Where a valid homestead is selected from community property, the property selected ceases to be community property,[82] and the husband's right of absolute control over it as authorized by statute immediately ceases,[83] although the homestead has been held to be under his management[84]

569, 117 La. 268.—Hardin v. Wolf, 29 La. Ann. 333.

(2) In these circumstances she is bound to support all the expenses of the household including care and education of the children and is recognized as the head of the family.—Ginsberg v. Groner, supra.

(3) Where the wife is not separated in property from her husband, and is not the head of the family, which is supported by him, she is not entitled to a homestead in her separate property.—Bank of Lafayette & Trust Co. v. Fabre, 126 So. 916, 169 La. 1185.

(4) Rule under earlier provisions.—Fuselier v. Buckner, 28 La. Ann. 594.

74. Ill.—Kenley v. Hudelson, 99 Ill. 493, 39 Am. R. 31.
Mo.—Nash v. Norment, 5 Mo. App. 545.
Wife as head of family generally see supra § 24.

75. Ill.—Kenley v. Hudelson, 99 Ill. 493, 39 Am. R. 31.
29 C.J. p. 853 note 66.

76. Ga.—Johnson v. Little, 17 S.E. 294, 90 Ga. 781.
29 C.J. p. 853 note 60.

77. Minn.—Rossing v. Larson, 202 N.W. 711, 162 Minn. 176.—Gilbert v. Case, 161 N.W. 515, 136 Minn. 257.
Okl.—Mitchell v. Quinton, 116 P.2d 995, 189 Okl. 329.—Gooch v. Gooch, 133 P. 242, 38 Okl. 300, 47 L.R.A.,N.S., 480.
29 C.J. p. 846 note 60, p. 853 note 67 [a], [b].

Adjoining or detached tracts generally see supra §§ 64, 65.

78. Ala.—Beard v. Johnson, 6 So. 383, 87 Ala. 729.
29 C.J. p. 853 note 68.

79. Tex.—Crowder v. Union Nat. Bank of Houston, 261 S.W. 375, 114 Tex. 34, answering certified questions, Civ. App., 264 S.W. 791.—Person v. Levenson, Civ. App., 143 S.W.2d 119.—Logan v. Aiken, Civ. App., 123 S.W.2d 401, error dismissed judgment correct.—Gillespie v. Gillespie, Civ. App., 110 S.W.2d 89, error dismissed.—Kerens Nat. Bank v. Stockton, Civ. App., 281 S.W. 580, reversed on other grounds 40 S.W.2d 7, 120 Tex. 546, 77 A.L.R. 362.—Medearis v. Buratti, Civ. App., 275 S.W. 617.
29 C.J. p. 853 note 67 [c], p. 854 note 72.
Partition of homestead in community property see the C.J.S. title Partition § 33, also 29 C.J. p. 854 notes 81-82.
Property jointly owned by husband and wife see supra § 88.
Rights of survivor in community homestead see infra § 265.

Effect of declaration of homestead
Where a declaration of homestead in community property is made, the property becomes, by operation of law the estate in joint tenancy of the husband and wife, of which they are seized in equal shares.—Schuler v. Savings & Loan Soc., 1 P. 479, 64 Cal. 397.

80. Cal.—Arendt v. Mace, 18 P. 376, 76 Cal. 315, 9 Am.S.R. 207.

81. Wash.—In re Feas, 70 P. 270, 30 Wash. 51.

82. Cal.—Yardley v. San Joaquin Valley Bank, 86 P. 978, 3 Cal.App. 651.
29 C.J. p. 854 notes 74, 75.—31 C.J. p. 78 note 3.

83. Cal.—Gimmy v. Doane, 22 Cal. 635.
29 C.J. p. 854 note 75.—31 C.J. p. 84 note 3.

Property used as residence
(1) This is true of community property used as a residence.—Wilson v. Wilson, 57 P. 708, 6 Idaho 597.—Law v. Spence, 48 P. 282, 5 Idaho 244.

(2) However, the husband may at any time abandon such residence without his wife's consent, whereupon his community control of the property is restored, unless the property has been dedicated as a homestead.—Law v. Spence, supra.

Proceeds of a sale or lease of a homestead are mere "personal property" before and after they are received, and hence the husband has the right to collect, receive, or dispose of the proceeds.—Gulf Production Co. v. Continental Oil Co., 164 S.W.2d 488, 139 Tex. 183, affirming, Civ. App., 61 S.W.2d 185, and superseding 132 S.W.2d 553, 139 Tex. 183.

84. Tex.—Cetti v. Dunman, 64 S.W. 787, 26 Tex. Civ. App. 433.
31 C.J. p. 84 note 2.

Subjection to prior encumbrance. If a declaration of homestead from community property is filed subsequently to a mortgage thereof, it is subject to the mortgage,[85] unless because of error in description the homestead property is not covered thereby[86]

Prior sale by husband. The rights of purchasers of community property, acquired under a contract of sale made by the husband, are superior to the homestead subsequently selected by the wife,[87] where they successfully maintain an action for specific performance[88]

II. LIABILITIES ENFORCEABLE AGAINST HOMESTEAD

§ 93. In General

As a general rule, the homestead exemption applies to all debts not excepted by constitutional or statutory provision.

Constitutional and statutory provisions relating to homestead exemptions and providing for enforcement against the homestead of certain classes of debts,[89] as determined by the time when,[90] or the manner in which,[91] they are contracted, have been frequently construed and applied by the courts Independently of such exceptions, if the claim is one which is peculiarly a just charge against the homestead, it is sometimes allowed to be enforced,[92] but the homestead exemption will, as a rule, apply to all debts not excepted by the constitution and statute[93] Since the general policy of the law is to exempt the homestead, exemption is the rule, and liability the exception[94] Persons dealing with homestead rights must take notice of matters that will impress lands with such rights[95] Where the constitution provides for exemption from all debts, a statute excluding specified classes of debts is invalid[96] It is not within the equitable powers of the court to declare any indebtedness a lien on a homestead where the constitution prescribes the manner of its creation[97]

§ 94. Liabilities Antedating Homestead Law

a. Contractual liabilities
b Liabilities arising out of torts

85. Cal—Loewenthal v Coonan, 67 P 321, 135 Cal 381, 87 Am S R 115

86. Nev—Adams v Baker, 51 P 252, 24 Nev 162, 77 Am S R 799

87. Cal—McClellan v Lewis, 169 P. 436, 35 Cal App 64

88. Cal—McClellan v Lewis, supra 29 C J. p 854 note 79.

89. Ala—Crabtree v. Kirby, 142 So 32, 225 Ala 20
Cal—In re Muntz's Estate, 231 P. 371, 69 Cal App 404
29 C J p 855 note 4 [a]
Liabilities enforceable against rights of surviving husband, wife, and children see infra §§ 261–264

What law governs
The rights of creditors in homestead of deceased are determined by the law which is in force at the time of the death of the homesteader—Kay v Politte, 129 S W 2d 863, 344 Mo 805, 122 A L R 1145

90. N Y—Cook v Newman, 8 How Pr 523
29 C J p 855 note 5

91. Va—Burton v Mill, 78 Va 468
29 C J p 855 note 6

92. Neb—Lynch v Lynch, 26 N W 390, 18 Neb 586
Ohio—Rinehart v Rinehart, 6 Ohio Dec (Reprint) 907, 8 Am L Rec 654

93. Ark—Franklin Fire Ins Co v Butts, 42 S W 2d 559, 184 Ark 363—McKee v Waters, 265 S W 947, 166 Ark 301
Cal—Jacobson v Pope & Talbot, 7 P 2d 1017, 214 Cal 758
Iowa—Price v Scharpff, 261 N W 511, 220 Iowa 125—Wheeler v Meyer, 206 N W 301, 201 Iowa 59
Mich—Rossman v Hutchinson, 286 N W 835, 289 Mich 577
Minn—Renville State Bank v Lentz, 214 N W 467, 171 Minn 431
Neb—State Bank of Beaver Crossing v Mackley, 236 N W 165, 121 Neb 28
N D—Cullen v Sullivan, 199 N W 760, 51 N D 384
Okl—Moore v Rick, 97 P 2d 884, 186 Okl 351—Ringer v Byrne, 80 P 2d 212, 183 Okl 46
Tex—Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253, 121 Tex 409, 83 A L R 44, reversing Security Nat Bank of Wichita Falls v Andrews, Civ App, 24 S W 2d 509—Whiteman v Burkey, 282 S W 788, 115 Tex 400, answer to certified question conformed to, Civ App, 286 S W 350—Burke v Guilford Mortg Co, Civ App, 161 S W 2d 574, error refused—Atkins v Schmid, Civ App, 129 S W 2d 412—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—King v Plainview Nat Farm Loan Ass'n, Civ App, 100 S W 2d 434, reversed on other grounds Federal Land Bank of Houston v King, 122 S W 2d 1061, 132 Tex 481—Jones v. Moore, Civ App, 289 S W 709
29 C J p 855 note 8
"As to a homestead, there are no creditors"—Jones v Thompson, 166 S W 2d 1036, 1040, 204 Ark 1085.

Charges for physician's services to family are not lien on homestead—Dorsey v Bentzinger, 226 N W 52, 209 Iowa 883

Meaning of word "debt" used in homestead statute may vary from that given in other contexts—Smith v Andrew, 227 N W 587, 209 Iowa 99

Debts of occupants and others
Homestead exemption would prevent declaration of lien on homestead land for debts which occupants themselves owed as well as for debts of others—Jones v Lamensdorf, 167 So 624, 175 Miss 565

Warehouseman's lien for storage is not superior to claim of short homestead set apart after accrual of charges—Morrow Transfer & Storage Co v Whitson, 92 S E 761, 20 Ga App 149

Community debts
Land becoming a homestead during marriage was not subject to payment of community debts—Dorough v Panse, Tex Civ App, 24 S W 2d 69

94. Iowa—Knox v Hanlon, 48 Iowa 252

95. Tex—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed

96. S D—Home Lumber Co v Heckel, 293 N W 549, 67 S D 429
29 C J p 855 note 10

97. Kan—In re Casey's Estate, 134 P 2d 665, 156 Kan 590—Jenkins v Simmons, 15 P 522, 37 Kan 496

a. Contractual Liabilities

As against preëxisting contractual liabilities, state laws creating or enlarging the homestead exemption are invalid, but the rule is otherwise as to acts of congress; and generally provisions which decrease the homestead exemption are valid.

As against preëxisting contractual liabilities, state laws creating or enlarging the homestead exemption, whether statutory merely or embodied in the constitution, are inoperative and void[98] Thus, since the law of the place, as represented by existing constitutional and statutory provisions, is as much a part of the contract as if embraced or referred to in the contract itself, see Contracts § 330, a subsequent statute creating or enlarging a homestead exemption is invalid as to preëxisting liabilities, in so far as it may be inconsistent with the constitution or statutes existing at the time when such liabilities were incurred[99] If, however, when adopting a constitution or enacting a homestead law enlarging the homestead exemption, a prior law is expressly or impliedly continued in force as to the liabilities incurred by the debtor under it, as where the prior law is not repealed, is preserved by a saving clause in the subsequent law, or is substantially reenacted except as to the increase or enlargement of the homestead exemption, the respective rights of the debtor and his creditors as to such liabilities will be governed by the prior law[1]

Acts of congress creating or increasing exemption Congress is not precluded from passing homestead laws applicable to all contracts, regardless of the time when they were entered into[2]

Laws decreasing exemption. Although there are some decisions to the contrary,[3] it is generally held that provisions which decrease the homestead exemption are applicable to preëxisting contracts, determining both the rights of the creditor and those of the debtor[4]

b. Liabilities Arising Out of Torts

A homestead law is valid against an existing claim for damages arising out of a tort.

A homestead law may be valid against a claim for damages arising out of a tort although such claim existed prior to the enactment of the law[5]

§ 95. Liabilities Existing before Acquisition of Property

a In general

b Property acquired by marriage, gift, descent, or devise

a. In General

As a general rule, homestead exemptions cannot be claimed as against debts or liens existing before the property was acquired

Although the contrary view appears to be held in some jurisdictions,[6] the rule in most jurisdictions is that the homestead exemptions cannot be claimed as against debts or liens existing before the property was acquired[7] Especially is this the case

98. Fla—Weigel v Broward County Port Authority, 10 So 2d 815
29 C J p 855 note 14, p 856 notes 15, 16, 20, 21, p 857 note 26
Constitutionality of homestead laws in general see supra § 7
Retroactive effect of statute see supra § 9
Validity, under obligation of contract clause, of constitutional or statutory provisions as to homestead exemption see Constitutional Law § 390 b
Validity as impairing vested rights of statutory provisions for homestead exemptions see Constitutional Law § 236
What law governs see supra § 5

99. N C—Wharton v Taylor, 88 N C 230
29 C J p 856 note 22

1. N H—Murray v Trumbull, 29 A 461, 67 N H 281
29 C J p 857 notes 30–32

2. U S—In re Owens, D C Ind, 18 F Cas No 10,632, 6 Biss 432
29 C J p 857 note 34
Exemption of homestead in public lands of United States as to debts contracted prior to patent see the C J S title Public Lands § 230, also 29 C J p 857 note 34 [b], 50 C J p 1134 note 8

3. Neb—Gallagher v Smiley, 41 N W 187, 28 Neb 189, 26 Am S R 319
29 C J p 857 note 35

4. Wis—Bull v Conroe, 13 Wis 233
29 C J p 857 note 36

5. Tenn—Parker v Savage, 6 Lea 406
29 C J p 858 note 39
Liability of homestead to be subjected to satisfaction of judgment for tort see infra § 111

6. Tenn—Maples v Rawlins, 58 S W 644, 105 Tenn 457, 80 Am S R 903
29 C J p 858 note 41

In absence of peculiar equities in favor of existing creditors, an insolvent debtor could assert homestead exemption to property purchased with proceeds of nonexempt property, even though purchase was made to acquire property that should constitute a homestead and as such be beyond reach of creditors—Metz v Williams, 88 P 2d 1093, 149 Kan 647—McConnell v Wolcott, 78 P. 848, 70 Kan 375, 3 L R A, N S, 122 109 Am S R 454

7. Ark—Keesee v Bushart, 158 S W 2d 915, 203 Ark 668
Fla—Porter-Mallard Co v Dugger, 157 So 429, 117 Fla 137
Ill—State Bank of Palatine v Barbaras, 252 Ill App 115
Iowa—Kramer v Hofmann 257 N W 361, 218 Iowa 1269—Clark v Chapman, 239 N W 797, 213 Iowa 737—Hallam v Finch, 195 N W 352, 197 Iowa 224
Ky—Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 828—Mullins v Robinson, 9 S W 2d 988, 225 Ky 648—Baker v Davis, 262 S W 3, 203 Ky 221
Mo—Shipman v Fitzpatrick, 164 S W 2d 913—Poplar Bluff Trust Co v Bates, 31 S W 2d 93, 224 Mo App 636
Tex—Becker v Maillot, Civ App, 19 S W 2d 919, error refused
29 C J p 858 note 42

Mortgage of land not owned by mortgagor

A mortgagor who did not own mortgaged land when deed of trust was executed, but who subsequently acquired title to land, could not impair mortgagee's rights by asserting

where the liability is for the purchase money of the land,[8] or is created at the same time that the debtor acquires title to the premises and as part of the same transaction.[9] It is not necessary that a judgment should have been rendered on the indebtedness prior to the time when the homestead is acquired, the liability attaching when the debt was incurred,[10] and it is immaterial that the amount of the debt was denied by the debtor and that an accounting was necessary to ascertain the amount.[11] However, a "debt" contracted prior to acquisition of the homestead within the rule is a debt which is certain and in all events payable, and does not include money payable on a contingency, which becomes a debt only when the contingency has happened,[12] and it has been held that until the lien of a judgment has been obtained, the premises cannot be seized in the hands of a purchaser without notice.[13] An abstract of judgment does not create a lien on the homestead subsequently acquired if the homestead was dedicated at the moment of the acquisition,[14] and it has also been held that where the property is purchased for use as a homestead, the homestead character and attending right of exemption attaches in such case simultaneously with the acquisition of the property in preference to judgment liens then on record against the purchaser.[15] Where land is purchased for a home, it has been held that although a registered judgment stands against the purchaser, he may proceed to occupy it, and if there be no residence thereon, he may proceed to provide one, and make such use of it as a base of family supplies as he may, and so prevent the attaching of a judgment lien.[16]

Some decisions have held that the homestead is not deemed to have been purchased or acquired, so as to become exempt from subsequently contracted debts, until paid for;[17] nor is it considered as having been purchased where it is given to the homestead claimant in settlement of his contest of a will which if successfully prosecuted would have given

a homestead in land, which was allegedly established after mortgagor acquired title, as against mortgagee —Meyers v American Oil Co., 5 So 2d 218, 192 Miss 180

Mechanics' liens

Okl —Ketcham v Cunliff, 187 P. 1095, 77 Okl 287

Tex —Boozer v Smith, Civ App., 36 S W 2d 1064, error dismissed

Double liability of stockholder, acquiring stock before claiming property as homestead, was held debt incurred before acquisition of homestead rendering homestead subject to claim therefor —Smith v Andrew, 227 N W 587, 209 Iowa 99

Sale of estate distinguished

An indebtedness is not brought within the statute permitting the sale of a homestead merely because it was contracted before the acquisition of the homestead That circumstance will deprive a living debtor of his homestead exemption as against an attachment or execution on an antecedent debt, but the statute has no application to the estate which passes on his death to his widow and children —Nettleton Bank v McGauhey's Estate, 2 S W 2d 771 318 Mo 918—Maupin v Longacre, 288 S W 54, 315 Mo 872

Lien of judgment against seller

Purchasers of property subject to lien of judgment against seller could not defeat lien by subsequently filing declaration of homestead --Pratt v McInroe 283 P 1089, 155 Wash 239

Homestead right in estate by entirety

A wife has homestead right in an estate by entirety which she may assert subsequent to the death of her husband against an unsecured indebtedness of herself and her husband incurred subsequent to the filing for record of deed conveying such estate —Ahmann v Kemper, 119 S W 2d 256, 342 Mo 944

8. Ga —Harris v Glenn, 56 Ga 94—Sparger v Cumpton, 51 Ga 355
Debts or obligations for purchase money see infra §§ 100–104

9. Ala —Moses v Home Bldg & Loan Ass'n, 14 So 412, 100 Ala 465
29 C J p 858 note 44

10. Iowa --Bills v Mason, 42 Iowa 329

11. Iowa —Hallam v Finch, 195 N W 352, 197 Iowa 224

12. **Contingent attorney's fees**
Money judgment for attorney's fees was not lien against homestead acquired in 1920 as being on debt contracted prior to acquisition of homestead, where attorney was retained on contingent fee before 1920 to collect claim allowed in 1924 and paid in 1928 —Hunt, Hill & Betts v Moore, 258 N W 114, 219 Iowa 451

13. Iowa —Higley v Millard, 45 Iowa 586
29 C J p 858 note 46

14. Tex —J R Watkins Co v Dawson, Civ App., 145 S W 2d 901

Property occupied as homestead

Person otherwise qualified may claim homestead exemption on property occupied as homestead, when acquiring title, to prejudice of judicial mortgage previously recorded So judgment creditor undertaking execution on debtor's recently-acquired property necessarily accepted debtor's ownership with attendant rights of possession occupancy, and homestead exemption —Maines v Sistrunk, 129 So 158, 170 La 768

15. Tex —Hughes v Groshart, Civ. App 150 S W 2d 827--Young v Hollingsworth, Civ App., 16 S W 2d 844, error refused
Time of acquisition of homestead generally see supra § 19

Enlargement of homestead

Son possessing mother's land as tenant, with intention to enlarge his homestead by annexing land inherited from her, in which he acquired undivided interest, had homestead right superior to levy under judgment against him —Young v Hollingsworth supra

Grantee of judgment debtor

The lien of a judgment properly recorded in the county before the acquisition of realty by judgment debtor, who occupied the realty as a homestead, was not superior to the homestead right of the purchaser from the judgment debtor, who occupied the premises as a homestead before judgment debtor had vacated them, notwithstanding deed from debtor was placed in escrow under agreement providing for delivery thereof only on completion of installment payments of purchase price, and several months thereafter a correction deed was given by debtor and recorded providing for payment of purchase price by an installment vendor's lien note —Hughes v Groshart, Tex Civ App., 150 S W 2d 827

16. Ala —W T Rawleigh Co v Patterson, 195 So 729, 239 Ala 309

17. Ky —Norvell v Faulk, 139 S W. 2d 428, 282 Ky 591.
29 C J p 858 note 47.

him, as heir of the testator, a greater share of his estate.[18] An analysis of these decisions discloses, however, that they hold only that, where one buys a homestead on credit and before it is paid for contracts other debts, the payments on the homestead after the other debts are contracted may be subjected to that extent to the payment of the debts contracted before the payment on the homestead,[19] and where there has been no payment on the homestead since the creation of the debts in question, and no improvements erected thereon, the homestead exemption can be claimed, there being no fund which has gone into the homestead which may be subject to the debt.[20] So if the homestead has been fully paid for before the debt was created, it is not subject to execution on the debt, although no deed for the land was made until after the creation of the debt.[21]

Separate property of wife Where a homestead is constructed on lots owned by the wife, and the greater part of its cost is voluntarily paid by the husband without any intention of having or receiving an interest in the homestead, it is exempt from execution for debts incurred by the husband prior to its acquisition.[22]

b. Property Acquired by Marriage, Gift, Descent, or Devise

Property acquired by marriage, gift, descent, or devise, and occupied by a debtor as his homestead is commonly held not subject to payment of his debts whether contracted prior or subsequent to its acquisition

While the contrary view is held under the statutes of some jurisdictions,[23] a debtor is under the statutes of other jurisdictions entitled to hold property acquired by descent or devise, or by gift, and occupied by him as a homestead, free from his debts whether contracted prior or subsequent to its acquisition,[24] and a homestead acquired by a debtor through marriage has been held to be protected against his debts, contracted before or after it was obtained.[25] The party who has acquired the property by any of these methods is entitled to a reasonable time in which to convert it into a homestead,[26] but if he does not act within a reasonable time the property will not be exempt.[27] Where after a tenant in common has established a homestead right in his undivided interest in the property, a judgment is entered against him, and subsequently he inherits the undivided interest of a cotenant, such undivided interest becomes impressed with the homestead character of the land, and the lien of the judgment attaches to no part of his interest.[28]

§ 96. Liabilities Changed in Form after Land Acquired

A mere change in the form of a preexisting liability will not enable a debtor to secure an exemption in land acquired before such change occurred, but if a new obligation is created the exemption may be claimed

A mere change in the form of a preexisting liability will not enable the debtor to secure an ex-

18 Ky.—Burrow v. Maxon, 112 S.W. 661, 129 Ky. 578.
Property acquired by devise see infra § 95 b.

19 Ky.—Ratliff v. Anderson & Ratliff, 242 S.W. 35, 195 Ky. 320—Moseley v. Bevins, 15 S.W. 527, 91 Ky. 260, 12 Ky.L. 825.

20 Ky.—Ratliff v. Anderson & Ratliff, 242 S.W. 35, 195 Ky. 320.

21. Ky.—Turner v. Browning, 107 S.W. 318, 128 Ky. 79, 32 Ky.L. 891.

22. Iowa.—Price v. Scharpff, 261 N.W. 511, 220 Iowa 125.

23. Wis.—Bridge v. Ward, 35 Wis. 687.
29 C.J. p. 859 note 52.

24. Ky.—Deboe v. Brown, 22 S.W.2d 111, 231 Ky. 682—O'Neal v. Turney's Ex'x, 300 S.W. 913, 222 Ky. 361.
29 C.J. p. 859 note 53, p. 855 note 91 [a].
Improvements placed on inherited land see infra § 98.

Homestead prior to acquisition
Where legal title to land is in the name of another and has been impressed with homestead character by one put in possession, to the exclusion of the owner, in contemplation of future vesting of title by inheritance or otherwise, claim of homestead right by the one in possession becomes coextensive with his after-acquired title and has priority over an abstract judgment lien.—Atkins v. Schmid, Tex.Civ.App., 129 S.W.2d 412.

Judgment lien, recorded before judgment debtor inherited land levied on under alias execution was held not superior to his homestead rights therein.—Farmers' & Mechanics' Trust Co. v. Perry, Tex.Civ.App., 56 S.W.2d 501, error refused.

Intention
To claim homestead exemption of land from judgment lien, in absence of actual occupancy or use as homestead, there must be intention evidenced by preparation before, or at least contemporaneously with, time judgment lien could attach.—Farmers' Nat. Bank of Seymour v. Coffman, Tex.Civ.App., 79 S.W.2d 905.

25. Tex.—North v. Shearn, 15 Tex. 174.

26. Ky.—Cooper v. Cooper, 20 S.W.2d 731, 230 Ky. 696.
29 C.J. p. 859 note 55.

27 What constitutes reasonable time
(1) Reasonable time in which to convert inherited land into homestead had expired, where defendant had taken no steps toward such end in five years.—Cooper v. Cooper, 20 S.W.2d 731, 230 Ky. 696.
(2) Other illustrations see 29 C.J. p. 859 note 55 [a].

28. Tex.—W. R. Thompson & Sons Lumber Co. v. Clifton, 124 S.W.2d 106, 132 Tex. 366, affirming Clifton v. W. R. Thompson & Sons Lumber Co., Civ.App., 100 S.W.2d 392.

Partition
Where tenant in common, who established homestead right in his undivided interest in land as father's heir subsequently inherited an undivided interest in same land as mother's heir, and property was then partitioned, a lien of judgment against the tenant in common abstracted after acquisition of interest from father and before acquisition of interest from mother attached to no part of tract received by the tenant in common on partition.—J. R. Watkins Co. v. Dawson, Tex.Civ.App., 145 S.W.2d 901.

emption in land acquired before such change occurred;[29] or if such right did not exist when the original obligation was created,[30] but if a new obligation is created, an exemption may be claimed against it, in land then occupied as a homestead.[31]

§ 97. Liabilities Existing before Establishment of Homestead

a. In general
b Before occupancy
c. Before debtor has acquired personal homestead status
d Before filing of declaration
e. Before registration of deed conveying homestead
f Before selection or setting apart
g Mortgage or conveyance as security

a. In General

Although the rule is otherwise, or at least subject to limitations, in some jurisdictions, generally obligations or liens existing prior to the establishment of the homestead right will not be defeated where the debtor subsequently claims that the premises are his homestead.

In some jurisdictions it is held that general obligations existing prior to the establishment of the homestead right will not be defeated where the debtor subsequently claims that the premises are his homestead,[32] but in other jurisdictions a different rule apparently obtains.[33]

Prior liens While in some jurisdictions the rule is otherwise, or at least subject to limitations or modifications,[34] the general rule is that the exemption cannot be claimed as against valid liens which have attached to the premises before they are impressed with the homestead character, whether such

29. Vt—Robinson v Leach 31 A 32 67 Vt 128, 48 Am S R 807, 27 L R A 303
29 C J p 859 note 56

Good faith

A head of family, occupying encumbered land as homestead, has right to renew, rearrange, and readjust encumbering obligation and, in accomplishing such purpose may change form of obligation, if he acts in good faith and does not intentionally increase burden on homestead for purposes not necessary for readjustment of outstanding obligation Thus, an amended deed, substituting for grantee's obligation under original deed to support grantor an obligation to pay four thousand dollars, evidenced by two notes, in addition to notes for three thousand dollars balance of six thousand dollars consideration recited in original deed, was held not to impose renewal obligation so disproportionate to original obligation as to evidence bad faith or intention to increase burden on grantee's homestead for purposes not reasonably necessary for readjustment of obligation to support grantor—Machicek v Barcak, Tex, 170 S W 2d 715

30. Ark—Cohn v Hoffman, 45 Ark 376
29 C J p 789 note 14, p 790 note 16 [a] (1)

31. Mass—Tucker v Drake, 11 Allen 145
29 C J p 790 notes 15, 16 [a] (2)

32. Iowa—Kramer v Hofmann, 257 N W 361, 218 Iowa 1269
Mo—Dent v Dent, 166 S W 2d 582—Poplar Bluff Trust Co v Bates, 31 S W 2d 93, 224 Mo App 636
29 C J p 859 note 58

33. Ky—Hensey v Hensey, 17 S W 333, 92 Ky 164, 13 Ky L 426
29 C J p 859 note 59, p 869 note 97 [a]

34. Ariz—Wheeler Perry Co v Mortgage Bond Co of New York, 17 P 2d 331, 41 Ariz 247—Security Trust & Savings Bank v McClure, 241 P 515, 29 Ariz 325
29 C J p 859 note 60 [b], [c]

Limitation respecting judgment liens

(1) In some states, including Colorado, Mississippi, and Washington, liens attaching by operation of law, such as judgment liens, are suspended by homestead exemption perfected at any time before the premises have actually been sold thereunder
Colo—Howell v Burch Warehouse & Transfer Co, 67 P 2d 73, 100 Colo 247—Sterling Nat Bank of Sterling v Francis, 240 P 945, 78 Colo 204
Wash—State ex rel Van Doren v Superior Court for King County, 37 P 2d 215 179 Wash 241—Brown v Manos, 250 P 36, 140 Wash 525
29 C J p 859 note 60 [a]

(2) But it has been said that the determination rests solely on the existence or lack of a specific lien on definite property, as distinguished from a general or blanket statutory lien resulting through filing a transcript of judgment, the controlling factor being that if the lien which the homestead entryman would supplant precedes in time of record, and is specific and definite as to the property involved, it holds its preference—Bean v Eves, 20 P 2d 514, 92 Colo 339

(3) All contracts permitted by law with reference to land, by the owner thereof, are enforceable although afterward the land becomes such owner's homestead—Smith v. Smith, Miss, 8 So 2d 161

(4) Thus prior covenants, or encumbrances running with the land, such as options to purchase, defeat homestead exemptions subsequently arising—Smith v Smith, supra—Minor v Interstate Gravel Co, 94 So 3, 130 Miss 553

(5) The rule has been applied where husband owning land which was not a homestead mortgaged the land, and wife did not join in execution of mortgage which misdescribed land, and husband and wife thereafter occupied land as a homestead—Smith v Smith, supra.

(6) Judgment creditor was charged with knowledge that debtor might acquire status of householder before sale on execution, and thereby claim homestead rights—Brown v Manos, 250 P 36, 140 Wash 525

(7) Homestead declaration, filed after sale, is ineffectual—State ex rel Union Savings & Loan Ass'n v Kay, 26 P 2d 1045, 175 Wash 151

(8) Under former statute requiring selection of homestead prior to entry of judgment, mortgagor, failing to file declaration of homestead before entry of foreclosure judgment, was not entitled to possession during period of redemption—State v Superior Court of Chelan County, 266 P 731, 147 Wash 571

(9) The right of the head of a family to prevent the sale of land owned by him, but not his homestead, under an execution issued on a judgment against him, by moving on and occupying the land as a homestead before the sale, does not confer on him the right to convey land not his homestead, free from the lien of a judgment then existing against him—Bank of Philadelphia v Posey, 92 So 840, 130 Miss 530, reversed on other grounds 95 So. 134, 130 Miss 825.

liens are obtained by contract or operation of law[35] The rule has been applied in case of liens created by filing a bill in equity,[36] liens created by judgment,[37] liens created by levy of execution,[38] liens created by attachment,[39] mechanics' liens,[40] materialmen's liens,[41] liens created by the giving of a purchase-money note stipulating for the payment of attorneys' fees,[42] and liens created by the giving of a tax collector bond[43] Where the homestead is abandoned and later resumed, intervening liens are unaffected[44] However, on the discharge of the liens the exemptions may become effective.[45]

b. Before Occupancy

Where occupancy is required before the homestead privilege attaches, the homestead exemption cannot ordinarily be claimed as against valid liens which have attached to the premises, or claims which have arisen, prior to occupancy for homestead purposes.

Where occupancy is required before the homestead privilege attaches, see supra § 33, if the premises are not actually resided on at the time of levy they cannot be claimed as exempt;[46] and obviously the general rule, stated supra subdivision a of this section, will apply where it is sought to claim the exemption as against judgments,[47] other liens,[48] or even general claims,[49] existing prior to occupancy of the premises for homestead purposes In those jurisdictions where prior liens[50] or claims[51] will not be upheld as against a homestead subsequently claimed, however, the rule of prior occupancy may not be strictly applicable

35. Ala —W T Rawleigh Co v Patterson, 195 So 729, 239 Ala 309
Fla —Sonneman v Tuszynski, 191 So 18, 139 Fla 824—Moorhead v Yongue, 183 So 804, 134 Fla. 135, 118 A L R 1377
Kan —Ellinger v Thomas, 67 P 529, 64 Kan 180
La —Williams v Continental Bank & Trust Co, 137 So 59, 173 La 353
N D — First State Bank of Gackle v Fischer, 272 N W 752, 67 N D 400, 110 A L R 878
Tex —Machicek v Barcak, 170 S W 2d 715—Thompson v Kay, 77 S W 2d 201, 124 Tex 252, affirming Kay v Thompson, Civ App, 40 S W 2d 884 —Huey v Warner, 77 S W 2d 201, 124 Tex 252, affirming Warner v Huey, Civ App, 29 S W 2d 452— Massey v Citizens' Nat Bank of Weatherford, 77 S W 2d 201, 124 Tex 252, affirming Massey v. Citizens' Nat Bank, Civ App, 28 S W 2d 257— Gill v Baird, 77 S W 2d 201, 124 Tex 252, affirming, Civ App, 32 S W 2d 941—Johnson v Prosper State Bank, Civ App, 125 S W 2d 707, affirmed 138 S W 2d 1117, 134 Tex 677—Forman v Barron, Civ App, 120 S W 2d 827, error refused—Doak v Casner, Civ App, 101 S W 2d 1033, error refused— Huffstedler v Glenn, Civ App, 82 S W 2d 733
Utah —McMurdie v Chugg, 107 P 2d 163, 99 Utah 403, 132 A L R. 435
Wis —In re Hogan's Estate, 282 N W 5, 7, 230 Wis 455, citing **Corpus Juris.**
29 C J p 860 note 61
Mortgage liens see infra subdivision g of this section

36. Ala —Hines v Duncan, 79 Ala. 112, 58 Am R 580

37. U S —Lyon v Arnold, C C A Fla., 46 F 2d 451
Ala —W T Rawleigh Co v Patterson, 195 So 729, 239 Ala 309
Fla —Moorhead v Yongue, 183 So 804, 134 Fla 135, 118 A L R 1377— Porter-Mallard Co v Dugger, 157 So 429, 117 Fla 137—First Nat Bank v Peel, 145 So 177, 107 Fla 413
Minn —Rusch v Lagerman, 261 N W 186, 187, 194 Minn 469, citing **Corpus Juris.**
Neb —Welch v Falk, 291 N W 488, 490, 137 Neb 764, citing **Corpus Juris.**
N D —First State Bank of Gackle v Fischer, 272 N W 752, 67 N D 400, 110 A L R 878
Wis —Qualley v Zimmerman, 285 N W 735, 231 Wis 341—In re Hogan's Estate, 282 N W 5, 7, 229 Wis 600, citing **Corpus Juris.**
29 C J p 860 note 63

38. Ky —Carter v Goodman, 11 Bush 228
Tex —Watson v Texarkana City Nat Bank, 119 S W 915, 56 Tex Civ App 138

39. S C —Ex parte Morrow, 190 S E 506, 183 S C 170, 110 A L R 898
29 C J p 860 note 65—6 C J p 278 note 31

40. Okl —Ketcham v Cunliff, 187 P. 1095, 77 Okl 287
29 C J p 860 note 66

Unexecuted intent to abandon homestead, so as to acquire new one not subject to mechanics' liens, is insufficient without discontinuing use of former homestead, with intent not to use it again as such —Crawford v Grand Saline Lumber & Supply Co, Tex Civ App, 281 S W 592

Validity of contract

Where husband and wife had not yet acquired homestead rights in property, fact that some labor and material had been furnished before execution of building contract in which there was a purported lien or that acknowledgments thereto or to deed of trust covering property were fatally defective was held not to invalidate contract made by husband and wife with contractor to erect dwelling —Towery v Plainview Building & Loan Ass'n, Tex Civ App, 99 S W 2d 1039, error refused.

41. Tex —Clem Lumber Co v Elliott Lumber Co, Com App, 254 S W 935, modifying Elliott Lumber Co v Mitchell, Civ App, 241 S W 221

42. Tex —Finley v Wakefield, Civ App, 184 S W 755

43. Ill —Hook v Richeson, 5 N E 98, 115 Ill 431

44. Cal —White v Rosenthal, 35 P 2d 154, 140 Cal App 184
29 C J p 860 note 70

45. Fla —Pasco v. Harley, 75 So 30, 73 Fla 819

46. Ark —De Loney v Dillard, 40 S W 2d 772, 183 Ark 1053
29 C J p 860 note 73

47. Ark —De Loney v Dillard, 40 S W 2d 772, 183 Ark 1053
Ill —Rawlins v Launer, 17 N E 2d 330, 369 Ill 494
Minn —Rusch v Lagerman, 261 N W 186, 194 Minn 469
29 C J p 861 note 75

Institution of suit to subject to judgment

If judgment debtor performed acts necessary to give effect to homestead exemption after institution of suit to subject equitable estate to judgment property would not be exempt as homestead, decree establishing rights as of date of institution of suit — First Nat Bank v Peel, 145 So 177, 178, 107 Fla 413, citing **Corpus Juris.**

48 Mich —McMonegal v Wilson 61 N W 495, 103 Mich 264
Mortgage liens generally see infra subdivision g of this section

49. Iowa —Kramer v Hofmann, 257 N W 361, 218 Iowa 1269
Mo —Poplar Bluff Trust Co v Bates, 31 S W 2d 93, 224 Mo App 636
29 C J p 861 note 78

50. Miss —Letchford v Cary, 52 Miss 791—Trotter v Dobbs, 38 Miss 198

51. Ky —Crouch v Megular-Harris Co, 42 S W 91, 19 Ky L 819
29 C J. p 861 note 80 [a]

c. Before Debtor Has Acquired Personal Homestead Status

Although there is authority to the contrary, generally no homestead can be claimed as against a lien which attached to the land when the debtor had not acquired the personal status giving him the exemption privilege.

In accordance with, and subject to, the limitations of the general rule, stated supra subdivision a of this section, it is frequently held that no homestead can be claimed as against a lien which attached to the land when the debtor was not entitled to an exemption because he had not acquired the personal status giving him the exemption privilege[52] However, a contrary view has been taken,[53] but even where the contrary view prevails it has been held that a nonresident moving into the state cannot, by occupying property on which a lien has become fixed, acquire a homestead exemption as against the lien[54]

d. Before Filing of Declaration

In some jurisdictions where a declaration of homestead is essential to the acquisition of the exemption, the homestead is exempt only as against debts contracted after the recording of such declaration, but in other jurisdictions the exemption may be claimed provided the declaration is registered prior to the attachment of a lien

In some jurisdictions where a declaration of homestead is essential to the acquisition of the exemption, see supra § 46, the homestead is exempt only as against debts contracted after such declaration of homestead has been recorded,[55] and a fortiori, the recording of a declaration of homestead has no effect on prior liens,[56] and the fact that no judgment was recovered on such debt until after recording of the homestead claim will not avail claimant[57] On the other hand, in other jurisdictions where such a declaration of a homestead is required, the exemption may be claimed, provided the declaration is registered prior to the attachment of a lien,[58] but if the attachment of the lien antedated the filing of the declaration of exemption the premises may be sold to discharge the lien[59] Under a statute which is silent as to the time when the making and filing of the declaration of homestead shall be done, it has been held that the homestead becomes exempt from sales for all debts or liabilities whatsoever,[60] although contracted before the declaration was made and filed[61] and whether or not secured by lien,[62] except such debts as are expressly excepted from the operation of the exemption by the homestead provisions themselves[63]

e. Before Registration of Deed Conveying Homestead

Under some statutes in order to preserve the homestead right against debts it is necessary, prior to the creation of the debts, to record the deed conveying the homestead

Under the statutes which provide that a homestead shall be subject to execution on all causes of action existing at the time of acquiring the homestead and that such time shall date from the filing of the deed of the homestead for record, it is necessary, in all cases to preserve the homestead right against debts, that the deed should have been filed before the creation of such debts,[64] even though the owner had lived on the land as his home until he filed his deed for record[65]

52. U S —In re Porter, D C Fla, 3 F Supp 582
Fla —Moorhead v Yongue, 183 So 804, 134 Fla 135, 118 A L R 1377
La —Prudential Ins Co of America v Guillory, 145 So 6, 175 La 1058
29 C J p 861 note 82

53. Ga —Kirkpatrick Hardware Co v Rogers, 134 S E 806, 35 Ga App 790
Wash —Brown v Manos, 250 P 36, 140 Wash 525
29 C J p 861 note 83

54. Miss —Meyer Bros Drug Co v Fly, 63 So 227, 105 Miss 752

55. W.Va —Cabell v Given, 5 S E 442, 30 W Va 760
29 C J p 861 note 86

56. W Va —Cabell v Given, supra

57. La —Kinder v Lyons, 38 La Ann 713
29 C J p 862 note 88

58. Cal —Beaton v Reid, 44 P 167, 111 Cal 484
29 C J p 862 note 90, p 844 note 31 [a]

Attachment lien is defeated by subsequent declaration of homestead before judgment
Cal —Yager v Yager, 60 P 2d 422, 7 Cal 2d 213, 106 A L R 664—Lucci v United Credit & Collection Co, 31 P 2d 369, 220 Cal 492—Jacobson v Pope & Talbot, 7 P 2d 1017, 214 Cal 758
Mont —De Fontenay v Childs, 19 P 2d 650, 93 Mont 480—Wall v Duggan, 245 P 953, 76 Mont 239

Pendency of litigation
Declaration of homestead may be filed during pendency of litigation, at any time before judgment has become lien on property —Yager v Yager 60 P 2d 422, 7 Cal 2d 213, 106 A L R 664

After levy of execution
Declaration of homestead may be filed after levy of execution, and, where there is not a valid and subsisting judgment lien on property, it is not subject to execution sale except on proceedings had under statute providing for reaching of excess in value above homestead exemption —Yager v Yager, supra

59. Cal —White v Rosenthal, 35 P 2d 154, 140 Cal App 184
29 C J p 862 note 91
Mechanic's lien filed prior to the declaration of homestead takes precedence over the homestead exemption —Brace & Herbert Mill Co v Burbank, 151 P 803, 87 Wash 356, Ann Cas 1917E 739—Olson v Goodsell, 105 P 463, 56 Wash 251

60. U S —Nevada Bank v Treadway, C C Nev, 17 F 887, 8 Sawy 456
Nev —In re Walley, 11 Nev 260
29 C J p 862 note 92

61. Nev —In re Walley, supra

62. Nev —In re Walley, supra.

63. Nev —In re Walley, supra

64. Mo.—Tennent v Pruitt, 7 S W. 23, 94 Mo 145
29 C J p 862 note 97
Time of acquisition of homestead see supra § 49

65. Mo —Tennent v Pruitt, 7 S W. 23, 94 Mo 145—Shindler v. Givens,

f. Before Selection or Setting Apart

The subsequent assignment to the debtor, under the homestead statutes, of premises which have become encumbered by a lien will not defeat the lien

When premises have become encumbered by a lien before they are set off or selected by the debtor as his homestead, their subsequent assignment to him under the homestead statutes will not defeat the lien [66]

g. Mortgage or Conveyance as Security

A debtor, by executing a mortgage on real estate in which he has previously established no homestead rights, or a conveyance in trust to secure a debt, prevents the assertion of such homestead rights as against the mortgagee or grantee.

In accordance with, and subject to, the limitations of the general rule stated supra, subdivision a of this section a debtor, by executing a mortgage on real estate in which he has previously established no homestead rights, prevents the assertion of such rights as against the mortgagee,[67] whether there is, in the mortgage, an express waiver of homestead privileges[68] or whether there is no such waiver [69] This rule has been applied where occupancy is required before the homestead privilege attaches and the mortgage was executed prior to occupancy [70] So a mortgage executed and delivered before the mortgagor's marriage but not recorded until thereafter is superior to the homestead claim of the mortgagor's wife, notwithstanding she did not sign or acknowledge it,[71] and the interest of a second wife, who was not one of the signers of an existing mortgage on a homestead, is inferior to the existing mortgage executed by the first wife and her husband [72] Even though a mortgage is executed after the premises become a homestead, if it does not create a new, but only changes the form of a prior lien, no exemption exists,[73] but an extension of a preexisting mortgage, without the consent of both husband and wife,[74] or the reissuance of a mortgage note held in the possession of the maker while the latter acquired homestead rights in the property,[75] will not have this effect A statute providing that the homestead is subject to execution or sale in satisfaction of a judgment obtained on debts secured by a mortgage on the premises executed before the declaration of homestead was filed for record contemplates a live mortgage at the time of the execution or sale, and not one the lien of which has been barred by limitations prior to the declaration of homestead before final judgment on the debt,[76] and the filing of a declaration of homestead in such case prior to entry of a money judgment on the indebtedness originally secured by the mortgage exempts the property from execution [77]

A conveyance in trust to secure a debt is governed by the same rules as is a mortgage [78]

63 Mo 394—Furra v Quigly, 57 Mo 284

66. Ga—Clements v Lee, 47 Ga 625
29 C J p 862 note 99
Selection and allotment of homestead see supra §§ 42 47

67 Ark—Raines v O'Neal, 72 S W 2d 235, 189 Ark 365
La—Prudential Ins Co of America v Guillory, 115 So 6 175 La 1058—Williams v Continental Bank & Trust Co 137 So 59 173 La 353
Wash—Davies v Metropolitan Life Ins Co, 71 P 2d 552 191 Wash 459, appeal dismissed 59 S Ct 465, 306 U S 665 83 L Ed 1061
29 C J p 863 note 3
Encumbering homestead after acquisition see infra §§ 123 156

68. Ga—Webster v Dundee Mortg & Trust Co, 20 S E 310, 93 Ga 278

69. Ill—McCormick v Wilcox, 25 Ill 274

70. La—Gilmer v O'Neal, 32 La Ann 979
Tex—Chipman v McKinney, 41 Tex 76
29 C J p 861 note 76

71. Ark—Raines v O'Neal, 72 S W 2d 235, 189 Ark 365

72. Kan—John Hancock Mut Life Ins Co v Mays, 102 P 2d 984, 152 Kan 46.

73 Cal—Swift v Kraemer, 13 Cal 526, 73 Am D 603

74. Cal—Corey v Matot, 190 P 378 47 Cal App 184

75. La—Hammond State Bank & Trust Co v Broderick, 151 So 739, 179 La 693

76. Mont—Siuru v. Sell, 91 P 2d 411, 108 Mont 438, 123 A L R 423

77 Mont—Siuru v Sell, supra

78. U S—Green v Ætna Life Ins Co C C A Tex 30 F 2d 100, certiorari denied 49 S Ct 481 279 U S 861, 73 L Ed 1001, rehearing denied 50 S Ct 79
Cal—Bracey v Gray, 121 P 2d 770, 49 Cal App 2d 274
Colo—Farley v Harvey, 25 P 2d 185, 93 Colo 105—Bean v Eves, 20 P 2d 544, 545, 92 Colo 339, citing **Corpus Juris.**
Tex—Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253, 121 Tex 109, 83 A L R 44, reversing Security Nat Bank of Wichita Falls v Andrews, Civ App, 24 S W 2d 509—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—Jefferson County Inv & Bldg Ass'n v Gaddy, Civ App, 90 S W 2d 295, error refused—First Nat Bank v Zarafonetis, Civ App, 15 S W 2d 155, error refused
29 C J p 863 note 8

Renewal or extension

Establishment of homestead on property did not affect existing trust deed or power of owner to renew or extend it, and the fact that renewal note was for amount in excess of that properly chargeable against homestead did not render note and mortgage void, but raised equities which courts would adjust in proper procedure seasonably instituted, but however, where mortgagor, with full notice, permitted sale of land under terms of mortgage, he could not question validity of sale or title -Price v McAnelly, Tex Civ App, 287 S W. 77

Erection of house on vacant lots does not impress it with homestead character as against lien given to secure prior loan for construction of house—Keys v Tarrant County Building & Loan Ass'n, Tex Civ App, 286 S W 593

Abandonment of homestead

Where husband's homestead was abandoned, his subsequent trust deed could not be avoided by convevance to wife and by her asserting homestead—Cannon v Hathaway, Tex. Civ App, 12 S W 2d 618.

§ 98. Debts Contracted Prior to Erection of Improvements

Under a statute providing that the exemption shall not attach as against debts contracted prior to the erection of improvements, creditors may reach the property to the extent of the value of improvements erected subsequent to the time the debt was incurred

Under a statute providing that the homestead exemption shall not attach as against debts contracted prior to the erection of improvements, creditors may reach the property if their claims antedated its improvement by the debtor,[79] and this is so, although the note or document evidencing the debt was executed subsequent to the making of improvements.[80] It has been held, however, that only the buildings or other improvements erected subsequent to the time when the debt was incurred and not the homestead as it existed prior thereto can be subjected to its payment.[81] Furthermore, the statute applies only to new and extensive improvements placed on the land whereby its value is increased in an amount exceeding the homestead exemption and not such as are caused by repairing or adding to those already made for the increased comfort of the family,[82] and a building erected on homestead property under an agreement between the homesteader and the person building it that the latter could remove it at any time does not belong to the homesteader nor add to the value of the property in such a manner that the homestead, to the extent of the value of the building, could be subjected to the payment of a debt of the homesteader contracted before its erection.[83]

Improvements placed on inherited land may be subjected to the payment of prior debts.[84]

§ 99. Debts and Liens Prior to Change of Homestead

Where a debtor exchanges his homestead for another, the new homestead is generally liable or exempt to the same extent as was the one for which it has been substituted, but the rule has some limitations, as where the proceeds of the prior homestead which were used to purchase the new one were subjected to an intervening use, or where the land claimed to be the new homestead was charged with debts before it became a homestead.

Where a debtor may and does exchange his homestead for another, the new homestead stands in the place of the old homestead, and is liable or exempt, as the case may be, to the same extent as was the homestead for which it has been substituted,[85] in accordance with, and subject to, the limitations of the general rules discussed supra §§ 97, 98, infra §§ 100–115. The rule, however, has no application in respect of a homestead purchased with the proceeds of a prior homestead where such proceeds have been subjected to an intervening use,[86] or to a homestead purchased in another state.[87] Likewise, the homestead will be liable for purchase money unpaid on the former homestead,[88] and it has been held that, if the debtor owns two parcels of land, one of which he claims as a homestead, but subsequently removes to the other, which he thereafter occupies as his home, the latter is not exempt from debts chargeable against it before it became a homestead,[89] and also that, where the owner of a lot occupied as a homestead exchanged it for another lot of about the same value, which he claimed as his homestead, and at the same time purchased, with funds not derived from the homestead, another lot adjoining the new homestead, the lot purchased did not become part of the homestead, as against a judgment recovered before its purchase, the additional lot making the new homestead of greater value than the original homestead.[90] Where a debtor had a residence on part of a tract, and therefore had the right to claim a homestead therein, the fact that he moved into a

79. Ky.—Runyon v. Runyon's Adm'x, 95 S.W.2d 802, 264 Ky. 823—Baker v. Davis, 262 S.W. 3, 203 Ky. 221
29 C.J. p. 863 note 10

80. Ky.—Keeny v. Burke, 12 Ky.L. 461—Thacker v. Booth, 6 S.W. 460, 9 Ky.L. 715

81. Ky.—Darnell v. Smith, 32 S.W. 715, 98 Ky. 238—Moseley v. Bevins, 15 S.W. 527, 91 Ky. 260—Hemphill v. Haas, 11 S.W. 510, 88 Ky. 492, 11 Ky.L. 62

82. Ky.—Cowan v. Evan, 101 S.W. 964, 31 Ky.L. 222
29 C.J. p. 863 note 13

83. Ky.—Weber v. Gardner, 80 S.W. 481, 26 Ky.L. 44, modified on other grounds 81 S.W. 678, 26 Ky.L. 416

84. Ky.—Cooper v. Cooper, 20 S.W. 2d 731, 230 Ky. 696
29 C.J. p. 859 note 53 [c]
Subjecting inherited land to payment of prior debts generally see supra § 95

85. Iowa—Blue v. Heilprin, 75 N.W. 642, 105 Iowa 608
29 C.J. p. 863 note 17, p. 840 note 61 [d] (2), p. 841 note 85 [b], p. 842 note 94 [b]
Exchange of homestead generally see supra § 72
Property purchased with proceeds of sale see supra § 77

Evasive contracts seeking to create lien other than for purchase money or improvements on homestead during supposed interval between abandonment of one and acquisition of another should not be recognized—Andrews v. Security Nat. Bank of Wichita Falls, 50 S.W.2d 253, 121 Tex. 409, 83 A.L.R. 44, reversing Security Nat. Bank of Wichita Falls v. Andrews, Civ.App., 21 S.W.2d 509

86. Iowa.—Peninsular Stove Co. v. Roark, 63 N.W. 326, 94 Iowa 560

87. Mo.—Stinde v. Behrens, 6 Mo.App. 309

88. Ky.—Hensley v. Webb, 101 S.W. 375, 31 Ky.L. 87
29 C.J. p. 864 note 21
Unpaid debt due for purchase money of former homestead as obligation contracted for purchase enforceable against land received in exchange see infra § 102

89. Tex.—Jefferson County Inv. & Bldg. Ass'n v. Gaddy, Civ.App., 90 S.W.2d 295, error refused
29 C.J. p. 864 note 22

90. Iowa.—Atkinson v. Hancock, 25 N.W. 701, 67 Iowa 152

new house on the same tract and sold the part of the tract including the old dwelling house did not constitute an abandonment of the right to claim a homestead, and the property was exempt even as against a debt which accrued after acquisition of the land but before the removal.[91]

Intention in selling old homestead Where a debtor has sold his homestead and invested the proceeds in another homestead, it is not necessary, in order to entitle him to the exemption of the new homestead as against a debt created prior to the purchase of the new homestead, but subsequent to the purchase of the old homestead, that he show that the sale was made with the intention to reinvest the proceeds in another homestead, it is sufficient that the reinvestment has in fact been made.[92]

§ 100. Debts or Obligations for Purchase Money

a In general
b Agreement to pay debt of vendor to third person
c Purchase price of other property
d Money borrowed to pay purchase price
e Payment made by third person

a. In General

Whether a homestead is exempt as against claims for purchase money depends on the controlling statute

Whether or not property claimed as a homestead is exempt as against claims for purchase money depends on the particular homestead provisions.[93]

b. Agreement to Pay Debt of Vendor to Third Person

As a general rule, if the purchaser, as part of the consideration, agrees to pay the vendor's debt to a third person, the latter may enforce his rights in preference to the homestead claim

Under most homestead provisions if a part of the consideration for the conveyance of land is the purchaser's agreement to pay a debt of the vendor to a third person, the latter may enforce his rights in preference to the homestead claim.[94] The rule is otherwise, however, where the provisions contain no exception as to purchase money.[95]

c. Purchase Price of Other Property

If the homestead consists of several parcels of land, only that parcel not paid for is subject to the debt, but if part of the purchase money for the entire tract remains unpaid, no homestead in any parcel of the premises can be claimed as against vendor until full payment for the whole is made

If the homestead consists of a number of parcels of land, and the purchase price of one is not paid, that part alone is subject to the debt,[96] but, if the debtor has paid a part of the purchase money for the entire tract and a part of the purchase price remains unpaid, no homestead in any parcel of the premises can be claimed as against the vendor until full payment is made for the whole.[97]

d. Money Borrowed to Pay Purchase Price

Although there is some diversity of holding on this point, in many jurisdictions one who advances money to the debtor for the specific purpose of purchasing the premises acquires the rights of the vendor

There is some diversity of holding as to whether a homestead is subject to a debt incurred by procuring money for its purchase In some jurisdictions the courts construe the term "purchase money" strictly, applying it only to the original obligation owing to the vendor and created by the purchase.[98] In others, applying the doctrine of subrogation or construing the applicable statutory or constitutional

91. Iowa—Perner v Dellinger 222 N W 370, 206 Iowa 1382

92 Ky—Cooper v Arnett, 26 S W 811, 95 Ky 603, 16 Ky L 145

93 S D—Northwestern Loan & Banking Co v Jonasen, 79 N W 840, 11 S D 566
29 C J p 864 note 24 [a]

Insurance money

Act of revisors in incorporating provision exempting insurance money on homestead with that exempting insurance money on personal property, thus making insurance money not exempt on a debt for purchase price of homestead was held not the result of mistake, so as to make insurance money on a burned homestead exempt from garnishment on a debt for the purchase price—Cavadini v Larson, 218 N W 209, 211 Wis 200

94. S D—Olson v Colton Sav Bank, 213 N W 361, 365, 51 S D 253, citing **Corpus Juris.**
Tex—Quinn v Dickinson, Civ App, 146 S W 993
29 C J p 866 note 45

95. Minn—Kugath v Meyers, 64 N W 1138, 62 Minn 399

96. Ga—Cook v Cook 67 Ga 381

Apportionment of purchase price

The homestead rights having attached in absence of showing that money borrowed was used in payment of purchase money for a small tract used as part of rural homestead, no equitable lien would be created against such tract Thus, where owners of fifty-five-acre rural homestead acquired an equitable estate to adjacent eight and one-third-acre tract under contract of purchase and went into possession and began use and occupancy thereof and carried out intentions of making it a part of homestead and thereafter executed a note for a loan with which to pay purchase money of other tract and small portion of purchase money of eight and one-third-acre tract, lien on such tract could not be foreclosed except for such small portion—Hayes v First Trust Joint Stock Land Bank of Chicago Tex Civ App 111 S W 2d 1172 error dismissed

97 Ga—Sale v Wingfield 55 Ga 622
29 C J p 866 note 48

98 Cal—Campan v Molle, 57 P 208, 124 Cal 415
29 C J p 866 note 49

provisions, it is held that the lender acquires the rights of the vendor when he advances money to the debtor specifically for the purchase of the premises,[99] but the money must have been borrowed for that specific purpose.[1] The violation of an oral promise to mortgage the homestead for money lent to procure it does not require imposition of a lien to enforce a trust ex maleficio, and a judgment for money so lent cannot be declared a lien on the homestead under a statute exempting homesteads from seizure for debts not lawfully charged thereon in writing.[2]

e. Payment Made by Third Person

Generally a third person who, at the instance of the purchaser, pays the contract price directly to the vendor acquires rights which take precedence over the homestead right of the vendee

While there is some authority to the contrary,[3] it is very generally held that, where a third person, at the instance of a purchaser of land, pays the contract price directly to the vendor, the debt thereby created is deemed to be for purchase money, and no homestead rights of the vendee will take precedence over it.[4]

§ 101. —— Obligations Secured by Vendor's Lien or Mortgage

a In general
b Attorney's fees included in vendor's lien notes
c Effect of waiver or loss of lien

a. In General

Obligations for purchase money secured by liens contemporary with the transaction, such as a vendor's lien or a mortgage, take precedence over any claims of homestead

Under the homestead laws of practically all jurisdictions, obligations for purchase money secured by liens contemporary with, and a part of, the transaction, such as a vendor's lien,[5] or a mortgage

99. Ark.—Starr v. City Nat. Bank, 252 S.W. 356, 159 Ark. 109.
Kan.—Farmers' State Bank of Kingman v. Pickering, 205 P. 1110, 111 Kan. 132.
Mont.—De Fontenay v. Childs, 19 P.2d 650, 652, 93 Mont. 480, citing **Corpus Juris.**
Nev.—Sugale v. Pagni, 250 P. 991, 992, 50 Nev. 74, citing **Corpus Juris.**
Tex.—Floyd v. Hammond, Com. App., 268 S.W. 146, affirming Hammond v. Floyd, Civ. App., 255 S.W. 777.
29 C.J. p. 866, note 50.
Loans and advances used in removing encumbrances, see infra § 107.

Money originally advanced for other purpose

The fact that the part of money secured by trust deed was originally advanced to purchase other property than the home which was purchased with it and money subsequently loaned did not defeat lien as to such part where lender permitted borrower to retain it under agreement that it was to be used in purchase of home.—Maxwell v. Schott, Tex. Civ. App., 295 S.W. 266.

Determination of liability

In determining what portion of present indebtedness against a tract of land which includes a homestead is chargeable as a lien against the homestead, such amount should be based solely on the amount of indebtedness unpaid on purchase price of homestead tract plus whatever interest has accrued thereon, and such amount should not be increased by any other indebtedness.—Laubhan v. Alliance Life Ins. Co., Tex. Civ. App., 134 S.W.2d 788.

1. Ark.—Starr v. City Nat. Bank, 252 S.W. 356, 159 Ark. 409.
Mont.—De Fontenay v. Childs, 19 P.2d 650, 652, 93 Mont. 480, citing **Corpus Juris.**
29 C.J. p. 867, note 51.

2. Minn.—Renville State Bank v. Lentz, 214 N.W. 167, 171 Minn. 431.

3. Ala.—Tyler v. Jewett, 2 So. 905, 82 Ala. 93.

4. Okl.—Mercer v. McKeel, 108 P.2d 138, 113, 188 Okl. 280, citing **Corpus Juris.**
29 C.J. p. 867, note 53.

5. U.S.—Meek v. Belote, D.C. Tex., 5 F.Supp. 519.
Ala.—Coon v. Henderson, 199 So. 704, 240 Ala. 492.—Posey v. Dodson, 100 So. 188, 211 Ala. 335.
Cal.—In re Reid's Estate, 79 P.2d 451, 26 Cal.App.2d 362.
Ill.—Rewerts v. Johnson, 113 N.E. 137, 311 Ill. 594.—Waschow v. Waschow, 155 Ill.App. 167.
Tex.—Kerens Nat. Bank v. Stockton, 94 S.W.2d 161, 127 Tex. 326, reversing Civ. App., 61 S.W.2d 572.—Gregory v. Ward, 18 S.W.2d 1049, 118 Tex. 526, modifying Civ. App., 28 S.W. 935.—Woods v. West, Com. App., 37 S.W.2d 129, reversing, Civ. App., 21 S.W.2d 1090.—First State Bank of Carbon v. Thurman, Com. App., 12 S.W.2d 146, reversing Thurman v. First State Bank of Carbon, Civ. App., 300 S.W. 123.—Broussard v. American Nat. Ins. Co., Civ. App., 133 S.W.2d 811, error dismissed, judgment correct.—Kennerly v. Taylor, Civ. App., 130 S.W.2d 1089.—Curtis v. Speck, Civ. App., 130 S.W.2d 348, error refused.—Williams v. Tooke, Civ. App., 116 S.W.2d 1114, error dismissed.—Hayes v. First Trust Joint Stock Land Bank of Chicago, Civ. App., 111 S.W.2d 1172, error dismissed.—Gonzales v. Singer, Civ. App., 85 S.W.2d 273, error dismissed.—Mitchell v. Dallas Loan Co., Civ. App., 52 S.W.2d 756.—Coffman v. Brannen, Civ. App., 50 S.W.2d 913.—Willard v. Phillips, Civ. App., 43 S.W.2d 170.—First Nat. Bank v. Casey, Civ. App., 31 S.W.2d 662.—Lawson v. Abney, Civ. App., 7 S.W.2d 109.—Skinner v. Home Building & Loan Ass'n, Civ. App., 292 S.W. 913.—Kocur v. Pawelek, Civ. App., 268 S.W. 241.—Smith v. Clark, Civ. App., 266 S.W. 518.—Glenn v. Shamburger, Civ. App., 240 S.W. 701, error refused.
29 C.J. p. 861, note 25.

Debt incurred by prior owner

Debt for purchase money incurred by prior owner, who had no homestead claim was not subject to claim of homestead by subsequent purchaser.—Booze v. Smith, Tex. Civ. App., 36 S.W.2d 1061, error dismissed.

Interest is agreed between parties to land purchase agreement, or in absence of agreement, legal interest on the unpaid purchase price of land is included in amount of vendor's lien which attaches to the land for the unpaid purchase price when the agreement to sell is executed, and the interest is included in the amount of the lien which is prior to the homestead exemption claim.—McMurdie v. Chugg, 107 P.2d 163, 99 Utah 403, 132 A.L.R. 135.

Lien provided in deed for antecedent debt to third person, who also advanced additional funds to carry out exchange of homesteads, was held not sustainable against homestead as lien for purchase money.—Andrews v. Security Nat. Bank of Wichita Falls, 50 S.W.2d 253, 121 Tex. 409, 83 A.L.R. 44, reversing Se-

to secure payment of the purchase money,[6] take precedence over any claims of homestead and are enforceable against the premises, although a homestead may be obtained in such lands subject to such obligations.[7] Where, after the sale of a lot, the vendee moves thereon a house which prior thereto had been his homestead, and which continued as such to the vendor's knowledge, the vendor's lien attaches to the lot and improvements placed thereon by the vendor, but not to the house.[8]

Lands descending to widow and children of purchaser. Under the homestead laws of at least one jurisdiction it is held that homestead lands descending from the purchaser to his widow and children are exempt from the vendor's lien.[9]

b. Attorney's Fees Included in Vendor's Lien Notes

The plea of homestead is not available against the collection of attorney's fees provided the note given as a consideration for the purchase price includes such fees as a part of the consideration

Where a vendor's lien note given as a consideration for the purchase price includes attorney's fees as a part of the consideration, the plea of homestead is not available against the collection of such fees,[10] but, where provision is not made for attorney's fees in the original note given for the purchase money, and a renewal note is given after the property has become the homestead of the purchaser, containing a stipulation for attorney's fees, no lien is thereby created for the fees superior to the homestead rights.[11]

c. Effect of Waiver or Loss of Lien

Under some statutes a claim for unpaid purchase money takes precedence over the homestead right, even though the vendor may have lost or waived his lien, but under other statutes the rule is otherwise

Where the homestead laws except "debts" or "obligations" for purchase money generally, a vendor's claim for unpaid purchase money takes precedence over the homestead right, although he may have waived or lost his lien.[12] Where the constitution merely excepts from its operation property sold subject to a vendor's lien, however, and a mortgage is taken for the purchase money, the vendor's lien is thereby waived and the homestead is exempt from execution as against any purchase-money mortgage not recorded before the declaration of homestead was filed,[13] and it has been held that any right which a money judgment creditor might otherwise

curity Nat Bank of Wichita Falls v Andrews Civ App, 21 S W 2d 509

Obligation to support grantor

Under deed conveying land for stated sum partly evidenced by grantee's notes, obligating grantee to support grantor during his lifetime and reserving vendor's lien on land until such notes and reservations were fully paid and carried out grantee's contractual obligation to support grantor, as well as debt evidenced by notes constituted charge or encumbrance against land, as regards homestead rights -Machicek v Barcak Tex, 170 S W 2d 715

Homestead in house on lot purchased

Where house placed by purchasers on lot was permanent fixture and attached to lot without agreement for removal purchasers were not entitled to remove house on vendor's suit to foreclose lien against lot and improvements notwithstanding house was purchasers' homestead In such case, where equitable division could not be had of property court must ascertain respective values of parties' interest in property, order sale thereof and distribute proceeds in proportion thereto —Hartell v Tulsa Rig, Reel & Mfg Co, Tex Civ App, 64 S W 2d 804

Cancellation of forged deed

Where vendee under forged deeds sold purchase-money notes to a bona fide purchaser, on cancellation of the deeds such bona fide purchaser was not entitled to a lien against the property, which was the purported vendor's homestead for money turned over to the vendor by the vendee from the sale of the notes since the homestead rights of the vendor's wife who was not a party to the transaction could not be so jeopardized Harris v Cordella Tex Com App 285 S W 268 modifying Cordella v Collier Civ App 280 S W 217

Extinguishment of lien

Where wife's father had vendor's lien on homestead of husband and wife for amount of money loaned to them and thereafter the wife's father died leaving three children including the wife, there was an extinguishment of the lien to the extent of the wife's ownership in the debt by "merger" thereof in the homestead estate —Mikulenka v Mikulenka, Tex Civ App, 168 S W 2d 517

6. Ala —Coon v Henderson 199 So 704 240 Ala 492—Booker v Booker, 125 So 212, 220 Ala 367—King v Chandler, 105 So 184 213 Ala 337
Colo —Bean v Eves, 20 P 2d 544 545, 92 Colo 339, citing **Corpus Juris.**
Ky —Ratliff v Anderson & Ratliff 242 S W 35, 195 Ky 320
Miss —Box v Early, 178 So 793 181 Miss 19
N C —Virginia-Carolina Chemical Co v Walston, 123 S E 196, 187 N C 817
29 C J p 864 note 26.

Possession prior to execution of trust deed

Where landowners segregated a lot from other lots used as their home, erected store building thereon and leased it and subsequently purchased lessee's business, the fact that lessee delivered goods and possession of the premises before execution of note and deed of trust for purchase price did not cause the premises to become owners' business homestead so as to be exempt from the deed of trust lien Archer v Youngblood Tex Civ App 129 S W 2d 382 error refused

7. Cal —McHendry v Reilly 13 Cal 75

8 Tex —Hartell v Tulsa Rig, Reel & Mfg Co, Civ App 64 S W 2d 804

9 Wis —Schmidt v Schmidt, 101 N W 678 123 Wis 295—Berger v Berger 80 N W 585 104 Wis 282, 76 Am S R 877

10 Tex —Duller v McNeill Civ App 163 S W 636—Blackmon v Texas Securities Co Civ App, 196 S W 590

11 Tex —Anderson v Womack, Civ App, 35 S W 2d 843 error dismissed
Utah —McMurdie v Chugg 107 P 2d 163 99 Utah 403 132 A L R 135
29 C J p 865 note 29

12 Iowa —Anderson v Renshaw, 294 N W 274 229 Iowa 93
29 C J p 865 note 32

13. Cal —Lee v Murphy, 51 P 549, 955, 119 Cal 364

have to proceed against the debtor's homestead on the ground that the debt was incurred in the purchase of the property may be barred by proof that all liens were waived by plaintiff in a compromise agreement subsequently consummated by a consent judgment [14]

§ 102. —— Unsecured Obligations

Where the constitutional or statutory provision relating to homestead exemption provides that the homestead property is liable for a debt or obligation contracted for the purchase thereof, even in the absence of a lien no homestead can be acquired in the premises as against a purchase-money debt

In many jurisdictions the constitutional and statutory provisions relating to homestead exemption contain exceptions by virtue of which property in which a homestead is claimed is liable for a "debt" or "obligation" contracted for the purchase of such property, and it has been said that homestead provisions containing exceptions of this character should be strictly construed [15] Under these provisions, even in the absence of any lien, no homestead can be acquired in the premises as against a purchase money debt [16]

Debt or obligation within rule. The following debts or obligations have been considered a purchase-money "debt" or "obligation" contracted for the purchase of property in which a homestead was claimed A debt incurred in the purchase of an outstanding title to premises occupied as a homestead which is paramount to that already possessed by the purchaser,[17] a note against a third person transferred by the vendor's indorsement in part payment of the purchase money,[18] a debt created for the purpose of paying for or erecting a house on a vacant lot,[19] and the assumption by each partner of a portion of the partnership liability on the dissolution of the firm and division of property [20] Where the vendee exchanges his homestead, against which there is a debt due for the purchase money, for other land which he claims as exempt, such debt is an obligation contracted for the purchase, and may be enforced against the land received by the vendee in exchange [21] Rents promised to be paid by a tenant constitute the purchase money for his homestead rights in the premises he occupies [22]

Debt or obligation not within rule The debt for purchase money excepted by the constitution can be none other than that created in acquiring some sort of title to the homestead,[23] and hence cannot arise from a contract made after such title is fully vested, and the homestead acquired [24] The following debts or obligations have been considered not a purchase-money "debt" or "obligation" contracted for the purchase of property in which a homestead was claimed A debt contracted for material used in the improvement of a homestead,[25] a debt resulting from a former sale of the property to one

14. Kan —Wagner v Downey, 99 P 2d 761, 151 Kan 505

15. Fla —Wilhelm v Locklar, 35 So 6, 46 Fla 575
29 C J p 865 note 36

16 U S —In re David, D C Fla, 54 F 2d 140
Ill —Baker v Salzenstein, 145 N E 355, 314 Ill 226
Iowa —Anderson v Renshaw, 294 N W 274, 229 Iowa 93—Westerman v Raid, 212 N W 134, 203 Iowa 1270—Brunsdon v Brunsdon, 200 N W 823, 199 Iowa 1099
Kan —Wagner v Downey, 99 P 2d 761, 151 Kan 505—De Bolt v Sharp, 80 P 2d 1054, 148 Kan 298
N C —Johnson v Leavitt, 125 S E 490, 188 N C 682
Okl —Mercer v McKeel, 108 P 2d 138, 188 Okl 280—In re Gardner's Estate, 250 P 490, 122 Okl 26
S D —Olson v Colton Sav Bank 213 N W 364, 51 S D 253
Tex —Kerens Nat Bank v Stockton, 94 S W 2d 161, 127 Tex 326 reversing, Civ App, 61 S W 2d 572—Laubhan v Alliance Life Ins Co, Civ App 134 S W 2d 788
Wash —Lampaert v Marohn, 118 P 2d 954, 11 Wash 2d 211—Lenz v Harding, 59 P 2d 713, 186 Wash 642—First Nat Bank v Mapson, 42 P 2d 782, 181 Wash. 196—Lyon v Herboth 233 P 24 26, 133 Wash 15, citing **Corpus Juris.**
29 C J p 865 note 37

17. Ill —Cassell v Ross, 33 Ill 245, 85 Am D 270
Okl —Mercer v McKeel, 108 P 2d 138, 188 Okl 280

18. Mass —New England Jewelry Co v Merriam, 2 Allen 390
N C —Whitaker v Elliott, 73 N C 186

19. Ky —Norvell v Faulk, 139 S W 2d 428, 282 Ky 591

Improvement of house
The sums expended in purchase of land and for improvement under contracts executed simultaneously constituted the purchase price of homestead which came into existence when house thereon was finally made suitable for occupancy as a home —Wilson v Hinton, 116 S W 2d 365, 131 Tex 593, reversing Hinton v Meador, Civ App, 97 S W 2d 251

20. U S —In re David, D C Fla, 54 F 2d 140

21. U S —Meek v Belote, D C Tex 5 F Supp 519
Tex —Woods v West, Com App 37 S W 2d 129 reversing, Civ App, 21 S W 2d 1090
29 C J p 866 note 40
Liability of homestead for purchase money unpaid on former homestead generally see supra § 99

22 Tex —Stephens v Cox Civ App, 256 S W 613, denying rehearing 255 S W 241

23. Tex —Hayes v Taylor, 43 S W 314, 17 Tex Civ App 449

Judgment for damages
Where plaintiffs traded farm to defendants for realty, stock of merchandise, and fixtures, which were warranted to be free of encumbrances, and merchandise and fixtures were lost in forced sale because they were incumbered, plaintiffs were not entitled in action for damages not remotely connected with purchase price to have judgment against defendants declared a lien on farm, which defendants were occupying as a homestead on theory that transaction was part of purchase price of homestead —Buzzard v Odle, 89 P 2d 360, 184 Okl 631

24. Hayes v Taylor 43 S W 314, 17 Tex Civ App 449

25. Okl —South Texas Lumber Co v Epps, 150 P. 164, 48 Okl 372

Cost of house
Iowa —Brunsdon v Brunsdon, 200 N. W 823, 199 Iowa 1099

who is evicted by foreclosure of a prior mortgage and who afterward acquired a new title to the property,[26] and a judgment as for money had and received, recovered in an action to rescind a contract for the purchase of land.[27] Where arbitrators assign land to an heir and report that the heir owes the estate a stated amount, this debt, if partly contracted prior to the ancestor's death, is not deemed to be for the purchase price of the land so assigned.[28] Where a wife is the owner of a stock of goods and merchandise, the husband carrying on the business in his own name, if the proceeds of sales are invested in real estate, the title to which is taken in the name of the wife, and which is immediately occupied by the family as a homestead, no purchase-money obligation accrues to business creditors of the husband, at least where it does not appear that the proceeds of the goods sold by the husband and wife constituted any part of the purchase price.[29]

§ 103 —— Change in Form of Debt or Taking of Security

Land which has become subject to the payment of purchase money continues chargeable therewith, although the original indebtedness is changed in form and although new or substituted security is executed

Land which has become subject to the payment of purchase money continues chargeable therewith, although the original indebtedness is repeatedly changed in form, provided it can be traced,[30] and the rule is not rendered inapplicable by the fact that the new or substituted security is executed to a third party for money advanced or loaned for the purpose of paying off the original encumbrance.[31] If the original debt is evidenced by a note secured by indorsements,[32] or by mortgage,[33] or has been renewed by other notes, although for a different amount,[34] or with a different rate of interest,[35] or if the original or renewal note has been reduced to judgment,[36] the homestead remains liable for the payment of the purchase money so evidenced. Where time of payment of purchase money for a homestead was extended by execution of a deed of trust of the homestead to secure a note to a third party who took over the purchase money to his vendor, a sale under the trust deed is valid,[37] notwithstanding the note to the third party was in excess of the amount of indebtedness secured by vendor's lien.[38] Where an overdraft on a bank has been canceled by a drawer who has deposited in his own name money held by him as treasurer of a school district, but the depositor gives a note afterward for the money received thereby, the bank cannot enforce a judgment thereon against the depositor's homestead, purchased with money procured by the overdraft on the ground that the debt was contracted by the purchase money.[39]

§ 104. —— Transfer of Obligation

Obligations for purchase money may be assigned, and the assignee may satisfy his debt out of land claimed as a homestead

Obligations for purchase money, within the rules stated supra §§ 100-103, may be assigned or otherwise transferred to the same extent as liens or obligations for ordinary indebtedness, and the assignee may satisfy his debt out of the land, although it is claimed as a homestead.[40]

26. La—Heinss v Henry, 54 So 24, 127 La 770

27. Utah—Brown v Cleverly, 85 P 2d 769, 96 Utah 120, denying rehearing, 83 P 2d 1009, 96 Utah 116

28 Ga—Brady v Brady, 67 Ga 368

29. Kan—Tootle v Stine, 1 P 279, 31 Kan 66

30. Ky—Ratliff v Anderson & Ratliff 242 S W 35 195 Ky 320
Miss—Box v Early, 178 So 793, 181 Miss 19
Tex—Bellamy v Oklahoma Farm Mortg Co Com App, 278 S W 180, affirming Oklahoma Farm Mortg Co v Bellamy Civ App, 265 S W 1070—De Busk v Jacksonville Building & Loan Ass'n, Civ App, 147 S W 2d 537, error dismissed, judgment correct
29 C J p 867 note 54

Extension or renewal of barred note
Tex—National Bank of Commerce of Houston v Irvine, Civ App, 73 S W 2d 929, error refused—Hoelscher v Ehlinger, Civ App, 57 S W 2d 283—Hall v Hix, Civ App, 297 S W 191

31. Miss—Box v Early, 178 So 793, 181 Miss 19
Wyo—Powers v Pense 123 P 925 20 Wyo 327, 40 L R A,N S, 785

32 Ark—Boone County Bank v Hensley 35 S W 1101, 62 Ark 398
Wyo—Wright v Walker, 225 P 75, 76, 31 Wyo 233, quoting **Corpus Juris.**

33 Cal—Dillon v Byrne, 5 Cal 455
Ga—Lane v Collier, 46 Ga, 580
Tex—Parker v Bushong, Civ App, 143 S W 281

34. Wyo—Wright v Walker, 225 P 75, 76, 31 Wyo 233, quoting **Corpus Juris.**
29 C J p 867 note 58

35. Tenn—Bentley v Jordan, 3 Lea 353

36. Wash—Lenz v Harding, 59 P 2d 743, 186 Wash 642—Lyon v Herboth, 233 P 21 26, 133 Wash 15, citing **Corpus Juris.**
Wyo—Wright v Walker, 225 P 75, 76 31 Wyo 233, quoting **Corpus Juris.**
29 C J p 867 note 60

37 Tex—W C Belcher Land Mortg Co v Taylor, Com App, 212 S W 617, reversing Civ App 173 S W 278
29 C J p 867 note 61

38 Tex—W C Belcher Land Mortg Co v Taylor, supra

39. Iowa—Hill v Richards, 45 N W 734, 80 Iowa 164

40. Ill—Baker v Salzenstein, 145 N E 355 314 Ill 226
Miss Box v Early 178 So 793 181 Miss 19
Tex—Hoelscher v Ehlinger Civ App, 57 S W 2d 283
29 C J p 868 note 65

Assignment by debtor as administrator
Where owner of vendor's lien notes

§ 105. Liabilities for Improvement and Protection of Property

Under common statutory and constitutional provisions no exemption can be secured against debts created in the improvement of the homestead, provided the contract for the improvement is in compliance with the requirements of the homestead law

Under common statutory and constitutional provisions no exemption can be secured against debts created in the improvement of the homestead, such as debts or obligations incurred in the erection of buildings and other improvements of a substantial nature on the premises[41] It has been held that provisions relating to this matter ought to be strictly construed,[42] and, if the homestead laws contain no exceptions in favor of debts created in making improvements, the courts can make none[43] Where the constitution defines and enumerates the exceptions to its homestead exemptions and does not except debts for labor and material used in improving a homestead, a statute assuming to make such exception is unconstitutional and void,[44] and, under a constitutional provision exempting a homestead from forced sale and authorizing the legislature to limit the amount in value that shall be exempt, a statute authorizing sale of a homestead for the agreed or reasonable cost of material furnished or labor performed in the original erection and construction of buildings thereon is void[45] A statute excepting claims for improvements is void where the constitution provides that a reasonable amount of property shall be exempt from seizure and sale for the payment of any debt or liability[46]

Creation of lien Provisions of the character under consideration do not of themselves create a lien,[47] but the lien must be acquired by some method provided by law,[48] the debt becomes a lien on the homestead in the same manner that other debts become liens[49] Under the provisions of some homestead laws the debt must be created by written contract in order to secure a lien[50]

Extent and limitations of rule generally. Where the contract for the improvement is in compliance

died intestate leaving as sole heir maker of notes and owner of land subject to vendor's lien, indebtedness evidenced by notes was not extinguished and lien discharged under principles of "confusion of rights" or "confusion of debts" where maker qualified as administrator of intestate's estate and in such capacity assigned the notes to third parties, and hence homestead right of maker and wife in the land was not superior to rights of assignees of notes to foreclose lien on such land —Fisher v First Nat Bank of Throckmorton, Tex Civ App, 171 S W 2d 223

41. Fla —La Mar v Lechlider, 185 So 833, 135 Fla 703—Jones v Carpenter, 106 So 127, 90 Fla 407, 43 A L R 1409

Iowa —Moffitt v Denniston & Partridge Co, 294 N W 731, 229 Iowa 570

Minn —H E Westerman Lumber Co v Raschke, 215 N W. 197, 172 Minn 198

Tex —Scarborough v Home Owners' Loan Corporation, Civ App, 161 S W 2d 886, error refused—Hayes v First Trust Joint Stock Land Bank of Chicago, Civ App, 111 S W 2d 1172, error dismissed—Britton v Wilson, Civ App, 101 S W 2d 889, error dismissed —Starks v National Bond & Mortgage Corporation, Civ App, 85 S W 2d 1056, error dismissed

29 C.J p 868 notes 67, 68

Necessity of joinder of husband and wife in creation of lien for improvements see infra § 130

Right to create lien for improvements see infra § 134.

Registration of evidence of debt held unnecessary

La —Louisiana Red Cypress Co v Rabalais, 112 So 647, 163 La 679

Paving street

Sufficient contract for paving street which abuts homestead property executed in conformity with law may not be defeated by claim of homestead, but is regarded as contract, and lien for improvement of homestead —Glenn v Panhandle Const Co, Tex Civ App, 110 S W 2d 1217—White v Dozier Const Co, Tex Civ App, 70 S W 2d 240

Lien antedating homestead rights

Where homestead claimant had orally purchased realty and where at time deed was delivered by vendor to claimant's nominee nothing had been done by claimant to remove entire oral contract from statute of frauds, nominee acquired title in trust for claimant, but claimant could not demand conveyance except on compliance with trust agreement in pursuance of which note and lien were given to secure expenses incurred by trustee in improving realty, hence lien was valid, since claimant and wife had no antecedent superior homestead rights which would defeat the lien —Doak v Casner, Tex Civ App, 101 S W.2d 1033, error refused

42. Kan —Dotson-Murray Fruit Co v Leibrand, 53 P 2d 487, 143 Kan 72

29 C J p 868 note 69

43. Ga —Builders' Lumber Co v Hunt, 176 S E 11, 179 Ga 367

29 C J p 868 note 70

44. N C —Cumming v. Bloodworth, 87 N C 83

45. S D —Home Lumber Co v Heckel, 293 N W 549, 67 S D 429

46. Utah —Volker-Scowcroft Lumber Co v Vance, 88 P 896, 32 Utah 74, 125 Am S R 828

29 C J p 868 note 72

47. Minn —H E Westerman Lumber Co v Raschke, 208 N W. 960, 167 Minn 243

29 C J p 868 note 73

48. Minn —Hasey v McMullen, 123 N W 1078, 109 Minn 332

Creation of liens on homestead generally see infra § 125

Affidavit of attachment not complying with statute is insufficient to fix lien on homestead —H E Westerman Lumber Co v Raschke, 208 N W 960, 167 Minn 243

49. Minn —H E Westerman Lumber Co v Raschke, supra

50. Tex —Glenn v Panhandle Const Co, Civ App, 110 S W 2d 1217—Lubbock Nat Bank v Nickels, Civ. App, 63 S W 2d 764—McCanless v Devenport, Civ App, 40 S W 2d 903

29 C J p 868 note 75

Contract held sufficiently definite

Facts that only general character of building to be erected was set out in construction contract and that, although contract provided building was to be erected in accordance with certain specifications, no such specifications were ever prepared were held not to render construction contract so indefinite that lien could not be fixed on property as against claim of homestead where, after building was completed, owners accepted it as compliance with contract —Hufstedler v. Glenn, Tex Civ App., 82 S.W.2d 733.

with the requirements of the homestead law, a resulting lien is enforceable against the homestead, although the building when finished cost more than the contract called for[51] The fact that an advancement was a loan to husband and wife to improve their homestead did not avoid the effect in fixing the lien for the money so borrowed where the facts showed that all the loan was used for such purpose;[52] but the lien can be claimed only for such moneys as were expended on improvements placed on the property,[53] and not for attorney's fees provided for in the note and trust deed securing the indebtedness,[54] although the lender is not thereby prevented from recovering a personal judgment against the debtor for the amount of such fees[55] It is not necessary that the contract should insure value received for the moneys expended[56] Obligations incurred for personal property purchased for the improvement of the homestead and which has become a part of it by being attached thereto are debts, within the rule, which may be enforced against the premises,[57] but, if the party furnishing the improvement agrees to consider it as personalty, although annexed to the homestead realty, he cannot subject the latter to his claim for the price[58] A mortgage given on a homestead to secure the release of a judgment on a lien for improvements is valid to the extent of the debt for improvements and interest thereon, even though it covered sums over and above that amount[59]

Provisions of the character under consideration have no application to a claim for material furnished for the improvement of the homestead but not actually used for that purpose,[60] and, where the owner contracted for improvement of an entire tract, only a part of which constituted his homestead, the homestead is chargeable only with the amount actually expended on it, and not with the amount expended on the other parts of the tract.[61] As between the lender and the borrower, money borrowed and used in the improvement of the land is not a debt incurred for the improvement of the homestead, within the meaning of the rule.[62] Where a chattel mortgage has been taken to secure the purchase money of personal property after it has become attached as a fixture to the premises, the seller's only remedy is to enforce the lien which he has obtained under the mortgage[63] Improvements unauthorizedly placed on land by a tenant cannot be charged to infants claiming a homestead right in the premises[64] As long as a divorced wife's separate property is used as a homestead, no lien can be foreclosed against it for community funds used in making improvements[65]

Improvements made before execution of contract. A contract giving a lien for money loaned on a homestead to pay for improvements erected prior to the execution of the contract is ineffectual[66]

Abandonment of work after transfer of lien. Where the contract for improvements contemplated that the contractor, independently of all others, should perform the contract, and he thereafter transferred notes for the price and lien securing them to a third person, and then abandoned the work without cause, it was held that the third person could not enforce the lien[67]

An occupying claimant who makes improvements on land, supposing that he has acquired a good title thereto, has a lien therefor,[68] although the land may be assigned to the original owner as a homestead[69]

§ 106. —— Wages and Materials

Although the rule is otherwise in the absence of such provisions, under various constitutional and statutory provisions the lien or obligation of a mechanic, laborer,

51. Tex—Turbeville v Book, Civ App, 226 S W 814—Hicks v Texas Loan & Investment Co, 111 S W 784, 51 Tex Civ App 298

52. Tex—Turbeville v Book, Civ App, 226 S W 814
29 C J p 868 note 77

53. Tex—Hufstedler v Glenn, Civ App, 82 S W 2d 733

54. Tex—Glenn v Noah, Civ App, 130 S W 2d 1069—Hufstedler v Glenn, Civ App, 82 S W 2d 733
Attorney's fees generally see infra § 113

55. Tex—Hufstedler v Glenn, Civ App, 82 S W 2d 733.

56. Tex—Turbeville v Book, Civ App, 226 S W 814

57. S C—All v. Goodson, 11 S.E. 703, 33 S C. 229.

58. Kan—Marshall v Bacheldor, 28 P 168, 47 Kan 442

59. Wyo—Wright v Walker, 225 P 75, 31 Wyo 233

60. Kan—Wichita Acetylene Mfg Co v Haughton, 155 P 1078, 97 Kan 528
29 C J p 869 note 81

61. Tex—Starks v National Bond & Mortgage Corporation, Civ App, 85 S W 2d 1056, error dismissed

62. Kan—Dotson-Murray Fruit Co v Leibrand, 53 P 2d 487, 143 Kan 72
29 C J p 869 note 82
Trust deed held invalid as to amount loaned to make improvements after homestead right attached—Maxwell v Schott, Tex Civ App, 295 S W. 266

63. Tex—Low v Tandy, 8 S W 620, 70 Tex 745—McNeil v Moore, 27 S W 163, 7 Tex Civ App 536
29 C J p 869 note 83

64. Ky—Morris v. Mitchell, 39 S W 250, 19 Ky L 136

65. Tex—Kyle v Kyle, Civ App, 55 S W 2d 885

66. Tex—Pioneer Savings & Loan Co v Dougherty, Civ App, 35 S W 698

67. Tex—Murphy v Williams, Civ App, 116 S W 412

68. S C—Wilson v Counts, 29 S E 649, 52 S C 218.

69. S C—Wilson v Counts, supra—Tumbleston v. Rumph, 21 S E 84, 43 S.C. 275.

or materialman who has performed labor or furnished material in improving the homestead may be enforced against it, provided there is a compliance with the constitutional or statutory requirements.

Under the provisions of the homestead laws in many jurisdictions a mechanic, laborer, or materialman may have a lien on the homestead for labor and materials furnished in improving it, provided he has perfected his obligation or lien in accordance with the statutory requirements,[70] unless he is excused from doing so by reason of the death of the debtor during the time allowed from perfecting the lien,[71] or unless the work was done or the materials furnished on the personal security of the debtor alone.[72] Under some provisions, broader in their terms, claims for labor or material are excepted from the homestead exemption, without limitation as to the perfecting of the lien or obligation.[73] A provision making the property subject to seizure and sale for any debt incurred to any laborer or servant for labor or service performed refers to the relation of employer and employee between the owner of the property and the laborer or servant,[74] and the homestead is not liable for a debt incurred to a laborer by virtue of some collateral agreement with his employer.[75] Furthermore, a laborer or servant contemplated by such provision is one who performs manual labor or menial tasks.[76] Under the provisions of some of the homestead laws which do not impair a mechanics' lien on the homestead premises, its enforcement is suspended if and when the owner of the homestead claims the exemption.[77] By virtue of some provisions, if both husband and wife, when contracting for materials for a house, intend that it shall be their homestead, liens for these materials will not attach to either the building or the land unless acts of estoppel are shown,[78] but, if it is the intention of both husband and wife to erect the house for other than homestead purposes, the liens attach both to the building and the land on which it is situated.[79] In the absence of a statutory provision of the general character under consideration, the homestead exemption operates against claims for wages and materials furnished in making improvements on the property, as in the case of other claims.[80]

Requisites of contract In some jurisdictions, the debt must be created by a written contract, which must in all respects comply with the statutory requirements,[81] and it has been held that in the absence of such contract a lien declared by a city under an ordinance against a homestead to secure payment for material and labors furnished by a paving company is a nullity.[82]

Work done or materials furnished pursuant to contract In order that the lien may attach it is necessary that the labor must have been done or the materials furnished in pursuance of the con-

70. Miss.—Mitchener v. Robins, 19 So. 103, 73 Miss. 383
29 C.J. p. 869 note 90
Homestead property as subject to mechanics' liens see the C.J.S. title Mechanics' Liens § 14, also 40 C.J. p. 61 notes 2-5

Lot occupied partly as residential, and partly as business, homestead
Where part of lot was occupied as a residential homestead and part as a business homestead, lien, on entire lot securing funds with which brick building constituting business homestead was erected, was valid and enforceable as against entire lot.—Scarborough v. Home Owners' Loan Corporation, Tex.Civ.App., 161 S.W.2d 886, error refused

In Georgia
(1) Neither an article of necessity furnished for the use of the family, nor feed for horses set apart as a part of the homestead is material furnished for the benefit of the homestead within the constitutional provision that homestead property may be sold for material furnished therefor.—McLamb & Co. v. Lambertson, 62 S.E. 107, 4 Ga.App. 553

(2) So homestead is not subject to debt for fertilizer used thereon.—Blackshear Mfg. Co. v. Carter, 181 S.E. 155, 180 Ga. 828

(3) Materialman's lien acquired before homestead was set apart, was held not in nature of claim for purchase money superior to pony homestead.—Wright v. Carolina Portland Cement Co., 170 S.E. 795, 177 Ga. 564

In North Carolina
A judgment for sale of land free of homestead is erroneous where based on assertion of lien for materials furnished, for while a mechanic's lien is superior to homestead exemption, a lien for materials furnished is inferior.—Cameron v. McDonald, 6 S.E.2d 497, 216 N.C. 712

71. Miss.—Mitchener v. Robins, 19 So. 103, 73 Miss. 383

72. Ala.—Tyler v. Jewett, 2 So. 905, 82 Ala. 93

73. Okl.—Kleindorfer v. Dascomb-Daniels Lumber Co., 226 P. 354, 102 Okl. 60.—Holland v. Robbins, 219 P. 387, 92 Okl. 225
29 C.J. p. 869 note 94

74. Minn.—Lahti v. Peterson, 221 N.W. 534, 175 Minn. 389

75. Minn.—Lahti v. Peterson, supra

76. Salesman
An automobile salesman's judgment against homestead owner for unpaid salary and commissions earned while in owner's employ was not a debt incurred to a "laborer" or "servant," within constitutional provision.—Fletcher v. Scott, 277 N.W. 270, 201 Minn. 609, 114 A.L.R. 762

77. Or.—Paulson v. Hurlburt, 183 P. 937, 93 Or. 419.—Johnson v. Tucker, 167 P. 787, 85 Or. 646

78. S.D.—Jensen v. Griffin, 190 N.W. 319, 46 S.D. 55.—Jensen v. Griffin, 168 N.W. 764, 41 S.D. 30

79. S.D.—Charles Betcher Co. v. Cleveland, 83 N.W. 366, 13 S.D. 347

80. Colo.—McPhee v. O'Rourke, 15 P. 420, 10 Colo. 301, 3 Am.St.R. 579
29 C.J. p. 869 note 97 [a]
Liabilities incurred prior to designation of homestead see supra § 97

81. Tex.—Beckner v. Barrett, Civ.App., 81 S.W.2d 719, error dismissed
29 C.J. p. 870 note 2

82. Tex.—Creosote Wood Block Pav. Co. v. McKay, Civ.App., 211 S.W. 822
29 C.J. p. 870 note 3.

tract and not prior thereto,[83] and, where it appears that the labor was performed in part before the contract was made, to that extent at least there can be no recovery.[84]

§ 107. —— Loans and Advances Used in Removing Encumbrances

When authorized by statute, loans or advances made to discharge the homestead from enforceable liens or encumbrances and actually applied to that purpose may be charged against the premises.

Under the homestead laws of some states a loan or advance made to discharge the homestead from enforceable liens or encumbrances may be charged against the premises where the money is actually expended for that purpose;[85] and it has been held that this is so, although the instrument claimed to create the lien in favor of the party advancing the money may be void,[86] and that the fact that the lender of the money charged usury does not deprive him of the equitable rights resulting from the application of his money to the discharge of the encumbrance.[87] Nevertheless the mere fact that borrowed money was used to discharge liens or encumbrances will not subrogate the lender to the rights of the encumbrancer, unless the funds were loaned for that specific purpose.[88] It has been held that money borrowed to pay off purchase-money notes on a homestead already purchased is not purchase money[89] and the right to collect it does not take precedence over the homestead exemption,[90] but there is authority to the contrary.[91] Under a statute exempting a homestead from seizure and sale on account of any debt not lawfully charged thereon in writing, one who advanced money to another to pay a mortgage on a homestead, on the latter's unfulfilled oral promise to give him a mortgage to secure payment of the money advanced, is not entitled to be subrogated to the rights of the mortgagee whose mortgage was thus paid off or to any lien on the homestead property.[92]

§ 108. Debts Due to Government

An exemption from debts due the government is denied only if the statute expressly subjects the homestead thereto; and accordingly it has been held under some statutes and denied under others that the debtor is entitled to the exemption in the case of local assessments, fines, penalties and costs, and official defaults.

The general rule is that it is only in case the homestead statute expressly subjects the homestead to debts due the state or the United States that an exemption therefrom is denied.[93]

Local assessments. While it has been held that local assessments are not taxes within provisions in homestead laws which prevent the claim of an exemption as against taxes,[94] local assessments have been held enforceable against the homestead under laws containing no exception of debts due for taxes or assessments.[95]

Fines, penalties, and costs. The exemption has been held to include fines, penalties, and costs due the state in criminal prosecutions,[96] although in some jurisdictions the contrary view obtains.[97] Under a homestead law providing that, "where there is no special declaration of the statute to the contrary," the homestead of every family, whether owned by the husband or the wife, is exempt from judicial sale, a statute making premises, illegally used for the manufacture or sale of intoxicating liquors, liable for fines and costs assessed and judgments rendered for a violation of the law, contained a "special declaration" within the meaning of the law.[98]

83. Tex.—Lignoski v. Crooker, 24 S. W. 278, 788, 86 Tex. 324.
29 C J p 870 note 4

84. Tex.—Lignoski v. Crooker, supra

85. Kan.—Tillotson v. Goodman, 114 P. 2d 845, 154 Kan. 31.
29 C J p 870 note 6

Judgment held encumbrance within rule
Ga.—Kelly v. Stephens, 39 Ga. 466.

86. Kan.—Ayres v. Probasco, 14 Kan. 175

87. Ga.—McConnell v. Gregory, 91 S. E. 550, 146 Ga. 475—McWilliams v. Bones, 10 S. E. 724, 84 Ga. 203.
29 C J p 870 note 8

88. Neb.—Engaard v. Schmidt, 171 N. W. 905, 103 Neb. 369.
29 C J p 871 note 9

89. Ark.—Phillips v. Colvin, 169 S. W. 316, 114 Ark. 14, L. R. A. 1915E 875.
Money borrowed to pay purchase price see supra § 100 d.

90. Ark.—Phillips v. Colvin, supra

91. Nev.—Segale v. Pagni, 250 P. 991, 50 Nev. 74.

92. Minn.—Kingery v. Kingery, 241 N. W. 583, 185 Minn. 467

93. U. S.—Fink v. O'Neil, Wis., 1 S. Ct. 325, 106 U. S. 272, 27 L. Ed. 196.
29 C J p 871 note 12

94. Tex.—Higgins v. Bordages, 31 S. W. 52, 803, 88 Tex. 458, 53 Am. S. R. 770, reversing, Civ. App., 28 S. W. 350, overruling Lufkin v. Galveston, 58 Tex. 545—Beaumont v. Russell, Civ. App., 112 S. W. 950.
29 C J p 871 note 18.
Enforcement of tax lien against homestead see the C.J.S. title Taxation § 590, also 61 C J p 920 note 81 [a], p 921 note 95
Exemption of homestead from.
Assessments for municipal improvements see the C J S title Municipal Corporations § 1345, also 44 C J p 544 notes 27–37
Sale for delinquent taxes see the C J S title Taxation § 759
Taxes see the C J S title Taxation § 250, also 29 C J p 871 notes 13–16
Statutory liability for taxes of property occupied as home see the C J S title Taxation § 250, also 61 C J p 414 note 51–p 415 note 53

95. Mo.—Robinson v. Levy, 117 S. W. 577, 217 Mo. 498.
29 C J p 871 note 19

96. Ark.—Hollis v. State, 27 S. W. 73, 59 Ark. 211, 43 Am. S. R. 28.
29 C J p 871 note 20

97. Neb.—Mancuso v. State, 242 N. W. 430, 123 Neb. 204.
29 C J p 871 note 21

98. Iowa.—McClure v. Braniff, 39 N. W. 171, 75 Iowa 38—Arnold v. Gotshal, 32 N.W. 508, 71 Iowa 572

Defaulting officers and sureties. A surety on the bond of a defaulting public officer[99] and such officer himself[1] have been held not entitled to an exemption, although there are some decisions to the contrary[2]

§ 109. Judgments

As a general rule no lien attaches by reason of a judgment against the homestead claimant on property previously impressed with the homestead character; but in some jurisdictions a judgment against one occupying land in excess of the homestead exemption becomes a lien on the surplus On abandonment of a homestead without conveying the property the judgment lien attaches, according to some authorities.

Reducing a claim to judgment does not bar the debtor's right of homestead.[3] In a number of jurisdictions the homestead laws do not prevent judgments against the owner of a homestead from becoming liens on it, but the lien attaches subject to the homestead use and retains its priority over subsequent liens and may be enforced when that use has terminated by sale, abandonment, or otherwise,[4] but, in perhaps a majority of jurisdictions in which the question has arisen, no lien attaches by reason of a judgment against the homestead claimant on property previously impressed with the homestead character,[5] and, according to the deci-

99. Ky—Hudson v Combs, 62 S W 709, 110 Ky. 762, 23 Ky L. 231
29 C J p 871 note 22

1. Ala—Schessler v Dudley, 2 So 526, 80 Ala 547, 60 Am R 124
29 C J p 871 note 23

2. Ill—School Trustees v Hovey, 94 Ill 394
29 C J p 871 note 24

Surety
Ala—State v Allen, 71 Ala 543
29 C J. p 871 note 24 [a]

3 Ala—Walker v Carroll, 65 Ala 61
29 C J p 871 note 26

4. Or—Hansen v Jones, 109 P 868, 57 Or 416
29 C J p 871 note 27.

In North Carolina
(1) Where judgment debtors, became nonresidents their real property free of homestead exemption became subject to execution, a right which inured to all judgment creditors and could not be affected by resort to attachment—Summers Hardware Co v Jones, 23 S E 2d 883, 222 N C 530—29 C J p 871 note 27 [d]

(2) Where husband and wife conveyed lots owned by wife after plaintiff had recovered judgment against them and grantees reconveyed lots to wife, reconveyance was held to entitle wife to homestead exemption in lots and to preclude plaintiff from having lots sold under execution—Equitable Life Assur Soc of U S v Russos, 185 S E 632, 210 N C 121

(3) The share of costs of partition proceeding, assessed against share of land allotted to one of parties, was not a personal judgment on which an allotment of a homestead could be based, and attempted allotment based thereon was invalid—Sansom v Johnson, 193 S E 272, 212 N C 383

In Texas
(1) Judgment lien does not attach to homestead of judgment debtor while property remains a homestead—Hughes v Groshart, Civ App, 150 S W 2d 827—Oakwood State Bank of Oakwood v Durham, Civ App, 21 S. W 2d 586—Panhandle Lumber Co. v Fairey, Civ App, 3 S W 2d 941—29 C J p 871 note 27

(2) If such property ceases to be homestead while it still belongs to the judgment debtor, the judgment lien will attach as of the date the property ceased to be homestead—Posey v Commercial Nat Bank, Com App, 55 S W 2d 515, reversing Commercial Nat Bank of San Antonio v Posey, Civ App, 34 S W 2d 678—Walton v Stinson, Civ App, 140 S W 2d 497, error refused—Oakwood State Bank of Oakwood v Durham, supra—29 C J p 871 note 27

(3) Judgment lien, not having attached as against judgment debtor because land was homestead, could not, on his death, attach as against heirs—Oakwood State Bank of Oakwood v Durham, supra

(4) Judgment filed against homestead did not attach as lien either before or after death of homesteader, but judgment lien on homestead, filed against father and son, attaches to son's interest thereafter inherited from his mother—McDaniel v Milner, Civ App, 19 S W 2d 426, affirmed Milner v McDaniel, 36 S W 2d 992, 120 Tex 160

(5) Where testator devised his estate to his wife for life with full power of disposition, and remainder, if any, at her death to be divided equally between daughter and three grandchildren, and life tenant subsequently conveyed to one of remaindermen, judgment creditor of such remainderman could not foreclose its judgment lien against homestead rights acquired by remainderman by virtue of deed from life tenant—First Nat Bank v Mabry, Civ App, 126 S W 2d 59, error dismissed, judgment correct

5. Ark—Franklin Fire Ins Co v Butts, 42 S W 2d 559, 184 Ark 263—McKee v Waters, 265 S W 947, 166 Ark 301
Cal—Coakley v Swim, 23 P 2d 518, 218 Cal 340—Thomas v Speck, 118 P 2d 365, 47 Cal App 2d 512—Coca Cola Bottling Co v Feliciano, 114 P 2d 604, 45 Cal.App 2d 680—Thatcher v. Van Bever, 34 P 2d 740, 139 Cal App 658
Fla—Second Nat Bank v Richter, 148 So 517, 110 Fla 237—Jones v Carpenter, 106 So 127, 90 Fla 407, 43 A L R 1409
Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434
Iowa—American Sav Bank of Marengo v Willenbrock, 228 N W 295, 209 Iowa 250—Dorsey v Bentzinger, 226 N W 52, 209 Iowa 883
Kan—Anderson v Anderson, 123 P 2d 315, 155 Kan 69—Kalivoda v Kalivoda, 80 P 2d 1050, 148 Kan 238—First Nat Bank v Tyler, 286 P 400, 130 Kan 308
Mo—Murphy v Wilson, 84 Mo App 178—Rodgers v First Nat Bank of Appleton City, 82 Mo App 377.
Neb—Hawley v Arnold, 288 N W 823, 137 Neb 238—Connor v McDonald, 233 N W 894, 120 Neb 503—Farmers' Loan & Trust Co v Schwenk, 74 N W 1063, 54 Neb 657
N D—First State Bank of Gackle v Fischer, 272 N W 752, 67 N D 400, 110 A L R 878—In re Teiten's Estate, 249 N W 913, 63 N D 729
Okl—Home Savings & State Bank v Union Nat Bank, 53 P 2d 695, 175 Okl 559—Finerty v First Nat Bank, 218 P 859, 92 Okl 102, 32 A L R 1326—Japp v Sapulpa State Bank of Sapulpa, Okl, 215 P 1059, 90 Okl 56
S D—Smith v Midland Nat Life Ins Co, 234 N W 20, 57 S D 497
Wash—Brown v Manos, 250 P 36, 140 Wash 525—Insley v Webb, 209 P 1093, 122 Wash 98, 41 A L R 274
Wis—Reburg v Lang, 1 N W 2d 759, 239 Wis 381
29 C J p 872 note 28

Judgment on unpaid compensation award is not lien on employer's homestead notwithstanding law providing compensation award shall have preference against assets of employer—Aase v Langston, 220 N W. 421, 175 Minn 161

Rescission of contract
Where purchasers instead of trying to enforce contract or, in lieu thereof, obtain judgment against the

sions on the question, he may convey[6] or mortgage[7] the homestead property free from any lien against it on such judgment.

Excess of homestead exemption. In some jurisdictions a judgment against one occupying land in excess of the homestead exemption becomes a lien on the surplus from the rendition of the judgment,[8] and the lien is not postponed until the assignment of the homestead after a subsequent levy of execution.[9] In other jurisdictions, because of a difference in the provisions of the homestead laws, a judgment creates no lien on the surplus.[10]

Effect of abandonment of homestead. Although there is some authority to the contrary,[11] it is generally held, even in jurisdictions where the majority rule prevails, that, if the homestead is abandoned without the property having been conveyed, the lien of a judgment will then attach,[12] and if there were several judgments, the liens will attach in the order in which the judgments were rendered.[13]

§ 110. —— Judgments for Alimony

Although in some jurisdictions a homestead is exempt from the levy of an ordinary execution issued on a general judgment for alimony, the amount allowed may be decreed to be a lien on the property, or the court may require conveyance of the homestead by the husband to the wife.

In some jurisdictions it seems to be held without qualification that a husband cannot claim exemption of homestead against levy of execution on his land from forced payment of a judgment for alimony.[14] In others, a homestead is exempt from the levy of an ordinary execution issued on a general judgment for alimony in the same manner and to the same extent as in cases of execution on other judgments,[15] unless, as may be done,[16] the amount allowed is decreed to be a lien on the property,[17] and the homestead is brought into the jurisdiction of the court by proper pleadings,[18] which must at least describe the homestead, and make proper allegations of facts showing the necessity for declaring a lien, so that defendant may know at the time of the suit that his exempt property would be claimed to satisfy the debt, and to make proper showing as to why such lien should not be declared.[19]

Decreeing conveyance to wife. The court, in a

land for the amount paid under the contract, had brought an action to rescind contract for purchase of land and obtained a judgment as for money had and received, they could not, after vendors had filed a homestead claim, urge that the vendors could not by fraud take purchasers' money for purchase price and then claim homestead exemption on land to defeat purchasers' right to return of amount paid.—Brown v. Cleverly, 85 P.2d 769, 96 Utah 120, denying rehearing 83 P.2d 1009, 96 Utah 116.

In Mississippi

(1) Under statute providing that exempt property shall not by disposal become liable to debts of owner, judgment lien does not attach to exempt homestead, and exemptionist can convey homestead unaffected by enrolled judgment. So where homestead at time of conveyance was occupied as such, judgment lien did not extend to it and did not attach thereto when exemptionist moved.—De Bardelleben Coal Corporation v. Parker, 145 So. 341, 164 Miss. 728, overruling suggestion of 144 So. 474, 165 Miss. 728.

(2) Under early statutes, the homestead was exempted on the condition of occupancy as a residence, and when the occupancy was abandoned the right was gone and the property was open to seizure and sale by judgment creditors.—Edmonson v. Meacham, 50 Miss. 34.—Whitworth v. Lyons, 39 Miss. 467.

6. Ariz.—Security Trust & Savings Bank v. McClure, 241 P. 515, 29 Ariz. 325.
Fla.—Hutchinson Shoe Co. v. Turner, 130 So. 623, 100 Fla. 1120.
Ill.—Lehman v. Cottrell, 19 N.E.2d 111, 298 Ill.App. 434.
Kan.—First Nat. Bank v. Tyler, 286 P. 400, 130 Kan. 308.
Minn.—Gordon v. Emerson-Brantingham Implement Co., 210 N.W. 87, 168 Minn. 336.
Neb.—Roberts v. Robinson, 68 N.W. 1035, 49 Neb. 717, 58 Am.S.R. 567.
29 C.J. p. 873 note 29.
Rights of purchaser as against outstanding judgments generally see infra § 149.

7. Kan.—First Nat. Bank v. Tyler, 286 P. 400, 130 Kan. 308.
29 C.J. p. 873 note 30.

8. U.S.—In re Rohl, C.C.A.S.D., 34 F.2d 268.
Mo.—Daniels v. Peck, 288 S.W. 84, 221 Mo.App. 877.
Okl.—Finerty v. First Nat. Bank, 218 P. 859, 92 Okl. 102, 32 A.L.R. 1326.
Tex.—Clement v. First Nat. Bank, 282 S.W. 558, 115 Tex. 342, reversing, Civ.App., 245 S.W. 719.
Utah.—Brown v. Cleverly, 83 P.2d 1009, 96 Utah 116, rehearing denied 85 P.2d 769, 96 Utah 120.
29 C.J. p. 873 note 31.

9. Mo.—Childers v. Pickenpaugh, 118 S.W. 478, 219 Mo. 455.
Tex.—Harrison v. Lewisville First Nat. Bank, Com.App., 238 S.W. 209.

10. Cal.—Thomas v. Speck, 118 P.2d 365, 47 Cal.App.2d 512.
29 C.J. p. 873 note 33.

11. Neb.—Horbach v. Smiley, 74 N.W. 623, 54 Neb. 217.
29 C.J. p. 873 note 34.

12. Ill.—Rawlins v. Launer, 17 N.E.2d 330, 369 Ill. 494.
Minn.—Gordon v. Emerson-Brantingham Implement Co., 210 N.W. 87, 168 Minn. 336.
29 C.J. p. 873 note 35.

13. Iowa.—Lamb v. Shays, 14 Iowa 567.

14. Ky.—Nunn v. Page, 121 S.W. 442, 134 Ky. 698, 135 Am.S.R. 429.
29 C.J. p. 873 note 38.
Effect of divorce on wife's right to homestead see infra § 160.

15. Ark.—Massengale v. Massengale, 56 S.W.2d 763, 186 Ark. 917.
Cal.—Yager v. Yager, 60 P.2d 422, 7 Cal.2d 213, 106 A.L.R. 664.
Iowa.—Luedecke v. Luedecke, 192 N.W. 515, 195 Iowa 507.
29 C.J. p. 873 note 39.

16. Ark.—Massengale v. Massengale, 56 S.W.2d 763, 186 Ark. 917.
Iowa.—Luedecke v. Luedecke, 192 N.W. 515, 195 Iowa 507.
29 C.J. p. 873 note 41.—19 C.J. p. 314 note 29.
Power of court to decree alimony a lien on husband's realty generally see Divorce § 268 b.

17. Ark.—Massengale v. Massengale, 56 S.W.2d 763, 186 Ark. 917.
Iowa.—Ayers v. Ayers, 288 N.W. 679, 227 Iowa 646.—Luedecke v. Luedecke, 192 N.W. 515, 195 Iowa 507.
29 C.J. p. 873 note 41.

18. Miss.—Jackson v. Coleman, 76 So. 545, 115 Miss. 535.
Wash.—Philbrick v. Andrews, 35 P. 358, 8 Wash. 7.

19. Miss.—Jackson v. Coleman, 76 So. 545, 115 Miss. 535.

divorce proceeding by the wife, may decree a conveyance of the homestead by the husband to the wife within a fixed time,[20] and, on his failure to comply, it may direct the master in chancery to execute such conveyance and deprive the husband of the right of redemption[21]

Redemption Where a sale has been ordered to satisfy a judgment for alimony, the husband has the same right to redeem as in ordinary sales on execution[22] The court which has by its decree made the judgment for alimony a lien on the husband's real estate divested of its homestead character may not only direct a sale of the real estate under execution[23] but may authorize the redemption from such sale[24]

Claim of exemption after remarriage. Where a decree of divorce and for the payment of alimony is granted a wife, the derelict husband cannot defeat the collection of alimony by remarrying, and claiming the benefit of the Exemption Law,[25] but a homestead of the husband and his second wife declared on their community property has been held not subject to sale on a judgment for alimony owed by the husband to his first wife[26]

Homestead purchased with pay of retired soldier may be subjected to the payment of a decree, against such soldier, awarding alimony to his wife[27]

§ 111. —— Judgments for Torts

Under some statutes the homestead cannot be subjected to the satisfaction of a judgment for tort, but under other statutes the rule is otherwise.

Under laws which exempt a homestead without regard to the character of the liabilities against which it may be claimed, the homestead cannot as a rule be subjected to the satisfaction of a judgment for tort,[28] and this rule has been applied where the homestead was declared pending the tort action but prior to judgment therein,[29] and notwithstanding it was used to protect transactions bordering on fraud[30] The same rule is applied in some states where the law exempts the homestead from "debts contracted" or "any debt contracted"[31] In other jurisdictions no exemption can be claimed under such a law except as against a contract indebtedness[32] A statute exempting the homestead as against "any debt" allows the exemption as against liabilities generally,[33] while, if the language used is "debts founded on contract," liabilities arising out of torts and public wrongs override the exemption[34] A statute giving persons injured by the reckless operation of motor vehicles a lien on the vehicle next in priority to the lien for taxes creates a lien which is superior to homestead claims in the motor vehicle[35]

§ 112. Miscellaneous Claims Enforceable against Homestead

Various miscellaneous claims, such as claims for funds improperly invested in homesteads, debts owed in a fiduciary capacity, debts contracted through false representations, expenses of last illness, funeral, or administration, obligations incurred in raising crops, and allowance for support of abandoned wife or child, have under the particular circumstances of the case been held enforceable or not enforceable against the homestead

Where the parties are sui juris and dealing at arm's length, a homestead is notice to the world of restrictions on its alienation, but it cannot be employed as a shield and defense after fraudulently imposing on others[36] Dependent on the facts of the case, the right of the defrauded party may become paramount to that of the homestead owner where proceeds from property fraudulently obtained find their way into a homestead for purposes of seclusion[37] So, in an action by the injured party,

20. Ill—Bobowski v Bobowski, 90 N E 361, 242 Ill 524

21. Ill—Bobowski v. Bobowski, supra

22 S D—Harding v Harding, 92 N W 1080, 16 S D 406, 102 Am S R 694

23. Ill—Bobowski v Bobowski, 90 N E 361, 242 Ill 524

24. Ill—Bobowski v Bobowski, supra

25 Neb—Winter v Winter, 145 N W 709, 95 Neb 335, 50 L R A,N S, 697

26. Cal—Yager v Yager, 60 P 2d 422, 7 Cal 2d 213, 106 A L R 664.

Decree for future alimony

Ex-husband's homestead was exempt from sale to satisfy judgment for accrued alimony, where original decree awarded future alimony only, and land involved had been conveyed to first divorced wife, whom grantor married after second divorce—Massengale v Massengale, 56 S W 2d 763, 186 Ark 917

27. Iowa—Szymanski v Szymanski, 176 N W 806, 188 Iowa 931
29 C J p 874 note 50

28. Cal—Montgomery v Bullock, 77 P 2d 846, 11 Cal 2d 58—Schmidt v Denning, 3 P 2d 322, 117 Cal App 36
29 C J p 874 note 51
Necessity of determination whether action in which judgment is recovered is in contract or tort for purpose of determining defendant's right to claim homestead see Actions § 45

29. Cal—Montgomery v Bullock, 77 P 2d 846, 11 Cal 2d 58

30. Cal.—Montgomery v. Bullock, supra—Schmidt v Denning, 3 P 2d 322, 117 Cal App 36

31. Mich—Mertz v Berry, 59 N W 445, 101 Mich 32, 45 Am S R 379, 24 L R A 789
29 C J p 874 note 52

32. Ala—Randolph v Brown, 22 So 524 115 Ala 677
29 C J p 874 note 53

33. N C—Simpson v Houston, 2 S E 651, 97 N C 311, 2 Am S R 297
29 C J p 874 note 54

34. Ga—Davis v. Henson, 29 Ga 345
29 C J. p 874 note 55

35. S C—In re McFadden, 99 S E 838, 112 S C 258

36. Fla—Jones v Carpenter, 106 So. 127, 90 Fla 407, 43 A L R 1409

37. Cal—Parker v Riddell, 108 P 2d 88, 41 Cal App 2d 908.

the exemption does not apply where the homestead was purchased or improved with, stolen money,[38] embezzled funds,[39] money procured by forgery,[40] or trust funds,[41] as where a guardian has used his ward's money [42]

Under a constitutional provision making the exemption available only against debts contracted, an amount decreed to be owing by complainants to defendants on rescission of a contract for exchange of realty on the ground of mutual mistake is not a contracted debt.[43] In such case where title was revested in complainant, who was to pay the stipulated amount to defendant, complainant held such amount as trustee, and hence the homestead exemption did not apply [44]

Debts owed in fiduciary capacity. Under the homestead provisions of some jurisdictions debts owed by an attorney, trustee, or other fiduciary in his fiduciary capacity are enforceable against his homestead, but to render these provisions operative it is essential that the debt should have been incurred by the fiduciary while acting in that relation [45] A constitutional provision which exempts homesteads from judgment liens, except judgments for money collected by the trustees of express trusts, does not extend the exception to ordinary clerks and employees or agents intrusted with the collection of money,[46] and does not apply to a judgment by a surety against a railway station agent for reimbursement of an amount paid in satisfaction of the bond of such agent.[47] So, if the demand arises out of a contract of bailment or agency in the ordinary course of business, or if it is a mere loan or credit induced by the confidence in the integrity or punctuality of the debtor, the transaction does not constitute an express trust within the rule,[48] the existence of liability must spring from some breach of trust, the defalcation or indebtedness must occur and exist while the debtor is acting in a fiduciary capacity, and must be no mere debt, but a contract which results from the rightful possession of money that belongs to another, and which is being used for his benefit.[49]

Debts contracted through false representations. A debtor who has rendered himself liable for the payment of money obtained by his fraudulent representations, or who has subjected himself to an action for fraud in the sale of property, cannot claim a homestead exemption acquired after the liability accrued as against such liability.[50] Likewise the owner of land, making a colorable transfer to a grantee who obtains a loan secured by mortgage on the premises, is estopped to set up a homestead claim against the mortgage, the mortgagee not knowing that the conveyance was simulated [51] An indebtedness incurred by a representation that real estate belonging to the debtor was unencumbered when as a matter of fact it had been impressed with the homestead character cannot be enforced against the premises [52]

Expenses of last illness, funeral, or administration. In the absence of a statute so providing, the expenses of the funeral and last illness of the owner of a homestead are not charges against the homestead estate,[53] but the expenses of the last illness, funeral, and administration of the estate are not debts of decedent within a statute directing that the homestead shall be exempt from the payments of the debts of decedent, and it has been held that, where the rest of the estate is insufficient for their payment, resort may be had to the homestead [54] Under a statute providing that the homestead shall be subject to the expenses of the last sickness, funeral, and probate, the homestead is subject to

38. Wis—Truelsch v Northwestern Mut Life Ins Co, 202 N W 352, 186 Wis 239, 38 A L R 914

39. Fla—Jones v Carpenter, 106 So 127, 90 Fla 407, 43 A L R 1409
Minn—American Ry Express Co v Houle, 210 N W 889, 169 Minn 209, 48 A L R 1266

40. Cal—Kemp v Enemark, 230 P 441, 194 Cal 718

41. Mich—Long v Earle, 269 N W 577, 277 Mich 505
Tex—Smith v Green, Civ App, 243 S W 1006
Wis—Warsco v Oshkosh Savings & Trust Co, 208 N W 886, 190 Wis 87, 47 A L R 366

42. Tenn—Gordon v English, 3 Lea 634
Purchase of property with ward's funds generally see Guardian and Ward § 93.

43. Ala—Craft v King, 167 So 332, 232 Ala 155

44. Ala—Craft v King, supra

45. Ark—Sanders v Sanders, 20 S W 517, 56 Ark 585
29 C J p 875 notes 71 [a], 72

46. Ark—U S Fidelity & Guaranty Co v Smith, 147 S W 54, 103 Ark 145

Tax collector is not trustee of express trust, subjecting homestead to lien of surety's judgment for collections not paid to state—Arnold v Stephens, 296 S W 24, 173 Ark 205, 54 A L R 1282.

47. Ark—U S Fidelity & Guaranty Co v Smith, 147 S W 54, 103 Ark 145

48. Ark—Carr v Harrington, 155 S. W 1166, 107 Ark 535

49. Ark—Carr v Harrington supra

50. Ky—Moore v Reynolds, 22 S W 413, 15 Ky L 47
29 C J p 876 note 77

51. Tex—Forbes v Thomas, Civ App 51 S W 1097
Constitutional and statutory provisions restricting encumbrances except for certain debts see infra § 134

52. N Y—Robinson v Wiley, 15 N Y 489
29 C J p 876 note 76—20 C J p 1251 note 63 [d]

53. Iowa—Knox v Hanlon, 48 Iowa 252
Tex—Equitable Building & Loan Ass'n v Jones, Civ App, 36 S W 2d 252

54. Utah—In re Mower's Estate, 73 P.2d 967, 93 Utah 390

such expenses only if there is not sufficient other property in the estate to meet them [55]

Obligations incurred in raising crops. A statute which provides that the products of the homestead shall be subject to the payment of obligations contracted for their production has been upheld as constitutional [56] Under such a statute, where defendant gave a note for fertilizer which was used on his homestead, it was given for an agricultural advance and enforceable against any crops grown on the homestead,[57] and a landlord who signs the tenant's note given for fertilizer is entitled to recover as one making agricultural advances [58]

Allowance for support of abandoned wife or child A husband's obligation to support his wife during the existence of the marriage relation is not a debt within the meaning of the constitutional provisions creating homestead exemptions, but arises out of the very nature and purpose of the marriage relation,[59] and, in making an allowance for the support and maintenance of an abandoned wife, the court may place a lien on the husband's homestead [60] This principle is applicable also to an allowance in a divorce case for the support and maintenance of an infant [61] A father required by divorce decree to make monthly payments for the support of his child does not on the theory of unjust enrichment, however, hold title to land subsequently acquired as a homestead under a trust for the benefit of the child to the extent of accumulated unpaid installments represented by a judgment recovered against him [62]

Lien for debt on other lands A homestead cannot be impressed with a lien for indebtedness on other lands after the homestead was established [63]

§ 113. —— Costs and Attorney's Fees

Whether or not a homestead is exempt from judgments or orders for the payment of costs or attorney's fees depends on the applicable homestead provisions and the particular proceeding or judgment in connection with which such costs or fees are allowed.

Whether or not a homestead is exempt from decrees, judgments, or orders for the payment of costs or attorney's fees would seem to depend on the homestead provision of the particular jurisdiction, as well as on the rules discussed supra §§ 109–111 as to the exemption of the homestead from the particular proceeding or judgment in connection with which such costs or attorney's fees are allowed [64] A decree subjecting the homestead to satisfaction of the judgment for alimony may provide also that an allowance of attorney's fees and costs may be made a lien on the homestead [65] In some jurisdictions costs recovered after the homestead enactment, in a suit brought previously to its taking effect, are not subject to the exemption [66]

Acquisition of property or preservation of homestead rights There is a lack of harmony with respect to the enforcement against a homestead of contracts for services rendered in the preservation of homestead rights, resulting from the diversity of the homestead provisions respectively, and the nature of the services performed, as well as the contract under which the services were rendered [67] It is generally held that attorney's fees stipulated for the collection of an amount due for improvements do not constitute a part of the lien on the homestead [68] So it has been held that a provision in a contract for the building of a house upon a homestead which gives an attorney's fee in case of a foreclosure of a mechanic's lien is invalid [69] A lien for attorney's fees for services rendered in acquiring real estate for a client, however, is superior to any claim of homestead which the client or his widow could assert in the property [70]

§ 114. —— Debts Due for Necessaries

A statute which subjects the homestead to debts due

55. Or—In re Banfield's Estate, 298 P 905, 137 Or 167, modifying 296 P 1066, 137 Or 167

56. S C—White v Barberry, 88 S E 132, 103 S C 223
29 C J p 876 note 79

57. S C—White v Barberry, supra

58. S C—White v Barberry, supra

59. N C—Anderson v Anderson, 110 S E 863, 183 N C 139

60. N C—Anderson v Anderson, supra
Judgment for alimony as lien on homestead property see supra § 110
Lien on real property generally in separate maintenance actions see the C J S title Husband and Wife § 625, also 30 C J p 1093 note 22
Necessity of specific decree as to homestead in actions for separate maintenance see the C J S title Husband and Wife § 625, also 30 C J p 1093 note 15

61. N C—Walker v Walker, 167 S E 818, 204 N C 210

62. Kan—Anderson v Anderson, 123 P 2d 315, 155 Kan 69

63. Tex—Laubhan v Alliance Life Ins Co, Civ App, 134 S W 2d 788

64. Ala—Crabtree v Kirby, 142 So 32, 225 Ala 20
29 C J p 875 note 57

65. Iowa—Luedecke v Luedecke, 192 N W 515, 195 Iowa 507.

66. N C—Long v Walker, 10 S E 858, 105 N C 90
29 C J p 875 note 58

67. Ga—Strohecker v Irvine, 76 Ga. 639, 2 Am S R 62
29 C J p 875 note 61

68. Ill—Biebel Roofing Co v Pritchett, 30 N E 2d 196, 307 Ill App 247, transferred, see 25 N E 2d 800, 373 Ill 214
29 C J p 875 notes 62, 63
Attorney's fees provided for in note and trust deed securing loan for improvements see supra § 105

69. Tex—Summerville v King, 84 S W 643, 98 Tex 332, 83 S W 680, affirming, Civ App, 80 S W 1050

70. Ky—Brown v Ingram's Ex'x, 168 S W 2d 31, 292 Ky. 703.

for necessaries contemplates such supplies and services as were furnished the family in connection with the enjoyment of the premises or the support of the family while residing thereon.

If the homestead acts subject the property to debts due for necessaries, the latter are construed to include such supplies and services as were furnished the family in connection with the enjoyment of the premises, or the support of the family while residing thereon,[71] but the term will not include the rent of a house and lot wholly disconnected from the homestead,[72] or a debt due a physician for services rendered a minor child of the homesteader.[73] Conceding that a statute which makes no property exempt from execution for debts for necessaries, etc., is applicable to homestead exemption, the homestead is not liable where there is no pleading or proof that the necessaries were furnished within the time designated by statute.[74]

§ 115. —— Liabilities Enforceable against Business Homestead

Debts incurred in the purchase of merchandise are not chargeable against a business homestead.

A business homestead is exempt from sale to pay debts incurred in the purchase of merchandise.[75]

§ 116. Time of Contracting Liability; Computation

In determining priority of a creditor's claim over that of the homestead, the date of the execution of the contract, or, in the case of a judgment creditor, the date when the judgment became a lien, is controlling

The date of the execution of the contract, and not that of the breach of it, governs with respect to the priority of the creditor's claim over that of the homestead.[76] In determining priority between a judgment creditor and the homestead right, the controlling date is the date the judgment becomes a lien.[77]

§ 117. Proceedings for Enforcement of Claims

a. In general
b. Jurisdiction
c. Parties
d. Pleading
e. Evidence
f. Trial
g. Judgment and enforcement thereof

a. In General

Proceedings to enforce claims against a homestead must comply with statutory requirements.

A creditor whose debt is collectable from the homestead must proceed to its enforcement according to the Homestead Law[78] and the general statutes supplementary thereto.[79] A homestead is not subject to attachment on the ground that the owner is a nonresident.[80]

b. Jurisdiction

In the absence of statutes providing otherwise, claims against a homestead may be enforced in the court which would have jurisdiction of such claims irrespective of homestead considerations, but equity will not interfere where the legal remedy is adequate

In the absence of a provision in the homestead law to the contrary, claims against a homesteader may be enforced in that court of law, or of equity, as the case may be, which would have jurisdiction of such claims, irrespective of homestead considerations.[81] Where the homestead is subject to sale on final process, equity will not entertain an action to set aside a homestead allotment and to enforce a judgment against it, since the legal remedy is adequate,[82] nor will equity interfere to set aside a decree of foreclosure against a homestead, where no objection to the enforcement of the mortgage is made in the foreclosure suit and no homestead rights appear therein.[83]

71. Ga.—Huff v. Bournell, 48 Ga. 338

72. Ga.—Huff v. Bournell, supra

73. Ga.—Doster v. Bush, 73 Ga. 133
29 C.J. p. 875 note 68

74. Wash.—Downey v. Wilbur, 202 P. 256, 117 Wash. 660

75. U.S.—Webb v. Hayner, D.C.Tex., 49 F. 601, 605
Business homestead see supra § 40

76. Tenn.—Gross v. Washington, Ch. A., 38 S.W. 442
29 C.J. p. 876 note 86
Change in form of
Debt for purchase money or taking security see supra § 103
Liability after land acquired see supra § 96.

77. Kan.—Caple v. Warburton, 264 P. 47, 125 Kan. 290

Judgment for material used in improvement

When no materialman's lien was created because of failure to comply with the provisions of the statute, but a personal judgment for the amount due for the material used in constructing improvements on a homestead is obtained against the owner of the homestead, the lien attaches from the date of the judgment in the district court, subject to the superior intervening rights of third persons.—Kleindorfer v. Dascomb-Daniels Lumber Co., 226 P. 354, 102 Okl. 60

78. Ill.—Nichols v. Spremont, 111 Ill. 631.

79. Tex.—Ellerman v. Wurz, 11 S.W. 333

80. Ga.—Burns v. Lewis, 13 S.E. 123, 86 Ga. 591

81. Tex.—Telschow v. House, 32 S.W. 153, 10 Tex.Civ.App. 671
29 C.J. p. 879 note 26
Jurisdiction of proceedings to protect and enforce homestead claims see infra § 226

82. Ga.—Greenway v. Goss, 55 Ga. 588
29 C.J. p. 879 note 30
Adequate remedy at law see Equity §§ 19–38

83. Iowa.—Oleson v. Bullard, 40 Iowa 9.—Haynes v. Meek, 14 Iowa 320.

c. Parties

The wife may intervene to protect her interest if the homestead is about to be taken on execution, and she is a necessary party to a suit to foreclose a lien when her homestead right, if asserted, would present a possible defense against such foreclosure.

While it is held that the wife may intervene to protect her interest if the homestead is about to be taken on execution,[84] the authorities differ as to the necessity of making her a party to a proceeding to subject the homestead to a claim Thus she has been held a necessary party on foreclosure of a mortgage,[85] although the contrary view has also been maintained[86] So she has been held a necessary party to a petition for partition by cotenants of the husband to divide the estate and have certain claims of her husband made liens against the homestead,[87] and to an action to dissolve a partnership involving the question whether certain property is the homestead of one partner or partnership property[88] On the other hand, it is held that the wife need not be made a party to a suit in which the property claimed as homestead is attacked,[89] nor is she a necessary party to a suit against her husband to enforce a lien arising out of an obligation contracted for the purchase of property claimed to be exempt as the homestead of the family[90] She is a necessary party to a suit to foreclose a lien on the homestead only when her homestead right, if asserted, would present a possible defense against such foreclosure[91]

d. Pleading

A creditor must allege and prove facts sufficient to entitle him to reach his debtor's homestead, and if he relies on an exception contained in the exemption law he must plead it specially

A creditor must allege and prove facts sufficient to entitle him to reach his debtor's homestead, stating the grounds of his claim, how the property is liable, and who are the parties interested as homesteaders[92] If plaintiff relies on an exception contained in the exemption law he must plead it specially,[93] and, if the debtor bases his defense on the general immunities granted by the Homestead Act, the creditor must reply with facts depriving defendant of its benefit[94] Where a creditor seeks to subject the homestead of the debtor, alleging that the improvements to the value of five hundred dollars were placed on the land after the creation of the debt sued on, it is error to adjudge the entire property to the wife as a homestead on her petition therefor, in the absence of any denial of the allegations of the original petition[95] Evidence of the homestead right is admissible under the general denial[96] or when specially pleaded[97] Where a bill

84. Cal—Bartholomew v Hook, 23 Cal 277
Iowa—McClure v Braniff 39 N W 171 75 Iowa 38
Parties in proceedings to
Avoid conveyance see infra § 154
Enforce homestead rights in mortgaged premises generally see infra § 151
Protect and enforce homestead rights generally see infra § 231

85 Cal—Brackett v Banegas 48 P 90 116 Cal 278 58 Am S R 164 29 C J p 880 note 35

86 Mich—Amphlett v Hibbard 29 Mich 298

87. Kan—Wheat v Burgess, 21 Kan 407

88. Nev—Rhodes v Williams, 12 Nev 20

89 Iowa—Helfenstein v Cave, 3 Iowa 287

90. Fla—Porter v Teate, 17 Fla 813
Tex Ohmart v Highbarger, Civ App, 43 S W 2d 975, error refused 29 C J p 880 note 40

91. Tex - Bruce v Thomas, Civ App, 106 S W 2d 806

92. Ala—Story Mercantile Co v McClellan, 40 So 123, 145 Ala 629 29 C J p 880 note 42
Pleading in proceedings to
Avoid homestead conveyance see infra § 154.
Enforce homestead rights in mortgaged premises generally see infra § 151
Protect and enforce homestead claims see infra § 232

Allegations held insufficient
Fla—Giddens v McFarlan, 10 So 2d 807

93 Tex—Pinchain v Collard, 13 Tex 33

In Kentucky
(1) Under the former homestead laws the exceptions were contained in a section separate and distinct from the section conferring the homestead right and the rule of the text prevailed and it was unnecessary in asserting a homestead right to negative the exceptions—Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823—29 C J p 880 note 43

(2) The laws were subsequently changed however, and the exceptions placed in the same clause that confers the right, and under such statute defendant asserting homestead right must negative exceptions by alleging that debt or liability from which he claims exemption did not exist before purchase of land and erection of improvements thereon—Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823

94. Ky—Cooper v Arnett, 26 S W 811, 95 Ky 603, 16 Ky L 145
Tex—McNeil v Moore, 27 S W 162, 7 Tex Civ App 536

95. Ky—Ford v Price, 42 S W 341, 19 Ky L 830

96 Ill—Crawford v Richeson, 101 Ill 351
Wyo - State Bank of Wheatland v Bagley Bros 13 P 2d 561 44 Wyo 456 quoting **Corpus Juris,** denying rehearing 11 P 2d 572 586, 44 Wyo 244, citing **Corpus Juris.**

97. Tex - Panhandle Const Co v Wiseman, Civ App, 110 S W 2d 615, error dismissed

Sufficiency of particular allegations
(1) Failure of owner to allege his calling, and that the building under construction was suitable for such calling render pleading insufficient to raise issue that the place is his business homestead, under the constitution defining it as a place to exercise the calling of the head of the family—Clem Lumber Co v Elliott Lumber Co, Tex Com App, 254 S W 945 modifying Elliott Lumber Co v Mitchell, Civ App, 241 S W 221

(2) Allegations that property "was claimed and intended" as homestead and that assessment lien on property was subordinate to another lien "by reason of the fact that such property was the homestead" indicated only that owners claimed and intended property to be homestead, and were insufficient to warrant introduc-

to subject lands to a debt is taken pro confesso, the debtor may still claim his exemption, if the bill does not allege freedom from exemption [98]

e. Evidence

In proceedings to subject a homestead to a debt, general rules as to burden of proof, admissibility, and weight and sufficiency of the evidence have been applied

Where in an action to subject a homestead to a debt defendant seeks to take advantage of his homestead exemption, the burden of proof is on him to show that the case is within the provisions of the statute giving him such right,[99] and ordinarily he makes out a prima facie defense under the statute by proof that he is a homesteader, the head of a family, owning and occupying as a residence the premises in question at the time judgment was rendered against him, or the lien was acquired, and that the homestead right has not been released [1] When he has shown that he is prima facie entitled to the benefits of the statute, it is then incumbent on the creditor or other person denying the homestead right to rebut such prima facie case by showing that the debt is one against which no exemption exists [2] In an action by the seller of material for the improvement of a homestead to place a constructive trust on the homestead for fraud of the buyer in the concealment of his insolvency, the burden is on the seller to establish the facts necessary to his recovery [3] A party seeking to establish an indebtedness as a lien on a homestead has the burden of showing that no portion of the indebtedness due on any other land has been charged as a lien against the homestead [4]

Parol evidence is admissible for the purpose of showing that a debt on which an execution was issued existed at the time of filing the deed of homestead [5]

The weight and sufficiency of the evidence to show matters involved in the issues raised in proceedings to enforce claims against a homestead are governed by the general rules [6]

f. Trial

Disputed questions of fact should be submitted to the jury, but a verdict may be directed when there is no substantial controversy as to the facts

In accordance with the general rules applicable in the trial of civil actions generally, disputed questions of fact should be submitted to the jury for determination [7] If there is no material question of fact for submission to the jury on which there is any substantial controversy, the court may direct a verdict [8]

tion of evidence of elements essential to existence of homestead—Glenn v Panhandle Const Co, Tex Civ App, 110 S W 2d 1217

(3) Where a vendor's lien is retained in the purchase of property the homestead plea is inadmissible in the absence of pleadings under oath that the recitations with reference to the lien were induced through fraud or mistake—Curtis v Speck Tex Civ App, 130 S W 2d 348, error refused

98 Ill—Silsbee v Lucas, 36 Ill 462

99 Ala—Moseley v Neville, 129 So 12 221 Ala 429
Tex - Shambaugh v Smithey, Civ App, 59 S W 2d 189, affirmed Smithey v Shambough, 88 S W 2d 475 126 Tex 396
29 C J p 880 note 49

Evidence
In proceedings to
Avoid homestead conveyance see infra § 154
Enforce rights under homestead conveyance see infra § 151
Protect and enforce homestead claim see infra § 233
Of
Abandonment waiver, or forfeiture see infra §§ 196-198
Acquisition and establishment of homestead see supra § 51

1. Ill—White v Clark, 36 Ill 285
29 C J p 880 note 50

2. Ill—Bach v May, 45 N E 248, 163 Ill 517
29 C J p 880 note 51 p 988 note 78

3 Tex—Higginbotham-Bartlett Co v Powell Civ App 270 S W 193

4. Tex—Laubhan v Alliance Life Ins Co Civ App, 131 S W 2d 788

5. Vt Gilson v Parkhurst, 53 Vt 384

6. **Evidence held sufficient**
(1) To sustain findings that the plaintiff furnished money evidenced by notes sued on to purchase land in question under agreement that it would be secured therefor and that amounts furnished amounted to one transaction—Farmers' State Bank of Kingman v Pickering, 205 P 1110, 111 Kan 132

(2) To show that codefendant alone owned leasehold as business homestead—Beckner v Barrett Tex Civ App, 81 S W 2d 719, error dismissed

(3) In seller's action to place constructive trust on buyer's homestead for buyer's fraud in concealment of his insolvency in purchasing material for improvement thereof, to sustain finding that buyer was not insolvent at time of purchase and that he had reasonable expectations of paying seller out of his calf crop at time of purchase, although subsequent to purchase buyer scheduled many of debts in bankruptcy which were at time of purchase in existence, but few, if any of which were due and although he was unable to pay obligations as they became due
Higginbothim-Bartlett Co v Powell Tex Civ App 270 S W 193

(4) Other illustrations see 29 C J p 881 note 55

Evidence held insufficient
(1) To establish exemption—United Fidelity Life Ins Co v Plainview Building & Loan Ass'n, Tex Civ App, 81 S W 2d 1092

(2) To warrant trial court's determination of amount of indebtedness secured by trust deed which constituted a lien against a homestead and to establish indebtedness outstanding against tract other than homestead tract had been satisfied—Laubhan v Alliance Life Ins Co, Tex Civ App 131 S W 2d 788

(3) Other illustrations see 29 C J p 881 note 55

7. **Whether property was homestead when lien attached**
Tex—Continental Southland Savings & Loan Ass'n v Panhandle Const Co Civ App, 77 S W 2d 896 error refused

8. Ala—Wylie v Flowers, 67 So 980, 191 Ala 36
29 C J p 881 note 56 [a]

g. Judgment and Enforcement Thereof

Statutory provisions relating to the judgment and execution must be complied with. In some jurisdictions the homestead may be sold unconditionally on general execution, but in others the judgment or execution should indicate that the debt is one against which no exemption exists, or a certificate or affidavit to that effect should be placed in the sheriff's hands before levy.

A homestead liable to sale for claims against which no exemption exists may in some jurisdictions be sold unconditionally on general execution,[9] and it has been held that such a sale is not void, although there is no evidence of record that the execution was based on a judgment for an exempted debt, the sheriff taking the responsibility of acting on his own conviction that such was the case and his conclusion being right.[10] In other states the judgment[11] or the execution[12] should indicate that the debt is one against which no exemption exists, although in some jurisdictions this purpose may be accomplished by a certificate of the court issuing the process[13] or by an affidavit placed in the sheriff's hands before levy.[14] If the judgment includes both exempt and nonexempt claims, it is error to allow the whole judgment to stand as found against the homestead.[15] If land including the homestead is sought to be sold on execution, the writ must direct that other property also subject to sale shall be first disposed of.[16] Refusal to modify a judgment imposing a lien on a homestead for the amount of a trust fund which defendant admitted he had invested therein is not an abuse of discretion on an application alleging that only a part of the fund was so invested.[17]

After recovery the enforcement of the judgment cannot be interfered with by a mere affidavit of illegality filed by the debtor's wife,[18] or by an affidavit filed by the debtor that to the best of his knowledge and belief he had paid the debt sought to be enforced.[19]

Courts of equity are reluctant to appoint a receiver to subject the rents and profits of a homestead to the payment of a mortgage indebtedness,[20] but it has been held, in the absence of statutory provisions precluding such relief, that the matter rests in the sound discretion of the court,[21] and unless that discretion is improperly exercised the order will not be disturbed.[22]

Property acquired by descent Where, in a proceeding to sell land acquired by descent for debts, it appears by admissions in the pleading that the debts contracted by decedent before the adoption of the homestead exemption law exceeded the value of the personalty, an unconditional sale should be ordered,[23] and it is error to discriminate between debts incurred before and after the passage of the homestead law.[24]

Platting homestead before sale A sheriff's sale, to satisfy a nonexempt debt, is not open to attack because the homestead was not platted by the sheriff before being sold.[25]

Process against debtor's heirs If the judgment creditor could not proceed against the homestead during the debtor's life, he cannot proceed by execution against the debtor's heirs.[26]

9. Iowa—Anderson v Renshaw, 294 N W 274, 229 Iowa 93
Okl—Holland v Robbins, 219 P 387, 92 Okl 225
29 C J p 881 note 58
Judgment
As claim against homestead generally see supra §§ 109–111
In proceedings to enforce or protect homestead rights see infra § 236
Order in proceeding by judgment creditor for appraisal of homestead as not appealable see Appeal and Error § 130 b (2).

10. N C—Durham v Bostick, 72 N. C 353

11. Ala—McLaren v Anderson, 8 So 188, 81 Ala 106
29 C J p 881 note 60
Provision incorporating finding
That a judgment by default for recovery of money was for a debt for work done and material furnished in construction, repair, or improvement of debtor's homestead, and hence enforceable by execution, may be established by a provision in judgment incorporating a finding made under amendment of allegations in complaint that work was done and material was furnished in deepening a well on debtor's "home" to effect that work was done and material was furnished in deepening a well on debtor's "homestead," or by extrinsic evidence showing that judgment was for such a debt, or by both—Keys v Schultz, 2 N W 2d 549, 212 Minn 109
Judgment enforceable by execution
A judgment lien under a money judgment for debt for work done and material furnished in construction, repair, and improvement of homestead may be enforced by execution against a homestead, the same as other realty—Keys v Schultz, supra

12. S C—Burnside v Watkins, 10 S E 960, 32 S C 247—Burnside v Watkins, 9 S E 518, 30 S C 459

13. S C—Holladay v Hodge, 65 S E 1019, 84 S C 109
29 C J p 881 note 63

14. Ga—Davis v Taylor, 30 S E 50, 103 Ga 366—Personal Finance Co v Evans, 163 S E 250, 45 Ga App 53.
29 C.J p 881 note 64.

15. Ill—Boyd v Ernst, 36 Ill App 583

16. N C—McMillan v Williams, 13 S E 764, 109 N C 252

17. Wis—Warsco v Oshkosh Savings & Trust Co, 208 N W 886, 190 Wis 87, 47 A L R 366

18. Ga—Johnson v Poullain, 61 Ga 204

19. Ga—McGhee v Way, 46 Ga 282

20. Wis—Peters v Bossmann, 192 N W 465, 180 Wis 62
42 C J p 120 note 2

21. Wis—Peters v. Bossmann, supra

22. Wis—Peters v. Bossmann, supra
42 C J p 120 note 6

23. N C—Gamble v Watterson, 83 N C 573

24. N C—Gamble v Watterson, supra.

25. Iowa—Smith v De Kock, 46 N W 1056, 81 Iowa 535

26. Ill—Dinsmoor v Rowse, 65 N E 1079, 200 Ill 555
Rights of surviving spouse, children,

The statute of limitations, in North Carolina, does not run against a judgment recovered against the owner of a homestead after there has been an actual allotment of homestead.[27]

§ 118. —— Waiver, Forfeiture, and Estoppel

That the premises have been impressed with homestead character will not generally preclude a creditor from proceeding against them on an excepted indebtedness, although he may be estopped where, by consent of all parties, a homestead is allotted a widow out of her husband's estate. No waiver or forfeiture results from failure to reach proceeds of other property, or from mere lapse of time short of the statutory period, although other circumstances may result in waiver or estoppel.

That the premises have been impressed with the homestead character, whether by decree of court, occupancy, or whatever may be necessary as the case may be, will not generally preclude a creditor from proceeding against them on a preexisting or other excepted indebtedness,[28] but it has been held that, if such creditor puts his right in issue and contests the allotment of the homestead in a legal proceeding, he is bound by the decree rendered,[29] although where the homestead allotment was made under a law invalid in toto a contesting creditor will not be bound.[30] Where by consent of all parties, homestead is allotted to a widow out of her husband's estate, the creditors are estopped to claim a return of the property to the estate, although the court transcended its jurisdiction, and although the exemption allowed was illegal.[31] No waiver results from failure to reach or participate in the proceeds of other property belonging to the debtor.[32] The mere lapse of time short of the statutory period of limitation will not cause a forfeiture of the creditor's rights against the homestead,[33] and as long as the judgment continues as a lien a judgment creditor is not barred by laches from equitable relief under a statute providing for suit to subject to execution property of the judgment debtor which the latter claimed as a homestead.[34] A creditor whose claim is a lien against the home property waives his rights against it, however, by agreeing to a reservation of the exemption by his debtor and participating in the proceeds from this or other of the debtor's property;[35] and a waiver may likewise occur where the creditor long neglects to pursue his remedy against the land and permits it to be set apart to the family of the debtor after the latter's death.[36] So a creditor by accepting benefits under a contract made between the homesteader and other creditors is estopped to set up any rights against the consideration received by the homesteader for waiver.[37] Under a statute giving to a landlord having a claim for rent a lien on the premises superior to the tenant's right of homestead therein, an office judgment by confession for rent due is a waiver of the lien, and renders the judgment inferior to the right of homestead.[38] A mortgagee forfeits his rights under a sale of the homestead so long as he does not account for the surplus proceeds after discharging his mortgage debt.[39]

§ 119. —— Joinder of Claims and Causes

An excepted indebtedness intermingled with other claims not entitled to priority can be enforced against the homestead only if the various amounts can be separately adjudicated

An excepted indebtedness cannot be enforced against the homestead if intermingled with other claims not entitled to priority, unless the various amounts can be distinguished and separately adjudicated.[40]

§ 120. —— Exhausting Other Property before Resorting to Homestead

It is a general rule with some qualifications that a debtor is entitled to have his nonexempt property exhausted before the homestead can be sold, but this right may be waived or abandoned

In the absence of special statutes so providing, a person who has a lien on land superior to a debtor's right of homestead need not resort to other property of the debtor before the homestead may be sold.[41] On the other hand, it is generally held, usu-

or heirs generally see infra §§ 239–291

27. N C—Farrar v Harper, 45 S E 510, 133 N C 71—McDonald v Dickson, 85 N C 248

28. Ga—Newton v Summey, 59 Ga 397
29 C J p 877 note 92

29. Ga—Wofford v Gaines, 53 Ga 485
29 C J p 877 note 93

30. N C—Gheen v Summey, 80 N C 187
29 C J. p 877 note 94.

31. S C—Chalmers v Turnipseed, 21 S C 126

32. Cal—Montgomery v Robinson, 18 P 261, 76 Cal 229
Iowa—Denegre v Haun, 14 Iowa 240, 81 Am D 480
Exhausting other property see infra § 120

33. S C—Bull v Rowe, 13 S C 355

34. Fla—Giddens v McFarlan, 10 So 2d 807

35. Ky—Hasty v Berry, 1 S W 8, 8 Ky L 55, 12 Ky L 240—Bates v Scobee, 3 Ky L 758.

36. Tex—Lawler v Yeatman, 37 Tex 669

37. Ky—Bates v Scobee, 3 Ky L 758, 11 Ky Op 608

38. U S—In re Lumpkin, D C Va, 15 F Cas No 8,606, 2 Hughes 175

39. Tex—Hunter v. Wooldert, 55 Tex 433

40. S C—Burnside v Watkins, 9 S E 518, 30 S C 459
29 C J p 877 note 5.

41. Mich—Stevens v Leonard, 80 N W 1002, 122 Mich 125
29 C J p 877 note 6—38 C.J p 1375 note 62.

ally by reason of statute so providing, that all nonexempt property of the debtor, both real and personal, must be exhausted before the homestead can be sold,[42] and it has been held that a debtor may insist that recourse shall last be had to the homestead property, and that the lienholder whose security affects the homestead with other land shall resort, first, to the other lands,[43] even though by so doing the security of other creditors on the same land may be impaired or destroyed.[44]

Extent and limits of rule. Where property mortgaged is ample to pay the mortgage debt and still leave the homestead intact, the mortgagor in foreclosure proceedings cannot require the mortgagee to exhaust his remedies on a collateral note in or-

In Alabama

(1) The rule of the text has been applied—Booker v Booker, 144 So 870, 225 Ala 626—Bramlett v Kyle, 52 So 926, 168 Ala. 325—29 C J p 877 note 6 [b]

(2) Thus, where mortgagor separately mortgaged farm lands and homestead to secure purchase money debt for homestead, mortgagor's crossbill charging bank purchasing farm lands at foreclosure sale with notice of lis pendens, whereby mortgagor sought to have mortgage first satisfied out of farm lands rather than homestead did not entitle mortgagor to affirmative relief—Booker v Booker, supra

(3) In a proper case, however, the widow of the debtor has the right to require the marshaling of assets to save the homestead rights provided by statute, that being a different and superior right from that denied the debtor husband—Howell v Ward, 161 So 487, 494, 230 Ala 379, citing **Corpus Juris.**

42 Ark—Bank of Hoxie v Graham, 44 S W 2d 1099, 184 Ark 1065
Iowa—Anderson v Renshaw, 294 N W 274, 229 Iowa 93
Minn—Adrian State Bank v Mulroy, 215 N W 850, 172 Minn 529
Or—Smith v Kay, 54 P 2d 1160, 1166, 153 Or 80, citing **Corpus Juris.**
Tex—Kerens Nat Bank v Stockton, 40 S W 2d 7, 9, 120 Tex 546, 77 A L R 362, quoting **Corpus Juris**—Laubhan v Alliance Life Ins Co, Civ App, 134 S W 2d 788—Jefferson Standard Life Ins Co v Lindsey, Civ App, 94 S W 2d 549, error dismissed—Burg v Hitzfeld, Civ App, 89 S W 2d 272, 277, error dismissed, citing **Corpus Juris**—First Nat Bank v Willis, Civ App, 58 S W,2d 1065, 1066, citing **Corpus Juris**—Colwick v Wright, Civ App, 275 S W 152
Wis—Wisconsin Mortg & Sec Co v Kriesel, 211 N W 795, 191 Wis 602
29 C J p 878 note 8—23 C J p 624 note 91—38 C J p 1375 note 60
Rights of junior lienors see the C J S title Marshaling Assets and Securities § 10, also 38 C J p 1375 note 56-p 1376 note 75

Purpose of statute is to permit sale of only as much land as was necessary to satisfy the debt and to stimulate competition in bidding, and not to place owner in a more advantageous position in making redemption—Prudential Ins Co of America v Westfall, 260 N W 344, 219 Iowa 1119, followed in American Sav. Bank & Trust Co v Davis, 268 N.W 9, 221 Iowa 1183

Mortgages

(1) Holders of second mortgage held not entitled to foreclose it against homestead land after having sold, under third mortgage, cattle covered by second, more than enough to satisfy second—Mounce v Wightman, 243 P 415, 417, 29 Ariz 567, 44 A L R 754, citing **Corpus Juris.**

(2) Mortgagor's right under first mortgage to have excess land over homestead sold first on foreclosure could not be defeated by assignments of portions of indebtedness to mortgagee and successive foreclosures thereof—Boykin v First State Bank of Comanche, Tex Civ App, 61 S W 2d 126

Validity of sale

(1) Sheriff's sale on special execution in mortgage foreclosure proceeding of eighty-acre farm, half of which constituted defendant's homestead to mortgagee holding judgment for eight thousand two hundred fifty-six dollars and seventeen cents debt and one hundred forty-four dollars and twenty cents costs for eight thousand two hundred twenty-two dollars and eighty five cents, after bid of two thousand dollars for nonhomestead half and of three thousand dollars for homestead half, was held valid under statute authorizing sale of pledged homestead only for deficiency after exhausting all other pledged property—Prudential Ins Co of America v Westfall, 260 N W 344, 219 Iowa 1119, followed in American Sav Bank & Trust Co v Davis, 268 N W 9 221 Iowa 1183

(2) Sale was held not invalid although sheriff did not sell the nonhomestead property before placing the homestead property on sale—Eakin v Glenn, Tex Civ App, 141 S W 2d 420

Procedure to be followed stated

Iowa—Prudential Ins Co of America v Westfall, 260 N W 344, 219 Iowa 1119, followed in American Sav Bank & Trust Co v Davis, 268 N W 9, 221 Iowa 1183.

Platting homestead

(1) Sheriff's deed of mortgaged property to purchaser on foreclosure sale was held not void, because mortgagors occupied part of property as homestead, and sheriff failed to serve notice on them to plat their homestead as required by statute, where mortgagors did not occupy property until after debt was created and pledged entire property to payment thereof, and hence deed could not be attacked in a collateral manner So the sheriff's failure to give mortgagors chance to plat their homestead was immaterial, where mortgagors were not seeking to redeem and sheriff in conducting sale offered various tracts constituting property separately and received no bid there on, and amount paid for property on sale was more than its actual value—Arnold v Murphy, 203 N W 387, 199 Iowa 934

(2) A sheriff's sale on foreclosure of mortgage was not invalid because sheriff failed to notify purchasers of mortgaged land from mortgagors to plat their homestead before sale as required by statute, where sheriff had homestead platted before sale, offered land, exclusive of homestead in separate parcels without receiving any bids therefor, offered homestead separately without receiving any bids therefor, and then offered land as a whole, and where purchasers of mortgaged land by specific agreement had waived platting and recording of homestead and had agreed in case of sheriff's sale that premises might be sold in one body—Travelers Ins Co v Brooks, 276 N W 617, 224 Iowa 170

43. Cal—Nolan v Nolan 101 P 520, 155 Cal 476, 132 Am S R 99, 17 Ann Cas 1056
Tex—Kerens Nat Bank v Stockton, 40 S W 2d 7, 9, 120 Tex 546, 77 A L R 362, quoting **Corpus Juris.**

44. Cal—Nolan v Nolan, 101 P 520, 155 Cal 476 132 Am S R 99, 17 Ann Cas 1056
Tex—Kerens Nat Bank v Stockton, 40 S W 2d 7, 9, 120 Tex 546, 77 A L R 362, quoting **Corpus Juris**—Boykin v First State Bank of Comanche, Civ App, 61 S W 2d 126
29 C J p 878 note 10

Creditor held charged with knowledge of rule

Tex—Burg v Hitzfeld, Civ App, 89 S W 2d 272, error dismissed.

der to save the homestead,[45] even though the mortgagor may have some defense in a suit brought by the payee which would not be available against a bona fide holder.[46] So, if several tracts are mortgaged, and none of them was then the homestead, but one is afterward selected as such, the mortgagee need not exhaust those which are nonhomestead lands before resorting to the home tract.[47] A purchaser of a homestead which is subject to an encumbrance, such as a mortgage, is not entitled to have the property of his grantor exhausted before the mortgage can be enforced against the property so purchased.[48] Trustees in a trust deed are entitled to sell two lots together as authorized by the deed notwithstanding a declaration of homestead as to one lot, where the grantors in the trust deed had lost all interest in such lot through a sale foreclosing a lien and expiration of the redemption period.[49]

Necessity of ownership of nonexempt property If a debtor seeks to restrain the sale of his homestead because the creditor has not previously exhausted all of the nonexempt property of the debtor, under the rule requiring this to be done, he must show actual ownership of nonexempt property.[50] Other property of the debtor, within the meaning of the general rule, comprises such property as still belongs to the debtor at the time of enforcing the claim, not that which he has conveyed away,[51] and he cannot require that the property sold should be exhausted before resorting to the homestead.[52]

Purchase-money mortgages. An exception to the general rule is recognized in case of purchase-money mortgages in which case an exhaustion of other property before resorting to the homestead is not necessary.[53] When land which one has received in exchange for another tract is taken from him to satisfy a lien for purchase money which existed when he received the land, he may recover the land which he gave in exchange free from any claim of the party in possession of the homestead.[54] Failure of a referee to claim that a homestead was subject to a purchase-money mortgage along with other land when the other land is first sold furnishes no ground of complaint to the mortgagor where the referee made no order of sale.[55]

Presentation of claims against decedent's estate is made a condition precedent, under some statutes, in order to fulfill the requirement of exhausting other property before resorting to the homestead.[56]

Waiver of right. The debtor's right to have the other property exhausted before resorting to the homestead may be waived,[57] and what will constitute a waiver depends on the circumstances of the particular case.[58] Thus it has been held that waiver results from failure to assert the homestead exemption and resulting right in the foreclosure suit,[59] or from permitting the whole property to be sold in bulk.[60] On the other hand, it has been held that the right is not lost by failure to demand that nonhomestead property be sold first, where no detriment resulted to the purchaser.[61] In suits to foreclose mortgage and vendor's liens, the mortgagors suffered no actual injury by refusal of their demand for a separate and prior sale of the mortgaged tract under the order of sale on the judgment foreclosing the vendor's lien where the proceeds of the sale of such tract were insufficient to satisfy both liens in full without the sale of property claimed as homestead.[62]

Sale in disregard of rights If homestead property is sold in disregard of the demands of the homestead claimant that property other than the homestead be first sold, the sale is voidable only at the election of claimant.[63]

§ 121. —— Application of Proceeds

Where the homestead has been sold to pay a privileged creditor, such creditor should be paid in full and

45 Wis —Bryden v Cairncross, 130 N W 527, 145 Wis 478

46. Wis —Bryden v Cairncross, supra

47. Ill —Gaither v Wilson, 46 N E 58, 164 Ill 544, affirming 65 Ill App 362

48. Iowa —Kemerer v Bournes, 4 N W 921, 53 Iowa 172—Barker v Rollins, 30 Iowa 412

49. Cal —Eigenhuis v Morris, 28 P 2d 928, 136 Cal App 333

50. Iowa —Hale v Heaslip, 16 Iowa 451
29 C J p 879 note 16
Proceedings for enforcement and protection of homestead rights generally see infra §§ 226–238

51. Iowa —Dilger v Palmer, 10 N W 763, 11 N W 134, 60 Iowa 117

52. Iowa —Dilger v Palmer, supra
Mo —Hall v Morgan, 79 Mo 47
29 C J p 879 note 18

53. Ga —McDaniel v Westberry, 74 Ga 380
Ill —Gaither v Wilson, 46 N E 58, 164 Ill 544
29 C J p 879 note 19

54. Ky —Williams v Samuels, 13 S W 438, 90 Ky 59, 11 Ky L 863
29 C J p 879 note 20

55. Iowa —Stein v Chambless, 24 Iowa 595
29 C J p 879 note 21.

56. Cal —Hinkel v Crowson, 206 P 58 188 Cal 378
29 C J p 879 note 22

57. Tex —Colwick v Wright, Civ App, 275 S W 152
29 C J p 879 note 23

58. Tex —Colwick v Wright, supra

59. Tex —Colwick v Wright supra

60. Tex —Price v McAnelly, Civ App, 287 S W 77.

61. S D —Krueger v Central Lumber Co, 230 N W 243, 56 S D 626

62. Tex —Colwick v Wright, Civ App, 275 S W 152

63. Cal —Weber v McCleverty, 86 P. 706, 149 Cal 316

the surplus remaining, if any, should be paid to the homesteader according to his interest at the time the fund is finally disposed of. In some jurisdictions, however, the proceeds may be reinvested under court order in another homestead for the benefit of the debtor or his family.

Where the homestead has been sold to pay a privileged creditor, such creditor should be paid in full,[64] and the surplus remaining, if any, should be paid to the homesteader[65] The rights of a debtor in the surplus proceeds of a sale of homestead property sold to satisfy liens existing prior to its acquisition must be determined on the state of facts existing at the time the fund was finally disposed of,[66] and the debtor is not entitled to the fund if at such period he has abandoned[67] or sold[68] or waived[69] the homestead If certain debts are charges against the homestead while others are not, the former share pro rata with all other debts in the surplus remaining after deducting the statutory exemption,[70] and, as far as concerns the unpaid balance of the nonexempt claims, they may come against the proceeds which represent the exemption[71] Such part of the proceeds as remains after satisfying nonexempt claims will, however, not be subject to general debts which are unenforceable against the homestead, if the debtor intends to use such surplus in redeeming his homestead or purchasing another.[72] The debtor may elect to have the surplus fund applied to payment of a homestead mortgage in preference to prior judgments, which, although constituting a lien on it, do not subject it to sale[73] Debts contracted before the enactment of the homestead law take precedence in distribution of proceeds over debts contracted after such enactment, although reduced to judgment before judgment is recovered on the old debts[74]

Investment of proceeds. In some jurisdictions the proceeds realized from the sale of a homestead may be reinvested under order of court in another homestead for the benefit of the debtor and his family, where it appears that he is insolvent,[75] or, in case of his death, for his widow and children[76] In at least one jurisdiction where a judgment debtor mortgages all of his lands, including his homestead, the homestead right passes to the mortgagee, and where land, including the homestead, is subject to the lien of a judgment, duly docketed before the execution of a mortgage given by the husband and wife on the entire tract, and such tract is sold by agreement of parties, as much of the proceeds as exceeds the statutory exemption will be applied to the judgment, the amount representing the exemption will be invested under direction of court, and, on termination of the homestead right, will be applied on the judgment, the remainder of such amount, with accruing interest, being applied on the mortgage debt[77]

§ 122. Perfecting and Keeping Alive Liens

Liens which attach to the homestead premises must be perfected as provided by the general law and kept alive in order to retain whatever rights they may possess against the homestead

Liens which are held to attach to the premises, whether arising prior or subsequent to the time when the premises were impressed with the homestead character, must be perfected as provided by the general laws, with such qualifications as may be injected by the exemption law, and kept alive, in order to retain whatever rights they may possess against the homestead, and priority over other liens[78]

64. Cal—White v Horton, 97 P 70, 154 Cal 103, 18 L R A,N S, 490
29 C J p 881 note 75

65. Wis—Northwestern Securities Co v Nelson, 211 N W 798, 191 Wis 580
29 C J p 881 note 76
Allowance to debtor in proceedings to subject to levy and sale value of homestead property in excess of homestead exemption see supra § 60

66. Ohio—Cooper v Cooper, 24 Ohio St 488
29 C J p 882 note 77

Determination of rights
Homestead rights in surplus proceeds of mortgage foreclosure sale remained undetermined, where court failed to ascertain whether mortgaged property was homestead, as required by rule of court—Northwestern Securities Co v Nelson, 211 N W 798, 191 Wis 580

67. Ohio—Cooper v Cooper, 24 Ohio St 488

68. La—In re Penn, 58 So 554, 130 La 710

69. La—In re Penn, supra
29 C J p 882 note 80

70. Ky—Webster v Bronston, 68 Ky 521
29 C J p 882 note 81

71. Ky—Webster v. Bronston, 5 Bush 521

72. Kan—Mitchell v Milhoan, 11 Kan 617

73. N C—Leak v Gay, 12 S E 312, 315, 107 N C 468, 482, 483

74. Ga—Pratt v Atkins, 54 Ga. 569.

75. Ga—Ragland v Moore, 51 Ga 476
S C—Elliott v Mackorell, 19 S C 238

76. Ky - McTaggert v Smith, 14 Bush 411

77. N C—Vanstory v Thornton, 19 S E 359, 114 N C 375, 377—Vanstory v Thornton, 17 S E 566, 112 N C 196, 34 Am S R 483

78. Minn—H E Westerman Lumber Co v Raschke, 208 N W 960, 167 Minn 243
29 C J p 882 note 94

Recovering and docketing judgment
A lien on a homestead for a debt from which it is not exempt may be obtained by recovering and docketing a money judgment in the same manner and to the extent as though there were no exemptions from any debt—Keys v Schultz, 2 N W 2d 549, 212 Minn 109.

III. TRANSFER OR ENCUMBRANCE

A. POWER TO TRANSFER OR ENCUMBER

§ 123. In General

In the absence of constitutional or statutory restrictions, or where there has been a compliance with such restrictions, the owner of a homestead may sell or encumber it

The power of alienation is an incident of the ownership of the property independent of the homestead law, and the directions and prohibitions of the constitutional or statutory homestead provisions as to the alienation are mere restrictions on this antecedent power[79] Accordingly, where there is neither constitutional nor statutory prohibition or where there has been a compliance with applicable restrictions, the owner of a homestead may as incident to the right of ownership sell or encumber it[80] either in whole,[81] in part,[82] or conditionally,[83] and the sale or transfer, when evidenced by a proper conveyance, will be as valid as though the property had not been set apart as a homestead[84] He may sell undivided portions of his homestead and claim an exemption in the undivided residue, as against all persons except his cotenants,[85] and he may exchange his homestead for another, see supra § 72 A mortgage executed in lieu of another

79. Ky—Brannon v Bohannon, 96 S W 2d 1036, 265 Ky 394
29 C J p 883 note 97
Abandonment by sale and conveyance see infra § 173
Mortgage as waiver of right see infra § 183
Right of surviving spouse, children, or heirs to encumber see infra §§ 285-287
Validity of transfer as against creditors see Fraudulent Conveyances § 31

80. Cal—Coakley v Swim, 23 P 2d 518, 218 Cal 340
Colo—Farley v Harvey, 25 P 2d 185, 93 Colo 105
Ga—Lyle v Roswell Store, 200 S E 702, 187 Ga 386
Ky—Brannon v Bohannon, 96 S W 2d 1036, 265 Ky 394
Mont—U S Building & Loan Ass'n v Stevens, 17 P 2d 62, 93 Mont 11
N D—Birks v Globe International Protective Bureau, 218 N W 864, 56 N D 613
Okl—Oklahoma State Bank v Van Hassel, 114 P 2d 912, 189 Okl 48
Or—Stewart v. Black, 22 P 2d 336, 143 Or 291
Tex—Grissom v Anderson, 79 S W 2d 619, 125 Tex 26, reversing, Civ App, 48 S W 2d 809—Mayfield v First State Bank of Holland, Civ App, 19 S W 2d 454—Adams v Bartell, 102 S W 779, 46 Tex Civ App 349, error refused
Wyo—Delfelder v Teton Land & Investment Co, 24 P 2d 702, 716, 46 Wyo 142, quoting **Corpus Juris.**
29 C J p 883 note 98

Adjustment of liens

A husband may reencumber or dispose of the homestead in the adjustment of valid liens against it, where such adjustment is not made in fraud of the wife's rights—Driscoll v Morris, Tex Civ App, 275 S W 196

Alienation to children

An alienation of the homestead may be to some of the children of the homestead owner if it is duly made in good faith for an appropriate consideration and for no illegal purpose—Parrish v Robbirds, 200 So 925, 146 Fla 324—Jones v Equitable Life Assur Soc of U S, 171 So 317, 126 Fla 527—Daniels v Mercer, 111 So 189, 105 Fla 362—29 C J p 883 note 98 [b]

Transfer by widow as feme sole

(1) Parol gift of land by widow to her son gave him good title, since she had legal right to transfer property while unmarried whether or not it was part of her homestead—Union Building & Loan Ass'n v Pratt, Tex Civ App, 84 S W 2d 781, followed in Union Building & Loan Ass'n v Jackson, 84 S W 2d 784

(2) Where widow of one of brothers who owned large tract of land as partners was a feme sole at time she joined with other brothers to execute renewal mortgage on land, such act created a valid lien on life estate she inherited from her husband, although she was living on land with her children at time of executing renewal mortgage—Rutland Sav Bank v Isbell, Civ App, 129 S W 2d 505, affirmed 134 S W 2d 442, 137 Tex 432

Levy of attachment, execution sales

(1) Since creditors have no interest in exempt property and since the debtor may sell it as against his creditors, the levy of an attachment on such property does not prevent the title from passing under a sale subsequent to such levy—Johnson v Echols, Tex Civ App, 21 S W 2d 382, error refused

(2) This power to sell the homestead exists regardless of any judgments against the owner and sales of the property under executions based on such judgments
U S—In re Bitner, Ill, 255 F 48, 166 C C A 376.
Ill—Brokaw v Ogle, 48 N E 394, 170 Ill. 115.

(3) The reason for this holding is that the sale is a nullity and no title whatever passes thereunder—In re Bitner, supra—29 C J p 884 note 7

Means of acquisition

It is immaterial how the homestead property was acquired—Lies v De Diablar, 12 Cal 327

To pay debts

(1) Homestead owners may lawfully sell their homestead for the purpose of paying an existing debt of one of them—Anglin v Cisco Mortg Loan Co, 141 S W 2d 935, 135 Tex 188, reversing, Civ App, 118 S W 2d 817—Hiner v Meyer, Tex Com App, 44 S W 2d 961, affirming, Civ. App, 25 S W 2d 196—Roberson v Keck, Tex Civ App, 135 S W 2d 256, error dismissed, judgment correct

(2) This is true even though the indebtedness forming the consideration for the conveyance was not secured by a lien on the homestead—Gore v Citizens State Bank, Tex Civ App, 88 S W 2d 721, error refused
Restricting encumbrances except for certain debts see infra § 134

81. Kan—Home Owners' Loan Corporation v Benner, 91 P 2d 9, 150 Kan 108
29 C J p 883 note 98

82. Kan—Home Owners' Loan Corporation v Benner, supra
29 C J p 883 note 99

83. Kan—Home Owners' Loan Corporation v Benner, supra
Tex—Brannon v Gartman, Com App, 288 S W 817, reversing Gartman v Brannon, Civ App, 270 S W. 255

84. Ky—Brannon v Bohannon, 96 S W 2d 1036, 265 Ky 394
29 C J p 883 note 1

85. Colo—Dallemand v Mannon, 35 P 679, 4 Colo App 262.
29 C.J. p 883 note 2.

security is valid where the latter was enforceable against the premises [86]

Exercise of power Generally an intent to convey is an essential element in an exercise of the power to convey a homestead [87] A reservation of a life estate in the grantors does not stop the passage of title to the grantees when the deed is delivered [88] In some jurisdictions an executory contract to convey the homestead in the future is without legal force,[89] and a conditional delivery or a delivery in escrow is insufficient to pass title [90]

§ 124. Conveyance Subject to Homestead Right

A conveyance may be made subject to the right of homestead

A conveyance of land subject to the right of homestead therein has been held to be valid and to carry with it the estate of the grantor, subject only to the homestead right,[91] that is, the reversion after the existing homestead rights shall have expired,[92] and this is so in jurisdictions where the homestead is not considered an estate in land [93] Such a reservation is neither conclusive nor presumptive evidence of fraud [94] So a conveyance by the husband alone, not expressed to be subject to the homestead right, has been held to vest the estate in the vendee, subject only to the use and occupation by the husband and wife until another homestead is acquired, or until the character of the premises as a homestead is otherwise gone [95] On the other hand, it has been held that a conveyance of homestead prop-

86. N H—Wood v Lord, 51 N H 448
29 C J p 884 note 5

Conversely, it is not sufficient to make a mortgage lien good against a homestead that it was given in lieu of another mortgage on the property, unless it further appears that the first mortgage was a lien superior to the right of homestead—Griffin v Treutlen, 48 Ga 148

87. Consent procured through error does not constitute an act of sale of homestead—Gant v. Palmer, La App 10 So 2d 523

Items included in note

Note and trust deed to be binding on feme sole, require that she must have voluntarily executed instruments, knowing and assenting to all items included in note and that she was securing its payment by trust deed lien on her home—Beaumont Holding Co v Sapp, Tex Civ App, 62 S W 2d 703, error dismissed

Lease

Notwithstanding a wife joins with her husband in executing an oil lease of homestead property, the lease is nevertheless inoperative as a conveyance of interest in the homestead where the wife executed it merely for the purpose of enabling the lessee to secure other leases and the lessee was aware of such fact—McEntire v Thomason, Tex Civ App, 210 S W 563

Option

Where husband and wife contracted with third person that he should sell part of homestead and pay proceeds to wife, and incorporated in such contract an option in favor of such third person, and for convenience executed deeds to him deeds did not pass fee simple, but were in nature of power of attorney, and, in absence of exercise of option in husband's lifetime, there was no alienation of homestead under Florida constitution, and such lands, on death of husband, descended to widow and his heirs, although third person conveyed them to corporation, which took with notice—Croker v Croker, D C Fla, 7 F 2d 218

88 Fla—Daniels v Mercer, 141 So 189, 105 Fla 362

89. U S—Jones v Continental Royalty Co, C C A Tex 115 F 2d 731
Tex—Jefferson County Inv & Bldg Ass'n v Gaddy Civ App, 90 S W 2d 295, error refused Washington v City of Houston Civ App, 60 S W 2d 519, error refused Staten v Harris, Civ App, 239 S W 334, error refused
29 C J p 889 note 3 [e]

Married woman cannot make contract with reference to her homestead which is not a present conveyance of whole or part of her title—Pickens v Bacle, 104 S W 2d 482, 129 Tex 610, affirming Bacle v Pickens Civ App, 78 S W 2d 260, and rehearing denied Pickens v Bacle, 135 S W 2d 212, 129 Tex 610

Renunciation

Married woman's executory contract to sell her homestead may be renounced any time before acknowledgment—Finley v Messer, Tex Civ App, 9 S W 2d 756

Reservation of occupancy

Deed, although in consideration partly of care for grantors during their lives and containing reservation in grantors of right to occupy house on premises for life, conveyed present fee-simple title, and was not mere executory contract to convey homestead in future—Sisk v Randon 70 S W 2d 689, 123 Tex 326 affirming Civ App, 33 S W 2d 1082

90. Notification not to deliver

Where spouses executed escrow agreement together with deed to homestead, and wife subsequently notified escrow agent not to deliver deed, grantee could not compel delivery of deed by mandatory injunction—De Bell v Schuetz, Tex Civ App, 65 S W 2d 413, error refused

91. Ga Landrum v Carey, 194 S E 362, 185 Ga 76—Donalson v Yeates, 159 S E 856, 173 Ga 30, followed in Shingler v Yeates 159 S E 859 first case, 173 Ga 31, and 159 S E 859, second case, 173 Ga 35
29 C J p 884 note 8

Rights obtained

One who takes "subject to the homestead" rights obtains title to the entire tract, less the statutory exemption—Joyner v Sugg, 11 S E 122, 132 N C 580, rehearing 42 S E 828, 131 N C 121

Wife, if intended to be given gift of undivided interest in homestead may convey her interest before termination of homestead subject to homestead, and the administrator of husband's estate, after termination of homestead, could not recover land conveyed for purpose of administration—Williamson v Johnson, 156 S E 617, 171 Ga 713

92. Ga—Wardlaw v Woodruff, 165 S E 557, 175 Ga 515—Donalson v Yeates 159 S E 856 173 Ga 30 followed in Shingler v Yeates 159 S E 859, first case, 173 Ga 31 and 159 S E 859 second case 173 Ga 35—Williamson v Johnson, 156 S E 617, 171 Ga 713—Browning v Barber, 113 S E 797, 151 Ga 221
29 C J p 884 note 9

93 N C—Kirkwood v Peden, 92 S E 264, 173 N C 460
Homestead as an estate see supra § 3

94. N C—Kirkwood v Peden, supra —Davis v Smith 18 S E 53, 113 N C 94—Morehead Banking Co v Whitaker, 14 S E 920, 110 N C 345

95. Cal—Gee v Moore, 14 Cal 472
Tex—Grissom v Anderson 79 S W 2d 619, 125 Tex 26, reversing, Civ App, 48 S W 2d 809—Primitive Baptist Church at Fellowship v

erty by the husband alone is void, and that under such circumstances the husband did not sell his homestead subject to the homestead rights of his nonjoining wife [96]

§ 125. Creation of Lien

Constitutions and statutes frequently place restrictions on the creation of liens on homesteads

Whether or not a lien may be given on homestead property, and the circumstances under which it may be given, depends on the particular constitutional and statutory provisions Where a lien permitted by law is created on a homestead, it does not operate in favor of creditors generally, and does not extend beyond the debt for which it is granted [97]

A statute providing that a homestead shall be subject to seizure and sale for certain debts,[98] or an agreement by owners that they will not claim homestead rights as against a particular debt,[99] does not of itself create a lien on homestead property

Restrictions of encumbrances except for certain debts are discussed infra § 134.

B CONSTITUTIONAL AND STATUTORY RESTRICTIONS

§ 126. In General

Homesteads, where there are constitutional or statutory restrictions, cannot be alienated or encumbered except as the law directs

The people, as far as future debts may affect it, have the right, in their constitution, to prohibit the owner of a homestead from conveying or encumbering it or may place material limitations on his power in this regard, and the legislature may do the same thing when not restricted by the constitution [1] Where the constitution or statutes place restrictions on the transfer or encumbrance of homesteads, they cannot be alienated except in compliance with such restrictions [2] There can be no operative convey-

Fla-Tex Corporation, Civ App, 158 S W 2d 549 error refused—Weinert v Cooper Civ App, 107 S W 2d 593, error dismissed—Skiles v Shropshire, Civ App, 50 S W 2d 402 modified on other grounds 77 S W 2d 872, 124 Tex 462—Fertitta v Toler, Civ App 43 S W 2d 167 reversed on other grounds Toler v Fertitta Com App, 67 S W 2d 229

Not absolute nullity

Husband's deed of homestead of community property, executed without wife's consent and in which she did not join, was not an absolute nullity, since it would become effective on the subsequent abandonment of the property as a homestead—McDonald v Simons, Tex Com App, 280 S W 571, reversing Civ App, 271 S W 119

Possession postponed

Where husband's land is duly set apart as homestead for wife and minor children such exemption does not divest husband of legal title, and purchaser from husband will take legal title with right of possession postponed until after termination of homestead by death of wife and marriage or attainment of majority by children—Landrum v Carey, 194 S E 362, 185 Ga 76

Undertaking to support

It has been held that, where the husband conveyed the homestead, together with other land, to his son in consideration of the son's undertaking to support the father and his wife during their life, besides paying a money consideration, the deed was enforceable where the son had fully performed his covenants, although the wife of the father had not joined therein—Whitmore v Hay 55 N W 708 85 Wis 240 39 Am S R 838 29 C J p 899 note 56

96. Mo—Gum v Wolfinbarger 93 S W 2d 667, 338 Mo 968—Haines v Carroll, 38 S W 2d 1047 327 Mo 1026

97. Iowa—American Sav Bank of Marengo v Willenbrock, 228 N W 295 209 Iowa 250

98. Minn—Hasey v McMullen 193 N W 1078 109 Minn 332

99. Iowa—First Nat Bank v Phillips 212 N W 678 203 Iowa 372

1. W Va—Moran v Clark 1 S E 303 30 W Va 358 8 Am S R 66

Power of legislature

Under some constitutions, the husband has homestead estate in wife's land so long as devoted to homestead uses, including right to continue in possession and enjoyment thereof as homestead until abandonment or conveyance by deed of both parties, and legislature cannot confer on either spouse exclusive possession or power to dispose of homestead at least while they remain husband and wife and continue to perform their marital duties—Gonzales v Gonzales, 273 S W 798, 115 Tex 16, reversing Civ App, 256 S W 658

2. Ala—Weatherwax v Heflin, 12 So 2d 554—Majors v Killian, 162 So 289, 230 Ala 531

Fla—Nelson v Franklin, 12 So 2d 771—Suttle v Wold, 158 So 447 117 Fla 802—Oates v New York Life Ins Co, 152 So 671, 113 Fla 678, 116 Fla 253—Jones v Carpenter, 106 So 127, 90 Fla 407, 43 A L R 1109

Ill—Voss v Regis 175 N E 799, 343 Ill 471

Kan—Hawkins v State of Kansas Social Welfare Board 84 P 2d 930, 148 Kan 760

Neb—Application of Abboud 290 N W 713, 137 Neb 652

Okl—Billy v Le Flore County Gas & Electric Co, 120 P 2d 774 190 Okl 88

Tex Thompson v Crim 126 S W 2d 18 132 Tex 586 affirming Civ App 103 S W 2d 855—Pickens v Bade 104 S W 2d 182 129 Tex 610 affirming Bade v Pickens Civ App, 78 S W 2d 260 rehearing denied Pickens v Bade 105 S W 2d 212 129 Tex 610—Grissom v Anderson 79 S W 2d 619 125 Tex 26 reversing, Civ App, 18 S W 2d 809—Crowder v Union Nat Bank of Houston, 261 S W 375, 114 Tex 34, answering certified questions, Civ App 264 S W 791—De Bell v Schuetz Civ App 65 S W 2d 413, error refused—Harborth v Petermann Civ App 291 S W 641, reversed on other grounds Peterman v Harboth, Com App 300 S W 33

The purpose of statute governing "conveyance or incumbrance" of homestead is to prevent the destruction of homestead rights of married persons except in the manner prescribed by statute—Wright v Flatterich 281 N W 221, 225 Iowa 750

Statutes are mandatory

Statutory requirements for conveyance of homestead by married man are mandatory—Metropolitan Life Ins Co v Estes, 155 So 79, 228 Ala. 582

ance or effectual release of the exemption unless the mode pointed out by statute is pursued with reasonable strictness;[3] and no requirement of the constitution or of the statutes may be waived by the husband and wife or by either of them.[4] Equity will not interfere to give relief, but will remain passive, where by express law there is a limitation on the power of alienation of the homestead, and the final relief sought is merely to relieve such limitation.[5]

§ 127. Construction and Operation of Restrictions

Statutes regulating transfers and encumbrances of homesteads must not conflict with constitutional provisions. Such statutes ordinarily do not operate retroactively, and it is generally held that the right of alienation or encumbrance of a homestead is governed by the law in force when the property was acquired

In case of conflict between a constitutional provision securing homestead rights and a statute on the same subject, the constitution controls, whether the statute enlarges or diminishes those rights.[6] As between different statutes repeals by implication are not favored,[7] nor will a subsequent statute ordinarily be deemed retroactive.[8]

While there is some authority apparently to the contrary,[9] it is generally held that the right of alienation or encumbrance is governed by the law in force when the property was acquired, since vested rights of ownership cannot be destroyed by legislative or constitutional provisions.[10] The owner may, however, voluntarily dedicate the property to the purposes of a homestead after the restrictions of the constitutional or statutory provisions have become effective.[11] If the homestead rights under a prior law have been lost by abandonment, they can only be gained anew under the law in force when the attempted acquisition occurs; and a mortgage executed after such abandonment and before the new acquisition is valid.[12] It has been held that conveyances of homesteads which are formally defective when executed may be validated by subsequent curative acts,[13] but it has also been held that, where a contract conveying a right of way over homestead was void when executed, it could not be validated by any subsequent constitutional provision relating to homestead.[14]

§ 128. What Law Governs

The law of the state where the land is situated controls in cases of conflict between the laws of different jurisdictions.

The validity and operation of an encumbrance on a homestead is to be determined by the homestead legislation of the state where the land is situated and the judicial decisions construing such legislation.[15]

§ 129. Consent and Joinder of Husband and Wife

Particular matters relating to consent and joinder of spouses in the conveyance or encumbrance of homestead property are discussed in detail in the sections immediately following

Examine Pocket Parts for later cases.

§ 130. —— Necessity

a. In general
b. Particular kinds of homestead property
c. Particular transfers or encumbrances
d. Conveyances by unmarried persons or after separation or abandonment
e. Conveyances and mortgages between husband and wife

3. Ill.—Holterman v. Poynter, 198 N.E. 723, 361 Ill. 617, 101 A.L.R. 842—Voss v. Rezgis, 175 N.E. 799, 343 Ill. 451.
29 C.J. p. 885 note 32.

Indirect methods

A conveyance of homestead not permitted to be made in one way is not valid when made in another, if the results are the same.—Church v. Lee, 136 So. 242, 102 Fla. 478

4. Fla.—Hutchinson v. Stone, 84 So. 151, 79 Fla. 157
Waiver of homestead rights see infra §§ 179–186

5. Tex.—Reynolds Mortg. Co. v. Gambill, Civ.App., 276 S.W. 480, certified questions answered 280 S.W. 531, 115 Tex. 273

6. Kan.—Appeal of Barnell, 44 P.2d 214, 141 Kan. 842
29 C.J. p. 885 note 33.

Statute held valid

The statute providing that a deficiency judgment rendered on an indebtedness evidenced by a mortgage on a homestead shall not be enforceable after two years is not unconstitutional.—Montalto v. Yeckley, 34 N.E.2d 765, 138 Ohio St. 314

7. Minn.—Barton v. Drake, 21 Minn. 299
Tenn.—First Nat. Bank v. Meacham, Ch.App., 36 S.W. 724

8. Ill.—Schroeder v. Ginn, 141 N.E. 716, 310 Ill. 271
29 C.J. p. 885 note 35

9. Ala.—Watts v. Burnett, 56 Ala. 340
29 C.J. p. 885 note 38

10. Mo.—Gladney v. Sydnor, 72 S.W. 554, 172 Mo. 318, 95 Am.S.R. 517, 60 L.R.A. 880
29 C.J. p. 885 note 39.

11. N.C.—Bruce v. Strickland, 81 N.C. 267
29 C.J. p. 885 note 40

12. Cal.—Cohen v. Davis, 20 Cal. 187

13. Ark.—Hanson v. Brown, 213 S.W. 12, 139 Ark. 60
29 C.J. p. 885 note 36

14. Okl.—Kelly v. Mosby, 124 P. 984, 34 Okl. 218

15. U.S.—Moody & Son v. Century Sav. Bank, Iowa, 36 S.Ct. 111, 239 U.S. 374, 60 L.Ed. 239
Law of what time see supra § 127.
What law governs
Homestead rights generally see supra § 5
Proceedings for protection of homestead rights see infra § 207.
Rights of surviving wife, husband, children, or heirs see infra § 240.

f. Conveyances where husband or wife is insane
g. Transfers and encumbrances prior to acquisition and establishment or after termination
h. Transfer or encumbrance to secure debts enforceable against homestead
i. Subsequent agreements affecting liability under transfer or encumbrance

a. In General

Where the constitution or a statute so requires, a homestead can be alienated or encumbered only with the consent and joinder of husband and wife.

Unless restrained by constitutional or statutory provision, a homestead may be sold or encumbered by the husband without the wife's consent or joinder in the conveyance.[16] However, in the majority of jurisdictions by reason of express constitutional and statutory provisions, the homestead can be alienated or encumbered only with the consent and joinder of husband and wife[17] On the other hand, in the absence of other constitutional or statutory

16. Ky—Brannon v Bohannon, 96 S W 2d 1036, 265 Ky 394
Neb—Perry v Ritze, 193 N W 758, 110 Neb 286
Okl—Barnett v Sanders, 247 P 55, 121 Okl 14—Christie v Thompson, 211 P 513, 88 Okl 85.
29 C J p 885 note 48
Conveyance or alienation of dower rights by husband and release of dower rights by wife see Dower §§ 57–60, 65.

Property not selected

Husband is proper person to select homestead, and conveyance by him of his separate property, which has not been impressed with homestead, is valid without wife's signature—Hensley v Fletcher, 44 P 2d 63, 172 Okl 19—Hensley v Maxwell, 44 P 2d 60, 172 Okl 21.

In Louisiana

(1) Under the constitution a husband may make a bona fide sale of the homestead without his wife's consent The constitutional provision for the waiver of the exemption refers only to mortgages, and the husband is free to make a bona fide sale of the homestead—Reymond v Louisiana Trust & Savings Bank, 148 So 663, 177 La 409—29 C J p 885 note 48 [a] (2)

(2) The husband, however, cannot mortgage homestead property and waive the benefit of the homestead without the wife's written consent—Reymond v Louisiana Trust & Savings Bank, 153 So 529, 179 La 104

(3) Such sale must be a genuine and bona fide sale and not made to evade the homestead exemption Sales and resales, having for their purpose merely the conversion of an unsecured debt into a debt secured by mortgage and vendor's lien on property otherwise entitled to homestead exemption, are pignorative contracts, and void as to the homestead—Clarke v Oden, 99 So 605, 155 La 801

(4) If the wife avails herself of the statutory privilege of filing and recording a declaration of homestead, the husband has no power to mortgage or sell it without her consent—Reymond v. Louisiana Trust & Savings Bank, 148 So 663, 177 La 409—Smith v Marino, App, 12 So 2d 71

(5) Other particulars of Louisiana rule see 29 C.J p 885 note 48 [a]

17. U S—In re Matley, D C Nev, 47 F Supp 558, affirmed, C C A, Myers v Matley, 130 F 2d 775, certiorari granted 63 S Ct 435, 317 U S. 621, 87 L Ed —, affirmed 63 S Ct 780
Ala—People's Bank of Red Level v Barrow & Wiggins, 94 So 600, 208 Ala 433
Ark—Sirman v Sloss Realty Co 129 S W 2d 602, 198 Ark 534—Williams v Courton, 287 S W 745, 172 Ark 129
Fla—Bigelow v Dunphe, 198 So 13, 144 Fla 330, denying rehearing 197 So 328, 143 Fla 603—Jones v Federal Farm Mortg Corporation, 188 So 804, 138 Fla 65—Gulf Refining Co v Ankeny, 135 So 521, 102 Fla 151
Iowa—Brunsdon v Brunsdon 200 N W 823, 199 Iowa 1099—Van Horn v Bell, 11 Iowa 165, 79 Am D 506
Kan—Hawkins v State of Kansas Social Welfare Board, 84 P 2d 930, 148 Kan 760—Eakin v Wycoff, 234 P 63, 118 Kan 167
Mich—Boman v Wolverine Power Co, 255 N W 613, 268 Mich 59—La Londe v Bloom, 188 N W 291, 218 Mich 588.
Minn—Sherwood v Rosenstein, 228 N W 339, 179 Minn 42
Miss—Smith v Smith, 8 So 2d 461—Davis v Crawford, 168 So 261, 175 Miss 493—Jones v Lamensdorf, 167 So 624, 175 Miss 565—Federal Land Bank of New Orleans v Miles, 152 So 472, 169 Miss 43
Mo—Glitzke v Ginsberg, 258 S W 1004
Neb—Anderson v Cusack, 214 N W 73, 115 Neb 643—David City Building & Loan Ass'n v Fast, 208 N W 964, 114 Neb 671
N D—Hazlett v Mathieu, 220 N W 647, 57 N D 57
Okl—Billy v Le Flore County Gas & Electric Co, 120 P 2d 771, 190 Okl 88—Brooks v Butler, 87 P 2d 1092, 184 Okl 414—Barnett v Sanders, 247 P 55, 121 Okl 14—Kyger v Caudill, 241 P 814, 115 Okl 102—Fetterman v Franklin, 211 P 403, 88 Okl. 1—Fletcher v. Popejoy, 209 P 746, 87 Okl 185—Baker v Grayson, 207 P 301, 86 Okl 159
S C—Ex parte Sams, 119 S E 798, 126 S C 245
S D—O'Neill v Bennett, 207 N W 543, 49 S D 524
Tenn—Beard v Beard, 14 S W 2d 745, 158 Tenn 437—Beard v. Beard, 10 Tenn App 52
Tex—Grissom v Anderson, 79 S W 2d 619, 125 Tex 26, reversing, Civ App, 48 S W 2d 809—Cleveland v Milner, Com App, 170 S W 2d 472, reversing, Civ App, 166 S W 2d 351—Higgins v Bankers' Mortg Co, Com App, 13 S W 2d 683, reversing Bankers' Mortg Co v Higgins, Civ App, 1 S W 2d 102—Bethel v Yearwood, Civ App, 142 S W 2d 927, error dismissed, judgment correct—Bower v Nelson, Civ App, 138 S W 2d 601, error refused—Hibbs v City Nat Bank of Wichita Falls, Civ App, 293 S W 350—Gates v Pitts, Civ App, 291 S W 948—Harborth v Petermann, Civ App, 291 S W 641, reversed on other grounds Peterman v Harboth, Com App, 300 S W 33—Medearis v Buratti, Civ App, 275 S W 617—Stephenson v Mallett, Civ App, 240 S W 633, error refused—Texas Land & Mortgage Co v Cooper, Civ App, 67 S W 173, error refused
Wyo—State Bank of Wheatland v Bagley Bros, 11 P 2d 572, 44 Wyo 214, rehearing denied 13 P 2d 564, 44 Wyo 456
29 C J p 885 note 49, p 891 note 85½, p 910 note 74

Character as homestead

(1) Whether conveyed property was homestead, so as to necessitate signature of each spouse to deed, is determined by homestead characteristics, or lack thereof, rather than by size, or by size of property remaining—Hickok v Cowart, 58 P 2d 1240, 177 Okl 336—Hickok v Kennedy, 58 P 2d 1236, 177 Okl 334

(2) House in which family lived held a homestead, and the wife, under the circumstances where the husband was incapacitated, was the head of the family, within a constitutional provision that a 'homestead" owned by "head of family" shall not

restrictions, a conveyance or encumbrance of homestead property executed by both husband and wife is valid and enforceable.[18] The extent of the lien arising from a mortgage executed by husband and wife is to be determined by the provisions in the mortgage,[19] and the terms of the mortgage cannot be enlarged by the terms of a note which is invalid as to the wife.[20]

As a general rule, the effect of these provisions is to prohibit all methods of alienation or encumbrance other than those therein designated,[21] and a conveyance or mortgage of homestead property by one spouse, in which the other spouse does not join as required by law, is generally held to be void,[22] both

be alienable without joint consent of husband and wife—Bigelow v Dunphe, 197 So 328, 143 Fla 603, rehearing denied 198 So 13, 144 Fla 330

(3) Wife's homestead rights, necessitating her joinder in deeds of trust thereto, arise by virtue of use and occupancy of the property for homestead purposes A vacant lot on which a house is being constructed does not assume character of "homestead" as to deprive husband of right to designate another piece of common property suitable for home, or encumber premises without concurrence of wife, or over her protest—Continental Southland Savings & Loan Ass'n v Palmer, Tex Civ App, 92 S W 2d 1053, error dismissed

Evidence held sufficient to show that mortgagor's wife never joined in execution of mortgage on homestead—Addington v McKee, 282 S W 678, 170 Ark 1192

Exception to general law

Statute prohibiting encumbrance of homestead by married person unless executed and acknowledged by both husband and wife is regarded as an exception to general provisions of statute providing that property owned by husband before marriage and that acquired afterward by gift, bequest, devise, or descent should not be subject to debts or contracts of wife, and might be sold or encumbered without wife joining as effectively as though husband were unmarried—Davies v Metropolitan Life Ins Co, 71 P 2d 552, 191 Wash 459, appeal dismissed 59 S Ct. 465, 306 U S 665, 83 L Ed 1061.

Validity

It has been said that these provisions constitute a proper means of protecting and perpetuating the homestead and that they are not open to an objection that by legislative action only they impair or defeat the husband's right of individual conveyance—Gaar v Collin, 110 N W 81, 15 N D 622—29 C J. p 887 note 51

18. Cal—Williams v Nieto, 277 P 513, 98 Cal App 615
Fla—New York Life Ins Co v Oates, 192 So 637, 141 Fla 164—Norton v Baya, 102 So 361, 88 Fla 1
Kan—Rogler v Bocook, 84 P.2d 893, 148 Kan 858.
Okl—Keist v. Cross, 247 P. 85, 118 Okl 142
Tex—Brittain v. Dickson, Civ App, 60 S W 2d 1093, error dismissed

Additional security

A wife who joined with her husband in a mortgage on their homestead as additional security to bank on notes of her husband and son simply pledged her interest in property as additional security, since bank parted with nothing and she derived no benefit from transaction—First Nat Bank v Ten Napel, 200 N W. 405, 198 Iowa 816

Assignment of rents

A provision in mortgage given to Home Owners' Loan Corporation by husband and wife that, in case of default in payment of mortgage debt, all rents from the premises should be assigned to the mortgagee, was not invalid because mortgaged premises were a homestead—Home Owners' Loan Corporation v. Benner, 91 P 2d 9, 150 Kan 108.

Continued residence

Husband joined by wife may in good faith sell homestead to pay debts, and fact that they continue to reside on the property after sale does not as a matter of law avoid the transaction—Ellerd v Dollar, Tex Civ App, 265 S W 754

Erasure of word "homestead"

As respects spouses' warranty deed of homestead by which wife affirmatively relinquished dower and homestead rights, erasure of word "homestead" therefrom would have no legal effect, and it would be immaterial whether word "homestead" was or was not included in recitals of deed—Clark v Chapman, 239 N W. 797, 213 Iowa 737

19. Mich—Carroll v Chauret, 216 N W 913, 241 Mich 338

Future advances

A provision of a trust deed executed by husband and wife that it is to secure any further amounts that may be advanced them has been held to refer to both mortgagors, and, consequently, a subsequent note on which the husband is principal is not secured by the deed—Davis v Crawford, 168 So 261, 175 Miss 493

20. Mich—Carroll v Chauret, 216 N W 913, 241 Mich 338

21. Fla—Thomas v Craft, 46 So 594, 55 Fla 842, 15 Ann Cas 1118

No device or subterfuge entered between husband and his creditor, such as sale and resale with retention of vendor's privilege, or sale with right of redemption, will defeat husband's right to claim homestead exemption for benefit of his dependents—Reymond v. Louisiana Trust & Savings Bank, 148 So. 663, 177 La 409

Not property right

Wife's veto power against conveyance of homestead by husband without her consent is not a property right—Kimbrough v. Powell, 108 So 498, 143 Miss 498.

Waiver of damages

The owner of the legal title to a homestead may not impair it by a waiver of the right to bring an action for damages to the homestead in derogation of the statutory provisions requiring the signature of the spouse to a valid conveyance or encumbrance—Conlon v City of Dickinson, N D, 5 N W 2d 411, 142 A L R 525

22. Ala—Lazenby v Lazenby, 15 So 670, 229 Ala 426—*Carey* v Hart, 94 So 298, 208 Ala 316—Burgin v Hodge, 93 So 27, 207 Ala 315
Ark—Callaway v Ashby, 95 S W 2d 907, 192 Ark 929—Johnson v Commonwealth Building & Loan Ass'n, 31 S W 2d 136, 182 Ark 226—Watson v Poindexter, 5 S W 2d 299, 176 Ark 1065—Hall v. Mitchell, 1 S W 2d 59, 175 Ark. 641—Addington v McKee, 282 S W 678, 170 Ark 1192
Iowa—Thayer v Sherman, 255 N W 506, 218 Iowa 451
Ky—Damron v Pikeville Grocery Co, 2 S W 2d 366, 222 Ky 749
La—Reymond v Louisiana Trust & Savings Bank, 148 So. 663, 177 La 409
Minn—Kingery v Kingery, 241 N W 583, 185 Minn 467
Neb—Storrs v Bollinger, 196 N W 512, 111 Neb 307
Okl—Standard Savings & Loan Ass'n v Acton, 63 P 2d 15, 178 Okl 400—Montgomery v Wise, 62 P 2d 647, 179 Okl 247—First Nat Bank v Good, 260 P 473, 127 Okl 251—Abbott v Independent Torpedo Co, 224 P 708 98 Okl 239—Bishoff v Myers, 223 P 165, 101 Okl 36—Thomason v Martin, 222 P 511, 97 Okl 17—Fetterman v. Franklin, 211 P 403, 88 Okl 1—Baker v Grayson, 207 P 301, 86 Okl 159
S D—Farmers' & Merchants' Nat

as to his interest and her rights therein,[23] although, as discussed supra § 124, in some jurisdictions a conveyance or encumbrance of a homestead by one spouse is upheld subject to the homestead right The object of such requirements is to protect the wife and family of a homestead claimant against his improvidence,[24] as well as against the rapacity of the creditor[25] The fact that a full consideration was paid cannot prevent the operation of the rule established by the statute that a conveyance by the husband without the joinder of the wife is invalid[26]

Where the marriage is void, the restrictive provisions as to joinder of the wife in the transfer of a homestead do not apply[27]

The fact that the husband procures another woman, who is described as his wife, to join with him in the execution of an encumbrance on the homestead cannot serve as a protection against the claim of the wife or estop her to deny the validity of the mortgage[28] A grantor's conveyance of the homestead is not invalidated by failure to secure the signature of a woman with whom he lived upon the premises but who was not his lawful wife[29]

Conveyance by wife. It has been said that the constitution and laws may confer on married women such absolute right to the disposition of their own separate property that a married woman who is the owner of the homestead may convey it without the husband joining in the instrument[30] On the other hand, ordinarily under the various constitutional and statutory provisions the consent and joinder of the husband in a transfer or encumbrance of the homestead by the wife are as essential as the wife's consent and joinder in a transfer or encumbrance of the homestead by the husband,[31] and a conveyance or encumbrance by a wife of homestead property owned by her is void[32] and is

Bank of Milbank v Bank of Commerce of Milbank, 206 N W 691, 49 S D 130

Wis —Eaton Center Co-op Cheese Co v Heintz, 241 N W 620, 209 Wis 170—Helander v Wogensen, 191 N W 964, 179 Wis 520

Wyo —State Bank of Wheatland v Bagley Bros, 11 P 2d 572, 44 Wyo 241, rehearing denied 13 P 2d 564, 44 Wyo 456

Decretal sale

Purchasers at decretal sale are not entitled to immediate possession, as against wife who did not surrender her right of dower or homestead in land sold, as wife may claim homestead even after sale —Conrad v Martin, 270 S W 805, 208 Ky 411

Passes no title

(1) A deed to a homestead without wife joining therein passes no title —Phillips v Smith, 107 So 841, 214 Ala 382

(2) Where the property sought to be conveyed does not exceed the homestead exemption in value, a conveyance not signed by the wife is wholly ineffectual to convey any interest whatever in the premises — Bailey v Hamilton, 169 N E 743, 337 Ill 617

Recovery of interest

Where wife did not consent, in manner provided by statute, to sale or exchange of realty in which she had a homestead right, she and her husband were entitled to recover interest in realty that husband's deeds undertook to convey —Cleveland v Milner, Tex Com App, 170 S W 2d 472, reversing, Civ App, 166 S W 2d 351

Reformation

Deed of trust securing loan, and executed by husband only was not subject to be reformed so as to embrace land constituting homestead, notwithstanding representation by husband that buildings were upon land embraced in trust deed —Federal Land Bank of New Orleans v Miles, 152 So 472, 169 Miss 43

Rents

Administratrix of wife who did not join husband in conveyance of homestead property had no right to collect rents on land from grantee or his successors in interest —Thompson v Marlin 243 P 950, 116 Okl 159, 45 A L R 388

Valuation of homestead was unimportant, in wife's suit to quiet title against purchaser of homestead from husband without wife's consent — O'Neill v Bennett, 207 N W 543, 49 S D 524

23. Ala —People's Bank of Red Level v Barrow & Wiggins, 94 So 600, 208 Ala 433

Mo —Gum v Wolfinbarger, 93 S W 2d 667, 338 Mo 968—Haines v Carroll, 38 S W 2d 1047, 327 Mo 1026

24. Miss —McDonald v Sanford, 41 So 369, 88 Miss 633, 117 Am S R 758, 9 Ann Cas 1

29 C J p 887 note 52

Benefit of all interested

(1) The provisions of such statutes are for the benefit of all who are interested in the homestead They are designed as a protection to the wife, children, and the husband himself —Thayer v Sherman, 255 N W 506, 218 Iowa 451

(2) The object sought is to protect and preserve the home for the benefit of the family as a whole —Conlon v City of Dickinson, N D, 5 N W 2d 411, 142 A L R 525

Passage of homestead law manifests a legislative policy precluding the possibility of a wife being divested of the home by the acts of her husband perpetrated either with a design to defraud her or through misguided or imprudent business transactions in which she had no part —Myers v Matley C C A Nev, 130 F 2d 775, affirming, D C, In re Matley, 47 F Supp 558, certiorari granted Myers v Matley, 63 S Ct 435, 317 U S 621, 87 L Ed ——, affirmed 63 S Ct 780

25. Tex —Jones v Goff, 63 Tex 248

26. Tenn —Caruthers v Caruthers, 2 Lea 71—Mash v Russell, 1 Lea 543—Carter v Hatton, King Dig 1231—Williams v Williams, King Dig 1231

27. Tex —Middleton v Johnston, Civ App, 110 S W 789

28. Cal —Security L & T Co v Kauffman, 11 P 467, 108 Cal 214

29. Iowa —Goodwin v Goodwin, 85 N W 31, 113 Iowa 319

30. Mich —Buckingham v Buckingham, 45 N W 504, 81 Mich 89

31. Tex —Gonzales v Gonzales, 273 S W 798, 115 Tex 16, reversing, Civ App, 256 S W 658

29 C J p 887 note 50

32. Miss —Breland v Parker, 116 So 879, 150 Miss 476

Provision of constitution that all property of a wife owned by her before her marriage or lawfully acquired afterward shall be her separate property and not subject to husband's debts without her consent given by some instrument in writing does not modify or affect operation of constitutional provision regulating the execution of conveyances and mortgages of homestead realty, whether the wife or the husband is the head of the family and the owner of the homestead realty —Bigelow v. Dunphe, 198 So 13, 144 Fla.

insufficient to divest the husband of his homestead rights.[33]

A deed of the homestead from the husband to the wife does not operate as a surrender of the husband's homestead rights in the property conveyed so as to enable the wife to convey the homestead to another without the joinder of the husband.[34]

Husband imprisoned Notwithstanding a husband is in jail, a conveyance by the wife without his joinder will be void where he does not lose his status as head of the family by reason of the continued relationship between himself and his wife and his resumption of his ordinary relations with his family as soon as he is released.[35]

Injunction against interference A decree in an action for divorce denying a divorce to both parties and enjoining the wife from interference with the husband's possession of homestead does not divest the wife's interest therein so as to render valid a conveyance by her husband without her consent or joinder.[36]

Knowledge These restrictive provisions apply with full force and effect to conveyances executed by the husband alone, with the wife's knowledge[37] and without objection on her part.[38]

Property in excess of exemption Where property owned by the husband and occupied as a homestead exceeds in value or extent the constitutional or statutory exemption, he may without his wife joining in the conveyance execute a valid deed or mortgage of as much of it as is in excess of the exemption,[39] provided, according to some decisions, the land so conveyed is not, and has not been, used for any household or other purposes connected with the dwelling, although capable of being so used.[40] Also, when he owns several tracts of land and resides with his family on one of them worth as much as the homestead exemption, he may convey the other tracts free of the homestead right.[41]

b. Particular Kinds of Homestead Property

Constitutional and statutory restrictions requiring the joinder of spouses in conveyances or encumbrances of homestead property have been held to be applicable to various kinds of homestead property

Constitutions and statutes requiring the consent and joinder of husband and wife to a conveyance or encumbrance of the homestead property have been held to apply to community property occupied by husband and wife as a homestead,[42] to property occupied by them as joint tenants,[43] to a business homestead,[44] to property acquired by husband and wife by adverse possession,[45] to property for which the husband has exchanged his homestead and which is to be occupied in its place instead as a homestead,[46] and to property in respect of which the husband had equitable title only.[47]

Homestead held under contract of purchase Under some constitutions and statutes, where land is held under a contract of purchase and is occupied as a homestead, rights existing under the contract cannot be alienated unless both husband and wife join therein,[48] unless the assignment is to one who has furnished the homesteader with all moneys which have been paid on the purchase price,[49] nor will a cancellation and surrender of a contract for

330, denying rehearing 197 So 328, 143 Fla 603

33. Ill—Van Winkle v. Weston, 276 Ill App 66

34. Iowa—Spoon v Van Fossen, 5 N W 624, 53 Iowa 494

35. Tenn—Bryant v Freeman, 183 S W 731, 134 Tenn 169, Ann Cas 1917E 111

36. Okl—McWhorter v. Brady, 140 P 782, 41 Okl 383

37. Mich—Ring v Burt, 17 Mich 465, 97 Am D 200

38. Mich—Bovine v Selden, 119 N W 1090, 155 Mich 556, 130 Am S R 579

39. Ill—Mitchell v Mitchell, 159 N E 274, 328 Ill 136
29 C J p 898 note 52

Contract granting attorneys interest in realty recovered in litigation to recover interest in estate was not void on ground that portion of amount recovered was homestead and contract was not signed by wife of client, where amount ultimately set apart exceeded homestead exemption —Burgin v Godwin, Tex Civ App, 167 S W 2d 614

Excess value as security
A mortgage on house and lot owned by husband and occupied as a homestead, not validated by proper signature and separate acknowledgment of wife is void as to the homestead, but if it exceeds in value the homestead right of two thousand dollars mortgage passes the equity in the excess value as security for mortgage debt—Carpenter v First Nat Bank, 181 So 239, 236 Ala 213

40. Vt—Thorp v Thorp, 39 A. 245, 70 Vt 46
29 C J p 898 note 53

41. Tenn—Rayburn v Norton, 3 S W 645, 85 Tenn 351—First Nat Bank v. Meachem, Ch A, 36 S W 724—Enochs v Wilson, 11 Lea 228

42. Tex—Astin v Martin, Civ App, 289 S.W. 442, reversed on other grounds Martin v Astin, Com App, 295 S W 584
29 C J p 888 note 56

43. Ill—Lininger v Helpenstell, 82 N E 306, 229 Ill 369, 120 Am S R 264
29 C J p 888 note 57

44. Tex—Willis v Pounds, 25 S W 715, 6 Tex Civ App 512
29 C J p 888 note 58

45. Tex—Coler v Alexander, 128 S. W 664, 60 Tex Civ App 573

46. Mich—Dikeman v Arnold, 40 N W 42, 71 Mich 656

47. Kan—Holland v Holland, 132 P. 989, 89 Kan 730
29 C J p 888 note 61

48. Kan—Southern v Linville, 33 P. 2d 123, 139 Kan 850
Mich—Ter Keurst v Zinkewicz, 235 N W 191, 253 Mich 383
Minn—Craig v Baumgartner, 254 N W 440, 191 Minn 42
29 C J. p 889 note 83

49. Iowa.—Dahl v Thompson, 67 N. W. 579, 98 Iowa 599.

purchase of a homestead be sustained, which is not executed by both spouses;[50] nor a renunciation of title by the husband alone, where he has practically paid the purchase price of the property.[51]

Homestead of leased premises It has been held that the wife must join in an assignment or surrender of a lease under which the husband occupies the premises as a homestead,[52] and the same rule has been applied to a building erected on the leased premises[53] A new contract modifying a contract of purchase and a lease executed between seller and purchaser not signed by or consented to by the wife are void[54]

Proceeds of condemnation It has been held that a husband, part of whose homestead is taken under the right of eminent domain, may dispose of the compensation awarded him therefor without the consent of his wife[55]

c. Particular Transfers or Encumbrances

(1) In general
(2) Contract to convey, mortgage, or exchange
(3) Dedication to public use or grant of easement
(4) Lease
(5) Relinquishment of equity of redemption and conveyance of reversionary interest

(1) In General

The restrictions relating to the joinder of husband and wife have been applied to or held inapplicable to transfers or encumbrances in many and various forms

Constitutional and statutory restrictions requiring the joinder of husband and wife in transfers or encumbrances of homestead property have been held applicable to. An agreement fixing the boundary line between the homestead property and a tract belonging to an adjoining owner,[56] an agreement to arbitrate differences arising on a partition of land where one of the parcels was occupied as a homestead after partition,[57] an agreement to repay taxes paid by a third person under a tax deed to the premises;[58] a conveyance of all the minerals in the homestead with the right to enter and mine or drill for them,[59] a disclaimer of water rights appurtenant to the homestead,[60] a gift of homestead land to the son of the person owning the homestead,[61] the creation of a lien for materials purchased in improving the homestead;[62] the giving of an option on the homestead,[63] and a mortgage on crops, raised upon the homestead land, where it is given to secure payment for supplies used in their cultivation[64]

On the other hand, the restrictive provisions under discussion have been held inapplicable· Where the husband contracts to deliver fruit to be grown upon the premises,[65] where the husband disposes of proceeds of the land realized from an involuntary alienation,[66] where the husband waives the exemption from garnishment of money derived from an insurance policy on the homestead,[67] where one homestead is exchanged for another,[68] where the property, although occupied as a homestead, is above the statutory value,[69] to the filing of a plat and incorporation of the homestead as an addition to a city, notwithstanding the resulting reduction in the extent of the homestead exemption,[70] and where the premises are purchased by the husband in his own name to defraud his creditors[71] A statute giving the wife veto power against encumbrances or conveyances by her husband of the exempt homestead imposes no limitation on his rights to deal with the indebtedness secured by the homestead.[72] Statutes requiring the wife's consent

50. Iowa—Lessell v Goodman, 66 N W 917, 97 Iowa 681, 59 Am S R 432
29 C J p 889 note 85

51. Tex—Arnold v Macdonald, 55 S W 529, 22 Tex Civ App 487

52. Iowa—Wright v Flatterich, 281 N W 221, 225 Iowa 750
29 C J. p 889 note 88

53. Ala—Watts v Gordon, 65 Ala 546—Weber v Short, 55 Ala. 311
29 C J p 889 note 89

54. Kan—Walz v. Keller, 169 P. 196, 102 Kan. 124.

55. Minn—Canty v Latterner, 17 N W 385, 31 Minn 239

56. Kan—Kastner v. Baker, 139 P 1189, 92 Kan 26
29 C J. p 894 note 78.

57. Tex—Oldham v. Medearis, Civ App, 40 S W 350

58. Iowa—King v Bolt, 130 N.W 818, 151 Iowa 1.

59. Tex—Stephenson v. Mallett, Civ App, 240 S W 633, error refused

60. Idaho—Stowell v. Tucker, 62 P 1033, 7 Idaho 312

61. Ark—McLeod v McLeod, 198 S W 115, 130 Ark 481

62. Mich—Wallace Sons Co v Wilkinson, 148 N W 166, 181 Mich 693
29 C J p 894 note 83.

63. Tex—Miller v Gray, 68 S W 517, 29 Tex Civ App 183

64. Ga—Martin v. Davis, 30 S E 753, 104 Ga 633.

65. Mich—Dickey v Waldo, 56 N W 608, 97 Mich 255, 23 L R A. 419
29 C J p 899 note 61

66. Minn—Canty v Latterner, 17 N W 385, 31 Minn 239

67. Tex—Whiteselle v Jones, Civ App, 39 S W 405

68. Tex—Slavin v Wheeler, 61 Tex 654

69. Ala—Farley v Whitehead, 63 Ala 295
29 C J p 899 note 65

70. Kan—Fletcher v. Weigel, 102 P 2d 1055, 152 Kan 104

71. U S—In re Boothroyd, D C Mich, 3 F Cas No 1,653
29 C J p 899 note 66

72. Miss—McFarlane v Plant, 188 So 530, 185 Miss 616.

to an alienation of the homestead do not apply to a descent of the land on the husband's death [73] A statute providing that no deed of conveyance of a homestead shall be valid unless both husband and wife execute it does not include a sheriff's deed made pursuant to sale on execution [74]

Chattel mortgages A chattel mortgage on improvements on homestead premises has been held to be invalid where both husband and wife did not join in the mortgage [75] In some jurisdictions a mortgage given on fruit produced by cultivation on the homestead is not an alienation of the homestead real estate requiring the joint consent of husband and wife [76]

Conditional conveyances. It has been held that a husband cannot, without the consent of his wife, make a conditional sale of his equitable interest in land occupied by him as a homestead [77]

Conveyance of part of premises occupied as homestead The restrictive provisions requiring the joinder of the spouses have been held not to apply where the part conveyed is a portion of the homestead tract, but enough remains to satisfy all homestead demands [78] The invalidity of a conveyance by the husband, without the joinder of his wife, of so large a portion of the tract of land occupied by them as a homestead that the value of the part retained is less than the statutory exemption, is not affected by the fact that the husband owns and retains other land worth more than the amount which can be held exempt as a homestead [79] Where a husband and wife are occupying as a homestead more land than the law exempts as such, and the homestead has not been selected and platted as required by law, it has been held that a mortgage executed by the husband alone on any part of the land so occupied is invalid [80]

Conveyance of timber Some decisions hold that a conveyance of timber on homestead property is ineffectual without the consent and joinder of both husband and wife in the conveyance,[81] except, perhaps, to grant a mere license which may be terminated on notice not to cut further timber on the premises [82] Other decisions hold that, although the owner of the homestead is forbidden to convey the homestead without his wife joining in the conveyance, a sale by him of timber thereon will be valid if the use of the lands as a homestead is not interfered with or the value of the homestead impaired by the sale of the timber [83]

Licenses In applying the restrictive provisions under discussion, it has been held that the husband need not join in a wife's grant of a license to use a stairway situated on her land, no easement being created,[84] and that a husband may, without the joinder or assent of the wife, give a valid license to remove minerals where the wife has knowledge thereof and makes no objection [85] On the other hand, a contract granting a license to take oil and gas from a homestead has been held to be void where there was no compliance with a statute requiring joinder of husband and wife [86]

Partition deed Where tenants in common obtained title simultaneously, consent of defendant's wife to partition was unnecessary, as defendant's right of homestead was subject to plaintiff's right of partition [87]

Release of disputed claim Where a wife's claim to property which she and her husband were occupying as a homestead was disputed by others, her release of all claim thereto, although incidentally extinguishing the homestead, is valid without the husband joining therein, as required by statute or a valid conveyance of a homestead [88]

Replacing lost deeds Statutory requirements as to joinder of husband and wife in the same deed in making a conveyance of the homestead do not render invalid a transaction by which the husband's grantor replaces a lost deed to the husband by a deed to the wife in which the husband acquiesces [89]

73. Ill—Turner v Bennett, 70 Ill 263

74. Nev—McGill v Lewis, 118 P 2d 702, denying rehearing 116 P 2d 581

75. Mont—Watterson v Bonner Co., 48 P 1108, 19 Mont 551, 61 Am S R 527

76. Fla—Gentile Bros v Bryan, 113 So 630, 101 Fla 233

77. Kan—Moore v Reaves, 15 Kan 150

78. Vt—Thorp v Thorp, 39 A 245, 70 Vt 46
29 C J p 899 note 69

79. Tenn—Cottrell v Rogers, 42 S W 445, 99 Tenn. 488.

80. Iowa—Goodrich v Brown, 18 N W 893, 63 Iowa 217, distinguishing Helfenstein v Cave, 3 Iowa 287, 6 Iowa 374

81 Ark Edwards v Jones, 123 S W 2d 286, 197 Ark 229
Miss—Robert G Bruce Co v Spears, 181 So 333, 181 Miss 786
29 C J p 891 note 29

82. Miss—Blair v Russell, 81 So 785 120 Miss 108

83. Iowa—Harkness v Burton, 39 Iowa 101
Tex—Downey v Dowell, Civ App, 207 S W 585
29 C J p 891 note 31

84. Iowa—Stokes v Maxson, 84 N W 949, 113 Iowa 122, 86 Am S R 367

85. Iowa—Harkness v Burton, 39 Iowa 101

86 Okl—Billy v Le Flore County Gas & Electric Co, 120 P 2d 774, 190 Okl 88

87. Tex—Reed v Howard, 9 S W. 109 71 Tex 204
29 C J p 899 note 72

88. Iowa—Lillie v Shriver, 179 N W 632, 190 Iowa 861
29 C J p 899 note 73

89. Iowa—Hays v Dean, 164 N.W. 770, 182 Iowa 619
29 C J. p 899 note 74.

Reservation of life interest to wife. These restrictive provisions apply notwithstanding a reservation in the conveyance of a life interest in the property for the wife's benefit.[90]

(2) Contract to Convey, Mortgage, or Exchange

Under the various constitutional and statutory restrictions it is generally held that a contract to convey, mortgage, or exchange homestead property executed by one spouse, and in which the other spouse does not join, is invalid

In applying the restrictive provisions under discussion, while there is some authority to the contrary,[91] in most jurisdictions husband and wife must join in the execution of an agreement to convey the homestead,[92] to mortgage it,[93] or to exchange it.[94] The rule has been applied to verbal contracts to convey the homestead,[95] even though the wife consents to,[96] or subsequently ratifies, the contract,[97] and the husband alone afterward executes a deed in accordance with it.[98]

A conveyance which is invalid for noncompliance with the requirements as to consent and joinder of husband and wife is not enforceable as an agreement to convey.[99]

Waiver of rights by wife. While a contract for the sale of a homestead, in which the wife did not join, is void, her joinder in the deed, which was intended to be delivered, and which was deposited in escrow, waives her homestead rights on its subsequent delivery.[1]

(3) Dedication to Public Use or Grant of Easement

In some jurisdictions a husband may grant an easement over homestead property owned by him, without the joinder of his wife, where the easement granted does not materially interfere with the use of the property as a homestead

In some jurisdictions it is held, under the particular constitutions and statutes, that no right of way over homestead property can be granted except by the joint deed of husband and wife.[2] On the other hand, in other jurisdictions in applying the particular restrictions applicable it has been held that a dedication of the homestead property, in which the wife does not join, for a purpose which practically excludes all use of the premises as a homestead, is void.[3] Likewise the grant of a perpetual easement which materially impairs the use and value of the homestead is invalid without the signature of the wife.[4] The husband, however, may, without the concurrence of his wife, grant a right of way over the homestead, provided it does not materially interfere with the use of the premises as a home,[5] and this rule has been applied in respect of private ways,[6] railroad rights of way,[7] and roads[8] and streets.[9]

(4) Lease

In some jurisdictions a husband cannot lease homestead property without his wife's joinder. In other jurisdictions the husband cannot lease homestead property without the wife's consent if it will interfere with its use as a residence

90. Mich.—Gadsby v. Monroe, 73 N.W. 367, 115 Mich. 282.
Wis.—Ferguson v. Mason, 19 N.W. 420, 60 Wis. 377.

91 Ky.—Hanna v. Gay, 78 S.W. 915, 25 Ky.L. 1794.
29 C.J. p. 889 note 2.

92 Ark.—Watson v. Poindexter, 5 S.W.2d 299, 176 Ark. 1065.
Mo.—Gum v. Wolfinbarger, 93 S.W.2d 667, 338 Mo. 968.—Haines v. Carroll, 38 S.W.2d 1047, 327 Mo. 1026.
29 C.J. p. 889 note 3.

If right of repurchase rested only on an option executed by the husband alone the day after receiving the deed it would without doubt be unenforceable.—Papenthien v. Coerper, 198 N.W. 391, 184 Wis. 156.

In Texas

(1) A contract by the husband to convey the homestead is not unlawful.—Gibson & Johnson v. Ward, Civ.App., 35 S.W.2d 824, error dismissed, followed in Gibson v. Canon, 35 S.W.2d 828 and Gibson & Johnson v. Axe, 35 S.W.2d 828.

(2) Other particulars of Texas rule see 29 C.J. p. 889 note 3 [e].

93. Iowa.—Clay v. Richardson, 13 N.W. 644, 59 Iowa 483.

94 Mich.—Bovine v. Selden, 119 N.W. 1090, 155 Mich. 556, 130 Am.S.R. 579.
29 C.J. p. 890 note 5.

95. Iowa.—Stickley v. Widle, 98 N.W. 135, 122 Iowa 400.
Mich.—Fleming v. Fleming, 168 N.W. 157, 202 Mich. 615.

96. Mich.—Fleming v. Fleming, supra.

97. Iowa.—Stickley v. Widle, 98 N.W. 135, 122 Iowa 400.

98. Mich.—Fleming v. Fleming, 168 N.W. 157, 202 Mich. 615.
29 C.J. p. 890 note 9.

99. Ala.—Henderson v. Kirkland, 28 So. 674, 127 Ala. 185.—Jenkins v. Harrison, 66 Ala. 345.

1. Minn.—Lussnig v. Investors' Security Assoc., 186 N.W. 574, 150 Minn. 491.

2. Ala.—Alabama Power Co. v. Cornelius, 100 So. 207, 211 Ala. 245.
29 C.J. p. 889 note 97.

3. Cal.—San Francisco v. Grote, 52 P. 127, 120 Cal. 59, 65 Am.S.R. 155, 41 L.R.A. 335.
Mich.—Jasper Tp. v. Martin, 126 N.W. 437, 161 Mich. 336, 137 Am.S.R. 508.

4 N.D.—Conlon v. City of Dickinson, 5 N.W.2d 411, 142 A.L.R. 525.

Right to take water

A husband alone cannot contract with a railway company empowering it to use water from a spring located on his homestead, and to enter on the homestead to erect necessary pumping works.—Houston & T.C.R. Co. v. Cluck, 72 S.W. 83, 31 Tex.Civ.App. 211.

5 Tex.—Wilson v. Guadalupe County, Civ.App., 58 S.W.2d 1067, error refused.—Gates v. Pitts, Civ.App., 2 S.W.2d 307.—Denton County v. Sauls, Civ.App., 265 S.W. 1091.

6. Iowa.—Maxwell v. McCall, 124 N.W. 760, 145 Iowa 687.

7. Iowa.—Ottumwa, C.F. & St.P.R. Co. v. McWilliams, 32 N.W. 315, 71 Iowa 164.
29 C.J. p. 889 note 95.

8. Tex.—Wilson v. Guadalupe County, Civ.App., 58 S.W.2d 1067, error refused.

9. Tex.—Gates v. Pitts, Civ.App., 2 S.W.2d 307.
29 C.J. p. 889 note 96.

Under some constitutions and statutes it has been held, without qualification, that a lease of homestead premises, in which the wife did not join, is absolutely void[10] The husband may, of course, lease premises in which no homestead has been selected, without his wife's joining in the lease.[11]

In some jurisdictions the husband cannot lease and transfer possession of the homestead without the wife's consent if its use and enjoyment as a place of residence will be thereby interfered with,[12] and, on the other hand, in a number of decisions it is held that, if a lease will not interfere with the use or enjoyment of the premises as a homestead, the wife's consent is not necessary to the validity of the lease[13]

Lease of homestead and personal property is good as to the latter, although executed by the husband alone.[14]

(5) Relinquishment of Equity of Redemption and Conveyance of Reversionary Interest

Under some statutes a husband cannot relinquish an equity of redemption to the prejudice of his wife's homestead rights without her consent It has been held that it is not necessary for the wife to join in a conveyance of the reversionary interest after the termination of the homestead.

Under some homestead laws the relinquishment by a husband, without his wife's knowledge or consent, of a right to redeem from a mortgage will not bar her right of homestead.[15] A conveyance of such future interest in homestead premises as may arise after the homestead has terminated, where such conveyance is permissible, is not within the requirement of the statute that the wife shall join in a deed of the land.[16] A conveyance by the husband alone, reserving the use of the property conveyed to himself and wife during their lives, is invalid if it gives the grantee any present rights in the property which amount to an encroachment on the wife's homestead privilege,[17] and the same is true where the husband reserves the right of possession, and the rents and profits during his life, but does not reserve the wife's interest in the homestead[18]

d. Conveyances by Unmarried Persons or after Separation or Abandonment

A requirement of the homestead laws that spouses join in the execution of conveyances or encumbrances of homestead property is inapplicable to conveyances or encumbrances by an unmarried person, but such restriction usually is applicable to a conveyance or encumbrance where the spouses have separated and are living apart.

Constitutional and statutory provisions requiring

10. Ark —Mid-Continent Petroleum Corporation v Smith, 56 S W 2d 420, 186 Ark 838
N D —Jessen v Pingel, 257 N W 2, 65 N D 209
Wis —Hovie v Pleshek, 203 N W 910, 187 Wis 55
29 C J p 890 note 15

In Texas

(1) A lease by the husband of an unabandoned homestead for a period of longer than one year is void, unless the wife joins in such lease in the manner provided by law —Leigh v Wampler Civ App, 83 S W 2d 1012 —Simms Oil Co v Rutledge, Civ App, 53 S W 2d 673, modified on other grounds 86 S W 2d 209, 126 Tex 37

(2) The wife cannot be deprived of her homestead rights by husband's acceptance of lease from party having no title to the land —Simms Oil Co v Rutledge, supra

(3) Minerals in place in Texas are a part of the lands they underlie, and it is well settled that, as such, when part of the homestead tract, they cannot be conveyed away or leased by the husband's deed alone
U S —Evans v Mills, C C A Tex, 67 F 2d 840
Tex —Grissom v Anderson, Civ App, 48 S W 2d 809, reversed on other grounds 79 S W 2d 619, 125 Tex 26

(4) For purpose of divesting a husband and wife of any interest in premises, which were at the time their homestead, a lease signed by him, but not by her, in effect recognizing a third person as landlord, and making them his tenants, is void —Gutierrez v Cuellar, Civ App, 236 S W 497—29 C J p 888 note 69

11. N D —Wegner v Lubenow, 95 N W 442, 12 N D 95

12. Ga —Pritchett v Davis, 28 S E 666 101 Ga 236, 65 Am S R 298
29 C J p 890 note 17

Oil and gas lease

(1) An oil and gas lease containing the usual provisions of such a lease, covering a homestead, is such a grant of the use and occupancy of, and interest in, the homestead as requires the joint consent of both the husband and wife
U S —Sperry Oil & Gas Co v Chisholm, Okl, 44 S Ct 372, 264 U S 488, 68 L Ed 803, affirming in part and reversing in part, C C A, 282 F 93, which affirms, D C, Chisholm v Creek & Indiana Development Co, 273 F 589—Evans v Mills, C. C A Tex, 67 F 2d 840
Okl —Farmers' Union Co-op Royalty Co v. Adams, 77 P 2d 68, 182 Okl 245
29 C J p 890 note 17 [a]

(2) Joint consent of the husband and wife is necessary to give validity to a lease of the homestead for a period of twenty-one years with the privilege of prospecting for gas coal, oil, and other minerals upon any or all portions of the homestead, at the pleasure of the lessee, and the right to erect derricks, engine houses, and buildings for storage purposes, if needed —Wea Gas, Coal & Oil Co v Franklin Land Co, 38 P 790 51 Kan 533, 45 Am S R 297—Franklin Land Co v Wea Gas, Coal & Oil Co, 23 P 630 43 Kan 518

Right of occupancy

A lease on a homestead, by the terms of which the lessee would occupy it to the exclusion of the family of the owner, executed by the husband alone and not consented to by his wife, is invalid —Bennett v Glazier, 66 P 2d 370, 145 Kan 571

13. Minn —Bacon v Mirau, 181 N W 579, 148 Minn 268
29 C J p 891 note 18

14. Vt —Welch v Miller, 39 A. 749, 70 Vt 108

15. Iowa —Haggerty v Brower, 75 N W 321, 105 Iowa 395

16. Iowa —Reilly v Reilly, 110 N W 415, 135 Iowa 440
29 C J p 893 note 73

17. Wis —Town v Gensch, 76 N W. 1096, 101 Wis 445, rehearing denied 77 N W 893, 101 Wis 445

18. Ark.—Park v. Park, 72 S W. 993, 71 Ark. 283.

the joinder of spouses in transfers of homestead property do not restrain the powers of alienation possessed by unmarried persons,[19] whether such person be the surviving husband or wife,[20] or the head of a family who is unmarried.[21] A deed or mortgage of homestead property signed and acknowledged at a time when the grantor was a married person is not invalid for failure of the other spouse to join therein where it is not delivered until after the death of such other spouse.[22] Where a single man contracted to sell and convey his homestead and thereafter married, the homestead rights of the wife in the land were subordinate to the contract, irrespective of whether or not she had notice of the contract before the marriage.[23] Where a mortgage is given by an unmarried debtor on land subsequently claimed by him as a homestead after his marriage, the mortgage may be enforced against the homestead,[24] especially where the mortgage has been transferred to a third person.[25]

As a general rule under the various homestead laws neither spouse can mortgage or convey the home tract without the other's consent, even though they are not living together at the time.[26] The rule has been held to apply in case of a conveyance by the husband, although the wife at the time is living in another state,[27] or although in fact she had never lived in the state where the homestead property is situated.[28] The wife's absence from the premises does not authorize the husband to convey or encumber the homestead without her joinder as required by statute,[29] particularly where such absence does not amount to abandonment.[30] On the other hand, under some constitutions and statutes, after separation or abandonment one spouse may encumber or convey homestead property belonging to him or her without the consent or joinder of the other spouse.[31] Where the statute requires the joinder of the wife where the husband is living with her, and the spouses have separated and are living apart, the husband's conveyance of homestead property belonging to him is valid without the wife's signature.[32] Under some statutes a husband may convey the homestead without the joinder of his wife who has never been a resident of the state.[33] A statute requiring the conveyance of a married person's homestead to be executed and acknowledged by both husband and wife has been held not to be intended to apply to an instance where the wife was always a nonresident alien without any

19. Iowa—Scott v. Brenton, 150 N W 56, 168 Iowa 201
29 C J p 897 note 39

20. Ark—Veith v Jackson, 1 S W 2d 66, 175 Ark 874
29 C J p 897 note 40
Right of surviving wife or husband to transfer or encumber homestead acquired by survival see infra §§ 285, 286

21. Fla—Johns v Bowden, 66 So 155, 68 Fla 32
29 C J p 898 note 41

22. Ark—Veith v Jackson, 1 S W 2d 66, 175 Ark 874
Miss—Ladner v Moran, 1 So 2d 781, 190 Miss 826

23. Miss—Minor v Interstate Gravel Co, 94 So 3, 130 Miss 553
29 C J p 898 note 42

24. Minn—Spalti v Blumer, 65 N W 454, 63 Minn 269

Renewal notes

Wife becoming such after her husband, a widower, had conveyed property to trustee to secure indebtedness could not, after property had been sold under trust deed, establish homestead rights in property on theory that such rights accrued by virtue of marriage despite prior alienation, notwithstanding husband after marriage executed renewal notes—Maples v Staub, 87 S W 2d 1010, 169 Tenn 348

25. Minn—Spalti v Blumer, 65 N. W. 454, 63 Minn. 269.

26. Mich—Rogers v Day 74 N W 190, 115 Mich 664 69 Am S R 593
29 C J p 892 note 54

Declarations immaterial

Where a husband conveyed real estate occupied by himself and wife as their homestead, and his wife subsequently abandoned him but was never divorced, and the husband thereafter executed a deed for such real estate, not being joined by his wife, reciting therein that he was a single man, and declaring to the purchaser that he lived in another state, and that the lands conveyed were unoccupied, such subsequent recitation and declaration were immaterial, since the homestead character had previously been impressed on such real estate—Thomason v Martin, 222 P 511, 97 Okl 17

Living with another

A deed of homestead by a husband to a woman with whom he lived as his wife without a divorce, not joined by his lawful wife, was void—St Denis v Mullen, 196 N W 258, 157 Minn 266

27. Ark—Mason v Dierks Lumber & Coal Co, 125 S W 656, 94 Ark 107, 26 L R A,N S, 574
Neb—Whitlock v Gosson, 53 N W. 980, 35 Neb 829.

28. Kan—Chambers v Cox, 23 Kan 393
Minn—Rux v Adams, 172 N.W. 912, 143 Minn 35

29. Ala—Carey v Hart, 94 So 298, 208 Ala 316
29 C J p 888 note 64

30. Fla—O'Neal v Miller, 196 So. 178, 143 Fla 171, 129 A L R 295
29 C J p 888 note 65

31. Okl—Kerr v Garrison, 223 P. 609, 101 Okl 101
Tex—Service Parts Co v Bizzell, Civ App, 120 S W 2d 919—Jones v. El Paso Bitulithic Co, Civ App, 246 S W 749

Nonresident wife

Under a statute providing that where the title to the homestead is in the husband, and the wife voluntarily abandons him for a period of one year, or from any cause takes up her residence out of the state, he may convey or mortgage the homestead without being joined therein by her, a deed executed by a married man whose wife was never a resident of the state and never lived on the land in question, but on which he lived until its sale, conveyed title to grantee without the signature of the wife—Armstrong v Independent Oil & Gas Co, 219 P 353, 95 Okl 231.

32. Miss—Sylvester v Stevens, 191 So 483, 186 Miss 503—Lewis v Ladner, 172 So 312, 177 Miss 473, overruling suggestion of error 168 So 281, 177 Miss 473

33. Mich—Leonetti v Tolton, 250 N W 512, 264 Mich 618, 92 A.L.R. 1050
29 C J p 888 note 66.

intention of ever making the homestead her dwelling place and who was never in this country.[34] Where the statute merely exempts the homestead from sale under coercive process and leaves the husband's right to alienate the exemption unchanged, it has been held that a husband, after his abandonment of the wife, has the legal right to sell and alienate homestead property owned by him without his wife joining in the conveyance.[35]

The rule requiring the joinder of spouses in conveyances or encumbrances of homestead property although they are separated has been held to be applicable where the misconduct of the spouse executing the conveyance or encumbrance is the cause of the separation.[36] Even where the homestead statute requires the wife's signature only when she is living with the husband, his sole deed has been held to be invalid if he has driven her from home without cause, and will not permit her to return,[37] and the husband will be considered as living with her, unless he has left her with a settled determination never to return.[38] Further, it has been held that, unless the homestead provision makes an exception to the rule,[39] a conveyance by one spouse alone, who has been wrongfully abandoned by the other, is invalid.[40]

e. Conveyances and Mortgages between Husband and Wife

In many jurisdictions a conveyance or encumbrance by the husband to the wife, or to the wife and children, is valid without the joinder of the wife

In many jurisdictions where the homestead laws require conveyances or mortgages of homestead property to be executed by both husband and wife, the husband may make a valid conveyance of,[41] or, in some jurisdictions, a valid mortgage on,[42] the homestead property to, or in favor of, his wife, without her joining in the conveyance or mortgage. This rule has been extended to a conveyance by the husband to a trustee for the wife and children,[43] and to conveyances made by a husband to third persons who immediately reconveyed to his wife,[44] or to himself and his wife.[45] It has been held also that the husband may make a conveyance of the homestead to his wife and children without the wife's joinder,[46] although there is also contrary authority.[47] A conveyance by a husband to his wife after divorce is valid without her signature.[48] Notwithstanding a conveyance to the wife, the husband's right to occupy the premises as a home is not defeated thereby and, as the law requires his consent to his wife's alienation of the homestead,

34. Neb.—Engen v. Union State Bank of Harvard, 236 N.W. 741, 121 Neb. 257, certiorari denied 52 S.Ct. 33, 284 U.S. 655, 76 L.Ed. 555.

35. Ky.—Brannon v. Bohannon, 96 S.W.2d 1036, 265 Ky. 394.

36. Ala.—Winkles v. Powell, 55 So. 536, 173 Ala. 46.
29 C.J. p. 892 note 57.

37. Miss.—Scott v. Scott, 19 So. 589, 73 Miss. 575.
29 C.J. p. 892 note 59.

Where no violence was offered her, and where it is clear that the wife agreed to a separation agreement, she is not living with her husband within the meaning of the statute, although the husband without cause told the wife to leave and that he would no longer live with her.—Board of Mayor and Aldermen of Town of Booneville v. Clayton, 124 So. 490, 155 Miss. 428.

38. Miss.—Walton v. Walton, 25 So. 166, 76 Miss. 662, 71 Am.S.R. 540.
29 C.J. p. 893 note 60.

39. Tex.—Miller v. Stine, Civ.App., 99 S.W.2d 397.
29 C.J. p. 893 note 61.

40. Minn.—Murphy v. Renner, 109 N.W. 593, 99 Minn. 318, 116 Am.S.R. 418, 8 L.R.A.,N.S., 565.
29 C.J. p. 893 note 62.

41. Tex.—Martin v. Barnum, Civ.App., 286 S.W. 550, 551, citing **Corpus Juris.**
Va.—Russ v. King, 127 S.E. 100, 101, 141 Va. 355 citing **Corpus Juris**
29 C.J. p. 896 note 20.
Conveyance between husband and wife as constituting abandonment. See infra § 173.

Conveyances by wife
(1) Wife may convey interest in homestead to husband and subject property conveyed to payment of encumbrance.—Truro Sav. Bank of Truro v. Foster, 220 N.W. 20, 206 Iowa 132.

(2) Wife, at time of divorce was held to have an estate as homestead in separate property of husband that could be alienated or conveyed by her to her husband.—First Nat. Bank v. Jeffress, Tex.Civ.App., 71 S.W.2d 298, error refused.

The policy of statutes restraining alienation of homestead without wife's joining in deed is to protect wife, and to enable her to protect the family, and not to interpose obstacles in the way of conveyance of homestead to wife or to wife and children with wife's consent and approval, whatever may be the form of such conveyance.—Hall v. Hall, 145 S.W.2d 752, 346 Mo. 1217.

42. Okl.—Brooks v. Butler, 87 P.2d 1092, 1096, 184 Okl. 414, citing **Corpus Juris.**
29 C.J. p. 896 note 21.

43. Wis.—Riehl v. Bingenheimer, 28 Wis. 84.

44. Mich.—Stevens v. Castel, 29 N.W. 828, 63 Mich. 111.
Neb.—McMahon v. Spellman, 30 N.W. 10, 15 Neb. 653.
29 C.J. p. 896 note 23.

45. Mich.—Weaver v. Michello, 160 N.W. 612, 193 Mich. 572.

46. Tex.—Martin v. Barnum, Civ.App., 286 S.W. 550.
29 C.J. p. 897 note 25.

Reason for rule
"The parties to the instrument were the sole constituents of the family, and we cannot see how their enjoyment of the homestead was in any way disturbed by the conveyance. It was in no sense an alienation of the homestead because all members of the family, grantor as well as grantees, were left with its full possession and enjoyment. Their situation in that regard remained the same."—White v. White, Tex., 172 S.W.2d 293, 296, reversing Civ.App., 168 S.W.2d 321.

47. Miss.—Chatman v. Poindexter, 58 So. 361, 101 Miss. 496.
29 C.J. p. 897 note 26.

Stepchild
Deed signed by husband only, conveying part of homestead to wife and stepdaughter, was ineffective to convey interest to stepdaughter, although valid as between husband and wife.—Smith v. Stanley, 132 So. 452, 159 Miss. 720.

48. Cal.—Grupe v. Byers, 14 P. 863, 73 Cal. 271.

his right cannot be impaired so long as the place is used as a homestead.[49] A conveyance to the wife for life with remainder to a third person, in which conveyance the wife did not join, has been held to be invalid[50]

Contrary view In some jurisdictions, however, it is held that the homestead laws requiring conveyances of the homestead to be executed by both husband and wife apply as well to conveyances by husband to wife as to conveyances to strangers[51]

Mortgaging community homestead A homestead declared on community property cannot be mortgaged by the wife to her husband to secure money lent her by him[52]

f. Conveyances Where Husband or Wife Is Insane

In some jurisdictions the restrictions requiring joinder of spouses apply although one of the spouses is insane; but this rule is not followed in all jurisdictions, and under some statutes such joinder is unnecessary.

A constitutional or statutory provision requiring joinder or consent of husband and wife to a conveyance or encumbrance of the homestead applies with full force and effect in case one of the two spouses is insane[53] If the homestead laws make no exception in case of insanity, it has been held that the courts have no power to do so[54] In some jurisdictions and under some statutes, however, the husband or wife of an insane or incompetent spouse may convey homestead property[55] A conveyance

49. Miss.—Williams v. Green, 91 So. 39, 128 Miss. 416

50 Iowa.—Thayer v. Sherman, 255 N.W. 506, 218 Iowa 451

51. Vt.—Ellingwood v. Ellingwood, 99 A. 781, 91 Vt. 134
29 C.J. p. 897 note 29

In Florida

(1) Under Const. art. 10 §§ 1, 2, a homestead is not alienable without the joint consent of husband and wife, and the homestead rights inure to the widow and heirs of the party entitled to such exemption. Consequently, where there is a child or children of the husband, who is head of the family, homestead real estate may not be conveyed by deed made by the husband to the wife. Jahn v. Purvis, 199 So. 310, 145 Fla. 354.—Norton v. Bava, 102 So. 361, 88 Fla. 1.—29 C.J. p. 897 note 29 [a] (1)-(3)

(2) The reason for this rule is that homestead exemptions inure to the heirs, infant or adult, of the owner of the homestead as well as to the widow.—Norton v. Bava, supra

(3) If there are no children, a conveyance of the homestead to the wife by the husband, in which conveyance she does not join, will operate as a relinquishment of the rights of the husband in the homestead.—Rawlins v. Dade Lumber Co., 86 So. 334, 80 Fla. 398

(4) Where the homestead has been abandoned, the disability imposed by the constitution of the alienation of the property is removed, and the husband may validly convey to the wife.—Miller v. West Palm Beach Atlantic Nat. Bank, 194 So. 230, 142 Fla. 22

(5) Other particulars of Florida rule relating to restrictions on alienation where there are children living see infra § 135

In Illinois

(1) Prior to the amendment of 1919, L. 1919 p. 590, which is not retroactive in operation, a deed of a homestead by a householder to his or her wife or husband not subscribed and acknowledged by the wife or husband did not convey the homestead estate where possession was not abandoned or given pursuant to the conveyance.—Schroeder v. Ginn, 141 N.E. 716, 310 Ill. 271.—29 C.J. p. 897 note 31

(2) Other particulars of former Illinois rule see 29 C.J. p. 897 notes 30–34

52 Cal.—Freimuth v. Steigleman, 62 P. 615, 130 Cal. 392, 80 Am.S.R. 138
29 C.J. p. 897 note 35

53 Ala.—Lazenby v. Lazenby, 157 So. 670, 229 Ala. 426.—Owens v. Harris, 133 So. 6, 222 Ala. 461
Fla.—Stokes v. Whidden, 122 So. 566, 97 Fla. 1057
Kan.—Appeal of Barnell, 44 P.2d 211, 141 Kan. 842
Tenn.—Shaw v. Woodruff, 3 S.W.2d 167, 156 Tenn. 529
29 C.J. p. 893 note 66

Abandonment statute inapplicable

Where husband had been adjudged insane and was under guardianship the statute authorizing a husband or wife having title to a homestead, to convey, mortgage or make any contract relating to the homestead after an abandonment of a year by the other was not applicable.—Marathon Oil Co. v. Western Oil & Drilling Co., 89 P.2d 939, 185 Okl. 53

Mortgage by guardian

Where wife of an insane husband did not join with the guardian, who had been duly authorized by the court, in the execution of a mortgage on the homestead property, the mortgage was not enforceable as a lien against the homestead.—Evans v. First Nat. Bank of Fairbury, 297 N.W. 154, 138 Neb. 727

54. Ala.—Thompson v. New England Mortg. Security Co., 18 So. 315, 110 Ala. 400, 55 Am.S.R. 29

Refinancing necessary

Where wife was insane, that husband would be unable to refinance mortgage on his lands unless homestead was included in refinance mortgage and that wife's homestead right would be lost if refinancing were not made, did not authorize encumbrancing homestead without assent of wife.—Lazenby v. Lazenby, 157 So. 670, 229 Ala. 426

55 Mortgage

Power to convey includes the power to mortgage.—Hayes-Lucas Lumber Co. v. Gieseke, 215 N.W. 857, 172 Minn. 504

In Texas

(1) Homestead which is community property or separate estate of husband may be conveyed by husband whose wife is insane.—Reynolds Mortg. Co. v. Gambill, 280 S.W. 531, 115 Tex. 273, answering certified question, Civ.App., 276 S.W. 480.—Gersdorff v. Torres, Com.App., 293 S.W. 560, affirming in part and reversing in part Torres v. Gersdorff, Civ.App., 287 S.W. 668

(2) Where the husband has been regularly appointed and duly qualified as administrator of the community estate of himself and his insane wife he may make a good conveyance of homestead property.—Green v. Windham, 278 S.W. 1101, 115 Tex. 162, affirming Civ.App., 230 S.W. 726

(3) The statutes relating to conveyance by wife of insane husband, with court's permission, of separate property or the homestead were merely cumulative of wife's right to convey theretofore recognized were not restrictive thereof, and did not invalidate conveyances made without compliance with statute by wife joined by insane husband.—Ross v. Tide Water Oil Co., 145 S.W.2d 1089, 136 Tex. 66, affirming Tide Water Oil Co. v. Ross, Civ.App., 123 S.W.2d 479

or encumbrance made without attempting to comply with statutes governing the transfer of the homestead when one spouse is insane is void[56] Under some statutes, after obtaining the approval of the guardian of the incompetent spouse, the husband or wife of an insane or incompetent ward is authorized to convey any real estate, the title to which is or may be in such husband or wife, as fully as though he or she were unmarried[57] Where the husband has legal authority to make conveyance of the homestead of himself and insane wife, where the homestead is either community property or the separate estate of the husband, one who claims title to homestead property under a deed executed by the husband has the burden of proving the fact of the wife's insanity at the time the deed was executed[58]

The guardian of an insane wife is not authorized to sell the homestead without the husband joining in the conveyance and the latter is not estopped to claim a homestead by such sale made without notice to him[59] Likewise the fact that the wife was the guardian of her insane husband has been held not to authorize her to convey homestead property[60]

g. Transfers and Encumbrances Prior to Acquisition and Establishment or after Termination

Restrictions of the homestead laws requiring joinder of spouses are inapplicable to transfers and encumbrances made prior to the acquisition and establishment, or after the termination, of the homestead

It is not necessary for a husband and wife to join in a conveyance or encumbrance of the homestead to satisfy or secure a debt accruing before the constitutional provision giving homestead rights went into effect,[61] nor, although there is some contrary authority,[62] does the rule apply to conveyances of, or encumbrances on, the premises by the husband before the homestead right has been perfected in accordance with existing homestead law[63] If no homestead rights attach until the land is paid for, a husband's release or encumbrance of the property prior to payment is valid without the wife's signature[64]

The fact that the encumbrance was not recorded until after the filing of the homestead does not render it unenforceable because of the fact that the wife did not join in its execution,[65] and this is so although a statute gives preference to debts secured "by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record"[66]

The fact that a man has conferred on an agent authority to sell his homestead before his marriage will not authorize him to sell it after his marriage, either in person or by his agent, without his wife's joining in the conveyance, even though the authority to the agent to sell has never been revoked[67] The wife's right in the homestead cannot be subordinated to a mortgage executed by her husband alone after the marriage, even though he applied

56. N D—Grotberg v First Nat Bank 210 N W 21 51 N D 518

57 Mortgage

The word "conveyance" as used in such a statute includes mortgage—Hayes-Lucas Lumber Co v Gieseke, 215 N W 857 172 Minn 501

58. Tex—Gersdorff v Torres, Com App 293 S W 560, affirming in part and reversing in part Torres v Gersdorff Civ App, 287 S W 668

59. Iowa—Singleton v National Land Co, 167 N W 97, 183 Iowa 1108

60. Fla—Stokes v Whidden, 122 So 566, 97 Fla 1057

61. Ala—Slaughter v McBride, 69 Ala 510

62. Tenn—Mitchell v Denny, 164 S W 1140 129 Tenn 366, 371 29 C J p 895 note 9

63. Cal—Riverside First Nat Bank v Merrill, 139 P 1066 167 Cal 392 29 C J p 895 note 10—p 896 note 14

Before acquisition of title

That husband had no title to land when he gave plaintiff a deed of trust purporting to cover the land and that husband and his family at a subsequent date had moved upon land and were making it their home when husband acquired title did not warrant treating deed of trust as becoming operative as of date of acquirement of title by husband and deed of trust was not void on ground that wife did not join in its execution—Meyers v American Oil Co, 5 So 2d 218, 192 Miss 180

Written option to repurchase, executed by defendant husband the day after deed was executed to him and his wife, under plaintiff's oral contract to convey, with option to repurchase being manifestly executed to reduce a part of the oral contract to writing should be construed as contemporaneous with the deed, and the two should be read together, so that the agreement, being thus made while the property was plaintiff's, and before it became defendants' homestead and the signature of the husband, who was authorized by the wife to act for her in the purchase with option to repurchase, bound both—Papenthien v Coerper, 198 N W 391, 184 Wis 156

Where, however, the statute provides that no deed of conveyance or mortgage of a homestead regardless of whether or not a declaration thereof has been filed shall be valid for any purpose unless both husband and wife execute and acknowledge it the homestead sought to be protected is the homestead de facto created by its being the abiding place of the husband and wife and although the homestead has not previously been registered as required by law, the husband's sole conveyance of it does not pass title Myers v Matley C C A Nev, 130 F 2d 775 affirming D C, In re Matley 47 F Supp 558, certiorari granted Myers v Matley 63 S Ct 435 317 U S 621, 87 L Ed ——, affirmed 63 S Ct 780

64. Tex De Bruhl v Maas 54 Tex 461

65. Cal—Riverside First Nat Bank v Merrill 139 P 1066, 167 Cal 392—Duncan v Curry 56 P 898, 124 Cal 106

66 Cal—Duncan v Curry supra 29 C J p 896 note 17

67. Tex—Henderson v. Ford, 46 Tex 627.

for the loan before his marriage and at the time of the execution of the mortgage the mortgagee did not know of the marriage.[68] Where an option to purchase was given by a single man, who afterward married and occupied the land as a homestead, a conveyance to the optionee in accordance with the option has been held to be valid, although the wife did not join therein.[69]

Conveyance after termination After a termination of homestead rights by a general waiver or abandonment, the homestead premises may then be conveyed or encumbered without the wife's joinder or consent.[70] After abandonment the property is subject to conveyance the same as other property belonging to the husband,[71] and he may convey an abandoned homestead without joinder of the wife whether it is his own property or the community property of the husband and wife.[72] The abandonment having been established, the power of the husband exists, regardless of whether at the time of the conveyance an intent on the part of the husband to acquire another homestead exists or whether another homestead in fact is ever acquired.[73]

h. Transfer or Encumbrance to Secure Debts Enforceable against Homestead

Ordinarily it is not necessary for a spouse to join in a transfer or encumbrance to secure a debt enforceable against the homestead

It is generally held that a debt enforceable against the homestead property may be satisfied or secured by a deed or mortgage executed by the husband alone,[74] as long as the indebtedness against the homestead is not increased.[75] If, however, the husband seeks to bind the homestead by a new contract or encumbrance relating to but not constituting or securing a former enforceable debt, the wife is a necessary party to its execution.[76] Accordingly the mere fact that there is an encumbrance against the homestead does not authorize the husband, without the wife's joinder, to convey[77] or mortgage the homestead premises, even though the purchaser assumes the indebtedness, and although no actual fraud against the wife is shown.[78]

Encumbrance for purchase money It is very generally considered that the owner of a homestead may, without the joinder or consent of his or her spouse, encumber the property for the purpose of securing the purchase money due thereon,[79]

68. U S —Tolman v Leathers, C C Iowa 2 F 653 1 McCrary 329
29 C J p 896 note 18

69. Miss —Minor v Interstate Gravel Co, 94 So 3, 130 Miss 553

70. Ala —Shaddix v Bilbro, 127 So 227, 220 Ala 657
Ark - McKenzie v Rumph, 286 S W 1022 171 Ark 791
Tex Anderson v Pioneer Bldg & Loan Ass'n, Civ App, 163 S W 2d 421, error refused -Miller v Southland Life Ins Co, Civ App, 68 S W 2d 558—Simms Oil Co v Rutledge Civ App, 53 S W 2d 673, modified on other grounds 86 S W 2d 209 126 Tex 37—Cannon v Hathaway, Civ App, 12 S W 2d 618—O'Fiel v Janes, Civ App, 269 S W 1071, affirmed Janes v O'Fiel, Com App, 280 S W 163, motion to relax cost dismissed 299 S W 640—Means v Beauchamp, Civ App, 241 S W 307
29 C J p 898 note 46, p 955 notes 31, 32
Operation and effect of waiver or abandonment generally see infra § 187

Showing necessary

When property has once been impressed with the homestead character, it must be made to appear clearly that both the husband and wife have voluntarily intended to relinquish and did abandon the homestead, and that another homestead has been acquired, before either spouse can convey it without being joined in the deed of conveyance by the other, so long as the relationship of husband and wife exist —Wilson v Clark 223 P 668, 97 Okl 299—Fletcher v Popejoy 209 P 746, 87 Okl 185—Long v Talley, 201 P 990, 84 Okl 38

71. Ark -Newman v Jacobson, 158 S W 131, 108 Ark 297
29 C J p 898 note 47

72. Tex —Alvord Nat Bank v Ferguson Civ App, 126 S W 622

73 Tex —Shepherd v Cassidy, 20 Tex 24, 7 Am D 372—Ayres v Shackels, 2 Tex Unrep Cas 274—Gilley v Troop, Civ App, 146 S W 954

74. Ark —Harris v Mosley, 111 S W 2d 563, 195 Ark 62
Tex —Robertson v Lee, Com App, 249 S W 217, affirming, Civ App, 230 S W 730—Travelers Ins Co v Anderson, Civ App, 89 S W 2d 428, error refused—Kenyon v Stoufflet, Civ App, 85 S W 2d 303, error dismissed—Hill v Wright, Civ App, 30 S W 2d 812—McNeal v McCraw, Civ App, 15 S W 2d 139
Wyo —Wright v Walker, 225 P 75, 31 Wyo 233
29 C J p 894 note 89.

Liens

The right of the husband alone to deal with liens on the homestead, which attached to the property prior to the homestead right, as long as he does not act in fraud of the wife's homestead interest, is well established —Mikulenka v Mikulenka, Tex Civ App, 168 S W 2d 517—Dyess v Hansen Tex Civ App, 151 S W 2d 904, error dismissed, judgment correct—Odom v Empire Building & Loan Ass'n, Tex Civ App, 134 S W 2d 1053 error dismissed, judgment correct

75 Ark —Harris v Mosley, 111 S W 2d 563 195 Ark 62

76. Iowa —Burnap v Cook, 16 Iowa 119, 85 Am D 507
29 C J p 894 note 90

77. Tex —Gibbons v Hall, Civ App, 59 S W 811

78. Tex -Church v Hayner, Civ App, 201 S W 711

79 Miss —Stuart v Kennedy & Co, 110 So 817, 145 Miss 728
N D —First Nat Bank v Zook, 196 N W 507 50 N D 423
Tex —Dyess v Hansen, Civ App, 151 S W 2d 904, error dismissed, judgment correct—E Y Chambers & Co v Little, Civ App, 21 S W 2d 17, error refused
29 C J p 894 note 92

Contract to recovery

A contract by purchaser to reconvey land in event of default in payment of purchase money, which was executed and delivered as part of transaction for purchase of land, was not void as a fraud on homestead rights of purchaser or wife, who did not join in contract, since by express statutory provision, purchaser's homestead exemption is subject to purchase-money mortgage and vendor's lien —Coon v Henderson, 199 So 704, 240 Ala. 492.

or even, in some jurisdictions, to alienate it to satisfy the claim for purchase money,[80] provided this is done in good faith,[81] and the rule has been applied to a mortgage on the homestead, payment of which was assumed by the purchaser at the time of acquiring the property,[82] and to a deed of trust given on the release of a mortgage given for purchase money.[83] However, it has been held that, where personal security is taken by the vendor, he waives his lien for purchase money and a mortgage thereafter executed to secure the purchase money must be signed by the wife,[84] that a husband's conveyance of the homestead, his wife not joining, will pass no title as against her homestead rights, where the deed is made under a fraudulent claim that it is necessary for payment of purchase money, the grantee taking with notice of the fraud,[85] and that a husband by signing as surety a note which falsely recites that it is for purchase money of the homestead occupied by the surety and his wife does not render the homestead liable, if the wife was not a party to the contract of suretyship.[86] It has also been held that the fact that the money used in the purchase of property was acquired from a third person does not entitle such person to a lien therefor, and that a trust deed given by the borrower without his spouse's joinder to secure such loan was invalid.[87]

Encumbrance for improvements Although there is some authority to the contrary,[88] it is usually held that a mortgage for the purpose of obtaining funds or materials to make improvements on the homestead is not within the rule requiring the joinder or consent of the wife of the homesteader,[89] unless it is otherwise provided by statute.[90]

Extensions and renewals The wife need not join in an extension or renewal of a lien on the homestead where her joinder was unnecessary in the creation of the original lien,[91] but her joinder is essential to a valid extension or renewal where her joinder was necessary in the creation of the original lien after the homestead rights had vested.[92] The wife's consent is necessary to a renewal for an amount in excess of the original indebtedness.[93]

Mortgage to secure money

There is no homestead exemption against a claim for purchase money due for the homestead property and it is not necessary that a wife shall join with her husband in a mortgage given to secure money with which to pay off the purchase price for the homestead—Ratliff v. Anderson & Ratliff, 242 S.W. 35, 195 Ky. 320.

80. Tex.—Torres v. Black, Civ.App., 121 S.W.2d 443, error dismissed—Davis v. Ciss County, Civ.App., 111 S.W.2d 751—Travelers Ins. Co. v. Anderson, Civ.App., 89 S.W.2d 428, error refused—McNeal v. McCraw, Civ.App., 15 S.W.2d 139.
29 C.J. p. 895 note 93.

Mere existence of vendor's lien does not authorize the husband to alienate homestead property, at least where the note representing the indebtedness is not in default and the transfer is not a settlement of the indebtedness.—Smith v. Prater, Tex.Civ.App., 161 S.W.2d 361.

Mineral rights

Where husband and wife were in default on their contract for purchase of land, the husband alone without joinder of wife had right to protect their homestead by canceling the contract and entering into new contract which reserved most of the mineral rights to the vendors.—McGuire v. Roemer, Tex.Civ.App., 162 S.W.2d 1018, error refused.

Returning unrecorded deed

Where land was conveyed to the husband, who paid a small amount thereon, the wife could not set up homestead rights where the husband returned the deed unrecorded to the grantor without acting in fraud of the rights of the wife who raised no objection until after the land had enhanced materially in speculative value.—Cooper v. Hinman, Tex.Civ.App., 235 S.W. 561.

In Oklahoma the constitution places two limitations on transactions wherein a homestead is involved. First, it shall not be subject to forced sale for the payment of debts. Second, it cannot be sold by the owner, if married, without the consent of his or her spouse. An exception is made as to the first limitation in that the homestead may be subject to forced sale for the payment of purchase money, but there is no exception to the second limitation.—Mathers v. Quinn, 87 P.2d 331, 181 Okl. 361.

81. Tex.—Odom v. Empire Building & Loan Ass'n, Civ.App., 134 S.W.2d 1053, error dismissed, judgment correct.
29 C.J. p. 895 note 94.

82. Kan.—Sheldon v. Prucssner, 35 P. 201, 52 Kan. 579, 22 L.R.A. 709.

83. Ill.—Austin v. Underwood, 37 Ill. 438, 87 Am.D. 254.
29 C.J. p. 895 note 96.

84. Tex.—Cannon v. Bonner, 38 Tex. 487.

85. Tex.—Morris v. Geisecke, 60 Tex. 633.

86. Tex.—Gober v. Smith, Civ.App., 36 S.W. 910.

87. Miss.—Welch v. Thigpen, 159 So. 101, 172 Miss. 5.

88. Minn.—Smith v. Lackor, 23 Minn. 154.

89. Ky.—Thacker v. Booth, 6 S.W. 160, 9 Ky.L. 715.
29 C.J. p. 895 note 4.

Purchase-money mortgage

A debt created for the purpose of erecting a house is in principle a debt created for the purchase of the home, and the wife's failure to join in the mortgage given to secure debt does not invalidate it.—Norvell v. Faulk, 139 S.W.2d 428, 282 Ky. 591.

90. Tex.—Lyon v. Ozee, 17 S.W. 405, 66 Tex. 95.
29 C.J. p. 895 note 5.

91. Tex.—Uvalde Rock Asphalt Co. v. Hightower Com.App., 166 S.W.2d 681, reversing Civ.App., 154 S.W.2d 940—Dyess v. Hansen, Civ.App., 151 S.W.2d 904, error dismissed, judgment correct—Odom v. Empire Building & Loan Ass'n, Civ.App., 134 S.W.2d 1053, error dismissed, judgment correct.

92. Improvements

A husband alone cannot execute a valid renewal of a lien for improvements on the homestead which was created after the complete investiture of the homestead rights.—Uvalde Rock Asphalt Co. v. Hightower, Tex.Com.App., 166 S.W.2d 681, reversing, Civ.App., 151 S.W.2d 940.

93. Ark.—Harris v. Mosley, 111 S.W.2d 563, 195 Ark. 62.

i. Subsequent Agreements Affecting Liability under Transfer or Encumbrance

Ordinarily under the various homestead laws the wife must join in a subsequent agreement materially changing the terms of a conveyance of, or encumbrance on, homestead property in order that it be valid

In applying constitutional and statutory restrictions requiring the joinder of husband and wife in conveyances and encumbrances of homestead property, subsequent agreements, entered into by but one of the spouses, which materially change the terms of a conveyance or encumbrance of homestead property, which had been properly executed by both spouses, are invalid[94] A subsequent agreement, however, which does not enlarge the rights granted,[95] or which relieves the homestead instead of burdening it,[96] or which is for the preservation of the homestead,[97] is not invalid for failure of the wife to join therein

Where the wife has joined her husband in the execution of a mortgage, it is not necessary that she should assent to an assignment thereof[98]

It is not necessary for the wife to join in an extension of a prior valid mortgage previously executed by both spouses[99]

Reviving or restoring liability After a mortgage on the homestead, executed by both husband and wife, has been paid, the husband alone by verbal agreement or otherwise cannot revive the mortgage and attach its security to other debts[1]

Some decisions hold that the husband cannot, without the consent of the wife, extend the duration of a mortgage lien on their homestead beyond its original term,[2] but other decisions have reached an opposite conclusion,[3] even to the extent of upholding the validity of an agreement by the husband alone renewing a cause of action, barred by the statute of limitations, on a mortgage of the homestead executed by the husband and his wife[4]

§ 131. —— Consideration for Consent of Spouse

It is generally held that the consent of the spouse to a transfer or encumbrance of homestead property need not be supported by an independent consideration

Except where the consenting spouse has some estate or property right in the premises,[5] other than

94. A compromise agreement relating to homestead property which materially changes the terms of the original contract has been held to be invalid when executed by the husband alone, notwithstanding the original agreement was properly executed by husband and wife—Dodd v Daniel Tex Civ App, 89 S W 2d 491

Alteration of lease

Where a wife joins with her husband in executing an oil and gas lease on the homestead, the persons for whose benefit the oil and gas lease was taken cannot make a material alteration of the lease without the knowledge and consent of both husband and wife—Francen v Oklahoma Star Oil Co, 191 P 193, 80 Okl 103

Liability under mortgage

(1) The husband alone cannot change the character or the priority of a mortgage lien on the homestead—Jenkins v Simmons 15 P 522, 37 Kan 496—29 C J p 892 note 41

(2) The obligation of such mortgage cannot be enlarged by the mere substitution of a new loan for a larger sum representing a further loan to the husband to which the wife is not a party—Douglas v Ogle, 85 So 243, 80 Fla 42

(3) A separate instrument executed by the mortgagee and husband without the wife's knowledge or consent as part of the mortgage, by which materially new conditions and an increased amount were engrafted into the mortgage is invalid State First Nat Bank v Ashmead, 14 So 886 33 Fla 416

95. Kan—Rix v Brush 210 P 660 112 Kan 110
29 C J p 891 note 40

Payment

Where mineral lease executed by husband and wife provided that if no well was commenced within one year, lease should terminate unless privilege of commencement was deferred by payment of rental, acceptance of syndicate certificates by husband and wife in payment of delay rentals continued lease in force without necessity of reexecution and did not violate wife's homestead rights Gulf Production Co v Continental Oil Co 161 S W 2d 488, 139 Tex 183, rehearing 132 S W 2d 554, 139 Tex 183, affirming Civ App, 61 S W 2d 185

96. Iowa—Blake v McCosh, 60 N W 127, 91 Iowa 544
29 C J p 892 note 44

97. Miss—Vaughan v Powell, 4 So 257, 65 Miss 401
29 C J p 892 notes 45 46

98. Ky—Bratcher v Ohio County Bank's Assignee, 153 S W 950, 152 Ky 158

99. Kan—Jenness v Cutler, 12 Kan 500

1. Wis—Spencer v Fredenhall, 15 Wis 666
29 C J p 892 note 49

Assignment

Where mortgage executed by spouses was paid with money of mortgagor husband mortgage lien was extinguished and was void as against wife's right of homestead notwithstanding mortgagor husband had mortgagee assign mortgage to creditor to secure creditor for debt owing creditor by mortgagor husband in amount approximately equal to that of mortgage Hall v Hutton 6 N E 2d 928 289 Ill App 192

Redelivery of instrument

Under some statutes where the indebtedness is fully paid and the deed of trust executed by husband and wife is delivered to one of the grantors, the lien thereof is extinguished and the redelivery of the instrument to the mortgagee by the husband to secure a further loan does not inject life into it so as to create an enforceable lien on the homestead of the grantors Jones v Hyman Mercantile Co, 98 So 845, 131 Miss 275

2. Cal—Barber v Babel, 36 Cal 11
Wis—Dunn v Buckley, 11 N W 67 56 Wis 190

3. Tex—Jackson v Bradshaw 57 S W 878, 24 Tex Civ App 30 error refused
29 C J p 892 note 51

4. Iowa—Mahon v Cooley, 36 Iowa 479

5. U S—California Fruit Transp Co v Anderson, C C Cal, 79 F 404
29 C J p 899 note 76

the mere power of veto against conveyances and encumbrances of the homestead, as where he or she is jointly interested with the other spouse in the nature of a joint tenant,[6] in order to render valid a conveyance of the homestead in which both spouses join there need be no consideration proceeding to the consenting spouse [7]

§ 132. —— Nature and Sufficiency of Consent or Joinder

a In general
b Joinder by separate instruments or separate execution of same instrument
c Reality of consent

a. In General

The nature and sufficiency of the consent or joinder of the spouse to a conveyance or encumbrance of homestead property depends largely on the particular constitutional or statutory restriction

The nature and sufficiency of the consent or joinder of the spouse to an instrument conveying or encumbering the homestead, within the meaning of the constitutional and statutory restrictions under discussion, depend largely on the particular homestead provision [8]

Conditional consent A consent granted on certain conditions is not sufficient where the conditions are not accepted [9]

Conveyance by trustee or guardian It has been held that, where a husband and wife have joined in a deed conveying the homestead to a trustee for the husband, with full power and authority in the trustee "to sell and convey the same in his own name as trustee and execute all necessary conveyances and contracts therefor without any intervention or signature of the grantors or either of them," it is not necessary to the validity of a subsequent mortgage of the property by the trustee that the wife should join therein [10] A guardian appointed by the court on the insanity of the husband has no right, without the consent of the wife, to sell a homestead acquired by the husband before his lunacy, and a sale without such consent is void, even though made by order of court and with the consent of an attorney whom the court has appointed to represent the wife [11]

Conveyance not delivered The depositing of a deed signed by husband and wife with a custodian, to await completion of a pending sale, but without authority to the custodian to deliver it, is not a sufficient compliance with a statute which prohibits the maintenance of an action for the specific performance of a contract to sell or exchange the homestead, unless the contract is signed by both husband and wife [12]

Effect of joinder for release of dower While the mere insertion in a mortgage of the usual clause

Florida rule relating to restrictions on voluntary alienations to wife where there are children living see infra § 135

Transaction of renewal

A mortgage of homestead premises is supported by a sufficient consideration as to the wife where she executes the mortgage jointly with her husband as a part of a transaction whereby he procures a renewal and extension of a then existing indebtedness owing by him alone—First Nat Bank v Benson, 220 N W 645, 57 N D 117

In Iowa

(1) Where the wife in signing a mortgage executed by her husband occupies the position of a surety, it is not necessary that a consideration run to her—Charlson v Farmers' State Bank of Lake Mills Iowa, 206 N W 812, 201 Iowa 120

(2) Where the wife denied having any knowledge or information whatever as to the transaction of her husband and his indebtedness to the mortgagee, and also denied that she ever received anything of value for her alleged signature to the note and her evidence with relation thereto stood undenied in the record, it was held that there was no consideration for her signature to the note and mortgage—Greenland v Abben, 254 N W 830, 218 Iowa 255

6. Cal—Barber v Babel 36 Cal 11—Cohen v Davis, 20 Cal 187

7. Okl—Reeves v Dyer, 153 P 850, 52 Okl 750
29 C J p 900 note 79

8. **By instrument "duly executed"**

(1) If the homestead provisions require that a conveyance or mortgage of the homestead be "duly executed" by husband and wife it is necessary that this requirement be complied with in order to give validity to the transfer
Fla—Shad v Smith, 76 So 897, 74 Fla 321 Jennings Bank v Jennings, 71 So 31 71 Fla 145
Tenn—Hoge v Hollister, 2 Tenn Ch 606

(2) "Duly executed" means executed by husband and wife in the manner prescribed by law for the execution by them of conveyances or mortgages of real estate—New York Life Ins Co v Oates, 166 So 269, 122 Fla 540

(3) Mortgage on homestead real estate owned by spouses by entireties, which mortgage appears on its face and by appended official certificate to have been executed by spouses in accordance with law, is prima facie valid—New York Life Ins Co v Oates, supra

Joinder held sufficient and to be in compliance with statute
Fla—Johnston v Cox, 154 So 206, 114 Fla 243
Kan—Elliott v Faulkner, 292 P 918, 131 Kan 528
Okl—Moore v Beverlin, 99 P 2d 886 186 Okl 620

The consent required, under some statutes, in the alienation of the homestead of the wife consists of the wife's joining in the conveyance, her signature thereto, and her separate acknowledgment thereof taken and certified to by the proper officer—Logan v Aiken, Tex Civ App, 123 S W 2d 401, error dismissed, judgment correct

9. Kan—Norton Nat Bank v Duncan 125 P 76, 87 Kan 610

10. Iowa—Des Moines Ins Co v McIntire, 68 N W 565, 99 Iowa 50

11. Cal—Fledge v Garvey, 47 Cal 371

12. Kan—Martin v Hush, 139 P 401, 91 Kan 833.

releasing dower does not manifest an intention not to part with the homestead right,[13] if the husband alone assumes to grant or mortgage the premises, but both he and his wife join in signing and acknowledging the instrument, the homestead right is not defeated, if the wife signs merely to relinquish her dower right, this fact appearing either by the instrument itself or by her acknowledgment,[14] and it has been held that, although the body of the instrument contains a formal release of the homestead right, the latter is not affected if the wife in her acknowledgment only assumes to release her dower,[15] but there is also authority to the contrary.[16]

Execution of a will The execution of a will by husband and wife is not such a compliance with the homestead requirements as to joinder as will satisfy their requirements[17]

Execution under power of attorney or by husband as agent Ordinarily the consent required by statute cannot be given by an attorney in fact,[18] and, consequently, the husband cannot consent for his wife by signing her name, although he is expressly or impliedly authorized so to do[19] Under some statutes, however, the wife may alien her rights under a power of attorney,[20] but the power of attorney must be acknowledged by the wife in the manner prescribed by statute in order for a conveyance thereunder to be valid,[21] and she may withdraw her consent at any time before the deed is executed by her attorney[22]

In pleadings. An answer filed in a foreclosure suit agreeing to the reformation of a mortgage sought to be corrected for a mutual mistake in omitting the homestead is not a sufficient consent[23]

Oral or written consent While there is some contrary authority,[24] in most jurisdictions mere verbal consent is insufficient[25] A verbal agreement for the transfer of the homestead, however, assented to by both husband and wife, followed by a change of possession and a performance of the agreement, has been held to operate to transfer the equitable title[26]

Signature alone In some jurisdictions, subject to certain limitations,[27] the wife must join in the granting part of the instrument as an actual party thereto, and her mere signature is insufficient[28] This is the rule under statutes requiring her to "join in a deed of conveyance,"[29] requiring "a conveyance signed by the husband and wife" and acknowledged and recorded,[30] requiring the "joint consent" of the husband and wife "evidenced by conveyance duly executed,"[31] or providing that husband and wife must concur in and sign the same joint instrument[32] A deed reciting in the granting clause that the grantor joined by his wife does grant, etc, duly subscribed and acknowledged by

13. NH—Perley v Woodbury 78 A 1073 76 N H 23

14 Ala—Phillips v Smith, 107 So 841, 214 Ala 382
29 C J p 900 note 23

15 Ill—Clubb v Wise, 64 Ill 157—Boyd v Cudderback, 31 Ill 113—Vanzant v Vanzant, 23 Ill 536

16 Ky—Razor v Donan, 13 S W 914, 12 Ky L 111

17 Mass—Gould v Mansfield, 103 Mass 468 4 Am R 573
Mich—Fleming v Fleming 168 N W 457, 202 Mich 615—Grindling v Rehyl 113 N W 290, 149 Mich 641, 15 L R A N S, 466
29 C J p 902 note 20

18 Cal—Gagliardo v Dumont, 54 Cal 496

19. Kan—Wallace v Travelers' Ins Co 38 P 489 54 Kan 442, 45 Am S R 288 26 L R A 806
29 C J p 901 note 9

20. Tex Warren v Jones, 6 S W 775, 69 Tex 162
29 C J p 901 note 10

21. Tex—Jones v Robbins, 12 S W 824, 74 Tex 615

22. Tex—Warren v Jones, 6 S W 775, 69 Tex 162
29 C J p 901 note 12.

23. Wis—O'Malley v. Ruddy, 48 N W 116 79 Wis 147, 24 Am S R 702

24. **In Kansas** consent of a spouse in whom title to the homestead is not vested need not be in writing—Haas v Nemeth, 31 P 2d 6 139 Kan 252—Eakin v Wycoff 234 P 63 118 Kan 167—29 C J p 900 note 83 [a]

25. Iowa—Wright v Flatterich, 281 N W 221 225 Iowa 750
Mich—La Londe v Bloom, 188 N W 291 218 Mich 588
29 C J p 900 note 84

26 Iowa—Winkleman v Winkleman, 14 N W 556, 79 Iowa 319

Contract for support

(1) Where a husband and wife both received the full benefit of an oral agreement under which they agreed to give the homestead in return for support, it was held that there was a sufficient consent, where the homestead was abandoned by them in favor of the parties who agreed to furnish the support—Drake v Painter, 42 N W 526, 77 Iowa 731—29 C J p 900 note 86

(2) An oral agreement between a son and his parents that on their death he shall become vested with the title of the family homestead, in consideration of his carrying on the business of the parents and providing them, during their lifetime, with a home and maintenance has been held to be testamentary in character and not in violation of homestead provisions Teske v Dittberner 91 N W 181 65 Neb 167 101 Am S R 614 rehearing 88 N W 658 65 Neb 607

27 Ark—Gantt v Hildreth, 118 S W 255, 90 Ark 113
29 C J p 900 note 89

28. **Signing and acknowledging insufficient**

Where husband alone gave deed to homestead when family were not living upon it and wife subsequently signed and acknowledged the deed but did not join therein wife was not estopped to claim homestead as against subsequent lienor on ground that she had ratified husband's separate deed Logan v Aiken, Tex Civ App 12? S W 2d 401, error dismissed, judgment correct

29. Mass—Greenough v Turner, 77 Mass 332

30. Ky—Withers v Pugh, 16 S W 277 91 Ky 522, 13 Ky L 101
29 C J p 901 note 92

31. Tenn—Hoge v. Hollister, 2 Tenn Ch 606

32. Iowa—Wilson v Christopherson, 5 N W 687, 53 Iowa 481.
29 C J p 901 note 94.

husband and wife, satisfies a provision that no conveyance of the homestead shall be valid unless in writing and subscribed to by both husband and wife[33] Where the wife was not named in the granting clause, but where after the habendum clause there appeared the statement that she thereby joined in the conveyance, it has been held that the wife thereby became a grantor with her husband[34]

On the other hand, in some jurisdictions the name of the wife need not appear in the body of the instrument, but it will be sufficient that it is signed by her[35] It is so held, where the statute requires the wife's "voluntary signature and assent,"[36] requires that the conveyance be "subscribed" by husband and wife,[37] or requires that the wife's signature be attached to the instrument[38] Under the construction of some homestead provisions, no form being prescribed for the manner of her giving consent, it is sufficient that it be in writing and signed with no more formality than is necessary in ordinary contracts concerning land, and the wife need not join in the conveyance[39]

b. Joinder by Separate Instruments or Separate Execution of Same Instrument

In some jurisdictions the joinder of spouses in the conveyance or encumbrance of homestead property cannot be by the execution of separate instruments or by the separate execution of the same instrument

Where a homestead can be conveyed or encumbered only by the joint conveyance or joint consent of the husband and wife, it cannot be conveyed or encumbered by their separate and independent instruments[40] In those jurisdictions in which the joint consent must be concurrent, a conveyance or encumbrance executed by the husband or wife alone cannot be subsequently assented to or ratified by the other, either by a separate execution of the former instrument or by an execution of a separate instrument, so as to release or bar his or her interest in the homestead[41] In some jurisdictions, however, the joint consent need not be contemporaneous, and an instrument executed by one may be subsequently assented to and ratified by the other,[42] but there can be no valid delivery until this is done[43]

Ratification by subsequent deed An oil and gas lease, invalid for nonjoinder of wives of joint owners occupying the land as a homestead, has been held to be ratified by the wives' joinder in a subsequent mineral deed expressly made subject to the gas and oil lease[44]

c. Reality of Consent

Insanity, fraud, or duress may invalidate a wife's consent to a transfer or encumbrance of homestead property

All transactions in which the joinder or assent of the wife is obtained in or to any disposition of the homestead, by either lease, mortgage, or absolute sale, will be scrutinized by the courts with jealous vigilance, and the wife's rights will be protected against the influences of force, fraud, or mistake, but this will not be carried to the extent of relieving her from the consequences of her own acts which she clearly did understand or should have understood[45] A wife who joins her husband in a conveyance of the homestead will be conclusively

33. Okl—Lowery v Westheimer, 160 P 196, 58 Okl 560

34. Okl—Melton v Sneed, 109 P 2d 509, 188 Okl 388

35. Ala—Staten v Shumate, 9 So 2d 751, 243 Ala 261

36. Ala—Fletcher v Shumate, 9 So 2d 753, 243 Ala 271—Staten v Shumate 9 So 2d 751, 243 Ala 261
29 C J p 901 note 98

37. Ill—Iocum v Lovell, 111 Ill 212
29 C J p 901 note 99

38. Mich—Barrett v Cox, 70 N W 446, 112 Mich 220

39. Ga—Wynn v Ficklen, 54 Ga 529
29 C J p 901 note 3.

40. Cal—Dixon v Russell, 70 P 2d 196, 9 Cal 2d 262
Okl—Wilson v Clark, 223 P 668, 97 Okl 299—Thomas v James, 202 P 499, 84 Okl 91—Hawkins v. Corbit, 201 P 649, 83 Okl 275.
29 C J p 901 note 16.

41. Ill—Moore v Martin, 84 N E 630, 233 Ill 512
29 C J p 902 note 17.

In Iowa

(1) Under Code 1935 § 10147, a contract terminating homestead rights must be in writing, and must be executed by both husband and wife in the same joint instrument—Wright v Flatterich, 281 N W 221, 225 Iowa 750

(2) Where contracts for deed of lots constituting their homestead ran to husband and wife jointly, and wife assigned her interest in the contracts to her husband, the assignment of the contracts by him alone to a third person was wholly void—Brunsdon v Brunsdon, 200 N W 823, 199 Iowa 1099

(3) The statute requiring that an encumbrance on a homestead be signed jointly by the husband and the wife does not require that they sign and acknowledge the instrument at the same time—Harlow v Larson, 213 N W 417, 204 Iowa 328.

(4) Other particulars of Iowa rule see 29 C J p 902 note 17 [b]

42. Ala—Yates v McLeod, 96 So 583, 209 Ala 483
Cal—Cunnyngham v Mason-McDuffie Co, 22 P 2d 515, 218 Cal 196, distinguishing Hart v Church, 58 P 296, 59 P 296, 126 Cal 171, 77 Am S R 195
Kan—Mid-West Lumber Co v Wagner, 300 P 1067, 133 Kan 105
Okl—Melton v Sneed, 109 P 2d 509, 188 Okl 388
29 C J p 902 note 18

43. Tenn—Eldridge v Hunter, 113 S W 892, 125 Tenn 309, 10 L R A, N S 628
29 C J p 902 note 19

44. Tex—Grissom v Anderson, 79 S W 2d 619, 125 Tex 26, reversing, Civ App, 48 S W 2d 809
Ratification of conveyances not in compliance with statute generally see infra § 143

45. Okl—Bastin v. Shaffer, 85 P 349, 15 Okl 607
29 C J p 903 notes 26, 27.

presumed to have had knowledge of its contents,[46] and the fact that she did not read it will be of no avail.[47]

Effect of fraud and duress. Where a husband executes a mortgage without joinder of the wife in its execution or acknowledgment and another person fraudulently signs her name to the mortgage and acknowledges it, it is void and of no effect,[48] even in the hands of an innocent purchaser for value and without notice, and even though the mortgage and the execution thereof in every way appear regular on its face.[49]

Consent of a wife, obtained by fraud, may be insufficient to satisfy the homestead provisions,[50] but if the wife signs the document under a mistake as to its scope and effect, due to misrepresentations of the husband or of a third person, the contract is binding in the absence of fraud on the part of the grantee or mortgagee,[51] but it is otherwise if he is a party to the fraud.[52]

Consent of the wife obtained by duress will not satisfy the homestead provisions,[53] notwithstanding the grantee was ignorant of the duress,[54] although it has been held that, where property has passed to a bona fide purchaser from the grantee, it cannot be recovered.[55] If there was no coercion exercised to procure her signature, her act is in law deemed voluntary notwithstanding she signed the instrument reluctantly and after great hesitation.[56]

Effect of insanity or minority. If the husband or wife is insane when a joint conveyance or mortgage of the homestead is executed, the conveyance is invalid, because it is not the joint act of both,[57] and the rule applies even though the grantee was ignorant of the incompetency,[58] although it has been held that such an instrument may be enforced after the death of the insane spouse where the mortgagee was ignorant of her insanity and where the mortgage money was paid over to the mortgagor and by him used for the betterment of the homestead property.[59] Similarly, even though the wife joins in the execution of the instrument, it has been held that it may be disaffirmed if she was a minor at the time of the execution.[60]

46. U S—Allen v Spensley, C C A Wis, 202 F 62, 120 C C A 378

47. Iowa—Cochran v Main, 162 N W 561, 181 Iowa 906

48. N D—Yusko v Studt, 163 N W 1066, 37 N D 221

Forgery

Mortgage purporting to encumber homestead, executed and acknowledged by husband, but to which wife's signature was forged, was void—Bacon v Western Securities Co, 252 N W 317, 125 Neb 812

49. N D—Yusko v Studt, 163 N W 1066, 37 N D 221

50. Iowa—Charlson v Farmers' State Bank of Lake Mills, Iowa, 206 N W 812, 201 Iowa 120
29 C J p 903 note 34

Presumption and burden of proof

A married woman who had gratuitously released her right of ownership of an entire homestead owned by husband for a life interest in one-half of the homestead on misrepresentations of her husband and his friends was presumptively acting under the influence of her husband and friends, and the burden is on the husband or those benefited to show that she fully and voluntarily entered into the conveyance with a full knowledge of her interest in the estate and its approximate value—McCollough v McCullough, 185 So 417, 237 Ala 77

What constitutes fraud

Husband, in procuring wife's signature to mortgage on homestead, practiced no fraud on her, where he did no more than put document before her with request to sign, and merely on his request and without inquiry as to what it was she affixed her signature. Her inability to read it and her signing it without being informed of its character would not entitle her to relief—First Nat Bank v Ten Napel, 200 N W 405, 198 Iowa 816

51. Iowa—First Nat Bank v Ten Napel, supra
29 C J p 903 note 35

52. Iowa—First Nat Bank v Ten Napel, supra
Tex—McDonald v Simons, Civ App, 271 S W 119, reversed on other grounds, Com App, 280 S W 571
29 C J p 903 note 36

Failure to read

Mortgage was not procured by fraud, deceit, or bad faith on part of mortgagee, where only claim was mortgage was not read to mortgagor, and he was not told it covered homestead—Charlson v Farmers' State Bank of Lake Mills, Iowa, 206 N W 812, 201 Iowa 120

Matters no defense

"The lack of information and experience of a wife as to the method of mortgaging land, and the knowledge of the legal description of her homestead, and her failure to read the mortgage or have it read to her, and the failure of her husband to properly inform her, will not deprive her of the defense of want of joint consent in the execution of the mortgage on her homestead when the plaintiff, being interested in the matter of obtaining the mortgage, intentionally did not disclose to her when she executed the mortgage that it covered her homestead"—Larrick v. Jacobson, 32 P 2d 204, 139 Kan 522

53. Ala—Sims v Gunter, 78 So 62, 201 Ala 286
29 C J p 903 note 38

54. Iowa—Hayden v Latch, 182 N. W 868, 191 Iowa 469
Kan—Anderson v Anderson, 9 Kan. 112
29 C J p 903 note 39

55. Ala—Gilley v Denman, 64 So. 97, 185 Ala 561

56. Ala—Coleman v Smith, 55 Ala. 368

Tired of being nagged

Wife's statement that she was signing, but not of her own free will and accord, and that she was only signing because she was tired of being nagged by her husband, does not show exercise of duress on wife—Mid-West Lumber Co v Wagner, 300 P 1067, 133 Kan 405

57. Ala—Butler v Wilson, 186 So. 687, 237 Ala 312—Sumners v Jordan, 125 So 642, 220 Ala 402—Hall v Britton, 113 So 238, 216 Ala 265
29 C J p 904 note 42

58. Ala—Beaty v Washam, 87 So 337, 205 Ala 92
Iowa—Hayden v Latch, 182 N W. 868, 191 Iowa 469
29 C J p 904 note 43

59 U S—Miners' Sav Bank v Sandy, C C Kan, 71 F 840
29 C J p 904 note 44

60. Tenn—McBroom v Whitefield, 67 S W 794, 108 Tenn 422.
29 C J p 904 note 45

§ 133. Consent of Court and Reinvestment in New Homestead

Where the state constitution so requires, land set apart as a homestead cannot be conveyed by the head of the family during the existence of the homestead except by order of the court for the purpose of reinvesting the proceeds for the same use.

Since the Georgia constitution of 1877 land set apart as a homestead cannot be conveyed by the head of the family pending the homestead, except by order of the court,[61] where the homesteader resides or where the land is situated,[62] for the purpose of reinvesting the proceeds for the same uses,[63] in the manner prescribed in the statute,[64] and any attempted sale otherwise is invalid,[65] and does not convey even a reversionary interest.[66] This provision is operative, even though the conveyance is by the husband to his wife who is the sole beneficiary of the homestead,[67] or although the conveyance is to his wife in trust for his daughter.[68] It cannot be mortgaged for any purpose either by the husband or by the wife who applied for the homestead out of her husband's property, he having refused to apply.[69] If the officer consents, his decision on the sufficiency of the price paid is final.[70] No confirmation of the sale is necessary.[71] The court may order a third person to receive the proceeds, and invest them in a new homestead for the original parties, and this will not prevent such third person from purchasing the old homestead.[72] Where the proceeds were reinvested in land which by the husband's direction was conveyed to the wife in fee, such deed to the wife included any reversionary interest in the land to which the husband might have been entitled after termination of the homestead.[73]

§ 134. Restricting Encumbrances Except for Certain Debts

Under some constitutions and statutes no encumbrance of a homestead is permissible except for designated debts

In some jurisdictions under the restrictions of the homestead provisions no encumbrance of a homestead is permissible except for designated debts,[74] the most common debts designated being those for purchase money[75] or for improvements.[76]

These restrictions apply to mortgages by the husband to the wife as well as to strangers.[77] They

61. Ga.—Dorsey v. Dorsey, 7 S.E.2d 273, 189 Ga. 662.—Rushing v. Sikes, 165 S.E. 89, 175 Ga. 124.
29 C.J. p. 901 note 49.

62. Ga.—DeLay v. Latimer, 106 S.E. 903, 151 Ga. 370.

63. Ga.—Dorsey v. Dorsey, 7 S.E.2d 273, 189 Ga. 622.—DeLay v. Latimer, 106 S.E. 903, 151 Ga. 370.

64. Ga.—DeLay v. Latimer, supra.

65. Ga.—Dorsey v. Dorsey, 7 S.E.2d 273, 189 Ga. 662.
29 C.J. p. 901 note 54.

66. Ga.—DeLay v. Latimer, 106 S.E. 903, 151 Ga. 370.—Denson v. Keyes, 78 S.E. 768, 140 Ga. 131.
29 C.J. p. 901 note 55.

67. Ga.—Love v. Anderson, 16 S.E. 68, 89 Ga. 612.

68. Ga.—Denson v. Keyes, 78 S.E. 768, 140 Ga. 131.

69. Ga.—Planters Loan & Sav. Bank v. Dickinson, 10 S.E. 146, 83 Ga. 711.
29 C.J. p. 901 note 58.

70. Ga.—Dexton v. Bell, 8 S.E. 620, 81 Ga. 570.

71. Ga.—Williamson v. Richardson, 31 S.E. 799, 106 Ga. 65.

72. Ga.—Willingham v. Richardson, supra.

73. Ga.—Browning v. Barber, 113 S.E. 797, 154 Ga. 324.
Conveyance subject to homestead right see supra § 124.

74. Tex.—Person v. Levenson, Civ.App., 143 S.W.2d 419.—Burkhardt v. Lieberman, Civ.App., 142 S.W.2d 283, modified on other grounds, 139 S.W.2d 847, 138 Tex. 109.—Bower v. Nelson, Civ.App., 138 S.W.2d 601, error refused.—First Nat. Bank v. Solis, Civ.App., 137 S.W.2d 112, error refused.—Blomgren v. Van Zandt, Civ.App., 126 S.W.2d 506.—Spencer-Sauer Lumber Co. v. Ballard, Civ.App., 111 S.W.2d 288.—Spencer-Sauer Lumber Co. v. Ballard, Civ.App., 98 S.W.2d 1054.—Beiss v. Moeller, Civ.App., 83 S.W.2d 1098.—Wilson v. Levy, Civ.App., 13 S.W.2d 971.—Commerce Farm Credit Co. v. Sayles, Civ.App., 79 S.W. 567, reversed on other grounds, Commerce Farm Credit Co. v. Sayles, Com.App., 288 S.W. 802.—Peaslee v. Walker, 78 S.W. 980, 31 Tex.Civ.App. 297, error refused.
29 C.J. p. 901 note 61.

Antecedent debts

Where it is incompetent to mortgage the homestead for money received at the time it is incompetent to mortgage it to secure an antecedent debt or to give it in payment of such debt or agree to do so.—Maxwell v. Roach, 30 So. 251, 106 La. 123.

Debts held not included

(1) Attorney's fee.—Brown v. Rice, Tex.Civ.App., 290 S.W. 784, affirmed Rice v. Brown, Com.App., 296 S.W. 495.

(2) Insurance premiums on house.—Cleveland v. Alpine Lumber Co., Tex.Civ.App., 75 S.W.2d 977.

Right of designating the homestead cannot be used as a cloak to enable the homestead claimant to evade the law prohibiting the mortgage of a homestead.—McGaughey v. American Nat. Bank, 92 S.W. 1003, 41 Tex.Civ.App. 191.

75. Tex.—Bower v. Nelson, Civ.App., 138 S.W.2d 601, error refused.—Threadgill v. Fagan, Civ.App., 64 S.W.2d 405.—E. Y. Chambers & Co. v. Little, Civ.App., 21 S.W.2d 17, error refused.—Jones v. Moore, Civ.App., 289 S.W. 709.
29 C.J. p. 905 note 65.

Acceleration clause

Provision for acceleration of maturity of a renewal of a purchase-money note secured by trust deed on homestead for failure of mortgagor to pay taxes was not void as an additional burden on the homestead.—Natali v. Witthaus, 135 S.W.2d 969, 134 Tex. 513, reversing, Witthaus v. Natali, Civ.App., 107 S.W.2d 998.

76. Tex.—Lippincott v. York, 24 S.W. 275, 86 Tex. 276.—Dallas Building & Loan Ass'n v. Henry, Civ.App., 98 S.W.2d 1030, error dismissed.
29 C.J. p. 905 note 66.

Security

Delivery of land contract by assignees to materialman as security was not sale divesting assignees of homestead rights.—Standard Lumber & Mfg. Co. v. Looper, Tex.Civ.App., 1 S.W.2d 150.

77. Tex.—Madden v. Madden, 15 S.W. 480, 79 Tex. 595.

apply although both husband and wife joined in the conveyance [78] The exception in these restrictions does not extend to encumbrances to secure mere loans of money,[79] even though part of the money may be used for purposes for which a mortgage of the property would be authorized [80]

A person advancing money to take up, pay off, and extend an indebtedness secured by a permissible lien on a homestead may become subrogated to the original lien to secure him for the money so advanced, with interest [81] Such lien, however, cannot be extended to cover items not included in the original permissible lien [82] An existing lien on a part of the homestead may not be spread over another part not charged with the debt secured [83]

Conveyance void Any encumbrance for debts other than those thus excepted is not voidable merely, but absolutely void,[84] and can never be made valid [85] The subsequent termination of the home-

78. Tex —Kearby v Cox, Com App, 211 S W 932—Hiner v Meyer, Civ App, 25 S W 2d 196, affirmed, Com App, 44 S W 2d 961

79. Tex —Gaylord v Loughridge, 50 Tex 573
29 C J p 905 note 78.

80. Tex —Building and Loan Ass'n of Dakota v Logan, Civ App, 33 S W 1088

81. Tex —Farm & Home Savings & Loan Ass'n v Martin, 88 S W 2d 459, 126 Tex 417, reversing Martin v Farm & Home Savings & Loan Ass'n, Civ App, 81 S W 2d 779—Lippencott v York, 24 S W 275, 86 Tex 276—Hensel v International Bldg & Loan Ass'n, 20 S W 116, 85 Tex 215—Wingate v People's Bldg & Loan Sav Assoc, 39 S W 999, 15 Tex Civ App 416

Application of proceeds

Mortgagee under trust deed on homestead securing money advanced pursuant to mechanic's lien contract was not under duty to see that identical money advanced was paid directly to contractor —Farm & Home Savings & Loan Ass'n of Missouri v Muhl, Tex Civ App, 37 S W 2d 316, error refused

Assignment of notes

A purchase-money mortgage lien does not result from an assignment of purchase-money notes by a vendor who has reserved a lien therefor — Breneman v Mayer, 58 S W 725, 24 Tex Civ App 164

Contracting for payment

A permissible lien may be created by contracting with a third person that the latter shall pay for labor and materials necessary in the erection of a dwelling house —Pioneer Savings & Loan Co v Edwards, 34 S W 192, 12 Tex Civ App 556

Lien not for purchase money

A permissible lien may not be created by payments made by a third person in satisfaction of a lien not given to secure the original purchase money —Kallman v Ludenecker, 28 S W 579, 9 Tex Civ App 182

Stock subscription

Where borrower executed deed of trust on realty to building and loan association to secure a loan, and association was assigned mechanic's lien note which loan was made to pay, lien of deed of trust protected only loan and did not secure payment of stock subscription made at same time, as against contention that deed of trust invalidly attempted to create lien on homestead to secure stock subscription —Continental Southland Savings & Loan Ass'n v Bunyard, Tex Civ App, 109 S W 2d 276

82 Attorney's fees

Tex —Continental Southland Savings & Loan Ass'n v Bunyard, Civ App, 109 S W 2d 276

Liens on two homestead lots

(1) Deed of two homestead lots held effectively to segregate the liens against each lot —Glasgow v John Hancock Mut Life Ins Co Civ App 117 S W 2d 888, affirmed John Hancock Mut Life Ins Co v Glasgow, 111 S W 2d 942, 135 Tex 470

(2) A trust deed lien on one of two homestead lots in tract over all of which lien originally spread could not be subsequently released and transferred to other homestead but each homestead could be burdened only with its proportionate part of lien, and the release of one homestead from claims against it could not burden other homestead therewith —John Hancock Mut Life Ins Co v Glasgow 111 S W 2d 942 135 Tex 470 affirming Glasgow v John Hancock Mut Life Ins Co, Civ App, 117 S W 2d 888

(3) Under such circumstances, an insurance company, arbitrarily accepting portion of vendors and trust deed liens shifted from one homestead lot to the other with knowledge of all facts acquired no greater right in purchase-money notes and liens than that of original payees, whose right was only as against such homestead to extent of purchase money actually due thereon, and balance of lien was void and unenforceable —Glasgow v John Hancock Mut Life Ins Co, supra

83. Tex —Baxter v Crow, Civ App, 133 S W 2d 187, error dismissed, judgment correct—Hayes v First Trust Joint Stock Land Bank, Civ App 111 S W 2d 1172

84. Tex —Slaughter v Qualls 162 S W 2d 671, 139 Tex 340, affirming, Civ App, 149 S W 2d 651—Burkhardt v Lieberman, 159 S W 2d 847, 138 Tex 409, modifying, Civ App, 142 S W 2d 283—Anglin v Cisco Mortg Loan Co, 141 S W 2d 935, 135 Tex 188, reversing, Civ App, 118 S W 2d 817—J P Wooten Motor Co v First Bank of Swenson, Com App, 281 S W 196, affirming, Civ App, 260 S W 1093—Straus v Brooks, Civ App, 126 S W 2d 542, reversed on other grounds 148 S W 2d 393, 136 Tex 141—Duvall v Kansas City Life Ins Co, Civ App, 104 S W 2d 10, modifying and denying rehearing 96 S W 2d 793, affirmed Kansas City Life Ins Co v Duvall, 104 S W 2d 11, 129 Tex 287—King v. Plainview Nat Farm Loan Ass'n, Civ App, 100 S W 2d 431, reversed on other grounds Federal Land Bank of Houston v King, 122 S W 2d 1061, 132 Tex 481—Milliken v Coker, Civ App, 90 S W 2d 902, modified on other grounds 115 S W 2d 620 132 Tex 23—Wilson v. Alexander, Civ App 50 S W 2d 140, reversed on other grounds Alexander v Wilson 77 S W 2d 873 124 Tex 392 128 A L R 412—Gibraltar Sav & Bldg Ass'n v Harper, Civ App, 41 S W 2d 130, error refused —Norville v Clark, Civ App, 8 S. W 2d 327—Thurman v First State Bank of Carbon, Civ App, 300 S W 123, reversed on other grounds First State Bank of Carbon v Thurman Com App 12 S W 2d 146 —Walter Connally & Co v Gaston, Civ App, 295 S W 953
29 C J p 884 note 16, p 906 note 88

Renewal notes

Where lien securing original note was void as contrary to homestead laws renewal notes were also without valid lien —Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253 121 Tex 409 83 A L R 44, reversing Security Nat Bank of Wichita Falls v Andrews, Civ App, 24 S W 2d 509

85 Tex —Guaranty Bond State Bank of Mt Pleasant v Kelley, Com App, 13 S W 2d 69 modifying Kelley v Guaranty Bond State Bank of Mt Pleasant Civ App 2 S W 2d 572—Babbe v Federal Land Bank of Houston, Civ App, 161 S. W 2d 1097, error refused.

stead in any manner,[86] or the subsequent divorce of the husband and wife,[87] does not validate an encumbrance executed in violation of such restrictions at a time when the land was impressed with the homestead character. The fact that the mortgagors had formed the intention of abandoning the homestead at the time of giving the mortgage does not alter the rule[88]

Covenants and sworn statements A mortgage for a debt other than one excepted is void, although the instrument contains a covenant on the part of the mortgagor that the property covered is not his homestead[89] A trust deed to land on which the owners actually resided as a homestead was held to be void, notwithstanding the sworn statements of the owners that they had abandoned the land and moved from the state[90]

Crops and fixtures It has been held that the restrictions do not apply to crops growing on the homestead,[91] but the rule is otherwise as to fixtures[92] If property covered by a mortgage was part of the mortgagor's homestead, he could not render the mortgage valid, and take it out of the protection of the constitution, by agreeing that the mortgaged property should be treated as chattels, and not as fixtures[93]

Proceeds of sale Constitutional and statutory restrictions as to encumbering homestead property have been held not to extend to the proceeds of a voluntary sale thereof, and such proceeds may be pledged[94]

Simulated transactions; conditional sales These restrictions cannot be evaded by simulated transactions which are in fact intended to operate as mortgages,[95] and the rule applies with full force and effect to a conveyance absolute in form but intended as a mortgage[96] Whether the instrument is an absolute deed or a mere security does not de-

Cancellation of title

A mortgage of homestead property cannot afterward be vitalized by cancellation of the title on which the homestead right was predicated—Doak v Moore 109 S W 405, 48 Tex Civ App 591

86. Tex—Anglin v Cisco Mortg Loan Co, 141 S W 2d 935, 135 Tex 188, reversing, Civ App 118 S W 2d 817—Citizens State Bank of Lindale v Jeffries, Civ App, 2 S W 2d 317, error refused
29 C J p 916 note 78

A subsequent abandonment of the homestead does not validate a deed of trust executed at a time when the land was impressed with the homestead character—L Simpson Lumber Co v Craig, Tex Civ App, 84 S W 2d 882, error dismissed—29 C J p 906 notes 84 89

87. Tex—Toler v Fertitta Com App, 67 S W 2d 229 reversing Fertitta v Toler Civ App 13 S W 2d 467—Wood v De Winter, Civ App, 280 S W 303

88. Tex—Delaney v Walker, Civ App 79 S W 601

89. Tex—Hines v Nelson, Civ App, 21 S W 541

90. Tex—Knowles v Waddell Inv Co Civ App 280 S W 885, 886

91. Tex—Silverberg v Trilling, 18 S W 591, 82 Tex 523
29 C J p 906 note 85

92. Tex Gentry v Bowser, 21 S W 569, 2 Tex Civ App 388

93. Tex—Doak v Moore, 109 S W 405, 48 Tex Civ App 591

94. Tex—First Nat Bank v Farrier, Civ App, 113 S W 2d 285—L Simpson Lumber Co v Craig, Civ App, 84 S W 2d 882, error dismissed.

Proceeds of voluntary sale as constituting homestead property see supra § 71

95 Tex—Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253, 121 Tex 109, 83 A L R 41 reversing Security Nat Bank of Wichita Falls v Andrews Civ App, 21 S W 2d 509—Rivers v Westbrooks Civ App 126 S W 2d 46 error refused—Brown v Shamburger, Civ App 104 S W 2d 112—Sammons v Davis Civ App, 15 S W 2d 707—Mansfield v Orange Inv Co Civ App, 260 S W 307, rehearing overruled 263 S W 658
29 C J p 905 note 69

Collusive attempts

"The Texas decisions are vigorous and unswerving in enforcing and giving effect to the homestead article of the Texas Constitution as against collusive attempts of lenders and borrowers no matter how ingenious to avoid it"—Collier v Union Central Life Ins Co, C C A Tex 100 F 2d 111, 113

Loss of security is penalty equity and the constitution assess against one who lends money on a homestead where the parties try to disguise the true nature of the transaction by the giving of an instrument in the form of a warranty deed—Wood v De Winter Tex Civ App 280 S W 303

Transaction held bona fide sale of the property, the deed not at the time when made being intended as a mortgage—L Simpson Lumber Co v Craig, Tex Civ App, 84 S W 2d 882, error dismissed

96 Tex—Slaughter v Qualls, 162 S W 2d 671, 139 Tex 340, affirming, Civ App, 149 S W 2d 651—McKelroy v Hamilton, Civ App, 130 S W 2d 1114—Brannon v Gartman, Com App, 288 S W 817, reversing Gartman v Brannon, Civ App, 270 S W 255—Young v Blain Com App 245 S W 65, reversing, Civ App 231 S W 851—McFarlane v Couger, Civ App, 139 S W 2d 158, error refused—Martin v Martin, Civ App, 130 S W 2d 863 error dismissed judgment correct—First Nat Bank v Farrier Civ App, 113 S W 2d 285—Anderson v Barnwell, Civ App 52 S W 2d 96, affirmed in part Anderson v Brawley, 86 S W 2d 41, 126 Tex 182—Citizens' State Bank of Lindale v Jeffries Civ App, 2 S W 2d 317, error refused—Bell v Ramirez Civ App 299 S W 655—Hein v Henry, Civ App, 299 S W 156—Brown v Brown Civ App 280 S W 918—Wood v De Winter, Civ App, 280 S W 303—Lilly v Lewis, Civ App, 249 S W 1095
29 C J p 905 note 70

"The pretended sale, with condition of defeasance, prohibited by the Constitution includes any character of pretended sale, having for its purpose the placing of a lien on the homestead, other than those expressly permitted by the Constitution and it is immaterial whether or not the condition of defeasance is expressed in the instrument"—Anglin v Cisco Mortg Loan Co, 141 S W 2d 935, 938, 135 Tex 188, reversing Civ App, 118 S W 2d 817—Risk v Randon, 70 S W 2d 689, 693, 123 Tex 326, affirming, Civ App 33 S W 2d 1082

As between the parties thereto, such a conveyance is void—Barron v Theophilakos, Tex Civ App, 13 S W 2d 739
Estoppel to assert invalidity see infra § 142

Attorney's fee

Deed to homestead as mortgage to

pend on the form of the instrument, but on the intention of the parties thereto[97] On the other hand, such a constitutional provision does not declare every sale of a homestead involving a condition of defeasance void, but only pretended sales involving such conditions are void[98] Consequently a conditional sale of a homestead is valid[99]

Status as homestead property The status of the property as homestead property, so as to be protected from unauthorized encumbrances, must be decided by the conditions existing at the time when the attempt to create the lien was made[1] The restrictions do not apply to property as to which the homestead right had not attached when mortgaged,[2] although at the time of the mortgage the mortgagor intended and was preparing to use the property as a homestead and did so use it afterward,[3] or to property in which the homestead rights had been abandoned before the mortgage was given[4]

Unmarried head of family The restrictions against mortgaging the homestead do not apply to an unmarried head of a family[5]

secure payment of fee to attorney for defending husband in criminal prosecution was invalid—Dallas Building & Loan Ass'n v Henry, Tex Civ App, 98 S W 2d 1030, error dismissed

Condition of defeasance need not appear in pretended conveyance of homestead to render instrument void as mortgage—Mosher Steel & Machinery Co v Nash, Tex Civ App, 6 S W 2d 158, error dismissed

Instruments construed together

Widow's deed to homestead for mineral rights must be construed with the written agreement which stated the conditions under which the deed was given since both deed and mortgage evidenced parts of the same transaction—Bacle v Pickens, Civ App, 78 S W 2d 260, affirmed, Com App Pickens v Bacle, 104 S W 2d 182 129 Tex 610, rehearing denied 105 S W 2d 212, 129 Tex 610

Joinder of wife

It is immaterial whether the instrument be executed by the husband alone or together with the wife—Toler v Fertitta, Tex Com App 67 S W 2d 229, reversing Fertitta v Toler, Civ App, 43 S W 2d 467

97. Tex—Brannon v Gartman, Com App, 288 S W 817, reversing Gartman v Brannon Civ App, 270 S W 255—Young v Blain Com App, 245 S W 65 reversing, Civ App, 231 S W 851—Smith v New Waverly State Bank, Civ App, 76 S W 2d 201 Kelly v Carpenter, Civ App, 67 S W 2d 328, error dismissed—Mosher Steel & Machinery Co v Nash, Civ App 6 S W 2d 158, error dismissed—Shear Co v Smith, Civ App, 250 S W 727
29 C J p 905 note 71

An equitable mortgage was held to result from an assignment of a contract to purchase by the homesteader to his creditor, where the former thereafter completed his payments and fraudulently took a conveyance of the land to himself—Hartwell v McDonald, 69 Ill 293

Conveyances held mortgages

(1) Conveyance of a homestead for an existing debt as the price, repurchase by the debtor, and retention of a vendor's lien by the creditor—O'Shaughnessy v Moore 11 S W 153, 73 Tex 108—29 C J p 905 note 72

(2) Debtor's deed with contract for reconveyance on payment of the debt and interest—Shaffer v Huff, 49 Ga 589—29 C J p 905 note 73

(3) Debtor's conveyance, the execution of a note for the purchase money secured by trust deed, and indorsement of the note by the debtor to a third person—Hurt v Cooper 63 Tex 362—29 C J p 905 note 74

Parol testimony

The general rule that, where a recited consideration in a deed is contractual in its nature, it cannot be varied by parol evidence, in the absence of fraud accident or mistake, has no application where a pretended sale is in fact intended as a mortgage of a homestead, and it is permissible to prove that a deed was in fact intended as a mortgage—Anglin v Cisco Mortg Loan Co 141 S W 2d 935 135 Tex 188, reversing Civ App 118 S W 2d 817 Sisk v Rindon 70 S W 2d 689, 123 Tex 326 affirming, Civ App, 33 S W 2d 1082—29 C J p 905 note 71 [a]

Privilege to repurchase

Deed of a husband and wife, and lease to them by grantees with privilege to purchase within five years at a named price, but not obliging them to repurchase did not show as a matter of law a pretended sale of a homestead void under Const art 16 § 50—Mansfield v Orange Inv Co, Tex Civ App 260 S W 307, rehearing overruled 263 S W 658

98. Tex—Red River Nat Bank in Clarksville v Latimer, Civ App, 110 S W 2d 232

99. Tex—Brannon v Gartman, Com App, 288 S W 817, reversing Gartman v Brannon, Civ App 270 S W 255
29 C J p 905 note 76

Transaction held void as mortgage, given for an existing debt, and not sustainable as a conditional sale—Mosher Steel & Machinery Co v Nash, Tex Civ App, 6 S W 2d 158, error dismissed

1. Tex—First Nat Bank v Farrier, Civ App, 113 S W 2d 285—Wilson v Levy, Civ App, 13 S W 2d 971—French v Coleman, Civ App, 13 S W 2d 169

2. Tex—Kempner v Comer, 11 S W 194, 73 Tex 196
29 C J p 906 note 81

Grantors living elsewhere

Trust deed covering grantor's homestead was void, unless it appeared that grantors were living elsewhere and grantee was induced to take trust deed by grantor's representations that property was not their homestead—First Nat Bank v Zafaronetis Tex Civ App, 15 S W 2d 155, error refused

3 Tex—Kempner v Comer, 11 S W 194, 73 Tex 196

4. Iowa—Drake v Painter, 12 N W 526 77 Iowa 731
Tex White v Dabney, Civ App, 46 S W 653

5. Tex—Allen v Farm & Home Savings & Loan Ass'n of Missouri Civ App, 58 S W 2d 866, error refused—Lynch v First Nat Bank, Civ App, 50 S W 2d 418 error refused—Gordon-Sewall & Co v Walker, Civ App 258 S W 233
29 C J p 883 note 98 [a], p 906 note 87

After divorce, a woman may encumber her homestead as she chooses—Straus v Brooks 118 S W 2d 393 136 Tex 141, reversing Civ App, 126 S W 2d 542—Keels v First Nat Bank, Tex Civ App 71 S W 2d 372

Widow

(1) Where maker of notes was widow at time of alleged execution of note and deed of trust, existence of homestead was not a bar to execution of instruments—Pitts v Thompson Tex Civ App, 71 S W 2d 368, error dismissed

(2) Widow can mortgage community homestead to secure debt against community estate—Gonzalez v Zachry, Tex Civ App, 84 S W 2d 855, error refused

(3) Deed of trust by widow upheld—Dwyer v Foley, Tex Civ App, 35 S W 820—29 C J p 906 note 87 [b]. Transfer or encumbrance by surviving wife generally see infra § 285

§ 135. Restricting Alienation Where Children Living

Under some homestead laws the power of alienation is restricted where there are infant children.

Under some homestead laws it is not within the power of husband and wife to release their homestead rights, where there are infant children living,[6] although it is competent for husband and wife to release the wife's homestead interest where there are no such children.[7]

In Florida, in view of the constitutional provisions that homestead exemptions shall inure to the widow and heirs of the person entitled to such exemption, and that nothing in the homestead article shall be construed, if the holder be without children, to prevent him or her from disposing of his or her homestead by will, where there are children surviving it has been held that it follows by necessary implication that a homestead cannot be alienated to the wife even by joint deed, if the real effect would indirectly nullify the constitutional inhibition.[8] The "alienation" of homesteads contemplated by the constitutional provision that homestead real estate shall not be alienable without the joint consent of husband and wife, when that relation exists, is a bona fide conveyance of the homestead to third persons for a valuable consideration,[9] and is not a conveyance without consideration by the owner of the homestead directly to his wife,[10] or by the husband and wife joining in a conveyance without consideration to a third person who reconveys the same property without consideration to the wife alone[11] or to the husband and wife as tenants by the entireties,[12] which conveyances necessarily would have the effect of divesting children of the owner of their vested rights in the homestead.[13] Apparently if the conveyance to the wife is based on a consideration it is not invalid as an indirect attempt to evade the constitutional restriction.[14] The restriction is inapplicable to transfers of property which is not homestead property at the time of the conveyance.[15] The statute authorizing a husband to deed real estate directly to his wife, as though they were not married, does not apply to homestead real estate.[16]

C FORM AND REQUISITES OF INSTRUMENT, ACKNOWLEDGMENT, AND RECORD

§ 136. Form and Requisites

An instrument conveying a homestead, to be valid, must comply with the specific requirements of the homestead laws and the usual requirements of instruments conveying real estate in general

In order to be valid, a conveyance or encum-

Widower

(1) A widower residing on premises as a homestead can execute a mortgage thereon—Rutland Sav Bank v Isbell Civ App, 129 S W 2d 505 affirmed 154 S W 2d 442 137 Tex 13—Hunt v Bagwell Tex Civ App 111 S W 2d 312 error refused—Bagwell v Hunt, Tex Civ App, 65 S W 2d 869

(2) A landowner who is a widower may, in consideration of the renewal of a purchase-money note which is a lien on a portion of his homestead, extend the lien by the provisions of the new note to cover the whole tract - Stoker v Patton Tex Civ App 35 S W 61

Transfer or encumbrance by surviving husband generally see infra § 286

6. Ill—Zachman v Zachman, 66 N E 256 201 Ill 380, 94 Am S R 150—McGee v McGee, 91 Ill 518

7. Ill Colbert v Rings, 83 N E 274 231 Ill 101—Merki v Merki, 72 N E 9 212 Ill 121, affirming 113 Ill App 518

8 **Effect**

"An attempted 'alienation' of the homestead by the owner and wife directly to the wife merely leaves the title substantially as it was before without divesting it of its character as a homestead"—Church v Lee 136 So 242 244 102 Fla 478

Joinder an idle act

To require a wife to unite in a conveyance 'alienating the homestead to herself would be to require the performance of an idle act as she cannot 'alienate' her interest in the homestead by joining in a conveyance of the homestead to herself'"—Church v Lee supra

9 Fla—Church v Lee, supra

10. Fla—Norman v Kannon, 182 So 903 133 Fla 710

"The organic provisions contemplate that neither the widow nor the heirs shall be deprived of their prospective rights in the homestead and requiring the joinder of husband and wife in such deed does not contemplate either a direct or indirect voluntary conveyance of the homestead to the wife"—Church v Lee, 136 So 242 243, 102 Fla 478

Consideration for consent of spouse generally see supra § 131

Necessity of joinder of wife in conveyances of homestead property to wife see supra § 130 c

11. U S—Croker v Croker, D C Fla, 7 F 2d 218

Fla—McEwen v Larson 185 So 866, 136 Fla 1—Norman v Kannon 182 So 903, 133 Fla 710—Church v. Lee, 136 So 242, 102 Fla 478—Jackson v Jackson, 107 So 255 90 Fla 563—Norton v Bava, 102 So 361, 88 Fla 1

12. U S—Croker v Croker D C Fla, 7 F 2d 218

Fla Norman v Kannon, 182 So 903, 133 Fla 710—Bess v Anderson, 136 So 898, 102 Fla 1127

13. Fla—Church v Lee 136 So 242 102 Fla 478

14. **Burden of proof**

A deed to a homestead executed jointly by the owner and wife directly to the wife where there is a child or children surviving, whether minors or adults or whether residing with the family is prima facie ineffective, as against the interests of such heirs, to convey legal title If the payment of a valuable consideration for the conveyance becomes material, it must be affirmatively proved by the party relying on its validity—Church v Lee supra

Conveyance held based on consideration

Fla—Weigel v Wiener, 5 So 2d 447, 149 Fla 231

15. Fla—Menendez v Rodriguez, 143 So 223 106 Fla 211

16. Fla Church v Lee, 136 So 242, 102 Fla 478

brance of homestead property must be in writing,[17] and the instrument of conveyance must comply not only with the specific requirements of the homestead laws[18] but also with the usual requirements of instruments conveying or encumbering real estate in general.[19] Thus it is essential to the validity of a deed or other instrument conveying the homestead that there be competent parties,[20] an absence of fraud[21] and duress,[22] a valid or good consideration,[23] proper words showing an intent to convey,[24] and a formal signing, execution,[25] attesta-

17. Fla—Oates v New York Life Ins Co, 152 So 671, 113 Fla 678 116 Fla 253—McEwen v Schenck, 146 So 839, 108 Fla 119
Okl—Billy v Le Flore County Gas & Electric Co, 120 P 2d 774, 190 Okl 88
Tex—Pickens v Bacle, 104 S W 2d 482, 129 Tex 610, affirming Bacle v Pickens, Civ App, 78 S W 2d 260, rehearing denied Pickens v Bacle, 105 S W 2d 212, 129 Tex 610
Form and requisites of instrument releasing homestead in general see infra §§ 181–184

Agreement terminating lease
An oral agreement between landlord and tenants that tenants would terminate lease and surrender possession was invalid as respects land claimed by tenants as homestead—Wright v Flatterich, 281 N W 221, 225 Iowa 750

An oral agreement to encumber homestead property will not subject it to any lien
Iowa—Rutt v Howell 50 Iowa 697
Minn—Kingery v Kingery, 241 N W 583, 185 Minn 467
29 C J p 907 note 3

18. Fla—Oates v New York Life Ins Co 152 So 671, 113 Fla 678 116 Fla 253
29 C J p 906 note 93
Sufficiency of consent or joinder see supra § 132

The purpose of the regulations and prescribed formulas for executing and acknowledging conveyances and mortgages of homesteads is to secure certainty and reliability in conveyances and mortgages and not to afford a means of misleading those who execute or acquire conveyances or mortgages—New York Life Ins Co v Oates, 192 So 637, 141 Fla 164

To create a lien for materials and labor against a homestead, there must be a contract entered into in writing and acknowledged by the wife before the material is furnished or the labor performed—Kepley v Zachry, 116 S W 2d 699, 131 Tex 554 modifying, Civ App, 90 S W 2d 571, and opinion supplemented 121 S W 2d 595, 131 Tex 554—Collier v Valley Building & Loan Ass'n, Tex Com App, 67 S W 2d 82 reversing Civ App, 43 S W 2d 173, and conformed to Valley Bldg & Loan Ass'n v Collier, 88 S W 2d 611

19. Tex—King v Hill, Civ App, 167 S W 2d 628, affirmed, Sup, 172 S W 2d 298
29 C J p 906 notes 94, 95

20. Competent grantors
(1) Husband's signature to mortgage on homestead being secured when under disability of intoxication, mortgage was invalid as to both husband and wife in absence of ratification—State Exchange Bank of Parkersburg, Iowa, v Nolan, 207 N W 715, 201 Iowa 722

(2) Mortgage signed by married woman under twenty-one years of age was ineffectual to waive homestead—Schlenker v Clark, 11 S W 2d 725, 226 Ky 665

Necessity of grantee in existence
Deed signed and acknowledged by wife after death of purchaser was void and ineffectual as deed to divest vendors of homestead interest, it being a deed to a grantee not in existence at time of its execution—King v Hill Civ App 167 S W 2d 628, affirmed, Tex 172 S W 2d 298

21 Representations by mortgagee that placing homestead in trust deed was mere formality and that it would be in no danger of foreclosure which were believed by mortgagors and induced them to execute trust deed including homestead constituted such fraud as to entitle mortgagor to avoid deed in so far as it concerned homestead—Rouge v Dunlap Tex Civ App 91 S W 2d 905 error dismissed by agreement

22 Duress not shown
Minn Heins v Byers, 202 N W 733, 162 Minn 349

23 Necessity of consideration
Iowa—Greenland v Ahlen, 254 N W 830, 218 Iowa 255
29 C J p 910 note 68

Sufficiency of consideration
(1) A nominal consideration has been held sufficient to support a conveyance of a homestead to the children of the owner—Brooks v Collins 11 Bush, Ky, 622

(2) Renewal of existing indebtedness is sufficient consideration for mortgage of homestead—First Nat Bank v Benson, 220 N W 645, 57 N D 117

(3) Where transaction whereby mortgagees undertook to care for indebtedness of mortgagor to bank was not closed until after making of mortgage, there was sufficient consideration for mortgage of homestead—Heins v Byers 202 N W 733, 162 Minn 349

Failure of consideration
(1) Generally—Ganson v Baldwin, 53 N W 171, 93 Mich 217

(2) If the wife does not join, where a husband assumes to convey the use of the homestead to one who is to support the wife in consideration of the conveyance, the wife is not bound by the contract where no support is given to her—Ganson v Baldwin, supra
29 C J p 910 note 72 [a]
Consideration for consent of spouse see supra § 131

24. Cal—Cordano v Wright, 115 P 227, 159 C 1 610, Ann Cas 1912C 1044
29 C J p 907 notes 4, 5

25 Fla—Oates v New York Life Ins Co, 152 So 671 113 Fla 678, 116 Fla 253—McEwen v Schenck, 146 So 839 108 Fla 119
29 C J p 906 notes 94–96

Adopting another's signature
Where notary handed mortgage on homestead to alleged mortgagor without her signature to it and explained the document, alleged mortgagor took document into house and brought it back with her name signed to it, stating that she knew all about it, alleged mortgagor was bound by the signature, whether signature was placed on document by her or mother because she adopted signature as her own Picetti v Orcio 67 P 2d 315 57 Nev 52 affirming 58 P 2d 1046 57 Nev 52

Forged signature
Mortgage of homestead by married man to which wife's signature was forged was void—Gutlie v Rowe 221 N W 749 197 Wis 257, modified on other grounds 223 N W 93, 197 Wis 257

When legality of execution may be assumed
Where prescribed execution and acknowledgment of conveyance or mortgage of homestead appear to be regular and legal, and mortgage or conveyance or record thereof does not indicate failure to comply with formal requirements as to execution acknowledgment, or record of such instruments other persons may assume legality of execution thereof in absence of notice or knowledge of irregularity—New York Life Ins Co v. Oates, 192 So 637, 141 Fla 164

tion,[26] and delivery [27]

Description of premises. The conveyance of a homestead must, as in the case of other property, sufficiently describe the homestead,[28] but, as in other cases, a description is sufficient if the property can be identified therefrom [29] In jurisdictions where an express release of the homestead is unnecessary, a deed or mortgage need not refer to the premises as a homestead if they are otherwise sufficiently described [30] A warranty deed to a homestead, duly executed and acknowledged by both husband and wife, passes all their interest, including the homestead estate, although that particular estate is not specifically mentioned [31] If the description of the land is erroneous it may be reformed,[32] but a defect in this respect cannot be cured by the subsequent act of the husband alone so long as the property is occupied as a homestead [33]

Necessity and sufficiency of release of homestead Under some homestead provisions a formal and express release or waiver of the homestead rights in deeds or mortgages is necessary to accomplish this purpose,[34] and it will not be sufficient to recite in the certificate of acknowledgment that the wife acknowledged her release of her homestead rights,[35] or to release in the body of the instrument "every claim, interest and estate, of whatever description, at law, or in equity,"[36] nor will the insertion of general covenants operate as a release or waiver,[37] and where the proof as to the contents of a lost deed does not disclose a release or waiver the deed must be held to convey only the excess on the homestead [38] In other jurisdictions no express release is required,[39] but nevertheless an express waiver results from inserting the words "We jointly relinquish our right of homestead or dower in our landed estate,"[40] or by using the phrase, "bargain, sell and convey" the homestead property [41]

§ 137. Acknowledgment

Where the statute so requires, a conveyance of the homestead, to be valid, must be acknowledged in the manner prescribed.

While in some jurisdictions, except for the purposes of recordation, no acknowledgment of a conveyance of a homestead is necessary,[42] by express provision in many homestead laws the conveyance to be valid must be acknowledged by the wife,[43]

26. Necessity of attestation
(1) Under the constitutional and statutory provisions in some jurisdictions a homestead deed or mortgage, to be properly executed, must be signed, sealed, and delivered in the presence of at least two subscribing witnesses—Everglade Cypress Co v Tyner, 160 So 513, 119 Fla 43—Oates v New York Life Ins Co, 152 So 671, 113 Fla 678, 116 Fla 253—McEwen v Schenck, 146 So 839, 108 Fla 119—Hutchinson v Stone, 81 So 151, 79 Fla 157

(2) Where mortgage was executed by grantors' marks and not attested by two witnesses as required by law, mortgage was void—Thomas v Davis, 2 So 2d 616, 241 Ala 271

Effect of defective attestation
Wife's conveyance of her homestead was effective even if not properly witnessed where she admitted signing deed and no relief was sought for want of attestation—Jones v Stollenwerck, 119 So 844, 218 Ala 637

27. Fla—Oates v New York Life Ins Co, 152 So 671, 113 Fla 678, 116 Fla 253—McEwen v Schenck, 146 So 839, 108 Fla 119
Neb—Willis v Sponaler, 219 N W 581, 117 Neb 1
29 C J p 906 note 96 [a]

28. Iowa—Wright v Flatterich, 281 N W 221, 225 Iowa 750
29 C J p 907 note 7.

29. Ill.—Casler v. Byers, 22 N E 507, 129 Ill 657, affirming 28 Ill App 128
Iowa—Shoemake v Smith, 45 N W 744, 80 Iowa 655

30. Wash—Brown v Elwell, 49 P 1068, 17 Wash 442
29 C J p 907 note 10

31. Neb—Radruck v Omaha First Nat Bank, 145 N W 715 95 Neb 288

32. Ill—Snell v Snell, 14 N E 684, 123 Ill 403 5 Am S R 526
Mich—Beyschlag v Van Wagoner, 8 N W 693, 46 Mich 91

33. Tex—Coker v Roberts, 9 S W 665, 71 Tex 597

34. Wyo—Jones v Losekamp, 114 P 673, 19 Wyo 83
29 C J p 907 note 14, p 953 note 2

35. Ill—Hutchings v Huggins, 59 Ill 29.

36. Ill—Redfern v Redfern, 38 Ill 509

37. Ill—Vanzant v Vanzant, 23 Ill 536.

38. Ill—Mason v Truitt, 100 N E 202, 257 Ill. 18

39. U S—In re Gish, D C Ky, 32 F 2d 322
Ky—Carr v Britton 103 S W 2d 300, 267 Ky 802—Arnett v Salversville Nat Bank, 46 S W 2d 124, 242 Ky 216.
29 C J p 907 note 19, p 954 note 3.

40. Ky—Edy v. Lovelace, 4 Ky L 449

41. Tenn.—Daly v Willis, 5 Lea 100.

42. Iowa—Anderson v Renshaw, 291 N W 274, 229 Iowa 93—Harlow v Larson, 213 N W 417, 204 Iowa 328—First Nat Bank v Ten Napel, 200 N W 105 198 Iowa 816
29 C J p 907 note 23

43. Ala—Owens v Harris, 133 So 6, 222 Ala 161
Ark—Sirman v Sloss Realty Co, 129 S W 2d 602, 198 Ark 534—Autrey v Lake, 112 S W 2d 434, 195 Ark 243—Mid-Continent Petroleum Corporation v Smith, 56 S W 2d 420, 186 Ark 838
Fla—Suttle v Wold, 158 So 447, 117 Fla 802—Smith v Hogan, 157 So 183, 117 Fla 82—Oates v New York Life Ins Co, 152 So 671, 113 Fla 678, 116 Fla 253—McEwen v Schenck, 146 So 839, 108 Fla 119
Tex—Sanger v Calloway, Com App, 61 S W 2d 988, reversing Calloway v Bookout, Civ App, 37 S W 2d 243—King v Hill, Civ App, 167 S W 2d 628, affirmed, Sup, 172 S W 2d 298—Watson v Tolar, Civ App, 153 S W 2d 506—Logan v Aiken Civ App, 123 S W 2d 401 error dismissed, judgment correct Cates v Greene, Civ App, 114 S W 2d 592—Capitol Building & Loan Ass'n of Texas v Sosa, Civ App, 72 S W 2d 936—Hill v Wright, Civ App, 30 W 2d 812
29 C J p 908 note 25

Conveyance of minerals on homestead involves realty and requires acknowledgment—Sabens v Cochrum, Tex Civ App, 292 S W. 281.

or by both husband and wife.[44] Under these provisions it is as essential that a conveyance shall be acknowledged as that it shall be executed,[45] and a failure to acknowledge the conveyance as required by statute renders the conveyance void.[46] Where a separate acknowledgment of the wife does not comply with the statutory requirements, it has been held that no subsequent acknowledgment by the wife can make the conveyance effective,[47] although she was the only heir so that the title vested in her.[48] A properly signed contract to convey homestead property, although not acknowledged, is valid, however, where it is made simultaneously with the execution of a warranty deed which is properly acknowledged and delivered in escrow.[49] If witnesses to the acknowledgment are required by statute, this provision must be strictly complied with.[50]

Second acknowledgment after reformation. If the mortgage releasing the homestead right is corrected by a court of equity in its description of the premises no further acknowledgment by the wife is necessary.[51]

Time of acknowledgment While the conveyance of a homestead may be acknowledged by a wife on a date subsequent to the signing of the document, and the instrument is thereby rendered binding from the latter date,[52] such acknowledgment will not operate to affect the title of the husband's heirs, where he has died before the wife's acknowledgment was taken,[53] or the rights of those who purchase the land on execution sale, prior to the acknowledgment.[54]

Mode of taking acknowledgment An acknowledgment of a conveyance or encumbrance of homestead property should be taken in the manner prescribed by statute.[55] In the absence of contrary statute, the acknowledgments of husband and wife need not be taken before the same officer,[56] and, in the absence of special statutory provisions requiring it, a separate private examination of the wife in taking her acknowledgment is not necessary.[57] However, in some jurisdictions a privy examination of the wife is sometimes, by statute, made a prerequisite to the validity of a deed or mortgage of the homestead interest, executed by husband and wife.[58] While substantial compliance with the stat-

When acknowledgment not required The husband may transfer the community homestead without the wife's acknowledgment when it is done for the purpose of settling liens that are superior to the homestead claim, provided this is done in good faith and without a purpose to defraud the wife of her homestead rights—Travelers Ins Co v Anderson, Tex Civ App, 89 S W 2d 428, error refused—Hill v Wright, Tex Civ App, 30 S W 2d 812

44. Cal—Cunnyngham v Mason-McDuffie Co, 22 P 2d 515, 218 Cal 196
Neb—Storz v Clarke, 221 N W 101, 117 Neb 488—Anderson v Cusack, 214 N W 73, 115 Neb 643—David City Building & Loan Ass'n v Fast, 208 N W 964, 114 Neb 621
N D—Acklin v First Nat Bank, 254 N W 769, 64 N D 577—Hazlett v Mathieu, 220 N W 647, 57 N D 57
29 C J p 908 note 25

45. Fla—Hutchinson v Stone, 84 So 151, 79 Fla 157
N D—Acklin v First Nat Bank, 254 N W 769, 64 N D 577—Severtson v Peoples, 148 N W 1054, 28 N D 372

46. Ala—Carpenter v First Nat Bank, 181 So 239, 236 Ala 213—Hardaway v Sadler, 130 So 378, 221 Ala 618—Phillips v Smith, 107 So 841, 214 Ala 382
Ark—Autrey v Lake, 112 S W 2d 434, 195 Ark 243
Fla—Smith v Hogan, 157 So 183, 117 Fla 82—McEwen v Schenck, 146 So 839, 108 Fla 119
Neb—Storz v Clarke, 221 N W 101, 117 Neb 488—Anderson v Cusack, 214 N W 73, 115 Neb 643—David City Building & Loan Ass'n v Fast, 208 N W 964, 114 Neb 621
N D—Acklin v First Nat Bank 254 N W 769, 64 N D 577
Tex—Sanger v Calloway, Com App, 61 S W 2d 988, reversing Calloway v Bookout, Civ App, 37 S W 2d 243—Hill v Wright, Civ App, 30 S W 2d 812—Lummus v Alma State Bank, Civ App, 4 S W 2d 195—Green v Hopper, Civ App, 278 S W 286—Cosgrove v Nelson, Civ App, 269 S W 891, affirmed Nelson v Cosgrove, Com App, 277 S W 1118
29 C J p 908 notes 25, 27, p 910 note 74 [b]

47. Ala—Gilbert v Pinkston, 32 So 142, 167 Ala 190, 140 Am S R 89
29 C J p 908 note 28

48. Ala—Gilbert v Pinkston, supra

49. Neb—Farmers' Inv Co v O'Brien, 189 N W 291, 109 Neb 19

50. N H—Wilson v Mills, 22 A 455, 66 N H 315

51. Ill—Denison v Gambill, 81 Ill App 170

52. Ala—Hood v Powell, 73 Ala 171—Balkum v Wood, 58 Ala 642

53. Ala—Richardson v Woodstock Iron Co, 8 So 7, 90 Ala 266, 9 L R A 348

54. Ala—Smith v Pearce, 4 So 616, 85 Ala 264, 7 Am S R. 44.

55. The purpose of the regulations and prescribed formulas for acknowledging conveyances and mortgages of homesteads is to secure certainty and reliability in conveyances and mortgages, and not to afford a means of misleading those who execute or acquire conveyances or mortgages—New York Life Ins Co v Oates, 192 So 637, 141 Fla 164

56. Cal—Cunnyngham v Mason-McDuffie Co, 22 P 2d 515, 218 Cal 196

57. Ala—Jones v Roper, 5 So 459, 86 Ala 210
29 C J p 908 note 35

58 Fla—Suttle v Wold, 158 So 447, 117 Fla 802—Oates v New York Life Ins Co, 152 So 671, 113 Fla 678, 116 Fla 253
Tex—Sanger v Calloway, Com App, 61 S W 2d 988, reversing Calloway v Bookout Civ App, 37 S W 2d 243
29 C J p 908 note 36

The purpose of this statutory requirement is to safeguard the wife from possible duress or other improper influence of the husband—Weatherwax v Heflin, Ala, 12 So 2d 554—Lazenby v Lazenby, 157 So 670, 229 Ala 426

Where the homestead is the property of the wife and not of the husband, the requirement of the statute relating to private examination of the wife does not apply—Jones v Stollenwerck, 119 So 844, 218 Ala 637—29 C J p 908 note 36 [a]

band in a conveyance of the homestead, she is estopped thereafter to assert any right, title, or interest therein;[95] and a wife, who joins her husband in deeding the homestead owned by the husband as security for a loan then made and for future advances to him, binds her homestead right for such future advances.[96] A court, however, may not impose a greater encumbrance on the homestead than has been placed thereon by the parties themselves, or by the law[97]

Conveyance of undivided interest in homestead Where a husband and wife convey, in the manner provided by law, an undivided interest in their homestead property, their homestead rights are subordinated to all the rights and obligations pertaining to the relation of tenants in common[98] In such a case the parties may enter into a voluntary partition of the premises, in which case they may agree for the payment of owelty to equalize the shares allotted[99]

§ 140. Conveyances Not in Compliance with Statutory Requirements

a In general
b Effect of divorce
c. Remedies of homestead claimants

a. In General

Conveyances of the homestead not in compliance with statutory requirements are generally considered to be void as to the homestead interest.

A conveyance or encumbrance of homestead property which does not comply with the statutory requirements for the conveyance or encumbrance of homesteads is generally considered to be void[1] as to the homestead interest.[2] Such a conveyance, however, is not void as to those grantors who have no homestead interests in the premises conveyed,[3] and, as will be seen infra § 146, it is not necessarily void as to that portion of the property conveyed which is in excess of the statutory homestead exemption

Where the wife does not consent to a mortgage of the homestead, it may nevertheless be enforced if neither the mortgagor nor his wife claims the premises as a homestead[4]

b. Effect of Divorce

According to the weight of authority a homestead conveyance which is invalid because not the joint act of husband and wife is not validated by their subsequent divorce

Where a conveyance or encumbrance of the homestead without the joinder or consent of both husband and wife is invalid, it is held, according to the weight of authority, that a subsequent divorce of the homesteader and his wife will not give force to the invalid conveyance or encumbrance,[5] but the contrary view also finds support[6]

c. Remedies of Homestead Claimants

Where a conveyance of the homestead is invalid, the homestead claimant may institute an appropriate proceeding to protect his rights

In a proper case the homestead claimants may recover damages from one claiming under an invalid conveyance of the homestead where he has wrongfully deprived them of possession of the homestead premises[7]

Specific performance of contract to convey Where a contract for the sale of a homestead is

95. Neb—Laughlin v Gardiner, 176 N W 727, 104 Neb 237, rehearing denied 178 N W 270, 104 Neb 237
Tenn—Conyers v Frye, Ch A, 58 S W 1126

96. Minn—Staples v East St Paul State Bank, 142 N W 721, 122 Minn 419

97. S D—Boyce v Hawn, 216 N W 589, 52 S D 53

98. Tex—Sayers v Pyland, 161 S W 2d 769, 139 Tex 57, 140 A L R 1164, reversing, Civ App, Pyland v Savers, 118 S W 2d 450.

99. Validity of lien
Where husband and wife, having conveyed an undivided half interest in their homestead property, assumed a note secured by a lien on the one-half interest conveyed by them as part of partition agreement in order to equalize the partition, agreeing that indebtedness should be secured by vendor's lien on all of property set aside to them, indebtedness was secured by a valid lien against entire interest in property set aside to husband and wife which lien was superior to homestead right of husband and wife—Savers v Pyland, supra

1. Neb—Anderson v Cusack 214 N W 73, 115 Neb 643—David City Building & Loan Ass'n v Fast, 208 N W 961 114 Neb 621
N D—Acklin v First Nat Bank, 254 N W 769, 64 N D 577
Tex—Hill v Wright, Civ App, 30 S W 2d 812
29 C J p 910 note 74, 29 C J p 911 note 81 [c]
Failure to comply with particular statutory requirements as rendering conveyance or encumbrance void see supra §§ 126–138

2. Ala—Carpenter v First Nat Bank, 181 So 239, 236 Ala 213
Ill—Logue v Von Almen, 40 N E 2d 73, 379 Ill 208, 140 A.L R 251.

3. Ill—Logue v Von Almen, supra

4. Ky—Page v Coakley, 7 Ky L 368

5. Cal—Kinsell v Thomas, 124 P 220, 18 Cal App 683
29 C J p 912 note 85

6. Vt—Heaton v Sawyer, 15 A 166, 60 Vt 495
29 C J p 911 note 86

7. **Evidence** in trespass to try title warranted judgment for actual and exemplary damages against association claiming homestead under invalid deed executed by insane husband, for wrongfully suing out writ of sequestration with knowledge of husband's incapacity at time of execution of instrument under which claim was made—Dallas Building & Loan Ass'n v Henry, Tex Civ App, 98 S W 2d 1030, error dismissed
Avoidance of transaction see infra §§ 152–156.

not signed by the spouse of the vendor, it cannot be enforced specifically by the vendor while it remains in that condition;[8] but if the nonjoining spouse thereafter confirms the sale and both spouses are willing to perform the contract and offer to do so they may enforce specific performance of the contract against the purchaser,[9] provided he has not previously repudiated the contract[10]

The right of the vendee to specific performance of a contract to convey the homestead is considered infra § 151 b

Damages for breach of contract to purchase When a husband alone enters into an executory contract for the sale of homestead premises and afterward tenders a sufficient conveyance in which the wife properly joins, the husband can compel the purchaser to respond in damages if he refuses to accept the conveyance[11] This is also true where a properly signed and acknowledged deed is tendered by the husband after making a contract to convey which is defective because not properly acknowledged, at least where the tender is made before the contract is renounced and the purchaser at the time of the tender does not object because the contract is not acknowledged[12]

The right of the purchaser to recover damages for breach of a contract to convey homestead property is considered infra § 151 c

§ 141. —— On Termination of Homestead

The authorities differ as to whether a homestead conveyance not in compliance with statutory requirements becomes operative on the premises subsequently losing their character as a homestead

In many jurisdictions a conveyance or encumbrance of homestead property, which is inoperative because of failure to comply with statutory requirements for the conveyance or encumbrance of homesteads, does not become operative on the premises subsequently losing their character as a homestead,[13] as, for instance, by the death of both husband and wife.[14] The rule is, however, subject under some statutes to the limitation that the title, which remains in the grantor because of the insufficiency of the conveyance, will pass to the grantee if possession thereof is abandoned by the grantor pursuant to the conveyance,[15] although mere abandonment not pursuant to the conveyance and for the express purpose of giving effect thereto has no such effect[16] In other jurisdictions the rule above stated does not obtain, and on termination of the homestead such a conveyance does not continue to be inoperative,[17] and it has been held that, although the wife did not join in a deed or mortgage of the homestead, it will become operative when for any cause the homestead terminates[18] Where, however, a contract for the sale of a homestead belonging to a husband and wife in which the wife did not join is void, it cannot thereafter become valid by their ceasing to occupy the land as a home, no other homestead having been acquired[19]

§ 142. —— Estoppel to Assert Invalidity

a In general
b Nonjoinder of husband or wife in conveyance
c Representations or recitals that property is not homestead
d Pretended sales and encumbrances prohibited by law
e Estoppel of wife by acts of husband

8. Neb —Storrs v Bollinger, 196 N W 512, 111 Neb 307

9. Tex —Milliken v Townsend, Com App, 16 S W 2d 259, affirming Townsend v Milliken, Civ App, 291 S W 938
29 C J p 923 notes 18, 19

10. **Right to withdraw offer**
If a contract for the sale of a homestead not signed by the wife of vendor be treated as an offer by the vendee, he may withdraw it at any time before legal acceptance by vendor —Storrs v Bollinger, 196 N W 512, 111 Neb 307

11. Tex —Gibson & Johnson v Ward, Civ App, 35 S W 2d 824, error dismissed, followed in Gibson v Canon, 35 S W 2d 828, and Gibson & Johnson v Axe, 35 S W 2d 828
29 C J p 924 note 28

12. Neb —Marodolac v Uhe, 203 N W 547, 113 Neb 450.

13. Cal - Kinsell v Thomas, 124 P 220, 18 Cal App 683
Vt —Johnson v Churchill, 92 A 26, 88 Vt 137
29 C J p 910 note 71

14. Mich —Cooper v Cooper, 127 N W 266, 162 Mich 301

15. Ill —Garrard v J S Ashbrook Co, 222 Ill App 387
29 C J p 911 note 77

16. Ark —Newman v Jacobson 158 S W 134, 108 Ark 297
Ill —Garrard v J S Ashbrook Co, supra
29 C J p 911 note 78

17. Ga —Wright v Durden, 123 S E 701, 158 Ga 244
Tex —Broussard v American Nat Ins Co, Civ App, 133 S W 2d 814, error dismissed, judgment correct —Hill v McIntyre Drilling Co, Civ App, 59 S W 2d 193, error refused - Alvord Nat Bank v Ferguson, Civ App, 126 S.W 622.
29 C J p 911 note 81.

18. Tex —Miller v Southland Life Ins Co Civ App, 68 S W 2d 558 - Gates v Pitts, Civ App, 2 S W 2d 307—Southwestern Lumber Co of New Jersey v Evans Civ App, 275 S W 1078—Fisher v Gulf Production Co, Civ App, 231 S W 450
29 C J p 910 note 74 [c], p 911 note 81

The reason for this rule is "that the husband has the authority to convey the community property subject to the impediment of its being a homestead The purpose of the law is to protect the wife's homestead rights in the land When the homestead character of the property ceases, the reason for the law's protection of it as such ceases"—Hill v McIntyre Drilling Co, Tex Civ App, 59 S W 2d 193, 195, error refused

19. Tex —Ward v Walker, Civ App, 159 S W 320.

a. In General

The parties to a conveyance or encumbrance of a homestead may be estopped by their acts or conduct to assert its invalidity.

Although a conveyance or encumbrance of the homestead not executed as required by the statutes may be void or at least inoperative during the existence of the homestead, see supra §§ 140, 141, it has frequently been recognized that the parties may by their conduct estop themselves to assert its invalidity.[20] Neither the statute of frauds[21] nor the various statutory provisions for the protection of the homestead[22] do away with the general equity doctrine of estoppel, and courts of equity will not permit laws enacted for the protection of the homestead to be invoked as a shield to perpetrate a fraud.[23] In order to work an estoppel, however, the essential elements of an estoppel must be present.[24] Thus, to work an equitable estoppel, it is essential that the spouse charged therewith should have done, or refrained from doing, some act, or pursued some course of conduct, on which the estoppel may be based,[25] that he or she should have acted with knowledge of the facts and of his or her rights,[26] that the party claiming the estoppel was without knowledge or means of knowledge of the facts on which he bases his claim of estoppel,[27] and that he was misled[28] and prejudiced[29] by the acts or conduct of the spouse sought to be estopped.

Against husband. The husband is not estopped by his false representation that his wife's acknowledgment was taken before the proper officer,[30] and his participation in the execution of a deed or mortgage as an individual will not estop him, in a representative capacity, to deny its validity as to beneficiaries of the homestead.[31] The husband, however, may not question the validity of a conveyance executed by himself and a woman erroneously supposed by him to be his lawful wife, where he subsequently secures a divorce from his lawful wife and the latter dies, leaving no children of the marriage.[32]

Against wife. A wife may be estopped by her acts or conduct to assert the invalidity of a conveyance or encumbrance of the homestead.[33] An

20. U.S.—Hamling v. Ætna Life Ins. Co. of Hartford, Conn., C.C.A.Neb., 34 F.2d 112.
N.D.—State v. Stoelting, 208 N.W. 101, 53 N.D. 736.
Wis.—Hainz v. Kurth, 278 N.W. 413, 227 Wis. 260—Krueger v. Groth, 209 N.W. 772, 190 Wis. 387.
29 C.J. p. 912 note 89.
But it has been held that if the statutory requirement of signature and acknowledgment is not complied with the signature and acknowledgment cannot be supplied by estoppel.—Davis v. Thomas, 92 N.W. 187, 66 Neb. 26—29 C.J. p. 913 note 26.
Estoppel to claim homestead see infra §§ 191–195.

21. N.D.—Engholm v. Ekrem, 119 N.W. 35, 18 N.D. 185.

22. Fla.—New York Life Ins. Co. v. Oates, 192 So. 637, 141 Fla. 164.
29 C.J. p. 912 note 91.

23. Fla.—New York Life Ins. Co. v. Oates, supra.
Iowa.—Townsend v. Woodworth, 169 N.W. 752, 185 Iowa 99.
N.D.—State v. Stoelting, 208 N.W. 101, 53 N.D. 736.

24. Iowa.—State Exchange Bank of Parkersburg, Iowa, v. Nolan, 207 N.W. 745, 201 Iowa 722.
Tex.—Milliken v. Coker, Civ.App., 90 S.W.2d 902, modified on other grounds, 119 S.W.2d 620, 132 Tex. 23.—Fest v. Williams, Civ.App., 89 S.W.2d 1072.—Harboth v. Petermann, Civ.App., 291 S.W. 641, reversed on other grounds, Peterman v. Harboth, Com.App., 300 S.W. 33.

Incompetency of parties.
Building and loan association claiming homestead under deed executed by insane husband of whose insanity building and loan association had notice and by wife, was not entitled to property by estoppel since to work estoppel parties to deed must be sui juris and competent to make deed effectual as contract.—Dallas Building & Loan Ass'n v. Henry, Tex.Civ.App., 98 S.W.2d 1030, error dismissed.

25. Tex.—First State Bank of Hubbard v. Yeanon, Civ.App., 169 S.W.2d 735.—Laubhan v. Alliance Life Ins. Co., Civ.App., 131 S.W.2d 788.

26. Ark.—Callaway v. Ashby, 95 S.W.2d 907, 192 Ark. 929.

27. Tex.—First State Bank of Hubbard v. Yeanon, Civ.App., 169 S.W.2d 735.—Logan v. Aiken, Civ.App., 123 S.W.2d 401, error dismissed, judgment correct.—Glenn v. Miller, Civ.App., 82 S.W.2d 167, error dismissed.—Bernard v. Jefferson County Inv. & Bldg. Ass'n, Civ.App., 65 S.W.2d 503, affirmed, 95 S.W.2d 1307, 128 Tex. 97.—Washington v. City of Houston, Civ.App., 60 S.W.2d 519, error refused.—Robertson v. Vernon, Civ.App., 3 S.W.2d 573, affirmed, Com.App., 12 S.W.2d 991.—Green v. Hopper, Civ.App., 278 S.W. 286.

28. Tex.—Logan v. Aiken, Civ.App., 123 S.W.2d 401, error dismissed, judgment correct.—Mosher Steel & Machinery Co. v. Nash, Civ.App., 6 S.W.2d 158, error dismissed.—Robertson v. Vernon, Civ.App., 3 S.W.2d 573, affirmed, Com.App., 12 S.W.2d 991.
29 C.J. p. 913 note 28.

29. Tex.—Robertson v. Vernon, supra.—Walter Connally & Co. v. Gaston, Civ.App., 295 S.W. 953.
29 C.J. p. 913 note 28.

30. Ala.—New England Mortg. Security Co. v. Payne, 18 So. 164, 107 Ala. 578.—Edinburgh American Land Mortg. Co. v. Peoples, 14 So. 656, 102 Ala. 241.

31. Ga.—Powell v. Powell, 127 S.E. 117, 159 Ga. 837.—Hall v. Matthews, 68 Ga. 490.
La.—Barron v. Jackson Parish Bank, 168 So. 90, 181 La. 886.—Reymond v. Louisiana Trust & Savings Bank, 148 So. 663, 177 La. 409.

32. Mich.—Trout v. Rumble, 16 N.W. 367, 82 Mich. 202.

33. Fla.—New York Life Ins. Co. v. Oates, 192 So. 637, 141 Fla. 164.
Iowa.—Townsend v. Woodworth, 169 N.W. 752, 185 Iowa 99.
Tex.—Dutton v. Kinsey, Civ.App., 124 S.W.2d 416.
29 C.J. p. 912 note 1.
Estoppel of wife by acts of husband see infra subdivision e of this section.

Wife held estopped.
Married woman signing note on repurchase of homestead with deed of trust containing notary's certificate of acknowledgment, following appearance before notary was estopped as against innocent holder of note for value to assert that original deed conveying homestead lacked acknowledgment.—Sanger v. Calloway, Tex.

estoppel may be created against the wife by her affidavit that the money, to secure which a mortgage is given on the homestead, is to be used in paying the purchase price,[34] by her surrendering possession of the homestead attempted to be conveyed, permitting the grantee to contract with third persons respecting the land and to improve it,[35] by her reciting in the deed, made under an order of court requiring a cash sale, that the consideration has been paid,[36] by her sale of part of a tract of land subject to a lien, and by her consenting to a release of the lien on that part,[37] by her delaying to make objection until after the land had enhanced greatly in value by reason of the discovery of oil in the vicinity,[38] or by her joining with her husband in a subsequent valid mortgage, where previously a defective one had been executed by him alone,[39] but no equitable estoppel arises against the wife unless she has been guilty of a positive fraud or some act of suppression which in law would be equivalent thereto.[40] No estoppel arises against her from a recital in a valid contract, executed by both spouses, of a prior but invalid lease executed by the husband alone,[41] or by a surrender of the premises to the vendee by husband and wife, when the wife knows nothing of the contract of sale and did not join therein,[42] or by husband and wife giving an option for the sale of land, subsequently claimed as a homestead.[43] The mere acceptance of the purchase money and the delivery of an instrument which is void as a conveyance of the homestead will not estop the wife to deny the validity of the conveyance as against one who is not a purchaser for value without notice.[44] Likewise, where the husband becomes insane and the homestead is sold by order of court to pay the expenses of the wife and children, the fact that the wife receives a part of the proceeds of the sale will not estop her to recover possession of the homestead from the purchaser.[45]

Against both husband and wife Both husband and wife may be estopped if they convey jointly and surrender possession of the premises,[46] if they verbally agree to convey and the purchaser pays the whole or a part of the price, enters into possession, and makes permanent improvements with their acquiescence,[47] if they convey by deed absolute, subsequently disavowing all interest in the land and permitting their grantee to mortgage it to an innocent third person,[48] or if they mortgage one of two tracts of land, residing at the time upon the parcel not encumbered.[49] If the conveyance is valid on its face and the homestead laws have been complied with, husband and wife may be estopped to set up the actual fraud of either to render the conveyance void.[50]

Against purchaser or mortgagee Where the elements of estoppel are present, the purchaser of homestead premises may be estopped to set up the invalidity of the conveyance or contract to convey.[51] So also a mortgagee may be estopped to assert the invalidity of a prior mortgage of the homestead.[52]

Com App, 61 S W 2d 988, reversing Calloway v Bookout Civ App, 37 S W 2d 213

Wife held not estopped

(1) Wife's failure to object to foreclosure of mortgage purporting to encumber homestead but which was void because not acknowledged by her, was not acquiescence constituting estoppel notwithstanding mortgagee paid taxes — Acklin v First Nat Bank, 274 N W 769, 64 N D 577

(2) Married woman who joined in sale and repurchase of homestead was not estopped to allege invalidity of deed for want of acknowledgment by her her failure to acknowledge being neither intentional nor fraudulent — Cosgrove v Nelson Tex Civ App 269 S W 891 affirmed, Com App, Nelson v Cosgrove, 277 S W 1118

34. Ga — Lathrop v Soldiers' Loan & Building Assoc 15 Ga 483

35. Iowa — Spafford v Warren, 47 Iowa 47

36. Ga — Grant v McCurty, 43 S E 401, 117 Ga 188

37. Tex — Loe v Bellgardt Civ App, 193 S W 714 — Henkel v Bohnke 26 S W 645, 7 Tex Civ App 16

38. Tex — Cooper v Hinnman, Com App 235 S W 561, reversing, Civ App, 212 S W 972

39. Tenn — Enochs v Wilson, 11 Lea 228

40. Tex — Grissom v Anderson Civ App, 18 S W 2d 809, reversed on other grounds 79 S W 2d 619, 125 Tex 26

41. Kan — Franklin Land Co v Wea Gas Coal & Oil Co, 93 P 630, 43 Kan 518

42. Minn — Law v Butler, 47 N W 53, 14 Minn 482, 9 L R A 856

43. Ala — Lyon v Harden, 29 So 777, 129 Ala 643

44. Tex — Pickens v Bacle, 101 S W 2d 182, 129 Tex 610, affirming Bacle v Pickens, Civ App, 78 S W 2d 260, rehearing denied Pickens v Bacle, 105 S W 212, 129 Tex 610

45. Cal — Fluge v Garvey, 47 Cal 371

46. Ill — Brown v Coon, 36 Ill 214, 85 Am D 402

Mo — Kopp v Blessing, 25 S W 757, 121 Mo 391

47. Ark — Dillard v Kelley, 171 S W 2d 53 — Nicholas v Ward 168 S W 2d 1095

N D — Engholm v Ekrem, 119 N W 35, 18 N D 185

Tex — Guerra v Tabasco Consol Independent School Dist Civ App 103 S W 2d 173 error dismissed

29 C J p 959 note 13

Parol gift of homestead is within rule Peterman v Harboth Tex Com App, 300 S W 33, reversing Harboth v Petermann, Civ App, 291 S W 641

48. Kan Sellers v Gay, 36 P 741, 53 Kan 551 Sellers v Crossan, 35 P 205, 52 Kan 570

49. Ky — Hayden v Robinson, 7 Ky L 707

50. Ala — Sims v Gunter, 78 So 62, 201 Ala 286

29 C J p 913 note 21

51. Iowa — Luttschwager v Fank, 140 N W 170, 151 Iowa 55

29 C J p 917 note 6

52. N D — State v Stoelting, 208 N W 101, 53 N D 736.

General covenants of title. Although there is authority to the contrary,[53] it has been held that where the deed or mortgage contains general covenants of title these will estop neither the homesteader[54] nor his wife[55] to assert homestead rights

b. Nonjoinder of Husband or Wife in Conveyance

A husband and wife may be estopped by their acts or conduct to assert the invalidity of a conveyance of their homestead on the ground that one of them did not join therein

On the principle that estoppel will not supply the want of power or make valid an act prohibited by express provision of law,[56] it is held in jurisdictions where a conveyance of the homestead is void without the joinder of husband and wife that the husband is not estopped by a deed,[57] although founded on a valuable consideration,[58] or by a mortgage of the homestead,[59] or by a lease,[60] in which the wife does not join, and that the wife is likewise not estopped by a conveyance, lease, or encumbrance of the homestead in which she did not join,[61] and the fact that she was willing to join in the conveyance does not estop her[62] It has also been held that no estoppel results against the wife from her executing a mortgage[63] or lease[64] of the premises without her husband joining her in its execution, even though she accepts the benefits of the transaction[65]

Estoppel independent of fact of nonjoinder Notwithstanding the rule, above stated, of no estoppel arising from mere nonjoinder of the spouses, where the acts or conduct of the grantor[66] or the nonjoining spouse[67] are such as to raise an independ-

53. N H —Foss v Strachn, 42 N H 40

54. Minn —Alt v Banholzer, 40 N W 830, 39 Minn 511, 12 Am S R 681
29 C J p 913 note 24

55. Ga —Timothy v Chambers 11 S E 598 85 Ga 267, 21 Am S R 163

56. Neb —Whitlock v Gossen, 53 N W 980, 35 Neb 829

57. Tenn —Shaw v Woodruff, 3 S W 2d 167, 156 Tenn 529
29 C J p 913 note 35

On termination of homestead

A husband acting in good faith may select the homestead of the family and when he has acquired a new home, and his wife has removed with him to the newly acquired homestead, a prior deed made by him without her concurrence to the former homestead becomes as to the husband operative as an estoppel against his right to recover the property and the wife's right being that of homestead only, ceases when a new homestead has been acquired and she removes thereto —Southwestern Lumber Co of New Jersey v Evans, Tex Civ App, 275 S W 1078—29 C J p 914 note 44 [a]

58 Ala —Clark v Bird, 18 So 359, 157 Ala 278 132 Am S R 25
29 C J p 914 note 36

59. Ala —Carey v Hart, 94 So 298 208 Ala 316
Tenn —Shaw v Woodruff, 3 S W 2d 167, 156 Tenn 529
29 C J p 914 note 37

60. Okl —Farmers' Union Co-op Royalty Co v Adams 77 P 2d 68, 182 Okl 245
29 C J p 914 note 38

61. La —Clarke v Oden, 99 So 605, 155 La 801
Okl —Farmers' Union Co-op Royalty Co v Adams, 77 P 2d 68, 182 Okl 245.
Tenn —Shaw v Woodruff, 3 S W 2d 167 156 Tenn 529
Tex —Gose v Burnett Civ App, 60 S W 2d 886, error refused
29 C J p 914 note 39

62 Idaho —Hughes v Latour Creek R Co, 166 P 219, 30 Idaho 475

63. Miss —Gardner v Cook, 158 So 150 173 Miss 244
Okl —Standard Savings & Loan Ass'n v Acton, 63 P 2d 15 20 178 Okl 400 quoting **Corpus Juris**
29 C J p 914 note 41

64. Kan —Thompson v Millikin, 172 P 534 102 Kan 717
29 C J p 914 note 42

65 Kan —Thompson v Millikin, supra
29 C J p 914 note 42

Receipt by wife of proceeds of loan to her secured by mortgage of homestead executed by her alone as fee owner does not estop her to assert that the mortgage is invalid because the husband did not join therein
Miss —Gardner v Cook, 158 So 150, 173 Miss 244
Okl —Standard Savings & Loan Ass'n v Acton, 63 P 2d 15 178 Okl 400

66. Ala —Green v Federal Land Bank of New Orleans, 183 So 418 236 Ala 431
N D —State v Stoelting, 208 N W 101 53 N D 736
29 C J p 914 note 44

Acts held not to raise independent estoppel

Husband is not estopped to assert invalidity of oil and gas lease of homestead executed by him alone by reason of his having received and retained dividends paid on stock of lessee —Farmers' Union Co-op Royalty Co v Adams, 77 P 2d 68, 182 Okl 245

67. Iowa —Shaffer v Miller, 192 N W 868, 195 Iowa 891.
Minn —St Denis v Mullen, 196 N W 258, 157 Minn 266
N D —State v Stoelting 208 N W 101, 53 N D 736
Okl —Studham v Moore, 227 P 128 100 Okl 26
Tex —Grissom v Anderson, Civ App, 48 S W 2d 809 reversed on other grounds 79 S W 2d 619, 125 Tex 26
29 C J p 914 note 45

Acts held to raise independent estoppel

(1) A wife who joined in action to compel specific performance of contract relating to sale of land could not assert in subsequent action to establish title to the same land that the land was her homestead and that she had not signed the contract —Rogler v Bocook, 84 P 2d 893, 148 Kan 858

(2) A wife who observed her husband removing timber from their homestead property and received benefit from proceeds of sale of the timber was estopped to deny validity of timber deed on ground that she had not joined in its execution and acknowledgment —Edwards v Jones, 123 S W 2d 286, 197 Ark 229

(3) Husband to whom wife deeded one-half interest in homestead subject to mortgage executed by her alone is estopped to deny validity of mortgage as to interest so conveyed —Truro Sav Bank of Truro v Foster, 220 N W 20, 206 Iowa 432

Acts held not to raise independent estoppel

(1) Failure of wife to make complaint to mortgagee on learning that mortgage not executed or acknowledged by her, was outstanding against homestead does not estop her from claiming relief against mortgage —Bacon v Western Securities Co, 252 N W 317, 125 Neb 812

(2) Wife's request to husband to transfer homestead and recognition

ent estoppel, such estoppel may be invoked against them. As against the grantor, this may be done where the grantor stated at the time of the execution of the instrument that he or she was single and unmarried,[68] unless the advantage from his or her wrong will accrue at least in part to some person other than himself or herself protected by the homestead law,[69] but it has been held that the mere fact that the grantor is described in the conveyance as a single person will not estop the grantor to show that he or she is a married person and that the conveyance is invalid.[70] Where the husband and wife are occupying property standing in the name of the husband as their home without a declaration of homestead, a mortgage executed by the husband alone to a mortgagee who knows the facts is binding as to the interest of the husband in the homestead,[71] but not as to the wife's interest.[72]

Death of the nonjoining spouse will not affect an estoppel arising before such death.[73]

Estoppel as against spouses' children. Where the children of a husband and wife inherit an interest in the homestead on the death of the husband, they may be estopped by their conduct to claim that a conveyance by the husband of the homestead in which his wife did not join is void.[74]

c. Representations or Recitals That Property Is Not Homestead

Where land is not actually being used as a homestead, representations by the owners in conveying it that it is not homestead property may estop them to assert the contrary later. If, however, the land is actually being used as a homestead, such representations, do not work an estoppel

Where land is not actually being used as a homestead,[75] or where it is being used in such an ambiguous manner as to render its status as a homestead doubtful,[76] representations by the husband

of transfer, without her signature, as valid could not give deed validity—Fairley v Howell 131 So 109, 159 Miss 668

(3) Fact that husband signed as witness on wife's new contract for deed did not estop him to assert invalidity of surrender of prior contract for deed as attempt to alienate interest in homestead without his consent—Craig v Baumgartner, 254 N W 440 191 Minn 42

(4) Other acts

U S—Sperry Oil & Gas Co v Chisholm, C C A Okl, 282 F 93, affirming, D C, Chisholm v Creek & Indiana Development Co, 273 F 589, and certiorari granted 43 S Ct 463, 261 U S 611, 67 L Ed 826, and affirmed in part and reversed in part on other grounds 44 S Ct 372, 264 U S 488 68 L Ed 803

Ark—Callaway v Ashby, 95 S W 2d 907, 192 Ark 929

Iowa—Mill Owners' Mut Fire Ins Co v Petley, 229 N W 736, 210 Iowa 1085—Brunsdon v Brunsdon, 200 N W 823, 199 Iowa 1099

Minn—Butler Bros Co v Levin, 207 N W 315, 166 Minn 158

Tex—Logan v Aiken, Civ App, 123 S W 2d 401, error dismissed, judgment correct

68. Ark—Johnson v Commonwealth Building & Loan Ass'n, 31 S W 2d 136, 182 Ark 226

29 C J p 914 note 47

Grantee not misled by statement

City taking purported deed from grantor as feme sole, knowing that she was married woman living with her husband in possession of land which was her homestead, could not claim land by way of estoppel—Washington v City of Houston, Tex Civ App, 60 S.W 2d 519, error refused

69. Neb—Pitman v Mann 98 N W 821, 71 Neb 257

29 C J p 914 note 48

70. Neb—France v Bell, 71 N W 984, 52 Neb 57

29 C J p 914 note 49

71. Utah—Thompson v Reynolds, 204 P 516 59 Utah 416

72. Utah—Thompson v Reynolds, supra

73. Kan—Adams v Gilbert 72 P 769, 67 Kan 273, 100 Am S R 456

Neb—Pitman v Mann, 98 N W 821, 71 Neb 257

74. Mich—Altfather v Bloom, 188 N W 428 218 Mich 582

Minn—St Denis v Mullen, 196 N W 258 157 Minn 266

75. U S—Collier v Union Central Life Ins Co, C C A Tex, 100 F 2d 411

Tex—Lincoln v Bennett 156 S W 2d 504, modifying Civ App, 135 S W 2d 632—Skiles v Shropshire, 77 S W 2d 872, 124 Tex 162, modifying, Civ App, 50 S W 2d 402—Whittaker v Schlanger Civ App, 139 S W 2d 177, error dismissed, judgment correct—Rutland Sav Bank v Isbell, Civ App, 129 S W 2d 505, affirmed 154 S W 2d 412, 137 Tex 432—Greer v Franklin Life Ins Co, Civ App, 109 S W 2d 305, error dismissed—Caraway v John Hancock Mut Life Ins Co, Civ App, 103 S W 2d 791, error dismissed—Greer v Brock, Civ App, 91 S W 2d 855—Wehring v Schumann, Civ App, 83 S W 2d 1112—McCrea v Underwood, Civ App, 73 S W 2d 593—Weiser v Travis Cotton Seed Products Co, Civ App, 63 S W 2d 246 error refused—First Texas Joint Stock Land Bank of Houston v Chapman, Civ App, 48 S W 2d 651, error dismissed—Wharton v Mortgage Bond Co of New York, Civ App 48 S W 2d 519—Rose v Turner, Civ App, 16 S W 2d 433 conforming to answer to certified questions 7 S W 2d 70, 117 Tex 461—Wooten v Jones, Civ App, 286 S W 680—Llewellyn v First Nat Bank, Civ App, 265 S W 222—Watkins Land Mortg Co v Temple 119 S W 728, 56 Tex Civ App 65—Leslie v Elliott, 64 S W 1037, 26 Tex Civ App 578

29 C J p 915 note 53

Right to rely on representation

The grantee or mortgagee has a right to rely on such a representation unless the existing visible circumstances are such as to apprise him of the contrary—Alexander v Wilson, 77 S W 2d 873 124 Tex 392, 128 A L R 412 reversing Wilson v Alexander, Civ App, 50 S W 2d 410

Mortgagors were estopped to assert claim to homestead in mortgaged farm by declaration in mortgage that farm was not their homestead, where mortgagors resided in town notwithstanding husband used farm for raising of live stock and cultivated part of land and that mortgagee knew that mortgagors did not own their town residence—Alexander v Wilson, supra

Where the grantee or mortgagee knew that the property was homestead property, he cannot invoke an estoppel, because he could not have relied on the homestead claimant's contrary statements—First Nat Bank v Solis, Tex Civ App, 137 S W. 2d 142, error refused—Higgins v Millsap Tex Civ App, 121 S W 2d 169—Glenn v Miller, Tex Civ App, 82 S W 2d 167, error dismissed

76. Tex—Lincoln v Bennett, Tex, 156 S W 2d 504, modifying, Civ App, 135 S W 2d 632—Greer v.

and wife in conveying or encumbering it that it is not homestead property may estop them and their heirs thereafter to assert the contrary On the other hand, where the property is openly occupied as a homestead, representations of this character made by husband or wife or both[77] as where they are in the instrument of conveyance in question,[78] in another instrument,[79] or in an affidavit made to secure a loan,[80] will not estop the party so representing to claim the statutory exemption

Franklin Life Ins Co, Civ App, 109 S W 2d 305, error dismissed—First Texas Joint Stock Land Bank of Houston v Chapman, Civ App, 48 S W 2d 651, error dismissed

Where either of two places may constitute homestead

(1) Where the tangible facts respecting two places are such that the homestead character will attach to either, to the exclusion of the other, according as the husband and wife intend, a declaration by the spouses of their intentions in this respect may estop them from disputing the truth of the declaration--Hughes v Wruble, 116 S W 2d 368, 131 Tex 444, affirming, Civ App, 88 S W 2d 661—Carstens v Landrum Tex Com App, 17 S W 2d 803, reversing, Civ App, 5 S W 2d 208—Haile v Federal Land Bank of Houston Tex Civ App 135 S W 2d 1024, error refused Covel v Mortgage Bond Co of New York, Tex Civ App 124 S W 2d 204—Higgins v Millsap Tex Civ App, 121 S W 2d 169 Gibraltar Sav & Bldg Ass'n v Collier Tex Civ App 118 S W 2d 639, error refused - First Coleman Nat Bank of Coleman v Childs Tex Civ App, 113 S W 2d 602 error refused—Greer v Franklin Life Ins Co Tex Civ App, 109 S W 2d 305 error dismissed—Carraway v John Hancock Mut Life Ins Co Tex Civ App, 103 S W 2d 791 error dismissed—Continental Southland Savings & Loan Ass'n v Palmer Tex Civ App, 92 S W 2d 1053 error dismissed—Hughes v Wruble Civ App, 88 S W 2d 661 affirmed 116 S W 2d 368, 131 Tex 444—Walthall v Barnes, Tex Civ App 83 S W 2d 1082, error dismissed—McMullan v San Antonio Joint Stock Land Bank of San Antonio, Tex Civ App, 78 S W 2d 669, error refused—Ackerson v Farm & Home Savings & Loan Ass'n of Missouri, Tex Civ App 77 S W 2d 559, error refused--Farmers' Nat Bank of Dublin v Carmony, Tex Civ App, 62 S W 2d 1115—Life Ins Co of Virginia v Weatherford, Tex Civ App, 60 S W 2d 883 error refused—American State Bank & Trust Co v Johnston Tex Civ App 58 S W 2d 880, error refused—Sanders v Life Ins Co of Virginia Tex Civ App 57 S W 2d 327—Dallas Building & Loan Ass'n v Patterson Tex Civ App 48 S W 2d 657, error refused—Wharton v Mortgage Bond Co of New York, Tex Civ App, 48 S W 2d 519—Blanks v First Nat Bank Tex Civ App 44 S W 2d 393, error refused—Gibraltar Sav & Bldg Ass'n v Harper, Tex Civ App, 41 S W 2d 130, error refused—Purdy v Grove, Tex Civ App, 35 S W 2d 1078 error refused

(2) Where husband and wife in their homestead designation make representations to party with respect to which of certain lands comprise their homestead, and such party in good faith and without notice of untruthfulness of such representations, acts on them to his damage, husband and wife will be estopped to deny truth of such representations

US—Western Mortgage & Investment Co v Burford Tex 71 F 74 17 C C A 602, reversing C C, 67 F 860

Tex—Dallas Joint Stock Land Bank v Gore Civ App, 100 S W 2d 396, error dismissed—Wehring v Schumann, Civ App 83 S W 2d 1112—Dodson v Dickey Civ App, 264 S W 586

(3) Fraudulent conspiracy between lender's agent and spouses making affidavit designating adjoining place as homestead, to secure loan on spouses' homestead avoided imputation of agent's notice to lender and estopped spouses to assert homestead against lender - Dallas Building & Loan Ass'n v Patterson Tex Civ App, 48 S W 2d 657, error refused

77. Miss Kyle v Peoples Bank & Trust Co 187 So 534, 186 Miss 287

Okl—State v Stokes 286 P 1, 6 142 Okl 160 quoting **Corpus Juris**

Tex—Lincoln v Bennett 156 S W 2d 504 modifying Civ App, 135 S W 2d 632 Rutland Sav Bank v Isbell 154 S W 2d 442 137 Tex 432 affirming Civ App, 129 S W 2d 505—Nixon v Hirschi 136 S W 2d 583, 131 Tex 415 reversing Hirschi v Nixon, Civ App 103 S W 2d 833—First State Bank of Hubbard v Zeanon Civ App, 169 S W 2d 735—Ray v Metzger, Civ App 165 S W 2d 207 affirmed, Sup, 172 S W 2d 480—Rutland Sav Bank v Isbell Civ App, 129 S W 2d 505 affirmed 154 S W 2d 442, 137 Tex 432—Blomgren v Van Zandt Civ App, 126 S W 2d 506—Higgins v Millsap Civ App, 121 S W 2d 469—Greer v Franklin Life Ins Co, Civ App 109 S W 2d 305, error dismissed—Fest v Williams, Civ App 89 S W 2d 1072- Ackerson v Farm & Home Savings & Loan Ass'n of Missouri Civ App 77 S W 2d 559, error refused—Seidemann v New Braunfels State Bank, Civ App, 75 S W 2d 167 error refused—Weiser v Travis Cotton Seed Products Co, Civ App, 63 S W 2d 246, error refused—Gibraltar Sav & Bldg Ass'n v Harper, Civ App, 41 S W 2d 130, error refused—Wilson v Levy, Civ App, 13 S W 2d 971—Citizens' State Bank of Lindale v Jeffries, Civ App, 2 S W 2d 317, error refused—Thurman v First State Bank of Carbon, Civ App, 300 S W 123, reversed on other grounds First State Bank of Carbon v Thurman, Com App, 12 S W 2d 146—Blanton v Alexander, Civ App, 298 S W 308—Wootton v Jones Civ App 286 S W 680—Llewellyn v First Nat Bank, Civ App, 267 S W 222

29 C J p 915 note 55

The reason is that those dealing with the homestead owners cannot ignore the notice conveyed by actual use of the premises as a homestead—Wharton v Mortgage Bond Co of New York, Tex Civ App, 48 S W 2d 519—City Central Bank & Trust Co v Byrne, Tex Civ App 47 S W 2d 432 error refused—American Exchange Nat Bank v Jeffries, Tex Civ App, 36 S W 2d 558 error dismissed—Farmers' State Bank v Farmer, Tex Civ App, 157 S W 283

78. Tex—Blomgren v Van Zandt, Civ App, 126 S W 2d 506 Higgins v Millsap, Civ App, 121 S W 2d 169—City Central Bank & Trust Co v Byrne, Civ App, 47 S W 2d 432, error refused—American Exchange Nat Bank v Jeffries, Civ App, 36 S W 2d 558 error dismissed—Black v Boyer Civ App, 21 S W 2d 1091, error dismissed

29 C J p 915 note 56—21 C J p 1096 note 67

Estoppel to deny existence of representation

Under deed of trust reciting that mortgagors warranted that they did not live on realty conveyed therein and that realty was no part of homestead and not used for any homestead purpose, mortgagors were estopped to declare that no representation had been made that mortgaged property was not homestead—Le Master v Farrington Tex Civ App, 103 S W 2d 189, error dismissed

79. Tex—City Central Bank & Trust Co v Byrne, Civ App 47 S W 2d 432, error refused--American Exchange Nat Bank v Jeffries, Civ App, 36 S W 2d 558, error dismissed

29 C J p 915 note 57

80. Tex—Straus v Brooks, Civ App, 126 S W 2d 542 reversed on other grounds 148 S W 2d 393, 136 Tex 141—American Exchange Nat

d. Pretended Sales and Encumbrances Prohibited by Law

Homesteaders may be estopped by their acts and conduct to claim the benefit of homestead laws forbidding pretended sales of the homestead and the fixing of liens thereon except for certain specified debts.

The owners of a homestead may be estopped by their acts and conduct to claim the benefits of a constitutional or statutory provision forbidding the fixing of liens on the homestead except for the purchase money therefor or improvements made thereon [81] Such an estoppel may arise from declarations made by the owners inconsistent with their claim of exemption [82] Thus the homestead owners may be estopped to assert the invalidity of a prohibited mortgage of the homestead executed by them where at the time the mortgage was executed they represented or declared that the property mortgaged was not homestead property, see supra subdivision c of this section, and when the homestead owners represent that existing notes are valid mechanic's lien notes for improvements, secured by a mechanic s lien contract properly executed, and they thereby induce innocent third persons to invest funds on the faith and credit of such lien, they are estopped as to such third persons to plead that the lien is invalid [83] Likewise an estoppel may arise where the owners of the homestead enter into a pretended sale thereof Thus, where the owners enter into a simulated transaction having all the outward appearance of a valid and unconditional sale of the homestead, they are estopped to assert as against an innocent third person without notice of the facts who purchases a vendor's lien note created by the pretended sale,[84] or as against bona fide purchasers

Bank v Jeffries, Civ App, 36 S W 2d 558, error dismissed
29 C J p 915 note 58

81. U S —Collier v Union Central Life Ins Co, C C A Tex, 100 F 2d 411

Tex —Burkhardt v Lieberman, 159 S W 2d 847, 138 Tex 409, modifying, Civ App, 142 S W 2d 283—National Bond & Mortgage Corporation v Davis, Com App, 60 S W 2d 429, reversing Davis v National Bond & Mortgage Corporation, Civ App, 45 S W 2d 272—Scarborough v Home Owners' Loan Corporation, Civ App, 161 S W 2d 886, error refused—Shaw v Dyer, Civ App, 62 S W 2d 617, error dismissed—Dallas Trust & Savings Bank v Pickett, Civ App 59 S W 2d 1090, error dismissed—Dallas Building & Loan Ass'n v Patterson, Civ App, 48 S W 2d 657, error refused—First Texas Joint Stock Land Bank of Houston v Chapman, Civ App 48 S W 2d 651, error dismissed -Barron v Theophilakos, Civ App, 13 S W 2d 739—Citizens' State Bank of Lindale v Jeffries, Civ App, 2 S W 2d 317, error refused—Walter Connally & Co v Gaston, Civ App, 295 S W 953

82. Declarations consistent with known facts

Where facts of which mortgagee knows or is required to take notice are consistent with declared intention of mortgagors, mortgagors' declaration may estop them to assert homestead claim —Alexander v Wilson, 77 S W 2d 873, 124 Tex 392, reversing Wilson v Alexander, Civ App, 50 S W 2d 440

83. Tex —Lincoln v Bennett, 156 S W 2d 504, modifying, Civ App, 135 S W 2d 632—Zeigler v Federal Land Bank of Houston, Civ App, 86 S W 2d 864, error dismissed—Ackerson v Farm & Home Savings & Loan Ass'n of Missouri, Civ. App, 77 S W 2d 559, error refused —First Texas Joint Stock Land Bank of Houston v Chapman Civ App, 48 S W 2d 651, error dismissed—Garrett v Katz, Civ App, 23 S W 2d 436, corrected 27 S W 2d 373

Where wife with knowledge of falsity made affidavit that mechanic's lien claim against property was valid in order to secure loan on homestead, wife was estopped to deny validity of lien as against foreclosing mortgagee, although wife did not actually participate in collusion between husband and mortgagee's agents —Engell v Union Central Ins Co of Cincinnati, Ohio, Tex Civ App, 81 S W 2d 738

84. Tex —Lincoln v Bennett, 156 S W 2d 504, modifying, Civ App, 135 S W 2d 632—Little v Shields, Com App, 63 S W 2d 363, reversing Shields v Little, Civ App, 40 S W 2d 850—Pickett v Dallas Trust & Savings Bank, Com App, 24 S W 2d 351, reversing, Civ App, 13 S W 2d 195—Rivers v Westbrooks, Civ App 126 S W 2d 46, error refused —Strauss v Friedman, Civ App, 109 S W 2d 553, error dismissed—First Texas Joint Stock Land Bank of Houston v Chapman, Civ App, 48 S W 2d 651, error dismissed—Stooksberry v Lingwiler, Civ App, 25 S W 2d 931, error refused--Campbell v Crowley, Civ App, 56 S W 373

"It is a well-established rule in this state that where the husband and wife execute and deliver a deed to their homestead and receive in return vendor's lien notes and assign such notes to a good faith purchaser, who takes the same without notice and pays value therefor, they are estopped as against the claim of the holder of such notes to set up the defense that the sale of the homestead was simulated"—Coskrey v Morrison, Tex Civ App, 91 S W 2d 902, 903, error refused

"If the owners of the homestead simulate a transaction, in which a negotiable note would be secured by a valid and meritorious lien on the exempt estate, and their artifice succeeds in imposing upon an innocent party they are estopped from denying the truth of their solemn statements, and cannot be permitted to prove that a lien their acts declared to be valid, is void because their acts were false"—Heidenheimer v Stewart, 65 Tex 321, 323—National Bond & Mortgage Corporation v Davis, Tex Com App, 60 S W 2d 429, 434, reversing Davis v National Bond & Mortgage Corporation, Civ App, 45 S W 2d 272—Goodrich v Second Nat Bank of Houston, Tex Civ App, 151 S W 2d 276, 279, error refused—Pickett v Dallas Trust & Savings Bank, Tex Civ App, 13 S W 2d 195, 199, reversed on other grounds, Com App, 24 S W 2d 351

Owners remaining in possession

(1) The text rule has been applied even where the owners of the homestead remained in possession of the premises after entering into the pretended sale —Guaranty Bond State Bank of Mt Pleasant v Kelley, Tex Com App, 13 S W 2d 69, modifying Kelley v Guaranty Bond State Bank of Mt Pleasant, Civ App, 2 S W 2d 572—Rabbe v Federal Land Bank of Houston, Tex Civ App, 161 S W 2d 1097, error refused—Goodrich v Second Nat Bank of Houston, Tex Civ App 151 S W 2d 276, error refused—Hester v Kemper Military School, Tex Civ App, 138 S W 2d 833

(2) Thus a husband and wife representing that purported vendor's lien notes on homestead occupied by them are genuine are estopped to deny the vendor's lien —Thurman v. First State Bank of Carbon Tex Civ App, 300 S W 123, reversed on other

or other lienholders from their vendee,[85] that the simulated transaction, although in the form of an unconditional sale, was in fact a mortgage or pretended sale involving a condition of defeasance prohibited by law Subsequent declarations by the owners of the homestead inconsistent with their claim of homestead rights, however, will not necessarily estop them to claim as against their grantee, that their deed to him was but a mortgage[86] Where an attempted lien on the homestead is enforced on an estoppel, the attempted lien is not thereby made valid, but recovery is permitted to prevent fraud[87]

e. Estoppel of Wife by Acts of Husband

Acts or conduct of the husband in conveying the homestead in which the wife does not join or participate will not ordinarily estop her to claim homestead rights in the property

As will be seen infra § 195, acts or conduct of the husband with relation to homestead property in which the wife does not join or participate will not ordinarily estop her to claim homestead rights in the property Hence if the husband executes a conveyance or encumbrance of the homestead in which the wife did not join, see supra subdivision b of this section, or makes false representations in conveying or encumbering the homestead,[88] such

grounds First State Bank of Carbon v Thurman, Com App, 12 S W 2d 146

Affidavit that conveyance was bona fide

When a vendor and his wife and the purchaser all represent under oath that a deed, absolute in form, has been executed and delivered on a valuable consideration as a bona fide transaction, and such deed is duly registered, both vendors and purchaser are estopped to assert that the transaction was simulated and that the purported vendor's lien was void because of the realty being the homestead of the vendors, as against one who in good faith and without notice, purchases or lends money to take up and extend the vendor's lien note —Rabbe v Federal Land Bank of Houston, Tex Civ App 161 S W 2d 1097, error refused- Zeigler v Federal Land Bank of Houston Tex Civ App 86 S W 2d 861 error dismissed —Humphreys v Standard Savings & Loan Ass'n Tex Civ App 80 S W 2d 438, error refused - Rowland v Skiles, Tex Civ App, 79 S W 2d 898

Particular applications of rule

(1) Where recorded warranty deed executed by vendor and his wife, who were in possession of the land, recited existence of purchase-money note, and the note, secured by vendor's lien, was acquired by good-faith holder and nothing occurred that was calculated to put holder on notice of vendor's claim of homestead, vendor was estopped to contend that purported sale was simulated and was intended not to pass title but to create a mortgage of vendors homestead to secure an existing debt and was void under homestead laws — Goodrich v Second Nat Bank of Houston, Tex Civ App, 151 S W 2d 276, error refused

(2) Where owners of realty which was their homestead, conveyed the realty to a relative, and the relative borrowed money from insurance company to pay amount of vendor's lien note, owners were estopped to deny, in suit by insurance company to foreclose trust deed executed by relative that there was a sale of the homestead and to maintain that conveyance to relative was merely a simulated transaction to borrow money on the homestead — Anderson v Jefferson Standard Life Ins Co, Tex Civ App, 167 S W 2d 797

85. "A homestead claimant is estopped to assert the invalidity of her purported absolute deed of conveyance, as against a bona fide purchaser or lienholder from such homestead claimant's vendee in which she has apparently vested title, that is, as against a purchaser (1) in good faith, (2) for a valuable consideration, and (3) without any notice of the facts invalidating the homestead claimant's deed"—Red River Nat Bank in Clarksville v Latimer Tex Civ App 110 S W 2d 232, 237

Owners remaining in possession

The text rule has been applied even where the owners of the homestead remained in possession of the premises after entering into the pretended sale —Wood v Eastland Building & Loan Ass'n, Tex Civ App 75 S W 2d 466 error refused—Barton v Theophilakos, Tex Civ App 13 S W 2d 739

Rule limited to bona fide purchasers or lienholders

Where it appears that the conveyance by the homestead claimant was a simulated or pretended one, one who holds under the claimant's grantee cannot assert estoppel as against the homestead claim unless he is in the position of a bona fide purchaser for value and without notice of the facts giving rise to the claim of homestead--Vogel v Zipp, Tex Civ App, 90 S W 2d 668, error dismissed —Anderson v Barnwell, Civ App, 52 S W 2d 96, affirmed in part Anderson v Brawley, 86 S W 2d 11, 126 Tex 182—Walter Connally & Co v Gaston, Tex Civ App, 295 S W 953— Bailey v Bailey, Tex Civ App, 188 S W 261

Particular applications of rule

(1) Husband and wife who executed conveyance to third person which appeared regular on its face, and signed affidavit to effect that conveyance was real transaction in good faith were estopped to assert homestead claim as against company which made loan to third person believing that husband and wife had in fact parted with all title to property in question in absence of information by loan company to the contrary —Union Central Life Ins Co v Roach Tex Civ App, 106 S W 2d 374 error dismissed

(2) Grantors who conveyed land to grantee to enable him to procure loan thereon, and who assisted grantee to procure loan knowing that he was asserting title to the land, will not be permitted as against mortgagee to assert title and invalidity of mortgage on ground that land was their homestead--Welborn v Earle, Tex Civ App, 268 S W 982

86. Affidavit that conveyance was unconditional

Where deed absolute to homestead executed to bank was intended as mortgage, and bank knew the property was homestead, affidavit of mortgagor, executed after the deed, which stated that conveyance was unconditional, negatived idea of reconveyance, and which stated that conveyance was not for purpose of creating lien on the property, did not estop mortgagor to assert that deed was but a mortgage —First Nat Bank v Farrier, Tex Civ App, 113 S W 2d 285

87. Tex —Guaranty Bond State Bank of Mt Pleasant v Kelley, Com App, 13 S W 2d 69 modifying Kelley v Guaranty Bond State Bank of Mt Pleasant, Civ App, 2 S W 2d 572 Rabbe v Federal Land Bank of Houston Civ App, 161 S W 2d 1097, error refused

88. Ark —Johnson v Commonwealth Building & Loan Ass'n, 31 S W 2d 136, 182 Ark 226

Tex —First State Bank of Hubbard v Zeanon, Civ App, 169 S W 2d 735—Mikulenka v Mikulenka, Civ App, 168 S W 2d 517.

as representations[89] made in the deed or mortgage[90] that no homestead rights exist in the property, or recites in his deed that the consideration is the cancellation of purchase-money notes,[91] or attempts to correct an erroneous description of the premises by pointing out the true boundaries,[92] or creates a fraudulent vendor's lien on the homestead,[93] the wife's rights remain unaffected, but if the husband acts as her authorized agent,[94] or if she participates with him in an attempted fraud on innocent persons,[95] or by her actions acquiesces in an abandonment of premises by him as a homestead,[96] she is estopped to claim an exemption

§ 143. —— Ratification

In a proper case a voidable conveyance or encumbrance of the homestead may be rendered effectual by subsequent ratification

As a general rule an invalid conveyance or encumbrance of the homestead may be rendered effectual by subsequent ratification[97] provided it was not absolutely void when made[98] and the power to make the conveyance or encumbrance exists under the homestead laws at the time the ratification is made[99] Thus an invalid conveyance or encumbrance of the homestead may be made effectual by ratification where it was originally voidable for fraud[1] or temporary incapacity,[2] and in some jurisdictions a conveyance which is invalid because executed by only one of the spouses may be subsequently assented to, and ratified by, the other[3]

Ratification of a voidable conveyance or encumbrance of the homestead may be shown by subsequent acts, words, or conduct evidencing an intent to ratify,[4] as by the homesteader's acceptance of the benefits flowing from the conveyance or encumbrance[5] To establish ratification, however, a clear intent to ratify must be shown[6] It has been held that mere acceptance by a widow of the benefits of a parol contract by the husband to convey does not constitute a ratification,[7] nor will knowledge by the wife of improvements made by the purchaser have this effect[8] It has been held that a husband can-

89. Tex.—Lincoln v. Bennett, 156 S.W.2d 504 modifying Civ.App., 135 S.W.2d 632

90. Tex.—Hibbs v. City Nat. Bank of Wichita Falls, Civ.App., 293 S.W. 350—Parker v. Schrimsher, Civ.App., 172 S.W. 165

91. Tex.—Sherring v. Augustus, 32 S.W. 450, 11 Tex.Civ.App. 194

92. Tex.—Coker v. Roberts, 9 S.W. 665, 71 Tex. 597

93. Tex.—Smith v. New Waverly State Bank, Civ.App., 76 S.W.2d 201.—Seay v. Fennell, 39 S.W. 181, 15 Tex.Civ.App. 261

94. Iowa.—Sawyer v. Perry, 17 N.W. 497, 62 Iowa 238

95. Mich.—Norton v. Nichols, 35 Mich. 118

Tex.—Lincoln v. Bennett, Civ.App., 135 S.W.2d 632, modified on other grounds, 156 S.W.2d 504, 138 Tex. 56—Pickett v. Dallas Trust & Savings Bank, Civ.App., 13 S.W.2d 195, reversed on other grounds, Com.App., 24 S.W.2d 354

96. S.D.—Centerville Tp. v. Jenter, 126 N.W. 575, 25 S.D. 314

29 C.J. p. 915 note 67

97. Okl.—Crookum v. Ketchum, 50 P.2d 710, 174 Okl. 468

S.D.—Smith v. Midland Nat. Life Ins. Co., 234 N.W. 20, 57 S.D. 497

Tex.—Wilson v. Martinez, Civ.App., 74 S.W.2d 308

98. Neb.—Denesia v. Denesia, 219 N.W. 142, 116 Neb. 789

Tex.—Sanger v. Calloway, Com.App., 61 S.W.2d 988, reversing Calloway v. Bookout, Civ.App., 37 S.W.2d 243—McKelroy v. Hamilton, Civ.App., 130 S.W.2d 1111—Rivers v. Westbrooks, Civ.App., 126 S.W.2d 46, error refused—Farmers Royalty Holding Co. v. Jeffus, Civ.App., 94 S.W.2d 255—Bacle v. Pickens, Civ.App., 78 S.W.2d 260, affirmed Pickens v. Bacle, 104 S.W.2d 482, 129 Tex. 610, rehearing denied 105 S.W.2d 212, 129 Tex. 610

99. Tex.—Collier v. Valley Building & Loan Ass'n, Com.App., 62 S.W.2d 82, reversing, Civ.App., 43 S.W.2d 173 and conformed to Valley Bldg. & Loan Ass'n v. Collier, 88 S.W.2d 611

Mechanic's lien

To create a mechanic's lien against a homestead, there must be a contract entered into in writing and acknowledged by the wife before the material is furnished or the labor performed, and failure so to do cannot be waived or ratified by any contract made after the material is furnished or the labor performed.—Keplev v. Zachry, 116 S.W.2d 699, 131 Tex. 554, modifying, Civ.App., 90 S.W.2d 571, opinion supplemented 121 S.W.2d 595, 131 Tex. 554

1. Tex.—Graham v. Apple, Civ.App., 287 S.W. 1107.

2. Iowa.—State Exchange Bank of Parkersburg, Iowa, v. Nolan, 207 N.W. 745, 201 Iowa 722

3. Iowa.—Brunsdon v. Brunsdon, 200 N.W. 823, 199 Iowa 1099

29 C.J. p. 902 note 18

Ratification by separate execution of instrument of transfer or by execution of separate instrument see supra § 132

4. Mo.—Mitchell v. Eidson, 50 S.W. 2d 135, 330 Mo. 445

Okl.—Stidham v. Moore, 227 P. 128, 100 Okl. 26

Tex.—Bewley Mills v. First Nat. Bank, Civ.App., 110 S.W.2d 201, error dismissed

5 Okl.—Crookum v. Ketchum, 50 P.2d 710, 174 Okl. 468

Conveyance voidable for fraud

Where a husband and wife contracted to sell their homestead and the wife subsequently refused to join, notwithstanding they had acquired a new homestead with the proceeds of the sale and had removed thereto, their act in accepting the purchase money for the land with full knowledge of the material facts was a ratification precluding them from recovering for false representations inducing the execution of the earnest money receipt by the wife.—Fisher v. Gulf Production Co., Tex.Civ.App., 231 S.W. 150

6. Tex.—State Exchange Bank of Parkersburg, Iowa, v. Nolan, 207 N.W. 745, 201 Iowa 722

Ratification not shown

(1) In general.—State Exchange Bank of Parkersburg, Iowa, v. Nolan, supra.—Brunsdon v. Brunsdon, 200 N.W. 823, 199 Iowa 1099

(2) A husband who receives and accepts from his wife portions of the proceeds of a loan made to her on their homestead will not be held to have ratified a mortgage on the homestead executed by his wife he not having participated in the transaction.—Standard Savings & Loan Ass'n v. Acton, 63 P.2d 15, 178 Okl. 400

7 Iowa.—Clark v. Evarts, 46 Iowa 248

8. Tex.—Eckhardt v. Schlecht, 29 Tex. 129.

not by subsequent acts, unauthorized by the wife, validate a conveyance of the homestead, voidable on the ground of the grantee's fraud, practiced on the husband and wife joining in the conveyance [9]

When a ratification has been properly made it cannot thereafter be repudiated [10] The ratification relates back to the date of the defective conveyance so as to make it effective from that date [11]

§ 144. —— Curative Acts

A defective homestead conveyance may be validated by a curative act provided the conveyance was not absolutely void in the beginning.

The legislature may by a curative act cure defects in the execution of a conveyance or encumbrance of the homestead,[12] but it cannot render valid a conveyance or encumbrance which was absolutely void in the beginning [13]

§ 145 Conveyances Prohibited by Constitution or Statute

As has been seen supra § 134, where the constitution and statutes prohibit absolutely a mortgage of a homestead a mortgage thereof, whether executed by husband and wife or by the husband alone, is void In a proper case, however, the homestead claimants may be estopped to assert the invalidity of such a mortgage, as discussed supra § 142 d

Examine Pocket Parts for later cases.

§ 146. Lands Conveyed or Leased in Excess of Homestead

A conveyance, even though it is invalid as to the homestead, may be sufficient to convey that portion of the property covered by the conveyance which is in excess of the statutory exemption.

While there is authority to the contrary,[14] the general rule is that a deed or mortgage covering the homestead and other lands, or covering a single tract whose value exceeds the statutory exemption, although it is invalid as to the homestead, may yet be sufficient to convey or encumber that portion of the property which is in excess of the statutory exemption [15] The same rule applies to contracts to convey as well as to conveyances and mortgages,[16] and also to leases [17] Where a homestead exceeds in value or area the statutory exemption, a sale of the excess operates as a selection of the remainder as the homestead to the exclusion of the alienated tract,[18] and hence a sale of such excess is not rendered invalid because it fails to comply with the statutory requirements for the conveyance of homesteads [19]

Recovery of rent If one in possession of a tract conveyed to him by the homesteader and which includes the home place and other land is ousted by an execution creditor of the grantor, the creditor

9. Tex —Graham v Apple, Civ App , 287 S W 1107—Cotton v Morrison, Civ App , 140 S W 114

10. Tex —Grissom v Anderson, 79 S W 2d 619, 125 Tex 26, reversing, Civ App , 48 S W 2d 809

11. As against creditors

Wife's ratification of allegedly irregular deed conveying homestead rendered instrument valid from its date as against attack by execution creditor – Smith v Midland Nat Life Ins Co , 231 N W 20, 57 S D 197

12. Ark —Hall v Mitchell, 1 S W 2d 59, 175 Ark 641

Curative statute held not repealed

Ark — Sanders v Flenniken, 289 S W 485 172 Ark 454

That widow of grantor in mortgage of homestead had become endowed does not prevent statute subsequently enacted from curing defect in mortgage —Sanders v Flenniken, supra

13. In Arkansas

(1) It has been held that a mortgage of the homestead executed without the joinder of the wife is a mere nullity and cannot be validated by a curative act at least where the wife did not intend to be bound by the mortgage, as where she refused to sign it.—Ramey v Pyles, 31 S.W. 2d 533, 182 Ark 320—Hall v Mitchell, 1 S W 2d 59, 175 Ark 641

(2) But it has also been held that the legislature may, by express enactment, validate homestead conveyances executed by the husband without the proper joinder of the wife except as against persons who have acquired vested interests in the land previous to such enactment —Sanders v Flenniken, 289 S W 485, 172 Ark 454—29 C J p 916 note 75

14. Ariz —Edwards v Simms, 71 P 902, 8 Ariz 261

15. Mo —Saxbury v Coons, 98 S W 2d 662

Tex — Adkins-Polk Co v Rhodes, Com App 94 S W 2d 351, modifying, Civ App , 13 S W 2d 386—Tyner v La Coste, Com App , 13 S W. 2d 685, affirming Sederholm v City of Port Arthur, Civ App , 3 S W 2d 925, and followed in Tyner v Keith, Com App 13 S W 2d 687, affirming Sederholm v City of Port Arthur, Civ App , 3 S W 2d 925—Blankenship v Lusk, Civ App , 77 S W 2d 341

29 C J p 916 note 84

Enforceable as equitable mortgage

Where mortgage of homestead was never acknowledged in fact by husband or witnessed, instrument, although not enforceable at law, is enforceable as an equitable mortgage on the excess value —Carpenter v First Nat Bank, 181 So 239, 236 Ala 213

Proceedings for setting off homestead

Miss -- Robert G Bruce Co v Spears, 181 So 333, 181 Miss 786

16. Ill — Rewerts v Johnson, 143 N E 437, 311 Ill 591

29 C J p 916 note 85

Recovery of damages for refusal to convey nonhomestead property see infra § 151 c

Specific performance as to nonhomestead portion of property where wife refuses to release or convey homestead see the C J S title Specific Performance § 21, also 58 C J p 908 note 36—p 909 note 43

17. Ill —Gillespie v Fulton Oil & Gas Co , 86 N E 219 236 Ill 188

Wyo —Jones v Losekamp 114 P 673, 19 Wyo 83

18. Ala --Alabama Power Co v Cornelius 100 So 207, 211 Ala 245—Williams v Kilpatrick, 70 So 742, 195 Ala 563

19. Ala —Alabama Power Co v Cornelius, 100 So 207, 211 Ala. 245 —Williams v Kilpatrick, 70 So 742, 195 Ala 563

Tex —Hanes v Hanes, Com App , 239 S W 190, overruling motion 234 S W 1078.

cannot recover rent for the entire tract from the occupying grantee, but only such an amount as is proportionate to the excess of the land over the homestead exemption [20]

§ 147. Rights of Purchasers and Mortgagees

The rights and remedies of purchasers and mortgagees are considered infra §§ 148–151.

Examine Pocket Parts for later cases.

§ 148. —— As against Persons Having Homestead Interests

a. In general
b. As affected by good faith and notice

a. In General

(1) Rights of purchasers and lessees
(2) Rights of lienholders

(1) Rights of Purchasers and Lessees

Generally a properly executed conveyance of the homestead passes title to the grantee free from homestead claims. A void lease of the homestead is not binding on the lessee

As a general rule a conveyance of homestead property executed in conformity with the requirements of the homestead law passes title to the grantee free from homestead claims [21] Grantees of homestead property, however, take subject to defects in execution [22] and statutory restrictions concerning the joinder of husband and wife [23] Where a deed transfers only the reversionary interest in a homestead, the purchaser cannot assert his title until the homestead estate has expired [24] A purchaser of the homestead cannot set off against the purchase price debts of the vendor against which the homestead was exempt [25]

Ordinarily the rights of a purchaser of homestead property must be determined as of the date of the execution of the instrument of transfer [26]

Purchaser's right of election A purchaser of lands including a homestead, if the defense of homestead is raised, may exercise an option to take conveyance of the premises other than the homestead,[27] but, in the absence of such defense, or if it is waived or withdrawn before final decree in an action for specific performance, no option exists,[28] and the purchaser cannot escape the obligation to accept a tendered conveyance of the entire property by alleging the invalidity of the contract on such ground [29]

A lessee of homestead premises is not bound by the lease where it is void because not signed by the lessor's wife [30]

(2) Rights of Lienholders

Generally the homestead right is postponed to the lien of a mortgage, if the latter is not forbidden by statute and is properly executed

As a general rule the homestead right is postponed to the lien of a mortgage, if the latter is not forbidden by statute and is properly executed,[31]

20. Ala.—Clark v. Allen, 6 So. 272, 87 Ala. 198.

21. Iowa.—Clark v. Chapman, 239 N.W. 797, 213 Iowa 737.
Rights of purchaser at judicial sale see infra § 225.

Fee simple conveyed
If a deed conveying the homestead is formally executed purports to pass the interest of the husband and wife in the premises, and the consideration is adequate a fee simple will be conveyed.—Parker v. Parker, 6 So. 740, 88 Ala. 362, 16 Am.S.R. 52—29 C.J. p. 907 note 97.

Fraudulent representations as not affecting grantee's rights
Fraudulent representations of the husband made to the wife do not affect the grantee in a deed of the homestead which was procured through such representation.—Cochran v. Main, 162 N.W. 561, 181 Iowa 906.

22. Ala.—Sims v. Gunter, 78 So. 62, 201 Ala. 286.
29 C.J. p. 917 note 93.

23. Mich.—Boman v. Wolverine Power Co., 255 N.W. 613, 268 Mich. 59.
29 C.J. p. 917 note 94.

24. Ga.—Taylor v. James, 34 S.E. 674, 109 Ga. 327.

25. Ky.—Weber v. Zook, 53 S.W. 1034, 21 Ky.L. 1027.

26. N.D.—Grotberg v. First Nat. Bank, 210 N.W. 21, 51 N.D. 548.

27. Iowa.—Blankenhorn v. Edgar, 186 N.W. 893, 193 Iowa 184.

28. Iowa.—Blankenhorn v. Edgar, supra.

29. Iowa.—Blankenhorn v. Edgar, supra.

30. Lessee entitled to quit
Where lease of premises, partly constituting homestead of landlord was void because his wife did not sign it, tenant was entitled to quit, notwithstanding wife may have been at all times ready and willing to sign lease and tenant had notice thereof before abandonment, rights of parties being fixed at execution and delivery of lease.—Hovie v. Pleshek, 203 N.W. 910, 187 Wis. 55.

31. Kan.—Prudential Ins. Co. of America v. Clark, 251 P. 199, 122 Kan. 109.
Ky.—Carr v. Britton, 103 S.W.2d 300, 267 Ky. 802.
Mont.—U. S. Building & Loan Ass'n v. Stevens, 17 P.2d 62, 93 Mont. 11.
Tex.—Gordon-Sewall & Co. v. Walker, Civ.App., 258 S.W. 233.
29 C.J. p. 917 note 92.
Rights of mortgagee as to interest of surviving spouse or children see infra § 262.

A mortgage with covenants of warranty and against encumbrances, signed, sealed, witnessed, and acknowledged by both husband and wife, in which the wife joins with the husband in the granting clause, in which they grant the land, bars the homestead right, unless there is a clause in the mortgage reserving and disclosing an intention to reserve the homestead right.—Perley v. Woodbury, 78 A. 1073, 76 N.H. 23.

Extent of lien
Interest on notes secured by mortgage was properly charged as secured by lien on homestead.—Shaw v. American Life Ins. Co., Tex.Civ.App., 60 S.W.2d 1110, error dismissed.

but mortgagees take subject to defects in execution,[32] to statutory restrictions concerning joinder of husband and wife,[33] to express reservations of homestead, existing when the mortgage is executed,[34] and to the general right of homestead exemption when it is not waived or otherwise released.[35] One who takes a mortgage of homestead property contrary to law acquires no rights under the instrument,[36] but the invalidity of a lien on the homestead does not necessarily render invalid the debt purported to be secured thereby.[37]

Ordinarily the rights of one obtaining a lien on homestead property must be determined as of the date of the execution of the instrument creating the lien.[38]

Right of possession Where a mortgage of the homestead is properly executed and not forbidden by statute, the mortgagee is entitled to possession of the homestead premises where the mortgage so provides.[39]

Release of lien increasing burden on homestead The act of a mortgagee in releasing part of the land from his mortgage and renewing the mortgage for the entire amount on the remainder of the land, including the homestead, does not release the remainder of the land from the mortgage, even though the burden on the homestead is thereby increased.[40]

b. As Affected by Good Faith and Notice

The equitable doctrine protecting bona fide purchasers and lienholders applies to bona fide purchasers and lienholders of homestead property.

In applying the rules governing the rights of bona fide purchasers, it has been held that one who becomes a purchaser or mortgagee of homestead property, under circumstances giving him neither actual nor constructive notice of its homestead character, takes free from homestead claims,[41] but purchasers and mortgagees are bound to make search for such facts as might reasonably be ascertained by them,[42] and must take notice of the conditions that impress the homestead with the homestead character.[43] Hence a purchaser or a mortgagee of homestead premises takes them encumbered with homestead rights where he had notice of the homestead character of the premises or of facts charging him with such notice,[44] unless he acquired his rights from one who was himself a bona fide purchaser of the homestead premises without notice of the homestead rights.[45]

Bona fide purchasers under defective conveyances While a bona fide purchaser claiming under a voidable conveyance of the homestead may be pro-

32. Tenn.—Roach v. Francisco, 197 S.W. 1099, 138 Tenn. 357, 1 A.L.R. 1074
29 C.J. p. 917 note 93

33. Fla.—Bigelow v. Dunphe, 197 So. 328, 143 Fla. 603, rehearing denied 198 So. 13, 141 Fla. 330
La.—Raymond v. Louisiana Trust & Savings Bank, 148 So. 663, 177 La. 409
29 C.J. p. 917 note 94

34. N.H.—Perley v. Woodbury, 78 A. 1073, 76 N.H. 23
29 C.J. p. 917 note 95

But where valid mortgage was discharged by mortgage given by grantee in deed intended as mortgage, last mortgagee's rights cannot be impaired by alleged oral reservation of homestead when deed was given.—Clark v. Chapman, 239 N.W. 797, 213 Iowa 737

35. Ga.—Camp v. Teal, 163 S.E. 233, 44 Ga. App. 829
29 C.J. p. 917 note 96

36. Tex.—King v. Hill, Civ. App., 167 S.W.2d 628, affirmed, Sup., 172 S.W.2d 298
29 C.J. p. 918 note 15

37. Tex.—Hiner v. Meyer, Com. App., 44 S.W.2d 961, affirming, Civ. App., 25 S.W.2d 196

38. N.D.—Grotberg v. First Nat. Bank, 210 N.W. 21, 54 N.D. 548.

39. Neb.—Hanks v. Northwestern State Bank of Hay Springs, 9 N.W.2d 175
Right of possession during period of redemption see infra § 151 e

40. If the additional burden on the homestead is unenforceable, the mortgagor can avoid it by tendering the amount of the debt legally chargeable against the homestead and restraining a sale under the mortgage until the equities of the transaction are adjusted in proper proceedings.—Price v. McAnelly, Tex. Civ. App., 287 S.W. 77

41. Ala.—Brooks v. Capps, 115 So. 864, 217 Ala. 375
Cal.—Mabury v. Ruiz, 58 Cal. 11
Ga.—Faison v. Lanier, 139 S.E. 540, 164 Ga. 742
Iowa.—Clark v. Chapman, 239 N.W. 797, 213 Iowa 737
Tex.—Home Owners' Loan Corporation v. Netterville, Civ. App., 110 S.W.2d 628, reversed on other grounds 132 S.W.2d 93, 134 Tex. 30
29 C.J. p. 917 note 10, p. 918 note 18
"It was never intended that the homestead law should be used to defeat the rights of an innocent third party who, in good faith, without notice, for a valuable consideration, has acquired valid liens against the property."—National Bond & Mortgage Corporation v. Davis, Tex. Com. App., 60 S.W.2d 429, 434, reversing Davis v. National Bond & Mortgage Corporation, Civ. App., 45 S.W.2d 272

Purchasers ignorant of homestead claimant's marriage
A mortgagee and purchaser on foreclosure thereunder of premises on which the mortgagor did not reside and who declared at the time of the transfer that he was unmarried, and who were in fact ignorant of his marriage, are bona fide purchasers and entitled to hold the land in spite of any claim of homestead therein.—Steves v. Smith, 107 S.W. 141, 49 Tex. Civ. App. 126

42. Ark.—Altheimer v. Davis, 37 Ark. 316
Tex.—Moore v. Chamberlain, 195 S.W. 1135, 109 Tex. 64

43. Tex.—Collett v. Harris, Civ. App., 229 S.W. 885.—Watkins Land Mortg. Co. v. Temple, 119 S.W. 728, 56 Tex. Civ. App. 65

44. Ga.—Powell v. Powell, 127 S.E. 117, 159 Ga. 837
Tex.—Fest v. Williams, Civ. App., 89 S.W.2d 1072
29 C.J. p. 918 note 13

45. Tex.—Gill v. First Nat. Bank, Civ. App., 114 S.W.2d 428

tected,[46] a void conveyance of the homestead passes no title and cannot be made the foundation of a good title even under the equitable doctrine protecting bona fide purchasers.[47] One who in good faith takes title to a homestead under a void conveyance and makes judicious improvements thereon, however, is entitled to an allowance for the improvements.[48] Statutes protecting bona fide purchasers from insane persons have been held inapplicable to a conveyance of the homestead by an insane spouse.[49]

Subsequent purchasers under simulated sale The rule protecting bona fide purchasers and lienholders has been applied to a purchaser or lienholder from one who purported to take title under a simulated sale intended merely to operate as a mortgage or encumbrance of the homestead premises when the homestead laws prohibited such mortgages or encumbrances,[50] but the rule does not apply to a subsequent purchaser or lienholder in such a case who is not a purchaser for value[51] or who has knowledge or notice of the facts giving rise to the claim of homestead,[52] although an exception has been recognized in the case of mere constructive notice;[53] but, even where the subsequent purchaser has notice of the homestead character of the premises, it has been held that he will be protected if his grantor was a bona fide purchaser,[54] or if the mortgagors or simulating grantors were estopped to assert the homestead exemption against the mortgagee or simulating grantee.[55]

Subsequent holders of simulated liens Where simulated or fictitious transactions give rise to ostensible liens on homesteads, subsequent bona fide purchasers of such liens will usually be protected.[56] Thus, where a fictitious vendor's lien is created on homestead property at the time of its purchase or as a result of a pretended sale of the homestead, a subsequent bona fide holder of the pretended lien acquiring it for value before maturity and without notice of its invalidity will be protected.[57] One is not entitled to protection as a bona fide holder of the

46. Tex.—Gore v. Citizens State Bank, Civ.App., 88 S.W.2d 721, error refused—Patterson v. Farmers' Royalty Holdings Co., Civ.App., 79 S.W.2d 917—Driscoll v. Morris, Civ.App., 275 S.W. 196

Purchaser with notice

A subsequent purchaser is not entitled to protection as a bona fide purchaser where he has notice of the facts invalidating the original conveyance of the homestead.—Dallas Building & Loan Ass'n v. Henry, Tex.Civ.App., 98 S.W.2d 1030, error dismissed

Improper acknowledgment

(1) To entitle a subsequent purchaser to a community homestead, notwithstanding defects in the wife's acknowledgment on the ground that he is an innocent purchaser, it must appear that he purchased in good faith, without notice, actual or constructive, of the invalidity of the wife's acknowledgment, and that he paid a valuable consideration at the time he purchased.—Stephenson v. Mallett, Tex.Civ.App., 240 S.W. 633, error refused

(2) Grantors are bound by conveyance of homestead, notwithstanding wife's acknowledgment was taken without separate privy examination where innocent grantee paid valuable consideration in ignorance of defects of acknowledgment, certificate of which was regular.—Whittley v. Howerton, Tex.Civ.App., 18 S.W.2d 687 error dismissed

Duress

(1) Duress is not available to wife as defense against foreclosure of mortgage on homestead as against purchaser of note and mortgage before maturity for value and without notice.—Illinois Bankers Life Assur. Co. v. Day, 62 P.2d 970, 178 Okl. 281

(2) Where mortgagee does not know husband compelled wife to execute mortgage on homestead by duress, mortgagee is "purchaser for value".—Pirtle v. Pirtle, 60 S.W.2d 172, 166 Tenn. 180

47. Defective acknowledgment

(1) The rule has been applied where the conveyance was void because the acknowledgment was taken before a notary public who was financially interested in the transaction.—Logue v. Von Almen, 40 N.E.2d 73, 379 Ill. 208, 140 A.L.R. 251

(2) The rule has also been applied where the conveyance of the homestead was void because the wife did not in fact acknowledge it.—Lummus v. Alma State Bank, Tex.Civ.App., 4 S.W.2d 195—Cosgrove v. Nelson, Tex.Civ.App., 269 S.W. 891 affirmed Nelson v. Cosgrove, Com.App., 277 S.W. 1118

48. Iowa.—Stinson v. Richardson, 44 Iowa 373

Rule held inapplicable

Iowa.—Brunsdon v. Brunsdon, 200 N.W. 823, 199 Iowa 1099

49. Ala.—Butler v. Wilson, 186 So. 687, 237 Ala. 312—Hall v. Britton, 113 So. 238, 216 Ala. 265

50. Tex.—Shields v. Little, Civ.App., 40 S.W.2d 850, reversed on other grounds Little v. Shields, Com.App., 63 S.W.2d 363—Tuerpe v. George Saunders Live Stock Commission Co., Civ.App., 245 S.W. 741 29 C.J. p. 918 note 19.

51. Antecedent debt as consideration

A subsequent purchaser who receives the conveyance on the consideration of a prior indebtedness of the grantor is not entitled to protection as a bona fide purchaser.—Vogel v. Zipp, Tex.Civ.App., 90 S.W.2d 668, error dismissed

52. Tex.—Vogel v. Zipp, supra
29 C.J. p. 918 note 20

53. Tex.—Brooker v. Wright, Civ.App., 216 S.W. 196
29 C.J. p. 918 note 21

54. Tex.—Allen v. Northcutt, Civ.App., 65 S.W.2d 403

55. Tex.—Haswell v. Forbes, 27 S.W. 566, 8 Tex.Civ.App. 82
29 C.J. p. 918 note 22

56. Simulated mechanic's lien

Bona fide purchaser may enforce simulated mechanic's lien contract on homestead.—Garrett v. Katz, 23 S.W.2d 136, corrected Tex.Civ.App., 27 S.W.2d 373

57. Tex.—Graves v. Kinney, 66 S.W. 293, 95 Tex. 210, affirming, Civ.App., 64 S.W. 1094—Pickett v. Dallas Trust & Savings Bank, Com.App., 24 S.W.2d 354, reversing, Civ.App., 13 S.W.2d 195—First State Bank of Carbon v. Thurman, Com.App., 12 S.W.2d 146, reversing, Thurman v. First State Bank of Carbon, Civ.App., 300 S.W. 123—Anderson v. Thomas, Civ.App., 50 S.W.2d 844, error granted—Ledbetter v. Martinez, Civ.App., 48 S.W.2d 408, error refused—Wroten v. Davis, Civ.App., 260 S.W. 331—Brooker v. Wright, Civ.App., 216 S.W. 196—New England Safe-De-

purported vendor's lien, however, where he is not a purchaser for value[58] without notice,[59] or where he purchased the notes secured by such lien after their maturity,[60] unless the elements of an estoppel are presented.[61] Where one is entitled to protection as a bona fide holder of the purported lien, persons subsequently acquiring it from him are likewise protected.[62]

What constitutes notice In accordance with well-settled equitable principles, anything that will put a prudent man on inquiry is notice,[63] and gross negligence in failing to make inquiry, when the surrounding facts suggest the existence of others and that inquiry should be made, is equivalent in courts of equity to notice.[64] It is sufficient to put one on inquiry as to the character of the property that a deed thereof mentioned both husband and wife and was signed by only one,[65] that a deed of trust stated with particularity that it secured only debts supposed to support a lien on the homestead, such as purchase money, taxes, etc.,[66] or that a deed conveying land recited that the premises were purchased with the proceeds from a sale of the former homestead.[67] A mortgagee or purchaser is charged with knowledge of all instruments of record in the chain of title,[68] and notice to an agent acting for the purchaser or mortgagee is notice to his principal.[69]

If the premises are actually occupied by the homestead claimant and his family as a homestead when mortgaged or conveyed, the mortgagee or transferee[70] and persons to whom they have in turn

posit & Trust Co v Harrell, Civ App, 39 S W 142, error refused
29 C J p 918 note 19 [b]
Estoppel of homestead claimant to assert invalidity of transaction in which vendor's lien was created see supra § 112 d

Bona fide holder of notes
Even though one may have become a prima facie bona fide holder of the vendor's lien notes, stripped of the lien, he is not necessarily a bona fide holder of the lien securing the notes – Anglin v Cisco Mortg Loan Co, 141 S W 2d 935 135 Tex 188, reversing, Civ App, 118 S W 2d 817

If one is not an innocent holder of the notes, he is not an innocent holder of the vendor's lien securing the notes –Smith v New Waverly State Bank, Tex Civ App, 76 S W 2d 201

58. Cancellation of antecedent debt
(1) One who paid nothing for the vendor's lien notes, received by the sellers in transferring their homestead, other than the cancellation of an antecedent indebtedness is not entitled to protection as a bona fide purchaser for value — Anglin v Cisco Mortg Loan Co, 141 S W 2d 935, 135 Tex 188, reversing Civ App, 118 S W 2d 817

(2) But one paying a substantial portion of the purchase price of the vendor's lien notes is a purchaser for value even though he credited the balance on a preexisting debt — Oskrey v Morrison, Tex Civ App, 91 S W 2d 902 error refused

59. Tex —Anglin v Cisco Mortg Loan Co 141 S W 2d 935, 135 Tex 188, reversing, Civ App, 118 S W 2d 817

60. Tex —Anglin v Cisco Mortg Loan Co, supra—Lybrand v Fuller, 69 S W 1005, 30 Tex Civ App 116, error refused

Series of notes
Where bank had acquired four notes secured by a purported vendor's lien on homestead after maturity of two notes, it was not holder in good faith as to other two notes which were acquired as part of same transaction —Smith v New Waverly State Bank, Tex Civ App, 76 S W 2d 201

61. Implied warranties arising from indorsement
Payee of vendor's lien notes, although indorsing notes after one note had matured, is precluded by his implied warranties from claiming against bona fide indorsee that notes arose out of simulated transaction —Little v Shields Tex Com App, 63 S W 2d 363 reversing Shields v Little Civ App, 10 S W 2d 850

62. Tex —Ledbetter v Martinez, Civ App, 48 S W 2d 408, error refused

Subsequent purchaser with notice
One purchasing a secured vendor's lien note from an innocent purchaser may enforce it against the land even though he had notice before the purchase that the note arose out of a simulated sale of the homestead — Brooker v Wright Tex Civ App, 216 S W 196

63. La —Louisiana Red Cypress Co v Rabalais, 112 So 647, 163 La 679
29 C J p 918 note 23

Facts held sufficient to put purchaser or lienholder on inquiry — Stout v Sommers, Tex Civ App, 28 S W 2d 247 affirmed Sommers v Stout, Com App, 44 S W 2d 901

Facts held insufficient to put purchaser or lienholder on inquiry — Stooksberry v Lingwiler, Tex Civ App, 25 S W 2d 931, error refused

64. Tex —Higgins v Millsap, Civ App, 121 S W 2d 469
29 C J p 918 note 24

65. Kan —Cropper v Goodrich, 132 P 163, 89 Kan 589

66. Tex – Girardeau v Perkins, 126 S W 633, 59 Tex Civ App 552
29 C J p 919 note 26

67. Ga —Cheney v Rodgers, 54 Ga 168

68. S D —Krueger v Central Lumber Co, 230 N W 213 56 S D 626
Tex —Glasgow v John Hancock Mut Life Ins Co, Civ App, 117 S W 2d 888, affirmed John Hancock Mut Life Ins Co v Glasgow, 141 S W 2d 912 135 Tex 470

Record as notice
(1) Where deed was recorded by copying into blank form on page of public record erasure of 'homestead' from such form did not operate as reservation of homestead and notice to the world —Clark v Chapman, 239 N W 797, 213 Iowa 737

(2) Homestead record on one lot would not constitute constructive notice that remaining lots were exempt as proceeds of homestead property —Faison v Lanier, 139 S E 540, 164 Ga 712

69. Tex —Davis v National Bond & Mortgage Corporation Civ App 15 S W 2d 272 reversed on other grounds National Bond & Mortgage Corporation v Davis, Com App, 60 S W 2d 429
29 C J p 919 note 39 [b]

Necessity of agency
To make this rule applicable the person in question must be the agent of the purchaser or mortgagee – Union Central Life Ins Co v Roach, Tex Civ App, 106 S W 2d 374, error dismissed

An exception to the rule exists where the agent is shown to be in collusion with a third person to defraud the principal – Union Central Life Ins Co v Roach, supra—29 C J p 918 note 15 [b]

70. Fla —Bigelow v Dunphe, 197 So 328, 330, 143 Fla 603, citing **Cor-**

transferred or mortgaged the property[71] generally take with notice of the true character of the premises if they fail to make proper inquiry,[72] and that, too, in the absence of actual knowledge that the premises are so occupied,[73] and irrespective of any declarations of the occupants to the contrary.[74] However, possession may be under such circumstances as not to bring the case within the rule,[75] and the rule is inapplicable where the homestead claimant in possession is under a duty to assert his homestead right and fails to do so.[76]

Under homestead laws forbidding pretended sales of the homestead which are in fact mortgages, a subsequent vendee under such a sale,[77] or a subsequent purchaser of the alleged purchase-money notes,[78] is chargeable with knowledge of the real

pus Juris, and rehearing denied 198 So 13, 144 Fla 330

S D—Krueger v Central Lumber Co, 230 N W 243, 56 S D 626

Tex—First State Bank of Hubbard v Zeanon Civ App, 169 S W 2d 735—Lincoln v Bennett, Civ App, 135 S W 2d 632, modified on other grounds 156 S W 2d 504, 138 Tex 56—Hamshire v De Villeneuve, Civ App, 135 S W 2d 571—Blomgren v Van Zandt, Civ App, 126 S W 2d 506—Bernard v Jefferson County Inv & Bldg Ass'n, Civ App, 65 S W 2d 503, affirmed 95 S W 2d 1307, 128 Tex 97—American Exchange Nat Bank v Jeffries, Civ App, 36 S W 2d 558, error dismissed—Thurman v First State Bank of Carbon, Civ App, 300 S W 123, reversed on other grounds First State Bank of Carbon v Thurman, Com App, 12 S W 2d 146—Tiblier v Perez, Civ App, 277 S W 189

29 C J p 919 note 29

Due title registration concurring with occupancy constitutes notice of husband's inability to bind wife respecting homestead—Martin v Astin, Tex Com App, 295 S W 584, reversing Astin v Martin, Civ App, 289 S W 442

The sole office which possession performs in matter of notice of homestead character of property is to put person desiring to purchase on inquiry, and it has no effect of determining what inquiry shall be or of whom it shall be made—Burkhardt v Lieberman, Civ App, 142 S W 2d 283, modified on other grounds 159 S W 2d 847, 138 Tex 409

71. Miss—Breland v Parker, 116 So 879, 150 Miss 476

Tex—Helge v American Central Life Ins Co, Civ App, 124 S W 2d 191, error dismissed, judgment correct—Fest v Williams, Civ App, 89 S W 2d 1072—American Exchange Nat Bank v Jeffries, Civ App, 36 S W 2d 558, error dismissed

29 C J p 919 note 30

Of what matters possession is notice

Possession and residence of vendee on property, while notice of his homestead right, was not necessarily notice to purchaser of vendor's lien notes that such right was superior to vendor's lien—Wroten v Davis, Tex Civ App, 260 S W 331

72. Mortgagee held to have performed duty of inquiring of possessors concerning their alleged homestead rights, entitling him to status of purchaser for value without notice of alleged homestead rights—Clark v Chapman, 239 N W 797, 213 Iowa 737

73. Kan—Cropper v Goodrich, 132 P 163, 89 Kan 589

74. Tex—Martin v Astin, Com App, 295 S W 584, reversing Astin v Martin, Civ App, 289 S W 442—Lincoln v Bennett, Civ App, 135 S W 2d 632, modified on other grounds 156 S W 2d 504, 138 Tex 56—Blomgren v Van Zandt, Civ App, 126 S W 2d 506—Tiblier v Perez, Civ App, 277 S W 189—Watkins Land Mortg Co v Temple, 119 S W 728, 56 Tex Civ App 65

75. Tex—Home Owners' Loan Corporation v Netterville, 132 S W 2d 93, 134 Tex 30, reversing Civ App, 110 S W 2d 628—National Bond & Mortgage Corporation v Davis, Com App, 60 S W 2d 429, reversing Davis v National Bond & Mortgage Corporation Civ App, 15 S W 2d 272—Burkhardt v Lieberman, Civ App, 142 S W 2d 283, modified on other grounds 159 S W 2d 847, 138 Tex 409—Union Central Life Ins Co v Roach, Civ App, 106 S W 2d 374, error dismissed

29 C J p 919 note 33

Where conveyance expressly renounced homestead claim to the land it was held that grantor's continued residence on the land was not notice sufficing to put purchasers on such inquiry as to his homestead claim as would have led to disclosure of such claim if pursued, there being evidence that the grantor informed intending purchasers that his home was elsewhere, and made no homestead claim—Tuerpe v George Saunders Live Stock Commission Co, Tex Civ App, 245 S W 741

76. Claimant assisting grantee to procure mortgage

Where the grantors in a deed claimed to be a mortgage assisted the grantee to procure a mortgage, they were bound to inform the mortgagee of their alleged homestead, and a failure to do so operated as a performance by the mortgagee of whatever duty he owed to the grantors in possession of the premises—Clark v Chapman, 239 N W 797, 213 Iowa 737

77. Tex—Moore v Chamberlain, Civ App, 195 S W 1125

29 C J p 919 note 39

Where premises occupied as homestead

The general rule is that where a grantor by deed absolute in form, but in fact a mortgage, conveys a homestead, which is in fact in the grantor's actual possession at the time of a subsequent conveyance by his grantee, or a subsequent grantee in the claim of title, the purchaser under the subsequent conveyance must take notice of the title under which the one in possession is holding—Vogel v Zipp, Tex Civ App, 90 S W 2d 668, error dismissed—Williams v Daniels, Tex Civ App, 4 S W 2d 189

78. Tex—Anglin v Cisco Mortg Loan Co, 141 S W 2d 935, 135 Tex 188, reversing Civ App, 118 S W 2d 817—Cosgrove v Nelson, Civ App, 269 S W 891, affirmed Nelson v Cosgrove, Com App, 277 S W 1118

29 C J p 919 note 40

Continued occupancy of homestead by vendors

(1) Where husband and wife executed and delivered deed to homestead which was duly recorded and received vendor's lien notes, continued occupancy of homestead by husband and wife, after conveyance, does not preclude recovery by a good-faith purchaser of the notes, as against contention that sale of homestead was simulated and that continued occupancy of the premises gave purchaser notice of homestead character thereof—Little v Shields, Tex Com App, 63 S W 2d 363, reversing Shields v Little, Civ App, 40 S W 2d 850—Helge v American Central Life Ins Co, Tex Civ App, 124 S W 2d 191, error dismissed, judgment correct—Ledbetter v Martinez, Tex Civ App, 48 S W 2d 408 error refused—Brooker v Wright, Tex Civ App, 216 S W 196

(2) The rule applies where the occupancy of the homestead by the husband and wife is continued through a tenant—Dallas Trust & Savings Bank v Pickett, Tex Civ App, 59 S W 2d 1090, error dismissed

nature of the transaction if he knows or may reasonably infer that the purpose of the apparent sale is to use the homestead as a security in raising money.

§ 149. —— As against Third Persons

a. In general
b Rights as against prior defective conveyances

a. In General

As a general rule, when a homestead is sold, the purchaser takes title clear and free of judgment liens and claims against the vendor which could not be enforced against the homestead during the time the vendor occupied it as a residence

It is a well established general rule, almost universally followed, that when a homestead is sold the exempt character of the homestead property existing at the time of the sale runs with the transfer and, as far as the rights of the purchaser are concerned, no claim[79] or judgment[80] against the vendor can be asserted against the property which could not be enforced during the time the debtor occupied it as a residence This rule has been held to apply with full force and effect in favor of mortgagees as well as purchasers[81] It applies even though the homestead has not been admeasured and set off[82] The rule has even been extended to transfers by the homesteader for a nominal consideration[83] or on no consideration whatever,[84] or even where the vendor has afterward removed from the state,[85] but there is also authority to the contrary of this last proposition[86] Such property is not subject to the lien of a bond given by the homesteader as collector of taxes,[87] or to claims of his creditors who have levied an attachment or execution on the property prior to the conveyance,[88] nor is it liable for the satisfaction of a note or bond given for the purchase price,[89] or a note executed by the vendor prior to the sale of the homestead[90] On the other hand, claims, judgments, and liens enforceable against the homestead premises before its sale or transfer by the homesteader can be asserted after as well as before such sale or transfer, and hence a lien may follow the homestead property after its sale by the homesteader where the lien was one enforceable against the homestead in the hands

—Pickett v Dallas Trust & Savings Bank, Tex Civ App, 13 S W 2d 195, reversed on other grounds, Com App, 24 S W 2d 351

(3) The purchaser of the notes is charged with the duty of inquiring as to the rights of the vendors that is, the husband and wife, in possession —Guaranty Bond State Bank of Mt Pleasant v Kelley, Tex Com App, 13 S W 2d 69, modifying Kelley v Guaranty Bond State Bank of Mt Pleasant, Civ App 2 S W 2d 572

(4) But the registration of the vendors' deed satisfies the requirement as to diligence on the part of the purchaser —Guaranty Bond State Bank of Mt Pleasant v Kelley, supra.

(5) And, even where the deed is not recorded, the vendors' acknowledgment of the deed before a representative of the purchaser of the vendor's lien notes satisfies the requirement of diligent inquiry where the vendors continue in possession — Guaranty Bond State Bank of Mt Pleasant v Kelley, supra

79. Fla —Hart v Gulf Fertilizer Co, 108 So 886, 91 Fla 991
Okl —Oklahoma State Bank v Van Hassel 114 P 2d 912, 189 Okl 48— Dreyfus v Dickason, 56 P 2d 881, 176 Okl 477—Japp v Sapulpa State Bank of Sapulpa, Okl, 215 P 1059, 90 Okl 56—Gray v Deal, 151 P 205, 50 Okl 89
Tex —Jones v L E Whitham & Co, Civ App, 37 S W 2d 327, error refused
29 C J p 920 note 43.

"Where the homestead character is maintained to the time of transfer of the property, it is not lost so that liens attach because of the act of transfer"—Wadle v Boston Market Co, 191 N W 528, 530, 195 Iowa 16

80. Idaho —Campbell v Largilliere Co, Bankers, 256 P 371, 44 Idaho 293
Ill —Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434
Iowa —Wadle v Boston Market Co, 191 N W 528, 195 Iowa 46
Kan —First Nat Bank v Tyler, 286 P 400, 130 Kan 308
Neb —Connor v McDonald 233 N W 894, 120 Neb 503—Hess v Eselin, 194 N W 469, 110 Neb 590
N M —Custer v Block, 82 P 2d 282, 42 N M 513
N D —Nelson v Griggs County, 219 N W 225, 56 N D 729—Birks v Globe International Protective Bureau, 218 N W 864, 868, 56 N D 613, citing **Corpus Juris.**
Okl —Oklahoma State Bank v Van Hassel, 114 P 2d 912, 189 Okl 48— Dreyfus v Dickason, 56 P 2d 881, 176 Okl 477—Japp v Sapulpa State Bank of Sapulpa, Okl, 215 P 1059, 90 Okl 56—Gray v Deal, 151 P 205, 50 Okl 89
Or —Willamette Collection & Credit Service v Henry, 7 P 2d 261, 138 Or 460
Tex —Sakowitz Bros v McCord, Civ App, 162 S W 2d 437
29 C J p 920 note 44

81. Ariz —Wheeler Perry Co v Mortgage Bond Co of New York, 17 P 2d 331, 41 Ariz 247.

Kan —First Nat Bank v Tyler, 286 P 400, 130 Kan 308
Neb —Hess v Eselin, 194 N W 469, 110 Neb 590
29 C J p 920 note 47

82. Reason for rule
The setting off of the homestead is intended merely to designate what is exempt, and does not affect the right of exemption —Eaddy v Wall 190 S E 497, 183 S C 229

83. Ky —Brooks v Collins, 11 Bush 622
29 C J p 920 note 48

84. Ky —Maynard v May, 11 S W 806, 11 Ky L 166

85. N C —Adrian v Shaw, 82 N C 474

86. Ga —Macon City Bank v Smisson, 73 Ga 422

87. Ill —Crawford v Richeson, 101 Ill 351

88. Mich —Wernik v Kolodziejczak, 215 N W 360, 240 Mich 468
Or —Willamette Collection & Credit Service v Henry, 7 P 2d 261, 138 Or 460
29 C J p 921 note 53

Grantee under pretended sale holding bare legal title for purpose of securing loan on homestead may assert grantor's homestead right against execution on property by grantor's creditors —W F Dulaney & Sons v Lawler, Tex Civ App, 282 S W 321

89. N C —Smith v High, 85 N C 93 —Hoskins v Wall, 77 N C 249

90. Iowa —Higley v. Millard, 45 Iowa 586.

of the vendor,[91] where the homesteader sells the premises in order to move to another state and reinvest the proceeds in a new home,[92] where the property is conveyed subject to the homesteader's existing debts,[93] where the homestead tract exceeds the statutory limit of value, the lien attaching to the excess,[94] where the exemptioner sells, but subsequently procures a conveyance by the purchaser to the former's wife, on surrender of the purchaser's notes,[95] or where no homestead was allotted to the vendor during his life and he leaves no wife or minor child[96]

One who purchases homestead property in good faith and for a valuable consideration, prior to the term of court at which personal judgment was rendered against the husband for a debt which is by statute made a claim against the homestead when reduced to judgment, takes the property discharged of the judgment[97]

Minority rule. Under some homestead provisions the rule is that, when the owner of a homestead sells it, the purchaser takes it subject to all valid claims or judgments against it, even though they are not of such a character as to have been enforceable against the homestead in the vendor's hands[98]

b. Rights as against Prior Defective Conveyances

In the absence of an estoppel or agreement to the contrary, a purchaser or mortgagee of the homestead ordinarily takes free from prior defective conveyances

It has generally been held that if the homesteader has attempted to transfer or encumber the homestead in violation of law or by an instrument incomplete or defective, and subsequently conveys the property by a valid deed to a third person, the latter will, in general, obtain a good title,[99] even though he knew of the prior ineffectual transaction[1] Similarly a mortgagee ordinarily takes free from prior defective conveyances,[2] but not if the mortgagor executes a first mortgage containing no release of homestead and afterward a second containing such release and then abandons the premises[3]

Limitations of the rule have been asserted Thus it has been held that a purchaser will not be protected if he buys subsequent to a transfer of possession to one who purchased at a sale under a trust deed containing no release of homestead rights,[4] if he pays only a nominal consideration and seeks to perpetrate a fraud on the prior grantee,[5] if his acts or conduct are such as to create an estoppel against him to assert the invalidity of the prior conveyance,[6] if he contracts, in the case of a prior ineffectual encumbrance, to assume it,[7] or if the premises were abandoned by the grantor as a homestead at the time of the prior conveyance, and possession was in the first grantee when the second grantee obtained a deed, founded on an inadequate consideration[8] Where a donee of a homestead was in the open, notorious, and exclusive possession under a parol gift in which the wife of the donor joined, a subsequent purchaser from the donor will be put on inquiry as to the rights of the donee[9]

Redemption from prior mortgage The second

91. Cal—Martin v Hildebrand, 212 P 618, 190 Cal 369
N D—First State Bank of Gackle v Fischer, 272 N W 752, 67 N D 400, 110 A L R 878
29 C J p 921 note 57

92. Ga—Macon City Bank v Smisson, 73 Ga 422

93. Mich—Farrand v Caton, 37 N W 199, 69 Mich 235
Neb—Comnock v Wilson, 50 N W 959, 33 Neb 615

94. Cal—Marelli v Keating, 282 P 793, 208 Cal 528—Martin v Hildebrand, 212 P 618, 190 Cal 369
Ill—Moriarty v Galt, 112 Ill 373

95. Miss—Adams v Dees, 62 Miss 354

96. N C—Rogers v Kimsey, 8 S E 159, 101 N C 559

97. Kan—Dean v McAdams, 22 Kan 544

98. N C—Duplin County v Harrell, 142 S E 481, 195 N C 445
29 C J p 919 note 42

In Louisiana
(1) When the owner sells his homestead it passes to the purchaser and his assigns burdened with judicial mortgages inscribed against it—Murff v Ratcliff, 138 So 908, 19 La App 109—29 C J p 919 note 42 [a]
(2) Where the homesteader repurchases the homestead exemption does not revive—Hebert v Mayer, 8 So 590, 42 La Ann. 839—Murff v. Ratcliff, supra

99. Kan—Wea Gas Coal & Oil Co v Franklin Land Co, 38 P 790, 54 Kan 533, 45 Am S R 297
29 C J p 921 note 64
Effect of abandonment or waiver on priority of mortgage see infra § 188

1. Tex—J P Wooten Motor Co v First Bank of Swenson, Com App, 281 S W 196, affirming, Civ App, 260 S W 1093
29 C J p 921 note 65.

2. Neb—Anderson v Cusack, 214 N W 73, 115 Neb 643—Trevett, Mattis & Baker Co v Reagor, 200 N W 449, 112 Neb 470.
29 C J p 921 note 66

3. Ill—Coe v Smith, 47 Ill 225

4. Ill—McDonald v Crandall, 43 Ill. 231, 92 Am D 112
29 C J p 921 note 69

5. Iowa—Luther v Drake, 21 Iowa 92

6. Tex—Rice-Stix Dry Goods Co v. First Nat Bank of McGregor, Com App, 231 S W 386, reversing, Civ App, 213 S W 344
29 C J p 921 note 63½

7. Tex—J P Wooten Motor Co v. First Bank of Swenson, Com App., 281 S W 196, affirming, Civ App, 260 S W 1093—McMullan v San Antonio Joint Stock Land Bank of San Antonio, Civ App, 78 S W.2d 669, error refused—Warren v Higginbotham-Bartlett Co, Civ App., 75 S W 2d 487
29 C J p 912 note 96

8. Iowa—Corbin v Minchen, 47 N. W 879, 81 Iowa 682

9. Cal—Kinsell v Thomas, 124 P. 220, 18 Cal App 683.

mortgagee in whose favor homestead rights are waived may redeem from a prior mortgagee and hold free from the homestead, but cannot compel the first mortgagee to set out and assign him a homestead in the premises [10]

§ 150. —— Effect of Adverse Possession as against Homesteaders and Third Persons

A purchaser under an invalid conveyance of the homestead may acquire title thereto by adverse possession

A purchaser under an invalid conveyance of the homestead may acquire title thereto, free and clear of the homestead right, by peaceable, continuous, and adverse possession of the premises for the statutory period,[11] but title cannot be gained by lapse of time where the occupant apparently holds under a recorded lease, but in reality under an unrecorded deed, of which the homestead claimant is ignorant [12] As against the creditors of the homesteader, the purchaser under an invalid deed cannot begin to acquire any rights until the homestead interest terminates [13] In computing the statutory period, the possession of the homesteader's wife, under order of court setting apart a homestead, cannot be tacked to the subsequent possession of a purchaser, in order to bar the rights of a creditor whose claim was enforceable against the original homestead [14]

§ 151. —— Remedies and Proceedings for Enforcement of Rights

a In general
b Specific performance of contract to convey
c Damages for breach of contract to convey
d Recovery back of purchase money
e Foreclosure

a. In General

A purchaser of a homestead may institute an appropriate proceeding to protect his rights as such.

Where a homestead has been conveyed by a valid conveyance, the grantee may, to prevent a cloud on his title, enjoin a sale of the premises under a judgment rendered against his grantor,[15] provided he has no adequate remedy at law [16] If the grantee has purchased an undivided interest in the homestead, he may, it is held, compel partition [17] If, however, the conveyance is invalid, the grantee is not entitled to an injunction restraining the homesteader and his family from the free use of their homestead,[18] and where an instrument, although in the form of an absolute deed, operates as a mortgage of the homestead in contravention of the homestead law, the grantee or mortgagee cannot maintain ejectment for the premises [19]

Allotment of homestead or cash in lieu thereof Where a husband conveys the homestead without the consent or joinder of his wife, the grantee, in a proper case, may apply to the court for an order to sell the property and set aside from the proceeds for the benefit of the wife an amount corresponding to the statutory valuation of the homestead exemption, or, in case this cannot be done, to have an amount in cash awarded to her in lieu of the homestead rights and possession awarded to the grantee [20]

Contract liens A valid contract lien on a homestead may be enforced by the usual methods for enforcing contract liens [21]

Proceedings General rules governing civil proceedings usually apply to proceedings by a purchaser of homestead property to protect his rights as such [22] Thus the general rules of the law of pleading[23] and evidence[24] are ordinarily applicable in such proceedings

10. N H —Gunnison v Twitchel, 38 N H 62

11. Iowa —Boling v Clark, 50 N W 57, 83 Iowa 481
29 C J p 921 note 76

12. Cal —Mauldin v Cox, 7 P 804, 67 Cal 387

13. Ga —Hart v Evans, 5 S E 99, 80 Ga 330

14. Ga —Smith v Ezell, 51 Ga 570

15. S C —Ketchin v McCarley, 11 S E 1099, 26 S C 1, 4 Am S R 674
Wis —Smith v Zimmerman, 55 N W 956, 85 Wis 542
Avoidance of transaction see infra §§ 152–156

16. Filing claim to property
Bankrupt's transferees were not entitled to enjoin enforcement of executions levied on property set apart to bankrupt as homestead, since transferees had adequate remedy at law by filing claim to property —Parris v Morris Plan Co of Georgia, 183 S E 61, 181 Ga 480

17. Tex —Ferguson v Reed, 15 Tex 574

18. Tex —Smith v Prater, Civ App, 161 S W 2d 361

19. U S —Lanahan v Sears, Tex, 102 U S 318, 26 L Ed 180

20. Ill —Hotchkiss v Brooks 93 Ill 386, reversing 4 Ill App 175
29 C J p 922 note 88 [a]

21. Lien for labor and improvements
Where a valid contract lien is given on the homestead for labor and improvements, the method of enforcing such a lien differs from that of enforcing a mechanic's lien which rests entirely on statute and the method for enforcing the statutory lien need not be pursued to enforce the contract lien but the latter may be enforced by the usual methods for enforcing contract liens —Lippencott v York, 24 S W 275, 86 Tex 276

22. Wis —Smith v Zimmerman, 55 N W 956, 85 Wis 542

23. Allegations
If the purchaser of a homestead seeks to enjoin a sale thereof, on execution of a judgment against the grantor, rendered while he was in possession, the complaint need not show that the premises were the grantor's homestead at the time of the execution and levy —Smith v. Zimmerman, 55 N W 956, 85 Wis 542

24. Kan —Hurd v. Hixon, 27 Kan. 722.

b. Specific Performance of Contract to Convey

Subject to certain recognized limitations, a contract to convey the homestead made by the husband and wife or by only one of them cannot be specifically enforced by the intended purchaser.

Subject to certain recognized limitations,[25] the general rule is that a contract to convey homestead property cannot be specifically enforced by the intended purchaser where either husband or wife fails to join in the execution thereof,[26] and some decisions have gone even further and hold that as long as the homestead right exists[27] specific performance cannot be decreed of a contract to convey the homestead, although both husband and wife join in its execution,[28] on the theory that the homestead cannot be made the subject of an executory contract for its sale by the husband and wife,[29] even though the contract was based on a valuable consideration.[30] It has been held that a contract to convey real property made after the recording of a claim of homestead thereto is not specifically enforceable by the intended purchaser,[31] but a declaration of homestead made subsequent to the execution of the agreement to convey does not impair the purchaser's right to specific performance.[32] A judgment decreeing specific performance of a contract to convey real property is not a "sale" or "forced sale" within the meaning of statutes exempting a homestead from forced sale.[33]

c. Damages for Breach of Contract to Convey

By the weight of authority a contract to convey the homestead executed by only one spouse furnishes no basis

Admissibility of evidence

In an action of ejectment by a grantee of premises including a homestead, evidence of the value of the portion claimed as exempt is admissible to determine whether it exceeds the statutory limit—Hill v Bacon, 43 Ill 477

25. Mich—Stevenson v Jackson, 40 Mich 702
29 C J p 922 note 13
Right of vendor to specific performance of contract to convey homestead see supra § 140 c

After termination of homestead

A limitation of the rule has been placed on it by some decisions which hold in effect that a contract to convey a homestead invalid for failure of one of the two spouses to join in its execution may be specifically enforced against the one executing it after the termination of the homestead by abandonment, death of the wife or otherwise, provided the homestead terminates before the contract is barred by the statute of limitations—Hudgins v Thompson 211 S W 586 109 Tex 433, reversing, Civ App, 163 S W 659- Bell v Crabb Tex Com App, 244 S W 371, reversing Crabb v Bell, Civ App, 220 S W 623—29 C J p 922 note 13 [a]

Deed placed in escrow

Plaintiff could obtain specific performance of defendant's contract to convey homestead, notwithstanding defendant's wife had not signed contract, where she joined in execution and delivery of deed in escrow—Mitchell v Eidson, 50 S W 2d 135, 330 Mo 445

Where the purchaser agrees to take subject to homestead rights, specific performance may be decreed in a proper case—Watson v Doyle, 22 N E 613, 130 Ill 415—29 C J p 922 note 13 [b]

Contract to reconvey

Where the husband at the time he purchased the homestead entered into a contract to reconvey it to the vendor in the event of default in the payment of the purchase money, the vendor, on such default, is entitled to specific performance of the contract to reconvey even though the vendee's wife was not a party to the contract—Coon v Henderson, 199 So 701, 240 Ala 492

26. Ark—Oliver v Routh 184 S W 843, 123 Ark 189
Iowa—Laubscher v Mixell, 153 N W 395, 171 Iowa 88
Kan—Tucker v Finch, 188 P 235, 106 Kan 419
Minn—Horseth v Fuglesteen, 205 N W 607, 165 Minn 38
Mo—Glitzke v Ginsberg, 258 S W 1004
Neb—Storrs v Bollinger, 196 N W 512, 111 Neb 307
Tex—Bell v Crabb Com App, 244 S W 371, reversing Crabb v Bell, Civ App 220 S W 623—Smith v Prater Civ App 161 S W 2d 361—Richardson v Terry Civ App, 212 S W 523, error dismissed—Burnett v Mitchell, Civ App, 158 S W 800, error refused
29 C J p 923 note 14
Specific performance as to nonhomestead portion of property where wife refuses to release or convey homestead see the C J S title Specific Performance § 21, also 58 C J p 908 note 36–p 909 note 43

Retaining bill to allow purchaser lien on land

Under Code 1907 § 4161, as to homestead alienation, the rule that although specific performance is denied, the bill may be retained to allow the purchaser a lien on the land to reimburse for purchase price paid or the cost of improvements made by him, is not applicable, where the land involved is a part of a homestead, the whole of which is worth less than two thousand dollars, and the wife refuses to join in the verbal sale sought to be enforced, for verbal sale of part when the whole is worth less than two thousand dollars cannot be treated as a selection of a homestead to the exclusion of the alienated tract—Irvin v Irvin, 93 So 517, 207 Ala 493

27. "An executory contract for the sale of the homestead made by the husband and wife is unenforceable specifically so long as the homestead exists, but the contract is nevertheless binding upon the husband, and, if the homestead is subsequently abandoned, its specific performance may be decreed"—Bell v Crabb, Tex Com App, 244 S W 371, reversing Crabb v Bell, Civ App, 220 S W 623

28 Ala—Lyon v Harden, 29 So 777, 129 Ala 643
Tex—Bell v Crabb, Com App, 244 S W 371, reversing Crabb v Bell Civ App 220 S W 623—Saulsbury v Anderson, Civ App, 39 S W 2d 142 error dismissed—Hudgins v Thompson, Civ App, 163 S W 659, reversed on other grounds 211 S W 586, 109 Tex 433
29 C J p 923 note 15

29. Tex—Jones v Goff, 63 Tex 218
29 C J p 923 note 16

Lease placed in escrow

Although husband and wife signed and acknowledged an oil and gas lease of their homestead and placed it in escrow, contract still being executory up to actual delivery with intent to vest title, specific performance cannot be decreed—Jackson v Scoggins, Tex Civ App, 220 S W 302

30. Tex—Jones v Goff, 63 Tex 218

31. Ariz—Strahan v Haynes, 262 P 995, 33 Ariz 128

32. Ariz—Strahan v Haynes, supra
Cal—Smith v Bangham, 104 P 689, 156 Cal 359, 28 L R A, N S, 522—Hughes v Heffner, 84 P 2d 540, 29 Cal App 2d 382

33. Ariz—Strahan v. Haynes, 262 P. 995, 33 Ariz 128.

for recovery of damages by the intended purchaser for its breach.

While in some jurisdictions the rule has been denied or at least limited in its operation,[34] according to the weight of authority a contract to convey the homestead which is executed by the husband without the consent and joinder of his wife or vice versa is absolutely void and furnishes no basis for recovery of damages by the intended purchaser[35] for its breach, and it has been held that this is so even though the contract is accompanied by partial performance on the part of the intended purchaser.[36] In some jurisdictions neither the husband nor the wife is responsible for damages for the wife's failure to comply with her executory contract to convey her homestead where the intended purchaser has knowledge of the homestead right.[37]

Contract to convey land in excess of homestead Where the owner of a homestead enters into a contract, in which his wife does not join to convey the homestead together with other land, damages may be recovered from him in some jurisdictions for his refusal to convey that part of the land not occupied by him as a homestead,[38] but in other jurisdictions the contrary has been held.[39]

d. Recovery Back of Purchase Money

Where a conveyance of the homestead, or an agreement to convey it, is invalid, the consideration paid by the intended purchaser may be recovered back in some jurisdictions, but not in others

Although there is authority to the contrary,[40] it has been held that the consideration paid by an intended purchaser, on a contract to convey the homestead void for want of the joinder of the wife therein, may be recovered back,[41] and even that, where the husband executed a conveyance of the homestead without the wife's consent and joinder therein, the grantee may recover back the money paid for the conveyance in an action of assumpsit.[42]

e. Foreclosure

The holder of a valid mortgage on the homestead may enforce his rights by foreclosure

If a mortgage of the homestead is valid, the mortgagee may enforce his rights by foreclosure[43] even after the mortgagor's death.[44] No action is maintainable, however, to foreclose a mortgage where, by reason of noncompliance with statutory provisions on the part of the mortgagee, the homestead property is released from the mortgage.[45] In case a homestead is sold and part of the proceeds invested in another, on which a mortgage is given to secure the balance of the price, the mortgagee on foreclosure, it seems, may sell only such a fractional interest in the premises as represents the unpaid balance together with the debtor's reversion in the rest of the land.[46]

Proceedings in general It is within the power of the legislature to regulate proceedings for the foreclosure of mortgages on homesteads.[47] In the absence of specific statutory regulations, however, the foreclosure of mortgages on homesteads is usually governed by the general rules applicable to the

34. Ill.—White v. Bates, 84 N.E. 906, 234 Ill. 276, reversing 138 Ill. App. 112
29 C.J. p. 923 note 20
Agreement by husband alone
(1) An agreement by the husband alone to convey the homestead at some future time is not an unlawful undertaking and is not void in toto and damages are recoverable from him for its breach
Ala.—Ben Cheeseman Realty Co. v. Thompson, 112 So. 151, 216 Ala. 9
Mich.—Droppers v. Marshall, 168 N.W. 1001, 203 Mich. 173, 4 A.L.R. 1266
Tex.—Cross v. Everts, 28 Tex. 523—Gibson & Johnson v. Ward, Civ. App., 35 S.W.2d 824, error dismissed, followed in Gibson v. Canon, 35 S.W.2d 828 and Gibson & Johnson v. Axe, 35 S.W.2d 828
29 C.J. p. 923 note 20 [a]
(2) The purchaser, however, may recover as damages only the amount he has expended under the contract.—Saulsbury v. Anderson, Tex. Civ. App., 39 S.W.2d 142, error dismissed

35. Kan.—Tucker v. Finch, 188 P. 235, 106 Kan. 419
Minn.—Horseth v. Fuglesteen, 205 N.W. 607, 165 Minn. 38
29 C.J. p. 924 note 22
Damages for breach by purchaser of contract to convey homestead see supra § 140 c

36. Okl.—Elliott v. Bond, 176 P. 991, 72 Okl. 3, denying rehearing 176 P. 242, 72 Okl. 3

37. Tex.—Finley v. Messer, Civ. App., 9 S.W.2d 756

38. Kan.—Hughes v. Cressler, 287 P. 271, 130 Kan. 533
Demand as condition precedent
An action for damages cannot be maintained prior to a demand for conveyance of such part and a refusal to convey.—Lamb v. Cooper, 129 N.W. 323, 150 Iowa 18

39. Minn.—Horseth v. Fuglesteen, 205 N.W. 607, 165 Minn. 38

40. Kan.—Thimes v. Stumpff, 5 P. 431, 33 Kan. 53
29 C.J. p. 924 note 25.

41. Iowa.—De Kalb v. Hingston, 73 N.W. 350, 104 Iowa 23
29 C.J. p. 924 note 26

42. Mich.—Stern, Jr. & Bros. Co. v. Wing, 97 N.W. 791, 135 Mich. 331
29 C.J. p. 924 note 27

43. Okl.—Home Owners' Loan Corporation v. Rusch, 80 P.2d 639, 183 Okl. 115—Adams v. Swan, 288 P. 476, 143 Okl. 162, 303
Right to claim homestead as against foreclosure see infra § 204

44. Cal.—Collins v. Scott, 34 P. 1085, 100 Cal. 446

45. Cal.—Votypka v. Valentine, 182 P. 76, 41 Cal. App. 71
29 C.J. p. 922 note 93

46. Ga.—Johnson v. Poullain, 62 Ga. 375

47. Okl.—Home Owners' Loan Corporation v. Rusch, 80 P.2d 639, 183 Okl. 145—Adams v. Swan, 288 P. 476, 143 Okl. 162, 303.

foreclosure of mortgages in general with respect to pleadings,[48] defenses,[49] presumptions,[50] burden of proof,[51] admissibility of evidence,[52] weight and sufficiency of evidence,[53] trial,[54] findings,[55] judgment,[56] and with respect to such accompanying mat-

48. Tex—Chalk v Daggett, Com App, 257 S W 228, modifying, Civ App, 204 S W. 1057

Pleading homestead exemption

(1) Where neither note sued on nor deed of trust securing it indicated that property was defendants' homestead, or that they claimed it as such, homestead exemption was matter of defense to be pleaded by defendants—Hufstedler v Glenn, Tex Civ App, 82 S W 2d 733

(2) In action on note and for foreclosure of trust deed, defendants who failed to plead homestead as a defense were not entitled to introduce proof of the homestead issue—Roberson v Home Owners' Loan Corporation, Tex Civ App, 147 S W 2d 949, error dismissed, judgment correct

(3) Refusal to foreclose deed of trust on ground that property was homestead when deed was executed was error, where that theory had no support in pleading—First Nat Bank v Zarafonetis, Tex Civ App, 15 S W 2d 155, error refused

Alternative allegations

In foreclosure suit, bill may allege that mortgage on homestead was duly executed and acknowledged by mortgagor's wife as it purports to be, and in alternative, that if not in fact acknowledged by the wife the property has an excess value subject to foreclosure—Carpenter v First Nat Bank 181 So 239, 236 Ala 213

Necessary allegations

If suit is brought to foreclose a mortgage of homestead premises in which the wife did not join, a sale of so much thereof as is in excess of the statutory limitation as to value will not be decreed, unless the value of the property is alleged by plaintiff, or put in issue by proper pleadings—Whitlock v Gosson, 53 N W 980, 35 Neb 829

Sufficiency of pleadings

An allegation by a mortgagee that the premises in suit were conveyed to him sufficiently shows that the grantor's homestead was released—West v Krebaum, 88 Ill 263

Admissions by failure to reply

The debtor's allegation in an answer to a foreclosure proceeding that he is entitled to a homestead on the mortgaged property is not admitted by a failure to reply, if the mortgage, constituting a part of the complaint, shows an absolute conveyance without reservation—Mullins v Clark, 15 S W 784, 13 Ky L 29

Evidence admissible under general denial

Evidence of homestead right is admissible under general denial—State Bank of Wheatland v Bagley Bros., 13 P 2d 564, 44 Wyo 456, denying rehearing 11 P 2d 572, 44 Wyo 244

49. Fla—Everglade Cypress Co. v. Tyner, 160 So 513, 119 Fla 43

Particular defenses available

Suit to foreclose mortgage on homestead may be defended on ground that note and mortgage were signed by mortgagors as accommodation to mortgagee and were never unconditionally delivered—Willis v Sponsler, 219 N W 581, 117 Neb 1

50. Presumption not created

Fact that property was occupied as homestead when plaintiff purchased trust deed lien did not raise presumption of homestead occupancy at date of execution of deed, as against owners' representations in trust deed and their statement to purchaser that lien was valid—Judge v Shaboub, Tex Civ App, 57 S W 2d 613

51. Tex—Davis v National Bond & Mortgage Corporation, Civ App, 45 S W 2d 272 reversed on other grounds National Bond & Mortgage Corporation v Davis, Com App 60 S W 2d 429—Medearis v Buratti, Civ App 275 S W 617

29 C J p 819 note 43 [a] (1)

Burden is on debtor claiming homestead exemption

(1) To establish the defense that the property in question is homestead property

Ill—Huber v First Nat Bank, 251 Ill App 36

Tex—Campbell v First Nat Bank, Civ App, 88 S W 2d 1084 error refused

(2) To establish compliance with the statutes—Fidelity Philadelphia Trust Co v Brown, 232 N W 740, 181 Minn 392

Burden of proving excess

Where a mortgagee, having no lien on the homestead proper, claims a right to come against the excess of the residence premises over the statutory limit, the burden of proof is on him to show such excess—Bull v Coe, 15 P 123, 2 Cal Unrep Cas 807

52 Tex—Mitchell v Federal Mortg Co, Civ App, 45 S W 2d 649

53. Evidence held sufficient

(1) In general

Ark—Nicholas v Ward, 168 S W 2d 1095

Okl—Illinois Bankers Life Assur Co v Day 62 P 2d 970, 178 Okl 284

Tex—Chalk v Daggett, Com App, 257 S W 228, modifying, Civ App 204 S W 1057—Anderson v Jefferson Standard Life Ins Co, Civ App, 167 S W 2d 797—Skiles v Shropshire, Civ App, 50 S W 2d 402, modified on other grounds 77 S W 2d 872, 124 Tex. 462.

(2) To sustain particular findings.

Ark—Wooten v Farmers' & Merchants' Bank, 249 S W 569, 158 Ark 179

Iowa—State Exchange Bank of Parkersburg, Iowa, v. Nolan, 207 N W 745, 201 Iowa 722

Kan—Larrick v Jacobson, 32 P 2d 204, 139 Kan. 522

La—Bank of Winnfield v. Hyde, 148 So 253, 177 La 346

S D—Smith v Owens, 245 N W 56, 60 S D 550

Tex—Campbell v First Nat Bank, Civ App, 88 S W 2d 1084, error refused—Lubbock Nat Bank v Nickels, Civ App, 63 S W 2d 764

(3) To warrant judgment foreclosing mortgage liens—Collier v Union Central Life Ins Co, C C A Tex, 100 F 2d 411

Evidence held insufficient

Cal—Williams v Nieto, 277 P. 513, 98 Cal App 615.

Minn—Fidelity Philadelphia Trust Co v Brown, 232 N W 740, 181 Minn 392

Tex—Campbell v First Nat Bank, Civ App, 88 S W 2d 1084, error refused—Mills v Womack, Civ App., 15 S W 2d 116

54 Questions of law and fact

Tex—Covel v Mortgage Bond Co of New York, Civ App, 124 S W 2d 201 -Judge v Shaboub, Civ App, 57 S W 2d 613

55. Tex—National Bond & Mortgage Corporation v Davis, Com App, 60 S W 2d 429, reversing Davis v National Bond & Mortgage Corporation, Civ App, 45 S W 2d 272--Tunstall v C E Carlton & Co, Civ App, 57 S W 2d 589—Rose v Turner, Civ App, 16 S W 2d 433, conforming to answer to certified questions 7 S W 2d 70, 117 Tex 464

Wash -State ex rel Corbett v Superior Court for King County, Department No 10 thereof, 48 P 2d 617, 183 Wash 373

56. Tex—Benson v Mangum, Civ App, 117 S W 2d 169, error refused

Construction of judgment

Tex—Shawver v Masterson, Civ. App, 81 S W 2d 236, error refused

Conclusiveness of judgment

(1) Where the wife of the homesteader is not a party to the foreclosure suit, neither the wife nor the husband is estopped by the foreclosure judgment to plead their homestead claim in a subsequent suit to establish their homestead rights—Dillard v Duke, Tex Civ App, 107 S W 2d 414.

ters as sale,[57] deficiency,[58] personal liability,[59] and distribution of the proceeds of the foreclosure sale [60]

Parties General rules as to parties apply in an action to foreclose a mortgage on a homestead [61] Accordingly, in order to conclude the homestead rights of husband and wife in mortgaged premises, both must be joined as defendants to a bill to foreclose the mortgage,[62] whether the mortgage was executed by both,[63] or by the husband[64] or wife[65] alone Likewise a second wife who marries the homesteader after he has executed a mortgage on the homestead in which the first wife did not join is a necessary party to the foreclosure proceeding to bar her interest.[66] If the wife is not thus

(2) In action, to which wife had not been made party, foreclosing property claimed as homestead, wife, by testifying and asserting homestead rights in hearing on motion for new trial, was not bound by judgment and barred from thereafter asserting homestead claim —Smith v New Waverly State Bank, Tex Civ App, 76 S W 2d 201

Relief against foreclosure decree

(1) Where a husband represented that he was single, and thereby obtained a loan secured by a mortgage on his homestead, the wife, if entitled to relief against a foreclosure decree, may obtain it in an independent suit —Brignardello v Cooper, 172 S W 1030, 116 Ark 103

(2) Vacation of decree for fraud — Chapman v Clark, Tex Com App, 276 S W 197, affirming, Civ App, 262 S W 161

57. Tex —Calvert v Hanna, Civ App, 140 S W 2d 976

Statute held not to prohibit sale

Statute prohibiting sale of land in which debtor has homestead, unless over one thousand dollars is offered, does not apply to mortgage foreclosure sale —McGuire v Cope, 9 S W 2d 528, 225 Ky 521

Enjoining sale to allow allotment

If the mortgage contains no reservation of homestead rights, it has been held that the foreclosure sale will not be enjoined to allow an allotment, as the debtor is entitled to the excess of the proceeds over the amount of the debt, free from claims of creditors —Montague v Raleigh Sav Bank, 24 S E 6, 118 N C 283

Selling nonhomestead property first

It has been held that, if there has been a release of the homestead right by a mortgage which covered the residence and other property, the latter need not be first sold on foreclosure if the residence tract was not such when the instrument was executed or if the mortgage was given to secure the price Gaither v Wilson, 46 N E 58, 164 Ill 544, affirming 65 Ill App 362

Trust deed securing sum in part not chargeable against property

(1) A sale made under a deed of trust for a sum larger than the amount with which the homestead property is properly chargeable is not void —W C Belcher Land Mortgage Co v Taylor, Tex Com App, 212 S W 647—Miller v Gibralter Sav & Bldg Ass'n, Tex Civ App, 132 S W 2d 606, error dismissed, judgment correct—Wood v Eastland Building & Loan Ass'n, Tex Civ App, 75 S W 2d 466, error refused—Chambers & Co v Little, Tex Civ App, 21 S W 2d 17, writ denied

(2) At the most it is only subject to be set aside by the homestead claimant paying, or offering to pay, the amount properly chargeable against the property —Floyd v Hammond, Tex Com App, 268 S W 146, affirming Hammond v Floyd, Civ App, 255 S W 777—Bruce v Thomas, Tex Civ App, 106 S W 2d 806

Where the mortgage is void, a sale thereunder is void —Burkhardt v Lieberman, 159 S W 2d 847, 138 Tex 409, modifying, Civ App, 142 S W 2d 283.

58. Enforcement of deficiency judgment

A statute providing that a deficiency judgment rendered on an indebtedness evidenced by a mortgage on a homestead shall not be enforceable after two years is valid, but it does not operate to preclude the enforcement of a deficiency judgment rendered for an indebtedness secured by mortgage on premises never occupied or held as a homestead —Montalto v Yeckley, 34 N E 2d 765, 138 Ohio St 314

59. Wife not executing mortgage note

The mortgagee can obtain no personal judgment against the wife if she did not execute the mortgage note —Wolf v Shenandoah Nat Bank, 50 N W 561, 84 Iowa 138

60. Lien covering part only of premises

Where a homestead and other property were mortgaged by a husband and wife, she is entitled to have the property outside the homestead applied to the satisfaction of that mortgage before its application to a mortgage not valid against the homestead — Hunt v Davis, 96 A 811, 90 Vt 153

Distribution of surplus

(1) One joined by wife in mortgaging homestead, after recovery of judgment against him, was not entitled to present cash value of foreclosure sale proceeds exceeding mortgage debt — Farris v Hendricks, 146 S E 77, 196 N C 439

(2) Mortgagees purchasing mortgaged homestead for more than sum due them on vendor's lien crediting excess on general judgment against mortgagors, were not equitably entitled to benefit of purchase —Wilson v Levy, Tex Civ App, 62 S W 2d 501, error dismissed

61. Minor heirs of mortgagor

If mortgaged realty was homestead, the minor children of deceased mortgagor then became "necessary parties" to foreclosure action, as a "condition precedent" to the effective foreclosure of their interests, and the failure to join them resulted in their interests not being foreclosed —Rives v Stanford, 106 P 2d 1101, 188 Okl 108

Wife of heir

The wife of deceased mortgagors' son inheriting an interest in mortgaged homestead was not a "necessary party" to suit to foreclose mortgage, where marriage was not consummated until nearly one month after filing of foreclosure suit and lis pendens notice — Federal Land Bank of St Louis v Cottrell, 126 S W 2d 279, 197 Ark 783

62. Cal —White v Rosenthal, 35 P 2d 154, 140 Cal App 184—Baker v Superior Court in and for Los Angeles County, 7 P 2d 193, 120 Cal App 1

Okl - Grubb v Fay State Bank of Fay, 219 P 341, 119 Okl 199

Tex —Dillard v Duke, Civ App, 107 P 2d 414

29 C J p 924 note 30

Where wife has valid defense

(1) A wife is a necessary party to a foreclosure suit brought against the husband alone where there is any defense available to her growing out of her homestead rights which will defeat the action —Smith v New Waverly State Bank, Tex Civ App, 76 S W 2d 201

(2) Where a lien on the homestead may be created without the wife's consent, she is not a necessary party defendant to a suit seeking to foreclose such a lien —Kenyon v Stouffet, Tex Civ App, 85 S W 2d 303, error dismissed

63. Tex —Thompson v Jones, 60 Tex 91

64. Mich —Shoemaker v Collins, 14 N W 559, 49 Mich 595

65. Kan —Dollman v Harris, 5 Kan 597.

66. Iowa —Larson v Reynolds, 13 Iowa 579, 81 Am D 444.

joined, to answer to her rights, she may intervene and litigate the question of homestead [67]

Allotment of homestead Where a mortgage of an entire tract covers more than the homestead portion and is invalid as to that portion, an allotment of the homestead may be made under orders of court in proceedings to foreclose the mortgage,[68] and the court may order commissioners to set off the exemption[69] in as compact a form as possible, including the dwelling house [70]

Receivership Courts of equity are reluctant to appoint a receiver to subject the rents and profits of the homestead to the payment of the mortgage indebtedness [71] In some jurisdictions, under particular statutes, it is held that the remedy of appointing a receiver in an action of foreclosure is not applicable where the mortgaged property is the homestead of the mortgagor,[72] but in other jurisdictions it is held that it is a matter within the discretion of the lower court.[73] Where the homestead right does not attach to the entire property and there is no objection on the ground of difficulty in separating it, a receiver may be appointed so as to subject the excess to dispossession [74]

Right of possession during period of redemption. The right to possession of the homestead premises during the period of redemption usually is governed by statute [75] Under the statutes in some jurisdictions the judgment debtor is entitled to retain possession of the homestead premises during the period of redemption,[76] provided the premises are occupied by him as a homestead[77] at the time of the foreclosure sale [78]

67. Cal—Mabury v Ruiz 58 Cal 11—Moss v Warner, 10 Cal 296

68 Miss—Howell v Bush, 54 Miss 437
29 C J p 922 note 97

69. Cal—Moss v Warner, 10 Cal 296
Miss Howell v Bush, 54 Miss 137

70 Cal—Moss v Warner, 10 Cal 296

71. Neb—Mackey v Cox, 146 N W 1008, 95 Neb 833
42 C J p 120 note 2

72. U S—U S Nat Bank of Omaha v Pamp, C C A Neb, 83 F 2d 493
Neb Federal Credit Co v Reynolds, 272 N W 897, 132 Neb 495—Sanford v Anderson 95 N W 632, 69 Neb 249 reversing 3 Nebr, Unoff, 561, 92 N W 152
42 C J p 120 note 4

73. Iowa—Finken v Schram, 236 N W 108, 212 Iowa 406
Wis—Nash v Meggett, 61 N W 283, 89 Wis 486

Statute held applicable to homesteads

The statute providing for appointment of a receiver on foreclosure of a mortgage applies to homestead as well as other property—Home Owners' Loan Corporation v Rusch, 80 P 2d 639, 183 Okl 145—Adams v Swan 288 P 476 143 Okl 162, 303

Appointment of receiver

(1) Application to appoint a receiver to take possession of mortgaged homestead is to be granted or denied according to rules of equity jurisprudence, and with due regard to statutory limitations—Sheakley v Mechler, 203 N W 929, 199 Iowa 1390

(2) Facts justifying appointment of receiver for premises not a homestead do not always warrant appointment of one for homestead—Crosby v Keilman, 239 N W 431, 206 Wis 252

(3) Where mortgage pledges rents and profits and authorizes appointment of receiver and proof shows inadequacy of security, receiver should be appointed although mortgage covers homestead, unless circumstances justify refusal to appoint receiver—Iowa-Des Moines Nat Bank & Trust Co v Crawford, 252 N W 97, 217 Iowa 609

(4) Appointment of receiver held proper—Farmers' Trust & Savings Bank of Laurens v Miller, 214 N W 546, 203 Iowa 1380

(5) Refusal to appoint receiver held error—Iowa-Des Moines Nat Bank & Trust Co v Crawford supra.

Possession of premises by receiver

In view of Code 1924 §§ 10150, 10155 par 2, a mortgagor may pledge as security for debt right of occupancy of homestead, with its incidental rights and profits during year of redemption but as homestead cannot be resorted to to pay for a deficiency on judgment, if a deficiency exists, until mortgagee has exhausted all other property by same contract, receiver under a mortgage cannot take possession of homestead until sale on execution is had, when it can be determined whether deficiency exists—Sheakley v Mechler, 203 N W 929, 199 Iowa 1390

Disposition of funds in hands of receiver

Income from mortgaged property in the hands of a receiver appointed in a suit to foreclose a mortgage against a homestead must be applied by receiver to the judgment obtained by mortgagee in the mortgage foreclosure action—Home Owners' Loan Corporation v Rusch, 80 P 2d 639, 183 Okl 145

74. Neb—Mackey v Cox, 146 N W 1008, 95 Neb 833—Sanford v Anderson, 95 N W 632, 69 Neb 249

75. Wash—Union Central Life Ins Co v Fischer, 13 P 2d 889, 169 Wash 75

76. Wash—Pease v Stephens, 21 P 2d 294, 173 Wash. 12—North Pacific Loan & Trust Co v Bennett, 94 P 664, 49 Wash 34

Covenants of warranty in the mortgage do not prevent a mortgagor from asserting this right—North Pacific Loan & Trust Co v Bennett, supra

Persons entitled to benefits of statute

(1) Although mortgagee had released them from personal liability, mortgagors were "judgment debtors" and entitled to possession of homestead during period of redemption—Union Central Life Ins Co v Fischer, 13 P 2d 889, 169 Wash 75

(2) Purchasers, having no homestead right against vendors until payment of price, are not entitled to possession of premises based on claim of homestead during redemption period after judgment for trustee of vendor's successor on realty contract—First Nat Bank v Mapson, 42 P 2d 782, 181 Wash 196

Proceedings to determine right of possession

Wash—State ex rel Crawford v Paul, 54 P 2d 411, 185 Wash 306—State ex rel O'Brien v Superior Court for King County, 24 P 2d 117, 173 Wash 679, adhered to 29 P 2d 1119, 176 Wash 704 and followed in New York Life Ins Co v Rohne, 32 P 2d 118, 177 Wash 26

77. Mont—Dyer v. Schmidt, 213 P 1117, 67 Mont 6

78. Wash—Seattle Trust Co Stephens, 49 P.2d 463, 183 Wash 687.

Rights and remedies of purchaser at foreclosure sale. Where the mortgage of the homestead is valid, a purchaser at a foreclosure sale thereunder acquires a good title,[79] and may maintain an appropriate action,[80] such as an action of ejectment,[81] to recover possession, but, where the mortgage covered more property than enough to satisfy a homestead exemption that might be claimed by the mortgagor who had previously conveyed without his wife's consent the same premises to another, the purchaser of the homestead interests under the foreclosure of the mortgage has not the right to select what portion of the whole tract he wishes to be considered as the homestead, and then bring ejectment therefor, for the grantor and mortgagor, in the absence of a selection by him, will be presumed to have selected that part of the premises as a homestead on which his dwelling house is situated.[82]

As a general rule a void foreclosure sale passes no title to the purchaser,[83] and if he takes possession of the premises he is not entitled to recover for improvements made by him where he did not act in good faith.[84]

Ejectment against purchaser Where the mortgage is invalid because executed by the husband alone, the heir of the mortgagor may maintain ejectment against one who holds under a sale on foreclosure.[85]

E. AVOIDANCE

§ 152. Persons Entitled to Assert Invalidity

a Owners of homestead
b Other persons

a. Owners of Homestead

In a proper case the grantors or mortgagors of homestead property, provided they have not since parted with all right, title, and interest therein, may have the conveyances or mortgages set aside or canceled In some jurisdictions the relief is limited to avoidance of the conveyance only as to the rights of a spouse as to whom it is defective

As in the case of other invalid instruments, see Cancellation of Instruments §§ 45, 46, the grantors or mortgagors of their homestead property may in a proper case maintain actions to set aside or cancel conveyances or mortgages,[86] which are invalid under the rules heretofore considered, see supra §§ 123–151 The husband may not impeach his deed of the homestead to the wife, on the ground of informality, where he has deserted her since its execution.[87]

The grantors of a trust deed covering homestead property, who have since parted with all their right, title, and interest therein to a grantee who assumed the indebtedness, are not entitled to oppose the foreclosure of the trust deed.[88]

Enforcement as to grantor and avoidance as to spouse In some jurisdictions where a deed or conveyance does not pass the wife's homestead rights because of defects in the wife's acknowledgment or other matters which render it ineffective as to her, she is entitled to have it canceled in its entirety, as against the contention that it is effectual as respects the husband and will become operative when the homestead rights terminate.[89] Under statutory provisions which expressly provide that a husband or wife who executes a deed, mortgage, or conveyance of the homestead without the other joining therein is concluded thereby, and that the deed may be avoided only by the husband or wife who did not execute it, a deed or mortgage of the homestead by

79. Wis—Kent v Lasley, 4 N W 23, 48 Wis 257—Kent v Agard, 22 Wis 150

80. Defenses
Miss—Gardner v Cook, 158 So 150, 173 Miss 241

81. Wis—Kent v Lasley, 4 N W 23, 48 Wis 257—Kent v Agard, 22 Wis 150

Parties
If the property is sold under a foreclosure subject to the homestead privilege, the wife is not bound by a subsequent judgment in ejectment, to which latter action she was not a party Mix v King, 55 Ill 434

Burden of proof
Ala—Metropolitan Life Ins Co v. Estes, 155 So 79, 228 Ala 582

82. Wis—Kent v. Lasley, 4 N W 23, 18 Wis 257 overruling Kent v Agard 22 Wis 150

83. Tex—Milliken v Coker, Civ App, 90 S W 2d 902, modified on other grounds 115 S W 2d 620, 132 Tex 23

84. Notice of homestead claim
A purchaser of homestead property at sale under trust deed which was void because not executed for purposes authorized by constitution, could not recover from owners for improvements made by him thereon, because owners possession at time of sale was "notice" of homestead interest of owners, and therefore, improvements were not made in "good faith"—Burkhardt v Lieberman, 159 S W 2d 847 138 Tex 109 modifying, Civ App 142 S W 2d 283

85. Mich—Sherrid v Southwick, 5 N W 1027, 43 Mich 515

86. Tex—First Nat Bank v Dismukes, Civ App 240 S W 665 29 C J p 925 note 47

87 Ill—Hagerty v Hagerty, 36 N E 981, 149 Ill 655

88. Tex—Knowles v Waddell Inv Co, Civ App 280 S W 885 886

89. Tex—Cates v Greene, Civ App, 111 S W 2d 592

Basis for rule
The holding is predicated on the proposition that the homestead right is not a mere privilege of possession and enjoyment but extends to full dominion over the title to the property for the purposes of sale or exchange, to which dominion the conveyance of the husband constitutes an impediment which the wife has the right to remove at any time during the existence of the homestead—Cates v Greene, supra.

the husband is conclusive against, and may not be avoided by, him,[90] but it may be avoided as to the wife's rights,[91] and the decree which protects the rights of the grantee or mortgagee should subject the land to the homestead rights of the wife as long as they may exist.[92]

b. Other Persons

Other than the husband and wife, only those standing in privity with them or possessing a valid lien on the property may attack a conveyance or mortgage of homestead property; general creditors of the grantor or mortgagor cannot attack such a transfer and the heirs of the homesteader cannot in general assert rights contra to executed agreements of the ancestor

Aside from the husband and wife, only those standing in privity with them,[93] or those having a valid lien on the homestead property[94] are entitled to attack a conveyance or mortgage deed thereof by husband or wife in which one of the spouses did not join. The nonjoinder of the wife may be made a ground of attack by a grantee or mortgagee whose deed is subsequent to the one alleged to be invalid.[95] The purchaser of homestead property under an executed contract of sale under which possession of the premises was delivered, the consideration paid, and a deed to the premises properly executed and acknowledged by the husband and wife tendered, cannot have the contract of sale set aside because not executed and acknowledged by both husband and wife as required by statute.[96] A grantee of the premises may not maintain an action to annul a prior conveyance, where he secures the property for a nominal consideration and for a fraudulent purpose,[97] nor can a grantee question the regularity of a prior mortgage, where the amount of the mortgage debt was deducted from the purchase price, and assumed by the grantee.[98]

General creditors of the grantors or mortgagors cannot attack transfers of homestead property.[99] Creditors of the exemptioner cannot question the validity of a voidable mortgage of the homestead executed by him, where he waives the irregularity by failing to claim his exemption.[1] An attaching creditor whose subsisting rights as an unsecured creditor were not affected by the passage of a homestead law cannot question the validity of a husband's sole conveyance and thereby acquire a lien on the homestead.[2]

Heirs of homesteader. Heirs of the homesteader cannot assert a claim of homestead which will be paramount to the right of one who holds a purchase-money mortgage.[3] Also, they cannot contest the validity of a contract of sale entered into by their ancestor by alleging that the property constituted his homestead, where the vendee has been placed in possession by the ancestor and has paid the purchase price,[4] but they may refuse to complete the sale if the vendor dies before conveyance or abandonment of the homestead pursuant to contract.[5] However, if a transfer of the homestead title has been ordered by the court in performance of an oral contract of sale, entered into by the ancestor, the heirs may sue to revise the order, when the quantity of land specified therein was erroneous.[6] The husband's mistake of law in believing the law required the deed to land in which the proceeds of his homestead were reinvested to be taken in the name of his wife does not authorize the annulment or modification of the instrument by the heirs of the husband.[7]

§ 153. Nature and Form of Action and Time to Sue

a. Nature and form of action

b. Limitations on time to sue; laches

90. Okl.—Christie v. Thompson, 211 P. 513, 88 Okl. 85—Maloy v. Cameron, 119 P. 587, 29 Okl. 763

91. Okl.—Maloy v. Cameron, supra

92. Okl.—Christie v. Thompson, 211 P. 513, 88 Okl. 85—Maloy v. Cameron, 119 P. 587, 29 Okl. 763

93. Ala.—Reid v. Allen, 62 So. 801, 183 Ala. 582
29 C.J. p. 925 note 55

94. Kan.—Howell v. McCrie, 14 P. 257, 36 Kan. 636, 59 Am.R. 584
29 C.J. p. 925 note 56
Remedies of purchasers or mortgagees see supra § 151

95. Iowa.—Alley v. Bay, 9 Iowa 509
29 C.J. p. 925 note 57

96. Neb.—Johnson v. Kelley, 198 N.W. 567, 112 Neb. 60

Purpose of statute

The statute is for the protection of the homestead interest, and is not intended to be used as a weapon by third parties with which to abrogate executed contracts otherwise valid.—Johnson v. Kelley, supra

97. Iowa.—Luther v. Drake, 21 Iowa 92

98. Iowa.—Myers v. Bowers, 30 N.W. 24, 70 Iowa 95

99. Ala.—Reid v. Allen, 62 So. 801, 183 Ala. 582
Tex.—W. F. Dulaney & Sons v. Lawler, Civ.App., 282 S.W. 321
29 C.J. p. 925 note 60

1. Ky.—Taylor v. Dismuke, 15 Ky.L. 703

Title quieted as against claim of husband's creditor

A husband's failure to join his wife in executing and acknowledging her deed of homestead in portion of community property did not defeat grantee's right to judgment quieting her title to homestead property, as prayed in her separate answer to complaint in action by husband's judgment creditor to quiet title, where husband joined with wife in averring in their answer that they claimed no interest in property.—Montgomery v. Bullock, 77 P.2d 846, 11 Cal.2d 58

2. Vt.—Howe v. Adams, 28 Vt. 541

3. Ga.—Mims v. Wight, 3 S.E. 447, 78 Ga. 12

4. Mich.—Lamore v. Frisbie, 3 N.W. 910, 42 Mich. 186

5. Neb.—Solt v. Anderson, 93 N.W. 205, 67 Neb. 103

6 Tex.—Norris v. Duncan, 21 Tex. 594

7. Ga.—Browning v. Barber, 113 S.E. 797, 154 Ga. 221

a. Nature and Form of Action

Defects in a conveyance of, or encumbrance on, homestead property may be shown by direct attack, and if statutory provision is not made for the determination of various questions involved the court will devise a suitable procedure A suit to quiet title is proper.

The infirmities in a mortgage on homestead property can be shown on direct attack on its validity [8] Where the statute does not provide a remedy for determining the excess of land over the homestead allowance, a court of equity will invent a suitable remedy in a suit by the wife to cancel the husband's deed to land, including the homestead [9] If a husband has attempted wrongfully to assign away his wife's homestead rights, she may remain in possession of the premises and defend against ejectment [10]

Suit to quiet title Suit to quiet title may be brought by a holder of a homestead right to quiet title thereto [11] A wife may maintain a bill quia timet, filed by her next friend, for the removal of a cloud on her title and for the confirmation of her homestead rights in the property [12]

b. Limitations on Time to Sue; Laches

Statutes of limitations begin to run against a person entitled to assert the invalidity of a homestead conveyance from the time of transfer In some jurisdictions laches is not available as a defense

It has been held that the statute of limitations begins to run against a wife who is entitled to assert the invalidity of a homestead conveyance, from the time of transfer, and her coverture continuing after such time will not suspend the running of the statute [13] In some jurisdictions the defense of laches is not available when homestead rights are involved [14]

§ 154. Proceedings Generally

a Parties
b Pleading
c Evidence
d Trial
e Review

a. Parties

In general all parties in interest must be made parties, but a person having no interest in the cause is not a necessary party The wife may unite with, or intervene in, a proceeding brought by her husband, but ordinarily she is not entitled to sue alone during her husband's lifetime

In general, all parties having an interest in, or whose rights will be affected by, the decree in the cause must be made parties,[15] but a person having no interest therein is not a necessary party [16] As a general rule, although there is authority to the contrary,[17] the wife may unite with her husband in an action to set aside a conveyance,[18] or mortgage of homestead premises,[19] in which she did not join, and her death pending such suit does not affect its further maintenance where a child survives and is made a party thereto [20] It has been held also that she may intervene in the husband's suit to recover

8. Ala —Becker Roofing Co v Farmers' & Merchants' Bank of Piedmont, 134 So 635, 223 Ala 132
Remedies of purchaser or mortgagee see supra § 151
What constitutes direct attack
(1) By direct attack is meant some proceeding begun and prosecuted for the express purpose of having the conveyance adjudged void and canceled--Becker Roofing Co v Farmers' & Merchants' Bank of Piedmont, supra
(2) A bill to enforce a materialman's lien, which seeks as an incident thereto the cancellation of a prior mortgage for invalid acknowledgment is a direct attack on the mortgage --Becker Roofing Co v Farmers' & Merchants' Bank of Piedmont, supra
Bill in equity by mortgagor
In statutory ejectment suit by mortgagee of homestead, who purchased property at attempted foreclosure sale, mortgagors were not remitted to bill in equity for sale of homestead property and separation of homestead interest to present question of due execution vel non of conveyance of homestead —Metropolitan Life Ins Co v Estes, 155 So 79, 228 Ala 582

9. N D —Severtson v Peoples, 148 N W 1054, 28 N D 372

10. Wis —Green v Lyndes, 12 Wis 404

11. Neb —Naiman v Bohlmeyer, 150 N W 829 97 Neb 551
29 C J p 926 note 71

12. Tenn — Williams v Williams, 7 Baxt 116

13. Tex — Hussey v Moser, 7 S W 606, 70 Tex 42

14. Ill —Rhodes v Davis, 28 N E 2d 113 374 Ill 65

15. U S —Croker v Croker, D C Fla, 9 F 2d 109
Tex —Hargrove v Hopper Civ App, 56 S W 2d 1090, error dismissed
Husband
In a wife's suit to cancel a deed to community homestead property executed by the husband and wife, the husband on his refusal to join as plaintiff is a necessary party defendant —Hargrove v Hopper, supra

16. U S —Croker v Croker, D C Fla, 9 F 2d 409
Tex —Garrett v Katz, Civ App, 23 S W 2d 436, corrected on other grounds 27 S W 2d 373
Unnecessary parties
(1) Maker of simulated mechanic's lien note, having no interest therein, is not necessary party to cross action by purchaser of note —Garrett v Katz, supra
(2) A person who was a mere conduit for conveyance of the husband's homestead to him and his wife is not a necessary party to a suit to avoid the conveyances —Croker v Croker, D C Fla, 9 F 2d 409

17. Ala —Grider v American Freehold Land Mortg Co of London Limited 12 So 775 99 Ala 281, 42 Am S R 58

18. Tex —Myers v Evans, 16 S W 1060 81 Tex 317
29 C J p 926 note 76
Joinder of wife in proceeding for enforcement and protection of homestead rights see infra § 231

19. Mich —Shoemaker v Gardner, 19 Mich 96

20. Mich --Shoemaker v Collins, 14 N W 55, 49 Mich 595

back the homestead exchanged by him for other land,[21] or defend against the enforcement of a claim founded on a note, by showing usury;[22] or that she may intervene in an action brought against the husband for specific performance of a contract to convey the homestead, and thus protect her interests.[23] She cannot, however, as an intervener in a foreclosure suit, question by demurrer an alleged assignment of the mortgage to the present plaintiff from the original mortgagee, as she has no interest in the validity of the assignment.[24] Where residence land is claimed as the wife's both she and her husband, occupying it, should be joined as defendants in a suit in ejectment to test the validity of a conveyance to her.[25] She is not a necessary party, if she has joined in a mortgage to release dower and homestead rights, and the husband seeks to enjoin a sale under the mortgage.[26]

Right of wife to sue alone As a general rule, although there is some authority to the contrary,[27] during the husband's lifetime the wife is forbidden to sue alone, to set aside a conveyance of the homestead, as she is held to possess no property right therein, but a mere veto on the husband's power of alienation,[28] and where as the vendee of her husband she brings such a bill her authority to sue is referable solely to the title acquired by conveyance from her husband.[29] However, under some circumstances, it has been held that the wife may alone assert her homestead rights, as where her husband has deserted her,[30] in which case she is regarded by the law as a feme sole for the purpose of suing and being sued,[31] where her husband has died;[32] where her husband refuses to act in seeking the relief sought,[33] where she executed a conveyance of a homestead under her husband's coercion,[34] or by reason of the misrepresentations of the grantee,[35] where by fraud or deception of either her husband or a third person she was induced to sign a release or conveyance of their homestead rights,[36] where by the fraud of her husband and the grantee she has been induced to join in the deed, believing it to be a mortgage;[37] or where a creditor is wrongfully attempting to subject the homestead to the payment of his claim,[38] or, where she states facts sufficient for the recovery of alimony and the bill prays general relief.[39]

b. Pleading

The plaintiff's pleadings must allege facts sufficient to constitute a cause of action The issues must be clearly presented by the pleadings The proof should conform to the pleadings and must support the cause of action alleged

One who seeks to set aside or have canceled a deed, mortgage, or other lien of homestead premises must allege facts which show that the property was homestead property at the time the deed or mortgage was executed,[40] but it is not necessary to allege that no new homestead has since been acquired, nor that complainant has no homestead at the time of filing suit.[41] If cancellation is sought on the ground the instrument is a mortgage on the

21 Tex —Joplin v Fleming, 38 Tex 526

22 Iowa —Lyon v Welsh, 20 Iowa 578

23 Iowa —Perry v Dillrance 53 N W 280, 86 Iowa 424—McClure v Braniff, 39 N W 171, 75 Iowa 38

24. Cal —Mabury v Ruiz, 58 Cal 11

25. Mich —Hodson v Van Fossen, 26 Mich 68

26. Iowa —Sloan v Coolbaugh, 10 Iowa 31—Helpenstein v Cave, 3 Iowa 287

27. Fla —Wright v Wright, 77 So 616, 75 Fla 7
29 C J p 926 note 79

28 Ala —Fies & Sons v Lowery, 147 So 136, 226 Ala 329
29 C J p 926 note 80
Right of wife to sue for enforcement and protection of homestead rights see infra § 231

29. Ala —Fies & Sons v Lowery, supra

30. Mich —Sanborn v Sanborn, 62 N W 371, 104 Mich 180
29 C J p 926 note 82

31. Mich —Sanborn v Sanborn, 62 N W 371, 104 Mich 180.

32. N H —Atkinson v Atkinson, 37 N H 434
Vt —Davis v Andrews, 30 Vt 678

33. Ala —Nelson v First Nat Bank, 113 So 291, 216 Ala 349
Tex —Hargrove v Hopper Civ App, 56 S W 2d 1090, error dismissed
29 C J p 926 note 85

Collusive arrangement not countenanced

While remedy in wife to protect husband's homestead is recognized, collusive arrangement between her and husband cannot be countenanced —Nelson v First Nat Bank, 113 So 291, 216 Ala 349.

34. Tex —Essex v Mitchell, Civ App, 183 S W 399

35. Tex —Essex v Mitchell, supra

36. Minn —Tomlinson v Kandiyohi County Bank, 202 N W 494, 162 Minn 230

37 Tex —Wilson v Lewis, 81 S W 834, 36 Tex Civ App 371

38. Tex —Baxter v Dear 24 Tex 17, 76 Am D 89

39. Miss —Scott v Scott, 19 So. 589, 73 Miss 575

40. Ala —King v Chandler, 105 So 184, 213 Ala 337
29 C J p 926 note 98

Allegations held sufficient

In suit to foreclose vendor's lien defendant's plea of business homestead, alleging that he was sixty-four years old, had wife and family, and had used and occupied premises involved in conducting his business for thirty years, that property was adapted to such purpose, that he had no other place or way in which to earn livelihood, and that he had no other place of business, was sufficient —Pyland v Sayers, Civ App, 148 S W 2d 450, reversed on other grounds Sayers v Pyland, 161 S W 2d 769, 139 Tex 57, 140 A L R 1164

Allegations held insufficient

Allegations that complainants were living on the place when the bill was filed are insufficient to show that it was their homestead at the time prior thereto when the mortgage was executed —King v Chandler, 105 So 184, 213 Ala 337

41. Tex —Hays v Hays, 1 S W 895, 66 Tex 606.

homestead prohibited by constitutional or statutory provision, facts must be alleged which show that the transaction is one that is forbidden and not within the exceptions stated in the statute or constitution [42] In a suit to foreclose a vendor's lien, the burden is on defendant husband and wife claiming the sale was simulated to plead that fact [43] In a suit to annul and cancel a mortgage it should be alleged that the mortgage was not a part of a transaction of purchase and sale [44] If the pleadings attacking the mortgage show that anything was obtained on the security thereof an offer to do equity by restoration of what was thus received must be made [45]

Where during the life of a husband the wife has no legal or equitable title to a homestead owned by the husband, she cannot maintain a bill to avoid a conveyance of the homestead, on the ground that it was executed without her voluntary signature and assent in the absence of an allegation that the husband fails to act [46] As against a general demurrer, all reasonable intendments are indulged in favor of plaintiff's pleadings [47] If the bill or complaint states facts entitling the homesteader and his wife to substantial relief, mere technical errors in pleading will be ignored.[48]

Issues, proof, and variance. As is true in civil actions generally, see the C.J.S. title Pleading §§ 512–519, also 49 C.J. p. 780 note 50–p. 785 note 51, in order that questions be put in issue they must be clearly presented by the pleadings [49] Evidence within the legitimate scope of the pleadings and issues is admissible [50] A wife cannot defeat a homestead conveyance merely by proof that she was misled by the notary as to the character of the instrument without proof that the grantee participated in the fraud [51] Invalidity of a mortgage on a homestead because it was acknowledged by a notary public with a financial interest in the mortgagee cannot be shown except on direct attack [52]

c. Evidence

The rules applicable in proceedings to set aside or cancel instruments in writing generally apply as regards the burden of proof, and the admissibility and weight and sufficiency of the evidence

One who seeks to avoid a conveyance or encumbrance of homestead property has the burden to prove all the elements essential to his right thereto,[53] such as that the property was impressed with

42. Tex.—J. P. Wooten Motor Co. v. First Bank of Swenson, Com. App., 281 S.W. 196, affirming, Civ. App., 260 S.W. 1093—Kangerga v. Willard, Civ. App., 191 S.W. 195

Pleading held sufficient

(1) Purchaser's petition to remove cloud on title alleging making of mortgage by vendor on homestead and its invalidity, is good against general demurrer.—J. P. Wooten Motor Co. v. First Bank of Swenson, Tex. Com. App., 281 S.W. 196, affirming, Civ. App., 260 S.W. 1093

(2) Under a statute which prohibits the mortgage of a homestead, a petition which alleges plaintiff's indebtedness and that conveyance of homestead was not in payment thereof sufficiently shows continuance of original indebtedness, so as to show that transaction operated as a lien and not as a conveyance.—Mosher Steel & Machinery Co. v. Nash, Tex. Civ. App., 6 S.W.2d 158, error dismissed

43. Tex.—Coskrey v. Morrison, Civ. App., 91 S.W.2d 902, error refused

44. Ala.—King v. Chandler, 105 So. 184, 213 Ala. 337

45. Ala.—Jones v. First Nat. Bank, 184 So. 168, 236 Ala. 606—Grider v. American Freehold Land Mortg. Co. of London, Limited, 12 So. 775, 99 Ala. 281, 42 Am.S.R. 58

46. Ala.—Fies & Sons v. Lowery, 147 So. 136, 226 Ala. 329

47. Tex.—Berryman v. Norfleet, Civ. App., 41 S.W.2d 722, error dismissed

Petition held sufficient

Petition held to contain sufficient allegations of fraud as against general demurrers.—Berryman v. Norfleet, Tex. Civ. App., 41 S.W.2d 722, error dismissed

Cross bill

In suit by creditors of husband to set aside husband's conveyance of lands embracing the homestead on the ground of fraud the wife cannot maintain a cross bill to avoid the conveyance of the homestead, on the ground that it was executed without her voluntary signature and assent, where she does not allege that the husband "fails to act" in the premises.—Seaman v. Nolen, 68 Ala. 463

48. Mich.—Evans v. Grand Rapids L. & D. R. Co., 36 N.W. 687, 68 Mich. 602

29 C.J. p. 927 note 4

49. Tex.—Garrett v. Katz, Civ. App., 23 S.W.2d 436, corrected on other grounds 27 S.W.2d 373

Issues presented by pleadings

Whether makers were estopped to deny invalidity of mechanic's lien sought to be canceled held presented.—Garrett v. Katz, supra

50. Proof admissible under pleadings

Averment that joinder by wife in conveyance of homestead property under constitution of Florida, was induced by fraud is sufficient basis for proof, which, if made would vitiate transaction on theory that, if property was homestead, "joint consent" of husband and wife to alienation thereof was essential.—Lightsey v. Butts, 104 So. 852, 89 Fla. 185

51. Tex.—Shear Co. v. Smith, Civ. App., 250 S.W. 727

52. Ala.—Jones v. First Nat. Bank, 184 So. 168, 236 Ala. 606

53. Elements complainant required to prove

(1) That the wife was mentally incompetent at the time she signed the instrument.—Whittington v. McMasters, 109 P.2d 228, 188 Okl. 334

(2) That a subsequent purchaser of the homestead was not an innocent purchaser, although the homestead owners were in possession at the time of his purchase.—Stephenson v. Mallett, Tex. Civ. App., 240 S.W. 633, error refused.

(3) That assignee of vendor's lien note had notice of the simulated character of the sale.—Strauss v. Friedman, Tex. Civ. App., 109 S.W.2d 553, error dismissed

(4) Mortgagee's knowledge or notice, when executing refinancing mortgage, of unrecorded contract under which they claim homestead.—Brooks v. Capps, 115 So. 864, 217 Ala. 375

Signature and acknowledgment

(1) Married woman suing to set aside mortgage apparently executed

the homestead character at the time of the conveyance or encumbrance complained of,[54] and for this purpose it is necessary for him to show every fact or element essential to give the land a homestead character,[55] including the extent and value thereof.[56] On the other hand defendant has the burden of proof as to matters of affirmative defense.[57] In a suit to foreclose a vendor's lien, in which defendant husband and wife claim that the sale was simulated and the lien void because it was a lien on homestead property prohibited by statute, the burden of proof is on the spouses to prove the sale a simulated one.[58] In order to avoid a conveyance on the ground that the wife of the grantor did not join therein, it must be shown that he had a wife living at the time when the conveyance was made.[59] If the owner attempts to avoid a lien created by him, alleging that the homestead was free from prior equities and encumbrances and that the lien was not a substitution for them, he must prove that the former have actually ceased to exist, and mere evidence of lapse of time sufficient to outlaw them is not sufficient.[60] If the parties seek to set aside a conveyance of the homestead on the ground that it was obtained by fraud, the burden is on them to prove the fraud alleged,[61] and where this is based on the violation of a relation of trust and confidence, complainant has the burden to show that such relation existed.[62] When the wife, during coverture, is induced without adequate consideration to release or renounce her homestead interest, the burden is on the husband or those thereby benefited to show that she fully and voluntarily entered into the conveyance with a full knowledge of her interest in the estate and its approximate value.[63]

Under a statute which forbids mortgaging homestead premises except for specified purposes, a trust deed cannot be avoided by proof of the homestead character of premises at the time of executing the deed, but it must be shown not to have been given for any of the claims excepted from the statutory prohibition.[64] However, under such a statute, in an action by a debtor to cancel a transaction which grew out of a preexisting indebtedness in which the debtor conveyed his homestead to his creditor and then leased the property, the burden is on the creditor to show that the debt was extinguished and that the deed and lease contract did not represent a mere change in security.[65]

Admissibility The rules governing the admissibility of evidence in proceedings to set aside or cancel instruments in writing generally, see Cancellation of Instruments § 70, control its admissibility in suits to avoid a conveyance or encumbrance of homestead property.[66] A previous declaration of

by her covering homestead had burden to establish that she did not sign and acknowledge it—Walthall v McArthur, 48 S W 2d 227, 185 Ark 437—Johns v McNutt, 276 S W 859, 169 Ark 1211

(2) In suit to foreclose deed of trust covering homestead, where the wife denies that she signed or acknowledged the deed of trust but fails to verify her answer, she has the burden of proving that she did not sign and acknowledge it—Callaway v Ashby, 95 S W 2d 907, 192 Ark 929

(3) In suit by husband to enjoin sale of mortgaged property, the husband has the burden of proving that his wife's signature to the mortgage, concurring in the homestead waiver, was a forgery Barron v Jackson Parish Bank 168 So 90, 184 La 886

54 Okl—Norton v Kelly, 156 P 1161 57 Okl 222
29 C J p 927 note 6

55 Tex—Murphy v Lewis, Civ App, 198 S W 1059
29 C J p 927 note 7

56. N D—Severtson v Peoples, 148 N W 1054, 28 N D 372

Value in excess of statutory amount

The burden is on those claiming under a husband's deed of a homestead in which the wife did not join, to show that the value of the premises exceeded one thousand dollars—Karsten v Winkelman, 71 N E 45, 209 Ill 547

57. **Abandonment by spouse**

Where title to the premises was in plaintiff, the burden is on defendant to prove the defense that plaintiff's husband abandoned her for such a period prior to the execution and delivery of the instruments as enabled her, under the statute, to make a valid conveyance of her homestead without being joined by her husband—Taylor v Bunyard 239 P 131, 111 Okl 146

Intent to abandon

Where plaintiff's evidence establishes the homestead character of the premises, the burden is on defendant to establish the intention of plaintiff to abandon them as a homestead—Taylor v Bunyard, supra

58. Tex—Coskrey v Morrison Civ App, 91 S W 2d 902, error refused

59. Tex—McLean v Ellis, 15 S W 394, 79 Tex 398

60. Tex—Gillum v Collier, 53 Tex 592

61. U S—Connecticut Gen L Ins Co v Weldon, D C Ala, 246 F 265

62. Ala—Boothe v Reed, 159 So 218, 229 Ala. 690

63. Ala—McCollough v McCollough, 185 So 417, 237 Ala 77.

Cancellation authorized

A married woman ignorant of rights in real estate owned by husband and induced to sign a deed by which she gratuitously renounced her right of ownership of an entire homestead for a life interest in one half of it, in reliance on representations by her husband and his friends, was entitled to cancellation, although the deed may have been signed voluntarily when those who benefited by the deed failed to show that she had voluntarily made the conveyance with full knowledge of her interest and its approximate value—McCollough v McCollough, supra

64 Tex—Toole v Dibrell, Civ App, 29 S W 387

65. Tex—Mosher Steel & Machinery Co v Nash, Civ App, 6 S W 2d 158 error dismissed

66 Tex—Mosher Steel & Machinery Co v Nash, supra

Evidence held admissible

(1) Statement of agent of grantee as to indebtedness of grantor to grantee and its possession of a lien on the homestead was admissible, on the issue as to whether deed was in reality a mortgage—Mosher Steel & Machinery Co v Nash, supra

(2) In suit to invalidate trust deed on ground that some of signers of deed were married and occupying

homestead is admissible in evidence where the validity of a conveyance of an alleged homestead is involved.[67] The wife may disprove her consent to the instrument by showing that it was obtained from her by fraud.[68] Should the wife rely on the fact that fraud has been practiced on her by the husband in behalf of the grantee or mortgagee, the latter may show, by affidavits, that he acted in good faith and for a valuable consideration, and if no counter-affidavits are presented, such purchaser may proceed to assert his claim against the homestead, and to that end may obtain a dissolution of an injunction against him.[69] Where the deed is ineffectual to convey the homestead but may pass the excess above the statutory amount, as considered supra § 146, the fact that such excess existed can be ascertained by proof of the consideration agreed to be paid by a grantee who received his deed several months after the execution of the deed in question, and by proof of the value at the time of trial.[70] A defective deed improperly acknowledged by the wife may be introduced in evidence where there is proof of possession taken under it.[71] In ejectment, where defendants claimed under a deed from plaintiff and his wife, evidence that the grantee paid nothing for the homestead conveyed to him is admissible as affecting his own right, and contingently that of his grantee, to protection as a purchaser for value.[72]

Weight and sufficiency In conformance with the general rules relative to the weight and sufficiency of the evidence in proceedings to set aside or cancel instruments in writing, discussed in Cancellation of Instruments § 71, which apply in proceedings to avoid a conveyance or encumbrance of homestead property, complainant is required to establish by a preponderance of the evidence the various matters as to which he has the burden of proof,[73] such as that complainant did not sign and acknowledge a mortgage apparently signed and acknowledged by her.[74] In the notes cases are referred to in which the sufficiency of the evidence has been considered as to various questions in issue,[75] such

land conveyed as a homestead and that their spouses did not sign deed, exclusion of evidence of common-law marriage was error—Jones v Lamensdorf, 167 So 624, 175 Miss 565

(3) In suit to cancel deed, excluding evidence that plaintiffs lived on land as homestead with defendant's knowledge when deed was executed was error—Ledbetter v Wright, Tex Civ App, 13 S W 2d 388

(4) In suit to cancel deed as being in fact mortgage on homestead, evidence showing conversations and negotiations between parties when instrument was executed was improperly excluded—Keely v Carpenter, Tex Civ App, 67 S W 2d 328, error dismissed

Evidence held inadmissible

In suit to cancel trust deed on ground that mortgaged property was homestead of mortgagors at time of execution of deed, permitting mortgagor to testify that she did not read trust deed which she signed and acknowledged before notary public was error—Le Master v Farrington, Tex Civ App, 103 S W 2d 189, error dismissed

67. Cal—Graves v Baker, 8 P 691, 68 Cal 133

68. Tex—Westbrooks v Jeffers 33 Tex 86
29 C J p 927 note 15

69. Minn—Pineo v Heffelfinger, 12 N.W 522, 29 Minn 183

70. Ill—Barrows v Barrows, 28 N E 983, 138 Ill 619

71. Tex—Cosby v Stimson, Civ App, 26 S.W 275.

72. Ala—Gilley v Denman, 64 So 97, 185 Ala 561

73. Ark—Walthall v McArthur 48 S W 2d 227, 185 Ark 437

74. Ark—Walthall v McArthur, supra

75. Evidence held sufficient

(1) To show that defendant's husband had not abandoned defendant or their homestead when she executed trust deed, on foreclosure of which plaintiff purchased land, so that deed, in which husband did not join, was void—Gardner v Cook, Miss, 158 So 150

(2) To authorize verdict for plaintiff against claims of original vendor's wife that the land involved was her separate estate and was the homestead that the deed executed by her was not delivered, and that sale was never consummated, on ground that plaintiff was a bona fide purchaser and that vendor's wife knew of, and participated in, mere simulation of sale—Dutton v Kinsey, Tex Civ App, 124 S W 2d 416

Evidence held to sustain findings

(1) That because of a defective acknowledgment the deed was void—Rhodes v Davis, 28 N E 2d 113, 374 Ill 65

(2) That wife had abandoned the husband at the time of the conveyance—Graham v Hollandsworth Drilling Co, Tex Civ App, 169 S W 2d 1001, error refused

(3) That consideration for conveyance of land was paid in full on execution of deed to plaintiff's husband, in suit to cancel husband's deed of trust lien, thereafter given, which contained recital that it was to secure a part of the purchase money—Bower v Nelson, Tex Civ App, 138 S W 2d 601, error refused

(4) That subsequent purchaser of the homestead property did not pay a valuable consideration therefor—Stephenson v Mallett Tex Civ App, 240 S W 633, error refused

Evidence held insufficient

(1) To authorize cancellation of the instrument
Fla—Parrish v Robbirds, 200 So 925, 146 Fla 324—Daniels v Mercer, 141 So 189, 105 Fla 362
Tex—Greer v Franklin Life Ins Co, Civ App, 109 S W 2d 305, error dismissed

(2) To support a judgment for defendants—Taylor v Runyard, 239 P 131, 111 Okl 146

(3) To show notice to mortgagee of unrecorded instrument under which complainant claims—Brooks v Capps, 115 So 864, 217 Ala 375

(4) As a matter of law to show notice to holder of note and lien at time of execution thereof of son's secret title or interest in land claimed under equitable partnership and alleged parol gift so as to subordinate lien to son's claim of homestead—Thornton v Central Loan Co, Tex Civ App, 164 S W 2d 248, error refused

(5) To authorize finding that erasure of name of original grantee and substitution of name of another in place thereof was made with knowledge and consent of wife of grantor—Tucker v Kanatzar, 25 N E 2d 823, 373 Ill 162

(6) In surviving widow's suit against transferee of deed of trust

as whether the property involved was homestead property,[76] whether the mortgagee had notice of the homestead character of the premises;[77] whether the wife signed or acknowledged the instrument;[78] whether the conveyance was executed by the wife under duress,[79] whether the wife was mentally incompetent when she executed the instrument;[80] whether the transfer was the joint act of the spouses;[81] whether or not there was fraud in the transaction;[82] whether the transaction was a simulated sale in violation of law,[83] whether defendant had knowledge that the sale was simulated

to recover title and possession of land and for cancellation of deed of trust and transfer thereof on ground that notes, which were signed by widow's husband and secured by deed of trust, were not given for purchase money and that land was the homestead of widow and husband when notes were given, evidence did not disclose a contract for a vendor's lien, other than the deed of trust — Bower v Nelson, Tex Civ App, 138 S W 2d 601, error refused

Conclusiveness of recitals in certificate of acknowledgment.

Generally see Acknowledgments §§ 121-124

Of a conveyance or encumbrance of homestead property see supra § 137

76. Evidence held sufficient

(1) To show that the property involved was homestead property

Fla — Jahn v Purvis, 199 So 340, 145 Fla 354

Tex — Greer v Franklin Life Ins Co, Civ App, 109 S W 2d 305, error dismissed

(2) To show that plaintiff abandoned the land as her homestead prior to the execution of the deed — Whitmire v Thraves, 238 P 409, 111 Okl 15

(3) To support finding that at time of execution of deed of trust grantors had not ceased to occupy the premises as a homestead — L Simpson Lumber Co v Craig, Tex Civ App 84 S W 2d 882, error dismissed

(4) To sustain finding that at time of signing deed the land was not worth one thousand dollars — Logue v Von Almen, 40 N E 2d 73 379 Ill 208, 140 A L R 251 Rhodes v Davis, 28 N E 2d 113, 374 Ill 65

Evidence held insufficient

(1) To show that property involved was homestead property — Guerra v Garza, Tex Civ App, 93 S W 2d 537—Ragley-McWilliams Lumber Co v Davidson, Tex Civ App, 178 S W 785

(2) To prove that husband was head of family residing in state when deed executed by husband to wife and claimed to be conveyance of homestead was executed — Gilmore v Gilmore, 166 So 214, 123 Fla 28

77. Evidence held sufficient to show notice — Mitchell v Morgan, Tex Civ App, 165 S W 883

78. Evidence held sufficient

(1) To show that the wife did not sign or acknowledge the instrument

Ark — Callaway v Ashby, 95 S W 2d 907, 192 Ark 929

La — Barron v Jackson Parish Bank, 168 So 90, 184 La 886

Tex — Texas Osage Co-op Royalty Pool v Kemper, Civ App, 170 S W 2d 819

(2) To sustain findings that wife did not sign or acknowledge mortgage on homestead

Ark — Walthall v McArthur, 48 S W 2d 227 185 Ark 437—Hall v Mitchell, 1 S W 2d 59, 175 Ark 641

N D — Hazlett v Mathieu, 220 N W 617, 57 N D 57

(3) To warrant finding that wife's signature and acknowledgment of deed were not forged — Johns v McNutt, 276 S W 859, 169 Ark 1211

(4) Certificate of officer who was shown to be a man of high character and well acquainted with his official business and proof that the husband paid rent for the property during his lifetime that the wife knew of this, and after her husband's death she paid rent on the premises for a time and then voluntarily surrendered them to the grantee, and that the bill to avoid the conveyance was not filed until after the death of the husband and the officer warranted finding that the wife signed and acknowledged the deed — Yost v Alderson 58 Miss 40

Evidence held insufficient to support finding that mortgage of homestead of married man was signed by wife — Garlie v Rowe, 221 N W 719, 197 Wis 257, modified on other grounds 223 N W 93, 197 Wis 257

79. Evidence held sufficient

(1) To show that the conveyance was executed by the wife under duress Hayden v Latch, 182 N W 868, 191 Iowa 469

(2) To show that the conveyance was not executed by the wife under duress — Allen v Spensley, Wis, 202 F 62 120 C C A 378

Evidence held insufficient to show wife's signature was obtained by duress

Ala — Nelson v First Nat Bank, 113 So 291, 216 Ala 349

Tenn — Pirtle v Pirtle, 60 S W 2d 172 166 Tenn 180

80. Evidence held sufficient to show insanity — Hayden v Latch, 182 N W 868, 191 Iowa 469

Evidence held insufficient to show mental incompetency of wife at time of execution of instrument — Whittington v. McMasters, 109 P 2d 228, 188 Okl 334

81. Evidence held sufficient to show transfer was the joint act of the spouses — Kinsell v Thomas, 124 P. 220, 18 Cal App 683

82. Evidence held sufficient

(1) To show fraud — Fontenot v. White, 242 P 854, 115 Okl 248

(2) To show that wife's signature was obtained by fraud — Gill v Flynn, Tex Civ App, 175 S W 853

Evidence held to sustain findings

(1) That no fraud or undue influence was practiced on complainant — Boothe v Reed, 159 So 218, 229 Ala 690

(2) That a relation of trust and confidence did not exist between complainant and mortgagee's trustee — Boothe v Reed, supra

Evidence held insufficient to show fraud in the procurement of the instrument — Nelson v First Nat Bank, 113 So 291, 216 Ala 349

83. Evidence held sufficient

(1) To show transaction a simulated sale

La — Clarke v Oden, 99 So 605, 155 La 801

Tex — Vogel v Zipp, Civ App, 90 S W 2d 668, error dism

29 C J p 927 note 31

(2) To show that sale was genuine — Coskrey v Morrison, Tex Civ App, 91 S W 2d 902, error refused

(3) To sustain finding that conveyance was an absolute sale and not a mortgage — Anderson v Barnwell, Civ App 52 S W 2d 96, affirmed in part Anderson v Brawley, 86 S W 2d 126 Tex 182—Flynn v Citizens' Nat Bank of Waco, Tex Civ App, 31 S W 2d 185, error refused Orsburn v First State Bank of Sulphur Springs Tex Civ App, 291 S W 225

(1) To sustain finding that assignee of vendor's lien notes made agreement with debtors and a brother of one of the debtors whereby debtors conveyed homestead to the brother for sole purpose of creating a mortgage lien against homestead property and that deed was not intended to convey title — Rivers v Westbrooks, Tex Civ App, 126 S W 2d 16 error refused

Evidence held insufficient to warrant finding that the transaction constituted a mortgage on the homestead and not a sale thereof — Hallom v McKinley, Tex Civ App, 64 S W 2d 1060, error dismissed.

and the conveyance intended as a mortgage;[84] whether the homesteaders were estopped to deny the invalidity of the lien sought to be canceled;[85] whether the contract was without consideration,[86] and whether there was not a sufficient and proper delivery of the instrument[87]

d. Trial

On conflicting evidence questions of fact should be submitted to the jury, where the trial is to a jury, under proper instructions. The judgment must be supported by the findings and the evidence.

In suits to avoid a conveyance or encumbrance of homestead property, which are tried to a jury, issues of fact as to which there is substantial evidence in support thereof, or as to which the evidence is conflicting, should be submitted to the jury[88] However, under proper circumstances the court may direct the verdict[89] Proper instructions on the various issues submitted should be given,[90]

84. Ev'dence held sufficient

(1) To warrant finding that bank, taking vendor's lien notes as security for money loaned to vendors and vendee, knew that land conveyed was vendors' homestead and that sale was simulated to encumber it with lien—Chapman v Clark, Tex Civ App, 262 S W 161, affirmed, Com App, 276 S W 197

(2) To warrant finding that defendant purchased land without knowledge that deed to his grantor was intended as mortgage—Allen v Northcutt, Tex Civ App, 65 S W 2d 403

(3) To sustain finding that assignee of lien was innocent purchaser—Garrett v Katz, Tex Civ App, 23 S W 2d 436, corrected on other grounds 27 S W 2d 373

Evidence held insufficient

Continued occupancy of homestead premises after conveyance thereof was not, as matter of law, proof that assignee of vendor's lien note had notice that conveyance was merely a pretended sale for purpose of obtaining money on the homestead—Strauss v Friedman, Tex Civ App, 109 S W 2d 553, error dismissed

85. Evidence held sufficient to establish estoppel to deny invalidity of lien—Garrett v Katz, Tex Civ App, 23 S W 2d 436, corrected on other grounds 27 S W 2d 373

86 Evidence held sufficient to show contract was without consideration—Sabens v Cochrum, Tex Civ App, 292 S W 281

87. Evidence held sufficient

(1) To show mortgage was not delivered

Minn—Tomlinson v Kandiyohi County Bank, 202 N W 494, 162 Minn 230

Tex—Sabens v Cochrum, Civ App, 292 S W 281

(2) To show that the mortgage was never unconditionally delivered, although recorded—Willis v Sponsler 219 N W 581, 117 Neb 1

88. Tex—Pickett v Dallas Trust & Savings Bank Com App, 24 S W 2d 354, reversing, Civ App, 13 S W 2d 195

Issues held for jury

(1) Whether deed sought to be canceled by grantors was properly acknowledged for conveyance of homestead—Baird v Laycock, Tex Civ App, 94 S W 2d 1185 error dismissed

(2) Whether wife had abandoned grantor prior to execution of deeds for no fault of his so as to preclude wife from claiming homestead—Graham v Hollandsworth Drilling Co, Tex Civ App, 169 S W 2d 1001 error refused

(3) Whether broker was agent of assignee of vendor's lien note and knew transaction was to obtain loan on homestead—Pickett v Dallas Trust & Savings Bank, Tex Com App, 24 S W 2d 354, reversing, Civ App, 13 S W 2d 195

(4) Whether mortgagor, who included homestead in trust deed, relied on mortgagee's representations that placing homestead in deed was mere formality and that it would be in no danger of foreclosure—Rotge v Dunlap, Tex Civ App, 91 S W 2d 905, error dismissed by agreement

(5) Whether transaction was a simulated sale and the deed in fact a mortgage on the homestead—Anglin v Cisco Mortg Loan Co, 141 S W 2d 935, 135 Tex 188, reversing, Civ App, 118 S W 2d 817—Brannon v Gartman, Tex Com App, 288 S W 817, reversing Gartman v Brannon, Civ App, 270 S W 255—Red River Nat Bank in Clarksville v Latimer, Tex Civ App, 110 S W 2d 232—Strauss v Friedman, Tex Civ App, 109 S W 2d 553, error dismissed—Hunt v Cass County, Tex Civ App, 106 S W 2d 810—Keely v Carpenter Tex Civ App 67 S W 2d 328, error dismissed—Flynn v Citizens' Nat Bank of Waco, Tex Civ App, 31 S W 2d 185, error refused

(6) Whether purchaser of vendor's lien notes on homestead property had notice or knowledge of simulated nature of sale transaction—Strauss v Friedman supra—Hunt v. Cass County, supra.

(7) Whether bank that subsequently took mortgage from grantee was protected as a bona fide purchaser, in a suit to set aside deed of homestead property as constituting mere pretended sale and intended as mortgage—Red River Nat Bank in Clarksville v Latimer, Tex Civ App, 110 S W 2d 232

(8) Waiver of grantee's fraud by grantor's wife—Graham v Apple, Tex Civ App, 287 S W 1107

Proof required to make jury case

To make a case for the jury in a suit to cancel deed as being in fact a mortgage on homestead, plaintiffs must show that they executed and delivered the instrument and defendant accepted it with intent that it should have effect as a mortgage—Keely v Carpenter, Tex Civ App, 67 S W 2d 328 error dismissed

Questions held to be questions of fact

(1) Whether the premises have been abandoned as a homestead—Taylor v Bunyard, 239 P 131, 111 Okl 116

(2) Whether or not the transaction was a pretended sale only not intended to pass title—Red River Nat Bank in Clarksville v Latimer, Tex Civ App, 110 S W 2d 232

89 Tex—Bell v Remirez Civ App, 299 S W 655

Direction of verdict held proper

In suit to recover land which was conveyed by deed of trust to secure a note and sold on default, and which was claimed as a homestead after notice of sale, the facts that no other land was claimed as a homestead when deed was executed, that plaintiff was using it for farming, that he had made plans to move with his family thereon prior to execution of deed of trust that he could neither read nor write and understood that deed did not cover part claimed, authorized instructed verdict for plaintiff—Tiblier v Perez, Tex Civ App, 277 S W 189

90. Okl—Warden v Kerns, 233 P 1018, 108 Okl 115

Instruction held erroneous

Instruction on abandonment of homestead by husband without qualifying it as to duration thereof in suit to cancel conveyance of land as homestead was prejudicial error—Warden v Kerns, supra

Clarity

Issue as to whether mortgagee represented to mortgagor that mortgagor's homestead was being put in trust deed as mere formality and

but instructions should not be given on issues not raised.[91]

The judgment must be supported by the findings and the evidence.[92] A judgment invalidating the conveyance of a homestead is supported by findings that the contract to convey was without consideration and that the conveyance was never delivered for the purpose of taking effect.[93]

e. Review

The appellate court, on its own motion, and regardless of whether or not the question was presented in the lower court, may declare invalid an alienation of a homestead where it appears that both spouses did not consent thereto.

The public policy against permitting one spouse to alienate any interest in the homestead without the consent of the other is so strong that, regardless of whether or not it has been pleaded in the lower court and whether or not there is a shift of theories on plaintiff's part in the appellate court, where it clearly appears that a homestead has been alienated without the consent of the other spouse, the appellate court can on its own motion declare the alienation to be void.[94]

§ 155. Nature and Conditions of Relief

a In general
b Rents and profits
c Improvements

a. In General

The avoidance of a conveyance of a homestead, invalid because in violation of a prohibition against the alienation of the homestead by a married man without the consent of his wife, will be as to the interest of both the husband and the wife. The cancellation of a homestead conveyance will not affect the rights of a lienholder whose rights attached prior to the execution of the conveyance avoided.

Under constitutional and statutory provisions prohibiting the alienation of the homestead by a married man without the consent of his wife, evidenced in the manner required by law, in a suit by the wife to avoid a conveyance on such grounds the relief granted will not be limited to an avoidance of the conveyance as to the wife's interest only, but it will be held void and inoperative to convey any interest in the premises of both the husband and the wife.[95] If the wife of a homesteader procures the cancellation of an agreement between an unpaid vendor, the husband and a third party, whereby a previous conveyance to the husband is replaced by one to the third party, thus defeating the wife's rights in the premises as a homestead, the relief granted to her will not defeat the rights of the unpaid vendor to his lien against the land for purchase money.[96]

b. Rents and Profits

The possessor of a homestead under an invalid conveyance must account for the profits received therefrom or its reasonable rental value, but the wife is not entitled to income from the homestead which accrued when she was living apart from her husband or which became personalty under the control of her husband.

One who obtains possession of a homestead under an invalid conveyance may be required to account for mesne profits received by him[97] or for the reasonable rental value of the premises,[98] but if the beneficiaries of the homestead have enjoyed the proceeds of the conveyance, such proceeds may be set off against the claim for profits.[99] Where a wife living apart from her husband received a mortgage on the homestead to secure a postnuptial settlement and subsequently foreclosed the mortgage, she was not entitled to recover rents and profits during the years of nonoccupancy against the holder of a void deed from her husband alone.[1] Where a conveyance of property which was community property and the homestead of husband and wife is canceled because of a defective acknowledgment by the wife, income from the property which accrued prior to

that it would be in no danger of foreclosure was held not misleading, ambiguous, or confusing.—Rotge v Dunlap, Tex Civ App, 91 S W 2d 905, error dismissed by agreement

91. Okl.—Warden v Kerns, 233 P 1048, 108 Okl 115

92 Judgment held proper

(1) Judgment denying cancellation of instruments was proper where jury did not find that property was plaintiffs' homestead when they executed note to defendants, and did find that deed from plaintiffs to defendants was not intended as mortgage.—Hagar v McCaskill, Tex Civ App, 98 S W 2d 367

(2) Findings that wife was precluded by abandonment from claiming homestead and attacking husband's mineral deeds because of wife's failure to join in their execution were not insufficient to support judgment for grantees because of absence of finding that husband and wife had lived apart for ten years prior to execution of deeds, since, to constitute "abandonment" it was not necessary that they should have lived apart for ten years, which is the time necessary to constitute a ground for divorce.—Graham v Hollandsworth Drilling Co, Tex Civ App, 169 S W 2d 1001, error refused

93. Tex.—Sabens v Cochrum, Civ App, 292 S W 281

94. Minn.—Craig v Baumgartner, 254 N W 440, 191 Minn 42.

95. Tex.—Stallings v Hullum, 35 S W 2, 89 Tex 431.—Rogers v Renshaw, 37 Tex 625

96. Tex.—Cadwallader v Campbell, Civ App, 31 S W 829

97. N D.—Swingle v Swingle, 162 N W 912, 36 N D 311
29 C J p 928 note 35

98. Tex.—Clark v Tulley, Civ App, 200 S W 605, error dismissed

99 Ga.—Taylor v James, 34 S E 674, 109 Ga 327.—Timothy v Chambers, 11 S E 598, 85 Ga 267, 21 Am S R 163

1. Okl.—Whelan v Adams 145 P 1158, 44 Okl 696, L R A 1915D 551

the cancellation became personal community property and passed under an assignment by the husband to the grantee [2]

c. Improvements

In general a purchaser of homestead property under a void conveyance is not entitled to reimbursement for improvements placed on the premises, particularly where he knew of the facts which invalidated the conveyance, but in proper cases innocent parties may be protected.

A court of equity cannot fasten a lien on the homestead for improvements made by one in possession under a void contract of purchase on the theory of an equitable estoppel, for this would be doing indirectly by the machinery of a court what the parties could not have done directly except in a certain manner [3] If the purchaser of homestead property places improvements on the premises, knowing the homestead rights of a widow therein, the improvements inure to the benefit of her estate [4] However, the grantee of a wife, to whom the husband made an invalid conveyance of the homestead, is entitled to be reimbursed for the value of permanent improvements he placed on the premises less the value of timber or other property he took therefrom during his occupancy, in a suit by the heirs of the husband in which cancellation of the conveyance from the husband to the wife and from the wife to her grantee is granted [5] Where improvements are erected at the joint expense of the cotenants, and one of them occupies the improvements by consent of the other, and claims his homestead estate therein, if the land is afterward partitioned, the occupant is entitled to his homestead estate, and the other cotenant is entitled to one half of the value of the improvements erected at the joint expense of both [6]

§ 156. —— Restoration of Status Quo

Conformably to the general rules as to the restoration of the status quo, a return of the consideration paid is ordinarily a condition precedent to relief in suits to avoid instruments conveying or encumbering homestead property, but it is not ordinarily required of persons who did not themselves receive the consideration, or where the return thereof would establish a lien on the homestead in violation of the policy of the law, or where the instrument was obtained through fraud, or the grantee was present and knew of its defective execution

Conformably to the general rules as to the restoration of the status quo, with their limitations and exceptions, considered in Cancellation of Instruments § 44, which are generally applicable in suits to avoid instruments conveying or encumbering homestead property, an owner who invokes the jurisdiction of the court to cancel a mortgage given on his homestead, as a condition precedent to such relief, must offer to restore to the mortgagee whatever of value he received from such mortgagee at the time of the execution of the mortgage [7] Also restoration of the consideration paid is a condition of the rescission in a suit by a husband and wife to rescind a conveyance of homestead premises, where the conveyance was regular in form and substance and the grantee was ignorant of the defect and innocent of any wrong doing, as where the conveyance was void because of a defective acknowledgment of the grantor's wife,[8] or the husband's

2. Tex.—Cates v. Greene, Civ.App., 114 S.W.2d 592

Rentals under lease

Where instrument executed by husband and wife assigned half their interest in oil, gas and mineral rights, subject to existing lease, but including half of rights due under such lease, but acknowledgment thereof was fatally defective as respects wife's homestead interest, and lessee under prior lease brought suit to establish rights to royalties and rentals under lease, wherein husband and wife obtained cancellation of the defective instrument, half of deferred rentals which lessee paid into court before judgment should be allowed to assignee, since they were subject to disposal by husband as community personalty and wife's homestead rights had not intervened —Cates v. Greene, supra

3. Ala.—Clark v. Bird, 48 So. 359, 158 Ala. 278, 132 Am.S.R. 25

Wife's knowledge of improvements

The wife's mere tacit knowledge of the wrongful occupation and improvement of a portion of the homestead will not necessitate reimbursement of the party making such improvements as a prerequisite to rendition of a judgment restoring the possession to the family.—Eckhardt v. Schlecht, 29 Tex. 130

4. Tex.—Hillen v. Williams, 60 S.W. 997, 25 Tex.Civ.App. 268

5. Fla.—John v. Purvis, 199 So. 340, 145 Fla. 354

6. Tex.—Lewis v. Sellick, 7 S.W. 673, 69 Tex. 379

7. Ala.—Jones v. First Nat. Bank, 181 So. 168, 236 Ala. 606.—Estes v. Metropolitan Life Ins. Co., 169 So. 316, 232 Ala. 656.—Sumners v. Jordan, 125 So. 642, 220 Ala. 402.—Mathews v. J. S. Carroll Mercantile Co., 70 So. 143, 195 Ala. 501.—Hayes v. Southern Home Building & Loan Ass'n., 26 So. 527, 124 Ala. 663, 82 Am.S.R. 216.—Giddens v. Bolling, 13 So. 511, 99 Ala. 319.—Grider v. American Freehold Land Mortg. Co. of London, Limited, 12 So. 775, 99 Ala. 281, 42 Am.S.R. 58. Miss.—Pounds v. Clarke, 14 So. 22, 70 Miss. 263

Wife suing as vendee of husband

A mortgagor's wife suing as the vendee of her husband to cancel a mortgage covering the homestead as a cloud on her title on the ground of the invalidity of her acknowledgment must as a condition precedent to cancellation, make restitution of the money or other things of value obtained by the mortgagor on the supposed validity of the mortgage.—Fies & Sons v. Lowery, 147 So. 136, 226 Ala. 329

Sufficiency of offer

An offer to set off against the price received a claim against the grantee for timber cut on the land and, if the value of the timber is less than the money received to pay the excess, is not a sufficient offer to return the consideration received to entitle complainant to relief.—Loxley v. Douglas, 25 So. 998, 121 Ala. 575

8. Tex.—Whittley v. Howerton, Civ.App., 18 S.W.2d 687, error dismissed.

incapacity,[9] or both[10] However, parties who did not actually receive the consideration for a conveyance or encumbrance of the homestead are not ordinarily bound to restore it as a condition precedent to having the conveyance or encumbrance canceled,[11] and when the mortgagee or other alience of homestead property is the actor who invokes the jurisdiction of the court in a suit in which one of the parties seeks cancellation of the mortgage, the owner need not offer to restore whatever of value he received as a condition precedent to cancellation, the rule requiring such an offer when the owner invokes the jurisdiction of the court being inapplicable[12] Also a return of the consideration paid on a conveyance of the homestead, void for want of the wife's consent, will not be required as a condition precedent to its recovery, where to do so would result in the fastening of a lien or encumbrance thereon which could not be placed thereon by the direct and voluntary act of the owner[13] If the mortgage of the homestead was obtained by fraud, the mortgagors need not tender the amount of liens paid thereon by the mortgagee in order to have the mortgage avoided,[14] and where a husband and a third person fraudulently induced the wife to deed to the third person her homestead, the wife believing that the transaction constituted a mortgage, she could have, against a purchaser of her vendor's lien note from the third person with knowledge of the facts, cancellation of the note and deed, irrespective of her return of the consideration paid her[15] Restoration of the property received is not required on the cancellation of a conveyance of the wife's separate property constituting her homestead, which was void because her separate acknowledgment was not taken, where the vendee was present and knew of such defective acknowledgment[16] It has also been held that even in equity, to establish or assert a homestead right in opposition to a deed void for usury, neither payment nor tender of the debt which the deed was made to secure is necessary.[17]

A husband and wife are not entitled to cancellation of an encumbrance or conveyance of a homestead which was given in the adjustment of prior liens or equities enforceable against it, or to an injunction to restrain the enforcement thereof, in the absence of payment or tender of payment of the amounts expended in the adjustment of the prior valid liens or equities[18] So if an equity of redemption is sold by an assignee in insolvency, subject to the debtor's homestead right, and the purchaser pays a mortgage in which the homestead right was released, the insolvent is not entitled to a homestead without redeeming from the mortgage although the purchaser's deed from the mortgagee stated that its intent was to discharge the mortgage[19] If the debtor had but an equitable title, and executed an informal mortgage on the homestead to secure the repayment of the purchase money advanced for him, and the mortgagee afterward acquired the legal title, a court of equity would not cancel the mortgage and decree a divestiture of the

9. Tex—Pearson v Cox, 9 S W 124, 71 Tex 246, 10 Am S R 740

Sale to satisfy amount due

The decree should provide that if restoration of the consideration received is not made within the time fixed by the court the land should be sold to satisfy such sum—Pearson v Cox, supra

10. Tex—McFalls v Brown, Civ App, 37 S W 784 rehearing, Civ App, 36 S W 1110

11. **Wife**

Wife, who did not herself receive the proceeds from a conveyance or encumbrance by her and her husband of their homestead, is not bound, where grounds exist for the avoidance of such conveyance or encumbrance, to return such proceeds as a condition precedent to relief—McBroom v Whitefield, 67 S W 794 108 Tenn 422—Bradshaw v Van Valkenburg, 37 S W 88, 97 Tenn 316

Heirs of husband

The heirs of a husband who made an invalid conveyance of his homestead property to his wife are not required to return the consideration paid by the wife's grantee to the wife, which the heirs did not receive, in order to obtain a cancellation of the conveyance from the husband to the wife and from the wife to her grantee—Jahn v Purvis, 199 So 340, 145 Fla 354

Heirs of wife

Where a wife made a void deed to her husband of the homestead for the consideration of notes of a third party, which she afterward collected, her heirs were not bound to restore the consideration as a condition precedent to the assertion of their claim to the property against the husband's heirs, there being no showing that any part of the consideration ever reached complainants—Gillam v Wright, 92 N E 906, 246 Ill 398, 138 Am S R 243

12. Ala—Estes v Metropolitan Life Ins Co, 169 So 316, 232 Ala 656—Mathews v J S Carroll Mercantile Co, 70 So 143, 195 Ala 501—Clark v Bird, 48 So 359, 158 Ala 278, 132 Am S R 25

Homestead exemption allowed without payment to mortgagee

In bill by mortgagee's transferee to have mortgage, signatures to which were not acknowledged, declared an equitable mortgage, mortgagor was entitled to two thousand dollars exemption out of proceeds of sale of homestead, as against contention that mortgagor was first required to pay, or offer to pay, indebtedness due transferee as condition precedent to allowance of homestead exemption—Estes v Metropolitan Life Ins Co, 169 So 316, 232 Ala. 656

13. Ala—Clark v Bird, 48 So 359, 158 Ala 278, 132 Am S R 25
29 C J p 928 note 49

14. Tex—Rotge v Dunlap, Civ App, 91 S W 2d 905, error dismissed by agreement

15. Tex—Essex v Mitchell, Civ. App, 183 S W 399

16. Tex—Green v Hopper, Civ. App, 278 S W 286

17. Ga—Tribble v. Anderson, 63 Ga. 31

18. Tex—Kenyon v. Stoufflet, Civ App, 85 S W 2d 303, error dismissed

19. N H—Richardson v. Baker, 34 A. 671, 68 N H 43.

legal title, without requiring the repayment of the purchase money so advanced [20]

In jurisdictions where constitutional or statutory provisions prohibit the mortgaging or other encumbering of homesteads and provide that such a mortgage or encumbrance shall be invalid, a debtor suing for the cancellation of a mortgage or other security arrangement is not required to tender the indebtedness due at the time the mortgage or other security agreement was executed,[21] but in a proceeding to avoid a simulated sale of their homestead by a husband and wife, an innocent party who, without notice of the simulated character of the sale, purchases the premises or loans money on the security of a lien thereon is entitled to be protected to the extent of the money advanced or liability incurred thereon [22]

Under constitutional provisions prohibiting the alienation of homestead property without the joint consent of husband and wife, when that relation exists, money received by the husband and wife on the execution of a trust deed or other lien agreement on their homestead cannot be decreed a lien thereon where either the husband or wife is insane [23]

In a suit by husband and wife to cancel a quitclaim deed executed by the husband alone to homestead property, the equitable title to which was held under an executory contract of sale, the husband and wife were entitled to pay defendant the amount he expended in paying the unpaid part of a purchase-money note given by the husband to his vendor [24]

Where a husband, after mortgaging premises, files a declaration thereon, and the wife is not made a party to a foreclosure of the mortgage, it is no defense to an action of ejectment by the wife against the purchaser at the foreclosure sale, that the mortgagor had not paid the mortgage debt [25]

Failure to perform contract to transfer. Where a husband, acting in good faith, attempts to sell or lease the homestead or a part thereof, and the contract fails because of the nonjoinder of the wife, the purchaser or lessee is entitled to recover the money paid by him in reliance on the contract [26]

Right to judgment in personam A purchaser of homestead property from the husband, the transfer of which is void because not signed by the wife, is entitled to recover a personal judgment against the husband for the return of the money paid [27]

IV. ABANDONMENT, WAIVER, OR FORFEITURE

A LOSS OR RELINQUISHMENT OF RIGHT IN GENERAL

§ 157. General Statement

Aside from cases in which the right is lost by termination of a limited estate or interest in the property or, in some jurisdictions, by death of the homesteader or dissolution of his family by death or otherwise, a homestead right, once acquired, is not lost, destroyed, or defeated except by some act or omission of the owner, such as abandonment or alienation

A loss or relinquishment of the homestead exemption is not favored by the law,[28] and is held to occur only in the manner and by the means specified in the statute, if the matter is regulated by statute [29] Also, any relinquishment of homestead rights must be unequivocal [30]

20. Ala.—Tyler v Jewett, 2 So 905, 82 Ala 93

21. Tex.—Mosher Steel & Machinery Co v Nash, Civ App, 6 S W 2d 158, error dismissed

22. Tex.—Campbell v Crowley, Civ App, 56 S W 373

Subsequent purchaser

The grantee of a purchaser of homestead property at a trustee's sale under a trust deed which had its origin in a simulated sale of the property by a husband and wife, and who purchased without notice of the simulated character of the transaction, paying a part of the purchase price in money and giving his note for the balance is entitled, in an action by the husband and wife to recover the property, to be protected to the extent of the cash payment, and also as to the note if conditions are such that he cannot be relieved from its payment.—Campbell v Crowley, supra

23. Tenn.—Shaw v Woodruff, 3 S W 2d 167, 156 Tenn 529

24. Tex.—Clark v Tulley, Civ App, 200 S W 605, error dismissed

25. Cal.—Watts v. Gallagher, 31 P. 626, 97 Cal 47

26. Tex.—Simms Oil Co v Rutledge 86 S W 2d 209, 126 Tex 37, modifying, Civ App, 53 S W 2d 673

Effect of lessee's breach of oral contract

Recovery of debt of husband to lessee canceled as consideration for lease, is not prevented by claim of husband against lessee for breach of oral contract executed at time of lease and which was not pleaded by the husband as a set-off in the suit by the lessee.—Simms Oil Co. v. Rutledge, supra.

27 Miss.—Fuqua v Joudon, 158 So 795, 172 Miss 11

28 Iowa.—Schaffer v Campbell, 199 N W 334, 198 Iowa 43

Wyo.—State Bank of Wheatland v Bagley Bros 11 P 2d 572, 44 Wyo 214, rehearing denied 13 P 2d 564, 44 Wyo 456

Law will look to substance, rather than to form in determining whether homestead exemption was destroyed.—Booker v First Nat Bank, 245 P 881, 117 Okl 179

29 Ill.—Van Winkle v Weston, 276 Ill App 66

Iowa.—First Nat Bank v Phillips, 212 N W 678, 203 Iowa 372

29 C J p 931 note 79

30. Iowa.—Barrett v. Wilson, 102 Ill 302

Okl.—McCammon v Jenkins, 145 P 1163, 44 Okl 612.

A homestead right, once acquired, is not lost, defeated, destroyed, or terminated except by some act or omission on the part of the owner,[31] such as abandonment[32] or alienation,[33] or except by death,[34] acquisition of another homestead,[35] cessation of ownership[36] or right of occupancy,[37] cessation of occupancy and use[38] as a homestead[39] or residence for the family,[40] a definite repudiation of an intention to retain the homestead,[41] or by the owner's leaving the property with the intention of not returning or his forming of such intention after leaving.[42] As noted infra § 158, dissolution of the family relationship terminates the homestead right in some, but not other, states. A sheriff's deed to the mortgagee in foreclosure proceedings does not extinguish the homestead right of the mortgagor where, by virtue of a parol agreement for redemption, the deed is for security only and the mortgagor remains the equitable owner;[43] and the debtor's ignorance of the execution, and consequent nonacceptance, of a deed to him does not deprive him of his homestead in property of which he is the owner by adverse possession.[44] The making of improvements on his property by the husband with borrowed money does not defeat the wife's homestead rights in the property.[45] The marriage of a person after acquiring a homestead right does not deprive such person of the right or cause it to be lost or terminated.[46]

31. Iowa—Fyffe v. Beers, 18 Iowa 4, 85 Am.D. 577
29 C.J. p. 931 note 77

Corpus Juris is cited as stating the view of a majority of the courts that where the homestead character has attached to property, it can be lost only by waiver or abandonment by the owner—In re McClain's Estate, 262 N.W. 666, 670, 220 Iowa 638

Waiver see infra §§ 179–190

Estoppel see infra §§ 191–195

32. U.S.—Evans v. Mills, C.C.A.Tex., 67 F.2d 840

Ky.—Brewer v. Brewer, 105 S.W.2d 582, 268 Ky. 625

Okl.—Glaze v. Drawver, 117 P.2d 544, 189 Okl. 402—Herren v. Herren, 4 P.2d 92, 152 Okl. 281

Tex.—Posey v. Commercial Nat. Bank, Com.App., 55 S.W.2d 515, reversing Commercial Nat. Bank of San Antonio v. Posey, Civ.App., 34 S.W.2d 678—Sakowitz Bros. v. McCord, Civ.App., 162 S.W.2d 437—Archer v. Youngblood, Civ.App., 129 S.W.2d 382, error refused—Evans v. Galbraith-Foxworth Lumber Co., Civ.App., 51 S.W.2d 831, error dismissed—Brown v. Logan, Civ.App., 7 S.W.2d 189—Grimes v. Cline, Civ.App., 300 S.W. 235—Teller v. Fitch, Civ.App., 281 S.W. 893—Cockerell v. Callaham, Civ.App., 257 S.W. 316—Tucker v. Dodson, Civ.App., 245 S.W. 728

Residence or business homestead

The rule that homestead right can be defeated only by showing abandonment thereof is applicable to both residence homestead and business homestead—Panhandle Const. Co. v. Head, Tex.Civ.App., 134 S.W.2d 779, error refused

Necessity of act implying intention to abandon

To lose a homestead, there must be some act from which the law will imply an intent to abandon—White v. Turner, 155 S.W.2d 714, 203 Ark. 95

Rules relating to abandonment and effect thereof see infra §§ 163–178, 187

33. U.S.—Evans v. Mills, C.C.A.Tex., 67 F.2d 840.

Okl.—Marathon Oil Co. v. Western Oil & Drilling Co., 89 P.2d 939, 185 Okl. 53—Lane v. Amis Bros., 43 P.2d 73, 171 Okl. 593—White Inv. Co. v. Stupart, 4 P.2d 77, 152 Okl. 144

Tex.—Posey v. Commercial Nat. Bank, Com.App., 55 S.W.2d 515, reversing Commercial Nat. Bank of San Antonio v. Posey, Civ.App., 34 S.W.2d 678—Sakowitz Bros. v. McCord, Civ.App., 162 S.W.2d 437—Tucker v. Dodson, Civ.App., 245 S.W. 728

Conveyance as abandonment see infra §§ 173, 174

Conveyance and removal from premises as abandonment see infra § 168

34. Tex.—Posey v. Commercial Nat. Bank, Com.App., 55 S.W.2d 515, reversing Commercial Nat. Bank of San Antonio v. Posey, Civ.App., 34 S.W.2d 678—Sakowitz Bros. v. McCord, Civ.App., 162 S.W.2d 437

Effect of death of members of family see § 158

Whether homestead exemption continues after death of homesteader in favor of surviving spouse or minor children see infra §§ 243, 255, 259

35. Tex.—Brown v. Logan, Civ.App., 7 S.W.2d 189—Cockerell v. Callaham, Civ.App., 257 S.W. 316

36. Fla.—Menendez v. Rodriguez, 143 So. 223, 106 Fla. 214

Tex.—Archer v. Youngblood, Civ.App., 129 S.W.2d 382, error refused—Evans v. Galbraith-Foxworth Lumber Co., Civ.App., 51 S.W.2d 831, error refused—Grimes v. Cline, Civ.App., 300 S.W. 235

Termination of estate less than fee generally as terminating homestead exemption see supra § 15

Loss of homestead right with loss of rights under contract for purchase of land see supra § 81

Termination of life estate as terminating homestead right see supra § 84

Termination of leasehold estate as terminating homestead right see supra § 85

37. Tex.—Evans v. Galbraith-Foxworth Lumber Co., Civ.App., 51 S.W.2d 831, error refused—Grimes v. Cline, Civ.App., 300 S.W. 235

38. Ky.—Foreman v. Cook, 127 S.W.2d 856, 858, 277 Ky. 812, citing **Corpus Juris**—Barnes v. Montjoy's Adm'r, 290 S.W. 349, 217 Ky. 465
29 C.J. p. 791 note 47

Removal from premises as abandonment see infra §§ 164–166

39. Tex.—Archer v. Youngblood, Civ.App., 129 S.W.2d 382, error refused

40. Ky.—Tyler's Ex'r v. Williamson, 36 S.W.2d 34, 237 Ky. 579

41. Okl.—Glaze v. Drawver, 117 P.2d 544, 189 Okl. 102

42. Okl.—Marathon Oil Co. v. Western Oil & Drilling Co., 89 P.2d 939, 185 Okl. 53—Lane v. Amis Bros., 43 P.2d 73, 171 Okl. 593—Brunhoeber v. Davis, 30 P.2d 669, 167 Okl. 484—White Inv. Co. v. Stupart, 4 P.2d 77, 152 Okl. 144—First Nat. Bank v. Burnett, 254 P. 95, 122 Okl. 255—American State Bank of Covington v. Leforce, 218 P. 1073, 93 Okl. 88

Removal from premises with intention of not returning as abandonment see infra § 165

43. Iowa—Kleinsorge v. Clark, 4 N.W.2d 433

Whether conveyance by owner as security for debt constitutes abandonment see infra § 174

44. Ky.—Wells v. Dixon, 283 S.W. 434, 214 Ky. 499

45. Tenn.—Beard v. Beard, 10 Tenn. App. 52

46. Ky.—Brewer v. Brewer, 105 S.W.2d 582, 268 Ky. 625

Tex.—Central Life Assur. Soc. (Mutual) v. Gray, Civ.App., 32 S.W.2d 259, error refused—Gordon-Sewall

The duration of the homestead exemption generally is discussed supra § 15

§ 158. Dissolution of Family Relationship

In many, although not all, states a homestead, once acquired, is not lost by the dissolution of the family by the death, removal, or majority of all members of the family other than the head, provided he or she continues to occupy the premises. On the death of the owner of the homestead, the homestead terminates where no constituent member of his family survives or, under some statutes, where neither spouse nor minor children survive

In some jurisdictions the right to homestead terminates when the debtor ceases to be the "head of a family," by death or permanent removal from the premises of all the dependent members or by their reaching the age of majority[47] This has been held to be the rule in a state where the statutes extend the homestead exemption to the "family" only[48] On the other hand, in many jurisdictions it is held that after a homestead has once been acquired, it is not dependent on the continued existence of a family,[49] or on the continued dependence of other members of the family on the owner,[50] or their continued residence on the property,[51] and that it is not lost by the subsequent loss, dissolution, or disintegration of the family[52] through the death, permanent removal, or majority of all the members other than the head thereof,[53] but continues to be exempt as long as the premises are occupied as a home[54] Under either rule the right is not lost by the death of the wife or other constituent member of the family where there are other persons who are members of the family of the owner of the homestead, so that the family relation continues[55] Where the owner of a homestead dies, the homestead terminates, although he leaves descendants, if the latter are not constituent members of his family,[56] or, under some statutes, where neither spouse nor minor children survive[57]

§ 159. —— Desertion

Subject to the rights of the wife in her separate property, the wrongful abandonment or desertion by one spouse of the other spouse or the other spouse and their children may cause a loss of the homestead rights

& Co v Walker, Civ App, 258 S W 233

47. Colo—Monte Vista Bank & Trust Co v Savage, 225 P 219, 75 Colo 180

Fla—Whidden v Abbott, 168 So 253, 124 Fla 293—Herrin v Brown, 33 So 522, 44 Fla 782, 103 Am St R 182

Utah Zuniga v Evans, 48 P 2d 513, 524 87 Utah 198, citing **Corpus Juris**

29 C J p 931 note 81

Use is then fully executed and is at an end and the property thereby becomes disencumbered and is liable to the debts of the owner—Gresham v Johnson, 70 Ga 631

48. Iowa—Solnar v Solnar, 216 N W 288, 205 Iowa 701

29 C J p 932 note 83

49. Tex—Woods v Alvarado State Bank, 19 S W 2d 35, 39, 118 Tex 586, quoting **Corpus Juris,** and reversing C v App, 275 S W 187—Daniel v Cook, Civ App, 70 S W 2d 1024

29 C J p 932 note 86

Existence of family as essential to original acquisition of homestead see supra § 23

50. Ky—First Nat Bank of Jackson v Oliver, 150 S W 2d 894, 286 Ky 286

Dependence of other members on head or some one member of family as essential to acquisition of homestead see supra §§ 23, 24 b

51. Ky—First Nat Bank of Jackson v Oliver, supra

Whether dependents must live with claimant on premises to constitute him head of family see supra § 24 c, d

52 Ark—Jones v Thompson, 166 S W 2d 1036, 204 Ark 1085—White v Turner, 155 S W 2d 714, 203 Ark 95

Ky—Foreman v Cook, 127 S W 2d 856 277 Ky 812

Tex—Uvalde Paving Co v Kennedy, Civ App, 22 S W 2d 1091

53. Ark—Beeson v Byars, 63 S W 2d 540, 187 Ark 966—Butt v Walker, 6 S W 2d 301, 177 Ark 371

Ky—First Nat Bank of Jackson v Oliver, 150 S W 2d 894, 286 Ky 286—Foreman v Cook, 127 S W 2d 856, 858 227 Ky 812, quoting **Corpus Juris**—Eastern State Hospital v Cottle, 256 S W 1101, 201 Ky 377

N D—Meidinger v Security State Bank of Medina, 213 N W 850, 55 N D 301

Okl—Greenshaw v Brown, 219 P 934, 96 Okl 11—Holmes v Holmes, 111 P 220, 27 Okl 140, 30 L R A, N S, 920, overruling Betts v Mills, 58 P 957 8 Okl 351

Tenn—Hinds v Buck, 150 S W 2d 1071, 177 Tenn 414

Tex—Woods v Alvarado State Bank, 19 S W 2d 35, 39, 118 Tex 586, quoting **Corpus Juris,** and reversing, Civ App, 275 S W 187—W T Rawleigh Co v Blackwell, Civ App, 48 S W 2d 754, error dismissed—Schultz v Schultz, Civ App, 45 S W 2d 312.

29 C J p 932 note 86, p 791 note 48

Under particular constitutional provision

This has been held to be the rule in a jurisdiction where the constitution exempts a homestead when 'occupied as a residence by the family of the owner"—Weaver v Chicago First Nat Bank, 94 P 273 76 Kan 540 123 Am S R 155 16 L R A N S, 110, overruling Ellinger v Thomas 67 P 529 64 Kan 180—29 C J p 932 note 82

54. Ark—Jones v Thompson 166 S W 2d 1036 204 Ark 1085—White v Turner, 155 S W 2d 714, 203 Ark 95—Beeson v Byar, 63 S W 2d 540, 187 Ark 966

Ky—Foreman v Cook 127 S W 2d 856 858 227 Ky 812 quoting **Corpus Juris.**

Tex—Woods v Alvarado State Bank 19 S W 2d 35 39, 118 Tex 586, quoting **Corpus Juris,** and reversing, Civ App, 275 S W 187—Schultz v Schultz, Civ App, 45 S W 2d 312—Uvalde Paving Co v Kennedy, Civ App 22 S W 2d 1091

29 C J p 932 note 86, p 791 note 47

55. Fla—Cumberland & Liberty Mills v Keggin, 190 So 492, 139 Fla 133

29 C J p 932 note 87

56. Tex—Grey v Longview Nat Bank, Civ App, 161 S W 2d 166—Kay v Thompson Civ App, 40 S W 2d 884, affirmed Thompson v. Kay, 77 S W 2d 201, 124 Tex 252

29 C J p 932 note 88

57. Okl—Manning v Dosher, 29 P. 2d 966, 167 Okl 368—Greenshaw v Brown, 219 P 934, 96 Okl 11—Union Trust Co v Cox, 155 P 206, 55 Okl 68, L R A 1917C 356

S D—In re Clouse's Estate, 257 N W 106, 63 S D 147

Rights of surviving spouse or minor children see infra §§ 243, 255, 259

of the offending spouse but not affect the homestead character of the property generally or the homestead rights of the nonoffending spouse and children in the property while they continue to occupy it.

The homestead character of property, previously existing, may remain where the wife refuses to move from the property and continues to reside thereon without the husband,[58] even though the husband has virtually abandoned the family[59] While there is authority to the contrary,[60] the better view is that the abandonment by a husband or a husband and father of his wife or of his wife and children does not operate to deprive them of their homestead rights in the homestead premises if they continue to occupy them,[61] and the same rule applies where the wife has been driven from home by or through the fault of the husband,[62] it not being permissible for the husband to defeat the wife's homestead right by the simple expedient of denying her the privilege of using or occupying the property[63] A deserted wife does not lose her right of homestead by being out of possession where she had been forcibly and unlawfully dispossessed under color of legal process,[64] if she has never evinced any intention of abandoning the homestead,[65] or where, subsequent to her husband's desertion, she was forcibly removed from the homestead which she occupied as such, and imprisoned in an insane asylum[66] Also, the wife does not lose her homestead rights by abandonment where the husband abandons her and she leaves the homestead merely because she cannot live there alone, but retains control of it by tenants until such time as she personally returns to it[67] Nevertheless, if after her husband's desertion she removes from the homestead premises with her children to another county, where she remains for over a year and until execution has been levied on the property, she will be considered as having abandoned the homestead,[68] her act alone being sufficient to evidence an abandonment of the homestead after she has been abandoned by the husband and while she is acting as head of the family[69] Where husband and wife left their homestead with intent to return to it, and while they were away he abandoned his family, and went to another state, his agency for his family ceased with the formation of his intent to abandon it, so that as regards the question of abandonment of the homestead his intent from such time not to return to it is not controlling[70]

The husband may be disentitled to the protection of a homestead exemption law where he has deserted his family,[71] but he does not forfeit his rights in a homestead, the legal title to which is in his wife's name, by abandoning his wife, unless the abandonment is wrongful,[72] and it has been held that a husband remaining in possession of a homestead owned by the wife does not forfeit homestead claims by mistreatment of the wife which causes her to abandon the premises[73]

Desertion of husband by wife The desertion of a husband by his wife without cause will not deprive him of his right of homestead in the premises occupied by them if he continues to occupy them as such,[74] and property does not lose its homestead character altogether when the wife temporarily leaves the husband who remains on the premises[75]

Where the wife abandons the husband without

58. Neb —Berggren v Bliss, 241 N. W 544, 122 Neb 801

59. Tex —Commercial Nat Bank v. Posey, Civ App, 34 S W 2d 678, reversed on other grounds, Posey v Commercial Nat Bank, Com App, 55 S W 2d 515

60. N C —Finley v Saunders, 4 S E 516, 98 N C 462
29 C J p 933 note 89 [a]–[b].

61. Ill —Weinebrod v Rohdenburg, 175 N E 379, 343 Ill 318—Bailey v Hamilton, 169 N E 743, 337 Ill 617—Maher v Goff, 147 N E 427, 316 Ill 605—Cohn v Litwin, 35 N E 2d 410, 311 Ill App 55
Tenn —Lusk v Hitt, 7 Tenn App 389
29 C J p 933 note 90

Ejectment by husband

As a consequence of this rule a husband who abandons his family without cause cannot maintain ejectment to dispossess it from the homestead He cannot be permitted to turn his wrong into a profit for himself —Gooch v Gooch, 133 P 242, 38 Okl 300, 47 L R A ,N S, 480

62. Iowa —Novotny v Horecka, 206 N W 110, 200 Iowa 1217, 42 A L R 1158
Kan —Meech v Grigsby, 113 P 2d 1091, 1093, 153 Kan 784, citing **Corpus Juris.**
29 C J p 933 note 91, p 940 note 84

63. Tex —Korn v Korn, Com App, 15 S W 2d 1017, reversing, Civ App, 7 S W 2d 177, and motion dismissed, Com App, 29 S W 2d 1075

64. Ill —Mix v King, 66 Ill 145

65. Wash —In re Murphy, 90 P. 916, 16 Wash 574

66. Ala —Lewis v Lewis, 77 So 406, 201 Ala 112
29 C J p 933 note 95

67. Ark —Montgomery v Dane, 98 S W 715, 81 Ark 154, 118 Am S R 37, 11 Ann Cas 421
29 C J p 940 note 85

68. Tenn —Henry v. Wilson, 9 Lea 176.
29 C J. p 933 note 96.
Removal from premises as abandonment of homestead generally see infra §§ 164–167

69. U S —In re Hawthorne, D C Tex, 45 F Supp 374
Husband's acts and intentions as controlling abandonment of homestead generally see infra § 163

70. Iowa —Vittengl v Vittengl, 135 N W 63, 156 Iowa 41

71. Tenn —Lusk v. Hitt, 7 Tenn App 389

72. S D —Somers v Somers, 131 N W 1091, 27 S D 500, 36 L R A ,N. S, 1024

73. Tex —Thomas v. Tyler, Com App, 6 S W 2d 350, reversing Tyler v Thomas, Civ App, 297 S W 609

74. Tex —Miller v. Stine, Civ App, 99 S W 2d 397
29 C J p 933 note 98

75. Tex —First Nat Bank v. Ervin, Civ App, 12 S W.2d 269.

just cause and without intent to return to him, her rights in his homestead property are thereby abandoned or forfeited,[76] especially where she also lives in adultery.[77] A fortiori is this so where she removes from the state without any intent to return and cohabits with another man for several years.[78] It has been held that, if the fee to the premises is in the wife, she may on abandoning him and her home sue in ejectment for possession as against him,[79] but it has also been held otherwise where the homestead was selected with the wife's consent from her separate property.[80]

§ 160. —— Divorce

a In general
b Effect on husband's right
c Effect on wife's right

a. In General

A homestead exemption may or may not continue after a divorce. Determining factors may be the existence or nonexistence of minor children and disposition or nondisposition of the property by the divorce decree

The homestead character of property may continue after a divorce[81] where the property is occupied by constituent members of the family, including minor children.[82] So, too, a divorce does not destroy the homestead rights of the family where there are minor children who, with one parent, continue to occupy and use the premises.[83] On the other hand, a divorce terminates homestead rights where the couple is childless[84] and, after the divorce, the person claiming the homestead is not the head of a family.[85] In other words, where the homestead exemption is based wholly on the marriage relationship, it is dissolved when the relationship is dissolved by the divorce decree,[86] it being destroyed by voluntary abandonment on the part of the actor who brings the suit[87] and, as against defendant, as a part of the judicial result of his or her derelictions during the existence of the relationship.[88] Also, if the divorce is accompanied by a partition of the homestead between the parties,[89] or if the decree sets apart premises to the wife for life, and she, having no family, continues to occupy them,[90] the privileged character of the property is destroyed. The power or duty of the court in a divorce action to dispose of homestead on granting divorce is discussed in Divorce § 294 c, and on denying divorce in Divorce § 291.

An interlocutory divorce decree does not impair a homestead,[91] and a decree of annulment of marriage is not a decree of divorce within a homestead exemption statute declaring that the right shall continue in favor of the party to whom it is adjudged by a divorce decree during continued personal occupancy by such party.[92]

Community property. By virtue of valid express provisions therein, a decree in a divorce suit may effectively vest all of the community property in one spouse and destroy the homestead in such property,[93] but, where a decree of divorce makes no provision as to community property occupied as a homestead, the former husband and wife hold the property as tenants in common, as discussed in Divorce § 180 b, and the homestead rights of each may continue in respect of his or her share.[94]

76. Tenn.—Swift v. Reasonover, 77 S.W.2d 809, 168 Tenn. 305, citing **Corpus Juris.**
29 C.J. p. 933 note 99

77. Tenn.—Coe v. Nelson, Ch., 59 S.W. 170

78. Tenn.—Grier v. Canada, 107 S.W. 970, 119 Tenn. 17

79. Ala.—Cook v. Cook, 27 So. 918, 125 Ala. 583, 82 Am.S.R. 264
29 C.J. p. 934 note 3
Ejectment by wife against husband in respect of her separate property generally see the C.J.S. title Husband and Wife § 395, also 30 C.J. p. 954 note 21

80. Neb.—Williams v. Williams, 184 N.W. 111, 106 Neb. 584
30 C.J. p. 954 note 21 [a]

81. Tex.—Dorough v. Panse, Civ.App., 24 S.W.2d 69

82. Tex.—Sakowitz Bros. v. McCord, Civ.App., 162 S.W.2d 437

83. U.S.—In re Hawthorne, D.C.Tex., 45 F.Supp. 374.

84. Tex.—Jackson v. Jackson, Civ.App., 283 S.W. 923

85. Tex.—Tanton v. State Nat. Bank of El Paso, 79 S.W.2d 833, 125 Tex. 16, 97 A.L.R. 1093, affirming, Civ.App., 43 S.W.2d 957

86. Tex.—Tanton v. State Nat. Bank of El Paso, supra

87. Tex.—Tanton v. State Nat. Bank of El Paso, supra

Divorce obtained by either spouse, if there are no minor children, operates as abandonment of homestead rights.—Guaranty State Bank of Checotah v. Price, 258 P. 748, 126 Okl. 83.—Trower v. Wetmore, 252 P. 48, 123 Okl. 81

88. Tex.—Tanton v. State Nat. Bank of El Paso, 79 S.W.2d 833, 125 Tex. 16, 97 A.L.R. 1093, affirming, Civ.App., 43 S.W.2d 957

89. Cal.—Shoemake v. Chalfant, 47 Cal. 432

Homestead rights of each spouse in land awarded to other are lost where divorce decree, pursuant to agreement, divides homestead between husband and wife.—Steiner v. Steiner, 10 P.2d 641, 156 Okl. 255

90. Tex.—Bahn v. Starcke, 34 S.W. 103, 89 Tex. 203, 59 Am.S.R. 40
29 C.J. p. 934 note 13

91. Cal.—Brandon v. Faria, 279 P. 192, 99 Cal.App. 594

92. Iowa.—Floyd County v. Wolfe, 117 N.W. 32, 138 Iowa 749

93. Cal.—Cooper v. Miller, 130 P. 1048, 165 Cal. 31

94. Tex.—Fertitta v. Toler, Civ.App., 43 S.W.2d 467, reversed on other grounds Toler v. Fertitta, Com.App., 67 S.W.2d 229
29 C.J. p. 934 note 19

Childless couple

In one case it was said that the homestead character of community property continues after dissolution of the marriage contract where no child or children are born to the union, but it was also said that no creditor may seek to subject the property on the theory that, there be-

Effect on rights of children When not conferred by statute, children are without homestead rights, after a divorce, in property occupied as a homestead at the time of the divorce.[95] Sometimes, it is provided by statute that the title to the homestead shall be vested, by decree of the court granting the divorce, in the wife, and after her death, it shall pass to the children,[96] but the right under such a statute is lost when the wife does not seek and obtain it[97]

b. Effect on Husband's Right

While it is otherwise as to his homestead rights in the wife's separate property, a husband's homestead rights in his own property survive the granting of a divorce where he continues to occupy the property and there are minor children whom he is obligated to support.

The homestead rights of the husband in his own property may continue after the granting of a divorce[98] where the divorce decree makes no disposition of the property[99] and he continues thereafter to occupy the land,[1] even though he occupies the property alone[2] or no family lives with him,[3] and even though the divorce was procured by the wife[4] His homestead rights continue where there are minor children and they remain with him[5] or even where the custody of such children is awarded or voluntarily relinquished to the wife,[6] since he still is under the legal and moral obligation to support them,[7] but, according to some authorities, it is otherwise where there are no minor children and no other persons living with him, such as will give him the status of the head of a family.[8]

In separate property of wife The husband's statutory right of homestead in the separate property of his wife will cease if a decree of divorce is granted either in her favor or in his,[9] unless the right to the homestead is permitted by statute to be secured to him by the decree and is so secured[10] It is immaterial in such case that he continues to occupy the premises, especially when he allowed the family to separate from him,[11] and the wife may recover possession of the premises by ejectment or a proceeding in the nature thereof.[12]

c. Effect on Wife's Right

Subject to some exceptions which are not uniform in the different states, a wife's homestead rights in her husband's property cease, and her homestead rights in her own property continue, after a divorce.

In the absence of statutory provision to the contrary, a wife's homestead rights in her husband's property cease after a decree of divorce,[13] where he continues to occupy such property[14] and the divorce decree makes no disposition of the property,[15] or, according to some authorities, even where she occupies the property[16] and has obtained, in the divorce decree, a statutory allowance or allotment of one third of his property[17] It is held to make

ing no children or family to support, the property has lost its homestead status—Davis v Davis, Tex Civ App, 108 S W 2d 681

95. Vt—Heaton v Sawyer, 15 A 166, 60 Vt 495
29 C J p 935 note 33 [a]–[b]

96 Tenn—Jackson v Shelton, 16 S W 112, 89 Tenn 82, 12 L R A 514

97. Tenn—Carey v Carey, 43 S W 2d 498, 163 Tenn 486

98. Neb—Federal Credit Co v Reynolds, 272 N W 397, 132 Neb 495

99. Okl—Harden v Harden, 77 P 2d 721, 182 Okl 364—Goldsborough v Hewitt 99 P 907 23 Okl 66, 138 Am S R 795

1. Ark—Butt v Walker, 6 S W 2d 301, 177 Ark 371
Or—Kaller v Spady, 34 P 2d 663, 148 Or 65
29 C J p 934 note 5

2. Neb—Dougherty v White, 200 N W 884, 112 Neb 675, 36 A L R 425

3. Ark—Jones v Thompson, 166 S W 2d 1036, 204 Ark 1085—Butt v Walker, 6 S W 2d 301, 177 Ark 371

4. Ark—Jones v Thompson, 166 S. W 2d 1036, 204 Ark 1085—Butt v Walker, 6 S W 2d 301, 177 Ark 371
Neb—Dougherty v White, 200 N W 884, 112 Neb 675 36 A L R 425
29 C J p 934 note 7

5. Tex—Woods v Alvarado State Bank, 19 S W 2d 35, 118 Tex 586, reversing, Civ App, 275 S W 187
29 C J p 934 note 8

6. Ky—Foreman v Cook, 127 S W 2d 856, 277 Ky 812
Neb—Dougherty v White, 200 N W 884, 112 Neb 675, 36 A L R 425
Tex—Commercial Nat Bank v Posey, Civ App, 34 S W 2d 678, reversed on other grounds Posey v Commercial Nat Bank, Com App, 55 S W 2d 515
29 C J p 934 note 9

7. Neb—Dougherty v White, 200 N W 884, 112 Neb 675, 36 A L R 425
Tex—Speer v Sykes, 119 S W 86, 102 Tex 451, 132 Am S R 896

8. Okl—Trower v Wetmore, 252 P 48, 123 Okl 81
29 C J p 934 note 11

9. Ky—Mize v Boston, 215 S W 33, 185 Ky 275
29 C J p 934 note 14

10. Cal—Burkett v Burkett, 20 P 715, 78 Cal 310, 12 Am S R 58, 3 L R A 761
Mass—Dunham v Dunham, 128 Mass 34.

11. Wyo—Arp v Jacobs, 27 P 800, 3 Wyo 489

12. Minn—Gummison v Johnson, 183 N W 515, 149 Minn 329
29 C J p 934 note 18

13. Ark—Moore v Warren, 255 S W 306, 160 Ark 629
Homestead right is abandoned where wife obtains divorce and there are no children—Guaranty State Bank of Checotah v Price, 258 P 748, 126 Okl 83

14. Ala—Hale v Kinnaird, 87 So 789, 205 Ala 285
29 C J p 934 note 21

15. Okl—Goldsborough v Hewitt, 99 P 2d 907, 23 Okl 66, 138 Am S R 795
It is duty of wife to ask that right be given by the divorce decree to continue to occupy the premises as her homestead and to preserve this right by bill or writ of error in case the court fails to award a homestead to her—Claussen v Claussen, 116 N E 693, 279 Ill 99

16. Ark—Moore v Warren, 255 S. W 306, 160 Ark 629

17. Her homestead rights are abandoned in such case—Oliver v Howie, 281 S W 17, 170 Ark 758.

no difference that the custody of the children is given to the wife,[18] but it is also held that, where the wife obtains a divorce and custody of the children, the homestead right passes to her as the head of the family.[19] Also it has been held in some states that, where the wife and children continue to occupy the homestead after a decree of divorce, the wife, as the head of the family, may claim it as exempt as against creditors of the husband,[20] but this is denied in others.[21] In some jurisdictions the wife is entitled to a homestead in her husband's property if she is abandoned by the husband who procures a divorce by publication and without her knowledge.[22]

Separate property A divorced wife who resides on her own separate property with her minor children whom she supports is entitled to a homestead in such property,[23] but a woman who has been divorced and has no children is not entitled to a homestead in property which she owns.[24]

§ 161. —— Separation by Agreement

Homestead rights may continue while husband and wife are living apart; and, under some, but not other, circumstances this may be true notwithstanding an agreement between the parties whereby property is partitioned or transferred between them

The homestead character of property may continue while husband and wife are living apart, where he resides on the property and discharges his obligation to support her.[25] The homestead right of the wife may continue while husband and wife are living apart,[26] and so may the homestead right of the husband where he resides on the property and discharges his obligation to support her and there are no grounds for divorce.[27]

It has been held that, where, on separation by agreement, there is a division of the property including the homestead, this constitutes an abandonment of the homestead by both husband and wife.[28] Also, it has been held that the husband abandoned the homestead where, in pursuance of a separation agreement and his intention to abandon the property permanently as his home, he executed a deed of the property to the wife and lived separate and apart from her for several months.[29] Under some

18. Vt—Heaton v Sawyer, 15 A 166, 60 Vt 495

19. Ill—Maher v Goff, 147 N E 427, 316 Ill 605

Occupancy by tenant

Where wife has succeeded to homestead estate on desertion of husband and securing of divorce and custody of children by wife, continued residence on premises is not necessary for continuation of estate of homestead, but she may occupy the premises by tenant—Maher v Goff, 147 N E 427, 316 Ill 605

20. U S—Sellon v Reed, C C Ill, 21 F Cas No 12,646, 5 Biss 125
29 C J p 935 note 27

Where land had been sold under execution against the husband and the wife later obtained a divorce, it was held that she was entitled to her homestead in the lands sold—Beard v Beard, 10 Tenn App 52.

21. Tex—Kirkwood v Domnau, 16 S W 128, 80 Tex 645, 26 Am S R 770

22. Ill—Lynn v Sentel, 55 N E 838, 183 Ill 382, 75 Am S R 110

23. Minn—Kern v Field, 71 N W 393, 68 Minn 317, 64 Am S R 479
29 C J p 935 note 29

Award to wife

Under a statute providing that the homestead shall continue to the party to whom it is adjudged in a decree of divorce, where the decree awards to the wife the property owned by her and occupied by her and her husband as a homestead, the property continues her homestead while she continues to occupy it—Roberts v Playle, 129 N W 945, 150 Iowa 279

Exemption duly reserved

A divorced woman who had been deserted and did not remarry did not lose the protection of her homestead exemption duly reserved by marginal record entry on the ground that she was no longer the "head of a family" within a statute, where she had no other property, and her six children, who had been reared in the home, had married and established homes of their own, but were with her at intervals—Craig Lumber Co v Ramey, 119 P 2d 608, 108 Colo 516

Right acquired prior to marriage

Where a widow acquired land before remarriage and supported minor children, as well as aged and dependent parents, and one parent still lives, with and is supported by her, her homestead exemption still exists, notwithstanding her children became of age and ceased to be members of her household before remarriage, one parent died, and the childless second marriage was terminated by divorce since her homestead right existed prior to second marriage, and continued during the marriage, and after its dissolution—Chamlee v Chamlee, Tex Civ App, 113 S W 2d 290

24. Tex—Comstock v Lomax, Civ App, 135 S W 185

25. Tex—Schulz v L E Whitham & Co 27 S W 2d 1093, 119 Tex 211, modifying L E Whitham & Co v Schulz, Civ App, 14 S W 2d 881—First State Bank of Hubbard v Zeanon, Civ App, 169 S W 2d 735

Absence of wife and children during school terms

Fact that mother and children resided at other places during school terms to give children educational advantages did not deprive farm, on which father lived throughout year, of character of family homestead—City Central Bank & Trust Co v Byrne, Tex Civ App, 47 S W 2d 432, error refused

26. Ala - Baccus v Eads, 96 So 757, 209 Ala 578
Ill—Bailey v Hamilton, 169 N E 743, 337 Ill 617
29 C J p 935 note 35

27. Tex - Schulz v L E Whitham & Co, 27 S W 2d 1093, 119 Tex 211, modifying L E Whitham & Co v Schulz, Civ App, 14 S W 2d 881

28. Cal—In re Winslow, 53 P 362, 121 Cal 92

29. Fla—Miller v West Palm Beach Atlantic Nat Bank 194 So 230, 142 Fla 22

Abandonment of rights of both spouses

Where husband at time of separation from wife removed from their homestead without intention to return he thereby abandoned his and his wife's homestead rights therein, although wife remained in possession under color of a deed given in settlement of claims for support, as she by agreeing to a marital separation, consented to his removal—Lewis v Ladner, 172 So 312, 177 Miss 473, overruling suggestion of error 168 So 281, 177 Miss 473.

circumstances, however, where husband and wife are living apart and an agreement relative to property is entered into by them, certain property remains the homestead of husband and wife notwithstanding the retention of the property in question by the husband on partition of all their property,[30] or the wife retains her homestead rights notwithstanding the giving of a deed to the property by her to the husband.[31]

§ 162. Forfeiture

In accordance with the rule that forfeiture of a homestead is not favored, various specific matters have been held not to forfeit or divest a homestead right or exemption

Forfeiture of a homestead is not favored.[32] The right of a homestead claimant is not affected by the fact that he also asserts an unfounded claim as absolute owner of the premises,[33] or that he commits perjury in swearing to a false schedule in making a claim for a homestead exemption.[34] Where, in an action against a husband, land was attached, and thereafter the wife intervened, claiming the land as her own, and a mortgagee also intervened, asking that his mortgages be declared prior liens to the attachment, the facts that the wife may have sworn falsely in assisting the mortgagee to have his mortgage liens established, and that no demand was made that the mortgagee be required first to exhaust the land described in the mortgage other than the homestead, did not operate as a forfeiture of the homestead or warrant a decree that the mortgage be first satisfied out of the homestead.[35] The question whether forfeiture of homestead rights results from abandonment or desertion of one spouse by the other is discussed supra § 159, and whether absence or removal from premises constitutes forfeiture or abandonment infra §§ 164–166.

Notwithstanding some decisions to the effect that a homestead exemption is lost by a conveyance with intent to defraud creditors, as discussed in Fraudulent Conveyances § 31 a, it is generally considered that a homestead right or exemption is not forfeited, defeated, or divested by the making[36] and setting aside[37] of a fraudulent conveyance of the property. On the other hand, it has been held that a debtor cannot claim a homestead exemption in land taken by him in exchange for goods transferred in fraud of his creditors.[38]

B ABANDONMENT OF HOMESTEAD

§ 163. In General

In most states, a homestead may be abandoned. Also, a part of a lot or tract may be abandoned as a homestead. The question whether there has been an abandonment is largely, although not entirely, one of intention and is to be determined from all the pertinent facts and circumstances of the particular case. Usually, the intentions of the husband, rather than those of the wife, are controlling

Abandonment, as it relates to homesteads, has been distinguished from waiver in that it is nonjudicial action, while a waiver is the act of the owner in a suit or judicial proceeding.[39] However, as appears infra §§ 181–186, a waiver, although it may arise from the act of the owner in a suit or judicial proceeding, may also arise otherwise. Also, abandonment is sometimes spoken of as a form of waiver, as in the statement that a homestead once acquired can be waived only by abandonment or

30. Tex.—First State Bank of Hubbard v. Zeanon, Civ App., 169 S.W. 2d 735

31 Separation occasioned by husband's fault and misconduct

Kan.—Mech v. Grigsby, 113 P.2d 1091, 153 Kan. 784

32. Or.—De Haven & Son Hardware Co. v. Schultz, 259 P. 778, 122 Or. 493

Loss or relinquishment of homestead right as not favored see supra § 157

33. Mass.—Sisson v. Tate, 114 Mass. 497

34. Ind.—Over v. Shannon, 91 Ind. 99

35. Iowa.—Citizens' Sav. Bank v. Glick, 111 N.W. 970, 134 Iowa 323

36. Ark.—White v. Turner, 155 S.W. 2d 714, 203 Ark. 95

Cal.—Palen v. Palen, 83 P.2d 36, 28 Cal. App. 2d 602

La.—Fussell v. Burris Bros., 139 So. 767, 174 La. 87

N.C.—New Amsterdam Casualty Co. v. Dunn, 184 S.E. 488, 209 N.C. 736

Utah.—Payson Exch. Sav. Bank v. Tietjen, 225 P. 598, 63 Utah 321

Fraudulent conveyance by husband to wife

U.S.—In re Roark, D.C.Ky., 28 F. Supp. 515

Ky.—Helton v. Vanderpool, 64 S.W. 2d 883, 251 Ky. 312

Estoppel of grantor to claim homestead see Fraudulent Conveyances see § 260

Protection of property in hands of grantee from judgments against grantor see Fraudulent Conveyances § 260

Question whether conveyance of homestead is fraud on creditors and furnishes them ground for complaint see Fraudulent Conveyances § 31 a.

37. Ark.—Wardlow v. McGhee, 63 S.W. 2d 312, 187 Ark. 955

La.—Fussell v. Burris Bros., 139 So. 767, 174 La. 87

Homestead rights of wife joining in conveyance with husband are restored on setting aside of conveyance as fraudulent to husband's creditors whether wife participates in fraudulent intent or not.—Elliott v. Locklar, 46 S.W. 2d 1105, 185 Ark. 269

Right of grantor to assert claim of homestead on setting aside of conveyance including both homestead and nonexempt property see Fraudulent Conveyances § 31 c.

38. U.S.—Pratt v. Burr, C.C.Wis., 19 F.Cas.No. 11,372, 5 Biss. 36

39. U.S.—In re Brooks, D.C.Tex., 27 F.2d 146

Abandonment and waiver distinguished generally see Abandonment § 2 b (10).

by alienation in the manner provided by law.[40]

In some states, it seems that there is no such thing as an abandonment of a homestead right, except in the sense that, where a person owns more than one parcel of land, he may claim the right as to one parcel and later abandon that as his homestead and claim another.[41] In most states, however, a homestead may be abandoned[42] by the owner of the property[43] or head of the family,[44] and the right to the homestead exemption may be lost by abandonment.[45] The question whether there has been an abandonment of a homestead is to be determined from all the pertinent facts and circumstances of each particular case as it arises.[46] An abandonment of a homestead exemption is largely,[47] primarily,[48] and almost entirely[49] and exclusively,[50] a question of intention,[51] to be determined from the facts and circumstances of each particular case,[52] but, while an intention to abandon is ordinarily necessary,[53] an abandonment of a homestead right cannot be accomplished by mere intention,[54] the intention must be accompanied by

40. Fla—Hillsborough Inv Co v Wilcox, 13 So 2d 448—Fidelity & Casualty Co of New York v Magwood, 115 So 67, 107 Fla 208—Nelson v Hainlin, 104 So 589, 89 Fla 356 Clark v Cox, 85 So 173, 80 Fla 63

41. Utah—Zuniga v Evans, 48 P 2d 513, 87 Utah 198

Change of homestead generally see supra § 50

Acquisition of new homestead as abandonment of prior homestead see infra § 170

Abandonment of homestead without acquisition of new homestead see infra § 165

42. Ark—Jones v Thompson, 166 S W 2d 1036, 204 Ark 1085—Neil v Neil, 288 S W 890, 172 Ark 381

43. Ala—Griffin v Ayers, 165 So 593, 231 Ala 493

Ky—First Nat Bank of Jackson v Oliver, 150 S W 2d 894, 286 Ky 286

44. U S—Croker v Croker, D C Fla., 7 F 2d 218

45. U S—Croker v Croker, C C A Fla., 51 F 2d 11

Fla—Miller v West Palm Beach Atlantic Nat Bank, 194 So 230 142 Fla 22—Lanier v Lanier, 116 So 867 95 Fla 522

N D—Colberg v First Nat Bank, 210 N W 21 54 N D 548

Tex—Wilson v Levy, Civ App, 13 S W 2d 971

Abandonment as one of exclusive ways in which homestead right may be lost see supra § 157

Operation and effect of waiver or abandonment see infra § 187

46. Fla—Miller v West Palm Beach Atlantic Nat Bank 194 So 230 142 Fla 22—Gulf Refining Co v Ankeny, 135 So 521, 102 Fla 151—Lanier v Lanier, 116 So 867, 95 Fla 522—Nelson v Hainlin, 104 So 589, 89 Fla 356

Ky—Foreman v Cook, 127 S W 2d 856, 277 Ky 812

Okl—First Nat Bank v Burnett, 254 P 95, 122 Okl 255

29 C J p 936 note 40

Whether unoccupied property has been abandoned as homestead depends on particular facts—Williams v Evans' Adm'r, 56 S W 2d 710, 247 Ky 105

Question for jury see infra § 199

47. U S—In re Hawthorne, D C Tex., 45 F Supp 374

Ill—Scogin v Scogin, 169 N E 201, 337 Ill 427

Iowa—Charter v Thomas, 292 N W 812 228 Iowa 554—Butler v Cleland, 202 N W 557, 200 Iowa 56—Schaffer v Campbell, 199 N W 334, 198 Iowa 43

La—Minden Hardware & Furniture Co v Smith, 115 So 381, 165 La 98—First Nat Bank v Brooks, 113 So 853, 164 La 297

Okl—Brattain v Hite, 224 P 501, 101 Okl 174

Tex—Silvers v Welch, 91 S W 2d 686, 127 Tex 58, affirming, Welch v Silvers Civ App, 59 S W 2d 879

29 C J p 935 note 38

Intention is controlling

Okl—Lane v Amis Bros, 43 P 2d 73, 171 Okl 593—Greenwood v Wilkinson, 256 P 46, 124 Okl 300—First Nat Bank v Burnett, 254 P 95, 122 Okl 255—Japp v Sapulpa State Bank of Sapulpa, Okl., 215 P 1059, 90 Okl 56

48 Tex—Sterling Nat Bank & Trust Co of New York v Ellis, Civ App, 75 S W 2d 716, error dismissed

49. Ark—Bradley v Humphries, 83 S W 2d 828 191 Ark 141—Butler v Butler, 2 S W 2d 63, 176 Ark 126—Caldcleugh v Caldcleugh, 250 S W 324, 158 Ark 224

50. Ark—Wooten v Farmers' & Merchants' Bank, 249 S W 569, 158 Ark 179

Tex—McMillan v. Warner, 38 Tex 410

51. U S—In re Walicek, D C Tex., 4 F 2d 265, petition denied, C C A, Adams v Walicek, 9 F 2d 26

Ala—McLeod v Adams, 118 So 636, 218 Ala 424

Ark—Jones v Thompson, 166 S W 2d 1036, 204 Ark 1085—Bunting v Rollins, 70 S W 2d 40, 189 Ark 12—Creekmore v Scott, 20 S W 2d 177, 179 Ark 1113

Or—De Haven & Son Hardware Co v. Schultz, 259 P 778, 122 Or 493.

Tex—Houston Chronicle Pub Co v Allen, Civ App., 70 S W 2d 482

52. Ark—Bunting v Rollins, 70 S W 2d 40, 189 Ark 12—Creekmore v Scott 20 S W 2d 177, 179 Ark 1113—Caldcleugh v Caldcleugh, 250 S W 324 158 Ark 224—Wooten v Farmers' and Merchants' Bank, 249 S W 569, 158 Ark 179.

Iowa—Schaffer v Campbell, 199 N W 334, 198 Iowa 43

La—Minden Hardware & Furniture Co v Smith, 115 So 381, 165 La 98—First Nat Bank v. Brooks, 113 So 853, 164 La 297

Okl—Brattain v Hite, 224 P 501, 101 Okl 174

Or—De Haven & Son Hardware Co. v Schultz, 259 P 778, 122 Or 493

29 C J p 935 note 39

Testimony of parties and surrounding circumstances

Question whether parties intended to abandon a homestead must usually be determined from testimony of the parties in light of surrounding circumstances—Charter v Thomas, 292 N W 812, 228 Iowa 554

53. U S—Johnson v Duncan, C.C.A. Tex., 61 F 2d 1007

Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434

S D—Smith v Midland Nat Life Ins Co., 234 N W 20, 57 S D 197

29 C J p 936 note 51

Absolute intent to abandon must appear before homestead protection will be refused—In re Walicek D C Tex., 4 F 2d 265, petition denied, C C A., Adams v Walicek, 9 F 2d 26

Intent of head of family permanently to abandon and cease to use property for homestead purposes is necessary—Northwestern Nat Life Ins Co v Griffith, Tex Civ App., 97 S W 2d 710—Federal Petroleum Co v Pittman, Tex.Civ App., 65 S W.2d 359, error refused

54. Tex—Clem Lumber Co v. Elliott Lumber Co., Com App., 254 S W 935, modifying Elliott Lumber Co v Mitchell, Civ App., 241 S W 221—Maury v. Mireles, Civ App., 93 S W 2d 1194, error dismissed—Jefferson County Inv & Bldg Ass'n v Gaddy, Civ App., 90 S.W 2d 295, error refused.

actual cessation or discontinuance of use of the property for homestead purposes.[55] Where it is sought to base abandonment on removal from the premises, there must be both removal and intention, as discussed infra §§ 164, 165, an unexecuted intention to remove not being sufficient, as discussed infra § 167; and, as stated infra § 169, an unexecuted intention to sell the property is not sufficient. It is unnecessary to decide any question relating to the subject of abandonment of the homestead right where such right did not exist at the time in question.[56] Abandonment of homestead right acquired by survivorship is considered infra § 273, and abandonment of spouse, or spouse and children, by other spouse as affecting homestead rights supra § 159.

In a few states the abandonment of a homestead is purely statutory,[57] the exclusive method for accomplishing an abandonment being provided by statute.[58]

Part of property constituting homestead A part of a lot or tract may be abandoned as a homestead,[59] if there is an intention that cessation of use of such part for purposes of a home shall be permanent,[60] and the abandonment is done in good faith[61] and by acts clearly evidencing the intention.[62] This is true, even though the part claimed to be abandoned is contiguous to that retained as a homestead.[63]

Act or intention of husband or wife Usually, abandonment of a homestead is the act of the husband,[64] and his intentions, rather than those of the wife, are controlling,[65] but, if the husband has abandoned the wife, and she is acting as head of the family, her act alone is sufficient to evidence an abandonment, as discussed supra § 159. There may be an abandonment by both husband and wife where they are joint tenants.[66]

§ 164. Removal from Premises

In most states, a removal from the premises may be, but is not necessarily, an abandonment of the homestead, the question of whether it is an abandonment being one, or largely one, of intention. Under the statutes of a few states, a removal is not an abandonment unless it is a permanent removal beyond the limits of the state.

Except in a few jurisdictions,[67] such as those wherein there are statutes providing that a home-

55. U.S.—In re Johnson, C.C.A.Tex., 294 F. 258
Tex.—Clem Lumber Co. v. Elliott Lumber Co., Com.App., 254 S.W. 935, modifying, Elliott Lumber Co. v. Mitchell, Civ.App., 241 S.W. 221—Jefferson County Inv. & Bldg. Ass'n v. Gaddy, Civ.App., 90 S.W.2d 295, error refused—Karr v. Cockerham, Civ.App., 71 S.W.2d 905, error dismissed—Wilson v. Levy, Civ.App., 13 S.W.2d 971
29 C.J. p. 943 note 23, p. 946 note 51 [a]

Execution of intent

Intent to abandon property for homestead purposes must be present, definite, and permanent intent to cease to use property for homestead purposes, and such intent must be actually executed by abandonment of the property for such purposes in accordance with such intent.—Northwestern Nat. Life Ins. Co. v. Griffith, Tex.Civ.App., 97 S.W.2d 710—Life Ins. Co. of Virginia v. Weatherford, Tex.Civ.App., 60 S.W.2d 883, error refused

56. Utah.—Zuniga v. Evans, 48 P.2d 513, 87 Utah 198

57. Cal.—Palen v. Palen, 83 P.2d 36, 28 Cal.App.2d 602

58. Cal.—Selinger v. Milly, 124 P.2d 631, 51 Cal.App.2d 286
29 C.J. p. 936 note 44 [a]

After declaration of homestead has been made and filed, homestead can be abandoned only as provided by statute.—Clark v. Clark, 47 P.2d 914, 56 Idaho 6

59. U.S.—Croker v. Croker, D.C.Fla., 7 F.2d 218
Ala.—Griffin v. Ayers, 165 So. 593, 231 Ala. 493
Tex.—Peterman v. Harborth, Com.App., 300 S.W. 33, reversing Harborth v. Petermann, Civ.App., 291 S.W. 641—Ray v. Metzger, Civ.App., 165 S.W.2d 207, affirmed, Sup., 172 S.W.2d 480—Weinert v. Cooper, Civ.App., 107 S.W.2d 593, error dismissed—Scottish American Mortg. Co. v. Milner, Civ.App., 30 S.W.2d 582, error refused
Power of husband to abandon part of homestead see infra § 178

60. Tex.—Peterman v. Harborth, Com.App., 300 S.W. 33, reversing Harborth v. Petermann, Civ.App., 291 S.W. 641—Weinert v. Cooper, Civ.App., 107 S.W.2d 593, error dismissed

Question of intention

(1) Question whether one abandoned portion of lot constituting homestead is one of intention to be gathered from all facts and circumstances of case.—Scottish American Mortg. Co. v. Milner, Tex.Civ.App., 30 S.W.2d 582, error refused

(2) Where claimant to homestead rights still occupies part of homestead, issue of abandonment of another part turns mainly on his intention.—Hibbs v. City Nat. Bank of Wichita Falls, Tex.Civ.App., 293 S.W. 350

(3) Question whether there was an intention to abandon part of property as a homestead will be determined as of time purported lien is attempted to be created on the property.—Ray v. Metzger, Tex.Civ.App., 165 S.W.2d 207, affirmed, Sup., 172 S.W.2d 480

61. Tex.—Ray v. Metzger, supra—Weinert v. Cooper, Civ.App., 107 S.W.2d 593, error dismissed—Scottish American Mortg. Co. v. Milner, Civ.App., 30 S.W.2d 582, error refused

62. Tex.—Ray v. Metzger, Civ.App., 165 S.W.2d 207, affirmed, Sup., 172 S.W.2d 480—Scottish American Mortg. Co. v. Milner, Civ.App., 30 S.W.2d 582, error refused

63. Tex.—Ray v. Metzger, Civ.App., 165 S.W.2d 207, affirmed, Sup., 172 S.W.2d 480

64. U.S.—In re Hawthorne, D.C.Tex., 15 F.Supp. 374

65. Iowa.—Illinois Oldsmobile Co. v. Miller, 202 N.W. 751, 199 Iowa 894
Tex.—Gough v. Gibson, Civ.App., 1 S.W.2d 684
29 C.J. p. 936 note 43
Power of husband to abandon homestead without wife's consent see infra § 178

66. Minn.—Leach v. Leach, 209 N.W. 636, 167 Minn. 489

67. Utah.—Zuniga v. Evans, 48 P.2d 513, 87 Utah 198
Wash.—Brown v. Manos, 250 P. 36, 140 Wash. 525
29 C.J. p. 936 note 44 [a]–[c]

stead can be abandoned only by a declaration of abandonment or by a grant, as considered infra § 172, or there are statutes under which occupancy is not necessary[68] or the homesteader may, within a limitation of value, claim an infinite number of parcels anywhere within the state,[69] it is a rule of general application that the homestead exemption may be lost or abandoned by a removal from the premises[70] under circumstances clearly indicating that the removal is not merely temporary.[71] Indeed, some authorities declare that a homestead, once acquired, can be abandoned in no other way than by moving from the premises with the intent to abandon them as a home,[72] but it is more often considered that there are other ways in which abandonment may be accomplished, such as a change in the character of the use of the property, as discussed infra § 171, or, under statute, a declaration of abandonment, as discussed infra § 172. The question whether conveyance above, or in connection with other matters, constitutes an abandonment is considered infra §§ 168, 172, 173.

Continuous actual occupation of,[73] or residence on,[74] the premises by the homestead claimants is not necessary in order to preserve or continue the homestead rights therein. So, also, for this purpose, the occupation need not in all cases be a personal occupation by the debtor himself at all times and under all circumstances.[75] A homestead claimant is not required to remain on the premises all of the time,[76] and he does not necessarily lose, forfeit, or abandon his homestead rights merely by removing[77] or being absent[78] from the premises, especially where the absence is temporary.[79] Even

68. Except in case of permanent removal beyond limits of state, homestead is not, under such statutes, abandoned by removal from the premises—Grier v Canada, 107 S W 970, 119 Tenn 17—29 C J p 936 note 44 [c].

Constitutional or statutory provisions under which occupancy not necessary see supra § 33

69. Utah—Zuniga v Evans, 48 P.2d 513, 87 Utah 198

70. Colo—Reed v State Sav. Bank, 25 P 2d 739, 93 Colo. 325.
29 C J p 936 note 45

Removal from homestead is prima facie abandonment

Iowa—Des Moines Marble & Mantel Co. v McConn, 227 N.W 521, 210 Iowa 266.

Cessation of occupancy

Homestead right is lost by definite voluntary cessation of occupancy—Lemay v Lemay, 149 A 864, 84 N H. 299

Presumption of abandonment arising from actual removal from, and cessation of use of, premises see infra § 196.

Removal from premises by deserted wife and children see supra § 159.

71. Iowa—Shaffer v Miller, 192 N. W. 868, 195 Iowa 891.

Removal and permanent cessation of occupancy

By removing from, and permanently ceasing to occupy, his homestead, the owner immediately loses the exemption right which the statute gives him—Gordon v. Emerson-Brantingham Implement Co, 210 N. W 87, 168 Minn. 336.

When constituent members of family permanently abandon premises, they surrender their homestead interest and lose the right to occupy the property either in person or through others.—Maxey v. Patterson, Tex Civ App, 82 S W 2d 386, error dismissed

72. Tex—Panhandle Const. Co v Continental Southland Savings & Loan Ass'n, Civ App, 110 S W 2d 632, error dismissed—Neece v King, Civ App, 73 S W 2d 550—Evans v. Galbraith-Foxworth Lumber Co, Civ App, 51 S W 2d 831, error dismissed—Grimes v Cline, Civ App, 300 S W 235

73. Ark—Bradley v Humphries, 83 S W 2d 828, 191 Ark 141—Butler v. Butler, 2 S W 2d 63, 176 Ark 126.
Mich—Van Kovering v Eggebeen, 290 N W 867, 292 Mich 457
Tex—Rutledge v. Mitchell, Civ App, 91 S W 2d 1135, error dismissed

74. Ill—Maher v Goff, 147 N.E 427, 316 Ill 605
29 C J p 936 note 48.

75. Colo—Pierson v Truax, 25 P 183, 15 Colo 223.

76. Ky—Brewer v Brewer, 105 S. W 2d 582, 268 Ky 625

77. Okl—Brattain v Hite, 224 P. 501, 101 Okl 174.
Tex—Coyel v. Mortgage Bond Co of New York, Civ.App, 124 S W.2d 204—Rutledge v. Mitchell, Civ App., 91 S W 2d 1135, error dismissed.

Moving away, returning, and again moving away

Tex.—Hughes v. Parmer, Civ.App, 164 S W.2d 576.

If owner does not abandon homestead as his place of abode, he may remove therefrom without affecting the exemption—Gordon v. Emerson-Brantingham Implement Co., 210 N. W. 87, 168 Minn. 336

Removal after levy

(1) It has been held that a removal after levy of execution does not render the homestead subject to the execution, the reason assigned for the holding being that the right to a homestead exemption must be determined according to the state of facts existing at the time when the lien of the execution attaches—Franklin v Comer, 54 So. 430, 170 Ala 229—29 C J p 936 note 49

(2) Another reason assigned, as considered infra § 166 b, is that the removal, when it is after execution sale, is not voluntary.

78. Ill—Lehman v Cottrell, 19 N. E 2d 111, 298 Ill App. 434

79. Ark—Keesee v Bushart, 158 S. W 2d 915, 203 Ark. 668
Ky—First Nat Bank of Jackson v. Oliver, 150 S W 2d 894, 286 Ky 286—Foreman v. Cook, 127 S W.2d 856, 277 Ky 812
N D—Grotberg v. First Nat. Bank, 210 N W 21, 54 N.D 548
Tex—Crowder v. Union Nat. Bank of Houston, Civ App., 264 S.W 791, certified questions answered 261 S. W. 375, 114 Tex 34.

Unless there is design of permanent abandonment, temporary absence from homestead will not deprive it of homestead character.
Fla.—Lanier v. Lanier, 116 So. 867, 95 Fla 522
Mich.—Van Kovering v Eggebeen, 290 N W 867, 292 Mich. 457.

Temporary absence for purpose of pleasure does not cause an abandonment or forfeiture.
Fla—Hillsborough Inv. Co. v. Wilcox, 13 So.2d 448
Ill.—Lehman v. Cottrell, 19 N.E.2d 111, 298 Ill.App. 734.
29 C.J. p 811 note 39 [a].

Husband's return to home place after temporary absence and actual occupancy thereof as homestead gave wife homestead rights.—Korn v. Korn, Tex.Com.App., 15 S.W.2d 1017, reversing, Civ.App., 7 S.W.2d 177, and motion dismissed, Com.App., 29 S.W.2d 1075.

Temporary absence and intent to return see infra § 166 a.

absence for a long period is insufficient of itself to establish abandonment of a homestead,[80] but it is a matter proper to be considered, in connection with other circumstances, in determining the question of abandonment.[81] The question whether one who removed from his homestead has abandoned it is one of intention,[82] or is largely one of intention,[83] which must be determined from the facts and circumstances attending each case.[84] So, also, the question whether a claimant who, during certain periods, was absent from the property and left it unoccupied has abandoned the homestead depends on his intention.[85]

If the homesteader is demented or too weak-minded to form a rational purpose of abandonment, none will occur, although he absents himself from his home.[86]

Resumption of occupation of a homestead once abandoned by removal gives a right of exemption dating from,[87] and only from,[88] the commencement of the new occupancy.

Removal from state A homestead exemption may be lost when the owner removes from the state and becomes a nonresident,[89] and, after it has been so lost, a return to the state in which the homestead premises are situated does not revive the homestead rights.[90] Under constitutional or statutory provisions requiring a homestead claimant to be the head of a family, as discussed supra § 24 a, and a resident of the state, supra § 18, a homestead exemption may be lost by the owner ceasing to be the head of a family, residing in the state,[91] and the exemption ceases when the family residing in the state ceases, by removal, so to reside.[92] Under provisions conferring the right of exemption on the family, as discussed supra § 23, it has been held that the right does not cease on a removal by the head of a family into another state to establish a new home if the family remains in possession of the original homestead.[93] Temporary removal to another state and intent to return are discussed infra § 166 a, and temporary renting or leasing of premises while owner is in another state infra § 175.

§ 165. —— Removal without Intent to Return

Either a lack of intention to return to the property and occupy it again as a home, or an intent never to do so, is necessary and sufficient to render a removal from the premises an abandonment of the homestead. Even where no new homestead is acquired, an actual removal with no intent to return, or with an intent never to occupy the property again as a homestead, is an abandonment.

While it is very generally held that, in order to constitute an abandonment of a homestead by a removal from the premises, the removal must be accompanied by an intent never to return,[94] or occupy the property as a homestead,[95] or claim the ex-

80. S.D.—Gerhart v. Quirk, 209 N.W. 544, 50 S.D. 269.
Tex.—Rutledge v. Mitchell, Civ.App., 91 S.W.2d 1135, error dismissed.
Absence for several years with intent to return see infra § 166

81. Ala.—Fuller v. American Supply Co., 64 So. 549, 185 Ala. 512.
Tex.—Carver v. Gray, Civ.App., 140 S.W.2d 227, error dismissed, judgment correct.

82. Ark.—Gillis v. Gillis, 262 S.W. 307, 164 Ark. 532.
Tex.—Rutledge v. Mitchell, Civ.App., 91 S.W.2d 1135, error dismissed—Realty Trust Co. v. Koger, Civ.App., 70 S.W.2d 448, error refused—Llewellyn v. First Nat. Bank, Civ.App., 265 S.W. 222.

83. Ill.—Rasmussen v. Rasmussen, 13 N.E.2d 166, 368 Ill. 137.
Tex.—City Nat. Bank of Bryan v. Walker, Civ.App., 111 S.W.2d 350, error dismissed.

84. Ark.—Gillis v. Gillis, 262 S.W. 307, 164 Ark. 532.
Ill.—Rasmussen v. Rasmussen, 13 N.E.2d 166, 368 Ill. 137.

85. Ky.—Smith v. Moss, 277 S.W. 245, 211 Ky. 226.

86. Mo.—Bealey v. Blake, 55 S.W. 288, 153 Mo. 657
Neb.—Whitford v. Kinzel, 138 N.W. 597, 92 Neb. 373, affirming 133 N.W. 1124, 90 Neb. 573

87. Iowa.—Keosauqua State Bank v. Hartman, 169 N.W. 339, 184 Iowa 961.

88. Minn.—Clark v. Dewey, 73 N.W. 639, 71 Minn. 108.
Mo.—Palmer v. Omer, 295 S.W. 123, 316 Mo. 1188.

89. N.C.—Summers Hardware Co. v. Jones, 23 S.E.2d 883, 222 N.C. 530
29 C.J. p. 937 note 55.

90. Ga.—McArthur v. Bridges, 103 S.E. 795, 150 Ga. 345
29 C.J. p. 937 note 58.

91. U.S.—Croker v. Croker, C.C.A.Fla., 51 F.2d 11.

92. S.C.—Ex parte Morrow, 190 S.E. 506, 183 S.C. 170, 110 A.L.R. 898

93. Iowa.—Decorah Sav. Bank v. Kennedy, 12 N.W. 479, 58 Iowa 454.
29 C.J. p. 937 note 56.

94. Tex.—Burkhardt v. Lieberman, 159 S.W.2d 847, 138 Tex. 409, modifying, Civ.App., 142 S.W.2d 283—McMillan v. Warner, 38 Tex. 410—Coyel v. Mortgage Bond Co. of New York, Civ.App., 124 S.W.2d 204
29 C.J. p. 936 note 51

Removal must be with definite intent to never return.—Wharton v. Mortgage Bond Co. of New York, Tex.Civ.App., 48 S.W.2d 519

Qualified or conditional intention not to return is not sufficient.—McCammon v. Jenkins, 145 P. 1163, 44 Okl. 612—29 C.J. p. 942 note 14 [a] (3), (3)

Alternative requirement
The leaving of the homestead must be with the intention of renouncing and forsaking it or leaving it never to return.—Bradley v. Humphreys, 83 S.W.2d 828, 191 Ark. 141—Butler v. Butler, 2 S.W.2d 63, 176 Ark. 126
Necessity of intent not to return where removal is for business purposes see infra § 166 c

95. Tex.—Coyel v. Mortgage Bond Co. of New York, Civ.App., 124 S.W.2d 304.

Fixed intention
To show an abandonment of a farm as a homestead, it was necessary to show that owners left farm with a fixed intention not to occupy it longer as a homestead.—Ran v. City Nat. Bank of Decatur, Tex.Civ.App., 272 S.W. 510.

emption,[96] or the removal must be without an intention to return and reoccupy the premises as a home,[97] yet it is equally well settled that an actual removal from the homestead with no intention of returning to it[98] and occupying it as a home,[99] or with a definite intention never to return,[1] or an intent not to occupy the property again as a homestead,[2] constitutes an abandonment of the homestead exemption, and, a fortiori, there is an abandonment where there is not only a lack of intention to return, but also an intention to occupy another house at a future time.[3] It is generally considered that, even where a new homestead is not acquired, an actual removal with no intention to return,[4] or with an intent never to occupy the property again as a homestead,[5] amounts to an abandonment; but it has been held otherwise under a particular statute.[6] Effect of acquisition of new homestead is considered infra § 170.

§ 166. —— Removal with Intent to Return

a. In general
b. Absence due to casualty or necessity
c Absence for business purposes
d Absence for education of children
e Absence on account of health
f. Filing claim or notice on removal

a. In General

A person may remove from his homestead without abandoning it, provided he has, in good faith, from the time of removal, a fixed, constant, abiding, and continuing intent to return to the property and occupy it as a homestead, and provided such intention is not vague, indefinite, or ineffective because of a condition attached thereto.

A removal from property constituting a homestead does not cause an abandonment of the homestead where the owner has an unqualified,[7] fixed, and abiding[8] intention to return to the property[9] and occupy it as a homestead,[10] where such intention remains at all times,[11] and no other homestead is acquired[12] This is true even though the removal is to another state[13] So, also, a temporary absence or removal, or a removal for a temporary purpose,[14] from the homestead will not forfeit, or constitute an abandonment of, the right of exemption where there is a constant,[15] abiding,[16]

96. Tex.—Burkhardt v. Lieberman, 159 S.W.2d 847, 138 Tex. 409, modifying, Civ.App., 142 S.W.2d 283

97. N.D.—Grotberg v First Nat. Bank, 210 N.W. 21, 54 N.D. 548

98. Ark.—Bratton v. Union Sawmill Co., 271 S.W. 32, 168 Ark. 637.
Ill.—Rasmussen v Rasmussen, 13 N.E.2d 166, 368 Ill. 137—Scogin v Scogin, 169 N.E. 201, 337 Ill. 427.
Iowa—In re McClain's Estate, 262 N.W. 666, 220 Iowa 638—Crail v. Jones, 221 N.W. 467, 206 Iowa 761
Kan.—State Bank of Webber v. Diamond, 239 P. 970, 119 Kan. 294.
Minn.—Bowers v. Norton, 218 N.W. 108, 173 Minn. 576—Gordon v. Emerson-Brantingham Implement Co., 210 N.W. 87, 168 Minn. 336—Clark v. Dewey, 73 N.W. 639, 71 Minn. 108.
Miss.—Ritter v. Whitesides, 176 So. 728, 179 Miss. 706.
Mo.—Maupin v. Longacre, 288 S.W. 54, 315 Mo. 872.
Tex.—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ.App., 75 S.W.2d 716, error dismissed.
29 C.J. p. 936 note 52.
Lack of definite intention to return is controlling fact in cases of physical absence.—McKenzie v. Mayer, Tex.Civ.App., 20 S.W.2d 238.

99. Minn.—Clark v. Dewey, 73 N.W. 639, 71 Minn. 108.
Mo.—Maupin v. Longacre, 288 S.W. 54, 315 Mo. 872.
29 C.J. p. 936 note 52.

1. Minn.—Bowers v. Norton, 218 N.W. 108, 173 Minn. 576.
Okl.—White Inv. Co. v. Stupart, 4 P.2d 77, 152 Okl. 144—Brattain v. Hite, 224 P. 501, 101 Okl. 174.
Tex.—McKenzie v. Mayer, Civ.App., 20 S.W.2d 238.
29 C.J. p. 936 note 52 [c]

2. Tex.—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ.App., 75 S.W.2d 716, error dismissed—Llewellyn v. First Nat. Bank, Civ.App., 265 S.W. 222

3. Okl.—Greenwood v. Wilkinson, 256 P. 46, 124 Okl. 300.

4. Vt.—Cushman v. Davis, 64 A. 456, 79 Vt. 111.
29 C.J. p. 938 note 60

5. Tex.—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ.App., 75 S.W.2d 716, error dismissed—Llewellyn v. First Nat. Bank, Civ.App., 265 S.W. 222.

6. Mass.—Woodbury v. Luddy, 14 Allen 1, 92 Am.D. 731.
29 C.J. p. 938 note 59 [a].

7. Ark.—Creekmore v. Scott, 20 S.W.2d 177, 179 Ark. 1113.

8. Ark.—Caldcleugh v. Caldcleugh, 250 S.W. 324, 158 Ark. 224

9. U.S.—In re Johnston, C.C.A.Tex., 294 F. 258.
Ark.—Butler v. Butler, 2 S.W.2d 68, 176 Ark. 126.
Iowa.—In re McClain's Estate, 262 N.W. 666, 220 Iowa 638.
Tex.—First Nat. Bank v. Solis, Civ.App., 137 S.W.2d 142, error refused—City Nat. Bank of Bryan v. Walker, Civ.App., 111 S.W.2d 350, error dismissed.

10. U.S.—In re Johnson, C.C.A.Tex., 294 F. 258.
Tex.—First Nat. Bank v. Solis, Civ.App., 137 S.W.2d 142, error refused—City Nat. Bank of Bryan v. Walker, Civ.App., 111 S.W.2d 350, error dismissed.

11. Tex.—City Nat. Bank of Bryan v. Walker, supra.
Until intent of returning is relinquished one leaving homestead with intent to return at future definite time does not abandon homestead right.—Knapp v. Brett, 222 N.W. 297, 54 S.D. 1.

12. Tex.—City Nat. Bank of Bryan v. Walker, Civ.App., 111 S.W.2d 350, error dismissed.
Effect of acquisition of another homestead see infra § 170.

13. Tex.—City Nat. Bank of Bryan v. Walker, supra.
Removal from state as abandonment generally see supra § 164.

14. Statute construed
The words "temporary removal," as used in a statute providing that the exemption shall not be impaired by temporary removal with the intention to reoccupy the premises as a homestead, obviously relate to a removal that is temporary and for a temporary purpose.—Hauser v. Schauer, 254 N.W. 313, 215 Wis. 75.

15. La.—Rigdon v. Bogan, 107 So. 403, 160 La. 551.
Or.—De Haven & Son Hardware Co. v. Schultz, 259 P. 778, 780, 122 Or. 493, citing **Corpus Juris.**
29 C.J. p. 938 note 61.

16. Or.—De Haven & Son Hardware

continuous,[17] definite,[18] fixed,[19] and settled[20] intention to return,[21] or, as sometimes expressed, an ever-present intention to return and occupy the property as a homestead,[22] where the intention is entertained honestly[23] and in good faith,[24] and the owner does nothing inconsistent therewith;[25] and it has been held that this is so, even though the removal is to another state,[26] or other governmental subdivision,[27] and even though the absence continues for several years.[28] Nevertheless, the element of lapse of time during which the owner has remained away is a matter to be considered, see supra § 164, and if the absence is prolonged, it may, if there is no evidence of a fixed intention to return, constitute an abandonment.[29]

A person removing from his homestead must, to avoid an abandonment thereof, have, from the time of removal,[30] a constant,[31] abiding,[32] continuing,[33] fixed,[34] specific,[35] and unequivocal[36] intent to return; a vague[37] or indefinite[38] intention is not sufficient. If at the time of removal there is an intention to return, but this intention is subsequently abandoned, the original intention ceases to be effective and there is an abandonment of the homestead right in the land,[39] and no resumption of the intention will reclaim the right to a homestead;[40] and although a homesteader who has removed from the premises with no intention to return may change his intention to resume possession and thereby reinvest the property with the homestead character,[41] such resumption of possession has only the effect of creating a new homestead right from the time of the new occupancy,[42] and it does not affect the rights of third persons acquired in the interim between the loss of the old and the acquisition of the new homestead.[43] It has been said that the intention to return formed on leaving the homestead must be executed by a resumption of the occupancy that once characterized the premises as a homestead.[44] To retain his homestead rights one leaving a homestead must in good faith intend to return at some future date,[45] but it is not essential that he

Co v Schultz, supra, citing **Corpus Juris.**
29 C.J. p 938 note 61

17. Iowa—Fardal v Satre, 206 N. W. 22, 200 Iowa 1109

18. Okl.—Lane v Amis Bros., 43 P. 2d 73, 171 Okl 593—White Inv. Co v Stupart, 4 P 2d 77, 152 Okl. 144

19. Iowa.—Fardal v Satre, 206 N. W 22, 200 Iowa 1109
Ky.—Brewer v. Brewer, 105 S.W.2d 582, 268 Ky 625
La.—Rigdon v. Bogan, 107 So. 403, 160 La 551.
Okl.—Lane v. Amis Bros., 43 P.2d 73, 171 Okl 593—White Inv. Co. v. Stupart, 4 P.2d 77, 152 Okl 144.

20. Iowa—Fardal v. Satre, 206 Iowa 22, 200 Iowa 1109.

21. U.S.—In re Hawthorne, D.C. Tex., 45 F.Supp. 374.
Fla.—Collins v. Collins, 7 So.2d 443, 150 Fla. 374.
N.D—Hazlett v. Mathieu, 220 N.W. 647, 57 N.D. 57.
Tex.—Wharton v. Mortgage Bond Co. of New York, Civ.App., 48 S.W.2d 519—W. B. Thomas Lumber Co. v. McClain, Civ.App., 294 S.W. 350.
29 C.J. p 938 note 61.

22. Ky.—Brewer v. Brewer, 105 S. W.2d 582, 268 Ky. 625—Tyler's Ex'r v. Williamson, 36 S.W.2d 34, 237 Ky. 579—Elliott v. Argenbright, 299 S.W. 957, 221 Ky. 763—Smith v. Moss, 277 S.W. 245, 211 Ky. 236.

23. S.D.—Yellowhair v. Pratt, 182 N. W. 702, 44 S.D. 136.

24. Iowa.—Fardal v. Satre, 206 N. W. 22, 200 Iowa 1109.
29 C.J. p 943 note 10.

25. S D—Yellowhair v Pratt, 182 N W 702, 44 S D 136

26. Ga—Willbanks v. Untriner, 25 S E. 841, 98 Ga. 801
29 C J. p 939 note 62.

27. Tex.—Robinson v McGuire, Civ. App, 203 S W 415
29 C.J p 939 note 63.

28. La—Rigdon v Bogan, 107 So. 403, 160 La. 551.
29 C J p 939 note 64

29. La—Lyons v Andry, 31 So 38, 106 La. 356, 87 Am S.R. 299, 55 L R A. 724.
29 C J. p 939 note 66

Mere claim of intent

Where the case is not one of temporary absence with a fixed intention of returning to one's residence on the premises, but is one where claimant was absent for a period of ten years, during which time he established two homes several miles distant and a third home in another state, the mere claim that during all this time he intended at some future period to build on the land and occupy it as a home is not sufficient to support a claim of homestead.—Richardson v. Richardson, 67 S W.2d 7, 252 Ky. 235.

30. Ark.—Walthall v. Walthall, 98 S.W.2d 70, 193 Ark. 137—Gillis v. Gillis, 262 S.W. 307, 164 Ark. 532.
29 C.J. p 943 note 13.

31. Ark.—Walthall v. Walthall, 98 S.W.2d 70, 193 Ark. 137—Gillis v. Gillis, 262 S.W. 307, 164 Ark. 532.

32. Ark.—Walthall v. Walthall, 98 S.W.2d 70, 193 Ark. 137—Gillis v. Gillis, 262 S.W. 307, 164 Ark. 532.
Iowa.—Grimes Sav. Bank v. McHarg, 276 N.W. 781, 224 Iowa 644.
Ky—Foreman v Cook, 127 S W.2d 856, 277 Ky 812.

33. Iowa—Maguire v Hanson, 74 N W. 776, 105 Iowa 215
29 C.J. p 943 note 15.

34. Iowa—Grimes Sav Bank v. McHarg, 276 N W. 781, 224 Iowa 644—Crail v Jones, 221 N W. 467, 206 Iowa 761.

35. Iowa—Grimes Sav Bank v. McHarg, 276 N W 781, 224 Iowa 644.

36. Ill—Rasmussen v Rasmussen, 13 N E 2d 166, 368 Ill 137.

37. Wis—Pedersen v. Nielsen, 250 N.W. 400, 212 Wis 608
29 C J p 940 note 88 [b]

38. Ky—Tyler's Ex'r v. Williamson, 36 S W 2d 34, 237 Ky 579.

39. Neb.—Edwards v. Reid, 58 N. W. 202, 39 Neb 645, 42 Am S R. 607.
29 C.J. p 943 note 16

Abandonment becomes complete, if intent to return ceases—Crail v. Jones, 221 N.W. 467, 206 Iowa 761.

40. Ky—White v. Wilder, 10 Ky. Op 836.

41. Wis.—Zimmer v. Pauley, 8 N.W. 219, 51 Wis. 282.
29 C.J. p 943 note 20.

42. Ill.—Titman v. Moore, 43 Ill. 169.
29 C.J. p 943 note 21.

43. Ky.—Carter v. Goodman, 11 Bush 228.
Mo.—Kaes v Gross, 3 S.W. 840, 92 Mo. 647, 1 Am.S.R. 767.

44. Okl.—Carter v. Pickett, 134 P. 440, 39 Okl. 144.
29 C.J. p 943 note 19.

45. S.D.—Yellowhair v. Pratt, 182 N.W. 702, 44 S.D. 136.

should intend to return at any particular time in the future [46]

The intention of a homesteader to return to and occupy the homestead after the termination of a removal therefrom is to be gathered not only from his declarations, but also from his actions and the surroundings and environment accompanying his absence [47]

Conditional intention. A removal from a homestead may constitute an abandonment thereof where the intent or purpose to return is contingent on the happening or not happening of a certain event,[48] especially where claimant intends to avoid the contingency,[49] as where he intends to return only in case his business is not a success,[50] or he cannot make a living elsewhere,[51] or he cannot make a sale of the homestead premises.[52] So, also, there is an abandonment where the condition attached to the intention to return, such as the erection and living in a new house on the premises, indicates that the owner will not occupy the premises again as they now exist [53] However, it is not necessary that there should be an intent to return regardless of all possible contingencies,[54] and a conditional intention of acquiring a residence elsewhere has been held not fatal [55] Qualified or conditional intent not to return is considered supra § 165

b. Absence Due to Casualty or Necessity

No abandonment is occasioned by a removal or temporary absence caused by some casualty or necessity and accompanied by an intent to return as soon as circumstances will permit Under a particular statute, a cessation of residence on the property must be so caused and be attended by such intent to avoid an abandonment

In order to constitute an abandonment of a homestead a removal must be voluntary and not under compulsion of any kind.[56] An abandonment is not occasioned by a removal or temporary absence caused by some casualty or necessity,[57] if there is an intention of returning as soon as circumstances will permit,[58] and if such intention is not abandoned [59] The fact that the length of enforced absence cannot be accurately forecasted will not alter the effect to be given the intention to return,[60] and it has been held that the rule applies regardless of the length of the absence.[61]

A casualty or necessity within the rule may consist of the destruction of the homesteaders' dwelling house,[62] or its unfitness for human habitation,[63] the disturbed conditions of the country,[64] a judgment or decree of court,[65] an execution sale,[66] imprisonment,[67] confinement in an asylum because of insanity,[68] or poverty [69] Where a mortgage by a husband was valid as against the homestead right and the wife of such mortgagor was compelled by the mortgagee to leave the homestead during her husband's life, she was not deprived of her rights of homestead after his death although the husband paid rent to the mortgagee for the same premises [70]

48. Okl.—German State Bank v Plachek, 169 P. 1094, 67 Okl. 176.
29 C J. p 942 note 8

47. Ky.—Foreman v Cook, 127 S W.2d 856, 277 Ky 812
Admissibility, weight, and sufficiency of evidence see infra §§ 197, 198.

48. U.S —Peterson v Wasserman, Wis, 246 F. 88, 158 C.C A. 314.
29 C.J. p 942 note 12

49. Iowa.—Conway v Nichols, 76 N. W. 681, 106 Iowa 358, 68 Am S.R. 311.

50. Wis.—Jarvais v Moe, 38 Wis. 440
29 C J. p 942 note 12 [c]

51. Iowa.—Kimbal v. Wilson, 13 N. W. 748, 59 Iowa 638—Leonard v. Ingraham, 10 N.W 804, 58 Iowa 406

52. Iowa.—Conway v Nichols, 76 N. W. 681, 106 Iowa 358, 68 Am S.R. 311.

53. Tex.—Harston v. Langston, Civ. App, 292 S W. 648.

54. S.D —Hewitt v Carlson, 244 N. W 108, 60 S.W. 168—Yellowhair v. Pratt, 182 N.W. 702, 44 S D 136.

55. Ill.—Imhoff v. Lipe, 44 N.E. 493, 162 Ill. 282.
29 C.J. p 942 note 14 [a] (1).

56. Iowa.—Schafter v Campbell, 199 N W 334, 338, 198 Iowa 43, citing **Corpus Juris.**
N D —Grotberg v. First Nat Bank, 210 N W. 21, 54 N D 548
29 C J. p 939 note 71.

57. Iowa —Schaffer v Campbell, 199 N.W 334, 338, 198 Iowa 43, citing **Corpus Juris.**
Miss —Cliett v First Nat. Bank, 181 So 713, 182 Miss 560.
29 C J. p 939 note 72, p 811 note 39 [a]

58. Iowa —Schaffer v. Campbell, 199 N.W 334, 338, 198 Iowa 43, citing **Corpus Juris.**
Miss.—Cliett v. First Nat. Bank, 181 So. 713, 182 Miss. 560.
29 C J. p 939 note 73.

59. Miss.—Cliett v. First Nat. Bank, supra.

60. Mo.—Snodgrass v. Copple, 111 S. W. 845, 131 Mo.App. 346.

61. Tex.—Wiener v. Zweib, Civ.App., 138 S W. 699.

62. Ark.—Gazole v. Savage, 96 S W. 981, 80 Ark 249.
29 C.J. p 939 note 77.

63. Kan.—Rose v. Farmers' & Mechanics' Bank, 148 P. 745, 95 Kan. 331

64. Iowa —Schaffer v. Campbell, 199 N W. 334, 338, 198 Iowa 43, citing **Corpus Juris.**
29 C.J. p 940 note 79.

65. Ill.—Kuttner v. Haines, 25 N.E. 752, 135 Ill. 382, 25 Am.S.R. 370.
29 C J p 940 note 80.
Injunction against use and occupancy of property as homestead
Tex —Sakowitz Bros. v. McCord, Civ. App., 162 S.W.2d 437.

66. La.—Citizens' Nat. Bank of Hammond v. Loranger, 111 So. 679, 163 La 209.

67. Ky.—Clollinger v. Callahan, 263 S.W. 700, 204 Ky. 33.
29 C.J. p 940 note 81.

68. Tenn —Hinds v. Buck, 150 S.W. 2d 1071, 1072, 177 Tenn. 444, citing **Corpus Juris.**
29 C.J. p 940 note 82.

69. Mich.—Karn v. Nielson, 26 N.W. 666, 59 Mich. 380.
Mo.—Snodgrass v. Copple, 111 S.W. 845, 131 Mo.App. 346.

70. N.H.—Wood v. Lord, 31 N.H. 448.

Under a statute providing that, whenever the debtor shall cease to reside on the property, it shall be liable to his debts, unless his removal be temporary, by reason of some casualty or necessity, and with the purpose of speedily reoccupying it as soon as the cause of his absence can be removed, both a sufficient cause for removal and an intent speedily to reoccupy must exist to protect the homestead exemption.[71] The statute allows only a removal which may be justly adjudged as temporary,[72] it requires a speedy return as soon as the cause of absence can be removed, and, under it, there is an abandonment, notwithstanding an intent to return, where the obstacle in the way of a speedy return may never be removed.[73]

c. Absence for Business Purposes

A temporary removal or absence for business purposes, with a continuing intent to return, does not constitute an abandonment of a homestead.

To constitute an abandonment of a homestead by reason of removal for business purposes, there must in addition be an intent not to return to the property as a home.[74] A removal for temporary business purposes will not debar the debtor from his exemption[75] if he continually purposes to return.[76] Hence such absence to engage in trade,[77] to seek or engage in work elsewhere,[78] to raise crops during several seasons on the land of another,[79] to dispose of a stock of goods owned by the wife,[80] to hold an official position,[81] or to secure a more convenient location for the practice of medicine,[82] will not forfeit, or constitute an abandonment of, the homestead. However, the intent not to return may appear notwithstanding the declarations of the homesteader to the contrary,[83] and an abandonment takes place where the absence is for a lifelong purpose and is in the pursuit of practically the life work of the debtor.[84] A reasonable time will be allowed after the completion of the business to return to the old home,[85] and, if the debtor is prevented forcibly from so doing his homestead rights will continue for a reasonable time after the removal of the preventing cause.[86]

d. Absence for Education of Children

Absence for the purpose of obtaining better educational facilities for the debtor's children, and not intended to be permanent, is not an abandonment of the homestead.

If the debtor removes from the home property for the purpose of obtaining better educational facilities for his children, his absence is not regarded as an abandonment, if the removal is not intended to be permanent,[87] even though he votes in the city of his temporary residence[88] or subsequently sells the homestead and never returns.[89] Especially is the rule applicable where he left a tenant

71. Miss.—Moore v. Bradford, 11 So. 630, 70 Miss. 70.
29 C.J. p. 938 note 61 [b].

72. Miss.—Bank of Cruger v. Hodge, 198 So. 26, 189 Miss. 356.

One's removal is not temporary, or by reason of casualty or necessity, where he moves to another state, and there organizes a business and becomes its manager with no intention of returning if it is successful.—Meyer Bros. Drug Co. v. Fly, 63 So. 227, 105 Miss. 752.

73. Miss.—Bank of Cruger v. Hodge, 198 So. 26, 189 Miss. 356.

74. S.D.—Warner v. Hopkins, 176 N. W. 746, 42 S.D. 613.
29 C.J. p. 940 note 87.

75. Ark.—Butler v. Butler, 2 S.W. 2d 63, 176 Ark. 126.
Fla.—Hillsborough Inv. Co. v. Wilcox, 13 So.2d 448.
Ill.—Lohman v. Cottrell, 19 N.E.2d 111, 298 Ill.App. 434.
29 C.J. p. 940 note 88, p. 811 note 39 [a].

Wife joining husband.
The fact that the wife left to join her husband, at his invitation, while he was out of the state pursuing his calling of a preacher, was not an abandonment of the homestead on her part.—Beard v. Beard, 10 Tenn. App. 52.

76. La.—First Nat. Bank v. Brooks, 113 So. 853, 164 La. 297.
29 C.J. p. 940 note 88.

77. La.—Coleman v. Continental Bank & Trust Co., 72 So. 742, 139 La. 1078.
29 C.J. p. 940 note 89.

78. Okl.—Japp v. Sapulpa State Bank of Sapulpa, Okl., 215 P. 1059, 90 Okl. 56.
Tex.—McClendon v. Brown, Civ.App., 63 S.W.2d 746, error dismissed—W. T. Rawleigh Co. v. Blackwell, Civ.App., 48 S.W.2d 754, error dismissed.
29 C.J. p. 940 note 90.

79. Ky.—McFarland v. Washington, 14 S.W. 354, 12 Ky.L. 376.
29 C.J. p. 941 note 91.

80. Neb.—Quigley v. McEvony, 59 N. W. 767, 41 Neb. 73.

81. La.—First Nat. Bank v. Brooks, 113 So. 853, 164 La. 297.
29 C.J. p. 941 note 93.

82. Tex.—Farmer v. Hale, 37 S.W. 164, 14 Tex.Civ.App. 73.

83. Ky.—Crush v. Stewart, 7 Ky. L. 825.
29 C.J. p. 941 note 95.

84. Wis.—Pedersen v. Nielsen, 250 N.W. 400, 212 Wis. 608.

85. Neb.—Allen v. Holt County, 115 N.W. 775, 81 Neb. 198.

86. Neb.—Allen v. Holt County, supra.

87. Iowa.—Schaffer v. Campbell, 199 N.W. 334, 338, 198 Iowa 43, citing **Corpus Juris.**
Kan.—Farmers' State Bank of Belvue v. Weeks, 26 P.2d 262, 138 Kan. 376.
N.D.—Grotberg v. First Nat. Bank, 210 N.W. 21, 54 N.D. 548.
Tex.—W. R. Thompson & Sons Lumber Co. v. Clifton, 124 S.W.2d 106, 132 Tex. 366, affirming Clifton v. W. R. Thompson & Sons Lumber Co., Civ.App., 100 S.W.2d 392.
Wyo.—State Bank of Wheatland v. Bagley Bros., 11 P.2d 572, 586, 44 Wyo. 244, quoting **Corpus Juris,** and rehearing denied 13 P.2d 564, 44 Wyo. 456.
29 C.J. p. 941 note 98.

88. Kan.—Farmers' State Bank of Belvue v. Weeks, 26 P.2d 262, 138 Kan. 376.
Weight and sufficiency of evidence of voting see infra § 198.

89. Iowa.—Schaffer v. Campbell, 199 N.W. 334, 338, 198 Iowa 43, citing **Corpus Juris.**
Kan.—Fredenhagen v. Nichols & Shepard Co., 160 P. 997, 99 Kan. 113.

in possession[90] and with the proceeds supported his family,[91] or where he rented a part of the property but continued to cultivate the balance.[92]

e. Absence on Account of Health

A homestead is not abandoned by a temporary absence due to the state of health of the debtor or some member of his family.

A debtor may be absent without abandoning his homestead where the state of his health, or that of some member of the family, renders it necessary or advisable for him to remove temporarily from his home,[93] and he intends to return,[94] or no intent to abandon the homestead appears,[95] and especially is this so where he leaves a tenant in possession.[96]

f. Filing Claim or Notice on Removal

As properly construed, and within their limited sphere of operation, statutes requiring notice of claim of homestead to be filed in case cessation of occupancy continues more than a prescribed period, or providing that, when a declaration of a claim of homestead has been filed, the leaving of the homestead temporarily shall not operate as an abandonment, will be accorded effect

A statute providing that, when a declaration of a claim to a homestead has been filed in the probate office, the leaving of the homestead temporarily shall not operate as an abandonment does not add anything to the essential rights and privileges of the owner,[97] although it may aid him in the proof thereof,[98] the filing of the declaration being prima facie,[99] although not conclusive,[1] evidence of an intent to return, and, in the absence of evidence to the contrary, stamping on the place the brand of a homestead.[2] So, also, while the court will note a failure to prove compliance with the statute,[3] the statute does not deny to the owner, leaving temporarily, any privilege he had previously enjoyed,[4] and, notwithstanding a failure to comply with the statute, there is no abandonment where an owner leaves his home only temporarily, with an intention to return, and without putting it out of his power at any time so to do[5]

Under another statute requiring notice of claim of homestead to be filed in case cessation of occupancy continues more than six months, the homestead exemption is lost by ceasing to occupy the property more than six months and failing to file the notice,[6] even though there is an intention to return;[7] but retention of the homestead within the six months' period is not dependent on the filing of the notice;[8] and where the owner removes from, and ceases to occupy, the homestead, with the intention of permanently abandoning it as a home or place of residence, his homestead right ceases immediately and does not continue for six months,[9] nor is it preserved or continued by filing the statutory notice[10]

§ 167. —— Effect of Intent to Remove without Actual Removal

When it is unperformed, an intention to remove from the premises is not an abandonment.

An unperformed intention to remove from the premises will not constitute an abandonment; there must be an intention to change the residence and an actual change.[11] This is true, even though the intent to remove is accompanied by preparations

90. N D—Grotberg v First Nat Bank, 210 N.W 21, 54 N D 548.
91. Ky—Brandenburgh v. Rose, 110 S W. 376, 33 Ky.L. 585
92. Ky.—Frazier v. Potter, 150 S. W. 19, 150 Ky. 127.
93. Fla—Hillsborough Inv. Co v Wilcox, 13 So.2d 448.
Ill—Lehman v Cottrell, 19 N.E.2d 111, 298 Ill App. 434.
Neb.—Dougherty v. White, 200 N.W. 884, 112 Neb 675, 36 A.L.R 425.
N.D.—Meidinger v. Security State Bank of Medina, 213 N.W. 850, 55 N.D. 301.
Or.—In re Dunlap's Estate, 87 P.2d 225, 161 Or. 93.
Tex—Weitzman v. Lee, Civ App., 262 S.W. 859.
29 C.J. p 941 note 3.
94. Iowa.—Southwick v. Strong, 255 N.W 523, 218 Iowa 435
N.D.—Grotberg v. First Nat. Bank, 210 N.W. 21, 54 N.D. 548.
95. Ark.—White v. Turner, 155 S.W. 2d 714, 203 Ark. 95.
96. Iowa—Southwick v. Strong, 255 N.W 523, 218 Iowa 435.
N D.—Grotberg v. First Nat. Bank, 210 N W. 21, 54 N.D. 548.
29 C J. p 941 note 4.
97. Ala—Fuller v. American Supply Co, 64 So 549, 185 Ala 512.
29 C J. p 941 note 7 [a] (9)
98. Ala—Fuller v. American Supply Co., supra.
99. Ala.—Powers Clothing Co. v. Smith, 81 So. 576, 202 Ala. 634.
29 C.J. p 941 note 7 [a] (2).
1. Ala—Beckert v. Whitlock, 3 So. 545, 83 Ala. 123.
29 C.J. p 941 note 7 [a] (10).
2. Ala.—Powers Clothing Co. v. Smith, 81 So. 576, 202 Ala. 634.
3. Ala.—Frazier v Espalla, 125 So. 611, 220 Ala. 446.
4. Ala—Fuller v. American Supply Co., 64 So. 549, 185 Ala. 512.
5. Ala.—National Surety Co. v. Baker, 142 So. 829, 225 Ala. 298.
29 C.J. p 941 note 7 [a] (4).
6. Minn—Sheehan v. First Nat. Bank, 204 N W. 38, 163 Minn. 294.
29 C J. p 941 note 7 [b] (1).
7. Minn.—Sheehan v. First Nat. Bank, supra—Quehl v. Peterson, 49 N.W. 390, 47 Minn. 13.
8. Minn.—Russell v. Speedy, 37 N.W. 340, 38 Minn. 303.
29 C.J. p 941 note 71 [b] (3).
9. Minn—Gordon v. Emerson-Brantingham Implement Co., 210 N. W. 87, 168 Minn. 336.
10. Minn.—Clark v. Dewey, 73 N.W. 639, 71 Minn. 108.
29 C.J. p 941 note 7 [b] (4).
11. Minn.—Bowers v. Norton, 218 N.W. 108, 173 Minn. 576.
Tex—Clem Lumber Co. v. Elliott Lumber Co., Com.App., 254 S.W. 935, modifying, Elliott Lumber Co. v. Mitchell, Civ.App., 241 S.W. 321—Towery v. Plainview Building & Loan Ass'n, Civ.App., 99 S.W.2d 1039, error refused.
29 C.J. p 943 note 23.

for removal.[12] However, it has been held that, where the owner of a city homestead makes all preparations to abandon it and to reoccupy a former country homestead as speedily as possible, but is prevented by sickness and death from actually taking possession, the country homestead becomes reinvested with its homestead character and there is an abandonment of the city homestead.[13] Insufficiency of intent alone to effect abandonment of homestead generally is discussed supra § 163.

§ 168. Removal and Conveyance

An abandonment may arise from a removal from the premises followed by a conveyance, or a conveyance followed by a removal.

If the homesteader and his family remove from the premises and he afterward conveys them by a valid and absolute deed,[14] or if there are a sale and a conveyance followed by a removal from the premises[15] and delivery or surrender of possession to the grantee,[16] this constitutes an abandonment of the homestead, or at least it is prima facie sufficient to show an abandonment;[17] but it has been held that a sale and a conveyance of, and removal from, the land do not constitute an abandonment of the homestead so as to make the land subject to the payment of a judgment.[18] Sale and conveyance of property as abandonment of homestead generally are considered infra § 173. The question whether abandonment arises on marital separation and division of property or conveyance to wife is discussed supra § 161.

Defective or invalid conveyance. The execution of a deed to the homestead without conforming to legal requirements if followed by delivery of possession to the purchaser constitutes an abandonment;[19] but the execution of an invalid deed without a previous abandonment is not conclusive of abandonment unless accompanied or followed by surrender of possession to the purchaser.[20] If the removal follows a conveyance void by statute because not joined in by the wife, the homestead is not considered as abandoned.[21]

§ 169. Offer or Unexecuted Intention to Sell

A mere offer, attempt, or unexecuted intention to sell property constituting a homestead is not of itself an abandonment of the homestead.

A mere attempt[22] or offer[23] to sell homestead premises, or an unexecuted intention to sell and reinvest the proceeds in another home,[24] does not of itself amount to an abandonment of the homestead, even though, in the case of an offer, the owner, at the time thereof, is temporarily residing away from the premises,[25] an offer to sell not being necessarily inconsistent with an intention to return and reoccupy the property as a home if not sold.[26] However, it has been said that an offer to sell one's homestead not then in occupation as such is a fact to be considered on the question of intent to abandon.[27]

There was no abandonment by removal under contract to sell, where the purchaser abandoned the contract and the widow and children of the owner who had died immediately after the execution of the contract returned to the premises within a few months after the contract was made.[28]

§ 170. Acquisition of New Homestead

Abandonment of a prior homestead necessarily results from the acquisition of a new homestead, and the same result may, but does not necessarily, follow the

12. Ala.—Herzfeld v. Beasley, 17 So. 623, 106 Ala. 447.
29 C.J. p 943 note 23 [b] (1), [e].

13. Miss.—Ross v. Porter, 16 So. 906, 72 Miss. 361.

14. Okl.—Perkins v. Cissell, 124 P. 7, 32 Okl. 827.
29 C.J. p 943 note 26.

15. Fla.—Miller v. Mobley, 186 So. 797, 136 Fla. 351.
Tex.—Major v. Loy, Civ.App., 155 S.W.2d 617.
29 C.J. p 944 note 27.

16. Ark.—Beeson v. Byars, 63 S.W.2d 540, 187 Ark. 966.
Fla.—Miller v. Mobley, 186 So. 797, 136 Fla. 351.
Tex.—Blesse v. Wessels, Civ.App., 18 S.W.2d 734, error dismissed.
29 C.J. p 946 note 70.

17. Neb.—McHugh v. Smiley, 24 N.W. 177, 17 Neb. 636.
29 C.J. p 944 note 28.

18. Ky.—Wells v. Dixon, 283 S.W. 434, 214 Ky. 499.

19. Ala.—Mower v. Sharit, 85 So. 23, 204 Ala. 50—Thacker v. Morris, 52 So. 73, 166 Ala. 395.

20. Ala.—Mower v. Sharit, 85 So. 23, 204 Ala. 50.

21. Tenn.—Collins v. Boyett, 10 S.W. 512, 87 Tenn. 334.
29 C.J. p 944 note 32.

22. S.D.—Smith v. Midland Nat. Life Ins. Co., 234 N.W. 20, 57 S.D. 497.

Resort to all known means to sell An owner of a homestead living apart therefrom does not forfeit his homestead rights by resorting to every known means to sell such homestead.—Yellowhair v. Pratt, 182 N.W. 702, 44 S.D. 136.

23. Iowa.—Schaffer v. Campbell, 199 N.W. 334, 198 Iowa 43.
29 C.J. p 944 note 33.

Offer of farm for sale did not weaken claim that it was homestead. —De Haven & Son Hardware Co. v. Schultz, 259 P. 778, 122 Or. 493.

24. Ill.—Wike v. Garner, 53 N.E. 613, 179 Ill. 257, 70 Am.S.R. 102
29 C.J. p 944 note 37.

Desire to sell one homestead for purpose of acquiring another is not indicative of intention to abandon the first.—Fardal v. Satre, 206 N.W. 22, 200 Iowa 1109.

25. Mich.—Steel v. Blanchette, 159 N.W. 138, 193 Mich. 167.
29 C.J. p 944 note 34.

26. Tex.—Dunlap v. English, Civ. App., 230 S.W. 829.

27. Ala.—Mower v. Sharit, 85 So. 23, 204 Ala. 50.

28. Ky.—Persifull v. Hind, 11 S.W. 15, 88 Ky. 296, 10 Ky.L. 880.

removal to, and occupancy of, other property under circumstances entitling the occupant to claim it as a homestead, the question being one of intention.

Since no one can own two homesteads at the same time, as considered supra § 13, if the debtor acquires a new homestead he thereby abandons and loses his homestead rights in the former place of residence.[29] This is so, although he leaves part of his furniture in the prior residence, or files a notice that he claims the premises as exempt.[30] Removal, without acquiring new homestead, as abandonment is discussed supra § 165

The best evidence of the abandonment of a former homestead is the fact that a new and permanent home has been acquired[31] and appropriated as such.[32] The removal of the owners from one property to another, and the occupancy and use of the latter property as a homestead, unaccompanied by any act evidencing an intention to return to the former home, silently, but effectively, proclaims the latter property to be their homestead and constitutes the highest and most conclusive evidence of the abandonment of the former property as a homestead.[33] However, the mere fact of acquiring, and moving on, another piece of property does not conclusively establish abandonment.[34] A person may retain his old homestead notwithstanding removal to, and occupancy of, other property under circumstances entitling him to claim it as a homestead,[35] provided he does not form an intention never to return to the original property and occupy it as a homestead.[36] In a case of acquisition of, and removal to, other property, the question of abandonment depends on the intention of the head of the family,[37] to be determined from the surrounding circumstances,[38] but there is no abandonment of a homestead at the time of the execution of a deed of trust on newly acquired property where the latter property has not yet been used for homestead purposes, even though the owner has contracted to sell the property on which he is living and has declared his intention to abandon such property and reside on the newly acquired property.[39] Where there is no intention to abandon the prior homestead, the temporary occupancy of other property which might be claimed as a homestead does not constitute an abandonment,[40] and it has been held that a person who has acquired a new residence, although not a homestead, cannot be permitted to insist on the homestead right to defeat a deed or mortgage executed by him while occupying such newly-acquired residence, and which fails to release the benefit of the act,[41] unless it clearly appears that the new residence is only temporary.[42]

29. Mo.—Palmer v Omer, 295 S W 123, 316 Mo. 1188.
Okl —Preston v Ottawa County Nat Bank, 280 P. 581, 138 Okl 133.
Tex —Silvers v. Welch, 91 S W 2d 686, 127 Tex. 58, affirming Welch v Silvers, Civ App, 59 S.W 2d 879 —Bell v Crabb, Com App, 244 S W 371, reversing Crabb v Bell, Civ App, 220 S W 623—First Nat Bank v Wallace, Civ App., 13 S.W 2d 176, 183, quoting **Corpus Juris,** and reversed on other grounds Wallace v. First Nat Bank, 35 S W 2d 1036, 120 Tex 92.
29 C.J p 944 note 40.
Right to change homestead see supra § 50.

30. Minn —Donaldson v Lamprey, 11 N.W 119, 29 Minn 18.

31. Tex —Hudgins v. Thompson, 211 S W 586, 109 Tex 433—Walker v Dailey, Civ App, 290 S W. 813.

Failure to acquire homestead in property purchased

Purchase of other property for a home and removal to it as a permanent home necessarily operates as an abandonment of the homestead, even though for any reason there is a failure to acquire a homestead right in the property to which the removal is made.—Clay v. Washington, 210 S.W. 484, 183 Ky 756.

32. Tex.—Panhandle Const Co. v. Wiseman, Civ.App., 110 S W.2d 615, error dismissed.

33. Tex —Hinton v Uvalde Paving Co, Civ.App., 77 S.W 2d 733, error refused.

Case of abandonment

Evidence of removal from a former to a new homestead, unaccompanied by evidence of an intention on the part of the head of the family to return to the old, or make temporary his new residence, presents a case of abandonment —Chalk v Daggett, Tex.Com App, 257 S W. 228, modifying, Civ App, 204 S W 1057

34. Tex —Silvers v Welch, 91 S W 2d 686, 127 Tex 58, affirming Welch v. Silvers, Civ App., 59 S W. 2d 879.

Two homes for families of different marriages

Fact that one, having established homestead, in order to relieve discord between families by first and second marriages, established home on nearby farm for second wife and her children, and himself continued to live on former homestead with children of former marriage, does not show an abandonment by him of the homestead first established.—In re Walicek, D C.Tex., 4 F.2d 265, petition denied, C.C.A., Adams v. Walicek, 9 F.2d 26.

35. Tex —Walthall v. Barnes, Civ. App., 83 S.W.2d 1082, error dismissed.

36. Tex.—Coyel v. Mortgage Bond Co of New York, Civ.App, 124 S. W.2d 204.

37. Tex.—Coyel v. Mortgage Bond Co of New York, supra

Intent rather than occupancy and acceptance of deed

The fact that claimants of a homestead received a deed of other property on which they lived does not affect the question of their abandonment of homestead, if they at all times intended not to make their home on the property when it was deeded to them, but to return to the former homestead.—Thigpen v. Russell, 118 S.W. 1080, 55 Tex.Civ.App. 211.

38. Tex.—Coyel v. Mortgage Bond Co. of New York, Civ.App., 124 S. W 2d 204

39. Tex —Staten v. Harris, Civ.App., 239 S W 334
29 C.J. p 945 note 45.
Unperformed intent to remove generally see supra § 167.

40. Tex.—McKenzie v. Mayer, Civ. App., 20 S.W.2d 238.

Living on rented premises does not forfeit one's right to established homestead, use of which has been temporarily abandoned.—Wharton v. Mortgage Bond Co. of New York, Tex Civ.App., 48 S.W.2d 519.

41. Ill.—Titman v. Moore, 43 Ill. 169.

42. Ill.—Titman v. Moore, supra.

It has been held or stated, on the one hand, that a homestead is abandoned by taking up a permanent abode at a distant place,[43] and, on the other hand, that the acquisition of title to, and occupancy of, premises in a near-by town do not alone amount to such permanent absence from the homestead as to work an abandonment thereof as long as an intention to return to the homestead exists[44]

§ 171. Change in Character or Use of Property

A homestead may be abandoned in whole or part by changing the use of all or a part of the homestead tract so that it is no longer of a homestead character

The homestead may be abandoned either in whole or in part by changing the character of the use of all or a part of the homestead tract from residence purposes to some other character of use which will deprive it of the homestead character[45] Since a residence exempt as part of a homestead loses its identity when utterly destroyed or demolished, the material, when hauled away and used in combination with other material for the construction of another house on other land which is subject to a mortgage, does not carry with it the exemption of the homestead house, of which it had formed part, but as part of the house into which it thus enters becomes subject to the mortgage resting on the land[46]

Before it will be held that a part or portion of a homestead has lost its exemption right, it must appear that there was an intention to abandon it as a homestead[47] and that it has been put to a use inconsistent with the homestead character of the premises[48] It has been held that a landowner does not lose, destroy, or abandon his homestead exemption by using part of the homestead for business purposes,[49] erecting on the land some structure useful to him in his business or calling,[50] creating an easement on or through the land,[51] enlarging the building constituting his home,[52] moving his dwelling from one part of the homestead premises to another,[53] removing one of two houses from the premises,[54] or, as to a tract which continues to be used as a part of the homestead, by residing on a separate tract which also forms a part of the homestead[55] The building of a house for the owner's son and grandchildren on a portion of his homestead lot is not an abandonment of that portion[56] Where property in which homestead rights exist is owned by cotenants and is not partnership property, devotion of the use thereof to partnership purposes does not cause a cessation of homestead rights,[57] especially in a state where, as

43. Fla—Miller v West Palm Beach Atlantic Nat Bank, 194 So 230, 142 Fla 22—Lanier v Lanier, 116 So 867 95 Fla 522

44. Okl—White Inv Co v Stupart, 1 P 2d 77 152 Okl 141—German State Bank of Elk City v Plachek 169 P 1094 67 Okl 176

45. Tex - Peterman v Harborth Com App, 300 S W 33, reversing Harborth v Petermann, Civ App, 291 S W 641—Weinert v Cooper Civ App, 107 S W 2d 593, error dismissed—Yates v Home Building & Loan Co, Civ App 103 S W 2d 1081—O'Fiel v Janes, Civ App, 269 S W 1074, affirmed Janes v O'Fiel Com App, 280 S W 163, motion dismissed, 299 S W 640
29 C J p 945 note 47

Appropriation to inconsistent use

The permanent appropriation of a part of the homestead tract to an inconsistent use constitutes an abandonment thereof—Uvalde Rock Asphalt Co v Warren, 91 S W 2d 321, 127 Tex 137, 104 A L R 1043, affirming, Civ App, 59 S W 2d 272—Atwood v Guaranty Const Co, Tex Com App, 63 S W 2d 685, reversing Guaranty Const Co v Atwood, Civ App, 43 S W 2d 159—Archer v Youngblood, Tex Civ App, 129 S W 2d 382 error refused—29 C.J p 945 note 47 [a] (1).

Erection, on part of property, of apartment house or other building for rental purposes is an abandonment of such part as a homestead
Fla—McEwen v Larson, 185 So 866 136 Fla 1
Tex—Atwood v Guaranty Const Co, Com App, 63 S W 2d 685, reversing Guaranty Const Co v Atwood Civ App, 43 S W 2d 159—Texas Building & Mortgage Co v Morris Civ App, 123 S W 2d 365, error dismissed—Starks v National Bond & Mortgage Corporation, Civ App, 85 S W 2d 1056, error dismissed—Mays v Mays Civ App, 43 S W 2d 118, error refused
29 C J p 945 note 47 [a] (2)

Segregation of parts of tract for rental purposes was an abandonment of such parts for homestead purposes—Westergren v Campbell, Tex Civ App, 127 S W 2d 985

Use by another for residence purposes

Owner of urban homestead who gives another permission to erect and occupy small residence on portion thereof abandons homestead to that extent, where wife acquiesces in such permission—Anderson Mill & Lumber Co v Clements, 134 So 588 101 Fla 523

46. La—Coltharp v. West, 52 So 675, 127 La 430

47. Kan—Barten v Martin, 299 P 614, 133 Kan 329

48. Kan—Barten v Martin, supra

49. Ark—Starr v City Nat Bank, 252 S W 356 159 Ark 409
Whether use for other than residence purposes prevents acquisition of homestead see supra § 36

50. Ark—Berry v Meir, 66 S W 439, 70 Ark 129
La—Wilkins v Fremaux, 36 So 805, 112 La 921

51. Fla—Shone v Bellmore, 78 So 605, 75 Fla 515
29 C J p 945 note 51

52 Tex - Yates v Home Building & Loan Co, Civ App 103 S W 2d 1081

53. Neb—City Sav Bank v Thompson 136 N W 992, 91 Neb 628, 41 L R A N S, 89
29 C J p 945 note 50

Removal to another tract of land
Mich—Bunker v Paquette, 37 Mich 79
29 C J p 961 note 56 [b] (2)

54. Tex—Alamo Lumber Co v Walker, Civ App, 103 S W 2d 792

55. U S—Giles v Robinson, C C A Tex, 38 F 2d 228

56 Ark—Brown v Brown, 149 S W 330, 104 Ark 313

57. Minn—Eberhart v National Citizens' Bank of Mankato, 214 N W 793, 172 Minn 200.

long as actual occupancy of a homestead exists, its use otherwise matters little [58] Cessation or discontinuance of use of property for homestead purposes as essential element of abandonment of homestead generally is considered supra § 163.

§ 172. Declaration of Abandonment

By virtue of express statutory provisions in a few states, a homestead may be abandoned only by a declaration of abandonment or by a grant.

Real property may be abandoned in whole or in part as a homestead by express declaration and conduct consonant therewith [59]

Under the express provisions of some statutes, a homestead may be abandoned only by a declaration of intent to abandon, signed, acknowledged, and recorded, or by a grant executed and acknowledged as provided by statute [60] Hence a removal from the premises,[61] or the execution of a mortgage,[62] a lease,[63] or a lease and the purchase of other property and residence thereon,[64] will not destroy the exempt character of the premises, and, in the absence of such declaration or grant, no other premises than the original homestead may be claimed as exempt [65] A deed of the homestead, or part thereof, by a husband to his wife is not an abandonment within these statutes,[66] nor is a quitclaim deed by the wife to the husband, signed by the wife alone, even though, as part of the same transaction, the husband quitclaims other property to the wife, as, under the statute and the construction thereof, a homestead cannot be abandoned by separate instruments separately executed by the husband and wife [67] On the other hand, a joint conveyance of the homestead by the husband and wife,[68] a quitclaim deed,[69] or an agreement of separation between husband and wife which provides for an equal division of all property between them,[70] provided it is recorded,[71] is a grant within the meaning of these provisions, and an abandonment of the homestead Indeed, it has been stated broadly that the word "grant," as used in such statutes, is applicable to all transfers of realty, including transfers by operation of law as well as voluntary transfers [72] There may be a destruction of the homestead right when title to all or a portion of the homestead property is transferred to a third person, even though the conveyance contains a reservation of the right of possession and profits during the life of the spouses,[73] but it is otherwise where there is a reservation of a life estate sufficient to support the homestead [74] Also, a conveyance may destroy the homestead right even though the property or a portion thereof is immediately reconveyed to one of the spouses as a part of the same transaction,[75] but the opposite conclusion was reached where a deed was given by husband and wife to another in constructive trust for the wife's use and benefit, without intent to convey any beneficial interest to the grantee, and the grantee subsequently reconveyed the legal title to the wife without consideration [76]

§ 173. Sale and Conveyance

While, in so far as the homesteader himself is concerned, a valid conveyance of homestead property may constitute a loss, destruction, or abandonment of the homestead exemption, there are various situations, involving, in most cases, a simulated transaction and

58. Minn —Eberhart v National Citizens' Bank of Mankato, supra

59. Fla —Gulf Refining Co v Ankeny, 135 So 521, 102 Fla 151

60. Cal —Thatcher v Van Bever, 34 P 2d 710 139 Cal App 658
Wash —Brown v Manos, 250 P 36, 140 Wash 525
29 C J p 936 note 44 [a] p 945 note 54

Declaration of abandonment filed before declaration of homestead is not available to defeat the homestead —State ex rel Van Doren v Superior Court for King County, 37 P 2d 215, 179 Wash 241

61. Idaho —Campbell v Largilliere Co, Bankers, 256 P 371, 44 Idaho 293
Wash —Brown v Manos, 250 P 36, 140 Wash 525
29 C J p 945 note 55, p 936 note 44 [a]

Question of occupancy is not a material one under such a statute —Lewis v Mauerman, 76 P 737, 35 Wash 156

62. Cal —Kennedy v Gloster 32 P 941, 98 Cal 143
29 C J p 945 notes 56 68 [b]

63. Cal —Simonson v. Burr, 54 P 87, 121 Cal 582

64. Cal —Simonson v Burr, supra
29 C J p 948 note 11 [a]

65. Cal —Waggle v Worthy, 15 P 831 74 Cal 266, 5 Am S R 440

66. Cal —Payne v Cummings, 80 P 620, 146 Cal 426, 106 Am S R 47—Brandon v Faria, 279 P 192, 99 Cal App 594

67. Cal —Dixon v Russell, 70 P 2d 196, 9 Cal 2d 262

68. Cal —Oaks v. Oaks, 29 P 330, 94 Cal 66

69. Cal —Fairie v Daley, 29 P 256, 93 Cal 664

70. Cal —In re Winslow, 53 P 362, 121 Cal 92

71. Cal —In re Lamb's Estate, 30 P 568, 95 Cal 397

72. Cal —White v Rosenthal, 35 P 2d 151, 140 Cal App 184

Foreclosure sale
Where husband and wife as homestead owners were made parties to mortgage foreclosure proceeding, on foreclosure sale, owners lost all control and homestead was as completely abandoned as though owners had disposed of their property by grant deed, and such abandonment was not affected because owners and mortgagee during latter part of period of redemption engaged in negotiations to refinance property and to reconvey it —White v Rosenthal, supra

73. Cal —First Trust & Savings Bank of Pasadena v Warden, 63 P 2d 329, 18 Cal App 2d 131

74. Cal —Wright v Rule & Sons, 107 P 2d 970, 41 Cal App 2d 852

75. Cal —First Trust & Savings Bank of Pasadena v Warden, 63 P 2d 329, 18 Cal App 2d 131

76. Cal —Palen v Palen, 83 P 2d 36, 28 Cal App 2d 602.

lack of intent to vest any beneficial interest in the grantee, in which a conveyance is not an abandonment. In connection with other circumstances, a parol sale or defective deed may cause an abandonment; but a mere executory contract to sell does not do so.

In so far as the homesteader himself is concerned, there is a loss, abandonment, or destruction of the homestead exemption on a valid conveyance of the homestead property,[77] especially when the conveyance is followed by a surrender of possession to the grantee, as considered supra § 168, or where the proceeds are appropriated to the purchase of other property not exempt from seizure and sale for debt,[78] and after the exemption has been so lost, it is not revived by a reacquisition of the property by the former owner,[79] although the property may, on reestablishment of a home thereon, take on a new and independent homestead status.[80] However, a conveyance of homestead property by a judgment debtor may raise no question of abandonment that will affect the homestead right of the purchaser.[81] The question whether grantee of homestead property takes title free of claims and judgments against grantor is considered supra § 149, and the question whether judgment is enforceable lien after conveyance of debtor's homestead property supra § 109

No loss or abandonment of a homestead exemption is worked by an attempted conveyance, rescinded before consummation,[82] a conveyance and a reconveyance to claimant, there being no consideration for either deed,[83] a conveyance of community

77. Iowa—Kleinsorge v Clark, 4 N W 2d 433
Mo—Kelley v Parman, App, 51 S W 2d 231—Mercantile Bank of Louisiana, Mo v Becker, App, 43 S W 2d 862, transferred, see, Sup, 40 S W 2d 626, 75 A L R 1227
Tex—Buelin v Smith Civ App, 294 S W 317, reversed on other grounds Bulin v Smith, Com App, 1 S W 2d 591
29 C J p 945 note 68

As to debt assumed by purchaser
Where widowed owner of homestead sold and conveyed homestead in partial consideration of purchaser's assumption of paving debt, retaining vendor's lien, and holder of paving debt acquiesced in shift of obligors, lien inured to benefit of holder of paving debt for amount thereof and was enforceable by him—Gonzalez v Zachry, Tex Civ App, 84 S W 2d 855, error refused

Mortgagor's sale of property to mortgagee destroys mortgagor's homestead exemption—Murff v Ratcliff 138 So 908, 19 La App 109

Wife, by joining in husband's conveyance of homestead property, abandons her right therein—Johnson v Commonwealth Building & Loan Ass'n, 31 S W 2d 136, 182 Ark 226

Conveyance of part of tract
(1) Where part of a tract constituting a homestead is sold and conveyed it is severed from the remainder of the homestead and ceases to be a part of the home—O'Fiel v Janes, Tex Civ App, 269 S W 1074, affirmed Janes v O'Fiel, Com App, 280 S W 163, motion dismissed 299 S W 640

(2) If the part sold contains the home and buildings occupied by the family, the portion remaining is no longer impressed with the statutory privilege
Ill—Abernathie v Rich, 99 N E 883, 256 Ill 166
Kan—Matney v Linn, 54 P 668, 59 Kan 613.

Conveyance of undivided interest
(1) Where husband and wife after they had acquired their homestead in property conveyed an undivided one-half interest in the property to another in manner provided by law for sale of homestead, husband and wife thereby voluntarily subordinated their homestead right to all the rights and obligations appertaining to relation of tenants in common, and consequently they thereafter stood in same position as if their homestead rights in property had been acquired after parties had become tenants in common in the property—Sayers v Pyland, 161 S W 2d 769, 139 Tex 57, 140 A L R 1164, reversing Pyland v Sayers, Civ App, 148 S W 2d 450

(2) The conveyance of an undivided interest in the homestead destroys the exemption as to the whole, where homestead rights do not attach to lands held in common by joint tenancy—Howes v Burt, 130 Mass 368
29 C J p 945 note 68 [a]

Extinction of leviable interest
This species of abandonment may leave no interest in the debtor to be levied on—Farmers' Savings, Bldg & Loan Ass'n v Berger, 69 S W 57, 70 Ark 613
Alienation as one of exclusive methods of terminating homestead exemption generally see supra § 157
Grant as one of exclusive methods of abandonment permitted by statute see supra § 172

78. Ky—Rose v Cookendolpher, 9 Ky Op 815

79. Iowa—Kleinsorge v Clark, 4 N W 2d 433
29 C J p 946 note 74

Reacquisition for independent consideration
Mo—Mercantile Bank of Louisiana, Mo v Becker, App, 43 S W 2d 862, transferred, see, Sup, 40 S W 2d 626, 75 A L R 1227

Cancellation of instrument of conveyance
The cancellation, by agreement of parties, of a deed made by husband and wife, which had conveyed the absolute title to the homestead, and had declared the amount of unpaid purchase money, without express reservation of a vendor's lien, cannot reinvest the husband and wife with such homestead rights in the land as will prevent it from being subjected to forced sale to satisfy notes for the unpaid purchase money in the hands of one who acquired them before cancellation of the deed—Brooks v Young, 60 Tex 32

80. Fla—Miller v Mobley, 186 So 797, 136 Fla 351

Character of use
Where part of land constituting a homestead has been conveyed, question whether, on reconveyance, it again becomes part of the homestead depends on the use to which it is put, that is, on the devotion or lack of devotion, thereof to homestead purposes—O Fiel v Janes, Tex Civ App, 269 S W 1074, affirmed Janes v O Fiel, Com App 280 S W 163, motion dismissed 299 S W 640

81. Tex—Hughes v Groshart, Civ App, 150 S W 2d 827

82. U S—Thompson v McConnell, Tex, 107 F 33, 46 C C A 124

83. Cal—Palen v Palen, 83 P 2d 36, 38, 28 Cal App 2d 602, citing **Corpus Juris.**
29 C J p 916 note 77

Community homestead
A husband cannot convert the community homestead of himself and wife into his separate estate by deeding it away, without joinder by the wife, and receiving it back in the form of a gift—John Hancock Mut Life Ins Co v Bennett, 128 S W 2d 791, 133 Tex 450, reversing, Civ App, 106 S W 2d 822

Deeds executed for convenience
Where landowner conveyed land

property by a surviving husband to his children,[84] a conveyance of homestead property to a third person to enable the grantor to borrow money from a bank, which was not intended to vest in the third person any beneficial right to the land,[85] the execution of a deed of the homestead by parents to their son to induce him to live with them on the homestead and to secure his assistance in maintaining them on the premises,[86] a voluntary conveyance of a homestead, reserving to the grantor the rents thereof for life,[87] or by a mere assignment[88] in trust for the assignor[89] Also, the homestead of a person owning an undivided interest in land remains notwithstanding the land has been ordered to be sold in order to divide the proceeds,[90] and there is no abandonment of a homestead where the purpose of an agreement of partition of property constituting the homestead is only to place the legal title of one half in the wife and title to the other half in the husband, and there is no intent to convey homestead rights,[91] but a devisee and his wife abandon their homestead rights, if any, in that part of property which they deed to a codevisee who is unmarried and can have no homestead rights[92] When not otherwise abandoned or extinguished, a homestead may continue notwithstanding the husband's conveyance, or pretended conveyance, of his part of, or interest in, the homestead property[93]

Remaining in possession. Notwithstanding the grantor remains in possession at the sufferance of the grantee, property may cease to be the homestead of the grantor on the making of a real, and not a simulated, conveyance thereof,[94] or at least the question of abandonment is one of fact where there is an intent to abandon and the deed carries with it a right to immediate possession by the grantee,[95] but, where the grantor remains in possession, the homestead exemption status is not changed by a conveyance to a son or daughter[96]

Purchase of reversionary or dower interest A loss of homestead rights results from a purchase by the sole beneficiary of a homestead estate of the absolute title to the reversionary interest in the property out of which the homestead estate was carved, when it does not appear that it was the intention of such beneficiary to keep the two estates separate,[97] but a remainderman may acquire the dower interest on which his estate is expectant, even after levy of execution, and not lose his homestead rights[98]

Conveyance to wife or for her benefit Homestead rights are not lost by reason of a conveyance of the homestead property by the husband to the wife[99] Where the homestead is conveyed to a

to third person, who reconveyed it to owner and wife and they subsequently authorized third person to sell land and for convenience executed deeds to him, there was no abandonment of homestead —Croker v Croker D C Fla , 7 F 2d 218

84. Wash —In re Feas 70 P 270, 30 Wash 51

85. Cal —Palen v Palen 83 P 2d 36, 38, 28 Cal App 2d 602, citing **Corpus Juris.**
29 C J p 946 note 79

86. Wis —Murphy v Crouch, 24 Wis 365

87. Ky —Rothwell v Rothwell, 104 S W 276, 31 Ky L 851

88. U S —In re Deadwiler & Fortson, D C Ga , 293 F 762

Wife's assignment to husband of her joint interest in contract to purchase property, does not affect or alter status of property as homestead —Brunsdon v Brunsdon, 200 N W 823, 199 Iowa 1099

89. Cal —Palen v Palen, 83 P 2d 36, 38, 28 Cal App 2d 602, citing **Corpus Juris.**
29 C J p 946 note 82

90. Tex —Boone v McBee, Civ App , 280 S W 295

91. Tex —Crowder v Union Nat Bank of Houston, 261 S W 375, 114 Tex 34 answering certified questions, Civ App 264 S W 791

92. Tex —Price v Reeves, Civ App , 91 S W 2d 862, error dismissed

93. Conveyance while spouses living together
If, under a partition between husband and wife of land constituting the family homestead, there was no abandonment of the homestead, a pretended conveyance by the husband of his half under the partition agreement to his son unknown to the wife, made while the husband and wife were living together constituted no abandonment of part of their homestead Crowder v Union Nat Bank of Houston, 261 S W 375 114 Tex 34 answering certified questions, Civ App , 261 S W 791

Conveyance after husband left wife
Where husband and wife owned homestead property as joint tenants, and husband left wife who continued to reside on the homestead property and thereafter husband divested himself of his one-half interest and wife remained on homestead until her death, and cotenant did not exercise right to extinguish the homestead right as provided by statute by tendering to the wife the value thereof, wife was entitled to exclusive use of homestead and rents and profits therefrom regardless of its value until homestead was extinguished, and was not required to account to cotenant for such profits — Strickler v Yates, 32 N E 2d 681, 309 Ill App 128

94. Tex —Williams v Corpus Christi Bank & Trust Co , Civ App , 104 S W 2d 56, error refused

95. Tex —Jones v Lanning, Civ App 201 S W 443

96. Ky —First Nat Bank of Jackson v Oliver 150 S W 2d 894, 286 Ky 286
Tex —Chesnut v Specht, Civ App , 272 S W 830

97. Ga —Goodell v Hall, 37 S E 725, 112 Ga 435

98. N C —Wright v Bond, 37 S E 65 127 N C 39, 80 Am S R 761

99. Neb —Berggren v Bliss, 241 N W 544, 122 Neb 801
Okl —Oklahoma State Bank v Hassel, 114 P 2d 912, 189 Okl 48
Wyo —Altman v Schuneman, 273 P 173, 39 Wyo 414
29 C J p 946 note 88

Vesting homestead right or estate in wife
According to the doctrine of some cases, such a conveyance will be regarded as vesting the homestead estate, or the right to claim it, in the wife
Ill —Leupold v Krause, 95 Ill 410

third person, under an agreement that it shall be immediately reconveyed to the wife, which is done, the homestead rights are not affected;[1] but, in the absence of such an agreement, express or implied, a conveyance to a third person may constitute an abandonment notwithstanding a reconveyance to the wife.[2]

Invalid or defective deed A conveyance of the homestead premises, although itself defective, may, when taken in connection with other circumstances, work an abandonment of the homestead exemption,[3] as, for instance, where a new homestead is subsequently acquired,[4] or where the purchaser is put into possession, as considered supra § 168, but ordinarily a defectively executed deed, in the absence of delivery of possession, does not constitute an abandonment of the homestead.[5]

If the conveyance fails as to part of the interest sought to be conveyed, the grantor may afterward declare a homestead in that portion.[6]

An executory contract to sell a homestead does not as a matter of law deprive it of its homestead character,[7] but it is a circumstance to be considered by the jury in determining the issue of abandonment.[8]

Parol sale accompanied by delivery of possession A sale by parol when accompanied by delivery of possession to the purchaser amounts to an abandonment of the homestead exemption.[9]

§ 174. —— Conveyance as Security for Debt

It is generally, although not always, considered that, where he remains in possession of the premises, a person does not destroy his homestead exemption, or abandon the homestead to other creditors, by executing a mortgage or a deed absolute on its face, but intended only as security. Failure to redeem after foreclosure causes a loss of homestead rights.

The execution of a mortgage covering homestead property does not destroy the exemption[10] or constitute an abandonment of the homestead[11] to other creditors,[12] in the absence of foreclosure or interference with possession.[13] So, also, except as to an innocent purchaser,[14] destruction or abandonment is not caused by a conveyance absolute on its face, but intended only as security for a debt,[15] where the owner continues to reside and pay taxes on, and improve, the premises.[16] However, the giving of a second mortgage after a judgment lien has attached is held to be an extinguishment of the homestead as against the judgment lien.[17] Also, where a mortgage of the homestead to secure a loan would be contrary to law, the continuity of an intention not to abandon as a homestead property from which the owners have removed is deemed to be broken when they mortgage the property to secure a loan, as it will not be assumed that they would be parties to a void, illegal, and futile act.[18] Furthermore, the owner will not be permitted, after the execution of a mortgage, to claim exemption as against the mortgagees, where, at the time of execution, the owner was not occupying the prem-

Tenn.—Ruohs v. Hooke, 3 Lea 302, 31 Am.R. 642.

Coerced grant of life estate

Where deed granting wife life estate in husband's interest in community homestead was coerced, husband's remainder in homestead could not be subjected to his debts.—Posey v. Commercial Nat. Bank, Tex.Com.App., 55 S.W.2d 515, reversing Commercial Nat. Bank of San Antonio v. Posey, Civ.App., 34 S.W.2d 678.

1. Mich.—Burkhardt v. Walker, 92 N.W. 778, 132 Mich. 93, 102 Am.S.R. 386.
29 C.J. p. 947 note 89.

2. Iowa.—Jones v. Currier, 22 N.W. 663, 65 Iowa 533.
29 C.J. p. 947 note 90.

3. Ala.—Thacker v. Morris, 52 So. 73, 166 Ala. 395.
29 C.J. p. 947 note 2.

4. N.H.—Horn v. Tufts, 39 N.H. 478.

5. Ill.—Davis v. McCullouch, 61 N.E. 377, 192 Ill. 277.
29 C.J. p. 947 note 5.

6. Miss.—Chapman v. White Sewing-Mach. Co., 28 So. 749, 77 Miss. 890.

7. Iowa.—Vittengl v. Vittengl, 135 N.W. 63, 156 Iowa 41.
29 C.J. p. 946 note 84.

Option of refusing to carry out contract

A contract for the sale of a homestead was executory and did not constitute an enforceable sale of the homestead or a sale whereby a right could be asserted superior to the then existing homestead rights, since owner had the option of refusing to carry out the contract.—Panhandle Const. Co. v. Continental Southland Savings & Loan Ass'n, Tex.Civ.App., 110 S.W.2d 632, error dismissed.

Default by purchaser

(1) Vendor's execution of contract for sale of realty, with provision for voiding contract if purchasers failed to pay note and for retaining defaulting purchasers' part payments as rent and damages, did not constitute abandonment of vendor's homestead, where purchasers defaulted and became tenants of vendor.—Bunting v. Rollins, 70 S.W.2d 40, 189 Ark. 12.

(2) Removal under contract to sell subsequently abandoned by purchaser see supra § 169.

8. Tex.—O'Fiel v. Janes, Civ.App., 220 S.W. 371.

9. S.D.—Karlsson v. Odland, 192 N.W. 758, 46 S.D. 350.
29 C.J. p. 947 note 6.

10. N.C.—Cleve v. Adams, 22 S.E.2d 567, 222 N.C. 211.

11. Ark.—Hill v. Schultz, 27 S.W.2d 512, 181 Ark. 719.

12. Wis.—Wisconsin Mortg. & Sec. Co. v. Kriesel, 211 N.W. 795, 191 Wis. 602.
29 C.J. p. 947 note 93.

13. Ark.—Hill v. Schultz, 27 S.W.2d 512, 181 Ark. 719.

14. Cal.—Mabury v. Ruiz, 58 Cal. 11.

15. Iowa.—Sweet v. Bergen, 295 N.W. 181, 229 Iowa 858.—Butler v. Cleland, 202 N.W. 557, 200 Iowa 56.
29 C.J. p. 947 note 94.

16. Iowa.—Butler v. Cleland, supra.

17. Neb.—Hess v. Eselin, 194 N.W. 469, 110 Neb. 590.

18. Tex.—Hinton v. Uvalde Paving Co., Civ.App., 77 S.W.2d 733, error refused.

ises and had not made known his claim of homestead, even though, under the law in force at the time, occupancy of the premises was not necessary.[19]

An instrument giving security on moneys due as oil and gas royalties does not withdraw minerals from a homestead exemption[20]

Mortgages as waiver of homestead rights are considered infra § 183, and the operation and effect of special waiver infra §§ 188–190

Reconveyance Where there has been a conveyance of lands as security for a debt, and later a reconveyance to the original grantor, there is no abandonment of the homestead right[21] A like conclusion has been reached where there was an agreement to reconvey on payment of the debt secured, the debt was paid, and the deed was returned, although no formal reconveyance was made[22]

Redemption or failure to redeem. Where, on foreclosure of a mortgage which releases the homestead, the mortgagor fails to redeem, he loses his homestead rights,[23] and the rule has the same operation as against a purchaser from the mortgagor, where he does not redeem,[24] but the homestead right is not extinguished where another creditor having no claim to the homestead redeems, and on sale of the premises there remains a surplus[25]

§ 175. Lease

The renting or leasing of homestead property, or a part thereof, may, under some circumstances, constitute an abandonment of the rented property as a homestead, but not where the renting or leasing is only temporary, there is no intent to abandon the premises as a homestead, and another homestead has not been acquired.

In one state, under an amended statute now in force, which differs not only from the original statute but also from the rule obtaining prior to the enactment of such statute, any leasing which transfers the exclusive possession to the lessee for any definite term is an abandonment of the homestead right unless the right is saved and preserved by the filing of a declaration of claim to the exemption[26] In most states, however, the mere renting or leasing of property does not destroy its homestead character,[27] since, if claimant in good faith intends at some future time to return and again occupy the property as his home, he may retain his homestead exemption right as against creditors,[28] but the renting or leasing is a proper matter to be considered, in connection with other matters, in determining the question of abandonment[29] A temporary renting or leasing of the homestead premises is not an abandonment of the homestead right[30] where there is no intent to abandon the premises as a homestead[31] and no other homestead has been acquired,[32] this being true even where the homestead-

19. Wyo—Harney v Montgomery, 213 P 378, 29 Wyo 362

20. Tex—First Nat Bank v Willis, Civ App, 58 S W 2d 1065

21. Cal—Kennedy v Gloster, 32 P 941, 98 Cal 143

22. La—Colvin v Woodward, 4 So 564, 40 La Ann 627
29 C J p 947 note 97

23. Ill—Herdman v Cooper, 28 N E 1094, 138 Ill 583
N H—Richardson v Baker, 44 A 520, 68 N H 297.

24. Ill—Shroeder v Bauer, 29 N E 560, 140 Ill 135

25. Ill—Garlick v. Squires, 45 Ill App 521
29 C J p 947 note 1.

26. Ala—Shaddix v Bilbro, 127 So 227, 220 Ala 657—Trapp v First Nat Bank, 117 So 197, 217 Ala 587—Hollis v American Wholesale Corporation, 112 So 204, 215 Ala 644—Miles v Miles, 99 So 187, 211 Ala 26
29 C J p 941 note 7 [a] (5)–(8), (11), (12)

27 Tex—Schulz v L E Whitham & Co, 27 S W 2d 1093, 119 Tex 211, modifying L E Whitham & Co v Schulz, Civ App, 14 S W 2d 881—Carver v Gray, Civ App, 140 S W 2d 227, error dismissed, judgment correct—First State Bank of Memphis v Seago Civ App, 120 S W 2d 951, error refused

Owner not party to lease

Where husband and wife occupy homestead owned by wife, husband's lease not joined in or authorized by wife does not constitute abandonment—Bowers v Norton, 218 N W 108, 173 Minn 576

Lease of farm from year to year is not inconsistent with claim of homestead right therein—De Haven & Son Hardware Co v Schultz, 259 P 778, 122 Or 493

28. Tex—Carver v Gray, Civ App, 140 S W 2d 227, error dismissed, judgment correct

29. Tex—Carver v Gray, supra

30. Tex—Scarborough v Home Owners' Loan Corporation, Civ App, 161 S W 2d 886, error refused—Yates v Home Building & Loan Co, Civ App, 103 S W 2d 1081

Constituent members of family may lease property temporarily to others—Maxey v Patterson, Tex Civ App, 82 S W 2d 386, error dismissed

31. Ky—Foreman v Cook, 127 S W 2d 856 277 Ky 812
N D—Grotberg v First Nat. Bank, 210 N W 21, 54 N D 548
Tex—Cocke v Conquest, 35 S W 2d 673, 120 Tex 43, affirming, Com App, 13 S W 2d 348, which affirmed, Civ App 2 S W 2d 992—Hughes v Parmer, Civ App, 164 S W 2d 576—Hibbs v City Nat Bank of Wichita Falls, Civ App, 293 S W 350
29 C J p 947 note 8

Absence of intention to abandon as making leasing or renting temporary

The courts will construe the renting or leasing as being temporary only, unless the circumstances under which it is done or some other means or proof, establishes the intention of the owner of the homestead to abandon it—First State Bank of Memphis v Seago, Tex Civ App, 120 S W 2d 951, error refused

Leaving tenant in possession during temporary absence on account of health see supra § 166 c

Renting property, or part thereof, during absence for education of children see supra § 166 d

32. U S—Johnson v Duncan, C C A Tex, 61 F 2d 1007
Okl—Long v Talley, 201 P 990, 84 Okl 38
Tex—Hughes v Parmer, Civ App, 164 S W 2d 576—Hibbs v City Nat

er has removed from the state,[33] and it being especially true where the lease is by husband to wife, since this in itself indicates an intent that the right of occupancy shall remain in the family.[34] On the other hand, except in those jurisdictions where it is provided by statute that a homestead can be abandoned only by a declaration of abandonment or by a grant thereof, as considered supra § 172, leasing the premises and giving possession to the tenant with no intention of again occupying the property as a homestead will amount to an abandonment of the exemption,[35] even though the term covered by the rental contract is only a short period of time.[36] There must be an intention on the part of the owner again to use the property for residence purposes,[37] but the fact of renting or leasing the homestead in connection with other circumstances may show such an intent.[38] Where the homestead is rented or leased for such a length of time or under such circumstances as to constitute an abandonment, it commences from the time possession is surrendered to the tenant or lessee, although the term does not begin until a later date.[39]

Lease of portion of premises A temporary[40] renting or leasing of a portion of the homestead premises, the owner continuing to occupy and use the remainder, does not deprive such portion of its homestead character,[41] whether the portion rented is a part of the dwelling house,[42] or a separate building and the land it occupies.[43] However, the renting of a house located on the debtor's homestead may under some circumstances amount to an abandonment of the rented portion,[44] as where the rented portion is permanently detached for rental purposes,[45] or where a building is erected on a part of the homestead tract with no view of making it a part of the homestead, but solely for the purpose of renting it to others for mercantile or other purposes, as considered supra § 171.

§ 176. Miscellaneous Acts of Abandonment

Various miscellaneous acts have been claimed to constitute an abandonment of a homestead and, as to some, the contention has been sustained, but, as to many others, the opposite conclusion has been reached

An aged couple were deemed to have abandoned their homestead in a small farm which they surrendered to an adult son in consideration that he remain on the premises, operate the farm, and support them.[46]

Bank of Wichita Falls, Civ.App., 293 S.W. 350

A constitutional provision that a temporary letting of the homestead shall not change the character thereof when no other homestead has been acquired bears as directly on the question of intent as it does on the question of occupancy. If head of family intends again to use property as homestead, rental is temporary, but if he does not intend again to use it as homestead, then rental is permanent.—Houston Chronicle Pub. Co. v. Allen, Tex.Civ.App., 70 S.W.2d 482.

33. Tenn.—Beeler v. Nance, 150 S.W. 797, 126 Tenn. 589.
29 C.J. p. 939 note 68.

The wife may consent to renting the homestead temporarily and voluntarily accompany her husband to another state without losing her rights in the homestead.—Long v. Talley, 201 P. 990, 84 Okl. 38.

34. Wyo.—Jones v. Kepford, 100 P. 923, 17 Wyo. 468.

35. Tex.—Houston Chronicle Pub. Co. v. Allen, Civ.App., 70 S.W.2d 482.
29 C.J. p. 948 note 12.

36. Tex.—Houston Chronicle Pub. Co. v. Allen, supra.

37. Tex.—Thornton v. Wear, Civ.App., 202 S.W. 1038.

38. Ky.—White v. Roberts, 66 S.W. 758, 112 Ky. 788, 23 Ky.L. 2187.
29 C.J. p. 948 note 14.

39. Vt.—Davis v. Andrews, 30 Vt. 678.

40. U.S.—Giles v. Robinson, C.C.A.Tex., 38 F.2d 228.
Iowa.—Hatter v. Icenbice, 223 N.W. 527, 207 Iowa 702.
29 C.J. p. 948 note 16.

Lack of intent to abandon
Fact that after husband's death wife rented part of homestead premises from month to month while she occupied remainder without intending to abandon any portion of homestead did not terminate property's homestead character.—Smith v. Simpson, Tex.Civ.App., 97 S.W.2d 522, error refused.

41. U.S.—In re Walicek, D.C.Tex., 4 F.2d 265, petition denied, C.C.A., Adams v. Walicek, 9 F.2d 26.
Ala.—Cade v. Graffo, 148 So. 591, 227 Ala. 11.

Renting part of rural homestead
Okl.—Exchange Nat. Bank of Tulsa v. Rose, 103 P.2d 496, 187 Okl. 481.
Tex.—Schultz v. Schultz, Civ.App., 15 S.W.2d 312.

Oil and gas or other mineral lease
U.S.—Evans v. Mills, C.C.A.Tex., 67 F.2d 840.
Tex.—Bradley v. Howell, Civ.App., 126 S.W.2d 547, error dismissed, judgment correct—Boone v. Bassham, Civ.App., 51 S.W.2d 1065, error refused.

42. Ala.—Taylor v. Gallaha, 103 So. 457, 212 Ala. 474.
29 C.J. p. 949 note 17.

Renting of apartments on second floor of garage on a lot which was part of a homestead did not constitute an abandonment of the lot as a homestead, but was analogous to renting a room in the family residence.—Budde v. Drawhorn, Tex.Civ.App., 110 S.W.2d 929.

43. Kan.—Pitney v. Eldridge, 48 P. 854, 58 Kan. 215.
29 C.J. p. 949 note 18.

44. Tex.—White v. Cotton, Civ.App., 72 S.W.2d 669.—Harston v. Langston, Civ.App., 292 S.W. 648.
29 C.J. p. 949 note 19.

Houses rented permanently
Tex.—Maury v. Mireles, Civ.App., 93 S.W.2d 1194, error dismissed.

New house rented continuously for five years
Tex.—Yates v. Home Building & Loan Co., Civ.App., 103 S.W.2d 1081.

45. Okl.—Bouse v. Stone, 162 P. 479, 65 Okl. 5.
29 C.J. p. 949 note 20.

Corpus Juris was cited in arriving at the conclusion that lien on lot comprising homestead could not be foreclosed merely because one house on lot was being rented, without some showing which would enable homestead to be separated from rented property.—Real Estate Land Title & Trust Co. v. Beryle, Tex.Civ.App., 88 S.W.2d 767, 769.

46. Iowa.—Robison v. Robison, 175 N.W. 9, 187 Iowa 1209.

There was no abandonment of the homestead where the owner moved from a town house to a country residence, leaving part of his personal effects in the former and intending to return,[47] where he removed from a farm homestead to a town, leaving most of his household goods at the former, and considered it his home,[48] where he left his residence for that of his son, selling his personalty, but soon afterward made arrangements to return to his former home and there reside,[49] where the husband and wife left the dwelling, removed their furniture and went out to work separately, the wife returning from time to time to care for the property,[50] or where the owner stored his personal property in his dwelling, and slept there part of the time, but took his meals elsewhere[51] Also, no abandonment was occasioned where the former residence tract was used in connection with a neighboring one to which the family of the homesteader removed[52] Abandonment cannot be predicated on representations alone,[53] and it does not result from the mere filing of a suit to partition the homestead property,[54] the payment of a poll tax in another county,[55] or the acceptance of a lease during occupancy under a contract to purchase[56] The fact that the owner, who is seeking to borrow money on the security of only a part of the property, proceeds to take the necessary steps to free that part from apparent liens which would attach except for the homestead character of the property, does not constitute an abandonment of the balance of the property as a homestead[57] The cessation of preparation, during the pendency of litigation regarding the homestead claim, to unite another house on the same lot with the house occupied is not an abandonment of the claim[58] Even a total cessation of use does not result in abandonment unless there concurs with the cessation the absence of any intention to resume use[59]

Devise The fact that a homestead is devised by the owner does not work an abandonment of the exemption,[60] and it has been said that the fact that the owner of a homestead disposes of a part of it by will does not have the effect of destroying the homestead character of the part which is not devised[61]

The question whether divorce is abandonment of homestead right is considered supra § 160, and the separation of husband and wife and division of property as abandonment supra § 161

§ 177. Abandonment of Business Homestead

There is no substantial difference between the rules for determining whether a business homestead has been abandoned and those for determining whether a residence homestead has been abandoned

The rules for determining whether a business homestead has been abandoned are substantially the same as those for determining whether a residence homestead has been abandoned[62] The element of intention is of vital concern[63] If the owner of a business homestead ceases to use the premises for business purposes with no intention to resume them or to pursue some other calling or business on the homestead property there is an end to the exemption,[64] and a mere intention again to occupy the premises as a place of business at some indefinite time in the future and dependent on a contingency which may not happen does not preserve the exemption[65] On the other hand, the homestead is not

47. Ky—Black v Black, 12 S W 147, 11 Ky L 378

48. Mo—Mills v Mills, 42 S W 709 141 Mo 195

49. Tex—Curtis v Cockrell, 28 S W 129, 9 Tex Civ App 51

50. Mass—Drury v Bachelder, 11 Gray 214

51. Ky—Central Kentucky Lunatic Asylum v Craven, 32 S W 291 98 Ky 105, 17 Ky L 667, 56 Am S R 323

52. Ark—Kulbeth v Drew County Timber Co, 188 S W 810, 125 Ark 291

29 C J p 949 note 22

53. Tex—Higgins v Millsap, Civ App, 121 S W 2d 469

54. Tex—Berry v Godwin, Com App, 222 S W 191—Carr v Langford, Civ App, 144 S W 2d 612, affirmed Langford v Carr 159 S W 2d 107, 138 Tex 330

55. Tex—McKenzie v Mayer, Civ. App, 20 S W 2d 238.

58. Iowa—Duffield v Dosh, 99 N W 1074, 124 Iowa 286

57. S D—Edelman v Scandrett, 293 N W 817, 67 S D 453

58. Tex—Scottish American Mortg Co v Milner Civ App, 30 S W 2d 582, error refused

59 Tex—Haile v Federal Land Bank of Houston Civ App, 135 S W 2d 1024, error refused

60. Miss—Norris v Callahan, 59 Miss 140

Will or contract to make will in consideration of care does not imply a surrender of testator's right to claim that the premises involved are exempt under the homestead law—In re Dunlap's Estate, 87 P 2d 225, 161 Or 93

61. Wis—Johnson v Harrison, 41 Wis 381

62. Tex—Panhandle Const Co v Head, Civ App, 134 S W 2d 779, error refused—Texas Pac Coal & Oil Co v Guthrie, Civ App, 100 S W 2d 125, modified on other grounds Guthrie v Texas Pac Coal & Oil Co, 122 S W 2d 1049, 132 Tex 180—Federal Petroleum Co v Pittman, Civ App, 65 S W 2d 359, error refused

Abandonment by husband alone see infra § 178

63 Tex—Guthrie v Texas Pac Coal & Oil Co, 122 S W 2d 1049 132 Tex 180 modifying Texas Pac Coal & Oil Co v Guthrie, Civ App, 100 S W 2d 125

64. Tex—Blaylock v Slocomb, Civ App, 250 S W 218

29 C J p 949 note 37

65. Tex—Hill v Hill, 19 S W 1016, 85 Tex 103

29 C J p 950 note 38, p 942 note 13

Mere willingness to go into business again in the near future, without a definite intention to use the property in question in business at any definite time, coupled with the means of doing so, is not sufficient.—

abandoned where the owner temporarily quits business on account of illness with the intent to reëngage in business as soon as he is restored to health,[66] where the place of business is necessarily closed temporarily in consequence of the levy of an attachment on the stock and fixtures,[67] or where there is a temporary interruption of the conduct of the debtor's business by his performance of the duties of a public officer[68] A business homestead is not abandoned in part by tearing down a portion of the building standing on it, for the purpose of erecting a new building, which new building is immediately erected, and, before it is finished, is occupied and used in connection with the old one[69] Possession and use of a building for carrying on a business enterprise are not surrendered by an agreement to pay another tenant in common a certain sum monthly for designated purposes, including the payment of all taxes, insurance, and upkeep of the building[70]

Transfer There may be an abandonment of a business homestead where there is a transfer, in good faith, to a corporation of all the stock and fixtures used in the business[71] or a transfer of the real property to a corporation, an assignment by the corporation to others, and a holding of the property by the assignees for one year[72] However, a general assignment of the business homestead is not an abandonment where the homesteader retains his homestead, and carries on his business subsequent to the assignment[73]

Leasing While a mere temporary renting of the business homestead or a portion of it may not constitute an abandonment,[74] a leasing for several years, with an option of renewal, where there is only an indefinite intention to resume the business on the land, will constitute an abandonment[75] There may be no abandonment under the circumstances, notwithstanding a renting or leasing of a portion of the property,[76] but it is held that the leasing of a portion of the business homestead for purposes inconsistent with its use as such will operate as an abandonment of the business homestead in the portion so leased, where there is ample space left the owner for the business carried on[77] Where defendant made a general assignment, and his assignee sold his business homestead, and the person in possession paid only one month's rent to the purchaser, holding the remaining rent until the right to the homestead should be determined, there was no question of abandonment by lease or other contract[78]

Reasonable time for reembarking in business Where, because of ill health, failure in business, or any other good reason, the owner of a business homestead ceases to carry on the business in which he has been engaged, the property does not immediately become subject to forced sale, he is allowed a reasonable time in which to plan and arrange for, and embark in, some business, of the same or a different kind, at the same place, and during this interval the exemption of the place of business is not lost[79]

§ 178. Power of Husband to Abandon Homestead without Wife's Consent

In some, but not all, states, the husband may in good faith abandon the homestead without the wife's consent

In a majority of the states wherein the question has arisen, the husband may, provided he acts in good faith and without fraud on the rights of the wife,[80] abandon the homestead and withdraw it

Casey v Walker-Smith Co Tex Civ App, 112 S W 2d 813

66. Tex—Panhandle Const Co v Head Civ App, 134 S W 2d 779, error refused
29 C J p 950 note 39

67 Tex—King v Harter, 8 S W 308, 70 Tex 579

68. Tex—Schoellkopf v Cameron, 47 S W 518, 19 Tex Civ App 593
29 C J p 950 note 41

69. U S—Building & Loan Ass'n of Dakota v Logan, Tex, 66 F 827, 14 C C A 133

70. Tex—Cooper Co v Werner, Civ App, 111 S W 2d 823

71. Tex—Nowlin v Wm Cameron & Co, Civ App, 54 S W 2d 1035, error refused

72. Tex—Mayfield v First State Bank of Holland, Civ App, 19 S W 2d 454.

73. Tex McDowell v Northcross, Civ App, 162 S W 13

74. Tex—Panhandle Const Co v Head, Civ App, 134 S W 2d 779, error refused—Blaylock v Slocomb, Civ App 250 S W 218
29 C J p 950 note 45

75. Tex—Alexander v Lovitt 69 S W 68 95 Tex 661 reversing Civ App 67 S W 927

76. Tex—First State Bank of Memphis v Seago, Civ App, 120 S W 2d 951 error refused
29 C J p 950 note 48

Occupancy by owner after vacation by tenant
That part of a homestead unit consisting of a business homestead was not abandoned and appropriated to rental purposes where the owner occupied one half of the property from the beginning and the other one half for several years after vacation by a tenant who occupied it several months—Scarborough v Home Owners' Loan Corporation, Tex Civ App 161 S W 2d 886, error refused

77. Tex—Pfeiffer v McNatt, 12 S W 821 74 Tex 610
29 C J p 950 note 47

78. Tex—McDowell v Northcross, Civ App, 162 S W 13

79 U S—In re Reagor, C C A Tex, 294 F 875, certiorari denied Hall v Reagor, 44 S Ct 404, 264 U S. 591 68 L Ed 865
Tex Blaylock v Slocomb, Civ App, 250 S W 218
29 C J p 950 note 43

Change in business would not affect the exemption—McCarty v Coffin, Tex, 150 F 307, 80 C C A 195

80. Tex—Anderson v Pioneer Bldg & Loan Ass'n, Civ App, 163 S W 2d 421, error refused—Cooper Co v Warwick, Civ App, 120 S W 2d 128

from the right of exemption given by the homestead laws for the benefit of his family,[81] and he may do so without the wife's knowledge[82] or consent,[83] or against her wishes.[84] The rule applies to homesteads in both separate and community property,[85] and to business homesteads.[86]

Insanity of the wife does not affect the operation of the rule for the reason that her consent is not necessary.[87]

In some jurisdictions, however, where land has once been impressed with the homestead character, the husband cannot abandon the homestead without the wife's consent.[88] In such jurisdictions, the abandonment of a homestead by the husband and father while his wife is confined in an insane asylum does not deprive her of her right therein.[89] Similarly the wife cannot abandon the homestead and thereafter sell it to the exclusion of the right of her insane husband.[90]

Wife leaving premises voluntarily. Under the majority rule not requiring the wife's consent, the abandonment is not dependent for its validity on the wife's voluntarily leaving the property and ceasing to use it as her home,[91] although, if the wife voluntarily leaves the homestead to accompany her husband when he abandons it, there can then be no question that her homestead rights are lost,[92] even under the minority rule against abandonment without the consent of the wife.[93]

C. WAIVER

§ 179. In General

As a general rule homestead rights may be waived.

As a general rule homestead rights may be waived by the parties entitled thereto.[94] Such rights, however, may not be waived prior to their acquisition,[95] and in some jurisdictions the relation of

—Weinert v Cooper, Civ App, 107 S W 2d 593, error dismissed—Woolf v Smith, Civ App, 86 S W 2d 67—Miller v Southland Life Ins Co, Civ App, 68 S W 2d 558—Gross v White, Civ App, 67 S W 2d 895—Wharton v Mortgage Bond Co of New York, Civ App, 48 S W 2d 519—Sanders v Crump, Civ App, 23 S W 2d 850—Hibbs v City Nat Bank of Wichita Falls, Civ App, 293 S W 350

29 C J p 950 note 50 [b], p 951 notes 54, 57 [a], [b]

Good faith of husband is test

Tex—First Coleman Nat Bank of Coleman v Childs, Civ App, 113 S W 2d 602, error refused

Plan of action beginning with void deed of trust

A husband cannot abandon a homestead as part of a plan of action, deliberate or innocent on his part, that begins with void deed of trust executed by him alone for purpose not authorized by constitution and ends in sale to which wife is not party, and about which she knows nothing, especially where husband surrenders property to purchasers at trustee's sale reluctantly and in ignorance of his rights—Burkhardt v Lieberman, 159 S W 2d 847, 138 Tex 409, modifying, Civ App, 142 S W 2d 283

81. Ark—Nicholas v. Ward, 168 S W 2d 1095

Tex—Anderson v Pioneer Bldg & Loan Ass'n, Civ App, 163 S W 2d 421, error refused—Cooper Co v Warwick, Civ App, 120 S W 2d 128—First Coleman Nat Bank of Coleman v Childs, Civ App, 113 S W 2d 602, error refused—Miller v Southland Life Ins Co, Civ App, 68 S W 2d 558—Gross v. White, Civ App, 67 S W 2d 895—Wharton v Mortgage Bond Co of New York, Civ App, 48 S W 2d 519—Sanders v Crump, Civ App, 23 S W 2d 850

Wis—Krueger v Groth, 209 N W 772, 190 Wis 387

29 C J p 950 note 50

Part of homestead may be abandoned by the husband

Ark—Nicholas v Ward, 168 S W 2d 1095

Tex—Peterman v Harborth, Com App, 300 S W 33, reversing Harborth v Petermann, Civ App, 291 S W 641—Weinert v Cooper, Civ App, 107 S W 2d 593, error dismissed

29 C J p 950 note 50 [b]

82. Tex—Bishop v Williams, Civ App, 223 S W 512

29 C J p 950 note 50

83. Ark—Nicholas v Ward, 168 S W 2d 1095—McKenzie v Rumph, 286 S W 1022, 171 Ark 791

Tex—Peterman v Harborth, Com App, 300 S W 33, reversing Harborth v Petermann, Civ App, 291 S W 641—Weinert v Cooper, Civ App, 107 S W 2d 593, error dismissed—Woolf v Smith, Civ App, 86 S W 2d 67—Wharton v Mortgage Bond Co of New York, Civ App, 48 S W 2d 519

29 C J p 950 note 50, p 951 note 52

84. Tex—Woolf v. Smith, Civ.App, 86 S W 2d 67

29 C J p 950 note 50, p 951 note 53

85. Tex—Gross v White, Civ App, 67 S W 2d 895—Bishop v Williams, Civ App, 223 S W 512

86. Tex—Inge v. Cain, 65 Tex 75

87. Tex—Gibson v Pierce, Civ App, 146 S W 983

88. Iowa—Novotny v Horecka, 206 N W 110, 200 Iowa 1217, 42 A L R 1158

29 C J p 951 note 63

89. Iowa—Singleton v National Land Co, 167 N W 97, 183 Iowa 1108

29 C J p 951 note 64.

90. Neb—Weatherington v Smith, 112 N W 566, 77 Neb 369

29 C J p 951 note 65

91. Tex—Bishop v Williams, Civ App, 223 S W 512

92. Tex—Portwood v Newberry, 15 S W 270, 79 Tex 337

29 C J p 951 note 60

93. Ill—Brown v Coon, 36 Ill 243, 85 Am D 402

94. N C—Cameron v McDonald, 6 S E 2d 497, 216 N C 712—Pence v Price, 192 S E 99, 211 N C 707

Okl—Goolsby v Cheatham, 61 P 2d 1073, 178 Okl 113—Taylor v Campbell, 281 P 243, 139 Okl 110

Tenn—Clevenger v Rains, 73 S W 2d 1114, 18 Tenn App 128

Tex—Roberson v Home Owners' Loan Corporation, Civ App, 147 S W 2d 949 Error dismissed, judgment correct—Benson v Mangum, Civ App, 117 S W 2d 169, error refused—Shonaker v Citizens' Loan & Investment Co, Civ App, 8 S W 2d 566, error refused

Va—Home Owners Loan Corporation v Reese, 196 S E 625, 170 Va 275

29 C J p 951 note 67

Permissibility of legislation authorizing waiver of homestead exemption see supra § 7

Waiver by surviving

Children see infra § 257.

Wife see infra § 249

95. Kan—West v Grove, 31 P 2d 10, 139 Kan 361.

debtor and creditor with respect to a specific debt must exist between the parties at the time of the waiver in order to render it binding.[96]

Before or after allotment. While in some jurisdictions there can be no waiver of a homestead after it has been set apart,[97] in others the waiver may be made either before or after the property has been set apart[98]

General or special waiver Where the constitution provides that the waiver may be either general or special, the homesteader and his wife may restrict the waiver of their homestead rights as they think proper[99] The waiver may be as to all creditors,[1] a particular creditor,[2] or a particular debt.[3]

The waiver must be certain to the extent that it may be operative,[4] especially in the case of a special waiver[5]

§ 180. By Whom Made

Generally a homestead right may be waived only by the person entitled thereto

As a general rule no waiver of a homestead exemption by one of the persons entitled to its enjoyment can affect the rights of the others,[6] and accordingly it is usually held that no waiver by a husband can affect the rights of his wife and children,[7] but there is also contrary authority.[8]

A partner may waive his own homestead rights;[9] but one partner cannot waive the right of another partner to the benefit of homestead out of the latter's individual real property,[10] unless he has express authority to do so,[11] nor can the general manager of a mercantile firm, even though authorized to sign notes to creditors of the firm, waive the homestead exemption of any partner without express authority to do so[12]

§ 181. How Waived

Where the method of waiving homestead rights is prescribed by statute, there can be no waiver except by the method so prescribed.

Where the method of waiving homestead rights is prescribed by statutory provisions, there can be no waiver except by the method so prescribed[13] Accordingly, where the statute or constitution so provides, a waiver of homestead rights must be in writing,[14] and the instrument of waiver must be duly acknowledged[15] and recorded[16] In the absence of contrary statute, however, the waiver need not be by notarial act,[17] nor need it be judicially recognized[18]

96. Ga—Ragan, Malone & Co v Taft, 68 S E 579, 134 Ga 835
29 C J p 953 note 94 [a]

Homestead waiver in financial statement, not requiring purchase or binding merchant to extend future credit is void as to subsequent debts—Southern Wholesale Corporation v Pincus, 160 S E 377, 173 Ga 421—Frank & Co v Weiner, 147 S E 51, 167 Ga 892

97. Ga—Russell v Gilliland, 91 S E 1065, 19 Ga App 676
29 C J p 951 note 67 [b]

98. Va—Linkenhoker v Detrick, 81 Va 44, 59 Am R 648—Reed v Union Bank 29 Gratt 719, 70 Va 719
29 C J p 951 note 67

99. La—Martin v Gary, 61 So 218, 132 La 246

1. Present and future debts
The waiver may be as to all present debts, or all future debts, or both—Oxford v Colvin, 64 So 919, 134 La 1094

2. Kan—Schloss v Unsell, 216 P 1091, 114 Kan 69
La—Oxford v Colvin, 64 So 919, 134 La 1094

3. La—Oxford v Colvin, supra

4. Minn—Benning v Hessler, 175 N W 682, 144 Minn 403

5. Minn—Benning v Hessler, supra
29 C J p 952 note 75.

6. N D—Schaf v Corey, 196 N W 502, 50 N D 432
29 C J p 952 note 76

7. N D—Schaf v Corey, supra
Okl—Randel v Heckman, 245 P 589, 114 Okl 190
29 C J p 952 note 77

8. In Georgia prior to the assignment of a homestead, a waiver of the homestead right by the husband bars the rights of the wife and children to the homestead—Jackson v Parrott, 67 Ga 210—Taliaferro v Pry, 41 Ga 622

In Nebraska, under the Homestead Law of 1867, it has been held that the husband alone could waive the exemption and subject the property to a judgment—Jackson v Creighton, 45 N W 638, 29 Neb 310

9. Ga—Perry v Britt-Carson Shoe Co, 59 S E 216, 129 Ga 560, 121 Am S R 232, 239

10 Ga—Perry v Britt-Carlson Shoe Co, supra—Giles v Vandiver, 17 S E 115, 91 Ga 192

11. Ga—S J Winkles & Co v Simpson Grocery Co, 75 S E 640, 138 Ga 482

12. Ga—S J Winkles & Co v Simpson Grocery Co, supra

13. Ky—Hensley v Lovely 64 S W 2d 157, 250 Ky 832, citing **Corpus Juris.**

La—First Nat Bank v Hebert, 111 So 66 162 La 703
Va—Home Owners Loan Corporation v Reese, 196 S E 625, 170 Va 275
29 C J p 952 note 80

14. Ky—Hensley v Lovely, 64 S W 2d 157, 250 Ky 832
La—Abshire v Comeaux 106 So 574, 159 La 1087
29 C J p 953 note 87

15. Ky—Hensley v Lovely, 64 S W 2d 157, 250 Ky 832
29 C J p 954 note 9
Acknowledgment of conveyances or encumbrances of homestead see supra § 137

16. Ky—Hensley v Lovely, supra
29 C J p 954 note 9
Registration of homestead conveyances and encumbrances see supra § 138

As against third persons
Under the constitutional provisions in some jurisdictions homestead waivers must be recorded to be effective as against third persons, but they need not be recorded to be effective as between the parties to the waiver—Jeffcoat v Hammons, La App, 160 So 182

17 La—Abshire v. Comeaux, 106 So 574, 159 La 1087

18. Suit on, or judicial recognition of, homestead waiver is not necessary to continued validity thereof,

§ 182. —— By Contract in General

The homestead right may be waived by contract providing for such waiver

Aside from waiver by mortgage considered infra § 183, the homestead exemption may be waived by contract providing for such waiver[19] To be effective, however, a waiver of homestead rights by contract must be supported by an adequate consideration[20] and must comply with any statutory requirements on the subject which may exist[21] The contract must in general be in writing,[22] and the waiver must be in plain and unmistakable language[23]

In instrument creating debt In some jurisdictions the contract creating the debt may contain the waiver,[24] while by special statutory provisions in others the waiver must be made by separate instrument in writing[25] In still other jurisdictions a debtor's waiver of homestead rights in the contract creating the debt is void as against public policy[26]

In usurious contract While usury in a debt will defeat a waiver of homestead made in an instrument which represents the debt,[27] it is well settled that, where the debt has been reduced to judgment, both the maker of the instrument waiving the homestead right and the beneficiaries of a homestead set apart after the execution of such instrument are estopped to set up that the waiver of homestead was void because of usury in the debt,[28] unless the usury appears on the face of the instrument.[29]

Prior to claim of homestead While a contrary rule prevails in some jurisdictions,[30] in other jurisdictions the homestead right cannot be waived by contract in advance of the occasion of asserting such right,[31] the view being taken that such a contract of waiver is against public policy[32] The contracting parties, it is said, cannot repeal the statute or upset the constitution itself[33]

Recordation If acknowledgment and recording are provided for by statute a satisfaction of these requirements is necessary[34]

§ 183. —— Mortgage Waiving Exemption

Except where homestead mortgages are prohibited by law, homestead rights may be waived in a mortgage of the homestead by a provision therein expressly releasing such rights

Except where mortgages of the homestead are prohibited by law,[35] homestead rights may be waived by inserting in a mortgage on property to which such rights attach a provision expressly re-

since such waiver in proper form reflects its own existence—Jeffcoat v Hammons, La App, 160 So 182

19. Iowa—Bussard v Parker, 198 N W 190, 197 Iowa 1074
Kan—Schloss v Unsell, 216 P 1091 1092, 114 Kan 69, quoting **Corpus Juris.**
La—Banahan v Haynes, 115 So 625, 165 La 374
Miss—Patrick v Rembert 55 Miss 87
S D—Wilson v Hayes-Lucas Lumber Co 226 N W 343, 345 55 S D 331, citing **Corpus Juris,** and modifying 207 N W 155 49 S D 311
29 C J p 952 note 83
Form and necessity of release in transfer or encumbrance see supra § 136

20. Miss—Hubbard v Sage Land & Improvement Co, 33 So 413, 81 Miss 616

21. Kan—West v Grove, 31 P 2d 10 139 Kan 361
N C—Howell v Roberson, 150 S E 32 197 N C 572
Va—Home Owners Loan Corporation v Reese 196 S E 625, 170 Va 275
29 C J p 952 note 85

22. Va—Home Owners Loan Corporation v Reese, supra
29 C J p 953 note 86

23. Homestead right held not waived
(1) A prenuptial contract providing that the wife's property should descend free from the dower right or distributive share of the husband who "expressly waives and renounces" all claims is not a waiver of the husband's homestead right—Mill Owners' Mut Fire Ins Co v Petley, 229 N W 736, 210 Iowa 1085
(2) A provision in a lease whereby a tenant to secure the payment of rent, waived the benefit of "the exemption laws" was not a waiver of homestead rights—West v Grove, 31 P 2d 10 139 Kan 361

24. Ga—Lyle v Roswell Store, 200 S E 702, 187 Ga 386
Iowa First Nat Bank v Phillips 212 N W 678 203 Iowa 372
La Jeffcoat v Hammons App 160 So 182
Va—Home Owners Loan Corporation v Reese, 196 S E 625, 170 Va 275
29 C J p 953 note 88

25 Ala—Wagnon v Keenan, 77 Ala 519
29 C J p 953 note 90

26. A waiver of homestead rights in a note is void as against public policy
Ohio—Dennis v Smith, 180 N E 638, 125 Ohio St 120
Utah—Bunker v Coons, 60 P 549, 21 Utah 164, 81 Am S R 680

27. Ga—De Lay v Latimer, 117 S E 446, 155 Ga 463—Long v Gresham, 96 S E 211, 148 Ga 170—Prather v Smith, 28 S E 857, 101 Ga 283—Cleghorn v Greeson 77 Ga 343

28. Ga—De Lay v Latimer, 117 S E 446 155 Ga 463—Hendrix v Webb, 39 S E 461, 113 Ga 1028—Ezzard v Estes, 22 S E 713, 95 Ga 712—Stewart v Stisher, 9 S E 1041, 83 Ga 297—McLaws v Moore, 9 S E 615, 83 Ga 177

29. Ga—Johnson v Davis, 22 S E 911 97 Ga 282

30. La—Oxford v Colvin, 64 So 919 134 La 1094
29 C J p 953 note 93

31. Utah—Bunker v Coons, 60 P 549 21 Utah 164, 81 Am S R 680
29 C J p 953 note 94

32. Utah—Bunker v Coons, supra
29 C J p 953 note 95

33 Wis—Maxwell v Reed, 7 Wis 582

34. La—Iberville Bank & Trust Co v Dupuy 71 So 206, 139 La 28
29 C J p 953 note 97

To be effective against third persons, homestead waivers by contract must be recorded as in the case of real estate conveyances—Jeffcoat v Hammons, La App, 160 So 182

35. Tex—Sampson v Williamson, 6 Tex 102, 55 Am D 762
29 C J p 953 note 99 [a]
Homestead laws restricting encumbrances except for certain debts see supra § 134.

leasing such rights,[36] and, as has been seen supra § 136, according to some of the decisions such a provision is necessary to effect this result, but according to others an express waiver is not necessary

Deed intended as mortgage The execution of a deed of conveyance, "absolute on its face" but in fact intended only as a mortgage, does not deprive the grantors of their homestead rights,[37] except as against innocent purchasers, see supra § 148.

§ 184. —— Joinder of Husband and Wife

Although not required by some homestead laws, the joinder of husband and wife is in general essential to the validity of a waiver of homestead rights.

Although under some homestead laws a contrary conclusion has been reached,[38] it is generally necessary that any instrument containing a waiver of homestead exemption shall be executed by both the husband and the wife.[39]

§ 185. —— Implied Waiver in General

In the absence of contrary statute, there may be an implied waiver of homestead rights.

In the absence of contrary statute, there may be an implied waiver of homestead rights.[40] Such a waiver may arise under various circumstances[41] Thus a waiver may result from a failure to assert the homestead right in apt time[42] or in an appropriate proceeding[43] Where the statute requires an

36. Ark—Free v Harris, 27 S W 2d 510, 181 Ark 644
La—Bank of Coushatta v Burch, 148 So 680 177 La 465
Mont—U S Building & Loan Ass'n v Stevens, 17 P 2d 62, 93 Mont 11
S C—Tucker v People's Bank of Anderson, 137 S E 601, 139 S C 206
29 C J p 953 note 1
Effect of conveyance or encumbrance insufficient to convey homestead see supra § 140 et seq
Homestead right as postponed to lien of valid mortgage see supra § 148

Usurious debt

Unless the usury appears on the face of the instrument it is too late for a debtor after a judgment of foreclosure to attack as being void because of usury in the debt secured by a mortgage, a waiver of homestead duly made therein—Johnson v Davis, 22 S E 911, 97 Ga 282

37. Iowa—People's Nat Bank v Maxson, 150 N W 601, 168 Iowa 318
29 C J p 954 note 4

38. Neb—Jackson v Creighton, 15 N W 638 29 Neb 310
29 C J p 954 note 7

In South Carolina joint execution by husband and wife is unnecessary to waive homestead where bankrupt failed to record proceedings in bankruptcy setting aside homestead—Baker v De Witt, 138 S E 626, 140 S C 114

39. Ky—Hensley v Lovely, 64 S W 2d 157 250 Ky 832
29 C J p 954 note 8
Joinder of husband and wife in conveyances or encumbrances of homestead see supra §§ 129-132

40. Ark—Jones v Thompson, 166 S W 2d 1036
Iowa—Shaffer v Miller, 192 N W 868, 195 Iowa 891
Miss—Chett v First Nat Bank, 181 So 713, 182 Miss 560
N C—Miller v Little, 194 S E 92, 212 N C 612
29 C J p 954 notes 10, 13

41. Facts creating implied waiver

(1) A waiver results from an order by the mortgagor of a homestead to the mortgagee, accepted by the latter, to pay to a creditor of the former the balance of the proceeds of an insurance policy on a homestead dwelling destroyed by fire, remaining after the satisfaction of the mortgage debt—Potter v Northrup Banking Co, 53 P 520, 59 Kan 455

(2) Where one in possession of premises which he has conveyed by a deed which does not effectually release his homestead accepts a lease from the grantee, he waives his homestead rights, provided he is not coerced into making the lease contract
Ill—Winslow v Noble 101 Ill 194
Ky—Braun v Fogle, 5 Ky L 607, 12 Ky Op 432

(3) A debtor may waive his homestead exemption by consenting to the entry of a judgment and its satisfaction out of the homestead—Simmons v McCullin 79 S E 625, 163 N C 409, Ann Cas 1915B 244—29 C J p 955 note 18

(4) If a beneficiary of the homestead accepts or receives his share of the proceeds from a judicial sale, his homestead rights are lost—Rolf v. Timmermeister, 15 Mo App 249

Facts not creating implied waiver

(1) In general
Mont—Siuru v Sell, 91 P 2d 411, 108 Mont 438, 123 A L R 423
Or—In re Dunlap's Estate, 87 P 2d 225, 161 Or 93

(2) Conveyance of property claimed as homestead, in trust for benefit of homestead claimant, does not constitute waiver of homestead right—Stewart v Black, 22 P 2d 336, 143 Or 291

(3) Direction to pay debts first out of the estate of the testator does not waive the homestead rights—Smith v Moore, 95 S E 351, 109 S C 196

(4) Surrender of possession pursuant to decree of court has been held not to be a waiver of a right of homestead in the premises surrendered—Kuttner v Haines, 25 N E 752, 135 Ill 382, 25 Am S R 370

(5) Recognition of a superior title in another does not waive homestead rights—Dulanty v Pynchon, 6 Allen, Mass, 510

(6) Partition of the fee at the instance of the owner of a homestead right therein is not in itself a waiver of such right
N C—Smith v Eakes, 193 S E 393, 212 N C 382
Tex—Langford v Carr, 159 S W 2d 107, 138 Tex 330 affirming Carr v Langford Civ App 144 S W 2d 612

(7) Homestead rights of a lunatic are not waived by an order of court directing the guardian to place the property on the inventory without directing it be set aside as a homestead as required by statute—Griffin v Harris, 88 S W 493, 39 Tex Civ App 586

(8) Where landowner without wife's signature executed an instrument purporting to grant city an easement across the land for the use of river as a sewage outlet, homestead right was not "waived" by failure to make a selection thereof—Conlon v City of Dickinson, 5 N W 2d 411, 142 A L R 525

42. N C—Cameron v McDonald, 6 S E 2d 497, 216 N C 712—Pence v Price, 192 S E 99, 211 N C 707
29 C J p 954 note 13
Time for asserting homestead claim as against creditors see infra § 212

43. Okl—Taylor v Campbell, 281 P 243, 139 Okl 110
29 C J p 954 note 13
Failure to assert homestead right in property seized see infra § 210

Homestead right may be waived by failure to assert it

(1) In a proceeding to foreclose a mortgage on the homestead
Okl—Goolsby v Cheatham, 61 P 2d 1073, 178 Okl 113
Tex—Roberson v Home Owners'

express waiver, however, there can be no implied waiver of homestead rights [44]

§ 186. —— Failure to Object or Consent to Levy and Sale

A homestead right may be waived by consenting to a sale of the homestead premises under execution or other legal process.

As a general rule homestead rights are waived where the homestead claimants consent, directly or indirectly, to a sale of the homestead premises under execution or other legal process [45] Thus, where the owner of a homestead who has ceased to occupy the premises for a number of years directs the sheriff to levy thereon,[46] or where he executes a written surrender of the premises to the sheriff, removes therefrom, and remains away for a number of years without asserting his rights,[47] he cannot afterward claim the premises as a homestead. There is, however, no waiver of homestead right by reason of the debtor's acquiescence in an illegal execution sale, where such acquiescence is based on a contract for maintenance made, and later repudiated, by the purchaser,[48] or by his neglect to demand an exemption where the writ of execution could be levied on lands other than the homestead,[49] or by a delay in applying for the surplus from a valid sale until after confirmation,[50] but it has been held that, where the homesteader allows the officer to apply the surplus on other executions against him, he cannot thereafter assert his exemption rights in such funds.[51] A written waiver of the publication of notice of a sale of land under a venditioni exponas and a consent to such sale at a specified time without further notice does not operate as a waiver of defendant's homestead rights in the land [52]

D OPERATION AND EFFECT OF WAIVER OR ABANDONMENT

§ 187. In General

A valid abandonment or general waiver of homestead rights terminates the homestead exemption. Thereafter the property may be dealt with in the same manner as other nonexempt realty.

Since, whenever there is a valid abandonment or general waiver, the right to the homestead exemption ceases,[53] it has, accordingly, been held that such a waiver or abandonment of homestead rights enables the husband to convey his property in which such right had existed without the joinder of his wife by his sole deed, see supra § 130, or to make any other disposition of it,[54] at his pleasure, and to control the proceeds of the sale or other disposition of the premises,[55] that it removes the inhibition against encumbering,[56] and leaves the premises subject to judgment liens,[57] attachment,[58] and sale on execution,[59] even though the owner had acquired no homestead at the time of the levy,[60] and that it enables a judgment debtor to sell the homestead property to the judgment creditor for a fair price,[61] even though no order of court em-

Loan Corporation, Civ App, 147 S W 2d 949, error dismissed, judgment correct—Benson v Mangum, Civ App, 117 S W 2d 169, error refused

(2) In an ejectment action resulting in a judgment involving title to the homestead property—Taylor v Campbell, 281 P 243, 139 Okl 110

44. Va—Home Owners Loan Corporation v Reese, 196 S E 625, 170 Va 275
29 C J p 955 note 15

45. By electing to take the proceeds of the sale, the homestead claimants abandoned their rights to the property itself—Phœnix Trust Co v Vaught, 205 N W 792, 201 Iowa 450

Sale consented to not forced sale

When homestead owners consent directly or indirectly to sale of homestead premises under execution or other legal process, the sale is "voluntary" and not "forced" within the meaning of laws protecting homesteads from "forced sale"—White v Rosenthal, 35 P.2d 154, 140 Cal App 184.

Failure to assert homestead right in property seized as waiver see infra § 210

46. Iowa—Wilson v Daniels, 44 N W 246, 79 Iowa 132—Parsons v Cooley, 14 N W 308, 60 Iowa 268

47. Ky—Ireland v Pugh, 4 Ky L 252

48. Ill—Barrett v. Wilson, 102 Ill 302

49. Iowa—Owens v Hart, 17 N W 898, 62 Iowa 620
S D—Krueger v Central Lumber Co, 230 N W 243, 56 S D 626

50. Ohio—McConville v. Lee, 31 Ohio St 447

51. Iowa—Brumbaugh v Zollinger, 13 N W 338, 59 Iowa 384

52. Tenn—Commercial Bank & Trust Co v Tacker, Ch App, 52 S W 714

53. Fla—Hillsborough Inv. Co v. Wilcox, 13 So 2d 448—Miller v West Palm Beach Atlantic Nat Bank, 194 So 230, 142 Fla 22
Ill—Lehman v Cottrell, 19 N E 2d 11, 298 Ill App 434.
29 C J p 955 note 30.

54. Mich—Stanton v Hitchcock, 31 N W 395, 64 Mich 316, 8 Am S R 821
Tex—Alvord Nat Bank v Ferguson, 126 S W 622, 59 Tex Civ App 113

55. Tex—Alvord Nat Bank v Ferguson, supra

56. Iowa—Davis v Kelley, 14 Iowa 523
Tex—Cannon v Hathaway, Civ App., 12 S W 2d 618

57. Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434

58. Tex—L T Stanley Estate v. First Nat Bank, Civ App, 24 S W. 2d 440, error refused

59. La—Comeaux v. Savoy, App, 146 So 725
S D—Smith v. Midland Nat Life Ins Co, 234 N W 20, 57 S D 497
29 C J p 955 note 36.

60. Tex—Baker v. Magee, Civ App, 136 S W 1161.

61. Ga—Hughey v. Peacock, 42 S E. 44, 115 Ga. 735.

powering such transfer is obtained.[62] After abandonment, a creditor's claim under an attachment made subsequent thereto will prevail over a grantee's claim under a deed made after the attachment.[63] An abandonment of a homestead does not relate back and validate a void sale thereof under execution,[64] but, as has been seen supra § 141, it may validate a prior defective conveyance of the homestead by the homestead owner

Property and rights subsequently acquired In jurisdictions where it is not considered against public policy to waive homestead rights which may thereafter be acquired, it has been held that if the general waiver is express it operates as to all homestead rights which then exist or may thereafter arise by the debtor becoming the head of a family[65] A waiver does not apply to property subsequently inherited as a share in the homestead of a deceased parent[66]

Priorities The prior of two valid mortgages made or liens created before an abandonment or general waiver of homestead rights will take precedence,[67] even though the homestead rights were released in the instrument creating the second lien but not in the instrument creating the first lien,[68] and this is so in jurisdictions where a special waiver in favor of one lien creditor operates as an abandonment of homestead rights as to other lien creditors, see infra § 188

The registry of a homestead waiver protects the officer seizing the property from liability for damages[69]

Reacquisition of homestead rights. Where homestead owners have lost their homestead rights by abandonment, they may subsequently reacquire homestead rights in the same premises[70] To reacquire such rights, however, requires the same overt acts as are required for their acquisition in the first instance,[71] and where such rights are reacquired they have no retroactive operation[72]

§ 188. Special Waiver

Generally a special waiver of homestead rights in favor of one creditor operates only in his favor, and only as to the particular debts as to which the waiver is made. Such a waiver does not convey an estate, it merely denies the right to claim the homestead exemption.

A valid special waiver of homestead rights terminates the homestead exemption to the extent of the waiver[73] It enables the creditor in whose favor it is made to collect his debt out of the homestead property[74] It does not, however, increase or diminish the amount of the debt due from the homesteader,[75] and it does not convey an estate[76]

As a general rule waivers as to particular debts operate only as to the debts intended[77] If, however, the homestead has been sold to satisfy a privileged debt, a nonprivileged lienholder who redeems may then subject the land to his debt, as he is subrogated to the rights of the purchaser from whom he has redeemed,[78] but a nonprivileged creditor of the husband is not subrogated to the rights of a mortgagee of the homestead, where the property belongs to the wife who mortgages it for the hus-

62. Ga.—Hughey v. Peacock, supra

63. Vt.—Labaree v. Wood, 54 Vt 452

64. Wash.—Asher v. Sekofsky, 38 P. 1133, 10 Wash. 379
29 C.J. p. 967 note 93

65. Ga.—Broach v. Powell, 3 S.E. 763, 79 Ga. 79, distinguishing Benedict v. Webb, 57 Ga. 348

66. Iowa.—Maguire v. Kennedy, 59 N.W. 36, 91 Iowa 272.

67. N.Y.—Smith v. Brackett, 36 Barb. 571

In Illinois

(1) The text rule has been followed in cases involving mortgages.—Asher v. Mitchell, 92 Ill. 480.—29 C.J. p. 956 note 48

(2) In cases involving the priority of judgment liens, however, it has been held that all prior judgments attach at the moment of abandonment without precedence and the judgment creditor first proceeding to enforce his judgment will be in priority over other judgment creditors.—Bliss v. Clark, 39 Ill. 590, 89 Am.Dec. 330.—Lehman v. Cottrell, 19 N.E.2d 111, 298 Ill. App. 434

68. N.Y.—Smith v. Brackett, 36 Barb. 571
29 C.J. p. 956 note 48

69. La.—Jeffcoat v. Hammons, App., 160 So. 182

70. Tex.—Silvers v. Welch, 91 S.W. 2d 686, 127 Tex. 58, affirming Welch v. Silvers, Civ.App., 59 S.W.2d 879

71. Cal.—White v. Rosenthal, 35 P. 2d 154, 140 Cal.App. 184
Okl.—Trower v. Wetmore, 252 P. 48, 123 Okl. 81.
Tex.—Silvers v. Welch, 91 S.W.2d 686, 127 Tex. 58, affirming Welch v. Silvers, Civ.App., 59 S.W.2d 879
Acquisition and establishment of homestead rights in general see supra §§ 29–51

72. Minn.—Clark v. Dewey, 73 N.W. 639, 71 Minn. 108

73. A homestead claim is subordinate to the lien of a mortgage waiving the homestead exemption.—Tucker v. People's Bank of Anderson, 137 S.E. 601, 139 S.C. 206

74. Va.—Home Owners Loan Corporation v. Reese, 196 S.E. 625, 170 Va. 275

Bankrupt's remainder interest in land set apart as homestead and allowed in bankruptcy became equitable assets as affecting creditors holding homestead waiver judgments.—Bank of Statesboro v. Waters, 142 S.E. 156, 165 Ga. 848

Intervention by creditor of bankrupt holding note containing homestead waivers, older than note sued on was proper in equitable proceeding to enforce payment of note.—Moon v. First Nat. Bank, 136 S.E. 433, 163 Ga. 489

75. Va.—Home Owners Loan Corporation v. Reese, 196 S.E. 625, 170 Va. 275

76. Ga.—Norris v. Aikens, 117 S.E. 248, 155 Ga. 488

77. Tenn.—Archer v. Archer, 3 Tenn.App. 623
29 C.J. p. 956 note 63

78. Ill.—Schroeder v. Bauer, 29 N.E. 560, 140 Ill. 135, affirming 41 Ill.App. 484
29 C.J. p. 956 note 56.

band's debt and the husband afterward pays the mortgage debt from his own funds[79] A judgment may be set off against another, although the latter was entered on a note containing a waiver of homestead[80]

In whose favor waiver operates Except in jurisdictions where a special waiver of homestead rights in favor of one creditor operates as an abandonment or a general waiver as to other or certain other creditors,[81] a mortgage or other encumbrance on the homestead waiving homestead exemptions in favor of one creditor operates only in his favor,[82] or his privies or successors in interest,[83] in the absence of specific intent that it shall not so operate[84]

Priorities As a general rule a lien which is enforceable against the homestead is superior to the lien of a subsequent mortgage containing an express waiver of homestead rights[85] A subsequent lienholder in whose favor a waiver of homestead has been made, however, takes precedence over a prior lienholder whose lien was unenforceable against the homestead because created without a waiver of homestead,[86] except in those jurisdictions in which a special waiver operates as a general waiver as to other creditors or an abandonment of the homestead right, in which case the prior lienholder in whose favor no waiver has been made takes precedence,[87] especially where the homesteader has surrendered possession of the premises to the subsequent lienholder in whose favor the waiver was made[88] Where the owner of a judgment which is a lien on all the lands of a debtor except his homestead, after junior judgment liens have arisen in favor of other creditors, takes a mortgage on the homestead, the lien of his judgment is not merged in the mortgage lien[89]

The rank of homestead waivers, as to third persons, is controlled in some jurisdictions by the chronological order of their registry, and not necessarily by their dates of execution[90]

Surplus after foreclosure As against general creditors, the homesteader usually is entitled to the surplus arising on a sale of the homestead, made in satisfaction of a privileged claim,[91] and the doctrine of marshaling assets and securities will not apply in favor of such creditors to defeat the rights of the homesteader[92] As against a prior lienholder whose lien is enforceable against the homestead such surplus will not be thus protected,[93] even though his lien may be defective because of a mutual mistake in the description of the premises,[94] nor will the surplus be protected in jurisdictions where the law confers homestead rights on land only and not on the proceeds of the sale of land[95]

Rights of creditors where land exceeds in value homestead exemption In jurisdictions in which a special waiver does not operate as a general waiver, mortgages on a tract of land whose value exceeds the statutory exemption must be satisfied according to priority whether or not they contain special waivers of homestead rights, and, if prior mortgages with or without waiver clauses exhaust the surplus above the homestead exemption, subsequent mortgages containing waivers must be satisfied from the homestead fund[96]

§ 189 —— Rights of Person or Creditor Favored

The rights of a person or creditor in whose favor a special waiver of homestead rights has been made are considered supra § 188

79. Iowa—Wells v Anderson, 66 N W 102, 97 Iowa 201, 59 Am S R 409
80. Pa—Riehl v Vockroth, 10 Pa Co 657
29 C J p 956 note 54
81. N Y—Smith v Brackett, 36 Barb 571
29 C J p 957 note 68
82. U S—In re Gish, D C Ky, 32 F 2d 322
Ky—Lyon v Lemaster, 109 S W 2d 39, 270 Ky 122
S D—Boyce v Hawn, 216 N W 589, 52 S D 53
Tenn—Whitfield v People's Union Bank & Trust Co, 73 S W 2d 690, 168 Tenn 24
29 C J p 947 note 92, p 956 notes 51, 65
Rights of mortgagee as to prior conveyance or encumbrance insufficient to release homestead see supra § 149.
83. La—Comeaux v Savoy, App, 146 So 725
29 C J p 956 note 52
84. La—Martin v Gary, 61 So 218, 132 La 216
85. La—Louisiana Red Cypress Co v Rabalais, 112 So 647, 163 La 679
Priorities on abandonment or general waiver see supra § 187
86. La—Hardesty v Warner, 58 So 527, 130 La 735
29 C J p 956 note 67
87. N Y—Smith v Brackett, 36 Barb 571
29 C J p 957 note 68
88. Ill.—Asher v Mitchell, 92 Ill 480
89. S C—Ex parte Voorhies, 24 S E 170, 46 S C 114
90. La—Jeffcoat v Hammons, App, 160 So 182
91 Tenn—White v Fulghum, 10 S W 501, 87 Tenn 281
29 C J p 957 note 72
Surplus reinvested in new homestead The surplus must, under some homestead laws be reinvested in a new homestead—White v Fulghum, 10 S W 501, 87 Tenn 281
92. Tenn—White v Fulghum, 10 S W 501 87 Tenn 281, overruling Parr v Fumbanks 11 Lea 391
29 C J p 957 note 73
93. Ohio—Timmerman v Howell, 2 Ohio Cir Ct 27, 1 Ohio Cir Dec 340
29 C J p 957 note 74
94. Ohio—Timmerman v Howell, supra
95. Mo—Casebolt v Donaldson, 67 Mo 308
29 C J p 957 note 76
96. La—Bank of Erath v Broussard, 109 So 347, 161 La. 657

Examine Pocket Parts for later cases

§ 190. —— Rights of Other Creditors

The rights of creditors other than those in whose favor a special waiver of homestead rights has been made are considered supra § 188.

Examine Pocket Parts for later cases.

E ESTOPPEL TO CLAIM HOMESTEAD

§ 191. By Deed

A grantor may be estopped by his deed to assert homestead rights in the land conveyed

Where a wife joins with her husband in a deed of trust of a homestead, she is estopped to deny that it was binding on her, in that it contains no clause conveying her homestead interest.[97] It has been held that a husband and his grantee are estopped to claim that the property is exempt as against the wife who purchased it under an execution on a judgment recovered by her for alimony, where the husband had previously conveyed to the grantee without the wife's consent.[98]

§ 192. By Record

An estoppel by record may preclude one from asserting homestead rights.

While there is some authority apparently to the contrary,[99] it very generally has been held that, where the right to a homestead was fairly within the issues presented in an action or suit, a judgment or decree therein is conclusive and will bar a subsequent assertion of the claim where the question has been decided adversely to claimant, or where there has been a failure on the part of claimant to assert the right in the cause,[1] but the rule does not apply where the homestead rights were not fairly in issue,[2] and no estoppel results from failure to litigate the question of homestead exemption in a proceeding before a court having no jurisdiction over such inquiries.[3]

§ 193. By Conduct

In the absence of contrary statute, the right to claim a homestead may be lost by an equitable estoppel

While the contrary has been held under the homestead laws in some jurisdictions,[4] the almost universal rule is that the right to claim a homestead may be lost by estoppel through the acts, representations, or omissions of the homestead claimant,[5] provided all the elements of an estoppel are present.[6] It has, however, been held that as long as the owner is in possession of his homestead, no

97. Tenn.—Convers v. Frye, Ch. App., 58 S.W. 1126.
Estoppel to assert invalidity of conveyance or encumbrance of homestead in general see supra § 142.

98 Wis.—Keyes v. Scanlan, 23 N.W. 570, 63 Wis. 315.

99. Ga.—Frost v. Borders, 59 Ga. 817.
29 C.J. p. 957 note 82.

1. Tex.—Staley v. Vaughn, Civ. App., 50 S.W.2d 907, error refused.
29 C.J. p. 957 note 84.
In foreclosure suit
(1) In a foreclosure suit the debtor must set up the right of homestead or lose it.
Okl.—Goolsby v. Cheatham, 61 P.2d 1073, 178 Okl. 113.
Tex.—Benson v. Mangum, Civ. App., 117 S.W.2d 169, error refused.
29 C.J. p. 957 note 84 [e] (1).
(2) Such right is not, however, affected by the failure of the husband and wife to set it up in a proceeding to foreclose a mortgage, which contains no release or waiver of the homestead.—Allen v. Hawley, 66 Ill. 164.—29 C.J. p. 957 note 84 [e] (2), p. 958 note 88.

2. Ill.—Moore v. Titman, 33 Ill. 358.
Ky.—Ryan v. Flynn, 4 Ky. L. 986.
Where the homestead rights were not originally in issue, the homesteader may by a supplemental pleading assert such rights after judgment or decree.—Ryan v. Flynn, supra.

3. Ark.—Irwin v. Taylor, 2 S.W. 787, 48 Ark. 224.

4. Statutes prescribing methods of releasing homestead
Under statutes providing that the homestead right may be extinguished only by an instrument properly acknowledged or by abandonment, it has been held that the right may not be lost by estoppel.—Holterman v. Poynter, 198 N.E. 723, 361 Ill. 617, 101 A.L.R. 842.

5. U.S.—Collier v. Union Central Life Ins. Co., C.C.A. Tex., 100 F.2d 411.
Cal.—Jefferson v. Tom, 126 P.2d 387, 390, 52 Cal. App. 2d 432, citing **Corpus Juris.**
Iowa.—Clark v. Chapman, 239 N.W. 797, 213 Iowa 737.—Phoenix Trust Co. v. Vaught, 205 N.W. 792, 201 Iowa 450.
N.C.—Cameron v. McDonald, 6 S.E.2d 497, 216 N.C. 712.
Tex.—Home Owners' Loan Corporation v. Netterville, 132 S.W.2d 93, 134 Tex. 30, reversing, Civ. App., 110 S.W.2d 628.—Lincoln v. Bennett, Civ. App., 135 S.W.2d 632, modified on other grounds 156 S.W.2d 504, 138 Tex. 56.—Niebuhr v. Behringer, Civ. App., 123 S.W.2d 733, error dismissed, judgment correct.—Wiedeman v. Houston Building & Loan Ass'n, Civ. App., 120 S.W.2d 882, error dismissed.—Thompson v. Investors' Syndicate, Civ. App., 52 S.W.2d 923, error refused.
Wis.—Kreuger v. Groth, 209 N.W. 772, 775, 190 Wis. 387, citing **Corpus Juris.**
29 C.J. p. 958 note 93, p. 913 note 5.
Estoppel to assert invalidity of conveyance or encumbrance of homestead see supra § 142.

6. Neb.—Meyer v. Platt, 291 N.W. 86, 137 Neb. 714.
S.D.—Edelman v. Scandrett, 293 N.W. 817, 67 S.D. 453.
Tex.—Burkhardt v. Lieberman, 159 S.W.2d 817, 138 Tex. 409, modifying, Civ. App., 142 S.W.2d 283.—Bower v. Nelson, Civ. App., 138 S.W.2d 601, error refused.—Higgins v. Millsap, Civ. App., 121 S.W.2d 469.—Staley v. Vaughn, Civ. App., 50 S.W.2d 907, error refused.—Wharton v. Mortgage Bond Co. of New York, Civ. App., 48 S.W.2d 519.
29 C.J. p. 955 note 22 [a], p. 958 note 94.
Prejudice or detriment to the party claiming it is essential to an estop-

declarations[7] or other conduct[8] on his part can estop him to claim the exemption

Inducing belief that homestead has been abandoned. Acts of such a character as will induce the belief that all claims to the homestead have been abandoned may operate as an estoppel where some one has acted in reliance on such acts to his disadvantage,[9] but a married man, having a homestead and living on the land with his family at the time of his conveyance to one who had knowledge of that fact, was not estopped to deny his alleged abandonment[10]

Change of selection Where the owner of more than one tract of land out of which he may select his homestead makes his selection and thereafter encumbers the other tracts, he is estopped to assert homestead in the latter against persons who dealt with him on the faith of his selection,[11] and, where a debtor claims his exemption to prevent a sale under a levy, and has his homestead set off to him pursuant to the statute, he cannot before sale abandon it, move upon another tract of land, sell that which had been set off, and successfully claim as his homestead the new selection[12] A claim of exemption as to one piece of property, however, does not estop the owner later to claim another tract as homestead where no rights have intervened in reliance on the former claim[13]

Disclaimer in general A disclaimer of homestead rights may, under certain circumstances, operate to estop those making the disclaimer to assert such rights,[14] as, for instance, where the disclaimer was made in respect of property not at the time occupied and used as a homestead,[15] but no estoppel results from a disclaimer where the parties to whom it was made were not deceived thereby[16]

Representations that property is not homestead As a general rule, when the family is in actual occupancy of the homestead by residing thereon, representations that the property is not a homestead will not estop the husband or wife so representing subsequently to claim the homestead exemption,[17] because the occupancy of the property charges all persons with notice of its homestead character[18] Such representations, however, may work an estoppel where the property was not actually occupied as a homestead at the time the representations were made,[19] or where it was used in such an ambiguous manner as to render its status as a homestead doubtful[20] As will be seen supra § 142 c, these rules are frequently applied in cases where an estoppel to assert the invalidity of a conveyance or encumbrance of the homestead is sought to be established on the basis of such representations

Recognition of superior title The recognition by a homestead claimant of superior title in another does not necessarily estop him to claim the home-

pel to claim homestead rights—Holterman v Poynter, 198 N E 723, 361 Ill 617, 101 A L R 842

7. Okl—State v Stokes, 286 P 4, 142 Okl 160
Tex—Cooper Co v Werner, Civ App, 111 S W 2d 823
29 C J p 958 note 95
"So long as the owner is in occupancy of the property no parol declaration on his part can estop him from claiming the exemption because those dealing with him cannot ignore the notice conveyed by his actual use"—Hensley v Lovely, 64 S W 2d 157, 158, 250 Ky 832

8. Tex—McDowell v Northcross, Civ App, 162 S W 13
29 C J p 958 note 95

9. Tex—First Coleman Nat Bank of Coleman v Childs, Civ App, 113 S W 2d 602, error refused
29 C J p 958 notes 96 97

10. Ark—Newman v Jacobson, 158 S W 134, 108 Ark 297
Tex—Higgins v Millsap, Civ App, 121 S W 2d 469

11. Tex—Walthall v Barnes, Civ App, 83 S W 2d 1052, error dismissed—Life Ins Co of Virginia v Weatherford, Civ App, 60 S W 2d 883, error refused—Merchants' & Planters' State Bank of Winnsboro v Nichols, Civ App, 275 S W 84—Dodson v Dickey, Civ App, 264 S W 586
29 C J p 958 note 99

12. Miss—Richie v. Duke, 12 So 208, 70 Miss 66
29 C J p 959 notes 1, 2

13. Or—In re Dunlap's Estate, 87 P 2d 225, 161 Or 93

14. Tex—Turrentine v Doering, Civ App, 203 S W 802
29 C J p 959 note 6

15. U S—Andruss v People's Bldg, Loan & Saving Assoc, Tex, 94 F 575, 36 C C A 336
29 C J p 959 note 7

16. U S—Andruss v People's Bldg, Loan & Saving Assoc, supra
29 C J p 959 note 8
If the property is actually being used as a homestead at the time that a disclaimer of homestead rights therein is made, the disclaimer will not estop parties making it to assert homestead rights—Seidemann v New Braunfels State Bank, Tex Civ App, 75 S W 2d 167, error refused—29 C J p 959 note 8 [a]

17. Miss—Breland v. Parker, 116 So 879, 150 Miss 476.
Tex—Higgins v Millsap, Civ App, 121 S W 2d 469—Fest v Williams, Civ App, 89 S W 2d 1072—Seidemann v New Braunfels State Bank, Civ App, 75 S W 2d 167, error refused—Weiser v Travis Cotton Seed Products Co, Civ App, 63 S W 2d 246, error refused—Lloyd v Christian, Civ App, 54 S W 2d 197—Wharton v Mortgage Bond Co of New York, Civ App, 48 S W 2d 519—Llewellyn v First Nat Bank, Civ App, 265 S W 222
29 C J p 958 note 95, p 959 note 4

18. Okl—State v Stokes, 286 P 4, 142 Okl 160
Tex—Hutchenrider v Smith, Com. App, 242 S W 204, reversing, Civ App, 228 S W 989—Standard Paving Co v Tolson, Civ App, 86 S W 2d 789—Wootton v Jones, Civ App, 286 S W 680

19. Tex—Weiser v. Travis Cotton Seed Products Co, Civ App, 63 S W 2d 246, error refused—Wootton v Jones, Civ App, 286 S W 680—Llewellyn v First Nat Bank, Civ. App, 265 S W 222
29 C J p 959 note 4

20. Tex—Greer v Franklin Life Ins Co, Civ App, 109 S W 2d 305, error dismissed.

stead exemption.[21] Thus the acceptance of a lease of the premises,[22] or occupancy of and holding possession of the premises as a tenant,[23] do not necessarily constitute such a recognition of a superior title as to raise an estoppel against the tenant to claim homestead rights therein

Other acts or representations Provided the elements of estoppel are present, in addition to the estoppels already considered, it has been held that a homesteader may be estopped to claim homestead rights by borrowing money to pay for the premises and conveying them to the lender as security,[24] by fraudulent representations or concealment of the homestead character of the premises,[25] by having previously claimed a homestead in other property,[26] or by permitting another person to take title and, as the latter's attorney, creating a lien on the property by a trust deed[27]

No estoppel arises, it has been held, from a special waiver as to a certain portion of a tract, where nothing is stated concerning the residue, in which a homestead is afterward claimed,[28] or from the execution by the exemptioner of a financial statement including the homestead as part of his assets,[29] or from his failure to contest proceedings to impose special assessments on the homestead,[30] or from his representing, in order to obtain credit, that there were no claims or liens on his property, where there is already on file a record of a homestead claim asserted in the premises,[31] or by acquiescence in an execution sale and acceptance of small amounts advanced by the judgment creditor who bought in the property for an entirely inadequate consideration on the theory that the creditor was owner where the facts were known to both parties;[32] or by the debtor and his wife falsely representing to a lender that they own and use the land adjacent to the residence tract, which adjacent lands are in fact owned and occupied by another person, the object of such assertions being to show an apparent mortgageable excess over the statutory exemption represented by the residence parcel,[33] or by the debtor assigning a contract for purchase of the premises to a creditor, and thereafter secretly taking title to himself,[34] or by the judgment debtor suing the sheriff for ignoring his exemption claim and recovering from such officer the value of the property by way of damages,[35] or by the debtor's revocable license to the purchaser at an execution sale of the homestead, to take possession of and sell the land, the license being revoked before it was acted on[36]

Necessity of estoppel against both husband and wife Where the homestead claimant is a married person, acts or omissions alleged to constitute an estoppel to assert the homestead right must be the acts or omissions of both the husband and wife[37] No estoppel is effective as to either which is not applicable to both[38] Hence, if the wife is not estopped, neither is her husband[39]

§ 194. By Position Taken or Admissions in Judicial Proceedings

The doctrine of estoppel to assume inconsistent positions in judicial proceedings may estop one to assert homestead rights, provided all the essential elements of an estoppel are present

One who pleads that land was occupied at a cer-

21. Acceptance of deed
Fact that one of donees of farm held as homestead accepted deed subjecting farm to lien for debt of donor did not estop donee to assert that homestead interest had already attached when deed was accepted—King v Plainview Nat Farm Loan Ass'n, Civ App, 100 S W 2d 434, reversed on other grounds Federal Land Bank of Houston v King, 122 S W 2d 1061, 132 Tex 481

22. N C—Abbott v Cromartie, 72 N C 292, 21 Am R 457.
29 C J p 959 note 9

23. Ala—Stephens v Stark, 168 So 873, 232 Ala 485
29 C J p 959 note 10

24. Ga—Bugg v Russell, 75 Ga 837

25. Tex—Home Owners' Loan Corporation v Netterville, 132 S W 2d 93, 134 Tex 30, reversing, Civ App, 110 S W 2d 628
29 C J p 959 note 15

26. Miss—Brantley v Batson, 36 So 521, 84 Miss 411.

27. Tex—Ranney v Miller, 51 Tex 263

28. Ark—Berry v Meir, 66 S W 439, 70 Ark 129

29. Minn—Jacoby v Parkland Distilling Co, 43 N W 52, 41 Minn 227

30. Tex—Jones v L E Whitham & Co, Civ App, 37 S W 2d 327, error refused

31. N Y—Robinson v Wiley, 19 Barb 157, reversed on other grounds 15 N Y 489

32. Mo—Ehlers v Potter, 219 S W 915

33. Tex—Sheckels v Lewis, 75 S W 836, 33 Tex Civ App 8

34. Ill—Hartwell v McDonald, 69 Ill 293

35 Mo—Tapley v Ogle, 62 S W 431, 162 Mo 190

36. Mo—Tapley v Ogle, supra

37. Tex—Burkhardt v. Lieberman, 159 S W 2d 847, 138 Tex 409, modifying, Civ App, 142 S W 2d 283
"To make estoppel effectual as to a homestead, it must operate both as to the husband and to the wife"—Hammond State Bank & Trust Co v Broderick, 154 So 739, 741, 179 La 693
Estoppel of either spouse by acts of the other see infra § 195

38 Tex—Martin v Astin, Com App, 295 S W 584, reversing Astin v Martin, Civ App, 289 S W 442—Thomas v Creager, Civ App, 107 S W 2d 705, error dismissed

39. Tex—Burkhardt v Lieberman, 159 S W 2d 847, 138 Tex 409, modifying, Civ App, 142 S W 2d 283—Andrews v Security Nat Bank of Wichita Falls, 50 S W 2d 253, 121 Tex 409, 83 A L R 44, reversing Security Nat Bank of Wichita Falls v Andrews, Civ App, 21 S. W 2d 509—Martin v Astin, Com App, 295 S W 584, reversing Astin v Martin, Civ App, 289 S W 442

tain time by himself and family as a homestead, such claim having reference to the complete title to land, and not to an undivided fractional interest therein, is estopped to assert that such tract was at the same time the homestead of another,[40] but the admission by one as a witness in another action that a homestead had not been abandoned at a certain date does not estop him to claim that it had been abandoned at a subsequent date, prior to the levying of the attachment under which he now claims.[41] A homesteader is not necessarily estopped to claim homestead rights in certain property by the fact that in his pleadings in a previous action involving other parties he claimed a homestead in other property,[42] and no estoppel results from the husband's signing, at the sheriff's instance, a receipt for surplus proceeds realized from a sale of a homestead, ordered by the court to be paid to the wife and receipted for by her also.[43]

§ 195. Estoppel of Either Spouse by Acts of the Other

As a general rule one spouse is not estopped to claim a homestead by the acts or declarations of the other spouse

As a general rule, a wife is not estopped to claim a homestead either by her husband's acts,[44] or by his representations.[45] The wife is not estopped by a deed given by the husband in which she did not join where the claim of estoppel rests solely on false statements made by the husband alone and not chargeable to her.[46] No estoppel is created against her where her husband permits a judgment in ejectment for the premises to go against him in a suit to which the wife was not made a party,[47] or where he acquires another domicile and homestead against the wife's consent,[48] where he recognizes and confirms or ratifies a sale of the homestead, voidable for the fraud of the grantee,[49] where he relinquishes the right to redeem from a mortgage,[50] where he takes a lease of the premises[51] and it does not appear that she ever consented to her husband's taking such lease,[52] or where he engages in any other conduct which would estop him were he alone concerned, but in which his wife does not participate.[53] However, it has been held that she is estopped by his admissions made in the course of judicial proceedings, respecting his own property, claimed by her as a homestead,[54] and by his declarations, while in possession of land, respecting his acquisition of it and by his arrangements for obtaining title.[55] So also it has been held that the wife may be estopped by acts or conduct of the husband constituting an estoppel against him where the homestead claim attaches to only an equitable community interest,[56] or where the family is not in actual occupancy of the homestead premises by residing thereon and the question of homestead rests on the intention of the husband.[57]

Estoppel of husband A husband is not estopped to assert his homestead rights by the acts of the wife.[58]

40. Kan.—Linn v. Ziegler, 75 P. 489, 68 Kan. 528
29 C.J. p. 960 note 28

41. Iowa.—Parsons v. Cooley, 14 N.W. 308, 60 Iowa 268

42. Tex.—First Nat. Bank v. Solis, Civ.App., 137 S.W.2d 142, error refused

43. Neb.—Van Doren v. Weideman, 91 N.W. 121, 68 Neb. 243

44. La.—Hammond State Bank & Trust Co. v. Broderick, 154 So. 739, 179 La. 693
Tex.—Burkhardt v. Lieberman, 159 S.W.2d 847, 138 Tex. 109, modifying, Civ.App., 142 S.W.2d 283—Andrews v. Security Nat. Bank of Wichita Falls, 50 S.W.2d 253, 121 Tex. 409, 83 A.L.R. 44, reversing Security Nat. Bank of Wichita Falls v. Andrews, Civ.App., 24 S.W.2d 509—Miller v. Southland Life Ins. Co., Civ.App., 68 S.W.2d 558
29 C.J. p. 960 note 32
Necessity of estoppel against both husband and wife see supra § 193

45. Tex.—Burkhardt v. Lieberman, 159 S.W.2d 847, 138 Tex. 109, modifying, Civ.App., 142 S.W.2d 283—Dressen v. Citizens State Bank, Civ.App., 165 S.W.2d 120—Home Owners' Loan Corporation v. Netterville, Civ.App., 110 S.W.2d 628, reversed on other grounds 132 S.W.2d 93, 134 Tex. 30
29 C.J. p. 960 note 33

46. S.D.—Smith v. Allmendinger, 169 N.W. 512, 41 S.D. 141
Tex.—Bower v. Nelson, Civ.App., 138 S.W.2d 601, error refused

47. Ill.—Mix v. King, 55 Ill. 434

48. Tex.—Gibbs v. Mayes, 2 Tex. Unrep.Cas. 215

49. Kan.—Wicks v. Smith, 21 Kan. 412, 30 Am.R. 433
Tex.—Morrison v. Cotton, Civ.App., 152 S.W. 866

50. Iowa.—Haggerty v. Brower, 75 N.W. 321, 105 Iowa 395

51. Tex.—Lumpkin v. Woods, Civ.App., 135 S.W. 1139
29 C.J. p. 961 note 39

52. Iowa.—Haggerty v. Brower, 75 N.W. 321, 105 Iowa 395—Anderson v. Cosman, 72 N.W. 523, 103 Iowa 266, 64 Am.S.R. 177

53. Iowa.—Shaffer v. Miller, 192 N.W. 868, 195 Iowa 891
29 C.J. p. 961 note 41

54. Ga.—Palmer v. Simpson, 69 Ga. 792

55. Tex.—Lochausen v. Laughter, 23 S.W. 513, 4 Tex.Civ.App. 291
29 C.J. p. 961 note 44

56. Tex.—Home Owners' Loan Corporation v. Netterville, 132 S.W.2d 93, 134 Tex. 30, reversing, Civ.App., 110 S.W.2d 628—Ranney v. Miller, 51 Tex. 263—Federal Life Ins. Co. v. Martin, Civ.App., 157 S.W.2d 149, error refused

57. Tex.—Skiles v. Shropshire, 77 S.W.2d 872, 124 Tex. 462—First Coleman Nat. Bank of Coleman v. Childs, Civ.App., 113 S.W.2d 602, error refused

58. Neb.—Weatherington v. Smith, 109 N.W. 381, 77 Neb. 363, 124 Am.S.R. 855, 13 L.R.A.,N.S., 430.

F EVIDENCE, QUESTIONS OF LAW AND FACT, AND FINDINGS

§ 196. Presumptions and Burden of Proof

Presumptions favoring the preservation and continuance of a homestead right or exemption usually are indulged, and the burden of proving abandonment is on the party asserting abandonment, but a presumption of abandonment may arise from actual removal from, and cessation of use of, the homestead premises, which presumption must be negatived by the party asserting the existence of the homestead right or exemption

All presumptions are in favor of the preservation and retention of the homestead.[59] When property has been impressed with the homestead character, it will be presumed to continue so until its use as such has been shown to have terminated.[60] This presumption of the continuance of the homestead character of the premises is not, in general, conclusive, however,[61] but is merely a rebuttable presumption of fact.[62]

The burden of proving a waiver or loss of homestead rights is on the party asserting such waiver or loss,[63] and, where it is shown that a homestead once existed, the burden of proof rests on those who allege an abandonment thereof to show that it has been abandoned.[64]

While it has been stated broadly that abandonment of a homestead will not be presumed,[65] and, according to some cases, a presumption of abandonment will not in general be indulged unless a new homestead is acquired,[66] as a general rule an actual removal from, and cessation of use of, the

59. Ark.—City Nat. Bank v. Johnson, 96 S.W.2d 482, 484, 192 Ark. 915, quoting **Corpus Juris**
Iowa.—In re McClain's Estate, 262 N.W. 666, 670, 220 Iowa 638, quoting **Corpus Juris**
Neb.—Whitford v. Kinzel, 138 N.W. 597, 92 Neb. 373
29 C.J. p. 961, note 53

60. Ark.—City Nat. Bank v. Johnson, 96 S.W.2d 482, 484, 192 Ark. 915, quoting **Corpus Juris.**
Iowa.—In re McClain's Estate, 262 N.W. 666, 670, 220 Iowa 638, quoting **Corpus Juris.**
La.—Minden Hardware & Furniture Co. v. Smith, 115 So. 381, 165 La. 98
Minn.—Gordon v. Emerson-Brantingham Implement Co., 210 N.W. 87, 168 Minn. 336
Okl.—Lane v. Amis Bros., 43 P.2d 73, 171 Okl. 593
Or.—De Haven & Son Hardware Co. v. Schultz, 259 P. 778, 780, 122 Or. 493, citing **Corpus Juris.**
Tex.—Ray v. Metzger, Civ.App., 165 S.W.2d 207, affirmed, Sup., 172 S.W.2d 480—Postal Savings & Loan Ass'n v. Powell, Civ.App., 17 S.W.2d 343, error refused—McKenzie v. Mayer, Civ.App., 20 S.W.2d 238
29 C.J. p. 961, note 53

61. Iowa.—In re McClain's Estate, 262 N.W. 666, 220 Iowa 638

62. Tex.—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ.App., 75 S.W.2d 716, error dismissed

Departure of members of family

(1) In some jurisdictions presumption of continuance of homestead may be rebutted by proof that members of family have left home and owner is residing there alone.—In re McClain's Estate, 262 N.W. 666, 220 Iowa 638

(2) As to whether dissolution of family relationship terminates homestead right in general see supra § 158

63. Mich.—Beecher v. Baldy, 7 Mich. 488
Mo.—Seibert v. McAnally, 122 S.W. 1064, 223 Mo. 505, 135 Am.St.R. 522
29 C.J. p. 961, notes 54, 55

Discontinuance of use of driveway as part of homestead

Tex.—White v. Cotton, Civ.App., 72 S.W.2d 669

64. U.S.—In re Reagor, C.C.A.Tex., 294 F. 875, certiorari denied Hall v. Reagor, 44 S.Ct. 401, 264 U.S. 591, 68 L.Ed. 865.—Dunn v. Eckhardt, Tex., 256 F. 315, 167 C.C.A. 185
La.—Minden Hardware & Furniture Co. v. Smith, 115 So. 381, 165 La. 98.—First Nat. Bank v. Brooks, 113 So. 853, 161 La. 297
N.D.—Scherr v. Fisher, 226 N.W. 481, 58 N.D. 817
Okl.—Lane v. Amis Bros., 43 P.2d 73, 171 Okl. 593.—Greenwood v. Wilkinson, 256 P. 46, 124 Okl. 300.—American State Bank of Covington v. Leforce, 218 P. 1073, 95 Okl. 88
Or.—De Haven & Son Hardware Co. v. Schultz, 259 P. 778, 780, 122 Or. 493, citing **Corpus Juris.**
S.D.—Smith v. Midland Nat. Life Ins. Co., 234 N.W. 20, 57 S.D. 497
Tex.—Ray v. Metzger, Civ.App., 165 S.W.2d 207, affirmed, Sup., 172 S.W.2d 480.—Hughes v. Parmer, Civ.App., 164 S.W.2d 576.—Mayfield Co. v. Owens, Civ.App., 65 S.W.2d 343.—Simms Oil Co. v. Rutledge, Civ.App., 53 S.W.2d 673, modified on other grounds 86 S.W.2d 209, 126 Tex. 37.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 343, error refused.—Tyler v. Thomas, Civ.App., 297 S.W. 609, reversed on other grounds Thomas v. Tyler, Com.App., 6 S.W.2d 350.—Hibbs v. City Nat. Bank of Wichita Falls, Civ.App., 293 S.W. 350.—Tuerpe v. George Saunders Live Stock Commission Co., Civ.App., 245 S.W. 741
29 C.J. p. 961, notes 54, 55

Intention to abandon

The burden of proving that the intention was to abandon a homestead is on the party charging it.—Japp v. Sapulpa State Bank of Sapulpa, Okl., 215 P. 1059, 90 Okl. 56

Business homestead

Rule stated in the text applies to a business homestead.—Panhandle Const. Co. v. Head, Tex.Civ.App., 131 S.W.2d 779, error refused.—Blaylock v. Slocomb, Tex.Civ.App., 250 S.W. 218

65. La.—Minden Hardware & Furniture Co. v. Smith, 115 So. 381, 165 La. 98.—First Nat. Bank v. Brooks, 113 So. 853, 161 La. 297.—St. Mary Bank & Trust Co. v. Daigle, 55 So. 345, 128 La. 758

66. U.S.—Woodward v. Sanger, Tex., 246 F. 777, 159 C.C.A. 7
Tex.—Gonzalez v. Zachry, Civ.App., 84 S.W.2d 855, error refused

Mere absence for other than extended period

Mere absence from the homestead premises does not create a presumption of abandonment, if a new homestead is not acquired and the absence is not for an extended period.—Blaszynski v. Starczewski, 25 N.E.2d 884, 373 Ill. 140.—Lehman v. Cottrell, 19 N.E.2d 111, 298 Ill.App. 434

Unsuccessful attempt to find new home

Abandonment of the homestead will not be presumed from the fact that the head of the family went in search of another home, and being disappointed, returned to the old home.—Ives v. Mills, 37 Ill. 73, 87 Am.D. 238.—Kitchell v. Burgwin, 21 Ill. 40

premises may raise a presumption of abandonment,[67] especially where the owner of the homestead removes therefrom to another house owned by him where he actually resided[68] While such presumption is not conclusive but may be overcome,[69] yet proof of these facts in general casts on the party asserting the continuance of the homestead right the burden to negative the presumption[70] Accordingly, such party has the burden of establishing want of intention permanently to abandon the homestead,[71] and of establishing an intent to return and occupy the premises as a homestead,[72] and of showing that the land is still within the protection of the homestead law[73]

If the homesteader removes with his family, it will be presumed that the removal was made in good faith[74] and with the consent of his wife[75] If a husband deserts his family without cause, leaving them in possession of the homestead, it will be presumed that his desertion is temporary only and not an abandonment[76]

Partial abandonment and extent of abandonment. A party who asserts that part of the property has been abandoned as a homestead must show the extent of abandonment, if any[77] If any portion of a building has lost its homestead character by reason of the manner of its use, the burden is on the one asserting it to establish the facts from which the disuse or abandonment may appear[78]

Estoppel. In general the burden of proving that a claimant of a homestead right is estopped to assert such right is on the party who alleges or relies on such estoppel[79]

67. Colo—Monte Vista Bank & Trust Co v Savage, 225 P 219, 75 Colo 180
Iowa—Fardal v Satre, 206 N W 22, 200 Iowa 1109
29 C J p 961 note 56

Removal of dwelling from land
Ill—Fergus v Woodworth, 44 Ill 374
Iowa—Maguire v Hanson, 74 N W 776, 105 Iowa 215
29 C J p 961 note 56 [b] (1)

68. Ark—Gillis v Gillis, 262 S W 307, 164 Ark 532
Iowa—Evans v Evans, 210 N W 564, 202 Iowa 493
Wis—Hausar v Schauer, 254 N W 343, 215 Wis 75
29 C J p 961 note 57

Prima facie case
Showing of physical abandonment of homestead property and purchase and occupation of new home constitutes a prima facie case of abandonment—In re McClain's Estate, 262 N W 666, 220 Iowa 638

Presumption of removal of furniture
In connection with a conclusive showing that there had been a removal to a new home, it was presumed, in the absence of a showing to the contrary, that, in moving to the new home, household furniture and all other articles used in the home were moved—Panhandle Const Co v Wiseman, Tex Civ App, 110 S W 2d 615, error dismissed

69. Iowa—Schaeffer v Campbell, 199 N W 334, 198 Iowa 43
29 C J p 962 note 58

70. Colo—Monte Vista Bank & Trust Co v Savage, 225 P 219, 75 Colo 180
Iowa—Evans v Evans, 210 N W 564, 202 Iowa 493
29 C.J p 962 notes 59, 60

Overcoming prima facie case
Where owner discontinued business, executed a ten-year lease giving lessee option to purchase his business property, was insolvent and without credit, and moved to other state, there was a prima facie abandonment of the business homestead placing burden on owner of showing property exempt from execution in his action to enjoin sale on execution—Weitzman v Lee, Tex Civ App, 262 S W 859

71. Iowa—Citizens Bank of Milo v Frank, 235 N W 30, 212 Iowa 707—Illinois Oldsmobile Co v Miller, 202 N W 751, 199 Iowa 894

72. Iowa—Evans v Evans, 210 N W 564, 202 Iowa 564—Fardal v Satre, 206 N W 22, 200 Iowa 1109—Schaffer v Campbell, 199 N W 334 198 Iowa 43—Shaffer v Miller, 192 N W 868, 195 Iowa 891
Tex—First Nat Bank v Jones, Civ App, 59 S W 2d 1103
29 C J p 962 note 59

Burden of going forward with proof
Showing of physical abandonment of homestead property and purchase and occupation of new home imposes burden of going forward with proof to show that there was intention to return on person claiming that homestead right was not lost—In re McClain's Estate, 262 N W 666, 220 Iowa 638

Removal consistent with purpose to return
Where there is an entire removal of the husband and wife from the actual possession and actual use of the property as a home, the burden of showing that such removal was temporary and consistent with a continuing purpose to return and occupy and use the property as a home is on the party asserting such right—Shaffer v Miller, 192 N W 868, 195 Iowa 891

Instruction as to burden of proof
Trial court properly refused instruction that burden of proof was on plaintiff to sustain his allegation of abandonment of homestead by defendant where uncontroverted evidence showed an abandonment unless defendant had the intention to return to the premises, which was a matter peculiarly within his own knowledge—Ran v City Nat Bank of Decatur, Tex Civ App, 272 S W 510

73. Ala—Hodges v Hodges, 77 So 741, 201 Ala 215
Iowa—Maguire v Hanson, 74 N W 776, 105 Iowa 215
29 C J p 962 notes 60, 61

74. Tex—Smith v Uzzell, 56 Tex 315—Gross v White, Civ App, 67 S W 2d 695—Gough v Gibson, Civ App, 1 S W 2d 684

75. Tex—Gross v White, Civ App, 67 S W 2d 895
29 C J p 962 note 62

76. Ark—Hall v Roulston, 68 S W 24, 70 Ark 343

77. Tex—City of Amarillo v Loden, Civ App, 22 S W 2d 969

78. Iowa—Buckles v Matson, 159 N W 1007, 178 Iowa 310

Business homestead
Burden of establishing that a person who was engaged in the business of cotton ginner at a business homestead intended to, and actually did, abandon as his homestead that portion of the property on which he erected and operated a filling station was on the party asserting abandonment—First State Bank of Memphis v Seago, Tex Civ App, 120 S W 2d 951, error refused

79. Tex—Nixon v Hirschi, 136 S W 2d 583, 134 Tex 415, reversing Hirschi v Nixon, Civ App, 103 S W 2d 833

Acting on faith of representations
Burden was on party alleging estoppel to show that he was induced to act on faith of representations of

§ 197. Admissibility of Evidence

In most, but not all, jurisdictions the homesteader may testify as to his intention in so far as intention bears on the issue of abandonment; rules as to admissibility of declarations and documentary evidence in civil actions generally apply where the issue of abandonment is involved

In general, a party who claims a homestead right may testify as to his intention with respect to alleged abandonment,[80] including his intention in leaving the homestead property,[81] and he may testify that he had no intent to abandon the property as a homestead,[82] and that he intended to return to such property,[83] but in some jurisdictions, he may not, in the face of due objection, testify as to his intention in leaving the property.[84] Evidence of facts which tend to show or throw light on the intention of the owner or claimant with respect to abandonment is generally admissible,[85] and testimony of claimant as to facts tending to show his intention and whether he abandoned his homestead is also admissible.[86] So his testimony as to his reason for leaving the place where his alleged homestead is located is admissible, where it tends to show that the absence from the homestead was temporary,[87] as is other evidence which tends to show that absence from the homestead was temporary,[88] and which tends to explain such temporary absence.[89]

When husband and wife are in accord, evidence of the intention of the wife with regard to the selection of a homestead has been regarded as admissible as pointing to the intention of the husband.[90] Evidence as to wife's intention with respect to abandonment is properly excluded, however, if the husband's intention is controlling and other evidence is sufficient to show his intention to abandon the homestead.[91] Under a statute requiring concurrence of both husband and wife to alienation of homestead, evidence that the husband intended to abandon the homestead is immaterial on the question whether the wife as against a purchaser from the husband had abandoned the homestead.[92]

Among matters which have been regarded as admissible on the issue as to abandonment or loss of homestead are evidence of the homesteader's pro-

homesteader—Straus v Brooks, Civ App, 126 S W 2d 512, reversed on other grounds 118 S W 2d 393, 136 Tex 111—Hill v Engle, Civ App, 89 S W 2d 219

80. Tex—Federal Petroleum Co v Pittman, Civ App, 65 S W 2d 359, error refused

Business homestead

Rule applies with respect to abandonment of business homestead—Federal Petroleum Co v Pittman, Tex Civ App, 65 S W 2d 359, error refused

Right of witness to testify as to his intention in civil actions generally see Evidence § 510a

81 Iowa—Boot v Brewster, 36 N W 649, 75 Iowa 631, 9 Am S R 515
Wis—Hauser v Schauer, 254 N W 343, 215 Wis 75
29 C J p 962 note 69

82 S D—Warner v Hopkins, 176 N W 746, 42 S D 613

83. Iowa—Des Moines Marble & Mantel Co v McConn, 227 N W 521, 510 Iowa 266
Kan—Killough v Swift & Co Fertilizer Works, 114 P 2d 831, 154 Kan 113—People's State Bank v Hill, 263 P 1045, 125 Kan 308—Blitz v Metzger, 241 P 259, 119 Kan 760, rehearing denied 245 P 161, 120 Kan 555
29 C J p 962 note 69

Homesteader and his wife could testify as to their intention to return—Killough v Swift & Co Fertilizer Works, 114 P 2d 831, 154 Kan 113

84. In Alabama

(1) The evidence is regarded as inadmissible against due objection, on the ground that intention of a person must be established as an inference from his conduct and the surrounding circumstances—Hollis v American Wholesale Corporation, 112 So 201, 215 Ala 644—Fuller v Whitlock, 13 So 80, 99 Ala 411

(2) One who had left property levied on, claiming it as homestead, cannot testify as to intention to leave property temporarily—Hollis v American Wholesale Corporation, supra

(3) The right to testify as to his intention to retain a right to occupy part of the property as a home has been denied—Bland v Putnam, 32 So 616 142 Ala 613

85 Ala—Taylor v Gallaha, 103 So 157, 212 Ala 474

Refusal to take home offered and leaving furniture

Evidence of refusal of wife to go to home offered by daughter, together with fact that part of furniture was left in home when other part of house was temporarily occupied by a caretaker, was admissible as tending to show intent of claimant and wife as to home in question—Taylor v Gallaha, supra

86. Ala—Taylor v Gallaha, supra

Ownership of other property

Claimant's testimony as to whether he owned any other home during the eighteen years since he bought the property, was admissible as affording an inference as to abandonment of homestead—Taylor v Gallaha, supra

Claiming place as home

Claimant could properly testify whether he had at all times claimed as his home the property alleged by him to be his homestead, because the fact which it was sought to elicit would have authorized an inference as to whether there had been an abandonment—Taylor v Gallaha, supra

87 Ala—Taylor v Gallaha, supra

Temporary absence of claimant and presence of caretaker

Questions to claimant as to his inability to obtain work at the place where the homestead was located and his answers thereto, and questions and answers of like import were proper as explaining why claimant went elsewhere temporarily for work, and the temporary nature of the presence of a caretaker on the homestead premises—Taylor v Gallaha, supra

88. Temporary nature of caretaker's tenancy

Testimony tending to show that tenancy of caretaker in alleged homestead was temporary in nature was admissible—Taylor v Gallaha, supra

89. Ala—Taylor v Gallaha, supra

90. Tex—Gunn v Wynne, Civ App, 43 S W 290

91. Tex—Metts v Waits, Civ App, 8 S W 2d 569

92. S D—O'Neill v Bennett, 181 N W 97, 43 S D 569.

longed absence from the premises,[93] of the conveyance of the premises to a third person,[94] of the conduct of the homesteader after a sale of his homestead[95] or after his removal therefrom,[96] that he took legal advice as to the effect of removal,[97] that he left his family in possession,[98] and that a deed was, by agreement, to operate only as a mortgage [99] The facts that defendant had not paid for the land claimed as homestead or received a deed therefor until after his return to the land are also proper matters to be considered on the question of abandonment [1]

If the issue is as to abandonment, evidence as to an attempted sale by the homesteader of property then occupied by him as a homestead is admissible only in so far as it relates to his intention with respect to abandonment [2]

Evidence as to intent to return and retain premises as a homestead is properly excluded where the owner was consecutively absent from the premises for more than the period fixed by statute for determining when the homestead shall be deemed abandoned and failed to file a notice claiming homestead in accordance with the statutory requirements under these circumstances [3]

Declarations and admissions Declarations of the homesteader,[4] or of his wife,[5] are usually admissible on the issue as to abandonment, and their declarations, statements, and admissions tending to show abandonment are admissible not only as original evidence of intention to abandon the homestead[6] or of want of a fixed intention to return to the homestead property and again to occupy it as a home,[7] but also in rebuttal of their testimony that their absence was temporary and that they intended to return [8]

Separation of husband and wife. A deserted wife may introduce evidence that she has given her husband no cause to abandon her, as showing that she had not forfeited her rights in the homestead estate [9]

Documents, affidavits A note containing a waiver of homestead is admissible to show a waiver [10]

On the issue whether land designated as a rural homestead had lost its character as such because of the fact that it had been platted into lots, blocks, and streets as a part of a town, a pencil sketch made by the owner, showing his residence and other lots on the tract, but which was not complete, in that it did not show all the blocks and lots and streets, was properly excluded, after the court had allowed the owner to use it for the purpose of explaining his testimony [11]

In an action on a note secured by a trust deed to premises to which defendant claimed homestead right, where he previously left such premises, and he claimed intent to return, his certified copy from the general land office of his application to purchase land, reciting by affidavit that he desired to purchase land to make a home, was admissible [12]

A written designation of certain property as a homestead is admissible on an issue as to estoppel to

93. Iowa—Van Bogart v. Van Bogart, 46 Iowa 359
29 C J p 962 note 71

94. Mich—Amphlett v Hibbard, 29 Mich 298
Tex—Reece v Renfro, 4 S W 545, 68 Tex 192

95. Tex—Willis v Pounds, 25 S W 715, 6 Tex Civ App 512

96. Tex—White v Epperson, 73 S W 851, 32 Tex Civ App 162

97 Iowa—Painter v Steffen, 54 N W 229 87 Iowa 171
Neb - Quigley v McEvony, 59 N W. 767 41 Neb 73
Tex—Shepherd v Cassiday, 20 Tex 24 70 Am D 372

98. Ky—Warren v Block, 1 Ky L 121

99. Tex—Ullmann v Jasper, 7 S W 763, 70 Tex 146

1. Tex—Rockwell v Hudgens 123 S W 185, 57 Tex Civ App 504

2. Kan—People's State Bank v Hill, 263 P 1045, 125 Kan 308

3. Minn—Hall v Holland, 165 N W. 235, 138 Minn 403

4. Kan—People's State Bank v Hill 263 P 1045, 125 Kan 308
Ky—Cincinnati Leaf Tobacco Warehouse Co v Thompson, 49 S W 446 105 Ky 627 20 Ky L 1439
29 C J p 962 note 82

Intention to return
Evidence of declarations by homesteader of his intention to return to homestead property is admissible—People's State Bank v Hill, 263 P 1045, 125 Kan 308—29 C J p 962 note 82

Declarations accompanying and explaining acts tending to show abandonment, evidence of which has been admitted, are admissible—O'Fiel v Janes, Tex Civ App, 269 S W 1074, affirmed on other grounds Janes v O'Fiel, Com App 280 S W 163, motion dismissed, Com App, 299 S W. 640

5. U S—Kerr v South Park Comrs, C C N D, 14 F Cas No 7,733, 8 Biss 276
Tex—Farmers' & Merchants' Nat Bank v Ivey, Civ App., 182 S W 706—Gaar v Burge 110 S W 181, 49 Tex Civ App 599

6. Tex—Jacobs v Hawkins, 63 Tex 1—Sproul v Farmers Nat Bank of Follett Civ App 246 S W 1081

7. Tex—Ran v City Nat Bank of Decatur Civ App, 272 S W 510

Statements and admissions after execution of trust deed
Statements and admissions of owner and his wife, after executing note and deed of trust on farm showing their intent to abandon such place as their homestead were admissible—Ran v City Nat Bank of Decatur, supra

8. Tex—Ran v City Nat Bank of Decatur, supra

9. Tex—Long v Long, 70 S W 587, 30 Tex Civ App 368

10 Ga—Flemister v Phillips, 65 Ga 676

11. Tex—Ayres v Patton, 111 S W 1079, 51 Tex Civ App 186

12. Tex—Calvin v. Neel, Civ App., 191 S W 791.

claim a homestead in other property, notwithstanding such designation may not be regarded as a statutory designation [13]

Mere opinions and hearsay statements of third persons respecting the intention of the homesteader are inadmissible [14]

Waiver A written waiver of homestead and exemption, although not shown by an execution issued on a suit based on the contract wherein the waiver was made, is provable aliunde, whether the lien is general or special [15]

§ 198. Weight and Sufficiency of Evidence

a General considerations
b Claimant's or homesteader's testimony as to his intention
c Declarations
d Duration of absence
e Acquisition of new residence or homestead
f. Acceptance of lease of premises
g Renting premises to another
h Exercising political rights or rights of citizen at place other than where homestead located
i. Miscellaneous

a. General Considerations

In general evidence to show abandonment of a homestead right or exemption must be clear and convincing.

With respect to a homestead in property from which the homesteader or claimant of the right has removed, it has been said that it is impossible to lay down an absolute rule as to the extent, amount, or character of evidence sufficient to show an abandonment,[16] or to show a waiver of the homestead right in such property [17]

It has been stated broadly that abandonment of the homestead right or exemption must be shown by clear and convincing evidence or proof [18] Considering the question specifically in view of the fact that a new homestead has not been acquired, it has been stated that abandonment must be shown by clear and conclusive evidence or proof [19] In any

13. Tex—Ran v City Nat Bank of Decatur, Civ App, 272 S W 510

14. Iowa—Jones v Blumenstein, 42 N W 321, 77 Iowa 361
29 C J p 963 note 88

15. Ga—Hester v McGinnis, 95 S E 718, 22 Ga App 137

16. Ky—Williams v Evans' Adm'r, 56 S W 2d 710, 247 Ky 165—Louisville Tobacco Warehouse Co v Calvert, 203 S W 567, 180 Ky 718—Burch v Atchison, 82 Ky 585, 6 Ky L 592, 636

Reason for rule
"The question must turn on the evidence of 'the actual, fixed ever-present intention' of the owner to return to such property at the end of his temporary absence therefrom"—Williams v Evans' Adm'r, 56 S W 2d 710, 712, 247 Ky 165

17. Ky—Louisville Tobacco Warehouse Co v Calvert, 203 S W 567, 180 Ky 718—Burch v Atchison, 82 Ky 585, 6 Ky L 592, 636

18. Minn—Gordon v Emerson-Brantingham Implement Co 210 N W 87, 168 Minn 336—Sheehan v First Nat Bank, 204 N W 38, 163 Minn 291—Stewart v Rhodes, 39 N W 141, 39 Minn 193
Okl—Bradley v Flowers, 49 P 2d 803, 174 Okl 554—White Inv Co v Stupart, 4 P 2d 77, 152 Okl 144—German State Bank of Elk City v Ptacek, 169 P 1094, 67 Okl 176—Carter v Pickett, 134 P 440, 39 Okl 144
Or—De Haven & Son Hardware Co v Schultz, 259 P. 778, 122 Or 493

Certain and conclusive evidence
(1) It has been stated that certain and conclusive evidence of abandonment is required—Bogart v Cowboy State Bank & Trust Co, Tex Civ App, 182 S W 678

(2) Certain and conclusive evidence of abandonment, with no intention to return and claim the exemption, is required—Rollins v O'Farrel, 13 S W 1021, 77 Tex 90—Milliken v Coker, Civ App, 90 S W 2d 902, modified on other grounds 115 S W 2d 620, 132 Tex 23—Walthall v Barnes, Tex Civ App, 83 S W 2d 1082, error dismissed—Bogart v Cowboy State Bank & Trust Co, supra

Clear and conclusive proof
Proof must be clear and conclusive that use of a business homestead has been discontinued with the intention not to resume it—Blaylock v Slocomb, Tex Civ App, 250 S W 218

Clear and decisive proof
Proof must be clear and decisive of intention to abandon homestead—Gardner v Cook, Miss, 158 So 150—Campbell v Adair, 45 Miss 170

Clearly established
Abandonment of homestead must be clearly established—Minden Hardware & Furniture Co v Smith, 115 So 381, 165 La 98—First Nat Bank v Brooks, 113 So 853, 164 La 297

Other designations of required evidence or proof of abandonment
(1) Competent and convincing proof—Ray v Metzger, Tex Civ App, 165 S W 2d 207, affirmed, Sup, 172 S W 2d 480

(2) Clear proof—Jackson v Coleman, 76 So 545, 115 Miss 535

(3) Clear, convincing and conclusive proof—Elliott v Bond 176 P 212, 72 Okl 3, rehearing denied 176 P 991, 72 Okl 3

(4) Clear, conclusive, and convincing evidence—Lane v Amis Bros, 43 P 2d 73, 171 Okl 593

(5) The most clear, conclusive, and undeniable evidence—McCammon v Jenkins, 145 P 1163, 44 Okl 612

(6) Showing or proof of abandonment beyond doubt—In re Walcek, D C Tex, 4 F 2d 265, petition denied C C A, Adams v Walcek 9 F 2d 26—Woodward v Sanger, Tex 246 F 777, 159 C C A 79

19 Tex—Scott v Dyer, 60 Tex 135—Jolesch & Chaska Co v Hampton, Civ App, 297 S W 271

Clear and conclusive proof of intention
Removal from the homestead property with an intention not to return must be clearly and conclusively proved where a new homestead was not acquired—Armstrong v Neville, Tex Civ App, 117 S W 1010

Clear proof
(1) Abandonment must be clearly shown where no new homestead has been acquired—Gaar v Burge, Tex Civ App, 110 S W 181

(2) If another home is not shown to have been acquired proof of intention not to return to the home-

event there is not a sufficient showing of abandonment where it is not established by a preponderance of evidence.[20] It has been held that a removal, even though accompanied by circumstances which might indicate an intention not to return, is not conclusive proof of abandonment[21]

Abandonment of homestead may be proved by conduct, circumstances, and actions as well as by direct testimony[22]

While it has been said that it is impossible to lay down an absolute rule as to the amount or character of evidence that is sufficient to prove that a homestead in unoccupied property has not been abandoned,[23] according to some cases evidence sufficient to overcome the presumption of abandonment arising from actual removal from, and cessation of use of, homestead premises, considered generally supra § 196, must be clear and definite[24] It has been stated, however, that strong evidence is not required to sustain the claim that it was the intention of the person claiming a homestead right to return to the homestead and to retain the homestead right[25]

Sufficiency of evidence to raise issue of fact and to authorize or require submission to jury of issue of abandonment is considered infra § 199

Indebtedness contracted during occupancy or after removal According to some cases stronger proof of abandonment is required when the debt to which it is sought to subject the land was contracted during actual occupancy than when it was contracted while the homesteader was not in actual possession of the premises,[26] and, conversely, that if the debt was contracted while the homesteader was not in actual possession of the premises, the court should incline the more strongly to the conclusion that there was a present intention on leaving to remain permanently away or should require stronger evidence to the contrary,[27] although this rule would not apply where no credit was extended to the homesteader on the faith of the homestead and no money lent to him but simply placed to his credit by mistake[28]

b. Claimant's or Homesteader's Testimony as to His Intention

Testimony of person whose right to homestead is involved as to his intention with respect to abandonment may be sufficient to prove such intention, but such testimony is not necessarily conclusive

As bearing on the issue as to abandonment, the testimony of claimant of a homestead right or exemption as to his intention may establish the existence of a continued purpose to return to the home-

stead property must be clear—Milliken v Coker, Civ App, 90 S W 2d 902, modified on other grounds 115 S W 2d 620, 132 Tex 23

Clear and convincing proof

In the absence of clear and convincing proof that, when a person, who had been occupying premises as a business homestead, erected and subsequently operated a filling station thereon, he intended to abandon as a business homestead the part on which such station was erected, it was not permissible to hold that he had abandoned it—First State Bank of Memphis v Seago, Tex Civ App, 120 S W 2d 951, error refused

Most clear and conclusive proof

If a new homestead is not acquired, there must be the most clear and conclusive showing of abandonment, with an intention not to return—Shepherd v Cassiday, 20 Tex 24, 70 Am D 372

Other designations of required evidence or proof

(1) Very convincing evidence—First State Bank of Memphis v Seago, Tex Civ App, 120 S W 2d 951, error refused

(2) Clear and decisive evidence—Shepherd v. Cassiday, 20 Tex 24, 70 Am D 372

(3) The most clear, conclusive, and undeniable evidence—Cross v Everts, 28 Tex. 524—Dunlap v. English, Tex Civ App, 230 S W 829—Bell v Franklin, Tex Civ App, 230 S W 181

(4) Evidence undeniably clear, and beyond almost the shadow, at least, of all reasonable ground of dispute—Gouhenant v Cockrell 20 Tex 96—Ayres v Shackey 2 Tex Unrep Cas 274—Ritz v Pecos First Nat Bank, Tex Civ App, 234 S W 425—Bell v Franklin, Tex Civ App, 230 S W 181—Armstrong v Neville, Tex Civ App, 117 S W 1010- Sykes v Speer, Tex Civ App, 112 S W 122

(5) Proof which is clear and beyond all reasonable ground of dispute—Gonzalez v Zachry, Tex Civ App, 84 S W 2d 855, error refused

20. N D—Scherr v Fischer, 226 N W 481, 58 N D 317

Alleged abandonment of part of business homestead

Tex—First State Bank of Memphis v Seago, Civ App, 120 S W 2d 951, error refused

21. Tex- Mills v Von Boskirk, 32 Tex 360

22. Ark—Harrison v Rosenzweig, 47 S W 2d 2, 185 Ark 281—Creekmore v Scott 20 S W 2d 177, 179 Ark 1113—Lilly v Lilly, 11 S W 2d 765, 178 Ark 324

Discharge of burden of proof

(1) The burden of proving abandonment of right of homestead may be discharged by proof of circumstances and evidence bearing on claimant's intention to abandon it—Ray v Metzger Tex Civ App 165 S W 2d 207 affirmed Sup, 172 S W 2d 180

(2) Burden of proving abandonment in general see supra § 196

23 Ky- Conway v Reed, 235 S W 747, 193 Ky 287

24. Colo—Monte Vista Bank & Trust Co v Savage, 225 P 219, 75 Colo 180

Convincing testimony

Presumption of abandonment from one leaving home, acquiring another, and residing there for a considerable time is effective, in absence of convincing testimony to contrary—Gillis v Gillis, 262 S W 307, 164 Ark 532

25. Ky—Brewer v Brewer, 105 S W 2d 582, 268 Ky 625

26. Iowa—Robinson v Charleton, 73 N W 616 101 Iowa 296 29 C J p 963 note 2

27 Ky—Brewer v Brewer, 105 S W 2d 582, 268 Ky 625—Conway v Reed, 235 S W 747 193 Ky 287—Farmers' & Traders' Bank v Childers 150 S W 840, 150 Ky 719—Burch v Atchison, 82 Ky 585, 6 Ky L 592, 636

28. Ky—Farmers' & Traders' Bank v Childers, 150 S W. 840, 150 Ky 719.

stead property,[29] and his testimony that he intended to return, in connection with evidence of other facts consistent with such testimony, may be sufficient to show that there was not an abandonment.[30] His testimony that he intended to return and did not intend to abandon the homestead is not necessarily conclusive, however,[31] it is necessary to test its truthfulness by its reasonableness and consistency in the light of the circumstances[32] and to consider his conduct.[33]

Claimant's testimony that he did not intend to abandon the homestead may be overcome by evidence of his admissions and conduct.[34] Claimant's testimony that he intended to return to the homestead property is not necessarily overcome, however, by evidence of matters constituting a part of his conduct, inconsistent with such testimony, where there is evidence that his conduct in part is consistent with, and corroborative of, such testimony.[35]

The testimony of one who has had a homestead right in certain premises to the effect that, on removal, he intended to abandon such right and that he did not intend to return to the premises, under some circumstances, may be conclusive on the issue as to abandonment.[36]

Conflicting testimony of husband and wife In jurisdictions in which a married man may abandon a homestead without the consent of his wife, under rules stated supra § 178, the wife's testimony that she did not intend to abandon the homestead is not effective where abandonment is conclusively established by testimony of the husband that there was an abandonment, which is supported by surrounding circumstances, in the absence of any showing of fraud or bad faith on his part.[37]

c. Declarations

Evidence of declarations of the claimant or homesteader with respect to abandonment is not necessarily conclusive.

While declarations of the person whose homestead right or claim is involved are admissible on the question as to abandonment, as shown supra § 197, they are not conclusive either to establish an abandonment[38] or to show that there existed an intention to return and occupy the premises.[39] Such declarations usually have some weight, however,[40] especially when they are consistent with the acts of declarant,[41] and a declaration, in connection with other evidence, may be sufficient to show the relinquishment or loss of the right of homestead.[42]

d. Duration of Absence

The length of time during which the homesteader remains away from the premises after removal tends to show his intention with respect to abandonment, but the

29. Iowa—Illinois Oldsmobile Co v Miller, 202 N W 751, 199 Iowa 894
Admissibility of claimant's testimony as to his intention see supra § 197

30. Ill—See Dooley v Ahern, 191 Ill App 140
Kan—Citizen's State Bank of Sabetha v Bird, 249 P 593, 121 Kan 617
Tex—First Nat Bank v Solis, Civ App, 137 S W 2d 142, error refused—City Nat Bank of Bryan v Walker, Civ App, 111 S W 2d 350, error dismissed

31 Iowa—Des Moines Marble & Mantel Co v McConn, 227 N W 521, 210 Iowa 266
Ky—Elliott v Argenbright, 299 S W 957, 221 Ky 763
Minn—Gordon v Emerson-Brantingham Implement Co, 210 N W 87, 168 Minn 336
Tex—Guthrie v Texas Pac Coal & Oil Co, 122 S W 2d 1049, 132 Tex 180, modifying Texas Pac Coal & Oil Co v Guthrie, Civ App, 100 S W 2d 125—Cannon v Hathaway, Civ App, 12 S W 2d 618

32. Iowa—Des Moines Marble & Mantel Co v McConn, 227 N W 521, 210 Iowa 266

33. Minn—Gordon v Emerson-Brantingham Implement Co, 210 N W 87, 168 Minn 336

34. Tex—Cannon v Hathaway Civ App 12 S W 2d 618—Tuerpe v George Saunders Live Stock Commission Co, Civ App, 245 S W 741

Testimony of little force or effect
It has been said that testimony of one claiming a homestead exemption as to what his intention was when removing from the homestead property is of little force or effect, especially where such testimony is not corroborated and is inconsistent with his acts and conduct—Hauser v Schauer, 254 N W 343, 215 Wis 75

35. Kan—People's State Bank v Hill, 263 P 1045, 125 Kan 308

36. Tex—Sterling Nat Bank & Trust Co of New York v Ellis Civ App, 75 S W 2d 716, error dismissed

Overcoming presumption of continuance of homestead interest
Uncontradicted testimony of occupants of homestead that they moved from premises without expectation of returning overcame presumption of continuance of their homestead right from fact of previous occupancy—Sterling Nat Bank & Trust Co of New York v Ellis, supra

37. Tex—Anderson v Pioneer Bldg & Loan Ass'n, Civ App, 163 S W 2d 421, error refused

38. U S—Hughes v Newton, Wis, 89 F 213, 32 C C A 193
Ky—Williams v Evans' Adm'r, 56 S W 2d 710, 247 Ky 105—Conway v Reed 235 S W 747, 193 Ky 287
29 C J p 963 note 6

Declarations of themselves are not sufficient to establish an abandonment where the conduct or situation of declarant does not sustain the declarations—Galloway v Rowlett, 71 S W 260, 24 Ky L 2503

39. Tex—Woolfolk v Ricketts, 48 Tex 28
Wis—Jarvais v Moe 38 Wis 440
29 C J p 963 note 7

40. Tex—Boehm v Beutler, 41 S W 658, 16 Tex Civ App 580
29 C J p 963 note 7

41. Iowa—Benbow v Boyer, 56 N W 544, 89 Iowa 494
29 C J p 963 note 7

42. In Mississippi recital by husband in trust deed executed by him alone, that land involved was no part of his homestead, was sufficient evidence of his selection of new homestead, when he and wife were in fact occupying other land for living purposes and recordation of such trust deed prevented the parties from acquiring any but subordinate rights in the land, in view of Code 1930 § 1776—Ritter v Whitesides, 176 So 728, 179 Miss 706.

duration of the absence is not conclusive evidence of abandonment.

While the length of time during which the homesteader who has removed from the premises remains away is important as indicating his intention and must be taken into account in determining the question of abandonment,[43] yet, in itself, the duration of an absence,[44] whether prolonged[45] or limited,[46] is not conclusive evidence of abandonment

It has been stated broadly that long-continued absence can be looked to only for the purpose of determining the intent with which the removal was made,[47] even a prolonged absence may, in the light of the attendant circumstances, be wholly consistent with an intention to return which will preclude the finding of an abandonment[48] However, where the absence is continued for a number of years, and there is no circumstance or act which shows an intention to return and occupy the homestead, the length of the absence may become a controlling circumstance[49] If there exists an intention not to return, it is not necessary that the absence be continued for a great length of time in order to work an abandonment[50]

e. Acquisition of New Residence or Homestead

While not under all circumstances conclusive, acquisition of a new residence tends to show abandonment of homestead in property formerly occupied as residence, and proof of acquisition of new homestead is usually sufficient to show abandonment of former homestead

According to some cases, while evidence of the acquisition of a new residence tends strongly to show that the new residential property has been selected as the homestead with resultant abandonment of the old homestead,[51] such evidence is not conclusive,[52] and evidence showing the existence of a continued and fixed intention on the part of claimant to return to the homestead premises is sufficient to overcome the effect of evidence showing acquisition of a new residence[53]

Abandonment may be sufficiently shown by proof that a new homestead has been acquired, notwithstanding certain personal property was left on the former homestead premises[54] With respect to showing the acquisition of a new homestead as bearing on the issue as to abandonment, particular evidence has been regarded as sufficient to show, or to support a finding of, such acquisition,[55] while other evidence has been considered insufficient in this regard[56]

f. Acceptance of Lease of Premises

Acceptance by the homesteader of a lease of the homestead premises will, under some circumstances, be sufficient to authorize an inference of intention to abandon the homestead premises

The intention to abandon the homestead exemption may be inferred from the acceptance by the homesteader of a lease of the premises from a person who holds a mortgage thereon which has been irregularly foreclosed,[57] or from a grantee of the

43. Or—De Haven & Son Hardware Co v Schultz, 259 P 778, 122 Or 493
29 C J p 963 note 9

44. Or—De Haven & Son Hardware Co v Schultz, supra
29 C J p 963 notes 10, 11

45. Ala—Mower v Sharit, 85 So 23, 204 Ala 50
Ark—Melton v Melton, 191 S W 20, 126 Ark 541
Tex—City Nat Bank of Bryan v Walker, Civ App, 111 S W 2d 350, error dismissed—Blanks v First Nat Bank, Civ App, 44 S W 2d 393, error refused—Lewis v Pitts, Civ App, 275 S W 473
29 C J p 963 note 10, p 964 note 13

46. La—St Mary Bank & Trust Co v Daigle, 55 So 345, 128 La 345

47. Tex—Cline v Upton, 56 Tex. 319

Other statement

"Length of time is unimportant, save as indication of intention"—Brown v Watson, 41 Ark 309, 313

48. U S—Hughes v Newton, Wis, 89 F 213, 32 C C A 193
Ark—Robinson v Sweamingen, 17 S W 365, 55 Ark 55.
Mich—Kaeding v Joachimsthal, 56 N W 1101, 98 Mich 78
29 C J p 961 note 13

49. Iowa—Newman v Franklin, 28 N W 579, 69 Iowa 244
Tex—Johnson v Goldstein, Civ App, 173 S W 458
29 C J p 964 note 14

50. Tex—Cline v Upton, 56 Tex 319

51. Tex—Walthall v Barnes, Civ App, 83 S W 2d 1082, error dismissed
29 C J p 963 note 8
Abandonment of homestead by acquisition of new homestead or residence in general see supra § 170
Voting in connection with acquisition of new residence see infra subdivision h of this section

52 Tex—Walthall v Barnes, supra

53. Iowa—Illinois Oldsmobile Co v Miller, 202 N W 751, 199 Iowa 894

54. Tex—Davis v Taylor, Civ App, 33 S W 543
29 C J p 965 note 38

55. Tex—Panhandle Const Co. v. Wiseman, Civ App, 110 S W 2d 615, error dismissed—Woolf v Smith Civ App, 86 S W 2d 67—Hinton v Uvalde Paving Co, Civ App, 77 S W 2d 733, error refused

Title to new homestead taken in name of another

Evidence bearing on debtor's intent to abandon property as his homestead when he rented it and moved to another town, sustained finding that property in town to which debtor removed was purchased by debtor and became his homestead, notwithstanding it was held in the name of debtor's unmarried son—Carver v Gray, Tex Civ App, 140 S W 2d 227, error dismissed, judgment correct

Intent

Evidence supported finding that plaintiff removed from homestead property to other property with the intention of making such other property his future permanent home—Zolandek v First Nat Bank, 250 N W 391, 212 Wis 632

56. Tex—Gonzalez v Zachry, Civ App, 84 S W 2d 855, error refused

57. Iowa—Bradshaw v Remick, 57 N W 897, 90 Iowa 409.

premises by an invalid conveyance.[58] So the fact that claimant reoccupied the property as tenant of one whose claim was necessarily in opposition to a homestead right may, in connection with other evidence, be sufficient to show abandonment.[59]

Particular evidence has been regarded as insufficient to show conclusively that claimant had occupied as a tenant premises in which he had a homestead right.[60]

g. Renting Premises to Another

Evidence that the homesteader rented the premises to another is not conclusive evidence of abandonment.

Abandonment of a homestead is not conclusively shown by evidence that the homesteader rented the premises to another,[61] nor is an abandonment of part of the homestead conclusively shown by renting such part to another.[62] Evidence of the physical facts and of the surrounding circumstances, however, may have such probative force as to overcome claimant's testimony in support of his claim that his leasing to another of part of the homestead was temporary.[63]

h. Exercising Political Rights or Rights of Citizen at Place Other than Where Homestead Located

Exercise of political rights or rights of a citizen, such as voting, at place other than where homestead is located is not necessarily conclusive evidence of abandonment of homestead, but it is a circumstance which may be considered in determining the question as to abandonment.

Where an actual resident acquires a homestead, mere exercise of acts of citizenship in another state, while temporarily absent from the homestead, does not necessarily amount to an abandonment, although it is strong evidence thereof.[64] So the act of voting at a place other than that in which the homestead is located does not of itself conclusively prove a change of domicile and an abandonment of the homestead,[65] or of an intention to abandon the homestead,[66] but is simply a fact to be taken in con-

58. Iowa—Anderson v Cosman, 72 N W 532, 103 Iowa 266, 64 Am S R 177

59. Tex—Reece v Renfro, 4 S W 545, 68 Tex 192

60. Mortgaged premises

Where examiner in charge of mortgagee bank for receiver agreed to extend period of redemption and reduced amount necessary to be paid by mortgagor, informing mortgagor that he would be required each month to pay small amount for interest and taxes, small payments made by mortgagor to examiner between issuance of sheriff's deed following foreclosure sale and execution of receiver's deed to mortgagor were not entitled to controlling consideration in determinating whether mortgagor's homestead rights had been extinguished in a case in which the party who controverted the existence of the homestead right claimed the payments were for rent—Kleinsorge v Clark, Iowa, 4 N W 2d 433

61. Ark—Melton v Melton, 191 S W 20, 126 Ark 541

La—Minden Hardware & Furniture Co v Smith, 115 So 381, 165 La. 98

Business homestead

Tex—Crockett v Atkinson, Civ App, 107 S W 2d 591, error dismissed

Whether leasing of premises to another constitutes abandonment in general see supra § 175

Voting elsewhere in connection with renting homestead premises see infra subdivision h of this section

62. Iowa—Charter v Thomas, 292 N W 842, 228 Iowa 554

Tex—Mayfield v. Owens, Civ App, 65 S W 2d 343.

Showing intention

To show loss of exemption of part of homestead, the renting of such part and the surrounding circumstances should show intention to abandon that part as homestead—Barten v Martin, 299 P 614, 133 Kan 329

Evidence held insufficient to show abandonment by renting—City of Amarillo v Loden, Tex Civ App, 22 S W 2d 969

63. Tex—Thornton v Wear, Civ App, 202 S W 1038

64. Ark—Harris v Ray, 154 S W 499, 107 Ark 281

Seeking and accepting public office

Husband and wife were not concluded from asserting homestead by evidence that they moved to, and acquired residence in, another state and that husband accepted offices of deputy sheriff and justice of the peace and was a candidate for the legislature therein—Putman v Coleman, Tex Civ App, 277 S W 213

65. Ark—Harris v Ray, 154 S W 499, 107 Ark 281

Ill—Holterman v Poynter, 198 N E 723, 361 Ill 617, 101 A L R 842—Imhoff v Lippe, 41 N E 493, 162 Ill 282

Iowa—Rand Lumber Co v Atkins, 89 N W 1101, 116 Iowa 242—Phoenix Trust Co v Vaught, 205 N W 792, 201 Iowa 150

Kan—Osage Mercantile Co v Blanc, 99 P 601, 79 Kan 356

N D—Scherr v Fischer, 226 N W 481, 58 N D 317

Okl White Inv Co v Stupart, 4 P 2d 77, 152 Okl 144—McCammon v Jenkins, 145 P 1163, 44 Okl 612

29 C J p 964 note 19

In California it has been held that removing from the state, becoming a citizen of a territory to which the homesteader removed and voting and running for office there did not constitute an abandonment, where there was no intention to abandon and the intention to return continued, the court took the view that abandonment could be effected only as provided by statute and that the grounds of abandonment urged were not within the statute—Porter v. Chapman, 4 P 237, 65 Cal 365

Registering as voter

(1) Abandonment was not conclusively shown by evidence that homesteader and his wife registered as voters in a county other than that in which homestead was located—Courts v Aldridge, 120 P 2d 362, 190 Okl 29.

(2) As bearing on issue as to abandonment, the fact that owner, within six months after removal from homestead, registered as voter in city to which he moved, did not conclusively establish change of residence, especially where it appeared that registration was induced by belief that he had the right to vote at place where he resided temporarily—Gordon v Emerson-Brantingham Implement Co, 210 N W 87, 168 Minn 336

66. Iowa—Citizens' Bank of Milo v Frank, 235 N W 30, 212 Iowa 707

29 C J p 964 note 19

Wife of claimant

In a case in which the question as to abandonment of homestead was involved and in which the court ruled that the selection of place of residence rested primarily with hus-

nection with other facts in aiding the court in determining whether or not the removal of the owner from the premises was permanent or temporary,[67] and its effect may be overcome by circumstances showing an intent to return[68]

Nevertheless, when taken in connection with other circumstances, it may be sufficient to establish an abandonment,[69] as for instance where he engages in business elsewhere,[70] engages in business elsewhere and leases a homestead,[71] engages in business elsewhere, buys new home, and runs for office,[72] rents homestead and removes to better location,[73] rents and mortgages the old homestead,[74] mortgages his homestead and removes household goods,[75] offers[76] or attempts[77] to sell the homestead property, claims residence elsewhere,[78] or purchases and occupies a new residence[79]

A statute providing that, if a person shall go into another state and vote there, he shall be considered to have lost his residence in the state which he left is intended merely for the guidance of the judges of election and has no application where the question is one of homestead[80]

i. Miscellaneous

In a wide variety of cases the courts have considered the evidence and held it sufficient or insufficient to show, or to support a finding, that there was an abandonment of, or an estoppel to claim, a homestead right.

Among other instances of evidence regarded as sufficient to show abandonment of a homestead right are evidence that the owner or occupant of the premises actually left the premises, never returned, and, while absent, formed the intention not to return,[81] that he deserted his family, removed from the state, declared his intent not to live with his wife thereafter, and claimed a residence elsewhere, and the wife removed to another county,[82] that he left the premises, engaged in various occupations elsewhere, and finally removed from the state,[83] that he took up his residence in another state at the direction of his employer, but after being discharged did not return,[84] and that he sold the homestead premises[85] Evidence of failure to move back to the homestead premises for a substantial period after the remarriage of claimant and of payment of personal taxes elsewhere tends to show abandonment[86]

Abandonment is not conclusively proved by the fact that claimant's children were not living with him when suit involving the premises was filed,[87] or by the platting of land not within the limits of an incorporated city or town and a sale of lots ac-

band, it was stated that the mere fact that the wife of claimant voted at a place other than where the homestead was located was not conclusive proof of her intention as to change of domicile -- Illinois Oldsmobile Co v Miller, 202 N W 751, 199 Iowa 984

Registering as voter

The fact that a homestead claimant registered as a voter at the place to which he had removed has been held not to be as strong evidence of intention to remain away as is the act of voting, it is, however, a fact to be considered as any other fact in the case and to be given such weight as it is entitled to under the rules governing the consideration of testimony -- Mallard v North Platte First Nat Bank, 59 N W 511, 40 Neb 784.

Payment of poll tax at place other than where homestead was located is not conclusive evidence of intention not to return to homestead property -- McKenzie v. Mayer, 20 Tex Civ App 238

67. Ky -- Louisville Tobacco Warehouse Co v Calvert, 203 S W 567, 180 Ky 718 -- Campbell v Potter, 29 S W 139, 16 Ky L 535
Mo -- Snodgrass v Copple, 111 S W 845, 131 Mo App 346
29 C J p 964 note 21

68. Iowa -- Robinson v Charleton, 73 N W. 616, 104 Iowa 296
Ky -- Cincinnati Leaf Tobacco Warehouse Co v Thompson 49 S W 446, 105 Ky 627 20 Ky L 1439
29 C J p 961 note 21

69. Ark -- Creekmore v Scott, 20 S W 2d 177, 179 Ark 1113
Iowa -- Citizens' Bank of Milo v Frank, 235 N W 30, 212 Iowa 707 -- Shaffer v Miller, 192 N W 868, 195 Iowa 891
Kan -- Mosteller v Readhead, 50 P 948, 6 Kan App 512
29 C J p 964 note 22

Strong circumstance

In a case in which question as to abandonment of homestead was involved, it was stated that deliberately voting away from alleged homestead is strong circumstance tending to show intention to change residence -- Citizens' Bank of Milo v Frank, 235 N W 30, 212 Iowa 707.

Effect of husband's voting

Evidence that married man voted at place other than where homestead was located was not conclusive as to his wife's claim of homestead -- Painter v Steffen, 54 N W 229, 87 Iowa 171

70. Fla -- Murphy v Farquhar, 22 So 681, 39 Fla. 350
29 C J p 964 note 23

71. Ky -- Smith v Mattingly, 13 S W 719, 11 Ky L 975
29 C J p 964 note 24

72. Tex -- Griffin v McKinney, 62 S W 78, 25 Tex Civ App 432.

73. Miss -- Thompson v Tillotson, 56 Miss 36

74. Ill -- Titman v Moore, 43 Ill 169

75. Ill -- Clark v Smith, 88 Ill 298

76. Iowa -- Cotton v Hamil, 12 N W 607, 58 Iowa 594

77. Kan -- Mosteller v Readhead, 50 P 948, 6 Kan App 512

78. Mich -- Hoffman v Buschman, 55 N W 458, 95 Mich 538

79. Neb -- Flynn v Riley, 83 N W 663, 60 Neb 491
Tex -- Kutch v Holley, 14 S W 32, 77 Tex 220

80. Kan -- Osage Mercantile Co v Blanc, 99 P 601, 79 Kan 356

81. Neb -- Christensen v Smith, 243 N W 118, 123 Neb 388

82. Tenn -- Henry v Wilson, 9 Lea 176

83. Neb -- McCord v Tessier, 96 N W 342, 1 Neb, Unof, 740

84. Miss -- Salter v Embrey, 18 So 373
29 C J p 965 note 37

85. Tex -- Sanders v Crump, Civ App, 23 S W 2d 850

86. Ark -- Harrison v Rosenzweig, 47 S W 2d 2, 185 Ark 281

87. Tex -- Berry v Godwin, Com App., 222 S W. 191.

cording to the plat, which land is owned by the head of a family, and occupied as a homestead;[88] nor is an absolute intent to abandon homestead property shown by evidence that the owner or claimant attempted to sell the property,[89] or that he intended to sell his homestead and not to invest the proceeds in another home.[90] According to some cases proof of intention to abandon a homestead is not sufficient to prove abandonment as against evidence of actual and continued ownership, use, and possession of the premises involved.[91]

Cultivation of land does not disprove previous abandonment of the land as a homestead, and the owner may, without intending to make it his home again, cultivate, rent, or otherwise utilize the property after removal, abandonment of homestead not signifying abandonment of claim to ownership.[92] The intention to return to the homestead property is not conclusively shown by evidence that some furniture was left there,[93] or that the property was visited more or less frequently by claimant.[94]

It is sufficiently shown that a removal was merely temporary, where it appears from the evidence that the homesteader expected to return in a short while, but was prevented from so doing by unforeseen events, and that he repeatedly expressed a purpose to return.[95]

Failure to acquire another homestead may be considered as a circumstance tending to negative an intention to abandon the former homestead,[96] but such failure is not sufficient of itself to overcome other and stronger evidence of abandonment.[97]

Sufficiency of evidence to raise issue of fact and to require or authorize submission to jury of issue as to abandonment is considered infra § 199

In various cases the evidence has been regarded as sufficient to show, or to sustain a finding of, abandonment or loss of homestead;[98] abandonment of business homestead,[99] abandonment of homestead by both husband and wife,[1] abandonment of part of homestead,[2] abandonment of homestead by husband in good faith without intent to defraud wife;[3] consent of wife to abandonment,[4] intent to abandon homestead;[5] and want of requisite intention to return to homestead premises.[6]

88. Fla.—Shone v. Bellmore, 78 So. 605, 75 Fla. 515

89. S.D. Smith v. Midland Nat. Life Ins. Co., 234 N.W. 20, 57 S.D. 197

90. Tex.—Gaar v. Burge, 110 S.W. 181, 49 Tex. Civ. App. 599

91. Tex.—Wilson v. Levy, Civ. App., 13 S.W.2d 971

92. Tex.—Bishop v. Williams, Civ. App., 223 S.W. 512

93. Iowa.—Citizens' Bank of Milo v. Frank, 235 N.W. 30, 212 Iowa 707

94. Iowa.—Citizens' Bank of Milo v. Frank, supra

95. Ky.—Campbell v. Potter, 29 S.W. 139, 16 Ky.L. 535

96. Tex.—Gough v. Gibson, Civ. App., 1 S.W.2d 684

97. Tex.—Gough v. Gibson, supra

98. U.S.—Green v. Ætna Life Ins. Co., C.C.A.Tex., 30 F.2d 100, certiorari denied 49 S.Ct. 481, 279 U.S. 861, 73 L.Ed. 1001, rehearing denied 50 S.Ct. 79, law of Texas involved

Ark.—Harrison v. Rosenzweig, 47 S.W.2d 2, 185 Ark. 281—Creekmore v. Scott, 20 S.W.2d 177, 179 Ark. 1113—McKenzie v. Rumph, 286 S.W. 1022, 171 Ark. 791—Gillis v. Gillis, 262 S.W. 307, 164 Ark. 532—Wooten v. Farmers' & Merchants' Bank, 249 S.W. 569, 158 Ark. 179

Iowa.—Des Moines Marble & Mantel Co. v. McConn, 227 N.W. 521, 210 Iowa 966—Solnar v. Solnar, 216 N.W. 288, 205 Iowa 701—Shaffer v. Miller, 192 N.W. 868, 195 Iowa 891

Ky.—Walters v. Jenkins' Adm'r, 130 S.W.2d 43, 279 Ky. 144—Tyler's Ex'r v. Williamson, 36 S.W.2d 34, 237 Ky. 579

Minn.—Sheehan v. First Nat. Bank, 204 N.W. 38, 163 Minn. 294—Clark v. Dewey, 73 N.W. 639, 71 Minn. 108

Miss.—Ritter v. Whitesides, 176 So. 728, 179 Miss. 706

Tex.—Reece v. Renfro, 4 S.W. 545, 68 Tex. 192—Posey v. Commercial Nat. Bank, Com.App., 55 S.W.2d 515, reversing Commercial Nat. Bank of San Antonio v. Posey, Civ.App., 34 S.W.2d 678—Anderson v. Pioneer Bldg. & Loan Ass'n, Civ.App., 163 S.W.2d 421, error refused—John Hancock Mut. Life Ins. Co. v. Bennett, Civ.App., 159 S.W.2d 892, error refused—Woolf v. Smith, Civ.App., 86 S.W.2d 67—Gross v. White, Civ.App., 67 S.W.2d 895—Welch v. Silvers, Civ.App., 59 S.W.2d 879, affirmed Silvers v. Welch, 91 S.W.2d 686, 127 Tex. 58—L.T. Stanley Estate v. First Nat. Bank, Civ.App., 24 S.W.2d 440, error refused—Sanders v. Crump, Civ.App., 23 S.W.2d 850—Cannon v. Hathaway, Civ.App., 12 S.W.2d 618—Walker v. Dailey, Civ.App., 290 S.W. 813—Teller v. Fitch, Civ.App., 281 S.W. 893—Sproul v. Farmers Nat. Bank of Follett, Civ.App., 246 S.W. 1081—Tuerpe v. George Saunders Live Stock Commission Co., Civ.App., 245 S.W. 741

Wis.—In re Fish's Estate, 253 N.W. 387, 214 Wis. 464—Zolander v. First Nat. Bank, 250 N.W. 391, 212 Wis. 632

29 C.J. p. 965 note 39

Abandonment as of specified date

Tex.—Stout v. Sommers, Civ.App., 28 S.W.2d 247, affirmed Sommers v. Stout, Com.App., 44 S.W.2d 901

Abandonment by husband

Particular evidence has been regarded as sufficient to support finding that husband of the owner of certain property had abandoned his homestead right and did not thereafter live with his wife as her husband.—Weinebrod v. Rohdenburg, 175 N.E. 379, 343 Ill. 318

99. Tex.—Bradley v. Janssen, Civ.App., 93 S.W. 506

1. Neb.—Zeng v. Jacobs, 164 N.W. 656, 101 Neb. 645

Wis.—Krueger v. Groth, 209 N.W. 772, 190 Wis. 387

2. Tex.—Burns v. Parker, Civ.App., 137 S.W. 705

3. Tex.—Gross v. White, Civ.App., 67 S.W.2d 895—Bishop v. Williams, Civ.App., 223 S.W. 512

4. Tex.—Sproul v. Farmers Nat. Bank of Follett, Civ.App., 246 S.W. 1081

5. Ark.—Creekmore v. Scott, 20 S.W.2d 177, 179 Ark. 1113

Okl.—Greenwood v. Wilkenson, 256 P. 46, 124 Okl. 300

Tex.—Carver v. Gray, Civ.App., 140 S.W.2d 227, error dismissed, judgment correct—Gross v. White, Civ.App., 67 S.W.2d 895

6. Ark.—Gillis v. Gillis, 262 S.W. 307, 164 Ark. 532

Under the general rules considered supra subdivision a of this section, the evidence has been held sufficient to show, or to sustain a finding, that there was not an abandonment of a homestead,[7] that there was not an abandonment up to the time of trial;[8] that there was not an abandonment of a business homestead,[9] that there was not an abandonment of part of the homestead,[10] that there was not an intention to abandon a homestead[11] or part of a homestead,[12] and that the person claiming or entitled to the homestead right intended to return to the homestead premises from which he had removed.[13]

Particular evidence has been regarded as sufficient to show that claimant was not estopped to assert the claim of homestead.[14] Other evidence has been regarded as sufficient to support a finding that claimant was estopped to set up a claim of homestead.[15] In various cases the evidence has been re-

Mich —Ungers v Chapman, 109 N W 1124, 146 Mich 643.

Change of intention

Evidence was sufficient to show that defendant left his home place with intention of returning to it, and that he held that intention until he decided to buy another plantation, after which, and until financial difficulties overtook him, his acts and declarations demonstrated an intention to abandon, and not to return to, the former homestead —Wooten v Farmers' & Merchants' Bank, 249 S W. 569, 158 Ark 179.

7. Ala —National Surety Co v Baker, 142 So 829, 225 Ala 298
Ark —City Nat Bank v Johnson, 96 S W 2d 482, 192 Ark 945—Bradley v. Humphreys, 83 S W 2d 828, 191 Ark 141
Colo —Vassek v Moffat County Mercantile Co, 285 P 939, 87 Colo 153
Fla —Hillsborough Inv. Co v Wilcox, 13 So 2d 448—U S Fidelity & Guaranty Co v Marshall, 4 So. 2d 337, 148 Fla 286
Ill —Holterman v Poynter, 198 N E 723, 361 Ill 617, 101 A L R 842
Iowa —Mill Owners' Mut Fire Ins Co v Petley, 229 N W 736, 210 Iowa 1085
Kan —Killough v Swift & Co Fertilizer Works, 114 P 2d 831, 154 Kan 113
Ky —Brewer v Brewer, 105 S W 2d 582, 268 Ky 625—Williams v Evans' Adm'r, 56 S W 2d 710, 247 Ky 105
Minn —Eberhart v National Citizens' Bank of Mankato, 214 N W 793, 172 Minn 200—Lundgren v Yde, 213 N W 537, 171 Minn 176—Wells-Dickey Trust Co v Lindberg 206 N W 929, 165 Minn 192
N D —Hazlett v Mathieu, 220 N.W 647, 57 N D 57
Okl —Courts v Aldridge, 120 P 2d 362, 190 Okl 29—White Inv Co v Stupart 4 P 2d 77, 152 Okl 144—McCammon v Jenkins, 145 P 1163, 44 Okl 612
Or —De Haven & Son Hardware Co v Schultz, 259 P 778, 122 Or 493
S D —Hewitt v Carlson, 244 N W 108, 60 S D 168
Tex —Posey v Commercial Nat Bank, Com App, 55 S W 2d 515, reversing Commercial Nat Bank of San Antonio v Posey, Civ App, 34 S W 2d 678—Hughes v Parmer, Civ App, 164 S W 2d 576—First Nat Bank v. Solis, Civ App, 137 S W 2d 142, error refused—City Nat Bank of Bryan v Walker, Civ App, 111 S W 2d 350, error dismissed—Griffay v Robbins, Civ. App, 91 S W 2d 1160, error dismissed—Houston Chronicle Pub Co v Allen, Civ App, 70 S W 2d 482—First Nat Bank v Willis, Civ App, 58 S W 2d 1065—Ingram v. Summers, Civ App, 29 S W 2d 447, error dismissed—McKenzie v Mayer, Civ App, 20 S W 2d 238—Carstens v Landrum, Civ App, 5 S W 2d 208, reversed on other grounds, Com App, 17 S W 2d 803—Cockerell v Callahan, Civ App, 257 S W 316
29 C J p 965 note 44

Overcoming presumption

(1) The evidence considered has been regarded as sufficient to overcome any presumption of abandonment which may have arisen from evidence of removal from homestead premises —Fardal v Satre, 206 N W 22, 200 Iowa 1109—Illinois Oldsmobile Co v Miller, 202 N W 751, 199 Iowa 894—Schaffer v Campbell, 199 N.W 334, 198 Iowa 43

(2) Presumption of abandonment based on evidence of removal in general see supra § 196

8. Iowa —Boyer v Dague, 149 N W 73, 167 Iowa 212

9. Tex —First Nat Bank v Dismukes, Civ App, 241 S W 199

10. Iowa —Charter v Thomas, 292 N W 842, 228 Iowa 554
Tex —Mayfield Co v Owens, Civ App, 65 S W 2d 343

11. Ark —City Nat Bank v Johnston, 96 S W 2d 482, 192 Ark 945
Fla —U S Fidelity & Guaranty Co v Marshall, 4 So 2d 337, 148 Fla 286
Ill —Holterman v Poynter, 198 N E 723, 361 Ill 617, 101 A L R 842—Imhoff v Lippe, 44 N E 493, 162 Ill 282
Iowa —Elliott v Till, 259 N W 460, 219 Iowa 649
Kan —People's State Bank v. Hill, 263 P 1045, 125 Kan 308
Okl —White Inv Co v Stupart, 4 P 2d 77, 152 Okl 144
Tex —Northwestern Nat Life Ins Co v. Griffith, Civ App., 97 S W 2d 710

Negativing presumption

Mortgagor's occupying land as homestead at time of foreclosure sale, and other circumstances, negatived presumption he intended to abandon homestead —Krueger v Central Lumber Co, 230 N W 243, 56 S D 626

12. Iowa —Charter v. Thomas, 292 N W 842, 228 Iowa 554

13. Ark —City Nat Bank v Johnston, 96 S W 2d 482, 192 Ark 945
Iowa —Fardal v Satre, 206 N W 22, 200 Iowa 1109—Illinois Oldsmobile Co v Miller, 202 N W 751, 199 Iowa 894
Kan —People's State Bank v Hill, 263 P 1045, 125 Kan 308
Okl —White Inv Co v Stupart, 4 P 2d 77, 152 Okl 144
S D —Hewitt v Carlson, 244 N W 108, 60 S D 168
Tex —Aman v Cox, Civ App, 164 S W 2d 744—First Nat Bank v Solis, Civ App, 137 S W 2d 142, error refused—First Nat Bank v Jones, Civ App, 59 S W 2d 1103

Temporary absence and intention to return

(1) Evidence has been held sufficient to show that claimant left homestead property for a temporary purpose, with intention to return
Iowa —Elliott v Till, 259 N W 460, 219 Iowa 649
Or —In re Dunlap's Estate, 87 P 2d 225, 161 Or 93—Sterrett v Hurlburt, 275 P 689, 129 Or 520, rehearing denied and modified on other grounds 278 P 986, 129 Or 520

(2) Evidence has been held sufficient to sustain finding that claimant left his home only temporarily, with intention to return and without putting it out of his power at any time to return —National Surety Co v Baker, 142 So 829, 225 Ala 298

14. Tex —Laas v Poth, Civ App, 112 S W 2d 1087

15. Tex —Judge v Shaboub, Civ App, 57 S W 2d 613—Sanders v Life Ins Co of Virginia, Civ App, 57 S W 2d 327—Glaser v Henderson, Civ App, 2 S W 2d 987.

garded as insufficient to show abandonment or loss of homestead,[16] abandonment of business homestead;[17] abandonment of part of homestead;[18] or intent to abandon homestead.[19]

In cases in which removal from the homestead premises has been shown, particular evidence has been regarded as insufficient to show, or to support a finding, that there was not an abandonment,[20] or that there was an intention to return to the homestead premises and not to abandon the homestead right[21]

Particular evidence has been regarded as insufficient to show that a married woman was estopped to assert a claim of homestead.[22]

With respect to whether owner of property lost homestead exemption on his wife's obtaining a divorce, particular evidence has been considered and held insufficient to show that he remained the head of a family after the divorce[23]

§ 199. Questions of Law and Fact

Whether a homestead right has been abandoned is usually a question of fact which is to be determined by the jury or by the court in a case tried without a jury.

Whether a homestead has been abandoned is usually a question of fact[24] for the jury[25] or for the trial court in a case tried by the court without a

16. Iowa—Fardal v Satre, 206 N W 22, 200 Iowa 1109—Phœnix Trust Co v Vaught, 205 N W. 792, 201 Iowa 450
Ky—Galloway v Rowlett, 74 S W 260, 24 Ky L 2503
La—Minden Hardware & Furniture Co v Smith, 115 So 381, 165 La. 98
Minn—Wells-Dickey Trust Co v. Lindberg, 206 N W 929, 165 Minn 492—Stewart v Rhodes, 39 N W. 141, 39 Minn 193
N D—Scherr v Fischer, 226 N W 481, 58 N D 317—Schaf v Corey, 196 N W 502, 50 N D 432
Okl—Lane v Amis Bros, 43 P 2d 73, 171 Okl 593
Or—In re Dunlap's Estate, 87 P 2d 225, 161 Or 93
Tex—Gonzalez v Zachry, Civ App, 81 S W 2d 855, error refused—Jolesch & Chaska Co v Hampton, Civ App, 297 S W 271.
29 C J p 965 note 54

Rebutting presumption of continuance

Particular evidence was regarded as insufficient to overcome presumption of continuance of homestead where it was claimed that the homestead character of the premises was lost because of change in family relation—In re McClain's Estate, 262 N W 666, 220 Iowa 638

17. Tex—Malone v Kornrumpf, 19 S W 607, 84 Tex 454—Crockett v Atkinson, Civ App, 107 S W 2d 591, error dismissed

Abandonment of part of business homestead

Tex—First State Bank of Memphis v Seago, Civ App, 120 S W 2d 951, error refused

18. Kan—Barton v Martin, 299 P 614, 133 Kan 329
Tex—Mayfield Co v Owens, Civ App, 65 S W 2d 343—City of Amarillo v Loden, Civ App, 22 S W 2d 969

Specific portion

Evidence under consideration was regarded as insufficient to show waiver or abandonment of any specific portion of original homestead property—Hughes v Bond, Tex Civ App, 118 S W 2d 443, error dismissed

Driveway

Evidence was insufficient to show discontinuance of use of driveway as part of homestead—White v Cotton, Tex Civ App, 72 S W 2d 669

19. Fla—U S Fidelity & Guaranty Co v Marshall, 4 So 2d 337, 148 Fla 286
Minn—Wells-Dickey Trust Co v Lindberg, 206 N W 929, 165 Minn 492
S D—Yellowhair v Platt, 182 N W 702, 44 S D 136

Finding of intention to abandon not necessarily required

S D—Smith v Midland Nat Life Ins Co, 234 N W 20, 57 S D 497

20. Tex—Gough v Gibson, Civ App, 1 S W 2d 684

Negativing or overcoming presumption

(1) Particular evidence has been regarded as insufficient to negative or overcome presumption of abandonment arising from evidence of removal from homestead premises
Colo—Monte Vista Bank & Trust Co v Savage, 225 P 219, 75 Colo 180
Iowa—Evans v Evans, 210 N W 564, 202 Iowa 493—Shafter v Miller, 192 N W 868, 195 Iowa 891
Wis—Hauser v Schauer, 254 N W 343, 215 Wis 75

(2) Presumption of abandonment based on evidence of removal in general see supra § 196

21. Iowa—Grimes Sav Bank v McHarg, 276 N W 781, 224 Iowa 644—Citizens' Bank of Milo v Frank, 235 N W 30, 212 Iowa 707
Ky—Elliott v Argenbright, 299 S W 957, 221 Ky 763

Temporary removal with intention to return

Particular evidence has been regarded as insufficient to show that removal was temporary, with intention to return
Iowa—Des Moines Marble & Mantel Co v McConn, 227 N.W. 521, 210 Iowa 266
Wis.—Hauser v Schauer, 254 N W 343, 215 Wis 75

22. Assignment of contracts for purchase

Evidence was held insufficient to show that wife, who transferred to her husband her joint interest in contracts for deed of lots constituting their homestead, ratified her husband's arrangement with his brother for the brother to build a house on the premises so as to be estopped to set up homestead against a claim by the brother of equitable lien for labor and material furnished in such building—Brunsdon v Brunsdon, 200 N W 823, 199 Iowa 1099

23. Tex—Tanton v State Nat Bank of El Paso, Civ App 43 S W 2d 957, affirmed 79 S W 2d 833, 125 Tex 16, 97 A L R 1093

24. Ala—National Surety Co v Baker, 142 So 829, 225 Ala 298
Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434
Kan—Citizen's State Bank of Sabetha v Bird, 249 P 503, 121 Kan 617
Okl—Bradley v Flowers, 49 P 2d 803, 174 Okl 554—Lane v Amis Bros, 43 P 2d 73, 171 Okl 593—White Inv Co v Stupart, 4 P 2d 77, 152 Okl 114
Tex—Maury v Mireles Civ App, 93 S W 2d 1194 error dismissed—Mayfield Co v Owens, Civ App, 65 S W 2d 343—McKenzie v Mayer, Civ App 20 S W 2d 238
29 C J p 936 note 10, p 965 note 60, p 966 note 62

Whether absence temporary

Whether the absence of claimant from the homestead property was temporary, as bearing on the question of abandonment, is usually a question of fact—Blitz v Metzger, 241 P 259, 119 Kan 760, rehearing denied 245 P 161, 120 Kan 555

25. Tex—Mayfield Co v Owens, Civ App, 65 S W 2d 343—Farmers' State Bank of Georgetown v Roberts, Civ App, 59 S W 2d 1089 error dismissed—Riggs v First Nat Bank, Civ App, 24 S W 2d 454—

jury,[26] although it has been said to be a mixed question of law and fact to be determined in the light of all the facts and circumstances of the case.[27] The intent of the owner or claimant of a homestead with respect to abandonment,[28] including the intent with which he removes from the premises,[29] is usually a question of fact for the determination of the jury,[30] or for the court in a case tried by the court without a jury.[31]

Stating the rule with specific reference to the evidence, the question as to abandonment may and should be submitted to the jury as a question of fact if the evidence is conflicting,[32] or if reasonable men may differ as to the inferences which may be drawn from the evidence.[33] In particular cases the evidence has been regarded as sufficient to raise an issue of fact as to whether there was an abandonment,[34] including the issue as to intention,[35] and, accordingly, to authorize the submission of the issue to the jury[36] or to require the submis-

Tyler v Thomas, Civ App, 297 S W 609, reversed on other grounds Thomas v Tyler, Com App, 6 S W 2d 350—Hibbs v City Nat Bank of Wichita Falls, Civ App, 293 S W 350—Orr v Wallace, Civ App, 285 S W 650, affirmed Harrison v Orr, Com App, 296 S W 871, modified on other grounds, 10 S W 2d 381—Crump v Andress, Civ App, 265 S W 1074, reversed on other grounds, Com App, 278 S W 422
29 C J p 965 note 60

Whether renting constituted abandonment

Whether temporary rental of portion of homestead constituted abandonment was question of fact for jury—Hibbs v City Nat Bank of Wichita Falls, Tex Civ App, 293 S W 350.

Good faith of husband

Good faith of husband conveying lot without wife joining, and designating other property as homestead, was a question for the jury—Hibbs v City Nat Bank of Wichita Falls, supra

26. Kan—Citizen's State Bank of Sabetha v Bird, 249 P 593, 121 Kan 617
Tex—Mayfield Co v Owens, Civ App, 65 S W 2d 343
29 C J p 936 note 40

Whether absence from homestead premises temporary

Kan—Blitz v Metzger, 241 P 259, 119 Kan 760, rehearing denied 245 P 161, 120 Kan 555

27. Kan—Moore v Sanford, 41 P 1064, 2 Kan App 213
Mo—Snodgrass v Copple, 111 S W 845, 131 Mo App 346

28. Tex—Houston Chronicle Pub Co v Allen, Civ App, 70 S W 2d 482—Simms Oil Co v Rutledge, Civ App, 53 S W 2d 673, modified on other grounds 86 S W 2d 209, 126 Tex 7—Sproul v Farmers Nat Bank of Follett, Civ App, 246 S W 1081
29 C J p 935 note 39, p 966 note 62

Intent in renting premises

Tex—Houston Chronicle Pub Co v. Allen, Civ App, 70 S W 2d 482

Business homestead

Question as to intention to abandon business homestead is fact question under all the circumstances—Johnson v Duncan, C C A Tex 61 F 2d 1007

29. Ala—Mower v Sharit, 85 So 23, 203 Ala 50
Okl—Nickel v Janda, 242 P 264, 115 Okl 207
29 C J p 966 note 62

30. Ala—Mower v Sharit, 85 So 23, 204 Ala 50
Tex—Carver v Gray, Civ App, 140 S W 2d 227, error dismissed judgment correct—Simms Oil Co v Rutledge, Civ App 53 S W 2d 673, modified on other grounds 86 S W 2d 209, 126 Tex 7
29 C J p 966 note 62

Intention while occupying homestead premises

Question as to intention of homesteader to abandon homestead rights while still occupying the homestead premises was one of fact for the jury—Hibbs v City Nat Bank of Wichita Falls, Tex Civ App, 293 S W 350

31. Tex—Simms Oil Co v Rutledge, Civ App, 53 S W 2d 673 modified on other grounds 86 S W 2d 209, 126 Tex 37
29 C J p 935 note 39

Intention while occupying homestead premises

Whether the owner of a homestead intended, while he was occupying the premises, to abandon the homestead right was a question of fact for the trial court which tried the case without a jury—Simms Oil Co v Rutledge, Civ App 53 S W 2d 673, modified on other grounds 86 S W 2d 209, 126 Tex 37

32. Ark—Walthall v Walthall, 98 S W 2d 70, 193 Ark 137

Intention

Where the evidence is conflicting as to the intention of the owner to return to the homestead premises, it is a matter for the jury to determine—Walthall v Walthall, supra

33. Fla—Gulf Refining Co v Ankeny, 135 So 521, 102 Fla 151

34. Tex—Guthrie v Texas Pac Coal & Oil Co, 122 S W 2d 1049, 132 Tex 180, modifying Texas Pac Coal & Oil Co v Guthrie, Civ App, 100 S W 2d 125—Haile v Federal Land Bank of Houston, Civ App, 135 S W 2d 1024, error refused—Rutland Sav Bank v Isbell, Civ App 129 S W 2d 505, affirmed 134 S W 2d 442, 137 Tex 432—Hughes v Bond, Civ App, 118 S W 2d 443, error dismissed—Weltzman v Lee, Civ App, 262 S W 859
29 C J p 965 note 60

Abandonment in good faith

In a case in which a wife claimed that property, alleged to be a homestead, was fraudulently conveyed by her husband the evidence was regarded as sufficient to raise an issue as to whether there had been an abandonment of the homestead in good faith—Korn v Korn, Tex Com App, 15 S W 2d 1017, reversing, Civ App, 7 S W 2d 177, and motion dismissed, Com App, 29 S W 2d 1075

Abandonment not shown as matter of law

Where woman left her homestead to live with a daughter while in poor health and then obtained government employment her marriage thereafter to one in government employ who owned no home, the government furnishing them a place in which to live, did not as a matter of law work a forfeiture of the homestead right—Yellowhair v Pratt, 182 N W 702, 44 S D 136

35. Tex—Guthrie v Texas Pac Coal & Oil Co, 122 S W 2d 1049, 132 Tex 180, modifying Texas Pac Coal & Oil Co v Guthrie, Civ App, 100 S W 2d 125—Chalk v Daggett, Com App, 257 S W 228, modifying, Civ App, 201 S W 1057—Carver v Gray, Civ App, 140 S W 2d 227 error dismissed, judgment correct
29 C J p 966 note 62

Widow's uncontradicted testimony

that she always intended to return to and occupy as her home, farm formerly occupied by her as homestead, and purchased by her after husband's death, was sufficient to raise fact issue for jury, although evidence showed no acts of preparation confirming such testimony—Daniel v Cook, Tex Civ App, 70 S W 2d 1024

36. Tex—Ray v Metzger, Civ App, 165 S W 2d 207, affirmed, Sup, 172 S W 2d 480—Carver v Gray, Civ App, 140 S W 2d 227, error dismissed, judgment correct—Cooper

sion of the issue to the jury,[37] to call for its determination, as an issue of fact, by the trial court in a case tried by the court without a jury,[38] to render proper the denial of a directed verdict or peremptory instruction,[39] or to render improper the giving of such direction or instruction.[40] According to some cases, however, if the facts are not controverted, whether there has been an abandonment may be determined as a matter of law under some circumstances,[41] and, if the evidence of plaintiff who seeks to recover land on the theory that it constitutes his homestead conclusively shows that the homestead was abandoned, a demurrer to the evidence is properly sustained.[42] So, under some circumstances, uncontradicted testimony of one who has had a homestead right in certain premises to the effect that he intended to abandon such right and not to return to the premises may be binding on the trier of the facts.[43]

Whether a homestead has been abandoned is determined, as a question of fact, from the circumstances surrounding the particular transaction,[44] or, as otherwise stated, from the entire evidence before the jury or before the court sitting without a jury.[45]

Co v Warwick, Civ App, 120 S W 2d 128
29 C J p 965 note 60, p 966 note 62

Issue as to abandonment of part of premises
Tex—Ray v Metzger, Civ App, 165 S W 2d 207, affirmed, Sup, 172 S W 2d 480

Abandonment not shown as matter of law
It has been held that the evidence in the particular case did not show abandonment as a matter of law and that it was proper to submit to the jury the issue as to abandonment—Farmers' State Bank of Georgetown v Roberts, Tex Civ App, 59 S W 2d 1089, error dismissed—Lewis v Pitts, Tex Civ App, 275 S W 473

Widow's claim for land on ground of want of homestead
(1) Evidence has been held sufficient to authorize submission to jury of question as to whether husband and wife had a homestead in certain property, which had not been abandoned at the time of his death, where, as widow, she sought to have certain lands set apart to her on ground that there was no homestead when her husband died—Melcher v Super, 120 S W 569, 56 Tex Civ App 276

(2) Evidence in proceedings by surviving spouse or children of deceased homesteader to establish claim on theory of homestead existing at death of homesteader see infra § 279

37. Tex—Chalk v Daggett, Com App, 257 S W 228, modifying, Civ App, 204 S W 1057—Ray v. Metzger, Civ App, 165 S W 2d 207, affirmed Sup, 172 S W 2d 480—Rutland Sav Bank v Seeger, Civ App, 125 S W 2d 1113, error dismissed, judgment correct—Milliken v Coker, Civ App, 90 S W 2d 902, modified on other grounds 115 S W 2d 620 132 Tex 23—Wharton v Mortgage Bond Co of New York, Civ App, 48 S W 2d 519
29 C J p 965 note 60, p 966 note 62.

Abandonment not shown as matter of law
In various cases it has been held that the evidence was not sufficient to show abandonment as matter of law, and that it was improper not to submit the issue to the jury—Inman v Inman, Tex Civ App, 80 S W 2d 1103—Blanks v First Nat Bank, Tex Civ App, 44 S W 2d 393, error refused—Orr v Wallace, Tex Civ App, 285 S W 650, affirmed Harrison v Orr, Com App, 296 S W 871, modified on other grounds, 10 S W 2d 381—Crowder v Union Nat Bank of Houston, Tex Civ App, 264 S W 791, conforming to answers to certified questions 261 S W 375, 114 Tex 34

38. Tex—Halle v Federal Land Bank of Houston, Civ App, 135 S W 2d 1024 error refused—Rutland Sav Bank v Isbell, Civ App, 129 S W 2d 505, affirmed 154 S W 2d 442, 137 Tex 432

Abandonment not shown as matter of law
Evidence has been held not sufficient to show abandonment as a matter of law and, therefore, the question as to abandonment was one of fact to be determined by the trial court sitting without a jury—Mayfield Co v Owens, Tex Civ App, 65 S W 2d 343

Demurrer to evidence
Testimony of former owner that, before he sold the premises to plaintiff and while he was still in actual possession, he had decided to give up the homestead did not render plaintiff's evidence subject to demurrer in a suit to quiet title in which plaintiff claimed that there had not been an abandonment—Killough v. Swift & Co Fertilizer Works, 114 P 2d 831, 154 Kan 113

39. **Denial of directed verdict or peremptory instruction for claimant of homestead right**
Tex—Ray v Metzger, Civ App, 165 S W 2d 207, affirmed, Sup, 172 S W 2d 480—Carver v Gray, Civ App, 140 S W 2d 227, error dismissed, judgment correct.

40. Fla—Gulf Refining Co v Ankeny, 135 So 521, 102 Fla 151
Tex—Chalk v Daggett, Com App, 257 S W 228, modifying, Civ App, 204 S W 1057—Rutland Sav Bank v Seeger, Civ App, 125 S W 2d 1113, error dismissed, judgment correct—Inman v Inman, Civ App, 80 S W 2d 1103—Wharton v Mortgage Bond Co, of New York, Civ App, 48 S W 2d 519

41. Fla—Nelson v Hamlen, 104 So 589 89 Fla 356

Directed verdict
Where there was no evidence to support the claim that a business homestead had been abandoned, an instructed verdict based on the existence of such homestead and on the absence of abandonment was proper—Inman v Inman, Tex Civ. App, 80 S W 2d 1103

Evidence held insufficient to take to the jury question as to whether there had been an abandonment—Tyler v Thomas, Tex Civ App, 297 S W 609, reversed on other grounds Thomas v Tyler, Com App, 6 S W 2d 350

42. Okl—Garrett v Abraham, 242 P 155, 113 Okl 271

43. Tex—Sterling Nat Bank & Trust Co of New York v Ellis, Civ App, 75 S W 2d 716, error dismissed

44. Okl—Bradley v Flowers, 19 P 2d 803, 171 Okl 554—White Inv Co v Stupart, 4 P 2d 77, 152 Okl 144—German State Bank of Elk City, 169 P 1094, 67 Okl 176
29 C J p 966 note 63

45. Tex—McKenzie v Mayer, Civ. App, 20 S W 2d 238
29 C J p 966 note 63

Intention
The question of fact as to whether the owner intended to abandon the homestead right is to be determined from all the facts and circumstances developed by the evidence—Nickel v Janda, 242 P 264, 115 Okl 207

Whether absence temporary
Where one claiming a homestead had moved away from the property,

Estoppel. Usually the question as to estoppel to claim a homestead is one of fact for the jury[46] Conflicting evidence as to whether certain representations relied on as a basis of estoppel were made precludes a determination, as a matter of law, whether there is an estoppel and raises an issue of fact,[47] which is to be determined by the jury[48] or by the court in a case tried by the court without a jury.[49]

§ 200. Findings

The propriety of particular findings depends largely on the evidence.

If the evidence respecting the debtor's intention to abandon his residence is conflicting, it is not error to find that there was not an abandonment;[50] and a finding on disputed evidence as to the debtor's intent in leaving the premises that there was no abandonment will not be disturbed[51] Sufficiency of evidence to support particular findings with respect to abandonment is considered supra § 198.

V. PROTECTION AND ENFORCEMENT OF RIGHTS

A. PROCESS OR OTHER PROCEEDINGS AGAINST WHICH EXEMPTION MAY BE ALLOWED

§ 201. In General

Broadly speaking, a homestead is protected as against all manner of judicial proceedings, and process issued therein, by which it may be sought to appropriate the property to the payment of debts

Under most of the homestead laws the homestead is protected in all judicial proceedings, whether in courts of law or equity, in which it is sought to appropriate the property to the payment of debts and from all process issuing from such courts,[52] unless it has been waived, abandoned, or otherwise lost,[53] and this is so whether the title is in the husband or in the wife[54]

§ 202. Levy of Attachment or Execution

Ordinarily there may be no levy of attachment or execution against homestead property except for debts enforceable against the homestead

As a general rule realty which is exempt as constituting a homestead is not subject to the levy of an attachment,[55] or is not subject to the levy of

or ceased to occupy it as a residence, whether such absence was temporary is to be determined, as a question of fact, by the court, on a trial without a jury, from all the pertinent circumstances, as shown by the evidence, including the purpose of moving from the premises and the intention to return or to establish a residence elsewhere—Blitz v Metzger, 241 P 259, 119 Kan 760, rehearing denied 245 P 161, 120 Kan 555

46. Tex—Wharton v Mortgage Bond Co of New York, Civ App, 48 S W 2d 519—Riggs v First Nat Bank, Civ App, 24 S W 2d 454—Wootton v Jones, Civ App, 286 S W 680

29 C J p 966 note 64, p 959 note 5

Evidence held sufficient to take case to jury

Tex—Glaser v Henderson, Civ App, 2 S W 2d 987

Evidence held insufficient, in a case tried before a jury to show an estoppel as a matter of law—Blanks v First Nat Bank, Tex Civ App, 41 S W 2d 393, error refused

Questions of law and fact with respect to estoppel in general see Estoppel § 163

47. Tex—First Nat Bank v Solis, Civ App, 137 S W 2d 142, error refused - McCrea v Underwood, Civ App, 75 S W 2d 593

48. Tex.—McCrea v Underwood, supra

49. Tex—First Nat Bank v Solis, Civ App, 137 S W 2d 142, error refused

50. Ky—Cole v Rhor, 1 Ky L 62

51. Kan—Kline v Graff, 54 P 328, 8 Kan App 855

Findings held sufficient

(1) To support a conclusion that claimants never formed the intention permanently to abandon the homestead—Federal Petroleum Co v Pittman, Tex Civ App, 65 S W 2d 359, error refused

(2) To sustain the claim that one of the parties is estopped to assert the claim of homestead—Gibraltar Sav & Bldg Ass'n v Collier, Tex Civ App, 118 S W 2d 639, error refused

Findings construed

Findings have been considered and construed as not amounting to a finding that there was an abandonment prior to the voluntary sale of the homestead property—Ingram v Summers, Tex Civ App, 29 S W 2d 447, error dismissed

52. Ala—Terry v Schaeffer, 194 So 502, 239 Ala 261

Fla—Phare v Randall, 122 So 217, 97 Fla 858

La—Milliken & Farwell v Rivet, 6 La App 457

Or—Willamette Collection & Credit Service v Henry, 7 P 2d 261, 138 Or 460

29 C J p 966 note 66.

Garnishment

La—Thompson-Ritchie & Co v Graves, 120 So 631, 167 La 1024, 63 A L R 1283

Tex—First Nat Bank v Jeffress, Civ App, 71 S W 2d 298, error refused

Receivership

Homestead rights could not be reached by receivership proceedings, since order appointing receiver to appropriate rentals of homestead property was at least tantamount to a "final process" within statute exempting homestead from execution or any other final process—Bartold v Lewandowska Mich, 8 N W 2d 133

53. Ill—Claffy v Farrell 196 Ill App 65

Abandonment waiver or forfeiture of homestead see supra §§ 157-200

54. Okl—Alton Mercantile Co v Spindel, 140 P 1168, 42 Okl 210

55. Fla—Hart v Gulf Fertilizer Co, 108 So 886, 91 Fla 991

Kan—Angola State Bank v Fry, 287 P 245, 130 Kan 641

Or—Willamette Collection & Credit Service v Henry, 7 P 2d 261, 138 Or 460

Tex—Johnson v Echols, Civ App, 21 S W 2d 382, error refused

29 C J p 966 note 71

Attachment lien void

Attachment lien on land constitut-

an execution[56] except for debts or obligations enforceable against the homestead, such as debts which are expressly excepted by the homestead laws from their operation,[57] or liabilities and liens which attached before the debtor acquired or was entitled to acquire the homestead,[58] and within this exception the debtor cannot by subsequently taking possession of the property and claiming it as his homestead defeat a prior attachment lien.[59] So, where land is seized as having been conveyed in fraud of creditors and is reconveyed to the debtor, a subsequent occupancy will not enable him to set up the homestead exemption as against the attaching creditors.[60] If the writ has been wrongfully levied on the property constituting a homestead, damages are recoverable for the seizure, as explained infra § 238

Additions to, or increase in, value of homestead Where a homestead has been set apart to a debtor and subsequently, because of the erection of buildings thereon, there is an increase in the value of the premises over the statutory amount, such increase in value cannot be reached by execution, but it may be reached by an appropriate proceeding in equity.[61]

Chattels becoming a part of the homestead are not subject to seizure under an attachment or execution,[62] except, it seems, where it is sought to foreclose the specific lien in favor of the seller whose lien is enforceable as against the homestead.[63]

Levy to secure other property Homestead property is not exempt from levy of execution and attachment where this is necessary to preserve the rights of a judgment creditor to nonexempt property of the debtor,[64] as where such levy is permitted as the process by which the judgment creditor may reach the excess value over the amount of the homestead exemption,[65] but in the absence of proper proof that there is an excess value over the homestead exemption a levy of execution or attachment should not be granted.[66]

§ 203. Execution and Judicial Sales

Ordinarily homestead property is not subject to a forced or judicial sale except to satisfy debts enforceable against the homestead.

As a general rule realty which is exempt as constituting a homestead is not subject to a forced or judicial sale[67] except to satisfy debts enforceable against the homestead.[68] Indeed, a forced or judicial sale of the homestead in satisfaction of a debt not enforceable against the homestead is generally regarded as void[69] and will not be confirmed

ing homestead when writ was levied is absolutely void—L. T. Stanley Estate v. First Nat. Bank, Tex.Civ.App., 24 S.W.2d 440, error refused

56. Ala.—Terry v. Schaeffer, 194 So. 502, 239 Ala. 264—Majors v. Killian, 162 So. 289, 230 Ala. 531
Ark.—Franklin Fire Ins. Co. v. Butts, 42 S.W.2d 559, 184 Ark. 263—McKee v. Waters, 265 S.W. 947, 166 Ark. 301
Cal.—Parker v. Riddell, 108 P.2d 88, 41 Cal.App.2d 908—Graham v. Hunt, 7 P.2d 186, 119 Cal.App. 586
Fla.—Hart v. Gulf Fertilizer Co., 108 So. 886, 91 Fla. 991
Mich.—Bartold v. Lewandowska, 8 N.W.2d 133
S.C.—Eaddy v. Wall, 190 S.E. 497, 183 S.C. 229
Tex.—McKenzie v. Mayer, Civ.App., 20 S.W.2d 238—W. F. Dulaney & Sons v. Lawler, Civ.App., 282 S.W. 321
29 C.J. p. 966 note 72

Execution absolutely void
An execution levied on premises constituting homestead of judgment debtor is absolutely void, not merely voidable.—Payson Exch. Sav. Bank v. Tietjen, 225 P. 598, 63 Utah 321

57. Ga.—Marcrum v. Washington, 34 S.E. 585, 109 Ga. 296
Liabilities enforceable against homestead see supra §§ 93–122.

Tender of debt by wife
A statute permitting the wife of an execution debtor to tender the debt to the creditor and thus obtain his right and title under the levy on the homestead is not retrospective in operation.—Whedon v. Gorham, 38 Conn. 408—29 C.J. p. 968 note 20

58. U.S.—Lyon v. Arnold, C.C.A.Fla., 46 F.2d 451
29 C.J. p. 966 note 75

59. Mich.—Avery v. Stephens, 12 N.W. 211, 48 Mich. 246
29 C.J. p. 966 note 77

60. Mich.—Noble v. McKeith, 86 N.W. 526, 127 Mich. 163

61. N.C.—Vanstory v. Thornton, 14 S.E. 637, 110 N.C. 10

62. Tex.—McNeil v. Moore, 27 S.W. 163, 7 Tex.Civ.App. 536

63. Tex.—McNeil v. Moore, supra

64. Cal.—Southern Pac. Milling Co. v. Milligan, 104 P.2d 654, 15 Cal.2d 729, superseding, App., 96 P.2d 1010—Marelli v. Keating, 282 P. 793, 208 Cal. 528

65. Cal.—Marelli v. Keating, supra

66. Cal.—Southern Pac. Milling Co. v. Milligan, 104 P.2d 654, 15 Cal.2d 729, superseding, App., 96 P.2d 1010

67. Ala.—Terry v. Schaeffer, 194 So. 502, 239 Ala. 264
Ark.—McKee v. Waters, 265 S.W. 947, 166 Ark. 301
Ill.—Maher v. Goff, 147 N.E. 427, 316 Ill. 605
Mich.—Roubaje v. Graszuk, 221 N.W. 289, 244 Mich. 179
Miss.—Felder v. McCormick, 4 So.2d 363, 191 Miss. 851
Mont.—Oregon Mortg. Co. v. Dunbar, 289 P. 559, 87 Mont. 603, 73 A.L.R. 113
N.D.—In re Teiten's Estate, 249 N.W. 913, 63 N.D. 729
Or.—Willamette Collection & Credit Service, 7 P.2d 261, 138 Or. 460
S.D.—Smith v. Midland Nat. Life Ins. Co., 234 N.W. 20, 57 S.D. 497
Tenn.—Beard v. Beard, 10 Tenn.App. 52
Tex.—Miles v. Atlanta Nat. Bank, Civ.App., 71 S.W.2d 933—W. F. Dulaney & Sons v. Lawler, Civ.App., 282 S.W. 321

68. Cal.—Jacobson v. Pope & Talbot, 7 P.2d 1017, 214 Cal. 758
Tex.—Crowder v. Union Nat. Bank of Houston, 261 S.W. 375, 114 Tex. 34, answering certified questions, Civ.App., 264 S.W. 791
Liabilities enforceable against homestead see supra §§ 93–122

69. Ill.—Starczewski v. Toman, 16 N.E.2d 932, 296 Ill.App. 602
Iowa.—Hatter v. Icenbice, 223 N.W. 527, 207 Iowa 702
Or.—Allison v. Breneman, 254 P. 201,

by the court where the homestead exemption is properly asserted[70] Such a sale is invalid even where the homestead is sold to satisfy an indebtedness part of which is, and part of which is not, protected by the homestead exemption[71] Property in excess of the homestead exemption, however, may be subject to a forced or judicial sale,[72] and under the homestead laws in some jurisdictions the homestead claimant does not have an absolute right to prevent a judicial sale of the homestead but only a right to require that the property shall not be sold for less than the amount which constitutes the homestead exemption[73]

In instances where the power to sell homestead property to satisfy debts exists, the creditor must exercise such power in strict compliance with, and only in those cases specified by, governing provisions of law[74] Under provisions of law permitting a sale of homestead property exceeding in value a specified sum, such property must be sold subject to any encumbrance thereon,[75] and no valid sale may be had unless the bid received exceeds the the sum specified as the homestead exemption[76] As will be seen infra § 216 a, a sale of property, out of which a homestead may be claimed, without setting apart the homestead as required by law is invalid

Sale of homestead by guardian It has been held that a statute exempting a homestead from levy on execution does not prevent a sale by the guardian of the owner on his becoming a spendthrift, on license of the court of probate, of the homestead property for payment of his debts and for his support and maintenance.[77]

§ 204. —— Foreclosure Proceedings

Broadly speaking, a sale under a mortgage foreclosure may transfer a homestead interest where the mortgage of the homestead property was valid but not where such mortgage was invalid, this general rule being subject to such variations as may be introduced by particular statutory provisions A sale pursuant to a power of sale conferred by the mortgage is not "forced" within the meaning of statutes forbidding forced sales of homesteads

Subject to particular statutory provisions considered infra this section, it may be broadly stated that

203, 121 Or 102, citing **Corpus Juris.**

Tex —Atkins v Schmid Civ App, 129 S W 2d 412—Anchor v Anchor, Civ App, 15 S W 2d 77—Tucker v Dodson, Civ App, 245 S W 728
29 C J p 967 note 92

Order of sale "stillborn"

In legal effect a court order directing a sale of exempt homestead property "is stillborn, and, like an execution is without any effect whatever"—Payson Exch Sav Bank v Tietjen, 225 P 598, 599, 63 Utah 321

Unselected homestead

Seizure and sale of a tract of land as an entirety, which includes a homestead not as yet selected or set off as such is void—First Nat Bank v Tyler, 286 P 400, 130 Kan 308

70. Or—Marvin & Co v Piazza, 276 P 680, 129 Or 128

Confirmation held proper

A claim of homestead as to part of the premises does not bar confirmation of a sale on execution where there is no objection on that ground and where the record shows that none of the property claimed as homestead was sold at the execution sale—Lukart v Miles, 271 N W 160, 132 Neb 106

Effect of confirmation of invalid sale

(1) Confirmation of an invalid judicial sale of homestead property does not cure the invalidity—First Nat Bank v Tyler, 286 P 400, 130 Kan 308

(2) Nor does it bar the homesteader to assert homestead rights

Alaska—Williams v Thompson, 7 Alaska 601

Kan—First Nat Bank v Tyler, supra

71. Wash—Byam v Albright, 162 P 10 94 Wash 108
29 C J p 967 notes 97, 98

72. Ill—Leupold v. Krause, 95 Ill 440

73. La—Bank of Coushatta v Burch, 148 So 680, 177 La 165

Operation of constitutional provision

(1) Under constitutional provisions to the effect that, if a homestead exceeds a specified sum in value, the beneficiary shall be entitled to such amount if a sale under legal process realizes more than the specified sum it has been held that, as long as a homestead has not been judicially declared exempt from seizure and is worth more than the specified sum, it is subject to seizure by the sheriff and to be offered for sale in order to determine whether it is in truth worth more than the specified sum—Oden v First Nat Bank, 162 So 189, 182 La 591

(2) A sale for more than the specified sum is valid—Oden v First Nat Bank, supra

(3) All that the homesteader may successfully claim is the specified sum to be paid him out of the proceeds of sale—Oden v First Nat Bank, supra

(4) If the property is bought in by a creditor, for a sum in excess of the amount of the exemption, and if there is another claim which may be prior to the rights of the homesteader due to a special waiver of homestead, the buying creditor may secure possession without first paying off the homesteader, as it is proper first to make such other claimant a party and to determine the respective rights of the homesteader and claimant—Oden v First Nat Bank, supra

(5) No part of the specified sum may be withheld for costs, and a judgment creditor must assume the risk that the proceeds of sale will be sufficient to pay the specified sum and costs, and if they are not the judgment creditor will be forced to defray costs so that the homesteader may receive the specified sum intact—Succession of White, 127 So 883, 170 La 403

74. Cal—Palen v Palen 83 P 2d 36, 28 Cal App 2d 602

Mich—Roubaje v Graszuk, 221 N W 289, 244 Mich 179

Wyo—Altman v District Court of Second Judicial Dist in and for Albany County, 251 P 691, 693, 36 Wyo 290, citing **Corpus Juris.**

75. Cal—Southern Pac Milling Co v Milligan, 104 P 2d 651, 15 Cal 2d 729, superseding, App 96 P 2d 1010

76. Cal—Southern Pac Milling Co v Milligan, supra

Ill—Blaszynski v Starczewski, 25 N E 2d 884, 373 Ill 140

Ky—Gibbs v Deins, 139 S W 2d 430, 282 Ky 625

77. Mass—Wilbur v. Hickey, 8 Gray 432.

where power to mortgage homestead premises exists and has been duly exercised, under principles discussed supra §§ 123–156, the homestead property may be sold under a foreclosure of the mortgage,[78] but that where the power does not exist, or, if existent, has not been exercised in compliance with governing provisions of law, an attempted sale on foreclosure is invalid[79]

Protection against "attachment, levy, or sale" Sales under a decree of foreclosure have been held valid under homestead laws protecting the homestead from "attachment, levy, or sale, upon execution or other process issuing out of any court,"[80] or exempting homestead property from "attachment, levy or sale, on any mesne or final process issued from any Court"[81]

Protection against "forced sale" In jurisdictions where homestead laws exempt the homestead property from "forced sale," according to one view a sale under decree of foreclosure is a forced sale and, therefore, prohibited by the homestead laws,[82] but according to another view such a sale, to satisfy a valid mortgage, is not a forced sale within the meaning of these laws, and confers a good title[83]

Sale under trust deed, or power of sale in mortgage. Both in jurisdictions where a sale under decree of foreclosure is considered a forced sale and in jurisdictions where it is not, it has been held that a sale by a trustee under a valid deed of trust or a sale under a valid mortgage containing a power of sale without the intervention of a court is valid, the view being taken that this is not a forced sale[84]

§ 205. —— Partition

A tenant in common may not claim a homestead in the entire premises for the purpose of defeating a suit for partition, but if a homestead may be set off to one tenant without injury to the others this may be done

One tenant in common cannot defeat a suit for partition by the other and prevent a sale of the premises under decree in such proceedings, when the premises are indivisible, by setting up a claim to homestead in the entire premises,[85] as the homestead laws apply only when the homestead is sought to be taken to pay debts[86] Nevertheless, as shown supra § 88, if the premises are sold on partition, the debtor may assert his exemption in the proceeds of sale as against a creditor attempting to enforce his lien thereon, and, if a homestead can be set off to claimant without manifest injury to other parties in interest, it may be done[87]

B ESTABLISHMENT OF RIGHT

§ 206 In General

To establish a homestead right one must show that he comes within the protection of the homestead law

Every presumption should be indulged and every fair and reasonable effort should be exercised by the courts to safeguard a homestead[88] To be entitled to claim a homestead the claimant must be in the situation with respect to the property which the statute prescribes as a condition precedent to the right to claim homestead[89] The right of home

78 Ky—Newsom v Newsom, 159 S W 1175, 155 Ky 547
29 C J p 967 note 4
Foreclosure proceedings generally see supra § 151

79. Tex—Wilson v Levy Civ App, 62 S W 2d 501, error dismissed
29 C J p 967 note 4 [a] (2)
Mortgage covering land in excess of homestead
A mortgagor, in defense of a suit to foreclose the mortgage on a homestead, not validated by proper signature and separate acknowledgment of the wife, may assert claim to homestead and take steps to withdraw it from the mortgage, and segregate it from the excess subject to the mortgage debt—Carpenter v First Nat Bank, 181 So 239, 236 Ala 213

80. Neb—Rector v Rotton, 3 Neb 171
29 C J p 968 note 6

81. S C—Homestead Assoc v. Enslow, 7 S C 1
29 C J p 968 note 7

82. Tex—Sampson v Williamson, 6 Tex 102, 55 Am D 762
29 C J p 968 note 8½

83. Okl—Home Owners' Loan Corporation v Rusch, 80 P 2d 639, 183 Okl 145—Adams v Swan, 288 P 476, 143 Okl 162, 303
29 C J p 968 note 9

84. Cal—Peterson v Hornblower, 33 Cal 266
29 C J p 968 note 11
Sale voluntary
Sale under mortgage foreclosure decree is "judicial sale" and is regarded in law as sale by judgment debtor of a voluntary character, and is not a "forced sale" within constitutional provision protecting homesteads from forced sales—White v Rosenthal, 35 P 2d 154, 140 Cal App 184

85. Ohio—Rinehart v Rinehart, 6 Ohio Dec, Reprint, 907, 8 Am L Rec 654
Tex—Medearis v Buratti Civ App, 275 S W 617
Partition of homestead estates generally see the C J S title Partition § 33, also 29 C J p 1039 note 42–p 1041 note 87, p 849 notes 94–97

86. Ohio—Rinehart v Rinehart, 6 Ohio Dec, Reprint, 654, 8 Am L Rec 907—McMasters v Smith, 2 Ohio Dec, Reprint, 723, 5 West L Month 25

87. Ill—Cribben v Cribben, 27 N E 70, 136 Ill 609
Right of wife to have homestead set off on partition where husband is tenant in common has been recognized—Medearis v Buratti, Tex Civ App, 275 S W 617

88. Tex—Burg v Hitzfeld, Civ App, 89 S W 2d 272, error dismissed

89. Ariz—Elquest Paint Co v Collister, 41 P 2d 1088, 45 Ariz 191
Wash—Traverso v. Cerini, 263 P 184, 146 Wash 273.

stead, once acquired, continues until terminated in the manner provided by law, as explained supra § 15, and the person entitled thereto may protect his right as long as the homestead character and attributes of the property exist[90]

Generally speaking, the existence of a homestead, when the homestead exemption is claimed as against a creditor, depends on the facts of the particular case as viewed in the light of the controlling principles of law,[91] and every case must be determined on the intention and purpose of the claimant as revealed by the evidence adduced[92] As against a lienholder, the right of homestead is determined by the situation existing at the time the lien is claimed to have attached[93]

§ 207. Statutory Provisions

It has been held that the law in force at the time when a homestead exemption is claimed is controlling, but other authorities hold that the mode of selection is that provided by the law in force when the homestead was acquired.

It has been held in some jurisdictions that the law in force when the exemption is claimed determines the rights of an exemptioner,[94] but it has also been held in other jurisdictions that the mode of selection is that provided by the law in force when the homestead was acquired[95]

§ 208. Duty of Officer Making Levy

Under some statutes the levying officer must notify the debtor of his homestead rights Where no homestead rights exist the officer may ignore a claim of homestead

Under some statutes it is the duty of an officer levying an execution on property constituting a homestead to notify the debtor of his homestead rights.[96] Such notice, however, need not be given where the debtor is not entitled to a homestead in the land levied on.[97] Where the homestead interest has been extinguished, the sheriff in selling the property on execution is not required to take notice of a claim of homestead[98] and may make a valid sale passing all right and title to the property by his deed[99]

The duty of the levying officer to set apart a homestead in the property levied on is considered infra § 216 b.

§ 209. Claim of Homestead

Questions dealing with particular matters relating to a claim of homestead, such as the necessity thereof, are considered infra §§ 210-215.

Examine Pocket Parts for later cases.

§ 210. —— Necessity of Claim

Some homestead laws contemplate a definite assertion by the debtor of his right of exemption, while under other laws no such claim on the debtor's part is necessary to preserve his rights.

Under some laws the homestead exemption does not arise as a matter of right so as to preclude action against property on the mere showing of its homestead character,[1] but is regarded as a personal privilege which must be claimed or asserted in order to become available,[2] but under other homestead laws no such claim is necessary on the debtor's part, or at least a failure to make such claim is not fatal,[3] and, accordingly, it has been held that a

90. Fla —Fidelity & Casualty Co of New York v Magwood 145 So 67, 107 Fla 208

91. Ky —Brewer v Brewer, 105 S W 2d 582, 268 Ky 625

92. Ky —Brewer v Brewer, supra

93. Ala —Majors v Killian, 162 So 289, 230 Ala 531
29 C J p 968 note 19

94. Wis —Roche v Du Bois, 271 N W 84, 223 Wis 438
29 C J p 968 note 17
What law governs
Right of homestead generally see supra § 5
Rights of surviving wife, husband, children, or heirs to homestead see infra §§ 240, 241
Transfer or encumbrance of homestead see supra § 128

95. Wash —Whitworth v McKee, 72 P 1046, 32 Wash 83
29 C J p 968 note 18

96. Mo —Stinson v Call, 63 S W 729, 163 Mo 323
29 C J p 969 note 40.

97. Mo —Smith v Thompson, 69 S W 1040, 169 Mo 553

98. Neb —Hess v Eselin, 194 N W 469, 110 Neb 590

99. Neb —Hess v Eselin, supra

1. Tex —Benson v Mangum, Civ App, 117 S W 2d 169, error refused —Shonsker v Citizens' Loan & Investment Co, Civ App, 8 S W 2d 566

2. U S —In re Robinette, D C Va, 34 F Supp 518
Ala —Carpenter v First Nat Bank, 181 So 239, 236 Ala 213—Coleman v Birmingham Fertilizer Co, 93 So 901, 208 Ala 160
La —Hall v Courtney, 165 So 458, 184 La 80
N C —Sugg v Pollard, 115 S E 153, 184 N C 494
Or —Crim v Thompson, 229 P 916, 112 Or 399
Tex —Weitzman v Lee, Civ App, 262 S W 859
29 C J p 969 note 37.

Assertion in each proceeding
Right to claim homestead exemption is a personal privilege which must be exercised every time that levy is made in each separate proceeding —Willamette Collection & Credit Service v Henry, 7 P 2d 261, 138 Or 460

That owner of homestead was absent from state is not a valid excuse for her failure to claim exemption from sale under execution —Crim v Thompson, 229 P 916, 112 Or 399

3. Ark —Spurlock v Gaikens, 225 S W 17, 146 Ark 50
Fla —Fidelity & Casualty Co of New York v Magwood, 145 So 67, 107 Fla 208
Mich —Fitzsimons v Kane, 222 N W 111, 245 Mich 246
Tenn —Beard v Beard, 10 Tenn App 52
Wis —Wisconsin Mortg & Sec Co v Kriesel, 211 N W 795, 191 Wis 602
29 C J p 955 note 22, p 969 note 41

Failure to assert claim does not create estoppel to assert it later —

debtor's failure to notify a purchaser at the execution sale that the premises are exempt, will not prevent their recovery by him,[4] especially where the intention to make the premises a homestead is manifest,[5] and the purchaser has knowledge of the debtor's homestead rights,[6] that the debtor may in a proper action still assert his homestead right in property levied on and have the levy and all proceedings thereunder adjudged void;[7] and that a debtor, having the right to select a homestead when apprised by the officer of his right to do so, may waive his right to select without losing his right to this exemption.[8] It has been held, however, that, where a homestead right has not been asserted in defense to a bill in aid of an execution and defendant has died and his children have attained full age, there is no obstacle to a sale and levy,[9] and that, where a whole section of land has been levied on under execution, on failure either of the head of the family or his wife to claim the homestead exemption, no presumption of law arises that the debtor claims as his homestead the particular governmental quarter section upon which his dwelling house stands.[10]

§ 211. —— Persons Who May Make Claim

As a general rule a homestead right may be asserted only by those entitled to the right.

It has been declared that only those may claim the homestead exemption who are mentioned in the homestead laws[11] and that no one may assert a homestead claim under the doctrine of subrogation.[12] A homestead exemption may be claimed only in one's own right[13] and only by those having an interest in the homestead property.[14]

Ordinarily the head of the family is the one to assert the homestead right,[15] which may be done in his own name.[16] Under the homestead laws in some jurisdictions, however, the wife of the head of a family has such an interest in the homestead as enables her to intervene and claim the property as exempt or to institute an independent action therefor.[17] So under the several homestead laws it has variously been held that the wife may be permitted to assert the homestead exemption where the husband has abandoned her and his family,[18]

Scofield v Hopkins, 21 N W 259, 61 Wis 370—29 C J p 969 note 49
Estoppel to claim homestead in general see supra §§ 191–195

Homesteaders not appearing

Under court rule, the court could, in mortgage foreclosure suit, determine existence of homestead rights in favor of owners who did not appear—Wisconsin Mortg & Sec Co v Kriesel, 211 N W 795, 191 Wis 602

4. Ark—McKee v Waters, 265 S W 947, 166 Ark 301
29 C J p 969 note 42

5. Wis—Scofield v Hopkins, 21 N W 259, 61 Wis 370

6. Wis—Larson v State Bank of Ogema, 230 N W 132, 201 Wis 313

7. Minn—Bigler v Chamberlin, 176 N W 19, 145 Minn 104
29 C J p 969 note 11

8. Wis—Fischer v Schultz, 74 N W 222 98 Wis 462
29 C J p 969 note 15

9. Mich—Matson v Melchor, 4 N W 200, 42 Mich 477

10. N D—Foogman v Patterson, 83 N W 15, 9 N D 254.

11. Or—Davis v Low, 135 P. 314, 66 Or 599
Persons entitled to homestead see supra §§ 16–28

12. La—Davis v. Loranger, 8 La App 773
Transfer or encumbrance of homestead see supra §§ 123–156

13. Tex—Palm v Chernowsky, 67 S W 165, 28 Tex Civ App 405

Tenant, in action on rental contract, may not claim homestead, in right of third persons, on property in his possession—Fidelity Trust & Mortgage Co v Davis, 155 S E 622, 158 S C 100

14. **Lienholders**

(1) Holder of vendor's lien may claim homestead character of property in suit to remove cloud created by mechanic's lien securing paving costs—Fuller Const Co v Hudson, Tex Civ App 11 S W 2d 541

(2) A lienholder, however, cannot claim a particular part of a tract as homestead except in right of a designation or selection by the homesteader—First Nat Bank v Skidmore, Tex Civ App, 267 S W 1051

Purchasers

It has been held that a purchaser of land constituting part of a homestead may, as against one holding a prior deed of trust, assert that the land constituted a homestead and that the deed of trust was invalid, the right to make such assertion not being personal to the owner of the homestead—Ringle v Waggoner, Tex Civ App, 238 S W 236—McGregor First Nat Bank v Rice-Stix Dry Goods Co, Tex Civ App, 213 S W 344

Judgment creditors

The right to a homestead is a personal privilege, and the owners of judgments cannot assert for the purpose of defeating a prior judgment docketed before their judgments were obtained that it was a mere personal judgment subject to homestead rights not asserted by the judgment debtors themselves—Sugg v Pollard, 115 S E. 153, 184 N C 494.

Holder of a fraudulent deed to homestead could not maintain a suit to cancel deed given on execution sale of the homestead since she had no interest in the subject matter—White v Turner, 155 S W 2d 714 203 Ark 95

15 La—Hammond State Bank & Trust Co v Broderick, 154 So 739, 179 La 693
Tex—Odom v Empire Building & Loan Ass'n, Civ App, 134 S W 2d 1053, error dismissed, judgment correct
29 C J p 970 note 55

16. Ga—Crowley v Freeman, 70 S E 319, 9 Ga App 1

17. Ala—Jackson v Blankenship, 105 So 684, 213 Ala 607
Ga—Wood v Wood, 155 S E 678 171 Ga 389
Tex—Citizens' State Bank of Lindale v Jeffries, Civ App, 2 S W 2d 317, error refused
29 C J p 970 note 58

Separate or community character of property immaterial

The wife has the right by suit to preserve and protect her rights in the homestead, regardless of whether the homestead is her separate property or community property, and in some cases she has this right even where the homestead is the separate property of the husband—Crowder v Crowder, Tex Civ App, 111 S W 2d 1161, error dismissed

18. Ala—Jackson v Blankenship, 105 So 684, 213 Ala 607
La—Reymond v Louisiana Trust & Savings Bank, 153 So 529, 179 La 104.

fails to assert his right of homestead,[19] refuses to assert and protect the homestead exemption,[20] or is absent at the time the homestead is levied on,[21] or where the title to the land is in the wife and her husband has made no claim of homestead rights for the protection of his property[22]

§ 212. —— Time for Making Claim

The claim of homestead should be asserted in apt time, as before levy or sale or at such other time as may be proper under the homestead laws of the particular jurisdiction. Where the homestead right exists without necessity of claim it may be asserted at any time, as after execution sale and in defense of an action to evict the homesteader

By reason of the difference in the statutory provisions in the several jurisdictions, it has been variously held that the claim of homestead must be made in apt time,[23] before levy,[24] when execution is levied;[25] before a sale under execution or order of court is made,[26] that a claim may be asserted after rendition of judgment or decree,[27] or at any time before sale,[28] provided, the right to exemption exists at that time,[29] that the claim may be made after levy[30] or even after a sale,[31] that the right may be asserted before, or at the time of, the levy or within a reasonable time thereafter,[32] that the claim may be made at any time before final order disposing of the proceeds of sale,[33] that the right may be asserted in proceedings brought for possession of the lands constituting homestead,[34] or by notifying the levying officer and one who had garnished the proceeds of the sale of the homestead of

Tex —Crowder v Crowder, Civ App, 111 S W 2d 1161, error dismissed
29 C J p 970 note 59

19. La —Reymond v Louisiana Trust & Savings Bank, 153 So 529, 179 La 104
29 C J p 970 note 60

20. Ky —Bishop v Simpson, 6 S W 2d 253, 224 Ky 289
La —Reymond v Louisiana Trust & Savings Bank, 153 So 529, 179 La 104
29 C J p 970 note 61

21. Iowa —Lowell v Shannon, 15 N W 566, 60 Iowa 713
29 C J p 970 note 62

22 Mo —Richards v Stewart 84 S W 1181, 185 Mo 533—Sherp v Stewart, 84 S W 963, 185 Mo 518

23. N C —Cameron v McDonald, 6 S E 2d 497, 216 N C 712

Prior to proceedings against homestead

The claim need not be made until there is an attempt to subject the homestead to the satisfaction of debts —First Nat Bank of Jackson v Oliver, 150 S W 2d 891, 286 Ky 286

24. Colo —Jones v Olson, 67 P 349, 17 Colo App 144

25 Fla —Barclay v Robertson, 65 So 546, 67 Fla 116
Ohio —Sears v Hanks, 14 Ohio St 298, 84 Am D 378

26. Ala —Majors v Killian, 162 So 289, 230 Ala 531
29 C J p 970 note 69

Claim must be made before sale is ordered

Ala —Rogers v Lackland, 23 So 489, 117 Ala 599
29 C J p 970 note 70

In Louisiana

(1) Ordinarily the claim of homestead exemption must be made before a sale under execution —A M Edwards Co v Hano, 177 So 691, 188 La 632—Andrews v McCreary Lumber Co, 99 So 579, 155 La 730, 33 A L R 608—29 C J p 970 note 69 [a] (1), (2), (6)

(2) But, where a homestead is sold at a judicial sale for a debt against which it is not exempt and a surplus remains, the debtor's claim is that of owner, and his action is timely when brought before the sheriff or the purchaser at judicial sale has paid out the surplus of the proceeds —Reymond v Louisiana Trust & Savings Bank, 153 So 529, 179 La 104—Reymond v Louisiana Trust & Savings Bank, 148 So 663, 177 La 409—29 C J p 970 note 69 [a] (3), (4)

27. Okl - State Nat Bank v Lokey 240 P 101, 112 Okl 82
Utah —Payson Exch Sav Bank v Tietjen, 225 P 598, 63 Utah 321
29 C J p 970 note 71

After judgment of foreclosure

Widow who failed to claim homestead exemption in suit to foreclose mechanic's lien on property prior to entry of foreclosure judgment was not barred from setting up claim, where notice of exemption was given to sheriff before he undertook to sell premises under order of sale and claim was also urged on petition to quash a writ of assistance —Utah Builders' Supply Co v Gardner, 39 P 2d 327, 86 Utah 250, 103 A L R 932, rehearing denied 42 P 2d 989, 86 Utah 257, 103 A L R 932

28. U S —In re Matley, D C Nev, 47 F Supp 558 affirmed, C C A, Myers v Matley, 130 F 2d 775, certiorari granted 63 S Ct 435, 317 U S 621, 87 L Ed ——, affirmed 63 S Ct 780, 318 U S 622 87 L Ed ——
Ala —Coleman v Birmingham Fertilizer Co, 93 So 904, 208 Ala 160
Or —Willamette Collection & Credit Service v Henry, 7 P 2d 261, 138 Or 460—Crim v Thompson, 229 P 916, 112 Or 399
Utah —Utah Builders' Supply Co v Gardner, 42 P 2d 989, 86 Utah 257, 103 A L R 932, denying rehearing 39 P 2d 327, 86 Utah 250, 103 A L R 932
29 C J p 971 note 72

29. Miss —Wood v Bowles, 16 So 414, 92 Miss 843, 131 Am S R 559

30. Iowa —Yost v Devault, 9 Iowa 60

During continuance of execution

Debtor's homestead right in property was not terminated by levy of execution, and petition for establishment under statute could be brought at any time during its continuance, where officer made levy without proceeding to set homestead off —Avery v Davis, 128 A 332, 81 N H 414

31. Ark —Spurlock v Gaikens, 225 S W 17, 146 Ark 50
Ky —Greenhill's Adm'rs v Oppenheimer, 72 S W 2d 1037, 255 Ky 221 —Pinson v Murphy, 295 S W 412, 220 Ky 164
Wis —Larson v State Bank of Ogema, 230 N W 132, 201 Wis 313
29 C J p 971 note 75

The claim may be made after levy, sale, and collection of proceeds of sale —O'Neal v Turney's Ex'x, 300 S W 913, 222 Ky 361

32. Mich —Beecher v Baldy, 7 Mich 488

33 U S —In re Gibson, D C Ky, 33 F Supp 838

34. Ark —Bank of Salem v White, 171 S W 2d 55—McKee v Waters, 265 S W 947, 166 Ark 301—Dean v Cole, 216 S W 308, 141 Ark 177

On demand for possession following sale

Where homestead has been sold under execution for contract debt and sheriff's deed to purchaser has been confirmed, homestead exemption may be asserted when possession is demanded, although interposition of the homestead defense before bringing of possessory action is premature —White v Turner, 155 S W 2d 714, 203 Ark. 95.

the claim of exemption;[35] and that under a bill in aid of execution the court has the power and duty to protect the homestead right even if the claim is not presented until the decree is being reduced to form.[36]

After attachment of proceeds of sale Failure to claim a homestead exemption until after the proceeds of the sale of the homestead were attached is not a waiver of the homestead right where this was the first opportunity claimant had after learning that defendant was taking steps to subject the proceeds to the payment of his claim.[37]

Separate claims of spouses at different times Where immediately after attachment the husband serves notice of a claim of exemption as homestead on the levying officer, the notice is in time and is not rendered insufficient or lessened in force because the wife serves a similar notice after the court has ordered a sale of the attached property.[38]

Application for allotment by creditor Under statutes providing for an allotment of homestead on application of the judgment creditor within a certain time after levy of execution, the judgment creditor's lien ceases if this is not done.[39]

Protection of homestead in judgment or decree The fact that the homestead was not designated before the levy furnishes no ground for setting the levy aside, where the judgment protects the homestead claimant and gives claimant the right to designate it in the manner in which the law permits such designation to be made.[40]

§ 213. —— Form, Requisities, and Sufficiency of Claim

A claim of homestead, in order to be sufficient, must be made in the manner and form prescribed by statute. It should state the nature and grounds of the claim and describe the property.

Whatever form the claim may take, statutory requirements as to what it shall contain should be complied with substantially.[41] The claim should state the nature and grounds of the claim,[42] as that the premises are occupied as a homestead,[43] that claimant has a family[44] of which he or she is the head,[45] and such other matters as are necessary to qualify claimant as a homesteader.[46] The claim should identify the land with reasonable certainty,[47] although it need not describe it fully,[48] and it should also state the date of contracting tiff in execution thereof.[56] In the absence of contracting the debt sought to be enforced so that the law governing the exemption can be ascertained.[49] The debtor, however, need not allege facts showing that the debt in question is not privileged by law from exemption,[50] nor need his claim of homestead include an allegation that the sheriff has levied on the property.[51] An affidavit made after levy averring ownership and occupancy of the land at the date of the affidavit is insufficient.[52]

§ 214. —— Notice and Filing of Claim

Under some homestead laws notice of the debtor's claim should be given to the levying officer and creditor

Under some homestead laws notice of the debtor's claim to a homestead must be given to the levying officer,[53] as by filing the notice with

35 Utah—Hansen v. Mauss, 121 P. 607, 40 Utah 361

36. Mich.—Fitzsimons v. Kane, 222 N.W. 111, 245 Mich. 216

37. Mich.—Holley v. Horton, 129 N.W. 6, 161 Mich. 31

38. Or.—Watson v. Hurlburt, 170 P. 511, 87 Or. 297

39. Cal.—Magneson v. Pacific Mfg. Co., 146 P. 69, 26 Cal.App. 52

40. Tex.—Parker v. Coop, 60 Tex. 111

41. Ala.—Clark v. Spencer, 75 Ala. 19
29 C.J. p. 971 note 87

Claim held sufficient
Homestead exemption claim describing property, giving acreage and value and reciting that it was affiant's "residence and homestead," complied sufficiently with statutory requirements.—J. A. Sloan & Co. v. Fields, 127 So. 816, 221 Ala. 54

42. Ky.—Marshall v. Tully, 235 S.W. 726, 193 Ky. 246

43. Ala.—Blum v. Carter, 63 Ala. 235.—Wilson v. Brown, 58 Ala. 62, 29 Am.R. 727

44. Ala.—Wilson v. Brown, supra
29 C.J. p. 97 note 90

45. La.—Prudential Ins. Co. of America v. Guillory, 151 So. 76, 178 La. 197

46. Ky.—Marshall v. Tully, 235 S.W. 726, 193 Ky. 246

47. Ala.—Blum v. Carter, 63 Ala. 235
29 C.J. p. 971 note 92

48. Ala.—Blum v. Carter, supra.—Andrews v. Melton, 51 Ala. 400

49. Ala.—Block v. Bragg, 68 Ala. 291
29 C.J. p. 971 note 94

50. Ky.—Stumes v. Webb, 11 S.W. 508, 11 Ky.L. 36

51. Or.—Sterrett v. Hurlburt, 275 P. 689, 129 Or. 520, rehearing denied and modified on other grounds 278 P. 986, 129 Or. 520

52. Ark.—Reynolds v. Tenant, 9 S.W. 857, 51 Ark. 84

Ill.—Zander v. Scott, 46 N.E. 2, 165 Ill. 51

53. Or.—Mansfield v. Hill, 107 P. 171, 56 Or. 100, modified on rehearing 108 P. 1007, 56 Or. 400
29 C.J. p. 972 note 98

Sufficiency of notice
(1) Generally.—Rogers v. Kimsey, 135 S.E. 497, 163 Ga. 146.—29 C.J. p. 972 note 98 [a]

(2) Notice signed by husband and wife to sheriff who has levied execution on separate property of wife for her individual debt that husband and wife claim homestead in property is sufficient to require sheriff to take statutory steps for ascertainment of homestead.—Bliss v. White, 272 N.W. 769, 132 Neb. 651

Effect of notice
(1) After the claim of exemption has been filed with the sheriff the latter cannot disregard the claim and sell the property under an execution in which process it is not made to appear that the execution's command is not subject to claim of exemptions.—Wooten v. Jordan, 96

him.[54] The primary purpose of such notice is to apprise the levying officer and creditor of the debtor's homestead right or claim, so that they may proceed accordingly.[55]

Notice to creditor. Under the statutes in some jurisdictions the levying officer, when apprised of the homestead claim, is required to notify the plaintiff in execution thereof.[56] In the absence of contrary statute, however, notice to the levying officer may be regarded as notice to the execution creditor.[57]

§ 215. —— Contest and Determination of Claim

A judgment creditor has a right to contest his debtor's homestead claim to property sought to be sold on execution, and in some jurisdictions the homestead laws make provision for such a contest.

A judgment creditor who desires to subject to execution property of his judgment debtor claimed by the latter to be exempt as his homestead has a right to contest the validity of the homestead claim,[58] and if the statutes do not prescribe the procedure by which such a contest may be instituted the courts will themselves formulate the remedy.[59] It is not the function of the levying officer, however, to determine the controversy between the judgment creditor and his debtor.[60]

In Alabama the statutes make provision for a contest of a homestead claim and for the reaching of property improperly included therein. Such statutes are limited in their application to cases falling within the contemplation of their provisions.[61] As to cases falling within the contemplation of the statutes, there must be a substantial compliance with the statutory requirements as to the time and manner of contesting the homestead claim.[62] An affidavit of contest in the language of the statute will in general be sufficient,[63] even though couched in general terms,[64] and it is not governed by the formal rules of pleading.[65] The sufficiency of the affidavit of contest must be referred to the tribunal from which the process issued,[66] and cannot be passed on by the levying officer.[67] The homestead claimant is entitled to notice of the contest of his claim.[68] Interrogatories may be filed by the creditor.[69]

The affidavit of contest is not a statement of the issue on such contest.[70] The issue is made up under the direction of the judge trying the contest[71] who has large discretionary powers in directing the framing of the issue.[72] The court may admit any

So 196, 209 Ala 293—McLaren v Anderson, 8 So 188, 81 Ala 106

(2) In some jurisdictions, however, the notice given to the levying officer does not necessarily bar the sale —Kaley v Eselin, 188 N W 254, 108 Neb 544

54. Ala—Schuer v King, 13 So 912, 100 Ala 238
29 C J p 972 note 99

55. Neb—Bliss v White, 272 N W 769, 132 Neb 651

56. Ala—Allen v Towns, 8 So 101, 90 Ala 479

57. Since the sheriff is sub modo the agent of the execution creditor, notice to the sheriff of the homestead claim is notice to the creditor —Cobbs-Mitchell Co v McMahan, 289 P 495, 133 Or 191

58. Or—Stewart v Black, 22 P 2d 336 143 Or 291
Wash—Paramount Securities Co v Tasker, 29 P 2d 920, 176 Wash 523 —Traverso v Cerini, 263 P 184, 146 Wash 273
Proceedings to protect and enforce homestead rights in general see infra §§ 226–238

59. Wash—Traverso v Cerini, supra

Particular remedies

(1) As the statute provides no method of determining the validity of a claim of homestead, when it is disputed, the question should be determined in a proper action on issues regularly joined—Kaley v Eselin, 188 N W 254, 108 Neb 544

(2) A rule on the sheriff requiring him to show cause why he should not be required to sell the land levied on is not a proper method of contesting a claim to homestead in property which has been levied on—Corry v Tate, 26 S E 794, 48 S C 548

60. Neb—Wallace v Peterson, 284 N W 866, 136 Neb 39

61. Inapplicable to claims not sued on

Statutory contest of homestead exemption claim has reference to a claim which has become the subject of a suit at law and is inapplicable to the claim of a simple contract creditor—Warley v Patterson, 185 So 891, 237 Ala 126

62. Ala—Farley v Riordon, 72 Ala 128
29 C J p 972 note 7

63. Ala—Crabtree v Kirby, 142 So 32, 225 Ala 20—Pinckard v Freeman, 55 So 503, 172 Ala 333

64. An averment that the claim of exemption is "invalid entirely" is sufficient without setting forth any facts on which such averment is based, since the requirement of the statute that the affidavit shall specify wherein "invalidity or excess consists" has reference only to cases where the affidavit alleges that a homestead claim is invalid in part or is excessive, and not to cases where it alleges entire invalidity —Crabtree v Kirby 142 So 32, 225 Ala 20

65. Ala—Pinckard v Freeman, 55 So 503, 172 Ala 333
29 C J p 972 note 9

66. Ala—McLaren v Anderson, 8 So 188, 81 Ala. 106—Block v Bragg, 68 Ala 291

67. Ala—McLaren v Anderson, 8 So 188, 81 Ala 106—Block v Bragg, 68 Ala 291

68. Ala—Mead v Larkin, 66 Ala 87

69. Interrogatories held not prematurely filed

Ala—Kimball v Cunningham Hardware Co, 78 So 787, 201 Ala 109

Service of a copy of the interrogatories on an attorney who had represented the judgment debtor by filing a demurrer to an affidavit of contest of homestead exemption, and who has since continued to represent such party in such proceeding, is effective—Kimball v Cunningham Hardware Co, supra

70. Ala—Crabtree v Kirby, 142 So 32, 225 Ala 20

71. Ala—Crabtree v Kirby, supra

72. Ala—Emrich v Gilbert Mfg Co 35 So 322, 138 Ala 316.
29 C J p 972 note 12

evidence properly relating to the validity of the exemption claim at the time the lien in question attached[73] The claim of exemption is to be taken as prima facie correct,[74] and the burden of proof is on the levying creditor to show that it is incorrect[75]

The lien is not destroyed during the proceedings, but no sale of the property is permitted until their termination[76]

§ 216. Allotment and Appraisal

a. In general
b. Setting off of homestead by debtor, levying officer, or court
c Appraisal in general
d Jurisdiction

a. In General

Where property out of which a homestead may be claimed is sought to be sold on execution or under other judicial process, it is generally necessary to set apart the homestead before the sale is made

The general rule is that a sale on execution or a judicial sale of property, out of which a homestead may be claimed, without setting apart a homestead for the party entitled thereto is invalid,[77] even though part of the proceeds is paid into court as the value of the homestead[78] However, if a homestead has been set apart under one execution, no allotment is necessary on alias executions issued on the same judgment[79] It has been held that an allotment is not necessary where the tract sold is not a homestead,[80] as where it is not the residence of the debtor;[81] where the debtor plainly is not entitled to a homestead in the premises,[82] as where no homestead was asserted or in existence at the time of the levy and no declaration of intention to claim a homestead had then been filed as required by statute,[83] where the tract sold is within the limits fixed by statute,[84] or where the sale is made to preserve a valid encumbrance on the premises,[85] especially where the rights of the debtor are being adequately protected[86]

Where docketing of the judgment in the county where the land lies is not a prerequisite to its enforcement by execution, under principles discussed in Executions § 64, the fact that the judgment was not so docketed is not fatal to the allotment of a homestead to the debtor in proceedings under an execution[87]

Notice of application for allotment. The creditor against whose debt the exemption is asserted has a right to be notified of the debtor's application for an allotment of homestead[88] Even general creditors are sometimes given the same right by statute[89] If the notice is not given as required by statute, the assignment of homestead is subject to attack by creditors not notified[90]

Survey and plat In some states a survey and plat are necessary steps in the allotment under some circumstances[91]

Recording of allotment Where the statute so provides, the instrument in which the allotment is made must be recorded[92]

73 Ala—Emrich v Gilbert Mfg Co, supra
29 C J p 972 note 12

74. Ala—Planters' Chemical & Oil Co v Graham, 80 So 866, 202 Ala 482
29 C J p 972 note 13

75 Ala—Murphy v Vaughan, 147 So 101, 226 Ala 461—Bailey v D R Dunlap Mercantile Co, 35 So 451, 138 Ala 415

76. Ala—Block v Bragg, 68 Ala 291

77. Ill—Brown v Nelson 41 N E 2d 499, 379 Ill 371, reversing 33 N E 2d 648, 309 Ill App 557
29 C J p 967 note 92
Allotment before levy see supra § 48

Extent of invalidity

(1) A sale without setting off the homestead as required by statute is generally regarded as void - Kaley v Eselin, 188 N W 251, 108 Neb 514—29 C J p 967 note 92

(2) In some jurisdictions, however, it is not necessarily void—Leupold v Krause, 95 Ill 440

(3) It is merely voidable—Newman v Franklin, 28 N W 579, 69 Iowa 244—29 C J p 967 note 95

(4) And it has been characterized as irregular—Fairbanks v Devereaux, 48 Vt 550

Power of court to grant redress

Where judgment creditor failed to set off to judgment debtors their homestead estate before execution sale of debtors' property but sheriff's deed had not been issued and redemption period had not expired at time debtors made motion to set aside the sale, the court which ordered the execution to issue had authority to grant redress for such error—Brown v Nelson, 41 N E 2d 499, 379 Ill 371, reversing 33 N E 2d 648, 309 Ill App 557

78. N C—Oakley v Van Noppen, 2 S E 663, 96 N C 247

79 Ala - Jones v De Graffenreid, 60 Ala 115
29 C J p 972 note 22

80. Ill—Miller v McAllister, 64 N E 254, 197 Ill 72
29 C J p 972 note 23

81. Ill—Gardner v Eberhart, 82 Ill 316—Linton v Quimby, 57 Ill 271

82. Or—Cabler v Alexander, 224 P 1076, 111 Or 257
29 C J p 972 note 25

83. Wash—Scott v Gulberson, 129 P 886, 72 Wash 36

84. Ga—Rogers v Hawkins, 20 Ga 200

85. N C—Hinson v Adrian, 92 N C 121

86 N C—Hinson v Adrian, supra

87. N C—Cox v Boyden, 69 S E 504, 153 N C 522

88 S C—Ex parte Lummus Cotton Gin Co, 106 S E 861, 116 S C 64
29 C J p 972 note 1

89. S C -Nixon Grocery Co v Spann, 94 S E 531, 108 S C 329

90. U S—McCrae v Felder, C C A S C, 12 F 2d 554
29 C J p 972 note 3

91 Iowa—Lutz v Ristine, 112 N W 818, 136 Iowa 684
29 C J p 975 note 89

92 Recording as condition precedent to exemption from other debts

Recording of homestead allotment set apart in adversary proceedings is condition precedent to exemption

Unauthorized allotment. If a debtor succeeds in securing an allotment of homestead to which he is not entitled, it may be levied on and sold.[93]

b. Setting Off of Homestead by Debtor, Levying Officer, or Court

In some jurisdictions it is the duty of the levying officer to set off the homestead Under some statutes the debtor may select the homestead in the first instance, and if he fails to do so the court may make the selection.

Where the homestead is a part of a larger tract than may be claimed as exempt, it is the duty of the levying officer, under the homestead laws in some jurisdictions, to set apart a homestead before making the sale, irrespective of any application therefor by claimant[94] Under some homestead laws the debtor has the right to select the homestead;[95] and under these statutes the levying officer should set off the homestead selected by the debtor,[96] unless some other portion of the property is better adapted to homestead purposes and uses,[97] and if the debtor fails to make the selection it has been held that it may be made by the court[98] or application of the creditor[99] or by the officer having charge of the writ.[1]

Expenses Except where the creditor's claim is enforceable against the homestead itself,[2] the expenses of an official setting off a homestead are payable by the creditor[3] and usually should be tendered or paid before the officer can be compelled to act[4]

c. Appraisal in General

Ordinarily there should be an appraisal prior to sale of land in which homestead is claimed unless it is clear that the claim is unfounded or that the value of the land is not in excess of the homestead exemption

Under statutes limiting the homestead exemption to land not exceeding a specified sum in value, an appraisal is usually a prerequisite to a sale of land in which a homestead exemption is claimed,[5] unless the debtor's demand for homestead is manifestly unfounded[6] Under some statutes the creditor must apply for an appraisement,[7] but under some stat-

from debts other than those under execution for which allotment was made —McCrae v Felder, C C A S C, 12 F 2d 554

93. Mass —Bemis v Driscoll, 101 Mass 418

94. Tenn —Beard v Beard, 10 Tenn App 52
29 C J p 968 note 24

Effect of failure to perform duty
The failure of the officer making the sale to observe statutory requirements relative to setting apart of the homestead will not deprive the homestead claimant of his rights
Ky —Greenhill's Adm'rs v Oppenheimer, 72 S W 2d 1037, 255 Ky 221
Tenn —Beard v Beard, 10 Tenn App 52

Where no homestead exists the sheriff has no power to set aside a homestead —Dirks v Venenga, 292 N W 841, 228 Iowa 557

95. Okl —Finerty v First Nat Bank, 218 P 859, 92 Okl 102, 32 A L R 1326
Tex —White v Glenn, Civ App, 138 S W 2d 914, error dismissed, judgment correct

Duty of officer
Under some statutes the levying officer should apprise the debtor of his right to select his homestead — Stinson v Call, 63 S W 729, 163 Mo 323 - 29 C J p 969 note 40

Acts held not to constitute selection by debtor —Rossing v Larson, 202 N W 711, 162 Minn 176

Conclusiveness of selection
Judgment debtor's selection of land **to be allotted to him as homestead,** made before appraiser's allotment, is binding on him — Citizens' Bank of Yancey v Robinson, 161 S E 487, 201 N C 796

If the creditor is dissatisfied with the debtor's selection, the officer should have a survey made, and set off the exempt portion in a compact form, including the dwelling house and its appurtenances
Minn —Rossing v Larson, 202 N W 711, 162 Minn 176
Wis —Myers v Ford, 22 Wis 139— Herrick v Graves, 16 Wis 157

Right of creditors to contest selection
Where landowners, within statutory time after levy of execution, presented to sheriff selection of homestead, which was ignored, attaching creditors could not contest selection so made - Rossing v Larson, 202 N W 711, 162 Minn 176

96. Ky —Bennett v. Baird, 81 Ky 554
Wis —Myers v Ford, 22 Wis 139

97. Ky —Bennett v Baird, 81 Ky 554
29 C J p 969 note 28

98. Iowa —Townsend v Blanchard, 90 N W 519, 117 Iowa 36
Okl —Finerty v First Nat Bank, 218 P 859, 92 Okl 102, 32 A L R 1326
Tex —Reed v Mahone, Civ App, 281 S W 277
29 C J p 969 note 30.

99. Tex —White v Glenn, Civ App, 138 S W 2d 914, error dismissed, judgment correct.

1. Minn —Hook v Northwest Thresher Co, 98 N W. 463, 91 Minn 482

2. N C —McCanless v Flinchum, 4 S E 359, 98 N C 358

3. N C —Lute v Reilly, 65 N C 20
29 C J p 969 note 32

4. N C —Vannoy v Haymore, 71 N C 128
S C —King v McCarley, 10 S E 1075, 32 S C 264

5. Cal —Brandon v Faria, 279 P 192, 99 Cal App 591
Miss —Willis v Allen, 95 So 435, 131 Miss 264
29 C J p 973 note 32

Effect of admissions as to value
Where appraisal was asked if homestead exceeded value of homestead exemption, admissions as to value did not bind trial court, and appointment of appraisers was proper —Nelsen v McKeen, 5 P 2d 333, 165 Wash 274

Where an appraisal would serve no useful purpose, as where the property is indivisible, no appraisal is necessary under some homestead statutes
Cal —Martin v Hildebrand, 212 P 618, 190 Cal 369
Ky — Gibbs v Dems, 139 S W 2d 430, 282 Ky 625—Paintsville Nat Bank v Conley, 78 S W 2d 313, 257 Ky 425

6. Mo —Shindler v Givens, 63 Mo 394

7. Cal —Graham v Hunt, 7 P 2d 186, 119 Cal App 586
29 C J p 973 note 35

Failure of a creditor to ask appraisal of property when the debtor selects his homestead may estop the former later to question the matter of value —Wendler v. Brenneman, 7 Alaska 13.

utes the right to ask for an appraisement does not apply in the case of a levy merely under a writ of attachment,[8] or in an action or suit in the nature of a creditors' bill[9]

The petition of a creditor for appraisement must comply with statutory requirements[10] It must be verified[11] and filed[12] within the time prescribed by statute,[13] and notice must be given to the homestead claimant in the manner provided by statute[14] While the homestead claimant is not required to file pleadings in answer to the creditor's petition,[15] he may do so,[16] and he is entitled to a hearing on the petition[17] No formal trial, however, is required,[18] and if the court finds that the value of the property does not exceed the exemption a refusal to appoint appraisers is proper[19]

Defects and irregularities Mere irregularities will not necessarily render an appraisal and allotment invalid,[20] and even if an appraisement is defective it will not invalidate a prior levy[21]

Irregularities may be waived by long acquiescence in the appraisement and allotment,[22] or by failure to question the competency of appraisers before they enter on their duties,[23] but no such result follows from a creditor's acceptance of proceeds from the sale of all his debtor's property, excluding the homestead,[24] or from a purchaser at the execution sale receiving a sheriff's deed in which the officer describes the land as the debtor's homestead[25]

Appraisal in absence of debtor. Where under the statute the debtor is entitled to select the homestead it has been held that an appraisal and allotment made in his absence not due to any fault of his own is void[26]

d. Jurisdiction

No court or authority other than that designated by statute may exercise original jurisdiction in the matter of setting apart homestead premises

Jurisdiction in respect of allotment or setting apart of homestead premises is largely a matter of statutory regulation, and no court or authority other than that designated by statute may exercise original jurisdiction in this matter[27] In some jurisdictions the statutes vest chancery courts with jurisdiction in respect of setting apart and allotting of homestead[28]

As incidental relief. It has been held, where a court has acquired jurisdiction of a cause, that it may allot homestead where such allotment is a necessary incident to the proper exercise of jurisdiction already acquired on other grounds,[29] but it is also held that, where the court has jurisdiction to set apart the homestead as such necessary incident, it cannot exercise the power to allot homestead unless it has acquired jurisdiction on other grounds[30]

8. Mo—State v Mason, 15 Mo App 141

9. Utah—Crosby v Anderson, 162 P 75, 19 Utah 167
29 C J p 973 note 37

10. Cal—Graham v Hunt, 7 P 2d 186, 119 Cal App 586

11. Cal—Graham v Hunt, supra

12. Cal—Graham v Hunt, supra

13. Effect of failure to comply with statute
Failure of judgment creditor to perfect its levy of execution by filing of petition for appointment of appraisers of debtor's homestead property within sixty days after the levy has the effect of extinguishing the lien of execution and precludes any subsequent levy of execution against the homestead property based upon the same judgment—Arighi v Rule & Sons, 107 P 2d 970 41 Cal App 2d 852—Palen v Palen, 83 P 2d 36, 28 Cal App 2d 602

14. Cal—Graham v Hunt, 7 P 2d 186, 119 Cal App 586

15. Cal—Stockton Savings & Loan Bank v Mello, 256 P 202, 201 Cal 194

16 It is not error to allow the homestead claimant to file an answer and contest the question whether the value of the homestead exceeds the amount of the exemption before appraisers are appointed—France v Hohnbaum, 102 N W 75, 73 Neb 70, motion overruled 104 N W 865, 73 Neb 70

17. Cal—Stockton Savings & Loan Bank v Mello, 256 P 202 201 Cal 194—Brandon v Faria 279 P 192 99 Cal App 591

Burden of proof is on creditor, petitioning for appraisement of debtor's homestead, to show value exceeds exemption—Stockton Savings & Loan Bank v Mello, 256 P 202, 201 Cal 194

18. Cal—Brandon v Faria, 279 P 192, 99 Cal App 591

19. Neb—France v Hohnbaum, 102 N W 75, 73 Neb 70 motion overruled 104 N W 865, 73 Neb 70

20 N C—Carstarphen v Carstarphen, 137 S E 658, 193 N C 541
29 C J p 975 note 10

21 Mo—Straat v Rinkle, 16 Mo App 115

22. N C—Cox v Boyden, 69 S E 504, 153 N C 522
29 C J p 975 note 13

23 N C—Burton v Spiers 87 N C 87

24 S C—Charles v Charles 13 S C 385 Douglass v Craig, 13 S C 371

25. S C—Carrigan v Bozeman, 13 S C 376

26. N C McKeithen v Blue, 55 S E 285 142 N C 360

27. Ill—Lindsay v Richards, 163 N E 101 331 Ill 483
S C—Morris v Smoak, 171 S E 607, 171 S C 108
29 C J p 973 note 15
Jurisdiction of proceedings for
Enforcement and protection of homestead rights generally see infra § 226
Setting apart and protection of rights of surviving spouse see infra § 279

28. Fla—McMichael v. Grady, 15 So 765, 34 Fla 219
29 C J p 973 note 46

29. Tenn—Galyon v Gilmore, 28 S W 301, 93 Tenn 671
29 C J p 973 note 47

30. Tenn—Galyon v Gilmore, supra
29 C J p 973 note 48.

§ 217. —— Selection, Appointment, and Competency of Appraisers

Appraisers must be selected and appointed in the manner prescribed by statute. They should be competent and disinterested persons.

The officer selecting appraisers represents all parties in interest and need not consult the debtor respecting the appointment,[31] although he may designate persons agreed on by both parties to the suit[32] Sometimes the appraisal and allotment are made by a commissioner[33] or commissioners[34] appointed by the court.

Competency and qualification The commissioners or appraisers must stand neutral between the parties in interest,[35] and this is so although the statute does not specifically so provide[36] Close kinship to either of the parties disqualifies an appraiser,[37] but remote kinship does not have this effect[38] An appraiser is not disqualified by the fact that previous to his appointment by the sheriff he was selected by one of the parties[39] The commissioners or appraisers generally should be freeholders[40] or householders,[41] and familiar with the property, and, if it is farming land, with agriculture[42] They must be duly sworn[43] by any officer competent to administer oaths, although not necessarily by the one who summons them[44]

Remedy for incompetency In case an appointee is incompetent or disqualified, either party may move the court to vacate his appointment,[45] or, if an appraisal and allotment have been made, to set them aside[46]

In case of vacancy caused by the absence of one of the appraisers, the court may appoint another without further notice.[47]

§ 218. —— Powers, Duties, and Determination of Appraisers

a In general
b Description of homestead

a. In General

It is the function of commissioners or appraisers to set off the homestead This should be done in the manner prescribed by law

The extent of the authority of the commissioners or appraisers is to set off the homestead It is not within their province to attempt to determine the rights of the respective parties who may be interested in the property or the proceeds thereof,[48] these matters being for the determination of the court[49] The fact that the appraisers failed to proceed according to the statutes does not deprive claimant of his right to homestead, as this right is safeguarded by the constitution and statutes enacted thereunder,[50] after a futile attempt to set off homestead this right is as inviolate as it was before[51]

Only so much land should be set apart as exempt as is permitted by law[52] whether or not there is opposition[53] In setting out the homestead it should be carved only from the tract levied on,[54] and if it is taken from different parcels of farming land the several tracts should be thrown together if practicable[55] In some jurisdictions the assignment may be of unencumbered rather than encumbered land,[56] although the latter contains the debtor's dwelling

31. Ill—Cummings v Burleson, 78 Ill 281

32 Ill—Dillman v Will County Nat Bank, 28 N E 946, 139 Ill 269, affirming 36 Ill App 272

33. Ill—Quinn v People, 34 N E 118, 146 Ill 275

34. Ky—Riley v Smith 5 S W 869, 9 Ky L 615
Mass—Pittsfield Bank v Howk, 4 Allen 317

35 Tenn—Wilson v Lowe, 7 Coldw 153
29 C J p 973 note 54

36 Ill—Pickford v Harrison, 160 Ill App 207

37. Tenn—Wilson v. Lowe, 7 Coldw 153

38. N C—Chambers v Penland, 74 N C 340

39. Miss—Edwards Bros v Bilbo, 103 So 209, 138 Miss 484.

40. Tenn—Wilson v Lowe, 7 Coldw 153
29 C J p 974 note 58

41. Ill—Newman v Willitts, 78 Ill 397—Mooney v Moriarty, 36 Ill App 175

42. Miss—Wiseman v Parker, 19 So 102, 73 Miss 378

43. N C—Coble v Thom, 72 N C 121—Smith v Hunt, 68 N C 482

44 Ill—Dillman v Will County Nat Bank, 28 N E 946, 139 Ill 269, affirming 36 Ill App 272—Dillman v Will County, 27 N E 1090, 138 Ill 282, affirming 38 Ill App 566

45. Cal—Harrier v Bassford, 78 P 1038 145 Cal 529

46. Statutory remedy
If an appointee is not qualified or is prejudiced, the injured person's remedy, under the statute, is by affidavit of incorrect allotment—Edwards Bros v Bilbo, 103 So 209, 138 Miss 484

47. Cal—Harrier v Bassford, 78 P 1038, 145 Cal 529

48 Iowa—McCrackin v Weitzell, 29 N W 624, 70 Iowa 723
29 C J p 971 note 66

49. Iowa—McCrackin v Weitzell, supra
29 C J p 974 note 67

50. S C—Nixon Grocery Co v Spann, 94 S E 541, 108 S C 329
29 C J p 974 note 68

51. S C—Nixon Grocery Co v Spann, supra

52 Cal—In re Liggett 49 P 211, 117 Cal 352, 59 Am S R 190
Amount and extent of homestead generally see supra §§ 56 62

53. Cal—In re Liggett, supra

54. Mo—Shacklett v Scott, 23 Mo App 322

55. Ky—Burns v Hoffman, 3 Ky L 696

56. N C—Flora v. Robbins, 93 N C 38.

house [57] If the owner surveys and selects a larger quantity than he should, and refuses to designate what portion is to be treated as excess, the court, by its proper officers, may cut off such excess from whatever part it sees fit.[58]

If the homestead claimant is a life tenant of the whole tract, an amount may be set off to which the fee-simple title is equal to the statutory exemption [59]

Homestead of tenant in common The homestead interest in lands owned by a debtor as tenant in common with others may not be set off, as it is impossible for the appraisers to obey the direction of the statute to set off the homestead by metes and bounds and appraisers lack power to effect a partition [60]

Subjecting to easement The homestead may be subjected to a perpetual easement for passage to and from the residue of the tract, if this can be done without injury to the homestead right [61]

Value of homestead The value of the premises in which the homestead is claimed, when material, should be determined with exactness,[62] although it has been said that the appraisers should not hold to a fractional nicety in estimating the value of the property [63] The value of buildings erected on the land should be considered [64] According to some decisions encumbrances existing against the land when the debt in question is reduced to judgment should be taken into account by the appraisers in setting apart the homestead,[65] and if this is not done the remedy of an execution debtor is to proceed by motion in the same cause to have it done,[66] but the view has been taken that this is solely a function of the court,[67] that appraisers appointed to set apart homestead cannot take any notice of liens existing against the property,[68] and that if the appraisers considered mortgages on the property in their appraisal the proceeding is void [69] The value of the homestead is to be estimated at the time of making the claim, which must be at the time of or after a levy and before sale [70]

b. Description of Homestead

The premises set apart as a homestead should be properly described.

It has been held that any description of the land set apart as a homestead which will enable it to be located is sufficient, even though the boundaries are not given as accurately as possible [71] However, at least this much is necessary. An assignment of homestead is void for uncertainty that does not describe the homestead by metes and bounds or give any description by which it can be defined [72] Under some homestead provisions it has been held to be the duty of the appraisers, when possible and feasible, to set off the homestead by metes and bounds [73] However, a statute which requires the homestead to be fixed by metes and bounds applies only to lands held in severalty which are capable of such a description,[74] and if the land cannot be described by metes and bounds any description which is sufficient to identify it will suffice [75]

§ 219. —— Report and Proceedings Thereon

a In general
b Approval, setting aside, and reappraisal

a. In General

Ordinarily the appraisers must report their action to the court or other statutory authority The report must comply with statutory requirements. Ordinarily it need not be recorded

The appraisers usually are required by statute to report their action to the court, or other statutory

57 N C—Flora v Robbins, supra

58. Tex—Robb v. Robb, Civ App, 62 S W 125

59 Ohio- Kerns v Linden, 23 Ohio Cir Ct 162

60. S C—Eaddy v Wall, 190 S E 197, 183 S C 229—Burton v English, 121 S E 782, 128 S C 332

61. Mo—Schaeffer v. Beldsmeier, 9 Mo App 438

62. Cal—Gary v. Eastabrook, 6 Cal 457

63. Ala—Pomroy v. Bunting, 42 Ala 250
29 C J p 974 note 76

64. N C—Ray v Thornton, 95 N C 571
29 C J p 974 note 77
Determination of value in general see supra § 62.

65. Mo—Houf v Brown, 71 S W 125 171 Mo 207
29 C J p 974 note 78
Determination of value in general see supra § 62

66. Mo—Meyer v Nickerson, 14 S W 188, 101 Mo 184

67. S C—Nixon Grocery Co v Spann 94 S E 531, 108 S C 329

68. S C—Harrison v. Caudle, 139 S E 812 141 S C 107
Liens regarded as not existing
The homestead should be allotted subject to, and burdened with, prior encumbrances as though they did not exist—Miller v Little 194 S E 92, 212 N C 612—Crow v Morgan 185 S E 668, 210 N C 153—Virginia-Carolina Chemical Corporation v. Stuart, 157 S E 608, 200 N C. 490.

69 S C—Nixon Grocery Co v Spann 94 S E 531 108 S C 329
29 C J p 974 note 81

70 Mich—Herschfeldt v George, 6 Mich 156
29 C J p 974 note 82

71. N C—Ray v Thornton, 95 N C 571
29 C J p 975 note 90

72 N C—Littlejohn v Egerton, 77 N C 379

73. N C—Green v Summey, 80 N C 187
29 C J p 975 note 96

74. N C—Kelly v McLeod, 81 S E 455, 165 N C 382—Ray v Thornton, 95 N C 571

75. N C—Kelly v McLeod 81 S E 455, 165 N C 382—Ray v Thornton, 95 N C 571.

authority, which thereupon confirms it or sets it aside.[76]

Requisites of report in general. While the report should comply with statutory requirements,[77] mere irregularities will not invalidate it[78] Thus the omission of appraisers to assert in their report the date of allotment is not fatal,[79] and it is not a fatal irregularity that the attorney of the creditor wrote the appraiser's report[80]

Recording report. Statutory provisions for recording the report are directory only, when the statute also provides for filing the report with the judgment roll in the action brought against the debtor, in which action the homestead is claimed and secured[81]

Second report and allotment When a homestead has been allotted, the report has been registered, and the time for filing exceptions has passed, a second report and allotment must be treated as void, even though the second report may be under a judgment docketed after the first report[82]

b. Approval, Setting Aside, and Reappraisal

(1) In general
(2) Proceedings
(3) Effect of approval or of setting aside; reappraisement

(1) In General

When a report allotting homestead is presented to the court, it may approve the report or, for good cause, set it aside and direct a reallotment

When a report allotting homestead is presented to the court it may approve the report,[83] or, where there is good cause to do so, it may set the report aside and direct a reallotment,[84] or it may itself fix the amount of the allotment[85] It has been held that good cause for setting the report aside is shown where it appears that the appraisers were incompetent or not duly qualified,[86] that the appraisers set off two tracts of the statutory size instead of one,[87] that their valuation of the premises is grossly excessive or inadequate,[88] or that the allotment is void for uncertainty[89] Ordinarily, however, the court will not disturb the sworn report of commissioners in the absence of some element of fraud,[90] or serious mistake on their part,[91] or some substantial defect in the proceedings[92] The fact that the homestead might have been allotted so that it would be more convenient for the claimant constitutes no ground for setting aside the report[93]

76. Mo—Childers v Pickenpaugh, 118 S W 478, 219 Mo 455
29 C J p 975 note 2

To what court report made
Where a judgment obtained in one county was docketed in another county, a report to the court in which the judgment was docketed has been held sufficient—Crouch v. Crouch, 76 S E 482, 160 N C 447

Property not divisible
Where the appraisers find that the premises cannot be divided so as to set off the homestead without injury to the remainder, they must make return of their appraisal together with such finding—Nixon Grocery Co v Spann, 94 S E 531, 108 S C 329

77. Report by majority held sufficient
S C—Bleckley v Shirley, 36 S E 503, 58 S C 52—Carolina Sav Bank v Evans, 6 S E 321, 28 S C 521

Setting apart personalty
In some states the report should set apart the personal property of the debtor which is exempt—Bleckley v Shirley 36 S E 503, 58 S C 52

78. N C—Beavans v Goodrich, 3 S E 516, 98 N C 217

79. N C—Beavans v. Goodrich, supra

80. Ill—Dillman v Will County Nat Bank, 28 N E 946, 139 Ill 269, affirming 36 Ill App 272.

81. N C—Carstarphen v Carstarphen, 137 S E 658, 193 N C 541
29 C J p 975 note 6

82. N C—Thornton v Vanstory, 12 S E 203, 107 N C 331

83. An approval may be shown by an order that the report be received and recorded, where no exceptions have been filed—Dossey v Pitman, 2 So 443, 81 Ala 381—29 C J p 977 note 55

84. Tenn—Trenton Wholesale Grocery Co v Arnold, 126 S W 2d 364, 23 Tenn App 29
29 C J p 976 note 21

This may be done any number of times in analogy to the granting of new trials—Kerchner v Singletary, 15 S C 535

85 Ky—Paintsville Nat Bank v Conley, 78 S W 2d 313, 257 Ky 425—Mount v Fourth Street Bank, 161 S W 220, 156 Ky 503

86. Miss—Edwards Bros v Bilbo, 107 So 209, 138 Miss 484
29 C J p 976 note 23

87 Miss—Ferguson v. Ferguson, 5 So 514

88. Ky—McMillan, Hazen & Co v Noe, 270 S W 799, 208 Ky 314

The report of appraisers is not conclusive on the question of value as against a direct proceeding for a revaluation—Schaeffer v Beldsmeier, 9 Mo App 438—29 C J. p 977 note 48

A mere mistake in judgment on the part of the appraisers on the question of value, however, is not ground for disturbing their allotment of homestead—Gowdy v Johnson 47 S W 624, 104 Ky 648 20 Ky L 997, 44 L R A 400—29 C J p 977 note 49

89. N C—Coble v Thom, 72 N C 121
29 C J p 976 note 25

90. Ky—Tully v Trimble, 193 S W 659, 175 Ky 30
29 C J p 976 note 41

91 Ky—Tully v Trimble, supra

92. N C—Smith v. Hunt, 68 N C. 482

Disregarding former decree fixing value as substantial error
Where former decree fixed the value of land and improvements sought to be set aside as homestead in an amount in excess of one thousand dollars chancellor was in error in accepting commissioners' report fixing the value of the land at less than one thousand dollars, and should have sustained exceptions thereto and appointed new commissioners with specific directions that former decree had fixed value of land in excess of one thousand dollars—Trenton Wholesale Grocery Co v. Arnold 126 S W 2d 364, 23 Tenn App 29

93. N C.—Ray v. Thornton, 95 N C 571.

(2) Proceedings

Either party may apply by motion to have a report allotting homestead set aside. The application must comply with statutory requirements The parties are entitled to a hearing on the application, and usually the court's ruling is subject to review

Either party may in a proper case apply by motion[94] or otherwise as provided by law[95] to have the report of appraisers or commissioners set aside and a new appraisement and allotment made The application must be made in strict conformity with the requirements of the statute[96] It must be filed within the time prescribed by statute,[97] or within a reasonable time, if no time is fixed by statute[98] If the debtor objects to the value stated in the report he should except at the time[99] and cannot afterward show on a claim for further exemption that the property assigned was not of the value stated in the return[1]

Sufficiency of allegations, exceptions The application must allege facts sufficient to bring the applicant within the scope of the statute permitting it[2] Exceptions to the report of appraisers may be filed in an action wherein a judgment has been rendered against the debtor by a creditor who has a suit then pending[3] Exceptions must set out the facts on which they are based[4]

Filing and notice of exceptions Ordinarily exceptions must be filed, personal service on the adverse party being insufficient[5] If a dissatisfied party has filed exceptions and they have been placed on the court calendar a reasonable time before the commencement of the next term, no notice of such filing need be given to the adversary[6]

Notice of trial It has been held that the filing of exceptions to the report will constitute sufficient notice of trial[7]

Hearing As the duty of appraisers is confined to determining value and allotting homestead bounds, as explained supra § 218, these are the only questions presented to the court on a hearing of objections to the appraisers' report,[8] and the equities of the parties will not be adjudicated by the court on such hearing[9]

Under some statutes questions arising on exceptions must be tried by the court on evidence adduced and testimony taken in open court[10] One who excepts to the report of commissioners setting off to her as homestead only part of a tract claimed on the ground that the value of the entire tract did not exceed the statutory exemption may give evidence as to the value[11] The court in passing on a report need not hear evidence showing an unwise division of the land, where the facts sought to be proved would not warrant a recommittal of the report[12]

Review Where a review by appeal or otherwise is allowed from the approval or disapproval of a report of appraisers, the rules governing review in courts of last resort ordinarily are controlling[13] Accordingly all presumptions are indulged in favor of the regularity of the appraisers' appointment and qualifications,[14] and, where proof of value of the premises is conflicting, the judgment of the lower court refusing to interfere with the appraisers' valuation will not be disturbed,[15] nor will the appellate court consider an exception to the report in the absence of facts in the record supporting the objection[16]

(3) Effect of Approval or of Setting Aside, Reappraisement

An approval of a report allotting homestead fixes the homestead limits A disapproval nullifies the appraisers' action If reappraisement is ordered, new appraisers will be appointed

When exceptions are overruled and the report of

94. Cal—Harrier v Basford 75 P 1038 145 Cal 529
Miss—Ferguson v Ferguson, 5 So 514

95. N C—Hartman v Spiers, 94 N C 150
29 C J p 976 note 19

96. N C—Hartman v Spiers supra —Heptinstall v Perry, 76 N C 190

97. N C—Hartman v Spiers, 94 N C 150
29 C J p 976 note 27

98. Ky—Wood v Corley, 43 S W 235, 19 Ky L 1307
29 C J p 976 note 28

99. S C—Globe Phosphate Co v Pinson, 29 S E 549, 52 S C 185

1. S C—Globe Phosphate Co v Pinson, supra

2. Mo—Fenwick v Wheatley, 23 Mo App 641

3. S C—In re Wylie, 41 S E 320, 63 S C 214

4. S C—Bleckley v Shirley, 36 S E 503, 58 S C 52

5. S C—Ex parte Ransey, 32 S E 522, 54 S C 517
29 C J p 976 notes 34, 35

6. S C—Bleckley v Shirley, 36 S E 503 58 S C 52
29 C J p 976 note 36

7. S C—Bleckley v Shirley, supra
29 C J p 976 note 37

8 N C—Aiken v Gardner, 12 S E 250, 107 N C 236—Ray v Thornton, 95 N C 571

9. N C—Aiken v Gardner, 12 S E 250 107 N C 236—Ray v Thornton, 95 N C 571

10. S C—Bleckley v Shirley, 36 S E 503, 58 S C 52

Evidence held sufficient to show undervaluation—McMillan, Hazen & Co v Noe 270 S W 799, 208 Ky 314

11. Ky—Hogan v Hogan, 44 S W 953 19 Ky L 1960

12. Mass—Warren v Greenwood, 121 Mass 112

13. S C—Nance v Hill, 1 S E 897, 26 S C 227

14. S C—Nance v Hill, supra

15. Ky—Ruggles v Robinson, 57 S W 619, 22 Ky L 437

16. S C—Bleckley v Shirley, 36 S E 503, 58 S C 52.

commissioners or appraisers allotting homestead is confirmed, the right to the homestead is complete,[17] and the homestead limits become fixed.[18] On the other hand, when the report is set aside the debtor is left where he was before the appraisers' action.[19]

Reappraisement If a reappraisement is ordered, the new appraisers may be appointed by the court at the suggestion of the judgment creditor and without notice to the debtor.[20]

§ 220. —— Operation and Effect

a In general
b Collateral attack

a. In General

An assignment of homestead has the effect of designating the homestead. In some jurisdictions the assignment is conclusive even though there is a subsequent increase or decrease in the value of the homestead assigned

Until the conveyance of the homestead is complete it is not too late for another judgment creditor to object and require a reassignment.[21] Setting apart the homestead does not of itself discharge the property from liability for debts where a return and record of the allotment proceedings are required,[22] nor does the allotment, when completed, determine title or create the exemption, since it is only a method of designating the homestead and ascertaining the excess.[23] Where a mortgaged homestead is levied on and appraised, necessarily subject to prior recorded encumbrances, it will be inferred that the mortgages were considered both on the appraisal and at the sale.[24]

Conclusiveness of assignment in general The debtor, failing to except to, or appeal from, the assignment, is estopped to question it,[25] nor can a creditor levy an execution thereafter against the land or demand a reassignment of homestead,[26] unless the allotment proceedings were under a void statute[27] or the conditions existing when they were had have since materially changed.[28]

Increase or decrease in value of homestead allotted Where a homestead has been assigned to a debtor and subsequently it increases in value so as to be worth more than the statutory limit, it may be reassigned in some jurisdictions and the excess applied to the payment of the homesteader's debts,[29] and in these jurisdictions, if the assigned homestead depreciates in value, the homesteader may add to it and claim a revaluation.[30] In other jurisdictions, however, the rule is that no reallotment of homestead is allowable where no fraud or want of jurisdiction appears and there is no specific statutory provision sanctioning it, even though the premises have, since the original allotment, increased[31] or decreased[32] in value.

b. Collateral Attack

Usually a homestead allotment is not open to collateral attack except where it is absolutely void

As a general rule, neither the debtor nor the creditor can attack the appraisal and allotment by collateral proceedings, but should address objections directly and in the same proceeding to the court receiving the report.[33] Nevertheless, where the court or body assigning homestead is without jurisdiction of the subject matter, the attempted adjudication is void and subject to collateral attack,[34] and it has been held that a proceeding by a judgment creditor against his debtor and his grantee, to whom the sheriff had allotted a homestead, to have the allotment declared void, and to direct the sheriff to proceed with a sale of such lots under the execution in his hands, will not be dismissed on the ground that plaintiff should have proceeded by a motion in the cause.[35]

17. Mo—Childers v Pickenpaugh, 118 S W 478, 219 Mo 455
S C—Culler v Crim 30 S E 635, 52 S C 574

18 Mo—Childers v Pickenpaugh, 118 S W 478, 219 Mo 455
Reassignment of homestead by reason of subsequent increase or decrease in value see infra § 220

19 Mo—Childers v Pickenpaugh, supra

20. S C Ex parte Ellis, 20 S C 344

21. S C—Ex parte Lummus Cotton Gin Co, 106 S E 861 116 S C 64
29 C J p 977 note 67

22. U S—McCrae v Felder, C C A S C 12 F 2d 554
29 C J p 977 note 68.

23. N C—Lambert v Kinnery, 74 N C 348
29 C J p 977 note 69

24. Mich—Lieblien v Hansen, 144 N W 196, 178 Mich 11

25. N C—Whitehead v Spivey, 9 S E 319, 103 N C 66
29 C J p 977 note 73

26 Ky—Caldwell v Taylor, 32 S W 678 17 Ky L 781
29 C J p 977 note 74

27. N C—Gheen v Summey, 80 N C 187

28. Ala—McClarm v Anderson, 16 So 639, 104 Ala 201

29. Mo—Childers v Pickenpaugh, 118 S W 478 219 Mo 155
29 C J p 976 note 45

30. Mo—Beckner v Rule, 3 S W 490, 91 Mo 62

31. Ky—Wilson v Newberry, 38 S W 2d 695, 238 Ky 635
29 C J p 977 note 46

32. N C—Wilson v Newberry, 38 S W 2d 695, 238 Ky 635—Shoaf v Frost 31 S E 653, 123 N C 343

33. Ky—Wilson v Newberry, 38 S W 2d 695, 238 Ky 635
29 C J p 978 note 77

34. Iowa—Dirks v Venenga, 292 N W 841, 228 Iowa 557
S C—Nixon Grocery Co v Spann, 94 S E 531, 108 S C 329

35. N C—Chadbourn Sash, Door & Lumber Co v Parker, 69 S E 1, 153 N C 130
29 C J p 978 note 79.

§ 221. —— Claiming Successive Exemptions

While a homesteader is not entitled to successive exemptions, he may sometimes make successive claims to different parcels of land in order to obtain the full quantum allowed by statute.

The debtor is not entitled to successive exemptions,[36] but he may sometimes make successive claims to different parcels of land in order to secure the full quantum allowed by statute.[37]

§ 222. Disposition of Property and Rights of Purchasers

Under the practice prevailing in some, but not all, jurisdictions, where the value of property including a homestead exceeds the amount of the homestead exemption, the court may order a sale of the whole property and apportion the proceeds as between the homestead debtor and his creditor.

Not in all,[38] but in many states it has been held that, where the value of the premises exceeds the statutory exemption limit, the court may order a sale of the entire premises and direct a proper division of the proceeds for the purpose of segregating the value of the excess from that of the exemption,[39] although it is also recognized that instead of ordering a sale of the premises the debtor may be allowed to retain the premises on proper conditions,[40] but cannot be compelled against his wishes to sell his own interest[41] or to buy that of the creditor.[42] The order of sale should specify the portion of lands exempt,[43] and if the entire property is sold the terms of sale should be cash, at least to the amount of the homestead exemption.[44] If a sale of the whole property does not bring an amount in excess of the exemption, it should be abandoned and no further proceedings taken,[45] but if the sale brings more than the statutory exemption the officer conducting the sale should, out of its proceeds, pay the amount of the homestead exemption to the execution debtor.[46] Where, following a sale of property, plaintiffs have not in fact been deprived of their homestead but still occupy it with title thereto, they may not maintain a suit against the sheriff to recover part of the proceeds of the sale.[47]

§ 223. —— Sale of Property Subject to Homestead Right

Under some statutes no sale of the residence property can be made subject to the homestead right; but under other homestead laws such a sale is allowed.

Under some statutes no sale of the residence property can be made subject to the homestead right,[48] but under other homestead laws such a sale is allowed,[49] apparently on the theory that the homestead is not an estate in land.[50]

§ 224. —— Retaining Property beyond Exemption on Payment of Excess

A debtor is sometimes permitted by statute to retain the whole of premises including a homestead where he pays the excess in value over the statutory exemption or where he pays rent for the excess.

Where premises including a homestead cannot be divided so as to set off the homestead without injury to the remainder, the debtor under some statutes may pay the excess above the statutory exemption to his execution creditor and retain the property.[51] Under other statutes he may retain

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36. NC—Marshburn v Lashlie, 29 S E 371, 122 N C 237.
29 C J p 978 note 80
Reassignment of homestead by reason of increase or decrease in value of homestead previously assigned see supra § 220

37. NC—Springer v Colwell, 21 S E 301 116 N C 520
Tex—Parrish v Frey, 44 S W 322, 18 Tex Civ App 271

38. N C—Campbell v White, 95 N C 491

39. Ill—Mayne v Drury, 129 N E 77, 295 Ill 533
29 C J p 978 note 83

Substantial excess over exemption required
It has been said that the remedy of selling homestead property and transferring the owner's homestead rights to the proceeds should not be employed unless it is clear that there will be a substantial excess over the amount of the homestead exemption —Brennecke v Riemann, Mo, 102 S. W 2d 874, 109 A L R. 1214.

Allowance in lieu of homestead
Where judgment creditor asked that liens be marshaled, and a mortgagee set up a mortgage on the judgment debtor's homestead but did not ask for foreclosure, judgment debtor, by virtue of statute, was not entitled to a homestead exemption but to an allowance of $500 in lieu thereof—Aikin Loan Co v Mustaine, 26 N E 2d 229, 63 Ohio App 227

Execution purchaser must pay amount of homestead exemption immediately on sale of property —Altman v District Court of Second Judicial Dist in and for Albany County, 251 P 691, 36 Wyo 290

40. S C—Simonds v Haithcock, 2 S E 616, 26 S C 595
29 C J p 978 note 84

41. N H—Barney v Leeds, 54 N H 128

42. N H—Barney v Leeds, supra

43. Ala—Hardy v Sulzbacher, 62 Ala 44.

44. Tex—Wood v Wheeler, 11 Tex 122.

45. Miss—Dogan v Cooley, 185 So 783 184 Miss 106

46. Miss—Dogan v Cooley, supra

47. Ill—Staiczewski v Toman 16 N E 2d 932 296 Ill App 602

48. Ky—Fraser v Stewart, 299 S W 541, 221 Ky 640
29 C J p 978 note 91

In Illinois there can be no sale of the homestead premises subject to the homestead right where the property is not worth more than the exemption allowed by statute—Blaszynski v Staiczewski 25 N E 2d 884, 373 Ill 140—29 C J p 978 note 91 [c]

49. Tenn—Flatt v Stadler & Co, 16 Lea 371
29 C J p 979 note 92

50. U S—Black v Curran, Ill, 14 Wall 163 20 L Ed 849
29 C J p 979 note 93
Homestead as estate in land see supra § 3

51. S C—Nixon Grocery Co v. Spann, 94 S E 531, 108 S C 329
29 C.J p 979 note 94

the premises on the payment of a certain rental to the execution creditor.[52]

§ 225. —— Rights of Purchasers

a. In general
b Under sales in violation of homestead laws
c. Under sale subject to homestead
d. Right to possession during period of redemption

a. In General

A purchaser of a homestead at a valid execution sale acquires the interest of the homesteader in the premises. Usually the purchaser may raise the same objections to the claim of homestead as could the creditor.

A purchaser at a forced or involuntary sale of homestead property may in general raise the same objections to the claim of homestead by the debtor as could the creditor under whose judgment he has acquired title to the premises.[53] He cannot be forced to accept, in full satisfaction of any supposed liability of the debtor, the latter's deed releasing homestead rights in the land purchased,[54] nor is he rendered a tenant in common with a debtor or to whom upper stories of the family residence are allotted as exempt, where the purchaser buys the lower stories at the execution sale.[55] If the sale is valid, the interest acquired by the purchaser is that of the homestead claimant freed from the burden of homestead.[56] On a sale under execution of the debtor's interest in lands held by him as a tenant in common, the purchaser takes the remainder of the debtor's share in the land left after allotting to him a homestead in the premises.[57]

Where the statute requires a creditor to file an affidavit stating that the homestead exceeds a given value before he may sell on execution, a purchaser at such sale is chargeable with notice whether the affidavit has or has not been filed.[58]

Grantee of purchaser. A grantee of the purchaser acquires no better title than that of the purchaser himself.[59]

Purchase subject to prior assignment of homestead. A purchaser at a sheriff's sale is bound by a prior assignment of homestead where he buys subject thereto.[60]

Redeeming creditors. Judgment creditors who redeem homestead property sold on execution stand in the shoes of the purchaser at the execution sale.[61]

b. Under Sales in Violation of Homestead Laws

As a general rule a forced or involuntary sale of homestead premises in violation of the homestead law passes no title to the purchaser.

The general rule is that a forced or involuntary sale of homestead premises in violation of the provisions of the homestead law confers on the purchaser no title thereto[62] or any right of possession,[63] and in consequence he has no rights against the debtor's grantee,[64] even though the debtor abandons the premises subsequent to the sale.[65] A common application of the rule is that, where land is in fact a homestead of the extent and value allowed by law, and not in excess thereof, an attempted sale thereof is void and conveys no title to the purchaser.[66] However, the purchaser's title may be rendered good by acts of the owner which

Time of payment

Such payment must be made within the time fixed by law—Carolina Sav Bank v Evans, 6 S E 321, 28 S C 521

If the debtor fails to pay within the time prescribed by statute the premises may be sold on execution—Barron v English, 121 S E 782, 128 S C 332

52. Ohio—Powell v. Hambleton, 6 Ohio Dec (Reprint) 735, 7 Am L Rec 605

Rent begins to run from the time an order of sale of the premises was issued—Powell v Hambleton, supra

Debtor owning fractional interest

Where judgment debtor owned a two-thirds interest and his wife owned a one-third interest in realty, from which it was impossible to set off a homestead by metes and bounds, the rights of the parties were required to be determined by the provisions of the statute dealing with procedure when homestead is not divisible and, if the appraised rental value of the property should exceed one hundred dollars per annum, two-thirds of the excess would be subject to the demands of the judgment creditor—New Martinsville Grocery Co v Hannibal Store Co, 29 N E 2d 226, 65 Ohio App 50

53. Ga—Zorn v Walker, 43 Ga 418
Rights of purchasers and mortgagees under voluntary sale see supra §§ 147–151

54. Ill—Meade v Finley, 47 Ill 406

55. Iowa—McCormick v Bishop, 28 Iowa 233

56. Cal—Martin v Hildebrand, 212 P 618, 190 Cal 369

Prior valid liens on the property are unaffected by the sale—Martin v Hildebrand supra

57. S C—Mellichamp v Mellichamp, 5 S E 333, 28 S C 125
29 C J p 979 note 3

58. Wash—Philbrick v. Andrews, 35 P 358, 8 Wash 7.

59. Tex—Sykes v Speer, Civ App, 112 S W 122
29 C J p 980 note 19

60. S C—McKeown v Carroll, 5 S C 75

61. Ill—Starczewski v Toman, 16 N E 2d 932, 296 Ill App 602

62. Iowa—Frum v Kueny, 207 N W 372, 201 Iowa 327
Mo—Burton v Look, 63 S W 112, 162 Mo 502
29 C J p 979 note 4

63. Ark—Hughes v Watt, 26 Ark 228
Wash—Scott v Guiberson, 129 P 886, 72 Wash 36

64. Ill—Hamalle v Lebensberger, 108 N E 669, 267 Ill 602, affirming 187 Ill App 539

65. Ill—Hartwell v McDonald, 69 Ill 293
Wash—Asher v Sekofsky, 38 P 1133, 10 Wash 379

66. Ill—Lindsay v Richards, 163 N E 401, 331 Ill. 483—Biebel Roofing

work an estoppel, such as holding out a third person as owner,[67] and a limitation of the rule has been recognized in a case where no claim of homestead rights was made.[68] It has also been held that where the statute is otherwise complied with, but the sheriff pays over to the homesteader less than the required amount, the purchaser's title is valid.[69] Further, it has been held that a purchaser's title cannot be defeated on the ground that the land sold was exempt from sale, where he purchased at a forced sale invalid because the execution was not a lien on the property, but there was, in the sheriff's office at the time the execution was improperly levied, another writ of the same nature which was a lien on the homestead, although not levied and not known by such purchaser to exist,[70] where property was sold under two foreclosures in the same suit if one of the two liens was valid and enforceable against the homestead,[71] where a foreclosure sale of the homestead was made in connection with other lands without inquiring, as the statute directed, whether it could be sold separately,[72] unless such irregularity injured the person questioning the sale,[73] or where a sheriff's sale made under order of sale on foreclosure and under a void execution was confirmed and, after expiration of the redemption period, a deed was executed.[74]

Where the creditors of a vendor who has conveyed his homestead extinguish an encumbrance thereon, and sell the property under execution against the vendor, the purchaser at the sheriff's sale cannot have the original encumbrance enforced against the property in an action brought to set aside the sheriff's deed.[75]

Failure to make due allotment of homestead. Where an appraisal and allotment of homestead are required either with or without a claim or demand therefor, the rule laid down by the weight of authority, without reference to the extent or value of the property sold, is that a sale of the premises without an appraisal and allotment of the homestead conveys no title,[76] but in some jurisdictions this rule is operative only with certain qualifications,[77] nor is the rule applicable, as will be seen infra subdivision c of this section, in jurisdictions where the sale may be made subject to homestead rights.

Recovery back of purchase money. When the homestead has been unlawfully sold and the exemptioner recovers it back from the purchaser, the latter is entitled to recover from the exemptioner the purchase money which was applied in satisfaction of the judgment against the exemptioner.[78]

c. Under Sale Subject to Homestead

If a homestead can properly be sold subject to the debtor's statutory rights, the purchaser obtains title, even though no allotment was previously made

If a homestead can properly be sold subject to the debtor's statutory rights under principles discussed supra § 223, the purchaser obtains title, even

Co v Pritchett, 30 N E 2d 196, 307 Ill App 247, transferred, see 25 N E 2d 800, 373 Ill 214—Starczewski v Toman, 16 N E 2d 932, 296 Ill App 602
29 C J p 980 note 8

67. Tex—Dwyer v Foley, Civ App, 35 S W 820

68. Ark—Snider v Martin, 17 S W 712, 55 Ark 139
29 C J p 980 note 13

69. Ill—Johnson v Muntz, 4 N E 2d 826, 364 Ill 482

Adjustment of equities

Noncompliance with statute requiring payment of one thousand dollars to debtor in satisfaction of his homestead right on execution sale of homestead having value of more than one thousand dollars did not render sale void, and, where it was brought in question in suit in chancery court, in exercise of its equitable powers, could adjust rights of parties as circumstances required—Johnson v Muntz, supra

70. S C—Agnew v Adams, 17 S C 364

71. Ill—Silsbee v Lucas, 36 Ill 462
29 C J p 980 note 15

72. Wis—Lloyd v Frank, 30 Wis 306
29 C J p 980 note 16

73. Wis—Lloyd v Frank, supra

74. Kan—Catlin v Deering, 170 P 396, 102 Kan 256

75. Mo—Beckmann v Meyer, 7 Mo App 577, affirmed 75 Mo 333

76. Minn—Kipp v Bullard, 14 N W 364, 30 Minn 84
29 C J p 980 note 22
Appraisal and allotment generally see supra §§ 216–221

77. S C—Martin v Bowie, 15 S E 736, 37 S C 102
29 C J p 981 note 23 [c]

In Georgia where, pending application of the head of a family to have a homestead set apart for the family in accordance with the statutory provisions, the land was sold at sheriff's sale, a purchaser with notice that the application was pending takes title to the property subject to the encumbrance of the homestead when properly laid off—Rogers v Kimsey, 171 S E 707, 177 Ga 839—Rogers v Kimsey, 135 S E 497, 163 Ga 146—29 C J p 981 note 23 [a]

In Illinois

(1) A sale under execution of the judgment debtor's homestead without observing the requirements of the statute conveys no title capable of being asserted in a court of law whether or not the premises sold exceed in value or extent the exemption allowed by the statutes—Diets v Hagler, 141 N E 194, 309 Ill 381—Biebel Roofing Co v Pritchett, 30 N E 2d 196, 307 Ill App 247, transferred, see 25 N E 2d 800, 373 Ill 214—Starczewski v Toman, 16 N E 2d 932, 296 Ill App 602—Clayton v Maxey, 2 N E 2d 583, 284 Ill App 658—29 C J p 981 note 23 [b] (1)

(2) But title to so much of the property sold as is in excess of the exemption will be recognized and enforced in equity, either by setting off a homestead or, if the premises are not susceptible of division by requiring the purchaser to pay the value of the exemption to the judgment debtor—Voss v Rezgis, 175 N E 799, 343 Ill 451—Lindsay v Richards, 163 N E 401, 331 Ill 483—Diets v Hagler, 141 N E 194, 309 Ill 381—Starczewski v Toman, supra—29 C J p 981 note 23 [b] (2)

78. Tex—Cline v Upton, 59 Tex 27
29 C J p 980 note 20

though no allotment was previously made.[79] In some jurisdictions he becomes a tenant in common with the homesteader and entitled to share equally in crops growing at the confirmation of the sale.[80] He is not entitled to compensation, however, for improvements erected by him on the land before his complete rights as owner mature,[81] and, if he buys the undivided interest of the debtor subject to the homestead, the latter may be set off from the portion allotted to such purchaser on partition.[82] Where there is in fact and in law no homestead, a sale of premises in which the homestead is claimed subject to the right of homestead passes the fee to the purchaser under the sheriff's deed.[83] The purchaser of property subject to a mortgaged homestead right can redeem the property only in the manner prescribed by statute.[84]

d. Right to Possession during Period of Redemption

Under the statutes in some jurisdictions a homestead claimant ordinarily is entitled to possession of the homestead premises during the period of redemption from execution or mortgage foreclosure sale

Where homestead property is sold under execution, a claim of homestead filed prior to judgment ordinarily carries with it the right of the judgment debtor to occupy the premises during the period of redemption.[85] This rule, however, is inapplicable where the judgment represents the purchase price of the homestead premises.[86]

Where homestead property is sold at a mortgage foreclosure sale, the judgment debtor has a right under the statutes in some jurisdictions to occupy during the redemption period the premises used by him as a homestead[87] if the premises are actually occupied by him.[88] Under these statutes proper proceedings should be taken by the judgment debtor in order to establish his right to possession.[89] Where the homesteader retains possession of farm land during the period of redemption and does not redeem, crops raised by him during such period are not subject to a lien in favor of the purchaser at the foreclosure sale for taxes paid by him during the period of redemption or for interest accruing during such period on his judgment.[90]

79. Tex.—Bass v. Albright, Civ.App., 59 S.W.2d 891, error refused
29 C.J. p. 981 note 26

80. Tenn.—O'Bryan v. Brown, Ch.A., 48 S.W. 315
29 C.J. p. 981 note 27

81. Ala.—Andrews v. Melton, 51 Ala. 100

82. Ga.—King v. Dillan, 66 Ga. 131

83. S.C.—Bullard v. Cox, 101 S.E. 111, 112 S.C. 392

84. Ill.—Butler v. Brown, 69 N.E. 44, 205 Ill. 606
29 C.J. p. 981 note 33

85. Wash.—State ex rel. Ritchie v. Douglas, 89 P.2d 227, 198 Wash. 561

86. Grantee assuming grantor's debts

Judgment creditor who purchased realty at execution sale following judgment against purchaser of realty on an indebtedness assumed by the purchaser as part payment of purchase price of the realty, was entitled to be put in possession of realty during period of redemption, as against purchaser who filed claim of homestead prior to entry of judgment.—State ex rel. Ritchie v. Douglas, supra.

87. Statutes creating right held valid and effective

Wash.—Pease v. Stephens, 21 P.2d 294, 173 Wash. 12
42 C.J. p. 270 note 20

Retroactive operation of statute

The purchaser's right to possession during the redemption period is not affected by a subsequently enacted statute entitling debtors to possession of premises occupied as a homestead.—Citizens' Nat. Bank of Laurel v. Western Loan & Building Co., 208 P. 893, 61 Mont. 40

Who is "judgment debtor"

(1) A purchaser of mortgaged premises, when made a party to the foreclosure suit and against whom the decree runs, becomes a "judgment debtor" and is entitled to the right of possession under the statute, notwithstanding a discharge in bankruptcy had released him from personal liability on the mortgage note.—State ex rel. O'Brien v. Superior Court for King County, 24 P.2d 117, 173 Wash. 679, adhered to, 29 P.2d 1119, 176 Wash. 704, and followed in New York Life Ins. Co. v. Rohne, 32 P.2d 118, 177 Wash. 26

(2) Formerly it was held that a purchaser of mortgaged property not assuming the mortgage debt was not a "judgment debtor" within the statute.
Wash.—Northwest Trust & Safe Deposit Co. v. Butcher, 167 P. 46, 98 Wash. 158

Right to possession
During period of redemption from mortgage foreclosure sale in general see the C.J.S. title Mortgages § 769, also 42 C.J. p. 270 note 11–p. 271 note 33
Where mortgage was executed by homesteader see supra § 151

88. Mont.—Dyer v. Schmidt, 213 P. 1117, 67 Mont. 6

89. Time and method of raising question

Where homestead in mortgaged premises has been created before entry of foreclosure decree, question of right to possession during redemption period must be raised by claimant in foreclosure action if he be party thereto, or else judgment will be res judicata of right to possession, but where homestead in mortgaged premises is declared after entry of foreclosure decree, but within thirty days after notice of such entry and before foreclosure sale, claimant can raise question of right to possession during redemption period, if timely action be taken. In a proper case the question may be determined on the mortgagee's petition for writ of assistance.—State ex rel. O'Brien v. Superior Court for King County, 24 P.2d 117, 173 Wash. 679, adhered to, 29 P.2d 1119, 176 Wash. 704, and followed in New York Life Ins. Co. v. Rohne, 32 P.2d 118, 177 Wash. 26

90. Wash.—Pease v. Stephens, 21 P.2d 294, 173 Wash. 12.

C. PROCEEDINGS FOR ENFORCEMENT AND PROTECTION OF HOMESTEAD RIGHTS

§ 226. Jurisdiction

A court of general jurisdiction has jurisdiction, where the issue is properly before it, to decide whether a claimed homestead exemption exists and embraces a particular debt, and courts of equity have inherent jurisdiction to afford relief to a homesteader whose rights have been, or are about to be, infringed.

Courts of equity have inherent jurisdiction to afford relief in respect of the protection or recovery of homestead property where the rights of the owner therein have been infringed or are in jeopardy through no fault of his own[91] As appears infra § 228, this jurisdiction is frequently invoked in suits to enjoin sales of the homestead which are for any reason illegal, and in suits to set aside sales of this character as constituting a cloud on title, and under some statutes courts of equity alone have jurisdiction of suits for the recovery of property which has been sold after having been set apart as a homestead[92] However, in the absence of any special statutory provision on the subject, relief may be had in a court of law, as, for instance, where the homestead right is set up either as a cause of action or a defense in a suit of ejectment, see infra § 228, or where motion is made to set aside a sale of the homestead premises on execution, see infra § 229 It has been held that a court of general original jurisdiction necessarily has jurisdiction, whenever a homestead exemption is claimed in an action pending therein, to determine whether the particular debt is or is not one for which a homestead may be seized and sold and whether the claimant of the homestead exemption possesses the qualifications necessary to entitle him to a homestead[93]

Where a sale of homestead property was confirmed without any provision having been made to compensate the debtor for his homestead interest in the property, the court had jurisdiction to determine the debtor's claim to a portion of the proceeds even after the expiration of the term at which the sale was confirmed[94]

§ 227. Right of Action for Denial and Infringement of Right and Defenses Thereto

A homesteader may maintain an action or assert a defense for the protection of his homestead right or to prevent its infringement. In a proper case, an action for damages for the unlawful sale of homestead property may be maintained.

The owner of a homestead may maintain an action or assert a defense for the protection or enforcement of his homestead right or to prevent its denial or infringement,[95] as where the homestead property is, or is about to be, unlawfully sold on execution[96] or in consummation of a fraud[97] The particular remedies available are considered infra §§ 228, 229

Action for damages It has been held that one whose homestead has been unlawfully seized and sold may sue the officer and purchaser for damages, and need not pursue the property[98] However, where no injury can be shown, the homesteader cannot maintain an action against the sheriff and his sureties for an unlawful levy and sale of the premises[99] The wife has been denied the right to recover damages from a sale of the homestead[1]

§ 228. Nature of Actions or Proceedings in Which Relief Granted

According to some authorities, the question of homestead exemption may be raised in an action of eject-

91. Fla.—Hillsborough Inv. Co. v. Wilcox, 13 So.2d 448—Bennett v. Bogue, 101 So. 206, 88 Fla. 109
29 C.J. p. 981 note 35
Jurisdiction of proceedings
For allotment and appraisal see supra § 216
To enforce claims against homestead see supra § 117

92. Ga.—Woodward v. Bivins, 71 Ga. 589
29 C.J. p. 981 note 38

93. La.—Jefferson v. Gamm, 90 So. 682, 150 La. 372

94. Wyo.—Altman v. District Court of Second Judicial Dist. in and for Albany County, 254 P. 691, 36 Wyo. 290

95. Ill.—Blaszynski v. Starczewski, 25 N.E.2d 884, 373 Ill. 140.
S.C.—Ex parte Rizer, 164 S.E. 131, 165 S.C. 487

Suit by wife against second mortgagee
Where wife filed and recorded statutory homestead declaration before husband executed second mortgage, she had vested right in mortgage foreclosure proceeds in excess of amount of first mortgage, enforceable against second mortgagee, who purchased homestead at foreclosure sale, where husband refused to claim excess of two thousand dollars for wife.—Reymond v. Louisiana Trust & Savings Bank, 148 So. 663, 177 La. 409

Following proceeds of fraudulent sale by husband
If fraud was practiced on a wife in obtaining her signature to a deed to the homestead, the wife was entitled to follow proceeds of sale of homestead or so much thereof as went into purchase of annuity contract by husband.—Maruska v. Equitable Life Assur. Soc. of U.S., D.C.Minn., 21 F.Supp. 841

96. Ill.—Blaszynski v. Starczewski, 25 N.E.2d 884, 373 Ill. 140
Miss.—Willis v. Allen, 95 So. 435, 131 Miss. 435

97. Ark.—Jennings v. Carter, 13 S.W. 800, 53 Ark. 212
29 C.J. p. 982 note 42

98. Ga.—Personal Finance Co. v. Evans, 163 S.E. 250, 45 Ga.App. 53
29 C.J. p. 993 note 7
Measure of damages see infra § 238

99. Cal.—Kendall v. Clark, 10 Cal. 17, 70 Am.D. 691
Tex.—Trawick v. Martin-Brown Co., 14 S.W.2d 564, 79 Tex. 460

1. Ky.—Buckner v. Fleming, 5 Ky.L. 607.

ment brought by or against the debtor. A suit for an injunction or to set aside a sale are among the equitable remedies available to the homesteader.

Although there is some authority apparently to the contrary,[2] the weight of authority is that the question of homestead exemption may be raised in an ejectment suit brought by,[3] or against,[4] the debtor, except where courts of equity are vested with exclusive jurisdiction over matters of homestead right.[5] In some states an action of claim is a proper remedy to contest a levy on, and sale of, the homestead.[6] The fraudulent grantee of a homestead cannot maintain trespass against a creditor of the fraudulent grantor who seizes it on execution.[7]

Equitable remedies generally The general rule that equitable remedies are not available if there is an adequate remedy at law applies to remedies for the enforcement or protection of homestead rights.[8] A wife who has been ousted from her possession of the premises after an abandonment by the husband may assert her rights by a bill in equity.[9] Homestead rights may be claimed and allowed in a suit to marshal liens against property which had been fraudulently conveyed.[10]

Injunction Since a judicial sale, even though invalid, casts a cloud on the debtor's title to the homestead so disposed of, an injunction will lie,[11] at least until the determination of the right or claim to the homestead exemption,[12] against an unauthorized levy of execution or a sale of the premises, or against the issuance of a deed and the conveyance of the homestead,[13] and the same remedy is available against an eviction by one who purchases at a sheriff's sale, where the levy of execution is made subject to the homestead interest,[14] or against one who buys pending an application by the judgment debtor for his exemption,[15] or against the foreclosure of a mortgage on the home tract,[16] or a sale under a power therein contained,[17] or under a foreclosure of an attachment lien.[18] The court will not, however, determine the homestead right on affidavits filed on a motion for a temporary injunction to restrain a levy,[19] nor will the injunction issue where the applicant has an adequate remedy at law[20] by protecting his homestead under the statute of exemptions,[21] as where the sale would not defeat complainant's homestead right.[22] In proceedings to enjoin the sale of the debtor's homestead on general execution, the creditor may successfully defend by showing that the claim on which his execution rests is excepted by statute from the homestead exemption.[23] The granting or denial of a temporary injunction is a matter of discretion.[24] The right to an injunction to restrain the sale of the property under judicial proceedings is predicated on the absence of any adjudication in such proceedings of the claim to homestead.[25]

Bill to set aside A remedy frequently resorted to is a bill in equity to set aside a sale of the homestead premises for any reason improperly made as

2. Miss—Lazar v Caston, 7 So 321, 67 Miss 275
29 C J p 982 note 50

3. Ala—Shaw v Lindsey, 60 Ala 314
Alaska—Williams v Thompson, 7 Alaska 601

4. Ariz—Elquest Paint Co v Collister, 41 P 2d 1088, 45 Ariz 194
Ark—Jennings v Carter, 13 S W 800, 53 Ark 242
Ill—Blaszynski v Starczewski, 25 N E 2d 884, 373 Ill 140—Van Winkle v Weston 276 Ill App 66
29 C J p 982 note 52

5. Ga—Woodward v Bivins, 71 Ga 589
29 C J p 982 note 53

6. Ga—Brantley v Stephens, 77 Ga 467

7. N H—Brookfield v Sawyer, 39 A 257, 68 N H 406—Currier v Sutherland, 54 N H 475, 20 Am R 143

8. Ill—Brown v Nelson, 41 N E 2d 499, 379 Ill 371, reversing 33 N E 2d 648, 309 Ill App 557

9. Ill—Mix v King, 55 Ill 434

10. Ohio—Dietz v. Haber, App, 38 N E 2d 216.

11. Ariz—Elquest Paint Co v Collister, 41 P 2d 1088, 45 Ariz 194
Kan—Owens v Wagers 235 P 589 118 Kan 517
Miss—Felder v McCormick, 4 So 2d 363, 191 Miss 851—Willis v Allen, 95 So 435, 131 Miss 264
Tex—Hughes v Bond, Civ App, 118 S W 2d 443, error dismissed—First Nat Bank v Coffman, Civ App, 27 S W 2d 567, error refused—Johnson v Echols, Civ App, 21 S W 2d 382, error refused—Samuelson v Bridges 25 S W 636, 6 Tex Civ App 425
Wash—Traverso v Cerini, 263 P 184, 146 Wash 273
29 C J p 982 note 58
Injunction against sale under execution generally see Executions §§ 151, 152

12. Ga—Gober v Richards, 128 S E 668, 160 Ga 565
Tex—Young v Hollingsworth, Civ App 16 S W 2d 811, error refused—Braly v Webster, Civ App, 4 S W 2d 580

13. Alaska—Williams v. Thompson, 7 Alaska 601
29 C J p 982 note 59

14. Ga—Shore v Gastley, 75 Ga. 813—Pinkerton v. Tumlin, 22 Ga 165

15. Ga—Kilgore v Beck, 40 Ga 293

16. Okl—Hoyt v First Nat Bank, 77 P 2d 538, 182 Okl 350
29 C J p 982 note 62

17. Ill—Boyd v Cudderback, 31 Ill 113

18. Tex—Gates v Pitts, Civ App 291 S W 918

19. Cal—Farley v Hopkins, 21 P 737, 79 Cal 203

20. Ala—Gunn v Hardy, 18 So 284, 107 Ala 609
29 C J p 982 note 66
Right to apply for opening of judgment is not an adequate remedy at law—Owens v Wagers, 235 P 589 118 Kan 517

21. Iowa—Henderson v. Rainbow, 41 N W 29, 76 Iowa 320
29 C J p 982 note 66

22. S C—Brown v Green, 71 S E 958, 89 S C 326

23. Kan—Carter v Des Moines Silo & Mfg Co, 187 P 656, 106 Kan 342

24. Fla—Bishop v First Old State Bank, 194 So 488, 142 Fla 190

25. Tex—Johnson v Echols, Civ App, 21 S W 2d 382, error refused

being a cloud on title.[26] It has been held that the fact that the sale is void does not affect the right to this remedy,[27] but there is also authority to the contrary.[28] A bill to set aside a levy on the ground that the property is a homestead will not lie, where proceedings for the debtor's protection are provided by statute,[29] but it has been held that if equitable jurisdiction to entertain such a bill existed prior to the time when a legal remedy was afforded, it will continue to exist until abolished by some prohibitory legislative enactment.[30] A court of equity will not set aside a sale on the ground that the homesteader was given no notice or opportunity to select his homestead, where it does not appear that he was injured by the failure to receive such notice or opportunity.[31] Where the contention that the realty was homestead was not raised in the court ordering its sale and hence was not considered on appeal from such order, the order was neither void nor voidable, and the owner could not maintain an independent action to cancel and set aside the sale and to recover damages for his ouster under a writ of possession.[32]

Suit to quiet title It may be proper to determine a claim of homestead exemption in an action to quiet title[33] and homestead rights may be asserted in a suit by the owner to quiet title after the purchaser has taken possession.[34]

§ 229. —— Motions and Other Summary Remedies

Motions or other summary remedies are sometimes available for the protection of homestead rights.

In some jurisdictions the homestead exemption may be presented by a motion to set aside the sale on execution or decree,[35] made in the action or suit in which the execution was issued or order of sale was made,[36] and not by a separate action,[37] but in other jurisdictions it must be brought before the court by a direct action.[38] A rule against the sheriff to show cause why he should not levy on and sell the homestead has been held to raise the question of a debtor's rights in the property sold, where there is no serious dispute on any question of law or fact,[39] but, although there is authority to the contrary,[40] it has also been held that the homestead right cannot be presented by resistance to a motion to confirm a sheriff's sale of the premises.[41] A rule to recover exempt proceeds of homestead property paid by the sheriff to judgment creditors under a judgment subsequently reversed has been held proper.[42] A petition to set aside a default, decree, and foreclosure sale is addressed to the discretion of the court.[43] In a proper case a levy on homestead property may be quashed[44] on the court's own motion.[45] A court rule requiring a bond of a litigant seeking an order to stay a sale under execution is not applicable to a proceeding by a judg-

26. Ariz.—Elquest Paint Co. v. Collister, 41 P.2d 1088, 45 Ariz. 194
29 C.J. p. 983 note 69

27. Ill.—Conklin v. Foster, 57 Ill. 104
Tex.—Gallagher v. Keller, 23 S.W. 296, 4 Tex. Civ. App. 454

28. N.C.—Murray v. Hazell, 5 S.E. 428, 99 N.C. 168

29. Mich.—Dodge v. Barker, 204 N.W. 802, 231 Mich. 577

30. Mo.—Harrington v. Utterback, 57 Mo. 519

31. Wis.—Schoffen v. Landauer, 19 N.W. 95, 60 Wis. 334

32. Ky.—Hargis v. Maloney, 153 S.W.2d 944, 287 Ky. 473

33. Cal.—Wagner v. Ulrich, 268 P. 629, 204 Cal. 452—Montgomery v. Bullock, 56 P.2d 564, 13 Cal. App. 2d 196

Separation of homestead in action to quiet title

It was proper for trial court to separate portion of realty impressed with homestead from remainder, constituting business property, in action to quiet title thereto.—Montgomery v. Bullock, 77 P.2d 846, 11 Cal. 2d 58

34. Alaska.—Williams v. Thompson, 7 Alaska 601.

35. Neb.—Bliss v. White, 272 N.W. 769, 132 Neb. 651
29 C.J. p. 983 note 74

Practice held unsatisfactory since if the sale alone is vacated, the judgment directing the sale still stands and another sale may be made thereunder; hence the proper step to reach the root of the matter is to move to set the judgment aside and be let in to defend or to obtain a reversal of it by proceedings in error.—Helmer v. Rehm, 15 N.W. 344, 14 Neb. 219

36. Ala.—Cross v. Ensley Bank, 87 So. 843, 205 Ala. 274
Ill.—Brown v. Nelson, 41 N.E.2d 199, 379 Ill. 371, reversing 33 N.E.2d 618, 309 Ill. App. 557

After notice to sheriff

After service on sheriff of notice signed by husband and wife that homestead is claimed in property of wife levied on for her individual debt, sheriff has no judicial discretion to determine that property is not homestead without taking statutory steps for ascertainment of homestead and where proper notice is served and sale is made without such steps being taken, sale is void and will be set aside on motion.—Bliss v. White, 272 N.W. 769, 132 Neb. 651

37. Ala.—Cross v. Ensley Bank, 87 So. 843, 205 Ala. 274

38. S.D.—Froelich v. Aylward, 80 N.W. 131, 11 S.D. 635
29 C.J. p. 983 note 77

39. S.C.—Charles v. Charles, 13 S.C. 385, distinguished in Corry v. Tate, 26 S.E. 791, 48 S.C. 518.—Kellar v. Myers, 5 S.C. 11

40. N.C.—Bailey v. Barron, 16 S.E. 910, 112 N.C. 54

41. Neb.—Wallace v. Peterson, 284 N.W. 866, 136 Neb. 39.—Kaley v. Eselin, 188 N.W. 251, 108 Neb. 544.—Best v. Zutavern, 74 N.W. 81, 53 Neb. 619, overruling Berkley v. Lamb, 1 N.W. 320, 8 Neb. 392, in so far as conflicting with text rule.
Wash.—Traverso v. Cerini, 263 P. 184, 146 Wash. 273
29 C.J. p. 983 note 80

42. La.—Smith v. Phillips, 131 So. 23, 171 La. 291

43. Colo.—Lock v. Berkins, 33 P.2d 393, 95 Colo. 135

44. Mo.—Kelley v. Parman, App., 282 S.W. 755

45. Mo.—Kelley v. Parman, supra

ment debtor for an order directing the sheriff to set off a homestead in the land and staying the sale of the land until this has been done.[46]

§ 230. Time to Sue and Limitations

The right to question or obtain relief from a sale of homestead property may be lost by the operation of a statute of limitations or by laches.

If the statute limits the time within which a sale of the homestead may be questioned through legal proceedings, it, unless they are excepted by its terms, applies to minors and married women as well as to other claimants,[47] and to sales made in good or bad faith;[48] and if the statutory period expires the homestead right may be lost by the adverse possession of a wrongful occupant.[49] Under a statute so providing, a homesteader's action to prevent ouster from realty selected as homestead after the sale on execution is instituted in time[50] Limitations do not run against a creditor as to a homestead until it has ceased to be such[51]

Laches. In a proper case the laches of the homestead claimant may defeat a proceeding on his part for the protection of his homestead rights[52] Thus an injunction will not issue in a case where a homesteader has been guilty of laches[53] However, it has been held that a party, as long as he is in possession of the property he claims as homestead, cannot be barred by laches from suing to protect his rights[54]

§ 231. Parties

Questions as to what persons are proper or necessary parties in proceedings to enforce or protect homestead rights are determined in accordance with general rules.

The person entitled to the homestead, whether the husband, father, or other person as the case may be, as the real party in interest or the representative of the family, ordinarily is a proper party in proceedings for the enforcement and protection of the homestead.[55] Thus a husband in joint possession with his wife of land belonging to her but used as the family homestead has, as head of the family, such an interest in the land as entitles him to complain of any unlawful interference with it[56] However, it has also been held that the beneficiaries have such an interest in the use and enjoyment of the property as will entitle them to protect it[57] Thus the wife or the wife and minor children have such an interest in the homestead premises as will entitle her or them to maintain an action or defense for the assertion or protection of the homestead rights,[58] especially is this so where the husband is absent,[59] or refuses to join in the suit,[60] or has abandoned his family[61] Under a statute giving a cause of action to the wife or family of the debtor for damages for a wrongful levy on the homestead, the wife may maintain such an action, or the husband, as head of the family, may do so and hold the recovery, if any, for the family's use[62] Where a married woman is invested by statute with the right to sue alone in an action involving or concerning her right or claim to homestead property, she may sue alone in an action to quiet title to property claimed as a homestead, and she need not establish a valid homestead right before suing[63]

Necessary parties According to some decisions, the wife is a necessary party to a suit brought to protect the property from unauthorized sale,[64] or to determine the question whether the premises are a homestead[65] It has been held that the wife is

46. S C—Ex parte Morrow, 190 S E 506, 183 S C 170, 110 A L R 898

47. Ga—McWhorter v Cheney, 49 S E 603, 121 Ga 541—Pittman v Matthews, 66 Ga 600

48. Ga—Rowan v McCurry, 68 Ga 732

49. Tex—Simonton v Mayblum, 59 Tex 7

50. Ark—Massengale v Massengale, 56 S W 2d 763, 186 Ark 917

51. S C—Anderson v Baughman, 48 S E 38, 69 S C 38

52. Kan—Iliff v Arnott, 3 P. 525, 31 Kan 672
29 C J p 983 note 86

53. Ga—Platt v Sheffield, 63 Ga. 627.
29 C J p 983 note 87

54. Ill—Rhodes v Davis, 28 N E 2d 113, 374 Ill 65

55. Kan—Schoen v Arkansas Valley Gas Co, 263 P 1079, 1081, 125 Kan 206, quoting **Corpus Juris.**
Parties in proceedings to
Avoid conveyance of homestead see supra § 154
Enforce
Claims against homestead see supra § 117
Rights under homestead see supra § 151
Protect and enforce homestead rights of survivorship see infra § 279

56. Kan—Schoen v Arkansas Valley Gas Co, 263 P 1079, 1081, 125 Kan 206, quoting **Corpus Juris.**
Mich—Rowe v Kellogg, 19 N W 957, 54 Mich 206

57. Kan—Schoen v Arkansas Valley Gas Co, 263 P 1079, 125 Kan 206
Miss—Columbian Mut Life Ins Co v Jones, 133 So 149, 160 Miss 41

58. Miss—Felder v McCormick, 4 So 2d 363, 191 Miss 851—Columbian Mut Life Ins Co v Jones, 133 So 149, 160 Miss 41
29 C J p 984 note 97

59. Tex—Kelley v Whitmore, 41 Tex 647

60 Ky—Hemphill v Haas, 11 S W 510, 88 Ky 492, 11 Ky L 62
Tex—Kelley v Whitmore, 41 Tex 647.

61. Ky—Warren v Block, 1 Ky L 121
N M—U S v Lesnet, 50 P 321, 9 N M 271

62. Ga—Personal Finance Co v Evans, 163 S E 250, 45 Ga App 53

63. Cal—MacLeod v Moran, 105 P. 932, 11 Cal App 622

64. Ill—Cassell v. Ross, 33 Ill 244, 85 Am D 270

65. Nev—Rhodes v. Williams, 12 Nev 20.

an indispensable party defendant to an action to establish an interest adverse to the right of homestead on the property upon which she and her husband reside and title to which the husband claims [66] Some courts hold that the wife is a necessary defendant when, and only when, she has a defense arising from her homestead interest which would defeat the action,[67] and even where she has such a defense, while she is a necessary party defendant in the sense that she cannot be concluded by the judgment unless she is joined, she is not an indispensable party in the sense that the proceedings are so defective without her as to be subject to a plea of misjoinder [68] Where a statute requires the actual occupant to be made a party defendant in an action of ejectment, a husband and wife who occupy premises owned by either as their home must be joined as defendants [69] A person having no justiciable interest in property claimed to be a homestead on which a lien is sought to be foreclosed is not a necessary party to the suit [70] The wife is not a necessary party to the husband's action for injury to his land where the record shows that the case must be determined on the theory that the land is not a homestead [71]

Joinder Joinder of husband and wife has been held proper in a suit by them to set aside on the ground of fraud a deed executed by them covering the homestead [72] Where the homestead of husband and wife was held in the wife's name, and they both testified that it was the property of both, they were properly joined as plaintiffs in an action for damages thereto [73] When the legal title to a homestead is in a wife, but the larger portion of the purchase price was paid by the husband, their joint interest in the preservation of the homestead gives them the right to join as plaintiffs in an action to enjoin its sale.[74] Also the wife may properly be joined as a party with her husband as a joint plaintiff in an action to determine adverse claims to the homestead,[75] although the legal title is in the husband's name [76]

Attaching and execution creditors It has been held that attaching creditors should be made parties to a proceeding by the debtor to require payment to him, in lieu of a homestead, of funds held by a sheriff after sale of the premises,[77] and that in an action to enjoin a sale of land claimed as a homestead nonresident execution creditors should be made parties defendant,[78] but that the execution creditor is not a necessary party to a suit to enjoin a levy, at least after answer and trial without objection made because of such nonjoinder [79]

Defendant in garnishment may voluntarily appear or be cited in by the garnishee, that he may protect his rights arising from the fact that his credit is exempt as the proceeds of a sale of a homestead [80]

Sheriff It has been held that the sheriff is not a necessary party defendant to a bill seeking a homestead allotment and to enjoin a sale ordered by the court,[81] but there is also authority to the contrary [82]

§ 232. Pleading

a In general
b Amendments
c Issues, proof, and variance

a. In General

The person relying on a homestead right must plead it, and his allegations must be sufficient to show such right under the applicable statutes

66. Okl—Mercer v McKeel, 108 P 2d 138, 188 Okl 280

67. Tex—Hunt v Cass County, Civ App, 106 S W 2d 810—Collett v Brokaw, Civ App, 296 S W 333, reversed on other grounds Brokaw v Collett, Com App, 1 S W 2d 1090—Astin v Martin Civ App, 289 S W 442, reversed on other grounds Martin v Astin, Com App, 295 S W 584—Medearis v Buratti, Civ App, 275 S W 617.
29 C J p 981 note 6
Conclusiveness of judgment against spouse not party see the C J S title Judgments § 798, also 34 C J p 1022 notes 17–19

Where question of title or superior lien involved
Where the question is one of title by which the homestead property was acquired or concerning an asserted lien which if established would be superior to the homestead right, the wife is not a necessary party—Power v Westhoff, Tex Civ App, 4 S W 2d 271, error dismissed

68. Tex—Martin v Astin, Com App, 295 S W 584 reversing Astin v Martin Civ App, 289 S W 442—Broadland v City Nat Bank of Corpus Christi, Civ App 15 S W 2d 112

69. Mich—Carby v Combs 130 N W 625, 166 Mich 317—Haddy v Tobias 18 N W 199, 85 Mich 326—Stoinski v Pulte, 43 N W 979, 77 Mich 322

70. Tex—Carver v Gray Civ App, 140 S W 2d 227, error dismissed, judgment correct

71. Neb—McCullough v St Edward Electric Co, 165 N W 157, 101 Neb 802

72. Ill—Bailey v Hamilton, 169 N E 743, 337 Ill 617

73. Neb.—Kayser v Chicago, B & Q R Co 129 N W 554, 88 Neb 343

74. Utah—Anderson v Davis, 55 P. 363, 18 Utah 200

75. N D—Sexton v Sutherland, 164 N W 278, 37 N D 500
29 C J p 984 note 2

76. N D—Sexton v Sutherland, supra

77. Ill—Self v Schoenfield, 60 Ill App 65

78. Tex McCandless v Gray, Civ App 153 S W 171

79. Ill—Webb v Hollenbeck, 48 Ill App 514

80. Tex—Russell v Hamilton, Civ App, 174 S W 705

81. Tenn—Montgomery v Whitworth, 1 Tenn Ch 174

82. Tex—McCandless v Gray, Civ App., 153 S W. 174.

In proceedings for the enforcement or protection of homestead rights, matters of pleading are governed by the general rules pertaining thereto.[83]

Right of homestead, necessity for averment. If a homestead right is relied on, either as a cause of action[84] or as a defense,[85] it must be pleaded by the person so relying on it, and ordinarily no duty rests on the person asserting a claim against the property to anticipate the defense of homestead.[86] But, although there is authority to the contrary,[87] it is very generally held that it is unnecessary for the debtor to allege that the debt sought to be enforced against the property is not embraced within any of the statutory exceptions,[88] it is for the party seeking to enforce his claim against premises alleged to be a homestead to allege that the claim is one against which exemption is unavailing[89] Neither is it necessary for the debtor to anticipate and negative any matters whereby he might be considered as having forfeited his right of action;[90] and estoppel of the debtor to assert his homestead right must be alleged by the adverse party[91] Defects in, or omissions from, the debtor's pleadings may be cured by averments or denials contained in the pleadings of his adversary which clearly recognize the homestead character of the property[92]

Right of homestead; sufficiency of averment The sufficiency of a pleading asserting a homestead exemption is governed by the general rules applicable to pleadings[93] The pleading in which a debtor asserts a homestead right must set forth facts establishing the right and not merely allege in general terms that such right exists[94] Hence, although he need not name in specific terms the statute under which he acquired his right,[95] everything made essential to the exemption by law must be alleged,[96]

83. Minn—Mulroy v Rowe, 282 N W 723, 162 Minn 311
Pleadings in proceedings to
Avoid homestead conveyance see supra § 154
Enforce
Claims against homestead see supra § 117
Rights under homestead see supra § 151

Petition held insufficient in action for damages for attempted foreclosure of lien on homestead property —Panhandle Lumber Co v Fairey, Tex Civ App, 3 S W 2d 941

Alleging record title
A petition alleging that a threatened levy is a cloud on plaintiff's title should disclose whether the record title is in the name of plaintiff or of his wife, since, if the record shows that the land is the separate property of the wife a levy thereon under execution against the husband would not cloud the wife's title—Alexander v Banner, 30 S W 563, 10 Tex Civ App 111

Alleging terms of contract
In an action to enjoin interference with complainant's homestead rights in land alleged to have been purchased by complainant from defendant bill was held demurrable for failure to allege the terms of the contract of purchase, such allegations being necessary for the court to ascertain the real interest of the parties—Rewerts v Johnson, 143 N E 437, 311 Ill 594

84. N D—Ilvedsen v Bowbells First State Bank, 139 N W 105, 24 N D 227
29 C J p 985 note 15

85. N D—Ruble v Grafton Nat Bank of Grafton, 250 N W 784, 64 N D 129
Tex—Benson v Mangum, Civ App, 117 S W 2d 169, error refused—Shonaker v Citizens' Loan & Investment Co, Civ App, 8 S W 2d 566, 568, error refused, quoting **Corpus Juris**—Bankers' Mortg Co v Higgins, Civ App, 4 S W 2d 102, reversed on other grounds Higgins v Bankers' Mortgage Co, Com App, 13 S W 2d 683
29 C J p 985 note 16

In trespass to try title
(1) In Texas it has been held on the one hand that, in trespass to try title, the defense that conveyance was invalid as to the grantor's wife, who did not join therein, because of homestead rights, must be pleaded, a plea of not guilty being insufficient —Guarantee Mercantile Co v Nelson, Tex Civ App, 223 S W 543

(2) But it has been held that, in view of the statutory provision that in an action of trespass to try title the only defensive plea required is that of not guilty, such a plea is sufficient to raise the issue of homestead—Smith v Simpson, Tex Civ App, 97 S W 2d 522, error refused

In suit for sale of land for division among tenants in common, where there was no reference in bill to any question of homestead, complainants were under no duty to anticipate any such defense based upon that theory, but rather duty rested upon defendants of establishing their defense

86. Ala—Saltsman v. Saltsman, 10 So 2d 752
Ky—Goff v. National Rubber & Leather Co, 60 S W 2d 944, 249 Ky 363

87. Ky—Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823

Under a former Kentucky statute, in which the exceptions were contained in a section separate and distinct from the section conferring the homestead right, it was held unnecessary, in asserting a homestead right, to negative the exceptions—Runyon v Runyon's Adm'x, supra—
29 C J p 986 note 39

88. S D—Coash v Bailey, 280 N W 402, 50 S D 12
29 C J p 986 note 39

89. Ky—Morehead v Morehead, 25 S W 750, 16 Ky L 34

90. La—Banahan v. Svarva, 84 So 200, 145 La 906

91. Tex—Nixon v Hirschi, 136 S W 2d 583, 134 Tex 415, reversing, Civ App, 103 S W 2d 833

92. Ky—Central Kentucky Lunatic Asylum v Craven, 32 S W 291, 98 Ky 105, 17 Ky L 667, 56 Am S R 323
29 C J p 986 note 37

93. Tex—C D Shamburger Lumber Co v Delavan, Civ App, 106 S W 2d 351

94. Tex—Plough, Inc, v Moore, Civ App, 56 S W 2d 681
29 C J p 985 note 17

95. La—Hebert v Mayer, 17 So 131, 47 La Ann 563

96. Tex—Rose v Turner, Civ App, 16 S W 2d 433, conforming to answer to certified questions 7 S W 2d 70, 117 Tex 164
29 C J p 985 note 19

Petitions or allegations held sufficient
(1) Generally
Colo—Vassek v Moffat County Mercantile Co, 285 P 939, 87 Colo 153
La—Smith v Marino, App, 12 So 2d 71
Or—Sterrett v Hurlburt, 275 P 689, 129 Or 520, rehearing denied and modified on other grounds 278 P 986, 129 Or 520
Tex—Federal Petroleum Co v Pittman, Civ App, 65 S W 2d 359 error refused—Postal Savings & Loan Ass'n v Powell, Civ App, 47 S W 2d 343, error refused—Cocke v Conquest, Civ App, 2 S W 2d 992, af-

and that the premises claimed continued exempt to the time of levy and sale.[97] More particularly, the debtor must show that he is a member of that class of persons for whose benefit the exemption exists,[98] but he need not declare of whom his family consists,[99] or aver in exact words that he was a bona fide housekeeper with a family at the time of levy, where his occupancy and its character otherwise appear,[1] or show the exact character of the homestead.[2]

By reason of the particular statutory requirements for the acquisition of a homestead, see supra §§ 29–48, it may be necessary to allege that the premises claimed as homestead have on them a dwelling constituting his residence,[3] that he is a "householder,"[4] that he owns the property or has such interest in it as will support a homestead exemption for his benefit,[5] that the premises have been occupied under such circumstances that a homestead has actually been acquired,[6] that the word "homestead" is written on the margin of the recorded title of the premises occupied as a homestead,[7] and that the value of the property does not exceed the statutory limitation,[8] although there are decisions to the contrary of this last proposition.[9] It may also be necessary for him to allege when the debt was contracted.[10]

Description of premises Where the homestead is part of a larger tract,[11] or if the party claiming it claims as tenant in common,[12] the pleading should specify the part claimed as a homestead. An equitable petition to restrain interference with the homestead is demurrable where the premises claimed as a homestead are not sufficiently described.[13]

firmed Com App 13 S W 2d 348, affirmed 35 S W 2d 673, 120 Tex 43

(2) In action to foreclose a judgment lien on realty, allegations of existence of a family relationship, use and occupancy of the property as a homestead, and dates of such use with respect to times the lien could have attached, were sufficient to set up defendants' claim of homestead —Hughes v Parmer, Tex Civ App, 164 S W 2d 576

(3) Averments that defendant was bona fide housekeeper with family, had acquired homestead in land attached before creation of debt, and had not abandoned right by temporary absences with family, because of intention to retain and return to homestead, held sufficient allegation of exemption —Smith v Moss, 277 S W 245, 211 Ky 226

(4) Allegations held sufficient, as against general demurrer to show that property allegedly wrongfully levied on had been duly set apart as homestead —Personal Finance Co v Evans, 163 S E 250, 45 Ga App 53

Petitions or allegations held insufficient

(1) Generally

Fla —Bishop v First Old State Bank, 194 So 488, 142 Fla 190

Kan —Birch v Solomon Nat Bank, 246 P 688, 121 Kan 333

Ky —Smith v Moss, 277 S W 245, 211 Ky 226

(2) A petition, alleging that plaintiff in suit to enjoin sale of property under execution on ground that it was his business homestead, operated general mercantile store in building thereon before making assignment for his creditors' benefit, and kept store fixtures in storage in such building thereafter, and that defendant knew of plaintiff's intention to reenter property for use as business homestead and reestablish business in such building in near future, was insufficient as not showing definite intention to use property in plaintiff's business at definite time and means of doing so —Casey v Walker-Smith Co, Tex Civ App, 112 S W 2d 813

(3) In suit to enjoin execution sale of property alleged to be part of owner's homestead, complaint which alleged that owner moved on property, had continually used property as home for himself and family, and had used and occupied no other property as home held not to state cause of action for exemption as part of owner's business homestead —Cain v Dickson, Tex Civ App, 78 S W 2d 1095

Contiguity

Complaint, in action to declare judgment not a lien on homestead, need not allege that premises are contiguous, where it is alleged that premises were homestead —Coash v Bailey, 208 N W 402, 50 S D 12

97. Tex —Mullins v Looke, 27 S W 926, 8 Tex Civ App 138
29 C J p 985 note 20

98. Fla —Bishop v First Old State Bank, 194 So 488, 142 Fla 190
Ill —Rewerts v Johnson, 143 N E 437, 311 Ill 594
Ohio —James v James, 44 N E 2d 368, 69 Ohio App 485
Tex —Plough, Inc, v Moore, Civ App, 56 S W 2d 681

99. Tex —Gentry v Bowser, 21 S W 569, 2 Tex Civ App 388

1. Ky —Crouch v Meguiar-Harris Co, 42 S W 91, 19 Ky L 819

2. Ga —Personal Finance Co v Evans, 163 S E 252, 45 Ga App 54— Personal Finance Co v Evans, 163 S E 250, 45 Ga App 53

3. Mich —Lozzo v Sutherland, 38 Mich 168
29 C J p 986 note 25.

4. Ill —Rewerts v Johnson, 143 N E 437, 311 Ill 594

5. Kan —Ard v Pratt, 58 P 283, 10 Kan App 335, reversed on other grounds 60 P 1048, 61 Kan 775
29 C J p 986 note 26

6. Ala —Gentry v Lawley, 37 So 829, 142 Ala 333
29 C J p 986 note 27

Allegations held sufficient

Complaint to have judgment declared not a lien on homestead, alleging occupancy of premises for two years and locating premises within state, held sufficient —Coash v Bailey, 208 N W 402, 50 S D 12

7. U S —Goodwin v Colorado Mortgage & Investment Co, Colo, 3 S Ct 473, 110 U S 1, 28 L Ed 47

8. Mich —Matson v Melchor, 4 N W 200, 42 Mich 477
29 C J p 986 note 29

Allegations held sufficient

Complaint to declare judgment not a lien on homestead alleging mortgages of ten thousand dollars and total value of twelve thousand eight hundred dollars held to show equity did not exceed five thousand dollars —Coash v Bailey, 208 N W 402, 50 S D 12

9. Tex —McKenzie v Mayer, Civ App, 20 S W 2d 238
29 C J p 986 note 30

10. Iowa —McCleary v Ellis, 6 N W 571, 54 Iowa 311, 37 Am R 205
Ky —Davidson v Dishman, 59 S W 326, 22 Ky L 940

11. Ala —Cross v Ensley Bank, 84 So 267, 203 Ala 561
29 C J p 986 note 32

12. Tex —Ellis v Harrison, 56 S W 592, 57 S W 984, 24 Tex Civ App 13

13. Ga —King v. King, 85 S E 95, 143 Ga 385

Miscellaneous averments The debtor is not required to aver a notification of the officer levying on the home property, if such notice is not prescribed by law[14] Where a petition in a suit to enjoin the sale of lots on execution on the ground that they were part of plaintiff's homestead did not allege that plaintiff at the first opportunity pointed out or offered to point out personal property on which to make the levy, he cannot object that the court sustained a special exception to other allegations of his petition that the levy was unlawfully, spitefully, and willfully made, without demand for payment or to point out a levy being made of plaintiff, when he had personal property subject to execution in the county and was personally present there all the time[15] It has been held that a complaint which alleges that the debtor had offered other property to be levied on in satisfaction of the debt is bad if it does not allege that the property so offered belonged to the debtor[16] A plea to the jurisdiction alleging the homestead character of property sought to be reached by foreclosure is not demurrable[17] In a suit to enjoin the sale of certain lots on execution on the ground that they were part of plaintiff's homestead, plaintiff is the one seeking affirmative relief, and hence a contention that the answer filed by defendant is insufficient in its allegations for affirmative relief to sustain a judgment against plaintiff and foreclosing an execution lien on part of the property is without merit[18] If the petition to enjoin a sale under decree or judgment proceeds on the theory of fraud, the fraudulent acts must be averred,[19] and it will not be sufficient to allege generally that the decree or judgment was procured by fraud[20] A petition seeking to remove a cloud on the debtor's title, created by a sheriff's deed to a purchaser at execution sale, need not state how such deed constitutes a cloud[21] The debtor need not, in pleading his rights in a second homestead, allege that he sold the former one with the intention of investing in another[22] In an action for damages for a wrongful levy on homestead property, the allegations must be sufficient to overcome a presumption of due performance on the part of the levying officer[23]

b. Amendments

Pleadings may be amended in a proper case in accordance with general rules

In accordance with general rules of pleading, if the pleadings are defective in form or substance they may be amended,[24] provided no new and distinct cause of action is thereby added, or new and distinct parties introduced[25] However, the adversary should be given notice of material amendments permitted by the court[26] A party cannot in his answer claim to be the owner of real property and after that issue has been decided against him amend his pleading and claim a lien[27]

c. Issues, Proof, and Variance

Only issues raised by the pleadings may be considered, and only evidence relevant to such issues should be admitted.

As a general rule, only issues raised by the pleadings may be considered,[28] and only evidence relevant to such issues should be admitted[29] A homestead claimant fails to raise an issue respecting his right of exemption where he does not allege his occupancy of the premises as a residence[30] or does not claim a homestead by his pleading or evidence[31] If the homesteader pleads an intention to occupy the premises as a residence when the debt was contracted, he cannot prove actual occupation at that time,[32] but evidence that premises were used in connection with the residence is admissible under an allegation that they were part of the homestead, in the absence of objection to the latter averment because too general[33] An issue may sometimes be involved without special reference thereto in the

14. Iowa—Helfenstein v Cave, 6 Iowa 374

15. Tex—Harris v Matthews, 81 S W 1198, 86 Tex Civ App 424

16. Ind—Alexander v Mullen, 42 Ind 398

17. Tex—Gentry v Bowser, 21 S W 569, 2 Tex Civ App 388

18. Tex—Harris v Matthews, 81 S W 1198, 36 Tex Civ App 424

19. Ga—Mobley v Belcher, 87 S E 470, 144 Ga 112
29 C J p 987 note 46

20. Ga—Mobley v Belcher, supra

21. Tex—Gallagher v Keller, 23 S W 296, 4 Tex Civ App 454

22. Ky—Cooper v Arnett, 26 S W 811, 95 Ky 603, 16 Ky L 145.

23. Ga—Personal Finance Co v Evans, 163 S E 252, 45 Ga App 54—Personal Finance Co v Evans, 163 S E 250, 45 Ga App 53

24. Ky—Smith v Moss, 277 S W 245, 211 Ky 226
La—Rigdon v Bogan, 107 So 403, 160 La 551
29 C J p 987 note 53
Amendment of pleadings
Generally see the C J S title Pleading §§ 275–322, also 49 C J p 465 et seq
In equity see Equity §§ 390–424

25. Ga—Eve v Cross, 76 Ga. 693

26 Cal—Tappendorff v Moranda, 66 P 491, 134 Cal 419

27. Ky—Davidson v Dishman, 59 S W 326, 22 Ky L 940

28. Tex—Bankers' Mortg Co v Higgins, Civ App, 4 S W 2d 102, reversed on other grounds Higgins v Bankers' Mortgage Co, Com App 13 S W 2d 683
29 C J p 957 note 58

29. Tex—Cocke v Conquest Civ App, 2 S W 2d 902, affirmed 13 S W 2d 348, affirmed 35 S W 2d 673, 120 Tex 43
29 C J p 987 note 58 [a]

30. Ala—Lyne v Wann, 72 Ala 43—Daniel v Collins, 57 Ala 625

31. Tenn—Evans v Van Valkenburg, Ch App, 47 S W 1101

32. Ky—Thacker v Booth, 6 S W. 460, 9 Ky L 745

33. Tex—Paris & G N R Co v. Gremel, 19 S W 564, 84 Tex 443.

pleadings when it is plainly inferable from their allegations.[34] An allegation of wrongful abandonment of her husband by a claimant may be negatived by proof that she was driven from home by his cruelty, although such facts were not pleaded by her[35] Under the allegation, based on his recorded homestead declaration, that he was the head of a family with dependent children, plaintiff could prove that, after his children were no longer dependents, and their mother dead, his dependent family consisted of a wife of a second marriage and other dependents[36] Where husband and wife file separate declarations of homestead as to the same property, the court will not require an election as to which of the declarations they rely on, in a contest with creditors[37]

Under general denial or general issue A general denial permits of evidence of voluntary abandonment of a homestead,[38] but the rule is otherwise where, in addition to the general denial, special defenses other than that of abandonment are pleaded[39] One who resists the claim cannot question whether the premises exceed the value fixed by law by filing a general denial to a plea of homestead[40] However, it has been held that a wife, sued in ejectment with her husband by the latter's grantee in a deed in which she did not join, may assert her homestead rights under the general denial, inasmuch as it may be shown under the general denial that a deed was executed by a grantor wanting in capacity.[41] In an action of trespass to try title, evidence of the homestead character of the premises in controversy has been held admissible under a plea of not guilty[42]

§ 233. Evidence

a In general
b Burden of proof and presumptions
c Admissibility
d. Weight and sufficiency

a. In General

Evidence in proceedings to enforce or protect homestead rights is considered in the ensuing subdivisions of this section Evidence of acquisition and establishment of homesteads generally is considered supra in § 51, and evidence of abandonment, waiver, or forfeiture is treated supra §§ 196–198. The rules of evidence in proceedings to avoid homestead conveyances are considered supra § 154, in proceedings to enforce claims against homestead property supra § 117, and in proceedings to enforce rights under a homestead conveyance supra § 151

Examine Pocket Parts for later cases.

b. Burden of Proof and Presumptions

As a general rule the party asserting the homestead right has the burden of proving its existence, and the party seeking to enforce a claim against the property has the burden of proving that the exemption does not apply to his claim

The general rules governing burden of proof and presumption will control in proceedings to protect and enforce homestead rights[43] While there is a presumption that the homestead of a debtor is exempt from sale on execution,[44] and that a state of facts which entitles one to a homestead continues until the contrary is established,[45] it is generally held that one who claims a homestead right in premises in proceedings instituted by him to protect the right or in proceedings in which he asserts the right as a defense has the burden of establishing it,[46] al-

34. Tex—Telschow v House, 32 S W 153, 10 Tex Civ App 671
29 C J p 987 note 63

35. Tex—Bradley v Deroche, 7 S W 779, 70 Tex 465

36. La—Herbert v Mayer, 17 So 131, 47 La Ann 563

37. Wash—Nelsen v McKeen, 5 P 2d 333, 165 Wash 274

38. Tex—Weitzman v Lee, Civ App 262 S W 859
Admissibility of evidence on issue of abandonment generally see supra § 197

39. Tex—Huss v Wells, 44 S W 33, 17 Tex Civ App 195

40. Tex—Hargadene v Whitfield, 9 S W 475, 71 Tex 482.

41. N C—Cawfield v Owens, 41 S E 891, 130 N C 641

42. Tex—Smith v Simpson, Civ App, 97 S W 2d 522, error refused

43. Tex—Farm & Home Savings & Loan Ass'n of Missouri v Muhl, Civ App, 37 S W 2d 316, error refused
29 C J p 988 note 71
Failure to allot homestead
One attempting to show that commissioner's deed executed at judicial sale was void for reason that sale was had without first allotting to judgment debtor his homestead had burden of establishing that no homestead had been allotted to debtor—Johnson v Sink, 9 S E 2d 371 217 N C 702

44. Ky—Thorn v. Darlington, 6 Bush 448
29 C J p 988 note 72

45. Ala—Powers Clothing Co. v Smith, 81 So 576, 202 Ala 634
29 C J p 988 note 73
Burden of showing change
Burden was on homestead claimant's judgment creditor to show that rural character of property had changed to urban so as to reduce homestead to one not exceeding half acre—Hatter v Isenbice, 223 N W 527, 207 Iowa 702

46. Alaska—Williams v Thompson, 7 Alaska 601
Tex—Robinson v Home Owners' Loan Corporation, Civ App, 147 S W 2d 949, error dismissed, judgment correct—Hughes v Wruble, Civ App 88 S W 2d 661, affirmed 116 S W 2d 368, 131 Tex 444—Lowry v Henderson, Civ App, 244 S W 636
29 C J p 988 note 74
Action for damages for wrongful entry
Judgment debtors, claiming that deputy sheriff's entry on alleged homestead to pick cherry crop to satisfy execution was unlawful, must prove existence of homestead—Ross v Beedelman, 294 P. 410, 110 Cal. App. 506.

though there is also authority to the contrary;[47] and it has been held that he has the burden of establishing this right, although plaintiff holds the affirmative in the pleadings, as where the petition alleges that the land is not exempt from execution and is not occupied by defendant as a homestead.[48] Nevertheless, it is only necessary that claimant should establish a prima facie right to a homestead exemption.[49] Claimant need not show affirmatively that the debt against which he asserts his exemption is not privileged.[50] Where a judgment debtor sets up a claim to money in the hands of a garnishee as exempt as being the proceeds of a homestead, he has the burden of proving this fact.[51]

Value. The rule is that the burden is on the party setting up a claim to a homestead to show that the premises so claimed do not exceed in value the statutory exemption,[52] but there are decisions which hold that it is not presumed that the premises held as a homestead exceed the statutory limit of value,[53] and that, if the creditor claims that the debtor's interest in the property exceeds the homestead exemption in value, he has the burden of proving such claim.[54] If the commissioners refer in their report to the debtor's "homestead," it will be presumed to be of the full statutory value.[55] The evidence of value must relate to the time when the value is an issue,[56] as, for instance, at the time of the levy and sale under execution of the premises claimed as homestead,[57] for there is no presumption that the value remains unchanged during a series of years.[58]

Identity. The party asserting the homestead has the burden of proving what land constitutes the homestead, where such an issue arises.[59]

Fraud. If one claiming a homestead charges that the judgment under which it was sold was obtained by fraud, the burden of proof is on him to establish that fact.[60] Where it is shown that a vendor's lien notes were fraudulently executed without consideration for the purpose of raising money with a homestead as security, the burden is on plaintiffs, assignees of the notes and lien as collateral for a loan to the payee, in an action to foreclose the lien for payment of the balance on the notes, to show the amount due on the note for which they were collateral, even if they are innocent holders of the notes.[61]

c. Admissibility

The admissibility of evidence is governed by general rules

In proceedings to protect or enforce homestead claims any competent and material evidence bearing directly on the existence of facts which are pertinent under the particular homestead law,[62] or tending to show the exempt character of the property claimed as a homestead,[63] is admissible. Accordingly there may be admitted proof of circumstances under which a former home was sold and another purchased,[64] evidence of the intention of the parties,[65] evidence of intention of the homesteader and his wife to occupy the premises in question as a home,[66] evidence of a creditor's levy subject to the

Purchase with proceeds of prior homestead

Party claiming present homestead was procured with proceeds of prior homestead has burden of proof.—Crail v Jones, 221 N W 467, 206 Iowa 761

47. Ala.—Hollis v American Wholesale Corporation, 112 So 204, 215 Ala 644

48. Ky.—Robertson v Robertson, 20 S W 543, 14 Ky L 505

49. Tex.—Braly v Webster, Civ App., 4 S W 2d 580
29 C J p 988 note 76

50. Iowa.—Perry v Adams, 162 N W 817, 179 Iowa 215
29 C J p 988 note 77

51. Iowa.—First Nat Bank v Neve, 235 N W 561, 213 Iowa 344
Utah.—Giesy-Walker Co v Briggs, 162 P 876, 49 Utah 205

52. La.—Daniel v Thigpen, 194 So 6, 194 La 522
29 C J p 989 note 81

53. Ill.—Mueller v Conrad, 52 N E 1031, 178 Ill 276.

54. Utah.—Williams v Peterson 46 P 2d 674, 86 Utah 526

55. Mass.—Warren v Greenwood 121 Mass 112

56. Ala.—Sheffey v Davis, 60 Ala 548
Cal.—In re Delaney, 37 Cal 176

57. Ala.—Sheffey v Davis, 60 Ala 518

58. Cal.—In re Delaney, 37 Cal 176

59. Ark.—Hatcher v Wasson, 87 S W 2d 578, 191 Ark 765
Okl.—Marathon Oil Co v Western Oil & Drilling Co., 89 P 2d 939, 185 Okl 53

60. Ga.—Mobley v Belcher, 87 S E 170, 144 Ga 442

61. Tex.—Harbers v Levy, 77 S W 261, 33 Tex Civ App 480

62. Ala.—Cofer v Scroggins, 13 So 115, 98 Ala 342, 39 Am S R 54

Parol evidence was admissible to show that property not constituting homestead was first offered for sale and that no bids were received therefor, where such evidence did not prejudice the rights of third persons.—Equitable Life Ins Co of Iowa v Ryan, 239 N W 695, 213 Iowa 603

Evidence held admissible

(1) Evidence of designation of homestead, mortgage of land and partition of homestead estate was admissible on question of defendant's right to recover exemplary damages for impounding proceeds of homestead by garnishment.—Washington v Huggins, Tex Civ App., 10 S W 2d 140

(2) Other evidence.—Farm & Home Savings & Loan Ass'n of Missouri v Muhl, Tex Civ App., 37 S W 2d 316, error refused

63. Okl.—Morey v James, 248 P 594, 118 Okl 277
29 C J p 989 note 91

64. Ga.—Mitchell v Prater, 3 S E 658, 78 Ga 767

65. S D.—Clark v Evans, 60 N W 862, 6 S D 244
29 C J p 989 note 93

66. Tex.—Morris v Simmons, Civ App., 138 S W 800
29 C J. p 989 note 94.

homestead estate,[67] the filing of a certified copy of a claim for exemption in accordance with statutory requirements,[68] the occupation of land as a residence by the debtor at the time and since the debt or lien was created,[69] and a schedule of the debtor's real and personal property duly returned to the ordinary and recorded.[70] Declarations made in disparagement of the existence of a homestead are competent in favor of one claiming adversely.[71] Evidence is admissible, on the question of notice to the lender, to show that the agent who made a loan on property subsequently claimed as a homestead was previously instructed not to lend money on homesteads and to require applicants to make affidavit as to what constituted their place of residence.[72] Evidences of indebtedness given by the homestead claimant to third persons are admissible as tending to disprove his claim that the property in question was paid for exclusively with rents and profits from a homestead.[73] It may be shown by documentary evidence that after the homestead was set apart it was sold on execution to satisfy a judgment to which it was subject, and that the purchaser conveyed it to the debtor's wife, such evidence tending to prove loss of possession and of homestead rights.[74] If the issue is whether a homestead was set off to a widow as head of a family, it may be shown by parol that she paid the estate of her deceased husband the excess in value over the statutory limit of a homestead.[75]

On the other hand, evidence which is irrelevant, incompetent, or immaterial is inadmissible.[76] Thus a wife cannot testify to her ignorance of the contents of a mortgage or mortgage application signed by her where there is no issue as to the genuineness of her signature or as to fraud in procuring it.[77] Where defendant claimed the right to hold property sued for under an alleged parol partition awarding the property to her husband as a homestead, evidence that plaintiff as executor of the will of his deceased wife under which the property had passed had taken advice of attorneys prior to his son's marriage and had been advised that he could not set apart any portion of the property of the estate to his son until his daughter arrived at the age of twenty-one is inadmissible as irrelevant.[78] Where a judgment debtor excepts to the return of the appraisers assigning him a homestead, and his exception is based on the ground that the exemption was laid off to him in his wife's lands and not in his own, the debtor's statements, not sworn to, are incompetent evidence.[79] Evidence that the debtor's wife was on friendly terms with him and accompanied him when he absconded and abandoned the homestead is not competent where the issue is the existence of a homestead right.[80]

Evidence of void proceedings had on claims for an allotment of a homestead is not admissible to show the existence of the homestead privilege or the character of the premises.[81]

Value Competent and relevant evidence as to the value of property claimed as exempt is admissible.[82] Thus, in ascertaining the value of the property, evidence is admissible of improvements made thereon[83] before and after the owner abandoned them,[84] but assessment rolls on which the property is listed are not competent evidence for that purpose.[85]

Consideration of debt If it is sought to prove that the debt in question was or was not enforceable against the homestead, its consideration, although it is a debt reduced to judgment, may be shown.[86]

d. Weight and Sufficiency

The weight and sufficiency of the evidence is governed by general rules

67. Ga—Haslam v Campbell, 60 Ga 650

68. Ala—Cofer v Scroggins, 13 So 115, 98 Ala 342, 39 Am S R 54
Ga—Brown v Driggers, 62 Ga 354

69. Ill—Parrott v Kumpf, 102 Ill 423

70. Ga—Piedmont Nat Bldg & Loan Assoc v Bryant, 41 S E 661, 115 Ga 417

71. Kan—Anderson v Kent, 14 Kan 207

72. Tex—Scottish-American Mortg Co v Scripture, Civ App, 40 S W 210

73. Ga—Kiser v Dozier, 30 S E 967, 102 Ga 429, 66 Am S R 184

74. Ga—American Freehold Land Mortg Co v Walker, 42 S E 59, 115 Ga 737.

75. Ga—Groover v Brown, 69 Ga 60

76. Ga—Powell v Powell, 127 S E 117, 159 Ga 837
Tex—Martin v Astin, Com App, 295 S W 584, reversing Astin v Martin, Civ App, 289 S W 442—Holden v Gibbons, Civ App, 101 S W 2d 837, error dismissed
Wis—Roche v Du Bois, 271 N W 84, 223 Wis 438

77. Tex—Scottish-American Mortg Co v Scripture, Civ App, 40 S W 210

78. Tex—Long v Long, 70 S W 587, 30 Tex Civ App 368

79. S C—Vermillion v Mattison, 14 S C 625

80. Ala—Cofer v Scroggins, 13 So 115, 98 Ala 342, 39 Am S R. 54

81. Ga—King v King, 85 S E 95, 143 Ga 385
29 C J p 990 note 15

82. Ga—Kimsey v Rogers, 142 S E 667, 166 Ga 176

83. Ga—Kimsey v Rogers, supra
Cross-examination as to cost of improvements placed on property was improperly excluded on value of improvements—Kimsey v Rogers, supra

84. Ala—Cofer v Scroggins, 13 So. 115, 98 Ala 342, 39 Am S R 54

85. Tex—McLane v Paschal, 11 S W 837, 74 Tex 20

86. Kan—Hurd v Hixon, 27 Kan 722
Mo—Ingraham v Dyer, 28 S W 840, 125 Mo 491.

The general rules regarding the weight and sufficiency of evidence in civil actions apply in actions involving homestead rights.[87] To establish the fact of a homestead, every fact essential to its existence must be shown.[88] In the notes cases are referred to in which may be found illustrations of evidence held sufficient to show a right to a homestead,[89] to show a right to a business homestead,[90] to show a continuation without break on exchange of an old homestead for a new one,[91] to show or sustain a finding that a homestead was exempt from sale under execution for a particular debt,[92] that a homestead was urban rather than rural[93] or rural rather than urban,[94] that there was no right to a homestead,[95] that there was no unreasonable delay in asserting claim to homestead,[96] that a judgment debtor with certain others constituted a "family,"[97] that homestead claimant falsely represented himself as unmarried when obtaining a loan without joinder of his wife in the encumbrance,[98] or to show or support findings as to other matters,[99] or to sustain a judgment or decree in favor of[1] or against[2] the homestead claimant. Also referred to are cases in which may be found illustrations of evidence held insufficient to show a right to a homestead,[3] to show a right to a business homestead,[4] to show that a purported sale of a homestead was a simulated transaction,[5] to show that the homestead claimant was the sole surviving constituent of the family,[6] or to show or sustain findings as to other matters,[7] or to sustain a verdict, judgment, or decree for[8] or against[9] the claimant.

Value. Value of premises may be shown by evidence of an offer by the debtor to sell for a given amount.[10] In the absence of any other evidence of value, the owner's testimony that he would take a certain sum for the homestead is evidence of its value.[11] The homesteader's admission under oath that the homestead exceeded the value allowed by statute has been held conclusive against him.[12]

87. La.—Minden Hardware & Furniture Co. v. Smith, 115 So. 381, 165 La. 98.

Evidence of transfer of sheriff's certificate of purchase of homestead property goes only to question as to proper or necessary party to motion by owner for share of proceeds.—Altman v. District Court of Second Judicial Dist. in and for Albany County, 254 P. 691, 36 Wyo. 290.

88. Cal.—Ross v. Biedelman, 294 P. 410, 110 Cal. App. 506.

89. Ala.—Cade v. Graffo, 148 So. 591, 227 Ala. 11.
Fla.—Sherman v. Ford, 136 So. 343, 102 Fla. 611.
Kan.—Wagner v. Downey, 99 P.2d 761, 151 Kan. 505.
Okl.—Farmer's Exch. Bank of Lindsay v. Cutler, 229 P. 186, 100 Okl. 193.
Tex.—Shaw v. Suhr, Civ. App., 81 S.W.2d 182.
Wash.—Paramount Securities Co. v. Tasker, 29 P.2d 920, 176 Wash. 523.
29 C.J. p. 990 note 19.

90. Tex.—Crockett v. Atkinson, Civ. App., 107 S.W.2d 591, error dismissed—Cooper Grocery Co. v. Peter, 80 S.W. 108, 35 Tex. Civ. App. 49.

91. Tex.—Andrews v. Security Nat. Bank of Wichita Falls, 50 S.W.2d 253, 121 Tex. 409, 81 A.L.R. 44, reversing Security Nat. Bank of Wichita Falls v. Andrews, Civ. App., 24 S.W.2d 509.

92. Mo.—Dent v. Dent, 166 S.W.2d 582.

93. Tex.—Boerner v. Cicero Smith Lumber Co., Civ. App., 293 S.W. 632, reversed on other grounds, Com. App., 298 S.W. 545, motion granted 9 S.W.2d 1105.

94. Tex.—Farmers' & Mechanics' Trust Co. v. Perry, Civ. App., 56 S.W.2d 501, error refused—Schultz v. Schultz, Civ. App., 45 S.W.2d 312.

95. Minn.—Mahon v. Van Valkenburg, 188 N.W. 316, 152 Minn. 162.
29 C.J. p. 990 note 21.

96. Ky.—Robinson v. Burnett, 192 S.W. 871, 174 Ky. 766.

97. Tex.—Tunnell v. Johnson, Civ. App., 209 S.W. 451.
29 C.J. p. 990 note 23.

98. Minn.—Bozich v. First State Bank of Buhl, 184 N.W. 1021, 150 Minn. 241.

99. Ark.—Canady v. Victoria Bank of Strong, 7 S.W.2d 763, 177 Ark. 1193.
Iowa.—American Sav. Bank of Marengo v. Willenbrock, 228 N.W. 295, 209 Iowa 250.
Neb.—Hawley v. Arnold, 288 N.W. 823, 137 Neb. 238.
S.D.—Olson v. Colton Sav. Bank, 213 N.W. 364, 51 S.D. 253.
Tex.—Hughes v. Wruble, Civ. App., 88 S.W.2d 661, affirmed 116 S.W.2d 368, 131 Tex. 444—Farm & Home Savings & Loan Ass'n of Missouri v. Muhl, Civ. App., 37 S.W.2d 316, error refused.

1. Ga.—Volunteer State Life Ins. Co. v. Calhoun, 169 S.E. 197, 176 Ga. 891.
La.—Mallouf v. Fontenot, 128 So. 652, 170 La. 612.
Neb.—Bliss v. White, 272 N.W. 769, 132 Neb. 651.
Okl.—Farmers' State Bank of Newkirk v. Hess, 251 P. 73, 120 Okl. 210—Booker v. First Nat. Bank, 245 P. 881, 117 Okl. 179—Farmers' Exch. Bank of Lindsay v. Cutler, 229 P. 186, 100 Okl. 193.

2. Tex.—Lowry v. Henderson, Civ. App., 244 S.W. 636.

3. Ark.—Jones v. Thompson, 166 S.W.2d 1036.
Tex.—Rose v. Turner, Civ. App., 16 S.W.2d 113, conforming to answer to certified questions, 7 S.W.2d 70, 117 Tex. 161.
Wash.—Traverso v. Cerini, 263 P. 181, 146 Wash. 273.
29 C.J. p. 990 note 25.

4. Tex.—Gibbs v. Hartenstein, Civ. App., 81 S.W. 59.

5. Tex.—Harrison v. Lewisville First Nat. Bank, Civ. App., 224 S.W. 269.

6. Tex.—Ingram v. Summers, Civ. App., 29 S.W.2d 447, error dismissed.

7. Ga.—Greenwood v. Greenwood, 173 S.E. 858, 178 Ga. 605.
Tex.—Smith v. Simpson, Civ. App., 97 S.W.2d 522, error refused—Dallas Trust & Savings Bank v. Pickett, Civ. App., 59 S.W.2d 1090, error dismissed—Good v. Good, Civ. App., 293 S.W. 621.
Wyo.—State Bank of Wheatland v. Bagley Bros., 11 P.2d 572, 44 Wyo. 244, rehearing denied 13 P.2d 564, 44 Wyo. 456.

8. Tex.—Cain v. Dickson, Civ. App., 78 S.W.2d 1095.

9. Tex.—Young v. Hollingsworth, Civ. App., 16 S.W.2d 844, error refused.

10. Iowa.—Boot v. Brewster, 36 N.W. 649, 75 Iowa 631, 9 Am. St. R. 515.

11. Iowa.—Boot v. Brewster, supra.

12. Ky.—Cincinnati Leaf Tobacco Warehouse Co. v. Thompson, 49 S.W. 446, 105 Ky. 627, 20 Ky. L. 1439.

Where the opinions of witnesses differed widely as to the value of the homestead, a valuation in accordance with the average value fixed by the witnesses has been sustained.[13] In a number of other cases the sufficiency of the evidence as to the value of the property has been considered.[14]

§ 234. Trial

Instructions, findings, and other aspects of the trial of the proceedings are governed by the general rules applicable in civil actions.

The trial of proceedings to protect and enforce homestead rights is controlled by the usual rules governing procedure in civil actions generally Questions of law and fact in such proceedings are discussed infra § 235

Instructions. The general rules relating to instructions in civil actions apply in proceedings of the character under consideration[15] Accordingly it has been held that an instruction is improper if it suggests an issue not properly within the case,[16] or which is inapplicable to the evidence,[17] or if it is confusing or misleading[18] or incorrectly states the law[19] An instruction should be refused which withdraws from the jury an issue the determination of which will ascertain the homestead rights of parties to the suit[20] A charge may be erroneous also for an omission to define terms employed in it[21] Where the charge as a whole is sufficient, a party cannot complain of the failure to give a particular instruction which was not requested[22]

If a charge concerning abandonment of the residence property ignores the element of an intention to return, it is erroneous,[23] and it is error to charge that there must be both abandonment and the acquisition of a new homestead before there is a loss of the statutory exemption[24] An instruction which requires the concurrence of the wife in the husband's intention not to return to occupy the homestead as such in order to constitute an abandonment is erroneous[25] If a plea of abandonment has been pleaded and the debtor was not in actual occupation at the time the debt was created, it is not necessary to charge expressly that the burden of proving abandonment is on the creditor[26] An instruction, on an issue whether land had been abandoned as a homestead, that the burden was on plaintiffs to show the abandonment, but that such proof might be made by facts and circumstances or by circumstances alone, if the jury deemed the same "sufficiently strong and cogent," is not objectionable as requiring greater certainty of proof than was proper[27]

An instruction was properly refused which stated that a second parcel of land leased by the debtor from a landlord other than the party from whom he had previously leased his residence tract must be designated as a homestead as fully as the original homestead was designated[28] So it is error to tell the jury that the intentions of the homesteaders respecting the future occupancy of their property are immaterial if, by representing that the premises had never been occupied as their homestead, they had obtained the loan sued for where the evidence tended to show their statements to the creditor that they intended moving upon the property to live as soon as their children completed their education[29] The jury may be told that, if they find

13. Ky—Riley v Smith, 5 S W 869, 9 Ky L 615

14. Utah—Brown v Cleverly, 83 P 2d 1009, 96 Utah 116 rehearing denied 85 P 2d 769, 96 Utah 120
Wis—Roche v Du Bois, 271 N W 84, 223 Wis 138

15. Tex—Ran v City Nat Bank of Decatur, Civ App, 272 S W 510

16. Ark—Pipkin v Williams, 21 S W 433, 57 Ark 212, 38 Am S R 241
29 C J p 991 note 49

17. N C—Welch v Welch, 8 S E 156, 101 N C 565
29 C J p 991 note 50

18. Okl—Morey v James, 276 P 707, 136 Okl 174

19. Okl—Morey v James, supra
Tex—Lewis v Pitts, Civ App, 275 S W 473

20. Ala—Hodges v Hodges, 77 So 741, 201 Ala 215
Tex—Schneider v Sanders, 61 S W 727, 26 Tex Civ App 169.

21. Tex—Graves v Campbell, 12 S W 238, 71 Tex 576
29 C J p 991 note 52

22. Tex—Lewis v Pitts, Civ App, 275 S W 473

Growing crops

The court need not inform the jury that growing crops ready to be harvested are not in themselves exempt but when on a homestead they cannot be levied on, it having already instructed that to sustain a claim by the homesteader for damages in levying on growing crops the jury must find that such crops were on the homestead land—Moore v Graham, 69 S W 200, 29 Tex Civ App 235

23 Tex—Keller v Beattie, Civ App, 34 S W 667
29 C J p 991 note 59

Time of forming intention

A charge on the issue of abandonment, asking the jury to find whether or not the homestead claimants, prior to the levy, left their homestead with the intention never to return to it as a homestead, was not erroneous, as against the contention that the charge should have informed the jury that the intention not to return and occupy the land as a homestead could have been formed after claimants had left the land and before the levy—Farmers' State Bank of Georgetown v Roberts, Tex Civ App, 59 S W 2d 1089, error dismissed

24. Tex—Scottish-American Mortg Co v Scripture, Civ App, 40 S W 210

25. Tex—Cooper Co v Warwick, Civ App, 120 S W 2d 128

26. Tex—White v Dabney, Civ App 46 S W 653

27. Tex—Gaar v Burge, 110 S W 181 49 Tex Civ App 599
Burden of proof on issue of abandonment see supra § 196

28. Tex—Moore v Graham, 69 S W 200, 29 Tex Civ App 235

29. Tex—Davidson v Jefferson, Civ App, 68 S W. 822.

the property in controversy was set off to the homesteader by partition and became his separate property, they should find it was a homestead[30] The court may properly instruct that the husband alone has the right to designate a homestead, and that unless he intends to use the property as a home it will not be impressed with that character, although the wife may have intended making it her abode[31] Where the facts involve a question of bona fide purchase for value and without notice of notes which recite that they are given in part payment of land subsequently claimed as exempt from their collection, the court should instruct that a purchase of the notes prior to the makers' occupancy of the property as a homestead and prior to their manifesting an intention so to occupy, the purchaser of the notes being without notice of such intended occupancy, would render them enforceable against the property[32]

Verdict and findings. The general rules as to findings in civil actions apply[33] Answers to immaterial issues submitted to the jury may be disregarded[34] A judgment cannot be based on irreconcilably conflicting findings on material issues[35] A finding that the applicant is entitled to a homestead means a homestead in the entire real estate involved in the application[36] If it is found that two parties executed a declaration of homestead "as husband and wife," this will not be considered equivalent to stating that they were then husband and wife, but that they represented themselves to be such in their declaration[37]

While the owner of a business may have the right to elect, if he is engaged in two businesses, which he will hold as his business homestead, see supra § 40, a finding of the jury that his principal place of business was one and not the other shows an election[38] A finding that an uptown office of wholesale grain dealers was used as an auxiliary to, and in connection with, the plant which they claimed exempt from a trust deed as their business homestead, is not inconsistent with a finding that the uptown office was their principal place of business as wholesale grain dealers[39]

A verdict enjoining interference with the homestead by a mortgagee should not restrain the creditor from enforcing his rights after termination of the homestead[40]

A statement of value contained in the verdict includes the value of the premises with improvements, where the further finding appears that the land with improvements would not have brought over a given amount upon certain named dates[41]

If the subjects of rents and the proportion in which claimants of a homestead are entitled are not litigated, a verdict need not dispose of such matters, but the court may distribute the rental funds on the basis of the respective interests which the litigants have in the premises as fixed by the verdict[42]

§ 235. —— Questions of Law and Fact

If the evidence on an issue of fact is conflicting or such that several conclusions might reasonably be drawn therefrom, the issue is for the jury, but if only one conclusion is possible the issue should be disposed of by the court

If the evidence on any issue of fact is conflicting or such that several conclusions might reasonably be drawn therefrom, the issue is one for the triers of fact[43] The existence of facts on which a homestead exemption is predicated ordinarily is a question of fact[44] Accordingly it has been held that it is for the jury to determine whether the

30. Tex—Long v Long, 70 S W 587, 30 Tex Civ App 368

31. Tex—Evans v Daniel, 60 S W 1012, 25 Tex Civ.App 362

32. Tex—Evans v Daniel, supra

33. S D—Henry v. Meade County Bank, 148 N W 626, 34 S D 369 29 C J p 992 note 66

34. Tex—Burkhardt v Lieberman, Civ App, 142 S W 2d 283, modified on other grounds 159 S W 2d 847, 138 Tex 109

35. Tex—King v Hill, Civ App, 167 S W 2d 628, affirmed, Sup, 172 S W 2d 298—Barton v Wood, Civ App, 162 S W 2d 147, error refused

Findings held not conflicting

Findings that defendants did not intend to return to property as homestead, and that they had not abandoned such an intention, were not conflicting—Tanner v Grisham, Tex Civ App, 259 S W 146, reversed on other grounds, Com App, 295 S W 590

36 Ga—Brand v Kennedy, 71 Ga 707

37. Cal—Emmal v Webb, 36 Cal 197

38. Tex—Bowman v Stark, Civ App, 185 S W 921

39. Tex—Bowman v Stark, supra

40. Ga—American Freehold Land Mortg Co v Walker, 46 S E 426, 119 Ga 311

41. Tex—McLane v Paschal, 11 S W 837, 74 Tex 20

42. Tex—Salmons v Thomas, 62 S W 102, 25 Tex Civ App 422

43. Ala—Metropolitan Life Ins Co v Estes, 155 So 79, 228 Ala 582 Tex—Jones v First Nat Bank of McAllen, Com App, 259 S W 157—Henry v Williams, Civ App, 132 S W 2d 633—Strauss v Friedman Civ App, 109 S W 2d 553, error dismissed—Greer v Brock, Civ App, 91 S W 2d 855—Milliken v Coker, Civ App, 90 S W 2d 902, modified on other grounds 115 S W 2d 620, 132 Tex 23—Wilson v Levy, Civ App 62 S W 2d 501 error dismissed—First State Bank in Caldwell v Stubbs Civ App 48 S W 2d 446—Farm & Home Savings & Loan Ass'n of Missouri v Muhl Civ App 37 S W 2d 316, error refused—Williams v Daniels, Civ App, 4 S W 2d 189—Commerce Farm Credit Co v Sayles, Civ App, 279 S W 567

44. Tex—Dallas Trust & Savings Bank v Pickett, Civ App, 59 S W 2d 1090, error dismissed

premises have been dedicated or occupied as a homestead,[45] whether claimant was the head of a family during his occupancy of the premises in suit;[46] whether a tract situated in or adjacent to a town was a rural or urban homestead;[47] the value of improvements on the land claimed as homestead;[48] and whether a tract of land adjacent to a dwelling is embraced within the homestead of which the dwelling house is a part[49]

Questions for court and direction of verdict. If the evidence is not conflicting as to any material issue, and but one conclusion can reasonably be drawn therefrom, the question becomes one of law and the court may and should direct a verdict[50] If the evidence is clear and uncontradicted that a mortgagee was ignorant of the fact that the mortgaged property was a homestead at the time the debt was contracted, the court may instruct the jury to find an absence of such knowledge respecting the character of the land[51] Where the petition shows that the land sought to be recovered had been set apart as a homestead and had been sold without an order from the probate court to defendant who was put in possession, and these allegations were not denied, the court may direct a verdict for plaintiff for the premises[52] Although a piece of land separated from the tract on which the dwelling is situated may be so used as to make it a part of the homestead, testimony merely that land so situated was considered by the owner as part of his homestead is not sufficient to establish that fact so as to justify a peremptory instruction[53]

§ 236. Judgment and Enforcement

The judgment or decree must conform to, and be supported by, the pleadings and proof. Its effect and conclusiveness are governed by general rules.

The judgment or decree in a proceeding to enforce or protect homestead rights must conform to, and be supported by, the pleadings and the proof,[54] it should not grant more than the pleadings and proof warrant,[55] or determine issues not involved in the proceeding[56] Thus, if a creditor attempts to subject his debtor's homestead to sale, it is error to adjudge the entire property to the debtor's wife as exempt on her petition therefor, in the absence of any denial by her of the allegations of the creditor's petition[57] Where the proceeding is in equity, the court may afford complete relief to all parties before it, although such relief was not specifically prayed for by each of the respective parties[58] An injunction decree should not be so broad as to pre-

Wash—State ex rel Ritchie v Douglas, 89 P 2d 227, 198 Wash 564

Abandonment waiver or forfeiture as question of law or fact see supra § 199

45. Tex—Milliken v Coker Civ App, 90 S W 2d 902 modified on other grounds 115 S W 2d 620, 132 Tex 23

29 C J p 991 note 37

46. Mo—Mathewson v Kilburn, 81 S W 1096, 183 Mo 110

47 Tex—Jones v First Nat Bank of McAllen Com App 259 S W 157—Farmers' & Mechanics' Trust Co v Perry, Civ App 56 S W 2d 501, error refused—Schultz v Schultz Civ App, 45 S W 2d 312—Commerce Farm Credit Co v Sayles, Civ App, 279 S W 567—Connelly v Johnson, Civ App, 259 S W 634—Ewing v Riley, Civ App 246 S W 94—Saunders v Lanham, Civ App, 57 S W 70

29 C J p 991 note 40

48 Ga—Kimsey v Rogers, 142 S E 667, 166 Ga 176

49. Tex—Andrews v Hagadon, 54 Tex 571—Arto v Maydole, 54 Tex 244

50 Ga—Powell v Powell, 127 S E 117, 159 Ga 837

Tex Farmers' & Mechanics' Trust Co v Perry, Civ App, **56** S W 2d 501, error refused

Fact held not established as matter of law

Continued occupancy of homestead premises after conveyance thereof was not, as matter of law, proof that assignee of vendor's lien note had notice that conveyance was merely a pretended sale for purpose of obtaining money on the homestead—Strauss v Friedman, Tex Civ App, 109 S W 2d 553, error dismissed

51. Tex—Scripture v Scottish-American Mortg Co, 49 S W 644 20 Tex Civ App 153

52 Ga—Willford v Denby, 56 S E 1010 127 Ga 786

53. Tex—Johnson v Russell, Civ App, 220 S W 352

54. Tex—Brown v Jones, Civ App, 134 S W 2d 850—Ramirez v Castro, Civ App, 121 S W 2d 652

Utah—Cleverly v District Court of Second Judicial Dist in and for Davis County, 39 P 2d 748, 85 Utah 440

Vt—In re Wolff's Estate, 182 A 187, 108 Vt 54

Judgment held not to conform to petition

Where defendants alleged that "the south 200 acres" of three hundred and twenty acre tract involved constituted their homestead, judgment decreeing that defendants should recover "the north 200 acres" of three hundred and twenty acre tract as their homestead was fundamental error—Hughes v Stovall, Tex Civ App, 135 S W 2d 603, error dismissed, judgment correct

55. Tex—Ramirez v Castro, Civ App, 121 S W 2d 652

Wis—Roche v Du Bois, 271 N W 84, 223 Wis 438

56. Tex—White v Blackman, Civ App, 168 S W 2d 531

57. Ky—Eaton v Price, 42 S W 341

58. Ky—Riley v Smith 5 S W 869, 9 Ky L 615

Injunction on conditions

Trial court did not err in enjoining defendants from bringing on sale of plaintiff's realty under execution until plaintiff's application for homestead should be finally determined, although plaintiff had given a deed and a note containing a homestead waiver to a banking company and one of the defendants after obtaining judgment against plaintiff and being unable to find property of plaintiff on which to levy a fieri facias paid amount of note to banking company and received a deed from banking company where injunction was conditioned on payment by plaintiff into court of amount owed on note—Pass v Pass, Ga, 23 S E 2d 697

Apportionment of mortgage debt

On application by mortgagors to compel purchaser at foreclosure sale to pay them amount of bid above amount due on special execution,

vent defendant from exercising such rights as he has or may in the future acquire against the property.[59] Where the debtor attempts to enjoin the enforcement of a judgment against property, including the homestead, on the ground that a lien was improperly taken by the judgment creditor against such property, his relief will be confined to the homestead premises.[60] If the debtor fails in a suit to restrain a sale of his residence premises by a trustee under a trust deed, the decree should not direct their sale by the sheriff[61]

Judgment for the exemptioner may properly be based on findings sufficient when taken together to establish his right of homestead,[62] as, for example, on findings that before levy the exemptioner intended in good faith to occupy the premises as his home and had taken possession for that purpose within a reasonable time thereafter;[63] and it has been held that a decree allowing a claim of homestead should find all facts necessary under the statute for its existence[64] So, in an action to quiet title to realty by one claiming under a conveyance from a judgment debtor before an execution sale on the judgment purporting to sell plaintiff's property to satisfy the debt involving questions of judgment lien against land and whether it had been the judgment debtor's homestead, it was error to enter judgment for defendant without any determination as to whether the land had been a homestead exempt from execution[65] An order putting the purchaser at execution sale in possession on the ground that the judgment on which the execution issued was for a debt constituting part of the purchase price of the property need not recite such fact[66]

If an execution sale has been set aside and the sheriff's certificate and deed canceled in order to relieve the judgment debtor, the satisfaction of the debt will also be vacated and an alias execution be issued to collect the judgment[67] A preliminary injunction against the sale on execution of homestead property will not be dissolved until final hearing, where the creditor sets up as an affirmative defense the fact that the debt is enforceable against the property as antedating its homestead character.[68] If petitioner's claim for homestead as against a liability for street improvements is denied and the case continued to fix the time and amount of his payment, the petition should not be dismissed until those facts are ascertained[69] When real estate is conveyed to a wife, or to another in trust for her, in exchange for a deed to a homestead in which she joins, the district court's judgment holding the real estate so conveyed to her as security for a judgment lien against such homestead, that was fraudulently concealed from the purchaser by the vendors at the time of the exchange, was not error[70] Because of the unseverable character of the homestead right in the husband and wife, as long as the marital relation and the homestead interest exist there can be no judgment ousting either spouse from possession where the rights of the other spouse have not been adjudicated[71] A decree purporting to extinguish the husband's homestead interest upon payment of the value thereof could not affect the wife's homestead rights[72]

Necessity of bond Where the statutes require the furnishing of a bond by one seeking a stay of execution pending appeal from a judgment or as a condition to the granting of an injunction restraining the enforcement of a judgment, the court is without jurisdiction to grant an injunction restraining the execution of an order to sell homestead property to a debtor who appealed without giving a supersedeas bond, unless such an injunction is conditioned on the furnishing of a bond as required by statute[73]

where foreclosure sale of homestead could not be attacked, if mortgagors are entitled to relief asked, amount paid by purchaser should be so apportioned that homestead would bear its proportionate amount of mortgage indebtedness—Phenix Trust Co v Vaught, 205 N W 792, 201 Iowa 150

59 La—Rigdon v Bogan, 107 So 403, 160 La 551
Tex—Uvalde Paving Co v Kennedy, Civ App, 22 S W 2d 1091

Decree held not too broad

A decree enjoining defendant from asserting any claim adverse to the homestead "as hereby ascertained and determined" was not too broad as estopping defendant to proceed to appraise the value of the homestead in the manner provided by statute—Coakley v Swim, 23 P 2d 518, 218 Cal 340

60. Tex—Roller v Woolridge, 46 Tex 485

61. Tex—Bomback v Sykes, 24 Tex 217

62. Tex—Stevenson v Wilson, Civ App, 130 S W 2d 317 error refused
Utah—Jensen v Jensen, 269 P 485, 72 Utah 189

63 Tex—Foley v Holtkamp, 66 S W 891, 28 Tex Civ App 123

64. Ill—Kitchell v Burgivin, 21 Ill 40

65. Utah—Antelope Shearing Corral v Consolidated Wagon & Machine Co, 180 P 597, 54 Utah 355

66 Wash—State ex rel Ritchie v. Douglas, 89 P 2d 227, 198 Wash 564

67. Wis—Phillips v Root, 31 N W 712 68 Wis 128

68. Iowa—Hayes v Billings, 28 N W 652, 69 Iowa 387

69. Ky—Allen v Nevin, 38 S W 888 18 Ky L 901

70. Neb—Laughlin v Gardiner, 176 N W 727, 178 N W 270, 104 Neb 237

71. Tex—Astin v Martin Civ App, 289 S W 442, reversed on other grounds Martin v Astin, Com App, 295 S W 584
Parties see supra § 231

72. Ill—Voss v Rezgis, 175 N E 799, 343 Ill 451

73. Tex—Glenn v Hollums, Civ App, 73 S W 2d 1068.

Conclusiveness and effect. A judgment setting aside a homestead is not conclusive against a creditor who subsequently attempts to subject the land to his claim after the exemption ceases.[74] Under a statute making an order exempting property from levy or sale conclusive for only a year, a judgment should limit the period of exemption to one year.[75] A decision that the premises claimed were not the individual homestead of the claimant but came to him by survivorship does not determine the question of his rights therein.[76] The effect of an order vacating an order for the sale of a homestead on the ground that the judgment creditor had unreasonably delayed in instituting proceedings to reach the value in excess of the exemption is to relieve the property of the execution lien.[77] A decree for the sale of all right and interest in the premises in question will be presumed to pass the homestead right to a purchaser, although it is not specified.[78]

Vacation. An order which is void on its face may be vacated at any time.[79]

§ 237. Review

General rules governing review in civil actions are applicable

The fact that the debtor's wife did not join with her husband in the oath prescribed for poor persons on appeal by herself and husband from a judgment denying their homestead rights does not prevent either party from asserting those rights in the appellate court.[80] It has been held that an appeal of the entire case lies from a decision sustaining a motion to dissolve an injunction against the execution sale of the homestead, if the debtor's petition seeking to protect his homestead is dismissed at the same time the injunction is dissolved.[81]

Parties. If a wife appeals separately from a decree final against her homestead rights, it is no objection that her husband did not join, although he was a party defendant with his wife, the decree not being final as against him.[82] The purchaser of property claimed by surviving minors as a homestead is a proper party with the administrator of the deceased parents' estate, on certiorari from a decree of the probate court refusing to set aside the residence as exempt and ordering a sale of the land.[83]

The record on an appeal from a judgment determining homestead rights should show only the proceedings in the contest of those rights.[84]

Scope of review. Questions not properly raised below[85] or not properly presented before the appellate court[86] will not be considered. If the record presents a question of fact on conflicting proof, there will be no reversal, unless the conclusion of the lower court is flagrantly against the evidence.[87] Where the pleadings and evidence concerning appellant's claim to a homestead are not contained in the record, the refusal of the court to allow such claim cannot be reviewed on appeal.[88] The exercise of the lower court's discretion will not be disturbed unless an abuse of discretion clearly appears.[89]

Harmless error will not work a reversal.[90]

Disposition of case. In a suit to subject assets to judgment, a decree finding that a debtor after suit conveyed his homestead to his daughter without consideration and setting aside the conveyance will be reversed, where the value of the homestead was neither proved nor found by the decree, and there was nothing in the record authorizing the assumption that it was worth more than the exempt amount.[91] In a proper case the judgment of the trial court may be modified on appeal.[92]

74. Va.—Hanby v. Henritze, 7 S.E. 204, 85 Va. 177

75. Wis.—Roche v. Du Bois, 271 N.W. 84, 223 Wis. 438

76. S.C.—Hosford v. Wynn, 1 S.E. 197, 26 S.C. 130

77. Cal.—Graham v. Hunt, 7 P.2d 186, 119 Cal.App. 586

78. Ill.—West v. Krebaum, 88 Ill. 263

79. Utah.—Cleverly v. District Court of Second Judicial Dist. in and for Davis County, 39 P.2d 748, 85 Utah 440

80. Tenn.—Bostick v. Haynie, Ch.A., 36 S.W. 856

81. Ky.—Pendergest v. Heekin, 22 S.W. 605, 94 Ky. 384, 15 Ky.L. 180

82. Nev.—Rhodes v. Williams, 12 Nev. 20

83. Tex.—Connell v. Chandler, 11 Tex. 249

84. Ala.—Wright v. Jones, 15 So. 852, 103 Ala. 539

85. Tex.—Harris v. Matthews, 81 S.W. 1198, 36 Tex.Civ.App. 424
29 C.J. p. 993 note 1

Question raised in different proceeding

In a suit to quiet title as against the lien of a judgment plaintiff's claim of homestead will not be passed on where the pleadings and findings are silent on the subject of homestead, and it appears only incidentally that there was a homestead claim in the former action in which the judgment was recovered.—Hickey v. Algie, 197 P. 359, 51 Cal.App. 595.

86. Vt.—In re Wolff's Estate, 182 A. 187, 108 Vt. 54

87. Okl.—Clay v. First Nat. Bank, 39 P.2d 64, 170 Okl. 225
29 C.J. p. 993 note 2

88. Ky.—Finnell v. Higginbotham, 29 S.W. 740, 97 Ky. 21, 16 Ky.L. 758

89. Colo.—Lock v. Perkins, 33 P.2d 393, 95 Colo. 145
Fla.—Bishop v. First Old State Bank, 194 So. 488, 142 Fla. 190

90. Tex.—Salmons v. Thomas, 62 S.W. 102, 25 Tex.Civ.App. 422
29 C.J. p. 993 note 4

91. Ill.—Iles v. Heidenreich, 127 N.E. 722, 293 Ill. 291

92. Wis.—Roche v. Du Bois, 271 N.W. 84, 223 Wis. 438.

Subsequent proceedings If there has been an appeal from homestead proceedings and the judgment in favor of the debtor has been affirmed, the creditor may not file a supplemental pleading in the lower court and reach the property by showing that the exemption has terminated [93]

§ 238. Damages

Damages to a homesteader who has been kept from possession are estimated from the date of levy, and may include the rental value of the premises

Where damages are recovered by a homesteader who has been kept from the possession of his homestead, they are estimated from the date of levy,[94] and may include the rental value of the premises during the period recovered for,[95] from which should be deducted the taxes properly paid by the wrongful occupant during his possession,[96] but if the amount recovered is the value of the property and not merely the rents accrued such amount cannot be offset by the taxes paid by the wrongful occupant during his possession [97] Damages equal to the value of exempt crops wrongfully levied on are recoverable by the homesteader,[98] and cannot be offset by a recovery against him on a note in the same action [99] Where the homestead is wrongfully sold on execution and the purchaser raises a crop on the land, the homesteader is not entitled to the value of the crops as damages, although if he regains possession before the crop is matured and severed the crop becomes his property [1] The measure of damages for wrongfully impounding the proceeds of a homestead by garnishment has been held to be interest on the money impounded at the rate prescribed by law [2]

VI. RIGHTS OF SURVIVING SPOUSE, CHILDREN, OR HEIRS

§ 239. In General

Succession to, and continuation of, a right of homestead to a survivor or survivors are limited to the persons, and under the conditions, described in the homestead statute A homestead set apart to a survivor is commonly called a "probate homestead"

Succession to, and continuation of, a right of homestead by survival are limited to the persons described by the homestead statute,[3] and under the conditions prescribed by the statute,[4] so long as the survivor may assert such right,[5] and terminate with the death of the homesteader, if there is no surviving person in whom the right is continued by the statute,[6] but where the homestead character has once attached, it may continue for the benefit of a single individual who is the sole survivor of the persons or group designated [7] A surviving spouse, or person within the statute, takes the homestead rights, not by right of survivorship, but as property set aside by law from decedent's estate for the benefit of such survivor,[8] and his or her rights are neither enlarged nor diminished by the fact of such death [9] The right cannot be transmitted by descent [10]

The policy of the homestead laws generally is to secure to the surviving widow and minor children a homestead and homestead rights, and to give them special protection [11]

93. Ky—Wilcox v Parker, 6 Ky L 150

94. Tex—Bailey v Oliver, 9 S W 606

Right of action for damages see supra § 227

95. Mo—Dent v Dent, 166 S W 2d 582

29 C J p 993 note 9

96. Ill—Mix v King 66 Ill 145

97. Ky—Funk v Walter, 7 S W 926, 87 Ky 182, 10 Ky L 27

98. Tex—Cry v J W Bass Hardware, Civ App, 273 S W 347—Moore v Graham, 69 S W 200, 29 Tex Civ App 235

99. Tex—Cry v J W Bass Hardware, Civ App, 273 S W 347—Moore v Graham, 69 S W 200, 29 Tex Civ App 235

1. Mo—Dent v Dent, 166 S W 2d 582

2. Tex—Washington v Huggins, Civ App, 10 S.W 2d 140.

3. Mo—Collier v Porter 16 S W 2d 49 322 Mo 697

Okl—Manning v Doscher, 29 P 2d 966 167 Okl 368—Greenshaw v Brown 219 P 934, 96 Okl 11

S C—Darn v Stedham, 137 S E 331, 139 S C 66

S D—In re Clouse's Estate, 257 N W 106 63 S D 147

Tex—Holland v Swilley, Civ App, 268 S W 758

Immediate members of family, or, in other words the surviving husband or wife and their minor children are only ones included in homestead exemption under the statute—Greenshaw v Brown, 219 P 934, 96 Okl 11

4. Miss—Bank of Myrtle v Garrison, 184 So 291, 183 Miss 526

Surviving spouse over sixty years of age

Miss—Bank of Myrtle v Garrison, supra

5. Okl—McGaffey v. Mulky, 241 P 480, 115 Okl 44

6 S C—In re Snoddy's Estate, 21 S E 2d 198, 201 S C 14—Dorn v Stidham 137 S E 331, 139 S C 66

Duration and termination of homestead right generally see infra §§ 271–277

7. Okl—Oklahoma State Bank v Van Hassel, 114 P 2d 912, 189 Okl 48 Greenshaw v Brown, 219 P 934, 96 Okl 11

8. U S—Maruska v Equitable Life Assur Soc, D C Minn, 21 F Supp 841

Minn—Tomlinson v Kandiyohi County Bank, 202 N W 494, 162 Minn 230

9. Colo—Union Nat Bank of Greeley v Wright, 242 P 54, 78 Colo 346

10. Tex—Holland v Swilley, Civ App, 268 S W 758

Course of descent of homestead see infra § 242

11. Ala—Bishop v Johnson, 7 So 2d 281, 242 Ala 551.

Probate homestead The homestead right set apart to a surviving spouse or minor children is commonly called a "probate homestead,"[12] which, as defined by statute, is a homestead set apart by the court for the use of the surviving spouse and the minor children out of the common property, or if there be no common property, then out of the real estate belonging to deceased,[13] or a homestead to be created by the probate court out of any property belonging to decedent, which was subject to a homestead at the time of his death[14] The right to such a homestead is not a vested right, but a privilege, the validity of which depends on the conditions existing when the application therefor is made[15]

§ 240. Constitutional and Statutory Provisions

Exemptions in favor of the surviving spouse or children are generally controlled by the homestead law in force at the time of the homesteader's death, and such law is generally given a liberal construction in favor of the homestead claimant

Although there is authority to the contrary,[16] it is generally held that the laws in force at the time of the homesteader's death are controlling in respect of the exemptions in favor of the surviving spouse and children,[17] and that subsequent legislation will not enlarge or diminish their rights in this respect,[18] although as to this last proposition there is some contrary authority,[19] as where the subsequent legislation is general and refers to a prior general statute[20] The proportional interests of the widow and minor children, it has been held, are determined by the law in force when the order of court is made, setting apart a probate homestead to their use[21]

Sale to pay debts of decedent A sale of homestead real estate to pay the homesteader's debts generally is controlled by the statute in force at the time of his or her death,[22] but a statute which prevents the selling of the fee of decedent's homestead until the youngest child has attained majority does not affect the rights of creditors which have become fixed before that date to have the fee, in a homestead that has come into existence before, subjected

Cal —In re Kachigian's Estate, 128 P 2d 865, 20 Cal 2d 787 prior opinion App, 121 P 2d 869
Fla —Church v Lee, 136 So 242, 102 Fla 478

Purpose of statute providing for a homestead to the surviving widow or minor children, or a given amount in lieu thereof, "is to provide a means of severance of the homestead, when necessary, from interests subject to a due administration and the payment of debts and to save inviolate the homestead right which the law gives to the widow or children"—Howell v Ward, 161 So 487, 492 230 Ala 379
Homestead rights of surviving children see infra §§ 255–258
Homestead rights of surviving wife see infra §§ 243–254

12. Okl—Ringer v Byrne, 80 P 2d 212 183 Okl 46

13 Cal —In re Estate of Noah, 15 P 290, 73 Cal 590, 591, 2 Am S R 834—In re Maxwell's Estate 46 P 2d 777, 7 Cal App 2d 641

Right to probate homestead is favored by the law and should be liberally construed —In re Maxwell's Estate, supra
Widow's quarantine see Executors and Administrators §§ 327–331

14. Idaho —In re McVay's Estate, 93 P 28, 34, 14 Idaho 56

15 Cal —In re Pillsbury's Estate, 166 P 11, 175 Cal 454, 3 A L R 1396—In re Wyss' Estate, 297 P 190, 112 Cal App 487

16. S C —Ex parte Strobel, 2 S C 309
29 C J p 1010 note 52

17. Cal —Selinger v Milly, 124 P 2d 631, 51 Cal App 2d 286 —In re Wright's Estate, 277 P 372, 98 Cal App 633
Mo —Kay v Politte, 129 S W 2d 863 344 Mo 805 122 A L R 1115—In re Clute's Estate, 161 S W 2d 705 236 Mo App 1030
Or —Kinney v Uglow, 98 P 2d 1006, 163 Or 539
Vt —Richardson v Richardson, 11 A 2d 227, 232, 111 Vt 140, citing **Corpus Juris.**
Wash —Morley v Morley, 230 P 645, 131 Wash 540
29 C J p 1010 note 53

In Alabama

(1) The rule stated in the text generally applies —Bishop v Johnson, 7 So 2d 281 242 Ala 551—Dake v Inglis 194 So 673 239 Ala 241—Haynes v Haynes, 181 So 757, 236 Ala 331 —Ratliff v Ratliff, 175 So 259 234 Ala 320—Williams v Overcast, 155 So 543, 229 Ala 119—Gray v Weatherford, 119 So 819, 227 Ala 324—Taylor v Taylor, 127 So 503 221 Ala 74—Buchannon v Buchannon 124 So 113 220 Ala 73—Tharp v Johnson, 122 So 668, 219 Ala 537—Bodeker v Tutwiler, 100 So 776, 211 Ala 537—29 C J p 1010 note 53 [a] (1)

(2) Some earlier cases, however, qualified the rule to the extent that as against creditors of decedent the law in force at the time of the creation of a debt by contract governs —Munchus v Harris, 69 Ala 506—29 C J p 1010 note 53 [a] (2)

Rights of parties to partition involving homestead right acquired from deceased father and husband of children and surviving wife are determinable by law in force at time right arose —Schowe v Kallmeyer, 20 S W 2d 26, 323 Mo 899
What law governs
Homestead rights generally see supra § 5
Proceedings for protection of homestead rights see supra § 207
Transfer or encumbrance of homestead see supra § 128

18 Ala —Bodeker v Tutwiler 100 So 776, 211 Ala 537—Taylor v Pettus 52 Ala 287
Neb —In re Costello, 178 N W 192 104 Neb 577

19. Ky —Funk v Walters, 6 Ky L 297
29 C J p 1011 note 55

20. Or —In re Frizzell's Estate, 185 P 707 95 Or 681
29 C J p 1011 note 55 [a]

21. Cal —Sheehy v Miles 28 P 1046 93 Cal 288—Sulzberger v Sulzberger, 50 Cal 385
Ga —Gerding v Beall, 63 Ga 561

22 Mo —Kay v Politte, 129 S W 2d 863 344 Mo 805, 122 A L R 1115 —In re Clute's Estate, 161 S W 2d 705, 236 Mo App 1030
Sale
Of homestead property under order of court see Executors and Administrators § 552
Subject to homestead rights generally see infra § 291

to payment of such debts at any time before or after the date of the act [23]

Descent and distribution statutes Except where it is otherwise specially provided by the homestead laws,[24] the rights of the widow and children are to be determined by the provisions of the homestead laws alone and not by the statutes of descent and distribution [25] A statute authorizing exempt property to be set aside for the surviving spouse or children does not prevail over a statute specifically providing for the descent and devise of homesteads by reason of the fact that the former statute is reenacted subsequently by the addition of a curative clause [26]

Construction of statutes Statutes or constitutional provisions pertaining to the homestead rights of a surviving spouse and minor children, generally should be liberally construed in favor of the homestead claimants,[27] but a statute authorizing property to be set over to a surviving spouse in lieu of a homestead and exemptions, which property would pass to the heirs under the common law, being in derogation of the common law, should be strictly construed [28] A constitutional provision relating to the acquisition and disposal of a married woman's separate estate, and as to its being exempt from the husband's debts and obligations, does not inhibit the legislature from providing for a homestead therein in aid of her surviving husband,[29] and, where the constitution effects equality between husband and wife as far as disposing of his or her separate estate by will is concerned, a statute reserving a homestead to the survivor of either is not unconstitutional [30] A statute providing for the setting apart of homesteads to survivors is not affected by a statute which deals exclusively with family support and the administration and settlement of estates;[31] and a statute relating exclusively to the right of exemption of a homestead from process issued for the collection of debts does not affect the right of exemption from administration and the payment of debts.[32]

§ 241. —— Retroactive Operation

Homestead laws are generally prospective, and not retrospective, in their operation.

The homestead statutes are prospective, and not retrospective, in their operation [33] A statute exempting a decedent's homestead estate in the hands of a surviving husband, wife, or children will not be construed to apply to debts contracted prior to its enactment,[34] although it has been held not to give it a retrospective operation to regard such debts as barred, provided the debtor died after the law went into effect but at the time the liabilities were incurred a general homestead exemption statute was in force [35] If land is acquired by a married woman and, before birth of issue, a law is passed giving minor children a right to the homestead of their deceased mother, superior to the husband's estate of curtesy, such law is deemed valid, as to issue subsequently born, as against the surviving husband [36]

§ 242. Course of Descent of Homestead

Except in so far as abrogated or modified by the homestead laws, homestead property descends to the heirs of the owner of the property in the same manner as other real estate, subject to the homestead rights and the claims of creditors

Except in so far as the rule may be abrogated or modified by special provisions in the homestead laws themselves,[37] homestead property descends to the

23. Mo—Russell v Gold, App, 195 S W 757
29 C J p 1011 note 59

24. Fla—Hinson v Booth, 22 So 687 39 Fla 333
29 C J p 1011 note 60

25. Mo—Armor v Lewis, 161 S W 251, 252 Mo 568

26. Or—Winslow v Becker 58 P 2d 620, 154 Or 336—Overland v Jackson 275 P 21, 128 Or 455—In re Leet's Estate 202 P 414, 104 Or 32, modified on other grounds 206 P 548 104 Or 32

27. Ark—Bradley v Humphreys, 83 S W 2d 828, 191 Ark 141—Colum v Thornton, 183 S W 205, 122 Ark 287
Cal—In re Kachigian's Estate, 128 P 2d 865, 20 Cal 2d 787, prior opinion, App, 121 P 2d 869
Colo—Chapin Lumber Co v Day, 103 P 2d 14, 106 Colo. 194
Fla—Milam v Davis, 123 So 668, 97 Fla 916, certiorari denied Tiffany & Co v Davis, 50 S Ct 82, 280 U S 601, 74 L Ed 646
Kan—In re Dittemore's Estate, 106 P 2d 1056, 152 Kan 574
Miss—Lackey v Harrington, 139 So 313, 162 Miss 512
Or—In re Frizzell's Estate, 188 P 707 95 Or 681
Wash—In re Anoflan's Estate, 34 P 2d 883, 178 Wash 316
Wis—In re Borchardt's Will, 200 N W 461, 184 Wis 561
Construction of homestead laws generally see supra § 8

28. Wash—In re Tyler's Estate, 250 P 456, 140 Wash 679, 51 A L R 1088

29. Utah—In re Petersen's Estate, 93 P 2d 415, 97 Utah 324

30. Utah—In re Petersen's Estate, supra

31. Utah—In re Syndergaard's Estate, 88 P 616, 31 Utah 490

32. Ala—Cox v McLemore, 183 So 860, 236 Ala 559—Sewell v Sewell 47 So 204, 156 Ala 616—Garland v Bostick, 23 So 698, 118 Ala 209

33. Hawaii—Waiakea Mill Co v Vierra, 35 Hawaii 550
Wash—In re Bloor, 187 P 396, 109 Wash 554
29 C J p 1011 note 62

34. N H—Squire v Mudgett, 61 N H 149

35. Miss—Morrison v McDaniel, 30 Miss 213

36. Ark—Littell v Jones, 19 S W 497, 56 Ark 139—Thompson v. King, 11 S W 925, 54 Ark 9

37. Cal—Selinger v Milly, 124 P 2d 631, 51 Cal App 2d 286—In re Wright's Estate, 277 P. 372, 98 Cal App 633
29 C J p 1043 note 15.

heirs of the owner of the property in which the homestead exists in the same manner as other real estate,[38] that is, in accordance with the local statutes of descent and distribution, under which the heirs usually take the fee,[39] subject to such rights in the property as may be given by the homestead laws to the surviving spouse or to minor children of the owner of the homestead,[40] such as the right of possession which is postponed until the termination of the homestead,[41] and also subject to valid claims of creditors of the estate.[42] Where this rule is embodied in the organic law of the state, a statute which assumes to give the homestead of deceased absolutely to his widow and minor children

In North Dakota

(1) Under Comp L 1913 §§ 5627 and 8723, homestead does not descend to children except on death of both husband and wife—In re Druhl's Estate, 237 N W 697, 61 N D 168

(2) If a surviving spouse remarries and takes children into another state, homestead estate ceases, and property descends to surviving spouse and heirs in same manner as realty which has never been subject to homestead estate—In re Druhl's Estate, supra

Nature of estate or interest transmitted see infra § 265

38. Ala—Martin v Cothran, 200 So 609, 240 Ala 619—Wright v Fannin, 121 So 528, 219 Ala 234
Fla—Brown v Jones, 192 So 188, 140 Fla 506—McEwen v Larson, 185 So 866, 136 Fla 1
Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434
Iowa—Crouse v Crouse, 259 N W 443, 219 Iowa 736
Ky—Shields v Parsons, 18 S W 2d 961, 230 Ky 143
Mont—Raistakka v Fagerstrom, 208 P 949, 64 Mont 173
Neb—Meck v Wilg, 262 N W 829, 129 Neb 746—Dougherty v White, 200 N W 884, 112 Neb 675, 36 A L R 425
N D—In re Druhl's Estate, 237 N W 697, 61 N D 168
Or—In re Potter's Estate, 59 P 2d 253, 154 Or 167—In re Leet's Estate, 206 P 548, 101 Or 32, modifying 202 P 414, 104 Or 32
S C—Ex parte Cothran, 121 S E 556, 128 S C 122
Tex—Greene v White, 153 S W 2d 575, 137 Tex 361, 136 A L R 626, reversing White v Greene, Civ App, 129 S W 2d 801—Thompson v Kay, 77 S W 2d 201, 124 Tex 252, affirming Kay v Thompson, Civ App, 40 S W 2d 884—Huey v Warner, 77 S W 2d 201, 124 Tex 252, affirming Warner v Huey, Civ App, 29 S W 2d 452—Massey v Citizens' Nat Bank of Weatherford, 77 S W 2d 201, 124 Tex 252, affirming Massey v Citizens' Nat Bank, Civ App, 28 S W 2d 257—Gill v Baird, 77 S W 2d 201, 124 Tex 252, affirming, Civ App, 32 S W 2d 941—Hudson v Hutchinson, Civ App., 41 S W 2d 1013
29 C J p 1043 note 16

Community property

(1) In Texas, under Vernon's St Annot Const art 16 § 52, community property, constituting part of homestead of spouses and their children, descends and vests, on death of one spouse, in the same manner as his or her other realty—Padalecki v Dreibrodt, Tex Civ App, 129 S W 2d 481, error dismissed, judgment correct—29 C J p 1043 note 16 [b]

(2) Interest of deceased spouse in community homestead vests in children on death of parent, subject to life use of surviving spouse—Lone-Star Gas Co v Meyer, Tex Civ App, 296 S W 1110

Property acquired by joint industry

Homestead acquired under United States law during marriage relation and lived on by husband and wife until patent is issued thereon is property acquired by joint industry of husband and wife during coverture, within the meaning of a statute providing that, where property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate goes to the survivor, at whose death, if any of the property remains it descends one half to the heirs of the husband and one half to the heirs of the wife—Flowers v Flowers, 245 P 622, 117 Okl 209

Widow taking child's part

The title to deceased person's homestead descends to the widow taking a child's part and to the heirs, and neither can be lawfully divested of such title, nor acquire any better or different title by proceedings in the county judge's court acting as a court of probate—Spitzer v Branning, 190 So 516, 139 Fla 259—Spitzer v Branning, 184 So 770, 135 Fla 49

Preference in favor of children of whole blood

A statute giving a qualified preference to children of the whole blood over those of the half blood does not apply to a homestead allotted to a widow out of her deceased husband's estate, so as to exclude her children by a former marriage from sharing in it on her subsequent death intestate—Eatman v Eatman, 3 So 850, 83 Ala 478

Passing estate to heirs exempt from ancestor's debts see infra § 265

39. Cal—In re Muntz's Estate, 231 P 371, 69 Cal App 401
Ill—Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434
29 C J p 1043 note 18.

40. Ala—Wright v. Fannin, 121 So 528, 219 Ala 234
Iowa—Crouse v Crouse, 259 N W 443, 219 Iowa 736
Kan—Solomon Nat Bank v Birch, 246 P 1007, 121 Kan 334
Ky—Shields v Parsons, 18 S W 2d 961, 230 Ky 143
Neb—Meck v Wilg, 262 N W 829, 129 Neb 746
Tex—Greene v White, 153 S W 2d 575, 137 Tex 361, 136 A L R 626, reversing White v Greene, Civ App, 129 S W 2d 801—Thompson v Kay, 77 S W 2d 201, 124 Tex 252, affirming Kay v Thompson, Civ App, 40 S W 2d 884—Huey v Warner, 77 S W 2d 201, 124 Tex 252, affirming Warner v Huey, Civ App, 29 S W 2d 452—Massey v Citizens' Nat Bank of Weatherford, 77 S W 2d 201, 124 Tex 252, affirming Massey v Citizens' Nat Bank, Civ App, 28 S W 2d 257—Gill v Baird, 77 S W 2d 201, 124 Tex 252, affirming, Civ App, 32 S W 2d 941—Lone-Star Gas Co v Meyer, Civ App, 296 S W 1110
29 C J p 1043 note 19
Homestead rights of
Surviving children see infra §§ 255–258
Surviving wife see infra §§ 243–254

41. Ga—Donalson v Yeates, 159 S E 856, 173 Ga 30, followed in Shingler v Yeates, 159 S E 859, first case, 173 Ga 34, and 159 S E 859, second case, 173 Ga 35

42. Neb—Dougherty v White, 200 N W 884, 112 Neb 675, 36 A L R 425
S C—In re Snoddy's Estate, 21 S E 2d 198, 201 S C 14—Dorn v Stidham, 137 S E 331, 139 S C 66
29 C J p 1043 note 20

Burial expenses

Tex—Kay v Thompson Civ App, 40 S W 2d 884, affirmed Thompson v Kay, 77 S W 2d 201, 124 Tex 252

Heirs take subject to debts

The fee descends to the heirs at law encumbered with debts of deceased owner—Bowman v Bowman, 77 S W 2d 455, 168 Tenn 281

Homestead becomes subject to payment of owner's debts at his death unless his heirs have homestead right therein in their own behalf—Schuler v Johnson, 261 N W 905, 63 S D. 542

Claims enforceable see infra § 262

or constituents of his family in case deceased was insolvent is unconstitutional and void.[43] If an heir dies before the termination of the homestead in the survivors, his interest is not thereby defeated, but descends to his heirs.[44] If there is no surviving spouse or child the homestead may pass by virtue of a residuary clause of a will.[45]

§ 243. Surviving Wife

a In general
b Occupancy by head of family
c Residence within state of husband or widow
d Insolvency or indebtedness of estate
e As affected by devise or testamentary disposition

a. In General

The homestead rights of a husband generally continue, on his death, for the benefit of his widow, subject to certain limitations.

The homestead exemption continues after the death of the homesteader in favor of the widow only to the extent authorized by organic law or legislation.[46] Under the constitutional and statutory provisions of most states, and subject in some states to certain limitations hereafter considered, the homestead right or privilege does not terminate on the husband's death, but is continued for the benefit of his widow[47] and accrues to the widow, because of the homestead of her deceased husband, at the time of his death[48] and not by transfer from him.[49] If this were not so "the homestead exemption would be deprived of the feature which chiefly recommends it to favor."[50] However, the general rule is

43. Tex.—Hays v. Moore, Civ.App., 114 S.W. 1054
29 C.J. p. 1044 note 21

44. Ga.—Griffin v. Griffin, 113 S.E. 161, 153 Ga. 547

Descent to grandparent
Minor's interest in homestead, where minor dies leaving no brothers or sisters or father or mother descends to grandfather.—Raistakka v. Fagerstrom, 208 P. 949, 64 Mont. 173

45. Minn.—In re Anderson's Estate, 279 N.W. 266, 207 Minn. 513, 116 A.L.R. 82—Larson v. Curren, 140 N.W. 337, 121 Minn. 104, 44 L.R.A.,N.S., 1177

46. Fla.—McEwen v. Larson, 185 So. 866, 136 Fla. 1

In Louisiana
(1) Under the provisions of Const. 1932, art. 11, § 1, and prior similar constitutions, a widow may claim the benefit of the homestead exemption of her deceased husband in community property.—Adams v. McCoy, 72 So. 797, 140 La. 26—29 C.J. p. 994 note 14 [a] (4), (5).

(2) Surviving widow without dependents is entitled to constitutional homestead exemption where husband could have successfully claimed exemption.—Succession of White, 127 So. 883, 170 La. 403.

(3) Under the provision relating to homestead exemption to head of family, etc., a widow cannot claim the benefit of such exemption, unless she is head of family or has persons dependent on her for support.—Thompson v. Succession of Gow, 125 So. 588, 169 La. 546—Thompson v. Succession of Gow, 123 So. 616, 168 La. 909.

(4) Surviving widow with whom two major daughters, having no means, resided, is "head of family," within such provision.—Thompson v. Succession of Gow, 125 So. 588, 169 La. 546—Thompson v. Succession of Gow, 123 So. 616, 168 La. 909.

(5) Exclusive dependence is not required.—Succession of Harrington, 94 So. 447, 152 La. 927.

(6) Formerly a homestead exemption did not descend from the debtor in favor of his widow.—Briant v. Lyons, 29 La.Ann. 64—Burnett v. Walker, 23 La.Ann. 335.

In Nevada homestead in community property vests in the wife on the death of the husband, but the homestead exemption as to separate property ceases on the death of the husband.—In re Cook, 117 P. 27, 34 Nev. 217—29 C.J. p. 994 note 14 [b]

47. U.S.—In re Gibson, D.C.Ky., 33 F.Supp. 838—Maruska v. Equitable Life Assur. Soc. of U.S., D.C.Minn., 21 F.Supp. 841
Ala.—People's Bank of Red Level v. Barrow & Wiggins, 94 So. 600, 208 Ala. 433
Cal.—In re Kachigian's Estate, 128 P.2d 865, 20 Cal.2d 787, prior opinion, App., 121 P. 869
Fla.—Hays v. Jones, 164 So. 841, 122 Fla. 67—Church v. Lee, 136 So. 242, 102 Fla. 478
Iowa.—Southwick v. Strong, 255 N.W. 523, 218 Iowa 435
Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522—Brewer v. Brewer, 105 S.W.2d 582, 268 Ky. 625
N.D.—Meidinger v. Security State Bank of Medina, 213 N.W. 850, 55 N.D. 301
Okl.—In re Gardner's Estate, 250 P. 490, 122 Okl. 26
Or.—In re Laughlin's Estate, 134 P.2d 961
S.C.—Dorn v. Stidham, 137 S.E. 331, 139 S.C. 66
Tenn.—Beard v. Beard, 14 S.W.2d 745, 158 Tenn. 437
Tex.—McCusker v. Field, Civ.App., 76 S.W.2d 816—Crow v. First Nat. Bank, Civ.App., 64 S.W.2d 377, error refused—Hudson v. Hutchinson, Civ.App., 41 S.W.2d 1013
29 C.J. p. 994 note 18

As property exempt from execution
Under a statute providing that all property of an estate, exempt by law from execution, shall go to the widow of deceased to maintain her and her minor children, a homestead being exempt from execution is the property of the widow.—In re Iltz's Estate, 206 P. 550, 104 Or. 59, affirming 202 P. 409, 104 Or. 59
Continuance for benefit of children or heirs see infra §§ 255–258
Independent right of widow to a homestead see supra §§ 24, 26
Nature of estate or interest transmitted by survivorship see infra § 265

48. Ala.—Davis v. Bates, 194 So. 647, 239 Ala. 214
Ark.—Bruce v. Bruce, 3 S.W.2d 6, 176 Ark. 442
Colo.—Chapin Lumber Co. v. Day, 103 P.2d 14, 106 Colo. 194
Iowa.—In re McClain's Estate, 262 N.W. 666, 220 Iowa 638
Ky.—Brewer v. Brewer, 105 S.W.2d 582, 268 Ky. 625
Minn.—In re Lee, 213 N.W. 736, 171 Minn. 182
Mo.—Martin v. Martin, 285 S.W. 92, 313 Mo. 476—Jennings v. Cherry, 257 S.W. 438, 301 Mo. 321
Okl.—In re Gardner's Estate, 250 P. 490, 122 Okl. 26
Tenn.—Miller v. Fidelity Bankers' Trust Co., 46 S.W.2d 516, 164 Tenn. 149

49. Tenn.—State v. Clayton, 38 S.W.2d 551, 162 Tenn. 368

50. Ala.—Burrow v. Clifton, 65 So. 58, 186 Ala. 297
29 C.J. p. 995 note 20

"It is the policy of the law to preserve a home for a widow who may live sheltered beyond the reach of

that the homestead is for the benefit of both the widow and children of deceased,[51] that the widow is not entitled to exclusive possession as against decedent's minor children,[52] but that they have an equal right to occupy the homestead premises in conjunction,[53] as tenants in common,[54] or as joint tenants,[55] according as the statute may provide

Widow of second marriage. Where one who has acquired a homestead dies leaving a widow by a second marriage, the homestead right vests in her,[56] in preference to the dower rights of a divorced first wife;[57] and, if there are minor children by the first marriage, she holds as tenant in common with them[58] If she has minor children of her own and there are no children by the first marriage,[59] or if all the original members of the family have withdrawn therefrom or have attained majority,[60] the homestead inures to the benefit of herself and her minor children.

Property in excess of certain amount. A homestead vests in a widow, under some statutes, only where it does not exceed a specified value,[61] but, under other statutes, the homestead may vest in her without regard to its value[62]

b. Occupancy by Head of Family

A widow has no homestead right in property which was not occupied as a homestead at the time of her husband's death, unless such occupancy is not required by the statute.

Inasmuch as the purpose of the homestead laws is to secure to the family their usual place of residence, as stated supra § 2, the widow generally has no homestead right in property of which her husband dies seized, and which he had not occupied as a homestead,[63] or which he had abandoned before his death,[64] but a temporary absence with the in-

urgent creditors or economic misfortune The stability and welfare of the state demands the preservation of the home"—In re Laughlin's Estate, Or, 134 P 2d 961, 963

51. Ala—Glover v Mitchell, 99 So 905, 211 Ala 136
Ark—Kulbeth v Drew County Timber Co, 188 S W 810, 812, 125 Ark 291
Ky—Brewer v Brewer, 105 S W 2d 582, 268 Ky 625
Minn—Tomlinson v Kandiyohi County Bank, 202 N W 494, 162 Minn 230
Tex—Hudson v Hutchinson, Civ App, 41 S W 2d 1013, error refused
Homestead rights of surviving children see infra §§ 255–258

Concurrent enjoyment
The homestead right of a widow and minor children of a decedent is enjoyed concurrently—Bishop v Johnson, 7 So 2d 281, 242 Ala 551—Buchannon v Buchannon, 124 So 113, 220 Ala 72

52. Ky—Atkins v Baker, 66 S W 1023, 112 Ky 877, 23 Ky L 2224
29 C J p 995 note 22

53. Ky—Taree v Spriggs, 147 S W 754, 149 Ky 20—Atkins v Baker, 66 S W 1023, 112 Ky 877
Tex—Cox v Oliver, 95 S W 596, 43 Tex Civ App 110
29 C J p 995 note 23

54. Ill—Chapman v Chapman, 25 N E 2d 92, 303 Ill App 340
29 C J p 995 note 24

55. Mo—Willoughby v Brandes, 297 S W 54, 317 Mo 544
29 C J p 995 note 25

56. Ill—Potter v Clapp, 68 N E 81, 203 Ill 592, 96 Am S R 322
Tex—Horn v Sankary, Civ.App, 161 S W 2d 156
29 C J p 995 note 26.

In property owned and possessed at time of death
The second wife is entitled to no homestead right in that portion of the estate owned by decedent's first wife, but is entitled to a homestead right to whatever property the husband actually owned and possessed at the time of his death—Horn v Sankary, supra

Widow has right to continue to occupy community homestead as homestead after husband's death to exclusion of husband's adult children by former marriage—Ellis v Patrick Tex Civ App 93 S W 2d 1201
Rights of divorced wife see infra § 246

57. Ill—Potter v Clapp, 68 N E 81, 203 Ill 592, 96 Am S R 322
29 C J p 995 note 26 [a]

58. Tex Richmond v Sims, Civ App, 114 S W 1142

Homestead in undivided one-half interest
(1) Where children of deceased by first marriage owned community property of deceased's first marriage in common with estate of deceased, even if second wife of deceased were entitled to homestead rights in such property, second wife was entitled to a homestead in only undivided one-half interest—Murphey v Murphey, Tex Civ App, 131 S W 2d 158

(2) Second wife acquires on husband's death homestead right in one-half interest in fee in lands constituting rural community homestead of husband and first wife—Schultz v. Schultz, Tex Civ App, 45 S W 2d 312

Decree construed, as giving widow of second marriage homestead interest in entire tract—Schultz v Schultz, Tex Civ App, 45 S W 2d 312

59. Tenn—Pulaski Nat Bank v Shelton, 11 S W 95, 87 Tenn 393

60. Ga—Nelson v Commercial Bank, 9 S E 1075, 80 Ga 328—Dismuke v Eady, 5 S E 494, 80 Ga 289

61. Mo—Jennings v Cherry, 257 S W 438, 301 Mo 321
Utah—Knudsen v Hannberg, 30 P 749, 8 Utah 203

Determination of amount
Under a statute permitting no homestead right in the estate of a deceased person, assets of which over and above all debts due and charges of administration, shall exceed a specified amount, the personal property which is assigned by the probate court to the widow, and likewise the widow's dower are not to be reckoned among the assets—Chaplin v Sawyer, 35 Vt 286
Excess in value as affecting homestead right generally see supra § 60
Value of survivor's homestead generally see infra § 270

62. Neb—Meisner v Hill, 138 N W 581, 92 Neb 435
S D—Hansen v Hansen, 166 N W 427, 40 S D 114
29 C J p 1021 note 47 [c], [d]

63. Kan—Anderson v Shannon, 73 P 2d 5, 146 Kan 704, 114 A L R 200
29 C J p 995 note 32
Actual occupancy as necessary to confer benefit of homestead exemption generally see supra §§ 32–39
Property used as a family residence as subject to appropriation as homestead generally see infra § 267

64. Ark—Brignardello v Cooper, 172 S W 1030, 116 Ark 103
Abandonment of homestead generally see supra § 163 et seq.

tent to return is not such an abandonment.[65] However, under statutes which do not make occupancy necessary to the acquisition of homestead rights, it is not necessary either to acquisition or exemption of a widow's homestead right that there should have been actual occupancy of the land [66]

c. Residence within State of Husband or Widow

A homestead right in favor of the widow generally does not exist where the husband was a nonresident of the state, and, under some statutes, also where she was a nonresident at the time of his death.

The constitutional and statutory provisions in regard to homestead exemptions being intended for the benefit only of residents and their families, as discussed supra § 18, residence of the deceased husband within the state at the time of his death is necessary, and if he was a nonresident, there is no homestead right in favor of the widow,[67] even though he had bought property in the state and was making preparations to remove thereto,[68] but it has been held that a mere temporary absence of the husband in another state will not deprive his wife of her homestead right on his death [69]

Residence of widow Under some statutes the widow also must have been a resident of the state at the time of her husband's death,[70] but under other statutes this rule either does not obtain or is subject to material limitations,[71] as where the absence from the state was with the husband's consent and with no intent to abandon him [72]

d. Insolvency or Indebtedness of Estate

Under some statutes, a widow is entitled to homestead rights only where her deceased husband's estate is insolvent, or at least indebted.

Under some homestead statutes the estate must be insolvent,[73] or, in others, at least indebted,[74] to entitle the widow to the homestead; and the fact that the homestead was claimed by the husband in his lifetime is not, as against the heir, presumptive proof that there are subsisting debts of the estate outstanding [75] However, unless the provisions contain limitations of this character the widow's right to the exemption by survivorship is held to exist whether or not the husband's estate is indebted [76] The fact that the estate is insolvent does not take away the widow's right to homestead,[77] even though the property to be set apart as homestead constitutes the entire estate of decedent [78] Under some statutes if the value of the homestead exceeds the statutory exemption and the estate is solvent, the homestead right does not attach in favor of the widow [79]

e. As Affected by Devise or Testamentary Disposition

Under most statutes, a homesteader cannot by will deprive his widow of the homestead estate conferred on her by statute.

While the rule has been materially limited or denied altogether under some statutes,[80] under most statutes, the homesteader cannot, by will, deprive

65. Fla - Collins v Collins, 7 So 2d 443, 150 Fla 374

66. S D—In re Sanford, 164 N W 95, 39 S D 366
29 C J p 995 note 35

Under statutory provision that "the homestead must be the actual abode of and occupied by the owner, his or her spouse" the fact that deceased husband never occupied premises owned by him as a home would not, in itself, preclude his widow from exercising right of homestead exemption therein—In re Laughlin's Estate, Or 134 P 2d 961, 963

67. Ala—Lucky v Roberts, 100 So 878, 211 Ala 578
Fla—Church v Lee, 136 So 242, 102 Fla 478—Rawlins v Dade Lumber Co, 86 So 334, 80 Fla 398.
29 C J p 995 note 37

A husband is a nonresident when he ceases to dwell within the state for an uncertain period without a definite intention of returning, although he has a general intention to return at some future time, it being his intention that controls, not the absence of the wife from state.—Lucky v Roberts, 100 So 878, 211 Ala 578

68. Ala—Talmadge v Talmadge, 66 Ala 199

69. N H—Meader v Place, 43 N H 307

70. Tenn—Prater v Prater, 9 S W 361, 87 Tenn 78, 10 Am S R 623
29 C J p 995 note 40

71. Ala—Lucky v Roberts, 100 So 878, 211 Ala 578
29 C J p 995 note 41

72. Tex—Lacey v Clements, 36 Tex 661
29 C J p 995 note 41 [c]

73. Mich—Zoellner v Zoellner, 19 N W 556, 53 Mich 620
29 C J p 996 note 42
Necessity of insolvency to right to claim homestead
In general see supra § 20
Widow's right against heirs see infra § 264

74. Va—Barker v Jenkins, 6 S.E 459, 84 Va 895
29 C J p 996 note 43

75. Va—Barker v Jenkins, supra

76. Ala—People's Bank of Red Level v. Barrow & Wiggins, 94 So 600, 208 Ala 433—Cox v Bridges, 4 So 597 84 Ala 553
Ky—Lancaster v Redding, 26 S W 1013, 16 Ky L 147
29 C J p 996 note 45

77. Cal—In re Adams, 57 P 569, 128 Cal 380 In re Mason's Estate 244 P 629, 76 Cal App 315
29 C J p 996 note 46

78. Cal—Keyes v Cyrus, 34 P 722, 100 Cal 322, 38 Am S R 296—In re Mason's Estate, 244 P 629, 76 Cal App 315

79. Utah—Knudsen v Hannberg, 30 P 749, 8 Utah 203
29 C J p 996 note 48
Course of descent of homestead property generally see supra § 242

80. Ky—Hazelett v Farthing, 22 S W 646, 94 Ky 421, 42 Am S R 365
Wis—In re Bresnehan's Will, 265 N W 93, 221 Wis 51
29 C J p 930 note 71

Devise subject to homestead rights
A will devising to widow all that part of estate to which she would be entitled had no will been made and devising home to adopted son, subject to homestead and dower right of widow, and devising residue of

his surviving widow of the homestead estate bestowed on her by statute,[81] or in any way limit her homestead right,[82] unless she consents thereto,[83] or elects to take under the will[84] This rule applies although the devise is to the widow herself,[85] although the will provides for the payment of all the

property to adopted son and sister of testator, vests widow with dower and homestead interest in home, notwithstanding invalidity of adoption proceeding by which son was adopted—In re Bresnehan's Will, 265 N W 93 221 Wis 51

In Utah regardless of statute providing for summary distribution of small estates, a man whose estate is less than one thousand five hundred dollars cannot by will take it from his widow and minor children—In re Mower's Estate, 73 P 2d 967, 93 Utah 390—29 C J p 930 note 71 [g]

81. U S—Polsky v Continental Nat Bank of Lincoln, C C A Neb, 110 F 2d 50
Ala—Gray v Weatherford, 149 So 819, 227 Ala 324—Wood v Cantrell, 140 So 345, 224 Ala 294—Williams v Massie, 102 So 611, 212 Ala 389—Coker v Coker, 94 So 566, 208 Ala 354—Seay v Huggins, 70 So 113, 194 Ala 496
Ark—Wofford v James, 163 S W 2d 710, 204 Ark 700—Reeves v Bridges, 99 S W 2d 242, 193 Ark 292
Fla—Brickell v Di Pietro, 198 So 806, 145 Fla 23—Spitzer v Branning, 190 So 516, 139 Fla 259—Mullan v Bank of Pasco County, 133 So 323, 101 Fla 1097—Parker v Penny, 117 So 703, 95 Fla 922—Hamilton v Morgan, 112 So 80, 93 Fla 311—Jackson v Jackson, 107 So 255, 257, 90 Fla 563, citing **Corpus Juris**—Morgan v Bailey, 105 So 113, 90 Fla 17—Norton v Bava, 102 So 361 88 Fla 1
Okl—Gassin v McJunkin, 48 P 2d 320 173 Okl 210—Scott v Scott, 268 P 245, 131 Okl 144
Or—In re Dunlap's Estate, 87 P 2d 225 161 Or 93—Ferguson v Holborn, 211 P 953, 106 Or 566
Tenn—Miller v Fidelity Bankers' Trust Co, 46 S W 2d 516, 164 Tenn 149
Tex—Lindsley v Lindsley, 163 S W 2d 633, 139 Tex 512, reversing, Civ App, 152 S W 2d 415—Buckner v Buckner, Civ App, 51 S W 2d 769—Kerens Nat Bank v Stockton, Civ App, 281 S W 580, reversed on other grounds 40 S W 2d 7, 120 Tex 546, 77 A L R 362
Vt—In re O'Rourke's Estate, 175 A 21, 106 Vt 327
29 C J p 930 note 72

Widow's homestead rights, being given by statutes, cannot be taken away by testamentary disposition—Lindsley v Lindsley, 163 S W 2d 633, 139 Tex 512, reversing, Civ App, 152 S W 2d 415

Where widow does not take under will, an attempted devise of homestead to third person, pursuant to contract for care of deceased, is void as to her—In re Dunlap's Estate, 87 P 2d 225, 161 Or 93

Homestead held by husband and wife by entireties would pass to wife after husband's death, and would not be affected by joint will of husband and wife devising all property to survivor and providing for payment of designated bequests out of property at death of survivor—Hays v. Jones, 164 So 841, 122 Fla 67.

In California

(1) Right of testamentary disposition as well as of inheritance is subject to homestead allowance rights—In re Bain's Estate, 31 P 2d 211, 137 Cal App 547—In re Mason's Estate, 244 P 629, 76 Cal App 315

(2) However, under Civ Code § 1265, as it stood between its amendments in 1874 and in 1880, one who had selected a homestead of his own separate property could dispose of it by will—Patchett v Webber, 245 P 422, 198 Cal 440

In South Carolina

(1) Under Const 1895 art 3 § 28, no gift or devise of property by will can defeat a widow's right of homestead, in view of Civ Code 1922 §§ 5490 5493 5494—Ex parte Cothran, 121 S E 556, 128 S C 122—29 C J p 930 note 72 [c] (3)

(2) The homestead laws, however, do not affect the right to dispose of title to lands, tenements, or hereditaments by will with certain exceptions, since to hold that the widow and children could invoke the homestead exemption if the testator owed debts would be to deny testator the right to dispose of his property at his own free will and pleasure—Dorn v Stidham, 137 S E 331, 139 S C 66—Ex parte Cothran, supra

82. Ala—Edmonds v Cogsdill, 62 So 691, 182 Ala 309
29 C J p 931 note 73.

Devise in trust

Where testator devised all his property including homestead in trust, income to be paid to wife for life, remainder to granddaughters, homestead descended to granddaughters on death of testator's wife free of the testamentary trust, since by statute the homestead was not subject to testamentary disposition—Crosby v Wartmann, 183 So 32, 133 Fla 353.

83. Kan—Burns v Spiker, 202 P 370, 109 Kan 22
Minn—Radl v Radl, 75 N W. 111, 72 Minn 81
Vt—In re O'Rourke's Estate, 175 A 24, 106 Vt. 327

Sale with widow's consent

(1) Clauses of will, authorizing trustee to sell homestead, with consent of testator's widow, and divide proceeds among widow and testator's children, if she desired, giving entire residue of testator's property in trust for named purposes, and directing payment of income therefrom, were broad enough to include homestead after it lost such character on widow's death—Polsky v. Continental Nat Bank of Lincoln, C C A Neb., 110 F 2d 50

(2) Under will directing trustee to pay income from residue of testator's property to his widow and children, providing that deceased child's issue should receive such child's share of income from other properties than those embraced in twenty-five year trust, and directing distribution of all except such trust property and homestead twelve years after date of will, homestead, subject to widow's life estate and right of sale thereof with her consent was included in trust estate—Polsky v Continental Nat Bank of Lincoln, supra

84. Or—In re Dunlap's Estate, 87 P. 2d 225, 161 Or 93

Right of election cannot be controlled by testator, where the necessity of electing to take under the will or the homestead is imposed by the will—Wofford v James, 163 S W 2d 710, 204 Ark 700
Election to take under will as affecting widow's homestead rights generally see the C J S title Wills § 1287, also 69 C J p 1135 notes 4-7—29 C J. p 999 notes 6-9, 12, 13

85. Ill—Gahan v Golden, 162 N E 164, 330 Ill 624
Wash—In re Behre's Estate, 227 P 859, 130 Wash 458

Fact that widow is given life estate by will does not prevent her from also enjoying a homestead title in fee—Ferguson v Holborn, 211 P 953, 106 Or 566

Widow may have homestead in realty devised to her, but never in personal property—Gahan v Golden 162 N E 164, 330 Ill 624

Property passing to her under residuary clause

A statutory provision that homestead award shall not be taken from deceased's separate property otherwise disposed of by will, where there is no minor issue of deceased and surviving spouse, refers only to property devised or bequeathed to others than widow, and property passing to her under residuary provisions is subject to her claim for

testator's just debts,[86] although the homestead is the only property owned by decedent at the time of his death, and he expressly directs a sale of the whole property and a distribution of the proceeds in pecuniary bequests,[87] and although the wife became insane and remained in that condition until after her husband's death.[88] The title to the property, however, has been held to pass to the devisees until it is divested by the property being set aside as a homestead by the probate court,[89] but where the will provides for the free use of the home place by the wife for her life or until remarriage, she may occupy it as a homestead as long as she pleases, after which deceased husband's interest will go to the devisees mentioned in the will.[90]

§ 244. —— Conveyance during Coverture and Abandonment during Husband's Lifetime

A surviving wife may be not entitled to homestead rights by reason of her having united with her husband in a conveyance or mortgage of the homestead premises, or having voluntarily abandoned them as a homestead during his lifetime

A mortgage, lease, or other conveyance not signed by the wife, or otherwise executed in violation of the prescribed statutory mode, as discussed supra §§ 126–135, will not bar her right in the homestead as survivor,[91] and the same rule has been applied where the conveyance was made shortly before her marriage to deceased.[92] It has been held, however, that if the husband conveys his homestead without the concurrence of his wife, and subsequently acquires a new homestead, although of less value, the right in the former homestead is thereby terminated, and on the husband's death the widow cannot claim the old homestead,[93] nor can the widow, whose marriage to deceased was a secret one, and who has never occupied the premises as a homestead, claim homestead rights as against a mortgagor who was ignorant of her marriage.[94]

If the wife unites with her husband in the conveyance or mortgage of their homestead, she cannot, on the husband's death, have the homestead as against the alienee or against the mortgagee until the mortgage debt is paid,[95] or at least, in the case of an encumbrance, until she has paid her ratable share of the debt,[96] and she has no right at all to a homestead after the mortgage or lien has been duly foreclosed,[97] although she may have the right to occupy the premises until a sale is had on the foreclosure.[98] By joining in a mortgage, with her husband, however, she does not relinquish her rights as against the children or heirs,[99] nor, where the mortgage was irregular or ineffective, is it such a waiver as would prevent her from seeking relief in

homestead —In re Behre's Estate, 227 P 859, 130 Wash 458

Validity of will

Statute invalidating conveyance of homestead of married man without joinder and acknowledgment of wife therein does not invalidate will bequeathing homestead of testator to wife and child for life with remainder to another, since remainderman acquired no rights until homestead ceased to exist, but such a will does not affect the homestead in any way —Reeves v Bridges, 99 S W 2d 242 193 Ark 292

86. Kan —Homewood v Eggers, 295 P 681 132 Kan 256

87. Cal —In re Lahiff's Estate, 24 P 850, 86 Cal 151

88. Neb —In re Robertson, 125 N W 1093, 86 Neb 490

89. Or —In re Potter's Estate, 59 P 2d 253, 151 Or 167

90. Tex —Dakan v Dakan, 83 S W 2d 620, 125 Tex 305, affirming, Civ App, 52 S W 2d 1070

91. Ala —Scott v Simons, 70 Ala 352

Ky —White's Adm'r v Curd, 5 S W 553, 86 Ky 191, 9 Ky L 505

Mich —Boman v Wolverine Power Co, 255 N W 613, 268 Mich 59

29 C J p 996 note 50.

Recovery of damages

Where wife did not join in husband's deed conveying unrestricted easement in perpetuity to power company to flood land, she could recover damages for flooding of land selected as homestead after husband's death, although she might have selected land which would not have been flooded —Boman v Wolverine Power Co, 255 N W 613, 268 Mich 59

The claim of a grantee, holding under a defective deed from the debtor, is inferior to the rights of the debtor's widow —Day v Adams, 42 Vt 510

92. Ark —Harrison v Harrison, 127 S W 2d 270, 198 Ark 61

Where husband on day of marriage secretly conveyed land to grantees but continued to live with wife on the land for ten years, grantees took no title which would exclude widow of her homestead —Harrison v Harrison, supra

93. N H —Horn v. Tufts, 39 N H 478

94. Mich —Hall v Marshall, 102 N W 658, 139 Mich 123, 11 Am S R 404

29 C J p 996 note 50 [a]

95. Ala —Howell v Ward, 161 So 487, 230 Ala 379—Whitehead v. Boutwell, 117 So 623, 218 Ala 109

Ark —Hoyle v Hoyle, 26 S W 2d 587, 181 Ark 463

N C —Caudle v Morris, 76 S E 17 160 N C 168

Tex —McCusker v Field, Civ App, 76 S W 2d 816

29 C J p 996 note 52

Joining in conveyance of homestead to minor children waives the widow's right to homestead —Woodall v Rudd, 41 Tex 375

Mortgage of part of tract

A widow of deceased mortgagor did not lose right of homestead in land by foreclosure sale of a portion of the land, and the homestead right continued in the portion not sold —Gill v Dunn, 116 S W 2d 612, 196 Ark 1178

96. Ill —Selb v Montague, 102 Ill 446

Minn —McGowan v Baldwin, 49 N W 251, 46 Minn 477

29 C J p 996 note 53

97. Ky —Harpending v. Wylie, 13 Bush 158

29 C J p 996 note 54

98. Ky —Hersperger v. Smith, 16 Ky L 61

29 C J p 996 note 55

99. Ala —Whitehead v Boutwell, 117 So. 623, 218 Ala 109.

a court of equity;[1] and, under some statutes, her joining in a mortgage does not affect her rights to free occupancy of her deceased husband's lands and to the proceeds therefrom until a homestead is set apart.[2] Her right to a homestead is not affected by a quitclaim deed from her to her husband, during his lifetime, covering the claimed homestead property.[3]

Abandonment. Ordinarily the surviving wife is not entitled to homestead in premises which she abandoned as a homestead during her husband's lifetime,[4] and if after such abandonment the property is sold and the proceeds invested in another home, the new home is not invested with the characteristics of a homestead.[5] Such abandonment, however, must have been voluntary.[6] A surviving wife is not deprived of her right of homestead after her husband's death, by abandonment, by the fact that she had been living apart from him, where the separation was by agreement,[7] or by necessity,[8] or was excused or justified by the husband's conduct.[9] The fact that the widow had lived apart from her husband, whether for her fault or his, is not an abandonment of the homestead, to which she had the privilege of returning, with her husband's consent, at any time, and which she recognized as her homestead.[10]

§ 245. —— Existence of Children

The existence of children surviving the husband ordinarily is not necessary to invest the widow with homestead rights.

By the prevailing rule the existence of children surviving the husband is not necessary to invest the widow with homestead rights,[11] even though the statute secures the right of succession expressly to the surviving widow and children.[12] Under some statutes, however, a widow is not entitled to a homestead if her husband dies leaving children, whether they are minors or adults,[13] or she is not entitled to an assignment of homestead out of her husband's estate if all the children have arrived at full age.[14] Under other statutes, the fact that all her children are grown and do not need support from her does not in any way affect her right to homestead,[15] and she is entitled to have it set off for her exclusive use and occupancy.[16]

§ 246. —— Validity and Continuance of Marriage Relation

A widow's homestead rights rest on the validity and continuance of the marriage relationship during the hus-

Rights as against heirs generally see infra § 264

1. Ala.—Howell v. Ward, 161 So. 487, 230 Ala. 379

Joining of guardian's wife in mortgage executed by guardian to ward is not such waiver of wife's homestead rights as would prevent her as widow, in court of equity from marshaling security for rights and benefit of minor ward, and at same time preserve her homestead unimpaired and to safeguard fund for remaindermen after expiration of wife's life estate where mortgage was executed by guardian individually to himself officially instead of to ward as required by statute.—Howell v. Ward, supra

2. Ala.—Whitehead v. Boutwell, 117 So. 623, 218 Ala. 109

3. Cal.—In re Hale's Estate, 4 P.2d 263, 117 Cal.App. 515

4. Iowa.—In re McClain's Estate, 262 N.W. 666, 220 Iowa 638
29 C.J. p. 996 note 56
Abandonment generally see supra §§ 163–178

5. Iowa.—In re McClain's Estate, supra

6. Kan.—Meech v. Grigsby, 113 P.2d 1091, 153 Kan. 784
N.H.—Wood v. Lord, 51 N.H. 448
Tex.—Sakowitz Bros. v. McCord, Civ.App., 162 S.W.2d 437—Ellis v. Patrick, Civ.App., 93 S.W.2d 1201—McCusker v. Field, Civ.App., 76 S.W.2d 816.

Widow alone has right to elect whether community homestead shall be occupied by her as homestead or abandoned.—Ellis v. Patrick, Tex.Civ.App., 93 S.W.2d 1201

Abandonment as question of fact
Tex.—Ellis v. Patrick, Civ.App., 93 S.W.2d 1201

7. Kan.—Meech v. Grigsby, 113 P.2d 1091, 153 Kan. 784
Tex.—Good v. Good, Civ.App., 293 S.W. 621

8. Tenn.—Hinds v. Buck, 150 S.W.2d 1071, 177 Tenn. 111

Confinement in institution for insane
Tenn.—Hinds v. Buck, supra
Confinement for insanity as not abandonment generally see supra § 166

9. Kan.—Meech v. Grigsby, 113 P.2d 1091, 153 Kan. 784
N.H.—Wood v. Lord, 51 N.H. 448
Tex.—Milliken v. Coker, Civ.App., 90 S.W.2d 902, modified on other grounds, 115 S.W.2d 620, 132 Tex. 23—Good v. Good, Civ.App., 293 S.W. 621—Ward v. Walker, Civ.App., 159 S.W. 320
29 C.J. p. 997 note 58
As interference with marriage relation forfeiting homestead privilege see infra § 246

10. Ark.—Bruce v. Bruce, 3 S.W.2d 6, 176 Ark. 442

Wife living separate from husband on own property
Ark.—Bruce v. Bruce, supra

11. Ark.—Bradley v. Humphreys, 83 S.W.2d 828, 191 Ark. 141
Iowa.—In re McClain's Estate, 262 N.W. 666, 220 Iowa 638
29 C.J. p. 997 note 61

In Louisiana, under Const. art. 11 § 1 surviving widow who is head of family composed of deceased's minor child entirely dependent on the surviving widow for support, is entitled to homestead exemption from proceeds of sale of home occupied by deceased to extent of two thousand dollars.—Succession of Burns, 7 So.2d 359, 199 La. 1081

Continuance of family
Exemption of homestead, whether acquired by husband and wife while living together or by one spouse after dissolution of marriage relation continues as long as land remains occupied by survivor, although no constituent members of their family remain.—Daniel v. Cook, Tex.Civ.App., 70 S.W.2d 1021

12. Cal.—Armstrong's Est., 22 P. 79, 80 Cal. 71
29 C.J. p. 997 note 62

13. N.C.—Barnes v. Cherry, 130 S.E. 611, 190 N.C. 772
29 C.J. p. 997 note 61 [b]

14. Ohio.—Taylor v. Thorn, 29 Ohio St. 569

15. Mo.—Rockhey v. Rockhey, 11 S.W. 225, 97 Mo. 76
N.D.—Healy v. Bismarck Bank, 153 N.W. 392, 30 N.D. 628

16. Mo.—Rockhey v. Rockhey, 11 S.W. 225, 97 Mo. 76.

band's lifetime, and may be lost by her having abandoned him without just cause, but ordinarily it is not lost by the mere fact that she did not reside with him at the time of his death

The right of the widow in the homestead rests on the validity and continuance of the marriage relationship during the husband's lifetime.[17]

Abandonment of spouse It has been held that if the wife abandons her husband without just cause, she thereby forfeits her rights, as survivor, in the residence property,[18] especially if she is guilty of conjugal infidelity.[19] If a wife, although she acts in good faith, believing her former husband is dead, remarries, and thereafter the first husband dies, she can claim no homestead rights in his property until the second marriage is annulled.[20] On the other hand, the abandonment of the husband by the wife,[21] or of the wife by the husband,[22] although coupled with conjugal infidelity,[23] has been held not to forfeit the surviving widow's homestead rights.

Separation and divorce A widow is not deprived of her homestead rights by the mere fact that she was not residing with her husband at the time of his death,[24] or that she was receiving separate maintenance,[25] unless there is a statutory provision to the contrary.[26] If she is caused to live apart from her husband without any fault on her part, as by reason of his cruelty,[27] or a voluntary separation is agreed on[28] and a division of their property is effected,[29] or if a limited divorce a mensa et thoro is obtained,[30] the wife retains her privileges under the homestead law as a survivor. After a divorce a vinculo, however, the wife can claim no rights as survivor in the homestead of the deceased husband where no such right is given to her by express statutory enactment or by the decree in which the divorce was granted.[31]

Void marriage Where the marriage is void, no right under it exists for the benefit of the surviving widow.[32]

§ 247. —— Effect of Possession of Other Property

Ownership or possession of other property by the widow ordinarily does not affect her right to a homestead

Except in so far as denied or modified by constitutional or statutory provision,[33] the fact that a widow owns or possesses property other than the homestead will not usually defeat her claim to the

17. Ark.—Duffy v. Harris, 45 S.W. 545, 65 Ark. 251, 67 Am.S.R. 925, 40 L.R.A. 750.
Kan.—Goodman v. Malcolm, App., 58 P. 564.
Tenn.—State v. Clayton, 38 S.W.2d 551, 162 Tenn. 368.
Dissolution of family relationship as abandonment, waiver, or forfeiture generally, see supra §§ 158–161.

18. Tenn.—Freeman v. Freeman, 76 S.W. 825, 111 Tenn. 151.
29 C.J. p. 997 note 67.

19. Cal.—In re Cameto, Myr. Prob. 42.
Tenn.—Freeman v. Freeman, 76 S.W. 825, 111 Tenn. 151.
29 C.J. p. 997 note 68.

Removing to another state and living in adultery
Tenn.—Prater v. Prater, 9 S.W. 361, 87 Tenn. 78, 10 Am.S.R. 623.

20. Cal.—In re Harrington's Estate, 73 P. 1000, 140 Cal. 244, 98 Am.S.R. 51, former opinion 74 P. 136, 140 Cal. 294.
Remarriage of widow see infra § 253.

21. Ala.—Coker v. Coker, 49 So. 684, 160 Ala. 269, 135 Am.S.R. 99.
Ark.—Duffy v. Harris, 45 S.W. 545, 65 Ark. 251, 67 Am.S.R. 925, 40 L.R.A. 750.
29 C.J. p. 997 note 71.

22. Mo.—Whitehead v. Tapp, 69 Mo. 415.

23. Ark.—Duffy v. Harris, 45 S.W. 545, 65 Ark. 251, 67 Am.S.R. 925, 40 L.R.A. 750.
Mo.—Whitehead v. Tapp, 69 Mo. 415.
29 C.J. p. 997 note 73.

24. Ala.—Coker v. Coker, 49 So. 684, 160 Ala. 269, 135 Am.S.R. 99.
Cal.—In re Hale's Estate, 4 P.2d 263, 117 Cal.App. 545.
Ky.—Redmond v. Redmond, 66 S.W. 745, 112 Ky. 760, 23 Ky.L. 2161.
29 C.J. p. 997 note 74.

25. Cal.—In re Hale's Estate, 4 P.2d 263, 117 Cal.App. 545.

26. Ohio.—Nichols v. French, 93 N.E. 897, 83 Ohio St. 162; Elliott v. Plattor, 1 N.E. 222, 43 Ohio St. 198.

Under statute requiring widow to be part of decedent's family at the time of his death, a widow who had separated from her husband and was permanently residing elsewhere at the time of his death is not entitled to homestead rights.—Nichols v. French, 93 N.E. 897, 83 Ohio St. 162.

27. Neb.—Dillon v. Dillon, 171 N.W. 917, 103 Neb. 322.
29 C.J. p. 997 note 76.
As not constituting abandonment of homestead see supra § 241.

28. Cal.—Eproson v. Wheat, 53 Cal. 715.
29 C.J. p. 997 note 77.

29. Cal.—Wickersham v. Comerford, 31 P. 358, 96 Cal. 433.

30. La.—Liddell's Succession, 22 La. Ann. 9.
Tenn.—Howell v. Thompson, 32 S.W. 309, 95 Tenn. 396.
Wis.—In re Kehl's Estate, 251 N.W. 639, 215 Wis. 353.

31. Cal.—In re Wright's Estate, 277 P. 372, 98 Cal.App. 663.—Zanone v. Sprague, 116 P. 989, 16 Cal.App. 333.
Ill.—Stahl v. Stahl, 2 N.E. 160, 114 Ill. 375.
Tex.—Hall v. Fields, 17 S.W. 82, 81 Tex. 553.

Interlocutory judgment
A wife, against whom husband has recovered an interlocutory judgment of divorce based on her cruelty, is not entitled to the probate homestead, since the judgment that the marriage be dissolved was based on the fault of the wife which rendered the husband no longer liable for her support.—In re Egeline's Estate, 127 P.2d 948, 53 Cal.App.2d 368.

32. Tex.—Chapman v. Chapman, 41 S.W. 533, 16 Tex.Civ.App. 382.
29 C.J. p. 998 note 81.

33. Miss.—Osburn v. Sims, 62 Miss. 429.
29 C.J. p. 998 note 82.

In Louisiana, under Const. 1921 art. 11 § 1, a surviving widow without dependents is not entitled to claim constitutional homestead exemption where she owned in her own right property of value in excess of such exemption.—Prudential Ins. Co. v. Slagle, 166 So. 673, 184 La. 536.

latter, whether such property is her separate estate[34] or was obtained through her husband;[35] and although it is a homestead obtained from a former husband.[36] However, under some statutes, a widow is not entitled to a homestead in her deceased husband's lands, if she has selected a separate homestead on her own lands after her husband's death;[37] but she cannot by such a course waive the right to a homestead which inures to her and her children as a joint right[38] If the husband conveys the home place to the wife as a gift, to be held as a residence, she is not entitled to an allowance out of his estate in lieu of a homestead after his death[39]

§ 248. —— Effect of Insanity of Wife

Insanity of the wife and confinement in an asylum do not affect her homestead rights

The fact that the wife was insane and confined in an asylum after her husband's death does not in any way affect her homestead rights[40]

§ 249. —— Waiver, Release, or Bar in General

A widow may waive, release, or be estopped to assert her homestead rights, except in so far as restricted by statute.

Under many statutes a widow may waive, or be estopped by her conduct to assert, her rights to a homestead,[41] but under some statutes the waiver may be made only in the manner prescribed by the statute[42] If a wife signs a waiver of her interest in the homestead, she is estopped to deny the validity of the instrument after the husband's death[43]

Particular matters The widow's right to homestead is not barred, lost, or waived by her becoming her husband's executrix,[44] or his executrix and

34. Ala—Howell v Ward, 161 So 487, 230 Ala 379—People's Bank of Red Level v Barrow & Wiggins, 94 So 600, 208 Ala 433
Ark—Bruce v Bruce, 3 S W 2d 6, 176 Ark 442
Ky—Taylor v Shelton, 13 S W 2d 506, 227 Ky 473
Tex—Rex Supply Co v Shepherd Civ App 293 S W 342
29 C J p 998 note 83

Surviving widow need not show that she has no property, as condition precedent to assertion of claim to homestead—Thompson v Succession of Gow, 125 So 588, 169 La 546—Thompson v Succession of Gow, 123 So 616 168 La 909

Joint occupancy with minor children of homestead in husband's land is not affected by widow's ownership of other property—Taylor v Shelton, 13 S W 2d 506 227 Ky 473

Widow's purchase of home after the husband's death does not affect her rights to an allowance of the value of an appropriate home out of the community estate—Rex Supply Co v Shepherd, Tex Civ App, 293 S W 342

35. La—Smith v Jenkin, 85 So 68, 147 La 437
Mo—Albrecht v Imbs, 3 Mo App 587
29 C J p 998 note 84

Widow's receipt of insurance on husband's life does not affect right to claim homestead—Langston v. Cox, 132 So 502, 171 La 924—29 C J p 998 note 81 [b]

Purchasing other property with proceeds of insurance policies on her husband's life, which policies belonged to her and not to his estate, is not abandonment of the homestead right—Hufschmidt v. Gross, 20 S W 679, 112 Mo. 649.

36. Ark—Stone v Stone, 47 S W 2d 50, 185 Ark 390

37. Ark—Bradley v Humphreys, 83 S W 2d 828, 191 Ark 141—Stone v Stone 47 S W 2d 50 185 Ark 390—Brown v Brown, 149 S W 330, 104 Ark 313 Wilmoth v Gossett, 76 S W 1073, 71 Ark 591

38. Cal—Phelan v Smith, 34 P 667, 100 Cal 158

Widow's purchase of and residence on other premises as a homestead, and subsequent sale thereof, does not waive the right to a homestead in the husband's property, jointly with the children since she cannot individually waive such right—Phelan v Smith, supra

39. Tex—Ball v Lowell, 56 Tex 579
Allowance in lieu of homestead generally see infra § 269

40 Ala—Coker v Coker 94 So 566 208 Ala 354
Ky—Higgins v Higgins 78 S W 1124, 117 Ky 725 25 Ky L 1824
Tenn—Hinds v Buck, 150 S W 2d 1071, 177 Tenn 414

"Head of family"
Where minor children were living with their father when he purchased land while his wife was confined as an inmate in an asylum and the father mortgaged the land before his death, the wife not joining in mortgage, the homestead, which existed at father's death although children were then of age, inured to surviving wife's benefit, since the father was the "head of a family," notwithstanding that wife was in asylum and could not live on land—Hinds v Buck, supra

41. Cal—Selinger v Milly, 124 P 2d 631, 51 Cal App 2d 286
Ill—Wright v Dunning, 46 Ill 271, 92 Am D 257
Neb—McManus v Farrell, 264 N W 144, 130 Neb 69
Okl—In re Irwin's Estate, 136 P 2d 940
Tenn—Whitehead v Brownsville Bank 61 S W 2d 975 166 Tenn 249—Clark v Bullen, 247 S W 107, 147 Tenn 261

Devisees of widow, being in privity with their testatrix, are bound by such estoppel—Selinger v Milly, 124 P 2d 631, 51 Cal App 2d 286

42 S C—Foster v Pruitt, 167 S E 410 168 S C 262

Widow defaulting in administrator's proceeding to sell land in aid of assets, this not being one of the statutory modes of waiver did not thereby waive homestead and was entitled to proceeds of sale thereof in administrator's hands—Foster v Pruitt supra

43. Cal—In re Wyss' Estate, 297 P 100 112 Cal App 487

44 Cal—In re Firth, 78 P 643 145 Cal 236

The conduct of administration of testator's estate by surviving widow as executrix and distribution decree entered therein in accordance with will devising to widow only a life estate in premises that had been selected from community property and recorded as testator's homestead with remainder to children did not "estop" widow and those claiming under her to assert that homestead vested absolutely in widow as against one who lent money to one of testator's children and took an assignment of his interest in estate as security for renewal thereof after fact of testator's death had been established and made of record—Selinger v Milly, 124 P 2d 631, 51 Cal App. 2d 286.

residuary legatee;[45] by merely participating in the probate of her husband's will;[46] by her obtaining an unsatisfied money judgment for a year's support,[47] by her failure to object to the sale of decedent's personalty by the administrator,[48] by her release as to part of an entire tract, where the portion occupied by the dwelling is not included in such waiver,[49] by her failure promptly to select her exempt estate,[50] or to take steps to have it set apart to her,[51] by her execution of a rent note to a child to whom, jointly with herself, the husband's vendor had conveyed the homestead premises over her protest,[52] by her request to a third person to buy decedent's land,[53] by her consent to the sale of her deceased husband's property,[54] by her mistake in bringing an action for a partition and sale of the homestead property,[55] by taking other persons to reside with her,[56] or by an invalid judicial sale of the home property[57] Her acts, conduct, or declarations will not estop her to assert or claim the homestead where all the elements of an estoppel are not present[58]

On the other hand she may waive, or, by her acts with respect thereto, be estopped to assert, her homestead rights as against one who would be injured thereby,[59] as by her unreasonable delay in asserting such rights.[60] She is estopped or barred from claiming a homestead by survivorship by joining with the administrator in asking for a sale of all his land and by accepting part of the purchase price in lieu of the homestead interest,[61] by joining with the heirs in a deed of the property containing a covenant of warranty,[62] by electing to partition the homestead premises,[63] by filing a bill to foreclose a vendor's lien on property held by her deceased husband and collecting the money thereunder,[64] by taking a lease of the homestead tract from the heirs, conveying back to them, canceling the lease, and accepting other provisions for her support,[65] by releasing all her rights in the homestead after her husband's death, and acquiescing in such release for a long period of time,[66] unless such release is procured by fraud and undue influence, and without consideration,[67] by an agreement with the heirs, under which she accepts valuable property rights, in addition to all the provisions made for her in her deceased husband's will,[68] or by failing to raise an issue concerning her homestead rights, in a proceeding instituted by her for partition of the property after the husband's death[69]

45. Cal—Sulzberger v Sulzberger, 50 Cal 385

46. Ala—Edmonds v Cogsdill, 62 So 691, 182 Ala 309—Bell v Bell, 4 So 189, 84 Ala 64
29 C J p 1002 note 73

47. Ga—Green v Hambrick, 15 S E 420, 118 Ga 569

48. S C—Ex parte Worley, 26 S E 949, 49 S C 41

49. Ill—Aldrich v Thurston, 71 Ill 324

50. Minn—Wilson v Proctor 8 N W 830, 28 Minn 13

51. Ala Roy v Roy, 172 So 253, 233 Ala 440

Delay after mortgage foreclosure
Homestead exemption, claimed by and set apart to widow during administration of her husband's estate, was not lost to her because she took no steps to have homestead set apart to her until four years after foreclosure of mortgage thereon—Roy v Roy, supra

A widow is not estopped to claim land as her homestead by the fact that she did not prosecute her petition for allotment of her homestead in the probate court, abandoned her objections to the administrator's petition for sale of the homestead property, and bid at the sale of such property—Houf v Brown, 71 S W 125, 171 Mo 207

52. Ky—Lancaster v Redding, 26 S W 1013, 16 Ky L 147.
Proceedings for selection and setting apart of homestead see infra § 279

53. Mich—Showers v Robinson, 5 N W 988, 43 Mich 502

54. Mo—Kelsay v Frazier, 78 Mo 111
Vt—In re Worcester, 15 A 336, 60 Vt 420

55. Cal—Krieg v Crawford, 210 P 636, 59 Cal App 309

56. Iowa—Jones v Blumenstein, 42 N W 321, 77 Iowa 361
Tex—Salmons v Thomas, 62 S W 102, 25 Tex Civ App 422
29 C J p 1002 note 82

57. Tenn—Gross v Washington, Ch A, 38 S W 442

58. Ala—Dake v Inglis, 194 So 673, 239 Ala 211—Birmingham Securities Co v Hodges, 68 So 980, 193 Ala 197
29 C J p 1002 note 85

59. Kan—In re Meech's Estate, 130 P 2d 571, 155 Kan 792

Acts constituting estoppel
A widow who caused administrator to institute proceeding to sell decedent's real estate for payment of debts, bargained with prospective purchaser about sale price, and knew that a down payment and extensive improvements on property had been made by purchaser, was "estopped" to assert homestead right therein to the injury of purchaser, even though she did not discover that she had homestead right until she had permitted improvements to be made—In re Meech's Estate, supra

60. Ala—Leddon v Strickland, 118 So 651, 218 Ala 136
Cal—Jefferson v Tom, 126 P 2d 387, 52 Cal App 2d 432

Where she stands by and permits a sale of the residence estate in a suit to which she is a party and then removes from the premises, she cannot afterward set up her right as against the purchaser—Wright v Dunning, 46 Ill 271, 92 Am D 257

61. Neb—Tarnow v Carmichael, 116 N W 1031 82 Neb 1

62. Ala—Reeves v Brooks, 80 Ala 26

63. Neb—Metzger v Metzger, 188 N W 229, 108 Neb 613
Partition of homestead generally see the C J S title Partition § 33, also 29 C J p 1039 note 40–p 1041 note 87

64. Ala—Thacker v Morris, 52 So 73, 166 Ala 395

65. Iowa—Ditson v Ditson, 52 N W 203, 85 Iowa 276

66. Ill—Robb v Howell, 54 N E 324, 180 Ill 177
29 C J p 1003 note 90

67. Okl—Scott v Scott, 268 P 245, 131 Okl 144

68. Neb—McManus v Farrell, 264 N W 144, 130 Neb 69

69. Tex—Moore v Moore, 33 S W. 217, 32 S W 161, 89 Tex 29.

She waives her rights to rents and profits by failing to object to an administrator cultivating the home place for the benefit of the estate, where the proceeds from such cultivation are not misapplied [70]

Listing homestead as asset of estate. A widow's homestead right is not waived by her, as administratrix, filing a list of the homestead property as property of the estate and reciting that she is without property of her own, where she at all times lives on the property and claims it as a homestead,[71] or by the fact that she as administratrix lists the homestead as a part of the assets of the estate and files a final account in which the homestead is so listed and procures the approval of the account and an order of distribution, in which order the court determines who the heirs of such estate are and their respective interests therein [72]

The guardian of an insane widow cannot waive her rights to the homestead [73]

Release under order of court. A proper court may, on application of the widow, make an order entering the release of her homestead rights[74] and direct that the release be recorded for the purpose of notice,[75] and also, in the absence of prejudice to the rights of third persons, the court may allow the widow on good cause shown to withdraw such release [76]

Killing husband Under some statutes a widow who killed her husband loses her right to a homestead, but the burden of proving her guilt is on those who claim the homestead on that ground.[77]

§ 250. —— Antenuptial and Postnuptial Contracts

Although there is authority to the contrary, ordinarily a widow's right to a homestead in her deceased husband's property cannot be waived or released by reason of an antenuptial or postnuptial contract made by her.

It has been held that an antenuptial agreement whereby each party releases all interest in the property of the other operates to extinguish a widow's right of homestead in her deceased husband's property,[78] and, under some statutes, an antenuptial agreement releasing the wife's right of homestead is effective where the deceased left no minor children, but not where he left such children,[79] and the same limitation applies to a postnuptial agreement,[80] although a contention as to such release is immaterial where the widow enjoys the same use of the property under the agreement as she would if she were in possession of it as a homestead [81] On the other hand, by the weight of authority, such right of homestead cannot be waived or renounced by an antenuptial agreement,[82] particularly where the contract is unjust and inequitable [83]

A widow's right to a homestead is not released by an antenuptial contract in which she released her

Specific allegation not required to prevent waiver

Where widow alleged that the entire tract of land sought to be partitioned was subject to her homestead right and did nothing to waive that right except ask for partition, the pleadings were sufficient to show that widow did not "waive" such right notwithstanding she failed to pray specifically that her homestead right be preserved in the entire tract —Langford v Carr, 159 S W 2d 107, 138 Tex 330, affirming Carr v Langford, Civ App, 144 S W 2d 612

70. Tex —James v Thompson, 14 Tex 463

71. Okl —Ringer v Byrne, 80 P 2d 212, 183 Okl 46

72. Okl —Pennington v Woodner-McGaugh, 153 P 875, 54 Okl 110
29 C J p 1002 note 69

73. Iowa —Ratcliff v Davis, 20 N W 763, 64 Iowa 467

74. N H —Town of Raymond v Goodrich, 116 A 38, 80 N H 215
Okl —In re Irwin's Estate, 136 P 2d 940

Her motives for applying for the release are immaterial —In re Irwin's Estate, supra.

75. N H —Town of Raymond v Goodrich, 116 A. 38, 80 N H 215

76. N H —Town of Raymond v Goodrich, supra

Good cause as question of fact

N H —Town of Raymond v Goodrich, supra

77. Iowa —Crouse v Crouse, 229 N W 850, 210 Iowa 508

78. Iowa —Finn v Grant, 278 N W 225, 224 Iowa 527

79. Ill —Allen v Allen, 222 Ill App 438
29 C J p 998 note 97 [a]

Sufficiency of agreement

Where the statute prescribes such requisites, an antenuptial agreement, releasing the wife's right of homestead, is insufficient, where no recital of such release appears in the agreement and also in the acknowledgment —Allen v Allen, supra

80. Ill —Merki v Merki, 72 N E 9, 212 Ill 121—Zachmann v Zachmann, 66 N E 256, 201 Ill 380, 94 Am S R 180

81. Ill —Guhl v Guhl, 33 N E 2d 185, 376 Ill 100

82. Kan —Boulls v Boulls, 22 P 2d 465 137 Kan 880—Hoard v Jones, 237 P 888, 895, 119 Kan 138—Watson v Watson, 189 P 949, 106 Kan 693—Hafer v Hafer, 13 P 821, 36 Kan 524
N D —Swingle v Swingle, 162 N W 912, 36 N D 611
29 C J p 998 note 96

83. Ark —Burnes v Burnes, 157 S W 2d 24, 203 Ark 334

Contract held unenforceable

Where antenuptial contract which was signed at intended husband's request by inexperienced intended wife without knowledge of contents thereof and under mistaken belief that a home would be provided for her as long as she lived, provided that intended wife waived all her rights to homestead in husband's property without making any provision for wife in lieu thereof except that she should be furnished a home during husband's lifetime and her children educated for ordinary duties of life, contract was so unjust and inequitable as to be unenforceable as a bar to wife's claim to homestead in deceased husband's estate —Burnes v. Burnes, supra.

dower[84] or dower and distributive share[85] An antenuptial agreement to share the husband's property equally with his children does not deprive a widow of her statutory right to occupy the homestead until it is disposed of according to law[86]

A widow's homestead rights are not barred by a postnuptial agreement between herself, her husband, and the latter's heirs by which she consents to the sale of the homestead and payment to her of a child's share,[87] or by her contract of release of all claim in the homestead, in consideration of a payment to her of part of the purchase money, where such part is reinvested in a new homestead[88] A postnuptial contract providing homestead rights and other benefits for the wife in case he predeceases her precludes her from claiming any additional homestead rights as widow[89]

§ 251. —— Election to Take under Will

A widow's right to a homestead as affected by her election to take under the will of her deceased husband is considered in the C J S title Wills § 1287, also 69 C J p 1135 notes 4-7, and 29 C J p 999 notes 6-9, 12, 13, and her election not so to take under will in the C J S title Wills § 1288, also 29 C J p 999 note 10, and the necessity for such an election in the C J S title Wills § 1264, also 69 C J p 1103 notes 55-66 and 29 C J p 999 note 11

Examine Pocket Parts for later cases

§ 252. —— Election between Homestead and Distributive Share, or Year's Support

Under some statutes the surviving spouse may elect to retain the homestead in lieu of his or her distributive share in the deceased spouse's property, or may elect to take a year's support out of the homestead property instead of retaining the homestead.

Under a statute which provides that on the death of either husband or wife the survivor may continue to possess the whole homestead until otherwise disposed of by law and that the setting aside of the distributive share shall be such a disposition, but that the survivor may elect to retain the homestead for life in lieu of distributive share, the right to the distributive share is a primary right of the survivor,[90] who by the express terms of the statute has the right to elect between homestead and the distributive share therein provided for[91] The survivor cannot take both, but must make an election in order to retain the homestead,[92] and on failure to do so the survivor takes a distributive share,[93] which operates as an abandonment of homestead rights,[94] and, on the other hand, an election to take the homestead divests the right to the distributive share[95] If the election is to take the homestead,

84. Mo —Mack v Heiss, 3 S W 80, 90 Mo 578
Acceptance of dower in lieu of homestead see Dower § 74

85. Ala —Collier v Tatum, 160 So 530, 230 Ala 218
Iowa —Mahaffy v Mahaffy, 18 N W 685, 63 Iowa 55

Unenforceable agreement
Wife's agreement to release dower and distributive share in husband's estate in consideration of property owned by her and wrongfully withheld by husband to force wife to sign agreement wherein husband did not release interest in wife's estate but thereafter devised five dollars to her from estate worth seven thousand dollars is unenforceable and does not estop her to take homestead exemptions —Collier v Tatum, 160 So 530, 230 Ala 218

86. Iowa —Fraizer v Fraizer, 207 N W 772, 201 Iowa 1311

87. Tex —Winn v Winn, 57 S W 80, 23 Tex Civ App 617

88. Ill —Nance v Nance, 28 Ill App 587

89. Kan —Porter v Axline, 114 P 2d 849, 154 Kan 87

90. Iowa —Prichard v Anderson, 278 N W 348, 224 Iowa 1152—VanVeen v. VanVeen, 236 N W. 1, 213 Iowa 323 modified on other grounds 238 N W 718, 213 Iowa 323 —Myrick v Bloomfield, 210 N W 428, 202 Iowa 401—Corn Belt Trust & Savings Bank of Belle Plaine v May, 196 N W 735, 197 Iowa 54 Coleman v Bosworth, 164 N W 238, 180 Iowa 975—Bosworth v Blanc, 152 N W 567, 170 Iowa 296— Robson v Lambertson 88 N W 944, 115 Iowa 366 —Peebles v Bunting, 73 N W 882, 103 Iowa 189
Widow's distributive share as analogous to but distinguished from, her homestead rights see Descent and Distribution § 49 a

91. Iowa —Myrick v Bloomfield, 210 N W 428, 202 Iowa 401—Whitehead v Conklin, 48 Iowa 476
29 C J p 999 note 18

The purpose of the statute was to give the surviving spouse the right to continue in possession and occupancy of the whole homestead free from judicial sale or otherwise until either the distributive share or the occupancy of the homestead for life had been selected —Wadle v Boston Market Co, 191 N W 528, 195 Iowa 46
Election between
Distributive share and other rights generally see Descent and Distribution § 60
Dower and homestead see Dower § 74
Taking allowance in lieu of homestead see infra § 269

92. Iowa —Corn Belt Trust & Savings Bank of Belle Plaine v May, 196 N W 735, 197 Iowa 54- Wadle v Boston Market Co, 191 N W 528, 195 Iowa 46
29 C J p 999 note 19

The right to continue in possession and occupancy after the death of either husband or wife, is, under the statute a "homestead right," and the right of exemption therein is the same as that which existed at the time of the death of decedent —Wadle v Boston Market Co, supra

93. Iowa —Corn Belt Trust & Savings Bank of Belle Plaine v May, 196 N W 735 197 Iowa 54
29 C J p 999 notes 19, 21

94. Iowa —Crouse v Crouse, 259 N. W 443, 219 Iowa 736—Edinger v. Bain, 98 N W 568, 125 Iowa 391, motion for rehearing overruled 101 N W 119 125 Iowa 391
29 C J p 999 note 21

95. Iowa —Prichard v Anderson, 278 N W 348, 224 Iowa 1152—Jackson v Grant, 278 N W 190, 224 Iowa 579—Van Veen v Van Veen, 236 N W. 1, 213 Iowa 323, modified on

by inclusion in the distributive share, such homestead is a continuation of the original homestead, and not a newly acquired homestead[96] A disposal of the homestead, within the above statute, is effected by a setting aside of the distributive share, and not by a mere election to take such share,[97] and therefore the survivor is not chargeable with rental on the homestead after such election, but before the setting off of the distributive share[98] The distributive share must be so set off as to include the dwelling house given by the law as a homestead, unless a different arrangement is preferred,[99] and property subject to such an election must have been occupied as a homestead by the deceased spouse at the time of his or her death,[1] and must be located within the state[2]

Seasonable election The survivor is not required to make the election immediately after the death of the other spouse but the choice may be made within a reasonable time,[3] and a delay may be excused where it is not due to any fault on the part of the survivor,[4] but, where property is left subject to administration, the survivor by neglect or failure to seek administration cannot prolong the term in which an election may be made[5]

Mode of election. While a written election is the most definite and certain method of exercising the right,[6] an election may nevertheless be manifested by unequivocal acts, words, and conduct.[7]

Evidence of election The right to a distributive share being a primary right, in the absence of evidence otherwise there is a presumption that the survivor has taken the distributive share,[8] and to overthrow such presumption it must be shown that there was an election to take the homestead[9] Ordinarily an election to take the homestead right is evidenced by the continued occupancy of the premises, although this is not conclusive, as the true nature of the occupancy must be determined from all the facts and circumstances,[10] to show such an election the occupancy must be such as is not only consistent with the homestead right, but it must be maintained under and because of such right[11] If the occupancy is continued by the survivor and family it raises the presumption that the survivor has elected to retain the homestead in lieu of the distributive share, which presumption will prevail,[12]

other grounds 238 N W 718, 213 Iowa 323—Amish v Amish 195 N W 359, 196 Iowa 685

The local statute governs the question whether widow, by electing to take homestead in another state, thereby deprived herself of right to claim one-third share in Iowa real estate—Ehler v Ehler, 243 N W 591, 214 Iowa 789

96. Iowa—American Nat Bank of Alamosa, Colo, v Wetherell 200 N W 221, 198 Iowa 648

97. Iowa—Crouse v Crouse, 259 N W 443, 219 Iowa 736—Fraizer v Fraizer, 207 N W 772, 201 Iowa 1311

98. Iowa—Fraizer v Fraizer, supra

99. Iowa—In re Crocker, 126 N W 962, 148 Iowa 104

29 C J p 999 note 22

1. Iowa—Peebles v Bunting, 73 N W 882, 103 Iowa 489

Property subject to appropriation as homestead generally see infra § 267

2. Iowa—Ehler v Ehler, 243 N W 591, 214 Iowa 789

Election to take homestead in another state does not deprive widow of right to claim her share in Iowa real estate—Ehler v Ehler, supra

3. Iowa—Stoddard v Kendall, 119 N W 138, 140 Iowa 688—Cunningham v Gamble, 10 N W 278, 57 Iowa 46

4. Iowa—Crouse v Crouse, 259 N W 443, 219 Iowa 736.

Resistance by heirs

Widow's statutory right to occupy homestead after husband's death intestate continued until her distributive share of his land was set aside to her, notwithstanding seven years' delay, due to heirs' resistance of proceeding to set aside such share—Crouse v Crouse, supra

5. Iowa—Stoddard v Kendall, 119 N W 138, 140 Iowa 688

6. Iowa—Stoddard v Kendall, supra

7. Iowa—Wadle v Boston Market Co 191 N W 528, 195 Iowa 46—Stoddard v Kendall, 119 N W 138, 140 Iowa 688—Edinger v Bain, 98 N W 568, 125 Iowa 391 motion for rehearing overruled 101 N W 119 125 Iowa 391

29 C J p 999 note 26

8. Iowa—Jackson v Grant, 278 N W 190, 224 Iowa 579—Corn Belt Trust & Savings Bank of Belle Plaine v May, 196 N W 735, 197 Iowa 54—Peebles v Bunting, 73 N W 882, 103 Iowa 489

9. Iowa—Jackson v Grant, 278 N W 190, 224 Iowa 579—Corn Belt Trust & Savings Bank of Belle Plaine v May, 196 N W 735, 197 Iowa 54

The burden of establishing that the widow divested herself of her distributive share by electing to occupy the homestead is on the party claiming that fact—Yagge v Tyler, 280 N W 559, 225 Iowa 352—Jackson v Grant, 278 N W. 190, 224 Iowa 579

10. Iowa—Jackson v Grant, supra—Corn Belt Trust & Savings Bank of Belle Plaine v May, 196 N W 735, 197 Iowa 54

Equivocal declarations of widow respecting her desire to remain on homestead were not determinative of alleged election to retain homestead for life in lieu of her distributive share in intestate husband's estate, and were to be considered with declarations which were consistent with a continued occupancy as a tenant in common, and with evidence of the conduct and attitude of the parties relative to the entire transaction—Jackson v Grant, 278 N W 190, 224 Iowa 579

11. Iowa—Prichard v Anderson, 278 N W 348, 224 Iowa 1152—Jackson v Grant 278 N W 190 224 Iowa 579—Corn Belt Trust & Savings Bank of Belle Plaine v May, 196 N W 735, 197 Iowa 54

Occupancy insufficient to show election

Iowa—Prichard v Anderson, 278 N. W 348, 224 Iowa 1152—Jackson v. Grant, 278 N W 190, 224 Iowa 579.

Continued possession of the survivor under an arrangement of the heirs is not an election to take the homestead rather than a distributive share—Bosworth v Blaine, 152 N W. 567, 170 Iowa 296—Hemping v Hemping, 120 N W 111, 141 Iowa 535—29 C J p 1000 note 30

12. Iowa.—Corn Belt Trust & Sav-

unless rebutted by proof of a contrary intention,[13] as where the survivor asserts some interest in the title other than, or inconsistent with, the mere life occupancy and use.[14]

Conveyance to children prior to election. The fact that the survivor quitclaims land of decedent to their children without their knowledge, with the idea that if he were going to keep the homestead he should deed the other property to his children, was not an election to take the homestead in lieu of a distributive share where within three months after administration was granted a formal written election to take the homestead was filed[15]

Election under mistaken belief An election made in ignorance of material facts is not binding, where no other person's rights have been affected,[16] nor is an intention to elect presumed if a person, although knowing the facts, acted in misapprehension of his legal rights and in ignorance of his obligation to make an election[17] An election by the survivor to take a homestead in lands under the mistaken belief as to the title thereto which terminated with decedent's death does not affect the survivor's rights in other lands purchased by the survivor during the marriage, or the rights of survivor's heirs[18]

Taking share in land in lieu of dower as not waiver of homestead Under a statute providing that the widow may take in lieu of dower the undivided third part in fee of the whole of the land, and that she shall be deemed to have so elected unless she commences proceedings for dower within a year after deceased's death, the fact that the widow applies for a one-third interest in fee simple in her deceased husband's property in lieu of dower raises no presumption of an election to waive her homestead rights where she was ignorant of her right to a homestead, no intention to relinquish it being shown and no rights of third persons having intervened Since this estate in fee simple applies to all the parcels of real property of the estate, while the exempt property of the estate which she is entitled to have set apart to her under the homestead laws is restricted to one particular parcel, the homestead, the doctrine of election does not apply, the two rights not being alternatives or substitutes[19] A widow's election to take a child's part in lieu of dower, as authorized by statute, does not affect her homestead rights in and to the homestead property,[20] notwithstanding the homestead rights exceed in value the interest in the lands which might have been assigned as dower[21]

Election between homestead and year's support. Under some statutes a widow is not entitled to a homestead and a year's support where the aggregate of the two provisions exceeds the amount which may be set apart as a homestead and exemption under the law[22] She may elect either to allow the homestead to remain for her benefit as the sole beneficiary, or to take a year's support out of the homestead property,[23] but if she enjoys the use of the homestead for a number of years after her husband's death she will be conclusively presumed to have elected to take the homestead, and cannot thereafter take a year's support[24]

ings Bank of Belle Plaine v May, 196 N W 735, 197 Iowa 54
29 C J p 1000 note 27

13. Iowa—Jackson v Grant, 278 N W 190, 224 Iowa 579
29 C J p 1000 note 28

Management by children

Evidence respecting management of intestate's estate and distribution of income therefrom by children for the maintenance of all property and for their own and widow's support established that widow had not elected to retain a homestead for life in lieu of her distributive share notwithstanding her continued and exclusive occupation of homestead until her death—Jackson v Grant, supra

14. Iowa—Deere v Meyer, 108 N W 236, 131 Iowa 172
29 C J p 1000 note 29

15. Iowa—Deere v Meyer, supra.
29 C J p 1000 note 31.

16. Or—In re Iltz, 202 P. 409, 104 Or 59

17. Or—In re Iltz, supra.
29 C J p 1000 note 39.

18. Iowa—Husted v Rollins, 137 N W 462, 156 Iowa 546, 42 L R A ,N S , 378

19. Or—In re Iltz, 202 P 409, 104 Or 59

20. Mo—Stanton v Leonard, 130 S W 2d 487, 344 Mo 998—McFadin v Board, 87 S W 948, 188 Mo 688

21. Mo—Stanton v Leonard, 130 S W 2d 487, 344 Mo 998

Reason for rule

The fact that homestead rights of widow in realty exceeded value of one-third interest for life in lands belonging to deceased husband did not affect rights of widow to hold child's part and retain homestead rights in full, since, on election to take child's part, widow took fee-simple interest in the lands as that of a child, subject to homestead, notwithstanding all of realty was homestead property—Stanton v Leonard, supra

Statutory limit applicable only to dower

A statute providing that, if interest of widow in homestead shall equal or exceed one-third interest for and during her natural life in real estate of which head of family shall have died seized, no dower shall be assigned applies solely to dower and not to the estate which the widow may elect to take in lieu of dower, which is ordinarily referred to as "election dower"—Stanton v Leonard, supra

22. Ga—Green v Hambrick, 45 S E 420, 118 Ga 569

23. Ga—Miller v Crozier, 31 S E. 122, 105 Ga 54
Allowance of maintenance and support generally see Executors and Administrators § 332

24. Ga—Culpepper v Crane, 77 S E. 1058, 139 Ga 665

If widow continues to live on the property until her death, several months after the husband's death, without making an application for a year's support she will be held to have elected to take the homestead rather than such support.—Ehrlich

§ 253. —— Remarriage

The remarriage of a widow, under some statutes, does not forfeit her homestead estate by survivorship, even though she removes to the home of her second husband; but under other statutes a contrary rule obtains.

Under some statutes it is held that the widow may retain her homestead privileges only during widowhood [25] Under other statutes, however, a widow by remarrying does not lose her estate of homestead by survivorship,[26] and this rule has been applied whether the homestead was assigned to her before such marriage or afterward [27] Under some of these statutes it has also been held that the widow does not forfeit her homestead by a second marriage and removal to the home of her second husband,[28] even though she marries a nonresident and removes from the state [29] Under other statutes, however, it is held that the remarriage of a widow and her removal to the homestead of her second husband[30] or her removal to another state with her second husband[31] will operate as, or at least raise the presumption of, an abandonment of the homestead acquired by her from her first husband,[32] even though she continued in possession of the homestead of her first husband by tenant,[33] unless it is shown that the removal was intended to be merely temporary,[34] the burden being on the widow to show an unequivocal intention to return to the homestead left by her,[35] and, in the absence of evidence clearly showing such intention, the fact of her living on the property of her second husband would entitle her to maintain a claim of right to a homestead in his home [36]

A putative widow on remarriage loses any right she may have had to claim a widow's homestead in competition with the legal widow.[37]

§ 254. —— Alienation after Husband's Death

A widow's alienation of the homestead property, after the husband's death, under some statutes constitutes an abandonment of her homestead rights in the property, but under other statutes such an alienation does not affect the exempt character of the property.

Under some statutes alienation of the homestead property by a widow has been held not to constitute an abandonment by her of the exempt character of the property,[38] and a fortiori is this so where, at the time the widow joined in a sale of the homestead premises, she was ignorant of her rights

v Silverstein, 48 S E 703, 121 Ga 51

25. Wis —Lands of Sydow, 154 N W 371, 161 Wis 325
29 C J p 1001 note 44

In Missouri

(1) Under Rev St 1929 § 612 a widow, on remarriage loses her homestead rights in her deceased husband's homestead property —Hall v Hall, 145 S W 2d 752, 346 Mo 1217

(2) Under prior statutes, a widow's remarriage did not forfeit her homestead rights even though she removed to the home of her second husband — Cave v Wells, 5 S W 2d 636, 319 Mo 930—Wicoff v Moore, 257 S W 474 —Ludwig v Carr, 240 S W 515, 210 Mo App 489—29 C J. p 1001 notes 45, 47, Missouri cases

Right of occupancy or interest as conditioned on not remarrying see infra § 265.

26. Ala —Montgomery v Hammond, 153 So 654, 228 Ala 449
Ark —Stone v Stone, 47 S W 2d 50, 185 Ark 390—Davis v Neal, 140 S W 278, 100 Ark 399, L R A 1916A 399
29 C J p 1001 note 45.

27. N H —Miles v Miles, 46 N H 261, 88 Am D 208

28. Ala —Montgomery v Hammond, 153 So 654, 228 Ala 449
Ark —Stone v Stone, 47 S.W 2d 50, 185 Ark 390
29 C J p 1001 note 47.

Heirs cannot object

Question whether selection by widow of second husband's homestead constitutes abandonment of first husband's homestead cannot be raised by second husband's heirs at law —Stone v Stone, supra

29. Ala —Johns v Cannon, 74 So 42, 199 Ala 138
29 C J p 1001 note 48

30. Ill —Rasmussen v Rasmussen, 13 N E 2d 166 368 Ill 137
Tex —Wallingford v Bowen, Civ App, 104 S W 2d 188
29 C J p 1001 note 49

31. Iowa —Anderson v Blakesly, 136 N W 210, 155 Iowa 430
Ky —Love v McCandless, 163 S W 197, 157 Ky 352
29 C J p 1001 note 50

32. Ill —Dinquel v Dacco, 112 N E 337, 273 Ill 117—Loveless v Thomas, 38 N E 907, 152 Ill 479

33 Ill —Home Ins Co v Field, 42 Ill App 392
Ky —Nelson v Nelson, 96 S W 794, 29 Ky L 885
29 C J p 1001 note 52

34. Ill —Rasmussen v Rasmussen, 13 N E 2d 166, 368 Ill 137—Dinquel v Dacco, 112 N E 337, 273 Ill 117 —Loveless v Thomas, 38 N E 907, 152 Ill 479

35. Ill —Rasmussen v Rasmussen, 13 N E 2d 166, 368 Ill 137

Evidence of intention to return held insufficient

A widow who on remarrying moved to homestead of her second husband was not entitled to a homestead in first husband's property sought to be partitioned, where whether widow would ever return to first homestead depended on future conditions or circumstances she left nothing in first homestead when she moved out, and there was no evidence of any agreement or present intention that widow and her second husband would ever return to her original homestead other than her statement that she expected to go back some time. —Rasmussen v Rasmussen, supra

36. Ill —Rasmussen v Rasmussen, supra

37. La —Jackson v Gordon, App, 186 So 399

38. Cal —In re Vance, 34 P 1087, 100 Cal 425
Ill —Plummer v White, 101 Ill 474
Mont —Kerlee v Smith, 124 P 777, 46 Mont 19
Tenn —Grier v Canada, 107 S W 970, 119 Tenn 17
29 C J p 1001 note 53

A quitclaim deed by the widow after her husband's death conveyed only her interest in the property which she received on his death by succession, and did not deprive her of her homestead right in such property —In re Moore, 57 Cal 437

Transfer or encumbrance of widow's homestead right or interest see infra § 285.

in the homestead[39] However, under other statutes it is held that her homestead rights are lost to her by the attempted alienation,[40] as by a sale with no right of reclamation;[41] and it has been held that by joining with the heirs of the deceased husband in executing a mortgage of lands the widow estops herself to assert her homestead rights as against the mortgagee.[42] So a sale under the widow's mortgage of a community homestead divests her of her right of occupancy[43]

Where the sale of the property is conditional, the widow's homestead rights are not abandoned until the happening of the contingency constituting the conditions,[44] nor is there an abandonment where the widow conveys her interest in her husband's estate subject to her homestead rights,[45] or where the conveyance is made in consideration of the widow being kept by the grantee for the remainder of the widow's life,[46] nor are the homestead rights abandoned by a mere offer by the widow to sell the property[47]

Releasing other interests. There is no abandonment, it seems, where the widow executes a deed which releases her dower in the personalty[48] and her interest in the portion of the estate which would go to the executor,[49] or where she conveys an undivided interest, retaining the possession, use, and profits of the land,[50] or where she conveys a portion of her interest in oil and gas rights in the homestead premises,[51] but where, after the death of a testator, his widow executed a deed to the executor, releasing, remising, and quitclaiming all her right, title, and interest in the testator's estate, whether of dower or "otherwise," and all claims and demands against said estate, whether under the will or under the law, such deed passed the widow's right of homestead[52]

Executory sale and repurchase. A widow, having a right of homestead in lands left by her husband, who with the heirs made an executory sale of the property, retaining a vendor's lien and taking a trust deed securing the purchase money, with the intention of acquiring another homestead when the purchase money was paid, but who on its non-

39. Wash—Smith v Ferry, 86 P 658, 43 Wash 460

40. Ark—Sheppard v Zeppa, 133 S W 2d 860, 199 Ark 1—Rone v Sawrey, 123 S W 2d 524, 197 Ark 472—Henry v Dollin, 113 S W 2d 97, 195 Ark 607—Graves v Simms Oil Co, 75 S W 2d 809, 189 Ark 910—Murphy v Graves, 279 S W 359, 170 Ark 180
Ky—Berger v Berger, 94 S W 2d 618, 264 Ky 225—Combs v Ezell, 24 S W 2d 301, 232 Ky 602—Settle v Simpson, 264 S W 1092, 204 Ky 470—Moore v Moore, 78 S W 141
Tex—Ingram v Summers, Civ App, 29 S W 2d 447, error dismissed—York v Hutcheson, 83 S W 895, 37 Tex Civ App 367
29 C J p 1001 note 55

A widow's right to claim immunity from a forced sale of the homestead property is abandoned by her sale of the property, since she can no longer assert her homestead claim in such property—Ingram v Summers, supra

Conveyance to second husband and removal to another home
Where widow, on her remarriage, conveyed what had been her homestead to her second husband and moved with him to another home, there was an "abandonment" by her of her homestead - Smart v Murphy, 139 S W 2d 33, 200 Ark 406

Oral gift by widow of land subject to homestead rights, followed by change of possession and making of improvements thereon by donee, constitutes abandonment of homestead—Graves v. Simms Oil Co, 75 S W.2d 809, 189 Ark 910—Murphy v Graves, 279 S W 359, 170 Ark 180
Parol gift of land generally see Gifts § 57

Sale by widow of interest in oil, gas, and minerals in homestead constituted an abandonment of her interest therein by virtue of her homestead right, as much as though she had sold a part of the land constituting her homestead—Warren v Martin, 272 S W 367, 168 Ark 682

In Alabama
(1) The effect of the statute providing that actual occupancy of homestead by widow and minors is not essential to preservation of right of homestead exemption was to prevent waiver of right of exemption by a sale and abandonment of possession by exemptioner—Davis v Bates, 194 So 647, 239 Ala 214—Cox v McLemore, 183 So 860, 236 Ala 559

(2) Under former statutes a conveyance and giving possession by the widow destroyed her homestead rights—Tharp v Johnson, 122 So 668, 219 Ala 537—Bodeker v Tutwiler, 100 So 776, 211 Ala 537
Rights
Acquired by grantee or purchaser see infra § 288
Of children or heirs as affected by conveyance by widow see infra § 257

41. Ky—Brewer v Brewer, 105 S W 2d 582, 268 Ky 625

42. Ala—Todd v Interstate Mortgage & Bond Co, 71 So 661, 196 Ala 169

43. Tex—Ostrom v Arnold, 58 S W 630, 24 Tex Civ App 192.

44. Ky—Moore v Moore, 78 S W 141

Sale to tenant on condition
Where a widow agrees with her tenant that if she has the right to sell the land which constitutes her homestead she will do so, and makes him a deed under that agreement, it does not constitute an abandonment of the homestead—Moore v Moore, supra

45. Tenn—Cowan v Carson, 50 S W 742, 101 Tenn 523

Where a widow insists throughout on an allowance in lieu of homestead, the fact that she, recognizing that the homestead lot is incapable of division, seeks a sale to accomplish a partition, is not a waiver of her homestead rights—McCandless v Devenport, Tex Civ App, 40 S W 2d 903

46. Ky—Howard v Mitchell, 105 S W 2d 128, 268 Ky 429
Tex—Wilson v Fields, Civ App, 50 S W 1021

47. Tex - Perkins v Perkins, Civ App, 166 S W 915

48. Mo—Mack v Heiss, 15 Mo App 596, reversed on other grounds 3 S W 80, 90 Mo 578

49. Mo—Mack v Heiss, supra

50. Kan—Harclerode v Green, 54 P 505, 8 Kan App 477.
Mo—Mack v Heiss, 3 S W 80, 90 Mo 573, reversing 15 Mo App 596

51. Okl—Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 524

52. Mo—Mack v Heiss 3 S W 80, 90 Mo 573, reversing 15 Mo App 596.

payment, not having acquired a homestead, foreclosed the trust deed and repurchased the property with the intention of resuming occupancy as a homestead, which she did on regaining possession, will not be held to have lost her homestead rights,[53] at least as against a creditor obtaining and registering a judgment after her repurchase of the property.[54]

§ 255. Surviving Children or Heirs

Surviving children have no homestead rights by survivorship in the homestead of a deceased parent unless such rights are conferred by constitutional or statutory provisions.

Under the constitutional and statutory provisions in various jurisdictions, the homestead right continues in favor of the children[55] However, in some jurisdictions the homestead right of surviving children is greatly restricted or denied altogether, sometimes the right comes into existence only on the death of both parents[56]

Residence Residence in the state of a deceased husband and father, at the time of his death, is usually a statutory prerequisite to give the right of homestead to the widow, as considered supra § 243,

53. Tex—Smith v Wright, 36 S W 324, 13 Tex Civ App 480

54. Tex—Smith v Wright, supra

55. Ala—People's Bank of Red Level v Barrow & Wiggins, 94 So 600, 208 Ala 433
Ark—Sheppard v Zeppa, 133 S W 2d 860 199 Ark 1
Ky—Wilson's Adm'r v Wilson, 156 S W 2d 832, 285 Ky 522—Howard v Mitchell, 105 S W 2d 128, 268 Ky 429
La—Kinchen v Talbert, 128 So 525, 170 La 590
N C Overton v Highsmith 131 S E 712 191 N C 376—Spence v Goodwin, 38 S E 859, 128 N C 273
S C—Dorn v Stidham 137 S E 331 139 S C 66
29 C J p 1003 note 94
Allowance out of estate of decedent see Executors and Administrators §§ 323–366
Continuance of personal property exemption in favor of children or heirs see Exemptions § 23 c
Interest of children during life of homesteader see supra § 1
Nature of estate or interest transmitted to children see infra § 265 b

56. In Florida

(1) Under Const art 10 § 2 the homestead exemption inures to the widow and heirs and not to the children as such—Spitzer v Branning, 181 So 770, 135 Fla 49

(2) Homestead exemption for benefit of decedent's heirs see infra § 265 d

In Missouri

(1) Under Rev St 1929 § 612, Mo St Annot p 4227 § 612 on the death of the husband the children of deceased have the joint occupation of the homestead with the widow until they arrive, respectively, at the age of twenty-one years—Hall v Hall, 115 S W 2d 752, 346 Mo 1217

(2) Under Rev St 1889 § 5439, providing that, if a housekeeper or head of a family shall die leaving a widow or any minor children, his homestead shall pass to, and vest in, the widow or children, or both, where a married woman owned land which she occupied as a homestead and died leaving minor children, there was no provision in such statute for the continuation of the homestead in the children but it descended to the heirs subject to the payment of debts—Chapman v McGrath, 63 S W 832, 163 Mo 292—Keyte v Peery, 25 Mo App 394

(3) Nature of estate or interest transmitted to surviving wife and children see infra § 265 b

In Nebraska

On the death of either a husband or wife holding the deed of the family homestead, the homestead vests in the surviving spouse for life Their minor children merely by virtue of such relation have no homestead interest therein—In re Lewis, 263 N W 480, 130 Neb 62 -29 C J p 1003 note 1

In Oklahoma

(1) Under the statute on the death of "both husband and wife the children may continue to occupy the whole homestead until the youngest child becomes of age" Under this provision the homestead right of children does not vest until surviving parent's death—Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 524 overruling prior inconsistent decisions—Lusk v Carter Oil Co of West Virginia, 53 P 2d 656 172 Okl 508

(2) Under Oklahoma law on death of mother, her homestead right inured to benefit of her daughter—Pfister v Johnson, D C Okl, 13 F Supp 662

(3) The Oklahoma statute is substantially the equivalent of the South Dakota provision—Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 524

In South Dakota

Under the statute, on the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead and the children's homestead right vests only on the death of both parents and continues until the youngest child becomes of age—In re Clouse's Estate, 257 N W 106, 63 S D 147—Bailly v Sisseton Farmers' State Bank, 150 N W 942, 35 S D 122

In Tennessee

During the lifetime of the widow the minor children do not, under the constitution and statutes, have any present homestead right, although on her death or where she predeceases her husband, a homestead right vests in them—Carey v Carey, 43 S W 2d 498 163 Tenn 486—29 C J p 1003 note 94

In Texas

(1) Where there is a surviving parent, the homestead right vests entirely and exclusively in him or her Johnson v Prosper State Bank Civ App, 125 S W 2d 707 affirmed 138 S W 2d 1117, 134 Tex 677—Whiteman v Burkey Civ App 286 S W 350, conforming to answer to certified question 282 S W 788 115 Tex 400—29 C J p 1003 note 3 [a] (1)

(2) The children have no interest in the homestead, as such, as against the surviving parent—Smith v Dunnam, Civ App, 57 S W 2d 873, error refused—29 C J p 1003 note 3 [a] (2)

(3) Rights of widow's minor children to occupy property as homestead may be asserted only through widow and not through order of probate court procured by her—Ellis v Patrick Civ App, 93 S W 2d 1201

(4) As against a third person, however, children of deceased spouse have right of title and possession in community homestead—Lone Star Gas Co v Meyer, Civ App, 296 S W 1110

(5) When the homestead right of the surviving spouse ceases, the minors may assert their homestead rights through a guardian, and under Const art 16 § 52, the right of the minors cannot be taken away as long as the court permits the guardian to occupy it with them as a homestead—Hall v Fields, 17 S W 82, 81 Tex 553

(6) On abandonment of the homestead by the surviving wife, the guardian of a minor child has the right to the use of the property for

and to the minor child or children of decedent.[57]

Heirs and constituent members of family As is considered infra § 265 c and d, in some jurisdictions the constitutions or statutes continue the homestead right or exemption in favor of the heirs or issue or in favor of constituent members of the family.

§ 256. —— Persons Entitled

Under statutes continuing the homestead in favor of the children, no right of homestead inures to the benefit of any person who is not a child within the meaning of the statutes.

A person does not acquire a right of homestead by survivorship under constitutions or statutes continuing the homestead for the children, unless he is a child within their meaning,[58] although, as considered infra § 265 c and d, in some jurisdictions the homestead right or exemption is continued in favor of heirs or issue or constituent members of the family. The term "children" in the statutes is used in the sense of immediate descendants of decedent[59]

Minor or adult children. Although the rule is otherwise under some statutes,[60] minor children are generally those contemplated by the homestead enactments as beneficiaries of the homestead, and an adult cannot claim its benefits[61]

homestead purposes in behalf of the minor—Henry v. Brown, Civ App., 279 S.W. 541

(7) The minors cannot assert any right to the occupancy of the homestead except through their guardian—Cline v Niblo, 8 S.W.2d 633, 117 Tex. 474, 66 A.L.R. 916, modifying, Com App., 292 S.W. 178, reversing, Civ App., 286 S.W. 298—Ridling v Murphy, Com App., 228 S.W. 165

(8) Other cases see 29 C.J. p. 1003 note 3

(9) Homestead inuring to constituent member of family and heirs see infra § 265 c, d

57. Ala.—Lucky v Roberts, 100 So. 878, 211 Ala. 578

What constitutes nonresidence

As to giving minor children a homestead in his land, a father is a "nonresident" when he ceases to dwell within the state for an uncertain period without a definite intention of returning, although he has a general intention to return at some future time, it being his intention that controls, not the absence of the wife from state—Lucky v Roberts, supra

58. Okl.—Manning v Dosher, 29 P.2d 966, 167 Okl. 368

S.C.—Dorn v Stidham, 137 S.E. 331, 139 S.C. 66

Adopted children see Adoption of Children §§ 59 a, 63 a

Children of divorced parents see infra § 257

Child en ventre sa mere at the time of its father's death may claim as may a child which was then in esse—In re Seabolt, D.C.N.C., 113 F. 766

Children living on homestead

Where the statute continues the exemption in favor of "the children living on the homestead," it does not pass to adult children who were living in homes of their own—In re Snoddy's Estate, 21 S.E.2d 198, 201 S.C. 14

Married children having homes of their own are not usually considered within the provisions of the statutes—Smith v Landis, 144 P. 998, 93 Kan. 453—29 C.J. p. 1004 note 16

Termination of homestead by marriage of minor child see infra § 275

Married woman living with foster father

Where a married woman over twenty one years of age who, with her husband, had been living with foster father on his homestead about a month before his death inherited foster father's estate by virtue of a declaration of heirship previously made by foster father, she acquired no homestead right in any of decedent's lands, but inherited title thereto in fee subject to payment of decedent's debts for which personal property was insufficient—Carl v Elizabeth Hospital, 164 S.W.2d 432, 204 Ark. 716

59. Tex.—Wilkins v Briggs, 107 S.W. 135, 48 Tex. Civ. App. 596

60. Kan.—Protection State Bank v Baker, 53 P.2d 469, 143 Kan. 201, rehearing denied and opinion supplemented 55 P.2d 818, 143 Kan. 526—Solomon Nat. Bank v Birch, 246 P. 1007, 121 Kan. 334

Okl.—Hembree v Magnolia Petroleum Co., 56 P.2d 851, 176 Okl. 524, overruling Manning v Dosher, 29 P.2d 966, 167 Okl. 368

29 C.J. p. 1004 note 11

Exemption for debts of adult child see infra § 263

Adult nephews

Where bachelor owning one hundred and sixteen and one-half acre farm opened his farm home to his brother's widow and her three small sons in 1908, and they lived there until widow's death in 1913, and thereafter bachelor and his three minor nephews continued to reside there, and the nephews attained their majority, and thereafter one nephew moved away, but the bachelor and two nephews remained until bachelor's death in 1937, and thereafter the two nephews continued to live there, the farm home, which had become a "family domicile" in 1908, remained a "homestead" and, being devised to the nephews, it was exempt from execution in invitum for satisfaction of bachelor's debts since the term "family," as used in the homestead law, is interpreted most liberally—In re Dittemore's Estate, 106 P.2d 1056, 152 Kan. 574

In Alabama

(1) Under Code 1923 § 7956, Code 1940 § 702, in all proceedings to set aside, allot, or decree homestead exemptions to the widow or minor children where the title to the property so exempt or set aside vests absolutely in the widow or minor children, one or both, the children who were minors at the death of their deceased parent shall be held to take jointly with the widow and other minors, although such minors are twenty-one years of age at the time the homestead is allotted, set apart decreed, or determined to vest title absolutely in the widow or minors—Judd v Dowdell, 12 So.2d 858

(2) Prior to Code 1923 § 7956, on arrival of a minor child at full age, no proceeding to set apart the homestead and to vest a fee in him having been instituted, his homestead right was ended, and he took his position as an heir at law of the estate—T. S. Faulk & Co. v Boutwell, 7 So.2d 490, 242 Ala. 526—Buchannon v Buchannon, 124 So. 113, 220 Ala. 72

(3) Prior to 1923, although homestead right of minor ended if he arrived at full age without proceedings having been instituted to set apart homestead, the fee of remaining minors was not enlarged by death or arrival at full age of other minor children living at death of owner of homestead—T. S. Faulk & Co. v Boutwell, supra—Buchannon v Buchannon, 124 So. 113, 220 Ala. 72

61. S.D.—In re Clouse's Estate, 257 N.W. 106, 63 S.D. 147.

29 C.J. p. 1004 note 12

Homestead right inuring to heirs of decedent see infra § 265 d.

Legitimate children. It has been held that the statutory provisions apply only to legitimate children.[62]

Grandchildren. While there is authority apparently to the contrary,[63] it is generally held that the term "children," as used in homestead provisions, is not broad enough to include grandchildren,[64] although they have always been supported by decedent as a part of the family.[65]

Children of second marriage. Where, under the statute, the homestead is continued for the benefit of decedent's widow and children, children of the widow's second marriage have no homestead rights in the property.[66]

§ 257. —— Extent and Limits of Rights

a In general
b Affected by acts of others
c Affected by their own acts
d Affected by curtesy or dower

a. In General

The extent and limits of the homestead rights of surviving children depend on the constitutional and statutory provisions.

Under homestead provisions giving the children a homestead right by survivorship, the homestead may survive on the death of either or both of the parent spouses,[67] but, as shown supra § 255, under some homestead laws it is necessary that both their parents shall be dead. In the absence of restrictions in the homestead laws, the children will be entitled to the benefit of the exemption, although there is no widow at the time of the death of the head of the family,[68] in which event the homestead is continued solely for their benefit,[69] and the fact that the children were not living with decedent at his death does not deprive them of their statutory right.[70] Barring limitations or restrictions in the constitutions or homestead statutes, the rights of the children are not affected by the fact that they own other property besides the homestead,[71] or by the fact that their parents did not apply for a homestead.[72]

Intestacy, indebtedness, and insolvency of decedent Under some statutes the children are not entitled to the exemption unless the father dies intestate,[73] and under others the children's right of homestead is dependent on the indebtedness[74] or insolvency[75] of the estate; but this is not so where the statutes contain no such limitation.[76]

Effect of divorce of parents The homestead right of the minor children is not in general affected by the divorce of the parents.[77] Where on divorce a wife was allowed the custody of her child and the benefit of her homestead, her death did not operate to destroy the homestead right of the child, who was entitled to such right until he should arrive of age.[78]

Respective rights of children and surviving

Termination of minor's right on attaining majority see infra § 274

Setting aside homestead after attaining majority

The right of a child of deceased to have a probate homestead set aside to her out of the estate is forfeited by her failure to apply therefor during her minority.—In re Heywood, 84 P 834, 149 Cal 129

62. Tex.—Thompson v Kay, 77 S W 2d 201, 124 Tex 252, affirming Kay v Thompson, Civ App, 40 S W 2d 884—Huey v Warner, 77 S W 2d 201, 124 Tex 252, affirming Warner v Huey, Civ App, 29 S W 2d 452—Massey v Citizens' Nat Bank of Weatherford, 77 S W 2d 201, 124 Tex 252, affirming Massey v Citizens' Nat Bank, Civ App, 28 S W 2d 257—Gill v Baird, 77 S W 2d 201, 124 Tex 252, affirming, Civ App, 32 S W 2d 941—Hayworth v Williams, 116 S W 43, 102 Tex 308, 132 Am S R 879

63. Kan.—Cross v Benson, 75 P 558, 68 Kan 495, 64 L R A 560
29 C J p 1004 note 19

64. Okl.—Hardridge v Hardridge, 31 P 2d 597, 168 Okl 7—Manning v. Dosher, 29 P 2d 966, 968, 167 Okl 368, citing **Corpus Juris.**
S D.—In re Clouse's Estate, 257 N W 106, 63 S D 147
29 C J p 1004 note 20

65. Tex.—Warner v Huey, Civ App, 29 S W 2d 452, affirmed Huey v. Warner, 77 S W 2d 201, 124 Tex 252
29 C J p 1004 note 21

66. Mo.—Canole v Hurt, 78 Mo 649
Okl.—In re Musselman's Estate, 31 P 2d 142, 167 Okl 560

Homestead estate of widow and minor children does not open to admit children of widow's second marriage.—Schowe v Kallmeyer, 20 S W 2d 26, 323 Mo 899

67. Ark.—O'Connell v Sewell, 87 S W 2d 985, 191 Ark 707
29 C J p 1004 note 25
Homestead right inuring to heirs, issue, and constituent members of family see infra § 265 c, d

68. Ky.—Higginbotham v Meadows, 6 Ky L 660, 13 Ky Op 374
Tenn.—McCrae v McCrae, 54 S W 979, 103 Tenn 719
29 C J p 1005 note 28.

69. Ark.—Kirksey v Cole, 1 S W. 778, 47 Ark 504
29 C J p 1005 note 28

70. Ala.—Chamboredon v Fayet, 57 So 845, 176 Ala 211
29 C J p 1005 note 29

71. N C.—Spence v Goodman, 38 S. E 859, 128 N C 273
29 C J p 1005 note 30

72. N C.—Welch v Macy, 78 N C. 240

73. Miss.—Johnson v Cooper, 56 Miss 608

74. N C.—Hager v Nixon, 69 N C. 108
S C.—Ex parte Worley, 26 S E 949, 49 S C 41

75. Mich.—Zoellner v Zoellner, 19 N W 556, 53 Mich 620
29 C J p 1005 note 36

76. Ala.—Hudson v Stewart, 48 Ala 204

77. Ala.—Chamboredon v Fayet, 57 So 845, 176 Ala 211
Tex.—Scripture v Scripture, Civ App, 231 S W 826
29 C J p 1005 note 38

78. Ill.—Bonnell v. Smith, 53 Ill 375.

spouse. Where the surviving spouse and minor children each have a homestead right by survivorship, no distinct or independent right of occupancy exists in favor of the minor children as against the surviving spouse,[79] although, if both widow and children survive, the homestead should not be assigned to the widow alone.[80]

Effect of order vesting title in widow. The rights of minors during minority cannot be affected by an order of court assuming to vest title in the widow.[81]

b. Affected by Acts of Others

The homestead rights of surviving children ordinarily may not be prejudiced by the acts of the surviving spouse, by acts of their guardian, or by testamentary disposition.

Although the rule is otherwise in some jurisdictions,[82] the rights of surviving children in the homestead of a deceased parent cannot, under most homestead laws, be prejudiced by the acts of the surviving spouse.[83] Accordingly it has been held that the rights of the surviving children will not be prejudiced by the following acts of the surviving spouse: Abandonment of the homestead,[84] in which case the right to the entire homestead vests in the minor child or children,[85] neglect to claim homestead,[86] remarriage of the widow,[87] sale[88] or mortgage of the property,[89] although there is au-

79. Ala.—Kyser v. McGlinn, 92 So. 13, 207 Ala. 82.
Minn.—McCarthy v. Van der Mey, 44 N.W. 53, 42 Minn. 189.
Joint occupancy by widow and surviving children see supra § 243.
Rights of heirs and remainderman as against surviving spouse and children see infra § 264.

80. S.C.—Ex parte Worley, 26 S.E. 919, 49 S.C. 41.

81. Ark.—Sansom v. Harrell, 11 S.W. 683, 51 Ark. 429.

Effectiveness of order on children reaching majority
An order of the probate court, vesting homestead of decedent absolutely in widow, decedent having left children who were still minors when order was made, was void, and could not be confirmed or ratified on children arriving at age.—Hildebrand v. Graves, 275 S.W. 524, 169 Ark. 210.

82. S.D.—Bailly v. Sisseton Farmers' State Bank, 150 N.W. 942, 35 S.D. 122.
29 C.J. p. 1005 note 47, p. 1003 note 2 [a] (2) (3).

In Oklahoma
(1) The surviving spouse may abandon the homestead effective as to herself and minor children.—Hembree v. Magnolia Petroleum Co., 56 P.2d 851, 176 Okl. 521.—Lusk v. Carter Oil Co. of West Virginia, 53 P.2d 656, 172 Okl. 508.

(2) As against the children, the surviving parent may sell and convey the right to receive royalties from oil and gas leases executed prior to death of the other parent.—Lusk v. Carter Oil Co. of West Virginia, supra.

(3) Widow's conveyance of a portion of her inherited interest in oil and gas rights in homestead premises was not an abandonment of right of occupancy of premises as homestead which would preclude existence of homestead right in children after mother's death.—Hembree v. Magnolia Petroleum Co., supra.

In Tennessee
(1) The minor children are without any right to the homestead to which the widow, while living, is entitled, so that, where during the husband's lifetime the court was not asked in divorce proceedings to award to the wife the title to husband's homestead exemption her action bound children so far as right to homestead on father's death is concerned.—Carey v. Carey, 43 S.W.2d 498, 163 Tenn. 486.

(2) However, there have been cases holding that the acts of the surviving spouse may not operate to prejudice the homestead rights of the children.—Shelton v. Hurst, 16 Lea 470.—Farrow v. Farrow, 13 Lea 120.
29 C.J. p. 1006 notes 48, 49, Tennessee cases.

83. Minn.—Kohrt v. Mercer, 282 N.W. 129, 203 Minn. 491.
29 C.J. p. 1006 note 48.
Effect of death of surviving parent see infra § 276.

84. Ark.—Butler v. Butler, 2 S.W.2d 63, 176 Ark. 126.
29 C.J. p. 1006 note 49.

85. Ark.—Sheppard v. Zeppa, 133 S.W.2d 860, 199 Ark. 1.—Henry v. Dollin, 113 S.W.2d 97, 195 Ark. 607.
29 C.J. p. 1006 note 50.
Right of remainderman on termination of homestead see infra § 271.

86. Mich.—Showers v. Robinson, 5 N.W. 988, 43 Mich. 502.
29 C.J. p. 1006 note 51.

87. La.—Harrelson v. Webb, 50 So. 833, 121 La. 1007, 134 Am.S.R. 529.
29 C.J. p. 1006 note 52.

In Missouri
(1) Under Rev.St.1919 § 5857, on widow's remarriage, only child of deceased landowner became entitled to sole right of occupancy until his majority, of which his mother could not deprive him by deed.—Moore v. Mansfield, 286 S.W. 353.

(2) Under the Homestead Act of 1895, amending Rev.St.1889 § 5439, so as to define the rights of the children in the homestead as the joint right of the occupation with the widow until they reached their majority, and providing that on the widow's death or remarriage the homestead shall pass to the heirs of the husband, the rights of the minor children ceased on the termination of the widow's homestead rights by her remarriage.—C. M. Smith Bros. Land & Investment Co. v. Phillips, 233 S.W. 413, 289 Mo. 579.—29 C.J. p. 1005 note 47 [b].

(3) Under Rev.St.1879 § 2693, the widow and children jointly held possession under their several rights, and a mother could not, by remarriage or any other deed or act, deprive them of their interest.—Schowe v. Kallmeyer, 20 S.W.2d 26, 323 Mo. 899.

(4) Termination of widow's homestead by her remarriage see supra § 253.

88. Mo.—Jennings v. Cherry, 257 S.W. 438, 301 Mo. 321.
29 C.J. p. 1006 note 53, p. 1038 note 14, p. 1013 note 96 [a].
Transfer or encumbrance by widow of right or interest in homestead see infra § 285, 288.

Where widow has only life estate, a sale of such interest does not affect the rights of her minor children.—Bishop v. Johnson, 7 So.2d 281, 242 Ala. 551.

Widow having sold and abandoned homestead during the minority of the children, they were entitled to exclusive possession thereof and could enforce that right by appropriate proceedings.—Jennings v. Cherry, 257 S.W. 438, 301 Mo. 321.

89. U.S.—Hannon v. Sommer, C.C. Kan., 10 F. 601, 3 McCrary 126.

Trust deed
Ill.—Loeb v. McMahon, 89 Ill. 487.

Postponing foreclosure until majority
Where husband devised an undivided one-half interest in the homestead

thority to the contrary;[90] or release of homestead rights[91]

The homestead rights of the surviving children are not affected by a widow's election to accept dower in lieu of homestead,[92] or to take a child's share of the husband's estate in lieu of dower[93] The widow's acceptance of, or a failure to renounce, the provisions of her husband's will does not deprive the children of their homestead rights,[94] although there is authority to the contrary[95]

Testamentary disposition as affecting rights of children While the rule has been materially limited or denied altogether in some jurisdictions,[96] generally the homesteader cannot, by will, deprive the children of the homestead rights bestowed on them by constitutional or statutory provisions[97] The homestead rights of the children are not affected by a will of the deceased owner containing a general clause directing payment of debts out of his estate[98] or by a devise made to them by the testator[99]

A voluntary distribution of the estate of a testator does not bar the right of a minor child of the testator to a homestead[1]

Antenuptial contracts of parents. The homestead rights of surviving children are not affected by antenuptial contracts made by their parents.[2]

Acts of guardian or next friend A surviving child cannot be barred during minority from bringing suit by his mother as next friend to recover possession of homestead property because of admissions made by her in such suit,[3] or because of the laches of his guardian short of the period fixed by statute for the final distribution of a decedent's estate[4] The rights of surviving children are not affected by the act of a guardian in renting the premises to a third person,[5] or by his exchange of the homestead property for other property,[6] or by the failure of a guardian ad litem to assert their rights by answer in an administrator's proceeding to sell decedent's real estate,[7] or by the purchase by the mother and guardian of minor children of

to the wife, and the other one-half interest to the minor children, with directions that the land should not be sold until the youngest child became of age, a mortgage executed by the wife in which she was joined by her second husband under Rev L 1910 § 1113, was valid as to the wife's interest in view of §§ 8405 and 8406, but could not be foreclosed until the youngest child became of age—Hogan v Reiker, 206 P 203, 86 Okl 55

90. Kan—Allen v Holtzman, 64 P 966, 63 Kan 40

91. Minn—Mintzner v St Paul Trust Co, 47 N W 973, 45 Minn 323
29 C J p 1006 note 56

92 U S—In re Gibson, D C Ky, 33 F Supp 838
29 C J p 1006 note 57
Election between dower and homestead see Dower § 74

Duty to furnish homestead to children
If the widow elects to take dower she must, under St 1903 § 1706 furnish a homestead for the infant children to the extent of one thousand dollars out of it—Warren v Warren, 104 S W 1199, 32 Ky L 82

Homestead right of children attaches to dower
U S—In re Gibson, D C Ky, 33 F Supp 838
Ky—Hanna v Gay, 78 S W 915, 117 Ky 695, 25 Ky L 1794

93. Ky—Schnabel v Schnabel, 56 S W 983, 108 Ky 536, 22 Ky L 234

94. Ky—Kiesewetter v Kress, 70 S W 1065 24 Ky L 1239
29 C J p 1006 note 59

95 Kan—Allen v Holtzman, 64 P 966, 63 Kan 40
Minn—Jones v Jones, 77 N W 551, 75 Minn 53
29 C J p 1006 note 60

96. Ark—Brown v Nelms, 112 S W 373, 86 Ark 368
29 C J p 930 note 71
Testamentary disposition as affecting rights of surviving spouse see supra § 243, infra § 259

97. Ala—Killian v Nappier, 12 So 2d 402—Cade v Giaffo, 148 So 591, 227 Ala 11
Tex—Kerens Nat Bank v Stockton Civ App, 281 S W 580, reversed on other grounds 40 S W 2d 7, 120 Tex 546, 77 A L R 362
29 C J p 930 note 72

Mother, as well as father may not deprive minor children of their homestead rights by testamentary disposition—Williams v Massie, 102 So 611, 212 Ala 389

In Florida
(1) Where there are children, the holder of the homestead is prohibited under Const 1885 art 10 § 4, from disposing of it by will, and any will attempting to dispose of the homestead is utterly void as to it for any purpose—Brickell v Di Pietro 198 So 806, 145 Fla 23—Bess v Anderson, 136 So 898, 102 Fla 1127—Church v Lee, 136 So 242, 102 Fla 478—Mullan v Bank of Pasco County, 133 So 323, 101 Fla 1097—Moore v Price, 123 So 768, 98 Fla 276—Parker v. Penny, 117 So. 703, 95 Fla. 922—Morgan v Bailey, 105 So 143, 90 Fla 47—Norton v Bava, 102 So 361, 88 Fla 1—29 C J p 930 note 72 [b]

(2) Children of deceased husband did not by accepting legacies, give validity to attempted testamentary disposition of homestead property, and were not estopped from claiming rights therein—Waldin v Waldin, 123 So 777, 98 Fla 344

(3) Constitutional exemptions inuring to heirs see infra § 265 d

98 Kan—Homewood v Eggers, 295 P 681 132 Kan 256—Hicks v Sage, 180 P 780, 104 Kan 723
Tenn—McCrae v McCrae, 54 S W 979, 103 Tenn 719

99. Kan—In re Dittemore's Estate, 106 P 2d 1056 152 Kan 574
29 C J p 1005 note 33

1. Ala—Chamboredon v Favet, 57 So 845, 176 Ala 211
29 C J p 1007 note 73

2. Ill—McGee v McGee 91 Ill 548
Kan—Hafer v Hafer, 50 P 537, 33 Kan 449

3. Ga—Buchan v Daniel, 94 S E 578, 147 Ga 450

4. Ala—Chamboredon v Favet, 57 So 845, 176 Ala 211

5. Ill—Brinkerhoff v Everett, 38 Ill 263

6. Transfer null and void
Ark—Gatlin v Lafon, 129 S W 284, 95 Ark 256

7. Ga—Yeates v Donalson, 94 S E 465, 147 Ga 335
N C—Spence v Goodwin, 38 S E 859, 128 N C. 273.

the homestead property at a foreclosure sale thereof[8] The guardian of a minor's estate cannot so deal therewith as to deprive the guardian of the minor's person of his right of occupancy of the homestead with the ward[9]

Acts of beneficiary other than surviving spouse The rights of surviving minor children in a homestead cannot be affected by the acts of beneficiaries other than the surviving spouse[10]

c. Affected by Their Own Acts

Surviving minor children usually are incapable of waiving or abandoning their homestead rights.

During minority the surviving children usually are incapable of waiving or abandoning their homestead rights by any act or declaration[11] They do not waive their rights by a temporary absence from the state,[12] nor are they barred by mere absence from the home place,[13] or by removal from the premises,[14] or by paying rent to the widow in ignorance of their rights[15] So children of decedent are not estopped from claiming an interest in so much of a homestead tract, occupied by the widow, as exceeds the statutory value of a homestead, although they have partitioned decedent's estate among them, except such home parcel,[16] neither are they barred by delaying, while minors, to assert a claim during the continuance of the widow's right or after its termination,[17] although lapse of time after the children have arrived at full age may prevent them from attacking a sale of the premises made under order of court by the surviving parent[18]

In some jurisdictions, it has been stated that the homestead may be abandoned by the children as well as by the widow,[19] at least in the case of adult children,[20] and on abandonment by one of several children, his share may be held for the payment of the debts of decedent.[21]

d. Affected by Curtesy or Dower

The homestead rights of minor children surviving their mother are superior to the father's curtesy, but are subject to the mother's dower where she survives the father.

The homestead rights of children after the mother's death have been held paramount to the father's curtesy during their minority[22] Where the husband predeceases the wife, the children take subject to the rights of the widow, whether of homestead or of dower[23] The right of minor children to hold as a homestead land of their deceased fa-

8. Mo—McMichaels v Reece, 190 S W 51, 194 Mo App 363
29 C J p 1007 note 69

9. Tex—Hudgins v Sansom, 10 S W 104, 72 Tex 229

10. Ark—Shapard v Mixon, 184 S W 399, 122 Ark 530—Hargett v Hill, 142 S W 1137, 101 Ark 510
29 C J p 1007 note 72
Rights of heirs as against minor children see infra § 264

11. Ark—Kitchens v Wheeler, 141 S W 2d 34, 200 Ark 671—Levinson v Treadway, 78 S W 2d 59, 190 Ark 201
29 C J p 1007 note 74

12. Absence to attend school
Ala—Kelly v Garrett, 67 Ala 304

13. Ark—Levinson v Treadway, 78 S W 2d 59, 190 Ark 201
29 C J p 1007 note 76

14. Okl—Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 524
29 C J p 1007 note 77

15. Tex—Loessin v Washington, 57 S W 990 23 Tex Civ App 515

16. Mo—Ball v Ball, 65 S W 552, 165 Mo 312

17. Ark—Johnston v Turner, 29 Ark 280
29 C J p 1007 note 80

18. Mich—Louden v Martindale, 67 N.W. 133, 109 Mich 235.

19. Kan—Brigham v Pfister, 101 P 2d 869, 151 Kan 991

Evidence held sufficient
(1) To sustain finding that minor children, as well as widow, had not abandoned homestead—Roberts v First Nat Bank, 268 P 799, 126 Kan 503

(2) In action to subject proceeds from sale of homestead to payment of debts of one who owned and occupied it at time of death, evidence was sufficient to support finding of trial court that infant children of owner had not abandoned homestead rights, although children had not lived on homestead for a while after owner's death—Sage v Ijames, 233 P 1013, 118 Kan 11

20. Acts constituting waiver
Where 1902 divorce decree directing setting aside of homestead was not enforced by mother before death and daughter permitted father with whom she lived until 1904 to remain in unmolested possession and pay all taxes, daughter twenty-three years after becoming of age in 1909 waived whatever right, if any she had, to an interest in the homestead—Nicholson v Holt, 125 S W 2d 483, 174 Tenn 358

Evidence held sufficient to support finding that unmarried daughter had never permanently abandoned the property as her homestead—Shaw v Suhr, Tex Civ App, 81 S.W.2d 182.

In Arkansas, under the constitutional and statutory provisions, where there is only one child and that child a female she may relinquish or abandon her homestead right after becoming of age because in such case she has a right in the homestead and may dispose of it as she pleases after she becomes of age - Shapard v Mixon, 184 S W 399, 122 Ark 530—Hargett v Hill, 142 S W 1137, 101 Ark 510

21. Kan—Brigham v Pfister, 101 P 2d 869, 151 Kan 991

22. Ark—O'Connell v Sewell, 87 S W 2d 985, 191 Ark 707
29 C J p 1007 note 81

Arkansas law applied
Ill—Sewell v Sewell, 1 N E 2d 492, 363 Ill 166

Husband's distributive share
Claim of husband to life estate in deceased wife's realty is inferior to homestead rights of her children, in view of Code 1896 § 2077, relating to exemptions to minor child or children allowed from estate of deceased mother, which limits § 2534 giving husband of such deceased wife half her personalty and use of land during life—Williams v Massie, 102 So 611, 212 Ala 389

23. N C—Graves v Hines, 13 S.E 15, 108 N C 262
29 C.J. p 1008 note 86.

ther until they become of age is superior to the title of a purchaser of the widow's dower.[24]

§ 258. —— Enforcement and Protection of Rights

Surviving minor children are protected in the enjoyment of the homestead.

Until their interest is legally terminated, surviving minor children are protected in the enjoyment of the homestead.[25] It has been held that minors have such rights in the homestead as can be enforced independently of the widow,[26] and that ejectment will lie in behalf of a minor to recover his homestead which has been wrongfully conveyed by his mother.[27] On the other hand, it has been held that the exemption cannot be secured by a defense to an action brought to set aside a conveyance made by decedent to his minor children as in fraud of creditors,[28] and it has been held that, although a debtor may claim exemption as against a purchaser of homestead property at a judicial sale under a decree against him, his surviving children have no such interest in the property as enables them to vindicate it by suit as a right of property,[29] nor do they possess such an interest in community property as enables them to redeem it from a foreclosure sale, where the law vests the whole title to such property in the surviving spouse.[30]

If a child asks that a foreclosure sale of an encumbered homestead, made to the widow, be set aside and title to one half decreed in him, the relief will not be granted unless such child contributes ratably to the payment of the encumbrance, which was discharged by the widow's purchase;[31] and, if the child sues after he is of age, having never been in possession of the property, and the premises were not a homestead when the debt in question was contracted nor thereafter, he cannot object to their sale on execution.[32]

§ 259. Surviving Husband

Unless conferred by constitutional or statutory provisions, a surviving husband has no homestead right by survivorship.

A surviving husband has no homestead right by survivorship on the death of his wife[33] unless the right is conferred by constitutional or statutory provisions.[34] In the absence of a constitutional or

24. Ark.—Burel v. Baker, 116 S.W. 181, 89 Ark. 168

25. Cal.—Hoppe v. Hoppe, 37 P. 894, 104 Cal. 94
Ky.—Farmer v. Hampton, 156 S.W. 1041, 154 Ky. 83
Protection of rights by redemption from liens see infra § 283
Selection and allotment see infra §§ 279–282

26. Mo.—Hufschmidt v. Gross, 20 S.W. 679, 112 Mo. 649

27. Ala.—Tharp v. Johnson, 122 So. 668, 219 Ala. 537
Mo.—Rogers v. Maves, 84 Mo. 520

28. Tex.—Picton v. Sloan, Civ.App., 28 S.W. 251

29. Miss.—Taylor v. Smith, 54 Miss. 50

30. Cal.—Collins v. Scott, 34 P. 1085, 100 Cal. 446

31. Mo.—Ailey v. Burnett, 33 S.W. 1122, 35 S.W. 1137, 134 Mo. 313

32. S.C.—Parr v. Lindler, 18 S.E. 636, 40 S.C. 193

33. Ala.—Little v. Simmons, 131 So. 561, 222 Ala. 206
Ariz.—Varnes v. White, 12 P.2d 870, 40 Ariz. 427
Mo.—Collier v. Porter, 16 S.W.2d 49, 322 Mo. 697
29 C.J. p. 1009 note 20

34. Cal.—In re Barkley's Estate, 267 P. 148, 91 Cal.App. 388
Ill.—Van Winkle v. Weston, 276 Ill.App. 66
Ky.—Lear v. Lear, 28 S.W.2d 32, 234 Ky. 369—Shields v. Parsons, 18 S.W.2d 961, 230 Ky. 143—Anderson's Adm'r v. Creekmore, 287 S.W. 941, 216 Ky. 345
Minn.—Snortum v. Snortum, 193 N.W. 304, 155 Minn. 230
Miss.—Myrtle v. Garrison, 184 So. 291, 183 Miss. 526
Neb.—Application of Abboud, 290 N.W. 713, 137 Neb. 652—Bartels v. Seefus, 273 N.W. 485, 132 Neb. 841
N.D.—Meidinger v. Security State Bank of Medina, 213 N.W. 850, 55 N.D. 301
Okl.—Oklahoma State Bank v. Van Hassel, 114 P.2d 912, 189 Okl. 48—McGaffey v. Mulky, 241 P. 480, 115 Okl. 44
Tex.—Johnson v. Hampton, 8 S.W.2d 640, 117 Tex. 580, reversing Civ.App., 297 S.W. 891—White v. Sparks, Civ.App., 118 S.W.2d 619, opinion supplemented 119 S.W.2d 114—Watson v. Watson, Civ.App., 28 S.W.2d 1100—Oakwood State Bank of Oakwood v. Durham, Civ.App., 21 S.W.2d 586—Washington v. Huggins, Civ.App., 10 S.W.2d 140—Good v. Good, Civ.App., 293 S.W. 621
29 C.J. p. 1009 note 22
Divorced surviving husband see infra § 260
Nature of estate or interest transmitted see infra § 265 b

Statute abolishing curtesy does not operate to give surviving husband homestead right in property belonging to wife.—Collier v. Porter, 16 S.W.2d 49, 322 Mo. 697.

In Louisiana

(1) Under Const. art. XI § 1 the benefit of the homestead exemption may be claimed by the surviving spouse, including the surviving husband.—In re Bennett, D.C.La., 33 F.2d 335

(2) Where the exemption is claimed against his own debts, the husband must be the head of a family or have a dependent or dependents, but these conditions are not required where the exemption is claimed against the debts of the succession.—Wood v. Mason, 3 So.2d 256, 198 La. 1—Doucet v. Fontenot, 115 So. 655, 165 La. 458, certiorari denied 49 S.Ct. 28, 278 U.S. 561, 73 L.Ed. 506—Baker v. Davis, 78 So. 473, 143 La. 215

(3) A widower, who accepted succession of his wife unconditionally, thereby rendering himself personally liable for debts of succession, see Descent and Distribution § 120, and who with his wife had occupied property as their home, which was occupied subsequent to wife's death by widower and a cripple who was dependent on widower for support, was not entitled to constitutional "homestead" exemption.—Wood v. Mason, supra

(4) A natural child is a "dependent" within the requirement that, as against his own debts, the exemption may not be claimed by a husband without dependents.—In re Bennett, D.C.La., 33 F.2d 335.

statutory provision to the contrary, the right of survivorship conferred on the husband exists, even though no children of the marriage are living,[35] even though no children or dependents reside with him,[36] or they have attained their majority,[37] or even though he is not a housekeeper with a family[38] or the head of a family[39]

Where the statute gives the surviving husband the right to continue to possess and occupy the homestead on the death of his wife, a right of homestead does not continue in favor of a surviving husband who had never possessed or occupied the homestead[40]

Void marriage The homestead right does not extend to one whose marriage to decedent was for any reason void[41]

Second husband. The statutes giving a right of homestead to a surviving husband usually do not give a homestead right to the second husband in the homestead acquired by the widow from her first husband, although the second husband lives with the widow on the homestead,[42] and although he acquires the remainder interests of the first husband's children[43]

Effect of ownership of other property. In the absence of constitutional or statutory limitations, the surviving husband is not deprived of homestead rights because of his ownership of other property[44]

Testamentary disposition as affecting right of husband While the rule has been materially limited or denied altogether in some jurisdictions,[45] generally the wife may not, by will, deprive her surviving husband of his homestead right,[46] even

In Oregon

(1) A homestead may be set apart by the court to the surviving husband—In re Potter's Estate, 59 P 2d 253, 154 Or 167—In re Clymer's Estate, 41 P 2d 1082, 150 Or 351—In re Baker's Estate, 20 P 2d 1069, 142 Or 559—29 C J p 1009 note 22 [d]

(2) Right of decedent's husband to homestead exemption could not be conditioned on paying estate depreciation in value resulting from failure to repair—In re Banfield's Estate, 296 P 1066, 137 Or 167, modified on other grounds 298 P 905, 137 Or 167

(3) Death of widower, after cause had been submitted, but before court made order setting aside, as homestead, realty which widower's deceased wife had devised to others, did not terminate right to have homestead set aside—In re Potter's Estate, supra

(4) For a period of time, however, a homestead could not be set aside for the surviving husband, but the property descended, in the absence of a will to the heirs of the deceased wife—Overland v Jackson, 275 P 21, 128 Or 455—Slattery v Newell, 236 P 268, 115 Or 22

35. Neb—Shearon v Goff, 145 N W 855, 95 Neb 417
29 C J p 1009 note 23

36. Neb—U S v National Bank of Omaha v Simonds 274 N W 187, 133 Neb 42—Bartels v Seefus, 273 N W 485, 132 Neb 841—Dougherty v White, 200 N W 884, 112 Neb 675, 36 A L R 425
29 C J. p 1009 note 24

37. Ga—Torrance v Boyd, 63 Ga. 22.
Wash—In re Feas, 70 P. 270, 30 Wash. 51.

38. Ky—Ellis v Davis 14 S W 74, 90 Ky 183, 11 Ky L 893

39. Neb—First Nat Bank v Reece, 89 N W 801, 64 Neb 292
29 C J p 1009 note 27

Dependency of surviving member of family is not essential to claim by surviving husband—Dreyfus v Dickason 56 P 2d 881 176 Okl 477—McGaffy v Mulky, 241 P 180, 115 Okl 44

40. Iowa—Solnar v Solnar, 216 N W 288, 205 Iowa 701

41. Ill—Wilson v Cook, 100 N E 222, 256 Ill 460, 43 L R A, N S, 365

42. Okl—In re Musselman's Estate, 31 P 2d 142, 167 Okl 560

43. Ark—Kulbreth v Drew County Timber Co, 188 S W 810, 125 Ark 291

44. Utah—In re Petersen's Estate, 93 P 2d 445, 97 Utah 324

Necessity for dependence on homestead

To entitle deceased wife's surviving husband to homestead allowance from her estate no showing of his dependence on homestead is required under Rev St 1933 101-4-6—In re Petersen's Estate, supra

45. Kan—Vining v Willis 20 P 232, 40 Kan 609
29 C J p 930 note 71
Testamentary disposition as affecting rights of surviving
Wife see supra § 243
Children see supra § 257 b

In Alabama widow's homestead right is unaffected by husband's will, but wife may devise her estate as though she were sole, as against husband—*Gray v Weatherford*, 149 So 819, 227 Ala. 324

In Minnesota

(1) Husband's written consent validates wife's testamentary disposition of homestead, and it becomes immaterial whether will provided for husband—Overvold v Nelson, 243 N W 439, 186 Minn 359

(2) A will which gives the homestead to a third party with a provision that the surviving husband shall have the exclusive control of it during his lifetime, does not give him a life estate in the homestead which he would have if he took under the statute—Patterson v Hall, 192 N W 342, 157 Minn 46

(3) Other cases see 29 C J p 930 note 71 [c]

46. Neb—Application of Abboud, 290 N W 713, 137 Neb 652
Tex—White v Sparks, Civ App, 118 S W 2d 649, opinion supplemented 119 S W 2d 114
Utah—In re Petersen's Estate, 93 P 2d 445, 97 Utah 324
29 C J p 930 note 72

Person holding under agreement with devisee

A husband having homestead right in property was entitled to the property as against party claiming under an agreement with an alleged devisee under the unprobated will of the husband's deceased wife—White v Sparks, Tex Civ App, 118 S W 2d 649, opinion supplemented 119 S W 2d 114

Where property is not homestead but the separate property of the wife, she may devise it to a son of the former marriage as against her second husband—Nelson v Franklin, Fla, 12 So 2d 771

In Oregon

(1) Under Code 1930 § 3-206, testator's disposal by will of a homestead to any person other than widow, widower, or surviving minor children of testator, is effective as to widow, widower, or minor children only when they elect to take under such will—In re Dunlap's Estate, 87 P 2d 225, 161 Or 93.

though the homestead is the only property owned by her at her death, and she expressly directs her executor to sell the whole property and distribute the proceeds in pecuniary bequests [47]

§ 260. —— Waiver, Forfeiture, Release, or Estoppel

The homestead right of the surviving husband may be waived, forfeited, or released, or he may be estopped to assert such right

The surviving husband may waive, forfeit, or release his homestead right or be estopped to assert such right [48] It has been held that a surviving husband is not estopped to assert his homestead right either because he entered into a joint will with his wife in which his homestead right was not mentioned or by reason of having qualified as executor of her will,[49] and that a surviving husband does not waive any homestead rights by his silence and the inclusion of the land involved in his petition for letters of administration on his wife's estate and in his final report as a part of the assets thereof [50]

Separation from, or abandonment of, wife A husband's abandonment of his wife without cause or excuse, continuing until her death, forfeits, it has been held, all rights of homestead in the land which the wife owned at her death,[51] even though the property is community property[52] and the abandonment does not operate to sever marital relations [53] A separation of the husband and wife, although it may have continued until the death of the wife, will not constitute such an abandonment as to forfeit the right of homestead if such separation was by agreement, or excused or justified by the ill-treatment of the wife,[54] and the surviving husband's mistreatment of his wife causing her to leave the homestead is not a forfeiture of his rights where he continues to occupy the premises as his home [55]

Divorce Although divorced, a surviving husband may be entitled to a continuance of a homestead in the community property, even though the wife had remarried after the divorce [56]

Remarriage of the surviving husband does not, in the absence of a constitutional or statutory provision to the contrary, work a termination of his homestead rights [57]

§ 261. Precedence of Other Claims

Constitutional and statutory provisions determine the extent to which the homestead right of the surviving spouse takes precedence over other claims

(2) Under L 1919 p 160, providing that, when any homestead shall have been disposed of by will, the devisee shall take the same, where a married woman devised her homestead to her children, the devise vested the homestead in the children subject only to the dower of the husband — In re Leet's Estate, 206 P 548, 104 Or 32, rehearing 202 P 414, 104 Or 32

47. Cal — In re Lahiff, 24 P 850, 86 Cal 151

48. Kan — Hewett v Gott, 294 P 897, 132 Kan 168

Effect of election to take under wife's will see the C J S title Wills § 1287, also 69 C J p 1135 note 23, and 29 C J p 1010 notes 41–44

Loss of homestead by abandonment by husband see infra §§ 273, 286

Postnuptial agreement

Where parties to postnuptial contract renounced all interest in property of each other in case of death, surviving husband was thereby divested of homestead right in wife's land — Hewett v Gott, supra

Consideration for agreement releasing right

(1) Agreement between widower and his children whereby widower waived claim to deceased's homestead in return for life interest in all rents and profits of homestead property was void for want of consideration if farm land occupied as homestead had value under three thousand dollars, but waiver agreement was supported by consideration if value of land exceeded three thousand dollars — In re Clymer's Estate, 44 P 2d 1082, 150 Or 351

(2) Evidence showed that value of homestead was more than three thousand dollars, and hence that agreement was based on consideration — In re Clymer's Estate, 86 P 2d 365, 160 Or 359

(3) Widower who agreed with his children to release homestead claim in return for rents and profits from homestead property for life was not estopped to assert that agreement was void for want of consideration where he did nothing to mislead his children to their prejudice — In re Clymer's Estate, 44 P 2d 1082, 150 Or 351

Exchange of portion of homestead

Fact that surviving husband had exchanged his interest in portion of homestead for land against which there was a lien did not estop him to assert his homestead rights as against real estate brokers seeking to recover alleged commissions for procuring purchasers for sale of land — Washington v Huggins, Tex Civ App, 10 S W 2d 140

In New Hampshire the right of waiver or release given by a statute, providing that the surviving husband, by waiving the provisions of his wife's will in his favor, if any, and by releasing his estate by the curtesy and his homestead right, shall be entitled to one half of her property in fee, after the payment of debts, is personal and does not pass to the husband's representatives, to be effectual the waiver or release must be filed and recorded as required by law — Horner v Reynolds, 81 A 1078, 76 N H 259 — 29 C J p 1000 note 34

49. Neb — Application of Abboud, 290 N W 713, 137 Neb 652

50. Okl — Pennington v Woodner-McGaugh, 153 P 875, 54 Okl 110

51. Tex — Hector v Knox, 63 Tex 613 — Hollie v Taylor, Civ App, 189 S W 1091

52. Tex — Hollie v Taylor, supra.

53. Tex — Hollie v Taylor, supra.

54. Tex — Good v Good, Civ App, 293 S W 621

55. Tex — Thomas v Tyler, Com. App, 6 S W 2d 350

56. Tex — Stone v McClellan, 81 S W 751, 36 Tex Civ App 364 29 C J p 1010 note 50

57. Utah — In re Hansen, 184 P. 197, 55 Utah 23.

The extent to which the homestead right of the surviving spouse acquired by survivorship takes precedence over other claims depends on the constitutional and statutory provisions in the particular jurisdiction.[58] The surviving spouse usually may occupy the homestead to the exclusion of a joint tenant or tenant in common,[59] and, as is shown infra §§ 262–264, the homestead right is usually paramount to ordinary claims against decedent's estate, to debts incurred by the survivor, and to the interest of the heirs of decedent As shown supra § 257 d, the homestead rights of surviving children are paramount to the curtesy of the husband but inferior to the widow's dower.

§ 262. —— Debts of Decedent

a. Debts not enforceable
b Debts enforceable

a. Debts Not Enforceable

The homestead rights of the survivors acquired by survivorship usually are paramount to ordinary claims against the estate of the decedent.

On the decease of a debtor, his survivors usually hold the homestead free from all ordinary claims against the estate[60] Exemption against claims of this character may be waived[61] and an undertaking given to pay these claims and a lien on the property given to secure them.[62]

Effect of administration of decedent's estate.

58. **Except against holders of enforceable liens** right of surviving spouse to occupy homestead protects such person until voluntary waiver —In re Gardner's Estate, 250 P 490, 122 Okl 26

Execution of replevy bond by claimant

A husband who had homestead rights in property of his deceased wife and who recovered the property from another claimant thereto in sequestration proceeding could not be denied possession by claimant's filing of a statutory replevy bond which provided only that claimant would not injure the property, and that she would pay to the husband the value of the rent of the property in case she should be condemned to do so —White v Sparks, Tex Civ App, 118 S W 2d 649, opinion supplemented 119 S W 2d 114

59. Tex —White v Sparks, supra
Rights of heirs see infra § 264

Child's grantee

A conveyance of a child's interest in the deceased parent's estate does not make his grantee a tenant in common with the surviving parent, and entitled as such to share possession of the home property —Moore v Hoffman, 57 P 769, 125 Cal 90, 73 Am S R 27

Widow, redeeming her interest from tax sale, had right against the other tenants not being heirs or descendants, to occupy property as homestead while widow, regardless of source from which cotenant's title was derived —Lackey v Harrington, 139 So 313, 162 Miss 512

60. Iowa.—Southwick v Strong, 255 N W 523, 218 Iowa 435
Kan —Boulls v Boulls, 22 P 2d 465, 137 Kan 880—Solomon Nat Bank v. Birch, 246 P 1007, 121 Kan 334
Ky —Shields v Parsons, 18 S W 2d 961, 230 Ky. 143.
La —Succession of White, 127 So 883, 170 La 403
Neb —In re Lewis, 263 N W 480, 130 Neb 62
N D —Cullen v Sullivan, 199 N W 760, 51 N D 384
Tex —Sakowitz Bros v McCord, Civ App, 162 S W 2d 437—Panhandle Const Co v Head, Civ App, 134 S W 2d 779, error refused—City of Fort Worth v Wisehart, Civ App, 33 S W 2d 556—Slay v Gose, Civ App, 237 S W 348
29 C J p 1011 note 67
Liabilities enforceable against homestead see supra §§ 93–122
Liability of homestead for debts of decedent see infra §§ 289–291
Sale of homestead by personal representative under order of court to pay decedent's debts see Executors and Administrators § 552

Creditor of estate is in fact not a creditor at all as to homestead exemption —Union Nat Bank of Greeley v Wright, 242 P 54, 78 Colo 346

Judgments

(1) A deceased person's homestead is exempt, during minority of infant children of deceased, from sale in satisfaction of probate judgments against deceased —Henry v. Dollin, 113 S W 2d 97, 195 Ark 607

(2) Judgments against householder which did not represent debts contracted for purchase price of property or improvements thereon did not become liens against homestead and title to homestead passed to householder's heirs immediately on householder's death and householder's judgment creditors stood in same relation as general creditors of householder's estate —Lehman v Cottrell, 19 N E 2d 111, 298 Ill App 434

(3) The lien of a judgment against testator does not attach against his homestead on conveyance of homestead by widow to guardian of minor child, who uses property for homestead purposes in behalf of minor —Henry v Brown, Tex Civ App, 279 S W 541

Fact that lien against homestead may be enforced does not authorize sale of homestead in satisfaction of other demands —Henry v Dollin, 113 S W 97, 195 Ark 607

Surviving wife as head of family

Under some statutes it is only where a widow seeks to claim the homestead exemption against her own debts that she must do so as the head of a family or have a dependent or dependents, these conditions are not required when she claims the exemption against debts contracted by her husband or by the marital community debts against which the husband, himself, could have successfully claimed the exemption —Succession of White, 127 So 883, 170 La 403.

Heirs and devisees of survivor

(1) Under Code Civ Proc § 1485, providing that persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads shall have all the rights and benefits conferred by law on the persons whose interests and rights they acquire, where homestead property vested absolutely in the surviving spouse and then passed to the heirs on the death of the surviving spouse under the laws of succession, such heirs took the property free from any liability for the unsecured debts of the original homesteader —In re Muntz's Estate, 231 P 371, 69 Cal App 404

(2) Where the surviving spouse devised the fee the devisee also took the property free from such liability —In re Fath, 64 P. 995, 132 Cal 609
Exemption from decedent's debts inuring to heirs, issue, or constituent members of family see infra § 265 c, d

61. Tex —Adams v Bartell, 102 S. W 779, 46 Tex Civ App 349

62. Tex —Adams v. Bartell, supra.

Since the homestead continues exempt, it does not generally become an asset in the hands of the administrator, see Executors and Administrators § 115, or subject to his control,[63] and neither the administrator nor the probate court at its instance has any authority to diminish it[64] Even debts accruing in the course of administration are nonenforceable against the home place,[65] unless, as shown infra subdivision b of this section, such expenses are by statute made chargeable against the homestead in the hands of the survivors.

Liability of decedent as guardian In the absence of a statutory provision to the contrary, the homestead cannot be used to offset a liability of the ancestor as guardian and his surety for devastavit of the ward's estate, even though the guardian was the father of the wards, where the homestead continues to be used after the death of the ancestor by his widow and minor children, but, on the other hand, all property left by a guardian except the homestead descends to his heirs, charged with his debts, and should be used to offset any liability incurred by him[66]

b. Debts Enforceable

(1) In general
(2) Mortgage liens

(1) In General

The homestead rights of the survivors acquired by survivorship are inferior to the claims for which the homestead was liable during the lifetime of the decedent.

The homestead ordinarily is liable in the hands of the debtor's survivors for the same debts for which it could have been taken during his life,[67] and this is so although the survivor had no knowledge of the debts prior to the death of decedent[68] The survivors cannot claim any exemption which the decedent himself could not have claimed[69] Accordingly the homestead property in the hands of the survivors can be reached and subjected if the liability was contracted before the filing of a deed of homestead,[70] or before the homestead right otherwise attached,[71] or prior to the passage of the homestead statute[72] or acquisition of the premises by the debtor,[73] or before recording a declaration of homestead, where this is necessary under the homestead laws to the acquisition of a homestead,[74] or if the liability is for purchase money,[75] or on a judgment for a tort,[76] or for taxes which by the homestead laws are charged on the homestead,[77] or for obligations contracted in the raising of crops[78]

The survivors do not hold the homestead free of such debts of decedent's estate as are expressly excepted by the homestead law in cases where there is no other property in the estate sufficient to discharge them[79]

63. Ark—Levinson v Treadway, 78 S W 2d 59, 190 Ark 201
29 C J p 1012 note 73
Control of realty of decedent by personal representative generally see Executors and Administrators §§ 252–298

64. Ark—Henry v Dollin, 113 S W 2d 97, 195 Ark 607
29 C J p 1012 note 74
Effect of administrator's sale see infra § 278

65. Nev—In re Walley, 11 Nev 269
29 C J p 1012 note 75

Expenses of administration
Proportion of costs of administration of succession of deceased husband's estate could not be deducted from surviving widow's constitutional homestead exemption right—Succession of White, 127 So 883, 170 La 403

66. Tex—American Bonding Co v Logan, 166 S W 1132, 106 Tex 306—American Bonding Co v Fountain, Civ App, 196 S W 675

67. N D—Cullen v Sullivan, 199 N W 760, 51 N D 384
Tex—City of Fort Worth v Wisehart, Civ App, 33 S W 2d 556
Wis—In re Hogan's Estate, 282 N W 5, 229 Wis 600
29 C J p 1012 note 82.

Liabilities enforceable against homestead see supra §§ 93–122

Judgment lien attaching before premises impressed with homestead character is superior to rights of survivors—In re Hogan's Estate, supra

68. Tex—Munroe v Munroe, 116 S W 878, 54 Tex Civ App 320

69. Ark—Carr v Harrington, 155 S W 1166, 107 Ark 535

70. Mo—Anthony v Rice, 19 S W 423, 110 Mo 223
29 C J p 1012 note 85

71. Mo—Kelsay v Frazier, 78 Mo 111

72. N C—Gregory v Ellis, 86 N C 579
29 C J p 1012 note 87

73. N C—Moore v Bond, 75 N C 213
Vt—Perrin v Sargeant, 33 Vt 84

74. W Va—Reinhardt v Reinhardt, 21 W Va 76

75. Tex—Laubhan v Peoria Life Ins Co, Civ App, 107 S W 2d 889—Slay v Gose, Civ App, 233 S W 348
29 C J p 1012 note 90

Vendor's lien
(1) Order of probate court setting apart as homestead of debtor's widow and children land on which plaintiff had a vendor's lien did not affect plaintiff's right to have lien foreclosed—Gregory v Ward, Civ App, 285 S W 935, modified on other grounds 18 S W 2d 1049, 118 Tex 526

(2) The heirs of the vendor of realty who acquired a vendor's lien could not defeat right of widow of purchaser to probate homestead on property, but could enforce lien by appropriate proceeding to have homestead vest in widow subject to lien for payment of unpaid portion of purchase price on the land—In re Reid's Estate, 79 P 2d 451, 26 Cal App 2d 362

76. Ala—Erlenbach v Cox, 89 So 465, 206 Ala 298

77. Va—Murphy v Richmond, 69 S E 142, 111 Va 459

78. S C—Berry v Berry, 33 S E 363, 55 S C 303

79. Expenses of administration, of last illness and funeral expenses have precedence over the widow's homestead where the statute expressly provides for such priority in cases where other assets of the estate are not available—Dobler v Clark, 292 P 246, 42 Wyo 160

Where widow as administratrix paid subordinate claims before preferred claims in disregard of statute, leaving preferred claims unpaid, she

Fiduciary obligations of decedent Under some homestead provisions the homestead as against the survivors will be subjected to the payment of a debt due from decedent in his fiduciary capacity as trustee of an express trust, although it had not been reduced to judgment in his lifetime [80]

(2) Mortgage Liens

The homestead rights of the surviving spouse and children are inferior to a valid mortgage placed on the homestead during the lifetime of the decedent.

If a mortgage created an enforceable lien against the homestead during the lifetime of the mortgagor, it becomes paramount to the rights of his widow,[81] and the same rule has been held to apply with respect to the rights of the surviving children [82] If the administrator of the husband satisfies the mortgage from assets of the estate, the widow has a right to claim a homestead in the premises without making contribution [83] An heir of real estate, liable to sale for debts of deceased, who gives bond to the executor for payment of all debts against the estate and who, in performance of such obligation, takes an assignment of a mortgage constituting a valid lien against such property, cannot by foreclosure defeat the widow's right of homestead therein, assigned to her with his assent [84]

If the land is sold under a valid mortgage executed by the husband and the equity of redemption is afterward sold by the administrator of the mortgagor, the purchaser at the latter sale cannot buy in the title sold on foreclosure and bar the widow; but the latter may avail herself of her homestead right in the equity of redemption by contributing to the purchase of the title acquired on foreclosure [85] Where decedent devises to his widow, "her dower portion" in land including the homestead and the remainder to his children, the widow, as purchaser at the foreclosure sale, takes the property subject to the right of the children to participate in the benefits of her purchase by contributing within a reasonable time their share of the purchase money [86]

Resort to other property Under some homestead provisions the debt should be satisfied if possible out of the rest of the mortgagor's estate before resort is had to the homestead [87]

Foreclosure and rights incident thereto The holder of an enforceable mortgage must pursue his remedy by foreclosure,[88] and not ask the probate court to order, at the time of allotting the homestead, that it be taken subject to the mortgage lien,[89] but, under some homestead provisions, it seems that he may seek to enforce his claim in administration proceedings, and his failure to do so has been held to estop him thereafter to seek to enforce it [90] If the property is of greater value

was not entitled to homestead exemption as against such preferred creditors—Dobler v Clark, supra

80. Ark—Carr v Harrington, 155 S W 1166, 107 Ark 535
Debts owed in fiduciary capacity as liability against homestead see supra § 112

81. Ala—Howell v Ward, 161 So 487, 230 Ala 379
29 C J p 1013 note 97
Allotment subject to prior lien see infra § 279
Obligation for purchase money secured by mortgage as liability against homestead see supra § 101
Right of owner to mortgage homestead see supra § 123 et seq

Mortgage to ward of guardian husband

(1) Where the deceased husband was guardian of a minor and had with the approval of the court borrowed money of the ward and executed a mortgage to himself as guardian on the homestead, the setting aside of a homestead by the probate court to his widow of a part of the mortgaged lands did not affect the mortgage, if it was effective in equity, and correctly described the property.—Howell v. Ward, supra.

(2) Where the mortgage is not couched in the language of the statute requiring land to be conveyed to the ward, a trust or equitable mortgage for the ward may arise—Howell v Ward, supra

Where mortgagors and their son fraudulently permitted mortgaged property to be sold for taxes and then obtained quitclaim deed from the county, neither son nor his wife had any interest in the property which was not subject to the mortgage and foreclosed by foreclosure action, and hence wife could not claim homestead—Giglioti v Albergo, 115 P 2d 791, 100 Utah 392

82. Ark—Federal Land Bank of St Louis v Cottrell, 126 S W 2d 279, 197 Ark 783—Henry v Dollin, 113 S W 2d 97, 195 Ark 607
29 C J p 1013 note 98
Mortgage by surviving parent as affecting rights of children see supra § 256 b

Postponing foreclosure until child reaches majority

The right to foreclose defaulted mortgage executed by deceased mortgagors on homestead was not postponed until daughter who reached age of eighteen prior to filing foreclosure suit and who inherited an interest in the mortgaged premises should reach age of twenty-one—Federal Land Bank of St Louis v Cottrell, 126 S W 2d 279, 197 Ark 783

83. N H—Norris v Morrison, 45 N H 490

84. Mass—King v King, 100 Mass 224

85 Ill—Montague v Selb 106 Ill 49—Selb v Montague, 102 Ill 446
Contribution between cotenants on purchase or discharge of outstanding title or encumbrance see the C J S title Tenancy in Common § 66, also 62 C J p 473 note 2 et seq

86 Mo—Willoughby v Brandes, 297 S W 54, 317 Mo 541

87. Ky—Tillett v Curd, 35 S W 920, 18 Ky L 182
29 C J p 1013 notes 3, 4
Exhaustion of other property before resorting to homestead generally see supra § 120

88. Cal In re Rondel, Myr Prob p 70
29 C J p 1013 note 6

89. Cal—In re Rondel, supra

90. Tex—Tiboldi v Palms, 79 S W 23, 97 Tex 414, affirming 78 S W. 726, 34 Tex Civ App 318.
29 C J p 1013 note 9.

than the homestead and the mortgage combined, the widow is entitled to the surplus on the foreclosure sale of the property after the death of her husband after a deduction of the amount of the mortgage [91]

§ 263. —— Debts of Survivor

Under some statutes the homestead of the surviving spouse is exempt from his or her own debts

In some jurisdictions the rule is laid down that a homestead set apart under the Probate Act simply becomes not subject to administration, that is, not subject to claims of general creditors of the estate, but remains subject in the hands of the widow to the payment of her debts, whether contracted before or after it was so set apart [92] However, under some statutes, where a homestead has vested in the surviving husband or wife, it is not only exempt from the debts of the deceased spouse, but also from the debts of the survivor, whether the latter obligations were incurred prior or subsequent to the death of the former spouse,[93] and without regard to which spouse held the legal title to the property during their married life,[94] although it has been held that adult children may not claim and hold realty as a homestead exempt from sale for their own debts [95]

If the distributive share in the deceased's estate is set apart to the survivor in lieu of a homestead, his or her creditors cannot reach it [96] Where a widow has her distributive share of the husband's estate set apart to her out of the homestead, it is not liable for her debts contracted before the husband's death [97]

§ 264. —— Rights of Heirs and Remainderman

The homestead rights of the surviving spouse and minor children acquired by survivorship usually are superior to the rights of the heirs of the decedent.

Under the constitutional and statutory provisions of some states the rights of a widow obtained in the homestead by survivorship, see supra § 243, are paramount not only to the claims of the husband's creditors,[98] but also to those of his heirs as well [99]

91. Mo —Hardy v Atkinson, 118 S W 516 136 Mo App 595
29 C J p 1013 note 10

92. Nev—In re Walley, 11 Nev 260
29 C J p 1013 note 13

93. Cal —In re Barkley's Estate, 267 P 148 91 Cal App 388
Colo —Chapin Lumber Co v Day, 103 P 2d 14, 106 Colo 194
Kan —Boulls v Boulls, 22 P 2d 465, 137 Kan 880- Solomon Nat Bank v Birch, 246 P 1007 121 Kan 331
Tex —McCusker v Field, Civ App, 76 S W 2d 816
29 C J p 1013 note 15, p 1014 note 16

Lien on proceeds of sale

Judgment creditor of widow had no lien on proceeds resulting from sale of homestead by widow and minor children —Roberts v First Nat Bank, 268 P 799, 126 Kan 503

Surviving widow's occupancy of property was "notice" to all of her homestead rights and exemptions — Bartold v Lewandowska, Mich, 8 N W 2d 133

Interest of spouse inherited from heir

Where the homestead descends to the heirs of the deceased spouse subject to the homestead right of the surviving spouse, and thereafter the survivor inherits an interest on the death of one of the heirs such inherited interest is liable to a judgment rendered against the surviving spouse —Kelley v Williams, 81 N W 230, 110 Iowa 153—Strong v Garrett, 57 N W 715, 90 Iowa 100

94. Kan—Weaver v Chicago First Nat Bank, 94 P. 273, 76 Kan. 540, 123 Am S R 155, 16 L R A,N S, 110

95. Kan —Protection State Bank v Baker, 53 P 2d 469, 143 Kan 201, rehearing denied and opinion supplemented 55 P 2d 818, 143 Kan 526 —Solomon Nat Bank v Birch, 246 P 1007, 121 Kan 331
Exemption inuring to heirs issue, or constituent members of family for their antecedent debts see infra § 265 c, d
Surviving adult children as entitled to homestead see supra § 256

96. Iowa —American Nat Bank of Alamosa, Colo v Wetherell 200 N W 221, 198 Iowa 648—Coleman v Bosworth, 164 N W 238, 180 Iowa 975- Briggs v Briggs, 45 Iowa 318
Election of widow between homestead and distributive share see supra § 252

97. Iowa —Knox v Hanlon, 48 Iowa 252

98. Miss —Bohn v Bohn, 5 So 2d 429 193 Miss 122 appeal dismissed 62 S Ct 1283, 316 U S 646, 86 L Ed 1730
Rights of widow as superior to claims of husband's creditors see supra § 262

99. Ill —Gradle v Johnson, 22 N E 2d 946, 372 Ill 137—Howe v Brown, 123 N E 46, 287 Ill 532
Iowa —Crouse v Crouse, 259 N W 443, 219 Iowa 736
Ky —Howard v Mitchell, 105 S W 2d 128, 268 Ky 129—Rowe v Blair, 299 S W 571, 221 Ky 685—Charboneau v Hart, 277 S W 242, 211 Ky 204—Brandenburg v. Petroleum Exploration, 291 S W 757, 218 Ky 557
Miss —Bohn v Bohn, 5 So 2d 429, 193 Miss 122, appeal dismissed 62 S Ct 1283, 316 U S 646, 86 L Ed 1730
Mo —Jennings v Cherry, 257 S W 438, 301 Mo 321
N D— Calmer v Calmer, 106 N W 681 15 N D 120
Okl —Lusk v Carter Oil Co of West Virginia, 53 P 2d 656, 172 Okl 508 —In re Gardner's Estate, 250 P 490, 122 Okl 26
Tenn —Shearin v Shearin, 29 S W 2d 251 161 Tenn 172
Tex —Greene v White, 153 S W 2d 575 137 Tex 361, 136 A L R 626, reversing White v Greene Civ App 129 S W 2d 801 Reconstruction Finance Corporation v Burgess Civ App 155 S W 2d 977, error refused—Crump v Andress, Civ App, 265 S W 1071, reversed on other grounds, Com App, 278 S W 422
29 C J p 1014 note 22, p 996 note 43 [b]
Effect of testamentary disposition on rights of surviving spouse or children see supra §§ 243, 257 b, 259
Nature of estate or interest transmitted to heirs see infra § 265 d
Partition of homestead on application of heirs see the C J S title Partition § 33, also 29 C J p 1040 note 63—p 1041 note 87
Respective rights of children and surviving spouse see supra § 257 a
Right to rents and profits see infra § 265 e
Title of heirs to real property see Descent and Distribution § 66

The right of the husband to the homestead on the death of his wife, see supra § 259, has also been held to be superior to the interest of the wife's heirs,[1] and the rights of minor children are generally held to take precedence over the claims of the heirs.[2] The widow and remainderman cannot have a right of homestead in the same land at the same time, and her right to possession as against him is exclusive.[3]

Under some statutes, the widow's rights are superior to those of the heirs only if the estate is insolvent,[4] or if the estate is indebted,[5] or if the husband died intestate.[6]

§ 265. Nature of Estate or Interest Transmitted

a In general
b To surviving spouse and children
c To constituent member of family
d To heirs or issue
e. Incidental rights and liabilities

a. In General

Survivors of a homesteader take such estate or interest in the decedent's homestead as is given them by the homestead laws of the particular jurisdiction.

The nature, quality, and quantity of the estate or interest continued or transmitted by operation of law to those surviving a homesteader depend on the particular homestead provisions.[7]

Right of inheritance as distinct. The right or privilege of the surviving spouse or children to continue in possession after the homesteader's death is distinct from the rights of such person or persons as an heir or heirs.[8] A minor child who inherits the homestead has two separate and distinct estates in the homestead[9] existing at the same time and incapable of merger,[10] namely, homestead and inheritance,[11] one of which may be alienated and the other reserved.[12] The homestead right entitles him to entry at the death of his ancestor, and the inheritance right entitles him to entry at the time when he attains his majority.[13]

"Many of our cases deal with the immunity of the homestead to sale or disturbance under the claims of creditors. Such charitable protection is dictated by the same considerations which should exempt it from a similar calamity at the hands of the heirs. It is not conceivable that a disruption of the widow's use of the homestead as a haven or for subsistence could be less painful or distressing if accomplished at the hands of members of her own family"—Bohn v Bohn, 5 So 2d 429, 432, 193 Miss 122, appeal dismissed 62 S Ct 1283, 316 U S 646, 86 L Ed 1730

Although possession is held by tenants of widow and minor children, it may not be disturbed by the heirs—Stuckey v Horn, 200 S W 1025, 132 Ark 357

Misappropriation by heir of timber

Heir in unlawful possession of homestead of widow is not entitled to denude property in his possession of timber and appropriate the proceeds to his own use—Wood v Wood, 157 S W 2d 36, 203 Ark 344

1. Ky—Shields v Parsons, 18 S W 2d 961, 230 Ky 143
Tex—Greenawalt v Cunningham, Civ App, 107 S W 2d 1099
29 C J p 1014 note 22 [c]

Community property

Tex—Sargeant v Sargeant, 15 S W 2d 589, 118 Tex 343, answering certified questions, Civ App, 19 S W 2d 383

Contribution between husband and wife's heirs

Where husband and wife as tenants in common executed mortgage to secure joint note which represented purchase price of wife's undivided one-half interest plus balance of purchase price of husband's undivided interest previously acquired, and subsequently mortgagee bequeathed note and mortgage to husband, the husband as homestead claimant and wife's heirs were required to bear their shares of burden in proportion to amount of their interests, subject to payment of mortgage debt, in value of undivided interest of deceased wife which were to be determined in accordance with law in force at time of wife's death—Richardson v Richardson, 11 A 2d 227, 111 Vt 140

2. Ark—Stuckey v Horn, 200 S W 1025, 132 Ark 357—Burel v Baker, 116 S W 181, 89 Ark 168
29 C J p 1014 note 27
Homestead exemption inuring to heirs, issue, or constituent members of family see infra § 265 c, d

3. Ky—Merrifield v Merrifield, 82 Ky 526

4. Ala—Thornton v Thornton, 45 Ala 274
Mich—Zoellner v Zoellner, 19 N W 556, 53 Mich 620
Homestead right of widow as dependent on insolvency see supra § 243

5. Va—Davis v Davis, 43 S E 358, 101 Va 230
29 C J p 1014 note 25

6. Fla—Wilson v Fridenburg, 19 Fla 461

7. Or—Banfield v Small, 8 P 2d 779, 139 Or 134

8. Ark—Sheppard v Zeppa, 133 S W 2d 860, 199 Ark 1
Iowa—Crouse v Crouse, 259 N.W 443, 219 Iowa 736
Mo—Hall v Hall, 145 S W 2d 752, 346 Mo 1217
N D—In re Druhl's Estate, 237 N W 697, 61 N D 168—Cullen v Sullivan 199 N W 760, 51 N D 384
29 C J p 1014 note 36
Right of
Heirs as against surviving spouse see supra § 264
Surviving spouse and children to inherit see Descent and Distribution §§ 19–60

9. Ark—Kitchens v Wheeler, 141 S W 2d 34, 200 Ark 671—Sheppard v Zeppa, 133 S W 2d 860, 199 Ark 1
29 C J p 1014 note 37

10. Ark—Kitchens v Wheeler, 141 S W 2d 34, 200 Ark 671—Sheppard v Zeppa, 133 S W 2d 860, 199 Ark 1
29 C J p 1014 note 38

Effect of statute allowing suit after reaching majority

The statute providing that if any person entitled to bring any action be, at the time of accrual of cause of action, under twenty-one years of age, such person shall be at liberty to bring such action within three years next after full age does not affect rule that homestead estate of minor children and the estate of inheritance are separate and are incapable of merger—Kitchens v Wheeler, 141 S W 2d 34, 200 Ark 671

11. Ark—Sheppard v Zeppa, 133 S. W 2d 860, 199 Ark 1
29 C J p 1014 note 39

12. Ark—Shapard v Mixon, 184 S W 399, 122 Ark 530

13. Ark—Kessinger v Wilson, 14 S W. 96, 53 Ark 400, 22 Am S R. 220

b. To Surviving Spouse and Children

The nature of the estate or interest in the homestead transmitted to the surviving spouse depends on constitutional and statutory provisions, and under particular provisions may be a fee simple, a life estate, or a mere right of occupancy.

The nature of the estate a surviving spouse has in a homestead by survivorship depends entirely on the construction of constitutional and statutory provisions.[14] Under some homestead laws the surviving wife, or the surviving husband, or the surviving wife and the minor children if any, or the surviving husband and the minor children if any, as the case may be under the particular statutory provision, take absolutely all the estate or interest that was vested in the deceased homesteader in the homestead property at the time of his death, as under statutory provisions in Alabama,[15] in California,

14. Or—Banfield v. Small, 8 P 2d 779, 139 Or 134, citing **Corpus Juris.**

Tex—Sargeant v Sargeant, 15 S W 2d 589, 118 Tex 343, answering certified questions, Civ App, 19 S W 2d 382

Survivorship rights generally of surviving

Child or children see supra § 255–258

Spouse see supra §§ 243–254, 259, 260

15. Insolvency of estate

(1) Where decedent's estate was insolvent the title of the homestead vests absolutely in the wife, or the wife and minor children if any, as against decedent's creditors, provided there is a judicial ascertainment of insolvency—Saltsman v Saltsman, Ala, 10 So 2d 752—Bishop v Johnson, 7 So 2d 281, 242 Ala 551—Martin v Cothran, 200 So 609, 240 Ala 619—Lester v Stroud, 103 So 692, 212 Ala 635—People's Bank of Red Level v Barrow & Wiggins, 94 So 600, 208 Ala 433—Kyser v McGlinn 92 So 13, 207 Ala 82—29 C J p 1015 note 53 [b] (1), (2)

(2) Setting apart of homestead to widow and minor child of husband's half interest in land of which husband and wife were tenants in common, on rendition of decree of insolvency of husband's estate, divested adult children of any interest and invested the right, title, interest, and use therein in widow and minor child, under Code 1907 §§ 4196, 4227—Glover v Mitchell, 99 So 905, 211 Ala 136

(3) A judicial ascertainment may be by decree of insolvency in equity as well as in the probate court—Roy v Roy, 172 So 253, 233 Ala 440—Tiger v Holesapple, 146 So 611, 226 Ala 271—Hames v Irwin, 108 So 253, 211 Ala 422—Evans v Evans, 101 So 515, 213 Ala 265—Lester v Stroud, 103 So 692, 212 Ala 635—29 C J p 1015 note 53 [b] (3) (4)

(4) Decree in equity refusing adjudication of insolvency was held to be erroneous under evidence—Hames v Irwin, supra

(5) Where widow, who was administratrix of deceased husband's estate, died pending decision of contested insolvency proceeding, subsequent entry of decree of insolvency did not vest fee title to decedent's homestead in widow or her heirs or devisees, but such fee remained in deceased husband's heirs or devisees, since title to property cannot by judicial decree or otherwise be vested in a person not at the time living, and statute providing for enlargement of widow's homestead right into a fee title on ascertainment of insolvency was intended to afford widow the greater security and not to substitute her heirs or devisees for those of husband as successors to an estate which never inured to widow's benefit during her life—Martin v Cothran, 200 So 609, 240 Ala 619

(6) Where decedent estate was probably insolvent, so that homestead probably would have been wife's fee simple, under Code 1907 § 1196, and she also released life interest in another tract of land under agreement with administrator and heirs that the homestead and the other land should be sold and two thousand dollars paid to her, sum to be paid widow was to be hers absolutely and not merely for life—Matthews v Lovelady, 100 So 855, 211 Ala 495

Homestead not exceeding area or value allowed

(1) If the homestead does not exceed in area or value the statutory exemption, the wife, or the wife and minor children if any, as against creditors of decedent, will acquire an absolute estate or title in fee in the homestead property, at least where the homestead is all the real estate owned by decedent at the time of his death—Montgomery v Hammond, 153 So 654, 228 Ala 449—Bedwell v Dean, 132 So 20, 222 Ala 276—Lester v Stroud, 103 So 692, 212 Ala 635—Davis v Davis, 100 So 315, 211 Ala 317—Baccus v Eads, 96 So 757, 209 Ala 578—29 C J p 1015 note 53 [a] (1)–(4)

(2) Where minor children, as well as the widow, survive, the fee is vested jointly in the widow and children and the probate court has no jurisdiction to set it apart, and vest title thereto in widow, to exclusion of minor children—Keenum v Dodson, 102 So 230, 212 Ala 146

(3) Where mother's homestead constitutes all of her land at time of her death, and its value does not exceed two thousand dollars, no proceeding is necessary to have it set apart and appraised, but title thereto vests in her minor child or children—Cade v Graffo, 148 So 591, 227 Ala 11

(4) Formerly the title vested absolutely whether or not the homestead was set apart, and as against creditors the rule has been stated that an allotment is not required to vest the absolute title—Dake v Inglis, 194 So 673, 239 Ala 241—Ratliff v Ratliff, 175 So 259, 234 Ala 320—Miles v Lee, 61 So 915, 180 Ala 439—29 C J p 1015 note 53 [a] (2), p 1029 note 39 [b] (1)

(5) As against creditors, the title to the homestead will be presumed absolute until it is judicially determined that it is not all of the real estate left by decedent, and that it is of greater value than two thousand dollars—Davis v Bates, 194 So 647 239 Ala 214—Sims v Kitchens, 172 So 638, 233 Ala 484

(6) Code 1896 § 2071, as placed in Code 1907 § 4198 and subsequent codes, underwent a change and as against other heirs the title to the homestead does not vest absolutely in the widow and minor children, one or both, "until it is so set apart and until it is judicially determined that it is all the real estate owned by the decedent and that it is of not greater value than two thousand dollars"—Sams v Sams, 5 So 2d 771, 242 Ala 240—Dake v Inglis, 194 So 673, 239 Ala 241—Davis v Bates, 194 So 647, 239 Ala 214—Cox v McLemore, 183 So 860, 236 Ala 559—Haynes v Haynes, 181 So 757, 236 Ala 331—Sims v Kitchens, 172 So 638, 233 Ala 484—Franklin v Scott, 148 So 873, 227 Ala 101—Cade v Graffo, 148 So 591, 227 Ala 11—Bryant v Perryman, 105 So 561, 213 Ala 561—Keenum v Dodson, 102 So 230, 212 Ala 146—Miles v Lee, 61 So 915 180 Ala 439

(7) As against heirs, a judicial determination is necessary to vest absolute title in the children on the death of their mother occupying a homestead—Bryant v Perryman, 105 So 561, 213 Ala 561

(8) Where the only heirs of decedent are his surviving wife and minor children one or both, they take

Idaho, and Washington,[16] in Florida,[17] in Nevada,[18] | in North Dakota,[19] in Oregon,[20] in South Caro-

a fee by inheritance and no proceeding to set apart the homestead smaller in area and less in value than is allowed by statute is necessary as to them—Judd v. Dowdell, Ala., 12 So 2d 858—Buchannon v Buchannon, 124 So 113, 220 Ala 72—Mathews v Goodenough, 89 So 708, 206 Ala 229

(9) As against the heirs, evidence that husband at time of his death owned homestead, value of which did not exceed two thousand dollars, and a cemetery lot warranted decree vesting in widow absolute title to one-half undivided interest in homestead as "all the real estate" owned by deceased, since cemetery lot did not constitute such other real estate within the statute as would affect vesting of absolute title to one-half interest in homestead in widow—Sams v Sams, 5 So 2d 774, 242 Ala 240

(10) It has also been stated that, when a homestead if occupied by a decedent at time of his death is a tract or parcel separate and apart and not a part of a larger tract and does not exceed in value the exemption allowed, the exemptioner in any event takes a life estate without proceeding to set apart the homestead, the law in such case intervening and making the allotment without any act on the part of exemptioner—Bishop v Johnson 7 So 2d 281, 242 Ala 551—Cox v McLemore 183 So 860 236 Ala 559—Franklin v Scott, 148 So 833 227 Ala 101

(11) Where the homestead is smaller in area and less in value than the exemptions to which the widow is entitled and the husband leaves no children or other real estate she is entitled to the homestead and to the absolute title thereto when set apart—McCollough v McCollough, 185 So 417, 237 Ala 77

(12) If the one hundred and sixty acres of land of value of less than two thousand dollars owned by intestate at time of his death in 1904 was not a homestead and all the land owned by intestate a judicial proceeding was necessary in order to vest title in widow and minor children under Code 1896 §§ 2070, 2097-2100—Saltsman v Saltsman, Ala., 10 So 2d 752

(13) Where it was undisputed that land constituting owner's homestead was only real estate owned by him at time of his death, his widow and minor children were entitled to have it set apart to them as exempt by probate court decree adjudicating necessary facts to vest them with legal title, and where decree granting such relief did not judicially ascertain such undisputed fact equity court should intervene at their instance after adverse possession of land by them for over twenty years and cure such defect by quieting title in them as against other heirs suing for sale of land and division of proceeds among alleged joint owners—Bearden v Orr, 4 So 2d 138, 241 Ala 585

Homestead exceeding area or value allowed

Under certain homestead provisions the rule has been said to be that, if the homestead exceeds in area or value the prescribed exemption and the estate is not insolvent, the widow takes only a life estate the fee going to the heirs at law—McDuffie v Morrisette, 63 So 542, 184 Ala 360—29 C J p 1016 note 63 [d] (1)

Construction of earlier statutes

Ala.—Shamblin v Hall, 26 So 285, 123 Ala 541—Miller v Marx, 55 Ala 322—Weber v Shore, 55 Ala 311

16 Community property

(1) If a homestead is selected from community property in the lifetime of both spouses, it vests in the survivor in fee and becomes his or her separate property

Cal.—Slinger v Milly, 124 P 2d 631, 51 Cal App 2d 286—In re Muntz's Estate, 231 P 371, 69 Cal App 104—In re Sequeria's Estate, 217 P 1078, 63 Cal App 14—In re Mendes' Estate 217 P 1077, 63 Cal App 11—In re Wrenn's Estate, 215 P 909 61 Cal App 602

Idaho—Oylear v Oylear 208 P 857, 35 Idaho 732

29 C J p 1015 note 54 [a] (1)

(2) Other cases see 29 C J p 1015 note 54 [a]

Separate property

(1) In California and Idaho, if the homestead was selected from separate property during the life of husband and wife, title vests absolutely on death in the survivor

Cal.—Watson v Peyton 73 P 2d 906, 10 Cal 2d 156—In re Wrenn's Estate, 215 P 909 61 Cal App 602

Idaho—Oylear v Oylear 208 P 857, 35 Idaho 732

29 C J p 1015 note 54 [c] (2)

(2) Under Cal Prob Code § 661, Code Civ Proc § 1468, the court may set aside for a limited period a probate homestead to the surviving spouse out of the separate property of decedent—In re Maxwell's Estate 46 P 2d 777, 7 Cal App 2d 641 In re Simonini's Estate 291 P 24, 110 Cal App 518—In re Barkley's Estate, 267 P 148, 91 Cal App 388—In re Mason's Estate, 241 P 629, 76 Cal App 315—29 C J p 1015 note 54 [c] (9)

(3) Under Cal Civ Code § 1265 minor children of divorced husband on his death were entitled to have homestead set apart to them for limited period, not exceeding minority—In re Wright's Estate, 277 P 372, 98 Cal App 633

(4) Other cases see 29 C J p 1015 note 54 [c]

17. In Florida

(1) As to real estate other than a homestead, the "children or their descendants" of a male parent are his "heirs," under Gen St 1906 § 2295, but as to the homestead real estate, if there are no children of the owner at his death, and if he leaves a wife surviving him, she takes the entire property, under § 2297—Rawlins v. Dade Lumber Co., 86 So 334, 80 Fla 398

(2) The title to a deceased person's homestead descends to the widow taking a child's part and to the heirs and neither can be lawfully divested of such title, or acquire any better or different title by proceedings in the county judge's court acting as a court of probate—Spitzer v Branning, 190 So 516, 139 Fla 259—Spitzer v Branning, 184 So 770, 135 Fla 49

(3) A widow to whom testator's homestead was set apart as her child's part although with acquiescence of testator's heir, took only an undivided one-half interest therein—Spitzer v Branning, 190 So 516, 139 Fla 259

(4) Under Comp Gen L 1927 §§ 5484, 5493, 5496, where head of family owning homestead dies leaving child surviving widow who does not within time limited elect to take child's part will be confined to one-third dower interest for life in the homestead—Church v Lee, 136 So 242, 102 Fla 478

18. Nev.—Smith v Shrieves, 13 Nev 303

29 C J p 1016 note 56

19. Where no children survive, the entire fee of the homestead estate of the deceased husband vests in the surviving wife, free from all claims against the estate except such as are specifically mentioned by the statute—Cullen v Sullivan 199 N W 760 51 N D 384—29 C J p 1016 note 57 [a] (1)

Where children also survive, the fee does not vest in the surviving wife, but she takes an estate for life or years as provided by statute—O'Hare v Bismarck Bank, 178 N W 1017, 45 N D 641

When the wife owns the homestead, her title and her exemption right are not affected by the death of her husband While she continues the head of a family and resides in her home, it is exempt—O'Hare v Bismarck Bank, supra

20. Homestead set apart to surviving spouse vests a fee simple estate

lina,[21] in Utah,[22] and in Vermont.[23]

By other homestead laws the wife, or under some statutes the surviving spouse, is given a life estate or an interest in the nature of a life estate[24] which, under some provisions, becomes absolute on the death of the surviving spouse before proceedings to set it apart.[25] Under some statutes the surviving spouse has a mere right of occupancy[26] terminable on remarriage,[27] or a life estate on condition subsequent that the spouse does not remarry,[28] or the right to use the homestead as long as the spouse occupies it in person or by tenant.[29] In the case

—Banfield v Small, 8 P 2d 779, 139 Or 131—In re Iltz's Estate, 202 P 409, 104 Or 59—29 C J p 1016 note 58 [a]

21. S C—Price v Price, 22 S E 790, 45 S C 57
29 C J p 1016 note 59

22. Utah—In re Bedford, 95 P 518, 34 Utah 24, 16 L R A,N S, 728, 16 Ann Cas 118
29 C J p 1016 note 60

23. Vt—Day v. Adams, 42 Vt 510

24. Ark—Sheppard v Zeppa, 133 S W 2d 860, 199 Ark 1—Butler v Butler, 2 S W 2d 63, 176 Ark 126
Minn—Kohrt v Mercer, 282 N W 129 203 Minn 494—In re Lee, 213 N W 736, 171 Minn 182—St Denis v Mullen, 196 N W 258, 157 Minn 266—Snortum v Snortum, 193 N W 304, 155 Minn 230
Miss—Bohn v Bohn, 5 So 2d 429, 193 Miss 122, appeal dismissed 62 S Ct 1283, 316 U S 646, 86 L Ed 1730
29 C J p 1016 note 63

In Iowa

(1) The right of the surviving spouse to continue in possession and occupancy of the homestead under Code § 10145, is a mere personal right to possess and occupy the premises but is unaccompanied by any title or property interest. It does not accrue on the death of deceased, nor is it enlarged or otherwise affected by his or her death—Crouse v Crouse, 259 N W 413, 219 Iowa 736—Voris v West, 162 N W 836, 180 Iowa 138—29 C J p 1016 note 63 [e]

(2) The right of the surviving wife under Code § 10145 to occupy the homestead is a temporary right and has been compared to the widow's allowance—Crouse v Crouse, supra

(3) The possession given to a spouse under Code § 10146, providing that the survivor may elect to retain the homestead for life in lieu of a distributive share, is a life estate—Crouse v Crouse, supra

(4) Election between homestead and distributive share see supra § 252

In Nebraska the homestead estate descends to the surviving spouse for life, and heirs of the owner take the remainder in fee
U S—Polsky v Continental Nat Bank of Lincoln, C C A Neb., 110 F 2d 50
Neb—Gordon v Gordon, 299 N W 515, 140 Neb 400—Bartels v Seefus, 273 N W 485, 132 Neb 841—In re Lewis, 263 N.W. 480, 130 Neb 62—In re Freling's Estate, 230 N. W 443, 119 Neb 605
29 C J p 1016 note 63 [g].

In Tennessee before allotment of homestead to a widow she has a mere right which does not rise to the dignity of an estate, but after allotment either by operation of law when the lands are worth less than the statutory limit or otherwise where they are worth more, it becomes a life estate—Hutcheson v Hutcheson, 113 S W 2d 886, 176 Tenn 468—Bowman v Bowman, 77 S W 2d 455, 168 Tenn 281—Carey v Carey, 43 S W 2d 498, 163 Tenn 486—29 C J p 1016 note 63 [i]

In Texas

(1) Right of surviving spouse to occupy home place as a homestead is not an "estate"—Dakan v Dakan, 83 S W 2d 620, 125 Tex 305, affirming, Civ App., 52 S W 2d 1070—White v Glenn, Civ App., 138 S W 2d 911, error dismissed, judgment correct

(2) The right of a surviving spouse in homestead is more than a mere right of possession and occupancy and is an estate in the nature of a life estate, the right encompassing every element of a life estate created by operation of law—Sargeant v Sargeant, 15 S W 2d 589, 118 Tex 343, answering certified questions, Civ App., 19 S W 2d 382—White v Blackman, Civ App., 168 S W 2d 531—Petrus v Cage Bros., Civ App., 128 S W 2d 537, error refused

(3) A wife, on the intestate death of her husband, whose only heirs were his wife, a brother and four children of a deceased brother, acquired an undivided one-half interest in the homestead and a homestead estate in the other one half terminable on her death or abandonment of such homestead right—Shelton v Providence Washington Ins Co, Civ App., 131 S W 2d 330

25 Minn—Nordlund v Dahlgren, 153 N W 876, 130 Minn 462

26 S D—In re Clouse's Estate, 257 N W 106, 63 S D 147
Termination of homestead right on cessation of occupancy see infra § 272

27. Va—Murphy v Richmond, 69 S E 442, 111 Va 459
29 C J p 1017 note 65

28. Wis—In re Sydow, 154 N W 371, 161 Wis 325—Ferguson v Mason, 19 N W 420, 60 Wis 377
29 C J p 1017 note 66
Remarriage of surviving spouse as affecting homestead rights see supra §§ 253, 260

In Missouri

(1) Under the later statute, and under some of the former statutes, the widow takes a conditional life estate on the death of her husband, subject to be defeated on remarriage—Hall v Hall, 145 S W 2d 752, 346 Mo 1217—Maupin v Longacre, 288 S W 54, 315 Mo 872—Falvey v Hicks, 286 S W 385, 315 Mo 442—Moore v Mansfield, 286 S W 353—Martin v Martin, 285 S W 92, 313 Mo 476—29 C J p 1017 note 66 [b] (1)

(2) The homestead right of the widow is not a mere privilege or exemption but the homestead becomes a vested estate in the lands, vesting immediately on the death of the husband—Hall v Hall, supra—Brewington v Brewington, 109 S W 723, 211 Mo 48—Bank of Hartsburg v Sapp, 73 S W 2d 294, 228 Mo App 784

(3) Under statutes formerly in force the widow acquired the fee simple title of the husband, at least after the children had attained their majority—Overfield v Overfield 30 S W 2d 1073, 326 Mo 83—Willoughby v Brandes, 297 S W 54, 317 Mo 544—Jennings v Cherry, 257 S W 438, 301 Mo 321—29 C J p 1017 note 66 [b] (3)

29. U S—In re Gibson, D C Ky, 33 F Supp 838
Ky—Foreman v Cook, 127 S W 2d 856, 277 Ky 812—Berger v Berger, 94 S W 2d 618, 264 Ky 225—Parkey v Arthur, 53 S W 2d 921, 245 Ky 525—Lear v Lear, 28 S W 2d 32, 234 Ky 369—Shields v Parsons, 18 S W 2d 961, 230 Ky 113—Hager v Vincent, 15 S W 2d 426, 228 Ky 589—Rowe v Blair, 299 S W 571, 221 Ky 685—Brandenburg v Petroleum Exploration, 291 S W 757, 218 Ky 557.
29 C J p 1017 note 67

In Oklahoma

(1) Statutory right of surviving spouse to occupy homestead premises during his or her life is exclusive and is purely optional with surviving spouse—Sharp v Jones, 43 P 2d 427 171 Okl 471

(2) The right is not a life estate or any interest in the property, but is merely the right to continue to possess and occupy the premises as a home—Pence v Cole, 205 P 172, 85 Okl 69—Bacus v. Burns, 149 P 1115, 48 Okl. 285.

of minor children it has been held that they take an estate for years[30] which, as shown infra § 274, is determinable as to each minor on attaining his majority.

c. To Constituent Member of Family

In Texas, if a constituent member of the family survives after the death of the head of the family, the homestead is secured to the use of such survivor free from the general claims against the estate and debts of such survivor.

In Texas, under Const art 16 §§ 50–52 and the statutes, after the death of the head of the family, if a constituent member of the family survives, the homestead is secured to the use of such survivor as fully as it had been during the lifetime of decedent,[31] and passes to such survivor free from ordinary claims against the estate[32] and free from the debts of the survivor,[33] and, as shown infra subdivision d of this section, it remains exempt in the hands of the heirs after constituent members of the family cease to occupy it The homestead right inures only to such survivors as are embraced within the statute[34] If no constituent member of the family survives, the homestead becomes subject to decedent's debts, although he may have left children not constituent of the family.[35]

d. To Heirs or Issue

Homestead property descending to the heirs of the decedent is not exempt from the debts of the decedent unless the homestead exemption is continued in favor of the heirs by constitutional or statutory provisions.

Realty descending to heirs generally is liable for the debts of the ancestor, see Descent and Distribution §§ 116–138, and with respect to homestead realty this rule obtains where the homestead provisions or other statutes do not continue the exemption of the deceased homesteader in favor of his heirs[36] However, under the homestead laws of some jurisdictions, the homestead passes to the heirs exempt from the ancestor's debts, and, under others, from the antecedent debts of the heirs also[37]

(3) Nevertheless, in determining the rights of a surviving wife to royalties from an oil and gas lease executed during her husband's lifetime, she has been regarded as a life tenant
U S —Baze v Scott, D C Okl, 24 F Supp 806
Okl —Lawley v Richardson, 223 P 156, 101 Okl 10, 43 A L R 803

(4) Right of widow to royalties from oil and gas lease see infra subdivision e (2) of this section

30. Mo —Hall v Hall, 145 S W 2d 752, 346 Mo 1217—Moore v Mansfield, 286 S W 353
31. Tex —Sakowitz Bros v McCord, Civ App, 162 S W 2d 437
29 C J p 1017 notes 71, 70 [a]
Homestead right of surviving wife or husband see supra §§ 243, 259

Waiver of homestead right by constituent member

Agreement signed by an unmarried daughter, who survived the death of her parents, to have partition made by trustees or attorneys effected a waiver or surrender of any pre existing homestead claim —Davis v Davis Tex Civ App, 41 S W 2d 417

32. Tex —Cline v Niblo, 8 S W 2d 633, 117 Tex 474, 66 A L R 916, modifying Com App, 292 S W 178, reversing Civ App, 286 S W 298—Shaw v Suhr, Civ App, 81 S W 2d 182 Hall v Morton, Civ App, 39 S W 2d 903—29 C J p 1017 note 72
Sale of homestead by personal representative under order of court see Executors and Administrators § 552

33. Unmarried adult daughter

As long as unmarried adult daughter continued to occupy and claim homestead premises as her home which had come to her by descent from her mother, it was not subject to forced sale for payment of daughter's general unsecured debt, or to satisfy an involuntary lien arising therefrom —Reconstruction Finance Corporation v Burgess, Tex Civ App 155 S W 2d 977, error refused

34. Tex —Huey v Warner, 77 S W 2d 201, 124 Tex 252, affirming Warner v Huey, Civ App, 29 S W 2d 452
29 C J p 1017 note 71 [a]–[f]

Unmarried adult daughter who remains continuously with "family" is as much a component member thereof for homestead purposes as is the husband wife or any minor child —Reconstruction Finance Corporation v Burgess, Tex Civ App, 155 S W 2d 977, error refused

Daughter, who had been married and had left her husband and returned and kept house for decedent but was not divorced, is not an unmarried daughter within a statute providing for the setting aside of the homestead to the widow, minor children, and unmarried daughters remaining with the family —Wilkins v Briggs, 107 S W 135, 48 Tex Civ App 596

Stepdaughter of decedent is not "daughter" within homestead exemption statute, and hence unmarried stepdaughter, although continuing after mother's death to reside as member of family on stepfather's homestead, could not prevent sale through administration of stepfather's interest to satisfy stepfather's debts incurred after his wife's death —Huey v Warner, 77 S W 2d 201, 124 Tex 252, affirming Warner v Huey, Civ App, 29 S W 2d 452

35. Tex —Burns v Jones, 37 Tex 50 —Kay v Thompson, Civ App, 40 S W 2d 884 affirmed Thompson v Kay, 77 S W 2d 201, 124 Tex 252—Holland v Swilley, Civ App, 268 S W 758

36. Okl —Manning v Doscher, 29 P 2d 966, 968, 167 Okl 368
Course of descent of homestead property generally see supra § 242
Right of surviving children to homestead right see supra § 255 et seq
Rights of heirs as against homestead rights of surviving spouse and children see supra § 264

37. In Oklahoma

(1) On the death of a homesteader leaving no surviving spouse or minor child, the property in the hands of the heirs is subject to the debts against decedent's estate —Manning v Doscher, supra

(2) Where the homesteader leaves a minor child and the probate homestead vests in him, the property descends to him forever free from the debts of the homesteader so that even after the child attains his majority the property is not liable for decedent's debts —Ringer v Byrne, 80 P 2d 212, 183 Okl 16—First Nat Bank v. Scott, 62 P 2d 511, 178 Okl 175

(3) The filing of documents in the county court signed by a widow and by her attorneys listing homestead property and reciting that it was property of estate and that widow was without property of her own did not estop heirs of widow to assert homestead rights in property as against special administrator of es-

In Florida, under Const. art 10 § 2, the homestead exemptions inure to the benefit of the widow and the heirs of the party entitled to such exemption free from the debts of the ancestor except those debts, if any, which are specified in the constitution as not being subject to homestead exemption [38]

The title of the heirs is derived from the laws of inheritance,[39] but the constitution annexes the incident that the homestead inheritance is free from liability from the debts of the ancestor.[40] Nothing inures to the heirs under the constitutional provision except an exemption from debts [41] The provision is applicable only when the estate of the owner in the homestead land does not terminate before or at his death [42] Where the property constituting the homestead is owned by the husband and wife as tenants by the entireties, on his death the whole title vests in the surviving wife and no homestead exemption inures to the heirs since they have no estate or interest in the property [43] The homestead property passing to the heirs of the husband on his death is subject to the widow's dower, and to her right to take a child's part and her quarantine right.[44]

The constitutional exemptions inure to the heirs and not to the children as such [45] The benefit of the provision is not limited to heirs who are minors or dependents[46] but inures to adult heirs as well as to minor heirs,[47] to nonresident heirs,[48] and to posthumous children as heirs,[49] and it accrues to the heirs notwithstanding the deceased head of the family had not resorted to the statutory method of defining and placing on record a description of the property which he intended should constitute his homestead [50]

The rights of the heirs are not affected by a mortgage[51] or by a devise[52] of the homestead property by the widow; nor are they affected by her election to take a child's share of her husband's

tate in absence of showing of reliance to detriment of special administrator — Ringer v Byrne, supra

In Oregon

(1) Homestead property unless devised or conveyed descends to the heirs and their title is not divested until a homestead is set apart by the probate court — In re Potter's Estate, 59 P 2d 253, 154 Or 167—Mansfield v Hill, 107 P 471, 56 Or 400, modified on other grounds 108 P 1007, 56 Or 400

(2) For a period of time, however, resulting from a change in the statutory law of the state, the court was without jurisdiction to set aside a homestead for the surviving spouse or minor children and the homestead descended to the heirs of the deceased spouse — Overland v Jackson, 275 P 21, 128 Or 455—Slattery v Newell, 236 P 268, 115 Or 22

In Wisconsin

(1) The operation and effect of the statute is to give the heirs a vested estate in the homestead at the death of the owner, subject to the conditional life estate of the widow, the vesting of the estate is not postponed until death or remarriage of the widow — In re Christianson, 155 N W 115, 161 Wis 611

(2) The proceeds of the homestead, when it becomes necessary to sell it to satisfy any mortgage or lien upon it, are, after the discharge of such mortgage or lien, to be distributed to the heirs according to law and are not subject to the general debts of the estate if deceased dies intestate without a family, and, where the homestead consisted of forty acres of land, the exemption as to thirty-five acres which constituted a part of the homestead is not lost in consequence of the devise of five acres, including the dwelling, by the testator — Johnson v Harrison, 41 Wis 381

(3) Under St 1929 § 49 25 the homestead in the hands of decedent's heirs is liable to county for advances made as an old age pension — In re Wickesberg's Estate, 244 N W 561, 209 Wis 92

38. Fla — Cumberland & Liberty Mills v Keggin, 190 So 492, 139 Fla 133—Church v Lee, 136 So 242, 102 Fla 478
29 C J p 1018 note 83, p 1011 note 67 [a]
Homestead exemption inuring to widow see supra § 243

Heirs of surviving wife

If widow, having fee by survivorship under estate by entireties, acquires and retains homestead exemption rights in the property after husband's death, such exemption if existing at her death, inures to her heirs — Knapp v Fredricksen, 4 So 2d 251, 148 Fla 311—Norman v Kannon, 182 So 903, 133 Fla 710—Menendez v Rodriguez, 143 So 223, 106 Fla 214

39. Fla — McEwen v Larson, 185 So 866, 136 Fla 1 — Menendez v Rodriguez, 143 So 223, 106 Fla 214—Hinson v Booth, 22 So 687, 39 Fla 333
29 C J p 1018 note 85
Course of descent of homestead generally see supra § 242

Right of heirs to bring ejectment

Fla — Barco v Fennell, 5 So 9, 24 Fla 378

40. Fla — Moore v Price, 123 So 768, 98 Fla 276
29 C J p 1018 note 85

41. Fla — Moore v Price, supra

42. Fla — Menendez v Rodriguez, 143 So 223, 106 Fla 214—Lang v Kennard, 91 So 372, 83 Fla 395

43. Fla — Knapp v Fredricksen, 4 So 2d 251 148 Fla 311—Norman v Kannon, 182 So 903, 133 Fla 710—Menendez v Rodriguez, 143 So 223, 106 Fla 214
Tenancy by entirety see the C J S title Husband and Wife § 34, also 30 C J p 561 note 66 et seq

44. Fla — Moore v Price, 123 So 768, 98 Fla 276

45. Fla — Spitzer v Branning, 184 So 770, 135 Fla 49

46. Fla — Cumberland & Liberty Mills v Keggin, 190 So 492, 139 Fla 133

47. Fla — Cumberland & Liberty Mills v Keggin, supra—Church v Lee, 136 So 242, 102 Fla 478—Miller v Finegan, 7 So 110, 26 Fla 29, 6 L R A 813

"Heirs" includes adult grandson

Fla — Miller v Finegan, supra

48. Fla — Scull v Beatty, 9 So 4, 27 Fla 426

49. Fla — Shone v Bellmore, 78 So 605, 75 Fla 515

50. Fla — Baker v State, 17 Fla 406

51. Fla — Wilson v Fridenburg, 19 Fla 461

Purchase-money mortgage executed by remarried widow of deceased vendee, who had acquired homestead rights in mortgaged land under executory contract of sale, could not constitute superior lien on property as against interest of vendee's children — Nelson v Dwiggins, 149 So 613, 111 Fla 298

52. Fla — Caro v. Caro, 34 So 309, 45 Fla 203.

estate in lieu of dower[53] The rights of heirs of the homestead owner are not affected by a conveyance of the homestead in which both parents did not join[54] On the death of the head of a family, the heirs are necessary parties to proceedings affecting the homestead[55]

In Iowa, where there is no surviving husband or wife, under the statute the homestead descends to the issue of either husband or wife according to the rules of descent unless otherwise directed by will and where it descends to such issue it is held by them exempt from any antecedent debts of their parents or their own, except those of the owner thereof contracted prior to its acquisition[56] The homestead property in the hands of the issue is exempt from the debts of the ancestor[57] and also from their own antecedent debts[58]

The statute is operative in favor of adult heirs[59] and of heirs who reside in another state[60] The exemption of the heirs is not because of any homestead right of their own, but is founded on the ancestor's homestead right[61] Where the homestead terminates before the death of the ancestor,[62] or the ancestor abandoned the homestead before his death,[63] the heir's exemption is lost The exemption as to the ancestor's debts does not include debts which might have been enforced against the homestead in the hands of the ancestor[64]

Where there is a surviving spouse the privilege of exemption of the homestead for liability for debts of the heir does not exist,[65] and the fact that the surviving spouse elects to take a distributive share does not affect the operation of this rule,[66] on the other hand, although the surviving spouse elects to take a distributive share instead of homestead, the homestead will descend to the heirs free from the debts of the ancestor,[67] and this is also the case where the surviving spouse loses or waives the right of occupancy or abandons the homestead[68] Where a homestead is transmitted by devise to one of several of testator's children, it has been held that the devisee is not entitled to an exemption as to his antecedent debts, under these circumstances the statute is not operative to give an exemption[69]

In Nebraska the statute vests the homestead in the surviving spouse for life and thereafter, in the absence of testamentary disposition, in decedent's heirs[70] Heirs include either direct or collateral heirs[71]

In the absence of a will the heirs take a vested remainder in fee, subject to the life estate of the surviving spouse, if any,[72] and exempt from any liability for the payment of debts existing against either the husband or wife at the time of his or her death except such as are specially provided for by statute,[73] and this right of the heirs is

53. Fla—Miller v Finegan, 7 So 110 26 Fla 29, 6 L R A 813

54. Fla—Hutchinson v Stone, 84 So 151 79 Fla 157

55. Fla—Wilson v Fridenburg, 19 Fla 461

56. Iowa—Oskaloosa Nat Bank v Jamison 218 N W 29 205 Iowa 349—Kinzer v Stephens, 96 N W 858 121 Iowa 347
29 C J p 1018 note 95

Exemption where homestead devised Where the homestead is devised to the heirs the statute exempting the premises in the hands of the issue is inapplicable—What Cheer First Nat Bank v Willie, 87 N W 734, 115 Iowa 77

Where the ancestor was without title to the homestead, the heirs do not take the homestead by descent—Mann v Nies, 238 N W 601, 213 Iowa 121

57. Iowa—Southwick v Strong, 255 N W 523 218 Iowa 135
29 C J p 1018 note 96

Heirs of widow holding fee by devise Homestead property which on death of owner passed to his widow in fee under will, on death of widow intestate, was not liable in the hands of her heirs at law for his debts, from which it was exempt in her hands—Wheeler v Meyer 206 N W 301, 201 Iowa 59

58. Iowa—Oskaloosa Nat Bank v Jamison 218 N W 29 205 Iowa 349—Arispe Bank v Werner, 207 N W 578 201 Iowa 484—Dever v Turner, 205 N W 755 200 Iowa 926
29 C J p 1018 note 96

59. Iowa—Maguire v Kennedy 59 N W 36, 91 Iowa 272

60. Iowa—Maguire v Kennedy, supra

61. Iowa—Kite v Kite, 41 N W 716, 79 Iowa 491
29 C J p 1011 note 60 [a] (2)

62. Iowa—Solnar v Solnar, 216 N W 288, 205 Iowa 701

63. Iowa—Baker v Jamison, 36 N W 647, 73 Iowa 698

64. Iowa—Moninger v Ramsey, 48 Iowa 368

65. Iowa—Voris v West, 162 N W 836, 180 Iowa 138
29 C J p 1018 note 4

66. Iowa—Voris v West, 162 N W 836, 180 Iowa 138
Election between homestead and distributive share see supra § 252

67. Iowa—In re Coulson, 64 N W 755, 95 Iowa 696

68. Iowa—In re Guthrie, 167 N W 601 183 Iowa 851—Zwick v Johns, 56 N W 665, 89 Iowa 550
29 C J p 1018 note 7

69. Iowa—Rice v Burkhart 107 N W 308 130 Iowa 520

70. Neb—Gordon v Gordon, 299 N W 515 140 Neb 100
29 C J p 1018 note 10
Course of descent of homestead property generally see supra § 242

Words "his or her heirs" in former statutes referred to the heirs of decedent and not to those of the survivor—Fort v Cook 90 N W 634 3 Neb, Unof, 12—Schuyler v Hanna, 47 N W 932, 31 Neb 307

71. Neb—In re Freling's Estate, 230 N W 443, 119 Neb 605—Judson v Creighton, 128 N W 651, 88 Neb 37

72. Neb—In re Freling's Estate, 230 N W 443, 119 Neb 605
29 C J p 1019 note 13, p 1016 note 63 [g]

73. Neb—Dougherty v White, 200 N W 884, 112 Neb 675, 36 A L R 425
29 C J p 1019 note 13

Allowance made by probate court to decedent's widow was a debt against decedent's estate, but could not be satisfied out of decedent's homestead valued at less than two

not affected by the fact that the surviving spouse failed to occupy the property as a homestead after the owner's death,[74] or by the fact that decedent died leaving no surviving spouse,[75] although where the surviving wife acquires the fee by devise from her husband and fails to acquire a homestead interest in her own right, her heirs on her death do not succeed to any homestead right which would exempt the property for the debts of the surviving wife incurred after the decease of her husband.[76]

During the existence of the life estate of the surviving spouse the heirs may maintain an action to quiet title or remove a cloud therefrom.[77]

In Texas, under Const. art 16 § 52, a fee simple title vests in the heirs of the homesteader as provided by the statutes of descent and distribution,[78] subject to the homestead rights of the surviving spouse or constituent members of the family of deceased.[79] The title of the heirs cannot be divested except by their voluntary action.[80]

Where the property remains and retains its homestead character after the death of the husband and wife, because constituent members of the family survive who are entitled to its use, see supra sub-

thousand dollars—Gordon v Gordon, 299 N W 515, 140 Neb 400

74. Neb—Cooley v Jansen, 74 N W 391, 54 Neb 33

75. Neb—U S Nat Bank of Omaha v Simonds, 274 N W 187, 133 Neb 42—Dougherty v White, 200 N W 884, 112 Neb 675, 36 A L R 425

76. Neb—In re Lewis, 263 N W 480, 130 Neb 62, expressly disaffirming contrary dicta in In re Freling's Estate, 230 N W 443, 119 Neb 605 and Judson v Creighton, 128 N W 651, 88 Neb 37

77. Neb—Hobson v Huxtable, 116 N W 278, 79 Neb 340

78. Tex—Ward v Hinkle, 8 S W 2d 641, 117 Tex 566, reversing, Civ App, 252 S W 236—Reconstruction Finance Corporation v Burgess, Civ App 155 S W 2d 977, error refused—Shelton v Providence Washington Ins Co Civ App, 131 S W 2d 330—Lyne v Panhandle Const Co Civ App, 114 S W 2d 1195, error dismissed—Greene v Cass County State Bank, Civ App, 7 S W 2d 620

Children's right to homestead see supra § 255

Course of descent of homestead property generally see supra § 242

Stepdaughter was not "heir" of stepfather, and therefore not entitled to homestead claim in deceased stepfather's estate—Warner v Huey, Civ App, 29 S W 2d 452, affirmed Huey v Warner, 77 S W 2d 201, 124 Tex 252

Prior to adoption of Const. art 16 § 52 the title to homestead property, when set aside to the widow and minor children, vested absolutely in them, to the exclusion of adult children. One purpose of the section was to change this rule and permit adult children to inherit an interest in the homestead property, subject to the right of the surviving husband or wife and minor children to occupy and use it as a homestead—Rettig v Houston West End Realty Co, Tex Com App, 254 S W 765, affirming Rettig v West End Realty Co, Civ App, 241 S W 614.

Disposition without consent of other spouse

Where land belonged to, and was part of, the homestead of a deceased husband, and was disposed of without the wife's consent, the heirs have rights therein apart from any which they might claim through an administrator—Norris v Duncan, 21 Tex 594

79. Tex—Milner v McDaniel, 36 S W 2d 992, 120 Tex 160, affirming McDaniel v Milner, Civ App, 19 S W 2d 126—Greenawalt v Cunningham, Civ App 107 S W 2d 1099—McCusker v Field Civ App, 76 S W 2d 816—Kay v Thompson, Civ App, 10 S W 2d 884, affirmed Thompson v Kay, 77 S W 2d 201 124 Tex 252—Oakwood State Bank of Oakwood v Durham, Civ App, 21 S W 2d 586—Lone Star Gas Co v Meyer, Civ App, 296 S W 1110
29 C J p 1017 note 77

Homestead right of

Constituent member see supra subdivision c of this section

Surviving spouse see supra §§ 243, 259

Interest is merely right in remainder without right of possession and, in law, not in possession—Johnson v Prosper State Bank, Civ App, 125 S W 2d 707, affirmed 138 S W 2d 1117 134 Tex 677—Greenawalt v Cunningham, Tex Civ App, 107 S W 2d 1099

Permitting heir to live on land

(1) Where surviving husband continued to reside on homestead and never relinquished any specific interest in land to son, but permitted son to live upon land, son did not acquire a homestead interest in land—Greenawalt v Cunningham, supra—Rettig v Houston West End Realty Co, Tex Com App, 254 S W 765, affirming Rettig v West End Realty Co, Civ App, 241 S W 614

(2) Estate in remainder as sufficient to support claim of homestead see supra § 82

Adult unmarried daughter

(1) The title of the heirs is inferior to the right of occupancy of an adult unmarried daughter, a constituent member of the family, at least where there are also minor children—Ward v Hinkle, 8 S W 2d 641, 117 Tex 566, reversing Civ App, 252 S W 236—Cline v Niblo, 8 S W 2d 633, 117 Tex 474, 66 A L R 916, modifying, Com App, 292 S W 178, reversing, Civ App, 286 S W 298

(2) Where, however, there are no minor children and no creditors asserting rights in the homestead the homestead right of the adult unmarried daughter is not paramount to that of the heirs for the purpose of partition—Patton v Byrd, Tex Civ App, 75 S W 2d 456, error refused

(3) On death of father, his interest in homestead property passed to heirs subject to right of surviving wife to occupy it as her home, and on wife's death her interest in homestead property passed to her heirs subject to right of unmarried adult daughter to occupy entire homestead until partition was effected with her adult brothers and married sister, and the unmarried daughter was entitled after partition to occupy that part of homestead set aside to her in the partition so long as she lived or desired to do so—Reconstruction Finance Corporation v Burgess, Tex Civ App, 155 S W 2d 977, error refused

(4) Partition on application of heirs see the C J S title Partition § 33, also 29 C J p 1039 note 40-p 1041 note 87

Partition as constituting exchange of lands

Where, by partition of land between surviving husband and his children all but a partition of land designated as homestead was given to children, and husband received remainder together with another tract on which he had executed deed of trust the result was but an exchange of portion of homestead for the other tract—Washington v Huggins, Tex Civ App, 10 S W 2d 140

80. Tex—Sakowitz Bros v McCord, Civ App, 162 S W 2d 437—Greene v Cass County State Bank, Civ App, 7 S W 2d 620
29 C J. p 1017 notes 76, 77.

division c of this section, it does not thereafter on their ceasing to occupy this relation go back into the estate for the payment of debts, but the title which vested on the death of deceased in the heirs continues free from all claims of creditors attempting to subject it to forced sale except those claims specifically permitted by the constitution and statute.[81] Where there is no remaining constituent of the family entitled to occupy the homestead as such on the death of the husband or wife, it descends and vests in the heirs subject to the payment of debts of decedent.[82]

e. Incidental Rights and Liabilities

(1) In general
(2) Rents and profits

(1) In General

A person occupying a homestead by survivorship has certain rights and liabilities, and where his interest is a life estate the rights and duties of a life tenant are usually conferred and imposed

The estate or interest of the survivor in the homestead usually carries with it such incidental rights as ordinarily accompany lawful possession or right to possession of the property.[83] He or she is entitled to the use and occupancy of the homestead,[84] and is entitled to use a right of way appurtenant thereto.[85] Where the surviving spouse uses the rents in paying a community debt constituting a lien on the homestead, he or she is entitled to reimbursement therefor out of the community estate.[86] The survivor may sue for breach of a covenant running with the land,[87] and has such an interest as will enable him or her to maintain trespass against one who wrongfully enters upon the premises,[88] or sue for injuries to his or her enjoyment of the property by any wrongdoer,[89] but a surviving wife is not a proper party to a suit begun by the husband and revived by his administrator, for damages in taking a part of the homestead for a right of way.[90] The survivor cannot defeat the rights of the heir.[91]

Debts, charges, and expenses. Where the surviving spouse occupies the homestead as a life tenant, the general rules pertaining to the liability of

81. Tex.—Milner v. McDaniel, 36 S.W.2d 992, 120 Tex. 160, affirming McDaniel v. Milner, Civ.App., 19 S.W.2d 426—Cline v. Niblo, 8 S.W.2d 633, 117 Tex. 474, 66 A.L.R. 916, modifying, Com.App., 292 S.W. 178, reversing, Civ.App., 286 S.W. 298—Johnson v. Hampton, 8 S.W.2d 640, 117 Tex. 580, reversing, Civ.App., 297 S.W. 891—Ward v. Hinkle, 8 S.W.2d 641, 117 Tex. 566, reversing, Civ.App., 252 S.W. 236—Aman v. Cox, Civ.App., 164 S.W.2d 744—First Coleman Nat. Bank of Coleman v. Vaughan, Civ.App., 139 S.W.2d 870, error dismissed, judgment correct—Panhandle Const. Co. v. Head, Civ.App., 134 S.W.2d 779, error refused—McKelroy v. Hamilton, Civ.App., 130 S.W.2d 1114—Coleburn v. Underwood, Civ.App., 53 S.W.2d 331—Hudson v. Hutchinson, Civ.App., 41 S.W.2d 1013, error refused—McCanless v. Devenport, Civ.App., 40 S.W.2d 903—Kay v. Thompson, Civ.App., 10 S.W.2d 884, affirmed Thompson v. Kay, 77 S.W.2d 201, 124 Tex. 252—L. T. Stanley Estate v. First Nat. Bank, Civ.App., 24 S.W.2d 440, error refused—Greene v. Cass County State Bank, Civ.App., 7 S.W.2d 620.
29 C.J. p. 1019 note 22

Whether estate is solvent or insolvent the title vests in the heirs free of claims of creditors.—Wade v. Scott, Tex.Civ.App., 145 S.W. 675—Hoefling v. Thulemeyer, Tex.Civ.App., 142 S.W. 102

Heir does not inherit homestead right, but takes such right by virtue of constitution and statute.—Warner v. Huey, Civ.App., 29 S.W.2d 452, affirmed Huey v. Warner, 77 S.W.2d 201, 124 Tex. 252

82. Tex.—Thompson v. Kay, 77 S.W.2d 201, 124 Tex. 252, affirming Kay v. Thompson, Civ.App., 40 S.W.2d 884—Engbrock v. Haidusek, Civ.App., 95 S.W.2d 520, error refused—Rhoades v. Gay, Civ.App., 58 S.W.2d 153

83. Miss.—Miers v. Miers, 133 So. 133, 160 Miss. 746.
29 C.J. p. 1019 note 28
Transfer or encumbrance by survivor see infra §§ 285–288

Widow has right to retain homestead as it was during decedent's lifetime, and that is true even if decedent left children surviving him.—Bohn v. Bohn, 5 So.2d 429, 193 Miss. 122, appeal dismissed 62 S.Ct. 1283, 316 U.S. 646, 86 L.Ed. 1730

Proving homestead right under plea of not guilty

In a suit against the surviving husband for possession of the property, his homestead rights may be proved as a matter of defense under a plea of not guilty.—Thomas v. Tyler, Tex.Com.App., 6 S.W.2d 350, reversing Tyler v. Thomas, Civ.App., 297 S.W. 609

84. Okl.—Lawley v. Richardson, 223 P. 156, 101 Okl. 40, 43 A.L.R. 803
Tex.—Gulf, C. & S. F. Ry. Co. v. Coffman, Civ.App., 11 S.W.2d 631, affirmed Coffman v. Gulf, C. & S. F. Ry. Co., Com.App., 23 S.W.2d 304—Mattingly v. Kelly, Civ.App., 124 S.W. 483

"Undisturbed possession"

Under statutes giving a decedent's widow the right of "undisturbed possession" or use of the homestead and prohibiting partition thereof during her widowhood, "undisturbed possession" must be defined, not in terms of widow's forbearance or patience, but in terms of the legal right not to be subjected to the probability or possibility of a challenged dominion.—Bohn v. Bohn, 5 So.2d 429, 193 Miss. 122, appeal dismissed 62 S.Ct. 1283, 316 U.S. 646, 86 L.Ed. 1730

85. Mass.—Bodfish v. Bodfish, 105 Mass. 317

86. Tex.—Mattingly v. Kelly, Civ.App., 124 S.W. 483

87. Ark.—St. Louis I. M. & S. R. Co. v. O'Baugh, 5 S.W. 711, 49 Ark. 418

88. Ark.—Little Rock & Fort Smith R. Co. v. Dyer, 35 Ark. 360

89. Iowa.—Cain v. Chicago, R. I. & P. R. Co., 3 N.W. 736, 6 N.W. 268, 54 Iowa 255

90. Ala.—Cowan v. Southern R. Co., 23 So. 754, 118 Ala. 554

91. Ky.—Carter v. Monarch, 188 S.W. 379, 171 Ky. 345
29 C.J. p. 1014 note 31.

Where widow has only life estate, she cannot by sale affect the rights of heirs.—Bishop v. Johnson, 7 So.2d 281, 242 Ala. 551.

a life tenant to pay debts, charges, and expenses, see Estates §§ 48, 49, ordinarily apply.[92]

Growing crops. When homestead is assigned to a widow while the crops growing at her husband's death still remain upon the land, she takes the crops as against the decedent's creditors and next of kin[93]

Improvements and repairs Where the homestead right of a surviving spouse is in the nature of a life estate, he or she is under a duty to make ordinary repairs to the homestead and has no right to charge the heirs of decedent with such expenses,[94] and he or she is not entitled to reimbursement by deceased's heirs for expenditures for permanent improvements made on the property during the time the property is occupied as a homestead,[95] at least where such improvements are voluntarily made,[96] although it has been held that reimbursement may be had where such improvements were placed on the premises by the surviving spouse under the bona fide belief that he or she was owner of the fee[97]

Insurance Where a surviving spouse occupies the homestead as a life tenant, such spouse is under no obligation to insure or to apply money received therefrom to rebuilding so that the heir may not be deprived of his inheritance[98] If the homestead passes to the widow in fee simple by allotment and is subsequently destroyed, she owns the insurance money absolutely as against heirs and creditors[99]

Waste The surviving spouse, occupying the homestead as a life tenant, may not permit waste of, or injure or permit injury to be done to, the estate of reversion[1]

(2) Rents and Profits

(a) In general

(b) Rights of children

(a) In General

A surviving spouse is usually entitled to the rents and profits of the homestead and as a life tenant may receive the profits of a mine or oil or gas well opened on the homestead during the lifetime of the deceased spouse

As long as it remains the homestead and contributes to the support of the family the surviving spouse usually is entitled to the rents thereof as a

92. Interest on encumbrances

Survivor is bound to pay the interest on encumbrances

Ill.—Sprague v. Beamer, 45 Ill.App. 17

Mo.—Maupin v. Longacre, 288 S.W. 54, 315 Mo. 872

Water rents

Payment by the surviving husband of water rents on the homestead in the possession of tenants is for his personal benefit and the community estate is not chargeable therefor.—Mattingly v. Kelly, Tex.Civ.App., 124 S.W. 483

93. Tenn.—Vaughn v. Vaughn, 13 S.W. 1089, 88 Tenn. 742

Ownership of growing crops generally see Crops § 5

94. S.D.—Wells v. Sweeney, 94 N.W. 394, 16 S.D. 489, 102 Am.S.R. 713

Tex.—Sargeant v. Sargeant, 15 S.W.2d 589, 118 Tex. 343, answering certified questions, Civ.App., 19 S.W.2d 382.—Williams v. Davis, Civ.App., 133 S.W.2d 275.—Strickler v. Kassner, Civ.App., 64 S.W.2d 1025

Duty of life tenant to make repairs see Estates § 44

95. S.D.—Wells v. Sweeney, 94 N.W. 394, 16 S.D. 489, 490, 102 Am.S.R. 713

Lien for improvements

(1) Where widow on her husband's death used her life insurance money and other money to erect a house on the family homestead, her minor sons agreeing to remain unmarried and at home until they were twenty-one, and to maintain her, which agreement they broke, she had no lien on the land of the minors for the value of the improvements so placed on their land by her.—Beck v. Karr, 95 So. 881, 209 Ala. 199

(2) One who lived with his mother on homestead after father's death was not entitled, on conveyance to him of other property as his share of his father's estate, to a lien on homestead for moneys expended in rebuilding the house on the homestead particularly where it appeared that rents were amply sufficient to take care of such items.—Reeves v. Reeves, 264 S.W. 979, 165 Ark. 505

96. Tex.—Sargeant v. Sargeant, 15 S.W.2d 589, 118 Tex. 343, answering certified questions, Civ.App. 19 S.W.2d 382.—Williams v. Davis, Civ.App., 133 S.W.2d 275

Permanent street improvements

The amount paid by the surviving husband for permanent street improvements in front of the premises, after the death of the wife, while the premises constituted his homestead, is properly deducted from the proceeds of a sale of the premises in determining the amount the only child of the surviving husband and the deceased wife is entitled to receive.—Mattingly v. Kelly, Tex.Civ.App., 124 S.W. 483

97. Tex.—Williams v. Davis, Civ.App., 133 S.W.2d 275.

Question for jury

In suit in trespass to try title by heirs of deceased wife against those holding homestead by virtue of husband's deed, whether husband had made improvements on homestead under bona fide belief that he had fee-simple title, so that those holding homestead would be entitled to be reimbursed by the heirs, was for the jury under the evidence.—Williams v. Davis, supra

98. Ill.—Home Ins. Co. v. Field, 42 Ill.App. 392

Duty of life tenant to insure premises see Estates § 46

99. Ala.—Miller v. Birmingham First Nat. Bank, 69 So. 916, 194 Ala. 477

1. Okl.—Sharp v. Jones, 43 P.2d 427, 171 Okl. 471.—Lawley v. Richardson, 223 P. 156, 101 Okl. 40, 43 A.L.R. 803

Liability of life tenant for waste see Estates § 43

Timber

(1) A widow in possession of homestead is entitled to the use of the timber for necessary repairs.—Wood v. Wood, 157 S.W.2d 36, 203 Ark. 344

(2) However, as against the reversioners the widow may not make a sale of standing timber where it appears that such sale will injure the value of the freehold and is not essential to a legitimate use of the property for homestead purposes.—Smith v. Smith, 31 S.E. 135, 105 Ga. 106.

separate property;[2] and in some jurisdictions the constitution or statutes expressly vest the rents and profits of the homestead in the widow during her natural life or a portion of such rents during the minority of the children.[3] During the occupancy of the homestead the surviving spouse is not chargeable with rent for the use of the homestead,[4] and where he or she is excluded by the heirs from the homestead or a portion thereof the rental value may be recovered from them[5] or they may be compelled to account for the amount of rent collected by them.[6] Where the surviving husband collects rents from real estate after it has ceased to be his homestead, the only child of the marriage is entitled to his proportionate share thereof.[7]

Mining rights and royalties. Where the interest of a surviving spouse in the homestead is regarded as a life estate, the survivor may operate a mine on the premises which was opened during the lifetime of the deceased spouse, the right to operate may be exercised by the surviving spouse in person or through any other agency selected, including a lessee.[8] In the case of oil and gas, the surviving spouse, as a life tenant, is entitled as against the heirs and devisees to receive and collect absolutely the royalties arising from oil and gas wells developed under a lease executed prior to the death of the other spouse, and is not confined to the interest on such royalties,[9] but on abandon-

2. Miss.—Bohn v. Bohn, 5 So.2d 429, 193 Miss. 122, appeal dismissed 62 S.Ct. 1283, 316 U.S. 646, 86 L.Ed. 1730.—Miers v. Miers, 133 So. 133, 160 Miss. 746.

Mo.—Moore v. Mansfield, 286 S.W. 353.

Tex.—Ruble v. Ruble, Civ.App., 261 S.W. 1018.

29 C.J. p. 1019, note 38.

Surviving husband

Tex.—Sargeant v. Sargeant, 15 S.W.2d 589, 118 Tex. 343, answering certified questions, Civ.App., 19 S.W.2d 382.—Williams v. Davis, Civ.App., 133 S.W.2d 275.—Gulf, C. & S. F. Ry. Co. v. Coffman, Civ.App., 11 S.W.2d 631, affirmed Coffman v. Gulf, C. & S. F. Ry. Co., Com.App., 23 S.W.2d 304.—Roberts v. Roberts, Civ.App., 278 S.W. 937.—Mattingly v. Kelly, Civ.App., 124 S.W. 483.

If surviving spouse chooses to rent homestead property and use the rentals in lieu of using the homestead for living purposes, the rentals belong to the surviving spouse, and not to the heirs of the deceased spouse.—Williams v. Davis, Tex.Civ.App., 133 S.W.2d 275.

Lease of homestead as constituting abandonment see infra § 273.

Pending election to take distributive share

(1) A surviving wife may enjoy the rents and profits accruing from the homestead from the time of her husband's death until her election between the homestead and a distributive share.—Cunningham v. Gamble, 10 N.W. 278, 57 Iowa 46.

(2) Election between homestead and distributive share see supra § 252.

Rental from property other than homestead

In order to compel a surviving husband to account for rents and profits the heirs must show that he had used and rented out more than the acreage allowed him by law as a homestead.—Roberts v. Roberts, Tex.Civ.App., 278 S.W. 937.

Decree assigning rents in lieu of dower

Where suit was filed by widow against deceased's daughter to have widow's dower and homestead set off in property, and circuit court took jurisdiction, and widow and daughter were fully heard on the issues, the court could properly enter a decree assigning to widow, in lieu of dower, one third of net rents and profits from property in question as a tenant in common with daughter, and the decree was not subject to collateral attack by daughter in widow's subsequent suit for an accounting for rents claimed under such decree.—Chapman v. Chapman, 25 N.E.2d 92, 303 Ill.App. 340.

3. Ark.—Wood v. Wood, 157 S.W.2d 36, 203 Ark. 344.—Butler v. Butler, 2 S.W.2d 63, 176 Ark. 126.—Russell v. Berry, 67 S.W. 864, 70 Ark. 317.—Stull v. Graham, 31 S.W. 46, 60 Ark. 461.

Right of children to rents and profits see infra subdivision e (2) (b) of this section.

Liability of heir in possession for rental value

(1) Where heir in unlawful possession of homestead and dower rights of widow removed timber from the land, chancery court properly preserved the principal amount received from the wrongful sale of the timber for the heir with directions that it be loaned out and interest paid to the widow.—Wood v. Wood, 157 S.W.2d 36, 203 Ark. 344.

(2) Where heir was in unlawful possession of homestead of widow, chancery court's allowance of fifty dollars a year for rents was not contrary to clear preponderance of evidence in widow's suit to recover possession and rental value of the property.—Wood v. Wood, supra.

4. Miss.—Bohn v. Bohn, 5 So.2d 429, 193 Miss. 122, appeal dismissed 62 S.Ct. 1283, 316 U.S. 646, 86 L.Ed. 1730.—Martin v. Martin, 36 So. 523, 84 Miss. 553.

Or.—In re Baker's Estate, 67 P.2d 185, 156 Or. 256.

Occupancy pending election to take distributive share

Iowa.—Crouse v. Crouse, 259 N.W. 443, 219 Iowa 736.—Fraizer v. Fraizer, 207 N.W. 772, 201 Iowa 1311.—In re Baker's Estate, 145 N.W. 898, 164 Iowa 305.

5. Miss.—Bohn v. Bohn, 5 So.2d 429, 193 Miss. 122, appeal dismissed 62 S.Ct. 1283, 316 U.S. 646, 86 L.Ed. 1730.

Rights of heirs as against surviving spouse see supra § 264.

6. Iowa.—Crouse v. Crouse, 259 N.W. 443, 219 Iowa 736.

7. Tex.—Mattingly v. Kelly, Civ.App., 124 S.W. 483.

8. Tex.—Petrus v. Cage Bros., Civ.App., 128 S.W.2d 537, error refused.

Mining rights and royalties
- Life tenant see Estates § 42
- Tenant
  - By curtesy see Curtesy § 17
  - In dower see Dower § 111 c

Coal

Where deceased husband had opened coal mines on the homestead the widow, continuing to occupy the homestead with her children, was entitled to lease the mines and collect the rent under Const.1874, art. 9, § 6, providing that "the rents and profits thereof shall vest in her during her natural life".—Russell v. Berry, 67 S.W. 864, 70 Ark. 317.

9. U.S.—Baze v. Scott, D.C.Okl., 24 F.Supp. 806.

Ark.—Butler v. Butler, 2 S.W.2d 63, 176 Ark. 126.—Warren v. Martin, 272 S.W. 367, 168 Ark. 682.

Okl.—Humbree v. Magnolia Petroleum Co., 56 P.2d 851, 176 Okl. 524.—Lusk v. Carter Oil Co. of West Virginia, 53 P.2d 656, 172 Okl. 508.—Tarman v. Pierce, 33 P.2d 203, 168 Okl. 348.—Lawley v. Richardson, 223 P. 156, 101 Okl. 40, 43 A.L.R. 803.

Tex.—White v. Blackman, Civ.App., 168 S.W.2d 531.

ment of the homestead the surviving spouse is no longer entitled to collect and retain all the rents, profits, and royalties [10] In some jurisdictions, where the homestead right of a surviving wife is a mere right of occupancy, she has only a right to use the surface of the land and is not entitled to oil produced from the land or the proceeds thereof or entitled to take over and operate wells that are producing and appropriate the oil that may be produced during her occupancy [11]

(b) Rights of Children

The homestead right of the surviving children usually entitles them to share in the rents and profits of the homestead

The right given to the surviving minor children of joint occupancy of the homestead with the surviving parent, see supra § 255, usually entitles them to the rents and profits of the homestead, or a portion thereof,[12] but, as against the surviving parent, their right of joint occupancy does not entitle them to all the rents and profits [13] In some jurisdictions the constitution or statutes expressly provide that the children, during their minority, shall share with the widow in a certain portion of the rents and profits [14] Where the children are entitled

Effect of application for widow's allowance

Widow's application for support without mentioning royalties from oil and gas wells developed on homestead under lease executed by husband did not estop widow to claim royalties, where they were withheld from her by lessee because of executor's claim thereto —Tarman v Pierce, 33 P 2d 203, 168 Okl 348

10 Okl —Lusk v Carter Oil Co of West Virginia, 53 P 2d 656, 172 Okl 508

11. Lease executed by adult children

Ky - Brandenburg v Petroleum Exploration, 291 S W 757, 218 Ky 557

12 Mo -- Gorman v Hale, 82 S W 1110, 109 Mo App 176

29 C J p 1008 note 89

Enforcement and protection of rights of children see supra § 258

Child voluntarily leaving and remaining away from homestead cannot recover from the widow a proportionate share of rents received by her during her temporary removal from the land, where the child's right of joint occupancy has never been denied Burns v Falls, 56 S W 576, 23 Tex Civ App 386

Where child has abandoned rights to rents and profits, he cannot object to a widow's fee simple title acquired by her purchase at foreclosure and redemption sales and paid for by rents and profits derived from the homestead —Kyle v Wills, 46 N E 1121, 166 Ill 501

Recovery after attaining majority

(1) If a child attains majority before obtaining a decree for his proportion of rents and profits, he may recover such portion as should have been paid to him during his minority —Hutschmidt v Gross, 20 S W 679, 112 Mo 649

(2) However, it has been held that after minor beneficiaries have arrived at majority, they cannot maintain an action against one who wrongfully excluded them from the possession during their minority and took the rents and profits for his own use, their right as beneficiaries having become extinct by lapse of time, they have no claim as beneficiaries, and consequently no title, legal or equitable, on which they can recover — Moore v Peacock, 21 S E 114, 94 Ga 523

13 Ill —Carr v Carr, 52 N E 732, 177 Ill 454

14. Ark —Butler v Butler, 2 S W 2d 63 176 Ark 126—Russell v Berry, 67 S W 861, 70 Ark 317 -- Sparkman v Roberts, 31 S W 742, 61 Ark 26

Failure to assign dower

The widow cannot defeat an action by the infant children to recover their share of the rents and profits by showing that no dower has been assigned to her - Winters v Davis, 11 N W 420, 51 Ark 335

Abandonment by widow

If the wife abandons her right by executing a conveyance of the land to a third person, her right vests in the children but not before such abandonment —Stubbs v Pitts, 104 S W 1110, 84 Ark 160

Right of children to recover widow's portion

The fact that a widow has lost the right to recover her portion of the rents either through laches or limitations does not vest the right to recover such rents in the children until they have recovered possession of the homestead from the adverse holder --Stubbs v Pitts, supra

When children attain majority all the rents and profits go to the surviving wife —Winter v Davis, 11 S W 120, 51 Ark 335

Increased rent by reason of improvements

Minors are not liable for permanent and valuable improvements placed on their homestead, nor can the occupant of the homestead be lawfully charged an increased rent on account of improvements, and, in the absence of a contract, the occupant may be allowed a reasonable compensation for necessary repairs only and is chargeable with such rents as the premises will yield without improvements —Warren v Henson, 283 S W 19 171 Ark 162—Gatlin v Lafon, 129 S W 281, 95 Ark 253 —Sparkman v Roberts, 31 S W 742, 61 Ark 26

Rights as affected by curtesy of surviving husband

(1) Minor children were entitled to cash payment for oil and gas lease and all royalties derived from deceased mother's homestead during their minority, as against tenant by curtesy consummate —O'Connell v Sewell 87 S W 2d 985, 191 Ark 707

(2) Funds arising from oil and gas lease on Arkansas land in which infants had fee and homestead estate during minority and infants' father had right of curtesy were required to be considered as corpus, the fee of which was in infants and income from which should be applied to the homestead and curtesy estates during their existence —Sewell v Sewell, 1 N E 2d 492 363 Ill 166

(3) Presumption existed that Arkansas probate court approved the lease of oil lands, on behalf of infants having homestead estate for the benefit of the entire estate and in the anticipation that oil produced would be considered a part of land —Sewell v Sewell supra

In Alabama

(1) Under Code 1907 §§ 4196, 4227, providing that the widow and minor children are to be equally benefited by the rents and profits of the homestead, if the family is a collective unit, as is nearly always the case, courts will presume a legislative intent that the rents and profits shall be collectively administered by the widow as natural guardian of the minor children, and in such a case a specific admeasurement and appropriation of shares is manifestly impracticable as well as inexpedient — Strong v Ford, 82 So 121 203 Ala. 110, 111—29 C J p 1008 note 6

(2) On the other hand, when the family is not an essential unit, as where one or more members are strangers in blood and in law to the widow, the situation is entirely

to the rents and profits of the homestead, or a portion thereof, they may recover rent from a purchaser of the premises,[15] or from a devisee of land devised by the father who took and retained possession thereof, including land in which the minor children had a homestead.[16]

Where the minor children have no homestead right as against the surviving parent, they are not entitled to any of the rents, profits, or income from the homestead during occupancy by the surviving parent,[17] but they may under certain homestead provisions be entitled to the rents and profits during their minority on the death of the surviving parent,[18] unless the right to such rents and profits has been legally destroyed by the acts of such parent.[19]

Under lease from decedent If rents fall due after the father's death, they may be claimed by the children,[20] but if they repudiate the lease they can recover only the rental value of the premises, less necessary expenditures made by the lessee for repairs and taxes.[21]

§ 266. Property Subject to Appropriation, Nature, Amount, and Extent

The property subject to the survivor's homestead, the nature of the estate or interest of decedent, an allowance in lieu of homestead, and the extent and value of the homestead are discussed infra §§ 267–270. Property constituting the homestead generally is considered supra §§ 52–92.

Examine Pocket Parts for later cases.

§ 267. —— Property Subject to Appropriation

a In general
b Property used as family residence
c Property not impressed with homestead character during decedent's lifetime

a. In General

Unless otherwise provided by statute, the surviving spouse or children may claim as a homestead only such property as the decedent had selected or could have selected as a homestead.

Since their claim is a derivative one,[22] the rule is, except as it may be otherwise provided by statute, that on the death of a homesteader the surviving spouse, or the surviving spouse and children, as the case may be, under the right of survivorship, succeed to homestead rights only of decedent to which he was entitled at the time of death, and can claim as a homestead only such property as decedent had selected or which could have been selected as a homestead.[23]

changed and there is neither reason nor necessity for a collective consumption of the joint income, and accordingly where neither of the coexemptioners occupies the land and one of them is a stepchild, living, not with the widow, but with a guardian, the widow may be required to pay over to the stepchild his share of income from the property as it is collected by her —Strong v Ford, supra
29 C J p 1008 note 8

15. Ark —Nichols v Shearon, 4 S W 167, 49 Ark 75
29 C J p 1008 note 91

16. Ill —Cox v Johnson, 89 N E 697, 242 Ill 159

17. Tex —Whiteman v Burkey, Civ App, 286 S W 350, conforming to answer to certified question 282 S W 788, 115 Tex 400

18 Okl —Lusk v Carter Oil Co of West Virginia, 53 P 2d 656, 172 Okl 508

19. **Oil and gas royalties**
Right of occupancy of homestead only vested in children on widow's death, unaccompanied by right to use oil and gas royalties as incident thereto, where widow, who was previous homestead occupant, had waived right to such royalties —Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 524.

20 Tex —Porter v Sweeney, 61 Tex 213

21. Ark —Shapard v Mixon, 184 S W 399, 122 Ark 530
29 C J p 1008 note 98

22. Ark —Spaulding v Haley, 142 S W 172, 101 Ark 296
Ky —Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823
Interest of wife or children during life of person acquiring homestead see supra § 4

23. Ala —Moseley v Neville, 129 So 12, 221 Ala 429—Chambliss v Derrick, 112 So 330, 216 Ala 49
Ky —Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823
N D —Cullen v Sullivan, 199 N W 760, 762, 51 N D 384
Tex —Crow v First Nat Bank, Civ App, 64 S W 2d 377, error refused —Gould v Gresham & Son, Civ App, 247 S W 316
29 C J p 1020 note 47
Property constituting homestead see supra §§ 52–92

Where decedent had no homestead or it had terminated prior to his death, there can be no homestead rights to be continued in favor of the surviving children —Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823—29 C J p 1004 note 5, p 996 note 54 [a].

No right of possession of lands other than decedent's homestead passes to widow under her homestead right, whether for life or in fee, until it is set apart to her in course of administration, under Code 1923 §§ 7919, 7930, 7931 7932, or without administration under § 7948 —Lester v Stroud, 103 So. 692, 212 Ala 635

Adjoining lots
(1) Where premises consisted of two adjoining lots in unincorporated village on one of which was dwelling occupied by deceased and his family while on the other was a building in which deceased conducted a tavern and dance hall, and value of both lots was less than five thousand dollars, widow was entitled to have both lots assigned as "homestead" of deceased, notwithstanding deceased was conducting a business on one of lots —In re McKenzie's Estate, 287 N W 695, 232 Wis 425

(2) Adjoining lots or tracts as property constituting homestead see supra § 64

Contiguous tract divided by highway
(1) Where products of land rented to daughter and son by owner to enable them to be near him and help to maintain his home were used for support and enjoyment of owner living on contiguous tract separated from rented land only by unfenced

Property not claimable. Applying the rule stated supra this subdivision note 23, it has been held that the survivor or survivors by reason of survivorship cannot claim or select a homestead out of property which decedent had never selected as a residence and which he had properly disposed of by will,[24] out of specific property in which decedent had lost homestead rights by removal and failure to claim as exempt,[25] or by otherwise abandoning it,[26] or out of property which decedent had conveyed in the manner prescribed by the homestead laws[27] Where a married woman borrows money for her separate use, and gives a mortgage therefor on her paraphernal property, she cannot afterward, on death of her husband, acquire a homestead right in the property to the prejudice of the mortgagee[28]

Property claimable. Under the rule stated supra this subdivision note 23, it has been held that the survivor or survivors may claim or select by right of survivorship a homestead in property purchased and occupied by decedent for a home,[29] although decedent may have left it temporarily on account of sickness,[30] in property occupied as a residence by the family and conveyed by decedent to his wife to avoid creditors, although never formally designated by him as a homestead,[31] in homestead property conveyed by decedent without consent of the spouse,[32] in property devised by a husband to his wife for life and in trust for their minor children,[33] in property rented in part to tenants,[34] or in property which had been set off to decedent during the lifetime of his former wife[35]

Property used as business homestead Where a homestead exemption may be claimed in a business homestead, see supra § 40, a surviving wife by right of survivorship is entitled to exemption in her deceased husband's business homestead[36]

Property owned jointly, separately, or in community In the absence of statutory provisions to the contrary, it is immaterial whether the title to the homestead property at the time of decedent's death was in the name of the husband or of the wife[37]

road rented land was "used for purposes of home" so as to entitle owner's widow to homestead therein—Youngblood v Youngblood, 76 S W 2d 759, 124 Tex 184, modifying, Civ App, 46 S W 2d 390

(2) Lot or tract divided by highway or street as constituting homestead see supra § 66

Separate and detached parcels

(1) Whether houses and lots were part of homestead of widow depended largely on character of buildings and uses to which they were adapted and devoted—Griffin v Ayers, 165 So 593, 231 Ala 493

(2) A city lot not connected with a homestead in any manner cannot be set apart for the widow as exempt—Thompson v Miller, 85 So 689, 204 Ala 502

(3) Where two or more tracts of land are claimed as a probate homestead by a surviving spouse, the proof must show actual occupancy or express intention of deceased owner to occupy one tract, and facts and circumstances of using the other tract or tracts, or an intention to use such tract or tracts, in connection with the occupied tract, in the interest and for the benefit of the family, where eighty-acre tract of farm land, which was approximately two miles from thirty-seven-acre tract occupied by owner of both tracts, was leased to tenants, fact that income from eighty-acre tract was used for benefit of owner's family was insufficient to indicate an intention on owner's part to select eighty-acre tract as part of homestead—Powell v Powell, 116 P 2d 889, 189 Okl 255

(4) Separate and detached parcels of land as constituting homestead see supra § 65

Part of lot or tract

(1) The surviving spouse may not select a fraction of a lot in a way and manner which show a disregard for the rights of judgment creditors—McGaffey v Mulkey, 241 P 480, 115 Okl 44

(2) Part of lot, tract, or building as constituting homestead see supra § 67

24. Wash—In re Eyres, 34 P 831, 7 Wash 291
Effect of testamentary disposition see supra §§ 243, 257 b, 259
Property used as family residence see infra subdivision b of this section

25. Minn—Bailif v Galpin, 41 N W 1059, 40 Minn 172

26. Tex—Drew v Wooten, 66 S W 331, 27 Tex Civ App 456

27. Ala—Love v Lee, 75 So 24, 199 Ala 676

28. La—Percy v Ewing, 69 So 852, 137 La 1100

29. N D—In re Telten's Estate, 249 N W 913, 63 N D 729
Wis—In re Bresnehan's Will, 265 N W 93, 221 Wis 51
29 C J p 1020 note 56

30. Idaho—In re McVay, 93 P 28, 14 Idaho 56

31. Ark—Bennett v Hutson, 33 Ark 762

32. N H—Atkinson v Atkinson, 37 N H 434

33. Ga—Bridwell v. Bridwell, 76 Ga 627

34. Mo—Albrecht v Imbs, 3 Mo App 587.

Apartment house

That building in which spouses lived at time of wife's decease was apartment house did not preclude husband from exercising right to have homestead set aside to him in such building—In re Baker's Estate, 20 P 2d 1069, 142 Or 559

Lease for business purposes

(1) If widow occupied portion of house owned by her deceased husband at time of his death as her home, fact that widow leased remainder of house for business purposes would not deprive her of homestead rights in such property—In re Laughlin's Estate, Or, 134 P 2d 961

(2) Two-story building, notwithstanding part of first floor was occupied by tenants who conducted retail merchandise business, was subject to homestead exemption claimed by surviving widow—In re Telten's Estate, 249 N W 913, 63 N D 729

35. Tenn—Pulaski Nat Bank v. Shelton, 11 S W 95 87 Tenn 393

36. Tex—Evans v Pace, 51 S W. 1094, 21 Tex Civ App 368

37. N D—Meidinger v Security State Bank of Medina, 213 N W 850, 55 N D 301—Healy v Bismarck, 153 N W 392, 30 N D 628
S D—Wells v Sweeney, 94 N W 394, 16 S D 489 102 Am S R 713
29 C J p 1009 notes 28, 29
Nature of estate or interest transmitted see supra § 265
Right of heirs see supra § 264

Title taken in daughter's name

Where a house adjoining the family home was acquired in 1909 and used in part by the family as their home, it became impressed with homestead character and exemption,

Thus it has been held that a homestead right may be enjoyed by a surviving spouse on property belonging to the separate estate of the deceased spouse[38] and that the surviving spouse succeeds to homestead rights in community property[39] If the husband and wife own contiguous tracts, both occupied as a homestead, with the dwelling on the latter's land, she may have a homestead right in the husband's tract on his death.[40] Property in the name of the wife but occupied as a homestead at the husband's death may continue to be impressed with the homestead character in favor of the surviving wife,[41] and a surviving wife may possess a homestead right in an estate held by the entirety[42] although it has been held that a widow is not entitled to a homestead in premises of which she was joint owner with her husband[43]

Minor children continue to enjoy the homestead, whether the land belonged to their deceased father or mother;[44] but it has been held that, where the property belonged to both parents, and a second wife obtained the husband's one half as alimony, the children of the first marriage were not to be entitled thereto as a homestead,[45] and also that, where surviving children have a homestead fixed and determined during the lifetime of their deceased parent on community property, they cannot secure an exemption in his separate estate[46]

Proceeds of sale of property In the absence of statutory authorization, the survivor or survivors cannot claim or select by reason of survivorship a homestead out of the proceeds of the sale of lands other than lands that had been or could have been selected by decedent as a homestead[47] Where the survivor voluntarily sells the homestead, the proceeds of the sale are not exempt[48] unless they are made exempt by statute,[49] but the proceeds are ex-

and after destruction of the home by fire and the house was the sole dwelling place of the family its homestead character was unquestionable, even though the title in 1909 was taken in the name of an unmarried daughter and after the death of the mother the land was voluntarily partitioned by the father among three daughters reserving, however, the right to live with them, and exacting a contract for support from them for the remainder of his life — Hutchenrider v Smith Tex Com App 242 S W 204, reversing, Civ App, 228 S W 989

38. Tex —Lindsley v Lindsley, 163 S W 2d 633, 139 Tex 512, reversing Civ App 152 S W 2d 415

Surviving husband may have homestead right in separate estate of deceased wife —Thomas v Tyler, Tex Com App, 6 S W 2d 350 rehearing denied 9 S W 2d xxiii —Buse v Buse, Tex Civ App, 287 S W 141

Wife and children may lawfully claim homestead rights in husband's and father's separate estate - Milliken v Coker, Civ App, 90 S W 2d 902, modified on other grounds 115 S W 2d 620, 132 Tex 23

39. La —Tinney v Vittur, 64 So 407, 134 La 519
Tex —Pleasant v Sanders, Civ App, 46 S W 2d 1045 —Oakwood State Bank of Oakwood v Durham, Civ App, 21 S W 2d 586
29 C J p 994 note 14 [a] (4)

Second wife

A homestead by right of survivorship may be allowed to a second wife and her child in the husband's moiety of community property which was a homestead under the first marriage, subject to the right of partition by the heirs of the first wife.—West v. West, 29 S W 212, 9 Tex Civ App 475

40 Ky —Buckler v Brown, 39 S W 509 825, 101 Ky 46, 19 Ky L 85
29 C J p 1021 note 44

41. Colo - Chipin Lumber Co v Day, 103 P 2d 14, 106 Colo 194
N D —Healy v Bismarck Bank, 153 N W 392, 30 N D 628

42. Mo —Ahmann v Kemper 119 S W 2d 256 342 Mo 941

43. Ohio - Stegeman v Riede, 26 Ohio N P N S, 221

44. La --Coleman's Succession 27 La Ann 289

45 Ohio —Rinehart v Rinehart, 6 Ohio Dec, Reprint, 907, 8 Am L Rec 654

46. Tex — McAlister v Farley 39 Tex 552

47. Ala —McGaugh v Davis, 13 So 715 150 Ala 558
29 C J p 1020 note 71.
Proceeds of
Involuntary conversion generally see supra §§ 73–75
Voluntary sale generally see supra § 71
Sale in lieu of realty see infra § 269 b

48. Iowa —Kinzer v Stephens, 96 N W 858, 121 Iowa 347
Alienation of homestead as abandonment see supra §§ 254, 286

Heirs

The homestead exemption inuring to the issue or heirs of husband or wife from antecedent debts of their parents or their own, see supra § 265 d, does not, in the absence of statute or proof that the heirs were intending to invest the proceeds in another homestead, attach to the proceeds of a voluntary sale —Kinzer v Stephens, supra

Surplus proceeds of mortgage foreclosure sale

(1) Equity of redemption from mortgage foreclosure sale of realty under power of sale is estate capable of descent as realty and subject to homestead rights, so that surplus proceeds of such sale after mortgagor's death are exempt from payment of decedent's debts and not subject to set-off of another debt to same mortgagee as on personal property mortgage —Roy v Roy, 172 So 253, 233 Ala 440

(2) However, it has been held that a widow who had joined with her husband in a deed of trust cannot have homestead in the surplus proceeds of a foreclosure sale made by the trustee under a power of sale — Woerther v Miller, 13 Mo App 567

(3) Surplus proceeds of foreclosure sale as assets of decedent's estate see Executors and Administrators § 110 b

49. Miss Bank of Myrtle v Garrison, 181 So 291 183 Miss 526
Tex —Ingram v Summers Civ App, 29 S W 2d 447, error dismissed

Exemption under conditions prescribed

The proceeds of the sale are not exempt under a statute allowing an exemption for a limited period of time where the conditions prescribed by the statute do not exist —Ridling v Murphy, Tex Com App, 228 S W 165—29 C J p 1007 note 71

Custom among real estate agents and brokers cannot govern widow's right to claim exemption as to proceeds of homestead —Ingram v Summers, Tex Civ App., 29 S.W 2d 447, error dismissed.

empt for a reasonable time where the sale is involuntary.[50]

Under some statutes, where decedent has converted the homestead into money for reinvestment in a home, but dies before effectuating his purpose, the widow is entitled to receive the proceeds as against creditors of the husband for investment in the homestead for herself and children.[51]

New homestead Where the statute so provides, a new homestead is exempt where it has been purchased by the surviving spouse with proceeds derived from her sale of the old homestead.[52]

Exchange of property The surviving wife has been allowed her homestead right in property exchanged for the homestead.[53]

b. Property Used as Family Residence

Under some homestead provisions the property set apart to survivors must have been used by the decedent as a place of residence at his death

Except as it may be provided otherwise by statute,[54] the property set apart to survivors must have been used by decedent as a place of residence at the time of death,[55] at least in jurisdictions where use of the property as a family residence is necessary to the acquisition of a homestead, see supra §§ 32–41, 54, although it has been held that, if decedent had only a life estate in the portion on which the dwelling stood, the widow may claim a homestead in the remaining portion of the tract, owned by him in fee.[56]

c. Property Not Impressed with Homestead Character during Decedent's Lifetime

Unless required by statute, the property claimed by a survivor need not have been impressed with the homestead character during the decedent's lifetime

Under some homestead statutes the property claimed by a survivor must have been impressed with the homestead character during decedent's lifetime,[57] but under others this is unnecessary.[58]

§ 268. —— Nature of Estate, Ownership, or Interest of Decedent

Homestead rights may be acquired by the survivors only in property in which decedent had some interest or estate at the time of his death, although the estate need not have been a fee simple

It has been held that homestead can be acquired by the survivors only in property of which decedent died seized,[59] or in which decedent had some in-

50. Condemnation for public use

Where property occupied by the survivors is exempt as a homestead and a portion of it is condemned for public purposes, the survivors are entitled to the proceeds of the condemnation exempt from the creditors of the husband.—Brooks v Collins, 11 Bush Ky, 622

Sale to Tennessee Valley Authority of land left by intestate and set apart to widow as homestead, which sale was approved by chancellor, was not a voluntary sale, since the authority could have condemned the land, and entire fee and homestead estate passed to the authority, the whole fund realized from the sale represented the land itself and was impressed with widow's homestead right.—Hutcheson v Hutcheson, 143 S W 2d 886, 176 Tenn 468

Heirs

Proceeds of heir's interest in homestead sold to pay indebtedness of estate were exempt from garnishment for preexisting judgments against heir.—Oskaloosa Nat Bank v Jamison, 218 N W 29, 205 Iowa 349

51. Iowa.—Schuttloffel v Collins, 67 N W 397, 98 Iowa 576, 60 Am S R 216

52. Iowa.—Magel v Hunt, 265 N W 119, 221 Iowa 199

Surviving spouse as "owner"

A surviving husband who has acquired the benefit of the wife's homestead on her death is an "owner" under a statute permitting an owner to change his homestead.—Green v Root, D C Iowa, 62 F 191

Homestead taken as distributive share

(1) Right to change homesteads by selling one and investing proceeds in another, under Code § 2981 is available to surviving wife who took homestead as distributive share, under § 3167.—American Nat Bank of Alamosa, Colo v Wetherell, 200 N W 221, 198 Iowa 648

(2) Election by widow between homestead and distributive share see supra § 252

53. Exchange made by second husband

Where the widow elected to take homestead right in land of her first husband, and second husband exchanged such land for other land widow's homestead interest attached to tract conveyed to her second husband in exchange, and her children had a remainder interest in the same, preceded by widow's homestead right.—Rowe v Blair, 299 S W 571, 221 Ky 685

54. Cal.—In re Henningsen's Estate, 247 P 1082, 199 Cal 103

29 C J p 1020 note 74

Homestead right of surviving wife as dependent on occupancy by husband see supra § 243

Flats occupied by tenants, wherein neither spouse resided, were properly set apart as homestead to surviving spouse.—In re Henningsen's Estate, 247 P 1082, 199 Cal 103

55. Ala.—Rash v Bogart, 146 So 811, 226 Ala 284.—Lester v Stroud, 103 So 692, 212 Ala 635

29 C J p 1021 note 75

56. Mo.—Brown v Stratton, 8 Centr. L J 46

57. Tex.—Meyers v Riley, Civ App, 162 S W 955

29 C J p 1021 note 79

Impressing property with homestead character generally see supra §§ 29–51

58. Wash.—McMillan v Mau, 23 P. 141, 1 Wash 26

29 C J p 1021 note 80

59. N H.—Horn v Tufts, 39 N H. 478

29 C J p 1021 note 82

Estate, ownership, or interest to support homestead see supra §§ 78–92

"Seized" within meaning of statute

Under statute providing that, when any person dies "seized" of a homestead and leaving a widow or husband, such widow or husband shall be entitled to the homestead, the death of either husband or wife who has occupied a homestead does not destroy the homestead right in the survivor so long as the survivor resides upon the property, the word "seized" meaning the right of possession which inheres in both husband and wife in case of a home-

terest or estate at the time of death,[60] and that he should have had at least such an interest as could ordinarily be sold by his personal representative for the payment of debts.[61] Hence it has been held that a survivor succeeds to no homestead interest or right in property which decedent was merely holding adversely,[62] or as a tenant at will,[63] which decedent had conveyed reserving a mere right of occupancy,[64] which had been sold on execution before the death of the homesteader,[65] or which had been transmitted by inheritance to the children of a former wife;[66] nor does the survivor succeed to an interest in property in which decedent's estate is merely a remainder expectant on the death of his mother.[67]

Fee simple estate. It is not essential that the estate or interest of decedent should have been a fee simple.[68]

Equitable estate or interest. An equitable estate in decedent will support a claim of homestead in his survivors,[69] and it has been so held in respect of an equitable title acquired under a contract of purchase,[70] or the equity of redemption of mortgaged premises;[71] and the fact that only part of the purchase price under the contract of purchase had been paid at the time of decedent's death is immaterial.[72] However, if decedent had merely an equitable title under an executory contract for the purchase of land and his equitable estate thereunder had become extinguished, the survivor acquires no right of homestead in the land.[73]

Tenancy in common, partnership interest. If decedent was a tenant in common, his surviving children and his widow obtain rights of exemption in the property in jurisdictions in which a homestead may be acquired in property so held.[74]

No homestead by right of survivorship, it has been held, can be claimed in partnership property, at least while firm debts remain unpaid,[75] although in some jurisdictions a partner may acquire a business homestead in partnership property and the survivors take the property free of individual and firm debts.[76]

Leasehold estate. It has been held that a homestead can be claimed by a survivor in leasehold property,[77] although there is also authority to the

stead—Chapin Lumber Co. v. Day, 103 P.2d 14, 106 Colo. 194

60. Ga.—Jemison v. Anderson, 94 S.E. 241, 147 Ga. 405
Tex.—Smith v. Uzzell, 61 Tex. 220
29 C.J. p. 1021 note 83

61. Ala.—Bolling v. Jones, 67 Ala. 508
Kan.—Vanek v. Vanek, 184 P. 731, 105 Kan. 388

62. N.C.—Atwell v. Shook, 45 S.E. 777, 133 N.C. 387

63. Miss.—Berry v. Dobson, 10 So. 45, 68 Miss. 483

64. Ill.—Hertz v. Buchmann, 53 N.E. 67, 177 Ill. 553

65. La.—Murphy v. Rulh, 24 La. Ann. 74

66. Tex.—McDougal v. Bradford, 16 S.W. 619, 80 Tex. 558—Gilliam v. Null, 58 Tex. 298

67. Tenn.—Howell v. Jones, 19 S.W. 757, 91 Tenn. 402

68. Ky.—Howard v. Mitchell, 105 S.W.2d 128, 134, citing **Corpus Juris.**
29 C.J. p. 1021 note 91

69. Cal.—In re Reid's Estate, 79 P.2d 451, 26 Cal. App.2d 362
29 C.J. p. 1021 note 92
Homestead in equitable estate see supra § 81

70. Cal.—In re Reid's Estate, 79 P.2d 451, 26 Cal. App.2d 362
29 C.J. p. 1022 note 93

71. Ala.—Roy v. Roy, 172 So. 253, 233 Ala. 440—Tiger v. Holcsapple, 146 So. 614, 226 Ala. 271.
29 C.J. p. 1022 note 94.

72. Ark.—Spaulding v. Haley, 142 S.W. 172, 101 Ark. 296
Cal.—In re Reid's Estate, 79 P.2d 451, 26 Cal. App.2d 362

73. Ark.—Rhodes v. Porter, 154 S.W. 510, 107 Ark. 222
N.D.—Ferris v. Jenson, 114 N.W. 372, 16 N.D. 462
29 C.J. p. 1022 note 96

74. Ala.—Chambliss v. Derrick, 112 So. 330, 216 Ala. 49
29 C.J. p. 1022 note 97
Tenancy in common as sufficient to support homestead see supra § 88

In California

(1) The probate court on petition must set aside to the surviving spouse a homestead for her use out of her deceased husband's undivided interest in realty held by decedent and a third person as tenants in common.—In re Kachigian's Estate, 128 P.2d 865, 20 Cal.2d 787, prior opinion, App., 121 P.2d 869

(2) Formerly the probate court could not designate a homestead in such property for the use of the family of one of the owners after his death.—In re Carraghar's Estate, 183 P. 161, 181 Cal. 15—29 C.J. p. 1022 note 98

(3) Formerly it was held that property held as partnership assets could not be set apart by the probate court as a homestead to the widow of the deceased member of the firm.—Kingsley v. Kingsley, 39 Cal. 665

In Louisiana in the constitution of 1879 it was expressly provided that the benefit of the homestead exemption might be claimed by the surviving husband or wife or minor children of the deceased beneficiary and the same provision was retained in the constitutions of 1908 and 1913. Hence it follows that although, as a general rule, the owner of an undivided interest in property is not entitled to the homestead exemption, the surviving husband or wife of a deceased beneficiary is entitled to the benefit of the homestead exemption of community property by an express provision of the constitution.
U.S.—In re Bennett, D.C.La., 33 F.2d 135
La.—Adams v. McCoy, 72 So. 797, 140 La. 26
29 C.J. p. 991 note 14 [a] (5)

75. Miss.—Robertshaw v. Hanaway, 52 Miss. 713
Homestead in partnership property see supra § 89

76. Solvent partnership
Property purchased by solvent partnership, and used by then solvent partner, head of family, as business homestead, was exempt from partner's firm or individual debts, at partner's death leaving minor children as constituent members of his family.—Hall v. Morton, Tex. Civ. App., 39 S.W.2d 903, error refused

77. Okl.—Miller v. Farmers' State Bank of Temple, 279 P. 351, 137 Okl. 183
29 C.J. p. 1022 note 5.

contrary[78] If the lease has expired, the widow cannot extend it by a claim of homestead[79]

Property held in trust. If the property was held in trust by decedent, the survivor succeeds to no homestead rights therein[80]

§ 269. —— Allowance in Lieu of Homestead

a. In general
b From proceeds of sale of property
c From other lands

a. In General

Where practicable, an actual homestead in the original homesteader's land should be allotted for the use of the surviving spouse and minor children

From the very definition, nature, and purpose of a homestead, it is the policy of the homestead laws that an actual homestead in the original homesteader's land should be allotted for the use of the surviving spouse and minor children in every instance where practicable[81] Ordinarily, therefore, neither a money allowance[82] nor other land of decedent[83] will be given to the survivors in lieu of the homestead property of decedent, except where in the circumstances such homestead cannot be given to them,[84] or where there is some special statutory provision authorizing such procedure[85] and in any event great care should be exercised to protect their interests[86] Where an allowance is permitted in lieu of homestead, it should be made out of the debtor's entire estate rather than out of any specific property,[87] although it has been held that it may be made out of proceeds from the sale of real estate, other than the homestead, in the hands of a trustee in bankruptcy[88] A court of equity may decree a portion of the lands, which the widow is entitled to have allotted to her as homestead, in fee simple in lieu of such homestead where she and the adult heirs consent and it clearly appears that such action is to the manifest interest of the minors.[89]

b. From Proceeds of Sale of Property

The survivors ordinarily are entitled to the homestead rather than to the proceeds of a sale thereof

Under the rule stated supra subdivision a of this section, the homestead ordinarily cannot be taken away from a survivor entitled to it and the proceeds of a sale thereof substituted for it,[90] unless under some special statutory authorization the survivor may and does consent to such a proceeding[91] However, while the rule may be otherwise under some homestead provisions,[92] ordinarily where in the nature of things land cannot be set apart as a homestead to the survivors then the law will make provision for them in lieu thereof,[93] and in some

Homestead in leasehold estate see supra § 85

State school lands

Minor children of deceased lessee of state school lands are entitled to homestead therein for unexpired term of lease—Miller v Farmers' State Bank of Temple, supra

78. Ala—Pizzala v Campbell, 46 Ala 35

79. Ill—Brown v Keller, 32 Ill 151, 83 Am D 258

80. Kan—Vanek v Vanek, 184 P 731, 105 Kan 388
Tenn—Kaphan v Toney, Ch A, 58 S W 909
29 C J p 1022 note 7
Homestead in property held in trust see supra § 78

81. Ala—Tiger v Holesapple, 146 So 614, 226 Ala 271
Ky—Taylor v Shelton, 13 S W 2d 506, 227 Ky 473, quoting **Corpus Juris.**
Tenn—Cobb v Pegues, 8 Tenn App 74
29 C J p 1022 note 9
Allowance to surviving spouse or children see Executors and Administrators §§ 323–366

82. Tenn—Mabry v Mabry, 5 Tenn App 307
29 C J p 1022 note 10.

83. Tex—Blair v Thorp, 33 Tex 38

84. Colo—Union Nat Bank of Greeley v Wright, 242 P 54 78 Colo 346
29 C J p 1022 note 12

Where homestead is a life interest only, if the allotment is money in lieu of a homestead the survivor should be given merely the income—Merritt v Merritt, 97 Ill 243

85 Ala—Tiger v Holesapple, 146 So 614, 616 226 Ala 271, citing **Corpus Juris.**
29 C J p 1022 note 13

86. Ky—Thompson v Thompson, 105 S W 1185, 32 Ky L 319

87. Tex—Mabry v Harrison, 44 Tex 286

88. U S—In re Buckingham, D C Ohio, 102 F 972

89. Tenn—Gillespie v Jackson, 281 S W 929, 153 Tenn 150

90. Ky—Taylor v Shelton, 13 S W 2d 506, 227 Ky 473
29 C J p 1022 note 18

91. Ill—Richardson v Trubey, 95 N E 971, 250 Ill 577
29 C J p 1022 notes 19, 20

92. Property not subject to division

(1) Where property of decedent is not capable of proper division the court cannot substitute therefor the payment of money to the widow in lieu of the homestead—In re Noah's Estate, 15 P 290, 73 Cal 590 2 Am S R 834

(2) Where the homestead is indivisible without material injury the surviving husband or wife or minor children, as the case may be, are entitled as against the heirs or devisees, to hold the entire property as a homestead estate, although it exceeds the statutory limit in value.
N D—Calmer v Calmer, 106 N W 684, 15 N D 120
Okl—In re Gardner's Estate, 250 P. 490, 122 Okl 26

93. Ala—Tiger v Holesapple, 146 So 614, 226 Ala 271
Colo—Union Nat Bank of Greeley v Wright, 242 P 54 78 Colo 346
Or—In re Baker's Estate, 20 P 2d 1069, 142 Or 559
Tex—McCanless v Devenport, Civ. App., 10 S W 2d 903
29 C J p 1023 note 22

Where mortgage covered homestead and nonhomestead lands, the mortgagor's widow was entitled to have the equity of redemption in the entire encumbered property sold, and the proceeds not exceeding two thousand dollars decreed to her in lieu of her homestead, where it appeared that the homestead right would be of no value in excess of the encumbrances unless burden was imposed on other lands covered by the mort-

jurisdictions it is so provided by statute [94] Under some statutes where the husband owned no homestead property, an allowance in money may be made the widow in lieu thereof,[95] but under other statutes no such allowance may be made where these circumstances exist [96] In some jurisdictions, apparently without reference to other statutes, it has been held that, where land allotted to the widow is of less value than the exemption fixed by statute, she will be entitled to have proceeds of the sale of other property of the estate to an amount sufficient to make up the shortage set apart to be invested for her benefit,[97] and that, where in the course of administration land of deceased is sold to pay his debts without the widow having made application to set off a homestead, the creditors will not be entitled to the entire fund but the court may grant an allowance to the widow out of the proceeds in lieu of homestead [98]

Tender of money or security for payment. In order to authorize the sale of the homestead property when it is indivisible, it is not necessary that the value of the homestead right be tendered to its owner before a sale can be made; it is sufficient if the payment is secured to be made from the proceeds of the sale before surrender of possession [99]

c. From Other Lands

Pursuant to statutory authorization, the homestead may be given to the survivors in other lands of the decedent

In the absence of statutory authorization the survivor or survivors by reason of survivorship ordinarily cannot claim or select a homestead out of decedent's lands other than lands which he had or could have claimed or selected as a homestead during his life [1] However, under some homestead provisions the homestead may under some circumstances be given in other lands of the decedent [2]

gage—Childs v Julian, 2 So 2d 453, 241 Ala 249—Tiger v Holesapple, 146 So 614, 226 Ala 271

Using proceeds of other property to make up deficiency

Homestead, to which widow was entitled, not being in condition as to title to be partitioned and used as home, and proceeds alone being insufficient, making appropriations from homestead lot and another lot to make up sufficient homestead allowance was proper—McCanless v Devenport, Tex Civ App, 40 S W 2d 903

Setting apart of homestead by commissioners and confirmation thereof did not affect power of court of equity in due administration of estate, and under widow's concessions or admissions in her pleadings, to sell all lands of estate which embraced homestead in parcels or as a whole, to protect homestead to extent of provisions of statute—Howell v Ward, 161 So 487, 230 Ala 379

94. Ky—Warren v Warren, 104 S W 751, 1199, 126 Ky 692, 31 Ky. L 1101
29 C J p 1023 note 23

95 Tex—Terry v Terry, 39 Tex 310
29 C J p 1023 note 24

96. Ohio—Wolverton v Paddock, 3 Ohio Cir Ct 488, 2 Ohio Cir Dec 279
29 C J p 1023 note 25

97. Ky—Shea v Shea, 72 S W. 7, 24 Ky L 1702

98. Ohio—Evans v Staggaman, 8 Ohio Dec, Reprint, 244, 6 Cinc L Bul 636
29 C J p 1023 note 27

99. Colo—Union Nat Bank of Greeley v Wright, 242 P 54, 55, 78 Colo 346, quoting **Corpus Juris.** Ill—Grote v Grote, 113 N E 967, 275 Ill 206

1. Ala—McCaugh v Davis, 43 So 745, 150 Ala 558

2. Wash—In re Jones' Estate, 118 P 2d 951, 11 Wash 2d 254
29 C J p 1023 note 32

Construction of statute

Statute providing for exemption in lieu of homestead when decedent has no homestead at time of death must be construed in connection with statute providing that when homestead set apart to widow and minor child or children constitutes all decedent's realty in state, title vests absolutely in widow and children—Worthy v Walton, 167 So 799, 232 Ala 317

Where homestead declaration was ineffectual, because not followed by residence, surviving husband was entitled to property in lieu of homestead—In re Leupp's Estate, 279 P 579, 153 Wash 218

Felonious killing of deceased spouse

(1) Uxoricide may not have property from wife's estate set over to him in lieu of homestead and exemptions—In re Tyler's Estate, 250 P 456, 140 Wash 679, 51 A L R 1088

(2) "Since the decision in the Tyler case, [supra] the legislature has amended § 1473 . . . and by such amendment denied to a surviving spouse, who has feloniously killed the deceased spouse, the right to have property awarded to him or her, as provided in the section"—In re Welch's Estate, 94 P 2d 758, 760, 200 Wash 686

Diminution of share of minor does not bar widow from securing award—In re Welch's Estate, supra.

Short duration of marriage is no ground for refusing award to widow—In re Welch's Estate, supra.

Effect of devise of property

(1) Under some statutes an award may not be taken from separate property of deceased, which is otherwise disposed of by will where there is no minor child living as the issue of the surviving spouse and deceased—In re Monighan's Estate, 88 P 2d 403, 198 Wash 253

(2) Adopted child is "issue"—In re McCorkle's Estate, 223 P 1038, 128 Wash 556

(3) Where the husband deeds property to the wife so as to become her separate property, on her death he is not entitled to an award in lieu of homestead where the property is otherwise devised and no minor child survives—In re Brickey's Estate, 289 P 1015, 157 Wash 532.

(4) The statute refers only to property devised or bequeathed to others than widow, and property passing to her under residuary provisions is subject to her claim for homestead—In re Schiffner's Estate, 21 P 2d 134, 174 Wash 134—In re Behre's Estate, 227 P 859, 130 Wash 458.

(5) Where husband and wife had no minor children at time of death of wife who bequeathed certain specific amount out of her separate estate to husband and made a daughter residuary legatee, husband was not entitled to homestead in the separate property—In re Monighan's Estate, supra

Particular property to be selected

In widow's proceeding to set aside homestead, widow was not entitled to have awarded to her husband's

Thus, if the homestead occupied by decedent was of no value to the widow because encumbered to the extent of its full value, she will be entitled to select from land owned by decedent at the time of his death a homestead exemption conforming in value, quality, quantum of interest, and duration of enjoyment to the exemption provided by law [3] Where a mortgage of the homestead is forbidden, the widow is entitled to the homestead property free from any claim of a mortgagee under such a mortgage, and cannot be permitted to take in lieu thereof a greater quantity of other land of her deceased husband, which pertained to the assets of his estate for the payment of his debts [4]

§ 270. —— Territorial Extent, Quantity of Interest, and Value

a In general
b Value

a. In General

Constitutional and statutory provisions control the extent and quantity of a survivor's homestead.

The privilege of survivorship is limited to one homestead for all [5] The survivor is entitled to the quantity permitted by constitutional or statutory provisions [6] but is entitled to no more than such provisions allow [7]

b. Value

The homestead of a survivor may not exceed in

undivided one-seventh interest in tract of land which widow and husband occupied under a written lease notwithstanding husband owned the small undivided interest in land—In re Jones' Estate, 118 P 2d 951, 11 Wash 2d 254

Inclusion of household goods and furniture

Under statute providing that award of homestead to surviving spouse shall include the home and household goods if any failure to award widow household goods and furniture as a portion of the amount set off to her as homestead was error—In re Jones' Estate, supra

Setting aside lands to minor child

(1) Where mother dies leaving no homestead and lands are set aside to minor child or children in lieu of homestead, title to and interest in such lands vest in child or children to same extent as though lands constituted mother's homestead at her death—Worthy v Walton, 167 So 799, 232 Ala 317

(2) Where mother died seized of three contiguous lots with three houses thereon occupied by tenants, as her only realty, and property did not exceed one hundred and sixty acres in area nor two thousand dollars in value, minor daughter who was only heir at law was entitled to property in fee simple as exempt to daughter in lieu of homestead—Worthy v Walton, supra

3. Ala—Ticer v Holesapple, 146 So 614, 226 Ala 271
20 C J p 1023 note 33.

4. Tex—Blair v Thorp, 33 Tex 38
29 C J p 1023 note 34

5. S C—Mutual Ben Life Ins Co v Yarborough's Estate, 169 S E 289, 169 S C 486—Carolina Nat Bank v Senn, 25 S C 572
Amount, extent, and value of property to which head of family is entitled see supra §§ 56–62.
Nature of estate or interest transmitted see supra § 265

6. Ark—O'Connell v Sewell, 87 S W 2d 985, 191 Ark 707—Robertson v Adams, 260 S W 37, 163 Ark 290
Tex—Crow v First Nat Bank Civ App 64 S W 2d 377, error refused
Vt—Richardson v Richardson, 11 A 2d 227, 111 Vt 140
29 C J p 1024 note 42

Whole homestead

Under 58 St Annot § 311 the surviving spouse is entitled to possession of all of what constituted at time of death of spouse the constitutional homestead of deceased spouse exempted to such spouse in his lifetime as head of a family but such homestead may not be enlarged or another selected—Powell v Powell 116 P 2d 889, 189 Okl 255—In re Gardner's Estate, 250 P 490, 122 Okl 26

"Lot"

The term "lot" within a statute giving a widow a homestead right in the premises to the extent of the house and a quantity of ground on which the house is situated, not exceeding, in amount "one lot" is not to be understood as synonymous with "tract" or "parcel," but in the sense of a city town, or village lot according to the survey and plat of the city, town, or village in which the property is situated—Wilson v Proctor, 8 N W 830, 28 Minn 13

Ownership of other property as affecting interest of survivor

(1) Where the widow owned in her right one fourth of the tract of land, including the dwelling house and appurtenances, occupied by her husband as a homestead at his death, she is entitled under the statute, to land, including the dwelling house and appurtenances, worth one thousand dollars, as a homestead, but her own interest in the land allotted to her must be estimated as part of the exemption—Miles v Hall, 12 Bush, Ky, 105

(2) However, it has been held that, where the surviving wife, being head of a family, is in possession of community property as owner of an undivided one half and usufructuary of the other undivided one half, she is entitled to a homestead exemption of the whole property—Tinney v Vittur, 64 So 107, 131 La 549

(3) Under Const 1898 art 244, exempting a homestead, or two thousand dollars from the proceeds of a sale thereof, other property owned by the claimant of the homestead is not to be deducted from the two thousand dollars—Succession of Harrington 94 So 447, 152 La 927

Income from proceeds of homestead

(1) The exemption right of widow and children of homesteader, on homesteader's death in proceeds derived from sale of his homestead, under Kentucky statute, is limited to enjoyment of the income from the exempt fund, which must be invested under order of the court or otherwise so protected that creditors of homesteader can secure fund after right of widow and children in the income derived therefrom has been extinguished—In re Gibson, D C Ky, 33 F Supp 838

(2) Where the homestead is sold, infant children having a homestead right may, in the discretion of the court, be given the interest on the amount exempted, or the present cash value of their estate, or a reinvestment of the fund in a homestead for their benefit may be directed—Schnabel v Schnabel, 56 S W 983, 108 Ky 536, 22 Ky L 234

Computation of value of widow's estate where minor children

Ill—Allen v Allen, 222 Ill App 438

7. Ala—Ticer v Holesapple, 146 So 614, 226 Ala 271
Mont—In re Trepp's Estate, 227 P. 1005, 71 Mont 154
29 C.J p 1024 note 42.

value the amount limited by constitutional or statutory provisions.

A survivor's homestead is not limited in value[8] unless a limitation is imposed by constitutional or statutory provisions.[9]

Time of valuation In determining the amount thus exempt, it has been held that the value at the debtor's death will control and not the value when the homestead was acquired,[10] although the contrary view also finds support[11] Where decedent failed to have his homestead assigned to him during his lifetime, the limits of the homestead estate and the value of the same, it has been held, must be determined in the proceeding for an allotment as of the present time.[12]

Matters considered in determining value. Improvements on the premises are not to be considered in determining the value of the survivor's homestead where improvements are expressly excluded by constitutional or statutory provisions[13] Improvements made by the surviving husband for his own use after his wife's death have been excluded in estimating the value of the homestead[14]

Insurance money collected on a dwelling burnt before the allotment cannot be included in determining the value of the homestead[15]

Encumbered property. In some jurisdictions if the homestead property is encumbered, the amount of such encumbrance is deducted in determining the value of the homestead.[16] Where the widow, entitled to a homestead, paid an encumbrance thereon created by her husband, the homestead should, for purposes of allotment, be valued on the basis of the difference between the value of the property and the encumbrance[17] If the property is worth more than both the statutory amount of exemption and the mortgage, and is sold to pay debts of decedent, the survivor's homestead interest need not contribute to discharging the mortgage[18]

Increase in value In some jurisdictions an increase in value of the homestead after allotment does not deprive the surviving spouse of any part of it[19]

§ 271. Duration and Termination of Right

The persons entitled to the fee in remainder may take possession of the homestead property on the termination of the homestead right of the survivors.

The homestead right of the survivor may be terminated in several ways, as discussed infra §§ 272-277 On the termination of the homestead of the survivors those persons entitled to the fee in remainder may take possession,[20] and, as shown in-

8. Cal—In re Muntz's Estate, 231 P 371, 69 Cal App 404
29 C J p 1024 note 47
Value of homestead generally see supra §§ 59–62

9. Ala—Ticer v Holesapple, 116 So 614, 226 Ala 271
Ky—Mangrum v Mangrum, 287 S W 532 216 Ky 154
Mont—In re Trepp's Estate, 227 P 1005, 71 Mont 154
N D—In re Teiten's Estate, 249 N W 913, 63 N D 729
S C—Mutual Ben Life Co v Yarborough's Estate, 169 S E 289, 169 S C 486
29 C J p 1024 note 46

Where homestead is indivisible without material injury, the surviving husband and wife or minor children are entitled, as against the heirs or devisees, to hold the entire premises as a homestead estate, even though the property exceeds the statutory limit in value
N D—Calmer v Calmer, 106 N W 684, 15 N D 120
Okl—In re Gardner's Estate, 250 P 490, 122 Okl 26
Rights of heirs as against survivors see supra § 264

10. Ala—Haynes v Haynes 181 So 757, 236 Ala 331—Sims v Kitchens, 172 So 638 233 Ala 181—Gray v. Weatherford, 149 So 819, 227 Ala 324—Ticer v Holesapple, 116 So 614, 226 Ala 271
29 C J p 1024 note 48, p 1011 note 56

11. Ill—Garwood v Garwood, 91 N E 672, 241 Ill 580
29 C J p 1024 note 49

12. Ill—Mason v Truitt, 100 N E 202, 257 Ill 18

13 In Texas
(1) Under the express provisions of the constitution art 16 § 51, a homestead in a city, town, or village shall consist of a lot or lots not to exceed in value five thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon —Whiteman v Burkey Civ App, 286 S W 350, conforming to answer to certified question 282 S W 788, 115 Tex 400

(2) Formerly in assigning a homestead to the survivor in a city or town lot or lots, the value of improvements thereon, as well as of the land itself, was considered in determining the survivor's exemption—McLane v Paschal, 62 Tex 102—Williams v Jenkins, 25 Tex. 279

14. Ky—Shields v Parsons, 18 S W 2d 961, 230 Ky 143

15. Ill—Ketcham v Ketcham, 109 N E 1025, 269 Ill 584
29 C J p 1024 note 52

16. Ala—Childs v Julian, 2 So 2d 453, 241 Ala 249—Ticer v Holesapple 146 So 614, 226 Ala 271
Mo—Martin v Martin, 285 S W 92 313 Mo 476

Estate should be valued as if it were free from the mortgage, if the estate is subject to a mortgage which takes precedence over the homestead right, and the rights of the mortgagee will remain unaffected by the assignment the operation of which will be merely to give the widow the right to hold the homestead assigned to her until proceedings to enforce the paramount right under the mortgage—Norris v Moulton, 34 N H 392

17. Ill—Garwood v Garwood, 91 N E 672, 241 Ill 580

18. Mo—Hufschmidt v Gross 20 S W 679, 112 Mo 619

19 Ky—Wilson v Devasher, 264 S W 1057, 204 Ky 108
Tenn—Hutcheson v Hutcheson, 143 S W 2d 886, 176 Tenn 468

20. Ky—Howard v Mitchell, 105 S W 2d 128, 268 Ky 429
Miss Bohn v Bohn, 5 So 2d 429, 193 Miss 122, appeal dismissed 62 S Ct 1283, 316 U S 646, 86 L Ed 1730
Mo—Hall v Hall, 145 S W 2d 752, 346 Mo 1217
29 C J p 1017 note 77, p 1043 note 15 [a] (1).

fra, § 290, the homestead property is usually then subject to the debts of decedent.

§ 272. —— As Affected by Occupancy of Premises

Unless required by statute, the homestead right may be preserved without continued occupancy by the survivor.

Under the construction of some homestead provisions, continued occupation of residence on the premises is not required of the surviving spouse,[21] of the minor children,[22] or of heirs in whom the homestead laws vest the homestead estate free from the debts of the ancestor,[23] in order to continue the exemption from decedent's debts However, under the construction of other homestead provisions, the exempt character of decedent's homestead continues only so long as it is occupied by the surviving spouse [24]

Sufficiency of occupancy As regards sufficiency of occupancy when required, it has been held that a guardian,[25] or a guardian's tenant,[26] may occupy for the ward, and that a tenant may occupy for the surviving spouse and children,[27] although the surviving spouse may reside out of the state [28] The premises may be partly rented and partly used for cultivation and pasturage by the surviving spouse who resides elsewhere,[29] or the premises may be cultivated by a child who resides elsewhere,[30] or may, as it has been held, be used by the beneficiary merely for storage of furniture [31] Minor children for whom their guardian has thought it desirable to find other temporary quarters cannot be considered as having abandoned the homestead [32] An

Course of descent of homestead property see supra § 242

Possession by owners of fee on abandonment of homestead by widow see infra § 273 a

In Georgia under Civ Code 1910 § 3396, property set apart to a wife or wife and minor children as a homestead on termination of the homestead estate reverts to the estate from which it was set apart unless sold or reinvested in pursuance of the provisions of the Code, and the division of the land by the wife and some of the children, or its sale by them, even if valid under Const art 9 § 9 par 1, did not defeat the interest of another child on termination of the homestead estate — Griffin v Griffin, 113 S E 161, 153 Ga 547

21. Ill —Rasmussen v Rasmussen, 13 N E 2d 166, 368 Ill 137
Mo —Cave v Wells, 5 S W 2d 636, 319 Mo 930- Wiroff v Moore, 257 S W 171
Neb —Bartels v Seefus, 273 N W 485, 132 Neb 841
29 C J p 1025 note 57
Abandonment of homestead see infra § 273
Nature of estate or interest transmitted to survivors see supra § 265

Reason assigned in some jurisdictions for the rule is that, under the homestead laws, on the death of either husband or wife "a new title is created which vests in the survivor for life unconditionally "—Bartels v Seefus, 273 N W 485, 132 Neb 841—29 C J p 1025 note 57 [a]

In Alabama

(1) Since the passage of Act Feb 28, 1889, L 1889 p 113, Code 1940 § 698, occupancy of the homestead allotted to the widow and minor children is not necessary to preserve the right —Cox v McLemore, 183 So 860, 236 Ala 559—Kyser v McGlinn, 92 So 13, 207 Ala 82.

(2) Prior to 1889 the homestead was conditioned on continued occupancy —Bodeker v Tutwiler, 100 So 776, 211 Ala 537

(3) The Act of 1889 did not apply where decedent died prior thereto —Bodeker v Tutwiler, supra

(4) Alienation of homestead after husband's death as constituting forfeiture see supra § 254

In Tennessee

(1) Since the passage of L 1879 c 171 the right of homestead is not dependent on occupancy —Clark v Bullen, 247 S W 107, 147 Tenn 261

(2) Prior to 1879 continued occupation of the premises was required —Hicks v Pepper, 1 Baxt 42

In Texas

(1) Const art 16 § 52 does not require occupancy of the homestead in order to preserve it, except as against the heirs of deceased to have a partition of the property —Sargeant v Sargeant Civ App, 19 S W 2d 382 certified questions answered 15 S W 2d 589 118 Tex 343—Good v Good Civ App, 293 S W 621

(2) Children cannot succeed to the homestead rights of their parents unless they remain together as a family and occupy the property as a homestead —Petty v Barrett, 37 Tex 84

(3) In the case of a widow's business homestead, exemption is lost by her failure to conduct a business on the premises —Harle v Richard 14 S W 257, 78 Tex 80

(4) The exempt character of a business homestead is not lost by the fact that the survivors do not intend to continue decedent's business on the premises —Clift v Kaufman, 60 Tex 64

22. Mo —Moore v Mansfield, 286 S W 353

23. Iowa —Kite v Kite, 44 N W 716, 79 Iowa 491
Tex — Greene v Cass County State Bank, Civ App, 7 S W 2d 620
29 C J p 1025 note 58
Homestead exemption inuring to heirs see supra § 265 d

24. Iowa —Crouse v Crouse, 259 N W 443, 219 Iowa 736
Kan — Anderson v Shannon, 73 P 2d 5, 146 Kan 704, 111 A L R 200
Ky —Howard v Mitchell, 105 S W 2d 128, 268 Ky 429
Wyo —Dobler v Clark, 292 P 246, 42 Wyo 160
29 C J p 1025 note 60
Homestead right of surviving spouse as mere right of occupancy see supra § 265

Involuntary relinquishment of possession

Widow's statutory right to occupy homestead until her distributive share of intestate's land was set aside, see supra § 252, was not lost by her ouster therefrom under judgment later set aside —Crouse v. Crouse, 259 N W 443, 219 Iowa 736

25 Ark —Booth v Goodwin, 29 Ark 633

26 Kan —Shirack v Shirack, 24 P 1107 41 Kan 653
Okl —Rockwood v St John, 62 P 277 10 Okl 476

27. Ky —Overby v Williams, 185 S W 822, 170 Ky 140
29 C J p 1025 note 65, p 1027 note 84

28. Tenn —Peterson v Goudge, 6 Tenn Civ A 288

29. Tex — Edwards v Clemmons, Civ App, 181 S W 840

30 Kan —Deering v Beard, 28 P 981, 48 Kan 16

31. Mass —Brettum v Fox, 100 Mass 234

32. Kan —Smith v Landis, 144 P. 998, 93 Kan 453.

unexecuted intention to occupy will not prolong the exemption [33]

§ 273. —— Abandonment

a By surviving wife
b By surviving husband

a. By Surviving Wife

The homestead right of a widow acquired by survivorship may be lost by abandonment.

It is very generally held that the widow's right of homestead acquired by survivorship may be lost by abandonment,[34] although no question of an abandonment of a homestead can arise during a possession which was not referable to the homestead right [35] Abandonment is a question of intention[36] which may be shown by acts and conduct [37] Whether acts of a widow amounted to the abandonment of her homestead is ordinarily a question of fact[38] to be determined from all the circumstances [39] To constitute an abandonment, the surviving wife must remove from the homestead with intent not to return to it as a place of residence, or must, after removing therefrom, form such intention [40]

Permanent removal or absence Under many homestead laws a permanent removal by the widow operates as an abandonment of her homestead right in the premises,[41] and it has been held that the fact that she was ignorant of her homestead rights at the time of her removal will not prevent the loss of such rights,[42] but under other homestead laws permanent removal from the homestead premises will not work an abandonment of the homestead exemption,[43] at least where the title has become vested absolutely in the widow [44]

33. Ky —Hicks v. Soaper, 6 Ky L 364

34. Ark —Kitchens v Wheeler, 141 S W 2d 34 200 Ark 671—Gill v Dunn, 116 S W 2d 612, 196 Ark 1178—Hill v Schultz, 27 S W 2d 512, 181 Ark 719
Kan —Brigham v Pfister, 101 P 2d 869, 151 Kan 991
Ky —Brewer v Brewer, 105 S W 2d 582, 268 Ky 625—Berger v Berger, 94 S W 2d 618, 264 Ky 225
Okl —Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 521
29 C J p 1026 note 73
Abandonment by minor child see supra § 257 c
Abandonment by widow
Alienation after husband's death see supra § 254
Effect on homestead rights of minor children see supra § 257 b
Remarriage and removal see supra § 253
Waiver, release, or bar of widow's homestead see supra §§ 249–254

Occupancy of portion of homestead premises by son of deceased who had no homestead right could not preserve the right of homestead in favor of deceased's wife who abandoned her homestead after deceased's death —Gill v Dunn, 116 S W 2d 612, 196 Ark 1178

Estoppel to claim abandonment
Where wife obtained order to sell husband's land after his death subject to homestead right, neither she nor those claiming under her can assert abandonment of homestead —Maupin v Longacre, 288 S W 54, 315 Mo 872

35. Ill —Sotek v Sotek, 97 N E 656, 253 Ill 302
29 C J p 1026 note 74

36. Ark —Hill v Schultz, 27 S W 2d 512, 181 Ark 719
Ill —Rasmussen v Rasmussen, 13 N E 2d 166, 368 Ill. 137.
Okl —Herren v Herren, 4 P 2d 92 152 Okl 281

Widow who is insane and who is being cared for in a hospital cannot be regarded as having abandoned the homestead —Smith v Landis, 141 P 998, 93 Kan 453—Withers v Love, 83 P 204, 72 Kan 140, 3 L R A,N S, 514

37. Ky —Love v McCandless, 163 S W 197, 157 Ky 352
29 C J p 1026 note 75

Evidence held sufficient
(1) To show intent to abandon—Tarce v Spriggs, 147 S W 754, 149 Ky 20

(2) To sustain findings that widow had not abandoned homestead
Kan —Roberts v First Nat Bank, 268 P 799, 126 Kan 503
Okl —Lusk v Carter Oil Co of West Virginia, 53 P 2d 656 172 Okl 508 —Herren v Herren, 4 P 2d 92, 152 Okl 281

Evidence held insufficient to show abandonment
Kan —In re Carlson's Estate, 221 P 895 115 Kan 722
Wash —Smith v Ferry, 86 P 658, 43 Wash 460

38. Ky —Love v McCandless, 163 S W 197, 157 Ky 352
Tex —Good v Good, Civ App, 293 S W 621

39. Kan —Brigham v Pfister, 101 P 2d 869, 151 Kan 991

40. Tex —Good v Good, Civ App, 293 S W 621

41. U S —Magnolia Petroleum Co v Mayer, C C A Okl, 58 F 2d 48, certiorari denied Brown v Mayer, 53 S Ct 18, 287 U S 618, 77 L Ed 536
Tenn —Carey v Carey, 43 S W 2d 498 163 Tenn 486
Wis —In re Fish's Estate, 253 N W 387, 214 Wis 161
29 C J p 1026 note 77.

Widow's removal from land possessed by adverse occupant was abandonment of homestead right —Clark v Friend, 295 S W 392, 174 Ark 26

Removal from state
(1) The widow's rights in the homestead are forfeited in favor of the husband's creditors by her removal to another state subsequently to the husband's death —Clark v Bullen 247 S W 107 147 Tenn 261—29 C J p 1026 note 77 [b]

(2) Where surviving wife remarries and takes the children into another state, the homestead estate ceases —In re Druhl's Estate, 237 N. W 697, 61 N D 168

(3) Remarriage as affecting widow's homestead see supra § 253

42. Mass —Paul v Paul, 136 Mass 286

43. Mo —Cave v Wells, 5 S W 2d 636, 319 Mo 930
29 C J p 1026 note 79

In Alabama
(1) Under the express provisions of Act Feb 28, 1889 L 1889 p 113, Code 1940 § 698, a homestead allotted to the widow and minor child or children is not abandoned or forfeited by a removal therefrom —Davis v Bates 194 So 647, 239 Ala 211—Cox v McLemore 183 So 860, 236 Ala 559—Casey v Sacks, 134 So 851, 223 Ala 147—Kyser v McGlinn, 92 So 13, 207 Ala 82—Johns v Cannon, 74 So 42 199 Ala 138- 29 C J p 1026 notes 80 [a] (2), (3), 73 [b]

(2) Prior to 1889, a permanent removal operated as an abandonment of the homestead —Bodeker v Tutwiler, 100 So 776, 211 Ala 537
29 C J p 1026 note 80 [a] (1)

44. Ala —Munchus v Harris, 69 Ala 506
Miss —Brown v. Brown, 33 Miss. 39

Short or temporary removal or absence. While the removal from a homestead for any length of time, however short, with a settled purpose to quit its occupancy and take up a domicile elsewhere, constitutes an abandonment,[45] an abandonment of the homestead premises sufficient to deprive the widow of her right to a homestead is not effected by mere temporary absence with intent to return[46] The widow may leave the homestead unoccupied indefinitely if she intends to and does return to occupy it[47]

Involuntary surrender of premises Abandonment must be predicated on a voluntary action of the widow[48] She cannot be charged with abandonment where she surrenders the premises under duress or is driven from her home[49]

Lease of homestead A mere temporary absence after having rented out the homestead and placed it in possession of the tenant has been held not to be such an abandonment as will forfeit the widow's claim to the homestead, and the occupancy of her tenant will be considered as her occupancy[50] However, where a widow rents the premises, and leaves them with no intention of returning and occupying them as a homestead, but with the intention of remaining away permanently, there is an abandonment[51] It has been held that a widow abandoned her rights in a homestead and exempt personalty by accepting a lease thereof from decedent's heirs, and subsequently conveying the property to them, canceling the lease, and accepting other provisions for her support[52]

Acquisition of new homestead. In the absence of a statute otherwise providing, the acquisition by the widow of a homestead in her own right, after the death of her husband does not constitute an abandonment of her husband's homestead[53]

Boarding relatives The fact that a widow who continues to reside on the homestead takes her son-in-law and family to board with her does not amount to an abandonment[54]

Nonpayment of taxes may be evidence of abandonment when coupled with other facts and circumstances showing the intention to abandon.[55]

A widow who becomes a nonresident under some homestead provisions loses her rights in the homestead[56]

Effect of abandonment In case of abandonment by the widow, including abandonment by alienation of the property, the person entitled to the fee may at once enforce his right thereto, unencumbered by the homestead[57]

b. By Surviving Husband

A surviving husband may abandon a homestead right acquired by survivorship

The homestead right of a surviving husband may be abandoned[58] Under some homestead laws, it has been held that a loss of the homestead exemp-

45. Iowa—Anderson v Blakesly, 136 N W 210, 155 Iowa 430

46. Ill—Rasmussen v Rasmussen, 13 N E 2d 166, 368 Ill 137
Ky—Hamer v McCown, 21 S W 2d 833, 231 Ky 522
Tex—Good v Good, Civ App, 293 S W 621
29 C J p 1026 note 82

Absence for purpose of employment
Where wife lived on homestead for a time after husband's death and then went away to work for other people, but kept her household goods, cows and farm implements on the place, returned to it at her convenience and regarded it as her home, her departure did not constitute an 'abandonment" of homestead—Stump v Smarsh, 113 P 2d 1058, 153 Kan 804

47. Ill—Dunbar v Dunbar, 98 N E 563, 254 Ill 281

48. Ark—Wood v Wood, 157 S W 2d 36, 203 Ark 344

49. Ark—Wood v Wood, supra.

Where son, entitled to remainder of estate, by abuse drove mother from homestead and through threats prevented her from returning to her home, he could not plead abandonment as a defense to her right to recover the homestead—Wood v Wood, supra

Surrender in ignorance of her rights and under duress is no destruction of the homestead privilege—Young v Milward, 58 S W 592, 109 Ky 123, 22 Ky L 615, 627

50 Ill—Reilly v Reilly, 26 N E 604, modified on other grounds 28 N E 960, 139 Ill 189
Ky—Hamer v McCown, 21 S W 2d 833, 231 Ky 522
29 C J p 1027 note 84

51. Ill—Farnan v Borders, 10 N E 550, 119 Ill 228
29 C J p 1027 note 85

52. Iowa—Ditson v Ditson, 52 N W 203, 85 Iowa 276

53. Ark—Butler v Butler, 2 S W 2d 63, 176 Ark 126

54. Iowa—Jones v Blumenstein, 42 N W 321, 77 Iowa 361

55. Ark—Gill v Dunn, 116 S W 2d 612, 196 Ark 1178

56. Tenn—Coile v Hudgins, 70 S W 56, 109 Tenn 217

57. Ark—Smart v Murphy, 139 S W 2d 33, 200 Ark 406—Clark v Friend, 295 S W 392, 174 Ark. 26—Murphy v Graves, 279 S W 359, 170 Ark 180—Warren v Martin, 272 S W 367, 168 Ark 682
Iowa—Anderson v Blakesly, 136 N W 210 155 Iowa 430
29 C J p 1001 note 58
Abandonment of widow's homestead by alienation see supra § 251
Homestead right of minor children as affected by abandonment by parent see supra § 257 b

Rents and profits accruing after abandonment
Where widow abandoned her interest in mineral rights in homestead by sale thereof an heir of husband became entitled to her interest therein and to have an accounting for amounts collected as royalties from land since date of convevance—Warren v Martin, 272 S W 367, 168 Ark 682

58. Ky—Hager v Vincent, 15 S W 2d 126, 228 Ky 589
Alienation by surviving husband as abandonment see infra § 286

Evidence held insufficient to authorize finding that surviving husband abandoned homestead interest in mortgaged land—Washington v Huggins, Tex Civ App, 10 S.W 2d 140.

tion in favor of the surviving husband occurs by abandonment where he ceases to occupy the homestead premises and permanently makes his home elsewhere.[59] If he never lived on the premises and never asserted a claim thereto, and his wife devised it to adult children who were heads of families, the land is subject to her debts.[60] However, a mere temporary absence or removal from the premises by the surviving husband does not terminate his homestead right,[61] and it has been held that this is so, although he intended to return only in case he did not sell the premises.[62]

§ 274. —— Attaining of Majority of Children

The homestead right of surviving minor children usually terminates as to each child on his attainment of majority.

Under most homestead laws the rights which a decedent's minor children hold in his homestead by survivorship continue as to each child until he reaches majority, but terminate at that period.[63] The benefit of the survivorship is not extended by the fact that the child who attains full age after the homesteader's death is a dependent female,[64] or an imbecile.[65] However, it has been held that, where several children are entitled to a homestead, a creditor cannot complain because those arriving at twenty-one years of age remain on the homestead with a younger child as this does not in any way affect or injure the rights of creditors.[66]

The rule under which the children's rights terminate on majority has no application in jurisdictions where the homestead laws pass the homestead property to the heirs exempt from the ancestor's debts, see supra § 265 d, or where a homestead right may be claimed by adult children, see supra § 256, or under homestead laws by which the homestead is "forever discharged from all debts of the decedent."[67]

§ 275. —— Marriage of Minor Children

The marriage of a minor child may terminate his homestead right acquired by survivorship.

A child who has married and established a separate domicile must be considered as having voluntarily parted with her right of occupancy.[68] Where the statutes provide that the unmarried infant children of a decedent shall be entitled to a joint occupancy until the youngest arrives at majority, a homestead right vested in an infant daughter is divested by her marriage during minority.[69]

§ 276. —— Death of Surviving Parent or Children

The homestead right of the surviving spouse terminates on his or her death, but the death of the surviving parent does not affect the homestead rights of minor children.

The homestead right of the surviving spouse terminates on his or her death.[70] The widow's in-

59. Iowa—Hornbeck v Brown, 59 N W 33, 91 Iowa 316—Butterfield v Wicks, 44 Iowa 310
29 C J p 1027 note 94

Rental of premises
Iowa—Finn v Grant, 278 N W 225, 224 Iowa 527

60. Tex—Craddock v Burleson, 52 S W 644, 21 Tex Civ App 250

61. Ky—Evansville Coffin Co v Sumner, 226 S W 363, 189 Ky 839
29 C J p 1027 note 96

Temporary absence on farm for purpose of improving health was not inconsistent with right of homestead—In re Baker's Estate, 20 P 2d 1069, 142 Or 559

Temporary residence on premises of second wife
Surviving husband, retaining possessions in room until forcibly ejected, did not abandon homestead, despite temporary residence on premises of second wife, there being no intent to abandon—Good v Good, Tex Civ App, 293 S W 621

Evidence held sufficient to sustain finding of jury that surviving husband did not abandon his homestead in the city, although he spent large portion of his time on his farm—Whiteman v Burkey, Civ App, 286 S W 350, conforming to answer to certified question 282 S W 788, 115 Tex 400

62. Ill—Henson v Moore, 104 Ill 403
Ky—Gregory v Oats, 18 S W 231, 13 Ky L 761

63. Ala—Bishop v Johnson, 7 So 2d 281, 242 Ala 551—Tharp v Johnson, 122 So 668, 219 Ala 537
Ark—Sheppard v Zeppa, 133 S W 2d 860, 199 Ark 1—Arnold v Arnold, 97 S W 2d 634, 193 Ark 109
Ga—Roughton v Roughton, 173 S E 673, 178 Ga 367—Donalson v Yeates, 159 S E 856, 173 Ga 30, followed in Shingler v Yeates, 159 S E 859 (first case), 173 Ga 34, and 159 S E 859 (second case), 173 Ga 35
Mo—Hall v Hall, 145 S W 2d 752, 346 Mo 1217—Willoughby v Brandes, 297 S W 54, 317 Mo 544—Moore v Mansfield, 286 S W 353—Martin v Martin, 285 S W 92, 313 Mo 476—Jennings v Cherry, 257 S W 438, 301 Mo 321
N D—Ruble v. Grafton Nat Bank of Grafton, 250 N W. 784, 64 N D 129
29 C J p 1027 note 1.

64. Ga—Bell v Carter, 75 S E 638, 138 Ga 530
29 C J p 1028 note 2

65. Ga—Neal v Brockhan, 13 S E 283, 87 Ga 130

66. Ky—Lawrence v Lawrence, 10 Ky Op 353

67. Okl—First Nat Bank v Scott, 62 P 2d 511, 512, 178 Okl 175, quoting **Corpus Juris.**
29 C J p 1028 note 6

68. Kan—Smith v Landis, 144 P 998, 93 Kan 453
Necessity of occupancy see supra § 272

69. Kan—Smith v Landis, 144 P 998, 93 Kan 453
Ky—Jones v Crawford, 84 S W 568, 27 Ky L 191, 68 L R A 299

70. Ala—Bishop v Johnson, 7 So 2d 281, 242 Ala 551—Tharp v Johnson, 122 So 668, 219 Ala 537
Ga—Roughton v Roughton, 173 S E 673, 178 Ga 367—Donalson v Yeates, 159 S E 856, 173 Ga 30
Mich—Dodds v Purdy, 269 N.W 613, 277 Mich 593.

Where surviving spouse has life estate in homestead, such interest becomes extinct on her death
Neb.—In re Lewis, 263 N.W. 480,

terest does not terminate on the death of the children of the marriage who survive the homesteader,[71] nor does the death of the surviving parent terminate the child's interest,[72] and, as shown supra § 265 d, under some statutes the homestead passes to the heirs exempt from the ancestor's debts and from the antecedent debts of the heirs If the right of the surviving spouse is an absolute estate in the homestead property, on her death her interest passes by descent to her heirs and not to the heirs of her deceased spouse.[73]

§ 277. —— Merger

General rules governing the merger of estates usually apply in the case of a survivor's homestead interest

General rules pertaining to merger of estates ordinarily apply in the case of homesteads acquired by survivorship[74] Where a surviving spouse acquires an absolute estate in the homestead property by reason of its being set apart as a year's support, the homestead interest of such spouse consisting of a life estate is merged into the fee[75]

If the right of a surviving spouse is a life estate and such spouse inherits a share from one of decedent's children, such share does not merge in her life estate[76] and may be reached by her creditors[77]

§ 278. Rights as Affected by Administrator's Sale

The interests of the survivors in the homestead of the decedent are not affected by an administrator's sale

Since the survivors as beneficiaries of the homestead are not represented by the executor or administrator of decedent,[78] the interests of the widow and minor children in the homestead of decedent are not affected by a sale of the homestead premises with or without order of court,[79] or whether the

130 Neb 62—In re Freling's Estate, 230 N W 443, 119 Neb 605
N D—Ruble v Grafton Nat Bank of Grafton, 250 N W 784, 64 N D 129

When homestead has been selected from community property and on death of either husband or wife has vested in survivor, under Code Civ Proc § 1471, it ceases to exist on death of survivor—In re Muntz's Estate, 231 P 371, 69 Cal App 404

71. Ky—Gay v Hanks, 81 Ky 552

72. Mo—Canole v Hurt, 78 Mo 649
29 C J p 1028 note 10

73. Ala—Sims v Sims, 51 So 731, 165 Ala 111

74. Tex—McCanless v Devenport, Civ App, 40 S W 2d 903
Merger of estates generally see Estates §§ 123–131
Merger of minor child's homestead right and inheritance see supra § 265 a
Nature of homestead estate or interest see supra § 265

Homestead title in fee is not merged in life estate
Or—Ferguson v Holbarn, 211 P 953, 106 Or 566

Where widow's homestead and life interests are of equal degree in the same property, neither being greater than the other, technically they do not merge, although life estate is submerged while homestead right is exercised, but practically merger is produced by unity of possession—McCanless v Devenport, Tex Civ App, 40 S W 2d 903

Assignment to survivor of mortgage on homestead
A surviving husband's estate of homestead is not destroyed by merger in a mortgage estate assigned to him by the holder of the mortgage security on the premises—Sprague v Beamer, 45 Ill App 17

75. **Under statute** providing that, where two estates unite in the same person, the lesser merges with the greater, the text rule has been followed—Stringfellow v Stringfellow, 37 S E 767, 112 Ga 491—Lowe v Webb, 11 S E 845, 85 Ga 731—29 C J p 1000 note 42

Year's support in homestead conveyed by husband
Where husband's land was duly set apart as a homestead, husband conveyed land to secure note for individual loan, and, following husband's death, widow attempted to have land set apart to her as statutory year's support, there was no merger of estates in widow so as to terminate her right of homestead and authorize sale under security deed, since husband's conveyance put legal title beyond reach of statutory year's support—Landrum v Carey, 194 S E 362, 185 Ga 76
Allowance to surviving spouse see Executors and Administrators §§ 323–366

76. Iowa—Strong v Garrett, 57 N W 715 90 Iowa 100
Ky—Evansville Coffin Co v Sumner 226 S W 363, 189 Ky 839
29 C J p 1014 note 46

77. Iowa—Strong v Garrett, 57 N W 715, 90 Iowa 100

78. Cal—Hoppe v Hoppe, 36 P 389, 4 Cal Unrep Cas 569

79. Ark—Levinson v Treadway, 78 S W 2d 59, 190 Ark 201—Hart v Wimberly, 296 S W 39, 173 Ark 1083
La—Succession of White, 127 So 883, 170 La 403
Tex—Cline v Niblo, 8 S W 2d 633, 636, 117 Tex 474, 66 A.L.R. 916, quoting **Corpus Juris**, and modifying, Com App, 292 S W 178, reversing, Civ App, 286 S W 298
29 C J p 1028 note 15, p 1012 note 74
Sale of homestead by personal representative under order of court to pay decedent's debts see Executors and Administrators § 552
Sale subject to homestead rights of survivor see infra § 291

Court may set aside homestead for widow, notwithstanding order has been made by the probate court for the sale of the real estate of the intestate—In re Smith, 51 Cal 563

Community property
Judgment creditors, having no lien on the community homestead do not acquire, by reason of administration and sale of such homestead by the administrator, any right to subject it to the satisfaction of their claim—Advance-Rumely Thresher Co v Blevins, Tex Civ App, 248 S W 1086

Right of entry by administrator
Where the head of a family dies after his property has been set apart as a homestead for the use of his family, but before termination of the homestead, the administrator on his estate, as against beneficiaries of the homestead remaining in possession, does not by virtue of an order of the court of ordinary, directing sale of the homestead property for the purpose of paying debts and for distribution, acquire a present right of entry—Craddock v Kelly, 60 S E 193, 129 Ga 818

Estoppel of minor child
Debtor's minor child was not estopped to assert invalidity of administrator's sale of debtor's homestead to creditor bank by failure to object to probate proceedings—Greene v Cass County State Bank, Tex.Civ App, 7 S W 2d 620.

sale is by the court,[80] or is finally consummated and approved.[81] The purchaser at the administrator's sale buys at his peril and is bound to take notice of the rights of the survivors,[82] and if the sale proceeds without the widow's intervention, although she is enabled to intervene by statute, she may obtain a right of allotment from the avails of sale.[83]

If there is an excess above the size fixed by statute, and the property is sold by an administrator, but is subject to homestead exemption, the purchaser obtains title to the excess.[84] The purchaser of the premises at such sale, if they exceed the statutory valuation, may, it is held, become a tenant in common with the survivors who continue to own a homestead therein,[85] since the sale is presumed to have been made subject to the homestead right.[86]

§ 279. Proceedings for Selection, Setting Apart, and Protection of Rights

a In general
b Necessity for selection and allotment
c Proceedings in which right asserted or protected
d Time for proceedings, laches
e Jurisdiction
f Notice
g Parties
h Pleadings
i Contest and determination of claim or right
j Duty to allot
k Method of allotment
l Order or decree, findings

a. In General

The statutes of the particular jurisdiction generally control the proceedings for the selection, setting apart, or protection of a survivor's homestead.

The applicable statutes of the particular jurisdiction generally control the proceedings for the selection, setting apart, or protection of a survivor's homestead rights.[87] However, since the homestead exemption of the surviving spouse or children is essentially the same as that of the decedent debtor, it has been held that the homestead may be selected and set apart to such survivor or survivors precisely as it would have been on application of the debtor.[88]

Selection by minor children It has been held that if both parents die without making a selection of homestead, the right to do so inures to the benefit of the minor children as being the owners of the homestead.[89]

As proceeding in rem Under some statutes a proceeding to have a survivor's homestead set apart is considered a proceeding in rem.[90]

Necessity for claim or demand Where the widow's right to a homestead exemption is considered personal to her, the right must be claimed and tested in a proper proceeding.[91]

It has been held that, while it may be the rule that adults in order to hold their homestead rights in the equity of redemption must make claim therefor prior to foreclosure, minors ordinarily are protected without such claim, for the reason that on the death of their father the statute vests in them a homestead estate in the equity of redemption during their minority.[92]

80. Cal—In re Lahiff, 24 P 850, 86 Cal 151

81. Ala—McCuan v Turrentine, 48 Ala 68
29 C J p 1028 note 17

82. Ark—Levinson v Treadway, 78 S W 2d 59, 190 Ark 201
29 C J p 1028 note 18

83. Ohio—Evans v Staggaman, 8 Ohio Dec, Reprint, 244, 6 Cinc L Bul 636

84. Mo—Anthony v Rice, 19 S W 423, 110 Mo 223

85. Ill—Montague v Selb, 106 Ill 49

86. Mich—Showers v Robinson, 5 N W 988, 43 Mich 502

87. Like other exempt property
In view of statute, homesteads may be set aside to surviving widow like other exempt property—In re Dunlap's Estate, 87 P 2d 225, 161 Or 93.

On death of person entitled
Where a resident dies leaving two or more persons entitled to a homestead exemption condition requiring judicial determination, on death of one or more so entitled the survivors may have homestead determined and set aside—Haynes v Haynes, 181 So 757, 236 Ala 331
Pendency of partition proceeding as abating proceeding to set land apart as homestead see Abatement & Revival § 47 c

88. Ga—Roff v Johnson, 40 Ga 555—Hodo v Johnson, 40 Ga 439
Enforcement and protection of rights of surviving children see supra § 258
Proceedings for
Allotment in acquiring homestead generally see supra § 48
Enforcement and protection of homestead generally see supra §§ 226-238

89. Ark—Cowley v Spradlin, 91 S W 550, 77 Ark 190

90. Ala—Williams v Overcast, 155 So 543, 229 Ala 119—Bedwell v Dean, 132 So 20, 222 Ala 276—Berry v Manning, 96 So 762, 209 Ala 587—Douglas v Bishop, 77 So 752, 201 Ala 226—Headen v Headen, 51 So 646, 171 Ala 521
Mo—Limb v Bevins, 155 S W 2d 508, 236 Mo App 556—First National Bank of Golden City v Cook, App, 74 S W 2d 846
As affecting necessity for notice see infra subdivision f of this section
Binding effect of allotment on all the world see infra § 280

91. La—Hall v Courtney, 165 So 458, 184 La 80
Homestead right of surviving wife see supra § 243

92. Mo—Elstroth v. Young, 83 Mo. App 253.

In some jurisdictions the survivor need not precede the filing of a petition for homestead by a demand of homestead, nor need the survivor then be in possession of any part of the premises.[93]

b. Necessity for Selection and Allotment

There is no uniformity with respect to the necessity of a selection or setting apart of the homestead in order that the survivor's right may attach thereto, the question being largely dependent on the statutes.

The homestead provisions of the particular jurisdiction in effect at the time of the decedent's death ordinarily determine whether or not a selection and setting apart of the homestead to which one may be entitled by right of survivorship is necessary.[94] Under some homestead provisions such action is considered essential to enable the survivor to secure the benefits of the homestead rights,[95] while under others it is not necessary.[96]

Area or value exceeding exemption limit. Generally, where the tract consists of a larger area, or is of greater value than can be claimed as exempt, selection and allotment of homestead to the survivors is necessary,[97] even where there is no express direction or provision of the statute for selecting the homestead by or for the widow or children.[98]

Area or value not in excess of limit. In some jurisdictions, where the area or value of a homestead which was occupied by decedent on his death does not exceed the limit allowed by law as exempt, and the homestead is not a part of a larger tract of land, no selection and setting apart thereof to the survivors is necessary to invest them with the homestead right in such property,[99] but all that is necessary is that the claim shall have been asserted or made known before the personal representative

93. N H—Atkinson v Atkinson, 40 N H 249, 77 Am D 712

94. Ala—Dake v Inglis, 194 So 673, 239 Ala 241
Dedication and selection of homestead generally see supra §§ 42–47
Duty of court to make allotment see infra subdivision j of this section
Judicial determination or setting apart as affecting nature of estate or interest transmitted to survivor see supra § 265
Widow's title to homestead on death of husband see supra § 243

95. Tenn—Miller v Fidelity Bankers' Trust Co, 46 S W 2d 516, 164 Tenn 149

Inchoate right

In New Hampshire the homestead right of a w dow is inchoate and unconditional until set out in the specific property to which it may attach and is similar in its attributes to her right of dower in her husband's estate—Perley v Woodbury, 78 A 1073, 76 N H 23—Lake v Page, 1 A 113, 63 N H 318

Occupancy as heir subject to homestead

(1) Widow of deceased, occupying land as only heir, subject to homestead and dower rights of mother, without assignment of homestead, had no homestead rights—Scanland v Walters, 26 S W 2d 603, 324 Mo 1084

(2) Separate homesteads in same tract considered generally see supra § 14

(3) Joint occupancy of homestead see supra § 38

96. Minn—In re Lee, 213 N W 736, 171 Minn 182
29 C J p 1029 note 31

Continuance of occupancy

(1) Under statute authorizing the surviving spouse to continue in possession and occupancy of the homestead, it has been held that this may be done without first procuring a court order—Moore v Rick, 97 P 2d 884, 186 Okl 351—Hicks v Jeffress, 61 P 2d 1079, 178 Okl 109—Kimberlin v Anthony, 254 P 1, 124 Okl 170

(2) Homestead rights of widow and minor children are not barred by decree of final distribution distributing homestead premises in fee to heirs without mention of homestead claim, since homestead right was not within issues arising on administration proceedings and no decree was necessary to entitle widow or minor children to continue to possess and occupy premises—Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 524

Homestead not occupied

In construing homestead provision it has been held that in the absence of occupancy by decedent at the time of his death, judicial proceedings are necessary for the purpose of impressing the homestead character on the land not then so used and thus withdrawing it from administration—Hogan v Scott, 65 So 209, 186 Ala 310—Hall v Hall, 55 So 146, 171 Ala 618—Thocker v Morris, 52 So 73, 166 Ala 395

In Texas

(1) The actual setting apart of the homestead has been held unnecessary if it is clearly defined and distinct from the other property, title vesting in the surviving spouse and heirs without such designation—Greene v Cass County State Bank, Civ App, 7 S W 2d 620—29 C J p 1029 note 31 [c]

(2) Thus failure of probate court to set aside homestead divests children of no right—Cline v Niblo, Civ App, 286 S W 298, reversed on other grounds, Com App, 292 S W 178, modified on other grounds 8 S W 2d 633, 117 Tex 474, 66 A L R 916

(3) So the absence of an order setting apart the homestead for use of heirs does not affect rights of the heirs or exemption of the homestead from simple debts—Greene v Cass County State Bank, supra

(4) However, it has also been held that minor children have no homestead rights in any particular portion of the property of their deceased parent until it is set apart to them by order of court—White v Yates, Civ App, 85 S W 46

(5) So it has been held that the right of minor children to occupy the homestead on the death of both parents is not an absolute right but one which can be based only on an order of a court of competent jurisdiction in proceedings in which they are represented by their guardian—Osborn v Osborn, 13 S W 538, 76 Tex 494—29 C J p 1028 note 26
Homestead as asset of decedent's estate see Executors and Administrators § 115 p 1070 note 46

97. Wyo—Delfelder v Teton Land & Investment Co, 21 P 2d 702, 710, 46 Wyo 142, citing **Corpus Juris.** 29 C J p 1029 note 37

98. Ala—Jarrell v Payne, 75 Ala. 577
Extent and value of survivor's homestead see supra § 270

99. Ala—Bishop v Johnson, 7 So 2d 281, 242 Ala 551—Cox v McLemore, 183 So 860, 236 Ala 559—Franklin v Scott, 148 So 833, 227 Ala 101—Tartt v Negus, 28 So 713, 127 Ala 301
29 C J p 1029 note 39
Necessity for judicial determination of elements entitling homesteader to absolute fee see supra § 265.

acquires dominion over it for the purposes of administration, or some creditor procures its sale before the payment of debts[1] In these circumstances it is said that the homestead is "unerringly designated by the law"[2] Nevertheless it is said that the proceedings authorized by law may be resorted to for the purpose of establishing the exempt character of the particular property by record evidence[3]

As affected by prior selection Under some statutes, if no homestead was selected and recorded during decedent's lifetime, it is the duty of the court to designate and set apart a homestead,[4] out of the community property, if any,[5] and, if not, out of the separate property of decedent[6] Under some of these statutes, if a married person has declared a homestead in community property prior to the death of the spouse, on such death the homestead right vests in the survivor without administration or an order setting it apart[7]

c. Proceedings in Which Right Asserted or Protected

The proceedings by or in which a survivor's homestead is set aside or the right protected depends on the statutes and practice of the particular jurisdiction.

The proceedings which may be instituted to set aside a survivor's homestead or in which such rights may be asserted or enforced are largely dependent on the statutes and practice of the particular jurisdiction[8] Aside from direct proceedings by petition or application for the setting apart of a homestead, discussed infra subdivision h of this section, and the assertion of the homestead rights in other proceedings, as considered in this subdivision this section, it has been held that the widow may assert her homestead rights by a bill in equity to have the homestead ascertained and set off to her,[9] by a bill in equity to quiet title to the homestead property,[10] by a bill in equity for subrogation to the rights of decedent who died pending an appeal in proceedings in which he had appealed for a homestead,[11] or by a bill to enjoin an execution sale of the property claimed as a homestead,[12] and under some homestead laws the widow may maintain an action at law as sole beneficiary under an existing homestead set apart to her husband, since deceased, to recover land set apart as a homestead[13] So it has been held that an injunction lies against the vendee of land to restrain ouster of the widow and children or one who occupied the land as a homestead under a contract of purchase from him[14]

Other proceedings Statutes prescribing a method for setting aside the homestead of a debtor during his life do not exclude other methods for setting apart the homestead of the widow after his death[15] By virtue of the provisions of the particular statute involved, it has been held that homestead rights of a widow may be asserted in her answer to a writ of entry to recover the land,[16] in proceedings on petition to sell the property to pay debts of the estate,[17] in an action to have the realty sold because of indivisibility and the proceeds distributed among the heirs,[18] by answer or counter-

1. Ala —Jarrell v Payne, 75 Ala 577
Ill —Atherton v Hughes, 94 N E 546, 249 Ill 317

2. Tenn —Carver v Maxwell, 71 S W 759, 110 Tenn 75
29 C J p 1030 note 41

3. Ala —Hodges v Birmingham Securities Co, 65 So 920, 187 Ala 290 —Tartt v Negus, 28 So 713, 127 Ala 301

4. Mont —In re Trepp's Estate, 227 P 1005, 71 Mont 154
Duty of court to set apart homestead in proceedings therefor, see infra subdivision j of this section
Necessity for dedication and selection of homestead generally see supra § 43

5. Cal — In re Poland, 43 Cal 640
29 C J p 1029 note 31

6. Cal —In re Lahiff, 24 P 850, 86 Cal 151—In re Davis, 10 P 671, 69 Cal 458

7. Cal —Spencer v Stewart, 262 P 331, 202 Cal 695—Selinger v Milly, 124 P 2d 631, 51 Cal App 2d 286

8. N D —Farmers' State Bank of Buttzville v Bartley, 206 N W 414, 53 N D 376

9. Mich —King v Burt, 17 Mich 465, 97 Am D 200

10. **Offer to pay claim unnecessary**
Where husband, without wife's consent, had deposited deed to homestead in escrow with instructions to deliver it to guarantors of corporation's note, should the guarantors be held liable on the note, offer of wife and minor children to pay amount, which guarantors had been forced to pay on corporation's note, was not a condition precedent to their equitable right to quiet title to the homestead on husband's death —Braly v McKenna, 83 P 2d 631, 148 Kan 547

11. Ga —Hodges v Hightower, 68 Ga 281

12. **Homestead right must appear**
In suit to enjoin sale of plaintiff's interest in land on ground that land constituted plaintiff's homestead, where plaintiff failed to show that he was entitled to claim homestead on lands in which he had merely a contingent or remainder interest after death of mother who owned the homestead, court properly denied injunctive relief —Grecnawalt v Cunningham, Tex Civ App, 107 S W 2d 1099

13. Ga —Pollard v Blalock, 94 S E 226, 147 Ga 406

14. Ala —Burrow v Clifton, 65 So. 58, 186 Ala 297

15. N H —Fletcher v State Capital Bank, 37 N H 369

16. Mass —Swan v Stephens, 99 Mass 7
29 C J p 1031 note 60

17. Ill —Howe v Brown, 123 N E 46, 287 Ill 532
Kan —Meech v Grigsby, 113 P 2d 1091, 153 Kan 784
Ky —Wilson's Adm'r v Wilson, 156 S W 2d 832, 288 Ky 522

Selection and description by widow
Where an administrator files petition to sell town lots for payment of debts, widow claiming homestead exemption in one acre of the tract is required to select and describe particular land claimed, and may not postpone such selection until final settlement of the estate —Meech v. Grigsby, 113 P 2d 1091, 153 Kan 784

18. Ky —Berger v. Berger, 94 S.W.

claim in an action against the estate to enforce a claim and establish a lien against the realty claimed as a homestead,[19] by applying to the court, ordering a sale of decedent's lands, for payment of debts, and securing an allotment by the decree of sale,[20] or by her return of a proper schedule of decedent's property and record thereof [21]

Where a survivor refuses to surrender possession of premises claimed by him as a homestead and sold under a decree of court, his rights may be determined on confirmation of a report of sale of the premises [22]

Under a statute providing that, when a party as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest on a sum of money, or to the use of any estate, and is willing to accept a gross sum in lieu of the use, the sum shall be estimated in the manner therein provided, in a suit by a widow and minor son, the minor son's interest cannot be ascertained in land of which his mother, as widow, had a homestead, nor is the widow's interest in the proceeds of the homestead susceptible of ascertainment in such a suit [23]

Where a married woman served notice on the grantees of her husband in deeds executed immediately before his marriage in fraud of her marital rights that she would insist on such rights, the expenditure by the grantees of money in making improvements on the land did not affect her right to sue to set aside the conveyance as in fraud of her homestead rights, as the survivor of her husband.[24]

On partition of premises. Under the provisions of the particular statute involved, it has been held that a widow may assert her homestead rights by suit for partition where the whole value of the premises exceeds the homestead exemption,[25] or by her answer to a petition by the heirs for partition,[26] and that the court may arrest proceedings to partition a homestead among heirs until the interests of a minor are duly investigated and presented by his guardian [27]

If the property in which an exemption is asserted is to be partitioned, the homestead portion will be assigned to a surviving child of the homesteader, in preference to surviving grandchildren, unless such an assignment will result in such portion going to the creditors of the child, in which event the grandchildren are preferred to the surviving child [28]

d. Time for Proceedings; Laches

Apart from statutory limitations and principles of laches, the proceedings to set aside or protect or enforce a survivor's homestead ordinarily may be instituted at any time within the prescriptive period, or, in some cases, within a reasonable time Under some statutes the survivor's homestead may be applied for at any time before distribution of the property in a creditor's suit to subject such property to decedent's debts.

Unless the time for instituting the proceedings to set aside the survivor's homestead is fixed by statute, it may be commenced at any time within the prescriptive period [29] If application is made in

2d 618, 264 Ky 225—Taylor v Shelton, 13 S W 2d 506, 227 Ky 473

19 Ky —Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823
Tex —Uvalde Paving Co v Brooks Civ App, 86 S W 2d 49

20. S C —McMaster v Arthur, 12 S E 308, 33 S C 512

21. Ga —Mapp v Long, 62 Ga 508

22. S C —Crotwell v Boozar, 1 S C 271

23. Mo —Schlup v Thrasher, 229 S W 1094, 207 Mo App 646

24. Ill —Dunbar v Dunbar, 98 N E 563, 254 Ill 281

25. Ala —Quillen v Johns, 135 So 325, 223 Ala 198
29 C J p 1031 note 68
Partition of survivor's homestead see the C J S title Partition § 33, also 29 C J p 1039 note 40–p 1041 note 87

26. Mo —Kay v Politte, 129 S W 2d 863, 344 Mo 805, 122 A L R 1145—Martin v Martin, 285 S W 92, 313 Mo 476
Tex —McCanless v Devenport, Civ App, 40 S W 2d 903
29 C J p 1031 note 69

Sufficiency of bill

Where bill to partition intestate's land conceding widow homestead in part, failed to show that residue was not part of homestead, this was not basis for demurrer widow being required to establish her claim of homestead —Moseley v Neville, 129 So 12, 221 Ala 429

Widow's right based on lease

In a partition suit to which the widow of the deceased owner was made a party and in which the widow claims under a lease from her children, the court is not under a duty to set out her homestead —Mastin v Ireland, 8 S W 2d 900, 320 Mo 617

27. Tex —Osborn v Osborn, 13 S W 538, 76 Tex 494

28. Fla —Bird v Bird, 15 Fla 424, 21 Am R 296

29. **In Alabama**

(1) Under the Alabama statute there is no time limit within which the proceeding may be instituted in the probate court where there has been no administration of decedent's estate, except that it cannot be instituted within sixty days of decedent's death —Davis v Bates, 194 So 647 239 Ala 214

(2) Thereunder the widow or minors may institute the proceedings within twenty years of decedent's death —Buchannon v Buchannon, 124 So 113, 220 Ala 72

(3) The widow may institute the proceedings for herself, although she had instituted no such proceedings during minority of the children —Buchannon v Buchannon, supra

(4) Where widow of owner of homestead, who died intestate, conveyed the homestead without taking steps to have it set apart as exempt, and the grantees reconveyed to the widow, the widow was authorized after the reconveyance to institute proceedings to have the homestead set apart as exempt —Davis v Bates, supra.

Time

For making claim to homestead generally see supra § 212

To sue for enforcement or protection of homestead generally see supra § 230

good faith and within a reasonable time, the fact that it is filed after a child has reached his majority does not defeat the surviving spouse's right to the homestead [30] It has been held that minors may assert their rights by application for allotment at any time before administration of the estate has been closed [31]

Before distribution of assets Under some statutes the survivor's right to a homestead may be applied for and obtained at any time before the distribution of the proceeds of decedent's property in an action by a creditor to subject such property to decedent's debts [32]

Laches Laches in asserting the homestead right may be a factor in determining a survivor's rights in equity [33] However, that a widow did not bring suit to quiet title to the homestead property for several years after discovering that deceased had pledged such property as security for a debt without her consent does not constitute laches barring the suit where she had at all times occupied the homestead and acted promptly to set aside the adverse claim when it was asserted of record [34] So the failure of the survivor to select the homestead and have it set apart before the filing of a creditors' suit does not of itself defeat the homestead exemption [35]

Assertion of claim by remainderman As the right of a remainderman to homestead is in abeyance during the continuance of the life tenancy, under principles discussed supra § 82, his right to a homestead in the property or in the proceeds thereof is not prejudiced by his failure to assert in any manner this right during the existence of the life tenancy [36] Furthermore, he is entitled to a reasonable time after the extinguishment of the life tenancy to assert his right to a homestead [37]

e. Jurisdiction

Jurisdiction of proceedings or actions to set apart a survivor's homestead or otherwise involving the enforcement or protection of such right is largely a matter of statute, jurisdiction frequently being in the probate courts, and often in courts of equity.

Jurisdiction of proceedings or suits in which the right of survivors to the homestead in decedent's property is involved is entirely a matter of statutory regulation [38] This jurisdiction is frequently vested by statute in courts of probate jurisdiction,[39] which

30. Wash —In re Anofian's Estate, 34 P 2d 883, 178 Wash 316

31. Cal —In re Still, 49 P 463, 117 Cal 509

32. Ky —Wilson's Adm'r v Wilson, 156 S W 2d 832, 285 Ky 522

33. Delay in seeking relief may be considered in suit by married woman to have homestead decreed in mortgaged farm on ground husband procured her signature to mortgage by duress —Pirtle v Pirtle, 60 S W 2d 172, 166 Tenn 180

34. Kan —Braly v McKenna, 83 P 2d 631, 148 Kan 547

35. Tex —Crow v First Nat Bank, Civ App, 64 S W 2d 377, error refused

36. Ky —Staun v Proctor, 153 S W 196, 152 Ky 142
29 C J p 971 note 82

37. Ky —Staun v Proctor, supra— Spratt v Allen, 50 S W 270, 106 Ky 274, 20 Ky L 1822

38. Ala —Dake v Inglis, 194 So 673, 239 Ala 241
Jurisdiction
Allotment generally see supra § 216
Enforcement of
Claims against homestead see supra § 117
Homestead rights generally see supra § 226

39. Ala.—Glasscock v Kelley, 192 So 586, 238 Ala 593
Cal —Rich v Tubbs, 41 Cal 34
Mo —First National Bank of Golden City v Cook, App, 74 S W 2d 846
Tex —Boyle v Paul, 86 S W 2d 741 126 Tex 242—Britton v Wilson Civ App, 101 S W 2d 889, error dismissed
29 C J p 1030 note 47

As incident to jurisdiction over administration of estate
Ala —Gray v Weatherford, 149 So 819, 227 Ala 324
Mo —First Nat Bank of Golden City v Cook, App, 74 S W 2d 846

Extent of jurisdiction
Under the Minnesota statute the probate court has original jurisdiction over homesteads at least to render decree establishing the record title, to determine heirship, to determine what constitutes the homestead, and to sell the homestead under the statute, if parties consent thereto— Christianson v Olson, 253 N W 661, 191 Minn 166

Claim of homestead
(1) A claim of homestead is unnecessary under some statutes to confer jurisdiction on the probate court to set aside a survivor's homestead in connection with the administration of the decedent's estate— First Nat Bank v Reeves, 234 P 556, 27 Ariz 508

(2) Necessity for claim to survivor's homestead generally see supra subdivision a of this section

(3) Necessity for claim of homestead generally see supra § 46

Failure to dissent from will does not deprive probate court of jurisdiction to allot homestead to widow —Gray v Weatherford, 149 So 819, 227 Ala 324

County court
(1) The county court administering decedent's estate has jurisdiction to set aside to a widow for life the homestead of her deceased husband —In re Kopac's Estate, 299 N W 489, 140 Neb 316

(2) The county court of a county in which an estate is settled has jurisdiction to assign the homestead, where the facts on which the right of homestead depends are not in dispute —U S Fidelity & Guaranty Co v Bates, 296 N W 560, 139 Neb 131

(3) County court having probate jurisdiction is not deprived of its jurisdiction of a proceeding to set aside a homestead to the widow by reason of a constitutional provision withholding jurisdiction of such court in matters involving title to realty since title cannot be put in issue in the homestead proceeding —Tarman v Pierce, 33 P 2d 203, 168 Okl 348

(4) Questions involving title as not involved in proceedings to set aside homestead see infra subdivision i of this section

In Oregon
(1) Under Or Code 1930 §§ 3-205 and 11-402, the probate court has power to set aside the survivor's homestead —In re Dunlap's Estate, 87 P 2d 225, 161 Or 93—In re Pot-

jurisdiction, under some of the statutes, is special and limited, and hence can be exercised only with relation to questions and under circumstances as to which the statute contains special authorization [40]

Equity courts. In some jurisdictions under some circumstances the statutes vest chancery courts with jurisdiction over this class of proceedings or suits [41] In some of such jurisdictions equity may take jurisdiction of the proceedings if the remedy in the probate court is inadequate,[42] but not otherwise [43] After administration or final settlement of decedent's estate equity has been held to have jurisdiction to set aside the homestead for which no pro-

ter's Estate, 59 P 2d 253, 154 Or 167—In re Clymer's Estate, 44 P 2d 1082, 150 Or 351—In re Baker's Estate, 20 P 2d 1069, 142 Or 559

(2) Formerly, however, the probate court was held without power to set aside the homestead as separate property of the surviving spouse or minor children under a statute providing for the setting aside of exempt property generally in view of a statute dealing specifically with the descent of homestead property—Overland v Jackson, 275 P 21, 128 Or 455—In re Brizzolari's Estate, 275 P 17, 129 Or 307—Slattery v Newell, 236 P 268, 115 Or 22

(3) Course of descent of homestead see supra § 242

40. Ala—Dake v Inglis, 194 So 673, 239 Ala 241—Miller v Thompson, 96 So 481, 209 Ala 469
29 C J p 1030 note 48, 15 C J p 1016 note 3

In absence of administration

(1) Setting apart homestead exemption in probate court under some statutes is dependent on fact that more than specified number of days have elapsed after death of decedent, and there has been no administration of his estate—Dake v Inglis, 194 So 673, 239 Ala 241—Bryant v Perryman, 105 So 561, 213 Ala 561—29 C J p 1030 note 48 [a]

(2) Under such statutes the jurisdiction of the probate court ceases after the administration is finally settled and the administrator discharged—Ex parte Griffin, Ala, 11 So 2d 738—Evans v Evans, 104 So 515, 213 Ala 265

(3) Under such statutes a widow's withdrawal of proceedings commenced to set aside her homestead in deceased husband's land left the probate court without jurisdiction to determine right of exemption—Dake v Inglis supra

(4) Hence an order of a probate court authorizing complainant to withdraw her petition to set aside complainant's homestead in land of her deceased husband on complainant's payment of one half of the costs and which order recited that complainant consented to take a life estate in the land, did not "estop" complainant thereafter to bring a statutory quiet title proceeding against the deceased husband's collateral heirs and an alleged purchaser—Dake v Inglis, supra

Cancellation of purchase-money lien improper

(1) The holders of valid existing purchase-money liens against portion of estate set aside as a homestead were entitled to have judgment, which canceled such liens without notice to them or opportunity to be heard, vacated, notwithstanding no fraud, accident, or mistake was alleged or that application to set aside was made subsequent to the term at which judgment was entered since probate court was without authority to enter such judgment in the first place—Laubhan v Peoria Life Ins Co, Tex Civ App, 107 S W 2d 889

(2) Survivor's homestead as subject to purchase-money lien see supra § 262

Existence of debts chargeable against homestead may be determined by the probate court when setting aside the homestead—Boyle v Paul, 86 S W 2d 744, 126 Tex 242

In Florida

(1) A county judge sitting as a court of probate was held not to have jurisdiction to adjudicate rights in testator's homestead property, since homestead property was not an asset of the estate—Spitzer v Branning, 184 So 770, 135 Fla 49

(2) No action or inaction by the parties to a proceeding to set aside a homestead in the probate court can confer jurisdiction on such court—Spitzer v Branning, 190 So 516 139 Fla 259—Spitzer v Branning, 184 So 770, 135 Fla 49
Jurisdiction of probate court generally see Courts §§ 298–304

41. Neb—Wardell v Wardell, 99 N W 674, 71 Neb 774
29 C J p 1030 note 49

42. Ala—McGowin v McGowin, 169 So 232, 232 Ala 601—Quillen v Johns, 135 So 325 223 Ala 198—Hames v Irwin, 108 So 253, 214 Ala 422—O'Daniel v Gaynor, 43 So 305, 150 Ala 205

Jurisdiction obtained on equitable grounds

The homestead right is a favored one, and does not depend on statutory provisions to set it apart, but may be set aside in equity where jurisdiction of the res is obtained on recognized equitable grounds—Evans v Evans, 104 So 515, 213 Ala 265

Land incapable of allotment without sale

(1) Bill seeking settlement and distribution of estate showing no necessity for administration and alleging realty incapable of homestead allotment without a sale is sufficient to confer jurisdiction on equity—Quillen v Johns, 135 So 325, 223 Ala 198

(2) When a husband dies who is the owner of land occupied as a homestead exceeding the value of two thousand dollars and so situated that the dwelling house and the grounds on which it stands, to the value of the exemption, cannot be set aside, equity has jurisdiction, on application of the administrator, to sell the whole tract to pay debts, and out of the proceeds of the sale to direct investment of two thousand dollars during the life of the widow, the interest to be paid to her for life, and on her death the principal to descend as in case of other exemptions—Wardell v Wardell, 99 N W 674, 71 Neb 774

(3) In some jurisdictions where decedent's realty may be sold for reinvestment of proceeds in a homestead, see supra § 269, equity may take jurisdiction of a proceeding to accomplish such purpose—Casey v Sacks, 134 So 851, 223 Ala 147

(4) In such a case the equity court, ordering sale of decedent's realty for reinvestment of part of proceeds in homestead for widow and children could distribute balance—Casey v Sacks, supra

Validity and effect of agreement

The power of surviving widow to revoke agency of her son created under a compromise agreement concerning the dismissal of widow's first petition to have homestead set apart, and right of the widow to repudiate the agreement in advance of performance, and whatever equities if any, may have arisen from the entire transaction were not for the probate court in a subsequent proceeding to have homestead set apart to the widow but were matters for a court of equity—Patterson v Murphy, 9 So 2d 754, 243 Ala 267

43. Ala—Glasscock v Kelley, 192 So 586, 238 Ala 593—Frazier v Frazier, 100 So 118, 211 Ala 176—Beck v Karr, 95 So 881, 209 Ala 199.

ceeding was theretofore had [44]

Law courts. A circuit or other court as a court of law has been held to have no jurisdiction over the assignment of a homestead,[45] nor has such court jurisdiction over a dispute respecting title to land, where a conveyance by a deceased husband is attacked.[46] So it has been held that a district court has no jurisdiction to determine whether a widow's claim for an allowance in lieu of homestead is superior to a tax lien [47]

In an action against the estate in the district court to enforce a claim and establish a lien against the land for improvements, the court was held authorized to establish the claim and lien and to adjudicate the question whether the property was a homestead at the time of the improvement and when the lien was fixed [48]

f. Notice

While there are cases holding that notice of a proceeding to set aside a survivor's homestead should be given to all persons interested whose rights would be affected, where the proceedings are considered in rem ordinarily no such notice is necessary.

It has been held, sometimes by reason of statute, that all persons interested as owners of the fee, or beneficiaries of the homestead, or otherwise, should be given notice of a proceeding to set off a survivor's homestead affecting their rights [49] However, where proceedings to set apart the homestead are considered to be proceedings in rem, see supra subdivision a of this section, no such notice is held necessary [50] Thus, in the absence of a provision in the statute for special notice to creditors, no such notice is necessary in a proceeding in the probate court to set aside the homestead during the administration of the estate of which the creditors had the statutory notice [51] However, a notice to interested persons was held not necessary where the proceedings were instituted after the administration of the estate was closed [52]

g. Parties

In so far as applicable, general rules as to parties control in actions or proceedings involving the enforcement or protection of a survivor's right of homestead

The general rules as to parties, in so far as applicable and not changed by statute are controlling in proceedings involving the enforcement or protection of a survivor's homestead rights [53] Thus it has been held that the homestead cannot be set apart in an ejectment suit where all the parties interested are not before the court [54]

In an action to recover possession of land from which the beneficiaries of a homestead exemption have been unlawfully evicted, ordinarily the husband would be a proper party, but if he is dead and the exemption has ceased as to the children in existence, when the property was set aside by reason of death, marriage, or attainment of majority, but has

44. Ala.—Ex parte Griffin, 11 So.2d 738—Evans v. Evans, 104 So. 515, 213 Ala. 265

45. Cal.—Richards v. Wetmore, 5 P. 620, 66 Cal. 365
S.C.—McMaster v. Arthur, 12 S.E. 308, 33 S.C. 512
29 C.J. p. 1030 note 50

46. Ala.—Cox v. Bridges, 4 So. 597, 84 Ala. 553

47. Tex.—State v. Jordan 59 S.W. 826, 60 S.W. 1008, 25 Tex.Civ.App. 17

48. Tex.—Uvalde Paving Co. v. Brooks, Civ.App., 86 S.W.2d 49

49. Wyo.—In re Kiesel's Estate, 249 P. 81, 35 Wyo. 300
29 C.J. p. 1031 note 73
Conclusiveness of order or decree setting apart homestead to survivor see infra § 280
Notice of contest of claim of homestead generally see supra § 215

50. Mo.—Limb v. Bevins, 155 S.W.2d 508, 510, 236 Mo.App. 556, citing **Corpus Juris**—First National Bank of Golden City v. Cook, App., 74 S.W.2d 846, 852, citing **Corpus Juris.**
29 C.J. p. 1031 note 75.

In Alabama

(1) There are cases which hold in accord with the text—Williams v. Overcast 155 So. 543, 229 Ala. 119—Bedwell v. Dean, 132 So. 20, 222 Ala. 276—Lester v. Stroud, 103 So. 692, 212 Ala. 635

(2) It has also been held that an order in ex parte proceedings for allotment will not preclude creditors from showing that the party to whom the homestead was allotted was not entitled to it—Corl v. Shackelford, 68 Ala. 241

(3) So, where intestate's widow entered into possession and use of all of his land under parol agreement with his heirs that at her death it should come to them, statutory procedure in probate court, by which without notice to heirs she had all lands set apart to herself as her homestead exemption, was held breach of trust and void, although procedure in force at time required no notice to heirs, and placed burden on them to keep lookout for proceedings in probate court—Lester v. Stroud, supra

(4) Under Code 1940 tit. 7 § 677, Code 1923 § 7934, notice of the report of the appraisers or commissioners appointed to set apart the homestead must be given by the probate court on return of the report

51. Mo.—Limb v. Bevins, 155 S.W.2d 508, 236 Mo.App. 556—First Nat. Bank of Golden City v. Cook, App., 74 S.W.2d 846

Notice of administration sufficient
Mo.—Limb v. Bevins, 155 S.W.2d 508, 236 Mo.App. 556—First National Bank of Golden City v. Cook, App., 74 S.W.2d 846

52. Mo.—Miller v. Schnebly, 15 S.W. 435, 103 Mo. 368

53. Ala.—Thompson v. Butts, 92 So. 121, 207 Ala. 226
Mo.—Miller v. Schnebly, 15 S.W. 435, 103 Mo. 368
In proceedings to
Avoid conveyance see supra § 154
Enforce
Claims against homestead see supra § 117
Rights of purchaser or mortgagee against homestead see supra § 151
Protect and enforce homestead rights generally see supra § 231

54. Mo.—Miller v. Schnebly, 15 S.W. 435, 103 Mo. 368.

not ceased as to a child born after the homestead was set apart, the widow for the use of herself and such after-born child, during its minority, may maintain the action.[55]

In a contest based on exceptions to the report of commissioners to set aside a survivor's homestead, a person not in interest is not a proper party [56]

Executor or administrator. Whether the personal representative of decedent is a necessary party to proceedings of this character will depend on the circumstances and the construction put on the particular statutory provisions involved.[57] Thus it has been held that, as a homestead is not subject to any rights of the administrator, he is not a necessary party to a bill by the widow to have homestead assigned and set off to her [58] However, it has also been held that the administrator, as the general representative of the estate, should be made a party to a proceeding by the widow to withdraw from the hands of the administrator and the control of the court a part of the property and to have it set apart as a homestead for the use of the widow and children [59]

Heirs or next of kin of decedent. Under some statutes the heirs or next of kin of a deceased husband are proper and necessary parties to the widow's suit to have land set apart to her absolutely in fee,[60] as in the case of a bill by the widow to have the estate declared insolvent for the purpose of raising her homestead from a life estate to a fee [61]

Minor children and guardian The guardian of minor children is usually the custodian of their interests[62] and as such entitled to assert their rights in the homestead of a deceased parent [63] Thus it has been held that minor children themselves cannot select, or seek to have set apart to them, the homestead,[64] but that this duty will devolve on their guardian under the superintending control of the probate or other competent court,[65] or that the court will do so in their behalf through commissioners appointed for that purpose [66] So it has been held that the minors' right of occupancy in the homestead where there is no surviving parent can be asserted only through a guardian, to whom the occupancy for the minor is assigned [67] It has also been held, however, that the guardian is not entitled, in behalf of his ward, to claim a sum ordered by the court to be paid by an administrator to the widow in lieu of homestead [68]

Under some statutes requiring notice to be given to interested persons, see supra subdivision f of this section, the minor children of decedent, as interested persons, may appear through a guardian, in opposition to an application to have the homestead set apart [69] It has also been held that, while minor children may be joined in a suit by the widow to enforce the homestead, they are not necessary parties.[70] Under some statutes, however, minor children must be represented by a guardian or guardian ad litem on the hearing of exceptions to the report of commissioners appointed to set apart the homestead [71]

h. Pleadings

Where proceedings to set apart or enforce a survivor's right of homestead are based on an application or petition, the right must be properly pleaded, and all jurisdictional elements and facts must be sufficiently set forth.

Under the statutes or practice of some jurisdictions the proceedings to set apart a survivor's homestead are instituted by an application or petition,[72] the filing of an application or petition being essen-

55. Ga —Hughes v Purcell, 68 S E 1111, 135 Ga 174

56. Mortgagee of heir

Where a widow assigned her homestead right to her minor daughter, who petitioned to have the tract set apart to her as a homestead, one claiming an interest by virtue of a mortgage executed by an adult heir was not a "person in interest," and had no proper place in the proceeding, for the title to the land was not invalid, and there was no inquiry as to whether there were outstanding incumbrances to which the homestead right was subordinate —Thompson v Butts, 92 So 121, 207 Ala 226

57. Ill —Higgins v Higgins, 76 N E 86, 219 Ill 146, 109 Am S R 316
Tex —McLane v Paschal, 47 Tex 365

58. Ill —Higgins v Higgins, 76 N E 86, 219 Ill 146, 109 Am S R 316

59. Tex —McLane v Paschal, 47 Tex 365

60. Ala —Frazier v Frazier, 100 So 118, 211 Ala 176

When brought in

Under some statutes not until the filing of the commissioners' report are steps taken to bring in the heirs of law, when they are authorized by exceptions to institute a suit inter partes testing the right of the widow to take a fee instead of a life estate in the homestead —Patterson v Murphy, 9 So 2d 754, 243 Ala 267

61. Ala —O'Daniel v Gaynor, 42 So 205, 150 Ala 205

62 Ark —Sparkman v. Roberts, 31 S W 742, 61 Ark 26
29 C J p 1032 note 85

63. Tex —Hall v Fields, 17 S W 82, 81 Tex 553
29 C J p 1032 note 86.

64 Ark —Cowley v Thompson, 91 S W 552, 77 Ark 186

65. Ark —Grimes v Luster, 84 S W 223, 73 Ark 266

66. Ark —Cowley v Thompson, 91 S W 552, 77 Ark 186

67. Tex —Hall v Fields, 17 S W 82, 81 Tex 553—Gaines v Gaines, 23 S W 465, 4 Tex Civ App 408

68. Tex —Burt v Box, 36 Tex 114

69. Wyo —In re Kiesel's Estate, 249 P 81, 35 Wyo 300

70 Mich —Showers v Robinson, 5 N W 988, 43 Mich 502
N H —Miles v Miles, 46 N H 261, 88 Am D 208

71. Ala —Thompson v Butts, 92 So 121, 207 Ala 226

72. Wyo —In re Kiesel's Estate, 249 P. 81, 35 Wyo 300.

tial.[73] On the other hand, in some jurisdictions under the statutes, the probate court administering decedent's estate may of its own motion act to allot the widow's homestead, an application therefor being unnecessary[74] except where the procedure provided for in the absence of an application is ineffective to set aside the homestead.[75] An application is necessary, however, if no administration of decedent's estate is pending.[76]

If a survivor's homestead right is relied on either as a basis for the proceeding or action[77] or as a matter of defense[78] it must be properly pleaded, and, in order that the court may acquire jurisdiction of the proceedings to set apart the homestead, the petition or application must contain all the averments required by statute and must sufficiently allege the facts necessary to show petitioner's rights under the particular statute.[79]

73. Wyo.—In re Kiesel's Estate, supra

Verbal request of court

An assignment of homestead cannot be obtained on a verbal request to the court, a petition or other application being usually required.—Cameto v Dupuy, 47 Cal 79

Limitations of rule

(1) If an inferior court proceeds to act on the question of homestead exemption but refuses to allow it to minors, on certiorari the objection cannot be raised that no formal application was addressed to the lower court.—Connell v Chandler, 11 Tex 249

(2) It has been held that the allowance may be made in compliance with a petition filed by heirs for partition of the property and alleging the homestead rights of the widow.—Schaefer v Kienzel, 15 N E 164, 123 Ill 430

74. Ala.—Gray v Weatherford, 149 So 819, 227 Ala 324

Ariz.—First Nat Bank v Reeves, 234 P 556, 27 Ariz 508

75. Ala.—Gray v Weatherford, 149 So 819, 227 Ala 324.—Evans v Evans, 104 So 515, 213 Ala 265

76. Ala.—Gray v Weatherford, 149 So 819, 227 Ala 324

77. Request for allotment should be stated in petition.—Howe v Brown, 123 N E 46, 287 Ill 532

78. Ala.—Saltsman v Saltsman, 10 So 2d 752

Elements of right must be set forth.—Saltsman v Saltsman, supra

Negativing statutory exceptions

(1) Under some statutes, one asserting a homestead right as a survivor in an action against the estate on a debt of decedent must negative a statutory exception by alleging that the debt from which exemption is claimed did not exist before the purchase of the land and erection of improvements thereon.—Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823

(2) Necessity for negativing statutory exceptions generally see supra § 232

79. Ala.—Waller v Harris, 128 So 606, 221 Ala 313.—Frazier v Frazier, 100 So 118, 211 Ala 176

29 C J p 1032 note 97.

In equity

Ala.—Frazier v Frazier, 100 So 118, 211 Ala 176.—Beck v Karr, 95 So 881, 209 Ala 199

Jurisdictional allegations in probate court

(1) Under the Alabama statutes, where there has been no administration of the estate, and an independent petition in probate court is filed for allotment of homestead, the petition must show facts prescribed by statute, which are regarded as jurisdictional and, in absence of such showing, decree will be void on its face.—Cogburn v Callier, 104 So 330, 213 Ala 46.—Miller v Thompson, 96 So 481, 209 Ala 469

(2) Such petition must allege that no administration had been granted on estate.—Evans v Evans, 104 So 515, 213 Ala 265

(3) In proceeding by the widow it must also allege that husband left no minor children, that quantity of land is within area to which statute applies, and that value of lands does not exceed statutory limit.—Quick v McDonald, 108 So 526, 214 Ala 587

(4) Where administration of the estate is pending, the petition for allotment of homestead need not show jurisdictional facts, for jurisdiction of probate court is complete without aid of petition for allotment, as proceeding is merely ancillary and part of court's original jurisdiction for administration of estates of decedents.—Cogburn v Callier, 104 So 330, 213 Ala 46

Allegation of forced abandonment held not to be construed as transfer of rights.—McGowin v McGowin, 169 So 232, 232 Ala 601

Averments as to heirs and next of kin

(1) In widow's suit to set apart homestead, averments that deceased left widow, no minor children, and one son, and that he died intestate, leaving complainant and one son surviving him, were held sufficient on demurrer to show that they were his only heirs.—Frazier v Frazier, 100 So 118, 211 Ala 176

(2) In such a suit an averment that grantee died intestate, leaving widow and children named, "who are his next of kin and heirs at law," stated with sufficient certainty under demurrer that such persons, who were parties to cause, were all the heirs and all the next of kin of deceased.—Frazier v Frazier, supra

Description of property

(1) In Alabama, because the statute under which the proceeding was brought did not require that the application should contain a description of the property, no description was held necessary.—Coker v Coker, 94 So 566 208 Ala 354

(2) Under another statute, however, a description of the real estate in which the homestead is claimed was held necessary.—Hogan v Scott, 65 So 209, 186 Ala 310

Real property not in excess of exemption

(1) Under the Alabama statute in an application by a widow for a homestead exemption before administration, an averment that the real property owned by decedent at the time of his death does not exceed in amount and value the exemptions allowed in favor of the widow and minor child or children, or either, is jurisdictional, without it the proceedings are void.—Alford v Claborne, 157 So 225, 229 Ala 401.—Brooks v Johns, 24 So 345, 119 Ala 412

(2) Recital in decree that petition did contain jurisdictional averment is insufficient to sustain proceedings.—Alford v Claborne, supra

(3) Allegation that husband at time of his death owned real estate consisting of one hundred six acres having value of less than two thousand dollars, was insufficient averment that property of husband at time of his death did not exceed amount and value allowed widow as exemptions, for purposes of conferring jurisdiction on probate court.—Alford v Claborne, supra

(4) Other cases see 29 C J p 1032 note 97 [c]

Residence in state or county

Ala.—Waller v Harris, 128 So 606, 221 Ala 313

29 C J p 1032 note 97 [e]

Selection of homestead

In widow's petition to assign homestead of deceased, exclusion of outhouses in widow's selection because of erroneous view that she was limited to a homestead of one fourth of

Amendments. The petition will not be dismissed for mere irregularities which are amendable, but the court should direct that the proper amendments be made [80]

i. Contest and Determination of Claim or Right

(1) Matters to be determined
(2) Evidence
(3) Trial or hearing, objections and exceptions

(1) Matters to Be Determined

The basic question for determination in a proceeding to set apart or enforce a survivor's homestead is the character of the property involved as a homestead and whether the area or value is within statutory limits. The rights of the several survivors must be considered

On application by survivors to have a homestead set apart, the real purpose being to separate the homestead lands from the land subject to administration,[81] the questions to be considered are whether the property was impressed with the homestead character at the time of decedent's death and whether the area or value of the premises is within the statutory limit [82] However, in allotting a widow's homestead, the rights of the children as well as the widow must be considered [83] The court may also consider and determine whether the homestead has been abandoned so as to make it subject to decedent's debts [84]

In a statutory proceeding by a surviving spouse for an award of property in lieu of a homestead, the failure of applicant to account, as the administrator of decedent's estate, cannot be considered [85]

Questions regarding the title to land are not involved and cannot be considered [86] Such questions can be determined only in an appropriate action brought at law [87]

Superior liens It has been held that the court cannot take cognizance of, or adjudicate on, liens on the land superior to the widow's homestead right [88]

(2) Evidence

General rules of evidence apply in proceedings or actions to set apart or enforce a survivor's homestead

In a proceeding or action to set apart a survivor's homestead or involving the enforcement or protection of such right, the general rules of evidence with regard to the burden of proof,[89] presump-

an acre did not invalidate selection, where land was not within city or village—In re McKenzie's Estate, 287 N W 695, 232 Wis 425

Pleading in proceedings to
- Avoid homestead conveyance see supra § 154
- Enforce
  - Claims against homestead see supra § 117
  - Rights of purchaser or mortgagee against homestead generally see supra § 151
- Protect and enforce homestead claims generally see supra § 232

80. Ala—Hudson v Stewart, 48 Ala 204

81. Ala—Coffey v Joseph, 74 Ala 271

82 Ala—Cox v Bridges, 4 So 597, 84 Ala 553—Coffey v Joseph, 74 Ala 271

Determination of value

(1) Issue of value of homestead was held question of fact not properly determinable on pleadings in proceedings to set off homestead to widower, in which defense was asserted that widower had waived homestead right by agreement—In re Clymer's Estate, 44 P 2d 1082, 150 Or 351

(2) In considering value in proceedings to set aside homestead for widow, some margin must be allowed for bona fide differences thereon—Quick v McDonald, 108 So. 529, 214 Ala 587

(3) Special conditions, such as fluctuating value of lands in particular years, are proper considerations—Quick v McDonald, supra.

Residence of guardian

In a proceeding to allot a widow's homestead, the residence of her guardian in a different county cannot be made the subject of inquiry—Coker v Coker, 94 So 566, 208 Ala 354

83. Ala—Rash v Bogart, 146 So. 814, 226 Ala 284

84. As matter of law

Where facts are not controverted, it may be determined as matter of law whether there has been such an abandonment of homestead as to make it subject to owner's debts or to his devise—Nelson v Hamlin, 104 So 589, 89 Fla 356

85. Wash—In re Leupp's Estate, 279 P 579, 153 Wash 218

Allowance in lieu of homestead see supra § 269

86 Cal—Rich v Tubbs, 41 Cal 34
Okl—Tarman v Pierce 33 P 2d 203, 205, 168 Okl 348, quoting **Corpus Juris.**
29 C J p 1033 note 3

87. Cal—In re Kimberly, 32 P 234, 97 Cal 281

88. Ala—Jackson v Sheffield, 18 So 106, 107 Ala 358
29 C J p 1033 note 5

89. Establishment of right generally

Burden of establishing right to homestead is on survivor seeking to have homestead set apart—Moseley v Neville, 129 So 12, 221 Ala 429

(2) Burden is on the survivor as to the existence and extent of the homestead claimed
Cal—In re Delaney, 37 Cal 176
Tex—McLane v Paschal, 11 S W 837, 71 Tex 20—McLane v Paschal 17 Tex 365

(3) Burden is also on survivor to show her own relationship to decedent—Sims v Birden, 73 So 379, 744, 197 Ala 690

(4) If the heirs of decedent attempt to protect decedent's property from levy and sale on the ground that it is exempt as a residence, they must prove themselves members of his family or that they claim under his allotment of homestead—Pierce v De Graffenried, 13 Ga 392

Residence of decedent

In a proceeding by a widow of a landowner to have a homestead set apart, where the residence of deceased was established in the state in which the lands lay until he left to live in another state, contestant had the duty of going forward with evidence to support her exceptions to the report setting aside the homestead—Lucky v Roberts, 100 So 578 211 Ala 578

Status as widow

Where heir at law objected to the setting aside of deceased's homestead for life to petitioner as widow of deceased on the ground that petitioner

tions,[90] and the admissibility[91] and sufficiency there- | of,[92] apply.

was not the widow of deceased, the burden of proof was on the objector—In re Kopac's Estate, 299 N W 489, 140 Neb 346

Homestead in several tracts

Where surviving widow sought to have two separate tracts of farm land, only one of which had been occupied by deceased husband and family, set apart as her probate homestead, burden was on widow to show that unoccupied tract was used, or intended to be used, not only for benefit of family, but also in connection with the occupied tract as a home place—Powell v Powell, 116 P 2d 889, 189 Okl 255

Abandonment of homestead

(1) Persons claiming forfeiture of homestead by abandonment of surviving spouse must prove abandonment was without just cause, continuing until other's death—Good v Good, Tex Civ App 293 S W 621

(2) In action, after death of owner of premises, on judgment against owner for amount of paving assessment certificates but denying foreclosure of lien on ground that premises were a business homestead, plaintiff has burden of proving that owner abandoned homestead before his death—Panhandle Const Co v Head, Tex Civ App, 131 S W 2d 779, error refused

Ownership and occupancy of property by decedent at time of death must be established by widow—In re Arndt's Estate, 225 N W 134, 199 Wis 1

Value of homestead

In probate proceeding burden is on contestant with regard to question of value of homestead—Gray v Weatherford 119 So 819, 227 Ala 324

In proceedings to protect or enforce homestead generally see supra § 233

90. Va—Barker v Jenkins, 6 S E 459, 84 Va 895
29 C J p 1033 note 11

Appraisers' report as to value

Report of appraisers as to value of homestead at death of deceased is prima facie correct—Gray v Weatherford, 119 So 819, 227 Ala 324

Continuance of right

Right of surviving spouse to homestead is presumed to continue until proof of abandonment—Good v. Good, Tex Civ App, 293 S W 621

In proceedings to protect or enforce homestead generally see supra § 233

91. Tex—Shepherd v White, 11 Tex 346
29 C J p 1033 note 12

Evidence of creditors generally

The creditor may in general introduce evidence to show that the premises were not a homestead or were wholly or in part subject to his debt—McLane v Paschal, 62 Tex 102

Question of ownership

In action by widow to establish homestead against one claiming ownership of the property, in which it was testified that both the widow and deceased husband acknowledged that the property belonged to defendant and he would have to pay for insurance on the property, the fire insurance policy issued to defendant on such property was held admissible—Youngblood v Youngblood, Civ App, 46 S W 2d 390, reversed in part on other grounds 76 S W 2d 759, 124 Tex 184

Misconduct of surviving husband

(1) The husband's mistreatment of his wife causing her to abandon the premises occupied as a homestead does not constitute a forfeiture of the husband's homestead rights as a survivor, as stated supra § 260

(2) Accordingly, evidence that surviving husband remaining in possession of homestead owned by wife had mistreated wife, causing her to abandon premises was held inadmissible as immaterial, where husband remained in possession—Thomas v Tyler, Tex Com App, 6 S W 2d 350, reversing Tyler v Thomas, Civ App, 297 S W 609 and rehearing denied Thomas v Tyler, Com App, 9 S W 2d xviii

Value of property

(1) In contesting homestead exemptions allotted to widow, location and value of deceased's lands in relation to neighboring lands were competent Waller v Harris, 128 So 606, 221 Ala 313

(2) Other instances see 29 C J p 1033 note 12 [a] (1)

In proceedings to protect or enforce homestead generally see supra § 233

92 Ala—Sims v Birden, 73 So 379 714, 197 Ala 690
29 C J p 1033 note 13

Evidence held sufficient

(1) To show that land of which husband died seized constituted "homestead"—Overfield v Overfield, 30 S W 2d 1073, 326 Mo 83

(2) To show that property set aside by probate court as homestead of widow was purchased and improved with community funds—In re Mason's Estate, 244 P 629, 76 Cal App 315

(3) To sustain order setting apart homestead—Wells-Dickey Trust Co v Lindberg, 206 N W 929, 165 Minn 492

(4) To sustain finding that land was not family homestead—Byrd v McKoy, 81 P 2d 315, 183 Okl. 209—Hickok v Kennedy, 58 P 2d 1236, 177 Okl 334, followed in Hickok v Cowart, 58 P 2d 1240, 177 Okl 336

(5) To support finding that premises which were formerly homestead of decedent were not homestead at time of death—In re Fish's Estate, 253 N W 387, 214 Wis 464

(6) To justify decree setting apart to surviving widow homestead in property acquired by deceased by contract to purchase from father—In re Reid's Estate, 79 P 2d 451, 26 Cal App 2d 362

(7) To sustain finding that property was not homestead of husband at time of his death nor of wife when she subsequently conveyed property to daughter - Waltz v Sheetz, 61 P 2d 883, 144 Kan 595

(8) To sustain commissioners' valuation of property in allotting homestead—McFadden v Farmers State Bank of London, 129 S W 2d 550, 278 Ky 805

(9) To establish value of property as in excess of the homestead exemption justifying sale thereof—Berger v Berger, 94 S W 2d 618, 264 Ky 225

(10) To establish that farm had been occupied by decedent and petitioner at the time of decedent's death and that petitioner was the widow of decedent so as to warrant setting aside of the farm to widow for life as homestead of decedent, where there were no creditors of decedent, and personal property in estate was sufficient to pay expenses and cost of administration—In re Kopac's Estate, 299 N W 489 140 Neb 346

(11) To sustain finding that defendant had no right of homestead in the premises—Filley v Dickinson, 193 N W 914 110 Neb 356

(12) To sustain finding that one of two tracts sought as probate homestead was not used or intended to be used in connection with the occupied tract as a homestead—Powell v Powell 116 P 2d 889 189 Okl 255

(13) To support finding that farm was homestead of widow and her deceased husband, and that it had not been abandoned as such—Courts v Aldridge, 120 P 2d 362, 190 Okl 29

(14) To show no abandonment by deceased—In re Dunlap's Estate, 87 P 2d 225, 161 Or 93

(15) To sustain finding that property was community property entitling widow to the fee as a homestead—In re Pickard, 146 P 425, 169 Cal 162

(16) To support finding of abandonment
Ill—Weinebrod v Rohdenburg, 175 N E 379, 343 Ill 318
Tex—Woolf v Smith, Civ App, 86 S W 2d 67.

(3) Trial or Hearing, Objections and Exceptions

All interested parties to the proceedings to set apart or protect a survivor's homestead are, under some statutes or practice, entitled to interpose objections and be heard. If the issues are heard by a jury, questions of fact are for its determination.

Under applicable statutes or practice, interested parties may interpose appropriate objections on the trial or hearing of a proceeding to set apart a survivor's homestead,[93] and all interested persons who have been given notice of the proceedings are entitled to be heard.[94]

The objecting party should, it is held, present his objections to the assignment of homestead and not delay until the premises are sold subject to the exemption,[95] but exceptions by creditors have been allowed to be filed after a return of the appraisers appointed to lay off the homestead.[96]

The objections should contain statements of fact and not conclusions respecting the excess in statutory value of the premises and the impossibility of carving a homestead from them;[97] and they should be written in language readily comprehended.[98]

Interrogatories. Under the practice of some jurisdictions, contestant may propound proper interrogatories to a petitioner who is seeking to have a homestead set apart, bearing on the right to the homestead.[99]

Questions for jury. Where the homestead right is involved in an action tried before a jury, fact questions involved are for determination by the jury.[1]

Appointment of commissioners or appraisers to make allotment is considered infra subdivision j of this section.

(17) To support finding of no abandonment—Aman v Cox, Tex Civ App, 164 S W 2d 744

(18) To show property was business homestead as against contention of abandonment by lease—Inman v Inman, Tex Civ App, 80 S W 2d 1103

(19) To show wife knew what she was signing when signing waiver attached to husband's will waiving homestead—In re Wyss' Estate, 297 P 100, 112 Cal App 487

Evidence insufficient

(1) To sustain plea that petitioner, seeking to have homestead of decedent set aside to her for life, was not the widow of decedent—In re Kopac's Estate, 299 N W 489, 140 Neb 316

(2) To support finding that farm was homestead of tenant at time of decedent's death, where it appeared that tenant had vacated premises prior to entry of decree assigning homestead to the widow—In re Kopac's Estate, supra

(3) To show that lands set apart to widow were in excess of homestead exemptions—Waller v Harris 128 So 606, 221 Ala 313

(4) To show that property was not abandoned as business homestead—Inman v Inman, Tex Civ App, 80 S W 2d 1103

(5) To rebut presumption of continuance of testatrix' homestead right in property on which she was living with daughter and son-in-law at time of her death—In re McClain's Estate, 262 N W 666, 220 Iowa 638

(6) To show forfeiture by wife during the life of her husband of her homestead right by misconduct—Farmer v Hampton, 156 S W 1041, 154 Ky 83.

(7) In a proceeding by widow of deceased landowner to have homestead set apart where his domicile in the state was established until he and his wife left to live in another state, evidence offered by contestant was held not sufficient to sustain the burden of proof—Lucky v Roberts, 100 So 878, 211 Ala 578

In proceedings to protect or enforce homestead generally see supra § 233

93. Collateral heirs as objectors

Under the Alabama statute, collateral heirs of decedent were held to have statutory right to contest right of decedent's surviving widow as exemptioner to have homestead set apart only on ground that the homestead exceeded in area one hundred and sixty acres and in value two thousand dollars and was not all the realty owned by decedent at his death—Davis v Bates, 194 So 647, 239 Ala 214

94. Wyo—In re Kiesel's Estate, 249 P 81, 35 Wyo 300

Contest and determination of claim for homestead generally see supra § 215

95. N H—Probate Judge v Simonds, 46 N H 363

96. Ala—Kelly v Garrett, 67 Ala 304

S C—Ex parte Kurz, 24 S C 468

97. Ala—Jackson v Rowell, 6 So 95, 87 Ala 685, 4 L R A 677

98. Ga—Hodo v Johnson, 40 Ga 439

29 C J p 1033 note 9

99. Domicile of decedent

In proceeding by widow of deceased landowner to have lands set apart as a homestead, answers to interrogatories as to the residence of deceased at his death, that he left state where his lands were located on a certain date and remained in another state, where he resided at death, were pertinent as to husband's domicile, and his intention to remain—Lucky v Roberts, 100 So 878, 211 Ala 578

Purpose of petitioner to sell property is immaterial—Lucky v Roberts, supra

Residence of petitioner

(1) In proceeding by the widow to have lands of her deceased husband set apart as a homestead, failure to require her to answer interrogatories, relating to the residence of petitioner, was not error, her residence not being a condition precedent to homestead—Lucky v Roberts, supra

(2) Residence as condition precedent to right to homestead see supra § 243

1. Abandonment of homestead

Tex—Thomas v Tyler, Com App, 6 S W 2d 350, reversing Tyler v Thomas, Civ App, 297 S W 609, and rehearing denied Thomas v Tyler, Com App, 9 S W 2d xxiii—Good v Good, Civ App, 293 S W 621

Intent in use of property

(1) Whether husband intended and used tract, received on partition in lieu of his interest in entire community estate, including homestead in another tract, as part of homestead, was a question for jury—Youngblood v Youngblood, Civ App, 46 S W 2d 390 reversed in part on other grounds 76 S W 2d 759, 124 Tex 184

(2) Where there is evidence of actual use of the property, however, investigation of the user's intention need not be made—Youngblood v Youngblood 76 S W 2d 759, 124 Tex 184, reversing in part, Civ App, 46 S W 2d 390.

j. Duty to Allot

Under some statutes the court is under a duty to set apart the survivor's homestead on establishment of the right thereto; under others a discretion is vested in the court to allow or refuse an application under certain circumstances

Under some statutes when the right to a survivor's homestead has been established the court is under a duty to grant the application therefor and make an allotment in accordance with prevailing practice, the court having no discretion in the matter [2] Under other statutes a discretion is vested in the court under certain circumstances to allow or refuse the application [3]

Allotment subject to lien In some states it has been held that the widow's right to an allotment of homestead cannot be denied because of the existence of a judgment lien or mortgage on the premises, which, on enforcement, would be superior to the homestead claim, since it would still remain subject to the lien notwithstanding the allotment [4]

k. Method of Allotment

The method or manner of making the allotment of a survivor's homestead depends on the particular statutes involved Under some statutes it is accomplished by appraisers or commissioners appointed by the court In the absence of a specific statutory procedure the court may adopt an appropriate method conforming to the general purpose of the homestead law

If the statute does not point out the method of setting apart a homestead during the lives of husband and wife, on the death of either, the probate court may adopt its own method, conforming to the general purposes of the homestead act [5] So, if the statute provides no mode of selecting the homestead where none was selected during the life of decedent, the court may adopt a procedure substantially conforming to that which would have been followed during decedent's lifetime [6]

While the selection of a homestead for the survivors should be made primarily for their benefit,[7] yet it should also be laid off in such a manner as not to injure capriciously or arbitrarily others who may be interested [8]

Appraisers or commissioners Under the statutes of some jurisdictions the allotment of a survivor's homestead is made by appraisal by appraisers or commissioners appointed by the court to determine the extent and value of the property involved, and when necessary to admeasure and set out the homestead,[9] the particular procedure to be followed being determined by statute [10] Under such

2. Wash—In re Jones' Estate, 118 P 2d 951, 11 Wash 2d 254
29 C J p 1034 note 29

Absence prior to selection
Ariz—Pauley v Hadlock, 188 P 263, 21 Ariz 340
Cal—In re Mattingly's Estate, 65 P 2d 1338, 19 Cal App 2d 550—In re Hale's Estate, 4 P 2d 263, 117 Cal App 515—In re Barkley's Estate, 267 P 148, 91 Cal App 388—In re Mason's Estate, 244 P 629, 76 Cal App 315
29 C J p 1034 note 29 [c] (1)

On filing of inventory of estate
Probate court, on filing of inventory of estate, was under duty to make order setting apart property exempt to surviving husband according to exemption laws in force at time of wife's death—In re Banfield's Estate 296 P 1066, 137 Or 167 modified on other grounds 298 P 905, 137 Or 167

Property included
Under the Washington statute the court is under a duty to set aside a homestead, which must include the home and household goods, and other property up to the statutory valuation—In re Jones' Estate, 118 P 2d 951, 11 Wash 2d 254

Waiver
The court may consider, however, whether the homestead was waived by the petitioner moving to have a homestead set apart—In re Wyss' Estate, 297 P. 100, 112 Cal App 487

Allowance in lieu of homestead see supra § 269
Discretion as to particular property selected see infra subdivision k of this section
Necessity for setting apart survivor's homestead see supra subdivision b of this section

3. In Texas the probate court is sometimes given a discretion to allow or refuse an allotment to minor children, where the widow has sold her interest in the property and it is impracticable for the minors to live together and the income on their shares is adequate for their support—Garrison v Ferguson, Civ App, 54 S W 217

4. Ala—Jackson v Sheffield, 18 So 106, 107 Ala 358
N H—Norris v Moulton, 31 N H 392
Particular debts chargeable against survivor's homestead see supra §§ 261–264

5. Ala—Keel v Larkin, 72 Ala 493
Cal—Phelan v Smith, 34 P 667, 100 Cal 158
Ohio—Wanzer v Widow, 2 Ohio Dec, Reprint, 323, 2 West L Month 426

6. Mont—In re Trepp's Estate, 227 P 1005, 71 Mont 154

7. Ark—Cowley v Spradlin, 91 S W 550, 77 Ark 190

8. Ark—Cowley v Spradlin, supra—Sparks v Day 33 S W 1073, 61 Ark 570 51 Am S R 279
29 C J p 1034 note 34

9. Ala—Patterson v Murphy, 9 So 2d 754 243 Ala 267
Mo—Jennings v Cherry, 257 S W 438 301 Mo 321
29 C J p 1034 note 29 [a]

Appointment as of course
Under some statutes commissioners are appointed by the court as of course on the filing of a proper application to set aside the homestead for the purpose of appraising the value and extent of the land—Patterson v Murphy, 9 So 2d 754, 243 Ala 267
Allotment and appraisal of homestead generally see supra §§ 216–221
Statute authorizing commissioner to make the allotment as not improper delegation of judicial power see Constitutional Law § 173 b

10 N D—Farmers' State Bank of Buttzville v Bartley, 206 N W 414, 53 N D 376

Exclusion of excess
Under a statute requiring the appraisers to divide the property selected as the homestead so as to exclude the excess in value from the homestead unless they find that it cannot be done without material injury to the property, an order setting aside homestead is not void, notwithstanding the appraisers valued

a statute, if the property involved is found by the court to be less than the homestead exemption the appointment of a commissioner to admeasure and set out the homestead is unnecessary [11]

Where the report of the commissioners is ex parte it is not entitled to the same force and effect as the finding of a jury hearing the evidence of both parties [12] Exceptors to the report nevertheless have the burden of overcoming the findings thereof by clear and convincing evidence [13]

Property selected Under some of the statutes imposing an absolute duty on the court to select and set apart the survivor's homestead, the court has a discretion with respect to the particular property to be set apart, the wishes of applicant not being binding,[14] although the dwelling house should be included [15] If the land on which the house is located is insufficient in area to constitute the complete homestead permitted by the statute, adjoining land in quantity sufficient to complete the homestead may properly be designated as part of the homestead [16]

If two homesteads are claimed the court should require an election as to which of the two will be taken [17]

Mere irregularities. If the allotment proceedings are formally defective, through mere irregularities of procedure, this will not vitiate the assignment of the homestead [18]

1. Order or Decree; Findings

The order or decree setting apart a survivor's homestead should identify the parties, and a description of the property must appear therein or in other papers in the proceedings Findings must be supported by the pleadings and evidence.

The findings with respect to the survivor's right to the homestead must be supported by the pleadings and evidence [19]

The parties must be identified in the order setting apart the homestead,[20] but this may be done by referring to them as the "family" of decedent [21]

The order should not determine where the property shall vest on the termination of the homestead [22] It should not direct a sale of the remainder in the homestead to pay a balance of purchase money, but ought to provide for a sale of a part of the premises for that purpose,[23] nor can the court, if acting as a probate tribunal, decree that the homestead shall be subject to a certain mortgage,[24] or that the return of appraisers, assigning the homestead, shall be set aside unless a specified judgment against decedent is paid within a given time [25] The decree may, however, make provision for the payment of the excess of decedent's property over the homestead value to the personal representative, for the benefit of decedent's creditors [26]

the property in excess of the exemption and did not find that the homestead could not be divided without material injury, where the order was made after two formal hearings, at one of which claimant presented evidence —Farmers' State Bank of Buttzville v Bartley, supra

11. Mo —Jennings v Cherry, 257 S W 438, 301 Mo 321

12. Ala —Long v Doegg, 173 So 41, 233 Ala 637—Foote v Foote, 140 So 603, 224 Ala 391

13. Valuation of property fixed by the commissioners —Long v Doegg, 173 So 41, 233 Ala 637—Foote v Foote, 140 So 603, 224 Ala 391

14. Cal —In re Schmidt's Estate, 29 P 714, 94 Cal 331—In re Mattingly's Estate, 65 P 2d 1338, 19 Cal App 2d 550—In re Mason's Estate, 244 P 629, 76 Cal App 315
Wash —In re Jones' Estate, 118 P. 2d 951, 11 Wash 2d 254

Extent and limits of homestead

(1) The extent of, and limitations on the homestead rest in the discretion of the court —In re Barkley's Estate, 267 P 148, 91 Cal App 388

(2) In determining limitation of homestead, the court may consider the demands of the family, the value of the homestead, the financial condition of the estate, and rights of the creditors —In re Barkley's Estate, supra

(3) Setting apart of probate homestead to widow was held not an abuse of discretion where creditor was not injured, and widow had paid with her own property debts of estate exceeding value of homestead, which could not be partitioned without impairing its value —In re Knight's Estate, 245 P 454, 76 Cal App 618

15. Tex —White v Mitchell, 60 Tex 164
Wash —In re Jones' Estate, 118 P 2d 951 11 Wash 2d 254

16. Fla —Fort v Rigdon, 129 So 847, 100 Fla 398

17 Ark —Cowley v Thompson, 91 S W 552, 77 Ark 186

18. N C —Formeyduval v Rockwell, 23 S E 488, 117 N C 320
Vt —Doane v Doane, 33 Vt 649

Delayed appointment of appraisers

That court did not appoint appraisers until dissent was filed, and recited that widow had filed dissent, in no way affected court's jurisdiction to allot homestead to widow, such recital being mere surplusage —Gray v Weatherford, 149 So. 819, 227 Ala 324

19. Homestead set up by answer

Answer and counterclaim pleading homestead in action against administratrix and decedent's infant children for sum loaned to decedent by plaintiff was held insufficient to support finding of homestead in absence of allegations that debt sued on did not exist before erection of improvements on land subject to lien for payment thereof, where such defect was not supplied by answer or other pleading or cured by evidence heard without objection —Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823

20. Cal —Phelan v Smith, 34 P 667, 100 Cal 158
Judgment in proceedings to protect or enforce homestead generally see supra § 236

21. Cal —Phelan v Smith, supra

22. Cal —In re Firth, 78 P. 643, 145 Cal 236
29 C J p 1033 note 17.

23. Ky —Davidson v Davidson, 1 Ky L 360

24. Cal —Chalmers v Stockton Bldg & Loan Soc, 28 P 59, 64 Cal 77

25. S C —Ex parte Young, 7 S E 499, 29 S C 298

26. Payment from proceeds of sale

Description of premises. A description of the land must be given in the order setting apart the homestead or in other papers in the proceeding or the order will be void [27] However, it has been held no objection to the allowance of the homestead that the order fails to define the boundary and extent of the premises necessary to reach the sum allowed by statute, and to find whether they can be divided [28]

Excess in value when property indivisible Where a homestead estate is decreed in homestead property which exceeds the statutory exemption in value and which is indivisible, the decree should show the amount of the excess in value and the fact that the property is indivisible [29]

Rent and damages Where a surviving husband entitled to the exclusive occupation of an unassignable homestead estate is excluded by the heirs from all parts of the house, except one room, and is mistreated, and put in fear, a decree awarding him the right to exclusive occupancy may award to him a fixed sum as rent for the time he was denied the use of the homestead, but should not award any damages for failure to assign his homestead estate [30]

Mere surplusage in the order will not vitiate it [31]

Notice of order In the absence of statute so requiring, it has been held that a widow applying to the probate court to have her homestead set apart is not entitled to notice of the court's action in approving the commissioner's report and setting out her homestead.[32]

The recording of the order setting apart a homestead is not necessary unless there is some statute requiring it [33]

§ 280. —— Operation and Effect of Assignment of Homestead

a In general
b Withdrawing property from administration
c Collateral attack

a. In General

An order or decree adjudicating a survivor's homestead right or setting apart the homestead is binding on the parties in interest unless appealed from, and where the proceedings are considered in rem the allotment is binding on the whole world

The adjudication of homestead rights and the setting apart of a homestead generally are conclusive on parties in interest,[34] unless appealed from,[35] and where the proceedings are considered in rem, see supra § 279 a, the order setting apart the homestead is binding on the whole world [36]

of the property—Kimbrough v Powell, 108 So 498, 143 Miss 498

27. Ala—Tanner v Thomas, 71 Ala 233
Ill—Gibbs v Gerdes, 126 N E 155, 291 Ill 490
22 C J p 1033 note 22

28. Nev—In re Quinn, 74 P 5 27 Nev 156
29 C J p 1034 note 23

29. N D—Calmer v Calmer, 106 N W 684, 15 N D 120

30 Ill—Powell v Powell, 93 N E 432, 247 Ill 432
Rent is incident of survivor's homestead right see supra § 265

31. N C—Formeyduval v Rockwell, 23 S E 188, 117 N C 320

32. Mo—Mulkey v Mulkey, App, 145 S W 2d 996

33. Cal—Otto v Long, 77 P 885, 114 Cal 144

34. Ala—Jones v Hubbard, 94 So 167, 208 Ala 269
29 C J p 1034 note 41.

Matters determined

(1) Where a probate court sets aside a widow's homestead, the decree is final as to whether deceased, at the time of his death owned the property, whether the lands were all the lands he owned at his death and whether they exceeded either in value or area the constitutional limit of a homestead whether the widow was in fact his widow, and whether decedent left surviving him any minor child or children—Jones v Hubbard, supra

(2) Under circumstances entitling the widow to an allotment of a fee, a probate decree alloting homestead of deceased to widow was an adjudication of all facts necessary to vest in widow the fee to the property including an adjudication that she left no minor child—Taylor v Dew, 184 So 184, 236 Ala 624

(3) Where, in ejectment by plaintiffs' curator, appointed under statute, during plaintiff's minority, the court found that the land in dispute was the homestead of plaintiffs' father, that it did not exceed the maximum value allowed by law for a homestead at the time of his death, and that his widow sold the land to third person, the judgment as to the value of the homestead and that such third person was the owner thereof in fee, subject to the interest of plaintiffs during minority, was within the jurisdiction of the court and was a final adjudication, although in so far as it attempted to exclude plaintiffs from possession of the land during their minority it was beyond the court's jurisdiction—Jennings v Cherry, 257 S W. 438, 301 Mo 321.

(4) Judicial allotment suffices to remove cloud on widow's homestead by virtue of will—Wood v Cantrell, 140 So 345, 224 Ala 294

Persons without interest

An aunt and uncle of a sole surviving infant daughter cannot complain of a judgment quieting title to the infant daughter's homestead to her grandfather on her death, and before any proceedings for the administration of her estate were had, since the aunt and uncle have no interest whatever in the homestead—Raistakka v Fagerstrom, 208 P 949, 64 Mont 173

Nature of estate or interest transmitted see supra § 265

Operation and effect of allotment of homestead generally see supra § 220

35. Cal—Gruwell v. Seybolt, 22 P. 938 82 Cal 7
29 C J p 1034 note 42
Review of order setting apart homestead see infra § 282

36. Mo—Limb v Bevins, 155 S W. 2d 508, 236 Mo App 556—First Nat. Bank of Golden City v Cook, App, 74 S W 2d 846

Heirs without notice

Ala—Bedwell v. Dean, 132 So 20, 222 Ala. 276.

Creditors[37] and heirs[38] are concluded thereby

The widow, after acquiescence, is likewise prevented from disputing the allotment made to her[39]

A proceeding setting aside land in accordance with an order directing commissioners to do so is conclusive on the widow and those claiming under her as to title to land being in her husband[40] If common property, descending one half to the surviving spouse and one half to the children, is set apart to the widow as owner of the fee, she cannot deny a trusteeship of the children's half interest.[41]

Purchasers of homesteads, buying at a sheriff's sale and subject to an assignment of homestead already made, are bound thereby[42]

Abandonment An assignment to the widow is an adjudication that she has not lost her rights by abandonment up to that time[43]

Revaluation Where the homestead has been set off to the survivors, it cannot be revalued and a new homestead set off in the absence of special statutory authorization,[44] even though the value of the property set apart at a subsequent time exceeds the limit of the statutory exemption[45]

No publication of appointment of administrator The fact that an administrator did not publish notice of his appointment does not affect the conclusiveness of an order of the county court setting apart property covered by a trust deed to the children of decedent as their homestead, since all persons interested in the estate were required to take notice of the administration proceedings regularly begun, and the administrator's failure only renders him liable for any damages occasioned a creditor thereby, as provided by statute[46]

Unnecessary order Under circumstances rendering it unnecessary to set aside the homestead to the survivor, see supra § 279 b, an order of the probate court attempting to set apart the homestead is ineffective,[47] and, as discussed infra subdivision b of this section, serves only to withdraw the property from administration and further consideration

Matters not affected or determined. Liens existing against the property remain unaffected by setting it apart as a homestead[48] Where the order of court setting apart community property to a widow as a probate homestead was passed prior to a mortgage thereon being executed by the widow, but not entered until after the date of the mortgage, the validity of the mortgage is not affected[49] If the judgment recites the names of decedent's children and sets a homestead apart for the widow, it does not thereby adjudicate the children's interests or that they are minors[50] A setting apart does not determine that the widow may claim a distributive share in the homestead premises to be enjoyed by her in severalty[51] If she and the children are denied a homestead in land held by the deceased under a contract to purchase, they may renew their application after the purchase price has been fully paid[52]

37. Ala.—McDonald v. Berry, 7 So. 838, 90 Ala. 464
29 C.J. p. 1034 note 43
"The homestead is free from execution and sale for benefit of creditors and especially is that true where homestead has been duly and legally set apart for the benefit of the widow and minor children.—First Nat. Bank of Golden City v. Cook, Mo.App., 74 S.W.2d 846, 850

Creditor taking no action
County court's order redesignating homestead set aside to deceased's widow and minor children became final, where creditor made no effort to procure relief in such court except to file protest.—Askey v. Power, 94 S.W.2d 136, 127 Tex. 335, affirming, Civ.App., 58 S.W.2d 1041

Judgment creditor with notice
Wash.—Branche v. Aumiller, 266 P. 723, 147 Wash. 463

38. Cal.—Fealey v. Fealey, 38 P. 49, 104 Cal. 354, 43 Am.S.R. 111.
29 C.J. p. 1034 note 44

Homestead in larger tract
Where judgment had awarded homestead interest to father as to two hundred acres of two hundred eighteen and three-fourths acre tract as exclusive homestead, son could not enjoin execution of writ of possession, notwithstanding the eighteen and three-fourths acres which it was proposed to leave to son were untillable, without improvements, and almost valueless and notwithstanding son was at the time occupying about twenty-two acres which he had improved at his own expense.—Bobbitt v. Bobbitt, Tex.Civ.App., 134 S.W.2d 484
Rights of heirs and remaindermen see supra § 264

39. Cal.—Holden v. Pinney, 6 Cal. 234
29 C.J. p. 1034 note 45

40. Va.—Arendall v. Arendall, 89 S.E. 87, 119 Va. 1

41. Cal.—Hoppe v. Hoppe, 37 P. 894, 104 Cal. 94

42. S.C.—McKeown v. Carroll, 5 S.C. 75

43. Ill.—Plummer v. White, 101 Ill. 474
Abandonment of survivor's homestead generally see supra § 273

Waiver, release, or bar of widow's homestead see supra §§ 249–254

44. Mo.—Brewington v. Brewington, 109 S.W. 723, 211 Mo. 48
Utah.—In re Bedford, 95 P. 518, 34 Utah 24, 16 L.R.A.,N.S., 728, 16 Ann.Cas. 118

45. Utah.—In re Bedford, supra

46. Tex.—Tiboldi v. Palms, 78 S.W. 726, 34 Tex.Civ.App. 318, affirmed 79 S.W. 23, 97 Tex. 414

47. Cal.—In re Simonton's Estate, 190 P. 442, 183 Cal. 53.—Selinger v. Milly, 124 P.2d 631, 51 Cal.App.2d 286

48. Cal.—In re McCauley, 50 Cal. 544
Tex.—Hensel v. International Bldg. & Loan Assoc., 20 S.W. 116, 85 Tex. 215

49. Cal.—Otto v. Long, 77 P. 885, 144 Cal. 144

50. Cal.—Hoppe v. Hoppe, 36 P. 389, 4 Cal.Unrep.Cas. 569

51. S.C.—Glover v. Glover, 22 S.E. 739, 45 S.C. 51

52. S.C.—Munro v. Jeter, 24 S.C. 29

Adjudication of title. The setting apart of a homestead to survivors does not adjudicate title to the premises or in any way affect title [53]

b. Withdrawing Property from Administration

An assignment or allotment of a survivor's homestead ordinarily withdraws the property from the administration of the decedent's estate

After a homestead has been set apart it is no longer subject to administration,[54] and cannot be sold in proceedings in the probate court for debts of decedent,[55] even though secured by a valid mortgage on the homestead,[56] or for the support of the family,[57] and such sales are absolutely void [58]

c. Collateral Attack

An order of a court having jurisdiction of the proceedings adjudicating a survivor's right of homestead is not subject to collateral attack except for fraud in the procurement of the order

If a court of competent jurisdiction adjudicates homestead rights, its judgment is not open to collateral attack[59] for mere irregularities,[60] but can be reviewed only by direct appeal therefrom [61] This is so even though the decree is based on a law subsequently declared unconstitutional,[62] or although error appears on the face of the decree [63] The rule

53. Okl—Tarman v Pierce, 33 P 2d 203, 205, 168 Okl 348, quoting **Corpus Juris.**
29 C J p 1036 note 72

Use alone involved
Under some statutes, setting apart of homestead for wife and children does not change title, but only use during life of wife and minority of children—Donalson v Yeates 159 S E 856, 173 Ga 30, followed in Shingler v Yeates, 159 S E 859 (first case), 173 Ga 34 and 159 S E 859 (second case), 173 Ga 35

Individual interest of widow
Proceeding in which homestead was set apart to surviving wife and minor child in deceased husband's half interest in land of which husband and wife had been tenants in common on rendition of decree of insolvency of husband's estate, did not divest wife of her individual half interest—Glover v Mitchell, 99 So 905, 211 Ala 136
Nature of estate or interest transmitted see supra § 265

54. Cal—Saddlemire v Stockton Savings & Loan Soc, 79 P 381, 144 Cal 650
29 C J p 1035 note 60

Probate court loses jurisdiction of property after setting it apart as homestead—In re Gilmore's Estate, 22 P 655, 81 Cal 240

Unnecessary order
A probate court order setting aside the homestead to surviving spouse is ineffective and serves only to withdraw the premises from administration and from further consideration by the court—Selinger v Mills, 124 P 2d 631, 51 Cal App 2d 286

55 Ohio—Wehrle v Wehrle, 39 Ohio St 365

56. Cal—In re Orr 29 Cal 101
29 C J p 1035 note 62

57. Tex—Cummins v Denton 1 Tex Unrep Cas 181

58. Ohio—Wehrle v Wehrle, 39 Ohio St 365

59. Ala—Williams v Overcast, 155 So 543, 229 Ala 119—Bedwell v Dean 132 So 20, 222 Ala 276—Quick v McDonald 108 So 529, 214 Ala 587—Cogburn v Callier, 104 So 330, 213 Ala 46—Berry v Manning, 96 So 762, 209 Ala 587—Jones v Hubbard 94 So 167, 208 Ala 269
Ill—Chapman v Chapman, 25 N E 2d 92, 303 Ill App 340
Mo—Mulkey v Mulkey, App, 145 S W 2d 996—First Nat Bank of Golden City v Cook, App, 74 S W 2d 846
Tex—Askey v Power, 94 S W 2d 136, 127 Tex 335 affirming, Civ App, 58 S W 2d 1041
29 C J p 1035 note 65

Jurisdictional facts alleged in the petition are determined by the proceedings and are not subject to collateral attack—Taylor v Dew 184 So 181, 236 Ala 624 Quick v McDonald, 108 So 529 214 Ala 587—Jones v Hubbard, 94 So 167, 208 Ala 269

Absence of notice to heirs or next of kin
Absence of notice to heirs or next of kin does not render the order void where the jurisdiction of the court is not dependent on notice—Bedwell v Dean, 132 So 20, 222 Ala 276—Jones v Hubbard, 94 So 167, 208 Ala 269

Statutory procedure followed
Ala—Bedwell v Dean, 132 So 20 222 Ala 276

Subsequent change in law inapplicable
Ala Williams v Overcast, 155 So 543, 229 Ala 119

Complainant without interest
Adopted child was not entitled to have probate court decree setting apart homestead to widow set aside in equity for widow's alleged fraud in failing to mention adopted child as minor child where probate record was void on its face, and effort to show that complainant was adopted child failed because attempted adoption did not conform to statute—Glasscock v Kelley, 192 So 586, 238 Ala 593

Court record controls
Where son, who was a minor at time of father's death in 1909 and when proceedings to set aside homestead were filed, became of age before report of commission setting aside homestead was confirmed, but probate record did not show that son had become of age before sale was confirmed decree setting property aside as homestead to son would not be held void in suit for sale of land for division, brought by one claiming under sheriff's deed executed contrary to claim of homestead—Albright v Creel, 182 So 10, 236 Ala 286
Action to vacate order see infra § 281

60 Ala—Bedwell v Dean, 132 So 20 222 Ala 276—Berry v Manning 96 So 762, 209 Ala 587

Appraisal as of erroneous date
Ala—Cogburn v Callier, 104 So 330 213 Ala 16

Error in appointment of appraisers
Ala—Miller v Thompson 96 So 481, 209 Ala 169

Want of qualification of commissioners
Ala—Cogburn v Callier, 104 So 330, 213 Ala 16

61. Ala—Cogburn v Callier, supra—Jones v Hubbard, 94 So 167, 208 Ala 269
Mo Mulkey v Mulkey, App, 145 S W 2d 996
29 C J p 1035 note 66

Lack of knowledge of order
Widow's lack of knowledge of entry of judgment by probate court, on widow's application, setting off her homestead in decedent's realty, did not excuse widow's failure to appeal from judgment so as to enable her to maintain suit in equity to vacate probate court's judgment without alleging as ground therefor fraud in the act of procuring the judgment—Mulkey v Mulkey, supra

62. Neb—Brandhoefer v Bain, 64 N W 213, 45 Neb 781

63. Cal—Rountree v Montague, 157 P 623, 30 Cal App 170.
29 C J p 1035 note 68.

may apply also even in the case of fraud,[64] but not where the fraud was as to matters extrinsic of the matters involved in the judgment or decree[65] However, if the court had no jurisdiction of the subject matter, its decree may be questioned in a collateral proceeding, as is the case with other decrees[66]

§ 281. —— Vacating and Setting Aside Allotment

An order setting apart a survivor's homestead may be set aside on motion for inadvertence, surprise, excusable neglect, or fraud, in accordance with the local practice, and a suit to vacate the order also lies for jurisdictional defects or fraud in procurement of the order.

An order setting apart a survivor's homestead may be set aside or vacated on the ground of inadvertence,[67] surprise,[68] excusable neglect,[69] or fraud,[70] on motion[71] of the personal representatives and heirs,[72] in accordance with the local practice[73] An order prematurely confirming a report of homestead commissioners may be set aside on motion[74]

Suit to vacate A suit to annul or vacate an order or decree setting aside a survivor's homestead may be maintained for jurisdictional defects in such order or decree[75] or for fraud in its procurement[76]

64. Ala—Jones v Hubbard, 94 So 167, 208 Ala 269—Douglas v Bishop 77 So 752 201 Ala 226
29 C J p 1035 note 69

65. Ala—Jones v Hubbard 94 So 167, 208 Ala 269—Douglas v Bishop, 77 So 752, 754, 201 Ala 226
"The fraud necessary to set aside a judgment of a court of competent jurisdiction must be such as has relation to matters extrinsic or collateral, and not to a fraud, in the matter in which the decree was rendered"—Douglas v Bishop supra

Fraud in procurement of judgment
Mo—Mulkey v Mulkey, App, 145 S W 2d 996

Questions of value of exemption
(1) Purpose of petitioner to secure lands in excess of exemption in proceedings to set aside homestead for widow will not invalidate final decree in absence of fraud preventing hearing, where appraisers have performed duty—Quick v McDonald 108 So 529, 214 Ala 587

(2) That parties promoting proceedings to set aside homestead for widow knew value of property exceeded exemption and intended to obtain title through fraudulent court proceedings negatives bona fide error of judgment as to value—Quick v McDonald, supra

(3) Disparity between actual and appraised value of homestead may be so obvious as to warrant a conclusion of bad faith or incompetence—Quick v McDonald, supra

Insufficient allegations as to fraud—Bedwell v Dean, 132 So 20, 222 Ala 276

Evidence insufficient as to fraud
Ala—Cogburn v Callier, 104 So 330, 213 Ala 16

66. Ala—Bryant v Perryman, 105 So 561, 213 Ala 561
29 C J p 1036 note 71

Jurisdictional defect in petition
Where widow's petition to have real estate set apart to her as homestead lacked averment that property of husband at time of his death did not exceed amount and value allowed widow as exemptions, decree of probate court was void and could be attacked either directly or collaterally—Alford v Claborne, 157 So 226, 229 Ala 401.

Absence of notice
Order of superior court, declaring community property to be homestead of surviving husband, on ex parte hearing, on same day declaration of homestead was filed in auditor's office, and not showing service of notice on, or appearance by children interested as remaindermen, under mother's will, whose rights had become vested was collaterally impeachable in proceeding by remaindermen against husband's second wife as devisee under his will for partition—Morley v Morley, 230 P 645, 131 Wash 510

Decree in excess of jurisdiction
In suit on street paving certificates, probate court order setting aside to defendant as widow, discharged of all debts as homestead, property against which lien was sought was properly excluded since probate court has no authority to set aside to widow, as exempt, property subject to valid lien—Hinton v Uvalde Paving Co Tex Civ App, 77 S W 2d 733, error refused

Adjudicating title
Where mother died intestate in 1915 occupying eighty-acre tract worth less than two thousand dollars leaving surviving her husband, one adult child and seven minor children, and in 1932 only remaining minor filed application to set apart entire tract as exempt to him, as much of probate court decree as attempted to vest in the minor an absolute fee title to the property was void and was to be so considered on "collateral attack" in proceeding for decree ordering sale for division among tenants in common—T S Faulk & Co v Boutwell, 7 So 2d 490, 242 Ala 526

67. Ala—Kelly v Garrett, 67 Ala 304
Cal—Levy v San Francisco, 73 P 417, 139 Cal 590

68. Cal—Levy v San Francisco, supra

69. Cal—Levy v San Francisco, supra

70. Probate court
District court properly affirmed orders of probate court vacating its previous order setting aside a homestead, where petition in probate court, which alleged that decedent did not reside on land claimed as homestead and that previous order setting aside homestead was obtained by fraud perpetrated on court, was not contradicted in district court In re Flanagan's Estate 261 N W 433, 196 Minn 110

71. Ala—Kelly v Garrett, 67 Ala 304
Cal—Levy v San Francisco, 73 P 417, 139 Cal 590

Jurisdiction of particular courts
A superior court has power to vacate or modify an order in probate setting apart a homestead—Cahill v Superior Court of City & County of San Francisco, 78 P 167, 145 Cal 42

72. Cal—Levy v San Francisco, 73 P 417 139 Cal 590

73. In Washington an order setting apart a homestead is in the nature of a final judgment that can be set aside only on motion for new trial within the time limited by law or by motion or by petition based on some statutory ground—In re McKeever, 93 P 916, 48 Wash 429

74 Ala—Kelly v Garrett, 67 Ala 304

75. Minor child not represented
The trial court, while rightly entertaining petition of minor's guardian to set aside an award to the widow of the homestead, because the minor was not represented when the property was set aside, to the widow, should have confirmed the previous order awarding property to widow—In re McCorkle's Estate, 223 P 1038, 128 Wash 556
Collateral attack on order see supra § 280 b

76 Cal—Wickersham v Comerford, 31 P 358, 96 Cal 433.

Mere lack of knowledge by the widow of the entry of the order setting apart her homestead is no ground for a separate suit to vacate the order without allegations of fraud in procurement of such order.[77] It has been held, however, that, where an order of the probate court is absolutely void, a bill in equity to vacate the order does not lie since the probate court may expunge the order.[78]

In an action to vacate a judgment setting apart a homestead, the probate court records of the proceedings in which the homestead was set apart should be received in evidence.[79]

Collateral attack on order setting aside. Where an allotment has been irregularly made under an order not absolutely void, a subsequent order setting aside the former cannot be collaterally attacked, if the court which sets it aside acts within its jurisdiction.[80]

§ 282. —— Review

The review of an order adjudicating a survivor's right of homestead or setting apart of such homestead is governed by the local statutes.

Under the statutes of some jurisdictions an appeal lies from an order or decree allowing and setting apart a homestead.[81] In such jurisdictions, it has been held, in conformity with the practice prevailing therein, that the appeal must be taken and perfected within the time limited by the statute[82] or it will be dismissed,[83] that such an order is not reviewable on appeal from a subsequent order,[84] and that an interlocutory order of a probate court which sets aside its own proceedings on the widow's petition for a homestead is not appealable.[85]

Scope of review and matters considered. As a rule errors not appearing on the face of the judgment roll are disregarded.[86] The reviewing court will not assume that a widow is not the head of a family where it is only shown that she has no children.[87]

On appeal a proper selection by the widow or commissioners will be presumed where there has been an allotment, occupancy by the widow, and no exceptions filed to the commissioners' report.[88]

The discretion of the court in limiting the period of the homestead will not be interfered with on appeal unless it is abused.[89]

Findings of fact by the court not clearly erroneous will not be disturbed.[90] Thus, if the ques-

Ga.—Brown v. Thornton, 47 Ga. 474
29 C.J. p. 1036 note 79

Allegations of fraud essential

Mo.—Mulkey v. Mulkey, App., 145 S.W.2d 996

Matters not considered

Whether educational advantages afforded minor children justified sale of decedent's farm for reinvestment of proceeds in city homestead for widow and children cannot be considered.—Casey v. Sacks, 134 So. 851, 223 Ala. 117

Acts not constituting fraud

(1) Where a husband devised all his property to his wife for life with remainder to others, and the wife, in honest belief that she was the sole heir, began an action in the circuit court for the construction of the will, which was decided adversely to her, that decree did not prevent her from petitioning the county court for an order setting aside a homestead, and in her failure to inform the county court of the former proceeding there was no fraud.—Ferguson v. Holborn, 211 P. 953, 106 Or. 566

(2) A mistake of the applicant as to the extent of his rights is not equivalent to fraud.—Wickersham v. Comerford, 38 P. 101, 101 Cal. 194

Sufficiency of evidence

(1) In a suit against the administratrix of an estate to vacate a decree of the probate court setting aside homestead to the widow, evidence was held to support a finding that complainant was over the age of twenty-one years at the time of decedent's death, and that she had knowledge of the proceedings to set aside the homestead and exemptions, so that she was bound by the decree, having taken no appeal therefrom.—Jones v. Hubbard, 94 So. 167, 208 Ala. 269

(2) Evidence of inadequacy of price received for decedent's realty, sold for reinvestment of proceeds in homestead for widow and children, was held insufficient to raise presumption of fraud.—Casey v. Sacks, 134 So. 851, 223 Ala. 117

77. Mo.—Mulkey v. Mulkey, App., 145 S.W.2d 996
Notice of order as unnecessary see supra § 279.1

78. Ala.—Glasscock v. Kelley, 192 So. 586, 238 Ala. 593

79. Ala.—Hynes v. Underwood, 67 So. 994, 191 Ala. 90

80. Ala.—Baker v. Barclit, 76 Ala. 414

81. Ala.—McDaniel v. McDaniel, 74 So. 917, 199 Ala. 467.
29 C.J. p. 1036 note 84.

Who may appeal

Administrator or one of deceased's children as party in interest may except and appeal in contest of homestead exemptions set apart to widow.—Waller v. Harris, 128 So. 606, 221 Ala. 313.

Review of order in proceedings to protect or enforce homestead generally see supra § 237

82. Ala.—McDaniel v. McDaniel, 74 So. 917, 199 Ala. 467
29 C.J. p. 1036 note 86

83. Ala.—McDaniel v. McDaniel, supra.—Ingram v. Ingram, 24 So. 47, 119 Ala. 256

84. Cal.—In re Burns, 54 Cal. 223

85. Cal.—Johnson v. Tyson, 45 Cal. 257

86. Nev.—In re Quinn, 71 P. 5, 27 Nev. 156

87. S.C.—Moore v. Parker, 13 S.C. 486

88. Ala.—Dossey v. Pitman, 2 So. 413, 81 Ala. 381

89. Cal.—In re Barkley's Estate, 267 P. 118, 91 Cal.App. 388

90. Value of property

(1) There is presumption on appeal in favor of finding of trial judge, who saw and heard witnesses, as to value of realty set apart to decedent's widow as homestead.—Hardy v. Morgan, 189 So. 878, 238 Ala. 251

(2) Thus, in proceeding to have homestead set aside to surviving widow of deceased, a finding that value of the property in question did not exceed statutory amount was not so clearly erroneous as to warrant disturbance of the finding.—Patterson v. Murphy, 9 So.2d 754, 243 Ala. 267.

tion of domicile is decided in the lower court and such finding is supported by the evidence, it will not be disturbed on appeal.[91] Where, however, the evidence leaves no room for doubt that the findings are erroneous, the appellate court must reverse the judgment based thereon.[92]

A reversal will not be ordered for error in findings of facts by commissioners, when the statute makes final the acceptance of their report by the trial court,[93] nor will an allowance to minors in lieu of a homestead be disturbed, if it is not shown that such allowance is insufficient for their support,[94] or an appraisal by commissioners, fixing the value of a widow's interest in the homestead at the full appraised value of the land,[95] or a refusal to allot a homestead to a minor within a few days of his majority, where it is not shown that the use for that period would have been beneficial to him[96]

On appeal to an intermediate court the time when debts of decedent were contracted may be shown by other evidence than the commissioners' report[97] An intermediate court did not err in refusing to order a reassignment of a single homestead to several children of decedent, where the only question before it was whether several homesteads could be allotted to the children respectively[98]

Certiorari. Notwithstanding the probate court's want of jurisdiction to sell a homestead during the minority of the children, it is not error on certiorari to refuse to quash an order confirming a sale of decedent's property, on the ground that part of the lands constitute the homestead of deceased, and that the sale was made during the minority of his child[99]

No particular description of the property is necessary on certiorari from proceedings in which the probate court failed to set apart a homestead for minors and order a sale of the land.[1]

On certiorari to a district court to correct an order of the probate court allotting homestead, a decree of the county court recognizing a rent contract as superior to the homestead claim cannot be pleaded in bar.[2]

§ 283. Protection of Rights by Redemption from Liens

The survivors are entitled to protect their rights in the homestead by redeeming it from liens or charges which may deprive them of the homestead.

The surviving wife and children are entitled to protect their right in the homestead by redeeming it from any lien or charge which threatens to deprive them of its shelter.[3]

§ 284. Transfer or Encumbrance

Under some statutes the court may authorize a sale of the survivor's homestead, as, for example, for the purpose of reinvestment, provided the statutory requirements are complied with Under other statutes a homestead in community property may be disposed of, like any other property, by the surviving spouse.

The transfer or encumbrance of the survivor's homestead by the surviving widow, widower, or children and heirs is considered infra §§ 285–287, and the transfer or encumbrance of a homestead generally supra §§ 123–156

Under some statutes the probate court may authorize the sale of a minor's homestead[4] The provisions of the statute as to the manner of conducting the sale must be complied with, however, or else such a sale will be void[5]

91. Ga—Harkins v Arnold, 46 Ga 656

92. Value of property

Where evidence leaves no room for doubt that decedent's realty, set apart to his widow as homestead, by probate court's judgment, was worth more than two thousand dollars above amount of lien thereon at times of husband's death and commissioners' appraisal of property, supreme court must reverse such judgment—Hardy v Morgan, 189 So 875, 238 Ala 251

Procedure on reversal

On reversal of probate court's judgment, setting apart realty to decedent's widow as homestead, on ground that evidence showed conclusively that value thereof above amount of lien thereon exceeded two thousand dollars, supreme court may remand cause to probate court for appointment of commissioners to set aside and allot to widow so much of such realty as will not exceed such value in excess of encumbrance—Hardy v Morgan, supra

93. N H—Doughty v Little, 61 N H 365

94. Tex—Ross v Smith, 44 Tex 398

95. Mo—Gore v Riley, 61 S W 837, 161 Mo 238

96. Wash—Stewin v Thrift, 70 P 116, 30 Wash 36

97. Vt—Perrin v Sargeant, 33 Vt 84
29 C J p 1037 note 99

98. S C—Carolina Nat Bank v Senn, 25 S C 572

99. Ark—Burgett v Apperson, 12 S W 559 52 Ark 213
29 C J p 1037 note 3

1. Tex—Connell v. Chandler, 11 Tex 249.

2. Tex—Oldham v. McIver, 49 Tex 556

3. Iowa—Cedar Rapids First Congr Church v Terry, 107 N W 305, 130 Iowa 513, 114 Am S R 443
29 C J p 1037 note 6
Charges enforceable against survivor's homestead see supra §§ 261–264

4. Ark—Levinson v Treadway, 78 S W 2d 59, 190 Ark 201

5. Ark—Levinson v Treadway, supra

Sale void for noncompliance

Where no notice of sale of minor's homestead was given, no appraisement made, and sale was for less than one sixth of actual value, and petition for sale did not allege whether minor had debts, and appointment of guardian, petition for sale, sale, report of sale, approval by court, and deed by guardian were

Under the statutes of some jurisdictions the homestead in community property may be disposed of, like any other property, by the surviving spouse [6]

By personal representative of decedent The homestead of the surviving spouse or minor child cannot be mortgaged by the administrator of decedent's estate,[7] even under authority of the probate court,[8] the homestead not being subject to administration proceedings until it is otherwise disposed of according to law.[9]

By trustee under will. Where the homestead passes directly to the heirs, as considered supra § 265, it cannot be mortgaged by the trustee under the will of decedent authorizing the trustee to mortgage the property [10] Such a mortgage is ineffective to create an equitable lien against the undivided interest of incompetent heirs and others of whose interests the mortgagee has constructive notice [11] The undivided interest of the trustee who was also an heir and obtained the benefits of the mortgage loan is subject to a lien for the amount of the mortgage indebtedness.[12]

Sale for reinvestment Under the statutes of some jurisdictions the homestead property may be sold on order of the court for purpose of reinvestment [13]

Some of these statutes provide that a homestead vesting absolutely in the widow and minor children cannot be sold by order of any court until the death of the widow and the attainment of majority by the youngest child, except for reinvestment, with the consent of the widow, if she is living [14] Under such a statute the homestead when set apart cannot be sold without the widow's consent,[15] even for reinvestment [16] Such a statute has been held to prevent the widow from selling or encumbering the homestead so as to affect the rights of the minor children,[17] but not to prevent the widow or children through proper court proceedings from selling or encumbering their interests [18]

Disposition by will Under some statutes a homestead in community property may be disposed of, the same as any other property, by the surviving spouse by will [19]

all made on same day, orders of probate court directing sale and confirming it were held void—Levinson v Treadway, supra

Sale of infant's homestead by guardian under order of Court see Guardian and Ward § 106

6. Cal—In re Muntz's Estate, 231 P 371, 69 Cal App 404

Transfer by surviving spouse as affecting rights of children see supra § 257

Conveyance of homestead as not fraud on creditors see Fraudulent Conveyances § 31

7. Okl—Moore v Rick, 97 P 2d 884, 186 Okl 351

8. Mortgage to pay taxes

Mortgage on homestead property was void, notwithstanding widow, who was administratrix of husband's estate, had petitioned county court for an order to mortgage the property to secure a sum sufficient to pay ad valorem and special taxes due on the property and to prevent a foreclosure and sale thereof, and pursuant to county court's order mortgage was executed—Moore v Rick, supra

Sale of homestead by order of court administering estate see Executors and Administrators § 552

9. Okl—Moore v Rick, supra

10. Fla—Brown v Jones, 192 So 188, 140 Fla 506

11. Fla—Brown v Jones supra

12. Fla—Brown v Jones, supra

13. Use of proceeds

(1) On sale of land for division and reinvestment the proceeds should be kept together for joint use of survivors—Glover v Mitchell, 99 So 905, 211 Ala 136

(2) Where sale of land set apart to widow as homestead was approved by chancellor on behalf of widow and the adult and minor heirs of intestate, the fund which was realized from the sale and which was impressed with widow's homestead right was properly ordered to be invested in other land with title for life in widow and remainder in heirs—Hutcheson v Hutcheson, 113 S W 2d 886, 176 Tenn 468

14. Ala—Judd v Dowdell 12 So 2d 858—Killian v Nappier, 12 So 2d 402—Williams v Uptagrafft, 168 So 570, 232 Ala 454—Grisham v Rotholz, 122 So 649, 219 Ala 434

15. Ala—Clements v Faulk, 61 So 264, 181 Ala 219

Allowance to survivor in lieu of homestead see supra § 269

16. Ala—Clements v Faulk, supra

17. Ala—Killian v Nappier, 12 So 2d 402—Hames v Irwin, 108 So 253, 214 Ala 422

Use and possession during minority

Where testator survived by widow and two minor children executed will giving all property to widow, trial court properly decreed the minor children to be the owners of two-thirds interest in homestead property less than two thousand dollars in value with the right to the use and possession thereof during minority as against purchaser of premises from widow at private sale—Killian v Nappier, Ala, 12 So 2d 402

Transfer or encumbrance by widow generally see infra § 285

18. Ala—Judd v Dowdell 12 So 2d 858—Williams v Uptagrafft, 168 So 570 232 Ala 454—Grisham v Rotholz 122 So 649, 219 Ala 434

Reason for rule

(1) "The inhibition of the statute is directed against its [homestead] sale as a whole so as to break up the homestead possessory rights secured by the statute"—Williams v Uptagrafft, 168 So 570, 572 232 Ala 454

(2) Such sale or encumbrance does not break up the homestead right—Judd v Dowdell, Ala 12 So 2d 858

Effect on right to possession

(1) When interests of widow and only remaining minor heir have been sold there remains no further possessory "homestead" right as distinguished from the title—Judd v Dowdell supra

(2) Thus, where decedent was survived by widow and two minor children, and the widow and one of the children sold their interests in the homestead to third party the other child on reaching his majority did not have right of possession of the land as a "homestead", freed from right to its sale for division at suit of the third party—Judd v Dowdell, supra

19. Cal—In re Muntz's Estate, 231 P 371, 69 Cal App 404

Devisee as coparcener

If persons to whom widow devised homestead property expended money on payment of taxes upkeep and improvements of the property, they were vested only with the interest of the widow and occupied the status of coparceners in possession of the

Partition. The partition of a survivor's homestead is considered in the C.J.S. title Partition § 33, also 29 C.J. p. 1039 note 41–p. 1041 note 87.

§ 285. —— By Surviving Wife

The right of a surviving wife to transfer the homestead depends on the statutes of the particular jurisdiction

The right of a surviving wife to transfer or encumber the homestead depends on the homestead laws of the particular jurisdiction and nature of the survivor's estate or interest. Thus, under some statutes, as where the interest passing to the widow is a mere right of occupancy, the right being conditioned on continued occupancy, she has no such right or interest as may be conveyed or encumbered.[20] Such an attempted conveyance, as discussed supra § 254, operates as an abandonment or forfeiture of her rights, although, as discussed infra § 288, it confers no right or title on the grantee.

However, under the homestead laws of many jurisdictions, as where the widow's right in the homestead premises is not conditioned on continued occupancy, as considered supra § 272, it has been held that she may convey or encumber her right or interest in the homestead premises,[21] especially where she owns the property in her own right and not as widow,[22] although, as discussed supra § 257, such a conveyance or encumbrance will not be allowed to operate to the prejudice of the homestead rights of the surviving minor children. This right is in no way affected by a constitutional or statutory provision making a conveyance by the owner of a homestead invalid unless both husband and wife join in the conveyance,[23] since the statute has no application whatever to a conveyance by the surviving spouse,[24] nor is her right to convey such interest affected by a constitutional prohibition against partition of a homestead during the lifetime of the surviving husband and wife.[25] In some jurisdictions, where the right of the widow to convey or encum-

estate and were entitled to an accounting and settlement thereof being credited with amount of expense incurred and being charged with use value of property while in exclusive possession thereof - Spitzer v. Branning, 190 So. 516, 139 Fla. 259.

Course of descent of homestead property in absence of will of survivor see supra § 242.

20. Iowa.—Crouse v. Crouse, 259 N.W. 443, 219 Iowa 736.
29 C.J. p. 1037 note 9.

As personal right

Tex.—John Hancock Mut. Life Ins. Co. v. Bennett, Civ. App., 159 S.W. 2d 892, error refused—York v. Hutcheson, 83 S.W. 895, 37 Tex. Civ. App. 367.

Continued occupancy as condition of survivor's homestead exemption see supra § 272.

Nature of estate or interest passing to survivor see supra § 265.

21. Kan.—In re Casey's Estate, 134 P. 2d 665, 156 Kan. 590—Roberts v. First Nat. Bank, 268 P. 799, 126 Kan. 503.

Minn.—Kohrt v. Mercer, 282 N.W. 129, 203 Minn. 194.
29 C.J. p. 1037 note 12, p. 1019 note 41.

Consideration immaterial

A widow, in whom title to her deceased husband's homestead is vested, may convey it to any person she pleases, with or without consideration - In re Casey's Estate, 134 P. 2d 665, 156 Kan. 590.

Homestead in community property

Cal.—In re Muntz's Estate, 231 P. 371, 69 Cal. App. 401.

Widow without children

Ark.—Bradley v. Humphreys, 83 S.W. 2d 828, 191 Ark. 141.

Homestead devised to widow

Kan.—In re Casey's Estate, 134 P. 2d 665, 156 Kan. 590.

After assignment

Tenn.—Hutcheson v. Hutcheson, 143 S.W. 2d 886, 176 Tenn. 468—Carey v. Carey, 43 S.W. 2d 498, 163 Tenn. 486.
29 C.J. p. 1038 note 20, Tennessee cases.

Extension of lien on community property

The surviving wife, although she has not qualified as community survivor has authority to renew a lien on homestead property.—Uvalde Rock Asphalt Co. v. Hightower, Tex. Civ. App. 154 S.W. 2d 940, reversed on other grounds, Com. App., 166 S.W. 2d 681, 143 A.L.R. 1366—Bell v. Pirtle, Tex. Civ. App., 69 S.W. 2d 476.

Payment of community debts

(1) Under the Texas statutes, an unqualified surviving wife has power to sell community homestead to pay ordinary community debts.—Davis v. Magnolia Petroleum Co., 134 S.W. 2d 1042, 134 Tex. 201, affirming, Civ. App., 105 S.W. 2d 695.

(2) Minor children cannot prevent her exercise of this power.—Davis v. Magnolia Petroleum Co., supra.

(3) She also may sell the homestead to reimburse herself for money paid out by her in satisfaction of community indebtedness.—Davis v. Magnolia Petroleum Co. supra.

(4) Where surviving spouse conveyed homestead to pay community debts, as respects her power to convey, it was immaterial whether she acted in her own name simply or in her name as survivor or as an unqualified community survivor.—Davis v. Magnolia Petroleum Co., supra.

(5) This power was not affected by fact that deed was made more than four years after the decease of her husband.—Davis v. Magnolia Petroleum Co., supra.

(6) Question whether community debts were secured or unsecured had no bearing on a community survivor's power to convey homestead for their payment, especially where survivor was not acting as an administrator under the statute.—Davis v. Magnolia Petroleum Co., supra.

Alienation of homestead by surviving wife as abandonment of homestead see supra § 254.

22. Tenn.—McCreary v. McCorkle, Ch. App., 54 S.W. 53.
29 C.J. p. 1038 note 13.

23. S.D.—Bailly v. Farmers' State Bank, 150 N.W. 942, 35 S.D. 122.

Dower interest

Although deed of homestead by husband and wife to wife is invalid, mortgage covering homestead executed by wife after death of owner may be enforceable lien to extent of unassigned one-third dower right of wife in the homestead, the widow having but a dower interest in the homestead because of her failure to elect to take a child's share in the homestead.—Church v. Lee, 136 So. 212, 102 Fla. 478.

24. S.D.—Bailly v. Farmers' State Bank, 150 N.W. 942, 35 S.D. 122.
Joinder of husband and wife in transfer or encumbrance of homestead generally see supra §§ 129–132.

25. Tex.—Spencer v. Schell, 173 S.

ber the homestead is recognized, it is held that the right cannot be exercised before the homestead has been set off according to law;[26] in others that, until the homestead has been duly set off, it cannot be conveyed except to the owner of the fee;[27] but in still others it has been held that the widow's interest in the homestead property may be transferred or encumbered before it has been set apart to her.[28]

Disposition by will. It has been held that, where the homestead has passed to the surviving widow in fee under decedent's will, she has power to devise it by will.[29]

§ 286. —— By Surviving Husband

The right of a surviving husband to transfer or encumber the homestead depends on the terms of the statutes of the particular jurisdiction.

Under the statutes of some jurisdictions, as where the right conferred on the surviving husband by the homestead laws is one merely of occupancy, the right is not of such a character as can be conveyed or encumbered,[30] and an attempted transfer operates as an abandonment of the homestead right.[31] Likewise, where he procures an unconditional sale and conveyance in a suit instituted for that purpose against the minor children, there is an abandonment of the homestead,[32] although an offer of the property for sale will not of itself have such effect.[33]

However, under the homestead laws of some jurisdictions, as where the right which passes to the surviving husband is greater than one of mere occupancy, he may mortgage or encumber the homestead property.[34]

Under the statutes of Illinois it was held that a surviving husband could not convey by deed to a third person his estate of homestead in premises, the fee of which was in the heirs of his wife before the homestead had been assigned or set off, so as to vest the grantee of the deed with the right to have the homestead set off and assigned to him[35]

§ 287. —— By Surviving Child or Heir

The right of the children or heirs of decedent to

W 867, 107 Tex 44, affirming, Civ App, 142 S W 111.

26. Ky—Hurt's Guardian v Crawford Coal Corporation, 1 S W 2d 955, 222 Ky 504
N H—Lake v Page, 1 A 113, 63 N H 318
Tex—Green v Crow, 17 Tex 180.

27. Ill—Garwood v Garwood, 91 N E 672, 244 Ill 580
29 C J p 1038 note 19

28. Mo—Weatherford v King, 24 S W 772, 119 Mo 51, overruling Miller v Schnebly, 15 S W 435, 103 Mo 368
Wis—Pollock v. Columbia Bank, 214 N W 363, 193 Wis 389
29 C J p 1038 note 20

29. Ark—Boyd v Simpson, 40 S W 2d 454, 183 Ark 1148
Devise of homestead by surviving widow see supra § 243

30. Iowa—E B Piekenbrock & Sons v Knoer, 114 N W. 200, 137 Iowa 534
29 C J p 1038 note 21

31. Ky—Hager v Vincent, 15 S W 2d 426, 228 Ky 589—Shepard v. Browning, 160 S W 950, 156 Ky. 194

32. Ky—Clay v Wallace, 76 S W 388, 116 Ky 599, 25 Ky L 820

33. Ky—Gregory v Oates, 18 S W 231, 92 Ky 532, 13 Ky L 761

34. Cal—Dickey v Gibson 45 P 15, 113 Cal 26, 54 Am S R 321

Homestead in community property
Cal—In re Muntz's Estate, 231 P 371, 69 Cal App 404

Sale to satisfy debts of creditors
Okl—In re Irwin's Estate, 136 P 2d 940.

Effect of transfer on right of exemption

(1) A surviving husband does not lose his homestead right or exemption by a sale of the homestead premises where the statute expressly provides that a disposal of exempt property, real or personal, shall not by disposal become liable for his debts—Bank of Myrtle v Garrison, 184 So 291, 183 Miss 526

(2) Under such a statute, the husband's homestead exemption was not lost by sale of his interest in homestead after wife's death and reconveyance of homestead to husband by purchaser on cancellation of notes and deed of trust given by purchaser, where husband was sixty years of age at wife's death, and homestead had been acquired by husband and wife and occupied as homestead and was less than one hundred sixty acres and of less value than three thousand dollars—Bank of Myrtle v Garrison, supra

(3) Proceeds of sale as subject to homestead right see supra § 267.

In Texas

(1) Widower is empowered to sell or mortgage property, although occupied as homestead with persons constituting family and although homestead is exempt from execution—Campbell v First Nat Bank, Civ App, 88 S W 2d 1084, error refused—Miles v Atlanta Nat Bank, Civ App, 71 S W 2d 933—Massey v Citizens' Nat Bank, Civ App, 28 S W 2d 257, affirmed 77 S W 2d 201, 124 Tex 252

(2) Thus a widower residing with his minor children on premises as homestead could execute valid mortgage or deed of trust lien thereon—Bagwell v Hunt, Civ App, 65 S W 2d 369, error refused—29 C J p 1038 note 25 [a] (1)

(3) Husband qualifying as community administrator may sell community property, including homestead, notwithstanding nonexistence of debts—Brunson v Yount-Lee Oil Co, 56 S W 2d 1073, 122 Tex 237, affirming, Civ App, 32 S W 2d 893—Advance-Rumely Thresher Co v Blevins, Civ App, 248 S W 1086

(4) The surviving husband qualifying as community administrator has the power and authority to sell and pass good title to the community homestead, whether or not estate is insolvent—Advance-Rumely Thresher Co v Blevins, supra—29 C J p 1038 note 25 [a] (2)

(5) Where decedent's son claimed a homestead in land which decedent who held record title thereto after death of his wife conveyed by deed of trust to secure a note, judgment of probate court allowing claim of holder of note and lien against land was not subject to "collateral attack" because of lack of jurisdiction of probate court over homestead, since only homestead involved in probate proceeding was that of decedent and constitutional limitation of power to mortgage a homestead does not apply to a widower—Thornton v Central Loan Co, Civ App, 164 S W 2d 248, error refused

(6) Other Texas holdings see 29 C J p 1038 note 25 [a]

35. Ill—Best v. Jenks, 15 N E 173, 123 Ill 447.

alienate their interest in the homestead depends on the statutes of the particular jurisdiction and the nature of the interest of such children or heirs.

Where the survivor has no power to alienate or encumber the homestead property, see supra § 284, minor children for whom a homestead has been set apart have no power to convey or encumber it [36] It is otherwise in jurisdictions where the homestead may be alienated or encumbered by the survivor, the minor child acting through his guardian in an authorized manner.[37]

Remainder. An heir of a homesteader may, even during the lifetime of the surviving spouse, convey his vested remainder in the homestead, where such surviving spouse is given only a life estate.[38]

§ 288. —— Rights Acquired by Grantee or Purchaser

The purchaser or encumbrancer of a survivor's interest in the homestead takes whatever interest the transferor had free from the ordinary debts of decedent. Where the right to alienate or encumber the homestead does not exist the transferee or encumbrancer takes nothing.

Where the homestead may be transferred or encumbered by a survivor, see supra §§ 284–287, the grantee or purchaser under a foreclosure of the encumbrance may take only such interest as the survivor possessed,[39] subject to the homestead rights of other survivors,[40] and free from all debts and liabilities of decedent,[41] except such as would have been enforceable against the homestead prior to such conveyance or encumbrance [42] If the homestead property has been lawfully encumbered by a mortgage or trust deed of the survivor, the holder thereof may enforce the same by appropriate action [43] Where, however, the homestead cannot be transferred or encumbered by a survivor, see supra §§ 284–287, the grantee or encumbrancer takes nothing [44]

36. Ala —Miller v Marx, 55 Ala 322
Ga —Yeates v Donalson, 94 S E 465, 147 Ga 335
29 C J p 1039 note 27

In Arkansas

(1) It is held that a female child may convey the homestead as soon as she reaches the age of eighteen years where there are no younger children —Shapard v Mixon, 184 S W 399, 122 Ark 530—Hargett v. Hill, 142 S W 1137, 101 Ark 510

(2) If order of probate vesting title to land in mother, as widow, was invalid, because land was homestead, female child could convey her interest, notwithstanding such order —Mason v Graves, 265 S W 667, 167 Ark 678
Nature of interest passing to survivors see supra § 265

37. Kan —Sage v Ijames, 233 P 1013, 118 Kan 11

Minor's deed not disaffirmed when minor attained majority is valid —McGill v Reed, Tex Civ App, 64 S W 2d 358

38. Ga —Donalson v Yeates, 159 S E 856, 173 Ga 30, followed in Shingler v Yeates, 159 S E 859, first case, 173 Ga 34, and 159 S E 859, second case, 173 Ga 35
29 C J p 1039 note 28

39. Ala —Bishop v Johnson, 7 So 2d 281, 242 Ala 551
Kan —In re Casey's Estate, 134 P 2d 665, 156 Kan 590—Dayton v Donart, 22 Kan 256
Ky —Howard v Mitchell, 105 S W 2d 128, 268 Ky 625
29 C J p 1039 note 31, p 1013 note 96

Widow's transfer for herself and children

Kan —Roberts v First Nat. Bank, 268 P. 799, 126 Kan 503.

Minor's conveyance of undivided interest in deceased father's land was not defeated by fact that land was burdened with homestead rights of his minor sister, known to purchasers —McGill v Reed, Tex Civ App, 64 S W 2d 358

Mineral interests

Conveyance of mineral interest in allotted homestead land by deceased owner's widow and son who attained majority after decedent's death, did not sever such interest from surface rights, and such son's conveyance of his entire interest to same grantees after widow's death, leaving him and other children as her heirs, conveyed only interest descending to him on father's death, so that joint tenancy or tenancy in common, authorizing sale of both surface and mineral interests for division, resulted —Williams v Overcast, 155 So 543, 229 Ala 119
Rights of purchasers and mortgagees of homestead generally see supra §§ 147–151

40. Tex —McGill v Reed, Civ App, 64 S W 2d 358

Estoppel of widow

Where widow, claiming as a homestead land involved in suit to recover on a vendor's lien and deed of trust note executed by her son and to foreclose liens on land, authorized loan to be made to son, was present when loan was made, and asserted no claim of any rights to land, widow was "estopped" as a matter of law to deny the validity and binding effect of the note and deed of trust —Sheats v King, Tex Civ App, 152 S W 2d 456, error refused

41. Kan —Sage v Ijames, 233 P 1013, 118 Kan 11
29 C J. p 1039 note 32.

Ordinary debts

Kan —In re Casey's Estate, 134 P 2d 665, 156 Kan 590

Grantee may assert homestead

Kan —In re Casey's Estate, supra

Allowance of claim against estate is immaterial.—In re Casey's Estate, supra

Transfer to heirs of deceased

Homestead property occupied for a time by a husband after the death of his wife, and then deeded to his wife's children by a former marriage, goes to them free from any of his deceased wife's debts and free from any debt or judgment lien against him —Wadle v Boston Market Co, 191 N W 528, 195 Iowa 46

42. Kan —Sage v Ijames, 233 P 1013, 118 Kan 11—Dayton v Donart, 22 Kan 256
29 C J p 1039 note 33
Claims enforceable against survivor's homestead see supra §§ 261–264.

43. On death of survivor

After death of the surviving husband who executed a trust deed on his homestead interest, the holder thereof may foreclose the same, the obligation not abating on his death —Thompson v Kay, 77 S W 2d 201, 124 Tex 252, affirming Kay v Thompson, Civ App, 40 S W 2d 884—Huey v Warner, 77 S W 2d 201, 124 Tex 252, affirming Warner v Huey, Civ App, 29 S W 2d 452—Massey v Citizens' Nat Bank of Weatherford, 77 S W 2d 201, 124 Tex 252, affirming Massey v Citizens' Nat Bank, Civ App, 28 S W 2d 257—Gill v Baird, 77 S W 2d 201 124 Tex 252, affirming, Civ App, 32 S W 2d 941

44. Ky —Shepard v Browning, 160 S. W. 950, 156 Ky 194.

Transfer or encumbrance by widow or children. In a conveyance or encumbrance by the widow the grantee acquires whatever interest the widow possessed,[45] and so does a purchaser at a sale on foreclosure of the encumbrance.[46] The widow can confer by conveyance[47] or mortgage[48] of the homestead no greater rights than she herself possesses Where the homestead vests absolutely in the survivors, see supra § 265, but a sale thereof is prohibited until the death of the surviving widow and until the majority of the minor children is attained, see supra § 284, a sale by the widow or children in accordance with the law will pass their interests to the purchaser,[49] although the right to possession is postponed as against other surviving minor children[50] Where, however, the homestead cannot be transferred or encumbered by the widow, see supra § 285, the grantee or encumbrancer takes nothing.[51]

45. Kan—In re Casey's Estate, 134 P.2d 665, 156 Kan 590
Okl—Hembree v Magnolia Petroleum Co, 56 P 2d 851, 176 Okl 524
Tex.—Union Building & Loan Ass'n v. Pratt, Civ App, 84 S W 2d 78, followed in Union Building & Loan Ass'n v Jackson, Civ App, 84 S W 2d 784.
29 C J p 1039 note 34

Community property

(1) That separate estate of deceased husband owned an equitable interest in a portion of land occupied by widow and minor children, and that it was the homestead of deceased and family, did not prevent purchaser of oil and gas leasehold from widow as community survivor from being an "innocent purchaser" where deed of record conveyed the property to husband and wife and order appointing widow as community survivor appeared to be regular—Boyd v Orr, Tex Civ App, 170 S W 2d 829

(2) Purchaser of oil and gas lease from widow as qualified community survivor, without knowledge or notice of an undisclosed interest in the community property of the separate estate of the deceased spouse, took good title as innocent purchaser, since community survivor had full authority to sell the land even though it was homestead—Boyd v Orr, supra

(3) Community survivor's right to sell or encumber property see the C J S title Husband and Wife § 563, also 31 C J p 183 note 94—p 184 note 98

Equitable interest of purchaser

Where widow on husband's death procured order for sale of the homestead for debts not legally charged thereon, the sale was a nullity, the minor child becoming owner of the fee on the widow's death, subject to an equitable interest acquired by the widow in paying legal encumbrances, for which those thereafter subrogated to by mesne conveyance were entitled to compensation which was to be determined on an accounting—Maupin v Longacre, 288 S W 54, 315 Mo 872

Sufficiency of transfer

(1) Gift of land by widow to son, who made valuable and permanent improvements thereon, with her knowledge and consent, was held to invest him with title by estoppel, since property had ceased to be part of widow's homestead regardless of its previous character.—Union Building & Loan Ass'n v Pratt, Tex Civ App, 84 S W 2d 781, followed in Union Building & Loan Ass'n v Jackson, Civ App, 84 S W 2d 784.

(2) Validity of parole gift of land generally see Gifts § 57

46. Tex—Grothaus v De Lopez, 57 Tex 670
Wis—Pollock v Columbia Bank, 214 N W 363, 193 Wis 389
29 C J p 1039 note 35

However, it has been held that a widow's homestead right in land was a personal right which could not be sold or conveyed by widow to a loan company, and that it did not pass to the company on foreclosure of its trust deed—John Hancock Mut Life Ins Co v Bennett, Tex Civ App, 159 S W 2d 892, error refused

47. Ala—Bishop v Johnson, 7 So 2d 281, 242 Ala 551
Ky—Howard v Mitchell, 105 S W 2d 128, 268 Ky 625
Mo—Dennis v Gorman, 233 S W 50, 289 Mo 1

Effect of remarriage

(1) The rights of one, to whom the widow of deceased owner of a homestead quitclaimed, terminated, so far as the homestead right was concerned, on the widow's remarriage—Dennis v Gorman, supra

(2) Effect of remarriage on widow's right to homestead see supra § 253

Rights of children

(1) The purchaser from the widow takes subject to the rights of surviving children
Ark—Henry v Dollin, 113 S W 2d 97, 195 Ark 607
Mo—Jennings v Cherry, 257 S W 438, 301 Mo 321

(2) If widow undertakes to sell her life estate even by warranty deed, she conveys only that estate, and conveyance does not affect rights of minor children or heirs at law—Bishop v Johnson, 7 So 2d 281, 242 Ala 551

(3) Where homestead was never set apart to decedent's widow and minor children, and widow conveyed homestead lands children who did not act to disavow conveyance of their interests until more than three years after they attained majority were foreclosed by conveyance from asserting their rights as against successor in interest of widow's grantee—Bishop v Johnson, supra

Rights of remaindermen

Where owner of homestead died intestate leaving surviving his widow and no children or lineal descendants, and widow took no steps to have homestead set apart as exempt although the land consisted of less than the statutory exemption, conveyance executed by widow and second husband, while purporting to convey a title in fee with warranty, as against the collateral heirs at law of deceased husband as remaindermen, passed to the grantee only the life estate of the widow, and did not affect the rights of the remaindermen, but remaindermen were not entitled to recover the land during life of widow—Cox v McLemore, 183 So 860, 236 Ala 559

48. Ill—Gibbs v. Gerdes, 126 N E. 155, 291 Ill 490
29 C J p 1039 note 37

49. Ala.—Williams v Uptagrafft, 168 So 570, 232 Ala 454.

50. Ala—Killian v Nappier, 12 So 2d 402—Williams v Uptagrafft, 168 So 570, 232 Ala 454

51. Ark—Rone v Sawrey, 123 S W 2d 524, 197 Ark 472
Ky—Hager v Vincent, 15 S W 2d 426, 228 Ky 589—Settle v Simpson, 264 S W 1092, 204 Ky 470
Tex—John Hancock Mut Life Ins Co v Bennett, Civ App, 159 S W 2d 892, error refused—York v Hutcheson, 83 S W 895, 37 Tex Civ App 367
29 C J p 1001 note 57

Estoppel to assert invalidity

Where title to one and one fourth-acre portion of tract had been in husband prior to his death as part of his homestead and deed to church trustees by widow alone constituted mere abandonment of that portion of homestead, but church building was begun thereon with knowledge and acquiescence of all heirs, purchaser of entire tract was estopped to assert title to the one and one fourth acre portion, being bound by any estoppel which was binding on heirs

§ 289. Liability of Homestead for Debts of Decedent

a In general
b. Devise or testamentary disposition as affecting rights of creditors

a. In General

Under some statutes the homestead passes to the beneficiaries free from the ordinary debts of the decedent under all circumstances.

Under some of the homestead laws, the homestead property passes to the beneficiaries exempt from the debts of decedent,[52] under all circumstances,[53] except such debts as are legally chargeable thereon during the lifetime of deceased.[54] On the other hand, as discussed infra § 290, in many jurisdictions the premises may be subjected to the claims of the creditors of decedent after termination of the homestead, which, as discussed infra § 291, may be done under some provisions by an involuntary sale subject to the homestead rights before the termination of the homestead, but under other provisions only after the termination of the homestead.

b. Devise or Testamentary Disposition as Affecting Rights of Creditors

A homesteader may usually devise the homestead property free from his ordinary debts, provided, in same jurisdictions, a survivor remains who is entitled to take and occupy the homestead.

Under the rule that a homesteader may dispose of the homestead property, as discussed supra § 123, and that such disposal by him is not a fraud on his creditors, as discussed in Fraudulent Conveyances § 31, he may make a testamentary disposition of the homestead free from liability for his debts,[55] except

even if he had not taken any inconsistent position —Rone v Sawrey, 123 S W 2d 524, 197 Ark 472

Transfer before allotment

Ky —Hurt's Guardian v Crawford Coal Corporation, 1 S W 2d 955, 222 Ky 504

52. Iowa —Alpha State Bank v Ostrander, 243 N W 198, 214 Iowa 563

Minn —Kohrt v Mercer, 282 N W 129, 203 Minn 494

Okl —In re Irwin's Estate, 136 P 2d 910—Oklahoma State Bank v Van Hassel, 114 P 2d 912, 189 Okl 48 —Ringer v Byrne, 80 P 2d 212, 183 Okl 16

Tex —Connor Bros v Williams, 112 S W 2d 709, 130 Tex 572, reversing Williams v Connor Bros, Civ App, 83 S W 2d 692 —Kerens Nat Bank v Stockton, 94 S W 2d 161 127 Tex 326, reversing, Civ App 61 S W 2d 572—Whiteman v Burkey, 282 S W 788, 115 Tex 400 answer to certified question conformed to, Civ App, 286 S W 350 —Sargeant v Sargeant, Civ App 19 S W 2d 382 certified questions answered 15 S W 2d 589, 118 Tex 343

29 C J p 1041 note 88

Vested homestead

Mo —Maupin v Longacre, 288 S W 54, 315 Mo 872—Bank of Hartsburg v Sapp, 73 S W 2d 294, 228 Mo App 784—Nettleton Bank v McGaughey's Estate App, 11 S W 2d 1093

Homestead in community property

Tex —Bower v Nelson, Civ App, 138 S W 2d 601 error refused

Property losing homestead character

(1) Where husband erected rental property on severable portion of homestead, after which he conveyed entire property through third party to wife, mortgage executed by the wife after husband's death was valid as against property used for rental purposes, but was invalid as to the homestead property at death of the owner —McEwen v Larson, 185 So 866, 136 Fla 1

(2) Abandonment of homestead by change in character or use of property see supra § 171

Property held as joint tenants

Where wife consented to taking of title to realty purchased with community funds as joint tenants with right of survivorship, husband's estate in realty was coupled with right of immediate possession and was his separate "property" from which he could select a homestead without wife's consent and such estate covered the whole interest in realty, subject to right of survivorship, and on husband's death the entire estate, subject to homestead, vested absolutely in wife and was not thereafter subject to payment of any debt existing against either spouse at husband's death —Watson v Peyton, 73 P 2d 906 10 Cal 2d 156

Debts enforceable and not enforceable see supra § 262

Sale to pay debts by order of court in administration of estate see Executors and Administrators § 552

53. Cal —In re Muntz's Estate, 231 P 371, 69 Cal App 404

29 C J p 1041 note 88

Death of survivors

(1) Under some statutes, homestead of community property on death of surviving spouse who left no minor children, descends free from liability for owner's debts —In re Muntz's Estate, 231 P 371, 69 Cal App 404

(2) So under some constitutional provisions, the community homestead passes to surviving spouse free from community debts and on survivor's death descends to collateral heirs free from liability therefor —Sargeant v Sargeant, Civ App, 19 S W 2d 382, certified questions answered 15 S W 2d 589, 118 Tex 343

(3) Course of descent of homestead see supra § 242

Passage of homestead to heirs free from debts see supra § 265

54. Iowa —Arispe Bank v Werner, 207 N W 578, 201 Iowa 484

Mo —Maupin v Longacre, 288 S W 54, 315 Mo 872—Bank of Hartsburg v Sapp, 73 S W 2d 294, 228 Mo App 784—Nettleton Bank v McGaughey's Estate, App, 11 S W 2d 1093

Tex —Connor Bros v Williams, 112 S W 2d 709, 130 Tex 572, reversing Williams v Connor Bros, Civ App, 83 S W 2d 692—Kerens Nat Bank v Stockton, 94 S W 2d 161, 127 Tex 326, reversing, Civ App, 61 S W 2d 572—Whiteman v Burkey, 282 S W 788, 115 Tex 420 answer to certified question conformed to, Civ App 286 S W 350

Wis —In re Wickesberg's Estate, 244 N W 561 209 Wis 92

The value of the homestead above the exemption is liable for the satisfaction of claims allowed against the estate where title was in decedent at the time of his death —W J Perry Live Stock Commn Co v. Biggs, 94 N W 712, 4 Neb, Unoff, 440

Territorial extent, quantity of interest, and value of survivor's homestead see supra § 270

55. Iowa —Long v Northrup, 279 N W 104, 225 Iowa 132, 116 A L R 1475- Buck v MacEachron, 229 N W 693, 209 Iowa 1168.

Minn —Kohrt v Mercer, 282 N W 129, 203 Minn 494—Overvold v Nelson, 243 N W 439 186 Minn 359

Mo —Limb v Bevins, 155 S W 2d 508,

such debts as are otherwise chargeable against the homestead,[56] provided, in some jurisdictions, a survivor remains who is entitled to take and occupy the homestead.[57]

However, he may charge the devise with conditions such as the payment of debts and legacies,[58] and expenses of administration,[59] and funeral expenses,[60] subject, however, under some statutes to the widow's right of exemption if she elects to assert it.[61] A mere devise of the homestead, although permitted by statute, will not, in the absence of such special provision, have this effect.[62] To make the devise subject to the payment of the testator's debts, the language must be unequivocal and imperative.[63] Mere formal phrases or clauses will not suffice to charge the devised homestead with the debts of decedent.[64] In this category are mere general phrases directing the payment of the testator's debts, or the expenses of his last illness and funeral.[65]

Where a testator directs that after his debts are paid a certain sum shall go to his son, the legatee is entitled to such legacy out of the surplus remaining after the foreclosure of a mortgage on the homestead, as against a general creditor.[66]

This right to devise the homestead property free from the claims of decedent's creditors is restricted in some jurisdictions to devises to persons who would otherwise succeed to the homestead as survivors.[67] Thus, where the homestead right rests

511, 236 Mo App 556, quoting **Corpus Juris.**
Neb—Gordon v Gordon, 299 N W 515, 140 Neb 400
S C—Ex parte Cothran, 121 S E 556, 128 S C 122
29 C J p 929 note 58

Effect of consent to sale

Consent by devisees to administrator's sale of homestead together with other mortgaged realty was held not waiver of right to claim proceeds of homestead as exempt from claims of general creditors—Overvold v Nelson, 243 N W 439, 186 Minn 359

As against surviving
Children see supra § 255
Husband see supra § 259
Wife see supra § 243

56. Tex—City of Fort Worth v Wisehart, Civ App, 33 S W 2d 556

Secured debts

Homestead devised by will was not exempt from foreclosure and sale to enforce payment of testator's secured debts for taxes and sums secured by mortgage on part of tract, devisees not taking title free of liability to pay such debts—Masterson v Wingate, Tex Civ App, 151 S W 2d 956, error refused

Debts of decedent chargeable against homestead see supra § 262

57. Tex—Coleburn v Underwood, Civ App, 53 S W 2d 331

58. Iowa—De Cook v Johnson, 284 N W 118, 226 Iowa 246—Buck v MacEachron, 229 N W 693, 209 Iowa 1168—In re Schultz's Estate, 185 N W 24, 192 Iowa 436
Minn—In re Schultz' Estate, 282 N W 471, 203 Minn 565—Overvold v Nelson 243 N W 439, 186 Minn 359
Mo—Limb v Bevins, 155 S W 2d 508, 511, 236 Mo App 556, quoting **Corpus Juris.**
Neb—Gordon v Gordon, 299 N W 515, 140 Neb 400
29 C J p 929 note 59

However, it has been held that a testator's power to devise his property is subject to the court's duty to set aside a homestead to the survivor, of which the creditors must take notice—In re Mason's Estate, 244 P 629, 76 Cal App 315

Executor as party to suit

In partition suit, parties asserting right and title to homestead realty involved under will empowering executors to sell as much of testator's realty as might be needed to pay his just debts took homestead burdened with specific charges or limitations placed thereon by will, so that trial court erred in not making executors parties to suit for purpose of determining right of judgment creditor of testator's estate to have his allowed demand paid from sale price of such realty—Limb v Bevins, 155 S W 2d 508, 236 Mo App 556

59. Wis—In re Madden, 80 N W 100, 104 Wis 61

60. Iowa—De Cook v Johnson, 284 N W 118, 226 Iowa 246

61. Wis—In re Madden, 80 N W 100, 104 Wis 61
29 C J p 929 note 61
Election of widow to take under will as waiver of homestead see supra § 251

62. Miss—Norris v Callahan, 59 Miss 140

63. Iowa—De Cook v Johnson, 284 N W 118, 226 Iowa 246—Luckenbill v Bates, 263 N W 811, 814, 220 Iowa 871, 103 A L R 252, citing **Corpus Juris.**
Kan—In re Casey's Estate, 134 P 2d 665, 156 Kan 590
Mo—Limb v Bevins, 155 S W 2d 508, 511, 236 Mo App 556, quoting **Corpus Juris.**
Neb—Gordon v Gordon, 299 N W 515, 140 Neb 400
Tex—City of Fort Worth v Wisehart, Civ App, 33 S W 2d 556
29 C J p 929 note 63.

Intent to charge personalty only

Iowa—Buck v MacEachron, 229 N W 693, 209 Iowa 1168

64. Kan—In re Casey's Estate, 134 P 2d 665, 156 Kan 590
Mo—Limb v Bevins, 155 S W 2d 508, 236 Mo App 556
Neb—Gordon v Gordon, 299 N W 515, 140 Neb 400
29 C J p 929 note 63 [a]

As affected by existence of personal estate

Although testator at time of his death had no appreciable property except homestead, it cannot be presumed that at time of executing his will, eight years earlier, he was without a personal estate or that he did not expect it to be sufficient to pay his just debts without resort to homestead—In re Borchardt's Will, 200 N W 461, 184 Wis 561

65. Iowa—De Cook v Johnson, 284 N W 118, 226 Iowa 246—Long v Northrup 279 N W 104, 225 Iowa 132, 116 A L R 1175—Luckenbill v Bates, 263 N W 811, 220 Iowa 871, 103 A L R 252—Buck v MacEachron, 229 N W 693, 209 Iowa 1168
Kan—In re Casey's Estate, 134 P 2d 665, 156 Kan 590
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S C—Ex parte Cothran, 121 S E 556, 128 S C 122
Tex—City of Fort Worth v Wisehart, Civ App, 33 S W 2d 556
Wis—In re Borchardt's Will, 200 N W 461, 184 Wis 561
29 C J p 929 note 63 [a] (2).

66. Wis—Kuener v Prohl, 97 N W 201, 119 Wis 487
29 C J p 929 note 64

67. S C—Dorn v Stidham, 137 S E 331, 139 S C 66.

on the owner's status as head of the family under a statute giving a survivor's right to the homestead to the surviving spouse and children only, a homesteader without a spouse or children cannot devise the property free from the lien of a judgment creditor.[68]

Debts of life tenant. Under a will devising the homestead to the beneficiary "to have and to use during his lifetime and at his death after all indebtedness and funeral expenses are paid," the property to go to the residuary beneficiaries, the property passes subject to the debts and funeral expenses of the life tenant on his death, the provision for payment of the debts being a condition on the devise to the residuary beneficiaries[69]

Devise to wife or children While there is some contrary authority,[70] it is generally held that the husband may devise the homestead to the wife,[71] or to the wife and children,[72] or to the children where the wife does not survive the husband,[73] and the creditors have no right to complain;[74] and this view has been sustained against the objection that a devise constitutes an alienation within the meaning of a constitutional provision requiring the joint consent of the husband and wife to the alienation of a homestead.[75]

§ 290. —— After Termination of Homestead

Under many statutes the homestead property becomes subject to decedent's debts on cessation of the homestead right of the survivors.

Under the provisions of most homestead laws, the rule is that, after the homestead exemption ceases in favor of survivors, the property reverts to decedent's estate and becomes subject to his debts,[76] as well as to the survivor's own debts,[77] the property becoming subject to debts accruing before or after the homestead was set apart,[78] and such a reverter occurs on abandonment of the homestead,[79] or on the death of the surviving spouse where there are no minor children,[80] or on the death of the sur-

68. S C —In re Snoddy's Estate, 21 S E 2d 198, 201 S C 14—Dorn v Stidham, 137 S E 331, 139 S C 66

Reason for rule

The homestead right exists in the head of the family only until death —Dorn v Stidham, supra

69 Iowa —De Cook v Johnson, 284 N W 118, 226 Iowa 246

70. Ky —McLean v Trabue, 135 S W 309, 142 Ky 806, overruling in terms or in effect Schonbachler v Schonbachler, 57 S W 232, 22 Ky L 314, Nichols v Lancaster, 32 S W 676, 17 Ky L 777, Pendergest v Heekin, 22 S W 605, 94 Ky 384, 15 Ky L 180, and Myers v Myers, 12 S W 933, 89 Ky 442, 11 Ky L 659

29 C J p 929 note 65 [a]

71. Iowa —Wheeler v Meyer, 206 N W 301, 201 Iowa 59

Kan —In re Casey's Estate, 134 P 2d 665, 156 Kan 590

29 C J p 929 note 66

72. Wis —Polzen v Polzen, 158 N W 327, 164 Wis 18—Foote v Foote, 149 N W 738, 159 Wis 179

73. Iowa —Luckenbill v Bates, 263 N W 811, 220 Iowa 871, 103 A L R 252

29 C J p 929 note 68

74. Iowa —Luckenbill v Bates, supra—Wheeler v Meyer, 206 N W 301, 201 Iowa 59

Kan —In re Casey's Estate, 134 P 2d 665, 156 Kan 590

S C —Ex parte Cothran, 121 S E 556, 128 S C 122

Wife as constituent member of family

Tex —Coleburn v Underwood, Civ App, 53 S W 2d 331.

"Worthier title" doctrine

Where estate was devised to testator's children in equal shares, so that estate would pass as if there had been no will, "worthier title" doctrine could not be applied so as to subject homestead to testator's debts created after he acquired homestead, since estate would be distributed in accordance with descent and distribution law —Luckenbill v Bates, 263 N W 811, 220 Iowa 871, 103 A L R 252

Passing to heirs free from debts see supra § 265

75. Kan —Postlethwaite v. Edson, 171 P 769, 102 Kan 104, L R A 1918D 983

29 C J p 929 note 70

Consent and joinder of husband and wife in transfer or encumbrance of homestead generally see supra §§ 129–132

76. Ark —Roberts v. Miller, 291 S W 814, 173 Ark 38

Okl —In re Irwin's Estate, 136 P 2d 940

29 C J p 1042 note 92

Freedom from debts during occupancy

(1) Under some statutes the homestead is free from the debts of decedent as long as it is occupied as a homestead —In re Casey's Estate, 134 P 2d 665, 156 Kan 590

(2) The fact that title to homestead property passes according to direction of deceased owner's will, instead of statute of descents and distributions, does not change rule that intestate's homestead is exempt from sale for payment of his debts as long as it is occupied by any of his family —In re Casey's Estate, supra

(3) Passage of title by conveyance is immaterial —In re Casey's Estate, supra

Liability for debts subject to occupancy

(1) Under some statutes a homestead is liable for decedent's debts subject only to the right of occupancy by the widow and minor children —Eastern State Hospital v Cottle, 256 S W 1101, 201 Ky 377

(2) After the death in a state asylum of a person who had been committed as a pauper patient his homestead may be subjected to the payment of the state's claim at statutory rates for his board, treatment, etc, during his confinement —Eastern State Hospital v Cottle, supra

(3) Reimbursement of public authorities for cost of maintaining insane person see the C J S title Insane Persons § 75, also 32 C J p 687 note 86–p 690 note 27

Termination of survivor's homestead generally see supra §§ 271–277

77. Kan —Davton v Donart, 22 Kan 256

29 C J p 1027 note 91

78. Va —Hanby v Henritze, 7 S E 204, 85 Va 177

79. Ark —Gill v Dunn, 116 S W 2d 612, 196 Ark 1178—Roberts v Miller, 291 S W 814, 173 Ark 38

29 C J p 1042 note 94

Property may be sold after relinquishment of homestead —In re Irwin's Estate, Okl, 136 P 2d 940

80. Cal —Raggio v Palmtag, 103 P 312, 155 Cal 797

Ill —Lewis v McGraw, 19 Ill App 313

viving spouse and attainment of majority by the minor children.[81]

Presentation of claims against the estate of decedent, in conformity with the practice of the particular jurisdiction, as considered in Executors and Administrators § 394, is in some jurisdictions a condition precedent to the enforcement of payment against the homestead property.[82]

Statutes of limitation will not run against a judgment,[83] or fieri facias,[84] during the life of the homestead, although the length of time after administration was closed until the homestead right expired exceeded the time prescribed by limitations for the collection of the judgment, and the creditor did not ask to have administration suspended.[85]

§ 291. —— Sale Subject to Homestead Rights

Under some statutes the homestead may be sold to satisfy debts of decedent before termination of the survivor's homestead right, the sale being subject to such right. Under other statutes the property may not be so sold until termination of the rights of the survivors.

In many jurisdictions where the homestead may be subjected to the claims of the creditors of decedent, as considered supra § 290, the property cannot be sold before the termination of the homestead subject to the homestead rights of the beneficiaries therein, but can be sold only after the premises lose their homestead character,[86] the effect being to suspend the rights of the creditor until the homestead right of the widow and minor children ceases.[87] An order of sale prior to the termination of the homestead right is an absolute nullity in some jurisdictions,[88] although it is held that the purchaser at a void sale under such order will be subrogated to the rights of the creditors to the payment of whose claims the purchase money was appropriated.[89]

Laches. It has been held that no inflexible rule can be adopted by the courts fixing a time after the expiration of the homestead estate in which an application to sell real estate to pay debts must be made, but each case must be largely controlled by its own circumstances.[90]

Right to sell recognized. In some jurisdictions where the homestead may be subjected to the debts of decedent, a sale is permitted, if made subject to the rights of occupancy by survivors, such sale becoming effective when the exemption terminates.[91] Some of these statutes permit the sale of the prop-

81. Ark.—Roberts v. Miller, 291 S.W. 814, 173 Ark. 38.
Ga.—Roughton v. Roughton, 173 S.E. 673, 178 Ga. 367.
29 C.J. p. 1042 note 96.
Sale of homestead to pay debts of decedent under order of court administering estate see Executors and Administrators § 552.

82. Ark.—Nichols v. Shearon, 4 S.W. 167, 19 Ark. 75.
Cal.—Sanders v. Russell, 24 P. 852, 86 Cal. 119, 21 Am.S.R. 26.
29 C.J. p. 1042 note 99.

83. Ark.—Abramson v. Rogers, 133 S.W. 836, 97 Ark. 189.
During minority of children.
Ark.—Henry v. Dollin, 113 S.W.2d 97, 195 Ark. 607.

84. Ga.—Redding v. Anderson, 86 S.E. 241, 144 Ga. 100—Craddock v. Kelly, 60 S.E. 193, 129 Ga. 818.

85. Ark.—Abramson v. Rogers, 133 S.W. 836, 97 Ark. 189.

86. N.C.—Rocky Mount Savings & Trust Co. v. McDearman, 195 S.E. 531, 213 N.C. 141.
29 C.J. p. 1042 notes 6, 7—24 C.J. p. 567 note 20.
Sale by administrator.
"The administrator cannot sell the homestead subject to the homestead rights."—Hart v. Wimberley, 296 S.W. 39, 41, 173 Ark. 1083.
In Missouri.
(1) Under the Missouri statutes the homestead may not be sold in the interest of decedent's creditors subject to the rights of the widow and minor children until termination of the homestead rights.—Kay v. Politte, 129 S.W.2d 863, 344 Mo. 805, 122 A.L.R. 1145—Kelley v. Parman, App., 282 S.W. 755—29 C.J. p. 1042 note 6 [c].

(2) The interest of an heir may be sold, however, subject to the rights of the widow, when all of decedent's heirs are persons other than his children.—Dennis v. Gorman, 233 S.W. 50, 289 Mo. 1.

(3) The interest of an adult son of deceased homesteader in land which surviving widow and minor children occupied as homestead may be sold on execution against adult son.—Kay v. Politte, supra, overruling Kelley v. Parman, in so far as it holds to the contrary.

(4) Where decedent left no other assets, a sale of decedent's homestead having a value of less than one thousand five hundred dollars, subject to homestead rights, for purpose of procuring funds with which to pay a statutory allowance for support of decedent's widow was authorized by statute and such sale would convey fee-simple title, subject to widow's homestead rights.—In re Clute's Estate, App., 161 S.W.2d 705.
Sale subject to homestead in general see supra § 223.
Sale of homestead to pay decedent's debts by order of court administering estate see Executors and Administrators § 552.

87. Ark.—Abramson v. Rogers, 133 S.W. 836, 97 Ark. 189.

88. Ark.—Bond v. Montgomery, 20 S.W. 525, 56 Ark. 563, 35 Am.S.R. 119.
Cal.—Bull v. Coe, 15 P. 123, 2 Cal. Unrep. Cas. 807.

89. Ark.—Harris v. Watson, 20 S.W. 529, 56 Ark. 574—Bond v. Montgomery, 20 S.W. 525, 56 Ark. 563, 35 Am.S.R. 119.

90. Ill.—Atherton v. Hughes, 94 N.E. 516, 249 Ill. 317.
24 C.J. p. 1043 note 11.

91. Ky.—Eastern State Hospital v. Cottle, 256 S.W. 1101, 201 Ky. 377.
29 C.J. p. 1043 note 13—24 C.J. p. 567 note 19.
Absence of claim to homestead.
In an action to settle an estate, it was not erroneous not to allow infant children a homestead where no claim for a homestead was set up for them, receipts from sale of realty plus other assets were insufficient to meet liabilities in full, and there was no showing in record which would have warranted the setting aside of the homestead for all of the children or those who might have been entitled to it.—Howard v. Howard, 150 S.W.2d 653, 286 Ky. 139.

erty for payment of decedent's debts, that part of the proceeds equaling the amount of the statutory exemption remaining subject to the homestead right [92]

Sale of excess over homestead exemption. In some jurisdictions, if the property occupied as a homestead exceeds in value and amount the homestead exemption, the excess property may be sold to satisfy debts of decedent like any other property, protection being accorded, however, to the homestead right [93]

If the interests of the children are subject to a lien previously existing against the homestead, so much of the premises should be sold as is not claimed by them as a residence, in order to exonerate the homestead for their benefit [94]

HOMICIDA. In Spanish law, one guilty of homicide.[1]

HOMICIDAL. Pertaining to homicide, relating to homicide, impelling to homicide, as a homicidal mania.[2]

92. Limits on use of fund

The amount of the exemption does not go to the survivors absolutely, but must be set aside for their use for such time as the survivors are entitled to the use of the homestead —Runyon v Runyon's Adm'x, 95 S W 2d 802, 264 Ky 823—Warren's Adm'r v Warren, 104 S W 754, 126 Ky 692

93. Miss —Marx v Haley, 45 So 612, 92 Miss 113

Tex —Whiteman v Burkey, 282 S W 788, 115 Tex 400, answer to certified question conformed to, Civ App, 286 S W 350

Absence of survivor's consent immaterial

On a petition to sell a deceased wife's real estate to pay debts, it is the duty of the county court, notwithstanding objection by a creditor, to include in its decree of sale property constituting the homestead, provided property can be sold for more than one thousand dollars even though the sale thereof lacks the written consent of the surviving husband —Ankrom v Doss, 270 Ill App 464

Compliance with statute mandatory

(1) Under some statutes an objecting creditor claiming the homestead to be of a greater value than allowed by the statute may, by taking the required steps, have the property levied on and sold and the proceeds applied to the debt after setting aside to the homestead survivor an amount equal to the homestead exemption — Whitlock v Alliance Coal Co, 214 P 546, 73 Colo 205

(2) The levy of an execution against the debtor's homestead made prior to his death is void as to the homestead, irrespective of its value, where no affidavit that such homestead was of the value in excess of two thousand dollars was filed before the levy, as required the debtor's widow and administratrix being entitled to an injunction to prevent sale under such execution —Whitlock v Alliance Coal Co, supra

Sale for division of proceeds

Decedent's realty may be sold for division of proceeds after carving widow's homestead therefrom — Whitehead v Boutwell, 117 So 623, 218 Ala 109

Property of lesser value

(1) If the property brings less than the exemption, it should not be sold over the objection of the survivor —Anderson's Adm'r v Creekmore, 287 S W 941, 216 Ky 345

(2) If property fails to bring more than value of improvements and amount of homestead exemption, no sale should be declared —Whiteman v Burkey, 282 S W. 788, 115 Tex 400, answer to certified question conformed to, Civ App, 286 S W 350

(3) Judgment not providing that, if land did not bring more than the amount of the exemption, there should be no sale, was held not to conform with agreement between parties for sale in which homestead rights of surviving spouse were not waived —Anderson's Adm'r v Creekmore, supra

(4) Judgment vesting title in testator's children to acreage of estate over and above homestead was held proper where value of such acreage was less than amount children were entitled to receive out of sale proceeds thereof if sold —Kerens Nat Bank v Stockton Civ App, 61 S W 2d 572, reversed on other grounds 94 S W 2d 161, 127 Tex 326

94. Ark —Littell v Jones, 19 S W 497, 56 Ark 139

1. Escriche Diccionario.

2. Black L D

"Homicidal mania" defined see the C J S title Insane Persons § 1, also 32 C J p 611 notes 88 89

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I. HOMICIDE IN GENERAL

§ 1. Definitions and Classification

Homicide is the killing of a human being. Some authorities limit the definition to a killing by another person, but others hold that it includes suicide and involuntary manslaughter committed by a corporation. Homicide may be hospiticide, hosticide, infanticide, regicide, or the like, depending on who the victim is.

Homicide has been defined as the killing of any human being[1] by a human being.[2] While the term is frequently defined as the killing of one human being by "another" human being,[3] it has been held that this definition is not entirely accurate or comprehensive[4] in so far as it excludes suicide[5] or cases of involuntary manslaughter by a corporation aggregate.[6] Homicide is sometimes defined by statute.[7]

Homicide may be lawful as well as unlawful,[8] intentional or unintentional,[9] felonious or nonfelonious.[10] Felonious or unlawful homicide is the killing of a human being without legal justification or excuse,[11] a killing committed intentionally, maliciously, or negligently,[12] and is either murder or manslaughter.[13] Nonfelonious homicide is either

1. Tex.—Great Southern Life Ins. Co. v. Akins, Civ.App., 105 S.W.2d 902, error refused
Wis.—Foster v. State, 196 N.W. 233, 234, 182 Wis. 298, citing **Corpus Juris.**
29 C.J. p. 1049 note 1

Intention to kill the victim is not an essential of homicide in its ordinary and usually accepted meaning.—United Life & Accident Ins. Co. v. Prostic, 182 A. 421, 169 Md. 535

Death necessary
Striking of fatal blow does not alone constitute homicide, which is not complete until death of victim.—Alderson v. State, 115 N.E. 572, 186 Ind. 22

2. Mich.—People v. Austin, 192 N.W. 590, 221 Mich. 635

3. Ariz.—State v. Ponce, 124 P.2d 543, 59 Ariz. 158.—Kinsey v. State, 65 P.2d 1141, 49 Ariz. 201
Colo.—Leopold v. People, 95 P.2d 811, 105 Colo. 147
Del.—State v. Lee, 171 A. 195, 6 W.W.Harr. 11
Mo.—State v. Glover, 50 S.W.2d 1049, 1055, 330 Mo. 709, citing **Corpus Juris.**
Mont.—State v. Chavez, 281 P. 352, 85 Mont. 541
N.Y.—People v. McMurty, 219 N.Y.S. 293, 294, 128 Misc. 333
R.I.—Black v. Massachusetts Accident Co., 189 A. 3, 4, 57 R.I. 237, citing **Corpus Juris.**
29 C.J. p. 1049 note 2

"Homicide is the slaying of one human being by the act procurement, or omission of another."—State v. Trent, 252 P. 975, 977, 122 Or. 441, rehearing denied 259 P. 893, 122 Or. 444

4. R.I.—Black v. Massachusetts Accident Co., 189 A. 3, 57 R.I. 237

5. N.J.—State v. Lehigh Valley R. Co., 103 A. 685, 90 N.J.Law 372

"Homicide is a comprehensive word which means any killing of a human being, whether by his own act or by the act of another."—Ziolkowski v. Continental Casualty Co., 263 Ill.App. 31, 43

6. N.J.—State v. Lehigh Valley R. Co., 103 A. 685, 90 N.J.Law 372
Homicide by corporation see Corporations § 1364 b

7. **Under Georgia statutes** homicide is the killing of a human being of any age or sex.—Daly v. Stoddard, 66 Ga. 145.—29 C.J. p. 1049 note 1 [c]

Under New York statutes homicide is the killing of one human being by the act, procurement or omission of another.—People v. Rochester R. & Light Co., 88 N.E. 22, 195 N.Y. 102, 107, 133 Am.St.R. 779, 21 L.R.A.,N.S., 998, 16 Ann.Cas. 837.—29 C.J. p. 1049 note 2 [a]

Under Texas statutes homicide is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another.—Great Southern Life Ins. Co. v. Akins, Civ.App., 105 S.W.2d 902, error refused.—Whiteside v. State, 12 S.W.2d 218, 220, 111 Tex.Cr. 116

8. Ariz.—State v. Ponce, 124 P.2d 543, 59 Ariz. 158
Colo.—Leopold v. People, 95 P.2d 811, 105 Colo. 147
N.Y.—People v. McMurty, 219 N.Y.S. 293, 128 Misc. 333
R.I.—Black v. Massachusetts Accident Co., 189 A. 3, 4, 57 R.I. 237, citing **Corpus Juris.**
29 C.J. p. 1049 note 4

"There is no such offense as homicide. It is a generic term made to apply to acts which are not offenses, as well as to those which have been defined and denounced as penal offenses by the statute."—Whiteside v. State, 12 S.W.2d 218, 221, 111 Tex.Cr. 116

"It [homicide] does not necessarily import a crime, but includes also those cases in which the law justifies or excuses the taking of human life."—Ziolkowski v. Continental Casualty Co., 263 Ill.App. 31, 43

9. Tex.—Great Southern Life Ins. Co. v. Akins, Civ.App., 105 S.W.2d 902, error refused

Willful killing
"An intentional killing is a willful killing."—State v. Holland, 6 S.E.2d 217, 220, 216 N.C. 610

10. Me.—State v. Budge, 137 A. 244, 126 Me. 223, 53 A.L.R. 241
Mich.—People v. Austin, 192 N.W. 590, 221 Mich. 635
R.I.—Black v. Massachusetts Accident Co., 189 A. 3, 4, 57 R.I. 237, citing **Corpus Juris.**
29 C.J. p. 1049 note 5

11. La.—State v. Plumlee, 149 So. 425, 177 La. 687
N.Y.—People v. Angelo, 159 N.E. 394, 246 N.Y. 451, affirming 221 N.Y.S. 47, 219 App.Div. 646, reversing 214 N.Y.S. 499, 126 Misc. 448
29 C.J. p. 1049 note 11

Similar definitions
(1) One who in furtherance of a fixed design kills another in cold blood is guilty of a felonious killing. In fact any intentional killing without just cause, excuse or justification is felonious."—State v. Holland, 6 S.E.2d 217, 220, 216 N.C. 610

(2) A felonious homicide occurs where, without legal excuse, one takes the life of another human being purposely, or unintentionally while needlessly doing anything in its nature dangerous to life, or where one causes death by neglecting a duty imposed either by law or by contract, or in the course of committing a crime or even a civil wrong.—Neusbaum v. State, 143 A. 872, 156 Md. 149

Culpable homicide includes any homicide from the very lowest culpability up to the very verge of murder.—Arkley R. p. 72

12. Pa.—Commonwealth v. Ireland, 27 A.2d 746, 748, 149 Pa.Super. 298
Tex.—Great Southern Life Ins. Co. v. Akins, Civ.App., 105 S.W.2d 902, 904, error refused

13. Cal.—People v. Bird, 300 P. 23, 212 Cal. 632
Del.—State v. Lee, 171 A. 195, 6 W.W.Harr. 11
Iowa.—State v. Johnson, 264 N.W. 596, 221 Iowa 8
Me.—State v. Budge, 137 A. 244, 126 Me. 223, 53 A.L.R. 241

justifiable or excusable [14]

Homicidio proditorio means treacherous homicide [15]

Fratricide means the killing of a brother or sister, also one who commits such offense [16]

Hospiticide means the killing of one's guest or host, also one who commits such offense [17]

Hosticide means one who kills an enemy, also the act or offense of so doing [18]

Infanticide means the murder or killing of an infant soon after its birth, also one who commits such offense [19]

Infanticidio, in Spanish law, means the death by violence of a child under seven [20]

Maniticide means the killing of a husband by his wife, also a woman who kills her husband [21]

Matricide means the crime of killing one's mother, also one who commits such offense [22]

Parricide is the offense of killing one's ancestor or other close relative, such as one's father, mother, brother, sister, or child, also the person who commits such offense [23]

Patricide means the offense of killing one's father, also one who commits such offense [24]

Regicide means the murder of a sovereign, also the person who commits such murder [25] The term has also been applied to a member of the court of parliament that in 1649 sentenced Charles I to death [26]

Sororicide means the killing or murder of a sister, also one who murders his sister [27]

Uxoricide means the killing of a wife by her husband, also one who murders his wife [28]

§ 2. Persons Subject of Homicide

a. In general
b Unborn child

a. In General

Any living human being may be the subject of a felonious homicide, even though wounded or incurably diseased

Any human being may be the subject of a felonious homicide, including an idiot or lunatic,[29] a criminal,[30] an alien enemy confined in prison,[31] an unchaste wife,[32] a bad, quarrelsome, or brutal man,[33] a slave, see the C J S title Slaves § 8, also 58 C J p 759 notes 88, 89, and 29 C J p 1049 note 20, or an Indian, see the C J S title Indians § 75, also 29 C J p 1049 note 21

Person already mortally wounded or dead A person ceases to be a human being at death, and no injury to a corpse can be homicide,[34] but the erroneous belief of a murderer that his victim was already dead is immaterial [35]

Person incurably diseased A person may be the subject of homicide, although affected with an incurable disease which would have in all probability caused his death within a short time [36]

b. Unborn Child

At common law an unborn child is not the subject of a homicide Although the infant ordinarily must have an independent existence, the presence or absence of respiration is not conclusive, and there is a conflict of authority as to the necessity of the umbilical cord being severed

Mich —People v Austin, 192 N W 590, 221 Mich 635
"Manslaughter" defined see infra § 37
"Murder" defined see infra § 13

Corpus Juris cited in connection with holding that murder and manslaughter are felonies at common law —State v Gloyd 84 P 2d 966, 969, 148 Kan 706

14. N Y —People v McMurty, 219 N Y S 293, 128 Misc 333
29 C J p 1049 note 6
What constitutes justifiable or excusable homicide see infra § 97

15. Escriche Diccionario.

16. Black L D

17. Black L D

18. Black L D

19. Black L D
31 C J p 977 note 94
"Feticide" defined see 36 C J S p 732

20. Escriche Diccionario.

21. Webster New Int D.

22. Abbott L D

23. Bouvier L D —Webster New Int D

"A stranger who participates in the perpetration of parricide is not guilty of parricide but only of murder or homicide according to the factors present in the offense"—People v Patricio, 46 Philippine 875, 879

24. Black L D

25. Black L D

26 English D

27 Black L D

28. Black L D

29. Miss —State v Jones, 1 Miss 83
Tex —Perryman v State, 36 Tex 321

30. Tex —Rye v State, 8 Tex App 153
29 C J p 1050 note 26
Killing of convict see Convicts § 2

31. Minn —State v Gut, 13 Minn 341.

32. Mo —State v Burns, 49 S W 1005 148 Mo 167 71 Am S R 588
29 C J p 1049 note 24
Provocation reducing offense to manslaughter see infra § 49

33. Or —State v Morey, 35 P 655, 36 P 573, 25 Or 241
29 C J p 1050 note 25

34. Ky —Jackson v Commonwealth, 38 S W 422, 1091, 100 Ky 239, 66 Am S R 336
29 C J p 1050 note 39
Act of accused as cause of death see infra § 11
Offenses as to dead bodies see Dead Bodies § 10

35. Ky —Jackson v Commonwealth, supra
29 C J p 1050 note 40

36 Cal —People v Lanagan, 22 P 482, 81 Cal 142
29 C J p 1050 note 42
Enfeebled condition of victim as contributing cause of death see infra § 11.

An infant may be the subject of homicide,[37] but at common law, and except as the statutes may otherwise provide, it is necessary that the child be fully born,[38] and have an existence independent of its mother, and derive none of its power of living through any connection with her.[39] By statute, however, the killing of an unborn child is sometimes made manslaughter, see infra § 38, either in the first degree, see infra § 65, or in the second degree, see infra § 66

Ordinarily a child becomes fully born so as to be a subject of homicide when the body of the child has been completely delivered and an independent circulation established.[40] According to some authorities the umbilical cord must have been severed,[41] but according to others this is not necessary.[42] If the child is born alive it may be the subject of homicide although its death was caused by injuries inflicted before its birth.[43]

Respiration Ordinarily independent life may be shown by the fact that the child has breathed.[44] This test is not infallible, however,[45] and the fact that the child has breathed is not conclusive of independent life since children sometimes breathe before complete delivery and while placental circulation is still going on,[46] nor is the fact that the child has not breathed conclusive of an absence of independent life, since independent life may exist momentarily before perceptible breathing begins.[47]

§ 3. Capacity and Responsibility

One who was unconscious at the time of committing a homicide and who did not know what he was doing is not criminally responsible therefor

The capacity and responsibility for crimes in general are considered in Criminal Law § 55 The responsibility of infants for crimes is discussed in the C J S title Infants §§ 93–96, also 31 C J p 1094 note 76–p 1101 note 43; that of a married woman for her own crimes in the C J S title Husband and Wife §§ 221, 222, also 30 C J p 790 note 13–p 794 note 67, and that of a corporation for homicide in Corporations § 1364 b

If accused was temporarily unconscious so as not to know what he was doing when he committed the homicide he is not criminally responsible.[48]

§ 4. —— Insanity

- a In general
- b Time of insanity
- c. Knowledge of right and wrong
- d. Uncontrollable action, irresistible impulse
- e. Insane delusions and partial insanity
- f. Anger and emotional insanity

a. In General

Insanity of the sufficient degree constitutes a defense to homicide, from whatever cause it originated, but the authorities are in conflict on the question whether mental incapacity can be such as to require acquittal of a higher grade of homicide and at the same time permit conviction of a lower degree

One who is so insane, at the time of the commission of a homicide, as to be incapable of acting with criminal intent cannot be held criminally responsible for his act,[49] and a statute providing that the insanity of accused at the time of the commission of a homicide shall not be a defense against an indictment for murder has been held unconstitutional.[50] It has been said that insanity on the part of the person committing a homicide does not in any degree alter the nature of the homicide as an un-

37. Tex —Perryman v State, 36 Tex 321

38 Ga —Passley v State, 21 S E 2d 230, 194 Ga 327 - Shedd v State, 173 S E 847, 848, 178 Ga 653, citing **Corpus Juris.**
Ky -Jackson v Commonwealth, 96 S W 2d 1014, 1015 265 Ky 295 citing **Corpus Juris.**
29 C J p 1050 notes 28, 29

Quick child
At common law it was not homicide to kill an unborn child even after it had quickened
Mass —Commonwealth v Parker, 9 Metc 263, 43 Am D 396
N J —State v Cooper, 22 N J Law 52, 51 Am D 248

Reasonable creature in being
Under statutes requiring the victim to be a reasonable creature in being, the child must have been born alive – Morgan v State, 256 S W 433, 148 Tenn 417.

39. Ky —Jackson v Commonwealth, 96 S W 2d 1014 1015, 265 Ky 295, citing **Corpus Juris.**
Tenn —Morgan v State, 256 S W 433 434 148 Tenn 417, citing **Corpus Juris**
29 C J p 1050 note 32

40. Tenn —Morgan v State supra, citing **Corpus Juris.**
29 C J p 1050 note 33

41. Tenn —Morgan v State, 256 S W 433, 148 Tenn 417
29 C J p 1050 note 34

42. Ky – Jackson v Commonwealth, 96 S W 2d 1014, 1015, 265 Ky 295, citing **Corpus Juris.**
29 C J p 1050 note 34

43. Tenn -Morgan v State, 256 S W 433 148 Tenn 417
29 C J p 1050 note 37

44. Tenn – Morgan v State, supra

45. Tenn —Morgan v State, supra

46. Ky – Jackson v Commonwealth, 96 S W 2d 1014 1015 265 Ky 295, citing **Corpus Juris.**
Tenn —Morgan v State, 256 S W 433, 434 148 Tenn 417, citing **Corpus Juris**
29 C J p 1050 note 35

47. Tenn —Morgan v State supra, citing **Corpus Juris.**
29 C J p 1050 note 36

48. Ky —Newsome v Commonwealth, 154 S W 2d 737 287 Ky 649
29 C J p 1056 note 88

49. Cal —People v Leong Fook, 273 P 779, 206 Cal 64
29 C J p 1050 note 17
Insanity as defense against
Charge of assault with intent to kill see infra § 88
Prosecutions generally see Criminal Law § 56

50. Miss —Sinclair v State, 132 So 581, 161 Miss 142, 74 A L R 241

lawful act, but merely prevents punishment of the slayer [51]

The insanity required to exempt one from criminal responsibility for a homicide must be in the nature of a mental disease,[52] and cannot consist in mere stupidity or weakness of mind,[53] or mere mental depravity or so-called moral insanity,[54] at least if the slayer was aware of the nature and quality of his act, as discussed infra subdivision c of this section

Degree or grade of homicide It has been held by some authorities that insanity cannot be presented for the purpose of reducing the degree or grade of a homicide, that it must be such as to warrant acquittal of any degree or grade, and that it cannot be of such nature as to warrant acquittal of a higher degree or grade of homicide and at the same time permit conviction of a lower degree or grade [55] According to other authorities, however, the mental impairment of accused may be such as not entirely to relieve him of criminal responsibility and still such as to render him incapable of deliberation and premeditation, or of forming a particular intent, constituting a necessary element of a higher degree or grade of homicide,[56] and, as shown infra subdivision d of this section, it has been held that an irresistible impulse may reduce the offense to the grade of manslaughter

Cause of insanity One who is legally insane has been held exempt from criminal responsibility for homicide regardless of the cause of his condition,[57] as where his insanity was brought about by his continued use of intoxicating liquors, as discussed infra § 5 d, or by his own fault in yielding to anger or passion,[58] but, as shown infra subdivision f of this section, a state of frenzy produced by anger or similar passion does not of itself constitute legal insanity

Somnambulism has been classed with insanity as a defense and held not to constitute a defense other than that embraced in a plea of insanity,[59] and the responsibility of one who at the time of the commission of a homicide acted under the influence of such affliction is governed by the same rules as those which govern the responsibility of persons whose minds are impaired by mental disease [60]

In New Hampshire the existence of any definite test of insanity is denied, and it is held that the entire question of responsibility where the defense is insanity is one of fact, namely, whether accused had a mental disease having the effect of preventing the formation or entertainment of a criminal intent [61]

b. Time of Insanity

To constitute a defense, insanity must have existed at the time of the commission of the homicide, but if it did this is sufficient notwithstanding the accused was not insane for a long period and had lucid intervals at other times

To relieve one from responsibility for a homicide it must appear that he was insane at the time of its commission, and not merely prior or subsequent thereto [62] Thus one who suffers from intermittent insanity is fully responsible for a homicide committed during a lucid interval,[63] although if

51. Cal—People v Leong Fook 273 P 779 206 Cal 64

52. Ala—Kilpatrick v State, 101 So 656, 213 Ala 358
29 C J p 1051 note 58

53 Ga—Goosby v State, 112 S E 467, 153 Ga 496
29 C J p 1051 note 59

54 Ala—Manning v State, 116 So 360 217 Ala 357- Kilpatrick v State 101 So 656 213 Ala 358
Cal People v French 87 P 2d 1014, 12 Cal 2d 720—People v Donegan, 90 P 2d 856, 32 Cal App 2d 716
29 C J p 1056 note 87
Mental depravity or moral insanity generally see Criminal Law § 63

55. Cal—People v Troche 273 P 767 206 Cal 35 appeal dismissed and certiorari denied Troche v People of State of California, 50 S Ct 87, 280 U S 521, 74 L Ed 592
Pa—Commonwealth v Scott, 14 Pa Dist & Co 191
29 C J p 1051 note 49
Insanity as affecting grade or degree of offense generally see Criminal Law § 58

56 Ariz—Foster v State 294 P 268 37 Ariz 281
Conn—Anderson v State 13 Conn 514
N Y—People v Moran, 163 N E 553 249 N Y 179
N C—State v Alston, 197 S E 719, 214 N C 93
Ohio—State v Adin 7 Ohio Dec Reprint 25, 1 Cinc L Bul 38
Utah—State v Green, 6 P 2d 177, 186 78 Utah 580
"When insanity is made an issue in a case of homicide such insanity may have the effect of reducing the homicide to voluntary manslaughter"—State v Green supra

57 Mass—Commonwealth v Parsons 81 N E 291, 195 Mass 560
29 C J p 1051 note 48

58. Wis—Duthey v State, 111 N W 222, 131 Wis 178, 10 L R A, N S 1032
29 C J p 1051 note 48

59. Ky—Fain v Commonwealth, 78 Ky 183 39 Am R 213
Philippine People v Gimena, 55 Philippine 601
Somnambulism and Somnolentia generally see Criminal Law § 64

60 Ky—Fain v Commonwealth, 78 Ky 183 39 Am R 213
29 C J p 1056 note 90

61 N H—State v Jones, 50 N H 369 9 Am R 242
29 C J p 1052 note 60

62 Cal—People v Keaton, 296 P 609 211 Cal 722
Fla—Crews v State 196 So 590 143 Fla 263—Chesser v State, 109 So 599 92 Fla 589—Collins v State, 102 So 880 88 Fla 578
Ky—Murrell v Commonwealth, 163 S W 2d 1 291 Ky 65
Miss—Nelson v State 92 So 66, 129 Miss 288
Wis—State v Johnson, 290 N W 159, 233 Wis 668
29 C J p 1051 note 51
Time of insanity as affecting defense against charge of crime generally see Criminal Law § 57

63. Miss—Ford v State, 19 So 665, 73 Miss 734 35 L R A 117.
29 C J p 1051 note 52

the homicide was committed during an insane interval he is not responsible if the insanity was then of the degree that would be recognized as a ground for acquittal if the insanity were habitual[64] In other words, however sane one may have been at all other times, if he was actually insane at the time he committed the homicide he is not responsible[65] His insanity need not have existed for any definite period, it is essential only that it existed at the precise moment when the homicide was committed[66] The fact that accused has, prior to the commission of the homicide, been adjudged insane, and has not been discharged as cured or adjudged to have been restored, is not conclusive of his state of mind at the time of the commission of the homicide[67]

c. Knowledge of Right and Wrong

Ability of the accused to distinguish right from wrong with respect to the homicide and to know the nature of the act is the most frequently applied test of sanity One who has such ability may be responsible although he is in some other respects abnormal

The test of mental capacity most frequently employed in determining the criminal responsibility of accused for homicide is the capacity to distinguish right from wrong as applied to the particular act, and to understand the nature, quality, and consequences of such act[68] Thus all of the courts are agreed that one who at the time of the commission of a homicide, by reason of mental disease, was incapable of knowing the nature and the quality of his act, or that the act was wrong, is not criminally responsible,[69] and, except in jurisdictions where incapacity by reason of mental disease to control one's action is recognized as a defense, see infra subdivision d of this section, it is generally considered that one who knows the nature and quality of his act and that it is wrong is criminally responsible[70] In jurisdictions in which the ability to distinguish between right and wrong is the test of insanity, one who is able so to distinguish is responsible notwithstanding he has a low intelligence quotient and a mental age far below his actual age,[71] or is weak-minded or feeble-minded,[72] or even a low grade moron not capable of understanding the nature of his acts and the consequence thereof so as to be relieved from responsibility —State v Macias, Ariz, 131 P 2d 810

Knowledge "to a limited extent"

One who can distinguish between right and wrong "to a limited extent" may be convicted of homicide —Commonwealth v Clark, 198 N E 641, 645, 292 Mass 409

64. Okl —Maas v Territory, 63 P 960, 10 Okl 714, 53 L R A 814
29 C J p 1051 note 53

65. Pa —Commonwealth v Beckwith 27 Pa Co 481
Wis —Duthey v State 111 N W 222, 131 Wis 178, 10 L R A N S, 1032

66. U S —U S v Sickles, 27 F Cas No 16 287a 2 Hayw & H 319
Wis —Duthey v State, 111 N W 222, 131 Wis 178 10 L R A,N S, 1032

67. Ky —Southers v Commonwealth 272 S W 26 209 Ky 70
Presumption of continued insanity see infra § 191

68. Cal —People v Perry, 234 P 890, 195 Cal 623
Ky —Murrell v Commonwealth, 163 S W 2d 1 291 Ky 65— Southers v Commonwealth 272 S W 26, 209 Ky 70
Okl —Turner v State, 279 P 525, 43 Okl Cr 380—Claycomb v State, 211 P 429 22 Okl Cr 315
Tex —Davidson v State, 4 S W 2d 74 109 Tex Cr 251 Craven v State, 247 S W 515 93 Tex Cr 328
Wash —State v Carpenter, 7 P 2d 573, 166 Wash 478
Wis - State v Johnson, 290 N W 159 233 Wis 668
29 C J p 1052 note 64
Right and wrong test generally see Criminal Law § 59

Amount of education

One who had finished the common school course with reasonable credit and had spent some time in the high school apparently leaving it voluntarily and not because of a failure to keep up with his work would not necessarily be classed automatically as an idiot, imbecile, or

69 Ala —Manning v State, 116 So 360 217 Ala 357
Idaho - State v Van Vlack, 65 P 2d 736 57 Idaho 316
Ill —People v Varecha, 186 N E 607, 353 Ill 52
Iowa —State v Maharras 224 N W 537 208 Iowa 127—State v Buck, 219 N W 17, 205 Iowa 1028
Ky —Newsome v Commonwealth, 154 S W 2d 737 287 Ky 649—Thomas v Commonwealth, 245 S W 164, 196 Ky 539
N J —State v Lynch, 32 A 2d 183
Pa —Commonwealth v Santos, 119 A 596 275 Pa 515
Utah — State v Green, 6 P 2d 177, 78 Utah 580
29 C J p 1052 note 62

70. Ariz —Foster v State 294 P 268 37 Ariz 281
Cal —People v Keaton 296 P 609, 211 Cal 722
N C —State v Bracy, 1 S E 2d 891, 215 N C 218
Or —State v Riley, 30 P 2d 1041 147 Or 89
Pa —Commonwealth v Szachewicz, 154 A 483, 303 Pa 110
Tenn —Davis v State, 28 S W 2d 993, 161 Tenn 23- -McElroy v State, 242 S W 883, 146 Tenn 442
W Va —State v Evans, 117 S E 885, 94 W Va 47
29 C J p 1052 note 61

71. Cal —People v Perry, 234 P 890, 195 Cal 623
Mass —Commonwealth v Stewart, 151 N E 74 255 Mass 9, 14 A L R 579
"The law does not substitute mental standardization in place of actual age as the sole test of responsibility for the commission of crime"—People v Perry 234 P 890, 896, 195 Cal 623

Of mental age of child

(1) A thirty-four year-old man with the mental age of a boy of eight can be guilty of murder in the first degree if understanding the character consequences and nature of his act and possessing the power successfully to resist its commission — State v Kelsie, 108 A 391, 93 Vt 450

(2) An accused as to whom a psychometric test revealed a mental age of seven years and three months and an intelligence quotient of forty-eight has been held legally sane — Commonwealth v Howell, 13 A 2d 521 338 Pa 577

72. Tex —Banks v State 112 S W 2d 745 133 Tex Cr 541—McKenny v State 288 S W 165 105 Tex Cr 353—Craven v State 247 S W 515, 93 Tex Cr 328

"High grade feeble-minded person" is criminally responsible for homicide if aware of the difference between right and wrong and of the consequences of his act —Commonwealth v Howell, 13 A 2d 521, 522, 338 Pa 577.

suffers from some nervous disorder,[73] or has some mental defect which makes him more liable to yield to passion than if he were mentally sound,[74] or is otherwise mentally abnormal or defective[75]

d. Uncontrollable Action; Irresistible Impulse

In some jurisdictions, to render one suffering from mental disease responsible for homicide, he must have had the ability not only to distinguish right from wrong, but also to choose between them; but in other jurisdictions this doctrine does not obtain.

In many jurisdictions it is held that, although one committing a homicide had the capacity to distinguish between right and wrong as to his act, still he is not responsible if, by reason of mental disease he could not control his conduct, the view of these authorities being that the slayer is responsible if, and only if, he can choose between right and wrong in addition to being able to distinguish between them[76] In other jurisdictions, however, it is held that the irresistible or uncontrollable impulse doctrine does not prevail,[77] or at least is not available as a complete defense,[78] although it may reduce the offense to the grade of manslaughter,[79] and it is held that one who at the time of the commission of a homicide had sufficient mental capacity to know that his act was wrong is criminally responsible although his act was caused by an insane irresistible impulse,[80] and particularly is it held that a person capable of knowing the wrongfulness of his acts at the time of the commission of a homicide is not excused from criminal responsibility, even though he acted under the influence of an irresistible impulse produced by mental disease, in jurisdictions where there are statutory provisions to the effect that one is not excused from criminal responsibility on the ground of insanity, except where at the time of the commission of the alleged criminal act he had not sufficient mental capacity to know that his act was wrong[81] The courts are agreed that one who acted under the influence of an irresistible impulse produced by disease of the mind is not criminally responsible for a homicide, if, at the time of the commission of the act, such disease was sufficient to render him incapable of understanding the nature of his act or that it was wrong.[82] To excuse homicide the irresistible impulse must have been induced by a mental disease,[83] and not have resulted from mere moral obliquity or wicked propensities and habits[84]

e. Insane Delusions and Partial Insanity

An insane delusion, to excuse homicide, must be connected with the homicide, and one who is sane with respect to the homicide is not excused by the fact that as to other matters he is insane One suffering from insane delusions is not responsible, as a general rule, if the facts imagined would have excused the homicide, but the authorities conflict on whether he is responsible where the imagined facts, if true, would not have been an excuse

Partial insanity or insane delusion or hallucination is not sufficient of itself to avoid criminal responsibility for homicide,[85] there must be a connection between the homicide and the peculiar delusion under which accused was laboring,[86] and one

73. Cal People v Keaton, 296 P 609 211 Cal 722

74. Mont —State v Colbert 194 P 115, 58 Mont 584—State v Brooks 57 P 1038, 23 Mont 146

75. Cal —People v Keaton, 296 P 609, 211 Cal 722

76. Ala —Boyle v State, 154 So 575, 229 Ala 212
Ill —People v Varecha, 186 N E 607 353 Ill 52—People v Geary, 131 N E 652 298 Ill 236
Ky —Murrell v Commonwealth, 163 S W 2d 1, 291 Ky 65—Southers v Commonwealth, 272 S W 26 209 Ky 70 Thomas v Commonwealth, 245 S W 161, 196 Ky 539
Pa —Commonwealth v Foltz, 5 Pa Dist & Co 559
Utah —State v Green, 6 P 2d 177, 78 Utah 580
29 C J p 1053 notes 65, 69, p 1054 note 70 [a]
Irresistible impulse generally see Criminal Law § 61

Corpus Juris cited to show conflict of authority —Davis v State, 28 S W 2d 993, 995, 161 Tenn 23

77. Cal —People v Donegan, 90 P 2d 856 32 Cal App 2d 716
29 C J p 1053 note 69 [c].
"Irresistible impulse influenced by an insane delusion is therefore a defense not known to our law, as long as the faculty remains to distinguish between right and wrong"—Davis v State 28 S W 2d 993, 996, 161 Tenn 23

Modern rule
It has been denied that the irresistible impulse test is the more progressive and modern rule of determining criminal responsibility for homicide —State v Riley, 30 P 2d 1041 147 Or 89

In Oklahoma the doctrine of irresistible impulse is no longer the law, earlier authorities to the contrary having been overruled —Arms v State 292 P 76, 49 Okl Cr 34—Roe v State, 191 P 1048 17 Okl Cr 587

78. Or —State v Nortin, 133 P 2d 252

79. Or —State v Nortin, supra

80. Cal —People v French, 87 P 2d 1014 12 Cal 2d 720
N J —State v Lynch, 32 A 2d 183
Okl —Roe v State, 191 P 1048, 17 Okl Cr 587
Or —State v Riley, 30 P 2d 1041, 147 Or 89
Tenn —Davis v State, 28 S W 2d 993, 161 Tenn 23
29 C J p 1054 note 70, p 1056 note 87 [a]

Irresistible impulse to rob, steal, and flee would not be defense to crime of murder committed during robbery —Commonwealth v Schroeder, 152 A 835 302 Pa 1

81. N Y —People v Krist, 60 N E 1057, 168 N Y 19, 15 N Y Cr 532
Or —State v Hassing, 118 P 195, 60 Or 81
29 C J p 1054 note 72

82. Okl —Roe v State, 191 P 1048, 17 Okl Cr 587
29 C J p 1053 note 68

83. Ala —Thompson v State, 128 So 161, 23 Ala App 529

84. Ala —Parsons v State, 2 So 854, 81 Ala 577
29 C J p 1056 note 87 [b]

85. Cal —People v French, 87 P. 2d 1014, 12 Cal 2d 720
Insane delusions and partial insanity generally see Criminal Law § 60

86 Ga —Barker v State, 4 S E 2d 31, 188 Ga 332

who at the time of the commission of a homicide understood the nature and character of his act, and its consequences, knew that it was wrong, and was not impelled to its commission by an insane irresistible impulse, is not relieved from criminal responsibility by the fact that, as to other subjects, he may have been insane [87]

With respect to the question whether the homicide would have been justified or excusable had the facts with respect to which the delusion exists been real, the courts are agreed that one who at the time of the commission of a homicide was partially insane, that is, subject to delusions as to some matters, but in other respects sane, is not criminally responsible if the homicide would have been excusable or justifiable were the facts such as his delusion lead him to believe [88] The authorities are not agreed, however, as to the rule in cases where the delusion, even if true, would not justify or excuse the homicide According to some authorities the slayer is responsible where the imagined facts, if real, are not such as would justify or excuse the homicide,[89] other authorities adopt this rule with the proviso that the delusion must not be such as to render accused unable to distinguish between right and wrong,[90] and hold that an insane delusion which so corrupts the mental processes as to incapacitate the slayer from distinguishing between right and wrong with respect to the act constitutes a defense, although the imagined state of facts, if real, would not have justified a sane man in doing the same act [91] Further, there is considerable authority to the effect that cases of partial insanity are to be governed by the same rules that govern general insanity, and that the test to be applied is whether, as to the particular act in question, accused was capable of knowing right from wrong,[92] or, in those jurisdictions wherein the doctrine of insane irresistible impulse is accepted, see supra subdivision d of this section, whether he was capable of knowing right from wrong and of exercising the power to choose between them as to the particular act [93]

An insane delusion must be distinguished from the erroneous conclusion of a sane mind, which is no defense [94] It has been held that an insane delusion which does not entirely relieve accused from criminal responsibility may nevertheless create such passion and agitation as to warrant conviction for manslaughter only, and not for murder [95]

f. Anger and Emotional Insanity

Emotional frenzy which is unassociated with mental disease, such as anger, jealousy, or the like, does not excuse homicide

Emotional insanity which is not associated with mental disease does not absolve the person afflicted therewith of responsibility for homicide [96] Thus, if there is no mental disease, one who commits a homicide in a frenzy produced by anger, jealousy, or other like passion, although he may be unable to control himself, is fully responsible for the homicide,[97] particularly under statutes in effect so pro-

87. Tex —Morris v State, 255 S W 744, 96 Tex Cr 63
29 C J p 1055 note 81

Eccentricity as to religious matters
Criminal responsibility attaches to one who claims to have killed in obedience to a command of God, and whose mind is normal in all respects except as to some eccentricity in connection with matters of religion —McElroy v State, 212 S W 883, 146 Tenn 412

88. Tenn —Overton v State, 56 S W 2d 740, 165 Tenn 575
29 C J p 1054 note 74

89. Ga —Barker v State, 4 S E 2d 31, 188 Ga 332
29 C J p 1055 note 75

90. Fla —Blocker v State, 110 So 547, 92 Fla 878—Davis v State, 44 Fla 32, 32 So 822

91. Neb—Kraus v State, 187 N W 895, 108 Neb 331

92. Ill —Hopps v People, 31 Ill 385, 83 Am D 231
29 C J p 1055 note 76

93. Ala —Parsons v State, 2 So 854, 81 Ala 577, 60 Am R 193
29 C J p 1055 notes 75 [b], 78

Will controlled by disease; stages of paranoia
The rule that the case should be considered as though the facts with respect to which the delusion exists were real does not apply to those cases in which the disease has advanced to such a stage that its victim is no longer able to control his will and actions with reference to the delusions, and hence, in the case of paranoia, the rule applies only where the disease is in its first or earliest stage of development, and not where the disease has progressed to its second or persecutory stage, or to subsequent stages —Woodall v State, 231 S W 186, 149 Ark 33—Hankins v State, 201 S W 832, 133 Ark 38 L R A 1918D, 784

94. U S —Hotema v U S, Tex, 22 S Ct 895, 186 U S 413, 46 L Ed 1225
29 C J p 1055 note 82

95. Tenn —Davis v State, 28 S W 2d 993, 161 Tenn 23
Insanity as reducing degree or grade of homicide generally see supra subdivision a of this section

96. Ala —Manning v State, 116 So 360, 217 Ala 357—Kilpatrick v State, 104 So 656 213 Ala 358
Cal —People v French 87 P 2d 1011, 12 Cal 2d 720—People v Donegan, 90 P 2d 856, 32 Cal App 2d 716
N J —State v Lynch 32 A 2d 183—State v Aeschbach 153 A 505 107 N J Law 133
Anger and emotional insanity generally see Criminal Law § 62

Father outraged by wrongs against daughter
Homicide by outraged father while emotionally insane from wrongs to his daughter is not excusable —Pippin v State, 123 So 288 23 Ala 232

97. Fla —Chesser v State 109 So 599, 92 Fla 589—Collins v State, 102 So 880, 88 Fla 578
Ky —Golden v Commonwealth 121 S W 2d 21, 275 Ky 208—Howard v Commonwealth, 5 S W 2d 1056, 224 Ky 224
Pa —Commonwealth v Foltz, 5 Pa Dist & Co 559
29 C J p 1056 note 84

Inability to reflect
Uncontrolled passion or excitement rendering the mind incapable of cool reflection does not inject insanity

viding.[98]

§ 5. —— Intoxication

a In general
b Homicides requiring intent, deliberation, or premeditation
c Involuntary intoxication
d Intoxication coupled with insanity, delirium tremens

a. In General

The general rule is well settled that intoxication does not excuse a homicide for which no specific intent or malice is required, such as manslaughter or murder in the second degree. It may, however, according to some authorities, negative malice, or show that the homicide was committed as a result of provocation rather than of malice

At common law intoxication was no defense to homicide, particularly a homicide committed under such circumstances that malice would be inferred or imputed to the perpetrator if he had been sober at the time of the killing, and it could neither justify an acquittal nor reduce common-law murder to manslaughter[99] In accord with this doctrine the general rule is now well settled that if, the other attendant facts afford neither justification, excuse, nor mitigation, the mere fact of voluntary intoxication does not of itself excuse a homicide[1] for which no specific intent or malice is required,[2] or reduce the degree or grade of a homicide which would otherwise be murder[3] in the first degree[4] Particularly will intoxication not reduce the degree of murder where the distinction between a higher and lower degree of murder is made to depend, not on the intent, but on the manner in which the crime is committed, or the attending circumstances[5] Nevertheless, while voluntary intoxication does not excuse a homicide, it is generally held that the fact of drunkenness, although voluntary, may be considered in determining whether accused possessed the specific intent to kill or other mental state required to constitute a particular grade of homicide, see infra subdivision b of this section; and, as shown infra subdivision d of this section, a settled or permanent insanity resulting from continued intoxication constitutes a defense to the same extent as insanity produced by any other cause

into a case—Swann v State 242 S W 735, 92 Tex Cr 153

98. Okl - Updike v State, 130 P 1107 9 Okl Cr 124—Morris v Territory 99 P 760 101 P 111, 1 Okl Cr 617

99. D C—Bishop v U S, 107 F 2d 297, 71 App D C 132
29 C J p 1058 note 94

1. Ala—Ivory v State 186 So 160, 237 Ala 344- Kilpatrick v State, 101 So 656 213 Ala 358
Ark--Ballentine v State 132 S W 2d 384 198 Ark 1037
Cal—People v Griggs 110 P 2d 1031, 17 Cal 2d 621 -People v Lami, 36 P 2d 192 1 Cal 2d 197
Del—State v Kupis, 179 A 640, 7 W W Harr 27
D C—Bishop v U S, 107 F 2d 297, 71 App D C 132
Idaho—State v Sprouse, 118 P 2d 378
Ind—O Neil v State, 22 N E 2d 825, 216 Ind 21
Ky--Smiddy v Commonwealth, 152 S W 2d 919 287 Ky 276—Vance v Commonwealth 72 S W 2d 43 254 Ky 667—Graham v Commonwealth, 252 S W 1012 200 Ky 161—Thomas v Commonwealth 245 S W 164 196 Ky 539
Miss Melton v State 124 So 802, 155 Miss 659
Mo—State v Bartley, 84 S W 2d 637, 641 337 Mo 229 citing **Corpus Juris**—State v Bushong, 246 S W 919
N M—State v Aragon, 292 P 225, 35 N M 198
N C—State v Cureton, 11 S E 2d 169, 218 N C 191—State v Hammonds, 3 S E 2d 439, 216 N C 67
Ohio—Rucker v State, 162 N E 802, 119 Ohio St 189
Okl—Skeen v State, 66 P 2d 1106, 61 Okl Cr 188—Quinton v State, 9 P 2d 51 53 Okl Cr 194
Tex—Soderman v State, 260 S W 607, 97 Tex Cr 23
Utah--State v Stenback, 2 P 2d 1050, 78 Utah 350, 79 A L R 878
Vt—State v Stacy, 160 A 257, 104 Vt 379, motion denied 160 A 747, 104 Vt 379
Va—Little v Commonwealth, 175 S E 767 163 Va 1020—Giles v Commonwealth 126 S E 51, 141 Va 415
29 C J p 1056 note 92 p 1057 note 93
Voluntary intoxication as a defense generally see Criminal Law § 66

Use of deadly weapon; absence of provocation

One who voluntarily becomes too drunk to know what he is about and then with a deadly weapon kills another, or without provocation assaults and beats another to death, does murder the same as though he were sober—Ballentine v State 132 S W 2d 384, 198 Ark 1037—High v State, 120 S W 2d 24 197 Ark 681—Weakley v State, 273 S W 374, 168 Ark 1087—Byrd v State, 88 S W 974, 76 Ark 286

2. Ala - Briley v State 109 So 845, 21 Ala App 473, certiorari denied 109 So 846, 215 Ala 106
Ark—Bloyd v State, 255 S W 566, 161 Ark 665
Fla—Curlee v State 195 So 430 210 Fla 16—Folks v State, 95 So 619, 85 Fla 238
Iowa—State v Johnson, 245 N W 728 215 Iowa 483
Ky—Richardson v Commonwealth, 114 S W 2d 492, 281 Ky 319
Homicides requiring intent, deliberation or premeditation see infra subdivision b of this section

3. Ark—High v State 120 S W 2d 24, 197 Ark 681 -Weakley v State, 273 S W 371 168 Ark 1087
Ga—Allen v State, 200 S E 109, 187 Ga 178 120 A L R 495
Mass—Commonwealth v Soaris, 175 N E 491, 275 Mass 291
Nev—State v Fisko 70 P 2d 1113, 58 Nev 65
Va—Drinkard v Commonwealth, 183 S E 251, 165 Va 799—Little v Commonwealth 175 S E 767, 163 Va 1020

4. Cal—People v Smith, 95 P 2d 453, 14 Cal 2d 511
N C—State v Hammonds 3 S E 2d 439 216 N C 67

Homicide during perpetration of burglary

Drunkenness is not a defense to a homicide committed in the perpetration of a burglary and will not reduce the crime from murder in the first degree to murder in the second degree—State v Roach, 197 A 33, 119 N J Law 488

5. Mass—Commonwealth v Gilbert, 42 N E 336, 165 Mass 45.
29 C J p 1058 note 96

According to the weight of authority, the fact that one, by reason of his previous habits, had dipsomania or such an appetite for intoxicating liquor as amounts to a disease overcoming his will and impelling him to drink is no excuse for a homicide committed while he was intoxicated.[6] The fact that by reason of constitutional infirmity, prior accident, or other cause one is more susceptible to the influence of intoxicating liquor than other men does not excuse him from criminal responsibility for a homicide committed under the influence of intoxication, if he has legal memory and discretion when sober and, knowing of the infirmity, voluntarily becomes intoxicated.[7] The fact that one committing a homicide was voluntarily intoxicated at the time of its commission does not aggravate the offense,[8] although there are expressions in some of the earlier cases indicating that the rule at common law was formerly otherwise.[9]

As defense to murder in the second degree Voluntary intoxication does not constitute a defense to a charge of murder in the second degree, or reduce murder in the second degree to manslaughter, at least in jurisdictions where intent to kill is not an essential element of murder in the second degree,[10] or, as the rule is sometimes expressed, as between murder in the second degree and manslaughter, drunkenness forms no legitimate matter of inquiry.[11] Voluntary intoxication does not of itself negative the malice required to constitute murder in the second degree and thereby reduce murder in the second degree to voluntary manslaughter.[12] The fact that overindulgence in alcoholic liquors has so affected one's judgment and intelligence as to cause him to be utterly reckless in doing acts endangering life does not reduce the grade of offense from murder in the second degree to manslaughter.[13]

As defense to charge of manslaughter At the utmost intoxication only extenuates a homicide from murder to manslaughter,[14] except as it may have resulted in a settled or fixed insanity, see infra subdivision d of this section. It is no defense to a charge of manslaughter,[15] voluntary[16] or involuntary,[17] or to manslaughter in either degree,[18] so that a homicide committed by one voluntarily intoxicated is manslaughter if the same act committed by a sober man would constitute such offense.[19]

Malice It has been held that intoxication may be considered on the question of the existence of malice or malice aforethought,[20] but it has also been held that the intention to drink may fully supply the place of malice aforethought.[21] Intoxication at the time the crime is committed, nothing else appearing, does not negative or repel malice.[22] Where to constitute any particular degree of murder implied malice only is required, the fact that the perpetrator was voluntarily intoxicated is not a defense as to that degree.[23]

6. N C- State v Potts, 6 S E 657, 100 N C 457
29 C J p 1058 note 99
Dipsomania as
Excuse for crime generally see Criminal Law § 70
Question for jury see infra § 349

7. Ga—Choice v State, 31 Ga 424
N C—State v Wilson, 10 S E 315 104 N C 868

8. W Va—State v Cross, 24 S E 996, 42 W Va 253
29 C J p 1063 note 47
Intoxication as
Affecting mitigation of punishment see infra § 435
Aggravating or mitigating offenses generally see Criminal Law § 67

9. N Y—People v Eastwood, 14 N Y 562
29 C J p 1063 note 48

10. Ark Ballentine v State, 132 S W 2d 384 198 Ark 1037—Borland v State 219 S W 591 158 Ark 37
D C Bishop v U S, 107 F 2d 297 71 App D C 132
N M—State v Aragon 292 P 225, 35 N M 198
N C—State v Alston 186 S E 354 210 N C 258
Intent to kill as element of murder in second degree see infra § 35

11. N M—State v Aragon, 292 P 225, 35 N M 198
Va—Cody v Commonwealth 23 S E 2d 122 180 Va 449—Little v Commonwealth 175 S E 767, 163 Va 1020—Gills v Commonwealth, 126 S E 51 141 Va 445

12. D C—Nestlerode v U S 122 F 2d 56 71 App D C 276—Bishop v U S 107 F 2d 297, 71 App D C 132

13. D C—Nestlerode v U S, 122 F 2d 56 74 App D C 276

14 Okl—Skeen v State, 66 P 2d 1106 61 Okl Cr 188

15. Ark—High v State, 120 S W 2d 24, 197 Ark 681
Fla—Folks v State, 95 So 619, 85 Fla 238
Idaho State v Morrison, 11 P 2d 619, 52 Idaho 99
Iowa—State v Johnson, 215 N W 728, 215 Iowa 483
Miss—Long v State, 141 So 591, 163 Miss 535
N C—State v Alston, 186 S E 354, 210 N C 258

16. Ark—Boyd v State, 255 S W 566, 161 Ark 665
N M—State v Aragon, 292 P 225 35 N M 198

17. Ark—Bennett v State, 257 S W 372, 161 Ark 496

18 Ala—Cagle v State 100 So 318 211 Ala 346—Tate v State 161 So 456 26 Ala App 411, certiorari denied 161 So 457 230 Ala 392—Briley v State 109 So 845 21 Ala App 173, certiorari denied 109 So 846 215 Ala 106

19 Mich—People v Townsend, 183 N W 177 211 Mich 267
29 C J p 1058 note 98

20. Idaho—State v Sprouse, 118 P 2d 378
Ky—Vance v Commonwealth 72 S W 2d 43 254 Ky 667 Thomas v Commonwealth 215 S W 164 196 Ky 549

21. Ark—Ballentine v State, 132 S. W 2d 384 198 Ark 1037—High v State 120 S W 2d 24 197 Ark 681—Weakley v State 273 S W 371 168 Ark 1087—Byrd v State, 88 S W 971, 76 Ark 286

22. D C—Nestlerode v U S, 122 F 2d 56 74 App D C 276—Bishop v U S, 107 F 2d 297, 71 App D C 132
N C State v Hammonds, 3 S E 2d 439 216 N C 67—State v Kale 32 S E 892, 121 N C 816

23 Nev—State v Fisko, 70 P 2d 1113 58 Nev 65
29 C J p 1058 note 95

Provocation. Where adequate provocation for the homicide existed, but it is uncertain whether accused acted under such influence or was actuated by prior malice, the fact of intoxication may be considered in determining whether he acted under the influence of the provocation rather than as a result of the malice [24] It is generally held that to reduce a homicide committed in sudden passion, on provocation received when accused was intoxicated, from murder to manslaughter, the provocation must have been legally adequate to reduce the grade of the crime if accused had been sober [25] There is, however, some authority to the contrary [26] If there was sufficient cooling time after adequate provocation the grade will not be reduced to manslaughter, although, because of intoxication, accused had not recovered from his passion [27]

Self-defense A homicide committed by one under the unjustifiable belief, due to voluntary intoxication, that his life was in danger, so that he was justified in killing deceased, is not on that account reduced to manslaughter [28] Where the question is whether the homicide was committed in self-defense or with malice aforethought, and it is shown that accused had attempted to kill deceased a short time before the final encounter, the fact that accused was intoxicated at the latter time may be considered on the question whether the intent to kill which was present at the time of the first encounter persisted and continued up to the time of the fatal encounter [29]

Aiding and abetting; conspiracy. On a prosecution for aiding and abetting in the commission of a murder, it may be shown that accused was so drunk as to be incapable of understanding what his codefendants were doing, for in such case he could not be guilty of aiding and abetting [30]

On a prosecution for conspiracy to murder it may be shown that accused was so drunk at the time the alleged conspiracy was entered into that he did not know what he was doing [31]

b. Homicides Requiring Intent, Deliberation, or Premeditation

(1) In general
(2) Extent of intoxication

(1) In General

While there is some authority to the contrary, the general rule is that intoxication may be asserted to negative the existence of deliberation, premeditation, or a specific intent, and may thus reduce the grade or degree of a homicide The rule is applied with caution, however, and is inapplicable where the slayer became intoxicated with the intent to carry out a preconceived design

Where deliberation and premeditation or a specific intent to kill is required as an essential element of a particular grade or degree of homicide, as in the case of murder in the first degree, the fact of intoxication may be considered in nearly all jurisdictions to determine whether the requisite intent, deliberation, or premeditation existed,[32] particularly under statutes in effect so providing,[33]

24. La—State v Hogan, 42 So 352, 117 La 863
29 C J p 1059 note 6

25. S C—State v McCants, 28 S C L 384
29 C J p 1059 note 7
Provocation in general see infra § 46
'The standard of the provocation that may create the 'heat of passion' reducing murder to manslaughter is the same for all men whether drunk or sober"—Bishop v U S, 107 F 2d 297 303, 71 App D C 132

26. Del—State v Hurley Houst Cr Cas p 28
29 C J p 1059 note 8

27. N C—State v John, 30 N C 330, 49 Am D 396
29 C J p 1059 note 9

28. Ala—Springfield v State, 11 So 250, 96 Ala 81, 86, 38 Am S R 85
Tenn—Atkins v State, 105 S W 353, 119 Tenn 458, 13 L R A,N S 1031

29. Ga—Jones v State, 29 Ga 594
Accused's intoxication is evidence in his favor, tending to rebut the presumption of persistence or continuance of the same state of mind as existed at the time of the first encounter—Jones v State, supra

30. Iowa—State v Pasnau, 92 N W 682, 118 Iowa 501
29 C J p 1062 note 26

31. Ind—Booher v State, 60 N E 156, 156 Ind 435, 54 L R A 391
Iowa—State v Pasnau, 92 N W 682, 118 Iowa 501

32. Del—State v Kupis, 179 A 640, 7 W W Harr 27
D C—Bishop v U S, 107 F 2d 297, 71 App D C 132
Ind—O Neil v State, 22 N E 2d 825, 216 Ind 21
Iowa—State v Johnson, 245 N W 728, 215 Iowa 483—State v Johnson, 234 N W 263, 211 Iowa 874
Ky—Richardson v Commonwealth, 144 S W 2d 492 284 Ky 319—Graham v Commonwealth, 252 S W 1012, 200 Ky 161
Mass—Commonwealth v Soaris, 175 N E 491 275 Mass 291
Nev—State v Fisko, 70 P 2d 1113, 58 Nev 65
N C—State v Alston, 197 S E 719, 214 N C 93—State v Edwards, 191 S E 1, 211 N C 555—State v Alston, 186 S E 354, 210 N C 258
Ohio—Rucker v State, 162 N E 802, 119 Ohio St 189—Long v State, 141 N E 691, 109 Ohio St. 77.
Okl—Gallihar v State, 42 P 2d 148, 56 Okl Cr 430
29 C J p 1059 note 11
Intoxication as defense to assault with intent to kill see infra § 88
Voluntary intoxication as defense to crime generally where specific intent necessary see Criminal Law § 68
'A homicide committed by one so intoxicated as to be incapable of deliberation is not murder in the first degree"—State v Brigance, 246 P 897, 31 N M 436
'Intoxication is not an excuse for crime, but if it deprives the intellect of power to think and weigh the nature of the act, it may prevent a conviction of murder in the first degree'—Commonwealth v Senft, 12 Pa Dist & Co 735

Affirmative defense
Where intoxication is relied on in connection with the rule stated in the text, it is an affirmative defense akin to the plea of insanity—State v Cureton, 11 S E 2d 469, 218 N C 491

33. N Y—People v Crumble, 35 N E 2d 634, 286 N Y 24

and to this extent drunkenness may reduce the degree of a homicide from murder in the first degree to murder in the second degree,[34] or, in some jurisdictions, from murder to manslaughter.[35] There is, however, authority which holds broadly that voluntary intoxication does not operate to reduce the degree of a homicide where the perpetrator was previously in the requisite condition of mental responsibility,[36] and that intoxication of accused is not a factor to be considered in determining the existence or absence of elements such as deliberation, premeditation, or intent to kill,[37] even though he was drunk to insensibility at the time of the commission of the offense,[38] or so intoxicated as to be temporarily insane.[39]

Becoming intoxicated with intent to carry out preconceived design The fact that one was so intoxicated at the time of the commission of a homicide as to be incapable of forming a specific intent to kill or of exercising deliberation and premeditation is not a defense to a grade of homicide of which such elements are essential if, prior to the commission of the crime, and before becoming so intoxicated, he had formed the requisite intent or had exercised the required deliberation and premeditation, and had become intoxicated for the purpose of carrying out his preconceived design.[40] It is otherwise, however, where his intoxication is unconnected with such design.[41]

Caution in applying rule In accord with the general rule in all criminal cases, see Criminal Law § 68 a, proof of intoxication of one guilty of a homicide, for the purpose of negativing the existence of the specific intent to kill or of the exercise of deliberation and premeditation required to constitute any particular grade of homicide, should be received with caution.[42]

(2) Extent of Intoxication

To warrant reduction of the grade or degree of homicide, intoxication must have been such that the accused was incapable of having, or at least did not have, the intent, deliberation, or premeditation required for the commission of the higher offense

The effect of intoxication on such questions as the existence of premeditation depends on the degree of intoxication and its effect on the mind and passion,[43] and the mere fact that one was intoxicated at the time of the commission of a homicide does not necessarily negative the existence of the required intent or deliberation and premeditation.[44] Where the grade or degree of homicide depends on the existence of a specific intent to kill or of deliberation and premeditation, it is generally held that the intoxication of the slayer, in order to render him guiltless of the higher degree, must have been so great and complete as to have made him utterly incapable of forming the intent or of acting with deliberation and premeditation,[45] and according to some authorities the degree of intoxication must have been such as to affect the slayer's power of reason and ability to understand the nature and

Utah—State v Stenback, 2 P 2d 1050, 78 Utah 350, 79 A L R 878
29 C J p 1060 note 15

34. Ala—Ivory v State, 186 So 460, 237 Ala 344
Del—State v Kupis, 179 A 640, 7 W W Harr 27
D C—Bishop v U S, 107 F 2d 297, 71 App D C 132
N Y—People v Crumble, 35 N E 2d 631, 286 N Y 24
N C—State v Kelly, 6 S E 2d 513, 216 N C 627
Pa—Commonwealth v Lehman, 164 A 526, 309 Pa 486—Commonwealth v Walker, 129 A 453, 283 Pa 468
Va—Little v Commonwealth, 175 S E 767, 163 Va 1020—Gills v Commonwealth, 126 S E 51, 141 Va 415
Wis Lasecki v State, 208 N W 868, 190 Wis 274

35. Ala—Ivory v State, 186 So 460, 237 Ala 344—Cagle v State, 100 So 318, 211 Ala 346
Fla—Curlee v State, 195 So 430, 240 Fla 16
N Y—People v Crumble, 35 N E 2d 634, 286 N Y 24
Okl Gallihar v State, 42 P 2d 148, 56 Okl Cr 430
29 C J p 1059 note 5
Intoxication as not constituting defense to charge of murder in second degree see supra subdivision a of this section
"Drunkenness so excessive as to paralyze the mental faculties rendering one incapable of premeditation or malice may, in extreme cases, reduce a homicide from murder to manslaughter."—Kilpatrick v State, 101 So 656, 661, 213 Ala 358

36. Vt State v Stacy, 160 A 257, 104 Vt 379, motion denied 160 A 747, 104 Vt 379

37. Mo—State v O'Reilly, 29 S W 577, 126 Mo 597
29 C J p 1060 note 12

38. Mo—State v Dearing, 65 Mo 530

39. Mo—State v Hundley, 46 Mo 414, State v Harlow, 21 Mo 446

40. Ky—Welch v Commonwealth, 258 S W 90, 201 Ky 632
N C—State v Miller, 149 S E 590, 197 N C 445
29 C J p 1061 note 20

41. Ark—Pless v State, 145 S W 221, 102 Ark 506
29 C J p 1061 note 21

42. Nev—State v Jukich, 242 P 590, 598, 49 Nev 217, citing **Corpus Juris.**
Ohio—Long v State, 141 N E 691, 109 Ohio St 77
29 C J p 1061 note 23

43 N C—State v Cureton, 11 S E 2d 469, 218 N C 491

44 Del State v Kupis, 179 A 640, 7 W W Harr 27
Fla—Times v State, 9 So 2d 926
N C—State v Cureton, 11 S E 2d 469, 218 N C 491
Okl—Skeen v State, 66 P 2d 1106, 61 Okl Cr 188
29 C J p 1061 note 19

45. Del—State v Kupis, 179 A 640, 7 W W Harr 27
Iowa—State v Johnson, 245 N W 728, 215 Iowa 483—State v Johnson, 231 N W 263, 211 Iowa 871
Ohio—Long v State, 141 N E 691, 109 Ohio St 77
Okl—Gallihar v State, 42 P 2d 148, 56 Okl Cr 430
Pa—Commonwealth v Lehman, 164 A 526, 309 Pa 486—Commonwealth v Walker, 129 A. 453, 283

consequence of his act[46] According to other authorities, however, the intoxication need not have been such as to deprive the slayer of all power of volition, or of all ability to form an intent or exercise deliberation and premeditation,[47] but merely such that the intent or deliberation and premeditation did not exist[48]

c. Involuntary Intoxication

Involuntary intoxication brought about by force, fraud, or strategem of another constitutes a defense to homicide if it affected the mental capacity of the slayer to the proper extent.

The rule that drunkenness does not exempt one from criminal responsibility for a homicide does not apply to involuntary intoxication[49] In order to exempt one from criminal responsibility for a homicide, involuntary intoxication must be such as to render him incapable of discerning right from wrong and of controlling himself[50] Intoxication is not involuntary within this rule unless it is brought about against the will of the slayer, as where he is compelled to drink by force, fraud, or strategem of another, or takes liquor prescribed by a physician in good faith,[51] and it is not involuntary because of the fact that deceased furnished accused with intoxicating liquor or induced him to drink,[52] or because accused, by reason of his previous habits, had such an appetite for drink as amounted to a disease overcoming his will and impelling him to drink[53] Where one drinks of his own free will, the mere fact that he misjudges his own capacity or the intoxicating effect of the particular beverage will not render his intoxication involuntary[54]

d. Intoxication Coupled with Insanity; Delirium Tremens

Insanity combined with, or resulting from, intoxication is a defense to homicide if it is of a permanent nature and meets the test of insanity generally, but a mere temporary frenzy induced by intoxication is not a defense

Delirium tremens or mental disease of a permanent or settled nature amounting to insanity, produced by prior intoxication, is treated like other insanity, and is an absolute defense in a prosecution for homicide to the extent that insanity due to any other cause and of the same degree would be a defense,[55] and if such insanity actually existed it is immaterial that accused was or was not drunk at the time of the commission of the homicide[56] Insanity resulting from intoxication, in order to free one from responsibility for a homicide, must be of such degree as would render one irresponsible if the insanity were due to any other cause[57] Drunkenness alone, however, is not insanity,[58] to be an ab-

Pa 468—Commonwealth v Troy, 118 A 252, 274 Pa 265
29 C J p 1060 note 16—30 C J p 224 note 68

"So long as the mind of a criminal is capable of conceiving the purpose to kill he must be held to the responsibility of one who is sober"—State v Trefficanto, 146 A 313, 106 N J Law 344

Conscious purpose

"Intoxication which will negative plan and premeditation and the intent to kill must be such as to subvert conscious purpose"—Commonwealth v Kline, 19 A 2d 59, 60, 341 Pa 238

46. Rules stated

(1) "For it to constitute a defense it must appear that defendant was not able by reason of drunkenness to think out beforehand what he intended to do and to weigh it and understand the nature and consequence of his act"—State v Cureton, 11 S E 2d 469, 471, 218 N C 491

(2) Intoxication does not reduce an offense from murder to manslaughter unless it is so extreme as to suspend entirely the power of reason and render the slayer incapable of any mental action—People v Minzer 19 N E 370, 358 Ill 315

(3) Intoxication to be available as a defensive plea and to warrant a reduction of the degree of murder must be of such extent and degree as to deprive one of the powers of reason and render him incapable of appreciating the nature or quality of his acts and to deprive him of the ability to entertain malice or criminal intent or, in other words must amount virtually to insanity—Hall v Commonwealth 81 S W 2d 401, 258 Ky 744

(4) Evidence that accused was intoxicated at time crime was committed is not available as a defense or to mitigate punishment unless the intoxication was of such a degree as to deprive accused of power of reason and make him unconscious of what he was doing—Triplett v Commonwealth, 111 S W 2d 1108, 272 Ky 714

47. N Y—People v Crumble, 35 N E 2d 634, 286 N Y 21
29 C J p 1061 notes 17, 18

48. Neb—Smith v State, 4 Neb 277
29 C J p 1061 note 17

49. Tex—Carter v State, 12 Tex 500, 62 Am D 539
29 C J p 1062 note 29
Involuntary intoxication as a defense generally see Criminal Law § 69

50. Okl—Choate v State, 197 P 1060, 19 Okl Cr 169
29 C J p 1062 note 30

51. Ky—Tackett v Commonwealth, 266 S W 26, 205 Ky 190

52. Okl—Chambers v State, 182 P 711, 16 Okl Cr 238
29 C J p 1062 note 31

53 N C—State v Potts, 6 S E 657, 100 N C 457
29 C J p 1062 note 32

54. Ky—Tackett v Commonwealth 266 S W 26, 205 Ky 190

55 Ark—Weakley v State, 273 S W 374, 168 Ark 1087
Cal—People v Griggs 110 P 2d 1031, 17 Cal 2d 621
Ga—Peck v State, 116 S E 629, 155 Ga 49
Ohio—Rucker v State 162 N E 802, 119 Ohio St 189
29 C J p 1062 note 34
Insanity
As defense in homicide cases generally see supra § 4
From intoxication generally see Criminal Law § 70

56. W Va State v Kidwell 59 S E 494, 62 W Va 466, 13 L R A N S, 1024
29 C J p 1063 note 39

57. Ark—Weakley v State, 273 S W 371, 168 Ark 1087
Tex—Cruse v State, 66 S W 2d 324, 125 Tex Cr 123
29 C J p 1063 note 41

58. Ala—Kilpatrick v State, 104 So 656, 213 Ala 358

solute defense the intoxication must have produced a fixed mental disease of some duration or permanence, and temporary alcoholic insanity, that is to say, the mental excitement or frenzy directly caused by voluntary excessive indulgence in intoxicating liquors, does not exempt one from responsibility for a homicide [59] As sometimes expressed, the mental disease must be the remote effect of intoxication, not the direct effect,[60] and must last after the immediate effects of the intoxication have passed away [61]

One who was insane from the combined effect of the use of intoxicating liquors and some other cause is not criminally responsible,[62] particularly if the other cause intervened after he had become intoxicated,[63] unless the direct, immediate, and primary cause of the insanity was the use of the intoxicating liquors [64] An insane person who became intoxicated and who at the time of committing a homicide was so insane from defect or disease of the mind as not to be responsible for his act does not lose his right to rely on his insanity as a defense by the fact that he became intoxicated,[65] although in such case his defense must be placed on the original insanity, and not on the subsequent drunkenness [66]

§ 6. —— Narcosis and Hypnosis

One who is insane from the use of drugs to the extent that he does not know what he is doing or that what he is doing is wrong has been held not responsible for homicide, but he is not relieved from responsibility by a mere temporary intoxication

Irresponsibility for crimes generally by reason of the use of narcotics or other drugs, or by reason of being under the influence of hypnotism, is considered in Criminal Law § 72 One who drinks what he thinks is whisky cannot avoid criminal responsibility for a homicide, in which the intent to kill is not a necessary element, by reason of the fact that the effect of the liquor which accused drank was of a nature contrary to the effect of whisky and crazed him to the extent that he did not know what he was doing, where the liquor produced a temporary besotted and unconscious condition but no disease of the mind, either permanent, temporary, or periodical [67] It has been held, however, that one who is insane from the use of morphine to such an extent that he does not know what he is doing or that what he is doing is wrong is not criminally responsible [68]

§ 7. Parties to Offenses

At common law parties to a homicide are divided into principals, either of the first or second degree, and accessaries, either before or after the fact In many jurisdictions, however, the distinctions between degrees of principals, and between accessaries before the fact and principals, have been abolished by statute

As in the case of other felonies, see Criminal Law § 81, and except as the distinctions have been modified or abrogated by statute, the participants in the commission of a homicide may be principals, either of the first or second degree, or accessaries, either before or after the fact [69] The actual perpetrator of the homicide is a principal in the first degree, see infra § 8, those who are present aiding and abetting him, but who do not actually perpetrate the homicide, are principals in the second degree, see infra § 9 a An accessary is one who, although in some way concerned with the homicide, was neither the direct perpetrator thereof nor present, either actually or constructively, at the time and place of the homicide,[70] if the accessary aided and abetted in the commission of the homicide he is an accessary before the fact, see infra § 9 a, if he first injected himself into the situation after the commission of the homicide he is an accessary after the fact, see infra § 10

"Drunkenness is one thing, and the disease of the mind to which drunkenness leads is a different thing"—Cheadle v State 149 P 919, 11 Okl Cr 566, 571, L R A 1915E, 1031

59 Fla—Crews v State 196 So 590 143 Fla 263—Cochran v State, 61 So 187 65 Fla 91—Thomas v State, 36 So 161 47 Fla 99—Garner v State, 9 So 835 28 Fla 113, 29 Am S R 232
Ga—Peek v State, 116 S E 629, 155 Ga 19
Ky—Tackett v Commonwealth, 266 S W 26, 205 Ky 190
Ohio—Rucker v State, 162 N E 802, 119 Ohio St 189
Okl—Larkin v State, 24 P 2d 357, 55 Okl Cr 81
29 C J p 1062 note 35, p 1063 note 36

60 U S—U S v Clarke, 25 F Cas No 14,811, 2 Cranch C C 158
Tex—Ward v State, 19 Tex A 664

61. Ala Beasley v State, 50 Ala 149, 20 Am R 292
Mo—State v Hundley, 46 Mo 414

62. Tex—Phillips v State, 98 S W 868, 50 Tex Cr 481

63. Tex—Leggett v State, 17 S W 159, 21 Tex A 382

64 Tex—Chapman v State 124 S W 2d 112, 136 Tex Cr 285 rehearing denied 124 S W 2d 996, 136 Tex Cr 285

65 La—State v Kraemer, 22 So 251, 49 La Ann 766 62 Am S R 664
29 C J p 1063 note 44.

Drinking by insane person generally see Criminal Law § 71

66 La—State v Kraemer, 22 So 251 49 La Ann 766, 62 Am S R 664

67 Ark—Bennett v State, 257 S W 372 161 Ark 496

68 Tex—Phillips v State, 98 S W 868, 50 Tex Cr 481

69 N C—State v Allison, 156 S E 547, 200 N C 190
S C State v Jennings, 155 S E 621, 622 158 S C 122, citing **Corpus Juris**
Persons liable for assault with intent to murder or kill see infra § 96

70. N J—State v Giberson, 122 A. 724, 99 N J Law 85.

In many jurisdictions there is no longer a distinction, with respect to homicide, between principals in the first and second degree[71] or between principals and accessaries before the fact,[72] and one who participates or aids and abets in the commission of a homicide is himself guilty of the homicide as a principal, see infra § 9 a

§ 8. —— Principals in First Degree

A principal in the first degree is one who actually perpetrates the homicide, either directly or through an innocent agent.

Principals in the first degree are those who actually perpetrate the homicide, those whose unlawful acts or omissions, without the intervention of any responsible agent, cause the death of the victims[73] Two persons may be the actual perpetrators of a homicide so as to render each a principal in the first degree[74] A person who causes a homicide to be committed through the instrumentality of an innocent agent is a principal in the first degree,[75] although he was not present at the time and place of the crime[76]

§ 9. —— Principals in Second Degree and Accessaries before the Fact

a In general
b Liability as affected by responsibility of actual perpetrator
c What constitutes participation
d Intent
e Common design

a. In General

A principal in the second degree is one who, although not directly causing death, is present, actually or constructively, aiding the commission of a homicide. An accessary before the fact is one who aids in the homicide but is not present thereat All such persons are held responsible as principals in jurisdictions wherein the distinction between principals and accessaries before the fact has been abolished.

Principals in the second degree in the commission of a homicide are those who are present, actually or constructively, at the time and place of its commission, aiding and abetting or otherwise participating therein, but not directly causing the death[77] An accessary before the fact in the commission of a homicide is one who was not present either actually or constructively at the time and place of its commission, but who counseled, procured, instigated, or commanded the actual perpetrator to commit the offense, or otherwise assisted therein[78]

In many jurisdictions the distinction between principals and accessaries, or between principals in the first and second degree, has been abolished by statute, see supra § 7, and the general rule is that one who participates or aids and abets in the commission of a homicide is himself guilty of the homicide[79] as a principal, to be indicted, tried, and punished as such,[80] regardless whether or not he fired

71. Ark—Parker v State, 275 S W 758, 169 Ark 421
Cal—People v Lee Yick, 209 P 538, 189 Cal 599
N C—State v Allison, 156 S E 547, 200 N C 190
29 C J p 1063 note 58
Statutes abolishing distinction generally see Criminal Law § 82 c

72. Cal—People v Lee Yick, 209 P 538, 189 Cal 599
Okl—Birdwell v State, 210 P 358, 22 Okl Cr 184
29 C J p 1063 note 58
Statutes abolishing distinction generally see Criminal Law § 82 c

73. N C—State v Allison, 156 S E 547, 200 N C 190
29 C J p 1064 note 63
Principals in the first degree generally see Criminal Law § 83

74. Ky Bennett v Com 150 S W 806, 150 Ky 604, 43 L R A,N S 419
29 C J p 1064 note 64

75. Ala—Johnson v State, 38 So 182, 142 Ala 70 2 L R A N S, 897
29 C J p 1064 note 65
Commission of crime by agent generally see Criminal Law § 84

76. Ga—Johnson v State 17 S E 974, 92 Ga 36
29 C J p 1064 note 66

77 Fla Pope v State, 94 So 865, 84 Fla 428
Ga—Screws v State, 4 S E 2d 601, 188 Ga 678
29 C J p 1064 note 69
Principal in second degree generally see Criminal Law §§ 85–89

78. R I—State v McVay 132 A 436, 47 R I 292, 44 A L R 572
W Va—Moore v Lowe 180 S E 1 116 W Va 165, certiorari denied 56 S Ct 130, 296 U S 574, 80 L Ed 406
29 C J p 1066 note 82
Accessaries before the fact generally see Criminal Law §§ 90–94

79 Cal—People v Will, 248 P 1078, 79 Cal App 101
N Y—People v Weiner 161 N E 411, 248 N Y 118

80. Cal—People v Lee Yick, 209 P 538, 189 Cal 599
Conn—State v Leopold 117 A 118, 110 Conn 55
Ky—McIntosh v Commonwealth, 27 S W 2d 971, 234 Ky 192
Mich—People v Licavoli, 239 N W 292, 256 Mich 229
Mo—State v Ring, 141 S W 2d 57 346 Mo 290—Ex parte Burgess 274 S W 423, 309 Mo 397
Pa—Commonwealth v Strantz, 195 A 75 328 Pa 13
Puerto Rico—People v Velez, 32 Puerto Rico 355
29 C J p 1063 note 58

Where two persons fire simultaneously it a third person and continue until the third person dies the rule as to aiding and abetting has but a limited application since both are principals—People v Will, 248 P 1078, 79 Cal App 101

In the Philippines

(1) Where murder is committed by one person acting under the influence and guidance of others, the actual slayer is guilty as an author by direct participation, and the others who planned the crimes are guilty as authors by inducement—People v Astad, 55 Philippine 697

(2) Where three persons attack another person, and one inflicts a fatal blow and immediately thereafter, the others inflict minor injuries, the first is guilty of homicide as principal and the others as accomplices—People v Cortes, 55 Philippine 143.

the fatal shot or struck the fatal blow.[81]

In jurisdictions in which the distinction between principals and accessaries before the fact has not been abolished, an accessary before the fact is guilty of a crime distinct from that of principal in the murder,[82] such accessary cannot be convicted of murder[83] as a principal,[84] nor can the actual murderer be convicted of being an accessary before the fact.[85] In such jurisdictions one may by separate acts be both an accessary before the fact and a principal in the second degree to the same murder.[86]

Consummation of killing The crime of an accessary before the fact to a homicide is not complete until the killing is consummated, and if the killing has not taken place one cannot be held responsible for having counseled or procured the commission of a homicide, notwithstanding the existence of statutes abolishing the distinction between accessaries before the fact and principals.[87]

Presence Although at one time those who were present aiding and abetting were called accessaries at the fact and were treated as accessaries,[88] it is now well settled that all who were present aiding and abetting in the commission of a homicide are principals,[89] and one cannot be charged as an accessary before the fact in the commission of a homicide if he was present either actually or constructively at the time of its commission.[90] At common law, and in a jurisdiction where the common-law rule has not been changed by statute, in order to render one a principal in the second degree, his presence, either actual or constructive, at the time and place of the homicide is essential,[91] and, in a jurisdiction in which a distinction is made between principals, accomplices, and accessaries, one who was not present at the scene of the homicide and who was not doing anything at the time in aid of a common design cannot be convicted as a principal, notwithstanding the proof may be sufficient to show that he was an accomplice or an accessary.[92] Under statutes, however, particularly statutes abolishing the distinction between accessaries before the fact and principals, see supra § 7, one who has aided and abetted a homicide may be held guilty of the homicide[93] as a principal,[94] although not present at its commission, and, as shown infra subdivision e of this section, presence is not required in the case of one who has participated in a common design to commit an unlawful act.

One who aids or abets the commission of a homicide is criminally responsible therefor, as, for example, as a "principal" or a "principal in the second degree," if he is constructively present at the homicide.[95] One is deemed to be constructively

81 Ark.—Parker v. State, 275 S.W. 758, 169 Ark. 421.
Ky.—Smith v. Commonwealth, 157 S.W.2d 79, 288 Ky. 831.
Okl.—Hughes v. State, 259 P. 668, 38 Okl.Cr. 195.—Birdwell v. State, 210 P. 558, 22 Okl.Cr. 184.
Tex.—Shine v. State, 269 S.W. 861, 99 Tex.Cr. 418.
Va.—McMurray v. Commonwealth, 129 S.E. 252, 143 Va. 489.

82 S.C.—State v. Jennings, 155 S.E. 621, 158 S.C. 422.
29 C.J. p. 1066 note 82 [a].

83 La.—State v. Rodosta, 138 So. 121, 173 La. 623.

84 S.C.—State v. Jennings, 155 S.E. 621, 158 S.C. 422.

85 La.—State v. Rodosta, 138 So. 124, 173 La. 623.

86 N.M.—State v. Archer, 255 P. 396, 32 N.M. 319.

Statutory change

It should be noted that the New Mexico statute abrogating the distinction between accessaries before the fact and principals in the second degree, and between principals in the first and second degree, L.1925, c. 145, § 25, Comp.St.1929, § 35-1125, had not become applicable at the time of the trial of the case cited in support of the text.

87 Or.—State v. Steeves, 43 P. 947, 29 Or. 85.
29 C.J. p. 1066 note 83.

88 Ala.—Jolly v. State, 10 So. 606, 94 Ala. 19.
29 C.J. p. 1061 note 69 [a].

89. Ark.—Parker v. State, 275 S.W. 758, 169 Ark. 421.
Nev.—State v. Watts, 296 P. 26, 53 Nev. 200, affirming 290 P. 732, 52 Nev. 453.
N.J.—State v. Giberson, 122 A. 724, 99 N.J.Law 85.—State v. Carlino, 118 A. 784, 98 N.J.Law 48, affirmed 122 A. 830, 99 N.J.Law 292.
Okl.—Methvin v. State, 60 P.2d 1062, 60 Okl.Cr. 1.—Davis v. State, 57 P.2d 634, 59 Okl.Cr. 26.
S.C.—State v. Griggs, 192 S.E. 360, 181 S.C. 304.—State v. Luster, 182 S.E. 427, 178 S.C. 199.—State v. Francis, 149 S.E. 348, 152 S.C. 17, 70 A.L.R. 1133.
29 C.J. p. 1064 note 69 [a].
Necessity of presence generally see Criminal Law § 86 a.
Presence as constituting participation see infra subdivision e of this section.

90 N.J.—State v. Giberson, 122 A. 724, 99 N.J.Law 85.
29 C.J. p. 1066 note 84.

91 Fla.—Pope v. State, 94 So. 865, 84 Fla. 428.
29 C.J. p. 1065 note 70.

92 Tex.—Taylor v. State, 18 S.W.2d 1078, 113 Tex.Cr. 16.

One who furnished the means by which others committed a homicide cannot be convicted as a principal if he was absent from the scene of the homicide at the time of its commission and was not then doing something in furtherance of the common design which would make him constructively present.—Hext v. State, 282 S.W. 242, 104 Tex.Cr. 46.

93 Mo.—State v. Robinett, 279 S.W. 696.

94. Ark.—Crow v. State, 79 S.W.2d 75, 190 Ark. 222.
Ill.—People v. Dalton, 189 N.E. 265, 355 Ill. 312.
N.Y.—People v. Sobieskoda, 139 N.E. 558, 235 N.Y. 411.

95 Fla.—Pope v. State, 94 So. 865, 84 Fla. 428.
Ga.—Adkins v. State, 1 S.E.2d 420, 187 Ga. 519.—Thompson v. State, 144 S.E. 301, 166 Ga. 758.
N.J.—State v. Giberson, 122 A. 724, 99 N.J.Law 85.
29 C.J. p. 1065 note 72.
Constructive presence generally see Criminal Law § 86 b.

Standing by, within sight or hearing

The presence required to constitute one a principal in the second degree need not, where the statutes in effect so provide, be actual standing by,

present at the time and place of the commission of a homicide where he is at the time performing any act in furtherance of the commission of the homicide,[96] such as keeping watch[97] or signaling,[98] or is so situated as to make his personal assistance in the commission thereof available[99] Conversely, to be constructively present as an aider or abettor one must be in such contiguity as to enable him actually to render aid in the commission of the homicide or in escaping thereafter,[1] and the mere fact that one is a party to a conspiracy to commit a homicide does not show constructive presence[2]

b. Liability as Affected by Responsibility of Actual Perpetrator

Where several persons participate in a homicide with the same state of mind, all are equally guilty, but where malice or premeditation exists on the part of one, and not the others, each may be guilty of a different degree or grade of homicide A personal incapacity such as youth, which renders the actual perpetrator not guilty, or guilty in some lesser degree, does not excuse one who assists him

One acting as an accessary before the fact or principal in the second degree may be punished, although the perpetrator of the homicide is not punishable or is punishable only in a more limited degree by reason of his youth[3] or other incapacity[4] So, although the principal is a corporation which is not subject to the punishment by imprisonment imposed by the statute defining the offense, nevertheless individuals who aid and abet the corporation may be punished[5] On the other hand, where the killing was done under such circumstances that the actual perpetrator was not guilty of murder or manslaughter, one who participated with him therein is not guilty, either as a principal in the second degree or as an accessary before the fact[6] Thus if the actual perpetrator was acting in necessary self-defense, one who aided or assisted him in killing deceased is not criminally responsible[7]

One who aids in the commission of a homicide is, in the absence of circumstances showing an intent, purpose, or mental capacity on his part different from that of the actual slayer, guilty equally with,[8] and of the same degree or grade of homicide as,[9] the actual slayer, at least he is not guilty of a higher degree or grade of homicide than the actual slayer[10] At common law an accessary could not be guilty of any other or higher grade of homicide than that of which the principal was guilty,[11] but it is now generally held that an accessary, or principal in the second degree, or aider and abettor is not necessarily guilty of the same grade or degree of homicide as the actual perpetrator[12] Thus, although the direct actor in the commission of the homicide is guilty of murder, as defined by common law, one who participates may be guilty of manslaughter only, as, for example, where he acted in the heat of passion, without malice, and without knowledge of the malice of the direct actor[13] On the other hand, the direct actor may be guilty of manslaughter only, and the other of murder, as, for example, where the latter participated mali-

within sight or hearing of the act—Collins v State, 14 S E 474 88 Ga 347

96 Ala —State v Tally, 15 So 722, 102 Ala 25
29 C J p 1065 note 73

97 Ga —Berryhill v State, 107 S E 158, 151 Ga 416
29 C J p 1065 note 73 [c]

98 Tex Bass v State, 127 S W 1020, 59 Tex Cr 186
29 C J p 1065 note 73 [b]

99 N C —State v Chastain, 10 S E 519, 101 N C 900
29 C J p 1065 note 74

1. Fla —Pope v State, 94 So 865, 84 Fla 428
Ky Brisden v Commonwealth, 114 S W 2d 73, 272 Ky 267
29 C J p 1065 note 74 [b]

2. Ala —State v Wisdom, 8 Port 511
Miss —Commonwealth v Knapp 9 Pick 496 20 Am D 491

3 Tex —Smith v State, 237 S W 265, 91 Tex Cr 15
29 C J p 1064 note 59

4. S C State v Burbage, 28 S E 967, 51 S C 284
29 C J p 1064 note 60

5. U S —U S v Van Schaick, C C N Y, 134 F 592

6 Ky Centers v Commonwealth 72 S W 2d 123, 254 Ky 733
Responsibility of one acting through innocent agent see supra § 8

7. Ohio —Goins v State 21 N E 476, 46 Ohio St 457
29 C J p 1072 note 41

Encouragement by wife to husband
Where a husband claimed that he acted in self-defense in killing deceased his wife as an aider and abettor of the husband stood in his place and had the right to encourage him to defend himself —Hurd v Commonwealth, 78 S W 2d 9 257 Ky 315

Rights of aider and abettor in homicide prosecution rest on rights of principal in crime and wife as aider and abettor went into affray at her own peril and became fully responsible for all her husband did —Hurd v Commonwealth, supra

8. Ky —Clift v Commonwealth 105 S W 2d 557 268 Ky 573
N C State v Casey, 193 S E 411, 212 N C 352
Equal guilt of parties to assault with intent to murder see infra § 96

9. N C —State v Casey, 193 S E 411, 212 N C 352—State v Allison, 156 S E 547, 200 N C 190
29 C J p 1076 note 84

10. Mo —State v Carey, 282 S W 22 313 Mo 436—State v Recke, 278 S W 995 311 Mo 581

11. Fla —Thomas v State, 74 So 1, 73 Fla 115
W Va —Moore v Lowe, 180 S E 1, 116 W Va 165, certiorari denied 56 S Ct 130, 296 U S 574, 80 L Ed 406

12. Iowa —State v Stewart, 197 N W 971 198 Iowa 618
W Va —Moore v Lowe, 180 S E 1 116 W Va 165, certiorari denied 56 S Ct 130, 296 U S 574 80 L Ed 406
29 C J p 1077 note 85

13 Ga —Speer v State, 182 S E 824, 52 Ga App 209
N M —State v Lord, 84 P 2d 80, 42 N M 638
W Va —Moore v Lowe, 180 S E 1, 116 W Va 165 certiorari denied 56 S Ct 130, 296 U S 574, 80 L Ed 406
29 C J p 1077 note 86

ciously while the former was acting in sudden heat of passion due to adequate provocation, and without malice.[14]

Accessaries before the fact to manslaughter There is authority both for[15] and against[16] the view that there can be an accessary before the fact to manslaughter. Some authorities consider the kind of manslaughter and hold that there cannot be accessaries before the fact to voluntary manslaughter,[17] but that such accessaries may exist in cases of involuntary manslaughter[18] Clearly there cannot be accessaries before the fact in manslaughter or in negligent homicide where the statutes of the jurisdiction so provide[19]

Principals in the second degree to manslaughter One may be held guilty as a principal in the second degree, or as an aider and abettor, to the crime of manslaughter,[20] including, according to the weight of authority, involuntary manslaughter,[21] although as to the latter proposition there is some authority to the contrary[22]

Accessaries before the fact to murder in the second and third degrees Where malice is an element of the crime of murder in the second degree, there may be accessaries before the fact in the commission of the offense[23] Murder in the third degree also admits of accessaries before the fact where malice is an element of that offense.[24]

Necessity of conviction or identification of perpetrator At common law a conviction of the principal was required to precede or accompany that of one charged as an accessary to a homicide,[25] but this is no longer necessary under the statutes in some jurisdictions[26] If two or more are acting independently, and the actual perpetrator of the homicide cannot be identified, all must be acquitted, although it is certain that one of them was guilty;[27] but, as shown infra subdivision c of this section, identification of the actual perpetrator is not required where the parties have acted pursuant to a common design

c. What Constitutes Participation

Participation may consist not only in physically aiding the commission of the homicide, but also in oral expressions or encouragement, but mere knowledge, or presence at the scene, of the homicide is insufficient. The aid may be furnished in the preliminary stages of the homicide or at the time of its commission, but not thereafter

In order that a person other than the actual slayer become a participant in, and responsible for, a homicide he must in some manner, by overt act or oral announcement, encourage, assist, or instigate the actual perpetrator[28] Mere mental assent to,

14 Miss —Fleming v State, 108 So 113, 142 Miss 872
W Va —Moore v Lowe 180 S E 1, 116 W Va 165, certiorari denied 56 S Ct 130 296 U S 574, 80 L Ed 406
29 C J p 1077 note 87

15. Fla —Thomas v State, 71 So 1 73 Fla 115

Acts of commission or omission
There is some authority to the effect that there may be an accessary before the fact to manslaughter whether it is accomplished by commission or omission —Mathis v State, 34 So 287, 45 Fla 46

16 S C - State v Jennings, 158 S E 687, 160 S C 348
29 C J p 1067 note 85

Reason for rule
"The real reason lies in the nature of the crime Manslaughter can be committed only where there is no premeditation it follows therefore that a person cannot be convicted as an accessory before the fact for procuring another to commit such crime"—State v O Shields, 161 S E 693, 693, 163 S C 408

17. W Va —Moore v Lowe, 180 S E 1, 116 W Va 165, certiorari denied 56 S Ct 130, 296 U S 574, 80 L Ed 406
29 C J p 1067 note 85

Corpus Juris cited to support proposition that manslaughter cannot be committed pursuant to conspiracy to kill —Gilbert v Commonwealth 14 S W 2d 194 200 228 Ky 19

18. Mo —State v Recke, 278 S W 995, 311 Mo 581
Or State v Newberg, 278 P 568 129 Or 564 63 A L R 1225
R I —State v McVay, 132 A 436, 438, 47 R I 292 44 A L R 572, quoting **Corpus Juris.**
29 C J p 1067 note 91
One may be an aider and abettor in involuntary manslaughter because of a common purpose to participate in the unlawful act the natural and probable result of which was to kill another'—Wade v State 121 S W 2d 710, 711 174 Tenn 248

19 Tex —Bowman v State, 20 S W 558
29 C J p 1067 note 92

20. N C -State v Hall 112 S E 131 183 N C 806
29 C J p 1066 note 77

21. Ohio —Black v State, 133 N E 795, 103 Ohio St 131
29 C J p 1066 note 78

22. **In Indiana**
(1) It has been held that one cannot be an aider and abettor to involuntary manslaughter —Adams v State, 65 Ind 565
(2) In an earlier case, however, it was held broadly that one could be an aider and abettor to manslaughter -Goff v Prime, 26 Ind 196

23 Tex —Jones v State, 13 Tex 168, 62 Am D 550
29 C J p 1067 note 93

24. Fla —Mathis v State, 34 So 287, 45 Fla 46

25 Colo Howard v People, 51 P 2d 594 97 Colo 550

26. Colo —Howard v People, supra
Miss —Fleming v State, 108 So 113, 142 Miss 872
N C —State v Walton 119 S E 886, 186 N C 485
W Va —Moore v Lowe, 180 S E 1, 116 W Va 165 certiorari denied 56 S Ct 130, 296 U S 574, 80 L Ed 406

27 N C State v Goode 13 S E 562, 172 N C 982
29 C J p 1072 note 42

28 Ill People v Suddeth, 28 N E 2d 268 371 Ill 132 People v Dalton 189 N E 265, 355 Ill 312
Ky —English v Commonwealth 12 S W 2d 706, 240 Ky 116
Miss —Brown v State, 115 So 133, 149 Miss 239
Mo —State v Jackson 253 S W 731
Okl —Hubbard v State 112 P 2d 171, 71 Okl Cr 373
Va —Hurd v Commonwealth, 165 S E 536, 159 Va 880

or tacit approval of, the homicide, or sympathy with the perpetrator, does not constitute participation,[29] nor does one become an accessary before the fact because he knew that a homicide was to be committed by another and concealed the fact or failed to prevent its commission.[30] One who participates in a homicide is criminally responsible and may be held liable notwithstanding his participation is without preconcert, prearrangement, or conspiracy with the actual perpetrator.[31] It is not necessary that the participant should have originated the criminal design,[32] or that the actual perpetrator should have known that the other was rendering him assistance.[33]

Responsibility attaches to one who aids or assists in the actual commission of the homicide,[34] as for example, by holding the victim or otherwise preventing him from defending himself,[35] joining in shooting at the victim,[36] preventing the escape of the victim,[37] or encouraging the actual perpetrator in the commission of the act.[38] The assistance or encouragement of an aider or abettor may consist of overt acts or oral expressions,[39] and responsibility attaches to one who advises or counsels,[40] incites or instigates,[41] or employs, hires, or procures[42] the slayer to commit the homicide.

Participation or knowledge necessary

Accused charged with murder in the first degree must be acquitted unless he participated in killing or had previous knowledge that codefendant's purpose was to kill deceased --State v Galvano, 154 A 461, 4 W W Harr, Del, 409

29. Okl—Hubbard v State, 112 P 2d 174, 71 Okl Cr 373
29 C J p 1069 note 19

30. Tex- Jones v State, 163 S W 75, 71 Tex Cr 350
29 C J p 1070 note 31

Knowledge of poisoning

Where certain persons had administered arsenic to the victim the fact that accused knew, just before the death of the victim that such persons were killing the victim, does not render accused responsible if he did nothing to aid, encourage, or countenance their acts—Commonwealth v Giovanetti, 19 A 2d 119, 341 Pa 315

31. Ala—Stephenson v State, 185 So 910, 28 Ala App 418
Ky—Simpson v Commonwealth, 170 S W 2d 869, 293 Ky 831—English v Commonwealth, 42 S W 2d 706, 240 Ky 416—Lester v Commonwealth, 40 S W 2d 306, 239 Ky 703
Mo—State v Carey, 282 S W 22, 313 Mo 136
N M—State v. Lord, 84 P 2d 80, 42 N M 618
R I- State v Brown, 119 A 324, 45 R I 9
Tex Harris v State, 97 S W 2d 226, 131 Tex Cr 223
Wyo—Espy v State, 92 P 2d 549, 54 Wyo 291
29 C J p 1072 note 45
"It is not necessary as a predicate to an acting together as principals that a conspiracy between the parties to commit the crime be shown"—Harris v State, 97 S W 2d 226, 227, 131 Tex Cr 223

32 Miss—Keithler v State, 18 Miss 192

33. Ala--Way v State, 16 So 273, 155 Ala 52
29 C J p 1069 note 18.

34. Ill—People v McNeal, 179 N E 109, 346 Ill 329
Iowa—State v Stewart, 197 N W 974, 198 Iowa 618
R I—State v Brown, 119 A 324, 45 R I 9
S C--State v Williams, 199 S E 906, 189 S C 19
Wyo—Espy v State 92 P 2d 549, 557, 54 Wyo 291, citing **Corpus Juris.**
29 C J p 1067 note 5

Circumstances showing participation

(1) Flight of accused after his companion had struck and searched deceased, and the return of accused for the purpose of a further search, are circumstances showing guilty knowledge and participation—People v Bauman, 103 P 2d 1020, 39 Cal App 2d 587

(2) Where accused yielded to the solicitation of two companions by loaning them his revolver, knowing that they intended to hold up a storekeeper, and drove them near the scene of the holdup where he waited and in the perpetration of the holdup the storekeeper was killed by one of the companions accused's knowledge and participation made him guilty of murder in the first degree—People v Peranio, 195 N W 670, 225 Mich 125

(3) Where accused and a companion had difficulties with other individuals as a result of which one of the other individuals fired a gun, and accused and his companion went away but returned a short time later with a gun carried by accused's companion, and during an ensuing dispute accused's companion shot one of the others, accused, who provoked the first fire from the others was "concerned" in the crime and aided and abetted his companion in its commission so as to be a principal—People v Marty, 210 P 964, 59 Cal App 503

35. Ala—Roberson v State, 118 So 654, 218 Ala 442
29 C J p 1067 note 5 [c].

36. Cal—People v Will, 248 P 1078, 79 Cal App 101
29 C J p 1067 note 5 [a]

37 Ky—Lester v Commonwealth, 40 S W 2d 306, 239 Ky 703

38. Cal—People v Blackwood 96 P 2d 982, 35 Cal App 2d 728
Iowa—State v Stewart, 197 N W 974, 198 Iowa 618
Ky—Kinder v Commonwealth, 91 S W 2d 530, 262 Ky 840- Hurd v Commonwealth 78 S W 2d 9, 257 Ky 315
N C-- State v Allison 156 S E 547, 200 N C 190
Va—Shiflett v Commonwealth, 115 S E 336, 151 Va 556
29 C J p 1068 note 6

39 Ky Kinder v Commonwealth, 91 S W 2d 530, 262 Ky 840
N C—State v Allison, 156 S E 547, 200 N C 190
29 C J p 1068 note 6

Immediate overt act unnecessary

One who encourages abets and counsels the actual perpetrator becomes a party to the crime notwithstanding he commits no other immediate overt act—Hurd v Commonwealth, 78 S W 2d 9, 257 Ky 315

40 Ky—Hurd v Commonwealth, supra
N C—State v Allison, 156 S E 547, 200 N C 190
S C State v Benjamin, 130 S E 209, 133 S C 137
29 C J p 1068 note 10, p 1069 note 11

41 Ala—Handley v State, 106 So 692, 214 Ala 172
N C—State v Allison, 156 S E 547, 200 N C 190
Pa Commonwealth v Guida, 148 A 501, 298 Pa 370
29 C J p 1068 notes 8, 9

42 Ala—Handley v State 106 So 692, 214 Ala 172
Conn—State v Leopold, 117 A 118, 110 Conn 55
Ky—Lester v Commonwealth, 40 S W 2d 306, 239 Ky 703
Mo—State v Boesel, 61 S W 2d 243
29 C J p 1068 note 7

Aid in preliminary stages of homicide One may become criminally responsible for a homicide by rendering help to the perpetrator in the preliminary stages of the homicide,[43] as by provoking a difficulty with the victim for the purpose of furnishing a pretext for killing him,[44] inducing the victim to go where the murderer lies in wait,[45] detaining the victim until the murderer arrives,[46] pointing out the intended victim to the actual perpetrator,[47] taking the victim into custody at the orders of the murderer,[48] harboring the murderers in one's home for the purpose of accomplishing the killing,[49] or engaging a guide to conduct the murderers to the house of the victim.[50] One becomes a participant in the homicide by furnishing the actual perpetrator with a weapon with which to do the killing and for that purpose,[51] but the fact that accused furnished the weapon with which the homicide was committed does not of itself make him a participant where there was no prearranged plan between accused and the perpetrator, and accused did not in any way encourage, abet, or assist the perpetrator.[52]

Presence as constituting participation The mere presence of a person at the time and place of a homicide without his giving of aid or encouragement at or before its commission to the parties thereto and without preconcert does not amount to aiding and abetting or other participation in the crime,[53] notwithstanding he knows that the crime is to be committed.[54] One who is present at a homicide does not become a participant therein by the fact that he passively acquiesces in, or negatively consents to, the commission of the homicide,[55] or makes no effort to prevent its commission,[56] apprehend the perpetrator,[57] or report the homicide,[58] even approval of the homicide, not communicated to the actual perpetrator, does not of itself constitute participation on the part of one present thereat.[59] On the other hand, one becomes a participant in a homicide where he is present at the time and place of the crime by preconcert with the actual perpetrator,[60] or where he intends to assist, if necessary, in the commission of the homicide, and the fact of such presence and intention is communicated to the actual perpetrator,[61] and there is au-

43 Mich.—People v. Peranio, 195 N.W. 670, 225 Mich. 125
Pa.—Commonwealth v. Giovanetti, 19 A.2d 119, 341 Pa. 345
29 C.J. p. 1067 note 97

One giving information as to usual customs of bank messengers in transporting funds, with view of assisting in commission of robbery on promise of reward, is guilty participant in conspiracy, and liable for resulting murder, but, if forced to give information by threats to destroy him and his family, element of willful participation necessary to conviction is wanting.—People v. Pantano, 146 N.E. 646, 239 N.Y. 416

44 Mo.—State v. Paxton, 29 S.W. 705, 126 Mo. 500
N.C.—State v. Robertson, 81 S.E. 689, 166 N.C. 356

45 Va.—Lashley v. Commonwealth, 13 S.E. 803, 88 Va. 400

46 Idaho.—State v. O'Brien, 29 P. 38, 3 Idaho 374

47. N.J.—State v. Giberson, 122 A. 724, 99 N.J.Law 85.—State v. Mowser, 103 A. 805, 91 N.J.Law 395

48. Philippine.—U.S. v. Valencia, 5 Philippine 352

49 Pa.—Commonwealth v. Giovanetti, 19 A.2d 119, 341 Pa. 345

50. Ill.—Kennedy v. People, 40 Ill. 488

51. Miss.—Boutwell v. State, 178 So. 585, 181 Miss. 509
Mo.—State v. Smith, 281 S.W. 35, 313 Mo. 71
29 C.J. p. 1067 note 97

Absence of specific victim; attempt to retrieve weapon
Evidence that accused told enraged woman who had been drinking that if she wanted to "raise hell," she could use his gun and to go ahead and "kill all of them," handing her his loaded pistol and that woman almost immediately killed another woman showed that accused was principal in second degree, and sustained conviction of voluntary manslaughter, notwithstanding accused specified no victim and attempted to retrieve pistol immediately after parting with it.—McCoy v. State, 176 S.E. 912, 50 Ga.App. 54

52. Okl.—Anderson v. State, 91 P.2d 791, 66 Okl.Cr. 291

Knowledge of perpetrator's intent
The mere fact that accused knew that certain persons who borrowed a gun from accused intended to kill deceased does not make accused an accessary to the homicide either at common law or under a statute which defines an "accessary" as one who aids, abets or assists in the commission of a crime.—People v. Dalton, 189 N.E. 265, 355 Ill. 312

53 Ala.—Hand v. State, 159 So. 275, 26 Ala.App. 317
Ark.—Ransom v. State, 42 S.W.2d 411, 416, 184 Ark. 257, citing **Corpus Juris.**
Fla.—Rivals v. State, 150 So. 132, 112 Fla. 1
Ky.—Ray v. Commonwealth, 43 S.W.2d 694, 241 Ky. 286.—Bryant v. Commonwealth, 21 S.W.2d 231, 231 Ky. 152.—Watkins v. Commonwealth, 12 S.W.2d 329, 227 Ky. 100
Pa.—Commonwealth v. Giovanetti, 19 A.2d 119, 341 Pa. 345
Va.—Shiflett v. Commonwealth, 145 S.E. 336, 151 Va. 556.—Rasnake v. Commonwealth, 115 S.E. 543, 135 Va. 677
29 C.J. p. 1069 note 22

Necessity of presence
Generally see supra subdivision a of this section
Of conspirator see infra subdivision c of this section

54 Cal.—People v. Balkwell, 76 P. 1017, 143 Cal. 259
29 C.J. p. 1070 note 23

55 Va.—Rasnake v. Commonwealth, 115 S.E. 543, 135 Va. 677
29 C.J. p. 1069 note 20

56 Ill.—Crosby v. People, 59 N.E. 546, 189 Ill. 298
29 C.J. p. 1070 note 24

57 Tex.—Burrell v. State, 18 Tex. 713

58 Pa.—Commonwealth v. Giovanetti, 19 A.2d 119, 341 Pa. 345

Terrified onlooker
If one is only a terrified onlooker, neither his presence at the homicide nor his failure to report it would make him an accomplice.—Commonwealth v. Giovanetti, supra

59 Miss.—Bruce v. State, 103 So. 133, 138 Miss. 382
29 C.J. p. 1070 note 26

60 W.Va.—State v. Prater, 43 S.E. 230, 52 W.Va. 132
29 C.J. p. 1070 note 28

61. N.C.—State v. Chastain, 10 S.E. 519, 104 N.C. 900
29 C.J. p. 1070 note 29

thority, also, to the effect that, where a bystander is a friend of the actual perpetrator and knows that his presence will encourage him, he participates by being present [62]

Time of participation To render one responsible as a participant in a homicide his participation must occur either at the time of the homicide or prior thereto, he cannot become an aider and abettor by injecting himself into the situation after the crime has been committed,[63] although he may by rendering aid after the commission of the homicide become an accessary after the fact, as considered infra § 10 One does not become an accessary before the fact or a principal by approving the homicide after its perpetration,[64] nor does he become an accomplice by the mere fact that he knows an unlawful homicide has been committed, and fails to report it [65]

Operative effect of assistance In order to render one a principal in the second degree or an accessary before the fact in the commission of a homicide, his acts must in some manner have contributed to the killing [66] It is not necessary, however, that they contribute in the sense that but for such acts, the killing would not have occurred, it is sufficient if they facilitate the killing, although it might have taken place without their occurrence [67] In accordance with this rule, one is responsible if his acts deprive deceased of a chance of life which he might otherwise have had, although it does not appear that he would have availed himself of that chance [68]

d. Intent

One is not responsible for a homicide committed by another unless he shared the criminal intent of the actual slayer, and this is so notwithstanding he had some previous difficulty with the victim The intent may, however, be formed at the scene of the homicide.

In order to render one responsible as an aider, abettor, principal in the second degree, or accessary before the fact in the commission of a homicide it is essential that he share in the criminal intent of the direct actor [69] Thus, although one may have had some difficulty or altercation with deceased, he is not responsible for a homicide committed at or about the same time, by a third person, acting independently and without a prior understanding, if he did not share in the design of such third person,[70] and in this connection it is immaterial that the altercation brought on the fatal encounter,[71] or that accused was the aggressor in the difficulty,[72] or that the third person interfered to aid him [73] It is not enough that the acts of one tended to aid or encourage the principal in the first degree, they must have been done for that

62. N C—State v Cloninger, 63 S E 154, 149 N C 567
29 C J p 1070 note 30

63. Ky—Pelham v Commonwealth 41 S W 2d 277, 241 Ky 387 Lyons v Commonwealth, 287 S W 534, 216 Ky 202
29 C J p 1069 note 22 [b]

Collection of insurance; payment of killer

One does not become an accessary before the fact or a principal by the fact that, after the homicide, he collected insurance money on the life of the victim, paid the killer and sought to cover up the nature of the transaction —People v Landers, 190 N E 904, 264 N Y 119, reargument denied and amended 191 N E 616, 264 N Y 665

64. N Y People v Landers, supra

65 Pa Commonwealth v Giovanetti, 19 A 2d 119, 341 Pa 345

66. Tex Rhodes v State, 45 S W 1069, 39 Tex Cr 352
29 C J p 1069 note 14

67. Mass Commonwealth v Macloon, 101 Mass 1 100 Am D 89
29 C J p 1069 note 15

68. Ala -State v Tally, 15 So 722 102 Ala 25

69. Fla—Ryals v State, 150 So 132, 112 Fla 4
Ga—Baker v State 115 S E 119, 154 Ga 716
Ky - Whitt v Commonwealth, 298 S W 1101 221 Ky 490
S C—State v Lowman, 133 S E 457, 134 S C 485
29 C J p 1070 note 32

70 Fla--Ryals v State, 150 So 132, 112 Fla 4
Ky—Warren v Commonwealth, 1 S W 2d 771, 222 Ky 460
Miss Prine v State 7 So 2d 555, 192 Miss 726 citing **Corpus Juris**
Mo—State v Mull 300 S W 511, 318 Mo 617
Philippine—People v Ortix & Zausa, 55 Philippine 993—People v Caballero 53 Philippine 585
Tex--Mowery v State 105 S W 2d 239 132 Tex Cr 408—Howle v State, 43 S W 2d 594, 119 Tex Cr 17
W Va - State v Reedy, 127 S E 24, 97 W Va 549
29 C J p 1071 note 33

Absence of knowledge or encouragement

(1) Where an attorney, angered by a remark of deceased in court, assaulted him without any intention to kill, and while he and deceased were struggling his client kicked and killed deceased without the attorney's knowledge or approval, the attorney was not guilty of homicide — State v Stemmons, Mo, 262 S W 706

(2) Accused was not an aider or abettor of homicide where he had engaged in fist fight with several other persons and his companion, previously unarmed picked up a pistol dropped by an adversary and immediately fired the fatal shot, there being no showing of concerted action, or that accused gave any encouragement to his companion in the commission of the homicide Combs v Commonwealth 6 S W 2d 1082, 224 Ky 653

Separate encounters; acquittal of participant

Where prisoner died as result of two separate encounters with police officers, and one officer was acquitted in absence of evidence of conspiracy between the officers the act committed by the acquitted officer could not be imputed to the other officer - State v Yingling, Ohio App, 41 N E 2d 361

71. Tex—Howle v State, 43 S W 2d 594, 119 Tex Cr 17
29 C J p 1071 note 34

72 W Va - State v Reedy, 127 S. E 24, 97 W Va 549
29 C J p 1071 note 35

73. Fla—Ryals v State, 150 So 132, 112 Fla 4
Tex—Howle v State, 43 S W 2d 594, 119 Tex Cr 17
29 C J p 1071 note 36.

purpose[74] The fact that one has "caused" the killing of another does not establish that he aided and abetted a criminal homicide, since one may cause the death of another without intending so to do, that is, one may have caused the death of another and yet have been without the necessary criminal intent to make him responsible[75]

The intent to aid and abet in the commission of a homicide may be formed at the scene of the crime, even though accused may have gone there without any such intention,[76] and, although the original assembling of the parties charged was lawful,[77] or was had without any particular object in view,[78] their subsequent conduct may be of such a character as to show guilty participation in the homicide afterward committed One who participates in the commission of a homicide with full knowledge of the criminal intent with which the actual perpetrator is acting thereby adopts the intent of the direct actor as his own,[79] but he adopts it only to the extent of his knowledge, or of the natural and reasonable consequences of the act participated in by him[80]

Homicide by opponents of accused While there is authority to the contrary,[81] it is generally held, in accordance with the rule requiring a participant to share in the intent of the actual slayer, that those who participate on one side of a contest are not responsible for a homicide committed by their opponents[82]

Premeditation, malice In a jurisdiction in which all distinctions between principals in the first or second degree or between principals and accessaries before the fact have been abolished, if the actual slayer had the malice aforethought and premeditation required for murder in the first degree, one who has advised or commanded the killing is also chargeable with such malice and premeditation.[83] In a jurisdiction where a distinction is observed between a principal in the first degree and a principal in the second degree, it has been held that, where premeditation is material, it should be established as well against a principal in the second degree as against a principal in the first degree,[84] and that, where murder is sought to be predicated, not on the ground that it was perpetrated during the commission of some other unlawful act or felony, but on the ground that it was committed out of a premeditated design to effect death, in order to convict a principal in the second degree it is necessary to show either that he acted on a premeditated design to take human life, or else that he knew that the actual perpetrator intended to kill[85] Where the homicide is not such as to require a premeditated design to kill on the part of the actual perpetrator, it is unnecessary to establish such a design on the part of one who was present, actually or constructively, aiding and abetting in the unlawful act[86]

e. Common Design

(1) In general
(2) Common design to kill
(3) Natural consequences, departure from design

(1) In General

One who joins in a common design to commit an unlawful act involving danger to life is responsible for a homicide committed in furtherance of the design, although he was not the actual slayer and the plan did not expressly involve the taking of life This rule has been applied where the common design was to commit assault, burglary, robbery, and other crimes

All who join in a common design to commit an unlawful act, the natural and probable consequence of which involves the contingency of taking human life, are responsible for a homicide committed by

74. Tex—Ramon v State, Cr, 68 S W 987
29 C J p 1071 note 37

75. Miss—Brown v State, 115 So 433, 149 Miss 239

Exclamation causing another to kill
Where a father was assailed and exclaimed "Don't let him kill me," and thereupon his son killed the assailant, the fact that the father may have caused the death of the assailant does not put him in the position of having aided and abetted the homicide—Brown v State, supra

76. Cal—People v Will, 248 P 1078, 79 Cal App 101

77. Mo—State v Walker, 9 S W 646, 11 S W 1133, 98 Mo 95
N M—State v Wilson, 46 P 2d 57, 60, 39 N M 284, quoting **Corpus Juris.**

78 N M State v Wilson, supra, quoting **Corpus Juris.**

79 N M—State v Wilson, supra, quoting **Corpus Juris.**
29 C J p 1072 note 50

80. Ga—Brown v State, 28 Ga 199
Tex—Renner v State, 65 S W 1102, 43 Tex Cr 347

81. Pa—Commonwealth v Hare, 2 Pa L J R 467, 4 Pa L J 257
29 C J p 1071 note 38
Liability of conspirators for death of confederate see infra subdivision e of this section

82. Tex—Oates v State, 95 S W 105, 50 Tex Cr 39
29 C J p 1071 note 39

In North Carolina
(1) It has been held to be the general rule that the killing must have been perpetrated by some one acting in concert with accused and not by his adversary—State v Oxendine, 122 S E 568, 187 N C 658

(2) It has also been held however, that, where two persons recklessly and willingly engage in shooting in a public place, and a bystander is killed, both are guilty of the homicide one as principal and the other as aiding and abetting—State v Lilliston, 54 S E 427, 141 N C 857, 115 Am S R 705

83 Cal—People v Lee Yick, 201 P 538 189 Cal 599

84. Fla—Leavine v State, 117 So 897, 109 Fla 417

85. Fla—Leavine v State, supra—Pope v State, 94 So 865, 81 Fla 428

86. Fla—Pope v State, supra.

one of them while acting in pursuance or furtherance of the common design,[87] regardless of which one fired the fatal shot or delivered the fatal blow,[88] and notwithstanding a failure to identify the actual perpetrator.[89] The actual perpetrator is considered as the agent of his associates and his act is their act,[90] and under such rule, according to the au-

87. Ala.—Hand v. State, 159 So. 275, 26 Ala. App. 317—Cline v. State, 148 So. 172, 174, 25 Ala. App. 433, citing **Corpus Juris.**

Ark.—Spear v. State, 44 S.W.2d 663, 184 Ark. 1047.

Cal.—People v. Bringhurst, 221 P. 897, 192 Cal. 748—People v. Cowan, 101 P.2d 125, 38 Cal. App. 2d 231—People v. King, 85 P.2d 928, 30 Cal. App. 2d 185—People v. La Vers, 80 P.2d 1002, 27 Cal. App. 2d 336—People v. Sutton, 62 P.2d 397, 17 Cal. App. 2d 561—People v. La Vers, 20 P.2d 967, 130 Cal. App. 708—People v. Wheaton, 220 P. 451, 64 Cal. App. 58.

Conn.—State v. Cots, 9 A.2d 138, 143, 126 Conn. 48, quoting **Corpus Juris.**

Fla.—Milligan v. State, 147 So. 260, 109 Fla. 219—Pope v. State, 94 So. 865, 84 Fla. 428.

Ga.—Adkins v. State, 1 S.E.2d 120, 187 Ga. 519—Gore v. State, 134 S.E. 36, 162 Ga. 267.

Ill.—People v. Tarver, 45 N.E.2d 630, 381 Ill. 411—People v. Suddeth, 28 N.E.2d 268, 374 Ill. 132—People v. Faught, 175 N.E. 416, 343 Ill. 312—People v. Rudecki, 140 N.E. 832, 309 Ill. 125.

Kan.—State v. Boone, 257 P. 739, 740, 124 Kan. 208, quoting **Corpus Juris.**

Ky.—Whitfield v. Commonwealth, 128 S.W.2d 208, 211, 278 Ky. 111, citing **Corpus Juris**, Gilbert v. Commonwealth, 14 S.W.2d 191, 228 Ky. 19.

La.—Rush v. Town of Farmerville, 101 So. 243, 156 La. 857.

Mo.—State v. Powell, 95 S.W.2d 1186, 1188, 339 Mo. 80, citing **Corpus Juris**, State v. Jackson, 253 S.W. 731.

Neb.—Dean v. State, 259 N.W. 170, 128 Neb. 466—Fields v. State, 250 N.W. 63, 125 Neb. 290.

N.Y.—People v. Ryan, 189 N.E. 225, 263 N.Y. 298—People v. Udwin, 172 N.E. 489, 254 N.Y. 255—People v. La Barbera, 287 N.Y.S. 257, 159 Misc. 177.

N.C.—State v. Oxendine, 122 S.E. 568, 187 N.C. 658.

Okl.—Cirle v. State, 244 P. 833, 34 Okl. Cr. 24.

Pa.—Commonwealth v. Gilida, 164 A. 531, 309 Pa. 501—Commonwealth v. Doris, 135 A. 313, 287 Pa. 547—Commonwealth v. Spardute, 122 A. 161, 166, 278 Pa. 37, quoting **Corpus Juris**—Commonwealth v. Murrano, 120 A. 106, 107, 276 Pa. 239, quoting **Corpus Juris.**

Tenn.—Williams v. State, 51 S.W.2d 482, 484, 164 Tenn. 562, quoting **Corpus Juris.**

Utah.—State v. Kukis, 237 P. 476, 65 Utah 362.

Wis.—Pollack v. State, 253 N.W. 560, 215 Wis. 200, affirmed 254 N.W. 471, 215 Wis. 200.

29 C.J. p. 1073, note 59.

Husband and wife

Where without coercion on husband's part, wife engaged with her husband in the commission of a felony, and murder was committed by the husband in connection with the other crime, the wife is also guilty. Miller v. State, 25 Wis. 384.

Guilt as "principal"

(1) Those who aid and abet actual slayer pursuant to common purpose or design are guilty of the homicide as "principals."—Suhay v. U.S. C.C.A. Kan., 95 F.2d 890, certiorari denied 58 S.Ct. 1060, 304 U.S. 580, 82 L.Ed. 1543.

(2) Under federal statutes, a person who, in the commission of an illegal act with others, arms and instructs his confederates to kill if obstructed in the attempt, with the purpose and intent that they do so, is in law a "principal" in any willful killing resulting from carrying out those instructions.—Young v. U.S. C.C.A. Tex., 97 F.2d 200, 117 A.L.R. 816, rehearing denied 97 F.2d 1023.

(3) One who remained in an automobile, with the engine running and horn blowing to drown the sound of pistol shots, and who was in a position to come to the assistance of the actual slayer to prevent him from being surprised or to give alarm to favor his escape was present and aiding and abetting in the commission of the homicide and was as much a principal, in legal contemplation, as the actual slayer.—State v. Daleo, 154 So. 437, 179 La. 516—State v. Capaci, 154 So. 419, 179 La. 462.

Necessity of conspiracy to commit felony

(1) If the homicide was committed in the course of a conspiracy to commit a felony, all of the parties to the conspiracy are guilty of murder but if the conspiracy was to commit a less serious offense not naturally tending to the destruction of human life the conspirators are guilty of manslaughter only.—Rush v. Town of Farmerville, 101 So. 243, 156 La. 857.

(2) To render the conspirators liable for murder the conspiracy must have been to commit a felony, and in this connection it has been held that conspiracy itself is a misdemeanor only, and not a felony, but if the conspiracy was to commit a felony, and the homicide was committed in the course of the felony or an attempt to commit the felony, all the conspirators were guilty of murder.—People v. Collins, 137 N.E. 753, 234 N.Y. 355.

Operative effect of accused's acts

It is not necessary that the acts of accused must have resulted in encouraging, instigating, inciting, advising, or counseling others in the common design to kill.—Durden v. State, 93 So. 342, 18 Ala. App. 498, certiorari denied Ex parte Durden, 93 So. 922, 208 Ala. 697.

Statute held not to affect rule

A statute making any "person" who has killed another in attempting to commit an unlawful act guilty of murder does not change the rule stated in the text, since the statute is applicable to an act committed by two or more persons, notwithstanding its use of "person" in the singular. State v. Carlino, 118 A. 784, 98 N.J. Law 48, affirmed 122 A. 830, 99 N.J. Law 292.

88. Cal.—People v. Erno, 232 P. 710, 195 Cal. 272.

D.C.—Borum v. U.S., 56 F.2d 301, 61 App. D.C. 4, certiorari denied Logan v. U.S., 52 S.Ct. 459, 285 U.S. 555, 76 L.Ed. 941.

Ill.—People v. Watt, 44 N.E.2d 580, 380 Ill. 610.

Ind.—Peats v. State, 12 N.E.2d 270, 213 Ind. 560.

N.Y.—People v. Florence, 262 N.Y.S. 775, 146 Misc. 735, modifying 261 N.Y.S. 803, 146 Misc. 152.

Pa.—Commonwealth ex rel. Moszczynski v. Ashe, 21 A.2d 920, 343 Pa. 102—Commonwealth v. Shawell, 191 A. 17, 325 Pa. 497—Commonwealth v. Brue, 131 A. 367, 284 Pa. 294.

Tex.—Grayson v. State, 291 S.W. 908, 106 Tex. Cr. 251.

89. Ark.—Spear v. State, 44 S.W.2d 663, 184 Ark. 1047.

Pa.—Commonwealth v. Spardute, 122 A. 161, 166, 278 Pa. 37, quoting **Corpus Juris**—Commonwealth v. Murrano, 120 A. 106, 107, 276 Pa. 239, quoting **Corpus Juris.**

Tenn.—Williams v. State, 51 S.W.2d 482, 484, 164 Tenn. 562, quoting **Corpus Juris.**

29 C.J. p. 1074, note 62.

90. Fla.—Milligan v. State, 147 So. 260, 109 Fla. 219—Pope v. State, 94 So. 865, 84 Fla. 428.

Ill.—People v. Tarver, 45 N.E.2d 630, 381 Ill. 411.

La.—State v. Capaci, 154 So. 419, 179 La. 462—State v. Terrell, 144 So.

thorities, his intent is imputable to the others.[91] Responsibility attaches although the taking of life was not specifically intended or contemplated by the parties or involved in the plan,[92] or was even forbidden by accused,[93] and the fact that accused regretted that the killing had occurred in no way lessens his responsibility.[94]

A common design need not have existed for any particular length of time before the commission of the homicide,[95] it is sufficient if there was a community of purpose between accused and the direct actor at the time the homicide was committed.[96] Liability on the part of the confederates is not excused by the fact that the person killed was one of the confederates,[97] except, it has been held, where the death of a conspirator occurs by his own act.[98] The liability of one who has aided and abetted a homicide does not depend on whether any of his co-conspirators, or persons acting for them, have been indicted.[99]

Particular unlawful acts The rule holding one responsible for a homicide committed by his confederate in the furtherance of a common design has been applied where the common object or purpose was to commit or perpetrate an assault[1] involving

188, 175 La 758, appeal dismissed and certiorari denied Terrell v State of Louisiana, 53 S Ct 386 288 U S 589 77 L Ed 968
Neb—Dean v State 259 N W 175, 128 Neb 166—Fields v State 250 N W 63 125 Neb 290
N Y—People v La Barbera, 287 N Y S 257 159 Misc 177—People v Florence, 262 N Y S 775, 146 Misc 735 modifying Gen Sess, 261 N Y S 803 146 Misc 152
Tenn—Woodruff v State 51 S W 2d 813 164 Tenn 530
Utah—State v Kukis 237 P 476, 65 Utah 362
Wis—Pollack v State 253 N W 560, 215 Wis 200 affirmed 254 N W 471 215 Wis 200

91. Ga—Lumpkin v State, 168 S E 241 176 Ga 446—Thompson v State, 144 S E 301, 166 Ga 758—Gore v State 131 S E 36, 162 Ga 267
Wis—Pollack v State, 253 N W 560, 215 Wis 200, affirmed 254 N W 471 215 Wis 200

92 Ala—Robinson v State, 133 So 578 222 Ala 541
Ark—Speir v State, 44 S W 2d 663, 184 Ark 1047
Cal—People v Waller, 96 P 2d 344 11 Cal 2d 693—People v Boss, 290 P 881, 210 Cal 245—People v Perry, 234 P 890 195 Cal 623—People v Caballero, 87 P 2d 364, 31 Cal App 2d 52
Fla—Pope v State, 94 So 865 870, 84 Fla 128, citing **Corpus Juris.**
Ga—Lumpkin v State, 168 S E 241, 176 Ga 446—Thompson v State, 144 S E 301 166 Ga 758
Ill—People v Rudecki, 110 N E 832, 309 Ill 125
Ind—White v State, 37 N E 2d 937, 219 Ind 290
Kan—State v Bundy, 75 P 2d 236, 147 Kan 4—State v Boone, 257 P 739 740, 121 Kan 208, quoting **Corpus Juris.**
Ky—Simpson v Commonwealth, 170 S W 2d 869, 293 Ky 831—Commonwealth v Gabbard, 255 S W 73, 200 Ky 642
Mass—Commonwealth v Heinlein, 152 N E 380, 256 Mass 387
Miss—Woodward v State, 113 So 859, 166 Miss 596—Fisher v State 116 So 746, 150 Miss 206
Mo—State v Nascllo, 30 S W 2d 132, 325 Mo 442
N M—State v Smelcer, 228 P 183, 30 N M 122
Okl—Morris v State 96 P 2d 88 68 Okl Cr 147—McDonald v State, 15 P 2d 1092, 54 Okl Cr 161
Pa—Commonwealth v Rose 193 A 17, 327 Pa 220—Commonwealth v Shawell 191 A 17 325 Pa 497—Commonwealth v McManus 127 A 316 282 Pa 25—Commonwealth v Spardute 122 A 161 166 278 Pa 37 quoting **Corpus Juris**—Commonwealth v Murrano 120 A 106 107 276 Pa 239, quoting **Corpus Juris**
Tenn—Williams v State, 51 S W 2d 182, 484, 164 Tenn 562 quoting **Corpus Juris.**
Tex—Hemphill v State 110 S W 2d 64, 133 Tex Cr 257
Utah—State v Kukis, 237 P 476 65 Utah 362
29 C J p 1074 note 60

Killing unnecessary to achieve object

A conspirator is responsible for a homicide committed by his fellow conspirator notwithstanding the killing was unnecessary to effect the purpose of the conspiracy.—State v Messino 30 S W 2d 750 325 Mo 743

93 Cal—People v Boss, 290 P 881, 210 Cal 245—People v Caballero, 87 P 2d 364, 31 Cal App 2d 52
Mass—Commonwealth v Heinlein, 152 N E 380, 256 Mass 387
Pa—Commonwealth v Spardute 122 A 161, 166, 278 Pa 37, quoting **Corpus Juris**—Commonwealth v Murrano, 120 A 106, 107, 276 Pa 239 quoting **Corpus Juris.**
Tenn—Williams v State, 51 S W 2d 482, 484, 164 Tenn 562, quoting **Corpus Juris.**
29 C J p 1074 note 61

94 Cal—People v Boss, 290 P 881, 210 Cal 245—People v Lawrence, 76 P 893, 143 Cal 148, 68 L R A 193

95. N M—State v Wilson, 46 P 2d 57 60 39 N M 284 quoting **Corpus Juris.**
29 C J p 1072 note 47

96. N M—State v Wilson, supra, quoting **Corpus Juris**
29 C J p 1072 note 17

97. Cal—People v Caballero, 87 P 2d 364, 31 Cal App 2d 52
N Y—People v Udwin 172 N E 489, 251 N Y 255
Homicide by opponents of accused generally see supra subdivision d of this section.

98. N Y—People v La Barbera, 287 N Y S 257, 159 Misc 177

Burning to death during arson

Where in the course of a conspiracy to commit arson one of the conspirators burned himself to death his co-conspirators are not liable for homicide
Cal—People v Ferlin, 265 P 230, 203 Cal 587
N Y—People v La Barbera 287 N Y S 257, 159 Misc 177

99 Ind—Peats v State, 12 N E 2d 270, 213 Ind 560

1. Ala—Robinson v State 133 So 578, 222 Ala 541—Cleveland v State, 103 So 707 20 Ala App 426 certiorari denied Ex parte Cleveland, 103 So 711, 212 Ala 635
Ind—Peats v State, 12 N E 2d 270, 213 Ind 560
Iowa—State v Pinkerton, 208 N W 351, 201 Iowa 940
Pa—Commonwealth v Strantz, 195 A 75, 328 Pa 33—Commonwealth v Spardute, 122 A 161, 278 Pa 37—Commonwealth v Micuso, 117 A 211, 273 Pa 174
S C—State v Williams, 199 S E 906, 189 S C 19
29 C J p 1075 note 71

Comparative degree of moral guilt

Where each of several police officers actively participated at one stage or another in assault on, and killing of, prisoner, all such officers were chargeable in law as principals, although not morally chargeable in the same degree for the death.—State v Paschall, 85 P 2d 1046, 197 Wash 582

the element or consideration of danger to life,[2] a breach of the peace, particularly if involving personal violence or the use of deadly weapons,[3] burglary,[4] to effect an escape from custody, particularly if involving the procurement and use of dangerous weapons,[5] to commit grand[6] larceny[7] and robbery,[8] also, according to the decisions of the

Shooting of intended whipping victim

One who entered into a conspiracy with others to commit the unlawful act of whipping a particular individual was responsible for the fatal shooting of such individual, although it was one of the others who fired the fatal shot

Ala.—Sullivan v. State, 119 So. 243, 23 Ala. App. 10.

Tex.—Shelburne v. State, 11 S.W.2d 519, 111 Tex.Cr. 182.

29 C.J. p. 1075 note 71 [a] (2).

Homicide by selectees of co-conspirators

One who entered into a conspiracy to commit an assault on deceased was responsible for a homicide committed by the men selected by his co-conspirators to aid in the assault.—State v. Reeke, 278 S.W. 995, 311 Mo. 581.

2. Tenn.—Williams v. State, 51 S.W.2d 482, 484, 164 Tenn. 562, quoting **Corpus Juris.**

Utah.—State v. Kukis, 237 P. 476, 65 Utah 362.

29 C.J. p. 1075 note 71.

Use of deadly weapon as direct purpose of conspiracy

The fact that on one occasion deadly weapons were used threateningly by two or more conspirators, without the knowledge of the other conspirators, does not make the unlawful use of a deadly weapon, or the killing, a direct purpose of the conspiracy and an acknowledged means of accomplishing its end so as to include within the purpose of the conspiracy assault with a deadly weapon or murder.—People v. Cowan, 101 P.2d 125, 38 Cal.App.2d 231.

3. Ala.—Cleveland v. State, 103 So. 707, 20 Ala.App. 426, certiorari denied Ex parte Cleveland, 103 So. 711, 212 Ala. 645.

Ill.—People v. Tarver, 45 N.E.2d 630, 381 Ill. 111.

Ind.—Peats v. State, 12 N.E.2d 270, 213 Ind. 560.

Tenn.—Williams v. State, 51 S.W.2d 482, 484, 164 Tenn. 562, quoting **Corpus Juris.**

29 C.J. p. 1075 note 70.

Riotous group

Each member of a riotous and unlawful assembly formed for the purpose of disturbing the public peace was responsible for a homicide committed by any member of the company in carrying out the purpose of the assembly, a shot fired by one member of the mob was a shot fired by all and all must answer for the result.—People v. Rudecki, 140 N.E. 832, 309 Ill. 125.

4. Cal.—People v. Bringhurst, 221 P. 897, 192 Cal. 748.—People v. Wheaton, 220 P. 451, 61 Cal.App. 58.

Kan.—State v. Boone, 257 P. 739, 124 Kan. 208.

Mich.—People v. Mangiapane, 188 N.W. 401, 219 Mich. 62.

Pa.—Commonwealth v. Brue, 131 A. 367, 284 Pa. 294.

29 C.J. p. 1074 note 65.

5. N.Y.—People v. Udwin, 172 N.E. 489, 254 N.Y. 255.

Okl.—Prather v. State, Cr., 137 P.2d 249.

R.I.—State v. Miller, 161 A. 222, 52 R.I. 440.

29 C.J. p. 1075 note 69.

Prisoner's promise not to use pistols

Where wife of prisoner participated in conspiracy to assist him in escaping from penitentiary, which constituted felony and furnished him with pistols to aid him in escaping, and, in effecting escape murder was committed, wife was guilty of murder and the fact that he promised not to use pistols in escaping is not a defense but merely a mitigating circumstance.—Commonwealth v. Walters, 266 S.W. 1066, 206 Ky. 162.

A life prisoner is responsible for a homicide committed by a fellow prisoner in attempting to escape from custody, notwithstanding he is not within a statute providing that a prisoner confined "for a term less than life" is guilty of a felony in attempting to escape, where many of the convicts in the escape were not life prisoners.—People v. Udwin, 172 N.E. 489, 254 N.Y. 255.

6. Cal.—People v. Olsen, 22 P. 125, 80 Cal. 122.

7. Okl.—Carle v. State, 244 P. 833, 31 Okl.Cr. 24.

8. Ark.—Anderson v. State, 121 S.W.2d 216, 197 Ark. 600.—House v. State, 92 S.W.2d 868, 192 Ark. 476.—Spear v. State, 44 S.W.2d 663, 184 Ark. 1047.—Turnage v. State, 30 S.W.2d 865, 182 Ark. 74.

Cal.—People v. Waller, 96 P.2d 341, 14 Cal.2d 693.—People v. Martin, 85 P.2d 880, 12 Cal.2d 466.—People v. Boss, 290 P. 881, 210 Cal. 245.—People v. Gomez, 286 P. 998, 209 Cal. 296.—People v. Perry, 234 P. 890, 195 Cal. 623.—People v. Ferdinand, 229 P. 341, 194 Cal. 555.—People v. Bringhurst, 221 P. 897, 192 Cal. 748.—People v. Caballero, 87 P.2d 361, 31 Cal.App.2d 52.—People v. Matthew, 228 P. 417, 68 Cal.App. 95.—People v. Wheaton, 220 P. 451, 64 Cal.App. 58.

Conn.—State v. Cots, 9 A.2d 138, 126 Conn. 48.

Fla.—Smith v. State, 176 So. 506, 129 Fla. 388.

Ga.—Jenkins v. State, 9 S.E.2d 909, 190 Ga. 556.—Burns v. State, 2 S.E.2d 627, 188 Ga. 22.—Simmons v. State, 184 S.E. 291, 181 Ga. 761.—Simpson v. State, 148 S.E. 511, 168 Ga. 598.—Gore v. State, 134 S.E. 36, 162 Ga. 267.

Ill.—People v. Watt, 44 N.E.2d 580, 380 Ill. 610.—People v. Schanda, 185 N.E. 183, 352 Ill. 36.—People v. Grant, 144 N.E. 813, 313 Ill. 69.

Ind.—White v. State, 37 N.E.2d 937, 219 Ind. 290.—Turpin v. State, 189 N.E. 403, 206 Ind. 345.—Burns v. State, 136 N.E. 857, 192 Ind. 427.

Kan.—State v. Bundy, 75 P.2d 236, 147 Kan. 4.—State v. Boone, 257 P. 739, 124 Kan. 208.

Mass.—Commonwealth v. Heinlein, 152 N.E. 380, 256 Mass. 387.

Miss.—Carrol v. State, 183 So. 703, 183 Miss. 1.—Fisher v. State, 116 So. 746, 150 Miss. 206.

Mo.—State v. Powell, 95 S.W.2d 1186, 339 Mo. 80.—State v. Messino, 30 S.W.2d 750, 325 Mo. 743.—State v. Nasello, 30 S.W.2d 132, 325 Mo. 442.—State v. Jackson, 253 S.W. 734.

Mont.—State v. Miller, 9 P.2d 171, 91 Mont. 596.

N.C.—State v. Green, 177 S.E. 120, 207 N.C. 369.—State v. Stefanoff, 174 S.E. 411, 206 N.C. 443.—State v. Bell, 171 S.E. 50, 205 N.C. 225.

Okl.—Morris v. State, 96 P.2d 88, 68 Okl.Cr. 147.—McDonald v. State, 15 P.2d 1092, 54 Okl.Cr. 161.

Pa.—Commonwealth ex rel. Moszczynski v. Ashe, 21 A.2d 920, 343 Pa. 102.—Commonwealth v. Shawell, 191 A. 17, 325 Pa. 497.—Commonwealth v. Crow, 154 A. 283, 303 Pa. 91.—Commonwealth v. Mellor, 144 A. 531, 294 Pa. 339.—Commonwealth v. Doris, 135 A. 313, 287 Pa. 517.—Commonwealth v. Bentley, 135 A. 310, 287 Pa. 539.—Commonwealth v. McManus, 127 A. 316, 282 Pa. 25.—Commonwealth v. Spardute, 122 A. 161, 165, 278 Pa. 37, quoting **Corpus Juris.**—Commonwealth v. Mutiano, 120 A. 106, 107, 276 Pa. 239, quoting **Corpus Juris.**

R.I.—State v. Saccoccio, 147 A. 878, 50 R.I. 356.

Tex.—Hemphill v. State, 110 S.W.2d 64, 133 Tex.Cr. 257.—Simmons v. State, 296 S.W. 513, 107 Tex.Cr. 504.—Rowan v. State, 260 S.W. 591, 97 Tex.Cr. 130.

Wis.—Pollack v. State, 253 N.W. 560, 215 Wis. 200, affirmed 254 N.W. 471, 215 Wis. 200.

29 C.J. p. 1074 note 66.

Remaining nearby to aid escape

One who was stationed near the

courts on the question, to resist arrest[9] with dangerous weapons,[10] or to engage in the unlawful manufacture or transportation of intoxicating liquors.[11]

It has been held that there can be no common design to commit a negligent act resulting in homicide.[12]

Lawful common design Where the common purpose of several persons sought to be charged with criminal responsibility for a homicide committed by another is shown to have been lawful and to have been planned to be accomplished by lawful means, they will not be held criminally responsible for a homicide which has been committed by one of their number by reason of his own malice or independent intent, and which was not incidental to the common purpose, unless with knowledge of his criminal intent they actually participated in his crime by rendering him aid or encouragement in its perpetration.[13]

Presence Where several persons join in a common, unlawful design, and each takes the part assigned to him, some to commit the act, others to watch to prevent a surprise or to aid an escape, they are all present at a homicide committed in the course of carrying out the common design.[14] A conspirator need not, however, have been within sight or hearing of the homicide,[15] he is liable for a homicide committed by his co-conspirator in furtherance of the common design whether he was present at the homicide or not.[16]

scene of a proposed robbery as a lookout or to aid in an escape from the scene was responsible for a homicide perpetrated by his confederate during the commission or attempted commission of the robbery
N Y —People v Walsh, 186 N E 422, 262 N Y 140
N C—State v Bell, 171 S E 50, 205 N C 225

Knowledge and consent as to arming

(1) Accused who knew his co-conspirators were armed was responsible for all consequences that followed attendant on robbery in which night watchman was killed, notwithstanding accused was unarmed—People v Jones, 29 P 2d 902, 136 Cal App 722

(2) Accused who participated in conspiracy to rob bank and consented to arming of conspirators constructively consented to any act done by any conspirator in furtherance of the purpose of the conspiracy—Tincher v Commonwealth 69 S W 2d 750, 253 Ky 623

Use of deceased as shield from attack

Accused, who with others robbed bank and in effecting escape, forced teller to accompany them as shield from attack from town marshal who accidentally killed the teller when shooting at robbers, is guilty of "murder" both at common law and under statute—Wilson v State, 68 S W 2d 100, 188 Ark 846

Comparative guilt

Accused is guilty of murder in the first degree where his co-conspirators perpetrated the homicide while attempting to commit the robbery, however slight his guilt in comparison with the guilt of the actual perpetrator—People v Ryan, 189 N E 225, 263 N Y 298

Liability as principal

(1) All the conspirators are liable as principals
N J—State v Mule, 177 A. 125, 114 N J Law 384
N Y—People v Ryan, 189 N E 225, 263 N Y 298

(2) Accused who did his part in the plan to rob a post office, during which robbery an employee was killed, by placing himself where he could render aid in preventing pursuit and capture was a principal—Rowan v State, 260 S W 591, 97 Tex Cr 130

Liability as accessary before the fact

(1) Where two persons joined in a robbery in the course of which one committed homicide while the other was standing guard, it is immaterial who did the slaying, since the one standing guard was an accessary before the fact and liable to the same punishment as the murderer—Smith v Commonwealth 157 S W 2d 79, 288 Ky 831

(2) Where accused entered into agreement to commit robbery encouraged its commission agreed prior to commission of offense to furnish an alibi to those who actually committed robbery and received part of proceeds of robbery, accused was an accessary before the fact to murder committed during robbery, and he was guilty of murder as a principal—People v Suddeth, 28 N E 2d 268, 374 Ill 132

Husband and wife as conspirators

The rule stated in the text applies notwithstanding the conspirators are husband and wife—Thompson v State 141 S E 301, 166 Ga 758

9 Cal.—People v Bringhurst, 221 P 897, 192 Cal 748—People v Wheaton 220 P 151, 64 Cal App 58
29 C J p 1071 note 68

10. Ohio—Ralls v State, 182 N E 691, 43 Ohio App 129—Ralls v State, 177 N E 787, 10 Ohio App 69
29 C J p 1074 note 68

11. Ala.—Hodges v State, 113 So 474, 22 Ala App 111—Ex parte Lawrence, 109 So 615, 21 Ala App 537
Ga.—Lumpkin v State 168 S E 241, 176 Ga. 446
Mass.—Franklin v State, 196 So 787, 189 Miss 142
Tex.—Coomer v State, 262 S W 495, 97 Tex Cr 588

12. Mo.—State v Gartland, 263 S W 165, 304 Mo 87

Negligent shooting by police officer

Where police officers, while pursuing a car which they believed to contain intoxicating liquors, negligently shot and killed a nonparticipant, one of the officers cannot be held guilty of the death caused by the negligent act of the other on the theory of a common design to commit the negligent act.—State v Gartland, supra

13. U S.—Collier v Vaccaro, C C A Md. 51 F 2d 17, modifying, D C, Vaccaro v Collier, 38 F 2d 862
Ky.—Stacy v Commonwealth, 298 S W 696, 221 Ky 258
29 C J p 1076 note 77

14. N J.—State v Gilberson, 122 A 721, 99 N J Law 85—State v Carlino, 118 A 784, 98 N J Law 48, affirmed 122 A 830, 99 N J Law 292

15 N J State v Carlino supra
Necessity of presence at homicide generally see supra subdivision a of this section

16. Cal.—People v King 85 P 2d 928, 30 Cal App 2d 185
Ill.—People v Suddeth 28 N E 2d 268, 374 Ill 132—People v Faught, 175 N E 446, 343 Ill 312
La.—State v Dallao 175 So 4, 187 La 392, appeal dismissed Dallao v State of Louisiana, 58 S Ct 51, 302 U S 635, 82 L Ed 494, rehearing denied 58 S Ct 138, 302 U S 777, 82 L Ed 601, appeal dismissed Couche v State of Louisiana, 58 S Ct 18, 302 U S 636, 82 L Ed 495, rehearing denied 58 S Ct 137, 302 U S 776, 82 L Ed 601, appeal dismissed Ugarte v State of Louisiana, 58 S Ct 51, 302 U S 635, 82 L Ed 494, rehearing denied 58 S Ct 139, 302 U S 777, 82 L Ed 601

(2) Common Design to Kill

One who joins in a common design to kill is responsible for a homicide committed by any of the participants, although he was not the direct perpetrator and had not contemplated the precise outcome which ultimately resulted

All who join in a common design to kill, whether in a sudden emergency, or pursuant to a conspiracy, are liable for the acts of each of their accomplices in furtherance thereof.[17] Responsibility attaches to one who participates in such a venture notwithstanding another was the principal actor in the commission of the homicide,[18] or the conspirator who actually committed the homicide cannot be identified,[19] for it is immaterial which one fired the fatal shot or delivered the fatal blow.[20] This liability attaches, although the culpable acts were not specifically contemplated, as where the common design was to kill one person but by mistake or misfortune another was killed,[21] and although accused did not know when or how the homicide was to be committed, or what particular individual was to do the killing,[22] or was under the impression that the person whose death he was endeavoring to bring about was a different individual from the one actually killed.[23] The law fixes no time for the commencement or duration of a conspiracy to murder so as to render each of the conspirators criminally responsible.[24]

(3) Natural Consequences, Departure from Design

One who joins in a common design is not responsible for a homicide committed by one of the participants out of private malice or for some purpose unconnected with the original design, nor is he responsible for a homicide committed after completion of, or his withdrawal from, the original design. Responsibility is not avoided under this rule, however, merely by the fact that the homicide was committed during an attempted escape, or after withdrawal from the scene of the unlawful act

Criminal responsibility for a homicide committed by a fellow conspirator does not extend to every killing more or less connected with the conspiracy to commit an unlawful act.[25] Responsibility attaches only where the homicide was committed in furtherance of the common design[26] or was a natural consequence, departure from, of the original design.

—State v. Terrell, 144 So. 488, 175 La. 758, appeal dismissed and certiorari denied Terrell v. State of Louisiana, 53 S.Ct. 386, 288 U.S. 589, 77 L.Ed. 968.

Pa.—Commonwealth v. Crow, 154 A. 283, 303 Pa. 91.

Absence from state

One who conspired with others to commit a homicide is equally guilty of the homicide although he was out of the state at the time of the actual perpetration of the homicide.—Lester v. Commonwealth, 40 S.W.2d 306, 239 Ky. 703.

17. Fla.—Strickland v. State, 165 So. 289, 122 Fla. 384.

Ga.—Adkins v. State, 1 S.E.2d 420, 187 Ga. 519.

Ill.—People v. Looney, 155 N.E. 363, 324 Ill. 375.

Miss.—Jones v. State, 198 So. 555, 189 Miss. 533.

Mo.—Ex parte Burgess, 274 S.W. 123, 309 Mo. 397.

29 C.J. p. 1072, note 52, p. 1069, note 12.

Killing to overcome resistance

All are liable where two or more persons combine to kill in case killing is necessary to overcome resistance to the attainment of an end in view.

N.Y.—People v. Enuleta, 144 N.E. 187, 238 N.Y. 158.

Tex.—Rowan v. State, 260 S.W. 591, 97 Tex.Cr. 130.

18. Cal.—People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, superseding 89 P.2d 39, certiorari granted Lisenba v. People of State of California, 61 S.Ct. 68, two cases, 311 U.S. 617, 85 L.Ed. 391, affirmed 61 S.Ct. 832, two cases, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, two cases, 313 U.S. 597, 85 L.Ed. 1550, affirmed 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, rehearing denied 62 S.Ct. 620, two cases, 315 U.S. 826, 86 L.Ed. 1222.

19. Ill.—People v. Looney, 155 N.E. 363, 324 Ill. 375.

29 C.J. p. 1073, note 57.

20. Ala.—Roberson v. State, 118 So. 651, 218 Ala. 442.—Lockett v. State, 117 So. 457, 218 Ala. 10.

Cal.—People v. Yeager, 229 P. 40, 194 Cal. 452.

D.C.—Borum v. U.S., 56 F.2d 301, 61 App.D.C. 4, certiorari denied Logan v. U.S., 52 S.Ct. 459, 285 U.S. 555, 76 L.Ed. 944.

Fla.—Wadsworth v. State, 186 So. 145, 136 Fla. 134.

Ga.—Baker v. State, 115 S.E. 119, 154 Ga. 716.

Mo.—State v. Boesel, 61 S.W.2d 243, State v. Lucas, 292 S.W. 714, 316 Mo. 904, rehearing denied, 293 S.W. 1051, 316 Mo. 904.

Tenn.—Reagan v. State, 293 S.W. 755, 155 Tenn. 397.

Tex.—Jennings v. State, 51 S.W.2d 341, 121 Tex.Cr. 384, McDonald v. State, Cr., 22 S.W.2d 670.

21. N.M.—State v. Wilson, 46 P.2d 57, 39 N.M. 284.

29 C.J. p. 1073, note 53.

Killing to remove menace or obstacle

Where the common design was to kill one person a conspirator is liable for the act of his co-conspirator in killing another person who constituted or was thought to constitute a menace to the safety of the conspirators or an obstacle to the execution of their original purpose.—People v. Sobieskoda, 139 N.E. 558, 235 N.Y. 411.

22. Ill.—Spies v. People, 12 N.E. 865, 17 N.E. 898, 122 Ill. 1, 3 Am.S.R. 320.

29 C.J. p. 1073, note 55.

23. Ky.—Jennings v. Commonwealth, 16 S.W. 318, 13 Ky.L. 79.

Miss.—Wynn v. State, 63 Miss. 260.

24. Cal.—People v. Yeager, 229 P. 40, 194 Cal. 452.

25. N.Y.—People v. Ryan, 189 N.E. 225, 263 N.Y. 298.

26. Ill.—People v. Basile, 190 N.E. 307, 356 Ill. 171.

The fact that killing was result, direct or remote, of conspiracy to rob is not sufficient of itself to establish responsibility on the part of those who did not actually perpetrate the killing. It must be shown that the killing occurred in the attempted execution of the design to commit a robbery.—People v. Ryan, 189 N.E. 225, 263 N.Y. 298.

Failure to connect homicide with conspiracy

Where accused and others intended to commit a robbery in a building, and accused remained outside as driver of automobile, proof which shows only the killing of a police officer in the building but which does not show any connection of the killing with the proposed robbery will not warrant conviction of accused for homicide.—People v. Basile, 190 N.E. 307, 356 Ill. 171.

ural and probable result thereof[27] A conspirator is not responsible for a killing committed by his co-conspirator as an independent act, growing out of some private malice or purpose of the slayer, and not in furtherance of, or connected with, the original unlawful purpose,[28] particularly where the common design did not contemplate the commission of a homicide, and was of such a nature that a homicide would not be a natural or probable result[29] A distinction has been made that, if the common design was to commit a trespass or a minor offense, the accomplices are not liable for a homicide committed by the principal unless it was a plain and direct consequence of the design,[30] whereas, if the common design was to commit a felony, they are liable, although the homicide resulted collaterally therefrom[31]

One who joins in a common design to kill is not responsible for a homicide committed by another, not in pursuance of, or connected with, the common design[32] Thus, if two persons conspire to commit murder and one of them conspires with another to commit a different murder, the one who is involved in only the first conspiracy will not be responsible for the acts of the others in consummating the second[33]

Withdrawal from, or completion of, common design, homicide during escape One who has joined in a common design to kill, or to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, escapes responsibility for a homicide committed by a confederate in pursuance of the common design, if, before the homicide was committed, he withdrew entirely from the undertaking,[34] and the fact of his withdrawal was communicated to his associates, under such circumstances as would permit them to take the same action[35] Notwithstanding his attempted withdrawal, he is responsible for a homicide committed in pursuance of the original design, or as a natural or probable consequence of the execution thereof, by one of his associates to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated,[36] or, if it had, was not communicated under such circumstances as would permit his associate to withdraw[37] There is authority to the effect that the acts of one who has in fact withdrawn

27 N J State v Carbino 118 A 781 98 N J Law 18 affirmed 122 A 830 99 N J Law 292

Killing as reasonable result of contemplated act

If in consummation of an express and unlawful purpose of conspiracy one of conspirators goes outside of such express purpose and kills the other conspirators cannot escape responsibility where killing was not an unreasonable result to be expected from acts of sabotage and violence which were contemplated —People v Cowan 101 P 2d 125, 38 Cal App 2d 231

28 N Y —People v Sobieskoda 139 N E 558, 235 N Y 411

If the conspirators had only the common purpose of committing an offense and one of the conspirators commits a murder merely as a result of the situation in which he finds himself and proceeding from the impulse of the moment without any previous concert his coconspirators would not be guilty of murder — State v Taylor 139 So 463, 476, 173 La 1010 certiorari denied Taylor v State of Louisiana 52 S Ct 408, 285 U S 547, 76 L Ed 938

Existence of original purpose

The rule stated in the text applies notwithstanding the original unlawful purpose was still in existence at the time of the killing —People v Sobieskoda, 139 N E 558, 235 N Y 411

Rule held inapplicable

It has been held that the rule exempting conspirators from responsibility for a killing committed by a co-conspirator which was not in furtherance of the common purpose or the natural and probable consequence of anything connected therewith is not available where the killing was done during the perpetration of a robbery in which all were participating People v Caballero, 87 P 2d 364, 31 Cal App 2d 52

29 Ill —People v Faught 175 N E 446 343 Ill 312
29 C J p 1075 note 74

Agreement unlawfully to purchase liquor

One who entered into an agreement for the unlawful purchase of liquor which contemplated neither the destruction of human life nor even the use of force in any degree is not criminally responsible for a homicide which was the independent act of one of the confederates and foreign to common design —People v Faught supra

30 U S —U S v Ross, C C R I, 27 F Cas No 16 196, 1 Gall 624
Iowa —State v Shelledy 8 Iowa 477

31 U S —U S v Ross, C C R I 27 F Cas No 16 196, 1 Gall 624
29 C J p 1075 note 73

32 Tex —Cline v State, 178 S W 520 77 Tex Cr 281
29 C J p 1073 note 58

33 Okl —Geiger v State, 221 P 122 25 Okl Cr 139

34 Cal People v Cowan 101 P 2d 125 38 Cal App 2d 231

Withdrawal held not shown

Accused who obtained iron bar for another which was used by such other in perpetration of homicide was not excused from liability by the fact that he had signaled to the other to the effect that it was "no go" where meaning of the signal was a matter of conjecture accused did not replace bar did nothing to warn victim of the danger and there was nothing to indicate that signaling was intended to deter the other from using the bar —State v Lee Ohio App 34 N E 2d 985

35 La —State v Taylor, 139 So 463 476 173 La 1010 citing **Corpus Juris**, and certiorari denied Taylor v State of Louisiana 52 S Ct 408, 285 U S 547, 76 L Ed 938
N J —State v Mule, 177 A 125, 111 N J Law 381
29 C J p 1076 note 78

36 La - State v Taylor 139 So 463 476, 173 La 1010, citing **Corpus Juris**, and certiorari denied Taylor v State of Louisiana 52 S Ct 408 285 U S 547 76 L Ed 938
29 C J p 1076 note 79

37 La State v Taylor supra citing **Corpus Juris.**
N Y —People v Chapman 121 N E 381 224 N Y 463
Wis —Pollack v State, 253 N W 560, 565 215 Wis 200, citing **Corpus Juris**, and adhered to 251 N W 171, 215 Wis 200.

from participation in the common design, performed with the intention of communicating the fact of his withdrawal to an associate, need not necessarily produce the effect intended, it being sufficient if what was done should have been effectual for the purpose.[38] A participant in a common design is not responsible for a homicide committed by one of the others after the enterprise has been abandoned after a failure.[39]

Those who have joined in a common design to commit an unlawful act are not responsible for a homicide committed by one of their associates after the common object has been accomplished,[40] to render the conspirators liable for murder committed in the furtherance of a common design to commit a felony, the felony must have been in the course of commission when the killing occurred.[41] In this connection the common purpose is not complete so as to exempt one for a homicide committed by another of the participants in the common undertaking where further joint action in making an escape is contemplated,[42] and thus accused ordinarily is not relieved from responsibility by the fact that the homicide was committed at a time when one or more of the conspirators were attempting to escape from the scene of the offense which was the subject of the conspiracy,[43] at least if the conspirators contemplated and intended the doing of everything necessary to effect an escape,[44] including the killing of any one obstructing their escape.[45] In the absence of a common purpose to resist with great violence, or to kill any person who interfered with or attempted to apprehend the participants, it has been held that one is not liable for a homicide committed by one of the others during an escape where he did not consent thereto.[46]

Withdrawal from the scene of the homicide does not of itself establish the fact of withdrawal from the common design and absence of responsibility for a homicide committed by a confederate,[47] nor does it establish communication of the fact of withdrawal to those with whom he was acting,[48] but withdrawal from the scene, with the intention that such action should advise those associated with one that he had withdrawn from participation in the common design, may be considered with the other circumstances in determining whether the fact of his abandonment of the common purpose was communicated to his associates.[49]

38. Conn.—State v. Allen, 47 Conn. 121.

39. Kan.—State v. Boone, 257 P. 739, 740, 124 Kan. 208, quoting **Corpus Juris.**
29 C.J. p. 1076, note 76.

40. Kan.—State v. Boone, supra, quoting **Corpus Juris.**
29 C.J. p. 1076, note 75.

41. N.Y.—People v. Collins, 137 N.E. 753, 231 N.Y. 355.
"The responsibility is confined to a killing committed during the period between the inception of the attempt to commit the felony and the consummation or the frustration and abandonment of the attempt."—People v. Ryan, 189 N.E. 225, 226, 263 N.Y. 298.

42. N.J.—State v. Carlino, 118 A. 781, 98 N.J.Law 48, affirmed 122 A. 830, 99 N.J.Law 292.

Homicide before attainment of temporary safety

Where two persons conspired to commit robbery and one killed officer in immediate pursuit of one or both offenders attempting escape from scene of crime with loot, robbery was not complete at time of murder inasmuch as the conspirators had not attained temporary safety and hence both are guilty of murder.—People v. Bongiorno, 192 N.E. 856, 358 Ill. 171.

Homicide before division of proceeds

Undertaking of defendants to rob and divide proceeds continued to be joint until division of proceeds as regards responsibility for murder during escape after robbery.—State v. Taylor, 139 So. 463, 173 La. 1010, certiorari denied Taylor v. State of Louisiana, 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938.

43. Cal.—People v. Albritton, 294 P. 76, 110 Cal.App. 188.
Conn.—State v. Klein, 116 A. 596, 97 Conn. 321.
Kan.—State v. Boone, 257 P. 739, 124 Kan. 208.
Pa.—Commonwealth v. Curry, 135 A. 316, 287 Pa. 553.—Commonwealth v. Dorris, 135 A. 313, 287 Pa. 547, affirming Commonwealth v. Dorris, 8 Pa.Dist. & Co. 210.
Tenn.—Woodruff v. State, 51 S.W.2d 843, 164 Tenn. 530.

44. La.—State v. Taylor, 139 So. 463, 173 La. 1010, certiorari denied Taylor v. State of Louisiana, 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938.

45. Miss.—Huggins v. State, 115 So. 213, 149 Miss. 280.
Mo.—State v. Messino, 30 S.W.2d 750, 325 Mo. 713.—State v. Nasello, 20 S.W.2d 132, 325 Mo. 442.

46. La.—State v. Taylor, 139 So. 463, 173 La. 1010, certiorari denied Taylor v. State of Louisiana, 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938.
Miss.—Huggins v. State, 115 So. 213, 149 Miss. 280.

47. Ky.—Holmes v. Commonwealth, 44 S.W.2d 592, 241 Ky. 573.—Voils v. Commonwealth, 17 S.W.2d 238, 229 Ky. 305.
La.—State v. Taylor, 139 So. 463, 476, 173 La. 1010, citing **Corpus Juris,** and certiorari denied Taylor v. State of Louisiana, 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938.
Tenn.—Woodruff v. State, 51 S.W.2d 843, 164 Tenn. 530.
29 C.J. p. 1076, note 83.

Abandonment held not shown

One who conspired with another to commit robbery and who fatally shot the proposed victim after which he threw his gun down and ran away, while his accomplice stood ground and fired another fatal shot cannot be heard to say that he abandoned his criminal intent and that his accomplice only was guilty of murder.—Smith v. State, 176 So. 506, 129 Fla. 388.

48. La.—State v. Taylor, 139 So. 463, 476, 173 La. 1010, citing **Corpus Juris,** and certiorari denied Taylor v. State of Louisiana, 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938.
29 C.J. p. 1076, note 83.

49. Conn.—State v. Allen, 47 Conn. 121.
La.—State v. Taylor, 139 So. 463, 476, 173 La. 1010, citing **Corpus Juris,** and certiorari denied Taylor v. State of Louisiana, 52 S.Ct. 408, 285 U.S. 547, 76 L.Ed. 938.

§ 10. —— Accessaries after the Fact

An accessary after the fact to homicide is one who knows that the homicide has been committed and aids the perpetrator as by harboring him, or secreting the body Mere failure to report the homicide does not constitute one an accessary after the fact

An accessary after the fact is one who, knowing a homicide to have been committed, aids or assists a party thereto to escape apprehension or punishment[50] Ordinarily to render one liable as accessary after the fact, he must have had actual knowledge, at the time the aid or assistance was rendered, that the one so aided or assisted was a party to a homicide,[51] but it has been held that, if one had actual knowledge of facts which would give him good reason to believe the person assisted to be a party to a homicide, it is sufficient to render him responsible as an accessary after the fact[52] Proof that a person was an accessary after the fact is proof of a different offense than the homicide, and such proof does not make the accessary a principal as to the homicide[53]

A person who assists in secreting the body after a homicide is liable as an accessary after the fact,[54] and, where that is his sole connection with the homicide, only as an accessary after the fact[55] One who harbors and protects the slayer is an accessary after the fact notwithstanding, at the time he does so, no formal charge has been made against the slayer,[56] although, as shown in Criminal Law § 98, there is some authority holding that the existence of such a charge is necessary with respect to crimes generally, where the governing statute requires that the person assisted be "charged" with a felony There may be accessaries after the fact both to voluntary and to involuntary manslaughter[57]

One does not become an accessary after the fact by knowing of the commission of the homicide and failing to report it,[58] or even by falsely denying knowledge of the killing when questioned by public officers[59] A statute prohibiting any one from receiving, harboring, or concealing the guilty person has been held not violated by a concealment of the crime and the body of the murdered person[60] Aid or assistance rendered to a party to a homicide does not constitute one an accessary after the fact when the aid or assistance was rendered before the death of the victim[61] Under some statutory provisions certain persons cannot be accessaries after the fact[62] Where two unite in the commission of a murder and a third person agrees to conceal the fact that one of the principals participated in the crime and to throw the entire guilt on the other, such third person is not an accessary after the fact as to the person whose guilt is not concealed[63]

§ 11. Cause of Death

a In general
b Proximate cause; natural result of act
c Improper treatment of injury
d Prior causes

a. In General

In determining whether the act of accused has caused death, the test is whether such act has contributed to the death, and, if it has, responsibility is not avoided by the fact that independent causes, such as the negligence of deceased or others, have also contributed It is immaterial by what instrumentalities accused has caused death, accused is responsible for causing the victim to encompass his own death

50. N Y —People v Galbo 112 N E 1041 218 N Y 283 2 A L R 1220
29 C J p 1077 note 90
Accessaries after fact generally see Criminal Law §§ 95–99

51. Miss —Harrel v State, 39 Miss 702, 80 Am D 95
Tex —Jones v State, 128 S W 2d 803, 137 Tex Cr 146

52 Ky —Tully v Commonwealth, 13 Bush 142
Tex – Dent v State 65 S W 627, 43 Tex Cr 126

53. Ill —People v Cassler, 163 N E 430, 332 Ill 207

54. N Y —People v Farmer, 89 N E 462, 196 N Y 65

Disposal of body under compulsion
One does not become an accomplice to a homicide by assisting in disposing of the body under compulsion, such as a threat of death made by the perpetrator of the homicide —Owens v State, 252 S W. 25, 159 Ark 503.

55 Cal —People v Keefer, 3 P 818 65 Cal 232
N Y —People v Farmer, 89 N E 462, 196 N Y 65

56 Ark —State v. Jones, 120 S W 154, 91 Ark 5
Colo —Howard v People, 51 P 2d 594, 97 Colo 550

57 S C —State v Tapp, 89 S E 394 105 S C 55
29 C J p 1077 note 97

58. Pa —Commonwealth v Giovanetti, 19 A 2d 119, 341 Pa 345

59. Tex - Hargrove v State, 140 S W 234, 63 Tex Cr 143

60. Ga —Heath v State, 128 S E 913 160 Ga 678, answers to certified questions conformed to 128 S E 911, 34 Ga App 218

Reason for rule
The statute prohibits the positive commission of some act, and, therefore, is not violated by negative misprision, that is, a mere passive omission to do one's duty to the public by concealing the crime —Heath v State, supra

61. Miss —Harrel v State, 39 Miss 702, 80 Am D 95
29 C J p 1077 note 91

62. Domestic servant
In prosecution for murder, witness who was employed in public restaurant conducted by defendant and deceased which occupation was varied occasionally by hauling wood and sweeping and dusting rooms not shown to be occupied by any members of family, was not 'domestic servant" within Pen Code 1925 art 78 and therefore, was not precluded from being accessary after the fact - Littles v State, 14 S W 2d 853, 111 Tex Cr 500

63. Tex —Schackev v State, 53 S W 877, 41 Tex Cr 255

One is not legally responsible for a homicide unless his unlawful act, or unlawful omission to discharge a duty which he owed to deceased, contributed to the death of the victim.[64] Thus one who injured or wounded deceased[65] in a manner not calculated or likely to endanger life,[66] or even mortally,[67] is not guilty of homicide where death has resulted solely from an independent cause. However, the unlawful act or omission of accused need not be the sole cause of the death,[68] the test of responsibility is whether the act of accused contributed to the death,[69] and, if it did, he is not relieved of responsibility by the fact that other causes also contributed.[70] So, if an injury or act committed by accused contributed to the death, he is responsible, although the negligence of third persons also contributed thereto,[71] or although other injuries or wounds, whether or not mortal, inflicted independently by another, also contributed thereto,[72] and were subsequent in point of time.[73]

Ordinarily a person may be held responsible for a homicide and guilty of murder or manslaughter, according to the circumstances, in whatever manner or by whatever means the death was caused, provided it was caused by his unlawful act or omission.[74] One may be responsible also for a death caused by an omission to act, where he was under a legal duty to act, as well as for death caused by his positive act.[75] At early common law the view obtained that responsibility for homicide did not attach where there was no physical or corporeal injury, as for example, where death was the result solely of grief or fear,[76] but the modern rule is that, if the act of accused was the direct and actual

64. Ga.—Nelson v. State, 198 S.E. 305, 58 Ga. App. 243.
Ky.—Fitzpatrick v. Commonwealth, 275 S.W. 819, 210 Ky. 385.
S.C.—State v. Francis, 149 S.E. 348, 364, 152 S.C. 17, 70 A.L.R. 1113, quoting **Corpus Juris.**
S.D.—State v. Keeble, 207 N.W. 456, 49 S.D. 156.
29 C.J. p. 1078, note 1.

Where accused's blows are partly justified and partly not, he cannot be held responsible for homicide unless unlawful blows contributed to death.—State v. Rounds, 160 A. 249, 104 Vt. 442.—29 C.J. p. 1083, note 34 [b].

65. Neb.—Pherley v. State, 202 N.W. 419, 113 Neb. 198.
29 C.J. p. 1078, note 1 [a].

Heart failure

If death of decedent was due solely and exclusively to a natural cause such as heart failure and blow struck by accused in no way contributed to or accelerated it, there was no homicide. Duncan v. State, 6 So.2d 150, 30 Ala. App. 356, certiorari denied 6 So.2d 154, 242 Ala. 329.

66. Del.—State v. Johnson, 175 A. 669, 6 W.W.Harr. 341.
Ind.—Hall v. State, 159 N.E. 420, 199 Ind. 592.
Tenn.—Rucker v. State, 129 S.W.2d 208, 174 Tenn. 569.

67. W.Va.—State v. Angelina, 80 S.E. 141, 73 W.Va. 146, 51 L.R.A., N.S., 877.
29 C.J. p. 1078, note 3.

68. Pa.—Commonwealth v. Grimm, 5 Pa. Dist. & Co. 287.
Tenn.—Letner v. State, 299 S.W. 1049, 1051, 156 Tenn. 68, 55 A.L.R. 915, quoting **Corpus Juris.**
Vt.—State v. Rounds, 160 A. 249, 104 Vt. 442.
29 C.J. p. 1078, note 4.

69. Cal.—People v. Freeman, 60 P.2d 333, 16 Cal. App. 2d. 101.
Ind.—Hicks v. State, 11 N.E.2d 171, 213 Ind. 277, certiorari denied Hicks v. State of Indiana, 58 S.Ct. 951, 304 U.S. 561, 82 L.Ed. 1531.
Okl.—Pitts v. State, 8 P.2d 78, 53 Okl.Cr. 165.

70. Cal.—People v. Freeman, 60 P.2d 333, 16 Cal. App. 2d. 101.
Ind.—Hicks v. State, 11 N.E.2d 171, 213 Ind. 277, certiorari denied Hicks v. State of Indiana, 58 S.Ct. 951, 304 U.S. 561, 82 L.Ed. 1531.
Mass.—Commonwealth v. Giacomazzi, 42 N.E.2d 506, 311 Mass. 156.
Okl.—Pitts v. State, 8 P.2d 78, 53 Okl.Cr. 165.
S.C.—State v. Luster, 182 S.E. 427, 178 S.C. 199.
Vt.—State v. Rounds, 160 A. 249, 104 Vt. 442.
29 C.J. p. 1082, note 26.

Return to burning building

Where homicide has resulted from setting a building on fire, the perpetrator is not relieved of responsibility by the fact that the victims might have escaped if their father had not directed them to return to a certain part of the building to recover some money or other property.—State v. Leopold, 147 A. 118, 110 Conn. 55.

Push by third person

Where blow by accused dazed deceased and caused him to stagger against another who pushed him in an attempt to straighten him up, and deceased still dazed and staggering, took a few steps and fell against a projection on an iron post which resulted in his death, accused was responsible as against the contention that the push by the third party was an independent intervening cause of death.—Conner v. State, 177 So. 46, 179 Miss. 795.

71. Fla.—Graives v. State, 172 So. 716, 127 Fla. 182.—Austin v. State, 132 So. 191, 193, 101 Fla. 990, citing **Corpus Juris.**
Neb.—Benton v. State, 247 N.W. 21, 124 Neb. 185.
Okl.—Clark v. State, 224 P. 738, 717, 27 Okl.Cr. 11, citing **Corpus Juris.**
Or.—State v. Newberg, 278 P. 568, 129 Or. 561, 63 A.L.R. 1225.
Tenn.—Letner v. State, 299 S.W. 1049, 1051, 156 Tenn. 68, 55 A.L.R. 915, quoting **Corpus Juris.**
Tex.—Guajardo v. State, 139 S.W.2d 85, 88, 139 Tex.Cr. 201, quoting **Corpus Juris.**—Vasquez v. State, 52 S.W.2d 1056, 1057, 121 Tex.Cr. 478, quoting **Corpus Juris.**
29 C.J. p. 1079, note 5, p. 1155, note 5.
Death from erroneous treatment of injury, see infra subdivision c of this section.

72. Fla.—Brinson v. State, 198 So. 15, 141 Fla. 228.
Ky.—Payne v. Commonwealth, 75 S.W.2d 11, 255 Ky. 533.

73. Okl.—Pitts v. State, 8 P.2d 78, 53 Okl.Cr. 165.
29 C.J. p. 1079, note 6.

74. Ark.—Wilson v. State, 68 S.W.2d 100, 102, 188 Ark. 846, quoting **Corpus Juris.**
29 C.J. p. 1077, note 98.

Quarrel inducing brain hemorrhage

A disturbance of the peace by violent quarrels between two brothers, during which defendant ejected his mother from the house, which precipitated as a natural and probable consequence a hemorrhage in the brain of the mother, causing her death, is sufficient to authorize a conviction for manslaughter.—People v. Studer, 211 P. 233, 59 Cal. App. 547.

75. Tenn.—State v. Barnes, 212 S.W. 100, 111 Tenn. 469.
29 C.J. p. 1078, note 99.

76. Idaho.—In re Heigho, 110 P.

cause of the death, a conviction may be sustained for a death caused by fright, fear, or terror alone,[77] even though no hostile demonstration or overt act was directed at the person of deceased.[78] Clearly one is responsible if death resulted from the combined effect of physical injury and fright occasioned by his unlawful act.[79]

Contributory negligence of deceased If a negligent or culpable act of accused was a cause of death, it is not a defense to a prosecution for homicide that the negligence of deceased contributed thereto,[80] notwithstanding the contributory negligence was such as would defeat a civil action for damages.[81] However, decedent's conduct may show that accused's act was not the cause[82] or was not, under the circumstances, negligence.[83]

Death from act of deceased caused by accused's conduct Accused is responsible if the direct cause was an act of deceased himself reasonably due to accused's unlawful conduct.[84] In accordance with this rule a person who by actual assault or threat of violence causes another, acting on well grounded or reasonable fear or apprehension, to do an act resulting in physical or corporeal injury causing his death is responsible for homicide.[85] In order to fasten responsibility on him, however, it is essential that the fear or apprehension under which the deceased acted should have been well grounded or reasonable.[86]

1029, 18 Idaho 566, Ann Cas 1912A 138, 32 L R A,N S, 877
29 C J p 1080 note 12

77. Idaho—In re Heigho, supra
29 C J p 1150 note 58 p 1080 note 13

78. Idaho—In re Heigho, supra

79. N Y—Cox v People, 80 N Y 500

80. Ala Thornton v State, 108 So 80, 21 Ala App 323
Cal—People v Pociask 96 P 2d 788 793, 11 Cal 2d 679, citing **Corpus Juris**—People v Marconi, 5 P 2d 971 976 118 Cal App 683 quoting **Corpus Juris**
Kan—State v Custer 282 P 1071, 129 Kan 381 67 A L R 909
La—State v Wilbanks 123 So 600, 601 168 La 861 citing **Corpus Juris.**
Mich—People v McMurchy, 228 N W 723 249 Mich 147
Neb—Lenton v State 247 N W 71, 73, 124 Neb 485 citing **Corpus Juris**
N C—State v Cope, 167 S E 156, 204 N C 28
Pa—Commonwealth v Aurick 19 A 2d 920, 342 Pa 282, reversing 16 A 2d 129 142 Pa Super 364
S D—State v Nuzum, 231 N W 665, 668, 58 S D 6, citing **Corpus Juris**
Tenn—Letner v State, 299 S W 1049, 1051 156 Tenn 68 55 A L R 915, quoting **Corpus Juris**
Tex—Biscamp v State 154 S W 2d 466, 142 Tex Cr 401—Guajardo v State, 139 S W 2d 85, 88, 139 Tex Cr 201 quoting **Corpus Juris**—Stover v State, 104 S W 2d 48 132 Tex Cr 356—Vasquez v State, 52 S W 2d 1056 1057, 121 Tex Cr 478 quoting **Corpus Juris.**
Wash—State v Ramser, 136 P 2d 1013
29 C J p 1079 note 5, p 1155 note 4
Erroneous treatment of injury by deceased see infra subdivision c of this section

Negligence as to escape from burning building
In a prosecution for homicide as the result of the burning of a building the negligence of the victims with respect to making their escape from the premises does not constitute a defense
Conn State v Leopold, 147 A 118, 110 Conn 55
Ky—Embry v Commonwealth, 32 S W 2d 979 236 Ky 204

81. Ky—Embry v Commonwealth, supra
"Contributory negligence and other kindred defensive issues which ordinarily arise in civil actions for damages for personal injuries have no application to and do not govern negligent homicide cases."—Click v State 164 S W 2d 664, 666, 144 Tex Cr 468

82. Kan—State v Custer 282 P 1071, 129 Kan 381 67 A L R 909
N C—State v Eldridge, 150 S E 125, 197 N C 626
Tex—Guajardo v State Tex Cr 139 S W 2d 85 88, 139 Tex Cr 201, quoting **Corpus Juris**—Vasquez v State, 52 S W 2d 1056 1057, 121 Tex Cr 178, quoting **Corpus Juris**
29 C J p 1155 note 6

83. Tex—Guajardo v State 139 S W 2d 85, 88 139 Tex Cr 201, quoting **Corpus Juris**—Vasquez v State, 52 S W 2d 1056 1057, 121 Tex Cr 478 quoting **Corpus Juris.**
Wash—State v Ramser, 136 P 2d 1013
29 C J p 1155 note 7

84. Conn State v Leopold, 147 A 118, 121 110 Conn 55, citing **Corpus Juris**
Ind—Stephenson v State, 179 N E 633, 205 Ind 141, error coram nobis dismissed 186 N E 293, 205 Ind 141
Tenn—Letner v State, 299 S W 1049, 1051, 156 Tenn 68, 55 A L R 915, quoting **Corpus Juris.**
29 C J p 1079 note 8

Placing poison for another to take
Responsibility for homicide attaches to one who puts poison in the way of another to take innocently—Cassell v Commonwealth, 59 S W 2d 511 248 Ky 579—29 C J p 1079 note 8 [b]

85. Ky—Sanders v Commonwealth, 50 S W 2d 37, 39, 241 Ky 77, citing **Corpus Juris.**
29 C J p 1080 note 9

Causing victim to jump from window
Intentional act reasonably calculated to produce and actually producing well grounded belief that life is in danger and inducing deceased to jump from window to escape resulting in death constitutes intentional killing—White side v State, 29 S W 2d 399, 115 Tex Cr 271—29 C J p 1080 note 9 [a] (8), (9)

In Georgia
(1) Where one committed a felonious assault on another that is, an offense punishable either by death or confinement in the penitentiary, and the act of the other in avoidance of such felonious assault resulted in his death the offense is murder whether or not the act of avoidance was that of a reasonably prudent person under the circumstances—Patterson v State, 184 S E 309, 181 Ga. 698

(2) Where the assault was not such as is punishable by death or confinement in the penitentiary, and the victim did that which a reasonably prudent person would have done, if the act of avoidance was one which in its consequences naturally tended to destroy the life of a human being the offense is murder, but, if the act of avoidance was one which in its consequences did not naturally tend to destroy life, the offense is involuntary manslaughter—Patterson v State supra

86. Ky—Hendrickson v Commonwealth, 3 S W 166, 85 Ky 281, 8 Ky L 914, 7 Am S R 596
29 C J p 1080 note 10

b. Proximate Cause; Natural Result of Act

The act of accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of accused, as where the direct cause was a disease or infection resulting from the injury inflicted by accused

To warrant a conviction for homicide it is necessary,[87] but sufficient,[88] to establish that the act of accused was a proximate cause of death In this connection proximate cause does not necessarily mean the last act of cause or the act nearest in point of time to the death, it means rather nearness in point of causal relation [89] Accused's act or omission need not be the immediate cause of the death and he is responsible if the direct cause resulted naturally from his conduct [90] An injury is the efficient, proximate cause of the death where it directly and materially contributed to the happening of a subsequent accruing immediate cause of the death,[91] or, as the rule is sometimes stated, if the act of accused was the cause of the cause of death, no more is required [92]

It is not sufficient that the act of accused was the cause of a condition or situation affording an opportunity for the compassing of the death by some other unconnected agency,[93] so that, if the injury inflicted by accused was not mortal, and deceased, while suffering from its effects, became ill with a disease not caused by the injury, from which disease death resulted, he who inflicted the injury is not responsible for the death,[94] although the fatal progress of the disease was accelerated by the enfeebled or irritated condition of deceased caused by the injury [95]

Death from condition caused by injury Accused cannot escape responsibility where his act produced a condition causing death, although the condition might have been the immediate cause of death [96] If a wound or other injury causes a disease or infection, such as gangrene, empyema, erysipelas pneumonia, or the like, from which deceased dies, he who inflicted the wound or other injury is responsible for the death,[97] particularly if there is

87. Ga —Nelson v State, 198 S E 305, 58 Ga App 243
N C —State v Satterfield, 153 S E 155, 198 N C 682—State v Everett, 140 S E 22, 194 N C 142

88. Del —State v Benton, 187 A 609, 8 W W Harr 1
Ga —Wilson v State, 10 S E 2d 861, 190 Ga 824
Okl —Baker v State, 292 P 82, 48 Okl Cr 358

89. Tenn —Letner v State 299 S W 1049, 156 Tenn 68, 55 A L R 915

90. Ark —Wilson v State, 68 S W 2d 100, 102, 188 Ark 846, quoting **Corpus Juris.**
Conn —State v Leopold, 147 A 118, 121, 110 Conn 55, citing **Corpus Juris.**
Ind —Hicks v State, 11 N E 2d 171, 213 Ind 277, certiorari denied Hicks v State of Indiana, 58 S Ct 951 304 U S 561, 82 L Ed 1531—Hall v State, 159 N E 420, 199 Ind 592
Pa —Commonwealth v Scovern, 140 A 611, 292 Pa 26—Commonwealth v Grimm, 5 Pa Dist & Co 287
S C —State v Luster, 182 S E 427, 178 S C 199—State v Francis, 149 S E 348, 152 S C 17, 70 A L R 1133
Tenn —Letner v State, 299 S W 1049, 1051, 156 Tenn 68, 55 A L R 915, quoting **Corpus Juris.**
Vt —State v Rounds, 160 A 249, 104 Vt 442
29 C J p 1079 note 7
'One who inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependent upon and arising out of the original cause '—Rucker v State, 129 S W 2d 208, 210, 174 Tenn 569

Intervening cause as natural result
Accused is responsible for an intervening cause of death which was the natural result of his wrongful acts
Tenn —Letner v State, 299 S W 1049, 156 Tenn 68, 55 A L R 915
Vt —State v Rounds, 160 A 249, 104 Vt 442

Concurrent or next proximate cause
The act of accused need not have been a concurrent cause or the next proximate cause of death
Ark —Taylor v State, 101 S W 2d 956, 193 Ark 691
Vt —State v Rounds, 160 A 249, 104 Vt 442

Burns resulting from blow with lamp
Where during a quarrel accused struck victim with lighted lamp, which broke and fell to the floor causing the oil to ignite and set fire to the rug, and, in the course of scuffle which ensued on the floor, victim's clothes caught fire, resulting in burns from which he died, there was a sufficient causal relation between the death and the acts of accused to warrant a conviction for homicide —Williams v U S, 20 F 2d 269, 57 App D C 253

91. Ga —Wilson v State, 10 S E 2d 861, 190 Ga 824

92 Ark —Taylor v State, 101 S W 2d 956, 193 Ark 691
Vt —State v Rounds, 160 A 249, 104 Vt 442

93. Ga —Nelson v State, 198 S E 305, 58 Ga App 243
29 C J p 1080 note 15.

94. Miss —Quinn v State, 64 So 738 106 Miss 844
29 C J p 1081 note 17

95. Ga —Nelson v State, 198 S E 305, 58 Ga App 243
Va —Livingston v Commonwealth, 14 Gratt 592, 55 Va 592

96. Pa —Commonwealth v Williams, 156 A 86, 304 Pa 299

Hemorrhage
Accused is responsible where the immediate cause of death was a hemorrhage which was caused by his acts —Commonwealth v Williams, 156 A 86, 304 Pa 299

Shock
It is not a defense that death ensued from shock superinduced by the act of accused —Barron v State, 193 So 190, 29 Ala App 137

Brain injury produced by poisoning
Accused who administered strychnine to deceased is responsible for death ensuing from brain injury produced by the effect of the poisoning —People v Cobler, 37 P 2d 869, 2 Cal App 2d 375

97. Ga —Wilson v State, 10 S E 2d 861, 865, 190 Ga. 824, citing **Corpus Juris.**
Ind —Hall v State, 159 N E 420, 426, 199 Ind 592, citing **Corpus Juris.**
Ky —Commonwealth v Kilburn, 34 S W 2d 728, 236 Ky 828
Miss —Springer v State, 92 So 633, 129 Miss 589
Okl —Baker v State, 292 P 82, 48 Okl Cr 358
Pa —Commonwealth v Williams, 156 A 86, 304 Pa 299—Commonwealth v Grimm, 5 Pa Dist & Co 287
Tex —Wilson v State, 126 S W 2d 977.

no evidence of gross neglect or improper treatment [98]

c. Improper Treatment of Injury

It is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto, but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another.

One who has inflicted an injury which is dangerous, that is, calculated to destroy or endanger life, is not relieved of responsibility by the fact that the immediate or a contributing cause of the death was erroneous or unskillful medical treatment or care of the injury [99] by deceased,[1] or by a physician,[2] or by nurses or other attendants [3] Thus it is not a defense that the victim died during or as the immediate result of a surgical operation rendered necessary by the existence of the wound,[4] or that there was a possible mode of treatment which might have averted death,[5] or that deceased might have recovered if he had submitted to an operation,[6] or had adopted a different diet [7] One who inflicts an injury is not responsible, however, where death results solely from erroneous or unskillful treatment of the injury [8] In a jurisdiction where the statutes in effect so provide, one who has inflicted an injury which would not otherwise have been fatal is not responsible for a death occurring as a result of gross negligence or manifestly improper treatment [9]

d. Prior Causes

Responsibility for homicide attaches to one who accelerates the death of a person in poor physical condition, although the injury inflicted would not have killed a healthy person, and although the condition from which the victim was suffering would itself probably have been fatal Accused's ignorance of the victim's poor condition is immaterial

Responsibility attaches where the injury material-

136 Tex Cr 590—Embrey v State, 251 S W 1062, 94 Tex Cr 591
29 C J p 1080 note 16

Septicemia; blood poisoning

If the wound caused death indirectly through the consequential development of septicemia or blood poisoning, he who inflicted the wound or injury is responsible —Hall v State, 159 N E 420 199 Ind 592

98. Tex —Franklin v State 128 S W 2d 389, 137 Tex Cr 136—Moore v State 71 S W 2d 531, 126 Tex Cr 391

99. Ala —Washington v State App 13 So 2d 200, certiorari denied, Sup, 13 So 2d 203—Ingram v State, 194 So 694, 29 Ala App 144, certiorari denied 194 So 697, 239 Ala 244—Tate v State, 122 So 461, 23 Ala App 122, certiorari denied 122 So 462, 219 Ala 361—Bailey v State, 113 So 830, 22 Ala App 185—Lawman v State, 93 So 69, 18 Ala App 569
Ark —Taylor v State 101 S W 2d 956, 193 Ark 691
Ga —Crews v State, 162 S E 146, 41 Ga App 546
Ind —Hall v State, 159 N E 420, 426, 199 Ind 592, citing **Corpus Juris.**
Ky —King v Commonwealth, 148 S W 2d 1044, 285 Ky 654
29 C J p 1081 note 23

Absence of prompt medical aid

(1) The fact that a surgeon was not at hand to render immediate aid to one dying from an injury inflicted by accused is not a supervening cause relieving accused from responsibility for homicide Embrey v State, 251 S W 1062, 94 Tex Cr 591

(2) The fact that a knife wound was not of itself necessarily fatal, and that deceased died from loss of blood, which might have been prevented if medical aid had been promptly obtained, does not affect defendant's guilt —Mason v State, 251 S W 1065, 94 Tex Cr 532

1. Ala —Ingram v State, 194 So 694 29 Ala App 144, certiorari denied 194 So 697, 239 Ala 244—Bailey v State 113 So 830, 22 Ala App 185 —Lawman v State, 93 So 69, 18 Ala App 569
Del —State v Johnson, 175 A 669, 6 W W Harr 341
Ky – King v Commonwealth, 148 S W 2d 1044 285 Ky 654
29 C J p 1082 note 24

Leaving hospital contrary to instructions

Where deceased struck by defendant, fell and sustained cerebral injury, even if deceased's act in leaving hospital contrary to physician's instruction hastened death of deceased, or was a contributing cause thereof, or if deceased would not have died had he remained in hospital such facts did not preclude conviction – State v Myers, 125 P 2d 441, 59 Ariz 200

2. Ariz —State v Myers, supra
Ind - Hall v State, 159 N E 420 199 Ind 592
Okl - Baker v State, 292 P 82, 48 Okl Cr 158
29 C J p 1081 note 20

3. Ala - -Ingram v State, 194 So 694, 29 Ala App 144, certiorari denied 194 So 697, 239 Ala 244—Bailey v State, 113 So 830 22 Ala App 185—Lawman v State, 93 So 69, 18 Ala App 569
29 C J p 1082 note 25

4. Ind - Hall v State, 159 N E 420 199 Ind 592
Neb —Phegley v State, 202 N W 419, 113 Neb 138
Pa —Commonwealth v Williams, 156 A 86, 304 Pa 299

In Kentucky

(1) The rule is as stated in the text —King v Commonwealth, 148 S W 2d 1044, 285 Ky 654

(2) However there is early authority to the effect that accused is not responsible for a death resulting from an operation which, although deemed necessary, was not performed with ordinary skill even though the injuries would eventually have proved fatal — Coffman v Commonwealth, 10 Bush 495

5. Ala —Ingram v State, 194 So 694 29 Ala App 144, certiorari denied 194 So 697, 239 Ala 244—Tate v State, 122 So 461, 23 Ala App 122 certiorari denied 122 So 462, 219 Ala 361
29 C J p 1081 note 23 [b]

6. Ky —King v Commonwealth, 148 S W 2d 1044, 285 Ky 654

7. Ala —Bailey v State, 113 So 830, 22 Ala App 185

8. Ind —Hall v State, 159 N E 420, 426, 199 Ind 592, quoting **Corpus Juris.**
29 C J p 1081 note 21

Victim's misconduct or maltreatment of wound

One who has inflicted a wound which is not calculated or likely to endanger life is not responsible for homicide where death resulted solely as a result of the victim's misconduct or maltreatment of the wound —State v Johnson, 175 A 669, 6 W W Harr, Del, 341

9 Tex —Noble v State, 113 S W 281, 54 Tex Cr 436, 22 L R A, N S, 841
29 C J p 1082 note 27.

ly accelerates the death, although the death is proximately occasioned by a preexisting cause[10] Thus if deceased was diseased or in feeble health and died from the combined effects of the injury and of his physical condition, or if the injury accelerated the death from his physical condition, he who inflicted the injury is liable,[11] although the injury alone would not have been fatal had deceased been well[12] Similarly, accused is liable if deceased was suffering from a prior injury and the act of accused contributed to or accelerated his death, as where accused inflicted additional wounds which hastened the death of one already mortally wounded[13] Responsibility attaches for an injury which accelerated death although the condition from which the victim was suffering would itself probably have caused death,[14] or might have done so[15] The vitality which the victim possessed at the moment of accused's act, and the fact that he would have lived for only a short time in any event, are immaterial considerations, if any life at all was left the extinguishment of it is homicide[16] It is immaterial that accused did not know that deceased was in the feeble condition which facilitated the killing,[17] or that he did not reasonably anticipate that his act would cause death[18] If the death was solely due to disease, and was not caused or hastened by the injury, accused is not liable[19]

§ 12. Time of Death

Unless the statutes otherwise provide, the common-law rule prevails that death must occur within a year and a day from the injury For certain purposes the death relates back to the time of the injury.

At common law, and in the absence of statutes otherwise providing if more than a year and a day intervene between the injury and the death of the victim, the injury is not legally deemed the cause of the death, and the person who inflicted it is not criminally responsible for the homicide[20] The common-law rule is not abrogated by a statute providing for a short form of indictment in which an allegation that death occurred within a year and a day is unnecessary[21] In at least one jurisdiction the common-law rule has been abrogated by statute and it is no longer necessary that death result within a year and a day from the time of the injury[22]

When the death does occur within a year and a day, it relates back, for certain purposes, to the time at which the injury was inflicted[23] Accused must, for example, be tried according to the laws in force at that time[24]

10. Ga —Wilson v State, 10 S E 2d 861, 190 Ga 824

11. Ariz —Rutledge v State, 15 P 2d 255, 41 Ariz 48
Ga —Nelson v State, 198 S E 305, 58 Ga App 243—Wells v State 167 S E 709, 710 46 Ga App 412 quoting **Corpus Juris.**
Ky —Dial v Commonwealth, 109 S W 2d 41, 270 Ky 78
Mo —State v Frazier, 98 S W 2d 707, 713 339 Mo 966, quoting **Corpus Juris**
Tex - Embrey v State, 251 S W 1062, 94 Tex Cr 591
29 C J p 1082 note 28

12 Ariz —Rutledge v State, 15 P 2d 255 41 Ariz 48
Fla —Williamson v State, 111 So 245 92 Fla 1094
Ga Nelson v State, 198 S E 305, 58 Ga App 243—Wells v State 167 S E 709, 710, 46 Ga App 412, quoting **Corpus Juris.**
Mo —State v Frazier, 98 S W 2d 707, 713, 339 Mo 966, quoting **Corpus Juris**
Okl —Baker v State, 83 P 2d 586, 65 Okl Cr 136
29 C J p 1082 note 29

13. Ky —Payne v Commonwealth, 75 S W 2d 14, 255 Ky 533
Or —State v Weston, 64 P 2d 536, 545, 155 Or 556, 108 A L R 1402, citing **Corpus Juris.**
S C —State v Francis, 149 S E 348 364, 152 S C 17, 70 A L R 1133, quoting **Corpus Juris.**
Tex - Embrey v State, 251 S W 1062, 94 Tex Cr 591
29 C J p 1083 note 34, p 1078 note 2

14. Ariz —Rutledge v State, 15 P 2d 255 41 Ariz 48
Ga Wells v State, 167 S E 709 710, 46 Ga App 412, quoting **Corpus Juris**
Mo —State v Frazier, 98 S W 2d 707, 713, 339 Mo 966 quoting **Corpus Juris.**
29 C J p 1082 note 30

15 Ala —Barron v State, 193 So 190, 29 Ala App 137

16. S C —State v Francis, 149 S E 348, 152 S C 17, 70 A L R 1133

17 Ga - Nelson v State 198 S E 305 58 Ga App 243—Wells v State 167 S E 709 710, 46 Ga App 412, quoting **Corpus Juris.**
Mo —State v Frazier 98 S W 2d 707, 713, 339 Mo 966, quoting **Corpus Juris**
29 C J p 1082 note 31

18 Ga — Wells v State 167 S E 709 710 46 Ga App 412, quoting **Corpus Juris.**
Mo —State v Frazier, 98 S W 2d 707, 713, 339 Mo 966, quoting **Corpus Juris.**
29 C J p 1082 note 32

19 Ga —Wells v State, 167 S E 709, 710 46 Ga App 412, quoting **Corpus Juris.**
29 C J p 1082 note 33.

20. Ala —Howard v State, 137 So 532, 24 Ala App 512 certiorari denied 137 So 535, 223 Ala 529
Ga Head v State, App, 24 S E 2d 115
Ind —Alderson v State, 145 N E 572 196 Ind 22
La -State v Moore 199 So 661, 662 196 La 617, quoting **Corpus Juris**
Wash State v Spadoni, 213 P 851 856 137 Wash 684, citing **Corpus Juris.**
29 C J p 1083 notes 35, 36

Involuntary manslaughter
There is some authority which while recognizing the existence of the year-and-a-day rule at common law with respect to felonious homicide holds that the rule has no application to involuntary manslaughter —Commonwealth v Evaul, 5 Pa Dist & Co 105

21. La - State v Moore, 199 So 661, 196 La 617
Necessity that indictment allege death within a year and a day see infra § 155

22 N Y —People v Brengard, 191 N E 850, 265 N Y 100 93 A L R 1165 —People v Legeri, 266 N Y S 86, 239 App Div 47

23 Ala —Howard v State 137 So 532, 24 Ala App 512, certiorari denied 137 So 535, 223 Ala 529
29 C J p 1083 note 37

24. Ala —Howard v State, supra
29 C J p 1083 note 38.

II. MURDER

A. IN GENERAL

§ 13. Definition

Murder consists in the unlawful killing of a human being with malice aforethought

Murder, as defined at common law and by statutes declaratory thereof, consists in the unlawful killing of a human being with malice aforethought [25] The statutes in some jurisdictions simply prescribe the punishment for murder without

25. U S—U S v Martin, D C Or, 17 F 150, 9 Sawy 90
Ariz—Lasater v State, 81 P 2d 83, 52 Ariz 366—Williams v Territory, 114 P 556, 13 Ariz 306
Cal—People v Lee Look, 70 P 660 137 Cal 590—People v Evans, 56 P 1024, 124 Cal 206—People v Schmidt, 63 Cal 28 People v Cronin 34 Cal 191—People v Murray, 10 Cal 309—People v Weeks 286 P 514, 104 Cal App 708—People v Anderson, 208 P 204 57 Cal App 721 People v Huntington, 97 P 760 762 8 Cal App 612 People v Frank, 83 P 578 2 Cal App 283
Colo—Murphy v People, 13 P 528, 9 Colo 435
Conn—State v Jacowitz 20 A 2d 470 128 Conn 40
Del—State v Donovan, 8 A 2d 876, 1 Terry 257
Idaho—State v Phinney 89 P 634 13 Idaho 307, 12 L R A, N S 933, 12 Ann Cas 1079—People v O'Callaghan, 9 P 414, 2 Idaho 143
Ill—People v Lewis 31 N E 2d 795 375 Ill 330, certiorari denied Lewis v People of State of Illinois, 62 S Ct 58, 311 U S 628 86 L Ed 504—People v Goldvarg, 178 N E 892, 346 Ill 398
Iowa—State v Leib, 201 N W 29, 198 Iowa 1315
Me—State v Sprague 199 A 705 135 Me 470—State v Neal 37 Me 468
Mich—People v Austin, 192 N W 590, 221 Mich 645
Mont—State v Chavez, 281 P 352, 354 85 Mont 541—State v Gondeiro, 268 P 507, 82 Mont 530—State v Nelson, 100 P 229 38 Mont 451—State v McGowan, 93 P 552, 36 Mont 422—State v Hiboka, 78 P 965 31 Mont 455 3 Ann Cas 931—State v Sloan, 56 P 361 22 Mont 293—Territory v Manton 14 P 637, 7 Mont 162
Neb—Marion v State, 20 N W 289, 16 Neb 349
Nev—State v Thompson, 12 Nev 140
N M—State v Roy, 60 P 2d 646, 655, 40 N M 397, citing **Corpus Juris.**
N C—State v Banks, 57 S E 171, 176, 143 N C 652
Pa—Commonwealth v McLaughlin 142 A 213, 293 Pa 218—Commonwealth v Grimm, 5 Pa Dist & Co 287
S C—State v Bowers, 43 S E 656, 65 S C 207, 95 Am S R 795
Utah—State v McDonald, 46 P 872, 14 Utah 173
Wis—State v Scherr, 9 N W 2d 117, 243 Wis 65
29 C J p 1083 note 39
Homicide as including murder see supra § 1

Murder exists if accused killed deceased unlawfully and maliciously and without justification Hill v State, 138 S E 229, 164 Ga 298

Other definitions

(1) At common law, murder was, and still is, defined to be when a person of sound memory and discretion unlawfully kills a human being, with malice aforethought, either express or implied—State v Harrigan, 31 A 1052 9 Houst, Del 369

(2) Murder is the killing of any reasonable creature in being, with malice aforethought, express or implied
Del—State v Foreman 41 A 141, 1 Marv 517
Va—Whiteford v Commonwealth 6 Rand 721, 723, 27 Va 721, 723, 18 Am D 771

(3) "Murder" is the intentional killing of a human being—Doggett v State 93 S W 2d 399, 130 Tex Cr 208

(4) Other definitions
Ark—Dillard v State, 46 S W 533, 535 65 Ark 101
Del—State v People, Del, 33 A 257 9 Houst 188—State v Walker, Del, 33 A 227 9 Houst 161
Hawaii—Republic of Hawaii v Tsunikichi, 11 Hawaii 311
Ill—People v St Clair 91 N E 573 244 Ill 441—Kirkham v People 48 N E 165, 166, 170 Ill 9—Adams v People, 109 Ill 111 150, 50 Am R 617
N C—State v Johnson, 23 N C 354 362 35 Am D 742
Okl—Wilcher v Territory, 90 P 887, 18 Okl 528
Tenn—Morgan v State, 256 S W 433 148 Tenn 117
Va—Robertson v Commonwealth 20 S E 362, 364, 1 Va Dec 851

Peace of state

(1) "Murder," as defined by the common law, is "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace with malice aforethought, either express or implied"
U S—U S v Carr, C C Ga, 25 F Cas No 14732 1 Woods 480
Ala—Clarke v State, 23 So 671, 674, 117 Ala 1, 67 Am S R 163—Brown v State, 20 So 103, 104, 109 Ala 70
Dak—Territory v Bannigan, 46 N W 597, 1 Dak 451
Minn—Bonfanti v State, 2 Minn 123, 131
Mo—State v Wieners, 66 Mo 13, 21
Neb—Milton v State, 6 Neb 136, 138
Pa—Commonwealth v Martin 9 Kulp 69 70, 7 Pa Dist 219—Commonwealth v Moore 2 Pittsb R 502, 503, 11 Pittsb L J 369
Tenn—Fields v State, 1 Yerg 156, 159

(2) Equivalent phrases such as "in the peace of the sovereign" or "of the people" or "peace of the state" or "commonwealth" are also sometimes employed in the definition
U S—U S v Lewis, C C Tex, 111 F 630—U S v King, C C N Y, 34 F 302
Ark—Noble v State, 112 S W 2d 631, 195 Ark 453—Franklin v State, 240 S W 708, 153 Ark 536
Del—State v Jones, 47 A 1006 1007, 2 Penew 573 State v Miller 32 A 137, 138, 9 Houst 561
Ga—Smith v State, 55 S E 475, 126 Ga 541
Kan—State v Estep 24 P 986, 987, 41 Kan 572—State v Nixon, 4 P 159, 164, 32 Kan 572
Pa—Commonwealth v Patterson, 41 Dist & Co 215, 23 Erie Co 215—Kilpatrick v Commonwealth, 31 Pa 198 3 Phila 237 238, 15 Leg Int 347—Commonwealth v Sayres 12 Phila 553 555 5 W N C 121
Wash—Planton v State, 24 P 139, 1 Wash 265
Wash—Blanton v State, 24 P 439, 1 Wash 265
29 C J p 1083 note 39 [a]

(3) The phrase "in the peace of the state" is used to negative the idea that deceased was actually engaged at the moment in waging war against the state all others being entitled to the protection of the law—State v Corneille, 96 So 813, 153 La 929

Unlawfully

"It is not every homicide committed deliberately, premeditatedly, and with malice that is murder The homicide must in addition, have been done unlawfully"—Slayton v State,

specifically defining the offense, in which case the common-law definition is to be resorted to [26] Other statutes adopt the common-law definition and merely provide a more severe penalty where certain features are present,[27] or declare certain specifically described classes of homicide to be murder,[28] usually in connection with the division of the offense into degrees, see infra §§ 29–36 Statutes embracing the common-law definition of murder should be interpreted as is the common-law [29]

The crime of murder is a composite one It includes the assault committed on a person with intent to kill, and the resulting death from that assault Neither the assault nor the death of the person alone constitutes the crime [30]

The unlawful killing may be by any of the various means by which death may be occasioned [31]

Brutality The brutality or atrociousness of the homicide is not an element of the crime of murder [32]

Constructive murder The term "constructive murder" has been applied to those cases where, although the want of any actual intent to take life is conceded, yet the law, in view of some other malicious or criminal intent, punishes the offense as murder, and to cases of death produced through an utter wantonness and recklessness as to life in general, as well as to cases where the life of an officer is unintentionally taken when engaged in the performance of his duty [33]

Intent Murder involves intent,[34] that is, the act must have been with the required willful, felonious, and malicious intent on the part of accused,[35] and not under circumstances constituting justifiable or excusable homicide, see infra §§ 97–138 Although the general definition of malice in murder cases involves the deliberate intent unlawfully to take the life of a fellow creature, see infra § 14, a specific intent to kill, as discussed infra § 20, is not necessarily an essential element of the crime of murder

"Kill" distinguished The word "murder" implies something more than mere killing [36] It implies a felonious homicide, while the word "kill" does not contain such implication [37] The word "kill," when applied to persons, implies force, violence, a destruction of the organs necessary to life, and, if unaccompanied by any explanation or qualifying words, may have a felonious signification [38]

Motive As discussed infra § 318, proof of motive is not indispensable to a conviction of the crime of homicide

Petty treason distinguished At common law the crime of petty treason, discussed in the C J S title Treason § 1, also 63 C J p 814 note 4, was distinguished from murder only by the fact that it included the violation of that private allegiance which exists in the enumerated relations as to which the offense could be committed, and which was looked on as aggravating the degree of the offense, by making it treasonable in its nature Since murder was punished capitally, the distinction rested in the manner of punishment Such distinction is not recognized in the United States, and the sole effect of statutory abolition of the distinction is to abolish nothing, the distinction not existing [39]

173 So 612, 635, 27 Ala App 422, citing **Corpus Juris**, and reversed on other grounds 173 So 612, 234 Ala 1

Voluntary killing

Statute defining murder as voluntary killing of person held valid—Davis v State 10 S W 2d 116, 110 Tex Cr 605

26. Kan—State v Ireland, 83 P 1036, 72 Kan 265
29 C J p 1084 note 40

27. Conn—State v Lucowitz, 20 A 2d 470, 128 Conn 40

28 Tex—Robbins v State, 166 S W 528, 73 Tex Cr 367
29 C J p 1084 note 41

29. Ill—People v Lewis, 31 N E 2d 795, 375 Ill 330, certiorari denied Lewis v People of State of Illinois, 62 S Ct 58, 314 U S 628, 86 L Ed 504

30 S C—State v Rector, 155 S E 385, 158 S C 212
Assault with intent to commit murder see infra §§ 72–96

31 Mont—State v Gondeiro, 268 P 507, 82 Mont 530

Regardless of means

Homicide resulting from intentionally committed unlawful act is punishable, regardless of means and manner by which it was brought about—Landrum v Commonwealth, 99 S W 2d 787, 266 Ky 655

32. Mo—State v Murphy, 111 S W 2d 132, 341 Mo 1229
Circumstances of cruelty as indication of malice see infra § 24

33. N Y—Darry v People, 10 N Y 120
29 C J p 1083 note 39 [b]

34. Mich—People v Giacalone, 217 N W 758, 242 Mich 16

Gist of case

In prosecutions for murder, accused's intent is the gist of the case—Nash v Commonwealth, 42 S W 2d 898, 240 Ky 691

Malice aforethought

"While intent to kill is not an essential element of murder, the act of unlawful killing of itself does not constitute murder and malice aforethought, as the word 'aforethought' implies, requires an action of the brain prior to the act" People v Cochran, 145 N E 207, 212, 313 Ill 508

The material thing in homicide cases is the intent of the parties, and this may be shown by the previous actions leading up to the final act—Jones v Commonwealth, 60 S W 2d 991, 249 Ky 502

35. Ky—Privitt v Commonwealth 113 S W 2d 49, 271 Ky 665

36. Idaho—State v Sly, 80 P 1125, 11 Idaho 110
35 C J p 913 note 8

37. Ala—Pilcher v State, 77 So 75, 16 Ala App 237
35 C J p 913 note 10

38. N Y—Carroll v White, 33 Barb 615
35 C J p 913 note 11

39 Minn—State v. Bilansky, 3 Minn 246.

§ 14. Malice in General

Malice is a necessary element of the crime of murder It signifies a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

In the absence of a statute providing otherwise,[40] malice is a necessary element of the crime of murder[41] Malice or malice aforethought is the element which distinguishes murder at common law and, commonly, under the statutes defining murder, from other grades of homicide[42] Conversely, it has been stated that any unlawful killing of a human being with malice aforethought is murder,[43] and the character of weapon employed is immaterial if the act producing death is willfully and maliciously committed.[44]

40. In Florida it has been held that the statutory definitions of murder do not make malice an element of the offense —Riggins v State, 83 So 267, 78 Fla 459

In Texas

(1) Under the statute providing that whoever shall voluntarily kill any person within this state shall be guilty of murder murder may be committed with or without malice —Davis v State, 10 S W 2d 116, 110 Tex Cr 605

(2) Findings of malice are essential to support assessment of death penalty —Villareal v State, 146 S W 2d 406 140 Tex Cr 675

Murder without malice generally see infra § 38 b

41. Ala —Simpson v State, App, 13 So 2d 437

Ariz —Strickland v State, 294 P 617, 37 Ariz 368

Ark —Bramlett v State, 156 S W 2d 226, 202 Ark 1165

Cal —People v Pollock, 89 P 2d 128, 31 Cal App 2d 747

Colo —McAndrews v People, 208 P 186, 71 Colo 542, 24 A L R 655

Del —State v Lee, 171 A 195, 6 W W Harr 11

Ga —Shafer v State, 20 S E 2d 31, 193 Ga 718—Miller v State, 191 S E 115 184 Ga 136—Peek v State, 116 S E 629, 155 Ga 49

Ill —People v Motuzas 185 N E 614, 352 Ill 340—People v Wilson 174 N E 398, 342 Ill 358—People v Cochran 145 N E 207, 313 Ill 508

Iowa —State v Johnson, 245 N W 728 215 Iowa 483

La —State v Sevain, 156 So 162, 180 La 20

Me —State v Sprague, 199 A 705, 135 Me 470

Mo —State v Gadwood, 116 S W 2d 12 342 Mo 466

N J —State v Lederman 170 A 652, 112 N J Law 366

S C —State v Barfield, 122 S E 856, 128 S C 384

Va —Davidson v Commonwealth, 187 S E 437 167 Va 451—Mercer v Commonwealth, 142 S E 369, 150 Va 588—Scott v Commonwealth, 129 S E 360, 143 Va 510

W Va —State v Cassim, 163 S E 769, 112 W Va 92

29 C J p 1084 note 43

Material inquiry

In every case of homicide the material inquiry is whether the killing was done with malice and the intent to kill —Payne v Commonwealth, 75 S W 2d 14, 255 Ky 533

42. Ala —Roberson v State, 117 So 412, 217 Ala 696—Smith v State, App, 11 So 2d 466, certiorari denied 11 So 2d 473

Ariz —Harding v State, 225 P 482, 26 Ariz 334

Ark —Forrest v State, 288 S W 925, 172 Ark 1176—Stepp v State, 282 S W 684 170 Ark 1061—Dame v State, 262 S W 313, 164 Ark 430

Cal —People v King, 85 P 2d 928, 30 Cal App 2d 185

Conn —State v Jacowitz, 20 A 2d 470, 128 Conn 40

Del —State v Donovan, 8 A 2d 876, 1 Terry 257

Ga —Watson v State, 17 S E 2d 559, 66 Ga App 242

Ill —People v Papas, 44 N E 2d 896, 381 Ill 90—People v Lewis 31 N E 2d 795 375 Ill 330 certiorari denied Lewis v People of State of Illinois 62 S Ct 58 314 U S 628, 86 L Ed 501—People v Oberlin, 189 N E 333, 355 Ill 317

Iowa —State v Johnson, 234 N W 263, 211 Iowa 874

Ky —Noble v Commonwealth, 103 S W 2d 258 267 Ky 809—Tiernay v Commonwealth 43 S W 2d 661, 241 Ky 201—Parrott v Commonwealth, 298 S W 675, 221 Ky 202

La —State v Augusta, 7 So 2d 177, 199 La 896—State v Vial, 96 So 796 La La 883

Md —Neusbaum v State, 143 A 872, 156 Md 119

Pa —Commonwealth v Kelly 4 A 2d 805, 333 Pa 280—Commonwealth v Gibson 119 A 403, 275 Pa 338

R I State v Fenik, 121 A 218, 45 R I 509

Tenn —Garrison v State, 40 S W 2d 1009 163 Tenn 108—Toler v State, 260 S W 131 152 Tenn 1

Tex —Pinson v State, 251 S W 1092, 91 Tex Cr 517

Va —Williamson v Commonwealth, 23 S E 2d 240 180 Va 277—Thomason v Commonwealth 17 S E 2d 374, 178 Va 489—Davidson v Commonwealth, 187 S E 437, 167 Va 451—Bansell v Commonwealth, 181 S E 153, 165 Va 669—Hannah v Commonwealth, 149 S E 419, 153 Va 863—Harris v Commonwealth, 114 S E 597, 134 Va 688

W Va —State v Wilson, 121 S E 726, 95 W Va 525

29 C J p 1084 note 43.

Manslaughter is distinguished from murder by the absence of malice

Del —State v Phillips, 187 A 108, 7 W W Harr 544

Okl —Quick v State, 62 P 2d 1279, 1282, 60 Okl Cr 229, quoting **Corpus Juris.**

29 C J p 1123 note 40

43. Cal —People v King, 85 P 2d 928, 30 Cal App 2d 185

Ill —People v Guido, 152 N E 149, 321 Ill 397

Intentional killing as implying malice see infra § 17

Culpable homicide

One who intentionally inflicts a wound on another with a deadly weapon, from the effect of which death results without intervening cause is guilty of some grade of culpable homicide —Mason v State, 251 S W 1065, 94 Tex Cr 532

Deceased fleeing from robbery

Where it is charged that accused induced deceased to rob a bank in order that he might kill him and collect a reward therefor, if the killing of deceased was with malice and not to prevent him from fleeing with bank property at the time he was killed, accused would be guilty of murder —Alsup v State, 49 S W 2d 749, 120 Tex Cr 310

44. Ky —Landrum v Commonwealth, 99 S W 2d 787, 266 Ky 655 —Payne v Commonwealth, 75 S W 2d 14 255 Ky 533

Tex —Bearrow v State 118 S W 2d 594 135 Tex Cr 119—Pinson v State, 251 S W 1092, 91 Tex Cr 517—Walker v State, 251 S W 235, 91 Tex Cr 414

Use of deadly weapon as raising presumption of malice see infra § 25

Fists

One may commit murder by means of attack with fists or feet —State v Lloyd 87 S W 2d 418, 337 Mo 990

Life may be taken as result of an intent to take it although no deadly weapon in ordinary sense of that term is used —Commonwealth v. Kluska, 3 A 2d 398, 333 Pa 65

Without deadly weapon

A conviction for murder may be sustained even though the assault is made without a deadly weapon —State v Carter, 131 S W 2d 546, 345 Mo 74.

Definition. It is difficult to explain clearly what the law means by malice[45] Generally speaking, it signifies a condition of the mind and heart at the time of the fatal act[46] Malice is the deliberate intent unlawfully to take away the life of a fellow creature,[47] but it does not of necessity import ill-will toward the individual injured[48] or toward any particular person[49] Malice signifies a general malignant recklessness of the lives and safety of others,[50] or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief,[51] in other words, a malicious killing is one where the act is done without legal justification, excuse, or extenuation,[52] and malice has been frequently substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse[53] Malice includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive[54] It is not necessary that the killing be in cold blood or with settled design and premeditation[55] On the other hand, a killing is obviously malicious where the perpetrator is actuated by ill-will toward the individual,[56] or by motives of hatred[57] or revenge[58]

45 Del—State v Galvano, 154 A 461, 4 W W Harr 409

46. Del—State v Lee, 171 A 195, 6 W W Harr 11—State v Galvano 154 A 461, 4 W W Harr 409
Wyo—Eagan v State, 128 P 2d 215

Malice is a subjective condition of mind
W Va—State v Hamrick 163 S E 868 112 W Va 157

Willful or corrupt intention
"Malice, in its legal sense denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse It means any willful or corrupt intention of the mind"—Pembrook v State, 222 N W 956 957, 117 Neb 759—29 C J p 1086 note 50 [b] (2)

47. Ga—Hill v State 138 S E 229 161 Ga 298 -Vincent v State 112 S E 120, 153 Ga 278

Intent is a necessary part of malice - Busby v State 170 So 110, 177 Miss 68 setting aside, Sup, 168 So 286

Intent and will
Malice includes intent and will —State v Merry 8 A 2d 143 136 Me 243

Intent to injure
Malice is an intent to injure another - State v Covell, 232 P 628, 113 Or 254

48. Conn State v Jacowitz 20 A 2d 470 128 Conn 40
Del—State v Lee, 171 A 195, 6 W W Harr 11
Me—State v Merry, 8 A 2d 143, 136 Me 243
Mass—Commonwealth v Madeiros, 151 N E 297 255 Mass 304, 47 A L R 962—Commonwealth v Bedrosian 142 N E 778 247 Mass 573 29 C J p 1084 note 46

Preexisting hatred
Malice aforethought does not imply a preexisting hatred or enmity toward the individual injured—People v Coleman, 123 P 2d 557, 50 Cal App 2d 592

Unknown person
'A conspiracy to kill any person unlawfully if deemed necessary or convenient, coupled with the killing, even though the particular person was unknown or unheard of, is deliberate murder"—State v Nasello, 30 S W 2d 132, 137, 325 Mo 442

49. Tex—Johnson v State, 263 S W 924, 97 Tex Cr 658

Malice is not confined to ill will toward one or more individual persons but is intended to denote an action flowing from any wicked and corrupt motive State v Scherr 9 N W 2d 117 243 Wis 65

50. Del State v Lee 171 A 195, 6 W W Harr 11
29 C J p 1085 note 47

51. Ark—Noble v State 112 S W 2d 631 195 Ark 453
Cal—People v King, 85 P 2d 928 30 Cal App 2d 185
Conn—State v Jacowitz 20 A 2d 470, 128 Conn 40
D C—Liggins v U S, 297 F 881, 54 App D C 302
Ind -Brown v State, 189 N E 133 206 Ind 223
Iowa State v Burns 198 N W 82, 81 198 Iowa 1156, citing **Corpus Juris.**
Me—State v Merry, 8 A 2d 143, 136 Me 243
Mo—State v Gadwood, 116 S W 2d 42, 342 Mo 466
Pa—Commonwealth v Grimm, 5 Pa Dist & Co 287—Commonwealth v Foltz 5 Pa Dist & Co 559
Tex—Stephens v State, Cr 165 S W 2d 721—Barrow v State, 151 S W 2d 589 142 Tex Cr 125—Brewer v State, 113 S W 2d 599, 140 Tex Cr 9—Collins v State, 299 S W 103, 108 Tex Cr 72
Va—Wallen v Commonwealth, 114 S E 786 134 Va 773
Wis—State v Scherr, 9 N W 2d 117, 243 Wis 65
29 C J p 1085 note 48
"Malice is a legal term which comprehends not only a particular ill will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, or a mind regardless of social duty"—Commonwealth v McLaughlin 142 A 213, 215, 293 Pa 218

52 Cal—People v Coleman, 123 P 2d 557, 50 Cal App 2d 592
Mass—Commonwealth v Madeiros 151 N E 297, 255 Mass 304, 47 A L R 962
N C—State v Benson, 111 S E 869 183 N C 795
S C—State v Heyward, 15 S E 2d 669, 671 197 S C 371, quoting **Corpus Juris.**
29 C J p 1086 note 49

53. Mass—Commonwealth v Bedrosian, 142 N E 778, 247 Mass 573
Mo—State v Gadwood, 116 S W 2d 42, 342 Mo 466
Wyo -State v Sorrentino, 224 P 420 423, 31 Wyo 129, 34 A L R 1477, citing **Corpus Juris.**
29 C J p 1086 note 50

Any wrongful act
Malice means any wrongful act done wilfully or purposefully—Williamson v Commonwealth, 23 S E 2d 240 180 Va 277

However, an instruction that "The term 'malice' in its legal sense means the intentional doing of a wrongful act to another without legal justification" has been held to be erroneous in that it would apply equally to manslaughter—Collins v State, 299 S W 103 108 Tex Cr 72

54. Wis—State v Scherr 9 N W 2d 117 243 Wis 65
29 C J p 1086 note 49 [a]

55 U S—U S v Meagher, C C Tex, 37 F 875—U S v Cornell, C C R I, 25 F Cas Nos 14,867, 14,868, 2 Mason 60, 91

56. Ala—Bondurant v State, 27 So 775, 125 Ala 31
29 C J p 1087 note 54

57. Ga—Channell v State, 34 S E 353, 109 Ga 150

58. Okl—In re Fraley, 109 P 295, 3 Okl Cr 719, 139 Am S R 988
29 C J p 1087 note 56
"To kill with any degree of deliberation when no considerable provocation is given to the slayer by the deceased at the time, not for the purpose of preventing any impending wrong, but for the purpose of avenging a past wrong, is murder"—Daniels v State, 133 S E 866, 867, 162 Ga 366

Passion and malice Malice and passion cannot coexist in law in the sense that they may concurrently actuate a killing [59]

Motive Proof of motive is not essential to the establishment of malice [60]

§ 15. —— Malice Aforethought; Premeditated Design

Malice aforethought is an essential ingredient of murder No particular length of time is necessary for deliberation, and, if there is sufficient time for some reflection and consideration on the matter, it does not matter how brief it is.

Premeditation or malice aforethought is an essential ingredient of the offense of murder.[61] "Malice aforethought" or "malice prepense," which are the terms usually applied to the malice requisite in murder, is malice existing before the killing and acting as a cause of the killing [62] The term "malice aforethought" imports premeditation,[63] and has been held to involve deliberation,[64] although as to this there is contrary authority [65] It has been held that the deliberate design to kill must precede the killing by some appreciable space of time,[66] but no particular length of time is necessary for deliberation, and, if there is sufficient time for some reflection and consideration on the matter, it does not matter how brief it is [67] A deliberate intent to kill is not

59. W Va —State v Galford, 105 S E 237, 87 W Va 358
29 C J p 1087 note 58
"If the excitement and passion adequately aroused obscures the reason of the defendant, the killing will be reduced to manslaughter
A defendant acting under such temporary mental stress is presumed to be incapable of malice an essential ingredient of murder" —Davis v State 28 S W 2d 993, 996, 161 Tenn 23

Homicide committed in hot blood, growing solely out of combat for which person committing it was not responsible, is not murder —Wilkins v Commonwealth, 11 S E 2d 653 176 Va 580

Killing in sudden heat of passion excited by provocation, is not murder —Smith v State, App, 11 So 2d 466, certiorari denied, Ala, 11 So 2d 473

60. D C —Liggins v U S, 297 F 881 885, 54 App D C 302 citing **Corpus Juris.**
29 C J p 1087 note 59
Proof of motive as not indispensable to conviction of crime of homicide see infra § 318

61. Ala —Clack v State, 196 So 286 29 Ala App 377
Cal —People v Erno, 232 P 710, 195 Cal 272
Ga —Wims v State, 4 S E 2d 418, 60 Ga App 551
Idaho —State v Sprouse, 118 P 2d 378
Ky —Smiddy v Commonwealth, 106 S W 2d 131, 269 Ky 50
La —State v Avery 145 So 535, 176 La 264
Tex —Ex parte Vick, 292 S W 889 106 Tex Cr 373
To constitute murder there must have been a fixed design carrying with it deliberation and premeditation or predetermination
and such predetermination must occupy the mind at the time of the killing"—McHargue v Commonwealth, 21 S W 2d 115, 117, 231 Ky 82

62. Ky —Pierce v Commonwealth 284 S W 1035, 215 Ky 162
29 C J p 1087 note 60
Other definitions
(1) The words "malice aforethought" mean predetermination to commit the act of killing without legal excuse —Rose v Commonwealth, 149 S W 2d 772, 286 Ky 53—Smiddy v Commonwealth, 106 S W 2d 131 269 Ky 50—McHargue v Commonwealth 21 S W 2d 115, 231 Ky 82 —Farrell v Commonwealth, 270 S W 12, 207 Ky 733—Hall v Commonwealth, 270 S W 5 207 Ky 718—29 C J p 1087 note 60 [a] (5)
(2) Further definitions see 29 C J p 1087 note 60 [a]

63. Me —State v Merry, 8 A 2d 143, 136 Me 243
29 C J p 1088 note 61

64 Ill —People v Cochran, 145 N E 207 313 Ill 508
29 C J p 1088 note 62
Unfortunate result
The malice aforethought required must show some degree of deliberation or purpose or design as distinguished from the unfortunate result —State v Scheri, 9 N W 2d 117, 243 Wis 65

65. Ky —Turner v Commonwealth, 180 S W 768, 167 Ky 365 L R A 1918A 329
29 C J p 1088 note 63

66. Me —State v Merry, 8 A 2d 143, 136 Me 243

67. Ala —Corbin v State 98 So 132 19 Ala App 439 certiorari denied Ex parte Corbin, 98 So 134, 210 Ala 369
Ark —Tatum v State, 288 S W 904, 172 Ark 244
Fla —Powell v State, 112 So 608, 93 Fla 756
Ill —People v Kelly, 8 N E 2d 635, 366 Ill 326
Ky —Rose v Commonwealth, 149 S W 2d 772, 286 Ky 53—Woods v Commonwealth, 139 S W 2d 139, 282 Ky 596—Smiddy v Commonwealth, 106 S W 2d 131, 269 Ky 50—McHargue v Commonwealth, 21 S W 2d 115, 231 Ky 82—Pierce v Commonwealth, 284 S W 1035, 215 Ky 162—Farrell v Commonwealth, 270 S W 12, 207 Ky 733—Hall v Commonwealth, 270 S W 5, 207 Ky 718
La —State v Johnson, 92 So 139, 151 La 625
Me —State v Merry, 8 A 2d 143, 136 Me 243
Mass —Commonwealth v Madeiros, 151 N E 297, 255 Mass 304, 47 A L R 962
Miss —Motley v Smith, 159 So 553 172 Miss 148—Williams v State, 142 So 471, 163 Miss 475
R I —State v Fenik, 121 A 218, 45 R I 309
Tex —McClellan v State 40 S W 2d 87, 118 Tex Cr 473
29 C J p 1088 note 64
Time requisite for deliberation or premeditation in murder in first degree see infra § 33
'If malice is in the mind of the slayer at the moment the killing is done and it moves him to do the killing, no matter how short a time it may have existed such killing constitutes murder"—Brown v State 8 S E 2d 652 654 190 Ga 169
Formation at scene of crime
(1) Intent to kill or to aid and abet in killing, may be formed at scene of crime, even though accused may have gone there without such intention —State v Ochoa 72 P 2d 609, 41 N M 589

(2) Where participant in combat of opposing parties of several members each although free from felonious intent at beginning of combat, realized that another member of his party was employing deadly weapon he may be guilty of sharing such other's intent and hence become aider and abettor if he continued to participate except in necessary defense of himself —State v Ochoa, supra
Instant
(1) Malice may arise on the instant —McDowell v State 191 So 894, 238 Ala 482—Dixon v State, 29 So 623, 128 Ala 54

necessarily evidence of malice aforethought [68]

At common law no distinction is drawn between malice and malice aforethought,[69] and apparently there is no legal distinction between the terms and they may be used interchangeably,[70] and some statutory definitions of murder entirely omit the expression [71] Statutory expressions, such as "premeditated design"[72] or "deliberate design"[73] have been held to have the same meaning as "malice aforethought" as used at common law, but "malice aforethought" has been held not equivalent to "premeditated design to effect the death of the person killed, or of any other human being"[74]

Express or implied malice The expression "malice aforethought," as employed in common law and statutory definitions of murder, has been construed as embracing both express and implied malice,[75] although, as the expression was originally used, it conveyed only the idea of express malice [76] Some statutes defining murder describe the circumstances under which a killing shall constitute murder substantially in accord with the technical meanings given to express or implied malice [77]

§ 16. —— Express or Implied Malice

Malice is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. Implied malice is malice which inferentially appears from the circumstances attending the killing

At common law and under statutes declaratory thereof, the malice necessary to constitute the crime of murder may be either express or implied [78] The distinction between express and implied malice rests in the character of proof by which it is established and not in the particular condition of mind involved [79] Some statutory definitions of murder do not employ either of the terms [80]

Malice is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature [81] Express malice is also said

(2) Malice or premeditation may be instantly formed
Ky —Elliott v Commonwealth, 161 S W 2d 633, 290 Ky 502
Miss —Johnson v State, 105 So 742, 140 Miss 889

Voice of reason
If sufficient time intervened between provocation and killing to permit voice of reason to be heard crime is murder —People v Newman, 195 N E 645, 360 Ill 226

68 In self-defense deliberation and intention to take life may exist, and the intention may be carried out without the violation of any law — People v Spranger, 145 N E 706, 314 Ill 602

69. Ark —Noble v State, 112 S W 2d 631, 195 Ark 453
29 C J p 1088 note 65

Definitions of "malice aforethought" in terms of malice
(1) "The voluntary and intentional doing of an unlawful act, with the purpose means and ability to accomplish the reasonable and probable consequence of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief by one of sound mind and discretion, the evidence of which is inferred from acts committed or words spoken"—Noble v State 112 S W 2d 631, 633, 195 Ark 453
(2) Other definitions see 29 C J p 1088 note 65 [a]

70. Hawaii —Territory v Braly, 29 Hawaii 7
Ky —Walls v Commonwealth, 78 S W 2d 322, 323, 257 Ky 178, citing **Corpus Juris**
29 C J p 1089 note 66

71. Dak - Territory v Bannigan, 46 N W 597, 1 Dak 451
29 C J p 1089 note 67

72. Miss —Hawthorne v State, 58 Miss 778—McDaniel v State, 16 Miss 401, 47 Am D 93
N Y —People v Van Brunt, 11 N Y St 59, affirmed 15 N E 435, 108 N Y 656
29 C J p 1089 note 68

73 Miss —Hawthorne v State, 58 Miss 778

74. Okl —Jewell v Territory, 43 P 1075, 4 Okl 53
29 C J p 1089 note 70

75. Cal —People v Weeks, 286 P 514 104 Cal App 708
29 C J p 1089 note 71

76 Dak —Territory v Bannigan, 46 N W 597, 1 Dak 451
29 C J p 1089 note 72

77. Dak —Territory v Bannigan, supra
N Y —People v Enoch, 13 Wend 159, 27 Am D 197

78. Ark —Bramlett v State 156 S W 2d 226, 202 Ark 1165—Stepp v State 282 S W 684, 170 Ark 1061 —Dame v State, 262 S W 313, 164 Ark 430
Cal —People v Cook, 102 P 2d 752, 15 Cal 2d 507
D C —Bishop v U S, 107 F 2d 297, 71 App D C 132
Ga —Hopkins v State 8 S E 2d 633, 190 Ga 180—Vincent v State, 112 S E 120 153 Ga 278
Miss - Motley v Smith, 159 So 553, 172 Miss 118
Tex - Ely v State, 141 S W 2d 626, 139 Tex Cr 520—Cockrell v State, 117 S W 2d 1105, 135 Tex Cr 218
Va —Scott v Commonwealth, 129 S E 360 143 Va 510
29 C J p 1089 note 76

79. Ga —Jones v State, 29 Ga 594
Kan —Craft v State, 3 Kan 450
29 C J p 1089 note 77
"One difference between express malice and implied malice is the manner by which they may be shown to exist Implied malice may be inferred from the act or manner of committing the homicide, but express malice can only be proven by evidence of facts outside of the homicide itself which show the existence of the inward intention"- People v Scalisi, 154 N E 715, 722, 324 Ill 131

Mental condition
Malice aforethought express or implied, is a mental condition – State v Van Vlack 65 P 2d 736, 756, 57 Idaho 316, citing **Corpus Juris.**

80 N Y – Darry v People, 10 N Y 120, 2 Park Cr 606
Okl – Jewell v Territory, 43 P 1075, 4 Okl 53

81. Cal —People v Cook, 102 P 2d 752, 15 Cal 2d 507—People v Montezuma, 3 P 2d 370, 117 Cal App 125, modified on other grounds and rehearing denied 4 P 2d 285, 117 Cal App 125—People v Weeks, 286 P 514, 104 Cal App 708
29 C J p 1090 notes 82, 83

"Express malice is the deliberate intention to take the life of another, which is manifested by circumstances capable of proof"—People v Motuzas, 185 N E 614, 617, 352 Ill 340—People v Scalisi, 154 N E 715, 324 Ill 131

"If it be shown that one kills another as a result of a deliberate intention to take life, the wickedness of spirit, or, in other words, the malice is called actual or express

to exist where one with a sedate and deliberate mind and formed design kills another and the design is evinced by external circumstances discovering the inward intention,[82] the qualification that the killing must have been unlawful is sometimes added,[83] without which the definition is obviously incomplete and inaccurate.[84] Express malice has also been said to be evidenced where, on a sudden provocation, one inflicts on another a cruel and unusual punishment, so that he dies.[85] Malice is express when admitted or asserted,[86] or shown by positive and direct evidence.[87] However, it need not be evidenced by words only,[88] but it may be evidenced by external circumstances,[89] certain well recognized examples being frequently given,[90] such as lying in wait for the intended victim,[91] or the preparation and administration of poison for the purpose of taking life,[92] previous difficulties between accused and the victim,[93] or threats.[94] These examples are by no means exhaustive and any fact or circumstance which makes manifest the formed design of accused may be sufficient.[95] Personal ill will or hatred for the victim may show express malice,[96] but is not essential to its existence.[97] On the other hand, previous friendship with the victim may not be inconsistent with express malice at the time of the killing.[98] Where the facts and circumstances surrounding a homicide show a reckless disregard of human life, it is said to be conclusive evidence of express malice.[99]

Implied malice Malice may be inferred from the circumstances attending the killing,[1] and the courts have used the term "implied malice" as meaning malice not positively but inferentially appearing.[2] It has been said that malice is implied when there is no showing of actual intent to kill, but death is caused by acts which the law regards as manifesting such an abandoned state of mind as to be equivalent to a purpose to murder.[3] Implied malice also arises or may be inferred from the intentional do-

malice"—State v. Phillips, 187 A. 108, 110, 7 W.W. Harr., Del., 541.

"Actual malice" of one charged with a homicide arises from a showing of malignancy, and is a mental attitude, the method of proving which cannot be definitely prescribed.—State v. Gunter, 17 S.E.2d 46, 123 W.Va. 569.

Express malice is usually shown by something accused did or said before the killing, or some other circumstance which indicates clearly that he had the intention to kill when he made the fatal attack.—State v. Galvano, 154 A. 461, 4 W.W. Harr., Del., 409.

82. U.S.—U.S. v. Lewis, C.C.Tex., 111 F. 630.
29 C.J. p. 1089 note 79.

Sedate and deliberate mind
(1) "It is express when the wrongful act is done with a sedate and deliberate mind and formed design." Me.—State v. Merry, 8 A.2d 143, 146, 136 Me. 243.
Va.—Davidson v. Commonwealth, 187 S.E. 437, 167 Va. 451.
(2) Other cases see 29 C.J. p. 1089 note 79 [c].

83. Tex.—Herrin v. State, 33 Tex. 638.

84. Tex.—Crook v. State, 11 S.W. 444, 27 Tex.App. 198.
29 C.J. p. 1090 note 81.

85. Va.—Davidson v. Commonwealth, 187 S.E. 437, 167 Va. 451.

86. Del.—State v. De Paolo, 84 A. 213, 26 Del. 176.

87. S.C.—State v. Lee, 60 S.E. 524, 79 S.C. 223.
Tex.—Rice v. State, 103 S.W. 1156, 51 Tex.Cr. 255.

88. Tex.—Singleton v. State, 1 Tex.App. 501.

89. Tex.—Cano v. State, 111 S.W. 106, 53 Tex.Cr. 609.
29 C.J. p. 1090 note 87.

90. Ga.—Mitchum v. State, 11 Ga. 615.
29 C.J. p. 1090 note 88.

91. U.S.—Hottema v. U.S., Tex., 22 S.Ct. 895, 186 U.S. 413, 46 L.Ed. 1225.

92. U.S.—Hottema v. U.S., supra.

93. Ga.—Henderson v. State, 48 S.E. 167, 120 Ga. 504.—Brown v. State, 51 Ga. 502.—Wilson v. State, 33 Ga. 207.

94. Ga.—Henderson v. State, 18 S.E. 167, 120 Ga. 504.
29 C.J. p. 1090 note 92.

95. Tex.—Lewis v. State, 15 Tex.App. 617.

96. Ark.—Jett v. State, 236 S.W. 621, 151 Ark. 439.

97. Tenn.—Turner v. State, 108 S.W. 1139, 119 Tenn. 663, 123 Am.S.R. 758, 15 L.R.A.,N.S. 988, 14 Ann.Cas. 990.

98. Ill.—Kota v. People, 27 N.E. 53, 136 Ill. 655.

99. Tex.—Burt v. State, 40 S.W. 1000, 43 S.W. 344, 38 Tex.Cr. 397, 39 L.R.A. 305.

1. Ark.—Turner v. State, 298 S.W. 1028, 175 Ark. 232.—Ford v. State, 268 S.W. 21, 167 Ark. 677.
Ga.—Hopkins v. State, 8 S.E.2d 633, 190 Ga. 180.
Ky.—Rose v. Commonwealth, 119 S.W.2d 772, 286 Ky. 53.—Woods v. Commonwealth, 139 S.W.2d 139, 282 Ky. 596.—Fitzpatrick v. Commonwealth, 53 S.W.2d 221, 245 Ky. 108.—Morgan v. Commonwealth, 15 S.W.2d 274, 228 Ky. 432.—Bentley v. Commonwealth, 288 S.W. 295, 216 Ky. 665.—Pierce v. Commonwealth, 281 S.W. 1075, 215 Ky. 162.
Pa.—Commonwealth v. Aurick, 19 A.2d 920, 342 Pa. 282, reversing 16 A.2d 429, 142 Pa.Super. 364.
Tex.—Villareal v. State, 146 S.W.2d 406, 140 Tex.Cr. 675.—Ely v. State, 141 S.W.2d 626, 139 Tex.Cr. 520.—Parks v. State, 99 S.W.2d 943, 131 Tex.Cr. 461.
Wis.—Maxon v. State, 187 N.W. 753, 177 Wis. 379, 21 A.L.R. 1184.

Character of fatal act
Implied malice must be shown by the character of the fatal act.—State v. Galvano, 154 A. 461, 4 W.W. Harr., Del., 409.

2. S.C.—State v. Smith, 33 S.C.L. (11 Rich.L.) 77, 47 Am.D. 589.
Wis.—Hogan v. State, 36 Wis. 226.
29 C.J. p. 1091 note 98.

Fact of homicide
Malice is implied malice when it is inferred from the naked fact of the homicide.—Darry v. People, 10 N.Y. 120.—29 C.J. p. 1091 notes 1, 2.
Implication of malice from fact of killing see infra § 23.

Implied or constructive malice is an inference or conclusion of law from the facts found by the jury.—State v. Mills, 69 A. 811, 22 Del. 497.—29 C.J. p. 1091 note 99.—12 C.J. p. 1301 note 81.

3. Me.—State v. Merry, 8 A.2d 143, 136 Me. 243.
29 C.J. p. 1091 note 3.
"Malice does not necessarily mean an actual intent to take human life. It may be intentional or implied, instead of positive, as when an act which imparts danger to another is done so recklessly or wantonly as to

ing of an unlawful or wrongful act with a wrongful purpose [1] Malice, it has been said, is implied by law from every deliberate and cruel act committed by one person against another no matter how sudden such act may be [5] By statute in some jurisdictions it is prescribed that malice shall be implied when no considerable provocation appears or when all circumstances of the killing show a wicked and malignant heart [6] A mere intent to injure, however, does not necessarily imply malice.[7]

§ 17. Intentional Killing

In the absence of circumstances serving to mitigate, excuse, or justify the act, an intentional and premeditated homicide unlawfully committed constitutes murder.

Since, if there are no circumstances serving to mitigate, excuse, or justify the act, malice is implied in every intentional and premeditated homicide unlawfully committed, as considered infra § 23, such killings constitute murder [8] Accordingly, one who in mutual combat by agreement with deadly weapons, as in a duel, kills his opponent,[9] or one who provokes combat as a pretext for killing his adversary,[10] or one who kills another at his request or command,[11] or one who kills in revenge for a past offense, no matter how outrageous and aggravating,[12] is guilty of murder

If a person voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life [13]

§ 18. —— Intent to Kill One Person and Killing Another

The unlawful killing of one person, although the intent was to kill another, may constitute murder.

Since legal malice does not require ill will toward the victim, the crime may be murder although the person killed was not the one whom accused intended to kill,[14] as where the victim is mistaken

manifest depravity of mind and disregard of human life"—State v Trott 130 S E 627, 629, 190 N C 671, 42 A L R 1114

"Legal malice" of one charged with a homicide depends on intentional conduct, and it may be inferred from a purposeful and unjustifiable killing with a deadly weapon State v Gunter, 17 S E 2d 46 123 W Va 569

4. Ky —Burns v Commonwealth, 124 S W 409, 136 Ky 468

5 Del —State v Lee, 171 A 195, 6 W W Harr 11
29 C J p 1091 note 5
'Implied malice is evidenced by any deliberate, cruel act committed by one person against another, however sudden, as when a man kills another without any or without great provocation, in other words, if the punishment inflicted for a slight transgression is in its nature out of all reason and beyond all proportion to the offense offered, then the inference of law is that the perpetrator was actuated by malice, and he loses the presumption that the act was done in a moment of human frailty"—Davidson v Commonwealth, 187 S E 137, 139, 167 Va 451

6. Cal —People v Cook, 102 P 2d 752 15 Cal 2d 507—People v Wallace 37 P 2d 1053, 2 Cal App 2d 248—People v Semone, 35 P 2d 379 140 Cal App 318—People v Montezuma, 3 P 2d 370, 117 Cal App 125, modified on other grounds and rehearing denied 4 P 2d 285, 117 Cal App 125
Mont —State v Reagin, 210 P 86, 61 Mont 481
29 C J p 1091 note 6.

The intention of such a statute has been held not to be to define malice but to prescribe the evidence from which it may be implied as a conclusion of law State v Smith, 191 P 869, 26 N M 482

7. Ind —Field v State, 50 Ind 15

8 Cal —People v Wells 76 P 2d 193, 10 Cal 2d 610
Justifiable or excusable homicide see infra §§ 97–138
Voluntary manslaughter see infra §§ 40–54

9 Okl —Weatherholt v State, 131 P 185 9 Okl Cr 161
29 C J p 1092 note 1a- 19 C J p 825 note 3

Killing with malice

Where a killing is in the course of a rencounter in which the participants engage with a mutual intention to fight, if one of the participants kills the other with malice, it is 'murder" even though there is a mutual intention and agreement to fight —Rivers v State, 17 S E 2d 726, 193 Ga 133

10. Ga —Reed v State, 119 S E 23, 158 Ga 731
30 C J p 52 note 71

Regardless of extremity

One who provokes combat as pretext for killing adversary is guilty of murder, regardless of extremity State v Domingue, 118 So 46, 166 La 859

11 Tenn —Turner v State, 108 S W 1139, 119 Tenn 663, 123 Am S R 758, 15 L R A ,N S , 988, 14 Ann Cas 990

12. Ga —Coart v State, 119 S E 723 156 Ga 536

13. Ark —Palmore v State, 29 Ark 248
Mass —Commonwealth v York 9 Metc 93, 43 Am D 373
S C —State v Levelle, 13 S E 319, 31 S C 120, 27 Am S R 799

14. Ariz —Mayweather v State, 242 P 861, 865 29 Ariz 460, quoting **Corpus Juris**
Cal —People v Aranda 83 P 2d 928 12 Cal 2d 307—People v Weeks 286 P 514 104 Cal App 708
Ky —Commonwealth v Caldwell, 2 S W 2d 1055, 223 Ky 65
Mo State v Batson 96 S W 2d 384 388 339 Mo 298, quoting **Corpus Juris**—State v Lucas, 292 S W 711, 316 Mo 901 rehearing denied 293 S W 1051, 316 Mo 901
N Y People v Sobieskoda, 139 N E 558 235 N Y 411
Pa —Commonwealth v Lyons, 129 A 86 283 Pa 327
29 C J p 1092 note 21

Elements of offense

In prosecution for murder by accused, who killed one person while attempting to kill another, material elements of the offense which must be proved beyond reasonable doubt, are premeditated malice and purpose to kill the intended victim, and killing of actual victim in carrying out, or attempting to carry out, the offense against the intended victim —Noelke v State, 15 N E 2d 950, 214 Ind 427

Guilt same

Guilt of accused, who killed one person while intending to kill another, is the same as though he had killed the person he intended to kill Ala —Winton v State, 159 So 62, 229 Ala 642.

for another,[15] or where one shooting at another kills a bystander or third person coming within range,[16] or where one partakes of poison which accused intended for another,[17] or receives a blow intended for another.[18] Actual malice toward the unintended victim is not necessary.[19] The grade of the crime in such cases will be the same as though accused had killed the person whom he had intended to kill.[20]

§ 19. —— Killing Officers and Others in Discharge of Public Duty

A person who intentionally kills an officer or other person engaged in the discharge of a public duty, such as the making of a lawful arrest, is guilty of murder.

One who, in resisting a lawful arrest, intentionally kills a person seeking to arrest him is guilty of murder.[21] This rule applies to the killing of a peace officer,[22] although only a de facto officer,[23] a member of his posse,[24] or a private citizen engaged in assisting him.[25] However, accused must have known or have been chargeable with knowledge of the authority or purpose with which the officer or individual was acting.[26] It is likewise murder in-

Ark.—Daniels v. State, 32 S.W.2d 169, 182 Ark. 564
Ga.—Brown v. State, 165 S.E. 252, 175 Ga. 329
Tex.—Covert v. State, 113 S.W.2d 536, 134 Tex.Cr. 12.—Caraway v. State, 263 S.W. 1063, 98 Tex.Cr. 119

Intent

(1) The intent in such case is transferred by law from the intended victim to the person killed
Cal.—People v. Buenaflore, 105 P.2d 621, 40 Cal.App.2d 713.—People v. Pivaroff, 33 P.2d 44, 138 Cal.App. 675
Ind.—Noelke v. State, 15 N.E.2d 950, 214 Ind. 427
Miss.—Ross v. State, 131 So. 367, 158 Miss. 827

(2) As has been said, "The intention follows the bullet."—State v. Batson, 96 S.W.2d 384, 389, 339 Mo. 298

(3) The state must show that a felonious intent existed against the person shot or against some one at whom accused was shooting when he hit and killed deceased.—State v. Batson, supra

(4) Jury could convict accused of murder although some believed that intent was to kill deceased, and others to kill deceased's companion.—State v. Flathers, 232 N.W. 51, 57 S.D. 320, 72 A.L.R. 150

15. Cal.—People v. Rothrock, 68 P.2d 361, 21 Cal.App.2d 116
Ind.—Lloyd v. State, 189 N.E. 406, 206 Ind. 359
N.C.—State v. Burney, 3 S.E.2d 24, 215 N.C. 598
S.C.—State v. Heyward, 15 S.E.2d 669, 197 S.C. 371.—State v. Williams, 199 S.E. 906, 189 S.C. 19
Tenn.—Sullivan v. State, 121 S.W.2d 535, 173 Tenn. 475
29 C.J. p. 1093 note 22

16. Ala.—Naler v. State, 148 So. 880, 25 Ala.App. 486.—Little v. State, 129 So. 99, 23 Ala.App. 547.—Bush v. State, 127 So. 909, 23 Ala.App. 502.—Gilbert v. State, 100 So. 566, 20 Ala.App. 28
Ark.—Daniels v. State, 32 S.W.2d 169, 182 Ark. 564
Ga.—Durham v. State, 171 S.E. 265, 177 Ga. 744.—Holleman v. State, 154 S.E. 906, 171 Ga. 200.—Scott v. State, 120 S.E. 773, 157 Ga. 124
Mont.—State v. Chavez, 281 P. 352, 85 Mont. 544
Or.—State v. Grayson, 270 P. 404, 126 Or. 560
29 C.J. p. 1093 note 23

Determination of guilt

Guilt of accused, shooting at adversary and killing third person, is determinable solely by whether he would have been blameless if shot had killed adversary.—Vintson v. State, 115 So. 695, 22 Ala.App. 338

17. Ga.—Chelsey v. State, 49 S.E. 258, 121 Ga. 340, 343
29 C.J. p. 1093 note 24

Transfer as matter of law

One delivering bottle of poisoned whisky to one who gave it to third person, who delivered it to woman who died as result of drinking portion thereof cannot take advantage of his own wrongdoing or excuse himself in murder trial on ground that deceased was unintended victim, as original malice was transferred as matter of law from one against whom it was entertained to deceased.—Coston v. State, 190 So. 520, 139 Fla. 250

18. Ala.—Whorton v. State, 175 So. 562, 27 Ala.App. 530
Cal.—People v. Aranda, 83 P.2d 928, 12 Cal.2d 307
29 C.J. p. 1093 note 25

19. Ky.—Wheatley v. Commonwealth, 81 S.W. 687, 26 Ky.L. 136

20. Ala.—Whorton v. State, 175 So. 562, 27 Ala.App. 530.—Bush v. State, 127 So. 909, 23 Ala.App. 502.—Crosby v. State, 115 So. 860, 22 Ala.App. 392
Cal.—People v. Aranda, 83 P.2d 928, 12 Cal.2d 307.—People v. Buenaflore, 105 P.2d 621, 40 Cal.App.2d 713.—People v. Pivaroff, 33 P.2d 44, 138 Cal.App. 625.—People v. Weeks, 286 P. 514, 104 Cal.App. 708
Fla.—McCray v. State, 102 So. 831, 89 Fla. 65
Ga.—Scott v. State, 120 S.E. 773, 157 Ga. 124
Ind.—Noelke v. State, 15 N.E.2d 950, 214 Ind. 427
Ky.—Bolen v. Commonwealth, 97 S.W.2d 1, 265 Ky. 456
N.J.—State v. Trefficanto, 146 A. 313, 106 N.J.Law 344.—State v. Bectsa, 58 A. 933, 71 N.J.Law 322
Pa.—Commonwealth v. Lyons, 129 A. 86, 283 Pa. 327
Tenn.—Sullivan v. State, 121 S.W.2d 535, 173 Tenn. 475
29 C.J. p. 1093 note 27
Unintentional killing of bystander in exercise of right of self-defense see infra § 112

21 Kan.—State v. Boone, 257 P. 739, 740, 124 Kan. 208, quoting **Corpus Juris.**
Ky.—Sexson v. Commonwealth, 39 S.W.2d 299, 239 Ky. 177
Okl.—Davis v. State, 12 P.2d 555, 557, 53 Okl.Cr. 411 quoting **Corpus Juris.**
29 C.J. p. 1093 note 28

22 Ga.—Morton v. State, 10 S.E.2d 836, 190 Ga. 792.—Glaze v. State, 120 S.E. 530, 156 Ga. 807
Ky.—Cornett v. Commonwealth, 248 S.W. 540, 198 Ky. 236
Mich.—People v. Arnett, 214 N.W. 231, 239 Mich. 123
Miss.—Kirk v. State, 117 So. 523, 151 Miss. 225
29 C.J. p. 1094 note 29

Arrest without warrant

Person who has given peace officer reasonable cause to suspect him of attempt to commit robbery, killing officer attempting in good faith to arrest him without warrant, is guilty of murder.—State v. Genese, 130 A. 642, 102 N.J.Law 134.—29 C.J. p. 1094 note 29 [a]

23. Ga.—McDuffie v. State, 49 S.E. 708, 121 Ga. 580
W.Va.—State v. Long, 108 S.E. 279, 88 W.Va. 669

24. Miss.—Tolbert v. State, 14 So. 462, 71 Miss. 179, 42 Am.S.R. 454
29 C.J. p. 1094 note 31

25. Wis.—Krueger v. State, 177 N.W. 917, 171 Wis. 566
29 C.J. p. 1094 note 32

26. Ga.—Morton v. State, 10 S.E.2d 836, 190 Ga. 792

tentionally to kill an officer in resisting his attempt to prevent an escape or rescue,[27] or in resisting an officer in the lawful discharge of any other duty imposed on him by law,[28] for example, in preserving the peace,[29] since the officer has a right to use all necessary force to discharge his duty properly, and, therefore, such forcible acts will not reduce the grade of the crime,[30] and it is immaterial which side began the attack.[31] Similar rules apply if a citizen is killed while engaged in preventing the commission of crime,[32] or in making an authorized arrest,[33] although the private individual is in the illegal possession of a warrant.[34] Even when an attempt to arrest is illegal, the killing of the officer with malice is murder.[35] It has been held, however, that malice could not be implied where accused in killing deceased, a peace officer, used no more force than necessary to extricate himself from an illegal arrest.[36]

§ 20. Unintentional Killing

Where general malice is present, an unintentional killing may constitute murder.

In the absence of a statute to the contrary,[37] since the requisite malice may be either express or implied, see supra § 16, a person may be guilty of murder although there was no actual or specific intent to kill,[38] general malice being sufficient without a specific intent to kill.[39] Accordingly, if an unlawful act, dangerous to, and indicating disregard of,

Ky.—Cornett v. Commonwealth, 218 S.W. 540, 198 Ky. 236.
Miss.—Kirk v. State, 117 So. 523, 151 Miss. 225.
29 C.J. p. 1094 note 33.

Form of notice

The notice need not be in any particular form of words, all that is necessary is that the person be informed that he is required by one having the authority of the law to yield submission to the authority.—Brown v. State, 20 So. 103, 109 Ala. 70.

27. Ky.—Sexson v. Commonwealth, 39 S.W.2d 229, 239 Ky. 177.
N.J.—State v. Genese, 130 A. 642, 102 N.J.Law 134.
29 C.J. p. 1094 note 35.

28. Tex.—Smith v. State, 81 S.W. 936, 46 Tex.Cr. 267.
29 C.J. p. 1095 note 36.

Federal officers

(1) Under the federal statute, 18 U.S.C.A. § 253, the killing of certain federal officers while engaged in the performance of their official duties, or on account of the performance of their official duties, is homicide.—Arwood v. U. S., C.C.A.Tenn., 134 F.2d 1007, certiorari denied 63 S.Ct. 1436, 319 U.S. 776, 87 L.Ed. ——.—Barrett v. U. S., C.C.A.Ind., 82 F.2d 528.

(2) The words and intent of this statute are clear beyond the necessity of any canonical construction.—McNabb v. U. S., C.C.A.Tenn., 123 F.2d 818, certiorari granted 62 S.Ct. 1305, 316 U.S. 658, 86 L.Ed. 1736, reversed on other grounds 63 S.Ct. 608, 318 U.S. 332, 87 L.Ed. 579.

(3) To be amenable to punishment, the killer need not have known that he was killing an officer, agent or employee of the United States.—McNabb v. U. S., supra.

(4) An investigator of the alcohol tax unit was an "officer", "employee" and "agent" in the service of the internal revenue bureau, within meaning of this statute.—Arwood v. U. S., C.C.A.Tenn., 134 F.2d 1007, certiorari denied 63 S.Ct. 1446, 319 U.S. 776, 87 L.Ed. 1360.

Malice

Where an officer is killed in the discharge of his duty, it is not necessary to constitute the crime of murder that the slayer should have had any particular malice, provided the slaying was not done by accused in defending himself from an act of the officer in excess of his powers and authority as such.—Elliott v. Commonwealth, 161 S.W.2d 633, 290 Ky. 502.

Shooting without justification

Where those accused, when accosted by officers in the discharge of their duty for a violation of the law, began shooting without justification, the killing of an officer under such circumstances was murder, and not manslaughter.—People v. Watkins, 141 N.E. 204, 309 Ill. 318.

29. Ky.—Fleetwood v. Commonwealth, 80 Ky. 1.—Mockabee v. Commonwealth, 78 Ky. 380.

30. Mo.—State v. Evans, 61 S.W. 590, 161 Mo. 95, 84 Am.S.R. 669.
29 C.J. p. 1095 note 39.

31. Mo.—State v. Craft, 65 S.W. 280, 164 Mo. 631.
29 C.J. p. 1095 note 40.

32. Utah.—State v. Morgan, 61 P. 527, 22 Utah 162.
29 C.J. p. 1095 note 41.

To prevent escape

"It is the duty of all good citizens to arrest known felons and to prevent their escape. A citizen so doing his duty is entitled to the same protection as the officer of the law. It is well settled that it is malice in law for a criminal to shoot an officer doing his duty in order to effect an escape from him. It is also malice for a criminal to shoot a private citizen to effect his escape."—Sexson v. Commonwealth, 39 S.W.2d 229, 230, 239 Ky. 177.

33. Ga.—Meyers v. State, 151 S.E. 34, 169 Ga. 468.
29 C.J. p. 1095 note 42.

34. Ky.—Salisbury v. Commonwealth, 79 Ky. 425, 3 Ky.L. 211.

35. Ky.—Mims v. Commonwealth, 32 S.W.2d 986, 236 Ky. 186.
Nev.—State v. Smithson, 19 P.2d 631, 635, 54 Nev. 417, citing **Corpus Juris.**
Okl.—Davis v. State, 12 P.2d 555, 557, 53 Okl.Cr. 411, quoting **Corpus Juris.**
29 C.J. p. 1095 note 44.

No necessity to shoot

If one shoots and kills an officer to prevent an illegal arrest at a time when there is no actual or apparent necessity for doing so, either to save his own life or to prevent a felonious assault from being committed on him, he is guilty of murder.—Howell v. State, 134 S.E. 59, 162 Ga. 14.

36. Tex.—Ely v. State, 141 S.W.2d 626, 139 Tex.Cr. 520.

37. Okl.—Tubby v. State, 178 P. 491, 15 Okl.Cr. 496.
29 C.J. p. 1097 note 57.

38. Ala.—Davis v. State, 107 So. 737, 214 Ala. 273.
D.C.—Liggins v. U. S., 297 F. 881, 51 App.D.C. 302.
Ga.—Wright v. State, 141 S.E. 903, 166 Ga. 1.
Iowa.—State v. Burris, 198 N.W. 82, 198 Iowa 1156.
La.—State v. Sanderson, 124 So. 143, 169 La. 55.—State v. Newman, 102 So. 671, 157 La. 564.
Va.—Merritt v. Commonwealth, 180 S.E. 395, 164 Va. 653.
W.Va.—State v. Saunders, 150 S.E. 519, 108 W.Va. 148.
29 C.J. p. 1095 notes 45, 46.

39. Ill.—People v. Hartwell, 173 N.E. 112, 341 Ill. 155.—People v. Guido, 152 N.E. 149, 321 Ill. 397.—People v. Heffernan, 143 N.E. 411, 312 Ill. 66.

human life, causes the death of another, the perpetrator is guilty of murder, although he did not intend to kill[40] Likewise, if an assault was made upon deceased, not with the design of killing him, but of inflicting great bodily harm on him, it is murder if his death is caused thereby,[41] and it is murder where death results from an assault or other unlawful act, intentionally done in such a manner as was likely to cause death or serious bodily harm, even though there may have been no actual intent to cause death or great bodily harm,[42] but the injury intended must be such as involves serious consequence, either in endangering life or leading to great bodily harm,[43] and death or great bodily harm must have been a reasonable or probable consequence of the act[44] The omission or neglect to perform a duty resulting in death may constitute murder where the omission was willful and there was deliberate intent to cause death[45] So also, forcing one to do an act which will in all probability result in death is murder if death results.[46]

On the other hand, an intent to kill, either actual or implied, is essential to the commission of murder[47] Under a statute providing that whoever shall voluntarily kill any person within the state shall be guilty of murder, an intent to kill is a necessary ingredient of the crime of murder[48]

40. Ala—Reed v State, 142 So 411, 25 Ala App 18, certiorari denied 142 So 442, 225 Ala 219
Ga—Black v State, 130 S E 591, 34 Ga App 449
Ky—Hill v Commonwealth, 40 S W 2d 261, 239 Ky 646
N C—State v Cope, 167 S E 456, 204 N C 28
Pa—Commonwealth v McLaughlin, 142 A 213, 293 Pa 218
Tex—Brewer v State, 143 S W 2d 599, 140 Tex Cr 9—Ex parte Polk, 268 S W 464, 99 Tex Cr 106
W Va—State v Saunders, 150 S E 519, 108 W Va 148
29 C J p 1095 note 47

Equivalent of specific intent

A reckless disregard of human life may be the equivalent of a specific intent to kill -Webb v State, Ga App, 23 S E 2d 578

Malum prohibitum

Where death resulted from a reckless act which from its nature was capable of doing great bodily harm to a human being, if the act from which the death resulted was not only malum in se, but one malum prohibitum, the resultant death warrants a finding of the implied malice which would make the causal act murder at common law—Maxon v State, 187 N W 753, 177 Wis 379, 21 A L R 1484

May constitute murder

Under some circumstances a killing resulting from an unlawful act may constitute murder -State v Whaley, 132 S E 6, 191 N C 387

Wanton or reckless act

A presumption of malice may arise from a wanton or reckless act
Ill—People v Motuzas, 185 N E 614, 352 Ill 340
Pa—Commonwealth v Arnold, 140 A 898, 292 Pa 210
S C- State v Quick, 167 S E 19, 168 S C 76
Tex—Ely v State, 141 S W 2d 626, 139 Tex Cr 520.
Wis—State ex rel Shields v Portman, 6 N W 2d 713, 242 Wis 5

41. Wis—State v Scherr, 9 N W 2d 117, 243 Wis 65
29 C J p 1096 note 48

42. Ill—People v Lavac, 192 N E 568, 357 Ill 554—People v Guido, 152 N E 149, 321 Ill 397
Wash—State v Hiatt, 60 P 2d 71, 187 Wash 226
29 C J p 1096 note 49.

Reckless shooting

(1) One maliciously and without provocation firing gun into crowd and killing innocent bystander is guilty of murder
Cal—People v Dykes, 290 P 102, 107 Cal App 107
Ga—Durham v State, 171 S E 265, 177 Ga 744
W Va—State v Saunders, 150 S E 519, 108 W Va 148
29 C J p 1096 note 49 [a] (6)

(2) One who intentionally fires into automobile, which he knows is occupied and who kills someone therein is guilty of murder
Ky- Hill v Commonwealth, 40 S W 2d 261, 239 Ky 646
Tex—Davis v State, 292 S W 220, 106 Tex Cr 300

(3) Where one deliberately and wantonly opens fire on another human being with a deadly weapon and with intent to wound that person, the law holds him to the consequences of such act, and if the victim is fatally wounded the law presumes malice—State v Sullivan, 298 N W 884, 230 Iowa 817

(4) Person deliberately and maliciously shooting at another in a way likely to kill is guilty of murder if he kills either person shot at or another person, in such case an actual intention to kill not being essential element of the crime—State v Hill, 105 So 440, 159 La 435

Unprovoked assault

Malice aforethought will be implied from an unprovoked assault from which death results—People v Motuzas, 185 N E 614, 352 Ill 340

43. Ga—Henry v State, 33 Ga 441
Mich—Wellar v People, 30 Mich 16

44. Ill—People v Crenshaw, 131 N E 576 298 Ill 412, 15 A L R 671

45. Ga—Lewis v State, 72 Ga 164, 53 Am R 835
Mont—Territory v Manton, 19 P 387, 8 Mont 95
29 C J p 1097 note 53

Willful exposure

(1) Willfully allowing one to be exposed to conditions which will probably result in death where there is a duty to protect such person, constitutes murder—State v Rees, 107 P 893, 10 Mont 571—Territory v Manton, 19 P 387, 8 Mont 95—29 C J p 1097 note 55

(2) To create criminal responsibility for death resulting from exposure there must be neglect to perform legal or contractual duty which accused were bound to perform—State v Berry 14 P 2d 434 437, 36 N M 318, citing **Corpus Juris.**

46 U S—U S v Freeman CC Mass, 25 F Cas No 15,162, 4 Mason 505
29 C J p 1097 note 56

47. Mo—State v Recke, 278 S W 995 311 Mo 581

48 Tex—Miller v State, 13 S W 2d 865 112 Tex Cr 125

Murder with malice

A specific intention to kill must be found in order to support a verdict of murder with malice—Spivey v State, Tex Cr, 171 S W 2d 140—Barnett v State, Tex Cr, 162 S W 2d 411

However, it has also been held that a specific intent to kill is not in every case essential to support conviction of murder under such statute—Whiteside v State, 29 S W 2d 399, 115 Tex Cr 274.

§ 21. —— Homicide in Commission of Other Crime

a In general
b Relationship between killing and crime; attempts

a. In General

An unintentional killing in the perpetration of or in an attempt to perpetrate, a felony constitutes murder.

An unintended homicide, committed by one who at the time is engaged in the commission of some other felony, is murder both at common law and under the statutes declaratory thereof,[49] even though the statute requires a premeditated design to effect death as a requisite of murder.[50] A homicide committed or caused by one engaged in committing a felony is murder, irrespective of whether the person killed was the one on whom, or on whose property, the attempt had been made, or was another who interfered to prevent its success.[51] It seems, however, that the felony committed or attempted must be dangerous to human life,[52] and the homicide must be an ordinary and probable effect of the felony.[53] On the other hand, a statute providing that whoever, purposely, or in perpetrating or attempting to perpetrate certain felonies, kills another is guilty of murder, has been held not to be declaratory of the common law, and it has been held that there must be a purpose and intent to kill before the crime of murder can be complete.[54]

49. U S—Order of United Commercial Travelers of America v Meinsen, C C A Mo 131 F 2d 176, affirming, D C, Meinsen v Order of United Commercial Travelers of America, 43 F Supp 756
Ariz—Cochrane v State, 79 P 2d 658, 48 Ariz 124
Cal—People v De La Roi, 97 P 2d 836, 36 Cal App 2d 287—People v Attema, 213 P 161, 75 Cal App 642
Colo—Pacheco v People, 43 P 2d 165, 96 Colo 401
Conn—State v Feltovic, 147 A 801 110 Conn 303
D C—Marcus v U S, 86 F 2d 854, 66 App D C 298
Ind—McCutcheon v State, 155 N E 544 199 Ind 217
La—Rush v Town of Farmerville, 101 So 243, 156 La 857
Mass—Commonwealth v Green, 20 N E 2d 417 302 Mass 547
Mich—People v Arnett, 214 N W 231, 239 Mich 123
Mo—State v Batson 96 S W 2d 384 339 Mo 298, 390 citing **Corpus Juris**—State v Lindsey, 62 S W 2d 420, 333 Mo 139—State v Glover 50 S W 2d 1049 1052, 330 Mo 709, 87 A L R 100, citing **Corpus Juris.**
N M—State v Welch, 25 P 2d 211, 216, 37 N M 549, citing **Corpus Juris**—State v Smelcer, 228 P 183 184, 30 N M 122 citing **Corpus Juris.**
R I—State v Saccoccio, 147 A. 878, 50 R I 356
Tex—Shelburne v State, 11 S W 2d 519, 111 Tex Cr 182
Va—Bausell v Commonwealth 181 S E 462, 165 Va 693
Wis—Pollack v State, 253 N W 560, 215 Wis 200, affirmed 254 N W 471, 215 Wis 200
29 C J p 1097 note 59
"The intent to perpetrate a different felony, during the commission of which a person is killed supplies the elements of malice and intent to murder although the death is actually against the original intention of the party"—Simpson v Commonwealth, 170 S W 2d 869, 293 Ky 831
"Where an action unlawful and felonious in itself is done with deliberation and intent to do mischief either particularly or indiscriminately, and death ensues, either contrary to or beside the original intention of the party so committing the act the crime is murder"—People v Goldvarg, 178 N E 892, 894, 346 Ill 398

Attempt

Under the common-law rule that an intentional homicide in the commission, or attempted commission of a felony was "murder," the essential ingredient is either the commission of the felony or the attempt to commit a felony and the criterion is not whether the mere attempt to commit the felony is of itself as a distinct crime a felony or a misdemeanor—Commonwealth v. Guida, 19 A 2d 98, 341 Pa 305

Malice

(1) Malice, as a necessary ingredient of murder is presumed when killing results from attempt to commit felony—Kelly v State, 273 S W 11, 169 Ark 289

(2) Killing done in commission or attempt to commit a felony was with malice aforethought and was murder—Commonwealth v Madeiros 151 N E 297, 255 Mass 304, 47 A L R 962

Statute held declaratory of common law

Ill—People v Goldvarg, 178 N E 892, 346 Ill 398

Statute held valid

Ark—Clark v State, 276 S W 849, 169 Ark 717.

Death occurring after commission of felony

To constitute murder without design to cause death in commission of felony, death need not have occurred during its commission, but it is sufficient if the act which resulted in the death of the victim took place during the commission of the felony—State v Shortridge, 211 N W 336, 54 N D 779.

In Iowa, however, it has been held that it was not murder if one, while committing a public offense, except those offenses enumerated, killed another, unless there were present malice aforethought and the other elements necessary to constitute murder—State v Campbell, 251 N W 717 217 Iowa 848, 92 A L R 1176

50. Mo—State v Robinett, 279 S W 696, 700, quoting **Corpus Juris.**
29 C J p 1097 note 60

51. Ky—Marion v Commonwealth 108 S W 2d 721 269 Ky 729
Person killed need not be person robbed in order to constitute the crime
Mo—State v Messino, 30 S W 2d 750 325 Mo 743
Wash—State v Barton, 105 P 2d 63 5 Wash 2d 234

52. Ill—People v Goldvarg, 178 N E 892, 346 Ill 398
29 C J p 1097 note 62

Malum prohibitum

Prohibition law declaring sale of intoxicants a felony, did not render the sale of moonshine whisky in such an amount as to cause the death of the buyer to be murder, in absence of any intent to kill, since such sale was not an inherently dangerous common-law felony, but only "malum prohibitum," a crime existing only by statute—People v. Pavlic, 199 N W 373, 227 Mich 562, 35 A L R 741

53. Mo—State v Glover 50 S W 2d 1049, 1052, 330 Mo 709, 87 A L R 100, quoting **Corpus Juris.**
29 C J p 1097 note 61
Cause of death generally see supra § 11.

54. U S—Order of United Commercial Travelers of America v Meinsen C C A Mo, 131 F 2d 176, affirming, D C, Meinsen v Order of United Commercial Travelers of America, 43 F Supp. 756
Ohio—Turk v State, 194 N E 425, 48 Ohio App 489, affirmed State v Turk, 194 N E 453, 129 Ohio St. 245.

The general rule under discussion applies, for example, to an unintended homicide committed by one who was at the time engaged in committing an unlawful abortion, where this has been made a felony by statute,[55] and under some statutes a homicide committed in procuring an abortion is expressly declared to be murder[56] It also applies to one who has unintentionally committed a homicide in committing arson,[57] burglary,[58] rape,[59] or robbery,[60] or who while attempting to commit suicide unintentionally kills another[61] It is also murder within this rule where accused administered drugs for the purpose of producing merely temporary unconsciousness in order to accomplish a felonious intent, but death resulted[62]

Misdemeanor If the natural consequences of an unlawful act to be dangerous to life, and so known to the wrongdoer,[63] or if the unlawful act involves a breach of the peace,[64] an unintentional killing, at common law and statutes declaratory thereof, will be murder, even though the unlawful act amounts to no more than a misdemeanor On the other hand, in the absence of such circumstances or of a statute to the contrary, an unintentional homicide committed in the perpetration of a misdemeanor does not constitute murder[65]

55. Idaho—State v Alcorn 64 P 1014, 7 Idaho 599, 97 Am S R 252
29 C J p 1097 note 63

Criminal intent necessary to be established is the intent to commit a criminal abortion
Ill—People v Davis, 200 N E 334, 362 Ill 417
Tex—Ex parte Vick, 292 S W 889 106 Tex Cr 373

Dead fetus
Failure to require acquittal of accused, charged with murder while attempting abortion, if fetus was dead was not error—Wilbanks v State, 152 S E 619 41 Ga App 268

Unnecessary abortion
A fatal abortion, to constitute murder, must be one that was not necessary to preserve the life of the woman aborted—People v Long, 103 P 2d 969, 15 Cal 2d 590, superseding 96 P 2d 351 and 96 P 2d 1021, certiorari denied Long v People of State of California 61 S Ct 136, 311 U S 698, 85 L Ed 452

56 Ill—Clark v People, 79 N E 941, 224 Ill 554
29 C J p 1098 note 64

57 Ill—People v Goldvarg 178 N E 892, 346 Ill 398
Ky—Whitfield v Commonwealth, 128 S W 2d 208 278 Ky 111
29 C J p 1098 note 65

Expectation of presence
In prosecution for homicide in perpetration of arson, accused's expectation that any one would enter building was immaterial—State v Glover, 50 S W 2d 1049, 330 Mo 709, 87 A L R 400

Malice issue of fact
Statute declaring one who occasioned death of human being in unlawfully burning house guilty of murder does not avoid effect of general rule that whether killing was with malice was an issue of fact, in absence of statute—Ward v State, 109 S W 2d 207, 133 Tex Cr 110

58 Okl—In re Opinion of the Judges, 239 P 676, 31 Okl Cr 442
Pa—Commonwealth v Guida, 19 A 2d 98 341 Pa 305
29 C J p 1098 note 66

Breaking into schoolhouse
Accused, breaking lock and sending accomplice into schoolhouse to steal oil stove, was engaged in committing felony at time of shooting school district subdirector—State v Burzette, 222 N W 394, 208 Iowa 818

Common-law burglary
The statutes dealing with murder and degrees of murder, in using the word "burglary" mean the crime of burglary as at common law—State v Burrell, 199 A 18, 120 N J Law 277

59 Mass—Commonwealth v Osman, 188 N E 226, 284 Mass 421
Pa—Commonwealth v Guida, 19 A 2d 98, 341 Pa 305
29 C J p 1098 note 67

60 Ariz—Cochrane v State, 59 P 2d 658, 48 Ariz 124
Ark—House v State, 92 S W 2d 868, 192 Ark 476
Ind—McCutcheon v State, 155 N E 514 199 Ind 247
Ky—Williams v Commonwealth, 81 S W 2d 891 893, 258 Ky 830, citing **Corpus Juris**
Tex—Walker v State, 135 S W 2d 992, 138 Tex Cr 343
29 C J p 1098 note 68

Statute held valid
Ark Kelly v State, 273 S W 11 169 Ark 289

Taking from presence
Robbery may be committed by taking property from presence of another as well as from his person Consequently, efforts to force owners to disclose hiding place of liquor, so that it might be carried away against owners will, was an "attempt to rob," as regards basis for prosecution for murder committed in attempt to commit robbery Commonwealth v Crow, 154 A 283, 303 Pa 91

61. S C—State v Levelle, 13 S E 319, 34 S C 120, 27 Am S R 799
29 C J p 1098 note 69

In Iowa, however, if accused shot deceased while attempting to commit suicide, he was not doing an unlawful act, and hence was not necessarily guilty of murder—State v Campbell, 251 N W 717, 217 Iowa 848, 92 A L R 1176

62. La—State v Deschamps, 7 So 703, 42 La Ann 567, 21 Am S R 392
Tex—Rupe v State, 61 S W 929, 42 Tex Cr 477

63. Cal—People v Hubbard, 220 P 315 64 Cal App 27
La—Rush v Town of Farmerville, 101 So 243 156 La 857
29 C J p 1098 notes 71, 73

Assault
(1) To constitute murder at common law, when death resulted from a personal assault on deceased, which had not been made with intent to kill, the assault must have been of such a character as necessarily to have endangered the life of the person assaulted The assault must have been made with such a weapon or instrument as might endanger the life of the party assailed, or, if not made with a dangerous weapon, it must have been made in such a manner as to threaten great bodily harm, at least to the party assaulted—State v Scherr, 9 N W 2d 117, 243 Wis 65

(2) If accused by an agreement with others sought a difficulty with deceased for the purpose of chastising him and he and his companions armed themselves with weapons, and such weapons were used by any one of alleged conspirators, and deceased was thereby killed in pursuance of such purpose then it would be murder Cleveland v State, 103 So 707, 20 Ala App 426, certiorari denied Ex parte Cleveland, 103 So 711, 212 Ala. 635

64. Ill—Brennan v People, 15 Ill 511
Pa—Commonwealth v Daley, 2 Pa L J R 361, 4 Pa L J 150
29 C J p 1098 note 72

65 Cal—People v Hubbard 220 P 315, 64 Cal App 27
Ky—Baker v Commonwealth, 264 S W 1069, 1070, 204 Ky 420 citing **Corpus Juris.**
Mo—State v Robinett 279 S W 696
Va—Bausell v Commonwealth, 181 S E 462, 165 Va 693

b. Relationship between Killing and Crime; Attempts

To constitute murder, an unintentional killing in the perpetration of a felony must have been the probable consequence of the unlawful act A homicide is committed in the perpetration of a felony when it is committed within the res gestae of the felony In order that homicide may be committed in an attempt to perpetrate a felony, it is essential that the acts shall have gone beyond the point of mere preparation to commit the felony

In order for a killing to have been done in the perpetration or attempted perpetration of a felony, or of a particular felony, there must be some connection between the felony and the homicide [66] The killing must have been done in pursuance of the unlawful act, and not collateral to it [67] It is not enough that the killing occurred soon, or presently, after the felony was attempted or committed, there must be such a legal relationship between the two that it can be said that the killing occurred by reason of and as a part of the felony, or that it occurred before the felony was at an end, so that the felony had a legal relationship to the killing and was concurrent with it in part, at least, and a part of it in an actual and material sense [68] A homicide is committed in the perpetration of a felony when it is committed by accused while he is engaged in the performance of any act required for the full execution of such felony [69] A murder may be committed in the perpetration of a felony, although it does not take place until after the felony itself has been technically completed, if the homicide is committed within the res gestæ of the felony [70] The crime or attempted crime is a fact, to

At common law

Mo—State v Lindsey, 62 S W 2d 420, 333 Mo 139

Not malice under all circumstances

The intentional doing of an unlawful act in such manner and under such circumstances that the death of a human being may result therefrom does not under all circumstances constitute malice—Simmons v State, Tex Cr, 19 S W 2d 44

68. Wis—Hoffman v State, 59 N W 588, 88 Wis 166—Pliemling v State, 1 N W 278, 16 Wis 516
29 C J p 1122 note 36

Break in chain of events

For a homicide committed in perpetration or attempted perpetration of any of the felonies enumerated by statute to be "murder in first degree," there must have been no break in chain of events and homicidal act must have been connected with initial maliciously motivated offense—Commonwealth v Kelly, 4 A 2d 805, 333 Pa 280

Fact of death insufficient

Fact that victim of recklessness of one unlawfully taking car might be alive if car had not been taken was insufficient to constitute homicide murder—State v Diebold, 277 P 394, 152 Wash 68

Probable consequence

"Tersely put, death must have been the probable consequence of the unlawful act"—State v Opher, 188 A 257, 8 W W Harr, Del, 93

67. N Y—People v Elling, 16 N E 2d 501, 289 N Y 419, reversing People v Bender 37 N Y S 2d 227, 264 App Div 977
Pa—Commonwealth v Kelly, 4 A 2d 805 333 Pa 280
Wash State v Diebold, 277 P 394, 152 Wash 68

68. Del—State v Opher, 188 A 257 8 W W Harr 93
Wash—State v Diebold, 277 P. 394, 152 Wash 68.
Wis—Hoffman v State, 59 N W 588, 88 Wis 166

69. Wash—State v Anderson, 116 P 2d 346, 10 Wash 2d 167

Incident

'Murder in the perpetration of a burglary" is a murder resulting as an incident to the burglary, and associated with the burglary as one of its hazards—State v Burzette, 222 N W 394, 208 Iowa 818

Making away with plunder

The common-law rule is that, after the commission of a felony, if the criminal, in attempting to make away with his plunder, incidentally commits a homicide, he is guilty of murder—State v Robnett, Mo, 279 S W 696

Moving mash

Defendant was engaged in furtherance of process of manufacture of intoxicating liquor in moving mash from one place to another, and a homicide committed as an incident of such moving constituted murder
State v Robnett, Mo, 279 S W 696, 698, citing **Corpus Juris.**

70 Mo—State v Adams, 98 S W 2d 632, 339 Mo 926, 108 A L R 838—State v Batson, 96 S W 2d 384, 390 339 Mo 298, quoting **Corpus Juris.**
N J—State v Hauptmann, 180 A 809, 820 115 N J Law 412, quoting **Corpus Juris,** and certiorari denied Hauptmann v State of New Jersey 56 S Ct 310, 296 U S 649, 80 L Ed 161
Pa—Commonwealth v Bodner 16 Pa Dist 909, 34 Pa Co 401, 21 York Leg Rec 118
29 C J p 1107 note 59

Burglary

Where accused broke lock and sent accomplice into schoolhouse to steal oil stove, accused, shooting deceased, resisting burglary, was at time of killing engaged in "perpetration of burglary"—State v Burzette, 222 N W 394, 208 Iowa 818

Purpose of concealment

Fact that killing followed rape in point of time would not make crimes independent of each other, as regards question whether murder was committed in perpetration of rape, where circumstances permit inference that killing was done soon after rape and for purpose of concealing rape—Commonwealth v Osman, 188 N E 226, 284 Mass 421

Robbery

(1) If the killing occurred in the perpetration of the robbery whether before or after the fact, it was all part of the robbery and incidental to it, and constituted murder in the first degree—Commonwealth v Lawrence, 127 A 465, 282 Pa 128

(2) Robbery is not confined to a fixed locus but is frequently spread over considerable distance and varying periods of time The escape of the robbers with the loot by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property—People v Ross, 290 P 881 210 Cal 245

(3) To end an attempted robbery, where the robbers remained in freedom and possessed of a deadly weapon at the place of the attempted robbery until a fatal shooting took place, there must have been at least an appreciable interval between the alleged termination and the fatal shooting, a detachment from the enterprise before the shooting had become so probable that it could not reasonably be stayed, and such notice or definite act of detachment that other principals in the attempted crime had opportunity also to abandon it
Mass—Commonwealth v Green, 20 N E 2d 417, 302 Mass 547
N J—State v Mule, 177 A. 125, 114 N J Law 384.

be looked at objectively, and its beginning and end are marked by what is done, rather than by what is thought [71] Where the killing occurs after the felony has been completed and after the criminals have left the premises or are attempting to escape, the homicide, according to some authorities, is not committed in the perpetration of the felony,[72] but as to this there is authority to the contrary [73]

Under a statute making a killing murder when perpetrated by a person engaged in the commission of, or in an attempt to commit, or in "withdrawing from the scene of," a felony, there is no exact measure of the lapse of time or of the distance which accused must travel from the scene of the crime before it will be said that he is not withdrawing therefrom, and each case must depend on its own facts and circumstances [74] In a sense, a criminal has withdrawn from the scene of a felony if, after committing a crime, he keeps traveling in an attempt to escape, up to any conceivable distance, and in any direction, but such a "withdrawal" is not that contemplated by the statute [75] Under

(1) The mere putting away of the weapons, on the approach of others, and immediately redrawing them does not constitute a break in the chain of events —Commonwealth v Lessner, 118 A 24, 274 Pa 108

(5) It is immaterial that accused fired the shot to escape violence at the hands of the resisting victim and not to aid in the consummation of the planned robbery, as this does not constitute an abandonment of the criminal design —State v Mule, supra

(6) While anything remains to be done by the robbers to secure complete control over the property taken, the robbery is incomplete —State v McCarthy, 83 P 2d 801, 160 Or 196

(7) A homicide committed while fleeing from a robbery with the fruits thereof is committed while committing robbery
Cal —People v Ross, 290 P 881, 210 Cal 245 People v Dowell, 266 P 807, certiorari dismissed Dowell v People of State of California, 49 S Ct 7, 278 U S 660, 73 L Ed 568— People v Caballero, 87 P 2d 364, 31 Cal App 2d 52
Mo —State v King, 119 S W 2d 322, 342 Mo 1067—State v Messino, 30 S W 2d 750, 325 Mo 713
N J —State v Gimbel, 151 A 756, 107 N J Law 235
Ohio —State v Habig, 140 N E 195, 106 Ohio St 151
Or —State v McCarthy, 83 P 2d 801, 160 Or 196

(8) 'When, incident to a robbery one of the robbers kills a third party after the goods have been taken out of the possession of the owner (or his agents), while the robbery is complete so as to render the perpetrators liable to conviction for it, yet the killing being done in an attempt to conceal the crime, protect the robbers in the possession of the loot, and facilitate their flight, is so closely connected with the robbery as to be a part of the res gestae thereof, which may be an emanation of the act of robbery, and, although an act committed after the fact of robbery, it still constitutes part of the res gestae of that act and is murder committed in the perpetration of a robbery within the meaning of our statute and consequently murder in the first degree" -State v Turco, 122 A 844, 99 N J Law 96

(9) Question whether the killer was inside or outside the building in which the robbery was perpetrated at the time of firing the fatal shot was not conclusive in determining whether or not the robbery had been abandoned People v Walsh, 186 N E 422, 262 N Y 140

(10) Robbery had not ended when certain of those accused secured money and left building where other accused afterward killed watchman in order that the robbery might succeed and the parties escape with their loot —Commonwealth v Heinlein, 152 N E 380, 256 Mass 387

(11) Other cases see 29 C J p 1107 note 59 [b]

Withdrawing from scene

Fact that accused had left premises before death of fireman did not relieve him from responsibility on theory that homicide was not committed in perpetration of arson — State v Glover, 50 S W 2d 1049, 330 Mo 709, 87 A L R 400

71. Mass —Commonwealth v Green, 20 N E 2d 417, 302 Mass 547

72. N Y —People v Moran, 158 N E 35, 246 N Y 100
29 C J p 1107 note 60

Attempt to escape detection

Evidence that accused, after attempting to rape deceased, shot her in an attempt to escape detection and punishment, would not authorize conviction of murder in attempted perpetration of rape, since the murder was not part of the attempted rape and occurred after attempted rape was at an end —State v Opher, 188 A 257, 8 W W Harr, Del, 93

Person seeking capture

If, after attempted burglary or larceny, conspirators had been frightened away from the place of the crime, had quit their felonious acts or attempt and were seeking to escape by running away on the public streets, the death of a person seeking to capture them would not be the killing of a human being by a person engaged in the commission of a felony —People v Collins, 137 N E 753, 234 N Y 355

Securing plunder

The killing, to be a felony murder, must have occurred while the actor or one or more of his confederates was engaged in securing the plunder or in doing something immediately connected with the underlying crime Escape may, under certain unities of time manner and place, be a matter so immediately connected with the crime as to be part of its commission, but where there is reasonable doubt of a complete intervening desistance from the crime, as by the abandonment of the loot and running away, the subsequent homicide is not murder in the first degree without proof of deliberation and intent —People v Walsh, 186 N E 422, 262 N Y 140

73 Mo —State v Adams, 58 S W 2d 632, 636, 339 Mo 926, 108 A L R 838, quoting **Corpus Juris.**
29 C J p 1108 note 61

Attempt to escape

Testimony showing that the homicide was committed while accused was attempting to escape from the scene of an admitted burglary justifies a verdict of murder in the first degree, although the original crime had been completed, for accused is responsible for the consequences following To alter this rule it must appear that the criminal act originally undertaken had been abandoned by accused's voluntary act —Commonwealth v Tauza, 150 A 649, 300 Pa 375

74. Wash —State v Ryan, 73 P 2d 735, 192 Wash 160

In different jurisdictions

Under such a statute the felony may be committed in one jurisdiction and the killing may take place in another, the only connection between them being the circumstance of accused's flight from the place of the one to the scene of the other —State v Barton, 105 P 2d 63, 5 Wash 2d 234

75. Wash —State v Diebold, 277 P. 394, 152 Wash 68.

such a statute, the felony is not necessarily directly included as an integral part of the murder, but is only incidentally related thereto [76]

Under a statute providing that a homicide committed by accused in freeing or attempting to free himself from arrest or confinement for a certain designated offense shall be punished, a murder committed in an attempt to escape confinement for such offense is within the statute notwithstanding the attempted escape is quite apart in respect of time and place from the commission of the offense [77]

Attempts In order that a homicide may be committed in an attempt to perpetrate a felony it is essential that the acts shall have gone beyond the point of mere preparation to commit the felony,[78] the attempt to perpetrate the felony must have been actual and not merely constructive,[79] and the killing must have occurred in the performance of such acts as would establish the independent substantive crime [80] Where, however, the design of accused to commit the crime is clearly shown, slight acts in furtherance of the design will constitute an attempt [81] If an attempt to commit a felony has been made, it is immaterial that the attempt was not carried beyond its initial stage[82] or is abandoned before its completion [83]

§ 22. Particular Facts as Indications of Malice

The effect of particular facts as indicating malice is discussed with reference to specific facts infra §§ 23–26 Whether unintentional killings may constitute murder has been considered supra §§ 20, 21

Examine Pocket Parts for later cases.

§ 23. —— Fact of Killing

Malice may be inferred from the fact of an intentional killing without lawful excuse

In the absence of circumstances serving to mitigate, excuse, or justify the act,[84] malice is implied in every intentional and premeditated homicide, unlawfully committed,[85] and when the fact of killing is shown and the evidence adduced to establish the killing shows neither circumstances of justification nor alleviation, malice may be inferred [86] This is

76. Wash —State v Larton, 105 P 2d 63, 5 Wash 2d 234

77 U S —Gilmore v U S, C C A Okl, 124 F 2d 537

78. Pa —Commonwealth v. Eagan, 42 A 374, 190 Pa 10

Effect of frustration

If accused would have killed a third person if he had not been frustrated by the presence and interference of deceased, if his act had gone to the extent of placing it in his power to commit the offense unless interrupted, and nothing but such interruption prevented the present commission of the offense, his conduct went sufficiently beyond mere preparation so as to constitute an attempt to commit the crime of murder -- People v Sobieskoda, 139 N E 558 235 N Y 411

To steal from warehouse

Where the alleged attempt of accused and others to steal from a warehouse was either abandoned after arrival thereat, or frustrated by a difficulty with a watchman whom they killed and for which act accused was charged with murder in commission of or attempt to commit a felony, the hiring of a barge and proceeding thereon to a place near the warehouse would not constitute an attempt, but, if accused reconnoitered the warehouse to determine means of stealing therefrom, an attempt might be found, but, if he tried doors from curiosity or then abandoned his purpose before the encounter with the watchman occurred, there was no attempt —People v Collins, 137 N E 753, 231 N Y 355

Absence of goods sought to be stolen

In prosecution for murder committed in attempt to perpetrate robbery of whisky, whether there was whisky, as believed by robbers, is immaterial —Commonwealth v Crow, 154 A 283 303 Pa 91

79 Pa —Kelly v Commonwealth, 1 Grant 184
29 C J p 1108 note 63

80. Pa —Kelly v Commonwealth, supra —Commonwealth v Hanlon, 3 Prewst 161, 8 Phila 401, 423

81. Preparatory acts

(1) One fatally shooting bank janitor after obtaining ride in his automobile, securing his bank key by exhibiting gun, and going from automobile into park for purpose of tying him up, pursuant to plan to rob bank, was guilty of murder in first degree in attempt to perpetrate robbery, although killer had not entered bank at time of shooting, and the place of murder was far removed from bank —People v Perry, 91 P 2d 559, 4 Cal 2d 387, 121 A L R 1123

(2) Conduct of accused in approaching theater ticket office and pulling out pistol which was discharged as he was putting it up in cage was "attempt to perpetrate robbery," so that homicide perpetrated in connection therewith, whether intended or not, was murder in the first degree —People v Anderson, 37 P 2d 67, 1 Cal App 2d 687

82. N H - State v Greenleaf, 54 A 38, 71 N H 606

83. Cal --People v King, 90 P 2d 291, 13 Cal 2d 521
Pa —Commonwealth v Eagan, 42 A 374, 190 Pa 10

In New York, if one attempts to commit a felony and then abandons his purpose the attempt has ended, and a homicide committed after such abandonment is not murder in the first degree as being committed in an attempt to commit a felony —People v Collins, 137 N E 753, 234 N Y 355

84. Mass —Commonwealth v Bedrosian 142 N E 778, 247 Mass 573
29 C J p 1092 notes 9, 10

85. Cal —People v Wells, 76 P 2d 193, 10 Cal 2d 610 —People v Hoover, 290 P 493 107 Cal App 635
Mass --Commonwealth v Bedrosian, 142 N E 778 247 Mass 573
29 C J p 1091 note 8

86. Cal —People v Cardoza App 134 P 2d 877—People v Ross, 93 P 2d 1019, 34 Cal App 2d 574—People v Copley, 89 P 2d 160, 32 Cal App 2d 74
Conn —State v Simborski, 182 A 221, 120 Conn 624—State v Di Battista, 148 A 664, 110 Conn 519 —State v Feltovic, 147 A 801, 110 Conn 303
D C —Bishop v U S, 107 F 2d 297, 71 App D C 132
Ga —Wilson v State, 10 S E 2d 861, 190 Ga 824—Greenway v. State, 1

especially true in the case of an intentional homicide committed in the perpetration of, or attempt to, perpetrate some other felony, such as burglary[87] or robbery[88] The intent to kill need not precede the act by any particular length of time[89]

On the other hand a mere intention to kill does not necessarily raise the inference of malice,[90] and, unless the killing is shown to have been intentional, unlawful, and deliberate,[91] the inference of malice arising from the fact of the homicide may be overcome by evidence of alleviation or justification[92] If in addition to the fact of killing, the attendant circumstances are shown in evidence, whether on the part of the prosecution or accused, the character of the killing is to be determined by considering them, and it is then not a matter for presumption which operates in the absence of explanatory evidence, but for determination from the circumstances shown in evidence,[93] and by statute, it is sometimes required that there shall be some other evidence of malice than the mere proof of killing in order to prove murder in certain specified

S E 2d 217, 59 Ga App 461—Greer v State 125 S E 52, 159 Ga 85—Rentfrow v State, 51 S E 596, 123 Ga 539

Iowa—State v Leib, 201 N W 29, 198 Iowa 1315

Miss—Carter v State, 113 So 177, 147 Miss 171

Mo Ex parte Johnson 280 S W 702

Neb—Chadek v State 294 N W 384, 138 Neb 626

N J State v Mangino, 156 A 430, 108 N J Law 475

N C—State v Utley 25 S E 2d 195, 223 N C 39—State v Wishon 153 S E 395, 198 N C 762—State v Williams, 116 S E 570, 185 N C 643

Pa—Commonwealth v Grimm 5 Pa Dist & Co 287

Tex Lopez v State 17 S W 2d 807 112 Tex Cr 517—Posos v State 271 S W 902 100 Tex Cr 54—Simpson v State, 269 S W 797, 99 Tex Cr 406

Va Bradshaw v Commonwealth, 4 S E 2d 752 174 Va 391—Mosby v Commonwealth 190 S E 152, 168 Va 688—Adams v Commonwealth 178 S E 29, 163 Va 1053—Ballard v Commonwealth 159 S E 222 156 Va 980—Scott v Commonwealth 129 S E 360 143 Va 510—Wallen v Commonwealth 114 S E 786, 131 Va 773

29 C J p 1098 note 74

As constituting murder

The fact that accused shot deceased through the window without warning while deceased was sitting in his home at night writing a letter, if unexplained, would be murder—Bowlin v State, 248 S W 396, 93 Tex Cr 452

Deadly use of weapon

Malice aforethought is evidenced by the deadly manner in which the weapon was used and in the results which it accomplished—State v Matheson, 261 N W 787, 220 Iowa 132

Felonious homicide

A charge that all homicide is presumed to be malicious is erroneous, because the presumption of malice arises only in the case of felonious homicide—Commonwealth v Kluska, 3 A 2d 398 333 Pa. 65

Murder with malice

If accused shot deceased without any cause other than a verbal provocation, it would be an unjustified killing and would be "murder with malice" unless there existed "adequate cause"—Berry v State, 157 S W 2d 650, 143 Tex Cr 67

Neglect to furnish medical aid

Where shooting was intentional, accused would have been guilty of murder or voluntary manslaughter if shooting was unlawful irrespective of his neglect to furnish attention or medical aid or his refusal to permit others to do so King v Commonwealth, 118 S W 2d 1041, 285 Ky 654

Statutes construed

(1) The effect of a statute, which provides that on a trial for murder, the commission of homicide by accused being proved burden of proving the circumstances of mitigation or those that justify or excuse it is on accused, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that accused was justified or excused, is to relieve the prosecution in cases of murder alone of the burden of proving malice and willful intent—People v Campanella, 116 P 2d 633, 46 Cal App 2d 697

(2) Words 'proof in the case," as used in statute creating presumption of malice from proof of homicide mean proof on part of prosecution—State v Copenbarger, 16 P 2d 383, 52 Idaho 441

To avoid arrest

Where accused shot officer to avoid being arrested with revolver on his person such felonious killing would be presumed malicious—Commonwealth v Scott, 130 A 317, 284 Pa 159

87 Mo State v Miller, 13 S W 832, 105 Mo 14 S W 311, 100 Mo 606 N Y—Dolan v People, 64 N Y 485 affirming 6 Hun 493

Unintentional killing in commission of other crime see supra § 21

88. Pa—Commonwealth v Major, 17 A 741, 198 Pa 290, 82 Am S R 803 29 C J p 1092 note 13

89. Miss—King v State, 21 So 235, 74 Miss 576

29 C J p 1092 note 11

In course of attack

One who in course of attack on another committed homicide is guilty of murder although homicide may not have been originally contemplated—Boggs v Commonwealth, 149 S E 115 153 Va 828

90 Ill People v Motuzas, 185 N E 614, 352 Ill 310

29 C J p 1092 note 18

91 Presumption is conclusive where killing is shown to have been intentional, unlawful and deliberate—State v Covell 232 P 628, 113 Or 251

92 Ga Miller v State, 191 S E 115 184 Ga 336

Va Williamson v Commonwealth, 23 S E 2d 240 180 Va 277—Thomason v Commonwealth 17 S E 2d 371 178 Va 489—Hannah v Commonwealth, 149 S E 419, 153 Va 863

Justifiable homicide see infra §§ 97–108

Voluntary manslaughter see infra §§ 40 54

Evidence showing mitigation

Where evidence proving the killing also shows mitigation, no presumption of malice will follow from the killing—Roberts v State 5 S E 2d 310 189 Ga 36

Provocation

(1) The presumption does not arise where there is provocation which is more than "very slight"—Brown v Commonwealth, 122 S E 421 138 Va 807

(2) Accordingly where accused, deceased and two others had been engaged in a friendly crap game, and the killing resulted after deceased had seized money won by accused and struck him over the head with a bottle, there was more than very slight provocation, so that a presumption of malice from the fact of killing did not arise—Brown v Commonwealth, supra

93 Neb—Davis v State, 133 N W 106, 90 Neb 361

29 C J p 1099 note 75.

degrees[94] Malice will not be presumed where the proof of the homicide is derived solely through an admission of accused, which also presents matters of exculpation[95]

§ 24. —— Circumstances of Cruelty or Brutality

Circumstances of cruelty or brutality may raise an inference of malice

The fact that cruelty or brutality was manifested in the killing will raise an inference of malice[96]

§ 25. —— Use of Deadly Weapon

Malice may be presumed from the intentional use of a deadly weapon in a deadly and dangerous manner.

In the absence of circumstances disproving malice,[97] malice may be presumed from the intentional use of a deadly weapon in a deadly and dangerous manner[98] The use of a deadly weapon is not

94. Or—Goodall v State, 1 Or 333, 8 Am D 396

95. Ga—Miller v State 191 S E 115, 184 Ga 336—Brown v State, 191 S E 108, 184 Ga 305

98. U S—Evans v U S, C C A Kan, 122 F 2d 461, 466, citing **Corpus Juris,** and conforming to mandate 61 S Ct 548, 312 U S 651, 85 L Ed 1102, vacating C C A, 113 F 2d 935, certiorari granted 61 S Ct 69, 311 U S 635 85 L Ed 404

Colo—Townsend v People 111 P 2d 236, 107 Colo 258

Pa—Commonwealth v Arnold, 140 A 898, 292 Pa 210

29 C J p 1099 note 77

Character of assault

In prosecution for assault to murder, malice may be inferred from character of assault - Kirkland v State, 108 So 262, 21 Ala App 348

When person entered into combat with another, intending no more serious injury than an ordinary battery and no weapon was used, and death ensued, if force used was excessive, and assault brutal, malice may be inferred—Diamond v State, 123 So 55, 219 Ala 674

97. Ala—McDowell v State 191 So 894, 238 Ala 482—Simpson v State, App, 13 So 2d 137—Ferguson v State, 105 So 435, 21 Ala App 116

98. U S—Vaccaro v Collier D C Md, 38 F 2d 862, modified on other grounds, C C A, Collier v Vaccaro, 51 F 2d 17

Ala—McDowell v State, 191 So 894, 238 Ala 482—Oliver v State 175 So 305 234 Ala 460—Cooley v State 171 So 725, 233 Ala 107—Davis v State, 107 So 737 211 Ala 273—Dixon v State 29 So 623 125 Ala 54—Thomas v State, App, 9 So 2d 150—Austin v State, App 1 So 2d 442, certiorari denied 1 So 2d 444, 242 Ala 19 Coates v State, 199 So 830, 29 Ala App 616—Grays v State, 185 So 191, 28 Ala App 394—Thomas v State, 181 So 482, 28 Ala App 371—Corbin v State, 98 So 132, 19 Ala App 139 certiorari denied Ex parte Corbin, 98 So 134, 210 Ala 369—Smith v State, 92 So 93, 18 Ala App 318

Ark—Bramlett v State, 156 S W 2d 226, 202 Ark 1165—Porchia v State, 120 S W 2d 700, 196 Ark 1039—Rhine v State 42 S W 2d 8, 184 Ark 220—Freeman v State, 298 S W 333, 174 Ark 1035—Townsend v State 298 S W 3 174 Ark 1180—Tatum v State, 288 S W 904, 172 Ark 244—Stepp v State, 282 S W 684, 170 Ark 1061—Sullivan v State 258 S W 980 163 Ark 353—Fields v State, 241 S W 901, 154 Ark 188

Cal—People v Butterfield, 105 P 2d 628, 40 Cal App 2d 725

Conn—State v Feltovic, 147 A 801, 110 Conn 303

Del—State v Galvano, 154 A 461, 4 W W Harr 109

Ga—Wims v State, 4 S E 2d 418 60 Ga App 551—Jones v State, 198 S E 561, 58 Ga App 373

Ind—Mosier v State, 40 N E 2d 698—Pitts v State 23 N E 2d 673, 216 Ind 168—Everett v State, 195 N E 77, 208 Ind 145—Perkins v State, 191 N E 136 207 Ind 119—Lloyd v State, 189 N E 106 206 Ind 359—Landreth v State, 171 N E 192, 201 Ind 691, 72 A L R 891—Taylor v State 167 N E 133, 201 Ind 241—McCutcheon v State 155 N E 514 199 Ind 247

Iowa—State v Heinz 275 N W 10, 223 Iowa 1241 114 A L R 959—State v Johnson, 267 N W 91 221 Iowa 8—State v Johnson, 261 N W 596 221 Iowa 8—State v Berlovich 263 N W 853 220 Iowa 1288—State v Brewer 254 N W 834 218 Iowa 1287—State v Leib 201 N W 29 198 Iowa 1315—State v Burris, 198 N W 82 198 Iowa 1156

Ky—Shepherd v Commonwealth, 33 S W 2d 4 236 Ky 290 Patton v Commonwealth 32 S W 2d 405, 235 Ky 815—Ferguson v Commonwealth 5 S W 2d 897 899, 224 Ky 151, citing **Corpus Juris.**

Mich—People v Statkiewicz, 225 N W 540, 247 Mich 260

Miss—Durr v State 168 So 65 175 Miss 797—Talbert v State 159 So 549 172 Miss 243—Wright v State, 139 So 869 162 Miss 191—Bennett v State, 120 So 837, 152 Miss 728—Holmes v State 118 So 431 151 Miss 702—Kirk v State 117 So 523, 151 Miss 225—Johnson v State 105 So 742, 140 Miss 889

Mo—State v Richmond, 12 S W 2d 34, 321 Mo 662

N M—Torres v State, 43 P 2d 929, 39 N M 191—State v Gilbert, 24 P 2d 280, 37 N M 435

N C—State v Burrage, 25 S E 2d 393, 223 N C 129—State v Utley, 25 S E 2d 195, 223 N C 39—State v Debnam, 22 S E 2d 562 222 N C 266—State v Hammonds, 3 S E 2d 439, 216 N C 67—State v Bright 2 S E 2d 541, 215 N C 537—State v Hawkins 199 S E 284 211 N C 326—State v Payne, 197 S E 573, 213 N C 719—State v Terrell, 193 S E 161 212 N C 145—State v Cagle 182 S E 697, 209 N C 114—State v Bittings, 175 S E 299, 206 N C 798—State v Keaton 175 S E 296, 206 N C 682—State v Wall, 172 S E 216, 205 N C 659—State v Bailey, 171 S E 81, 205 N C 255—State v Ferrell 163 S E 563 202 N C 475—State v Miller, 119 S E 590, 197 N C 445—State v Trott, 130 S E 627, 190 N C 674 42 A L R 1114—State v Steele, 130 S E 308, 190 N C 506—State v Robinson 125 S E 617, 188 N C 784—State v Johnson 113 S E 617, 184 N C 637—State v Benson 111 S E 869 183 N C 795—State v Pasour, 111 S E 779, 183 N C 793

Pa—Commonwealth v Foltz, 5 Pa Dist & Co 559

S C State v Edwards, 10 S E 2d 587, 194 S C 410

W Va—State v Gunter 17 S E 2d 46 123 W Va 569—State v Bowles, 185 S E 205 117 W Va 217—State v Shelton, 178 S E 633 116 W Va 75

29 C J p 1099 note 78

Manslaughter see infra § 56

Murder in second degree see infra § 35 b

Presumptions and burden of proof as to degree of offense see infra § 199

"Every person is presumed to intend the natural and probable consequences of his own act, and the use of a dangerous weapon resulting in a homicide, by one having no right to use the weapon and in the absence of mitigating facts when he did use it, is always regarded as evidence of the existence of malice aforethought"—Liggins v U S, 297 F 881, 885 51 App D C 302

Against vital part of body

The intentional unlawful, and fatal use of a deadly weapon against

conclusive as to malice,[99] and the inference of malice therefrom may be overcome,[1] and it has been held that where the facts and circumstances of the killing are in evidence, the existence of malice must be determined as a fact from all the evidence.[2] It cannot be affirmed as a legal conclusion that an intent to take life is rebutted by the absence of a deadly weapon.[3]

Carrying or possession of deadly weapon Malice is not implied from the fact that one was carrying a dangerous weapon for self-defense,[4] or even from the fact that the weapon was carried in violation of law,[5] but if it appears that the weapon was provided for the purpose of killing another when occasion should arise, malice is implied.[6]

Character of weapon A deadly weapon is one which is likely to produce death or great bodily injury from the manner in which it is used,[7] and whether a weapon is to be regarded as deadly often depends more on the manner in which it has been used than on its intrinsic character.[8] The mere fact that an instrument produced death does not estab-

a vital part of the body gives rise to the presumption of fact that malice existed —Commonwealth v Robinson 157 A 689, 305 Pa 302—Commonwealth v Troup, 153 A 337, 302 Pa 246

Intent and purpose to kill may be inferred from the deliberate use of a deadly weapon in a manner calculated to produce death Pitts v State, 23 N E 2d 673 216 Ind 168

May be murder

Where the evidence showed that blow which produced death was with a deadly weapon intentionally aimed at person slain, the homicide, if not excusable, may be murder —Smith v State, Ala 11 So 2d 471

Number of shots

(1) Repeated firing of a revolver was sufficient to establish a premeditated purpose to kill State v McNamara, 184 A 797 798 116 N J Law 497, citing **Corpus Juris.**

(2) That accused killed decedent with deadly weapon and that there were two shots fired by accused, would supply presumption of malice —Jones v State, 174 So 546, 178 Miss 636

Shooting in back

Use of deadly weapon not in necessary self-defense, whereby death ensues, was evidence of malice where deceased was shot in back, nothing else appearing —Jennings v Commonwealth 31 S W 2d 622, 235 Ky 391

Test of criminal intent in the use of a deadly weapon is to be found, not in the manner in which or the purpose for which, the previous possession of the weapon was acquired but in its deliberate use for a deadly purpose —Evans v Commonwealth 170 S E 756 161 Va 992—Pauley v Commonwealth, 144 S E 361, 151 Va 510

99. Pa —Commonwealth v Foltz, 5 Pa Dist & Co 559
29 C J p 1101 note 79

1. Ala —Smith v State, App, 11 So 2d 466, certiorari denied 11 So 2d 473
Ind —Everett v State, 195 N E 77, 208 Ind 145.
Utah – State v Misato Karumai, 126 P 2d 1017, 101 Utah 592
29 C J p 1101 note 80

Presumption held overcome

Iowa —State v Borwick, 187 N W 160 193 Iowa 639

Provocation

(1) The presumption of malice from the use of a deadly weapon may be rebutted by evidence of provocation on the part of deceased calculated to engender great passion or fear in the mind of the slayer — State v Summers, 188 S E 873, 118 W Va 118

(2) Accordingly, where an affray is provoked by deceased, the use of a deadly weapon by accused will not give rise to a presumption of 'malice"—State v Ponce, W Va, 19 S E 2d 221—State v Cassim 163 S E 769, 112 W Va 92

2 Miss —Smith v State 137 So 96 161 Miss 430
29 C J p 1101 note 81

Before presumption disappears the facts of the killing must appear in the evidence and must change the character of the killing, either showing justification or necessity —Bennett v State 120 So 837, 152 Miss 728

Not from use alone

In facts and circumstances of a homicide appear malice is inferred, not from use of a deadly weapon alone, but from all of the facts and circumstances as shown —Eagin v State Wyo 128 P 2d 215

Testimony by eyewitnesses

Malice is never implied or presumed is a matter of law where the circumstances of the killing are testified to on the trial by eyewitnesses —Runyan v State, 216 N W 656, 116 Neb 191

3 Pa —Commonwealth v Kluska, 3 A 2d 398 333 Pa 65 Commonwealth v Guida, 148 A 501, 298 Pa 370

Charge properly refused

Charge that, if no deadly weapon was used, malice could not be presumed, was properly refused —Kirkland v State, 108 So 262, 21 Ala App 348

Not necessary

The use of a deadly weapon in commission of a homicide is not necessary to show murder with malice —Barnett v State, Tex Cr, 162 S W 2d 411

4. W Va —State v Clark, 41 S E 204, 51 W Va 457
29 C J p 1101 note 88

5. Ga —Alford v State, 33 Ga 303, 81 Am D 209

6. U S — Thompson v U S, Ark, 15 S Ct 73, 155 U S 675, 39 L Ed 146
29 C J p 1101 note 90

7. Ill —People v Merritt, 12 N E 2d 7, 367 Ill 521
Ky —Jordan v Commonwealth, 31 S W 2d 697, 235 Ky 449
N J —State v Cox, 23 A 2d 555, 128 N J Law 108—State v Jones, 179 A 320, 115 N J Law 257
Tex – Witty v State, 171 S W 229, 75 Tex Cr 440
29 C J p 1102 note 92
Deadly weapon generally see the C J S title Weapons § 6, also 68 C J p 29 note 76-p 31 note 5

In order that inference of malice may arise it must appear that the weapon used was one likely to produce death
Ga – Jordan v State, 53 S E 331, 124 Ga 780
Mass Commonwealth v Fox, 73 Mass 585

8. Cal People v Cook, 102 P 2d 752, 15 Cal 2d 507
Conn State v Litman, 148 A 132, 106 Conn 345
N C State v Smith, 121 S E 737, 187 N C 469
Pa —Commonwealth v Le Grand, 9 A 2d 896 336 Pa 511
Tex —Walker v State, 251 S W 235 91 Tex Cr 411
29 C J p 1102 note 93

Acid

In determining the intent of accused in throwing acid on the face of his wife, the question is whether he knew or believed that, if thrown on the face, the result would be likely to be that of a deadly weapon used on a vital part of the body — Commonwealth v Kluska, 3 A 2d 398, 333 Pa. 65.

lish its character as a deadly weapon,[9] although it may be evidence thereof.[10] Among other instruments which may under the circumstances of their use be regarded as deadly weapons may be enumerated sticks and cudgels of various descriptions,[11] a black-jack,[12] metal bars and rods,[13] metallic knucks,[14] rocks,[15] bricks,[16] beer glasses,[17] knives,[18] scissors,[19] a hoe,[20] an ax,[21] a sledge hammer,[22] a chisel,[23] a steel screw driver,[24] a blacksmith's tongs,[25] a fence rail,[26] a hunting rifle,[27] a pistol or revolver used either for shooting[28] or striking,[29] and a shotgun used as a club.[30] A blow with the fist does not ordinarily imply malice,[31] although there may be an inference of malice where such an attack has been made on an infant of tender years or on a person enfeebled by old age or worn out by disease.[32]

Intentional use In order that an implication of malice may arise from the use of a deadly weapon,

Claw hammer

The circumstances under which a claw hammer was employed, the manner in and place on which it was used may justify finding that it was deadly in character—Commonwealth v Scott, 127 A 240, 281 Pa 548

Likely to produce assault

Weapon is not to be considered deadly because likely to produce assault in manner used- Studdard v State, 11 S W 2d 69, 112 Tex Cr 55

9. Ga—Henry v State, 33 Ga 441
Tex—Hilliard v State, 218 S W 1052, 87 Tex Cr 15, 8 A L R 1316 Coleman v State, 90 S W 499, 49 Tex Cr 82

However, it has been held that any instrument capable of causing death, no matter how innocent its original purpose, becomes a deadly weapon when used for purposes of violence—Commonwealth v Kluska, 3 A 2d 398, 333 Pa 65—Commonwealth v Patterson 41 Pa Dist & Co 215, 23 Erie Co 215

10. Mo—State v Stewart, 212 S W 853, 278 Mo 177—State v Bowles, 47 S W 892, 146 Mo 6, 69 Am S R 598

11. Cal—People v Cook, 102 P 2d 752, 15 Cal 2d 507
29 C J p 1102 note 96

A baseball bat if viciously used is a deadly weapon—State v Smith, 121 S E 737, 187 N C 469

Not per se deadly

Wooden stick about two feet long with which accused inflicted mortal wound was not a "deadly weapon" per se—Pope v State, 72 S W 2d 278, 126 Tex Cr 395

12. Pa—Commonwealth v Pasco, 13 Northumb Leg J 372, affirmed 2 A 2d 736, 332 Pa 439

Weapon likely to produce grievous bodily harm

N Y—People v Wagner, 156 N E 614, 245 N Y 143

13. Ala—Stillwell v State, 19 So 322, 107 Ala 16
29 C J p 1102 note 97

Heavy metal pipe, eighteen inches long, is a deadly weapon—Commonwealth v Patterson, 11 Pa Dist & Co 215, 23 Erie Co 215

14. Ky—Martin v Commonwealth 78 S W 2d 786, 257 Ky 591

15. Ark—Killian v State, 42 S W 2d 12, 184 Ark 239
29 C J p 1102 note 98

16. Del—State v Lee, 171 A 195, 6 W W Harr 11
D C—Hopkins v U S, 4 App D C 430

At high speed

A rock or brick which was thrown at oncoming truck from an automobile traveling seventy miles an hour was a "deadly weapon"—Peats v State, 12 N E 2d 270, 213 Ind 560

Not per se deadly

An instrument consisting of two brick-bats cemented together was not per se a "deadly weapon"—Martinez v State, 151 S W 2d 817, 142 Tex Cr 113

17. Tex—Griffin v State, Cr., 53 S W 848

18. Ala—Coates v State, 199 So 830, 29 Ala App 616
29 C J p 1102 note 2

Penknives

Ala—Thomas v State, App., 9 So 2d 150
Iowa—State v Roan, 97 N W 997, 122 Iowa 136

Pocketknives

(1) Pocketknives, in view of the manner of their use have been held to be deadly weapons—Webb v State 14 So 865, 100 Ala 17—29 C J p 1102 note 4

(2) Pocketknives, however, are not per se deadly weapons—French v State, Okl Cr., 118 P 2d 664

(3) Also, a Texas jackknife is not a "deadly weapon per se"—Johnson v State, 68 S W 2d 202, 125 Tex Cr 381

19. Mo—State v Hardy, 8 S W 416 95 Mo 455

20. Mo—State v Bennett, 87 S W 2d 159

Not per se deadly

A hoe is not per se a "deadly weapon"—Joubert v State, 124 S W 2d 368, 136 Tex Cr 219

21. N C—State v Walker, 137 S E 429, 193 N C 489
29 C J p 1102 note 6

22. Ky—Philpot v Commonwealth, 6 S W 455, 86 Ky 595—Commonwealth v Branham, 8 Bush 387

23. Ky—Commonwealth v Branham, supra

24. Mo—State v Belfiglio, 134 S W 508, 232 Mo 235

25. Ky—Commonwealth v Hawkins, 11 Bush 603

26. Miss—King v State, 21 So 235, 71 Miss 576

27. Wash—State v Hedges, 113 P 2d 530, 8 Wash 2d 652

28 Ala—Kennedy v State, 5 So 300, 302, 85 Ala 326
Ark—Fields v State, 241 S W 901 154 Ark 188
Ky—Angel v Commonwealth, 158 S W 2d 640 289 Ky 281
N C—State v Benson, 111 S E 869, 183 N C 795
Pa—Commonwealth v Bryson, 120 A 552, 276 Pa 566
29 C J p 1102 note 12

29. Ky—Riggs v Commonwealth, 33 S W 413, 17 Ky L 1015

30 N C—State v Johnson, 97 S E 11, 176 N C 722

31. Colo—McAndrews v People 208 P 486, 71 Colo 542, 24 A L R 655 Murphy v People, 13 P 528, 9 Colo 435
Ill—People v Crenshaw 131 N E 576 298 Ill 412, 15 A L R 671—People v Mighell, 98 N E 236, 254 Ill 53

Person of small stature

A malicious intent to kill cannot be presumed from the striking of a full-grown person on the head with the bare fists by a person of small stature and mediocre strength, although death results unless the assault was so vicious, continued deadly, and barbaric, and under such circumstances, that malice can be implied—State v Roush, 120 S E 304, 95 W Va 132

32 Colo—McAndrews v People, 208 P 486, 71 Colo 542 24 A L R 655
Mass—Commonwealth v Fox, 73 Mass 585

Constitute dangerous weapon

Accused's hands and fists, violently used to strangle and beat child to death, constituted instruments likely to produce death and dangerous weapons—State v Heinz, 275 N W 10, 223 Iowa 1241, 114 A L R 959

it must appear that its use was willful or intentional,[33] deliberate,[34] or wanton.[35] This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use,[36] or that it was used in such a manner that the natural, ordinary, and probable result would be to take life.[37] On the other hand, the fact that accused, in the heat of combat, seized a stick or other object which casually happened to be near at hand, and struck the fatal blow with it, not having prepared any deadly instrument, is a circumstance which does not favor the implication of malice.[38]

Manner of use Malice is implied only when the homicide has been committed by the use of a dangerous weapon or instrument in such a manner as naturally and probably to cause death.[39]

Officer No presumption of malice arises by reason of the fact that accused, a peace officer, was armed with a deadly weapon,[40] and, if any malice is to be inferred, the inference must be drawn from the manner and circumstances in which he used his weapon.[41]

Superiority of weapon If one person kills another in mutual combat, the superiority of the weapon used by the slayer is not a fact from which malice is to be inferred.[42]

Under a statute providing that the intent to kill, justifying a finding of guilt of murder in the second degree, may be presumed whenever the means used is such as would ordinarily result in the death of the victim, the weapon or means used must either possess the quality of what is known as a deadly weapon without regard to the manner in which it was used or, if it is not such a weapon, the manner of its use must show that there was an evident intention to kill.[43]

§ 26. —— Administration of Poison

Malice is implied where death was occasioned by the intentional administration of poison

Malice is implied where death was occasioned by the intentional administration of poison.[44] If it appears that the poison was not administered with intent to take life, but to aid in the perpetration of another crime or in order to accomplish an unlawful act, it is no less murder.[45] If, however, it was not administered with intent to take life and where death as a result was so remote a contingency that no reasonable person could have taken it into consideration when administering the poison and could not have contemplated that death would result therefrom, malice will not be implied.[46]

§ 27. Presumption of Continuance of Malice

Where the existence of deliberate malice is once ascertained, its continuance down to the killing may be presumed, unless there is evidence to repel the presumption

Where the existence of deliberate malice in the slayer is once ascertained, its continuance down to the perpetration of the meditated act must be presumed, unless there is evidence to repel this presumption.[47] Where a deliberate purpose to kill or do great bodily harm is ascertained, and there was a consequent unlawful act of killing, the provocation, whatever it may be, which immediately preceded the act, is to be thrown out of the case and

33 N C —State v Debnam, 22 S E 2d 562, 222 N C 266
29 C J p 1101 note 83
"The test of the criminal intent in the use of a deadly weapon is to be found, not in the manner in which, or the purpose for which, the previous possession of the weapon was acquired, but in its deliberate use for a deadly purpose"—Pauley v Commonwealth 144 S E 361, 363, 151 Va 510—McMurray v Commonwealth, 129 S E 252, 255 143 Va 490—Mealy v Commonwealth, 115 S E 525, 530, 135 Va 585

34 Ga —Jordan v State, 53 S E 331 124 Ga 780
Ill —Davison v People, 90 Ill 221
Or —State v Abrams, 8 P 327, 11 Or 169

35. Ky —Fitzpatrick v Commonwealth, 53 S W 2d 221, 245 Ky 108 —Milburn v Commonwealth, 3 S W 2d 204, 223 Ky 188—Fleenor v Commonwealth, 298 S.W. 376, 221 Ky 175

Mo —State v Layton, 58 S W 2d 451 332 Mo 216
S C —State v Quick, 167 S E 19, 168 S C 76

36 Ind —Achey v State, 64 Ind 56
29 C J p 1101 note 85

37. Iowa —State v Sullivan 50 N W 572, 51 Iowa 142
29 C J p 1101 note 86

Stated conversely, death or great bodily harm must be the reasonable or probable consequence of the act in order to constitute it murder —McAndrews v People, 208 P 486, 71 Colo 542, 24 A L R 655

38. Ga —Ray v State, 15 Ga 223

39 Colo —McAndrews v People, 208 P 486, 71 Colo 542, 24 A L R 655

40. W Va —State v Holmes, 23 S E 2d 61

41. W Va —State v Holmes, supra

42. Cal —People v Barry, 31 Cal 357

43. Tex —Shaw v State, 31 S W 361, 31 Tex Cr 435

44. Mich —People v Austin, 192 N W 590, 221 Mich 635
29 C J p 1102 note 16

Validity of statute
Statute providing that all murder which is perpetrated by means of poison is murder in the first degree is not invalid on the ground that accused is deprived of the right to have the jury determine the presence or absence of malice, intent to kill, deliberation, and premeditation —State v Flory, 210 N W 961, 203 Iowa 918

45. Mich —People v Austin, 192 N. W 590, 221 Mich 635

46 Mich —People v Austin, supra.

47. Fla —Potsdamer v State, 17 Fla. 895
N C —State v Tilly, 25 N C 424—State v Johnson, 23 N C 354, 35 Am D 742.

goes for nothing, unless it can be shown that this purpose was abandoned before the act was done,[48] and the presumption is that the crime found its moving impulse in malice, and not in the passion produced by the provocation,[49] but in order to bring a case within the principle that, where one having express malice toward another kills him, the killing is referable to the previous malice and not to a provocation at the time of the killing, it is not sufficient to establish a mere grudge or malice in its general sense, without showing a particular and definite intent to kill[50] However, there is authority for the view that the killing will not be presumed to have been on the antecedent malice,[51] and that this is for the jury to determine and it is error for the court to state such a presumption in its instructions[52] Where express malice and a subsequent reconciliation followed by fresh provocation have been proved, the law will refer the motive of the slayer to the recent provocation, and not to the antecedent malice, unless the special circumstances of the case forbid such a presumption[53] So, too, if a person, on unexpectedly meeting his adversary who intercepts him on his lawful road and in his lawful pursuit, accepts a fight which he might have avoided by passing on, the provocation being sudden and unexpected, the law will not presume it to be on the old grudge, but on the fresh insult given by stopping him on his way[54] In murder an intention may be and is often formed simultaneously with the act, and its existence cannot be adopted as a predicate from which an inference can be logically drawn that it existed prior to its manifestation[55]

§ 28. Burden of Overcoming Inference of Malice

The burden of overcoming any inference of malice arising in the case rests on accused

Where the killing is shown to have been of such character, or to have taken place under such circumstances, as to give rise to the presumption of malice, it devolves on accused to rebut this presumption,[56] but the burden is on him only in the sense that he must make proof of legal excuse, justification, or extenuation or else take the risk of a conviction on the presumption or inference of malice which has arisen[57] The evidence rebutting the presumption may be found in the evidence introduced by the prosecution[58]

B DEGREES

§ 29. In General

In some jurisdictions the crime of murder is divided into degrees for the purpose of adjusting the punishment in case of aggravating circumstances

At common law[59] and under some statutes[60] murder is not divided into degrees However, the statutes in many states divide murder into two or more

48. N C —State v Tilly, 25 N C 424 —State v Johnson, 23 N C 354, 35 Am D 742

49. Mo —State v Stewart, 212 S W 853, 278 Mo 177

50. Miss —Cannon v State, 57 Miss 147

51. Tex —McCoy v State, 25 Tex 33, 78 Am D 520

52. Pa —Murray v Commonwealth, 79 Pa 311

53. N C —State v Horn, 21 S E 694 116 N C 1037—State v Barnewell, 80 N C 466—State v Johnson, 47 N C 247, 64 Am D 582

54. Tenn —Copeland v State, 7 Humphr 479

55. Cal —People v Arnold, 250 P 168, 199 Cal 471

56. Ala —Cooley v State, 171 So 725, 233 Ala 407—Austin v State, 4 So 2d 442, 30 Ala App 267, certiorari denied 4 So 2d 444 242 Ala 19

Cal —People v Wells, 76 P 2d 493, 10 Cal 2d 610

Ga —Greer v. State, 125 S E 52, 159 Ga 85.

Ind —Taylor v State, 167 N E 133, 201 Ind 241

Ky —Shepherd v Commonwealth, 33 S W 2d 4, 236 Ky 290—Patton v Commonwealth, 32 S W 2d 405, 235 Ky 845

Mont —State v Chavez 281 P 352 85 Mont 544

N J —State v Mangino, 156 A 430, 108 N J Law 175

N C State v Burrage, 25 S E 2d 393, 223 N C 129 State v Utley 25 S E 2d 195, 223 N C 39—State v Debnam 22 S E 2d 562, 222 N C 266—State v Beachum, 17 S E 2d 674, 220 N C 531—State v Hammonds, 3 S E 2d 439, 216 N C 67—State v Bright, 2 S E 2d 511, 215 N C 537 —State v Terrell, 193 S E 161, 212 N C 145—State v Cagle, 182 S E 697, 209 N C 114- State v Trott, 130 S E 627 190 N C 674, 42 A L R 1114

Va —Williamson v Commonwealth, 23 S E 2d 240 180 Va. 277—Brown v Commonwealth, 122 S E 421, 138 Va 807—Wallen v Commonwealth, 114 S E 786, 134 Va 773

29 C J p 1103 note 26

Presumptions and burden of proof as to grade or degree of offense see infra § 199

57 Iowa - State v Hayden, 107 N W 929, 131 Iowa 1

29 C J p 1103 note 27

58. Ga —Marcus v State, 99 S E 611, 149 Ga 209

29 C J p 1103 note 28

59. Cal —People v Bealoba, 17 Cal 389

Mo —State v Kauffman 73 S W 2d 217, 335 Mo 611—State v Moore, 33 S W 2d 905, 326 Mo 1199

Wash —Blanton v State, 24 P 439, 1 Wash 265

29 C J p 1103 note 29

60. U S —U S v Lewis, C C Tex., 111 F 630

Ill —People v Heffernan, 143 N E 411, 312 Ill 66

La —State v Capaci, 154 So 419, 179 La 462—State v Carricut, 102 So 98, 157 La 140

Me —State v Merry, 8 A 2d 143, 136 Me 243

S C —State v King, 155 S E 409, 158 S C 251

29 C J p 1103 note 30.

degrees[61] As a rule these statutes do not change the quality of the crime of murder as it was defined at common law, but merely recognize that the crime may be more or less atrocious according to conditions and circumstances, and, therefore, provide greater punishment in some cases than in others,[62] and the degrees do not constitute distinct crimes but are grades of the same offense[63] Ordinarily, murder in any of the statutory degrees would be murder at common law,[64] and, conversely, to constitute murder in any degree malice is a requisite[65] Some statutes make an intent to kill an element of murder in all of its degrees, except, in some cases, of particular killings, as in commission of felonies,[66] or broaden the definition to include killings which would not be murder at common law[67]

Statutes defining the various degrees of murder have been held to be in pari materia and should be read together[68]

§ 30. First Degree

Murder in the first degree usually embraces all the elements of murder in lesser degrees and also consists of additional elements

The particular elements which shall constitute the crime of murder in the first degree is a matter of statutory regulation and will be discussed in detail in the sections immediately following Quite generally under the various statutes dividing murder into degrees, murder in the first degree embraces all the elements and essentials of murder in the second degree, and consists of additional elements[69] Variances between the degree of offense charged and the proof are discussed infra § 177, the sufficiency of proof of the degree of murder, infra § 328, instructions as to the grade or degree of the offense, infra §§ 389–398, and the rule that accused cannot complain that he was convicted of a lower degree of the crime than the evidence would have warranted is considered infra § 428

§ 31. —— Particular Statutory Provisions

Under the various statutes defining murder in the first degree, there are several general classes of homicides constituting such murder which are, in general, willful, deliberate, and premeditated killings, as killing by an act greatly dangerous to the lives of others, by poison or lying in wait, in the perpetration of felony or of enumerated felonies, and by torture

A provision common to many of the statutes which divide murder into degrees is the provision that any willful, deliberate, and premeditated killing shall constitute murder in the first degree[70] Substantially the same description of murder in the

61. Mo—State v Baublits, 27 S W 2d 16, 324 Mo 1199
Utah—State v Avery, 125 P 2d 803 102 Utah 33
Va—Puckett v Commonwealth 160 S E 19 157 Va 800—Mercer v Commonwealth, 142 S E 369, 150 Va 588
29 C J p 1103 note 31

Admission of killing

Accused who admitted killing his wife, in absence of self-defense, was guilty of murder in first or second degree, or manslaughter—State v Parker, 152 S E 890, 198 N C 629

Dependent on circumstances

Whether crime is murder in the first or second degree depends on attending circumstances State v Nasello, 30 S W 2d 132, 325 Mo 442

62. Ariz—Singh v State, 280 P 672, 35 Ariz 432, 67 A L R 129
D C Bishop v U S, 107 F 2d 297 71 App D C 132
Mont State v Gunn, 300 P 212, 89 Mont 453
R I—State v Hathaway, 161 A 366, 52 R I 492
29 C J p 1103 note 32

Deceased's bad character cannot be considered in determining degree of murder—McCarty v State, 112 So 184, 22 Ala App 62.

63 Mont State v Gunn, 300 P 212, 89 Mont 453
29 C J p 1101 note 33

64 Kan - Roy v State, 2 Kan 105
Mo—State v Johnson, 192 S W 411 —State v Bobbitt, 111 S W 511, 215 Mo 10

65 Ala—Evers v State, 129 So 785, 24 Ala App 55
Or—State v Nortin 133 P 2d 252
Pa—Commonwealth v Gibson, 119 A 103, 275 Pa 338
R I—State v Fenik, 121 A 218 45 R I 309
Va—Williamson v Commonwealth 23 S E 2d 210, 180 Va 277 Mercer v Commonwealth, 142 S E 369, 150 Va 588
W Va State v Hurst, 116 S E 248, 93 W Va 222
29 C J p 1101 note 35

66. Ohio—Hagan v State, 10 Ohio St 459
29 C J p 1104 note 36

67 N Y—People v Enoch, 13 Wend 159, 27 Am D 197

68 Va Tucker v Commonwealth, 167 S E 253 159 Va 1038

69. Utah—State v Kukis 237 P 476, 65 Utah 362

70 Ala Hawes v State, 7 So 302, 88 Ala 37
Iowa - State v Phillips, 92 N W 876, 118 Iowa 660
Kan - State v Estep, 24 P 986, 44 Kan 572
Nev - State v Wong Fun, 40 P 95, 22 Nev 336
N J—Titus v State, 7 A 621, 49 N J Law 36
Pa—Commonwealth v Hawk, 196 A 5, 328 Pa 417 -Commonwealth v Dearolph, 11 Pa Dist & Co 613—Commonwealth v Patterson 41 Pa Dist & Co 215, 23 Erie Co 215—Commonwealth v Foltz 5 Pa Dist & Co 559—Commonwealth v Grimm 5 Pa Dist & Co 287 -Commonwealth v Sayres, 12 Phila 553 5 Wkly N C 424
Va—Wright v Commonwealth, 75 Va 911
29 C J p 1101 note 39

Malice, premeditation, and deliberation

Under such a statute an unlawful killing of a human being with malice premeditation and deliberation is murder in the first degree—State v Burrage, 25 S E 2d 393, 223 N C 129 -State v Utley, 25 S E 2d 195, 223 N C 39 - State v Smith, 20 S E 2d 313 221 N C 278—State v Starnes, 17 S E 2d 316 220 N C 384—State v Brown, 11 S E 2d 321, 218 N C 415—State v Hawkins, 199 S E 284, 214 N C 326—State v Bowser, 199 S E 31, 214 N C 219—State v Payne, 197 S E 573, 213 N C 719—State v Steele, 130 S E 308, 190 N C 506—State v. Benson, 111 S E. 869, 183 N C 795

first degree is expressed by other statutes in different language[71] The fact that the statute provides that all murders which shall be perpetrated by means of poison or lying in wait or any other kind of willful, deliberate, and premeditated killing shall constitute murder in the first degree does not require the application of the doctrine of ejusdem generis so that it shall be construed as applicable only to acts of the same general nature or class as those enumerated[72]

Act greatly dangerous to lives of others. A killing perpetrated by an act greatly dangerous to the lives of others and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is under some statutes murder in the first degree[73] This provision does not apply to cases of death produced by acts affecting a single individual,[74] or where there is an intent to kill any particular individual[75]

Poison or lying in wait. The statutes defining murder in the first degree frequently mention specifically murder perpetrated by means of poison[76] or by lying in wait[77] as being in that degree Lying in wait under such a statute consists in concealment for the purpose of taking the victim unawares, however it may be accomplished[78]

Perpetration of felony The statutes ordinarily classify as murder in the first degree killings committed in the perpetration of or attempt to perpetrate a felony,[79] or certain enumerated felonies,[80] such as arson,[81] burglary,[82] or certain enumer-

71. Deliberate and premeditated design to effect the death of the person killed or another —People v Moran, 158 N E 35, 246 N Y 100—29 C J p 1105 note 40 [d]

Deliberate, premeditated, malice aforethought

Hawaii —Republic of Hawaii v Nenchiro, 12 Hawaii 189

Premeditated design to effect the death of the person killed or another

Fla —Lowe v State, 105 So 829, 90 Fla 255

Wis —Walsh v State, 218 N W 714, 195 Wis 540—Montgomery v State, 190 N W 105, 178 Wis 461—Bernhardt v State, 51 N W 1009, 82 Wis 23

29 C J p 1105 note 40 [c]

Purposely and of deliberate and premeditated malice

Ohio —State v Pierce, 24 Ohio N P, N S, 413

Wash —Blanton v State, 24 P 439, 1 Wash 265—Leonard v Territory, 7 P 872, 2 Wash T 381

29 C J p 1105 note 40 [a]

Purposely and with premeditated malice

Ind —Lloyd v State, 189 N E 406, 206 Ind 359

Wyo —State v Pressler, 92 P 806, 16 Wyo 214, 15 Ann Cas 93

72. Nev —State v Randolph, 242 P 697, 698, 49 Nev 241, quoting **Corpus Juris.**

29 C J p 1105 note 41

73. N M —State v Reed, 39 P 2d 1005, 39 N M 44, 102 A L R 995

N Y —People v Jernatowski, 144 N E 497, 238 N Y 188

29 C J p 1108 note 70

74. N Y —Darry v People, 10 N Y 120, 2 Park Cr 606

29 C J p 1108 note 73 [d]

75 Ala —Mitchell v State, 60 Ala 26

Colo —Longinotti v. People, 102 P 165, 46 Colo 173.

76. Iowa —State v Robinson, 101 N W 634, 126 Iowa 69

29 C J p 1106 note 44

Adulteration of liquors

The language of statute making adulteration of liquors a crime and providing that, if death of person shall result from drinking adulterated liquor, "the crime shall be deemed murder and be punished accordingly" does not make the denounced act and culmination in death statutory "murder in first degree," but merely reaffirms the law as it was and would have been had such language not been used in the statute, and the denounced acts may culminate in murder in any one of the several degrees —Coston v State, 198 So 467, 144 Fla 676

77. Pa —Commonwealth v Guida, 148 A 501, 298 Pa 370.

29 C J p 1106 note 45

78. Iowa -State v Tyler, 97 N W 983, 122 Iowa 125

29 C J p 1106 note 46

79. N M - State v Smelcer, 228 P 183, 30 N M 122

N Y —People v Elling 46 N E 2d 501, 289 N Y 419 reversing People v Bender, 37 N Y S 2d 227, 264 App Div 977—People v Lytton, 178 N E 290, 257 N Y 310, 79 A L R 503 —People v Koerber, 155 N E 79, 244 N Y 147—People v La Barbera, 287 N Y S 257, 159 Misc 177

N C —State v Smith, 20 S E 2d 313, 221 N C 278

29 C J p 1106 note 47.

Escape

Killing in an attempt to escape imprisonment is murder in the first degree —People v Udwin, 172 N E 189, 254 N Y 255—People v Weiner, 161 N E 441, 248 N Y 118—29 C J p 1106 note 47 [a] (2)

There is no murder in second degree, when committed while engaged in attempt to commit felony, without design to effect death —People v Hoffman, 220 N Y S 219, 219 App Div 334, affirmed 157 N E 869, 245 N Y 588

80 Cal —People v Caballero, 87 P 2d 364, 31 Cal App 2d 52—People v Sutton, 62 P 2d 397, 17 Cal App 2d 561

Pa —Commonwealth v Kelly, 4 A 2d 805, 333 Pa 280—Commonwealth v Steuma, 192 A 906, 327 Pa 317

Completion not essential

The statute providing that all murder which shall be committed in the perpetration of or attempting to perpetrate any arson, rape, robbery, burglary or kidnapping shall be deemed "murder in the first degree" by implication recognizes that the essential is not the completion of the robbery, rape, etc , but that murder may be present in an attempted robbery rape, etc —Commonwealth v. Guida, 19 A 2d 98, 341 Pa 305

81. Mo —State v Glover, 50 S W 2d 1019 330 Mo 709, 87 A L R 400

Pa —Commonwealth v Hawk 196 A 5, 328 Pa 417—Commonwealth v. Ruttenberg, 19 Pa Dist & Co 534

29 C J p 1106 note 48

Common-law arson

"Arson" as used in statute punishing as murder in the first degree murder committed in perpetration of arson was intended to include common-law arson Consequently, one willfully setting fire to dwelling house in possession of another and in perpetration thereof causing death of a person, may be convicted of murder in the first degree —Commonwealth v Bruno, 175 A 518, 316 Pa. 394

82. Cal —People v Hawk, 112 P 2d 225, 17 Cal 2d 812—People v Green, 17 P 2d 730, 217 Cal 176—People v Sutton, 62 P 2d 397, 17 Cal App 2d 561

Mich —People v Treichel, 200 N.W. 950, 229 Mich 303

29 C J p 1106 note 49.

ated felonies such as larceny,[83] rape,[84] robbery,[85] or certain described crimes, such as crimes punishable with death,[86] or by death or life imprisonment,[87] or by imprisonment in the penitentiary[88]

Under a statute making the unintentional killing of another while engaged in the commission of a felony murder in the first degree, the other elements constituting the felony must be so distinct from that of the homicide as not to be an ingredient of the homicide indictable therewith or convictable thereunder.[89] It is not necessary, however, that the act which caused the death must have been a different one from that done in the commission of the collateral felony, but if the act causing the death was committed with a collateral and independent felonious design, it is sufficient.[90]

If accused was actually engaged in the commission of a felony it is immaterial that his victim did not know he was so engaged.[91]

Torture, circumstances of atrocity or cruelty By some statutes murder when committed with extreme atrocity or cruelty is made murder in the first degree.[92] Other statutes provide that killing perpetrated by torture is murder in the first degree.[93] A murder committed with peculiar and extreme atrocity and cruelty does not amount to a murder perpetrated by means of torture.[94]

83. Wash.—State v. Daniels, 205 P. 1054, 119 Wash. 557
29 C.J. p. 1106 note 50

84. Mass.—Commonwealth v. Osman, 188 N.E. 226, 284 Mass. 421
Wash.—State v. Whitfield, 224 P. 559, 129 Wash. 134
W.Va.—State v. Beale, 141 S.E. 7, 401, 104 W.Va. 617
29 C.J. p. 1106 note 51

85 Ark.—Williams v. State, 55 S.W.2d 928, 186 Ark. 738
Cal.—People v. Hawk, 112 P.2d 225, 17 Cal.2d 812.—People v. Meyers, 46 P.2d 282, 7 Cal.App.2d 351
Colo.—Abshier v. People, 289 P. 1081, 87 Colo. 507
Ind.—Burns v. State, 136 N.E. 857, 192 Ind. 427.—Cole v. State, 134 N.E. 867, 192 Ind. 29
Mo.—State v. Schnelt, 108 S.W.2d 377, 341 Mo. 241.—State v. Baker, 278 S.W. 987.—State v. Long, 253 S.W. 729
N.J.—State v. Calabrese, 151 A. 781, 107 N.J.Law 115.—State v. Carlino, 118 A. 784, 98 N.J.Law 48, affirmed 122 A. 830, 99 N.J.Law 292
N.C.—State v. Glover, 179 S.E. 6, 208 N.C. 68.—State v. Myers, 162 S.E. 761, 202 N.C. 351.—State v. Sterling, 156 S.E. 96, 200 N.C. 18
Ohio.—State v. Pierce, 24 Ohio N.P., N.S., 413
Pa.—Commonwealth v. Childers, 29 A.2d 471.—Commonwealth v. Shawell, 191 A. 17, 325 Pa. 497.—Commonwealth v. Flood, 153 A. 152, 302 Pa. 190.—Commonwealth v. Carelli, 127 A. 305, 281 Pa. 602.—Commonwealth v. Dorris, 8 Pa.Dist. & Co. 210, affirmed Commonwealth v. Doris, 135 A. 313, 287 Pa. 547
29 C.J. p. 1106 note 52

Beggar

Where accused shot and killed deceased on a public street when deceased refused to give him twenty-five cents, the jury could find the murder was committed in the perpetration of a robbery.—Commonwealth v. Vasbinder, 141 A. 476, 292 Pa. 506

Conception of design to rob

Accused is guilty of "first degree murder," regardless of when design to rob is conceived, if homicide occurs while he is perpetrating or attempting to perpetrate robbery.—Commonwealth v. Stelma, 192 A. 906, 327 Pa. 317

Motive in the killing is immaterial.—State v. McMahon, 261 P. 639, 145 Wash. 672

Provocation

Where the homicide was committed in the perpetration of a robbery, the fact that as accused started away from the scene of the crime deceased called him a vile name and raised his hand with something in it as if to strike, did not constitute just provocation so as to reduce the crime from murder in the first degree to murder in the second degree.—State v. King, 119 S.W.2d 322, 342 Mo. 1067

Resisting arrest

Accused killing officer attempting to arrest him at scene of robbery was guilty of murder in first degree.—Williams v. State, 39 S.W.2d 295, 183 Ark. 870

"Robbery"

(1) Word "robbery," as used in statute defining murder in first degree includes common-law offense as well as that defined by statute.—State v. Compo, 158 A. 541, 108 N.J.Law 499, 85 A.L.R. 866

(2) "Robbery" as used in statute was held to mean the felonious taking of property from the person of another by force.—State v. Thorp, 171 A. 633, 86 N.H. 501

86. Del.—State v. Opher, 188 A. 257, 8 W.W.Harr. 93
Hawaii.—Republic of Hawaii v. Nenchiro, 12 Hawaii 189
29 C.J. p. 1107 note 54

87. Mass.—Commonwealth v. Madeiros, 151 N.E. 297, 255 Mass. 304, 47 A.L.R. 962.—Commonwealth v. Pemberton, 118 Mass. 36

88. D.C.—U.S. v. Evans, 28 App.D.C. 264

89 Kan.—State v. Fisher, 243 P. 291, 293, 120 Kan. 226, quoting **Corpus Juris.**
N.Y.—People v. Lazar, 2 N.E.2d 32, 271 N.Y. 27.—People v. Moran, 158 N.E. 35, 246 N.Y. 100
29 C.J. p. 1107 note 57

Felonious assault

"We think it self-evident that the trial judge committed error when he charged that the killing may have been effected while the defendant was engaged in a felonious assault upon him and, basing their conclusion thereupon, might determine that the defendant was guilty of murder in the first degree. If this were not error, then every intentional killing, by means of a dangerous weapon regardless of deliberation and premeditation would constitute the crime of murder in the first degree since every such killing must be preceded by the direction of such a weapon against the body of the person killed which in itself would constitute a felonious assault."—People v. Wagner, 156 N.E. 641, 646, 245 N.Y. 143

90. N.Y.—People v. Huter, 77 N.E. 6, 184 N.Y. 237

91. Pa.—Commonwealth v. Major, 47 A. 741, 198 Pa. 290, 82 Am.S.R. 803

92 Hawaii.—Republic of Hawaii v. Nenchiro, 12 Hawaii 189
Mass.—Commonwealth v. Osman, 188 N.E. 226, 284 Mass. 421
29 C.J. p. 1108 note 68

93. N.M.—State v. Reed, 39 P.2d 1005, 39 N.M. 44, 102 A.L.R. 995

Beating

(1) Severe beating of wife by accused causing her death was "torture" within the statute.—People v. Murphy, 32 P.2d 635, 1 Cal.2d 37

(2) Accused's beating of his wife and his subsequent neglect to do anything to relieve wife until she had become unconscious constituted 'torture'.—People v. Cardoza, Cal.App., 134 P.2d 877

94. Colo.—Townsend v. People, 111 P.2d 236, 107 Colo. 258

§ 32. —— Intent to Kill

a In general
b Particular classes of murders

a. In General

Under statutes requiring the killing to be "willful," "purposed," or with "premeditated design," a specific intent to take human life is necessary to constitute murder in the first degree, but a specific intention to take the life of the person killed is not generally considered to be necessary.

Under those statutes which require the killing to be "willful," "purposed," or with "premeditated design," a specific intent to take human life is necessary to raise a murder to the first degree [95] Conversely, a deliberate intentional killing where there are no circumstances rendering the homicide justifiable or excusable is murder in the first degree under such statutes [96] The existence of the intent to kill is not enough to raise the crime to the first degree, the killing must be in pursuance of that intent [97] If the purpose to kill existed, it is not necessary that accused have carried out that purpose himself, he is equally guilty in the first degree if it was executed by an accomplice [98]

An intent to kill need not be directed toward any specific person,[99] and a conditional intent to kill, if carried into effect on the occurrence of the condition, is sufficient [1] For example, it may be murder in the first degree if there is an intent to kill any person who may attempt to do a certain thing, and one is killed because he makes such attempt [2]

Where a single act results in the killing of several, if it is murder in the first degree as to one of the victims, it is murder of the same degree as to the others, as where a single shot is fired killing two men [3]

Intent to kill another It is not ordinarily necessary under the statutes defining murder in the first degree that the specific intent to kill be directed toward the person actually killed, and the crime is, as a general rule, of the first degree if with the specific intent to kill one person accused by accident or mistake killed another,[4] or if, with the formed

95. Ala—Jackson v State, 193 So 417, 239 Ala 38
Ark—Gulley v State, 146 S W 2d 706, 201 Ark 741
Cal—People v Murphy, 32 P 2d 635, 1 Cal 2d 37—People v Burkhart, 297 P 11, 211 Cal 726—People v Vaiz, 131 P 2d 407, 55 Cal App 2d 714—People v Ross, 93 P 2d 1019, 34 Cal App 2d 574 People v Connors, 12 P 2d 43, 124 Cal App 216
D C—Lee v U S, 112 F 2d 46, 72 App D C 117
Iowa—State v Johnson, 215 N W 728, 215 Iowa 483—State v Johnson 234 N W 263, 211 Iowa 874
Neb—Dean v State, 259 N W 175, 128 Neb 466
N J—State v Close, 148 A 764, 106 N J Law 321
N M—Torres v State 43 P 2d 929, 39 N M 191
N Y—People v Koerber, 155 N E 79, 244 N Y 147
Or—State v Butchek, 253 P 367, 121 Or 141, rehearing denied 254 P. 805, 121 Or 141
Pa—Commonwealth v Robinson, 157 A 689, 305 Pa 302—Commonwealth v Santos, 119 A 596, 275 Pa 515—Commonwealth v Grimm, 5 Pa Dist & Co 287
29 C J p 1108 note 73

Distinction between degrees

(1) Intent is the main distinction of murder in the first from murder in the second degree—Commonwealth v Iacobino, 178 A 823, 319 Pa 65—Commonwealth v. Gibson, 119 A 403, 275 Pa 338

(2) Grade of offense of homicide is fixed by will and purpose to kill, and not the interval of time elapsing—Mosby v Commonwealth, 190 S E 152, 168 Va 688

First or second degree

Homicide, committed with intent to kill, is, if offense at all, murder in either first or second degree—State v Cooley, 5 P 2d 1005, 165 Wash 638

Motive distinguished

Intent is ripened purpose to effect a result, while motive is the moving power which leads the mind to desire the result and form the purpose—Harden v State, 101 So 442, 211 Ala 656

Premeditated design to effect death

is an essential element of murder in the first degree—Forehand v State 171 So 241 126 Fla 464—Rhodes v State, 140 So 309 104 Fla 520—Townsend v State, 116 So 7, 95 Fla 139—Smithie v State, 94 So 156, 84 Fla 498—Richardson v State, 86 So 619, 80 Fla 634

"Purposely"

"Purposely," as used in a statute providing that whoever shall purposely and of deliberate and premeditated malice kill another shall be deemed guilty of murder in the first degree, means intentionally—Pembrook v State, 222 N W 956, 117 Neb 759

Purpose to kill

The deliberation and premeditation required to constitute murder in the first degree must be connected with the carrying into execution of a fully conscious, no matter how hastily formed, purpose to kill, and not merely a desire to do great bodily harm—Commonwealth v Santos, 119 A 596, 275 Pa 515

98. W Va—State v Beatty, 41 S E 434 51 W Va 232
29 C J p 1109 note 74

97. Ala—Williams v State, 3 So 616, 83 Ala 16

98 Pa—Commonwealth v Neills, 2 Brewst 553
Parties to offense see supra §§ 7–10

99. Va—Williams v Commonwealth, 104 S E 853, 128 Va 698

1. Ala—Dabney v State 21 So 211, 113 Ala 38 59 Am S R 92
29 C J p 1109 note 79

2. Va—Williams v Commonwealth, 104 S E 853, 128 Va 698

Arming with deadly weapon

A person who determines to commit a wrongful act, who contemplates that another will or may, interfere with his enterprise, who arms himself with a deadly weapon with the intent to take the life of one who interferes, should it become necessary to save his own in the course of such interference, and who, in the pursuance of such intent does in fact take the life of the person so interfering is guilty of murder in the first degree Bausell v Commonwealth, 181 S E 453 165 Va 669—29 C J p 1113 notes 30, 31

3 Or—State v Taylor, 132 P 713, 65 Or 266

4. Cal—Mar Shee v Maryland Assur Corporation, Baltimore, 210 P 269, 190 Cal 1
29 C J p 1109 note 83, p 1110 note 88.

design of killing someone although with no definite person in mind, he shot and killed a person whom he did not know,[5] the underlying rule being that, where an act directed toward one person results in the unintentional killing of another, the degree of criminality is the same as though the person toward whom the act was directed had been the victim.[6] There is some authority, however, to the effect that the killing in such case cannot be held to be willful, deliberate, and premeditated,[7] or a killing with express malice[8] within the statutory definition of murder in the first degree. In any event, there must be a legal connection or relation between the original purpose and act and the unexpected result.[9]

b. Particular Classes of Murders

An intent to kill is not an essential element of the crime under some statutes raising particular atrocious killings to murder in the first degree

Frequently under statutes raising particular classes of atrocious killings to murder in the first degree, a specific intent to kill is not an essential element of the crime.

Dangerous act. Under a statute providing that a killing is murder in the first degree when committed by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual, a specific intent to kill someone at the time of the act is not an essential element of the crime.[10]

Killing in perpetration of other felony. An intent to kill ordinarily is not required under those clauses of the statutes making it murder in the first degree where the homicide is committed in the perpetration of a felony,[11] or of any of certain enumerated felonies,[12] or of a crime punishable by

5. Or—State v. Murray, 5 P. 55, 11 Or. 413
W.Va.—State v. Young, 40 S.E. 334, 50 W.Va. 96, 88 Am.St.R. 846
29 C.J. p. 1110 note 81

By express provision of some statutes, every murder perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed is murder in the first degree.—Gallant v. State, 52 So. 739, 167 Ala. 60—29 C.J. p. 1110 note 90

6. Iowa.—State v. Williams, 97 N.W. 992, 122 Iowa 115
29 C.J. p. 1110 note 85

7. Tenn.—Kannon v. State, 78 Tenn. 386—Bratton v. State, 10 Humphr. 103

8. Tex.—Sparks v. State, Cr., 77 S.W. 811
29 C.J. p. 1110 note 87

9. N.C.—State v. Cole, 44 S.E. 391, 132 N.C. 1069
29 C.J. p. 1110 note 89

10. N.Y.—People v. Jernatowski, 144 N.E. 497, 238 N.Y. 188

11. N.Y.—People v. Udwin, 172 N.E. 189, 251 N.Y. 255—People v. Emidota, 111 N.E. 487, 238 N.Y. 158—People v. Sobieskoda, 139 N.E. 558, 235 N.Y. 411—People v. La Barbera, 287 N.Y.S. 257, 159 Misc. 177
29 C.J. p. 1110 note 91

Legislature's intent, in enacting statutory provision that homicide was murder when perpetrated without any design to effect death by a person engaged in the commission of any felony, was to class certain homicides as murder, without containing the ingredient of premeditated design or intention, which homicides otherwise could not possibly be of a higher degree than manslaughter.—Morris v. State, 96 P.2d 88, 68 Okl. 117

12. Cal.—People v. Williams, 125 P.2d 9, 20 Cal.2d 273—People v. Waller, 96 P.2d 341, 14 Cal.2d 693—People v. Martin, 85 P.2d 880, 12 Cal.2d 166—People v. Boss, 290 P. 881, 210 Cal. 215—People v. Arnold, 250 P. 168, 199 Cal. 471—People v. Kaye, 111 P.2d 679, 43 Cal.App.2d 802—People v. Caballero, 87 P.2d 364, 31 Cal.App.2d 52—People v. Anderson, 37 P.2d 67, 1 Cal.App.2d 687
Conn.—State v. Di Battista, 148 A. 664, 110 Conn. 549
Ind.—Cole v. State, 134 N.E. 867, 192 Ind. 29
Mich.—People v. Crandell, 258 N.W. 224, 270 Mich. 124
Mo.—State v. Meadows, 51 S.W.2d 103, 330 Mo. 1020—State v. Glover, 50 S.W.2d 1049, 330 Mo. 709, 87 A.L.R. 400
Neb.—South v. State, 196 N.W. 681, 111 Neb. 383
N.J.—State v. Calabrese, 151 A. 781, 107 N.J.Law 115
Pa.—Commonwealth v. Blanchard, 26 A.2d 303, 345 Pa. 289, reargument denied 27 A.2d 48, 345 Pa. 289—Commonwealth v. Guida, 19 A.2d 98, 341 Pa. 305—Commonwealth v. Stelma, 192 A. 906, 327 Pa. 317—Commonwealth v. Shawell, 191 A. 17, 325 Pa. 497—Commonwealth v. McManus, 127 A. 316, 282 Pa. 25
W.Va.—State v. Williams, 127 S.E. 320, 98 W.Va. 458
29 C.J. p. 1110 note 92

Accidental discharge of gun in course of robbery, resulting in victim's death, constitutes murder in the first degree.—Cal.—People v. Perry, 94 P.2d 559, 4 Cal.2d 387, 124 A.L.R. 1123—People v. Manriquez, 206 P. 63, 188 Cal. 602, 20 A.L.R. 1441
Mont.—State v. Reagin, 210 P. 86, 64 Mont. 481
N.Y.—People v. Lytton, 178 N.E. 290, 257 N.Y. 310, 79 A.L.R. 503
Pa.—Commonwealth v. Frisbie, 20 A.2d 285, 342 Pa. 177—Commonwealth v. Sterling, 170 A. 258, 314 Pa. 76—Commonwealth v. Lessner, 118 A. 21, 274 Pa. 108
Wyo.—State v. Best, 12 P.2d 1110, 41 Wyo. 383

Armed with dangerous weapon

Under statute defining "murder in first degree" as the killing of another while armed with or using a dangerous weapon in the perpetration or attempted perpetration of a robbery, it is not necessary to show that the killing was done purposely to raise the offense to murder in the first degree.—Mumford v. U.S., 130 F.2d 411, 76 U.S.App.D.C. 107, petition denied 63 S.Ct. 53, 317 U.S. 656, 87 L.Ed. —

Death from severe beating is murder in the first degree when the beating was inflicted in aid of robbery.—United Life & Accident Ins. Co. v. Prostic, 182 A. 121, 169 Md. 535

Intent to commit murder

That accused in perpetration of robbery, had no intent to commit murder while committing robbery, would afford him no defense.—Clark v. State, 276 S.W. 849, 169 Ark. 717

Larceny

Laws 1919 p. 131 § 1, making it a felony to drive away an automobile without the consent of the owner, even though without intent to steal, does not prevent the taking of an automobile with an intent to steal it from being larceny under Remington Code 1915 § 2601, so that a kill-

death or imprisonment for life.[13] However, where the statute provides that any person who purposely and of deliberate and premeditated malice or in the perpetration or attempt to perpetrate certain enumerated felonies shall kill another shall be guilty of murder in the first degree, the intent or purpose to kill is essential.[14]

A statute providing that a homicide committed in the perpetration of a felony is first degree murder "without a design to effect death" does not render absence of intent to kill an essential ingredient of the offense.[15]

Killing by poison. Where the statute declares all murder perpetrated by means of poison to be murder in the first degree, in the case of a homicide committed by the unlawful administration of poison, a specific intent to kill is not necessary.[16] Under a statute which declares that "all murder which shall be perpetrated by means of poison . . or by any other kind of wilful, deliberate or premeditated killing" shall be murder in the first degree, the perpetrator, it has been said, may be held guilty of murder in the first degree without further proof that the death was the ultimate result which the will, deliberation, and premeditation of the party accused sought,[17] but under a statute providing that if any person of sound mind shall "purposely and with premeditated malice . . or by administering poison" kill any human being, he shall be guilty of murder in the first degree, a purpose to kill is essential where the murder is committed by poison.[18]

Killing by means of torture. Under a statute providing that all murder perpetrated by means of torture shall be deemed murder in the first degree, the purpose to kill is conclusively presumed from the intention to perpetrate the torture unlawfully inflicted.[19]

Lying in wait. Where the statute provides that all murder which shall be perpetrated by means of lying in wait or any other kind of willful, deliberate, malicious, or premeditated killing shall be murder in the first degree, in case of murder by lying in wait there is a conclusive legal presumption of malice and guilty intention from the means employed.[20] To the contrary, however, it has been held that, where a homicide was committed by lying in wait, it must have been with an actual intent to kill and not merely to do bodily injury.[21] In a jurisdiction in which a killing must be with express malice in order to constitute murder in the first degree, see infra § 34, a killing by a person lying in wait is not per se murder in the first degree.[22]

§ 33. —— Willfulness, Deliberation, and Premeditation; Premeditated Design

a In general
b Definitions and distinctions
c Time requisite for deliberation or premeditation
d Necessity that killing result from deliberation and premeditation
e Classes of killing where deliberation and premeditation not required

a. In General

Willfulness, deliberation, and premeditation are ordinarily distinctive features of one class of murder in the first degree, and to constitute such crime each of these elements must be present

Ordinarily, under the various statutes dividing murder into degrees, the distinctive features of one class of murder in the first degree are willfulness, deliberation, and premeditation.[23] The elements

ing in the perpetration of the stealing of an automobile is murder in the first degree under § 2392, making homicide without design by a person engaged in commission of larceny murder in the first degree.—State v Daniels, 205 P 1051, 119 Wash 557

13. Mass - Commonwealth v Heinlein 152 N E 380, 256 Mass 387—Commonwealth v Chance, 54 N E 551, 174 Mass 245, 75 Am S R 306

14. D C—Jordon v U S, 87 F 2d 64, 66 App D C 309, certiorari denied 58 S Ct 762, 303 U S 654, 82 L Ed 1114
29 C J p 1111 note 94

Purpose of securing insurance
Death of occupant in upper floor of building which was set afire by accused could not be considered as natural and probable consequence of burning of accused's store for purpose of securing insurance so as to show purpose to kill and therefore to constitute first degree murder.—Turk v State, 194 N E 425, 48 Ohio App 189, affirmed State v Turk, 194 N E 453, 129 Ohio St 245

15. N Y—People v Sullivan, 65 N E 989, 173 N Y 122, 93 Am S R 582, 63 L R A 353, 17 N Y Cr 180

16. Iowa—State v Thomas, 109 N W 900, 135 Iowa 717, error dismissed 30 S Ct 407, 215 U S 591, 54 L Ed 340
29 C J p 1111 note 96

17. Va—Commonwealth v. Jones, 1 Leigh 598, 28 Va 598

18. Ind—Bechtelheimer v State, 54 Ind 128
29 C J p 1111 note 98.

19. Cal—People v Murphy, 32 P 2d 635, 1 Cal 2d 37
Colo—Townsend v People, 111 P 2d 236, 107 Colo 258

20. Tenn—Bratton v State, 10 Humphr 103—Riley v State, 9 Humphr 646

21. Pa—Commonwealth v Klose, 4 Kulp 111

22. Tex—Osborne v State, 5 S W 251, 23 Tex A 131

23. Ariz—Lasater v State, 81 P 2d 83, 52 Ariz 366—Macias v State, 283 P 711, 36 Ariz 140—Singh v State, 280 P 672, 35 Ariz 432, 67 A L R 129
Ark—Gulley v State, 146 S W 2d 706, 201 Ark 744—McClendon v State, 126 S W 2d 928, 197 Ark 1135—Stanley v State, 40 S W 2d 415, 183 Ark. 1093.

described by the words "willful," "deliberate," and "premeditated" respectively as they are employed to characterize the killing in statutes defining murder in the first degree are distinct, and must each be present in order that the homicide may come within the definition [24] For example, under a statute providing that a willful, deliberate, and premeditated killing shall be murder in the first degree it is not murder in the first degree if the homicide is willful and premeditated but is without deliberation,[25] and this is also true under statutes requiring "deliberate and premeditated design"[26] So, likewise, if the element of premeditation is absent, a homicide is not murder in the first degree as a willful, deliberate, and premeditated killing,[27] or as a killing with premeditated malice [28]

Cal —People v French, 87 P 2d 1014, 12 Cal 2d 720—People v Howard, 295 P 333, 211 Cal 322, 71 A L R 1385—People v Ross, 93 P 2d 1019, 34 Cal App 2d 571—People v Connors, 12 P 2d 43, 124 Cal App 216

Conn —State v Simborski, 182 A 221, 120 Conn 624

D C —Bishop v U S, 107 F 2d 297, 71 App D C 132

Iowa —State v Leib, 201 N W 29, 198 Iowa 1315

Mass —Commonwealth v Bedrosian, 112 N E 778, 247 Mass 573

Mo —State v Long, 253 S W 729

Neb —Pembrook v State, 222 N W 956 117 Neb 759—Bartlett v State 211 N W 904, 115 Neb 148

N M —Torres v State, 43 P 2d 929, 39 N M 191

N C —State v Burrage, 25 S E 2d 393 223 N C 129—State v Utley, 25 S E 2d 195—State v Staines, 17 S E 2d 346 220 N C 381—State v Brown, 11 S E 2d 321, 218 N C 415—State v Hawkins, 199 S E 281 214 N C 426—State v Bowser 199 S E 31, 214 N C 249 State v Alston, 197 S E 719 211 N C 9—State v Payne, 197 S E 573 213 N C 719—State v Keaton 175 S E 296, 206 N C 682—State v Miller, 149 S E 590 197 N C 445

Ohio —Rudner v State, 160 N E 718, 27 Ohio App 59, error dismissed 160 N E 634, 117 Ohio St 620

Or —State v Butchek 251 P 805, 121 Or 141 denying rehearing 253 P 367 121 Or 141

Pa —Commonwealth v Kelly, 4 A 2d 805 333 Pa 280—Commonwealth v Patterson 41 Pa Dist & Co 215, 23 Erie Co 215—Commonwealth v Daniels, 19 Wash Co 119

R I State v Feni, 121 A 218, 45 R I 309

Utah —State v Stenback 2 P 2d 1050, 78 Utah 350, 79 A L R 878

Va —Bradshaw v Commonwealth, 4 S E 2d 752, 174 Va 391

W Va —State v Farley, 23 S E 2d 616

Wis Walsh v State, 218 N W 714, 197 Wis 510

29 C J p 1104 note 39, p 1105 note 10

Crime held murder in first degree

Mont —State v Louie Won, 248 P 201, 76 Mont 509

Deliberate and premeditated design

(1) Under some statutes to constitute murder in the first degree there must have been a deliberate and premeditated design —People v Sermarco, 95 N E 553, 202 N Y. 225—29 C J p 1112 note 8

(2) Under such statutes deliberation and premeditation are necessary constituents of the crime of murder in the first degree —People v Crumble, 35 N E 2d 634, 286 N Y 24—People v Leonardi, 38 N E 372, 143 N Y 360

Deliberation

Murder in the first degree is that form of murder in which there is present the deliberation which constitutes intensified malice or malice in the first degree —State v Reed 39 P 2d 1005, 39 N M 44, 102 A L R 995

Fixed purpose

To constitute murder in the first degree the intent to kill must have been formed into a fixed purpose by deliberation and premeditation —State v Lewis, 183 S E 357, 209 N C 191

Malice aforethought

A charge of murder in the first degree involves the element of malice aforethought —People v Lane, Mich, 7 N W 2d 210

Murder committed during robbery

(1) Although murder is committed during perpetration of robbery to constitute murder in the first degree state need not plead and prove that it was so committed if deliberation is shown —State v Moore, 33 S W 2d 905, 326 Mo 1199

(2) In prosecution for killing police officer after accused's attempted robbery, even if jury found that, although there had been an attempt to rob a certain person, the attempted robbery had been completely abandoned at time of shooting, a verdict of guilty of murder of the first degree was warranted if jury found that accused killed the officer willfully, deliberately, and with premeditation —Commonwealth v Kelly 10 A 2d 431, 337 Pa 171

Premeditated design

Under some statutes a premeditated design to effect death is an essential element of one class of murder in the first degree —Forehand v State, 171 So 241, 126 Fla 461—Leavine v State, 147 So 897, 109 Fla 417—Rhodes v State, 110 So 309, 101 Fla 520—Townsend v State, 116 So 7 95 Fla 139—Lowe v State, 105 So 829, 90 Fla 255—Smithie v State, 94 So 156, 84 Fla 498—29 C J p 1112 note 7

Purposely and with premeditated malice

Under some statutes to constitute this class of homicide it is essential that the killing shall have been done purposely and with premeditated malice —Lloyd v State, 189 N E 106, 206 Ind 359—29 C J p 1112 note 9

Use of dangerous weapon

Intentional killing by means of dangerous weapon does not constitute murder in the first degree in absence of deliberation and premeditation, except where accused is engaged at time in commission of independent felony —People v Lazar, 2 N E 2d 32, 271 N Y 27

Express malice aforethought

Murder in the first degree is killing with express malice aforethought, that is where one person kills another with a sedate, deliberate mind, and a formed design —State v Galvano, 154 A 461, 4 W W Del, Harr 109

24. Ala —Howell v State, 8 So 2d 815, 243 Ala 105

Ariz —Singh v State, 280 P 672, 35 Ariz 432, 67 A L R 129

Cal —People v Larios, 30 P 2d 404, 220 Cal 236—People v Fleming, 23 P 2d 28 218 Cal 300—People v Howard, 295 P 333 211 Cal 322, 71 A L R 1385—People v Smith, 77 P 2d 277, 25 Cal App 2d 241

Iowa —State v Brewer 254 N W 834, 218 Iowa 1287—State v Sipes, 209 N W 458, 202 Iowa 173, 47 A L R 407

N J —State v Turco, 118 A 579, 98 N J Law 61—State v Deliso 69 A 218 75 N J Law 808

Pa —Commonwealth v Dearolph, 41 Pa Dist & Co 613

29 C J p 1111 note 5, 6

25. Mo —State v Eaton, 154 S W 2d 767—State v Jackson, 130 S W 2d 595, 344 Mo 1055 State v Reagan, 108 S W 2d 391

29 C J p 1112 note 10

26 N Y —People v Brunt, 11 N Y St 59

27. Mo —State v Spever, 106 S W 505 207 Mo 540, 14 L R A, N S, 836

29 C J p 1112 note 12

28 Ind —Osburn v State 73 N E 601, 164 Ind 262 —Patterson v State, 66 Ind 185

While willfulness, deliberation, and premeditation must all be present and cannot be synchronous, the order in which they take place is not of controlling importance[29] It is not enough that the design to kill existed at the time of the killing,[30] but it must have been formed before it was put into execution[31]

b. Definitions and Distinctions

Among other terms employed in the various statutes defining murder in the first degree, which have received judicial interpretation, "willful" has been defined as intentional, "deliberation" as a thinking over in a cool state of blood, and "premeditation" as the entertaining by the mind of a design to kill prior to the killing

The term "willful" as used by the statutes to characterize a killing which may be murder in the first degree means intentional as distinguished from accidental[32] "Willful" means governed by the will, without yielding to reason[33]

While there is some authority to the contrary,[34] a distinction is ordinarily drawn between the words "deliberate" and "premeditated" as employed in statutory definitions of murder,[35] premeditation consisting in the entertaining by the mind of a design to kill prior to the killing,[36] and deliberation in the weighing of the considerations for and against it,[37] or the determination of whether or not the contemplated act should be done[38] Deliberation means a thinking over with calm and reflective mind,[39] and requires a cool state of blood and the absence of sudden passion caused by lawful or just provocation,[40] while one in a heat of passion may premeditate without deliberating[41] Although a specific intent to take life may be present, the killing, it has been held, is not necessarily deliberate and premeditated,[42] but the words "deliberately" and "premeditatedly" have been defined as meaning the intent to

29 N J —State v Mack, 90 A 1120, 86 N J Law 233

30. N J —State v Bonofiglio, 52 A 712, 54 A 99, 67 N J L 239, 91 Am S R 423
29 C J p 1116 note 56

31. N H —State v Greenleaf, 54 A 38 71 N H 606
29 C J p 1116 note 57
Time requisite for deliberation see infra subdivision c of this section

Fact determined from circumstances
In murder prosecution, accused's testimony as to the precise time when he formed intent to kill was not decisive, but such fact was to be determined in light of all the circumstances - State v Cox, 23 A 2d 555 128 N J Law 108

Stated conversely, if the act is preceded by, and is the result of, a concurrence of will, deliberation and intent the crime of murder in the first degree is proved — People v Cardoza Cal App, 134 P 2d 877

32. N C — State v Stackhouse, 67 S E 761, 152 N C 808
29 C J p 1112 note 16

If malicious intent to kill existed it is willful — Commonwealth v Foltz, 5 Pa Dist & Co 559

Under an indictment charging that accused feloniously, willfully deliberately premeditatedly, and of malice aforethought murdered deceased the homicide to constitute murder in the first degree, must have been willful, that is, intentional and not accidental - State v Di Battista, 148 A 664, 110 Conn 549

33 Ala —Martin v State, 25 So 255, 119 Ala 1—Hawes v State, 7 So 302 88 Ala 37—Mitchell v State, 60 Ala 26

34. Cal People v Pool, 27 Cal 572
Nev —State v Lopez, 15 Nev 407

Synonymous terms
"Premeditation" and "deliberation" are synonymous terms —White v State, 181 So 109, 236 Ala 124

35. Neb —Pembrook v State 222 N W 956, 117 Neb 759
29 C J p 1112 note 18

Deliberation is more than mere premeditation and is the distinguishing characteristic of murder in the first degree — Torres v State, 43 P 2d 929 39 N M 191

36. N M -Torres v State, supra
29 C J p 1112 note 19

Conceived beforehand
"Premeditated" means conceived beforehand — Pembrook v State, 222 N W 956 117 Neb 759

Deliberate and clear intent
To be premeditated the unlawful killing must have been accompanied by a deliberate and clear intent to take life — People v Cardoza, Cal App, 134 P 2d 877

Designed previously
"Premeditated" means contrived or designed previously - Martin v State, 25 So 255, 119 Ala 1—Hawes v State, 7 So 302 88 Ala 37—29 C J p 1112 note 19 [a] (1)

Thought of beforehand
Premeditation" means thought of beforehand
Mo —State v Cade 34 S W 2d 82, 326 Mo 1132
N M —Torres v State, 43 P 2d 929, 39 N M 191
N C —State v Brown, 11 S E 2d 321, 218 N C 415—State v Bowser, 199 S E 31, 214 N C 249—State v Buffkin, 183 S E 513, 209 N C 117—State v Steele, 130 S E 308, 190 N C 506—State v Benson, 111 S E 869 183 N C 795

37. N J —State v Mangano, 72 A 366, 77 N J Law 544.
29 C J p 1112 note 20

Maturely reflected
'Deliberate' means maturely reflected —Pembrook v State, 222 N W 956, 117 Neb 759

38. U S —U S v Kie, D C Alaska, 26 F Cas No 15,528b
29 C J p 1113 note 21

39. N M —Torres v State, 43 P 2d 929, 39 N M 191—Ex parte Simpson, 24 P 2d 291, 37 N M 453—State v Smith, 194 P 869, 26 N M 482

Formed with deliberation
"Deliberate" means formed with deliberation, in contradistinction to a sudden, rash act - Martin v State, 25 So 255 119 Ala 1—Hawes v State 7 So 302, 88 Ala 37—29 C J p 1113 note 22 [a] (2)

40 Mo —State v Reagan, 108 S W 2d 391—State v Cade, 34 S W 2d 82 326 Mo 1132—Ex parte Johnson, App, 142 S W 2d 651
N C —State v Brown, 11 S E 2d 321, 218 N C 415—State v Hawkins, 199 S E 284, 214 N C 326—State v Bowser, 199 S E 31 214 N C 249—State v Payne 197 S E 573, 213 N C 719 State v Buffkin, 183 S E 513 209 N C 117—State v Steele 130 S E 308 190 N C 506—State v Benson, 111 S E 869, 183 N C 795
Tenn Winton v State 268 S W 633, 151 Tenn 177
29 C J p 1113 note 22
"Deliberation means that the act is done in a cool state of the blood, in furtherance of some fixed design" —State v Evans, 150 S E 678, 680, 198 N C 82

41. Mo —State v Kotovsky, 74 Mo 247
29 C J p 1113 note 23

42. N J —State v Deliso, 69 A 218, 75 N J Law 808.

take life with a full and conscious knowledge of the purpose to do so,[43] and it has been said that a very correct definition of the two adjectives "deliberate" and "premeditated" is contained in an instruction to the effect that, "if a person had time to think, and did think, and, after having thought, he struck the blow as the result of a determination produced by the operation of the mind, then that would be a sufficient deliberation and premeditation"[44] A homicide committed for revenge is deliberate[45]

Premeditated design The phrase "premeditated design," as employed in some statutes defining murder in the first degree, has been held to signify merely an intent to kill[46] It is no more or less than a mental purpose to take human life[47]

Deliberate and premeditated design To constitute a deliberate and premeditated design to effect death the act must be deliberate, in the sense that it should not have been committed under the influence of sudden and uncontrollable impulse produced by a proximate cause, and premeditated, in the sense that an intention to inflict injury must have preceded the doing of the act which effected death[48]

Premeditated malice In order to constitute premeditated malice as employed in the definition of murder in the first degree, the thought of taking life must have been consciously conceived in the mind, the conception must have been meditated on, and a deliberate determination formed to do the act[49]

Deliberately premeditated malice aforethought. The phrase "with deliberately premeditated malice aforethought" within the meaning of a statute making murder so committed murder in the first degree means "thought upon, resolved upon beforehand, and not done suddenly," although no particular length of time is required[50] The word "deliberately" does not mean slowly, but refers to the purposeful character of the premeditated malice rather than to the time spent in premeditation[51]

c. Time Requisite for Deliberation or Premeditation

No particular length of time is necessary for deliberation and premeditation. In some jurisdictions the intention to kill and the act of killing may be as instantaneous as successive thoughts of the mind, but elsewhere it is held that there must be an appreciable time sufficient for some reflaction and consideration

No particular length of time is necessary for deliberation and premeditation,[52] as it is the fact of

43. Pa—Jones v Commonwealth, 75 Pa 403

44. Ala—Cleveland v State, 5 So 426, 86 Ala 1
29 C J p 1113 note 26

45. Mo—State v Vinso, 71 S W 1031, 171 Mo 576

46 Wis—Montgomery v State 116 N W 876, 136 Wis 119, 18 L R A, N S, 339
29 C J p 1113 note 28

47. Okl—Bishan v State, 287 P 761, 47 Okl Cr 204

48. N Y—People v Conroy 97 N Y 62 2 N Y Cr 565—Leighton v People 88 N Y 117

49 Ind—Dundovich v State, 131 N E 377, 190 Ind 600—Aszman v State, 21 N E 123, 123 Ind 347, 8 L R A 33

50. Mass—Commonwealth v Tucker, 76 N E 127, 189 Mass 457, 7 L R A, N S, 1056

51. Mass—Commonwealth v Brooks, 32 N E 2d 242, 308 Mass 367

52. U S—Evans v U S, C C A Kan, 122 F 2d 461, conforming to mandate 61 S Ct 548, 312 U S 651, 85 L Ed 1102, vacating 113 F 2d 935, certiorari granted 61 S Ct 69, 311 U S 635, 85 L Ed 404
D C—Bostic v U S, 94 F 2d 636, 68 App D C 167, certiorari denied 58 S Ct 523, 303 U S 635, 82 L Ed 1095
Fla—Rhodes v State, 140 So 309, 104 Fla 520—Buchanan v State 116 So 275, 95 Fla 301—Lowe v State 105 So 829, 90 Fla 255
Iowa—State v Heinz, 275 N W 10, 223 Iowa 1241, 114 A L R 959—State v Matheson, 261 N W 787, 220 Iowa 132—State v Troy, 220 N W 95, 206 Iowa 859, opinion supplemented 221 N W 370—State v Kneeskern 210 N W 465, 203 Iowa 929
Mont—State v Cates, 33 P 2d 578, 97 Mont 173
N J—State v Close, 148 A 764, 106 N J Law 321
N C—State v Brown, 11 S E 2d 321, 218 N C 415—State v Hudson 10 S E 2d 730, 218 N C 219—State v Hammonds 3 S E 2d 439, 216 N C 67—State v Buffkin, 183 S E 513, 209 N C 117—State v Evans, 150 S E 678, 198 N C 82—State v Benson 111 S E 869, 183 N C 795
Or—State v Butchek 254 P 805, 121 Or 141, denying rehearing 253 P 367 121 Or 141
Pa—Commonwealth v Patterson, 11 Pa Dist & Co 215, 23 Erie Co 215—Commonwealth v Grimm, 5 Pa Dist & Co 287
Va—Bradshaw v Commonwealth, 4 S E 2d 752, 174 Va 391—Mosby v Commonwealth, 190 S E 152, 168 Va 688—Shiflett v Commonwealth, 130 S E 777, 143 Va 609
Wash—State v Davis, 108 P 2d 641, 6 Wash 2d 696
29 C J p 1113 note 34, p 1114 notes 36, 43

"The length of time necessary to deliberate, or to form a specific intent to kill, need only be time enough to form a willful, premeditated, and specific intent to kill before the killing, and, if there be such time it is sufficient, no matter how long or how short it may be"—State v Simborski, 182 A 221, 223 120 Conn 624—State v Di Battista, 148 A 664, 668, 110 Conn 519

Constant purpose

"Premeditation" as an essential element of murder in first degree does not involve as a necessary element a constant purpose for a definite length of time—State v Farley, W Va, 23 S E 2d 616

Matter of logical sequence

"It is not so much a matter of time as of logical sequence First the deliberation and premeditation, then the resolution to kill, and lastly the killing in pursuance of the resolution and all this may occur in a few seconds"—Commonwealth v Brooks, 32 N E 2d 242, 243, 308 Mass 367—Commonwealth v Tucker, 76 N E 127, 141, 189 Mass 457, 7 L R A, N S, 1056

Premeditation is not controlled by lapse of time—People v Patubo 71 P 2d 270, 9 Cal 2d 537, 113 A L R 1303

deliberation which is important, rather than the length of time during which it continued[53] The requisite time cannot be measured by any rule other than that furnished by the circumstances of each case,[54] since the time necessary must vary according to the varying temperaments of men and the circumstances under which they are placed[55] It has been variously stated, in terms or effect, that any length of time, however short, is sufficient,[56] that it is sufficient if the purpose of killing is weighed long enough to form a fixed design to kill[57] or a conscious purpose to kill,[58] that it is sufficient if the design is formed even a moment before it is put into execution,[59] or that deliberation and premeditation may have existed but for an instant,[60] and that, if a design to kill has been deliberately formed, it may be instantly carried into effect[61]

In some cases it has been stated that there need be no appreciable time between the formation of the design and its execution,[62] and that the intention to kill and the act of killing may be as instantaneous as successive thoughts of the mind[63] On

53. D C—Bostic v U S, 94 F 2d 636, 68 App D C 167, certiorari denied 58 S Ct 523, 303 U S 635, 82 L Ed 1095

54. Pa—Commonwealth v Earnest 21 A 2d 38, 342 Pa 544—Commonwealth v Grimm, 5 Pa Dist & Co 287
Utah—State v Stenback, 2 P 2d 1050, 78 Utah 350, 79 A L R 878
29 C J p 1116 note 53

55. Ohio—Early v State, 16 Ohio Cir Ct 646, 7 Ohio Cir Dec 592

56. Del—State v Galvano, 154 A 461, 4 W W Harr 409
N C—State v Hawkins 199 S E 284, 214 N C 326—State v Payne, 197 S E 573, 213 N C 719—State v Lewis, 183 S E 357, 209 N C 191.
29 C J p 1114 note 37

Opportunity to recollect

An act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense or to be aware of what he is about to do and its consequences—State v Ruffkin, 183 S E 543, 209 N C 117

Removal of revolver from holster

Even if accused did not decide to shoot until he stopped in back yard where he had fled to escape officer, accused had time to deliberate after he stopped and while he was removing revolver from holster before officer appeared so as to support conviction for murder in the first degree of officer—State v Simborski, 182 A 221, 120 Conn 624

57. Colo—Maestas v People, 11 P 2d 227, 91 Colo 36
Utah—State v Masato Karumai, 126 P 2d 1047, 101 Utah 592
29 C J p 1114 note 38

It is fully formed purpose of accused to take life, and not length of time required to form purpose, which constitutes killing murder in first degree—Commonwealth v Scott, 130 A 317, 284 Pa 159

58. Mo—State v Kindred, 49 S W 845, 148 Mo 270
29 C J p 1114 note **39.**

59. Ala—White v State 181 So 109, 236 Ala 124
Del—State v Lee 171 A 195, 6 W W Harr 11—State v Galvano, 154 A 461, 4 W W Harr 409
Mont—State v Cates, 33 P 2d 578, 97 Mont 173
N C—State v Hudson, 10 S E 730, 218 N C 219—State v Hammonds, 3 S E 2d 439, 216 N C 67—State v Steele, 130 S E 308, 190 N C 506
Wash—State v Davis, 108 P 2d 641, 6 Wash 2d 696
W Va—State v Porter, 127 S E 386, 98 W Va 390
29 C J p 1114 note 40

"The intent to kill, distinctly formed even for a moment is sufficient"—Commonwealth v Dynarowicz 119 A 77, 78, 275 Pa 235

60. Iowa—State v Matheson 261 N W 787, 220 Iowa 132
W Va—State v Porter, 127 S E 386, 98 W Va 390
29 C J p 1114 note 41

"An instant of time may be all the time necessary for one to form a determination to do a certain thing, so swift is the operation of the human mind"—Commonwealth v Drecher, 118 A 215, 216, 274 Pa 325

Moment of firing

Deliberation could have been formed at the very moment the fatal shot was fired—State v Hall, 13 P 2d 624, 54 Nev 213

61 D C—Aldridge v U S, 47 F 2d 407, 60 App D C 15, certiorari granted 51 S Ct 333, 282 U S 836, 75 L Ed 743, and reversed on other grounds 51 S Ct 470, 283 U S 308, 75 L Ed 1054, 73 A L R 1203
29 C J p 1114 note 42

A premeditated design may be formed instantly preceding the act by which it is carried into execution—Basham v State, 287 P 761, 47 Okl Cr 204

62. Ariz—Sullivan v State, 55 P 2d 312, 47 Ariz 224—Macias v State 283 P 711, 715, 36 Ariz 140, citing **Corpus Juris.**
Cal—People v Smith, 104 P 2d 510, 15 Cal 2d 610—People v Dale, 59 P 2d 1014, 7 Cal 2d 156—People v Garcia 12 P 2d 1013, 2 Cal 2d 573—People v Larrios, 30 P 2d 404, 220 Cal 236—People v Fleming 23 P 2d 28, 218 Cal 300—People v Donnelly, 210 P 523, 190 Cal 57—People v Owens 81 P 2d 429, 27 Cal App 2d 606—People v Smith, 77 P 2d 277, 25 Cal App 2d 241—People v Hall 58 P 2d 697, 14 Cal App 2d 582—People v Pivaroff, 33 P 2d 41, 138 Cal App 625—People v Russo 24 P 2d 580, 133 Cal App 468—People v Weeks, 286 P 514, 101 Cal App 708
Idaho—State v Wilson, 213 P 359, 41 Idaho 616
Wash—State v Miller, 2 P 2d 738, 161 Wash 111
29 C J p 1115 note 44

63. Ariz—Macias v State, 283 P 711, 715, 36 Ariz 140 citing **Corpus Juris**
Cal—People v Smith 104 P 2d 510, 15 Cal 2d 610—People v French 87 P 2d 1014, 12 Cal 2d 720—People v Aranda, 83 P 2d 928, 12 Cal 2d 307—People v Brite, 72 P 2d 122, 9 Cal 2d 666—People v Dale 59 P 2d 1014, 7 Cal 2d 156—People v Garcia 42 P 2d 1013, 2 Cal 2d 573—People v Larrios 30 P 2d 404, 220 Cal 236—People v Fleming, 23 P 2d 28, 218 Cal 300—People v Donnelly, 210 P 523, 190 Cal 57—People v Blackwood, 96 P 2d 982, 35 Cal App 2d 428—People v Smith 77 P 2d 277, 25 Cal App 2d 241—People v Russo, 24 P 2d 580, 133 Cal App 468
Colo—Maestas v People 11 P 2d 227, 91 Colo 36
29 C J p 1115 note 45

'In order that there may be such premeditated malice as will make a killing murder in the first degree the thought of taking life must have been consciously conceived in the mind the conception must have been meditated upon, and a deliberate determination formed to do the act Where the homicide has been preceded by a concurrence of will, with an intention to kill, and these are followed by deliberate thought or premeditation, although they follow as instantaneous as successive thoughts can follow each other, the perpetrator may be guilty of murder in the

the other hand it has also been held that there must be an appreciable time sufficient for some reflection and consideration and the formation of a definite purpose, no matter how brief,[64] that there must be time enough to permit the formation of a distinct purpose to kill and for some reflection and consideration,[65] and that the statement that they may follow each other as two successive thoughts is erroneous,[66] and that time sufficient to form the intention to kill does not necessarily include sufficient time for premeditation and deliberation.[67] The time need not be long enough for defendant to ponder thoroughly over the act and its consequences[68] and he need not have brooded over it,[69] nor need there be a predetermined intention to kill fixed in the mind after a mature reflection and deliberation on the act of killing.[70] The fact that some appreciable time must elapse does not require the lapse of days or hours, or even minutes.[71]

d. Necessity That Killing Result from Deliberation and Premeditation

To constitute one class of murder in the first degree it is ordinarily necessary that the killing result from deliberation and premeditation. Deliberation and premeditation imply the existence of a mental state capable thereof.

It is not sufficient that there shall have been deliberation and premeditation at some time prior to the killing; the killing itself must have been the result thereof.[72] Where a wound is inflicted with intent to kill and is inflicted deliberately and premeditatedly, then the killing is also deliberate and premeditated.[73]

Deliberation and premeditation imply the existence of a mental state capable thereof[74] and deliberation requires a certain degree of mental coolness, as considered supra subdivision b of this section. Thus, although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion,[75] especially if

first degree"—Everett v. State, 195 N.E. 77, 79, 208 Ind. 145.

Rapid succession.

The formation of the intention and the doing of the acts in pursuance of that intention may be in rapid succession.—People v. Patubo, 71 P.2d 270, 9 Cal.2d 537, 113 A.L.R. 1303.

64. Conn.—State v. Palko, 186 A. 657, 121 Conn. 669.
D.C.—Bullock v. U.S., 122 F.2d 213, 74 App.D.C. 220, certiorari denied Bullock v. Rives, 63 S.Ct. 89, 317 U.S. 627, 87 L.Ed. 26—Bostic v. U.S., 94 F.2d 636, 68 App.D.C. 167, certiorari denied 58 S.Ct. 523, 303 U.S. 635, 82 L.Ed. 1095.
N.Y.—People v. Guadagnino, 135 N.E. 594, 233 N.Y. 344.
R.I.—State v. Feni, 121 A. 218, 45 R.I. 309.
29 C.J. p. 1115 note 46.

Cannot be simultaneous.

If the killing took place simultaneously with the formation of the intent to kill there would be no premeditation.—State v. Brown, 11 S.E.2d 321, 218 N.C. 415—State v. Evans, 150 S.E. 678, 679, 198 N.C. 82.

Momentary impulse, which might have passed or have been controlled if there had been time, is not a "deliberation," meeting the requirements of murder in the first degree.—Torres v. State, 43 P.2d 929, 39 N.M. 191.

In Florida.

(1) Premeditation must exist an appreciable length of time before the killing so that the perpetrator of the act may know and be conscious of the nature and character of the act which he is about to commit and the probable result therefrom in so far as the life of the assaulted person is involved.—Forehand v. State, 171 So. 211, 126 Fla. 461—29 C.J. p. 1115 note 46 [c] (1).

(2) Premeditation need not exist any extended time before the act.—Matthews v. State, 177 So. 321, 130 Fla. 53. Forehand v. State, supra. Hasty v. State, 162 So. 910, 120 Fla. 269.

(3) If the purpose or intention to kill is definitely framed in the mind of the killer and he proceeds to act in the execution of such thought or design the element of premeditation exists.—Milton v. State, 192 So. 219, 140 Fla. 617—Davis v. State, 190 So. 259, 138 Fla. 798.—Forehand v. State, supra.

(4) Where the evidence is sufficient to show that accused had ample time to form a purpose to kill deceased and for the mind of the killer to become fully conscious of its own design it will be deemed sufficient as to point of time in which to enable the killer to form a premeditated design to kill.—Rhodes v. State, 140 So. 309, 104 Fla. 520—Green v. State, 113 So. 121, 93 Fla. 1076.

(5) Under such circumstances the homicide will constitute murder in the first degree although the design and intent to commit such homicide were formed by accused immediately before the act was actually committed.—Wooten v. State, 140 So. 474, 104 Fla. 597.

(6) Other particulars of Florida rule see 29 C.J. p. 1115 note 46 [c].

65. N.Y.—People v. Chiaro, 93 N.E. 931, 200 N.Y. 316.
29 C.J. p. 1115 note 47.

66. Wash.—State v. Moody, 51 P. 356, 18 Wash. 165.
29 C.J. p. 1115 note 48.

67. N.J.—State v. Clayton, 85 A. 173, 83 N.J.Law 673.—State v. Mangano, 72 A. 366, 77 N.J.Law 514.

68. Ala.—White v. State, 181 So. 109, 236 Ala. 124.
29 C.J. p. 1115 note 50.

69. N.C.—State v. Hawkins, 199 S.E. 281, 214 N.C. 326—State v. Payne, 197 S.E. 573, 213 N.C. 719.
29 C.J. p. 1116 note 51.

70. Ark.—McAdams v. State, 25 Ark. 105.

71. D.C.—Bostic v. U.S., 94 F.2d 636, 68 App.D.C. 167, certiorari denied 58 S.Ct. 523, 303 U.S. 635, 82 L.Ed. 1095.

72. Cal.—People v. Maughs, 86 P. 187, 149 Cal. 253.
W.Va.—State v. Clifford, 52 S.E. 864, 58 W.Va. 681.

73. Iowa.—State v. Phillips, 92 N.W. 876, 118 Iowa 660.

74. N.J.—State v. Close, 148 A. 764, 106 N.J.Law 321.
N.Y.—People v. Crumble, 35 N.E.2d 634, 286 N.Y. 21—People v. Leonardi, 38 N.E. 372, 143 N.Y. 360.
29 C.J. p. 1116 note 60.
Intoxication as affecting power to premeditate or deliberate see supra § 5.
Mental capacity as affecting power to premeditate or deliberate see supra § 4.

75. Tenn.—Winton v. State, 268 S.W. 633, 151 Tenn. 177.
29 C.J. p. 1116 note 62.

Incident of mania.

The fatal blow must not have been the incident of mania or a sudden paroxysm or heat of passion such as

the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated.[76] However, passion does not always reduce the crime since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time.[77] If the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect.[78] Provocation has a bearing on the question of deliberation favorable to accused, just as its absence has an unfavorable bearing.[79] The degree of a deliberate killing committed under provocation but without passion is not reduced.[80] Mere anticipation of trouble with deceased is not sufficient of itself to reduce the degree of crime from murder in the first degree.[81]

e. Classes of Killings Where Deliberation and Premeditation Not Required

The statutes ordinarily do not require deliberation and premeditation in some classes of murder in the first degree, such as in case of a killing in the perpetration of a felony or a killing by lying in wait, by poison, or by torture

Ordinarily under the various statutes dividing murder into degrees deliberate premeditated malice aforethought is not always required to constitute murder in the first degree.[82]

Killing in perpetration of felony Where killing in the perpetration or attempt to perpetrate a felony or one of certain enumerated felonies is made murder in the first degree, the perpetration or attempt to perpetrate the felony is regarded as standing in the place of or as the legal equivalent of the willfulness, deliberation, and premeditation necessary under the statute as to other killings and dispenses with the necessity of proof thereof.[83] Such a statute applies to all homicides committed in the perpetration of the enumerated felonies and not merely to those which might be planned as part of the execution of the felony intended.[84] Where, under the statute, murder in the first degree may consist of a killing in the perpetration of certain enumerated felonies, and where there is no general provision that murder in the first degree may consist of a killing in the perpetration of a felony, a killing in the perpetration of a felony other than one of the enumerated felonies, in order to constitute murder in the first degree, must have been committed deliberately, premeditatedly, and with malice aforethought.[85]

suspends the cool normal state of mind.—Lowe v. State, 105 So. 829, 90 Fla. 255.

"Passion," within rule that killing to constitute murder in first degree must not have been committed under passion means the same thing as anger.—Winton v. State, 268 S.W. 633, 151 Tenn. 177.

76. Ark.—McClendon v. State, 126 S.W.2d 928, 197 Ark. 1145.
29 C.J. p. 1116 note 63.

77. N.Y.—People v. Johnson, 34 N.E. 920, 139 N.Y. 358.
29 C.J. p. 1116 note 64.

78. Ala.—Caldwell v. State, 84 So. 272, 203 Ala. 412.
29 C.J. p. 1117 note 65.

79. N.C.—State v. Starnes, 11 S.E.2d 553, 218 N.C. 539.

80. Cal.—People v. Gingell, 296 P. 70, 211 Cal. 532.
29 C.J. p. 1117 note 66.

81. Wash.—State v. Colagino, 205 P. 413, 119 Wash. 301.

82. Mass.—Commonwealth v. Clark, 198 N.E. 641, 292 Mass. 409.

83. Ark.—Davis v. State, 30 S.W.2d 830, 182 Ark. 123.—Washington v. State, 28 S.W.2d 1055, 181 Ark. 1011.
Cal.—People v. Boss, 290 P. 881, 210 Cal. 215.—People v. Arnold, 250 P. 168, 199 Cal. 471.—People v. Petro, 56 P.2d 984, 13 Cal.App.2d 245.—People v. Anderson, 37 P.2d 67, 1 Cal.App.2d 687.
Ind.—Cole v. State, 134 N.E. 867, 192 Ind. 29.
Mo.—State v. Schnelt, 108 S.W.2d 377, 341 Mo. 241.—State v. Kauffman, 73 S.W.2d 217, 335 Mo. 611.—State v. Meadows, 51 S.W.2d 1033, 330 Mo. 1020.—State v. Sharpe, 34 S.W.2d 75, 326 Mo. 1063.—State v. Moore, 33 S.W.2d 905, 326 Mo. 1199.—State v. Mabry, 22 S.W.2d 639, 321 Mo. 239.—State v. Robinett, 279 S.W. 696.—State v. Hayes, 262 S.W. 1031.
Mont.—State v. Reagin, 210 P. 86, 64 Mont. 181.
Neb.—Rogers v. State, 2 N.W.2d 529, 141 Neb. 6.—Swartz v. State, 225 N.W. 766, 118 Neb. 591.—South v. State, 196 N.W. 681, 111 Neb. 383.
N.C.—State v. Alston, 3 S.E.2d 11, 215 N.C. 713.
Okl.—Morris v. State, 96 P.2d 88, 68 Okl.Cr. 147.—McDonald v. State, 15 P.2d 1092, 54 Okl.Cr. 161.—Lovett v. State, 1 P.2d 800, 51 Okl.Cr. 324.—Howington v. State, 250 P. 941, 35 Okl.Cr. 352.
Wash.—State v. Barton, 105 P.2d 63, 5 Wash.2d 234.
29 C.J. p. 1117 note 68.

Absence of justification or excuse
Where the homicide was committed in the perpetration of the crime of an attempt to commit robbery by the use of a deadly weapon, it was unlawful and, in the absence of circumstances in justification or excuse or in extenuation the crime was committed with malice aforethought.—State v. Di Battista, 148 A. 664, 110 Conn. 549.

Attempt to rob another
The fact that there was no evidence of an attempt to rob deceased does not require the jury to find the elements of deliberation premeditation and malice in order for the crime to be murder in the first degree.—State v. Messino, 30 S.W.2d 750, 325 Mo. 743.

Implied
Willfulness deliberation, and premeditation are implied when the killing is committed in the perpetration of or attempt to perpetrate any of the felonies named.—Cochrane v. State, 59 P.2d 658, 48 Ariz. 124.

84. Cal.—People v. Caballero, 87 P.2d 364, 31 Cal.App.2d 52.—People v. Sutton, 62 P.2d 397, 17 Cal.App.2d 561.

85. Iowa.—State v. Campbell, 251 N.W. 717, 217 Iowa 818, 92 A.L.R. 1176.
Mo.—State v. Lindsey, 62 S.W.2d 420, 333 Mo. 139.—State v. Hayes, 262 S.W. 1034.

Larceny
Homicide incidental to commission or attempt to commit larceny would not constitute murder in first degree unless element of deliberation were

Killing by lying in wait Under some statutes deliberation and premeditation are established by lying in wait [86]

Killing by poison Where the statute prescribes that all murder which shall be perpetrated by means of poison or lying in wait or any other kind of willful, deliberate, and premeditated killing shall be murder in the first degree, murder perpetrated by means of poison ordinarily is said to carry with it the conclusive evidence of premeditation and deliberation,[87] but, on the other hand, it has been held that it may be possible that murder may be committed by means of poison and yet not be the result of a willful, deliberate, and premeditated act and hence that under a statute of this character a conviction of murder in the second degree may be legal [88]

Murder by torture Under a statute providing that all murder perpetrated by means of torture shall be deemed murder in the first degree, deliberation is not an essential element of the crime [89] The turpitude of the act of torture supplies the place of deliberate and premeditated malice [90]

§ 34. —— Malice

Malice is a necessary ingredient of murder in the first degree, and under some statutes the malice must be express malice

Ordinarily, under the various statutes, malice is a necessary ingredient of murder in the first degree [91] The distinction between murder in the first degree and murder in the second degree may lie in the kind of malice present [92] For example to constitute murder in the first degree, or a particular class of murder in the first degree, the malice must be express malice,[93] although under other statutes the malice may be either express or implied [94] Under statutes providing that all murder which shall have been committed in the perpetration of, or attempt to perpetrate, certain crimes shall be murder in the first degree, proof of express malice aforethought is unnecessary,[95] as the malice of the initial offense attaches to whatever else the criminal may do in connection therewith [96]

Willful, deliberate, and premeditated A killing with malice aforethought is not necessarily willful, deliberate, and premeditated so as to be as such murder in the first degree [97] The fact that a killing was with malice aforethought does not show necessarily the presence of the elements of willfulness, deliberation, and premeditation,[98] although a killing which would have been with malice aforethought under the common-law rule is in some jurisdictions held to be a killing with "premeditated design" as the term is employed in a statutory definition [99] However, a murder shown to have been committed on express malice is ordinarily a willful, deliberate,

shown - State v Sharpe, 34 S W 2d 75, 326 Mo 1063

88. N C—State v Daniels, 46 S E 991, 134 N C 671
29 C J p 1117 note 71

87. N C—State v Daniels, 46 S E 991, 134 N C 671
29 C J p 1117 note 69

Result
The statute classifying murders perpetrated in a particular manner as murder in the first degree includes murder by poison because it results from a willful, deliberate, and premeditated act—People v Austin 192 N W 590 221 Mich 635

88. Conn—State v Dowd, 19 Conn 388

89. N M—State v Reed, 39 P 2d 1005, 39 N M 44, 102 A L R 995

90. Colo—Townsend v People, 111 P 2d 236, 107 Colo 258

91. Ark—Bramlett v State, 156 S W 2d 226, 202 Ark 1165—Ballentine v State, 132 S W 2d 384, 198 Ark 1037
Ind—Perkins v State, 191 N E 136, 207 Ind 119
Neb—Quijas v State, 275 N W 588, 133 Neb 410
N C—State v Burrage, 25 S E 2d 393, 223 N C 129—State v Starnes, 17 S E 2d 346, 220 N.C 384.
Or—State v Butchek, 253 P 367 121 Or 111, rehearing denied 254 P 805, 121 Or 111
Malice in general see supra §§ 14 28
Necessity of malice to constitute murder in any degree see supra § 29

92. N M—Torres v State, 43 P 2d 929, 39 N M 191

93. Colo—Ingles v People, 22 P 2d 1109 92 Colo 518
Del—State v Lee, 171 A 195, 6 W W Harr 11
N M—Torres v State, 43 P 2d 929, 39 N M 191
N C—State v Hawkins, 199 S E 281 211 N C 326—State v Bowser 199 S E 31, 214 N C 249—State v Payne, 197 S E 573, 213 N C 719
Pa—See Commonwealth v. McFall, Add 255
29 C J p 1105 note 43, p 1118 note 74

"Express malice aforethought," as the term is employed in some statutes defining 'murder in the first degree," exists where the killing was done with a sedate, deliberate mind and formed design to kill—State v Phillips, 187 A 108, 7 W W Harr, Del, 541—29 C J p 1118 note 77

94. Ark—Bramlett v State, 156 S W 2d 226, 202 Ark 1165.
Cal—People v Cardoza, App, 134 P 2d 877
Ind—Perkins v State, 191 N E 136, 207 Ind 119
Iowa—State v Sullivan, 298 N W 884 230 Iowa 817
29 C J p 1118 note 76

95 Del—State v Opher 188 A 257, 8 W W Harr 93
Ind—Cole v State, 134 N E 867, 192 Ind 29
W Va—State v Williams, 127 S E 320 98 W Va. 458

No provocation
The malice necessary to characterize the killing as murder is to be implied from the fact that no provocation for the killing appeared—State v Reagin 210 P 86, 64 Mont 181

96 Pa—Commonwealth v Frisbie, 20 A 2d 285 342 Pa 177

97. N M—Ex parte Simpson, 24 P. 2d 291, 37 N M 453
29 C J p 1118 note 79

98 N H—State v Greenleaf, 54 A. 38, 71 N H 606
29 C J p 1112 note 14

99. Wis—Clifford v State, 17 N W 304, 58 Wis 477
29 C J. p 1112 note 15.

and premeditated murder and as such is a murder in the first degree [1]

Killing by means of poison Any intentional killing, committed by means of poison, evidences malice [2] Where the statute makes all murder perpetrated by means of poison murder in the first degree, it does not dispense with the necessity that the killing shall have been with malice aforethought, at least where "murder" is generally defined by statute as the unlawful killing of a human being with malice aforethought [3] Where the statute provides that all murder committed by poison shall be murder in the first degree, the killing may be either with express or implied malice [4]

§ 35. Second Degree

a In general
b Malice
c Intent to kill
d Deliberation and premeditation

a. In General

Where murder is divided into degrees, and murder in the second degree is not specifically defined, murder in the second degree usually is murder which is not accompanied by the distinguishing features of murder in the first degree

The statutes dividing murder into degrees quite frequently provide, after defining murder in the first degree, that all other murder shall constitute murder in the second degree [5] Under statutes of this description, murder in the second degree is common-law murder, but the killing is not accompanied by the distinguishing features of murder in the first degree [6] Some statutes, however, expressly define murder in the second degree or particular classes of homicides which shall constitute murder in the second degree,[7] for example, as an unlawful killing perpetrated by any act imminently dangerous to another and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual,[8] or an unlawful killing, perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed or of any human being,[9] or a killing in the performance of an unlawful abortion,[10] or a killing in sudden affray by use of a deadly weapon which was concealed before the commencement of the fight [11] Under some statutes a homicide committed in the perpetration, or attempt-

1. Ariz—Campbell v Territory, 125 P 717, 14 Ariz 109
29 C J p 1118 note 80

2. Kan—State v Baldwin, 12 P 318 36 Kan 1
29 C J p 1118 note 81

3. Idaho—State v Phinney 89 P 634 13 Idaho 307 12 L R A N S, 935, 12 Ann Cas 1079

4. Tex—Bailey v State, 141 S W 996, 65 Tex Cr 1.

5 Ariz—Lasater v State, 81 P 2d 83, 52 Ariz 366—Kinsey v State 65 P 2d 1141, 49 Ariz 201
Cal People v King, 85 P 2d 928, 30 Cal App 2d 185—People v Nerida, 81 P 2d 964, 29 Cal App 2d 11—People v Connors, 12 P 2d 43, 124 Cal App 216
Pa—Commonwealth v Drago, 88 Pittsb Leg J 617
Va—Puckett v Commonwealth, 160 S E 19, 157 Va 800
29 C J p 1118 note 84
Presumptions and burden of proof as to grade or degree of offense see infra § 199

6 N M—State v Aragon, 292 P 225, 35 N M 198
N D—State v Carter, 195 N W 567, 569 50 N D 270, citing **Corpus Juris.**
Pa—Commonwealth v McLaughlin, 142 A 213, 215, 293 Pa 218, citing **Corpus Juris.**
29 C J p 1118 note 85.

Dangerous consequences
Even if the death was occasioned by striking head on sidewalk after accused had struck deceased, jury could reasonably have found accused guilty of murder in the second degree since the consequences which would follow a fall upon concrete walk must have been known to accused—People v Efstathiou, 118 P 2d 22 47 Cal App 2d 441

7. Ala—Ex parte Howard, 30 Ala 43
29 C J p 1118 note 86, p 1119 notes 89, 90

Construction
Statute defining murder in second degree must be strictly construed—State v Diebold, 277 P 394 152 Wash 68

In Nebraska whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, shall be deemed guilty of murder in the second degree—Whitehead v State, 212 N W 35 115 Neb 143

8. Fla—Cruce v State, 100 So 264, 87 Fla 406
29 C J p 1119 note 87

Depravity of mind is an inherent deficiency of moral sense and rectitude It is equivalent of the statutory phrase 'depravity of heart" which has been defined to be the highest degree of malice—Ramsey v State, 154 So 855, 114 Fla 766.

Reckless and wanton killing, without premeditated design to effect death, warrants conviction for second degree murder—Bauer v State, 158 So 168, 117 Fla 674—29 C J p 1119 note 87 [b]

9. Wis—State v Genova, 8 N W 2d 260
29 C J p 1119 note 88

A "depraved mind" carries the suggestion of an induced or self created condition of mind, and is to be distinguished from a state of mind generally described as insanity or feeble-mindedness resulting from some disease or defect existing from birth or early childhood—State v Johnson 290 N W 159, 233 Wis 668

Reckless shooting
(1) Where accused, to annoy his brother, but without a premeditated design to effect death fired shots into the screen porch of his brother's home, and a child was killed as result of accused's acts, accused was guilty of "murder in the second degree" within meaning of statute—State v Johnson, supra

(2) Shooting at object seen to be man, if without premeditated design to kill, was held second degree murder—Walsh v State, 218 N W 714, 195 Wis 540

10. N M—State v Bassett, 194 P 867, 26 N M 476

11. Ala—Campbell v. State, 64 So 320, 185 Ala 17.

ed perpetration, of certain enumerated felonies is murder in the first degree, see supra § 31, and homicides committed in the perpetration of other felonies constitute murder in the second degree [12]

b. Malice

Malice is an essential element of murder in the second degree

In the absence of a statute to the contrary, the equivalent of common-law malice or malice aforethought must be present to constitute murder in the second degree [13] The malice essential to render a killing a murder in the second degree may be implied malice [14] Under statutes requiring murder in the first degree to be accompanied by actual mal-

12. Ariz—Kinsey v State, 65 P 2d 1141, 49 Ariz 201
Mo—State v Lindsey, 62 S W 2d 420, 333 Mo 139- State v Robinett, 279 S W 696

Abortion

(1) Under statute, use of any instrument with intent to procure miscarriage of a woman is a felony unless necessary to save woman's life A person who commits an unnecessary abortion resulting in death of woman is guilty of homicide and, since such homicide does not fall within statutory definition of murder in the first degree, it is murder in the second degree
Ariz—Kinsey v State, 65 P 2d 1141 49 Ariz 201
Iowa—State v Rowley, 248 N W 340, 216 Iowa 140

(2) Under such a statute it is necessary to show that accused performed an illegal operation on deceased by the use of an instrument, with intent to produce a miscarriage, and that such miscarriage was not necessary to save deceased's life, and that deceased died as a result thereof—State v Rowley supra

(3) Where a statute makes it a felony for any person to employ an instrument or other means with the intent thereby to procure the miscarriage of a pregnant woman, unless it is necessary to preserve her life where the prohibited acts are performed by a physician, such acts are not excused by the circumstance that he acted in good faith—State v Shortridge, 211 N W 336, 54 N D 779

Not necessarily first degree

Killing in perpetration or attempted perpetration of offense not enumerated in homicide statute is not necessarily murder in first degree—State v Miller, 161 A 222, 52 R I 440

13 Ala—Smith v State, App, 11 So 2d 466, certiorari denied Sup, 11 So 2d 473—Barnett v State, 111 So 318, 21 Ala App 646
Ark—Ballentine v State, 132 S W 2d 384, 198 Ark 1037—Daniels v State, 32 S W 2d 169, 182 Ark 564
Ind—Landreth v State, 171 N E 192, 201 Ind 691, 72 A L R 891
Mo—State v Burrell, 252 S W 709, 298 Mo 672
Mont—State v Park, 289 P 1037, 88 Mont 21
Neb—Quijas v State, 275 N W 588, 133 Neb 410—Runyan v State, 216 N W 656, 116 Neb 191—Whitehead v State, 212 N W 35, 115 Neb 143
N C—State v Robinson, 125 S E 617, 188 N C 784
N D—State v Carter, 195 N W 567, 569 50 N D 270 citing **Corpus Juris**
Pa—Commonwealth v McLaughlin, 142 A 213, 293 Pa 218
Va—Williamson v Commonwealth, 23 S E 2d 240, 180 Va 277
W Va—State v Ponce, 19 S E 2d 221—State v Roush, 120 S E 301, 95 W Va 132—State v Hurst, 116 S E 248, 93 W Va 222
29 C J p 1120 note 4
Malice in general see supra §§ 14–16

Accused held to have entertained malice so as to be guilty of murder in the second degree—Washington v State, 186 So 159, 237 Ala 239

"Depraved mind" within second-degree murder statute imports "malice" in popular sense of ill will hatred spite, evil intent—Ramsey v State, 154 So 855, 114 Fla 766

Distinction between murder in second degree and manslaughter is the presence of malice, expressed or implied—Townsend v State, 298 S W 3 171 Ark 1180

Malicious killings

(1) A killing with malice was held murder in the second degree—Rhinehart v State 299 S W 755 175 Ark 1170

(2) If accused engaged in a gun battle as a willing participant by reason of malice he would be guilty of murder in the second degree although he was attacked on his own premises—State v Miller, 25 S E 2d 623, 223 N C 184

Sudden passion

A homicide committed in a sudden passion or heat of blood without deliberation or malice, is not murder in the second degree
Iowa State v Johnson, 234 N W 263, 211 Iowa 871
Va—Hannah v Commonwealth 149 S E 419 153 Va 863

14 Cal—People v Cardoza, App 134 P 2d 877
Iowa—State v Johnson, 234 N W 263, 211 Iowa 874
N C—State v Bailey, 171 S E 81 205 N C 255—State v Trott, 130 S E 627, 190 N C 674, 42 A L R 1114
29 C J p 1120 note 5
Particular facts as indicating malice generally see supra §§ 22–26
Presumptions and burden of proof as to grade or degree of offense see infra § 199

Absence of provocation

The malice necessary to constitute murder in second degree may be implied when no considerable provocation appears, or when circumstances show abandoned and malignant heart
Mont—State v Park, 289 P 1037, 88 Mont 21
N M—Torres v State, 43 P 2d 929 39 N M 191

Dangerous act

When unlawful act resulting in death is deliberately performed by assailant who knows that his conduct endangers life of another and is executed without provocation or sudden passion, malice is presumed, and killing constitutes murder in second degree, if not premeditated—People v Copley 89 P 2d 160 32 Cal App 2d 74—People v Semone, 35 P 2d 379 140 Cal App 318

Fact of unlawful killing

(1) In the absence of proof of aggravation or mitigation, murder in the second degree arises from an intentional killing, malice being implied—People v Wells, 76 P 2d 493, 10 Cal 2d 610—People v Howard 295 P 333 211 Cal 322, 71 A L R 1385—People v Cardoza App 134 P 2d 877—People v Ross 93 P 2d 1019, 34 Cal App 2d 574- People v King 85 P 2d 928, 30 Cal App 2d 185—People v Connors, 12 P 2d 43 121 Cal App 216
N M—State v Aragon 292 P 225 35 N M 198
N C—State v Jones 124 S E 121, 188 N C 112
Pa—Commonwealth v Robinson, 157 A 689, 305 Pa 302

(2) The intentional killing of a human being with a deadly weapon implies malice and, nothing else appearing, constitutes murder in the second degree
Mo—State v Farrell, 6 S W 2d 857, 320 Mo 319
N C—State v Burrage 25 S E 2d 393, 223 N C 129 -State v Utley, 25 S E 2d 195, 223 N C 39—State v Debnam, 22 S E 2d 562, 222 N C 266 -State v Smith, 20 S E 2d 313, 221 N C 278—State v Beachum 17 S E 2d 674, 220 N C 531—State v Hawkins, 199 S E 284, 214 N C

ice or express malice, murder committed with implied malice is murder in the second degree.[15] Under some statutes requiring in the first degree express malice directed against the actual victim, it is murder in the second degree to kill one person while trying to kill another.[16] Under a statute providing that an unlawful killing perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree, proof of an intent to kill a particular individual will not exclude a conviction for murder in that degree.[17]

c. Intent to Kill

A specific intent to kill ordinarily is not an element of murder in the second degree, although under some statutes an intent to kill is necessary

Under many of the statutes a specific intent to kill is not an essential element of murder in the second degree.[18] So it may be murder in the second degree where the intent is merely to cause great bodily harm,[19] or to produce an unlawful abor-

326 State v Bowser 199 S E 31 214 N C 219—State v Mosley 195 S E 830 213 N C 304 State v Robinson, 195 S E 821, 213 N C 273—State v Terrell, 193 S E 161, 212 N C 145—State v Bittings, 175 S E 299, 206 N C 798—State v Gregory, 166 S E 387 203 N C 528—State v Pasour 111 S E 779 183 N C 793

(3) Where the provocation for the killing was more than very slight malice could not be presumed from the fact of killing and the crime of murder in the second degree was not proved in the absence of other evidence of malice - Wilkins v Commonwealth, 11 S E 2d 653, 176 Va 580 - Richardson v Commonwealth, 101 S E 788 128 Va 691

Intent to commit larceny

The felonious intent to commit larceny by the use of felonious means in the perpetration of which the victim is slain would constitute 'murder in the second degree' since under such circumstances malice is implied—People v Bauman, 103 P 2d 1020, 39 Cal App 2d 587

Use of deadly weapon

(1) The use of a deadly weapon raises a presumption of malice but in such instances the presumption is of murder in the second degree
Cal—People v Butterfield 105 P 2d 678 40 Cal App 2d 725
Iowa—State v Leib 201 N W 29 198 Iowa 131
N C—State v Hawkins 199 S E 284 214 N C 326 State v Bowser 199 S E 31 214 N C 219 State v Payne 197 S E 573, 213 N C 719

(2) A killing with a deadly weapon, unaccompanied by circumstances of mitigation, justification or excuse constitutes murder in the second degree - Williams v State 258 S W 386, 162 Ark 285 - Fields v State, 241 S W 901, 154 Ark 188

15. Colo—Ingles v People 22 P 2d 1109 92 Colo 518
29 C J p 1120 note 6

Commission of penitentiary offense

(1) In the District of Columbia "malice" exists sufficient to support conviction for murder in the second degree, where the killing results from the commission of a penitentiary offense which is reasonably calculated to cause death or inflict serious bodily injuries. Generally, the District of Columbia homicide statutes constitute a restatement of the common-law definition of murder, but have substituted for the indefinite common-law concept of felony the more precise concept which controls, of offenses punishable by imprisonment in the penitentiary—Lee v U S 112 F 2d 46, 72 App D C 147

(2) Where motorist engaged in illegal transportation of liquor killed third persons in collision while fleeing at rapid speed from police officers whom he allegedly thought were hijackers 'malice' authorizing conviction for murder in the second-degree was shown, as against contention that such motorist was merely guilty of the misdemeanor of violating the speed law, rather than of a felony—Lee v U S, supra

In Delaware

(1) Murder in the second degree occurs where there is no sedate deliberate mind and formed design to take life, but the circumstances surrounding the case are those from which the law implies malice—State v Lee, 171 A 195 6 W W Harr 11—State v Galvano 151 A 161 4 W W Harr 109—29 C J p 1120 note 6 [a]

(2) Implied malice" which makes offense second-degree murder exists where killing is done without premeditation but with depraved heart or cruel and wicked indifference to life—State v Phillips 187 A 108 7 W W Harr 514 State v Lee, 171 A 195 6 W W Harr 11—State v Galvano, 151 A 161 4 W W Harr 409

16 Tex—Buckley v State 181 S W 729 78 Tex Cr 378
29 C J p 1120 notes 7–9

17. Fla—Vasquez v State 44 So 739 54 Fla 127 127 Am S R 129 - Alvarez v State, 27 So 40, 41 Fla 532—Marshall v State, 14 So 92 32 Fla 462

18 Ark—Ballentine v State 142 S W 2d 384, 198 Ark 1037—Williams v State, 258 S W 386 162 Ark 285
Iowa—State v Johnson 215 N W 728, 215 Iowa 183—State v Johnson, 234 N W 263 211 Iowa 874—State v Burris, 198 N W 82, 198 Iowa 1156
Mo—State v Robinett, 279 S W 696
N M—State v Aragon, 292 P 225 35 N M 198
Pa—Commonwealth v McLaughlin, 142 A 213, 293 Pa 218
29 C J p 1119 note 93
Unintentional killing as common-law murder see supra §§ 20, 21

Accidental or unintentional killing will constitute "murder in the second degree" if accompanied by malice—Lee v U S, 112 F 2d 46, 72 App D C 147

Incapable mind

If accused's mind because of worry drugs disease or want of rest was prostrated to extent making him incapable of specific intent to kill, offense is murder in the second degree—State v Close, 148 A 704 106 N J Law 321

Murder in the second degree is the unlawful killing under circumstances of depravity of heart and a disposition of mind regardless of social duty where no intention to kill exists or can reasonably be inferred—Commonwealth v Patterson, 41 Pa Dist & Co 215, 23 Erie Co 215

Setting of spring gun

Person setting a spring gun, although without a specific intent to kill whereby a homicide resulted could be convicted of murder in the second degree. Pierce v Commonwealth 115 S E 686, 135 Va 635, 28 A L R 861—29 C J p 1119 note 88 [a]

Unlawful killing of human being with malice, express or implied, is murder in second degree, although unaccompanied by deliberation or specific intent to kill—State v Johnson 234 N W 263 211 Iowa 874

19 Pa—Commonwealth v Marshall 135 A 301 287 Pa 512
29 C J p 1119 note 91

tion,[20] or to perpetrate any unlawful act[21] The absence of an intent to kill frequently operates to reduce the crime from the first to the second degree,[22] although the presence of an intent to kill is not necessarily inconsistent with guilt of murder in the second degree[23]

On the other hand, under some statutes an intent to kill is required,[24] as where murder in the second degree is defined as a homicide committed purposely and maliciously, but without premeditation,[25] or without deliberation and premeditation[26]

d. Deliberation and Premeditation

Deliberation and premeditation ordinarily are not made elements of murder in the second degree

Where the statutes defining murder in the first degree provide that in addition to certain enumerated kinds of killings, any willful, deliberate, and premeditated killing shall constitute murder in the first degree and that all other murder shall be murder in the second degree, a murder which does not fall within the classes specifically enumerated in the definition of the first degree and is committed without deliberation, or deliberation and premeditation is murder in the second degree[27] Under the express definition of some statutes, a killing is murder in the second degree which is purposely and maliciously committed but without deliberation and premeditation,[28] or without premeditation[29] Under other statutes a killing is murder in the second degree when the killing is with malice aforethought,[30] when committed with a design to effect the death of the person killed or of another, but without deliberation and premeditation,[31] or without premeditation,[32] when perpetrated by any act im-

20 Ariz—Kinsey v State, 65 P 2d 1111, 49 Ariz 201
ND—State v Shortridge, 211 N W 336, 51 N D 779
29 C J p 1119 note 95

Willful cause of death

In prosecution for second degree murder by use of instrument with intent to produce miscarriage proof that death was willfully caused is unnecessary State v Rowley, 248 N W 340, 216 Iowa 140

21 Ala—Orr v State, 102 So 58, 20 Ala App 188, certiorari denied Ex parte Orr 102 So 61, 212 Ala 187
29 C J p 1119 note 96

Accidental discharge of gun

Accused pursuing deceased and intentionally using gun without legal excuse was guilty of "second degree murder," notwithstanding discharge of gun was accidental—Mullins v State 299 S W 1052, 156 Tenn 105

Attempt to rob

If accused when homicide was committed was engaged in committing felonious or unlawful act from which law implies malice, such as attempt to rob, he would be guilty of murder in the second degree, regardless of his intent State v Harris, 134 A 693, 3 W W Harr 236

Destructive consequences

Accused could be guilty of murder in the second degree, even though the killing was unintentional, if it happened in the commission of any unlawful act not amounting to a felony, but which in its consequences naturally tended to destroy life—People v Hubbard, 220 P 315, 61 Cal App 27

Intent essential

In prosecution for death by an unlawful act, proof that such act was willfully committed is essential - State v Rowley, 248 N W 340, 216 Iowa 140

22 Pa—Commonwealth v Iacobino, 178 A 823 319 Pa 65—Commonwealth v Robinson 157 A 689 305 Pa 302—Commonwealth v Gibson 119 A 403 275 Pa 338
29 C J p 1119 note 97

23 Iowa State v Johnson 234 N W 263, 211 Iowa 871—State v O'Donnell 157 N W 870, 176 Iowa 337

24. N Y—People v Koerber, 155 N E 79 244 N Y 147—People v Miller, 286 N Y S 702 247 App Div 489
29 C J p 1120 note 99

"Intent to take life or the mental state of having an abandoned and malignant heart which means, of course, a condition of mind and which therefore is a mental state is the essential ingredient of murder in the second degree" State v Van Vlack, 65 P 2d 736, 758, 57 Idaho 316

Purposely

Under some statutes fact that accused killed deceased "purposely" is a necessary element of the crime of murder in the second degree—Landreth v State, 171 N E 192, 201 Ind 691, 72 A L R 891

25 Wash—Blanton v State 21 P 439 1 Wash 265
29 C J p 1120 note 1

26. Neb—Runyan v State 216 N W 656, 116 Neb 191 Whitehead v State, 212 N W 35, 115 Neb 143
29 C J p 1120 note 2

27. Ala—Davis v State, 107 So 737, 214 Ala 273—Tyler v State, 97 So 573, 19 Ala App 380, reversed on other grounds Ex parte State ex rel Davis, 97 So 573, 210 Ala 96
Ariz—Lasater v State, 81 P 2d 83 52 Ariz 366—Singh v State, 280 P 672, 35 Ariz 432, 67 A L R 129
Ark—O'Neal v State, 151 S W 2d 822, 202 Ark 1023—Daniels v State, 32 S W 2d 169, 182 Ark 564
Cal—People v Wells, 76 P 2d 493, 10 Cal 2d 610—People v Moreno 58 P 2d 629, 6 Cal 2d 180—People v Efstathiou, 118 P 2d 22, 47 Cal App 2d 441—People v Bruman, 103 P 2d 1020, 39 Cal App 2d 587—People v Ross, 93 P 2d 1019 34 Cal App 2d 571—People v Norida 83 P 2d 964 29 Cal App 2d 11
Conn State v Litman 148 A 132, 106 Conn 315
N M Torres v State, 43 P 2d 929, 39 N M 191
N D State v Carter, 195 N W 567, 50 N D 270
Vt—Bradshaw v Commonwealth, 4 S E 2d 702 171 Va 391
29 C J p 1121 note 13

Murder with malice

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation or deliberation State v Burnett, 25 S E 2d 393 223 N C 129—State v Utley 25 S E 2d 195, 223 N C 39—State v Smith 20 S E 2d 313, 221 N C 278—State v Starnes 17 S E 2d 346 220 N C 384—State v Bright 2 S E 2d 541, 215 N C 537—State v Terrell 193 S E 161, 212 N C 145—State v Keaton, 175 S E 296, 206 N C 682 State v Miller 149 S E 590 197 N C 445—State v Robinson 125 S E 617, 188 N C 784—State v Benson, 111 S E 869, 183 N C 795

28 Kan—State v Kelly, 291 P 945, 131 Kan 357
29 C J p 1121 note 18

29. Ind—Lloyd v State, 189 N E 406, 206 Ind 359
29 C J p 1121 note 19

30. D C—Bishop v U S, 107 F 2d 297, 71 App D C 132

31. Minn—State v Nelson, 181 N W. 850 148 Minn 285
29 C J p 1121 note 20

32. Wash—State v Gounagias, 153 P 9, 88 Wash 304—State v Rutten, 43 P. 30, 13 Wash 203

imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual,[33] or when committed in the commission of a felony other than the specific felonies mentioned in the definition of murder in the first degree purposely and maliciously, but without deliberation and premeditation.[34] In some jurisdictions, however, murder in the second degree is defined as the killing of a human being willfully, premeditatedly and with malice aforethought,[35] but without deliberation.[36]

Effect of passion and provocation Under the view that deliberation is a distinguishing feature of murder in the first degree, a killing under the influence of passion induced by provocation insufficient to reduce the grade of the offense to manslaughter, see infra § 46, may be murder in the second degree.[37] Where express malice is a necessary element of murder in the first degree, see supra § 34, a malicious killing is murder in the second degree where the intent is formed in passion and is carried out before cooling time ensues.[38]

§ 36. Third and Lesser Degrees

Some statutes dividing murder into degrees provide for a third or a lesser degree of murder.

By some statutes particular homicides are made murder in the third degree,[39] as, for example, a homicide perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without a premeditated design to effect death,[40] or a homicide, without a design to effect death, by a person engaged in the commission of, or an attempt to commit, a felony,[41] or a felony other than those enumerated in the definition of the first degree.[42] Under such a statute no intent to effect death is necessary, but the fact that death is caused by a person in the commission of a felony is sufficient.[43] Indeed an intentional murder does not come under this clause,[44] although it is said that murder unintentionally committed in an attempt to commit mayhem would be within its scope.[45]

Fourth and fifth degrees Under some statutes a further division of murder as far as a fourth[46] or fifth[47] degree has existed.

III. MANSLAUGHTER

A. DEFINITION AND CLASSIFICATION

§ 37. In General

Manslaughter consists in the unlawful killing of another without malice, and without premeditation and deliberation, it is generally divided into voluntary and involuntary manslaughter

As defined at common law and under statutes simply declaratory thereof, "manslaughter," which is a public offense,[48] a felony,[49] and the lowest grade of unlawful killing[50] consists in the unlawful

33. Fla.—Williamson v. State, 111 So. 215, 92 Fla. 1094.
29 C.J. p. 1121 note 22.

34. Or.—State v. Morris, 163 P. 567, 83 Or. 429.

35. Mo.—State v. Murphy, 237 S.W. 529, 292 Mo. 275.
29 C.J. p. 1121 note 16.

36. Mo.—State v. Eaton, 154 S.W.2d 767.
29 C.J. p. 1121 note 17.

37. Ark.—Stanley v. State, 40 S.W.2d 415, 183 Ark. 1093.
Tenn.—Wooten v. State, 103 S.W.2d 321, 171 Tenn. 362.
29 C.J. p. 1121 note 26.

What constitutes provocation

(1) "Provocation", such as will preclude finding that homicide committed as result thereof constitutes murder in the first degree, may be opprobrious words or indecent gestures which convey imputations of criminal baseness against a person or his family sufficient to arouse in a man of ordinary pride and self-respect a high state of passion and a spirit of resentment.—State v. Eaton, Mo., 154 S.W.2d 767.—State v. Jackson, 130 S.W.2d 595, 344 Mo. 1055.

(2) A girl's statement to suitor that she did not want to see him did not constitute such "provocation" as would render homicide of girl murder in the second degree instead of murder in the first degree, particularly where homicide did not occur until later in the day after suitor had been absent for a period and returned.—State v. Eaton, supra.

38. Tex.—Rice v. State, 103 S.W. 1156, 51 Tex.Cr. 255.
29 C.J. p. 1122 note 27.

39. N.M.—Sandoval v. Territory, 15 P. 1125, 8 N.M. 573.
29 C.J. p. 1122 note 29.

40. Minn.—State v. Lowe, 68 N.W. 1094, 66 Minn. 296.
29 C.J. p. 1122 note 30.

Unintentional killing

Murder in the third degree by dangerous act, evincing depraved mind, although without premeditated design to kill involves unintentional killing.—State v. Shepard, 214 N.W. 280, 171 Minn. 414.

41. Minn.—Bonfanti v. State, 2 Minn. 123, Gil. 99.
Wis.—Hoffman v. State, 59 N.W. 588, 88 Wis. 166.—State v. Hammond, 35 Wis. 315.
29 C.J. p. 1122 note 31.

42. Fla.—Weightnovel v. State, 35 So. 856, 46 Fla. 1.
29 C.J. p. 1122 note 32.

43. Minn.—Bonfanti v. State, 2 Minn. 123.

44. Fla.—Tillman v. State, 88 So. 377, 81 Fla. 558.
29 C.J. p. 1122 note 34.

45. Wis.—State v. Hammond, 35 Wis. 315.

46. N.M.—Territory v. Pridemore, 13 P. 96, 4 N.M. 275.
29 C.J. p. 1122 note 37.

47. N.M.—Territory v. Baker, 13 P. 30, 4 N.M. 117.
29 C.J. p. 1122 note 38.

48. Ky.—Beach v. Commonwealth, 43 S.W.2d 6, 240 Ky. 763.

49. S.C.—State v. O'Shields, 161 S.E. 692, 163 S.C. 408.

50. N.C.—State v. Lutterloh, 124 S.E. 752, 188 N.C. 412.

killing of another without malice either express or implied,[51] and without premeditation and deliberation.[52] However, it has also been said that the reference to manslaughter as being without malice needs close scrutiny, and that malice in the sense of general criminal intent does exist in manslaughter.[53]

The motive for the crime is not an important factor[54] nor is the nature of the means or instrumentality used for the killing material, since any means or instrument may be used.[55]

Voluntary and involuntary manslaughter; intent. Manslaughter is generally divided into two classes, voluntary manslaughter and involuntary manslaughter,[56] which are considered in detail infra §§ 40–63, although, as appears infra § 38, under some statutes defining the offense, this distinction is not recognized or one of the classes is done away with. In general, the difference between the two classes is that voluntary manslaughter is intentional and

51. Ala.—Roberson v. State, 117 So. 412, 217 Ala. 696.
Cal.—People v. Miller, 299 P. 742, 114 Cal. App. 293.
Del.—State v. Donovan, 8 A.2d 876, 1 Terry 257—State v. Bell, 192 A. 553, 8 W.W.Harr. 328—State v. Phillips, 187 A. 108, 7 W.W.Harr. 544—State v. Kupis, 179 A. 640, 7 W.W.Harr. 27—State v. Galvano, 151 A. 461, 4 W.W.Harr. 409—State v. Dean, 122 A. 448, 2 W.W.Harr. 290, affirmed Dean v. State, 125 A. 478, 2 W.W.Harr. 479—State v. Disalvo, 121 A. 661, 2 W.W.Harr. 232.
Fla.—Roddenberry v. State, 11 So.2d 582, appeal dismissed 63 S.Ct. 266, 317 U.S. 600, 87 L.Ed. —, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed. —.
Hawaii.—Territory v. Braly, 29 Hawaii 7.
Ill.—People v. Papas, 44 N.E.2d 896, 381 Ill. 90—People v. Lewis, 31 N.E.2d 795, 375 Ill. 330, certiorari denied Lewis v. People of State of Illinois, 62 S.Ct. 58, 314 U.S. 628, 86 L.Ed. 504—People v. Lavac, 192 N.E. 568, 357 Ill. 554—People v. Rice, 184 N.E. 894, 351 Ill. 604—People v. Cochran, 145 N.E. 207, 313 Ill. 508.
Ind.—State v. Beckman, 37 N.E.2d 531—Roby v. State, 17 N.E.2d 800, 215 Ind. 55—Lloyd v. State, 189 N.E. 406, 206 Ind. 359.
Iowa.—State v. Johnson, 264 N.W. 596, 221 Iowa 8—State v. Bunn, 190 N.W. 155, 195 Iowa 9.
La.—State v. Williams, 112 So. 373, 163 La. 484—State v. Vial, 96 So. 796, 153 La. 883.
Md.—Neusbaum v. State, 143 A. 872, 156 Md. 149.
Me.—State v. Pond, 134 A. 572, 125 Me. 453.
Mass.—Commonwealth v. Demboski, 186 N.E. 589, 283 Mass. 315.
Mo.—State v. Connor, 252 S.W. 713.
N.C.—State v. Bright, 2 S.E.2d 541, 215 N.C. 537—State v. Terrell, 193 S.E. 161, 212 N.C. 145—State v. Keaton, 175 S.E. 296, 206 N.C. 682—State v. Durham, 161 S.E. 398, 201 N.C. 724—State v. Robinson, 125 S.E. 617, 188 N.C. 784—State v. Lutterloh, 124 S.E. 752, 188 N.C. 412—State v. Smith, 121 S.E. 737, 187 N.C. 469—State v. Benson, 111 S.E. 869, 183 N.C. 795.
Okl.—Quick v. State, 62 P.2d 1279, 1282, 60 Okl.Cr. 229, quoting **Corpus Juris.**
Pa.—Commonwealth v. Gill, 182 A. 103, 105, 120 Pa.Super. 22.
R.I.—State v. Hathaway, 161 A. 366, 52 R.I. 492—State v. Fenik, 121 A. 218, 45 R.I. 309.
29 C.J. p. 1122 note 39.
Homicide as including manslaughter see supra § 1.

Other definitions

(1) Killing another on a sudden falling out or provocation, or unjustifiable act, such killing as happens in a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all.—Commonwealth v. Gill, 182 A. 103, 105, 120 Pa.Super. 22.

(2) The unlawful killing of a human being without malice, that is, as the unpremeditated result of hot blood, caused by sudden, sufficient provocation.—Davis v. State, 107 So. 737, 214 Ala. 273.

(3) "Manslaughter" is the unintentional killing of another without malice where the slayer is in the commission of some unlawful act or the intentional killing on sudden provocation.—Keith v. State, 4 N.E.2d 220, 53 Ohio App. 58.

(4) Wherever a homicide is neither justifiable nor malicious, it is manslaughter.—Davis v. State, Ga., 22 S.E.2d 762.

Where malice exists, there can be no manslaughter.—State v. Lee, 171 A. 195, 6 W.W.Harr., Del., 11.

52. Cal.—People v. Miller, 299 P. 742, 114 Cal. App. 293.
Ill.—People v. Lavac, 192 N.E. 568, 357 Ill. 554—People v. Rice, 184 N.E. 894, 351 Ill. 604—People v. Cochran, 145 N.E. 207, 313 Ill. 508.
N.C.—State v. Burrage, 25 S.E.2d 393, 223 N.C. 129—State v. Utley, 25 S.E.2d 195—State v. Bright, 2 S.E.2d 541, 215 N.C. 537—State v. Terrell, 193 S.E. 161, 212 N.C. 145—State v. Keaton, 175 S.E. 296, 206 N.C. 682—State v. Robinson, 125 S.E. 617, 188 N.C. 784—State v. Lutterloh, 124 S.E. 752, 188 N.C. 412—State v. Smith, 121 S.E. 737, 187 N.C. 469—State v. Benson, 111 S.E. 869, 183 N.C. 795.
29 C.J. p. 1123 note 45.

Conspiracy to kill

Manslaughter cannot be committed in pursuance of conspiracy to kill.—Gilbert v. Commonwealth, 14 S.W.2d 194, 228 Ky. 19.

53. R.I.—State v. McVay, 132 A. 436, 438, 47 R.I. 292, 44 A.L.R. 572.
"The use of the term 'without malice' in the state's definition of manslaughter is, as often in the textwriter's, for the purpose of distinguishing manslaughter from murder rather than to give an all inclusive definition of manslaughter. Malice in the sense of general criminal intent exists in manslaughter."—State v. McVay, supra.
"Malice" defined see supra § 14.

54. Fla.—Savage v. State, 11 So.2d 778—Covington v. State, 200 So. 531, 145 Fla. 680.

55. Cal.—People v. Amick, 125 P.2d 25, 20 Cal.2d 247, prior opinion, App., 118 P.2d 490.

Deadly weapon unnecessary

It is unnecessary to support conviction of manslaughter that fatal blow delivered by defendant be inflicted with a deadly weapon.—Bess v. State, 1 So.2d 580, 146 Fla. 562.

56. Cal.—People v. Miller, 299 P. 742, 114 Cal. App. 293.
Del.—State v. Elliott, 8 A.2d 873, 1 Terry 250—State v. Kupis, 179 A. 640, 7 W.W.Harr. 27.
Ill.—People v. Hunter, 7 N.E.2d 444, 365 Ill. 618—People v. Rice, 184 N.E. 894, 351 Ill. 604.
Ind.—State v. Beckman, 37 N.E.2d 531—Roby v. State, 17 N.E.2d 800, 215 Ind. 55.
Me.—State v. Pond, 134 A. 572, 125 Me. 453.
Md.—Neusbaum v. State, 143 A. 872, 156 Md. 149.
N.C.—State v. Durham, 161 S.E. 398, 201 N.C. 724.

Corpus Juris analysis cited, to show classification of voluntary and involuntary manslaughter, in connection with discussion of distinctions between voluntary and involuntary manslaughter.—State v. McVay, 132 A. 436, 438, 47 R.I. 292, 44 A.L.R. 572.

involuntary manslaughter is unintentional[57] Thus, it has been said, concerning manslaughter generally, that a specific intent to kill is not an essential element of the offense,[58] although it may be present,[59] as in voluntary manslaughter, as considered infra § 44

Other homicides distinguished Manslaughter is distinguished from nonfelonious homicide generally, which is considered infra §§ 97–113, by the absence of circumstances excusing or justifying the killing,[60] and from homicide per infortunium or by misadventure, which is considered infra § 112, in that in the latter death ensues accidentally as a result of a lawful act, done without intention of bodily harm to any person[61] The distinction between murder and manslaughter is considered supra § 14 "Self-defense" is distinguished from "manslaughter" infra § 116

§ 38. Statutory Provisions

The effect of statutes defining and punishing manslaughter depends on their terms They may do away with the offense as such and make the offense of murder without malice the equivalent of voluntary manslaughter, and the offense of negligent homicide the equivalent of involuntary manslaughter.

The common-law definition of "manslaughter," as considered supra § 37, is generally applied under statutes which provide a punishment for manslaughter without defining the offense,[62] or which define it substantially according to the common law[63] Under other statutes so providing, which more or less change or supplement the common-law definition,[64] it has variously been held that manslaughter is the killing of a human being without a design to effect death in the heat of passion, but in a cruel and unusual manner, unless it is under circumstances that would constitute excusable or justifiable homicide,[65] or that it is a killing without authority of law, which is not specifically provided for by other statutory provisions,[66] or is an unlawful killing of another except as described in the statutory definition of murder,[67] or is the killing of a human being by the act, procurement, or culpable negligence of another in cases where such killing is not justifiable or excusable homicide or murder as defined by the statute[68] Manslaughter may, under

57. Ariz—Harding v State, 225 P 482, 26 Ariz 334
Cal—People v Miller, 299 P 742, 114 Cal App 293
Ind—Kelling v State, 200 N E 212 209 Ind 618
Md—Neusbaum v State, 143 A 872, 156 Md 149
Necessity of intent in
Voluntary manslaughter see infra § 44
Involuntary manslaughter see infra § 56

58. Ala—Duncan v State, 6 So 2d 450, 453, 30 Ala App 356, certiorari denied 6 So 2d 454 242 Ala 329, citing **Corpus Juris.**
Fla—Bess v State, 1 So 2d 580, 146 Fla 562—Gainer v State, 129 So 576, 100 Fla 164 Folks v State, 95 So 619, 85 Fla 238
Hawaii—Territory v Yoshimura, 35 Hawaii 324
Iowa—State v Johnson, 245 N W 728, 215 Iowa 483—State v Thomlinson, 228 N W 80, 209 Iowa 555
Mass—Commonwealth v Velleco, 171 N E 16, 272 Mass 91
29 C J p 1128 note 12

59. Ala—Duncan v State, 6 So 2d 450, 453, 30 Ala App 356, certiorari denied 6 So 2d 454, 242 Ala 329, citing **Corpus Juris.**
Iowa—State v Bunn, 190 N W 155, 195 Iowa 9
29 C J p 1128 note 13

Intention formed on sudden impulse

If intention to kill is formed on sudden impulse and immediately executed without deliberation, premeditation, or malice crime is not greater than manslaughter—State v Johnson, 234 N W 263 211 Iowa 871

60. Okl—Quick v State 62 P 2d 1279, 1282 60 Okl Cr 229, quoting **Corpus Juris.**
29 C J p 1123 note 41

61. Ind—Roby v State, 17 N E 2d 800 215 Ind 55
Pa—Commonwealth v Gill, 182 A 103, 105, 120 Pa Super 22

Accidental killing as manslaughter

An instruction to the effect that the killing, if by accident or misadventure, was manslaughter is incorrect—Collins v State, 210 P 285, 22 Okl Cr 203, 30 A L R 811

62. Mich—People v Rogulski, 148 N W 189, 181 Mich 481
29 C J p 1123 note 46

63. Cal—People v Miller, 299 P 742 114 Cal App 293—People v Hoover, 290 P 193, 107 Cal App 635—People v Anderson, 208 P 204, 57 Cal App 721
Ga—Rentfrow v State, 51 S E 596, 123 Ga 539
Ind—Kimmel v State, 154 N E 16, 198 Ind 441
Mont State v Chavez, 281 P 352, 85 Mont 544
Utah—State v Cobo, 60 P 2d 952, 90 Utah 89
29 C J p 1121 note 47

Common-law meaning adopted

The legislature in adopting the common-law definition of "manslaughter" intended to adopt the contents of each word in the act as defined at common law—Roby v State, 17 N E 2d 800, 215 Ind 55.

64. Hawaii—Territory v Braly, 29 Hawaii 7
29 C J p 1124 note 49

Defined with more particularity

A statute providing that "whoever kills a human being, without malice aforethought and without authority justification or extenuation by law is guilty of the offense of manslaughter" is more specific than the common-law definition in that it specifies what renders the homicide unlawful—Territory v Braly, supra

65 Ark—Tanks v State, 75 S W 851, 71 Ark 459
29 C J p 1124 note 50

66. Miss—Lee v State, 86 So 856, 124 Miss 398

67. Del—State v Bell, 192 A 553, 8 W W Harr 328
Wash—State v Hedges, 113 P 2d 530, 8 Wash 2d 652
29 C J p 1124 note 54

In Philippines

Under statute providing that the crime of homicide is any killing which does not constitute 'murder" as defined by statute, the absence of circumstances showing treachery renders the killing homicide—People v Abril, 51 Philippine 670

68. Fla—Roddenberry v State, 11 So 2d 582, appeal dismissed 63 S Ct 266, 317 U S 600, 87 L Ed —, rehearing denied 63 S Ct 440, 317 U S 713, 87 L Ed — —Gainer v State, 129 So 576, 100 Fla 164
Or—State v Nortin, 133 P 2d 252
29 C J p 1124 note 51

statutory provisions, include an unnecessary killing of another, either while resisting an attempt by such other person to commit a felony, or to do any other unlawful act, or after such attempt shall have failed [69]

Amendment An amendment to the manslaughter statute providing that in cases of involuntary manslaughter the punishment should be in the discretion of the court has been held not to repeal the manslaughter statute and has set up in its stead involuntary manslaughter as a misdemeanor [70]

Effect on distinction between voluntary and involuntary manslaughter Under some statutes which define "manslaughter," there is no such crime as involuntary manslaughter,[71] although a portion of the statutory definition of "manslaughter" may follow closely the definition of "involuntary manslaughter" at common law [72] So, where the statute simply provides that, on trials for murder, the jury may find the prisoner guilty of manslaughter, there is no such crime as involuntary manslaughter [73] However, it has also been held that, where the statutes define and punish the crime of voluntary manslaughter only, the common-law offense of manslaughter is in effect subdivided into the statutory offense of voluntary manslaughter, and the offense of involuntary manslaughter, which remains as a common-law offense,[74] and that there is no longer any such offense as simply manslaughter [75]

Where, by the statutory definition of "murder," all killings with a design to effect the death of the person killed or of another are made murder either in the first or second degree, there can be no voluntary manslaughter [76] Under some statutes defining "manslaughter" and dividing it into degrees, the absence of a design to effect death is essential to each of the degrees [77] Where a statute makes any unlawful and willful killing of a human being without malice manslaughter, the common-law distinction between voluntary and involuntary manslaughter is immaterial,[78] and such a statute will, for example, include a negligent killing which is also willful [79]

Degrees of manslaughter While, under some statutes, the crime of manslaughter is divided into degrees, as considered infra §§ 64, 67, such division is not essential, and a statute defining "manslaughter" in general terms is not void because it does not separate the crime into degrees [80]

Statutes expressly relating to abortions In some jurisdictions, under statutes expressly so providing, it is manslaughter to kill an unborn child after it has quickened [81] Under other statutes so providing, the death of the mother or child resulting from the administration to a pregnant woman of any drug or the employment of any other means with intent to destroy the child is manslaughter, unless such act is necessary to preserve the life of the mother,[82] and under such statutes it has been held not necessary that the fetus be quick or able to

In Missouri

(1) The effect of an act conforming to the text has been held to be to abolish all degrees of manslaughter State v Gore, 237 S W 993, 293 Mo 173—29 C J p 1124 note 51 [b]

(2) Under such a statute it has been held that the killing need not have been done in the heat of passion in order to constitute manslaughter —State v Davis, 34 S W 2d 133

(3) Offense was manslaughter, if deceased's assailants had no intention of killing him—State v Recke, 278 S W 995, 311 Mo 581

(4) An instruction that, if accused did the killing "feloniously" without the elements constituting murder, it would be manslaughter, and defining 'feloniously" as 'wickedly and against the admonition of the law, unlawfully," was held to be, in effect, exactly what the statute covers in its definition of "manslaughter"—State v Allister, 295 S W 754, 317 Mo 348

69. Self-defense

Under such a statute an unnecessary killing is manslaughter, even though in self-defense against an unlawful personal attack—Popps v State 162 So 701, 120 Fla 387

70 N C—State v Leonard, 180 S E 710 208 N C 346—State v Dunn, 180 S E 708 208 N C 333

71 Ind—Carney v U S, 104 S W 606, 7 Ind T 247

72. Ind—Carney v U S, supra 29 C J p 1125 note 66

73. La—State v Robinson, 78 So 938, 143 La 543

74. Ky—Cottrell v Commonwealth 111 S W 2d 415, 271 Ky 52—Spriggs v Commonwealth 68 S W 1087, 113 Ky 724, 24 Ky L 540

75. Ky—Spriggs v Commonwealth, supra—Mullins v Commonwealth, 67 S W 824, 23 Ky L 2433

76. Wash—State v Palmer, 176 P 547, 104 Wash 396
29 C J p 1125 note 69

To constitute "manslaughter" a homicide must have been without design to effect death—State v Hiatt, 60 P 2d 71, 187 Wash 226—State v Sandvig 251 P 887, 141 Wash 542 29 C J p 1125 note 69 [a]

77. N Y—People v Koerber, 155 N E 79, 244 N Y 147
29 C J p 1125 note 70

78 U S—U S v Meagher, C C Tex, 37 F 875

79 U S—U S v Meagher, supra

80 Hawaii—Territory v Braly 29 Hawaii 7

81 Fla—Williams v State, 15 So 760 34 Fla 217
29 C J p 1124 note 55
Unborn child as subject of homicide generally see supra § 2
Involuntary manslaughter in commission of abortion see infra § 59
Abortion as manslaughter in first or second degree see infra §§ 65, 66

82 Mich—People v Stahl, 208 N. W 685 234 Mich 569

Or—State v Atwood, 102 P 295, 54 Or 526, 21 Ann Cas 516, adhered to on rehearing 104 P 195, 54 Or 526, 21 Ann Cas 516

Death resulting from criminal abortion as statutory offense distinct from manslaughter see Abortion § 8.

move[83] Under some statutes, it is immaterial whether the death of the child was intended, if it would have been murder had the mother died from the operation,[84] but others require an intent to destroy the child,[85] and such statutes have been held not to apply to a woman who commits an abortion on herself[86] Under a statute to that effect, one using instruments or other means to produce an abortion in the belief that the woman is pregnant is guilty of manslaughter if the woman dies as a result thereof, even though she is not actually pregnant[87]

In Texas a statute defining and punishing manslaughter as a voluntary homicide committed under the influence of sudden passion arising from an adequate cause[88] has been repealed[89] The effect of the repealing statute was to repeal also all statutes which specified certain acts as constituting adequate cause for reducing the degree of homicide[90] Since the repealing statute contained an amendment so providing, offenses committed prior to its effective date were not affected thereby, but were governed by the earlier manslaughter statute,[91] and such amendment, although it became effective before the repealing statute, was not repealed when the latter became effective.[92]

Murder without malice. Under a statutory provision to that effect it has been held in Texas that, if one kills another without justification, under the immediate influence of sudden passion, aroused by an adequate cause, he is guilty of murder without malice[93]

Negligent homicide. In Texas there is no such crime as "involuntary manslaughter" eo nomine, but the statute has substituted what is termed "negligent homicide," which consists in the doing of an act, lawful or unlawful, in a careless or negligent manner,[94] when there is apparent danger of causing the death of the person killed or some other,[95] but with no apparent intention to kill[96] The homicide must be the consequence of the act done or attempted to be done[97]

Negligent homicide in the first degree is the killing of another by negligence and carelessness in the performance of a lawful act,[98] a lawful act being an act which is not forbidden by the penal law and which would not give just occasion for a civil action,[99] it being required that there must be ap-

83. Or—State v Ausplund 167 P 1019, 86 Or 121 rehearing denied 171 P 395, 87 Or 619—State v Atwood, 104 P 195, 54 Or 526, 21 Ann Cas 516, rehearing 102 P 295, 54 Or 526, 21 Ann Cas 516

84. Fla—Williams v State, 15 So 760, 34 Fla 217
N Y—Evans v People, 49 N Y 86

85 Kan—State v Young 40 P 659, 55 Kan 349
Miss—State v Prude, 24 So 871, 76 Miss 543

86. Miss—State v Prude supra

87. Wash—State v Martin, 34 P 2d 914, 178 Wash 290

88. Tex—Pinson v State, 251 S W 1092, 94 Tex Cr 517
29 C J p 1121 note 49 [b]

Manslaughter has been described as a voluntary and intentional, as well as unlawful, killing, but not a killing on malice aforethought—Cooper v State, 250 S W 185 94 Tex Cr 199

89. Tex—Berry v State, 157 S W 2d 650, 143 Tex Cr 67
Decisions under the former statute, in connection with the treatment of voluntary manslaughter generally, see infra §§ 10–54

90. Tex - Berry v State, supra

91. Tex—Cadena v State, 6 S W 2d 768, 109 Tex Cr 589—Flores v State, 4 S W 2d 43, 109 Tex Cr 261—O'Pry v State, 298 S W 596, 107 Tex Cr 661.

92. Tex—Flores v State, 4 S W 2d 43, 109 Tex Cr 261

93. Tex—Brewer v State, 157 S W 2d 388, 143 Tex Cr 136

Adequate cause

(1) Any cause which would commonly produce degree of anger rage resentment, or terror in person of ordinary temper sufficient to render mind incapable of cool reflection constitutes "adequate cause for sudden passion," reducing homicide to "murder without malice," and repeal of statute declaring that insulting words or gestures were not adequate cause for sudden passion reducing homicide to murder without malice was held to manifest intent that insulting words or gestures might be sufficient to constitute "adequate cause"—Elsmore v State, 104 S W 2d 493, 132 Tex Cr 261

(2) Provocation in voluntary manslaughter see infra §§ 46–53

Unlawfully carrying pistol

In affirming a conviction of murder without malice it was held that a rural mail carrier accused of murder unlawfully carried pistol with which he shot deceased, notwithstanding he carried gun in compliance with post mistress' instruction, where carrier was not in performance of his post-office duties at time of homicide—Williamson v State, 99 S W 2d 606, 131 Tex Cr 459

94. Tex—Menefee v State, 87 S W 2d 478, 129 Tex Cr 375—Barfield v. State, 43 S W 2d 106, 118 Tex Cr 394

Unlawful act as negligence per se

A person who injured another in the performance of an unlawful act is guilty of "negligence per se," that is, negligence as a matter of law—Sage v State, 124 S W 2d 376, 136 Tex Cr 252—Menefee v State, 87 S W 2d 478, 129 Tex Cr 375

95. Tex—Wilkerson v State, 59 S W 2d 392, 123 Tex Cr 532—Barfield v State, 43 S W 2d 106, 118 Tex Cr 394—Abell v State, 5 S W 2d 139 109 Tex Cr 380, 61 A L R 318—Simmons v State, 3 S W 2d 449, 109 Tex Cr 157

96. Tex—Barfield v State, 43 S W 2d 106, 118 Tex Cr 394 -Simmons v State, 3 S W 2d 449, 109 Tex Cr 157
29 C J p 1160 note 70

97 Tex—Howard v State, 8 S W 929, 25 Tex App 686
29 C J p 1160 note 71

98 Tex—Bowles v State, 146 S W 2d 183, 140 Tex Cr 511—Simmons v State, 3 S W 2d 449, 109 Tex Cr 157
29 C J p 1160 note 63

99. Tex—Teague v State, 206 S W 193, 84 Tex Cr 169

Lawfulness of act apart from negligence

The negligence cannot be regarded as rendering the act unlawful within this rule, and a statute authorizing action for wrongful death was

parent danger of causing the death of the person killed or some other person,[1] and the degree of care and caution required to prevent one from being guilty of such homicide being defined as such as a man of ordinary prudence would use under like circumstances.[2]

Negligent homicide in the second degree, which is made subject to the provisions with respect to such homicide in the first degree, except as otherwise provided, is the killing of another by negligence[3] in the performance of an unlawful act,[4] an "unlawful act" being defined as an act constituting a misdemeanor or giving just occasion for a civil action,[5] and killing in committing or attempting a felony being expressly excluded.[6]

There is a fundamental difference between the two degrees of negligent homicide,[7] so that, when a negligent homicide results from one transaction, accused cannot be found guilty of both offenses.[8]

§ 39. Status as Distinct Offense or as Degree of Murder

Manslaughter is a distinct crime, and not a degree of murder, although sometimes it is classed as a degree of felonious homicide.

Manslaughter is a distinct crime and does not constitute a degree of murder,[9] although it has been sometimes classed as a degree of felonious homicide.[10]

B VOLUNTARY MANSLAUGHTER

§ 40. Definition

"Voluntary manslaughter" has been defined as the unlawful killing of another intentionally, but in a sudden heat of passion due to adequate provocation, and not with malice.

Where a homicide is neither justifiable nor malicious but is intentional, it is voluntary manslaughter.[11] More specifically, "voluntary manslaughter," as defined at common law and under statutes declaratory thereof, is substantially, the unlawful killing of another intentionally, but in a sudden heat of passion due to adequate provocation, and not with malice.[12] By statute in some jurisdictions, "voluntary manslaughter" is defined as the unlawful

held not to repeal law relating to negligent homicide in first degree -- Simmons v State, 3 S W 2d 449, 109 Tex Cr 157

1. Tex Worley v State, 231 S W 391, 89 Tex Cr 393
29 C J p 1160 note 65

2. Tex --Haynes v State, 224 S W 1100, 88 Tex Cr 42
29 C J p 1160 note 66

3. Tex - Salamy v State, 37 S W 2d 1028, 117 Tex Cr 465

4. Tex - Bowles v State, 146 S W 2d 183, 140 Tex Cr 511—Morgan v State, 120 S W 2d 1063, 135 Tex Cr 402
29 C J p 1160 note 67

5. Tex —Gribble v State, 210 S W 215, 85 Tex Cr 52, 3 A L R 1096
29 C J p 1160 note 68

The act must be penal and a misdemeanor

Tex —Morgan v State, 120 S W 2d 1063, 135 Tex Cr 402

6. Tex —Holland v State, 115 S W 48, 55 Tex Cr 27
29 C J p 1160 note 69

7. Tex - Bowles v State, 146 S W 2d 183, 140 Tex Cr 511

8. Tex —Bowles v State, supra

9. Fla —Folks v State, 95 So 619, 85 Fla 238
Iowa --State v Johnson, 245 N W 728, 215 Iowa 483
29 C J p 1125 note 73

"Manslaughter is a crime distinct from murder, but may, however, be included in it"—People v King, 85 P 2d 928, 940, 30 Cal App 2d 185

10. Fla —Folks v State, 95 So 619, 85 Fla 238
N C —State v Keaton, 175 S E 296, 206 N C 682
29 C J p 1125 note 74

11. Ga —Davis v State, App, 22 S E 2d 762

12. U S --Metropolitan Life Ins Co v McDavid, D C Mich, 39 F Supp 228
Cal —People v Ross, 93 P 2d 1019, 31 Cal App 2d 574
Del —State v Elliott, 8 A 2d 873, 1 Terry 250—State v Bell, 192 A 553, 8 W W Harr 328—State v Kupis, 179 A 640, 7 W W Harr 27—State v Lee, 171 A 195 6 W W Harr 11
Ga —Pierce v State, 19 S E 2d 192, 66 Ga App 737—Cleary v State, 185 S E 834, 53 Ga App 358
Ill --People v Oberlin, 189 N E 333, 355 Ill 317
Ky —Cottrell v Commonwealth, 111 S W 2d 445, 271 Ky 52 —Dean v Commonwealth, 83 S W 2d 887, 260 Ky 97—Shorter v Commonwealth, 67 S W 2d 695, 252 Ky 472—Parrott v Commonwealth, 298 S W 675, 221 Ky 202—Watkins v Commonwealth, 97 S W 740, 123 Ky 817, 29 Ky L 1273—Mitchell v Commonwealth, 11 S W 2d 209, 88 Ky 349, 10 Ky L 910
Me --State v Pond, 134 A 572, 125 Me 453
Mass —Commonwealth v Soaris, 175 N E 491, 275 Mass 291
Mich —People v Ryczek, 194 N W 609, 224 Mich 106
Mo —State v Burrell, 252 S W 709, 298 Mo 672
N C —State v Smith, 20 S E 2d 313, 221 N C 278—State v Durham, 161 S E 398, 400, 201 N C 724—State v White, 51 S E 44, 138 N C 704
Pa —Commonwealth v Patterson, 41 Pa Dist & Co 215, 23 Erie Co 215 --Commonwealth v Grimm, 5 Pa Dist & Co 287—Commonwealth v Drago, 88 Pittsb Leg J 647
Va —Ballard v Commonwealth, 159 S E 222, 156 Va 980 Shiflett v Commonwealth, 130 S E 777, 143 Va 609
29 C J p 1125 note 75

Other definitions

(1) The unlawful intentional killing of another without malice —Beach v Commonwealth 43 S W 2d 6, 240 Ky 763—29 C J p 1125 note 75 [a]

(2) The unlawful killing of another without malice aforethought, either in a sudden affray, or in sudden heat and passion, and not in the necessary or apparently necessary defense of the slayer —Beach v Commonwealth, supra

(3) Killing "done either in sudden affray or in sudden heat of passion and upon provocation ordinarily calculated to excite the passion beyond control"—Cottrell v Commonwealth, 111 S W 2d 445, 448, 271 Ky 52, quoting **Corpus Juris**—29 C J p 1125 note 75 [a] (2).

killing of a human being without malice upon a sudden quarrel or heat of passion,[13] or upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible[14]

§ 41. Elements and Nature of Offense

The elements of self-defense are not essential to manslaughter, and the means used are immaterial.

The elements of voluntary manslaughter are considered specifically infra §§ 42–54 In general, the elements necessary to establish self-defense, as discussed, infra §§ 114–138, are not essential to reduce a homicide from murder to manslaughter[15]

Means or instrumentality used In the absence of statute changing the rule, the nature of the means or instrumentality used in the commission of the homicide is immaterial in determining whether the offense constitutes voluntary manslaughter[16]

§ 42. —— Sudden Passion Due to Adequate Provocation

With few exceptions, an intentional homicide may be reduced from murder to manslaughter only where it was committed in a sudden heat of passion caused by adequate provocation The requisite passion may be the result of rage, anger, fright, or terror, and must be of such a degree as would cause an ordinary man to act on impulse and without reflection

If an intentional, unlawful, homicide, which might otherwise be murder, was committed in a sudden heat of passion, caused by adequate provocation, technical malice being lacking, the crime is reduced to manslaughter,[17] and, except as hereinafter stat-

(4) Where one person kills another in the heat of blood, and usually in fighting or under sudden and great provocation —State v Dean, 122, 448, 2 W W Harr, Del, 290, affirmed Dean v State, 125 A 478, 2 W W Harr, Del, 469—State v Disalvo, 121 A 661, 2 W W Harr, Del, 232

(5) The intentional and unlawful killing of a human being without malice either express or implied, but committed under immediate influence of sudden passion —Commonwealth v Flax, 200 A 632, 331 Pa 145—Commonwealth v Yeager, 196 A 827, 329 Pa 81—Commonwealth v Carroll, 191 A 610, 326 Pa 135

(6) Other definitions see 29 C J p 1125 note 75 [a]

13. Utah —State v Cobo, 60 P 2d 952, 90 Utah 89
29 C J p 1126 note 76

14. Colo —Henwood v People, 129 P 1010, 54 Colo 188

15. Ala —Williams v State, 93 So 55, 18 Ala App 438

16. Tex —Pinson v State, 251 S W. 1092, 94 Tex Cr 517
29 C J p 1131 note 45

Deadly weapon unnecessary
Ky —Boggs v Commonwealth, 148 S W 2d 703, 285 Ky 558

Bare hands
(1) Where accused, with her fist, beat deceased to death, accused could not escape conviction of voluntary manslaughter on ground that means used in killing were not calculated to produce death, since it was not necessary to be guilty of offense that accused use a gun or any particular instrument —Pixley v State, 155 S W 2d 710, 203 Ark 42

(2) The fists, although not generally a deadly weapon," may become deadly by blows often repeated, long continued, and applied to vital and delicate parts of the body of a defenseless, unresisting man —State v Smith, 83 P 2d 749, 196 Wash 531

17. Ala —Buffalow v State, 122 So 633, 219 Ala 407
Ark —Arnold v State, 20 S W 2d 189, 179 Ark 1066
Cal People v Best, 57 P 2d 168, 13 Cal App 2d 606
D C —Kimard v U S, 96 F 2d 522, 68 App D C 250
Fla —Forehand v State, 171 So 241, 126 Fla 464
Ill —People v Hunter, 7 N E 2d 444, 365 Ill 618
Iowa —State v Johnson, 234 N W 263 211 Iowa 874
Ky —Cottrell v Commonwealth, 111 S W 2d 415, 271 Ky 52—Dean v Commonwealth, 83 S W 2d 887, 260 Ky 97—Commonwealth v Beverly, 34 S W 2d 941 237 Ky 35
Mo —State v Gadwood 116 S W 2d 42, 342 Mo 466—State v Rennison, 267 S W 850, 306 Mo 473
N M —State v Wright, 34 P 2d 870, 38 N M 427
Pa —Commonwealth v Santos, 119 A 596, 275 Pa 515
Tenn —Toler v State, 260 S W 134, 152 Tenn 1
Tex —Butler v State, 2 S W 2d 254, 108 Tex Cr 643—Walker v State, 282 S W 245, 104 Tex Cr 26—Simpson v State 269 S W 797, 99 Tex Cr 406 McKaskle v State, 260 S W 588, 96 Tex Cr 638—Davis v State, 259 S W 946 96 Tex Cr 646—Swann v State, 242 S W 735, 92 Tex Cr 153
Va —Davidson v Commonwealth, 187 S E 437 167 Va 451
W Va —State v Pusey, 188 S E 745, 118 W Va 95
29 C J p 1126 note 80
Intentional killing as murder see supra § 17
Necessity of concurrence of passion and adequate provocation see infra § 46

The term "sudden heat and passion" has been described as a technical term of the common law to describe the offense of manslaughter —Tall v Commonwealth, Ky, 110 S W 425—60 C J p 990 note 68

The test of whether the killing is from the sudden heat of passion is found in the nature and degree of the provocation and the manner in which it is resented
Va —Ballard v Commonwealth, 159 S E 222, 156 Va 980—Richardson v Commonwealth, 104 S E 788, 128 Va 691
W Va —State v Wilson, 121 S E 726, 95 W Va 525

Malice and heat of passion cannot coexist
Ala —Smith v State, App, 11 So 2d 466, reversed on other grounds 11 So 2d 471, 243 Ala 251, and certiorari denied 11 So 2d 473, 243 Ala 627
Ky —McHargue v Commonwealth, 21 S W 2d 115, 231 Ky 82
29 C J p 1126 note 80 [c]

Use of dangerous weapon
By express provision of the statutes in some jurisdictions, the killing of another in the heat of passion without malice by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, is manslaughter —Dalton v State, 105 So 781, 141 Miss 811—Haley v State, 85 So 129, 123 Miss 87, 10 A L R 462

At time of slaying
Emotional state referred to in manslaughter as heat of passion must dominate slayer at time, to reduce homicide from murder to manslaughter
Mo —State v Perno 23 S W 2d 87
Tex —Squyres v State, 242 S W 1024, 92 Tex Cr 160.

ed, such passion is essential to reduce a killing from murder to manslaughter [18]

Character of passion The passion ordinarily required to reduce a killing to the grade of manslaughter is that created by rage or anger [19] However, the passion may be one resulting from other conditions of the mind rendering it incapable of cool reflection,[20] such as fright or terror [21]

Degree of passion Passion in order to reduce murder to manslaughter must be of such a degree as would cause an ordinary man to act on impulse and without reflection [22] Stated otherwise, the passion must be irresistible,[23] or almost uncontrollable,[24] or such as to render the person beyond the power of self-control[25] or for the time being deaf to the voice of reason,[26] or such as temporarily to suspend or overthrow the reason or judgment by its violence,[27] or naturally to destroy the sway of reason and render the mind of an ordinary person incapable of cool reflection,[28] or it must produce what, according to human experience, may be called an uncontrollable impulse to do violence [29] Accused must have been aroused to the highest degree of exasperation [30] The heat of passion must be such as to exclude premeditation and a previously formed design,[31] and, under some statutes, anger when not of such a character as to render the mind incapable of forming a premeditated design to effect the death of deceased or some other human being will not reduce an unlawful killing from murder to manslaughter [32]

The passion need not be such as to dethrone reason,[33] or temporarily dethrone reason,[34] or be so overpowering as to destroy volition or the reasoning faculties,[35] or so overpowering as for the time to shut out knowledge and destroy volition,[36] or to render the person accused incapable of deliberation or premeditation,[37] or be uncontrollable,[38] nor need there have been "a whirl-wind" of passion,[39] or a "transport" of passion [40]

Apprehension of danger, imperfect self-defense As has been stated passion resulting from fright or terror may be sufficient to reduce a homicide from murder to manslaughter, and such a killing may be closely akin to a killing in self-defense [41] In this connection it has been held that in certain circum-

18 DC—Bishop v U S, 107 F 2d 297 71 App D C 132
Ga—Green v State 25 S E 2d 502—Rentfrow v State 51 S E 596 123 Ga 539—Nelson v State, 198 S E 305, 58 Ga App 243
Tex—Bowlin v State, 248 S W 396, 93 Tex Cr 452
Va—Harris v Commonwealth 114 S E 597, 134 Va. 688—McCoy v Commonwealth, 112 S E 704 133 Va 731

19 N M—State v Plummer, 107 P 2d 319, 44 N M 614
Pa Commonwealth v Flax, 200 A 632 331 Pa 145 Commonwealth v Grimm, 5 Pa Dist & Co 287
Tex—McKaskle v State, 260 S W 588, 96 Tex Cr 638
29 C J p 1127 note 86

20. N M—State v Plummer, 107 P 2d 319, 44 N M 614
Pa—Commonwealth v Flax, 200 A 632, 331 Pa 145—Commonwealth v Grimm, 5 Pa Dist & Co 287
Tex—Holcomb v State, 281 S W 202, 103 Tex Cr 352—McKaskle v State, 260 S W 588, 96 Tex Cr 638—Davis v State, 259 S W 946, 96 Tex Cr 646
29 C J p 1127 note 87

21. D C—Kinard v U S 96 F 2d 522, 68 App D C 250
N M—State v Plummer, 107 P 2d 319, 44 N M 614
Pa—Commonwealth v Flax, 200 A 632, 331 Pa 145 -Commonwealth v Grimm, 5 Pa Dist & Co 287
Tex—McKaskle v State, 260 S W 588, 96 Tex Cr 638
29 C J p 1127 note 88.

22. N M—State v Plummer, 107 P 2d 319 44 N M 614
29 C J p 1127 note 90
"Reason should at the time of the act be disturbed or obscured by passion to an extent which might render ordinary men of fair average disposition liable to act rashly or without due deliberation or reflection, and from passion rather than judgment"
Ky—McHargue v Commonwealth, 21 S W 2d 115 231 Ky 82
Mich—People v Lilley 5 N W 982 986 43 Mich 521—Maher v People 10 Mich 212, 220 81 Am D 781

23. Ark—Arnold v State, 20 S W 2d 189, 179 Ark 1066
Ill—People v Hunter 7 N E 2d 444 365 Ill 618—People v Rice 184 N E 891 351 Ill 604—People v Ortiz, 150 N E 708, 320 Ill 205
29 C J p 1128 note 96

24. Pa—Commonwealth v Ware, 20 A 806, 137 Pa 465

25 Neb—Braunie v State, 180 N W 567, 105 Neb 355, 12 A L R 658
29 C J p 1133 note 57

26. Del State v Primrose, 77 A 717, 25 Del 164

27 Miss—Preston v State, 25 Miss 383
Mo—State v Crouch, 124 S W 2d 1185, 1187, citing **Corpus Juris.**

28. S C—State v Davis, 27 S E 905, 50 S C 405, 62 Am S R 837

29. S C—State v Davis, supra

30. Miss—Preston v. State, 25 Miss 383
29 C J p 1133 note 58

31 Ala Smith v State, 3 So 551, 83 Ala 26
Mo—State v Crouch 124 S W 2d 1185, 1187, citing **Corpus Juris.**

32. Okl—Updike v State, 130 P 1107, 9 Okl Cr 121—Atchison v State 105 P 387, 3 Okl Cr 295

33 Ky—McHargue v Commonwealth, 21 S W 2d 115, 231 Ky 82
29 C J p 1128 note 97

34. Wis—Dillon v State, 119 N W 352 137 Wis 655 16 Ann Cas 913 - Johnson v State, 108 N W 55 129 Wis 146 5 L R A, N S 809 9 Ann Cas 923

35 Ky—McHargue v Commonwealth, 21 S W 2d 115, 231 Ky 82
29 C J p 1128 note 99

36. N C—State v Kennedy, 84 S E 515, 169 N C 288 294

37. Tenn—Toler v State, 260 S W 134, 152 Tenn 1
29 C J p 1128 note 2

38. Ky—Robinson v Commonwealth 9 Ky Op 926

39 Utah—People v Calton, 16 P 902, 5 Utah 451, reversed on other grounds 9 S Ct 435, 130 U S 83, 32 L Ed 870
29 C J p 1128 note 4

40 Tex—Clark v State, 102 S W 1136 51 Tex Cr 519
29 C J p 1128 note 5

41 D C—Kinard v U S, 96 F 2d 522, 68 App D C 250
29 C J p 1127 note 89
Self-defense generally see infra §§ 114–138.

stances a homicide may be reduced from murder to manslaughter, even though the killing was not done in the heat of passion,[42] as where the killing was done because the slayer believed that he was in great danger, although the facts did not warrant such a belief,[43] or, where there is a case of imperfect self-defense, that is, where the slayer, although acting in self-defense was not himself free from blame,[44] as where the difficulty was originally provoked by accused, as considered infra § 46

Although the right to kill in self-defense may have terminated, nevertheless a heat of passion created by the attending circumstances may continue so that the killing will be manslaughter and not murder.[45] Where the circumstances of the killing are such as may indicate that the person killed by his conduct had provoked passion on the part of the slayer, and also that the slayer may have acted in self-defense, the two theories are not so contradictory that they may not both be considered, and, although it may be found that the theory of self-defense is not supported, the theory of a killing under the influence of passion on adequate provocation may be found to have been established.[46]

§ 43. —— Sudden Combat or Affray

A killing ensuing from a sudden transport of passion or heat of blood, in sudden combat or affray, is manslaughter.

At common law a killing ensuing from a sudden transport of passion or heat of blood, if in sudden combat, was also manslaughter,[47] and the statutory definition of voluntary manslaughter has in some jurisdictions been made expressly to include a killing without malice in a sudden affray.[48] However, a sudden combat is ordinarily considered on the same footing as other provocations operating to create such passion as temporarily to unseat the judgment.[49]

"Sudden affray" has been defined as a difficulty or fight suddenly resulting from the mutual agreement of two or more parties,[50] and is not synonymous with the term "sudden heat and passion."[51]

§ 44. —— Intent; Willfulness

To constitute voluntary manslaughter the killing must be willful or intentional, although intent may be inferred, and reckless or wanton conduct, particularly with a deadly weapon, may be sufficient.

While a specific intent to kill is not an essential element of manslaughter, although it may be present, as considered supra § 37, nevertheless, except as appears below, to constitute voluntary manslaughter, the killing not only may, but must, be willful or intentional.[52] However, it has been held that a

42. Ark.—Freeman v. State, 298 S.W. 333, 174 Ark. 1035—Allison v. State, 86 S.W. 409, 74 Ark. 444

43. Ark.—Freeman v. State, 298 S.W. 333, 174 Ark. 1035

Pa.—Commonwealth v. Miller, 170 A. 128, 313 Pa. 567

29 C.J. p. 1127 note 82

Imminent danger of personal violence as adequate provocation see infra § 48 a.

As rebutting inference of malice

Although fright will not excuse the unnecessary taking of human life when there is no reasonable ground for apprehending death or enormous bodily harm, it may serve to repel the inference of malice and reduce the homicide to manslaughter, if the killing was done because the slayer believed he was in great danger but the facts did not warrant such belief.—State v. Thomas, 111 S.E. 834, 184 N.C. 757

44. Ark.—Freeman v. State, 298 S.W. 333, 174 Ark. 1035

La.—State v. Corneille, 96 So. 813, 153 La. 929

29 C.J. p. 1127 note 83

Imperfect self-defense as affecting guilt of accused generally see infra § 114

45. Tex.—McCampbell v. State, 174 S.W. 315, 76 Tex.Cr. 245.

29 C.J. p. 1127 note 84.

46. U.S.—Stevenson v. U.S., Tex., 16 S.Ct. 839, 162 U.S. 313, 40 L.Ed. 980

29 C.J. p. 1127 note 85

47. Del.—State v. Donovan, 8 A.2d 876, 1 Terry 257—State v. Kupis, 179 A. 640, 7 W.W.Harr. 27

Ky.—Beach v. Commonwealth, 43 S.W.2d 6, 240 Ky. 763—Watkins v. Commonwealth, 97 S.W. 710, 123 Ky. 817, 29 Ky.L. 1273—Mitchell v. Commonwealth, 11 S.W. 209, 88 Ky. 349, 10 Ky.L. 910

Mo.—State v. Shuster, 183 S.W. 296

N.C.—State v. Durham, 161 S.E. 398, 201 N.C. 724

48. Cal.—People v. Ross, 93 P.2d 1019, 34 Cal.App.2d 571

Ky.—Dean v. Commonwealth, 83 S.W.2d 887, 260 Ky. 97—Parrott v. Commonwealth, 298 S.W. 675, 221 Ky. 202

29 C.J. p. 1128 note 9

49. Mo.—State v. Shuster, 183 S.W. 296

Mutual combat as provocation see infra § 48

50. Ky.—Cavanaugh v. Commonwealth, 190 S.W. 123, 172 Ky. 799

60 C.J. p. 990 note 67

51. Ky.—Violett v. Commonwealth, 72 S.W. 1, 24 Ky.L. 1720

52. Ala.—Duncan v. State, 6 So.2d 450, 453, 30 Ala.App. 356, certiorari denied 6 So.2d 454, 242 Ala. 329, quoting **Corpus Juris.**

Ariz.—Harding v. State, 225 P. 482, 26 Ariz. 331

Cal.—People v. Miller, 299 P. 742, 114 Cal.App. 293

Ga.—Alexander v. State, 129 S.E. 102, 160 Ga. 769—Wims v. State, 4 S.E.2d 418, 60 Ga.App. 551

Ind.—Ketring v. State, 200 N.E. 212, 209 Ind. 618

Ky.—Boggs v. Commonwealth, 148 S.W.2d 703, 285 Ky. 558—Thacker v. Commonwealth, 91 S.W.2d 998, 263 Ky. 97—Kearns v. Commonwealth, 19 S.W.2d 1009, 243 Ky. 745—Hawpe v. Commonwealth, 27 S.W.2d 391, 234 Ky. 27—Lucas v. Commonwealth, 21 S.W.2d 113, 231 Ky. 76—Jones v. Commonwealth, 281 S.W. 164, 213 Ky. 356

Md.—Neusbaum v. State, 143 A. 872, 156 Md. 149

Utah.—State v. Cobo, 60 P.2d 952, 956, 90 Utah 89, citing **Corpus Juris.**

29 C.J. p. 1128 note 14

At least voluntary manslaughter

One intentionally shooting another with a deadly weapon, such as a revolver, is guilty of at least voluntary manslaughter.—Commonwealth v. Bryson, 120 A. 552, 276 Pa. 566

Intention to do great bodily harm is sufficient.—State v. Cobo, 60 P.2d 952, 90 Utah 89.

killing in the course of the commission of a felony may be voluntary manslaughter provided the killing was wholly unintentional, as by mistake, and without intent to wound or kill [53]

The existence of sudden and irresistible passion has been held to be inconsistent with the notion of intention,[54] but the difference is reconciled on the ground that the law disregards the actual intent,[55] or accused will be presumed not to have been actuated thereby [56] It has been held to be voluntary manslaughter in some jurisdictions where, although there is no evidence of an intent to kill, death results from an intentional and unlawful blow [57] It has been held difficult to reconcile the absence of malice with the presence of an intent to kill, where a statute defines "malice" as an intent to do a wrongful act established either by proof or presumption of law [58]

Inference of intent, reckless conduct Notwithstanding there is no showing of an intention to kill, such intention may be inferred from the acts of accused,[59] or may be founded on a manifest or reckless disregard for the safety of human life [60] Thus an intention to kill may be inferred from the willful use of a deadly weapon,[61] but, if the weapon is not deadly, the intent to kill cannot be inferred, but must appear from the evidence [62] However, it has been held that, if it is established that there was in fact no intent, the killing is at most involuntary manslaughter [63]

In at least one jurisdiction, it is also held that a homicide will constitute voluntary manslaughter where it was committed under such circumstances as to appear so reckless and wanton, or so grossly careless and negligent, as to be felonious, although not intended [64] Thus one may be guilty of voluntary manslaughter where death results from the reckless and careless use or handling of a deadly weapon,[65] or from shooting in a wanton, reckless,

Intention to punish or deter

Where homicide results to culprit whom it was intended merely to punish or deter from commission of offense, person responsible is guilty of manslaughter —Commonwealth v Beverly, 34 S W 2d 941, 237 Ky 35

Where intent existed at time of shooting, lack of intention of killing deceased at time of shooting of another was held not to change offense from murder to voluntary manslaughter —People v Ortiz 150 N E 708, 320 Ill 205

53 Ky Powers v Commonwealth 246 S W 436 197 Ky 154

54. Cal —People v Kernaghan, 14 P 566 72 Cal 609

55 Cal —People v Freel, 48 Cal 436

56 Cal —People v Dovell, 48 Cal 85

57. Ark —Perrymore v State, 83 S W 909, 73 Ark 278
29 C J p 1129 note 25

58. Cal —People v Kernaghan, 14 P 566 72 Cal 609

59. Ky —Boggs v Commonwealth, 148 S W 2d 703, 285 Ky 558—Kearns v Commonwealth, 49 S W 2d 1009, 243 Ky 745

60. Ky —Boggs v Commonwealth, 148 S W 2d 703, 285 Ky 558—Kearns v Commonwealth 49 S W 2d 1009, 243 Ky 745

61. Utah —State v Cobo, 60 P 2d 952, 956, 90 Utah 89, citing **Corpus Juris.**
29 C J p 1129 note 15

Deadly weapon or intent essential

If a killing occurred under the influence of sudden passion, aroused by adequate cause, by the use of means well calculated and likely to produce death, the killing is "manslaughter," but, if the means used were not likely to produce death the party killing is not deemed guilty of the homicide, unless his intent was to kill, such intent being a matter of proof —Twyman v State, 258 S W 480 96 Tex Cr 139

62. Utah —State v Cobo 60 P 2d 952 956, 90 Utah 89, citing **Corpus Juris.**
29 C J p 1129 note 16

63. Tenn —Robertson v State, 2 Lea 239 31 Am R 602
29 C J p 1129 note 20

64 Ky —King v Commonwealth, 148 S W 2d 1044, 285 Ky 654—Beach v Commonwealth, 13 S W 2d 6 210 Ky 763—Commonwealth v Anderson, 40 S W 2d 265 239 Ky 658—Embry v Commonwealth, 32 S W 2d 979, 236 Ky 204—Hawpe v Commonwealth, 27 S W 2d 394, 234 Ky 27—Jones v Commonwealth, 281 S W 164, 213 Ky 356—Jones v Commonwealth, 252 S W 130, 200 Ky 65

Ordinary negligence as reducing crime to involuntary manslaughter see infra § 62 a

Reason for rule

These opinions rest on the common-law principle that a man must be held to intend the necessary consequence of his act —Lucas v Commonwealth, 21 S W 2d 113, 231 Ky 76

"Grossly careless"

Words "grossly careless," with reference to voluntary manslaughter, mean that act was done under such circumstances as to strike one at first blush as reckless or wanton —Hill v Commonwealth, 40 S W 2d 261 239 Ky 646

"Gross negligence"

Words "gross negligence," used in defining voluntary manslaughter, are equivalent to words "reckless and wanton"—Jones v Commonwealth, 281 S W 164, 213 Ky 356

In absence of recklessness, an unintentional killing will not constitute voluntary manslaughter —Rains v Commonwealth, 10 S W 2d 643, 226 Ky 173

65. Ky —Thacker v Commonwealth, 91 S W 2d 998, 1000, 263 Ky 97, citing **Corpus Juris**—Smiley v Commonwealth, 32 S W 2d 51, 235 Ky 735—Jones v Commonwealth, 281 S W 164, 213 Ky 356—Davis v Commonwealth 265 S W 316, 317, 204 Ky 809, citing **Corpus Juris.**
29 C J p 1129 note 18, p 1156 note 19 [e] (1)

"Voluntary manslaughter as the result of a wanton, reckless or grossly careless use of a firearm exists only when there is an absence of malice aforethought, or specific intention to kill or to do serious injury, and the killing results from the reckless or grossly careless handling of the firearm, with the knowledge on the part of the accused that the use of the weapon in that way was dangerous to life"—Jones v Commonwealth, 252 S W 130, 133, 200 Ky 65—Davis v Commonwealth, 237 S W 24 25, 193 Ky 597, 23 A L R 1551

Homicide occasioned by ordinary negligence in handling of deadly weapons as involuntary manslaughter see infra § 62 b

Basis of rule

"The principle is based upon the theory that a man intends the natural consequences of his acts and what he is aware of or ought to be aware will result from the handling

and careless manner,[66] or from other acts manifestly dangerous to life[67]

Intention directed toward third person Where a shot or blow aimed at one person by a misadventure kills another, it is manslaughter if the homicide would have been of that grade had the person, against whom the blow or shot was directed, been killed,[68] and the same rule has been applied where a killing was through mistake as to the identity of the person killed[69]

Willfully Where a statute provides that the killing must be done unlawfully and willfully, the term "willfully" will be construed as meaning acting voluntarily with evil intent or design[70] Such willfulness may be shown by the fact that accused acted with reckless disregard of the life of another and that the means used were reasonably calculated to take such life[71]

§ 45. —— Absence of Malice

The absence of malice is essential to the crime of *voluntary manslaughter*, and if, notwithstanding the existence of passion, a homicide was committed with malice, it is murder and not manslaughter.

In accordance with the generally accepted rule considered supra § 37, malice, express or implied, is not an essential element of manslaughter,[72] and, in fact, the absence of malice is essential to the crime of voluntary manslaughter, both at common law and under the statutes,[73] this being the characteristic which distinguishes it from murder, as considered supra § 14 Therefore, an intentional homicide, if not justifiable or excusable, is murder and not manslaughter, even though there may have been adequate provocation, if the provocation did not actually cause a sufficient degree of passion, or if the homicide was the result, not of passion, but of malice[74] This is so even though a violent passion was aroused by the provocation,[75] and it is so in

of a weapon in a way dangerous to life although he actually has no intention to kill"—Jones v Commonwealth, 252 S W 130, 134, 200 Ky 65 —Davis v Commonwealth, 237 S W 24, 25, 193 Ky 597, 23 A L R 1551

Grossly careless or negligent

To constitute voluntary manslaughter as respects firearms and other deadly weapons, their use must have been grossly careless or grossly negligent—Newcomb v Commonwealth, 124 S W 2d 186 276 Ky 362

Particular circumstances

Fact that accused, drunk and falling shot deceased, inflicting fatal wound, supported conviction of voluntary manslaughter—Lucas v Commonwealth, 21 S W 2d 113, 231 Ky 76

68. Ky Siler v Commonwealth 134 S W 2d 945, 280 Ky 830—Hill v Commonwealth, 40 S W 2d 261 239 Ky 616
29 C J p 1129 note 17

67. Ky - Montgomery v Commonwealth 81 S W 264, 26 Ky L 356
29 C J p 1129 note 19

Pulling nonswimmer into deep water

To seize one unable to swim and, against his will, intentionally to pull him into deep water where he must swim or drown, and he is drowned thereby may constitute voluntary manslaughter—Watson v Commonwealth, 57 S W 2d 39, 247 Ky 336

Preventing aid for wounded man

If refusal to permit wounded person to obtain aid or medical attention or to render it where duty to render it exists, is so grossly negligent or reckless as to manifest wanton disregard for human life, rather than a specific intent to bring about death, the offenders may be guilty of voluntary manslaughter, but, where a shooting was intentional the crime is murder or voluntary manslaughter without more, so that gross negligence or wanton recklessness in failing to furnish or permit medical aid to deceased is immaterial—King v Commonwealth, 148 S W 2d 1044, 285 Ky 654

68. Fla—McCray v State, 102 So 831 89 Fla 65
Ga—McLendon v State, 157 S E 475 172 Ga 267
Ky—Bolen v Commonwealth 97 S W 2d 1 265 Ky 156
Mo—State v Stallings, 33 S W 2d 914, 326 Mo 1037
Pa—Commonwealth v De Matteo, 195 A 873, 328 Pa 359
S C State v Williams, 199 S E 906, 189 S C 19
Tex - Johnson v State 288 S W 223 first case 105 Tex Cr 299—Caraway v State, 263 S W 1063, 98 Tex Cr 119
29 C J p 1129 note 26, p 1147 note 18
Intent to kill one person and killing another as murder see supra § 18

Mutual intent to fight

Evidence warranting finding that accused and another had mutual intent to enter into fight and that in course of fight accused, in unlawfully shooting at opponent with intent to kill him, shot and killed bystander sustained conviction of voluntary manslaughter—Powell v State 179 S E 205, 51 Ga App 7

69 Tex—Jacobs v State, 213 S W 628, 85 Tex Cr 505
29 C J p 1147 note 19

70 U S Roberts v U S, Tex, 126 F 897, 61 C C A 427, rehearing denied 127 F 818, 62 C C A 134, certiorari denied 21 S Ct 855, 193 U S 673, 48 L Ed 842
29 C J p 1130 note 28.

71. U S—Roberts v U S, supra

72. Ala—Clack v State, 196 So 286, 29 Ala App 377
Ariz—Harding v State, 225 P 482, 26 Ariz 334
Ill—People v Oberlin 189 N E 333, 355 Ill 317
Iowa—State v Johnson, 245 N W 728, 215 Iowa 483
Ky Noble v Commonwealth, 103 S W 2d 258 267 Ky 809
La—State v Augusta 7 So 2d 177, 199 La 896
Mich—People v Goodfellow, 241 N W 184 257 Mich 196

Effect of statute

Law authorizing conviction for assault and battery under indictment for manslaughter does not by implication make malice ingredient of manslaughter—Territory v Braly, 29 Hawaii 7

73 Ark—Stepp v State 282 S W 684 170 Ark 1061 -Dame v State, 262 S W 313, 164 Ark 430
Cal—People v Crowey, 56 Cal 36
Iowa—State v Johnson, 231 N W 263, 211 Iowa 874
Mo—State v Gidwood, 116 S W 2d 42, 342 Mo 466
Pa Commonwealth v Gibson, 119 A 403 275 Pa 338
Va—Harris v Commonwealth, 114 S E 597 134 Va 688

74. Ala—Pierce v State, 178 So 218, 28 Ala App 10
Ky—Cottrell v Commonwealth, 111 S W 2d 415, 271 Ky 52
Va—Hannah v Commonwealth, 149 S E 419, 153 Va 863
29 C J p 1130 note 33

75. U S—Collins v U S, Ark, 14 S Ct 9, 150 U S 62, 37 L Ed 998
29 C J p 1130 note 34.

cases where the homicide was due to a prior grudge or there was a prior intent to kill and accused took advantage of the provocation to carry out such intent,[76] especially if accused used a deadly weapon, prepared for that purpose,[77] unless the murderous purpose can be shown to have been abandoned before the crime was committed.[78]

While the fact that accused had the weapon ready when he provoked the encounter, and immediately killed deceased with it, indicates prior malice,[79] the circumstances may show that the killing was not malicious, although accused used, and even though he had prepared, a deadly weapon.[80] The mere fact that accused armed himself after a quarrel with deceased does not necessarily prevent the subsequent killing from being reduced to manslaughter,[81] for if he armed himself because of a reasonable belief that he was in danger of death or of great bodily harm at the hands of deceased, the homicide is manslaughter if it would have been manslaughter had accused not especially armed himself,[82] but if he armed himself to pursue his adversary, after their quarrel, to get an opportunity to kill him, it is murder.[83]

§ 46. —— Provocation in General

a. In general
b. Original provocation by accused

a. In General

Provocation is a necessary element of voluntary manslaughter, but provocation and passion must concur. The provocation must be sufficient to produce the required degree of passion in an ordinary, average, or reasonable man

In accordance with the rule, considered supra § 42, that the grade of a felonious homicide committed on sudden heat of passion aroused by adequate provocation is reduced from murder to manslaughter, provocation is a necessary element of voluntary manslaughter.[84] However, the homicide will be reduced to voluntary manslaughter only when all the elements concur,[85] and neither passion alone, however violent,[86] nor provocation alone, however adequate,[87] will have this effect.

Nature and sufficiency of provocation required. In order to reduce a homicide to manslaughter, the provocation must be adequate or such as the law deems sufficient to produce the degree of passion required to mitigate the crime,[88] or, stated other-

76. U S —Collins v U S, supra
29 C J p 1130 note 35

77 U S —Collins v U S, supra
29 C J p 1131 note 36

78. Mo State v Stewart, 212 S W 853, 278 Mo 177
29 C J p 1131 note 37

79. Mo —State v Inks, 37 S W 942, 135 Mo 678
29 C J p 1131 note 38

80 Kan —State v Smith, 96 P 39, 78 Kan 179
29 C J p 1131 note 39

Intent when entering contest as controlling

Whether or not the provocation and passion will reduce the grade in such cases depends on accused's intent when he entered into the contest. If he then intended to use a deadly weapon the crime is murder but if he did not intend to use it when he began the contest, but later used it in the heat of passion provoked by the attack made on him, it is manslaughter —Commonwealth v Drum, 58 Pa 9

Circumstances excluding malice

Either assault on accused or other equivalent circumstances may exclude idea of deliberate and wanton intention to kill —McLendon v State, 157 S E 475, 172 Ga 267

81. U S —Gourko v U S, Ark, 14 S Ct 806, 153 U S 183, 38 L Ed 680
29 C J p 1131 note 41

82. U S —Gourko v U S, supra

83. U S —Gourko v. U. S, supra

84. Ark —Jimmerson v State 275 S W 662 169 Ark 353
Ill —People v Ortiz, 150 N E 708, 320 Ill 205
Va —Harris v Commonwealth, 114 S E 597, 134 Va 688

85. Ky —McHargue v Commonwealth 21 S W 115, 231 Ky 82
Requirement that provocation be cause of passion see infra § 52

Suddenness, heat of passion, and adequate provocation must all concur —McHargue v Commonwealth, supra

86 Ga —Allen v State, 200 S E 109 187 Ga 178, 120 A L R 495—Jackson v State, 128 S E 679, 160 Ga 565
Ill —People v Russell, 153 N E 389, 322 Ill 295—People v Ortiz, 150 N E 708, 320 Ill 205
Iowa —State v Johnson, 234 N W 263, 211 Iowa 874
Ky —McHargue v Commonwealth, 21 S W 2d 115, 231 Ky 82
N M —State v Nevares, 7 P 2d 933, 36 N M 41
Va —Mosby v Commonwealth, 190 S E 152, 168 Va 688—Davidson v Commonwealth, 187 S E 437, 167 Va 451—Ballard v Commonwealth, 159 S E 222 156 Va 980—Hannah v Commonwealth, 149 S E 419, 153 Va 863—Harris v Commonwealth, 114 S E 597, 134 Va 688
29 C J p 1131 note 47

87. Ga —Jackson v State, 128 S E 679, 160 Ga 565
Ill —People v Russell, 153 N E 389, 322 Ill 295
Ky —Cottrell v Commonwealth, 111 S W 2d 445, 271 Ky 52—McHargue v Commonwealth, 21 S W 2d 115, 231 Ky 82
Mo —State v Burrell, 252 S W 709, 298 Mo 672
N M —State v Nevares, 7 P 2d 933, 36 N M 41
Va —Mosby v Commonwealth 190 S E 152, 168 Va 688—Davidson v Commonwealth 187 S E 437, 167 Va 451—Ballard v Commonwealth, 159 S E 222, 156 Va 980—Hannah v Commonwealth 149 S E 419 153 Va 863—Harris v Commonwealth, 114 S E 597, 134 Va 688
29 C J p 1131 note 48

88. Ark —Arnold v State, 20 S W 2d 189, 179 Ark 1066
Ga —Allen v State, 200 S E 109, 187 Ga 178, 120 A L R 495—Gamble v State, 199 S E 662, 58 Ga App 637
Ill —People v Lavac, 192 N E 568, 357 Ill 554—People v Rice, 184 N E 894 351 Ill 601—People v Russell, 153 N E 389, 322 Ill 295—People v Ortiz, 150 N E 708, 320 Ill 205
Ky —Smiley v Commonwealth, 32 S W 2d 51, 235 Ky 735
Miss —Calvin v State, 168 So 75, 175 Miss 699
Mo —State v Gadwood, 116 S W 2d 42, 342 Mo 466
N M —State v Plummer, 107 P 2d 319, 44 N M 614—State v. Wright,

wise, it has been held that the provocation must be considerable,[89] or reasonable,[90] or legal,[91] or lawful,[92] and all of these expressions have been said to be interchangeable and synonymous.[93] The sufficiency of particular acts or circumstances as provocation is considered infra §§ 47–51

The provocation must be of such a character as would naturally or reasonably arouse the passion of an ordinary, average, or reasonable man to the required degree,[94] and it should be real or so apparent as to justify the assumption of its reality.[95]

A slight provocation will not be adequate, since the provocation must be proportionate to the manner in which accused retaliated, and therefore, if accused on a slight provocation, attacked deceased with violence out of all proportion to the provocation and killed him, the crime is murder, although there was no prior intent to take life.[96] This is especially true if the homicide was committed with a deadly weapon, and in such cases there must be some great provocation to reduce the grade,[97] but if the provocation was legally adequate, use of a deadly weapon does not prevent the homicide from being reduced to manslaughter.[98]

The fact that the statute enumerates certain causes from which passion characterizing a killing of manslaughter may arise does not exclude other causes.[99]

b. Original Provocation by Accused

Where accused provokes a difficulty to obtain an opportunity to kill, the homicide is not manslaughter, and in other circumstances deceased's assault, provoked by accused, has been held not to be adequate provocation, but if the difficulty was provoked without felonious intent, a killing in self-defense, or in passion aroused by deceased's assault, will be manslaughter.

Where a difficulty is provoked by accused for the purpose of obtaining an opportunity to kill or do great bodily harm, the homicide cannot be manslaughter.[1] Moreover, under other circumstances, it has been held that accused cannot claim the benefit of a sudden passion aroused by an assault made by deceased, but which was provoked by accused,[2]

34 P 2d 870, 38 N M 127—State v Nevares, 7 P 2d 933, 36 N M 11

Pa—Commonwealth v Flax, 200 A 632, 331 Pa 115—Commonwealth v Yeager, 196 A 827, 329 Pa 81—Commonwealth v Carroll, 191 A 610, 326 Pa 135—Commonwealth v Gelb, 128 A 77, 282 Pa 431

S C—State v Hollis, 95 S E 74, 108 S C 442

Tenn—Wooten v State, 103 S W 2d 324, 171 Tenn 362

Tex—Simpson v State, 269 S W 797, 99 Tex Cr 406—McKaskle v State, 260 S W 588, 96 Tex Cr 638

Utah—State v Martin, 300 P 1034, 1037, 78 Utah 23, quoting **Corpus Juris**

Va—McCoy v Commonwealth, 112 S E 701, 133 Va 731

Wis—Johnson v State, 108 N W 55, 129 Wis 116, 5 L R A, N S, 809, 9 Ann Cas 923

29 C J p 1131 note 49

"The nature and character of the wrongful act which provoked the difficulty determine whether the accused is guilty of murder or manslaughter."—Bausell v Commonwealth, 181 S E 453, 461, 161 Va 669

Sudden provocation

"It is not the assault or the provocation alone that reduces the grade of the crime, but it is the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements of malice and deliberation necessary to constitute murder are absent"—State v Clough, 38 S W 2d 36, 38, 327 Mo 700

89. Ky—Doyle v Commonwealth, 37 S W 153, 18 Ky L 518.
29 C J. p 1132 note 51.

90. Ky—Smiley v Commonwealth, 32 S W 2d 51, 235 Ky 735

Mo—State v Gadwood, 116 S W 2d 42, 342 Mo 466

Va—Harris v Commonwealth, 114 S E 597, 134 Va 688—McCoy v Commonwealth, 112 S E 701, 133 Va 731

29 C J p 1132 note 52

91. S C—State v Foster, 45 S E 1, 66 S C 169

29 C J p 1132 note 53

92. Mo—State v Gadwood 116 S W 2d 42, 342 Mo 466

29 C J p 1132 note 54

93. Mo—State v McKenzie, 76 S W 1015, 177 Mo 699

29 C J p 1132 note 55

94. Cal—People v Wells, 76 P 2d 493, 10 Cal 2d 610

D C—Hart v U S, 130 F 2d 456, 76 U S App D C 193—Bishop v U S, 107 F 2d 297, 71 App D C 132

Ill—People v Russell, 153 N E 389, 322 Ill 295—People v Ortiz, 150 N E 708, 320 Ill 205

Ky—McHargue v Commonwealth, 21 S W 2d 115, 231 Ky 82

N M—State v Wright, 34 P 2d 870, 38 N M 127—State v Nevares, 7 P 2d 933, 36 N M 11

Tenn—Wooten v State, 103 S W 2d 324, 171 Tenn 362—Toler v State, 260 S W 131, 152 Tenn 1

Tex—Davis v State, 259 S W 946, 96 Tex Cr 646

Wyo—State v Lantzer, 99 P 2d 73, 55 Wyo 230

29 C J p 1132 note 56, p 1133 notes 57, 58

"The provocation which will stir in the heart of the slayer that heat of passion which reduces the homicide from murder to manslaughter must be such as would have a like effect upon the mind and emotions of the average man—the man of ordinary self-control"—People v Golsh, 219 P 156, 458, 63 Cal App 609

Provocation with respect to intoxicated persons see supra § 5

Degree of passion required see supra § 42

95 Ala—Flanagan v State, 46 Ala 703

96 Cal—People v Wells, 76 P 2d 493, 10 Cal 2d 610

Nev—State v Fisko, 70 P 2d 1113 58 Nev 65

Va—Ballard v Commonwealth 159 S E 222, 156 Va 980—Hannah v Commonwealth, 119 S E 419, 153 Va 863

29 C J p 1133 note 60

97. Del—State v Lee, 171 A 195, 198, 6 W W Harr 11
29 C J p 1134 note 61

98. Ala—Judge v State, 58 Ala 406, 29 Am R 757
29 C J p 1134 note 62

99 Tex—Steen v State, 225 S W 529, 88 Tex Cr 256
29 C J p 1134 note 63

1. Ala—Roberson v State, 117 So 412, 217 Ala 696
29 C J p 1140 note 36

2. Cal—People v Hoover, 290 P 493, 107 Cal App 635.
29 C J p 1140 note 37.

and an act which standing alone might be adequate provocation may not be such provocation when in itself provoked by the conduct of accused,[3] as where an insult provokes a battery not disproportionate thereto.[4]

No felonious intent, imperfect self-defense The mere fact that the killing occurs in a difficulty begun or provoked by accused will not prevent the grade of the homicide from being manslaughter, if it was provoked without felonious intent.[5] Thus, where a fatal blow is struck in anger or fear suddenly aroused by an assault made on accused by decedent, which constituted a provocation apparently sufficient to make the passion irresistible, the grade of the offense will be manslaughter, even though accused was at fault in provoking the difficulty,[6] and, if the difficulty was provoked without felonious intent, accused has the right, sometimes described as imperfect self-defense, to have the homicide committed in defending himself against deceased's assault reduced to manslaughter.[7] This is so even though the assault of deceased was not of such apparent force as would justify accused in killing in self-defense.[8] Illustrations of killings of this character occur, where an assault by accused is returned with a violence which is manifestly disproportionate to its character.[9]

§ 47. —— Words or Gestures

In general, mere words or gestures, whether offensive, insulting, abusive, or threatening, are not sufficient provocation to reduce a homicide, committed in a passion provoked thereby, to manslaughter

While there is some authority to the contrary,[10] mere words or gestures, however offensive, insulting, or abusive they may be, are not, according to the great weight of authority, adequate to reduce a homicide, although committed in a passion provoked by them, from murder to manslaughter,[11] especially when the homicide was intentionally committed with a deadly weapon,[12] and this rule is embodied in

3. Ala —Smith v State, 15 So 813, 103 Ala 4
29 C J p 1141 note 42

4. Ga —Hanye v State, 25 S E 307, 99 Ga 212
29 C J p 1141 note 43

5. La —State v Corneille, 96 So 813, 153 La 929
29 C J p 1140 note 38

Lawful act as provocation

Where a quarrel arises from a lawful act of accused, the fact that such act caused deceased to give the provocation leading to the killing will not effect the adequacy of the provocation to reduce the killing to manslaughter —Bonnard v State, 7 S W 862, 25 Tex App 173, 8 Am S R 431—
29 C J p 1141 note 44

6. Ark —Price v State, 170 S W 235, 114 Ark 398
29 C J p 1141 note 39

7. La — State v Corneille, 96 So 813, 153 La 929
Mo —State v Dollarhide, 63 S W 2d 998, 333 Mo 1087—State v Harlan, 240 S W 197
Wyo —State v Flory, 276 P 458, 40 Wyo 184
30 C J p 52 note 75
Imperfect self-defense as affecting guilt of accused generally see infra § 114
Intention with which difficulty is provoked as affecting right of self-defense see infra § 120

Resisting assault by party illegally restrained

If accused and his father restrained and falsely imprisoned deceased by force or threats of the show of a weapon, and thereby compelled him to submit to being tied and to agree that he might be carried to the county seat, even though their purpose was to do him no other harm, such acts would be unlawful and if, in an effort to regain his freedom, deceased made an assault on the father, in which accused believed he used more force than was reasonably necessary and in response to which accused took the life of deceased, accused might be guilty of no higher offense than manslaughter under the doctrine of imperfect self-defense —Meador v State, 253 S W 297, 94 Tex Cr 608

8. Ark —Price v State, 170 S W 235, 114 Ark 398—Allison v State, 86 S W 409, 74 Ark 444

9. La - State v Corneille, 96 So 813, 153 La 929
29 C J p 1141 note 41

10. N Y —Wilson v People, 4 Park Cr 619

11. Ala —Harris v State, 2 So 2d 431 241 Ala 240—Roberson v State, 117 So 412, 217 Ala 696—Davis v State, 107 So 737, 214 Ala 273—Collins v State, 106 So 341, 21 Ala App 152, certiorari denied Ex parte **Collins**, 106 So 344, 214 Ala 61
Cal —People v **French**, 87 P 2d 1014 12 Cal 2d 720—People v Wells, 76 P 2d 493 10 Cal 2d 610—People v Manzo, 72 P 2d 119, 9 Cal 2d 594
Ill —People v Russell, 153 N E 389, 322 Ill 295
Kan —State v Hardisty, 253 P 615, 617, 122 Kan 527, citing **Corpus Juris**, and denying rehearing 249 P 617, 121 Kan 576
Mo —State v Bongard, 51 S W 2d 84, 330 Mo 805—State v Delbono, 268 S W 60, 306 Mo 553
N M —State v Nevares, 7 P.2d 933, 36 N M 41
N C —State v Mosley 195 S E 830, 213 N C 301—State v Benson, 111 S E 869, 183 N C 795
Pa —Commonwealth v Gelfi, 128 A 77, 282 Pa 434
Va —Mosby v Commonwealth, 190 S E 152, 168 Va 688—Reynolds v Commonwealth, 112 S E 707, 133 Va 760
29 C J p 1131 note 61
Information of wife's adultery as adequate provocation see infra § 49

Provocation held inadequate

(1) Reproof of accused by deceased girl for shooting and making trouble about her home and exhibition of anger was not sufficient provocation to make killing manslaughter instead of murder —People v Ortiz, 150 N E 708, 320 Ill 205

(2) Conviction of murder was unaffected by fact that deceased addressed accused, saying that he would not shake hands, because accused was not his friend —Tatum v State 288 S W 904, 172 Ark 244

In Kentucky

(1) The rule stated in the text has been followed —Sawyers v Commonwealth, 38 S W 136, 18 Ky L 657—Cantrell v Commonwealth, 17 S W 149, 13 Ky L 305 Rapp v Commonwealth, 14 B Mon 191

(2) However, the contrary has also been held —Commonwealth v Hourigan, 12 S W 550, 89 Ky 305 11 Ky L 509

12. Va —Harris v Commonwealth, 111 S E 597, 134 Va 688—McCoy v Commonwealth, 112 S E 704, 133 Va 731
W Va —State v White, 94 S E 972, 81 W Va 516
29 C J p 1134 note 65.

express statutory provisions in some jurisdictions.[13]

Threatening words or gestures. Threats or threatening gestures ordinarily are not regarded as in themselves adequate provocation,[14] although there is some contrary authority,[15] particularly where the threat is accompanied by acts showing a purpose to commit personal violence on accused.[16]

Insulting words with other insufficient provocation. Insulting words, coupled with other conduct that by itself would not amount to adequate provocation, usually will not reduce the grade of the crime,[17] but under special circumstances may do so.[18]

If insulting words provoke a combat in which at first there is no intent to kill, but such intent is later formed and executed in the heat of passion caused by the combat, the provocation is sufficient to reduce the grade,[19] but accused's retaliation when provoked by insulting words must not have been excessive, and if, on such provocation, he made a violent attack with a weapon on deceased and ultimately killed him, the grade is not reduced, although after the beginning of the attack the mutual combat became so violent that it would have been sufficient provocation, but for the excessive force originally used by accused.[20]

Insult toward female relative. In the absence of statute, defamatory words concerning, or insults to, female relatives of accused ordinarily are not regarded as sufficient provocation to reduce the grade of a homicide to manslaughter,[21] although there is some authority to the contrary.[22]

In Texas, however, it was held under a statute expressly so providing, which statute has since been repealed, see supra § 38 b, that insulting words or conduct of the person killed toward a female relative of the person committing the homicide were adequate cause for sudden passion.[23] Under such a statute it is immaterial whether or not the female was present when the insulting words were used concerning her,[24] or whether she is then living or dead.[25] It has been said that the statute applies to a homicide committed by a woman in a passion produced by insulting remarks concerning her female relatives,[26] but that it does not apply to a homicide committed in such passion aroused by an insult toward her.[27] Such a statute does not apply to an insult to any male relative, however feeble, infirm, or beloved,[28] nor does it apply to an insult directed at accused and only indirectly affecting his female relatives.[29] Accused must have been in a passion caused by the provocation at the time of the killing,[30] and, if present at the time of the insulting words or conduct, must have acted at once.[31]

Where accused was not present but is informed of the insult by others, the killing may occur at his first meeting with deceased after learning of the provocation and while still affected by the passion springing therefrom,[32] and the mere lapse of time

13. Ga.—Green v. State, 25 S.E.2d 502—Cone v. State, 18 S.E.2d 850, 193 Ga. 420—Slocumb v. State, 121 S.E. 116, 157 Ga. 131.
Tex.—Atkins v. State, 280 S.W. 792, 103 Tex.Cr. 334.
29 C.J. p. 1134 note 66.

14. Ga.—Green v. State, 25 S.E.2d 502.
29 C.J. p. 1135 note 73.
Threats or threatening gestures as justifying killing in self-defense see infra § 126 b (3).

15. Ill.—Silgar v. People, 107 Ill. 563.
29 C.J. p. 1135 note 74.

16. Ga.—Lamp v. State, 142 S.E. 202, 38 Ga.App. 36.
W.Va.—State v. Crawford, 66 S.E. 110, 66 W.Va. 114.

17. Del.—State v. Harrigan, 31 A. 1052, 14 Del. 369.
29 C.J. p. 1136 note 99.

18. Mo.—State v. Grugin, 47 S.W. 1058, 147 Mo. 39, 71 Am.St.R. 553, 42 L.R.A. 774.
29 C.J. p. 1136 note 1.

19. N.C.—State v. Hill, 20 N.C. 629, 34 Am.D. 396.
29 C.J. p. 1137 note 2.

20. Ga.—Arwood v. State, 59 Ga. 391.

21. Ark.—Keirsey v. State, 199 S.W. 532, 131 Ark. 487.
29 C.J. p. 1135 note 77.

22. Ky.—Stott v. Commonwealth, 29 S.W. 141, 17 Ky.L. 308—Massie v. Commonwealth, 24 S.W. 611, 15 Ky.L. 562, 29 S.W. 871, 16 Ky.L. 790.

23. Tex.—Claxton v. State, 288 S.W. 444, 105 Tex.Cr. 308—Bowlin v. State, 248 S.W. 396, 93 Tex.Cr. 152.
29 C.J. p. 1135 note 79.

Effect on ordinary man immaterial.
Insulting words and conduct are statutory adequate cause for passion reducing homicide to manslaughter, and the question is whether they occurred and in fact produced such passion, and it is error to require finding that they would have produced such passion in person of ordinary temper.—Stovall v. State, 253 S.W. 526, 95 Tex.Cr. 189.

Insufficient provocation.
Tex.—Peart v. State, 265 S.W. 389, 98 Tex.Cr. 194.
29 C.J. p. 1135 note 79 [b].

24. Tex.—Hudson v. State, 6 Tex.App. 565, 32 Am.R. 593.

25. Tex.—Willis v. State, Cr., 75 S.W. 790.

26. Tex.—Moore v. State, 26 S.W. 404, 33 Tex.Cr. 351.

27. Tex.—Moore v. State, supra.
29 C.J. p. 1136 note 83.

28. Tex.—Ex parte Jones, 20 S.W. 983, 31 Tex.Cr. 422.

29. Tex.—Barrett v. State, 267 S.W. 511, 98 Tex.Cr. 627.
29 C.J. p. 1136 note 85.

30. Tex.—Claxton v. State, 288 S.W. 444, 105 Tex.Cr. 308.
29 C.J. p. 1136 note 86.

31. Tex.—Moss v. State, 131 S.W. 1088, 60 Tex.Cr. 268.
29 C.J. p. 1136 note 87.

32. Tex.—Holcomb v. State, 251 S.W. 204, 103 Tex.Cr. 318—Stovall v. State, 265 S.W. 572, 98 Tex.Cr. 294—Middox v. State, 254 S.W. 800, 95 Tex.Cr. 129—Bowlin v. State, 248 S.W. 396, 93 Tex.Cr. 452—Henderson v. State, 244 S.W. 1030, 92 Tex.Cr. 607—Squyres v. State, 242 S.W. 1024, 92 Tex.Cr. 160.
29 C.J. p. 1136 note 88.

"First meeting" means the first time the persons are in proximity under such circumstances as would enable the slayer to act in the premises.—Smith v. State, 288 S.W. 458, 105 Tex.Cr. 327.

before such meeting does not of itself affect the rule.[33] The meeting may be casual or intended[34] and there need be no new provocation.[35] However, where the killing does not occur at the first meeting, the statute does not apply,[36] although accused was unarmed at the prior meeting,[37] unless a new provocation is given at the subsequent meeting[38]

Since, under the statute, the important factor is the effect produced on accused's mind,[39] it is immaterial whether the information on which he acted is true if it is in fact believed by him,[40] and, conversely, accused must have had knowledge of the insult before the killing,[41] and must have believed the untruth of the statements constituting the alleged insult[42]

§ 48. —— Personal Violence

a In general
b Mutual combat
c Injury to relative or third person

a. In General

Personal violence, if not so trivial as to be disproportionate to the violence of the retaliation, is adequate provocation In general, acts of the deceased putting the accused in apparent imminent danger are adequate, but the lawful exercise of force by the deceased is not adequate provocation

A blow or other personal violence inflicted on accused may constitute adequate provocation,[43] provided it is of such a character or inflicted under such circumstances as to be reasonably calculated to arouse passion,[44] and provided the killing is due to passion so aroused and not to malice[45]

A trivial[46] or slight[47] assault and battery entirely disproportionate to the violence of the retaliation will not constitute an adequate provocation However, in order to reduce the grade of the homicide, the assault need not be so violent as to put accused in imminent danger of death[48] or of such grievous bodily injury as might reasonably cause death,[49] and there is authority that the adequacy of the provocation does not depend on the degree of violence used, but on whether the assault, under the attending circumstances, is calculated to create, and does create, sudden heat of passion[50]

Imminent danger of personal violence While it has been held that acts of deceased from which accused could reasonably draw the conclusion that he was in imminent danger of personal violence constitute adequate provocation,[51] it has also been held that nothing less than actual violence to the person will constitute adequate provocation, a demonstration with a deadly weapon imminently

33. Tex.—Hudson v State, 66 S W 668, 43 Tex Cr 420
29 C J p 1136 note 89

34 Tex.—Davis v State, 155 S W 546, 70 Tex Cr 37—Allen v State, 70 S W 85, 44 Tex Cr 205

35. Tex.—Pauline v State, 1 S W 453, 21 Tex App 436

36. Tex.—Arkhammer v State, 296 S W 301, 107 Tex Cr 191—Smith v State, 288 S W 458, 105 Tex Cr 327—Holcomb v State, 281 S W 201, 103 Tex Cr 348
29 C J p 1136 note 92

37. Tex.—Pitts v State, 16 S W 189, 29 Tex App 374

38. Tex.—Richardson v State, 12 S W 870, 28 Tex App 216
29 C J p 1136 note 94

39. Tex.—Powers v State, 227 S W 671, 88 Tex Cr 457
29 C J p 1136 note 95

40 Tex.—Dixon v State, 289 S W 46, 105 Tex Cr 479
29 C J p 1136 note 96

41. Tex.—Cockerell v State, 25 S W 421, 32 Tex Cr 585
29 C J p 1136 note 97

42. Tex.—Redman v State, 108 S W 365, 52 Tex Cr 591

43. La.—State v Joiner, 109 So. 51, 161 La. 518.

Miss.—Combs v State, 167 So 51, 175 Miss 376
29 C J p 1137 note 4

Assault or attempt as essential

Provocation to reduce murder to manslaughter cannot be less than an assault actually committed or menaced under such circumstances as to convince accused that he had cause to believe that he would be presently assaulted.—Davis v State, 107 So 737, 214 Ala 273

Effort to disarm accused

Where deceased, after directing accused to do an act, undertook unlawfully to take from accused a gun with which accused was armed, and in order to secure the gun drew or attempted to draw a pistol, and was shot by accused in resisting such unlawful act, a conviction of murder will be set aside, for such killing at most would amount to no more than manslaughter.—Fletcher v State, 91 So 338, 129 Miss 207, modified on other grounds 92 So 556, 129 Miss 578

44 N C.—State v Ellick, 60 N C 450, 86 Am D 442
29 C J p 1137 note 5 [a]

45 N C.—State v Benson, 111 S E 869, 183 N C 795
29 C J p 1137 note 6

46. Del.—State v Emory, 58 A 1036, 21 Del 126
29 C J p 1138 note 10.

Assault held inadequate provocation

Evidence that deceased wife of accused induced by fear for her safety threw her arms around neck of accused in attempt to hold him from violence, although showing technically an assault, did not have probative effect as being of character likely to excite in a reasonable person an irresistible impulse to kill so as to reduce offense to voluntary manslaughter.—State v Fisko 70 P 2d 1113, 58 Nev 65

47. Cal.—People v Wells, 76 P 2d 493, 10 Cal 2d 610
29 C J p 1138 note 11

48. Ga.—English v State, 20 S E 651, 95 Ga 123
N C.—State v Sizemore, 52 N C 206

49 Ga.—Williams v State, 33 S E 648, 107 Ga 721
Ky.—Cook v Commonwealth, 4 Ky L. 31, 11 Ky Op 676

50 Ky.—Cook v Commonwealth, supra
29 C J p 1138 note 14

51. Ga.—Booker v State, 114 S E 711, 151 Ga 538
29 C J p 1137 note 8

No blow struck

It is not always necessary that a blow shall actually have been struck, but it is sufficient if deceased was evidently about to strike accused.—Whitener v State, 178 S W 394, 120 Ark 30—29 C J. p 1137 note 7

threatening danger not being sufficient [52] The sufficiency of accused's apprehension of danger to reduce a homicide from murder to manslaughter is considered supra § 42

Lawful exercise of force The lawful exercise of force is not such provocation as will reduce a homicide to manslaughter,[53] nor will the heat of passion aroused in mutual combat mitigate the killing where accused was trying to attack a third person and deceased interfered solely for the purpose of preventing the difficulty,[54] using no unnecessary violence [55]

Statutory provisions Under a statute so providing, it has been held that an adequate provocation may lie in an assault and battery by the victim causing pain or bloodshed [56] Under other statutes to that effect it has been held that to constitute adequate provocation there must be an actual assault or an attempt by the person killed to commit a serious personal injury on the person killing,[57] or other equivalent circumstances,[58] or a serious and highly provoking injury inflicted on the person killing [59]

b. Mutual Combat

A homicide resulting from mutual combat or the excitement and heat of passion arising therefrom is voluntary manslaughter There must be a mutual intention to fight, and, it has been held, deadly or dangerous weapons must be used

A homicide is voluntary manslaughter, rather than murder, where it results from mutual combat, or the excitement and heat of passion arising therefrom,[60] even though accused may not have attempted to retire from the conflict,[61] provided the killing was not due to malice,[62] but to the heat of passion aroused by the combat [63] So it may be

52. Mo —State v Bongard, 51 S W 2d 84 330 Mo 805, criticizing State v Brown, 64 Mo 367—State v Delbono, 268 S W 60, 306 Mo 553

However, it has also been held, in apparent recognition of the contrary rule, that the mere fact that accused believed that personal violence was about to be offered will not mitigate the homicide in the absence of reasonable ground for such belief State v Clay, 100 S W 439, 201 Mo 679 —State v Westlake, 61 S W 243, 159 Mo 669

53. Mo —State v Pollard, 40 S W 949, 139 Mo 220
29 C J p 1140 note 31

54. Ala —Holmes v State, 7 So 193, 88 Ala 26, 16 Am S R 17
29 C J p 1140 note 33

Attempt to separate combatants

Where two are fighting and one of them kills another who attempts to separate them, the offense is not necessarily manslaughter —McAllister v Washington Territory, 1 Wash T 360

55. La —State v Jackson, 13 So 703, 45 La 1031
29 C J p 1140 note 34

56 Tex —Butler v State, 2 S W 2d 254, 108 Tex Cr 643—Webster v State, 289 S W 689, 105 Tex Cr 600 — Andrews v State, 275 S W 1024, 101 Tex Cr 261—Davis v State, 259 S W 946, 96 Tex Cr 646
29 C J p 1138 note 15

57. Ga - Hill v State, 138 S E 229, 164 Ga 298—Jackson v State, 128 S E 679, 160 Ga 565
29 C J p 1138 note 16

Mere words held not assault

Ga — Brown v State, 165 S E 252, 175 Ga 329

Assault held insufficient

(1) If accused shot deceased because of a bare assault on him, and not to prevent a felony, the offense was voluntary manslaughter —Ellis v State, 117 S E 116, 30 Ga App 154

(2) In a prosecution for murder it was not error to charge that if the provocation given by deceased to accused and the only provocation, was to advance and place his hand upon his collar and that conduct was justified, then such conduct of deceased did not avail accused to reduce the killing from murder to voluntary manslaughter —Slocumb v State, 121 S E 116, 157 Ga 131

58. Ga —Jackson v State, 128 S E 679, 160 Ga 565
29 C J p 1138 note 17

Fear of injury less than felony

One who kills another under fears of reasonable man that injury about to be inflicted is less than felony may be guilty of voluntary manslaughter —Prater v State, 127 S E 296, 160 Ga 138

What constitutes "other equivalent circumstances"

The "other equivalent circumstances" must be such as would produce on the part of the slayer the same state of mind as would an assault or an attempt to commit a serious personal injury, in other words, they must be such as would as much exclude all idea of deliberation or malice, and justify the excitement of passion, as would an assault or an attempt to commit serious personal injury — Richardson v State, 5 S E 2d 891 189 Ga 418—Gamble v State, 199 S E 662, 58 Ga App 637—29 C J p 1138 note 17 [a]

59. Ill —People v Bartley, 104 N E 1057, 263 Ill 69

60. Ark —McClendon v State, 126 S W 2d 926, 197 Ark 1135
Ga —Rivers v State, 17 S E 2d 726 193 Ga 133—Shafer v State, 13 S E 2d 798, 191 Ga 722—Johnson v State, 161 S E 590, 173 Ga 734—Hill v State, 138 S E 229, 164 Ga 298—Beckworth v State, 4 S E 2d 707, 60 Ga App 688
Ky — Hanna v Commonwealth, 46 S W 2d 1098, 242 Ky 584
Va —Thomason v Commonwealth, 17 S E 2d 374 178 Va 489—Ballard v Commonwealth, 159 S E 222, 156 Va 980
29 C J p 1138 note 19
Voluntary participation in mutual combat as affecting right of self-defense see infra § 122

As separate type of voluntary manslaughter

It has been held that voluntary manslaughter "is of two types, distinguished by the motivating facts which prompt the act rather than the ends to be obtained, the one being based upon passion supposed to be irresistible and the other on the principle of mutual combat"—Watson v State, 17 S E 2d 559, 560, 66 Ga App 242

Willingly engaging in gun battle

One who willingly engages in a gun battle out of passion aroused by unprovoked assault and not in self-defense and kills his adversary is guilty of 'manslaughter" at least, although attacked on his own premises —State v Miller, 25 S E 2d 623, 223 N C 184

61. Ark —Middleton v State, 240 S. W 413, 158 Ark 642
29 C J p 1139 note 21.
Duty to retreat or avoid danger as essential to right to kill in self-defense see infra §§ 127–130

62. Cal —People v Worthington, 55 P 396, 122 Cal 583
29 C J p 1139 note 22

63. Cal —People v. Worthington, supra
29 C J p 1139 note 22.

manslaughter where the homicide is committed after the combat has terminated but before the passion has subsided,[64] although, if not under the influence of passion so aroused, it is murder.[65]

However, if accused or both accused and deceased entered the combat with the intention of killing, the heat of passion engendered by the mutual combat will not reduce the homicide to manslaughter.[66] Likewise if accused entered the combat dangerously armed and took an unfair advantage of deceased, malice is evidenced and the homicide is not reduced to manslaughter,[67] although, if accused did not intend to use the deadly weapon when he began the contest, but used it in the heat of passion in consequence of an attack made on him, it is manslaughter.[68]

What constitutes combat To constitute a mutual combat within this rule, the persons must have had a mutual intent to fight,[69] but it is not necessary that both persons shall have struck blows or fired shots,[70] as where the first blow or shot killed one of the participants.[71] While it has been held that the rule is especially applicable if deceased used a dangerous weapon,[72] it has also been held to be usually or generally necessary that both persons have been armed with deadly or dangerous weapons,[73] and that mutual combat does not mean a mere fist fight or scuffle.[74]

c. Injury to Relative or Third Person

In general, injury or violence to a relative or friend in the presence of the accused is adequate provocation, but mere information of the injury after it has occurred generally is insufficient.

It has been held to be sufficient provocation, so as to reduce a homicide to manslaughter, provided the killing was committed under the immediate influence of the heat of passion caused thereby,[75] that deceased committed personal violence, in the presence of accused, on accused's wife,[76] father,[77] mother,[78] brother,[79] or child,[80] although it has also been held that an assault causing pain or bloodshed made on one other than the slayer is not of itself adequate, so as to reduce the homicide to manslaughter.[81] However, while there is some authority to the contrary,[82] mere information of the injury after it has occurred, even though it be a rape or attack on accused's wife, has been held insufficient provocation.[83]

Injury to friend While there is some authority to the effect that an attack on the person and safe-

64 Colo.—Crawford v. People, 20 P. 769, 12 Colo. 290
29 C.J. p. 1139 note 23

65 Del.—State v. Gardner, Houst. Cr. p. 146
29 C.J. p. 1139 note 24

66 Okl.—Weatherholt v. State, 131 P. 185, 9 Okl.Cr. 161
29 C.J. p. 1139 note 25

Duel
One who kills another in a duel, however fairly conducted, and whether formal or suddenly improvised, is guilty of murder.—Thomas v. State, 61 Miss. 60.—29 C.J. p. 1140 note 28

67 N.C.—State v. White, 51 S.E. 44, 138 N.C. 704
29 C.J. p. 1139 note 26
However, it has been held that one voluntarily entering into mutual combat with deadly weapon and killing antagonist having only a rock, was guilty of voluntary manslaughter at least.—Handshoe v. Commonwealth, 53 S.W.2d 195, 245 Ky. 10

68 W.Va.—State v. Cassim, 163 S.E. 769, 112 W.Va. 92
29 C.J. p. 1140 note 27

69 Ga.—Roberts v. State, 5 S.E.2d 340, 189 Ga. 36.—Perry v. State, 195 S.E. 175, 185 Ga. 408.—Johnson v. State, 161 S.E. 590, 173 Ga. 734.—Wingate v. State, App., 22 S.E.2d 758.—Watson v. State, 17 S.E.2d 559, 66 Ga.App. 242.—Donalson v. State, 149 S.E. 429, 40 Ga.App. 360
29 C.J. p. 1140 note 29.

Mutual combat" defined see 15 C.J.S. p. 240 notes 47–50

In position to fight
It should appear affirmatively that at time of homicide both persons were in position and manifested an intention to fight, and the use of words, threats, menaces, or contemptuous gestures is insufficient under the doctrine of "mutual combat".—Cone v. State, 18 S.E.2d 850, 193 Ga. 420.—Cornelious v. State, 17 S.E.2d 156, 193 Ga. 25.

Facts held to constitute mutual combat
If two persons draw guns in a sudden quarrel and one kills the other such killing is manslaughter.—Williams v. State, Ga.App., 23 S.E.2d 205

70 Ga.—Roberts v. State, 5 S.E.2d 340, 189 Ga. 36.—Donalson v. State, 149 S.E. 429, 40 Ga.App. 360

71. Ga.—Tate v. State, 46 Ga. 148

72. N.C.—State v. Hough, 50 S.E. 709, 138 N.C. 663
29 C.J. p. 1139 note 20

73. Ga.—Wingate v. State, App., 22 S.E.2d 758
"The weapons or means used to consummate this intention may vary, they need not always be deadly weapons per se, but the weapons, manner of use, and other circumstances often enter. Usually there would be no means of manifesting a mutual intention to kill in the absence of a deadly or dangerous weapon with which to effectuate the intention to kill".—Watson v. State, 17 S.E.2d 559, 560, 66 Ga.App. 242

74. Ga.—Wingate v. State, App., 22 S.E.2d 758.—Watson v. State, 17 S.E.2d 559, 66 Ga.App. 242

75. Tex.—Wilson v. State, 129 S.W. 613, 60 Tex.Cr. 1

76 Mo.—State v. Johnson, 6 S.W.2d 898
29 C.J. p. 1141 note 46

77. Ga.—Alexander v. State, 44 S.E. 851, 118 Ga. 26
29 C.J. p. 1141 note 47

78. Va.—Jacobs v. Commonwealth, 111 S.E. 90, 132 Va. 681

79 U.S.—Collins v. U.S., Ark., 14 S.Ct. 9, 150 U.S. 62, 37 L.Ed. 998
29 C.J. p. 1141 note 49

80 Ky.—Campbell v. Commonwealth, 11 S.W. 290, 88 Ky. 402, 10 Ky.L. 975, 21 Am.S.R. 348
29 C.J. p. 1141 note 50

81. Tex.—Roebuck v. State, 18 S.W.2d 643, 113 Tex.Cr. 112

Assault on accused's son
Tex.—Roebuck v. State, 18 S.W.2d 643, 113 Tex.Cr. 112.—Hickox v. State, 285 S.W. 621, 104 Tex.Cr. 649

82. Wyo.—State v. Flory, 276 P. 458, 40 Wyo. 184

83. Iowa.—State v. Bone, 87 N.W. 507, 114 Iowa 537
29 C.J. p. 1141 note 51.

ty of a friend is provocation sufficient to mitigate a killing in his defense,[84] there is also cogent authority to the contrary,[85] and it has been held that the fact that accused knew that deceased had killed his friend is not adequate provocation, if the killing did not take place in the presence of accused.[86]

Interference in fight One who interfered in a fight between decedent and a third person wherein decedent had been the aggressor is guilty of manslaughter if, using more force than was reasonably necessary for the protection of the third person, he killed decedent where the interference was not in pursuance of a previously formed design,[87] although, on the other hand, it has been held that, where one who was neither assaulted nor threatened got down from his horse, armed himself with a club, interposed himself between two other persons who were about to engage in a fight, and killed one of them, he is guilty of murder.[88]

§ 49. —— Adultery and Other Illicit Intercourse

The killing of a spouse or the paramour in a heat of passion resulting from discovering them in the act of adultery is manslaughter; but it is not generally manslaughter where the passion is based on mere suspicion or on information of past adultery. These rules have been applied with respect to the illicit intercourse of other relatives.

If a husband detects his wife in the act of adultery, there is sufficient provocation to reduce the homicide to manslaughter if he immediately kills either the wife or her paramour,[89] provided the killing is due to passion aroused by the provocation and not to revenge or malice.[90] In general it is held or said that he must see them in the act, or that he must at least find them together under circumstances reasonably leading him to believe that they are or have been so engaged, and not kill merely on information of past adultery,[91] but it has also been held that such a homicide may be reduced to manslaughter if committed in the heat of passion on being informed of the wife's adultery if the jury find that the circumstances were such as reasonably to cause heat of passion.[92] Mere suspicion is not sufficient provocation,[93] nor is a belief on the part of accused, that his wife, whom he killed, was about to commit adultery.[94]

84. Tex.—Moore v. State, 9 S.W. 610, 26 Tex.App. 322.
29 C.J. p. 1142 note 55.

85. Pa.—Commonwealth v. Paese, 69 A. 891, 220 Pa. 371, 123 Am.S.R. 699, 17 L.R.A.N.S. 795, 13 Ann.Cas. 1081, disapproving Commonwealth v. Bell, Add. p. 156.
29 C.J. p. 1142 note 56.

86. Minn.—State v. Gut, 13 Minn. 341.

87. Tex.—Moffatt v. State, 33 S.W. 344, 35 Tex.Cr. 257.
29 C.J. p. 1141 note 53.

88. Va.—Johnston's Case, 5 Gratt. 660, 46 Va. 660.

89. Ala.—Sheppard v. State, 10 So.2d 822—Brunson v. State, 103 So. 664, 212 Ala. 571—Crowder v. State, 93 So. 338, 18 Ala.App. 632, petition dismissed Ex parte Crowder, 93 So. 922, 208 Ala. 697.
Del.—State v. Lee, 171 A. 195, 6 W.W.Harr. 11.
Fla.—Collins v. State, 102 So. 880, 88 Fla. 578.
Ky.—Harris v. Commonwealth, 33 S.W.2d 666, 230 Ky. 666.
R.I.—State v. Imundi, 121 A. 215, 45 R.I. 318.
Va.—Hannah v. Commonwealth, 149 S.E. 419, 153 Va. 863.
29 C.J. p. 1142 note 58.

Killing not during act

Where testimony of accused as to finding his wife and deceased in latter's shack raised issue of manslaughter, charge limiting right to kill to time of finding deceased in actual act of adultery was erroneous; and it was error to refuse request, that if accused believed deceased had committed act of adultery with accused's wife just before homicide, and shot deceased when latter was still in company with accused's wife, jury should return verdict of not guilty.—Cox v. State, 273 S.W. 580, 100 Tex.Cr. 402.

90. Ala.—Sheppard v. State, 10 So.2d 822—Brunson v. State, 103 So. 664, 212 Ala. 571—Crowder v. State, 93 So. 338, 18 Ala.App. 632, certiorari dismissed Ex parte Crowder, 93 So. 922, 208 Ala. 697.
Del.—State v. Lee, 171 A. 195, 6 W.W.Harr. 11.
Fla.—Collins v. State, 102 So. 880, 88 Fla. 578.
Va.—Hannah v. Commonwealth, 149 S.E. 419, 153 Va. 863.
29 C.J. p. 1142 note 59.

Mental suffering because of wrongful conduct of accused's wife with deceased was held not to justify taking deceased's life.—Howell v. Commonwealth, 292 S.W. 329, 218 Ky. 731.

Slaying held not in passion

(1) If the killing of a wife's paramour was not the result of sudden passion but of a preconceived plan to kill the wife and her paramour, provided the husband could detect not be reduced to manslaughter.—them in adultery, the crime would State v. Imundi, 121 A. 215, 45 R.I. 318.

(2) Killing of one found in act of adultery with accused's wife, if done under impulse of anger, jealousy, hatred, or revenge created by wife's prior infidelity constitutes murder.—State v. Lee, 171 A. 195, 6 W.W.Harr., Del., 11.

(3) Other instances.—Aiken v. State, 151 S.E. 368, 170 Ga. 895.—29 C.J. p. 1142 note 59 [a]-[c].

91. Colo.—Garcia v. People, 171 P. 751, 64 Colo. 172.
29 C.J. p. 1142 note 60.

Wife's confession of infidelity immediately before husband killed her could not reduce crime from murder to voluntary manslaughter.—Humphreys v. State, 165 S.E. 733, 175 Ga. 705.—29 C.J. p. 1142 note 61 [a].

92. Fla.—Collins v. State, 102 So. 880, 88 Fla. 578.
Tenn.—Davis v. State, 28 S.W.2d 993, 161 Tenn. 23.
29 C.J. p. 1135 notes 69-72, p. 1142 note 61.

In Texas, prior to the repeal of the manslaughter statute it was the rule, under provision to that effect, that information of past adultery might be adequate cause provided the slaying occurred as soon as the slayer got such information, or at the first meeting of the persons thereafter.—Arkhammer v. State, 296 S.W. 301, 107 Tex.Cr. 191.—29 C.J. p. 1142 note 61 [b].

93. Colo.—Garcia v. People, 171 P. 754, 64 Colo. 172.
29 C.J. p. 1143 note 62.

94. Conn.—State v. Saxon, 86 A. 590, 87 Conn. 5, 15.
29 C.J. p. 1143 note 63.

The rules above stated apply also to the killing of a husband or his paramour by his wife [95]

Illicit intercourse of one other than spouse Although there is authority to the contrary,[96] there are cases tending to show that the principles above stated apply where a father[97] or brother[98] kills one whom he detects in adultery or illicit intercourse with his daughter or sister, or where one kills a man detected in sexual intercourse with his betrothed,[99] and in like cases [1] The courts have, however, refused to extend the rules to a mistress of accused [2] The mere agent of a husband for the purpose of detecting his wife's adultery cannot set up her adultery to reduce his murder of her paramour to manslaughter [3]

§ 50. —— Arrests, Detentions, or Other Acts in Discharge of Public Duty

a In general
b Unlawful arrests, detentions, or other acts

a. In General

Homicide in resisting arrest, detention, or other lawful act of an officer in the course of his duties is not manslaughter, unless the arrest is made, or the act done, in an unlawful manner, or the accused is unaware of its legality

A lawful arrest or detention in a lawful manner by an officer or private person will not constitute an adequate provocation for heat of passion reducing the grade of the homicide to manslaughter,[4] nor will other lawful acts of officers while in the discharge of their duties constitute adequate provocation [5] Lawful restraint by a private person is not adequate provocation [6]

Lawful arrest in unlawful manner The killing may be only manslaughter where a legal arrest is attempted in an unlawful manner, as where the passion of accused is aroused by the employment of unnecessary violence [7]

Knowledge of legality of arrest It has been said that accused must have known that the officer was acting under authority and intended to arrest, in order to prevent the homicide from being reduced to manslaughter,[8] and it has been held that the killing may be only manslaughter where the officer failed to notify accused of the official character of the arrest as he may be required to do,[9] unless accused knew he was being rightfully arrested [10]

b. Unlawful Arrests, Detentions, or Other Acts

An illegal arrest, detention, or similar act is adequate provocation to reduce a homicide committed in resisting it to manslaughter, at least if the accused knew of its illegality

As the rule is ordinarily stated, an illegal arrest or attempt to arrest is adequate provocation to reduce a homicide to manslaughter,[11] unless the homi-

95. Ga —Daniels v State, 133 S E 866, 162 Ga 366
29 C J p 1143 note 64

96. Pa - Lynch v Commonwealth, 77 Pa 205
29 C J p 1143 note 65

97 Ga —Patterson v State 67 S E 816, 134 Ga 264
29 C J p 1143 note 66

98. Tex — Teague v State, 148 S W 1063, 67 Tex Cr 41
29 C J p 1143 note 67

99. Ind —Henning v State, 6 N E 803, 7 N E 4, 106 Ind 386, 55 Am R 756
29 C J p 1143 note 68

1. Mo —State v Herrell, 10 S W 387, 97 Mo 105, 10 Am S R 289
29 C J p 1143 note 69

2. Ga -Cyrus v State, 29 S E 917, 102 Ga 616
29 C J p 1143 note 70

3. Mich —People v Horton, 4 Mich 67

4. U S —Suhay v U S, C C A Kan, 95 F 2d 890, certiorari denied 58 S Ct 1060, 304 U S 580, 82 L Ed 1543
Miss —Wright v State, 139 So 869, 162 Miss 494
29 C J p 1143 note 74.

Killing in resistance of lawful arrest as murder see supra § 19
Self-defense in resistance of arrest see infra § 137

5 Utah People v Callaghan, 6 P 49, 4 Utah 49
29 C J p 1143 note 75

6. N C —State v Craton, 28 N C 164
29 C J p 1143 note 79

7. Tex —Condron v State 155 S W 253, 69 Tex Cr 513
29 C J p 1141 notes 80 [a] 81

Shooting to prevent escape
Where one arrested for misdemeanor flees in effort to escape, and officer shoots at him merely to prevent escape unlawful act of shooting may or may not, according to circumstances, afford ground for mitigation of homicide committed by prisoner in killing officer Paramore v State, 129 S E 772 161 Ga 166

8. U S - Suhay v U S, C C A Kan, 95 F 2d 890, certiorari denied 58 S Ct 1060, 304 U S 580, 82 L Ed 1543
Ga —Morton v State, 10 S E 2d 836, 190 Ga 792
Ill —People v Doody, 175 N E 436, 343 Ill 194
Ky —Cornett v Commonwealth, 248 S W 540, 198 Ky 236
29 C J p 1143 note 76

Acts other than arrests
A like rule has been applied in the case of other lawful acts of an officer in the discharge of his duty — Fleetwood v Commonwealth, 80 Ky 1 Mockabee v Commonwealth, 78 Ky 380

9 Okl —Love v State 177 P 387 15 Okl Cr 429
29 C J p 1144 note 82
Duty of officer to make known authority and intention to arrest see Arrest § 6 e

10. Ga —Robinson v State, 18 S E 1018, 93 Ga 77 41 Am S R 127
29 C J p 1144 note 83

11. Ga —Howell v State, 134 S E 59, 162 Ga 14—Glaze v State 120 S E 530 156 Ga 807—Giddens v State 113 S E 386, 154 Ga 54—Wall v State, 112 S E 142, 153 Ga 309 Plemmons v State, 158 S E 630 43 Ga App 311
Ill —People v White, 165 N E 168, 333 Ill 512—People v Scalisi, 154 N E 715, 324 Ill 131
Miss —Bergman v State, 133 So 208, 160 Miss 65
29 C J p 1144 note 84.

cide was in fact committed with malice,[12] the absence of which is not necessarily established by the fact that the arrest or attempt to arrest was illegal.[13] In order to permit the application of the doctrine there must not only have been an illegal arrest but the killing must have been done in actual resistance to the act of making the arrest and retaining illegal custody of accused.[14] A mere declaration of an intent to make an illegal arrest unaccompanied by an attempt to do so is not adequate provocation.[15]

The rules as to provocation occasioned by an illegal arrest have been also applied to cases of other illegal or unauthorized violences by an officer[16] or of illegal detention by officers or private persons.[17]

Knowledge of illegality While it has been held that illegality of an attempted arrest which is unknown to accused at the time cannot reduce what otherwise might be murder to manslaughter,[18] it has also been held to be immaterial that accused did not know that the arrest was illegal.[19]

Killing of person who caused arrest The provocation caused by an illegal arrest may be adequate to mitigate the killing of the person who caused the arrest to be made, if the killing occurred in a passion due to the illegal arrest and before there had been sufficient cooling time.[20]

As provocation to others An illegal arrest or detention may be provocation, not only to the person arrested or detained, but also to his relatives or friends, or even to a stranger.[21]

§ 51. —— Trespass on, or Other Invasion of, Property Right

An offense against property is not adequate provocation so as to reduce a homicide in defending the property to manslaughter, unless there are special circumstances

An offense against property does not, in the absence of other circumstances, constitute adequate provocation so as to reduce an intentional homicide, committed in defending the property, to manslaughter,[22] although there is some authority to the contrary.[23] The rule applies where the homicide was intentionally committed with a deadly weapon, even though the trespass or larceny could have been prevented in no other way.[24]

However, a forcible attack upon or entry into one's dwelling house may, under certain conditions, be adequate provocation to the owner or other in-

Arrest held illegal within rule

Husband who took gun away from wife with which she was threatening homicide, was held not guilty of any offense, and therefore attempted arrest at time of homicide was illegal -State v Kuykendall, 19 P 2d 744, 37 N M 135

12. Ga—Giddens v State, 113 S E 386, 154 Ga 54
Ill—People v White, 165 N E 168, 333 Ill 512—People v Scalisi, 151 N E 715 324 Ill 131
29 C J p 1144 note 85

Express malice

Homicide committed while resisting illegal arrest constitutes manslaughter, unless malice, perhaps express malice is shown—State v Kuykendall, 19 P 2d 744, 37 N M 135

13. Cal - People v Gilman, 190 P 205, 17 Cal App 118
29 C J p 1144 note 86

14. Ga—Howell v State 134 S E 59, 162 Ga 14 - Wall v State, 112 S E 142, 153 Ga 309
Mont—State v Cates, 33 P 2d 578, 97 Mont 173
29 C J p 1144 note 87

15. Mass—Commonwealth v Drew, 4 Mass 391
29 C J p 1145 note 91

16. Tex—Ledbetter v State, 9 S W 60, 26 Tex App 22
29 C J p 1145 note 93.

17. N C—State v Ramsey, 50 N C 195
Pa—Commonwealth v Balzano 104 A 683, 261 Pa 507
29 C J p 1145 note 94

18. N M—State v Middleton, 192 P 483, 26 N M 353
29 C J p 1145 note 90

19. Tex—Satterwhite v State 17 S W 2d 823 112 Tex Cr 571, second rehearing denied 17 S W 2d 1119 -Earles v State 85 S W 1, 47 Tex Cr 559
Contra Miller v State, 21 S W 925, 31 Tex Cr 609 37 Am S R 836--Ex parte Sherwood 15 S W 812, 29 Tex App 334

20 Tex—Mundine v State, 38 S W 619, 37 Tex Cr 5

21. Miss—Bergman v State 133 So 208, 160 Miss 65
29 C J p 1145 note 97

22. Kan—State v Hardisty, 253 P 615, 617, 122 Kan 527, quoting **Corpus Juris,** and denying rehearing 249 P 617, 121 Kan 576
Okl—Schmitt v State, 47 P 2d 199, 210, 57 Okl Cr 102, quoting **Corpus Juris**
29 C J p 1145 note 98

Absence of serious danger

"The owner may resist the entry, but he has no right to kill, unless it be rendered necessary to prevent loss of life or great bodily harm If he kills where there is not a reasonable ground of apprehension of imminent danger to his person or property, it is manslaughter and if done with malice, express or implied, it is then murder"- Bausell v Commonwealth 181 S E 453, 160, 165 Va 669

Statute as to unlawful acts

(1) Under statute making slaying of one attempting to commit an unlawful act manslaughter, homicide is not reduced to manslaughter where testimony does not first show that deceased had been told by accused to keep off premises, or had not received accused's message to such effect and where testimony fails to show that lands on which shooting occurred were inclosed or within a stock-law district—Atkinson v State, 101 So 490, 137 Miss 42

(2) A person claiming wild and unoccupied land in good faith could not be guilty of a criminal trespass thereon, as regards question whether deceased was committing trespass under circumstances as would reduce crime of murder to manslaughter—Prine v State, 193 So 446, 188 Miss 147

23. Mo—State v Matthews 49 S W 1085, 148 Mo 185, 71 Am S R 594
29 C J p 1145 note 99

24. Okl—Schmitt v State, 47 P 2d 199, 210, 57 Okl Cr. 102, quoting **Corpus Juris.**
29 C J p 1145 note 1.

mates,[25] even though accused had no reasonable cause to apprehend the commission of a felony by the trespasser,[26] and, if a person in lawfully opposing force to force in protecting his property is assaulted or becomes engaged in sudden combat, there may be sufficient provocation.[27]

§ 52. —— Provocation Must Be Cause of Passion

In order that a killing in passion may be reduced to manslaughter, the passion must have been caused by the provocation

Not only must there be both heat of passion and adequate provocation, as appears supra § 46, but the homicide is not reduced to manslaughter unless the provocation was the cause of the passion.[28] Hence, if the actual provocation was not known to accused at the time of the homicide it will not reduce the grade,[29] and passion arising from some provocation other than the one given when the homicide was committed will not reduce the grade.[30] However, if it is uncertain whether recent provocation actually produced passion, an antecedent provocation may indicate that it did by showing that accused's mental attitude toward deceased was such that provocation from deceased would be likely to arouse passion.[31]

Where two causes of provocation exist, the killing should be imputed to the more recent cause rather than to the earlier one.[32] This is especially so where there has been a meeting subsequent to the first cause at which the killing did not occur, although it occurred on the first meeting after the second provocation.[33]

Malice previously existing Where antecedent malice or intent to kill is established it will be presumed to continue, see supra § 27, and, unless shown to have been abandoned,[34] the killing will be attributed to it rather than to a later provocation.[35] However, where a homicide has been committed, and it appears that there was an old grudge between the persons, but at the time of the homicide there was a fresh and sudden provocation given by deceased to accused, the law presumes that the killing was caused by such fresh provocation and was not due to the old grudge.[36]

§ 53. —— By Whom Provocation Must Be Given

Provocation must have been given by the person killed, except where the wrong person was killed by accident or mistake, or the deceased was aiding and abetting the person giving the provocation.

The rule is that the provocation must have been given by the person who was killed, except in those cases in which the wrong person was killed by accident or mistake,[37] or deceased was present aiding and abetting the person causing the provocation.[38]

However, it will be only manslaughter if, while trying to kill the person from whom the provocation was received, accused killed a third person, either by accident[39] or because he mistook the third person for the one from whom the provocation was received.[40]

The killing of one other than the one accused intended to kill is considered generally supra § 44.

§ 54. —— Cooling Time

If before the killing the accused's passion had cooled, or there was sufficient time between the provocation and the killing for his passion to cool, the killing will be murder, not manslaughter.

25 Ga.—Wall v. State, 112 S.E. 142, 153 Ga. 309
Miss.—Jones v. State, 155 So. 430, 170 Miss. 581
29 C.J. p. 1145 note 2
Particular circumstances
Sixteen year-old son who shot brother of his fifty-six year-old widowed mother, as instructed by mother, when brother forced himself into mother's farm home over her protests to remonstrate with mother over mother's alleged unlawful sex relationship with man who lived in her home was held guilty of manslaughter.—Wooten v. State, 103 S.W.2d 324, 171 Tenn. 362

26. Mo.—State v. Taylor, 44 S.W. 785, 143 Mo. 150
29 C.J. p. 1145 note 3

27. Mo.—State v. Matthews, 49 S.W. 1085, 148 Mo. 185, 71 Am.S.R. 594

28. Pa.—Commonwealth v. Eckerd, 31 A. 305, 174 Pa. 137
29 C.J. p. 1146 note 6
Under statute
Tex.—Stovall v. State, 253 S.W. 526, 95 Tex.Cr. 189
29 C.J. p. 1131 note 49 [a], p. 1146 note 6 [a]

29. Tex.—Lacy v. State, 140 S.W. 461, 63 Tex.Cr. 189
29 C.J. p. 1146 note 7

30. Tex.—Finch v. State, Cr., 70 S.W. 207
29 C.J. p. 1146 note 8

31. Ga.—Golden v. State, 25 Ga. 527
29 C.J. p. 1146 note 9
Sufficiency of provocation as determined by effect on ordinary man see supra § 46 a

32. Tex.—Venters v. State, 83 S.W. 832, 47 Tex.Cr. 280

33. Tex.—Venters v. State, supra
29 C.J. p. 1146 note 11.

34. N.C.—State v. Horn, 21 S.E. 694, 116 N.C. 1037
29 C.J. p. 1146 note 13

35. Mo.—State v. Stewart, 212 S.W. 853, 278 Mo. 177
29 C.J. p. 1146 note 14

36. N.C.—State v. Baldwin, 68 S.E. 118, 152 N.C. 822
29 C.J. p. 1146 note 15

37. Ky.—Smiley v. Commonwealth, 32 S.W.2d 51, 53, 235 Ky. 735, citing **Corpus Juris.**
29 C.J. p. 1146 note 16

38. Del.—State v. Russo, 77 A. 743, 24 Del. 538
29 C.J. p. 1146 note 17

39. Ga.—Charlon v. State, 32 S.E. 317, 106 Ga. 400
29 C.J. p. 1147 note 18

40. Tex.—White v. State, 72 S.W. 173, 44 Tex.Cr. 346, 63 L.R.A. 660
29 C.J. p. 1147 note 19

If before the homicide was committed, accused's passion had cooled or there was sufficient time between the provocation and the killing for his passion to cool, the killing will not be attributed to the heat of passion but to malice, and will be murder,[41] even though accused's passion did not actually cool,[42] and this principle is in some jurisdictions embodied in express statutory provisions.[43] It is not necessary that the malice of accused be shown by some act of hostility committed or threatened between the provocation and the killing.[44] The exercise of thought, contrivance, and design in the mode of getting the weapon and replacing it immediately after the killing,[45] or a temporary diversion of accused's mind to some other matter, or a reasonable time between the provocation and the killing,[46] indicate design and malice, rather than a killing in sudden heat.

On the other hand, the killing need not follow immediately on the provocation,[47] and, where an interval occurs, the question whether or not it is sufficient for cooling time must be determined by the circumstances attending each particular case.[48]

The question of cooling time does not arise where there is no adequate provocation,[49] or where the entire difficulty is one single transaction,[50] or where the killing is the result of reflection or deliberation, no matter how soon it follows the provocation.[51]

Ordinary person as standard While, according to some authorities, the question whether there is sufficient cooling time should be governed by the standard of an ordinary reasonable person,[52] according to others the standard of the particular accused in the light of the facts and circumstances disclosed is to be considered.[53]

C INVOLUNTARY MANSLAUGHTER

§ 55. Definition

Involuntary manslaughter is the unintentional killing of another without malice in doing some unlawful act not amounting to a felony or tending to cause great harm, or in doing a lawful act negligently, or by negligently omitting to perform a legal duty

As described at common law and under statutes substantially declaratory thereof, involuntary manslaughter consists in the killing of another without malice and unintentionally, in doing some unlawful act not amounting to a felony or naturally tending to cause death or great bodily harm, or in doing some act lawful in itself in an unlawful manner or negligently, or by the negligent omission to perform a legal duty.[54] The unlawfulness of the

41. Ala—Sheppard v State, 10 So 2d 822—Brunson v State, 103 So 664, 212 Ala 571
Ark—Arnold v State, 20 S W 2d 189, 179 Ark 1066
Cal—People v Wells, 76 P 2d 493, 10 Cal 2d 610
Del State v Bell, 192 A 553, 8 W W Harr 328—State v Lee, 171 A 195, 6 W W Harr 11—State v Galvano, 154 A 461, 4 W W Harr 109
Fla—Collins v State, 102 So 880, 88 Fla 378
Mo—State v Davis, 34 S W 2d 133
Va—Mosby v Commonwealth, 190 S E 152, 168 Va 688
29 C J p 1147 note 21, p 1142 note 59 [b]
Killing at first meeting after insult to female relative see supra § 47

42. Mo—State v Farris, 6 S W 2d 903
29 C J p 1147 note 22

43. Ill—People v Bissett, 92 N E 919, 246 Ill 516
29 C J p 1147 note 23 [a]

44. Neb Savary v State, 87 N W 31, 62 Neb 166

45. Kan—State v Yarborough, 18 P 474, 39 Kan 581
29 C J p 1148 note 30

46. Pa—Commonwealth v Aiello, 36 A 1079, 180 Pa 597
29 C J p 1148 note 31.

47. Ind—Ferguson v State, 49 Ind 33

48. Mo—State v Crouch, 124 S W 2d 1185, 1188 citing **Corpus Juris.**
29 C J p 1148 note 28

49. N C—State v Spivey, 43 S E 475, 132 N C 989
29 C J p 1147 note 24

50. Mich—Hurd v People, 25 Mich 405
29 C J p 1147 note 25

51 Ala—Jarvis v State, 34 So 1025, 138 Ala 17
29 C J p 1147 note 26

52. Cal—People v Golsh, 219 P 456, 63 Cal App 609
29 C J p 1148 note 32
Effect of intoxication see supra § 5
Under statute defining "adequate cause" with reference to the degree of passion which would be aroused in a person of ordinary temper, the measure of a requisite cooling time must also be with reference to a person of ordinary temper—Hurst v State, 46 S W 635, 50 S W 719, 40 Tex Cr 378

53. N D—State v Hazlet, 113 N W 374, 16 N D 126

54. U S—Metropolitan Life Ins Co v McDavid, D C Mich, 39 F Supp 228
Ariz—Strickland v State, 294 P 617, 620, 37 Ariz 368, citing **Corpus Juris.**
Ark—Clafford v State, 273 S W 13, 14 169 Ark 225, citing **Corpus Juris.**
Cal People v Thomas, 208 P 343, 58 Cal App 308
Del State v Arnold, 27 A 2d 81—State v Donovan, 8 A 2d 876, 1 Terry 257
Ga—Hilburn v State, 197 S E 73, 57 Ga App 854—Stapler v State, 142 S E 570, 38 Ga App 33
Ill—People v Hunter, 7 N E 2d 444, 365 Ill 618 People v Lavac, 192 N E 568, 357 Ill 554
Iowa—State v Graff, 282 N W 745, 749 quoting **Corpus Juris**—State v Richardson, 219 N W 211, 212, 210 Iowa 809 citing **Corpus Juris**
Ky—Hunt v Commonwealth, 159 S W 2d 23, 289 Ky 527—Caudill v Commonwealth, 27 S W 2d 705, 234 Ky 142—Brown v Commonwealth, 293 S W 975, 219 Ky 106—Jones v Commonwealth, 281 S W 161, 213 Ky 356—Rowe v Commonwealth, 268 S W 571, 206 Ky 803—Commonwealth v Owens, 249 S W 792, 793, 198 Ky 655, citing **Corpus Juris.**
La—State v Lee, 156 So 801, 180 La 491
Me—State v Pond, 134 A. 572, 125 Me 453.

act in connection with which the killing occurs is the element which distinguishes involuntary manslaughter from a killing excusable as by accident or misfortune[55] It is difficult to separate sharply an unlawful act from a lawful act done in an unlawful manner or without due caution or circumspection[56]

It is immaterial by what means or methods the offense is committed[57]

§ 56. Intent and Malice

To constitute involuntary manslaughter the homicide must have been unintentional and without malice, but even though unintentional, malice may be presumed where the accused's acts were likely to cause death, as where he used a deadly weapon.

To constitute involuntary manslaughter, the homicide must have been without intention to kill or inflict serious bodily injury,[58] and without either

Mich—People v Wardell, 289 N W 328, 291 Mich 276—People v Ryczek, 194 N W 609, 224 Mich 106
N C—State v Stansell, 161 S E 580, 203 N C 69—State v Durham, 161 S E 398 400, 201 N C 724
Or—State v Boag, 59 P 2d 396, 154 Or 351
Pa—Commonwealth v Aurick, 19 A 2d 920, 923 342 Pa 282, quoting **Corpus Juris,** and reversing 16 A 2d 429, 142 Pa Super 364—Commonwealth v Flax, 200 A 632, 331 Pa 145—Commonwealth v McLaughlin, 142 A 213, 293 Pa 218—Commonwealth v Mayberry, 138 A 686, 688 290 Pa 195, quoting **Corpus Juris**—Commonwealth v Micuso, 117 A 211, 273 Pa 471—Commonwealth v Williams, 1 A 2d 812, 811 133 Pa Super 104, quoting **Corpus Juris**—Commonwealth v Samson, 196 A 564, 568, 130 Pa Super 65, quoting **Corpus Juris**—Commonwealth v McTague, 171 A 406, 112 Pa Super 471—Commonwealth v Ernesto 93 Pa Super 339 346, quoting **Corpus Juris**—Commonwealth v Lowans 21 Pa Dist & Co 66, 67, 82 Pittsb Leg J 238, 39 Dauph Co 66, 48 York Leg Rec 49, quoting **Corpus Juris**—Commonwealth v Miles, 27 Del Co 340—Commonwealth v Donato, 27 Del Co 235
Tenn—Wade v State, 124 S W 2d 710, 174 Tenn 248—Copeland v State 285 S W 565, 154 Tenn 7, 49 A L R 605
Utah—State v Cobo, 60 P 2d 952 90 Utah 89
Va—Massie v Commonwealth, 15 S E 2d 30 177 Va 883—Bell v Commonwealth 195 S E 675, 170 Va 597—Mundy v Commonwealth, 131 S E 242, 144 Va 609
Wash—State v Turpin, 290 P 824, 158 Wash 103
29 C J p 1148 note 36

Other definitions

(1) The killing of another in doing some unlawful act but without an intention to kill—Glover v Commonwealth 83 S W 2d 881, 260 Ky 48—Burchett v Commonwealth 56 S W 2d 571 247 Ky 21—Smiley v Commonwealth, 32 S W 2d 51, 235 Ky 735—Clem v Commonwealth, 248 S W 1036 198 Ky 486—29 C J p 1148 note 36 [a] (1)

(2) Where a person, in committing an unlawful act, not felonious or tending to great bodily harm, or in committing a lawful act without proper caution or requisite skill, unguardedly or undesignedly kills another—State v Elliott, 8 A 2d 873, 1 Terry, Del, 250—State v Phillips, 187 A 108, 7 W W Harr, Del, 514—State v Kupis, 179 A 640, 7 W W Harr, Del, 27—State v Dean, 122 A 148 2 W W Harr 290, affirmed Dean v State, 125 A 478 2 W W Harr 469—State v Disalvo 121 A 661, 2 W W Harr 232—29 C J p 1148 note 36 [a] (5)

(3) An involuntary killing done without any intent to kill, but in the commission of some unlawful act, or in the improper performance of some lawful act—Nichols v State, 63 S W 2d 655, 187 Ark 999—Bennett v State, 257 S W 372, 161 Ark 496

(4) Killing, without malice or intent to kill, in commission of unlawful act not amounting to felony—People v Miller, 299 P 742, 114 Cal App 293

(5) The unintentional killing of another in the commission of an unlawful act—Broxton v State, 171 So 390, 392 27 Ala App 298

(6) Other definitions see 29 C J p 1148 note 36 [a]

Statutory definitions

(1) The unlawful killing of a human being without malice, in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner or without due caution or circumspection
Ariz—Harding v State, 225 P 482, 26 Ariz 334
Cal—People v Herbert, 58 P 2d 909, 6 Cal 2d 511—People v Coan, 259 P 998, 85 Cal App 580
29 C J p 1148 note 36 [b] (3)

(2) Other statutory definitions see 29 C J p 1148 note 36 [b]

The essence of the crime of "involuntary manslaughter" is the death of a human being in consequence of an unlawful act—Commonwealth v Stosny, Pa Super, 31 A 2d 582

Voluntary manslaughter distinguished

Instruction that difference between voluntary manslaughter and involuntary manslaughter was that in voluntary manslaughter actor must intend to kill his victim and in involuntary manslaughter there need not be any intention to take life was erroneous, since distinction is that 'voluntary manslaughter" is done by design or intention, but without malice, and "involuntary manslaughter" is the unlawful killing of a person without malice, express or implied, but in the commission of some unlawful act—Hill v State, 11 N E 2d 141, 212 Ind 692

55 Ark—Crafford v State, 273 S W 13, 14, 169 Ark 225, citing **Corpus Juris.**
Or—State v Boag, 59 P 2d 396 401, 154 Or 354, citing **Corpus Juris**
Pa—Commonwealth v Aurick, 19 A 2d 920, 923, 342 Pa 282, reversing 16 A 2d 429, 142 Pa Super 361, quoting **Corpus Juris** Commonwealth v Flax, 200 A 632, 331 Pa 115
29 C J p 1149 note 37–40 C J p 1213 note 60 [b] (2)
Homicide by accident or misfortune see infra § 112

56. **Distinction stated**

'An act prohibited by law and made illegal regardless of the way it is performed is an unlawful act An act which is not itself illegal, but may be lawful, but which in a given case becomes illegal because of the manner or way in which it is performed, is a lawful act done in an unlawful manner and therefore becomes unlawful"—State v Anderson, 116 P 2d 398, 401, 100 Utah 468

57 Cal—People v Herbert, 58 P 2d 909, 6 Cal 2d 511

58. Ariz—Harding v State, 225 P 482, 26 Ariz 334
Ark—Nichols v State, 63 S W 2d 655, 187 Ark 999—Bennett v State, 257 S W 372, 161 Ark 496
Cal—People v Miller, 299 P 742, 114 Cal App 293
Ga—Watson v State, 10 S E 2d 755, 190 Ga 746 Reed v State, 149 S E 23, 168 Ga 731—Watson v State, 17 S E 2d 559, 66 Ga App 242—Hilburn v State, 197 S E 73, 57 Ga App 854—Taylor v State, 138 S E 83, 36 Ga App 639
Ill—People v Flanagan, 170 N E 265, 338 Ill 353.

express or implied malice.[59]

While the material inquiry is whether the killing was done with malice and intent to kill, and not the manner in which it was done or the deadly character of the weapon used,[60] and malice will not be presumed unless death or great bodily harm is a reasonable or probable consequence of the act,[61] nevertheless, even though the slayer did not actually intend to kill, if a deadly weapon was used in a manner likely to cause death or serious bodily harm and did so cause death, malice is implied, and the homicide will be murder rather than manslaughter,[62] and where accused's acts were such that he must have known that they were likely to cause death or serious bodily harm, so that his conduct indicated that he had a wicked, depraved, and malignant spirit, amounting to legal malice, an unintentional killing caused by such acts is murder, even though he did not use a deadly weapon.[63]

§ 57. Unlawful Acts

An unintentional killing in the commission of an unlawful act not amounting to a felony or naturally dangerous to life is involuntary manslaughter. Authorities differ as to whether the act must be one forbidden by statute or ordinance, but the act must be more than a mere thoughtless omission, and must be the proximate cause of the death.

It is involuntary manslaughter at common law and under statutes declaratory thereof where one unintentionally kills another in the commission of an unlawful act not amounting to a felony or naturally dangerous to life.[64] In determining wheth-

Ind—Ketring v State, 200 N E 212, 209 Ind 618
Ky—Dotson v Commonwealth, 143 S W 2d 517, 283 Ky 825
Md—Neusbaum v State, 143 A 872, 156 Md 149
Neb—Dean v State, 259 N W 175, 128 Neb 466
Pa—Commonwealth v Bergen, 4 A 2d 164, 134 Pa Super 62—Commonwealth v Micuso, 117 A 211, 273 Pa 474—Commonwealth v Pagano, 33 Berks Co L J 233
29 C J p 1149 note 38

Intent to do act causing death

(1) The intent to cause the death or serious injury of another is not an element of involuntary manslaughter, but the unlawful act, or lawful act done in an unlawful manner must have been intended
Ga—Cammons v State 2 S E 2d 205, 59 Ga App 759—Wells v State, 162 S E 835, 44 Ga App 760
Wash—State v Hopkins 265 P 481, 147 Wash 198 59 A L R 688, certiorari denied Hopkins v State of Washington 49 S Ct 21, 278 U S 617, 73 L Ed 540

(2) Involuntary manslaughter necessarily negatives any intent on the part of accused to kill another, but does not negative an intent to do the unlawful act, or the act not strictly unlawful in itself, but done in an unlawful manner and without due caution—Wade v State, 124 S W 2d 710, 174 Tenn 218

Poison

Where poison was not administered with intent to take life but where death as a result was so remote a contingency that no reasonable person could have taken it into consideration when administering it and could not have contemplated that death would result therefrom, the homicide is manslaughter only—People v Austin, 192 N W 590, 221 Mich 635

59. Ill—People v Oberlin, 189 N E 333, 355 Ill 317
Absence of malice as essential to manslaughter generally see supra § 37

60. Ky—Maulding v Commonwealth, 189 S W 251, 172 Ky 371—York v Commonwealth, 82 Ky 360

61. Ga—Wrye v State, 25 S E 610, 99 Ga 34
Ill—People v Crenshaw, 131 N E 576, 298 Ill 412, 15 A L R 671
Particular facts as indications of malice see supra §§ 22–26

62. Ga—Greenway v State, 1 S E 2d 217, 59 Ga App 461—Jones v State, 198 S E 564, 58 Ga App 373
29 C J p 1149 note 41

63. Ga—Warren v State, 135 S E 735 163 Ga 176
29 C J p 1149 note 43

64. Ariz—Strickland v State, 294 P 617, 37 Ariz 368
Cal—People v Hubbard, 220 P 315, 64 Cal App 12
Del—State v Bell 192 A 553, 8 W W Harr 328—State v Phillips, 187 A 108, 7 W W Harr 544
Ga—Cole v State, App., 22 S E 2d 529—Cammons v State, 2 S E 2d 205, 59 Ga App 759—Wells v State, 162 S E 835, 44 Ga App 760
Hawaii—Territory v Yoshimura, 35 Hawaii 324
Ind—Roby v State, 17 N E 2d 800, 215 Ind 55—Kimmel v State, 154 N E 16, 198 Ind 444
Kan—State v Custer, 282 P 1071, 129 Kan 381, 67 A L R 909
Ky—Dotson v Commonwealth, 143 S W 2d 517, 283 Ky 825—Kearns v Commonwealth, 49 S W 2d 1009, 243 Ky 745—Wiley v Commonwealth, 16 S W 2d 496, 229 Ky 63
Md—United Life & Accident Ins Co v Prostic, 182 A 421, 169 Md 535
Mich—People v Wardell, 289 N W 328, 291 Mich 276
Neb—Crawford v State, 216 N W 294, 116 Neb 125
N M—State v Nichols, 288 P 407, 408, 34 N M 639, quoting **Corpus Juris.**
N C—State v Whaley, 132 S E 6, 8, 191 N C 387
Pa—Commonwealth v Williams, 1 A 2d 812, 133 Pa Super 104
R I—State v McVay 132 A 436, 438, 47 R I 292 44 A L R 572, citing **Corpus Juris.**
29 C J p 1149 note 49
Unintentional killing as murder generally see supra § 20
Homicide in commission of crime as murder
Generally see supra § 21
In first degree see supra § 31

Principles of self-defense may be involved to determine whether accused was engaged in lawful act at time of killing—State v Phillips, 187 A 108, 7 W W Harr, Del, 544

Conspiracy

(1) Homicide in carrying out a conspiracy to commit an offense not amounting to a felony and not naturally tending to the destruction of human life is manslaughter—Rush v Town of Farmerville, 101 So 243, 156 La 857

(2) As a conspiracy to have sexual intercourse with a woman, where no conspiracy to do so by force was charged, involved commission of misdemeanor only, killing in carrying out such conspiracy was not murder, but manslaughter—Baker v Commonwealth, 264 S W 1069, 204 Ky 420

(3) Liability of parties to conspiracy see supra § 7

Throwing nonswimmer into water without intention to kill is manslaughter, whether such act is viewed as a minor assault and battery or as gross and culpable negligence—State v Pond, 134 A 572, 125 Me 453—29 C J. p 1149 note 49 [b]

er a homicide was committed by a person while engaged in the commission of a misdemeanor, while he must have had an intent to commit the act which constitutes the misdemeanor, it is not necessary that he shall have intended to violate the law[65] The degree of negligence, if any, is not important as an element of involuntary manslaughter based on an unlawful act[66]

What constitutes unlawful act within rule While it has been held that the unlawful act, within this rule, connotes no particular offense known to the common law or created by statute,[67] it has also been expressly held in some jurisdictions that the unlawful act must be condemned by some statute or valid municipal ordinance of the state,[68] and in others that acts condemned by statute only, and not those condemned by an ordinance, are sufficient.[69] It has also been held that the act must be one prohibited by positive law[70] designed to prevent injury to the person[71]

The rule in some jurisdictions that involuntary manslaughter ordinarily cannot be based on an unlawful act which is merely malum prohibitum is considered infra § 60.

Sufficiency of unlawful act. It has been held that an unlawful act, to be sufficient under this rule, must be more than a mere thoughtless omission or slight deviation from the norm of prudent conduct,[72] it must be reckless or in marked disregard of the safety of others,[73] approaching the aspects of acts malum in se,[74] and the spirit of the person while committing the infraction is immaterial[75] It is immaterial whether the unlawful act was unlawful in its inception or became unlawful after the act was begun[76] The unlawful act must be such as would be reasonably anticipated by an ordinarily prudent person as likely to result in the killing[77]

Unlawful act as cause of death There must be such legal relation between the commission of the unlawful act and the homicide that it logically follows that the homicide occurred as a part of the perpetration of, or attempt to commit, the unlawful act[78] Thus the death must be due to the unlawful act of accused and not to the intervening act or negligence of a third person,[79] or to an independent intervening cause in which accused did not participate and which he could not foresee,[80] and the death must have been the natural and probable consequence of the unlawful act,[81] and the act the

Unjustified forcible entry
Where death resulted from an unjustified forcible entry, and such entry constituted a misdemeanor, the crime is manslaughter—Bausell v Commonwealth, 181 S E 462, 165 Va 693

Taking firearms from trespassers is unlawful, so that an accidental homicide resulting therefrom is manslaughter--People v Rogulski, 148 N W 189, 181 Mich 481

65 Mich—People v Barnes, 148 N W 400, 182 Mich 179
29 C J p 1150 note 60

66. Pa—Commonwealth v Aurick, 10 A 2d 22, 138 Pa Super 180—Commonwealth v Bergen, 4 A 2d 164, 134 Pa Super 62—Commonwealth v Gill, 182 A 103, 120 Pa Super 22

67. Pa—Commonwealth v Aurick, 10 A 2d 22, 138 Pa Super 180

Statutory crime not necessary
Ind—State v Beckman, 37 N E 2d 531, 219 Ind 176

Misdemeanor by statute
The fact that the act which caused the death was not a misdemeanor at common law does not relieve the killing from being manslaughter if it is made a misdemeanor by statute
Mich—People v Harris, 182 N W 673, 214 Mich 145, 16 A L R 910
Or—State v Trent, 259 P 893, 122 Or 144, denying rehearing 252 P 975, 122 Or 144

68. Ga—Hayes v State, 75 S E 523, 11 Ga App 371
29 C J p 1150 note 53

69 Ohio—State v O Mara, 136 N E 885, 105 Ohio St 94—State v Minko, App, 46 N E 2d 469
29 C J p 1150 note 53

"Culpable negligence"
"Culpable negligence" in manslaughter statute relates to wrongful act or omission under statute or general rule of law, not breach of city ordinance—State v Bowser, 261 P 846, 124 Kan 556

70. Ind--Kimmel v State, 154 N E 16, 198 Ind 444

71. N C—State v Satterfield, 153 S E 155, 198 N C 682

72. Utah—State v Lingman, 91 P 2d 457, 97 Utah 180

73. Ind—State v Beckman, 37 N E 2d 531, 219 Ind 176

"Criminal negligence" sufficient to satisfy the statutory definition of manslaughter referring to commission of unlawful act not amounting to a felony means reckless conduct or conduct evincing marked disregard for the safety of others, not mere thoughtlessness or slight carelessness—State v Lingman, 91 P 2d 457, 97 Utah 180

74. Utah—State v Lingman, supra

75. Utah—State v Lingman, supra

76. **Manner of performance**
"It is immaterial whether the unlawfulness of the act is inherent in its very nature and purpose or arises only from the manner of performing an act which in its inception and aims is not unlawful"—Commonwealth v Aurick, 19 A 2d 920, 923, 342 Pa 282, reversing 16 A 2d 429, 142 Pa Super 364

77. Ohio State v Minko, App, 46 N E 2d 469

78 Ill--People v Mulcahy, 149 N E 266, 318 Ill 332
Ind—Votre v State, 138 N E 257, 192 Ind 684

79. Ga--Fair v State 155 S E 329, 332, 171 Ga 112, quoting **Corpus Juris.**
N M—State v. Nichols, 288 P 407, 408, 34 N M 639, quoting **Corpus Juris.**
29 C J p 1150 note 54

80 Ga—Fair v State, 155 S E 329, 332 171 Ga 112, quoting **Corpus Juris.**
N M—State v Nichols, 288 P 407, 408, 34 N M 639, quoting **Corpus Juris.**
Tenn—Copeland v State, 285 S W 565, 566 154 Tenn 7, 49 A L R 605, citing **Corpus Juris.**
29 C J p 1150 note 55

81. Ga—Fair v State, 155 S E 329, 332, 171 Ga 112, quoting **Corpus Juris.**
Ind—Kimmel v State, 154 N E 16, 198 Ind 444—Votre v State, 138 N E 257, 192 Ind 684

proximate cause [82]

§ 58. —— Assault and Battery, and Breaches of the Peace

An unintentional killing resulting from an unlawful assault and battery, not of a character of itself to cause death, is involuntary manslaughter Death unintentionally caused by an officer by violence in making an unlawful arrest, or by excessive violence in making a lawful arrest or preventing escape is within the rule

The rule that under certain circumstances an unintentional killing in the commission of an unlawful act may constitute manslaughter, considered supra § 57, has frequently been applied to death resulting from an unlawful assault and battery, not of a character of itself to cause death, wherein death unintentionally results either to the person assaulted[83] or another[84] If, however, an assault is made in self-defense, it would not be unlawful, so that the resulting death could not justify a conviction of involuntary manslaughter [85]

The rule has been applied to an unintentional homicide committed while engaged in a riot or unlawful assembly,[86] or in an affray or unlawful fighting,[87] including prize fighting, where such a fight is unlawful,[88] or in any unlawful game or sport [89] The rule also applies where death is unintentionally caused by the use of excessive force, although not such as is manifestly dangerous to life, in the correction or punishment of a child,[90] or pupil,[91] or menial [92]

Unlawful act of officer in performance of duties The rule applies to a death unintentionally caused by violence of an officer making an unlawful arrest,[93] or excessive violence in making an arrest otherwise lawful,[94] or in preventing an escape [95]

N M —State v Nichols, 288 P 407, 408, 34 N M 639, quoting **Corpus Juris.**
N C —State v Satterfield, 153 S E 155, 198 N C 682
Ohio —State v Minko, App, 46 N E 2d 469
Pa —Commonwealth v Aurick, 10 A 2d 22, 138 Pa Super 180—Commonwealth v Williams, 1 A 2d 812, 133 Pa Super 104
Tenn —Wade v State, 124 S W 2d 710, 174 Tenn 248—Copeland v State, 285 S W 565, 566, 154 Tenn 7 49 A L R 605, citing **Corpus Juris.**
29 C J p 1150 note 56

82. Ala - Broxton v State, 171 So 390, 27 Ala App 298
Ga —Fair v State 155 S E 329, 332 171 Ga 112, quoting **Corpus Juris**—Cammons v State, 2 S E 2d 205 59 Ga App 759—Wells v State, 162 S E 835, 44 Ga App 760
Ill - People v Mulcahy, 149 N E 266, 318 Ill 332
Ind —Kimmel v State, 154 N E 16, 198 Ind 411
N M —State v Nichols, 288 P 407, 408, 34 N M 639, quoting **Corpus Juris.**
Ohio State v Minko, App, 46 N E 2d 469.
Okl —Porter v State 297 P 305, 50 Okl Cr 156—Logan v State, 275 P 657, 42 Okl Cr 294
29 C J p 1150 note 57

Unlawful act held proximate cause
Firing shots toward boat, so frightening occupants that one upset boat and drowned another was proximate cause of death and punishable as involuntary manslaughter —Letner v State, 299 S W 1049, 156 Tenn 68, 55 A L R 915

Unlawful act held not proximate cause
The unlawful carrying of a loaded revolver, which accidentally fell to the floor at a public dance, was discharged, and caused the death of a person was held not the proximate cause of death so as to render the person carrying the revolver guilty of involuntary manslaughter State v Nichols, 288 P 407, 34 N M 639

83. Ala —Salter v State, 112 So 538, 22 Ala App 86
Del —State v Bell 192 A 553, 8 W W Harr 328
Mo —State v Frazier, 98 S W 2d 707, 713, 339 Mo 966 citing **Corpus Juris.**
Utah - State v Cobo, 60 P 2d 952 956, 90 Utah 89, citing **Corpus Juris**
29 C J p 1151 note 63

Deceased a hemophiliac
Facts that one whose blow with his fist on another's jaw produced fatal hemorrhage did not know that deceased was a hemophiliac and that death would not have resulted but for such affliction were not excuses precluding conviction of manslaughter —State v Frazier, 98 S W 2d 707, 339 Mo 966

84. Ala —Bob v State, 29 Ala 20
29 C J p 1151 note 64

85. Ill -People v Hunter, 7 N E 2d 414, 365 Ill 618

86. Ill —Brennan v People, 15 Ill 511
29 C J p 1151 note 68

87. Wis -- Hayes v State, 87 N W 1076, 112 Wis 304
29 C J p 1151 note 69

88. N Y —People v Fitzsimmons, 34 N Y S 1102
29 C J p 1151 note 70

89. Pa —State v Lewis, Add 279
29 C J p 1152 note 71

90. Ark —Ackers v State, 83 S W 909, 73 Ark 262
29 C J p 1152 note 72.

91. Mass —Commonwealth v Randall 4 Gray 36
29 C J p 1152 note 73

92. Miss —Kelly v State, 11 Miss 518
29 C J p 1152 note 74

93 Ga O'Connor v State, 64 Ga 125 37 Am R 58
29 C J p 1151 note 65

94. Ariz —Harding v State 225 P 482 26 Ariz 334
Ky - Siler v Commonwealth, 134 S W 2d 945 280 Ky 830
Okl —Vaughn v State, 14 P 2d 239, 51 Okl Cr 59—Coffey v State, 258 P 923 38 Okl Cr 91
Tenn - Taylor v State, 7 S W 2d 50, 157 Tenn 421
Wash -State v Paschall, 85 P 2d 1016 197 Wash 582
29 C J p 1151 note 66

Violence held not excessive
Where prisoner after a fight with one police officer who was attempting to put him in a cell started a fight with a second officer who was no physical match for prisoner, resort by second officer to use of black jack to overcome prisoner was not excessive force so as to establish an "assault and battery" on such prisoner as an element of a charge of manslaughter against second officer - State v Yingling, Ohio App, 44 N E 2d 361

95. Ky —Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830
Okl —Nowlin v State, 3 P 2d 916, 52 Okl Cr 169
29 C J p 1151 note 67

Held voluntary manslaughter
Pa — Commonwealth v Loughhead, 67 A 747, 218 Pa 429, 120 Am S R 896

§ 59. —— Other Unlawful Acts

The rule that an unintentional killing in doing an unlawful act is involuntary manslaughter has been applied to the unlawful handling of firearms, violation of liquor laws, performance of an abortion, and other unlawful acts

The rule that the unintentional killing of another in doing an unlawful act is manslaughter, considered supra § 57, has been applied not only to unintentional killings resulting from unlawful assaults and batteries and breaches of the peace, considered supra § 58, but also to unintentional killings resulting from other unlawful acts,[96] such as the unlawful shooting, pointing, or handling of firearms,[97] the sale of liquors, poisonous and dangerous to life, for use as beverages,[98] the violation of laws prohibiting the possession or manufacture of liquors,[99] the use of an instrument or administration of a drug to produce an abortion, where such an offense is a misdemeanor only and is not committed under such circumstances as naturally to endanger life;[1] the attempt to escape from lawful custody after an arrest,[2] the attempt to prevent entrance to property for the purpose of making an arrest,[3] and the placing of an obstruction on a railroad, where there is no intent to wreck a train and the circumstances are not such that malice can be implied.[4]

§ 60. —— Acts Merely Mala Prohibita

While some authorities make no such distinction, according to others an unintentional killing occasioned by an unlawful act which was merely malum prohibitum is not manslaughter unless the death was the natural or probable result of the act, or the act was negligent.

While according to some authorities, an unintentional homicide, committed in the commission of an unlawful act which was merely malum prohibitum, is not, without more, involuntary manslaughter[5] according to other authorities, there is no longer any distinction based on acts malum in se and acts malum prohibitum,[6] and it has been held that the

96. N J—State v Ireland, 20 A 2d 69, 126 N J Law 444, appeal dismissed 23 A 2d 560, 127 N J Law 558

Unintentional homicide by operation of motor vehicle in violation of law as manslaughter see the C J S title Motor Vehicles § 657, also 42 C J p 1155 note 41 and 29 C J p 1152 note 76

Violation of building code

Where collapse of building was caused by architect's violation of building code in preparing defective plans, and an occupant was killed, the architect is subject to indictment for manslaughter--State v Ireland, supra

Adultery

The rule has been applied to a homicide committed by one engaged in adultery with another's wife in defense of an attack by the husband, where adultery is a misdemeanor—Reed v State, 11 Tex App 509, 40 Am R 795

Illicit intercourse

If a man, in order to have unlawful sexual connection with a woman, used artificial means, with her consent, to make such connection practicable, and by carelessness or negligence in the operation inflicted on her a wound which caused her death, he is guilty of manslaughter as is another person who assisted him in such operation knowing the purpose thereof--State v Center, 35 Vt 378

97. Ga—Stapler v State, 142 S E 570, 38 Ga App 33

Ky—Glover v Commonwealth, 83 S W 2d 881, 260 Ky 48

Neb—Egbert v State, 205 N W 252, 113 Neb 790

Or—State v Trent, 259 P 893, 122 Or 144, denying rehearing 252 P 975, 122 Or 144

Pa--Commonwealth v Whildin, 17 Pa Dist & Co 370

29 C J p 1152 note 77

Pointing of firearm must be intentional

While under statute prescribing a punishment for one killing a person by the discharge of a firearm pointed or aimed intentionally, but without malice, intent is not an ingredient of the killing itself, the intentional pointing or aiming of the firearm must be found before a conviction can be had—People v Heikkala 197 N W 366, 226 Mich 332

Pointing gun held not unlawful

Where the statute makes unlawful the drawing or exhibition of a deadly weapon in a rude, angry, or threatening manner, a killing was not involuntary manslaughter where a gun pointed at deceased had not been so handled in anger—People v Sica, 245 P 461, 76 Cal App 648

98. N C—State v Keever, 97 S E 727, 177 N C 114

29 C J p 1152 note 78

99. Pa--Commonwealth v Mango, 101 Pa Super 385

1 Conn--State v Yochelman, 139 A 632, 107 Conn 148

Ill—People v Braune, 2 N E 2d 839, 363 Ill 551, 104 A L R 1513—People v Rongetti, 170 N E 14, 338 Ill 56

Mich—People v Stahl, 208 N W 685, 234 Mich 569

29 C J p 1152 note 79

2. W Va—State v Weisengoff, 101 S E 450, 85 W Va 271.

29 C J p 1153 note 80.

3. U S—Warren v Territory of Hawaii C C A Hawaii, 119 F 2d 936

4. Del—State v Brown, Houst Cr 539

29 C J p 1153 note 81

5 N C—State v Horton, 51 S E 945, 139 N C 588, 111 Am S R 818, 1 L R A, N S 991, 4 Ann Cas 797

29 C J p 1153 note 84

Reason for rule

Unlawful acts which are malum prohibitum do not supply the criminal intent necessary to render one punishable for a homicide unless the killing has been the natural and probable result of the act, while unlawful acts which are malum in se do supply the criminal intent—Keller v State, 299 S W 803, 155 Tenn 633, 59 A L R 685

Carrying firearms

Where killing was unintentional, accused must have pointed pistol, unlawfully carried, at deceased, or intentionally shot it so as to endanger deceased or otherwise handled it as to make the killing a natural or probable result, to make him guilty of involuntary manslaughter, since mere carrying of weapon is malum prohibitum--Holder v State, 277 S W 900, 152 Tenn 390

Acts held malum in se

(1) Scuffling with a policeman in order to deprive policeman of his pistol was "malum in se," and hence killing of third person when pistol was discharged was manslaughter—Creel v State, 191 So 814, 186 Miss 738

(2) Other acts see 29 C J p 1153 note 84 [d]

6. Pa—Commonwealth v Samson, 196 A 564, 130 Pa Super 65

rule, considered supra § 57, as to an unintentional killing resulting from the commission of an unlawful act, applies even though the unlawful act was merely malum prohibitum,[7] particularly where it was in violation of a statute intended and designed to prevent injury to the person[8]

In any event, the rule applies, whether the unlawful act be malum prohibitum or malum in se, where the homicide was the natural or probable result of the unlawful act,[9] or where the act of accused was not only in violation of statute, but was also negligent and careless[10] While it has been said that the cases in which an act merely malum prohibitum has been held a sufficient basis for a charge of involuntary manslaughter have been those in which the act which is unlawful is accompanied by negligence and reckless disregard of the safety of others,[11] the need for negligence has been expressly denied[12]

Felony merely malum prohibitum While, in general, a homicide which resulted from the commission of a felony is murder, considered supra § 21, it has been held that a homicide resulting from the commission of an act which has been made a felony by statute, and was not so at common law, and which is merely malum prohibitum, will constitute manslaughter rather than murder[13]

§ 61. —— Mere Civil Wrongs

English cases on the question of whether a homicide unintentionally caused in the commission of a mere civil wrong will constitute manslaughter are collected in 29 C J p 1154 notes 91, 92.

Examine Pocket Parts for later cases.

§ 62. Negligence

a In general
b Applications of rule

a. In General

An unintentional homicide occasioned by negligence in the commission of an act lawful in itself will constitute involuntary manslaughter The negligence is generally required to be of a higher degree than is required on civil issues, and is ordinarily required to be of a gross or flagrant character, unless the unlawful act is one likely to produce death

In accordance with the description of involuntary manslaughter as including an unintentional homicide resulting from the doing of a lawful act in an unlawful or negligent manner, considered supra § 55, where an unintentional homicide is occasioned by the gross or culpable negligence of accused, although in the commission of an act lawful in itself, it is manslaughter,[14] and under some statutes to that effect, involuntary manslaughter includes a

7. Ala —Broxton v State, 171 So 390, 27 Ala App 298
29 C J p 1153 note 86

8. Pa —Commonwealth v Samson, 196 A 564, 567, 130 Pa Super 65, quoting entire section from **Corpus Juris.**
29 C J p 1153 note 87

9. Tenn —Keller v State 299 S W 803, 155 Tenn 633, 59 A L R 685

10. Neb —Thiede v State, 182 N W 570, 106 Neb 48
29 C J p 1153 note 90

Sale of moonshine whisky
Unlawful sale of moonshine whisky, which causes death of buyer, does not, in absence of intent to kill, make seller guilty of involuntary manslaughter unless sale is made carelessly and in such manner as manifests reckless disregard of human life, and if the whisky was dangerous for use as a beverage, was of greater potency than ordinary whisky, or contained poisonous ingredients, accused, having distilled it himself, would be charged with knowledge of its dangerous character and guilty of involuntary manslaughter —People v Pavlic, 199 N W 373, 227 Mich 562, 35 A L R 741

11. Neb —Thiede v State 182 N W 570, 106 Neb 48

12. Ala —Thompson v. State, 31 So 725, 131 Ala. 18.

13 Mich —People v Pavlic, 199 N W 373, 227 Mich 562, 35 A L R 741

14. Del —State v Elliott, 8 A 2d 873, 1 Terry 250
Mich —People v McMurchy, 228 N W 723, 249 Mich 147
Mo —State v Mull, 300 S W 511 318 Mo 647
N J —State v Blaine, 140 A 566, 567, 104 N J Law 325, affirming State v Blaine, 137 A 829, 5 N J Misc 633 citing **Corpus Juris.**
R I —State v McVay, 132 A 436, 438, 47 R I 292, 44 A L R 572, citing **Corpus Juris.**
S C —State v Barfield, 122 S E 856, 128 S C 384
Tenn —Copeland v State, 285 S W 565, 566, 154 Tenn 7, 49 A L R 605, citing **Corpus Juris.**
Va —Goodman v Commonwealth, 151 S E 168, 169, 153 Va 943, quoting **Corpus Juris.**
29 C J p 1154 note 94

"Unlawful manner" as meaning negligence
It has been held that to constitute the offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner the unlawfulness of the manner, way, method, or means of performance of the lawful act must amount to culpable neglect —Croker v State, 197 S E 92, 57 Ga App 895

Intent supplanted by negligence
(1) Generally, a crime has two elements, the overt act and the criminal intent, but in statutory manslaughter the element of criminal intent has been supplanted by the statutory element of culpable negligence —Pitts v State, 182 So 231, 132 Fla. 812—Hulst v State, 166 So 828, 123 Fla. 315

(2) Negligence and reckless indifference to the lives and safety of others will supply the intent for the purpose of criminal law
Hawaii —Territory v Yoshimura, 35 Hawaii 324
Iowa —State v Thomlinson, 228 N W. 80, 209 Iowa 555

(3) However, it has been held that at common law, death by negligence creates no criminal responsibility, unless law imputes criminal intent —People v Campbell, 212 N W 97, 237 Mich 424

In absence of negligence there can be no liability under this rule —Austin v State, 132 So 491, 101 Fla 990.

Elements of willfulness, or of wantonness and recklessness, which in effect are willfulness, include knowledge of situation requiring ordinary care, ability to avoid resulting harm, and omission to use such care —People v Orr, 220 N W. 777, 243 Mich. 300.

homicide in the commission of a lawful act without due caution or circumspection,[15] or a homicide in the commission of a lawful act, which might produce death, in an unlawful manner or without due care and circumspection[16]

It must be shown that a homicide was not improbable under the facts as they existed which should reasonably have influenced the conduct of accused,[17] and it has been held that it is only negligence in doing such acts as will probably endanger life or limb which constitutes that gross and culpable negligence that amounts to an unlawful act within the definition of involuntary manslaughter[18] The negligence must be that of accused personally,[19] and it must be the proximate cause of the homicide[20]

Nature and degree of negligence required While the kind of negligence required to impose criminal liability has been described in differing terms,[21] it is almost uniformly held that it must be of a higher degree than is required to establish negligence on a mere civil issue[22] However, some authorities

15. Or—State v Clark, 196 P 360, 99 Or 629
29 C J p 1154 note 95

16. Cal—People v Poclask, 96 P 2d 788, 14 Cal 2d 679—People v Crow, 120 P 2d 686, 48 Cal App 2d 666—People v Anderson, 208 P 324, 58 Cal App 267—People v Seiler, 207 P 396, 57 Cal App 195
Utah—State v Lingman, 91 P 2d 457, 97 Utah 180

Criminal negligence is necessary element
Utah—State v Gutheil, 98 P 2d 943, 98 Utah 205

Unlawful or careless manner essential
Under such provision, doing the dangerous act is not itself unlawful and there must always be the ingredient of doing it in an unlawful or careless manner—State v Lingman, 91 P 2d 457, 97 Utah 180

Act fraught with danger
Under statutory definition of involuntary manslaughter, referring to "commission of a lawful act which might produce death in an unlawful manner or without due care and circumspection," the phrase "might produce death" means fraught with potentialities for producing death, such as the running of an automobile at high speed, however carefully, and handling of loaded arms, explosives, deadly germs, and the like, and under such provision the distinguishing characteristic is that the act have knowable and apparent potentialities for resulting in death—State v Lingman, 91 P 2d 457, 97 Utah 180

17. Ala—Barnett v State, 184 So 702, 707, 28 Ala App 293, certiorari denied 184 So 709, 236 Ala 666 quoting **Corpus Juris**—French v State, 180 So 592 594, 28 Ala App 147, certiorari denied 180 So 594, 235 Ala 570, quoting **Corpus Juris.**
Del—State v Benton, 187 A 609, 615, 8 W W Harr 1, citing **Corpus Juris**
Ga—Croker v State, 197 S E 92, 57 Ga App 895
Miss—Jabron v State, 159 So 406, 172 Miss 135
Mo—State v Studebaker, 66 S W 2d 877, 881, 334 Mo 471, quoting **Corpus Juris.**
Pa—Commonwealth v Aurick 19 A 2d 920, 342 Pa 282, reversing 16 A 2d 429, 142 Pa Super 364
Tenn—Copeland v State, 285 S W 565, 566, 154 Tenn 7, 49 A L R 605, quoting **Corpus Juris.**
Va—Bell v Commonwealth, 195 S E 675, 170 Va 597—Goodman v Commonwealth, 151 S E 168, 169 153 Va 943, quoting **Corpus Juris.**
29 C J p 1155 note 98

That it did not occur to accused that death was reasonable or probable result of assault did not, however, prevent conviction for manslaughter—Gainer v State, 129 So 576, 100 Fla 164

18. Ind—Kimmel v State, 154 N E 16, 198 Ind 444

19. N Y—People v Gaydica, 203 N Y S 243, 122 Misc 31
29 C J p 1155 note 1

Act must be voluntary
(1) In general—U S v Barnes, 12 Philippine 93

(2) Where circumstances and conditions beyond control of accused cause him against his will to be in a position and under conditions resulting in the death of another, no criminal liability attaches—Pitts v State, 182 So 234, 132 Fla 812

20. Wash—State v Ramser, 136 P 2d 1013
29 C J p 1155 note 2

21. Ala—Barnett v State, 184 So 702, 707, 28 Ala App 293, certiorari denied 184 So 709, 236 Ala 666, quoting **Corpus Juris**—French v State, 180 So 592 594, 28 Ala App 147, certiorari denied 180 So 594, 235 Ala 570, quoting **Corpus Juris.**
Fla—Cannon v State, 107 So 360, 363, 91 Fla 214, citing **Corpus Juris.**
Mo—State v Studebaker, 66 S W 2d 877, 334 Mo 471
Tenn—Copeland v State 285 S W 565, 566, 154 Tenn 7, 49 A L R 605, quoting **Corpus Juris.**
29 C J p 1154 note 96

Absence of due care
Negligence as element of involuntary manslaughter denotes absence of due care—Commonwealth v Ochs, 91 Pa Super 528

Criminal negligence
Ga—Croker v State, 197 S E 92, 57 Ga App 895
N M—State v Sisneros, 82 P 2d 274, 42 N M 500

Must be culpable or criminal in nature
Wyo—State v McComb, 239 P 526, 33 Wyo 346, 41 A L R 717

Culpable negligence is the omission to do something which a reasonable, prudent, and cautious man would do, or the doing of something which such a man would not do under circumstances surrounding the particular case
Fla—Russ v State, 191 So 296, 140 Fla 217
Miss—Robertson v State, 121 So 492, 153 Miss 770
Mo—State v Carter, 116 S W 2d 21, 342 Mo 439—State v Pauly, 267 S W 799
Okl—Romines v State, 281 P 310, 45 Okl Cr 40—Herndon v State, 261 P 378, 38 Okl Cr 338—Clark v State, 224 P 738, 27 Okl Cr 11—Pamplin v State, 205 P 521, 21 Okl Cr 136
29 C J p 1154 note 96 [h]

The standard of care to which every person is held by law is not to be determined by the judgment of a person charged with negligence, but it is that standard which is found in the conduct of reasonably prudent men in like circumstances—State v Arnold, Del, 27 A 2d 81

22. Ala—Barnett v State, 184 So 702, 707, 28 Ala App 293, certiorari denied 184 So 709, 236 Ala 666, quoting **Corpus Juris**—French v State, 180 So 592 594, 28 Ala App 147, certiorari denied 180 So 594, 235 Ala 570, quoting **Corpus Juris.**
Del—State v Arnold, 27 A 2d 81
Fla—Jackson v Edwards, 197 So 833, 835, 144 Fla 187, citing **Corpus Juris**—Russ v State, 191 So 296, 140 Fla 217—Pitts v State, 182 So 234, 132 Fla 812—Cannon v State, 107 So 360, 363, 91 Fla 214, citing **Corpus Juris.**
Ga—Croker v State, 197 S E 92, 57 Ga App 895
Me—State v Ela, 8 A 2d 589, 136 Me 303.

have held that ordinary negligence only is required to support a conviction for involuntary manslaughter,[23] and, as considered supra § 44, it has been held that gross carelessness renders the crime voluntary manslaughter

The degree of negligence required to render a killing occasioned thereby involuntary manslaughter has been held to vary with the potential danger involved in the lawful act being performed.[24] Thus, it is ordinarily required that the negligence on which involuntary manslaughter may be based must be of a gross or flagrant character, such as would show wantonness or recklessness, or would evince a reckless disregard of human life or the safety of others, or indifference to consequences, equivalent to criminal intent,[25] although the negligence must not be so gross as to raise the presumption of malice.[26] However, where the lawful act is a dangerous one which has notable and apparent potentialities for

Miss.—Cutshall v. State, 4 So.2d 289, 292, 191 Miss. 764, citing **Corpus Juris**—Shows v. State, 165 So. 862, 864, 175 Miss. 604.

Mo.—State v. Baublits, 27 S.W.2d 16, 324 Mo. 1199.

N.C.—State v. Cope, 167 S.E. 456, 204 N.C. 28.

Pa.—Commonwealth v. Aurick, 19 A.2d 920, 342 Pa. 282, reversing 16 A.2d 429, 142 Pa.Super. 361.

S.C.—State v. Davis, 122 S.E. 770, 771, 128 S.C. 265, quoting **Corpus Juris**.

Tenn.—Copeland v. State, 285 S.W. 565, 566, 154 Tenn. 7, 19 A.L.R. 605, quoting **Corpus Juris.**

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597—Goodman v. Commonwealth, 151 S.E. 168, 169, 153 Va. 913, quoting **Corpus Juris.**

Wyo.—State v. McComb, 239 P. 526, 529, 33 Wyo. 346, 41 A.L.R. 717, citing **Corpus Juris**.

29 C.J. p. 1154 note 97.

"Criminal liability may not be predicated upon every act carelessly performed merely because such carelessness results in the death of another."—People v. Schneider, 195 N.E. 430, 1?3, 360 Ill. 43—People v. Sikes, 159 N.E. 293, 297, 328 Ill. 64.

Simple negligence held insufficient.

S.C.—State v. Davis, 122 S.E. 770, 128 S.C. 265.

Likelihood of harm or death.

To be punishable criminally, conduct of the individual must have been such as was likely to cause great bodily harm or death to another reasonably within its range.—State v. Elliott, 8 A.2d 873, 1 Terry 250.

Mere inattention or mistaken judgment resulting even in death of another is not criminal unless quality of act makes it so.—State v. Studebaker, 66 S.W.2d 877, 334 Mo. 471.

Carelessness not involving criminality.

"Homicide may result from carelessness of such low degree or trivial character in the performance of a lawful act as not to involve criminality in the person so carelessly performing the act, and it follows that criminality cannot be affirmed of every lawful act carelessly performed, and resulting because of such carelessness in the death of another."—Barnett v. State, 184 So. 702, 708, 28 Ala.App. 293, certiorari denied 184 So. 709, 236 Ala. 666—French v. State, 180 So. 592, 594, 28 Ala.App. 117, certiorari denied 180 So. 594, 235 Ala. 570.

23. Ky.—Embry v. Commonwealth, 32 S.W.2d 979, 236 Ky. 204.

Wash.—State v. Ramser, 136 P.2d 1013.

However, it has also been held that gross negligence is required to make killing while performing a lawful act involuntary manslaughter.—Jones v. Commonwealth, 281 S.W. 164, 213 Ky. 356.

Effect of statute as to excusable homicide.

The statute providing that homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means with "ordinary caution" and without any unlawful intent does not require a finding by the jury that accused was guilty of gross negligence before a conviction for manslaughter may be had, but under the statute a finding that accused was guilty of ordinary negligence supports a conviction.—State v. Hedges, 113 P.2d 530, 8 Wash.2d 652.

Homicide held involuntary manslaughter.

Refusal to permit wounded person to obtain aid or medical attention, where death results therefrom, is involuntary manslaughter if such acts were the result of ordinary negligence.—King v. Commonwealth, 118 S.W.2d 1044, 285 Ky. 654.

24. Utah.—State v. Gutheil, 98 P.2d 943, 98 Utah 205—State v. Lingman, 91 P.2d 457, 97 Utah 180.

Deadly weapon.

A person handling a deadly weapon must use a higher degree of care and circumspection than if using an instrument ordinarily harmless.—Pamplin v. State, 205 P. 521, 21 Okl.Cr. 136.

25. U.S.—Reed v. Madden, C.C.A.Mo., 87 F.2d 816.

Del.—State v. Arnold, 27 A.2d 81.

Fla.—Pitts v. State, 182 So. 234, 132 Fla. 812—Cannon v. State, 107 So. 360, 91 Fla. 214.

Ga.—Collins v. State, 18 S.E.2d 24, 66 Ga.App. 325—Croker v. State, 197 S.E. 92, 57 Ga.App. 895.

Ill.—People v. Hansen, 38 N.E.2d 738, 378 Ill. 491—People v. Buzan, 184 N.E. 890, 351 Ill. 610—People v. Sikes, 159 N.E. 293, 328 Ill. 64.

Kan.—State v. Custer, 282 P. 1071, 129 Kan. 381, 67 A.L.R. 909.

Me.—State v. Ela, 8 A.2d 589, 136 Me. 303.

Mich.—People v. Campbell, 212 N.W. 97, 237 Mich. 421.

Miss.—Scott v. State, 185 So. 195, 183 Miss. 788—Bailey v. State, 169 So. 765, 176 Miss. 579—Shows v. State, 168 So. 862, 175 Miss. 604—Gregory v. State, 118 So. 906, 152 Miss. 133.

Mo.—State v. Ruffin, 126 S.W.2d 218, 344 Mo. 301—State v. Carter, 116 S.W.2d 21, 342 Mo. 439—State v. Melton, 33 S.W.2d 894, 326 Mo. 962—State v. Baublits, 27 S.W.2d 16, 324 Mo. 1199—State v. Millin, 300 S.W. 691, 318 Mo. 553.

N.C.—State v. Cope, 167 S.E. 456, 204 N.C. 28.

Pa.—Commonwealth v. Samson, 196 A. 561, 130 Pa.Super. 65—Commonwealth v. Pagano, 33 Berks Co.L.J. 233.

Utah.—State v. Gutheil, 98 P.2d 943, 98 Utah 205—State v. Lingman, 91 P.2d 457, 97 Utah 180.

Va.—Bell v. Commonwealth, 195 S.E. 675, 170 Va. 597.

29 C.J. p. 1154 note 96 [a], [b].

Indifference to life.

The culpable indifference need not be indifference to life as distinguished from indifference to the safety of others.—State v. Richardson, Iowa, 240 N.W. 695, adhered to on rehearing, 249 N.W. 211, 216 Iowa 809.

"Gross" is intended to convey the idea of recklessness with regard to the safety of others.

Minn.—State v. Lester, 149 N.W. 297, 127 Minn. 282, L.R.A.1915D 201.

N.J.—State v. Blaine, 140 A. 566, 567, 104 N.J.Law 325, affirming State v. Blaime, 137 A. 829, 5 N.J.Misc. 633, citing **Corpus Juris.**

26. Mo.—State v. Studebaker, 66 S.W.2d 877, 881, 334 Mo. 471, citing **Corpus Juris.**

29 C.J. p. 1155 note 99.

resulting in death, or where the statute requires that the act which was performed without due caution and circumspection must be one which might produce death, a wanton or reckless act is not required, it being sufficient that there was a failure to take those proper precautions which a person of ordinary prudence would have used under the circumstances [27]

It has been held that an intentional, willful, or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in death, is culpable negligence,[28] but it has also been held that one may violate the law without being culpably negligent in fact [29]

Negligence as unlawful act Even where involuntary manslaughter is defined as death resulting from an unlawful act, it includes death resulting from negligence where the negligence contains some element of rash or reckless conduct which approximates an unlawful act.[30]

b. Applications of Rule

The rule that a homicide occasioned by negligence may constitute manslaughter has been applied to negligence in connection with firearms, poisons, and other dangerous drugs, the operation of railroads and vessels, the acts of physicians, nurses, and the like, and in other instances

The rule that a homicide occasioned by culpable negligence may constitute manslaughter, considered supra subdivision a of this section, has been applied in a great variety of instances, as, for example, reckless or culpable negligence in riding or driving,[31] the negligent construction of a building, in consequence of which it collapses and causes death,[32] or killing another in supposed self-defense under a negligent apprehension of danger,[33] and other instances [34]

27. Cal —People v Pociask, 96 P 2d 788 14 Cal 2d 679, overruling People v Hurley 56 P 2d 978, 13 Cal App 2d 208 and People v Driggs, 295 P 51, 111 Cal App 42—People v Crow, 120 P 2d 686, 48 Cal App 2d 666—People v Marconi, 5 P 2d 971 118 Cal App 683—People v Anderson, 208 P 324, 58 Cal App 267 People v Seiler, 207 P 396, 57 Cal App 195

Pa —Commonwealth v Aurick, 19 A 2d 920 342 Pa 282 reversing 16 A 2d 429 142 Pa Super 361

Utah —State v Guthrie, 98 P 2d 943, 98 Utah 205—State v Lingman, 91 P 2d 457, 97 Utah 180

"When a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life"

Cal —People v Pociask, 96 P 2d 788 791, 14 Cal 2d 679—People v Wilson, 226 P 5, 7, 193 Cal 512- People v Crossan, 261 P 531, 533, 87 Cal App 5

Nev —State v Lewis, 91 P 2d 820, 824, 59 Nev 262

"Cautious" and "prudent" distinguished

In a prosecution for manslaughter, an instruction offered by accused, attempting to define the words "without due caution and circumspection" as the equivalent of the words "criminal negligence," and then further defining criminal negligence as the want of attention that a prudent man ordinarily bestows, was incorrect and properly refused, "prudent" differing in meaning from "cautious" which suggests the idea of timidity with its secondary meaning as overprudent, fearful —People v Anderson, 208 P 324, 58 Cal App 267

Without express reference to the dangerous character of the act it was held, in a case in which a dangerous instrumentality was involved, that reckless and wanton disregard for the lives of others need not be proved — Commonwealth v Peach, 132 N E 351, 249 Mass 575

28. N C —State v Cope, 167 S E 156, 204 N C 28

Inadvertent violation

Negligence based on inadvertent violation of prohibitory statute or ordinance accompanied by recklessness or probable consequences of dangerous nature when tested by rule of reasonable prevision amounting to thoughtless disregard of consequences or heedless indifference to safety and rights of others, if injury or death proximately ensue, would be "culpable negligence"—State v Cope, 167 S E 156 204 N C 28

29. Miss —Cutshall v State, 4 So 2d 289, 191 Miss 764

30. Pa —Commonwealth v Bergen, 1 A 2d 164, 134 Pa Super 62—Commonwealth v Ushka, 198 A 465, 130 Pa Super 600

"The words 'unlawful act' used in the statute defining involuntary manslaughter, comprise as they did at common law more than an act prohibited by positive statute"—Minardo v State, 183 N E 548, 550, 204 Ind 422

The word "reckless" imports more than carelessness or negligence, and denotes "rashly negligent" or "utterly heedless" act Commonwealth v Gill, 182 A 103, 120 Pa Super 22

31. Iowa —State v Moore, 106 N W 16 129 Iowa 514
29 C J p 1155 note 10

32 N Y —People v Buddensieck, 9 N E 44, 103 N Y 487, 57 Am R 766

Defective plans

Where collapse of building is caused by architect's neglect in preparing defective plans, and occupant is killed, the architect is subject to indictment for manslaughter —State v Ireland 20 A 2d 69, 126 N J Law 444 appeal dismissed 23 A 2d 560, 127 N J Law 558

Liability for act of contractor

An owner, subletting the entire work to independent contractors, is not liable for the negligence of any of the latter, but is answerable only for his personal negligence while actually participating in the work, and this rule applies to a contractor subcontracting his work, since building operations are not inherently dangerous, and supervision by the owner however vigilant, if confined to enforcing the terms of building contract or subcontract, does not constitute participation such as would render the owner liable for the negligence of the contractor or subcontractor, such right of supervision being optional, as he owes no duty of active vigilance to third parties, where the work is in charge of an independent contractor —People v Gaydica, 203 N Y S 243, 122 Misc 31.

33 Ark —Deatherage v State, 108 S W 2d 904, 194 Ark 513
29 C J p 1155 note 17

34. U S —Lilly v State of West Virginia, C C A W Va, 29 F 2d 61.

Homicide occasioned by negligence in the operation of a motor vehicle as manslaughter is considered in the C.J.S. title Motor Vehicles § 657, also 42 C.J p 1354 note 40–p 1356 note 48, and 29 C.J p 1156 note 18.

Firearms or other deadly weapons. An unintentional homicide occasioned by the careless handling of firearms or other deadly weapons may be manslaughter [35]

Poisons, drugs, and intoxicating liquors The act on which a charge of involuntary manslaughter is based may be the careless handling, exposure, administering, or use of poison or other dangerous drugs,[36] as by furnishing intoxicating liquor dangerous for use as a beverage [37]

Operation of railroads and steam and other vessels The rule that a homicide caused by negligence in doing an act lawful in itself is manslaughter also applies to homicide resulting from negligence in the operation or management of railroads,[38] street railroads,[39] steamboats,[40] or other vessels.[41] However, to render one liable he must have been guilty of gross or culpable negligence by omission of a duty imposed on him personally,[42] or by disobedience of rules or other like acts or omissions,[43] and not of mere mistake or error of judgment,[44] and the death must have been the result of such negligence [45]

Acts of physicians, nurses, and the like. A physician, surgeon, or other similar practitioner, or a person assuming to act as such, whether licensed or not, is guilty of manslaughter if he unintentionally causes the death of a patient by gross ignorance, negligence, or inattention,[46] but a mere mistake or error of judgment or a mere want of skill, where

Sudden applying of brake on a hand car, thereby throwing a person off and killing him—White v State, 4 So 598, 84 Ala 421

Use of excessive charges of explosives in blasting operations—People v Clemente 130 N Y S 612, 146 App Div 109, affirmed 101 N E 1114, 207 N Y 682

35. Cal—People v Hubbard, 220 P 315 64 Cal App 27
Del—State v Donovan, 8 A 2d 876, 1 Terry 257—State v Phillips, 187 A 108, 7 W W Harr 544
Ky—Bradley v Commonwealth, 111 S W 2d 414, 271 Ky 253—Burchett v Commonwealth, 56 S W 2d 571, 247 Ky 21
Miss—Robertson v State, 121 So 492, 153 Miss 770
Mo—State v Yates, 256 S W 809, 301 Mo 255
S C—State v Staggs, 195 S E 130 186 S C 151—State v Dixon, 186 S E 531 181 S C 1—State v Quick, 167 S E 19, 168 S C 76
29 C J p 1156 note 19
Reckless or grossly careless handling of firearms resulting in death as constituting voluntary manslaughter see supra § 44

Intentional shooting
Where shooting was intentional, involuntary manslaughter resulting from ordinary negligence, was not involved—King v Commonwealth, 148 S W 2d 1041, 285 Ky 651

Shooting by police officer
An officer who failed to exercise reasonable care in handling or shooting firearms, while making or attempting to make arrest or preventing escape, is guilty of "involuntary manslaughter" where offender was killed, although officer did not intentionally fire fatal shot
Ky—Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830—Hill v Commonwealth, 40 S W 2d 261, 239 Ky 646
Mo—State v Pauly, 267 S W 799

Shooting over head of another
One who, in attempting to shoot over the head or past the body of another with knowledge that use of the weapon in that way was dangerous to the other's life, caused his death, is guilty of "involuntary manslaughter," although the act was simply a reckless one and without design or purpose or intention to kill—State v Donovan, 8 A 2d 876, 1 Terry, Del, 257

Setting spring gun
Generally, person setting trap or spring gun solely to protect his property is guilty of at least manslaughter, if homicide resulted therefrom—State v Plumlee, 149 So 425, 177 La 687—29 C J p 1156 note 19 [d]

36. Mo—Rice v State 8 Mo 561
29 C J p 1157 note 20

37. Wash—State v Takano, 162 P 35, 94 Wash 119
29 C J p 1157 note 21

38. Ind—State v Dorsey, 20 N E 777, 118 Ind 167, 10 Am S R 111
29 C J p 1157 note 23

39. N J—State v Young, Sup, 56 A 471
Philippine—U S v Barias, 23 Philippine 434

40. N Y—People v Westchester County, 1 Park Cr 659
29 C J p 1157 note 25

41. U S—U S v Holmes, C C Ohio, 104 F 884
29 C J p 1157 note 26

42. N J—State v Young, Sup, 56 A 471
29 C J p 1157 note 27

43. N J—State v Young, supra
29 C J p 1157 note 28.

44. Pa—Commonwealth v Bilderbeck, 2 Pars Eq Cas 447

45. N Y—People v Jackson, 110 N Y S 807, 125 App Div 873
29 C J p 1158 note 30

46. Fla—State v Heines, 197 So 787, 144 Fla 272
Idaho—State v McMahan, 65 P 2d 156, 162, 57 Idaho 240, quoting **Corpus Juris.**
29 C J p 1158 note 32

Under general manslaughter statute
Fla—Hampton v State, 39 So 421, 50 Fla 55

"Criminal negligence" necessary to justify conviction of manslaughter in case of death resulting from physician's criminal negligence in treatment of case exists where physician, or person assuming to act as such, exhibited gross lack of competency, which may arise from gross ignorance of science of medicine and of effect of remedy employed or through gross negligence in application and selection of remedies, and may arise from failure to give proper instructions or the giving of improper instructions to the patient—State v Karsunky, 81 P 2d 390, 197 Wash 87

Abortion
A fatal abortion, to constitute manslaughter must be a lawful abortion but one performed without due caution and circumspection—People v Long, 103 P 2d 969, 15 Cal 2d 590, superseding, App, 96 P 2d 354, and 96 P 2d 1021, and certiorari denied Long v People of State of California, 61 S Ct 136, 311 U S 698, 85 L Ed 452

Chiropractor's use of forbidden instruments
That chiropractor, in treating patient, used instruments not permitted by his license, is in itself negligence—People v Mount, 269 P. 177, 93 Cal App 81.

there is not gross negligence or ignorance, will not render him liable.[47] The fact that the act is with the consent of decedent does not constitute a defense.[48] Liability in such cases depends on the existence of negligence, and the fact that accused acted with the intent and the expectation that the result would be beneficial will not control,[49] although there is some authority to the effect that criminal liability will not be imposed for the consequence of the ignorance of accused when he acts with good motives and honest intentions.[50] These rules also apply to negligence on the part of nurses and attendants in hospitals or asylums and other persons occupying like positions.[51]

§ 63. Omission to Perform Duty

A homicide proximately caused by negligent omission to perform a legal duty will constitute involuntary manslaughter

A charge of manslaughter may be predicated on a failure to act as well as on an act.[52] While the willful failure of a person to perform a legal duty, whereby the death of another was caused, is murder, as considered supra § 20, if the omission was not willful, but was the result of gross or culpable negligence, it is involuntary manslaughter.[53] The omission must have been due to gross or culpable negligence,[54] and must have been the proximate cause of the death,[55] and the death must have resulted from the neglect of a plain legal duty imposed by law or contract on accused personally,[56] although it has also been held that it is not necessary that the duty be specifically imposed by statute.[57] Accused must have had knowledge of the facts imposing the duty to act or he must have been grossly negligent in not ascertaining the facts.[58]

Neglect of children or other helpless and dependent persons. The rule that it may be manslaughter to omit to perform a legal duty has frequently been applied in cases of failure on the part of parents or others charged with the custody and care of children or other helpless and dependent persons to provide shelter, food, or medical attendance and in other like cases of neglect.[59] To render accused guilty in such a case, he must have been under a legal duty imposed either by law or contract to care for deceased, and a mere moral obligation is not sufficient.[60] It is also necessary that accused have had the means or ability to furnish the shelter, food, or other necessaries.[61]

Failure to call or render medical aid The failure to render medical aid where the duty to do so exists has been held to be involuntary manslaughter if such omission is due to ordinary negligence.[62] However, where the failure of a person charged with the duty of procuring medical attendance to procure such attendance is due to a conscientious disbelief in the efficacy thereof and not from any criminal indifference to the needs of the person, it has been held that it is not criminal negligence and cannot constitute a basis for a conviction of manslaughter,[63] although such conscientious belief will not preclude conviction of involuntary manslaughter, where a statute in effect so provides, such as a statute providing that any father who has willfully neglected to maintain his wife or children, such wife or children being destitute, shall be guilty of manslaughter.[64]

Other applications of rule The rule that it is manslaughter to cause death by a grossly negligent omission to perform a legal duty has been applied

47 Idaho—State v McMahan, 65 P 2d 156, 162, 57 Idaho 240, quoting **Corpus Juris.**
Wash—State v Karsunky, 84 P 2d 390, 197 Wash 87
29 C J p 1158 note 33

48. Wash—State v Gile, 35 P 417, 8 Wash 12
29 C J p 1158 note 34

49 Wash—State v Karsunky, 84 P 2d 390, 197 Wash 87
29 C J p 1158 note 35

50 Iowa—State v Schulz, 8 N W 469, 55 Iowa 628, 39 Am R 187
Mo—Rice v State, 8 Mo 561

51. Del—State v Brown, 36 A 458, 16 Del 380
29 C J p 1158 note 37

52. Del—State v Benton, 187 A 609, 616, 8 W W Harr 1, citing **Corpus Juris.**
Okl—Clark v State, 224 P 738, 741, 27 Okl Cr 11 citing **Corpus Juris.**
29 C J p 1158 note 39

53 U S—U S v Knowles, D C Cal., 26 F Cas No 15,540, 4 Sawy 517
29 C J p 1158 note 41

54. N J—State v Young, Sup., 56 A 471
29 C J p 1158 note 42

55. Wash—State v Ramser, 136 P 2d 1013

56 Del—State v Benton, 187 A 609, 616, 8 W W Harr 1, citing **Corpus Juris**
29 C J p 1158 note 43

57. **Statute as not precluding other duties**
Statutory provisions imposing duties to take certain precautions concerning work carried on at a place and under conditions manifestly dangerous do not preclude the duty of observing other precautions not covered by statute—Clark v State, 224 P 738, 27 Okl Cr 11

58. Me—State v Smith, 65 Me 257

59. Pa—Commonwealth v McTague, 171 A 406, 112 Pa Super 471
29 C J p 1159 note 51

60 Mich—People v Beardsley, 113 N W 1128, 150 Mich 206, 121 Am S R 617, 13 L R A, N S, 1020, 13 Ann Cas 39
29 C J p 1159 notes 52, 53

61. Vt—State v Noakes, 40 A 249, 70 Vt 247

62 Ky—King v Commonwealth, 148 S W 2d 1044, 285 Ky 654

63 Me—State v Sanford, 59 A 597, 99 Me 441
29 C J p 1160 note 58

64. Pa—Commonwealth v Breth, 44 Pa.Co. 56.

to neglect in other instances,[65] as, for example, neglect on the part of persons employed or engaged in the management or operation of railroads,[66] steamboats, or other vessels.[67]

D DEGREES OF MANSLAUGHTER

§ 64. In General

Statutes dividing manslaughter into degrees vary widely, the effect of some being merely to divide common-law manslaughter into degrees

In a number of states, manslaughter, like murder, considered supra §§ 29–36, has been divided by statute into two or more degrees, according to the circumstances under which it was committed, the statutes varying widely in the different states, as fully considered infra §§ 65–67 The effect of some such statutes has been merely to divide that which was manslaughter at common law into degrees[68] Thus, under some statutes, what would be voluntary manslaughter at common law is manslaughter in the first degree, and what would be involuntary manslaughter at common law is manslaughter in the second degree[69] A statute doing away with the degrees of manslaughter has no application to offenses committed before it took effect[70]

§ 65. First Degree

What constitutes manslaughter in the first degree depends on the statutory definition.

Under a statute making manslaughter by voluntarily depriving a human being of life manslaughter in the first degree, the offense consists of the unlawful killing of another without malice either express or implied[71] The offense is committed where there was either a positive intention to kill,[72] or an act of violence from which ordinarily, in the usual course of events, death or great bodily harm might result,[73] or an act of wanton negligence[74] If the act amounting to manslaughter was voluntarily committed, the statute, without regard to the circumstances of provocation, fixes the grade of the offense and makes it manslaughter in the first degree,[75] thus, if one intentionally did an act calculated to take life, and death was unintentionally produced, the homicide is manslaughter in the first degree[76]

65. Pa—Commonwealth v Rhoads, 20 Pa Dist 149

Operation of places of public entertainment

Pa—Commonwealth v Rhoads, supra
29 C J p 1159 note 19

66. Ind—State v Dorsey, 20 N E 777, 118 Ind 167, 10 Am S R 111
29 C J p 1159 note 46

67. U S—U S v Knowles, D C Cal, 26 F Cas No 15,540 4 Sawy 517
29 C J p 1159 note 47

68 N H—State v Greenleaf, 54 A 38, 71 N H 606

69. Ala—Duncan v State, 6 So 2d 450, 30 Ala App 356, certiorari denied 6 So 2d 454, 242 Ala 329—Sawyer v State, 103 So 309, 20 Ala App 504
29 C J p 1160 note 75

70. Fla—Reynolds v State, 14 So 723, 33 Fla 301

Aggravated manslaughter

There is no such crime as aggravated manslaughter in Florida—Norris v State, 145 So 761, 108 Fla 191

71. Ala—Pratt v State, 171 So 393, 27 Ala App 301—Savage v State, 100 So 919, 20 Ala App 97
29 C J p 1161 note 81

Malice is not essential ingredient to manslaughter in the first degree—Hill v State, 166 So 60, 27 Ala App 55, certiorari denied 166 So 64, 231 Ala 539

Person entering combat, intending ordinary battery, without weapon, if death ensues, and acts were unlawful, is guilty of manslaughter in the first degree—Diamond v State, 123 So 55, 219 Ala 674

72. Ala—Barnett v State, 171 So 293, 27 Ala App 277, certiorari denied 171 So 296, 233 Ala 182—Reynolds v State, 134 So 815, 24 Ala App 249, certiorari denied 134 So 817, 223 Ala 130
29 C J p 1161 note 79

73. Ala—Reynolds v State, supra—Childs v State 109 So 560, 21 Ala App 528
29 C J p 1161 note 79

Unlawful force

An actual intent to take life is not essential of "manslaughter in first degree," and voluntary setting in motion or application of unlawful force, whereby death ensued, suffices to supply legal element of evil intent, however free the action may have been from actual purpose to kill—Smith v State, 11 So 2d 471, 243 Ala 254—Thomas v State, Ala App, 9 So 2d 150

74. Ala—Willis v State, 197 So 62, 29 Ala App 365, certiorari denied 197 So 67, 240 Ala 52

Simple negligence is not sufficient to sustain a charge of manslaughter in the first degree—Willis v State, supra

What constitutes wanton negligence

(1) To constitute "wanton negligence," so that homicide resulting therefrom is first degree manslaughter, there must be a design, purpose or intent to do wrong, or reckless indifference to or disregard of, the natural or probable consequences of the act done—Willis v State, supra—Barnett v State, 171 So 293, 27 Ala App 277, certiorari denied 171 So 296, 233 Ala 182

(2) Act which would constitute wanton negligence must be done with consciousness that injury will probably result, and such knowledge cannot be implied merely from knowledge of dangerous situation—Barnett v State, supra

75. Ala—Oliver v State, 17 Ala 587

Deceased firing first shot

Evidence that deceased cursed accused, drew pistol, and fired at accused, before accused fired if believed, would authorize conviction for manslaughter in the first degree—Roberson v State, 117 So 412, 217 Ala 696

76. Ala—Thayer v State, 35 So 406, 138 Ala 39
29 C J p 1161 note 80

Use of deadly weapon

(1) Where the blow which produced death was with a deadly weapon intentionally aimed at the person slain, the homicide, if not excusable, constitutes at least manslaughter in the first degree—Smith v. State, 11 So 2d 471, 243 Ala 254—Thomas v State, Ala App, 9 So 2d 150—Lovelady v. State, 136 So 871,

Absence of design to effect death. Under some statutes to that effect, it is manslaughter in the first degree where a killing was without design to effect death and was caused by the act, procurement, or culpable negligence of another, while such other was engaged in the perpetration or attempt to perpetrate a crime not amounting to a felony in cases where such killing would have been murder at common law.[77] The crime or misdemeanor, to bring the offense within this statute, need not necessarily have been independent of and separate from the killing,[78] although the contrary view has been taken in some jurisdictions that the commission of the misdemeanor which accused was perpetrating or attempting to perpetrate must have been one which is not a part or an ingredient of the offense charged,[79] and under this view, accused must have been engaged in the commission of some offense other than violence on the person killed.[80] Where the killing was intentional, it cannot be manslaughter under this provision.[81]

Under various provisions to that effect, manslaughter in the first degree has been held to include homicide without a design to effect death, where it has been committed by a person who had been engaged in committing or attempting to commit a misdemeanor affecting the person or property either of the person killed or of another,[82] or who had been engaged in the commission of any offense,[83] or who had been bearing a deadly weapon either open or concealed,[84] or by a person in the heat of passion by means of a dangerous weapon or in a cruel or unusual manner.[85]

Statutes expressly relating to abortion. Under some statutes specifically so providing, the killing of an unborn quick child,[86] or the killing of the child or mother in an attempted abortion,[87] is, except where necessary to preserve the life of the mother, manslaughter in the first degree. To constitute a defense under such a statute, it is not necessary that the danger of death to the mother be immediate.[88]

§ 66. Second Degree

What constitutes manslaughter in the second degree depends on the statutory definition.

Under a statute making manslaughter by voluntarily depriving a human being of life manslaughter in the first degree, and manslaughter committed under any other circumstances manslaughter in the second degree, manslaughter in the second degree, commonly called "involuntary manslaughter,"[89] is committed where there is an unlawful killing without malice or intent to kill,[90] resulting from an unlawful act,[91] or, according to the judicial decisions

24 Ala App 502—Rice v State, 101 So 82, 20 Ala App 102
29 C J p 1161 note 80 [a]

(2) Fatal shooting into automobile refusing to stop could not be less than manslaughter in first degree, where officer was without warrant and did not make himself known—Jackson v State, 114 So 68, 22 Ala App 133 certiorari denied 114 So 69, 216 Ala 564

77. Wis—Maxon v State, 187 N W 753, 177 Wis 319, 21 A L R 1184
29 C J p 1161 note 83

78. Kan—State v Bassnett, 102 P 161, 80 Kan 392
29 C J p 1161 note 84

79. Mo—State v Downs, 3 S W 219, 91 Mo 19

80. Mo—State v Downs, supra—State v Sloan, 47 Mo 604

81. Wis—Anderson v State, 114 N W 112, 133 Wis 601
29 C J p 1161 note 87

82. N Y—People v Koerber, 155 N E 79, 244 N Y 147
29 C J. p 1161 note 88

Construction of statute

Under statute whereby one causing death of another while engaged in commission of misdemeanor "affecting the person or property, either of the person killed, or of another," is guilty of manslaughter in the first degree, quoted words must be given reasonable meaning and one in harmony with other provisions of Penal Law—People v Grieco, 193 N E 634, 266 N Y 48, reversing 270 N Y S 1020, 241 App Div 790, motion denied 193 N E 292, 265 N Y 505

Liability for nuisance

To sustain an indictment for manslaughter from the collapse of a building under construction, on the theory that the building constituted a nuisance, which is made a misdemeanor by statute, it must be shown that defendants intended that it should be constructed in a manner which proved to be improper, that they knew or ought to have known that such manner of construction was improper, and that such improper construction caused the injury—People v Gaydica, 203 N Y S 243, 122 Misc 31

Intention to kill unnecessary

Okl Hodges v State, 85 P 2d 443, 65 Okl Cr 277, modified on other grounds 92 P 2d 590, 66 Okl Cr 422

83. N H—State v Rheaume, 116 A 758, 80 N H 319

84. N H—State v Rheaume, supra

85. Minn—State v Towers, 118 N W 361, 106 Minn 105
29 C J p 1161 note 90

86. N Y—Evans v People, 49 N Y 86
29 C J. p 1162 note 92.

Unborn child as subject of homicide generally see supra § 2

87. Kan—State v Harris, 136 P 264, 90 Kan 807, 49 L R A,N S, 580
29 C J p 1162 note 93

88. Minn—State v Hatch, 164 N W 1017, 138 Minn 317

89. Ala—Duncan v State, 6 So 2d 450, 30 Ala App 356, certiorari denied 6 So 2d 451, 242 Ala 329—Sawyer v State, 103 So 309, 20 Ala App 504

90. Ala—Crump v State, 191 So 475, 29 Ala App 22 certiorari denied 191 So 478, 238 Ala 439—Jeffries v State, 126 So 177, 23 Ala App 401

Malice and specific intent to kill are not essential—Jones v State, 109 So 189, 21 Ala App 234—McClanahan v State, 103 So 717, 20 Ala App 553—Sawyer v State, 103 So 309, 20 Ala App 504—Estes v State, 93 So 217, 18 Ala App 606

Without intent to kill or inflict fatal injury

Ala—Jones v State, 109 So 189, 21 Ala App 234

91. Ala—Crump v. State 191 So 475, 29 Ala App 22, certiorari denied 191 So 478, 238 Ala 439—Rombokas v State, 170 So 780, 27 Ala App 227, certiorari denied 170 So 782, 233 Ala. 214—Karasek v State, 168 So 454, 27 Ala.App. 180—Bag-

on the subject, which comes to the same thing,[92] from a lawful act performed in an unlawful manner.[93] The offense is also committed where death resulted from a wrongful blow intentionally given, but without malice or intent to kill.[94] Negligence is not necessarily a constituent element of manslaughter in the second degree.[95] The triviality of the act being performed or of the degree of dereliction in the manner of performance have been held to be immaterial.[96]

Under various provisions to that effect, manslaughter in the second degree has been held to include a homicide where it was committed without a design to effect death, in a heat of passion, and in a cruel or unusual manner,[97] or where it was caused while committing or attempting to commit a trespass or other invasion of a private right, either of the person killed or of another, not amounting to a crime,[98] or where it was committed by any act, procurement, or culpable negligence not constituting murder or manslaughter in the first degree,[99] or in

well v State, 117 So 906, 22 Ala App 567—Hammell v State, 111 So 191, 21 Ala App 633—Jones v State, 109 So 189, 21 Ala App 234—Sawyer v State, 103 So 309, 20 Ala App 504—Pippin v State, 97 So 615, 19 Ala App 384—Estes v State, 93 So 217, 18 Ala App 606—Anderson v State, 93 So 68, 18 Ala App 129

29 C J p 1162 note 96 [a]

92. Ala—Crump v State, 191 So 475, 29 Ala App 22, certiorari denied 191 So 478, 238 Ala 439—Karasek v State, 168 So 454, 27 Ala App 180

93. Ala—Crump v State, 191 So 475, 29 Ala App 22, certiorari denied 191 So 478, 238 Ala 439—Karasek v State, 168 So 454, 27 Ala App 180—Pippin v State, 97 So 615, 19 Ala App 384—Estes v State, 93 So 217, 18 Ala App 606

Grossly negligent or improper manner

Ala—Jones v State, 109 So 189, 21 Ala App 234

94. Ala—Gore v State, 114 So 791, 22 Ala App 136, certiorari denied Ex parte State ex rel Attorney General, 114 So 791, 217 Ala 68—Sawyer v State, 103 So 309, 20 Ala App 504

Contributing cause

If blow struck by accused was a contributing cause of decedent's death and there was a tendency in the evidence to establish that it was perpetrated wrongfully but without malice or intention to kill accused could be convicted of manslaughter in the second degree—Duncan v State, 6 So 2d 450, 30 Ala App 356, certiorari denied 6 So 2d 454, 242 Ala 329

Deadly weapon

Where the blow which produced death was with a deadly weapon intentionally aimed at person slain the homicide is greater than "manslaughter in second degree"—Smith v State, 11 So 2d 171, 243 Ala 254—Thomas v State, Ala App, 9 So 2d 150

95. Ala—Benjamin v State, 25 So 917, 121 Ala 26

It is immaterial that accused did not actually know that his act would result in a homicide, or that after the act was done or while in progress accused used ordinary care to prevent the taking of human life—Estes v State, 93 So 217, 18 Ala App 606

Accident

In homicide prosecution, refusal of instruction to acquit, if death was result of mere accident was proper as such death might be manslaughter in second degree—Jones v State, 109 So 189, 21 Ala App 234

96. Ala—Crump v State 191 So 475, 29 Ala App 22 certiorari denied 191 So 478, 238 Ala 439—Karasek v State, 168 So 454, 27 Ala App 180

97. Mo—State v Canton, 222 S W 448

29 C J p 1162 note 98

Intentional killing cannot be manslaughter under this provision—State v Edwards, 70 Mo 480

"Heat of passion"

The words "heat of passion," as used in statute defining manslaughter in the second degree mean any intense and vehement emotional excitement of the kind prompting to violent and aggressive action, as rage anger hatred furious resentment, or terror—State v Linville, 79 P 2d 869, 148 Kan 142

98. N Y—People v Koerber, 155 N E 79, 244 N Y 147

29 C J p 1162 note 1

99. N Y—People v Gaydica, 203 N Y S 243, 122 Misc 31

29 C J p 1162 note 2

What constitutes culpable negligence

(1) Culpable negligence is the omission to do something which a reasonable and prudent person would do, or the doing of something which such a person would not do under the circumstances surrounding the particular case—Wilson v State, 105 P 2d 789, 70 Okl Cr 262—Freeman v State, 101 P 2d 653, 69 Okl Cr 164—Philby v State, 76 P 2d 412, 64 Okl Cr 1—Nail v State, 242 P 270, 33 Okl Cr 100

(2) It is something more than the slight negligence necessary to support a civil action for damages.

N Y—People v. Angelo, 221 N Y S 47, 219 App Div 646, reversing 214 N Y S 499, 126 Misc 448, and affirmed 159 N E 394, 246 N Y 451

Okl—Freeman v State, supra

(3) The test of "culpability" is whether acts charged as criminal show a degree of carelessness amounting to a culpable disregard of rights and safety of others, and whether such acts caused the death of deceased—Wilson v State, 105 P 2d 789, 70 Okl Cr 262

(4) It has also been held that culpable negligence requires conduct from which jury may reasonably infer mens rea, and that to constitute "culpable negligence" jury must find that accused intentionally did or omitted something that he should not have done or omitted and consciously realized that his conduct would in all probability produce the result actually produced—State v Bates, 271 N W 765, 65 S D 105

(5) Culpable negligence as basis of involuntary manslaughter generally see supra § 62

Negligent act constituting misdemeanor

That a negligent act, if a misdemeanor, may render one guilty of manslaughter in first degree if death resulted therefrom does not prevent it from being the basis of prosecution for manslaughter in the second degree—State v Donevan, 206 N W 927, 49 S D 192

Intent to kill is not an element

Okl—Wilson v State, 105 P 2d 789, 70 Okl Cr 262

Exercise of judgment by a contractor as to the proper method of constructing a building, which collapsed, was held not a proper basis for an indictment for manslaughter, even against the contractor who exercised the judgment—People v Gaydica, 203 N Y S 243, 122 Misc 31

Selection of contractor

Even if it is the duty of an employer to select a competent contractor to construct a building, a violation thereof is not shown by proving that the party selected has not been in business for any great length of time, and that a catastrophe has re-

the heat of passion but not by a dangerous weapon or by the use of means either cruel or unusual,[1] or where it has been unnecessarily committed while resisting an attempt by deceased to commit any felony, or to do any other unlawful act, or after such attempt has failed.[2] Under a statute so providing, a person who, by negligence or misconduct in a business in which he is engaged or in the use of any machinery or property intrusted to his care, occasioned the death of a human being, is guilty of manslaughter in the second degree.[3]

Statutes expressly relating to abortion Under some statutes it is manslaughter in the second degree to cause the death of a woman or a quick child of which she may be pregnant in an attempt to produce an unnecessary abortion.[4]

Homicide resulting from spring gun Under a statute specifically so providing, where death resulted from the placing of a spring gun, it is manslaughter in the second degree.[5]

§ 67. Third and Lesser Degrees

What constitutes manslaughter in the third and lesser degrees depends on the statutes

Under statutes to that effect, a homicide committed in the absence of justification or excuse in the heat of passion and without design to effect death, and by a dangerous weapon, is manslaughter in the third degree.[6] To come within this provision of the statutes, the killing must not have been intentional or with a design to effect death,[7] and must have been in the heat of passion.[8] Under other statutes it is manslaughter in the third degree where the homicide was involuntarily committed by the act or culpable negligence of another while engaged in committing or attempting a trespass or other injury to private rights or property.[9]

Fourth degree Under a statute so providing, it is manslaughter in the fourth degree, which is a felony,[10] where the killing was involuntary, in the heat of passion, in cases other than such as are justifiable or excusable.[11] Such a statute applies only to a killing which was unintentional,[12] and in the heat of passion,[13] and the involuntary killing must have been without a cruel or unusual weapon, and without any cruel or unusual means.[14] Under other provisions, to that effect, manslaughter in the fourth degree includes every other killing of a human being by the act, procurement, or culpable negligence of another which would be manslaughter at common law and which is not justifiable or excusable or elsewhere declared to be manslaughter in some other degree.[15] Such a provision is held to

sulted in the course of the work that he has undertaken.—People v. Gaydica, supra

1. N.Y.—People v. Sharkey, 84 N.Y.S. 780, 87 App.Div. 532 affirmed 70 N.E. 1104, 178 N.Y. 584

2. Wis.—Fertig v. State, 75 N.W. 960, 100 Wis. 301
29 C.J. p. 1162 note 4

Offense not limited to voluntary homicide
Kan.—State v. Gordon, 101 P.2d 888, 151 Kan. 932

3. N.Y.—People v. Smith, 105 N.Y.S. 1082, 56 Misc. 1.

4. Wis.—Foster v. State, 196 N.W. 233, 182 Wis. 298
29 C.J. p. 1163 note 7.
Unborn child as subject of homicide generally see supra § 2.

Fetus not yet quick
(1) If mother's death resulted from illegal abortion, offense is manslaughter in second degree regardless of whether fetus has quickened.—State v. Walters, 225 N.W. 167, 199 Wis. 68.

(2) There can be no prosecution for the death of the child unless it has quickened.—State v. Walters, supra—Foster v. State, 196 N.W. 233, 234, 182 Wis. 298.

(3) The reason for the rule is that "if pregnancy has not advanced sufficiently so that there is a living child—that is, a quick child—then felonious destruction of the fetus constitutes a criminal miscarriage only."—Foster v. State, supra

5. Wis.—Schmidt v. State, 149 N.W. 388, 159 Wis. 15, Ann.Cas.1916E 107

6. Mo.—State v. Lane, 59 S.W. 965, 158 Mo. 572
29 C.J. p. 1163 note 8

7. Mo.—State v. Miller, 175 S.W. 187, 261 Mo. 395
29 C.J. p. 1163 note 9

8. Wis.—Carlone v. State, 136 N.W. 153, 150 Wis. 38
29 C.J. p. 1163 note 10

Heat of passion, provocation
(1) To constitute heat of passion there must be "such mental disturbance caused by a reasonable, adequate provocation as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason, make him incapable of forming and executing that distinct intent to take human life essential to murder in the first degree, and to cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart or cruelty or recklessness of disposition."—Devroy v. State, 1 N.W.2d 875, 877, 239 Wis. 466—Balthazor v. State, 240 N.W. 776, 780, 207 Wis. 172—Johnson v. State, 108 N.W. 55, 60, 129 Wis. 146, 5 L.R.A.,N.S., 809, 9 Ann.Cas. 923.

(2) It has been held that mere words may be sufficient provocation.—Wilson v. People, 4 Park.Cr.,N.Y. 619.

9. Kan.—State v. Nash, 64 P. 1025, 63 Kan. 879

10. Even though sentenced to county jail
Kan.—State v. Bowser, 129 P.2d 268, 155 Kan. 723

11. Kan.—State v. Knoll, 77 P. 580, 69 Kan. 767
29 C.J. p. 1163 note 12

12. Wis.—Johnson v. State, 108 N.W. 55, 129 Wis. 146, 5 L.R.A.,N.S., 809, 9 Ann.Cas. 923
29 C.J. p. 1164 note 14

13. Mo.—State v. Hostetter, 222 S.W. 750
Wis.—Perugi v. State, 80 N.W. 593, 101 Wis. 230, 76 Am.St.R. 865

14. Kan.—State v. Bloom, 136 P. 951, 91 Kan. 156
29 C.J. p. 1164 note 15

15. Kan.—State v. Schwenk, 167 P. 743, 101 Kan. 408
29 C.J. p. 1164 note 16

Common law at date of statute
To constitute manslaughter, fourth degree, offense must have constituted manslaughter at common law when

comprehend that which was voluntary manslaughter at common law,[16] as, for example, a killing in a sudden heat of passion aroused by adequate provocation,[17] or the unintentional killing of a person through the negligent handling of a firearm in a way indicating reckless disregard of human life[18] It also includes that which was involuntary manslaughter at common law, such as death which resulted from conduct which was made unlawful by a statute enacted for the express purpose of protecting life and limb[19]

While it has been held that culpable negligence within the meaning of this provision of the statutes does not require the existence of gross negligence in the sense of a willful intent to injure or such a reckless disregard of the rights of others or the consequences as the law deems equivalent to an intent to injure,[20] there is also authority to the contrary.[21] Moreover, under a statute making the unjustifiable killing of another resulting from gross negligence manslaughter in the fourth degree, the negligence required is gross negligence and not mere want of ordinary care.[22]

IV. ATTEMPTS, SOLICITATIONS, AND THREATS

§ 68. Attempts

a In general
b Elements of attempt

a. In General

Except as the rule is modified by statute, generally an attempt to commit murder is a misdemeanor

In accordance with the common-law doctrine with respect to attempts generally, considered in Criminal Law § 74, an attempt to commit murder is a misdemeanor at common law,[23] however, by statute in some jurisdictions, such an attempt is raised to the grade of felony[24] A general attempt statute is applicable to an attempt to commit murder,[25] unless a specific statute is controlling[26]

b. Elements of Attempt

An attempt to commit murder consists of a specific intent to kill accompanied by a sufficient overt act tending to effectuate such intent, and there must be at least an apparent ability to commit the crime.

To constitute an attempt to murder, there must be a specific intent to kill[27] and some overt act in part execution of the intent to commit the crime[28] The attempt must have been made with such intent or under such circumstances that, if consummated, the homicide would have been murder, or murder of the particular degree charged to have been attempted[29] The existence of the intent may be inferred from

statute first appeared in state's criminal law—State v Custer, 282 P 1071, 129 Kan 381, 67 A L R 909

18. Mo—State v Wilson, 147 S W 95, 242 Mo 481
29 C J p 1164 note 17

17. Mo—State v Connor, 252 S W 71
29 C J p 1161 note 18

18. Mo—State v Grote, 19 S W 93, 109 Mo 345
29 C J p 1161 note 19

19. Kan—State v Custer, 282 P 1071, 129 Kan 381, 67 A L R 909

20 Mo—State v Horner, 180 S W 873, 266 Mo 109

21 **"Reckless conduct"**
To constitute manslaughter at common law when death resulted from negligent conduct in doing lawful act, conduct must have been reckless, that is, the conduct must evince disregard of consequences under circumstances involving danger to life or safety—State v Custer, 282 P 1071, 129 Kan 381, 67 A L R 909

22. **In Wisconsin**
( ) The rule stated in the text prevails—State v Whatley, 245 N W 95, 210 Wis 157, 99 A L R 749

(-) "Gross negligence," as used in statute requiring gross negligence in order to convict one of manslaughter in fourth degree, is not mere inadvertence in any degree, and, in order for "gross negligence" to exist, there must be present either willful intent to injure or that wanton and reckless disregard of rights of others and consequences of act to the actor as well as to others which the law deems equivalent to an intent to injure—Bussard v State, 288 N W 187, 233 Wis 11

(3) Prior to the amendment of the statute by the substitution of the word "gross" for the word "culpable," it was held that the existence of gross negligence was not required—Njecuk v State, 189 N W 147, 178 Wis 94
29 C J p 1165 note 20 [a]

23. Miss—Saunders v State, 114 So 747, 148 Miss 685
30 C J p 12 note 2

24. U S—U S ex rel Di Stefano v. Moore D C N Y 16 F 2d 308, affirmed, C C A, 16 F 2d 310, certiorari denied U S ex rel Di Stefano v Pulver 51 S Ct 364, 283 U S 830, 75 L Ed 1443
Miss—Saunders v State, 114 So 747, 148 Miss 685
30 C J p 12 note 4

25. U S—U S ex rel. Di Stefano v. Moore, D C N Y, 46 F 2d 308, affirmed, C C A, 46 F 2d 310, certiorari denied U S ex rel Di Stefano v Pulver, 51 S Ct 364, 283 U S 830, 75 L Ed 1443

26 Okl—Minter v State, Cr, 129 P 2d 210

27. Cal—People v Snyder, 104 P 2d 639, 15 Cal 2d 706, prior opinion, App, 96 P 2d 986—People v Miller, 42 P 2d 308, 2 Cal 2d 527 98 A L R 913
Mo—State v Lourie, 12 S W 2d 43—State v Davis, 6 S W 2d 609, 319 Mo 1222
Va—Merritt v Commonwealth, 180 S E 395, 164 Va 653
30 C J p 13 note 6
Elements of attempts generally see Criminal Law § 75

28. Cal—People v Miller, 42 P 2d 308, 2 Cal 2d 308
Mo—State v Lourie, 12 S W 2d 43—State v Davis, 6 S W 2d 609, 319 Mo 1222
Va—Lee v Commonwealth, 131 S E 212, 144 Va 594
30 C J p 13 note 10

29. Miss—Norwood v State, 183 So 523, 182 Miss 898
Va—Lee v Commonwealth, 131 S E 212, 144 Va 594
30 C J p 13 note 7.

the surrounding circumstances,[30] as from the deliberate and intentional use of a deadly weapon in the absence of circumstances negativing such intent,[31] or where one intends to kill a certain person and by mistake or inadvertence assaults or kills another person in his stead.[32]

No definite rule, applicable to all cases, can be laid down as to what constitutes an overt act tending to accomplish a murder.[33] Any act such as in the natural course of events will apparently result, if not hindered by extraneous causes, in the consummation of the murder, is sufficient.[34] Something more is required than mere menaces,[35] preparation, or planning.[36]

To constitute an attempt to murder, there must be an apparent ability to commit the intended crime,[37] and if the means used are so clearly unsuitable that it is obvious that murder cannot be committed there is no indictable attempt.[38] If there is an apparent ability to commit the murder, the attempt is indictable, although, by reason of some fact unknown to accused, the murder could not be accomplished.[39]

Distinguished from assault with intent to murder. It has been stated that there is very little substantial difference between an assault with intent to murder and an attempt to murder.[40]

§ 69. Frustrated Homicide

a. In general
b. Intent

a. In General

Under Philippine law there is a distinction between frustrated murder and attempted murder.

Under the Philippine statutes a distinction is drawn between a frustrated murder and attempted murder, the murder being regarded as frustrated where the offender performs all of the acts of execution which should precede the felony as a consequence but they nevertheless do not produce it by reason of causes independent of the will of the perpetrator,[41] while an attempt is where the offender commences the commission of the felony directly by overt acts and does not perform all of the

30 Cal.—People v. Rothrock, 68 P. 2d 364, 21 Cal. App. 2d 116.

Presumption insufficient

Where crime requires proof of specific intent to kill, such intent, like any other fact or essential of the crime, must be proved by evidence or inferences reasonably deducible therefrom and may not be based on a presumption.—People v. Snyder, 104 P. 2d 639, 15 Cal. 2d 706, superseding, App., 96 P. 2d 986.—People v. Miller, 42 P. 2d 308, 2 Cal. 2d 527, 98 A.L.R. 913.

31. Wis.—Jambor v. State, 44 N.W. 963, 75 Wis. 664.
30 C.J. p. 13 note 8.
Use of deadly weapon as raising inference or presumption of malice generally see supra § 25.

Intent not inferred

However, it has been held that an assault with loaded pistol must be committed with a specific intent to take life in order to elevate assault into an "attempt to commit murder," since evil intent cannot be drawn from an act, and then used to enhance the evil of the act.—Merritt v. Commonwealth, 180 S.E. 395, 164 Va. 653.

32. Cal.—People v. Rothrock, 68 P. 2d 364, 21 Cal. App. 2d 116.
30 C.J. p. 13 note 9.
Intent to kill one person and killing another as murder see supra § 18.

33. Va.—Hicks v. Commonwealth, 9 S.E. 1024, 86 Va. 223, 19 Am. S.R. 891.

34. Ala.—Johnson v. State, 55 So. 321, 1 Ala. App. 102.
30 C.J. p. 13 note 12.

Actual firing of gun was not under the evidence necessary to complete offense of attempt to murder.—Lee v. Commonwealth, 131 S.E. 212, 144 Va. 594.

35 Cal.—People v. Miller, 42 P. 2d 308, 309, 2 Cal. 2d 527, quoting **Corpus Juris**.
30 C.J. p. 13 note 14.

36. Mont.—State v. Rains, 164 P. 510, 53 Mont. 424.
30 C.J. p. 13 note 15.
Solicitation as an attempt see infra § 70.

Attempt and preparation distinguished

"The preparation consists in devising or arranging the means or measures necessary for the commission of the offense, the attempt is the direct movement toward the commission after the preparations are made."
Cal.—People v. Miller, 42 P. 2d 308, 2 Cal. 2d 527.—People v. Murray, 14 Cal. 159.
Mo.—State v. Davis, 6 S.W. 2d 609, 319 Mo. 1222.

Mere hiring for the purpose of committing a murder held not an act involving consummation of crime of attempt to commit murder.—State v. Lourie, Mo., 12 S.W. 2d 43.—State v. Davis, 6 S.W. 2d 609, 319 Mo. 1222.

Poison

(1) Where poison is the agent used to cause another's death, the offense is not complete where it is not actually taken by any person.—Minter v. State, Okl. Cr., 129 P. 2d 210.

(2) Other cases see 30 C.J. p. 13 note 15 [b].

(3) Administering poison as an assault with intent to murder see infra § 75.

37. Miss.—Stokes v. State, 46 So. 627, 92 Miss. 415, 21 L.R.A.,N.S., 898.
30 C.J. p. 13 note 18.

38. Ala.—State v. Clarissa, 11 Ala. 57.
30 C.J. p. 13 note 18.

39 Mo.—State v. Mitchell, 71 S.W. 175, 170 Mo. 633, 94 Am. S.R. 763.
30 C.J. p. 14 note 20.
Inability to commit intended crime generally see Criminal Law § 77.

40. Ga.—Wright v. State, 118 S.E. 731, 168 Ga. 690, conformed to 140 S.E. 153, 40 Ga. App. 118.
Elements of assault with intent to commit murder see infra §§ 73–80.

Basis for distinction

"The distinction . . . is that in the attempt statute any attempt by overt act to do an act that would, if completed, amount to murder, regardless of the specific intent to kill a specific person, is made out by doing such act as, if consummated, would amount to murder, [whereas assault] with specific intent to kill and murder a specified person is made out only by proof sufficient to find that the specific intent to kill existed."—Norwood v. State, 183 So. 523, 524, 182 Miss. 898.

41. Philippine.—People v. Mabug at, 51 Philippine 967.
30 C.J. p. 14 note 21.

acts of execution which constitute the felony by reason of some cause or accident other than his own voluntary desistance.[42] One who unlawfully discharges a firearm at another under circumstances such that the act cannot be held to constitute a frustrated crime of parricide, murder, or homicide, or an attempt to commit any one of these crimes, may be convicted of "disparo de armas de guego" (discharge at another of a firearm).[43]

b. Intent

An intent to kill is an essential element of frustrated homicide, and the existence of such intent may be determined from the circumstances

To constitute frustrated homicide there must be an intent on the part of the assailant to take the life of the person attacked,[44] which intent may be gathered from the circumstances surrounding the attack[45] or may be disproved by such circumstances.[46]

§ 70. Solicitation

Although mere solicitation of another to commit murder is a misdemeanor, the weight of authority is that it is insufficient as an overt act to constitute an attempt to murder

According to the weight of authority merely to solicit another to commit murder is not a sufficient overt act to constitute an attempt to murder,[47] although it is indictable as a distinct crime.[48] Both at common law[49] and under statute declaratory thereof,[50] soliciting another to commit murder is a misdemeanor.

§ 71. Threats

a In general
b Against president of the United States

a. In General

By statute in some jurisdictions, a threat to kill is a crime, however, it must be made with intent to carry it out and it is insufficient if it is made merely rashly or inconsiderably.

Under the statutes in some jurisdictions, a threat to take the life of another is made a distinct and specific offense.[51] To convict one of threatening the life of another it is necessary that the threat be made with an intent to carry it out,[52] and it has been stated that a rash or inconsiderate threat is insufficient to support a conviction.[53]

b. Against President of the United States

Subject to some qualifications, it is a federal offense knowingly and willfully to threaten to take the life of the president of the United States. The threat may be oral or written and need not be made in the presence of the president or communicated to him

Under a federal statute to that effect, it is made a specific offense knowingly and willfully to threaten to take the life of, or inflict bodily harm on, the president of the United States.[54] However, the statute includes only threats against the president in his public character and capacity.[55] It is not necessary that the threat be made in the presence of the president or communicated to him,[56] or that it should have been of such nature or extent as, in any degree, to disturb or unsettle his mind or deprive him of his free and voluntary action,[57] nor need the threat be communicated as a command to any-

42. Philippine—U S v Eduave, 36 Philippine 209
30 C J p 14 note 22

43. Philippine—U S v Worthington, 27 Philippine 512
30 C J p 11 note 23

44. Philippine—U S v Mendoza, 38 Philippine 691
30 C J p 11 note 24.

45. Philippine—People v Mabug-at, 51 Philippine 967
30 C J p 11 note 25

46. Philippine—U S v Redion, 4 Philippine 500—U S v Taguibao, 1 Philippine 16

47. Mo—State v Lourie, 12 S W 2d 43
30 C J p 11 note 28
Solicitation as an attempt generally see Criminal Law § 73
Solicitation generally see Criminal Law § 78

Payment to party accused solicited to commit murder was not "overt act" tantamount to an attempt—State v Davis, 6 S W 2d 609, 319 Mo 1222

48. Mo—State v Lourie, 12 S W 2d 43
16 C J p 118 note 66 [a]

49. Pa—Commonwealth v Randolph, 23 A 388, 146 Pa 83, 28 Am S R 782
30 C J p 14 note 29

50. N J—State v Quinlan, 91 A 111, 86 N J Law 120
30 C J p 11 note 30

51. Kan—State v Lanam, 36 P 2d 966, 140 Kan 434
30 C J p 15 note 31

Mode or means of threat

(1) No particular mode or means of threat to take life is required—Levy v State, 136 S W 2d 838, 138 Tex Cr 373

(2) Threat may be by written communication—People v Foligmos, 153 N E 373, 322 Ill 304

52. Tex—Strong v State, 255 S.W. 432, 95 Tex Cr 558—Wilkerson v State, Cr App, 30 S W 807

Threat must be seriously made
Tex—Brown v State, 154 S W 2d 161, 142 Tex Cr 405

53. Tex—Brown v State, supra—Lane v State 276 S W 712, 101 Tex Cr 593—Strong v State, 255 S W 432 95 Tex Cr 558

54. U S—U S v Reid, D C La 49 F Supp 313 affirmed, C C A, Reid v U S, 136 F 2d 476—U S v Apel D C Ill, 44 F Supp 592

55. U S—U S v Reid, D C La, 19 F Supp 313, affirmed, C C A, Reid v U S, 136 F 2d 476—U S v Metzdorf, D C Mont, 252 F 933

56. U S—U S v. Apel, D.C Ill, 44 F Supp 592
30 C J p 15 note 34

57. U S—U S v Stobo, D C Del, 251 F 689—U S v. Stickrath, D C Ohio, 242 F 151.

one obliged to act on it.[58] An oral,[59] as well as a written,[60] threat is within the meaning of the statute, and it need not be addressed or spoken to any person, if spoken in the hearing of any person or persons.[61]

A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him.[62] It is willfully made if, in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.[63] When the unlawful threat is knowingly and willfully made, the offense is complete[64] so that the existence of an intention to carry out the threat[65] or a subsequent abandonment of the bad intent with which the threat is made[66] is immaterial. Although idle talk or jesting will not constitute the crime,[67] accused cannot be regarded as having used his language only as a joke because of the fact that he may have had no intention to carry out his threat.[68]

The motive which prompts the utterance of the threat is immaterial.[69] To bring a case within the statute no evil purpose or malice is requisite other than an intention to give utterance to words which to accused's knowledge were in the form of, and would naturally be understood by the hearers as being, a threat.[70] A threat is not deprived of its quality as a threat by the fact that it is conditioned on a contingency which is possible.[71]

V. ASSAULT WITH INTENT TO MURDER OR KILL

§ 72. Assault with Intent to Murder

Particular matters and elements of an assault with intent to murder are discussed in detail in the sections immediately following.

Examine Pocket Parts for later cases.

§ 73. —— Definition and Nature of Offense

An assault with intent to murder is an unlawful attempt, committed willfully and maliciously, with intent to take the life of the party assaulted. It is a misdemeanor at common law, but by statutes in many jurisdictions it has been made a felony.

It has been stated that the elements constituting an assault with intent to murder, as discussed infra §§ 74–84, are an intentional attempt by violence with present or apparent ability, with malice and without legal excuse or provocation, to do an injury to the person of another, accompanied by facts and circumstances indicative of an intent to take life.[72] The crime of assault with intent to murder has been defined as an assault committed unlawfully, willfully, and maliciously, and with intent to take the life of the person assaulted.[73] While the ele-

58. U S—U S v Apel, D C Ill, 44 F Supp 592

59. U S—U S v Reid, D C La, 49 F Supp 313, affirmed, C C A, Reid v U S, 136 F 2d 476 U S v Stobo D C Del 251 F 785

60. D C—U S v Reid, D C La 49 F Supp 313 affirmed, C C A, Reid v U S, 136 F 2d 476

61 U S—U S v Stobo, D C Del, 251 F 689

62. U S—Ragansky v U S, Ill, 253 F 643, 165 C C A 269
30 C J p 15 note 38

63 U S—Ragansky v U S, supra

64. U S—U S v Stickrath, D C Ohio, 242 F 151

65. U S—U S v Reid, D C La, 49 F Supp 313 affirmed, C C A, Reid v U S, 136 F 2d 476

66. U S—U S v Stickrath, D C Ohio, 242 F 151

67. U S—U S v Reid, D C La, 49 F Supp 313, affirmed, C C A, Reid v U S, 136 F 2d 476

68 U S—Ragansky v U S, Ill, 253 F. 643, 165 C C A 269

69. U S—U S v Stickrath, D C Ohio, 242 F 151.

70. U S—U S v Stobo, D C Del, 251 F 689
30 C J p 15 note 43

71. U S—U S v Stobo, supra
30 C J p 15 note 45

72 Ala—Smith v State, 7 So 103, 88 Ala 23
30 C J p 16 note 51

Other statements

(1) Assault and specific intent to kill actuated by malice aforethought, must concur to constitute "assault with intent to murder"—Perez v State, 22 S W 2d 309, 114 Tex Cr 473

(2) It must appear that there was an unlawful assault with intent to kill, with malice, on the person of a human being, with a weapon likely to produce death in manner in which it was used at the time, and under such circumstances that, if death had resulted, accused would have been guilty of murder—Bond v State, Ga App, 21 S E 2d 866

(3) When one makes an assault on another with a deadly weapon, and has the intent to kill, and the killing, if death resulted, would be murder, the assailant, if death does not result, is guilty of the felony of assault with intent to murder—Martin v State, 113 S E 27, 28 Ga App 723

(4) Use of dangerous weapon capable of inflicting mortal wound and intent are necessary elements of "assault with dangerous weapon to murder"—People v Haskins, 169 N E. 18 337 Ill 131

73. Ala—Williams v State, 175 So 335, 27 Ala App 504

Other definitions

(1) An unlawful act of violent injury to the person of another accompanied by malice aforethought—State v Smith, 19 S E 2d 224, 199 S C 279

(2) Voluntary assault committed with deliberate design, and with instrument capable of producing death, where there are no extenuating circumstances, is assault with intent to murder"—Rose v State, 58 S W 2d 526, 123 Tex Cr 261

(3) Further definitions see 30 C J. p 16 note 51 [b]

"Unlawful" defined

'Unlawful" means without legal excuse or justification—Williams v. State, 175 So 335, 336, 27 Ala App. 504

"Willful" defined

(1) "'Willful' means that the accused must have been governed by his will as contra-distinguished from

ments of an assault may be involved in an attempt to commit murder, there is no such offense as an attempt to commit an assault with intent to murder [74]

Distinguished from assault with intent to kill. There is a well recognized distinction between an assault with intent to murder and an assault with intent to kill [75] Malice is a necessary element to constitute an assault with intent to murder but it is absent in an assault with intent to kill or commit manslaughter,[76] or, as it is said, the assault with intent to kill may be committed without malice [77] If malice is lacking and yet the assault is unlawful, the crime committed is of a lower degree than assault with intent to murder [78]

Grade of offense At common law, an assault with intent to commit murder is not a felony but is regarded as a serious or aggravated misdemeanor,[79] although anciently it appears to have been a felony [80] It has been held that the presence of the element of intent to kill raises the crime to the dignity of a felony [81] In many jurisdictions, it has been made a felony by statute,[82] although, under some statutory provisions, it remains a misdemeanor [83] Statutes changing the grade of the offense from that of a misdemeanor to that of a felony, however, do not change the common-law elements thereof [84]

§ 74. —— Attempt or Overt Act

An overt act in pursuance of an intent to murder is an essential element of an assault with intent to murder, and mere intent, preparation, or threat is insufficient

In addition to the requisite intent, as considered infra § 79, in order to constitute an assault with intent to murder, there must be an attempt[85] or an assault to carry out that intention [86] In other words, there must be an overt act in pursuance of the intent as distinguished from the mere intent itself,[87] and also from mere threats,[88] or mere preparations not going far enough to constitute an attempt [89] There must be a commencement of an act which, if not prevented, would produce a battery [90] On the other hand, there may be an assault where a dangerous weapon is presented in a threatening manner accompanied by a conditional threat,[91] unless in a case where the threat is conditioned on a demand which accused had a right to make [92] An overt act in execution of the requisite intent completes the offense [93] An assault may

a sudden or rash act" -Williams v State, supra

(2) "Willful" defined as used in criminal law generally see Criminal Law § 31 c

Distinguished from assault with intent to commit other felonies

Neb—Tasich v State, 194 N W 813, 110 Neb 709

Ohio—Foss v State, 173 N E 296, 36 Ohio App 417

74. Tex—White v State, 22 Tex 608

75. Mass—Commonwealth v Demboski, 186 N E 589, 283 Mass 315
30 C J p 28 note 77 [a]

76. Iowa—State v Crutcher, 1 N W 2d 195, 199, 231 Iowa 118, citing **Corpus Juris.**
Ky—Pack v Commonwealth, 140 S W 2d 626, 282 Ky 835
S C—State v Jones, 130 S E 747, 124 S C 167
30 C J p 28 note 71, p 28 note 77 [a]
Malice as essential element of assault with intent to murder see infra § 78

77. Fla—Fortner v State, 161 So 94, 96, 119 Fla 150, quoting **Corpus Juris.**
30 C J p 28 note 75

78. Ga—Bond v State, App, 21 S E 2d 80
Ky—Pack v Commonwealth, 140 S W 2d 626, 282 Ky 835

79. Ga—Wright v State, 148 S E 731, 168 Ga 690, conformed to 149 S E 153, 40 Ga App 118
Miss—Saunders v State, 114 So 747, 748, 148 Miss 685, citing **Corpus Juris**
30 C J p 16 note 54

80. Mass—Commonwealth v. Barlow 4 Mass 439

81. Miss—Norwood v State, 183 So 523, 182 Miss 898—Earl v State, 151 So 172, 168 Miss 124

82. Ga—Wright v State, 148 S E 731, 168 Ga 690, conformed to 149 S E 153, 40 Ga App 118—Martin v State, 113 S E 27, 28 Ga App 723
Ky—Pack v Commonwealth, 140 S W 2d 626, 282 Ky 835—Wilson v Commonwealth, 66 Ky 105
La—State v Jackson, 8 So 2d 285, 200 La 432
Mass—Commonwealth v Demboski, 186 N E 589, 283 Mass 315
Miss—Saunders v State, 114 So 747, 148 Miss 685
Mo—State v Wilson, 126 S W 996, 140 Mo App 726
30 C J p 16 note 56

83. N J—Jackson v State, 9 A 740, 49 N J Law 252

In North Carolina

The offense of assault with intent to commit murder is a felony except in those cases in which it is committed openly—State v Knotts, 83 S E 972, 168 N C 173—30 C J p 16 note 57 [a]

84. Ga—Wright v State, 148 S E 731, 168 Ga 690, conformed to 149 S E 153, 40 Ga App 118
30 C J p 16 note 58

85. Cal—People v Devine, 59 Cal 630
30 C J p 16 note 60

86. Tex—Eagle v State, 122 S W 2d 304, 135 Tex Cr 606—Hawkins v State, 29 S W 2d 384, 115 Tex Cr 163—Perez v State, 22 S W 2d 309, 114 Tex Cr 473
30 C J p 16 note 61

87. Miss—Norwood v State, 183 So. 523, 182 Miss 898
30 C J p 17 note 62

Some hostile demonstration is necessary

Mo—State v Lemon 263 S W 186

88. Mich—People v Lilley, 5 N W. 982, 43 Mich 521
N Y—Mulligan v People, 5 Park Cr 105

89. Ga—Burton v State, 34 S E 286, 109 Ga 134
30 C J p 17 note 64

90. Ala—Lawson v State, 30 Ala. 14
30 C J p 17 note 65

91. Ill—People v Bashic, 137 N E 809, 306 Ill 341
30 C J p 17 note 66

92. Miss—Hairston v State, 54 Miss 689, 28 Am R 392

93. Pa—Commonwealth v Berardino, 100 Pa Super 58, affirmed 153 A. 687, 302 Pa. 403

be complete, although accused is prevented from actually striking[94] or killing[95] by the intervention of an extrinsic agency, or although his weapon fails to fire,[96] or he does not discharge it.[97]

§ 75. —— Means Employed

Generally, except where required by statute, the use of a deadly or dangerous weapon is not an essential element of an assault with intent to murder The use of poison with an intent of causing the death of the victim may constitute the offense.

By the weight of authority it is not essential to an assault with intent to commit murder that a deadly or dangerous weapon shall have been employed,[98] unless the statute so requires,[99] nor need any weapon at all have been used[1] Thus trying to choke[2] or suffocate and drown[3] another, or the sending of a box containing explosives, which explodes when opened,[4] has been held to constitute an assault with intent to murder Also abandoning a newborn child to the elements,[5] or throwing a deformed and helpless person to the ground and leaving him there exposed to the inclemency of the weather,[6] may constitute the offense.

Poison Where poison is the agent employed with the intention of causing the death of another, the placing of it within reach of an intended victim does not complete the offense unless the poison is actually taken[7] Where, however, the poison is actually taken, it is not necessary that accused shall have manually administered it to the victim[8] Where poison is actually administered it has been held that it must be shown that it endangered life,[9] but, where it is shown that a dangerous poison was actually administered with the intent to take life, the offense is complete[10]

94. Mo—State v Tetrick, 97 S W 564, 199 Mo 100
30 C J p 17 note 68

95. Kan—State v Lanam, 36 P 2d 966, 140 Kan 434
30 C J p 17 note 69

96. Tex—Hanley v State, Cr, 47 S W 371
30 C J p 17 note 70

97. Wyo—Bryant v State, 40 P 518, 5 Wyo 376

98. Mo—State v Carpenter, 169 S W 2d 403—State v Clark, 111 S W 2d 100, 101, 341 Mo 1161, citing **Corpus Juris**—State v Lamb, 278 S W 1009
Tex—Butler v State, 100 S W 2d 707, 131 Tex Cr 543
30 C J p 17 note 74
Character of weapon as evidencing intent see infra § 79

Possibility of causing death

If it is possible that death might have been inflicted by the weapon used in committing an assault, and if accused intended thereby to take life by the use made thereof, the offense of "assault with intent to murder" was complete, notwithstanding the instrument used was not a deadly weapon—Ammann v State, Tex Cr, 165 S W 2d 744—Bailey v State, 58 S W 2d 834 123 Tex Cr 206—Rose v State, 58 S W 2d 526, 123 Tex Cr 261—Basquez v State, 26 S W 2d 206, 114 Tex Cr 602

Dangerous weapon as necessary element

However, it has been held that a necessary element of an assault with a dangerous weapon with intent to commit murder is the use of a dangerous weapon by which a mortal wound might be inflicted—People v Haskins, 169 N E. 18, 337 Ill 131

99. La—State v Curry, 140 So 180, 174 La 287
30 C J p 17 note 75
Use of deadly weapon in assault with intent to commit manslaughter see infra § 85

In Georgia

(1) Under a statute providing that "an assault with intent to murder, by using any weapon likely to produce death, shall be punished " the more recent cases in this jurisdiction hold that it must appear that the assault was made with a weapon likely to produce death in the manner in which it was used at the time – Kennedy v State, App, 24 S E 2d 321—Bond v State, App 21 S E 2d 866—Anderson v State, 176 S E 654, 51 Ga App 98—Griffin v State, 177 S E 511, 50 Ga App 213—Gazaway v State 129 S E 888, 34 Ga App 442

(2) However, there is authority in this jurisdiction holding that, even under this statute, the use of a weapon likely to produce death is not an essential element of the offense—Wright v State, 148 S E 731, 733 168 Ga 690, quoting **Corpus Juris**, and conformed to 149 S E 153, 40 Ga App 118

(3) The 'deadly weapon' required by the statute includes all means or instrumentalities by which assaults with intent to commit murder can be made—Wright v State 148 S E 731, 168 Ga 690, conformed to 149 S E 153, 40 Ga App 118

Weapons as used held dangerous or deadly

(1) Axe—Wilson v Commonwealth, 3 Bush, Ky, 105

(2) Metallic knucks—Perry v Commonwealth, 151 S W 2d 377, 286 Ky 587

Particular means held not deadly weapons

Hands and feet—McIntosh v Commonwealth, 120 S W 2d 1031, 275 Ky 126

1 Ga—Wright v State, 148 S E 731, 733, 168 Ga 690, quoting **Corpus Juris**, and conformed to 149 S E 153, 40 Ga App 118
30 C J p 17 note 76

Use of fists

Charge that, if accused used only his fists in difficulty, he could not be convicted of assault with intent to murder, was properly refused—Kirkland v State, 108 So 262, 21 Ala App 348

2. Mont—State v Sheerin, 31 P 543, 12 Mont 539, 33 Am S R 600
30 C J p 17 note 77

3. Conn—Southworth v. State, 5 Conn 325

4. Iowa—State v Hoot, 94 N W 564, 120 Iowa 238, 98 Am S R 372
30 C J p 17 note 79

5. Ala—Pallis v State, 26 So 339, 123 Ala 12, 82 Am S R 106
30 C J p 18 note 80

6. Ill—Nixon v People, 3 Ill 267, 35 Am D 107
30 C J p 18 note 81

7 Ga—Peebles v State, 28 S E 920, 101 Ga 585
30 C J p 18 note 84

8. N Y—La Beau v. People, 34 N. Y 223
30 C J p 18 note 85

9. N Y—People v. Burgess, 45 Hun 157

10. Miss—State v Stuart, 40 So. 1010, 88 Miss 406
30 C J p 18 note 87.

In Texas under the statute it was held that maliciously administering poison was not an assault with intent to murder, or an assault of any kind—Garnet v State, 1 Tex App. 605, 28 Am R. 425.

§ 76. —— Present Ability to Kill

Present ability to carry out the intent is an essential element of an assault with intent to murder, and under some authorities an apparent present ability is sufficient.

In order that there may be guilt of assault with intent to murder, the intent alone is not sufficient,[11] in the absence of either real or apparent ability to accomplish it[12] According to some authorities, accused must have had at the time of the act a present ability to carry out the intent[13]

The mere fact that an accused does not have the ability to kill does not necessarily show a lack of intent to murder[14] So that one may be guilty of assault with intent to murder, if he has such intent at the time, although the means selected and used in its attempted execution would not ordinarily accomplish the result intended, if accused is ignorant of such fact and thinks he is in fact employing means capable of executing the design[15] If, on the other hand, accused at the time has knowledge that the means which he employs are incapable of killing, it shows the absence of the requisite intent[16] Where an assault is made with a firearm within its carrying distance, the guilt of accused cannot be made to depend on whether the weapon was in fact capable of killing at the distance[17] All that is necessary in such a case is that the means are apparently adapted to the end[18]

Under a statute defining assault and making present ability to inflict injury an element thereof, it has been held that, in order that there may be guilt of assault with intent to murder, accused must at the time have had the ability to execute the intent[19] Under such a statute, it cannot be said that the ability to do the act threatened was wanting because the act was in some manner prevented,[20] nor, where accused was advancing with a weapon to strike, need he have come within striking distance[21]

§ 77. —— Extent of Injury

An actual striking or wounding of the person assaulted is not necessary to constitute an assault with intent to murder

The manner of an assault should not be confounded with its results[22] The extent of the injury received by the person assaulted does not necessarily determine accused's guilt of assault with intent to murder[23] Indeed it is not necessary that any bodily injury should have resulted where all the elements of murder were present had death ensued[24] Thus, where the intent to commit murder exists, to shoot at a man and miss him completes the offense[25]

§ 78. —— Malice

Generally, malice or malice aforethought is an essential element of an assault with intent to murder and may be express or implied Malice may be inferred from the surrounding circumstances, such as, among other facts, the use of a deadly weapon or the reckless disregard for human life

Malice or malice aforethought is an essential ingredient of assault with intent to murder[26] As in

11. Ala—Lawrence v State, 5 So 33, 84 Ala 424

12. Mich—People v Lilley, 5 N W 982, 43 Mich 521
30 C J p 18 note 90
Present ability as element of assault generally see Assault and Battery § 64

Within actual striking distance
(1) To constitute an assault with a pistol it is necessary that the person assaulted be within the carrying distance of the pistol—Ginn v State 79 S W 2d 327, 128 Tex Cr 109
(2) Other cases see 30 C J p 18 note 90 [a]

13. Ala—Marshall v State, 109 So 558, 21 Ala App 500
Ariz—State v Hanks, 118 P 2d 71, 58 Ariz 77
30 C J p 18 note 91
Necessity for indictment to allege ability to kill see infra § 172

14. Tex—Ammann v State, Cr, 165 S W 2d 744

15. S C—State v. Glover, 4 S E. 564, 27 S C 602
30 C.J. p 19 note 92.

16 Ala—Marshall v State, 109 So 558 21 Ala App 500
30 C J p 19 note 93

17. Colo—Warford v People, 96 P 556, 43 Colo 107
30 C J p 19 note 94

18. Ala—Christian v State, 32 So 64, 133 Ala 109
30 C J p 19 note 95

19. Ariz—State v Hanks 118 P 2d 71, 74, 58 Ariz 77, quoting **Corpus Juris.**
30 C J p 19 note 96

20. Cal—People v Lee Kong, 30 P 800, 95 Cal 666 29 Am S R 165, 17 L R A 626—People v Yslas, 27 Cal 630

21. Cal—People v Yslas, supra

22. Cal—People v Martinez, 120 P 786, 17 Cal App 579
30 C J p 19 note 99

23. Ga—Bond v State, App, 21 S E 2d 866
30 C J p 19 note 99

24. Mo—State v Broyles, 295 S W 550, 317 Mo 284
30 C J p 19 note 1.

25. Ark—Ragar v State 24 S W 2d 334 180 Ark 1131
Mo—State v Broyles, 295 S W 550, 317 Mo 284
Tex—Shine v State, 269 S W 804 99 Tex Cr 418
30 C J p 19 note 2.

26. Conn—State v Litman, 138 A 132 106 Conn 345
Ga—Anderson v State 179 S E 654, 51 Ga App 98—Griffin v State, 177 S E 511, 50 Ga App 213
Ill—People v Wilson, 174 N E 398, 342 Ill 358
Iowa State v Bingaman, 230 N W 394, 210 Iowa 160
Ky—Pack v Commonwealth, 140 S W 2d 626, 282 Ky 835—Hall v Commonwealth, 293 S W 961, 219 Ky 446
Miss - Walker v State, 112 So 673, 146 Miss 510
S C—State v Smith, 19 S E 2d 224, 199 S C 279
30 C J p 20 note 3.
Sudden passion as defense to assault with intent to murder see infra § 87.

the case of murder, considered supra § 16, malice may be either express or implied [27] It includes not only anger, hatred, and revenge, but every unlawful and unjustifiable motive [28] It is not confined to ill will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive,[29] done with a wicked mind under such circumstances as evince a plain indication of a heart reckless of social duty and fatally bent on mischief [30] It is implied from any deliberate or cruel act against another which shows an abandoned and malignant heart [31] It is the opposite of an act performed under uncontrollable action which prevents all deliberation or cool reflection in forming a purpose [32]

While the expression "malice aforethought" includes the element of premeditation,[33] it is immaterial for how short a time the malice may have existed [34]

Deliberation is regarded as an essential element of assault with intent to commit murder under some statutes,[35] while under other statutes, malice is sufficient without deliberation[36] or premeditation,[37] or premeditated design [38] Under statutes dividing murder into degrees, discussed supra § 29, and making premeditation an element of murder in the first degree, considered supra § 33, in order to constitute an assault with intent to commit murder in the first degree, the element of premeditation must be present,[39] but, under such statutes in order that there may be a conviction of assault with intent to murder, deliberation and premeditation are not essential [40] Where premeditated design is made an element of murder in the first degree, an assault with intent to kill without premeditated design may

"Malice" and "malice aforethought" defined

(1) 'Malice' is a mental state or condition of one's mind which prompts him to do an unlawful act without legal excuse or justification" —Williams v State, 175 So 335 336, 27 Ala App 504

(2) "Malice aforethought" means a predetermination to commit an act without legal justification or excuse —Harrison v Commonwealth, 131 S W 2d 454, 279 Ky 510

(3) The specific intent to kill unjustifiably constitutes legal malice —Thomas v State, 142 S E 195, 37 Ga App 823

(4) Definitions of malice as an element of murder see supra §§ 14-16

In Texas

(1) Under a statute eliminating malice as an essential element of assault with intent to murder, only intent to kill need be shown and not malice aforethought —Friday v State, 36 S W 2d 1036, 117 Tex Cr 37 —King v State, 36 S W 2d 490, 117 Tex Cr 43—Tucker v State, 26 S W 2d 638, 115 Tex Cr 41

(2) However, even under such statute, there is authority stating that to constitute an assault with intent to murder there must concur an assault and intent to kill, actuated by malice —Perez v State, 22 S W 2d 309 114 Tex Cr 473

(3) Prior to the statutory change malice was an essential element of assault with intent to murder —Davis v State, 259 S W 946, 96 Tex Cr 646

Desistance does not negative existence of malice aforethought —State v Litman, 138 A 132, 106 Conn 345

Law does not contemplate accused shall be found guilty of lesser crime than assault with intent to murder on proof of assault with malice aforethought of character likely to cause death —People v Herbert, 172 N E 740, 340 Ill 320

27. Ga —Anderson v State, 179 S E 651 51 Ga App 98—Griffin v State, 177 S E 511, 50 Ga App 213
Ill —People v Wilson, 174 N E 398, 342 Ill 358
30 C J p 20 note 5

28. Ill —People v Wilson, 174 N E 398 342 Ill 358

29. Ill —People v Wilson, 174 N E 398, 342 Ill 358
Ill will is not an essential element of malice —Harrison v Commonwealth, 131 S W 2d 454, 279 Ky 510

30. Ill —People v Wilson, 174 N E 398, 342 Ill 358

31. Ga —Chambliss v State, 139 S E 80, 37 Ga App 121—Huckaby v State, 118 S E 67, 30 Ga App 376
Ill —People v Wilson, 174 N E 398, 342 Ill 358

32. Ill —People v Wilson, supra

Relation to sudden passion

(1) Suddenly aroused passion and malice may coexist at the time of the assault —Pierce v State, 178 So 248, 28 Ala App 40

(2) Whether offense is assault with intent to murder or unlawfully shooting at another depends on whether defendant was motivated by malice or by passion —Haney v State, 13 S E 2d 384, 64 Ga App 396

Sedate and cool mind

(1) A sedate and deliberate mind is not essential to constitute the offense where malice aforethought existed —Stewart v State, Tex Cr, 50 S W 459.

(2) To convict one of assault to murder, the evidence must satisfactorily show that accused's mind was sufficiently cool to enable him to know and understand what he was doing and the consequences of his act —Davis v State, 259 S W 946, 96 Tex Cr 646

33. Mo —State v Venable, 177 S W 308
Puerto Rico —People v Solares, 19 Puerto Rico 423

34. Ill —People v Wilson, 174 N E 398, 342 Ill 358
Miss —Walker v State, 112 So 673, 146 Miss 510
30 C J p 20 note 7

Time malice existed

It is not necessary to show that malice aforethought existed at any particular time before the commission of the assault —Harrison v Commonwealth, 131 S W 2d 454, 279 Ky 510

35. Miss —Walker v State, 112 So 673, 146 Miss 510
30 C J p 20 note 8

36. Ark —Allen v State, 171 S W 1179, 117 Ark 432
30 C J p 20 note 9

37. Ala —Williams v State 93 So. 284, 18 Ala App 573
30 C J p 20 note 10

38. Ala —Welch v State, 27 So 307, 124 Ala 41—Kelly v State, 72 So 573, 15 Ala App 63

39. Tenn —Dains v State, 2 Humphr 439

40. Conn —State v Fiske, 28 A. 572, 63 Conn 388

Reason for rule

It is not essential that premeditation and deliberation should exist, for, if the assault was made with specific intent to kill and the circumstances are such that, if death had resulted it would have constituted murder, either in the first or second degree, the offense is assault with intent to murder —Cheeks v State, 278 S W 10, 169 Ark. 1192.

constitute an assault to commit murder in the second degree [41]

Inference and presumption of malice. The existence of malice as an element of assault with intent to murder may be inferred or presumed from the surrounding circumstances,[42] such as the use of a deadly weapon,[43] the character of the assault,[44] the unexplained attempt to take life,[45] or where the assault is unlawful and is done without reasonable provocation or circumstance of palliation,[46] or is committed deliberately and is likely to result fatally,[47] or from the reckless disregard of human life [48]

§ 79. —— Intent to Kill

a In general
b Inference of intent

a. In General

There must be a specific intent to kill in order to have an assault with intent to murder and the intent need not exist for any appreciable length of time.

A specific intent to take human life is an essential element of the offense of assault with intent to commit murder,[49] and, as otherwise stated, where an unjustifiable assault is made by one capable of cool reflection and not in the heat of passion, with

41. Fla —Dean v State, 83 So 504, 78 Fla 545
30 C J p 20 note 17

42. Ga —Thomas v State, 142 S E 195, 37 Ga App 823
Ill —People v Wilson, 174 N E 398, 342 Ill 358

43. Ga —Thomas v State, 142 S E 195, 37 Ga App 823
Iowa —State v Crutcher, 1 N W 195, 199, 231 Iowa 418, citing **Corpus Juris.**
Mo —State v Lamb, 278 S W 1009
30 C J p 112 note 74

Imputation of malice

Where one man wounds another with deadly weapon, law imputes malicious intent to act —Drinkard v Commonwealth, 183 S E 251, 165 Va 799—Gills v Commonwealth, 126 S E 51, 141 Va 445—Johnson v Commonwealth, 115 S E 673, 135 Va 524, 30 A L R 755

Self-defense

However, the use of a pistol in self-defense raises no implication of "malice"—People v Hannon, 44 N E 2d 923, 381 Ill 206

44. Ala --Kirkland v State, 108 So 262 21 Ala App 348

45. Ala —Williams v State, 77 Ala 53
Ark --Taylor v State, 102 S W 367, 82 Ark 540

46. Va --Harris v Commonwealth, 114 S E 597, 134 Va 688

47. Ill —People v Hannon 44 N E 2d 923, 381 Ill 206—People v Wilson, 174 N E 398, 342 Ill 358

48 Ga —Chambliss v State, 139 S E 80 37 Ga App 124
Ill —People v Merritt, 12 N E 2d 7, 367 Ill 521—People v Wilson, 174 N E 398, 342 Ill 358—People v Herbert, 172 N E 710, 340 Ill 320

49. Ala —Redd v State, 165 So 409, 410, 27 Ala App 19, citing **Corpus Juris**—Marshall v State, 109 So 558, 21 Ala App 500
Ark —Cheeks v State 278 S W 10 169 Ark 1192—Perkins v State, 271 S W 326, 168 Ark 710
Cal —People v. Pineda, 106 P 2d 25, 41 Cal App 2d 100—People v Brown, 81 P 2d 463, 27 Cal App 2d 612
Conn —State v Litman, 138 A 132, 106 Conn 345
Ga —Bond v State, App, 21 S E 2d 866—West v State, 18 S E 2d 500, 66 Ga App 551—Reece v State, 3 S E 2d 229, 60 Ga App 195—Mundy v State, 1 S E 2d 605, 59 Ga App 509—Anderson v State, 179 S E 654 51 Ga App 98—Griffin v State, 177 S E 511, 50 Ga App 213—Gresham v State, 166 S E 443 46 Ga App 54—Neese v State, 150 S E 451, 40 Ga App 503—Wright v State, 149 S E 153, 40 Ga App 118, conforming to 148 S E 731, 168 Ga 690—Thomas v State, 142 S E 195, 37 Ga App 823—Springer v State, 139 S E 159 37 Ga App 154 - Gazaway v State, 129 S E 888, 34 Ga App 442
Ill --People v Herbert, 172 N E 710, 340 Ill 320—People v Haskins, 169 N E 18, 337 Ill 131—People v Bashic 137 N E 809, 306 Ill 341.
Iowa —State v Bingaman, 230 N W 394 210 Iowa 160
Miss —Norwood v State, 183 So 523, 182 Miss 898--Stroud v State, 95 So 738, 131 Miss 875
Neb —Lillard v State, 244 N W 640, 123 Neb 838—Garrett v State, 193 N W 159, 110 Neb 118
Tex —Ammann v State, Cr, 165 S W 2d 744—Burks v State, Cr, 165 S W 2d 460—Eagle v State, 122 S W 2d 304, 135 Tex Cr 606—McCoy v State 102 S W 2d 206, 132 Tex Cr 45—Ginn v State, 79 S W 2d 327, 128 Tex Cr 109—Jessie v State, 70 S W 2d 743, 126 Tex Cr 250 --Rose v State, 58 S W 2d 526 123 Tex Cr 261—Hawkins v State, 29 S W 2d 384, 115 Tex Cr 163—Tucker v State, 26 S W 2d 638, 115 Tex Cr 41- Perez v State, 22 S W 2d 309, 114 Tex Cr 173—Hamrick v State, 18 S W 2d 650, 113 Tex Cr 155—Minor v State, 1 S W 2d 315, 108 Tex Cr 413
Utah —State v Minousis, 228 P. 571 64 Utah 206
30 C J p 20 note 18.

Test to ascertain intent

In ascertaining the intent alleged in an indictment alleging "assault with intent to commit murder," test to be applied is whether, if a homicide had occurred under the same circumstances, it would justify a conviction of murder —People v Downen, 28 N E 2d 91, 374 Ill 146

Meaning of "intent to kill"

(1) "Intent to kill" in making of an assault does not necessarily mean that accused had a premeditated design and fixed purpose to effect death, even for a short time before making the assault, but means that he willfully and unlawfully makes an assault with a deadly weapon which he knows, or should reasonably be expected to result in death of person assaulted —Phillips v State, 162 So 346, 120 Fla 134

(2) An intent to kill may be tantamount to an intent to commit murder —Commonwealth v Berardino, 153 A 687, 302 Pa 403, affirming 100 Pa Super 58

An accident does not constitute an assault with intent to murder —Buchanan v State, 74 S W 2d 1022, 127 Tex Cr 100

Intent to kill encompasses intent to injure

Cal —People v Kynette 104 P 2d 794, 15 Cal 2d 731, prior opinion 97 P 2d 287, certiorari denied Kynette v People of State of California, 61 S Ct 806, 312 U S 703, 85 L Ed 1136

Necessity of intent to assault

(1) Conviction of assault with intent to murder is unauthorized, where there was no evidence tending to show specific intent to kill or intentional assault - Springer v State, 139 S E 159, 37 Ga App 154

(2) The crime of assault with intent to commit murder requires the presence of both the intent to commit a violent injury, which is a necessary part of the assault, and the specific intent to kill —People v Alexander, 106 P 2d 450, 41 Cal App 2d 275, rehearing denied 106 P 2d 916, 41 Cal App 2d 275.

the intention of killing, it will constitute an assault with intent to murder where death does not result.[50] Of course, the mere fact that death does not result does not show an absence of an intent to kill.[51] The requisite intent may be formed on the instant of the assault[52]

A conviction will not be supported under circumstances showing no intent to kill,[53] as where the evidence shows but an intent to kill based on a conditional threat[54] or nothing more than an intent to maim[55] or to inflict serious bodily harm,[56] and it has been said that murder in the first degree may be committed in an attempt to perpetrate arson, rape, robbery, or burglary, and yet an assault committed in such an attempt is not an assault with intent to murder[57] Although there may be an intent to commit one crime, there may be an alternative or concurrent intent to take life[58]

Abandonment of intent If the specific intent existed and was accompanied by some assault, the conviction may be sustained, although there was a subsequent abandonment of the intent[59]

b. Inference of Intent

(1) In general
(2) Deadly weapon

(1) In General

The specific intent to kill required in an assault with intent to murder may be inferred from the surrounding circumstances, and various matters have been considered as bearing on the propriety of an inference of such intent.

While a specific intent to kill is an essential ingredient of the offense of assault with intent to commit murder, as stated supra subdivision a of this section, this requirement does not exact an intent, other than an intent which is inferable from the circumstances[60] The law presumes that one intended the natural and probable consequences of his act and the requisite intent to kill may be inferred from such acts[61] It may be inferred or presumed as a fact from the surrounding circumstances,[62] such as the acts and conduct of accused,[63] the nature of the instrument used in making the as-

50. Tex—Shine v State, 269 S W 804, 99 Tex Cr 418—Cheatham v State, 125 S W 565, 57 Tex Cr 442

51. Tex—Thornton v State, Cr, 169 S W 2d 177

52. Ill—People v Wilson, 174 N E 398, 342 Ill 358
30 C J p 21 note 21
Appreciable time
Intent need not have existed for any appreciable length of time—Evans v State, 226 S W 1063, 147 Ark 69

53. Ill—People v Downen, 28 N E 2d 91 374 Ill 146
Tex—Minor v State, 1 S W 2d 315, 108 Tex Cr 413

54. Reason for rule
"The reasoning upon which the rule is based seems to be that in such a case there can be no actual or present intent to kill, and may never be, since the intent is conditioned upon some other event which may not happen"- Stroud v State, 95 So 738, 131 Miss 875

55. Tex—Foster v State, 46 S W 231, 39 Tex Cr 399

56. Tex—Prescott v State, 105 S W 192, 52 Tex Cr 35
30 C J p 21 note 23
Unprovoked assault by itself indicated an intent to inflict an injury, but considered alone it would be insufficient for a finding that assailant had an intent to commit murder—Murrey v State, Tex Cr, 168 S W 2d 858

57. Ala—Simpson v State, 59 Ala 1, 31 Am R 1
Tex—White v. State, 13 Tex App 259.

58. Ill—People v Bashic, 137 N E 809, 306 Ill 341
Intent to rob and murder
If a man shoots another for the purpose of robbery, taking the chance of killing him by the shot, the ulterior purpose of robbery would not prevent his conviction for assault with intent to murder—Jones v State, 95 S W 1044, 50 Tex Cr 194

59 Tex—Hawkins v State, 29 S W 2d 381 115 Tex Cr 163
Overt act as completion of offense see supra § 74

60. Conn—State v Litman, 138 A 132, 106 Conn 345
Ga—Reece v State, 3 S E 2d 229, 60 Ga App 195
Ill—People v Herbert, 172 N E 740, 340 Ill 320
30 C J p 21 note 27
Basis for determination
In determining whether accused was guilty of an assault with intent to murder, each act or statement of accused should not be considered separately but with all circumstances must be considered together—McMurrey v State, Tex Cr, 168 S W 2d 858

61. Fla—Phillips v State, 162 So 346, 120 Fla 134
Wis—Esterra v State, 219 N W 349 196 Wis 104
Intending act likely to produce death
Accused to be guilty of assault with intent to murder, must have intended to do the thing, the reasonable and probable effect of which would be to produce death, even though he may not have intended specifically to kill person who fell the victim of his conduct—Redd v State, 165 So 409, 27 Ala App 19

62. Ala—York v State, 189 So 910, 28 Ala App 510, certiorari denied 189 So 913, 238 Ala 269
Ga—Chandler v State, 187 S E 856, 54 Ga App 334—Griffin v State, 177 S E 511, 50 Ga App 213
Ill—People v Bashic, 137 N E 809, 306 Ill 341
Neb—Lillard v State, 244 N W 640, 123 Neb 838
Tex—Ammann v State, Cr, 165 S W 2d 744—Bailey v State, 58 S W 2d 834, 123 Tex Cr 206—Rose v State, 58 S W 2d 526, 123 Tex Cr 261
Utah—State v Minousis, 228 P 574, 64 Utah 206
Wis—Esterra v State, 219 N W 349, 196 Wis 104
30 C J p 22 note 29
Inference of intent held reasonable
Ga—Thomas v State, 142 S E 195, 37 Ga App 823
Unlawful act
However, it has been held, that intent cannot be inferred or presumed from commission of unlawful act since intent is essential ingredient of the crime—People v Brown, 81 P 2d 463, 27 Cal App 2d 612
Not presumption of law
A murderous intent ordinarily will not be presumed as a matter of law, where no homicide is committed—Wright v State, 148 S E 731, 168 Ga 690—Gresham v State, 166 S E 443, 46 Ga App 54

63 Utah—State v Minousis, 228 P 574, 64 Utah 206.

sault,[64] the manner of its use,[65] from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result,[66] or from a total or reckless disregard of human life.[67] Other circumstances which may be considered as bearing on the propriety of an inference of intent are: The character of the assault,[68] the nature or extent or location of the wound or injury,[69] or the presence[70] or absence[71] of excusing or palliating facts or circumstances, and prior threats.[72] The question of intent as dependent on the physical circumstances and the impression made by them on the mind of accused must be determined by the facts as they were perceived or understood by accused.[73]

(2) Deadly Weapon

An inference of the requisite intent, in an assault with intent to murder, generally may be made from the unlawful use of a deadly weapon, provided it was used in a way to indicate an intention to kill. The weapon may be deadly per se or its deadly character may be determined from the manner of its use

The requisite intent in an assault with intent to murder may be inferred or presumed from the unlawful use of a deadly weapon,[74] provided it was used in such a manner as to indicate an intention to kill.[75] Even where the weapon used is not deadly, the intent to kill may be established by other facts.[76]

A deadly weapon may be defined as a weapon

64. Ga.—Reece v. State, 3 S.E.2d 229, 60 Ga.App. 195.
Tex.—Rose v. State, 58 S.W.2d 526, 123 Tex.Cr. 261.
Utah.—State v. Minousis, 228 P. 574, 64 Utah 206.

65. Ga.—Reece v. State, 3 S.E.2d 229, 60 Ga.App. 195.
Utah.—State v. Minousis, 228 P. 574, 64 Utah 206.

66. Utah.—State v. Minousis, supra.
30 C.J. p. 22 note 32.

67. Ill.—People v. Merritt, 12 N.E.2d 7, 367 Ill. 521.—People v. Wilson, 174 N.E. 398, 342 Ill. 358.

Equivalent to intent

Reckless disregard of human life may be equivalent of specific intent to kill.—Looney v. State, 153 S.E. 372, 41 Ga.App. 495.—Chambliss v. State, 139 S.E. 80, 37 Ga.App. 124.

68. Ala.—York v. State, 189 So. 910, 28 Ala.App. 510, certiorari denied 189 So. 913, 238 Ala. 269.
Ga.—Reece v. State, 3 S.E.2d 229, 60 Ga.App. 195.
Ill.—People v. Bashie, 137 N.E. 809, 306 Ill. 341.
Tex.—Pleasant v. State, 144 S.W.2d 545, 140 Tex.Cr. 267.—Sofge v. State, 111 S.W.2d 720, 133 Tex.Cr. 409.—Jones v. State, 28 S.W.2d 146, 116 Tex.Cr. 30.
30 C.J. p. 22 note 33.

69. Ala.—York v. State, 189 So. 910, 28 Ala.App. 510, certiorari denied 189 So. 913, 238 Ala. 269.
Ga.—Reece v. State, 3 S.E.2d 229, 60 Ga.App. 195.
Tex.—Ammann v. State, Cr., 165 S.W.2d 744.—Pleasant v. State, 144 S.W.2d 545, 140 Tex.Cr. 267.—Eagle v. State, 122 S.W.2d 304, 135 Tex.Cr. 606.—Sofge v. State, 111 S.W.2d 720, 133 Tex.Cr. 409.
30 C.J. p. 23 note 34.

70. Ala.—Brown v. State, 38 So. 268, 142 Ala. 287.

71. Ala.—Brown v. State, supra.—Meredith v. State, 60 Ala. 441.

72. Ala.—Newton v. State, 9 So. 404, 92 Ala. 33.

Ind.—Clinton v. State, 55 N.E. 420, 153 Ind. 540.

73. Mo.—State v. Foley, 12 Mo.App. 131.

Pursuit by police officer

Mere shooting at a police officer who was pursuing accused does not show requisite intent, unless the facts were known to accused at the time the shots were fired.—People v. Downen, 28 N.E.2d 91, 374 Ill. 146.

74. Ala.—York v. State, 189 So. 910, 28 Ala.App. 510, certiorari denied 189 So. 913, 238 Ala. 269.
Cal.—People v. Galloway, 286 P. 476, 104 Cal.App. 422.
Conn.—State v. Litman, 138 A. 132, 106 Conn. 345.
Fla.—Phillips v. State, 162 So. 346, 120 Fla. 134.
Ga.—Chandler v. State, 187 S.E. 856, 54 Ga.App. 334.
Ill.—People v. Wilson, 174 N.E. 398, 342 Ill. 358.—People v. Haskins, 169 N.E. 18, 337 Ill. 131.
Mo.—State v. Lamb, 278 S.W. 1009.—State v. Lemon, 263 S.W. 186.
Tex.—Ammann v. State, Cr., 165 S.W.2d 744.—Burks v. State, Cr., 165 S.W.2d 460.—Huntsman v. State, 143 S.W.2d 587, 140 Tex.Cr. 62.—Gay v. State, 115 S.W.2d 929, 134 Tex.Cr. 356.—Rose v. State, 58 S.W.2d 526, 123 Tex.Cr. 261.—McCoy v. State, 54 S.W.2d 530, 122 Tex.Cr. 298.—Hawkins v. State, 29 S.W.2d 384, 115 Tex.Cr. 163.
30 C.J. p. 22 note 30.

Leveling of gun

However intent to murder may not be inferred from mere leveling of gun, and the fact that accused did not shoot, there being nothing to prevent him, tends to negative existence of such intent.—Toler v. State, 108 So. 443, 143 Miss. 96.

Wounding

Law imputes a malicious intent to the act of wounding another with a deadly weapon.—Drinkard v. Commonwealth, 183 S.E. 251, 165 Va. 799.—Gillis v. Commonwealth, 126 S.E. 51, 141 Va. 445.—Johnson v. Commonwealth, 115 S.E. 673, 135 Va. 524, 30 A.L.R. 755.

Not presumption of law

Intent to kill is not presumed as a matter of law from the use of a deadly weapon in making the assault.
Cal.—People v. Maciel, 234 P. 877, 71 Cal.App. 213.
Va.—Thacker v. Commonwealth, 114 S.E. 504, 134 Va. 707.

75. Tex.—Butler v. State, 100 S.W.2d 707, 131 Tex.Cr. 543.—Hare v. State, 80 S.W.2d 963, 128 Tex.Cr. 203.
30 C.J. p. 22 note 31.

Conclusiveness of inference

(1) "If a deadly weapon is used in a deadly manner the inference is almost conclusive that the intent was to kill."—Scroggins v. State, 45 S.W.2d 983, 984, 119 Tex.Cr. 32.—Hawkins v. State, 29 S.W.2d 384, 385, 115 Tex.Cr. 163.

(2) Intent to kill is not conclusively shown by the use of a weapon likely to produce death.—Griffin v. State, 177 S.E. 511, 50 Ga.App. 213.

Absence of intent

Use of a deadly weapon without a homicidal intent will not sustain a charge of assault with intent to commit homicide in any degree.—Fortner v. State, 161 So. 94, 119 Fla. 150.

Physical circumstances

To shoot at another with a gun did not necessarily constitute "assault with intent to murder," to constitute such offenses the shot must be fired under such circumstances as are reasonably calculated to produce the result intended, and hence if the intended victim be at such a distance as to be out of range of the gun, the intent to kill may be lacking.—Burks v. State, Tex.Cr., 165 S.W.2d 460.

76. Tex.—Scroggins v. State, 45 S.W.2d 983, 119 Tex.Cr. 32.—Hawkins v. State, 29 S.W.2d 384, 115 Tex.Cr. 163.

with which death may be easily and readily produced,[77] or otherwise described as one which, from the manner used, is calculated or likely to produce death or serious bodily injury[78]

A weapon capable of producing death is not necessarily deadly or dangerous[79] In case a weapon is not deadly per se, the manner of its use will determine whether it is deadly or dangerous[80] So a piece of lumber,[81] a pocketknife,[82] a pistol,[83] a sawed-off billiard cue,[84] or a stone[85] may, from the manner of its use, constitute a deadly weapon

On the other hand, the following have been held not necessarily deadly weapons An axe,[86] a knife,[87] a piano stool,[88] and a screwdriver[89]

A dirk knife[90] a gun,[91] a pistol,[92] or shotgun[93] ordinarily is regarded as a deadly weapon per se

The lethal character of the weapon used in making an assault may be inferred from its size,[94] the effect produced,[95] the seriousness of the wounds inflicted thereby,[96] or other circumstances tending to show its deadly character[97] However, a mere desire to kill does show that the weapon used was deadly.[98]

Where the weapon used was not shown to be of a deadly character and there was nothing in the manner of its use to indicate an intention to take life, a conviction of assault with intent to murder cannot be sustained[99]

§ 80. —— Murder Had Death Ensued

To constitute an assault with intent to murder, the act must have been done under such circumstances that, if death resulted, the homicide would have been murder, and according to the weight of authority it is immaterial whether it would have been murder in the first or second degree

In order that an act may constitute an assault with intent to commit murder, it must have been committed under such circumstances that, had it resulted in death, the homicide would have been murder[1] However, the converse is not true and the fact that, if death had resulted, it would have been

77 U S —Accers v U S, Ark 17 S Ct 91 164 U S 388, 41 L Ed 481 29 C J p 1101 note 91

78. Tex —Scroggins v State, 45 S W 2d 983, 119 Tex Cr 32—Hawkins v State, 29 S W 2d 384, 115 Tex Cr 163

79. Tex —Hamrick v State, 18 S W 2d 650, 113 Tex Cr 155

80. Tex —Hare v State, 80 S W 2d 963 128 Tex Cr 203

81. Ala —Allen v State, 11 So 2d 391 30 Ala App 608, certiorari denied 11 So 2d 392, 243 Ala 617

82. Ga —Chisholm v State, 152 S E 907, 41 Ga App 311
Va —Gills v Commonwealth, 126 S E 51, 141 Va 445

83. Tex —Kelley v State, 185 S W 874, 79 Tex Cr 402

84. Conn —State v Litman, 138 A 132, 106 Conn 345

85 U S —Accers v U S, Ark, 17 S Ct 91, 92, 164 U S 388, 41 L Ed 481

86. Tex —Hawkins v State, 29 S W 2d 384, 115 Tex Cr 163

87. Ga —Burris v State, 58 S E 515, 2 Ga App 418
Tex —Ammann v State, Cr, 165 S W 2d 744—Pleasant v State, 144 S W 2d 545, 140 Tex Cr 267—Sofge v State, 111 S W 2d 720, 133 Tex Cr 409

Not per se deadly

An ordinary pocketknife is not per se a deadly weapon —Eagle v State, 122 S W 2d 304, 135 Tex Cr 606—Hare v State, 80 S W 2d 963, 128 Tex Cr 203—30 C J p 23 note 39 [b]

88. Tex —Morales v State, 8 S W 2d 152, 110 Tex Cr 81

89. Tex —Hawkins v State, 29 S W 2d 384, 115 Tex Cr 163

90. Conn —State v Litman, 138 A 132, 106 Conn 345

91. Conn —State v Litman supra

92. Conn —State v Litman, supra
Tex —McCoy v State, 54 S W 2d 530, 122 Tex Cr 298

93. Tex —Burks v State, Cr, 165 S W 2d 460

94. Tex —Eagle v State, 122 S W 2d 304, 135 Tex Cr 606

95. Ga —Kennedy v State, App, 24 S E 2d 321

96. Tex —Gay v State, 115 S W 2d 929, 134 Tex Cr 356—Butler v State, 100 S W 2d 707, 131 Tex Cr 543—Scroggins v State, 45 S W 2d 983, 119 Tex Cr 32—Hawkins v State, 29 S W 2d 384, 115 Tex Cr 163—Hamrick v State, 18 S W 2d 650 113 Tex Cr 155
30 C J p 23 note 40

97 Tex —Eagle v State, 122 S W 2d 304 135 Tex Cr 606

98. Tex —Ammann v State, Cr, 165 S W 2d 744—Pleasant v State, 144 S W 2d 545 140 Tex Cr 267—Eagle v State, 122 S W 2d 304, 135 Tex Cr 606—Sofge v State, 111 S W 2d 720, 133 Tex Cr 409

99. Mo —State v Clancy, 125 S W 458, 225 Mo 654
30 C J p 23 note 39
Character of weapon as question of fact see infra § 353.

1. Ala —Redd v State, 165 So 409, 27 Ala App 19
Ark —Cheeks v State, 278 S W 10, 169 Ark 1192
Fla - Thomas v State, 95 So 752, 85 Fla 113
Ga —Bond v State, App, 21 S E 2d 866
Ill —People v Downen, 28 N E 2d 91, 374 Ill 146—People v Herbert, 172 N E 740, 340 Ill 320—People v Browning 152 N E 552, 321 Ill 559
Va —Drinkard v Commonwealth, 183 S E 251, 165 Va 799—Johnson v Commonwealth, 115 S E 673, 135 Va 524, 30 A L R 755—Harris v Commonwealth, 114 S E 597, 134 Va 688
30 C J p 23 note 41

Felonious homicide

Under a statute defining certain assaults with intent to kill, it is not necessary to prove the elements of murder, but the charge is sustained if accused would have been guilty of any grade of felonious homicide had death ensued —Moore v State, 218 P 1106, 25 Okl Cr 54

Distinguished from murder

(1) The only difference between crime of 'murder' and "assault with intent to murder" is that in the former the state must prove that death ensued within a year and a day from date injury was inflicted, and in the latter death does not ensue within that period of time —Head v State, Ga App, 24 S E 2d 145

(2) Assault with intent to murder contains all the elements of murder except the actual death —State v Jones, 130 S E 747, 133 S C 167

murder is not conclusive that the assault was committed with the requisite intent to kill,[2] since, as discussed supra §§ 20–21, under some circumstances an unintentional killing may constitute murder Accordingly, if the evidence should show that, had homicide resulted, the offense would have been manslaughter only, then accused cannot be convicted of an assault with intent to murder [3]

Although the crime of murder has been divided into degrees by statute, as considered supra §§ 29–36, it is ordinarily immaterial whether the homicide, had it resulted, would have been murder in the first or second degree [4] However, to constitute an assault with intent to commit murder in the first degree, as defined by some statutes, it is essential that the homicide, had it occurred, would have been murder in the first degree,[5] and it is so held where only the first degree of murder requires an intent to kill.[6] Under a statute making the absence of a design to effect death an element of murder in the third degree, there can be no such offense as assault with intent to commit murder in the third degree [7]

§ 81. —— Intent to Kill One Other than Person Injured

The authorities are divided as to whether an accused may be convicted of an assault with intent to murder the person injured, where he intended to murder one person and inflicted injury on another not intended

According to one line of authorities, if the intent was to murder a person other than the person injured, accused cannot be convicted of assault with intent to murder the latter, proof of a general felonious intent not being sufficient to sustain the indictment,[8] so, if accused aims at one person but wounds another, he cannot be convicted of assault with intent to murder the person wounded [9] On the other hand, it is held in other jurisdictions that, where a man deliberately shoots at one person but misses him and wounds another, he may be convicted of assault with intent to murder the person injured [10] Some of these decisions are based on the theory that conduct which is so reckless as to imply total disregard for the lives of others raises an implication or presumption of general malice,[11] others are based on the theory that the proximity of the injured person to the person aimed at causes his injury to be necessarily apprehended as a probable consequence of the act,[12] others are based on the theory that the malicious intent is transferred to the person injured,[13] and still others on the language of statutes which do not in terms confine the intent to kill to the person assaulted [14]

Mistaken identity An accused, who assaulted another with intent to murder, under a mistaken belief that the person assaulted was a third person on whom the assault was intended, is guilty of assault with intent to murder the actual victim [15]

2. Vt—State v Taylor, 39 A 447, 70 Vt 1, 67 Am S R 648, 42 L R A 673
30 C J p 24 note 42
Necessity of intent to kill see supra § 79

3. Va—Drinkard v Commonwealth, 183 S E 851, 165 Va 799
30 C J p 24 note 14
Provocation and heat of passion as defense see infra § 87

4. Va—Johnson v Commonwealth, 115 S E 673, 135 Va 524, 30 A L R 755
30 C J p 24 note 46

Assault with intent to murder in second degree

Where ill assaulted person had died of wounds inflicted, defendant could be held to have committed murder in the second degree, he may properly be convicted of assault with intent to commit murder in second degree if assaulted person does not die of wound so inflicted—Phillips v State, 162 So 316, 120 Fla 134

Use of deadly weapon

One shooting another with a deadly weapon and with no pretense of provocation would have been guilty of murder in at least the second degree in case of death, and is guilty of malicious shooting with intent to kill—Johnson v Commonwealth, 115 S E 673, 135 Va 524 30 A L R 755

5. Tenn—Dains v State, 2 Humphr 439

6. Minn—Bonfanti v State, 2 Minn 123
30 C J p 24 note 48

7. Fla—Tillman v State, 88 So 377, 81 Fla 558
30 C J p 27 note 72

8. Ark—Lacefield v State, 34 Ark 275, 36 Am R 8
30 C J p 25 note 49

9 Ark—Ragar v State, 24 S W 2d 334, 335, 180 Ark 1131
30 C J p 25 note 19

Intent to kill one of several persons

"But where he [accused] shoots into a room containing three persons with intent to kill one or all of them under such circumstances that if death had resulted it would be murder, then he would be guilty of the crime charged, whether he hit any one of them or not, or if he hit one not intended, because he did intend to kill one of them and was so charged in the indictment"—Ragar v State, supra

10. Ill—People v Bollnow, 163 N E 137, 331 Ill 434—People v Cohen, 137 N E 511, 305 Ill 506.
Tex—Garrison v State, 158 S W 2d 815, 143 Tex Cr 403
30 C J p 25 note 51

Without malice

Where accused intended to shoot one person and hit another he was held guilty of assault with intent to murder without malice on the person wounded—Covert v State, 113 S W 2d 556, 134 Tex Cr 12

11. Ill—People v Bollnow, 163 N E 437, 331 Ill 434- People v Cohen, 137 N E 511, 305 Ill 506
30 C J p 25 note 53

12. Me—State v Gilman, 69 Me 163, 31 Am R 257
30 C J p 25 note 54

13. Tex—Jones v State, 231 S W 122, 89 Tex Cr 355
30 C J p 25 note 55

14. S D—State v Shanley, 104 N W 522, 20 S D 18
30 C J p 25 note 56

15. Ky—Williams v Commonwealth, 17 S W 2d 706, 229 Ky 580
30 C J p 25 note 57

Lying in wait

Accused, who lay in wait for certain person, but who shot at another thinking latter was person sought, was guilty of assault with intent to commit murder in first de-

§ 82. —— Indiscriminate Assault on Several

Shooting into a crowd indiscriminately, with intent to kill some one, is an assault with intent to kill each of them.

Where a person fires into a crowd indiscriminately with intent to kill some one, it is an assault with intent to kill each of them [16]

§ 83. —— Setting Spring Gun or Man Trap

Setting of a spring gun is not an assault with intent to murder in the absence of a specific intent to kill the person actually injured.

The setting of spring guns or other deadly machines as a nuisance, if the public is thereby subjected to danger, is discussed in the C J S title Nuisances § 71, also 46 C J p 724 notes 7–10, but it has been held that it is not punishable as assault with intent to murder where there was no specific intent to kill the person actually injured [17]

§ 84. —— Resisting Officer

Subject to some qualifications, the rule generally is that, one who resists and attempts to kill an officer lawfully executing his functions, such as arrest, may be guilty of an assault with intent to murder, but, where the officer is acting unlawfully, one may use reasonable force to resist his arrest

One who resists and attempts to kill an officer lawfully in the act of arresting him may be convicted of assault with intent to murder,[18] and the same rule applies in the case of the resistance of other lawful acts of an officer [19] Where a person is told by an officer that he is an officer and has a warrant for his arrest, or where the person has knowledge of such fact independently of any information given by the officer, it is his duty to submit to arrest,[20] but, where the person attempting to make the arrest conducts himself so as to put the prisoner's life in danger, the latter may repel force with force [21] When the aggression of an officer in making an arrest exceeds what is reasonably necessary to effect the arrest, the right of self-defense inures to the party assaulted [22] The fact that one engaged in a personal encounter is a peace officer gives him no greater rights than any other citizen, when he is not endeavoring to effect the arrest of a person assaulted by him [23]

No one is obliged to submit to an illegal arrest, and the fact that the person assaulted had no lawful authority to make the arrest will mitigate the offense or may even excuse the assault,[24] however, resistance in such cases must not be in enormous disproportion to the wrong and injury threatened [25] Accused's right to resist his illegal arrest is not dependent on the arresting officer's good or bad faith,[26] or on whether the officer was acting in his official capacity,[27] or on whether accused knew that he was an officer [28]

If accused was in no immediate danger of suf-

gree —Sanders v State, 270 S W 627, 151 Tenn 454

16. Ark —Ragar v State, 24 S W 2d 334, 335, 180 Ark 1131, quoting **Corpus Juris.**
30 C J p 25 note 58

17. Ala - Simpson v State, 59 Ala 1, 31 Am R 1
Means employed generally in assault with intent to murder see supra § 75

18. Ala —Berry v State, 175 So 407, 27 Ala App 507, certiorari denied 175 So 412, 234 Ala 414
Ark —State v Dowd, 16 S W 2d 1, 179 Ark 384
Mo —State v Peters, 242 S W 894
30 C J p 26 note 61.
Authority to arrest generally see Arrest §§ 4–10

19. Mich —People v Bernard, 84 N W 1092, 125 Mich 550, 65 L R A 559, appeal dismissed 22 S Ct 940, 184 U S 697, 46 L Ed 764.
30 C J p 26 note 62

Resistance to search
However, accused is entitled to resist entrance of officer where search warrant was not shown or mentioned and accused did not know thereof —Booth v State, 117 So. 492, 22 Ala App 508.

Preserving peace
Deputy sheriff was held engaged in performance of duties as conservator of peace in attempting to quiet disturbance —State v Lamb, Mo , 278 S W 1009

20. Mo —State v Bateswell, 16 S W 953, 105 Mo 609
30 C J p 26 note 63

21. Ark —Watkins v State, 18 S W 2d 343, 179 Ark 776
30 C J p 27 note 67

Unlawful arrest
In resisting an unlawful arrest, accused may attempt to slay the officer if he believes and has reasonable ground to believe that he is in danger of death or great bodily harm at the hands of the officer, and in the exercise of reasonable judgment that there is no other safe means of averting the real or apparent danger except to slay the officer —Smith v Commonwealth, 244 S W 878, 196 Ky 479

22. Tex —Stanfield v State, 38 S W 2d 94, 118 Tex Cr 47

23. Mo —State v Clayton, 13 S W 819, 100 Mo 516, 18 Am S R 565

24. Ala —Berry v State, 175 So 407 27 Ala App 507, certiorari denied 175 So. 412, 234 Ala. 414.
Conn —State v Engle, 162 A 922, 115 Conn 638
Ky —Smith v Commonwealth, 244 S W 878 196 Ky 479
30 C J p 26 note 64

Application of law of self-defense
Extent to which illegal arrest may be lawfully opposed is governed by law of self-defense —Stanfield v State, 38 S W 2d 94, 118 Tex Cr 47

25. Ala —Berry v State, 175 So 407, 27 Ala App 507, certiorari denied 175 So 412, 234 Ala 414
Ky —Smith v Commonwealth, 244 S W 878, 196 Ky 479
Mo —State v McGehee, 274 S W 70, 308 Mo 560

Reasonable force
Accused is entitled to use force reasonably necessary to prevent his unlawful arrest —Boyd v State, 56 S W 2d 651, 122 Tex Cr 514

26. Mo —State v McGehee, 274 S W 70, 308 Mo 560

Good faith considered as a circumstance of the case —State v McGehee, 274 S W 70, 308 Mo 560

27. Mo —State v McGehee supra.

28. Mo —State v McGehee, supra.

fering death or grievous bodily harm or he had no reasonable belief of such danger, his conviction of assault with intent to murder will be sustained, although the attempted arrest was illegal [29] Also, it has been held that, where there is no reasonable cause to apprehend any worse treatment than a legal arrest should subject a person to, it is the duty of a person to submit to an illegal arrest and seek his redress from the law [30] Even an unwarranted attempt by a private person to make an arrest will not justify resistance to the point of an assault with intent to murder [31]

Although an officer is never justified in shooting one guilty of a misdemeanor to effectuate his arrest or prevent his escape, as considered in Arrest § 13 c, in order to justify shooting in self-defense while attempting an arrest, the officer must be in imminent danger of great personal injury, or the shooting must be done to prevent the commission of a felony [32]

§ 85. Assault with Intent to Kill or Commit Manslaughter

a In general
b Elements of offense

a. In General

Although there is no such offense at common law, an assault with intent to kill or commit manslaughter is a statutory crime and, depending on the statute, is punishable as a felony or a misdemeanor.

At common law there is no such offense as assault with intent merely to kill or commit manslaughter [33] Assaults with intent to kill or with intent to commit manslaughter are frequently punishable as such under particular statutes [34] There is no such offense as an assault with intent to commit involuntary manslaughter [35] Dependent on statute, an assault with intent to kill or commit manslaughter may be a felony [36] or a misdemeanor [37]

Although similar, an attempt to commit manslaughter and an assault with intent to commit manslaughter are distinct offenses [38]

The distinction between an assault with intent to kill or commit manslaughter and an assault with intent to commit murder is considered supra § 73

b. Elements of Offense

Except as otherwise provided by statute, an assault with intent to kill or commit manslaughter consists of an intent to kill and an overt act toward its commission, under circumstances which would have made the act manslaughter if death had ensued

To constitute the statutory offense of assault with intent to kill or to commit manslaughter, the assault must have been made under circumstances which would have made the act manslaughter if death had ensued [39] It is necessary [40] and sufficient [41] that the

29. Ala—Allen v State, 11 So 2d 391, 30 Ala App 608, certiorari denied 11 So 2d 392, 243 Ala 617—Berry v State, 175 So 407, 27 Ala App 507, certiorari denied 175 So 412, 234 Ala 414

Reason for rule

"While personal liberty is a very highly esteemed right it is better to undergo the inconvenience of an unlawful arrest, from which the law will deliver, than that human life should be sacrificed, and a dispute as to whether an arrest is lawful or unlawful should not be decided with pistols, when it is a matter that the magistrate can speedily determine" —Smith v Commonwealth, 244 S W 878, 879, 196 Ky 479

Use of deadly weapon

(1) Accused, notwithstanding attempted unlawful arrest, is not excused from use of dangerous weapon, unless without malice and on reasonable grounds that he believed that its use was necessary to protect himself from death or serious bodily injury, or to prevent unlawful arrest—State v Engle, 162 A 922, 115 Conn 638

(2) Other cases see 30 C J. p 26 note 65 [a].

30. Cal—People v Seeley, 179 P 541, 39 Cal App 586
30 C J p 26 note 65

31. Ala—Dryer v State, 36 So 38 139 Ala. 117

32. Mo—State v McGhee 274 S W 70, 308 Mo 560
Use of force in arrest for felony see Arrest § 13 b
Homicide committed by person making arrest see infra § 102

Private person making arrest for felony is entitled to same protection as to self-defense, as police officer executing warrant—Burnell v State, 139 So 435, 21 Ala App 588

33. Fla—Fortner v State, 161 So 94, 119 Fla 150
30 C J p 27 note 69

34. Fla—State ex rel Brown v Mayo, 152 So 627, 113 Fla 716—Deude v Tucker, 152 So 624, 113 Fla 805
Iowa—State v Bunn, 190 N W 155, 195 Iowa 9
30 C J p 27 note 70
Shooting at another as statutory offense see Assault and Battery § 76

Statute construed
Ky—McIntosh v Commonwealth, 120 S W 2d 1031, 275 Ky. 126.

35. Tenn - Shotter v State, 247 S W 985, 147 Tenn 355
30 C J p 27 note 71

Well considered case
Fla—Fortner v State 161 So 94, 97 119 Fla 150, citing **Corpus Juris.**

36. Mass—Commonwealth v Demboski, 186 N E 589, 283 Mass 315

37. Ky—Wilson v Commonwealth 66 Ky 105
La—State v Broxton, 177 So 572, 188 La 456

38. Fla—State ex rel Brown v Mayo, 152 So 627, 113 Fla 746—Devoe v Tucker, 152 So 624, 113 Fla 805

39. Fla—Fortner v State, 161 So 94, 96, 119 Fla 150, quoting **Corpus Juris**—Lassiter v State, 123 So 735, 98 Fla 370
Iowa—State v Crutcher, 1 N W 2d 195, 199, 231 Iowa 418, citing **Corpus Juris.**
Mass—Commonwealth v Demboski, 186 N E 589, 283 Mass 315
30 C J p 27 note 73

40. Fla—Fortner v State, 161 So 94, 96, 119 Fla 150
30 C J p 28 note 79

41. Iowa—State v Crutcher, 1 N W 2d 195, 199, 231 Iowa 418, citing **Corpus Juris.**
30 C J p 28 note 77.

crime would have been voluntary manslaughter had death ensued from the assault; but if the crime would have been involuntary manslaughter had death ensued, it is insufficient[42] The gist of the offense is the intent to kill[43]

Overt act To constitute an assault with intent to kill or commit manslaughter, it is necessary that there be an attempt or offer by force or violence to carry out that intention[44]

Means employed It is not essential to an assault with intent to commit manslaughter that a deadly or dangerous weapon shall have been used,[45] unless under a statute so providing, it is required that, in addition to the intent to commit manslaughter on the person of the party assailed, the assault must have been made with a deadly weapon[46]

Extent of injury Under a statute to such effect, the infliction of serious injury not resulting in death is an essential element of the offense[47]

Necessity of striking Where a statute punishes shooting or wounding another with intent to kill, an actual striking is required,[48] and it has been held that a person is not "shot" when he is only powder burned by the weapon discharged[49]

Intent to kill one other than the person injured According to some authorities, if the intent was to kill a person other than the person injured, accused cannot be convicted of assault with intent to kill the person injured,[50] but there is other authority holding a contrary view.[51]

§ 86. Defenses

In addition to defenses usually available in the prosecution of any crime, matters which negative an essential element of an assault with intent to murder or kill constitute a defense thereto

Generally, matters which bar a prosecution for the offense, as discussed in Criminal Law §§ 38-54, or matters which negative the essential elements of the crime, to be discussed in detail in the following sections, are a defense to a prosecution for assault with intent to murder or kill[52] As noted supra §§ 79, 80, and infra § 87, a conviction of an assault with intent to murder cannot be supported where the circumstances are such that the killing, had it taken place, would not have been murder, nor, as appears infra §§ 88-95, can accused be convicted of an assault with intent to commit murder or manslaughter, where the killing, had it taken place, would have constituted justifiable or excusable homicide

Where the intent is directed toward one person and another person is injured by accident, accused is entitled to any defense, mitigation, or extenuation which might have been offered had he injured the person intended[53]

In addition to the specific defenses to the charge of assault with intent to murder or kill, discussed

42 Fla—Fortner v State, 161 So 94, 96, 119 Fla 150, quoting **Corpus Juris.**
30 C J p 28 note 78

43 Fla—Fortner v State, 161 So 94, 96, 119 Fla 150, quoting **Corpus Juris.**
Neb—Vallas v State, 288 N W 818, 137 Neb 250
N C—State v Hefner, 155 S E 879, 199 N C 778—State v Redditt, 126 S E 506, 189 N C 176
30 C J p 28 note 76

Inference or presumption of intent
(1) Intent to kill may be inferred from the circumstances of the case—Poline v State, 198 N E 67, 209 Ind 103

(2) It may be inferred from the use of a deadly weapon in a manner calculated to produce death
Ind—Poline v State, supra
Okl—Moore v State, 218 P 1106, 25 Okl Cr 54

Intent not presumed as matter of law
(1) Where no homicide is committed—State v Gibson, 145 S E 772, 196 N C 393—State v Redditt, 126 S E 506, 189 N C 176

(2) From the use of a deadly weapon
Neb—Vallas v State, 288 N W 818, 137 Neb 250
N C—State v Gibson 145 S E 772, 196 N C 393—State v Redditt, 126 S E 506, 189 N C 176

44. N C—State v Hefner, 155 S E 879, 199 N C 778—State v Redditt, 126 S E 506, 189 N C 176

45. Fla—Grantham v State, 190 So 495, 139 Fla. 129

46 Fla—Fortner v State, 161 So 94, 96, 119 Fla 150, quoting **Corpus Juris.**
N C—State v Hefner, 155 S E 879, 199 N C 778—State v Redditt, 126 S E 506 189 N C 176
30 C J p 28 note 80
Necessity of use of deadly weapon in assault with intent to murder see supra § 75

Particular means as used held deadly weapons
(1) Blackjack—State v Hefner, 155 S E 879, 199 N C 778

(2) Firearms—State v Hefner, supra

47. N C—State v Hefner, supra—State v Redditt, 126 S E 506, 189 N C 176

48 La—State v Manuel, 95 So 263, 153 La 7

49. La—State v Manuel, supra

50. Mo—State v Mulhall, 97 S W 583, 199 Mo 202, 7 L R A,N S, 630, 8 Ann Cas 781
30 C J p 25 note 50

Basis for rule
The essence of the crime charged is the specific intention to take the life of a certain person named in the indictment and in the absence of proof of such intention accused cannot be convicted of an assault with an intent to kill the person injured—Jones v State, 251 S W 690, 159 Ark 215

51. Kan—State v Taylor, 26 P 2d 598, 138 Kan 407
30 C J p 25 note 52

52. Ohio—McGraw v State, 174 N E 711, 123 Ohio St 196
Defenses to crimes generally see Criminal Law §§ 38-54

53. Iowa—State v Metcalfe, 212 N W 382, 203 Iowa 155
Tex—Watson v State, 13 S W 2d 696, 111 Tex Cr 636—Vining v State, 146 S W 909, 66 Tex Cr 316

in the succeeding sections, various other matters have been held to constitute[54] or not to constitute[55] justification, excuse, extenuation or mitigation of such assault.

§ 87. —— Passion and Provocation

Subject to some qualifications, the rule is that one cannot be guilty of an assault with intent to murder if the assault was the result of a sudden passion caused by an adequate provocation

Since malice is an essential element of assault with intent to commit murder, considered supra § 78, and since, as considered supra § 42, the technical malice essential to murder is lacking where a homicide is committed on a sudden heat of passion caused by adequate provocation, one cannot be guilty of assault with intent to murder if the assault was the result of a sudden passion occasioned by an adequate provocation,[56] but the provocation must have been adequate[57] It must be sufficient to stir the resentment of a reasonable man,[58] or, according to some authorities, to give rise to an irresistible passion[59]

Provocation alone is not sufficient[60] The exercise of a legal right, no matter how offensive, will not be deemed provocation for an assault[61] Mere words, no matter how vulgar or obscene[62] or abusive,[63] will not constitute adequate provocation. Further, accused must not himself have provoked or brought on the difficulty[64] Passion will not constitute a defense where there has been adequate cooling time,[65] and what constitutes adequate cooling time depends on the nature of the man and his mind as well as the circumstances and nature of the provocative act[66]

§ 88. —— Insanity and Intoxication

Usually, insanity or intoxication causing a mental incapacity to entertain the necessary intent to kill may constitute a valid defense to the charge of assault with intent to murder or commit manslaughter, even though the incapacity resulted from voluntary intoxication, although there is some authority to the contrary.

Subject to the rules hereinbefore stated, see supra § 4, insanity may constitute a defense to a charge of assault with intent to commit murder[67] or voluntary manslaughter[68]

There is authority holding that voluntary drunkenness or partial drunkenness is no defense to the

54. Tex —Buchanan v State, 74 S W 2d 1022, 127 Tex Cr 100

Making arrest by private person
Accused, as private person must show bona fide attempt to make arrest for felony to make such defense available under Code 1923 § 3267 — Burnell v State 139 So 435, 21 Ala App 588

55. Held insufficient
(1) Mere words —Haney v State, 101 So 533, 20 Ala App 236, certiorari denied Ex parte Haney, 101 So 537 211 Ala 614

(2) Insulting, abusive, or opprobrious language —Haney v State, supra

(3) A prior altercation or encounter
Ill —People v Cohen, 137 N E 511, 305 Ill 506
Okl —Compton v State, 122 P 2d 819, 74 Okl Cr 48

(4) Prosecuting witness' bad reputation for quarrelsomeness —Perry v Commonwealth, 151 S W 2d 377 286 Ky 587

(5) That accused is high strung, nervous, and excitable —Elmore v State 158 So 771, 26 Ala App 290

(6) That person assailed was armed but made no attempt to use his weapon —Purdy v State, 97 S W 480, 50 Tex Cr 318—30 C J p 28 note 85

(7) That deceased received mortal blow before blow by accused —Lawhorn v State, 136 S E 99, 36 Ga App 212.

(8) Further matters —State v Taylor, 26 P 2d 598, 138 Kan 407

56. Tex —Davis v State, 259 S W 946, 96 Tex Cr 646
30 C J p 29 note 88
Adequate provocation reducing murder to manslaughter see supra §§ 46–54

Injuring third person
Accidental shooting of third party instead of intended victim, in heat of passion, resulting from intended victim's conduct was merely aggravated assault —Watson v State, 13 S W 2d 696 111 Tex Cr 636

57. Cal —People v Galloway, 286 P 476, 104 Cal App 422
30 C J p 29 note 89

Legal provocation essential
If there is no legal provocation, heat of passion of accused is immaterial —People v Galloway, supra

58. Cal —People v Beam, 5 P 677, 66 Cal 394
Tex —Davis v State, 259 S W 946, 96 Tex Cr 646

59. Ark —Young v State, 138 S W 475, 99 Ark 407—Clardy v State, 131 S W 46, 96 Ark 52

60. Tex —Chatman v State, Cr, 55 S W 346

61. Nev —State v Lawry, 4 Nev 161
30 C J p 29 note 93

62. Tex — Mozee v State, Cr, 51 S W 250

63. Ala —Collins v State, 106 So 341, 21 Ala App 152, certiorari denied Ex parte Collins, 106 So 344, 214 Ala 61—Haney v State, 101 So 533, 20 Ala App 236, certiorari denied Ex parte Haney, 101 So 537 211 Ala 614
Ill —Steffy v People, 22 N E 861, 862, 130 Ill 98
30 C J p 29 note 95
Words as provocation reducing murder to manslaughter see supra § 47

64. Ky —Collett v Commonwealth, 113 S W 2d 861, 272 Ky 69
30 C J p 29 note 97
Effect of provocation by accused on reduction of murder to manslaughter see supra § 48

65. S C —State v Goodson, 138 S E 816, 140 S C 357
30 C J p 29 note 98
Cooling time in case of homicide see supra § 54

66. S C —State v Goodson, supra

67. Mich —People v Owen 118 N W 590, 154 Mich 571, 21 L R A, N S, 520
30 C J p 30 note 1

Test of insanity
If accused was able to distinguish right and wrong and to know the nature and quality of his act, then his defense of insanity fails —Hann v State, 247 P 129, 30 Ariz 366

Temporary or emotional insanity is no justification or excuse for felonious assault —Elmore v State, 158 So 771, 26 Ala App 290

68. Insanity held not shown
Tenn —Overton v State, 56 S.W 2d 740, 165 Tenn. 575

charge of assault with intent to murder or kill,[69] but in most jurisdictions, voluntary intoxication may reduce what would otherwise be an assault with intent to murder or kill to an offense of lesser degree, by showing that accused did not have the specific intent which is a necessary element in the crime,[70] unless the rule is changed by statute.[71] However, the latter rule does not apply where accused was not so drunk as to be incapable of entertaining the necessary specific intent.[72]

Drunkenness, although not so excessive as to render accused utterly incapable of forming a deliberate purpose, may have produced a state of mind unfavorable to premeditation, and this should be taken into consideration by the jury.[73] On the other hand, it has been held that drunkenness which does not amount to insanity is no defense, so as to entitle accused to an entire acquittal.[74]

§ 89. —— Self-Defense in General

Generally, self-defense obtains in cases of assault with intent to murder or kill if there is a reasonable apprehension of immediate danger of death or great bodily harm, and in a proper case a person acting in self-defense, may use such force as is reasonably necessary to protect himself from such danger

The law of self-defense in cases of homicide applies also in cases of assault with intent to murder or assault with intent to commit manslaughter,[75] so that if the homicide would have been excusable had death ensued the unsuccessful attempt to kill is also excusable.[76] If accused with good reason believed that the person assaulted was about to take his life or to do him great bodily harm, accused had a right to act in self-defense.[77] In order to invoke the doctrine of self-defense, no hard and fast rule can be laid down as to just what conduct on the part of the victim is sufficient to induce a reasonable belief in accused that he is about to lose his life or suffer great bodily harm.[78] Each case must be considered in the light of the proved facts and circumstances.[79]

If accused had a reasonable apprehension, under the circumstances, that he was in immediate danger of death or great bodily harm, even though in fact no such danger existed, it is sufficient to justify his act in self-defense,[80] although in at least one jurisdiction, accused's right of self-defense obtains against any character of unlawful attack and is not limited to attacks which put him in fear of death or serious bodily injury.[81] He must have entertained an honest belief that he was in such danger,[82] his act must have been necessary or honestly believed by him to be necessary to prevent the injury,[83] and

69. Tex.—McCall v. State, 117 S.W. 2d 791, 135 Tex.Cr. 252.
Va.—Johnson v. Commonwealth, 115 S.E. 673, 135 Va. 524, 30 A.L.R. 755.

70 Ky.—Blackburn v. Commonwealth, 255 S.W. 99, 200 Ky. 638.
30 C.J. p. 30 note 2.
Effect of intent formed prior to intoxication see supra § 5.

71. Ga.—Bonner v. State, 105 S.E. 863, 26 Ga.App. 185.
30 C.J. p. 30 note 3.

72. Cal.—People v. Owens, 86 P. 980, 3 Cal.App. 750.
30 C.J. p. 30 note 4.

73. Wash.—State v. Dolan, 50 P. 472, 17 Wash. 499.
30 C.J. p. 30 note 6.

74. Idaho.—State v. Rigley, 62 P. 679, 7 Idaho 292.
30 C.J. p. 30 note 7.

Drunkenness amounting to temporary insanity can be used by the jury, if they so desire, in amelioration of the penalty.—McCall v. State, 117 S.W.2d 791, 135 Tex.Cr. 252.

75. Tex.—Yarborough v. State, 84 S.W.2d 729, 129 Tex.Cr. 177.
Self-defense in homicide generally see infra §§ 114–138.

76. Conn.—State v. McGuire, 80 A. 761, 84 Conn. 470, 38 L.R.A.,N.S., 1045.
30 C.J. p. 30 note 10.

77. Iowa.—State v. Miller, 2 N.W.2d 290, 231 Iowa 863.
Ohio.—McGaw v. State, 174 N.E. 711, 123 Ohio St. 196.
30 C.J. p. 30 note 9.

Unexpected attack

If one charged with maliciously shooting at and wounding another with intention to kill him was unexpectedly assailed and fired on and wounded by such other before he began to shoot, his plea of self-defense should have been sustained.—Hendrickson v. Commonwealth, 257 S.W. 1029, 201 Ky. 582.

78. Iowa.—State v. Crutcher, 1 N.W. 2d 195, 231 Iowa 418.

79. Iowa.—State v. Crutcher, supra.

80 Ala.—Bodine v. State, 93 So. 264, 18 Ala.App. 514.
Kan.—State v. Taylor, 26 P.2d 598, 138 Kan. 407.
Miss.—Thornton v. State, 1 So.2d 778, 191 Miss. 107.
N.C.—State v. Elmore, 193 S.E. 713, 212 N.C. 531.
Ohio.—McGraw v. State, 174 N.E. 741, 123 Ohio St. 196.—Marcoguiseppe v. State, 151 N.E. 182, 111 Ohio St. 299.—Stewart v. State, 138 N.E. 876, 105 Ohio St. 625.
Okl.—Adams v. State, 70 P.2d 821, 827, 62 Okl.Cr. 167, quoting **Corpus Juris.**
Tex.—Pittman v. State, 144 S.W.2d 569, 140 Tex.Cr. 264.—Logan v. State, 296 S.W. 570, 107 Tex.Cr. 297.—Alexander v. State, 255 S.W. 408, 95 Tex.Cr. 197.
30 C.J. p. 31 note 11.

Actual assault by victim is not always necessary in order to justify accused in using a deadly weapon in self-defense, if the circumstances were such as to cause a reasonable apprehension that an assault was about to be committed.—State v. Crutcher, 1 N.W.2d 195, 231 Iowa 418.

81. Tex.—Cloudy v. State, 152 S.W. 2d 363, 142 Tex.Cr. 211.—Greer v. State, 47 S.W.2d 831, 120 Tex.Cr. 21.—Vega v. State, 276 S.W. 1101, 102 Tex.Cr. 37.—Holcomb v. State, 265 S.W. 1039, 98 Tex.Cr. 456.—Maynard v. State, 265 S.W. 167, 98 Tex.Cr. 201.—Schutz v. State, 257 S.W. 880, 96 Tex.Cr. 287.

82. Ohio.—McGraw v. State, 174 N.E. 741, 123 Ohio St. 196.—Stewart v. State, 138 N.E. 876, 105 Ohio St. 625.
Okl.—Adams v. State, 70 P.2d 821, 827, 62 Okl.Cr. 167, quoting **Corpus Juris.**
30 C.J. p. 31 note 12.

83. Ga.—Frazier v. State, 38 S.E. 349, 112 Ga. 868.
N.C.—State v. Elmore, 193 S.E. 713, 212 N.C. 531.
Ohio.—McGraw v. State, 174 N.E. 741, 123 Ohio St. 196.
"An accused is justified in using

the circumstances must have been such as to excite the fear of a reasonable man [84]

Necessity of overt act toward accused Mere threats, however violent, will not ordinarily justify an assault of a deadly nature [85] The person assaulted must in some manner have manifested his immediate intention of executing the threats,[86] or, as otherwise stated, at the time of the assault there must have been some overt act toward accused indicative of imminent danger [87] There is no exact general definition of an overt act justifying a person in the exercise of the right of self-defense which can be applicable to every case [88] The bare fear that a man intends to kill or commit some serious personal injury, however well grounded, unaccompanied by any overt act indicative of such intention, will not warrant killing or attempting to kill the party by way of prevention [89]

Amount of force in repelling attack Accused has a right to use such force as reasonably appears to him to be necessary to save his life or to protect himself from great bodily harm [90] However, he is not justified in using more force than is apparently necessary to avert the danger [91] He is required to exercise only reasonable judgment in determining the amount of requisite force [92]

Under circumstances which would justify it, accused may use a deadly weapon in self-defense.[93] If the assault is not felonious and there is no reason for a belief on the part of the person assaulted that the danger is actual and imminent, he is not justified in using a deadly weapon in a deadly manner [94] One on whom another was making a mere assault with the fist without intending to do great bodily harm, and who was not deceived as to the character of the assault was not justified in taking life or in using a deadly weapon in self-defense,[95] but if accused acted under the smart of an

force to defend his person only when force is necessary, or reasonably appears to be necessary, to accomplish that end"—State v Mark Len, 158 A 749, 108 N J Law 439

Self-defense coterminous with necessity

The law of Mississippi does not require flight by one assailed, but the law cannot ignore flight of prosecuting witness who had theretofore attacked accused, since right of "self-defense" is coterminous with reasonably apparent necessity—Thornton v State, 1 So 2d 778, 191 Miss 407

Lack of justification

Statute authorizing ejection of passengers was held applicable to prosecution for assault with intent to murder, by passenger cutting conductor while being properly ejected—Clinton v State, 139 S E 82, 37 Ga App 79

84. Ala—Cooke v State, 93 So 86, 18 Ala App 416, certiorari denied Ex parte Cooke, 93 So 824, 208 Ala 100
N J—State v Mark Len, 158 A 749, 108 N J Law 439
Ohio—McGraw v State, 171 N E 741, 123 Ohio St 196
Okl—Compton v State, 122 P 2d 819 74 Okl Cr 48—Adams v State, 70 P 2d 821, 827, 62 Okl Cr 167, quoting **Corpus Juris.**
Tex—Pittman v State, 144 S W 2d 569, 140 Tex Cr 264
30 C J p 31 note 14

Reasonable and prudent man

"Self-defense can be sustained only when the defendant, acting as a reasonable and prudent man under the particular circumstances, is justified in concluding that such course is necessary in order to protect himself against death or great bodily harm at the hands of his assailant"—Thornton v State, 1 So 2d 778, 191 Miss 407

Standard for measurement of danger

(1) The danger to accused must have been either real or reasonably apparent to a reasonable person, and the mere fact that accused himself thought that he was in danger is insufficient—Bodine v State, 93 So 264, 18 Ala App 514

(2) The conditions must be such as would alarm a man of ordinary firmness and impress him that the danger was imminent—Stewart v State, 138 N E 876, 105 Ohio St 625

Reasonable fear as defense to assault with intent to murder must show necessity or apparent necessity of attack to prevent felony—Martin v State, 136 S E 324, 36 Ga App 288

85. Ala—Cooke v State, 93 So 86, 18 Ala App 416, certiorari denied Ex parte Cooke, 93 So 824, 208 Ala 100
Ark—Smith v State, 287 S W 1026, 172 Ark 156
Iowa—State v Crutcher, 1 N W 2d 195, 231 Iowa 118
Miss—Callas v State, 118 So 447, 151 Miss 617

86. Ala—Cooke v State, 93 So 86 18 Ala App 416, certiorari denied Ex parte Cooke, 93 So 824, 208 Ala 100
30 C J p 31 note 16

Communication of threat

Neither communicated nor uncommunicated threats will mitigate an assault with intent to kill unless accompanied by some overt act—Compton v State, 122 P 2d 819, 74 Okl Cr 48

Previous difficulty is immaterial

Okl—Compton v State, supra

87. Miss—Callas v State, 118 So 447, 151 Miss 617
Okl—Compton v State, 122 P 2d 819, 74 Okl Cr 48
30 C J p 31 note 17

88. Ala—Cooke v State, 93 So 86, 18 Ala App 416 certiorari denied Ex parte Cooke, 93 So 824, 208 Ala 100

"Overt act" defined

An "overt act" which will justify the exercise of the right of self-defense, is such as would manifest to the mind of a reasonable person a present intention to kill him or do him great bodily harm—Cooke v State, supra

89. Ga—Martin v State, 136 S E 324, 36 Ga App 288

90. Ala—Patterson v State, 126 So 420, 23 Ala App 428
N C—State v Elmore, 193 S E 713, 212 N C 531

Protection from danger

One has right to repel assault with force necessary to protect himself, although assault is not such as would put him in fear of death or serious injury—Holcomb v State, 265 S W 1039, 98 Tex Cr 456

91. Kan—State v Taylor, 26 P 2d 598, 138 Kan 407
30 C J p 31 note 18

92. Mo—State v Hopkins, 213 S W. 126, 128, 278 Mo 385
30 C J p 31 note 19

93. Ill—People v Hannon, 44 N E. 2d 923, 381 Ill 206
Mich—People v Dann, 19 N W 159, 53 Mich 190, 51 Am R 151

94. Tex—Alexander v State, 255 S W 408, 95 Tex Cr 497
30 C J p 31 note 15

95. Ind—Larkin v. State, 71 N E 95, 163 Ind 375
30 C J p 31 note 20.

unexpected assault, he cannot be convicted of assault with intent to murder, although he may be convicted of simple assault, or at most aggravated assault [96]

Accidental injury to another Accused may assert that the shooting was in self-defense where in defending himself against a third person he accidentally shot another [97]

Attack by several Where one is attacked by several assailants, he is justified in acting on the hostile demonstrations of any one of them [98]

§ 90. —— Duty to Retreat

Except as modified by statute, the general rule, subject to some qualifications, is that it is necessary to retreat before one may resort to deadly measures in his defense

In order to justify his act on the ground of self-defense accused must as a rule have employed all means within his power and consistent with his safety to avoid the danger and avert the necessity for taking life [99] Therefore, it is as a general rule the duty of a person assaulted to retreat before resorting to deadly measures in his defense, unless retreat would increase his peril, or he has a reasonable apprehension that it would do so,[1] and he must retreat in good faith and not for the purpose of executing a fixed design to kill,[2] but a person assaulted in a place where he has a right to be may stand his ground and repel force with force even to the taking of his assailant's life, if necessary, in order to preserve his own or protect himself from great bodily harm [3] In some jurisdictions the common-law rule has been changed by statute so that a person who is unlawfully attacked is not bound to retreat, but may stand his ground, regardless of the character of the attack [4]

§ 91. —— Where Accused Is Aggressor

Ordinarily, one who provokes a difficulty is not entitled to the excuse of self-defense unless he first, in good faith, withdraws from the conflict

One who provokes a combat by assaulting another cannot as a rule avail himself of the excuse of self-defense,[5] unless he first, in good faith, withdraws from the contest which he has brought on [6] One who seeks another for the purpose of provoking a difficulty is not deprived of the right of self-defense, where he does nothing to provoke a difficulty when he meets him,[7] but on the other hand, one may be guilty of having provoked the difficulty, precluding him from invoking the doctrine of self-defense, although he did not intend to provoke any difficulty when he approached the prosecutor [8] If accused acted without felonious intent, the mere fact that he brought on the difficulty does not necessarily preclude him from justifying on the ground of self-defense where he was afterward compelled to act in self-defense [9]

Mere inequality in size and strength will not authorize the smaller combatant to resent a blow by stabbing his assailant —Morgan v State, 16 S E 836, 119 Ga 566

96. Tex —Brewer v State, 153 S W 622, 68 Tex Cr 483
30 C J p 32 note 21
Passion and provocation see supra § 87

97. Tex --Watson v State, 13 S W 2d 696, 111 Tex Cr 636
30 C J p 32 note 22

98. Miss —Gordon v State, 9 So 2d 877, 878, citing **Corpus Juris.**
30 C J p 32 note 23

99. Del —State v De Paolo, 84 A 213, 26 Del 176
30 C J p 32 note 25

1. Ala —Haney v State, 101 So 538, 20 Ala App 236, certiorari denied Ex parte Haney, 101 So 537, 211 Ala 614
30 C J p 32 note 26
Duty to retreat before committing homicide in self-defense see infra §§ 127–130

Aggressor
Instruction that accused although aggressor, need not retreat if prevented was erroneous as improperly stating law State v Leslie, 120 So 614, 167 La 967

2. W Va State v Hood 59 S E 971 63 W Va 182 129 Am S R 964, 15 L R A, N S, 448

3. Iowa - State v Metcalfe, 194 N W 81 196 Iowa 281
Kan —State v Taylor, 26 P 2d 598 138 Kan 107
30 C J p 32 note 28

Own place of business
S C State v Rogers, 126 S E 329, 130 S C 426

4. Kan – State v Pettys, 70 P 588, 65 Kan 625
30 C J p 32 note 29

5 Ky – Collett v Commonwealth 113 S W 2d 861, 272 Ky 69
30 C J p 33 note 31
Effect of aggression or provocation on right of self-defense in committing homicide see infra §§ 117–121

Manner or means of provocation
An instruction denying the right of self-defense, if accused 'brought on the difficulty," without describing the manner or means by which it was brought on, is erroneous —Martin v Commonwealth, 269 S W 556, 207 Ky 519

6. Ky —Collett v Commonwealth, 113 S W 2d 861, 865, 272 Ky 69, citing **Corpus Juris** Martin v Commonwealth, 269 S W 556 207 Ky 519
Okl --Moore v State, 218 P 1106, 25 Okl 51
30 C J p 33 note 31

Prior threats by the party assaulted are immaterial where accused provoked the difficulty —Lamb v Commonwealth 126 S E 3, 141 Va 481

Informing adversary of abandonment
One bringing about difficulty requiring self-defense cannot plead self-defense, unless before necessity he abandons difficulty and informs adversary —State v Leslie, 120 So 614 167 La 967

Although prevented from pursuing original design, person responsible for necessity of self defense cannot plead self-defense unless advising adversary of intent to quit --State v Leslie supra

7. Tex —Prescott v. State, Cr, 101 S W 215
30 C J p 33 note 32

8 Ala —Scoggins v State, 25 So 180, 120 Ala 369

9 Iowa —State v Miller, 2 N W 2d 290, 231 Iowa 863

Mere words, however, no matter how vile, will not constitute adequate provocation as to preclude the person speaking them from setting up self-defense [10] On the other hand, there is authority recognizing the rule that one who uses opprobrious language toward another which is calculated to and does bring on difficulty will be deprived of the right of self-defense.[11]

§ 92. —— Mutual Combat

One who voluntarily engages in a conflict cannot ordinarily assert self-defense as an excuse.

Where a fight is engaged in by mutual agreement, the law of self-defense cannot be invoked [12] So that, if accused invites the prosecuting witness to engage in a fight, self-defense cannot be set up in a prosecution for assault with intent to kill [13] A person who enters a combat armed with a concealed deadly weapon may use it to protect his life, if his adversary who struck the first blow resorts to such a weapon, and will not be guilty of assault with intent to murder, unless he intended from the first to use the weapon if necessary to overcome his antagonist [14]

§ 93. —— Defense of Property

One may use such reasonable force as is necessary to protect or regain possession of his property, and in a proper case an assault with intent to kill may be justified. A mere trespass will not, however, justify such assault

An assault with intent to kill cannot be justified on the ground that it was necessary to prevent a mere trespass on property or to expel an actual trespasser,[15] but a person may lawfully repel force by force in defense of his property against one who manifestly intends, by violence or surprise, to commit a felony against it, and, if in making such defense, he takes or endangers the life of the felonious aggressor, the act is justifiable [16] Under a statute regarding resistance of an attempt to take property by "force," an attempted taking need not be by violence to justify forcible resistance [17]

The owner may lawfully use such reasonable force as is necessary, under the circumstances, to protect or regain possession of his property,[18] and what is such reasonable force is a question of fact for the jury [19] The criterion of necessity which justifies the use of force by the property owner in defense of his property is the apparent, and not the actual, necessity,[20] and he will be judged by what a reasonably prudent man in good faith would do under such circumstances [21]

The use of a deadly weapon may sometimes be justified,[22] as where both the person and the property of the owner are in danger,[23] and is a factor to be considered in determining whether excessive force was used [24] The right of the proprietor of a store to eject therefrom a turbulent and profane intruder inheres also in his clerks [25] The manager or owner of a public resort has no right to eject a police officer who is there in performance of his duty [26]

§ 94. —— Defense of Habitation

An owner or occupant of a dwelling may use whatever reasonable force is necessary to prevent an invasion of his habitation or to protect it from a peace-disturbing intruder

The owner or occupant of a dwelling may lawfully repel force by force in defense of his habita-

Ky —Martin v Commonwealth, 269 S W 556, 207 Ky 519
30 C J p 33 note 34

10. Iowa —State v Miller, 2 N W 2d 290, 231 Iowa 863

11. S C —State v Wright, 159 S E 492, 161 S C 64

Limitation of rule
However, the right of self-defense is not destroyed if accused resents in harsh and indignant terms, even though they are such as are calculated to precipitate a difficulty, insulting remarks by the prosecuting witness —State v Wright, supra

12. Tex —Brewer v State, 153 S W. 622, 68 Tex Cr 483

"Mutual combat" defined
"Mutual combat" within statute providing for self-defense, is a mutual fight following a mutual intention to fight with felonious purpose —McDuffie v State, 168 S E 910, 46 Ga App 691.

Where accused is on his own premises and the prosecutor advances on him armed with a deadly weapon, the law of mutual combat does not apply —Campbell v State, 170 P 915, 14 Okl Cr 319

13. Ky —Doneghy v Commonwealth, 271 S W 586, 208 Ky 500

14. Miss —Aldrige v State, 59 Miss 250

15. S C —State v Rogers, 126 S E 329, 130 S C 426
30 C J p 33 note 39
Defense of property as justifying homicide see infra § 110

16. Ala —Levens v State, 57 So. 497, 3 Ala App 45
30 C J p 34 note 40

17. Iowa —State v Metcalfe, 212 N. W 382, 203 Iowa 155

18. Iowa —State v Metcalfe, supra
S C —State v Rogers, 126 S E 329, 130 S C 426
30 C J p 34 note 41

Bodily injury
Property owner had right in resisting felonious carrying away of property to inflict some degree of bodily injury —State v Metcalfe, 212 N W 382, 203 Iowa 155

19 Mo —State v Dooley, 26 S W 558, 121 Mo 591
30 C J p 34 note 41

20. Iowa —State v Metcalfe, 212 N W 382, 203 Iowa 155

21. Iowa —State v Metcalfe, supra

22. Iowa —State v Metcalfe, supra

23. Mich —People v Dann, 19 N W 159, 53 Mich 490, 51 Am R 151

24. Iowa —State v Metcalfe, 212 N W 382, 203 Iowa 155

25 Mo —State v Hamilton, 70 S W 876, 170 Mo 377

26. Cal —People v McKeehan, 105 P 273, 11 Cal App 443.
30 C J p 34 note 50.

tion against one who attempts to enter in a forcible or violent manner for the apparent purpose of committing a felony therein or inflicting great bodily harm or offering personal violence to an inmate, and, if in making such defense, he endangers the life of the felonious aggressor, his act is justifiable.[27] So the owner has the right, even if necessary to the extent of the taking of life, to protect his dwelling against a peace-disturbing, profane intruder.[28] These rules, however, are not applicable where the assault was unwarranted under the circumstances,[29] or was not necessary to prevent an invasion of accused's habitation,[30] or it was made on a person who, although in accused's habitation, was peacefully leaving it at accused's direction[31]

The fact that one sleeps in a place does not necessarily make that place his habitation so that he will be justified in defending it as such[32]

§ 95. —— Defense of Third Person

One may use, in defense of a third person, as much force as reasonably appears to be necessary, even to the extent of taking life but he is entitled to only such defenses as if he had been the person attacked.

One who has good reason to believe and does believe that he is resisting a felonious assault on a third person is not guilty of assault with intent to murder[33] A fortiori one may lawfully use sufficient force to repel an assault on a relative or a member of his family even to the taking of life, if that is necessary, and he is entitled to the same defenses as if he had been the person assaulted,[34] but to no other or greater defenses[35] A relative who strikes in defense of one who he knows provoked the difficulty will be bound by the wrong of the relative defended[36] and can avail himself of the doctrine of self-defense only where the party defended had a right to strike in his own defense.[37]

The right to defend another from death or great bodily harm does not depend on the reality of the danger or on the belief of the one in danger but on the facts as they reasonably appear to the defender[38] One may resort to a deadly weapon to prevent a police officer from an unlawful search of a mere friend[39]

§ 96. Persons Liable; Accessaries, Aiders, and Abettors

Although one does not actively participate in an assault with intent to take life, he may be accountable therefor if he aids or abets in, or procures the commission of, the offense, provided he has knowledge of the assailant's intent to kill.

Where assault with intent to commit murder is made a felony, as considered supra § 73, it is an offense to which there may be accessaries,[40] except where, as in the case of other offenses, considered in Criminal Law § 82, §§ 85–89, accessaries before the fact and principals in the second degree are regarded as guilty as principals[41] Under the general rule considered in Criminal Law § 81, that the distinction between principals and accessaries applies only in cases of felony, where the assault charged is regarded only as a misdemeanor all parties implicated are guilty as principals[42]

Where defendant and others have a common design to do an unlawful act, then whatever act any one of them does in furtherance of the design is an

27 Ga—Love v State, 80 S E 209, 14 Ga App 19
30 C J p 34 note 44
Defense of habitation as justifying homicide see infra § 109

28. Mo—State v Raper, 42 S W 935, 141 Mo 327
30 C J p 34 note 45

29 Mo—State v Peters, 242 S W 894

30. Ill—People v Osborne, 115 N E 890, 278 Ill 104
30 C J p 34 note 46
Resisting lawful arrest
Accused was also precluded from the defense that at the time the arrest was made he had become quiet, since his quietness was merely for the purpose of arming himself to carry on further resistance—State v Peters, Mo, 242 S W 894

31. Wyo—Delaney v. State, 81 P 792, 14 Wyo 1

32. Mich—People v Bernard, 84 N W 1092, 125 Mich 550, 65 L R A 559, appeal dismissed 22 S Ct 940, 184 U S 697, 46 L Ed 764
30 C J p 31 note 48

33. Okl—Head v State, 221 P 791, 26 Okl Cr 33
30 C J p 34 note 51

34. Okl—Head v State, 221 P. 791, 26 Okl Cr 33
30 C J p 34 note 52

35. Okl—Head v State, supra
30 C J p 35 note 53

36. Va—Lamb v Commonwealth, 126 S E 3 141 Va. 481

37. Va—Lamb v. Commonwealth, supra
30 C J p 35 note 54.
Acting on misinformation
It is no defense that accused was led to commit the assault by information brought to him by others that the person he assaulted was about to kill his son, when such was not the fact, for it was his business, when he came on the scene, to judge from what he saw whether such was the fact—State v Hays, 67 Mo 692
Resisting arrest
Where an officer in arresting accused's son used metal knucks in unlawful manner, right of self-defense was available to accused—Stanfield v State, 38 S W 2d 94, 118 Tex Cr 47

38. Kan—State v Mounkes, 127 P 637, 88 Kan 193

39. Cal—People v Seeley, 179 P. 541, 39 Cal App 586

40. Ill—People v Haskins, 169 N. E 18, 337 Ill 131
30 C J p 35 note 58

41. Ala—Smith v State, 62 So 575, 8 Ala App 187
30 C J p 35 note 60
Guilt of principals and accessaries in cases of homicide see supra §§ 7–10

42. S C—State v Smith, 118 S E 626, 125 S C 307—State v Epps, 114 S E 631, 122 S C. 272
30 C J p 35 note 62.

act by all, and all are equally guilty.[43] There must, however, be a common design[44]

All persons who engage in a conspiracy to commit an assault with intent to murder are equally guilty,[45] and actual participation in the assault is not essential.[46] One who is personally present, aiding and abetting,[47] as by approving of the assault and encouraging the assailant,[48] is guilty as a principal, although he does not actively participate.

Where a number of persons conspire to commit murder, and in execution of their common purpose a felonious assault is made by some of them on the intended victim, all are guilty of assault with intent to commit murder[49] Also, where parties enter into a conspiracy to commit another offense and in the execution of their common design one of them makes an assault with intent to murder, they are all equally guilty of the felonious assault,[50] provided such act was within the contemplation of the parties[51] The aider and abetter must as a rule either act himself with a specific intent to kill or know of such intent on the part of the principal[52] So, where one aids or encourages an assault without any malice or intent to kill and without knowledge of the principal's intent to kill, he may be guilty of simple assault and battery or aggravated assault only, according to the circumstances, although the principal may be guilty of assault with intent to murder[53] Where the only evidence to connect accused with the common design to commit the assault is certain words alleged to have been spoken by him, he cannot be convicted unless the words are spoken in the hearing of the persons engaged in the assault[54]

VI. JUSTIFIABLE OR EXCUSABLE HOMICIDE

A IN GENERAL

§ 97. What Constitutes in General

Justifiable homicide is the necessary killing of another in the performance of a legal duty, or where the slayer, without fault on his part, has a legal right so to kill

Excusable homicide is where the slayer, although at fault, has the legal right to kill, or where the killing is the accidental result of a lawful act done in a lawful manner

Concrete illustrations of classes of cases arising

43. Ala—Dunn v State, App, 5 So 2d 747
Ky—Rider v Commonwealth, 46 S W 2d 1102, 242 Ky 557
Miss—Anderson v State, 156 So 645, 171 Miss 41
30 C J p 35 note 63

Basis for rule

"This rests upon the principle of law that one who is present encouraging, aiding, abetting or assisting, or who is ready and willing to aid, abet, or assist the active perpetrator in the commission of the offense, is a guilty participant, and is just as guilty as the one who does the act" Haney v State, 101 So 533, 536, 20 Ala App 236 certiorari denied Ex parte Haney, 101 So 537 211 Ala 614

Time of making

The common undertaking may be made by prearrangement or entered into on the spur of the moment—Haney v State, supra

44. Ala—Dunn v State, App, 5 So 2d 747—Haney v State 101 So 533, 20 Ala App 236 certiorari denied Ex parte Haney, 101 So 537, 211 Ala 614
30 C J p 35 note 64

45. Ala—Harmon v State, 52 So 348, 166 Ala 28
30 C J p 35 note 65

46. Ala—Buford v. State, 31 So 714 132 Ala 6.
Ill—People v Corbishly, 158 N E 732, 327 Ill 312

Commission of overt act by accused is not required—Haney v State, 101 So 533 20 Ala App 236, certiorari denied Ex parte Haney 101 So 537 211 Ala 614

47. Ala—Dunn v State, App, 5 So 2d 747
Ky—Ridner v Commonwealth, 46 S W 2d 1102 242 Ky 557
Miss—Anderson v State, 156 So 645, 171 Miss 41
30 C J p 35 note 67

"He who aids and assists, advises or encourages, another to assault an individual with intent to kill and murder him is as guilty as the principals in the crime and is subject to the same punishment as those who followed such directions with intent to carry out the orders or directions"—People v Corbishly, 158 N E 732, 327 Ill 312

Actual assailant immaterial

Where both defendants acted in concert and each encouraged the other, it is immaterial which one of them struck the felonious blow, since the other was present and aiding and abetting and therefore, both were equally guilty—Cheeks v State, 278 S W 10, 169 Ark 1192—30 C J p 35 note 67 [a] [b]

48. Ill—People v Corbishly, 158 N E 732, 327 Ill 312
30 C J p 35 note 68

Indictment for different crimes

Accused could be indicted as principal for assault with intent to murder, for assault committed by codefendant, although codefendant had for same assault been indicted for assault with prohibited weapon—Lewis v State, 66 S W 2d 334, 125 Tex Cr 149

49. Ala—Deal v State, 34 So 23, 136 Ala 52
30 C J p 35 note 69

50. Ark—Lacy v State, 9 S W 2d 314, 177 Ark 1056
30 C J p 35 note 70

51. Tex—Nothaf v State, 240 S W 936, 91 Tex Cr 619

52. S C—State v White, 45 S E 210, 67 S C 320
30 C J p 35 note 71

Accessary after fact

An essential element of the crime of being an accessary after the fact to the crime of assault with intent to murder is that accused knew or believed, when he concealed the crime and harbored and assisted the wrongdoer to escape, that the wrongdoer had committed such assault—People v Haskins, 169 N E 18, 337 Ill 131

53. Tex—Nothaf v State, 240 S W 936, 91 Tex Cr 619—Lyons v State, 18 S W 416, 30 Tex App 642

54 Ala—Cabbell v. State, 46 Ala. 195.

and treated under particular headings in succeeding sections 100–113, or under self-defense, infra §§ 114–138, are deemed to furnish better and safer guides for the determination of what does or does not constitute excusable[55] or justifiable[56] homicide than abstract definitions Even statutory definitions and rules may fall short of a statement of the law as it has been interpreted and established by precedents and authorities of long and recognized standing.[57] If the fact of the killing is admitted, whether it was justifiable or excusable depends on the intent with which it was committed[58]

Justifiable homicide Justifiable homicide is the necessary killing of another in the performance of a legal duty or where the slayer, not being himself at fault, had a legal right so to kill,[59] the taking of human life under circumstances of justification, as a matter of right[60] It is a homicide authorized by law.[61]

Excusable homicide Excusable homicide is where the slayer, although himself at fault, had the legal right so to kill, or where the killing was the accidental result of a lawful act done in a lawful manner[62] It has also been defined as that killing which is not properly justifiable but which is allowable under certain circumstances, for example, the defense of one's own person, or that of some member of one's household, as wife, children, or servant,[63] or as that which takes place under such circumstances of accident or necessity that the party cannot be strictly said to have committed the act willfully and intentionally[64] It is committed either by misadventure or accident, as discussed infra § 112, or in self-defense on a sudden affray, infra § 114 The constituent elements of excusable homicide are three, namely, absence of intent to do harm, the lawfulness of the act resulting in death, and proper precaution to avoid mischief[65]

Under statute Within certain limits the legislature may prescribe the conditions under which homicide may be excusable or justifiable,[66] but it cannot deprive a person who is not a wrongdoer of the right of self-defense, as stated infra § 114 In many states justifiable and excusable homicides are defined by statute[67] The statutory definitions are in the main a reenactment of the common law,[68] and not in derogation thereof[69] However, in a few instances the statutes have gone further than the common law Thus, under some statutes homicide is justifiable when committed by anyone in a sudden heat of passion caused by the attempt of another to rape or otherwise defile his wife, daughter, sister, mother, or other family relation, or when the defilement has actually been committed[70] It is es-

55. Mich—Patten v People, 18 Mich 314, 330, 100 Am D 173
30 C J p 36 note 82
Justifiable or excusable homicide as defense to civil action for death see Death § 44

56. Tex—Richardson v State, 7 Tex App 186

57. Tex—Richardson v State, supra

58. Cal—People v Campanella, 116 P 2d 633, 46 Cal App 2d 697

59. Hawaii—Territory v Warren, 35 Hawaii 232
30 C J p 36 note 85
Justifiable homicide
By officer in execution of a legal sentence see infra § 106
In defense of another's person see infra § 108
In defense of habitation see infra § 109
In defense of property see infra § 110
In necessary self defense see infra §§ 114-138
To effect an arrest of a felon or to prevent his escape see infra § 102
To prevent commission of felony see infra § 101
To suppress a riot or affray see infra § 103

60. Okl Gaunce v State, 211 P 517, 518, 22 Okl Cr 361

61. Del—State v Walker, 33 A 227, 14 Del 464
Ky—Gill v Commonwealth, 31 S W 2d 608 235 Ky 351
By order of court
Me—State v Budge, 137 A 244, 246, 126 Me 223, 53 A L R 241

62. Eng—1 Hawkins P C c 29

63. Del—State v Walker, 33 A 227, 14 Del 464

64 Ohio—Williamson v State 2 Ohio Cir Ct 292, 1 Ohio Cir Dec 492
30 C J p 36 note 97

65 Okl—Gaunce v State, 211 P 517, 22 Okl Cr 361

66. Cal—People v McDonald, 163 P 1046, 32 Cal App 691
Tex Fambro v State, 154 S W 2d 840, 142 Tex Cr 473
Statutes not interchangeable
A statute permitting homicide to prevent murder, rape, etc, and a statute making homicide justifiable in protection of the person etc, cannot be used interchangeably—Stroud v State, 24 S W 2d 52, 113 Tex Cr 621

67. Ill—People v Black, 141 N E 170, 309 Ill 354
N Y—People v McMurty, 219 N Y S 293, 128 Misc 333
30 C J p 36 note 3
In Oklahoma
(1) Justifiable homicide, under Comp St 1921 § 1753, 1931 § 2236, "is the taking of human life under circumstances of justification, as a matter of right, such as self-defense, or other causes set out in the statute"—Gaunce v State, 211 P 517, 518, 22 Okl Cr 361

(2) Excusable homicide, under Comp St 1921 § 1752, 1931 § 2235 "is where death results from a lawful act by lawful means accomplished accidentally or by misfortune or misadventure or so accomplished with sufficient provocation with no undue advantage and without unnecessary cruel treatment"—Gaunce v State, supra

68 Ark—Carpenter v State, 36 S W 900 62 Ark 286

69. Wis—State v Payne, 227 N W 258 119 Wis 615

70. Ga—Court v State, 119 S E 723, 156 Ga 536
Utah—State v Botha, 75 P 731 27 Utah 289—People v Halliday 17 P 118, 5 Utah 467
30 C J p 36 note 5
Common-law rule as to homicide committed to avenge past wrongs see infra § 98
Justifiable or excusable homicide in defense of another see infra § 108.

sential, under such a statute, that accused act while in a sudden heat of passion, and that his act follow so closely, in point of time, the acquisition of knowledge of the defilement or attempt to defile as not to allow sufficient intervening time for reflection, deliberation, and the cooling of passion [71]

§ 98. Matters Not Constituting

Homicide can be justified only by the mandate of the law, or on the ground of necessity, and not on the ground of provocation unaccompanied by acts of violence, especially where the provocation is past and heat of passion has had time to cool

The intentional taking of human life can be justified only by the mandate of the law, or on the ground of necessity [72] A homicide is not justified by any kind of provocation unaccompanied with acts of violence,[73] especially where the provocation is past and accused's heat of passion has had time to cool [74] Unless expressly so provided by statute, as discussed supra § 97, the killing of a human being in heat of passion does not constitute justifiable homicide [75] Mere words,[76] or abusive, insulting, or opprobrious epithets or language,[77] or insulting looks or gestures,[78] do not furnish a justification for taking human life Anything unknown to accused at the time of the killing cannot afford him justification.[79]

Miscellaneous matters held not to be sufficient, of themselves, to justify a homicide include the fact that deceased was tall and of athletic build,[80] the making of a proposal of marriage by deceased to a daughter of accused;[81] the fact that deceased placed accused's name on a black, unfair, or debarred list or failed to deliver to him a letter of recommendation belonging to him,[82] the fact that the victim, who was the mother-in-law of accused, notified him to stay away from her home where his wife and children were,[83] and the fact that a reward has been offered by officers of the state for the killing of deceased [84]

Excuse Accused is not entitled to be acquitted on the ground of excusable homicide merely because he killed deceased in a sudden difficulty,[85] or because of jealousy or sudden anger caused by the knowledge that deceased, his mistress, had abandoned him,[86] or merely because deceased did not answer when hailed or called [87]

Justification or excuse It is important that the taking of human life be not excused or justified except in strict accordance with the established law [88] The idea of prevention or defense against

71. Ga —Daniels v State, 133 S E 866, 162 Ga 366
Utah —State v Botha, 75 P 721, 27 Utah 289—People v Halliday, 17 P 118, 5 Utah 467

Killing by wife of husband's mistress may be justifiable homicide or manslaughter, depending on necessity of killing to prevent sexual act and existence of passion — Daniels v State, 133 S E 866, 162 Ga 366

72. Okl —Wadsworth v State, 130 P 808 9 Okl Cr 84

73. Ky —Commonwealth v Beverly, 34 S W 2d 941 237 Ky 35
Ohio — State v Elliott 11 Ohio Dec, Reprint, 332, 26 Cinc L Bul 116 (libel)
30 C J p 37 note 10

Deceased's employment of negro in accused's employ
Ga Little v State, 139 S E 37, 164 Ga 509

74. Ga —Perry v State, 30 S E 903, 102 Ga 365
30 C J p 37 note 11

75. Cal —People v Ashland, 128 P 798 20 Cal App 168
As reducing crime to manslaughter see supra § 42

76. Ga —Coleman v State, 99 S E 627, 149 Ga 186—Taylor v State, 63 S E 296 131 Ga 765
Mont —State v Hanlon, 100 P 1025, 38 Mont 357
Okl —Abby v State, 114 P 2d 499, 115 P 2d 266, 72 Okl Cr 208

Bitter newspaper rivalry
Newspaper articles, letters, and conversations showing a bitter newspaper rivalry were not sufficiently provocative to justify homicide — People v French, 87 P 2d 1014, 12 Cal 2d 720
Threats as excuse or justification for homicide see infra § 126

77. Del —State v Lee, 171 A 195, 6 W W Harr 11
Iowa — State v Russo, 188 N W 660, 193 Iowa 992
Ky —Gooslin v Commonwealth, 142 S W 2d 989, 283 Ky 665
Mo —State v Robinett, 281 S W 29, 312 Mo 635—State v Ballance, 106 S W 60, 207 Mo 607
Okl —Trittbart v State, 247 P 1111, 35 Okl Cr 41—Burchett v State, 209 P 970, 22 Okl Cr 81—Turner v State, 111 P 988 4 Okl Cr 164
Or —State v Wiley 24 P 2d 1030, 144 Or 251
Va — Adams v Commonwealth, 178 S E 29, 163 Va 1053 — Sims v Commonwealth, 115 S E 382, 134 Va 736

That deceased cursed accused does not justify or excuse the homicide — Coulter v State, 162 S W 885, 72 Tex Cr 602

Effect of statute
A statute providing that, on a trial for an assault or an assault and battery, accused may give in evidence to the jury any opprobrious words or abusive language, used by the prosecutor or person assaulted and beaten, and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury does not justify accused, in homicide prosecution, in having assaulted deceased, and caused his death for the use of opprobrious words — Collum v State, 16 S E 2d 483, 65 Ga App 740

78. Del —State v Stevenson, 188 A 750, 8 W W Harr 105—State v Lee, 171 A 195, 6 W W Harr 11

79. Ga —Best v State, 107 S E 266, 26 Ga App 671

80. Puerto Rico —People v Diaz, 16 Puerto Rico 67

81. Ark —Lassiter v State, 208 S W 21, 137 Ark 273

82. Ky —Warner v Commonwealth, 84 S W 742, 27 Ky L 219

83. S C —State v Bramlett, 103 S E 755, 114 S C 389

84. Minn —State v Gut, 13 Minn 341

85. Okl —Wadsworth v State, 130 P 808, 9 Okl Cr 84
30 C J p 37 note 26

86. Ky —Howard v Commonwealth, 5 S W 2d 1056, 224 Ky 224

87. S C —State v Jones, 88 S E 444, 104 S C 141

88. Okl —Smith v State, 174 P. 1107, 14 Okl Cr 250.

an impending or progressing wrong must enter into all cases of justifiable homicide by a private person.[89] There is neither legal justification nor excuse for a private person attempting to take the law into his own hands and deliberately killing to inflict punishment or vengeance for past crimes or wrongs against himself or members of his family, no matter how serious or heinous such wrongs or crimes may have been[90] The rule is applicable even where the past wrongs of deceased were inflicted on the wife, daughter, or other female relative of accused and consisted of improper attentions, insulting conduct, or even rape, seduction, or adultery,[91] the so-called "unwritten law" or right to avenge a criminal wrong done to a female member of one's family by killing the wrongdoer is generally not recognized or available as a defense to homicide[92] Infidelity, undue intimacy, or even illicit relations by one spouse with a third person do not furnish legal justification or excuse for the taking of the life of that spouse by the other spouse[93] Homicide is not justified or excused by the mere fact that deceased was a person of bad or low character,[94] or of shady antecedents,[95] or had been an incorrigible law violator,[96] or had had some trouble with a third party just prior to the killing[97]

A homicide is neither justified nor excused by a mistake of law as to the slayer's right to take life,[98] and it is said that a homicide is never justifiable or excusable where the slayer is at the time violating some law[99] However, a person is not criminally responsible for a homicide committed by him by reason of a mistake as to the facts, where his ignorance or mistake was not due to negligence or bad faith on his part and where he would have been exempt from criminal liability if the facts were as he had supposed them to be[1]

89. Ga—Coart v State, 119 S E 723, 156 Ga 536—Brown v State, 70 S E 329, 135 Ga 656
30 C J p 37 note 29

90. Ga—Coart v State, 119 S E 723, 156 Ga 536—Thompson v State, 6 S E 2d 919, 61 Ga App 601
Iowa—State v Russo, 188 N W 660, 193 Iowa 992
La—State v Plumlee, 149 So 425, 177 La 687
Okl—Moore v State, 299 P 239, 51 Okl Cr 13—Litchfield v State 126 P 707, 8 Okl Cr 164, 45 L R A,N S, 153
Wyo—State v Sorrentino, 224 P 420, 31 Wyo 129 34 A L R 1477
30 C J p 37 note 30

91. Ala—Rogers v State, 22 So 666, 117 Ala 9—Boykin v State, 128 So 124, 23 Ala App 516
Ark—Fisher v State, 231 S W 181, 149 Ark 48
Ky—Stean v Commonwealth, 102 S W 2d 363 267 Ky 413—Harris v Commonwealth, 33 S W 2d 666, 236 Ky 666
Neb—Wehenkel v State, 218 N W 137, 116 Neb 493
Okl—Neece v State, 104 P 2d 568, 70 Okl Cr 60
Pa—Commonwealth v Foltz, 5 Pa Dist & Co 559—Commonwealth v Grimm, 5 Pa Dist & Co 287
Tex—Edwards v State, 68 S W 2d 1049, 125 Tex Cr 427
Wyo—State v Flory, 276 P 458, 464, 40 Wyo 184, citing **Corpus Juris.**
30 C J p 37 note 31

Indecent proposals to accused's wife
Ark—Stoddard v State, 276 S W 358, 169 Ark 594

Even though accused's suspicions of improper relations between deceased and accused's wife were true, it was murder for accused to drive his car alongside that in which deceased and his wife and child were riding and then to kill deceased—Stamp v Commonwealth, 253 S W 242 200 Ky 133

Mere verbal insults to female relative do not justify killing of another—Edwards v State, 68 S W 2d 1049 125 Tex Cr 427

Rule applicable to wife as accused
Rule applicable in a case where a man killed for insulting conduct toward a female relative should be applied if it is apt to a case where a woman killed another woman who sought to win her husband—Curlee v State, 282 S W 580, 104 Tex Cr 15

Killing to protect wife or daughter from present or future sexual offenses see infra §§ 108, 119

92. Ky—Stean v Commonwealth, 102 S W 2d 363, 267 Ky 413
Neb—Wehenkel v State, 218 N W 137 138 116 Neb 493, citing **Corpus Juris.**
Okl—Neece v State, 104 P 2d 568, 70 Okl Cr 60—Alexander v State, 90 P 2d 949, 66 Okl Cr 219—Merrick v State, 34 P 2d 281, 56 Okl Cr 88—Kell v State, 6 P 2d 836, 53 Okl Cr 45—Posey v State, 296 P 527, 50 Okl Cr 129—Pickett v State, 268 P 732, 40 Okl Cr 289
Pa—Commonwealth v Foltz, 5 Pa Dist & Co 559—Commonwealth v Grimm, 5 Pa Dist & Co 287
30 C J p 37 note 31 [b]

93. Ga—Aiken v State, 154 S E 368, 170 Ga 895—Rogers v State 57 S E 227, 128 Ga 67, 119 Am S R 364, 10 L R A,N S, 999
Pa—Commonwealth v Prophet, 160 A 597, 307 Pa 122
Tex—Steadham v State 43 S W 2d 944, 119 Tex Cr 475—Ott v. State, Cr, 235 S W 903
30 C J p 37 note 32.

Statute justifying slaying of spouse's paramour does not justify a husband in killing wife found in adultery—Jordan v State, 294 S W 1109, 107 Tex Cr 137—Jimenez v State, 280 S W 829, 103 Tex Cr 163—Billings v State, 277 S W 687, 102 Tex Cr 338

94. Ariz—Flowers v State, 229 P 1028 27 Ariz 70
Del—State v Stevenson, 188 A 750, 8 W W Harr 105
S C—State v Morrison, 113 S E 304, 121 S C 11
30 C J p 37 note 33

Unprovoked killing of bad man is no less murder than the killing of the most peaceful and law-abiding person in the community—Flowers v State, 229 P 1028, 27 Ariz 70

That accused's wife was employed in house of assignation, or that she did not heed his request to leave such place, did not justify accused in killing her—Flowers v State, supra.

95. Philippine—U S v Coronel, 30 Philippine 112

96. Ky—Hacker v Commonwealth, 155 S W 2d 867, 288 Ky 222

97. Ala—Tillis v State, 119 So 215, 218 Ala 527

98. Mich—People v Cook, 39 Mich 236 33 Am R 380

99. Ariz—Wiley v State, 170 P 869, 19 Ariz 316, L R A 1918D 373

1. Philippine—U S v Ah Chong, 15 Philippine 488
30 C J p 38 note 38
Accident or misadventure see infra § 112
Mistake as to danger to slayer acting in self-defense see infra § 125

It is no defense to a son who has killed his father that the latter had reared him badly [2] The imbecility or incapacity of deceased to have foreseen the danger and avoided its consequences is not allowable as a defense in a criminal prosecution for manslaughter [3] It is no defense to homicide by abortion that deceased consented to, desired, or requested the abortion,[4] although such fact may be considered by the jury in reaching their verdict [5]

§ 99. Distinctions; Exemption from Liability

Justifiable homicide and excusable homicide are to be distinguished, although accused is entitled to a full acquittal and discharge in either case.

"Justifiable homicide" and "excusable homicide" are not synonymous terms,[6] and as noted from the definitions, considered supra § 97, there are important distinctions between them,[7] although they are often used synonymously,[8] and in some states the distinctions have been expressly abolished by statute and the term "justifiable homicide" alone is employed [9] A distinction which formerly existed, that the perpetrator of an excusable homicide suffered forfeiture of his goods, while in case of justifiable homicide he forfeited nothing does not exist in this country,[10] and accused is entitled to a full acquittal and discharge where the homicide is either justifiable or excusable [11] However, some courts hold that, while there must be an entire acquittal whether the killing is excusable or justifiable, nevertheless some of the distinctions between the two kinds of homicide, such as the duty to retreat in one but not in the other, should not be ignored [12]

§ 100. Exercise of Authority or Duty

Homicide necessarily or inadvertently committed by a public officer, or one acting under his authority, while in the exercise of his authority or duty is generally justifiable or excusable

Where a public officer, or one acting under his authority, in the exercise of his duty as such, takes another's life by unavoidable necessity without any will, intention, desire, negligence, or inadvertence on his part and therefore without blame,[13] as where an officer in the due execution of his office kills a person who assaults or resists him,[14] or where an officer, in punishing a criminal within bounds of moderation and within the limits of the law, unfortunately kills him, considered infra § 112, the homicide is justifiable or excusable, but not where it is committed in excess of such officer's authority or duty [15] The mere fact that a person is a peace officer does not justify him in taking life otherwise than in the execution of duties of his office,[16] he cannot justify a homicide committed by him with a deadly weapon, while he was aiding in a violation of public laws or private rights, on the ground of his right to carry arms, since he was not at the time about his official duty and within the law.[17]

§ 101. —— Prevention of Offenses

A homicide is justifiable when committed by necessity and in good faith to prevent the commission of a felony attempted by force or surprise, but not when it is committed to prevent a mere misdemeanor

The taking of human life is justifiable when done for the prevention of any atrocious crime attempted to be committed with force [18]

2. Ky—Hargis v Commonwealth, 123 S W 239, 135 Ky 578
30 C J p 38 note 39

3. N J—State v Elliott, 110 A 135, 94 N J Law 76
Cause of death as affecting responsibility for homicide see supra § 11

4. Mo—State v Gunther, 169 S W 2d 401—State v Decker, 104 S W 2d 307, 340 Mo 972
Consent as no defense to crime of abortion see Abortion § 7

5. Mo—State v Decker, supra

6. Okl—Burton v State, 185 P 842, 844, 16 Okl Cr 602

7. Okl—Gaunce v State, 211 P 517, 518, 22 Okl Cr 361

8. Or—State v Trent, 259 P 893, 122 Or 144, denying rehearing 252 P 975, 122 Or 141—State v Gray, 79 P 53, 46 Or 24

9. Ga—Keener v State, 18 Ga 194, 63 Am D 269—Hudgins v. State, 2 Ga 173.

10 Pa—Commonwealth v Long, 17 Pa Super 641
30 C J p 38 notes 42–44

11. Ohio—Erwin v State, 29 Ohio St 186, 23 Am R 733
30 C J p 38 note 45

12. Ohio—Erwin v State, supra
Duty to retreat see infra §§ 127–130

13. Fla—Bassett v State, 33 So 262, 44 Fla 12
Tex—Great Southern Life Ins Co v Akins, Civ App, 105 S W 2d 902 904, error refused
30 C J p 38 note 48

Asylum attendant
Law will not measure with extreme nicety or exact calculation how much force attendant in asylum may use in enforcing discipline and sanitary regulations, provided he acts reasonably and without intention of cruelty or viciousness—Commonwealth v McTague, 171 A 406, 112 Pa.Super 471.

14 Ill—Lynn v People, 48 N E 961, 170 Ill 527
30 C J p 38 note 49

15. Ohio—State v Coit, 8 Ohio S & C P 62, 35 Cinc L Bul 82
Tex—Trimble v State, 104 S W 2d 31, 132 Tex Cr 236
30 C J p 38 note 51.

16. Ky—McIntire v Commonwealth, 230 S W 41, 191 Ky 299

17. Tex—Trimble v State, 104 S W 2d 31, 132 Tex Cr 236
Right to carry deadly weapon ceases, when condition that sanctions carrying of deadly weapon ceases—Trimble v State, supra
Right of peace officer to carry arms generally see the C J S title Weapons § 9, also 68 C J p 36 note 38–p 40 note 77.

18. Del—State v Watson, 82 A. 1086, 26 Del 273
30 C J p 38 note 54.

Felonies. According to the common law, it is the duty of every one, seeing any felony attempted, to prevent it by force, and if need be, by the extinguishment of the felon's existence.[19] A homicide is justifiable when committed by necessity and in good faith in order to prevent a felony attempted by force or surprise, such as murder, robbery, burglary, arson, rape, sodomy, and the like.[20] In applying the rule no distinction is made between statutory and common-law felonies.[21] The rule also is not confined to felonies against the person, but may be applicable to felonies against property.[22]

To justify the killing, it must be done in good faith and under an honest and reasonable belief that a felony is about to be committed and that the killing is necessary in order to prevent its accomplishment.[23] There need not be an actual necessity for the taking of life to prevent the felony, provided the circumstances are such as to impress the mind of the slayer with a reasonable belief in such necessity.[24] However, there either must be a necessity, or the circumstances must be such as to excite the fear of a reasonable man of a necessity, to take life to prevent the commission of a felony.[25] A bare fear of the commission of a felony is not sufficient to constitute a justification.[26] To be justifiable, the killing must be done while the person killed is in the act of committing the offense, or after some act done by him showing an evident intent to commit such offense.[27] It generally must be done for the prevention of a felony and not as a punishment for a felony already committed,[28] although, under some statutes, the killing is justified, in case of robbery, if it is done while the robber is in the presence of the victim or fleeing with the property taken,[29] or, in case of burglary or theft by night, if it is done while the offender is in the building or at the place where the felony is committed or within gunshot thereof.[30]

The mere intent of a person to commit a felony, without any overt act indicative of such intention, will not justify the killing of such person by way of prevention,[31] and after the necessity has ceased, and the supposed felon flees and thereby abandons his supposed design, a killing in pursuit is not justified however well founded the belief may be that he had intended to commit a felony.[32] The necessity must exist at the time, the mere opinion of the

19 Ark.—Carpenter v. State, 36 S.W. 900, 62 Ark. 286.
N.C.—State v. Robinson, 195 S.E. 824, 213 N.C. 273.
30 C.J. p. 38 note 56.
Felonious attack by deceased as
Affecting duty to retreat see infra § 129
Element of defense of
Another person see infra § 108
Habitation see infra § 109
Property see infra § 110
Right of private citizen to prevent commission of felony generally see Criminal Law § 2009

20 U.S.—Ex parte Dickson, D.C.N.Y., 14 F.2d 609.
Ariz.—Viliborghi v. State, 43 P.2d 210, 45 Ariz. 275.
Ga.—Thompson v. State, 6 S.E.2d 919, 61 Ga.App. 601.
Iowa.—State v. Shannon, 243 N.W. 507, 214 Iowa 1093.
Ky.—Commonwealth v. Beverly, 34 S.W.2d 941, 237 Ky. 35.—Gill v. Commonwealth, 31 S.W.2d 608, 235 Ky. 351.—Flynn v. Commonwealth, 264 S.W. 1111, 1112, 204 Ky. 572, quoting **Corpus Juris.**
Tex.—McKee v. State, 42 S.W.2d 77, 118 Tex.Cr. 479.
Wis.—State v. Payne, 227 N.W. 258, 119 Wis. 615.
Wyo.—State v. Sorrentino, 224 P. 420, 31 Wyo. 129, 34 A.L.R. 1477.
30 C.J. p. 38 note 57.

Where goods are stolen during commission of burglary, entire act is a felony, and accused who kills perpetrator before crime is completed must be tried by rules governing homicides committed to prevent felonies and not by those which govern killing to prevent misdemeanors, notwithstanding actual taking of property itself would only be a misdemeanor.—Viliborghi v. State, 43 P.2d 210, 45 Ariz. 275.

21. Ala.—Storey v. State, 71 Ala. 329.
Mich.—Pond v. People, 8 Mich. 150.

22. Ky.—Commonwealth v. Beverly, 34 S.W.2d 941, 237 Ky. 35.
Tex.—Moore v. State, 237 S.W. 931, 91 Tex.Cr. 118.
Defense of property or habitation against crime see infra §§ 109, 110

23 Ariz.—Viliborghi v. State, 43 P.2d 210, 45 Ariz. 275.
Miss.—Luttrell v. State, 174 So. 53, 178 Miss. 877.
N.Y.—People v. McMurty, 219 N.Y.S. 293, 128 Misc. 333.
30 C.J. p. 39 note 60.

24. Ariz.—Viliborghi v. State, 43 P.2d 210, 45 Ariz. 275.
30 C.J. p. 39 note 61.

25. Ga.—Lyons v. State, 66 S.E. 792, 133 Ga. 587.
30 C.J. p. 39 note 62.

26. Ga.—Thompson v. State, 55 Ga. 47.

27. Ariz.—Viliborghi v. State, 43 P.2d 210, 45 Ariz. 275.
Ill.—People v. Black, 141 N.E. 170, 309 Ill. 354.
Miss.—Luttrell v. State, 174 So. 53, 178 Miss. 877.
N.Y.—People v. McMurty, 219 N.Y.S. 293, 128 Misc. 333.
30 C.J. p. 39 note 64.

The felony must be one that is immediate and impending at the moment of the killing.—Luttrell v. State, 174 So. 53, 178 Miss. 877.

Smuggling

An officer is justified in using firearms to stop a smuggling automobile, when he plainly sees, or has good reason to believe, that the automobile contains smuggled goods, and the driver knows the officer's official character, and sees his signal to stop, and defiantly refuses to stop.—Ex parte Dickson, D.C.N.Y., 14 F.2d 609.

28 La.—State v. Varnado, 52 So. 1006, 126 La. 732.
N.C.—State v. Roane, 13 N.C. 58.
Wyo.—State v. Sorrentino, 224 P. 420, 31 Wyo. 129, 34 A.L.R. 1477.
Avenging past wrongs generally see supra § 98
Killing of adulterer after completion of act and before parties have separated see infra § 108

29. Tex.—Kee v. State, 42 S.W.2d 77, 118 Tex.Cr. 479.

30. Tex.—Teague v. State, 206 S.W. 193, 84 Tex.Cr. 169.—Slack v. State, 149 S.W. 107, 67 Tex.Cr. 460.
30 C.J. p. 39 note 66 [a].

31. La.—State v. West, 12 So. 7, 45 La.Ann. 14.
Va.—Stoneman v. Commonwealth, 25 Gratt. 887, 66 Va. 887.

32. N.C.—State v. Rutherford, 8 N.C. 457, 9 Am.D. 658.

slayer that a crime might be committed at some time in the future is not sufficient as a justification.[33] Killing to prevent a felony is not justifiable if the felony is a secret one, or unaccompanied by force,[34] or if it does not involve the security of the person or home,[35] or where the commission of the felony is problematical or remote.[36]

Misdemeanors. A homicide committed to prevent a mere misdemeanor is not justifiable, either by a private citizen or an officer.[37] A person has no right to kill to prevent a mere trespass,[38] amounting only to a misdemeanor,[39] which is unaccompanied by imminent danger of great bodily harm or felony and which does not produce in his mind a reasonable belief of such danger.[40] However, the rule is otherwise and a homicide is justifiable where the trespasser has the intent and the means to commit a forcible trespass and a felony if necessary to accomplish the end intended.[41]

§ 102. —— Making Arrest or Preventing Escape

a. In general
b In case of felony
c In case of misdemeanor
d Preventing escape of, or rearresting, convict
e Killing rescuer

a. In General

If an officer of the law, or other person authorized to make an arrest, uses proper and necessary means or force in making an arrest or preventing the prisoner's escape and is resisted, and the resisting person is unavoidably killed in the struggle, the homicide is justifiable.

In accordance with the rules relating to the use of force in making an arrest or preventing an escape in criminal cases, as discussed in Arrest § 13, an officer of the law or other person authorized to make an arrest, who uses proper means in making the arrest or preventing the prisoner's escape and is resisted may repel force with force, and if the person resisting is unavoidably killed in the struggle, the homicide is justifiable,[42] and since in such cases the killing is done by the officer in the performance of his duties to effect the arrest or imprisonment, the doctrine of self-defense has no application,[43] and the officer is not required to retreat before an assailing or resisting prisoner.[44] However he is not justified in using unnecessary force or resorting to the use of firearms or other dangerous weapons where with diligence and caution the prisoner can be otherwise arrested and detained,[45] although this does not require that he shall call bystanders to assist in making the arrest.[46] As otherwise stated, a homicide is justifiable where it results from the use, by the officer or person making the arrest, of such force as is reasonably necessary to overcome the resistance offered and to make the arrest or prevent the escape of the person under lawful arrest,[47] and where the arrest and impris-

33. Ga—Watson v State, 104 S E 572, 150 Ga 627.

34. Ala—Storey v State, 71 Ala 329
Ill—People v Black, 141 N E 170, 309 Ill 354
Ky—Commonwealth v Beverly, 34 S W 2d 941, 237 Ky 35
30 C J p 39 note 72

Mere fact that another is in his house does not justify the householder in killing him—People v Black, 141 N E 170, 309 Ill 354

35 Ky—Commonwealth v Beverly, 34 S W 2d 941, 237 Ky. 35

36. Tex—Weaver v State, 19 Tex App 547, 53 Am R 389

37. Ariz—Villiborghi v State, 43 P. 2d 210, 45 Ariz 275
La—State v Turner, 182 So 325, 190 La 198—State v Plumlee, 149 So 425, 177 La 687

Killing of thief who is engaged in a misdemeanor is not justifiable—Villiborghi v State, 43 P.2d 210, 45 Ariz 275

38. Ky—Commonwealth v Beverly, 34 S W 2d 941, 237 Ky 35.
La—State v Plumlee, 149 So 425, 177 La 687
30 C J p 39 note 74
Defense of property against trespass see infra §§ 109, 110

39. Ga—Drew v State, 71 S E 1108, 136 Ga 658—Crawford v State, 17 S E 628, 90 Ga 701, 35 Am S R 242

40. Ala—Lewis v State, 59 So 577, 178 Ala 26—Noles v State, 26 Ala 31, 62 Am D 711

41. Cal—People v Payne, 8 Cal 341

42 Ala—Dyson v State, 189 So 784, 28 Ala App 549
Ky—Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830—Crawford v Commonwealth, 44 S W 2d 286, 241 Ky 391
Miss—Carlee v State, 139 So 618, 162 Miss 263
30 C J p 40 note 81
Who may arrest see Arrest §§ 4–10

43. Ala—Dyson v State, 189 So 784, 28 Ala App 549
30 C J p 76 notes 26–30, 39
Self-defense by officer making arrest see infra § 137

44. Ala—Ex parte Warsham, 84 So. 889, 203 Ala 534, reversing 84 So 885 17 Ala App 181
30 C J p 76 notes 39, 40 p 40 note 41

45. Mo—State v Montgomery, 132 S W 232, 230 Mo 660
Tex—McDonald v State, Cr, 22 S W 2d 670
Va—Evans v Commonwealth, 170 S E 756, 161 Va 992
30 C J p 40 note 82

46. Ala—Daniel v State, 122 So 306, 23 Ala App 188
Summoning bystanders generally see Arrest § 16

47. Cal—People v Brooks, 63 P 464, 131 Cal 311
Ky—Keyes v Commonwealth, 114 S W 2d 742, 272 Ky 628—Collett v Commonwealth, 107 S W 2d 280, 269 Ky 346—Mays v Commonwealth, 99 S W 2d 801, 266 Ky 691—Bentley v Commonwealth, 27 S W 2d 397, 234 Ky 37—McClees v Commonwealth, 219 S W 1064, 187 Ky 533
N M—State v Vargas, 74 P 2d 62, 42 N M 1
N C—State v Miller, 149 S E 590, 197 N C 445
Philippine—U S. v. Salazar, 15 Philippine 315.

onment are legal, and the resistance of the prisoner is met without unnecessary force or violence, the homicide is justifiable, even though the officer may have entertained improper motives or purposes.[48] Even though the arrest is illegal, if the officer, a known peace officer, has acted in good faith, he may be justified in killing to overcome resistance after the arrest has been made, but not where he has acted in bad faith in attempting the arrest[49]

A homicide is not justifiable, however, where it was committed by an officer in attempting to arrest deceased during the course of a difficulty brought on by the officer,[50] or where it was committed by a person without authority to make an arrest in killing another person who has committed no offense,[51] or where the offense was not known until after the killing[52] Accused cannot invoke the doctrine of the right of an officer to kill if necessary, in making an arrest where he neither made an arrest nor a reasonable effort to make an arrest and deceased made no effort to evade arrest or to escape from the officer[53] An officer is not protected in killing a person being arrested without a warrant, where it is not evident that the arrest is for an offense committed in the officer's presence or that there is an attempt to escape,[54] or where the arrest is unlawful and only reasonable force is used in resisting it;[55] or where the officer has failed to perform his statutory duty of making known his authority and the cause of the arrest and where, therefore, the person being arrested is under no duty to submit,[56] unless the offender knows that he is being pursued for the purpose of arrest, and knows the offense with which he is charged[57] Under some statutes, an officer or other person executing an order of arrest is not justified in killing a person who attempts to escape unless the life of the officer is endangered or he is threatened with great bodily injury[58]

b. In Case of Felony

Homicide committed in attempting to arrest or prevent the escape of a felon is generally justifiable where otherwise the arrest cannot be made or the escape prevented

Homicide committed by a public officer or private citizen while attempting in a lawful manner and by the necessary use of force to arrest or prevent the escape of a felon, whether in fleeing from arrest or in attempting to escape after he has been taken, is justifiable where otherwise the arrest cannot be made or the escape prevented,[59] as where the

48. Ala—Birt v State, 46 So 858, 156 Ala 29

49. Ky—Keyes v Commonwealth, 114 S W 2d 712, 272 Ky 628

Accidental killing

Policeman who, with his companion, had made an arrest, would not be deprived of defense that the person arrested was killed accidentally when the policeman's companion accidentally discharged his pistol while he was trying to subdue person arrested if the arrest was wrongful unless companion acted in bad faith in attempting arrest and used authority merely as pretext for assaulting the person arrested—Keyes v Commonwealth, supra

50 Ark—Johnson v State, 23 S W 7, 58 Ark 57

51. Colo—Demato v People 111 P 703, 49 Colo 147, 35 L R A,N S, 621, Ann Cas 1912A 783

Ga—Coleman v State, 49 S E 716, 121 Ga 594

52. Ala—West v State, 114 So 568, 22 Ala App 187, certiorari denied 114 So 570, 217 Ala 62

53. Mo—State v Rollins, 126 S W 478, 226 Mo 524

Tex—Rezeau v State, 254 S W 574, 95 Tex Cr 323

Request to go to office

Where a patrolman of railroad yards asked deceased if he would go to the office, and deceased voluntarily assented, and no command or restraining word was given, and the door left open while they were in the office there was no arrest—Rezeau v State, supra

54. Ga—Luffman v State, 143 S E 371, 166 Ga 296

55 Ala—West v State, 114 So 568, 22 Ala App 187, certiorari denied 111 So 570, 217 Ala 62

56. Ala - Davis v State, 176 So 226, 27 Ala App 490, certiorari denied 176 So 227, 234 Ala 626—Jackson v State, 114 So 68, 22 Ala App 133, certiorari denied 114 So 69, 216 Ala 564—Tarwater v State, 75 So 816, 16 Ala App 140

Ky - Sizemore v Commonwealth, 130 S W 2d 31, 279 Ky 190

Prerequisite of arrest by private person for felony is that accosted party must be informed he is to be arrested, and cause thereof—Burnell v State, 139 So 435, 24 Ala App 588

Duty of officer, arresting without warrant, to make known his authority and intention see Arrest § 6 e

57. Ky—Sizemore v Commonwealth, 130 S W 2d 31, 279 Ky 190

58. Tex—Grohoske v State, 61 S W 2d 847, 124 Tex Cr 338—McDonald v State, Cr, 22 S W 2d 670

30 C J p 40 note 91.

59. U S—Stinnett v Commonwealth of Virginia, C C A Va., 55 F 2d 644—Vaccaro v Collier, D C Md, 38 F 2d 862, modified on other grounds, C C A, Collier v Vaccaro, 51 F 2d 17

Ariz—Villiborghi v State, 43 P 2d 210, 45 Ariz 275

Ill—People v Klein, 137 N E 145, 305 Ill 141

Ky—Crawford v Commonwealth, 44 S W 2d 286, 241 Ky 391—Fitzpatrick v Commonwealth, 275 S W 819, 210 Ky 385

Mich—People v Robinson, 199 N W 622, 228 Mich 64

Mo—State v Ford 130 S W 2d 635, 344 Mo 1219—State v Salts, 56 S W 2d 21, 331 Mo 665

Tenn—Scarbrough v State, 76 S W. 2d 106, 168 Tenn 106

30 C J p 40 note 92

Statutory provision

A statute providing that homicide shall be justifiable when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed justifies a homicide resulting from force necessarily exerted in effecting the arrest of an accused felon in flight.—State v Ford, 130 S W 2d 635, 344 Mo 1219—30 C J p 40 note 92 [a]

Officer may shoot one fleeing after committing felony and refusing to stop on demand—Ex parte Warner, D C Okl, 21 F 2d 542

Owner of burglarized property, where burglar attempts to resist or

felon's life is taken in the course of using such force in effecting his arrest and in overcoming his resistance, or in preventing his escape, as is necessary, or as appears to the arresting officer or citizen, in the exercise of a reasonable discretion, to be necessary.[60] In order to justify the killing the arresting officer or citizen is not limited to the use of such force as is necessary to protect himself from death or great bodily harm, or to the right of self-defense available to a private citizen,[61] although of course the right of self-defense is available to him in a proper case, as discussed infra § 137 However, it has been held that a private person is justified in killing only in self-defense,[62] and that he has no right to kill simply to prevent the person sought to be arrested from going away[63] If the arrest was made without a warrant to justify the homicide the felony must either have been committed in the view or presence of the person making the arrest,[64] or he must have reasonable cause to believe and must in good faith have believed that deceased has committed a felony and is trying to escape,[65] and a mere indefinite suspicion of that fact is insufficient[66] Some authorities hold that in such a case the killing cannot be justified without proof of guilt, however reasonable the grounds of belief[67] There must also be a necessity for the killing in order to justify it,[68] and according to some authorities it is sufficient that there is an apparent[69] or probable necessity,[70] but on the other hand positive necessity has been required[71]

Arrest of striking workmen A homicide committed by reasonable necessity by a public officer and his posse in attempting to arrest the leaders of a marching body of men who have banded themselves together and gone forth armed for the purpose, as he believes on reasonable grounds, of in-

flee from arrest, may use such force as is reasonably necessary for apprehension of burglar, even to taking of life, notwithstanding burglary has been completed--Viliborghi v State 43 P 2d 210, 45 Ariz 275
Amount of force in arrest for felony generally see Arrest § 13 b

60. U S-- Stinnett v Commonwealth of Virginia, C C A Va, 55 F 2d 641
Ala—Dredd v State 164 So 309, 311, 26 Ala App 594, citing **Corpus Juris**
Tenn—Human v Goodman, 18 S W 2d 381, 159 Tenn 241
30 C J p 40 notes 93, 94

61. Ala—Dyson v State 189 So 784, 28 Ala App 549—Dredd v State 164 So 309 311 26 Ala App 594, citing **Corpus Juris.**
Iowa—State v Smith, 103 N W 914, 127 Iowa 534, 109 Am S R 402, 70 L R A 246, 4 Ann Cas 758
Ky—Lindle v Commonwealth, 64 S W 986, 111 Ky 866, 23 Ky L 1307

62. Ky—Tolliver v Commonwealth, 170 S W 515, 161 Ky 81
30 C J p 40 note 81
Self-defense by person making arrest generally see infra § 137

63. Ky—Tolliver v Commonwealth, 170 S W 515, 161 Ky 81

64. Tex—Lacy v State, 7 Tex App 403

Arson
Where accused and another went to home in nighttime and set it on fire, officers in whose presence the offense was being committed not only had right to arrest accused without a warrant and to resort to such means and measures as seemed necessary to accomplish that objective, but had a right to kill accused while fleeing from the scene of the burning building—Barnes v State, 116 S W 2d 408, 134 Tex Cr 461.

65. U S—Vaccaro v Collier, D C Md, 38 F 2d 862, modified on other grounds, C C A, Collier v Vaccaro, 51 F 2d 17
Ariz—Viliborghi v State, 43 P 2d 210, 45 Ariz 275
Cal—People v Bost, 290 P. 513, 107 Cal App 550
Idaho—State v. Autheman, 274 P 805, 47 Idaho 328, 62 A L R 195
Ky—Martin v Commonwealth, 78 S W 2d 786, 257 Ky 591
Miss—Lee v State, 171 So 85, 179 Miss 122
Mo—McKeon v National Casualty Co, 270 S W 707, 216 Mo App 507
30 C J p 41 note 84

Reasonable apprehension and belief
Whether killing was necessary to prevent a burglary or to apprehend burglar after offense was committed, so as to make homicide justifiable, depends on whether accused's apprehension and belief were reasonable, and not on whether such apprehension and belief were justified by the facts as they actually existed—Viliborghi v State, 43 P 2d 210, 45 Ariz 275

Firing into house in nighttime with knowledge that house was occupied and that persons were sleeping therein was done in commission of act evincing a reckless disregard for human life, and with intent to injure some person therein, and town marshal living in house had such probable cause to believe that person firing gun had committed felony as would warrant marshal in arresting person without warrant—Lee v State, 174 So 85, 179 Miss 122

Accused need not satisfy himself beyond question that a felony has been committed, but he may not act on unsubstantial appearances or unreasonable stories—State v Autheman, 274 P 805, 47 Idaho 328, 62 A L R 195

66. Okl—Ex parte Finney, 205 P 197, 21 Okl Cr 103
30 C J p 41 note 84 [a]

67. N Y--Conraddy v. People, 5 Park Cr 234
30 C J p 41 note 85

68. Va—Hendricks v Commonwealth, 178 S E 8, 163 Va 1102
30 C J p 41 note 86

69. U S—U S v Kaplan, D C Ga, 286 F 963
Ky—Lindle v Commonwealth, 64 S W 986, 111 Ky 866, 23 Ky L 1307
Va—Hendricks v Commonwealth, 178 S E 8, 163 Va 1102

No other reasonably apparent method
An officer who killed some one when shooting at a fleeing automobile is faced with the necessity for showing that there was no other reasonably apparent method of effecting the arrest or preventing the escape of a fleeing felon, and that he had in other respects performed his duty—U S v Kaplan, D C Ga, 286 F 963

70. Miss—Jackson v State, 5 So 690, 66 Miss 89, 14 Am S R 542

71. N Y—Conraddy v. People, 5 Park Cr 234

Killing must be last resort and officer or private person cannot arbitrarily judge necessity of killing—Scarbrough v State, 76 S W 2d 106, 107, 168 Tenn 106

"Killing in flight is excusable only when it is shown that the felon cannot be ultimately taken by less drastic means"—Scarbrough v. State, supra.

timidating and injuring nonunion workers and compelling them to quit their work, is justifiable.[72]

c. In Case of Misdemeanor

An officer or person authorized to make an arrest ordinarily is not justified in killing a mere misdemeanant in order to effectuate his arrest or prevent his escape, unless it becomes necessary to kill in overcoming resistance offered.

An officer is not justified in killing a mere misdemeanant in order to effectuate his arrest or to prevent his escape after arrest,[73] and a private person assisting in the arrest, at the request of the officer, is subject to the same limitation.[74] The rule is commonly applied by holding that the killing of a misdemeanant while in flight is not justifiable.[75] Homicide, however, may be justified, under the rules justifying a homicide committed by an officer in making an arrest for a felony, where the conduct of a person in resisting an arrest on a misdemeanor charge is such as to constitute a felony committed in the presence of the officer,[76] or where the misdemeanor is flagrant, as where a dangerous wound has been inflicted or a riot exists, for the presumption is very great that the offense will turn out to be a felony.[77] Ordinarily in cases of misdemeanor an arresting officer's or citizen's right to kill is limited to self-defense,[78] but, where the offender forcibly resists arrest or, while in custody, uses force and violence to overpower the officer and accomplish his escape, the right of the officer to kill is not limited to the single ground of self-defense,[79] as in such a case he is entitled to use such force as is reasonably necessary to overcome the resistance offered even to the extent of taking life,[80] pro-

72. Ky—Lindle v Commonwealth, 64 S W 986, 111 Ky 866, 23 Ky L 1307

73. U S—Vaccaro v Collier, D C Md, 38 F 2d 862 modified on other grounds, C C A, Collier v Vaccaro, 51 F 2d 17—Ex parte Warner D C Okl 21 F 2d 512—U S v Kaplan, D C Ga, 286 F 963
Ala—Cobb v State, 97 So 779, 19 Ala App 345, certiorari denied Ex parte Cobb, 97 So 783, 210 Ala 252
Ark—Deatherage v State, 108 S W 2d 904, 194 Ark 513
Idaho—State v Wilson, 243 P 359, 41 Idaho 616
Ill—People v Scalisi, 154 N E 715, 324 Ill 131—People v Klein, 137 N E 145, 305 Ill 141
Ind—Durham v State, 159 N E 145, 199 Ind 567
Ky—Woods v Commonwealth, 139 S W 2d 439, 282 Ky 596—Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830—Taylor v Commonwealth, 114 S W 2d 482, 272 Ky 408—Layne v Commonwealth, 112 S W 2d 61, 271 Ky 418—Shelton v Commonwealth, 11 S W 2d 125, 226 Ky 460—Partin v Commonwealth, 248 S W 489, 197 Ky 840—Terrell v Commonwealth, 210 S W 81, 194 Ky 608
Mo—State v Ford, 130 S W 2d 635, 638, 344 Mo 1219, citing **Corpus Juris**—State v Salts, 56 S W 2d 21, 24, 331 Mo 665, citing **Corpus Juris**—State v McGehee, 274 S W 70, 308 Mo 560
N M—State v Gabaldon, 96 P 2d 293, 43 N M 525—State v Vargas, 74 P 2d 62, 42 N M 1
Okl—Sharp v U S, 118 P 675, 6 Okl Cr 350
30 C J p 41 note 90

Recapture

An officer has no right to kill one escaping after arrest for misdemeanor in order to recapture him, but may use such force as reasonably appears necessary to prevent his escape—Layne v Commonwealth, 112 S W 2d 61, 271 Ky 418
Amount of force in arrest for misdemeanor generally see Arrest § 13 c

74. Ala—Handley v State, 11 So 322, 96 Ala 48, 38 Am S R 81
N M—State v Gabaldon, 96 P 2d 293, 43 N M 525

75. U S—U S v Kaplan, D C Ga, 286 F 963
Ala—Green v State, 189 So 763, 238 Ala 113—Cobb v State, 97 So 779, 19 Ala App 345, certiorari denied Ex parte Cobb, 97 So 783, 210 Ala 252
Ky—Commonwealth v Anderson, 40 S W 2d 265, 239 Ky 658—Anderson v Commonwealth, 22 S W 2d 599, 232 Ky 159
Mo—State v Garland, 263 S W 165, 304 Mo 87
N M—State v Gabaldon, 96 P 2d 293, 43 N M 525
Okl—Vaughn v State, 14 P 2d 239, 54 Okl Cr 59—Nowlin v State, 3 P 2d 916, 52 Okl Cr 169—Coffey v State, 258 P 923, 38 Okl Cr 91
Tex—Martinez v State, 152 S W 2d 369, 142 Tex Cr 313
30 C J p 41 note 91

76. Ky—Bentley v Commonwealth 27 S W 2d 397, 231 Ky 37—Anderson v Commonwealth, 22 S W 2d 599, 232 Ky 159—Maggard v Commonwealth, 22 S W 2d 298, 232 Ky 10—Hickey v Commonwealth, 215 S W 431, 185 Ky 570—Reed v Commonwealth, 100 S W 856, 125 Ky 126, 30 Ky L 1212

Shooting at officer

Where a person who was drunk on the public highway started to shoot at a peace officer attempting to arrest him, he thereby committed a felony in the officer's presence, and the officer could arrest him without warrant, and in doing so, if necessary, take his life—Partin v Commonwealth, 248 S W 489, 197 Ky. 840

77. Mo—State v Salts, 56 S W 2d 21, 331 Mo 665—State v McNally, 87 Mo 644
Pa—Commonwealth v Max, 8 Phila 422

78. Ill—People v Scalisi, 154 N E. 715, 324 Ill 131—People v Klein, 137 N E 145, 305 Ill 141
Iowa—State v Towne, 160 N W 10, 180 Iowa 339
Ky—Layne v Commonwealth, 112 S. W 2d 61, 271 Ky 418—Hickey v. Commonwealth, 215 S W 431, 185 Ky 570

A motorist traveling at a high rate of speed cannot be killed, except in self-defense, in order to effect his arrest, whether the officer's purpose is to kill or merely to stop the misdemeanant's flight, even though the latter cannot be taken otherwise—People v Klein, 137 N E 145, 305 Ill 141
Right of officer or person making arrest to kill in self-defense generally see infra § 137

79. Ky—Giles v Commonwealth, 99 S W 2d 155, 266 Ky 475—Hatfield v Commonwealth, 59 S W 2d 540, 248 Ky 573—Smith v Commonwealth, 195 S W 811, 176 Ky 466—Stevens v Commonwealth, 98 S W. 284, 124 Ky 32, 30 Ky L 290
30 C J p 41 note 95

80. Ky—Woods v Commonwealth, 139 S W 2d 439, 282 Ky 596—Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830—Giles v Commonwealth, 99 S W 2d 455, 266 Ky 475—Hatfield v Commonwealth, 59 S W 2d 540, 248 Ky 573
Mo—State v Ford, 130 S W 2d 635, 344 Mo 1219
Neb—Broquet v State, 223 N W 404, 118 Neb 31
N M—State v Vargas, 74 P 2d 62, 42 N M 1
30 C J p 41 note 96

vided the resistance offered is such that in overcoming it and in making the arrest or preventing the escape the officer is placed in danger of loss of life or great bodily harm.[81] Where, under the circumstances, a private citizen is without authority to make an arrest for a misdemeanor without a warrant, he is not justified in taking life on meeting with resistance to an attempted arrest,[82] and the same is true where an officer is attempting to make an illegal arrest without a warrant, as for a misdemeanor not committed in his presence.[83] The person protected in taking life while employing such force as is reasonably necessary to overcome the resistance to an arrest for a misdemeanor is an officer engaged in the discharge of an official duty.[84]

d. Preventing Escape of, or Rearresting, Convict

Homicide is justifiable when committed to prevent the escape of a convict, but not in all cases when committed by a guard in attempting to rearrest an escaped convict.

Where a convict tries to escape, or where the circumstances are such as to lead his guard, as a reasonable man, honestly to conclude that the convict is trying to escape and that it is necessary for him to shoot and kill in order to prevent the escape, it is justifiable homicide,[85] but a statute authorizing the taking of life to prevent such an escape has been held to apply only to an escaping convict who is a felon, and not a misdemeanant.[86] However, this right does not extend to a guard or other person attempting to rearrest an escaped convict, he has only such authority as belongs to an ordinary officer in making an arrest,[87] nor is an officer authorized to use firearms to compel a misdemeanor convict to return to service or obey the officer's orders.[88]

e. Killing Rescuer

The killing, under circumstances of reasonable necessity, of one who attempts to rescue a prisoner from an officer who has him in custody is justifiable.

Where it is necessary, in order to prevent an escape, an officer may be justified in killing a person who attempts to rescue his prisoner.[89] However, the officer is not justified in killing for this purpose unless there is an apparent necessity for it,[90] and the law does not clothe him with authority to judge arbitrarily of the necessity of killing the rescuer.[91]

§ 103. —— Suppression of Riot or Affray

Homicide committed, when necessary, to suppress a riot or affray and preserve the peace is justifiable.

Force must be directed against officer to constitute forcible resistance to arrest which will justify homicide —Hill v Commonwealth, 40 S W 2d 261, 239 Ky 646

Refusal of driver of automobile to heed traffic officer's warning to stop does not amount to forcible resistance to arrest, justifying homicide — Hill v Commonwealth, supra

Statutory provisions

A statute providing that homicide shall be justifiable when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed does not negative right of officer to use all force reasonably necessary to effect and maintain against resistance the arrest of a misdemeanant, especially in view of statute providing that if, after notice of intention to arrest accused, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest —State v Ford, 130 S W 2d 635, 344 Mo 1219

81. Ark —Deatherage v State, 108 S W 2d 904, 194 Ark 513
Ill —People v Cash, 157 N E 76, 326 Ill 104
Ind — Durham v State, 159 N E 145, 199 Ind 567
Ky —Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830—Shelton v Commonwealth, 11 S W 2d 125, 226 Ky 460
N M —State v Gabaldon, 96 P 2d 293, 43 N M 525—State v Vargas, 74 P 2d 62, 42 N M 1.
W Va —State v Murphy, 145 S E 275, 106 W Va 216
30 C J p 42 note 97

The act of motorist in fleeing at high speed when officers were attempting to arrest him for drunken and reckless driving and assault was not such forcible obstruction to arrest as would justify officers in killing him —Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830

Large rocks, hurled by man at deputy sheriff who was attempting to arrest him, were "dangerous weapons," so that deputy sheriff was entitled to resort to extreme measures to avoid serious injury and accomplish arrest —State v Vargas, 74 P 2d 62, 42 N M 1

82. N C —State v Campbell, 12 S E 441, 107 N C 948

83. Cal —People v Bost, 290 P. 513, 107 Cal App. 550
Kan —State v. Dietz, 53 P. 870, 59 Kan 576
Ky —Taylor v Commonwealth, 120 S W 2d 228, 274 Ky 702

Killing occupant of automobile in unlawfully attempting to stop it.— State v Simmons, 135 S E 866, 192 N C 692

84. Ark —Jett v State, 236 S W. 621, 151 Ark 439

85. Ga.—Jackson v. State, 76 Ga 473.
Mo —State v Turlington, 15 S W 141, 102 Mo 642
N C —Holloway v Moser, 136 S E 375, 376 193 N C 185, 50 A L R 262, citing **Corpus Juris.**
Tex —Wright v State, 44 Tex 645

86. N C —Holloway v Moser, 136 S E 375, 193 N C 185, 50 A L R 262

87. N C —State v Stancill, 38 S E 926, 128 N C 606
Tex —Wright v State, 44 Tex 645

88. Miss —Kelly v State, 126 So 194, 156 Miss 535

89. Iowa —State v Smith, 103 N W 944, 127 Iowa 534, 109 Am S R 402, 70 L R A 246, 4 Ann Cas 758
Ky —Johnson v Commonwealth, 105 S W 2d 641, 268 Ky 555
30 C J p 42 note 6

Rescuer acts at own peril

Person attempting to effect rescue by force of other persons in custody of deputy constable acted at his peril where he could have learned by reasonable inquiry that deputy constable was an officer acting within statutory right to arrest —Johnson v. Commonwealth, supra.

90. Iowa —State v Smith, 103 N W 944, 127 Iowa 534, 109 Am S R 402, 70 L R A 246, 4 Ann Cas. 758
30 C J. p 42 note 7.

91. Colo —Campbell v. People, 133 P. 1043, 55 Colo 302
Mo —State v Montgomery, 132 S W 232, 230 Mo 660
N C.— State v Bland, 2 S E 460, 97 N. C. 438.

A public officer, or even a private citizen, will be justified in committing a homicide where it is necessary in order to suppress a riot or affray and preserve the peace,[92] but the mere fact that a person is requested to assist in preserving the peace does not of itself justify a homicide committed by him during the altercation[93]

§ 104. —— Quelling Disturbance among Prisoners

A homicide necessarily committed in quelling a disturbance among prisoners is justifiable.

A gaoler who is resisted in quelling a disturbance is justified in repelling force by force even if death should ensue[94] However, he is not justified in coming to extremities without a reasonable necessity therefor,[95] and is not justified in beating a prisoner to death because he fears that his unruly conduct may perhaps incite other prisoners to attempt to escape from jail[96]

§ 105. —— Obeying Order of Superior Officer

A homicide committed under the order of a superior officer is not for that reason justifiable

A homicide is not justified by the fact that it is committed under the order of a superior officer[97] The order of a superior officer does not justify a municipal policeman or other officer in striking a prisoner in custody a blow which results in death where either the order is unlawful or the act ordered to be done is unlawful[98]

§ 106. —— Execution of Criminal

The execution of a prisoner in pursuance of the sentence of a competent court and in strict conformity therewith is justifiable homicide.

Where a sheriff or other proper officer hangs or otherwise executes a prisoner in pursuance of the sentence of a competent court and in strict conformity therewith, the homicide is justifiable[99]

§ 107. —— Killing by Soldier

A homicide committed by a soldier without malice in the performance of his duty is justifiable.

A homicide committed by a soldier without malice in the performance of his duty,[1] as where he kills an alien enemy in the heat and exercise of war,[2] or kills under the order of a superior officer,[3] which does not expressly and clearly show its illegality on its face,[4] is justifiable However, a willful killing by a soldier is not necessarily a justifiable homicide[5] Obedience to an order of a superior officer does not constitute a justification where the order is manifestly beyond the scope of the officer's authority and the soldier must know as a man of ordinary understanding that the act is illegal[6] To justify the taking of life on the ground of public war it must be what is known by the law of nations as lawful war[7] A person is not relieved from responsibility for the killing of another by the fact that he acted under the order of an officer of insurgent or revolutionary forces[8] In times of peace a militiaman has no more right to take human life than any other officer or citizen, even though ordered by a superior officer to do a certain act at all hazards, he is authorized to use only such means to accomplish the desired result as are necessary without taking life or committing an assault.[9]

§ 108. Defense of Another

a In general
b Of particular persons
c Against sexual offenses

92. Tex—Patton v State, 86 S W 2d 774, 129 Tex Cr 269
30 C J p 42 note 10

93. Ala—Lawler v State, 115 So 420, 22 Ala App 329

94. Hawaii—Rex v Sherman, 1 Hawaii 150

95. Hawaii—Rex v Sherman, supra

96. Cal—People v Peirce, 116 P 2d 797, 46 Cal App 2d 731

97. R I—State v Sutton, 10 R I 159

Fact that a mate acted under the orders of the master is not a defense to an indictment for manslaughter—State v Sutton, supra
Order of superior military officer see infra § 107.
Duress or compulsion generally see infra § 113.

98. Philippine—U S. v. Tengco, 2 Philippine 189.

99. Del - State v Watson, 82 A 1086, 26 Del 273
30 C J p 42 note 15

1. U S—U S v Clark, C C Mich, 31 F 710
Liability of soldier to criminal prosecution generally see Army and Navy §§ 38-41

2. Minn—State v Gut, 13 Minn 341
Tex—Arce v State, 202 S W 951, 83 Tex Cr 292

3. Pa—Commonwealth v Shortall, 55 A 952, 206 Pa 165, 98 Am S R 759, 65 L R A 193
Tenn—Riggs v State, 3 Coldw 85, 91 Am D 272
Criminal liability of soldier for execution of order of superior generally see Army and Navy § 37 d (2).

4. U S—In re Fair, C C Neb., 100 F 149.
Tenn—Riggs v State, 3 Coldw 85, 91 Am D 272

5. U S—U S v Carr C C Ga, 25 F Cas No 14,732, 1 Woods 480

6. U S—U S v Clark, C C Mich, 31 F 710
Ala—Lancaster v State, 106 So 609, 21 Ala App 140, certiorari denied 106 So 617, 214 Ala 2, and 106 So 618, 214 Ala 76
Pa—Commonwealth v Shortall, 55 A 952 206 Pa 165, 98 Am S R 759, 65 L R A 193
30 C J p 43 note 22

7. N Y—People v McLeod, 1 Hill 377, 25 Wend 483, 37 Am D 328
30 C J p 43 note 23

8. Philippine—U S v. Velasco, 1 Philippine 346—U. S v Alfont, 1 Philippine 114

9. Tex—Manley v State, 137 S.W. 1137, 62 Tex.Cr 392.

a. In General

Homicide in defense of another person is justified or excused when the killing is done under such circumstances that the person defended would be justified or excused if he had committed the homicide in his own defense. It is generally necessary that neither the person defended nor the defender be at fault in bringing on the difficulty; and that the person defended shall be in imminent danger of death, great bodily harm, or some felony at the time, or it shall be reasonably apparent to the slayer, or he shall honestly and reasonably believe, that the person defended is in such danger and that it is necessary to kill to save him therefrom.

As a general proposition, a person is justified or excused in killing in defense of another person when, and only when, the circumstances are such that the latter person would be justified or excused if he had committed the homicide in his own defense. A person interfering in a difficulty in behalf of another simply steps in the latter's shoes; he may lawfully do in another's defense what such other might lawfully do in his own defense but no more; he stands on the same plane, is entitled to the same rights, and is subject to the same conditions, limitations, and responsibilities as the person defended, and his act must receive the same construction as the act of the person defended would receive if the homicide had been committed by him[10] This rule may be subject to qualifications based on accused's lack of knowledge of the facts and circumstances,[11] but in general it is necessary and sufficient to justify or excuse a homicide in defense of another that neither the person defended nor the defender shall be at fault in bringing on the difficulty,[12] or that, if he has provoked the attack, he shall in good faith withdraw from the combat before the killing,[13] that the danger, real or apparent, to the person defended shall be of death, great bodily harm, or a felony,[14] that it shall be present, imminent, and impending,[15] and not a past danger;[16] that either the person defended shall be in real danger of death, great bodily harm, or some

10. Ala.—Griffin v. State, 158 So. 316, 229 Ala. 482.—Humphries v. State, 181 So. 309, 28 Ala. App. 159, certiorari denied 181 So. 312, 236 Ala. 104.—Roberts v. State, 149 So. 356, 25 Ala. App. 477.—Burch v. State, 121 So. 441, 23 Ala. App. 89.—Vaughan v. State, 107 So. 797, 21 Ala. App. 204, certiorari denied 107 So. 799, 214 Ala. 384.
Cal.—People v. Will, 248 P. 1078, 1084, 79 Cal. App. 101, quoting **Corpus Juris.**
Ga.—Coart v. State, 119 S.E. 723, 156 Ga. 536.
Ill.—People v. Spranger, 145 N.E. 706, 314 Ill. 602.—People v. Dugas, 141 N.E. 769, 310 Ill. 291.
Ky.—Adkins v. Commonwealth, 168 S.W.2d 1008, 293 Ky. 329.—Privitt v. Commonwealth, 113 S.W.2d 49, 271 Ky. 665.—Pelfry v. Commonwealth, 74 S.W.2d 913, 255 Ky. 412.—Commonwealth v. Gurley, 42 S.W.2d 513, 240 Ky. 382.—Gill v. Commonwealth, 31 S.W.2d 608, 235 Ky. 351.—Brummett v. Commonwealth, 31 S.W.2d 391, 235 Ky. 322.—Miller v. Commonwealth, 27 S.W.2d 683, 234 Ky. 135.—Green v. Commonwealth, 4 S.W.2d 1109, 223 Ky. 826.—Wood v. Commonwealth, 293 S.W. 951, 219 Ky. 156.—Noble v. Commonwealth, 290 S.W. 330, 332, 217 Ky. 556, citing **Corpus Juris.**—Norton v. Commonwealth, 244 S.W. 310, 196 Ky. 90.
La.—State v. Johnson, 114 So. 82, 164 La. 420.—State v. Corneille, 96 So. 813, 153 La. 929.
Miss.—McGehee v. State, 104 So. 156, 138 Miss. 822.
Mo.—State v. Houston, 292 S.W. 728.
Okl.—Hendrick v. State, 73 P.2d 184, 63 Okl.Cr. 100.—Hare v. State, 54 P.2d 670, 58 Okl.Cr. 420.—Moore v. State, 219 P. 175, 25 Okl.Cr. 151.
S.C.—State v. Francis, 149 S.E. 348, 152 S.C. 17, 70 A.L.R. 1133.
Tex.—Martinez v. State, 152 S.W.2d 369, 142 Tex.Cr. 313.—Arkhammer v. State, 296 S.W. 301, 107 Tex.Cr. 191.—Ex parte Rivera, 285 S.W. 327, 105 Tex.Cr. 37.—Batchan v. State, 283 S.W. 507, 104 Tex.Cr. 228.—Wilkes v. State, 280 S.W. 787, 103 Tex.Cr. 209.—Shine v. State, 269 S.W. 804, 99 Tex.Cr. 418.
30 C.J. p. 79 note 74.
Prevention of offenses generally see supra § 101.

11. Ga.—Warnack v. State, 60 S.E. 288, 3 Ga. App. 590.
Mo.—State v. Eastham, 144 S.W. 492, 240 Mo. 241.
30 C.J. p. 79 note 75 [a].

12. Cal.—People v. Roe, 209 P. 560, 189 Cal. 548.
Colo.—Pacheco v. People, 43 P.2d 165, 96 Colo. 401.
Ill.—People v. Sullivan, 177 N.E. 733, 345 Ill. 87.
Ky.—Miller v. Commonwealth, 27 S.W.2d 683, 234 Ky. 135.
La.—State v. Corneille, 96 So. 813, 153 La. 929.
Okl.—Hendrick v. State, 73 P.2d 184, 63 Okl.Cr. 100.
S.C.—State v. Hays, 113 S.E. 362, 121 S.C. 163.
30 C.J. p. 79 note 76.

Rule not applicable where evidence conflicting

The rule that one may not by the commission of a felonious assault provoke a deadly counterattack on himself or another, and in the course of the counterattack kill the assailant and then invoke defense of another, does not prevent accused from relying on such defense when the evidence is incomplete and in irreconcilable conflict, not only as to the purpose and intent with which accused and her codefendants entered deceased's home, but also as to the nature and magnitude of the initial assault, and as to whether or not deceased, or accused and her codefendants, were the aggressors.—People v. Roe, 209 P. 560, 189 Cal. 548.

13. Ill.—People v. Forte, 110 N.E. 47, 269 Ill. 505, L.R.A.1916B 924.
La.—State v. Corneille, 96 So. 813, 153 La. 929.
30 C.J. p. 80 note 77.

14. Ariz.—Lacy v. State, 297 P. 872, 38 Ariz. 60.
Ark.—Steele v. State, 108 S.W.2d 474, 194 Ark. 497.
Ill.—People v. Dugas, 141 N.E. 769, 310 Ill. 291.
Iowa.—State v. Borwick, 187 N.W. 460, 193 Iowa 639.
Ky.—Mays v. Commonwealth, 56 S.W.2d 726, 247 Ky. 85.
Tex.—Nami v. State, 263 S.W. 595, 97 Tex.Cr. 522.
Wyo.—State v. Sorrentino, 224 P. 420, 31 Wyo. 129, 34 A.L.R. 1477.
30 C.J. p. 80 note 78.

Use of vile and obscene language in presence of accused's wife and children did not justify accused in shooting person using it without first asking him to leave house.—Mays v. Commonwealth, 56 S.W.2d 726, 247 Ky. 85.

15. Cal.—People v. Ortiz, 219 P. 1021, 63 Cal. App. 662.
Mo.—State v. Johnson, 6 S.W.2d 898.
S.C.—State v. Hays, 113 S.E. 362, 121 S.C. 163.
30 C.J. p. 80 note 79.

16. Wyo.—State v. Sorrentino, 224 P. 420, 31 Wyo. 129, 34 A.L.R. 1477.
30 C.J. p. 80 note 80.

felony at the time, or it shall be reasonably apparent to the slayer, or he shall honestly and reasonably believe, that the person defended is in such danger, and that it is necessary to kill to save him therefrom,[17] that the person defended shall retreat if he can do so without increasing his peril,[18] that neither the person defended nor accused could have averted the apparent danger by any reasonably safe means other than the killing of deceased,[19] and that the defender shall not use more force than is necessary or reasonably appears to him to be necessary to save the person defended from death or great bodily harm[20]

Accused's knowledge of aggression or provocation by person defended In some states the rule that a homicide is not justifiable or excusable as in defense of another, where the person defended is the aggressor or provokes the difficulty, is applied where accused has knowledge of the aggression or provocation,[21] but not where he is without knowledge, or a reasonable opportunity to acquire knowledge, and is himself without blame[22] In other states the rule is applied where the person defended is actually at fault, even though accused is without knowledge of such fault and has had no opportunity to acquire knowledge thereof,[23] or even though he entertains an honest and reasonable belief that the person defended is not at fault[24]

b. Of Particular Persons

Homicide may be justified or excused when it is committed by a person in defense of another who bears to him a close natural or civil relationship.

Subject to the rules, as considered supra subdivision a of this section, as to the requisites of a justifiable or excusable homicide in defense of another, a person is justified or excused, both at common law and under statute, in taking life in defense of another who bears to him a close natural civil or family relationship,[25] such as a parent,[26]

17. Cal—People v Ortiz, 219 P 1024, 63 Cal App 662
Ky—Taylor v Commonwealth, 98 S W 2d 928, 266 Ky 325—Hensley v Commonwealth, 69 S W 2d 17, 253 Ky 171—Turner v Commonwealth, 42 S W 2d 716, 240 Ky 536—Gill v Commonwealth 31 S W 2d 608, 235 Ky 351—Norton v Commonwealth, 244 S W 310 196 Ky 90
Miss—McGehee v State, 104 So 150, 138 Miss 822
Mo—State v Johnson, 6 S W 2d 898—State v Houston, 292 S W 728—State v Rennison, 267 S W 850, 306 Mo 473—State v Yates, 256 S W 809, 301 Mo 255
N C—State v Shepherd, 17 S E 2d 469, 220 N C 377—State v Robinson, 195 S E 824, 213 N C 273—State v Marshall, 179 S E 427, 208 N C 127—State v Glenn, 150 S E 663, 198 N C 79
Okl—Hendrick v State, 73 P 2d 184, 63 Okl Cr 100
S C—State v Francis, 149 S E 348, 152 S C 17, 70 A L R 1133—State v Petit, 142 S E 725, 144 S C 452—State v Hays, 113 S E 362, 121 S C 163
Tex—Fagan v State, 14 S W 2d 838, 112 Tex Cr. 107
30 C J p 80 note 81

Facts must justify belief of a reasonable man that it appears necessary to prevent felonious killing of another before person is authorized to act on apparent danger and kill
Ala—Cain v State, 77 So 452, 16 Ala App 303
Cal—People v Ortiz, 219 P 1024, 63 Cal App 662
Miss—McGehee v State, 104 So 150, 138 Miss 822

Reasonableness of accused's belief that it was necessary to kill must be judged by facts and circumstances as they appeared to him at time—State v Marshall, 179 S E 427, 208 N C 127—State v Glenn, 150 S E 663, 198 N C 79

Accused who aided and abetted or advised shooting of deceased should be acquitted if he did so believing, on reasonable grounds, that danger of death or great bodily harm to brother necessitated such aiding and abetting—Hensley v Commonwealth, 69 S W 2d 17, 253 Ky 171

Right to give weapon
One believing another's life is in danger does not necessarily have the right to give him a weapon to protect himself, if he does not have reasonable cause to believe imminence of danger and necessity to kill—People v Ortiz, 219 P 1024, 63 Cal App 662

18. Ala—Talley v State, 57 So 445, 174 Ala 101

19. Ky—Webb v Commonwealth, 110 S W 281, 33 Ky L 316
S C—State v Hays, 113 S E 362, 121 S C 163
30 C J p 80 note 83

20. Ark—Steele v State, 108 S W 2d 474, 194 Ark 497
N C—State v Bryson, 156 S E 113, 200 N C 50
30 C J p 81 note 84

21. Pa—Commonwealth v Russogulo, 106 A 180, 263 Pa 93
Tex—Parnell v State, 98 S W 269, 50 Tex Cr 419
30 C J p 81 note 86

22. N Y—People v Maine, 59 N E 696, 166 N Y 50, reversing 64 N Y S 579, 51 App Div 142
30 C J p 81 note 87

23. Ky—Noble v Commonwealth 290 S W 330, 217 Ky 556
S C—State v Cook, 59 S E 862, 78 S C 253, 259, 125 Am S R 788, 15 L R A N S, 1013, 13 Ann Cas 1051
30 C J p 81 note 88

24 Ala—Weaver v State, 55 So 956, 1 Ala App 48

25. N C—State v Marshall, 179 S E 427, 208 N C 127—State v Glenn, 150 S E 663, 198 N C 79

26. Ala—Vaughan v State, 107 So 797, 21 Ala App 204, certiorari denied 107 So 799, 214 Ala 384
Ariz—Lacy v State, 297 P 872, 38 Ariz 60
Ga—Court v State, 119 S E 723, 156 Ga 536
Mo—State v Rennison, 267 S W 850, 306 Mo 473
N C—State v Anderson, 22 S E 2d 271, 222 N C 148—State v Robinson, 195 S E 824, 213 N C 273
Okl—Hendrick v State, 73 P 2d 184, 63 Okl Cr 100
30 C J p 81 note 91

Firing fatal shot in defense of one's mother is justifiable or not, according as mother would be innocent or guilty had she fired shot in her own defense—Hare v State, 54 P 2d 670, 58 Okl Cr 420

Son killing father in defense of mother
Ala—Burch v State, 121 So 444, 23 Ala App 89

Stepfather
With respect to stepson's criminal liability for resulting death of third party, stepson had right to fight in the necessary defense of his stepfather who was fighting with third party—State v Robinson, 195 S E. 824, 213 N.C 273.

child,[27] husband or wife,[28] brother or sister,[29] uncle, nephew, or niece,[30] guardian or ward,[31] or master or servant.[32] A person is also justified or excused in killing to prevent the commission of a known felony by violence or surprise on any person in his presence or company, including even a stranger,[33] or guest,[34] or accused's paramour.[35] It has been held that justifiable interference in defense of a near relation does not extend beyond cases where a serious injury is threatened to a wife or husband, child or servant,[36] and that, where statutes enumerating the relatives in defense of whom a homicide is justifiable do not expressly include brothers and sisters, they cannot be included by construction.[37] On the other hand similar statutes have been construed not to provide an exclusive enumeration but rather to ingraft the common-law rule into the statutes of the state, and the statutes, with the common-law rule so incorporated, undoubtedly apply to the defense of a brother as well as to the defense of a wife or other relative specifically named in the statutes.[38]

c. Against Sexual Offenses

Homicide committed as being necessary to prevent the prepetration of a sexual offense, such as ravishment or under some statutes, adultery, on a wife or daughter is generally held to be justifiable.

Under the rule that the husband has the same right to defend his wife against a wrong committed in his presence, as the wife would have to defend herself,[39] where a husband discovered another in the act of ravishing or attempting to ravish his wife, and the taking of the life of such person reasonably appeared to be necessary to protect the wife from the assault, the husband was justified in taking life as fully as the wife would have been.[40] However, accused is not wholly excused or exempted from criminal liability where the means employed to repel the attack on the wife's honor went beyond those reasonably necessary to obtain the object in view,[41] as where deceased was unarmed and defenseless and the circumstances did not require that accused, after striking the first blow, should

27. Ala.—Roberts v. State, 149 So. 356, 25 Ala. App. 477
Ga.—Court v. State, 119 S.E. 723, 156 Ga. 536
Ky.—Miller v. Commonwealth, 27 S.W.2d 683, 231 Ky. 135
N.C.—State v. Anderson, 22 S.E.2d 271, 222 N.C. 148
Okl.—Moore v. State, 219 P. 175, 25 Okl. Cr. 151
30 C.J. p. 81 note 92

Accused operating still had right to exercise necessary force to defend sons against officer firing as they fled, if it reasonably appeared that sons were in danger of serious bodily harm.—Fagan v. State, 14 S.W.2d 838, 112 Tex. Cr. 107

28. Ky.—Taylor v. Commonwealth, 98 S.W.2d 928, 266 Ky. 325
Mo.—State v. Johnson, 6 S.W.2d 898
N.C.—State v. Anderson, 22 S.E.2d 271, 222 N.C. 148.—State v. Shepherd, 17 S.E.2d 469, 220 N.C. 377
S.C.—State v. Francis, 149 S.E. 318, 152 S.C. 17, 70 A.L.R. 1133
30 C.J. p. 81 note 93

The right of the husband to defend his wife is coextensive with the right of the wife to defend herself.—State v. Anderson, 22 S.E.2d 271, 222 N.C. 148

29. Ala.—Humphries v. State, 181 So. 309, 28 Ala. App. 159, certiorari denied 181 So. 312, 236 Ala. 104
Colo.—Pacheco v. People, 43 P.2d 165, 96 Colo. 401
Ill.—People v. Spranger, 145 N.E. 706, 314 Ill. 602.
Ky.—Taylor v. Commonwealth, 98 S.W.2d 928, 266 Ky. 325.—Hensley v. Commonwealth, 69 S.W.2d 17, 253 Ky. 171.—Turner v. Commonwealth, 42 S.W.2d 716, 240 Ky. 536.—Noble v. Commonwealth, 290 S.W. 330, 217 Ky. 556.—Norton v. Commonwealth, 244 S.W. 310, 196 Ky. 90
Mich.—People v. Arnett, 214 N.W. 231, 239 Mich. 123
30 C.J. p. 81 note 94

Interference with arrest
Where a sheriff in attempting to remove an intoxicated person from an automobile was shot by such person, the latter's brother was not justified in interfering with the sheriff before the shot was fired, as he was a volunteer aid in an obstruction of a lawful arrest, and blood relationship, without reasonable apprehension of bodily harm to his brother, was neither an excuse nor in any degree a justification.—People v. Arnett, supra

30. Ala.—Forman v. State, 67 So. 583, 190 Ala. 22
Iowa.—State v. Matheson, 261 N.W. 787, 220 Iowa 132
Tex.—Bice v. State, 100 S.W. 949, 51 Tex. Cr. 133

31. Ala.—Forman v. State, 67 So. 583, 190 Ala. 22
Ind.—Waybright v. State, 56 Ind. 122

32. Ark.—Steele v. State, 108 S.W. 2d 474, 194 Ark. 497
30 C.J. p. 81 note 97

33. Ill.—People v. Dugas, 141 N.E. 769, 310 Ill. 291
30 C.J. p. 81 note 98

34. Ark.—Steele v. State, 108 S.W. 2d 474, 194 Ark. 497
Iowa.—State v. Borwick, 187 N.W. 460, 193 Iowa 639

Café guests
A café owner has right to repel felonious attack on his guests if he uses no more or greater force than was reasonably necessary for such purpose and is free from fault or carelessness in so doing, but cannot kill assailant merely because patron was assaulted.—Steele v. State, 108 S.W. 2d 474, 194 Ark. 497

Guest in home
If accused believed that deceased, a guest in accused's home, was about to kill another guest therein, or to do the latter some great bodily harm, and had reasonable grounds for so thinking, and sought to prevent such act, he had the right to defend the guests so attacked.—State v. Yates, 256 S.W. 809, 301 Mo. 255

Guest in automobile
Iowa.—State v. Borwick, 187 N.W. 460, 193 Iowa 639

35. La.—State v. Johnson, 114 So. 82, 164 La. 420

36. Pa.—Commonwealth v. Russogulo, 106 A. 180, 263 Pa. 93

37 Fla.—Mitchell v. State, 30 So. 803, 43 Fla. 188.—Richard v. State, 29 So. 413, 42 Fla. 528

38. Ga.—Warnack v. State, 60 S.E. 288, 3 Ga. App. 590
Kan.—State v. Mounkes, 127 P. 637, 88 Kan. 193

39. Iowa.—State v. Thomas, 154 N.W. 768, 172 Iowa 485

40. Ga.—Court v. State, 119 S.E. 723, 156 Ga. 536
Iowa.—State v. Thomas, 154 N.W. 768, 172 Iowa 485.—State v. Thomas, 151 N.W. 842, 169 Iowa 591.
N.C.—State v. Neville, 51 N.C. 423

41. Philippine.—U. S. v. Ocampo, 6 Philippine 449.

continue the attack[42] A father, who acts in good faith and on reasonable appearances of imminent danger, has a right to defend his daughter against an assault with intent to rape, regardless of what her reputation may be, and he has the right to act immediately and with the most effective means at his command, and the law will hold him guiltless, even though it may subsequently turn out that he could have saved her by pursuing some course other than the instant killing of her assailant[43] For a homicide to be justifiable as in defense of the honor and chastity of the wife or daughter, it must be to prevent an impending or progressing wrong,[44] and not for a past offense[45] or anticipated attempt[46] It is held that a husband is not justified in killing another to prevent the seduction or debauching of his wife by artifice or fraud,[47] or for an assault on her virtue, where it is shown that she was not virtuous[48] A statute justifying homicide for defilement applies where deceased was discovered in an unnatural act of sexual perversion with defendant's daughter[49]

Adultery Unless so provided by statute, the husband is not entirely excused or justified in taking the life of another whom he discovers in the act of adultery with the wife,[50] as this is an act consented to by her and as she would have no right to take the life of her paramour because of the act committed, her husband, acting in her defense, has no greater right.[51] Under some statutes, however, a husband has as much right to protect his wife from adultery as from other felonies, and if it is necessary to prevent its perpetration, he is justified in taking life,[52] provided he has not forfeited the right by his previous conduct[53] Under some statutes of this nature, after the act of adultery has been committed by the wife, the husband is not justified in killing her paramour, the killing must be to prevent new acts of adultery with the wife,[54] the danger must be present and impending,[55] urgent and pressing,[56] and the killing must be necessary, or apparently necessary, to prevent the act of adultery[57] Under other statutes, however, the homicide is justifiable when committed by the husband on the person of anyone taken in the act of adultery with the wife, provided the killing takes place before the parties to the act of adultery have separated[58] "Adultery," as used in such a statute, means adultery as known in common parlance, whether consisting of one or more acts, and not statutory adultery consisting of a living together or habitual carnal intercourse,[59] and the expression "before the parties to the act of adultery have separated" does not require that the parties be still physically united in the act of copulation, but contemplates only that the parties be still together in company with each other, after the act, when the homicide is committed[60] Accused is entitled to act on appearances, where the circumstances are such

42. Philippine—U S v Ocampo, supra

43. Okl—Litchfield v State 126 P 707, 8 Okl Cr 164, 45 L R A,N S, 153

44. Ga—Coart v State, 119 S E 723, 156 Ga 536
30 C J p 82 note 11

Actual or apparent danger
If there was actual danger, or if it reasonably appeared that there was danger, of deceased committing future act of adultery with accused's daughter, and such danger demanded immediate action to prevent it, danger would be impending and would justify killing if, either actually or as it reasonably appeared to accused, danger could not be otherwise prevented than by death of deceased—Green v State, 183 S E 204, 52 Ga App 290

Seduction
Under a statutory provision that a homicide shall be justifiable "in all other instances which stand upon the same footing of reason and justice as those enumerated," a father may kill to prevent the seduction of his daughter where the circumstances are such that the killing stands on the footing of reason and justice, similar to that of self-defense—Coart v State 119 S E 723, 156 Ga 536

45. Okl—Nutt v State, 128 P 165, 8 Okl Cr 266
Past wrongs to female relative as justification generally see supra § 98

46 Miss—Lewis v State, 118 So 708, 709, citing **Corpus Juris.**
Okl—Nutt v State, supra

47. Or—State v Young, 96 P 1067, 52 Or 227, 132 Am S R 689, 18 L R A,N S, 688

48. Ga—Coart v State, 119 S E 723, 156 Ga 536

49. Utah—State v Besares, 283 P 738, 75 Utah 141

50. Ala—Hooks v State, 13 So 767, 99 Ala 166
Wis—State v Payne, 227 N W 258, 119 Wis 615
30 C J p 82 note 15

51. Iowa—State v Thomas, 154 N W 768, 172 Iowa 485
30 C J p 82 note 16

52. Ga—Daniels v State, 133 S E 866, 162 Ga 369—Coart v State, 119 S E 723, 156 Ga 536—Gibson v State, 161 S E 158, 44 Ga App 264
30 C J p 82 note 17

Wife killing woman committing adultery with husband is not within statute making homicide justifiable when committed by husband on one committing adultery with wife—Reed v State, 59 S W 2d 122, 123 Tex Cr 348

53. Ga—Wilkerson v State, 17 S E 990, 91 Ga 729, 44 Am S R 63

54. Ga—Curtis v State, 110 S E 907, 28 Ga App 219

55. Ga—Coart v State, 119 S E 723 156 Ga 536—Farmer v State, 18 S E 987, 91 Ga 720—Jackson v State, 18 S E 298, 91 Ga 271, 44 Am S R 22

56. Ga—Curtis v State, 110 S E 907, 28 Ga App 219

57 Ga—Farmer v State, 18 S E 987, 91 Ga 720—Jackson v State, 18 S E 298, 91 Ga 271, 44 Am S R 22

58 Tex—Williams v State, 165 S W 583, 73 Tex Cr 480
30 C J p 82 note 23

59. Tex—Price v State, 18 Tex App 474, 51 Am R 322

60. Tex—Price v State, **supra.**
30 C J. p 82 note 25.

as to cause him reasonably to believe from his standpoint, when he arrives on the scene, that his wife and deceased have just committed adultery, or are about to commit it, he is authorized to kill [61] In applying the statute the place where the homicide occurs is immaterial, the statute makes no exception in favor of one place or another but is broad enough to cover every place.[62]

§ 109. Defense of Habitation

a In general
b What constitutes habitation
c Nature of intrusion or danger
d Means of preventing or repelling intrusion

a. In General

Homicide in defense of habitation is justified where the killing is actually or apparently necessary in order to repel a person who attempts to enter in a forcible or violent manner for the apparent purpose of committing a felony therein on either person or property or of inflicting great bodily harm or offering personal violence to a person dwelling or being therein.

It is a general rule, expressly affirmed by statute in some states, that a person is justified in taking life in defense of his habitation where it is actually or apparently necessary to do so in order to repel another person who attempts to enter in a forcible or violent manner for the apparent purpose of committing a felony therein on either person or property or of inflicting great bodily harm or of assaulting or offering personal violence to a person dwelling or being therein.[63] The principle that the taking of life in defense of habitation is excusable or justifiable is not applicable to a common brawl for which accused was mainly responsible,[64] or to a case where deceased was on a public highway in front of accused's house and was not attempting to enter or to make any forcible attack or invasion,[65] or where, although deceased was attempting at the time unlawfully to enter accused's dwelling house, the killing was done with malice and ill will and not for self-protection or protection of the habitation [66]

Against person lawfully in house. The rights of a householder against a violent intruder have no relevancy, and the ordinary rules as to self defense are alone applicable, where deceased was not even a trespasser but was lawfully in the house, as where he and accused were members of the same family and household,[67] or he was in the house as a guest or visitor,[68] or where he was armed with a writ giving him the legal right to take possession of the dwelling for the purpose of ejecting accused and his household goods from it,[69] or where he was in the act of reasonably searching the premises under permission to do so,[70] or under the authority of a search warrant,[71] unless accused was not shown,

61. Ga—Cloud v State, 7 S E 641, 81 Ga 444
Tex—Gregory v State, 94 S W 1041, 50 Tex Cr 73
30 C J p 83 note 26

62. Tex—Giles v State, 67 S W 411, 43 Tex Cr 561

63. U S—Alberty v United States, C C Ark 16 S Ct 864, 162 U S 499, 40 L Ed 1051
Ala—Clack v State, 196 So 286, 29 Ala App 377—Hill v State, 166 So 60, 27 Ala App 55, certiorari denied 166 So 64, 231 Ala 539
Cal—People v Will, 248 P 1078, 79 Cal App 101—People v Hubbard, 220 P 315, 64 Cal App 27
D C—Laney v U. S., 294 F 412, 54 App D C 56
Ga—Shafer v State, 13 S E 2d 798, 191 Ga 722
Hawaii—Territory v Warren, 35 Hawaii 232
Ky—Johnson v Commonwealth, 132 S W 2d 72, 279 Ky 753—Commonwealth v Beverly, 34 S W 2d 911, 237 Ky 35—Farmer v Commonwealth, 28 S W 2d 978, 234 Ky 673—Cooper v Commonwealth, 27 S W 2d 405, 234 Ky 56—Sawyer v Commonwealth, 13 S W 2d 267, 227 Ky 435—Carroll v Commonwealth, 299 S W 183, 221 Ky 557—Raines v Commonwealth, 282 S W. 1109, 214 Ky. 211.
Miss—Bowen v State, 144 So 230, 231, 164 Miss 225, quoting **Corpus Juris**—Williams v State, 98 So 242
N Y—People v Wilcox, 157 N E 509, 245 N Y 404, reversing 221 N Y S 884, 220 App Div 732
N C—State v Marshall, 179 S E 427, 208 N C 127
Okl—Johnson v State, 58 P 2d 156, 59 Okl Cr 283
S C—State v Osborne, 21 S E 2d 178, 200 S C 504
Tenn—Wooten v State, 103 S W 2d 324, 171 Tenn 362—Hudgens v State, 60 S W 2d 153 155, 166 Tenn 231, quoting **Corpus Juris**—Winton v State, 268 S W 633, 151 Tenn 177
Tex—Louder v State, 44 S W 2d 719, 119 Tex Cr 438—Dennis v State, 276 S W 715, 101 Tex Cr 454—Mack v State, 263 S W 912, 97 Tex Cr 583
Va—Fortune v Commonwealth, 112 S E 861, 133 Va 669
W Va—State v Laura, 116 S E 251, 93 W Va 250
Wyo—State v Sorrentino, 224 P 420, 31 Wyo 129, 34 A L R 1177
30 C J p 83 note 29

64. N C—State v Robertson, 81 S E 689, 166 N C 356

65. Ga—Ward v State, 103 S E. 726, 25 Ga App 296

66. Ark—Hall v State, 168 S W 1122, 113 Ark 454
Conn—State v Perkins, 91 A 265, 88 Conn 360, L R A 1915A 73

Warning of attempt to keep deceased out of house

Where, while being chased around outside of accused's house, deceased in attempting to enter a door was shot by accused without accused's warning deceased that accused was trying to keep deceased out of house shooting was not justified on ground that accused was protecting her domicile—Wise v State, 183 So 520, 183 Miss 61

67. Pa—Commonwealth v Johnson, 62 A 1064, 213 Pa 432
30 C J p 83 note 37.

68. Ky—Banks v Commonwealth, 13 S W 2d 511, 227 Ky 500—Oney v Commonwealth, 9 S W 2d 723, 725, 225 Ky 590, citing **Corpus Juris.**
Va—Fortune v Commonwealth, 112 S E 861, 133 Va 669

69. Ala—Williams v. State, 41 So 992, 147 Ala 10

70. N M—State v Welch, 25 P 2d 211, 37 N M 549

71. Ala—Booth v State, 117 So. 492, 22 Ala.App 508.

and had no knowledge of, such warrant.[72] However, homicide in defense of the home may be resorted to as against one who, after lawfully entering the home, was guilty of conduct justifying his expulsion, and was killed in resisting such expulsion.[73]

Who may exercise such right of defense The right to take life in a proper case in defense of habitation may be exercised not only by the owner or occupant of the house[74] but also by his servants[75] and guests,[76] and even a bystander may be called by the owner to aid in ejecting another from his home.[77]

b. What Constitutes Habitation

Habitation which may be defended, even to the extent of taking life, includes any place where a person lives and which is his home and place of abode

The habitation which may be defended, even to the extent of taking life, includes any place where a person lives and which is his only home and place of abode,[78] even though he lives there with a woman in illicit relationship,[79] and even though it is a mere tent[80] or a box stall.[81] It includes outbuildings within the curtilage,[82] but it does not extend beyond the curtilage or the limits of the dwelling and the customary outbuildings,[83] and on the theory that a man is entitled to defend his house, not as property, but as his castle affording protection to his person, it is held that the rule does not apply to the lot of ground or yard on which the house stands.[84] In a restricted sense, a barn[85] or an automobile[86] may be regarded for the time being as a man's "castle" which he is entitled to defend for the protection of himself and others therein. It has also been held that a person has a right to take life to prevent the violent entry or assault on his place of business for the apparent purpose of inflicting death or great bodily injury on an occupant,[87] but on the other hand it has been

72. Ala.—Booth v. State, supra
S.C.—State v. Lowman, 133 S.E. 457, 134 S.C. 485

Until the authority of the officers to make a search is made known, the occupants of a house have right to use necessary force in keeping officers, who held search warrant, from entering house and in expelling them.—State v. Lowman, supra

73. Ky.—Sizemore v. Commonwealth, 118 S.W.2d 311, 285 Ky. 199—Haywood v. Commonwealth, 59 S.W.2d 531, 248 Ky. 569—Banks v. Commonwealth, 13 S.W.2d 511, 227 Ky. 500
S.C.—State v. Sparks, 183 S.E. 719, 179 S.C. 135
Va.—Fortune v. Commonwealth, 112 S.E. 861, 133 Va. 669

74. Ky.—Ogles v. Commonwealth, 11 S.W. 816, 11 Ky.L. 289

75. Ky.—Haywood v. Commonwealth, 59 S.W.2d 531, 248 Ky. 569—Hendrickson v. Commonwealth, 24 S.W.2d 564, 232 Ky. 691—Ogles v. Commonwealth, 11 S.W. 816, 11 Ky.L. 289

76. Ky.—Haywood v. Commonwealth, 59 S.W.2d 531, 248 Ky. 569—Hendrickson v. Commonwealth, 24 S.W.2d 564, 232 Ky. 691
S.C.—State v. Osborne, 25 S.E.2d 561—State v. Osborne, 21 S.E.2d 178, 200 S.C. 504
30 C.J. p. 83 note 32

Effect of challenge by accused
Where following altercation with deceased accused publicly posted challenge to deceased and the challenge was to come to house of accused, accused had no greater or less right in house where he was a guest than in his own home, and where the two houses were located near each other on same farm, challenge extended to house in which accused was a guest, and in such a case the applicable legal principles involved an admixture of law of habitation and mutual combat.—State v. Osborne, S.C., 25 S.E.2d 561

77. Iowa.—State v. Roan, 97 N.W. 997, 122 Iowa 136
Ky.—Haywood v. Commonwealth, 59 S.W.2d 531, 248 Ky. 569

Accused, when called on by half sister, had same right as she had to protect her home and those present against obscene language and assaults of another who had been drinking.—Haywood v. Commonwealth, supra

78. N.Y.—People v. Wilcox, 157 N.E. 509, 245 N.Y. 404, reversing 221 N.Y.S. 884, 220 App.Div. 732
S.C.—State v. Bradley, 120 S.E. 240, 126 S.C. 528

Roadhouse in which keeper lives is his home, from which he may exclude intruders by force even to the point of killing them, even although he is selling beer there illegally.—People v. Wilcox, 157 N.E. 509, 245 N.Y. 404, reversing 221 N.Y.S. 884, 220 App.Div. 732

Bedroom
Defendant, who was occupying a room in a building as a bedroom at the time of the homicide, had a right to protect it as against trespassers.—State v. Sorrentino, 224 P. 420, 31 Wyo. 129, 34 A.L.R. 1477

79. Cal.—People v. Hubbard, 220 P. 315, 64 Cal.App. 27

80. Or.—State v. Holbrook, 188 P. 947, 98 Or. 43, rehearing denied 192 P. 610, 98 Or. 43, second rehearing denied 193 P. 434, 98 Or. 43.

81. Neb.—Young v. State, 104 N.W. 867, 74 Neb. 346, 2 L.R.A.,N.S. 66

82. Mich.—People v. Coughlin, 35 N.W. 72, 67 Mich. 466—Pond v. People, 8 Mich. 150
S.C.—State v. Bradley, 120 S.E. 240, 126 S.C. 528

83. Or.—State v. Bartmess, 54 P. 167, 33 Or. 110
S.C.—State v. Faulkner, 149 S.E. 108, 151 S.C. 379—State v. Bradley, 120 S.E. 240, 126 S.C. 528—State v. Brooks, 60 S.E. 518, 79 S.C. 144, 128 Am.St.R. 836, 17 L.R.A.,N.S., 483, 15 Ann.Cas. 49

Street in front of house
One charged with assault and battery with intent to kill cannot defend on the ground that the right of castle extends to the middle of the street in front of accused's house.—State v. Boyd, 119 S.E. 839, 126 S.C. 300

84. Ky.—Farmer v. Commonwealth, 28 S.W.2d 978, 234 Ky. 673
Pa.—Commonwealth v. McWilliams, 21 Pa.Dist. 1131

85. Iowa.—State v. Baker, 135 N.W. 1097, 157 Iowa 126, modified on rehearing 138 N.W. 841, 157 Iowa 126

86. Iowa.—State v. Borwick, 187 N.W. 460, 193 Iowa 639

87. Ky.—Howard v. Commonwealth, 120 S.W.2d 212, 274 Ky. 653—Stanfill v. Commonwealth, 272 S.W. 1, 209 Ky. 10—Sparks v. Commonwealth, 20 S.W. 167, 89 Ky. 644, 13 Ky.Op. 484
W.Va.—State v. Laura, 116 S.E. 251, 93 W.Va. 250

A mere demonstration by deceased in front of accused's place of business did not constitute such an as-

held that a public place of business cannot be defended against intrusion as a dwelling house or private habitation even though a person sleeps and keeps articles of clothing therein [88]

c. Nature of Intrusion or Danger

To justify a homicide in defense of a habitation, there must be a manifest attempt to make a forcible and unlawful entry into the home, with the intent to commit a felony therein or to inflict great bodily harm on an occupant thereof, and the danger of accomplishing such acts must be imminent

The right to take life in defense of one's dwelling house arises only where the security or sanctity of the home is invaded or threatened,[89] and is subject to the qualification that the danger must be imminent and immediate and not a past danger [90] It is not practicable to formulate a rule applicable to all cases for determining what act or conduct constitutes an attempt to enter a house, the question is one more of fact than of law and must be determined by the circumstances of each case [91] The attempt must be manifest, that is, it must be so plainly made that no reasonable doubt exists as to the purpose of the aggressor,[92] and a mere demonstration, or even threat, to break into a house will not justify a homicide by the occupant [93] However, the killing of a person attempting to enter a house after being forbidden to do so may be justified by his menacing attitude and threats at the time [94]

In order that a homicide may be justifiable as in defense of habitation, it is not essential that there be peril of death or great bodily harm,[95] for, as considered supra subdivision a of this section, a violent attempt to enter with the apparent purpose of assaulting or offering personal violence to an inmate justifies defense of the habitation and an assault or offer of personal violence does not necessarily imply danger of death or great bodily harm [96] While homicide in defense of habitation is justifiable when actually or apparently necessary to repel an attempt to commit a felony, the courts are not agreed on the question whether an actual or apparent felonious purpose on the part of the assailant or intruder is necessary to the justification of the householder, some courts holding that the right to take life in defense of one's dwelling is limited to occasions where it is at least reasonably apparent that the intruder is actuated by felonious purpose,[97] and other courts stating broadly, without this qualification, that a person in his own dwelling house may use such means as are necessary, even to the taking of life, to prevent a forcible and unlawful entry,[98] or construing statutes not to require the assault, personal violence, or serious injury intended or threatened to amount to a felony, if perpetrated, in order to justify the taking of life in defense of habitation [99] In a few states it is a rule that there must be danger either of a felony, loss of life, or great bodily harm [1]

A burglar may be lawfully killed by the owner of a house,[2] where the burglar or thief is at the

sault on accused's place of business as to justify homicide—Howard v Commonwealth, 120 S W 2d 212, 274 Ky 653

88. Iowa—State v Smith, 69 N W 269, 100 Iowa 1

89. Ala—Clack v State, 196 So 286, 29 Ala App 377
Ky—Sizemore v Commonwealth, 148 S W 2d 341, 285 Ky 499

90. Ariz—Taylor v State, 232 P. 552, 27 Ariz 228
Ky—Fore v Commonwealth, 163 S W 2d 48, 291 Ky 34—Cooper v Commonwealth, 27 S W 2d 405, 234 Ky 56
Miss—Luttrell v State, 174 So 53 178 Miss 877—Bowen v State, 144 So 230, 232, 164 Miss 225, citing **Corpus Juris**
S C—State v Stockman, 64 S E 595, 82 S C 388, 129 Am S R 888
Va—Stoneman v Commonwealth, 25 Gratt 887, 66 Va 887
Wyo—State v Sorrentino, 221 P 420, 422, 31 Wyo 129, 34 A L R 1477

"The right is limited to prevention; it does not extend to punishment for an act already committed" —State v Sorrentino, supra

Where assault on the owner's house is an accomplished fact, owner can not punish act however wrongful, by taking intruder's life—Taylor v State, 232 P 552, 27 Ariz 228

91. Ark—Brown v State, 18 S W 1051, 55 Ark 593
Miss—Bowen v State, 144 So 230, 232, 164 Miss 225, citing **Corpus Juris.**

92. Ark—Brown v State, 18 S W 1051, 55 Ark 593
Miss—Bowen v State, 144 So 230, 164 Miss 225

93. Ky—Steele v Commonwealth, 232 S W 646, 192 Ky 223
Miss—Bowen v State, 144 So 230, 164 Miss 225

94. Mo—State v Sinclair, 157 S W 339, 250 Mo 278

95. Ill—Hayner v People, 72 N E 792, 213 Ill 142
Miss—Bowen v State, 144 So 230, 232, 164 Miss 225, quoting **Corpus Juris.**
Neb—Thompson v State, 85 N W 62, 61 Neb 210, 87 Am S R 453

Fact that deceased was armed with a deadly weapon is not essential to accused's right to defend home against one who had committed violence in the house and threatened lives of inmates on previous visit—Sawyer v Commonwealth, 13 S W 2d 267, 227 Ky 435

96. Ill—Hayner v People, 72 N E 792, 213 Ill 142

97. Tenn—Wooten v State, 103 S W 2d 324 171 Tenn 362—Hudgens v State 60 S W 2d 153, 166 Tenn 231
Va—Fortune v Commonwealth, 112 S E 861, 133 Va 669
30 C J p 84 note 57

98. S C—State v Bradley, 120 S E 240, 126 S C 528
30 C J p 84 note 58

99. Ga—McCray v State, 68 S E 62, 134 Ga 416, 20 Ann Cas 101.
30 C J p 84 note 59

1. Ala—Carroll v State, 23 Ala 28, 58 Am D 282—Bray v State, 78 So 463, 16 Ala App 433
Ky—Fore v Commonwealth, 163 S W 2d 48, 291 Ky 34—Sizemore v Commonwealth, 148 S W 2d 341, 285 Ky 499—Burks v Commonwealth, 71 S W 2d 418, 254 Ky 193

2. Del—State v. Horskin, Houst.Cr 116.

time committing a felony by attempting to break into and burglarize the house,[3] or even though he is attempting to escape,[4] but after he has entered, although burglariously, the owner has no right to kill him for the act of entry already committed[5] The owner does not lose the right to kill by reason of the fact that the burglar seizes the owner's weapon to prevent him from enforcing the right, unless the burglar surrenders himself[6]

Trespass An owner of a house may resist a trespass with force,[7] but he is not justified in killing to repel a mere civil or nonfelonious trespass[8] unaccompanied by any offer of violence[9] Even where the trespass is forcible and against accused's objections, this fact alone does not justify or excuse the taking of life,[10] to excuse the homicide it is essential that the taking of life shall be believed by accused to be necessary or reasonably necessary to protect himself or his family from danger[11] The mere fact that one knocks at the door of another's house in the nighttime does not confer on the latter a legal right to kill[12]

Attack by one or more persons Some statutes, by the use of the plural "persons," require an attack by two or more persons in order to justify a homicide in defense of habitation against an assault or offer of personal violence, but do not require action by more than one to justify a homicide in defense of habitation against an attempt to commit a felony, or to prevent a forcible attack and invasion of habitation after persuasion, remonstrance, and other gentle measures have first been used[13]

d. Means of Preventing or Repelling Intrusion

Homicide in defense of habitation generally is justified when it results from the use of such force only as is necessary or apparently necessary to prevent or repel the unlawful intrusion or aggression.

To justify a homicide as in defense of habitation, accused must use no greater force than is necessary or apparently necessary to a reasonably prudent man[14] The force used by him must be neither greater in degree[15] nor earlier[16] or later in point of

Ga —McPherson v State 22 Ga 478
N J —In re Charge to Essex Grand Jury, 7 N J L J 9

3. Ky —Caudill v Commonwealth, 27 S W 2d 705, 234 Ky 142 —Steele v Commonwealth, 232 S W 646, 192 Ky 223—Leach v Commonwealth, 112 S W 595, 129 Ky 497, 33 Ky L 1016

4. N J —In re Charge to Essex County Grand Jury, 7 N J L J 9

5. Ga —Horton v State, 35 S E 659, 110 Ga 739
Wyo —State v Sorrentino, 224 P 420, 31 Wyo 129, 34 A L R 1477

6. Ga —McPherson v State, 22 Ga 478

7. Del —State v Mills, 69 A 841, 22 Del 497
Ky —Commonwealth v Beverly, 34 S W 2d 941, 237 Ky 35
Mo —State v Taylor, 44 S W 785, 143 Mo 150
Okl —Johnson v State, 58 P 2d 156, 59 Okl Cr 283
30 C J p 84 note 65

. "The law regards with great jealousy and vigilance the peace and security of the dwelling A trespass upon it is more than a trespass upon property, it is the same as a trespass upon a person"—Clack v State, 196 So 286, 289, 29 Ala App 377

8. U S —Arwood v U S, C C A Tenn, 134 F 2d 1007, certiorari denied 63 S Ct 1436, 319 U S 776, 87 S Ct 1360
Ala —Russell v State, 122 So 683, 219 Ala 567
Ky —Commonwealth v Beverly, 34 S W 2d 941, 237 Ky 35—Carroll v Commonwealth, 299 S W. 183, 221 Ky 557.
Va —Bradshaw v Commonwealth, 4 S E 2d 752 171 Va 391
30 C J p 84 note 66

Unreasonable search

Whether investigator for internal revenue department had unlawfully invaded accused's house and was conducting an unreasonable search at time he was killed by defendant was no defense in murder prosecution, since even if investigator's conduct was unlawful it amounted only to a trespass which neither justified nor excused murder —Arwood v U S, C C A Tenn, 134 F 2d 1007, certiorari denied 63 S Ct 1436, 319 U S 776, 87 S Ct 1360

Lack of search warrant

Where accused who was concealed in upper story of his cabin shot a police officer who started up stairs of cabin in search of accused, the fact that officer at moment of starting up stairs became a technical trespasser because he lacked a search warrant did not give accused right to kill him —Bradshaw v Commonwealth, 4 S E 2d 752, 174 Va 391
Trespass on property other than habitation see infra § 110

9. Ill —People v Osborne, 115 N E 890, 278 Ill 104
30 C J p 84 note 67

10. Ala —Bray v State, 78 So 463, 16 Ala App 433
Ky —Miller v Commonwealth, 222 S W 96, 188 Ky 435

11. Ky —Miller v Commonwealth, supra

12. Ky —Steele v Commonwealth, 232 S W 646, 192 Ky 223—Leach v Commonwealth, 112 S W. 595, 129 Ky 497, 33 Ky L 1016.

13. Ga —Smith v State, 32 S E 851, 106 Ga 673, 71 Am S R 286—Hudgins v State, 2 Ga 173

14. Ala —Hill v State, 166 So 60, 27 Ala App 55 certiorari denied 166 So 64, 231 Ala 539
Hawaii —Territory v Warren, 35 Hawaii 232
Miss —Luttrell v State, 174 So 53, 178 Miss 877
N C —State v Baker, 23 S E 2d 340, 222 N C 428—State v Bryson, 156 S E 143 200 N C 50
Okl —Johnson v State, 58 P 2d 156, 59 Okl Cr 283
Tenn —Winton v State, 268 S W 633, 151 Tenn 177
Wash —State v Gallagher, 103 P 2d 1100, 4 Wash 2d 437
30 C J p 85 note 72

Laying trap for deceased

Evidence that deceased made to accused's wife a proposal for sexual intercourse, that deceased stated he would call on following morning, that wife told accused who early next morning concealed automobile and returned to residence that few minutes thereafter deceased appeared and led accused's wife to bedroom, whereupon accused stabbed deceased, does not entitle accused to directed verdict of not guilty on ground homicide was committed to prevent commission of felony in his dwelling —Luttrell v State, 174 So 53, 178 Miss 877

15 Cal —People v Hubbard, 220 P 315, 64 Cal App 27
Conn —State v Perkins, 91 A 265, 88 Conn 360, L R A 1915A 73

16. Conn —State v. Perkins, supra.

time than is necessary or apparently necessary Where the aggressor has ceased in his attempt to enter, or has been expelled, accused is not justified in subsequently taking his life[17] It is the duty of the householder to prevent the entry of his house by means not fatal if he can do so consistently with safety.[18] Where a person is already in the house, as where he is a guest or even a trespasser, he should be first requested to leave, and, on his refusal, other means short of taking life should be first resorted to before employment of that extreme means can be justified or excused,[19] and he is entitled to a reasonable time to depart before force may be used to eject him[20] If, however, he refuses to leave when the owner makes such demand, the owner may use as much force, even to the extent of taking his life, as may be reasonably necessary to accomplish the expulsion[21] Under some statutes an owner or occupant may not intentionally kill another solely in defense of habitation,[22] but he is not required to retreat if an intruder resists ejection, and may intentionally take the intruder's life if he has reason to believe, and does believe, that his life is in danger, or that he is in danger of receiving great bodily harm[23] However, where a person is attempting to break into the dwelling house of another in the nighttime with the intent to commit a felony, the owner may at once resort to the extremity of taking life.[24] Under some statutes every other effort in his power must be made by the occupant to repel the intrusion or aggression before he is justified in killing in defense of habitation[25] Persuasion, remonstrance, warning or other gentle measures must be first used in order to justify a homicide to prevent a forcible attack on, and invasion of, the habitation,[26] unless it is apparent from the circumstances that such a warning or remonstrance would be ineffective,[27] as where a person manifestly intends or endeavors by violence or surprise to commit a felony on the habitation.[28]

§ 110. Defense of Property

Homicide in defense of property, real or personal, is justifiable only where it is committed against one who manifestly intends and endeavors by violence or surprise to commit a felony on the property, and where the employment of reasonable force in protection of the property is resisted by means likely to produce death or great bodily harm

A person may use such force as is reasonably necessary to protect his property, real or personal, in his possession,[29] and, where the employment of such reasonable force by him is resisted with means likely to produce death or to inflict great bodily harm on him, he is justified in killing,[30] unless he was

17. Iowa—State v Baker, 135 N W 1097, 157 Iowa 126, modified on rehearing 138 N W 841, 157 Iowa 126
Or—State v Conally, 3 Or 69

18. Ark—Hall v State, 168 S W 1122, 113 Ark 454

19. Cal—People v Hubbard, 220 P 315, 64 Cal App 27
30 C J p 85 note 77

20. S C—State v Petit, 142 S E 725, 144 S C 452

21. Cal—People v Hubbard, 220 P 315, 64 Cal App 27
S C—State v Sparks, 183 S E 719 179 S C 135—State v Bradley, 120 S E 240, 126 S C 528

One who has rented a house for the occupancy of himself and his paramour can eject another who has been invited therein by the paramour, and on such other person's refusal to go may use such force as may be reasonably necessary to remove him after allowing a reasonable time for his departure—People v Hubbard, 220 P 315, 64 Cal App 27

22. Cal—People v Hubbard, supra

23. Cal—People v Hubbard supra
N C—State v Anderson, 22 S E 2d 271, 222 N C 148
S C—State v Osborne, 21 S E 2d 178, 200 S C 504

If one, or any member of his family, is attacked in his home, he may, without retreating, not only use such force as may be necessary to protect himself, or family, from the loss of life or serious injury, or against the perpetration of a felony but he may combine such force as is necessary to eject the assailant, whom he may kill if it appears unavoidable—State v Osborne, supra
Duty to retreat as element of self-defense see infra §§ 127–130

24. Del—State v Horskin, Houst Cr 116

25. Tex—Wells v State, 141 S W 96, 63 Tex Cr 618

26. Ga—Freeney v State, 59 S E 788, 129 Ga 759—Price v State, 72 Ga 441
N C—State v Baker, 23 S E 2d 340, 222 N C 428

27. N C—State v Baker, supra

28. Ga—Freeney v State, 59 S E 788, 129 Ga 759

29. U S—McNabb v U S, C C A Tenn, 123 F 2d 848, certiorari granted 62 S Ct 1305, 316 U S 658, 86 L Ed 1736, reversed on other grounds 63 S Ct 608, 318 U S 332, 87 L Ed 819
Ala—Russell v State, 122 So 683, 219 Ala 567
Iowa—State v Rhone, 275 N W 109, 223 Iowa 1221
La.—State v Plumlee, 149 So 425, 177 La 687
Okl—Hendrick v State, 73 P 2d 184, 63 Okl Cr 100—Jones v State, 56 P 2d 423, 59 Okl Cr 53—Hare v. State, 54 P 2d 670, 58 Okl Cr 420—Dyer v State 53 P 2d 700, 58 Okl Cr 345—Schmitt v State, 47 P 2d 199, 57 Okl Cr 102—Jackson v State, 293 P 567, 49 Okl Cr 337
Or—State v Trent, 259 P 893, 122 Or 144, denying rehearing 252 P. 975, 122 Or 144
30 C J p 85 note 83

A landowner has right to carry weapon in whatever manner he desires while on his land—State v Rhone, 275 N W 109, 223 Iowa 1221
Prevention of offenses against property generally see supra § 101

30. Ala—Bishop v State, 145 So 497, 25 Ala App 267, certiorari denied 145 So 499, 226 Ala 147
Ariz—Strickland v State, 294 P 617, 37 Ariz 368
D C—Laney v U S, 294 F 412, 54 App D C 56
Miss—Boykin v State, 38 So 725, 86 Miss 481
Tex—Moon v State, 18 S W 2d 635, 113 Tex Cr 230

An impounder of cows has a right to retain possession of the cows until repossessed by the owner by and through the processes of the law, and, being in the curtilage of his home, he has a right to arm himself against attack and to repel force with force, but he cannot use his curtilage as place to bring on diffi-

at fault in bringing on the difficulty,[31] or the trespass or wrong was completed before the altercation arose.[32] Where, however, there is no element of personal danger,[33] he is not justified or excused in taking life in defense of such property, other than his habitation, in order to prevent or resist a mere civil or nonfelonious trespass,[34] or larceny,[35] or wrongful taking or detention,[36] or other act or offense less than a felony[37] attempted by violence or surprise.[38] If no felony is attempted, and the owner is unable to prevent a trespass by any means short of taking or endangering life, he must suffer the trespass and seek redress at law.[39]

On the other hand, where one in defense of his property kills another who manifestly intends and endeavors by violence or surprise to commit a forcible or atrocious felony thereon, such as murder, burglary, robbery, and the like, the killing is justifiable or excusable homicide.[40] The right of accused to defend his person is far broader than the right to defend his property,[41] and care should be taken not

culty with owner of cows and then shoot him—Bishop v State, 145 So 497, 25 Ala App 267, certiorari denied 145 So 499, 226 Ala 147

Right of impounder to possession of impounded animal generally see Animals § 96

31. Tex—Mansfield v State, 138 S W 591, 62 Tex Cr 631

Where accused laid certain money on a table and challenged deceased to take it, evidently for the purpose of bringing on a difficulty and furnishing an excuse for killing deceased, defense of property cannot be invoked as an excuse or justification—Mansfield v State, supra

32. Ky—Doneghy v Commonwealth, 271 S W 586, 208 Ky 500

Removal of water meter

Although waterworks employee made mistake in removing water meter of defendant's father, and, in altercation, defendant shot employee, self-defense instruction was properly qualified by addition that, if he invited combat self-defense was unavailable, where trespass, if any, was completed before altercation arose—Doneghy v Commonwealth supra

33. Va—Pierce v Commonwealth, 115 S E 686, 135 Va 635, 28 A L R 864

34. U S—McNabb v U S, C C A Tenn., 123 F 2d 848, certiorari granted 62 S Ct 1305, 316 U S 658, 86 L Ed 1736, reversed on other grounds 63 S Ct 608, 318 U S 332, 87 L Ed 819

Ala—Russell v State, 122 So 683, 219 Ala 567—Dunn v State, 124 So 744, 23 Ala App 321

Ariz—Strickland v State, 294 P 617, 37 Ariz 368

D C—Holmes v U S, 11 F 2d 569, 56 App D C 183

Iowa—State v Metcalfe, 212 N W 382, 203 Iowa 155

Ky—Johnson v Commonwealth, 132 S W 2d 72, 279 Ky 753—Madden v Commonwealth, 36 S W 2d 346, 237 Ky 703—Howard v Commonwealth, 248 S W 1059, 198 Ky 453

La—State v Plumlee, 149 So 425, 177 La 687—State v Ciaccio, 112 So 486, 163 La 563

Mo—State v Beckham, 267 S W 817, 306 Mo 566, 37 A L R 1094

N M—State v Martinez, 278 P 210, 34 N M 112

Okl—Hare v State, 54 P 2d 670, 58 Okl Cr 420—Dyer v State, 53 P 2d 700, 58 Okl Cr 345

S C—State v Faulkner, 149 S E 108, 151 S C 379

W Va—State v Laura, 116 S E 251, 93 W Va 250

30 C J p 85 note 85

35. Ariz—Viliborghi v State, 43 P 2d 210, 45 Ariz 275

Ind—Bloom v State, 58 N E 81, 155 Ind 292

Ky—Kinder v Commonwealth, 92 S W 2d 8, 263 Ky 145—Howard v Commonwealth, 248 S W 1059, 198 Ky 453

La—State v Plumlee, 149 So 425, 177 La 687

Mo—State v Fultz, 142 S W 2d 39

Larceny, being secret crime not attended with force and violence, does not warrant killing of person to prevent its consummation, especially when goods taken are of small value—State v Plumlee, 149 So 425, 177 La 687

36. Ala—Russell v State, 122 So 683, 219 Ala 567

Ky—Madden v Commonwealth, 36 S W 2d 346, 237 Ky 703

30 C J p 85 note 87

37. Ariz—Viliborghi v State, 43 P 2d 210, 45 Ariz 275

Ky—Doneghy v Commonwealth, 271 S W 586, 208 Ky 500

Okl—Hendrick v State, 73 P 2d 184, 63 Okl Cr 100

30 C J p 85 note 88

Taking melons

(1) Killing of one lawfully driving on public highway, in belief that he had stopped to steal melons from defendant's patch, is not "justifiable," since deceased was not engaged in the commission of a felony on defendant's property—State v Trent, 259 P 893, 122 Or 144, denying rehearing 252 P 975, 122 Or 144

(2) Killing a boy in defendant's melon patch at night, in view of a statute making act of taking melons from a farm a misdemeanor only, is not within another statute, making killing justifiable if committed to prevent theft—McKinney v State, 257 S W 258, 96 Tex Cr 342

38. Ark—Brown v State, 233 S W. 762, 149 Ark 588

39. Ark—Carpenter v State, 36 S. W 900, 62 Ark 286

Okl—Hendrick v State, 73 P 2d 184, 63 Okl Cr 100—Jones v State, 56 P 2d 423, 59 Okl Cr 53—Hare v State, 54 P 2d 670, 58 Okl Cr 420—Dyer v State, 53 P 2d 700, 58 Okl Cr 345—Schmitt v State, 47 P 2d 199, 57 Okl Cr 102—Jackson v State, 293 P 567, 49 Okl Cr 337

40. Ark—Carpenter v State, 36 S W 900, 62 Ark 286

Conn—State v Feltovic, 147 A 801, 110 Conn 303

D C—Laney v U S, 294 F 412, 54 App D C 56

Ga—Shafer v State, 13 S E 2d 798, 191 Ga 722—Bennett v State, 91 S E 889, 19 Ga App 442

Iowa—State v Metcalfe, 212 N W. 382 203 Iowa 155

Ky—Kinder v Commonwealth, 92 S. W 2d 8, 263 Ky 145

La—State v Plumlee, 149 So 425, 430, 177 La 687, citing **Corpus Juris.**

Okl—Hendrick v State, 73 P 2d 184, 63 Okl Cr 100

W Va—State v Laura, 116 S E 251, 93 W Va 250

30 C J p 86 note 90

Employee assailed with deadly weapon in place of business had right to defend employer's property to extent of taking assailant's life—State v Feltovic, 147 A 801, 110 Conn 303

Illegal possession of alcohol

Can of alcohol, carried by defendant in violation of prohibition law when attacked by one whom he killed, was lawfully in his possession as against deceased and subject of robbery, so as to entitle him to defend possession thereof, although not property in commercial sense—State v Shannon, 243 N W 507, 214 Iowa 1093

Prevention of felonies generally see supra § 101

41. Tex—Richardson v State, 239

to restrict his right to that of defense of his property where he was attacked by deceased and took the life of deceased in order to save his own [42] The mere fact that the homicide took place on premises involved in controversy and litigation between deceased and accused does not necessarily characterize it as a homicide in defense of property,[43] and the fact that an intruding claimant acted in good faith in attempting to eject the rightful possessor in forcibly resisting the latter's efforts to eject him is no defense to his killing of such possessor, since his efforts were unlawful [44]

Necessity and sufficiency of possession A person has no right to slay another merely to protect his property where he is not in possession thereof Where property has been wrongfully taken from a person, or he is not in possession and cannot obtain possession by peaceable means, his sole means of redress is an appeal to the law, he has no right to resort to force or take life in order to obtain or regain possession,[45] and, a fortiori, he has no right to slay in revenge,[46] but it has been held that, in case of a robbery, the right to kill does not end as soon as there is such a change of possession of the property as will render the crime technically complete, but remains with the owner as long as his property is in his immediate presence, to prevent its being carried away,[47] and that in case of a burglary the killing may be done at any stage of the burglary, if it is reasonably necessary to prevent the final completion of the felony.[48]

Under some statutes, although the case does not fall within the terms of a particular statute justifying a homicide in defense of property to prevent anyone of certain enumerated offenses, mostly felonies, nevertheless the homicide may be justified as in protection of property against other unlawful and violent attack,[49] provided the possession was of corporeal property and not a mere right, it was actual and not merely constructive, and it was legal, although the right to the property might not have been in the possessor, provided the killing took place while the deceased was in the very act of making the unlawful and violent attack,[50] and provided the possessor resorted to all other means available at the time and made every effort in his power to prevent injury and repel the aggression before killing,[51] but this did not require the owner to have left premises to institute legal proceedings to prevent the aggression [52] Where a person is acting alone or personally in defense of his property, it is not essential under such a statute to the exercise of his right to defend that the threatened injury to his property be accompanied by violence to himself,[53] but, where a third person interfered in behalf of one whose property was attacked, a killing by such third person is not justifiable unless the life or the person of the property owner was in peril by reason of the attack on his property [54]

§ 111. —— Right to Set Spring Guns

Homicide by means of a spring gun or other like instrument, placed for the protection of property, is justifiable or excusable only where, under the circumstances, accused would have a right in person to take life for the protection of the property or of his life or person

A person is not justified or excused in placing spring guns or other like instruments of destruction for the protection of his property where he would not be justified in taking life with his own hands for its protection or for the protection of his life or person, as in the case of mere trespass,[55]

S W 218, 91 Tex Cr 318, 20 A L R 1249
30 C J p 86 note 91
Self-defense see infra §§ 114–138

42. Tex —Richardson v State, supra

43. Tex —Fambro v State, 141 S W 2d 354, 139 Tex Cr 480—Richardson v State, 239 S W 218, 91 Tex Cr 318, 20 A L R 1249

44. Ariz —Strickland v State, 294 P 617, 37 Ariz 368

Good faith cannot make actually unlawful possession a lawful one — Strickland v State, 294 P 617, 37 Ariz 368

45. Ark —Brown v State, 233 S W 762, 149 Ark 588—Carpenter v State, 36 S W 900, 62 Ark 286
30 C J p 86 note 95

46. Ga —Drew v State, 71 S E 1108, 136 Ga 658

Where the owner, on overtaking the thief, and without making any effort to retake possession of the property by peaceable means and without any necessity to take life, kills the thief, the homicide is not justifiable even though the theft is a felony —Drew v State, supra

47. Ky —Flynn v Commonwealth, 264 S W 1111, 204 Ky 572
Miss —Garner v State 2 So 2d 828

To constitute robbery, to prevent which killing may be justified, it is not necessary that taking of property shall be directly from one's person, it is sufficient if it is taken while in his possession and immediate presence —Flynn v Commonwealth, 264 S W 1111, 204 Ky 572

48. Ariz —Villiborghi v State, 43 P 2d 210, 45 Ariz 275

49. Tex —Gilliam v State, 272 S W 154, 100 Tex Cr 67—Espalin v State, 237 S W 274, 90 Tex Cr 625

50. Tex —Richardson v. State, 239 S W 218, 91 Tex Cr 318, 20 A L R 1249
30 C J p 86 note 2

51 Tex —Eckerman v State, 89 S W 2d 999, 129 Tex Cr 563—Turner v State, 87 S W 2d 736, 129 Tex Cr 380—Moon v State, 18 S W 2d 635, 113 Tex Cr 230—Gilliam v State, 272 S W 154, 100 Tex Cr 67—Richardson v State, 239 S W 218, 91 Tex Cr 318, 20 A L R 1249
30 C J p 86 note 3

52. Tex —Turner v State, 87 S W 2d 736, 129 Tex Cr 380—Hassell v State, 188 S W 991, 80 Tex Cr 93

53. Tex —Lilly v State, 20 Tex App 1.

54. Tex —Lilly v State, supra

55. U S —Warren v Territory of Hawaii, C C A Hawaii, 119 F 2d 936
Hawaii —Territory v Warren, 35 Hawaii 232, 244, quoting **Corpus Juris.**

or a minor crime such as petit larceny,[56] even though deceased had knowledge of the setting of the gun and failed to keep out of the place where it was set.[57] On the other hand, where he would have a right to slay another who is endeavoring with force and violence to commit a felony on the property, a killing committed by means of such instrument would likewise be justifiable.[58]

§ 112. Accident or Misfortune

a In general
b Elements of defense
c While defending against attack

a. In General

A homicide by accident, misadventure, or misfortune ordinarily is excusable where it is accidentally committed while doing a lawful act in a careful and lawful manner and without an unlawful intent

Homicide by misadventure is the accidental killing of another, where the slayer is doing a lawful act unaccompanied by any criminally careless or reckless conduct.[59] A homicide committed by accident,[60] misadventure,[61] or misfortune[62] is excusable, and, as in other cases of excusable homicide, the slayer is not criminally responsible therefor.[63] It is a general rule, expressly declared by statute in a number of states, that where a man while doing a lawful act in a careful and lawful manner and without an unlawful intent accidentally kills another it is excusable homicide.[64] The homicide is excusable if death unfortunately ensued where a parent was correcting his child or a master or teacher his apprentice or pupil, and the bounds of moderation were not exceeded either in the manner, the instrument, or the quantity of punishment,[65] where an officer was punishing a criminal in moderation and within the limits of the law,[66] where a person was at work with a hatchet and the head flew off and killed a bystander,[67] where a physician or surgeon or one acting as such administered a drug or performed an operation with due skill and caution,[68] and, under some circumstances, where a pistol or other firearm was accidentally and unintentionally,[69]

La—State v. Plumlee, 149 So. 425, 429, 177 La. 687, citing **Corpus Juris.**
Mo—State v. Beckham, 267 S.W. 817, 306 Mo. 566, 37 A.L.R. 1094.
30 C.J. p. 86 note 6.

56. La.—State v. Plumlee, 149 So. 425, 177 La. 687.
Stealing chickens
One setting trap gun in his barn to kill chicken thief is responsible for whatever harm may result therefrom and the killing of one entering the barn by such trap gun, is not justifiable or excusable, but unlawful homicide.—State v. Plumlee, supra.

57. La.—State v. Plumlee, supra.

58. Conn.—State v. Moore, 31 Conn. 479, 83 Am.D. 159.
Hawaii—Territory v. Warren, 35 Hawaii 232, 244, quoting **Corpus Juris.**
La.—State v. Plumlee, 149 So. 425, 429, 177 La. 687, citing **Corpus Juris.**
30 C.J. p. 87 note 7.

59. Del.—State v. Dean, 122 A. 418, 2 W.W.Harr. 290, affirmed Dean v. State, 125 A. 478, 2 W.W.Harr. 469.—State v. Disalvo, 121 A. 661, 2 W.W.Harr. 232.
Ohio—Williamson v. State, 2 Ohio Cir.Ct. 292, 1 Ohio Cir.Dec. 492.
30 C.J. p. 87 note 9.
Distinguished from involuntary manslaughter see supra § 55.

60. Del.—State v. Kupis, 179 A. 640, 7 W.W.Harr. 27.—State v. Dugan, Houst.Cr. 563.
Ky.—Embry v. Commonwealth, 32 S.W.2d 979, 236 Ky. 204.
Me.—State v. Budge, 137 A. 244, 246, 126 Me. 223, 53 A.L.R. 241.
Tex.—Great Southern Life Ins. Co. v. Akins, Civ.App., 105 S.W.2d 902, 904, error refused.—Cooper v. State, 161 S.W. 1094, 72 Tex.Cr. 250.
30 C.J. p. 87 note 10.

61. Del.—State v. Phillips, 187 A. 108, 7 W.W.Harr. 544.—State v. Kupis, 179 A. 640, 7 W.W.Harr. 27.
Ky.—Embry v. Commonwealth, 32 S.W.2d 979, 236 Ky. 204.
Me.—State v. Budge, 137 A. 244, 246, 126 Me. 223, 53 A.L.R. 241.
30 C.J. p. 87 note 11.
Misadventure means "a homicide occurring without negligence and while in the performance of a lawful act".—State v. Budge, supra.

62. Okl.—Mead v. State, 83 P.2d 404, 65 Okl.Cr. 86.
Tex.—Cooper v. State, 161 S.W. 1094, 72 Tex.Cr. 250.
"Misfortune" and "misadventure" analogous
The word 'misfortune" within statute defining excusable homicide is analogous with the word 'misadventure" and means the act of a man who, in doing any lawful act and without any unlawful intent, unfortunately kills another person.—Mead v. State, 83 P.2d 404, 65 Okl.Cr. 86.—Gaunce v. State, 211 P. 517, 22 Okl.Cr. 361.

63. Ky.—Embry v. Commonwealth, 32 S.W.2d 979, 236 Ky. 204.
30 C.J. p. 87 note 14.

64. U.S.—Ex parte Dickson, D.C.N.Y., 11 F.2d 609.
Ala.—Naler v. State, 148 So. 880, 25 Ala.App. 486.
Del.—State v. Phillips, 187 A. 108, 7 W.W.Harr. 544.—State v. Kupis, 179 A. 640, 7 W.W.Harr. 27.
Ky.—Hunt v. Commonwealth, 159 S.W.2d 23, 289 Ky. 527.—Rowe v. Commonwealth, 268 S.W. 571, 206 Ky. 803.
N.Y.—People v. McMurty, 219 N.Y.S. 293, 128 Misc. 333.
N.D.—State v. Shahane, 219 N.W. 132, 56 N.D. 642.
Okl.—Mead v. State, 83 P.2d 404, 65 Okl.Cr. 86.
Or.—State v. Boag, 59 P.2d 396, 154 Or. 354.—State v. Trent, 259 P. 893, 122 Or. 144, denying rehearing 252 P. 975, 122 Or. 144.
Tex.—Great Southern Life Ins. Co. v. Akins, Civ.App., 105 S.W.2d 902, error refused.
Wash.—State v. Hedges, 113 P.2d 530, 8 Wash.2d 652.
Wis.—Eckman v. State, 209 N.W. 715, 191 Wis. 63.
Wyo.—Eagan v. State, 128 P.2d 215, 222, citing **Corpus Juris.**
30 C.J. p. 87 note 15.
Accidentally shooting bystander while assisting to arrest another.—Bolen v. Commonwealth, 97 S.W.2d 1, 265 Ky. 456.

65. Or.—State v. Boag, 59 P.2d 396, 401, 154 Or. 354.
30 C.J. p. 87 note 16.

66. Del.—State v. Dugan, Houst.Cr. 563.—State v. Rhodes, Houst.Cr. 476.

67. Del.—State v. Dugan, Houst.Cr. 563.—State v. Rhodes, Houst.Cr. 476.
Or.—State v. Boag, 59 P.2d 396, 401, 154 Or. 354.

68. Mass.—Commonwealth v. Thompson, 6 Mass. 134.
Mo.—Rice v. State, 8 Mo. 561.
30 C.J. p. 87 note 20.

69. Ky.—Pash v. Commonwealth, 142 S.W. 700, 146 Ky. 390.

or even intentionally,[70] discharged, as where an innocent bystander was killed in a justifiable assault on a third person,[71] or where a soldier accidentally killed a third person in shooting at a fleeing prisoner, to prevent his escape.[72]

b. Elements of Defense

In order that a homicide by misadventure may be excusable, the act resulting in death must have been a lawful one; it must have been done with reasonable care and due regard for the lives and persons of others; and the killing must have been accidental and without unlawful intent or evil design.

Three elements enter into the defense of excusable homicide by misadventure. The act resulting in death must have been a lawful one,[73] it must have been done with reasonable care and due regard for the lives and persons of others;[74] and the killing must have been accidental and not intentional,[75] or without unlawful intent,[76] or without evil design or intention on the part of the slayer.[77] All these elements must concur and the absence of any one of them will involve in guilt.[78] Even though the homicide was unintentional, it is not excusable where it was the result or incident of an unlawful act,[79] such as pointing or presenting a gun, pistol or other firearm at another person in such a manner as to constitute an offense under the laws of the state,[80] or unlawfully striking another with an intent to hurt, although not with an intent to kill.[81] Likewise the homicide is not excusable where it was the result of an act done with such recklessness or carelessness as to amount to gross or criminal neg-

Tex.—Hodge v. State, 131 S.W. 577, 60 Tex.Cr. 157.
30 C.J. p. 87 note 21.

70. Del.—State v. Naylor, 90 A. 880, 28 Del. 99.
30 C.J. p. 87 note 22.

71. Ala.—Naler v. State, 148 So. 880, 25 Ala.App. 486.
Ky.—Gillis v. Commonwealth, 261 S.W. 591, 202 Ky. 821.
Intent to kill one person and killing another as murder see supra § 18.
Killing one person in defending against another see infra subdivision c of this section.

72. U.S.—U.S. v. Lipsett, D.C.Mich., 156 F. 65.
30 C.J. p. 87 note 22 [a].
Justifiable homicide by soldier see supra § 107.

73. Del.—State v. Phillips, 187 A. 108, 7 W.W.Harr. 544.
Ky.—Embry v. Commonwealth, 32 S.W.2d 979, 236 Ky. 204.
Okl.—Lane v. State, 84 P.2d 807, 65 Okl.Cr. 192—Mead v. State, 83 P.2d 404, 65 Okl.Cr. 86—Philby v. State, 76 P.2d 412, 64 Okl.Cr. 1—Gaunce v. State, 211 P. 517, 22 Okl.Cr. 361.
Pa.—Commonwealth v. Flax, 200 A. 632, 638, 331 Pa. 145, quoting **Corpus Juris**.
Wash.—State v. Hedges, 113 P.2d 530, 8 Wash.2d 652.
30 C.J. p. 87 note 23.

Finding that respondent was not doing unlawful act is unnecessary to acquit of manslaughter for misadventure.—State v. Budge, 137 A. 244, 126 Me. 223, 53 A.L.R. 241.

74. Del.—State v. Phillips, 187 A. 108, 7 W.W.Harr. 544—State v. Kupis, 179 A. 640, 7 W.W.Harr. 27.
Ky.—Embry v. Commonwealth, 32 S.W.2d 979, 236 Ky. 204.
Okl.—Lane v. State, 84 P.2d 807, 65 Okl.Cr. 192—Gaunce v. State, 211 P. 517, 22 Okl.Cr. 361.
Pa.—Commonwealth v. Flax, 200 A. 632, 331 Pa. 145.
Wash.—State v. Hedges, 113 P.2d 530, 8 Wash.2d 652.
30 C.J. p. 88 note 24.

75. Colo.—Jabich v. People, 143 P. 1092, 58 Colo. 175.
Del.—State v. Phillips, 187 A. 108, 7 W.W.Harr. 544.
Mo.—State v. Logan, 126 S.W.2d 256, 344 Mo. 351, 122 A.L.R. 417.
Okl.—Lane v. State, 84 P.2d 807, 65 Okl.Cr. 192.
Pa.—Commonwealth v. Flax, 200 A. 632, 331 Pa. 145.

"Accident" and "misfortune", as used in a statute defining excusable homicide as one committed by accident or misfortune mean the same thing, that is, a killing without intention to kill.—State v. Farrell, 6 S.W.2d 857, 860, 320 Mo. 319.

The act itself which caused the death, and not the resulting death, must be unintentional.—Hill v. Commonwealth, 40 S.W.2d 261, 239 Ky. 646—Clark v. Commonwealth, 13 S.W.2d 250, 227 Ky. 418—Lewis v. Commonwealth, 131 S.W. 517, 140 Ky. 652.

76. Fla.—Kent v. State, 43 So. 773, 53 Fla. 51.
Kan.—State v. Brecount, 107 P. 763, 82 Kan. 195, 28 L.R.A.,N.S., 187.
Pa.—Commonwealth v. Flax, 200 A. 632, 331 Pa. 145.
Wash.—State v. Hedges, 113 P.2d 530, 8 Wash.2d 652.

77. Ga.—Allen v. State, 67 S.E. 1038, 134 Ga. 380.
Ky.—Embry v. Commonwealth, 32 S.W.2d 979, 236 Ky. 204.
Okl.—Gaunce v. State, 211 P. 517, 22 Okl.Cr. 361.

78. Ala.—Jones v. State, 109 So. 189, 21 Ala.App. 234.
Okl.—Lane v. State, 84 P.2d 807, 65 Okl.Cr. 192.
Pa.—Commonwealth v. Flax, 200 A. 632, 331 Pa. 145.
Wyo.—Eagan v. State, 128 P.2d 215, 222, citing **Corpus Juris**.
30 C.J. p. 88 note 28.

79. Ala.—Naler v. State, 148 So. 880, 25 Ala.App. 486.
Me.—State v. Budge, 137 A. 244, 126 Me. 223, 53 A.L.R. 241.
Mo.—State v. Gartland, 263 S.W. 165, 304 Mo. 87.
Okl.—Lane v. State, 84 P.2d 807, 809, 65 Okl.Cr. 192, quoting **Corpus Juris**.
Or.—State v. Trent, 259 P. 893, 122 Or. 144, denying rehearing 252 P. 975, 122 Or. 144.
Pa.—Commonwealth v. Flax, 200 A. 632, 331 Pa. 145—Commonwealth v. Lessner, 118 A. 24, 274 Pa. 108.
30 C.J. p. 88 note 29.
Unintentional killing
In commission of other crime generally see supra § 21
While driving motor vehicle at unlawful rate of speed see the C.J.S. title Motor Vehicles § 662, also 42 C.J. p. 1357 notes 74–76.

80. Cal.—People v. King, 90 P.2d 291, 13 Cal.2d 521.
Miss.—Long v. State, 141 So. 591, 163 Miss. 535.
Okl.—Lane v. State, 84 P.2d 807, 65 Okl.Cr. 192.
Or.—State v. Trent, 259 P. 893, 122 Or. 144, denying rehearing 252 P. 975, 122 Or. 144.
Pa.—Commonwealth v. Flax, 200 A. 632, 331 Pa. 145.
30 C.J. p. 88 note 30.

Gun automatically discharged
Contention that codefendant did not intend to fire the gun and that the gun, by reason of the wearing of its parts, was capable of being automatically discharged several times by a single pressure on trigger, did not present a defense to murder of the first degree, especially where evidence did not show that such condition existed in the death gun.—People v. King, 90 P.2d 291, 13 Cal.2d 521.

81. Pa.—Commonwealth v. Flax, 200 A. 632, 331 Pa. 145.
S.C.—State v. Jones, 85 S.E. 239, 101 S.C. 111.

ligence,[82] unless the carelessness was of such a low degree or trivial character in the performance of a lawful act as not to involve criminality,[83] and also is not excusable where it was the result of an act done with unlawful intent even though it was done with usual and ordinary caution and under ordinary circumstances would have been lawful.[84] The distinction has been made that, in the absence of statute to the contrary, if the unlawful act was malum in se misadventure does not excuse the homicide,[85] but that if the unlawful act was malum prohibitum, misadventure may excuse the homicide unless such act is shown to be the proximate cause thereof.[86]

Under some statutes, in addition to other cases of accident or misfortune corresponding to the general rule, homicide is excusable when committed by accident and misfortune in the heat of passion, on any sudden and sufficient provocation, or on a sudden combat, when no undue advantage was taken, or any dangerous weapon used, and when the killing was not done in a cruel and unusual manner.[87] In order to excuse a homicide under such a statute, the case must be brought within its terms; the killing must not only have been committed by accident and misfortune,[88] but no undue advantage must have been taken or dangerous weapon used.[89]

c. While Defending against Attack

The homicide is excusable or justifiable where, while a person is lawfully acting in self-defense, the death of his assailant results from accident or misadventure, or an innocent bystander is killed by a random shot, if under the circumstances, the killing of the person intended to be killed would have been excusable or justifiable, as in self-defense.

Ordinarily the law of self-defense is not applicable in a case of a killing resulting from an act which was accidental and unintentional,[90] particularly where the facts of the case are not such as would make such law applicable.[91] However, where the defense of excusable homicide by misadventure is relied on, the principles of self-defense may be involved, not for the purpose of establishing defense of self, but for the purpose of determining whether accused was or was not at the time engaged in a lawful act,[92] and it has been held that in such case the right, but not the law, of self-defense is invoked.[93] Accused is entitled to an acquittal where he was lawfully acting in self-defense and the death

82. Wyo—Eagan v State, 128 P 2d 215
30 C J p 88 note 33

Shooting recklessly into room to scare victim—Mosby v Commonwealth, 190 S E 152, 168 Va 688

83. Ala—Fitzgerald v State, 20 So 966, 112 Ala 34—Crisp v State, 109 So 282, 21 Ala App 449, reversed on other grounds 109 So 287, 215 Ala 2

That accused was negligent or careless in discharging his pistol would not render him guilty of "murder" for what otherwise would be an "accidental homicide"—Burt v State, 145 S W 2d 886, 140 Tex Cr 410

84. Kan—State v Brecount, 107 P 763, 82 Kan 195, 28 L R A,N S, 187
30 C J p 88 note 34

85 Me—State v Budge, 137 A 244, 126 Me 223, 53 A L R 241

86. Me—State v Budge, supra
Mich—People v Barnes, 148 N W 400, 182 Mich 179
N C—State v Horton, 51 S E 945, 139 N C 588, 111 Am S R 818, 1 L R A,N S, 991, 4 Ann Cas 400
Cause of death generally see supra § 11

87. Ariz—State v Myers, 125 P 2d 441, 59 Ariz 200
N M—State v Welch, 25 P 2d 211, 37 N M 549
Okl—Mead v State, 83 P 2d 404, 65 Okl Cr 86
30 C J p 88 note 36

Independent defenses
Homicide while doing lawful act by lawful means with usual and ordinary caution and without unlawful intent, and homicide in heat of passion on sudden and sufficient provocation, are independent defenses—State v Welch, 25 P 2d 211, 37 N M 549
Homicide under sudden passion due to adequate provocation as manslaughter see supra § 42

88. S D—State v Stumbaugh, 132 N W 666, 28 S D 50

89. Ariz—State v Myers, 125 P 2d 441, 59 Ariz 200
Kan—State v Schwenk, 167 P 743, 101 Kan 408
Okl—Wadsworth v State, 130 P 808, 9 Okl Cr 84
S D—State v Stumbaugh, 132 N W 666, 28 S D 50

One may not seek out another, provoke an encounter or difficulty, and then claim, because he did not use a dangerous weapon or take some undue advantage or act cruelly or in an unusual manner, that he should be excused in event he killed the person so sought out—State v Myers, 125 P 2d 441, 59 Ariz 200

90 Ala—Lundsford v State, 56 So 89, 2 Ala App 38
Del—State v Phillips, 187 A 108, 7 W W Harr 544
Ga—Curry v State, 97 S E 529, 148 Ga 559

91. Ill—People v Jersky, 36 N E 2d 347, 377 Ill 261

Accidental discharge of gun
Even if defendant's claim was true that gun had been accidentally discharged in course of his struggle with deceased for possession thereof, killing was not thereby excused, where deceased had been unarmed, only partly dressed, and had retreated until his back was against his own front door prior to the shooting—People v Jersky, supra.

Deceased snapping pistol
In murder prosecution against one who killed another while attempting to rob him, fact that deceased snapped his pistol, thereby confusing defendant so that he inadvertently fired his own pistol, would afford no justification to defendant for killing deceased—Smith v State, 78 S W 2d 621, 128 Tex Cr 34

92. Colo—Jalich v People, 143 P 1092, 58 Colo 175
Del—State v Phillips, 187 A 108, 7 W W Harr 544

One may lawfully arm in reasonable anticipation of dangerous attack—State v Welch, 25 P 2d 211, 37 N M 549

"Self-defense", in a statute prohibiting the pointing of a gun at another, except in self-defense, is used in a broad sense as respects the lawfulness of the means by which a killing, claimed to be by accident or misfortune, was caused—State v Trent, 259 P 893, 122 Or 144, denying rehearing 252 P 975, 122 Or 144.

93. Ga—Curry v State, 97 S E 529, 148 Ga. 559.

of his assailant resulted from accident or misadventure,[94] as where in falling he struck or overturned an object and thereby received injuries resulting in his death,[95] or where in a struggle over the possession of a weapon it was accidentally discharged.[96] However, death resulting from a blow intentionally struck in a fight cannot be deemed an accidental killing, it is either felonious or excusable on the ground of self-defense.[97]

By person other than deceased The unintentional killing of a bystander, as by a random shot fired in the proper and prudent exercise of the right of self-defense, is excusable or justifiable if the killing of the person intended to be killed would, under all the circumstances, have been excusable or justifiable as in self-defense.[98] Where, however, the killing of the person intended could not have been excused or justified under the circumstances, the accidental killing of another is not excusable or justifiable,[99] as where accused sought and brought on the difficulty.[1] In other words, the inquiry is whether the killing would have been justifiable if accused had killed the person whom he intended to kill, as the unintended act derives its character from the intended act.[2] Accused is entitled to acquittal where it appears that he drew a pistol without any intention of shooting or shooting at another person, but only for the purpose of frightening such other person and causing him to desist from an attack on accused, and a third person grasped the pistol and in the ensuing struggle it was accidentally discharged and the third person was thereby killed,[3] accused cannot be charged with careless negligent handling of the pistol in the scuffle.[4]

§ 113. Compulsion or Necessity

The killing of an innocent man cannot be justified or excused on the ground that it was done under threats and compulsion from a third person in order to save the slayer's own life

Killing an innocent man cannot be justified or excused on the ground that it was done under threats and compulsion from third persons in order to save the slayer's own life,[5] especially where

94. Ala.—Judge v. State, 58 Ala. 406, 29 Am. R. 757.
Del.—State v. Phillips, 187 A. 108, 7 W. W. Harr. 544.

Where deceased attacked defendant without provocation and defendant could not conveniently escape or avoid attack and unintentionally stabbed deceased while using knife with such care as reasonably prudent person would use under circumstances, death would be accidental or 'death by misadventure' and defendant would not be guilty of manslaughter.—State v. Phillips, supra.

95. Del.—State v. Trusty, 40 A. 766, 17 Del. 319.
Ind.—Weston v. State, 78 N.E. 1014, 167 Ind. 324.
Mo.—State v. Coff, 183 S.W. 287, 267 Mo. 11.

96. Ga.—Curry v. State, 97 S.E. 529, 148 Ga. 559.
Iowa.—State v. Benham, 23 Iowa 154, 92 Am.D. 417.
Mo.—State v. Clinton, 213 S.W. 811, 278 Mo. 377.
Tex.—Matterson v. State, 152 S.W.2d 352, 142 Tex.Cr. 250.
30 C.J. p. 88 note 45.

Attempt to regain liberty.
If defendant was restrained of her liberty by deceased and drew pistol, not with intent to kill him but to induce him to release her, and in the scuffle which ensued over the pistol it was accidentally discharged, defendant would not be guilty of murder.—Matterson v. State, supra.

97. S.C.—State v. Jones, 85 S.E. 239, 101 S.C. 111.

98. Ala.—Bush v. State, 127 So. 909, 23 Ala.App. 502.—Lewis v. State, 113 So. 88, 22 Ala.App. 108.—Gilbert v. State, 100 So. 566, 20 Ala.App. 28.
Ariz.—Mayweather v. State, 242 P. 864, 29 Ariz. 460.
Del.—State v. Stevenson, 188 A. 750, 8 W.W.Harr. 105.
Fla.—McCray v. State, 102 So. 831, 89 Fla. 65.—Brown v. State, 94 So. 871, 84 Fla. 660.
Ky.—Noe v. Commonwealth, 160 S.W.2d 600, 290 Ky. 194.—Minix v. Commonwealth, 100 S.W.2d 825, 266 Ky. 801.—Bolen v. Commonwealth, 97 S.W.2d 1, 265 Ky. 456.—Foure v. Commonwealth, 283 S.W. 958, 214 Ky. 620.
Mo.—State v. Stallings, 33 S.W.2d 914, 916, 326 Mo. 1037, citing **Corpus Juris.**
N.M.—State v. Sherwood, 50 P.2d 968, 39 N.M. 518.
Okl.—Mayberry v. State, 2 P.2d 976, 52 Okl.Cr. 57.
Tex.—Watson v. State, 13 S.W.2d 696, 111 Tex.Cr. 636.—Johnson v. State, 288 S.W. 223, first case 105 Tex.Cr. 299.—Caraway v. State, 263 S.W. 1063, 98 Tex.Cr. 119.
Wash.—State v. Labbee, 234 P. 1049, 134 Wash. 55.
30 C.J. p. 88 note 47.

There must have been reasonable apprehension of danger and belief in necessity to justify killing.—Mayberry v. State, 2 P.2d 976, 52 Okl.Cr. 57.

Killing person, accidentally struck by rock, thrown at others by defendant believing himself, with reasonable grounds, to be in danger of death or great bodily harm, necessitating such action, was excusable.—Gray v. Commonwealth, 57 S.W.2d 6, 247 Ky. 282.

Evidence held to authorize instruction to acquit if defendant shot at another in self-defense to prevent threatened further assault and unintentionally killed deceased.—State v. Stallings, 33 S.W.2d 914, 326 Mo. 1037.

99. Ga.—Scott v. State, 120 S.E. 773, 157 Ga. 124.
Ky.—Bolen v. Commonwealth, 97 S.W.2d 1, 265 Ky. 456.
30 C.J. p. 89 note 48.

1. Ky.—Gray v. Commonwealth, 57 S.W.2d 6, 247 Ky. 282.—Foure v. Commonwealth, 283 S.W. 958, 214 Ky. 620.

2. La.—State v. Williams, 56 So. 891, 129 La. 795.
Tex.—Spannell v. State, 203 S.W. 357, 83 Tex.Cr. 418, 2 A.L.R. 593.

Where accused shoots at one person and kills another, his felonious intent is attached to killing, but any right of self-defense against person shot at is preserved.—State v. Batson, 96 S.W.2d 384, 339 Mo. 298.

3. Ky.—Beaty v. Commonwealth, 130 S.W. 1107, 140 Ky. 230.

4. Ky.—Beaty v. Commonwealth, supra.

5. Cal.—People v. Petro, 56 P.2d 984, 13 Cal.App.2d 245.
Okl.—Methvin v. State, 60 P.2d 1062, 60 Okl.Cr. 1.
Or.—State v. Weston, 219 P. 180, 185, 109 Or. 19, quoting **Corpus Juris.**

he failed to embrace an opportunity to escape or protect himself after being threatened,[6] or where the compulsion was not such as to make accused a mere physical instrument acting without will of his own and moved exclusively by another,[7] nor, if unlawful, can it be justified by the fact that it was committed under the commands of another.[8] Even extreme and inevitably necessity will not justify a man in taking another's life to save his own where there was no fault on the part of such other in producing the necessity.[9]

B SELF-DEFENSE

§ 114. In General

A homicide committed in legitimate and necessary self-defense is excusable or justifiable, and the slayer is innocent of any crime. Killing in self-defense is not limited to unintentional killings; it is consistent with, and according to some authorities limited to, intentional killings.

The right of self-defense extends to the killing of an assailant where the circumstances are such as excuse or justify resort to such an extreme measure.[10] This right is founded on the law of nature,[11] it is not derived from,[12] and is not, nor can be, superseded by[13] any law of society. All that the law attempts to do on the subject is to prescribe rules of caution and prudence to be observed by persons exercising the right.[14] These rules are often incorporated in statutes,[15] some of which establish more liberal rules than those obtaining at common law.[16] The right of self-defense is distinguishable from the right of redress. A person may prevent an injury from being done by all proper means, but, when done, he cannot take redress into his own hands.[17]

Homicide in self-defense is either justifiable[18] or excusable.[19] Justifiable homicide in self-defense occurs where a person without any fault on his part in bringing on the contest or struggle kills another under at least an apparent necessity, in order to save himself from death or great bodily harm.[20]

Wash.—State v. Moretti, 120 P. 102, 66 Wash. 537.
30 C.J. p. 89 note 52.

Doctrine of coercion does not apply to murder, since coercion has no application to capital offenses.—State v. Capaci, 154 So. 419, 179 La. 462.

6. Ala.—Leonard v. State, 114 So. 798, 217 Ala. 60.
30 C.J. p. 89 note 53.

7. Philippine.—U. S. v. Elicanal, 35 Philippine 209.

8. Miss.—Taylor v. State, 130 So. 502, 158 Miss. 505.
Or.—State v. Weston, 219 P. 180, 185, 109 Or. 19, quoting **Corpus Juris**.
R.I.—State v. Sutton, 10 R.I. 159.
Killing by soldier see supra § 107.

9. Cal.—People v. Martin, 108 P. 1034, 13 Cal. App. 96, 102.
30 C.J. p. 89 note 56.
Necessity as element of defense of Another person see supra § 108.
Habitation see supra § 109.
Self see infra § 115.

10. Ala.—Crenshaw v. State, 142 So. 669, 225 Ala. 316. Pelham v. State, 125 So. 688, 23 Ala. App. 359.
Ariz.—Lacy v. State, 297 P. 872, 38 Ariz. 60.
Ky.—Blanton v. Commonwealth, 276 S.W. 507, 210 Ky. 542.
Me.—State v. Cox, 23 A. 2d 634.
N.C.—State v. Terrell, 193 S.E. 161, 212 N.C. 145.—State v. Glenn, 150 S.E. 663, 198 N.C. 79.
Pa.—Commonwealth v. Grimm, 5 Pa. Dist. & Co. 287.
Va.—Smith v. Commonwealth, 182 S.E. 124, 165 Va. 776.
30 C.J. p. 44 note 54.

11. Ark.—Deatherage v. State, 108 S.W. 2d 904, 194 Ark. 513.
Ky.—Cottrell v. Commonwealth, 111 S.W. 2d 445, 271 Ky. 52.—Commonwealth v. Beverly, 34 S.W. 2d 941, 237 Ky. 35.
La.—National Life & Accident Ins. Co. v. Turner, App., 174 So. 646.
Mont.—State v. Jennings, 28 P. 2d 448, 96 Mont. 80, 121 A.L.R. 375.
N.C.—State v. Kirkman, 182 S.E. 498, 208 N.C. 719.—State v. Holland, 138 S.E. 8, 193 N.C. 713.
Va.—Dodson v. Commonwealth, 167 S.E. 260, 159 Va. 976.
30 C.J. p. 44 note 55.
"The right of self-defense . . . is a God given right which man had when he was yet a savage and which he did not surrender when he came into civil society."—Morgan v. Commonwealth, 15 S.W. 2d 273, 275, 228 Ky. 432.

12. Ky.—Morgan v. Commonwealth, 15 S.W. 2d 273, 228 Ky. 432.
30 C.J. p. 44 note 56.

13. Ky.—Cottrell v. Commonwealth, 111 S.W. 2d 445, 271 Ky. 52.
La.—National Life & Accident Ins. Co. v. Turner, App., 174 So. 646.
30 C.J. p. 44 note 57.

14. Ky.—Cottrell v. Commonwealth, 111 S.W. 2d 445, 271 Ky. 52.
30 C.J. p. 44 note 58.

15. Tex.—Petty v. State, 216 S.W. 867, 86 Tex. Cr. 324.
30 C.J. p. 44 note 59.

16. Mont.—State v. Merk, 164 P. 655, 53 Mont. 454.

17. Conn.—State v. Perkins, 91 A. 265, 88 Conn. 360, L.R.A. 1915A. 73.

18. Ill.—People v. Motuzas, 185 N.E. 614, 352 Ill. 340.
Iowa.—State v. Norton, 286 N.W. 476, 227 Iowa 13.
Me.—State v. Budge, 137 A. 244, 126 Me. 223, 53 A.L.R. 241.
Ohio.—Erwin v. State, 29 Ohio St. 186, 23 Am. R. 733.
Pa.—Commonwealth v. Capalia, 185 A. 203, 322 Pa. 200.
Tex.—Forrester v. State, 4 S.W. 2d 966, 109 Tex. Cr. 361.
Va.—Hale v. Commonwealth, 183 S.E. 180, 165 Va. 808.—Sims v. Commonwealth, 115 S.E. 382, 134 Va. 736.

19. Ala.—Simpson v. State, App., 13 So. 2d 437.
Iowa.—State v. Norton, 286 N.W. 476, 227 Iowa 13.—State v. Twine, 233 N.W. 476, 211 Iowa 450.
Pa.—Commonwealth v. Miller, 170 A. 128, 313 Pa. 567.
Va.—Dodson v. Commonwealth, 167 S.E. 260, 159 Va. 976.—Ballard v. Commonwealth, 159 S.E. 222, 156 Va. 980.—Sims v. Commonwealth, 115 S.E. 382, 134 Va. 736.
Wash.—State v. Smith, 83 P. 2d 749, 196 Wash. 534.
30 C.J. p. 43 note 31.

20. Ill.—People v. Motuzas, 185 N.E. 614, 352 Ill. 340.
Okl.—Perez v. State, 300 P. 428, 51 Okl. Cr. 180.
Va.—Smith v. Commonwealth, 182 S.E. 124, 165 Va. 776.—Hawkins v. Commonwealth, 169 S.E. 558, 160 Va. 935.—Dodson v. Commonwealth, 167 S.E. 260, 159 Va. 976.
30 C.J. p. 43 note 32.

Statutory definitions of justifiable homicide include the killing of a human being in self-defense;[21] in necessary self-defense,[22] in defense of person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony thereon,[23] in the lawful defense of the slayer, when there was reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer and there was imminent danger of such design being accomplished,[24] or in the actual resistance of an attempt to commit murder or a felony on the slayer.[25] Excusable homicide in self-defense occurs where a person, in the course of a sudden affray or combat in which he has become engaged with another, necessarily or under a reasonable apprehension of danger kills the other to save himself from death or great bodily harm.[26] Homicide in self-defense is defined in similar terms.[27] According to some authorities, fault or freedom from fault on the part of accused in bringing on the difficulty determines whether a homicide in self-defense is excusable or justifiable, if accused was without fault the homicide may be justifiable, but if he was originally at fault but abandoned the conflict and retreated as far as he safely could, the homicide may be excusable but it cannot be justifiable.[28]

Elements generally The various elements of self-defense, together with their limitations and qualifications, are discussed in detail in ensuing sections, but it may be stated here that a number of authorities, in enumerating the elements of self-defense, have referred to the following: (1) The absence of aggression or provocation on the part of the slayer in provoking or continuing the difficulty. (2) The actual and honest belief of the slayer that he was in imminent danger of death, great bodily harm, or some felony, and that there was a necessity to kill in order to save himself therefrom. (3) The existence of reasonable grounds for such belief. (4) The duty of the slayer to retreat or avoid the danger.[29] The acts which accused may do and justify under a plea of self-defense depend primarily on his own conduct and secondarily on the conduct of deceased.[30] If it appears that accused did not provoke the difficulty and was without fault, and that he performed his duty, under the circumstances, to resort to all available means of avoiding the danger, it then remains to determine from all the circumstances whether the conduct of deceased preceding and at the time of the killing was sufficient to justify accused in an honest belief as a reasonable man that he was in imminent danger of death or great bodily harm.[31] The elements are the same as applied to manslaughter in the first degree and to murder in either degree,[32] and the law of self-defense has been said to be the same in both civil and criminal cases, except in so far as it was affected in the latter by the doctrine of reasonable doubt.[33] In the application of the doctrine of self-defense, the courts should not so construe its re-

21. Ga.—Shafer v. State, 13 S.E.2d 798, 191 Ga. 722.
30 C.J. p. 43 note 33.

22. Ill.—People v. Jones, 145 N.E. 110, 313 Ill. 335.
30 C.J. p. 43 note 34.

23. Ga.—Shafer v. State, 13 S.E.2d 798, 191 Ga. 722.
Ill.—People v. Jones, 145 N.E. 110, 313 Ill. 335.
Utah.—State v. Turner, 79 P.2d 46, 95 Utah 129.
30 C.J. p. 43 note 35.

24. Fla.—Ammons v. State, 102 So. 642, 88 Fla. 444.
La.—National Life & Accident Ins. Co. v. Turner, App., 174 So. 646, 647, quoting **Corpus Juris.**
Miss.—Hodges v. State, 6 So.2d 123, 192 Miss. 322.
N.Y.—People v. Liguori, 31 N.E.2d 37, 284 N.Y. 309, reversing 19 N.Y.S.2d 316, 259 App.Div. 750 and 19 N.Y.S.2d 314, 259 App.Div. 750.—People v. McMurty, 219 N.Y.S. 293, 128 Misc. 333.
Okl.—Lemmons v. State, 265 P. 652, 39 Okl.Cr. 383.—Lee v. State, 244 P. 455, 33 Okl.Cr. 370.—Best v. State, 242 P. 1063, 33 Okl.Cr. 237.—Brown v. State, 216 P. 944, 24 Okl.Cr. 161.
Utah.—State v. Turner, 79 P.2d 46, 95 Utah 129.
30 C.J. p. 43 note 36.

25. Fla.—Ammons v. State, 102 So. 642, 88 Fla. 444.
N.Y.—People v. Liguori, 31 N.E.2d 37, 284 N.Y. 309, reversing 19 N.Y.S.2d 316, 259 App.Div. 750 and 19 N.Y.S.2d 314, 259 App.Div. 750.
Okl.—Lemmons v. State, 265 P. 652, 39 Okl.Cr. 383.—Lee v. State, 244 P. 455, 33 Okl.Cr. 370.—Best v. State, 242 P. 1063, 33 Okl.Cr. 237.—Brown v. State, 216 P. 944, 24 Okl.Cr. 161.
Utah.—State v. Turner, 79 P.2d 46, 95 Utah 129.
30 C.J. p. 43 note 37.

26. Va.—Dodson v. Commonwealth, 167 S.E. 260, 159 Va. 976.
30 C.J. p. 43 note 38.

27. Va.—Dodson v. Commonwealth, 167 S.E. 260, 159 Va. 976.
30 C.J. p. 43 note 39.

28. Va.—Dodson v. Commonwealth, 167 S.E. 260, 159 Va. 976.—Ballard v. Commonwealth, 159 S.E. 222, 156 Va. 980.—McCoy v. Commonwealth, 99 S.E. 614, 125 Va. 771.

29. Ala.—Hayes v. State, 142 So. 675, 225 Ala. 253.—Williams v. State, 163 So. 668, 26 Ala.App. 529, certiorari denied 163 So. 670, 231 Ala. 93.—Lawler v. State, 115 So. 420, 22 Ala.App. 329.—McBride v. State, 109 So. 566, 21 Ala.App. 508.—Vaughan v. State, 107 So. 797, 21 Ala.App. 204, certiorari denied 107 So. 799, 214 Ala. 384.—Rice v. State, 101 So. 82, 20 Ala.App. 102.
Fla.—Linsley v. State, 101 So. 273, 88 Fla. 135.
Iowa.—State v. Johnson, 274 N.W. 41, 44, 223 Iowa 962, quoting **Corpus Juris.**
Okl.—Powell v. State, 12 P.2d 247, 53 Okl.Cr. 366.

30. Cal.—People v. Rilarcosa, 65 P.2d 1325, 19 Cal.App.2d 537.
Iowa.—State v. Johnson, 274 N.W. 41, 44, 223 Iowa 962, quoting **Corpus Juris.**
30 C.J. p. 44 note 44.

31. Iowa.—State v. Johnson, supra, quoting **Corpus Juris.**

32. Ala.—Rice v. State, 101 So. 82, 20 Ala.App. 102.

33. Tex.—Fambrough v. Wagley, 169 S.W.2d 478, affirming Wagley v. Fambrough, Civ.App., 163 S.W.2d 1072.

quirements as, on the one hand, to work hardships on defendants, or, on the other hand, to bring the doctrine into disrepute or ridicule by reasonable men [34]

Effect on guilt of accused Where a homicide has been committed in legitimate and necessary self-defense, the slayer is entitled to an acquittal[35] and to exemption from criminal liability [36] He is deemed to be innocent and guiltless of any crime [37] In some jurisdictions, self-defense sufficient to exonerate accused completely is referred to as perfect self-defense, as distinguished from imperfect self-defense which exists where the circumstances do not warrant acquittal of all crime, but do justify reduction in the degree of offense of which accused may be found guilty [38]

Nature and propriety of plea Although there is authority to the effect that self-defense is not a special plea, and that a plea of self-defense does not admit that accused did the killing,[39] it has also been held that self-defense is an affirmative defense,[40] and is a plea in the nature of a confession and avoidance [41] The more generally held view is that a plea of self-defense does not traverse the averment of doing the act charged, but confesses and seeks to justify doing the act as legal and avoid any evil consequences from having done it because of having acted in self-defense [42] The plea of self-defense is consistent with an intent to kill[43] or disable [44] Indeed, killing in self-defense has been described as an affirmative, intentional act,[45] and some courts even hold that self-defense is limited to cases of intentional killing,[46] or at least is not ordinarily applicable in the case of a killing resulting from an act which was accidental and unintentional [47] At any rate it is not limited to cases of accidental or unintentional homicides [48] It has also been held that a plea of self-defense is not inconsistent with a killing on provocation in a heat of passion [49]

§ 115. Necessity and Good Faith Basis of Right

In order to justify or excuse a homicide as in self-defense, there must have been a real or apparent necessity for the killing of the assailant or for the use of the measures that resulted in his death

The law of self-defense is a law of necessity [50] In the absence of a necessity to defend, the prin-

34. Ala —McBride v State, 109 So 566, 21 Ala App 508

35. Del —State v Lee, 171 A 195, 6 W W Harr 11
Va —Dodson v Commonwealth, 167 S E 260, 159 Va 976—Sims v Commonwealth, 115 S E 382, 134 Va 736
30 C J p 43 note 27

36. Ky —Privitt v Commonwealth, 113 S W 2d 49, 271 Ky 665—Ross v Commonwealth, 259 S W 50, 202 Ky 204
S C —State v Osborne, 25 S E 2d 561
Va —Dodson v Commonwealth, 167 S E 260, 159 Va 976
30 C J p 43 note 28

37. Cal —People v Anderson, 208 P 204, 57 Cal App 721
Del —State v Lee, 171 A 195, 6 W W Harr 11
Ill —People v Lavac, 192 N E 568, 357 Ill 554—People v Motuzas, 185 N E 614, 352 Ill 340
Miss —Hartfield v State, 170 So 531, 176 Miss 776
30 C J p 43 note 29

Every degree of homicide is excused by self-defense —State v Twine, 233 N W 476, 211 Iowa 450

38. La —State v Corneille, 96 So 813, 15 La 929
Tex —Harper v State, 162 S W 2d 971, 144 Tex Cr 385—Meador v State, 253 S W 297, 94 Tex Cr 608
As affecting manslaughter see supra §§ 42, 46 b

39. La —State v Linden, 97 So 299, 154 La 65

40. Va —Thomason v Commonwealth, 17 S E 374, 178 Va 489

41. Ala —Rigsdale v State, 67 So 783, 12 Ala App 1

42. Ala —Ragsdale v State, supra
Iowa —State v Norton, 286 N W 476, 227 Iowa 13
Pa —Commonwealth v Flori, 150 A 290, 300 Pa 125

43. Del —State v Phillips, 187 A 108, 7 W W Harr 544
Ill —People v Lavac, 192 N E 568, 357 Ill 554—People v Motuzas, 185 N E 614, 352 Ill 340—People v Duncan, 145 N E 810, 315 Ill 106
30 C J p 44 note 50

44. La —State v Atkins, 67 So 926, 136 La 844

45. Mo —State v Page, 130 S W 2d 520—State v Singleton, 77 S W 2d 80—State v Smith, 21 S W 827, 114 Mo 406, overruling State v Stephens, 10 S W 172, 96 Mo 637

46. Ga —Curry v State, 97 S E 529, 148 Ga 559
Ohio —State v Champion, 142 N E 141, 109 Ohio St 281
Accident or misfortune as excuse for unintentional killing of bystander in exercise of right of self-defense see supra § 112
"Taking human life in self-defense is an affirmative, positive, intentional act and the law does not recognize the anomalous doctrine of accidental self-defense"—State v Whitehurch, 96 S W 2d 30, 35, 339 Mo 116.

Firing at random
Where accused fires at random and kills deceased, he cannot properly plead self-defense —State v Smith, 21 S W 827, 114 Mo 406, overruling State v Stephens, 10 S W 172, 96 Mo 637

47. Del —State v Phillips, 187 A 108, 7 W W Harr 544

48. Mo —State v Hopkins, 213 S W 126, 278 Mo 388
Tex —Merritt v State, 213 S W 941, 85 Tex Cr 365
Homicide by accident or misfortune while defending against attack see supra § 112

49. D C —Kinard v U S, 96 F 2d 522, 68 App D C 250

50. Ala —McBride v State, 109 So 566, 21 Ala App 508
Cal —People v Orosco, 239 P 82, 73 Cal App 580
D C —Holmes v U S, 11 F 2d 569, 56 App D C 183
Idaho —State v Jurko, 245 P 685, 42 Idaho 319
Ky —Morgan v Commonwealth, 15 S W 2d 273, 228 Ky 432
Mo —State v Page, 130 S W 2d 520
Okl —Whitfield v State, 283 P 266, 45 Okl Cr 397—Fulton v State, 254 P 761, 36 Okl Cr 358—Ging v State, 239 P 685, 31 Okl Cr 428
S C —State v Osborne, 25 S E 2d 561
Va —Thomason v Commonwealth, 17 S E 2d 374, 178 Va 489—Vlastaris v Commonwealth, 178 S E 775, 164 Va 617—Scott v Commonwealth, 129 S E 360, 143 Va 510
30 C J p 44 note 62.

ciple of self-defense is without application and cannot properly be invoked.[51] There must be a necessity,[52] real or apparent,[53] for the killing of the assailant or for the employment of the measure which resulted in his death As some courts have expressed it, the right to kill in self-defense begins where the necessity begins and ends where the necessity ends[54] It has been said that the necessity to kill is deemed to exist when an innocent person is placed in sudden jeopardy[55]

The law of self-defense is available only to those who act honestly and in good faith;[56] it cannot be employed as a shield for the protection of one clearly guilty of murder[57] It does not imply the right to attack,[58] nor will it condone acts done for purposes of retaliation, revenge, or redress.[59] A person may not kill another with malice and premeditation and yet do so in self-defense so as to be acquitted of all criminality[60] The mere fact that accused was drunk or had been drinking does not affect his right of self-defense,[61] even though the necessity for the exercise of the right might not have arisen had there been no drinking[62]

Necessity as affected by
Nature and imminence of danger see infra § 123
Duty to retreat or avoid danger see infra §§ 127–130

51. Ala—Henson v State, 25 So 23 120 Ala 316—Glass v State, 198 So 70, 29 Ala App 468, certiorari denied 198 So 72, 240 Ala 123
Ark—Johnson v State, 287 S W 172 171 Ark 1188
Okl—Ging v State, 239 P 685, 31 Okl Cr 428

52. Ala—McGee v State, 144 So 112, 25 Ala App 232
Ariz—Lacy v State, 297 P 872, 38 Ariz 60—Taylor v State, 232 P 552, 27 Ariz 228
Ga—Booker v State, 114 S E 711, 154 Ga 538
Hawaii—Territory v Warren, 35 Hawaii 232
Ill—People v Triolo, 163 N E 784, 332 Ill 410
N C—State v Glenn, 150 S E 663, 198 N C 79—State v Dillis, 146 S E 1 196 N C 457
Okl—Ging v State, 239 P 685, 31 Okl Cr 428
Va—Bausell v Commonwealth, 181 S E 453, 165 Va 669—Vlastaris v Commonwealth 178 S E 775, 164 Va 647
30 C J p 45 note 64

53. Ala—Smith v State, App, 11 So 2d 466, reversed on other grounds 11 So 2d 471, 243 Ala 251, and certiorari denied 11 So 2d 473 243 Ala 627—Williams v State, 163 So 668 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93
Cal—People v Orosco, 239 P 82, 73 Cal App 580
Del—State v Bell, 192 A 553, 8 W W Harr 328
Ga—Green v State 183 S E 204, 52 Ga App 290
Idaho—State v Jurko, 245 P 685, 42 Idaho 319
Ill—People v Priddy, 158 N E 457, 327 Ill 50—People v Durand, 139 N E 78, 307 Ill 611
Ky—Farley v Commonwealth, 145 S W 2d 100, 284 Ky 536—Cottrell v Commonwealth, 111 S W 2d 21, 275 Ky. 208—Dean v Commonwealth, 83 S W 2d 887, 260 Ky 97—McCurry v Commonwealth, 265 S W 630, 205 Ky 211
Me—State v Cox, 23 A 2d 631
Mo—State v Page, 130 S W 2d 520
N C—State v Mosley, 195 S E 830, 213 N C 304—State v Robinson, 195 S E 824, 213 N C 273—State v Terrell, 193 S E 161, 212 N C 145—State v Reynolds, 192 S E 871, 212 N C 37—State v Marshall, 179 S E 427, 208 N C 127—State v Parker, 152 S E 890 198 N C 629
Okl Ging v State, 239 P 685, 689, 31 Okl Cr 428, citing **Corpus Juris.**
Utah—State v Turner, 79 P 2d 46, 95 Utah 129
Wyo—Espy v State, 92 P 2d 549, 54 Wyo 291
30 C J p 45 note 65
Real or apparent danger see infra § 125

Appearance of reality

The necessity required "must bear all semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable or excusable"—Holmes v U S 11 F 2d 569, 571, 56 App D C 183

54. Mich—People v Giacalone, 217 N W 758, 242 Mich 16
Va—Thomason v Commonwealth, 17 S E 2d 374 178 Va 489

55. Cal—People v Estrada, 213 P 67, 60 Cal App 477
30 C J p 45 note 66

56. Ind—McKee v State, 154 N E 372, 198 Ind 590
Okl—Ging v State, 239 P 685, 689, 31 Okl Cr 428
30 C J p 45 note 67
Honest belief in necessity of killing see infra § 126

57. Ala—Crenshaw v State, 142 So 669, 225 Ala 346
Ind—Duncan v State, 86 N E 641, 171 Ind 444

58. Ill—People v Gibbs, 181 N E 628, 349 Ill 83—People v Andrews, 158 N E 462, 327 Ill 162
Okl—Whitfield v State, 283 P 266, 45 Okl Cr 397
Va—Dodson v Commonwealth, 167 S E 260, 159 Va 976
W Va—State v Curry, 165 S E 810, 112 W Va 549
30 C J p 45 note 69
Aggression as precluding self-defense see infra § 117

Accused's right to strike first

(1) In a number of cases where there was evidence of circumstances which might have justified accused in striking the first blow or shooting the first shot without waiting for the adversary's blow to fall it has been held error to instruct the jury that self-defense does not imply the right to attack—State v Rennison, 267 S W 850 306 Mo 473—State v Ball, Mo, 262 S W 1013

(2) Right to strike first in self-defense see infra § 126 b (2)

59. Ark Johnson v State, 287 S W. 172, 171 Ark 1188
Conn—State v Perkins, 91 A 265, 88 Conn 360, L R A 1915A 73
Del—State v Stevenson, 188 A 750 8 W W Harr 105—State v Lee, 171 A 195 6 W W Harr 11
Ill—People v Gibbs, 181 N E 628, 349 Ill 83—People v Andrews 158 N E 462 327 Ill 162
Ky—Ross v Commonwealth, 259 S. W 50, 202 Ky 204
30 C J p 45 note 70
Aggression for purposes of revenge, as precluding self-defense see infra § 120

Previous assault by deceased cannot justify homicide in self-defense—State v Stevenson, 188 A 750, 8 W W Harr Del, 105

Prior despoliation of home

A killing is not excused on ground of self-defense merely because victim has despoiled accused's home—Golden v Commonwealth, 121 S W 2d 21, 275 Ky 208—Cottrell v Commonwealth, 111 S W 2d 445, 271 Ky 52

60. Ala.—Crenshaw v State, 142 So 669, 225 Ala 346—DeArman v State, 77 Ala 10

61. Ky—Howard v Commonwealth, 56 S W 2d 362, 246 Ky 738

62. Va—Hawkins v Commonwealth, 169 S E 558, 160 Va. 935.

§ 116. Manslaughter Distinguished

Although it is sometimes difficult to draw an exact line between homicide in self-defense and manslaughter, the law distinguishes between the two.

On the facts of the immediate case it is sometimes difficult to draw the exact line between homicide in self-defense and manslaughter [63] Nevertheless the law distinguishes between the two,[64] and a statute stating the elements of manslaughter is inapplicable to a plea of self-defense [65] Conversely, self-defense has no place in a definition of manslaughter or any other degree of homicide as it excuses, rather than fixes the degree of, the homicide and entitles accused to a full acquittal [66]

§ 117. Aggression or Provocation by Accused in General

In order to invoke the right of self-defense, the slayer must have been reasonably free, or, as some authorities hold, entirely free, from fault in provoking or continuing the difficulty which resulted in the killing.

It is well established that one who was the aggressor or provoked the difficulty in which he killed his assailant cannot invoke the right of self-defense to justify or excuse the homicide,[67] unless, as considered infra § 121, he in good faith withdrew from the combat in such a manner as to have shown his adversary his intention in good faith to desist It is not enough to justify or excuse the homicide that in the course of the difficulty it became necessary for accused to kill deceased in order to save his own life or prevent great bodily harm, but he must also have been free from fault in provoking or continuing the difficulty which resulted in the killing [68] Accused cannot avail himself of, or shield himself

63. Cal—People v Best 57 P 2d 168 169, 13 Cal App 2d 606, quoting **Corpus Juris.**
30 C J p 45 note 73
Manslaughter generally see supra §§ 37–67

64. Mass—Commonwealth v. Riley, Thach Cr 471
Distinctions stated
(1) "Voluntary manslaughter" differs from "homicide" which is excusable because "committed in self defense' in that in the former there is no necessity to kill and in the latter there is an apparent necessity to kill the aggressor for self-preservation—Smith v State App, 11 So 2d 466, reversed on other grounds 11 So 2d 471 243 Ala 254, and certiorari denied 11 So 2d 473, 243 Ala 627

(2) Distinction between "self-defense" and "manslaughter" committed in heat of passion brought on by adequate provocation, lies in existence of reasonably founded belief of imminent peril to life or great bodily harm, as distinguished from influence of uncontrollable fear or terror conceivable as existing but not reasonably justified by immediate circumstances—People v Best, 57 P 2d 168, 13 Cal App 2d 606

(3) Other statements see Commonwealth v Colandro, 80 A 571, 231 Pa 343—30 C J p 45 note 74 [a]

65. Cal—People v Best, 57 P 2d 168, 169, 13 Cal App 2d 606, quoting **Corpus Juris.**
30 C J p 45 note 75

66. Cal—People v Best, supra, quoting **Corpus Juris.**
Iowa—State v Twine, 233 N W 476, 211 Iowa 450—State v Castello, 17 N W 605, 62 Iowa 404

67. Ala—Hayes v State, 142 So 675, 225 Ala 253—Johnson v State, 130 So 175, 221 Ala 632—Mullins v State, 183 So 894, 28 Ala App 288, certiorari denied 183 So 896, 236 Ala 578—Williams v State, 163 So 668, 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93—McBride v State, 109 So 566 21 Ala App 508—Vaughan v State, 107 So 797, 21 Ala App 204, certiorari denied 107 So 799, 211 Ala 384—Rice v State, 101 So 82, 20 Ala App 102
Ariz—State v Myers, 125 P 2d 141, 444, 59 Ariz 200, quoting **Corpus Juris**—Macias v State, 6 P 2d 423, 39 Ariz 303
Ark—Johnson v State, 287 S W 172, 171 Ark 1188—Hart v State, 257 S W 351, 161 Ark 649
Cal—People v Roe, 209 P 560 189 Cal 548—People v Hoover, 290 P 493, 107 Cal App 635
Del—State v Stevenson, 188 A 750, 8 W W Harr 105
Fla—Matthews v State, 177 So 321, 130 Fla 53
Ga—Rivers v State, 17 S E 2d 726 193 Ga 133
Iowa—State v Johnson, 274 N W 11 223 Iowa 962
Ky—Toncray v Commonwealth, 165 S W 2d 8 291 Ky 471—Noe v Commonwealth, 160 S W 2d 600, 290 Ky 194—Johnson v Commonwealth 147 S W 2d 1048, 285 Ky 374—Elschide v Commonwealth, 134 S W 2d 600, 280 Ky 690—Poore v Commonwealth, 61 S W 2d 320, 249 Ky 665—Jones v Commonwealth, 60 S W 2d 991, 249 Ky 502—McCarty v Commonwealth, 51 S W 2d 249, 244 Ky 413—Lewis v Commonwealth, 36 S W 2d 639, 237 Ky 786—Curtis v Commonwealth, 35 S W 2d 331, 237 Ky 215—Cooper v Commonwealth, 27 S W 2d 405, 234 Ky. 56—Banks v Commonwealth, 245 S W. 296, 196 Ky 639
La—State v Stroud, 5 So 2d 125, 198 La 841—State v. Plain, 129 So 730, 171 La 128—State v Corneille, 96 So 813 153 La 929
Miss—Woodward v State, 177 So 531, 180 Miss 571, suggestion of error overruled 178 So 469, 180 Miss 571
Okl—Whitfield v State, 283 P 266 45 Okl Cr 397—Crowell v State, 276 P 518 42 Okl Cr 392—Riley v State 268 P 996, 40 Okl Cr 323—Bard v State, 214 P 939, 23 Okl Cr 309—Berry v State, 213 P 909, 23 Okl Cr 223
Or—State v Kelley, 247 P 146, 150, 118 Or 397 quoting **Corpus Juris,** error dismissed and certiorari denied Kelley v State of Oregon, 47 S Ct 504, 273 U S 589 71 L Ed 790 and error dismissed Willos v State of Oregon, 47 S Ct 658, 274 U S 722, 71 L Ed 1326
S C—State v McAlister, 147 S E 310 149 S C 367
Utah—State v Turner, 79 P 2d 46, 95 Utah 129
Va—Smith v Commonwealth, 182 S E 121, 165 Va 776
Wash—State v Smith, 83 P 2d 749, 196 Wash 534
Wyo—State v Bristol 84 P 2d 757, 53 Wyo 304—State v Flory, 276 P 458, 462 40 Wyo 184, citing **Corpus Juris.**
30 C J p 45 note 78
Fault in bringing on difficulty as affecting duty to retreat see infra § 127

68. Ala—Shack v State, 184 So 688, 236 Ala 667—Simpson v State, App, 13 So 2d 437—Williams v State, 163 So 668, 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93—Patterson v State, 126 So 420, 23 Ala App 428—Lawler v State, 115 So 420, 22 Ala App 329—McBride v State, 109 So 566, 21 Ala App. 508—Orr v State, 102 So. 58, 20 Ala App 188, certiorari de-

on the ground of, a necessity which he has brought on by his own fault or wrongful act[69] The rule applies to one who interferes in a difficulty between others,[70] except where he interferes to prevent the commission of a felony[71] Also, the rule applies where accused provoked the difficulty, even though deceased voluntarily engaged therein[72] The rule does not, however, prevent accused from relying on self-defense where the evidence on the question of aggression or provocation is irreconcilably in conflict[73]

Entire or partial freedom from fault In at least one jurisdiction the rule that freedom from fault on the part of accused in provoking the difficulty which resulted in the killing is necessary to justify or excuse the homicide is vigorously enforced without qualification[74] Under this stringent rule, it is essential, in order to entitle accused to invoke the doctrine of self-defense, that he shall be wholly free from fault in provoking the difficulty,[75] and not merely reasonably so[76] Where, by word or deed, accused voluntarily contributes to the bringing on of the difficulty, he cannot invoke the doctrine of self-defense[77] Actual provocation of the difficulty is sufficient to render accused the aggressor, it is not necessary that his words or acts justify resentment by a man of ordinary self-control[78] In other jurisdictions, however, it is necessary and sufficient that accused shall be reasonably free from fault,[79] it is not required that he shall be entirely free from blame or wrong in order to be entitled to a perfect right of self-defense[80] In these jurisdictions, it is held that the fault must have been such as might reasonably have been calculated to bring on and precipitate a dangerous assault by deceased[81]

§ 118. Nature and Circumstances of Aggression or Provocation

The determination of what conduct constitutes agression or provocation, so as to deprive the slayer of the right of self-defense, depends on the nature and quality of the conduct and the surrounding circumstances

nied Ex parte Orr, 102 So 61, 212 Ala 187
Ariz—State v Myers, 125 P 2d 441, 444, 59 Ariz 200, quoting **Corpus Juris.**
Ark—Johnson v State, 287 S W 172, 171 Ark 1188—Brents v State, 247 S W 1061, 157 Ark 51.
Del—State v Stevenson, 188 A 750, 8 W W Harr 105
Fla—Matthews v State, 177 So 321, 130 Fla 53—Bowman v State, 152 So 739 114 Fla 29—Gaff v State, 138 So 48, 103 Fla 612
Ind—Hill v State, 11 N E 2d 141, 212 Ind 692
Nev—State v Hall, 13 P 2d 624, 54 Nev 213
N C—State v Robinson, 195 S E 824, 213 N C 273—State v Parker, 152 S E 890, 198 N C 629—State v Holland, 138 S E 8, 193 N C 713—State v Hardee, 135 S E 345, 192 N C 513
Okl—Gross v State 297 P 309, 50 Okl Cr 226—Battles v State, 282 P 689, 45 Okl Cr 242
Or—State v Kelley, 247 P 146 150, 118 Or 397, quoting **Corpus Juris,** error dismissed and certiorari denied Kelley v State of Oregon, 47 S Ct 504, 273 U S 589 71 L Ed 790 and error dismissed Willos v State of Oregon, 47 S Ct 658, 274 U S 722, 71 L Ed 1326
Va—Wallen v Commonwealth, 114 S E 786, 134 Va 773
Wyo—State v Flory, 276 P. 458, 40 Wyo 184
30 C J p 46 note 80

69. Ala—Shack v State, 184 So 688, 236 Ala 667
Ariz—State v Myers, 125 P 2d 441, 444, 59 Ariz 200, quoting **Corpus Juris.**
Ark—Johnson v State, 287 S W 172, 171 Ark 1188
Cal—People v Will, 248 P 1078, 79 Cal App 101
Fla—Bowman v State, 152 So 739, 114 Fla 29—Scholl v State, 115 So 43, 94 Fla 1138—Linsley v State 101 So 273, 88 Fla 135
Ga—Daniel v State, 1 S E 2d 6, 187 Ga 411
Ky—Johnson v Commonwealth, 147 S W 2d 1048, 285 Ky 374—Hall v Commonwealth, 270 S W 35, 207 Ky 794—Banks v Commonwealth, 245 S W 296, 196 Ky 639
La—State v Domingue, 118 So 46, 166 La 859
Miss—Woodward v State, 177 So 531 180 Miss 571, suggestion of error overruled 178 So 469, 180 Miss 571
Mo—State v Hamilton, 85 S W 2d 35, 337 Mo 460
Okl—Murphy v State, 112 P 2d 438, 72 Okl Cr 1
Or—State v Kelley, 247 P 146, 150, 118 Or 397, quoting **Corpus Juris,** error dismissed and certiorari denied Kelley v State of Oregon, 47 S Ct 504, 273 U S 589, 71 L Ed 790, and error dismissed Willos v State of Oregon, 47 S Ct 658, 274 U S 722, 71 L Ed 1326
Tex—Santos v State, 93 S W 2d 443, 130 Tex Cr 167
Va—Bausell v Commonwealth, 181 S E 453, 165 Va 669—Scott v Commonwealth, 129 S E 360, 143 Va 510—Sims v Commonwealth, 115 S E 382, 134 Va 736—Wallen v Commonwealth, 114 S E 786, 134 Va 773
30 C J p 46 note 81.

70 Iowa—State v Harbour, 187 N W 454, 193 Iowa 657.
30 C J p 46 note 82

71. Ky—Morrison v Commonwealth, 74 S W 277, 24 Ky L 2493
Homicide in the prevention of offenses see supra § 101

72 Tex—Godwin v State, 43 S W 336, 38 Tex Cr 466

73. Cal—People v Roe, 209 P 560, 189 Cal 548

74. Ala—Crawford v State, 21 So 214, 112 Ala 1
30 C J p 47 note 86

75. Ala—Shack v State, 184 So 688, 236 Ala 667—Lawler v State, 115 So 420 22 Ala App 329—Orr v State, 102 So 58, 20 Ala App 188, certiorari denied Ex parte Orr, 102 So 61, 212 Ala 187
30 C J p 47 note 87

76. Ala—Shack v State, 184 So 688, 236 Ala 667
30 C J p 47 note 88

77. Ala—Lakey v State, 101 So 537, 20 Ala App 78 certiorari denied Ex parte Lakey, 101 So 541, 211 Ala 615
30 C J p 47 note 89

78. Ala—McBryde v. State, 47 So. 302, 156 Ala 44

79 Fla—Landrum v. State, 84 So. 535, 79 Fla 189
30 C J p 47 note 91

80. Tex—Mason v State, 228 S W. 952, 88 Tex Cr 642
30 C J p 47 note 92

81. Wyo—State v Bristol, 84 P 2d 757, 53 Wyo 304.

The question of what conduct constitutes provocation, so as to deprive accused of the right of self-defense is one about which there is some uncertainty, if not confusion.[82] It is generally agreed that not every act by the slayer which produced a difficulty, in the course of which a necessity to kill another arose, will preclude the slayer from availing himself of the right of self-defense.[83] Whether or not the act has such effect depends on its character and quality[84] viewed in the light of the prior relations between the parties, if any,[85] and, as considered infra § 120, in some jurisdictions also on the intent with which the difficulty was brought on

§ 119. —— Acts or Words

a. In general
b Particular acts or words

a. In General

As a general rule, any conduct of accused which is reasonably calculated to lead to an affray or deadly conflict and which provokes the difficulty is such aggression as deprives him of the right of self-defense

As a general rule any wrongful or unlawful act[86] or insulting or opprobrious language[87] of accused, which is reasonably calculated to lead to an affray or deadly conflict, and which provokes the difficulty, is such aggression or provocation as deprives him of the right of self-defense Accused must be mindful of his words, acts, or conduct which might be likely to produce a deadly combat[88] If by his acts, words, or conduct he showed a willingness to enter the conflict, or if by his words or acts he invited it, he must be held to have produced the necessity for slaying his adversary, and cannot invoke the doctrine of self-defense[89] The provoking acts of accused need not have been such as would have created a right of self-defense on the part of deceased[90]

Some courts hold that any act intentionally done or word intentionally spoken which, under the circumstances, and in the light of accused's knowledge thereof, has a tendency to provoke a difficulty is wrongful within the meaning of the rule, even though ordinarily such act or word would not be wrongful or offensive[91] Other courts hold that a person may bring on a difficulty, which results in a homicide, without forfeiting the right of self-defense, even if the act by which it was brought on was wrongful,[92] that in order to estop accused to plead self-defense, the difficulty must have been brought about by him unlawfully,[93] that there must have been acts, words, or conduct on his part reasonably calculated to provoke the difficulty,[94] and uttered or performed willingly and knowingly,[95] although there is some authority to the effect that, where the conduct was intended to provoke

82. Tex—Young v State, 110 S W 445, 53 Tex Cr 416, 126 Am S R 792

83. Ga—Bennett v State, 91 S E 889, 19 Ga App 442
Ky—Hall v Commonwealth, 270 S W 35, 207 Ky 794
Wyo—State v Bristol, 84 P 2d 757, 53 Wyo 304—State v Flory, 276 P 458, 40 Wyo 184
30 C J p 47 note 96

84. Wyo—State v Bristol 84 P 2d 757 53 Wyo 304
30 C J p 47 notes 93, 97

"The gist of the rule which deprives one of the right of defending himself if he was the aggressor is the thing that he did, the overt act or hostile demonstration, which provoked the other party rather than the mere fact that he was present at the place or even had sought out the deceased"—Toncray v. Commonwealth, 165 S W 2d 8, 10, 291 Ky 471

85. Ala—Bishop v State, 145 So 497, 25 Ala App 267, certiorari denied 145 So 499, 226 Ala 147
Tex—Hunter v State, 128 S W 2d 1176, 137 Tex Cr 289

86. Ala—McBride v State, 109 So 566, 21 Ala App 508
Ky—Hall v Commonwealth, 270 S W 35, 38, 207 Ky 794, quoting **Corpus Juris.**
Okl—Wilkie v State, 242 P 1057, 33 Okl Cr 225
30 C J p 47 note 99

87. Okl—Wilkie v State, supra
S C—State v Woodham, 160 S E 895, 162 S C 492
30 C J p 47 note 1
Abusive or insulting language alone as provocation see infra subdivision b of this section

88. Ala—Shack v State, 184 So 688, 236 Ala 667—Williams v State, 163 So 668, 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93
30 C J p 47 note 2

89. Ala—Shack v State, 184 So 688, 236 Ala 667—McBride v State, 109 So 566, 21 Ala App 508
30 C J p 48 note 3

90. Ky—Commonwealth v Ashcraft, 5 S W 2d 1067, 224 Ky 203

91. Ala—Walker v State, 135 So 438, 223 Ala 294
30 C J p 48 note 4
However it has also been said, that to put one accused of murder at fault in bringing on the difficulty, his words or acts, viewed in the light of the surrounding circumstances must be offensive—Walker v State, 126 So 848, 220 Ala 544

92. Tex—Roberson v State, 203 S W 349, 83 Tex Cr 238—Franklin v State, 30 S W 231, 34 Tex Cr 286

93. Tex—Young v State, 110 S W 445 53 Tex Cr 416, 126 Am S R 792
30 C J p 48 note 6

94. Ga—Bennett v State, 91 S E 889, 19 Ga App 442
Okl—Wilkie v State, 242 P 1057, 33 Okl Cr 225
Tex—Crowley v State, 35 S W 2d 437 117 Tex Cr 372—Cottom v State, 240 S W 918, 91 Tex Cr 534
Wyo—State v Bristol, 84 P 2d 757, 53 Wyo 304—State v Flory, 276 P. 458, 40 Wyo 184
30 C J p 48 note 7
"Trivial words or slight provocation, not reasonably calculated and probably not designed to bring about an immediate fatal encounter, have never been deemed sufficient to deprive a defendant of his right of self-defense"—McCarty v Commonwealth, 51 S W 2d 249, 250, 244 Ky 413
30 C J p 48 note 7

95. Okl—Wilkie v State, 242 P. 1057, 33 Okl Cr 225
Tex—Crowley v State, 35 S W 2d 437, 117 Tex Cr 372.

and did provoke a difficulty, the question of whether it was reasonably calculated for such purpose is not a practical one.[96]

The act of provocation must have been committed at the time the homicide occurred,[97] and must have related to[98] or provoked[99] the assault in the resistance of which the assailant was killed. A person is not deprived of the right of self-defense solely because he may have been guilty in the past of some wrongful act,[1] or by reason of the fact that he may have had prior difficulties with deceased,[2] or by the fact that he may have been under a bond to keep the peace.[3]

Accused is not deprived of the right to defend himself, as distinguished from the right to defend another person, by the fact that such other person may have precipitated the difficulty.[4]

b. Particular Acts or Words

The general principles as to what conduct constitutes aggression or provocation on the part of accused so as to deprive him of the right of self-defense have been applied to particular acts or words

In the application of the principles considered supra subdivision a of this section, various particular matters have been held to constitute,[5] or not to constitute,[6] such fault, provocation, or aggression as to preclude accused from setting up self-defense.

Abusive or insulting language Some courts hold that mere words, however abusive or opprobrious, do not amount to such provocation as will preclude the person speaking them from killing in self-defense,[7] unless, in accordance with the rule considered infra § 120, he used that means of bringing on the difficulty for the purpose of affording him an opportunity to kill deceased or to do him great bodily harm.[8] Other courts, however, recognize the rule that the provocation may rest in the mere use of insulting or opprobrious words,[9] and it will be observed throughout this section that the rules as to what does or does not constitute a provocation of the difficulty are generally so stated as to include words as well as acts. Insulting or offensive words springing naturally from accused in a sudden quarrel,[10] or employed by accused after the difficulty has begun,[11] or prior threats by accused,[12] will not in themselves deprive him of the right of self-defense.

Looks or gestures In at least one jurisdiction, it has been said, in discussions of provocation as depriving accused of his right of self-defense, that no looks or gestures, however insulting, can amount in law to a provocation sufficient to justify an assault.[13] Glaring at deceased, with whom accused had had a previous altercation, has been held not to constitute such provocation as to deprive the latter of the right of self-defense.[14]

Making or causing assault or attack A person

98. Fla.—Marlow v. State, 38 So. 653, 49 Fla. 7.
30 C.J. p. 48 note 8.

97. Iowa.—State v. Borwick, 187 N.W. 460, 193 Iowa 639.
30 C.J. p. 48 note 9.

98. Iowa.—State v. Borwick, supra.
30 C.J. p. 48 note 10.

99. Tex.—Cottom v. State, 240 S.W. 918, 91 Tex.Cr. 534.

1. Ga.—Brown v. State, 70 S.E. 329, 135 Ga. 656.
Iowa.—State v. Borwick, 187 N.W. 460, 193 Iowa 639.

2. S.C.—State v. Gibbs, 102 S.E. 333, 113 S.C. 256.

3. S.C.—State v. Gibbs, supra.

4. Ky.—Logan v. Commonwealth, 191 S.W. 676, 174 Ky. 80.
Tenn.—Cooper v. State, 138 S.W. 826, 123 Tenn. 37.
Homicide in defense of another as excusable or justifiable see supra § 108.

Aggression by deceased against accused

Accused was entitled to defend himself, although his brother had first attacked deceased, if deceased had shot at accused immediately on accused's arrival at scene and before accused had participated in combat.—Pelfry v. Commonwealth, 74 S.W. 2d 913, 255 Ky. 412.

5. Ala.—Winder v. State, 78 So. 416, 16 Ala. App. 422.
30 C.J. p. 48 note 16.

6. N.C.—State v. Johnson, 81 S.E. 941, 166 N.C. 392.
30 C.J. p. 48 note 17.

7. Iowa.—State v. Davis, 228 N.W. 37, 209 Iowa 524.
Mo.—State v. Ball, 262 S.W. 1043.
30 C.J. p. 48 note 18.

In Delaware it has been stated in discussions of provocation as depriving accused of the right of self-defense that "no words, however offensive they may be, can amount in law to a provocation sufficient to justify an assault."—State v. Stevenson, 188 A. 750, 751, 8 W.W.Harr. 105; State v. Lee, 171 A. 195, 199, 6 W.W.Harr. 11.

8. Iowa.—State v. Davis, 228 N.W. 37, 209 Iowa 524.
Mo.—State v. Ball, 262 S.W. 1043.

9. Ky.—McCarty v. Commonwealth, 51 S.W.2d 249, 244 Ky. 413.
S.C.—State v. Council, 123 S.E. 788, 129 S.C. 116.
Va.—Scott v. Commonwealth, 129 S.E. 360, 143 Va. 510.
30 C.J. p. 49 note 20.

Retort to deceased

In a jurisdiction where accused must have been entirely free from fault in bringing on the difficulty, accused cannot plead self-defense where he used abusive insulting, or profane language in reply to similar language addressed by deceased to him.—Lakey v. State, 101 So. 537, 20 Ala.App. 78, certiorari denied Ex parte Lakey, 101 So. 541, 211 Ala. 615.

10. Ky.—Shrout v. Commonwealth, 186 S.W. 885, 170 Ky. 796.
30 C.J. p. 49 note 22.

11. Tex.—Trevino v. State, 204 S.W. 996, 83 Tex.Cr. 562.

12. Tex.—Lagrone v. State, 209 S.W. 411, 81 Tex.Cr. 609.
30 C.J. p. 49 note 24.

13. Del.—State v. Stevenson, 188 A. 750, 8 W.W.Harr. 105.—State v. Lee, 171 A. 195, 6 W.W.Harr. 11.
Looks or gestures
As not excusing or justifying homicide see supra § 98.
As affecting accused's belief in gravity and imminence of danger see infra § 126.

14. Wyo.—State v. Bristol, 84 P.2d 757, 53 Wyo. 304.

is the aggressor where he commences an assault[15] or commits a battery[16] on another person. He may also be guilty of such provocation as to deprive him of the benefit of self-defense if he caused, provoked, or invited deceased to assault or strike him, or to threaten to do so,[17] as where he made a threatening gesture toward deceased,[18] and this is true, even though accused did not strike the first blow[19] or fire the first shot.[20] Conversely, accused does not forfeit his right of self-defense merely because he strikes the first blow or fires the first shot where deceased provokes the difficulty.[21] Under some statutes a distinction is drawn between beginning a difficulty and provoking it.[22]

Commission of crime. Accused is not deprived of his right to claim self-defense merely by reason of his having been engaged in the commission of an offense at the time of the killing,[23] but a person who, while in the actual perpetration of a felony, by violence, kills another person attempting to prevent the felony, cannot plead self-defense.[24] Self-defense does not excuse a homicide committed by accused while engaged in committing robbery,[25] burglary,[26] or kidnapping.[27] However, it is not true that a person who is being pursued as a thief is not justified under any circumstances in protecting himself from any attack his pursuers may make on him.[28]

Trespass or resistance thereof. A mere trespass on the property of another is not such an act of aggression or provocation as will preclude the trespasser from killing in self-defense,[29] but the rule is otherwise where the trespass was made with the intent and purpose of bringing on a difficulty,[30] or with knowledge that it would provoke a violent conflict with the owner,[31] or where it was such as would reasonably be calculated to precipitate a conflict,[32] or where it was made in a violent, menacing, or aggressive manner, and the force used by the owner was no more than was necessary to eject the trespasser,[33] particularly, in any of these situations, where the trespasser came armed with a deadly

15. Iowa—State v Matheson, 261 N W 787, 220 Iowa 132
Ky—Cooper v Commonwealth, 27 S W 2d 405, 234 Ky 56
30 C J p 49 note 25

16. N C—State v Crisp, 87 S E 511, 170 N C 785

Battery on wife of deceased

The plea of self-defense is not available to accused where "his own testimony shows that he inflicted a severe battery on the wife of the deceased with a paling on account of the mere words which she spoke. He could not plead self-defense against her, nor against her husband, who had the right to protect her"—State v Shuler, 107 S E 147, 149, 116 S C 152

17. Ala—Russell v State, 97 So 845, 19 Ala App 425
Ga—Daniel v State, 1 S E 2d 6, 187 Ga 411
La—State v Domingue, 118 So 46, 166 La 859
Va—Adams v Commonwealth, 178 S E 23, 163 Va 1053
30 C J p 49 note 28

"A challenge to a mortal combat . . . or a personal affront of such serious character as to be reasonably calculated to provoke and to precipitate a dangerous assault from another, are generally deemed sufficient to authorize [denial of the] right of self-defense"—McCarty v Commonwealth, 51 S W 2d 249, 250, 244 Ky 413

18. Ga—Daniel v State, 1 S E 2d 6, 187 Ga 411
Ky—Lewis v Commonwealth, 36 S W 2d 639, 237 Ky 786

"One cannot make a threatening demonstration and then shelter from the storm he has purposely raised under the shield of self-defense"—McCarty v Commonwealth, 51 S W 2d 249, 250, 244 Ky 413

19. Mo—State v Hart, 237 S W 473, 292 Mo 74
30 C J p 49 note 27

20. Ark—Spear v State, 44 S W 2d 663, 184 Ark 1047—Brents v State, 247 S W 1061, 157 Ark 51
Ga—Daniel v State, 1 S E 2d 6, 187 Ga 411
Ky—Jones v Commonwealth, 60 S W 2d 991, 249 Ky 502—Smith v Commonwealth, 287 S W 8, 215 Ky 815

21. Ky—Shell v Commonwealth, 240 S W 747, 194 Ky 767

22. Tex—Carlile v State, 232 S W 822, 90 Tex Cr 1
30 C J p 49 note 30

23. Ill—People v Doody, 175 N E 436, 343 Ill 194
Okl—Lout v State, 244 P 818, 34 Okl Cr 73

Conspiracy

Although a conspiracy may have existed, accused is not deprived of the right of self-defense, unless he was present for the purpose of carrying out the conspiracy—Smith v Commonwealth, 268 S W 328, 206 Ky 728

24. Ark—Spear v. State, 44 S W 2d 663, 669, 184 Ark 1047, citing **Corpus Juris.**
La—State v Werner, 80 So 596, 144 La 380, 6 A L R 1601
Mo—State v Kenyon, 126 S W 2d 245, 249, 343 Mo 1168, citing **Corpus Juris.**
Tex—McKee v State, 42 S W 2d 77, 118 Tex Cr 479
Homicide while in commission of felony as murder see supra § 21

25. Ga—Daniel v State, 1 S E 2d 6, 187 Ga 411
Ill—People v Sullivan, 177 N E 733, 345 Ill 87
Ky—Williams v Commonwealth, 81 S W 2d 891, 893, 258 Ky 930, citing **Corpus Juris.**
Mo—State v King, 119 S W 2d 322, 327, 342 Mo 1067, citing **Corpus Juris.**
Tex—McKee v State, 42 S W 2d 77, 79, 118 Tex Cr 479, citing **Corpus Juris.**
30 C J p 49 note 32

26. Iowa—State v Burzette, 222 N. W 394, 208 Iowa 818

27. Mo—State v Kenyon, 126 S W 2d 245, 343 Mo 1168

28 Tex—Luera v State, 12 Tex A 257

29. Ariz—Strickland v State, 294 P. 617, 37 Ariz 368
Okl—Lout v State, 244 P. 818, 34 Okl Cr 73
30 C J p 49 note 34

30. U S—U S v Hart, C C Fla., 162 F 192
Intent generally see infra § 120

31. Iowa—State v Archer, 29 N W. 333, 69 Iowa 420

32. S C—State v Emerson, 58 S E 974, 78 S C. 83

33. Ky—Scott v. Commonwealth, 29 S W 977, 16 Ky L 702.
30 C J p 49 note 38.

weapon[34] which he intended to use if necessary.[35] Refusal of accused to leave the habitation of deceased, so that he became a trespasser who could be ejected by whatever force that might be necessary,[36] even to the taking of his life,[37] deprives accused, as trespasser, of the right to kill in defending himself against the force which was used to eject him Resisting a trespasser is not an act of aggression, so as to deprive one of the right of self-defense,[38] unless the resistance used is excessive and not warranted by the force used by the trespasser[39]

Carrying arms. The act of accused in arming himself may be a significant factor, when taken in connection with other facts, in leading to the determination that he provoked the difficulty which resulted in the killing[40] Thus, it has been held that the mere fact that accused arms himself after deceased arrives at the scene of the homicide may have a tendency to provoke a deadly combat[41] However, the mere fact that accused had a dangerous weapon and used it does not take away the right of self-defense if without that fact the right would have existed,[42] and the fact that a person is carrying a weapon unlawfully does not deprive him of the right to use it in his necessary self-defense[43] A person who arms himself, not for purposes of aggression, but in anticipation of a possible attack and for the sole purpose of necessary self-defense, may exercise the right of self-defense where he does nothing else or nothing wrongful to provoke or bring on a difficulty[44]

Criminal intercourse with wife or daughter of another According to some authorities, sexual intercourse with the wife of another is a wrong so obviously calculated to bring on a difficulty with the husband, that if the paramour, when caught in the act or just after it was over, killed the husband in order to save himself from death or great bodily harm, he could not invoke the doctrine of self-defense as a justification or excuse,[45] except where the husband attempted to kill him in vengeance for past wrongs, as where, knowing of his wife's infidelity, he deliberately lays a trap for her paramour in order to kill him if caught in the act[46] However, it is held in some jurisdictions that illicit intercourse with the wife of another is not alone such a provocation or bringing on of a difficulty as to deprive the paramour of the right of self-defense[47] The right of self-defense is not forfeited by the fact that some time prior to the homicide accused had intercourse with the wife of deceased[48] Engaging in illicit sexual intercourse with the daughter of deceased was a wrongful act reasonably calculated to provoke an attack by deceased and therefore deprives accused of the right of self-defense, where he was found in such intercourse at the time of the homicide,[49] but not where it occurred some time prior thereto[50]

It has been held that the doctrine as to aggression with respect generally to the doctrine of self-defense should be relaxed where a husband kills his wife or her paramour in self-defense in a struggle ensuing from his attack on her and her paramour

34. Ala—McBride v State 109 So 566, 21 Ala App 508
Iowa—State v Rhone, 275 N W 109, 223 Iowa 1221

35. Okl—Lout v State 244 P 818, 34 Okl Cr 73

36. Miss—Cotton v State, 100 So 383, 135 Miss 792

Failure to leave immediately
Where accused being unemployed, and his family were permitted to live at father-in-law's home with understanding that wife should help her mother with work, accused did not become a "trespasser" immediately on being ordered to leave by mother-in-law or other inmate of the household, so as to warrant the resulting summary and forcible ejectment of accused by brothers-in-law, in the course of which a brother-in-law was killed—State v Absher, 16 S E 2d 656, 220 N C 126

37. S C—State v Bradley, 120 S E 240, 126 S C 528

38. Ala—Gibson v State, 9 So 171, 91 Ala 64
30 C J p 49 note 39

39. Okl—Smith v State, 174 P 1107, 14 Okl Cr 250
30 C J p 50 note 40

40. Cal—People v Graham, 217 P 823, 62 Cal App 758
Miss—Lewis v State, 195 So 325, 188 Miss 410—Woods v State, 184 So 311, 183 Miss 135, overruling suggestion of error 183 So 508, 183 Miss 135
Okl Lout v State, 244 P 818, 34 Okl Cr 73.

41. Ala—Terry v State, 74 So 756, 15 Ala App 665

42. Ala—Russell v State, 122 So 683, 685, 219 Ala 567, citing **Corpus Juris.**
Tex—Hunter v State, 128 S W 2d 1176, 137 Tex Cr 289—Bennett v State, 252 S W 790, 95 Tex Cr 70—Cottom v State, 240 S W 918, 91 Tex Cr 534
30 C J p 50 note 43

43. Ill—People v Doody, 175 N E 436, 343 Ill 194
30 C J p 50 note 44

44. Ala—Bishop v State, 145 So. 497, 25 Ala App 267 certiorari denied 145 So 499, 226 Ala 147
Wyo—State v Bristol, 84 P 2d 757, 765 53 Wyo 301, citing **Corpus Juris**
30 C J p 50 note 15

45. Ala—Dabney v State, 21 So 211, 113 Ala 38, 59 Am S R 92
30 C J p 50 note 47
Defense of wife or daughter as excuse or justification for homicide see supra § 108

46. Ga—Wilkerson v State, 17 S E 990, 91 Ga 729 44 Am S R 63

47. Ariz—Woodson v State, 247 P 1103, 30 Ariz 448
Tex—Sensobaugh v State, 244 S W 379, 92 Tex Cr 417
30 C J p 50 note 49

48. Tex—Sheely v State, 201 S W 1012, 83 Tex Cr 127—Pannell v State, 113 S W 536, 54 Tex Cr 498

49. S C—State v Emerson, 58 S E 974, 78 S C 83

50. Ga—Brown v. State, 70 S E. 329, 135 Ga 656.

in, or immediately after, the act of adultery,[51] but where the husband, armed with a deadly weapon, breaks into the house or apartment of the paramour, while the latter was asleep, under circumstances sufficient to cause on the part of the paramour a reasonable apprehension of death or great bodily harm, the husband is the aggressor and precluded from setting up self-defense.[52]

Exercise of legal right The exercise of a legal right in a lawful manner does not ordinarily constitute such an act of provocation as will deprive the person exercising it of his right of self-defense,[53] although, having reason to believe that it might result in a struggle or conflict, he armed or otherwise prepared himself accordingly,[54] or, although by exercising such right, he put himself in the way of being attacked,[55] or even though he did strike the first blow, if this was necessary to secure his personal safety.[56] A person who has been threatened with loss of life or serious bodily injury may nevertheless go where he has a right to be,[57] he is not obliged to remain at home in order to avoid a meeting with, or assault by, his adversary but may arm himself and pursue his legitimate business or vocation without thereby losing his right of self-defense.[58] However, he has not the right to lie in wait for and slay his adversary,[59] or, as considered infra § 120, to seek or hunt him with the intention of killing or seriously injuring him. A person may not arm himself and renew a conflict in a public street, and then attempt to assert in his defense that deceased was interfering with his right to walk the street.[60]

§ 120. —— Intent

Although there is authority for the view that a person who brings on a difficulty may be deprived of his right of self-defense even though he has no specific intent to bring on the difficulty, it is generally held that accused does not lose his right of self-defense unless his conduct was intended or calculated to bring on the difficulty.

As a general rule, accused is not deprived of the right of self-defense on the ground of provocation of the difficulty unless he intends to provoke the difficulty,[61] even though his acts and words may be of such a nature as to provoke a difficulty and do in fact have that effect.[62] The test is said to be whether the acts or language of accused are intended or calculated to bring on a difficulty, if they are not, his right of self-defense is not lost.[63] However, a mere intent and design by accused to provoke a difficulty does not deprive him of his right of self-defense if he makes no overt act to provoke it.[64] In a jurisdiction where accused is required to be entirely free from fault in provoking or bringing on the difficulty in order to set up self-defense, as considered supra § 117, it is held that accused may be at fault within the meaning of the rule, even though he has no specific intent to bring on the difficulty.[65] Of course, self-defense is not available to one who conducts himself so as to provoke a deadly combat, with intent or design to accomplish this end.[66] While the belief of accused that he is in a place where he has a right to be does not establish the right of self-defense, it tends to rebut his bad faith in bringing on the conflict.[67]

To kill or inflict injury It is well settled that, where a person willfully and intentionally provokes

51 La.—State v. Cancienne, 24 So. 131, 50 La. Ann. 847

52 N.J.—State v. Agnesi, 104 A. 299, 92 N.J. Law 51, affirmed 106 A. 893, 108 A. 115, 92 N.J. Law 638

53 Wyo.—State v. Bristol, 84 P.2d 757, 765, 53 Wyo. 304, citing **Corpus Juris.**
30 C.J. p. 50 note 56
Making or resistance of arrest as aggression see infra § 137

54 Ala.—Russell v. State, 122 So. 681, 685, 219 Ala. 567, citing **Corpus Juris.**
Wyo.—State v. Bristol, 84 P.2d 757, 53 Wyo. 304
30 C.J. p. 51 note 57

55 S.C.—State v. Burdette, 101 S.E. 661, 118 S.C. 161
30 C.J. p. 51 note 58

56. Ky.—Bohannon v. Commonwealth, 8 Bush 481, 8 Am.R. 474
Mo.—State v. McDonald, 67 Mo. 13

57 Wyo.—State v. Bristol, 84 P.2d 757, 53 Wyo. 304

58 S.C.—State v. Strickland, 145 S.E. 401, 147 S.C. 511
Wyo.—State v. Bristol, 84 P.2d 757, 53 Wyo. 304
30 C.J. p. 51 note 60

59. Fla.—Barnhill v. State, 18 So. 251, 56 Fla. 16

60. Cal.—People v. Graham, 217 P. 823, 62 Cal. App. 758
Renewal of conflict generally see infra § 133

61. Ga.—Vincent v. State, 112 S.E. 120, 153 Ga. 278
Tex.—Caraway v. State, 263 S.W. 1063, 98 Tex.Cr. 119
30 C.J. p. 51 note 61

62. Ga.—Vincent v. State, supra
30 C.J. p. 51 note 65

63. N.C.—State v. Robinson, 195 S.E. 824, 213 N.C. 273
Tex.—Norwood v. State, 120 S.W.2d 806, 135 Tex.Cr. 406
Wyo.—State v. Flory, 276 P. 458, 40 Wyo. 184
30 C.J. p. 51 note 66

64. Okl.—Wilkie v. State, 242 P. 1057, 33 Okl.Cr. 225

65. Ala.—Madry v. State, 78 So. 866, 201 Ala. 513.—Rogers v. State, 22 So. 666, 117 Ala. 9

66 Cal.—People v. Graham, 217 P. 823, 62 Cal. App. 758
La.—State v. Domingue, 118 So. 46, 166 La. 859
Miss.—Woods v. State, 184 So. 311, 183 Miss. 135, overruling suggestion of error 183 So. 508, 183 Miss. 135
N.M.—State v. Pruett, 172 P. 1044, 21 N.M. 68
"One in no imminent danger from a minatory foe may not purposely confront him and then invoke self-defense for an immediate homicide."—State v. Curry, 165 S.E. 810, 811, 112 W.Va. 549

67. Ind.—Colondro v. State, 125 N.E. 27, 188 Ind. 533
Exercise of legal right as provocation see supra § 119.

or brings on a difficulty whether by words or other means, for the purpose of obtaining an opportunity, pretext, or excuse to kill another or inflict great bodily harm on him or to wreak malice on him, he cannot justify or excuse the homicide on the ground of self-defense, however necessary the killing to save himself from death or great bodily harm.[68] Where a wrongful or unlawful act, reasonably calculated to lead to an affray or deadly conflict, is committed by accused with the intent to kill if such a conflict should arise, he is more clearly guilty of aggression or provocation so as to deprive him of the right of self-defense than if his act were not accompanied by such intent.[69] However, the right of self-defense will not be impaired by the fact that accused has malice against deceased or that there is a mere intention or preparation to kill deceased or inflict great bodily harm on him, unaccompanied by overt acts indicative of the wrongful purpose, and calculated to provoke the difficulty.[70] In some jurisdictions, to preclude an aggressor entirely from the right of self-defense, he must have provoked the difficulty with a felonious intent, that is, with an intent of killing deceased or inflicting great bodily harm on him.[71] In these jurisdictions if he provokes the difficulty with any intent other than felonious, as where he intends only an ordinary battery, he has what is called an imperfect right of self-defense, that is, he is not entirely justified or excused in killing to save himself from death or great bodily harm, but the homicide is reduced to some grade less than murder, such as manslaughter.[72]

In seeking deceased Accused cannot claim self-defense where he seeks deceased for the purpose of provoking or bringing on a difficulty in which he may kill or inflict great bodily injury,[73] and where, on meeting deceased, he executes his purpose by provoking a difficulty with him.[74] Self-defense cannot be invoked by a person who arms himself and seeks or hunts his adversary for the purpose of killing him[75] or inflicting on him great bodily harm,[76] or with the intent of provoking a difficulty or having an affray,[77] and, on meeting him, provokes or brings on a difficulty,[78] and in such case it is immaterial whether accused or deceased provoked the difficulty or was the aggressor immediately before the homicide.[79] The same rule has been applied to one who, while armed in accordance with his custom, formed the intent to seek out and provoke a difficulty with deceased and to overcome any opposition by using his weapon.[80] The fact that threats against the life of accused have been made by deceased and communicated to accused does not give the latter the right to seek out deceased with intent to engage in a mortal com-

68. Ark.—Pope v. State, 287 S.W. 747, 172 Ark. 61
Ind.—McKee v. State, 154 N.E. 372, 198 Ind. 590
Ky.—Elschide v. Commonwealth, 134 S.W.2d 600, 280 Ky. 690.—McCarty v. Commonwealth, 51 S.W.2d 249, 244 Ky. 113
Mo.—State v. Painter, 44 S.W.2d 79, 329 Mo. 314
Okl.—Akes v. State, 239 P. 187, 31 Okl.Cr. 386
Tex.—Norwood v. State, 120 S.W.2d 806, 135 Tex.Cr. 406—Criddington v. State, 78 S.W.2d 185, 127 Tex.Cr. 613
Va.—Scott v. Commonwealth, 129 S.E. 360, 143 Va. 510
Wyo.—State v. Flory, 276 P. 458, 40 Wyo. 184
30 C.J. p. 51 note 72

69. Okl.—Lout v. State, 244 P. 818, 34 Okl.Cr. 73

70. Wyo.—State v. Bristol, 84 P.2d 757, 765, 53 Wyo. 304, citing **Corpus Juris**
30 C.J. p. 51 note 73

71. Okl.—Akes v. State, 239 P. 187, 31 Okl.Cr. 386
Wyo.—State v. Flory, 276 P. 458, 463, 40 Wyo. 184, citing **Corpus Juris.**
30 C.J. p. 52 note 74

72. Mo.—State v. Painter, 44 S.W.2d 79, 329 Mo. 314—State v. Harlan, 240 S.W. 197
Okl.—Akes v. State, 239 P. 187, 31 Okl.Cr. 386
Wyo.—State v. Flory, 276 P. 458, 463, 40 Wyo. 184, citing **Corpus Juris.**
30 C.J. p. 52 note 75
Imperfect self-defense as affecting manslaughter see supra §§ 42, 46 b

73. Ark.—Johnson v. State, 287 S.W. 172, 171 Ark. 1188
S.C.—State v. Strickland, 145 S.E. 401, 117 S.C. 514
30 C.J. p. 52 note 76

74. Ariz.—Murphy v. State, 264 P. 685, 686, 33 Ariz. 336, citing **Corpus Juris.**
"A person who having malice in his heart, should seek his enemy for the purpose of killing him, and should provoke him to resistance by any means whatever, in order to obtain a pretext for killing him in self-defense, would forfeit entirely such right."—Watkins v. U. S., 41 S.W. 1044, 1048, 1 Ind.T. 364

75. Ark.—Pope v. State, 287 S.W. 747, 172 Ark. 61
Miss.—Lewis v. State, 195 So. 325, 188 Miss. 410—Woodward v. State, 177 So. 531, 180 Miss. 571, suggestion of error overruled 178 So. 469, 180 Miss. 571—Ross v. State, 131 So. 367, 158 Miss. 827.
Mo.—State v. Harlan, 240 S.W. 197
30 C.J. p. 52 note 78

76. Mo.—State v. Harlan, supra

77. Iowa.—State v. Harbour, 187 N.W. 154, 193 Iowa 657
Miss.—Woods v. State, 184 So. 311, 183 Miss. 135, overruling suggestion of error 183 So. 508, 183 Miss. 135
Okl.—Roddie v. State, 198 P. 342, 19 Okl.Cr. 63

78. Miss.—Lewis v. State, 195 So. 325, 188 Miss. 410—Woods v. State, 184 So. 311, 183 Miss. 135 overruling suggestion of error 183 So. 508, 183 Miss. 135—Woodward v. State, 177 So. 531, 180 Miss. 571, suggestion of error overruled 178 So. 469, 180 Miss. 571
30 C.J. p. 52 note 80

79. Miss.—Lewis v. State, 195 So. 325, 188 Miss. 410

80. Miss.—Woods v. State, 184 So. 311, 183 Miss. 135, overruling suggestion of error 183 So. 508, 183 Miss. 135
However, it has also been held that a person who arms himself and provokes a difficulty does not necessarily lose his right of self-defense unless the purpose to provoke a difficulty and to overcome opposition exists at the time of arming.—Coleman v. State, 176 So. 714, 179 Miss. 661.

bat.[81] However, the fact that accused sought deceased with the intention of provoking a difficulty does not forfeit his right of self-defense, unless, after finding deceased, he did some act or uttered some word calculated to provoke a difficulty.[82] This is true, even though, in seeking deceased with the intention of provoking a difficulty, accused goes armed with a deadly weapon.[83] Likewise, although accused arms himself and seeks deceased with the intent to kill him, yet his right of self-defense is perfect where, on meeting deceased and before making any effort to carry out his intention, he is attacked by deceased.[84]

One may seek another against whom he has a grievance, and the fact that he arms himself is not necessarily a provocation placing him in the wrong.[85] Thus accused's right of self-defense is not forfeited by his having sought a meeting with deceased in a lawful and peaceable manner, not with the intention of provoking a difficulty but for a lawful purpose, such as to obtain a peaceable adjustment of differences or an explanation of language or conduct on the part of deceased which affects accused, his wife, or daughter,[86] nor is accused's right of self-defense affected by the fact that in seeking a meeting in such a manner and for such a purpose, he went armed in order to protect and defend himself against any attack which might be made on him.[87] However, a lawful or peaceable intention on the part of accused in approaching deceased will not excuse an unlawful homicide resulting from violence after they came together. The mere manner in which accused invited deceased to a particular place will not suffice to relieve him of fault in bringing on the difficulty if in fact his purpose was to kill deceased with a greater degree of safety in such place.[88] The act of accused in going to the place where deceased was, on the invitation and call of deceased, did not eliminate his right of self-defense when attacked by deceased,[89] even though, in complying with the invitation, he went armed.[90] Where the parties met otherwise than by the design and contrivance of accused, as by accident, accused is not necessarily guilty because he commenced the conflict.[91]

§ 121. Withdrawal after Aggression

One who has provoked a difficulty may nevertheless regain his right of self-defense by attempting to withdraw from it in good faith and in some manner advising his adversary of his intention to do so.

Where one who has provoked a combat abandons or withdraws from it in good faith, and not merely for the purpose of gaining advantage, and by his conduct clearly shows his desire to decline any further struggle, his right of self-defense is restored, and if thereafter he is pursued by his adversary, he is justified or excused in killing him if necessary to save himself from death or great bodily harm,[92] although the whole transaction consists of but one combat or assault.[93] In order that the right of self-

81. S C—State v Morrison, 113 S E 304, 121 S C 11

82. Tex—Blackwell v State, 281 S W 213, 103 Tex Cr 423
Wyo—State v Bristol, 84 P 2d 757, 765, 53 Wyo 304, citing **Corpus Juris**
30 C J p 52 note 81

83. Wyo—State v Bristol, 84 P 2d 757, 53 Wyo 304
30 C J p 52 note 82

84. Tex—Tilmyer v State, 126 S W 870, 58 Tex Cr 552, 137 Am S R 982

85 Tex—Bennett v State, 252 S W 790, 95 Tex Cr 70

86. Ga—Vincent v State, 112 S E 120, 153 Ga 278
30 C J p 53 note 84

87 Tex—Hunter v State, 128 S W 2d 1176, 137 Tex Cr 289—Alexander v State, 255 S W 408, 95 Tex Cr 497
30 C J p 53 note 85

88. Ala—Smith v State, 62 So 864, 183 Ala 10

89. Ala—Lett v State, 56 So 5, 1 Ala App 18
Tex—Torrez v State, 204 S W. 228, 83 Tex Cr 475

90. Ala—Lett v State, 56 So 5, 1 Ala App 18
Tex—Torrez v State, 204 S W 228, 83 Tex Cr 475

91. Ky—Botts v Commonwealth, 8 Ky Op 37

92. Ariz—State v Myers, 125 P 2d 441, 59 Ariz 200
Ark—Pope v State, 287 S W 747, 172 Ark 61—Johnson v State, 287 S W 172, 171 Ark 1188
Cal—People v Will, 248 P 1078, 79 Cal App 101
Fla—Gaff v State, 138 So 48, 103 Fla 642
Ky—Banks v Commonwealth, 245 S W 296, 196 Ky 639
La—State v Plain, 129 So 730, 171 La 128
Miss—Ross v State, 131 So 367, 158 Miss 827
Mo—State v Gadwood, 116 S W 2d 42, 342 Mo 466—State v Williams, 87 S W 2d 175, 337 Mo 884, 100 A L R 1503—State v Moncado, 34 S W 2d 59
N C—State v Miller, 20 S E 2d 274, 221 N C 356—State v Baldwin, 114 S E 837, 184 N C 189
Tex—Carlile v State, 255 S W 990, 96 Tex Cr 37
Utah—State v Turner, 79 P 2d 46, 95 Utah 129
Va—Harper v Commonwealth, 183 S E 171, 165 Va 816—Smith v Commonwealth, 182 S E 124, 165 Va. 776
30 C J p 53 note 91
Withdrawal from mutual combat see infra § 122

A real or apparent necessity for killing must be present after accused's withdrawal in order to restore his right of self-defense—McClusky v State, 96 So 9.5, 209 Ala. 611

After defending relative
If one enters a conflict to defend a relative and afterwards abandons his plan to defend such relative and himself withdraws in good faith from such conflict and is thereafter pursued, his right to defend himself from the latter attack is complete, although the relative to whose aid he first entered the conflict had not withdrawn therefrom—Moore v State, 218 P 1102, 25 Okl Cr 118

93. Cal—People v Button, 39 P. 1073, 106 Cal 628, 46 Am S R 259, 28 L R A 591, 38 P 200, 4 Cal Unrep Cas 876.

defense may be restored to a person who has provoked or commenced a combat, he must attempt in good faith to withdraw from the combat.[94] He must also in some manner make known his intention to his adversary,[95] and if the circumstances are such that he cannot notify his adversary,[96] as where the injuries inflicted by him are such as to deprive his adversary of his capacity to receive impressions concerning his assailant's design and endeavor to cease further combat,[97] it is the assailant's fault and he must bear the consequences. As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault.[98] Where the withdrawal is for the purpose of gaining some new advantage, or is merely colorable, the right of self-defense is not restored.[99] There has been said to be a wide difference between a withdrawal and a mere retreat,[1] the former being an abandonment of the struggle by one of the persons, while the latter may be and often is a continuance of hostilities.[2] In some jurisdictions it is held that withdrawal or retreat after aggression or fault renders a homicide committed in self-defense excusable although not justifiable.[3]

§ 122. Voluntary Participation in Mutual Combat

One who voluntarily participates in a mutual combat for purposes other than protection forfeits his right of self-defense unless, before the homicide is committed, he withdraws and endeavors to decline further combat, and makes that fact known to his adversary.

The principle which controls in cases of provoking a difficulty, see supra § 117, largely controls the doctrine of mutual combat.[4] Where a person voluntarily participates in a contest or mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense,[5] regardless of what extremity or imminent peril he may be reduced to in the progress of the combat,[6] unless, before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict,[7] and, either by word or act, makes that fact known to his adversary,[8] or unless

94. Ariz.—State v Myers, 125 P 2d 441, 59 Ariz. 200—Walker v. State, 83 P 2d 994, 52 Ariz 480.
Ky.—Banks v Commonwealth, 245 S W. 296, 196 Ky. 639
La.—State v. Corneille, 96 So. 813, 153 La. 929.
Mo—State v. Williams, 87 S W 2d 175, 337 Mo 884, 100 A.L R 1503
Nev.—State v. Robison, 6 P 2d 433, 54 Nev 56.
N C.—State v Baldwin, 114 S E. 837, 184 N C 189
Va.—Smith v Commonwealth, 182 S E. 124, 165 Va 776.
30 C J p 53 note 93.

95. Ariz—State v. Myers, 125 P.2d 441, 59 Ariz. 200
Ky.—Banks v Commonwealth, 245 S W. 296, 196 Ky. 639
La.—State v. Stroud, 5 So 2d 125, 198 La 841—State v Plain, 129 So 730, 171 La 128—State v. Corneille, 96 So 813, 153 La 929
Mo.—State v Gadwood, 116 S W 2d 42, 57, 342 Mo. 466, citing **Corpus Juris**—State v. Williams, 87 S.W 2d 175, 337 Mo. 884, 100 A.L R 1503
Okl.—Moore v. State, 218 P. 1102, 25 Okl.Cr. 118
Tex—Carlile v. State, 255 S.W 990, 96 Tex Cr. 37.
Va—Smith v. Commonwealth, 182 S E 124, 165 Va. 776
Wyo—State v. Flory, 276 P. 458, 40 Wyo. 184.
30 C J. p 54 note 94

96. Mo—State v Gadwood, 116 S.W. 2d 42, 57, 342 Mo 466, quoting **Corpus Juris.**
39 C J p 54 note 95.

97. Cal—People v. Button, 39 P 1073, 106 Cal 628, 46 Am S R 259, 28 L R.A 591, 38 P 200, 4 Cal. Unrep Cas 876

98. Mo—State v Gadwood, 116 S W 2d 42, 57, 342 Mo 466, quoting **Corpus Juris.**
Utah—State v Shockley, 80 P 865, 29 Utah 25, 110 Am S R 639

99. Ala—Jackson v. State, 56 So. 96, 2 Ala App 55

1. Mo—State v. Heath, 141 S W 26, 237 Mo 255
Duty to retreat see infra §§ 127–130

Mere backing away from an assailant while he continues an assault which one may have provoked is not such an abandonment as will restore his unqualified right to defend himself—Toncray v Commonwealth, 165 S W 2d 8, 291 Ky 471.

2. Mo—State v. Heath, 141 S W 26, 237 Mo. 255

3. Va—Dodson v. Commonwealth, 167 S.E. 260, 159 Va 976—Ballard v Commonwealth, 159 S E. 222, 156 Va. 980—McCoy v. Commonwealth, 99 S E 644, 125 Va 771.

4. Okl—Wadsworth v State, 130 P. 808, 9 Okl Cr 84

5. Ala.—Crenshaw v. State, 142 So. 669, 225 Ala. 346
Ariz.—Lepker v State, 11 P 2d 351, 40 Ariz 186
Ark—Sharp v. State, 3 S W.2d 23, 175 Ark. 1083.
Cal.—People v. Efstathiou, 118 P 2d 22, 46 Cal App 2d 441
Del—State v Bell, 192 A. 553, 8 W W.Harr 328
D C—Laney v U S, 294 F 412, 54 App D C 56
Ga—Benton v State, 194 S E 166, 185 Ga 254
Ky.—Mills v Commonwealth, 42 S.W 2d 505, 240 Ky 359—Smith v. Commonwealth, 287 S W 8, 215 Ky 815
Okl.—Green v State, 23 P.2d 506, 54 Okl Cr. 450—Gross v State, 297 P 309, 50 Okl Cr 226—Whitfield v. State, 283 P 266, 45 Okl Cr 397
Va—Carr v. Commonwealth, 114 S E. 791, 134 Va. 656
30 C.J. p 54 note 5
Killing in mutual combat as:
Manslaughter see supra § 48.
Murder see supra § 17

"One who enters willingly into a combat and fights willingly, not for his own protection, but to gratify his passion by inflicting injury upon his adversary, engages in a mutual combat, which will prevent him from invoking the doctrine of self-defense"—Phelps v State, 78 P.2d 1068, 1072, 64 Okl Cr 240.

6. Ala—Edwards v State, 108 So. 639, 21 Ala.App 375.
Ariz—Lepker v State, 11 P.2d 351, 40 Ariz 186.
30 C.J p 54 note 6

7. Ariz—Walker v. State, 83 P 2d 994, 52 Ariz 480—Lepker v. State, 11 P 2d 351, 40 Ariz 186.
30 C.J p 54 note 7.
Withdrawal after aggression see supra § 121.

8. Ky—Hellard v Commonwealth, 84 S.W. 329, 119 Ky. 445, 27 Ky.L. 115.
30 C.J. p 54 note 8.

the combat is entered into through mistake, as in the case of two persons taking each other for burglars.[9] In addition to withdrawal or attempted withdrawal and notification of his adversary, the person must honestly and reasonably believe that he is in danger of death or great bodily harm,[10] and some statutes go even further and require that there be a real and absolute necessity for taking the life of the adversary in order to save the life of the slayer.[11] Some authorities have held that the mere fact that accused intended[12] or that the parties agreed[13] to engage only in a fist fight did not give accused the right to kill in self-defense, without first endeavoring to withdraw, when deceased attacked him with a deadly weapon. However, there is also authority for the view that the intent and purpose of one person in mutually agreeing with another to settle a difficulty determines whether he is deprived of the right of self-defense. If he intends to settle the difficulty with dangerous or deadly weapons and engages in a mutual combat with such intention, he cannot successfully invoke the law of self-defense, but where he willingly enters into a mutual combat with another without any intent to do great bodily harm, and thereupon such other person resorts to a deadly weapon and is about to assault him therewith, he has a right to defend himself and to resort to a deadly weapon in his necessary self-defense.[14] At any rate when persons engage in a mutual combat under an agreement to have a fist fight, but one intends to use a deadly weapon and pursuant to such intention shoots and kills the other, the killing cannot be justified on the ground of self-defense.[15] In some states the rule is stated to be that a person voluntarily entering into a difficulty is entirely deprived of his right of self-defense when, and only when, he does so with some unlawful purpose, such as wreaking or gratifying malice, or taking life or doing great bodily harm.[16] Voluntary participation in a mutual combat has been held to give rise to an imperfect right of self-defense.[17]

What constitutes mutual combat. The expression "mutual combat" is practically self explanatory.[18] It is essential to constitute a mutual combat that there be a mutual intent to fight,[19] but there need not be mutual blows.[20] It is sufficient if there is a mutual intent to fight and one or more blows are struck,[21] and it is immaterial who strikes the first blow or fires the first shot.[22] The mutual intent to fight may be manifested by the acts and conduct of the persons and the circumstances surrounding them at the time of the combat, as well as the circumstances leading up to, and culminating in, the combat.[23]

Voluntary self-defense distinguished. A person does not under all circumstances forfeit his right of self-defense merely because he voluntarily and willingly engages in a fight or difficulty.[24] While it is sometimes stated generally that to be entitled to set up self-defense as a justification or excuse, one must not willingly enter into a fight,[25] difficulty,[26] or combat with deadly weapons,[27] such statements have been said to mean that he must not fight will-

9. Ind.T.—Bradburn v. U. S., 64 S.W. 550, 3 Ind.T. 604

10. Mo.—State v. Goode, 220 S.W. 854
30 C.J. p. 55 note 10

11. Ga.—Brown v. State, 24 S.E.2d 312
30 C.J. p. 55 note 12.

12. Okl.—Wood v. State, 107 P. 937, 3 Okl.Cr. 553.

13. Iowa.—State v. Whitnah, 105 N.W. 432, 129 Iowa 211.
30 C.J. p. 55 note 13.

14. Tenn.—Gill v. State, 184 S.W. 864, 134 Tenn. 591.

15. Tex.—Bordeaux v. State, 124 S.W. 640, 58 Tex.Cr. 61.

16. Mo.—State v. Feeley, 92 S.W. 663, 194 Mo. 300, 112 Am.S.R. 511, 3 L.R.A.,N.S., 351.
30 C.J. p. 55 note 19.

17. Tex.—Harper v. State, 162 S.W. 2d 971, 144 Tex.Cr. 385.

18. Okl.—Driggers v. U. S., 95 P. 612, 1 Okl.Cr. 590, 129 Am.S.R. 823.

19. Ga.—Roberts v. State, 5 S.E.2d 340, 189 Ga. 36—Benton v. State, 194 S.E. 166, 185 Ga. 254—Daniels v. State, 122 S.E. 223, 157 Ga. 780—Williams v. State, 23 S.E.2d 205, 68 Ga.App. 558—Warnack v. State, 60 S.E. 288, 290, 3 Ga.App. 590.
30 C.J. p. 55 note 21.

Similar to duel

A "mutual affray" or "combat" justifying a qualifying instruction on self-defense is a fight in which both persons willingly enter and is similar to a duel.—Taylor v. Commonwealth, 136 S.W.2d 544, 281 Ky. 442

20. Ga.—Roberts v. State, 5 S.E.2d 340, 189 Ga. 36—Benton v. State, 194 S.E. 166, 185 Ga. 254—Williams v. State, 23 S.E.2d 205, 68 Ga.App. 558.
30 C.J. p. 55 note 22.

21. Ga.—Benton v. State, 194 S.E. 166, 185 Ga. 254—Daniels v. State, 122 S.E. 223, 157 Ga. 780—Williams v. State, 23 S.E.2d 205, 68 Ga.App. 558.
30 C.J. p. 55 note 23.

22. Ga.—Williams v. State, supra.
30 C.J. p. 55 note 23 [a].

23. Ga.—Williams v. State, supra—Sanders v. State, 106 S.E. 314, 26 Ga.App. 475.

24. Ky.—Mills v. Commonwealth, 42 S.W.2d 505, 240 Ky. 359
30 C.J. p. 55 note 24

25. Ala.—Galloway v. State, 178 So. 896, 28 Ala.App. 82—Key v. State, 168 So. 602, 27 Ala.App. 189—Tennant v. State, 155 So. 885, 26 Ala.App. 206—Stokes v. State, 126 So. 856, 23 Ala.App. 447—Edwards v. State, 108 So. 639, 21 Ala.App. 375—Hughey v. State, 104 So. 884, 21 Ala.App. 32—La Farlett v. State, 99 So. 737, 19 Ala.App. 596—Sharpley v. State, 93 So. 210, 18 Ala.App. 620
Ky.—Curtis v. Commonwealth, 35 S.W.2d 331, 237 Ky. 215.
30 C.J. p. 55 note 25

26. Ala.—Patterson v. State, 41 So. 157, 146 Ala. 39.
Okl.—Riley v. State, 268 P. 996, 40 Okl.Cr. 323.

27. Ala.—Campbell v. State, 64 So. 320, 185 Ala. 17.
30 C.J. p. 55 note 27.

ingly to gratify his desire to fight[28] or at all, unless the elements of self-defense are present[29] Where, however, these elements are present, and one fights exclusively in his own defense, without employing excessive force, he should be acquitted even though he fights and defends himself "willingly" or "voluntarily"[30] In the sense that it is an affirmative, intentional act, as discussed supra § 114, self-defense is voluntary[31] In a very genuine sense, a person defending his life and limb does so willingly, but he does so rightfully[32] Considered from another point of view, a person is properly said to fight willingly where, although there is an impending peril to his life or person from an assault being made upon him, yet he chooses to enter into the fight when with safety to himself he might have avoided the peril without fighting,[33] and he cannot properly be said to enter willingly into a fight when his participation in it is under the compulsion of a necessity of defending himself, not occasioned or brought about by any fault on his part[34]

§ 123. Nature and Imminence of Danger

a Nature
b Imminence

a. Nature

In order to justify or excuse a homicide in self-defense, the accused must be in danger, real or apparent, of loss of life or of some great bodily harm.

Words and phrases, such as "great personal injury," "serious bodily injury" or "great bodily injury," used in the statutes and rules relating to self-defense in homicide cases, define themselves,[35] they are used in their ordinary sense in common acceptance among the people[36] A person is not justified or excused in taking life in all cases where he fears or apprehends that he will be harmed or injured regardless of the extent of the harm or injury apprehended[37] In order to justify or excuse the homicide, accused must be in danger, real or apparent, of loss of life or of some great bodily harm,[38] it is not required that the danger shall be of "enormous"[39] or "the most serious"[40] bodily harm Also the danger need not be that of loss of life, a person has as much right to protect himself against great bodily harm or serious bodily injury[41] or a felony upon the person[42] as he has against the taking of life The expression "serious bodily in-

28. Ala—Harbour v State, 37 So 330, 140 Ala 103

29. Ala—Harbour v State, supra

30. Ky—Mills v Commonwealth, 42 S W 2d 505, 240 Ky 359
30 C J p 56 note 34

31. Mo—State v Feeley, 92 S W 663 194 Mo 300, 112 Am S R 511, 3 L R A, N S, 351
30 C J p 56 note 35

32. N C—State v Pollard, 82 S E 167, 168 N C 116, L R A 1915B 529

33 Ala—Turner v State, 65 So 719 11 Ala App 1
Ariz—Lepker v State, 11 P 2d 351, 40 Ariz 186

34. Ala—Turner v State, 65 So 719, 11 Ala App 1

35. Okl—Roddie v State, 198 P 312, 19 Okl Cr 63
30 C J p 56 note 40

36. Okl—Roddie v State, supra

37. Ala—Loveladv v State, 136 So 871, 24 Ala App 502
30 C J p 56 note 42

One is not justified in shooting another simply because he fears the other—State v Fine, 2 P 2d 1016, 90 Mont 311

38. Ala—Barnum v State, 190 So 310, 28 Ala App 590—Tortomasi v State, 189 So 901, 28 Ala App 499, certiorari denied 189 So 905, 238 Ala 253—Green v State, 189 So 763, 238 Ala 143—Williams v State, 163 So 668, 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93—Pelham v State, 125 So 688, 23 Ala App 359—Wright v State, 115 So 852, 22 Ala App 376—Lawler v State, 115 So 420, 22 Ala App 329—Rice v State, 101 So 82, 20 Ala App 102
Ariz—Lacy v State, 297 P 872, 38 Ariz 60
Cal—People v Fleming 23 P 2d 28, 218 Cal 300
Del—State v Lynch 128 A 564, 2 W W Harr 597
Fla—Lightbourn v State, 175 So 857, 129 Fla 43—Scholl v State, 115 So 43, 94 Fla 1138
Idaho—State v Grover, 207 P 1080, 35 Idaho 589
Ill—People v Motuzas, 185 N E 614, 352 Ill 340
Ky—Hensley v Commonwealth, 69 S W 2d 17 253 Ky 171—Grubbs v Commonwealth, 42 S W 2d 702, 240 Ky 473
La—State v Thornhill, 178 So 343, 188 La 762—State v Ciaccio, 112 So 486, 163 La 563
Miss—Smith v State, 6 So 2d 131—Carnes v State, 185 So 810—Hartfield v State, 170 So 531, 176 Miss 776—Ransom v State, 115 So 208, 149 Miss 262
Mo—State v Bongard, 51 S W 2d 84, 330 Mo 805—State v McGehee, 274 S W 70, 73, 308 Mo 560, citing **Corpus Juris**—State v Ball, 262 S W 1043
N C—State v Robinson, 195 S E 824, 213 N C 273—State v Terrell, 193 S E 161, 212 N C 145—State v Glenn, 150 S E 663, 198 N C. 79.
Okl—Lemmons v State, 265 P 652 39 Okl Cr 383—Edge v State, 264 P 213, 39 Okl Cr 277—Fixico v State, 263 P 171, 39 Okl Cr 95—Fulton v State 254 P 761, 36 Okl Cr 358—Lee v State, 244 P 455, 33 Okl Cr 370—Best v State 242 P 1063, 33 Okl Cr 237—Brown v State, 216 P 944 24 Okl Cr 161
Tex—Forrester v State, 4 S W 2d 966 109 Tex Cr 361
Vt—State v Rounds, 160 A 249, 104 Vt 442—State v Tubbs, 139 A 769 101 Vt 5
Va—Smith v Commonwealth, 182 S E 121, 165 Va 776
Wyo—Espy v State, 92 P 2d 549, 54 Wyo 291—State v Sorrentino, 224 P 420 31 Wyo 129 34 A L R 1477—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 56 note 43

39. Tenn—McDonald v State, 14 S W 487 89 Tenn 161
30 C J p 56 note 44

40. Ill—Reins v State, 30 Ill 256

41. Ala—Hayes v State, 142 So 675, 225 Ala 253—Higdon v State, 143 So 213, 25 Ala App 209—Bailey v State, 117 So 505, 22 Ala App 531
N C—State v Mosley, 195 S E 830, 213 N C 304
30 C J p 56 note 46

42. Ala—Green v State, 189 So 763, 238 Ala 143—Higdon v State, 143 So 213, 25 Ala App 209
Ariz—Lacy v. State, 297 P. 872, 38 Ariz 60.

jury," sometimes employed in statutes and decisions instead of "great bodily harm," is deemed equivalent in meaning to the latter term[43] Also the term "great personal injury" is understood as equivalent in import to "great bodily harm"[44] A homicide is not justifiable or excusable on the ground of self-defense by reason of a danger, or apprehension of danger, of general bodily injury,[45] or of a mere indignity,[46] or of a slight or moderate injury,[47] such as that to be apprehended from a mere trespass[48] or a simple or ordinary assault or battery[49] with the hand or fist without a weapon,[50] unless the assault or trespass is accompanied by acts indicating imminent danger of great bodily harm or felony and produces in the mind of accused a reasonable belief of such danger[51] This is true although the peril could not be escaped by retreat or the danger would have been thereby increased[52] However, it is not true, without modification or qualification, that the great bodily harm which the law contemplates never can be, under any circumstances, such as may be inflicted by mere blows with the hands or feet[53] There may be cases in which, by reason of the great disparity in age or strength between the persons or the ferocity of the attack, the intended beating may be of such a character as to justify the assaulted person in killing[54] A number of courts hold that the attack on accused must be of a manifestly or apparently felonious nature to justify or excuse him in taking life in self-defense,[55] and that it is not justifiable to kill an assailant who apparently intends to commit a misdemeanor only[56] Some courts, however, hold that a person is justified in taking life if necessary to protect himself against great bodily harm, even though the attack upon him is not a felony,[57] and, under a statute so providing, homicide in self-defense against a nonfelonious assault is justifiable if the attack is unlawful and violent[58] The foregoing rules should not be taken to mean that the right of self-defense generally, as distinguished from the right in homicide cases, exists only where there is real or apparent danger of death or serious bodily injury, they mean only that such real or apparent danger must exist to constitute a justification or excuse for the taking of life as distinguished from the use of such force as would otherwise constitute a simple or aggravated assault[59]

b. Imminence

In order to justify or excuse a homicide in self-defense the danger, whether real or apparent, must be impending and imminent

Fla—Scholl v State, 115 So 43, 94 Fla 1138
Ga—Stubbs v State, 36 S E 200, 110 Ga 916
Ky—Commonwealth v Beverly, 34 S W 2d 911, 227 Ky 35—Gill v Commonwealth, 31 S W 2d 608, 225 Ky 351
Miss—Hodges v State, 6 So 2d 123, 192 Miss 322

Robbery

Accused may resist an attempt to rob him even to the extent of taking his assailant's life under statute relating to right to defend person or property against one intending or endeavoring to commit a felony on either—Daniel v State, 1 S E 2d 6, 187 Ga 411

43 Ill—Lawlor v People, 74 Ill 228
Tex—Ward v State, 126 S W 1145, 59 Tex Cr 62

Term defined

"Serious bodily injury," under the law of self-defense, means a grave, not trivial, injury, such an injury as gives rise to apprehension of danger to life, health, or limb—McKee v State, 246 S W 1035, 1036, 93 Tex Cr 217

44. Miss—Green v State, 28 Miss 687

45. Fla—Barnhill v. State, 48 So 251, 56 Fla 16.

46. Ala—Elland v State, 52 Ala 322

47. Miss—Smith v State, 6 So 2d 134
30 C J p 56 note 52

Whipping

Where it was shown that deceased, if he was the aggressor in the fatal encounter, was threatening only to whip two accused in a fist fight in the midst of a crowd of people, killing of deceased by striking him on the head with a club could not be justified on ground of self-defense—Espy v State, 92 P 2d 519, 54 Wyo 291

48. Ala—Green v State, 189 So 763, 238 Ala 143
Ga—Wall v State, 112 S E 142, 153 Ga 309
Iowa—State v Borwick, 187 N W 460, 193 Iowa 639
30 C J p 56 note 53

49. Cal—People v Anderson, 208 P 204, 57 Cal App 721
Miss—Smith v State, 6 So 2d 134
30 C J p 56 note 54.

50. Ala—Lovelady v State, 136 So 871, 24 Ala App 502
Iowa—State v Borwick, 187 N W 460, 193 Iowa 639
30 C J p 57 note 55

51. Ky—O'Neal v Commonwealth, 85 S W 745, 27 Ky L 547
30 C J p 57 note 56

52. Ala—Elland v State, 52 Ala 322—Lovelady v State, 136 So 871, 24 Ala App 502

53. Ala—Davis v State, 107 So 737, 214 Ala 273—Lovelady v State, 136 So 871, 24 Ala App 502
Miss—Hill v State, 49 So 145, 94 Miss 391
Mont—State v Jennings, 28 P 2d 448, 96 Mont 80, 21 A L R 375

54. Ala—Davis v State, 107 So 737, 214 Ala 273
30 C J p 57 notes 59, 60

55 Ga—Little v State, 142 S E 674 166 Ga 189—Wall v State 112 S E 142 153 Ga 309
Mo—State v McGehee, 274 S W 70, 73, 308 Mo 560, citing **Corpus Juris.**
N C—State v Robinson, 195 S E 824, 213 N C 273
30 C J p 57 note 61

56. Ga—Wall v State, 112 S E 142, 153 Ga 309
30 C J p 57 note 62

57. Okl—Roddie v State, 198 P. 342, 19 Okl Cr 63
30 C J p 57 note 63.

58. Tex—Fambro v State, 154 S W 2d 840, 142 Tex Cr 473—Broussard v State, 129 S W 2d 295, 137 Tex Cr 273—Joubert v State, 124 S W 2d 368, 136 Tex Cr 219—Bryant v State, 100 S W 371, 51 Tex Cr 66

59. Tex—Streich v State, 180 S.W. 266, 78 Tex Cr 155.

In order to justify or excuse the taking of human life in self-defense, the danger or peril of loss of life or the infliction of serious bodily harm must be, or appear to be, impending and imminent, the danger must be either actual, present, and urgent, or such as the slayer believes on reasonable grounds to be so urgent and pressing that it is necessary for him to kill in order to save himself from immediate death or great bodily harm[60] A mere fear or belief on the part of accused that he will suffer great bodily harm or loss of life in the future, as distinguished from the present, does not constitute a justification or excuse,[61] nor is a past danger or apprehension sufficient[62] However, accused is entitled to act as long as, from his standpoint, the danger is imminent, even though the act which demonstrates the imminence of danger has transpired[63] The danger need not appear to be urgent and pressing as a logical sequence of reasoning in conformity to normal standards.[64] Under a statute justifying homicide in self-defense against a nonfelonious attack, the killing is justified only if it occurs while the person killed is in the very act of making the attack, it is not justified if the person killed was only about to attack or was doing some act preparatory to the attack,[65] although the person attacked is not required even under this rule to wait until a battery has been inflicted upon him[66]

§ 124. Apprehension of Danger

As a general rule a person under an honest and reasonable apprehension of death or great bodily harm may kill his adversary in self-defense if the other elements of self-defense are present

It is well settled as a general rule that a person under an honest and reasonable apprehension of death or great bodily harm may kill his adversary in self-defense if the other elements of self-defense are present[67]

60. Ala.—Green v State, 189 So 763, 238 Ala 143—Hayes v State 142 So 675, 225 Ala 253—Barnum v State, 190 So 310, 28 Ala App 590—Tortomasi v State 189 So 901, 28 Ala App 499 certiorari denied 189 So 905 238 Ala 253—Williams v State, 163 So 668, 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93—Wright v State 115 So 852, 22 Ala App 376—Lawler v State, 115 So 420, 22 Ala App 329—McBride v State, 109 So 566, 21 Ala App 508—Vaughan v State, 107 So 797, 21 Ala App 204, certiorari denied 107 So 799, 214 Ala App 384—Rice v State, 101 So 82 20 Ala App 102

Ariz.—Taylor v State, 232 P 552, 27 Ariz 228

Del.—State v Stevenson, 188 A 750, 8 W W Harr 105—State v Lee 171 A 195, 6 W W Harr 11—State v Lynch 128 A 561, 2 W W Harr 597

Fla.—Rowe v State, 163 So 22, 120 Fla 649

Ga.—Little v State, 142 S E 674, 166 Ga 189

Idaho.—State v Grover, 207 P 1080, 35 Idaho 589

Ky.—Grubbs v Commonwealth, 42 S W 2d 702, 240 Ky 473

Miss.—Hartfield v State 170 So 531, 176 Miss 776—Ransom v State, 115 So 208, 149 Miss 262

Mo.—State v Bongard, 51 S W 2d 84, 330 Mo 805

Ohio.—State v Champion, 142 N E 141, 109 Ohio St 281

Okl.—Fulton v State 254 P 761, 36 Okl Cr 358—Best v State, 242 P 1063, 33 Okl Cr 237—Brown v State, 216 P 941, 24 Okl Cr 161

Or.—State v Kelley, 247 P 146, 150, 118 Or 397, quoting **Corpus Juris,** error dismissed and certiorari denied Kelley v State of Oregon, 47 S Ct 504, 273 U S 589, 71 L Ed 790, and error dismissed Willos v State of Oregon 47 S Ct 658 274 U S 722, 71 L Ed 1326

W Va.—State v Curry 165 S E 810, 112 W Va 549—State v McMillion 138 S E 732, 101 W Va 1

30 C J p 57 note 66

"Imminent" defined

(1) "Near at hand mediate rather than immediate, close rather than touching"—Scholl v State, 115 So 43 44 94 Fla 1138—Linsley v State, 101 So 273, 275, 88 Fla 135

(2) "Threatening to occur immediately, near at hand impending"—State v Huett, 104 S W 2d 252, 262, 340 Mo 934

61. Ky.—Grubbs v Commonwealth, 42 S W 2d 702 240 Ky 473

Okl.—Lary v State, 296 P 512, 50 Okl Cr 111

Or.—State v Kelley, 247 P 146, 150, 118 Or 397, quoting **Corpus Juris,** error dismissed and certiorari denied Kelley v State of Oregon 47 S Ct 504, 273 U S 589, 71 L Ed 790, and error dismissed Willos v State of Oregon, 47 S Ct 658, 274 U S 722, 71 L Ed 1326

30 C J p 58 note 67

62. Del.—State v Stevenson, 188 A 750, 8 W W Harr 105

Fla.—Linsley v State, 101 So 273, 88 Fla 135

Ky.—Lewis v Commonwealth, 36 S W 2d 639, 237 Ky 786—Ross v Commonwealth, 259 S W. 50, 202 Ky 204

Mich.—People v Giacalone, 217 N W 758, 242 Mich 16

Or.—State v Kelley, 247 P 146, 118 Or 397, error dismissed and certiorari denied Kelley v State of Oregon, 47 S Ct 504, 273 U S 589, 71 L Ed 790, and error dismissed Willos v State of Oregon, 47 S Ct 658, 274 U S 722, 71 L Ed 1326

W Va.—State v McMillion, 138 S E 732 101 W Va 1

30 C J p 58 note **68**

"At the point where the apparent danger ceases, the right of self-defense ceases"—Ging v State, 239 P 685 689 31 Okl Cr 428

Terminated assault

(1) "Justification cannot be based on a deadly assault which has completely ended, unless the assailant has some further apparent ability to continue it"—Cochran v State, 72 S E 281, 9 Ga App 824 825

(2) Thus accused was not justified in shooting his uncle on ground of self-defense where rock which uncle, while intoxicated, had thrown at accused had safely passed him and uncle did not attempt to draw his own gun until after accused drew his—Ledford v Commonwealth, 102 S W 2d 38, 267 Ky 289

63. Tex.—Orta v State, 71 S W 755 44 Tex Cr 393

64. Ill.—People v Stapleton, 133 N E 221, 300 Ill 471

65. Tex.—Fambro v State, 151 S W 2d 840 142 Tex Cr 473—Broussard v State, 129 S W 2d 295, 137 Tex Cr 373—Joubert v State, 124 S W 2d 368, 136 Tex Cr 219

66 Tex.—Bryant v State, 100 S W 371, 51 Tex Cr 66

67. Ark.—Deatherage v State, 108 S W 2d 904, 194 Ark 513

Del.—State v Lee, 171 A 195, 6 W W Harr 11

Ill.—People v Motuzas, 185 N E 614, 352 Ill 340—People v Organ, 178 N E 73, 345 Ill 339—People v Durand, 139 N E 78, 307 Ill 611

§ 125. —— Real or Apparent Danger Generally

In order to justify or excuse a homicide in self-defense there need not be a real or actual danger, if the appearances are such as to warrant a reasonable belief that there is real and imminent danger, the accused may be justified or excused for killing although it later develops that there was no real danger.

The danger which justifies killing in self-defense, see supra § 123, must be real or apparent[68] While a person may kill in his defense when there is actual danger making the killing necessary to prevent death or great bodily harm,[69] yet when all the elements necessary and sufficient to constitute an excuse or justification on the ground of apparent danger are present it is immaterial whether the danger is actual or not[70] The slayer need not be in actual danger of death or great bodily harm, he is entitled to act on appearances, and it is sufficient if he believes in good faith and on reasonable grounds that he is in such peril, although it afterward appears that he is mistaken as to the existence or imminence of the danger.[71]

§ 126. —— Belief of Accused

a. In general
b Grounds for belief

a. In General

Even though there is apparent danger, the accused is not justified or excused in killing his adversary unless he entertains an honest and bona fide belief that the danger is real, and acts under the influence of that belief The existence and reasonableness of such belief is to be determined in the light of the circumstances as they appeared to the accused at the time of the homicide.

To justify or excuse a homicide on the ground of apparent peril it is necessary that the slayer shall actually have an honest or bona fide belief that he is in imminent peril of death or great bodily

Ind —Hill v State, 11 N E 2d 141 212 Ind 692
Ky Hensley v Commonwealth, 69 S W 2d 17, 253 Ky 171—Goins v Commonwealth, 3 S W 2d 631, 223 Ky 211
Me —State v Cox 23 A 2d 634
Mo —State v Bongard, 51 S W 2d 84, 330 Mo 805
N C —State v Mosley, 195 S E 830, 213 N C 304—State v Elmore 193 S E 713, 212 N C 531—State v Holland, 138 S E 8, 193 N C 713—State v Bush, 114 S E 831, 184 N C 778—State v Johnson, 113 S E 617, 184 N C 637
Okl —Larry v State, 296 P 512, 50 Okl Cr 111
Pa —Commonwealth v Miller, 170 A 128 313 Pa 567—Commonwealth v Grimm, 5 Pa Dist & Co 287
Tex —Shannon v State, 30 S W 2d 331 115 Tex Cr 249—Gilbert v State, 26 S W 2d 644, 114 Tex Cr 532—Forrester v State, 4 S W 2d 966 109 Tex Cr 361
Vt —State v Rounds, 160 A 249, 104 Vt 442
Wyo —State v Radon 19 P 2d 177, 45 Wyo 383—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 58 note 75

68. Miss Hartfield v State, 170 So 531 176 Miss 776—Ransom v State, 115 So 208, 149 Miss 262
30 C J p 58 note 71
Real or apparent necessity see supra § 115

69. Ky —Goins v Commonwealth, 3 S W 2d 631, 223 Ky 211
N C —State v Mosley, 195 S E 830, 213 N C 304 State v Robinson, 195 S E 824, 213 N C 273—State v Marshall, 179 S E 427, 208 N C 127—State v Glenn, 150 S E 663 198 N C 79—State v Holland, 138 S E 8 193 N C 713—State v Johnson, 81 S E 911, 166 N C 392

70. Ala —Cox v State, 96 So 83, 19 Ala App 205
Ill —People v Motuzas, 185 N E 614, 352 Ill 340—People v Organ, 178 N E 73, 345 Ill 339 - People v Borella, 143 N E 471, 312 Ill 34—People v Durand, 139 N E 78, 307 Ill 611
Ky —McCurry v Commonwealth, 265 S W 630, 205 Ky 211
N C —State v Johnson, 113 S E 617, 184 N C 637
Ohio —Stewart v State, 138 N E 876, 105 Ohio St 625
Okl —Fulton v State, 254 P 761, 36 Okl Cr 358
Tex —Briggs v State, 255 S W. 410, 95 Tex Cr 629
30 C J p 58 note 74

71. Ala —Buffalow v State, 122 So 633, 219 Ala 407—Bailey v State, 117 So 505, 22 Ala App 531—Rice v State, 101 So 82, 20 Ala App 102—Cox v State, 96 So 83, 19 Ala App 205
Fla —Crockett v State, 188 So 214, 137 Fla 450—O'Steen v State, 111 So 725, 92 Fla 1062
Ill —People v Motuzas, 185 N E 614, 352 Ill 340—People v Organ, 178 N E 73, 345 Ill 339—People v Duncan 115 N E 810 315 Ill 106 —People v Borella, 143 N E 471, 312 Ill 34
Iowa —State v Rhone, 275 N W 109, 223 Iowa 1221
Kan —State v Kelly, 291 P 945, 131 Kan 357
Ky —Farley v Commonwealth, 145 S W 2d 100, 284 Ky 536—McCurry v Commonwealth, 265 S W 630 205 Ky 211—Banks v Commonwealth, 245 S W 296, 196 Ky 639
La —State v Thornhill, 178 So 343, 188 La 762
Mo —State v Huett, 104 S W 2d 252, 340 Mo 934 - State v Ball, 262 S W 1013
Mont —State v Jennings, 28 P 2d 148 96 Mont 80, 121 A L R 375—State v Harkins, 281 P 551, 85 Mont 585
N C —State v Mosley, 195 S E 830, 213 N C 304—State v Robinson, 195 S E 824 213 N C 273—State v Terrell, 193 S E 161, 212 N C 145 —State v Kirkman, 182 S E 498, 208 N C 719—State v Marshall, 179 S E 427, 208 N C 127—State v Glenn, 150 S E 663, 198 N C 79 —State v Bush, 114 S E 831, 184 N C 778—State v Johnson, 113 S E 617, 184 N C 637
Okl —Murphy v State 112 P 2d 438, 72 Okl Cr 1—Adams v State, 70 P 2d 821, 62 Okl Cr 167—Fulton v State, 254 P 761, 36 Okl Cr 358—Brown v State, 216 P 941, 24 Okl Cr 161
S C State v Blackstone, 154 S E 161, 157 S C 278
Tex - Holland v State 39 S W 2d 35, 118 Tex Cr 139 -Hanks v State, 269 S W 106 99 Tex Cr 218
Va —Fortune v Commonwealth, 112 S E 861 133 Va 669
Wash —State v Tyree, 255 P 382, 143 Wash 313
W Va —State v Preece, 179 S E 524, 116 W Va 176
30 C J p 59 note 76
"Men, when threatened with danger, must determine the necessity of resorting to self-defense, and they will not be held responsible for a mistake in the extent of the actual danger, nor be subject to the peril of making that guilty, if appearances prove false, which would be innocent if they proved true"—Cottrell v Commonwealth, 111 S W 2d 445, 451, 271 Ky 52.

harm or the commission of a felony upon his person, and that in order to save himself from such peril it is necessary to kill,[72] or, as some authorities hold, to use the force which he does use, however dangerous or deadly that force may be[73] The rule is applicable even though the circumstances and surroundings may be apparently dangerous[74] or although there are reasonable grounds to apprehend death or great bodily harm[75] The fact that a statute making homicide justifiable when there is reasonable ground for apprehension of danger does not refer by specific words to any belief or apprehension of danger which may exist in the mind of accused does not obviate the requirement, since it is held that there is not a reasonable ground of apprehension within the meaning of such a statute, unless it is such as actually produces in the mind of accused an honest belief of the existence of the danger which would justify his act of defense[76] Where accused knows that the appearances of danger are deceptive and that he is actually in no danger, he should not be acquitted on the ground that a man of ordinary reason and prudence in the same situation would be deceived by the false appearance of danger[77] While accused may act on appearances, see supra § 125, he must entertain a bona fide belief that he is in actual, and not apparent, peril or danger and that there is a real necessity to kill, in other words, the appearances of danger must be bona fide believed by him to indicate actual peril and a real necessity for taking life[78] A supposition[79] or a probable belief[80] is not the equivalent of the actual and bona fide belief required, and a belief that there is a reasonably apparent necessity to kill is insufficient[81] While the necessity of a belief implies to some extent the exercise of thought,[82] yet, since the circumstances under which an assailed person is called on to defend are often quite unfavorable to mature deliberation, to deny the right to act promptly and decisively and without deliberate thought in such instances would be to deny the right of self-defense[83] However, accused

72. Ala—Hayes v State, 142 So 675, 225 Ala 253—Simpson v State App, 13 So 2d 437—Williams v State, 163 So 668, 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93—Lawler v State, 115 So 420, 22 Ala App 329—McBride v State, 109 So 566, 21 Ala App 508—Vaughan v State 107 So 797, 21 Ala App 204, certiorari denied 107 So 799, 211 Ala 384—Rice v State, 101 So 82, 20 Ala App 102—Cox v State 96 So 83, 19 Ala App 205
Ariz—Walker v State, 83 P 2d 994, 52 Ariz 480—Woodson v State, 247 P 1103, 30 Ariz 448
Cal—People v Best, 57 P 2d 168, 15 Cal App 2d 606
Del—State v Lynch, 128 A 564, 2 W W Harr 597
DC—Kinard v U S, 96 F 2d 522, 68 App D C 250
Fla—Rowe v State, 163 So 22, 120 Fla 619
Idaho—State v Jurko, 245 P 685, 42 Idaho 319
Ill—People v Organ, 178 N E 73, 345 Ill 339—People v Jones, 145 N E 110, 313 Ill 335—People v Borella, 143 N E 471, 312 Ill 31
Iowa—State v Norton, 286 N W 476, 227 Iowa 13—State v Johnson, 274 N W 41, 223 Iowa 962
Ky—Grubbs v Commonwealth, 42 S W 2d 702, 240 Ky 473—Canterbury v Commonwealth, 27 S W 2d 946, 234 Ky 268—Eaton v Commonwealth, 19 S W 2d 218, 230 Ky 250
La—State v Ciaccio, 112 So 486, 163 La 563
Miss—Carnes v State, 185 So 810
Mo—State v Singleton, 77 S W 2d 80
N M—State v. Aragon, 292 P 225, 35 N M. 198.
N C—State v Mosley, 195 S E 830, 213 N C 304—State v Robinson, 195 S E 824, 213 N C 273—State v Terrell, 193 S E 161 212 N C 145—State v Keeter, 174 S E 298, 206 N C 482—State v Parker, 152 S E 890, 198 N C 629—State v Glenn, 150 S E 663, 198 N C 79—State v Holland, 138 S E 8, 193 N C 713—State v Johnson, 113 S E 617, 184 N C 637
Ohio—State v Champion, 142 N E 141, 109 Ohio St 281—Stewart v State, 138 N E 876, 105 Ohio St 625
Okl—Powell v State, 12 P 2d 247, 53 Okl Cr 366—Fulton v State, 251 P 761, 36 Okl Cr 358
Tex—McGrew v State, 80 S W 2d 748, 128 Tex Cr 238—Forrester v State, 4 S W 2d 966, 109 Tex Cr 361—Briggs v State, 255 S W 410, 95 Tex Cr 629
Vt—State v Rounds, 160 A 249, 101 Vt 412
Va—Vlastaris v Commonwealth, 178 S E 775, 164 Va 647
Wash—State v Tyree, 255 P 382, 113 Wash 313
W Va—State v Preece, 179 S E 524, 116 W Va 176
Wyo—Espy v State, 92 P 2d 519, 54 Wyo 291—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 60 note 79

73. Ind—Flick v State, 193 S E 603, 207 Ind 473
30 C J p 60 note 79 [b]
Manner of repelling attack see infra § 131
"The theory of self-defense is, that the party assailed has the right to repel force by force, and need not believe that his safety requires him to kill his adversary in order to give him the right to make use of force for that purpose He need not believe that he can only defend himself by taking the life of his assailant If the death of his assailant results from the reasonable defense of himself he is excusable, whether he intended that consequence or not, or whether he believed such result necessary or not"—Hicks v State, 51 Ind 107, 410

74. Ala—Harrison v State, 40 So 568 144 Ala 20
Ariz—Woodson v State 247 P 1103, 30 Ariz 448

75 Tex—Forrester v State, 4 S W. 2d 966, 109 Tex Cr 361
30 C J p 60 note 82

76 Wash—State v Bowinkelman, 119 P 824, 66 Wash 396

77. Fla—Sylvester v State, 35 So 142, 46 Fla 166, 182
Tex—Forrester v State, 4 S W 2d 966, 109 Tex Cr 361

78. Ark—Stoddard v State, 276 S W 358, 169 Ark 594
Fla—Crockett v State, 188 So 214, 137 Fla 450
Tex—Forrester v State, 4 S W 2d 966, 109 Tex Cr 361
30 C J p 60 note 84

79 Ala—Twitty v State, 53 So 308, 168 Ala 59
Iowa—State v Towne, 160 N W 10, 180 Iowa 339

80. Ala—Mann v State, 32 So 704, 134 Ala 1

81. Ark—Stoddard v State, 276 S W 358, 169 Ark 594

82. Ind—Fields v State, 32 N E 780, 134 Ind 46

83. Ind—Fields v State, supra.

must have arrived at his belief without any fault or negligence on his part.[84]

The right of a person to take life in self-defense arises from his belief in the necessity for it, and his belief and the reasonableness thereof are to be judged in the light of the circumstances as they appeared to him,[85] and not from the circumstances as they appear to others or the belief that others may or might entertain as to the nature and imminence of the danger and the necessity to kill,[86] although, as appears infra subdivision b (1) (b) of this section, there is a lack of harmony among the authorities as to the standard of reasonableness to be applied. Clearly it is not necessary that it appear to the jury or that the jury shall believe that accused was in actual danger of suffering death or great bodily harm from deceased and that there was an actual necessity for the killing.[87] Indeed, it is the duty of the jury to consider the facts from the standpoint of accused and not merely from the standpoint of accused as nearly as they are able to do so.[88]

As basis of action. In order to render a homicide justifiable or excusable on the ground that accused honestly fears or believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to kill to save himself therefrom, it is essential that he act solely under the influence of that fear, belief, or apprehension,[89] and not in a spirit of anger, revenge, or malice,[90] or through mere cowardice.[91] On the other hand, a showing that the killing was not done in a spirit of revenge is not essential to justify a homicide committed in resisting a felonious attack actually being made on accused.[92]

Where actual peril exists. Some authorities hold that the requirement of honest belief is applicable only to a state of reasonably apparent peril,[93] and that where accused was in actual imminent peril of his life or serious bodily harm, and the other con-

Accused not conscious of actions

Circumstances may justify a claim of self-defense even though accused was not conscious of his actions at the actual instant of killing, and he may claim the benefit of the situation as it reasonably appeared to him up to time when he became unconscious.—Wilker v State 83 P 2d 994, 52 Ariz 180

84. Fla.—Crockett v State, 188 So 214, 137 Fla 150—O'Steen v State, 111 So 725, 92 Fla 1062
30 C.J. p 59 note 77

85. Ark.—Sullivan v State, 286 S W 939, 171 Ark 768
Fla.—Crockett v State, 188 So 214, 137 Fla 150—Lightbourn v State, 175 So 857, 129 Fla 13—O'Steen v State, 111 So 725, 92 Fla 1062
Ill.—People v Duncan, 145 N E 810, 315 Ill 106—People v Jones, 145 N E 110, 313 Ill 335
Ind.—McKee v State, 154 N E 372, 198 Ind 590
Kan.—State v Kelly, 291 P 945, 131 Kan 357
Ky.—Fuson v Commonwealth, 20 S W 2d 742, 230 Ky 761—Lewis v Commonwealth, 6 S W 2d 502, 224 Ky 502—Goins v Commonwealth, 3 S W 2d 631, 223 Ky 211
N.C.—State v Terrell, 193 S E 161, 212 N C 145—State v Thornton, 190 S E 758, 211 N C 413—State v Marshall, 179 S E 427, 208 N C 127—State v Glenn, 150 S E 663, 198 N C 79
Okl.—Adams v State, 70 P 2d 821, 62 Okl Cr 167—Lary v State, 296 P 512, 60 Okl Cr 111—Whisenhunt v State, 266 P 792, 40 Okl Cr 50—Fulton v State, 254 P 761, 36 Okl Cr 358—Jamison v State, 250 P 548, 35 Okl.Cr 302.
Tex.—Henry v State, 123 S W 2d 317, 136 Tex Cr 22—McGrew v State, 80 S W 2d 748, 128 Tex Cr 238—Privett v State, 44 S W 2d 694, 119 Tex Cr 455—Robidoux v State, 34 S W 2d 863, 116 Tex Cr 132—Hanks v State, 269 S W 106, 99 Tex Cr 218—Brownlee v State, 87 S W 1153, 48 Tex Cr 408
Va.—Fortune v Commonwealth, 112 S E 861, 133 Va 669
Wash.—State v Tyree, 255 P 382, 143 Wash 313
30 C.J. p 60 note 78, p 64 note 38

88. Ky.—Lewis v Commonwealth, 6 S W 2d 502, 224 Ky 502—Goins v Commonwealth, 3 S W 2d 631, 223 Ky 211
Wash.—State v Tyree, 255 P 382, 143 Wash 313
"The accused is not tried from the standpoint of the other side."—Singleton v State, 216 S W 1094, 1095, 86 Tex Cr 101

Belief of codefendant

Ky.—Smith v Commonwealth, 6 S W 2d 464, 224 Ky 146

87. Ill.—People v Durand, 139 N E 78, 307 Ill 611
Iowa.—State v Leeper, 200 N W 732, 199 Iowa 132
Ky.—Canterbury v Commonwealth, 27 S W 2d 946, 231 Ky 268—Fuson v Commonwealth, 20 S W 2d 742, 230 Ky 761—Lewis v Commonwealth, 6 S W 2d 502, 224 Ky 502
N.C.—State v Bush, 114 S E 831, 184 N C 778
Okl.—Murphy v State, 112 P 2d 438, 72 Okl Cr 1—Brown v State, 216 P 944, 24 Okl Cr 161
Tex.—Privett v State, 44 S W 2d 694, 119 Tex Cr 455—Barfield v State, 43 S W 2d 106, 118 Tex Cr. 394—Holland v State, 39 S W 2d 35, 118 Tex Cr 439—Matthews v State, 28 S W 2d 161, 116 Tex Cr 519—Hanks v State, 269 S W 106, 99 Tex Cr 218—Briggs v State, 255 S W 410, 95 Tex Cr 629
Va.—Fortune v Commonwealth, 112 S E 861, 133 Va 669
Wash.—State v Tyree, 255 P 382, 143 Wash 313
30 C.J. p 60 note 78, p 64 note 38

88. Tex.—Brownlee v State, 87 S W 1153, 48 Tex Cr 408

89. Ariz.—Encinas v State, 221 P 232, 26 Ariz 24
Ark.—Smith v State, 287 S W 1026, 172 Ark 156
Cal.—People v Head, 288 P 106, 105 Cal App 331
Ill.—People v Duncan, 145 N E 810, 315 Ill 106—People v Jones, 145 N E 110, 313 Ill 335
Mont.—State v Harkins, 281 P 551, 85 Mont 585
N.M.—State v Aragon, 292 P 225, 35 N M 198
30 C.J. p 61 note 95

90. Ark.—Smith v State, 287 S W 1026, 172 Ark 156
Ill.—People v Jones, 145 N E 110, 313 Ill 335
30 C.J. p 61 note 96

91. Okl.—Murphy v State, 112 P 2d 438, 72 Okl Cr 1—Fisk v State, 71 P 2d 499, 62 Okl Cr 305—Calloway v State, 262 P 696, 38 Okl Cr 418
30 C.J. p 61 note 97

92. Ga.—Keaton v. State, 25 S E 615, 99 Ga 197.

93. Ala.—Walker v State, 126 So 848, 220 Ala 544—O'Rear v. State, 66 So 81, 188 Ala 71.

ditions requisite to the exercise of the right of self-defense were present, his honest belief in such peril is not material and the law will make no inquiry as to its existence.[94] However, it has also been held that a person who deliberately and maliciously kills another cannot successfully interpose the plea of self-defense where, although there is actual danger, he is ignorant thereof at the time and does not entertain any belief or apprehension of danger.[95]

Defense of one's self in one's habitation is subject to the same qualification as to good faith in believing the danger imminent as in other cases.[96]

b. Grounds for Belief

(1) Reasonableness of grounds
(2) Attack or demonstration
(3) Threats

(1) Reasonableness of Grounds

(a) In general
(b) Standards of reasonableness

(a) In General

To justify or excuse a homicide on the ground of self-defense it is not enough that the accused honestly believes himself to be in danger, but there must be reasonable grounds for such belief

To justify or excuse a homicide on the ground of self-defense it is not enough that the slayer honestly believes himself to be in danger,[97] or that he entertains a bare fear of the commission on his person of those felonies to prevent which homicide may be lawfully committed.[98] There must be some grounds for the belief or fear,[99] the circumstances must be such as to make the belief or apprehension a reasonable one.[1] As frequently stated the rule is that, where the other elements of self-defense are present, it is necessary and sufficient that accused have reasonable grounds or cause to believe or apprehend that another is about to take his life or do him great bodily harm, and that it is necessary to kill to save himself from the impending danger.[2] It is sometimes stated that the belief must be, or is

94. Ala.—Walker v. State, 126 So. 848, 220 Ala. 511.
30 C.J. p. 61 note 93.

95. Ind.—Trogdon v. State, 32 N.E. 725, 133 Ind. 1.

96. Minn.—State v. Touri, 112 N.W. 422, 101 Minn. 370.
Defense of habitation as justifying or excusing homicide see supra § 109.

97. Ariz.—Encinas v. State, 221 P. 232, 26 Ariz. 24.
Ark.—Smith v. State, 287 S.W. 1026, 172 Ark. 156.
Cal.—People v. Ingrum, 93 P.2d 1056, 34 Cal.App.2d 562.—People v. Head, 288 P. 106, 105 Cal.App. 331.—People v. Loomis, 261 P. 512, 86 Cal.App. 768.
Del.—State v. Lee, 171 A. 195, 6 W.W.Harr. 11.
La.—State v. Ciaccio, 112 So. 486, 163 La. 563.
Miss.—Hartfield v. State, 170 So. 531, 176 Miss. 776.—Ransom v. State, 115 So. 208, 149 Miss. 262.
N.C.—State v. Kirkman, 182 S.E. 498, 208 N.C. 719.
Okl.—Hood v. State, 106 P.2d 271, 70 Okl.Cr. 271.—Phelps v. State, 78 P.2d 1068, 64 Okl.Cr. 240.—Johnson v. State, 47 P.2d 605, 57 Okl.Cr. 239.—Lary v. State, 296 P. 512, 50 Okl.Cr. 111.—Lemmons v. State, 265 P. 652, 39 Okl.Cr. 383.—Edge v. State, 264 P. 213, 39 Okl.Cr. 277.—Fixico v. State, 263 P. 171, 39 Okl.Cr. 95.—Lee v. State, 244 P. 455, 33 Okl.Cr. 370.—Hunt v. State, 233 P. 506, 29 Okl.Cr. 255.
30 C.J. p. 61 note 99.

98. Ala.—Kennedy v. State, 196 So. 884, 240 Ala. 89.
Fla.—Thomas v. State, 118 So. 22, 96 Fla. 213.
Ill.—People v. Jones, 145 N.E. 110, 313 Ill. 335.
Miss.—Hartfield v. State, 170 So. 531, 176 Miss. 776.—Ransom v. State, 115 So. 208, 149 Miss. 262.
Mont.—State v. Harkins, 281 P. 551, 85 Mont. 585.
Okl.—Jamison v. State, 250 P. 548, 35 Okl.Cr. 302.
Va.—Vlastaris v. Commonwealth, 178 S.E. 775, 164 Va. 647.
30 C.J. p. 61 note 1.

99. Ark.—Allison v. State, 86 S.W. 409, 74 Ark. 444.
Tex.—Cloud v. State, 153 S.W. 892, 69 Tex.Cr. 76.
"No person has the right to kill another through unfounded fear or cowardice."—Murphy v. State, 112 P.2d 438, 457, 72 Okl.Cr. 1.—Fisk v. State, 71 P.2d 499, 501, 62 Okl.Cr. 305.—Calloway v. State, 262 P. 696, 699, 38 Okl.Cr. 418.

Uncontrollable fear

Accused who killed another while under the influence of uncontrollable fear of death or great bodily injury rendering him incapable of cool reflection, was not excused on ground of self-defense.—State v. Wright, 34 P.2d 870, 38 N.M. 427.

1. Ala.—Green v. State, 189 So. 763, 238 Ala. 143.—Rice v. State, 101 So. 82, 20 Ala.App. 102.
Ariz.—Taylor v. State, 232 P. 552, 27 Ariz. 228.
Ark.—Freeman v. State, 298 S.W. 333, 174 Ark. 1035.
Cal.—People v. Loomis, 261 P. 512, 86 Cal.App. 768.
Del.—State v. Stevenson, 188 A. 750, 8 W.W.Harr. 105.
D.C.—Kinard v. U. S., 96 F.2d 522, 68 App.D.C. 250.
Idaho.—State v. Jurko, 245 P. 685, 42 Idaho 319.
Ill.—People v. Motuzas, 185 N.E. 614, 352 Ill. 340.—People v. Jones, 145 N.E. 110, 313 Ill. 335.
Kan.—State v. Kelly, 291 P. 945, 131 Kan. 357.
Mo.—State v. Glover, 50 S.W.2d 1019, 1056, 330 Mo. 709 citing **Corpus Juris.**
N.C.—State v. Bush, 114 S.E. 831, 184 N.C. 778.
Ohio.—Stewart v. State, 138 N.E. 876, 105 Ohio St. 625.
Okl.—Murphy v. State, 112 P.2d 438, 72 Okl.Cr. 1.—Adams v. State, 70 P.2d 821, 62 Okl.Cr. 821.—Whisenhunt v. State, 266 P. 792, 40 Okl.Cr. 50.—Fulton v. State, 254 P. 761, 36 Okl.Cr. 358.—Jamison v. State, 250 P. 548, 35 Okl.Cr. 302.—Brown v. State, 216 P. 944, 21 Okl.Cr. 161.
Pa.—Commonwealth v. Miller, 170 A. 128, 313 Pa. 567.
Tex.—Shannon v. State, 30 S.W.2d 331, 115 Tex.Cr. 249.—Forrester v. State, 4 S.W.2d 966, 109 Tex.Cr. 361.
Va.—Vlastaris v. Commonwealth, 178 S.E. 775, 164 Va. 647.
30 C.J. p. 61 note 3.
"Men do not hold their lives at the mercy of excessive caution or unreasonable fear of others."—Ammons v. State, 102 So. 642, 645, 88 Fla. 444.

2. Ala.—Vaughan v. State, 107 So. 797, 21 Ala.App. 204, certiorari denied 107 So. 799, 214 Ala. 384.—Cox v. State, 96 So. 83, 19 Ala.App. 205.
Cal.—People v. Ingrum, 93 P.2d 1056, 34 Cal.App.2d 562.—People v. Best, 57 P.2d 168, 13 Cal.App.2d 606.—

sufficient if it is, well founded,[3] or reasonable and well-founded,[4] or reasonable and well grounded,[5] but it is expressly held that, unless otherwise limited,[6] it is error to require both a reasonable and a well grounded belief, as the former is sufficient and the latter signifies a higher apprehension of danger than the law requires to constitute a justification for a homicide.[7] The belief or conviction required is a "reasonable," rather than a "judicious" one.[8] It is not true that in all cases a person has a right to kill when he has reasonable ground for believing that he is in danger at the time of losing his life or incurring great bodily harm, all the other elements of self-defense must be present.[9] While it is not a condition to the exercise of the right of self-defense in a proper case that deceased have been, or known as, a dangerous man,[10] in determining from the standpoint of accused the reasonableness of his apprehension of danger his knowledge of deceased's propensity to attack persons without cause is an important circumstance.[11]

(b) Standards of Reasonableness

According to most authorities the test whether the accused's belief was reasonable is whether the circumstances would have induced a like belief in a reasonable man, but other authorities hold that the test is whether the circumstances were such as reasonably to induce in the accused, and not in a hypothetical reasonable man, a belief that he was in imminent and grave danger

While, as appears supra subdivision b (1) (a) of this section, it is generally agreed that accused's belief in the nature and imminence of the danger and the necessity of killing must be reasonable, the authorities are not in agreement as to the standard of reasonableness by which his belief is to be measured.

In the majority of jurisdictions, the reasonableness of his belief is not determined from the standpoint of accused, that is to say, it is not to be measured by accused's standard of reasonableness,[12] or by that of a man of the class to which accused belongs, such as a person of accused's age, temperament, intelligence, experience, or physical condi-

People v Orosco, 239 P 82, 73 Cal App 580
Del—State v Lee, 171 A 195, 6 W W Harr 11—State v Lynch, 128 A 564, 2 W W Harr 597
Fla—Crockett v State, 188 So 214, 137 Fla 450—Lightbourn v State 175 So 857, 129 Fla 43—Thomas v State 118 So 22, 96 Fla 243—Scholl v State, 115 So 43, 94 Fla 1138—O'Steen v State, 111 So 725, 92 Fla 1062—Linsley v State, 101 So 273, 88 Fla 135
Ill—People v Organ, 178 N E 73, 345 Ill 339
Iowa—State v Norton, 286 N W 476, 227 Iowa 13
Ky—Farley v Commonwealth, 145 S W 2d 100, 284 Ky 536—Hensley v Commonwealth, 69 S W 2d 17, 253 Ky 171—Grubbs v Commonwealth, 42 S W 2d 702, 240 Ky 473—Gill v Commonwealth, 31 S W 2d 608, 235 Ky 351—Fuson v Commonwealth, 20 S W 2d 742, 230 Ky 761—Eaton v Commonwealth, 19 S W 2d 218, 230 Ky 250—Morgan v Commonwealth, 15 S W 2d 273, 228 Ky 432
La—State v Thornhill, 178 So 343, 188 La 762—State v Ciaccio, 112 So 486, 163 La 563
Miss—Carnes v State, 185 So 810—Hartfield v State, 170 So 531, 176 Miss 776—Ransom v State, 115 So 208, 149 Miss 262
Mo—State v Huett, 104 S W 2d 252, 340 Mo 934—State v Singleton, 77 S W 2d 80—State v Bongard, 51 S W 2d 84, 330 Mo 805—State v Roberts, 242 S W 669, 294 Mo 284
Mont—State v Fine, 2 P 2d 1016, 90 Mont 311—State v Harkins, 281 P 551, 85 Mont 585
N M—State v Aragon, 292 P 225, 35 N M 198
N C—State v Mosley, 195 S E 830, 213 N C 301—State v Robinson, 195 S E 824 213 N C 273 State v Elmore, 193 S E 713, 212 N C 531—State v Terrell, 193 S E 161, 212 N C 115—State v Kirkman, 182 S E 498, 208 N C 719—State v Marshall 179 S E 427, 208 N C 127—State v Parker, 152 S E 890, 198 N C 629—State v Glenn, 150 S E 663, 198 N C 79—State v Holland 138 S E 8 193 N C 713—State v Johnson, 113 S E 617, 184 N C 637
Ohio—State v Champion 142 N E 141, 109 Ohio St 281
Okl—Hood v State, 106 P 2d 271, 70 Okl Cr 334—Phelps v State, 78 P 2d 1068, 64 Okl Cr 240—Johnson v State, 47 P 2d 605, 57 Okl Cr 239—Powell v State 12 P 2d 247, 53 Okl Cr 366—Lary v State 296 P 512, 50 Okl Cr 111—Lemmons v State, 265 P 652, 39 Okl Cr 383—Edge v State, 264 P 213, 39 Okl Cr 277—Fixico v State, 263 P 171, 39 Okl Cr 95—Lee v State, 244 P 455, 33 Okl Cr 370—Hunt v State, 233 P 506, 29 Okl Cr 255
Pa—Commonwealth v Capalla, 185 A 203, 322 Pa 200
Tex—Henry v State, 123 S W 2d 347, 136 Tex Cr 22—McGrew v State, 80 S W 2d 748, 128 Tex Cr 238—Barfield v State, 43 S W 2d 106, 118 Tex Cr 394
Vt—State v Rounds, 160 A 249, 104 Vt 442
Va—Smith v Commonwealth, 182 S E 124, 165 Va 776—Dodson v Commonwealth, 167 S E 260, 159 Va 976
Wyo—Espy v State, 92 P 2d 549, 54 Wyo 291—State v Radon, 19 P 2d 177, 45 Wyo 383—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 61 note 4

3. Ala—Williams v State, 50 So 59, 161 Ala 52
N C—State v Holland, 138 S E 8, 193 N C 713

4. Ill—People v Organ, 178 N E 73, 345 Ill 339

5. Ill—People v Motuzas, 185 N E 614, 352 Ill 340
30 C J p 62 note 6

6. Ill—People v Davis, 133 N E 320, 300 Ill 226, 235
30 C J p 62 note 7

7. Ill—People v Davis, supra
30 C J p 62 note 8

8. Cal—People v Smith, 129 P 785, 164 Cal 151

9. Tex—Robinson v State, 274 S W 137, 100 Tex Cr 424
30 C J p 62 note 10

10. Tex—Wallace v State, 97 S W 471, 50 Tex Cr 374—St Clair v State, 92 S W 1095, 49 Tex Cr 479

11. Conn—State v Padula, 138 A 456, 106 Conn 454
Okl—Murphy v State, 112 P 2d 438, 72 Okl Cr 1

12. Miss—Hartfield v State, 170 So 531, 176 Miss 776—Ransom v State, 115 So 208, 149 Miss 262
Okl—Adams v State, 70 P 2d 821, 62 Okl Cr 167
30 C J. p 62 note 12.

tion;[13] the test of reasonableness applied is that the circumstances surrounding accused at the time of the killing must be such as would induce a reasonable man,[14] or an ordinarily prudent man,[15] or a reasonably cautious man,[16] or a reasonably prudent man,[17] or a reasonable and prudent man,[18] or an ordinarily reasonable and prudent man,[19] or a reasonably cautious and prudent man,[20] or a reasonably prudent or cautious man,[21] or a reasonably well-disposed man of ordinary prudence[22] so situated honestly to believe that he is in imminent peril and that it is necessary for him to kill in order to save himself from death or great bodily harm The circumstances need not be such as to "convince" a reasonable man similarly situated that he is in danger of losing his life or receiving great bodily injury,[23] the term "induce to suppose" is said to express the right meaning[24] As sometimes stated, generally under statutory provisions, it must appear that the circumstances are such as would excite the fears of a reasonable person,[25] but the codes and statutes do not undertake to define what circumstances shall or shall not be sufficient to excite such fears[26] Some courts hold that the circumstances must be such as to induce or justify the requisite fear or belief on the part of a reasonably or ordinarily courageous man[27] or a person possessed of ordinary firmness[28] and reason,[29] but other courts, while adhering to the majority rule that the belief of a reasonable man is the test to be applied, nevertheless deem it improper to apply the standard of what a reasonably courageous man would have believed and done under the same circumstances[30] A belief in the necessity of killing does not excuse accused where it arises only from his intoxicated condition,[31] neither can accused excuse himself on the theory that under the excitement of the moment he acted with undue haste[32] In the case of actual impending peril, the law makes no inquiry as to the existence of such circumstances as would impress a reasonable man with the honest belief that impending peril exists[33]

The view obtaining in the minority of jurisdictions is that if the circumstances, viewed from the standpoint of accused alone, are sufficient to induce in him an honest and reasonable belief that he is in danger of great bodily harm or loss of life, he is justified or excused in killing[34] In these jurisdic-

13. Mont State v Cadotte, 42 P 857, 17 Mont 315
30 C J p 62 note 13

14. Ala—Buffalow v State, 122 So 633, 219 Ala 407—Bailey v State, 117 So 505, 22 Ala App 531—Rice v State, 101 So 82, 20 Ala App 102—Cox v State, 96 So 83, 19 Ala App 205
Ariz—Woodson v State, 247 P 1103, 30 Ariz 118—Encinas v State, 221 P 232, 26 Ariz 24
Cal—People v Orosco, 239 P 82, 73 Cal App 580
Del—State v Stevenson, 188 A 750, 8 W W Harr 105—State v Lee, 171 A 195, 6 W W Harr 11
Idaho—State v Jurko, 245 P 685, 42 Idaho 319
Ill—People v Scimeni, 147 N E 484, 316 Ill 591—People v Borella, 143 N E 471, 312 Ill 34
Iowa—State v Johnson, 274 N W 41, 223 Iowa 962
La—State v Ciaccio, 112 So 486, 163 La 563
Mont—State v Jennings, 28 P 2d 448, 96 Mont 80, 121 A L R 375—State v Harkins, 281 P 551, 85 Mont 585
Okl—Adams v State, 70 P 2d 821, 62 Okl Cr 167—Lary v State, 296 P 512, 50 Okl Cr 111—Fulton v State, 254 P 761, 36 Okl Cr 358—Jamison v State, 250 P 548, 35 Okl Cr 302
30 C J p 62 note 14

15. Iowa—State v Brooks, 186 N W 46, 192 Iowa 1107
N M—State v Simpson, 46 P 2d 49, 39 N M 271.

16. Fla—Scholl v State, 115 So 43, 94 Fla 1138
30 C J p 63 note 15

17. D C—Sacrini v U S, 38 App D C 371
30 C J p 63 note 16

18. N M—State v Calhoun, 170 P 750, 23 N M 681

19. Cal—People v Smith, 129 P 785, 164 Cal 451

20. Fla—Lightbourn v State, 175 So 857, 129 Fla 43—Scholl v State, 115 So 43, 94 Fla 1138—O'Steen v State, 111 So 725, 92 Fla 1062—Linsley v State, 101 So 273, 88 Fla 135
Wash—State v Tyree, 255 P 382, 143 Wash 313
Wyo—State v Sorrentino, 224 P 420, 31 Wyo 129, 34 A L R 1477
30 C J p 63 note 17

21. Fla—Crockett v State, 188 So 214, 137 Fla 150—Ammons v State, 102 So 642, 88 Fla 444

22. Miss—Hartfield v State, 170 So 531, 176 Miss 776

23. Ill—People v Williams, 88 N E 1053, 240 Ill 623

24. Ill—People v Williams, supra

25. Ariz—Encinas v State, 221 P 232, 26 Ariz 24
Ark—Smith v State, 287 S W 1026, 172 Ark 156
Cal—People v Head, 288 P 106, 105 Cal App 331
Ga—Vincent v State, 112 S E 120, 153 Ga 278
Ill—People v Duncan, 145 N E 810, 315 Ill 106—People v Jones, 145 N E 110, 313 Ill 335
30 C J p 63 note 23

26. Ga—Cumming v State, 27 S E 177, 99 Ga 662

27. Ga—Vincent v State, 112 S E 120, 153 Ga 278
N M—State v Simpson, 46 P 2d 49, 39 N M 271
30 C J p 63 note 25

28. Ohio—Stewart v State, 138 N E 876, 105 Ohio St 625

29. S C—State v Blackstone, 154 S E 161, 157 S C 278
30 C J p 63 note 26

30. Cal—People v Smith, 129 P 785, 164 Cal 451
Ill—People v Duncan, 145 N E 810, 315 Ill 106
30 C J p 63 note 27

31. Ill—Bleich v People, 81 N E 36, 227 Ill 80
30 C J p 63 note 25 [c]

32. Iowa—State v Towne, 160 N W 10, 180 Iowa 339

33. Ala—Carroll v State, 81 So 853, 17 Ala App 75
N Y—People v Fiori, 108 N Y S 416, 123 App Div 174

34. Ind—McKee v State, 154 N E 372, 198 Ind 590
Mich—People v Giacalone, 217 N W 758, 760, 242 Mich 16, quoting **Corpus Juris.**
Tex—Robidoux v State, 34 S W 2d 863, 116 Tex Cr 432—Shannon v State, 30 S W 2d 331, 115 Tex Cr.

tions the circumstances are not to be viewed and judged from the standpoint of, or according to the effect or belief they would produce in the mind of, a hypothetical reasonable man,[35] a prudent person,[36] a reasonably prudent man,[37] a reasonably cautious person,[38] a man of ordinary intelligence and courage,[39] or a man of ordinary prudence, caution, and courage[40] Obviously, where it is only required that the circumstances be such as to induce in accused a reasonable belief in the imminence of the danger and the necessity of killing, it is certainly sufficient if the circumstances are such as to induce such a belief in a reasonably prudent person[41]

Regardless of what standard of reasonableness is applicable, while accused is in the first instance the judge of the appearances of danger,[42] his judgment may not be arbitrary[43] and is not conclusive,[44] since, as appears infra § 344, ultimately the reasonableness of accused's belief or apprehension is to be determined by the jury.

(2) Attack or Demonstration

(a) In general

(b) With or without deadly weapon

(a) In General

While an actual assault or attack is not essential to justify or excuse a homicide in self-defense, there must have been some overt act or hostile demonstration by the deceased inducing the belief in the accused that he was in imminent and grave danger

In order to justify or excuse homicide in self-defense, it is not necessary that deceased shall have made an actual assault or attack on accused, if the circumstances showed or raised a reasonable apprehension that he was about to do so,[45] but it is generally held necessary that he shall have indicated by some overt act or hostile demonstration at the time of the killing a real or apparent intention to kill or inflict great bodily harm on accused and thereby induced the latter to believe on reasonable grounds that he was in imminent danger and that it was necessary to kill to save himself,[46] although it has also been held that, if deceased's conduct induced such a belief, a "pass" or "demonstration" was not required to entitle accused to exercise the right of self-defense[47] What constitutes such an overt act or demonstration depends on the circumstances of each case, no general rule can be laid down[48] The intent of deceased to kill or inflict serious bodily injury may reasonably appear from his acts alone or from his acts coupled with his

249—Gilbert v State, 26 S W 2d 614, 114 Tex Cr 532
30 C J p 63 note 31
"The conduct of any individual is to be measured by that individual's equipment mentally and physically He may act in self-defense, not only when a reasonable person would so act, but when one with the particular qualities that the individual himself has would do so A nervous, timid, easily frightened individual is not measured by the same standard that a stronger, calmer, and braver man might be"—Nelson v State, 181 N E 448, 449, 42 Ohio App 252

35. Ohio—Nelson v State, supra

36. Ohio—Taylor v State, 31 Ohio Cir Ct 602

37. Mo—State v Turner, 152 S W 313, 246 Mo 598, Ann Cas 1914B 451

38. N D—State v Hazlet, 113 N W 374, 16 N D 426

39. W Va—State v Cain, 20 W Va 679

40. Tenn—Frazier v. State, 100 S W 94, 117 Tenn 430

41. W.Va—State v Preece, 179 S E 524, 116 W Va 176

42. W Va—State v Cain, 20 W Va 679

43. Tex—Singleton v State, 216 S W 1094, 86 Tex Cr 401.

44. Miss—Hartfield v State, 170 So 531, 176 Miss 776—Ransom v State, 115 So 208, 149 Miss 262
N C—State v Terrell, 193 S E 161, 212 N C 145
30 C J p 64 note 41

45. Del—State v Stevenson, 188 A 750, 8 W W Harr 105—State v Lee, 171 A 195, 6 W W Harr 11
Iowa—State v Crutcher, 1 N W 2d 195 198 231 Iowa 418, citing **Corpus Juris.**
La—State v Ciaccio, 112 So 486 163 La 563
Mo—State v Bongard, 51 S W 2d 84, 330 Mo 805—State v Ball, 262 S W 1043
Tex—Gilbert v State, 26 S W 2d 644, 114 Tex Cr 532
Wash—State v Adamo, 223 P 9, 128 Wash 419
Wyo—State v Radon, 19 P 2d 177, 45 Wyo 383
30 C J p 64 note 43

46. Fla—Thomas v State, 118 So 22, 96 Fla 243
Ky—Golden v Commonwealth, 121 S W 2d 21, 275 Ky 208—Cottrell v Commonwealth, 111 S W 2d 45, 271 Ky 52
Miss—Anderson v State, 179 So 560, 181 Miss 300
Mo—State v Ball, 262 S W 1043
Tex—Barfield v State, 43 S W 2d 106, 118 Tex Cr 394
Va—Thomason v Commonwealth, 17 S E 2d 374, 178 Va 489—Vlastaris v Commonwealth, 178 S E 775, 164 Va 647—Mercer v Commonwealth, 142 S E 369, 150 Va 588
Wash—State v Adamo, 223 P 9, 128 Wash 419
Wyo—State v Radon, 19 P 2d 177, 181, 45 Wyo 383, quoting **Corpus Juris.**
30 C J p 64 note 44
Act or demonstration indicating purpose to execute threat see infra subdivision b (3) of this section

47 Tex—Robidoux v State, 34 S W 2d 863, 116 Tex Cr 432

48. Iowa—State v Crutcher, 1 N W 2d 195 231 Iowa 418
30 C J p 65 note 45

It may consist of a motion a gesture, conduct, or demonstration, or anything else reasonably evidencing a present design to take accused's life or to do him great bodily harm—Anderson v State, 179 So 560, 181 Miss 300

Demonstration held sufficient

Accused, testifying that he was put in fear by attitude of deceased, walking toward him with package wrapped in paper, was held not without reasonable ground to believe he was in imminent danger, as matter of law, in view of previous difficulties with and threats by deceased, although latter made no actual assault—State v. Radon, 19 P 2d 177, 45 Wyo. 383.

words, so as to give rise to the right of self-defense;[49] but it has been held that words alone, at least when they are not threatening, do not place the person against whom they are spoken in physical danger.[50] The mere fact that deceased had at hand the means of carrying out an intention to kill or inflict serious bodily injury is no justification or excuse for killing him.[51]

(b) With or without Deadly Weapon

The mere use or nonuse of a deadly weapon in making the assault on, or demonstration against, the accused does not conclusively determine whether the accused's fear of death or great bodily harm was well grounded; all the surrounding circumstances must be considered

Whether an assault or attack with a dangerous or deadly weapon justifies the killing of the assailant depends on the circumstances,[52] it is not, as a matter of law, a justification.[53] However, where a presumption of an intent to kill or inflict serious bodily injury arises from the use of a deadly weapon, see infra § 188, it has been held that, where accused was assaulted by deceased with a deadly weapon, he had the right to believe that deceased intended to kill him.[54] The circumstances attending an attack with a deadly weapon are frequently such as to give accused reasonable ground to believe that he is in danger of death or great bodily harm and that it is necessary to kill to save himself.[55] A person attacked with a deadly weapon may, if he does so honestly and in good faith, rightfully act in the light of his surroundings and on the appearances to him at the time.[56] The mere fact that deceased was carrying a deadly weapon,[57] or made a threatening gesture as though to draw or use one,[58] or even drew[59] or presented[60] one, does not raise the apprehension necessary and sufficient to justify or excuse a killing in self-defense, there must have been other circumstances indicating an intention on the part of deceased to kill or inflict great bodily harm. However, where the circumstances coupled with the act of deceased in drawing or attempting to draw a weapon or making a movement or demonstration as if to draw or procure a weapon were such as to afford reasonable grounds for the belief that he was about to kill or inflict great bodily harm, accused was entitled to defend himself even to taking the life of deceased.[61] In such case, while accused was not entitled to act on the first appearance of danger,[62] he had a right to act promptly on the reasonable appearance of things and to anticipate the action of deceased by firing first, it was not necessary for him to wait until deceased was on equal terms or until he shot or aimed his weapon at accused or presented it in instant readiness for shooting,[63] even though it subsequently appears, in case of a movement or demonstration as though to draw a weapon, that deceased was in fact unarmed.[64] In order to justify a killing in self-defense, it is not true that there must have been used against the slayer what is commonly understood to be of itself a deadly weapon. It is sufficient if he was confronted with such means of force as to induce a reasonable apprehension that he was in danger of loss of life or great bodily harm.[65] It cannot be said that a person who has disarmed his adversary is under no necessity to employ the same weapon against the adversary, where the struggle continues, there is the contingency that accused may in turn be disarmed, and, in view of the nature of a wound re-

49. Tex.—Joubert v. State, 121 S.W. 2d 368, 136 Tex.Cr. 219
30 C.J. p. 65 note 46

50. Ohio—State v. Elliott, 11 Ohio Dec., Reprint, 332, 26 Cinc.L.Bul. 116
30 C.J. p. 56 note 51 [a]

51. Ala.—Springfield v. State, 11 So. 250, 96 Ala. 81, 38 Am.St.R. 85
30 C.J. p. 65 note 47

52. Or.—State v. Butler, 186 P. 55, 96 Or. 219

53. Fla.—Ward v. State, 79 So. 699, 75 Fla. 756

54. Tex.—Forrester v. State, 4 S.W. 2d 966, 109 Tex.Cr. 361
30 C.J. p. 65 note 52

55. Cal.—People v. Sherman, 37 P. 388, 103 Cal. 409
Philippine—U.S. v. Patala, 2 Philippine 752

56. U.S.—Owens v. U.S., Alaska, 130 F. 279, 64 C.C.A. 525

57. La.—State v. Ciaccio, 112 So. 486, 163 La. 563
30 C.J. p. 65 note 55

58. Fla.—Thomas v. State, 118 So. 22, 96 Fla. 243—Ammons v. State, 102 So. 612, 88 Fla. 444
30 C.J. p. 65 note 56

59. Pa.—Commonwealth v. Principatti, 104 A. 53, 260 Pa. 587

60. La.—State v. West, 12 So. 7, 45 La.Ann. 14
S.C.—State v. Bodie, 11 S.E. 624, 33 S.C. 117

61. Ala.—Cox v. State, 96 So. 83, 19 Ala.App. 205
Tex.—Shine v. State, 269 S.W. 804, 99 Tex.Cr. 418
30 C.J. p. 65 note 59

62. Miss.—Molphus v. State, 87 So. 133, 121 Miss. 584

63. Del.—State v. Stevenson, 188 A. 750, 8 W.W.Harr. 105
Wash.—State v. Adamo, 223 P. 9, 128 Wash. 419
30 C.J. p. 65 note 61

Deceased not within "striking distance"

One who has good reason to believe that another is about to shoot him need not wait until such other is "within striking distance" from him before firing revolver at him.—State v. Adamo, 207 P. 7, 120 Wash. 268

Ascertaining whether gun would shoot

Where a rifle was aimed at accused he was not required before striking in his defense to ascertain whether the gun would shoot.—Cox v. State, 96 So. 83, 19 Ala.App. 205

64. Tex.—Puryear v. State, 98 S.W. 258, 50 Tex.Cr. 454
30 C.J. p. 65 note 62

65. Ala.—Davis v. State, 107 So. 737, 214 Ala. 273
Ill.—People v. Motuzas, 185 N.E. 614, 352 Ill. 340.—People v. Organ, 178 N.E. 73, 345 Ill. 339
Miss.—Waller v. State, 44 So. 825, 91 Miss. 557.

ceived by accused, he may reasonably fear the outcome of a prolonged and continued hand to hand struggle[66] If no deadly weapons are used in the attack the relative strength and size of the persons have a bearing on the reasonableness of the apprehension,[67] but the relative strength and size of the persons does not affect one's right of self-defense where deadly weapons are used[68] Where the persons are of equal size and physical strength, the attack of one, without a deadly weapon, upon the other does not furnish to the latter reasonable ground to anticipate danger to life or the infliction of great bodily harm[69]

Attack with sticks or clubs It is a question of fact whether a person attacked with a stick is justified in considering himself in danger of life or limb[70] Merely raising a stick to strike, although the stick is capable of producing death, does not justify killing the assailant[71]

Attack or demonstration with ax Where deceased, without provocation, assaulted accused with an ax and was close enough to have hit him with it by throwing it at him, and, knowing of the threats of deceased and remembering the previous difficulties, accused had cause to believe that deceased was about to kill him or inflict great bodily harm on him and, so believing, shot and killed deceased, he was justified in so doing on the ground of self-defense,[72] but the mere brandishing of an ax by deceased did not necessarily show that he was about to use it on accused, or that accused had reason to believe that he was in imminent peril.[73]

Attack with calicut. In a case where deceased struck at accused with a calicut, it was held that the character of the weapon was such that accused could not have reasonably believed that it was necessary to kill his assailant in order to repel the attack[74]

(3) Threats

As a general rule mere threats by the deceased do not justify his slaying by the person threatened, but threats accompanied or followed by an overt act or demonstration indicating an intention to execute them and inducing in accused a reasonable belief that he is in imminent and grave danger will justify or excuse the killing of deceased in self defense

While it has been said broadly that a person whose life is threatened and to whom such threats are communicated may take all measures permitted by law for protecting himself thereafter,[75] it is the general rule that threats,[76] or threats and the fear induced thereby,[77] standing alone, afford no excuse or justification for a homicide, they cannot put accused in imminent danger[78] The fact that deceased made threats against accused does not excuse or justify the killing as in self-defense, unless such threats were communicated to accused prior to the killing,[79] were threats of death or great bodily harm[80] to accused,[81] and were followed by some overt act or hostile demonstration indicating an impending purpose, real or apparent, to put them into

66. Philippine—U S v Salandanan, 1 Philippine 478

67. Ala—Davis v State 107 So 737 214 Ala 273
Tenn—Hudgens v State, 60 S W 2d 153, 166 Tenn 231

68. Tex—Vann v State, 77 S W 813 45 Tex Cr 434

Assailant's loss of weapon
(1) Where deceased was aggressor evidence that deceased lost his weapon while striking first blow did not deprive accused of right of self-defense, where deceased was larger and stronger man than accused—State v Jennings 28 P 2d 448, 96 Mont 80, 121 A L R 375

(2) The general rule that relative size of persons does not affect the right of self-defense where deadly weapons are used is inapplicable where slayer has seized deceased's weapon and demonstrated his ability to prevent the use thereof—Eaton v Commonwealth, 19 S W 2d 218, 230 Ky 250

69. Ala—Davis v State, 107 So 737, 214 Ala 273
Miss—Hill v State, 49 So 145, 94 Miss 391

70 U S—Allen v U S, Ark 15 S Ct 720 157 U S 675, 39 L Ed 854
30 C J p 65 note 67

71. Ga—Wortham v State, 70 Ga 336

72. Mo—State v Rodman, 73 S W 605 173 Mo 681

73. Ala—Patterson v State, 41 So 157, 146 Ala 39

74. Philippine—U S v Mendoza, 2 Philippine 109

75. Ark—Morrison v State, 297 S W 830, 174 Ark 1180

76. Ark—Abbott v State, 265 S W 666, 167 Ark 677
Cal People v Valher, 293 P 621, 109 Cal App 733
Iowa—State v Crutcher 1 N W 2d 195, 198 231 Iowa 418 citing **Corpus Juris.**
Ky—Davidson v Commonwealth, 87 S W 2d 119, 261 Ky 158—Ross v Commonwealth, 259 S W 50 202 Ky 204
La—State v Vernon, 2 So 2d 629, 197 La 867
Miss—James v State, 104 So 301, 139 Miss 521
Mo—State v Trainer, 80 S W 2d 131, 336 Mo 620
Okl—Abby v State 114 P 2d 499 72 Okl Cr 208 rehearing overruled 115 P 2d 266 72 Okl Cr 208—Ging v State 239 P 685 31 Okl Cr 128
Wyo—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 66 note 73

77 N C—State v Price, 74 S E 587 158 N C 611
Wyo—Durham v State, 210 P 934 29 Wyo 85

78. Ala—Barlow v State, 57 So 601 5 Ala App 290
Ky Davidson v Commonwealth, 87 S W 2d 119, 261 Ky 158

79. Ark—Abbott v State, 265 S W 666 167 Ark 677
30 C J p 66 note 76

80. Pa—Commonwealth v Digeso, 98 A 882, 254 Pa 291
30 C J p 66 note 77

81. Mont—State v Heaston, 97 P. 2d 330, 334, 109 Mont 303, citing **Corpus Juris.**
Tex Falbert v State, 8 Tex App 316

Threat against accused's wife could not be made basis of claim of self-defense by accused—State v Flory, 276 P 458, 40 Wyo 184.

execution,[82] and inducing an honest[83] belief,[84] based on reasonable grounds,[85] that deceased was about to execute the threats and that accused was in imminent peril of great bodily harm or loss of life The existence of all the elements is essential to justify or excuse the killing, even though the threats were made by a bad, desperate, vicious, or lawless man[86] On the other hand, where all of these elements were present, it is not essential to the exercise of the right of self-defense that deceased have been a dangerous man,[87] or that there have been an actual attack,[88] felonious assault,[89] or attempt to execute the threats[90] on the part of deceased, or that the threats have been seriously made as a matter of fact,[91] or that deceased should actually have intended at the time to execute the threats[92] It is not necessary that the demonstration be coupled with ability to take life, it is necessary and sufficient that the demonstration or attempt be coupled with a real or apparent ability to take life[93] The right of self-defense is not affected by whether accused himself heard the threats or merely heard of them and believed what he heard[94] So, even though threats have not in fact been made, yet, where accused has been informed and believes that they have been made, he is entitled to act on that belief and as though they had in fact been made, the threats should be viewed from his standpoint and not from the standpoint of whether they were or were not actually made[95] Accused had a right to interpret the conduct of deceased in the light of threats made by deceased against him[96] Where the threats of deceased were communicated to accused, the latter was entitled to act more promptly and on less demonstration of hostility than he otherwise would have been[97]

Words, threats, menaces, and contemptuous gestures A plea of self-defense is not sustained where it appears that the slayer took the life of his victim solely because he was provoked by words, threats, menaces, or contemptuous gestures,[98] but words, threats, menaces, or contemptuous gestures may amount to a complete justification under some circumstances, as where they are sufficient to excite the fears of a reasonable man that his life is in immediate danger or that a felony is about to be committed upon him[99]

§ 127. Duty to Retreat or Avoid Danger

As a general rule, in order to justify or excuse a homicide as in self-defense, the accused must have embraced all reasonable means within his power and consistent with his safety, including, according to most authorities, escape or retreat, to avoid the danger The rule, however, is subject to various exceptions and limitations.

Subject to certain exceptions and limitations, considered herein and infra §§ 128-130, it is a general rule that, in order to justify or excuse a homicide as in self-defense, accused must have embraced all reasonable or probable means within his power and consistent with his safety to avoid the danger and avert the necessity of killing, and such means generally are deemed to include escape or retreat from the impending danger[1] Some authorities

82. Ark—Abbott v State, 265 S W 666, 167 Ark 677
Miss—James v State, 104 So 301, 139 Miss 521
Okl—Abby v State, 114 P 2d 499, 72 Okl Cr 208 rehearing overruled 115 P 2d 266, 72 Okl Cr 208—Ging v State, 239 P 685, 31 Okl Cr 428
Wyo—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 66 note 79

83. Ala—George v State, 40 So 961, 145 Ala 41, 117 Am S R 17

84. Wyo—Durham v State, 210 P 934 29 Wyo 85
30 C J p 66 note 80

85. Fla—Garner v State, 9 So 835, 28 Fla 113, 29 Am S R 232
Okl—Ging v State, 239 P 685, 31 Okl Cr 428.
Wyo—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 66 note 82

86. Ky—Ware v Commonwealth, 131 S W 269, 140 Ky 534
30 C J p 60 note 83

87. Tex—St Clair v State, 92 S W 1095, 49 Tex Cr 479.

88. Tex—Ware v State, 152 S W 1074, 68 Tex Cr 376

89. Ala—George v State, 40 So 961, 145 Ala 41, 117 Am S R 17

90. Tex—Swain v State, 86 S W. 335, 48 Tex Cr 98

91. Tex—Swain v State supra

92. Fla—Barnhill v State, 48 So 251, 56 Fla 16

93. Cal—People v Smith, 129 P. 785, 164 Cal 451

94. Tex—Gunn v State, 252 S W 172, 95 Tex Cr 276

95. Tex—Harper v State, 170 S W 721, 75 Tex Cr 124
30 C J p 67 note 91

96. Wyo—State v Radon, 19 P 2d 177, 45 Wyo 383
30 C J p 67 note 92

97. Ky—Davidson v Commonwealth, 87 S W 2d 119, 261 Ky 158
30 C J p 67 note 93

98. Ga—Deal v State, 88 S E 573, 145 Ga 33
30 C J p 67 note 94

99. Ga—Johnson v State, 31 S.E 399, 105 Ga 665
30 C J p 67 note 95

1. Ala—Hays v State, 145 So 134, 225 Ala 666—Hayes v State, 142 So 675, 225 Ala 253—Bulfalow v State, 122 So 633 219 Ala 407—Clemmons v State, 116 So 913, 217 Ala 519, denying certiorari 116 So 910, 22 Ala App 418—Smith v State, 105 So 290 29 Ala App 212 certiorari denied 105 So 293, 239 Ala 301—Williams v State, 163 So 668, 26 Ala App 529 certiorari denied 163 So 670 231 Ala 93—McBride v State 109 So 566 21 Ala App 508 - Vaughan v State, 107 So 797 21 Ala App 204, certiorari denied 107 So 799, 214 Ala 384
Ark—Luster v State, 126 S W 2d 276, 197 Ark 1175—Bieard v State, 72 S W 2d 530, 189 Ark 217
Del—State v Stevenson, 188 A 750, 8 W W Harr 105—State v Phillips, 187 A 721, 8 W W Harr 24—State v Phillips, 187 A 108, 7 W W Harr 514—State v Lee, 171 A 195, 6 W W Harr 11
D C—Laney v U S, 294 F 412, 54 App D C 56
Fla—Teal v State, 161 So 422, 119 Fla 394—Scholl v State, 115 So 43, 94 Fla 1138—Linsley v State, 101 So 273, 88 Fla 135.

make it the duty of accused to retreat where he can do so with safety[2] or with reasonable safety[3] Others, however, impose an even greater burden on accused and state the rule to be that a person must retreat rather than take the life of another unless he would thereby increase his peril or it reasonably appears that his peril would be thereby increased[4] Under the latter view, where one can retreat without increasing his peril, it is his duty to do so rather than kill his adversary, even though he cannot retreat with absolute safety to his person;[5] and the fact that retreat will not place him in less peril or on a better vantage ground than before does not excuse him from performing this duty[6]

Under no view is it the law that the right of self-defense does not arise until accused has done everything in his power to avoid the necessity of killing,[7] nor is it necessary that there be an absolute lack of means of escape[8] If none was known or apparent to accused at the time it is sufficient,[9] and where accused, acting on appearances, honestly and reasonably believes that he cannot retreat without increasing his peril, he may justifiably kill in his own defense, even though, as a matter of fact, a retreat would not have endangered his personal safety[10] The question is not whether the jury believes, but whether accused believed and had reasonable grounds to believe, that he had no safe, or apparently safe, means of protecting himself other than the slaying of his adversary[11] Accused is not called on to turn and run the instant he sees his adversary start toward him[12] where it has not yet become reasonably apparent that to avoid great bodily harm he must retreat or take the life of his adversary,[13] where he has no warning that his adversary intends to assault him,[14] or where, although he has knowledge of such intention, he is justified in believing that a third person will prevent the assault[15] Accused is not required to retreat in all cases,[16] his duty to do so may be affected by the nature of the attack upon him, as discussed infra § 129, or by the place of the attack, as discussed infra § 130, or by the fact that he is an officer or person making an arrest, as discussed infra § 137

The fact that one in attempting to retreat chooses a wrong direction for his flight does not deprive

Idaho—State v Fox, 16 P 2d 663, 52 Idaho 474
Iowa—State v Johnson, 274 N W 41 223 Iowa 962- State v Leeper 200 N W 732, 199 Iowa 432—State v Marish, 200 N W 5, 198 Iowa 602
Mass—Commonwealth v Trippi 167 N E 354, 268 Mass 227—Commonwealth v Peterson, 154 N E 260, 257 Mass 473
Mo—State v Roberts, 242 S W 669, 294 Mo 284
N Y—People v Fucarino, 93 N Y S 689, 104 App Div 437, 19 N Y Cr 405
Pa—Commonwealth v Grimm, 5 Pa Dist & Co 287
Wyo—Durham v State 210 P 934, 29 Wyo 85
30 C J p 67 note 96

Doctrine as cowardly

This doctrine of retreat is sometimes referred to as being cowardly, but not so, it is based on the highest consideration of civilization, morals and religion It is better that one man should flee rather than take human life"—Higdon v State, 143 So 213, 216, 25 Ala App 209—Cooke v State, 93 So 86 90, 18 Ala App 416, certiorari denied Ex parte Cooke 93 So 824, 208 Ala 100—30 C J p 67 note 96 [b]

Rule applicable to soldier

The facts that accused is a soldier, in uniform, and that he has been taught by the military authorities that an American soldier should never retreat, call for no distinction or discrimination in the application of the established rules of law in the civil courts—Caldwell v State, 81 So 272, 203 Ala 412

2. Ark—Beard v State, 72 S W 2d 530, 189 Ark 217
Del—State v Stevenson 188 A 750, 8 W W Harr 105 State v Lee, 171 A 195 6 W W Harr 11
3. Del—State v Phillips, 187 A 108, 7 W W Harr 544
Me State v Cox 23 A 2d 634
4. Ala—King v State, 171 So 254, 233 Ala 198—Davis v State, 107 So 737, 214 Ala 273—White v State, 96 So 709, 209 Ala 516—Key v State 168 So 602 27 Ala App 189—Williams v State, 163 So 663, 26 Ala App 531, certiorari denied 165 So 667 231 Ala 127—Higdon v State, 143 So 213 25 Ala App 209—Stokes v State 126 So 856 23 Ala App 447—White v State, 101 So 312 20 Ala App 213 Rice v State 101 So 82 20 Ala App 102—King v State 96 So 636 19 Ala App 153, certiorari denied Ex parte King 96 So 639, 209 Ala 446—Cox v State, 96 So 83, 19 Ala App 205
S C—State v George, 111 S E 880, 119 S C 120
30 C J p 67 note 97
5. Ala—Keel v State, 64 So 513, 10 Ala App 13
6. Ala—King v State, 171 So 254, 233 Ala 198
30 C J p 68 note 99
7. Idaho—State v Fox, 16 P 2d 663, 52 Idaho 474—State v McGreevey, 105 P. 1047, 17 Idaho 453.
8. Ala—Smith v State 195 So 290 29 Ala App 212, certiorari denied 195 So 293, 239 Ala 301
S C—State v Thomas 88 S E 20 103 S C 316
9. Ala—Buffalow v State, 122 So 673, 219 Ala 407—Clemmons v State, 116 So 913, 217 Ala 519, denying certiorari 116 So 910 22 Ala App 418—Higdon v State, 143 So 213, 25 Ala App 209—Love v State, 82 So 639, 17 Ala App 149—Carroll v State, 68 So 530, 12 Ala App 69
10. Ala—Walker v State 135 So 438 223 Ala 294—Brewington v State 97 So 763, 19 Ala App 409 - Thomas v State, 93 So 287 18 Ala App 493
Iowa—State v Davis, 228 N W 37, 209 Iowa 524
30 C J p 68 note 3
11. Ala—Walker v State, 135 So 438 223 Ala 294
Iowa—State v Davis, 228 N W 37, 209 Iowa 524
Ky Oakley v Commonwealth, 11 S W 72, 10 Ky L 885
12. Ala—Davis v State, 107 So 737, 214 Ala 273
13. Ala—Davis v State, supra
14. S D—State v Jaukkuri, 168 N W 1047, 41 S D 4.
15. S D—State v Jaukkuri, supra
16. Iowa—State v Shannon, 243 N W 507, 214 Iowa 1093 State v Leeper, 200 N.W. 732, 199 Iowa 432.

him of the right of self-defense.[17]

As affected by accused's fault or freedom from fault The rule requiring accused to retreat is especially applicable where he was at fault in getting himself into the dangerous situation.[18] Some courts hold that the rule applies, even though accused was free from fault in bringing about the situation that imperiled his life or limb,[19] but other courts hold that a person who is in the right,[20] or on whom a difficulty is sought to be forced,[21] need not run away or retreat.

As affected by whether homicide is justifiable or excusable Some authorities make the duty to retreat depend on whether the circumstances are such as to render the homicide excusable or justifiable by holding that the duty to retreat exists in the former class of cases but not in the latter.[22]

Authorities denying duty to retreat By express statute in at least one jurisdiction, a person violently and unlawfully assaulted is in no case required to retreat in order to justify the killing of his assailant, although he is required in some instances to resort to all means other than retreat to avoid the necessity of killing his adversary.[23]

Means other than retreat Some courts hold that the aid of the law by peace proceedings should be sought before resorting to violence where such a course can be safely pursued,[24] but there is also authority to the contrary.[25] A person who is assaulted is not bound to call on bystanders to restrain his assailant before he is entitled to make personal resistance.[26]

§ 128. —— Retreat to Wall

Although the ancient common-law doctrine that a person may not kill in self-defense unless he first retreats "to the wall" appears still to obtain in some jurisdictions, the tendency of modern authorities is to qualify it, and some courts have even said that the doctrine is no longer the law.

An ancient common-law rule, frequently spoken of as the doctrine of "retreat to the wall," is that a person is not justified or excused in killing one who attacks him, unless he first retreats as far as he can do so without increasing his real or apparent peril.[27] Where one already has his back to the wall or is about as close to the wall as it is possible for him to be, the requirements of the rule are satisfied and he is not obliged to retreat or escape before taking life in self-defense.[28] The tendency of modern authorities is to qualify, and narrow the application of, the old common-law doctrine of retreating to the wall.[29] Some courts go so far as to say that the old doctrine of retreating to the wall is no longer the law, it having been superseded by the rule that a person who is in a place where he

17. Ill—People v Motuzas, 185 N E 614, 352 Ill 340

18. Ala—Key v State, 168 So 602, 27 Ala App 189
Ark—Johnson v State, 287 S W 172, 171 Ark 1188
Wyo—State v Flory, 276 P 458, 462, 40 Wyo 184 citing **Corpus Juris.**
30 C J p 68 note 13
Fault on part of accused as affecting
Duty to retreat where assault is felonious see infra § 129
Exemption from duty to retreat where attack is in dwelling of accused see infra § 130
Right of self-defense generally see supra § 117.
Withdrawal
After aggression see supra § 121
From mutual combat see supra § 122

19 Ala—Key v State, 168 So 602, 27 Ala App 189
30 C J p 68 note 14

20. Nev—State v Robinson, 6 P 2d 433, 54 Nev 56
Tex—Earles v. State, Cr, 94 S W 464
Va—Dodson v Commonwealth, 167 S E 260, 159 Va 976—State v Curry, 165 S E 810, 112 W Va 549—Ballard v Commonwealth, 159 S E 222, 156 Va. 980.

21. Tex—Voight v State, 109 S W 205, 53 Tex Cr 268

22. Va—Dodson v Commonwealth 167 S E 260, 159 Va 976—Ballard v Commonwealth 159 S E 222 156 Va 980—McCoy v Commonwealth, 99 S E 641, 125 Va 771
30 C J p 68 note 7

23. Tex—Prater v State, 155 S W 2d 934, 142 Tex Cr 626
Nature of attack as affecting duty to resort to other means see infra § 129

24. N Y—People v Lyons, 17 N E 391 110 N Y 618
Ohio—State v Martin, 9 Ohio S & C P 778

25. Kan—State v Hatch, 46 P 708, 57 Kan 420, 57 Am S R 337

26. Wis—Bird v State, 45 N W 1126, 77 Wis 276

27. Ala—Williams v State, 163 So 663, 26 Ala App 531, certiorari denied 163 So 667, 231 Ala 127
Cal—People v Zuckerman, App, 132 P 2d 545
Del—State v Bell, 192 A 553, 8 W W Harr 328
D C—Laney v U S, 294 F 412, 54 App D C 56
Iowa—State v Sipes, 209 N W 458, 460, 202 Iowa 173 47 A L R 407, citing **Corpus Juris.**
Okl—Perez v State, 300 P 428, 51 Okl Cr 180
30 C J p 68 note 17

The phrase "driven to the wall" is illustrated by the familiar instance given of two men in a room and one assailing another to take his life or inflict upon him some great harm, in which case the assailed must retreat as far as he can before he takes upon himself the final remedy for protection—State v Walker, 33 A 227, 14 Del 164 467—19 C J p 765 note 3

28. Ala—Williams v State, 163 So 663 26 Ala App 531 certiorari denied 163 So 667, 231 Ala 127
N C—State v Miller, 20 S E 2d 274, 221 N C 356—State v Glenn, 150 S E 663 198 N C 79
30 C J p 69 note 18

29. U S—De Groot v U S, C C A Alaska, 78 F 2d 244
D C—Laney v. U. S, 294 F 412, 54 App D C 56
Iowa—State v Davis, 228 N W 37, 209 Iowa 524—State v Sipes, 209 N W 458, 202 Iowa 173, 47 A L R 407—State v Borwick, 187 N W 460, 193 Iowa 639
Okl—Perez v. State, 300 P 428, 51 Okl Cr 180.
Wyo—State v Flory, 276 P 458, 40 Wyo 184
30 C J p 69 note 19.

has a right to be may stand his ground and defend himself,[30] or by the rule that the duty of retreat rests on the person who is in the wrong rather than on the one who is in the right.[31] However, it has been said that the doctrine is undoubtedly still a part of the law of a number of jurisdictions,[32] and this would seem to be borne out by the authorities supporting the rule stated supra § 127 that a person must retreat rather than take the life of another unless he would thereby increase or apparently increase his peril. In a few jurisdictions the doctrine is limited to cases in which the persons engage in mutual combat or where accused, being the assailant, does not endeavor in good faith to decline any further struggle, and possibly to other similar cases.[33]

§ 129. —— Nature of Attack

Although there are some dissident authorities, it generally is held that, while there is a duty to retreat rather than kill in the face of a nonfelonious assault, there is no duty to retreat in the face of a felonious assault or a sudden attack fraught with imminent danger to life and limb

One need not retreat where the assault on him is so fierce that he cannot yield a step without manifest danger of loss of life or enormous bodily harm and there is no other way of saving his own life.[34] If a felonious assault is made in such a manner as to render retreat impossible, there is no duty to retreat.[35] The fact that the assailant is known to be blood-thirsty and dangerous does not require accused to retreat more quickly.[36]

Nonfelonious assault. In the case of an ordinary or nonfelonious assault, even with a deadly weapon, the person assaulted is required to withdraw if he can do so, and to retreat as far as consistent with his own safety, before he is justified or excused in killing his assailant.[37] By virtue of express statutory provisions in some states, where an assault made does not threaten or apparently threaten death or serious bodily injury, the person assaulted must resort to all other means reasonably proper and effective for the purpose, except retreat, to protect himself from the injury before killing,[38] and this is true even though the attack is violent.[39] In applying such a statute and determining whether accused could have protected himself by other means than killing, the situation is to be viewed and judged from the standpoint of accused and not in the light of subsequent events.[40]

Felonious assault. In a few jurisdictions the general rule requiring retreat is deemed applicable even where a person is violently and feloniously assaulted and is without fault in having brought on the difficulty.[41] In the majority of jurisdictions it is a rule that a person who is violently and feloniously assaulted, so that he is or reasonably believes himself to be in imminent danger of loss of life or great bodily injury, is under no duty to retreat or to resort to other means to avoid the danger, although he could do so with safety, but may stand his ground and kill his assailant, if necessary or apparently necessary to save himself from death or great bodily harm,[42] except where he is at fault in

30. U S —De Groot v U S, C C A Alaska 78 F 2d 244
Ariz —Macias v State, 283 P 711, 36 Ariz 110
Cal —People v Zuckerman App 132 P 2d 515—People v Turner 269 P 204, 93 Cal App 133
Ill —People v Steiankovich 145 N E 172, 313 Ill 556—People v Durand, 139 N E 78, 307 Ill 611
Iowa —State v Sipes 209 N W 158, 202 Iowa 173, 47 A L R 407
Okl —Perez v State, 300 P 428, 51 Okl Cr 180
30 C J p 69 note 20

31. Tex —Voight v State, 109 S W 205, 53 Tex Cr 268—Cooper v State, 89 S W 1068, 49 Tex Cr 28

32 Iowa —State v Borwick, 187 N W 460, 193 Iowa 639
30 C J p 69 note 22

33. Colo —Harris v People, 75 P 427, 32 Colo 211
30 C J p 69 note 23

34. Minn —State v Sorenson, 19 N W 738, 32 Minn 118
30 C J p 70 note 37

35. Iowa —State v Shannon, 243 N W. 507, 214 Iowa 1093
Okl —Womick v State 253 P 1027, 36 Okl Cr 14

36. Ala —Henderson v State 101 So 88, 20 Ala App 124

37 Del State v Phillips 187 A 108, 7 W W Harr 544
N C —State v Bryant, 197 S E 530, 213 N C 752—State v Glenn 150 S E 663, 198 N C 79—State v Dills 146 S E 1, 196 N C 457—State v Johnson, 113 S E 617, 184 N C 637
30 C J p 69 note 24

38. Tex —Prater v State, 155 S W 2d 934, 142 Tex Cr 626—Jones v State 69 S W 2d 65, 125 Tex Cr 454—Stroud v State, 24 S W 2d 52, 113 Tex Cr 621—Andrews v State, 275 S W 1024, 101 Tex Cr 261
30 C J p 69 note 25

39. Tex Fambro v State, 154 S W 2d 840, 142 Tex Cr 473—Jones v State, 69 S W 2d 65, 125 Tex Cr 454—Holland v State, 61 S W 2d 838, 124 Tex Cr 348

40. Tex —Vinson v State, 117 S W 846, 55 Tex Cr 490

41. Del —State v Talley, 33 A 181, 14 Del 417
30 C J p 69 note 27

42. Cal —People v Zuckerman, App 132 P 2d 515
Ill —People v Williams 169 N E 190, 337 Ill 371
N Y —People v Lagouri, 31 N E 2d 37, 284 N Y 309, reversing 19 N Y S 2d 316, 259 App Div 750 and 19 N Y S 2d 311 259 App Div 750—People v Fiori, 108 N Y S 416, 123 App Div 171
N C —State v Mosley, 195 S E 830, 213 N C 304—State v Godwin, 190 S E 761, 211 N C 419—State v Thornton, 190 S E 758, 211 N C 413—State v Glenn, 150 S E 663, 198 N C 79—State v Dills, 146 S E 1 196 N C 457—State v Johnson, 113 S E 617, 184 N C 637
30 C J p 69 note 28

Necessity as affected by absence of duty to retreat

In cases of either a "murderous assault with intent to kill," or an "ordinary assault, with deadly weapons," person assaulted can only kill from necessity, but, in the one, he

having brought on the difficulty[43] In a jurisdiction in which a person without fault is never required to retreat but is at most required only to resort to means of avoiding the danger other than retreat, in the case of a violent or felonious assault even those other means need not be resorted to,[44] and the same rule has been applied to one attacked in such a manner as to produce in his mind a reasonable fear of death or of serious bodily injury[45] There is authority for the view that this rule is never applicable unless an actual assault is being made with a present purpose to kill and with the present ability, real or apparent, to carry out the felonious purpose[46] In at least one jurisdiction, while it is recognized that, where the assault by one person on another is manifestly felonious and forcible in its nature, the person assaulted is under no duty to retreat,[47] the rule is often stated as applying to cases where the attack is sudden and murderous,[48] where the assailant is armed with a deadly weapon and is in the very act of effecting his murderous purpose on accused,[49] and where all the other elements of self-defense,[50] including freedom from fault on the part of accused,[51] are present While it has been stated that the rule is applicable where the evidence is clear and without conflict or adverse inference,[52] this does not mean that it is applicable only in such instance, but that, where the evidence is clear and without conflict, the rule applies as a matter of law[53]

Sudden attack and imminent danger It has been stated broadly that the right of one when in imminent danger to take life does not depend on whether there is an opportunity to escape, under such circumstances he is not compelled to step aside or to flee[54] In other words, one is not obliged to turn his back on danger which is in fact imminent.[55] More frequently the absence of an opportunity to escape without increasing the danger is made an element of the rule Thus it is said that a person may stand his ground and slay his assailant where the attack is sudden and the danger imminent and to retreat would increase his peril;[56] that he need not retreat where he is suddenly subjected to a felonious assault[57] which gives him no opportunity to retreat,[58] and that, where the peril is great, and the danger to life or limb imminent, and the person is without fault, the law does not require him to increase his danger by putting himself at a disadvantage[59] The rationale of the rule is that events which terminate in a homicide frequently occur with great rapidity,[60] and that the very suddenness of the attack may put accused to the wall[61] A person who is being forcibly and rapidly attacked cannot be required to retain the presence of mind, calmness, and composure necessary to weigh with nicety the question whether some other means short of taking life will answer the purpose,[62] especially where the assailant has previously attacked him with a deadly weapon and without provocation and has threatened to take his life[63]

§ 130. —— Place of Attack

a In general
b Public place or conveyance
c Accused's premises

can have that necessity determined in view of fact that he has a right to stand his ground and in the other, he must show as one feature of the necessity, that he has retreated to the wall —State v Bryant, 197 S E 530, 213 N C 752

Robbery

Where highwaymen assaulted motorists in effort to rob them, and thereby endangered the motorists' lives, motorists had right to resist to extent of killing highwaymen, and were under no duty to retreat —Sovereign Camp, W O W, v Gunn 158 So 192, 229 Ala 508—Storey v State, 71 Ala 329

43 N C —State v Bryant, 197 S E 530, 213 N C 752—State v Mosley 195 S E 830, 213 N C 304—State v Thornton, 190 S E 758, 211 N C 413—State v Dills, 146 S E 1, 196 N C 457
30 C J p 70 note 29

44. Tex —Stroud v State, 24 S W 2d 52, 113 Tex Cr 621
30 C J p 69 note 28

45. Tex —Stroud v State, supra.

46. N C —State v Dove, 72 S E 792, 156 N C 653

47. Ala —Jones v State, 116 So 896, 22 Ala App 472—Simmons v State, 113 So 466, 22 Ala App 126
30 C J p 70 note 31

48. Ala —White v State, 96 So 709, 209 Ala 516
30 C J p 70 note 32

49. Ala —Hays v State 145 So 134, 225 Ala 666—Scruggs v State, 140 So 405, 224 Ala 328
30 C J p 70 note 33

50. Ala —Hutcheson v State, 54 So 119 170 Ala 29

51. Ala —Matthews v State, 68 So 334 192 Ala 1 Davis v State, 66 So 67, 188 Ala 59

52. Ala —Madison v State, 71 So 706, 196 Ala 590—Matthews v State, 68 So 334, 192 Ala 1

53. Ala —Scruggs v State, 140 So 405, 224 Ala 328—Walker v State, 126 So 818, 220 Ala 544

54. D C —Marshall v U. S, 45 App D C 373

55 N Y —People v Jelna, 110 N Y S 83, 125 App Div 697

56. Okl —Roddie v State, 198 P. 342, 19 Okl Cr 63
30 C J p 70 note 39

57. Cal —People v Estrada, 213 P 67, 60 Cal App 477

58. N C —State v Jordan, 5 S E 2d 156, 216 N C 356

59. Ala —Keith v State, 11 So 914, 97 Ala 32
30 C J p 70 note 41

60. N Y —People v Jelna, 110 N Y S 83, 125 App Div 697

61. Cal —People v Hecker, 42 P 307, 109 Cal 451, 30 L R A 403—People v Cyty, 106 P 257, 11 Cal App 702

62. N Y —People v Fiori, 108 N Y S 416, 123 App Div 174
Philippine —U S v. Salandanan, 1 Philippine 478
30 C J p 70 note 44

63. Okl —Jones v State, 202 P. 187, 20 Okl Cr 314.

d. Deceased's premises
e Employer's premises
f Host's premises

a. In General

Although it is denied or qualified by some authorities, it is the rule in many jurisdictions that a person violently and feloniously assaulted when he is without fault and in a place where he has a right to be need not retreat

Regardless of whether it is viewed as superseding or as merely qualifying the common-law doctrine that accused must retreat to the wall, see supra § 128, it is undoubtedly the rule in many jurisdictions that a person who is violently and feloniously assaulted when he is without fault and in a place where he has a right to be need not retreat but may stand his ground, repel force by force, and be justified in killing his assailant in the reasonable exercise of his right of self-defense [64] A qualification sometimes attached to the rule is that the person attacked must warn his assailant to desist from the attack, unless accused is justified in believing that he does not have time to give such warning [65] However, there is authority for the view that, regardless of whether one is or is not in a place where he has a right to be, he is not justified in taking the life of deceased unless he uses all reasonable means in his power and consistent with his safety to avoid the danger and avert the necessity of killing [66] The rule has also been qualified to the extent of holding that accused was not relieved from the general duty of retreating by the fact that he was in a place where he had a right to be where deceased also had a right to be in that place [67] A person who is in the wrong and in a place where he has no right to be does not have a right to stand his ground [68]

Various applications of the above-stated general rule will be specifically considered in the ensuing subdivisions of this section.

b. Public Place or Conveyance

According to some authorities, but not others, a person attacked when he is lawfully on a public highway is not required to retreat.

In some jurisdictions it is held or recognized that a person is not obliged to retreat when he is lawfully on a public highway and therefore is in a place where he has a right to be,[69] but in other jurisdictions he is not relieved from the duty to retreat under the general rule by the fact that the homicide occurs on a public street or highway,[70] or at a public ferry,[71] or while he is a passenger on a street railway,[72] or in a private conveyance on a public street [73] Under the latter rule, the fact that in retreating he will have to leave behind some property belonging to him, such as an animal or a vehicle, does not relieve him of the duty of retreating [74] The fact that the encounter occurs on a public street does not require him to retreat where other circumstances, such as the character of the attack, relieve him of that duty [75]

c. Accused's Premises

A person is not obliged to retreat where, being without fault in bringing on the difficulty, he is assaulted while in his dwelling house, office, or place of business, or on his premises, or at least within the curtilage thereof It is immaterial whether the assailant is an intruder or another lawful occupant of the premises

A person need not retreat or seek to escape, even though he can do so without increasing his danger, but may lawfully resist even to the extent of taking life if necessary, where, being without fault in bringing on the difficulty, he is assaulted while in his own dwelling house,[76] in his office or place of

64. U S—De Groot v U S, C C A Alaska, 78 F 2d 214
Ariz—Macias v State, 283 P 711, 36 Ariz 140
Cal—People v Zuckerman, App, 132 P 2d 545—People v Turner, 269 P 201, 93 Cal App 133
D C—Laney v U S, 294 F 412, 54 App D C 56
Ill—People v Sterankovich, 145 N E 172, 313 Ill 556—People v Durand 139 N E 78, 307 Ill 611
Ind—Flick v State, 193 N E 603, 207 Ind 473—Myers v State, 137 N E 547, 24 A L R 1196
Iowa—State v Sipes, 209 N W 458, 202 Iowa 173, 47 A L R 107
Ky—Gibson v Commonwealth, 34 S W 2d 936, 237 Ky 33
Okl—Perez v State, 300 P 428, 51 Okl Cr 180
Wash—State v Smith, 83 P 2d 749, 196 Wash 534—State v Hiatt, 60 P 2d 71, 187 Wash 226—State v Takeshima, 47 P 2d 991, 182 Wash 617—State v Spear, 33 P 2d 905 178 Wash 57
30 C J p 71 note 47

65. Wash—State v Stockhammer 75 P 810 34 Wash 262

66. Fla—Doke v State, 71 So 917, 71 Fla 633

67. Ala—Terry v State, 74 So 756, 15 Ala App 665

68. Ky—Henson v Commonwealth, 129 S W 566, 139 Ky 173
Okl—Reed v State, 103 P 1042, 2 Okl Cr 589

69. R I—State v Pallou, 40 A 861, 20 R I 607
Wash—State v Hiatt, 60 P 2d 71, 187 Wash 226
W Va—State v Donahue, 90 S E 834, 79 W Va 260

70 Ala—Nunn v State, 99 So 738, 19 Ala App 619
Iowa—State v Marish 200 N W 5, 198 Iowa 602—State v Jackson, 137 N W 1041, 156 Iowa 588
30 C J p 71 note 53

71. Ala—Terry v State, 74 So 756, 15 Ala App 665

72. Ala—Caldwell v State, 84 So 272, 203 Ala 412
30 C J p 71 note 55

73 Ala—Jones v State, 116 So 896, 22 Ala App 472
S C—State v McGee, 193 S E 303, 185 S C 184

74. Ala—King v State, 96 So 636, 19 Ala App 153, certiorari denied Ex parte King, 96 So 639, 209 Ala 446

75. Iowa—State v Borwick, 187 N W 460, 193 Iowa 639

76. Ala—Kelley v State, 145 So

business,[77] or on his premises[78] at or near his dwelling house or, as sometimes said, within the curtilage, or the dooryard, or such space as is customarily occupied by the dwelling house and outbuildings appurtenant thereto.[79] However, the rule is predicated on the absence of aggression or fault on his part in bringing on the difficulty;[80] the doctrine is for defensive, and not offensive, purposes.[81] It has been held that, although a person is not obliged to retreat when in his own home, yet, where he can avoid a difficulty without killing his assailant merely by closing a door, he should do so, as this does not amount to a retreat but is merely taking advantage of a means immediately available for avoiding the difficulty and the taking of human life.[82] There is, however, authority for the contrary view that

816, 226 Ala 80—Bowen v State, 117 So 204, 217 Ala 574—Vinson v State, 194 So 705, 29 Ala App 234—McDaniel v State, 161 So 832, 26 Ala App 414—Harris v State, 143 So 242, 25 Ala App 215—Graves v State, 127 So 253, 23 Ala App 474—Bishop v State, 121 So 455, 23 Ala App 109—Lawler v State, 117 So 605, 22 Ala App 549—Craven v State, 111 So 767, 22 Ala App 39—Terry v State, 105 So 386, 21 Ala App 100—Hackney v State, 101 So 85, 20 Ala App 65—Nunn v State, 99 So 738, 19 Ala App 619—Valentine v State, 98 So 483, 19 Ala App 510—Cox v State, 96 So 83, 19 Ala App 205

Ariz—Taylor v State, 232 P 552, 27 Ariz 228

Cal—People v Alexander, 205 P 876, 56 Cal App 137

Del—State v Phillips, 187 A 721, 8 W W Harr 24

D C—Laney v U S, 294 F 412, 54 App D C 56

Iowa—State v Sipes, 209 N W 458, 202 Iowa 173, 47 A L R 407—State v Leeper, 200 N W 732, 736, 199 Iowa 132, citing **Corpus Juris**

Ky—Caudill v Commonwealth, 27 S W 2d 705, 231 Ky 142

N C—State v Roddey, 14 S E 2d 526, 219 N C 532—State v Bryson, 156 S E 143, 200 N C 50

Pa—Commonwealth v Grimm, 5 Pa Dist & Co 287

S C—State v Bradley, 120 S E 240, 126 S C 528—State v Bowers, 115 S E 303, 122 S C 275

Utah—State v Turner, 79 P 2d 46, 95 Utah 129

Va—Fortune v Commonwealth, 112 S E 861, 133 Va 669

W Va—State v Preece, 179 S E 524, 116 W Va 176—State v Laura, 116 S E 251, 93 W Va 250

Wyo—State v Flory, 276 P 458, 40 Wyo 184

30 C J p 71 note 57

Defense of habitation see supra § 109

"A man dangerously assaulted or menaced, in his own house is already at the wall and need not retreat"—State v Miller, 20 S E 2d 274, 275, 221 N C 356

Residence rented by accused or wife

Accused prosecuted for homicide, being in his house and free from fault, was not required to retreat in order to invoke doctrine of self-defense, regardless whether contract of rental was made by wife or himself—Hicks v State, 108 So 612, 21 Ala App 335, certiorari denied 108 So 614, 214 Ala 675

Duty to retreat from automobile

Rule as to retreat applicable to domicile, should not extend to situation in which accused was in automobile

Ala—Clark v State, 111 So 227, 216 Ala 7

S C—State v McGee, 193 S E 303, 185 S C 184

77. Ala—Cox v State, 96 So 83, 19 Ala App 205

Iowa—State v Sipes, 209 N W 458, 460, 202 Iowa 173, 47 A L R 407, citing **Corpus Juris.**

S C—State v Rogers, 126 S E 329, 130 S C 426—State v Gordon, 122 S E 501, 128 S C 422—State v Bowers, 115 S E 303, 122 S C 275

Utah—State v Turner, 79 P 2d 46, 95 Utah 129

W Va—State v Laura, 116 S E 251, 93 W Va 250

30 C J p 72 note 58

Employer's premises see infra subdivision e of this section

78. N C—State v Miller, 25 S E 2d 623, 223 N C 184—State v Jordan, 5 S E 2d 156, 216 N C 356

S C—State v Cleland, 145 S E 628, 148 S C 86—State v Gordon, 122 S E 501, 128 S C 422—State v Bradley, 120 S E 240, 126 S C 528

30 C J p 72 note 59

Club rooms

The law of retreat in self-defense has no application where one is on his own premises, and where a member of a club was in the club rooms, and the rooms are owned by the club, the law of retreat does not apply to such club member when attacked therein—State v Marlowe, 112 S E 921, 120 S C 205

Attack by one not on premises

One standing on his own premises when attacked by another in highway or on adjoining premises, may stand his ground—State v Quick, 135 S E 800, 138 S C 147

79 Ala—Harris v State, 143 So 242, 25 Ala App 215—Nunn v State, 99 So 738, 19 Ala App 619

Va—Fortune v Commonwealth, 112 S E 861, 133 Va 669

30 C J p 72 note 60

The rule does not apply where accused was attacked when on his own land but elsewhere than in his house or within the curtilage or space usually occupied and used for the purposes of the house—Key v State, 168 So 602, 27 Ala App 189—Williams v State, 163 So 668, 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93—Williams v State, 163 So 663, 26 Ala App 531, certiorari denied 163 So 667, 231 Ala 127—Valentine v State, 98 So 483, 19 Ala App 510—30 C J p 72 note 60 [a]

"Curtilage" includes a yard, garden or field which is near to, and used in connection with, the dwelling, even though it is not inclosed or fenced off from other lands—Bowen v State, 117 So 204, 217 Ala 574—Craven v State, 111 So 767, 22 Ala App 39—Hicks v State, 108 So 612, 21 Ala App 335, certiorari denied 108 So 614, 214 Ala 675

"Curtilage" does not include a public road some appreciable distance from the dwelling house of accused—Nunn v State, 99 So 738, 19 Ala App 619

80. Ala—Vinson v State, 194 So 705, 29 Ala App 234—Key v State, 168 So 602, 27 Ala App 189—Graves v State, 126 So 253, 23 Ala App 474—Hackney v State, 101 So 85, 20 Ala App 65

Ark—Hart v State, 257 S W 354, 161 Ark 649

Va—Fortune v Commonwealth, 112 S E 861, 133 Va 669

30 C J p 72 note 61

Unwarranted attempt to eject deceased

Where accused relies on the right to eject to establish the first element of self defense, namely, that he was without fault in bringing on the difficulty he must also rely on this right to eject his assailant to relieve him from the duty of retreating on his own premises, hence if deceased was where he had a right to be and accused wrongfully brought on the difficulty by attempting to eject him, accused would not be relieved of the duty to retreat by the fact that he was on his own premises—State v Gordon, 122 S E 501, 128 S C 422

81. D C—Laney v. U. S., 294 F 412, 54 App D C 56

30 C J p 72 note 61

82 Ark—Bealmear v State, 150 S. W 129, 104 Ark 616.

after a man goes in his own house he is not required to close the door and remain inside, even though if he does so he may not be further molested, when a man is unlawfully assaulted on his own premises he may arm himself and, standing upon his own doorstep, defend himself to the last extremity against all assailants [83]

Attack by intruder or another occupant The rule that a person assailed in his own dwelling is not bound to retreat is the same whether the attack proceeds from some other occupant or from an intruder [84] Where a house, premises, or place of business is jointly occupied, used, and possessed by two persons, as by partners, joint tenants, or tenants in common, each joint occupant, being equally entitled to possession, need not retreat when attacked while in the building or premises by the other joint occupant [85]

Occupancy of part of house A person who is rightfully occupying a room or part of a house is not obliged to retreat when he is attacked while in his room or rooms,[86] but the rule is otherwise where the attack is made on him at a time when he is in another part of the house [87]

d. Deceased's Premises

Ordinarily a person attacked by the owner of premises while on such premises is required to retreat

Where one is a trespasser on the lands of deceased it is his duty, if he could do so without increasing his peril, to depart and to escape by retreating rather than to take the life of his assailant [88] Where one provokes the difficulty in another's home, it is his duty to retreat [89] It has even been held that where accused had a right to be on deceased's premises he should have retreated before resorting to homicide,[90] but it has also been held that, even though he was on the lands of deceased, accused was not bound to retreat where he was exercising his right and performing his duty to use all reasonable means, short of a breach of the peace, to prevent his sister and deceased from accomplishing their immoral and unlawful purpose to engage in sexual intercourse [91]

e. Employer's Premises

A person who is attacked in his employer's place of business by an outsider, and in some instances even by another employee, need not retreat

A person who is assailed in his employer's place of business by an outsider with a deadly weapon may defend himself to the extent of taking his assailant's life without first retreating [92] It has been held that the fact that both deceased and accused were employed by a railroad company and the difficulty occurred in a railroad yard where they were employed does not excuse accused from the duty of retreat,[93] but it has also been held that, whatever the rule as to fellow employees generally, as to a foreman in charge of the employer's work the employer's premises constitute the foreman's "place of business" so that he is under no duty to retreat before the attack of another employee [94]

f. Host's Premises

A guest need not retreat when attacked by an outsider in the dwelling or curtilage of his host

A person who is a guest at the house of another need not retreat when attacked in the dwelling or when attacked within the curtilage of his host[95]

83. S D—State v Bell, 160 N W 727, 38 S D 159

84. Del—State v Phillips 187 A 721, 722, 8 W W Harr 24, citing **Corpus Juris.**
N Y—People v Tomlins, 107 N E 496, 213 N Y 240 Ann Cas 1916C 916
S C—State v Gordon, 122 S E 501, 128 S C 422

85. Ala—Baugh v State, 112 So 157, 215 Ala 619
Del—State v Phillips, 187 A 721, 8 W W Harr 24
Iowa—State v Leeper, 200 N W 732, 199 Iowa 432
S C—State v Gordon, 122 S E 501, 502 128 S C 422, quoting **Corpus Juris.**
30 C J p 72 note 66

86. Ala—Huff v State, 126 So 417, 23 Ala App 426
Wyo—State v Sorrentino, 224 P 420, 31 Wyo 129, 34 A L R 1477
30 C J p 72 note 67

Stairway
Accused need not retreat from head of stairway serving only his apartment State v Preece, 179 S E 521 116 W Va 176

87. Iowa—State v Dyer, 124 N W 629 147 Iowa 217, 29 L R A, N S, 459
30 C J p 72 note 68

88. Ariz—Macias v State, 283 P 711 36 Ariz 140
Me—State v Cox, 23 A 2d 634
Mo—State v Roberts, 242 S W 669 294 Mo 284
Okl—Womack v State, 253 P 1027, 36 Okl Cr 44—Reed v State, 103 P 1012 2 Okl Cr 589
Premises occupied by both deceased and accused see supra subdivision c of this section

89. Ala—Cox v State, 96 So 83, 19 Ala App 205

Sharecropper's home on accused's land
Owner of farm cultivated by deceased sharecropper had right to go on farm and stand his ground when attacked, but could not pursue deceased into house and claim immunity from duty of retreating—State v Cleland, 145 S E 628 148 S C 86

90. Me—State v Cox 23 A 2d 634

91. S C—State v Burdette, 101 S E 664, 118 S C 664

92. Conn—State v Feltovic, 147 A 801 110 Conn 303

93. Ala—Buckner v State, 81 So 687, 17 Ala App 57

94. S C—State v Gordon 122 S E 501 128 S C 422
Accused's place of business generally see supra subdivision c of this section

95. Ala—Kelley v State, 145 So 816 226 Ala 80—Bowen v State, 117 So 204, 217 Ala 574—Bolton v State, 95 So 874 209 Ala 179—Key v State, 168 So 602 27 Ala App 189—Lawler v State, 117 So

by an outsider;[96] but where both deceased and accused were guests at the same house and hence on an equal footing so far as the law of self-defense is concerned, it was the duty of accused, when assaulted by deceased, to retreat if he could have done so with safety and thus avoid taking the life of his assailant.[97]

§ 131. Manner or Means of Repelling Attack

a In general
b Use of deadly weapon

a. In General

It is a commonly accepted rule that a person attacked may use only such means or force to repel the attack as is or reasonably appears to be necessary

Since self-defense is ex vi termini a defensive and not an offensive act, the means or force which a person is justified in using in self-defense depends on the circumstances of the attack and must in no case exceed the bounds of what is necessary or reasonably appears to be necessary for the purposes of mere defense and prevention,[98] but if the one attacked uses such means or force only as is necessary or as reasonably appears to be necessary to repel the attack and save himself from death or great bodily harm, and the death of his assailant ensues, it is justifiable or excusable homicide.[99] While the act of the slayer must not be entirely disproportionate to the assault made on him,[1] and for a clearly marked excess of force the law will deem him the aggressor[2] and hold him responsible[3] for manslaughter at least,[4] a person who is in danger of immediately losing his life or suffering great personal injury or the commission of a felony on him is not bound at his peril to determine with exactness and absolute certainty the amount of force necessary to meet the danger and repel the attack, he will not be held guilty merely because on a nice balancing of the probabilities it appears that a little

605, 22 Ala App 549—Lawler v State, 115 So 420, 22 Ala App 329
30 C J p 73 note 74
Defense of habitation by guest see supra § 109

Guest of deceased's tenant

Where at the time of an alleged murder, accused was a guest in the house in which the homicide occurred and there was testimony that decedent had invaded the house and made an attack on accused mere fact that deceased was owner of premises where homicide occurred and that accused and the one who occupied the house were mere sharecroppers did not establish that accused and deceased were on "common ground" and that accused was under duty to retreat, since sharecropper occupying the house had all rights of ordinary tenant including 'castle rights" or 'defense of habitation "—State v Osborne, 21 S E 2d 178, 200 S C 504

96. Ala—Bishop v State, 121 So 155, 23 Ala App 109—Simmons v State 113 So 466, 22 Ala App 126—Valentine v State, 98 So 483, 19 Ala App 510 Thomas v State, 69 So 315, 13 Ala App 50

97 Ala—Cole v State, 75 So 261, 16 Ala App 55

Accused defending host

Accused, attempting to protect woman to whom he was engaged from attack by another in her home, was not deprived of benefit of self-defense—State v Furthmeyer, 277 P 1019, 128 Kan 317

98. Ala—Matthews v State, 115 So 763, 22 Ala App 366
Ariz—Walker v State, 83 P 2d 994, 52 Ariz 480
Ark—Bleard v State, 72 S W 2d 530, 189 Ark 217.
Cal—People v Brite, 72 P 2d 122, 9 Cal 2d 666—People v Mesa, 8 P 2d 920 121 Cal App 345
Del—State v Stevenson, 188 A 750, 8 W W Harr 105—State v Lee, 171 A 195 6 W W Harr 11
Hawaii—Territory v Warren, 35 Hawaii 232
Idaho—State v Grover 207 P 1080, 35 Idaho 589
Ky—Gooslin v Commonwealth, 142 S W 2d 989 283 Ky 665—Caudill v Commonwealth, 27 S W 2d 705, 231 Ky 142—Lawson v Commonwealth, 6 S W 2d 488, 224 Ky 443
La—State v Stroud, 5 So 2d 125, 198 La 841
Mo—State v Singleton, 77 S W 2d 80, 85, citing **Corpus Juris**—State v Farrell, 6 S W 2d 857, 859, 320 Mo 819, citing **Corpus Juris.**
N C—State v Terrell, 193 S E 161, 212 N C 145—State v Marshall, 179 S E 427, 208 N C 127—State v Bryson, 156 S E 143, 200 N C 50—State v Glenn, 150 S E 663, 198 N C 79—State v Robinson, 125 S E 617 188 N C 784
Vt—State v Rounds 160 A 249, 104 Vt 442
Wash—State v Smith, 83 P 2d 749, 196 Wash 534
30 C J p 73 note 77

Means employed need not be actually necessary; it is sufficient if they reasonably appear necessary—McCurry v Commonwealth, 265 S W 630, 205 Ky 211

99. Ala—Clack v State, 196 So 286, 29 Ala App 377
Idaho—State v Grover, 207 P 1080, 35 Idaho 589
Ill—People v Williams, 169 N E 190, 337 Ill 371—People v Scimeni, 147 N E 484, 316 Ill 591
Ind—Flick v State, 193 N E 603, 207 Ind 473
Iowa—State v Stewart, 197 N W 974 198 Iowa 618—State v Borwick 187 N W 460, 193 Iowa 639
Ky—Childers v Commonwealth, 156 S W 2d 825 288 Ky 537—Jones v Commonwealth 60 S W 2d 991, 249 Ky 502—Blanton v Commonwealth 276 S W 507, 210 Ky 542
Va Fortune v Commonwealth, 112 S E 861 133 Va 669
Wash—State v Tyree 255 P 382, 143 Wash 313
30 C J p 73 note 78
Necessity as basis of self defense generally see supra § 115

1 Cal—People v Mesa 8 P 2d 920, 121 Cal App 345
N C—State v Terrell, 193 S E 161, 212 N C 145
Pa—Commonwealth v Drum 58 Pa 9

2 Del—State v Stevenson 188 A 750, 8 W W Harr 105—State v Lee, 171 A 195 6 W W Harr 11
Wash—State v Smith, 83 P 2d 749, 196 Wash 534

3. Cal—People v Campbell 30 Cal 312—People v Mesa, 8 P 2d 920, 121 Cal App 345
Fla—Popps v State, 162 So 701 120 Fla 387
N C—State v Robinson, 125 S E 617, 188 N C 784

4. Fla—Popps v State, 162 So 701, 120 Fla 387
N C—State v Terrell, 193 S E 161 212 N C 145—State v Marshall, 179 S E 427, 208 N C 127—State v Glenn, 150 S E 663, 198 N C 79—State v Robinson 125 S E 617, 188 N C 784
Wash—State v Smith, 83 P 2d 749, 196 Wash 534.

less force would have secured his safety.[5] The amount of force apparently necessary is to be determined in the light of the circumstances as they appeared to accused,[6] and not in the light of the circumstances as they subsequently appear to the jury to have been.[7] While it is not a condition to the exercise of the right of self-defense in a proper case that deceased have been, or known as, a dangerous man, see supra § 126 b (1) (a), more prompt and decisive measures of self-defense are justified when the assailant is of known violent and bloodthirsty nature than when he is not.[8]

In at least one jurisdiction the applicability of the rule that only the necessary amount of force may be used depends on the nature of the danger or attack. If the attack is nonfelonious or less than deadly the rule is applicable and the slayer may not use more force than is reasonably necessary to repel the attack,[9] but, if the real or apparent danger is such as to threaten loss of life or serious bodily injury, the rule that a person is not justified in using more force than the circumstances reasonably indicate to be necessary is not applicable, the only question being whether in the light of all the facts accused had the right of self-defense, in such case the right to kill is a corollary of the right of self-defense.[10]

b. Use of Deadly Weapon

The use of a deadly weapon in self-defense is justifiable or excusable when, and only when, it is necessary or reasonably or apparently necessary to defend against death or great bodily harm.

The use of a deadly weapon or other resistance of like effect in self-defense is justifiable or excusable when, and only when, it is necessary or reasonably or apparently necessary to defend against death or great bodily harm.[11] Accused is justified in having repelled an assault on him with a weapon similar to that used by deceased in making the assault.[12] Ordinarily the use of a deadly weapon is not justifiable in repelling an attack without a weapon,[13] an attack which is of a trifling character and which manifests no purpose or intention on the part of the assailant to inflict any serious injury,[14] a slight,[15] simple,[16] or nonfelonious[17] assault, or an assault with blows from the hand or fist[18] or with insulting words and blows.[19] However, it is not true as a matter of law that in all cases an attack with the fists alone or an attack by an unarmed man does not justify accused in the use of a deadly weapon in such manner as to produce death, there may be other circumstances, such as the very violence of the attack or a great disparity in the age or physical ability of the persons, which give accused reasonable ground to apprehend danger of

5. Cal.—People v. Mesa, 8 P.2d 920, 121 Cal.App. 345.
Ky.—Childers v. Commonwealth, 156 S.W.2d 825, 288 Ky. 537.
Mo.—State v. Singleton, 77 S.W.2d 80, 85, citing **Corpus Juris**.
N.C.—State v. Glenn, 150 S.E. 663, 198 N.C. 79.
Ohio—State v. Yingling, App., 44 N.E.2d 361.
Vt.—State v. Rounds, 160 A. 249, 104 Vt. 442.
30 C.J. p. 73 note 81.

Where imperfect self-defense is involved the rule is likewise applicable.—State v. Creed, 252 S.W. 678, 299 Mo. 307.

6. Idaho.—State v. Grover, 207 P. 1080, 35 Idaho 589.
Ky.—Childers v. Commonwealth, 156 S.W.2d 825, 288 Ky. 537.—Gooslin v. Commonwealth, 142 S.W.2d 989, 283 Ky. 665.—Caudill v. Commonwealth, 27 S.W.2d 705, 234 Ky. 142.—Lawson v. Commonwealth, 6 S.W.2d 488, 224 Ky. 413.—McCurry v. Commonwealth, 265 S.W. 630, 205 Ky. 211.
Wash.—State v. Tyree, 255 P. 382, 143 Wash. 313.

7. Wash.—State v. Tyree, supra.

8. Ala.—Henderson v. State, 101 So. 88, 20 Ala.App. 124.
30 C.J. p. 73 note 84.

9. Tex.—Martinez v. State, 151 S.W.2d 817, 142 Tex.Cr. 143.—Hughes v. State, 284 S.W. 952, 105 Tex.Cr. 57.

10. Tex.—Blacklock v. State, 196 S.W. 822, 81 Tex.Cr. 511.—Lyons v. State, 159 S.W. 1070, 71 Tex.Cr. 189.

11. Ala.—Matthews v. State, 115 So. 763, 22 Ala.App. 366.
Del.—State v. Stevenson, 188 A. 750, 8 W.W.Harr. 105.—State v. Lee, 171 A. 195, 6 W.W.Harr. 11.
Hawaii.—Territory v. Warren, 35 Hawaii 232.
Ind.—Flick v. State, 193 N.E. 603, 207 Ind. 473.
Ky.—Childers v. Commonwealth, 156 S.W.2d 825, 288 Ky. 537.—Dean v. Commonwealth, 83 S.W.2d 887, 260 Ky. 97.
La.—State v. Stroud, 5 So.2d 125, 198 La. 841.
Me.—State v. Cox, 23 A.2d 634, 643, citing **Corpus Juris**.
Miss.—Cook v. State, 12 So.2d 137.
Mo.—State v. Farrell, 6 S.W.2d 857, 320 Mo. 319.
Okl.—Lary v. State, 296 P. 512, 50 Okl.Cr. 111.—Lemmons v. State, 265 P. 652, 39 Okl.Cr. 383.
30 C.J. p. 73 note 85.

Fact that accused's possession of weapon was unlawful does not affect his right to use it in self-defense in a proper case.—State v. Shannon, 243 N.W. 507, 214 Iowa 1093.

12. Philippine.—U.S. v. Dinola, 37 Philippine 797.
30 C.J. p. 73 note 86.

13. Wash.—State v. Spear, 33 P.2d 905, 178 Wash. 57.
30 C.J. p. 73 note 87.

14. La.—State v. Stroud, 5 So.2d 125, 198 La. 841.
30 C.J. p. 74 note 88.

15. Del.—State v. Reese, 79 A. 217, 25 Del. 434.
30 C.J. p. 74 note 89.

16. Mo.—State v. Farrell, 6 S.W.2d 857, 320 Mo. 319.
Okl.—Gransden v. State, 158 P. 157, 12 Okl.Cr. 417.
Pa.—Commonwealth v. Lockett, 139 A. 836, 291 Pa. 319.

17. Del.—State v. Phillips, 187 A. 108, 7 W.W.Harr. 514.

18. Ala.—Matthews v. State, 115 So. 763, 22 Ala.App. 366.
Miss.—Cook v. State, 12 So.2d 137.
Mo.—State v. Singleton, 77 S.W.2d 80, 85, citing **Corpus Juris**.—State v. Farrell, 6 S.W.2d 857, 859, 320 Mo. 319, citing **Corpus Juris**.
Wash.—State v. Spear, 33 P.2d 905, 178 Wash. 57.
30 C.J. p. 74 note 91.

19. Ark.—Atkins v. State, 16 Ark. 568.

death or great bodily harm and justify him in employing a deadly weapon in self-defense [20] The infliction of a mortal wound with a dagger is not reasonably required or necessary in order to repel an attack with a piece of bamboo, it exceeds the limits of necessary self-defense [21]

Continuing to shoot Where a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life or body has ceased [22] Ordinarily one is not justified in shooting or employing a deadly weapon against his antagonist after the latter has been disarmed[23] or disabled [24] Although accused fired the first shot in necessary self-defense, yet he was not justified in firing a subsequent shot or shots, which produced death, at a time when he was no longer in danger and could not have entertained any reasonable fear of losing his life or receiving great bodily harm [25] Even though the last shot was intentional and may seem to have been unnecessary when considered in cold blood, accused does not necessarily lose his immunity if it followed close on the others while the heat of the conflict was on, and if accused believed that he was fighting for his life [26] Where the first and fatal shots were fired in necessary self-defense, the fact that accused fired other shots which neither contributed to nor hastened the death of deceased does not deprive accused of the right to plead self-defense [27]

§ 132. Pursuit of Adversary

Where a person assailed is under no duty to retreat, he may pursue his adversary until he has secured himself from all danger, but he may not pursue and kill his adversary after he knows or has reason to believe that the danger is no longer imminent

Where a person free from fault is attacked by another, who manifestly intends by violence to take his life or to do him great bodily harm or to commit a known felony upon him, and the circumstances are such that the person assailed is not required to retreat, as discussed supra §§ 127–130, many authorities hold that he may even pursue his adversary until he has secured himself from all danger or apparent danger, and if he kills his adversary in so doing, it is justifiable self-defense [28] The mere fact that the adversary withdraws does not deprive accused of the right to pursue where the withdrawal is merely for the apparent purpose of securing a better position from which to renew the combat [29] However, all authorities agree that the person assailed may not, even in the most extreme case, pursue and kill his adversary after he knows or has reasonable grounds for believing that the danger has ceased to be immediate and impending, as where the adversary, in good faith, retreats or endeavors to withdraw from the combat [30] The apparent intent of deceased in withdrawing is to be judged by appearances from the standpoint of accused at the time [31]

§ 133. Renewal of Conflict

Where a person renews a conflict which has terminated or which his adversary has abandoned, he is not justified in claiming self-defense, but where the adversary renews the conflict the accused's right of self-defense is not affected by the original encounter although he was the aggressor therein

Where after the original difficulty had ceased or deceased had abandoned it, or accused had an opportunity of declining further combat, and he instead continued the struggle or renewed the combat,

20. Miss —Cook v State, 12 So 2d 137, 138, citing **Corpus Juris.**
N C —State v Miller, 20 S E 2d 274 221 N C 356
Tenn —Kress v State, 141 S W 2d 735, 176 Tenn 478
Wash —State v Spear, 33 P 2d 905 178 Wash 57
30 C J p 74 note 93

21. Philippine —U S v De Castro, 2 Philippine 67

22 Tex —Bayer v State, 257 S W 242 96 Tex Cr 310
30 C J p 74 note 95
Pursuit of adversary see infra § 132

23. N Y —People v Silverman, 73 N E 980, 181 N Y 235

24. Cal —People v McCurdy, 35 P 2d 569, 140 Cal App 499
Ky —Hudson v Commonwealth, 69 S W 1079, 24 Ky L 785

25. Tex —Hardin v State, 283 S W 517, 104 Tex Cr 178
30 C J p 74 note 98.

Where first shots fatal

The rule stated in the text is true even where the first shot inflicted a fatal wound People v Brown, 216 P 411, 62 Cal App 96– 30 C J p 74 note 5 [a]

26 U S —Brown v U S, Tex, 41 S Ct 501, 256 U S 335, 65 L Ed 960 reversing 257 F 46, 168 C C A 258

Okl —Jones v State, 202 P 187, 20 Okl Cr 233

27. Ark —Moore v State, 160 S W 206, 109 Ark 475

Iowa —State v Linhoff, 97 N W 77, 121 Iowa 632

28. Mo —State v Gadwood, 116 S W 2d 42, 57, 342 Mo 466, citing **Corpus Juris.**

Tex —Thompson v State, 276 S W 699, 101 Tex Cr 587.
30 C J p 74 note 4

Accused may not pursue until all danger is past

Ala Russell v State, 97 So 845, 19 Ala App 425

29. Tex —Hardin v State 283 S W 517 104 Tex Cr 178
30 C J p 75 note 6
Pursuit by deceased after accused has provoked combat and withdrawn therefrom see supra § 121

30 Ala —Glass v State, 198 So 70, 29 Ala App 468, certiorari denied 198 So 72, 240 Ala 123—Williams v State, 163 So 668, 26 Ala App 529, certiorari denied 163 So 670, 231 Ala 93
Cal —People v Graham, 217 P 823, 62 Cal App 752
Ill —People v Jersky, 36 N E 2d 347, 377 Ill 261
Tex —Hardin v State, 283 S W 517, 104 Tex Cr 178
30 C J p 74 note 5

31. Tex —Thompson v. State, 210 S W 800, 85 Tex Cr 144.

he became the aggressor, irrespective of whether he was at fault in bringing on the original difficulty, and is not justified in claiming self-defense,[32] but, where the contest is renewed by the adversary, accused's right of self-defense is not affected by the original encounter, even though he was the aggressor therein,[33] and regardless whether deceased was in a cool state of mind or in a violent passion.[34] While it has been held that accused cannot properly plead self-defense where, instead of attempting to avoid further trouble after the cessation of an altercation, he needlessly and purposely put himself in the way of a renewal thereof,[35] it has also been held that a mere intent on the part of one in returning to the scene of trouble to provoke a difficulty is insufficient to limit his right of self-defense unless he commits some provocative act.[36] One who returns to the scene of the difficulty for the purpose of remonstrating against the continuance of deceased's abusive conduct does not thereby forfeit his right of self-defense.[37]

§ 134. Self-Defense by or against Particular Persons

An insane person may plead self-defense, and the right of self-defense is not affected merely by the relationship between the accused and the deceased

An insane person charged with homicide may plead self-defense.[38] Ties of blood or relationship between accused and deceased do not affect the right of self-defense.[39]

§ 135. —— Against Third Person

The right of self-defense against an assailant does not extend to the killing of an innocent third person

The right of self-defense may be exercised only against the person threatening death or bodily injury, it does not extend to the killing of an innocent third person.[40]

The fact that accused is guilty of such conduct toward one person as would impair his right of self-defense as against such person does not deprive him of the right to defend himself against an attack made on him by a third person.[41]

§ 136. —— Against Two or More Persons

Where the accused is attacked by several persons acting in concert, he may, in a proper case, defend himself by killing any one or all of them

Where accused is attacked by two or more persons, or is attacked by one person and others are acting with the assailant or are present and aiding and encouraging him, he has a right to act in self-defense against all and, in a proper case, to kill one or all.[42] However, accused is not justified in killing one of such persons where he does not entertain a belief that he is in danger of serious bodily injury or loss of life at the hands of such person.[43]

§ 137. —— By or against Officer or Person Making Arrest

a. Killing by officer
b. Killing of officer

a. Killing by Officer

An officer or other person authorized to make an arrest, when confronted with such resistance to an attempted arrest as to endanger or apparently endanger his life or limb, may kill in self-defense, and the ordinary requirements of freedom from aggression and attempt to retreat on the part of the slayer do not apply. A person

32. Cal.—People v. Graham, 217 P. 823, 62 Cal.App. 758.
Iowa.—State v. Clay, 210 N.W. 904, 202 Iowa 722.
Ky.—Johnson v. Commonwealth, 147 S.W.2d 1048, 285 Ky. 371.—Polly v. Commonwealth, 258 S.W. 291, 201 Ky. 740.
Miss.—Hays v. State, 94 So. 212, 130 Miss. 381.
N.C.—State v. Shepherd, 17 S.E.2d 469, 220 N.C. 377.
Tex.—Hardin v. State, 283 S.W. 517, 104 Tex.Cr. 178.
30 C.J. p. 75 note 7.

The doctrine of retreat on one's own premises is not applicable where accused withdrew to his house from an affray in the street and procured a gun and returned to the street and willfully renewed the fight.—Adams v. State, 186 So. 140, 237 Ala. 163.

33. S.D.—State v. Jaukkuri, 168 N.W. 1047, 41 S.D. 4.
30 C.J. p. 75 note 8.

Failure to notify adversary of withdrawal
The plea of self-defense was not unavailable because defendants had some thirty minutes prior to gun battle assaulted one of two victims of battle and had not given victims prior notice that they had abandoned the fight.—State v. Miller, 25 S.E.2d 623, 223 N.C. 184.

34. Mo.—State v. Little, 128 S.W. 971, 228 Mo. 273.

35. Cal.—People v. Burns, 149 P. 605, 27 Cal.App. 227.

Returning in a threatening attitude to the scene of a former difficulty amounts to an invitation to further combat and precludes accused from claiming self-defense.—Howard v. State, 183 S.W. 743, 122 Ark. 422.

36. Tex.—Dodd v. State, Cr., 68 S.W. 992.

37. Mo.—State v. Malone, 39 S.W.2d 786, 327 Mo. 1217.

38. Ark.—Flake v. State, 245 S.W. 174, 156 Ark. 34.

39. Ky.—Sayler v. Commonwealth, 94 S.W.2d 281, 264 Ky. 53.

40. Cal.—People v. Martin, 108 P. 1034, 13 Cal.App. 96.

41. Tex.—Smith v. State, 148 S.W. 722, 66 Tex.Cr. 593.
30 C.J. p. 75 note 12.

42. Ky.—Scott v. Commonwealth, 159 S.W.2d 13, 289 Ky. 136.—Williams v. Commonwealth, 14 S.W.2d 1077, 228 Ky. 322.
Miss.—Gordon v. State, 9 So.2d 877.
Tex.—Wilkes v. State, 280 S.W. 787, 103 Tex.Cr. 209.—Cruiz v. State, 63 S.W.2d 550, 124 Tex.Cr. 445.
30 C.J. p. 75 note 13.

Killing one person on threat by another may be justified where the assailants were acting in concert.—Griffin v. Commonwealth, 265 S.W. 327, 204 Ky. 783.

43. Tex.—Norris v. State, 61 S.W. 493, 42 Tex.Cr. 559.

attempting to make an unlawful arrest generally has no greater right to kill in self-defense than one not so engaged.

Where a public officer or other person having legal authority to make an arrest is lawfully engaged in an attempt to arrest and is resisted by the person to be arrested in such a manner that he believes, on reasonable grounds, that he is about to be killed or to receive great bodily harm, he may resist force with force, and, if it is necessary in self-defense, he is justified in taking the life of such person.[44] Although, as appears supra § 102, an officer generally is held justified in killing to effectuate the arrest or prevent the escape of a felon even though it is not necessary for him to do so in self-defense, but is not justified in killing a misdemeanant merely to effectuate his arrest or prevent his escape, nevertheless where the resistance offered by a misdemeanant is such as to create in the officer the reasonable belief that he is about to be killed or to receive great bodily harm, the officer may be justified in killing on the ground of self-defense.[45] However, the mere fact that a person resists arrest and assaults the person attempting to make the arrest does not necessarily and alone give to the latter a right to kill to protect his person from bodily harm,[46] there must be a real or apparent necessity to justify a resort to such an extreme measure.[47] The killing is not justifiable, on the ground of self-defense, where the person being arrested makes no resistance[48] or where the injury threatened by him is not a serious one.[49]

Where the officer is known to be one having legal authority to arrest, he need not show or read the warrant before the arrest is made in order to justify the killing.[50] An officer making an arrest is not deprived of the legal right to defend himself by reason of a mere formal defect in the warrant of arrest or the complaint on which it is based.[51]

Aggression and retreat The rule that to be entitled to invoke the right of self-defense the slayer must not have been the aggressor is not applicable to an officer who, while making an arrest or preventing escape, kills in self-defense;[52] for if freedom from aggression were essential to his protection an officer could not perform his duties properly.[53] In making an authorized arrest for a misdemeanor, an officer is not the "aggressor" in the sense in which that term is used in designating the moving party in encounters between private citizens.[54] Likewise a peace officer called on to quell a disturbance between deceased and another person cannot be regarded as having voluntarily provoked and brought on the difficulty so as to deprive him of the right to kill to protect himself from death or great bodily injury.[55]

A public officer, or one acting under his authority, who is attacked while in the lawful exercise of his duties, is under no duty to retreat, but may stand his ground and kill his assailant if necessary to save himself from death or great bodily harm,[56] but the person claiming such right must have been acting within the law.[57] The rule is applicable where a private citizen is attacked while in the exercise of his right to make an arrest, as where he had reasonable grounds to believe that deceased had committed a felony.[58]

Unlawful arrest Ordinarily self-defense will not justify a homicide committed by an officer or other

44. Mo—State v McGehee, 274 S W 70, 308 Mo 560
Ohio—State v Yingling, App, 44 N E 2d 361
W Va—State v Stockton, 124 S E 509, 97 W Va 46
30 C J p 76 note 17

45. U S—Vaccaro v Collier, D C Md 38 F 2d 862, modified on other grounds, C C A, Collier v Vaccaro 51 F 2d 17—U S v Kaplan, D C Ga 286 F 963
Ark—Deatherage v State, 108 S W 2d 904, 191 Ark 513
Ky—Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830—Layne v Commonwealth, 112 S W 2d 61 271 Ky 418
Mo—State v Salts, 56 S W 2d 21, 331 Mo 665
N M—State v Gabaldon, 96 P 2d 293 43 N M 525—State v Vargas, 74 P 2d 62, 42 N M 1

46. Ala—Flowers v State, 56 So 98, 2 Ala App 65.
"Their [officers'] right in resisting an assault can rise no higher than that of one in the exercise of the right of self-defense. Therefore the same rule applies to officers in resisting an assault and in exercising a lawful act under the circumstances, that is to say, before taking human life they must at least act with due care and circumspection."—Deatherage v State, 108 S W 2d 904, 907, 191 Ark 513

47. Cal—People v Newsome, 195 P 938 51 Cal App 42

48. Iowa—State v Weston, 67 N W 84 98 Iowa 125

49. Ky—Siler v Commonwealth, 134 S W 2d 945, 280 Ky 830
N J—State v Hickey, 57 A 264, 70 N J Law 623

50. U S—North Carolina v Gosnell, C C N C, 74 F 734

51. N C—State v Gupton, 80 S E 989, 166 N C 257

52. Ky—Keyes v Commonwealth, 114 S W 2d 742 272 Ky 628
Aggression as precluding self-defense generally see supra § 117

53. Ky—Keyes v Commonwealth, 114 S W 2d 742, 745 272 Ky 628, citing **Corpus Juris**
N M—State v Vargas 74 P 2d 62, 42 N M 1

54. Ky—Keyes v Commonwealth, supra
30 C J p 76 note 31

55. Ill—Lynn v People, 48 N E 964, 170 Ill 527

56. Ala—Cobb v State, 97 So 779, 19 Ala App 345, certiorari denied Ex parte Cobb, 97 So 783, 210 Ala 252
30 C J p 76 note 37

57. Ala—Cobb v State, supra

58. Ky—Tolliver v Commonwealth, 170 S W 515, 161 Ky 81.

person while attempting to make an unlawful arrest,[59] except where the resistance used is disproportionate to the force employed to detain, and is of such a character as unnecessarily to place the person attempting the arrest in danger of death or great bodily harm.[60] Where a person attempts to arrest without authority, he is to that extent the aggressor as he is acting without right.[61] However, where the person sought to be arrested attempts to kill the person seeking to make the arrest merely to prevent the threatened arrest and not to protect himself from danger or injury, then he is about to use an excess of force which, to that extent, makes him the aggressor and confers on the arresting person the right of self-defense.[62] Where a police officer is not acting as such at the time of the difficulty, his right of self-defense is the same as that of a private citizen.[63]

b. Killing of Officer

The killing of an officer or other person attempting to make a lawful arrest ordinarily cannot be excused or justified as in self-defense, but if the attempted arrest is unlawful the killing of the officer may be excused or justified as in self-defense if in the course of resistance to the arrest it becomes necessary to prevent death or great bodily harm, or even, according to some authorities, to retain or regain liberty.

The right of self-defense will not justify or excuse one who in the course of a lawful arrest properly attempted kills the officer or person who is attempting to arrest him,[64] but where the attempt to arrest is unlawful in itself or by reason of the manner in which it is attempted the person being arrested may resist with force, and if in the course of the ensuing struggle it becomes necessary or reasonably appears to be necessary for him to kill the person attempting the arrest in order to save himself from death or great bodily harm, or the commission of a felony upon him, it is justifiable homicide,[65] and this is true although the slayer is a fugitive from justice and accused of a felony.[66] So too, one who is restrained of his liberty under an illegal arrest may use such force as is necessary to regain his liberty, and, if it reasonably appears that

59 Tenn—Brown v State, 19 S W 2d 231, 159 Tenn 422
30 C J p 76 note 24

60. Ga—Luffman v State, 143 S E 371, 166 Ga 296
Tex—Rezeau v State, 254 S W 574, 95 Tex Cr 323
30 C J p 76 note 25
An officer attempting to make an unlawful arrest is not cut off from the right of self-defense"—Wilkinson v State, 108 So 711, 713, 143 Miss 324, 46 A L R 805

61. Miss—Wilkinson v State, supra
Tenn—Brown v State, 19 S W 2d 231, 159 Tenn 422
30 C J p 76 note 33

62. Ark—Jett v State, 236 S W 621, 151 Ark 439
Tex—Rezeau v State, 254 S W 574, 95 Tex Cr 323

63. Cal—People v Mallicoat, 149 P 1000, 27 Cal App 355
N C—State v Watkins, 75 S E 22, 159 N C 480

64. Ala—Welch v State, 183 So 879, 28 Ala App 273, certiorari denied 183 So 886, 236 Ala 577—Wiggins v State, 143 So 188, 25 Ala App 192
Ark—Harris v State, 282 S W. 680, 170 Ark 1073
Cal—People v Brite, 72 P 2d 122, 9 Cal 2d 666—People v. Boss, 290 P 881, 210 Cal 245
Ga—Paramore v State, 129 S E 772, 161 Ga 166
Mo—State v Batson, 96 S W 2d 384, 339 Mo 298
N J—State v Sage, 122 A 827, 99 N J Law 229
N C—State v Miller, 149 S E. 590, 197 N C 445—State v Hall 112 S E 431, 183 N C 806
Ohio—Atkins v State, 155 N E 189, 115 Ohio St 512, certiorari denied 47 S Ct 590, 271 U S 720, 71 L Ed 1321
Okl—Methvin v State, 60 P 2d 1062, 60 Okl Cr 1—Davis v State, 57 P 2d 631, 59 Okl Cr 26
Or—State v Cody, 241 P 983, 116 Or 509
Tex—Rickman v State 134 S W 2d 668, 138 Tex Cr 191—Graiff v State 113 S W 2d 546, 134 Tex Cr 30—Coomer v State, 262 S W 495, 97 Tex Cr 588
30 C J p 77 note 42
"When a man puts himself in a state of resistance, and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and to set up the excuse of self-defense"—State v Payne, 197 S E 573, 578, 213 N C 719

It is immaterial who fired the first shot, where accused was armed and resisting arrest
Cal—People v Yeager, 229 P 40, 191 Cal 452
Miss—Pickett v State, 104 So 358, 139 Miss 529
30 C J p 77 note 42 [c]

65. Ala—Green v State, 189 So 763, 238 Ala 143
Ga—Wall v State, 112 S E 112, 153 Ga 309
Ky—Mims v Commonwealth, 32 S W 2d 986, 236 Ky 186—Smith v Commonwealth, 244 S W 878, 196 Ky 479
N D—State v Carter, 195 N W 567, 50 N D 270
Okl—Robison v State, 9 P 2d 54, 53 Okl Cr 178
Tex—Fagan v State, 14 S W 2d 838, 112 Tex Cr 107
30 C J p 77 note 43

Arrest in wanton manner
If the officer exercises his right to arrest in a threatening, wanton, and menacing manner the person arrested is justified in resisting to the extent of taking life if necessary to save his own life—Coomer v State, 262 S W 495, 97 Tex Cr 588—30 C J p 77 note 43 [a]

Excessive force
(1) Where an officer in attempting to arrest accused for a misdemeanor uses excessive force, as by shooting at accused, the relations between them become the same as between private citizens in so far as the right of accused to kill in self-defense is concerned
Ga—Paramore v State, 129 S E 772, 161 Ga 166
Idaho—State v Wilson, 243 P 359, 41 Idaho 616
Ky—Anderson v Commonwealth, 22 S W 2d 599, 232 Ky 159
30 C J p 77 note 43 [b]

(2) The same rule has been applied where a felon is attempting to escape and the officer is in no danger of loss of life or great bodily injury—Fagan v State, 14 S W 2d 838, 112 Tex Cr 107

(3) Force held not excessive so as to justify killing of officer—People v. Brite, 72 P 2d 122, 9 Cal 2d 666

(4) Use of force in making arrest generally see Arrest § 13

66. Ga—Smalls v. State, 25 S E 614, 99 Ga 25.

the officer intends to kill him or do him great bodily harm in order to prevent his escape, he may kill the officer in self-defense [67]

A few courts hold that a person has a right to resist an unlawful arrest, even to the extent of taking the life of another, if it is necessary in order to regain his liberty and freedom,[68] or if it is necessary as an alternative to submission [69] These courts hold that a person has as much right to resist an invasion of his personal liberty, and under proper circumstances to take life, as he has to resist death or serious bodily injury,[70] that the right to resist arrest and the right of self-defense are fundamentally separate and distinct,[71] and that the existence of an actual belief by accused of the necessity to take the life of his assailant in order to protect himself from death or serious bodily harm, and the existence of circumstances sufficient to justify such a belief in the mind of a person possessed of ordinary firmness and reason, are not prerequisite to the exercise of the right to resist an unlawful arrest even to the extent of taking the life of another [72] However, the right to resist an unlawful arrest generally is treated as a phase of the right of self-defense [73] As in other cases of self-defense, a person is justified in taking life only when he has reasonable ground to apprehend that he is in imminent danger of death or great bodily harm, he is not justified in killing merely for the purpose of resisting an unlawful arrest or other restraint on his liberty and where the only injury which can be reasonably apprehended is unlawful detention for a short time or other injury short of death or serious bodily harm [74] The use of excessive force in resisting an unlawful arrest constitutes an unlawful attack[75] and eliminates the right of self-defense on the part of the person resisting [76]

Notice or knowledge of authority Except where the statute expressly requires that the officer making the arrest must make known to the person accused under what authority the arrest is made,[77] the mere fact that the officer attempting the arrest failed to inform accused of the warrant, of his official character, or of the intent to arrest, does not justify or excuse killing the officer,[78] especially where accused knew that the officer had the warrant and that his purpose was to arrest him,[79] or had notice of his official character,[80] or where the

67. Tex —Rickman v State, 134 S W 2d 668, 138 Tex Cr 191
30 C J p 77 note 45

68 S C —State v Robertson, 5 S E 2d 285, 191 S C 509
30 C J p 77 note 46

Necessity as dependent on acts of officer

A person has no right actively to resist an illegal arrest until the officer has done some overt act such as laying his hands upon him, and the mere statement by the officer to one sought to be unlawfully arrested to consider himself under arrest or that the officer has a warrant does not give the right to make a physical attack upon the officer, furthermore, a person sought to be illegally arrested must cease resistance if the officer desists from his effort to arrest - State v Francis, 149 S E 348, 152 S C 17, 70 A L R 1133

69 Neb —Simmerman v State, 21 N W 387, 16 Neb 615—Simmerman v State 17 N W 115, 14 Neb 568

70 S C —State v Davis, 31 S E 62, 53 S C 150, 65 Am S R 845

71. S C —State v Bethune, 99 S E 752, 112 S C 100

72. S C State v Bethune, supra

73. Ill —People v Scalisi, 154 N E 715, 324 Ill 131
Miss —Wilkinson v State, 108 So 711, 143 Miss 324 46 A L R 805
30 C J p 78 note 51

74. Ala —Green v State, 189 So 763, 238 Ala 113—Allen v. State, App., 11 So 2d 391, certiorari denied, Sup., 11 So 2d 392—Welch v State 183 So 879, 28 Ala App 273, certiorari denied 183 So 886, 236 Ala 577—Berry v State 175 So 407, 27 Ala App 507, certiorari denied 175 So 412, 234 Ala 414
Ariz —Lawrence v State 240 P 863, rehearing denied 241 P 511 certiorari denied 46 S Ct 201, 269 U S 585, 70 L Ed 425
Ga —Paramore v State, 129 S E 772, 161 Ga 166—Wall v State, 112 S E 112 153 Ga 309
Ill - People v Scalisi, 154 N E 715 324 Ill 131
Ky —Campbell v Commonwealth, 157 S W 2d 729, 289 Ky 34—Howard v Commonwealth 56 S W 2d 362 246 Ky 738—Smith v Commonwealth, 244 S W 878, 196 Ky 179
Miss —Wilkinson v State, 108 So 711, 143 Miss 324 46 A L R 805
Mont —State v Cates, 33 P 2d 578, 97 Mont 173
Nev —State v Smithson, 19 P 2d 631, 54 Nev 417, rehearing denied 22 P 2d 129 54 Nev 417
Okl —Hargus v State 54 P 2d 211, 58 Okl Cr 301—Robsion v State, 9 P 2d 54, 53 Okl Cr 178
Pa —Commonwealth v Troup, 153 A 337, 302 Pa 246
W Va —State v Holmes, 23 S E 2d 61
30 C J p 78 note 53
Nature and apprehension of danger generally see supra §§ 123–126

75. Ga —Coleman v State, 49 S E 716, 121 Ga 594
Tex —Grafft v State, 113 S W 2d 546 134 Tex Cr 30

76 Ala —Green v State, 189 So 763, 238 Ala 113—Allen v State, App., 11 So 2d 391, certiorari denied Sup., 11 So 2d 392—Welch v State 183 So 879 28 Ala App 273, certiorari denied 183 So 886 236 Ala 577—Berry v State 175 So 407, 27 Ala App 507, certiorari denied 175 So 412 234 Ala 414
30 C J p 78 note 55

77. Tex Montgomery v State 65 S W 537, 43 Tex Cr 304, 55 L R A 866

78 Ala —Wiggins v State, 143 So 188, 25 Ala App 192
30 C J p 78 note 57

79. Ark - Appleton v State, 33 S W 1066, 61 Ark 590
N C —State v Garrett, 60 N C 144, 84 Am D 359

80. Ala —Wiggins v State, 143 So 188, 25 Ala App 192
Okl —Methvin v State, 60 P 2d 1062 60 Okl Cr 1—Davis v State, 57 P 2d 634, 59 Okl Cr 26
Vt —State v Shaw, 50 A 863, 73 Vt 149

Failure to wear badge

Conviction of murder of railroad policeman will be sustained, although he was not at the time wearing badge, where accused knew he was a policeman —Atkins v State, 155 N E 189, 115 Ohio St 542, certiorari denied 17 S Ct 590, 274 U S 720, 71 L Ed 1324.

lack of such information was caused by his fleeing on seeing the officer approach [81] If, however, accused had not, and cannot be charged with, knowledge of the official character of the officer, the fact that deceased was an officer attempting to make an arrest did not deprive him of his right of self-defense,[82] and it has been held that, even though a person has been told by a third person that officers were likely to arrest him, nevertheless he is warranted in repelling an assault made on him by an officer unless he has acquired knowledge in some other way that he is being halted by an officer [83] A person cannot rely on the failure of the officer to state his authority or purpose as rendering the attempted arrest unlawful so as to justify resistance, where in the absence of any grounds for the apprehension of danger he attacks the officer as soon as he is accosted without giving the officer an opportunity to show his authority or purpose [84] Where a person states that he is an officer seeking to arrest accused for a stated offense, accused may either submit at once or demand proof of such person's authority, but if he resists such person without giving him an opportunity to show his authority he cannot plead self-defense if it turns out that such person is an officer [85] Self-defense is not available to a person who knew or had reason to believe that deceased was an officer and that his mission was the execution of a writ of possession and the homicide occurred before deceased had an opportunity to declare his purpose [86] Where accused knew that deceased was acting officially in taking him into custody, the fact that deceased made the arrest without a warrant and hence did not act technically within his rights furnishes no justification or excuse for a homicide committed in order to effect an escape from further detention [87] Likewise, where accused knew that deceased was an officer and was in good faith using no more force than was reasonably necessary to execute the warrant, the fact that the warrant was defective conferred on accused no legal right to kill the officer for the sole purpose of preventing the arrest [88] Where accused had attempted to commit a felony, he was charged with knowledge that a private person might lawfully arrest him, so that his ignorance of the identity of the officer who attempted to arrest him did not justify his killing of the officer [89]

Resistance of de facto officer A person who resists a de facto officer and slays him while in the discharge of his apparent duty has only such defense as would exist were the person slain an officer de jure [90]

Where officer not attempting to arrest A person attacked by a policeman independent of any attempt to arrest has the same right to defend himself as against a private citizen [91] Accused cannot urge as a defense that he killed deceased in resisting unlawful arrest where there was no threat of an arrest at the time of the homicide [92] The fact that a peace officer is attempting lawfully and with reasonable force to eject a person from a public street does not give such person any greater right of self-defense than if the officer were lawfully attempting to arrest him [93] The killing of a policeman, even when he is acting in excess of his authority in dispersing a public meeting, will not be excused on the ground of self-defense because of a supposed violation of the rights of the persons composing the meeting [94] A person who is not resisting an arrest but who is the aggressor and who

81. Ga.—Thomas v. State, 18 S.E. 305, 91 Ga. 204

82 Ala.—Spooney v. State, 115 So. 308, 217 Ala. 219, followed in Smith v. State, 118 So. 921, 218 Ala. 707.—Watson v. State, 112 So. 181, 22 Ala. App. 57

Ill.—People v. Lavac, 192 N.E. 568, 357 Ill. 551

83. Fla.—Presley v. State, 78 So. 532, 75 Fla. 431, L.R.A. 1918D 975. 30 C.J. p. 78 note 61

84. Okl.—Hargus v. State, 54 P.2d 211, 58 Okl.Cr. 301

Officer knocking on door

An officer who knocks on a person's front door does not necessarily do so at his own risk, nor is the person living in the house, if he hears the officer knock and does not give such officer time to make his presence and purpose known, exonerated if he harms the officer.—State v. Heyward, 15 S.E.2d 669, 197 S.C. 371

85 Ky.—Cornett v. Commonwealth, 248 S.W. 540, 198 Ky. 236

Officer in uniform

Failure of officer clad in uniform of highway patrolman to advise defendants that he was also state constable did not justify homicide in resisting arrest without inquiry on the part of defendants as to the officer's authority.—State v. Luster, 182 S.E. 427, 178 S.C. 199

86 Tex.—Smith v. State, 89 S.W. 817, 48 Tex.Cr. 233

Assault at officer's first word

Person about to be arrested, if having knowledge of officer's official character and intention to arrest him cannot assault officer on his first uttering words and justify act on ground that attempted arrest was illegal.—Robsion v. State, 9 P.2d 54, 53 Okl.Cr. 178

87. Wis.—Imperio v. State, 141 N.W. 241, 153 Wis. 455

88. Ky.—Alsop v. Commonwealth, 4 Ky.L. 547

89 Cal.—People v. Boulton, 54 P.2d 722, 5 Cal.2d 342

90. Fla.—Forehand v. State, 177 So. 550, 551, 130 Fla. 355, citing **Corpus Juris.**

S.C.—State v. Messervy, 68 S.E. 766, 86 S.C. 503

91. Ala.—Evers v. State, 128 So. 465, 23 Ala. App. 533

Tex.—Vann v. State, 77 S.W. 813, 45 Tex.Cr. 434, 108 Am.S.R. 961

92 Tex.—Friedsam v. State, 116 S.W.2d 1081, 134 Tex.Cr. 515

93. N.D.—State v. Carter, 195 N.W. 567, 50 N.D. 270

94. Ill.—Spies v. People, 12 N.E. 865, 17 N.E. 898, 122 Ill. 1, 3 Am.S.R. 320.

commences the affray by attempting to capture an officer cannot properly claim the right to kill the officer because the latter resists an illegal command to throw up his hands.[95] The killing of an officer several hours after he was captured by accused is not excused or justified by the fact that at the time he was captured he was making an investigation without legal authority therefor.[96] A person lawfully accosted for reasonable questioning under circumstances suggesting that a crime has been or is about to be committed is not justified in slaying the accoster in the absence of any reasonable apprehension of danger.[97]

§ 138. —— By Pupil against Teacher

In a proper case a pupil may kill a teacher in self-defense.

A pupil may be entitled to exercise the right to kill in self-defense against a school teacher inflicting punishment which is immoderate and in excess of the authority of the teacher or which is malicious or for the purpose of revenge, and the question is to be determined from accused's standpoint and the circumstances prompting him at the time.[98]

VII. INDICTMENT OR INFORMATION

A. FOR HOMICIDE

§ 139. In General

The rules governing indictments and informations generally, such as the necessity for averment of the essential elements of the offense charged, the certainty and precision required, the necessity for the use of technical terms, the effect of surplusage, and the propriety of averring different offenses in the same count ordinarily control in indictments or informations charging homicide

Indictments or informations for homicide are, except as may be otherwise required by statute or by the inherent character of the offense charged, controlled by the rules applicable to indictments and informations in criminal prosecutions generally. For example, they must state with certainty and precision[99] the facts essential to constitute the offense charged,[1] sufficient to give notice to accused of the particular accusation which he must prepare to meet.[2] Where the common law prevails, great strictness and technical accuracy are required.[3] Otherwise, however, the necessary allegations need not be expressed in the technical terms generally employed, but any words which are the legal equivalent thereof are sufficient,[4] nor is an indictment defective because the customary order of words is not followed.[5] Nothing material in the indictment

95. Colo—Pearson v People, 168 P 655, 69 Colo 76

96. Tex—Serrato v State, 171 S W 1133, 74 Tex Cr 413

97. Okl—Hargus v State, 54 P 2d 211, 58 Okl Cr 301

98. Tex—Dill v State, 219 S W 481, 87 Tex Cr 49

99. Ind—Alderson v State, 145 N E 572, 196 Ind 22

Clarity required

The averments will be held sufficient where the offense is stated with clarity, according to the common acceptation of the language used—Taylor v State, 225 P 988, 27 Okl Cr 165

Ambiguity not shown

Indictment accusing three persons of willful murder by two of them shooting deceased in manner unknown while other abetted them was held sufficient, not being ambiguous—Newsome v Commonwealth, 33 S W 2d 36, 236 Ky 344

Certainty and particularity in indictments and informations generally see the C J S title Indictments and Informations § 100, also 31 C J p 660 note 88-p 663 note 26

1. Ark—Clark v State, 276 S W 849, 169 Ark 717.

Del—State v Benton, 187 A 609, 8 W W Harr 1

Ga—Passley v State, 21 S E 2d 230, 194 Ga 327

Ill—People v Moore, 14 N E 2d 494, 368 Ill 455

Ind—Stephenson v State, 179 N E 633, 205 Ind 141, error dismissed 186 N E 293, 205 Ind 141

30 C J p 89 note 58

Forms sufficient under statutory provisions see infra § 141

Sufficiency of indictment or information for homicide occasioned through operation of motor vehicle see the C J S title Motor Vehicles § 664, also 42 C J p 1358 note 90-p 1359 note 10

Facts essential at common-law

An indictment for murder cannot omit fact regarded as essential element of crime at common law—Alderson v State, 145 N E 572, 196 Ind 22

Indictment held bad

Indictment, stating "The Grand Jury of said County charges that before the finding of this Indictment" accused killed another by shooting her with a shotgun contrary to law and against peace and dignity of the state, did not charge an offense—Pinson v State, 2 So 2d 339, 30 Ala App 153

2. Del—State v Benton 187 A 609 8 W W Harr 1

Mo—State v Anderson, 250 S W 68, 298 Mo 382

N C—State v Linney 194 S E 470, 212 N C 739

30 C J p 89 note 59

Indictment held sufficient as to accusatory part

In an indictment for involuntary manslaughter, accusatory part charging involuntary manslaughter by going to the home of deceased, who was seriously afflicted with heart trouble, and raising an altercation with her, was held subject to criticism for prolixity, it being sufficient to charge defendants merely with the crime of involuntary manslaughter—Commonwealth v Owens, 249 S W 792, 198 Ky 655

3. Mo—State v Anderson, 250 S. W 68, 298 Mo 382

4. Ga—Wright v State, 141 S E 903, 166 Ga 1

Miss—Wexler v State, 142 So 501, 167 Miss 464

N C—State v Linney, 194 S E. 470, 212 N C 739

5. La—State v Holbrook, 97 So 27, 153 La 1025

Indictment held not defective

An indictment for murder was not

shall be taken by intendment or implication.[6] A misspelling of material words may be fatal,[7] but, as in the case of other indictments, the mere misspelling of a word,[8] or an omission,[9] by which the meaning of the indictment is not obscured, is as a general rule immaterial

Two distinct offenses cannot lawfully be embodied in the same count,[10] but mere elaboration of the details of the particular offense charged will not render the indictment bad[11]

Surplusage may generally be disregarded,[12] the statutes sometimes expressly so providing[13]

It is desirable, although not necessary, to follow approved precedents as to form[14]

§ 140. Negativing Defenses or Statutory Exceptions

The indictment or information need not negative matters of defense or statutory exceptions, unless they form a portion of the description of the offense charged

In conformance with the rule governing indictments or informations in criminal prosecutions generally, see the C J S title Indictments and Informations § 116, also 31 C J p 672 note 46–p 673 note 51, an indictment or information charging a homicide need not negative matters of defense,[15] such as the commission of the act in self-defense,[16] nor is it necessary for the indictment to anticipate and negative testimony which may be offered by accused as to other independent causes of death[17] An allegation that an act was unlawful and felonious,[18] or with malice and purpose to kill,[19] or with premeditated design to effect death,[20] is sufficient without negativing the circumstance under which the act might have been innocent As in the case of other offenses, see the C J S title Indictments and Informations § 140, also 31 C J p 720 note 56–p 726 note 1, where an indictment is drawn under a statute, exceptions in the statute must be negatived where they form a portion of the description of the statutory offense,[21] but not otherwise[22] The exceptions may be alleged in the conjunctive where to do so does not alter the statutory description of the offense[23] It is not an objection that the negative averment contained in the indictment is more

defective because the words 'and of his malice aforethought' intervened between "feloniously" and 'kill and murder"—State v Holbrook, supra

6. Mo—State v Brown, 68 S W 568, 168 Mo 449
Tex—Middleton v State, 25 S W 2d 614, 114 Tex Cr 263
Directness and positiveness of statement in indictments and informations generally see the C J S title Indictments and Informations § 99, also 31 C J p 659 note 71–p 660 note 87

7. Mo—State v Fairlamb, 25 S W 895, 121 Mo 137

8. Mo—State v Miller, 56 S W 907, 156 Mo 76
30 C J p 89 note 61

9. La—State v Restiva, 90 So 23, 149 La 683
Mo—State v Thomas, 12 S W 643, 99 Mo 235

10. Ga—Grier v State 123 S E 210, 158 Ga 321

Indication of another pending charge
Indictment merely alleging details of particular charge of manslaughter, alleging that deceased shot at one person with malice aforethought, with intent to kill, but missed such person and killed another, was held not demurrable because jury might infer that another charge was pending against accused—Grier v State, supra

11. Ga—Grier v State, supra

Fuller than ordinary statement
The mere fact that the indictment sets forth more fully than ordinarily the manner in which the homicide was committed is not cause for complaint—Grier v State supra

Indictments held sufficient
Indictment merely alleging details of particular charge of manslaughter, alleging that deceased shot at one person with malice aforethought with intent to kill, but missed such person and killed another was held not demurrable as doubtful whether accused was to be tried for assault with intent to murder or for murder—Grier v State, supra

12. Ill People v Cordes, 137 N E 845, 306 Ill 264
La—State v Vinzant, 7 So 2d 917, 200 La 301
30 C J p 89 note 63

Surplusage
(1) In indictment in which charge of negligence and that such negligence caused decedent's death stated an offense, an allegation that accused was under the influence of intoxicating liquor merely constitutes an element of aggravation and may be treated as surplusage—Clifton v U S, 295 F 925, 54 App D C 104
(2) Other instances see 30 C J p 89 note 63 [a]

Redundance
In information charging accused with intent "to kill and murder" the words "to murder" were a "redundance"—Childs v State, 99 P 2d 539, 68 Okl Cr 435

13. Wyo—Gustavenson v. State, 68 P 1006, 10 Wyo 300

14. Fla—Newton v State, 41 So 19, 51 Fla 82
Kan—State v Wimer, 155 P 7, 97 Kan 353

15. Tex—Aven v State, 277 S W 1080, 102 Tex Cr 478

16 Ky—Greer v Commonwealth, 175 S W 665, 161 Ky 396

17. Ga—Wilson v State, 10 S E 2d 861, 190 Ga 824

18. Ind—Willey v State 46 Ind 363

19. Ind—Merrick v State, 63 Ind 327
30 C J p 90 note 69

20 Wash—State v Seifert, 118 P 746, 65 Wash 596

21. Hawaii—Territory v Ching, 33 Hawaii 686
Mo—State v Mikel, 278 S W 670
30 C J p 90 note 72
Necessity to allege lack of necessity for abortion causing death of woman or absence of advice by physician as to such necessity see infra § 148

Exceptions constituting portion of description of offense
The exception "without authority, justification or extenuation by law" contained in the statutory definition of murder forms a portion of the statutory description of that offense—Territory v Ching, 33 Hawaii 686

22 Hawaii—Territory v Ching, supra
30 C J p 90 note 73

23. Hawaii—Territory v Ching, supra.

inclusive than the statutory provisions,[24] and it is not necessary to follow the exact language of the statutory exception[25]

§ 141. Statutory Provisions and Forms

Under the statutes in force in many jurisdictions an indictment for homicide which charges the offense in simple and concise language is sufficient. A charge in the language of the statute under which the offense is charged, or in conformity with a statutory form, is good.

Under the statutes of criminal procedure existing in many states, much of the common-law technicality concerning an indictment for homicide has been removed, and it is sufficient if the indictment charges the essentials of the offense in simple and concise language[26] It is, however, necessary to allege every essential element of the crime

24. Ill—Beasley v People, 89 Ill 571
30 C J p 90 note 74

25. Mo—State v Dargatz, 148 S.W 889, 224 Mo 218
30 C J p 90 note 75

26. Cal—People v Magsaysay, 291 P 582, 210 Cal 301
Fla—Pell v State, 122 So 110, 97 Fla 650
Ky—Sexson v Commonwealth, 39 S W 2d 229, 239 Ky 177—Arnold v Commonwealth, 240 S W 87, 194 Ky 421
Neb—Chadek v State, 294 N W 384, 138 Neb 626
N Y—People v Gaydica, 203 N Y S 243, 122 Misc 31
Okl—Williams v State, 258 P 1066, 38 Okl Cr 1
30 C J p 90 note 77

Omission of old forms allowed

Omission of the old forms and phraseologies required in a common-law indictment is allowed—State v Benton, 187 A 609, 8 W W Harr, Del, 1

New pleading superior to old

This form of indictment is much less likely to mislead or confuse than the archaic, cumbersome, and uselessly meticulous common-law form Since the adoption of a simple statutory definition of murder it is no longer necessary to use the old common-law form with its unnecessarily detailed allegations, which tended not only to confuse the mind but also to produce variances in proof in respect of matters which are really immaterial—Pell v State, 122 So 110, 97 Fla 650

Forms suggested by court

(1) Forms suggested as proper to be used instead of the prolix common law forms are set forth in the following cases
Neb—Nichols v State, 191 N W 333, 109 Neb 335
Okl—Baysinger v Territory, 82 P 728, 15 Okl 386

(2) Informations drawn according to the form set out in the case of Nichols v State supra, have been approved in the following cases—Ringer v State 207 N W 928, 114 Neb 404—Phegley v State, 202 N W 419, 113 Neb 138

(3) In the following cases the form set out in the case of Nichols v State, supra, has been commended as preferable to the involved common-law form used therein—Bourne v State, 226 N W 784, 118 Neb 862—Sherman v State, 223 N W. 645, 118 Neb 84

Indictments or informations held sufficient

(1) Generally
Ky—Woods v Commonwealth, 139 S W 2d 439, 282 Ky 596—Luster v Commonwealth, 109 S W 2d 638, 270 Ky 292—Sexson v Commonwealth, 39 S W 2d 229, 239 Ky 177—White v Commonwealth, 7 S W 2d 1059, 225 Ky 153
Mo—State v Reagan, 108 S W 2d 391—State v Naylor, 40 S W 2d 1079, 328 Mo. 335 State v Benson, 8 S W 2d 49—State v Kunkel, 289 S W 865 315 Mo 1259—State v Bacey 267 S W 809
Neb—Chadek v State, 294 N W 384, 138 Neb 626
Okl—Fannin v State, 291 P 989, 48 Okl Cr 346—Williams v State 258 P 1066, 38 Okl Cr 1—Taylor v State, 225 P 988, 27 Okl Cr 165
Tex—Smart v State 146 S W 2d 397, 140 Tex Cr 664
30 C J p 90 note 77 [a]

(2) Information charging that the injuries to deceased were inflicted by accused with the premeditated design to effect death and alleging the means by which the homicide was committed—Evinger v State, 45 P 2d 552 57 Okl Cr 63

(3) Information for murder designating firearm manner of using it, intent with which act was done and person against whom act was directed in plain and concise language—Williams v State, 258 P 1066, 38 Okl Cr 1

(4) Indictment alleging that certain persons conspired to kill person unknown, and pursuant to conspiracy killed unknown by explosion of powder or high explosives—Jack v Commonwealth, 295 S W 983, 220 Ky 640

(5) Indictment for murder alleging that within court's jurisdiction named person unlawfully and with malice aforethought killed deceased by shooting him in body with pistol—Green v State, 158 S E 285, 172 Ga 635—Geer v State, 198 S E 828, 58 Ga App 422

(6) Information charging accused with murder in the first degree, in that on a specified date he feloniously shot and killed a named person in a designated county and state—State v Keyger, Mo, 253 S W 363

(7) Information accusing a person of crime of murder in the first degree in that he murdered named individual on certain day in named county of the state—State v Avery, 125 P 2d 803, 102 Utah 33

(8) An information, charging that the killing was done with malice aforethought, deliberation, and premeditation, to sustain a conviction of murder in the first degree—State v Bolton, 212 P 504, 65 Mont 74

(9) Information charging that decedent's injuries were inflicted by accused with premeditated design to effect death, and alleging means by which injuries were inflicted—Pulliam v State, 65 P 2d 426, 61 Okl Cr 18

(10) Indictment alleging that accused did unlawfully, voluntarily and with malice aforethought kill and murder another by then and there shooting him with a gun as charge of murder—Martin v State, 115 S W 2d 913, 134 Tex Cr 379

(11) Information charging that accused 'willfully, deliberately premeditatedly, and with malice aforesight made an assault on deceased with a dangerous and deadly weapon, to wit a revolver, loaded, etc., held by accused at and against deceased, and that accused in the same manner shot off and discharged said revolver and shot and struck deceased, thereby giving him a mortal wound whereof he then and there died"—State v Long, Mo, 253 S W 729

(12) Indictment charging that accused and his son, before the finding of the indictment, unlawfully, willfully, and feloniously, with malice aforethought and with intent to kill, shot and wounded the named person with pistols loaded with powder, ball, and other hard substance, from which shooting and wounding such person died within a year and a day thereafter—Harris v Commonwealth, 121 S W 2d 693, 275 Ky 425

(13) Indictment, alleging that accused did willfully, feloniously, deliberately, premeditatedly, and with

charged[27] in language sufficient plainly and fully to inform accused of the nature and cause of the accusation against him[28] Where murder[29] or manslaughter,[30] although defined by statute, is defined as at common law, an indictment following the common-law form will be sufficient and ordinarily, as appears infra § 162, under statutes dividing murder into degrees a good common-law indictment for murder will sustain a conviction for any of the statutory degrees Under some statutes altering the common-law definition of murder[31] or manslaughter,[32] an indictment in the common-law form is not sufficient, and, as appears infra § 162, this is also true under some statutes dividing murder into degrees Since a statute defining "willful murder" does not create a new crime, an indictment thereunder is not defective in charging "murder" instead of "willful murder"[33] It is not necessary to indicate specifically the statute under which accused is charged[34]

Under constitutional and statutory provisions allowing a prosecution for felony by indictment or information, it has been held that the formal requirements of an information charging the offense of murder are not different from those in the case of a charge of some other felony[35]

Charge in language of statute. An indictment or information charging the homicide in the language of the statute defining it,[36] or substantially so,[37] is ordinarily held sufficient, sometimes under statutes so providing, where the statute sets out all the elements constituting the offense,[38] or is completely descriptive of the offense,[39] and in some jurisdictions such form is required[40] However, where a statute uses general or generic terms in describing an offense, does not sufficiently define the crime, or set out all its essential elements, or where a charge in the language of the statute charges a mere legal conclusion, an indictment or information which alleges the crime in the language of the statute is not sufficient; a more particular statement of facts is necessary[41] Statutes authorizing the omission of descriptive averments have been construed as confined to cases where it will do no prejudice, and

malice aforethought, and with the intent to kill and murder deceased the method and manner being set out in detail as charge of murder in the first degree--State v Cooper, 191 N W 891, 195 Iowa 258

(14) Information "that on or about the night of December 23, 1919 in the municipality of Santa, Province of Ilocos Sur, Philippine Islands, said accused, Agapito Bueno voluntarily illegally, and criminally attacked Eusebio Alvior with a small bolo, inflicting upon him a wound in the abdomen which reached part of the small intestines and the peritoneum, as a result of which said Eusebio Alvior died the next day Act committed in violation of law"—U S v Bueno 41 Philippine 447 448

(15) Other instances see 30 C J p 90 note 77 [c]

27. Del—State v Benton, 187 A 609, 8 W W Harr 1
Fla—Pell v State 122 So 110, 97 Fla 650
Idaho—State v Lundhigh, 164 P 690, 30 Idaho 365
Tex—Middleton v State, 25 S W 2d 611, 114 Tex Cr 263
30 C J p 91 note 78

28. Del—State v Benton, 187 A 609, 8 W W Harr 1
30 C J p 91 note 78

Indictment held sufficient to inform accused of the nature of the offense of which he is accused
Ky—Commonwealth v Branham, 120 S W 2d 234, 274 Ky 730
Va—Hurd v Commonwealth, 165 S E 536, 159 Va 880

29. Mont—State v McGowan, 93 P 552, 36 Mont 422

30. Ohio—Sutcliffe v State, 18 Ohio 469, 51 Am D 459

31. Okl—Jewell v Territory, 43 P 1075, 4 Okl 53

32. Tex—Jennings v State, 7 Tex App 350

33. Ky—Metcalfe v Commonwealth, 86 S W 534 27 Ky L 701

34. U S—U S v Battle C C Ga 154 F 540, affirmed 28 S Ct 422 209 U S 36, 52 L Ed 670
Mich—People v Eger, 299 N W 803, 299 Mich 49

Statute not mandatory
Statute authorizing a reference to a statute by its title or in any other manner which identifies the statute does not require the statute under which the offense is charged to be specially pleaded in the information—People v Ingersoll, 222 N W 765 245 Mich 530

35. Mo—State v Lee, 259 S W 798, 303 Mo 246

36. Cal—People v Smith, 12 P 2d 945, 215 Cal 749—People v Suesser 75 P 1093, 142 Cal 354
Fla—Pell v State, 122 So 110, 97 Fla 650
Ga—Wilson v State, 10 S E 2d 861, 190 Ga 824
Idaho—State v Caviness, 235 P 890, 40 Idaho 500—State v Boykin, 234 P 157, 40 Idaho 536—State v Lundhigh, 164 P 690, 30 Idaho 365
La—State v Vinzant, 7 So 2d 917, 200 La 301
Mich—People v Eger, 299 N W 803, 299 Mich 49
Mo—State v Anderson, 250 S W 68, 298 Mo 382
N J—State v Juliano, 138 A 575, 103 N J Law 663
Ohio—Makley v State, 197 N E 339, 19 Ohio App 359
Or—State v Kingsley 2 P 2d 3, 137 Or 305 rehearing denied 3 P 2d 113 137 Or 305
Tex—Middleton v State, 25 S W 2d 611, 114 Tex Cr 263—Crutchfield v State, 10 S W 2d 119 110 Tex Cr 420
Wash—State v Paschall, 85 P 2d 1046, 197 Wash 582
31 C J p 717 note 27

Common law or statute
The indictment is good if it charges the offense according either to the common law or the statute—Witt v State, 6 Coldw Tenn 5

37. Fla—Pell v State 122 So 110 97 Fla 650
Idaho—State v McClurg, 300 P 898, 50 Idaho 762
Ill—People v Tokoly, 144 N E 808, 313 Ill 177
Mo—State v Dargatz 148 S W 889 244 Mo 218
Nev—State v Ceja 298 P 658, 53 Nev 272 rehearing denied 2 P 2d 124, 53 Nev 272
Okl—Taylor v State, 225 P 988, 27 Okl Cr 165—Fooshee v State, 108 P 554 3 Okl Cr 666

38. Mo—State v Anderson, 250 S W 68 298 Mo 382

39. Tex—Middleton v State, 25 S W 2d 614, 114 Tex Cr 263

40. Neb—Pembrook v State, 222 N. W 956, 117 Neb 759

41. Mich—People v Maki, 223 N W. 70, 245 Mich 455

not to authorize the omission of anything which is essential to the description of the offense.[42] Involuntary manslaughter has been held not to belong to that class of crimes which may be charged in the language of the statute.[43]

Short forms An indictment is valid which follows a prescribed statutory form[44] or a form prescribed by a valid rule of court,[45] particularly where supplemented by a bill of particulars,[46] and has been held not to violate the constitutional right of accused[47] to be informed of the nature and cause of the accusation against him.[48] A form which is prepared by code commissioners, however, is insufficient where it does not comply with the general statutory requirements as to indictments and informations.[49] In some jurisdictions the state may use either the common-law or the statutory form of indictment.[50] If the statutory form of indictment is used, while in general it must be strictly adhered to,[51] it need not be literally followed,[52] substantial conformity is sufficient.[53] However, an indictment which attempts to mingle a common-law and a statutory form, without fully embracing the requirements of either, is defective.[54] A statute requiring a count for a particular offense to be included does not apply where the facts do not authorize such a count.[55]

§ 142. Time of Offense

The indictment or information should show the time of the offense charged; but, subject to the requirement that it must show that the offense was committed before its finding or filing and that the death occurred within a year and a day from the date of the infliction of the injury, the time is not ordinarily such a material element as to require precise averment.

Conformably to the general rules as to the necessity for, and the sufficiency of, averments as to the time of the offense, see the C.J.S. title Indictments and Informations §§ 123–126, also 31 C.J. p. 680 note 64–p. 689 note 17, the indictment or information must ordinarily allege the time of the offense charged.[56] Where the common-law rule has not been changed by statute, an allegation of time is essential as to the commission of the act causing the death,[57] and as to each material fact alleged,[58] including the striking or time of infliction of the injury[59] and the death, see infra § 155 a, although, as appears infra § 178, these allegations need not

42. Mich.—People v. Olmstead, 30 Mich. 431

43. Ind.—State v. Beckman, 37 N.E. 2d 531, 219 Ind. 176

44. Cal.—People v. Burdg, 272 P. 816, 95 Cal. App. 259
Iowa.—State v. Harness, 241 N.W. 645, 214 Iowa 160.—State v. Harness, 238 N.W. 430, 214 Iowa 160
Ky.—Conway v. Commonwealth, 88 S.W.2d 957, 261 Ky. 721
Mass.—Commonwealth v. Giacomazza, 42 N.E.2d 506, 311 Mass. 456.—Commonwealth v. Di Stasio, 1 N.E.2d 189, 294 Mass. 273
Miss.—Talbert v. State, 159 So. 549, 172 Miss. 243
Utah.—State v. Avery, 125 P.2d 803, 102 Utah 33.—State v. Anderson, 116 P.2d 398, 100 Utah 468
Wis.—Derkop v. State, 219 N.W. 278, 196 Wis. 571
30 C.J. p. 91 notes 88, 89

Form in appendix to criminal code. An indictment for murder in the form given in the appendix to the criminal code is sufficient.—State v. Kelley, 247 P. 146, 118 Or. 397 error dismissed and certiorari denied Kelley v. State of Oregon, 47 S.Ct. 504, 273 U.S. 589, 71 L.Ed. 790, and error dismissed Willos v. State of Oregon, 47 S.Ct. 658, 274 U.S. 722, 71 L.Ed. 1326.—State v. Casey, 213 P. 771, 108 Or. 386, motion denied 217 P. 632, 108 Or. 386

Indictment or information held sufficient to charge murder.
La.—State v. Matthews, 179 So. 69, 189 La. 166.—State v. Capaci, 151 So. 419, 179 La. 462.—State v. Smith, 103 So. 534, 158 La. 129
N.J.—State v. Donato, 148 A. 776, 106 N.J. Law 397

45. N.M.—State v. Roy, 60 P.2d 646, 40 N.M. 397

46. N.M.—State v. Ochoa, 72 P.2d 609, 41 N.M. 589.—State v. Roy, 60 P.2d 646, 40 N.M. 397

47. La.—State v. Capaci, 154 So. 419, 179 La. 462.—State v. White, 136 So. 47, 172 La. 1045
N.J.—State v. Donato, 148 A. 776, 106 N.J. Law 397

48. La.—State v. Capaci, 154 So. 419, 179 La. 462.—State v. White, 136 So. 47, 172 La. 1045
N.M.—State v. Roy, 60 P.2d 646, 40 N.M. 397
Or.—State v. Casey, 213 P. 771, 108 Or. 386, motion denied 217 P. 632, 108 Or. 386
Utah.—State v. Avery, 125 P.2d 803, 102 Utah 33
Va.—Maxwell v. Commonwealth, 187 S.E. 506, 167 Va. 490
30 C.J. p. 91 note 90

49. Ky.—Commonwealth v. Mosser, 118 S.W. 915, 133 Ky. 609

50. Iowa.—State v. Harness, 238 N.W. 430, 214 Iowa 160
La.—State v. Pinsonat, 177 So. 67, 188 La. 334.—State v. Robinson, 78 So. 933, 143 La. 543

51. La.—State v. Pinsonat, 177 So. 67, 188 La. 334.—State v. Robinson, 78 So. 933, 143 La. 543

52. Minn.—State v. Holong, 37 N.W. 587, 38 Minn. 368
30 C.J. p. 91 note 92

53. Cal.—People v. Coen, 271 P. 1074, 205 Cal. 596.—People v. Cohen, 278 P. 1056, 99 Cal. App. 515
Va.—Bausell v. Commonwealth, 181 S.E. 453, 165 Va. 693

Substantial conformity shown. Count of indictment for murder in first degree charging that accused unlawfully and with malice aforethought killed a specified person by burning him with fire, followed in substance the form prescribed by statute.—Langham v. State, 11 So.2d 131, 243 Ala. 564

54. Miss.—Nichols v. State, 16 Miss. 284

55. S.C.—State v. Hasty, 56 S.E. 669, 76 S.C. 105
30 C.J. p. 91 note 94

56. N.C.—State v. Orrell, 12 N.C. 139, 17 Am.D. 563

57. S.C.—State v. Rector, 155 S.E. 385, 158 S.C. 212
30 C.J. p. 91 note 97

Allegations held sufficient as to time of giving mortal wound.—Escovar v. State, 245 P. 356, 30 Ariz. 159

58. La.—State v. Kennedy, 8 Rob. 590
30 C.J. p. 91 note 98

59. Ind.—Alderson v. State, 145 N.E. 572, 196 Ind. 22
Me.—State v. Conley, 39 Me. 78
N.C.—State v. Baker, 46 N.C. 267
30 C.J. p. 91 note 97 [a], p. 92 note 11.

be proved as laid. However, under the statutes in force in many jurisdictions an averment as to the time the homicide was committed is not material,[60] and is not an essential element to be alleged,[61] other than to show that the death occurred within a year and a day from the date of the infliction of the injury, which must appear from the indictment or information, see infra § 155 a, and that the offense was committed before the finding or filing of the indictment or information, which is ordinarily required,[62] although under the express provisions of some statutes an indictment will not be deemed invalid, or the judgment thereon arrested, for stating the offense to have been committed on a day subsequent to the finding of the indictment.[63] In general it is sufficient to allege that accused, on a certain day, killed deceased.[64] However, the precise date of the offense need not be alleged,[65] and under some statutes it may be omitted.[66] So an indictment or information is sufficient in its allegations as to the time of the offense where it avers or shows that the homicide was committed before the finding or filing of the indictment or information,[67] as where the acts constituting the offense are alleged in the imperfect or past tense, although no specific date is stated,[68] or where the indictment in code form charges in general terms, without date, that before the finding of the indictment accused committed the offense;[69] or where it is alleged that the murder was committed in a certain year, before the finding of the indictment,[70] or that accused committed a negligent act on a certain date and that "subsequently" the death of deceased was caused thereby,[71] or where the indictment fails to state the day of the month, if it appears that the offense was committed before the finding of the indictment and the death occurred within a year and a day of the wounding,[72] or where it alleges as the date of deceased's death a date prior to the date on which the indictment was returned.[73]

Date as of which offense occurred In some jurisdictions it has been held that the date of the homicide is properly alleged as of the date of the death where the death and wounding do not occur on the same day.[74] In others, however, it has been held that, since the essence of the crime is the infliction of the wound from which death ensues, the date of the offense is properly charged as of the date of the mortal blow.[75] The indictment or information may allege a continuing offense covering more than one date.[76]

Misstatement of date Ordinarily a misstatement as to the exact date of the commission of the homicide is immaterial and will not render the indictment or information bad.[77] Mere formal mistakes,

60. Ark.—Hunter v. State, 124 S.W. 1028, 93 Ark. 275.
La.—State v. Champagne, 106 So. 670, 160 La. 47—State v. McCarthy, 10 So. 673, 44 La.Ann. 323.
Mont.—State v. Heaston, 97 P.2d 330, 109 Mont. 303—State v. Vanella, 106 P. 361, 40 Mont. 326, 20 Ann. Cas. 398.

61. La.—State v. Cornelius, 42 So. 754, 118 La. 146.
Mass.—Commonwealth v. Howard, 91 N.E. 397, 205 Mass. 128.
Mo.—State v. Ward, 74 Mo. 253.

62. Ark.—Hunter v. State, 124 S.W. 1028, 93 Ark. 275.
Cal.—People v. Kelly, 6 Cal. 210.
Ky.—Price v. Commonwealth, 11 Ky. Op. 888.
La.—State v. McCarthy, 10 So. 673, 44 La.Ann. 323.
N.C.—State v. Orrell, 12 N.C. 139, 17 Am.D. 563.

63. Mo.—State v. McDaniel, 7 S.W. 634, 94 Mo. 301.

64. Ga.—Thomas v. State, 71 Ga. 44.
La.—State v. Warthen, 95 So. 711, 153 La. 260.
Minn.—State v. Ryan, 13 Minn. 370.
Effect of allegation as implying death of deceased see infra § 153.

65. Cal.—People v. Kelly, 6 Cal. 210.
Mont.—State v. Heaston, 97 P.2d 330, 109 Mont. 303—State v. Vanella, 106 P. 361, 40 Mont. 326, 20 Ann. Cas. 398.
30 C.J. p. 92 notes 18, 31.

On or about

An allegation that on or about a day designated which is prior to the date on which the indictment or information was found or filed, accused killed deceased is sufficient.
State v. Heaston, 97 P.2d 330, 109 Mont. 303—30 C.J. p. 92 notes 18 [a], 31 [a].

66. Mo.—State v. Ward, 74 Mo. 253.
Va.—Woods v. Commonwealth, 124 S.E. 458, 140 Va. 491.

67. Cal.—People v. Kelly, 6 Cal. 210.
Ky.—Puckett v. Commonwealth, 95 S.W.2d 242, 264 Ky. 577.
N.Y.—People v. Murphy, 87 N.Y.S. 786, 93 App.Div. 383, affirmed 72 N.E. 1146, 179 N.Y. 595.

Averments held to show killing prior to indictment

Ga.—Baker v. State, 49 S.E. 782, 121 Ga. 592—Sutherland v. State, 49 S.E. 781, 121 Ga. 591.

Failure to show date of finding

Indictment which alleges that act causing injury was committed before finding thereof is not insufficient for failure to show date of finding.—Puckett v. Commonwealth, 95 S.W.2d 242, 264 Ky. 577.

68. Ark.—Hunter v. State, 124 S.W. 1028, 93 Ark. 275.
30 C.J. p. 92 note 16.

69. Ala.—Burton v. State, 37 So. 435, 141 Ala. 32.

70. Cal.—People v. Kelly, 6 Cal. 210.

71. N.Y.—People v. Murphy, 87 N.Y.S. 786, 93 App.Div. 383, affirmed 72 N.E. 1146, 179 N.Y. 595.

72. Ky.—Milburn v. Commonwealth, 3 S.W.2d 204, 223 Ky. 188.
N.C.—State v. Shepherd, 30 N.C. 195.

Reason for rule

It is sufficient to allege any matter in the manner in which it is necessary to prove it.—State v. Shepherd, supra.

73. Ind.—Robinson v. State, 110 N.E. 980, 184 Ind. 208.

74. Mass.—Commonwealth v. Macloon, 101 Mass. 1, 100 Am.D. 89.
Ohio.—Hill v. State, 1 Ohio Dec., Reprint 135, 2 West.L.J. 427.

75. La.—State v. Hobbs, 33 La.Ann. 226—State v. Wallman, 31 La.Ann. 146.

76. Wash.—State v. Hazzard, 134 P. 514, 75 Wash. 5.
30 C.J. p. 92 note 6.

77. Ky.—Maxey v. Commonwealth, 74 S.W.2d 336, 255 Ky. 330.
La.—State v. Cornelius, 42 So. 754, 118 La. 146—State v. Hardaway, 24 So. 320, 50 La.Ann. 1345.

which may be corrected from the statements in the indictment itself, are cured by the statute of jeofails [78]

Repetition of date A repetition of the date as to a nonessential allegation is not necessary,[79] and a failure to repeat it before the allegation of the mortal wound has been held not to vitiate an indictment [80] An indictment which alleges the date of the assault and when accused held the weapon in his hand, but fails to repeat it as to the blow itself, is sufficient [81] Allegations of time may be repeated by words of reference, such as "then and there,"[82] "then" alone,[83] or "aforesaid"[84]

Showing offense within period of limitations Since a prosecution for a particular offense or crime is not barred by lapse of time, unless a period of prescription or limitation is fixed by law therefor, see Criminal Law § 223, in the absence of a statute barring a prosecution for murder, it is not necessary to show that the offense was within any period of limitations [85] However, where a prosecution is for manslaughter, which under the particular statute may be barred, the averment of time is necessary to show that limitations have not run, although the indictment is in form for murder [86]

§ 143. Place of Offense

The place of the offense must be alleged with sufficient particularity to show that it is within the jurisdiction of the court

It is essential that an indictment or information for homicide allege the place of the offense for the purpose of showing that it is within the jurisdiction of the court,[87] unless the necessity therefor has been obviated by statute [88] The allegation is in general required only to be sufficiently certain for that purpose,[89] but in some jurisdictions it is necessary to allege the place of the infliction of the wound [90] Ordinarily an allegation that the offense occurred in a certain county is sufficient [91] A charge that in a certain county accused killed deceased by certain acts sufficiently states that the acts as well as the killing took place in the county named [92]

Repetition of averment of place At common law it was necessary that the averment of place be repeated to every material fact in the indictment,[93] but this rule has been greatly relaxed under modern statutes, and it is sufficient if the place clearly appears from the entire indictment [94] Allegations of place may be repeated by words of reference such as "then and there"[95] or "aforesaid"[96]

The precise locality within the county at which the crime is committed need not be alleged [97]

§ 144. Description of Accused

The accused must be clearly and certainly described.

In conformity with the rule applicable in criminal prosecutions generally, see the C J S title In-

N C—State v Baker, 46 N C 267 - State v Orrell, 12 N C 139, 17 Am D 563
Pa—Commonwealth v Weiss, 130 A 403 284 Pa 105
Amendment of indictment or information as to date of offense charged generally see the C J S title Indictments and Informations § 242, also 31 C J p 831 note 86-p 832 note 3

78. Va.—Commonwealth v Ailstock, 14 Va 620, 3 Gratt 620
30 C J p 92 note 26

79. Ind—Welch v State, 104 Ind 347
30 C J p 92 note 3

80. Mass—Commonwealth v Barker, 12 Cush 186

81. N C—State v Cherry, 7 N C 7

82. Wash—State v Stone, 13 P 2d 427, 169 Wash 233
30 C J p 93 note 34
Mode of repeating allegations of time as to death of deceased see infra § 155 a

83. Mo—State v Taylor, 21 Mo 477
30 C J p 93 note 35

84. N C—State v Lamon, 10 N C 175.

85 Mass—Commonwealth v Snell, 75 N E 75 189 Mass 12, 3 L R A, N S, 1019
30 C J p 92 note 8

86. Cal—People v Miller, 12 Cal 291

87. Ky—Spencer v Commonwealth, 240 S W 750, 194 Ky 699
30 C J p 93 note 38
Allegations as to place of death see infra § 155 b
Amendment of allegations as to place of offense see the C J S title Indictments and Informations § 242, also 31 C J p 832 note 4-p 833 note 12

88. Mass—Commonwealth v Howard, 91 N E 397, 205 Mass 128
30 C J p 93 note 39

89. Wash—State v Hazzard, 134 P 514, 75 Wash 5
30 C J p 93 note 40
Details as to the place the crime occurred need not be alleged—State v Champagne 106 So 670, 160 La 47

90. Ind—Alderson v State, 145 N E 572, 196 Ind 22
Utah—State v Green, 6 P 2d 177, 78 Utah 580

91. Ariz—Escobar v. State, 245 P 356, 30 Ariz 159

Allegations held sufficient
Information, alleging that accused in the parish of Orleans and within the jurisdiction of the court, feloniously killed deceased, sufficiently charged the place of the killing, as the place alleged related to nothing else but the principal accusation—State v Warthen, 95 So 711, 153 La 260

"At" equivalent to "in"
Where it is charged that the offense was committed at a certain point, the word "at" means "in"
La—State v Smith, 38 La Ann 301
Mo—State v Barr, 102 S W 2d 629, 340 Mo 738

92 Iowa—State v Rankin, 130 N W 732 150 Iowa 701

93 La—State v Kennedy, 8 Rob 590

94. Ill—Jackson v People, 18 Ill 269
30 C J p 94 note 47

95. Mo—State v Riddle, 78 S W 606, 179 Mo 287
30 C J p 93 note 43

96. N C—State v Lamon, 10 N C 175

97. Wash—State v Anderson, 231 P 456, 132 Wash 130.
30 C J p 93 note 41.

dictments and Informations § 127, also 31 C J p 689 note 18–p 693 note 14, the indictment or information for homicide must be clear and certain as to the persons charged.[98] It is not necessary to state his residence[99] or other matter of particular description,[1] nor is it necessary to allege that accused was of sound memory and discretion,[2] or of sound mind[3]

An indictment charging accused with murder under a statute governing murder by convicts should allege that accused is a convict of the specified class[4]

§ 145. Description of Person Killed

- a In general
- b Sex, description of females
- c Social and civil status
- d Description of child
- e Other matters of description

a. In General

The indictment or information must so describe the person killed that the accused may know whom he or she is charged with having killed, if known, the name of the deceased must be alleged, but if unknown it need not be, provided that fact is alleged

The indictment or information must be so certain as to the person against whom the offense was committed that the person indicted may know and understand whom he or she is charged with having killed[5] The name of the deceased must be alleged, if known[6]

Name unknown If the name of the deceased is unknown to the grand jury, an indictment will be sufficient if it states such fact, either as to the Christian name,[7] the surname,[8] or the full name,[9] and describes him by a fictitious name[10] If the name is not known the indictment must allege the fact, and give as clear a description of the person injured as the facts before the grand jury will permit[11] When deceased is once described as a person whose name is unknown, he may be identified in subsequent allegations by words of reference[12]

Form and sufficiency of allegations A description of deceased by the name by which he is commonly known is sufficient, although variant from his true name,[13] and where the deceased was known by two names it is sufficient to allege either[14] It may be sufficient to employ the initials of the first name[15] An error in the middle name of the deceased is not material[16] An indictment for the killing of a freed man has been held sufficient, although it describes deceased by a Christian name only[17] Under some statutes an error in the name of the person deceased is not material where the offense is described in other respects with sufficient certainty to identify the act[18]

Repetition, variations, and place of averring name Where the name of a person has been once well stated, a variance in its repetition has been held not fatal unless prejudicial to accused,[19] as has the occurrence of a blank in place of a subsequent repetition,[20] or the omission of a word of reference to connect the repeated name with that previously stated[21] The word "alias" sufficiently

98. Philippine—U S v Li-Dao, 2 Philippine 677
30 C J p 94 note 50

99 Ga—Studstill v State, 7 Ga 2

1. D C—Lanckton v U S, 18 App D C 348
30 C J p 94 note 52

2. Ga—Green v State, 158 S E 285, 172 Ga 635—Powers v State 157 S E 195, 172 Ga 1—Geer v State, 198 S E 828, 58 Ga App 422
30 C J p 94 note 54

3. Ga—Brown v State, 79 S E 231, 13 Ga App 437
30 C J p 94 note 55

4. Ala—Williams v State, 195 So 213, 239 Ala 296

Averment not insufficient
An indictment under statute governing murder by convicts, charging that accused was "a convict sentenced to imprisonment for life for robbery from the Circuit Court of Mobile County", was not improper as referring to the nonexistent offense of "robbery from the court"—Williams v State, supra

5. Ala—Page v State, 61 Ala 16—Roberts v State 149 So 356, 25 Ala App 477
Amendment of description of person killed see the C J S title Indictments and Informations § 241, also 31 C J p 831 note 78

6. Ala—Reese v State, 8 So 818, 90 Ala 624
30 C J p 94 note 57
Name of child see infra subdivision d of this section

7. Ala—Bryant v State, 36 Ala 270
30 C J p 94 note 59

8. Ala—Osborn v State, 73 So 985, 198 Ala 21

9. Wyo—Trumble v Territory, 21 P 1081, 3 Wyo 280, 15 L R A 177
30 C J p 94 note 61

10. Mass—Commonwealth v Di Stasio, 1 N E 2d 189, 294 Mass 273
Mo—State v Sartino, 115 S W 1015, 216 Mo 408

11. Tex—Johnson v State, 131 S W 1085, 60 Tex Cr 305
30 C J p 94 note 63

12. Okl—Morgan v Territory, 85 P 718, 16 Okl 530
30 C J p 94 note 64

13 Ala—Roberts v State, 149 So 356, 25 Ala App 477
Ill—People v Colder, 137 N E 845, 306 Ill 261
30 C J p 94 note 66

14. Tex—Archer v State, 5 S W 2d 503, 109 Tex Cr 414

15 Va—Brown v Commonwealth, 10 S E 745, 86 Va 466
30 C J p 95 note 67

16. Cal—People v Lockwood, 6 Cal 205

17. Tenn—Boyd v State, 7 Coldw 69
30 C J p 95 note 69

18 Iowa—State v Windahl, 64 N W 420, 95 Iowa 470

19 Fla—Meyer v State, 103 So 630, 89 Fla 261
30 C J p 95 note 71

20 Ky—Alford v Commonwealth, 2 S W 234, 84 Ky 623, 8 Ky L 550
30 C J p 95 note 72

21. Tex—Pearson v State, Cr, 86 S W 325

expresses the meaning "otherwise called" or "otherwise known as,"[22] and where a person is known by two names, and both are stated under an alias, it is immaterial which is first stated or which is the true name.[23] Where the full name has been once well stated, an alias giving only a single name is not defective.[24] The state may designate deceased by different names in different counts,[25] or by a certain name in one count and as a person unknown in another.[26] Different spellings of the name of deceased, where they are idem sonans, do not render the charge defective.[27] If the name of the deceased is contained in the averment of the assault or infliction of the injury, its omission in the averment of death is immaterial.[28] However, it has been held that the name must be stated in the conclusion of an indictment for murder,[29] although it need not appear in order after the word "murder" if the conclusion clearly states the murder of a particular person,[30] and a conviction for manslaughter may be sustained where the name of the person killed is omitted from the conclusion.[31]

b. Sex; Description of Females

The sex of the person killed need not be alleged, unless the killing occurs in the commission of another offense which can be committed only on a female, and where that fact is otherwise shown a specific averment thereof is unnecessary. Ordinarily it is unnecessary to allege that a female killed in an attempt to procure an abortion was pregnant or quick with child.

It is not necessary to allege the sex of the person killed,[32] except when the killing occurs in the perpetration of another offense which may be committed only on a female.[33] In an indictment for homicide in the commission of, or attempt to commit, a crime on a female, the fact that deceased was a female is sufficiently shown by use of a feminine name and pronoun[34] or a reference to her womb,[35] or both.[36] An indictment or information for the murder or manslaughter of a female in an attempt to procure an abortion need not allege that she was pregnant[37] or quick with child,[38] but the rule has been held otherwise in an indictment for manslaughter where the words are made a descriptive averment in the statutory definition.[39]

c. Social and Civil Status

It is unnecessary to set out the social and civil status of the person killed, unless they are included in the definition of the crime as an element of the offense.

As a general rule, it is unnecessary to set out particular descriptive matters with relation to the person killed.[40] So, on an indictment for killing an officer in the discharge of his duty, the fact that deceased was an officer so acting need not ordinarily be alleged.[41] However, such descriptive matters may be necessary in a prosecution under a statute making such matters, other than those ordinarily included in the definition of the crime, an element of the offense.[42]

d. Description of Child

An indictment for the murder of a child may describe it as not named, or as of name unknown, and may identify it by reference to the names of its parents. Age and sex need not be alleged.

An indictment for the murder of a child may describe the child as not named,[43] or as of name unknown.[44] The indictment need not expressly state that the child was born alive.[45] Its age[46] or sex[47]

22. N Y —Kennedy v People, 39 N Y 245, 6 Transcr A 19, 5 Abb Pr N S 117

23 N Y —Kennedy v People, supra

24. Ala —Roberts v State, 149 So 356, 25 Ala App 477
30 C J p 95 note 76

25 Ala —Walker v State, 41 So 878, 146 Ala 45

26 Tenn —Boyd v State, 11 Lea 161—Boyd v State, 7 Coldw 69

27 Wyo —Gustavenson v State, 68 P 1006 10 Wyo 300
Idem sonans rule generally see the C J S title Names § 11, also 15 C J p 383 note 10–p 389 note 25, p 390 notes 33–42

28. Ky —Alford v Commonwealth, 2 S W 234, 84 Ky 623 8 Ky L 550

29. Ind —Dias v State 7 Blackf 20, 39 Am D 448
30 C J p 95 note 81

30. La —State v Griffin, 20 So 905, 48 La Ann 1409—State v Brabson, 38 La Ann 144.

31. Mich —Evans v People, 12 Mich 27

32 N C —State v Pate, 28 S E 354, 121 N C 659

33 Fla —Weightnovel v State, 35 So 856 46 Fla 1

34. Neb —Taylor v State, 126 N W 752, 86 Neb 795
30 C J p 95 note 87
Allegations as to name see supra subdivision a of this section

35 Fla Weightnovel v State, 35 So 856, 46 Fla 1

36 Fla Weightnovel v State, supra
Ill —People v Huff, 171 N E 261, 339 Ill 328

37 Fla —Weightnovel v State, 35 So 856, 46 Fla 1
Ill —People v Huff, 171 N E 261, 339 Ill 328

38. Ky —Peoples v Commonwealth, 9 S W 509, 810, 87 Ky 487, 10 Ky L 517

Me —State v Smith, 32 Me 369, 54 Am D 478

39. Mo - State v Emerich 87 Mo 110, affirming 13 Mo App 492

40. Ga - Boyd v State 17 Ga 194

41. Or State v Kingsley, 2 P 2d 3, 137 Or 305, rehearing denied 3 P 2d 113 137 Or 305
30 C J p 95 note 92

42. U S - U S v Scott, D C Ind, 27 F Cas No 16,241 1 Biss 29
30 C J p 96 note 93

43. Ala — Reeder v State, 97 So 73, 210 Ala 114
30 C J p 96 note 95

44. Ark - Rogers v State, 206 S W 152, 136 Ark 161
30 C J p 96 note 96

45. Cal —People v Eldridge, 86 P. 832, 3 Cal App 618

46. Tex —Triggs v State, Cr, 53 S W 104

47. Ala —Clarke v State, 23 So 671, 117 Ala 1, 67 Am S R 157.
30 C.J. p 96 note 1.

need not be stated. Accused cannot complain of the use of the names of the child's parents unless he was misled thereby[48] A description of a child as one without a name, the child of a woman named, is a sufficient averment of its surname[49]

e. Other Matters of Description

In general it is unnecessary to allege that the person killed was a human being, or a reasonable creature in being, or that he was "in the peace of the state" or a similar statement

It has been held that, where the language of the statute is not followed, and the indictment does not describe the offense as murder, which, as appears supra § 13, is defined as the unlawful killing of a human being, etc, the indictment, although naming the person killed, should state that he was a human being[50] As a general rule it need not be alleged that the person slain was a human being[51] where the name of the person killed is set out in the indictment,[52] at least where it is alleged that accused "murdered" the person named,[53] or committed an assault and battery on him,[54] and refers to said person named by the personal pronoun "he" or "him,"[55] particularly where the crime is pleaded in the form and language of the statute[56] A charge of killing an Indian is sufficient to aver the killing of a human being[57] It is not necessary to allege that the person killed was a reasonable creature in being,[58] or a person,[59] or to describe him as "the deceased"[60]

An averment that the person killed was "in the peace of the state"[61] or "in the peace of God"[62] is unnecessary

§ 146. Act or Omission Causing Death

In the absence of statute authorizing its omission, the act constituting the offense must be clearly alleged. All the parties accused may be charged as principals or they may be charged as principals and accessaries as the facts warrant If a conspiracy existed, it need not be alleged

In the absence of statute authorizing its omission, a clear and substantive charge of the act constituting the offense is necessary[63] The exact form of words is immaterial[64] Under the varying statutes in different jurisdictions various short forms of indictments or informations are sufficient, such as that accused murdered deceased,[65] that accused voluntarily killed deceased,[66] that accused voluntarily with malice aforethought killed deceased,[67] and under some it is sufficient to charge the homicide by name,[68] but in such case the court, in the

48. Iowa—State v Cunningham, 82 N W 775, 111 Iowa 233
30 C J p 96 note 3

49. Ala—Reeder v State, 97 So 73, 210 Ala 111

50 Cal—People v Lee Look, 70 P 660, 137 Cal 590
30 C J p 96 note 10
Sufficiency of language following statute see supra § 111

51. Fla—Lee v State, 155 So 123, 115 Fla 30—Whitman v State, 122 So 567, 97 Fla 988

52. Ga—Green v State, 158 S E 285, 172 Ga 635—Geer v State, 198 S E 828, 58 Ga App 422
Va—Woods v Commonwealth, 124 S E 458, 140 Va 491
Wash—State v Montgomery, 132 P 2d 720
30 C J p 96 note 11

53. Cal—People v Smith, 12 P 2d 945, 215 Cal 749
Va—Woods v Commonwealth, 124 S E 458, 140 Va 491
Wash—State v Montgomery, 132 P 2d 720
30 C J p 96 note 12

54. Puerto Rico—People v Cebuldan, 18 Puerto Rico 785

55. Va—Woods v Commonwealth, 124 S E 458, 140 Va 491

56. Cal—People v Smith, 12 P 2d 945, 215 Cal 749

57. Ark—Reed v State, 16 Ark 499

58. N C—State v Pate, 28 S E 354, 121 N C 659
30 C J p 96 note 15

59 Wis—Bowers v State, 99 N W 447, 122 Wis 163

60. La—State v Hogan, 42 So 352, 117 La 863

61. Ga—Barnes v State, 100 S E 788, 24 Ga App 372
30 C J p 97 note 19

Averment as to peace of the state held sufficient

(1) Information in murder prosecution held not defective as failing to charge that deceased "was then and there in the peace of the state" State v Young, 286 S W 29, 314 Mo 612

(2) A murder indictment alleging that defendants "made an assault on and upon the body of one Nicholas Miller who then and there was in the peace of the people of said state of Illinois" was not void for failure to allege in the language of the statute that deceased was "in the peace of the people"—People v Price, 20 N E 2d 61, 371 Ill 137 certiorari denied Price v People of State of Illinois, 60 S Ct 94, 308 U S 551, 84 L Ed 463

62 N C—State v Howard, 92 N C 772
30 C J p 97 note 20

63. Idaho—State v McMahan, 65 P 2d 156, 57 Idaho 240
Ind—Shelton v State, 199 N E 118, 209 Ind 534
N M—State v Gray, 30 P 2d 278, 38 N M 203
30 C J p 97 note 22

Case overruled

The case of State v Lundhigh, 164 P 690, 30 Idaho 365 which held that an indictment or information charging that accused at a specified time and place did then and there willfully, unlawfully feloniously and with malice aforethought kill and murder a named person, without stating the acts relied on to constitute the offense charged, was sufficient, and the cases following it in that particular were expressly overruled in the case of State v McMahan 65 P 2d 156, 57 Idaho 240

64. Iowa—State v Gibbons, 120 N W 171, 142 Iowa 96
30 C J p 97 note 23

65 Cal—People v Dykes, 290 P 102, 107 Cal App 107
La—State v White, 136 So 47, 172 La 1045
N M—State v Roy, 60 P 2d 646, 40 N M 397
Utah—State v Avery, 125 P 2d 803, 102 Utah 33

66 Tex—Powell v State, 21 S W 2d 728, 113 Tex Cr 314—Crutchfield v State 10 S W 2d 119, 110 Tex Cr 420

67. Tex—Powell v State, 21 S W 2d 728, 113 Tex Cr 314

68. Ariz—State v Benham, 118 P. 2d 91, 58 Ariz 129

exercise of a reasonable discretion, should be liberal in granting a bill of particulars where necessary to inform accused what the state expects to prove against him[69] Acts and omissions constituting the offense may be charged in the conjunctive[70] It is not necessary to repeat in the conclusion the acts which accused did[71]

Principals or accessaries The indictment may charge accused as a principal regardless of whether he was an accessary, aider, or abettor[72] Where two or more persons are charged with the crime, it is unnecessary to show whether the crime is charged to have been committed by the joint act of defendants or whether one is charged as an accessary[73] The indictment may charge all the defendants as principals,[74] or it may allege the matter according to the facts and charge the various defendants as principals and accessaries as the facts warrant,[75] nor is it necessary where the indictment charges accused and others with a homicide to allege whether accused committed the crime with the others in a joint enterprise or individually in a separate enterprise[76]

Conspiracy An indictment which charges two or more persons as principals need not charge a conspiracy in pursuance of which the homicide was committed[77]

§ 147. —— Omission of Duty or Negligence

Where the homicide is charged to have resulted from a negligent act or omission the indictment or information must be with certainty sufficient to put the accused on notice of the offense with which he is charged The act or omission must be alleged and such facts and circumstances as are essential to show negligence, but the duty violated, or the standard of care required, ordinarily need not be averred

In general, where the homicide is alleged to have resulted from a negligent act or omission, the indictment or information is sufficient where it puts accused on notice of the offense with which he is charged[78] There must be certainty in making the charge,[79] but no more certainty is required in charging manslaughter resulting from negligent inaction than from negligent action[80] All the facts and circumstances essential to show the neglect must be set forth,[81] but it is also held, where the acts in which accused was engaged are stated, that the charge is sufficient without setting out in detail in what the negligence consisted[82] However, under statutes providing that it shall be sufficient, in an indictment for manslaughter, to charge that accused did feloniously kill and slay deceased, it has been held that, where the acts constituting alleged

N M —State v Roy 60 P 2d 646, 40 N M 397
Utah —State v Avery, 125 P 2d 803, 102 Utah 33—State v Anderson, 116 P 2d 398, 100 Utah 468

69. Ariz —State v Benham, 118 P 2d 91, 58 Ariz 129

70 Minn -State v Staples, 148 N W 283 126 Minn 396

71. Mont —State v Bloom, 35 P 213, 13 Mont 551—State v Northrup, 35 P 228, 13 Mont 522

72. Ind —Peats v State, 12 N E 2d 270, 213 Ind 560

73 Cal —People v Burdg, 272 P 816, 95 Cal App 259

74. La —State v Capaci 154 So 419 179 La 162
Mo —State v Payton, 2 S W 394, 90 Mo 220

75 Mo —State v Payton, supra

Indictment held sufficient

An information charging that accused's codefendant feloniously and of his malice aforethought shot and killed deceased and that accused feloniously and of his malice aforethought was present, helping, abetting, etc such codefendant in the felony of murder and that accused and his codefendant feloniously, etc , and of their malice aforethought, killed and murdered such deceased, was held sufficient to inform accused of the nature of the charge against him, and to support the verdict and judgment rendered thereon —State v Jackson Mo 253 S W 734

76 Ga —Harris v State, 9 S E 2d 183, 190 Ga 258
Okl —Evinger v State, 45 P 2d 552, 57 Okl Cr 63

77. Ky —Jeffries v Commonwealth, 74 S W 2d 203, 255 Ky 365
Mo —State v Stogsdill, 23 S W 2d 22, 324 Mo 105
Wis —Pollack v State 253 N W 560, 215 Wis 200, adhered to on rehearing 254 N W 471, 215 Wis 200

78. Ark —Madding v State, 177 S W 410, 118 Ark 506
30 C J p 97 note 29

Indictments or informations held sufficient

(1) Generally —Clifton v U S, 295 F 925, 54 App D C 104

(2) Indictment for manslaughter in killing by use of trap gun State v Beckham, 267 S W 817, 306 Mo 566, 37 A L R 1091

(3) Indictment in involuntary manslaughter prosecution against railroad crossing watchman which alleged employment of watchman, duties cast on him by virtue of employment to give warning of approach of trains, and that watchman failed to perform such duties —State v Benton, 187 A 609, 8 W W Harr, Del, 1

(4) An information charging that chiropractor, in undertaking to treat a patient's infected foot, instructed the patient against the use of insulin, which was indispensable to the patient's recovery, knowing that the patient was suffering from diabetes and that the patient died as a result of such treatment, was sufficient to charge manslaughter —State v Heines 197 So 787, 144 Fla 272

(5) Other cases see 30 C J p 97 note 29 [a]

79. Del —State v Benton, 187 A 609, 8 W W Harr 1
Ind —State v Beckman, 37 N E 2d 531, 219 Ind 176

80 Del —State v Benton, 187 A 609, 8 W W Harr 1

81 D C —U S v Geare, 293 F 997, 54 App D C 30
Mich —People v Maki, 223 N W 70, 245 Mich 455
N M —State v Gray, 30 P 2d 278, 282, 38 N M 203, quoting **Corpus Juris.**
Okl —Vaughn v State, 276 P 701 42 Okl Cr 376.
Or —State v Miller, 243 P 72, 119 Or 409, affirmed Miller v State of Oregon, 47 S Ct 344, 273 U S 657, 71 L Ed 825
30 C J p 97 note 27

82. Neb —Schultz v State, 130 N W 972, 89 Neb 34, 33 L R A, N S, 403, Ann Cas 1912C 495.
30 C J p 97 note 28.

culpable negligence are set forth in an indictment for manslaughter, the acts so alleged must be of such character as to warrant an inference of culpable negligence therefrom,[83] but an indictment which charges that accused did feloniously kill and slay deceased by culpable negligence is not defective because of a failure to set forth the conduct constituting culpable negligence.[84] Where an essential element of the homicide charged is that it must have resulted from the negligence and carelessness of accused in the performance of a specified character of act, such as a lawful or an unlawful act, it must be alleged that accused was engaged in the performance of such specified character of act, setting it out, followed by an averment of negligence and carelessness in the performance of the act.[85] The distinction between involuntary manslaughter committed while perpetrating an unlawful act not amounting to a felony and the offense arising out of some negligence or fault in doing a lawful act in a grossly negligent manner and from which death results must be kept in mind on the question of pleading.[86] In the former case, as appears infra § 148, it is sufficient to allege the unlawful act with sufficient particularity to identify it and then to charge that as a consequence accused caused the death of deceased, and there is no need to aver in detail the specific acts of accused, but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged, as well as the acts of accused, constituting failure to perform or improper performance.[87] Where a positive act causing the death is charged, it is not essential to charge expressly the duty violated,[88] but such duty must be alleged where the wrong consists merely of nonfeasance,[89] and it has been held that in a case of manslaughter committed through gross or culpable negligence, while doing a lawful act, a duty which was neglected or improperly performed must be alleged.[90] The indictment must charge a neglect that is personal.[91] It is not necessary to set up a specific standard by which accused's acts might be measured,[92] or any specific degree of negligence.[93] However, an indictment or information charging involuntary manslaughter based on the commission of an act which is unlawful because it is negligent must allege facts by which it is made to appear that the act was done wantonly or with reckless disregard for the safety of others.[94] An indictment for involuntary manslaughter is not rendered insufficient by allegations of willful and culpable negligence.[95]

To charge manslaughter for a death occurring in the operation of an unsafe airplane the indictment must charge that the operation of the plane was carried on in an unlawful manner.[96]

Several defendants Where several defendants are charged the indictment must show such a joint undertaking that the negligence of one will be imputable to the others,[97] and the definite duty of each must be stated as well as the specific acts with which they are charged.[98]

83. Miss.—Williams v State, 137 So 106, 161 Miss 406

84. Miss.—Williams v State supra

85. Tex.—Salamy v State, 37 S W 2d 1028, 117 Tex Cr 465—Simmons v State, 3 S W 2d 419, 109 Tex Cr 157

86. Mich.—People v Wardell, 289 N W 328, 291 Mich 276—People v Maki, 223 N W 70, 245 Mich 455—People v Townsend, 183 N W 177, 214 Mich 267, 16 A L R 902
Or.—State v Miller 243 P 72, 119 Or 409, affirmed Miller v State of Oregon 47 S Ct 314 273 U S 657, 71 L Ed 825

87. Mich.—People v Maki, 223 N W 70, 245 Mich 455—People v Townsend 183 N W 177, 214 Mich 267, 16 A L R 902
Or.—State v Miller, 243 P 72, 119 Or 409, affirmed Miller v State of Oregon, 47 S Ct 314, 273 U S 657 71 L Ed 825

88. Iowa.—State v Behm, 34 N W 319, 72 Iowa 533
30 C J p 97 note 34

Character of duty charged

An indictment for manslaughter in the erection of a building which collapsed, which charged accused with the duty among others to erect such iron and steel and to cause them to be erected in compliance with the laws of the state, and that he failed in such duty imposed by the laws of the state and the ordinances of the city wherein the building was erected, charged a statutory and not a common-law duty.—People v Gavdica, 203 N Y S 243, 122 Misc 31

89. Sufficiency of allegations

(1) Indictment in involuntary manslaughter prosecution against railroad crossing watchman whose failure to give warning caused death of motorist who collided with train held not insufficient as failing to allege whether accused was present at time and place of homicide, or whether he was under duty to be there and that he was absent therefrom in violation of duty, where indictment sufficiently charged his employment on day alleged as a watchman at crossing and his failure to perform his duty.—State v Benton, 187 A 609, 8 W W Harr. Del. 1

(2) Other cases see 30 C J p 97 note 35 [b]

90. Okl.—Vaughn v State, 276 P 701, 42 Okl Cr 376

91. Del. State v Benton 187 A 609 8 W W Harr 1

92. Minn.—State v Lester, 149 N W 297, 127 Minn 282, L R A 1915D 201

93. Minn.—State v Lester, supra

94. Ind.—State v Beckman, 37 N E 2d 531 219 Ind 176

95. Ill.—People v Adams, 124 N E 575 289 Ill 339
Miss.—Williams v State, 137 So 106, 161 Miss 406

96. Ala.—French v State, 180 So 592, 28 Ala App 147, certiorari denied 180 So 594, 235 Ala 570

97. D C.—U S v Geare, 293 F 997, 54 App D C 30

98. D C.—Ainsworth v U. S., 1 App. D C 518.

§ 148. —— In Perpetration of Another Offense

In general, although there is authority to the contrary, an ordinary charge for murder without averment of the connected felony is sufficient to charge a homicide committed in the perpetration of a felony, but such an averment is proper and may be sufficient to charge the homicide as murder. A charge of manslaughter in the commission of an unlawful act must set out the unlawful act and show that it was unlawful, but it is only necessary to plead it with sufficient detail to identify it

Where the homicide is committed in the perpetration of or attempt to perpetrate a felony, or in the withdrawal or escape therefrom, although there is authority which holds it necessary to set out in the indictment or information the felony in the pursuance of which the homicide was committed as well as the homicide,[99] it is usually held that an indictment in the ordinary form for murder or for murder in the first degree is sufficient without averment of the connected felony.[1] Hence allegations as to the connected offense may be disregarded, where the remaining averments are sufficient to charge murder or murder in the first degree in the usual form,[2] and in any event are to be deemed sufficient if accused is not misled or prejudiced.[3] However, an indictment or information may count specifically on the connected felony as supplying the necessary elements to render the homicide murder,[4] and where it does it should set forth the felony and charge the killing by accused while engaged in the commission thereof.[5] In such case, although there is some authority to the effect that the constituent felony must be averred with the same formality which would be requisite were it

99. Ark.—Henry v. State, 237 S.W. 454, 151 Ark. 620—Rayburn v. State, 63 S.W. 356, 69 Ark. 177.
Ky.—Simmons v. Commonwealth, 92 S.W.2d 68, 263 Ky. 171.
30 C.J. p. 98 note 40.

Not surplusage

Reference, in indictment charging murder in pursuance of conspiracy to break and enter box car in attempt to steal, to conspiracy was not mere surplusage.—Simmons v. Commonwealth, supra.

Indictments or informations held sufficient

(1) Indictment charging that accused and other named persons willfully and feloniously killed another, while engaged in commission of crime of robbery charged murder in first degree.—Clark v. State, 276 S.W. 849, 169 Ark. 717.

(2) Indictment charging that accused, with felonious intent to rob deceased did assault and kill him sufficiently charged first degree murder, as against contention that the use of the word "intent" instead of "attempt," the word used in the statute, rendered it insufficient.—Turnage v. State, 80 S.W.2d 865, 182 Ark. 74.

(3) Indictment, charging that accused did "unlawfully and feloniously kill and murder (deceased) in the attempt to perpetrate a robbery by shooting at and thereby mortally wounding" deceased, and containing additional averment that at same time and place defendants attempted to rob another held to sufficiently charge murder in an attempt to rob as against motion to quash.—Parker v. State, 149 N.E. 59, 196 Ind. 534.

In attempt to escape

Indictment charging killing in attempt to escape after bank robbery held sufficient.—Sexson v. Commonwealth, 39 S.W.2d 229, 239 Ky. 177.

1. Fla.—Southworth v. State, 125 So. 345, 98 Fla. 1184.
Idaho.—State v. Reding, 13 P.2d 253, 256, 52 Idaho 260, citing **Corpus Juris.**
Iowa.—State v. Johnson, 34 N.W. 177, 72 Iowa 393.
Mo.—State v. Messino, 30 S.W.2d 750, 325 Mo. 743.—State v. Meyers, 12 S.W. 516, 99 Mo. 107.
Mont.—State v. Bolton, 212 P. 504, 65 Mont. 74.—Territory v. Stears, 2 Mont. 324.
N.J.—State v. Juliano, 138 A. 575, 103 N.J.Law 663.—Titus v. State, 7 A. 621, 49 N.J.Law 36.
N.Y.—People v. Flanigan, 66 N.E. 988, 174 N.Y. 356.—People v. Giblin, 21 N.E. 1062, 115 N.Y. 196, 4 L.R.A. 757.—Cox v. People, 80 N.Y. 500.
Or.—State v. Casey, 213 P. 771, 108 Or. 386, motion to recall mandate denied 217 P. 632, 108 Or. 386.
Pa.—Commonwealth v. Bruno, 175 A. 518, 316 Pa. 394.—Commonwealth v. Flanagan, 63 Pa. 415, 7 Watts & S. 415.
Tenn.—Sullivan v. State, 121 S.W.2d 535, 537, 173 Tenn. 175, quoting **Corpus Juris.**
Tex.—Roach v. State, 8 Tex.App. 178.
Utah.—State v. King, 68 P. 418, 24 Utah 182, 91 Am.St.R. 808.
Wyo.—Harris v. State, 212 P. 111, 34 Wyo. 175.
30 C.J. p. 98 note 39.
Admissibility of evidence of felony see infra § 253.
Homicide in commission of other crime as
Manslaughter see supra §§ 57–60.
Murder
Generally see supra § 21.
In first degree see supra § 31.

In attempt to murder another

Where accused shot and killed deceased in attempt to murder deceased's husband, an indictment in the common form for murder in the first degree of deceased was sufficient as against contention that indictment should have alleged that accused shot deceased while he was attempting to murder deceased's husband.—Sullivan v. State, 121 S.W.2d 535, 173 Tenn. 175.

Aider and abettor

An indictment, as in the text, is sufficient to charge one who aided and abetted in the felony.—State v. Bolton, 212 P. 504, 65 Mont. 74.

2. Pa.—Commonwealth v. Bruno, 175 A. 518, 316 Pa. 394.
30 C.J. p. 98 note 41.

Considered surplusage

(1) Indictment which properly charged murder and then alleged that death resulted from the perpetration of arson, setting forth the arson in language similar to that of a statute defining arson, enacted subsequently to the statute defining as murder a homicide committed in the perpetration of arson and broader in its definition of arson than the statute defining murder, is sufficient, since that portion of the indictment setting forth the arson may be considered as surplusage.—Commonwealth v. Bruno, supra.

(2) Other cases see 30 C.J. p. 98 note 41 [b].

3. Mich.—People v. Willett, 62 N.W. 1115, 105 Mich. 110.
30 C.J. p. 98 note 42.

4. Or.—State v. Dorland, 89 P.2d 595, 161 Or. 403.—State v. Brown, 7 Or. 186.
30 C.J. p. 98 note 43.
Necessity to allege
Deliberation and premeditation see infra § 158.
Malice see infra § 156.
Specific intent see infra § 157.
Willfulness, unlawfulness, and feloniousness see infra § 160.

5. N.Y.—People v. Cole, 2 N.Y.Cr. 108.
30 C.J. p. 98 note 43.

the sole basis of a count in an indictment,[6] as a general rule it is sufficient to allege that the killing was committed in the perpetration of or attempt to perpetrate a designated felony or felonies, or in the escape or withdrawal therefrom, without setting out in detail the facts constituting the alleged felony or felonies.[7] A charge of facts constituting the felony, however, will not in itself be sufficient unless such facts contain the essential elements of a charge of murder.[8] Where a killing is charged as having occurred in the perpetration of an unlawful design without intent to kill, a conviction of murder at common law cannot be sustained, where from the description of the intended offense it appears that it was not a felony.[9]

Where all participants in the perpetration of a felony in which a homicide is committed are liable as principals for the homicide committed, see supra § 9, the indictment or information may charge them all as principals and need not differentiate between them as principals and accessaries.[10] An indictment or information which charges that two or more persons shot and killed deceased is not defective because only one shot was fired where it appears that the shot was fired while those accused were jointly making a felonious assault on another.[11]

Where the connected felony is alleged, such averments refer to and are descriptive of the homicide charged, and hence the indictment or information is not duplicitous as containing a statement of more than one offense, within the meaning of a statute forbidding the charge of two or more offenses in the same indictment or information.[12]

Resisting arrest The fact that accused was resisting arrest at the time of the commission of the homicide, where such is the case, need not be alleged.[13]

Manslaughter Although it has been held sufficient in an indictment or information for manslaughter merely to charge that accused unlawfully killed deceased, without pleading the unlawful act, under statutory provisions which prescribe such a short form and also provide that it is unnecessary to set forth the manner and means of the killing,[14] by the weight of authority it is held that an indictment under a statute for manslaughter in the com-

6. N J—Titus v State 7 A 621, 49 N J Law 36
30 C J p 98 note 44

Averment of connected crime held sufficient

Where in alleging a murder perpetrated in the commission of the intended felony of grand larceny wherein the theft is averred in the words "did feloniously steal take and carry away," the particular intent essential to the crime is alleged, and where the value of the property is stated at a sum bringing it within the definition of grand larceny, the crime is sufficiently described as grand larceny—People v Willett 6 N E 301, 102 N Y 251

7. Idaho—State v Reding, 13 P 2d 253, 52 Idaho 260
Ohio—Southard v State, 153 N E 907, 22 Ohio App 185
Okl—Howington v State, 250 P 941, 35 Okl Cr 352
Wash—State v Anderson, 116 P 2d 346, 10 Wash 2d 167—State v Paschall, 85 P 2d 1046, 197 Wash 582—State v Ryan, 73 P 2d 735, 192 Wash 160—State v Fillpot, 98 P 659, 51 Wash 223
30 C J p 98 note 39 [c]

Designation of felony sufficient

In prosecution for murder of child by burning house, indictment charging accused with killing child by setting fire to house, "in which house at said time was Mary Lou Rardin," charged accused with killing child by setting fire to dwelling house—Whitfield v Commonwealth, 128 S W 2d 208, 278 Ky 111

Equivalent terms

An allegation in bill of indictment for murder, that murder was committed while defendants were in act of robbing deceased, was equivalent to alleging that it was committed in perpetration of a robbery, primary meaning of the word "perpetrate" being to do or perform—State v Linney 194 S E 470, 212 N C 739

Not duplicitous

An information is not improper and duplicitous because it alleges the homicide to have been committed while accused was engaged in several designated felonies, stated either conjunctively or in the alternative—State v Montgomery, Wash, 132 P 2d 720—State v Anderson, 116 P 2d 346, 10 Wash 2d 167

Indictment or information held sufficient

Indictment for murder, committed in perpetration of arson—State v Meadows, 51 S W 2d 1033, 330 Mo 1020

Particulars not required

(1) Indictment for murder charging killing which occurred in perpetration of arson was sufficient although not averring that house was burned—Taylor v State, 106 S W 2d 681, 133 Tex Cr 56

(2) Where the statutory form of indictment does not require it, an indictment for murder committed in the commission of a robbery need not allege that the money taken was the property of another than accused—State v McCarthy, 83 P 2d 801, 160 Or 196

Conspiracy

In prosecution for homicide in perpetration of felony, conspiracy, if any, need not be charged—State v Meadows, 51 S W 2d 1033, 330 Mo 1020—State v Messino, 30 S W 2d 750, 325 Mo 743

8. Iowa—State v Von Kutzleben 113 N W 484, 136 Iowa 89
30 C J p 98 note 45

9 Me—Smith v State, 33 Me 48, 54 Am D 607
30 C J p 99 note 46
Necessity that unlawful design be to commit felony in order that offense may constitute murder see supra § 21

10 N J—State v Juliano 138 A 575, 103 N J Law 663

11 Ark—Bone v State 129 S W 2d 240, 198 Ark 519

12. N Y—Dolan v People, 64 N Y 485
N D—State v Belyea, 83 N W 1, 9 N D 353
Wash—State v Fillpot, 98 P 659, 51 Wash 223

13. Or—State v Kingsley, 2 P 2d 3, 137 Or 305, rehearing denied 3 P 2d 113, 137 Or 305

14. Ohio—State v Schaeffer, 117 N E 220, 96 Ohio St 215, L R A 1918B 945, Ann Cas 1918E 1137.

mission of an unlawful act must set out and describe the unlawful act,[15] and show that it was unlawful[16] It is sufficient to allege the unlawful act with sufficient particularity to identify it and then to charge that, as a consequence, accused caused the death of deceased, without averring in detail the specific acts of accused[17] It is not essential that the incidental offense should be pleaded with the same fullness and particularity as would be necessary if it were the sole offense charged[18] Where killing of the mother in an attempted abortion is made punishable by a specific statute, an indictment for such offense must contain all the descriptive averments of the statute, and an ordinary indictment for manslaughter is held insufficient,[19] and in some jurisdictions,[20] but not in others,[21] it is necessary to allege that the act was not necessary to save the life of the woman, or necessary for medical or surgical treatment, or was not performed or advised as necessary by a duly licensed physician. Under a statute making it manslaughter to kill another while engaged in the commission of a misdemeanor, it is sufficient to allege facts showing the commission either of a misdemeanor or a felony, without alleging that accused was committing a misdemeanor.[22]

§ 149. —— Assault and Battery and Infliction of Mortal Wound

Except as the common-law rules have been altered by statute, it is necessary where a homicide was caused by violence to allege the assault and the battery to have been on the deceased and that the assault caused the battery. Where the person killed was another than the one intended the assault should be alleged to have been on the person killed and not on the person intended.

Except in so far as the common-law rules may have been relaxed by statute, it is necessary where a homicide was occasioned by a violence to allege an assault[23] on the person on whom the battery was inflicted,[24] together with the connection of the assault with the striking and wounding,[25] and the indictment must contain a direct averment of the striking and wounding of deceased by accused,[26] although it is not necessary that the assault[27] or battery[28] shall in all cases be alleged expressly, and it is ordinarily regarded as sufficient to employ such language as in its ordinary acceptance shows the infliction of the wound,[29] and the connection be-

15. Ind—Shelton v State, 199 N E 148, 209 Ind 534

16. Ind—Blackburn v State, 180 N E 180, 203 Ind 332—Kimmel v State, 154 N E 16, 198 Ind 414
30 C J p 99 note 47
Knowledge of character of poison see infra § 161
Negativing matters of defense see supra § 140

17. Mich—People v Maki, 223 N W 70, 245 Mich 455—People v Townsend, 183 N W 177, 214 Mich 267, 16 A L R 902
Or—State v Miller, 243 P 72, 119 Or 409, affirmed Miller v State of Oregon, 47 S Ct 344, 273 U S 657, 71 L Ed 825

18. Or—State v Miller, supra
30 C J p 99 note 49

Particulars not required

(1) Indictment for involuntary manslaughter based on violation of milk ordinance was not demurrable for failure to allege that action of health officer in prohibiting sale of said milk was made after inspection —Leontas v Walker, 142 S E 891, 166 Ga 266

(2) Indictment for involuntary manslaughter, based on violation of milk ordinance held not demurrable for not alleging conditions showing that milk was unfit—Leontas v Walker, supra

Time and place

Indictment for involuntary manslaughter, based on violation of milk ordinance, held not demurrable for failure to allege time and place of milk sale by accused—Leontas v Walker, supra

Manslaughter caused by abortion

(1) Generally—State v Dupree, Mo, 147 S W 2d 419—State v Goodson, 252 S W 389, 299 Mo 321—State v Anderson, 250 S W 68, 298 Mo 382

(2) Other cases see 30 C J p 99 note 49 [d]

19. Mich—People v Olmstead, 30 Mich 431
30 C J p 99 note 48
Description of female as "quick with child" see supra § 145 b

Infliction of wound

It is not necessary to allege that any wound was inflicted on the woman—State v Anderson, 250 S W 68, 298 Mo 382

20. Mo—State v Mikel, 278 S W 670—State v Dargatz, 148 S W 889, 244 Mo 218
30 C J p 90 note 72 [a]

Allegations held sufficient

Allegation that, in attempting to produce the miscarriage or abortion, accused was not engaged in any act necessary to preserve the life of deceased or that of an unborn child was sufficient—State v Dargatz, supra

21. Mich—People v Southwick, 261 N W 320, 272 Mich 258

Where proof not required

Where the statute provides that it is not necessary to prove lack of necessity to preserve life it need not be alleged—People v Southwick, supra.

22. N Y—People v Stacy, 85 N E 1114, 192 N Y 577, affirming 104 N Y S 615, 119 App Div 747

23. S C—State v Rector, 155 S E 385, 158 S C 212
Utah—State v Green, 6 P 2d 177, 78 Utah 580
30 C J p 99 note 53

24. Mo—State v Meadows, 56 S W 878, 156 Mo 110—State v Clark, 47 S W 886, 147 Mo 20

25. Mo—State v Birks, 97 S W 578, 199 Mo 263
30 C J p 99 note 55

26. Mo—State v Green, 20 S W 304, 111 Mo 585
30 C J p 100 note 56

27. Iowa—State v Whitnah, 105 N W 432, 129 Iowa 211
30 C J p 100 note 57

28. Tenn—Ray v State, 67 S W 553, 108 Tenn 282
30 C J p 100 note 58

29. Ill—Palmer v People, 28 N E 130, 138 Ill 356, 32 Am S R 146
30 C J p 100 note 59

Allegations held sufficient

(1) An indictment charging murder in the first degree in that accused killed deceased by striking him with a rock or some hard substance, and by hurling or throwing his body from bridge into river, was in compliance with law—Rowe v. State, Ala., 11 So 2d 749

(2) Other allegations see 30 C J p 100 note 59 [a].

tween the assault and the infliction of the wound [30] A charge of killing by means of shooting has been held sufficient, although there is no direct allegation that the bullets struck and penetrated,[31] or entered[32] the body of deceased, but there is also authority to the contrary [33] So also indictments have been sustained in the absence of direct allegations that the contents of a firearm were discharged into the body of deceased,[34] or that wounds were inflicted by the shooting [35] Mere surplusage does not vitiate an allegation of assault [36]

Several assaults The indictment may allege a series of assaults on different dates, as a result of which death ensued, although not from any particular assault [37]

Killing of person other than the one intended An indictment for the murder of one person in an attempt to kill a different person need not allege an actual assault on the person designed to be killed [38] It should allege an assault on the person killed in all respects as though he were the intended victim [39]

Person unknown Accused may be charged with cooperating with a person unknown who directly inflicted the fatal wound [40]

Repetition It is not necessary to repeat the charge of the assault in the part of the indictment stating the mortal wound, where connectives such as "then and there" are employed.[41]

§ 150. —— Manner and Means of Killing

a In general
b Instrument or means used
c Manner of using weapon
d Form and sufficiency of statement

a. In General

At common law and under the statutes in certain jurisdictions the manner and means of the killing, if known, must be alleged, and if not known that fact must be stated, but under the statutes in force in many jurisdictions such averments have been dispensed with, and such statutes do not deprive the accused of any of his constitutional rights

At common law and under the statutes in force in certain jurisdictions the manner and means of the killing, if known, must be alleged in the indictment or information [42] In many jurisdictions, however, the necessity for such averments has been dispensed with under the statutes in force therein [43] In some jurisdictions it is held that, under statutes requiring only a clear and distinct statement of the offense in ordinary and concise language, the manner and means of the killing need not be set out,[44] but in other jurisdictions it is held that under such statutes the manner and means of the killing must be set out [45] Statutes obviating the necessity for

30. Mo—State v Ballance 106 S W 60, 207 Mo 607
30 C J p 100 note 60

31. Ind—Veatch v State, 56 Ind 584, 26 Am R 44
30 C J p 100 note 61

32. Ga—Green v State, 158 S E 285, 172 Ga 635

33. Mo—State v Johnson, 90 S W 89, 191 Mo 177
30 C J p 100 note 62

34. Okl—Williams v State, 258 P 1066, 38 Okl Cr 1
S D—State v Swenson, 99 N W 1114, 18 S D 196

35. Ga—Green v State, 158 S E 285, 172 Ga 635
Kan—State v Truskett, 118 P 1047, 85 Kan 804—State v Kirby, 63 P 752, 62 Kan 436

36. Mo—State v Miller, 56 S W 907, 156 Mo 76
30 C J p 100 note 65

37. Mass—Commonwealth v Stafford, 12 Cush 619

38. Ky—Commonwealth v Branham, 126 S W 2d 234, 235, 274 Ky 730, quoting **Corpus Juris.**
Okl—Fooshee v State, 108 P 554, 3 Okl Cr 666

39. Ky.—Commonwealth v Branham, 126 S W 2d 234, 235, 274 Ky 730 quoting **Corpus Juris.**
30 C J p 101 note 68

40. S C—State v Green, 35 S C L 128 note

41. N C—State v Owen, 5 N C 452, 4 Am D 571

42. Ala—Langham v State 11 So 2d 131—Wilson v State, 8 So 2d 422, 243 Ala 1—McDonald v State, 1 So 2d 658, 241 Ala 172
Del—Dean v State, 125 A 478, 2 W W Harr 469, affirming State v Dean, 122 A 448, 2 W W Harr 290
Ind—Alderson v State, 145 N E 572, 196 Ind 22
Tex—Black v State, 128 S W 2d 406, 137 Tex Cr 173
30 C J p 101 note 71

43. Cal—People v Herbert, 58 P 2d 909, 6 Cal 2d 541
Colo—Jordan v People, 36 P 218, 19 Colo 417
La—State v Capaci, 154 So 419, 179 La 462—State v Smith, 103 So 534, 158 La 129
Md—Neusbaum v State, 143 A 872, 156 Md 149
Miss—Talbert v State, 159 So 549, 172 Miss 243
N J—State v Donato, 148 A. 776, 106 N J Law 397
N M—State v Roy, 60 P 2d 646, 40 N M 397
Wis—State v Sloan, 27 N W 616, 65 Wis 647
Wyo—Gustavenson v State, 68 P 1006, 10 Wyo 300
30 C J p 101 note 72

Present tendency

"Formerly great particularity was required in setting forth the manner of the death of the deceased and the means by which death was inflicted but it is the modern tendency of courts to relax the rigidity of requirements in indictments, and the particular circumstances of the offense under the modern practice and our statutes need not be charged unless they are necessary to constitute a complete offense"—Bramlett v State, 43 S W 2d 364, 365, 184 Ark 808

44. Ariz—Gutierrez v State, 34 P 2d 395, 44 Ariz 114—Macias v State, 6 P 2d 423, 39 Ariz 303—Collins v State, 294 P 625 37 Ariz 353
Mont—State v Heaston, 97 P 2d 330, 109 Mont 303—State v Louie Won, 248 P 201, 76 Mont 509
30 C J p 101 note 77

45. Idaho—State v Calkins, 120 P 2d 253—State v McMahan, 65 P 2d 156, 57 Idaho 240

such averments do not dispense with the necessity of setting out the facts constituting the offense,[46] but an unnecessary or defective statement of the manner or means will not vitiate the indictment[47]

The omission of such averments has been held not to deprive accused of his constitutional rights,[48] such as his right to be informed of the nature and cause of the accusation,[49] or to be charged by indictment, presentment, or impeachment,[50] and not to violate a statutory requirement of certainty regarding the offense charged[51]

Manner and means unknown In case the manner and means are unknown, such fact may be stated and a more specific statement will be excused,[52] and in some jurisdictions such an allegation is required[53]

b. Instrument or Means Used

Where an allegation as to the manner and means of the killing is required, the particular instrument of death or means used, if known, must be stated, and if unknown or only partially known an averment that such means are unknown, or unknown further than as averred, is required, but where the manner and means of the killing need not be alleged such a statement may be omitted, although it is usual to name the weapon employed

The requirement of a statement of the manner and means of the killing, see supra subdivision a of this section, requires that the indictment shall state the particular instrument or means of death used, if known,[54] but in jurisdictions where the manner and means of the killing need not be alleged, see supra subdivision a of this section, such a statement may be omitted,[55] although it is usual to name the weapon employed.[56]

Instrument of death unknown In case the instrument of death or means used is unknown it is sufficient to state that fact,[57] and in some states it must be expressly alleged,[58] an indefinite description being improper[59] Where the means by which the killing was accomplished are only partially known, such means, as far as known, should be alleged, with an averment that the means are unknown further than as averred[60]

c. Manner of Using Weapon

It is necessary in some jurisdictions to allege the manner in which the weapon used to kill was employed, but the details thereof, such as how and in what hand it was held, etc, need not be averred A charge that

Cases overruled

The decision in the case of State v Lundhigh, 164 P 690, 30 Idaho 365, which held that the manner and means of the killing need not be set out in the indictment or information, and the cases following it in that particular, have been expressly overruled—State v McMahan, 65 P 2d 156, 57 Idaho 240

46. Ind—Littell v State, 33 N E 417, 133 Ind 577

47. Wyo—Gustavenson v State, 68 P 1006, 10 Wyo 300
30 C J p 101 note 76

48. N J—State v Donato, 148 A 776, 106 N J Law 397
N C—State v Moore, 10 S E 183, 104 N C 743

49. Kan—State v Elftman, 226 P 795, 800, 116 Kan 214, citing **Corpus Juris.**
La—State v Capaci, 154 So 419, 179 La 462—State v Smith, 103 So 531, 158 La 129
N M—State v Roy, 60 P 2d 646, 40 N M 397
30 C J p 101 note 73

50. N C—State v Moore, 10 S E 183, 104 N C 743

51. Kan—State v Elftman, 226 P 795, 116 Kan 214

52. Ala—Langham v State, 11 So 2d 131
Kan—State v Buck, 127 P 631, 88 Kan 114, 42 L R A,N S, 854, Ann Cas 1914B 730
Ky—Newsome v Commonwealth, 33 S W 2d 36, 236 Ky. 344
Wash—State v Montgomery, 132 P 2d 720, 722, citing **Corpus Juris.**
30 C J p 102 note 78
Where instrument unknown see infra subdivision b of this section

53. Idaho—State v Calkins, 120 P 2d 253

54. Ala—Oliver v State, 175 So 305, 234 Ala 460
Del—Dean v State, 125 A 478, 2 W W Harr 469, affirming State v Dean 122 A 448, 2 W W Harr 290
Kan—State v Elftman, 226 P 795, 116 Kan 214
Tex—McCullough v State, 132 S W 2d 112, 137 Tex Cr 577—Black v State, 128 S W 2d 406, 137 Tex Cr 173—Jones v State, 104 S W 2d 42, 132 Tex Cr 216
30 C J p 102 note 84

55. Ariz—Macias v State, 6 P 2d 423, 39 Ariz 303—Azbill v State, 172 P 658, 19 Ariz 499—Molina v Territory, 95 P 102, 12 Ariz 14
Ark—Bramlett v State, 43 S W 2d 364, 184 Ark 808
Mont—State v Heaston, 97 P 2d 330, 109 Mont 303
30 C J p 102 note 85

56. Cal—People v Steventon, 9 Cal 273

57. Ala—Canty v State, 191 So 260, 238 Ala 384, reversed on other grounds 60 S Ct 612, 309 U S 629, 84 L Ed 988—King v. State, 34 So 683, 137 Ala 47
Ind—Peats v State, 12 N E 2d 270, 213 Ind 560
Tex—McNiel v State, 100 S W 2d 365, 131 Tex Cr 553—Bookman v State, 16 S W 2d 123, 112 Tex Cr 233—Walker v State, 251 S W 235, 94 Tex Cr 414
Wash—State v Montgomery, 132 P 2d 720

Conclusiveness of averment

Statements in the indictment as to lack of knowledge on the part of the grand jury must be taken as true unless the contrary appears on the face of the indictment—Peats v. State, 12 N E 2d 270, 213 Ind 560

58. Ala—Oliver v State, 175 So 305, 234 Ala 460
Idaho—State v Calkins, 120 P 2d 253
Tex—Black v State 128 S W 2d 406, 137 Tex Cr 173—Jones v State, 104 S W 2d 42, 132 Tex Cr 216

59. Tex—Huddleston v State, 156 S W 1168, 70 Tex Cr 260
30 C J p 103 note 95

60. Ala—Oliver v State, 175 So 305, 234 Ala 460

Partial description

(1) A general description of the weapon with an averment that its exact character is unknown was sufficient—Waller v State, 138 S E 67, 164 Ga 128

(2) Description of instrument as a blunt instrument, a more particular description of which the county attorney was unable to give, was sufficient—State v. Elftman, 226 P. 795, 116 Kan 214.

two or more persons killed deceased with one weapon is not defective.

Although the requirement of a statement of the facts and circumstances of the crime is sometimes held to render it necessary to state the manner in which the deadly weapon was employed,[61] it is apparently unnecessary to allege the way in which the instrument was held,[62] or that it was aimed and pointed at deceased,[63] or that it was in the hands of accused,[64] or in which hand,[65] or, if the killing was accomplished by shooting, the manner in which the firearm was discharged[66]

An indictment or information is not defective because it charges two or more persons with killing one person with one weapon[67] held in the hands of one of them,[68] or in the hands of all of them,[69] as it does not charge a physical impossibility,[70] although as to the latter the contrary has been held in a prosecution for assault and battery, see Assault and Battery § 110 g (1)

Where weapon not per se deadly It has been held in some jurisdictions that where the weapon used in committing the homicide is not per se a deadly or dangerous weapon the indictment or information must allege the manner in which it was used[71]

After verdict. The fact that the indictment does not show the manner in which the weapon was used cannot be urged after verdict[72]

d. Form and Sufficiency of Statement

(1) In general
(2) Homicide by poison

(1) In General

The manner and means of the homicide should be stated in ordinary and concise language, with as much certainty as possible, but a description of the weapon in general terms and without unnecessary detail is sufficient Different modes and means may be averred in the same or different counts, as may also allegations of specific modes and means and averments that they are unknown

The manner and means of the killing, when required to be stated, see supra subdivision a of this section, must be set out with as much certainty as the circumstances of the case will permit[73] As a general rule an averment in ordinary and concise language, such as to enable a person of ordinary understanding to know what was intended, is sufficient[74] Ordinarily where the commission of the

61. Ark—Edwards v State, 27 Ark 493
30 C J p 103 note 97

Manner of use sufficiently shown

(1) An indictment for murder alleging that defendants killed boy "by striking him with a certain instrument unknown to these grand jurors, and thereby inflicting a mortal wound" was not defective as failing to show how weapon was used—Johnson v State, 197 S E 786, 186 Ga 324

(2) An allegation that accused did kill deceased with a pistol, loaded, etc, from which shooting and wounding deceased died, inferentially alleges with sufficient clearness that the use of the pistol was by shooting it, and precludes any inference that the act constituting the crime was any other use of the pistol—Arnold v Commonwealth, 240 S W 87, 194 Ky 421

62. Ill—People v Corder, 137 N E 845, 306 Ill 264
30 C J p 103 note 98

63. Ga—Brown v State, 79 S E 231, 13 Ga App 437

64. S D—State v Swenson, 99 N W 1114, 18 S D 196
30 C J p 103 note 1

65. Ill—People v Lukoszus, 89 N E 749, 242 Ill 101
30 C J p 103 note 2

66. Ill—People v Corder, 137 N E 845, 306 Ill. 264.

67 U S—Bowen v Johnson, C C A Cal 97 F 2d 860 certiorari granted Bowen v Johnston, 59 S Ct 98, 305 U S 579, 83 L Ed 365 affirmed 59 S Ct 442, 306 U S 19, 83 L Ed 455
Ga—Harris v State 9 S E 2d 183, 190 Ga 258
Okl—Evinger v State, 45 P 2d 552 57 Okl Cr 63

Not contradictory or uncertain

Indictment against three persons for murder is not contradictory and uncertain in charging them with discharging a certain revolver in and upon the body of deceased—State v Brown 119 A 324, 45 R I 9

68 Ark—Sheppard v State, 254 S W 657, 160 Ark 315

69. Mo—State v Cooper, 259 S W 434
30 C J p 103 note 6

70 Va—Hash v Commonwealth, 13 S E 398, 88 Va 172
30 C J p 103 note 7

71. Okl—Scott v State 268 P 312, 40 Okl Cr 296

Indictment held sufficient

Indictment held sufficiently to charge accused with cutting and stabbing deceased—Scott v State, supra

72. Ky—Lightfoot v Commonwealth, 80 Ky 516

73. Mass—Commonwealth v Howard, 91 N E 397, 205 Mass. 128
30 C J p 103 note 12

Allegation held sufficiently definite

Allegation charging accused with killing deceased "by shooting him, the deceased, in the body with a pistol," is not dubious ambiguous, or demurrable for absence of an explanation as to how the pistol entered the body of the deceased, inasmuch as it is a matter of common knowledge that a statement that one had been shot with a pistol does not imply that the pistol itself entered the body of the person shot—Green v State, 158 S E 285, 172 Ga 635

74. Okl—Williams v State, 258 P 1066, 38 Okl Cr 1
30 C J p 103 note 13

Participial form

If the acts which constitute the offense are charged directly, the manner of doing them, or the means used to accomplish the offense may be alleged in the participial form—Caldwell v State, 14 S W 122, 28 Tex App 566

Omission of "with"

(1) An information charging that accused and another "upon one C did make an assault and a dangerous and deadly weapon to wit, a pistol in their hands then and there had and held, at and against him did shoot off and discharge," etc, held not insufficient on the ground that the word "with" was omitted after the word "assault"—State v. Baird, 248 S W 596, 297 Mo 219.

homicide by means of a weapon is charged the indictment must specify the weapon by name or description.[75] A description of the weapon in general terms is sufficient,[76] it is unnecessary to give its dimensions and weight,[77] or to aver that it was one susceptible of producing, or likely to produce, death,[78] or deadly or dangerous,[79] unless the indictment is drawn under a statute employing such words in defining the crime,[80] or, in some jurisdictions, except where the weapon used in committing the homicide is not per se a dangerous weapon.[81] Where the murder was accomplished by shooting it is unnecessary to allege the particular variety of firearm used,[82] or with what it was loaded,[83] or that it was loaded;[84] and the indictment is not rendered uncertain by the fact that the character of the charge is stated by the employment of words in the alternative where such words are to be regarded as synonymous,[85] or by the fact that different terms are used to describe the character of the charge and the missile with which deceased was struck, where one of the terms used is a general term which includes the other in its meaning.[86]

An indictment is not defective by reason of the fact that it charges two or more persons with the actual shooting and killing of deceased.[87]

(2) Other cases see 30 C J p 101 note 71 [a]

Averments held sufficient

(1) Shooting

Ga—Green v State, 158 S E 285, 172 Ga 635

Ill—People v Moore, 14 N E 2d 494, 368 Ill 455

30 C J p 103 note 13 [a] (9)

(2) Hitting or striking deceased with a rock or some hard substance—Rowe v State, Ala, 11 So 2d 749

(3) Throwing heavy missile at victim—Peats v State, 12 N E 2d 270, 213 Ind 560—Crickmore v State, 12 N E 2d 266, 213 Ind 586

(4) Shoving deceased from cliff—Black v State, 128 S W 2d 406, 137 Tex Cr 173

(5) Throwing body of deceased from a bridge into river—Rowe v State, supra

(6) Indictment for murder, concluding that "L in the manner and form and by the means aforesaid, feloniously did kill and murder," held not objectionable in that it omitted word "aforesaid' after word "form," it being construed as meaning that "the manner and form and means" conjunctively used, followed by the word "aforesaid" had direct reference to use of pistol by accused in killing victim—State v Williams, 274 S W 427, 309 Mo 155

(7) Information in murder prosecution held not defective for failure to charge that accused discharged and shot off pistol at deceased—State v Young, 286 S W 29, 314 Mo 612

(8) Other averments see 30 C J p 103 note 13 [a]

75. Ala—King v State, 34 So 683, 137 Ala 47

76. U S—Freihage v U S, C C A Alaska, 56 F 2d 127

Kan—State v Elftman 226 P 795, 116 Kan 214

30 C J p 102 note 87

Where weapon caused death

"Where the indictment alleges that the weapon used by the accused did in fact produce death, it is not necessary to describe with definiteness the weapon with which the crime is alleged to have been committed"—Waller v State, 138 S E 67, 164 Ga 128

Designation held sufficient

(1) A clamp—Freihage v U. S, C C A Alaska, 56 F 2d 127

(2) A piece of iron—Smith v State, 57 S W 2d 163, 123 Tex Cr 95—30 C J p 102 note 87 [a] (4)

(3) "A piece of iron . . some blunt instrument"—Waller v State, 138 S E 67, 68, 164 Ga 128

(4) Description of instruments, including hatchet, used by accused as being such as would likely produce death, and from use of which death resulted, was sufficient—Wilson v State 10 S E 2d 861 190 Ga 824

(5) Other cases see 30 C J p 102 note 87 [a]

77. U S—Freihage v U S, C C A Alaska, 56 F 2d 127

30 C J p 102 note 88

Descriptive value of "heavy"

The use of the word "heavy" in indictment charging the commission of murder with a "heavy" missile did not render indictment insufficient on theory that "heavy" had no value as descriptive of the weapon used, since 'heavy" conveys a definite impression—Peats v State, 12 N E 2d 270, 213 Ind 560

78. Ga—Waller v State, 138 S E 67, 164 Ga 128

Ky—Gray v Commonwealth, 170 S W 2d 870, 293 Ky 833

Allegation superfluous

Where indictment alleges commission of murder, allegation that instrument employed by accused in crime was capable of producing death is superfluous—Gray v. Commonwealth, supra

79. Ky—Gray v Commonwealth, supra—Payne v Commonwealth, 159 S W 2d 430, 289 Ky 590

Mo—State v Lloyd, 87 S W 2d 418, 337 Mo 990—State v Beard, 68 S. W 2d 698, 334 Mo 909.

30 C J p 102 note 89.

Indictment held sufficient

Voluntary manslaughter indictment alleging that accused willfully and feloniously in sudden affray without malice struck deceased with fist, hands, and feet causing deceased to fall and strike the pavement with such violence as to cause his death was not defective because it failed to state that the act was committed by the use of a deadly weapon—Payne v Commonwealth, 159 S W 2d 430, 289 Ky 590

80. N M—Tenorio v Territory, 1 N M 279

81. Okl—Scott v State 268 P 312, 40 Okl Cr 296

82 Ill—People v Corder, 137 N E 845, 306 Ill 264

Description held sufficient

Description of weapon as a gun is sufficient—Dickson v State, 113 S W 2d 528, 134 Tex Cr 22

83. Ga—Green v State, 158 S E 285, 172 Ga 635

Ill—People v Corder, 137 N E 845, 306 Ill 264

Okl—Williams v State, 258 P 1066 38 Okl Cr 1

30 C J p 103 note 91

84. Ark—Gibson v State, 205 S W 898, 135 Ark 520

Okl—Williams v State, 258 P 1066, 38 Okl Cr 1

85. Va—Green v Commonwealth, 94 S E 940, 122 Va 862

30 C J p 103 note 93

86. Mo—State v Majors, 44 S W 2d 163, 329 Mo 148

Metal and leaden balls

Indictment is not rendered uncertain because it is first alleged that pistol was loaded with leaden balls and when the missiles with which accused struck deceased are next referred to they are described as metal balls, since lead is a metal and leaden balls are metal balls—State v Majors, supra

87. Ky—Newsome v Commonwealth, 33 S W 2d 36, 236 Ky 344

The means may be stated as continuous; that is, that whatever means were used were applied and continued for a shorter or longer period of time, and that death was ultimately caused by the means so described [88]

A state or condition of the body of deceased making the assault more dangerous need not be averred [89]

Different modes or means The homicide may be charged to have been committed by the use of different instruments or means[90] and by various modes or manners,[91] particularly where there is doubt as to how death was produced [92] Averments of different means and modes of commission of the homicide may be made in different counts [93] They may also be made in the same count in conjunctive form,[94] in which case the indictment or information is not objectionable for failure to state which caused death,[95] or they may be charged by alternative averments in the same count,[96] but in such case it has been held that each alternative averment must be construed as a separate count,[97] and each alternative charge must describe the means with the same definiteness or particularity as would have been required had the charge been made separately in a separate count [98] An averment that the manner or means by which the killing was accomplished is unknown may be made in the same count in which specific means are charged[99] in the conjunctive,[1] or in the alternative,[2] or such an averment may be made in a separate count in an indictment or information in which specific means are charged in other counts [3]

Reason why manner or means unknown Where it alleged that the means by which the homicide was committed are unknown it is not necessary to state why they are unknown,[4] and the fact that it might have been stated more explicitly why the instrument alleged to have been used in committing the homicide could not be more fully described does not invalidate the indictment [5]

(2) Homicide by Poison

To charge murder by poison ordinarily it is sufficient to allege that the poison was administered and that it caused death, and usually it is unnecessary to allege such details as how it was administered, the quantity given, the particular poison administered, or its deadly and poisonous character

An indictment for murder by poison is sufficient in general if it charges that the poison was administered and that such poison so administered caused death,[6] and it is not necessary to charge that accused caused deceased to take the poison by force, threats or fraud,[7] or that deceased had no

88. Utah—State v Vance, 110 P 134, 38 Utah 1

89. Ga—Nelson v State, 198 S E 305, 58 Ga App 243
30 C J p 104 note 17

90. Ala—King v State, 34 So 683, 137 Ala 47
Mo—State v Mosley 22 S W 2d 784
S C—State v King, 155 S E 409, 158 S C 251
30 C J p 103 note 96

91. S C—State v King, supra

92. Mass—Commonwealth v Coy, 32 N E 4, 157 Mass 200
Okl—Elliott v State, 111 P 820, 4 Okl Cr 224, 140 Am S R 683
Tex—Pruitt v State, 102 S W 2d 417, 132 Tex Cr 113—Burt v State 40 S W 1000 43 S W 344, 38 Tex Cr 397, 39 L R A 305

93. Ala—McDonald v State, 1 So 2d 658, 241 Ala 172
Mass—Commonwealth v Coy, 32 N E 4, 157 Mass 200
Okl—Elliott v State, 111 P 820, 4 Okl Cr 224, 140 Am S R 683
Tex—Smith v State, 57 S W 2d 163, 123 Tex Cr 95

94. Or—State v Fiester, 50 P 561, 562, 32 Or 254
S C—State v King, 155 S E 409, 158 S C 251
Tex—Burt v State, 40 S W 1000, 43 S W 344, 38 Tex Cr 397, 39 L R A 305

95. Ga—Kettles v State, 88 S E 197, 145 Ga 6
30 C J p 104 note 14

96. Ala—King v State, 34 So 683, 137 Ala 47
Okl Elliott v State, 111 P 820, 4 Okl Cr 224 140 Am S R 683

97. Ala—Smith v State, 39 So 329, 142 Ala 14

98. Ala—King v State, 34 So 683, 137 Ala 47

99 Kan—State v Cruse, 212 P 81, 112 Kan 486
30 C J p 102 note 80

1. Kan—State v Cruse, supra

Allegations held sufficient

(1) An indictment or information which charges murder by choking and by other means unknown is sufficient—State v Cruse, supra—30 C J p 102 note 80 [a] (3)

(2) Allegation of assault with a rifle "and other instruments" did not affect the sufficiency of the charge of shooting deceased—Fannin v State, 291 P 989 18 Okl Cr 346

2. Ala—King v State, 34 So 683, 137 Ala 47
30 C J p 102 note 80 [a] (1), (2)

3. Ala—McDonald v State, 1 So 2d 658, 241 Ala 172
30 C J p 102 note 79.

4. Tex—Hughes v State, Cr, 60 S W 562

5. Ohio—Lynch v State, 23 Ohio Cir Ct N S, 230, 27 Ohio Cir Dec 189, 5 Oh A 16

6. Ark—Bowie v State 49 S W 2d 1019, 185 Ark 834, 33 A L R 126
Tex—Aven v State 277 S W 1080, 102 Tex Cr 478
30 C J p 104 note 19

7. Tex—Aven v State, supra

Suicide sufficiently negatived

Indictment charging that accused "administered" poison, causing deceased to swallow it with intent to kill her and that he did kill her with malice aforethought sufficiently negatives claim that accused merely prepared poison and deceased took it with suicidal intent—Aven v State, supra

Case overruled

The case of Sanders v State, 112 S W 68, 54 Tex Cr 101, 22 L R A, N S 243 which held the indictment insufficient for failure to aver that accused caused deceased to take the poison either by force or threats, or by fraud, and that deceased did not voluntarily take the poison with knowledge of its nature, was overruled in so far as it held the indictment insufficient—Aven v State, 277 S W. 1080, 102 Tex Cr 478

knowledge that the substance administered to him was poison.[8] So also, under a statute making it murder to assist another in the commission of suicide, it is sufficient to charge that accused assisted deceased in the commission of suicide by procuring for him the poison used for that purpose.[9] However, to charge merely in general terms that accused poisoned deceased, without particularizing the acts complained of, is insufficient where the statute divides the crime of murder by poisoning according to the method employed, as by administering the poison to deceased, placing it within reach of deceased, mingling it with food or other substances, etc.[10] The indictment need not allege the nature of the poisoning[11] or state how the poison was administered.[12] An indictment for murder perpetrated by mingling poison in the food or drink of another need not aver that the poison was given to deceased by accused.[13] It is not necessary to state the amount administered[14] or that the quantity given was sufficient to cause death,[15] nor is it necessary to set out in detail the mode in which the poison affected the body or the particular organ on which it operated.[16]

Designation of particular poison At common law it was necessary to allege the kind of poison administered,[17] and, although it is now ordinarily held unnecessary to state the particular poison employed,[18] it is held in some jurisdictions that the name of the poison, if known, should be stated,[19] and if the name of the poison is not known that fact should be stated.[20] It may be averred that named poisons and others unknown were administered.[21] Where a particular poison is named, a subsequent reference to it in general terms is not a defect.[22]

Deadly or poisonous nature. It has been held unnecessary to allege specifically that the drug or substance given was deadly in its nature or of a poisonous character.[23] There is authority, however, which holds that if the drug or substance alleged to have been administered, as a matter of judicial cognizance, is poison, and when administered in sufficient quantity is deadly, it is sufficient to name the drug or substance in the indictment or information,[24] but if the substance administered is not poison, as a matter of judicial knowledge, the indictment should aver that the substance so administered was deadly poison, or such as was calculated to destroy human life.[25]

§ 151. —— Description of Mortal Wound

a In general
b Mortal character
c Location

a. In General

At common law it was necessary to describe the mortal wound with great particularity, giving its length, breadth, and depth, if possible, but such particularity is now generally unnecessary

While at common law great particularity in the description of the wound is deemed to be essential,[26] and its length, breadth, and depth, if incised, should be stated,[27] it is now generally held under the statutes governing criminal procedure that such particularity is unnecessary,[28] and in some jurisdictions no description of the wound is required.[29] So, as a general rule, it is not now essential to state

8. Ind—Siple v State, 57 N E 544, 154 Ind 617
Tex—Aven v State, 277 S W 1080, 102 Tex Cr 178

9. Ark—Farrell v State, 163 S W 768, 111 Ark 180

10. Tex—Middleton v State, 25 S W 2d 614, 114 Tex Cr 263

11. Ark—Bowie v State 49 S W 2d 1049, 185 Ark 834, 33 A L R 426

12 Ala—Scott v State, 37 So 357, 141 Ala 1

13. Va—Purvear v Commonwealth, 1 S E 512, 83 Va 51
30 C J p 104 note 38

14. Ind—Rosenbarger v State, 56 N E 914, 154 Ind 425
30 C J p 104 note 33

15. Tex—Morrison v State, 51 S W 358, 40 Tex Cr 473

16. Ark—Bowie v State 49 S W 2d 1049, 185 Ark 834, 33 A L R 426
30 C J p 104 note 35

17. U S—Westmoreland v U S, Tex, 15 S Ct 213 155 U S 545, 39 L Ed 255

18. Ark—Bowie v State, 49 S W 2d 1049 185 Ark 834 33 A L R 426
30 C J p 104 note 36

19. Ala—Langham v State, 11 So 2d 131

20. Ala—Langham v State, supra

21. Kan—State v Buck 127 P 631, 88 Kan 114, 42 L R A,N S, 854, Ann Cas 1914B 730

22. Mo—State v Taylor, 190 S W 330
30 C J p 104 note 38

23. Mass—Commonwealth v Galavan, 9 Allen 271
Tex—Morrison v State, 51 S W 358, 40 Tex Cr 473

24. Ala—Langham v State, 11 So 2d 131

Where actual poisoning charged
In an indictment which charges an actual poisoning, an allegation that the substance administered was a poison is unnecessary—Anthony v State 29 Ala 27

Poisons sufficiently designated by name
(1) Mercury—Langham v State Ala 11 So 2d 131
(2) Morphine—Scott v State, 37 So 357, 141 Ala 1

25. Ala—Langham v State, 11 So 2d 131

26. N C—State v Owen, 5 N C 452, 4 Am D 571

27. N C—State v Owen, supra
30 C J p 105 note 42

28. Mo—State v Kenyon, 126 S W 2d 245, 343 Mo 1168
30 C J p 105 note 43

29. Ariz—Collins v State, 294 P 625, 37 Ariz 353
Mo—State v Kenyon, 126 S W 2d 245, 343 Mo 1168
Okl—Williams v State, 258 P 1066, 38 Okl Cr 1
30 C J p 105 note 44.

its length, breadth, and depth,[30] and since it may be rejected as surplusage, an apparent repugnancy in the description of the wound is not fatal.[31] General averments of mortal injuries and mortal sickness, a further description whereof is to the jurors unknown, have been sustained.[32]

b. Mortal Character

A specific allegation as to the mortal character of the wound inflicted, although unnecessary in some jurisdictions, is generally required, but the use of the term "mortal" is not ordinarily essential where the language employed is otherwise sufficient to so characterize the injury.

In some jurisdictions a specific allegation as to the infliction of a mortal wound is unnecessary.[33] However, it is generally held necessary, where death is charged to have resulted from a stroke or blow, to aver that the wound inflicted thereby was mortal[34] and that death resulted therefrom, as considered infra § 154. It is not necessary to show that the wound was of a character likely to produce death,[35] but it is sufficient to allege that it was a mortal wound, and caused the death of the party.[36] While the term "mortal" has been held indispensable,[37] it has, on the other hand, been held sufficient to allege that deceased died from the wound inflicted,[38] or that accused killed and murdered deceased by shooting him,[39] and that the use of the word "mortal" is not imperative.[40] An indictment for murder by choking and strangling need not allege that the injury was "mortal."[41]

c. Location

The common-law rule requiring the particular location of the wound on the body to be averred has been generally abrogated, it being ordinarily sufficient to allege that it was on the body

According to the strict common-law rule, it is essential that the indictment shall state on what part of the body the wound causing the death was inflicted,[42] any repugnancy being fatal,[43] but in most jurisdictions such particularity is not now essential,[44] it being held in many cases sufficient to charge that it was "on the body."[45] However, allegations giving the location are proper,[46] but repugnancy and inconsistency in such allegations may be disregarded as surplusage,[47] and an indictment is not fatally defective which alleges one mortal wound on two parts of deceased's body.[48]

§ 152. Death

The necessity and sufficiency of averments as to the fact and the cause of the death of deceased and as to the time and place thereof are treated in detail infra §§ 153–155.

Examine Pocket Parts for later cases.

§ 153. —— Fact of Death

The death of the person for whose killing accused is charged must be alleged, but the authorities are not in accord as to what constitutes a sufficient allegation thereof

The fact of the death of the person for whose killing accused is indicted must be alleged.[49] It has been held a sufficient allegation of death to aver that accused killed deceased,[50] that he deprived deceased of life,[51] that he killed and murdered de-

30. Fla.—Walker v. State, 16 So. 80, 34 Fla. 167, 43 Am. St. R. 186.
30 C.J. p. 105 note 45

31. Mo.—State v. Furgerson, 63 S.W. 101, 162 Mo. 668.
30 C.J. p. 105 note 46

32. Fla.—Mendenhall v. State, 72 So. 202, 71 Fla. 552.
30 C.J. p. 105 note 47

33. Ariz.—Collins v. State, 294 P. 625, 37 Ariz. 353.
Kan.—State v. Truskett, 118 P. 1047, 85 Kan. 804.

34. Okl.—Williams v. State, 258 P. 1066, 38 Okl. Cr. 1.
30 C.J. p. 105 note 48

Information held sufficient as against objection that it failed to charge that the wounds were mortal causing death—State v. Privett, 130 S.W.2d 575, 344 Mo. 1020.

35. Mo.—State v. Green, 20 S.W. 304, 111 Mo. 585.
Okl.—Williams v. State, 258 P. 1066, 38 Okl. Cr. 1.

36. Mo.—State v. Green, 20 S.W. 304, 111 Mo. 585.

37. La.—State v. McCoy, 8 Rob. 545, 41 Am. D. 301.

38. Fla.—Robinson v. State, 68 So. 619, 69 Fla. 521, L.R.A. 1915E 1215, Ann. Cas. 1917D 506.
30 C.J. p. 105 note 53

39. Ga.—Green v. State, 158 S.E. 285, 172 Ga. 635.

40. Fla.—Robinson v. State, 68 So. 619, 69 Fla. 521, L.R.A. 1915E 1215, Ann. Cas. 1917D 506.
30 C.J. p. 105 note 54

41. D.C.—Hamilton v. U.S., 26 App. D.C. 382.

42. Fla.—Keech v. State, 15 Fla. 591.
30 C.J. p. 105 note 56

43. Ind.—Dias v. State, 7 Blackf. 20, 39 Am. D. 448.
30 C.J. p. 105 note 57

44. Mo.—State v. Kenyon, 126 S.W. 2d 245, 343 Mo. 1168.—State v. Furgerson, 63 S.W. 101, 162 Mo. 668.
Neb.—Morris v. State, 191 N.W. 717, 109 Neb. 412.
30 C.J. p. 106 note 58

45. Neb.—Chadek v. State, 294 N.W. 384, 138 Neb. 626.—Morris v. State, 191 N.W. 717, 109 Neb. 412.
Okl.—Williams v. State, 258 P. 1066, 38 Okl. Cr. 1.
30 C.J. p. 106 note 59

46. Mass.—Commonwealth v. Snell, 75 N.E. 75, 189 Mass. 12, 3 L.R.A., N.S. 1019.
30 C.J. p. 106 note 60

47. Va.—Robertson v. Commonwealth, 20 S.E. 362.

48. Mo.—State v. Kenyon, 126 S.W. 2d 245, 343 Mo. 1168.

49. S.C.—State v. Rector, 155 S.E. 385, 158 S.C. 212.
30 C.J. p. 106 note 61

50. Wash.—State v. Day, 29 P. 984, 4 Wash. 104.
30 C.J. p. 106 note 62

51. Tex.—Walker v. State, 14 Tex. App. 609.

ceased,[52] or merely that he murdered deceased.[53] It has been held, on the other hand, insufficient to aver that accused murdered deceased,[54] or even that he killed and murdered deceased,[55] or mortally choked, suffocated, and drowned deceased.[56] An allegation in the conclusion that accused killed and murdered deceased is not sufficient.[57] That the omission of the word "did" before the word "die" vitiates the indictment has been affirmed[58] and denied.[59]

§ 154. —— Connection with Criminal Act

The indictment or information must allege that the death of deceased resulted from the criminal act or omission with which accused is charged.

The indictment must allege that the death of decedent resulted from the injury inflicted by accused,[60] or the act done by him,[61] or his negligence,[62] and, where manslaughter is charged based on a killing done in the commission of an unlawful act, it must allege facts which show that the unlawful act was the proximate cause of deceased's death.[63] However, where all persons present, aiding and abetting in the commission of the homicide, are considered principals in its commission, see supra §§ 7–9 it is not essential to the conviction of a participant to allege that he used the weapon with which the killing was done.[64] No particular form of words is necessary,[65] but it must be shown that the alleged act or acts of accused were the proximate cause of the death as distinguished from the cause of a condition affording an opportunity for the compassing of death by some other unconnected agency.[66] It has been held that it must appear that death was the natural and probable consequence of the act complained of,[67] and, to the contrary that, where the fact and cause of death are alleged in an indictment, it is not subject to attack on the ground that it does not show that the means of death were likely to produce death.[68] It is proper, where a

52. Ark.—Robinson v. State, 7 S.W. 2d 5, 177 Ark. 534.
Cal.—People v. Delhantie, 125 P. 1066, 163 Cal. 461.
30 C.J. p. 106 note 64.

53. Ariz.—Shaughnessy v. State, 32 P. 2d 337, 43 Ariz. 445.
Cal.—People v. Magsaysay, 291 P. 582, 210 Cal. 301—People v. Coen, 271 P. 1074, 205 Cal. 596.
Ind.—Bechtelheimer v. State, 54 Ind. 128.

54. Tex.—Pierce v. State, 3 S.W. 111, 21 Tex. App. 669.
30 C.J. p. 106 note 66.

55. Mo.—State v. Blan, 69 Mo. 317.

56. D.C.—U. S. v. Barber, 20 D.C. 79.

57. D.C.—U. S. v. Barber, supra.

58. Mo.—State v. Hagan, 65 S.W. 249, 164 Mo. 654.

59. Ark.—Kitts v. State, 69 S.W. 545, 70 Ark. 521.

60. Pa.—Commonwealth v. Ruttenberg, 19 Pa. Dist. & Co. 534, 537, citing **Corpus Juris.**
Utah.—State v. Green, 6 P. 2d 177, 78 Utah 580.
30 C.J. p. 106 note 73.

Indictment or information held insufficient

An information in a prosecution for murder charging that accused inflicted three mortal wounds on deceased, of which mortal wounds deceased "then and there did languish, and languishing did live until the 15th day of September, 1821, in the county of S. and state of Tennessee, did die," was held an insufficient allegation that deceased died from the effects of the mortal wounds.—State v. Jamerson, Mo., 252 S.W. 682.

61. Ind.—Stephenson v. State, 179 N.E. 633, 205 Ind. 141, error dismissed 186 N.E. 293, 205 Ind. 141.

Pa.—Commonwealth v. Ruttenberg, 19 Pa. Dist. & Co. 534, 537, citing **Corpus Juris.**
30 C.J. p. 106 note 74.

Result of attempted abortion

Indictment for murder by attempted abortion, not charging that death of woman resulted therefrom, was held insufficient.—People v. Huff, 171 N.E. 261, 339 Ill. 328.

62. Del.—State v. Benton, 187 A. 609, 8 W.W.Harr. 1.
Pa.—Commonwealth v. Ruttenberg, 19 Pa. Dist. & Co. 534, 537, citing **Corpus Juris.**
30 C.J. p. 106 note 75.

Manslaughter

In an indictment charging involuntary manslaughter, based on the commission of an act which is unlawful because it is negligent, it must appear that such act was the proximate cause of the death.—State v. Beckman, 37 N.E. 2d 531, 219 Ind. 176.

63. Ind.—Blackburn v. State, 180 N.E. 180, 203 Ind. 332—Kimmel v. State, 154 N.E. 16, 198 Ind. 444.

64. La.—State v. Capaci, 154 So. 419, 179 La. 462.

65. Ill.—People v. Corder, 137 N.E. 845, 306 Ill. 264.
30 C.J. p. 106 note 76.

Indictments or informations held sufficient

(1) Indictment averring that the mortal wound of which deceased died was the mortal wound inflicted by the bullet discharged from the gun held in the hand of accused is not uncertain, as not specifically averring that the mortal wound from which deceased died was the mortal wound inflicted by accused.—People v. Corder, 137 N.E. 845, 306 Ill. 264.

(2) An information, alleging that accused had pistol in his hands, discharged it against deceased, and shot latter with it, inflicting mortal wound resulting in instant death, was not defective as failing to connect accused with killing.—State v. Kenyon, 126 S.W. 2d 245, 343 Mo. 1168.

(3) An indictment charging that accused did "kill and murder" another by shooting him with a pistol and inflicting on him a mortal wound was not demurrable because not alleging specifically that victim died as result of the wound.—Harris v. State, 9 S.E. 2d 183, 190 Ga. 258.

(4) Indictment for involuntary manslaughter based on violation of milk ordinance was held not demurrable for failure to show relation between death and defendants' acts.—Leontas v. Walker, 112 S.E. 891, 166 Ga. 266.

(5) Other instances see 30 C.J. p. 106 note 76 [a], [b].

66. Ind.—Stephenson v. State, 179 N.E. 633, 205 Ind. 141, error dismissed 186 N.E. 293, 205 Ind. 141.

Poison taken because of treatment by accused

Indictment for homicide alleging in substance, that deceased took poison because of mental condition caused by treatment accorded her by accused and others was held sufficient.—Stephenson v. State, 179 N.E. 633, 205 Ind. 141, error dismissed 186 N.E. 293, 205 Ind. 141.

67. Ky.—Commonwealth v. Couch, 106 S.W. 830, 32 Ky.L. 638, 16 L.R.A.,N.S., 327.
30 C.J. p. 107 note 77.

68. N.Y.—People v. Harris, 134 N.Y.S. 409, 74 Misc. 353, 26 N.Y.Cr. 472.

wound is the cause of death, to allege that the death resulted from the wound and not from the stroke.[69]

After verdict it has been held that a verdict will obviate a defect arising from an omission to connect the injury inflicted and the death of deceased.[70]

§ 155. —— Time and Place

a Time
b Place

a. Time

As a general rule the indictment or information must allege the date of the death of the victim, so as to show that the death occurred within a year and a day from the date of the infliction of the injury

In the absence of a relaxation of the common-law rules, an indictment for homicide must allege the date of the death of the victim,[71] for the reason that it must appear from the indictment that the death occurred within a year and a day from the date of the infliction of the injury,[72] and an indictment which alleges as the date of death a date more than a year and a day subsequent to the date on which the infliction of the injury is alleged to have occurred does not allege a criminal homicide.[73] No particular form of allegation is required.[74] It is sufficient to state facts showing that the death was instantaneous,[75] or to allege that the wound or injury was inflicted on a certain date and that the victim died on a later certain date, which dates are not more than a year and a day apart,[76] or that the wound was inflicted on a certain date and that the victim died within a year and a day from the infliction of the wound.[77] It has also been held sufficient to allege the date of the striking or wounding and then that the victim instantly died therefrom,[78] or that the blow produced his immediate death,[79] but in some jurisdictions such words are regarded as in themselves insufficient,[80] unless the connection between the act and the death is further shown by the employment of the words "then and there,"[81] or by other sufficient words of connection.[82] An averment that deceased was injured on a certain day followed merely by a statement that he died is insufficient,[83] although an allegation that deceased "of the mortal wound aforesaid died" has been held sufficient as against the contention that the allegation should have read "of the mortal wound aforesaid then and there died."[84] An averment that accused killed deceased on a certain day is in some jurisdictions a sufficient allegation of the day of death,[85] and is construed to allege that he died on that date,[86] but there is authority to the contrary.[87] It is, in general, sufficient that it appear from the indictment that the death occurred within a year and a day after the assault which caused it.[88] Hence it is ordinarily held unnecessary to allege the exact date of the death where the date of the injury is laid within a year before the finding of the

69. S C—State v Wimberley, 14 S C L 190
30 C J p 107 note 79
Mortal character of wound see supra § 151 b

70. Pa—Commonwealth v Ruttenberg 19 Pa Dist & Co 534

71. Ga—Head v State, 24 S E 2d 145, 147, 68 Ga App 759 quoting **Corpus Juris.**
Ind—Alderson v State, 145 N E 572, 196 Ind 22
S C—State v Rector, 155 S E 385, 158 S C 212
Wash—State v Spadoni, 243 P 854, 137 Wash 684
30 C J p 107 note 80

72. Ga—Head v State, 24 S E 2d 145, 147, 68 Ga App 759, quoting **Corpus Juris.**
Ind—Alderson v State, 145 N E 572, 196 Ind 22
Wash—State v Spadoni, 243 P 854, 856, 137 Wash 684, citing **Corpus Juris.**
30 C J p 107 note 81
Necessity that death occur within year and day see supra § 12

73. Ga—Head v State, 24 S E 2d 145, 68 Ga App 759

74. Wash—State v Spadoni, 243 P 854, 137 Wash 684

75. Wash—State v Spadoni, supra

76. Tex—Allen v State, 277 S W 1080, 102 Tex Cr 478
Wash—State v Spadoni, 243 P 854, 137 Wash 684

77. Wash—State v Spadoni, supra

78. N M—Borrego v Territory, 46 P 319, 8 N M 446
30 C J p 107 note 82

79. Puerto Rico—People v Matos, 26 Puerto Rico 520

80. Mo—State v Jamerson, 252 S W 682
30 C J p 107 note 84

81. Mo—State v Steeley, 65 Mo 218, 27 Am R 271

82. Tex—Hardin v State, 4 Tex App 355
30 C J p 107 note 86

83. Mo—State v Jamerson, 252 S W 682
Wash—State v Spadoni, 243 P 854, 137 Wash 684

Information held insufficient
Allegation that deceased received wounds at the hands of accused, that he 'languished and languishing did live" until a stated day, and that he died at a specified place fails to allege that deceased died within a year and a day after receiving the wounds—State v Jamerson, Mo, 252 S W 682

84. Mo—State v Baird, 248 S W 596 297 Mo 219

85. Ga—Head v State, 24 S E 2d 145 68 Ga App 759
Or—State v Kelley 247 P 146, 118 Or 397 error dismissed and certiorari denied Kelley v State of Oregon 47 S Ct 504, 273 U S 589, 71 L Ed 790, and error dismissed Willos v State of Oregon, 47 S Ct 658, 274 U S 722 71 L Ed 1326
Wash—State v Stone, 13 P 2d 427, 169 Wash 233
30 C J p 107 note 87

86. Ga—Head v State, 24 S E 2d 145, 68 Ga App 759
Or—State v Kelley 247 P 146, 118 Or 397, error dismissed and certiorari denied Kelley v State of Oregon, 47 S Ct 504, 273 U S 589, 71 L Ed 790, and error dismissed Willos v State of Oregon, 47 S Ct 658, 274 U S 722, 71 L Ed 1326

87. Mo—State v Sundheimer, 6 S W 52, 93 Mo 311
30 C J p 107 note 88

88. Mass—Commonwealth v Robertson, 38 N E 25, 162 Mass. 90
30 C J p 108 note 89.

indictment,[89] or within the calendar year in which the indictment is returned,[90] and that in such case an omission of an allegation of the date of the death is immaterial,[91] especially where it is alleged that deceased died prior to the finding or filing of the indictment or information,[92] but there is authority requiring specific allegation of the date of death even in such circumstances.[93]

The date may be so stated at the beginning of the charging part as to apply to all its allegations, including that of the death.[94] Where time has been well laid to the giving of the mortal blow, it may be repeated as to the fact of death by words of reference such as "then and there,"[95] but such words must properly qualify the averment of death.[96]

It is not necessary to aver that deceased "languished and languishing did live until the date of death,"[97] and the fact that he is stated to have lived and languished, although death is alleged to have occurred on the day of the mortal blow, does not render the indictment repugnant,[98] nor is an allegation that deceased "languishing did live until" a certain day inconsistent with an allegation that the victim died on that day.[99]

Under statutes providing that an indictment shall not be held insufficient for any defect which does not tend to prejudice the substantial rights of defendants on the merits, it has been held unnecessary to make a specific allegation that death resulted within a year and a day after the infliction of the mortal wound in an indictment which sufficiently alleges that accused murdered deceased.[1]

A statutory form of indictment sufficient in some states contains no allegation as to the date of the death.[2]

b. Place

The place of death should be alleged, unless the necessity therefor is dispensed with by statute, as is true in a number of jurisdictions under statutes which, when the death and assault occurred in different counties, permit the prosecution to be in either county or in the county of the assault.

The place where the death of the injured person occurred should be set out in the indictment,[3] unless the necessity of such averment is dispensed with by statute.[4] As in the allegation of the time of death, the venue, when once alleged in the indictment, need not be repeated, but may be referred to by the use of "then and there."[5]

Death and assault in different counties or jurisdictions Where the mortal wound was given in one county and the victim died in another, in the interest of clarity it is better if the indictment charges the acts as having occurred in the county

89. Ill—People v. Corder, 137 N.E. 845, 306 Ill. 264
Ind.—Alderson v. State, 145 N.E. 572, 196 Ind. 22
90. Ky.—Milburn v. Commonwealth, 3 S.W.2d 204, 223 Ky. 188
91. Ky.—Milburn v. Commonwealth, supra
Wash.—State v. Stone, 13 P.2d 427, 169 Wash. 233
30 C.J. p. 108 note 90
92. Idaho—State v. Caviness, 235 P. 890, 40 Idaho 500
Ky.—Milburn v. Commonwealth, 3 S.W.2d 204, 223 Ky. 188
93. N.C.—State v. Orrell, 12 N.C. 139, 17 Am.D. 563
30 C.J. p. 108 note 91
94. N.Y.—People v. Murphy, 72 N.E. 1146, 179 N.Y. 595, affirming 87 N.Y.S. 786, 93 App.Div. 383, 18 N.Y.Cr. 366
95. Ind.—Alderson v. State, 145 N.E. 572, 196 Ind. 22
Wash.—State v. Stone, 13 P.2d 427, 169 Wash. 233
30 C.J. p. 108 note 93
96. La.—State v. Kennedy, 8 Rob. 590
30 C.J. p. 108 note 94
97. Me.—State v. Conley, 39 Me. 78
98. Pa.—Commonwealth v. Bell, Add. 156, 1 Am.D. 298
99. Ill.—People v. Limeberry, 131 N.E. 691, 298 Ill. 355
1. Ark.—Robinson v. State, 7 S.W.2d 5, 177 Ark. 534
30 C.J. p. 108 note 98
2. Mass.—Commonwealth v. Waketin, 120 N.E. 209, 230 Mass. 567
3. Ind.—Alderson v. State, 145 N.E. 572, 196 Ind. 22—Brockway v. State, 138 N.E. 88, 192 Ind. 656, 26 A.L.R. 1338
S.C.—State v. Rector, 155 S.E. 385, 158 S.C. 212—State v. Platt, 151 S.E. 206, 154 S.C. 1
30 C.J. p. 108 note 1
Amendment of allegations as to place of offense see the C.J.S. title Indictments and Informations § 242, also 31 C.J. p. 832 note 4—p. 833 note 12

County and state

The county and state where the death of deceased occurred should be alleged.—State v. Rector, 155 S.E. 385, 158 S.C. 212

Where indictment found

It has been stated, in a case in which the infliction of the wound and the death of the victim occurred in the same county, that "it was indispensable that the indictment should have averred that the murdered party did die in the county in which the indictment was found against the accused."—Alderson v. State, 145 N.E. 572, 574, 196 Ind. 22

Allegations held sufficient

(1) To show place of death.—State v. Stone, 13 P.2d 427, 169 Wash. 233

(2) Allegation that accused in specified county did "then and there" kill and murder deceased stated place of death in reasonably definite terms.—State v. Walters, 102 P.2d 284, 61 Idaho 341

4. Ark.—Brassfield v. State, 18 S.W. 1040, 55 Ark. 556
30 C.J. p. 109 note 2
5. Ind.—Alderson v. State, 145 N.E. 572, 196 Ind. 22
Wash.—State v. Bezemer, 14 P.2d 460, 169 Wash. 559—State v. Stone, 13 P.2d 427, 169 Wash. 233
30 C.J. p. 109 note 3

Indictment construed

(1) Where indictment charged accused in M. county made assault, and that deceased then and there died of wounds, death was alleged to have occurred in M. county.—State v. Platt, 151 S.E. 206, 154 S.C. 1

(2) Indictment stating county where shooting occurred, and alleging that defendants "then and there * * * did kill and murder," sufficiently showed place of deceased's death.—State v. Rector, 155 S.E. 385, 158 S.C. 212.

where the wound was given and the consequences in the county where the victim died.[6] However, under statutes permitting the offender to be prosecuted in either county, although it has been held in a few jurisdictions that the indictment must allege both the place of the injury and the place of death,[7] in the majority of jurisdictions where the question has arisen it has been held that the crime may be charged in the indictment or information to have been committed in its entirety in the county where the indictment or information was found or filed, without any averment of the attendant circumstances as to the place of injury and of death.[8] Under statutes permitting or requiring the offender to be prosecuted in the county where the injury was inflicted, it is held that the indictment or information need not aver the place of death.[9] Where the mortal wound was given in one county and the victim died in another county and state, an indictment found in the county where the wound was given charges the commission of an offense therein where it alleges the facts as to the place of the injury and of the death.[10]

§ 156. Malice

a. Necessity of averment
b. Sufficiency of averment

a. Necessity of Averment

At common law and under the statutes in many jurisdictions, an averment that the killing was with malice aforethought is necessary in order to charge murder; but in other jurisdictions such an averment is unnecessary in an indictment which charges the offense in the language of the statute defining murder or according to an express statutory form, or which charges a killing by certain means or in the commission of certain unlawful acts. It need not be averred in charging manslaughter.

A charge that the killing was committed with malice aforethought is essential to the validity of an indictment charging murder at common law,[11] and generally such an averment is required under the statutes governing criminal procedure in the various states,[12] particularly where the statutes define murder as it was defined at common law,[13] and even under statutes which are in some degree variant from the common-law definition,[14] at least where certain degrees of murder are charged or penalties sought.[15] So under a statute dividing murder into degrees, which after defining murder in the first degree provides that all other murder at common law shall constitute murder in the second degree, it has been held that an indictment to charge second degree murder must, as an indictment for murder at common law, allege the killing to have been with malice aforethought.[16] Where such an averment is required an indictment alleg-

6. Ky—Spencer v. Commonwealth, 240 S.W. 750, 194 Ky. 699

Indictment held sufficient

An allegation that the murder was committed by striking deceased on the head with a gun in Encinal County such county being attached to Webb County for judicial purposes, is sufficient to uphold a conviction in Webb County—Navarro v. State, Tex. Cr., 43 S.W. 105

7. Ind.—Brockway v. State, 138 N.E. 88, 192 Ind. 656, 26 A.L.R. 1338
S.C.—State v. Rector, 155 S.E. 385, 158 S.C. 212—State v. Platt, 151 S.E. 206, 154 S.C. 1—State v. Coleman, 17 S.C. 473

Indictment held sufficient

Indictment charging killing by administering poison in named county by reason of which deceased died in another named county was sufficient—Osbon v. State, 13 N.E.2d 223, 213 Ind. 413

8. Ky.—Spencer v. Commonwealth, 240 S.W. 750, 194 Ky. 699
La.—State v. Champagne, 106 So. 670, 160 La. 47
Miss.—Coleman v. State, 35 So. 937, 83 Miss. 290, 64 L.R.A. 807
N.M.—State v. Montes, 165 P. 797, 22 N.M. 530.
Tex.—Harris v. State, 149 S.W.2d 99, 141 Tex.Cr. 447—Stone v. State, 15 S.W.2d 18, 111 Tex.Cr. 547.

Place of death

Indictment for murder need not allege place where deceased died—Thomas v. State, 118 So. 22, 96 Fla. 243

Case overruled

The court held that, if there was anything in the case of State v. Cummings, 5 La.Ann. 330 opposed to the doctrine that, where the mortal blow is given in one parish and death ensues in another, it is sufficient to charge in the indictment that the murder was committed in the parish where the indictment was found, without setting out in detail that the mortal wound was inflicted in one parish and the death occurred in another it was not disposed to follow it—State v. Jones, 38 La.Ann. 792

9. Mo.—State v. Majors, 44 S.W.2d 163, 329 Mo. 148
Okl.—Albright v. Territory, 69 P. 789, 11 Okl. 497
30 C.J. p. 109 note 2

Not a jurisdictional defect

(1) Where indictment alleged that injury causing death was inflicted in the District of Columbia, failure to aver that death took place therein was not a jurisdictional defect—Bostic v. Rives, 107 F.2d 649, 71 App.D.C. 2, certiorari denied 60 S.Ct. 593, 309 U.S. 664, 84 L.Ed. 1011.

(2) Place of decedent's death is immaterial and need not be alleged in information charging murder, so far as jurisdiction is concerned—State v. Majors, 44 S.W.2d 163, 329 Mo. 148

10. Minn.—State v. Gessert, 21 Minn. 369

11. Ky.—Turner v. Commonwealth, 180 S.W. 768, 167 Ky. 365, L.R.A. 1918A 329
30 C.J. p. 109 note 4

12. Ga.—Wright v. State, 141 S.E. 903, 166 Ga. 1—Cole v. State, App., 22 S.E.2d 529
Miss.—Wexler v. State, 142 So. 501, 167 Miss. 464
Mo.—State v. Brown, 68 S.W. 568, 168 Mo. 449

13. Ariz.—Rodriquez v. Territory, 125 P. 878, 14 Ariz. 166
30 C.J. p. 109 note 5

14. Tex.—Johnson v. State, 263 S.W. 924, 97 Tex.Cr. 658
30 C.J. p. 109 note 6

15. Tex.—Swilley v. State, 25 S.W.2d 1098, 114 Tex.Cr. 228, followed in Dunwoody v. State, 25 S.W.2d 1107

16. Mo.—State v. Lowe, 5 S.W. 889, 93 Mo. 547.

ing a homicide which does not charge it to have been committed with malice aforethought cannot charge an offense greater in grade than manslaughter.[17] Also, under a statute which makes murder of every voluntary killing, but provides that punishment in excess of a specified penalty cannot be assessed unless the killing was on malice aforethought, an allegation that the killing was on such malice aforethought is indispensable where the state seeks a greater penalty than that specified.[18]

In jurisdictions where the statutes specifically define murder or its degrees, or provide a specific form of indictment therefor, although it has been held essential to charge malice aforethought where the common-law instead of the statutory form of indictment is used,[19] it has been held proper in a number of jurisdictions to omit the technical words "malice aforethought" where the indictment follows the statute in charging the offense,[20] as where it charges a willful, deliberate, and premeditated killing,[21] or a killing with a premeditated design to effect death,[22] or that accused killed and murdered deceased,[23] or murdered deceased.[24] It has also been held unnecessary specifically to allege malice or malice aforethought where the manner and means of the killing as set forth in the indictment necessarily import malice,[25] or where the indictment sets forth the offense in the language of a statute which defines as murder a homicide resulting from certain prohibited acts.[26] So it has been held unnecessary to allege malice aforethought in an indictment charging a killing by means of poison,[27] or a killing in the perpetration of, or attempt to perpetrate, a specified felony,[28] although such an allegation is not inconsistent with a charge of a killing in the perpetration of, or attempt to perpetrate, a specified felony and will not render the indictment defective,[29] or the death of a mother by producing a miscarriage.[30] In other jurisdictions, however, the necessity of alleging malice or malice aforethought has been held not dispensed with in indictments charging a killing in the commission of, or as a result of, certain acts which the statutes provide shall be murder,[31] as a homicide committed in the perpetration of a felony,[32] or a killing by means of poison.[33]

Express or implied malice It is not necessary to allege whether the malice was express or implied,

17. Ga.—Wright v. State, 141 S.E. 903, 166 Ga. 1
30 C.J. p. 109 note 7

18. Tex.—Spicer v. State, 28 S.W.2d 810, 115 Tex.Cr.R. 110—Cox v. State, 28 S.W.2d 146, 116 Tex.Cr.R. 528—Colbert v. State, 27 S.W.2d 214, 115 Tex.Cr.R. 363—Herrera v. State, 27 S.W.2d 211, 115 Tex.Cr.R. 526—Arocha v. State, Cr.App., 27 S.W.2d 197—Cox v. State, Cr.App., 27 S.W.2d 189—Hall v. State, 27 S.W.2d 187, 115 Tex.Cr.R. 548—Freeman v. State, 27 S.W.2d 162, 114 Tex.Cr.R. 624—Alonzo v. State, 26 S.W.2d 920, 114 Tex.Cr.R. 536—Leonard v. State, 26 S.W.2d 919, 114 Tex.Cr.R. 615—Allen v. State, 26 S.W.2d 919, 114 Tex.Cr.R. 575—Myatt v. State, 26 S.W.2d 915, 114 Tex.Cr.R. 516—Gilbert v. State, 26 S.W.2d 644, 114 Tex.Cr.R. 532—Fritts v. State, 26 S.W.2d 643, 114 Tex.Cr.R. 512—De Pena v. State, 25 S.W.2d 1106, 114 Tex.Cr.R. 314—Gossett v. State, 25 S.W.2d 1105, 114 Tex.Cr.R. 324—Swilley v. State, 25 S.W.2d 1098, 114 Tex.Cr.R. 228, followed in Dunwoody v. State, 25 S.W.2d 1107

"Voluntarily" insufficient to charge "malice aforethought"

Allegations that accused killed decedent "voluntarily" does not charge "malice aforethought"—Swilley v. State, 25 S.W.2d 1098, 114 Tex.Cr.R. 228, followed in Dunwoody v. State, 25 S.W.2d 1107

19. La.—State v. Pinsonat, 177 So. 67, 188 La. 334.

20. Cal.—People v. Smith, 12 P.2d 945, 215 Cal. 749—People v. Berg, 274 P. 433, 96 Cal.App. 430
Utah.—State v. Avery, 125 P.2d 803, 102 Utah 33
30 C.J. p. 109 note 9

21. Kan.—State v. McGaffin, 13 P. 560, 36 Kan. 315—State v. Pooks, 29 Kan. 425

22. Wash.—State v. Seifert, 118 P. 746, 65 Wash. 596
30 C.J. p. 109 note 11

23. Cal.—People v. Berg, 274 P. 433, 96 Cal.App. 430

24. La.—State v. Matthews, 179 So. 69, 189 La. 166
Utah.—State v. Avery, 125 P.2d 803, 102 Utah 33

25. Ohio.—Lindsey v. State, 69 N.E. 126, 69 Ohio St. 215
30 C.J. p. 109 note 8

26. Colo.—Johnson v. People, 80 P. 133, 33 Colo. 224, 108 Am.St.R. 85

27. Ind.—Bechtelheimer v. State, 54 Ind. 128
30 C.J. p. 109 note 13

28. Ark.—White v. State, 96 S.W.2d 771, 192 Ark. 1102
N.Y.—Cox v. People, 80 N.Y. 500, affirming 19 Hun 430
Or.—State v. Brown, 7 Or. 186

In attempt to escape

An indictment or information charging the killing of a private citizen in an effort to escape after the commission of a felony is not defective as not showing malice aforethought.—Sexson v. Commonwealth, 39 S.W.2d 229, 239 Ky. 177

29. Ark.—Noble v. State, 112 S.W.2d 631, 195 Ark. 453

30. Colo.—Johnson v. People, 80 P. 133, 33 Colo. 224, 108 Am.St.R. 85

31. Ga.—Wright v. State, 141 S.E. 903, 166 Ga. 1
Tex.—Johnson v. State, 263 S.W. 924, 97 Tex.Cr.R. 658

Unlawful act tending to destroy life

The manslaughter statute proviso that an involuntary killing in commission of an unlawful act naturally tending to destroy life shall be deemed murder is founded on the principle of implied malice and does not dispense with necessity of expressly alleging implied malice or its equivalent in an indictment for murder.—Cole v. State, Ga.App., 22 S.E.2d 529

Wrecking train

Indictment for murder resulting from the breaking of a switch lock and throwing switch in front of a passenger train not charging that murder was done with malice aforethought, was fatally defective.—Johnson v. State, 263 S.W. 924, 97 Tex.Cr.R. 658

32. Tex.—Jones v. State, 110 S.W. 741, 53 Tex.Cr.R. 131, 126 Am.St.R. 776

33. Mo.—State v. Woodward, 90 S.W. 90, 191 Mo. 617
Tex.—Hamlin v. State, 47 S.W. 656, 39 Tex.Cr.R. 579.

where malice aforethought is charged[34] Under a statute making the distinction between express and implied malice the distinction between murder in the first and second degrees, "malice aforethought" is sufficient to charge murder in either degree[35]

Feticide To charge feticide under a statute providing punishment for the willful killing of a "quick" unborn child by an injury to the mother which would be murder if it resulted in the death of the mother, the indictment must charge that the injury to the mother was inflicted with malice[36]

Manslaughter. On an indictment for manslaughter an allegation of malice aforethought is of course unnecessary,[37] and, where the crime is otherwise sufficiently charged, may be rejected as surplusage[38] It is not necessary to allege absence of malice,[39] but such an allegation does not render the indictment insufficient[40]

b. Sufficiency of Averment

In general where an averment of malice aforethought is essential it cannot be supplied by inference, but must be positively and directly alleged In some jurisdictions the exact expression must be used, but in other jurisdictions equivalent language is sufficient It must ordinarily be alleged as to the killing, and when properly alleged as to one element of the offense may be charged as to other elements by reference

Where an averment that the killing was with malice aforethought is regarded as essential, as considered supra subdivision a of this section, it cannot be supplied by inference,[41] and where the allegation as to malice aforethought is only made in the concluding clause it has been held insufficient[42] In some jurisdictions in making such an averment the exact words "malice aforethought" must be employed,[43] and an allegation of "malice" alone is not sufficient.[44] In other jurisdictions, however, it is not essential that the identical words, "malice aforethought," be used;[45] and the omission to use the exact expression may be supplied by any language which may be its legal equivalent,[46] or if from the language used in the indictment, it clearly appears that malice aforethought is charged[47] Under a statute providing that one who purposely and maliciously kills another shall be guilty of murder in the second degree, an indictment which sets forth such facts as necessarily import malice may be sufficient, although there is no direct averment of malice[48] The use of "of" instead of "with" is not a material variation[49] It has been held, also, that the omission of the pronoun whereby the malice aforethought is designated as that of accused does not render the indictment defective,[50] but there is other authority which holds that, where two or more persons are jointly indicted for the same murder under a common-law form of indictment, they must be charged to have committed the homicide of "their" malice aforethought, and to charge of "his" malice aforethought is fatal error[51] Where the indictment alleges that accused did unlawfully, willfully, feloniously, and of malice aforethought kill and murder deceased, it need not in addition use the word "malicious"[52]

Repetition The murder itself must generally be charged to have been done with malice aforethought, it is not sufficient to charge that the mor-

34. Cal—People v Bonilla, 38 Cal 699
Me—State v Verrill, 54 Me 408

35. Tex—White v State Cr, 42 S W 303
30 C J p 110 note 21

36. Ga—Passley v State, 21 S E 2d 230, 194 Ga 327

37. Ill—People v Adams 124 N E 575 289 Ill 339
30 C J p 110 note 22

38. Ky—Coe v Commonwealth, 23 S W 371 94 Ky 606 15 Ky L 284
30 C J p 110 note 23

39. Ga—Hayes v State, 75 S E 523, 11 Ga App 371

40. Ky—Beach v Commonwealth 43 S W 2d 6, 240 Ky 763

Offense held stated
Indictment charging murder unlawfully, willfully, feloniously, and without malice aforethought was held to state public offense—Beach v Commonwealth, supra

41. Ohio—Fouts v State, 8 Ohio St 98

Averment held sufficient
Murder indictment charging that accused did unlawfully and with malice aforethought kill deceased sufficiently averred killing with malice aforethought—Banks v State, 296 S W 563, 107 Tex Cr 221

42. Iowa—State v Andrews, 50 N W 549, 84 Iowa 88

43. La—State v Green, 7 So 793 42 La Ann 644
30 C J p 110 note 26 [b], [c]

44. La—State v Robinson, 78 So 933, 143 La 513
30 C J p 110 note 27

45. Iowa—State v Thurman, 24 N W 511, 66 Iowa 693

46. Ga—Cole v State App, 22 S E 2d 529
Miss—Wexler v State, 142 So 501, 167 Miss 464
30 C J p 110 note 28

Expressions held equivalent
(1) Maliciously—Walls v Commonwealth, 78 S W 2d 322, 257 Ky 478

(2) That he struck with the willful felonious and malicious intent to kill—Davenport v Commonwealth, 148 S W 2d 1054, 285 Ky 628

(3) Other cases see 30 C J p 110 note 28 [a]

47. Iowa—State v Thurman, 24 N W 511, 66 Iowa 693
30 C J p 110 note 29

48 Ohio—Lindsey v State, 69 N E 126 69 Ohio St 215

49. La—State v Fletcher, 53 So 877, 127 La 602
30 C J p 110 note 30

50. Miss—Wexler v State, 142 So. 501, 167 Miss 464

51. La—State v Pinsonat, 177 So 67, 188 La 334—State v Lee 15 So 159, 46 La Ann 623—State v Jones, 14 So 218, 45 La Ann 1154

52. Ark—Hamilton v State, 36 S W 1054, 62 Ark 543.

tal wound was so given,[53] but under statutes providing that ordinary and concise language, without repetition, is sufficient, it has been held unnecessary, where it is alleged that a mortal wound was inflicted with deliberate and premeditated malice, to repeat the allegation as to malice with respect to the killing.[54] Where the murder is charged to have been with malice aforethought, there is no necessity of repeating the charge in the description of the means,[55] especially under statutes of the kind just referred to,[56] and the fact that in the description of the means the words "unlawfully" and "feloniously" only are employed will not reduce the grade of the offense charged.[57] In case malice aforethought is charged with regard to the intent to kill, it is not necessary to charge it also with relation to the assault.[58] Where malice is properly alleged as to some elements of the offense, such allegations may be applied to other elements by reference.[59] In determining whether malice aforethought is properly averred with regard to the killing,[60] or to the assault,[61] the natural and grammatical construction of the words is to be considered, and in some cases the entire indictment has been resorted to.[62]

The evidence relied on to establish malice need not be alleged in the indictment.[63]

§ 157. Specific Intent to Kill

a Necessity of averment

b Sufficiency of averment

a. Necessity of Averment

At common law and under the statutes in force in a number of jurisdictions, a specific allegation of an intent to kill is unnecessary in an indictment for murder, but in other jurisdictions such an averment is required; ordinarily it is unnecessary where the killing is charged to have been done in the commission of a felony. Such an averment is unnecessary in an indictment for manslaughter.

At common law an indictment for murder need not allege a specific intention to kill.[64] In some jurisdictions the intent or purpose to kill, made an ingredient of murder by statutory definition, must be alleged.[65] In other jurisdictions such an averment is not required,[66] or an express allegation of intent is held unnecessary where from the facts alleged, the intent to kill is manifest,[67] but the better practice would appear to be to aver the intent specifically even in those states in which the omission is not regarded as fatal.[68] An allegation of an intent to kill has been held unnecessary on a charge of murder committed while accused was engaged in the commission of a felony,[69] or by means of poison.[70] However, such an averment has been held essential to a charge of murder in the first degree where the homicide is alleged to have resulted from an attempt to produce a miscarriage,[71] or by administering poison.[72]

Where the killing of deceased occurred in an attempt to kill another person, it is sufficient merely to allege an intent to kill deceased without alleging in detail the killing of deceased while attempting

53. La.—State v. Stelly, 90 So. 390, 149 La. 1022.
30 C.J. p. 110 note 33.

54. U.S.—Fitzpatrick v. U.S., Alaska, 20 S.Ct. 944, 178 U.S. 304, 44 L.Ed. 1078.
Ariz.—Rodriquez v. Territory, 125 P. 878, 14 Ariz. 166.

55. Iowa.—State v. Gibbons, 120 N.W. 474, 142 Iowa 96.
30 C.J. p. 110 note 35.

56. Wash.—State v. Tommy, 53 P. 157, 19 Wash. 270.

57. Or.—State v. Abrams, 8 P. 327, 11 Or. 169.

58. Ark.—Turner v. State, 33 S.W. 104, 61 Ark. 359.
30 C.J. p. 110 note 38.

59. Cal.—People v. Davis, 15 P. 8, 73 Cal. 355.
30 C.J. p. 110 note 39.

60. Kan.—State v. Harp, 3 P. 432, 31 Kan. 496.
30 C.J. p. 111 note 40.

61. Mont.—Burgess v. Territory, 19 P. 558, 8 Mont. 57, 1 L.R.A. 808.
30 C.J. p. 111 note 41.

62. Cal.—People v. Davis, 15 P. 8, 73 Cal. 355.
30 C.J. p. 111 note 42.

63. Ky.—Alsop v. Commonwealth, 4 Ky.L. 547, 11 Ky.Op. 851.

64. Ohio.—Fouts v. State, 8 Ohio St. 98.
30 C.J. p. 111 note 44.

65. Wash.—Blanton v. State, 24 P. 439, 1 Wash. 265.
30 C.J. p. 111 note 45.

Intent predicated by purpose.
Word "purposely" in statute defining murder predicated intent when used in indictment therefor.—Landreth v. State, 171 N.E. 192, 201 Ind. 691, 72 A.L.R. 891.

68. Colo.—Holt v. People, 45 P. 374, 23 Colo. 1.
Iowa.—State v. Harness, 241 N.W. 645, 214 Iowa 160.—State v. Harness, 238 N.W. 430, 214 Iowa 160.
Ky.—Commonwealth v. Branham, 120 S.W.2d 234, 274 Ky. 730.—Luttrell v. Commonwealth, 63 S.W.2d 292, 250 Ky. 334.
Neb.—Veneziano v. State, 297 N.W. 920, 139 Neb. 526.—Chadek v. State, 294 N.W. 384, 138 Neb. 626.
30 C.J. p. 111 note 16.

Presumption from other averments.
When the indictment charges that a killing was done unlawfully and with malice aforethought, intention will be presumed.—Commonwealth v. Branham, 120 S.W.2d 234, 274 Ky. 730.

67. Ga.—Chelsey v. State, 49 S.E. 258, 121 Ga. 340.
30 C.J. p. 111 note 47.

68. Mont.—Territory v. Godas, 21 P. 26, 8 Mont. 347.

69. Ark.—White v. State, 96 S.W.2d 771, 192 Ark. 1102.—Harris v. State, 282 S.W. 680, 170 Ark. 1073.
Ind.—Stephenson v. State, 179 N.E. 633, 205 Ind. 141, error dismissed 186 N.E. 293, 205 Ind. 141.
Or.—State v. Dorland, 89 P.2d 595, 161 Or. 403.—State v. Brown, 7 Or. 186.
30 C.J. p. 112 note 49.

70. Iowa.—State v. Robinson, 101 N.W. 634, 126 Iowa 69.
Mass.—Commonwealth v. Hersey, 2 Allen 173.

71. Iowa.—State v. Baldwin, 45 N.W. 297, 79 Iowa 714.

72. Ohio.—Robbins v. State, 8 Ohio St. 131.
30 C.J. p. 112 note 52.

and intending to kill the other person.[73]

Feticide. To charge feticide under a statute providing punishment for the willful killing of a "quick" unborn child by an injury to the mother which would be murder if it resulted in the death of the mother, the indictment must charge that the injury to the mother was inflicted with intent to kill her[74]

Manslaughter An indictment for manslaughter need not charge intent to kill,[75] nor is it necessary to allege the negative that the killing was done without a design to effect death[76] An indictment insufficient to sustain a charge of murder in the first degree under a statute, by reason of its failure to charge a purpose to kill, may be sufficient to support a judgment for manslaughter[77]

Criminal intent In some jurisdictions where a short form of indictment is prescribed, it is unnecessary to allege a criminal intent[78]

b. Sufficiency of Averment

Where an averment of intent to kill is required, it should be made positively and directly in the description of the offense, and as to the killing as well as to the assault, it cannot be made by inference or in the conclusion of the indictment only, but words of reference may be used to apply it to different elements of the offense

Where the intent to kill is regarded as a necessary averment, as considered supra subdivision a of this section, it cannot be alleged by mere inference[79] In such cases it is ordinarily held that a positive and direct averment of a purpose or intention to kill, in the description of the offense, is required,[80] and, although there is some authority to the contrary,[81] that the conclusion of the indictment will not aid a defective averment[82] The intent must be alleged as to the killing as well as to the assault,[83] although the allegation may be by the use of appropriate words of reference to the intent alleged as to the assault[84] An averment of intent as to the killing is applicable also as to the assault[85] Where purpose is laid to the charge of killing, the fact that in the description of the means the words "unlawfully" and "feloniously" only are employed will not reduce the grade of the offense charged[86] An allegation which charges an intent to kill is not insufficient because of the omission of the word "specific" before the word "intent"[87] An allegation that accused deliberately, premeditatedly, and with malice aforethought murdered the victim is sufficient to charge the intent to kill,[88] as is an allegation that the homicide was committed unlawfully and with malice aforethought,[89] or purposely,[90] or that the killing was willful, deliberate, and premeditated[91] Under a statute which defines murder as the voluntary killing of a person, an averment that it was done with malice aforethought is sufficient,[92] as is also an averment that accused did voluntarily kill deceased[93]

§ 158. Deliberation and Premeditation

a Necessity of averment
b Sufficiency of averment

a. Necessity of Averment

In some jurisdictions an allegation that the killing was done deliberately and premeditatedly is required, and in others it is not, where the killing is alleged to have been committed in the commission of a felony, such an averment is unnecessary, but if made will not invalidate the indictment

73. Ky —Commonwealth v Branham, 120 S W 2d 234, 274 Ky 730

74. Ga —Passley v State, 21 S E 2d 230, 194 Ga 327

75. Ill —People v Adams, 124 N E 575, 289 Ill 339
30 C J p 112 note 53

76. Minn —State v Staples, 118 N W 283, 126 Minn 396

77. Wash —Blanton v State, 24 P 439, 1 Wash 265
30 C J p 112 note 54

78. N M —State v Roy, 60 P 2d 646, 40 N M 397

79. Iowa —State v Linhoff, 97 N W 77, 121 Iowa 632
30 C J p 112 note 56

Sufficiency of averments

(1) Specific intent to kill held sufficiently alleged —State v Cooper, 191 N W 891, 195 Iowa 258

(2) Indictment held sufficient to charge that poison was administered with intent to take life —Davis v State, 215 N W. 785, 116 Neb 90.

(3) An indictment charging an assault with a revolver loaded with specific intent to kill and a willful, deliberate, premeditated, and felonious discharge of the revolver in and on the body of deceased which resulted in a mortal wound is not sufficient —State v Linhoff, 97 N W 77, 121 Iowa 632

(4) Other cases see 30 C J p 112 note 56 [a]

80. Ohio —Fouts v State, 8 Ohio St 98

81. Kan —State v Smith, 16 P 254, 38 Kan 194—State v Potter, 15 Kan 302

82. Wash —Blanton v State, 24 P 439, 1 Wash 265
30 C J p 112 note 63

83. Okl —Holt v Territory, 43 P 1083, 4 Okl 76
30 C J p 112 note 57

84. Fla —Daniels v State, 41 So 609, 52 Fla 18
30 C J. p 112 note 58.

85. Iowa —State v Wilson, 144 N W 47, 147 N W 739, 166 Iowa 309

86. Or —State v Abrams, 8 P 327, 11 Or 169

87. Iowa —State v Berlovich 263 N W 853, 220 Iowa 1288

88. Ark —Vasser v State, 87 S W. 635, 75 Ark 373
30 C J p 112 note 61

89. Ga Wright v State, 141 S E 903, 166 Ga 1

90. Ohio —Makley v State, 197 N E 339, 49 Ohio App 359

91. Kan —State v McGaffin, 13 P. 560, 36 Kan 315
30 C J p 112 note 62.

92. Tex —Taylor v State, 106 S W 2d 681, 133 Tex Cr 56—Crutchfield v State, 10 S W 2d 119, 110 Tex. Cr 420

93. Tex —Crutchfield v. State, supra.

Although the terms are employed in the statutory definition of murder, in some jurisdictions the killing need not be alleged to have been done "deliberately and premeditatedly" where an indictment charges it to have been with malice "aforethought,"[94] and this is of course true where the statute expressly authorizes the indictment to be in the common-law form,[95] or where the statute prescribes a form of indictment which shall be sufficient and which omits an averment of deliberation and premeditation.[96] Such indictments are held not to contravene the constitutional rights of accused.[97] In other jurisdictions, however, it has been held that deliberation and premeditation must be alleged where they constitute an essence of the crime,[98] although deliberation need not be alleged in charging a particular degree of murder where it is not an element thereof.[99] In such case an indictment or information which does not properly allege the word "deliberation" or its equivalent is insufficient,[1] and an averment of malice aforethought will not take the place thereof.[2]

Commission of felony Where murder committed in the perpetration of a felony is expressly made murder in the first degree, an averment of deliberation and premeditation necessary to constitute murder in the first degree generally need not be made.[3] However, such an allegation is not inconsistent with the charge of a killing in the perpetration of, or attempt to perpetrate, a specified felony and will not render the indictment defective,[4] and, where deliberation and premeditation are unnecessarily alleged, they may be regarded as surplusage.[5]

b. Sufficiency of Averment

When required the averment of deliberation and premeditation must be made directly and not by inference, by either the exact expression or words equivalent thereto, and ordinarily with reference to the killing itself

The averment of deliberation and premeditation, when regarded as necessary, as shown supra subdivision a of this section, must be made directly and not by inference.[6] However, the language employed will be given its natural and grammatical construction,[7] and words equivalent to "deliberation" and "premeditation" are sufficient.[8] An averment of deliberation has been held to include premeditation within its meaning,[9] but "deliberately" has been held not included within the meaning of "willfully and premeditatedly."[10] Although it has been held that an averment of deliberation and premeditation as to the assault sufficiently avers it as to the death,[11] as a general rule such averment must be made with reference to the killing itself,[12] or to the fatal stroke.[13] The averment once properly made may be applied to subsequent allegations by appropriate words of reference.[14] When alleged as to the killing it has been held to refer also to the assault.[15] Where deliberation and premeditation are laid to the charge of killing, the fact that in the description of the means the words "unlawfully" and "feloniously" only are employed will not reduce the grade of the offense charged.[16]

94. Ariz—Macias v State, 6 P 2d 423, 39 Ariz 303
Colo—Redus v People, 14 P 323, 10 Colo 208
30 C J p 112 note 65

Authority of case nullified

It has been stated that an examination of the case of Rodriquez v Territory, 125 P 878, 14 Ariz 166 will disclose that the statement therein that an indictment for murder in the first degree must charge that the killing was willful, deliberate, and premeditated, and with malice aforethought was unnecessary, and that in fact an indictment was upheld that did not allege that the killing was deliberate and unpremeditated - Macias v State, supra

95. Tenn—Mitchell v State, 8 Yerg 514—Mitchell v State, 5 Yerg 340

96. Nev - State v Munios, 195 P 806, 44 Nev 353
30 C J p 112 note 67

97. U S—Bergemann v Backer, 15 S Ct 727, 157 U S 655, 39 L Ed 845
30 C J p 113 note 68.

98. Ark—Harris v State, 282 S W 680, 170 Ark 1073
Mo—State v Ancell, 62 S W 2d 443, 333 Mo 26
Neb—Pembrook v State, 222 N W 956, 117 Neb 759

99. Mo—State v Ancell, 62 S W 2d 443, 333 Mo 26

1. Neb—Pembrook v State, 222 N W 956, 117 Neb 759
30 C J p 113 note 69 [a]

2. Ark - Cannon v State, 31 S W 150, 32 S W 128, 60 Ark 564
30 C J p 113 note 69

3. Ark—Noble v State 112 S W 2d 631, 195 Ark 453—White v State, 96 S W 2d 771, 192 Ark 1102—Harris v State, 282 S W 680, 170 Ark 1073
Neb—Keezer v State, 133 N W 204, 90 Neb 238
Or—State v Dorland, 89 P 2d 595, 161 Or 403

4. Ark—Noble v State, 112 S W 2d 631, 195 Ark 453

5. Neb—Keezer v State, 133 N W 204, 90 Neb 238

6. Iowa—State v Linhoff, 97 N W 77, 121 Iowa 632
30 C J p 113 note 71

7. Kan State v Petty, 21 Kan 54
30 C J p 113 note 75

8. Mo State v Dale, 18 S W 976 108 Mo 205

9. Ark—Averheart v State, 238 S W 620, 158 Ark 639
Mo—State v Dale, 18 S W 976, 108 Mo 205

10. Ark—Cannon v State 31 S W 150, 60 Ark 564, dissenting opinion 32 S W 128 60 Ark 564

11. Ariz—Escobar v State, 245 P 356 30 Ariz 159

12. Iowa—State v Andrews, 50 N W 519 84 Iowa 88
30 C J p 113 note 73

13. Mo—State v Woodward, 90 S W 90, 191 Mo 617

14. Mo—State v Woodward, supra
30 C J p 113 note 76

15. Ark—La Rue v State, 41 S W 53, 64 Ark 144—Turner v State, 33 S W 104, 61 Ark 359

16. Or—State v Abrams, 8 P. 327, 11 Or 169

In jurisdictions where it is not necessary to allege deliberation and premeditation, as shown supra subdivision a of this section, the use of the terms "deliberately" and "premeditated" to characterize the averment as to malice aforethought instead of the killing is immaterial and will not invalidate the indictment [17]

Conclusion It has been held that a failure to make a proper allegation of deliberation and premeditation in the body of the indictment will not be supplied by an averment in the conclusion that the prisoner did of deliberate and premeditated malice kill deceased,[18] but there is authority to the contrary [19]

§ 159. Deliberate and Premeditated Design

a Necessity of averment
b Sufficiency of averment

a. Necessity of Averment

In some jurisdictions an allegation that the killing was with a deliberate and premeditated design, or a premeditated design, is required, and in others it is not, but, where the killing is alleged to have been committed in the commission of a felony, such an averment is unnecessary, and as a general rule an averment that it was committed without any design to effect death is also unnecessary

In some jurisdictions an indictment or information is sufficient without the employment of such phrases as "deliberate and premeditated design"[20] or "premeditated design"[21] to effect death In other jurisdictions, however, "premeditated design" must be alleged [22]

Commission of felony Where one is charged with murder while engaged in the commission of a felony, it is not necessary to allege that the homicide was perpetrated with a design to effect death [23] Under a statute making homicide murder when perpetrated without any design to effect death by a person engaged in the commission of any felony, it has been held in some jurisdictions that the information should state that the homicide was committed without any design to effect death,[24] but in other jurisdictions such an averment has been held unnecessary [25] However, where the indictment avers that the killing was committed without a design to effect death, it will not authorize a conviction of a homicide of which a design to effect death is an essential element [26]

b. Sufficiency of Averment

Where an allegation of deliberate and premeditated design, or premeditated design, is required, it should be made as to a particular person, and as to the killing, and not merely as to the assault, the exact words need not be used, but words equivalent thereto are sufficient

In jurisdictions where it is regarded as essential to charge that the killing was with premeditated design to effect the death of the person killed, the averment must be made as to some particular human being [27] However, where one kills a person by mistake while attempting and intending with premeditated design to kill another person, the indictment in such a case properly alleges that the premeditated design was to effect the death of the person actually killed [28] In making such allegation it is not essential that the words "premeditated design" be used, but it is sufficient if words equivalent thereto, or of the same import, are employed [29]

17. Mont—State v Nielson, 100 P 229, 38 Mont 451

18. Iowa—State v Andrews, 50 N W 519, 84 Iowa 88
30 C J p 113 note 81

19. Kan—Smith v State, 1 Kan 365

20. N M—Borrego v Territory, 46 P 349, 8 N M 446, affirmed 17 S Ct 182, 164 U S 612, 41 L Ed 572
30 C J p 114 note 83

21. Minn—State v Johnson, 35 N W 373, 37 Minn 493
30 C J p 114 note 84

22. Fla—Coston v State, 198 So 467, 144 Fla 676
Okl—Basham v State, 287 P 761, 47 Okl Cr 204
30 C J p 114 note 85

23. Okl—Clark v State, 73 P 2d 481, 63 Okl Cr 138

24. N D—State v Belyea, 83 N W 1, 9 N D 353

25. N Y—Dolan v People, 64 N Y 485, affirming 6 Hun 493
Okl—Clark v State, 73 P 2d 481, 63 Okl Cr 138

Reason for rule

The sole purpose of the words "without any design to effect death" was to dispense with proof of any design and it was not intended to require proof in such a case that the killing was absolutely without any design to effect death—Dolan v People, 64 N Y 485, affirming 6 Hun 493

26. N Y—People v Hoffman, 220 N Y S 249, 219 App Div 334 affirmed 157 N E 869, 245 N Y 588

27. Fla—Coston v State, 198 So 467 144 Fla 676

Sufficiency of specification

(1) An information charging accused with a premeditated design to effect the death of a named sheriff of a named county, and any other officer who might attempt to inquire into and interfere with designated activities carried on by accused, is sufficiently specific as to the person against whom the design and intent of accused were directed—State v Baker, 272 P 80, 150 Wash 82

(2) An indictment is not defective for charging a design on the part of accused to "effect the death of" deceased "or another," since the intent is presumed from the fact of killing deceased, and the disproving of such intent is open to accused—State v Miller, 186 N W 803, 151 Minn 386

28. Fla—McCray v State, 102 So 831, 89 Fla 65—Hall v State, 69 So 692, 70 Fla 48

29. Okl—Basham v State, 287 P 761, 47 Okl Cr 204—Taylor v State, 225 P 988, 27 Okl Cr 165
30 C J p 114 note 88

Allegations held sufficient

(1) Information charging that homicide was committed with deadly weapon with intent to kill deceased, and that deceased died from mortal wound, as intended by accused, sufficiently charged premeditated design

It is insufficient to allege that the act was committed with malice aforethought,[30] or deliberate and premeditated malice,[31] but language which expresses a premeditated intent to kill sufficiently charges a premeditated design to effect death.[32] It is insufficient to allege the premeditated malice as to the assault alone without averring it as to the killing,[33] but, where such an allegation has been made as to the assault, it may be made as to the killing by the use of appropriate words of reference.[34] A charge that accused willfully killed deceased is not equivalent to "with a design to effect death,"[35] but, where it is alleged that the act which results in death was committed by accused with a premeditated design to kill, it is sufficient.[36]

§ 160. Willfulness, Unlawfulness, and Feloniousness

a Willfulness
b Unlawfulness
c Feloniousness
d Homicide in perpetration of another offense

a. Willfulness

As a general rule, although there is some authority to the contrary, willfulness need not be averred in an indictment for murder. Where it is necessary to aver, it cannot be charged by inference, but equivalent words are sufficient, and words of reference may be used to apply it to different elements charged

An averment that the killing was "willful" is not essential in a common-law form of indictment for murder,[37] and is not required under the procedure in use in a number of jurisdictions,[38] including those in which a short form of indictment is prescribed which does not include an averment as to willfulness,[39] and, where such an averment is made, it may be considered as surplusage.[40] Under some statutory provisions, however, willfulness must be charged.[41] Where it must be charged that the killing was willful, equivalent language may be used instead of the exact technical word.[42] Thus "willfully" is supplied by "feloniously,"[43] or "maliciously,"[44] or "malice aforethought."[45] It cannot be charged by inference,[46] but it may be alleged once in such a way as to apply to more than one element of the offense.[47] In case willfulness is alleged as to the intent to kill, it has been held unnecessary to repeat it with relation to the assault,[48] and, where willfulness has been alleged in the body of the indictment as to the assault and wounding, it may be alleged in the conclusion as to the killing.[49]

Meaning of term The term "willful," as used in the charge of murder, has been held to mean intentionally or designedly done and not accidentally.[50]

—Basham v State 287 P 761, 47 Okl Cr 204

(2) Other instances see 30 C J p 114 note 88 [a]

30. Okl--Jewell v Territory, 43 P 1075, 1 Okl 53

31. Okl--Holt v Territory, 43 P 1083, 1 Okl 76

32. Okl—Holt v Territory, supra

33. Okl—Holt v Territory, supra

34 Fla Daniels v State, 41 So 609, 52 Fla 18
30 C J p 114 note 92 [a]

Case overruled

The views expressed in the case of Simmons v State, 13 So 896, 32 Fla 387 as to the insufficiency of the allegations in the indictment therein to allege that the efficient cause of death was from a premeditated design to effect death, were disapproved in the case of Daniels v State, supra

35. Minn -State v Smith, 81 N W 17, 78 Minn 362

36. Okl—White v State, 111 P 1010, 4 Okl Cr 113
30 C J p 114 note 95

37. La—State v Robinson, 78 So 933, 143 La 513

38. Ky—Burnett v Commonwealth, 189 S.W 460, 172 Ky 398
30 C J. p 114 note 96.

39 La --State v Matthews 179 So 69, 189 La 166--State v Eisenhardt, 169 So 417 185 La 308-State v Dalco 151 So 437, 179 La 516 -State v Capaci 154 So 419, 179 La 462

Former rule

(1) Under a former statute which prescribed as a proper short form of indictment for murder the charge "that the defendant did feloniously, willfully and of his malice aforethought kill and murder the deceased," the word 'willfully" could not be omitted, but was required to be employed where the statutory form of indictment was used State v Robinson, 78 So 933 143 La 513 —State v Williams, 87 La Ann 776

(2) However, where the common-law, instead of the statutory, form of indictment was used, the word "willfully" did not have to be employed--State v Robinson, supra

(3) The case of State v Williams, supra, decided under such former statute, in holding that the omission of the word "willfully" in an indictment in the statutory form rendered it fatally defective, declared that the case of State v Harris, 27 La Ann 572, which reached a different conclusion, had been clearly, although impliedly, reversed by later cases

40. La State v Dalco 151 So 437, 179 La 516 State v Capaci, 154 So 419 179 La 462

41 Miss—Wexler v State, 142 So 501 167 Miss 464

42. Iowa—State v Townsend, 21 N W 535 66 Iowa 741
Kan—State v Whitaker, 12 P 106, 35 Kan 731
Miss—Wexler v State, 142 So 501, 167 Miss 464
Tenn—Fisher v State 10 Lea 151

43 Miss—Wexler v State, 142 So 501 167 Miss 464
30 C J p 114 note 3

44. Miss—Wexler v State, supra

45 Ark - Carroll v State, 75 S W 471, 71 Ark 403

46. Iowa - State v McCormick, 27 Iowa 402
30 C J p 114 note 7

47. Mo--State v Eaton, 75 Mo 586
30 C J p 114 note 6

48. Iowa--State v Dunn, 89 N W 981, 116 Iowa 219
30 C J p 115 note 9

49. Kan—Smith v State, 1 Kan. 365

50. Kan—State v Mathews, 21 P 2d 408, 137 Kan 546.

b. Unlawfulness

The authorities are not in accord as to the necessity for an express averment that the killing was unlawful; where required, an averment containing language equivalent to the word "unlawful" is sufficient

An express averment that the killing was unlawful is unnecessary in an indictment for murder in a number of jurisdictions, including a number of those in which the word "unlawful" is used in the statutory definition of murder,[51] and including those in which a short form of indictment prescribed by statute does not include an averment as to unlawfulness.[52] On the other hand, it has been held under a statute defining murder as a killing without authority of law that the indictment must contain such an averment,[53] and that, where it is an essential element of the homicide charged, as manslaughter, unlawfulness must be averred either expressly or by the use of such terms or such a statement of facts as conclusively implies it.[54]

In jurisdictions where the statutes prescribe as a sufficient form to charge murder the averment that accused murdered deceased, see supra § 146, the word "murdered" includes in its legal significance the unlawful killing.[55]

Where an averment of unlawfulness is required, it is not necessary to allege it in the exact language in which it is made a constituent part of the statutory definition of the homicide charged,[56] although it is preferable,[57] and any other equivalent language is sufficient.[58]

Even though it is unnecessary to allege expressly that the killing was unlawful, it does not vitiate the indictment so to state,[59] and, where alleged, it may be considered as surplusage.[60]

c. Feloniousness

At common law and under the statutes in many jurisdictions, although not in all, an averment of feloniousness in the commission of the offense is required, it must be made in positive language as to the killing or wounding, and in some jurisdictions also as to the assault, but, when once charged, words of reference may be employed to apply it to subsequent allegations.

At common law and under the statutes in many jurisdictions in an indictment for murder it is necessary to allege that the offense was committed feloniously or with felonious intent.[61] However, where the word "feloniously" is not used in the statutory definition of the homicide charged, the indictment or information need not charge that it was done feloniously,[62] and in jurisdictions where a short form of indictment is prescribed by statute which does not include an averment as to feloniousness, such an averment is unnecessary,[63] and in such case, when averred, it may be considered as surplusage.[64]

The averment as to feloniousness must be in positive language,[65] but an allegation that the homicide was perpetrated with a felonious intent sufficiently charges that it was feloniously committed.[66] Under some statutes it is unnecessary that the assault, as well as the killing, should be alleged to

51. U S—Davis v Utah Utah 11 S Ct 328 151 U S 262, 38 L Ed 153
Cal—People v Suesser, 75 P 1093, 142 Cal 354
Ind—Beavers v State, 58 Ind 530
Ky—Greer v Commonwealth, 175 S W 665 164 Ky 396
Tenn Riddle v State, 3 Heisk 401—Williams v State 3 Heisk 376
Tex—Thompson v State, 36 Tex 326—Dickson v State, 113 S W 2d 528 134 Tex Cr 22—Morrison v State 51 S W 358 40 Tex Cr 473

52. La—State v Matthews 179 So 69 189 La 166—State v Daleo, 154 So 437 179 La 516

53. Okl—Fooshee v State, 108 P 554 3 Okl Cr 666

54. Ala—Henry v State, 33 Ala 389
31 C J p 701 note 44 [a] (1), (2)

55 La—State v Capaci, 154 So 419 179 La 462—State v White, 136 So 47, 172 La 1045

56. Okl—Fooshee v State, 108 P 554, 3 Okl Cr 666

57. Okl—Fooshee v State, supra

58. Ga—Coxwell v. State, 66 Ga 309.
N M—Ruiz v Territory, 61 P 126 10 N M 120
Okl—Fooshee v State, 108 P 554, 3 Okl Cr 666

Equivalent expressions

(1) The words "with malice aforethought and intent to murder" are equivalent to "unlawfully"—People v Ah Toon, 9 P 311 68 Cal 362

(2) The word "feloniously" includes "unlawfully" in its meaning—Carroll v State, 75 S W 171, 71 Ark 403

(3) The word 'unlawfully" conveys the same meaning as the words "without authority of law"
Fla—Schley v State, 37 So 518, 48 Fla 53
Okl—Fooshee v State 108 P 554, 3 Okl Cr 666

(4) An omission of the word 'unlawfully" is supplied by an allegation that the act was contrary to the statute—State v Anderson 116 P 2d 398, 100 Utah 468

59. Tex—Johnson v State, 244 S W 1019, 92 Tex Cr 550

60. La—State v Daleo, 154 So 437, 179 La 516

61 Mo—State v Woodward, 90 S W 90 191 Mo 617
Okl—Wright v U S 90 P 732 18 Okl 510 11 Ann Cas 995
Tenn—Witt v State, 6 Coldw 5
31 C J p 699 note 9 [a] (1)

62 U S—Bowen v Johnson, C C A Cal 97 F 2d 860 certiorari granted Bowen v Johnston 59 S Ct 68 305 U S 579, 83 L Ed 365 affirmed 59 S Ct 412 306 U S 19 83 L Ed 455
Tenn—Riddle v State 3 Heisk 401

63. Cal—People v Dykes, 290 P 102, 107 Cal App 107
La—State v Matthews, 179 So 69, 189 La 166—State v Eisenhardt, 169 So 417 185 La 308—State v Daleo, 154 So 437 179 La 516—State v Capaci, 154 So 419, 179 La 462

64. La—State v Daleo, 154 So 437, 179 La 516—State v. Capaci, 154 So 419, 179 La 462

65. Okl—Wright v U S, 90 P 732, 18 Okl 510, 11 Ann Cas 995

66. Ark—Turner v State, 33 S W 104, 61 Ark 359
Ill—Fairlee v People, 11 Ill 1.

have been felonious;[67] and there is authority that an averment that the acts which finally resulted in the death of deceased were done feloniously is sufficient, even though it fails to charge the killing in such manner.[68] Under other statutes, however, the allegation of feloniousness should be made as to the assault[69] and also as to the wounding,[70] and an allegation of feloniousness merely as to the shooting or other assault is insufficient.[71] It is not necessary to repeat, in connection with each act necessary to constitute the crime of murder, that accused did it feloniously,[72] but, if the word "feloniously," used in connection with one element charged, is so connected with the allegations of the other elements as fairly to modify them, it is sufficient.[73]

d. Homicide in Perpetration of Another Offense

Averments of unlawfulness, willfulness, and feloniousness need not be made when the homicide is charged to have been committed in the commission of a felony

Where a killing committed in the perpetration of, or attempt to perpetrate, specified felonies is by express statutory provision made murder in the first degree, an indictment which charges a killing in the commission of one of the specified felonies need not allege that accused unlawfully, willfully, and feloniously killed deceased.[74]

§ 161. Knowledge

Knowledge, which constitutes an element of the crime, need not be expressly alleged where it is clearly shown by the use of other terms or allegations

Knowledge, where an element of the crime, need not be expressly alleged where it is clearly shown by the use of other terms.[75] In an indictment for murder by poison, it is unnecessary to allege that accused knew the substance employed to be a deadly poison,[76] at least when the intent to kill is alleged.[77] So it is held that a count for manslaughter by furnishing a deadly poison to a purchaser who asked for liquor need not allege knowledge of accused of the poisonous character of the substance delivered, but, on the other hand, it has been held that a count for the sale of liquor in which a poison had been mixed must allege such knowledge, or facts from which it may be inferred, although the sale of the liquor was unlawful.[78] In a prosecution for murder by mixing poison in the drink of another, it cannot be objected after verdict that it was not alleged that accused knew that deceased had any intention of drinking the liquid in which the poison was mixed.[79]

Knowledge of dangerous character of negligent act In a prosecution for negligent homicide an indictment need not aver that danger of death was apparent to accused, an averment that the danger was apparent being sufficient.[80] When the act causing death is one of gross carelessness or of foolhardy presumption, knowledge of its dangerous nature need not be averred,[81] but a count charging manslaughter in the operation of an unsafe airplane which was structurally or aerodynamically unfit or unstable for flight must aver that such infirmities in the aircraft were known to accused.[82]

67. Tenn.—Foster v. State, 6 Lea 213

68. Ind.—Drake v. State, 41 N.E. 799, 44 N.E. 188, 145 Ind. 210

69. Mo.—State v. Fairlamb, 25 S.W. 895, 121 Mo. 137
31 C.J. p. 700 note 30 [b] (3)

70. Mo.—State v. Kenyon, 126 S.W. 2d 245, 343 Mo. 1168.—State v. Woodward, 90 S.W. 90, 191 Mo. 617
Okl.—Wright v. U.S., 90 P. 732, 18 Okl. 510, 11 Ann.Cas. 995
31 C.J. p. 700 note 30 [b] (4)

71. Mo.—State v. Woodward, 90 S.W. 90, 191 Mo. 617.—State v. Herrell, 10 S.W. 387, 97 Mo. 105, 10 Am.St.R. 289

72. Mo.—State v. Kenyon, 126 S.W. 2d 245, 343 Mo. 1168.
Okl.—Wright v. U.S., 90 P. 732, 18 Okl. 510, 11 Ann.Cas. 995

73. Okl.—Wright v. U.S., supra

Averment held sufficient to charge a felonious wounding of deceased.—**State v. Privett, 130 S.W. 2d 575, 344 Mo. 1020.—State v. Kenyon, 126 S.W. 2d 245, 343 Mo. 1168.**

Word held not to modify subsequent averments

Where the pleader uses words to describe the intent with which the assault was made, the words "then and there," used in connecting the infliction of the mortal wound with a felonious intent will be interpreted to refer to the time and place merely, and not as a vehicle to carry the intent with which the assault was made through the indictment so as to modify the intent in making the mortal wound.—Wright v. U.S., 90 P. 732, 18 Okl. 510, 11 Ann.Cas. 995

74. Ark.—White v. State, 96 S.W. 2d 771, 192 Ark. 1102.—Harris v. State, 282 S.W. 680, 170 Ark. 1073

75. Ark.—Farrell v. State, 163 S.W. 768, 111 Ark. 180
30 C.J. p. 115 note 13

Purposely and willfully

In an indictment under a statute providing whoever purposely and willfully kills a policeman in the discharge of his duty is guilty of murder in the first degree, and shall be punished by death, it is not necessary to aver that accused knew deceased was an officer, since the words 'purposely" and "willfully" carry the meaning of designedly and knowingly, although such knowledge must be proved on the trial.—Holt v. State, 140 N.E. 349, 107 Ohio St. 307

76. Pa.—Commonwealth v. Earle, 51 Pa. 525, 1 Whart. 525
30 C.J. p. 115 note 14
Sufficiency of averments as to homicide by poison generally see supra § 150

77. U.S.—Westmoreland v. U.S., Tex., 15 S.Ct. 243, 155 U.S. 545, 39 L.Ed. 255
30 C.J. p. 115 note 15

78. R.I.—State v. De Fonti, 82 A. 722, 34 R.I. 51

79. Va.—Puryear v. Commonwealth, 1 S.E. 512, 83 Va. 51

80. Tex.—Van Arsdale v. State, 249 S.W. 863, 94 Tex.Cr. 169

81. Minn.—State v. Lester, 149 N.W. 297, 127 Minn. 282, L.R.A. 1915D 201
30 C.J. p. 97 note 32

82. Ala.—French v. State, 180 So. 592, 28 Ala.App. 147, certiorari denied 180 So. 594, 235 Ala. 570.

§ 162. Designation of Crime or Degree

In many, although not all, jurisdictions, it is unnecessary for an indictment to designate or charge a particular degree of unlawful homicide. An indictment in common-law form, or following a statutory definition or form for murder, is generally sufficient to charge murder in the first degree as well as murder in the second degree.

Under a statute requiring the name of the offense for which the indictment or information is brought to be stated in the accusatory part thereof, it is sufficient to designate the offense as murder without specifying the degree;[83] and an indictment designating the offense as murder is proper under a statute providing that an indictment may charge the commission of a felony generally or, in a proper case, of the crime of murder.[84] In those states in which the name of the offense is regarded as matter of form, it may be rejected under a statute providing for the rejection of surplusage and accused tried for the crime defined by the statement of facts.[85] It has been held to be of no moment that the name of the crime is incorrectly stated in the accusatory clause of the indictment or information if the specific allegations of the fact are sufficient, for the latter in such case control the character of the crimes presented.[86]

Under some statutes an indictment or information charging the crime of murder must be so drawn as to cover the various degrees thereof,[87] and hence should not specify any particular degree,[88] although an attempt to specify the degree is not a fatal defect.[89] In many jurisdictions, although murder is by statute divided into degrees which are specifically defined, an indictment which is sufficient to constitute a charge of murder generally under the law of the state is good, even though it does not designate the degree charged or allege matters which would restrict the charge to a particular degree.[90] Under this rule, an indictment for murder in the common-law form or substantially in such form,[91] or in the language of the statute defining murder generally,[92] may be sufficient, and in some of such jurisdictions an indictment in such form is expressly authorized by statute.[93] Such an indictment or information is held to embrace an accusation of murder in the first degree,[94] provided it does not allege anything to show that the murder was not one in the first degree.[95] In some states, however, the circumstances differentiating the degrees must be inserted in the indictment, so that where deliberation and premeditation are not charged, the indictment, in order to charge first degree murder, must show that it was committed under some of the peculiar circumstances defined by the statute,[96] as in the perpetration of one of the offenses named in the statute,[97] or by means of poison,[98] or torture,[99] or lying in wait.[1] Some statutes require the indictment to designate the degree of the crime,[2] which may be done by an averment that murder in a particular degree was committed, added after a statement of the offense in the common-law form,[3] or by alleging, in addition to the common-law requirements, willfulness, deliberation, and premeditation.[4] Apart from the question of whether or not

Reason to know

In a count charging accused with killing a person by carrying her up in an aircraft, knowing 'or having reason to know that said aircraft was unsafe for such purpose" the alternate averment quoted charged no offense and with other infirmities rendered the count defective and insufficient —French v State, supra

83. Iowa —State v Phillips, 92 N W 876, 118 Iowa 660

84. Nev —State v Harris, 12 Nev 414

85 Minn —State v Matakovich, 61 N W 677 59 Minn 514
30 C J p 115 note 23

86. N Y —People v Gaydica, 203 N Y S 243, 122 Misc 31

87 Cal —People v Paraskevopolis, 183 P 585 42 Cal App 325

88. Cal —People v King, 27 Cal 507, 87 Am D 95

89. Cal —People v King, supra
30 C J p 115 note 22

90. U S —Davis v Utah, Utah, 14 S Ct 328, 151 U S 262 38 L Ed 153
Mass —Commonwealth v Di Stasio, 11 N E 2d 799, 298 Mass 562

Short form

Information charging that accused "did murder' named person, supplemented by bill of particulars which informed accused that conviction for murder in first degree would be requested, was held not objectionable as not protecting accused from double jeopardy because it did not specify which type of murder was charged — State v Roy, 60 P 2d 646, 40 N M 397

91. Va —Hobson v Youell, 15 S E 2d 76, 177 Va 906
30 C J p 115 note 25

92. Utah —State v Campbell, 66 P 771, 24 Utah 103
30 C J p 116 note 27

93. Colo —Andrews v People 79 P 1031, 33 Colo 193, 108 Am S R 76
30 C J p 116 note 26

94. U S – Davis v Utah, Utah 14 S Ct 328, 151 U S 262, 38 L Ed 153
Cal —People v Superior Court in and for Alameda County, 259 P 943, 202 Cal 165
Colo —Andrews v People, 79 P 1031, 33 Colo 193 108 Am S R 76
Mass —Commonwealth v Di Stasio, 11 N E 2d 799, 298 Mass 562
Va —Hobson v Youell, 15 S E 2d 76, 177 Va 906
30 C J p 116 note 27

95. U S —Davis v Utah, Utah 14 S Ct 328, 151 U S 262, 38 L Ed 153

96. Iowa —Fouts v State, 4 Greene 500
Allegation of deliberation and premeditation see supra § 158

97. Kan —Smith v State 1 Kan 365

98. Iowa —State v Van Tassel, 72 N W 497 103 Iowa 6
30 C J p 116 note 33

99. N M —Territory v Vialpando, 42 P 64, 8 N M 211
30 C J p 116 note 34

1 Kan —Smith v State, 1 Kan 365
Mo —State v Jones, 20 Mo 58

2. Conn —Smith v State, 50 Conn. 193
30 C J p 116 note 36

3. Conn —Smith v State, 50 Conn. 193—State v Hamlin, 47 Conn 95, 36 Am R 54

4. Conn —State v Hamlin, supra.
30 C J p 116 note 38.

the name of the offense or its degree must be designated, it has been held by various authorities that it is not necessary to charge in terms "murder in the first degree"[5]

In conformance with the general rule stated supra § 139, an indictment in the form expressly set out by statute is sufficient to charge murder in the first degree,[6] even though it does not in terms or by its allegations restrict the charge to a particular degree[7] An indictment following the language or charging the elements contained in a statutory definition of murder in the first degree is sufficient,[8] as is an indictment charging murder in the first degree in direct and explicit language[9]

Second degree It has been held that the grand jury may prefer an indictment for murder in the second degree, although not expressly authorized by statute so to do,[10] and clearly where they are permitted to do so by express statutes[11] The enactment of such a statute is within the power of the legislature, and its provisions are not in conflict with statutes permitting the trial jury to fix the degree[12] An indictment drawn specifically for murder in the second degree is generally sufficient if it contains material averments of an indictment in the first degree, omitting[13] or negativing[14] the matter of aggravation which differentiates the degrees It need not allege that the act producing the death was "an act imminently dangerous to another" to accord with a statutory definition of the offense, but it is sufficient to describe the act[15] An indictment for murder in the second degree is sufficient if it alleges all the essential elements of that degree of the crime[16]

Instead of indicting for murder in the second degree, it is a common practice to indict for murder in the first degree and, where the evidence requires, take a conviction for murder in a lower degree,[17]

5 N M—Territory v O'Donnell 12 P 743, 4 N M 66
30 C J p 116 note 28

6. Ala—Franklin v State, 171 So 245, 233 Ala 203
Mass—Commonwealth v Giacomazza, 42 N E 2d 506, 311 Mass 456
Ohio - Pierpont v State, 195 N E 264 49 Ohio App 77
Or -State v Evans, 221 P 822 109 Or 503
30 C J p 91 note 89 [a] (1)—31 C J p 717 note 27 [a] (2), (4)

Form approved by court rule
Neb—Veneziano v State, 297 N W 920 139 Neb 526—Hansen v. State, 236 N W 329 121 Neb 169—Phegley v State, 202 N W 419, 113 Neb 138

7 Ala—Jones v State 109 So 189, 21 Ala App 344—Courington v State, 104 So 341 20 Ala App 581 certiorari denied Ex parte Courington, 104 So 343, 213 Ala 163
Cal—People v Magsaysay, 291 P 582, 210 Cal 301
Minn—State v Lautenschlager 22 Minn 514—State v Ryan, 13 Minn 343—State v Dumphey, 4 Minn 340
Va - Hobson v Youell, 15 S E 2d 76, 177 Va 906

8. Ala—Catrett v State 146 So 287 25 Ala App 334
Fla—Pope v State, 94 So 865, 84 Fla 128—Sloan v State, 69 So 871, 70 Fla 163
Iowa - State v Rhodes 288 N W 98 227 Iowa 332 certiorari denied Rhodes v State of Iowa, 60 S Ct 980, 310 U S 626, 84 L Ed 1398—State v Pinkerton, 208 N W 351, 201 Iowa 940
Kan—State v Baker, 253 P 221, 122 Kan 552
Mo—State v. Goodwin, 61 S W 2d 960, 333 Mo 168 -State v Johnson, 26 S W 2d 793—State v Fox 300 S W 820 State v Adams, 289 S W 918 316 Mo 157—State v Bell, 289 S W 619, 316 Mo 185—State v Sadowski, 256 S W 753
Neb—Hansen v State 236 N W 329, 121 Neb 169—Wilson v State, 222 N W 47 117 Neb 692
Ohio - Makley v State 197 N E 339, 49 Ohio App 359—Ralls v State, 182 N E 691 43 Ohio App 129—Ralls v State, 177 N E 787, 40 Ohio App 69
Wash—State v Carpenter, 7 P 2d 573 166 Wash 478

Indictments held sufficient
(1) Indictment charging that accused with felonious intent to rob deceased, did assault and kill him was sufficient, although it used the words "with felonious intent" instead of the statutory language 'in an attempt" Washington v State, 28 S W 2d 1055, 181 Ark 1011

(2) An information, charging that accused feloniously, willfully, deliberately premeditatedly, on purpose and of his malice aforethought shot named person "in and upon the head and body" with a loaded pistol, thereby inflicting a mortal wound, of which he instantly died, sufficiently charged murder in the first degree—State v Kenyon, 126 S W 2d 245, 343 Mo 1168

9. Ohio—Licavoli v State, App, 34 N E 2d 450

10. Canal Zone—Canal Zone v Houston, 2 Canal Zone 238

11. Mass—Commonwealth v Ibrahim, 68 N E 235, 184 Mass 255

12. Mass—Commonwealth v. Ibrahim, supra

13. Mo—State v Mitchell 252 S W 383
30 C J p 116 note 43

14. Canal Zone—Canal Zone v Houston, 2 Canal Zone 238

15. Fla—Sumpter v State, 57 So 202, 62 Fla 98

16. Iowa—State v Sweeney, 214 N W 735, 203 Iowa 1305
Mo—State v Smith 256 S W 1025

Indictments held sufficient
(1) Information stating that accused made assault on named person and "with his fists * * * feloniously, willfully premeditatedly and of his malice aforethought did beat and strike * * * upon the head * * * of the said" person, "inflicting mortal wounds from which * * * the said" person died ten days thereafter, sufficiently charged second degree murder although repetitious and misspelling accused's name and word "premeditatedly"—State v Frazier, 98 S W 2d 707 339 Mo 966

(2) An information charging accused with feloniously killing a certain person, without a premeditated design to effect death the killing being perpetrated by an act imminently dangerous to others and evincing a depraved mind regardless of human life was sufficient to charge the offense of murder in the second degree—State v Johnson, 290 N W 159, 233 Wis 668

17 Fla—Davis v State, 187 So 783, 137 Fla 423
Mo—State v Sundheimer, 6 S W 52, 93 Mo 311
Conviction of offenses included in charge see the C J S title Indictments and Informations § 280, also 31 C J p 857 note 86—p 859 note 6

an indictment in the common-law form[18] or a good indictment for murder in the first degree[19] being sufficient for murder in the second degree, and there being in some states no indictment for murder in a particular degree[20] It has been held that the grand jury has no power, where an indictment charges murder in the first degree, to return a true bill for murder in the second degree[21] A nolle prosequi to so much of an indictment charging murder in the first degree as charges deliberate and premeditated malice will not invalidate the indictment as a charge of murder in the second degree[22]

§ 163. Manslaughter

An indictment or information may properly be drawn for manslaughter alone, and an indictment for manslaughter is generally sufficient if it alleges all the elements of the offense, or states the charge in the language of the statute or in statutory form

Although an indictment for murder is generally sufficient to embrace a charge of manslaughter,[23] where the facts and circumstances justify it, an indictment or an information may charge manslaughter alone[24] Under the statutes in some jurisdictions it is sufficient to charge manslaughter to merely allege that accused unlawfully killed deceased,[25] but as a general rule an indictment for manslaughter must allege the acts constituting the offense[26] Under some statutes the indictment or information may be drawn as for murder omitting the elements of aggravation[27] The omission of the words "in the heat of passion," as employed in a statutory definition, has been held not material,[28] but under some statutes, such words,[29] or, as an alternative, the words "in sudden affray,"[30] must be used Where it is not included in the statutory definition of the particular degree of manslaughter charged, it is not necessary to allege that the homicide was committed in the heat of passion[31] The indictment need not allege that the acts were done by accused "in the fury of his mind"[32] That an indictment alleges elements of a higher degree of homicide does not vitiate it as a charge of manslaughter,[33] and where the facts alleged constitute one grade or degree of manslaughter, the fact that the accusatory clause of the indictment charges a different and greater grade or degree does not invalidate the indictment[34] The absence of apt words characterizing the acts to have been done with malice aforethought and the declaration that the crime intended to be charged is manslaughter,[35] or the statement of an intent to commit a less crime,[36] is a sufficient declaration that the homicide was accomplished without design to effect death While, as respects the indictment, there is no distinction at common law between voluntary and involuntary manslaughter,[37] where by statute voluntary and involuntary manslaughter are made distinct offenses, the indictment must contain facts rendering it certain which offense is charged,[38] although it is not necessary expressly to allege whether the homicide was voluntary or involuntary[39] Where the man-

18. Va—Jarrell v Commonwealth, 110 S E 430, 132 Va 551
30 C J p 116 note 47

19 Fla Davis v State, 187 So 783, 137 Fla 423—Morrison v State, 28 So 97, 42 Fla 149—McCoy v State, 24 So 485, 40 Fla 494
Mass—Commonwealth v Di Stasio 11 N E 2d 799, 298 Mass 562
Neb—Veneziano v State, 297 N W 920 139 Neb 526
30 C J p 116 note 48

20 W Va—State v Schnelle, 24 W Va 767

21. N C—State v Ewing, 37 S E 332, 127 N C 555

22. Ohio—Hurley v State, 4 Ohio Cir Ct 425, 2 Ohio Cir Dec 630

23. Mo—State v Sundheimer, 6 S W 52, 93 Mo 311

24. Cal—People v Paraskevopolis, 183 P 585 42 Cal App 325
30 C J p 117 note 53

25. Ohio—State v Schaeffer, 117 N E 220, 96 Ohio St 215, L R A 1918B 945, Ann Cas 1918E 1137—Williams v State, 35 Ohio St 175—Wolf v State, 19 Ohio St 248.
Wyo—State v McComb, 239 P 526 33 Wyo 346, 41 A L R 717

26. Ind—Blackburn v State 180 N E 180 203 Ind 332—Willey v State, 16 Ind 363
Iowa—State v Korth, 217 N W 236, 204 Iowa 1360
30 C J p 117 note 54

27. Ala—Frazer v State 195 So 287, 29 Ala App 204 certiorari denied 195 So 290 239 Ala 309
30 C J p 117 note 55

28 Minn State v Matakovich, 61 N W 677, 59 Minn 514
30 C J p 117 note 56

29. Ky—Commonwealth v Mosser, 118 S W 915, 133 Ky 609
30 C J p 117 note 57

30. Ky—Bynum v Commonwealth, 59 S W 2d 550, 248 Ky 564—Coe v Commonwealth, 23 S W 371, 94 Ky 606, 15 Ky L 284

31. Okl—Moody v State, 259 P 159, 38 Okl Cr 23

32. U S—U S v Erve, D C, 25 F Cas No 15,173, 4 Cranch C C 539

33. Minn—State v Staples, 148 N W 283, 126 Minn 396.
30 C J p 117 note 59.

Involuntary homicide
An indictment for involuntary homicide in the language of the statute, save the additional words "unlawfully, wilfully and felonously" caused the death, was not bad because of such addition—State v Vinzant 7 So 2d 917 200 La 301—State v Hudgens, 179 So 57, 189 La 128

34 N Y—People v Gaydica, 203 N Y S 243, 122 Misc 31
30 C J p 117 note 63 [b]

35 N Y—People v Mune, 64 N Y S 579 51 App Div 142, 15 N Y Cr 57, reversed on other grounds 59 N E 696 166 N Y 50

36 Kan—State v Harris, 136 P 264 90 Kan 807, 49 L R A, N S, 580
Charging intent to procure abortion is sufficient—State v Harris, supra

37. Pa—Commonwealth v Gill, 182 A 103, 120 Pa Super 22

38 Ind—State v Lay, 93 Ind 341
30 C J p 117 note 62

39. Ind—Brown v State, 11 N E 447, 110 Ind 486
30 C J p 117 note 63.

ner and means of the killing are set out, matter differentiating the degrees need not be averred [40]

In general, an indictment for manslaughter which alleges all the essential elements of the offense is sufficient [41] In conformity with the general rules stated supra § 141, an indictment charging manslaughter in the language of the statute,[42] or in the form expressly authorized by statute,[43] or substantially in such form,[44] is sufficient; but a statutory short form for manslaughter has been held insufficient to charge involuntary manslaughter [45] Where means by which accused may be informed of the nature and cause of the accusation are available, an indictment charging the offense of manslaughter by name may be sufficient,[46] particularly where such an indictment is expressly authorized by statute.[47]

B ASSAULT WITH INTENT TO MURDER OR KILL

§ 164. Elements of Offense in General

The elements of the offense of assault with intent to murder or kill must be set out in the indictment or information.

Under the rules applicable to indictments and informations generally, the elements of the offense of assault with intent to murder or kill as defined by the various statutes must be set out in the indictment or information [48] It has been held that the same particularity of averment is not necessary in an indictment for an assault with intent to kill as is required in an indictment for murder [49]

Under statutes, a statement of the offense in ordinary and concise language is usually sufficient [50] A statement of the offense is sufficient, which, in addition to the averments required by statute, fully advises accused of the offense with which he is charged,[51] or a statement of which the meaning is plain to a common intent,[52] which is so plain as to enable a person of ordinary common sense or understanding to know what is intended,[53] or which is so plain that the nature of the offense may be easily understood by the jury [54]

An indictment is not vitiated merely because it is awkwardly constructed, inartificially drawn, and ungrammatical [55] The ordinary rules of grammatical construction are to be applied, however, in determining the sufficiency of allegations [56] Surplusage may be disregarded [57]

40. Minn—State v Matakovich, 61 N W 677, 59 Minn 514
30 C J p 117 note 64

41. Ga—Wells v State, 162 S E 835, 44 Ga App 760
Iowa—State v Korth, 217 N W 236, 204 Iowa 1360
Allegations of particular matters see supra §§ 140 161

Voluntary homicide
Allegations that accused unlawfully and feloniously made an assault on decedent and performed an operation on him which was not necessary to preserve the life of decedent and had not been advised by physician to be necessary for that purpose, and that accused thereby unlawfully, willfully and feloniously killed decedent, charged the commission of a "voluntary homicide"—State v Stark, Mo, 151 S W 2d 1095

Negligent homicide
Tex - Hillin v State, 57 S W 2d 813, 123 Tex Cr 22

42. La - State v Warthen, 95 So 711, 153 La 260

43. Iowa—State v Long, 245 N W 726, 215 Iowa 194
Miss—Cutshall v State, 4 So 2d 289, 191 Miss 764
N J—State v Donato, 148 A 776, 106 N J Law 397

44. Md—Neusbaum v State 143 A 872, 156 Md 149

45. Mich—People v Ryczek, 194 N W 609, 224 Mich 106—People v Olmstead, 30 Mich 431

46. Ariz—State v Benham, 118 P 2d 91, 58 Ariz 129

47. Utah—State v Blazzard, 133 P 2d 1000—State v Anderson, 116 P 2d 398, 100 Utah 468

48. Fla—Thomas v State, 95 So 752, 85 Fla 113
Ga—Head v State, App, 24 S E 2d 145
Ky—Puckett v Commonwealth, 95 S W 2d 242, 264 Ky 577
Mo—State v Coleman, 284 S W 799—State v Henry, App, 256 S W 523, certiorari quashed State ex rel Henry v Allen, Sup, 263 S W 190
N C—State v Potter, 19 S E 2d 257, 221 N C 153
Ohio—Fry v State, 182 N E 695, 43 Ohio App 154
Okl—Dunbar v State, Cr, 131 P 2d 116—Gidens v State, 236 P 912, 31 Okl Cr 137—Bard v State, 214 P 939, 23 Okl Cr 309

49. La—State v. Green, 7 La Ann 518
Tex—State v Croft, 15 Tex 575

50. Okl—Dunbar v State, Cr, 131 P 2d 116—Bard v State, 214 P 939, 23 Okl Cr 309
30 C J p 118 note 87

Indictments held sufficient
(1) In general
Kan—State v. Clay, 232 P. 251, 117 Kan 538, denying rehearing 229 P 71, 116 Kan 724
Ohio—Fry v State, 182 N E 695, 43 Ohio App 154
Okl—Ward v State, 24 P 2d 358, 55 Okl Cr 10—Gober v State, 219 P 173, 25 Okl Cr 145
Tex—Small v State, 32 S W 2d 860 116 Tex Cr 41
30 C J p 118 note 87 [a] (1)

(2) Other forms held sufficient see 30 C J p 118 note 87 [a] (2)-(16)

51. Mo—State v Henry, App, 256 S W 523, certiorari quashed State ex rel Henry v Allen, Sup, 263 S W 190

52. Ind—Ellis v State, 40 N E 801, 141 Ind 357
30 C J p 119 note 88

53. Ky - Eisterling v Commonwealth 287 S W 972, 216 Ky 541
30 C J p 119 note 88

54. Ga—Ramsey v State, 125 S E 777, 33 Ga App 77

55. Ind—Ellis v State, 40 N E 801, 141 Ind 357
Mo—State v Henry, App, 256 S W 523, certiorari quashed State ex rel Henry v Allen, Sup, 263 S W 190

56. Mo—State v Venable, 177 S W 308
30 C J p 119 note 89.

57. Okl—Dunbar v State, Cr, 131 P 2d 116
30 C J p 119 note 90.

In case the assault with intent to kill is charged to have grown out of a neglect of duty, it is necessary to aver the ability to perform the duty [58]

Language of statute and statutory forms Subject to the general rules governing indictments and informations, it is ordinarily sufficient, as to both form and substance,[59] that indictments or informations for assault with intent to murder or kill follow the language of the statute defining the offense[60] without setting forth the particular circumstances [61] The offense may be pleaded in the exact terms of the statute,[62] but it is also sufficient to set it out substantially in the statutory language [63]

It is sufficient to follow literally forms prescribed by statute [64]

Name or description of offense A substantial compliance with an act requiring the statement of the name or a brief description of the offense is sufficient [65] Where the elements of the offense are all distinctly charged, the omission of descriptive words used in the statute in naming the offense is not fatal [66] Under a statute which does not name the offense, it need not be named provided its essential ingredients are set out [67]

Death of person assaulted It need not be alleged that the person assaulted did not die [68] An indictment which contains every essential element to be proved to establish the offense of murder except the death of the person assaulted within a year and a day may be sufficient to charge an assault with intent to murder [69] The effect of failure to allege that act of administering poison did not cause death is considered infra § 171

Included and collateral offenses It is not necessary to allege all the elements of minor offenses included in the offense charged,[70] although, where the statute punishes an assault with intent to murder when committed in the perpetration of, or attempt to perpetrate, particular crimes, it has been held that the indictment should set out with particularity the crime attempted,[71] but this is not essential when there is sufficient to show a complete offense, without considering the allegations as to the incidental offense [72] An indictment which sufficiently charges an offense under a particular statute is not vitiated by the fact that it contains expressions appropriate to a charge of a distinct offense, but which are insufficient to charge the latter offense [73] Under some statutes, however, an insufficient indictment drawn under one section of the statutes cannot be sustained as stating an offense denounced by another section [74]

§ 165. Time and Place of Offense

Except as the necessity may be obviated by statute, allegations of the place and time of the offense are essential

Except as a statute may provide otherwise, the date when the offense was committed must be alleged[75] and it is usual to allege the time as to each alleged fact,[76] however, it has been held sufficient to allege that the offense occurred on a certain day or thereabouts [77] The date of the offense once

58. Iowa—State v Merkley, 39 N W 111, 74 Iowa 695
30 C J p 119 note 94

59. Mo—State v Capps, 278 S W 695, 311 Mo 683—State v Crawford, 262 S W 700—State v Walker, 248 S W 947

60. Ariz—Hann v State, 247 P 129, 30 Ariz 366
Cal—People v Mitchell, App, 104 P 2d 545
Ind—State v Jenkins, 22 N E 133, 120 Ind 268
Ky—Watkins v Commonwealth, 161 S W 2d 625, 290 Ky 416
La—State v Cole, 104 So 720, 158 La 799
Miss—Word v State, 178 So 821, 180 Miss 883—Smith v State, 118 So 710, 152 Miss 114—State v May, 112 So 866, 147 Miss 79
Mo—State v Groves, 159 S W 2d 773—State v Layton, 58 S W 2d 454, 332 Mo 216—State v Dildine, 51 S W 2d 1, 330 Mo 756—State v Broyles, 295 S W 550, 317 Mo 284—State v Capps 278 S W 695, 311 Mo 683—State v Crawford, 262 S W 700—State v Walker, 248 S W 947—State v Brown, App, 149 S W 2d 414
31 C J p 714 note 96

Poisoning

An indictment based on a statute punishing the administration of poison may follow the language of the statute without an averment that the mixture administered was poisonous—Commonwealth v Galavan, 9 Allen, Mass 271

61. Cal—People v Mitchell, App, 104 P 2d 545

62. Cal—People v Mitchell, supra

63. Mo—State v Dildine, 51 S W 2d 1, 330 Mo 756

64. Ala—Barber v State, 129 So. 492, 23 Ala App 584

65. Ky—Clark v Commonwealth, 38 S W 489, 18 Ky L 758
30 C J p 119 note 91 [a]

66. Ky—Gratz v Commonwealth, 28 S W 159, 96 Ky 162, 16 Ky L 465
30 C J p 119 note 92

67. Ariz—Hann v State, 247 P 129, 30 Ariz 366

68. Ky—Burns v Commonwealth, 3 Metc 13—Taylor v Commonwealth, 8 Ky Op 401

69. Ga—Head v State, App, 24 S E 2d 145

70. S D—State v Morse, 150 N W 293, 35 S D 18, Ann Cas 1918C 570

71. La—State v Brown, 21 La Ann 347

72. La—State v Tyler, 15 So 624, 46 La Ann 1269
30 C J p 119 note 97

73. Ark—Butler v State, 34 Ark 480
30 C J p 119 note 98

74. La—State v Tuggle, 53 So 582, 127 La 330
30 C J p 119 note 99

75. Tex—Barnes v State, 59 S W. 882, 42 Tex Cr 297, 96 Am S R 801

76. Or—State v Kelly, 68 P 1, 41 Or 20

77. Nev—State v O'Connor 11 Nev 416

"And before the finding of this indictment" need not be inserted after the words quoted in the text, in the

properly alleged may be repeated by words of reference [78]

An averment of the place where the offense was committed is in general required only to be sufficiently definite to establish that the offense occurred within the jurisdiction of the court [79]

§ 166. Description of Person Assaulted

The person assaulted must be sufficiently described

The indictment or information charging an assault with intent to kill or murder must contain a clear and certain averment as to the person assaulted,[80] including an allegation of his name[81] or that it is unknown,[82] but its language is to be reasonably construed in determining its sufficiency for this purpose [83] A designation of the person's Christian name, middle initial, and surname is sufficient [84] It may be sufficient to employ the initials of the first name [85] Where the name has been once well stated, it has been held not necessary to repeat it in the charge of the specific intent to murder [86] It is better practice to describe a married woman by her Christian name rather than by the employment of her husband's name with the prefix "Mrs."[87] Where the name is several times correctly stated, a clerical error in one statement of it is not fatal [88] An indictment charging accused with assaulting with intent to murder several named persons is not bad on demurrer as duplicitous [89]

Where the name of the person assaulted is set out, the further fact that he is a human being need not be alleged,[90] especially where the indictment charges assault with intent to murder [91]

It need not be alleged that the person assaulted was "in the peace of the state"[92] The words "in the peace of the people," as applied to such person, means merely that he has done nothing to forfeit his right to live [93]

§ 167. Assault and Battery

a The assault
b The battery

a. The Assault

Except under statutes denouncing the doing of specific acts with intent to kill, an assault must be averred

Save in the case of indictments drawn under statutes punishing the doing of specific acts with intent to kill,[94] the indictment must either charge accused directly with having made an assault[95] or use such words as necessarily imply an assault [96] The failure to fill blanks in the date does not affect the sufficiency of the charge of the fact of assault [97]

Overt act An overt act in pursuance of the intent being an essential element of an assault with intent to kill and murder, as considered supra § 74, it is necessary that such overt act be alleged [98]

Assault on one's self An indictment which by a clerical error alleges an assault by the victim on himself is invalid on its face [99]

b The Battery

Only where a battery is an essential element of the crime is it necessary to allege a battery

Where a battery is not essential to the crime, no battery need be alleged,[1] but the inclusion of a

absence of statute so requiring—State v O'Connor, supra

78. Or—State v Kelly, 68 P 1, 41 Or 20
30 C J p 120 note 4

79. Va—Baccigalupo v Commonwealth, 33 Gratt 807, 74 Va 807, 36 Am R 795
30 C J p 120 note 6

80 Mo—State v Evans, 31 S W 34, 128 Mo 406
30 C J p 120 note 7

"Him"

Indictment for assault against a named person "with intent to murder," not followed by word "him," is fatally defective - Knotts v State, 111 So 48, 21 Ala App 620

81. Tex - Brown v State, 109 S W 188, 53 Tex Cr 303

82. Tex—Brown v State, 109 S W 188, 53 Tex Cr 303

83. Ill—People v Estes, 136 N E 459, 303 Ill 602

Indictments held sufficient

(1) Indictment charging assault on named person with intent "to commit murder" was held sufficiently to charge an intent to kill such person and not to kill and murder somebody not named—People v Estes, 136 N E 459, 303 Ill 602

(2) Other indictments held sufficient see 30 C J p 120 note 10 [a]

84. Okl—Dunbar v State, Cr, 131 P 2d 116 - Bard v State, 214 P 939, 23 Okl Cr 309

85. Ill - Vandermark v People, 47 Ill 122
W Va - State v Harr 17 S E 794, 38 W Va 58

86. Mich—People v Murray, 2 Mich N P 91

87. Ala—Cutcliff v State, 87 So 708 205 Ala 194—Cutcliff v State, 87 So 706 17 Ala App 586

88 Tex—Hart v State, 38 Tex 382
30 C J p 120 note 14 [a]

89. Ga—Ramsey v State, 125 S E 777, 33 Ga App 77

90. Cal—People v Vaughn, 111 P 620, 14 Cal App 201

91. Cal—People v Vaughn, supra

92. La—State v Simien, 36 La Ann. 923

93. Ill—People v Haskins, 169 N E 18, 337 Ill 131

94. La—State v Crittenden, 38 La. Ann 448
30 C J p 120 note 19

95 Wash - State v Clark, 167 P. 84 98 Wash 81
30 C J p 120 note 20

96. Mont Territory v Milroy, 20 P 650, 8 Mont 361
30 C J p 120 note 21—12 C J p 148 note 80 [a]

97. Tex—Barnes v State, 59 S W 882, 42 Tex Cr 297, 96 Am S R 801

98. Miss—Saunders v State, 114 So 747, 148 Miss 685
30 C J p 120 note 22

99. Mo--State v Manning, 68 S W 341, 168 Mo 418

1. Fla—Pyke v State, 36 So 577, 47 Fla 93.
30 C J p 120 note 24.

charge of a battery as part of the offense does not vitiate the indictment [2] On the other hand, where a battery is an essential element of the crime, the indictment should allege a battery [3] A specific description of the assault and battery is not necessary,[4] unless required by statute [5] No particular form of words is required to charge a battery [6] In case the statute requires the assault to have been made with actual violence, such violence need not be charged in express terms, when the facts of the assault as set out imply it [7] Where the statute so defines the offense, the indictment must allege that the touching was unlawful and in either a rude, insolent, or angry manner,[8] although words equivalent in substance may be used [9]

§ 168. —— Manner and Means

a In general
b Description of weapon or instrument

a. In General

Except where the means employed or the manner in which they were used are described in the statute defining the offense, it is not ordinarily necessary to aver such manner and means

Under statutes describing assaults with intent to kill or murder in general terms, a particular averment of the means employed or the manner in which they were used is ordinarily regarded as unnecessary,[10] the gist of the offense being regarded as an assault with a felonious intent [11] Under this rule it is not generally necessary to state the weapon with which the assault was made,[12] but, where the statute defining the offense describes the manner and means which must be employed, they must be alleged so as to bring the offense within the statute,[13] and it has been held that an indictment under a statute punishing unlawful shooting at another, with intent to kill or wound, must state the instrument or weapon and show that it was sufficient for the purpose [14] According to some authorities, however, the facts constituting the assault must in any event be alleged,[15] and, where the assault is alleged to have been made with some particular instrumentality, the manner of its use should be described with sufficient particularity to inform accused of the nature of the assault which is charged [16] If the weapon is stated to be a firearm, it is not necessary to aver that it was loaded,[17] or capable of being fired,[18] pointed,[19] pointed at a vital part of the person assaulted,[20] or discharged,[21] or that the person was struck by the weapon or by a shot therefrom,[22] nor is it necessary to aver the manner in which the weapon was held[23] or used [24]

2. Ark—Cole v State, 10 Ark 318

3. U S—U S v Turley, D C, 28 F Cas No 16,546, 4 Cranch C C 334
30 C J p 121 note 26

4. Ind—Williams v State, 47 Ind 568
Pa Scott v Commonwealth, 6 Serg & R 224

5. Miss—Williams v State, 42 Miss 328
30 C J p 121 note 28

6. Okl—Gidens v State, 236 P 912, 31 Okl Cr 137

Use of word "battery" is not essential—Gidens v State, supra—Clemmons v State, 128 P 739, 8 Okl Cr 452

Battery held to be sufficiently charged
(1) A charge of striking, cutting, stabbing and wounding is sufficient to charge a battery—Gidens v State, supra

(2) Other averments held sufficient to charge a battery see 30 C J p 121 note 29 [a]

7. Conn—State v Nichols, 8 Conn 496
30 C J p 121 note 30

8. Ind—Chandler v State, 39 N E 444, 141 Ind 106
30 C J p 121 note 31

Connecting touching with intent
The word "thereby" or some equivalent word is not required to follow the word "touch," so as to connect it with the felonious intention, in an indictment alleging that accused did in a rude, insolent, and angry manner touch a named person with intent to kill and murder—State v Jenkins, 22 N E 133, 120 Ind 268

9. Ind—Knight v State, 84 Ind 73
30 C J p 121 note 32

10 Ill—People v Scott, 48 N E 2d 530, 383 Ill 122—People v Gilday, 183 N E 573, 351 Ill 11
Okl—Gidens v State, 236 P 912, 31 Okl Cr 137
Tex—Jessie v State, 70 S W 2d 743, 126 Tex Cr 250—Perez v State, 22 S W 2d 309, 114 Tex Cr 473
W Va—State v Scaggs, 129 S E 705, 99 W Va 689—State v Coontz, 117 S E 701, 94 W Va 59
30 C J p 121 note 33

Bill of particulars
Accused desiring more specific information as to the manner of the assault may obtain such information by a bill of particulars—People v Gilday, 183 N E 573, 351 Ill 11

11. Ill—People v Scott, 48 N E 2d 530, 383 Ill 122
30 C J p 121 note 34

12. Tex—Perez v State, 22 S W 2d 309, 114 Tex Cr 473
30 C J p 121 note 35

13. Okl—Gober v State, 219 P 173, 25 Okl Cr 145
30 C J. p 121 note 36.

14. Ky—Commonwealth v McCrory, 3 Ky L 241, 11 Ky Op 242

15 Ala—Trexler v State, 19 Ala 21—Beasley v State, 18 Ala 535

16 Ga—Walker v State, 52 S E 738 124 Ga 440
30 C J p 121 note 39

17. Mo—State v Dildine, 51 S W 2d 1 330 Mo 756
30 C J p 122 note 40

"Deadly weapon"
The text rule is particularly applicable where the indictment or information charges that the assault was made with a 'deadly weapon," to wit, a pistol, since the allegation 'deadly" implies that it was loaded—State v Dildine supra

18 Mass—Commonwealth v Fenno, 125 Mass 387

19. Iowa—State v Shepard, 10 Iowa 126

20. Mo—State v Wilson, 103 S W. 110, 126 Mo App 302

21 Okl—Heatley v Territory, 78 P 79, 15 Okl 72
30 C J p 122 note 44

22 Fla—Pyke v State, 36 So 577, 47 Fla 193

23 Ind—White v State, 138 N.E 754, 193 Ind 70
30 C J p 122 note 46

24. Mo—State v Steinemann, 62 S. W 694, 162 Mo 188
30 C J p 122 note 47.

whom such intent is directed [63]

An allegation of intent to kill is also held sufficient to charge an intent to murder[64] and vice versa [65] Under a statute denouncing assault with intent to kill and murder, an indictment charging an assault with intent to kill has been held sufficient [66]

The intent to kill or murder must be stated in the body of the indictment,[67] although when once specifically stated it need not be repeated in the statement of the circumstances of the offense [68] The characterization of the intent of the assault need not be repeated in the specific averment of intent to kill and murder [69] The indictment may conclude with a charge of intent to kill and murder, although the statute defines the offense specifically as an assault with intent to kill,[70] or an assault with intent to murder [71]

A statutory intent may be averred by the use of equivalent expressions [72] An indictment for assault and battery with intent to kill, committed in perpetration of a felony, should charge the intent to commit a particular felony,[73] but it is not necessary to allege in terms that the intent was to commit a felony where the charge is of intent to murder [74] Under a statute making it necessary that the assault be committed on purpose and of malice aforethought, such elements must be charged in the indictment [75] Under a statute punishing assault with "attempt" to murder, a charge of assault with intent to murder is sufficient [76]

Attempt It is held, on the one hand, that a charge of an attempt to murder is not equivalent to a charge of intent to murder,[77] but, on the other, that a charge of an attempt to kill may be sufficient where the assault is well charged [78] Indictments or informations in prosecutions for an attempt to kill or murder are considered infra § 173

Connection of intent with assault It is not sufficient to charge accused with having a premeditated design and intent, without connecting such design and intent with the assault,[79] but language clearly showing such connection is sufficient [80]

Assault endangering life Under a statute punishing the making of an assault whereby the life of another is endangered, an express allegation of an intent to kill is unnecessary [81]

Degree of murder It is not ordinarily necessary to allege the intent to commit any particular degree of murder [82]

Intent to kill one of several assaulted There may be a charge of an assault on several with an intent to kill one [83]

b. Feloniousness

Where the statutory enumeration of the elements of the offense omits feloniousness, it need not be averred, it is otherwise generally necessary where the offense is made a felony

It would seem that the act need not be charged to have been done feloniously in an indictment for assault with intent to kill or murder at common law,[84] although there is authority to the contrary,[85] and

63. Cal—People v Swenson, 49 Cal 388
30 C J p 123 note 76

64. Tex—Jackson v State, 90 S W 34, 48 Tex Cr 648
30 C J p 123 note 77

65. N Y—Pontius v People, 82 N Y 339, affirming 21 Hun 328
Tex—Gilford v State, 114 S W 138, 54 Tex Cr 510

66. Miss—White v State, 153 So 387, 169 Miss 332

67. Fla—Ruis v State, 30 So 802, 43 Fla 186
30 C J p 124 note 79

68. Ky—Shouse v Commonwealth, 26 S W 814, 95 Ky 621, 16 Ky L 142
Mo—State v Venable, 177 S W 308

Variance between accusatory and descriptive part

An indictment charging accused in the accusatory part with malicious shooting and wounding with intent to kill, and in the descriptive part alleging that accused unlawfully, willfully, feloniously, and maliciously shot at and wounded named person with a pistol, although death did not ensue, was not defective on ground of "variance" because of omission of words "with intent to kill" in descriptive part—McClain v Commonwealth, 144 S W 2d 816, 284 Ky 359—Smith v Commonwealth, 143 S W 2d 859, 284 Ky 80

69. Ark State v Robinson, 18 S W 541, 55 Ark 439
30 C J p 124 note 86

70. Dak—People v Odell, 46 N W 601, 1 Dak 197
30 C J p 124 note 83

71. Cal—People v Marseiler, 11 P 503, 70 Cal 98
30 C J p 124 note 84

72. Fla—Johnson v State, 43 So 779 53 Fla 45
30 C J p 124 note 88

73. Fla—Hogan v State, 28 So 763, 42 Fla 562
30 C J p 124 note 89

74. Fla—Ormond v State, 86 So 629, 80 Fla 725
30 C J p 124 note 90

75. Mo—State v Harris, 34 Mo 347
30 C J p 124 note 91

76. Ala—State v Bullock, 13 Ala 413

77. Ala—State v Marshall, 14 Ala 411

78. Ark—Felker v State, 16 S W 663, 54 Ark 489

79 Fla—Anderson v State, 33 So 294 44 Fla 413
30 C J p 124 note 95

80. Fla—Gray v State, 33 So 295, 44 Fla 436
30 C J p 124 note 96

81. Mo—State v Hays, 67 Mo 692

82. Fla—Davis v State, 17 So 565, 35 Fla 614
30 C J p 124 note 85
Alleging grade or degree of offense had death ensued see infra § 171

83. Miss—White v State, 153 So 387, 169 Miss 332
Tex—State v Simpson, 32 Tex 98

84. Mass—Commonwealth v. Barlow, 4 Mass 439
N C—State v Swann, 65 N C 330

85. Ill—Curtis v People, 2 Ill 285—Curtis v People, 1 Ill 256

a charge that the act was done with a felonious intent is not necessary under statutes which do not make the offense charged a felony.[86] However, where the offense is made by statute a felony, it is in general necessary to charge that the criminal act was feloniously done.[87] In a prosecution for assault with intent to murder where the intent to murder is charged to have been felonious, it is held not necessary to charge the assault to have been felonious,[88] and, where a felonious assault is charged, it has been held unnecessary to allege that it was with a felonious intent to kill,[89] although there is other authority holding it necessary to charge both the act and the assault as felonious.[90] A charge that accused feloniously made an assault with intent feloniously to kill is sufficient to charge a criminal assault with intent to commit a felony.[91] An allegation that an assault was made with malice aforethought with intent to kill is sufficient to charge assault with intent to commit murder.[92] The use of the word "felonious" is unnecessary in connection with a charge of a statutory offense in the words by which the statute creates and describes the offense.[93] So, where the statute provides merely that the act must be intentional and wrongful and must be committed with the intent to kill, it is not necessary to allege that the intent to kill was felonious.[94]

c. Malice

Averments of malice are not usually required, except under statutes making malice an ingredient of the offense.

The more general rule, particularly where conviction is not sought on grounds of malice aforethought,[95] is that it is sufficient to allege an intent to murder without averments of malice aforethought,[96] this rule being in some instances based on statutes rendering it sufficient that the indictment follow the language of the statute defining the offense,[97] and in others on the fact that malice is not an ingredient of the offense under the statutes defining it.[98] There are, however, cases to the effect that an indictment which fails to allege that the assault was with malice aforethought is fatally defective,[99] this being stated to be the common-law rule.[1] So, also, where malice is made a statutory ingredient of the offense, it must be averred,[2] according to some authorities, in the technical terms employed,[3] although others hold the use of equivalent words sufficient.[4]

Where the indictment is merely for an assault with intent to kill, the phrase "with malice aforethought" need not be used,[5] and while an indictment which fails to use the phrase "with malice aforethought" may be insufficient as an indictment for assault with intent to murder, it may be sufficient

86. Mass.—Commonwealth v Barlow, 4 Mass 439
N C.—State v Swann, 65 N C 330

87. Miss.—State v May, 112 So 866, 147 Miss 79

88. La.—State v Sonnier, 38 La Ann 962
Miss.—Wood v State, 2 So 247, 64 Miss 761

89. Miss.—State v May, 112 So 866, 147 Miss 79
Mo.—State v Shelton, 267 S W 938, overruling State v Norman, 37 S W 827, 136 Mo 1, State v Davis, 26 S W 568, 121 Mo 104, and State v Clayton, 13 S W 819, 100 Mo 516, 18 Am S R 565—State v Lemon, 263 S W 186—State v Gabriel, 256 S W 765, 301 Mo 365—State v Baird, 195 S W 1010, 271 Mo 9, overruling State v Clayton supra—State v Wood, 27 S W 1114, 124 Mo 412
Va.—Commonwealth v Woodson, 9 Leigh 669, 36 Va 669
30 C J p 124 note 82 [b]

90. Ga.—Davis v State, 113 S E 11, 153 Ga 669—State v Howell, Ga Dec 158

91. D C.—U S v Angney, 17 D C 66

92. Tex.—Smith v State, 19 S.W. 546, 31 Tex Cr. 33.

93. Vt.—State v Daley, 41 Vt 564

94. Okl.—Moore v State, 111 P 822, 4 Okl Cr 212

95. Tex.—Jessie v State, 70 S W 2d 713, 126 Tex Cr 250

96. La.—State v Wilson, 137 So 57, 173 La 347—State v Mitchell, 92 So 50, 151 La 540
Mo.—State v Gabriel, 256 S W 765, 301 Mo 365
Tex.—Smith v State, 48 S W 2d 646, 120 Tex Cr 31—Cates v State, 37 S W 2d 1031, 118 Tex Cr 35—Friday v State, 36 S W 2d 1036, 117 Tex Cr 37—Jones v State, 36 S W 2d 736, 117 Tex Cr 8—Small v State, 32 S W 2d 860, 116 Tex Cr 41
30 C J p 125 note 10

Malice implied

La.—State v Fourney, 24 La Ann 191
30 C J p 125 note 10 [a]

97. La.—State v High, 40 So 538, 116 La 79
30 C J p 125 note 11

98. Tex.—Cates v State, 37 S W 2d 1031, 118 Tex Cr 35—Jones v State, 36 S W 2d 736, 117 Tex Cr 8
30 C J p 125 note 12

99. Me.—State v Leavitt, 32 A 787, 87 Me 72
30 C J p 125 note 13.

1. Ind.—State v Wilson, 7 Ind 516

2. Tex.—McKee v State, 115 S W 2d 913, 134 Tex Cr 309
30 C J p 125 note 15

Statute prescribing different punishment

Under a statute prescribing a different punishment for an assault with intent to murder with malice, than for an assault wherein such malice is lacking, an indictment for such assault with malice must aver that the assault was with malice or malice aforethought.—Crown v State, 159 S W 2d 872, 143 Tex Cr 506—Johnson v State, 128 S W 2d 384, 137 Tex Cr 82—Collins v State, 127 S W 2d 451, 136 Tex Cr 600—McKee v State, 115 S W 2d 943, 134 Tex Cr 309—Moore v State, 99 S W 2d 932, 131 Tex Cr 424—Weathersby v State, 87 S W 2d 1102, 129 Tex Cr 420

3. Miss.—Anthony v State, 21 Miss 263
30 C J p 125 note 16

4. Kan.—State v White, 14 Kan 538
30 C J p 125 note 17

5. Miss.—Allen v State, 107 So 384
Mo.—State ex rel Dutton v Sevier, 83 S W 2d 581, 336 Mo 1236.
30 C J p 126 note 18.

as an indictment for assault with intent to kill, although allegations in the indictment tend to show the intention of the prosecution to frame an indictment for assault with intent to murder[6] Under a statute defining the crime of maliciously shooting with intent to kill, an averment of malice has been held essential[7]

An indictment from which the charge of malice is omitted may be sufficient to sustain a conviction of assault with intent to commit voluntary manslaughter[8] The unnecessary use of the words "malice aforethought" or "premeditated malice" will not invalidate the indictment[9]

Where such an allegation is required, it has been held that it should refer to the intent to kill as well as to the assault or battery[10] On the other hand, where an averment of malice aforethought is laid to the acts done, it has been held that it need not be repeated with regard to the intent,[11] or the allegation may be repeated by words of reference[12] Conversely, a proper allegation as to the intent need not be repeated as to the acts done[13]

d. Willfulness and Unlawfulness

Equivalent words may be used to show that the assault was willful, and also to show the unlawfulness of the act

At common law,[14] and under some statutes,[15] it is necessary to allege that the assault was willful, but it is sufficient if equivalent words are used[16] An allegation that the act was willfully done sufficiently charges a willful intent[17] Failure of the accusatory part of the indictment to allege that the act was willful may be cured by a showing in the descriptive part that the act was willful[18]

Where the indictment or information is required to charge that the act was done unlawfully, equivalent words are sufficient[19] Accordingly, it is sufficient to charge that the act was done with malice or with malice aforethought[20]

§ 171. —— Grade or Degree of Offense Had Death Ensued

It is not usually necessary to aver that had death ensued the assault would have constituted murder, nor to aver the particular degree of murder that would have resulted

It is not usually regarded as essential that it be averred that, if death had ensued, the assault would have constituted murder[21] In at least one jurisdiction, however, such averments are necessary[22]

Ordinarily, where murder is divided by statute into degrees, the matter showing the degree need not be averred,[23] but there is authority to the contrary[24] An indictment insufficient to charge a higher degree may be sustained as for a lower degree[25]

Assault endangering life An indictment under a statute punishing an assault endangering life need not show the circumstances which, had death en-

6. Mo—State v McDonald, 67 Mo 13—State v Seward 42 Mo 206

7. Ky—Coates v Commonwealth, 22 S W 2d 34 235 Ky 683

Averments held insufficient

(1) An averment in the accusatory part of the indictment of "maliciously shooting" has been held insufficient to meet the requirements of the statute—Commonwealth v Tupman, 30 S W 661, 17 Ky L 217

(2) A charge of "malicious shooting" in the accusatory part has also been held insufficient—Puckett v Commonwealth, 95 S W 2d 242, 264 Ky 577

8. Ind—Pierce v State 75 Ind 199—State v Miller, 27 Ind 15

9. Wash—State v Ackles, 36 P 597, 8 Wash 462

10. Ind—State v Miller, 27 Ind 15
30 C J p 126 note 22

11. Wash—State v Michel, 54 P 995, 20 Wash 162
30 C J p 126 note 23

12. Va—Maile v Commonwealth, 9 Leigh 661, 36 Va 661.
30 C J. p 126 note 24.

13. La—State v Bellard, 23 So 504, 50 La Ann 599, 69 Am S R 461
30 C J p 126 note 25

14. Ind—State v Wilson, 7 Ind 516

15. Ky—Adkins v Commonwealth, 165 S W 2d 983—Hensley v Commonwealth, 95 S W 2d 564, 264 Ky 718
30 C J p 126 note 28

16. Ark—McCoy v State, 8 Ark 451
30 C J p 126 note 29

"Unlawfully and feloniously, with malice aforethought, and after premeditation and deliberation" charges that the act was willful—Halley v State 158 S W 121, 108 Ark 224

17. La—State v Marshall, 37 La Ann 26

18. Ky—Adkins v Commonwealth, 165 S W 2d 983—Hensley v Commonwealth, 95 S W 2d 564, 264 Ky 718

19. Cal—People v Ah Toon, 9 P 311, 68 Cal 362

20. Cal—People v Ah Toon, supra

21. La—State v Hopkins, 40 So 166, 167, 115 La 786.
30 C J p 125 note 1

22. N M—Territory v Carrera, 30 P 872 6 N M 593—Territory v Sevailles, 1 N M 119

23. Iowa—State v Keasling, 38 N W 397, 71 Iowa 528
30 C J p 125 note 2

Under Florida statute against assaults with intent to commit felonies providing a greater punishment in the case of assault with an intent to commit a felony punishable with death or imprisonment for life than if the felony intended was not so punishable, the indictment in the case of an assault with intent to commit murder need not state the degree of murder, as the punishment is the same if the intent was to commit murder either in the first or second degree—Thomas v State, 95 So 752, 85 Fla 113—30 C J p 125 note 2 [b]

Alleging intent to commit particular degree of offense see supra § 170

24. Wash—State v Ackles, 36 P 597, 8 Wash 462

25. Tenn—State v Saylor, 6 Lea 586
Wash—State v Ackles, 36 P. 597, 8 Wash 462

sued, would have constituted murder or manslaughter.[26]

Administering poison It is unnecessary to use the word "murder" in charging the offense of administering poison with intent to kill, but if used such word will not change the offense to that of assault to commit murder where the accusatory pleading otherwise charges the offense of administering poison with intent to kill An information charging the offense of administering poison with intent to kill is not open to the claim that it charges assault with intent to kill because of failure to allege that the act of administering the poison did not cause death, the very statement that the poison was administered with the intent to kill necessarily implying that death was not caused by the act[27]

§ 172. Present Ability to Execute Intent

Present ability of accused to execute the intent charged need not, usually, be alleged

Irrespective of whether the ability to carry out the intention is essential to accused's criminal liability, as considered supra § 76, the ability to do so need not, in most jurisdictions, be alleged[28] So when the assault is charged to have been committed with a firearm, it is not necessary to charge that accused was within range,[29] although it has been intimated that such an averment, while not required to sustain a conviction of simple assault, might be necessary to sustain a conviction of felonious assault[30]

Assault and battery with intent An indictment charging an assault and battery with intent to kill need not allege a present ability to commit the injury,[31] but such an averment is essential to an indictment merely charging an assault with intent to kill and murder,[32] and in its absence the indictment can be construed only as an attempt to charge an assault and battery with intent to murder[33]

It is unnecessary to describe accused's ability,[34] but an attempt to do so does not render the indictment defective[35]

C ATTEMPT, THREAT, OR SOLICITATION TO KILL

§ 173. Attempt or Solicitation

a Attempt
b Solicitation

a. Attempt

Acts constituting the attempt must, usually, be alleged in prosecution for attempt to kill or murder

The general rule is that an indictment for an attempt to kill and murder must allege some act done by accused of such nature as to constitute an attempt in a legal sense to commit the contemplated offense,[36] but need not set forth the special circumstances of the attempt[37] A statement of the offense in compliance with the statute defining it has been held sufficient, notwithstanding the omission of allegations of fact showing the overt or other acts constituting the attempt, particularly in the absence of demurrer by accused[38] It has been held that the indictment need not aver in express terms that the acts done in the attempt to kill were done with intent to murder,[39] but the better practice is to charge both the intent and the overt act,[40] and it has been held that malice aforethought should be al-

26. Mo—State v Moore, 65 Mo 606

27. Cal—People v Tinnen, 192 P 557, 49 Cal App 18
Alleging death of person assaulted generally see supra § 164

28. Mo—State v Fine, 23 S W 2d 7, 324 Mo 194
30 C J p 126 note 32
Allegations held sufficient
Mo—State v Fine supra
30 C J p 126 note 32 [a]

29. Mo—State v Fine, supra
30 C J p 126 note 33
Sufficient averments
(1) Information charging an "assault" with intent to kill with malice aforethought was held sufficient, notwithstanding omission of express averment that accused pointed loaded rifle within shooting distance at prosecuting witness—State v. Fine, supra
(2) Other illustrations see 30 C J p 126 note 33 [a]

30. Tenn—Dixon v State, 1 Tenn Cas 33 Thomps Cas 50

31. Ind—Vaughan v State, 27 N E 124, 128 Ind 14
30 C J p 126 note 35
Present ability sufficiently shown
Ind—Voght v State, 43 N E 1049, 145 Ind 12
30 C J p 126 note 35 [a]

32. Ind—Howard v State, 67 Ind 401
30 C J p 126 note 36

33. Ind—Voght v State, 43 N E 1049, 145 Ind 12

34. Ind—Freel v State, 25 N E 178, 125 Ind 166—State v. Trulock, 46 Ind 289

35. Ind—Freel v State, 25 N E 178, 125 Ind 166

36. U S—U S v Barnaby, C C Mont, 51 F 20
30 C J p 127 note 42
Allegations held sufficient
Kan—State v Boyd, 197 P 864, 865 109 Kan 99
30 C J p 127 note 42 [b]–[d]
Allegations held insufficient
Va—Hicks v Commonwealth, 9 S E 1024, 86 Va 223, 19 Am S R 891
30 C J p 127 note 42 [a]

37. Mich—Templeton v People, 27 Mich 501

38. Cal—People v Miller, 42 P 2d 308 2 Cal 2d 527, 98 A L R 913

39. Va—Smith v Commonwealth, 136 S E 598, 147 Va 648
30 C J p 127 note 44

40. W Va—State v Hager, 40 S E 393, 50 W Va 370
Intent implied
W Va—State v Hager, supra
30 C J. p 127 note 44 [a]

leged to show that if death had ensued the crime would have been murder [41]

The degree of the murder attempted need not be specified [42]

An indictment for an attempt to poison need not allege accused's knowledge of the deadly character of the substance used,[43] or that the quantity was sufficient to kill,[44] but it must allege that the substance administered was a poison [45]

In case the offense is defined by statute, language equivalent to that employed in the statute may be used in the description of the offense [46]

In a prosecution for an attempt to murder by shooting, it is not necessary to allege that the victim was seen, or could be seen, by accused, or that the victim was in such position that he could be hit by a bullet at the time of the shooting [47]

b. Solicitation

In prosecutions for solicitation, facts and circumstances constituting the offense must be alleged

In prosecutions for soliciting another to kill or murder, facts and circumstances constituting the offense charged must be alleged [48]

§ 174. Threat

The elements of the offense of threatening to take the life of another must be set out in the indictment or information.

Under statutes defining the offense of threatening to take the life of another, it is necessary that the indictment or information set out clearly the elements essential to the crime,[49] but it is sufficient if it substantially follows the statutory language,[50] and it is not necessary to negative facts which by a separate section of the statute would prevent the act from being criminal [51] It is not necessary to set out the language in which the threat was expressed,[52] nor is it necessary to allege that the person whose life was threatened was a "human being," notwithstanding the statute defining the offense employs such words [53]

Threats against president Under a statute defining the offense of threatening to take the life of the president of the United States, the indictment should state the offense in such a manner as fully to inform accused of the nature of the charge,[54] and must set forth the facts so distinctly as to enable him to prepare his defense,[55] and so particularly as to enable him to plead a former conviction or acquittal if again indicted for the same offense [56] It is not necessary that the indictment state in whose presence the threat was made,[57] although the

41. Pa—Commonwealth v Brosk, 8 Pa Dist 638

42. Va—Fields v Commonwealth, 106 S E 333, 129 Va 774

43. N C—State v Utley, 35 S E 428, 126 N C 997

44. Mass—Commonwealth v Kennedy, 48 N E 770, 170 Mass 18

45. Ala—Anthony v State, 29 Ala 27

46. Ala—Ben v State, 22 Ala. 9, 58 Am D 234
30 C J p 127 note 50

47. Va—Smith v. Commonwealth, 136 S E 598 147 Va 648

48. Pa—Commonwealth v Randolph, 23 A 388, 146 Pa St 83
30 C J p 14 notes 28-30

49. Tex—Levy v State, 136 S W 2d 838 138 Tex Cr 373
30 C J p 127 note 52

Mode and means

A "threat to take life" is a definite, single act, capable of being performed in different ways by use of different words just as in the case of an assault, but however variant the modes and means of performing the act, it is single and definite, and therefore it is not required that particular mode or means in any case shall be set out in indictment or information—Levy v. State, supra.

Threats in foreign language

In prosecution for threatening, by communication in Italian, to kill another with intent to extort money, indictment need not allege that those threatened could read and understand Italian—People v Folignos, 153 N E 373, 322 Ill 304

50. Tex—Levy v State, 136 S W 2d 838, 138 Tex Cr 373
30 C J p 127 note 53

Particular allegations held sufficient

Ga—Hall v State, 171 S E 727, 47 Ga App 833

51. Tex—McFain v State, 41 Tex 385
30 C J p 127 note 54

52. Tex—Levy v State, 136 S W 2d 838, 138 Tex Cr 373
30 C J p 127 note 55

Setting out letter

(1) Where it is charged that the threat was made in a letter sent by accused, it has been held unnecessary to set out such letter—Hall v State, 171 S E 727, 47 Ga App 833

(2) However, it has been held that the threatening letter must be set out where the offense consists in its having been sent for the purpose of extorting money—Tynes v State, 17 Tex App 123

53. Tex—Henderson v State, 53 S W 2d 785, 122 Tex Cr 86.

54. U S—U S v Apel, D C Ill, 44 F Supp 592

Public or private character of president

(1) There exists authority to the effect that the threat must be alleged to have been made against the president in his public or official character or capacity as distinguished from his private character—U S v Metzdorf, D C Mont, 252 F 933

(2) But there also exists authority to the contrary U S v Apel, D C Ill, 44 F Supp 592

Allegations held sufficient

U S—U S v Apel supra

Allegations held insufficient

U S—U S v Metzdorf, D C Mont, 252 F 933
30 C J p 127 note 52 [b]

55. U S—Pierre v U S, C C A Kan, 275 F 352

56. U S—Pierre v U S, supra

Threats made to, or in presence of, any person

An indictment failing to charge that the threats were made to, or in the presence of, any person is insufficient under the text rule—Pierre v U S, supra

57. U S—U S v Stickrath, D C Ohio, 242 F 151.

omission of an averment that an oral threat against the president was made in the hearing of any person other than accused has been held to render the indictment demurrable.[58]

D. ISSUES, PROOF, AND VARIANCE

§ 175. In General

On a plea of not guilty every material allegation of the indictment or information is in issue and must be proved, and under such plea accused may avail himself of any defense not required by law to be specially pleaded

Accused's plea of not guilty puts in issue every material allegation of the indictment or information,[59] and under this plea accused may avail himself of any defense not required by law to be specially pleaded.[60]

The fact that the prosecution introduces evidence of an intent and motive of committing another felony does not confine the charge to one of murder in the perpetration of such a felony, where the terms of the indictment are general.[61]

Matters to be proved The material allegations of the indictment or information must be proved;[62] but failure to establish matter which is unnecessary to the description of the offense is not as a general rule fatal.[63] Where there are two or more counts, it is not necessary that each of the counts be supported by evidence warranting a conviction.[64]

Evidence admissible under pleadings As in other criminal prosecutions, the evidence must be confined to the issues,[65] although a specific allegation

58. U S—U S. v Stobo, D C Del, 251 F 689

59. Ala—Bass v State, 122 So 45, 219 Ala 282
Tex—Wilson v State, 145 S W 2d 890, 140 Tex Cr 424
Wash—State v Barton, 105 P 2d 63, 5 Wash 2d 234

60. Ala—Williams v State, 195 So 213, 239 Ala 296
S C—State v Orr, 126 S E 766, 131 S C 276
Tex—Ward v State, 257 S W 536, 96 Tex Cr 278

Insanity

(1) Where the defense of insanity need not be specially pleaded, it may be asserted under the plea of not guilty
Idaho—State v Van Vlack, 65 P 2d 736, 57 Idaho 316
Mo State v Murphy, 90 S W 2d 103, 338 Mo 291
W Va—State v Beckner, 190 S E 693, 118 W Va 430

(2) But the rule is otherwise where the defense must be specially pleaded
Ala—Ledlow v State, 129 So 282, 221 Ala 511—Baker v State, 95 So 467, 209 Ala 142
Cal—People v Borja, 10 P 2d 477, 122 Cal App 646

Self-defense is not a special plea in a homicide prosecution, but is included in the general issue tendered by the plea of not guilty
Ala—Davis v State, 101 So 171, 20 Ala App 131
La—State v Richardson, 144 So 587, 175 La 823

Issues under claim of self-defense

In a homicide prosecution where self-defense is relied on, one issue is whether accused used more force than appeared to accused to be reasonably necessary—Huff v Commonwealth, 122 S W 2d 143, 275 Ky. 578

61 Cal—People v Andrade, 154 P 283, 29 Cal App 1

62. Ala—Davis v State, 101 So 171, 20 Ala App 131
Ga—Satterfield v State, 21 S E 2d 861, 68 Ga App 7—McDaniel v State, 187 S E 896, 54 Ga App 407
Tex—Freeman v State, 27 S W 2d 162, 114 Tex Cr 624—Wayboum v State, 19 S W 2d 60, 113 Tex Cr 50
Wash—State v Barton, 105 P 2d 63, 5 Wash 2d 234

It is essential to prove every constituent element of the crime charged
Ala—Williams v State, 195 So 213, 239 Ala 296
N C State v Howell, 10 S E 2d 815, 218 N C 280—State v Kline, 129 S E 417, 190 N C 177
Ohio—Massa v State, 175 N E 219, 37 Ohio App 532
Tex—Wilson v State, 145 S W 2d 890, 140 Tex Cr 424—Gandy v State, 129 S W 2d 661, 137 Tex Cr 412—Middleton v State, 25 S W 2d 614, 114 Tex Cr 263
30 C J p 127 note 57.

Negligence

Where an indictment for negligent homicide sets out the specific negligence it must be proved as laid—Commonwealth v Hartwell, 128 Mass 415, 35 Am R 391—30 C J p 128 note 66

Negative averments

In prosecution for manslaughter, under Rev St 1919 § 3239, relating to abortion, it is necessary for the state to prove the negative averments of the information to the effect that an abortion was not necessary for the preservation of the woman's life—State v Anderson, 250 S W 68, 298 Mo 382

That accused pleaded not guilty by reason of insanity did not dispense with necessity of proving killing deliberately and with malice aforethought—Ingles v People, 6 P 2d 455, 90 Colo 51

63 Ark—Noble v State, 112 S W 2d 631, 195 Ark 453
Or—State v Dorland, 89 P 2d 595, 161 Or 103
30 C J p 128 note 58, p 138 note 71 "Allegations which are not essential to constitute the offense and which may be omitted without affecting the charge or vitiating the indictment, do not require proof and may be rejected as surplusage"—Keezer v State, 133 N W 204, 205, 90 Neb 238

64. Ala—Johnson v State, 55 So 321, 1 Ala App 102
30 C J p 128 notes 67, 68

65 Ala—Ledlow v State, 129 So 282, 221 Ala 511—Edwards v State, 180 So 715, 28 Ala App 194—Pippin v State, 123 So 288, 23 Ala App 232
Ark Spear v State, 44 S W 2d 663, 184 Ark 1047
Cal—People v Borja, 10 P 2d 477, 122 Cal App 646
Miss—Carrol v State, 183 So 703, 183 Miss 1
Pa—Commonwealth v Stabinsky, 169 A 439, 313 Pa 231—Commonwealth v McCabe, 39 Pa Dist & Co 93, 56 Montg Co 211
30 C J p 128 note 60, p 222 note 39
Evidence admissible under pleadings in criminal cases generally see the C J S title Indictments and Informations § 253, also 31 C J p 839 note 39 et seq

On trial of plea of not guilty

Under the statutes in some jurisdictions evidence of mental condition is inadmissible on the separate trial of a plea of not guilty where accused also pleads insanity—People v Coleman, 126 P 2d 349, 20 Cal 2d 399—People v French, 87 P 2d 1014, 12 Cal 2d 720—People v. Leong Fook, 273

as to every circumstance relating to the crime is not essential to the admission of evidence relating thereto.[66] Declarations made as a part of the res gestæ are admissible although they tend to show malice not charged in the indictment.[67]

Variance between allegations and proof A disagreement between the averments of the indictment or information and the proof in some matter which is legally essential to the charge constitutes a variance,[68] and as a general rule a variance in a material matter is fatal.[69] Under the modern practice a variance is not material unless it misleads accused in making his defense or may expose him to the danger of being again put in jeopardy for the same offense.[70]

§ 176. Proof of Distinct Offense

Proof of an offense different from that charged usually constitutes a fatal variance

Proof of an offense different from that charged ordinarily constitutes a fatal variance,[71] but in case the same act constitutes two offenses it is immaterial that on a charge of one offense the proof incidentally discloses the other.[72] Proof of successive acts, so connected as to be part of one transaction, is not objectionable as showing more than one offense.[73] On a charge of voluntary manslaughter, under some statutes, accused cannot be convicted on proof of involuntary manslaughter.[74] Where it is charged that deceased was killed in an assault on a third person with intent to murder such person, evidence is admissible of the character of the assault on the third person.[75] Where two or more are jointly indicted for murder, and it appears that one of them inflicted the mortal wound, there can be no conviction as to the others based on an assault independent of that which caused the death.[76]

§ 177. Nature or Degree of Offense

General rules governing issues, proof, and variance apply with respect to the nature or degree of the offense.

An indictment for murder in the first degree will sustain a conviction of a lesser degree of homicide,[77] and it has been held that an accused on trial

P 779, 206 Cal 64—People v Troche, 273 P 767, 206 Cal 35, appeal dismissed and certiorari denied Troche v People of State of California, 50 S Ct 87, 280 U S 524, 74 L Ed 592—People v Brown, 110 P 2d 1059, 43 Cal App 2d 430

Proof of adultery under plea of insanity

In prosecution of an accused charged with murder of his wife under his plea of not guilty by reason of insanity, it was proper to prove the adultery of his wife, and such proof could be supplied by circumstantial evidence—George v State, 200 So 602, 240 Ala 632

Evidence to aid in fixing punishment

Although insanity is not specially pleaded as required by statute, evidence thereof may be admitted to aid the jury in fixing the punishment—Ingles v People, 22 P 2d 1109, 92 Colo 518

66. Ill—People v Cassler, 163 N E 430, 332 Ill 207
Mo—State v White, 51 S W 2d 109, 330 Mo 737
30 C J p 128 note 61

Evidence admissible without specific allegation

(1) That deceased was a human being—State v Montgomery, Wash, 132 P 2d 720

(2) That deceased usually carried considerable money—Thompson v State, 143 S E 896, 166 Ga 512

(3) Police regulations—Holmes v U S, 11 F 2d 569, 56 App D C 183

(4) Conspiracy—State v Copeland, 71 S W 2d 746, 335 Mo 140—30 C J p 128 note 61 [c]

67. N J—State v Powell, 7 N J Law 244

68. Okl—Hodges v State, 85 P 2d 413, 65 Okl Cr 277, modified on other grounds 92 P 2d 590, 66 Okl Cr 422

69. Ga—McDaniel v State, 187 S E 896, 54 Ga App 407
Mass—Commonwealth v Stone, 14 N E 2d 158, 300 Mass 160

70. Del—Dean v State, 125 A 478 2 W W Harr 499 affirming State v Dean, 122 A 448, 2 W W Harr 290
Okl—Hodges v State 85 P 2d 443, 65 Okl Cr 277, modified on other grounds 92 P 2d 590, 66 Okl Cr 422

Particular variance held not material

In a prosecution for assault with intent to murder, proof that accused shot at and missed the prosecuting witness is not fatally at variance with the indictment alleging shooting of the witness—McIntire v State, 289 S W 18, 105 Tex Cr 403

71. S D—State v McGaughey, 187 N W 717, 45 S D 379
30 C J p 128 note 69

The substance of one crime cannot be proved by proving the substance of another
Ill—People v Allen, 14 N E 2d 397, 368 Ill 368, certiorari denied Allen v People of State of Illinois, 60 S Ct 132, 308 U S 511, 84 L Ed 436
Ohio—State v Billotto, 135 N E 285, 104 Ohio St 13

Proof of different unlawful act

Where a person is charged with homicide while in the commission of an unlawful act and the act is set out in the indictment or information proof of any other or different unlawful act will not support a verdict of guilty—Shelton v State, 199 N E 148, 209 Ind 534

Proof of another offense not shown

Where accused was indicted for malicious shooting without wounding he was not convicted of another offense on proof of shooting with wounding, since there is but one crime of malicious shooting and it is immaterial whether there was or was not a wounding—Martin v Commonwealth 269 S W 556, 207 Ky 519

72. Ind—Enlow v State, 57 N E 539, 154 Ind 661
30 C J p 129 note 70

73. Tenn—McCommon v State 168 S W 581, 130 Tenn 1

74. Ind—Bruner v State, 58 Ind 159

75. Fla—Milton v State, 24 So 60, 40 Fla 251

76. Ga—Walker v State, 70 S E 1016, 136 Ga 126—Smith v State, 56 S E 360, 127 Ga 262

77. Ark—Harris v State, 282 S W 680, 170 Ark 1073
Conviction of lesser degree of homicide than warranted by evidence as nonprejudicial error see infra § 428

Failure to prove an allegation essential to the description of a higher degree will not invalidate a convic-

for murder in the second degree is not entitled to an acquittal because the evidence against him would sustain a conviction for murder in the first degree;[78] but it has also been held that, where the evidence discloses a higher grade or degree of crime than that charged,[79] or an offense not necessarily included within the terms of the allegations of the indictment or information,[80] then a fatal variance exists. In most jurisdictions an indictment in the ordinary form for murder in the first degree is sufficient to admit proof that the crime was committed in the perpetration or attempt to perpetrate a felony, thus bringing the killing within the statutory definition of murder in the first degree.[81] So an indictment good at common law which does not specify the degree will sustain a conviction of murder in any degree defined by the statute under which accused is prosecuted,[82] and the people may prove any case which amounts to murder under the statute,[83] and a conviction of murder in the first degree may be had in any case where the offense proved is brought within either of the statutory definitions of that degree.[84] So also, under an indictment or information charging murder perpetrated with a premeditated design to effect death under a statutory definition of murder, accused may be convicted of murder as defined by any of the subdivisions of the statute.[85] Proof that the killing was done after lying in wait is admissible, although not charged.[86] Under some statutes a common-law indictment for murder will not sustain a conviction of murder in the first degree.[87] Some authorities hold, morever, that, on a charge of a specific kind of murder as defined by statute, there can be no conviction on proof of another specific kind,[88] although admitting proof of the felony or attempt to perpetrate a felony under a general charge when proof of deliberation and premeditation has been received.[89] If the indictment unnecessarily charges that the killing was committed in the perpetration of a felony, and there is no evidence indicating that it was committed in such perpetration, proof that the killing was willful, deliberate, and premeditated is at variance with the allegation.[90]

§ 178. Time and Place

a. Time
b. Place

a. Time

As a general rule a variance as to the time of the offense or the date of death is immaterial

As a general rule a variance as to the time of the offense is immaterial in case it is shown to have occurred prior to the finding of the indictment and within the period prescribed by the statutes of limitations,[91] in some jurisdictions this rule being stat-

tion of a lower degree—Pyke v State, 36 So 577, 47 Fla 93—30 C J p 128 note 63

78. Not material variance

Where a conviction of murder in the second degree is set aside, and the evidence on the second trial for murder in the second degree establishes murder on express malice and murder in the first degree, such proof does not constitute a variance, entitling accused to an acquittal, but he may be convicted of murder in the second degree—Woodard v State, 111 S W 941, 54 Tex Cr 86

79. Okl—Harris v State, 177 P 122, 15 Okl Cr 369

80 Okl—Harris v State, supra
30 C J p 129 note 77

81. Ariz—Cochrane v State, 59 P 2d 658, 48 Ariz 124
Fla—Pope v State, 94 So 865, 84 Fla 428
Mo—State v King, 119 S W 2d 322, 342 Mo 1067—State v Copeland, 71 S W 2d 746, 335 Mo 140—State v Meadows, 51 S W 2d 1033, 330 Mo 1020—State v White, 51 S W 2d 109, 330 Mo 737—State v Messino, 30 S W 2d 750, 325 Mo 743—State v Nasello, 30 S W 2d 132, 325 Mo 442—State v Adams, 289 S W 948, 316 Mo 157—State v Merrell, 263 S W 118
N Y—People v Seiler 158 N E 615, 246 N Y 262—People v Florence 262 N Y S 775, 146 Misc 735, modifying 261 N Y S 803, 146 Misc 152
Or—State v Casey, 213 P 771, 108 Or 386, motion denied 217 P 632, 108 Or 386
Pa—Commonwealth v Bruno, 175 A 518, 316 Pa 394
Tex—Silva v State, 15 S W 2d 1046, 112 Tex Cr 223
Vt—State v Lescord, 117 A 242, 96 Vt 85
30 C J p 129 note 78

82 N Y—People v Willett, 6 N E 301, 102 N Y 251
30 C J p 129 note 79

Statutory form

The statute setting forth requirements of indictment for homicide covers all homicides, both statutory and common law and under indictment drawn in accordance therewith any facts evidencing murder or manslaughter may be introduced—Carrol v State, 183 So 703, 183 Miss 1

83. N Y—People v Osmond, 33 N E 739, 138 N Y 80

84. N Y—Cox v People, 80 N Y 500, affirming 19 Hun 430
Va—Hurd v Commonwealth 165 S E 536, 159 Va 880

85. Okl—Evinger v State, 45 P 2d 552, 57 Okl Cr 63—Ware v State 288 P 374, 47 Okl Cr 434—Carle v State 244 P 833, 34 Okl Cr 24
30 C J p 130 note 82

86 Mo—State v Kilgore, 70 Mo 546

87. Iowa—Fouts v State, 4 Greene 500

88. Fla—Patrick v State, 158 So 101, 117 Fla 432
30 C J p 130 note 85

89. Ark—Powell v State, 85 S W 781 71 Ark 355—Rayburn v State, 63 S W 356, 69 Ark 177

90. Nev—State v Mangana, 112 P 693, 33 Nev 511

91. Colo—Duncan v People, 262 P 918 83 Colo 107
Ind—Crickmore v State, 12 N E 2d 266, 213 Ind 586
Kan—State v Koester, 4 P 2d 679, 134 Kan 64
La—State v Augusta, 7 So 2d 177, 199 La 896
Ohio—Massa v State, 175 N E 219, 37 Ohio App 532
Pa—Commonwealth v Weiss, 130 A 403, 284 Pa 105—Commonwealth v Ryhal 118 A 358, 274 Pa 401
Tex—Ex parte Lovel, 276 S W 428, 100 Tex Cr 576
30 C J p 130 note 91

utory[92] So, where death has been alleged to be instantaneous,[93] or on a day certain,[94] proof that the death occurred on a later date does not constitute a material variance

b. Place

Ordinarily the state must prove the venue Except so far as to show jurisdiction, however, the averments as to the place of the offense need not as a rule be proved In some jurisdictions proof that death occurred in a county other than that alleged is not a fatal variance

In the absence of contrary statute, the state must prove the venue[95] even if it is not formally alleged in the indictment[96] It is sufficient, however, to prove that the offense was committed in a place which the court judicially knows to be within the county,[97] and it is not necessary for the state to locate the exact spot where the homicide was committed,[98] it being sufficient to show that it was committed in the vicinity of the place charged, which was in the county in which the charge was laid[99] Except so far as to show jurisdiction, the averments as to place of the offense need not as a rule be proved[1] It has been held, however, that a conviction cannot be sustained on proof of homicide committed in a county other than that alleged in the indictment,[2] and that the place of the mortal stroke alleged must be proved, although death occurred in another county, in which the prosecution is brought,[3] but where the offense may be prosecuted either in the county in which the injury was inflicted or that in which death resulted,[4] or where it is required to be prosecuted in the county[5] or district[6] in which the injury was inflicted, it may be shown that death occurred in a county other than that alleged, or even in another state,[7] and, where the indictment alleges that the offense charged was committed in one county, it may be shown that the wounding took place in another county[8]

§ 179. Description of Person Killed or Assaulted

It is necessary to prove that the person assaulted or killed was the one named in the indictment, and a material variance in this respect is fatal, under some decisions the question is treated as one of identity and if the proof identifies the victim as being the person described in the indictment it is sufficient

The person killed or assaulted must be proved to be the person named in the indictment[9] The name of the person killed or assaulted must generally be proved as alleged,[10] and so must an allegation that

92. Kan —State v Keester, 4 P 2d 679, 134 Kan 64
Ohio —Massa v State, 175 N E 219 37 Ohio App 532
30 C J p 130 note 92

93. Tex - Reddick v State, Cr, 47 S W 993
30 C J p 130 note 93

94. Ind —Crickmore v State, 12 N E 2d 266, 213 Ind 586
Mich - People v Robinson, 199 N W 622, 228 Mich 64
Ohio —Massa v State, 175 N E 219, 37 Ohio App 532
30 C J p 130 note 94

95. Ark —Thetstone v State, 32 Ark 179

Rule limited by statute
Some statutes expressly dispense with proof of venue, unless the issue is raised by plea in abatement — State v Outerbridge 82 N C 617

96 Ala —Noles v State, 24 Ala 672
Ark —Thetstone v State, 32 Ark 179

97. Ind —Cluck v State, 40 Ind 263
30 C J p 130 note 96

98. Ark —Tillman v State, 166 S W 582, 112 Ark 236

99. Ark - Tillman v State supra
Mich —People v Townsend, 183 N W 177, 214 Mich 267

1. Mass —Commonwealth v Snell, 75 N E 75, 189 Mass 12, 3 L R A,N S, 1019

2. Ky —Parker v Commonwealth, 12 Bush 191.

3. Fla —Smith v State, 27 So 868, 42 Fla 236

4. Miss —Coleman v State, 35 So 937 83 Miss 290, 64 L R A 807
Tex —Compton v State, 289 S W 51 105 Tex Cr 516
However, there is authority to the contrary —State v Platt, 151 S E 206, 154 S C 1

5 Okl —Loyd v State, 116 P 959, 6 Okl Cr 76

6. Canal Zone — Canal Zone v Houston, 2 Canal Zone 238

7. Ill —Kirkham v People 48 N E 465, 170 Ill 9

The contrary, however, has also been held — Brockway v State, 138 N E 88, 196 Ind 656 26 A L R 1338

8. Kan - State v Keester, 4 P 2d 679, 134 Kan 64
Ky —Spencer v Commonwealth, 240 S W 750, 194 Ky 699
Tex — Stone v State, 15 S W 2d 18, 111 Tex Cr 547

9. Ala —Cooper v State, 159 So 370, 26 Ala App 326
Fla —Branch v State, 115 So 143, 94 Fla 286
Ga —Wilson v State, 20 S E 2d 433, 67 Ga App 404- Thomas v State, 127 S E 617, 33 Ga App 677
Ill —Colombo v People, 55 N E 519, 182 Ill 411
30 C J p 131 note 11, p 139 note 29 [c]
"An accused cannot be tried for the manslaughter of any other person than the one charged by the indictment, upon which he is then being tried"—People v Allen, 14 N E 2d 397, 403, 368 Ill 368, certiorari denied Allen v People of State of Illinois, 60 S Ct 132, 308 U S 511, 84 L Ed 436
Variance with regard to names of third persons necessary to statement of offense generally see C J S title Indictments and Informations § 265, also 31 C J p 817 note 92—p 848 note 15

Proof of alias
Where an indictment charges accused with the homicide of "A alias B" and there was no evidence that A and B were the same person or that any such person as B ever had an existence, there was a total failure of proof as to an essential allegation which was fatal to the conviction —Goodlove v State, 92 N E 491, 82 Ohio St 365, 30 L R A,N S, 134, 19 Ann Cas 893

10. Ala —Jones v State 2 So 2d 122, 241 Ala 337—Cooper v State 159 So 370, 26 Ala App 326—Cashman v State, 101 So 555, 20 Ala App 599
Fla —Branch v State, 115 So 143, 94 Fla 286
Ga —Thomas v State, 127 S E 617, 33 Ga App 677
La —State v Smith, 107 So 386, 160 La 503
Tex —Freeman v State, 58 S W 2d 835, 123 Tex Cr 289
30 C J p 131 note 12.

the name is unknown to the grand jury[11] Formerly there was a strict application of this rule, and even slight variances, if the names were not idem sonans, were held fatal[12] The modern rule is that it is a question of identity,[13] and where the identity of the person in the evidence with the one named in the indictment is established,[14] as where there is direct testimony to that effect,[15] or where the inaccuracy is not misleading,[16] the variance is not fatal It is sufficient to show that deceased was generally known by the name stated in the indictment,[17] or that he was known by that name as well as another,[18] or that accused knew him by the name alleged,[19] and, under such circumstances, it is immaterial that the true name is not stated even under an alias[20]

Some statutes make an erroneous allegation as to the person injured immaterial if the act charged is sufficiently identified[21] or if the error does not prejudice accused's rights[22] The variance between an abbreviation, diminutive, or nickname and the full name is not material where it does not cast any doubt on the identity of the person[23] A failure to prove the complete name of the victim is not necessarily fatal,[24] and a mistake in the middle initial is not fatal,[25] even where there is shown to be another person of the name stated in the indictment, provided accused is not misled[26] Where the jury were justified in treating the name in the indictment and the name proved as the same, a conviction will not be set aside on the ground of variance[27]

A substantial agreement of the evidence with the charge as to the description of deceased, whose name is alleged to be unknown, is sufficient[28]

Unnecessary matters of description Averments descriptive of the person killed, although unnecessarily made, must be proved as alleged,[29] but it is

11. Ala —Reese v State, 8 So 818, 90 Ala 624
30 C J p 131 note 13

12. Ark —Bennett v State, 104 S W 928, 84 Ark 97

13. Mo —State v Hart, 274 S W 385, 309 Mo 77
30 C J p 131 note 15
"Identitate personæ, and not identitate nominis, is and should always have been the true and only issue"—Wilson v State, 20 S E 2d 433, 67 Ga App 404
"A material variance between the name alleged, and that proved, is fatal, yet it is a question of identity, and the essential thing in the requirement of correspondence between the allegation of the name in the information and the proof is that the record be in such shape as to inform the defendant of the charge against him and to protect him against another prosecution for the same offense"—Branch v State, 115 So 143, 94 Fla 286

14. Ala—Williams v State, 2 So 2d 423, 241 Ala 348—Jones v State, 2 So 2d 422, 241 Ala 337
Ga —Wilson v State, 20 S E 2d 433, 67 Ga App 404
Miss —Foreman v State, 191 So 657, 186 Miss 529
Mo —State v Hart, 274 S W 385, 309 Mo 77
Va —Brown v Commonwealth, 122 S E 421, 138 Va 807
30 C J p 131 note 16

15 Cal —People v Northcott, 189 P 701, 45 Cal App 706
Mo —State v Hart, 274 S W 385, 309 Mo 77
Va —Brown v Commonwealth, 122 S E 421, 138 Va 807

16. Fla—Branch v State, 115 So 143, 94 Fla 286
Tex —Hollan v State, 267 S W 981, 99 Tex Cr 3
30 C J p 131 note 18

Variance scarcely perceptible
If the variance in the name be so slight as scarcely to be perceptible, and the deceased would have been readily known by the name thus called, then such variance is immaterial —Jones v State, 2 So 2d 422, 241 Ala 337

Variance held immaterial
Description as "Emet Thornton" and proof of "Emmet Thornton"—Daniels v State, 16 S W 2d 539, 112 Tex Cr 305

17. Ala —Dinkins v State, 106 So 621, 21 Ala App 206
Fla —Branch v State, 115 So 143, 94 Fla 286
Mo —State v Hart, 274 S W 385, 309 Mo 77
Tex —Hollan v State, 267 S W 981, 99 Tex Cr 3
30 C J p 132 note 19

Fact that victim's baptismal name as established by the evidence was different from the name stated in the indictment was not a material variance since it was shown that he was generally known by the name alleged – State v Martinez, 278 P 210, 31 N M 112

18. Miss —Woulard v State, 102 So 781, 157 Miss 808
Tex —Pena v State, 164 S W 2d 703, 141 Tex Cr 521—Freeman v State, 58 S W 2d 835, 123 Tex Cr 289—Archer v State, 5 S W 2d 503, 109 Tex Cr 414—Young v State, 240 S W 930, 91 Tex Cr 511

19. Tex —Williams v. State, Cr, 53 S W 859
30 C J p 132 note 20.

20. Fla —Thomas v State, 38 So 516, 49 Fla 123

21. Idaho —State v St Clair, 53 P 1, 6 Idaho 109
30 C J p 132 note 26 [a]

22 N M —State v Martinez, 278 P 210, 34 N M 112

23. Ala —Dinkins v State, 106 So 621, 21 Ala App 206
Mo —State v Hart, 274 S W 385, 309 Mo 77
30 C J p 132 notes 19 [c] 27

Generally known by nickname
Where deceased is described in the indictment by her proper name, proof of such name is sufficient although the evidence discloses she was commonly and more generally known by a nickname —Daniels v State, 122 S E 223, 157 Ga 780

24. Variance immaterial
Mo —State v Sneed, 4 S W 411, 91 Mo 552
30 C J p 131 note 12 [c], p 132 notes 23, 30 [b]

Variance held fatal
Ill —Penrod v People, 89 Ill 150—Davis v People, 19 Ill 74

Other evidence may be received to complete the proof of identity —Shepherd v People, 72 Ill 480—30 C J p 132 note 24

25 Ala —Terry v State, 23 So 776, 118 Ala 79
30 C J p 132 note 28

26. Tex —Hassell v State, 188 S W 991, 80 Tex Cr 93

27. Ala —Suttle v State, 96 So 90, 19 Ala App 198
30 C J p 132 note 30

28. Tex —Brooks v State, Cr, 56 S W 924

29. Ark —Reed v State, 16 Ark 499.
30 C J p 132 note 31.

sufficient if there is substantial proof of identity [30] However, since it is not necessary to allege that a named decedent was a human being, proof of such fact is not required [31]

Separate counts. Where deceased is designated by different names in different counts, one count may be dismissed and conviction had on the other.[32]

Peace officer. It is not necessary to aver that the person killed was a peace officer acting in the discharge of his duty in order that proof of such fact be admissible [33]

§ 180. Indictments against Several and for Killing and Assaults on Several

A charge of killing two persons may be supported by proof of the killing of one. Where two persons are jointly indicted, one may be convicted and the other acquitted, and evidence may be admitted to show conspiracy without a formal charge of conspiracy

A charge of killing two persons may be supported by proof of the killing of one [34] So, on a charge of assault against several, it is not a fatal variance that the proof establishes that only one person was assaulted [35] In case an assault is charged with intent to murder two persons, it may be shown that it was by different acts, although in the same transaction [36]

Where two or more are jointly indicted for homicide or assault, it is not a variance fatal to the conviction of one that the guilt of one or more of the others is not established,[37] or that one or more of the others are found guilty of the crime but in a lesser degree [38] A charge that accused jointly with others killed deceased may be supported by proof that accused acted alone or in concert [39]

An indictment charging two or more persons jointly with murder necessarily involves conspiracy, and proof of the latter may be admitted without its being formally charged [40] That one count charges conspiracy to commit the murder does not prevent conviction under another count without proof of the conspiracy [41]

§ 181. Liability as Principal, Abettor, or Accessary

Where no distinction in punishment is made, one charged as a principal may be convicted on proof that he was an abettor, or vice versa, and, where the distinction between principals and accessaries before the fact is abolished, one charged as a principal may be convicted as an accessary before the fact, or vice versa.

Where no distinction in punishment is made, one charged as principal may be convicted on proof that he was present aiding and abetting[42] and an ac-

30. S C—State v Motley, 41 S C L 327
30 C J p 132 note 32 [a]

31. Ind—Epps v State, 1 N E 491, 102 Ind 539

32. N Y—O'Brien v People, 48 Barb 274, affirmed 36 N Y 276, 2 Transcr A 5, 3 Abb Pr, N S, 368

33. D C—Holmes v U S, 11 F 2d 569, 56 App D C 183
30 C J p 128 note 61 [d], p 133 notes 35, 36

34. Tex—Nite v State, 54 S W 763, 41 Tex Cr 340
Proof of distinct offense see supra § 176

35. Mo—State v Rambo, 8 S W 365, 95 Mo 462

36. Tex—Scott v State, 81 S W 950, 46 Tex Cr 305

37 Ala—Vincenzo v State 55 So 451, 1 Ala App 62

Proof of participation by all not required

"It was not necessary to show that all four named in the indictment participated in the crime"—Commonwealth v Madeiros, 151 N E 297, 300, 255 Mass 304, 47 A L R 962

Joint and several offense

Where two persons are jointly indicted for homicide, one may be convicted and the other acquitted for the offense is several as well as joint—Crawford v State, 21 So 214, 112 Ala 1

Guilt of principal not proved

Where two people are jointly indicted and tried, one as principal and the other as abettor, it is not fatal to the conviction of the latter that the principal is not found guilty—State v Norris, 223 P 1093, 115 Kan 693

38 N J—State v Donato, 148 A 776, 106 N J Law 397

39. Ga—Cochran v State, 39 S E 337, 113 Ga 736
30 C J p 133 note 43

40. Cal—People v Cowan, 101 P 2d 125, 38 Cal App 2d 231
Ky—Canada v Commonwealth, 45 S W 2d 834, 242 Ky 71—Crenshaw v Commonwealth, 12 S W 2d 336, 227 Ky 223
La—State v Terrell, 144 So 488, 175 La 758, appeal dismissed and certiorari denied Terrell v State of Louisiana, 53 S Ct 386, 288 U S 589, 77 L Ed 968—State v Gebbia, 47 So 32, 121 La 1083
Mo—State v Copeland, 71 S W 2d 746, 335 Mo 140—State v Messino, 30 S W 2d 750, 325 Mo 743—State v Nasello, 30 S W 2d 132, 325 Mo 442—State v Parr, 246 S W 903, 296 Mo 406
N J—State v Burrell, 199 A. 18, 120 N J Law 277
N Y—People v Florence, 262 N Y S 775, 146 Misc 735, modifying 261 N Y S 803, 146 Misc 152
N C—State v Gunter, 181 S E 323, 208 N C 401
30 C J p 128 note 61 [c] (2).

Question left undecided

"It is not necessary for us now to rule on the question whether when two or more defendants are jointly indicted for murder, that the indictment charges by implication a conspiracy to commit murder, but while not ruling on that question, we have no hesitation in saying that when in such cases the Commonwealth expects to prove a conspiracy, there should be a count in the indictment charging conspiracy"—Commonwealth v Petrillo, 12 A 2d 317, 329, 338 Pa 65

41. Ky—Jones v Commonwealth, 106 S W 802, 32 Ky L 598

42. Ala—Thompson v State, 193 So 323 29 Ala App 124, certiorari denied 193 So 324, 239 Ala 16
Cal—People v King, 85 P 2d 928, 30 Cal App 2d 185
Del—Dean v State, 125 A. 478, 2 W W Harr 469, affirming State v Dean, 122 A 448, 2 W W Harr 290
Fla—Pope v State, 94 So 865, 84 Fla 428
Ga—Adkins v. State, 1 S E 2d 420,

cused alleged to have been present aiding and abetting may be convicted on proof that he was the principal,[43] the variance as to the particular part taken by accused being considered immaterial[44] So, where the distinction between principals and accessaries before the fact is not recognized, an accessary before the fact may be indicted and tried as a principal in the first degree,[45] and, conversely, one charged as an accessary before the fact may be convicted although he was present at the killing[46] Where the distinction is retained, however, one indicted as a principal cannot be convicted as an accessary before the fact,[47] or as an accessary after the fact,[48] nor can a principal be convicted under an indictment charging that he is an accessary[49] Where it is not known to the grand jury which of two persons accused acted as principal and which as accessary, a statement of that fact in the indictment is sufficient on which to convict either as principal[50] So also one count may charge the perpetration of the act by a certain person, aided and abetted by accused, and another its perpetration by an unknown person so aided and abetted, and a conviction may be sustained on either theory[51] An information charging accused as an accessary after the fact to a murder by unknown persons is not at variance with proof that a designated person committed the murder[52] One charged as an accessary before the fact to murder may be convicted of being an accessary before the fact to manslaughter[53]

§ 182. Manner and Means

a. In general
b Conformity of proof to allegations in general
c Particular weapon or instrument
d Manner or means unknown
e Manner of using weapon or instrument

a. In General

If the indictment does not allege the manner or means of the homicide or assault the state may prove any manner or means

Where an indictment is drawn without specification as to either the manner or the means of the homicide or assault, the state may prove any manner[54] or means,[55] and it may prove different manners[56]

b. Conformity of Proof to Allegations in General

In case the manner or means by which the homicide

187 Ga 519 - Ford v State, 200 S E 810, 59 Ga App 339
Ill —People v Sink, 30 N E 2d 40, 374 Ill 480
Ky — McIntosh v Commonwealth, 27 S W 2d 971, 234 Ky 192—Watkins v Commonwealth, 12 S W 2d 329, 227 Ky 100—Benge v Commonwealth, 17 S W 146, 92 Ky 1
La —State v Capaci, 154 So 119, 179 La 462
N Y —People v Florence, 262 N Y S 775, 146 Misc 735, modifying 261 N Y S 803 146 Misc 152
N C — State v Green, 177 S E 120, 207 N C 369
Okl —Hopkins v State, 231 P 97, 28 Okl Cr 405
30 C J p 133 note 44

Proof under common-law form indictment

Proof that accused was present aiding and abetting is not so at variance with an indictment alleging murder with premeditation as to be fatal to conviction —Spear v State, 44 S W 2d 663, 184 Ark 1047

Bullet fired by another

Although indictment for murder while engaged in commission of felony only named two defendants, proof was not required to show that fatal bullet was fired by one of them —People v Collins, 2 N E 2d 647, 271 N Y 254

43. Ky —McIntosh v Commonwealth, 27 S W 2d 971, 234 Ky 192—Watkins v Commonwealth, 12 S W 2d 329, 227 Ky 100—Benge v Commonwealth, 17 S W 146, 92 Ky 1

44. Del —Dean v State 125 A 478, 2 W W Harr 469 affirming State v Dean, 122 A 448, 2 W W Harr 290
30 C J p 133 note 45

45 Ill —Spies v People 12 N E 865 17 N E 898 122 Ill 1, 3 Am S R 320
29 C J p 1067 note 89—30 C J p 133 note 47
Distinction between principal and accessary as not recognized see Criminal Law § 82

Absence of proof of criminal homicide

In a manslaughter prosecution based on causing the death of a pregnant woman by using instruments to procure her miscarriage, a conviction would not be sustained on proof that accused advised the woman to use the instruments upon herself since accused could not be convicted as an accessary before the fact in the absence of proof of a criminal homicide —State v McGaughey, 187 N W 717, 45 S D 379

46. Pa —Commonwealth v. Bradley, 16 Pa Super 561

47. Tex —Hext v State, 282 S W 242, 104 Tex Cr 46—Cooper v State, 154 S W 989, 69 Tex Cr 405
30 C J p 133 note 50

48. Del —State v Galvano, 154 A 461, 4 W W Harr 409
30 C J p 133 note 51

49. Tex —Cooper v State, 154 S W 989, 69 Tex Cr 405

A person indicted as an accessary before the fact to an assault with intent to murder cannot be convicted, on evidence which shows him to be a principal, either in the first or second degree —Snell v State 79 S E 71, 13 Ga App 158

50. Ky —Jackson v Commonwealth 38 S W 422, 1091, 100 Ky 239, 18 Ky L 795, 66 Am S R 336

51. Ill —Spies v People, 12 N E 865, 17 N E 898, 122 Ill 1, 3 Am S R 320

52. Colo —Roberts v People, 87 P 2d 251, 103 Colo 250

53 Fla —Thomas v State, 74 So 1 73 Fla 115
W Va - Moore v Lowe, 180 S E 1 certiorari denied 56 S Ct 130, 296 U S 571, 80 L Ed 406

54 Pa —Commonwealth v. Bruno, 175 A 518 316 Pa 394
30 C J p 133 note 55
Necessity of alleging manner or means of killing see supra § 150

55. Ill —People v Cassler, 163 N E 430, 332 Ill 207
Neb — Bassinger v State, 5 N W 2d 222, 142 Neb 93
30 C J p 133 note 55 [b]

56. W Va —State v Morgan, 13 S E 385, 35 W Va 260

was committed are alleged, the proof must correspond with the allegation, although substantial correspondence is sufficient

In case the indictment or information sets out the manner or means by which the assault or homicide was committed, the proof must correspond with such allegations,[57] although substantial correspondence is sufficient[58] A variance in this respect will not be fatal if it is of such a nature that accused cannot be misled,[59] or if the nature of the violence and kind of death inflicted by it are the same[60] In case the indictment charges the use of several means, the state may prove any or all of the means stated,[61] unless it charges death to have been caused by cooperating causes, in which case there can be no conviction on evidence that it was caused by one of them singly[62] If the indictment charges both known and unknown means, the state may prove any or all of the means stated or may prove that the means were unknown,[63] and if the indictment describes the instrument used in general terms, as a club, blunt instrument, or heavy missile, and further states that a more particular description is unknown, any instrument corresponding to the general description may be proved[64] When it is not required to allege that an assault with intent to kill was committed with a deadly weapon, such fact need not be shown by direct proof on the trial,[65] but it has also been held that, when it is charged in an indictment for assault with intent to murder that the assault was made with a weapon likely to produce death, the character of the weapon enters into the description of the offense and must be proved the same as any other essential feature[66] In a jurisdiction where an indictment for assault with intent to kill must allege the means used where the injury is other than by shooting, stabbing, cutting, or wounding, such other means cannot be proved unless alleged[67] Under a statute providing that the manner of killing is not material except to show the disposition of mind or intent with which the act was committed, where the conviction was of involuntary manslaughter, in which no intent to take life is involved, a variance between the man-

57. Ala—McDonald v State 1 So 2d 658 241 Ala 172
Del—Dean v State, 125 A 478, 2 W W Harr 469 affirming State v Dean, 122 A 448 2 W W Harr 290
Fla—Patrick v State 158 So 101, 117 Fla 432
Ind—Hicks v State, 11 N E 2d 171, 178 213 Ind 277, quoting **Corpus Juris** and certiorari denied Hicks v State of Indiana, 58 S Ct 951, 304 U S 564, 82 L Ed 1531
Kan—State v Norris, 223 P 1093, 1094 115 Kan 693, citing **Corpus Juris.**
Mass—Commonwealth v Stone, 14 N E 2d 158 300 Mass 160
30 C J p 134 note 57
"Proof of means, not of like kind as that averred is such a variance as to work a reversal of a conviction"—Oliver v State, 175 So 305, 307, 234 Ala 460 citing **Corpus Juris.**

58. Ala—Oliver v State, supra, citing **Corpus Juris.**
Kan State v Norris, 223 P 1093, 1094, 115 Kan 693, citing **Corpus Juris.**
30 C J p 134 note 58

Test as to variance

In homicide cases the test as to whether there is a material variance between the proof and the allegations in the indictment as to the manner and means of death depends entirely on whether the instrument used to cause death and the manner of death are substantially of the same nature and character as alleged in the indictment—Dean v State, 125 A 478, 2 W W Harr Del, 469, affirming State v. Dean, 122 A 448, 2 W W Harr 290.

Manner in which gun loaded

(1) An allegation that a gun was loaded with a lead bullet is sustained by proof of a bullet without specification as to metal—State v Wilson Mo 34 S W 2d 98

(2) Evidence of steel-jacket bullet sustains allegation of leaden bullet—Bigstaff v State, 30 S W 2d 213, 182 Ark 174

(3) Other cases see 30 C J p 134 note 58 [a]

Variance held immaterial

(1) Charge that the homicide was committed with a blunt instrument and proof that deceased was struck over the head with several such instruments and while in a dying condition was then shot—Hicks v State, 11 N E 2d 171 213 Ind 277, certiorari denied Hicks v State of Indiana 58 S Ct 951, 304 U S 564 82 L Ed 1531

(2) Charge that accused beat and struck deceased and proof that accused struck the victim and knocked him down as a result of which deceased's neck was broken, causing his death—Hodges v State, 85 P 2d 443, 65 Okl Cr 277, modified on other grounds 92 P 2d 590, 66 Okl Cr 122

59. Del—Dean v State, 125 A 478, 2 W W Harr 469, affirming State v Dean, 122 A 448, 2 W W Harr 290
Kan—State v Norris, 223 P 1093, 1094, 115 Kan 693, citing **Corpus Juris.**
30 C J p 134 note 59

60. Okl—Elliott v State, 111 P 820, 4 Okl Cr 224, 140 Am S R 668
30 C J p 135 note 60

61 Ga—Wrisper v State, 17 S E 2d 714 193 Ga 157
Okl—Brister v State, 266 P 486 40 Okl Cr 25—Gore v State, 219 P 153 25 Okl Cr 214
30 C J p 135 note 61

62 Utah—State v Vance, 110 P 431 38 Utah 1
30 C J p 135 note 62

63 Ga—Wrisper v State, 17 S E 2d 714 193 Ga 157
30 C J p 135 note 63

64 Ga—Goss v State, 7 S E 2d 87 61 Ga App 621
Ind—Peats v State 12 N E 2d 270 213 Ind 560
Okl—Tiger v State, 16 P 2d 889, 54 Okl Cr 202

Pistol used as club

(1) Where the indictment alleged the use of knucks, black-jack, or club" and stated that a further description of the instrument was unknown, proof that the blow was struck with a pistol used as a club or black-jack did not create a material variance—Barton v Commonwealth, 38 S W 2d 218 238 Ky 356

(2) But it has also been held that an indictment alleging an assault with "dangerous weapons, to wit, knives and clubs" would not sustain a conviction on proof of striking with a pistol—State v Braxton, 16 So 745, 47 La Ann 158

65. Mo—State v Miller, 175 S W 187, 264 Mo 395

66. Ga—Hardy v State, 100 S E 20, 24 Ga App 141

67. W Va—State v Gibson, 68 S E 295, 67 W Va. 548, 28 L R A, N S, 965.

ner and means alleged and proved is immaterial.[68] Where the allegation is that accused directly inflicted the fatal wound, and the proof shows that it was produced by some independent agency, there is a fatal variance[69]

c. Particular Weapon or Instrument

While the proof as to the instrument with which a homicide was committed must not be essentially different from that alleged in the indictment, ordinarily the state is not held to strict proof of the instrument alleged.

While the proof as to the instrument with which an assault or homicide was committed must not be essentially different from that alleged in the indictment,[70] the state generally is not held to strict proof of the instrument or weapon alleged[71] Thus a variance between the allegation and the proof is immaterial where the instruments are of the same variety and inflict the same kind of wound,[72] for example, when the murder is alleged to have been committed with a particular sort of firearm, proof establishing another sort is not a material variance[73] The same rule applies to instruments of striking,[74] but an indictment charging death from a blow with a particular instrument is not supported by proof that death resulted from a fall after the blow[75] If the particular poison administered in the commission of a homicide is unnecessarily stated, the proof need not correspond with the allegation[76] Where there is evidence to sustain the charge as to the instrument used, it is not fatal that such evidence is disputed[77] or that the jury might not find in accordance with it[78] Evidence of the use of instruments other than those alleged may be admitted, when competent, on the issues of the case generally, although not on that particular issue[79]

d. Manner or Means Unknown

Where the character of the weapon used is alleged to be unknown to the grand jury, the state may prove any weapon, but if the proof shows that the means of the killing were known to the grand jury there is a material variance

Where an indictment alleges only that the killing was done with an instrument unknown to the grand jury, and the proof shows that the means of the killing were known to the grand jury, there is a material variance[80] Where it is alleged that the character of the weapon used is unknown, it is held that the state should prove that fact,[81] and also that

68. Ark—Tharp v State, 137 S W 1097, 99 Ark 188
30 C J p 135 note 69

69 Okl—Elliott v State, 111 P 820, 4 Okl Cr 224 140 Am S R 668
30 C J p 135 note 70

70 Ga—McDaniel v State, 187 S E 896, 54 Ga App 407
Okl—Pitts v State 8 P 2d 78, 79, 53 Okl Cr 165, citing **Corpus Juris**
30 C J p 135 note 72

Misleading to prove weapon other than as alleged

While it was not essential to the validity of the indictment to allege that the assault was made with a knife, yet, once such a weapon was alleged, it became a material allegation and it was unfair and misleading to prove that the assault was with a blunt instrument and the variance was fatal to conviction—State v Myers, 190 S E 678, 118 W Va 397

71. Ark—Sullivan v State, 258 S W 980, 163 Ark 353, citing **Corpus Juris.**
Ga—Kennedy v State, App, 24 S E 2d 321
30 C J p 136 note 73

72. Ark—Sullivan v State, 258 S W 980, 163 Ark 353, citing **Corpus Juris.**
Ga—Kennedy v State, App, 24 S E 2d 321
Ky—Barton v Commonwealth, 38 S W 2d 218, 238 Ky 356
30 C J p 136 note 74

73. Ala—Eaton v State, 63 So 41, 8 Ala App 136
30 C J p 136 note 75.

Variance held immaterial

(1) Allegation of gun and proof of pistol—Sullivan v State, 258 S W 980 163 Ark 353 citing **Corpus Juris**—30 C J p 136 note 75 [a] (1)

(2) Allegation of pistol and proof of gun—Sullivan v State, supra, citing **Corpus Juris** 30 C J p 136 note 75 [a] (3)

(3) Allegation of pistol and proof of a revolver—State v Barr, 102 S W 2d 629, 340 Mo 738

(4) Allegation of revolving pistol and proof of automatic—State v Webb 162 S W 622, 254 Mo 414

74. Tex—Hillman v State, 72 S W 2d 607, 126 Tex Cr 529

Variance held immaterial

(1) Allegation of blow with shovel and proof of blow with spade—Langley v State, 86 S W 2d 755, 129 Tex Cr 254

(2) Other immaterial variances see 30 C J p 136 note 76 [a]

Variance held material

(1) Allegation of assault with knife and proof of assault with blunt instrument—State v Myers, 190 S E 678, 118 W Va 397

(2) Allegation of striking with gun and proof of striking with stock broken from shotgun—Hardrick v State, 155 S W 2d 367, 142 Tex Cr 520

(3) Allegation of striking with shovel and proof of striking with an ax—Ferguson v State, 4 Tex App 156.

75. Ky—Murphy v Commonwealth, 10 S W 2d 626, 226 Ky 169
30 C J p 136 note 77

76 U S—Westmorland v U S, Tex 15 S Ct 243, 155 U S 545 39 L Ed 255
30 C J p 136 note 78

77 Ind—Hicks v State, 11 N E 2d 171 213 Ind 277, certiorari denied Hicks v State of Indiana, 58 S Ct 951 304 U S 564 82 L Ed 1531
Iowa—State v Adams, 136 N W 1051, 155 Iowa 660
Or—Pitts v State, 8 P 2d 78, 53 Okl Cr 165

78. Iowa—State v Adams, 136 N W 1051 155 Iowa 660

79 Ariz Acker v State 226 P 199, 26 Ariz 372
30 C J p 136 note 81

80 Ala Canty v State, 191 So 260 238 Ala 384, reversed on other grounds Canty v State of Alabama 60 S Ct 612 309 U S 629, 84 L Ed 988—Smith v State 39 So 329, 142 Ala 14—Terry v State, 23 So 776, 118 Ala 79

Knowledge of grand jury not shown

The fact that an indictment of an accessary to a murder stated that deceased was choked to death by the principal does not render invalid an indictment, returned the following day charging the principal with the killing by means and manner to the grand jurors unknown—Sanchez v. State, 78 S W 504, 46 Tex Cr 179

81. Tex—Carr v State, 190 S W. 727, 80 Tex Cr. 465.

the grand jury could not have learned its character by reasonable diligence[82] On the other hand, it has been held that the allegation need not be proved in the first instance by the people,[83] that a conviction may be sustained on a count charging the means as unknown where the killing is established but there is no evidence of the particular means used,[84] that, in order to show a variance, the knowledge of the grand jurors must be clearly shown,[85] and that a variance is not shown by the fact that such means could have been ascertained by the grand jury with reasonable diligence[86] or the fact that they are made known to the petit jury[87] Where the indictment alleges that the character of the weapon used is unknown, the state may prove any weapon[88]

e. Manner of Using Weapon or Instrument

Where an indictment charges an assault or killing with a named weapon, without specifying the manner of its use, any manner consistent with the use of such weapon may be proved Where the manner of its use is stated, a substantial conformity of the proof thereto is sufficient

Where the indictment charges simply an assault or killing with a named weapon, without specifying the manner of its use, any manner not inconsistent with the use of such weapon may be proved[89] Where the manner of using the weapon is stated, a substantial conformity of the proof thereto is sufficient[90] Where it is alleged that the weapon was held in the hands or in either hand, this need not be proved[91] A fortiori a substantial correspondence between the allegations and proof in this particular is sufficient[92] Where, however, the manner of using the weapon is stated, proof of its use in an entirely different manner will not sustain a conviction[93] The particular manner in which poison was administered need not be proved as laid[94]

§ 183. Wound or Injury

A variance between an allegation describing the mortal wound and the proof is not fatal if there is a substantial agreement

In determining the scope of the issues as to the nature of the wound or injury, the indictment is to be construed in its ordinary rather than its technical sense[95] Although formerly at common law it was required to describe the mortal wound with particularity, as discussed supra § 151, it was held that if, on evidence, the wound of which the person died appeared to be of another kind the indictment would be sustained[96] So under modern decisions, in case a particular statement is given, it need not

Fact made obvious by evidence

"It is the safer and better practice for the state to make proof originally of such an averment in the indictment, but we can see no good reason for requiring proof by the state of a fact already made obvious by its evidence"—Forest v State 300 S W 51, 52 108 Tex Cr 159

82. Tex—Forest v State supra—Carr v State, 190 S W 727, 80 Tex Cr 465

83. Ill—Koser v People, 79 N E 615, 224 Ill 201

84. Mass—Commonwealth v Martin 125 Mass 394

85. Ala—Canty v State, 191 So 260, 238 Ala 384 reversed on other grounds Canty v State of Alabama, 60 S Ct 612, 309 U S 629 84 L Ed 988—Vaughn v State, 183 So 428, 430, 236 Ala 442, citing **Corpus Juris.**

30 C J p 137 note 87

86. Ala—Vaughn v State, supra, citing **Corpus Juris**—Terry v State, 25 So 176, 120 Ala 286

"The rule in reference to the averment in an indictment that a fact is unknown is that such an indictment will support a conviction unless it be shown that such fact was known to the grand jury It is not enough that the fact be proved and made known to the petit jury, or that by proper diligence, the grand jury could have learned the fact It is a question of variance between the averments and the proof and hence the proper inquiry is not whether the grand jury employed proper diligence or not It was their duty to do so and the law will presume they discharged this duty, and the inquiry is did they falsely affirm a fact as unknown when it was known The defendant may escape conviction by proving on the trial the falsity of the averment"—Terry v State 23 So 776, 778, 118 Ala 79

87. N M—State v Belisle, 161 P 168 22 N M 285

88. Wash—State v Smith, 83 P 2d 749, 196 Wash 534

30 C J p 137 note 91

Proof where both known and unknown means are alleged see supra subdivision b of this section

89 Fla—Peterson v State, 26 So 709, 41 Fla 285

30 C J p 137 note 92

90. Fla—Howard v State, 83 So 297, 78 Fla 413

30 C J p 137 note 93

91. Kan—State v Norris, 223 P 1093, 1094, 115 Kan 693, citing **Corpus Juris.**

Mass—Commonwealth v Costley, 118 Mass 1.

92 Del—State v Bell, 62 A 147, 21 Del 192

30 C J p 137 note 95

93 Ill—Guedel v People, 43 Ill 226

30 C J p 137 note 96

94. Mass—Commonwealth v Hobbs, 5 N E 158 140 Mass 443

30 C J p 137 note 97

95. Fla—Hampton v State, 39 So 421 50 Fla 55

30 C J p 137 note 98

"Wound"

In a prosecution for murder under an indictment charging that deceased received a mortal wound on the left side of the head from the hands of accused from which he instantly died, and it appeared that accused hit deceased with a brick fracturing his skull, there was no variance between the indictment and proof, the word "wounds" in medicine meaning injuries of every description that affect the hard or soft parts of the body, and comprehending bruises, contusions, fractures, luxations, etc, and in law the word means any lesion of the body, the correct definition of a "lesion" being a hurt, loss, or injury —People v Durand, 139 N E 78, 307 Ill 611

96. Mo—State v Edmundson, 64 Mo 398

30 C J p 137 note 1.

be proved as laid,[97] and a variance between an allegation descriptive of the wound and the proof is not fatal if there is a substantial agreement[98] Thus a variance as to the description of the size and shape of the wound,[99] or as to the part of the body upon which it was located,[1] is immaterial if the wound is of the same character Likewise it is immaterial that the indictment charges but one wound to have been inflicted, and proof shows several,[2] any one of which might have been mortal[3] Where the indictment contains no description of the wounds, such fact does not render the evidence with regard thereto inadmissible[4]

Where there is evidence to sustain the allegations that the homicide resulted from the particular wounds or injuries averred, it is not a material variance that there is also evidence showing other factors, such as an operation or an illness or a particular bodily condition, which contributed to cause the death[5]

§ 184. Intent

An indictment for murder charging that accused intentionally killed deceased is supported by proof that the intention was to kill a third person In a prosecution for assault with intent to murder, the specific intent must in general be proved as charged

An indictment for murder charging that accused wilfully and intentionally killed deceased is supported by proof that accused did an act with intent to kill a third person which resulted in the death of deceased,[6] or by proof of a general intent to kill[7] So, where the indictment charges the killing to have been committed with a premeditated design to effect the death of some person other than the one killed, it is not a fatal variance to prove that the premeditated design was to effect the death of the person killed,[8] and the converse of this proposition has also been held to be true[9]

Specific intent being of the gist of the offense of assault with intent to murder, as discussed supra § 79, it must in general be proved as charged,[10] and an indictment charging an intent to kill a person named cannot be supported by proof of intent to kill another,[11] or by proof that accused evinced a depraved heart, regardless of human life, if without a premeditated design to kill the particular person,[12] although the sufficiency generally of proof of intent to kill one to sustain an allegation of intent to kill another has been maintained[13]

Since there may be a conviction of an included offense, on failure of proof of the specific intent to kill, accused is not entitled to an acquittal if such intent is not proved[14] Where the motive or intent is not required to be stated and is not stated, it may nevertheless be proved as tending to establish the commission of the crime[15] In a prosecution for murder in the first degree, accused may introduce any relevant and proper evidence of a lack of premeditated design in the admitted killing so as to reduce the offense to a lower degree[16]

Where one is charged as an accomplice with having encouraged the principal to kill the person named, evidence that he encouraged him to kill another person is inadmissible,[17] although it has been

97. Mo—State v Edmundson, supra
N Y—Sanchez v People 22 N Y 147, reversing on other grounds 18 How Pr 72, 4 Park Cr 535

98. Fla—Freeman v State, 39 So 785, 50 Fla 38
30 C J p 137 note 3

99. Mass - Commonwealth v Coy, 32 N E 4, 157 Mass 200
30 C J p 137 note 4

1. Ill—Clark v People, 79 N E 941, 224 Ill 554
30 C J p 137 note 5

2. S C—State v Chiles, 22 S E 339, 44 S C 338
30 C J p 138 note 6

3. Fla—Bryan v State, 19 Fla 864
30 C J p 138 note 7

4. Ind—Dukes v State, 11 Ind 557, 71 Am D 370
La—State v Munco, 12 La Ann 625

5. Ga—Nelson v State, 198 S E 305, 58 Ga App 243
Mass—Commonwealth v Randall, 157 N E 354, 260 Mass 303
Okl—Walker v State, 19 P 2d 622, 54 Okl Cr 279

6. Ky—Commonwealth v Branham, 120 S W 2d 234 274 Ky 730
Miss—Ross v State, 131 So 367, 158 Miss 827
30 C J p 138 note 9

Evidence admissible under charge
Where the shot fired at J unintentionally killed J's son, no other pleading than a charge of murder of the son was necessary to render relevant evidence which would have been proper had the shot killed J instead of his son—Caraway v State, 263 S W 1063, 98 Tex Cr 119

7. Wash—State v Barr, 39 P 1080, 11 Wash 481, 48 Am S R 890, 29 L R A 154
30 C J p 138 note 10

8. Okl—Agent v State, 194 P 233, 18 Okl Cr 281

9. Okl—Agent v State, supra

10. Ill—People v Cohen, 137 N E 511, 305 Ill 506
Miss—Faulkner v State, 154 So 338, 170 Miss 195
Neb—Vallas v State, 288 N W 818, 137 Neb 250—Swartz v State, 238 N W 312, 121 Neb 696
Tex Griffith v State, 152 S W 2d 349, 142 Tex Cr 304—McCoy v State, 102 S W 2d 206, 132 Tex Cr 15
30 C J p 138 note 14

11 Miss - Faulkner v State 154 So 338, 170 Miss 195—Ross v State, 131 So 367 158 Miss 827—Morgan v State 21 Miss 242
30 C J p 138 note 15

12. Miss—Gentry v State, 45 So 721, 92 Miss 141
30 C J p 138 note 16

13. Ill—People v Cohen, 137 N E 511, 305 Ill 506
30 C J p 138 note 17

14. Ala—Turbeville v State, 40 Ala 715
30 C J p 138 note 18

15. S C—State v Kennedy, 67 S E 152, 85 S C 146

16. Fla—Whidden v State, 59 So 561, 64 Fla 165

17. Tex—Cooper v State, 154 S W 989, 69 Tex Cr 405

held to the contrary that an indictment charging one as accessary to the murder of a person named without allegation of the intent to murder another, and charging that the killing of the person actually killed was by mistake, is sufficient.[18]

VIII. EVIDENCE

A PRESUMPTIONS AND BURDEN OF PROOF

§ 185. In General

The prosecution has the burden throughout the trial of proving all of the essential elements of the offense and of establishing the guilt of the accused

The general rules of evidence respecting the burden of proof apply to prosecutions for homicide[19] The prosecution has the burden throughout the trial[20] of proving all of the essential elements of the crime charged,[21] and of establishing the guilt of accused[22] This burden is never discharged before a consideration of the whole evidence, including evidence offered by accused as to self-defense[23]

In accordance with the general rule in criminal prosecutions, stated in Criminal Law § 570, the state must prove the venue even if not formally alleged in the indictment[24]

Where the admissibility of evidence depends on the showing of other facts, as stated in Criminal Law § 578, the burden is on the party offering the evidence in question to prove such preliminary matters[25]

§ 186. Corpus Delicti

The prosecution has the burden of proof as to the corpus delicti, and in general no presumptions as to the fact of death may be indulged in against the accused, although as to the cause of death and the character of the killing certain presumptions may arise from the attendant circumstances

The burden is on the prosecution to prove the corpus delicti,[26] that is, the fact of the victim's

18. S C —State v Kennedy, 67 S E 152, 85 S C 146

19. Cal —People v Wells, 76 P 2d 493, 10 Cal 2d 610
Burden of proof and presumptions in criminal cases generally see Criminal Law §§ 566-599

20 Iowa —State v Hillman, 285 N W 176, 226 Iowa 932
N C —State v Howell, 10 S E 2d 815, 218 N C 280—State v Redman, 8 S E 2d 623, 217 N C 483

21. La —State v Elmore, 155 So 896, 179 La 1057
Ohio —Long v State, 141 N E 691, 109 Ohio St 77
Pa —Commonwealth v Flax, 200 A 632, 331 Pa 145
Wash —State v Barton, 105 P 2d 63, 5 Wash 2d 234
30 C J p 139 note 27

Assault with intent to kill or murder
Ga —Jackson v State, 192 S E 633, 56 Ga App 374
N C State v Kline, 129 S E 417 190 N C 177 State v Redditt, 126 S E 506, 189 N C 176

Manslaughter by abortion
Mo —State v Dupree, 117 S W 2d 419 —State v Decker, 104 S W 2d 307, 340 Mo 972—State v Smith, 76 S W 2d 1077, 336 Mo 126

Aiding and abetting
(1) The state had the burden of showing that codefendants aided, abetted, or encouraged accused in shooting deceased, or that they actively consented to such act —Ransom v State, 42 S W 2d 414, 184 Ark 257

(2) Where accused is present encouraging, assisting, and advising another to kill deceased, the law presumes that the one acting is induced to commit the act by such presence and encouragement — Bast v Commonwealth, 99 S W 978, 124 Ky 717, 30 Ky L 967

Culpable negligence
In a prosecution under a statute punishing the killing of a human being by another's culpable negligence as manslaughter when the killing is not justifiable or excusable homicide or murder, the burden of proving culpable negligence rests on the state —Russ v State, 191 So 296, 140 Fla 217

Identity of deceased
In prosecution for murder, where a small portion of a human body weighing between fifteen and twenty pounds was found in burned automobile, and the state sought to prove that the remains were of the person allegedly murdered by accused, burden was on state to prove such fact —O'Keefe v State, Tex Cr , 167 S W 2d 1035

Time and place
(1) In a murder prosecution, the state must prove the time and place of the assault and death —State v Rector, 155 S E 385, 158 S C 212

(2) The state must prove that death ensued within a year and a day from date injury was inflicted in a prosecution for murder —Head v State, Ga App , 24 S E 2d 145

On the trial of a convict for the murder of his guard, under a statute providing that the penalty shall be electrocution the prosecution must prove that at the time of the homicide accused was a convict —Brown v Commonwealth, 111 S E 112, 132 Va 606

22 Ala —Hand v State, 159 So 275, 26 Ala App 317—Davis v State, 101 So 171 20 Ala App 131 —Baker v State, 98 So 213, 19 Ala App 432, certiorari denied Ex parte State ex rel Attorney General, 98 So 215 210 Ala 374
Ark — Reynolds v State, 53 S W 2d 224 186 Ark 223
Ga —Floyd v State, 186 S E 556, 182 Ga 549
Idaho —State v Copenbarger, 16 P 2d 383 52 Idaho 441
Iowa —State v Hillman, 285 N W 176 226 Iowa 932
Va —Nelson v Commonwealth, 161 S E 55, 157 Va 851
Wis — Le Fevre v State, 8 N W 2d 288
30 C J p 139 note 26

23. Ala —Baker v State, 98 So 213, 19 Ala App 132, certiorari denied Ex parte State ex rel Attorney General, 98 So 215, 210 Ala 374

24. Ala —Noles v State, 24 Ala 672
Ark —Thetstone v State, 32 Ark 179

25. Burden was on the prosecution to connect accused with coat and empty pistol shell in deceased's room —Peoples v Commonwealth, 137 S E 603, 147 Va 692

26. Ala —Gachet v State, 124 So 670, 23 Ala App 313
Cal —People v King, 1 P 2d 15, 213 Cal 89

death[27] by the criminal agency of another,[28] and, in some jurisdictions, that it was caused by the criminal agency of accused.[29]

The prosecution has the burden to show all of the surrounding facts and circumstances which have any bearing on the manner of death and a tendency

Ga.—Jester v. State, 17 S.E.2d 736, 193 Ga. 202.
Ky.—Bates v. Commonwealth, 143 S.W.2d 730, 284 Ky. 1.
N.C.—State v. Cade, 2 S.E.2d 7, 215 N.C. 393.
Utah.—State v. Cobo, 60 P.2d 952, 954, 90 Utah 89, citing **Corpus Juris.**
30 C.J. p. 139 note 29.
"Corpus delicti" defined see infra § 312.
Weight and sufficiency of evidence see infra § 312.

Infanticide

In order to establish the corpus delicti in case of infanticide, the commonwealth must affirmatively prove that the child had a complete and separate existence of its own after birth.—Jackson v. Commonwealth, 96 S.W.2d 1014, 265 Ky. 295.

In a prosecution for manslaughter by criminal abortion or injury causing death, district attorney must establish proof of the corpus delicti.—People v. Srebnik, 251 N.Y.S. 392, 140 Misc. 694.

27. Ala.—Shelton v. State, 117 So. 8, 217 Ala. 465.
Ky.—Commonwealth v. Inman, 9 S.W.2d 1000, 225 Ky. 667.
Mont.—State v. Cates, 33 P.2d 578, 97 Mont. 173.
N.C.—State v. Johnson, 138 S.E. 19, 193 N.C. 701.
S.C.—State v. Rector, 155 S.E. 385, 158 S.C. 212.
Va.—Nelson v. Commonwealth, 191 S.E. 620, 168 Va. 742.
30 C.J. p. 139 note 29.

Aider and abettor

In a prosecution based on the theory that accused had aided and abetted a companion in the killing of another, it is incumbent on the state to prove the actual killing.—State v. Godlasky, 195 N.W. 832, 47 S.D. 36.

28. Ala.—Shelton v. State, 117 So. 8, 217 Ala. 465.
Ark.—Cole v. State, 26 S.W. 377, 59 Ark. 50.
Ky.—Commonwealth v. Inman, 9 S.W.2d 1000, 225 Ky. 667.
Mont.—State v. Cates, 33 P.2d 578, 97 Mont. 173.
Neb.—Treppish v. State, 252 N.W. 388, 126 Neb. 21.
N.C.—State v. Johnson, 138 S.E. 19, 193 N.C. 701.
Pa.—Commonwealth v. Williams, 1 A.2d 812, 133 Pa. Super. 104.
Tex.—Edge v. State, 164 S.W.2d 677, 144 Tex. Cr. 480.—Leahy v. State, 13 S.W.2d 874, 111 Tex. Cr. 570.—Hernandez v. State, 8 S.W.2d 947, 110 Tex. Cr. 159.
Va.—Terry v. Commonwealth, 198 S.E. 911, 171 Va. 505.

Inferences

(1) Where deceased was found dead from shotgun wounds, and there was no shotgun near body or other evidence of suicide, inference was, in the absence of proof to the contrary, that he had been unlawfully shot by some person.—Cooley v. State, 171 So. 725, 233 Ala. 407.

(2) However, deceased's sudden death does not warrant inference that his death was result of criminal act and, unless it is proved that death was the result of criminal act, presumption exists that it resulted from natural causes.—Treppish v. State, 252 N.W. 388, 126 Neb. 21.

Infliction of wounds before death

La.—State v. King, 117 So. 1, 176 La. 812.

Negativing natural causes

U.S.—U. S. v. Hewson, C.C.Mass., 26 F.Cas.No.15,360, Blunn Col.Cas. 532.

29. Ariz.—State v. Benham, 118 P.2d 91, 58 Ariz. 129.
Ga.—Jester v. State, 17 S.E.2d 736, 193 Ga. 202.
Iowa.—State v. Johnson, 274 N.W. 41, 223 Iowa 962.
Ky.—Bates v. Commonwealth, 143 S.W.2d 730, 284 Ky. 1.
Mont.—State v. Cates, 33 P.2d 578, 97 Mont. 173.—State v. Gunn, 300 P. 212, 89 Mont. 453.—State v. Gunn, 281 P. 757, 85 Mont. 553.
N.C.—State v. Howell, 10 S.E.2d 815, 218 N.C. 280.—State v. Redman, 8 S.E.2d 623, 217 N.C. 483.
Pa.—Commonwealth v. Shiroff, 200 A. 204, 131 Pa.Super. 565.
Tex.—Vallone v. State, 147 S.W.2d 227, 141 Tex.Cr. 220.—Reeves v. State, 101 S.W.2d 215, 131 Tex.Cr. 560.
Va.—Nelson v. Commonwealth, 191 S.E. 620, 168 Va. 742.
30 C.J. p. 139 note 32.

Participation in, or connection with, criminal act

(1) The state must show that accused was connected with, or participated in, the act that caused the death.—State v. Benham, 118 P.2d 91, 58 Ariz. 129.

(2) In prosecution for murder, burden was on the state to prove that deceased person met his death by the criminal act of another and that accused was present and assisted in the act or that she was performing some part in connection with it in a manner that would make her a principal in the crime.—O'Keefe v. State, Tex.Cr., 167 S.W.2d 1035.

(3) In a prosecution of one jointly indicted with another for murder in the first degree, the burden was on the state to prove that accused was particeps criminis in the killing.—Cranford v. State, 245 S.W. 189, 156 Ark. 39.

(4) In a prosecution for murder in the first degree, the burden is on the people to establish that accused was a principal in the killing.—People v. Sobieskoda, 139 N.E. 558, 235 N.Y. 411.

An act resulting mediately or immediately in death must be shown by the prosecution.—People v. Freeman, 60 P.2d 333, 16 Cal.App.2d 101.

Aiding and abetting

(1) In a prosecution for murder, the burden was on the commonwealth to prove that accused actually fired the shots, or aided and abetted others in doing the shooting.—Tester v. Commonwealth, 160 S.E. 62, 157 Va. 826.

(2) In a trial for murder of one concededly killed by accused's minor son, burden was on commonwealth to prove that accused was not only present when killing occurred, but was aiding and abetting son in the commission of the crime, by the performance of some overt act.—Hamilton v. Commonwealth, 15 S.E.2d 94, 177 Va. 896.

Administration of poison

(1) In a prosecution for murder by the use of strychnine, the state had the burden of proving that accused administered strychnine to deceased.—Osbon v. State, 13 N.E.2d 223, 213 Ind. 413.

(2) In a prosecution for involuntary manslaughter the burden was on state to prove that accused mixed morphine with coffee which caused death, or knew thereof.—State v. Korth, 217 N.W. 236, 204 Iowa 1360.

(3) The state had the burden of establishing that accused, charged with attempt to poison, gave poison to injured party on occasion in question notwithstanding state established motive.—Pullen v. State, 46 S.W.2d 1004, 120 Tex.Cr. 42.

Negativing manner of death

(1) The mere possibility that deceased received his fatal wound in some manner other than at the hands of accused need not be negatived by the state.—State v. Aiken, 1 S.E.2d 821, 215 N.C. 317.

(2) The prosecution need not prove that no one else fired the fatal shots.—People v. Spaulding, 141 N.E. 196, 309 Ill. 292.

to show whether it was natural, accidental, or felonious [30] On prima facie proof of the death of the person alleged to have been killed, the burden rests on accused to show that such person is still alive [31]

When a wound from which death might ensue has been inflicted with murderous intent and has been followed by death, the burden of proof is on accused to show that death did not result from such wound, but from some other cause [32]

Presumptions As to the fact of the victim's death no presumptions can be assumed against accused, but every presumption is in his favor [33] In the absence of inculpatory evidence there is a presumption that death was not caused by the criminal act of accused,[34] but there is no presumption that it was caused in any particular way, whether by suicide, by accused himself through innocent misadventure, or by the act of someone else undetected or unknown [35] However, the killing, when proved, is presumed to be felonious or unlawful until the contrary appears [36]

Evidence showing that accused's act was sufficient to cause death raises a rebuttable presumption that death was due to such act,[37] and death may be presumed to have been caused by apparent wounds, particularly where there is no suggestion in the record that deceased died from any other cause [38] While the law presumes accused innocent, there is also a strong presumption against suicide [39]

The possession of decedent's property by one not having rightful custody shortly after decedent's murder and robbery creates presumption that the possessor committed the murder.[40]

§ 187. Intent

Presumptions and burden of proof as to questions with reference to intent are treated specifically in the following sections, the specific question of intent to kill being discussed infra § 188, and questions with reference to assault with intent to kill infra § 189 and with reference to manslaughter infra § 190

Examine Pocket Parts for later cases.

§ 188. —— Specific Intent to Kill

The burden of proving a specific intent to kill is on the prosecution, although it may be inferred from the circumstances of the killing

The burden of proving an intent to kill on the part of accused is on the prosecution[41] except where it is not an essential element of the offense charged,[42] however, under the general rule that the law presumes that a person intends the natural, necessary, and probable consequences of his acts,[43]

30. Mich—Brown v People, 17 Mich 429, 97 Am D 195

Where manner not disputed

Even if accused, while disclaiming knowledge of killing, did not dispute manner of killing state had burden to show circumstances—State v Santello, 181 A 335 120 Conn 486

31. Iowa—State v Vincent, 24 Iowa 570, 95 Am D 753

32. Del—State v Johnson, 175 A 669, 6 W W Harr 311

Ga—Long v State, 4 S E 2d 75, 77, 60 Ga App 517, citing **Corpus Juris.** 30 C J p 139 note 37, p 110 note 40

Infliction of mortal wounds by two persons

(1) Where two persons independently inflict mortal wounds, the burden is on each to show that the wound inflicted by him did not cause death—U S v Abiog, 37 Philippine 137

(2) In a prosecution of a yard boss at a county farm for murder, wherein accused alleged that guard inflicted the injuries resulting in death, accused was required to show only that death resulted from blows administered by guard or to show such facts as would raise reasonable doubt thereof—Black v State, 132 S W 2d 267, 137 Tex Cr 516.

33. Miss—Harris v State 124 So 493 155 Miss 398

34. N Y—People v Miller, 177 N E 306, 257 N Y 54

35. N Y—People v Miller, supra

36. Ga—Fair v State, 155 S E 329, 171 Ga 112—Wilson v State, 69 Ga 224

Use of deadly weapon

Proof of an intentional killing with a deadly weapon raises a presumption against accused that the killing was unlawful—State v Bittings, 175 S E 299 206 N C 798—State v Keaton, 175 S E 296, 206 N C 682—State v Wall, 172 S E 216, 205 N C 659—State v Bailey, 171 S E 81, 205 N C 255—State v Ferrell, 163 S E 563, 202 N C 475—State v Miller, 149 S E 590, 197 N C 445—State v Robinson, 125 S E 617, 188 N C 784—State v Benson, 111 S E 869, 183 N C 795—State v Fowler, 66 S E 567, 151 N C 731

The taking of human life is presumed unlawful—Commonwealth v. Nelson, 144 A 542, 294 Pa 544

37. U S—U S v Wiltberger, Pa, 28 F Cas No 16,738, 3 Wash C C 515, reversed on other grounds 5 Wheat 76, 5 L Ed 37

30 C J p 139 notes 38, 39

38. Tenn—Franklin v State, 171 S W 2d 281.

39. Mo—State v Bauerle, 46 S W 609, 115 Mo 1

Defense of suicide see infra § 197

40 Ala—Frost v State, 142 So 427, 225 Ala 232

41. Ala—Grissett v State, 2 So 2d 399, 241 Ala 343

N C—State v Baker, 23 S E 2d 340, 222 N C 428

Pa—Commonwealth v Robinson, 157 A 689, 305 Pa 302—Commonwealth v Drago, 88 Pittsb Leg J 617

Va—Hamilton v Commonwealth, 15 S E 2d 94, 177 Va 896

30 C J p 110 note 47

Want of intent

Accused does not have the burden of proving want of intent—Jones v State, 13 Tex App 1

42 Ark—Rayburn v State, 141 S W 2d 532, 200 Ark 914

Cal—People v Cook, 102 P 2d 752, 15 Cal 2d 507

Ill—People v Faught, 194 N E 223, 359 Ill 81—People v Goldvarg, 178 N E 892, 346 Ill 398

43. Ala—Smith v State, 178 So 240, 28 Ala App 49—Lawman v State, 93 So 69, 207 Ala 419, 18 Ala App 569

Ark—Pixley v. State, 155 S W 2d 710, 203 Ark 42

Cal—People v Campanella, 116 P 2d 633, 46 Cal App 2d 697.

the intent or purpose to kill may be inferred from the circumstances of the killing,[44] such as the character of the assault,[45] the use of a deadly weapon,[46] or the use of a deadly weapon in a deadly manner.[47] Hence, where an assault is made with a dangerous or deadly weapon used in such a way as will naturally, probably, or reasonably produce death or jeopardize life, an intent to kill is presumed.[48] This rule, however, can be applied only where the assault has been committed with a mur-

Del—State v Lee, 171 A 195, 6 W W Harr 11
Iowa—State v Pinkerton, 208 N W 351, 201 Iowa 940
Ky—Luttrell v Commonwealth, 63 S W 2d 292, 250 Ky 334
N C—State v Wallace, 165 S E 716, 203 N C 284
Okl—Quinton v State, 9 P 2d 51, 53 Okl Cr 194
W Va—State v Hedrick, 130 S E 295, 99 W Va 529
30 C J p 140 note 49

Other statements of rule

(1) "It is a rule of universal application that every sane person is presumed to intend the natural and probable consequence of his deliberate and unlawful acts"—State v Schneider, 208 N W 566, 572, 53 N D 931

(2) "Every sane man is presumed to intend all of the natural and probable consequences flowing from his own deliberate act, therefore if one voluntarily and willfully does an act the direct and natural tendency of which is to destroy another life, the natural and irresistible conclusion, in the absence of qualifying facts is that the destruction of such person's life was intended"—People v Wilson, 174 N E 398, 342 Ill 358

(3) "Every person is presumed to contemplate the ordinary and natural consequences of his own acts, therefore when one man is found to have killed another, if the circumstances of the homicide do not of themselves show that it was not intended, but was accidental, it is to be presumed that the death of the deceased was designed by the slayer, and the burden of proof is on him to show that it was otherwise"—Pixley v State, 155 S W 2d 710, 713, 203 Ark 42—Harris v State, 34 Ark 469, 474

The law conclusively presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another—People v Garcia, 42 P 2d 1013, 2 Cal 2d 573

Proof of deliberate and premeditated malice

The law presumes guilty intent, where uncontradicted evidence in murder case showed that accused was actuated by deliberate and premeditated malice—People v Thomas, 271 P 1049, 205 Cal 594

44. Ala—Brown v State, 38 So 268, 142 Ala 287
Cal—People v Garcia, 42 P 2d 1013, 2 Cal 2d 573
Ind—Lloyd v State, 189 N E 406, 206 Ind 359—Landreth v State, 171 N E 192, 201 Ind 691, 72 A L R 891
Neb—Chadek v State, 294 N W 384, 138 Neb 626
Nev—State v Hall, 13 P 2d 624, 54 Nev 213
Wis—Farino v State, 234 N W 366, 203 Wis 374
30 C J p 141 note 56

Administration of poison

Criminal intent is inferred from every willful, deliberate, and unlawful administration of poison resulting in death—State v Schneider, 208 N W 566, 53 N D 931

Motive and intent

Mo—State v Seward, 247 S W 150

Words or acts

Pa—Commonwealth v Daynarowicz, 119 A 77, 275 Pa 235
Tex—Martin v State, 115 S W 2d 913, 134 Tex Cr 379

45. Ala—Brown v State, 38 So 268, 142 Ala 287
Ill—People v Guido, 152 N E 149, 321 Ill 397
Tex—Wilson v State, 126 S W 2d 977, 136 Tex Cr 590
Wis—Farino v State, 234 N W 366, 203 Wis 374

Striking head with fist

An inference of intent to kill is not warranted from the striking of a person on the head with the fist notwithstanding death results—Johnson v State, 58 P 2d 156, 59 Okl Cr 283

Vicious attack with club

It is a natural inference that a vicious attack with a club is with intent to inflict great bodily injury—People v Leddy, 273 P 110, 95 Cal App 659

46. Ala—Brown v State, 38 So 268, 142 Ala 287
Ind—Landreth v State, 171 N E 192, 201 Ind 691, 72 A L R 891—King v State, 118 N E 809, 187 Ind 220
Nev—State v Hall, 13 P 2d 624, 54 Nev 213
N J—State v Cox, 23 A 2d 555, 128 N J Law 108
Pa—Commonwealth v Kelly, 4 A 2d 805, 333 Pa 280
W Va—State v Bowles, 185 S E 205, 117 W Va 217—State v Hedrick, 130 S E 295, 99 W Va 529

Inference of fact and not presumption of law

Ark—Rhine v State, 42 S W 2d 8, 184 Ark 220
Miss—Busby v State, 170 So 140, 177 Miss 68, setting aside 168 So 286

Intentional use of deadly weapon

(1) When one kills another by the intentional use of a deadly weapon, design and motive may be inferred without more, and are presumed—Cooley v State, 171 So 725, 233 Ala 407—Austin v State, 4 So 2d 442, 30 Ala App 267, certiorari denied 4 So 2d 444, 242 Ala 19

(2) Intention to kill may be inferred from the intentional use of a deadly weapon on a vital part of the body—Commonwealth v Iacobino, 178 A 823, 319 Pa 65

Unlawful and unjustifiable use by officer

W Va—State v Holmes, 23 S E 2d 61

47. Iowa—State v Heinz, 275 N W 10, 223 Iowa 1241, 114 A L R 959—State v Berlovich, 263 N W 853, 220 Iowa 1288—State v Matheson, 261 N W 787, 220 Iowa 132—State v Brewer, 254 N W 834, 218 Iowa 1287—State v Leib, 201 N W 29, 198 Iowa 1315

In manner likely to produce death

Ind—Southerland v State, 197 N E 841, 209 Ind 308—McCutcheon v State, 155 N E 544, 199 Ind 247

48. Ala—Lawman v State, 93 So 69, 207 Ala 419, 18 Ala App 569
Iowa—State v Sullivan, 298 N W 881, 230 Iowa 817—State v Troy, 220 N W 95, 206 Iowa 859, opinion supplemented 221 N W 370
Mo—State v Gaters, 39 S W 2d 548—State v Hart, 274 S W 385, 309 Mo 77
Okl—Schmitt v State, 47 P 2d 199, 57 Okl Cr 102
Pa—Commonwealth v Scott, 130 A 317, 284 Pa 159
Tex—McBride v State, 51 S W 2d 385, 121 Tex Cr 409—Hanners v State, 300 S W 71, 108 Tex Cr 302—Collins v State, 299 S W 403, 108 Tex Cr 72—Twyman v State, 258 S W 480, 96 Tex Cr 439
Wis—Farino v State, 234 N W 366, 203 Wis 374
30 C J p 140 note 50

"It is elementary law that homicide with a deadly weapon justifies in itself a presumption that there was an intent to take life"—State v Jones, 179 A 320, 323, 115 N J Law 257

Presumption of fact

(1) Where one without sufficient cause of provocation unlawfully kills another by the use of a deadly weapon on a vital part of the body with manifest intent so to use it, the presumption of fact arises, in the absence of qualifying circumstances, that he intended the consequence of

derous weapon or has otherwise been of such nature that its probable and natural result would be to produce death,[49] and the manner of use even of a deadly weapon must always be considered.[50] It has been held that, where the mere fact of killing is shown and nothing more, the presumption is that the killing was intentional,[51] and there are statutes which are given that effect.[52] Where one human being kills another, it is not to be presumed, without evidence, that he committed the act unconsciously, accidentally, or while insane.[53]

Rebuttal of presumption The presumption of intent arising from proof of the killing[54] or from the use of a deadly weapon[55] is not conclusive, and it may be rebutted by evidence of other facts and circumstances,[56] and it has been held that, where there is direct evidence of eyewitnesses raising an issue as to the intent, there is no room for the application of the presumption arising from the use of a deadly weapon.[57]

§ 189. —— Assault with Intent to Kill

The burden is on the prosecution to establish the specific intent to take life.

In a prosecution for assault with intent to kill or murder, the prosecution must establish the specific intent to take life.[58] Such an intent may be presumed or inferred from the character of the as-

his act and to kill his victim —Commonwealth v Robinson, 157 A 689, 305 Pa 302—Commonwealth v Troup, 153 A 337, 302 Pa 246—Commonwealth v Green, 144 A 743, 294 Pa 573

(2) The presumption is not one of law but one of fact —Commonwealth v Kluska, 3 A 2d 398, 333 Pa 65

(3) The presumption arises from common knowledge that such use is likely to cause death —Commonwealth v Kluska, supra

Manner reasonably certain to produce death

Where an assault is made in a manner that is reasonably certain to produce death and which actually does cause death, the only rational presumption to be drawn therefrom is that the assailant intended to take life of person assailed —People v Patubo, 71 P 2d 270, 9 Cal 2d 537, 113 A L R 1303—People v Fleming, 23 P 2d 28, 218 Cal 300

The unlawful and intentional use of a deadly weapon in a deadly manner, resulting in death, raises the presumption of intent to kill —State v Pinkerton, 208 N W 351, 201 Iowa 940

Beating with ax

Presumptions of unlawful intent and intent of ordinary consequences is applicable where accused beat wife with ax —State v Butchek, 254 P 805 121 Or 141, denying rehearing 253 P 367, 121 Or 141

Shooting into a crowd

(1) One who shoots recklessly into a crowd in utter disregard of human life is presumed to intend to kill any or all of crowd —White v State, 153 So 387, 169 Miss 332

(2) Where one purposely shoots into a crowd, without intending to kill any particular person, but does kill one of the crowd, the law presumes the killing to have been intentional, because every man is supposed to intend the necessary consequences of his acts

Ind —Walker v State, 8 Ind 290
Mo —State v Edwards, 71 Mo 312

Stabbing with knife

(1) Where accused stabs deceased in neck with a pocketknife, an intent to kill will be presumed —Wims v State, 4 S E 2d 118, 60 Ga App 551

(2) The law presumes that knife wound was inflicted with intention that death should result therefrom - Luttrell v Commonwealth, 63 S W 2d 292 250 Ky 334

Use of loaded gun

(1) Intent to kill is presumed from use of loaded pistol —Hadnot v State, 7 S W 2d 566 110 Tex Cr 109

(2) The law presumes that one intentionally pointing loaded gun at another and discharging it intended usual consequences —Eckman v State, 209 N W 715, 191 Wis 63

One materially aiding another by shooting the person engaged in struggle is presumed to have shared intent of person aided —Luttrell v Commonwealth, 63 S W 2d 292, 250 Ky 334

49. N Y —People v Dinser, 106 N Y S 495 121 App Div 738 affirmed 84 N E 577, 192 N Y 80
30 C J p 141 note 51

Weapon not likely to produce death

Prior to repeal, Acts 1927, 40 Leg, p 412 c 274 § 3, a Texas statute provided that, if the instrument used was one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears -Studdard v State, 14 S W 2d 69, 112 Tex Cr 55 —Hanners v State, 300 S W 71, 108 Tex Cr 302—Forest v State, 300 S W 51, 108 Tex Cr 159—Cade v State, 258 S W 484, 96 Tex Cr 523—Twyman v State, 258 S W 480, 96 Tex Cr 439—Mason v State, 255 S W 986, 96 Tex Cr 48—Wolf v State, 253 S W 267, 95 Tex Cr 237—McCowan v State, 238 S W 921, 91 Tex Cr 310—30 C J p 141 note 51 [c]

50. Tex —Medford v State, 216 S W 175, 86 Tex Cr 237
30 C J p 141 note 52

51. Minn - -State v Miller, 186 N W 803, 151 Minn 386
30 C J p 141 note 53

52. Cal —People v Byler, 169 P 431, 35 Cal App 208
Mont —State v Colbert, 194 P 115, 58 Mont 584

Felonious intent is presumed when the homicide is proved, and state's case is free of exculpatory evidence —State v Copenbarger, 16 P 2d 383, 52 Idaho 411

53. N J —State v Silverio, 76 A 1069 79 N J Law 482

54. Ohio Munday v State, 26 Ohio Cir Ct 712

55 N C - -State v Hough, 50 S E 709 138 N C 663
Okl - Schmitt v State, 47 P 2d 199, 57 Okl Cr 102
30 C J p 291 note 44

56 Ga —Harrell v State, 95 S E 537, 22 Ga App 104
Iowa —State v Heinz 275 N W 10, 223 Iowa 1241 114 A L R 959
Or —State v Gibson, 73 P 333, 43 Or 184

In Pennsylvania

(1) A presumption of intent to kill arising from use of a deadly weapon on a vital part of another's body may be overcome by assailant's denial of such intent or by any other appropriate evidence -Commonwealth v Kluska, 3 A 2d 398, 333 Pa 65

(2) However, in an earlier decision such presumption was held not rebuttable —Commonwealth v Zec, 105 A 279, 262 Pa 251

57. Mo —State v Cole, 263 S W 207, 304 Mo 105—State v Burns, 213 S W 114, 278 Mo 446—State v Swearengin, 190 S W 271, 269 Mo 177
Presumption as to degree see infra § 199

58. Cal —People v Brown, 81 P 2d 463, 27 Cal App 2d 612

sault, the use of a deadly weapon, and other attendant circumstances, as appears supra § 79 However, the presumption of intent arising from the use of a deadly weapon is not conclusive,[59] unless the shooting is neither in self-defense nor under circumstances of justification[60]

In a prosecution for shooting with intent to kill, a presumption of law as to intent does not take the place of testimony of witnesses who were present and testified to details of shooting and attendant circumstances[61]

§ 190. —— Manslaughter

Although the prosecution has the burden of proof of the requisite criminal intent in a prosecution for manslaughter, it may be inferred from the circumstances

In a prosecution for manslaughter, the state has the burden of proving that the homicide was willful[62]

Under a statute prohibiting an intentional pointing of firearms at another, and providing that if death results from the discharge of such weapon the person pointing the same shall be guilty of manslaughter, the prosecution must prove affirmatively that the pointing was intentional[63]

In a prosecution for involuntary manslaughter, where there is a clear violation of the law leading necessarily to the fatal result, the law will infer the criminal intent[64]

§ 191. Malice

The burden of proof of malice is on the prosecution.

On a trial for murder, the burden of proving malice is on the prosecution,[65] and never shifts to accused[66]

Presumptions and inferences as to malice in prosecutions for murder are considered supra §§ 22–26, and in prosecutions for assault with intent to kill, supra § 78 The presumption of continuance of malice is considered supra § 27, and the burden of overcoming an inference of malice, supra § 28

When the question is as to whether or not accused, charged with intent to murder or with murder, acted on antecedent malice or fresh provocation, the law will presume that his action was on fresh provocation, unless there is evidence tending to connect the antecedent malice with the fresh provocation[67]

§ 192. Deliberation and Premeditation

The burden of establishing deliberation and premeditation is on the prosecution, although they may be inferred from the circumstances of the killing

The burden is on the prosecution to establish deliberation and premeditation,[68] or premeditated design to kill,[69] under statutes making such elements essential to the crime of murder or of murder in a particular degree, as discussed supra §§ 15, 30

Proof of the mere fact of killing,[70] or of killing

Ga —Jackson v State, 192 S E 613, 56 Ga App 374
N C —State v Gibson 145 S E 772, 196 N C 393—State v Kline 129 S E 417, 190 N C 177—State v Redditt 126 S E 506, 189 N C 176
Tex —Griffith v State, 152 S W 2d 349, 142 Tex Cr 304
30 C J p 141 note 65

59. Ga —Posey v State 95 S E 325, 22 Ga App 97
Okl —Jones v State, 154 P 689, 12 Okl Cr 255
30 C J p 291 note 45

60. Ga —Adams v State, 53 S E 804, 125 Ga 11

61. Mo —State v Wansong, 195 S W 999, 271 Mo 57
Neb —Vallas v State, 288 N W 818, 137 Neb 250

62. La —State v Elmore, 155 So 896, 179 La 1057

63 Del —State v Goodley, 33 A 226, 14 Del 484

64. N C —State v Gray, 104 S E 647, 180 N C 697
Inferences as to intent in voluntary manslaughter see supra § 44

65. Ga —Miller v State, 191 S E 115, 184 Ga 336
Ill —People v Motuzas, 185 N E 611, 352 Ill 340
La —State v Swain, 156 So 162, 180 La 20
Me —State v Sprague 199 A 705, 135 Me 470
Mont —State v Cates 33 P 2d 578, 97 Mont 173
N Y —People v Sobieskoda, 139 N E 558, 235 N Y 411
30 C J p 142 note 71

Absence of malice aforethought
A statute limiting punishment for murder without malice aforethought to five years is held not to impose burden on accused to prove absence thereof —Swilley v State, 25 S W 2d 1098, 114 Tex Cr 228, followed in Dunwoody v State, 25 S W 2d 1107

Premeditated malice
Ind —Everett v State, 195 N E 77, 208 Ind 115

66. Miss —Herman v State, 22 So 873, 75 Miss 340
N M —Territory v Lucero, 46 P 18, 8 N M 543

67. Okl —Clemmons v State, 126 P 704, 8 Okl Cr 159

68. Cal —People v Cook, 102 P 2d 752, 15 Cal 2d 507
Mont —State v Cates, 33 P 2d 578, 97 Mont 173—State v Le Duc, 300 P 919, 89 Mont 545—State v Gunn, 300 P 212, 89 Mont 453—State v Gunn, 281 P 757, 85 Mont 553
N C —State v Perry, 184 S E 515, 209 N C 604
Va —Nelson v Commonwealth, 191 S E 620, 168 Va 742
Wash —State v Davis, 108 P 2d 641, 6 Wash 2d 696
30 C J p 142 note 78

69 Fla —Miller v State 77 So 669, 75 Fla 136, L R A 1918C 562
Wash —State v Foley, 25 P 2d 565, 174 Wash 575

70. Mo —State v Evans 65 Mo 574
Va —Bradshaw v Commonwealth, 4 S E 2d 752, 174 Va 391
Wash —State v Gaines 258 P 508, 516, 111 Wash 446 citing **Corpus Juris,** and rule ordered to show cause why certiorari should not be denied Gaines v State of Washington 48 S Ct 339, 276 U S 607, 72 L Ed 728, error dismissed and certiorari denied 48 S Ct 468, 277 U S 81, 72 L Ed 793
30 C J p 147 notes 65, 66, p 294 note 97

The fact that killing is malicious in law does not necessarily imply the presence of willfulness, deliberation,

with a deadly weapon,[71] does not raise a presumption of premeditation or deliberation, so as to make the offense murder in the first degree under statutes dividing murder into degrees However, the premeditation or deliberation which is essential for this purpose may be inferred from the facts and circumstances of the killing.[72]

Where a homicide is committed in the perpetration of a felony deliberation and premeditated design are presumed [73]

The law presumes a homicide occurred because of an old grudge clearly proved, unless a new and sufficient provocation is shown, in which case the killing is presumed to have occurred on the new provocation.[74]

§ 193. Matters of Defense

In general it rests on accused to establish matters of justification, excuse, or mitigation where not shown by the evidence adduced against him, although the burden of proving an unlawful killing by accused rests on the prosecution throughout the trial.

The general rule, expressly stated by statute in some jurisdictions, is that, the fact of killing being first proved or admitted, any circumstances in mitigation or excuse or justification thereof are to be shown by accused,[75] unless they arise out of the

or premeditation—State v. Carter, 195 N W 567, 50 N D 270

Mere presence of specific intent to take life is not conclusive as to deliberation and premeditation—State v Bonofiglio, 52 A 712, 54 A 99, 67 N J Law 239, 91 Am S R 423

71. Ark—Weldon v State, 270 S W 968 168 Ark 534
Mo—Ex parte Johnson, 280 S W 702
N C—State v Hawkins, 199 S E 284, 214 N C 326—State v Bowser, 199 S E 31, 214 N C 249—State v Keaton, 175 S E 296, 206 N C 682—State v Miller, 149 S E 590, 197 N C 445
30 C J p 147 note 65, p 294 note 98

Use of deadly weapon in deadly manner

(1) Use of deadly weapon in deadly manner does not generate presumption of willfulness or premeditation—State v Johnson, 264 N W 596, 267 N W 91, 221 Iowa 8

(2) Deliberation and premeditation may not be inferred from the use of a deadly weapon in a deadly manner State v Brewer, 254 N W 834, 218 Iowa 1287—State v Leib, 201 N W 29, 198 Iowa 1315.

Use of gun

Premeditation may not be presumed from the use of a gun when facts and circumstances to the contrary are shown—State v Masato Karumai, 126 P 2d 1047, 101 Utah 592

Fact that town sergeant was armed raises no presumption of premeditation, where he had a right to be armed—Evans v Commonwealth, 170 S E 756, 161 Va 992

72. Ark—Bramlett v State, 156 S W 2d 226, 202 Ark 1165—Weldon v State, 270 S W 968, 168 Ark 534
Cal—People v Cook, 102 P 2d 752, 15 Cal 2d 507
Fla—Crawford v State, 1 So 2d 713, 146 Fla 729—Padgett v State, 163 So 291, 121 Fla 42—Hasty v State, 162 So 910, 120 Fla 269—Ryan v State, 92 So 571, 83 Fla 610.
Mont—State v Cates, 33 P 2d 578, 97 Mont 173
Mo—State v Page, 130 S W 2d 520—State v Kenyon, 126 S W 2d 245 250, 343 Mo 1168, quoting **Corpus Juris**—State v Cade, 34 S W 2d 82, 326 Mo 1132
N J—State v Cox, 23 A 2d 555, 128 N J Law 108—State v Jones, 179 A 320, 323, 115 N J Law 257, citing **Corpus Juris**
Or—State v Butchek, 254 P 805, 121 Or 141, citing **Corpus Juris,** and denying rehearing 253 P 367, 121 Or 141
Wash—State v Gaines, 258 P 508, 516, 144 Wash 446, citing **Corpus Juris,** and rule ordered to show cause why certiorari should not be denied Gaines v State of Washington, 48 S Ct 339, 276 U S 607, 72 L Ed 728, error dismissed and certiorari denied 48 S Ct 468, 277 U S 81, 72 L Ed 794
W Va—State v Farley, 23 S E 2d 616—State v Bowles, 185 S E 205, 117 W Va 217
Wis—Farino v State, 234 N W 366, 203 Wis 374
30 C J p 142 note 82, p 294 note 96

Reasonably warranting an inference
Cal—People v Smith, 104 P 2d 510, 15 Cal 2d 610—People v Wilhelm, 71 P 2d 815, 9 Cal 2d 567—People v Erno, 242 P 710, 195 Cal 272—People v Smith, 77 P 2d 277, 25 Cal App 2d 241—People v Golsh, 219 P 456, 63 Cal App 609

Particular circumstances

(1) Character of weapon used
Ark—Bramlett v State, 156 S W 2d 226, 202 Ark 1165—Weldon v State, 270 S W 968, 168 Ark 534
Cal—People v Vaiz, 131 P 2d 407, 55 Cal App 2d 714
N J—State v Cox, 23 A 2d 555, 128 N J Law 108
30 C J p 293 note 91

(2) Time consumed—State v Cox, supra

(3) Nature, location, and severity of the wounds
Ark—Bramlett v State, supra—Weldon v. State, supra
N J—State v Cox, supra
N Y—People v Ferraro, 55 N E 931, 161 N Y 365, 14 N Y Cr 266
N C—State v Bynum, 95 S E 101, 175 N C 777
30 C J p 293 note 92

(4) Acts, conduct, and language of accused
Ark—Bramlett v State, supra—Weldon v State, supra
Cal—People v Vaiz supra
Va—Williamson v Commonwealth, 23 S E 2d 240, 180 Va 277
30 C J p 293 note 89, p 294 note 95

(5) Circumstances surrounding and showing relationship of parties—People v Vaiz, supra

(6) Other particular circumstances—State v Hunt, 47 S E 49, 134 N C 684
30 C J p 293 notes 87, 90, 94

Particular facts held not to authorize inference
N C—State v Smith, 34 S E 235, 125 N C 615

73 Cal—People v Nolan, 14 P 2d 880, 126 Cal App 623
Idaho—State v Reding, 13 P 2d 253 52 Idaho 260
Okl—Fritz v State 128 P 170, 8 Okl Cr 342
30 C J p 148 note 79

74. Tenn—Leonard v State, 292 S W 849, 155 Tenn 325

75 Ala—Cooley v State, 171 So 725, 233 Ala 407—Austin v State, 4 So 2d 442, 30 Ala App 267, certiorari denied 4 So 2d 444, 242 Ala 19
Ariz—State v Ronce, 124 P 2d 543, 59 Ariz 158—Harris v State, 46 P 2d 1082, 46 Ariz 121—Villiborghi v State, 43 P 2d 210, 45 Ariz 275
Ark—Deatherage v State, 108 S W 2d 904 194 Ark 513—Ransom v State, 42 S W 2d 414, 184 Ark 257—Rhine v State, 42 S W 2d 8, 184 Ark 220—Wagner v State, 37 S W 2d 86, 183 Ark 1153—Beason v State, 265 S W 956, 166 Ark 142—Houston v State, 264 S W 869, 165 Ark 294
Cal—People v McLachlan, 87 P 2d 825, 13 Cal 2d 45—People v Cai-

evidence produced against him[76] However, there is authority that this rule does not mean that the burden of proof shifts to accused,[77] or that the burden of showing an unlawful killing does not rest on the prosecution throughout the trial[78]

son, 110 P.2d 98, 43 Cal App 2d 40—People v Soules, 106 P 2d 639, 41 Cal App 2d 298—People v Fitch, 81 P 2d 1019, 28 Cal App 2d 31—People v McCurdy, 35 P 2d 569, 140 Cal App 499—People v Connors, 12 P 2d 43, 124 Cal App 216—People v. Sprale, 262 P 795, 87 Cal App 724

Del—State v Lee, 171 A. 195, 6 W W Harr 11

Ga—Cone v State, 18 S E 2d 850, 193 Ga 420—Wilson v State, 10 S E 2d 861, 190 Ga 824—Walton v State, 10 S E 2d 755, 190 Ga 746

Ill—People v Brindley, 17 N E 2d 218, 369 Ill 486—People v Meyer, 163 N E 453, 331 Ill 608—People v Russell, 153 N E 389, 322 Ill 295

Ky—Caudill v Commonwealth, 166 S W 2d 1011, 292 Ky 761—Mason v Commonwealth, 165 S W 2d 24, 291 Ky 538—Canter v Commonwealth, 119 S W 2d 864, 274 Ky 508—Davis v Commonwealth, 97 S W 2d 43, 265 Ky 488—Hatfield v Commonwealth 95 S W 2d 562, 264 Ky 721—Lickliter v Commonwealth, 71 S W 2d 918, 255 Ky 471—Triplett v Commonwealth, 53 S W 2d 318 245 Ky 149 -Hensley v Commonwealth, 43 S W 2d 996, 241 Ky 367—Hendrickson v Commonwealth, 31 S W 2d 712, 235 Ky 462—Ferguson v Commonwealth, 5 S W 2d 897, 899, 224 Ky 151, citing **Corpus Juris**– Fleming v Commonwealth 294 S W 153, 219 Ky 697—Pitts v Commonwealth, 287 S W 32 215 Ky 837—Simmons v Commonwealth, 269 S W 732, 207 Ky 570

Mo—State v Allister, 295 S W 754, 756, 317 Mo 348, citing **Corpus Juris**—State v Roberts, 242 S W 669, 294 Mo 284

N C—State v Burrage 25 S E 2d 393, 223 N C 129—State v Beachum, 17 S E 2d 674, 220 N C 531—State v Sheek, 15 S E 2d 282, 219 N C 811—State v Howell, 10 S E 2d 815, 218 N C 280 -State v Bright, 2 S E 2d 541, 215 N C 537—State v Mosley, 195 S E 830, 213 N C 304—State v Robinson, 195 S E 821, 213 N C 273—State v Terrell, 193 S E 161, 212 N C 145—State v Keaton, 175 S E 296, 206 N C 682—State v Gregory, 166 S E 387, 203 N C 528—State v Holland, 138 S E 8, 193 N C 713—State v Robinson, 125 S E 617, 188 N C 784—State v Johnson, 113 S E 617, 184 N C 637

Okl—Patton v State, 25 P 2d 74, 55 Okl Cr 92—Thompson v State, 1 P 2d 811, 51 Okl Cr 335

Pa—Commonwealth v Weinberg, 120 A 406, 276 Pa 255

S C—State v Morrison, 113 S E 304, 121 S C 11

Tex—Musselman v State, 274 S W 628, 101 Tex Cr 96

Va—Nelson v Commonwealth, 191 S E 620, 168 Va 742—Adams v Commonwealth, 178 S E 29, 163 Va 1053—Mundy v Commonwealth, 131 S E 242, 144 Va 609—Scott v Commonwealth, 129 S E 360, 143 Va 510—Sims v Commonwealth, 115 S E 382, 134 Va 736

Wash—State v Davis, 108 P 2d 641, 6 Wash 2d 696—State v Gallagher, 103 P 2d 1100, 4 Wash 2d 437—State v Martin, 30 P 2d 660, 176 Wash 637

W Va—State v Hedrick, 130 S E 295, 99 W Va 529

30 C J p 142 note 83–p 143 note 88

Degree of proof required see infra § 326

Presumption of innocence of the homicide is dispelled by the direct admission of accused that he had stabbed deceased with his knife—People v Campanella, 116 P 2d 633, 46 Cal App 2d 697

Burden is not on state to disprove that accused was not free from fault Tyler v State, 97 So 573, 19 Ala App 380 reversed on other grounds Ex parte State ex rel Davis, 97 So 573 210 Ala 96

Burden of going forward with the evidence is on accused—Satterfield v State, 21 S E 2d 861, 68 Ga App 7

Burden of rebutting presumptions

(1) Accused who admitted killing with a deadly weapon assumed burden of rebutting presumptions arising from such admission State v Marshall 179 S E 427, 208 N C 127

(2) A threat of deceased to slap accused was not excuse sufficient to shift burden of presumption—Ballard v Commonwealth, 159 S E 222, 156 Va 980

Admission of fact of shooting

Person accused of maliciously shooting with intent to kill who admitted the shooting had to excuse his act—Davidson v Commonwealth, 87 S W 2d 119, 261 Ky 158

Legal excuse

Ky – Drake v Commonwealth, 91 S W 2d 1009, 263 Ky 107—Spicer v Commonwealth, 272 S W 909, 209 Ky 395

Legal excuse or justification

Ky—Adkins v Commonwealth, 168 S W 2d 1008, 293 Ky 329

Construction, operation, and effect of statutes

(1) The effect of the statute providing that on a trial for murder, the commission of homicide by accused being proved, burden of proving circumstances of mitigation or that justify or excuse it, is always on accused, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that accused was justified or excused, is to relieve the prosecution in cases of murder alone of the burden of proving malice and willful intent—People v Campanella, 116 P 2d 633, 46 Cal App 2d 697

(2) Statute is limited to "a trial for murder"—People v Lloyd, 275 P. 1010, 97 Cal App 664—People v Lopez, 253 P 169, 81 Cal App 199

(3) Similar statute is held not applicable in prosecutions for assault with intent to kill, but only in homicide cases—Francis v State, 71 S W 2d 469, 189 Ark 288—Parsley v State 235 S W 797, 151 Ark 246—Parsley v State, 230 S W 587 148 Ark 518

(4) Similar statute is held applicable to the crime of assault with intent to kill Smith v State, 212 P 1012, 22 Okl Cr 383

76. Ark—Wagner v State, 37 S W 2d 86, 183 Ark 1153

Del—State v Lee, 171 A 195, 6 W W Harr 11

Ga—Wilson v State, 10 S E 2d 861, 190 Ga 824- Walton v State, 10 S E 2d 755, 190 Ga 746—Satterfield v State, 21 S E 2d 861, 68 Ga App 7

Ill—People v Russell, 153 N E 389, 322 Ill 295

N C—State v Keaton, 175 S E 296, 206 N C 682—State v Gregory, 166 S E 387, 203 N C 528

Okl—Thompson v State, 1 P 2d 811, 51 Okl Cr 335

30 C J p 143 note 84, p 145 notes 10, 11

Under statute in some jurisdictions, the burden is not on accused where the prosecution's proof tends to show the crime is only manslaughter justifiable, or excusable

Ark—Rhine v State, 42 S W 2d 8, 184 Ark 220

Cal—People v Carson, 110 P 2d 98, 43 Cal App 2d 40—People v McCurdy, 35 P 2d 569, 140 Cal App 499—People v Connors 12 P 2d 43, 124 Cal App 216– People v Estrada, 213 P 67, 60 Cal App 477—People v Bannon, 209 P 1029, 59 Cal App 50

Okl—Smith v State, 212 P 1012, 22 Okl Cr 383

77 Ark—Scoggin v State, 159 S W 211, 109 Ark 510

30 C J p 143 note 85

78 N C—State v Howell, 10 S E 2d 815, 218 N C 280

Pa—Commonwealth v Flax, 200 A 632, 331 Pa 145

Theoretically, the burden of proving the absence of legal excuse or

The burden of proof rests on accused to establish any distinct affirmative matter of defense which is wholly disconnected from the body of the offense charged,[79] and the same is true as to defensive facts which are peculiarly within the knowledge of accused[80]

The burden is always on the state to rebut exculpatory evidence contained in its own case[81]

Where no mitigating circumstances are proved, the presumption is that there were none[82]

§ 194. —— Insanity and Intoxication

a. Insanity
b Intoxication

a. Insanity

While in some jurisdictions the state has the burden of proof of sanity of the accused, ordinarily the burden of proof of insanity relied on as a defense is regarded as resting on the accused.

While in some jurisdictions the burden of proving the sanity of accused rests on the state,[83] in a majority of jurisdictions, if a homicide or assault with alleged intent to kill is shown, accused has the burden of proving his insanity[84] at the time of the homicide,[85] if it is relied on as a defense, unless such insanity appears from the facts surrounding the crime[86] In either case the prosecution in the first instance may rely on the presumption of sanity.[87]

However, there is authority that, where evidence is introduced by accused or the state sufficient to raise a reasonable doubt of accused's sanity at the time of the homicide, the presumption of sanity ceases, and the burden of establishing sanity is on the state[88]

Proof of temporary or recurrent insanity of accused does not shift to the prosecution the burden of proving accused's sanity at the time of the homicide[89] If habitual, chronic, or permanent insanity

justification remains on the prosecution throughout the trial —Adkins v Commonwealth, 168 S W 2d 1008, 293 Ky 329

The accuser has burden of proving that accused is guilty of punishable homicide —Gill v Commonwealth, 31 S W 2d 608, 235 Ky 351

In prosecution for manslaughter the state had the burden of proving that the homicide was not justifiable — State v Elmore, 155 So 896, 179 La 1057

79. Iowa —State v Morphy, 33 Iowa 270, 11 Am R 122
30 C J p 143 note 86

80. Tex —Jones v State, 13 Tex App 1

81. Idaho —State v Copenbarger, 16 P 2d 383, 52 Idaho 441

82. Colo —Absher v People, 289 P 1081, 87 Colo 507

83. Ind —Noelke v State, 15 N E 2d 950, 214 Ind 427.
Mass —Commonwealth v. Clark, 198 N E 641, 292 Mass 409—Commonwealth v Soaris, 175 N E 491, 275 Mass 291
30 C J p 143 note 89

84. U S —U S v McGlue, C C Mass, 26 F Cas No 15,679, 1 Curt 1
Ala —Rowe v State, 11 So 2d 749—Manning v State, 116 So 360, 217 Ala 357
Ark —Kelley v State, 242 S W 572, 154 Ark 246
Cal —People v French, 87 P 2d 1014, 12 Cal 2d 720—People v Leong Fook, 273 P 779, 206 Cal 64
Ga —Clark v State, 145 S E 647, 167 Ga 341
Iowa —State v Maharras, 224 N W 537, 208 Iowa 127—State v Cooper, 191 N W 891, 195 Iowa 258
Ky —Young v Commonwealth, 81 S W 2d 595, 258 Ky 766
Mo —State v Corrington, 116 S W 2d 87—State v Murphy, 90 S W 2d 103, 108, 338 Mo 291, citing **Corpus Juris.**
N J —State v Ehlers, 119 A 15, 98 N J Law 236, 25 A L R 999
N C —State v Rogers, 6 S E 2d 499, 216 N C 731—State v Bowser, 199 S E 31, 214 N C 249
Pa —Commonwealth v Iacobino, 178 A 823, 319 Pa 65—Commonwealth v Morrison, 109 A 878, 266 Pa 223
R I —State v Fenik, 121 A 218, 45 R I 309
30 C J p 143 note 90
Burden of proof of insanity generally see Criminal Law § 576
Degree of evidence required see infra § 324

In Texas

(1) The rule stated in the text has been followed —Dobbins v State, 76 S W 2d 1057, 127 Tex Cr 380—Snow v State, 291 S W 558, 106 Tex Cr 222—McKenny v State, 288 S W 465, 105 Tex Cr 353

(2) However it has been held, on a plea of guilty, that the burden of proof of sanity, under statute is on the state —Harris v State, 172 S W 975, 76 Tex Cr 126

Insanity, lunacy, or unsoundness of mind

Okl —Hoggatt v State, 94 P 2d 264, 67 Okl Cr 377

Irresistible impulse

Pa —Commonwealth v. Foltz, 5 Pa Dist & Co 559

85. Iowa - State v Maharras, 224 N W 537, 208 Iowa 127
N C —State v Jones, 133 S E 81, 191 N.C. 753
Okl —Hoggatt v State, 94 P 2d 264, 67 Okl Cr 377

86. Iowa —State v Cooper, 191 N W 891, 195 Iowa 258

Throwing burning gasoline

The fact that accused killed husband by throwing burning gasoline on him was held not to relieve her of burden of proving insanity – State v Buck, 219 N W 17, 205 Iowa 1028

87. Ga —Clark v State, 145 S E 647, 167 Ga 341
Ill —People v Matter, 20 N E 2d 600, 371 Ill 333
Iowa —State v Cooper, 191 N W 891, 195 Iowa 258
Miss —Waycaster v State, 187 So 205, 185 Miss 25
Okl - Hoggatt v State, 94 P 2d 264, 67 Okl Cr 377
Pa —Commonwealth v Iacobino, 178 A 823, 319 Pa 65
Tex —Craven v State, 247 S W 515 93 Tex Cr 328
30 C J p 144 note 91

88. Fla —Thomson v State, 83 So 291, 78 Fla 400
Miss —Waycaster v State, 187 So 205, 185 Miss 25
Okl —Hoggatt v State, 94 P 2d 264, 67 Okl Cr 377 -Lemke v State, 32 P 2d 331 56 Okl Cr 1—Adams v State, 266 P 790, 40 Okl Cr 14—Alberty v State, 140 P 1025, 10 Okl Cr 616, 52 L R A ,N S , 248

Where prior insanity is shown, the state has the burden of proving accused's sanity in murder prosecution —Francks v State, 5 S W 2d 157, 109 Tex Cr 440

89. Miss —Ford v State, 19 So 665, 73 Miss 734, 35 L R A 117.
30 C J p 144 note 97.

is shown, the burden of proving that the offense was committed during a lucid interval rests on the state.[90]

Where insanity is shown to exist prior to the killing, there is a presumption of its continuance[91]

b. Intoxication

The burden of proof of intoxication as a defense rests on the accused

The burden of proving the defense of intoxication is on accused[92] However, there is authority that, where such defense is made, the burden is on the prosecution to establish that accused at the time of the homicide was of sound mind[93]

Voluntary drunkenness does not affect the presumption of a general criminal intent arising from the homicide, if other attendant circumstances afford neither justification, excuse, nor mitigation.[94]

§ 195. —— Self-Defense

In some jurisdictions the accused has the burden of establishing self-defense. In others the burden is on the state to show that the homicide was not in self-defense.

Where accused asserts that his act was done in self-defense, the rule as generally stated is that the burden is on him to establish such fact,[95] unless circumstances showing self-defense arise out of the evidence produced against him to prove the homicide[96] However, in some jurisdictions, on the ground that the burden of establishing the guilt of accused rests on the prosecution throughout the trial, a plea of self-defense is held not to place on

90. Mo—State v Schaefer, 22 S W 447, 116 Mo 96
30 C J p 144 note 96

91. Fla—Cochran v State, 61 So 187, 65 Fla 91
30 C J p 144 note 95

The presumption is merely evidentiary, and is not conclusive—State v Jones, 133 S E 81, 191 N C 753

92. Pa—Commonwealth v Iacobino, 178 A 823, 319 Pa 65—Commonwealth v Troy, 118 A 252, 271 Pa 265
30 C J p 144 note 1
Burden of proving defense generally see Criminal Law § 577
Degree of evidence required see infra § 324

Affirmative defense

In a murder prosecution, intoxication is an "affirmative defense" akin to plea of insanity, and, as every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crime until contrary is proved, burden of such defense is on accused—State v Cureton, 11 S E 2d 469, 218 N C 491

Degree of intoxication

(1) Accused has the burden of establishing the degree of his intoxication—Commonwealth v Walker, 129 A 453, 283 Pa 468

(2) The burden is on accused to show that he was so far intoxicated at the time of the homicide as to be incapable of forming a specific intent—State v Crietello, 197 N W 902, 197 Iowa 772

(3) Where accused asserts voluntary intoxication as a defense, it is incumbent on him to establish that degree of intoxication which rendered him incapable of forming the intent to kill, or of acting with premeditation—Long v State, 141 N E 691, 109 Ohio St 77

Mitigation of offense

In a homicide prosecution, the burden of proving drunkenness to mitigate the offense rests on accused—State v Kelly, 6 S E 2d 533, 216 N C 627—State v Hammonds, 3 S E 2d 439, 216 N C 67

93. Hawaii—U S v Wynne, 3 Hawaii Fed 345

94. N C—State v Trott, 130 S E 627, 629 190 N C 674, 42 A L R 1114, citing **Corpus Juris.**
29 C J p 1056 note 92
Presumption of intent to kill from act see supra § 188

95. Del—State v Stevenson, 188 A 750, 8 W W Harr 105—State v Lee, 171 A 195 6 W W Harr 11
Ky—Marcum v Commonwealth 160 S W 2d 660, 290 Ky 337—Satterfield v Commonwealth, 157 S W 2d 89 288 Ky 758—Newsome v Commonwealth, 153 S W 2d 949, 287 Ky 447—Turner v Commonwealth, 153 S W 2d 927, 287 Ky 499—Jackson v Commonwealth, 147 S W 2d 715, 285 Ky 313—Banks v Commonwealth 126 S W 2d 1122, 277 Ky 647—Terrill v Commonwealth 125 S W 2d 1015, 277 Ky 155—Huff v Commonwealth, 122 S W 2d 113, 275 Ky 578—Bigby v Commonwealth, 116 S W 2d 659, 273 Ky 335—Wireman v Commonwealth, 104 S W 2d 1083 268 Ky 339—Jeter v Commonwealth, 104 S W 2d 979, 268 Ky 285—Barton v Commonwealth, 38 S W 2d 218, 238 Ky 356
N C—State v Rogers, 6 S E 2d 499, 216 N C 731—State v Fleming, 163 S E 453, 202 N C 512—State v Bost, 133 S E 176, 192 N C 1—State v Robinson, 125 S E 617, 188 N C 784
Ohio—Ezell v State, 162 N E 106, 119 Ohio St 39
Pa—Commonwealth v Nelson, 144 A 542, 294 Pa 544—Commonwealth v Lockett, 139 A 836, 291 Pa 319—Commonwealth v Castellana, 121 A. 50, 277 Pa 117—Commonwealth v Weinberg, 120 A 406, 276 Pa 255
Wash—State v Turpin, 290 P 824, 158 Wash 103
30 C J p 144 note 3
Degree of proof required see infra § 326

In Alabama

(1) The rule stated in the text has been followed—Cooley v State, 171 So 725 233 Ala 407—Baugh v State, 117 So 426, 218 Ala 87—Austin v State, 4 So 2d 442, 30 Ala App 267, certiorari denied 4 So 2d 444 242 Ala 19—Coates v State, 199 So 830, 29 Ala App 616—McGee v State, 144 So 112 25 Ala App 232—30 C J p 144 note 3

(2) However, under other decisions, it has been held that accused need only introduce evidence of self-defense, and the burden of proof is not on accused—Lee v State, 132 So 61, 24 Ala App 168 Barbaree v State 130 So 903, 24 Ala App 127—Baker v State 98 So 213, 19 Ala App 432, certiorari denied Ex parte State ex rel Attorney General, 98 So 215, 210 Ala 374

96. Ky—Minix v Commonwealth, 100 S W 2d 825 266 Ky 801
30 C J p 145 notes 8-9

Statutory rule

By statute in some jurisdictions it is specifically provided that the burden of proving circumstances which justify or excuse the homicide devolves on accused, unless the proof on the part of the prosecution sufficiently manifests or tends to establish such fact—People v Elliott, 22 P 207, 80 Cal 296—30 C.J p 145 notes 10, 11

Fact that state's evidence tends to show extenuating circumstances, however, does not relieve accused of the burden of establishing self-defense—State v. Banks, 129 S E 715, 99 W.Va. 711.

accused the burden of proving it,[97] or, as the rule is sometimes stated, the burden is on the prosecution to show that the act was not in self-defense[98] Even though the burden of proof on the whole case lies with the prosecution, however, the burden of evidence, or of going forward with the evidence, may be transferred to accused[99] Thus, where the state's evidence shows a felonious killing or assault, and nothing more, if accused relies on self-defense for acquittal he must adduce evidence substantially tending to prove it.[1]

Elements of defense Where the burden is on accused to establish or adduce evidence of self-defense, the burden is on him to show the necessity, or a properly justified belief in the necessity, of his act[2] So also he must show the absence of a reasonable mode of retreat or escape,[3] unless under the circumstances affirmatively appearing from the evidence there was no duty on accused to retreat[4] The burden does not rest on accused to show affirmatively that he was free from fault in bringing on the difficulty[5] On the contrary, when the ingredients of self-defense have been established, the burden is on the state to show that accused was not free from fault,[6] unless it has been shown that the killing was unnecessary for self-defense.[7] However, there is authority that one who pleads self-defense is required to show that he

97. Ill—People v Duncan, 145 N E 810, 315 Ill 106
Mich—People v Cathey, 190 N W 753, 220 Mich 628
Minn—State v Quinn, 243 N W 70, 186 Minn 242
Mo—State v Davis, 116 S W 2d 110, 342 Mo 594—State v Malone, 39 S W 2d 786, 327 Mo 1217
N Y—People v Stern, 195 N Y S 348, 201 App Div 687, 39 N Y Cr 542
Va—Covington v Commonwealth, 116 S E 462, 136 Va 665
30 C J p 144 note 5

Rule applies in prosecution

(1) For assault with intent to kill—State v Hoerner, 215 N W 277, 55 N D 761

(2) For manslaughter—People v Turner 269 P 204, 93 Cal App 133

98. Iowa—State v Johnson 274 N W 41, 223 Iowa 962—State v Twine, 233 N W 476, 211 Iowa 450—State v Burzette, 222 N W 394, 208 Iowa 818
Mich—People v Asbury, 241 N W 144, 257 Mich 297
30 C J p 144 note 6

State must show felonious killing

The burden is not on accused to prove that he acted in self-defense, but the state must prove that the killing was done feloniously, and therefore not in self-defense—State v Thornhill, 178 So 343, 188 La 762—State v Disotell, 158 So 825, 181 La 149—State v Richardson, 144 So 587, 175 La 823—State v Conda, 101 So 19, 156 La 679—State v Linden, 97 So 299, 154 La 65—State v Vial, 96 So 796, 153 La 883—State v Scarborough, 94 So 204, 152 La 669

99. Mo—State v Davis, 116 S W 2d 110, 342 Mo 594
Okl—Proctor v State, 211 P 1057, 22 Okl Cr 415

1. U S—De Groot v U S, C C A Alaska, 78 F 2d 241
Mo—State v Roberts, 212 S W 669, 294 Mo 284
N Y.—People v. Stern, 195 N Y S 348, 201 App Div 687, 39 N Y Cr 542

Reason for rule

"There must be some substantial evidence of self-defense in the case before it can become an issue"—State v Davis, 116 S W 2d 110, 112, 342 Mo 594

2. Ala—Baugh v State, 117 So 426, 218 Ala 87—Jones v State, 121 So 1, 23 Ala App 77—McBride v State, 109 So 566, 21 Ala App 508—Vickers v State, 91 So 502, 18 Ala App 282, certiorari denied 91 So 924, 207 Ala 715
W Va—State v McMillion, 138 S E 732, 104 W Va 1
30 C J p 115 note 15

Good faith and necessary force

Accused must prove that the homicide was committed in good faith in fear of death or injury, and that no more force was used than necessary to avert the impending danger—Dixon v Commonwealth, 155 S W 2d 455, 288 Ky 57

Imminent peril of life or serious bodily harm

(1) Where accused sought to justify homicide on ground of self-defense, it was incumbent on him to show that at the time he fired the fatal shot he was in imminent peril, either actual or apparent, of suffering severe bodily injury at hands of deceased—Tortomasi v State, 189 So 901, 28 Ala App 499, certiorari denied 189 So 905, 238 Ala 253

(2) The burden is on accused to prove that he was in imminent peril of life or serious bodily harm, and that he shot to protect himself, although he was in his own home and had no duty to retreat, and was free from fault in provoking difficulty—Cooley v. State, 171 So 725, 233 Ala 407

Unless such fact appears from the state's evidence or other circumstances, the necessity to kill must appear affirmatively from the evidence adduced by accused—Thomason v Commonwealth, 17 S E 2d 374, 178 Va 489

3. Ala—Clemmons v State, 116 So 913, 217 Ala 519, denying certiorari 116 So 910, 22 Ala App 418—McBride v State, 109 So 566, 21 Ala App 508
30 C J p 145 note 16

4. Ala—Naugher v State, 17 So 24, 105 Ala 26—Lawler v State, 117 So 605, 22 Ala App 549

5. Ala—Patterson v State, 126 So 420, 23 Ala App 428
Okl—Edwards v State, 48 P 2d 1087, 58 Okl Cr 15
30 C J p 145 note 18

6. Ala—Bragg v State, 183 So 682, 236 Ala 270, granting certiorari 183 So 680, 28 Ala App 305—Walker v State, 126 So 818, 220 Ala 514—Buffalow v State, 122 So 633, 219 Ala 407—Huff v State, 126 So 417, 23 Ala App 426—Jones v State, 121 So 1, 23 Ala App 77—Dempsey v State 116 So 504, 22 Ala App 434—McBride v State, 109 So 566, 21 Ala App 508—Rhodes v State 107 So 722, 21 Ala App 285—Orr v State, 102 So 58, 20 Ala App 188, certiorari denied Ex parte Orr, 102 So 61 212 Ala 187—Lakey v State 101 So 537, 20 Ala App 78, certiorari denied Ex parte Lakey, 101 So 541, 211 Ala 615—Hackney v State, 101 So 85, 20 Ala App 65—Rice v State, 101 So 82, 20 Ala App 102—Thomas v State, 93 So 287, 18 Ala App 193—Minor v State, 78 So 317, 16 Ala App 401—Williams v State, 78 So 312, 16 Ala App 396
Okl—Edwards v. State, 48 P 2d 1087, 58 Okl Cr 15
30 C J p 145 note 19
Aggression or provocation by accused generally see supra §§ 117–121

7. Ala—Guffey v State, 62 So 293, 7 Ala App 52
Okl—Edwards v. State, 48 P 2d 1087, 58 Okl Cr 15.

was without fault in bringing on the difficulty,[8] or that he was not the aggressor, unless it is otherwise proved[9] The state is not bound to prove that deceased was free from fault[10]

Attack on officer Where one who is under arrest, or whom it is attempted to arrest, asserts the doctrine of self-defense as against the arresting officer, the burden is on him to overcome the presumption that the officer had not exceeded his duty and powers[11]

Presumptions. Where a person kills another, there is no presumption that he acted in self-defense,[12] and there is no presumption that an accused pleading self-defense is at fault solely because he was the aggressor[13]

By express provisions of the statutes in some jurisdictions, when the homicide takes place to prevent murder, maiming, or disfiguring, if the weapon or means used by the person attempting or committing such murder, maiming, or disfiguring are such as would have been calculated to produce that result, it is to be presumed that the person so using them designed to inflict the injury[14] The rule does not apply to an assault with a weapon which is not deadly,[15] unless from the manner of its use the intention to kill evidently appears,[16] or where there is failure to show that deceased was at the time of the difficulty using or attempting to use the deadly weapon of which he was possessed[17] The mere fact that deceased had a knife in his hand at the time of the homicide does not of itself raise the presumption of intent to kill,[18] although the fact that deceased held a gun in his hand may raise such a presumption,[19] unless the gun was not being used or in a position to be used[20] One who was in the act of drawing his pistol while uttering threats against accused must be held to have been "using" a deadly weapon under the statute[21] The statute is applicable where deceased did not in fact have a deadly weapon but where accused reasonably believed that deceased had a deadly weapon with which he was about to attack him,[22] and where deceased attacked a companion in whose defense accused claims to have acted[23] The statute cannot be applied to raise a presumption of intent to kill against accused because of accused's use of a deadly weapon[24] Although the statute uses the phrase "when the homicide takes place" it has, without discussion of the point, been held applicable to cases where accused was accused merely of making an assault with intent to murder[25]

§ 196. —— Accident

The defense that a homicide was accidental is not usually considered an affirmative defense, but as a denial of criminal intent, placing the burden of proving such intent on the prosecution However, under statutes placing on the accused the burden of proving circumstances of mitigation, justification or excuse, there is authority extending such burden to a claim of accidental killing

The defense that the homicide was accidental is not considered as an affirmative defense,[26] but as a denial of criminal intent, placing the burden of proving such intent on the prosecution[27] However,

8. S C—State v Floyd, 158 S E 809, 160 S C 420

9. Ind T—Burroughs v U S, 90 S W 8, 6 Ind T 164

10. Ala—Davis v State, 66 So 67, 188 Ala 59

11. Ky—Caperton v Commonwealth, 225 S W 481, 189 Ky 652

12. Tex—Dover v State, 277 S W 675, 102 Tex Cr 113

13 Ind—Males v State, 156 N E 403, 199 Ind 196

14. Tex—McGrew v State, 80 S W 2d 748, 128 Tex Cr 238—Gunn v State, 252 S W 172, 95 Tex Cr 276
30 C J p 145 note 24

Absolute presumption

Where the evidence raises the issue of the use of a deadly weapon by deceased, it is an absolute presumption that deceased intended to inflict the injury mentioned in the statute—Whatley v State, 149 S W 2d 98, 141 Tex Cr 436—McCoy v State 117 S W 2d 787, 135 Tex Cr 73—Gay v State, 115 S W 2d 929, 134 Tex Cr 356—Yarborough v State, 84 S W 2d 729, 129 Tex Cr 177

15. Tex—Priscoe v State, 236 S W 991 90 Tex Cr 650
30 C J p 145 note 25

16. Tex—Renow v State, 120 S W 174, 56 Tex Cr 343

17 Tex—McGrew v State, 80 S W 2d 748, 128 Tex Cr 238—Lawrence v State, 18 S W 2d 181 112 Tex Cr 659—Gunn v State 252 S W 172 95 Tex Cr 276
30 C J p 145 note 27

18 Tex—Hollman v State 212 S W 663, 85 Tex Cr 371

19. Tex—Holmes v State, 155 S W 205 69 Tex Cr 588

20. Tex—Anderson v State, 140 S W 457, 63 Tex Cr 525
30 C J p 146 note 30

21. Tex—Ward v State, 18 S W 793, 30 Tex App 687

22. Tex—McMichael v State, 93 S W 723, 49 Tex Cr 422

23. Tex—Deneaner v State, 127 S W 201 58 Tex Cr 624—Yardley v State, 100 S W 399, 50 Tex Cr 644, 123 Am S R 869

24. Tex—Borden v State, 62 S W 1064, 42 Tex Cr 648

25. Tex—Scott v State 81 S W 950 46 Tex Cr 305—Hall v State, 66 S W 783, 43 Tex Cr 479

26. N D—State v Hazlet, 113 N W 374, 16 N D 426
Pa—Commonwealth v Kluska, 3 A 2d 398 333 Pa 65—Commonwealth v Deitrick, 66 A 1007, 218 Pa 36
30 C J p 146 note 36

27. La—State v Graham 13 So 2d 249
Pa—Commonwealth v Kluska 3 A 2d 398 333 Pa 65—Commonwealth v Deitrick, 66 A 1007, 218 Pa 36
30 C J p 146 note 36
Burden of proving intent to kill see supra § 188

Homicide by misadventure

In a prosecution for manslaughter, the burden is not on accused to prove that the homicide occurred by misadventure but on the state to show an unintentional homicide due to a reckless disregard of others, an unlawful act malum in se or an act malum prohibitum proximately causing the homicide—State v Budge, 137 A 244, 126 Me. 223, 53 A L R 241.

under statutes placing on accused the burden of proving circumstances of mitigation, justification, or excuse where the commission of the homicide is proved, there is authority extending the burden to a claim of accidental killing [28]

There is no presumption that a killing was accidental [29]

Where accused claims that he shot to frighten deceased and accidentally killed him, the fact that at the time accused was angry, excited, or frightened will not necessarily raise the presumption that he failed to use due caution and circumspection [30]

§ 197. —— Other Particular Matters of Defense

The burden of proving matters of affirmative defense is on the accused

The burden is on accused to show that he killed to prevent murder[31] or the commission of a felony [32]

The burden has been held to be on accused to establish a defense that deceased committed suicide,[33] however, there is authority to the contrary [34]

Under a statute making the commission of an abortion resulting in death manslaughter in the first degree, unless it was necessary to preserve the life of deceased, the burden of proving the exception is on accused [35]

Where it is shown that accused sold a drink containing poison which caused death, the burden is on him to show that he did not put the poison into the drink or know it was there [36]

In a prosecution for an assault with a deadly weapon with intent to kill, accused has the burden of showing that the weapon was unloaded to sustain his defense that no assault was committed,[37] the presumption being that such weapon was loaded [38]

Defense of family or property Accused must show facts making apparent the necessity of exercising the defensive right of protecting his family or property [39]

The burden of proving an alibi, not being a matter peculiar to prosecutions for homicide, is considered in Criminal Law § 574

§ 198. Personal Relations

It has been both affirmed and denied that an additional presumption of innocence may grow out of the relation between the accused and the victim of the homicide, such as that of parent and child or husband and wife

There is authority that where a man is charged with the murder of his wife there is a strong presumption of innocence arising from the existence of the marital relation in addition to the legal presumption of innocence that exists in any case [40] Other authorities deny the existence of any such additional presumption in cases of wife murder,[41] or in the case of a parent charged with the murder of his child [42]

Where such presumption is asserted, it may, of course, be rebutted by evidence disproving the marital relation,[43] showing infidelity of accused,[44] ill treatment of deceased by accused,[45] or evidence of an unwilling marriage [46]

§ 199 Grade or Degree of Offense

A killing, or a killing with a deadly weapon, may raise a presumption of murder, the burden being on the accused to show that the offense was of a lower grade or excusable Under statutes defining murder and dividing it into degrees, ordinarily the proof of a killing or a killing

28. Ark—Jimmerson v State, 275 S W 662, 169 Ark 353
Cal—People v Grill, 91 P 515, 151 Cal 592

29 N J—State v Silverio, 76 A 1069, 79 N J Law 482

30. Idaho—State v Voss, 199 P 87 34 Idaho 164

31. Ga—Mitchell v State, 22 Ga 211, 68 Am D 493

32. Ky—Leach v Commonwealth, 112 S W 595, 129 Ky 497, 33 Ky L 1016

33. Del—State v Donovan, 8 A 2d 876 1 Terry 257

34. Iowa—State v Beeson, 136 N W 317, 155 Iowa 355, Ann Cas 1914D 1275
Tenn—Persons v State, 16 S W 726, 90 Tenn 291

35. Kan—State v Nossaman, 243 P 326, 120 Kan 177

N Y—People v Hammer, 186 N Y S 132, 194 App Div 712—People v McGonegal, 17 N Y S 147

36. N C—State v Keever, 97 S E 727, 177 N C 111

37. Ariz—Lee v State, 229 P 939, 27 Ariz 52

38. Ark—Ball v State, 95 S W 2d 632, 192 Ark 858

39. Tex Arkhammer v State, 296 S W 301 107 Tex Cr 191

Defense of sons

Where accused claimed that he killed in defense of his sons, the burden is on him to show that they were in imminent peril—Carroll v State, 68 So 530, 12 Ala App 69

Proof of ownership of property

Where an accused charged with murder relies on his legal right to protect his property, it is incumbent on him to show ownership of the property involved—Daniels v State, 155 S W 2d 990, 142 Tex Cr 587

40. Conn—State v Green, 35 Conn 203
30 C J p 146 note 49

41. Iowa—State v Meyer, 163 N W 214, 180 Iowa 210
Tex—Brown v State, 169 S W 437, 74 Tex Cr 356
30 C J p 146 note 50

42. Ala—Hawes v State, 7 So 302, 88 Ala 37

43. Conn—State v Green, 35 Conn 203

44. Conn—State v Watkins, 9 Conn 47, 21 Am D 712

45. Ga—Campbell v State, 51 S E 644 123 Ga 533—Roberts v State, 51 S E 374, 123 Ga 146

46. Idaho—State v McClurg, 300 P 898, 50 Idaho 762.

with a deadly weapon raises a presumption of murder in the second degree.

As has been noted, malice, which as discussed supra § 14, is the feature distinguishing murder at common law and under statutes declaratory thereof, may be inferred from the killing under rules stated supra § 23 or from the killing with a deadly weapon, see supra § 25, in the absence of circumstances of alleviation, excuse, or justification Hence, under such circumstances, the presumption is that the homicide is murder,[47] and the burden is on accused to show that the offense was of a lower grade [48] Under statutes defining murder and dividing it into degrees, while the presumption from the proof of a killing or a killing with a deadly weapon in the absence of other evidence as to the circumstances of the killing may be that it was murder,[49] although as to this there is conflicting authority,[50] the circumstances essential under the particular statute to characterize the offense as murder in the first degree, such as deliberation and premeditation,[51] or a premeditated design to effect death,[52] or express malice,[53] or the deliberate purpose to take life or do some great bodily harm,[54] cannot be presumed Hence, under the operation of such statutes, ordinarily it is held that the murder is murder in the second degree, where the definition of such degree does not include the essential elements hrembefore stated,[55] the burden being on the

47 Ga —Walton v State, 10 S E 2d 755, 190 Ga 746—Key v State, 170 S E 230, 177 Ga 329
Ind —McKee v State, 154 N E 372, 198 Ind 590
Miss —McGehee v State, 104 So 150, 138 Miss 822
Pa —Commonwealth v Foltz, 5 Pa Dist & Co 559
30 C J p 146 note 59

A felonious homicide is presumed to be murder and not manslaughter —Commonwealth v. Lessner, 118 A 24 274 Pa 108

Where the fact of the killing is controverted, the presumption does not arise against accused unless it is shown that he committed the homicide —Beach v State, 75 S E 139, 138 Ga 265

48. Ga —Wilson v State, 10 S E 2d 861, 190 Ga 824
Miss —Wright v State, 139 So 869, 162 Miss 494
N C —State v Terrell, 193 S E 161, 212 N C 145 State v Robinson, 125 S E 617, 188 N C 784—State v Pasour, 111 S E 779 187 N C 793
Pa —Commonwealth v Wemberg, 120 A 406, 276 Pa 255 —Commonwealth v Green, 10 Pa Dist & Co 56 affirmed 141 A 624, 292 Pa 579
30 C J p 146 note 60

Prima facie case

The state established a prima facie case when it produced evidence sufficient to show that accused killed deceased in the manner and in the county alleged in the indictment, thereby shifting to accused the burden of going forward with the evidence to show justification or such mitigating facts as would reduce the grade of homicide from murder, where state's evidence within itself did not show such justification or mitigation —Satterfield v State, 21 S E 2d 861, 68 Ga App 7

49. Iowa —State v Krampe, 140 N W 898, 161 Iowa 48
30 C J p 147 note 62
Definitions of degrees of murder see supra §§ 29–36.

A homicide will be deemed murder unless there is evidence of circumstances of mitigation reducing crime to manslaughter —People v Ford, 258 P 1111, 85 Cal App 258

50. Fla —Miller v State, 77 So 669, 75 Fla 136, L R A 1918C 562
30 C J p 147 note 63

51. Iowa —State v O'Donnell, 157 N W 870 76 Iowa 337
30 C J p 147 note 65
Presumption as to premeditation and deliberation see supra § 192

52 Fla —Dukes v State, 14 Fla. 499
30 C J p 147 note 66
Presumption as to intent see supra § 188

53. Tex —Hamby v State, 36 Tex 523
30 C J p 147 note 67
Presumption as to malice see supra § 191

54. Mo —State v Evans, 65 Mo 574

55. Cal —People v Connors, 12 P 2d 43, 124 Cal App 216
Idaho —State v Copenbarger, 16 P 2d 383 52 Idaho 441
Mo —State v Cade, 34 S W 2d 82, 326 Mo 1132—State v Henke, 285 S W 392
Mont —State v Le Duc, 300 P 919, 89 Mont 545—State v Chavez, 281 P 352, 85 Mont 544
N C —State v Burrage, 25 S E 2d 393, 223 N C 129—State v Bright, 2 S E 2d 541 215 N C 537
Pa —Commonwealth v Carroll, 191 A 610, 326 Pa 135—Commonwealth v Romanic, 166 A 902, 311 Pa 415 —Commonwealth v Troup, 153 A 337, 302 Pa 216—Commonwealth v Senft, 12 Pa Dist & Co 735—Commonwealth v Foltz, 5 Pa Dist & Co 559—Commonwealth v Grimm, 5 Pa Dist & Co 287—Commonwealth v Schurtz, 14 Northumb Leg J 165
Va —Hobson v Youell, 15 S E 2d 76, 177 Va 906—Bradshaw v Commonwealth, 4 S E 2d 752, 174 Va 391—Nelson v Commonwealth, 191 S E 620, 168 Va 742—Adams v. Commonwealth, 178 S E 29, 163 Va 1053—Ballard v Commonwealth, 159 S E 222, 156 Va 980—Nelson v Commonwealth, 150 S E 407, 153 Va 909 —Mercer v Commonwealth 142 S E 369, 150 Va 588—Mundy v Commonwealth, 131 S E 242, 144 Va 609—Martin v Commonwealth, 129 S E 348, 143 Va 479—McMurray v Commonwealth, 129 S E 252, 143 Va 489
Wash —State v Anderson, 116 P 2d 346, 10 Wash 2d 167—State v Davis, 108 P 2d 641, 6 Wash 2d 696—State v Gallagher, 103 P 2d 1100, 4 Wash 2d 437—State v Martin, 30 P 2d 660, 176 Wash 637
30 C J p 147 note 70

Effect on other presumptions

Presumptions that accused is innocent and that homicide is second degree murder may exist in the same case and together with other presumptions, force and effect of any or all of them being determinable after evidence is all in —Campbell v Commonwealth, 174 S E 856, 162 Va 818

Purpose of presumption

The presumption is not one established for the benefit and protection of a person charged with crime, but was originally adopted of necessity to assist the state in establishing a connected and complete prima facie case —State v Davis, 108 P 2d 641, 6 Wash 2d 696

The killing of officers of the law, while in the due and lawful performance of their duties, is presumed to be murder in second degree, in absence of contrary evidence —State v Lewis, 131 A 566, 3 W W Harr, Del, 123

Killing with a deadly weapon

(1) Generally a presumption of murder in the second degree arises from an intentional killing of a human being by another where a deadly weapon is used by him at a vital part of the body, in the absence of proof of other facts tending to show deliberation to raise such killing to

prosecution to raise it to the first degree,[56] and on accused to reduce the grade of the crime.[57] However, under a statute making a homicide murder in the first degree when perpetrated with a premeditated design to effect the death of the person killed, it has been held that the presumption of the premeditated design essential to the conviction of murder in the first degree may arise from the unexplained fact of the killing,[58] and this is more obviously so where the statutory phrase "premeditated design" is construed as requiring merely an actual intent to kill,[59] although under a similar statute it has also been held that in order to determine the classification of the offense there must be something more than a mere proof of the killing,[60] and a like conclusion has been reached by some authorities under a statute making the presence or absence of deliberation and premeditation the distinction between murder in the first and second degrees.[61] Under a statute placing the burden of proving circumstances of mitigation, justification, or excuse on accused where the homicide by him has been proved, it has been held that where the state has proved the commission of a homicide by accused the presumption is that he is guilty of murder in either the first or second degree unless the proof offered by the state itself tends to reduce the offense to manslaughter or to show that the act was justifiable or excusable.[62]

Attendant circumstances As has been shown supra § 192, the premeditation or deliberation essential to murder in the first degree may be inferred from the facts and circumstances of the killing and hence, where the circumstances are developed by the evidence, they may be sufficient to raise a presumption of murder in the first degree,[63] and it has been held that, where the facts characterizing the homicide are developed by the evidence, a presumption as to the degree of the homicide cannot be invoked.[64]

Where the facts and circumstances attending the killing are detailed by eyewitnesses, the question

murder in the first degree, or to show want of premeditation and malice to reduce the killing to manslaughter, or to show that such killing was excusable or justifiable—State v Miller, 143 S W 2d 241, 346 Mo 816—State v Cook, Mo, 44 S W 2d 90—State v Wampler, Mo, 58 S W 2d 266—State v Eason, 18 S W 2d 71, 322 Mo 1239—State v Snow, 238 S W 1069, 293 Mo 143

(2) The intentional use of a deadly weapon raises the rebuttable presumption that accused is guilty of murder in the second degree, but such presumption is not raised by the mere use of such a weapon—State v Debnam, 22 S E 2d 562, 222 N C 266

(3) Other statements of the rule

Mo—State v Page, 130 S W 2d 520—State v Westmoreland, 126 S W 2d 202—State v McCracken, 108 S W 2d 372, 341 Mo 697—State v Allister 295 S W 754, 317 Mo 348

N C—State v Perry, 184 S E 545, 209 N C 604—State v Walker, 137 S E 429, 193 N C 489

30 C J p 147 note 70 [b]

56 Mont—State v Chavez, 281 P 352, 85 Mont 544

N C—State v Perry, 184 S E 545, 209 N C 604

Pa—Commonwealth v Iacobino, 178 A 823, 319 Pa 65—Commonwealth v Romanic, 166 A 902, 311 Pa 415—Commonwealth v Grimm, 5 Pa Dist & Co 287

Va—Hobson v Youell, 15 S E 2d 76, 177 Va 906—Bradshaw v Commonwealth, 4 S E 2d 752, 174 Va 391—Nelson v Commonwealth, 191 S E 620, 168 Va 742—Adams v Commonwealth, 178 S E 29, 163 Va 1053—Puckett v. Commonwealth, 160 S E 19, 157 Va 800—Nelson v Commonwealth, 150 S E 407, 153 Va 909—Mercer v Commonwealth, 112 S E 369, 150 Va 588—McMurray v Commonwealth, 129 S E 252, 143 Va 489

Wash—State v Davis, 108 P 2d 641, 6 Wash 2d 696—State v Gallagher, 103 P 2d 1100, 4 Wash 2d 437—State v Martin, 30 P 2d 660, 176 Wash 637

30 C J p 148 note 71

57. Mont—State v Chavez, 281 P 352, 85 Mont 541

N C—State v Burrage, 25 S E 2d 393, 223 N C 129—State v Debnam, 22 S E 2d 562, 222 N C 266—State v Beacham, 17 S E 2d 674, 220 N C 531—State v Sheek, 15 S E 2d 282, 219 N C 811—State v Bright, 2 S E 2d 541, 215 N C 537—State v Mosley, 195 S E 830, 213 N C 304—State v Robinson, 195 S E 824, 213 N C 273—State v Keaton, 175 S E 296, 206 N C 682—State v Gregory, 166 S E 387, 203 N C 528

Pa—Commonwealth v Carroll, 191 A 610, 326 Pa 135—Commonwealth v Romanic, 166 A 902, 311 Pa 415—Commonwealth v Drago, 88 Pittsb Leg J 647

Va—Hobson v Youell, 15 S E 2d 76, 177 Va 906—Bradshaw v Commonwealth, 4 S E 2d 752, 174 Va 391—Nelson v Commonwealth, 191 S E 620, 168 Va 742—Adams v Commonwealth, 178 S E 29, 163 Va 1053—Puckett v Commonwealth, 160 S E 19, 157 Va 800—Ballard v Commonwealth, 159 S E 222, 156 Va 980—Nelson v Commonwealth, 150 S E 407, 153 Va 909—Mercer v Commonwealth, 112 S E 369, 150 Va 588—Mundy v Commonwealth, 131 S E 242, 144 Va 609—Scott v Commonwealth, 129 S E 360, 143 Va 510—McMurray v Commonwealth, 129 S E 252, 143 Va 489—Sims v Commonwealth, 115 S E 382, 134 Va 736

Wash—State v Davis, 108 P 2d 641, 6 Wash 2d 696—State v Gallagher, 103 P 2d 1100, 4 Wash 2d 437—State v Martin, 30 P 2d 660, 176 Wash 637

30 C J p 148 note 72

Presumptions and burden of proof as to matters of defense see supra § 193

58. Minn—State v Brown, 43 N W 69, 41 Minn 319

30 C J p 148 note 74

59. Wis—Farino v State, 234 N W 366, 203 Wis 374

30 C J p 148 note 75

60. Fla—Miller v State, 77 So 669, 75 Fla 136, L R A 1918C 562

30 C J p 148 note 76

61. Cal—People v Belencia, 21 Cal 544—People v Gibson, 17 Cal 283

62. Ariz—State v Ponce, 124 P 2d 543, 59 Ariz 158—Harris v State, 46 P 2d 1082, 46 Ariz 121—Viliborghi v State, 43 P 2d 210, 45 Ariz 275—Miranda v State, 26 P 2d 241, 42 Ariz 358

63. W Va—State v Hedrick, 130 S E 295, 99 W Va 529

64. Mo—State v Murphy, 90 S W 2d 103, 338 Mo 291—State v Majors, 44 S W 2d 163, 329 Mo 148—State v Cole, 263 S W 207, 304 Mo 105

30 C J p 148 note 83.

as to the grade of homicide rests on the evidence, and not on the presumption [65]

Rebuttal by evidence of prosecution. Where the state's own case shows adequate cause, reducing the offense to manslaughter, it is incumbent on the state to overcome the effect of such evidence to obtain a conviction of murder,[66] and accused may take advantage of the case as made by the state to reduce the homicide to manslaughter [67] So, where the state's evidence suggests an accidental killing or homicide by misadventure, the presumption of murder in the second degree does not arise [68]

Homicide in perpetration of felony Under a statute making a homicide committed in the attempted perpetration of a felony murder in the first degree, the prosecution must establish the fact that accused attempted the felony, and that death occurred as the outcome of such attempt [69] It is a legitimate assumption that one who plans a robbery or burglary, and by an overt act attempts to carry it out, has also planned to escape from the scene of his crime [70]

Murder by poison, lying in wait, etc Under statutes authorizing a conviction of murder in the first degree without proof of premeditation and deliberation under certain circumstances as in case of a homicide by poison, lying in wait, etc, proof of the intentional killing in such cases raises a presumption of murder in the first degree [71]

Murder without malice The burden is not on accused to prove the circumstances that would constitute the killing one on adequate cause or one of murder without malice as distinguished from murder with malice [72]

Treachery, etc In a jurisdiction where qualifying circumstances such as deliberate premeditation, treachery, or the like are essential elements required to raise a homicide to the degree of murder, such qualifying circumstances must be proved by the prosecution [73]

On a charge of involuntary manslaughter, the prosecution has the burden of proving that accused committed an unlawful act, not amounting to a felony, or an act not merely careless but also so rash and reckless as to approximate unlawfulness [74]

B ADMISSIBILITY IN GENERAL

§ 200. Statement of Rule

Generally speaking, the prosecution may show any matters tending to prove the elements of the homicide or the accused's participation therein, while the accused may show any matters tending to exculpate him or to reduce the grade of the offense, but to be admissible the evidence must be relevant, competent, and material to the issues

Broadly speaking, it is competent for the prosecution to show any matters which tend to establish any of the essential elements of the crime or to connect accused therewith, while accused may show any matters which justly tend to exculpate him or to reduce the grade of the offense [75] Any evidence which is otherwise pertinent and reasonably tends to show that a killing was unlawful is admissible in a prosecution for manslaughter even though the evidence may make a case of murder [76] Evidence, however, to be admissible must be relevant to the points in issue, and no circumstance is admissible which does not tend to establish a fact material to the prosecution or defense, or from which no presumption or inference can be reasonably drawn with reference to a material fact or inquiry involved in the issue [77] Where the peculiar

65 Mo —State v Malone, 39 S W 2d 786 327 Mo 1217—State v Cole, 264 S W 207, 304 Mo 105

66. Tex —Bibb v State, 205 S W 135, 83 Tex Cr 616

67. Mont —State v Kuum, 178 P 288, 55 Mont 436

68 N C —State v Gregory, 166 S E 387, 203 N C 528

69. N H —State v Greenleaf, 54 A 38, 71 N H 606
N Y —People v Marendi, 107 N E 1058, 213 N Y 600

70. **Under a statute** providing that a murder committed in the perpetration of certain felonies shall be deemed murder in the first degree, as respects whether there has been such a break in chain of events between initial crime and a homicide committed while departing from scene of initial crime as will relieve accused from the effect of such statute it is a legitimate assumption that one who plans a robbery or burglary, and by an overt act attempts to carry it out, has also planned to escape from scene of crime —Commonwealth v Kelly, 10 A 2d 431, 337 Pa 171

71. D C —Sabens v U S, 40 App D C 440
N C —State v Matthews, 55 S E 342, 142 N C 621

72. Tex —Brewer v State, 157 S W 2d 388 143 Tex Cr 136

73. Philippine —U S v Aslul, 21 Philippine 65—U S v Asilo, 4 Philippine 175—U S v Perdon, 4 Philippine 141
30 C J p 148 note 81

74. Pa —Commonwealth v Ushka, 198 A 165, 130 Pa Super 600

75 Tex - O'Keefe v State, Cr, 167 S W 2d 1035
30 C J p 148 note 90

Status of deceased as police officer
In prosecution for murder, where accused denied that he knew deceased was police officer, evidence of fact that deceased was an officer was admissible, in view of former admissions of accused that he possessed such knowledge, and fact that he lived and worked near by, and knew deceased, who wore badge —Commonwealth v Scott, 130 A 317, 284 Pa 159

76. Miss —Price v State, 120 So 751, 152 Miss 625

77. Ala —Bagwell v State, 117 So.

circumstances inspiring the deed are subject to controversy and uncertainty, the prosecution may advance any theory within the range of human experience and reasonable probability, and support it by appropriate evidence,[78] and conversely, in a prosecution based on circumstantial evidence, testimony presenting a theory consistent with accused's innocence should not be excluded because the circumstances incriminating accused are more numerous or more cogent[79]

§ 201. Corpus Delicti

Proof of the corpus delicti may be made by any legal evidence Evidence of circumstances tending to establish it is admissible The accused may introduce evidence of any fact tending to show that the alleged victim is alive, or, if dead, that he did not die as the result of a criminal agency

Proof of the corpus delicti in a homicide case, that is, the fact of death by the criminal agency of another, may be made by any legal evidence[80] It has been said that the best proof of the corpus delicti is the finding and inspection of the dead body,[81] but, in the absence of direct evidence, the corpus delicti may be sufficiently proved by circumstantial evidence, as explained infra § 312, and evidence of circumstances tending to establish it is admissible[82] Any fact which tends to show that the alleged victim is still alive, or that the person killed did not die as the result of criminal agency, may be shown by accused,[83] as, for example, that the alleged victim has merely absented himself from home[84] In order to establish the fact of death and to rebut accused's claim that deceased has merely gone away, evidence of declarations and acts of deceased negativing any intention of leaving home is competent[85] Evidence of events happening after the disappearance of deceased, and which could not have influenced his departure, is not admissible to support such a claim by accused[86] Competent evidence of the fact of death is not rendered objectionable merely because the witnesses give other incompetent testimony[87] Notwithstanding the introduction of other evidence to prove the corpus delicti, it is proper to admit the remains in evidence[88]

It is not necessary that the corpus delicti should be proved beyond a reasonable doubt before other evidence may be introduced which corroborates it or strengthens reasonable inferences drawn therefrom[89]

Particular circumstances It is ordinarily competent to admit evidence of sundry particular circumstances tending to show the corpus delicti, such as the condition of the body when found,[90] and the previous physical condition of deceased[91]

Proof of bloodstains at or about the place where violence is alleged to have been inflicted,[92] or upon articles of deceased found in possession of accused and not satisfactorily explained,[93] is competent

Previous threats of accused against deceased, however, are not admissible as proof of the corpus delicti,[94] and in a prosecution for wife murder it is not competent to admit evidence of the relations between accused and other women to prove the corpus delicti[95]

Confessions In the absence of other evidence

906, 22 Ala App 567—Stovall v State, 93 So 275, 18 Ala App 559
Mass—Commonwealth v Gettigan, 148 N E 113, 252 Mass 450
Mo—State v Stallings, 64 S W 2d 643, 334 Mo 1
Tex—Henderson v State, 106 S W 2d 291, 132 Tex Cr 596—McClellan v State, 40 S W 2d 87, 118 Tex Cr 473—Serna v State 7 S W 2d 543, 110 Tex Cr 220
30 C J p 149 note 97

78. Cal—People v Correa, 186 P 1055, 44 Cal App 631

79. Tex—Taylor v State, 195 S W 1147, 81 Tex Cr 359

80. Colo—Lowe v People, 234 P 169, 76 Colo 603
Tex—Gray v State, 268 S W 941, 99 Tex Cr 305, second rehearing denied 269 S W 1056, 99 Tex Cr 305
30 C J p 150 note 96

81. U S—U S v Williams, C C Me, 28 F Cas No 16,707, 1 Cliff 5

82. Ala—Rowe v State, 11 So.2d 749.
Ariz—La Grange v State, 222 P 411, 26 Ariz 102
Mo—State v Simler, 167 S W 2d 376, 383 citing **Corpus Juris.**
Tex—Black v State, 128 S W 2d 406, 137 Tex Cr 173—Langford v State, 63 S W 2d 1027, 124 Tex Cr 473
Wash T—Timmerman v Territory, 17 P 624, 3 Wash T 445
30 C J p 150 note 99

Burning of body
Removal of deceased's body from accused's home and burning of body could properly be shown in establishing corpus delicti—Stanley v State, 48 S W 2d 279, 120 Tex Cr 450

83. Mass—Commonwealth v Webster, 5 Cush 295 52 Am D 711

84. Kan—State v Winner, 17 Kan 298
30 C J p 150 note 2

85. Tex—Gay v State, 49 S W 612, 40 Tex Cr 242

86. Colo—Ausmus v People, 107 P 204, 47 Colo 167, 19 Ann Cas 491
Mo—State v Brown, 68 S W 568, 168 Mo 449

87. Or—State v Moran, 14 P 419, 15 Or 262

88 Ky—Sprouse v Commonwealth, 116 S W 344, 132 Ky 269

89. Cal—People v Ives, 110 P 2d 408, 17 Cal 2d 459—People v Kaye, 111 P 2d 679 43 Cal App 2d 802

90. Ala—Shamberger v State, 130 So 70, 221 Ala 538
Tex—Howard v State, 13 S W 2d 80, 111 Tex Cr 205—Gray v State, 268 S W 941 99 Tex Cr 305, second rehearing denied 269 S W 1056, 99 Tex Cr 305
30 C J p 150 note 99 [a]–[c]

91. Ind—Davidson v State, 34 N E 972, 135 Ind 254
30 C J p 150 note 99 [d]

92. U S—Wilson v U S, Ark, 16 S Ct 895, 162 U S 613, 40 L Ed 1090

93. U S—Wilson v U S, supra

94. Ky—Decker v Commonwealth, 128 S W 2d 600, 278 Ky 145

95. Ala—Spicer v. State, 65 So 972, 188 Ala. 9.

that a crime has been committed it is improper in the trial of a homicide case to admit in evidence the confession of accused,[96] but such confessions are properly admitted in conjunction with other evidence of the corpus delicti,[97] as where there is evidence from which the jury might reasonably infer the commission of the offense charged,[98] it being unnecessary to establish the corpus delicti beyond a reasonable doubt before evidence of the prisoners' confessions can be admitted.[99]

In infanticide cases Where the subject of the homicide is a newborn infant, a nonexpert may testify as to its having been a fully developed child.[1]

§ 202. Identity of Deceased

a In general
b Body not lost or destroyed
c Body wholly or substantially destroyed

a. In General

The identification of the body of the alleged victim is a material fact of which any competent evidence, direct or circumstantial, is admissible, but uncertain and remote evidence on such issue may be excluded

The identification of the body of a person alleged to have been murdered is a material fact of which competent evidence is admissible,[2] and circumstantial evidence is admissible to show identification.[3] Where, however, such evidence is uncertain, indefinite, and remote it may properly be excluded.[4] Proof by accused that the person alleged to have been murdered was seen by divers persons at various places after the time of the alleged murder cannot be rebutted by the prosecution by evidence that a person resembling deceased was at and about such places at the times stated.[5]

b. Body Not Lost or Destroyed

Where deceased's body is recovered, it is competent to prove its identity by relatives or acquaintances who are enabled to identify it by certain peculiar marks or other points of resemblance.

Where the body of deceased is recovered, it is competent to prove its identity by relatives or acquaintances who are enabled to identify it by certain peculiar marks, as birthmarks, or other points of resemblance,[6] even though the body may be mutilated and many of the features destroyed,[7] but it has been held that the witness can testify only as to the points of resemblance, and not to positive identity.[8] It is not essential that the witnesses testifying as to the identity of the body should have seen it, their testimony as to identity may be based on a minute description of it given by others who saw it, and who did not know deceased,[9] or the body may be identified by articles found thereon.[10] Accused will not be permitted to support a claim that the body found is not that of the person alleged to have been murdered by proof that the latter stated before his disappearance that he intended to leave and never make himself known.[11] It is improper to admit in evidence a membership card of a particular organization, found on the person of deceased, for the purpose of appealing to members of the jury who are members of the same organization, although ostensibly for the purpose of establishing the name of the victim.[12]

c. Body Wholly or Substantially Destroyed

Where the victim's body is substantially destroyed, evidence of the facts and circumstances surrounding the scene of the alleged crime is admissible where it tends to prove the identity of the victim

Where the body of the victim is substantially destroyed, evidence of the facts and circumstances surrounding the scene of the alleged crime is ad-

96 Minn.—State v. Laliver, 4 Minn. 368
Miss.—Pitts v. State, 43 Miss. 472

97. Ohio—State v. Knapp, 71 N.E. 705, 70 Ohio St. 380
30 C.J. p. 150 note 10

98 Minn.—State v. Laliver, 4 Minn. 368

99 Cal.—People v. Wolcott, 30 P.2d 601, 137 Cal.App. 355
Minn.—State v. Laliver, 4 Minn. 368

1. Ala.—Hubbard v. State, 72 Ala. 164

2. La.—State v. Dreher, 118 So. 85, 166 La. 924, certiorari denied Dreher v. State of Louisiana, 49 S.Ct. 36, 278 U.S. 641, 73 L.Ed. 556
30 C.J. p. 150 note 16

Evidence in substantiation

Evidence that police officer published contents of notebook found with deceased, and in consequence thereof interviewed certain persons and examined certain records and discovered who deceased was, was admissible as tending to explain the identification of deceased and making other evidence of his identification seem more natural and less mysterious.—Commonwealth v. Di Stasio, 1 N.E.2d 189, 294 Mass. 273

3 Tex.—Lee v. State, 161 S.W.2d 290, 144 Tex.Cr. 92
30 C.J. p. 151 note 17

Age

Testimony respecting the age of a decedent may be admissible on the issue of identification.—Ferguson v. State, 142 So. 659, 225 Ala. 202.—30 C.J. p. 150 note 16 [b]

4. Ala.—Stallworth v. State, 41 So. 184, 146 Ala. 8

5. Mass.—Commonwealth v. Webster, 5 Cush. 295, 52 Am.D. 711

6. Va.—Quillin v. Commonwealth, 182 S.E. 218, 165 Va. 768

7. Ala.—Shamburger v. State, 130 So. 70, 221 Ala. 538
Ind.—Keith v. State, 61 N.E. 716, 157 Ind. 376
30 C.J. p. 151 note 20

8. N.Y.—People v. Wilson, 3 Park. Cr. 199

9. Tex.—Taylor v. State, 35 Tex. 97

10. Iowa.—State v. Novak, 79 N.W. 465, 109 Iowa 717
30 C.J. p. 151 note 23

11. Iowa.—State v. Vincent, 24 Iowa 570, 95 Am.D. 753

12. Idaho.—State v. Lockhart, 111 P. 853, 18 Idaho 730.

missible where it tends to prove the identity of the victim.[13] So if the body is substantially destroyed, as by fire, its identity may be established by proof that deceased was accustomed to wear or carry certain articles found at the place of destruction,[14] and the length of time elapsing between the time of wearing such articles and the disappearance affects only the weight, not the competency, of such evidence,[15] or the identification may be made by proof identifying unconsumed fragments of the clothing as being parts of similar clothing worn by deceased.[16] Identity may also be shown by proof on the part of those acquainted with deceased that undestroyed portions of the body are parts of the body of the person missing.[17] Variance or uncertainty in such evidence goes to its credibility only, not its competency.[18] It is not competent for experts to testify that on account of natural and inevitable changes after death it is impossible for anyone to identify the dead person from his head preserved in alcohol.[19]

§ 203. Intent in General

To show the accused's criminal purpose and intent, evidence is admissible of the character and circumstances of the offense, of preceding threats or declarations, of the state of feelings between the persons involved, and of preparations

Evidence tending to show the criminal purpose and intent of accused is admissible in prosecutions for murder.[20] For this purpose, evidence is admissible of the character and circumstances of the offense,[21] of the state of feelings between the persons involved,[22] and of relevant circumstances preceding the commission of the offense,[23] such as preceding threats or declarations,[24] prior difficul-

13. Mont—State v Nordall, 99 P 960, 38 Mont 327
30 C J p 151 note 26

14. S C—State v Martin, 25 S E 113, 47 S C 67
30 C J p 151 note 27

15. N C—State v Williams, 52 N C 446, 78 Am D 248

16. Ala—Newell v State, 22 So 572, 115 Ala 54
30 C J p 151 note 29

Coat of kind worn only by decedent
In prosecution for murder, where deceased was partially identified by coat worn by him at time he was taken from accused's camp, it was competent for state to prove no one else about the camp wore such a coat at that time, the probative force of such evidence being for the jury—Snoddy v State, 101 So 303, 20 Ala App 168

17. Pa—Gray v Commonwealth, 101 Pa 380, 47 Am R 733
30 C J p 151 note 30

18. Mo—State v Dickson, 78 Mo 438
Pa—Gray v Commonwealth, 101 Pa 380, 47 Am R 733

19 Iowa—State v Vincent, 24 Iowa 570, 95 Am D 753

20. Cal—People v Pollock, 89 P 2d 128, 31 Cal App 2d 747

Warden's intent in confining deceased in sweatbox
In prosecution of work camp warden for murder of a convict who died as a result of being confined with twenty-one other convicts in a "sweatbox" for seven hours without adequate air and water, evidence showing the intent of warden in thus confining the convicts was admissible—Jacobson v State, Ga App, 21 S E 2d 863

Intent of principal
Where there was evidence that accused either fired the fatal shot or aided the person who did fire it, it was proper to show the intent of the principal—State v King, 197 N W 981, 198 Iowa 325

21. Ala—Redus v State, 9 So 2d 914
Cal—People v Silver, 108 P 2d 4, 16 Cal 2d 714, prior opinion, App, 102 P 2d 763
Tex—Newchurch v State, 121 S W 2d 998, 135 Tex Cr 619—Norwood v State, 120 S W 2d 806, 135 Tex Cr 406—Stalcup v State, 92 S W 2d 443, 130 Tex Cr 119—Ebers v State, 86 S W 2d 761, 129 Tex Cr 287
Wash—State v Adamo, 223 P 9, 128 Wash 419
30 C J p 151 note 33

Intoxication
In murder prosecution with defense of accidental death, evidence that prior to the attack upon deceased accused had indulged in intoxicating liquor was competent to show accused's mental state or intent—State v Sprague, Or, 136 P 2d 685

Spurting blood
Evidence that blood spurted from deceased's neck when accused stabbed him there was admissible to show character of wound and accused's intent—Baker v State, 288 S W 226, 105 Tex Cr 291

22. Ga—Davis v State, 149 S E 51, 40 Ga App 123
La—State v Plumlee, 149 So 425, 177 La 687
N M—State v Todd, 214 P 899, 28 N M 518
N C—State v Miller, 25 S E 2d 623, 223 N C 184
Tex—Smith v State, 119 S W 2d 1039, 135 Tex Cr 327
30 C J p 152 note 35

Showing animus of accused
Where the state's theory was that the homicide was intentional and malicious under circumstances constituting murder, and accused's theory was that the killing was unintentional and accidental, there was no error in submitting to the jury evidence of transactions indicating accused's animus closely connected in time with the shooting, contradicting accused's evidence—Vann v State, 92 So 182, 207 Ala 152

23. N M—State v Wright, 8 P 2d 443, 36 N M 74
Tex—Woods v State, 115 S W 2d 682, 134 Tex Cr 416

Taking out accident policy for victim
In prosecution for drowning wife, evidence concerning prior procurement of accident policy on wife's life was admissible as indicating intent—Dickerson v U S, 65 F 2d 824, 62 App D C 191, certiorari denied 54 S Ct 59, 290 U S 665, 78 L Ed 575

24. Ala—Lewis v State, 164 So 92, 231 Ala 211
Ga—Wingate v State, App, 22 S E 2d 758—Davis v State, 149 S E 51, 40 Ga App 123
Ky—Gambrel v Commonwealth 43 S W 2d 335, 241 Ky 39, followed in 43 S W 2d 339, 241 Ky 36 and 43 S W 2d 339, 241 Ky 37—Mason v Commonwealth, 272 S W 397, 209 Ky 157
La—State v Breedlove, 7 So 2d 221, 199 La 965—State v Woods, 109 So 519, 161 La 863
Mich—People v Zabijak, 280 N W 149, 285 Mich 164
Mo—State v Markel, 77 S W 2d 112, 336 Mo 129
Nev—State v Canak, 31 P 2d 1033, 55 Nev 293
Or—State v Casey, 213 P 771, 108

ties,[25] and preparations.[26] Evidence of the actions, conduct, and general demeanor of accused a short time before commission of the homicide is competent as tending to show his intent or state of mind at the time of the killing.[27] In the absence of evidence of intent based on the existence of ill feeling, evidence of friendly relations is inadmissible to show absence of intent,[28] nor may accused show absence of difficulty with, or threats toward, deceased by him on a particular occasion.[29] The opinion of a witness is not competent evidence of accused's intent.[30] Circumstances tending to rebut inference of intent to kill may be admitted on behalf of accused.[31]

Assault with intent to murder An intent to commit murder, necessary to sustain a conviction of assault with intent to commit murder, may be shown by direct evidence, such as an express confession or declaration of accused,[32] or by the acts and conduct of accused and other circumstances from which the jury may naturally and reasonably infer the intent.[33] In such prosecutions, evidence of the character of the means or instrument used,[34] the manner in which it was used,[35] the purpose to be accomplished,[36] the resulting wounds or injuries,[37] and the nature and extent thereof[38] is admissible to show the intent with which the assault was committed. Testimony that accused was an expert shot, offered to show that he could have killed his victim instead of merely wounding him had he so desired, has been held inadmissible on the issue of intent to kill, since lack of such intent does not necessarily follow from the fact of a mere wounding even by an expert shot.[39]

Or 386, motion denied 217 P 632, 108 Or 386
30 C.J. p 151 note 34, p 154 note 68

Interwoven threats

In murder prosecution, testimony of witness that accused had come to her home and said that three named persons, one of whom was victim, had to die because they knew too much about his counterfeiting business was properly admitted notwithstanding inclusion of other names in same threat, to show intent, since other names were so interwoven in threat that they were inseparable.—Bridges v. State, 83 S.W.2d 671, 128 Tex.Cr. 544

Suspicious remarks

In a prosecution of a wife for the murder of her husband, evidence of a remark by accused prior to the homicide that there was no justice in the county seat of the county where the homicide occurred, and that any one could commit murder and get clear, was admissible to show an intention on the part of accused to commit the crime.—State v. Giberson, 122 A. 724, 99 N.J.Law 85

25. Cal.—People v. Bannon, 209 P. 1029, 59 Cal.App. 50
Ga.—Jeffords v. State, 134 S.E. 169, 162 Ga. 573
Ky.—Newsome v. Commonwealth, 33 S.W.2d 36, 236 Ky. 344
N.C.—State v. Ray, 194 S.E. 482, 212 N.C. 725
Okl.—Tapedo v. State, 245 P. 897, 34 Okl.Cr. 165
Pa.—Commonwealth v. Ferry, 191 A. 130, 326 Pa. 129
30 C.J. p 157 note 16

Insult to wife

Testimony of deceased's wife showing insult that had been offered to her by accused and communication thereof to deceased was admissible in homicide prosecution to establish intent.—Morgan v. State, 49 S.W.2d 788, 121 Tex.Cr. 424

26. Del.—State v. Samuels, 67 A. 164, 22 Del. 36
La.—State v. Smith, 192 So. 92, 193 La. 665

27. Ala.—Roan v. State, 143 So. 454, 225 Ala. 428
Okl.—Hicks v. State, 106 P.2d 136, 70 Okl.Cr. 281.—Hennessee v. State, 54 P.2d 217, 58 Okl.Cr. 407.—O'Neal v. State, 31 P.2d 886, 35 Okl.Cr. 388.—Inman v. State, 210 P. 742, 22 Okl.Cr. 161.—Tallon v. State, 210 P. 309, 22 Okl.Cr. 89.—Williams v. State, 114 P. 1114, 4 Okl.Cr. 523
S.C.—State v. Gregory, 120 S.E. 499, 127 S.C. 87

Conduct on way to scene of homicide

Evidence of accused's conduct on way to scene of homicide, his intoxicated condition, mental attitude, and incidents of occurrence is admissible.—Kelly v. Commonwealth, 36 S.W.2d 344, 237 Ky. 690

28. Cal.—People v. Allen, 137 P. 1148, 166 Cal. 723

29. Ala.—Spelce v. State, 103 So. 691, 20 Ala.App. 412, certiorari denied Ex parte Spelce, 103 So. 705, 212 Ala. 559

30. Ga.—Fundy v. State, 30 Ga. 400

31. Ill.—People v. Lee, 93 N.E. 321, 248 Ill. 64
La.—State v. Van Duff, 84 So. 29, 146 La. 713

32. La.—State v. Stroud, 5 So.2d 125, 198 La. 841.—State v. Smith, 131 So. 296, 171 La. 452
30 C.J. p 152 note 40

33. Mo.—State v. Mathis, 18 S.W.2d 8, 323 Mo. 37
N.D.—State v. Mozinski, 191 N.W. 345, 49 N.D. 228
Va.—Drinkard v. Commonwealth, 183 S.E. 251, 165 Va. 799
30 C.J. p 152 note 41

Conjugal relations

In a prosecution of a husband for assault with intent to kill his wife, evidence concerning the relations of the parties was admissible to show intent.—State v. Mozinski, 191 N.W. 345, 49 N.D. 228

Criminal negligence

In prosecution for assault with intent to commit murder, criminal negligence may be shown to establish the intent to commit a violent injury, which is a necessary part of the assault.—People v. Alexander, 106 P.2d 450, 41 Cal.App.2d 275, rehearing denied 106 P.2d 916, 41 Cal.App.2d 275

34. Cal.—People v. Valliere, 56 P. 433, 123 Cal. 576.—People v. Hopper, 183 P. 836, 42 Cal.App. 499

35. Cal.—People v. Valliere, 56 P. 433, 123 Cal. 576

Extent of shooting

Where, on a prosecution for assault with intent to commit murder, accused contended that he shot only to scare Hallowe'en pranksters and only in one direction, it was proper to admit evidence that he shot in several directions and wherever boys were running.—State v. Bingaman, 230 N.W. 391, 210 Iowa 160

36. Cal.—People v. Valliere, 56 P. 433, 123 Cal. 576
30 C.J. p 152 note 44

37. Mo.—State v. Layton, 58 S.W.2d 451, 332 Mo. 216

Infliction of wound

In prosecution for felonious assault, evidence that wounds were inflicted was competent as tending to show intent with which accused fired revolver.—State v. Layton, supra

38. Ala.—Bone v. State, 142 So. 437, 25 Ala.App. 96, certiorari denied 142 So. 438, 225 Ala. 186.—Haney v. State, 101 So. 533, 20 Ala.App. 236, certiorari denied Ex parte Haney, 101 So. 537, 211 Ala. 614.—Bodine v. State, 93 So. 264, 18 Ala.App. 514

39. Ark.—Morton v. State, 20 S.W.2d 872, 180 Ark. 197

Threats to kill. On a prosecution for willfully threatening the life of the president of the United States, it is proper to admit evidence of other statements and instances wherein accused showed sympathy for the cause of enemies of the United States as shedding light on the intent of accused in making threats, indicating the serious nature of his statements as distinguished from mere idle talk or joking [40]

§ 204. Malice, Deliberation, and Premeditation

The admissibility of evidence on the question of malice, deliberation, and premeditation is considered in detail infra §§ 205–212

Examine Pocket Parts for later cases.

§ 205. —— Attending Circumstances Admissible

As a general rule, the acts and conduct of accused and the other circumstances and facts attending the homicide may be shown on the question of malice, premeditation, or deliberation

As a general rule, the acts and conduct of accused and the other circumstances and facts attending the homicide may be shown on the question of malice,[41] premeditation,[42] or deliberation [43] The fierceness and atrocity of the attack, the circumstances under which it was made, the nature and extent of the injury inflicted, the condition of the body and wearing apparel, the deadly nature of the weapon used, and the manner of using it, are proper subjects of inquiry [44] Evidence is admissible of matters occurring before the homicide which legitimately tend to show malice[45] or premeditation [46] So, also, within proper limits, evidence of previous declarations and threats by accused, considered infra § 206, and of the state of feeling between the parties, considered infra § 208, is admissible Any fact or circumstance tending to show whether the prisoner had a previously formed design to take the life of deceased is admissible in evidence on the issue of malice [47] Accordingly in a prosecution of a mother for murder of her infant child, the state may show that, prior to the child's birth, the mother meditated its destruction [48]

40. U S—U S v Reid, D C La, 49 F Supp 313

41. Ala—Higdon v State, 143 So 213, 25 Ala App 209
Cal—People v Page, 260 P 591, 86 Cal App 148
Fla—Britt v State, 102 So 761, 88 Fla 482
Ga—Harrell v State, 129 S E 666, 34 Ga App 577
Iowa—State v Bingaman, 230 N W 394, 210 Iowa 160
Ky—Radford v Commonwealth, 165 S W 2d 990, 292 Ky 77
La—State v Foster, 114 So 696 164 La 813
N C—State v Moore, 116 S E 161, 185 N C 637
Tex—Taylor v State, Cr, 166 S W 2d 713—Stapp v State, 147 S W 2d 256, 140 Tex Cr 669—McArthur v State, 105 S W 2d 227, 132 Tex Cr 447—Brazzell v State, 266 S W 788, 99 Tex Cr 33, leave to file second motion for rehearing denied 266 S W 1119, 99 Tex Cr 33—Pinson v State, 251 S W 1092, 94 Tex Cr 517
30 C J p 153 note 47

Universal malice
In murder prosecution, where universal malice is involved, state may fully show the act done, and pertinent facts showing that the act was greatly dangerous to lives of others in consequences—Bridges v State, 142 So 56, 225 Ala 81

42. Iowa—State v Williams, 192 N W 901, 195 Iowa 785
N C—State v Cash, 15 S E 2d 277, 219 N C. 818—State v Hudson, 10 S E 2d 730, 218 N C 219—State v Bowser, 199 S E 31, 214 N C 249
Wash—State v Evans, 258 P 845, 145 Wash 4
20 C J p 153 note 48

Fight with another
Evidence of fight between accused and another immediately following homicide was admissible to show premeditation—State v Mitchell, 138 S E 166, 193 N C 796

43. N C—State v Cash, 15 S E 2d 277 219 N C 818—State v Hudson, 10 S E 2d 730 218 N C 219—State v Bowser, 199 S E 31, 214 N C 249
Wash—State v Davis, 108 P 2d 641, 6 Wash 2d 696
30 C J p 153 note 49

Evidence of autopsies on others killed at same time, or other evidence showing how such others met their deaths, may be admissible as bearing on the question of deliberation of accused in killing the person with whose unlawful death he is charged—State v Mosley, Mo, 22 S W 2d 781—State v Rasco, 144 S W 149, 239 Mo 535

44 N C—State v Robertson, 81 S E 689, 166 N C 356
30 C J p 153 note 50

45. Ky—Evans v Commonwealth, 19 S W 2d 1091, 230 Ky 411, 66 A L R 360
S C—State v Bowers, 115 S E 303, 122 S C 275
Tex—Kelley v State, 112 S W 2d 470, 133 Tex Cr 460—Burkhardt v State, 74 S W 2d 692, 127 Tex Cr 1.
Va—Rasnake v Commonwealth, 115 S E 543, 135 Va 677
Wash—State v Stone, 13 P 2d 427, 169 Wash 233
30 C J p 153 note 51

Information against accused as a jointist was properly admitted to prove his malice against his wife, her name being endorsed thereon as a state's witness—State v Cook, 217 P 12, 126 Wash 81

Procuring pistol
Where, prior to the homicide decedent defendants and others were engaged in a crap game in which one of defendants pawned his pistol, and such defendant was searching for decedent from the time the game ended and he redeemed his pistol until the shooting occurred, evidence concerning the game and the procuring of the pistol was admissible to show malice—State v Oliver, 92 So 217, 151 La 659

Extent of inquiry matter of judicial discretion
The extent to which a witness may enter into detail in testifying as to communications made to accused for the purpose of showing his state of mind with respect to malice must be left largely to the discretion of the trial court—State v Bowers, 115 S E 303 122 S C 275

46. Ala—Mann v State, 32 So 704, 134 Ala 1

47. N J—State v Banusik, 64 A 994, 84 N J Law 640
30 C J p 153 note 55

48. Fla—Robinson v State, 68 So 649, 69 Fla 521, L R A 1915E 1215, Ann Cas 1917D 506.

Evidence offered on the issue of malice, premeditation, or deliberation, however, is inadmissible where it has no legitimate bearing on such issue [49] Accordingly, it has been held that evidence tending to show a malevolent spirit, a wicked and abandoned disposition, without malice directed toward deceased, is inadmissible [50] So, also, the flight of accused following the commission of the offense is inadmissible to show premeditation and deliberation [51] Matters not known to accused are not admissible on the issue of malice [52]

Express or implied malice The acts of accused and other circumstances attending commission of a homicide are admissible on the issue of express malice [53] Implied malice is proved by showing that the killing was done suddenly, without justification or excuse and without provocation, or without sufficient provocation to reduce the homicide to manslaughter [54] Malice, express or implied, may also be proved by showing that an unlawful act resulting in the death of another was attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, without reference to what was passing in the mind of accused at the time he committed the offense [55] The fact that external circumstances may exist capable of proof showing express malice, such as declarations of accused or his lying in wait for deceased, does not prevent the proof of other circumstances from which malice may be implied [56]

The defense may introduce facts tending to explain circumstances relied on by the prosecution to show deliberation,[57] premeditation,[58] or malice,[59] but accused may not introduce irrelevant or immaterial evidence to negative malice [60] He cannot show habitual blind obedience to his father in commission of the homicide in rebuttal of the inference of malice,[61] and since the flight of accused is inadmissible on the question of premeditation and deliberation, as has been considered above in this section, the motive of the flight is not admissible to repel an inference of premeditation and deliberation [62] Where accused is charged with the commission of a murder in the course of an unlawful arrest, evidence respecting his belief that it was his duty to arrest deceased is incompetent on the issue of malice in fact [63]

§ 206. —— Previous Declarations and Threats by Accused

a In general
b Nature of threat or declaration
c Against whom directed
d Time of threat or declaration

a. In General

Subject to the general rules as to competency and relevancy, evidence of previous threats and hostile declarations by accused against deceased is admissible to show malice, premeditation, and state of mind

Subject to the general rules as to competency and relevancy,[64] threats of accused to do violence to the person eventually slain, and all declarations and demonstrations of personal hostility, are admissible in evidence, as evincing malice and premeditation and tending to prove the state of mind of accused [65] Such evidence is of special importance

49. Ala —Brown v State, 116 So 812 22 Ala App 463
Iowa —State v Brewer, 254 N W. 834 218 Iowa 1287
N C - State v Birkman, 152 S E 630 198 N C 545
Mental ailment not existing at time of offense
Iowa —State v Brewer, 254 N W 834, 218 Iowa 1287

50 Ark —Breysacher v State, 184 S W 433, 123 Ark 101

51. N C —State v Payne, 197 S E 573 213 N C 719 —State v Steele, 130 S E 308 190 N C 506—State v Collins, 126 S E 98, 189 N C 15

52. Tex —Woodward v State, 58 S W 135, 42 Tex Cr 188
30 C J p 153 note 58

53 N C —State v Robertson, 81 S E 689, 166 N C 356
30 C J p 153 note 59

54. Del —State v Di Guglielmo, 55 A 350, 20 Del 336

55. Ga —Jordan v State, 22 Ga 545.
30 C J p 154 note 61.

56. Ill —People v Pursley, 134 N E 128, 302 Ill 62

57 Tex —Anderson v State, 214 S W 353, 85 Tex Cr 422

58 N J —Schlemmer v State, 15 A 836 51 N J Law 23
30 C J p 154 note 64

59 Ind -- Landreth v State 171 N E 192 201 Ind 691, 72 A L R 891
Tex —Waggoner v State 256 S W 266 96 Tex Cr 96
Accused may introduce evidence of self-defense to rebut inference of malice —Landreth v State, 171 N E 192, 201 Ind 691 72 A L R 891

60. Mont —State v Park, 289 P 1037, 88 Mont 21

61 Ky —Rainey v Commonwealth, 40 S W 682, 19 Ky L 390

62. N C -State v Collins, 126 S E 98, 189 N C 15

63. Ark —Jett v State, 236 S W 621, 151 Ark 439

64. When threats against deceased irrelevant
Evidence of threats by accused against deceased are inadmissible where deceased was killed while an innocent bystander to a difficulty between accused and a third person and where the prior threats were in no way connected with the difficulty during which deceased was shot —Naler v State 118 So 880, 25 Ala App 486

65. Ala - Shick v State, 181 So 688 236 Ala 667—Hendry v State 112 So 212 215 Ala 635—Davis v State 105 So 677, 213 Ala 541—White v State, 96 So 709, 209 Ala 516—Pynes v State, 92 So 666 207 Ala 413—Webb v State, 157 So 262 26 Ala App 241—Drummond v State, 102 So 723 20 Ala App 286, certiorari denied Ex parte Drummond, 102 So 726, 212 Ala 410—Grimsley v State, 101 So 156, 20 Ala App 155—Rice v State, 101 So 82, 20 Ala App 102—Gary v State, 92 So 533 18 Ala App 367—St John v State, 92 So. 25, 18 Ala App 285—Clark v State, 91 So 328, 18 Ala App 209, cer-

when accused claims that the homicide was excusable or justifiable.[66] Evidence of previous threats and hostile declarations by accused, if otherwise competent, is admissible, even though the threats or declarations were not communicated to, or made in the presence of, deceased,[67] and despite the fact that such evidence may reveal a former arrest of accused[68] or reflect on his character,[69] and even though the place and precise time of the making of the threats are not shown.[70] Matters essential to the proper understanding of a threat may also be shown,[71] but evidence of prior threats attributed to, but not shown to have been made by, accused is inadmissible.[72] Even if the corpus delicti must be proved before threats of accused may be shown, it is enough that there is evidence making it a question for the jury.[73]

Express malice may be proved directly by showing the deliberate intent of accused expressed or declared in words at the time of the killing or shortly before it took place.[74]

Assault with intent to murder. The rule admitting threats as evidence of malice applies in prosecutions for assault with intent to murder,[75] and tes-

tiorari denied 91 So 921, 207 Ala 710

Ark—Humpolak v State, 300 S W 426, 175 Ark 786

Fla—Wester v State, 193 So 300, 141 Fla 369—Walker v State 113 So 96, 93 Fla 1069—Lamb v State, 107 So 530, 90 Fla 844, stay of mandate granted 107 So 535, 91 Fla 396

Ga—Ethridge v State, 136 S E 72, 163 Ga 186—Davis v State, 149 S E 51, 40 Ga App 123

Ind—Johnson v State, 167 N E 531, 201 Ind 264

Ky—Holman v Commonwealth, 165 S W 2d 167 291 Ky 622—Decker v Commonwealth, 128 S W 2d 600, 278 Ky 145—Clark v Commonwealth 108 S W 2d 532 269 Ky 587—Slone v Commonwealth 99 S W 2d 207, 266 Ky 366—Ferguson v Commonwealth 34 S W 2d 959, 237 Ky 93—Evans v Commonwealth, 19 S W 2d 1091, 230 Ky 411, 66 A L R 360—Woodard v Commonwealth, 14 S W 2d 773, 228 Ky 254—Berry v Commonwealth, 13 S W 2d 521 227 Ky 528—Perkins v Commonwealth, 12 S W 2d 297, 227 Ky 129—Evans v Commonwealth 299 S W 553, 221 Ky 648—Johnson v Commonwealth 286 S W 1053, 215 Ky 717—Decker v Commonwealth, 241 S W 817, 195 Ky 64

La—State v Graffam, 13 So 2d 249—State v Avery, 145 So 535 176 La 264—State v Sharp, 141 So 859, 174 La 860—State v Dunn, 109 So 56, 161 La 532, error dismissed Dunn v State of Louisiana 47 S Ct 344, 273 U S 656, 741, 71 L Ed 825—State v King 106 So 461, 159 La 972—State v Oliver, 92 So 217, 151 La 659

Miss—McClellan v State, 184 So 307, 183 Miss 181—Self v State, 174 So 44, 178 Miss 560—Russell v State, 164 So 582, 174 Miss 333—Lambert v State, 158 So 139, 111 171 Miss 474, quoting **Corpus Juris**—Hardy v State, 108 So 727, 143 Miss 352

Mo—State v Bowenkamp, 39 S W 2d 753—State v Davis 7 S W 2d 264

N C—State v. Hawkins, 199 S E 284, 214 N C 326—State v Ballard, 131 S E 370, 191 N C 122

Okl—Tuggle v State, 209 P 187, 20 Okl Cr 314

Pa—Commonwealth v De Matteo, 195 A 873, 328 Pa 359

Tex—Smith v State, 119 S W 2d 1039, 135 Tex Cr 327—Kelman v State, 116 S W 2d 721, 134 Tex Cr 535—Henderson v State, 106 S W 2d 291, 132 Tex Cr 596—Davis v State, 258 S W 188, 96 Tex Cr 447

30 C J p 154 note 68

Admissibility of evidence of threats generally see infra § 236

Admissibility of threats to show motive see infra § 228

Evidence of ill feeling generally as evidence of malice see infra § 208

Threats contained in divorce record

In prosecution for murder of wife, admitting, over objection to entire record, original record in divorce suit brought by wife against accused consisting of petition alleging accused threatened wife's life, answer, and order, was not error—Fortenberry v State, 165 S E 215, 175 Ga 317

Testimony contradicted

Testimony as to prior threats of accused against deceased, although contradicted, is none the less competent—State v Johnson, 138 S E 19, 193 N C 701

66. N Y—People v Johnson, 77 N E 1164, 185 N Y 219—People v Gaimari, 68 N E 112, 176 N Y 84

67. Ark—Crowe v State, 13 S W 2d 606, 178 Ark 1121

Ga—Collins v State, 111 S E 733, 153 Ga 95—Davis v State, 149 S E 51, 40 Ga App 123

La—State v Pierce, 126 So 514, 169 La 1025

Miss—Lambert v State, 158 So 139, 171 Miss 474

30 C J p 154 note 68

It is immaterial to the admissibility of threats by accused whether they were made in or out of the presence of deceased—State v King, 106 So 461, 159 La 972

68. Ill—People v Dabney, 146 N E 166, 315 Ill 320

69. Nev—State v Canak, 31 P 2d 1033, 55 Nev 293

70. La—State v Foster, 114 So 696, 164 La 813

71. Ill—People v Dabney, 146 N E 166, 315 Ill 320

Ky—Johnson v Commonwealth, 286 S W 1053, 215 Ky 717

La—State v King, 106 So 461, 159 La 972

Tex—Mauney v State, 210 S W 959, 85 Tex Cr 184

Difficulty out of which threat grew

Evidence that two or three hours before homicide accused had difficulty with daughter of deceased, but was not then armed, was admissible, in connection with declarations of accused that he would kill occupants of deceased's house, to show malice and as shedding light on accused's subsequent trip to place of homicide armed with pistol—Stewart v State, 165 So 840, 231 Ala 594

72. Threats by parties unknown

Evidence that witness heard woman screaming and begging some one to stop, and man tell her to shut up or he would cut her throat, ten days before killing of wife by husband, was inadmissible without showing identity—Whiteside v State, 12 S W 2d 218, 111 Tex Cr 116

73. Ala—Parham v State, 42 So 1, 147 Ala 57

74. Me—State v Sprague, 199 A 705, 135 Me 470

N C—State v Hawkins, 199 S E 284, 214 N C 326—State v Bowser, 199 S E 31, 214 N C 219—State v Payne, 197 S E 573, 213 N C 719

30 C J p 155 note 70

75. Kan—State v Thyer, 53 P 2d 907, 143 Kan 238

Miss—Smith v State, 118 So 710, 152 Miss 114

N C—State v Gibson, 137 S E 117, 193 N C 487

Tex—Davis v State, 146 S W 2d 994, 140 Tex Cr 597—Bennett v State, 92 S W 2d 256, 130 Tex Cr 128—Steward v State, 75 S W 2d 113, 127 Tex Cr 63

30 C J p 155 note 75.

timony of the assaulted party that he had heard accused was going to kill him is properly admitted [76]

Manslaughter. Where the charge is but for manslaughter, malice not being an element of the offense, as considered supra § 37, evidence of previous threats or declarations of accused is inadmissible [77]

Testimony in rebuttal of evidence of threats of accused, in order to be admissible, must be shown to relate to the same occasion [78]

b. Nature of Threat or Declaration

An expression, to be admissible as a threat, must indicate a hostile purpose on the part of the speaker. Reckless, profane, or idle remarks not involving a threat to do violence are not as a rule admissible to show malice

An expression, to be admissible as a threat, must be of such character or made under such circumstances as to indicate a hostile purpose on the part of the speaker.[79] Reckless, profane,[80] or idle[81] remarks, or general complaints,[82] not involving a threat to do violence to anyone are not as a rule admissible to show malice, but evidence of general statements showing a malevolent or hostile spirit is sometimes admitted although not embodying a specific threat to kill [83] Language which may be properly construed as a threat to kill is admissible,[84] and words which, under the circumstances, imply a threat may be shown [85] Threats are admissible on the question of malice even though ostensibly made in jest,[86] in a thoughtless and bragging manner,[87] or although they refer to a means different from that which was actually employed [88] Where subsequent acts of accused clearly show that his prior threats did not refer to such acts, however, it is error to admit such threats [89]

Conditional threats are admissible to show malice, premeditation, or criminal intent,[90] as in the case of accused's threats to kill deceased if he

76. Ill —People v Starks, 114 N E 565, 276 Ill 157.

77. Ga —Hicks v State, 189 S E 373, 55 Ga App 149, citing **Corpus Juris.**
30 C J p 155 note 74

78. Tex —Baxter v State, 194 S W 1107, 81 Tex Cr 234

79. Ill —People v Scott, 120 N E 553, 284 Ill 465

80. Ky —Brooks v Commonwealth, 37 S W 1043, 100 Ky 194, 18 Ky L 702
30 C J p 155 note 79

81. Ky —Hensley v Commonwealth, 69 S W 2d 17, 253 Ky 171
W Va —State v Martin, 114 S E 876, 92 W Va 514

82 Ga —Little v State, 139 S E 37, 161 Ga 509

83 Ala —Glass v State, 41 So 727, 147 Ala 50
Cal —People v Barthleman, 52 P 112, 120 Cal 7

Wish to see deceased go to penitentiary

In a prosecution for murder, where there was evidence that ill will and hostility between accused and deceased had not abated, evidence of accused's statements that he would like to see deceased and another go to the penitentiary was relevant as a threat —Lewis v State, 244 S W 458, 155 Ark 205

84 Ga —McDow v State, 168 S E 869, 176 Ga 764

Language susceptible of two constructions

(1) In a prosecution for murder, language of accused susceptible of two constructions, one that it is a threat against deceased, and one that it is a declaration by accused of his intent and ability to defend himself against any assault by deceased is admissible, and the meaning thereof for the jury —State v Todd, 214 P 899 28 N M 518

(2) Accused's statement that he was at witness' house to have "reckoning" with deceased was properly admitted, it being for jury to say whether he meant it in primary sense of word, as counting or computing, or figuratively in sense of adjustment of reward or penalty on basis of merit, in which sense it is commonly used as prophecy or threat of punishment —Husch v State, 100 So 321, 211 Ala 274

85. Ala —Daugherty v State, 139 So 439, 24 Ala App 591
30 C J p 155 note 85

Particular statements held admissible as threats

(1) "There will be another day besides this one, old boy"—Nolen v State, 109 So 295, 21 Ala App 455

(2) That accused was going to "get" the victim —Commonwealth v Ramey, 137 N E 657, 243 Mass 394

(3) That accused was going to "get even" with deceased —State v Graham 140 S E 26, 194 N C 459

(4) That accused was going to "get rid" of deceased —Drummond v State, 102 So 723 20 Ala App 286, certiorari denied Ex parte Drummond, 102 So 726, 212 Ala 410

(5) Evidence that accused, in controversy over mules, had held up knife, and said, "This will put a stop to the fuss," was admissible in prosecution for murder by subsequent stabbing, growing out of same controversy —Halbert v State, 51 S W 2d 321, 121 Tex Cr 355

Statement not too vague

Testimony that before the killing of his wife accused was asked for the rent of the house in which she lived, and that he replied that she would not need the house or any other house, much longer was not inadmissible as too vague and indefinite but could be shown as in the nature of a threat —Seay v State, 125 S E 52, 159 Ga 84

86. Mich —People v Holmes, 69 N W 501, 111 Mich 364

87. N C —State v Horn, 21 S E 694, 116 N C 1037

88. N Y —Le Beau v People 34 N Y 223

89. Idaho —State v Buster, 152 P 196, 28 Idaho 110

90 Ala —Kilpatrick v State, 104 So 656, 213 Ala 358 —Daugherty v State, 139 So 439 24 Ala App 591
Ga —Collins v State, 111 S E 733, 153 Ga 95
N C —State v Casey, 168 S E 512 204 N C 411
Tex —Ballard v State, 280 S W 796 103 Tex Cr 340
30 C J p 155 note 84

Threat "if deceased turned him in"

Evidence that deceased found accused playing cards and wanted witness to report matter, whereupon accused stated that if deceased turned him in he would never remember turning in the next one is admissible as a conditional threat, such statement showing animosity, ill will, and malice toward deceased —Gilliam v State, 272 S W 154, 100 Tex Cr 67

Rule applies to prosecutions for assault with intent to kill —Cordell v State, 101 So 380, 136 Miss 293

talked too much,[91] or to inflict bodily harm if deceased disobeyed accused,[92] but it must appear that the conditions were fulfilled before threats of this character become competent evidence[93]

c. Against Whom Directed

As a general rule, general threats to kill, not shown to have any reference to deceased, are not admissible in evidence, but a threat to kill or injure some one not definitely designated is admissible where other facts adduced give individuality to it

General threats by accused to kill or injure some one,[94] or statements showing a general malevolent spirit,[95] which are not shown to have any reference to deceased are not as a rule admissible on the question of malice, deliberation, or premeditation General threats not referring to anyone in particular, however, may be admissible under certain circumstances[96] Thus a general threat to kill or injure someone, not definitely designated, is admissible when other facts adduced give individuality to it so that, as it is generally held, the jury may infer that the threat referred to deceased,[97] or when the threat was made shortly before the commission of the crime to which it may be construed to refer[98]

In order that threats, claimed to have been made against deceased, may be admissible, the language used, or the circumstances under which it was used, must be broad enough to include deceased within its terms[99]

Threats against a class Threats to do violence to a class of persons, one of whom became the victim, are admissible to show malice and state of mind, even though no particular person was named by accused[1] Thus threats against peace officer or

91. About robbery

Testimony in murder trial as to accused's recent threats to kill deceased if he talked too much about robbery arranged by accused and others was admissible—Goocher v State, 149 So 830, 227 Ala 337

92. Tex—Hildreth v State, 83 S W 2d 332, 128 Tex Cr 601

93. Va—Evans v Commonwealth, 170 S E 756, 161 Va 992

94. Ala—Savage v State, 100 So 919, 20 Ala App 97
Ky—Wright v Commonwealth, 102 S W 2d 14, 267 Ky 269
N C—State v Bowser, 199 S E 31, 214 N C 249—State v Payne, 197 S E 573, 213 N C 719
S D—State v Wilcox, 204 N W 369, 48 S D 289
Tex—Fey v State, 152 S W 2d 766, 142 Tex Cr 298—Lawrence v State, 82 S W 2d 617, 128 Tex Cr 416—Arnold v State, 62 S W 2d 130, 124 Tex Cr 295
Va—McMurray v Commonwealth, 129 S E 252, 143 Va 489
30 C J p 155 note 88

95. Ark—Graves v State, 243 S W 855, 155 Ark 30
Ky—Garrison v Commonwealth, 33 S W 2d 698, 236 Ky 706

96. Ala—Moulton v State, 98 So 709, 19 Ala App 416, certiorari denied Ex parte Moulton, 98 So 715, 210 Ala 656
Ky—Huff v Commonwealth, 122 S W 2d 143, 275 Ky 578
Miss—Huddleston v State, 98 So 839, 134 Miss 382
30 C J p 156 note 90

General malice

(1) A general threat to kill some one is admissible to show general malice and a purpose to injure or kill some one of which the deceased became the victim—Benge v Commonwealth, 94 S W 2d 38, 264 Ky 28—Fugate v. Commonwealth, 260 S W 338, 202 Ky 509—30 C J p 156 note 91

(2) But this rule is confined to threats made shortly before the homicide, and does not include indefinite and remote threats made several weeks before the homicide—Wireman v Commonwealth, 268 S W 586, 206 Ky 828

Design to kill

Testimony of accused's statement that he would kill somebody before night was admissible, not to show malice against deceased, but to show a design to kill—People v Andrews, 158 N E 462 327 Ill 162

97. Ala—Fowler v State, 181 So 266, 236 Ala 87—McCoy v State, 166 So 769, 232 Ala 104—Kilpatrick v State, 104 So 656, 213 Ala 358—Williams v State, 107 So 37 21 Ala App 227—Moulton v State, 98 So 709, 19 Ala App 416, certiorari denied 98 So 715, 210 Ala 656
Ark—Tolliver v State, 10 S W 2d 421 183 Ark 1122
Ga—McDow v State, 168 S E 869, 176 Ga 764—Gore v State, 118 S E 40, 155 Ga 642
Ky—Kelly v Commonwealth, 36 S W 2d 344, 237 Ky 690—Burns v Commonwealth, 248 S W 848, 198 Ky 319
La—State v Jackson, 96 So 53, 153 La 517
Miss—Self v State, 174 So 44, 178 Miss 560
Mo—State v Crowley, 139 S W 2d 473, 345 Mo 1177
N M—State v Todd, 214 P 899, 28 N M 518
N C—State v Bowser, 199 S E 31, 214 N C 249—State v Payne, 197 S E 573, 213 N C 719—State v Shouse, 81 S E 333, 166 N C 306
Tex—Franks v State, 68 S W 2d 207, 125 Tex Cr 245—Easley v State, 44 S W 2d 385, 119 Tex Cr 408—Lennon v State, 26 S W 2d 227, 114 Tex Cr 500—Gilliam v State, 272 S W 154, 100 Tex Cr 67—Bridges v State, 271 S W 87, 99 Tex Cr 627
Va—McMurray v Commonwealth, 129 S E 252, 143 Va 489
30 C J p 156 note 92

Threats against person who "had broken gun"

Where, about a year previous to homicide deceased had taken a gun from accused's son and destroyed it, causing ill feeling between accused and deceased, evidence as to threats made by accused against a man that had broken a gun "for some of his folks" was admissible—Little v Commonwealth, 272 S W 721, 209 Ky 263

Man marrying particular woman

Testimony that accused had threatened to kill man that married particular woman, which deceased did, was admissible in prosecution for murder—Story v State, 296 S W 516, 107 Tex Cr 293

98 Ala—Flournoy v State, 106 So 392 21 Ala App 182
Ky—Walling v Commonwealth, 84 S W 2d 10 260 Ky 178
Miss—Sandifer v State, 192 So 342
Wash—State v Hunter, 48 P 2d 262, 183 Wash 143

99. Ill—People v Scott, 120 N E 553, 284 Ill 465
30 C J p 156 note 89

1. Ala—Miller v State, 102 So 153, 20 Ala App 351
Del—State v Galvano, 154 A 461, 4 W W Harr 409
Ga—Ethridge v State, 136 S E 72, 163 Ga 186—Howell v State, 134 S E 59, 162 Ga 14
Ind—Johnson v State, 167 N E 531, 201 Ind 264
Ky—Wood v Commonwealth, 56 S W 2d 556, 246 Ky 829
La—State v Dunn, 109 So 56, 161 La 532, error dismissed Dunn v.

officers[2] or members of a particular family[3] are admissible, where deceased was a member of the class referred to Evidence of threats against a class, however, is not admissible when the cause of the fatal difficulty did not relate to the connection of deceased with such class[4]

Threats against third persons Ordinarily a threat by accused to kill or injure a person other than deceased is not admissible to show malice toward deceased,[5] but such a threat may be admissible where it is of such a character as, under the circumstances of the killing, to be applicable to deceased,[6] or where there is a connection between the threat and the crime[7] In a case of mistaken identity, where accused, intending to kill one person, killed another, evidence of threats by accused against the person really intended is admissible on the same principles and for the same reasons as though such person had been killed under the same circumstances.[8] So, also, where accused fires at one man and kills another, evidence of his state of feelings or threats toward his intended victim is competent to show the intention with which the fatal shot was fired[9]

d. Time of Threat or Declaration

While evidence of prior threats may be rejected under certain circumstances because of remoteness, such objection is ordinarily regarded as affecting the weight and not the admissibility of the evidence.

While evidence of prior threats may be rejected under certain circumstances because of remoteness,[10] such objection is ordinarily regarded as affecting the weight and not the admissibility of the evidence[11] Threats, even though remote, are competent when it appears that they were repeated

State of Louisiana, 47 S Ct 344, 273 U S 656, 744, 71 L Ed 825
Mo —State v Markel, 77 S W 2d 112, 336 Mo 129
N M —State v Stewart, 277 P 22, 34 N M 65
N C —State v Payne, 197 S E 573, 213 N C 719
Okl —Smith v State, 293 P 569, 49 Okl Cr 339
Tex —Wheeler v State, 103 S W 2d 768 132 Tex Cr 291—Lawrence v State, 82 S W 2d 647, 128 Tex Cr 416
Utah —State v Gardner, 213 P 794, 61 Utah 359
30 C J p 156 note 97

General malice

General or indefinite threats made by accused, tending to disclose general malice, may be shown, although not particularly directed against deceased but against a class of persons including deceased--Sears v State, 227 P 899, 27 Okl Cr 311

Persons passing house singing

Evidence that accused stated two or three weeks before shooting that "if they didn't quit passing his house singing he was going to shoot them" was in nature of a threat against a class, admissible where person shot was passing house singing —Miller v State, 102 So 153, 20 Ala App 354

Threat held not one against class

In prosecution for murder of hunter on accused's ranch, evidence as to three occurrences when accused shot at and threatened to shoot other named hunters was not competent on theory that evidence showed threats directed against hunters as class and made out general violent and malignant disposition of accused toward all hunters, in view of evidence that many persons hunted on accused's premises, since accused might have merely objected to named hunters' use of his premises--Lawrence v State, 82 S W 2d 647, 128 Tex Cr. 416

2. Ark —Day v State, 49 S W 2d 380 185 Ark 710
Ga —Howell v State, 134 S E 59, 162 Ga 14
Ind —Johnson v State, 167 N E 531, 201 Ind 264
Pa —Commonwealth v Troup, 153 A 337, 302 Pa 246 —Commonwealth v Luccitti, 145 A 85, 295 Pa 190
30 C J p 156 note 97 [a]

3. Tex —Russell v State, 256 S W 283, 96 Tex Cr 105
30 C J p 156 note 97

4. Tex —Harrison v State, 83 S W 699, 47 Tex Cr 393

5. Ky —Adams v Commonwealth, 120 S W 2d 237, 274 Ky 711—Wireman v Commonwealth, 268 S W 586, 206 Ky 828—Fugate v Commonwealth, 260 S W 338, 202 Ky 509
S C —State v Abercrombie, 126 S E 142, 130 S C 358
Tex --Lawrence v State, 82 S W 2d 647 128 Tex Cr 416
30 C J p 156 note 93

6. Idaho -- State v Fox, 16 P 2d 663, 52 Idaho 474
Okl —Smith v State, 293 P 569, 49 Okl Cr 339
Tex - Easley v State, 44 S W 2d 385, 119 Tex Cr 408
30 C J p 156 note 94

Threat against witnesses

Where testimony of deceased's son given with deceased's approval, procured liquor indictment against accused's general threat against anyone testifying that he had bought whisky from accused was admissible in murder case--Fritts v State, 42 S W 2d 609, 119 Tex Cr 412

7. Threats against fellow victim

Where accused killed decedent and another at same time, evidence of previous threat made by accused against the other was admissible as disclosing animus actuating killing of decedent —State v Corey, 171 S E 114, 114 W Va 118

8. Ala —Clarke v State, 78 Ala 474, 56 Am R 15
Fla —Owens v State, 62 So 651, 65 Fla 483

9. Miss —Dixon v State, 20 So 839, 74 Miss 271
Tex --Martin v State, 259 S W 572, 96 Tex Cr 575

10. Ky —Huff v Commonwealth, 122 S W 2d 143, 275 Ky 578—Turk v Commonwealth 38 S W 2d 937, 239 Ky 55 - Stewart v Commonwealth, 32 S W 2d 29 235 Ky 673
Miss —Mackmasters v State, 33 So 2, 81 Miss 374

Discretion of court

It has been held that it is within the discretion of the trial court not to be disturbed unless abused, to determine whether the evidence is so remote as to furnish no aid in determining the issue
Mass —Commonwealth v Ramey, 137 N E 657, 243 Mass 394
Mo —State v White, 99 S W 2d 72, 74, 339 Mo 1019, citing **Corpus Juris.**
30 C J p 157 note 2

11. Ala —Shumate v State, 97 So. 772, 19 Ala App 446, certiorari denied Ex parte Shumate, 97 So 777, 210 Ala 252
Ark —Combs v State, 260 S W 736, 163 Ark 550
Cal —People v Mandell, 120 P 2d 921, 48 Cal App 2d 806
Fla —Wester v State, 193 So 300, 141 Fla 369--Lamb v State, 107 So 530, 90 Fla 844, stay of mandate granted 107 So 535, 91 Fla 396
Ga —Williams v State, 119 S E 614, 156 Ga 285
Ky —Huff v Commonwealth, 122 S W 2d 143, 275 Ky 578—Thomas v Commonwealth, 78 S W 2d 777, 780, 257 Ky. 605, citing **Corpus Juris**—

from time to time, or the hostility continued, until shortly before the commission of the offense alleged,[12] and, where a threat is conditioned on the doing of an act by deceased which the latter did shortly before the homicide, such threat is admissible, although remote in point of time[13] Under the foregoing rules, as applied to the circumstances of the particular case, threats have been held not inadmissible as too remote where they were made within a matter of hours,[14] days,[15] weeks,[16] months,[17] or even years[18] before the commission of the offense

Crum v Commonwealth, 259 S W 708, 202 Ky 374

Mo —State v Clymer, 159 S W 2d 808 —State v White, 99 S W 2d 72, 74, 339 Mo 1019, quoting **Corpus Juris** —State v Shawley, 67 S W 2d 74, 334 Mo 352—State v Stallings, 33 S W 2d 914, 326 Mo 1037

N C —State v Bright, 2 S E 2d 541, 215 N C 537—State v Hawkins, 199 S E 284 214 N C 326—State v Payne, 197 S E 573, 218 N C 719

N D —State v Hanson, 207 N W 1000, 53 N D 879

Tex —Alexander v State, Civ App, 8 S W 2d 176—Owens v State, 56 S W 2d 867, 122 Tex Cr 561—Upton v State, Cr, 20 S W 2d 794—Dunn v State, 242 S W 1049, 92 Tex Cr 126

Va —Maxwell v Commonwealth, 187 S E 506, 167 Va 490

30 C J p 156 note 1

No mere distance of time is sufficient to make accused's threats irrelevant and inadmissible —State v Pierce, 126 So 514 169 La 1025

12. Ark —Crowe v State 13 S W 2d 606 178 Ark 1121—Lewis v State, 244 S W 458, 155 Ark 205

Fla —Wester v State, 193 So 300, 141 Fla 369

Ky —Fleenor v Commonwealth, 75 S W 2d 1, 255 Ky 526—Gambrel v Commonwealth, 43 S W 2d 335 241 Ky 39, followed in 43 S W 2d 339, 241 Ky 36 and 43 S W 2d 339, 241 Ky 37—Little v Commonwealth, 272 S W 721, 209 Ky 263

Mo —State v Johnson 163 S W 2d 780, 349 Mo 910—State v Clymer, 159 S W 2d 808—State v Houston, 292 S W 728

Pa —Commonwealth v Troup, 153 A 337, 302 Pa 246

30 C J p 157 note 3

Bad feeling during intervening years

In prosecution for assault to kill testimony that accused stated after fist fight with complaining witness five years before that he would kill complaining witness some time was competent in view of evidence of other witnesses as to accused's unfriendly conduct toward complaining witness on different occasions through intervening years —State v Thyer, 53 P 2d 907, 143 Kan 238

Continued threats connected with same matter

In prosecution for killing accused's creditor, testimony of threats made three years, fifteen months, less than a year, and one nearer in point of time and previous to homicide, all of which threats had to do with collection of debt by attachment process, was properly admitted, there being proof of continued ill feeling on part of accused toward creditor —Huff v Commonwealth, 122 S W 2d 143, 275 Ky 578

Threats at frequent intervals

Evidence of threats and quarrels between accused and deceased occurring at frequent intervals up to date of homicide was not objectionable as remote — State v Bowenkamp, Mo, 39 S W 2d 753

Continuing threat

Even though evidence of continuing threats was essential to competency of a threat made two years prior to homicide, requirement was sufficiently met by testimony of threat made a month before shooting and a threat made a week and a day before shooting —State v Bright, 2 S E 2d 541, 215 N C 537

The threat is never too remote where the state of feeling that prompted it continued up to the time of the offense —Conn v Commonwealth, 53 S W 2d 931, 245 Ky 583

Corroborating evidence

In murder prosecution, testimony that accused threatened deceased two years before homicide was competent, at least for corroborating testimony of threat one year later —State v Wishon, 153 S E 395, 198 N C 762

13. Ky —Privitt v Commonwealth, 113 S W 2d 19, 271 Ky 665

Mo — State v Kretschmar, 133 S W 16, 232 Mo 29

14. Ala —Davidson v State, 100 So 641, 211 Ala 471

Mo —State v Parmenter, 213 S W 439, 278 Mo 532

30 C J p 156 note 1 [a] (1)

Night before homicide

Ala —Howard v State, 194 So 853, 29 Ala App 199, certiorari denied 194 So 857, 239 Ala 274

Ark —Barber v State, 32 S W 2d 619, 182 Ark 738

15. Ala —Thomas v State, 92 So 241, 18 Ala App 314, reversed on other grounds 92 So 244, 207 Ala 244

Pa —Commonwealth v Troup, 153 A 337, 302 Pa 246

Utah —State v Gardner, 213 P. 794, 61 Utah 359.

16. Ga —Seay v. State, 125 S E 52, 159 Ga 84

Ky —Puckett v Commonwealth, 31 S W 2d 383, 235 Ky 340

La —State v King, 106 So 461, 159 La 972

Mo —State v Todd, 116 S W 2d 113, 342 Mo 601

N M —State v Roy, 60 P 2d 646, 40 N M 397

Wis —State v Taubenheim, 291 N W. 322, 234 Wis 434

30 C J p 156 note 1 [a] (2)

17. Ark —McGraw v State, 42 S W 2d 373, 184 Ark 342—Combs v State, 260 S W 736, 163 Ark 550—Lewis v State, 244 S W 458, 155 Ark 205

Cal —People v Mandell, 120 P 2d 921, 48 Cal App 2d 806

Ga —McDow v State, 168 S E 869, 176 Ga 764—Smith v State, 145 S E 517, 167 Ga 271—Williams v. State, 119 S E 614, 156 Ga 285

Ky —Thomas v Commonwealth, 78 S W 2d 777, 257 Ky 605—Crum v Commonwealth, 259 S W 708, 202 Ky 374

Mo —State v Shawley, 67 S W 2d 74 334 Mo 352

N C —State v Johnson, 138 S E 19, 193 N C 701

N D —State v Hanson, 207 N W 1000 53 N D 879

Tex Alexander v State, Cr, 8 S W 2d 176

Mere lapse of eighteen months did not render accused's threats against decedent inadmissible — Shumate v State, 97 So 772, 19 Ala App 416, certiorari denied Ex parte Shumate, 97 So 777, 210 Ala 252

18. Kan —State v Thyer, 53 P 2d 907 143 Kan 238

Ky — Huff v Commonwealth, 122 S W 2d 143 275 Ky 578—Privitt v Commonwealth, 113 S W 2d 49, 271 Ky 665—Fleenor v Commonwealth, 75 S W 2d 1, 255 Ky 526—Conn v Commonwealth, 53 S W 2d 931, 245 Ky 583—Gambrel v Commonwealth, 43 S W 2d 335, 241 Ky 39, followed in 43 S W 2d 339, 241 Ky 36 and 43 S W 2d 339 241 Ky 37

La —State v Ross, 107 So 481, 160 La 661

N C —State v Allen, 22 S E 2d 233, 222 N C 145—State v Bright, 2 S E 2d 541, 215 N C 537—State v Hawkins, 199 S E 284, 214 N C 326

Tex —Upton v State, Cr, 20 S W 2d 794—Jackson v State, 257 S W 892, 96 Tex Cr 299

30 C J p 156 note 1 [a] (3).

Three or four years

In prosecution for killing policeman, testimony that one of the defendants had threatened to shoot any policeman was not rendered inadmis-

Subsequent friendly relations. The objection that the threats are incompetent because it was shown that accused and deceased met afterward and that their relations appeared to be friendly is not well taken because it bears on the probative force of the threats rather than on their competency.[19] With added reason, a threat is not to be excluded on this ground where the fact of reconciliation is not clear[20]

Proving time when threats were made. Evidence of the time when threats were made by accused against decedent is properly admitted, although it does not fix the time with exactness[21]

§ 207. —— Threats by Victim

The victim's prior threats against accused, if not too remote to be of evidential value, are admissible to show the victim's state of mind and, where communicated to the accused, may be admissible to rebut malice of the latter. Threats of the victim against a third person have been held inadmissible

As a general rule a threat by the victim of the homicide or assault, directed toward accused, is admissible only in connection with evidence tending to establish self-defense, under principles discussed infra § 276, and is not admissible primarily to show malice on the part of accused,[22] nor, where threats are introduced in connection with evidence of self-defense, can the inference be drawn from them without other evidence that accused was influenced by them to act maliciously[23] A prior threat by the victim against accused may be admissible to throw light on the animus, malice, or state of mind of the victim,[24] even though not communicated to accused,[25] and, if communicated, may be considered for the purpose of rebutting malice on the part of accused,[26] to show the purpose of accused in slaying his victim,[27] or to enable the jury to understand the state of mind of the prisoner, the apprehension of danger under which he acted, and his conduct at the time of the difficulty.[28] If the evidence in respect of the homicide tending to prove the guilt of the prisoner is wholly circumstantial, and the character of the slaying is in doubt, evidence of previous threats by deceased against accused are admissible as tending to remove the doubt[29] The surrounding circumstances or details of a threat by the victim against accused are inadmissible[30]

Statements not amounting to threats, made by the victim, and not otherwise relevant to the issues of the case, are inadmissible[31] Accusations by deceased against accused are admissible to elucidate an alleged threat by accused[32]

sible as a matter of law because of the fact that it was made three or four years prior to the shooting of the policeman —State v Payne, 197 S E 573, 213 N C 719

19. N Y —People v Johnson, 77 N E 1164, 185 N Y 219—Jefferds v People, 5 Park Cr 522

20. Tex —Hamilton v State, 201 S W 1009, 83 Tex Cr 90

21. Ala —Bluett v State, 44 So 84, 151 Ala 41
Ill —People v Dabney, 146 N E 166, 315 Ill 330

Birth of child

In homicide prosecution, testimony of victim's wife that she was mother of child was properly admitted to fix time at which threats of accused had been made —Johnson v Commonwealth, 286 S W 1053, 215 Ky 717

22. U S —Allison v U S, Ark 16 S Ct 252, 160 U S 203, 40 L Ed 395

23. U S —Allison v U S, supra—Thompson v U S, Ark, 15 S Ct 73, 155 U S 271, 39 L Ed 146

24. Ala —Roberts v State, 149 So 356, 25 Ala App 477
Ky —Commonwealth v Girkey, 42 S W 2d 513, 240 Ky 382
30 C J p 157 note 11

Hostile state of mind

Evidence that deceased, whom town marshal killed while attempting to arrest deceased without warrant immediately after deceased fired into town marshal's house in nighttime, had stated some six months before that deceased would be tried for killing marshal and not for possessing intoxicating liquor if liquor prosecution were deferred was relevant as indicating hostile state of mind —Lee v Smith, 171 So 85, 179 Miss 122

Written threat

In a murder prosecution, a fragmentary paper, in deceased's handwriting, containing accused's name and a threat to kill her, was held admissible —Humber v State, 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559

25. U S —Wiggins v Utah, Utah, 93 U S 465, 23 L Ed 941
Ind —Southerland v State, 197 N E 841, 209 Ind 308
30 C J p 157 note 12

26. Mont —State v Shadwell, 57 P 281, 22 Mont 559
Tex —Crowley v State, 35 S W 2d 437, 117 Tex Cr 372
30 C J p 157 note 13

27. Mo —State v Bowenkamp, 39 S W 2d 753

28. Tenn —Fitzhugh v State, 13 Lea 258
30 C J p 157 note 14

29. N C —State v Hensley, 94 N C 1021.

30. Ala —Eden v State, 129 So 797, 24 Ala App 37

31. Ala —Childs v State, 109 So 560, 21 Ala App 528

In Texas under a statute abolishing manslaughter and permitting state or accused to offer testimony of relevant facts surrounding a killing and the previous relationship between accused and deceased and the former's condition of mind, it has been held that the statute does not extend or broaden the rules of evidence in homicide cases, but merely secures to accused the benefit of rules of evidence available under the repealed law of manslaughter, and evidence proffered as to opinions expressed by third persons to accused before the homicide that deceased would kill accused, which would have been inadmissible under the repealed law, because not amounting to actual threats by deceased against accused, remain inadmissible under the new statute —Mercer v State, 13 S W 2d 689, 111 Tex Cr 657

32. Ala - Rice v State, 101 So 82, 20 Ala App 102

Accusation explanatory of threat

It was competent for the state to show that deceased charged accused with stealing deceased's cotton, and that accused said he was going to "settle with him and settle with him in the ground," the preceding accusation elucidating the alleged threat. Rice v State, supra.

Time of threat In order for threats by deceased against accused to be admissible in a homicide case, the evidence must disclose with reasonable certainty the time when they were made The burden rests on accused to prove that a threat by deceased was not too remote to be of evidential value, doubts on the question of remoteness will be resolved against the admissibility of the threat, and, where the threats by deceased against accused were made at a time so remote from the acts which they are offered to color as to be of no evidential value, they should be excluded [33]

Threats against third persons Threats made by deceased against persons other than accused have been held inadmissible [34]

§ 208. —— State of Feeling between Parties in General

a General principles
b. Difficulties between persons in family relationship
c. Time of difficulty

a. General Principles

The general rule admits, on the issues of malice, premeditation, and state of mind, evidence of prior difficulties between victim and accused, but excludes evidence relative to the details thereof. Evidence of prior difficulties between third persons may be admissible where relevant to the offense, but not otherwise Evidence of friendly feelings may be admissible in rebuttal

Evidence as to ill will, prior difficulties, and other circumstances characterizing the disposition and attitude of accused and deceased toward each other is, subject to the general rules as to competency and relevancy, admissible as bearing on questions of malice, intent, motive, state of mind, or feeling,[35] as, for example, evidence that prior to the homicide accused was looking for deceased in a hostile mood,[36] or had made previous assaults or attacks on deceased,[37] or previous attempts to kill him [38] Only the fact and not the details of the prior difficulty may be shown,[39] and evidence as to its cause, merits, or particulars is inadmissible,[40] although this rule does not preclude the showing of connected ac-

33. Miss —Myers v State, 147 So 308, 167 Miss 76

Parties in frequent contact

Alleged threat by deceased to kill accused, made over eight months before homicide, was held properly excluded on ground of remoteness where during such period deceased and accused were in almost daily contact, living most of time under same roof —Myers v State supra

34. Miss —Walker v State, 105 So 497, 140 Miss 238

35. Ala —Roberson v State, 172 So 250, 233 Ala 442—Webb v State, 157 So 262, 26 Ala App 241—Narrell v State, 132 So 45, 24 Ala App 149, mandamus denied Ex parte Narrell, 132 So 47, 222 Ala 13, and reversed on other grounds Narrell v State 132 So 47 222 Ala 145—Clark v State, 91 So 328, 18 Ala App 209, certiorari denied 91 So 921, 207 Ala 710

Ark —Owens v State, 278 S W 3 169 Ark 1188- Lewis v State, 244 S W 458, 155 Ark 205

Cal —People v Bolton, 8 P 2d 116, 215 Cal 12—People v Kermott, 91 P 2d 215, 33 Cal App 2d 236

Ky —Carter v Commonwealth, 102 S W 2d 1020, 267 Ky 640—Carter v Commonwealth, 81 S W 2d 883, 258 Ky 807—Newsome v Commonwealth, 33 S W 2d 36 236 Ky 344

La —State v Graffam, 13 So 2d 249 —State v King, 106 So 461, 159 La 972

N C —State v Ray, 194 S E 482, 212 N C 725

Or —State v Sullivan, 11 P 2d 1054, 139 Or 640—State v Grayson, 270 P 404, 126 Or 560—State v Covell, 232 P 628, 113 Or 254

S C —State v Smith, 20 S E 2d 726, 200 S C 188—State v McGee, 193 S E 303, 185 S C 184

Tex —Rhodes v State, 126 S W 2d 987 136 Tex Cr 581—Norwood v State, 120 S W 2d 806, 135 Tex Cr 406—Kelman v State, 116 S W 2d 721, 134 Tex Cr 535—Easterwood v State, 101 S W 2d 576, 132 Tex Cr 9—Hildreth v State 83 S W 2d 332, 128 Tex Cr 601—McLaughlin v State, 76 S W 2d 768, 127 Tex Cr 390—Franks v State, 68 S W 2d 207, 125 Tex Cr 215—Fritts v State, 42 S W 2d 609, 119 Tex Cr 412—Whiteside v State, 12 S W 2d 218, 111 Tex Cr 116—Thompson v State 288 S W 464, 105 Tex Cr 351 —Caraway v State, 263 S W 1063, 98 Tex Cr 119

Wash —State v Davis, 108 P 2d 641, 6 Wash 2d 696

30 C J p 157 note 16

"It is elementary that evidence of prior difficulties between the accused and the deceased, and of prior hostile acts and threats made by the former against the latter [is] admissible for the purpose of showing that the accused in killing the deceased, acted with malice aforethought " State v King, 106 So 461, 159 La 972

Grudge

In murder prosecution, evidence showing accused had grudge against deceased was admissible to prove malice —State v Jennings, 158 S E 687, 160 S C 348

Evidence of altercations because of accused's "vulgar talk" in presence of deceased's wife was competent to show state of feeling, although the language used was not stated, as the fact that the talk created difficulties was sufficient to render the evidence admissible and the particular words used were immaterial to establishment of the fact of ill feeling —Young v Commonwealth, 6 S W 2d 269, 224 Ky 331

36. Ala —Hurston v State 178 So 223 235 Ala 213

37. Ind —Potts v State, 12 N E 2d 270, 213 Ind 560

Ky —Sanders v Commonwealth, 50 S W 2d 37 241 Ky 77

Mass —Commonwealth v Bartolini 13 N E 2d 382 299 Mass 503, certiorari denied Bartolini v Commonwealth of Massachusetts, 58 S Ct 950, 301 U S 565, 82 L Ed 1531

N C —State v Horne, 181 S E 470, 209 N C 725

Tex —Rhodes v State, 126 S W 2d 987 136 Tex Cr 581

38. Ala —Cole v State, 110 So 913, 21 Ala App 601, certiorari denied 110 So 914, 215 Ala 432

La —State v Graffam, 13 So 2d 249

Previous attempt to poison

In murder prosecution based on killing by strangulation, evidence of previous attempt of accused to poison deceased was admissible to show malice —State v Holmes, 171 S E 440, 171 S C 8

39. Ala —Allbritton v State, 191 So 268, 29 Ala App 1, certiorari denied 191 So 270, 238 Ala 439—Stover v State, 143 So 239, 25 Ala App 222

40. Ala —Lambert v State, 93 So 708, 208 Ala 42—Allbritton v State, 191 So 268, 29 Ala App 1, certiorari denied 191 So 270, 238 Ala 439—Newman v. State, 149

tions and transactions leading up to, and explanatory of, the offense, even though not a part of the res gestae, where they throw light on accused's actions or mental attitude at the time or his participation as accessary[41] nor is it an infringement of such rule against showing details to prove the words of an opprobrious epithet evincing ill will between the parties,[42] or to prove the use of threatening language by accused in connection with his prior difficulty with deceased[43]

In a prosecution for assault with intent to kill evidence of a previous difficulty between the parties is admissible to show malice,[44] but it is improper to admit evidence of all the particulars of the trouble[45] It has been held that where accused was clearly the aggressor, and where no issue of self-defense is involved in a prosecution for assault with intent to kill, it is proper to exclude evidence of bad feeling and prior difficulties between the victim and accused offered by the latter[46] Evidence as to the state of mind of a third person is ordinarily inadmissible in a prosecution for assault with intent to kill[47]

Evidence of previous difficulties between third persons, with which accused is not shown to have been connected in any way is inadmissible,[48] but

So 724, 25 Ala App 526—Spelce v State, 103 So 694, 20 Ala App 412, certiorari denied Ex parte Spelce, 103 So 705 212 Ala 559—Moulton v State, 98 So 709, 19 Ala App 446, certiorari denied Ex parte Moulton, 98 So 715, 210 Ala 656—Gilchrist v State, 95 So 197, 19 Ala App 16, certiorari denied Ex parte State, 95 So 200, 208 Ala 690—St John v State, 92 So 25, 18 Ala App 285

Ind—Keifer v State, 154 N E 870, 199 Ind 10

Ky—Carpenter v Commonwealth, 92 S W 2d 355, 263 Ky 408—Waggoner v Commonwealth, 72 S W 2d 723, 255 Ky 1—Hanna v Commonwealth, 46 S W 2d 1098, 242 Ky 584

La—State v Joiner, 109 So 51, 161 La 518

Miss—Hardy v State, 108 So 727, 143 Miss 352

S C—State v Smith, 20 S E 2d 726, 200 S C 188—State v Graham, 159 S E 838, 161 S C 362

Tex—Myatt v State, 26 S W 2d 915, 114 Tex Cr 516

30 C J p 157 note 16

Extent of injuries in previous assault

Conceding that the state in a prosecution for murder could properly prove accused's previous assault and battery of deceased, as tending to show his malice, or purpose in the homicide committed several months later, nevertheless it was incompetent to admit evidence detailing the nature and extent of injuries suffered by deceased on the occasion of such prior assault, this being a collateral matter which was not connected with the crime for which accused was on trial—Keifer v State, 154 N E 870, 199 Ind 10.

Magnitude of difficulty

In murder prosecution evidence regarding magnitude of difficulty between accused and deceased before killing was held properly excluded—Bowen v State, 117 So. 204, 217 Ala 574.

Puddle of blood

In murder prosecution, testimony respecting a previous encounter between accused and victim, to effect that there had been a puddle of blood on sidewalk which dogs had lapped up, was properly rejected as irrelevant—State v McGee, 193 S E 303, 185 S C 184

41. Ala—Sexton v State 180 So 729 28 Ala App 59 certiorari denied 180 So 731, 236 Ala 20—Newman v State, 149 So 724, 25 Ala App 526—Washington v State, 123 So 277, 23 Ala App 253

Miss—McDowell v State, 198 So 564 189 Miss 617

42. Ala—Narrell v State 132 So 47, 222 Ala 145 reversing Narrell v State, 132 So 45, 21 Ala App 149, mandamus denied Ex parte Narrell, 132 So 47 222 Ala 13

43. Ky—Fleenor v Commonwealth, 75 S W 2d 1, 255 Ky 526

Expression of desire to kill

In murder prosecution, testimony that accused had two years previous to homicide remarked to deceased he would like to kill him was not inadmissible as offending the rule against relating previous difficulties in much detail—Fleenor v Commonwealth 75 S W 2d 1, 255 Ky 526

44. Ala—Johnson v State, App, 5 So 2d 646

Tex—Steward v State, 75 S W 2d 113, 127 Tex Cr 63

30 C J p 158 note 19

Assaults and grudges

(1) Accused's antecedent menaces to, assaults on, and grudges against, prosecuting witness may be proved to show accused's state of mind and malice at time of alleged assault with intent to murder—Steward v State, supra

(2) In prosecution for murder and assault with intent to kill, testimony of accused on cross-examination that three and one-half weeks before murder of child and shooting of wife he hit wife in eye and pointed gun at her was admissible to show accused's feelings toward wife, his treatment of her, and motive for assault—People v Pivaroff, 33 P 2d 41, 138 Cal App 625

Entire transaction

Testimony of accused's wife, in trial for assault with intent to murder her, that accused twice drew gun on her little boy at time of assaulting witness with ice pick and threatening her with gun on day before assault, was admissible as part of same transaction on issue of malice and intent—Steward v State, 75 S W 2d 113, 127 Tex Cr 63

45. Ala—Johnson v State, App, 5 So 2d 646—Orrick v State 126 So 890, 23 Ala App 156—Sanders v State, 97 So 294, 19 Ala App 367—Morell v State, 91 So 501 18 Ala App 243 certiorari denied 91 So 923, 207 Ala 713

30 C J p 158 note 20

46. Iowa—State v Smith, 245 N W 309, 215 Iowa 371

47 Kan—State v Thyer, 53 P 2d 907, 143 Kan 238

Anger of victim's son

In prosecution for assault to kill, cross-examination of complaining witness' son, who accompanied his father at time of alleged assault whether sight of accused in right of way made "you angry" was properly excluded—State v Thyer supra

48 Ky—Bryant v Commonwealth, 288 S W 680, 216 Ky 721

Miss—Hunter v State, 184 So 835, 183 Miss 779

Mo—State v Jones, 155 S W 33, 249 Mo 80

Calling police in another connection

Evidence in trial for murder committed after row between deceased's wife and accused's wife and mother-in-law, that deceased went to nearby store and called police while women were at his house was inadmissible, where police came and went before accused arrived, and their coming and going had no connection with the fight between accused and deceased—Higdon v State, 143 So 213, 25 Ala App 209.

evidence of prior difficulties between third persons may become admissible where it throws light on the offense and accused's connection therewith is shown,[49] as where he participated therein,[50] although even in such a case the details thereof are inadmissible[51] Threats by one third person against another third person are inadmissible in the absence of relevancy to the offense[52]

Rebuttal of malice Evidence as to feelings between the parties is not confined to feelings of hatred and hostility, where no deliberate killing is shown, evidence of kindness of accused to deceased is admissible as tending to show that the killing was unintentional or purely accidental,[53] but where a deliberate killing is shown, evidence that the prisoner was on friendly terms with deceased and his family is not admissible[54] Where prior disputes have been shown, accused may show that ill feeling and disputes between him and deceased had terminated prior to the homicide, and evidence offered for such purpose and going to the issue of existence of ill feeling at the time of the homicide should not be excluded on the theory that it shows details of the prior difficulties[55] On the other hand, it has also been held that evidence of details of the difficulty offered by accused in rebuttal should be excluded[56] Where the state has shown a reconciliation between deceased and accused and its cessation, as tending to show malice, accused can in rebuttal show reasons for both[57] Where the prosecution has shown a previous difficulty on the occasion of an arrest of decedent by accused, a policeman, for the purpose of showing the origin of the ill will of accused, but his authority to make the arrest is not in issue, evidence of local ordinances giving such authority is immaterial, and may be excluded[58]

b. Difficulties between Persons in Family Relationship

Evidence of prior mistreatment of, or difficulties with, a victim sustaining a marital or family relationship toward the accused is admissible, but details are ordinarily inadmissible On the trial of the accused for killing a third person during the course of the accused's assault on his own spouse, evidence of prior difficulties of the accused with his spouse becomes admissible

On trial for unlawful homicide or deadly assault on one sustaining a family relationship toward accused, evidence of previous difficulties, such as accused's cruel treatment of his victim on previous occasions, is admissible to show malice or state of mind,[59] as, for example, previous difficulties of ac-

Feeling between families

Exclusion of testimony as to bad feeling between families of deceased and accused was not error where it threw no light on the state of feeling between deceased and accused—Bryant v Commonwealth, 288 S W 680, 216 Ky 724

49. Ala—Higdon v State, 143 So 213, 25 Ala App 209
Tex—Miller v State, 15 S W 2d 1013, 112 Tex Cr 194

Motivating cause of crime

In prosecution for murder testimony with respect to altercation between accused's adopted children and the children of deceased which took place within the hour prior to the homicide, was admissible as showing malice, where it appeared that such altercation was the motivating cause of the homicide—State v Vincent, 5 So 2d 327, 198 La 1037

Hostility between wives

Evidence of difficulty between deceased's wife and accused's wife and mother in-law about thirty minutes before the fatal shooting was relevant in a murder trial—Higdon v State, 143 So 213, 25 Ala App 209

50. Ark—Burns v State, 243 S W 963, 155 Ark 1
Ga—Harris v State, 191 S E 439, 184 Ga 382

Difficulty over school matters

Where the evidence showed bad feeling between deceased's family and the family for whom accused was working because of school matters, evidence of a quarrel between deceased's mother and the teacher on one side, and children of accused's employers on the other, at which accused was present and took sides with the children, was admissible—Burns v State, 243 S W 963, 155 Ark 1

Prior race difficulties

In prosecution of negro for murder of white man evidence of difficulty between deceased and his brother and group of unnamed negroes in town before encounter between two groups on highway was admissible to show bad feeling between the two groups, in view of other evidence tending to connect accused with the group of negroes—Harris v State, 191 S E 439, 184 Ga 382

51. Ala—Higdon v State, 143 So 213, 25 Ala App 209

52. Ky—Pennington v Commonwealth, 78 S W 2d 773, 257 Ky 511

Threats of parents

In murder prosecution exclusion of evidence that decedent's stepfather had made statement that he was going to shoot accused's father was proper—Pennington v Commonwealth, supra

53 W Va—State v Long, 108 S E 279, 88 W Va 669
Wyo - Johnson v State, 58 P 761, 8 Wyo 491

54. N C—State v Capps, 46 S E 730, 134 N C 622

55 Cal—People v Kermott, 91 P 2d 215, 33 Cal App 2d 236

56. S C—State v Smith, 20 S E 2d 726, 200 S C 188

Testimony of physician

In prosecution for murder of wife, testimony of physician who treated wife's foot wound resulting from husband's shot on night before homicide, and testimony of policeman relating to declarations made by wife as to manner in which she had been shot, was inadmissible to explain the difficulty to refute charge of malice, since rule excluding details of previous difficulty applies to testimony offered by accused as well as to that offered by the state—State v Smith, supra

57. Tex—Taylor v State, 197 S W. 196, 81 Tex Cr 347

58. S C—State v Angel, 76 S E 190, 93 S C 149

59. Ga—Beckworth v State, 190 S E 184, 183 Ga 871
Minn—State v Rediker, 8 N W 2d 527
N C—State v Vaughan, 120 S E 338, 186 N C 759
30 C J p 158 note 17.

cused with his brother,[60] daughter-in-law,[61] son,[62] son-in-law,[63] or spouse.[64] Evidence of the details or merits of prior difficulties between persons in a family relationship is ordinarily inadmissible,[65] and evidence of previous difficulties or acts of cruelty is not admissible unless there is evidence connecting accused with such acts.[66]

On trial for accidental killing of another while intending to slay spouse, whatever evidence of prior assaults would have been admissible on trial for assault of the spouse is admissible on trial for the homicide of the third person in fact killed.[67]

c. Time of Difficulty

Difficulties between the accused and his victim are admissible whether past or current in point of time, except where the difficulty is so remote in both time and circumstance as to afford no probative value. Remoteness in point of time ordinarily affects weight but not admissibility.

Evidence of difficulties between accused and deceased present and pending at the time of the homicide, as well as of prior difficulties, is admissible to show accused's malice and state of mind.[68] Evidence showing how long ill feeling had existed between the parties is proper.[69]

Remoteness. Evidence of difficulties so remote in time and circumstance as to have no relation to the difficulty under investigation is not admissible,[70] but, where the difficulties occurred within a time not too remote, or at any rate not too remote under prevailing circumstances, to be of probative value, evidence of prior difficulties are admissible as against the objection of remoteness,[71] and occur-

60. Cal.—People v. Kermott, 91 P. 2d 215, 33 Cal. App. 2d 236.

61. Or.—State v. Grayson, 270 P. 404, 126 Or. 560.

62. N.C.—State v. Vaughan, 120 S.E. 338, 186 N.C. 759.

Whipping in weakened condition. In prosecution for murder of son, testimony as to accused's statement to witness that he had "whipped the boy" notwithstanding his weakened condition, was competent to show animus or ill feeling.—State v. Vaughan, 120 S.E. 338, 186 N.C. 759.

63. Mo.—State v. Hughes, 125 S.W. 2d 66, 344 Mo. 116.

64. Ala.—Grooms v. State, 152 So. 455, 228 Ala. 133.—Ratliff v. State, 102 So. 621, 212 Ala. 410.
Cal.—People v. De Moss, 50 P. 2d 1031, 4 Cal. 2d 469.
Ga.—Hill v. State, 150 S.E. 587, 169 Ga. 455.—Willingham v. State, 119 S.E. 887, 169 Ga. 142.
Idaho.—State v. Frank, 97 P. 2d 410, 60 Idaho 774.
Ky.—Sanders v. Commonwealth, 50 S.W. 2d 37, 244 Ky. 77.—Alder v. Commonwealth, 286 S.W. 696, 215 Ky. 613.
N.C.—State v. Horne, 184 S.E. 470, 209 N.C. 725. State v. Goss, 160 S.E. 357, 201 N.C. 373.
Or.—State v. Butchek, 253 P. 367, 121 Or. 111, rehearing denied 254 P. 805, 121 Or. 111.
S.C.—State v. Smith, 20 S.E. 2d 726, 200 S.C. 188.
Tex.—Steward v. State, 75 S.W. 2d 113, 127 Tex. Cr. 63.

Indifference and continued ill-treatment. In prosecution for murder of accused's wife, evidence of indifference on part of accused as to provision for wife and of long course of ill-treatment continuing until shortly before homicide was admissible to show malice.—Beckworth v. State, 190 S.E. 184, 183 Ga. 871.

Marks of assault. In prosecution for murder of accused's wife resulting in conviction for manslaughter in first degree, where there was evidence of frequent quarrels between accused and his wife and of his abuse of her and evidence to connect fact of the wife's frequent bruises with noises and commotion commingled with accused's threats and curses emanating from their apartment, testimony that witnesses had seen wife with bruises and black eyes was admissible to show course of conduct and mental attitude of accused toward his wife and to show malice.—State v. Rediker, Minn., 8 N.W. 2d 527.

Pending charge of misconduct. In prosecution for killing of accused's wife, evidence as to misconduct charge pending against accused on complaint filed by wife, who stated that she was afraid her life would be taken by accused was admissible.—Hennessee v. State, 54 P. 2d 217, 58 Okl. Cr. 407.

65. Mo.—State v. Hughes, 125 S.W. 2d 66, 344 Mo. 116.

Grounds of divorce from daughter of accused. In murder prosecution fact that victim had been granted divorce from daughter of accused and pendency of motion by victim to modify decree were admissible to show state of feelings, between accused and victim but grounds of divorce and allegations of motion tending to exalt victim and debase accused were improperly admitted.—State v. Hughes, supra.

66. Utah.—People v. Hancock, 25 P. 1093, 7 Utah 170.

Accused's connection with difficulty must be definitely established before evidence of a prior difficulty with deceased becomes admissible, and where such connection was not shown, such evidence was inadmissible.—State v. Stallings, 64 S.W. 2d 643, 334 Mo. 1.

67. Pa.—Commonwealth v. Lyons, 129 A. 86, 283 Pa. 327.

Prior assault on wife may be shown in such a trial.—Commonwealth v. Lyons, supra.

68. Cal.—People v. Fleming, 23 P. 2d 28, 218 Cal. 300.

69. Ala.—Shirley v. State, 40 So. 269, 144 Ala. 35.

70. Ark.—Crews v. State, 14 S.W. 2d 261, 179 Ark. 94.
Ky.—Stewart v. Commonwealth, 32 S.W. 2d 29, 235 Ky. 670.
Okl.—Jones v. State, 56 P. 2d 423, 59 Okl. Cr. 53.
30 C.J. p. 158 note 22.

After twenty years. Evidence that accused had a difficulty with deceased in which the latter hit him over the head with brass knuckles and shot at him twice was inadmissible where it further appeared that such difficulty occurred twenty years before the homicide and that at the time of the killing deceased and accused were living in the same house in apparently friendly relationship.—Crews v. State, 14 S.W. 2d 261, 179 Ark. 94.

71. La.—State v. King, 106 So. 461, 159 La. 972.
Tex.—Thompson v. State, 288 S.W. 464, 105 Tex. Cr. 351.
Wash.—State v. Davis, 108 P. 2d 641, 6 Wash. 2d 696.

Conduct toward wife. In prosecution for murdering wife, daughter's testimony regarding accused's hostile attitude and conduct toward wife up to about ten months before homicide, was held not objectionable as too remote.—Warner v. Commonwealth, 43 S.W. 2d 521, 241 Ky. 118.

Insane ideas. In homicide prosecution, exclusion of testimony as to occurrences when

rences at a remote time are admissible when similar occurrences continued to the time of the homicide,[72] and it has been held broadly that the remoteness of the occurrence goes to the weight only, and not the admissibility of the evidence[73]

§ 209. —— Difficulty between Accused and Third Person

Evidence of previous difficulties between the accused and a third person is admissible where properly connected with the victim and offense, but not otherwise, and in any case evidence as to details of such a difficulty ordinarily is inadmissible.

Evidence is inadmissible to show a difficulty between accused and a third person in no way connected with the victim or offense,[74] or to show accused's state of mind toward such a person,[75] or to show threats made against accused by a person who was not present at the homicide and who is not shown to have been acting in concert with deceased[76] However, where their connection with the offense sufficiently appears, evidence of prior difficulties between accused and a third person[77] is admissible to show malice, premeditation, or general state of mind, as is evidence of accused's ill will toward a member of the family of deceased,[78] or that accused had a grudge against the companion of the victim at the time of the assault[79] Where the prosecution claims that accused killed deceased in an effort to kill a third person, evidence of former difficulties with the third person is admissible[80] Where deceased was a stranger to accused and was killed while intervening in a dispute between accused and a third person, it is proper to admit evidence of previous disputes between accused and such third person as throwing light on the trouble in which deceased participated[81]

officers, with aid of accused, arrested deceased in order to take him to insane hospital, was error, since evidence was admissible, in view of medical testimony that ideas once entertained by deceased would not be changed to show deceased's hostility to accused from time of arrest —Motley v State, 165 So 296, 174 Miss 568

72. Idaho —State v Frank, 97 P 2d 410, 60 Idaho 774
Tex —Paschal v State, 174 S W 1057, 76 Tex Cr 464

73. Cal —People v De Moss, 50 P 2d 1031, 4 Cal 2d 469—People v Bolton, 8 P 2d 116, 215 Cal 12
Ga —Willingham v State, 149 S E 887, 169 Ga 142
Idaho —State v Frank, 97 P 2d 410, 60 Idaho 774
Neb —Wever v State, 238 N W 736, 121 Neb 816
N J —State v Schuyler, 68 A 56, 75 N J Law 487
Wyo —Lampitt v State, 242 P 812, 34 Wyo 247

74. Ala —Wiggs v State, 129 So 706, 24 Ala App 22, quoting **Corpus Juris** —Clemmons v State, 94 So 245, 18 Ala App 650
Ill —People v Kowalski, 163 N E 399, 332 Ill 167
Tex — Maddox v State 115 S W 2d 644, 134 Tex Cr 289—Steen v State, 67 S W 2d 874, 125 Tex Cr 361
30 C J p 159 note 30

Distinct matter

Generally proof of difficulty, constituting separate and distinct matter unconnected with issue to be tried, between accused and another than deceased, is inadmissible in murder trial —Glover v State, 69 S W 2d 136, 125 Tex Cr 605

75. Cal —People v Richardson, 73 P 2d 610, 23 Cal App 2d 428

76. Ala —Grooms v State, 152 So 455 228 Ala 133
Ariz —Douglass v State, 33 P 2d 985 44 Ariz 84
Ky —Hanna v Commonwealth, 46 S W 2d 1098, 242 Ky 584
30 C J p 159 note 30

Threats by absent nonparticipants

In a prosecution for assault with intent to murder, evidence of threats made against defendants by third persons not present at the assault, and who took no part therein was inadmissible —Morell v State 91 So 501, 18 Ala App 243 certiorari denied 91 So 923, 207 Ala 713

77. Ark —Macias v State, 283 P 711, 36 Ariz 140
Ga —Jeffords v State, 134 S E 169, 162 Ga 573
Ky — Jarvis v Commonwealth, 43 S W 2d 2, 240 Ky 716
Or — State v Grayson, 270 P 404, 126 Or 560

Difficulty showing grudge toward victim

In murder prosecution testimony of victim's son as to a quarrel with accused was admissible where statements of accused in such quarrel were admissible as showing that accused was harboring a grudge toward victim —Williams v Commonwealth, 125 S W 2d 221 276 Ky 754

Difficulty with deceased's son

(1) Evidence of drinking, and threats by defendants charged with murder, and of difficulty with deceased's son shortly before killing, was admissible to show predetermination to harm deceased or son —Woodard v Commonwealth, 14 S W 2d 773, 228 Ky 254

(2) In a prosecution for murder, it was proper to admit evidence of a difficulty between accused and a son of deceased from ten to thirty minutes before the killing, to show that accused was in an angry mood, as general demeanor of accused a short time prior to the homicide was competent as tending to show his state of mind at the time of the killing —Inman v State, 210 P 742, 22 Okl Cr 161

Where victim present and involved

Evidence in murder trial as to accused's altercation with one whose son and deceased prevented accused from entering his automobile to leave held admissible on question of malice aforethought where deceased was present and physically involved in the altercation —Threadgill v State, 61 S W 2d 821, 124 Tex Cr 287

78. Ga —Jeffords v State, 134 S E 169 162 Ga 573
Tex - Ramirez v State, 117 S W 2d 131, 135 Tex Cr 192
30 C J p 159 note 31

79. Tenn —Hayes v State, 172 S W 296, 130 Tenn 661

80 Or —State v Ryan 108 P 1009, 56 Or 524
30 C J p 159 note 33

Possible mistake in identity

Testimony that accused stated that if a convict whom he had captured the day before had run he would have shot him and that witness had angered accused by stating that he would not under such circumstances shoot a convict, and that accused at scene of killing called witness a name which referred to such remark was admissible in prosecution for unlawful killing, where accused at the time he killed deceased, might have intended to kill witness and may have been confused as to identity of deceased —Hyde v State, 136 S W 2d 850 138 Tex Cr 157

81. Minn —State v Nelson, 181 N W 850, 148 Minn 285

Details. Evidence as to details of prior difficulties between accused and a third person ordinarily is inadmissible [82]

§ 210. —— Difficulty between Victim and Third Person

Evidence of prior difficulties between the victim and a third person, or of prior threats by such third person, are inadmissible where not properly connected with the offense for which the accused is being tried, but may become admissible where their relevancy is duly shown, as by proof of conspiracy between a third person and the accused

Evidence of a difficulty between the victim and a third person in which accused took no part,[83] or of threats by a third person against the victim unassociated with a conspiracy and not otherwise connected with the offense,[84] ordinarily is inadmissible on the issues of malice or its rebuttal, or to show the state of mind or feeling between the persons involved Evidence of a statement or declaration by a third person to the victim is inadmissible where not sufficiently connected with the offense to have any bearing on the issues of the case [85] Difficulties between deceased and a relative of accused at a remote time are properly excluded where there is ample evidence of ill feeling between accused and deceased at the time of the homicide [86] Where, however, the relevancy and materiality of such evidence to the offense sufficiently appears, prior difficulties of a third person and the victim,[87] or threats of a third person against the victim,[88] are admissible, as where evidence of such character is rendered relevant by proof of conspiracy between the third person and accused,[89] or by proof that accused afterward espoused the cause of such third person and made the quarrel his own [90] In case of a neighborhood feud where accused and deceased were members of opposing factions, evidence of previous fights and quarrels between such factions in which accused participated is admissible [91]

Codefendants Where the third person is a codefendant, evidence of his threats against the victim,[92] or of his prior difficulties with the victim,[93] is admissible where through conspiracy or in any other wise they are relevant to the offense of accused However, threats made by a codefendant out of the presence of another codefendant have been held inadmissible,[94] and, where conspiracy is neither charged nor proved, and those accused are separately tried, threats made by a coindictee in the absence of one codefendant have been held inadmissible [95]

Details of a difficulty between the victim and a third person prior to commission of the offense have been held inadmissible [96]

Subsequent declarations of a third person acting in concert with accused and showing hostility toward the victim may be admissible [97]

82. Ala —Sledge v State, 93 So 875 208 Ala 154
Ky —Carmichael v Commonwealth, 94 S W 2d 3, 263 Ky 830
Minn —State v Nelson, 181 N W 850, 148 Minn 285
Miss —Carter v State, 145 So 739, 167 Miss 331

83. Ala —Maxwell v State 125 So 682, 220 Ala 419—Carter v State, 123 So 50 219 Ala 670
Ark - Edwards v State, 21 S W 2d 850, 180 Ark 363
Ind - Pruitt v State, 152 N E 830, 198 Ind 141
Ky —Ely v Commonwealth, 40 S W 2d 276 239 Ky 638
Mass —Commonwealth v Caruso, 146 N E 661, 251 Mass 362
Miss - Irby v State, 185 So 812, 186 Miss 161
Pa —Commonwealth v Prophet, 160 A 597, 307 Pa 122
Tex —Grafft v State, 113 S W 2d 546, 134 Tex Cr 30
30 C J p 159 note 37.

84. Ala —Pendley v State, 138 So 589, 23 Ala App 539
Ind —Pruitt v State, 152 N E 830, 198 Ind 141
Ky —Baker v Commonwealth, 20 S W 2d 447, 230 Ky 569.
Tex —Beckhan v State, 120 S W 2d 97 135 Tex Cr 338
30 C J p 159 note 37

85. Ark —Swaney v State, 31 S W 2d 288, 182 Ark 254

86. Ark —McCain v State, 201 S W 840, 132 Ark 497

87. Mo —State v Malone, 39 S W 2d 786, 327 Mo 1217
Tex —Easley v State, 44 S W 2d 385 119 Tex Cr 408

Communicated difficulty

Parts of testimony by accused's wife as to difficulty between accused's son and deceased, communicated to accused, were admissible in prosecution for murder as bearing on the mind of accused at the time of the homicide —King v State, 286 S W 231, 104 Tex Cr 583

88. N C —State v Posey, 164 S E 340, 203 N C 4

89. Ala —Roberson v State, 118 So 654, 218 Ala 142
Tex —Jennings v State, 51 S W 2d 341, 121 Tex Cr 384
30 C J p 159 note 41

90. Tex —Jones v State, Cr, 42 S W 294
30 C J p 159 note 38.

91. Iowa —State v Helm, 66 N W 751 97 Iowa 378

92. Ky —Waters v Commonwealth, 298 S W 1078, 221 Ky 433

93 Ala - Baxley v State, 90 So 431, 18 Ala App 277, certiorari denied 90 So 925 206 Ala 698

94. Ky —Winstead v Commonwealth 32 S W 2d 719 236 Ky 151

95 Ky —Veteto v Commonwealth 50 S W 2d 7, 244 Ky 39

96 Ala —Roper v State, 147 So 201, 25 Ala App 397

97. Mo —State v Ring, 141 S W 2d 57, 346 Mo 290

Threat to "finish" victim following assault

In homicide prosecution, testimony that state's witness heard accused's companion say after companion had assaulted the deceased, that he had hit the deceased three times, and that he was going to finish deceased up before daylight, whether res gestae or not, was admissible, where there was evidence to sustain a finding that accused had in legal effect participated in the assault, that accused's companions did not know then that the assault would result in deceased's death, and that while still acting in concert they were bent on

§ 211. —— Subsequent Hostile Acts and Declarations by Accused

Subsequent hostile acts and declarations of the accused are admissible on the issue of malice and state of mind, where relevant to such conditions as of the time of the offense, but should be excluded where such relevancy does not appear.

Declarations by accused after the fatal affray showing his hostility to deceased are admissible in evidence on the issue of malice,[98] as are also declarations showing a depraved mind, regardless of human life,[99] although statements so remote in time and circumstance from the date of the homicide as to afford no probative weight are inadmissible[1] Acts or conduct showing continued hostility are admissible,[2] or, generally speaking, conduct of accused subsequent to the homicide which is directly connected with and tends to prove a preconceived plan and its continued execution, in which the homicide is but one of several acts planned, such evidence being admissible to characterize the homicidal act as unlawful and part of a premeditated criminal plan[3]

Indignity to the remains Any unseemly conduct toward the corpse of the person slain or any indignity offered it by the slayer should go to the jury on the question of malice[4]

Payment of funeral expenses. It has been held not proper to permit the state to prove, as showing malice, that accused failed to pay the burial expenses of his murdered wife,[5] but, where accused has testified that he offered to pay the funeral expenses of his victim, it is permissible for the state in rebuttal of such evidence as bearing on the issue of malice and ill will to offer evidence to the effect that accused did not pay the funeral expenses[6]

On a trial for assault with intent to murder, subsequent hostile statements of the assailant as to the person assaulted are admissible to show malice or state of mind at the time of the assault.[7]

§ 212. —— Acts in Preparation

Acts of preparation for the offense by accused ordinarily are admissible to show malice and state of mind, and by way of rebuttal the accused may introduce evidence furnishing an innocent explanation of such acts The preparatory acts of a third person are admissible only when properly connected with the accused and the offense

On a trial for an unlawful killing,[8] or for an as-

completing their work - State v Ring, supra—State v Crow, 141 S W 2d 66 346 Mo 306

Subsequent declarations of accused see infra § 211

98 Ark Ballentine v State 276 S W 1002 169 Ark 871

Ky —Karsner v Commonwealth 32 S W 2d 43 15, 235 Ky 710, citing **Corpus Juris.**

La —State v Scarbrock, 145 So 261, 176 La 48—State v Poole 100 So 613, 611 156 La 434, quoting **Corpus Juris.**

Me —State v Sprague, 199 A 705, 708, 135 Me 470, quoting **Corpus Juris.**

30 C J p 159 note 44

Particular declarations

(1) Evidence that shortly after the shooting accused exclaimed he 'got one of them and would get the rest," although inadmissible as part of the res gestæ was competent as an admission of accused tending to show ill will and relevant to the issue of express malice —People v Brown 216 P 111 62 Cal App 96

(2) Court did not err in permitting son of deceased to testify that immediately after the shooting he approached accused, who said to him "Ha! I kill you too," the incident so closely following the actual killing that it tended to show the frame of mind of accused at the time of the shooting —State v Adamo, 223 P 9, 128 Wash 449

Threats against family of deceased, made after the homicide may be shown to prove malice toward deceased —People v Pollock 89 P 2d 128, 31 Cal App 2d 717

99 N Y —People v Doyle, 2 Edm Sel Cas 258

Tex —Smith v State 119 S W 2d 1039, 135 Tex Cr 327

1. Ky —Karsner v Commonwealth, 32 S W 2d 43, 235 Ky 710

Remark made six months after homicide was not uttered within a reasonable proximity of the crime and was beyond all possible range of admissibility Karsner v Commonwealth, supra

2. La —State v Poole 100 So 613, 611, 156 La 434, quoting **Corpus Juris.**

Mo —State v Cade, 34 S W 2d 82, 326 Mo 1132

Tex — Waters v State, 241 S W 496, 91 Tex Cr 592

30 C J p 160 note 46

Beating decedent's widow

Testimony that accused, immediately after shooting, beat deceased's widow with gun, was admissible to prove malice —State v Hall, 13 P 2d 624, 54 Nev 213

3. S D —State v Staley 229 N W 373, 56 S D 495, reversing 223 N W 943, 54 S D 552

4. Ky - Duncan v Commonwealth, 12 S W 673, 11 Ky L 620

Attempt to lead mules over corpse

Evidence that accused after killing deceased, led his mules up close to the body, and stopped only when asked by deceased's mother not to lead them over deceased held relevant on the question of malice — Reece v State, 116 S E 631, 155 Ga 350

5. Tex —Washington v State, 79 S W 811, 46 Tex Cr 184

6 Tex —Green v State, 46 S W 2d 1001, 120 Tex Cr 355

7. Ark —Perkins v State, 271 S W 326, 168 Ark 710

30 C J p 160 note 48

8 Ala —Fowler v State, 181 So 266, 236 Ala 87—McCoy v State, 166 So 769, 232 Ala 104—White v State 96 So 709 209 Ala 516—Davis v State 113 So 393, 216 Ala 175 Bedsole v State, 114 So 786, 22 Ala App 274—Clark v State, 91 So 328 18 Ala App 209, certiorari denied 91 So 921, 207 Ala 710

Cal —People v Bolton, 8 P 2d 116, 215 Cal 12

Ga —Shafer v State, 13 S E 2d 798, 802, 191 Ga 722, citing **Corpus Juris**—Black v State, 199 S E 810, 187 Ga 136

Ky —Thomas v Commonwealth, 78 S W 2d 777, 780, 257 Ky 605, citing **Corpus Juris**—Stanifer v Commonwealth, 283 S W 84, 214 Ky 280—Decker v Commonwealth, 241 S W 817, 195 Ky 64

La —State v Johnson, 92 So 139, 151 La 625

Mass —Commonwealth v Simpson, 13 N E 2d 939, 300 Mass 45, certiorari

sault with intent to kill,[9] it is competent to prove all the acts of accused in preparation for the commission of the homicide, inasmuch as preparation beforehand of the means with which to perpetrate the crime tends to show malice, deliberation, and a fixed deadly purpose, but the rule will not be extended so as to render admissible evidence of details deemed irrelevant or immaterial.[10] Evidence of acts of preparation is admissible even though such acts involve the commission of another crime,[11] and although other means were actually used in the commission of the crime than those prepared,[12] and objections raised as to the remoteness of evidence offered to show preparation go to weight rather than to admissibility.[13] Where there is evidence of preparation tending to show antecedent malice, accused has the right to show that such preparation was made in anticipation of an expected attack on himself or for some other innocent purpose.[14] It is competent to prove why accused was carrying a weapon at the time of the difficulty in order to negative criminal purpose,[15] but it is not competent to show that accused obtained an alleged permission to carry a pistol from an official lacking authority to issue such a permit,[16] nor, it has been held, may accused show the carrying of a weapon

denied Simpson v Commonwealth of Massachusetts 58 S Ct 950, 301 U S 565, 82 L Ed 1531—Commonwealth v Snyder, 185 N E 376, 282 Mass 101, certiorari granted Snyder v Commonwealth of Massachusetts 54 S Ct 67, 290 U S 606, 78 L Ed 531, affirmed 54 S Ct 330, 291 U S 97, 78 L Ed 674, 90 A L R 575.

Mo—State v Farris, 6 S W 2d 903.
N J—State v Juliano, 138 A 575, 103 N J Law 663.
N M—State v Hernandez, 7 P 2d 930, 36 N M 35.
Tex—Bilberry v State, 18 S W 2d 615, 113 Tex Cr 9.
30 C J p 160 note 51.

Arming self

Evidence that accused purchased cartridges and armed himself before going to place where deceased was killed and that one of bullets purchased was taken from deceased's body was competent—Bilberry v State, 18 S W 2d 615, 113 Tex Cr 9.

Buying gun or ammunition

(1) Evidence of purchase of revolver and cartridges by accused shortly before homicide was admissible as tending to show premeditation—State v Stacy, 160 A 257, 104 Vt 379, motion denied 160 A 747, 104 Vt 379.

(2) In a prosecution for murder evidence relating to the purchase of a revolver by accused was properly admitted as tending to show preparation and premeditation—State v Burris, 198 N W 82, 198 Iowa 1156.

(3) Testimony of clerk in hardware store that accused bought shotgun shells of gauge to fit shotgun accused had with her at time she shot deceased is admissible—Thomas v Commonwealth, 78 S W 2d 777, 257 Ky 605.

Examination of weapon on day of crime

In a murder prosecution, it was proper to show that on the day of the shooting accused was looking at a pistol on the porch of his house—Clark v State, 91 So 328, 18 Ala App 209, certiorari denied 91 So 921, 207 Ala 710.

Explosive character of cartridges

In murder prosecution testimony that cartridges witness sold accused would explode when striking object was admissible to show preparation and malice—Shield v State, 38 S W 2d 76, 118 Tex Cr 509.

Mental and physical preparation

In a murder prosecution, testimony that on the day of the killing accused and his co-conspirator had whisky, were drinking it, getting cartridges and making threats against decedent was relevant as tending to show a preparation both mental and physical to murder deceased—Aplin v State, 99 So 734, 19 Ala App 604.

Planning jail break

In prosecution for murder of deputy sheriff while accused was attempting to escape from jail evidence that accused had talked to other prisoners about breaking jail and that no other prisoner had offered to help him escape was admissible to show premeditated design, and hence malice and motive—Banks v State, 95 S W 2d 421, 130 Tex Cr 505.

Suspicious inquiries

It is competent for the state to prove that immediately before the homicide accused made inquiries as to the probable movements of the person, or persons whom he subsequently killed indicating his purpose to place himself in such position that such person or persons necessarily must encounter him—State v Price, 115 S E 393, 92 W Va 542.

9. Ala—Floyd v State, 116 So 318, 22 Ala App 347, certiorari denied 116 So 320, 217 Ala 326.
Tex—Adams v State, 144 S W 2d 889, 140 Tex Cr 319—Clayton v State, 298 S W 601, 108 Tex Cr 19.

Possession of weapon

Testimony that accused charged with assault with intent to murder, had gun when approaching victim's house was admissible to show preparation, especially where there was evidence of a prior threat by accused—Floyd v State, 116 So 318, 22 Ala App 347, certiorari denied 116 So 320, 217 Ala 326.

10. Ala—Williams v State, 93 So 284, 18 Ala App 573.

Source whence weapon procured

In a prosecution for assault to murder, it was immaterial from whom accused got the pistol—Williams v State, supra.

11. Tex—Gilliam v State, 272 S W 151, 100 Tex Cr 67.
30 C J p 160 note 52.

12. Ky—Hocker v Commonwealth, 111 S W 676, 33 Ky L 944.

13. Cal—People v Bolton, 8 P 2d 116, 215 Cal 12.

Evidence not too remote

Testimony showing that accused, in spring of 1929 bought shotgun shells of kind with which deceased was shot in August, 1929 held not error it being a matter of common knowledge that shotgun shells retain their effectiveness for an even longer period of time—State v Cropper, 36 S W 2d 923, 327 Mo 193.

14. Ala—Bims v State, 151 So 614, 25 Ala App 590.
30 C J p 160 note 54.

15. Ind—Powers v State, 184 N E 549, 204 Ind 472, 86 A L R 166.
30 C J p 160 note 55.

Custom

Evidence in murder prosecution that accused habitually carried pistol was admissible to rebut state's theory he armed himself specially to kill deceased—Little v State, 139 S E 37, 164 Ga 509.

Possession of money

Evidence that accused carried a large sum of money on his person was admissible in explanation of why he carried a pistol, and corroborative evidence of a police officer should have been admitted in support thereof—Powers v State, 184 N E 549, 204 Ind 472, 86 A L R 166.

16. Ala—Murphy v State, 144 So 114, 25 Ala App 237.

for use in an occupation not requiring him to go armed,[17] and, where one committed a homicide while off duty, it has been held proper to exclude evidence that he was instructed to carry arms while on duty.[18] Evidence of the fact that accused lacked a permit to carry a weapon has been held inadmissible.[19] Accused may show that, before he made the preparation in evidence, he made an unsuccessful effort to protect himself by legal proceedings.[20]

Acts of third persons It is competent to show the acts of a third person in preparation for the offense where there is evidence of his acting in concert with accused and of his presence at the scene and time of the offense,[21] but it is not competent to show acts and conduct of a third person, who was not present or participating in the difficulty in question.[22]

§ 213. Commission of or Participation in Act by Accused

Evidence which actually tends to show accused's connection, or lack of connection, with the commission of the crime is relevant and admissible

Evidence tending to connect accused with the commission of the crime is always admissible,[23] as, conversely, is evidence tending to show the innocence of accused,[24] but evidence claimed to have this tendency must have the requisite relevancy.[25]

§ 214. Ability and Opportunity

Evidence that accused had an opportunity to commit the crime is admissible, as is also evidence that he possessed a weapon or instrument of the kind apparently used, or otherwise possessed the means for committing the homicide, and evidence in rebuttal of evidence of opportunity or possession of means is likewise admissible

Subject to the general rules as to competency and relevancy, proof that defendant had in his possession the means,[26] as, for example, a weapon or instrument of the character apparently used in the commission of the homicide,[27] that he owned the weapon used,[28] or had access to a weapon found near the body of deceased,[29] or claimed to have the peculiar skill,[30] or, where he denies it, that he had the skill,[31] for committing the homicide in the manner in which it was committed, is admissible on the question of his ability to commit it. Accused may show in rebuttal that he did not have, at the time of the homicide, an instrument or weapon of the kind used in its commission,[32] but, where he

17. Ala.—Knott v. State, 96 So. 731, 19 Ala. App. 258.

Game warden

Being a game warden not requiring of itself that one go armed in a prosecution for murder sustaining state's objection to a question to accused as to whether he took his pistol because he was a game warden in the county was not error.—Knott v. State, supra.

18. Tex.—Williamson v. State, 99 S.W.2d 606, 131 Tex.Cr. 459.

Mail carrier

In prosecution against rural mail carrier accused of murder, refusal to admit testimony that carrier was possessed of gun on day of homicide in compliance with post mistress instruction to carry gun was not error where carrier was not in performance of post office duties at time of homicide.—Williamson v. State, supra.

19. Ind.—Everett v. State, 195 N.E. 77, 208 Ind. 145.—Powers v. State, 181 N.E. 549, 204 Ind. 472, 86 A.L.R. 166.

20. Tex.—Sunday v. State, 177 S.W. 97, 77 Tex.Cr. 26.

21. Ala.—McCoy v. State, 166 So. 769, 232 Ala. 101.

Preparatory acts of son were admissible where there was evidence tending to show that he aided and abetted his father the accused and was present at the homicide.—McCoy v. State, supra.

Procuring pistol

In a prosecution for assault with intent to murder permitting proof that accused's pistol was secured from neighbor short time prior to difficulty by another was not erroneous where such other and accused had acted together at time of and prior to, difficulty.—Watson v. State, 287 S.W. 265, 105 Tex.Cr. 152.

22. Mo.—State v. Duncan, 140 S.W. 882, 237 Mo. 195.

23 Ala.—Cunningham v. State, 118 So. 242, 22 Ala.App. 583, certiorari denied 118 So. 248, 218 Ala. 166.

Ill.—People v. Cassler, 165 N.E. 130, 332 Ill. 207.

30 C.J. p. 161 note 58.

Extrajudicial confessions

Where the facts shown are such as to prove beyond a reasonable doubt that deceased was criminally killed, extrajudicial confessions of accused if otherwise competent, are admissible for the purpose of establishing his connection with the crime.—State v. Knapp, 71 N.E. 705, 70 Ohio St. 380.

24. Pa.—Commonwealth v. Loomis, 113 A. 128, 270 Pa. 251.

30 C.J. p. 161 note 59.

25. Ill.—People v. Cassler, 163 N.E. 430, 332 Ill. 207.

La.—State v. Harris, 117 So. 820, 166 La. 759, certiorari denied Harris v. State of Louisiana, 49 S.Ct. 34, 278 U.S. 641, 73 L.Ed. 556.

30 C.J. p. 161 note 58 [a].

26. Okl.—Quinn v. State, 25 P.2d 711, 55 Okl.Cr. 116.

30 C.J. p. 161 note 60.

In case of murder by poison, it is important, if not necessary, to trace the poison into the possession of accused.—State v. Smith, Mo., 222 S.W. 455.

27. Okl.—Quinn v. State, supra.

30 C.J. p. 161 note 61.

Possession of revolver prior to killing

Iowa.—State v. Leeper, 200 N.W. 732, 199 Iowa 132.

28. Ala.—Thomas v. State, 65 So. 863, 11 Ala.App. 85.

30 C.J. p. 161 note 62.

Asking accused whether he owned pistol, accused having committed homicide by shooting with pistol, was not error.—Parks v. State, 2 S.W.2d 215, 108 Tex.Cr. 576.

29. Mo.—State v. Isaacs, 187 S.W. 21.

30. Iowa.—State v. Leeper, 200 N.W. 732, 735, 199 Iowa 452, citing **Corpus Juris.**

Pa.—Commonwealth v. Crossmire, 27 A. 10, 156 Pa. 301.

31. Neb.—Lillie v. State, 100 N.W. 316, 72 Neb. 228.

30 C.J. p. 161 note 65.

32. Ind.—Lillard v. State, 50 N.E. 383, 151 Ind. 322.

Okl.—Edwards v. State, 48 P.2d 1087, 58 Okl.Cr. 15.

testifies, that he did not have such a weapon at the time, it is not error to reject the testimony of other witnesses, not with him at the time, that he did not then own or possess such a weapon;[33] and the exclusion of evidence that the weapon was not in his immediate and visible possession at a time between his admitted possession thereof and the homicide is not error.[34] Evidence as to the physical condition of the parties is considered infra § 224.

Opportunity Evidence that defendant had an opportunity to commit the crime is always competent,[35] and the probability of accused's guilt may be shown by the lack of opportunity on the part of others.[36] Such proof may be rebutted by evidence that the crime was not committed until after accused's opportunity therefor had passed.[37]

§ 215. —— Identity and Presence of Accused

a In general
b Declarations of, or identification by, person other than witness
c Tracks and fingerprints
d Bloodstains and other marks of crime
e Articles possessed by accused
f Other matters

a. In General

Competent evidence tending to identify accused as the guilty person, and show his presence at the scene of the crime, is admissible, as is also competent evidence in rebuttal thereof.

Subject to general rules excluding incompetent evidence,[38] any evidence tending to identify accused as the guilty person,[39] and show his presence at the scene of the crime,[40] is relevant and admissible, especially where proof of his guilt depends alone on circumstantial evidence.[41] Such testimony need not be positive, uncertainty affecting only its weight and not its admissibility.[42] So, also, the testimony is not rendered incompetent by accused's denial that he was the person seen by the witness on the day, and near the scene, of the homicide.[43] Evidence of accused's identity cannot be reinforced by proof that the witness failed to identify others as the guilty parties.[44]

Reasons for identification Reasons for the identification are not essential to render the testimony admissible,[45] but they may be given.[46]

Rebuttal Competent evidence may be received in rebuttal of the state's evidence as to the identity of accused,[47] and accused may prove his absence from the scene of the crime at the time of its commission.[48] In a prosecution based on circumstantial evidence, testimony creating a reasonable doubt as to the identity of the slayer should not be excluded because circumstances incriminating accused

33 Ala.—Gholston v. State, 130 So. 69, 221 Ala. 556

34. Or.—State v. O'Neil, 9 P. 281, 13 Or. 183

35. Pa.—Commonwealth v. Lawrence, 127 A. 465, 282 Pa. 128
30 C.J. p. 161 note 65

Opportunity to procure and use weapon
Ky.—Smallwood v. Commonwealth, 255 S.W. 106, 200 Ky. 582
30 C.J. p. 161 note 68 [a]

36. Or.—State v. Warren, 69 P. 679, 41 Or. 348

37. Neb.—Fleger v. State, 133 N.W. 431, 90 Neb. 390

38. Ill.—Devine v. People, 100 Ill. 290
30 C.J. p. 162 note 75

39. Ala.—Peterson v. State, 150 So. 156, 227 Ala. 361, certiorari denied Peterson v. State of Alabama, 54 S.Ct. 439, 291 U.S. 661, 78 L.Ed. 1053—Cunningham v. State, 118 So. 242, 22 Ala.App. 583, certiorari denied 118 So. 248, 218 Ala. 166
Cal.—People v. Sieber, 257 P. 64, 201 Cal. 341
Fla.—Williams v. State, 197 So. 562, 143 Fla. 826—Henderson v. State, 113 So. 689, 94 Fla. 318
Ga.—Burden v. State, 186 S.E. 555, 182 Ga. 533
Mass.—Commonwealth v. Rollins, 136 N.E. 360, 242 Mass. 427.
N.C.—State v. Tate, 188 S.E. 91, 210 N.C. 613—State v. Fogleman, 168 S.E. 536, 201 N.C. 401
30 C.J. p. 162 note 72

Testimony by one witness as to assault, and by another as to identity
Witness may testify to assault, although not identifying assailant or person assaulted, identity of each being established by another.—Allen v. State, 110 So. 124, 144 Miss. 447

40 Cal.—People v. Baker, 271 P. 765, 91 Cal.App. 628
Fla.—Williams v. State, 197 So. 562, 143 Fla. 826
30 C.J. p. 162 note 73

41. Tex.—Howard v. State, 8 Tex.App. 53

42. Ark.—Trulock v. State, 69 S.W. 677, 70 Ark. 558
30 C.J. p. 162 note 76

Testimony held not too vague and indefinite
Ga.—Lance v. State, 142 S.E. 105, 166 Ga. 15

Connection with other evidence
(1) In murder prosecution, testimony of conductor of street car, seeing two men get on his car who resembled accused and another, was competent to supplement testimony of motorman of same car who observed the two men twice, and who positively identified them, although conductor was unable to do so.—People v. Greeson, 203 N.W. 141, 230 Mich. 124

(2) In prosecution for assault with intent to murder, fact that prosecutrix had heard before assault, that accused was dead, is admissible as bearing on uncertainty of her recognition of accused.—Cunningham v. State, 118 So. 242, 22 Ala.App. 583, certiorari denied 118 So. 248, 218 Ala. 166

(3) Fact that witnesses are unable positively to identify accused, charged with murder as guilty one, may be considered by jury in connection with all other evidence.—People v. Baker, 271 P. 765, 91 Cal.App. 628

43 Tex.—Moore v. State, 78 S.W. 2d 189, 127 Tex.Cr. 637

44. Tex.—Moore v. State, 50 S.W. 942, 40 Tex.Cr. 439

45 Pa.—Commonwealth v. Roddy, 39 A. 211, 184 Pa. 274

46. Ark.—Adkisson v. State, 218 S.W. 165, 142 Ark. 15
30 C.J. p. 162 note 81

47 Iowa.—State v. Gludice, 153 N.W. 336, 170 Iowa 731, Ann.Cas. 1917C 1160
30 C.J. p. 162 note 82 [a], [b]

48. Ark.—Kinnemer v. State, 49 S.W. 815, 66 Ark. 206
Wis.—Goodwin v. State, 90 N.W. 170, 114 Wis. 318.

are more cogent[49] Where a witness has testified to seeing accused in the commission of the homicide, accused should be permitted to introduce evidence showing the witness' inability to identify him[50] Testimony as to accused's identity cannot be rebutted by proof that the witness thereto was silent when deceased stated that he did not know who his assailants were[51]

b. Declarations of, or Identification by, Person Other than Witness

While there is some divergence of authority as to the admissibility of extrajudicial declarations for the purpose of establishing identity or presence at the scene of the crime, such declarations are admissible when made by accused, and an identification out of court by decedent or the victim of an assault with intent to murder may be shown in evidence when it was made in the presence of accused.

The weight of authority favors the admissibility of declarations of deceased made shortly before the crime, which tend to prove the presence of accused at the time and place of the homicide,[52] but in some jurisdictions a contrary rule prevails[53] Evidence as to what occurred at the time accused was taken before decedent for identification is admissible,[54] and evidence of an identification then made by decedent is not subject to contradiction by evidence of a description of the guilty person's apparel given by decedent on another occasion when accused was not present[55] It has been held that the witness may testify to the fact of a conversation with deceased as to the identity of the slayer, but may not state the conversation[56] Also, it has been held not error to admit evidence that, as a result of deceased's identification of hats found at a lookout station, deceased and witness expected to find accused and another person at a still[57] Dying declarations are considered infra §§ 286–306

Declarations of accused It is proper to admit evidence of declarations of accused made several days before the crime indicating an intention to use a deadly weapon against deceased,[58] or to kill him[59] After accused's admission of his presence at the place of the murder, his previous denials of his presence may be shown[60]

Identification by victim of assault In a prosecution for assault with intent to murder, evidence that the victim of the assault identified accused, in the latter's presence and hearing, to an officer or at the police station is admissible[61]

Identification by third person The admissibility of testimony as to an identification of accused by a third person has been both affirmed[62] and denied[63]

c. Tracks and Fingerprints

Proper evidence tending to show that tracks or prints were found at or near the scene of the homicide and that they were or were not made by accused, or by an animal or vehicle he was using, may be admissible, but evidence offered for this purpose must be connected with the crime charged or involved and have a bearing on defendant's guilt or innocence

It is permissible to show that footprints or shoe tracks near where deceased's body was found were similar to those made by accused,[64] although no comparison is made except the size of the shoe,[65] and no measurement is made[66] Evidence is ad-

49. Tex.—Taylor v State, 195 S W 1147, 81 Tex Cr 359

50 Miss.—Mathison v State, 40 So 801, 87 Miss 739
30 C J p 162 note 84

51. Mass.—Commonwealth v Densmore, 12 Allen 535

52. Minn.—State v Hayward, 65 N W 63, 62 Minn 474
30 C J p 163 note 2

53. Cal.—People v Carkhuff, 24 Cal 640
Tenn.—Kirby v State, 9 Yerg 383, 30 Am D 420

54. Mich.—People v Foster, 179 N W 295, 211 Mich 486
Under statutory provisions making acts and declarations of another in the presence of a party admissible, the identification of accused by deceased, although not admissible as a dying declaration may be proved.—State v Fisher, 169 P 282, 54 Mont 211

55. Ky.—Ratcliffe v Commonwealth, 21 S W 2d 441, 231 Ky 337.

56. Ohio.—Moran v State 11 Ohio Cir Ct 464, 16 Ohio Cir Dec 234

57. S C.- State v Pittman, 134 S E 514, 137 S C 75

58. Ala.—Spraggins v State, 35 So 1000, 139 Ala 93
Previous threats by accused as evidence of identity see infra § 236

59 Ala.—Davis v State, 28 So 617, 126 Ala 14

60. Cal.—People v Moran 77 P 777, 141 Cal 48

61. Cal.—People v Garcia, 256 P 876, 83 Cal App 163
Ill.—People v Herbert, 172 N E 740, 340 Ill 320

62. Cal.—People v Quon Foo, 206 P 1028, 57 Cal App 237
30 C J p 162 note 77

63. N Y.—People v Seppi, 116 N E 793, 221 N Y 62

64. Ark.—Hendrix v State, 141 S W 2d 852, 200 Ark 973
30 C J p 162 note 87

Witness may describe known tracks of accused made at another time Phillips v State, 50 So 194, 162 Ala 14

Comparison with shoes and measurements and marks thereof

(1) Admission of testimony respecting finding of tracks near scene of homicide and comparison of tracks with accused's shoes was not error.—State v Martinez, 15 P 2d 685, 36 N M 360

(2) Evidence as to identity of tracks leading from place of murder with measurements and marks of accused's shoes is competent.—State v McLeod 152 S E 895, 198 N C 649

(3) A witness who had measured accurately the footprints of person slaying another and the shoe of accused could testify to such measurements.—Charles v State, 222 S W 255, 87 Tex Cr 233

65. Ark.—Owens v State, 179 S W 1014, 120 Ark 562
30 C J p 162 note 88

66. Tex.—Parker v State, 80 S W 1008, 46 Tex Cr 161.—Baines v State, 66 S W 847, 43 Tex Cr 490

missible to identify a shoe which had been fitted to tracks at the scene of the homicide as that of accused,[67] or to show the resemblance of tracks found in the direction in which the state claims accused went after the crime to those of accused,[68] or that tracks were found leading from where deceased was found to a place accused was shown to have been near the time of the homicide,[69] and such evidence is admissible, notwithstanding the tracks were not found immediately after the homicide.[70] As a predicate for such proof it is not incumbent on the state to introduce evidence to negative their presence there before the homicide,[71] but it would seem that the admissibility of such testimony is largely one of application to the particular case and the particular facts and environment as developed on the trial.[72]

Animal or vehicle tracks It is competent to prove that the feet or shoes of a horse belonging to accused fit corresponding tracks found at or near the place of the killing,[73] or that the tracks of an automobile were those of accused's machine.[74] Also, testimony concerning the finding of mule tracks may be admissible in connection with other evidence of accused's use of another's mule on the day of the homicide and having been seen walking toward the place where the tracks were found.[75]

Fingerprints or marks Accused's testimony may be an answer to a contention that evidence concerning his fingerprints is inadmissible because of a failure to show the time when the fingerprints were made.[76] In a prosecution for homicide in the commission of a robbery accused should be permitted to show that a fingerprint found on the article stolen was not that of accused.[77] However, the rejection of evidence, offered by accused, of a description of finger marks has been sustained where it was not distinctly claimed by him that the so-called finger marks were capable of measurement and comparison with his fingers,[78] and, where there is no claim or evidence that any fingerprints on a particular article are those of accused, evidence of the handling of the article by others is inadmissible on the question of accused's guilt unless it is in some way connected with the crime charged.[79]

d. Bloodstains and Other Marks of Crime

If consistent with the state's theory of the killing, evidence of bloodstains and other marks of the crime on the person or property of accused is admissible, as is also evidence of correspondence of a bloody imprint of a hand or shoe, on the wall or floor at the place of the homicide, with the hand or shoe of accused.

Evidence of bloodstains and others marks of the crime on the person or property of accused may be admitted,[80] as, for example, of a spot of blood on his clothes,[81] together with a physician's analysis thereof,[82] of bloody articles found in accused's room soon after the murder,[83] of the condition of accused's clothing found in his room the morning after the crime,[84] of a trunk and its contents which was shown to have been used by accused and his wife and which contained his bloody garments,[85] or of the finding of hair about accused of the same color as that of the person killed.[86] Also, evidence of correspondence of a bloody print of a hand on the wall where a homicide occurred with the hand of accused is admissible,[87] but, where distinctive footprints were left in blood on a linoleum covered floor, evidence relating to a sale of shoes is proper-

67. Ala DuBose v State, 42 So 862, 148 Ala 560
Wyo—Markoff v State, 75 P 2d 773, 776 52 Wyo 457 citing **Corpus Juris.**

68. Ala—Moss v State, 44 So 598, 152 Ala 30

Large tracks and large feet
Where state relied on circumstantial evidence in murder prosecution, testimony that accused had large feet was admissible in connection with other evidence that human tracks leading from burned barn where body was found were large tracks twelve inches long—Cobb v State 77 S W 2d 667, 127 Tex Cr 504

69. Tex—Thompson v State, 163 S W 973 72 Tex Cr 659

Following tracks two miles
Evidence that witness followed tracks from place of killing for distance of two miles was properly admitted—Ross v State, Tex Cr, 7 S W 2d 1078

70. Tex—Hewey v State, 220 S W 1106 87 Tex Cr 248

71. Tex—Hewey v State, supra

72. Tex—Burkhalter v State, 212 S W 163, 85 Tex Cr 282

Evidence held inadmissible
Ala—Johnson v State, 110 So 55, 21 Ala App 565
30 C J p 163 note 95 [a]

73. Ala—Campbell v State, 23 Ala 44
Tex—Bouldin v State, 8 Tex App 332

74. Tex—Haley v State, 209 S W 675, 84 Tex Cr 629, 3 A L R 779

75. Mo—State v Cropper, 36 S W 2d 923, 327 Mo 193

76. Mo—State v Richetti, 119 S W 2d 330, 342 Mo 1015

77. Pa—Commonwealth v Loomis, 113 A 428, 270 Pa 254
30 C J p 161 note 59 [a], p 163 note 1

78. D C—Funk v U S, 16 App D C 478

79. Vt—State v Lapan, 141 A 686, 101 Vt 124

80. Fla Williams v State 197 So 562 565 143 Fla 826 quoting **Corpus Juris.**

81. Ala—Davis v State 28 So 617, 126 Ala 44
Fla—Williams v State, 197 So 562, 565 143 Fla 826, quoting **Corpus Juris.**

82. Fla—Williams v State, supra, quoting **Corpus Juris.**
Ind—Beavers v State, 58 Ind 530

83. Ala—Walker v State, 35 So 1011, 138 Ala 53

84. Tex—Baines v State, 66 S W 847 43 Tex Cr 490

85. Cal—People v Antony, 79 P 858, 146 Cal 124

86. Mont—State v Nordall, 99 P. 960, 38 Mont 327

87. N J—State v Miller, 60 A 202, 71 N J Law 527.

ly restricted to shoes capable of making imprints similar to those made at the place of the crime[88] Where the state's theory of the killing is inconsistent with the presence of bloodstains, evidence on the part of accused that certain stains were not bloodstains is irrelevant.[89]

e. Articles Possessed by Accused

It may be shown that accused wore or possessed articles of clothing or other articles which the evidence indicates were associated with the crime

It is always permissible to show that accused wore or possessed articles of clothing[90] or other articles[91] which the evidence indicates were associated with the crime Dirt taken from the scene of the crime to be compared with dirt found on accused's clothing is admissible[92] So evidence is admissible as to cartridges found on the person of accused,[93] as to the character of shot taken from the pockets of clothes shown to belong to accused,[94] as to the similarity of an animal ridden near the scene of the homicide to that of accused,[95] and as to statements of accused tending to connect him with a mask found at the scene of the murder[96] Subsequent possession by accused of property of deceased is considered infra § 250

Where there is evidence that the murderer wore striped overalls and a black shirt, accused has a right to show that the employees at the place where he worked wore clothing of a different character,[97] and, where a witness for the state has identified accused as having been at the scene of the homicide wearing a certain kind of cap, and witnesses for the defense have testified that accused wore no such cap on the day of the killing, the state may, in rebuttal, show by a witness that on the day after the homicide accused wore such a cap[98]

f. Other Matters

Particular facts and circumstances of various character have been held admissible, and others have been held inadmissible, to prove or disprove the identity or presence of accused.

In particular prosecutions facts and circumstances of various natures have been held admissible[99] or inadmissible[1] to establish the identity or presence of accused For example, it has been held proper to admit evidence tending to show that accused saw deceased as he passed his house and pursued him,[2] that accused threw a missile, comprehended within the indictment, at the injured person,[3] that immediately after shooting deceased, accused entered a room and shot at another person whom, as well as deceased, he had previously threatened,[4] that just after the shooting accused appeared at a near-by house and renewed his shooting there,[5] and that accused was seen shortly after the homicide, running his car in the same particular manner in which the car which ran over and killed deceased was run at the time of the accident[6] So, also, it is proper to admit evidence of a previous altercation with accused and pursuit by him,[7] or previous ill-treatment of deceased by accused,[8] accused's presence and complicity in a robbery, for

88. N H —State v Thorp, 171 A 633, 86 N H 501

89 Ala —Vaughn v State, 30 So. 669 130 Ala 18

90 Ala —Cunningham v State, 118 So 242 22 Ala App 583, certiorari denied 118 So 248, 218 Ala 166
Cal —People v Page 260 P 591, 86 Cal App 148
30 C J p 163 note 19

91. Okl —Quinn v State, 25 P 2d 711, 55 Okl Cr 116
30 C J p 163 note 20

Automobile
Cal —People v Latona, 43 P 2d 260, 2 Cal 2d 711
Ill —People v Herbert, 172 N E 740 340 Ill 320
Miss —Cody v State, 148 So 627, 167 Miss 150

92 Cal People v Page, 260 P 591 86 Cal App 148
N Y —People v Wennerholm, 60 N E 259 166 N Y 567

93 N Y —People v Minisci, 12 N.Y St 719

94. Tex —Baines v State, 66 S W 847, 43 Tex Cr 490

95. N C —State v Cain, 95 S E 930, 175 N C 825

96. N Y —Murphy v People, 63 N Y 590

97 Ala —Jackson v State, 145 So 656, 226 Ala 72

98. La —State v Bagwell, 98 So 549, 154 La 980

99. Evidence held admissible
(1) Testimony that a man who looked like accused came into witness' store and asked if he had shotguns, where occurrence was in close proximity to time and place of homicide —Pruitt v State, 168 So 149, 232 Ala 121

(2) To show that officers, having arrested accused for another offense, allowed him to go to see a man who lived near deceased and that the last they saw of him he was going toward deceased's house —Williams v. State, 69 S W 2d 759, 126 Tex Cr 42

1. Evidence held inadmissible
Poll tax certificates offered for the purpose of fixing the time when an alibi witness saw accused at a certain place were inadmissible where the certificates were not in existence at the time of the crime or on the night preceding it —State v Dallao, 175 So 4, 187 La 392, appeal dismissed Dallao v State of Louisiana 58 S Ct 51 302 U S 635 82 L Ed 194, rehearing denied 58 S Ct 138, 302 U S 777, 82 L Ed 601, appeal dismissed Couche v State of Louisiana, 58 S Ct 48, 302 U S 636, 82 L Ed 495, rehearing denied 58 S Ct 137, 302 U S 776 82 L Ed 601, appeal dismissed Ugarte v State of Louisiana, 58 S Ct 51, 302 U S 635, 82 L Ed 494, rehearing denied 58 S Ct 139, 302 U S 777, 82 L Ed 601

2. Ala —Cawley v State, 32 So 227, 133 Ala 128

3. Ga —Plain v State, 60 Ga 284

4. Ala —Conwill v State, 62 So 1006, 8 Ala App 82

5. Tenn —Collins v State, 2 Tenn Cas 412

6 Ga —Reams v State, 100 S E 230, 24 Ga App 135

7. Tenn —Collins v State, 2 Tenn Cas 412

8. Ala —Fowler v State, 45 So 913, 155 Ala 21.

which he was arrested by the officer whom he is charged with killing,[9] or that he was a member of the band of robbers;[10] the hearing of accused's voice by one familiar with it,[11] and of outcries of deceased, or another who was also killed at or near the same time and place, made at the time of the assault.[12] The testimony of a witness which demonstrates the fact that the report of a gun fired at the place where the dead body was found could be heard at the home of another witness is admissible to corroborate the testimony of the other witness that he heard the report of a pistol within fifteen or twenty minutes after accused and deceased left his home.[13] The absence of other persons who might have committed the crime may be shown as tending to increase the probability that accused, who was the last person seen with deceased, committed it.[14]

Evidence of statements of a witness to accused at or near the time of the homicide may be admitted as part of the identification,[15] and testimony of a witness, for the purpose of showing that accused was seen near the scene of the homicide shortly before it occurred, that the witness spoke to a companion with reference to accused, without stating what was said, is admissible.[16]

The identity of accused as the person who was previously tried for, and convicted of another offense may be proved by the clerk or deputy clerk of the court wherein the former conviction was had[17] or by the son of decedent for whose murder accused was previously convicted.[18]

Inadmissible evidence It is proper to exclude a question, on cross-examination of a witness for the state, as to the name of the officer to whom the witness gave a description of a person he saw,[19] and the testimony of a theater patron that a theater cashier failed to identify him, which was offered to impeach the cashier's testimony identifying accused, where the cashier had not been asked about such patron on cross-examination and his attention had not been called to him by such an incident as directed his attention to accused.[20] After it has elicited from accused, on cross-examination, the information that he was known by two different names, the state may not prove by a witness that in a certain county accused used only one of such names.[21] The conduct of persons before whom accused was brought for identification is incompetent to prove his identity.[22]

Failure of witness to testify as expected Where accused proposed to prove by witnesses that they identified another, but the witnesses denied the identification, and all they could relate about it was elicited from them, there is no merit in a claim that their testimony was erroneously excluded or not admitted as offered.[23]

§ 216. —— Participation with Others

Noteworthy latitude is allowed in the admission of evidence where it is claimed that accused participated in a conspiracy to commit the crime or was an accessary to the person who did the killing

A wide range of evidence is permitted in a prosecution for murder pursuant to a conspiracy.[24] Sub-

9. Ala.—Miller v. State, 30 So. 379, 130 Ala. 1.

10. Tex.—Moore v. State, 50 S.W. 942, 40 Tex.Cr. 439.

11 Fla.—Mack v. State, 11 So. 706, 51 Fla. 55, 13 L.R.A.,N.S., 373, 14 Ann.Cas. 78.
30 C.J. p. 164 note 10.

Association of voice with person who shot victim

Refusal to exclude statement of witness who had testified that she did not know accused, to effect that while in bed on night of shooting she had heard man who shot victim call victim three times was not harmful if error where witness's further testimony disclosed a basis of fact on which she could have reasonably associated voice which called with the man who fired and other witnesses testified that accused had called to victim as if to identify him and had thereafter fired.—Hurston v. State, 178 So. 223, 235 Ala. 213.

12. Me.—State v. Wagner, 61 Me. 178.
30 C.J. p. 164 note 41.

13. Tex.—Bridges v. State, 83 S.W. 2d 671, 128 Tex.Cr. 544.

14. Or.—State v. Warren, 69 Pac. 679, 41 Or. 318.

15. Tenn.—Mays v. State, 238 S.W. 1096, 145 Tenn. 118.

16. N.Y.—People v. Wennerholm, 60 N.E. 259, 166 N.Y. 567.

17. Ala.—Williams v. State, 30 So. 336, 130 Ala. 31.

18. Pa.—Commonwealth v. Walker, 171 A. 615, 314 Pa. 385.

19. N.J.—State v. Juliano, 138 A. 575, 103 N.J.Law, 663.

20. N.J.—State v. Hauptmann, 180 A. 809, 115 N.J.Law, 412, certiorari denied, 56 S.Ct. 310, 296 U.S. 649, 80 L.Ed. 461.

21. Ark.—Combs v. State, 260 S.W. 736, 163 Ark. 550.

22. Miss.—Bird v. State, 11 So. 187.

23. Pa.—Commonwealth v. Fasci, 131 A. 165, 287 Pa. 1.

24. Ky.—Reynolds v. Commonwealth, 61 S.W. 2d 388, 249 Ky. 644.

Particular evidence

(1) Evidence of declarations of accused and his companions made a few moments antecedent to the homicide were admissible as tending to show that accused and his companions were acting together in their preparation to kill deceased with a common purpose.—Pinkston v. State, 241 S.W. 152, 91 Tex.Cr. 644.

(2) Evidence of the measurement and description of footprints of accused's brother who was also alleged to be implicated in the killing, and evidence that on the afternoon of his disappearance deceased was seen with brother of accused was admissible.—Mercado v. State, 258 S.W. 180, 96 Tex.Cr. 150.

(3) In a prosecution for murder of a Chinese member of the Suey Sing tong, by members of the Hop Sing tong, in a conspiracy forming part of a tong war the district attorney was properly permitted to show that defendants were active members of the Hop Sing tong and occupied official positions therein. Also, where the prosecution had

ject to the general rules as to relevancy and competency,[25] the prosecution may introduce evidence tending to show the fact[26] and nature[27] of a conspiracy between accused and others who were acting with him at the time of the homicide, and it is competent to prove a conspiracy among third persons to commit the crime, without showing knowledge or concurrence by accused at that time, if he is afterward by competent evidence connected with the conspiracy.[28] Where the killing was done by another person, any legal evidence tending to connect accused with the killer is material and relevant.[29] Evidence of the communication of instruction, advice, or counsel by accused as accessary to the person who actually committed the deed is admissible,[30] whether the communication was directly by word, act, or deed,[31] or through a third person,[32] and evidence of details of a prior difficulty between deceased and accused is admissible to show that accused was in fact an accessary and, as such, participated in the fatal difficulty.[33] Even in a prosecution for being an accessary before the fact, evidence of accused's conduct immediately after the perpetration of the crime is admissible where it affords some basis for an inference that he had knowledge of the crime at the time of its commission,[34] but evidence of the subsequent conduct of an aider and abettor is competent only against him and not against a codefendant who did the killing,[35] and evidence of a statement made by an alleged conspirator after the conspiracy, if any, was ended, is not admissible against accused.[36]

On the theory that accused was an accessary or conspirator, and in connection with other evidence, a witness may be permitted to testify that he saw the principal or another conspirator at a certain time and place,[37] and it is relevant to prove that another person jointly indicted with accused was, prior to the killing, possessed of a pistol of the caliber corresponding to the size of the empty shells found at the place of the homicide immediately thereafter,[38] and also, where only one shotgun was used, testimony as to which one of several defendants had it in his hands is competent.[39] Subject to proof of agency for accused, evidence of an agreement made by a person who hired an automobile connected with the homicide as to the length of time he was to use it is admissible.[40] On the other hand,

shown that defendants were members of the Hop Sing tong and deceased a member of the Suey Sing tong, and that hostilities existed between the two tongs, it was proper for the district attorney to go fully into the question whether defendants were gunmen or members of the highbinders branch of the Hop Sing tong.—People v. Jo Fong, 210 P. 548, 59 Cal.App. 259.

(1) In accordance with the general rule applicable in criminal prosecutions that one of several persons who have been indicted jointly becomes a competent witness for the prosecution against his codefendants where the indictment or information is dismissed as to him, stated in Criminal Law § 804 c. (1), the prosecution is entitled to use as a witness a codefendant, against whom the charge has been dismissed, for the purpose of showing accused's participation in the homicide.—People v. Braun, 88 P.2d 728, 31 Cal.App.2d 593.

25. Ill.—People v. Bundy, 129 N.E. 189, 295 Ill. 322.
30 C.J. p. 164 note 51.

26. Ala.—Robinson v. State, 133 So. 578, 222 Ala. 511.
Cal.—People v. Timm, 28 P.2d 951, 136 Cal.App. 301.
Ill.—People v. Cassler, 163 N.E. 430, 332 Ill. 207.
30 C.J. p. 164 note 52.

Association

(1) Where the prosecution claimed that defendants aided and abetted codefendants in committing a murder, it was not error to admit evidence that two days prior to the homicide defendants and codefendants were traveling on the same train in the direction of the scene of the homicide, and that codefendants were armed.—People v. Ho Kim You, 141 P. 950, 24 Cal.App. 451, followed in People v. Yee Yum, 141 P. 958, 24 Cal.App. 470.

(2) Where two or more persons are tried for murder, it is competent to prove that they were together or near the place where deceased might have been expected to be found shortly before the time at which the homicide was committed.
La.—State v. Howard, 45 So. 260, 120 La. 311.
Mich.—People v. Marble, 38 Mich. 117.

(3) Admission of evidence that accused was present with one of assassins on afternoon before homicide was not error.—People v. Moe, 3 P.2d 354, 116 Cal.App. 740, rehearing denied 4 P.2d 234, 116 Cal.App. 740.

Conspiracy as malice

(1) Proof of conspiracy to commit murder is merely means of establishing malice.—Jeffries v. Commonwealth, 74 S.W.2d 203, 255 Ky. 365.

(2) Evidence of malice generally, see supra §§ 204–212.

27. Ill.—People v. Bundy, 129 N.E. 189, 295 Ill. 322.
30 C.J. p. 165 note 53.

28. Miss.—Lamar v. State, 63 Miss. 265.
30 C.J. p. 165 note 54.

29. Cal.—People v. Arnold, 250 P. 168, 199 Cal. 471.

30. N.J.—State v. Fiore, 88 A. 1039, 85 N.J.Law 311.
S.C.—State v. Kennedy, 95 S.E. 350, 109 S.C. 141.

31. N.J.—State v. Fiore, 88 A. 1039, 85 N.J.Law 311.

32. N.J.—State v. Fiore, supra.

33. Ala.—Sexton v. State, 180 So. 729, 28 Ala.App. 59, certiorari denied 180 So. 731, 236 Ala. 20.

34. Mass.—Commonwealth v. Di Stasio, 8 N.E.2d 923, 297 Mass. 347, 113 A.L.R. 1113, certiorari denied Di Stasio v. Commonwealth of Massachusetts, 58 S.Ct. 50, 302 U.S. 683, 82 L.Ed. 527, and 58 S.Ct. 370, 302 U.S. 759, 82 L.Ed. 587.

35. Ky.—Hensley v. Commonwealth, 69 S.W.2d 17, 253 Ky. 171.

36. Tex.—Trimble v. State, 104 S.W. 2d 31, 132 Tex.Cr. 236.

37. Ga.—Thompson v. State, 143 S.E. 896, 166 Ga. 512.
N.C.—State v. Walton, 119 S.E. 886, 186 N.C. 485.
Tex.—Mercado v. State, 258 S.W. 180, 96 Tex.Cr. 450.

38. Ga.—Garner v. State, 65 S.E. 842, 6 Ga.App. 788.

39. Ill.—People v. Fisher, 172 N.E. 743, 340 Ill. 216.

40. La.—State v. Scarbrough, 119 So. 523, 167 La. 484.

in a prosecution for murder growing out of an abortion, accused being claimed to be an accessary before the fact, testimony as to whether the witness knows that the doctor who performed the abortion has been convicted of the offense of abortion is properly excluded,[41] as is testimony that the doctor registered at a hotel under an assumed name[42]

Accused may show that meetings relied on to show a conspiracy were for a lawful purpose,[43] and where the prosecution has introduced evidence from which the jury might infer that certain acts of a particular person were done in pursuance of a plan to murder deceased, accused may in rebuttal introduce evidence tending to show that such acts were done in good faith and without collusion with him[44] On the other hand, it is proper to exclude evidence offered by accused which would not tend to show an absence of collusion between him and the person who did the killing and is not otherwise admissible,[45] and evidence of dislike or enmity between accused and the persons who did the killing, which might otherwise be admissible to disprove the alleged conspiracy, may be rendered inadmissible by accused's own explanations and admissions[46]

§ 217. —— Suicide

Generally speaking, any evidence, otherwise competent, tending to show that deceased did or did not come to his death by his own act is admissible where the theory of the defense is that deceased committed suicide, but there is a conflict of authority on the admissibility of evidence of a disordered mental condition to prove suicide, as well as to the effect of the time at which they were made, on the admissibility of evidence, of decedent's declarations of intention to commit suicide

Where the theory of the defense is that deceased committed suicide, any evidence otherwise competent tending to show that deceased came to his death by his own act is admissible,[47] but to be admissible for this purpose, evidence must have some tendency to establish such fact[48] A suicidal tendency or disposition may be shown in order to create the presumption of suicide, where the testimony shows that death may have been produced by deceased, or there is no positive and direct proof of homicide[49] So evidence is admissible as to decedent's acts or declarations evincing an intention to commit suicide,[50] such as attempts and threats[51] The length of time intervening between the declarations and the death of deceased, according to some authorities, does not affect their competency, but only goes to their weight[52] According to other authorities, decedent's statements of intention to commit suicide, when neither a part of the res gestae nor dying declarations, are inadmissible,[53] and according to still other authorities, the declarations are admissible when made reasonably close to the time of death,[54] and although the trial judge has a wide, he does not have an absolute, discretion to refuse to admit declarations of intended suicide, if he considers them too remote[55] Evidence of isolated facts relative to deceased's financial condition or domestic troubles, not showing a suicidal tendency,[56] or statements made by members of his family to the effect that he committed suicide,[57] are inadmissible It has been held proper to show that deceased was under treatment for nervous disorder or disease,[58] or to show a disordered mental condition,[59] but the latter proposition is denied[60] At any rate, evidence of mental con-

41. Iowa—State v Sweeney, 214 N W 735, 203 Iowa 1305

42. Iowa—State v Sweeney, supra

43. Ky—Delaney v Commonwealth, 25 S W 830, 15 Ky L 797

44. Ala—Harrison v State, 78 Ala 5

45. Pa—Commonwealth v Prophet, 160 A 597, 307 Pa 122

46 Mo—State v Gadwood, 116 S W 2d 42, 342 Mo 466

47. N Y—People v Thomas, 269 N Y S 143, 240 App Div 101
N C—State v Prytle 132 S E 785 191 N C 698
30 C J p 165 note 57

48. Colo—Massie v People, 258 P 226, 82 Colo 205
30 C J p 165 note 58 [a]

Corpus Juris is cited in support of the point that as there was not the slightest evidence of suicide in the case, an instruction on the subject was not called for—State v Hefferman, 162 S W 2d 878, 887 349 Mo 681

49. Ind—Hall v State, 31 N E 536, 132 Ind 317
30 C J p 165 note 59

50 Ark—Bowie v State, 49 S W 2d 1049, 185 Ark 834 33 A L R 426
N Y People v Thomas, 269 N Y S 143 240 App Div 101
N C—State v Lagerholm, 179 S E 664 208 N C 195
30 C J p 165 note 60

51. Ky—Epperson v Commonwealth, 13 S W 2d 247, 227 Ky 404
N C—State v Prytle, 132 S E 785, 191 N C 698
30 C J p 165 note 61

Reasons given for threat
Testimony, in husband's trial for murdering wife by poison, as to reasons wife gave for threat testified to by witness to kill herself, is admissible on question whether she committed suicide—Pearce v State, 147 So 617, 226 Ala. 436

52. Mass—Commonwealth v Trefethen, 31 N E 961 157 Mass 180, 24 L R A 235
Ohio—Blackburn v State 23 Ohio St 146

53. Mo—State v Bauerle, 46 S W. 609 145 Mo 1
30 C J p 165 note 63

54. Pa—Commonwealth v Santos, 119 A 596, 275 Pa 515

55. Pa—Commonwealth v Santos, supra

56. Ind—Hall v State 31 N E 536, 132 Ind 317

57. Minn—State v Lentz, 47 N W. 720 45 Minn 177

58. Iowa—State v Beeson, 136 N. W 317 155 Iowa 355, Ann Cas. 1914D 1275

59. Ill—People v Ahrling 116 N E. 764, 279 Ill 70

60. Mo—State v Punshon, 34 S W. 25, 133 Mo 44

dition, when admitted for the purpose of showing a disposition to commit suicide, should be limited to the fact of such condition and not extend to the cause thereof [61]

A claim or question of suicide in the case will not be presumed in order to find error in the exclusion of the testimony of a witness, who is not a physician, as to a statement by deceased that he was tired of living and indifferent as to life or death [62]

Rebuttal Evidence is admissible to rebut proof of a theory of suicide [63] Where it appears from the evidence that deceased either committed suicide or was murdered, the prosecution may show the absence of any motive for suicide,[64] or that deceased had been apparently healthy and in good spirits,[65] or experiments made with the weapon with which the deed was done repelling the theory of suicide,[66] or expert testimony may be received showing that suicide with the weapon producing death or a similar weapon was improbable,[67] or that the fatal wound could not have been self-inflicted [68] Declarations by deceased while in his last agony,[69] or declarations of accused of an intention to murder a third person at the place and in the manner decedent was killed,[70] are admissible to disprove suicide, but while the acts and declarations of a person claimed to have been predisposed to suicide are competent to prove a contrary state of mind,[71] the acts and declarations admitted for this purpose should be limited to such as fairly tend to prove mental condition [72]

§ 218. —— Incriminating Others in General

Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt, but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that, in the absence of other evidence disclosing their relevancy or connecting the other person with the crime, they are excluded When admitted, such evidence is subject to rebuttal

Accused is entitled to introduce any legal evidence tending to show that a third person committed the offense with which he is charged [73] This is true where the evidence against accused is circumstantial,[74] and it is also true notwithstanding there is direct evidence tending to connect him with the crime [75] Evidence of another person's guilt offered by accused must be inconsistent with guilt of accused,[76] otherwise it is properly excluded,[77] as where the other, whose guilt is sought to be proved, acted jointly with accused,[78] or where accused admits the killing [79] Evidence to be admissible as tending to show the guilt of a third person need not amount to full proof,[80] or justify his conviction,[81] if it is of a character which may be sufficient to raise a reasonable doubt of accused's guilt,[82] but it must be of a character legitimately tending to establish the guilt of another,[83] and must be confined to substantial facts[84] which are connected with the transaction [85] Evidence which has

61. Miss —Floyd v State, 148 So 226 166 Miss 15

62. Vt —State v Fournier 35 A 178 68 Vt 262

63. Cal —People v Selby, 215 P 426, 198 Cal 126
30 C J p 165 note 70

64 Kan State v Smith, 174 P 551, 103 Kan 118
30 C J p 165 note 71

65 Tex —Porter v State, 215 S W 201 86 Tex Cr 23—Morrison v State 51 S W 358 40 Tex Cr 473

66 Pa —Sullivan v Commonwealth, 93 Pa 284
Tex — Coffman v State, 165 S W 939, 73 Tex Cr 295

67. Iowa —State v Cater 69 N W 880 100 Iowa 501

68. Mass —Commonwealth v Spiropoulos 94 N E 151 208 Mass 71
Tenn —State v McCravy, 181 S W 165, 133 Tenn 158

69. Iowa —State v Kuhn, 90 N W 733, 117 Iowa 216

70. Mass —Commonwealth v Snell, 75 N E 75, 189 Mass 12, 3 L R A, N S, 1019.

71. Ill —Jumpertz v People 21 Ill 375

72. Ill —Jumpertz v People, supra

73. Ala Goldsmith v State, 168 So 547, 232 Ala 436
Cal People v Mendez, 223 P 65, 193 Cal 39
Ill People v Nitti 143 N E 448 312 Ill 73
Iowa State v Williams 192 N W 901 195 Iowa 785
Kan —State v Scott 235 P 380 117 Kan 303, 118 Kan 464
Ky — Kelly v Commonwealth, 83 S W 2d 489 259 Ky 770
Va —Hines v Commonwealth, 117 S E 843 136 Va 728
Wash —State v Kwan, 25 P 2d 104, 174 Wash 528
Wyo —Johnson v State, 211 P 484, 29 Wyo 121
30 C J p 166 note 79

74. Kan —State v Scott, 235 P 380, 117 Kan 303 118 Kan 464
30 C J p 166 note 84

75. Ky —Ellis v Commonwealth, 113 S W 896, 130 Ky 723.
30 C J p 166 note 85

76. N H —State v Wren, 92 A 170, 77 N H 361
30 C J p 166 note 80

77. Ala —Strickland v State 44 So 90 151 Ala 31
30 C J p 166 note 81

78 N C —State v Gee, 92 N C 756
30 C J p 166 note 82

79. Fla —Lindrum v State, 84 So 535, 79 Fla 189
Ky —Mims v Commonwealth, 32 S W 2d 986 236 Ky 186

80 Conn State v Hawley, 27 A 417, 63 Conn 17
30 C J p 166 note 92

81. ky —Ellis v Commonwealth, 113 S W 896, 130 Ky 723—Sidney v Commonwealth, 1 Ky L 120, 10 Ky Op 664

82. Conn —State v Hawley, 27 A. 417, 63 Conn 17
30 C J p 166 note 94

83. Okl —Irvin v State, 146 P 453, 11 Okl Cr 301 331
30 C J p 166 note 95

84. Ala —Jones v State, 74 So 843, 16 Ala App 7
30 C J p 167 note 96

85. Ala —Cunningham v State, 118

no further effect than to cast a bare suspicion on another is incompetent and inadmissible[86] The difficulty of determining the relevancy of evidence offered to show that another person committed the crime has been frankly conceded by the courts,[87] and while particular evidence offered for this purpose is sometimes admitted,[88] frequently evidence so offered is excluded, and properly so,[89] because it is irrelevant,[90] or of slight probative value,[91] or would add nothing of consequence to what has been already admitted in evidence and might lead into collateral issues,[92] or because of a lack of other evidence to connect the third person with the crime[93] In the absence of other evidence showing its relevancy, it is improper to admit evidence that deceased had many and indefinite enemies,[94] or had had previous difficulties with a specified third person,[95] or that other unidentified persons had been in the vicinity,[96] or that automobiles were in the vicinity shortly before and after the explosion resulting in the homicide,[97] or that unidentified criminals had been operating in the vicinity,[98] or that a known and admittedly dangerous character had been actually present at the homicide,[99] or that accused and deceased lived in a lawless neighborhood,[1] but, where the relevancy appears from other facts in evidence, it is proper to introduce evidence of enmity shown by specific third persons against deceased,[2] or descriptions of unidentified persons seen near the place and at the time of the homicide[3]

Rebuttal Evidence introduced by accused to prove the commission of the crime by another person may be rebutted by the state or commonwealth[4] To rebut the claim of accused the state may offer proof of the acts and declarations of such other person done and made at or about the time of the homicide, and the circumstances attending them,[5] or proof that such person did not have in his possession the character of weapon with which the deed was done,[6] or that a pistol found in such person's house did not appear to have been recently discharged,[7] or that such person was an accomplice of accused,[8] or that he was not present at the scene of the crime[9] The opinion of accused, stated on cross-examination, that another designated person committed the crime is competent to be considered by the jury on the question of whether accused is attempting to escape responsibility by falsely charging such other person with the crime,[10] but evidence of the opinion of others as to the innocence

So 212 22 Ala App 583, certiorari denied 118 So 248, 218 Ala 166
30 C J p 167 note 97

Remote acts not connected immediately with the crime charged may not be proved separately to show that another person committed the crime
Nev —State v Russell, 220 P 552, 47 Nev 263
Wash —State v Kwan 25 P 2d 104, 171 Wash 528
30 C J p 167 note 97

86. Cal - People v Mendez, 223 P 65, 193 Cal 39
Okl —Irvin v State, 146 P 453, 11 Okl Cr 301
Wyo —Lampitt v State, 242 P 812, 34 Wyo 247

Names of persons suspected by commonwealth
In prosecution for involuntary manslaughter, trial court's exclusion of question as to who else witness had heard named as probably having done the shooting was not error, where all that was attempted to be elicited were names of persons suspected by commonwealth -- Nelson v Commonwealth, 130 S E 389, 143 Va 579

87. Ill —People v Pezutto, 99 N E 677, 255 Ill 583
Mass —Commonwealth v Abbott, 130 Mass 472

88. Ky —Tapp v Commonwealth 294 S W 160, 219 Ky 664
Tex —Mitchell v State, 26 S W 2d 201, 114 Tex Cr 301
30 C J p 167 note 9 [a]

89. Cal —People v Mendez, 223 P 65, 193 Cal 39
N C —State v Stewart, 127 S E 260 189 N C 140
30 C J p 167 notes 96 [a], 97 [a]-[c]

90. La —State v Stracner, 182 So 571 190 La 457—State v Dunn 109 So 56, 161 La 552 error dismissed Dunn v State of Louisiana 47 S Ct 344 273 U S 656 714, 71 L Ed 825
Miss —Wallace v State 105 So 520 140 Miss 881
Or —State v Covell 232 P 628 113 Or 254
30 C J p 166 note 95 [a], p 167 note 97 [c]

91. Pa —Commonwealth v Kosh, 157 A 179, 305 Pa 146

92. Mass - Commonwealth v Bartolini, 13 N E 2d 382 299 Mass 503 certiorari denied Bartolini v Commonwealth of Massachusetts, 58 S Ct 950, 304 U S 565, 82 L Ed 1531

93. Cal —People v Vatek 236 P 163 71 Cal App 453
Colo —Brindisi v People 230 P 797, 76 Colo 244
Nev —White v State, 285 P 503, 52 Nev 235
30 C J p 167 notes 97 [a] (1), (2) [b], 9 [b]

94. Wis —Lasecki v State, 208 N W 868, 190 Wis 274
30 C J p 167 note 99

95. Tex —Wells v State 115 S W 2d 658 134 Tex Cr 412
30 C J p 167 note 1

96. Ky —Alder v Commonwealth, 286 S W 696 215 Ky 613
Pa —Commonwealth v Winter, 137 A 261, 289 Pa 284
30 C J p 167 note 2

97. Wyo —Lampitt v State, 242 P 812 34 Wyo 247

98. Idaho —State v Caviness, 235 P 890 40 Idaho 500
30 C J p 167 note 3

99. La —State v Fontenot 19 So 113 48 La Ann 283

1. Tex - Golin v State, 38 S W 791 37 Tex Cr 90

2. Tex —Murphy v State, 35 S W 174, 36 Tex Cr 24

3 Cal —People v Tugwell 152 P 740, 28 Cal App 348

4. Ky —Kelly v Commonwealth 83 S W 2d 489 259 Ky 770

5. N Y —People v Driscoll, 14 N E 305, 107 N Y 414
30 C J p 168 note 16

6. Conn --State v Laudano, 51 A 860, 74 Conn 638

7. Mo - State v Houston, 292 S W 728

8 Pa - Commonwealth v Kaiser, 39 A 299, 184 Pa 493

9. Ala —Pope v State, 66 So 25, 188 Ala 50—Terry v State, 69 So 370, 13 Ala App 115

10. Mass —Commonwealth v Gettigan, 148 N E 113, 252 Mass 450

of the person whom defendant accuses is incompetent,[11] and testimony of a third person, accused by defendant, as to third-degree methods used by the sheriff's office to extort a confession from him, is not admissible on behalf of the state to prove a conspiracy, as to which there is no other evidence, on the part of accused and the sheriff's office to fix the crime on such third person.[12]

Fear and anticipated difficulty The fact that deceased feared a third person,[13] or had anticipated difficulty with him,[14] or the fact that deceased had stated that such third person had threatened to kill him,[15] has been held inadmissible to establish the guilt of such third person.

Flight of third person There are decisions holding broadly that the flight of a third person after the homicide is inadmissible to show his guilt,[16] but evidence of flight has been admitted where the evidence against accused was wholly circumstantial,[17] or where flight was merely corroborative of other facts indicating the guilt of the third person.[18] Although evidence of flight would be considered admissible in a proper situation, there is no error in rejecting it where, at the time it is offered, there is no evidence whatever in the case tending to connect the third person with the homicide and accused does not state to the court that he expects to introduce connecting evidence subsequently, and when the connection is afterward developed, he does not again offer evidence of flight.[19]

Criminal proceedings against another Evidence that another person pleaded guilty and was convicted of the same murder is competent for the purpose of establishing accused's innocence,[20] but it is otherwise where the other person was convicted as an accomplice and accused is charged as a participant.[21] Even an acquittal of the third person after trial does not render evidence of his guilt inadmissible for the defense, and the prosecution may not introduce evidence of the acquittal by way of rebuttal.[22] An indictment against another charging him with the crime,[23] or the record of such indictment,[24] is inadmissible, because foreign to the issue between accused and the state and res inter alios acta.[25] Also, it is improper to show that another was charged with, and arrested for, the crime,[26] or that a complaint was filed against "John Doe" and accused held as a material witness.[27]

§ 219. —— Motive for Others to Commit Crime

Evidence tending to show a motive of another person for committing the homicide may be admissible in connection with other evidence, but not otherwise

One indicted for a homicide may show that another had a motive for committing it,[28] especially where the testimony as to who inflicted the fatal wound is circumstantial,[29] and deceased and accused are shown to have been on friendly terms a short time before the homicide.[30] However, testimony of the isolated fact of motive on the part of another is inadmissible, in order to render evidence of his motive competent, there must be evidence connecting the other person with the homicide,[31] or testimony showing that he was in such proximity

11 Tex.—Cecil v. State, 72 S.W. 197, 44 Tex.Cr. 150
30 C.J. p. 168 note 20

12 Iowa.—State v. Williams, 192 N.W. 901, 195 Iowa 785

13 Pa.—Commonwealth v. Kosh, 157 A. 479, 305 Pa. 116
30 C.J. p. 168 note 10

14 Ala.—Goodlett v. State, 33 So. 892, 136 Ala. 39.—Tatum v. State, 31 So. 369, 131 Ala. 32

15 N.C.—State v. Patrick, 48 N.C. 443

16 Iowa.—State v. Minella, 158 N.W. 645, 177 Iowa 283
30 C.J. p. 168 note 13

17 Miss.—Haywood v. State, 43 So. 614, 90 Miss. 361
30 C.J. p. 168 note 11

18 Tex.—Dickson v. State, Cr., 67 S.W. 497
30 C.J. p. 168 note 15

19 Miss.—Deloach v. State, 117 So. 361, 151 Miss. 85

20 Mo.—State v. Couch, 111 S.W.2d 147, 341 Mo. 1239.

21 Pa.—Commonwealth v. Mendola, 111 A. 292, 294 Pa. 353

22 Cal.—People v. Mitchell, 34 P. 698, 100 Cal. 328

23 Ala.—Goldsmith v. State, 168 So. 517, 232 Ala. 436

24 Va.—Taylor v. Commonwealth, 17 S.E. 812, 90 Va. 109

25 Va.—Taylor v. Commonwealth, supra

26 Ala.—Baker v. State, 26 So. 194, 122 Ala. 1

27 Mass.—Commonwealth v. Bartolini, 13 N.E.2d 382, 299 Mass. 503, certiorari denied Bartolini v. Commonwealth of Massachusetts, 58 S.Ct. 950, 304 U.S. 565, 82 L.Ed. 1531

28 La.—State v. Dyer, 97 So. 563, 151 La. 379
Tenn.—Green v. State, 285 S.W. 554, 154 Tenn. 26
30 C.J. p. 168 note 21

Motive of codefendant

(1) Accused is entitled to show codefendant's motive for killing in order to show codefendant's sole guilt.—State v. Dreher, 118 So. 85, 166 La. 921, certiorari denied Dreher v. State of Louisiana, 49 S.Ct. 36, 278 U.S. 641, 73 L.Ed. 556

(2) Evidence of fight between deceased and person convicted with accused, shortly before shooting of deceased to show motive by conviction, was erroneously excluded.—Nunnally v. State, 156 S.E. 161, 42 Ga.App. 410

29 Ky.—Franklin v. Commonwealth, 48 S.W. 986, 105 Ky. 237, 20 Ky.L. 1137
30 C.J. p. 168 note 22

30 Ga.—Crawford v. State, 12 Ga. 142
30 C.J. p. 168 note 23

31 Conn.—State v. Perelli, 5 A.2d 705, 125 Conn. 321, 121 A.L.R. 1357
Miss.—Moore v. State, 175 So. 183, 179 Miss. 268
Neb.—Dobry v. State, 263 N.W. 681, 130 Neb. 51
30 C.J. p. 168 note 24

Motive to kill another and mistake in identity

Accused's evidence that another had motive to kill third person and due to mistake in identity killed wrong

to the murder as to render the fact of opportunity and motive of weight in determining the identity of the slayer, or in excluding accused [32] Evidence offered to show motive must, of course, have a tendency to do so in order to be admissible [33]

To refute the evidence of motive on the part of another, the state may show that intimate and friendly relations existed between such person and deceased,[34] and where the state offers evidence tending to refute the claim of motive on the part of another, accused is entitled to introduce proof in rebuttal thereof [35]

§ 220. —— Threats, Admissions, and Confessions by Others

Threats, declarations, admissions, or confessions by a third person are not admissible on behalf of accused unless they are part of the res gestae or are links in a chain of evidence connecting with the crime itself

For the purpose of showing that another than accused committed the crime, evidence of disconnected threats and declarations of third persons is inadmissible,[36] but such evidence is admissible where the threats and declarations are part of the res gestae or form links in a chain of evidence connecting with the crime itself [37] A similar rule applies to declarations of a third person that he committed the homicide or procured its commission [38] Where an alleged accomplice claims that he acted under the direction of accused, evidence of threats by the accomplice are admissible on behalf of accused [39] It is not error for the court, after permitting a witness to testify to a threat by a third person to kill deceased, to refuse to permit the witness to go into detail concerning acts and misconduct of deceased as the reason assigned by the third person for his threat [40] Threats and admissions which are not inconsistent with accused's guilt have been held inadmissible in some jurisdictions [41]

§ 221. Character and Habits of Accused

a Proof by accused
b Proof by prosecution

a. Proof by Accused

Accused is entitled to introduce evidence of his general reputation for peace and quiet in the community in which he resides at a time preceding the difficulty which is not too remote, but he is not entitled to show his general character or irrelevant traits of character, or to establish his character by evidence of specific facts and transactions or, in most states, by evidence based on the personal observation, knowledge, or belief of a witness Where the jury will determine the punishment, accused should be allowed, within reasonable limitations, to introduce some evidence as to his early life and environment

In accordance with the rules relating to evidence of the character and reputation of accused in crim-

person but not tending to connect alleged murderer by any overt act with commission of homicide, is properly excluded—Quinn v State, 25 P 2d 711, 55 Okl Cr 116

Motive and threats

(1) Mere evidence of motive in another person or of motive coupled with the threats of such other person is inadmissible, unless coupled with other evidence tending to directly connect such other person with the actual commission of the crime charged

Cal—People v Mendez, 223 P 65, 193 Cal 39

Wash—State v Kwan, 25 P 2d 104, 174 Wash 528

(2) Whether threats of third person are admissible to prove commission of homicide by him generally see infra § 220

Opportunity and motive

Evidence tending to show that a third person in no way connected with the trial, had both an opportunity and motive for committing the crime is not admissible to prove that the homicide was committed by such third person—State v Stewart, 127 S E 260, 189 N C 340

32. Tex—James v State, 219 S W 202, 86 Tex Cr 598
30 C J p 169 note 25

33. La—State v Dunn, 109 So 56, 161 La 532, error dismissed Dunn v State of Louisiana, 47 S Ct 311, 273 U S 656, 741, 71 L Ed 825

34 Mich—People v Doyle, 21 Mich 221
Tex—Walker v State, 17 Tex App 16

35 Kan—State v Brown, 21 Kan 38

36 Cal—People v Perkins, 66 P 2d 631, 8 Cal 2d 502
N C—State v Stewart, 127 S E 260, 189 N C 340
Tex—Smith v State, 152 S W 2d 751, 754, 142 Tex Cr 349 quoting **Corpus Juris.**
30 C J p 169 note 28

Threats by third person not against any particular person are inadmissible in favor of accused in murder prosecution—Bouchillon v State, 118 So 726, 151 Miss 752

Unnecessary admission of evidence

When the trial judge permitted accused to prove that a third person threatened deceased in the absence of evidence connecting the third person with the commission of the crime, he was more lenient to accused than was necessary under the established law of the state—People v Wagner, 68 P 2d 277, 21 Cal App 2d 92

37. Tex—Smith v State, 152 S W 2d 751, 754, 142 Tex Cr 349, quoting **Corpus Juris.**
30 C J p 169 note 29

38 Tex—Smith v State, supra quoting **Corpus Juris**
30 C J p 169 note 30

Declaration not admissible on behalf of accused

Ga—West v State, 117 S E 380, 155 Ga 182

Declaration is not admissible as confession or admission made by declarant even though he was jointly indicted with accused Whitaker v State, 127 S E 106, 159 Ga 787

Absence of showing of proximity

In prosecution for negligent homicide, testimony that another admitted he was drunk and might have run over deceased, was properly excluded in absence of showing that third party was in such proximity to offense at time it was committed as would make it reasonably probable that he might have been guilty—Bohannon v State, 273 S W 262, 100 Tex Cr 285

39 Ala—Marler v State, 67 Ala 55, 42 Am R 95

40. Ky—Harvey v Commonwealth, 100 S W 2d 829, 266 Ky 789

41. N C—State v Boon, 80 N C 461
30 C J p 169 note 32

inal prosecutions generally, as considered in Criminal Law §§ 676–679, on a trial for murder it is always competent for accused to introduce evidence showing his general character and reputation in the community in which he resides for being peaceable, quiet, and law-abiding [42] Such evidence is admissible, although the fact of homicide is proved by direct testimony, and does not depend on circumstantial evidence,[43] or although, in the opinion of the trial judge, the guilt of accused is clearly established,[44] or although the defense is insanity[45] or justification,[46] but where accused admits the homicide and claims that the shot was fired accidentally, evidence of good character may be considered only to determine whether the shot was fired accidentally or with premeditated design,[47] and under a plea of insanity it is not competent to show that accused possessed a nervous temperament, or that he was excitable and eccentric [48] On a prosecution for involuntary manslaughter, evidence on behalf of accused as to his good reputation for peace and quiet is inadmissible [49]

Traits of character involved Accused's evidence as to character, it is ordinarily held, should be confined to evidence as to those traits which make it improbable that he would commit the crime charged,[50] such as the traits of peaceableness and quietness,[51] and should not relate merely to general character[52] or to irrelevant traits of character, such as bravery,[53] chastity,[54] industry,[55] integrity,[56] trustworthiness,[57] or truth and veracity [58] Where accused is, or formerly was, an officer, but committed the homicide when acting as a private citizen, it is proper to exclude evidence of his reputation as a diligent and energetic officer [59] Also, it is proper to exclude evidence of the fact of accused's military service,[60] the length of such service,[61] and his excellent conduct as a soldier [62] The general rule is that evidence of the moral character of accused is inadmissible,[63] but there is authority for the view that accused may prove his good moral character as well as his character for peace and quietude [64] Notwithstanding some authority to the contrary,[65] it is generally held that accused is not entitled to introduce evidence of his reputation for honesty [66] Ordinarily, evidence of accused's kindness to his children is inadmissible,[67] but kindness to children may be relevant in a case of infanticide [68]

Manner of proof generally Except in some jurisdictions wherein accused is permitted to show from the personal observation and knowledge of a witness called in his behalf that he possesses those traits of character which would render it unlikely

42. Ala —Elmore v State, 113 So 33, 216 Ala 247
La —State v Pichon, 97 So 463, 154 La 334—State v Davis, 97 So 449, 154 La 295
Tex - Johnson v State, 135 S W 2d 485, 138 Tex Cr 188
30 C J p 169 note 34—22 C J p 476 notes 98, 9, 12

In prosecution for assault with intent to kill
Ala - Morgan v State, 6 So 761, 88 Ala 223

Orderly character or reputation as an orderly person has been held relevant in a case of homicide —State v Sterrett, 32 N W 387, 71 Iowa 386

Consideration and effect
Evidence of good character and peaceableness does not constitute defense to murder in first degree or any included offense but may be considered by the jury along with other facts and circumstances in determining the guilt or innocence of accused —State v Harness, 238 N W 430, 214 Iowa 160, modified on other grounds on petition for rehearing 241 N W 645, 214 Iowa 160

43. Miss Maston v State, 36 So 70, 83 Miss 647

44. Miss —Maston v State, supra

45. Ill —Hopps v People, 31 Ill 385, 83 Am D 231
30 C J p 169 note 37

46 Ga - Thornton v State, 33 S E 673, 107 Ga 683—Davis v State 10 Ga 101
Admissibility of evidence of accused's character or reputation on issue of self-defense see infra § 273

47. Wis —Eckman v State, 209 N W 715, 191 Wis 63

48. N Y —Sindram v People, 88 N Y 196, affirming 1 N Y Cr 448
Pa —Commonwealth v Cleary, 23 A 1110, 148 Pa 26

49 Cal —People v Thomas, 208 P 314, 58 Cal App 308

50. La —State v Thornhill, 178 So 343, 188 La 762
30 C J p 170 note 40

51. La State v Thornhill, supra
30 C J p 170 note 40 [b] (2)

52. Ga - Gunter v State, 10 S E 2d 264, 63 Ga App 65
30 C J p 170 note 40

53. Ind - Keyes v State, 23 N E 1097, 122 Ind 527
22 C J p 475 note 63—30 C J p 170 note 40 [a] (4)

54. Cal - People v Fair, 43 Cal 137

55. Mo —State v Niehaus, 87 S W 473, 188 Mo 304

Whether accused had worked within few months prior to trial is irrelevant in support of good character —Lovins v State, 141 So 881, 105 Fla 576

56. Cal —People v Cowgill, 29 P 228, 93 Cal 596

57. La —State v Thornhill, 178 So 343, 188 La 762

58. La - State v Thornhill, supra
22 C J p 476 notes 24, 25, p 475 note 91

59. Okl Jamison v State, 250 P 548, 35 Okl Cr 302
30 C J p 170 note 40 [a] (9)

60. Conn —State v Mangancila, 155 A 74, 113 Conn 209

61. Ala —Reed v State, 92 So 513, 18 Ala App 371

62. Tex - Oliver v State, 259 S W 589, 96 Tex Cr 633

63. Ind —Walker v State, 1 N E 856, 102 Ind 502
30 C J p 170 note 41—22 C J p 475 note 74

64. Ky —Denton v Commonwealth, 221 S W 202, 188 Ky 30
30 C J p 170 note 42

65. Pa —Commonwealth v Winnemore, 1 Brewst 356

66. La —State v Thornhill, 178 So 343, 188 La 762
30 C J p 170 notes 40 [a] (1), 44—22 C J p 475 note 91

67. Tex —Rea v State 179 S W 706, 77 Tex Cr 565

68. Iowa —State v Cunningham, 82 N W 775, 111 Iowa 233.

that he committed the offense with which he is charged,[69] the character of accused can be shown only by evidence of his general reputation or reputation in the community,[70] and the personal knowledge and belief of a witness as to the character of accused is not admissible.[71] Evidence of accused's reputation should be confined to the place of his residence or the neighborhood thereof,[72] and to a time preceding the difficulty[73] which is not too remote,[74] but evidence should not be excluded for remoteness where it reasonably tends to show his reputation at such time and place.[75] Evidence of this nature must be directed to accused's reputation or character among those with whom he, and not the witness, associates.[76] Evidence as to particular facts and circumstances is not admissible in chief on the question of character,[77] and even where cross-examination of accused results in proof that he has been prosecuted for a disturbance of the peace, he cannot be permitted to meet it by showing the details of his arrest and the offense.[78] If accused refuses to put his general character in issue, he will not be permitted to prove by his jailer what his character was while confined in prison.[79]

Testimony that accused stood well, except with quarrelsome people, is relevant on redirect examination to rebut testimony on cross-examination as to his quarrelsome reputation.[80]

A proper foundation must, of course, be laid for the admission of evidence as to reputation.[81]

Negative evidence, that is, that the witness has never heard anything against or about accused with respect to his character is admissible to establish his good reputation.[82] In this connection, a question as to whether the witness has ever heard of accused being in any fights has been held proper, it being equivalent to an inquiry as to whether the witness has heard anything against the character of accused for quiet, peace, or good order,[83] but, on the other hand, it is held proper to exclude the testimony of accused's mother on direct examination that he had never previously been in trouble.[84]

Environment or personal history Accused is not permitted to establish his character by proof of the business in which he is or has been engaged,[85] or by introducing testimony as to where he lived during all his life, except during his married life.[86] Where the jury determines the extent of the punishment, accused should be permitted, within reasonable limitations, to state something of his background,[87] such as his environment and hardship during childhood and early manhood,[88] but the trial court fulfills its duty in this respect when it

69. Ohio—State v. Dickerson, 82 N E 969, 77 Ohio St 34, 122 Am S R 479, 13 L R A,N S, 341
30 C J p 171 note 61

70. Miss.—Wilkerson v. State, 98 So 770, 134 Miss 853
30 C J p 171 note 60

71. N Y—People v. Van Gaasbeck 82 N E 718, 189 N Y 408, 12 Ann Cas 745, 22 L R A,N S 650
30 C J p 171 note 59

72. Me.—State v. Cloutier, 186 A 604, 134 Me 269
Mo.—State v. Farris, 6 S W 2d 903
30 C J p 171 note 62

Reputation in county

Where accused has resided for a number of years in a certain county, is well known there, and has established a general reputation in such county, an inquiry relative thereto, under a proper predicate, is permissible.—Craven v. State, 111 So 767, 22 Ala App 39

73. Ala.—Jenkins v. State, 103 So 458, 212 Ala 484.—McKenney v. State, 82 So 565, 17 Ala App 117
La.—State v. Iles, 9 So 2d 601, 609, 201 La 398, quoting **Corpus Juris.**
Miss.—Harris v. State, 130 So 697, 158 Miss 439

74. La.—State v. Plain, 129 So 730, 171 La 128
30 C J p 171 note 63—22 C J p 480 note 91 [a]

75. N Y—People v. Van Gaasbeck 82 N E 718, 189 N Y 408, 12 Ann Cas 745, 22 L R A,N S, 650

Questions and answers construed

Testimony of witnesses as to accused's moral character was not incompetent because not confined to a reasonable time before the commission of the homicide since although no particular time was specified, the present tense was employed in both the questions and answers, showing clearly that the witnesses were asked and testified as to his reputation at the time of the trial and not at a remote time.—Bryant v. Commonwealth 259 S W 1038, 202 Ky 127

76. Ohio.—Thurman v. State 1 Ohio Cir Ct 141, 2 Ohio Cir Dec 466

77. La.—State v. Pichon, 97 So 463, 154 La 334
Miss.—Wilkerson v. State, 98 So 770, 134 Miss 853
N H.—State v. Thorp, 171 A 633, 86 N H 501
30 C J p 171 note 66

Conduct when arrested on other occasions

In prosecution for murder of officer attempting to arrest accused, testimony of his quiet submission to other arrests was inadmissible.—State v. Adams, 19 S W 2d 671, 323 Mo 729

Irrelevancy

Testimony of state witness on cross-examination that he had had trouble with accused was without relevancy to issue of accused's reputation and sustaining objection to further inquiry was without error.—Nugent v. State, 273 S W 598, 101 Tex Cr 86

78. Mo.—State v. Brown, 79 S W 1111, 181 Mo 192

79. Ga.—Smalls v. State, 29 S E 153, 102 Ga 31

80. Ala.—Craven v. State, 111 So 767, 22 Ala App 39

81. Fla.—Prevatt v. State, 89 So 807, 82 Fla 284
Tex.—Newells v. State, 272 S W 492, 100 Tex Cr 261

82. Fla.—Popps v. State, 162 So 701, 120 Fla 387.—Herring v. State, 154 So 187, 114 Fla 156
30 C J p 172 note 69

83. Ala.—Diamond v. State, 116 So 312, 22 Ala App 410

84. Ga.—Wilson v. State, 10 S E 2d 861, 190 Ga 824

85. La.—State v. Pichon, 97 So 463, 154 La 334

86. Cal.—People v. Coleman, 123 P 2d 557, 50 Cal App 2d 592

87. Cal.—People v. Larios, 30 P 2d 104, 220 Cal 236

88. La.—State v. Henry, 198 So 910, 196 La 217.

admits testimony relative to the early life of accused and his home surroundings in so far as it is material and relevant [89]

Ownership, use, or carrying of firearms It is not error to exclude evidence, offered by accused, that he was in the habit of carrying a pistol,[90] or that he had a reputation for being cautious in the use of firearms,[91] or, where there is nothing to make it appear material and relevant, evidence of the reason why he carried a revolver [92]

b. Proof by Prosecution

The state may not attack the character of accused, otherwise than for the purpose of impeaching him as a witness, until he has placed it in issue, and even then it may not, except on cross-examination, attack it by evidence of specific acts, but it may introduce evidence otherwise admissible notwithstanding its incidental tendency to discredit or impugn accused's character Under some statutes the bad character of accused may be shown where he applies for a suspension of sentence

Where accused has not placed his character in issue, the state should not be permitted to introduce evidence of his bad character or reputation,[93] even though the evidence against accused is circumstantial [94] Accused by becoming a witness in his own behalf does not place his character in issue as to the particular trait involved in the crime charged,[95] nor does he place it in issue by an irresponsive answer followed by a claim that he can substantiate it by witnesses,[96] nor, where he defends on the ground of a frame-up, by testifying that a witness for the state had procured his arrest on a false charge of vagrancy [97] The impeachment of a witness, including the impeachment of accused in a criminal prosecution who testifies in his own behalf, by an attack on his character is considered in the C J S title Witnesses §§ 491–537, also 70 C J p 820 note 22–p 936 note 8

Evidence otherwise admissible need not be rejected because it incidentally tends to discredit or impugn accused's character,[98] and when accused introduces evidence of his good character the state may oppose it by proper proof that his previous character or reputation was bad [99] The state cannot, primarily or in rebuttal, introduce evidence of specific acts of accused involving the trait of character evidenced by the crime charged,[1] and some courts hold that even on cross-examination of character witnesses the state is limited to evidence of the general reputation of accused,[2] but the more general rule is that the state may on cross-examination properly test the credibility or information of a witness testifying to accused's good character by inquiry as to his knowledge of particular acts of accused involving the trait of character in ques-

89. R I—State v Adams 121 A 418

90. Ala - Whittle v State, 104 So 668 213 Ala 301

91. Tex—Bilyeu v State 279 S W 845, 103 Tex Cr 25

92. Conn - State v Manganella, 155 A 74, 113 Conn 209

93. Ark Owens v State 278 S W 3 169 Ark 1188
Ga—Fitzgerald v State, 190 S E 602, 184 Ga 19
Ky—Rose v Commonwealth, 149 S W 2d 772 286 Ky 53
Mich—People v Dunn, 206 N W 568 233 Mich 185.
N Y—People v Zackowitz, 172 N E 466, 254 N Y 192
S C—State v Hester, 134 S E 885 137 S C 145
Tex—Elizondo v State, 94 S W 2d 457, 130 Tex Cr 393
Wash—State v Barton, 88 P 2d 385, 198 Wash 268.
30 C J p 170 note 45

Dangerous, violent, turbulent, and bloodthirsty character
Ala—Brown v State, 100 So 616, 20 Ala App 28

Murderous and vicious propensities
N Y—People v Smith, 281 N Y S 294, 245 App Div 69

Bad reputation for peace and quietude
Ky—Waters v Commonwealth, 124 S W 2d 97, 276 Ky. 315—Vanover v Commonwealth 54 S W 2d 375 246 Ky 32—Shell v Commonwealth, 53 S W 2d 524 245 Ky 223—Hall v Commonwealth, 293 S W 961, 219 Ky 446—Strong v Commonwealth, 287 S W 235, 216 Ky 98

Character of codefendant
The rule may be applied to exclude evidence as to the character of a codefendant which cannot be introduced without infringing on the rule—Williams v State 51 S W 220, 40 Tex Cr 497

94. La—State v Lazarone, 57 So 532, 130 La 1

95 Minn - State v Nelson, 181 N W 850, 148 Minn 285
Mo—State v Beckner, 91 S W 892, 194 Mo 281, 3 L R A, N S, 535

96. Minn—State v Nelson, 181 N W 850, 148 Minn 285
30 C J p 171 note 50

97. S C—State v Abercrombie, 153 S E 314, 156 S C 375

98 Ga—Clifton v State, 2 S E 2d 102 187 Ga 502—Morris v State, 167 S E 509, 176 Ga 243
30 C J p 171 note 56

Evidence necessary to prove threat
Tex—Graham v State, 51 S W 2d 401, 121 Tex Cr 343

Evidence showing state of mind or mental condition
Ga - Hargroves v State, 177 S E 561, 179 Ga 722
Miss - Hand v State, 200 So 258 190 Miss 314
Okl - Fray v State 285 P 142, 46 Okl Cr 260
Va—Enoch v Commonwealth 126 S E 222, 141 Va 411

99. Ala—Pierce v State, 154 So 526, 228 Ala 515
Ga Willingham v State, 149 S E 887 169 Ga 142
Tex - Jones v State 113 S W 2d 908, 133 Tex Cr 622
30 C J p 171 note 47

1 Fla—Nelson v State, 13 So 361, 32 Fla 244
Miss—Hartfield v State, 189 So 530, 186 Miss 75
N Y—People v Smith, 281 N Y S 294, 245 App Div 69
Tex—Schupback v State 105 S W 2d 231 132 Tex Cr 419—Sessums v State, 83 S W 2d 965, 129 Tex Cr 128—Howard v State, 298 S W 587, 107 Tex Cr 585—Skelton v State, 291 S W 238, 106 Tex Cr 90
30 C J p 172 note 72

Specific offenses cannot properly be offered in rebuttal of evidence of good character—Commonwealth v. Jones, 121 A 486, 280 Pa 368

2. Fla—Nelson v State, 13 So 361, 32 Fla 244
30 C J p 172 note 74.

tion[3] Where accused introduces evidence of his good character based on the knowledge of the witness, as distinguished from his reputation, the state is not entitled on cross-examination to inquire as to the witness' knowledge of rumors or reports that accused had committed various other crimes[4] The evidence offered by the state must not be too remote,[5] but remoteness depends on the circumstances of the particular case,[6] and sometimes the objection is considered as going more to the weight than the admissibility of the testimony[7] A charge of, or incarceration for, felony must be shown to have been legal in order that it may be admitted in evidence[8]

Ordinarily, witnesses for the state cannot be permitted to give testimony as to the bad character of accused based on what they heard after the homicide,[9] except in so far as such evidence relates to the reputation of accused as of a time prior to the killing[10] However, where accused files an application for a suspended sentence, the statutes in some jurisdictions specifically authorize proof on the issue of his general reputation to enable the jury to decide intelligently whether to recommend such suspended sentence,[11] and in such case evidence of the general character of accused both before[12] and after[13] the commission of the homicide may be admitted Evidence of prior convictions to aid the jury in determining whether the death penalty should be imposed for the benefit of society should be limited to cases involving professional criminals who are a menace to society and wage war on it for a profit, and to cases of those who commit murder of a cold-blooded and atrocious nature[14] Prior assaults for which accused was not arrested or convicted may not be admitted in evidence to aid the jury in fixing the penalty[15]

In accordance with the foregoing rules, various matters, extraneous to, and disconnected with, the homicide, and effective only to prejudice the jury against accused, have been held not admissible in evidence,[16] while others have been admitted, notwithstanding a claim that their admission constitut-

3. Ala —Bryan v State 167 So 255, 232 Ala 226—Jones v State, 25 So 204, 120 Ala 303—Hall v State 159 So 500 26 Ala App 344
SC —State v Dill, 26 S E 567 48 S C 249
Tex —Sessums v State, 83 S W 2d 965, 129 Tex Cr 128—Shelburne v State, 11 S W 2d 519, 111 Tex Cr 182
30 C J p 172 note 73

4. Ohio —State v Dickerson 82 N E 969 77 Ohio St 34, 122 Am S R 479, 13 L R A, N S 341

5. Ill —People v Zachary, 141 N E 732, 310 Ill 351
Tex —Burkhalter v State, 212 S W 163, 85 Tex Cr 282

6. Tex —Lasater v State 227 S W 949 88 Tex Cr 452
30 C J p 172 note 77

Three or four years

Permitting state to prove general reputation of accused three or four years prior to difficulty was not error —Beard v State, 72 S W 2d 530, 189 Ark 217

7. Tex —Squyres v State, 275 S W 1027, 101 Tex Cr 308

8. Tex —Lasater v State, 227 S W 949, 88 Tex Cr 452

9. Ala —Smith v State, 195 So 290, 29 Ala App 212, certiorari denied 195 So 293, 239 Ala 301
Va —Ginger v Commonwealth, 120 S E 151, 137 Va 811
30 C J p 172 note 78

10. Ark —Harper v State, 246 S W 263, 151 Ark 338

11. Tex —Collins v State, 237 S W 560, 91 Tex Cr 151

12. Tex —Collins v State, supra

13. Tex —Ott v State, 235 S W 903 90 Tex Cr 403
30 C J p 172 note 81

14. Pa —Commonwealth v Clark, 185 A 764 322 Pa 321

15. Pa —Commonwealth v Clark, supra

16. Ariz —Turley v State, 59 P 2d 312, 48 Ariz 61
S D —State v Hoffman, 220 N W 615, 53 S D 182
Tex —Whiteside v State, 12 S W 2d 218 111 Tex Cr 116—Hightower v State, 281 S W 1063, 103 Tex Cr 665
Wyo —State v Vines 54 P 2d 826, 49 Wyo 212
30 C J p 170 note 45 [b]

Evidence of prior immoral conduct

Ky McKerrin v Commonwealth, 265 S W 318 206 Ky 677

Evidence of conviction of misdemeanor

Ky Waters v Commonwealth, 124 S W 2d 97, 276 Ky 315

Evidence that accused's residence was known as a "honk-a-tonk"

La —State v Johnson, 101 So 250, 156 La 875

Evidence concerning intoxicating liquor

(1) Evidence that accused was bootlegger —Slone v Commonwealth, 18 S W 2d 1005, 230 Ky 199

(2) Testimony that accused sold liquor —Williams v State, 195 So 338, 188 Miss 381

(3) Testimony that witness heard accused had some whisky —Davis v State, 101 So 171, 20 Ala App 131

(4) Evidence that accused purchased liquor and was seen under influence of liquor some time prior to homicide —Baker v Commonwealth, 104 S W 2d 976, 268 Ky 218

(5) Evidence of accused's habit of using intoxicants —Dunn v State, 81 S E 488 16 Ga App 9

(6) Evidence of a liquor escapade constituting a violation of statute, but not involving moral turpitude —Morris v State 142 So 685, 25 Ala App 175

Worthlessness

It is not competent for the state to prove by defendant that he had spent his part of his father's estate and that he was so worthless and drunken that his mother could not get him to attend to her business —Williford v State, 37 S W 761, 36 Tex Cr 414

Expulsion from lodge

Admitting evidence that, after shooting deceased defendant was expelled from a lodge was error —State v Kunkel, 289 S W 865 315 Mo 1259

Evidence of delay in making bond

when indicted for another offense should not be admitted, as it could only tend to show that accused was a bad man generally and one in whom confidence could not be imposed —Stratton v State, 8 S W 2d 171, 110 Tex Cr 254

Carrying pistol habitually or on other occasions

(1) Evidence of accused's habit or reputation of carrying a pistol is inadmissible —Newman v Commonwealth 88 S W 1089, 28 Ky L 81

(2) Where accused admitted he had pistol in his possession at time deceased was shot, evidence offered by the state as to his carrying pistol on

ed an improper attack on the character of accused.[17] The prosecution is not entitled to show that accused lived expensively or had no occupation or means,[18] or that he had no occupation.[19] However, it is not improper for the state to show what accused's business was,[20] or where he lived.[21] Also, permitting a witness to state that he is a parole and probation officer,[22] or is employed by the Federal Bureau of Narcotics,[23] is proper in order to furnish aid to the jury in estimating the weight to be given to his testimony, and is not objectionable as an attempt to get before the jury an insinuation that accused has been previously convicted of an offense.

§ 222. Character and Habits of Person Killed or Assaulted

a In general
b Habits

a. In General

(1) In general
(2) Extent of matters provable and evidence admissible

(1) In General

It is only in certain classes of cases, as where there is some evidence supporting a claim of self-defense, or the evidence of the homicide is entirely circumstantial, or the immediate circumstances of the killing leave the intention of the accused or the justifiableness of his act in doubt, that the accused may show the character of the deceased as having been violent and dangerous and the state may rebut the showing by proof of the deceased's peaceable and law-abiding character

Subject to certain limitations and qualifications hereinafter considered in this section and in § 272, which deals with the admissibility of evidence on the issue of self-defense, evidence as to the character or reputation of the victim of the homicide is inadmissible.[24]

Admissibility on behalf of prosecution Except perhaps where the evidence of the homicide is entirely circumstantial,[25] it is not permissible for the state in the first instance, and before the character of deceased has been assailed, to offer primary evidence or evidence in chief of deceased's good character or reputation as a quiet, peaceable, and law-abiding man.[26] This is true although accused offers evidence of his own good reputation.[27]

Where accused attempts to show that deceased was a violent and dangerous man, the state may properly offer proof of his peaceable and law-abiding character.[28] However, as judicially noted,[29]

occasions disconnected with offense charged is irrelevant.—Smith v State, 141 So 265, 25 Ala App 79.

Habit of carelessness may not be shown in a prosecution for manslaughter where there are many eyewitnesses.—People v Crossan, 261 P 531, 87 Cal App 5.

17. Evidence held admissible

(1) There was no irregularity on the part of the state in calling a witness who testified that on night of murder accused came to certain hotel with a woman and rented a room from the witness.—State v Palmer, 288 N W 160, 206 Minn 185.

(2) Question whether accused appeared sober when witness saw him dancing with deceased shortly before homicide, and affirmative answer, were not improper as against contention that question injected into case possibility that accused was a drinking man.—State v Hunter, 48 P 2d 262, 185 Wash 143.

(3) In prosecution for murder with rifle, evidence tending to prove that accused was proud of his skill in use of firearms and disposed to use them in enforcing rights or redressing grievances was admissible.—Farmer v People, 7 P 2d 947, 90 Colo 250.

18. Pa.—Commonwealth v Twitchell, 1 Brewst 551.

19. Iowa.—State v Thompson, 103 N W 377, 127 Iowa 440.

20. Ind.—Walker v State, 1 N E 856, 102 Ind 502.
30 C J p 171 note 54.

Limited consideration

Where there was evidence that accused was a gambler, jury was entitled to consider that fact as affecting his credibility as a witness, but not as a fact tending to show that he was a man likely to commit murder.—Espy v State, 92 P 2d 519, 54 Wyo 291.

21. Ala.—Kirkland v State, 37 So 352, 141 Ala 45.

22. Ky.—Waters v Commonwealth, 124 S W 2d 97, 276 Ky 315.

23. Ill.—People v Schaffner, 46 N E 2d 989.

24. Ala.—Webster v State, 93 So 545, 207 Ala 668.
30 C J p 172 note 83.

25. Tenn. Carroll v State, 3 Humphr 315.

26. Ariz.—Purnett v State, 268 P 611, 34 Ariz 129.
Ark.—Bridges v State, 275 S W 671, 169 Ark 335.
Ky.—Buttree v Commonwealth, 47 S W 2d 73, 242 Ky 623.
Mo.—State v Bolhofner, 82 S W 2d 894, 336 Mo 1155.
Okl.—Miller v State, 72 P 2d 520, 63 Okl Cr 64.—Coulson v State, 291 P 152, 48 Okl Cr 206.
Tex.—Seaton v State, 288 S W. 1082, 105 Tex Cr 451.
Va.—Thomason v Commonwealth, 17 S E 2d 371, 178 Va 489.
W Va.—State v Whitt, 122 S E 742, 96 W Va 268.
30 C J p 173 note 85.

Accused not permitted to assail deceased's reputation

Where accused sought to assail deceased's reputation but was not permitted to do so, admission of testimony as to deceased's reputation for peace and quiet over accused's objection was prejudicial error.—People v Hoffman, 232 P 971, 195 Cal 295.

Where disposition of deceased was not in issue, statement by a witness that deceased was one of the sweetest girls she ever knew was inadmissible.—Calloway v State, 241 S W 549, 92 Tex Cr 506.

27. Ill.—Kelly v People, 82 N E 198, 229 Ill 81, 12 L R A, N S, 1169, 11 Ann Cas 226.
Wash.—State v Eddon, 36 P 139, 8 Wash 292.

28. Cal.—People v Fitch, 81 P 2d 1019, 1024, 28 Cal App 2d 31, quoting **Corpus Juris.**
Ga.—Streeter v State, 192 S E 634, 56 Ga App 380.
La.—State v Matthews, 179 So 69, 189 La 166.
Va.—Thomason v Commonwealth, 17 S E 2d 371, 178 Va 489.
30 C J p 173 note 88.

29. Mo.—State v Bolhofner, 82 S W 2d 894, 336 Mo 1155.

there is a lack of uniformity in the holdings as to what constitutes an attack on the reputation of deceased so as to make admissible evidence of his good reputation According to some authorities, evidence of general reputation for violent or bad character on the part of deceased is not essential to render admissible evidence of his good character, it being sufficient that the defense shows particular bad traits of character,[30] although accused does not admit that he killed deceased and claim self-defense, his testimony that deceased made an attack on him is a direct attack on the character of deceased for peace and quietude so as to allow the state to introduce evidence of the good reputation of deceased for peace and quietude,[31] and, both under statute and otherwise, if accused undertakes to justify the homicide on the ground of threats made by deceased, the state may prove that the general character of deceased was that of an inoffensive man, and one not reasonably to be expected to execute the threats[32] On the other hand, evidence of threats by deceased,[33] or of specific unlawful acts by him,[34] or of his manner, demeanor, conduct, or statements[35] has been held not to authorize the introduction by the state of evidence of his good character or his good character for peace and quiet Proof that accused had heard of certain conduct of deceased, offered not as justification of the killing but to explain accused's presence, is not a sufficient basis for the admission of the reputation of deceased as to such conduct[36] Evidence which is otherwise admissible as tending to support a theory of the state or commonwealth may be received notwithstanding it may incidentally affect the character of deceased by disproving the fact that he was violating the law, it not being purely character testimony so as to be inadmissible until the character of deceased is attacked[37] It is proper for the state to introduce evidence that there had been no trouble between deceased and another person shortly before the killing to show that rough words spoken by deceased to such person were in jest[38]

Admissibility on behalf of accused Accused should be permitted to show the bad character of deceased or the person assaulted when,[39] and only when,[40] there is proof of circumstances bringing

Evidence held not to raise issue
Ark —Fisher v State, 231 S W 181, 149 Ark 48
30 C J p 173 note 88 [a]

30. Pa —Commonwealth **v.** Prophet, 160 A 597 307 Pa 122
30 C J p 173 note 89

31. Ind - Swearv v State, 5 N E 2d 511, 210 Ind 674, denying rehearing 1 N E 2d 992, 210 Ind 671

32. Cal —People v Fitch, 81 P 2d 1019, 1021 28 Cal App 2d 31, quoting **Corpus Juris.**
Tex —Turner v State, 16 S W 2d 127, 112 Tex Cr 245—Carpenter v State, 286 S W 228 104 Tex Cr 608
30 C J p 173 note 90

Statute applies in prosecution for assault with intent to murder
Tex —Wall v State, 7 S W 2d 958 110 Tex Cr 116

33. Ala —Jimmerson v State, 32 So 111, 133 Ala 18

34. Mo —State v Reed, 157 S W 316, 250 Mo 379
30 C J p 173 note 92

Specific acts of violence in home
N D —State v Shahane, 219 N W 132 56 N D 642

35. Mo —State v Bolhofner, 82 S W 2d 894, 336 Mo 1155

Vile and insulting language
Where accused introduces evidence that he heard decedent just before the killing apply vile and insulting language to accused's wife, testimony on behalf of the prosecution that witnesses have never heard decedent use vulgar or profane language is inadmissible, as it would tend to put in evidence the general character of decedent as to the particular vice in question and this may not be done when his general character in reference to such a trait has not been attacked - Phillips v State, 99 S E 871, 149 Ga 255

36 Ga —Turner v State, 63 S E 294, 131 Ga 761

37. Ky —Dimel **v** Commonwealth, 248 S W 511, 198 Ky 158

38. Ky —Delk v Commonwealth, 47 S W 2d 957 243 Ky 38

39 Ala - Terry v State, 105 So 386, 21 Ala App 100—Jones v State, 101 So 331, 20 Ala App 247
Ky —Bradley v Commonwealth, 148 S W 2d 737, 285 Ky 579
Mich —People v Dunn, 206 N W 568, 233 Mich 185
Mo — State v Turnbo 267 S W 817
N Y —People v Smith, 281 N Y S 294, 245 App Div 69
S C — State v Jernigan, 153 S E 480 156 S C 509—State v Boyd, 119 S E 839, 126 S C 300

40. Ariz —Sullivan v State, 55 P 2d 312 47 Ariz 224
Colo —Brindisi v People, 230 P 797 76 Colo 244
Ga —Cone v State, 18 S E 2d 850, 193 Ga 420
Mass - -Commonwealth v Festo, 146 N E 700, 251 Mass 275
Okl —Edwards v State, 48 P 2d 1087, 58 Okl Cr 15
Va —Mealy v Commonwealth, 115 S E 528, 135 Va. 585
30 C J p 174 note 2

Evidence that deceased was man of violent character
Ga —Hawkins v State, 80 S E 711 141 Ga 212
30 C J p 174 note 3

Unprovoked killing of man of bad character
The violent, revengeful, bloodthirsty character of deceased cannot be shown in excuse or palliation of the homicide, for the unprovoked killing of a bad man is no less murder than the killing of the most peaceful and law-abiding person in a community —Campbell v Territory 125 P 717, 14 Ariz 109—30 C J p 174 note 4

Absence of any thing to illustrate or explain
Such proof should never be admitted, when at the time of the killing there is no act or word of deceased which can be illustrated or explained by it --Eiland v State, 52 Ala 322 —30 C J p 174 note 5

Necessity of overt act or hostile demonstration at time of killing
(1) In absence of proof of overt act or hostile demonstration at time of killing, evidence of deceased's dangerous character is not admissible —State v Thornhill, 178 So 313 188 La 762—State v Sharpe, 127 So 368, 170 La 69

(2) Evidence that deceased was dangerous, blood-thirsty man is limited in consideration to determine solely meaning of overt act or demonstration of deceased at time of killing —Hembree v State, 110 So 171, 21 Ala App 577, certiorari denied 110 So 172, 215 Ala 246.

the case within an exception to the rule excluding evidence of the character of the victim Aside from the situation where there is a claim of self-defense and some evidence in support thereof, as discussed infra § 272, the violent, turbulent, and dangerous character of deceased may be shown when from the circumstances of the case it is a part of the res gestæ,[41] or it is relevant to illustrate the circumstances attending the homicide,[42] or where deceased was a felon attempting to escape from the custody of accused,[43] or there is evidence of threats by deceased against accused,[44] or when the evidence of the homicide is wholly circumstantial,[45] or where the immediate circumstances of the killing render it doubtful whether the act was justifiable or not,[46] or leave the question of the intention of accused in committing the crime doubtful or the proof evenly balanced,[47] or indicate provocation on the part of deceased[48] In some cases it is held that such character may be shown to enable the jury to determine the degree of the offense and the character and measure of the punishment[49]

(2) Extent of Matters Provable and Evidence Admissible

Ordinarily the inquiry, if any, which may be made as to the character of the deceased must be confined to his general character for violence, ferocity, vindictiveness, or bloodthirstiness, and the evidence admissible to show such character must, except on cross-examination, be limited to evidence of general reputation in the community at the time of the homicide or a time prior thereto which is not too remote

The inquiry as to the character of deceased must relate solely to his general character for violence, ferocity, vindictiveness, or bloodthirstiness[50] The general character,[51] or general moral character,[52] of deceased is not involved, it is held proper to exclude evidence of deceased's general reputation of having had a brutal and cruel disposition[53] or of his general good or bad reputation of having been law-abiding,[54] and it is improper to admit testimony that deceased was the most highly valued deputy sheriff the town ever had[55] It has been both affirmed[56] and denied[57] that accused should be permitted to prove the general reputation of deceased as having been an overbearing man Ordinarily deceased's general reputation in respect of drinking or not drinking intoxicating liquors,[58] or as to having

Where sole defense is insanity, the reputation of the hotel, of which deceased was proprietress, as a place where holdups frequently took place is irrelevant—State v Narich, 9 P 2d 477 92 Mont 17

41. Ala—Eiland v State, 52 Ala 322
30 C J p 174 note 8

42. Ala—Morgan v State 102 So 236, 20 Ala App 331, certiorari denied Ex parte Morgan, 102 So 238, 212 Ala 175

43. Ala—Dredd v State, 164 So 309 26 Ala App 594

44. Ala—Morgan v State, 102 So 236 20 Ala App 331, certiorari denied Ex parte Morgan, 102 So 238, 212 Ala 175
Tex—Duncan v State, 146 S W 749, 140 Tex Cr 606

45. Miss—Chase v State, 46 Miss 683
30 C J p 174 note 9

Character unknown to accused

Where the evidence of the killing is wholly circumstantial testimony of the violent character of deceased even if unknown to accused may, according to some authorities, be admissible as tending to show the inherent probabilities of the transaction irrespective of any question of self-defense—State v Byrd, 28 S E 353, 121 N C 684—State v Turpin, 77 N C 473, 24 Am R 455

46. Cal—People v Lombard, 17 Cal 316
30 C J p 174 note 10.

47. Minn—State v Dumphey, 4 Minn 438

48. Minn—State v Dumphey, supra

49 Ala—Dyson v State, 189 So 784 28 Ala App 549
30 C J p 174 note 8 [b]

50 Ala—Dyson v State, 189 So 784, 28 Ala App 549
N C—State v Hodgin 186 S E 495 499, 210 N C 371 quoting **Corpus Juris**—State v Gooch, 94 N C 987
30 C J p 174 note 15

Under statute, where threats by victim are proved

Tex Duncan v State, 146 S W 2d 749 140 Tex Cr 606 Ross v State, 29 S W 2d 381, 115 Tex Cr 152

51 Ala - Anderson v State 2 So 2d 161, 30 Ala App 124 certiorari denied 2 So 2d 463 241 Ala 381—McGimpsey v State, 100 So 628, 20 Ala App 11 certiorari denied Ex parte McGimpsey, 100 So 629, 211 Ala 415
Ga -Gunter v State 10 S E 2d 264, 63 Ga App 65

52. Ky—Benge v Commonwealth, 97 S W 2d 54 265 Ky 503—Roop v Commonwealth, 258 S W 667, 201 Ky 828
30 C J p 173 note 94

Reputation for virtue and chastity

Evidence that deceased's general reputation for virtue and chastity was bad was properly excluded—Alder v Commonwealth, 286 S W 696, 215 Ky 613

Decedent's general bad conduct or immorality may not be proved—State v Hodgin, 186 S E 495 199 210 N C 371, quoting **Corpus Juris**—30 C J p 175 note 16

Absence of connection with homicide

(1) Where alleged immorality of deceased was not shown to have been occasion or excuse for the fatal encounter exclusion of evidence of deceased's reputation for morality was not error—Harmon v State, 81 S W 2d 30, 190 Ark 823

(2) In the case of the killing of a woman in automobile with accused's wife, evidence that deceased was degenerate was properly excluded, where no demonstration toward any immoral practice between deceased and wife was made at time—Burns v State, 141 So 278 163 Miss 258

53 Tex—Scott v State, 105 S W 2d 212, 132 Tex Cr 517

54. Tex—Ross v State 29 S W 2d 381, 115 Tex Cr 152

55. Tex—Hillen v State, 1 S W 2d 883, 108 Tex Cr 516

56 Ala—Savage v State, 100 So 919, 20 Ala App 97

57 Ky—Commonwealth v Bright, 66 S W 604, 23 Ky L 1921
30 C J p 174 note 15 [a] (1)

58. Ala - Gibbs v State, 127 So 788, 23 Ala App 475, certiorari denied 127 So 790, 221 Ala 130—Orrick v State, 126 So 890, 23 Ala App 156
Ga—Townsend v. State, 114 S.E 642, 154 Ga 500.

been a rum maker[59] or bootlegger,[60] or the bad reputation of his home for drinking parties,[61] may not be shown, but, where the theory of the state is that the difficulty grew out of a purchase of whisky by deceased from accused, testimony as to whether deceased drank is admissible as tending to show whether deceased would have been likely to have had the whisky transaction with accused.[62] Until it is first established that deceased was a violent and dangerous man, testimony that his character was that of a drug addict is incompetent.[63] Where no statements of deceased are in evidence, it is proper to exclude evidence of his reputation for truth.[64]

Deceased's character, in a case where evidence thereof is admissible, may and must be shown by evidence of general reputation[65] in the community[66] at the time of the homicide[67] or at a time prior thereto[68] which is not too remote,[69] it may not be shown by evidence of specific acts[70] which are not

Iowa.—State v. Johnston, 267 N.W. 698, 221 Iowa 933.
Ky.—Benge v. Commonwealth, 97 S.W.2d 51, 265 Ky. 503.
30 C.J. p. 174 note 15 [a] (6).

Absence of other evidence disclosing pertinency

(1) Disallowing deceased's wife to testify whether deceased ever used denatured alcohol, and whether deceased drank denatured alcohol on day of homicide, was not error, where accused sought to introduce such testimony to show effect of such alcohol on body of individual who drinks it, and record did not disclose that deceased was dangerous either when sober or intoxicated, or that accused thought that deceased was dangerous. People v. Bermijo, 40 P.2d 823, 2 Cal.2d 270.

(2) Where there was no evidence that deceased had been drinking, evidence that he was bad about drinking was properly excluded. - Pynes v. State, 92 So. 666, 207 Ala. 113.

(3) Testimony as to witnesses seeing deceased with drunkard prior to killing was properly rejected, in absence of statement that deceased was seen drinking or under influence of liquor. Hickox v. State, 285 S.W. 621, 104 Tex.Cr. 649.

Evidence of habit see Infra subdivision b of this section.

59. Ala. Henley v. State, 97 So. 112, 19 Ala.App. 307.

60. Ky. Taylor v. Commonwealth, 99 S.W.2d 630, 262 Ky. 126.
30 C.J. p. 174 note 15 [c] (3).

Testimony that witness went to deceased's house to get whisky was properly excluded as irrelevant. Smith v. State, 152 S.E. 482, 170 Ga. 211.

61. N.C. State v. Taylor, 136 S.E. 832, 213 N.C. 521.

62. Ark. Clark v. State, 253 S.W. 178, 163 Ark. 150.

63. Nev. State v. Williams, 257 P. 819, 50 Nev. 271.

64. Ark. Harmon v. State, 41 S.W.2d 20, 180 Ark. 825.

65. Ark. Burton v. State, 164 S.W.2d 180, 204 Ark. 544.
Cal. People v. Soules, 106 P.2d 670, 644, 41 Cal.App.2d 298, quoting **Corpus Juris**—People v. Bermijo, 40 P.2d 823, 2 Cal.2d 270.
30 C.J. p. 175 note 18.

Reputation among different classes of people

Witness, testifying that general reputation of deceased was both good and bad, cannot be questioned as to whether it was good or bad among different classes.—Pope v. State, 287 S.W. 717, 172 Ark. 61.

66. Ala.—Maxwell v. State, 125 So. 682, 220 Ala. 119.
Cal.—People v. Soules, 106 P.2d 639, 643, 41 Cal.App.2d 298, quoting **Corpus Juris.**
Ga.—Jefferson v. State, 192 S.E. 644, 56 Ga.App. 383.
W.Va.—State v. Porter, 127 S.E. 386, 98 W.Va. 390.
30 C.J. p. 175 note 18.

A prison may be a suitable community in which to form a reputation as to character.—Thomas v. People, 67 N.Y. 218.

Reputation of accused in other communities where he had resided prior to the date of the homicide, as well as his reputation in the community where he lived at the time of the homicide, may be proved by the state. Newells v. State, 272 S.W. 192, 100 Tex.Cr. 261.

Reputation of deceased in foreign country is not a proper subject of inquiry. May v. People, 6 P. 816, 8 Colo. 210.

67. W.Va. State v. Porter, 127 S.E. 386, 98 W.Va. 390.

68. N.M.—State v. Gallegos, 213 P. 1030, 28 N.M. 403.

69. Colo. May v. People, 6 P. 816, 8 Colo. 210.

Trial judge has discretion to determine whether testimony of deceased's reputation is connected in point of time so as to be admissible. State v. Peak, 133 S.E. 31, 131 S.C. 329.

Few months prior to homicide

That deceased had only been back at his old home for a few months, following a prolonged absence of several years, was not good ground for rejection of testimony of qualified witnesses knowing his general reputation was that of a peaceable, law-abiding citizen.—Richardson v. State, 253 S.W. 273, 94 Tex.Cr. 616.

70. Ark.—Day v. State, 19 S.W.2d 380, 185 Ark. 710.
Cal.—People v. Soules, 106 P.2d 639, 643, 41 Cal.App.2d 298, quoting **Corpus Juris**—People v. Bermijo, 40 P.2d 823, 2 Cal.2d 270.
Ga.—Jefferson v. State, 192 S.E. 644, 56 Ga.App. 383.
La.—State v. Ricks, 128 So. 293, 170 La. 507. State v. Williams, 98 So. 738, 155 La. 9.
30 C.J. p. 175 note 18.

Specific acts of violence

Ala.—Jones v. State, 101 So. 331, 20 Ala.App. 247.
Ga.—Gunter v. State, 10 S.E.2d 264, 63 Ga.App. 65.
S.C.—State v. Boyd, 119 S.E. 839, 126 S.C. 300.
30 C.J. p. 175 note 18 [a] (1).

Fights

Tex.—Garvey v. State, 72 S.W.2d 293, 126 Tex.Cr. 526.

Details of antecedent difficulty, encounter, or transaction

Ky.—Bradley v. Commonwealth, 148 S.W.2d 737, 285 Ky. 579.
La.—State v. Steele, 109 So. 194, 161 La. 796.

Failure to give credit on another man's account

Difficulty having arisen over account which deceased alleged was owing by accused, evidence that deceased improperly failed to give credit on another man's account was incompetent and properly excluded. - Burris v. State, 273 S.W. 19, 168 Ark. 1115.

Evidence that deceased brought a witness some liquor on day of killing was not admissible to show violent character of deceased. Green v. State, Ga., 25 S.E.2d 502.

Carrying or reading books or papers

Deceased's kind and monotonous disposition cannot be established by papers or books he may have carried or read. Miller v. State, 71 S.W.2d 516, 126 Tex.Cr. 226.

Reputation evidence of specific facts

It was not error to refuse to allow witnesses to state the general reputation of deceased for being a man who visited and kept on his premises lewd women for immoral purposes, since specific facts cannot be

connected in time or occasion with the homicide[71] and are not material or relevant to any phase of the case.[72] It is essential that the witnesses from whom the testimony is elicited shall have, through acquaintance with the people residing in the community,[73] knowledge of the general reputation of deceased[74] and that such reputation shall have been known to accused.[75] While, on the cross-examination of the state's witnesses, accused is entitled to inquire as to their knowledge or information with respect to deceased or other difficulties in which he was engaged, the purpose of such inquiry being to test their credibility or their knowledge of deceased's character,[76] where the witnesses deny any knowledge or information of other difficulties, accused cannot introduce independent evidence thereof and of their notoriety.[77]

b. Habits

Various holdings have been made as to the admissibility, under the issues and circumstances of particular cases, of evidence of certain habits of the deceased

Notwithstanding some authority in favor of the proposition that the fact that decedent's habits were such that he would be apt to do a thing is not competent evidence that he did the act,[78] testimony as to a habit or custom of deceased may, under the circumstances of the case, be competent on behalf of the prosecution[79] or accused.[80] Evidence of deceased's occupation is wholly irrelevant unless there is an adequate explanation of its purpose.[81]

Carrying or use of deadly weapons It has been

proved by reputation evidence — Rasnake v Commonwealth, 115 S E 543, 135 Va 677

71. Ark — Burton v State, 163 S W 2d 160, 204 Ark 548
S C — State v Jones, 188 S E 178, 182 S C 1

Conviction of robbery in another state
Tex — Davis v State, 296 S W 895, 107 Tex Cr 315

Bond, executed five years before, to refrain from violating liquor statute
Ky — Shelton v Commonwealth, 75 S W 2d 491, 256 Ky 745

Acts which occurred at remote date
Iowa — State v Norton, 286 N W 476, 227 Iowa 13

Shooting other men
Refusal of court to permit witness to testify that deceased had shot two men did not present error where the date of such occurrences was not shown to have been within the rules relating to the admission of such evidence — Hill v State, 262 S W 750, 97 Tex Cr 605

72. Ala — Savage v State, 100 So 919, 20 Ala App 97
Tex — Benton v State, 300 S W 75, 108 Tex Cr 285 — Bond v State, 296 S W 602, 107 Tex Cr 453 — Patterson v State, 289 S W 398, 105 Tex Cr 508

Absence of preacher at funeral of deceased
Tex — Johnson v State, 293 S W 173, 106 Tex Cr 182

Administration of sedatives to deceased
Evidence in trial of state prison inmate for murder of fellow prisoner that prison physician administered sedatives and bromides to deceased in treating him for epilepsy was properly rejected as immaterial on question of deceased's reputation for peace and quiet — People v Garcia, 42 P 2d 1013, 2 Cal 2d 573

Questions to prosecuting witness, in trial for assault with intent to murder, as to whether he had been convicted of assault and battery and certain other offenses, were immaterial and improper, as were also questions as to whether he had been having trouble since getting into neighborhood — Craven v State, 111 So 767, 22 Ala App 39

73. N M — State v Gallegos, 213 P 1030, 28 N M 403

74. Ala — Hembree v State, 110 So 171, 21 Ala App 577, certiorari denied 110 So 172, 215 Ala 246
Okl — Sweet v State, 107 P 2d 817, 70 Okl Cr 443

Where a witness had no knowledge
of the character of deceased prior to the homicide, his testimony relative thereto is inadmissible, being mere hearsay — State v Kenyon, 26 A 199, 18 R I 217

75. W Va — State v Porter, 127 S E 386, 98 W Va 390

Conviction not known to accused
Evidence of a conviction of deceased, attempted to be shown by accused, was immaterial, its only purpose being to show that accused at the time of the killing knew of deceased's character, and it not appearing that he had ever heard of the judgment — People v Mohammed, 208 P 963, 189 Cal 429

Acts or conduct not known to defendant
Court properly excluded testimony concerning conduct of deceased when he was requested to assist in repairing a road, offered to show that deceased had a violent disposition, where it was not shown that acts referred to were known to accused — State v Norton, 286 N W 476, 227 Iowa 13

76. Cal — People v Soules, 106 P 2d 639, 643, 41 Cal App 2d 298, quoting **Corpus Juris.**

Tex — Hillen v State, 1 S W 2d 883, 108 Tex Cr 516
30 C J p 175 note 19

77. Ala — Hussey v State, 6 So 420, 87 Ala 121

78 Mass — Commonwealth v Rivet, 91 N E 877, 205 Mass 461

79. S C — State v Hester, 134 S E 885, 137 S C 145

Squatting down when conversing
When it is admitted that deceased was sitting down when shot, testimony as to the habit of deceased of squatting down when conversing is not prejudicial — Frazier v State, 23 So 131, 116 Ala 442

Leaving hat in particular place
Testimony that deceased generally laid his hat down where the witness saw it when he discovered the body of deceased is properly admitted over objection that it was not proper to prove the position of deceased's hat on this occasion by this custom — Butler v State, 82 S E 654, 142 Ga 286

Evidence as to where deceased lived is admissible
Ala — Kirkland v State, 37 So 352, 141 Ala 45
Ind — Walker v State, 1 N E 856, 102 Ind 502

80 Tex — Crow v State, 230 S W 148, 89 Tex Cr 119
30 C J p 174 note 13 [a]-[c]

Unchaste habits
(1) Where accused asserts as provocation improper relations between decedent and accused's female relation, decedent's unchaste habits may be shown as rendering such relations more probable — Orange v State, 83 S W 385, 47 Tex Cr 337

(2) In some cases, however, the unchastity or bad conduct offered to be shown has been held too indefinite — Adler v State, 201 S W 177, 83 Tex Cr 72 — 30 C J p 175 note 17 [a]

81. La — State v Stracner, 182 So 571, 190 La 457.

both affirmed[82] and denied[83] that evidence that deceased was an habitual carrier or user of deadly weapons is admissible Evidence that deceased was not in the habit of carrying a pistol is inadmissible[84] Evidence that deceased, who died from a pistol wound, was an expert with a pistol, is immaterial,[85] and, where there is no contention that deceased shot himself, it is proper to exclude evidence touching the alleged careless manner in which he habitually handled his revolver[86]

Use of intoxicating liquors Evidence of the habit of deceased in respect of drinking intoxicating liquors is inadmissible[87] in the absence of proof of his intoxication at the time of the homicide[88]

Use of drugs Testimony that deceased's habits were those of a drug addict and that an habitual drug user is a violent and dangerous person is incompetent until it is first established that deceased was a violent and dangerous man[89] Where there are pleas of not guilty and not guilty by reason of insanity, evidence that deceased habitually used morphine is not admissible, it being irrelevant to the issues joined and offering no excuse for the killing[90]

§ 223. Character and Habits of Third Persons

Ordinarily the character, reputation, habit, or custom of third persons is not provable as substantive evidence

Unless there is statutory provision therefor,[91] or some connection[92] which renders it competent, the character or reputation of third persons,[93] as for morals,[94] peace and quiet,[95] or being law-abiding citizens,[96] is not provable as substantive evidence It is held, on the one hand, that accused may not show the good[97] or bad[98] character of a codefendant, and, on the other hand, that accused in a prosecution for murder committed during a robbery, has no ground for objecting to evidence offered by the state that another participant in the robbery and murder, who was killed, had been a former convict,[99] and that, in a prosecution for being accessary after the fact, evidence of the murderer's character and intimacy with accused is competent as bearing on accused's knowledge of the commission of the crime by the murderer and the probability that accused would assist the murderer to escape conviction[1] Accused cannot prove the character of another participant in the fight in which deceased was killed, by showing the circumstances of a previous difficulty between such person and a witness[2] The admissibility of evidence of the character of third persons on the issue of self-defense is discussed infra § 274

Where there is nothing to render an exception to the rule applicable, evidence of the habit of a third person,[3] or of the custom of third persons,[4] is inadmissible

82. Ky.—Bradley v. Commonwealth 148 S.W.2d 737, 285 Ky. 579

83. Mo.—State v. Fitzgerald, 32 S.W. 1113, 130 Mo. 407

84. Ky.—Parker v. Com., 28 S.W. 500, 96 Ky. 212, 16 Ky.L. 449

85. Mo.—State v. Punshon, 27 S.W. 1111, 124 Mo. 448

86. Mo.—State v. Gaskins, 89 S.W. 2d 617

87. Pa.—Commonwealth v. Lutherman, 181 A. 759, 320 Pa. 261
Evidence of general reputation see supra subdivision a (2) of this section

88. La.—State v. Ricks, 128 So. 293, 170 La. 507

89. Nev.—State v. Williams, 257 P. 619, 50 Nev. 271

90. Ala.—Hill v. State, 94 So. 59, 208 Ala. 199

91. Tex.—Stovall v. State, 253 S.W. 526, 95 Tex.Cr. 189

92. Tex.—Lee v. State, 70 S.W.2d 190, 125 Tex.Cr. 622

Connecting evidence that third person might have committed homicide
Where state relies on circumstantial evidence, and evidence offered by accused that third person might have committed homicide is sufficiently connected in time and by circumstantial evidence to be competent, evidence of moral trait of such third person bearing on whether he would likely have committed offense, is admissible, and in such case the moral trait should ordinarily be shown by witnesses competent to testify to general reputation of such person as to such moral trait.—State v. Scott, 235 P. 380, 117 Kan. 303, 118 Kan. 464

Necessity of accused's fear of third person
The character of a third person to the quarrel in which the killing occurred is not admissible on behalf of accused in the absence of a showing that accused acted as he did through fear of such a third person.—Goldsmith v. State, 16 So. 933, 105 Ala. 8

93. Ala.—Bryan v. State, 167 So. 255, 232 Ala. 226

Evidence of general reputation or character of accused's spouse is not admissible to show improper relations between such spouse and deceased.—Rollings v. State, 49 So. 329, 160 Ala. 82

94. Ky.—Anderson v. Commonwealth, 137 S.W. 1063, 144 Ky. 215

Mich.—People v. Keller, 246 N.W. 151, 261 Mich. 367

Reputation for chastity
(1) Deceased's wife and daughter.—Howard v. State, 55 S.W.2d 1018, 122 Tex.Cr. 371

(2) Accused's paramour.—People v. Montgomery, 68 N.E. 258, 176 N.Y. 219, 17 N.Y.Cr. 503

95. Ky.—Reed v. Commonwealth, 131 S.W. 776, 140 Ky. 736

96. Tex.—Lee v. State, 70 S.W.2d 190, 125 Tex.Cr. 622

97. Where conspiracy is charged
Ky.—Omer v. Commonwealth, 25 S.W. 591, 95 Ky. 353, 15 Ky.L. 694

98. Ga.—Hudson v. State, 113 S.E. 519, 153 Ga. 695

99. N.C.—State v. Kelly, 6 S.E.2d 533, 216 N.C. 627

1. Mich.—People v. Keller, 246 N.W. 151, 261 Mich. 367

2. Ky.—Logsdon v. Commonwealth, 12 S.W. 628, 11 Ky.L. 550

3. Vt.—State v. Lapan, 141 A. 686, 101 Vt. 124

4 In manslaughter prosecution, the standard of care required may not be established by evidence of such custom.—People v. Crossan, 261 P. 531, 87 Cal.App. 5

§ 224. Physical Condition of Parties

a In general
b Manner of proof

a. In General

An inquiry into the physical condition and relative size and strength of the persons at the time of the alleged murder or assault with intent to murder ordinarily is proper, but not where it would not aid in determining the guilt or innocence of the accused or in sustaining or rebutting a proper claim or contention

Where death was caused in an affray, the strength and physical condition of deceased and accused at the time may be shown[5] Also, in a prosecution for murder or assault with intent to murder, the relative size and strength of accused and deceased or the injured person ordinarily may be shown[6] and, when shown, may be considered by the jury in determining the degree of the offense,[7] but sometimes evidence of such relative size and strength is irrelevant and without value,[8] and it is admissible in behalf of accused only when the proof establishes a prima facie case of self-defense, or a predicate has been laid therefor by proof that at the time of inflicting the mortal wound accused had been attacked by deceased[9]

Condition of deceased In order to show the relative physical strength or condition of the persons, ordinarily it is proper for the state to establish the victim's age at the time of the alleged crime,[10] his height,[11] the state of his health,[12] and his mental and physical condition immediately after receiving the mortal wound[13] So also the state is entitled to show other facts as to the physical condition of deceased[14] where such facts are relevant as bearing on the question of motive[15] or as contradicting a theory advanced by accused[16] Even though evidence of the poor physical condition of deceased at the time of the difficulty is irrelevant when first introduced by the state, it may be made material by evidence subsequently introduced by accused[17] On the other hand, it is not permissible for the state to prove the health or physical condition of deceased at the time he was killed where such proof would not aid in establishing the guilt of accused or in properly rebutting any defensive theory advanced[18] Evidence that deceased was nearly blind is inadmissible unless accused had knowledge of it[19] A statement by counsel for accused that certain evidence is offered to show that deceased was engaged in hard manual labor is not a sufficient showing of the logical relation between the proposed evidence and the material facts in issue to justify its admission[20]

The state may show that deceased was intoxicated at the time, and unable to make or resist an attack,[21] or, where accused testifies that deceased was drunk, it may show that he was sober when last seen before the homicide,[22] but, in the absence of evidence of intoxication at the time of the difficulty, evidence that deceased had been drinking that day,[23] or that deceased had liquor on that day,[24]

5. Me.—State v Sprague, 199 A 705, 135 Me 470

As affecting acts and motives of the parties concerned the age, weight, height, and health of the parties are relevant and proper subjects of inquiry in a homicide case growing out of a mutual rencounter —Hicks v State 108 So 612, 21 Ala App 335 certiorari denied 108 So 614, 214 Ala 675

Evidence that accused and deceased had been drinking together shortly before homicide is admissible to show their condition.—Oney v Commonwealth, 9 S W 2d 723, 225 Ky 590

6 Ala.—Bone v State 142 So 437, 25 Ala App 96, certiorari denied 142 So 438, 225 Ala 186
Tex.—Claxton v State, 4 S W 2d 512, 109 Tex Cr 345
30 C J p 176 note 32

7. Va.—Davidson v Commonwealth, 187 S E 137, 167 Va 451

8. Nev.—State v Fisko, 70 P 2d 1113, 58 Nev 65

9. Ala.—Kennedy v State, 196 So 884, 240 Ala 89 Smith v State, 96 So 779, 209 Ala 666.
La.—State v Thornhill, 178 So 343, 188 La 762
30 C J p 175 note 31
Admissibility on issue of self-defense see infra § 278

10. Ky.—Roop v Commonwealth, 258 S W 667, 669, 201 Ky 828 citing **Corpus Juris**
30 C J p 176 note 33

11 Kan.—State v Potter, 16 Kan 80
Ky.—Roop v Commonwealth 258 S W 667 669 201 Ky 828, citing **Corpus Juris.**

12 Ky.—Roop v Commonwealth, supra
30 C J p 176 note 35

13. Ky.—Roop v Commonwealth, supra
30 C J p 176 note 36

14. Ga.—Miller v State, 124 S E 195, 158 Ga 697
Tex.—Halbert v State, 137 S W 2d 1010 138 Tex Cr 592—Hickey v State 270 S W 552, 99 Tex Cr 529

15. **Pregnancy**
Ala.—Davis v State, 131 So 900, 222 Ala 285

16. Tex.—Washington v State, 79 S W 811, 46 Tex Cr 184
30 C J p 176 note 38 [a], [b]

Where accused puts habits or moral character of deceased in issue, the state is entitled to show that deceased's reputation as a bad or dangerous man was attributable to a cause beyond his control such as fits or spasms common in cases of epilepsy Roop v Commonwealth, 258 S W 667, 201 Ky 828

17. Ala.—Smith v State 96 So 779 209 Ala 666

18 Tex.—Watson v State, 59 S W 2d 126 123 Tex Cr 360—Watson v State, 48 S W 2d 633, 120 Tex Cr 482
30 C J p 176 note 38 [c]

19 Tex.—Clayton v State, 201 S W 172, 83 Tex Cr 57

20 La.—State v Strachner, 182 So 571, 190 La 457

21. Ky.—Roop v Commonwealth, 258 S W 667, 669, 201 Ky 828, citing **Corpus Juris.**
30 C J p 176 note 37

22. Ky.—Fitzpatrick v Commonwealth, 275 S W 819, 210 Ky 385

23. Ala.—Cain v State, 86 So 166, 17 Ala App 530—Cain v State, 77 So 453, 16 Ala App 303

24. Ala.—Tittle v State, 73 So 142, 15 Ala App 306

is inadmissible, and the intoxication of deceased is an immaterial inquiry on behalf of accused until the evidence tends to establish self-defense [25]

Condition of accused The size[26] and physical condition[27] of accused at the time of the affray, fatal encounter, or alleged assault with intent to murder is relevant and may be shown, except where there is no issue as to the comparative strength of the parties,[28] or the particular matter offered to be shown is immaterial[29] or would be effective only to prejudice accused with the jury [30] The drunkenness of accused at the time of the alleged offense may be shown,[31] and where there is evidence that he was intoxicated his conduct preceding the homicide may be proved to show his condition [32] While accused should be permitted to testify to his age, a refusal to allow him to do so is not reversible error where he takes the stand as a witness and is therefore observed by the jury [33] Since, in a prosecution for murder claimed to have been committed while deceased was attempting to prevent accused from killing a third person, accused is not being tried for killing or cutting the third person, it is proper to exclude evidence offered by accused that he was suffering from lung trouble and hence was not on an equal footing with the third person unless he resorted to a deadly weapon [34]

Condition of companion of accused An inquiry in respect of the physical weakness of a companion of accused when attacked by deceased and another person is proper [35]

b. Manner of Proof

While an inquiry into the physical condition and relative strength of parties to a homicide should be general and free of unnecessary details or reasons, it should not extend into the realm of speculation or embrace the testimony of nonexpert witnesses as to relative condition or strength. It must be confined to the time of the homicide

Evidence of the physical condition of a party to a homicide must be confined to the time of the homicide [36] The relative physical strength of the parties cannot be proved by evidence of specific acts,[37] or by proof of specific tests of strength [38] The inquiry should be general and without avoidable introduction of irrelevant matter [39] After the main fact of strength or weakness or general condition is established, there is no occasion or excuse for going into reasons or details [40] While the evidence should not be remote and speculative,[41] and a nonexpert witness should not be permitted to state his opinion as to the relative physical condition and strength of the persons,[42] but instead should be asked to state facts as to the relative size, muscular development, activity, and apparent health of the persons,[43] a nonexpert witness may testify that a woman appeared to be[44] or was[45] in "a family way" or as though she "was going to have a baby"[46] It has been held that deceased's health at the time of the killing may be established by his declarations with respect thereto, although made to a

25. Ala.—Killen v State 75 So 176, 16 Ala App 31, certiorari denied 76 So 568—Tittle v State, 73 So 112, 15 Ala App 306

26. Ala.—Lambert v State, 93 So 708, 208 Ala 42

27. Ala.—Lambert v State, supra Iowa—State v Coleman, 285 N W 269, 226 Iowa 968

28. Tex.—Hickman v State, 247 S W 518, 93 Tex Cr 407

Where there is no pretense that deceased struck or injured accused at the time of the shooting in question, physical condition of accused resulting from blow in remote past is not relevant or material—Maxwell v State, 125 So 682, 220 Ala 419

29. Whether accused could not run was immaterial, in view of evidence that he took his gun and followed victim without justification—Barber v State, 116 So 322, 22 Ala App 322 certiorari denied 116 So 323 217 Ala 330

30. Affliction with loathsome disease N Y.—People v Corey, 42 N E 1066, 148 N Y 476

31. N C.—State v Lance, 61 S E 198 149 N C 551
30 C J p 176 note 41

32. N C State v Williams, 83 S E 714, 168 N C 191

33 Ala.—Brown v State, 110 So 694, 21 Ala App 611

34. Miss.—Hunter v State, 184 So 835 183 Miss 779

35. Tex.—Wilkes v State, 280 S W 787, 103 Tex Cr 209

36. Ala.—Lambert v State, 93 So 708, 208 Ala 42—Williams v State, 93 So 284, 18 Ala App 573
Ky.—Delph v Commonwealth 72 S W 2d 1027, 255 Ky 259—Deaton v Commonwealth, 55 S W 2d 47, 216 Ky 367
Me.—State v Sprague, 199 A 705, 135 Me 470
N J.—State v Lederman, 170 A 652, 112 N J Law 366
30 C J p 176 note 50.

37. Mich.—Wellar v People, 30 Mich 16

38. Wash.—State v Cushing, 50 P 512, 17 Wash 544
30 C J p 176 notes 47, 48.

39 Mich.—Wellar v People, 30 Mich 16

40. Ala.—Spelce v State 103 So 694 20 Ala App 412, certiorari denied Ex parte Spelce, 103 So 705 212 Ala 559
30 C J p 176 note 51

Where accused testified that she was wearing abdominal belt and could not go without it question as to why she could not go without it was properly excluded—State v Lederman, 170 A 652, 112 N J Law 366

41. Cal People v Alexander, 106 P 2d 450, 41 Cal App 2d 275, rehearing denied 106 P 2d 916, 41 Cal App 2d 275

42. Wash.—State v Cushing 50 P 512 17 Wash 544
30 C J p 176 note 46

43 Ind.—Stephenson v State, 11 N E 360, 110 Ind 358, 59 Am R 216
30 C J p 176 note 49

44. Tex.—Cordes v State, 112 S W 943, 54 Tex Cr 204

45 Ala.—Littleton v State, 29 So 190, 128 Ala 31

46. Tex.—Cordes v State, 112 S W 943, 54 Tex Cr 204.

nonexpert witness,[47] but this is denied by other authority where the declarations are not part of the res gestæ[48]

The age of deceased cannot properly be established by the record of his or her marriage[49]

Expert evidence is admissible to show whether a person of accused's physique could inflict a mortal blow with a particular weapon,[50] or whether a person in accused's physical condition could have committed the crime under the circumstances shown without particular physical results[51] Where there is evidence as to the physical and mental condition of accused at the time of the homicide, there is no error in refusing to allow a physician to testify as to how long accused probably will live[52]

§ 225. Surviving Family of Deceased

In most cases evidence concerning the family left by the deceased is inadmissible

Ordinarily, on account of its irrelevancy[53] and prejudicial effect,[54] it is not permissible to introduce evidence showing that deceased left a family,[55] the size of the family,[56] that he left children,[57] the number,[58] ages,[59] and poverty[60] of the children, that some of the children are in state institutions,[61] that deceased left a widow,[62] that the widow has an unborn child[63] has left the community,[64] or that deceased was one of several children and that, by their father's death, her mother was left without any means of support[65] Even for the purpose of identifying deceased, it is not permissible to show that he left a widow and a family of children[66] Also, in a prosecution for threatening to kill, it is prejudicial to permit the state to prove that the father of prosecutrix is dead[67] Sometimes, however, the admission of evidence of this nature is held not to be reversible error[68] or the evidence is considered to have some slight bearing on a question of fact arising from a defense presented[69]

§ 226. Personal Relations of Parties

a. Relation between accused and deceased or prosecuting witness
b Relation between accused and third person
c. Relation between deceased and third person
d Relation between third persons

a. Relation between Accused and Deceased or Prosecuting Witness

(1) In general
(2) Where deceased or prosecuting witness was spouse or paramour of accused

(1) In General

Evidence of the previous relations between accused and deceased or the prosecuting witness may be admissible, but not unless it is relevant and material in the particular case and the evidence offered is competent

It may be proper to admit evidence of the prior acquaintance[70] and relations[71] between deceased or

47. Mo—State v Moxley, 14 S W 969, 102 Mo 374, concurring opinion 15 S W 556, 102 Mo 374

48 Ala—Kennedy v State, 37 So 90 140 Ala 1

49. Ala—Davis v State, 111 So 645, 21 Ala App 649

50 Tex—Wilganmowski v State, 180 S W 692 78 Tex Cr 328

51. Ala—Dixon v State, 36 So 784, 139 Ala 104

52. Ark—Burford v State 41 S W 2d 751 181 Ark 193
Ga—Tullard v State, 56 S E 429, 127 Ga 289

53. Fla—Rowe v State, 163 So 22, 120 Fla 619
Ill People v Corry, 181 N E 603, 349 Ill 122 86 A L R 828
La—State v Broughton 105 So 59, 158 La 1045
W Va—State v Sauls, 116 S E 391, 93 W Va 276

54. Tex—Elizondo v State 94 S W 2d 157, 130 Tex Cr 393
30 C J p 177 note 63 [a]

55. W Va—State v Sauls, 116 S E 391, 93 W Va 276.

56. Fla—Rowe v State, 163 So 22, 120 Fla 619

57. Tex—Elizondo v State, 94 S W 2d 157, 130 Tex Cr 393

58 Ala—Fisher v State, 129 So 303, 23 Ala App 544
Ill—People v Corry, 181 N E 603, 349 Ill 122 86 A L R 828
La—State v Broughton, 105 So 59, 158 La 1045
Mo—State v Baublits, 27 S W 2d 16, 324 Mo 1199
Tex—Ainsworth v State, 56 S W 2d 457, 122 Tex Cr 183
30 C J p 177 note 60

59 Ala—Fisher v State, 129 So 303, 23 Ala App 544
Mo—State v Baublits, 27 S W 2d 16, 324 Mo 1199
30 C J p 177 note 61

60. Tex—Ainsworth v State, 56 S W 2d 457, 122 Tex Cr 483

61 Ala—Stewart v State, 89 So 391, 18 Ala App 92

62. La—State v Broughton, 105 So 59, 159 La 1045
30 C J p 177 note 62.

63. Iowa—State v Brooks, 186 N W 16, 192 Iowa 1107
30 C J p 177 note 63

64. Ala—Stewart v State, 89 So 391, 18 Ala App 92

65. Ill—People v McMahon, 91 N E 104, 244 Ill 45

66 Ill—Filippo v People, 79 N E 609 224 Ill 212

67. Tex—Fogel v State, 68 S W 2d 1042, 125 Tex Cr 431

68. Ky—Smith v Commonwealth, 35 S W 2d 546, 237 Ky 317
Tex—Chapman v State, 124 S W 2d 112, 136 Tex Cr 285, rehearing denied 124 S W 2d 996, 146 Tex Cr 285—Ross v State 7 S W 2d 1078, 110 Tex Cr 260

69. W Va—State v Sauls, 116 S E 391, 93 W Va 276

70 Iowa—State v Coleman, 285 N W 269, 226 Iowa 968
Mo—State v Bongard, 51 S W 2d 84, 330 Mo 805

71. Ala—Hall v State, 94 So 59, 208 Ala 199
Ark—Thomas v State, 257 S W 376, 161 Ark 644.

the prosecuting witness and accused. However, to be admissible, evidence of prior relations between deceased and accused must relate solely to those previous relations which bear directly on the question of the homicide,[72] it is proper to exclude evidence of prior relations where its materiality is not made to appear,[73] or the particular evidence offered is incompetent[74] or too detailed,[75] or accused offering the evidence has already testified to the mutual good will existing between decedent and himself,[76] and, even if evidence of prior relations offered by accused is admissible, its rejection is not prejudicial where, regardless of the relationship existing between accused and his victim, the homicide was committed under such circumstances that it constituted murder in the first degree.[77] So, under the circumstances of the particular case, it has been held that accused could not show that he and deceased were friendly a year before the killing,[78] or even a short time before the commencement of the fatal difficulty, where it arose from a sudden quarrel,[79] or that the person assaulted made frequent visits to him.[80] The material issue being as to the prisoner's feeling toward deceased, accused is not entitled to show that deceased bore hatred or malice toward him.[81]

Whether accused bought the coffin in which deceased was buried is immaterial and without bearing,[82] but testimony that accused did not visit deceased's body or the scene of the alleged murder and did not attend the funeral is competent to show his real feeling toward deceased at variance with his declared sentiment of close and intimate friendship.[83]

On the inquiry as to the previous relations between the persons it is proper to permit a witness to testify whether those relations were friendly or otherwise, although his statement can be nothing more than an expression of his opinion,[84] yet when it appears that he speaks only from what he has heard one or the other say to himself or to third persons, it is nothing more than hearsay, and should be excluded.[85] The state of feelings between the persons may be shown by proof of the fact that deceased had circulated slanderous reports about accused,[86] but the truth of such reports is immaterial and evidence thereof should be excluded.[87] The nature of the relations between the per-

Mo—State v. Bowenkamp, 39 S.W. 2d 753, 754, citing **Corpus Juris**
N.C.—State v. Ray, 194 S.E. 482, 212 N.C. 725
Okl.—Durant v. State, 240 P. 1088, 1090, 32 Okl.Cr. 288, citing **Corpus Juris.**
S.C.—State v. Petit, 142 S.E. 725, 144 S.C. 452
30 C.J. p. 177 note 70.

Business relations

(1) In general
Ala.—Johnson v. State, 130 So. 175, 221 Ala. 632
Mo.—State v. Bongard, 51 S.W.2d 84, 330 Mo. 805

(2) Working together in making whisky.—Mills v. Commonwealth, 42 S.W.2d 505, 240 Ky. 359.—Colley v. Commonwealth, 24 S.W.2d 280, 232 Ky. 590

Visiting deceased and inviting return visit

Testimony showing that accused visited deceased's home few days before homicide, and invited deceased to visit him, is admissible to show feeling between them.—State v. Simmons, 58 S.W.2d 302, 332 Mo. 247

Evidence refuting claim of friendship

Evidence that accused had been ordered off premises is admissible to refute claim of friendship between accused and prosecuting witness.—Lee v. Commonwealth, 131 S.E. 212, 144 Va. 594

Settlement of prior difficulty

Exclusion of testimony of accused that he had settled prior difficulty with deceased and at time of homicide had approached deceased on peaceful mission was error.—Wood v. State, 144 So. 545, 165 Miss. 353

Matters occurring short time prior to homicide

Evidence of what occurred between accused and decedent at garage before taking ride on which killing occurred, is clearly competent as showing the attitude of the persons toward each other during the early stages of the controversy.—Commonwealth v. Bement, 281 S.W. 507, 213 Ky. 501

Conduct three or four years before killing

That conduct of accused toward deceased testified to was three or four years before the killing, claimed by accused to have been accidental, did not go to the admissibility of such evidence, but only to its weight.—Cole v. State, 243 S.W. 1100, 92 Tex.Cr. 368

Evidence as to
Malice, deliberation, and premeditation see supra §§ 204–212
Motive see infra §§ 227–235

72. Ga.—Richards v. State, 108 S.E. 800, 152 Ga. 207
30 C.J. p. 177 note 71.

73. Pa.—Commonwealth v. Disalvo, 118 A. 559, 275 Pa. 70

Payment for education

Whether accused had paid for, or contributed to, education of deceased his nephew, was immaterial.—Drummond v. State, 102 So. 723, 20 Ala. App. 286, certiorari denied Ex parte Drummond, 102 So. 726, 212 Ala. 110

74. Ala.—Scruggs v. State, 140 So. 405, 224 Ala. 328

75. Mo.—State v. Murphy, 111 S.W. 2d 132, 341 Mo. 1229

76. Mo.—State v. Salts, 56 S.W.2d 21, 331 Mo. 665

77. Cal.—People v. Kawamoto, 15 P. 2d 153, 216 Cal. 531

78. Pa.—Commonwealth v. Twitchell, 1 Brewst. 551

79. La.—State v. Lewis, 63 So. 597, 133 La. 1095

80. Ga.—Sasser v. State, 59 S.E. 255, 129 Ga. 511
Mo.—State v. Moore, 68 S.W. 358, 168 Mo. 432

81. Ga.—Jeffords v. State, 154 S.E. 201, 41 Ga.App. 618
N.C.—State v. Gooch, 94 N.C. 987

82. Ala.—Deloney v. State, 142 So. 432, 225 Ala. 65

83. Ky.—House v. Commonwealth, 65 S.W.2d 997, 251 Ky. 834

84. Iowa.—State v. Seymour, 63 N.W. 661, 91 Iowa 699
30 C.J. p. 178 note 80

85. S.C.—State v. James, 9 S.E. 844, 31 S.C. 218
30 C.J. p. 178 note 81

86. Ky.—Riggs v. Commonwealth, 45 S.W. 866, 103 Ky. 610, 20 Ky.L. 276

87. Ky.—Riggs v. Commonwealth, supra.

sons cannot be shown by conduct or declarations of deceased not known to accused at the time of the homicide [88]

(2) Where Deceased or Prosecuting Witness Was Spouse or Paramour of Accused

Within proper limitations, evidence of the previous relations between the accused and the deceased or the prosecuting witness is admissible where the accused is charged with the murder of, or assault with intent to murder, his or her spouse or a person with whom he or she was living unlawfully

Where a man killed his mistress proof of their relations is admissible,[89] and the fact that he is married to another woman may be shown [90] So also, testimony that accused had been unlawfully living with the man she is charged with murdering is relevant and admissible,[91] notwithstanding the natural prejudice against accused arising from such evidence [92] However, where the relation has already been shown, the exclusion of further evidence to show it is not erroneous,[93] and, where the state makes no attempt to show the conduct of accused toward deceased, his mistress, the exclusion of cumulative proof on his part of his kind treatment will not constitute reversible error [94]

Where deceased or prosecuting witness was wife of accused The rule admitting evidence of previous relations applies with peculiar force where a husband is charged with the murder of, or assault with intent to kill, his wife [95] These relations may be shown by proof of quarrels between accused and his deceased wife,[96] and his ill-treatment of her,[97] and proof of his illicit relations and conduct with another woman is competent to show his unpleasant relations with his wife, and his lack of respect and affection for her,[98] but such evidence is not admissible unless it throws light on the motive of accused,[99] or forms part of a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts.[1] Proof of the affection of deceased for accused is inadmissible since is does not show accused's feeling toward deceased,[2] nor can accused show that deceased was bitter and vindictive [3] Testimony that accused complained to his sister about his wife's treatment of him is not admissible under pleas of not guilty and not guilty by reason of insanity [4]

On the issue of accused's relations with the deceased wife, letters of accused to third persons are admissible, where they tend to show his relations with his wife,[5] or with a lewd woman,[6] or that he was engaged to marry another woman,[7] and letters of the wife to a third person, written within a few months of the killing, showing the pleasant and happy relations of her and accused, are admissible on behalf of accused [8] Also the relations of the persons may be shown by proof of the pendency of a suit for divorce brought by the wife against accused,[9] or of their separation,[10] or the issuance of a peace warrant against accused on the complaint of his wife,[11] or a prosecution of accused by deceased for an offense committed upon her,[12] but an

88. Wash—State v Walton 228 P 841 130 Wash 649

89 N Y—People v Sutherland, 48 N E 518, 154 N Y 345
30 C J p 179 note 31

90. Fla—Mobley v State, 26 So 732, 41 Fla 621

91. Tex—Milton v State 55 S W 2d 95, 122 Tex Cr 325

92. N Y—People v Buzzi, 144 N E 653, 238 N Y 390

93. Tex Mobley v State, 232 S W 531 89 Tex Cr 646
30 C J p 177 note 71 [e]

94. Colo—Murphy v People, 13 P 528, 9 Colo 435

95. Idaho—State v McClurg, 300 P 898 50 Idaho 762
Kan—State v Scott, 235 P 380, 117 Kan 303 118 Kan 464
Mass—Commonwealth v Mercier, 153 N E 831 257 Mass 353
N D—State v Mozinski, 191 N W 345, 49 N D 228
30 C J p 179 note 6

96. Ill—Parsons v People, 75 N E 993, 218 Ill 386
30 C J p 179 note 7

97. Ga—Beckworth v State, 190 S E 184 183 Ga 871—Williams v State 127 S E 278, 160 Ga 129
Tex—Baird v State 74 S W 2d 983, 127 Tex Cr 95
30 C J p 179 note 7

Evidence not too remote

(1) Evidence of ill treatment is not too remote where it is shown to have continued down to the time of the homicide—Cooper v State, 161 S W 1094, 72 Tex Cr 250

(2) Even evidence of ill-treatment three or four years prior to the killing was not incompetent as being too remote, since remoteness went to the weight and not to the competency of the testimony—State v. Hawkins, 199 S E 284 214 N C 326

98. Va—Abdell v Commonwealth, 2 S E 2d 293 173 Va 458
30 C J p 179 note 8

After wounding, and before death, of wife

Evidence concerning accused's attention to another woman after wounding of wife and before her death was admissible on feeling toward wife—Walton v State, 126 So 29 156 Miss 499

99. Miss—Raines v State, 33 So 19, 81 Miss 489

1. Ark—Nichols v State, 143 S W 1071 102 Ark 266
30 C J p 179 note 10

2. Tex—Brown v State, 169 S W 437, 74 Tex Cr 356

3 Mich—People v Simpson, 12 N W 662 48 Mich 474

4. Ala—Shelton v State, 117 So 8 217 Ala 465

5. Ky—O'Brien v Commonwealth 12 S W 471, 89 Ky 354, 11 Ky L 534

6. Ky—O'Brien v Commonwealth, supra

7. Ky—O'Brien v Commonwealth supra

8. Mo—State v Leabo, 84 Mo 168, 54 Am R 91

9. Ga—Lucas v State, 91 S E 72, 146 Ga 315
30 C J p 179 note 16

10. Ala—Wilson v. State, 67 So 1010, 191 Ala 7

11. S C—State v Senn, 11 S E 292, 32 S C 392

12. Mich—Washburn v. People, 10 Mich 372.

interlocutory decree of divorce should not be admitted in evidence for all purposes,[13] as, for example, suggesting to the jury that accused had been guilty of extreme cruelty toward deceased[14]

Accused should be permitted to say whether he loved his wife,[15] and, where the state has shown that there had been trouble between accused and his murdered wife, he should be allowed to prove that he had made up with her[16] Where accused charged his wife with jealousy, he may be cross-examined to show that the wife manifested jealousy only after he became unfaithful[17]

Where the marriage of accused with deceased is disputed, competent evidence is admissible to prove that fact,[18] but, under the circumstances of the particular case, whether deceased was accused's common-law wife may be irrelevant and immaterial[19] Evidence that accused gave deceased certain rings and that she wore those rings on a day prior to the killing is not admissible to establish a contention of the state that accused and deceased were living together as husband and wife[20]

In prosecution of wife for murder of husband it is error to reject evidence offered to show the affection of the wife for the husband,[21] and her testimony, elicited on cross-examination, as to title to property being in her name is competent as tending to negative a reason for the husband wishing to be rid of her as she claims[22] Inadmissible evidence includes Declarations of deceased to a third person concerning misconduct of accused and his intention not to withdraw a divorce suit,[23] evidence that deceased, without the wife's knowledge, made a second will reducing the amount of property left to her,[24] and, where there is no question of self-defense, evidence that deceased abused and mistreated accused[25] It is proper to exclude immaterial evidence, such as statements made by the husband as to his purpose in living with accused,[26] or remote and indefinite testimony calculate to reveal accused's mental state concerning her home life several months preceding the homicide[27]

b. Relation between Accused and Third Person

Ordinarily evidence of the relation between the accused and a third person is irrelevant and inadmissible, but sometimes it is admissible, as in the case of criminal intimacy between the accused and the wife of the deceased

It is proper to exclude, and improper to admit, evidence, irrelevant to any issue in the case, as to the relations between accused and a third person,[28] such as the brother of deceased[29] or the daughter of the person assaulted,[30] but it is not prejudicial to ask accused on cross-examination if he lived with a named woman where the question does not elicit anything improper in his relation with the woman[31] Evidence of the number[32] and ages[33] of accused's children, and his relations with them,[34] is irrelevant and immaterial

Spouse or former spouse of accused The relation between accused and his wife,[35] or between accused and a former spouse or spouses,[36] ordinarily is irrelevant and immaterial, except where accused is charged with the murder of, or assault with in-

13. Cal —People v Holloway, 151 P 975, 28 Cal App 214

14. Cal —People v Holloway, supra

15. Ky —Epperson v Commonwealth, 13 S W 2d 247, 227 Ky 404

16. Miss —Petty v State 35 So 213, 83 Miss 260

17. Colo —Weiss v People, 285 P 162, 87 Colo 44

18. N Y —Reinhart v People, 82 N Y 607
30 C J p 179 note 29 [a]

19. Ala —Williams v State, 95 So 31, 208 Ala 620
Tex.—Nelson v State, 206 S W 361, 84 Tex Cr 219

20. La —State v Graffam, 13 So 2d 249

21. W Va —State v Stanley, 164 S E 254, 112 W Va 310

22. Ky —Shorter v Commonwealth, 58 S W 2d 224, 248 Ky 37

23. Ky —Adams v Commonwealth, 120 S W 2d 237, 274 Ky 714

24. N Y —People v Soper, 153 N E 433, 243 N Y 320—In re Chittick's Will, 153 N E 83, 243 N Y 304 modifying 214 N Y S 167 216 App Div 179 and motion denied 154 N E 619, 243 N Y 593

25. Ill —People v Moore, 14 N E 2d 494, 368 Ill 455

26. Colo —Bray v People, 78 P 2d 366, 102 Colo 199

27. Colo —Bray v People, supra

28. Ala —Bagwell v State, 128 So 359, 23 Ala App 348, certiorari denied 128 So 362, 221 Ala 219
Cal —People v Carrillo, 285 P 866, 104 Cal App 389
N Y —People v Creasy, 140 N E 563, 236 N Y 205
S C —State v Swygert, 124 S E 636, 130 S C 91

29. Ky —Wireman v Commonwealth, 268 S W 586, 206 Ky 828

30. Mo —State v Williams, 26 S W 339, 121 Mo 399

31. Ky —Havens v Commonwealth, 82 S W 369, 26 Ky L 706

32. Ala —Deloney v State, 142 So 432, 225 Ala 65

33. Conn —State v Manganella, 155 A 74, 113 Conn 209
Mass —Commonwealth v Velleco, 171 N E 16 272 Mass 94

34. Ind —Pettit v State, 34 N E 1118, 135 Ind 393

35. Ala —Smith v State 111 So 763, 22 Ala App 36
Tex —Richardson v State, 77 S W 2d 215 127 Tex Cr 479
30 C J p 178 note 87
Evidence that wife did not visit accused in jail while he was confined there awaiting trial is incompetent when offered against accused —State v Bartley 84 S W 2d 637, 337 Mo 229
In prosecution for murder of father-in-law, accused cannot properly show his cordial relations with his wife —State v Lovelace, 101 S E 380 178 N C 762

36 Ky —Payne v Commonwealth, 75 S W 2d 14, 255 Ky 533
Tex —Lasater v State, 227 S W 949, 88 Tex Cr 452

tent to murder his or her spouse, as discussed supra subdivision a (2) of this section, but sometimes there is such a connection between such relation and the homicide as to render evidence thereof admissible,[37] and, where accused testifies or introduces evidence on the subject, the state may introduce proper evidence in rebuttal[38] Where accused claims to have killed deceased for insulting his wife, whether or not she was his lawful wife is a pertinent subject of inquiry[39]

Wife of deceased It is proper to question witnesses as to the feeling existing between accused and deceased's wife[40] Evidence as to criminal intimacy between accused and the wife of deceased is competent as showing the relations between them and as bearing on the means and opportunity to commit,[41] as well as the motive for committing, see infra § 230, the offense Accused may, however, show that the relations were proper,[42] or that he did not know of the marriage of deceased[43] Subsequent acts of decedent's widow without the knowledge or acquiescence of accused are not admissible against accused to show that she was in sympathy with accused, or that she had illicit relations with him prior to the homicide[44]

c. Relation between Deceased and Third Person

Sometimes there is a connection which renders evidence of the relation between the deceased and a third person admissible, but ordinarily it is inadmissible

Although it is sometimes held admissible in connection with other evidence[45] or a claim or defense asserted by accused,[46] ordinarily evidence of the relation between deceased and a third person is inadmissible,[47] especially under a defense that accused took no part in, and had no connection with, the killing[48] Accused is not entitled to show the relations between the victim and the brother or brothers of accused[49] or that deceased entertained bad feelings toward his co-conspirator in the homicide[50] Furthermore, a husband charged with the killing of his wife cannot show in extenuation or justification of the act that she was guilty of improper or unchaste conduct with other men,[51] especially when it has not been shown that accused had any knowledge or notice of such conduct,[52] or that the witnesses had any knowledge as to the illicit relations of which they testify, but testify only as to their opinion concerning the character of deceased[53]

Spouse or former spouse In the absence of some connection thereof with the homicide or accused's relations with deceased,[54] evidence of deceased's relations with his spouse,[55] or former spouse,[56] is inadmissible, as is also evidence as to whether deceased and his alleged wife were or were not married,[57] or as to when and where they were married,[58] but evidence of the fact that deceased was

37. La—State v Williams, 171 So 52 185 La 849
Nev—State v Canak, 31 P 2d 1033, 55 Nev 293

38. Mass—Commonwealth v Williams, 139 N E 347, 214 Mass 515
Tex—Smith v State 232 S W 497, 90 Tex Cr 24

Inadmissible evidence
In a prosecution for homicide resulting from a difficulty over relations between decedent and accused's wife evidence of improper proposals by accused to other women is inadmissible, although he testifies as to his affection for his wife—Reams v State, 157 P 273 12 Okl Cr 363

39. N Y—People v Webster, 34 N E 730 139 N Y 73, affirming 22 N Y S 634, 68 Hun 11
30 C J p 178 note 90

40. Mo—State v Johnson, 163 S W 2d 780, 349 Mo 910

41. Fla—Childers v State, 77 So 99, 74 Fla 288
30 C J p 178 note 98

42. Tex—Wadlington v State, 19 Tex App 266

43. Cal—People v Watson, 133 P 298 165 Cal 645

44. Ga—Sasser v. State, 59 S E 255, 129 Ga 541.

45. Mass—Commonwealth v Gettigan, 148 N E 113 252 Mass 150
Evidence of friendly and intimate relations between deceased and third person to refute evidence of motive of third person see supra § 219

46. Wyo—Johnson v State, 211 P 484, 29 Wyo 121
Unchaste habits as bearing on probability of improper relations between deceased and accused's female relative see supra § 222 b

47. Idaho State v Howard, 65 P 2d 764, 57 Idaho 381

48. Pa—Commonwealth v Prophet, 160 A 597, 307 Pa 122

49. Iowa—State v Jones, 99 N W 179, 125 Iowa 508, rehearing overruled 101 N W 193, 125 Iowa 508
Pa—Commonwealth v Prophet, 160 A 597, 307 Pa 122

50. Mont—Territory v Campbell, 22 P 121, 9 Mont 16

51. Ky—Commonwealth v Sapp, 14 S W 834, 90 Ky 580, 29 Am S R. 405, 12 Ky L 484
Tex—Meyer v State, Cr, 41 S W 632

52. Cal—People v Hill, 48 P 711, 116 Cal 562
30 C J p 175 note 23

53. Ala—Ragland v State, 65 So 776, 187 Ala 5

54. Mo—State v Ashbrook, 11 S W 2d 1037
Admissibility where accused charged with murder of, or assault with intent to kill spouse see supra subdivision a (2) of this section

55 Miss—Reece v State, 123 So 892, 154 Miss 862
Okl—Cody v State, 214 P 201, 23 Okl Cr 236
Tex—Davis v State, 66 S W 2d 339, 125 Tex Cr 141
30 C J p 177 note 71 [a] (2)

Employment of physician to attend wife
Permitting doctor to testify that deceased had employed doctor to attend deceased's wife at time of her approaching accouchement was error—Richardson v Commonwealth, 31 S W 2d 728, 235 Ky 469

56. Tex—Crow v State, 230 S W. 148, 89 Tex Cr 119
30 C J p 178 note 85

57. Ark—Harmon v State, 81 S W 2d 30, 190 Ark 823
Evidence of family surviving deceased see supra § 225

58. Cal—People v Fleming, 23 P 2d 28, 218 Cal 300.

married, although not pertinent, may be not prejudicial.[59]

Evidence of difficulties between deceased and his wife is admissible where the homicide resulted from accused's objection to deceased's treatment of the wife,[60] and evidence that the relations between deceased and his wife were pleasant and congenial is admissible to show the falsity of statements to the contrary made by accused after deceased's disappearance.[61] In a case arising out of intimacy between accused and the wife of deceased, separation of deceased and his wife may be shown,[62] but not what occurred between deceased and his wife, before, at the time of, and after their separation.[63]

Wife of accused Where accused did not act under the heat of passion or in self-defense, evidence of illicit relations between his wife and deceased is inadmissible.[64] Also testimony as to accused's wife giving of accused's insurance policies to deceased several months prior to the homicide is immaterial where there is no claim that the fact so enraged accused as to render him incapable of cool reflection.[65] Where accused has offered evidence to the effect that deceased imposed on and mistreated accused's wife, the state is entitled to introduce evidence to the contrary.[66]

d. Relation between Third Persons

Evidence of the relations existing between families or societies of which the accused and the deceased were members may be admissible, but before the relation between persons other than accused and deceased may be shown it must be made to appear that the accused had knowledge thereof and that it has some bearing on an issue in the case.

Evidence of the relations existing between the respective families of deceased and accused is admissible where it will be of assistance in determining one of the issues of the case,[67] but ill feeling between the wives of the parties to a homicide is not a proper subject of proof in the absence of evidence showing that accused had knowledge thereof,[68] and it is error to permit the prosecuting attorney to repeatedly ask witnesses if accused's sister, not produced as a witness, lived in illicit relations with a man.[69] In a prosecution for murder of a brother, it is proper to exclude the will of a grandfather where the will does not mention either deceased or accused.[70]

Evidence of the existence of war, at the time of the homicide, between two Chinese tongs or societies is admissible where accused was a member or partisan of one of the tongs and deceased was a member or partisan of the other tong.[71]

§ 227. Motive

Evidence tending to show the existence of a motive for the commission of the crime charged is admissible in a prosecution for homicide

Although, as appears infra § 318, the state, in a prosecution for homicide, is under no obligation to show a motive for the commission of the crime charged, evidence tending to show the existence of a motive is admissible,[72] this rule being especially

59. Tex.—Ross v. State, 7 S.W.2d 1078, 110 Tex.Cr. 260.

60. Tex.—Dixon v. State, 238 S.W. 227, 91 Tex.Cr. 217.
30 C.J. p. 178, note 84.

Attitude of deceased's wife toward deceased and killing was proper subject of inquiry where she testified that, the day before the killing she told accused, her father, that she was pregnant by deceased before they were married and that he had mistreated her after they were married. Gatlin v. State, 20 S.W.2d 431, 113 Tex.Cr. 217.

61. Tex.—Leahy v. State, 13 S.W.2d 871, 111 Tex.Cr. 570.

62. Ala.—Cook v. State, 59 So. 519, 5 Ala.App. 11.

63. Ala.—Cook v. State, supra.

64. Ala.—Angling v. State, 34 So. 846, 137 Ala. 17.
Admissibility to show provocation, see infra § 264.

65. Tex.—Cupp v. State, 74 S.W.2d 701, 127 Tex.Cr. 10.

66. Ala.—Thomas v. State, 92 So. 241, 18 Ala.App. 314, reversed on other grounds, 92 So. 244, 207 Ala. 214.

67. S.C.—State v. Petit, 112 S.E. 725, 144 S.C. 452.

68. N.Y.—Hackett v. People, 54 Barb. 370, 1 Cow.Cr. 393.

69. N.Y.—People v. Buzzi, 141 N.E. 653, 238 N.Y. 390.

70. Mo.—State v. Murphy, 111 S.W. 2d 142, 341 Mo. 1229.

71. Ariz.—Sam v. State, 265 P. 609, 33 Ariz. 383, followed in Shew Chin v. State, 265 P. 621, 33 Ariz. 419, and Gee Long v. State, 265 P. 622, 33 Ariz. 420.

72. Ala.—Langham v. State, 11 So. 2d 131.—Redus v. State, 9 So.2d 911.—Brothers v. State, 183 So. 433, 236 Ala. 448.—Pearce v. State, 147 So. 617, 226 Ala. 436.—Jordan v. State, 142 So. 665, 225 Ala. 350.—Roberson v. State, 118 So. 654, 218 Ala. 442.—Vann v. State, 92 So. 182, 207 Ala. 152.—Pruett v. State, 172 So. 911, 27 Ala.App. 386.—Bishop v. State, 145 So. 497, 25 Ala.App. 267, certiorari denied 145 So. 499, 226 Ala. 147.—Hill v. State, 141 So. 582, 25 Ala.App. 264, certiorari denied 141 So. 583, 225 Ala. 610.—Enzor v. State, 135 So. 595, 24 Ala.App. 316, certiorari denied 135 So. 598, 223 Ala. 297.—Whetstone v. State, 113 So. 494, 22 Ala.App. 120, certiorari denied 113 So. 495, 216 Ala. 171.—Largin v. State, 101 So. 50, 20 Ala.App. 550.—Tyler v. State, 97 So. 573, 19 Ala.App. 380, reversed on other grounds, Ex parte State ex rel. Davis, 97 So. 573, 210 Ala. 96.—Arnold v. State, 93 So. 83, 18 Ala.App. 153.

Ariz.—State v. Tuttle, 118 P.2d 88, 58 Ariz. 116.—Antone v. State, 65 P.2d 646, 49 Ariz. 168.—Macias v. State, 283 P. 711, 36 Ariz. 110.

Ark.—Sullivan v. State, 286 S.W. 939, 942, 171 Ark. 765, citing **Corpus Juris**.—Ballentine v. State, 276 S.W. 1002, 169 Ark. 871.—Weldon v. State, 270 S.W. 968, 168 Ark. 534.—Thomas v. State, 257 S.W. 376, 161 Ark. 641.

Cal.—People v. David, 86 P.2d 811, 12 Cal.2d 639.—People v. Rocco, 285 P. 704, 209 Cal. 68.—People v. Sieber, 257 P. 64, 201 Cal. 311.—People v. K. Nakamitu, 21 P.2d 320, 136 Cal.App. 582.—People v. Willis, 233 P. 812, 70 Cal.App. 465.

applicable where the evidence against accused is largely or entirely circumstantial.[73] For this purpose, it is proper to show matters occurring before the homicide,[74] such as declarations of accused,[75] although not communicated to deceased,[76] or to show acts of accused after the homicide.[77] Any evidence

Fla—Powell v State, 175 So 213, 214, 131 Fla 254, citing **Corpus Juris**—Britt v State 102 So 761, 88 Fla 482—Smithie v State, 101 So 276, 88 Fla 70

Ga—Hunter v State 3 S E 2d 729, 188 Ga 215—Sligh v State, 154 S E 799, 171 Ga 92—Wall v State, 112 S E 142, 153 Ga 309—Jacobson v State, App 21 S E 2d 863—Reid v State 115 S E 904 30 Ga App 21—Harrel v State, 129 S E 666, 34 Ga App 577

Ill—People v Mangano 30 N E 2d 128, 375 Ill 72—People v Hoffee, 188 N E 186, 354 Ill 123—People v Wilson, 174 N E 398, 342 Ill 358—People v Buonicontl, 172 N E 728 340 Ill 299—People v Meyer, 163 N E 453 331 Ill 608—People v Looney, 155 N E 363, 324 Ill 375—People v Billburg, 145 N E 373, 314 Ill 182

Ky—Taylor v Commonwealth, 98 S W 2d 928 266 Ky 325 Whitfield v Commonwealth 97 S W 2d 565, 265 Ky 640—Kinder v Commonwealth, 86 S W 2d 297 260 Ky 534—Reynolds v Commonwealth 61 S W 2d 288, 249 Ky 644—Deaton v Commonwealth 55 S W 2d 47 246 Ky 367—Clemens v Commonwealth 6 S W 2d 483, 224 Ky 370—Dockery v Commonwealth, 292 S W 336 218 Ky 703

Me—State v Merry, 8 A 2d 143, 136 Me 243

Md—Walters v State, 141 A 252 156 Md 240

Mass—Commonwealth v Capalbo 32 N E 2d 225 308 Mass 376—Commonwealth v Mercier, 153 N E 834, 257 Mass 353—Commonwealth v Caruso, 146 N E 664 251 Mass 362

Miss—White v State, 153 So 387 169 Miss 332

Mo—State v Cropper, 36 S W 2d 923, 327 Mo 193

N J State v Cappiello, 151 A 737, 107 N J Law 249

N M—State v Holden, 113 P 2d 171, 45 N M 147

N Y—People v Soper, 153 N E 433 243 N Y 320

N C—State v Lefevers, 5 S E 2d 552 216 N C 491—State v Burney, 3 S E 2d 21 215 N C 598

Okl Starks v State, 93 P 2d 50 67 Okl Cr 156—Harrell v State 278 P 404 43 Okl Cr 278—Stogsdill v State 216 P 681 24 Okl Cr 152

Or—State v Sullivan, 11 P 2d 1051, 139 Or 610—State v Casey 213 P 771, 108 Or 386, motion denied 217 P 632, 108 Or 386

S D—State v Ferguson, 204 N W 652, 48 S D 346

Tex—Reese v State, 151 S W 2d 828, 142 Tex Cr 254—Vaughn v State, 125 S W 2d 568, 136 Tex Cr 455—Shannon v State, 38 S W 2d 785, 118 Tex Cr 505—Callabrizzi v State, 288 S W 207, 105 Tex Cr 273—Gibbs v State, 268 S W 736 99 Tex Cr 186—Brazzell v State, 266 S W 788, 99 Tex Cr 33, leave to file second motion for rehearing denied 266 S W 1119, 99 Tex Cr 33

Vt—State v Winters, 145 A 413, 102 Vt 36

Wash—State v Richardson 84 P 2d 699, 197 Wash 157—State v Gaines 258 P 508 144 Wash 446, rule ordered to show cause why certiorari should not be denied Gaines v State of Washington 48 S Ct 339, 276 U S 607, 72 L Ed 728, error dismissed and certiorari denied 48 S Ct 468, 277 U S 81, 72 L Ed 793

30 C J p 179 note 37

Evidence of motive on issue of insanity see infra § 259

Reason for rule

Evidence tending to show a motive is always competent because, if clearly shown it may help to confirm the conclusion reached from all the other evidence that accused has committed the offense charged

Ky—Evans v Commonwealth, 19 S W 2d 1091, 230 Ky 411, 66 A L R 360

Mass—Commonwealth v Fecl 127 N E 602, 235 Mass 562

One purpose of admitting such evidence is to give to the jury an opportunity to increase or diminish the punishment accordingly—Evans v Commonwealth, 19 S W 2d 1091, 230 Ky 411 66 A L R 360

Accused's admission of homicide does not prevent state's introducing proof of motive State v Hollowell, 256 P 380 79 Mont 343

73. Ala—Turner v State, 140 So 447, 224 Ala 5, granting certiorari and remanding cause 140 So 445, 25 Ala App 21 certiorari denied 140 So 448, 224 Ala 315 conformed to 140 So 445, 25 Ala App 21

Idaho—State v Reding, 13 P 2d 253, 254, 52 Idaho 260, citing **Corpus Juris.**

Ky—Evans v Commonwealth, 19 S W 2d 1091, 230 Ky 411, 66 A L R 360—Anderson v Commonwealth 265 S W 824, 205 Ky 369

N Y—People v Soper 153 N E 433, 243 N Y 320

Or—State v Casey, 213 P 771, 108 Or 386, motion denied 217 P 632, 108 Or 386

S C—State v Thomas, 156 S E 169, 159 S C 76

30 C J p 180 note 38

Fact that evidence is not entirely circumstantial does not preclude proof of motive—People v Rappaport, 4 N E 2d 106, 364 Ill 238

74. Ark—Morton v State, 20 S W 2d 872, 180 Ark 197

Ga—Kennedy v State, 11 S E 2d 179, 191 Ga 22

Iowa—State v Williams, 192 N W 901, 195 Iowa 785

Ky—Kinder v Commonwealth, 86 S W 2d 297, 260 Ky 534—Jent v Commonwealth, 272 S W 29, 209 Ky 59—Davidson v Commonwealth, 264 S W 1051, 204 Ky 414

La—State v Chevallier, 124 So 670, 169 La 135—State v Fisher, 122 So 858, 168 La 584

Pa—Commonwealth v Winter, 137 A 261, 289 Pa 281

Tex—Stapp v State, 147 S W 2d 256, 140 Tex Cr 669—Norwood v State, 120 S W 2d 806, 135 Tex Cr 406—Johnson v State, 99 S W 2d 923 131 Tex Cr 435—Gray v State 268 S W 941, 99 Tex Cr 305 second rehearing denied 269 S W 1056, 99 Tex Cr 305—Sagu v State, 218 S W 390 94 Tex Cr 14

Vt—State v Winters, 145 A 413, 102 Vt 36

Wash—State v Gaines, 258 P 508, 144 Wash 446 rule ordered to show cause why certiorari should not be denied Gaines v State of Washington 48 S Ct 339 276 U S 607, 72 L Ed 728, error dismissed and certiorari denied 48 S Ct 468, 277 U S 81 72 L Ed 793

30 C J p 180 note 39

75. Ala—Davis v State, 105 So 677 213 Ala 541

Ariz—Encinas v State, 221 P 232, 26 Ariz 24

Ark—Robison v State, 298 S W 319, 174 Ark 899

Ky—Farley v Commonwealth, 93 S W 2d 858, 263 Ky 769

Mo—State v Todd, 116 S W 2d 113, 342 Mo 601

Tex—Gray v State, 268 S W 941, 99 Tex Cr 305, second rehearing denied 269 S W 1056, 99 Tex Cr 305

Vt—State v Winters, 145 A 413, 102 Vt 36

30 C J p 180 note 40

76. Ga—McCray v State, 68 S E 62, 134 Ga 116, 20 Ann Cas 101

La—State v Pierce, 126 So 514, 169 La 1025

Tex—Richardson v State, 239 S W 218, 91 Tex Cr 318

77. Ala—Jordan v State, 142 So 665, 225 Ala 350

Fla—Strickland v State, 165 So 289, 122 Fla 384

Ga—Randall v State, 169 S E 103, 176 Ga 897—Swain v State, 135 S E 187, 162 Ga 777—Johnson v State, 148 S E 610, 39 Ga App 836

which has a legitimate bearing on the question of motive is as a general rule admissible,[78] although remote[79] It must have such a legitimate bearing,[80] but the mere fact that the alleged motive is not correlative to the crime committed does not require the evidence thereof to be excluded,[81] for, although weak and inconclusive in itself, it is a circumstance to be considered in conjunction with others, which tend to implicate accused[82] Inferences based on inferences, however, are not admissible to establish motive,[83] and motive must be proved as a fact and not as hearsay[84] Where evidence for the prosecution as to motive is inconsistent with the theory asserted by the prosecution, it may be excluded[85]

Knowledge of accused It is essential that the facts on which the motive is assigned shall be within the knowledge of the person accused[86]

Ky —Tackett v Commonwealth, 12 S W 2d 289, 227 Ky 249
Nev —State v Hall, 13 P 2d 624, 54 Nev 213
30 C J p 180 note 42

78. Ala —Davis v State, 105 So 677, 213 Ala 541
Colo —Smaldone v People, 88 P 2d 103, 103 Colo 498
Fla —Beard v State, 180 So 1, 131 Fla 512
Ga —Burden v State 186 S E 555 182 Ga 533—Hudson v State, 113 S E 519, 153 Ga 695
Iowa —State v Campbell, 239 N W 715 213 Iowa 677
Ky —Cole v Commonwealth, 86 S W 2d 305, 260 Ky 554—Estes v Commonwealth, 17 S W 2d 757 229 Ky 617
Mass —Commonwealth v Gettigan, 148 N E 113 252 Mass 450
Miss —Dixon v State, 196 So 637 188 Miss 797—Sauer v State, 144 So 225, 166 Miss 507—Pruitt v State 139 So 861, 163 Miss 17
Mo —State v Stogsdill, 23 S W 2d 22, 324 Mo 105
N M —State v Massey, 258 P 1009, 32 N M 500
Pa —Commonwealth v Ricci, 3 A 2d 404 332 Pa 540
Tex Reese v State, 151 S W 2d 828, 142 Tex Cr 254—Graham v State, 51 S W 2d 401, 121 Tex Cr 343—Morgan v State, 49 S W 2d 788 121 Tex Cr 424—Frank v State 49 S W 2d 759, 120 Tex Cr 350—Harris v State 26 S W 2d 225, 114 Tex Cr 647—Couch v State, 245 S W 692, 93 Tex Cr 27, 25 A L R 1359
30 C J p 180 note 43

Evidence having probative value admissible

It is not necessary that each piece of evidence, to be admissible should be sufficient to prove the motive, it is enough if it has some probative value —Commonwealth v Mercier, 153 N E 834, 257 Mass 353

Letters

(1) Letters are admissible when disclosing a motive

Ala —Hall v State, 94 So 59, 208 Ala 199—Vintson v State, 115 So 695, 22 Ala App 338
Cal —People v Ure, 229 P 987, 68 Cal App 545
Ky —Cook v Commonwealth, 24 S W 2d 269, 232 Ky 613
Pa —Commonwealth v Edwards, 178 A 20, 318 Pa 1
30 C J p 180 note 43 [b]

(2) In a prosecution for the murder of accused's stepdaughter, a portion of a letter written by deceased and seen by accused shortly before the killing, in which deceased stated that she was going to leave home and not subject herself to any more of accused's indecent proposals, was admissible to show motive —Shell v State 240 S W 516, 91 Tex Cr 563

Evidence that accused was the father of the illegitimate child killed was admissible as tending to show motive on his part for its destruction — Reeder v State, 97 So 73, 210 Ala 114

That accused and deceased belonged to rival Chinese tongs is admissible to show motive State v Sing, 229 P 921 114 Or 267

Financial condition of accused is admissible to show motive
D C Ziang Sun Wan v U S 289 F 908, 53 App D C 250, certiorari granted 44 S Ct 34 263 U S 693, 68 L Ed 509 and reversed on other grounds 45 S Ct 1, 266 U S 1, 69 L Ed 131
Tex —Stegall v State, 252 S W 513 95 Tex Cr 4- Hart v State, 219 S W 821, 87 Tex Cr 55

Possession of victim's ring

Evidence that accused prosecuted for abortion culminating in death, had ring from deceased woman's finger, was admissible to show motive —State v Grissom, 298 P 666, 35 N M 323

79. Ala - Bass v State, 122 So 45, 219 Ala 282
La - State v Pierce, 126 So 514, 169 La 1025 State v Jackson 96 So 53, 153 La 517
30 C J p 181 note 44

Effect of remoteness

Remoteness of acts relied on to establish motive for homicide may go to probative force of testimony, but remoteness alone does not warrant exclusion of testimony if there is logical connection between it and particular act under investigation — Bailey v State, 72 S W 2d 243, 126 Tex Cr 319

80. Ky —Kinder v Commonwealth, 86 S W 2d 297, 260 Ky 534—Barker v Commonwealth, 273 S W 503, 209 Ky 817
Okl —Stogsdill v State, 216 P 681, 240 Okl Cr 152.
Tex —O'Keefe v State, Cr 167 S W 2d 1035—Jennings v State, 51 S W 2d 341, 121 Tex Cr 384—Hillen v State 1 S W 2d 883 108 Tex Cr 516—Payne v State 272 S W 788, 100 Tex Cr 241—Johnson v State, 263 S W 301, 98 Tex Cr 109
Wash State v Barton, 88 P 2d 385, 198 Wash 268
W Va —State v Brannon, 137 S E 649, 103 W Va 427
30 C J p 181 note 45

81 Neb —Lillie v State, 100 N W 316, 72 Neb 228
30 C J p 181 note 46

82 Ala —Hardaman v State, 78 So 324, 16 Ala App 408
30 C J p 181 note 47

83. Mo —State v Hyde, 136 S W 316, 234 Mo 200, Ann Cas 1912D 191
30 C J p 181 note 48

Evidence not objectionable as proving motive by inference on inference

Where the motive advanced by the state for the homicide was the imminent breaking off by the deceased of her incestuous relationship with accused the admission of evidence to show this relationship was not objectionable as an inference based on an inference, since the testimony, if believed by the jury, had a direct tendency to establish the improper relationship as a fact from which the motive could be legitimately inferred —State v Gaines 258 P 508, 141 Wash 446 rule ordered to show cause why certiorari should not be denied Gaines v State of Washington, 48 S Ct 339, 276 U S 607, 72 L Ed 728, error dismissed and certiorari denied 48 S Ct 468, 277 U S 81, 72 L Ed 793

84. Ala —Faire v State, 58 Ala 74
30 C J p 181 note 49

85. Mo —State v Hyde, 136 S W 316, 234 Mo 200, Ann Cas 1912D 191

86. Ga —Swain v State, 135 S E 187 162 Ga 777
Ky —Bolen v Commonwealth, 63 S W 2d 772, 250 Ky 593—Bullock v Commonwealth, 45 S W 2d 449, 241 Ky 799
Tex —Davis v State, 40 S W 2d 809, 118 Tex Cr 410—Berwick v State, 31 S W 2d 655, 116 Tex Cr 508—

Prejudicial effect. Evidence otherwise proper as to motive is admissible, although it may be of such a character as incidentally to prejudice the jury against accused [87]

Evidence of other crimes Evidence which has a direct tendency in view of the surrounding circumstances to establish motive is admissible against accused, even though it may tend to show him guilty of crimes other than that for which he is on trial [88] Thus it may be shown that the homicide charged was committed to avoid arrest for another offense [89] It may also be shown that the motive actuating accused for murder of guard in execution of conspiracy to escape, testimony as to previous attempt of accused to escape, although showing attempt to commit crime, was admissible to show motive, notwithstanding accused had not put his character in evidence — Castleberry v State 173 S E 833, 178 Ga 663

Edmondson v State, 6 S W 2d 119, 109 Tex Cr 518—Arriola v State, 1 S W 2d 287, 108 Tex Cr 270—Blackwell v State, 294 S W 852, 107 Tex Cr 58

30 C J p 181 note 51

Knowledge of threats

Although a witness testifying that deceased threatened to report accused for moonshining did not bring home to accused knowledge or notice of such threats, the evidence was admissible, where other evidence showed accused's knowledge that such threats had been made — McQueen v Commonwealth, 244 S W 681, 196 Ky 227

87. Ga — Black v State, 199 S E 810, 187 Ga 136

N C — State v Burney, 3 S E 2d 24, 215 N C 598

30 C J p 181 note 52

Homosexual relationship

Accused's voluntary declarations disclosing prior homosexual relationship between him and deceased were admissible to prove motive notwithstanding such declarations reflected prejudicially on accused's moral character — People v Hall, 81 P 2d 248 27 Cal App 2d 440

88. Ala — Vincent v State, 165 So 844, 231 Ala 657, certiorari denied 56 S Ct 960, 298 U S 682, 80 L Ed 1402 — Jordan v State, 142 So 665, 225 Ala 350

Ariz — Sullivan v State, 55 P 2d 312, 47 Ariz 224

Ark — Marsh v State, 34 S W 2d 767, 183 Ark 1 — Sullivan v State, 286 S W 939, 171 Ark 768

Cal — People v Parman, 92 P 2d 387, 14 Cal 2d 17 — People v Hall, 30 P 2d 23 220 Cal 166 rehearing denied 30 P 2d 996, 220 Cal 166, appeal dismissed Hall v People of State of California, 54 S Ct 869 292 U S 614, 78 L Ed 1473, certiorari denied Hall v State of California, 56 S Ct 381 296 U S 656, 80 L Ed 467 — People v Northcott 289 P 634 209 Cal 639, 70 A L R 806 — People v Lapierre, 271 P 197, 205 Cal 162 People v Selby, 245 P 126 198 Cal 426 — People v Hall 81 P 2d 248 27 Cal App 2d 440 — People v Braun, 253 P 735, 81 Cal App 226

Colo — Coates v People, 106 P 2d 354, 106 Colo 183

D C — Borum v U S, 56 F 2d 301, 61 App D C 1 certiorari denied Logan v U S, 52 S Ct 459, 285 U S 555 76 L Ed 944

Ga — Black v State, 199 S E 810, 187 Ga 136 — Tucker v State 178 S E 152, 180 Ga 87 — Wheeler v State, 175 S E 540, 179 Ga 287 — Swain v State, 135 S E 187 162 Ga 777

Idaho — State v Reding, 13 P 2d 253 254, 52 Idaho 260, citing **Corpus Juris** — State v McClurg 300 P 898, 909 50 Idaho 762 citing **Corpus Juris.**

Ill — People v Scheck, 190 N E 108, 356 Ill 56, 91 A L R 1472 — People v Looney, 155 N E 363, 324 Ill 375

Iowa — State v Carlson 212 N W 312, 201 Iowa 90 — State v King, 197 N W 981 198 Iowa 325

Ky — Canada v Commonwealth 136 S W 2d 1061, 281 Ky 641

Mass — Commonwealth v Simpson, 13 N E 2d 939, 300 Mass 45, certiorari denied Simpson v Commonwealth of Massachusetts, 58 S Ct 950 304 U S 565 82 L Ed 1531

Miss — Murphy v State, 92 So 694 129 Miss 634

Mo State v Sudduth, 55 S W 2d 962, 331 Mo 728 — State v Millsap 276 S W 625, 310 Mo 500

Mont — State v Simpson, 95 P 2d 761, 109 Mont 198 — State v Hollowell, 256 P 380 79 Mont 343

Nev — White v State, 285 P 503, 52 Nev 235

N J — State v Boccadoro, 144 A 612 105 N J Law 352 — State v Giberson 122 A 724, 99 N J Law 85

N M — State v Solis 37 P 2d 539, 38 N M 538 State v Johnson 21 P 2d 813, 37 N M 280, 89 A L R 1368

Okl — Fray v State, 285 P 142, 46 Okl Cr 260 — Tapedo v State, 215 P 897, 34 Okl Cr 165

Pa — Commonwealth v Luccitti, 145 A 85, 295 Pa 190

S C — State v Jennings, 158 S E 687, 160 S C 318

Tex — Parrish v State 114 S W 2d 559, 134 Tex Cr 187 — Stalcup v State, 92 S W 2d 443, 130 Tex Cr 119 — Frank v State, 49 S W 2d 759 120 Tex Cr 350 — Basham v State, 42 S W 2d 261, 118 Tex Cr 29 — White v State, 7 S W 2d 1086, 110 Tex Cr 206 — Keith v State, 282 S W 251, 103 Tex Cr 636 — Ross v State, 267 S W 499, 98 Tex Cr 567

Vt — State v Winters, 145 A 413, 102 Vt 36

30 C J p 181 note 53 — 16 C J p 601 note 36

Homicide in perpetration of other crime see infra § 253

Attempt to escape from jail

In prosecution of accused chain gang prisoner for murder of guard in

89. Ariz — Lawrence v State, 240 P 863, 29 Ariz 247, rehearing denied 241 P 511, 29 Ariz 318, certiorari denied 46 S Ct 201, 269 U S 585, 70 L Ed 425

Ark — Sullivan v State 258 S W 643, 163 Ark 11

Cal People v Lapierre, 271 P 497 205 Cal 462 — People v Slater, 249 P 177, 199 Cal 357 — People v Bringhurst, 221 P 897, 192 Cal 748 — People v La Vers 20 P 2d 967 130 Cal App 708 — People v Middleton, 223 P 418 65 Cal App 175

Conn — State v Simborski, 182 A 221 120 Conn 624

Ga — Groves v State, 164 S E 822, 175 Ga 37

Ill — People v Matheson, 26 N E 2d 465, 373 Ill 371 — People v Corry, 181 N E 603, 349 Ill 122, 86 A L R 828 — People v Doody, 175 N E 436 343 Ill 194 — People v Durkin, 161 N E 739, 330 Ill 394

Ind — Perkins v State 191 N E 136 207 Ind 119 — Anderson v State, 186 N E 316, 205 Ind 607

Ky — Waters v Commonwealth, 62 S W 2d 1027, 250 Ky 302

La — State v Jones 142 So 693, 174 La 1074 — State v Calloway, 140 So 2, 174 La 134

Mass — Commonwealth v Simpson, 13 N E 2d 939, 300 Mass 45, certiorari denied Simpson v Commonwealth of Massachusetts 58 S Ct 950, 304 U S 565, 82 L Ed 1531

Mont — State v Simpson, 95 P 2d 761 109 Mont 198

Ohio — Shelton v State, 110 N E 153, 106 Ohio St 243, affirming 16 Ohio App 303

30 C J p 181 note 53 [a]

Evidence that accused possessed stolen articles is admissible to show motive in a prosecution for the murder of a police officer — Eagles v U S, 25 F 2d 546 58 App D C 122, certiorari denied 48 S Ct 603, 277 U S 609, 72 L Ed 1013

Evidence that warrants had been issued for accused's arrest for previous crime may be shown as affecting motive for killing officer attempting to arrest accused.

cused in the commission of the crime charged was the concealment of another offense[90] by the destruction of one who had knowledge of such offense, or who had manifested a disposition to acquire information as to the perpetrators thereof[91] Evidence of the pendency of an indictment or information against accused for another crime in which deceased was the prosecutor[92] or a witness[93] is admissible on the question of motive, where it appears that accused knew such fact,[94] but while in such case it is proper to introduce in evidence the affidavit, complaint, indictment, or information,[95] it is not competent to introduce evidence of accused's guilt or innocence of such other crime[96] Also, where accused had a motive for killing a witness in the present case, namely, to prevent his own testimony from being contradicted, evidence of an assault on the witness is admissible[97]

Motive of other participants On the separate trial of one of several persons who acted in concert in the commission of an alleged murder, it is competent for the state to show the motives which actuated the others in the alleged homicide[98] Accordingly, on the trial of an aider and abettor, evidence of any facts tending to show motive on the part of the principal is admissible[99]

A motive for attempting the life of a third person may be shown on the trial for killing one who defended such third person.[1]

Evidence on behalf of accused The state's theory of motive is subject to rebuttal by accused,[2] and he may show acts of deceased or the person assaulted which were known to him and tend to show an innocent motive for his own conduct prior to

Ill—People v Durkin, 161 N E 739, 330 Ill 394
N C—State v Hall, 112 S E 431, 183 N C 806

Defective warrant admissible

In murder prosecution, admission of warrant for arrest and return to reformatory of accused for another crime, competent to show accused's motive for shooting officer attempting to arrest him, was proper although warrant bore an impossible date, and blank space for insertion of officer's name, to whom warrant was directed, was unfilled—People v Doody, 175 N E 436, 343 Ill 194

Escape from jail

In prosecution for murder of deputy sheriff who was attempting to arrest accused who had escaped from state prison on preceding day, evidence of accused's escape and circumstances thereof was admissible to show accused's motive in resisting arrest—Short v State, 87 P 2d 266, 53 Ariz 185

90. Ala—Harden v State, 101 So 442, 211 Ala 656
Ariz—Doughty v State, 33 P 2d 991, 44 Ariz 100—Douglas v State, 33 P 2d 985, 44 Ariz 84

91. Ala—Cavin v State, 112 So 542, 22 Ala App 88
Ark—Shank v State, 72 S W 2d 519, 189 Ark 243
Colo—Smaldone v People, 88 P 2d 103, 103 Colo 498
Ga—Bradberry v State, 154 S E 344, 170 Ga 859
Ind—Perkins v State, 191 N E 136, 207 Ind 119
Ky—Bowman v Commonwealth, 87 S W 2d 355, 261 Ky 215—Marcum v Commonwealth, 71 S W 2d 17, 254 Ky 120—Lankford v Commonwealth, 277 S W 239, 211 Ky 219
Mich—People v Collins, 193 N W 858, 223 Mich 303.
Mo—State v Dowling, 154 S W 2d 749, 348 Mo 589
Mont—State v Hollowell, 256 P 380, 79 Mont 343
N M—State v Massey, 258 P 1009, 32 N M 500
Tex—Basham v State, 42 S W 2d 261, 118 Tex Cr 29—Gray v State, 268 S W 941, 99 Tex Cr 305, second rehearing denied 269 S W 1056, 99 Tex Cr 305
Wash—State v Richardson, 84 P 2d 699, 197 Wash 157—State v Dinas, 224 P 597 129 Wash 75
16 C J p 601 note 39

Physicians' testimony of finding human bones and teeth in accused's residence was admissible where the state's theory of motive was that he had killed deceased to conceal prior murders—Snow v State, 291 S W 558, 106 Tex Cr 222

92. Ga—Lance v State, 142 S E 105, 166 Ga 15
Tex—Good v State, 267 S W 505, 98 Tex Cr 556—Ross v State, 267 S W 449, 98 Tex Cr 567
16 C J p 601 note 40

93. Ala—McDowell v State, 189 So 183, 238 Ala 101—Vaughn v State, 183 So 428, 236 Ala 442
Tex—Good v State, 267 S W 505, 98 Tex Cr 556
Wash—State v Cook, 217 P 42, 126 Wash 81
16 C J p 601 note 41

94. Pa—Commonwealth v Flori, 150 A 290, 300 Pa 125
Tex—Davis v State, 40 S W 2d 809, 118 Tex Cr 410
16 C J p 601 note 42

95. Ala—Carden v State, 4 So 823, 84 Ala 417
Cal—People v Lucich, 295 P 593, 111 Cal App 293
Fla—Beard v State, 180 So 1, 131 Fla. 512
Ga—Lance v State, 142 S E 105, 166 Ga 15.
Pa—Commonwealth v Flori, 150 A 290, 300 Pa 125
Tex—Fritts v State, 42 S W 2d 609, 119 Tex Cr 412
Wash—State v Cook, 217 P 42, 126 Wash 81
16 C J p 601 note 43

Indictment against co-conspirator

There being evidence of conspiracy between accused and the person who acted with him in the killing of deceased and another indictments for theft against the co-conspirator, as well as those against accused, procured by deceased were admissible on motive—Good v State, 267 S W 505, 98 Tex Cr 556

96. Pa—Commonwealth v Andrews, 83 A 412, 234 Pa 597
16 C J p 601 note 44

97. S C—State v Duncan, 70 S E 402, 88 S C 217

98 Fla—Strickland v State, 165 So 289 290, 122 Fla 384, quoting **Corpus Juris.**
Ill—People v Matheson, 26 N E 2d 465, 373 Ill 374
Ohio—Rufer v State, 25 Ohio St 464
Tex—Keith v State 282 S W 251, 103 Tex Cr 636—Good v State, 267 S W 505, 98 Tex Cr 556—Ross v State, 267 S W 499, 98 Tex Cr 567—Simpson v State, 263 S W 273, 97 Tex Cr 57

99. Ky—Young v Commonwealth, 6 S W 2d 269, 224 Ky 334

1. Cal—People v Miller, 53 P. 816, 121 Cal 343

2. Ala—Reeder v State, 97 So. 73, 210 Ala 114
Cal—People v Singh, 53 P 2d 403, 11 Cal App 2d 244
Mo—State v Murphy, 90 S W 2d 103, 338 Mo 291
Tex—Boles v State, 279 S.W 261, 102 Tex Cr 634
30 C.J p 181 note 56.

the alleged offense[3] He is not, however, entitled, under the guise of such rebuttal, to raise immaterial or collateral issues[4] He cannot testify as to secret and uncommunicated motives,[5] but may be required on cross-examination to state his motive or reason for striking the fatal blow[6] Evidence tending to show the existence of a motive on the part of a third person to commit the crime is not admissible in the absence of other evidence connecting such person with the crime,[7] but it has been held that where the state's case is based entirely on circumstantial evidence and the state finds it necessary as a link in the chain of that evidence to trace to accused a motive for the homicide in his previous quarrel with deceased, it is competent for the defense to prove facts showing similar or stronger motives in others to do the same act[8] It is said that absence of apparent motive may always be shown and is a circumstance for the jury to consider[9] On the other hand, evidence tending to show absence of a possible motive of which there is no evidence has been excluded as immaterial[10]

Rebuttal by state. The state may introduce evidence in rebuttal of evidence on behalf of accused of facts tending to show innocent motive[11] and may also offer evidence to rebut accused's claim as to the motive which impelled him to kill deceased.[12]

§ 228. —— Quarrels and Ill Feeling

a In general
b Between husband and wife

a. In General

Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime

Evidence of previous difficulties between accused and the person killed or assaulted,[13] or between their families,[14] or between deceased and co-conspirators of accused,[15] or members of accused's family,[16] or third persons whom it is contended

3. Ala —Ezzell v State, 68 So 578, 13 Ala App 156
30 C J p 181 note 57

4. Ala —Reeder v State, 97 So 73, 210 Ala 114
Ind —Diamond v State, 141 N E 466, 195 Ind 285
Tex —Davis v State, 255 S W 1112, 96 Tex Cr 93
30 C J p 181 note 58
Evidence held inadmissible
(1) In murder prosecution evidence of accused's sexual relations with his wife to rebut alleged motive of lust and passion in slaying deceased was properly excluded as being immaterial —Lowe v People, 234 P 169, 76 Colo 603

(2) In a prosecution for murder, evidence as to whether deceased made any statement as to why he refused to marry the sister of accused was inadmissible as irrelevant —Moulton v State, 98 So 709, 19 Ala App 446, certiorari denied Ex parte Moulton, 98 So 715, 210 Ala 656

(3) In a prosecution for murder, the refusal of testimony offered to show that the sister of accused had never had immoral relations with any other man than deceased was not erroneous —Moulton v State, supra

5. Ala —Spelce v State, 103 So 694, 20 Ala App 412 certiorari denied Ex parte Spelce, 103 So 705, 212 Ala 559
30 C J p 182 note 59

6. Ala —Eatman v State, 36 So 16, 139 Ala 67

7. Mass —Commonwealth v Knowlton, 163 N E 251, 265 Mass 382
Mich —People v Burnstein, 246 N W 217, 261 Mich 534
30 C J p 182 note 61

8. La —State v Johnson, 30 La Ann 921

9. Neb —Robinson v State, 98 N W 694, 71 Neb 142
Where defense is accident or self-defense, evidence of lack of motive to commit homicide is competent —People v Meyer, 163 N E 453, 331 Ill 608

10. Ala - Ward v State, 62 So 703, 182 Ala 1
30 C J p 182 note 64
Where act is charged to have been involuntary, absence of any motive to commit it raises no presumption of innocence, and is irrelevant —Nelson v Commonwealth, 130 S E 389 143 Va 579

11. Ala —Brown v State, 61 So 12, 7 Ala App 26
30 C J p 182 note 65

12. Tex —McDaniel v State, 42 S W 2d 435, 119 Tex Cr 442—White v State, 7 S W 2d 1086, 110 Tex Cr 206

13. Ala —McDowell v State, 189 So 183, 238 Ala 101—Webb v State, 157 So 262, 26 Ala App 241—Grimsby v State, 101 So 156, 20 Ala App 155
Ga —Weldon v State, 123 S E 217, 158 Ga 140
Ky —Thomas v Commonwealth, 145 S W 2d 37, 284 Ky 548—Canada v Commonwealth, 136 S W 2d 1061, 281 Ky 641—Carter v Commonwealth, 102 S W 2d 1020, 267 Ky 640—Lester v Commonwealth, 40 S W 2d 306, 239 Ky 703—Newsome v Commonwealth, 33 S W 2d 36, 236 Ky 344—Tackett v Commonwealth 17 S W 2d 241, 229 Ky 312—Berry v Commonwealth, 13 S W 2d 521, 227 Ky 528—Adams v Commonwealth, 279 S W 332, 212 Ky 334—Griffin v Commonwealth, 265 S W 327, 204 Ky 783—Decker v Commonwealth 241 S W 817, 195 Ky 64
La —State v Graffam, 13 So 2d 249 202 La. 869—State v Bradford, 114 So 83, 164 La 423
N C —State v Allen, 22 S E 2d 233, 222 N C 145—State v Hudson, 10 S E 2d 730 218 N C 219
Okl —Tapedo v State 245 P 897 34 Okl Cr 165—Stogsdill v State 216 P 681 683 24 Okl Cr 152, citing **Corpus Juris.**
Tex —Norwood v State, 120 S W 2d 806, 135 Tex Cr 406—Kelman v State 116 S W 2d 721 134 Tex Cr 535—Hildreth v State, 83 S W 2d 332, 128 Tex Cr 601—Steward v State, 75 S W 2d 113, 127 Tex Cr 63—Franks v State, 68 S W 2d 207, 125 Tex Cr 245 Fritts v State, 42 S W 2d 609, 119 Tex Cr 412—Whiteside v State, 12 S W 2d 218, 111 Tex Cr 116
30 C J p 182 note 66

14. Ark —Witham v State, 232 S W 437, 149 Ark 324
La —State v Vincent, 5 So 2d 327, 198 La. 1037
Tex —Shirley v State, 248 S W 692, 93 Tex Cr 537

15. Ark —Spivey v State, 169 S W 949, 114 Ark 267
30 C J p 182 note 68

16. Tex —Bailey v State, 72 S W 2d 243, 126 Tex Cr. 319.

accused desired to avenge,[17] or between accused and members of the victim's family,[18] or evidence of the feelings of accused toward the victim,[19] or toward the class to which the victim belonged,[20] is admissible on the question of motive Although the details or merits of such difficulties and ill feeling ordinarily may not be inquired into,[21] generally it is proper to introduce evidence of facts tending to show the cause of such difficulties and ill feeling,[22] including, when necessary to illustrate accused's

Knowledge by accused necessary

Evidence of a previous difficulty between deceased and a member of accused's family, occurring in accused's absence, is irrelevant and incompetent, the only competent evidence on the subject is as to what was communicated to accused concerning the difficulty prior to the homicide

Ala —Byrd v State, 95 So 655, 209 Ala 65

N M —State v Kile, 218 P 347, 29 N M 55

Okl —Radney v State 253 P 913, 36 Okl Cr 240

17. Ga —Wall v State, 112 S E 142, 157 Ga 309

Miss —Morris v State, 114 So 750, 148 Miss 680

Tex —Bailey v State, 72 S W 2d 243 126 Tex Cr 319

30 C J p 182 note 69

18 Ga —Henderson v State, 154 S E 232, 170 Ga 813—Jeffords v State 134 S E 169, 162 Ga 573

Ky —Castle v Commonwealth, 14 S W 2d 387 228 Ky 151

Mich —People v Cipriano, 213 N W 104, 238 Mich 332

Tex —Ramirez v State, 117 S W 2d 431, 135 Tex Cr 192

19. Ala —Webb v State 157 So 262, 26 Ala App 241—Grimsley v State, 101 So 156, 20 Ala App 155

Ark —Townsend v State 298 S W 3, 174 Ark 1180—Ballentine v State, 276 S W 1002, 169 Ark 871

Ga —Stanford v State, 112 S E 130 153 Ga 219—Davis v State, 149 S E 51, 40 Ga App 123—Black v State, 124 S E 805, 32 Ga App 754

Idaho —State v McClurg, 300 P 898, 909, 50 Idaho 762, citing **Corpus Juris**

Ky —Thomas v Commonwealth, 145 S W 2d 37, 284 Ky 548—Young v Commonwealth, 6 S W 2d 269, 224 Ky 334

Miss —Lee v State, 174 So 85, 179 Miss 122

Mont —State v Hollowell, 256 P 380, 79 Mont 343

Tex —Daniels v State, 16 S W 2d 539, 112 Tex Cr 305—Rutherford v State, 283 S W 512, 104 Tex Cr 127—Davis v State, 258 S W 188, 96 Tex Cr 447—Russell v State, 256 S W 283, 96 Tex Cr 105—Richardson v State, 239 S W 218, 91 Tex Cr 318, 20 A L R 1249

Vt —State v Winters, 145 A 413, 102 Vt 36

30 C J p 182 note 70.

Threats

(1) Evidence of accused's prior threats against deceased is admissible to show motive

Ala —Drummond v State, 102 So 723 20 Ala App 286, certiorari denied Ex parte Drummond, 102 So 726, 212 Ala 410—Grimsley v State, 101 So 156, 20 Ala App 155

Ark —Crowe v State, 13 S W 2d 606, 178 Ark 1121

Cal —People v Richardson, 73 P 2d 610, 23 Cal App 2d 428

Ga —Smith v State 145 S E 517, 167 Ga 271

Ill —People v Frank, 158 N E 712 327 Ill 393

Ky —Canada v Commonwealth 136 S W 2d 1061 281 Ky 641—Dean v Commonwealth, 83 S W 2d 887, 260 Ky 97—Tackett v Commonwealth 17 S W 2d 241, 229 Ky 312—Decker v Commonwealth, 241 S W 817, 195 Ky 61

La —State v Breedlove, 7 So 2d 221, 199 La 965

Mich —People v Zabiiak 280 N W 149, 285 Mich 161

N C —State v Allen, 22 S E 2d 233 222 N C 145

Wash —State v Dinas 224 P 597 129 Wash 75

30 C J p 182 note 70 [a]

(2) This is so even though the threats were not communicated to deceased —State v Pierce 126 So 514 169 La 1025

On the trial of an aider and abettor, evidence of any facts tending to show the principal's state of feeling toward deceased is admissible —Young v Commonwealth, 6 S W 2d 269, 224 Ky 334

20. Ala —King v State, 96 So 636 19 Ala App 153, certiorari denied Ex parte King, 96 So 639, 209 Ala 446

Fla —Buchanan v State, 116 So 275, 95 Fla 301

Ga —Burden v State, 186 S E 555, 182 Ga 533

Tex —Bridges v State, 271 S W 87 99 Tex Cr 627

30 C J p 183 note 71

Strikebreakers

In prosecution for murder where the homicide took place while a train, containing strikebreakers, moving into a mining area was attacked by armed strikers, evidence that about one month before a crowd of armed strikers near scene of homicide had searched a train, and removed and mistreated suspected strikebreakers, was admissible as tending to show state of hostility and ill will between the striking miners and their employers, and thus establishing a motive for the homicide charged, although it was not shown that accused was present or participated in the previous assault —State v Pagialakis, 238 P 256, 65 Utah 552

21. Ala —Byrd v State, 95 So 655, 209 Ala 65—Grimsley v State, 101 So 156, 20 Ala App 155

Ky —Davidson v Commonwealth, 264 S W 1051, 204 Ky 414

Introduction of much detailed testimony and printed matter in trial for murdering policeman to show controversy arising from accused's opposition to vaccination of his children for smallpox and resulting institution of proceedings against him for contributing to their delinquency was improper —People v Lavac, 192 N E 568, 357 Ill 554

22. Ala —Pruett v State, 172 So 911 27 Ala App 386

Cal —People v Lucich, 295 P 593 111 Cal App 293—People v Piazza 257 P 592, 84 Cal App 58

Fla —Beard v State, 180 So 1, 131 Fla 512

Ill People v Rappaport, 4 N E 2d 106, 364 Ill 238

Ky —Canada v Commonwealth, 136 S W 2d 1061 281 Ky 641—Huff v Commonwealth, 122 S W 2d 143, 275 Ky 578—Mills v Commonwealth 42 S W 2d 505 240 Ky 359 —Crenshaw v Commonwealth, 12 S W 2d 336, 227 Ky 223—Fleming v Commonwealth, 5 S W 2d 899, 224 Ky 160

Miss —McCaffrey v State, 187 So 740 185 Miss 659

Mo —State v Cropper, 36 S W 2d 923, 327 Mo 193—State v Lucas, 292 S W 714 316 Mo 904, rehearing denied 293 S W 1051, 316 Mo 904

N C —State v Smoak, 195 S E 72, 213 N C 79—State v Miller, 116 S E 416 185 N C 679

Okl —Stogsdill v State, 216 P 681, 683, 24 Okl Cr 152, citing **Corpus Juris.**

S C —State v Hughes, 158 S E 833, 160 S C 474

Tex —Smith v State 119 S W 2d 1039 135 Tex Cr 327—McArthur v State, 105 S W 2d 227, 132 Tex Cr 447—McBride v State 51 S W 2d 385, 121 Tex Cr 409—Davis v State, 296 S W 897, 107 Tex Cr 444—Watson v State, 287 S W 265, 105 Tex Cr, 152—Davis v State, 258 S W 188, 96 Tex Cr 447

Wash —State v Spadoni, 243 P 854,

motive, details of the previous encounter,[23] and the relations of the parties.[24] For example, it may be shown that deceased interfered with or prevented accused's establishing or maintaining improper relations with some person of the opposite sex.[25] The pendency of litigation between accused and deceased,[26] or between deceased and a member of accused's family,[27] or the fact of anticipated litigation[28] may be shown, but the pleadings and orders in the pending proceedings should not be read in evidence,[29] although under certain circumstances, it has been held, this may be done,[30] and evidence touching the merits of the litigation is not admissible in rebuttal.[31]

There must be some link of association between the difficulty or prior ill will and the killing giving color of cause and effect to the transaction.[32]

Remoteness While evidence as to prior difficulties or ill will may be rejected because of remoteness,[33] such objection ordinarily is regarded as affecting the weight and not the admissibility of the evidence,[34] especially when the conditions continue to the time of the homicide.[35]

Bad feeling between third persons is admissible where it shows a motive for the act of accused.[36]

137 Wash 684—State v Dinas, 224 P 597, 129 Wash 75
30 C J p 183 note 72

Conviction of assault on victim

In murder prosecution, complaint and information charging accused with aggravated assault which was committed on deceased about a year prior to murder were admissible as tending to show reason for accused's ill will toward deceased, where judgment showing conviction of simple assault was also offered—Gamez v State, 112 S W 2d 196, 133 Tex Cr 481

Previous criminal complaint

In murder prosecution, a complaint filed prior to homicide charging accused with a simple assault on deceased was admissible, especially where it had been otherwise shown without objection that a complaint had been filed charging accused with assault and that accused had been jailed in connection therewith—Rhodes v State, 126 S W 2d 987, 136 Tex Cr 581

Ravishment of victim's wife

In a prosecution for murder, evidence of the victim's wife that about two years before the tragedy accused had ravished her was admissible as being the cause of the trouble between accused and his victim, the quarrel growing out of the affair never having abated—Spier v State, 248 S W 281, 157 Ark 283

Rebuttal by state

In prosecution for murder, testimony that accused had told deceased's wife that he killed deceased because he had been killing his (accused's) dogs was admissible in rebuttal of accused's claim that he killed deceased for insulting his (accused's) wife—Hughes v State, 262 S W 745, 97 Tex Cr 607

23. Ga—Wilson v State, 110 S E 8, 152 Ga. 337
Tex—Russell v State, 209 S W 671, 84 Tex Cr 245

24. Fla—Smithie v State, 101 So 276, 88 Fla 70
Ill—People v Jones, 143 N E 479, 312 Ill 190.
Ky—Berry v Commonwealth, 13 S W 2d 521, 227 Ky 528
Mont—State v Hollowell, 256 P. 380, 79 Mont 343
N D—State v Mozinski, 191 N W 345, 149 N D 228
Okl—Tapedo v State, 245 P 897, 34 Okl Cr 165
Tex—Cole v State, 243 S.W 1100, 92 Tex Cr 368
30 C J p 183 note 74

25. Fla—Smithie v. State, 101 So 276, 88 Fla 70
Ill—People v Jones, 143 N E 479, 312 Ill 190
Okl—Starks v State, 93 P 2d 50, 67 Okl Cr 156
Tex—Smith v State, 119 S W 2d 1039, 135 Tex Cr 327—Smith v State, 288 S W 458, 105 Tex Cr 327—Gilmore v State, 241 S W 492, 91 Tex Cr 31
30 C J p 183 note 75

26. Ala—Powell v State, 123 So 34, 219 Ala 557
Mo—State v Hughes, 125 S W 2d 66, 71, 344 Mo 116, citing **Corpus Juris.**
Tex—Fambro v State, 154 S W 2d 840, 142 Tex Cr 473—Lawrence v State, 18 S W 2d 181, 112 Tex Cr 659
30 C J p 183 note 76

27. Mo—State v Hughes, 125 S W. 2d 66, 344 Mo 116

28. Ala—Commander v State, 60 Ala 1

29. Ky—Frazier v Commonwealth, 207 S W 13, 182 Ky 620
Mo—State v Hughes, 125 S W 2d 66, 71, 344 Mo 116, citing **Corpus Juris.**

Decree granting victim divorce from daughter of accused and motion by victim to modify decree with respect to custody of child were not admissible to show "motive"—State v Hughes, 125 S W 2d 66, 344 Mo 116

30. Citation in suit for alienation of affections

In a prosecution for murder, the admission in evidence of a citation served on accused in an action by deceased against accused for alienation of the affections of deceased's wife was not error where much testimony was offered without objection regarding the improper relations between the wife and accused, and one of the state's theories of motive was that deceased was killed because accused feared a public trial of the issues shown in the citation—Lawrence v State, 18 S W 2d 181, 112 Tex Cr 659

31. Ala—Commander v State, 60 Ala 1

32. N M—State v Kile, 218 P 347, 29 N M 55
Okl—Radney v State, 253 P 913, 36 Okl Cr 240—Stogsdill v State, 216 P 681, 683, 24 Okl Cr 152, citing **Corpus Juris.**
Tex—Bailey v State, 72 S W 2d 243, 126 Tex Cr 319
30 C J p 184 note 80

33. Miss—Herman v State, 22 So 873, 75 Miss 340
30 C J p 184 note 81

34. D C—Murray v U S, 288 F 1008, 53 App D C 119 certiorari denied 43 S Ct 703, 262 U S 757, 67 L Ed 1218
N C—State v Allen, 22 S E 2d 233, 222 N C 145
Tex—Bailey v State, 72 S W 2d 243, 126 Tex Cr 319
30 C J p 184 note 82

Threats

"No mere distance of time is sufficient to make defendant's threats irrelevant"—State v Pierce, 126 So 514, 515, 169 La. 1025

35. D C—Lomax v U S, 37 App D C 414
Idaho—State v Frank, 97 P 2d 410, 412, 60 Idaho 774, citing **Corpus Juris.**
Neb—Wever v State, 238 N W 736, 737, 121 Neb 816, citing **Corpus Juris.**
Okl—Tapedo v State, 245 P 897, 34 Okl Cr 165

36. Tex—Miller v State, 15 S W 2d 1043, 112 Tex Cr 194.
30 C J p 184 note 84.

Motive as to third person Where accused by mistake killed decedent when he intended to kill another person, evidence of accused's ill will toward the other person is admissible[37] So the pendency and nature of litigation between accused and a person who was injured by the shot which killed deceased may be shown[38]

Rebuttal by accused Where the state offers proof of quarrels and ill will between accused and deceased, evidence to show a different state of feeling, and that the relations between them were pleasant and agreeable, is admissible[39]

b. Between Husband and Wife

In a prosecution for uxoricide, evidence tending to show that the relations between the accused and the deceased were unpleasant or hostile is admissible on the question of motive.

Where the victim of the crime is the spouse of accused, evidence tending to show that the relations between accused and the victim were unpleasant or hostile is admissible on the question of motive[40] Thus ill treatment, recent acts of personal violence, and threats by accused to kill deceased may be shown as bearing on motive[41] The extent of the inquiry into the relations between accused and deceased is largely within the discretion of the trial court,[42] although care should be exercised to exclude proof of circumstances too remote in time or cause[43] However, evidence of difficulties several years before the homicide has been held not too remote[44] Proof of a quarrel between accused and deceased having no connection with the transaction wherein death resulted is inadmissible unless followed by proof of a continued difference flowing from such quarrel[45] The state may show that the victim had instituted divorce proceedings against accused,[46] or accused against deceased,[47] or the fact

37. Ga—Adams v State, 154 S E 700, 171 Ga 90
Mo—State v Lucas, 292 S W 714, 316 Mo 904, rehearing denied 293 S W 1051, 316 Mo 904
Pa—Commonwealth v De Matteo 195 A 873, 328 Pa 359
Tex—Bilyeu v State, 279 S W 845, 103 Tex Cr 25
30 C J p 184 note 85

Details of ill feeling not admissible
It was proper for prosecution to introduce sufficient evidence, if it could, that accused desired to have person accompanying deceased killed, because of his interference in connection with rumors of accused's attentions to a certain woman but it was improper and prejudicial to go into details, or undertake to establish truth or falsity of the rumors—Foure v Commonwealth, 265 S W 443, 205 Ky 62

38. N Y—Murphy v People, 63 N Y 590

39. Tex—Brown v State, 169 S W 437, 74 Tex Cr 356

40. Ala—Brothers v State, 183 So 433, 435, 236 Ala 448, citing **Corpus Juris**—Ratliff v State, 102 So 621, 212 Ala 410—Vaughn v State, 144 So 458, 25 Ala App 226, certiorari denied 144 So 460, 225 Ala 595
Ga—Beckworth v State, 190 S E 184, 183 Ga 871—Brookins v State, 145 S E 449, 167 Ga 325—Knowles v State, 142 S E 676, 166 Ga 182
Idaho—State v McClurg, 300 P 898, 909, 50 Idaho 762, citing **Corpus Juris.**
Kan—State v Elftman, 226 P 795 116 Kan 214—State v Cruse, 212 P 81, 112 Kan 486
Ky—Hill v Commonwealth, 23 S W 2d 930, 232 Ky 453
La—State v Brown, 156 So 359, 180 La 299.
Miss—Floyd v State, 148 So 226, 166 Miss 15
N C—State v French, 166 S E 717, 203 N C 632
N D—State v Mozinski, 191 N W 345, 149 N D 298
Pa—Commonwealth v Westwood 188 A 301 324 Pa 289
Tex—Steward v State, 75 S W 2d 113, 127 Tex Cr 63
30 C J p 184 note 89

Evidence of previous quarrels between accused and his murdered wife is admissible on the question of motive
Cal—People v De Moss 50 P 2d 1031, 4 Cal 2d 469
D C Murray v U S 288 F 1008 53 App D C 119, certiorari denied 43 S Ct 703, 262 U S 757 67 L Ed 1218
Kan State v Hilbish, 267 P 1109, 126 Kan 282

An original complaint charging accused with nonsupport of his murdered wife is admissible on the question of motive—State v Stacy 160 A 257, 104 Vt 379 motion denied 160 A 747, 104 Vt 379—30 C J p 184 note 89 [b]

A magistrate's docket entries of previous arrests of accused obtained by his murdered spouse are admissible to show motive—Commonwealth v Ferry, 191 A 130, 326 Pa 129

41. Ark—McGraw v State, 42 S W 2d 373 184 Ark 342
Cal—People v De Moss, 50 P 2d 1031, 4 Cal 2d 469
Ga—Cobb v State, 195 S E 758, 185 Ga 462—Beckworth v State, 190 S E 184, 183 Ga 871
Idaho—State v Frank 97 P 2d 410, 412, 60 Idaho 774, citing **Corpus Juris**—State v McClurg, 300 P 898, 50 Idaho 762
Kan—State v Hilbish, 267 P 1109, 126 Kan 282—State v Cruse, 212 P 81 112 Kan 486
Okl—Tapedo v State, 245 P 897 34 Okl Cr 165
Tex—Steward v State, 75 S W 2d 113, 127 Tex Cr 63
30 C J p 184 note 90

Peace bond
Evidence that accused on trial for murdering his wife was arrested few days before for mistreating her and put under bond to keep peace, although without surety is competent on question of motive—Waters v Commonwealth, 124 S W 2d 97, 276 Ky 315—Payne v Commonwealth 64 S W 2d 888, 251 Ky 776

Police court records showing proceedings against accused for brutality toward murdered wife are admissible
N Y—People v Conklin 67 N E 624, 175 N Y 333
Pa—Commonwealth v Terry 191 A 130 326 Pa 129

42. Iowa—State v Johnston, 267 N W 698, 221 Iowa 933
Mass—Commonwealth v Howard, 91 N E 397, 205 Mass 128

43 Ga—Miller v State, 124 S E 195 158 Ga 697
Iowa—State v Johnson, 267 N W 698, 221 Iowa 933
30 C J p 184 note 92

44. Ky—Childers v Commonwealth, 171 S W 149, 161 Ky 440

45. Ga—Miller v State, 124 S E 195, 158 Ga 697
N Y—People v Blake, 1 Wheel Cr 272 1 City Hall Rec 99

46. Cal—People v McNeer, 57 P 2d 1018, 14 Cal App 2d 22
30 C J p 184 note 95

47. Ala—Marshall v State, 121 So 72, 219 Ala 83, 63 A L R 560

of their separation,[48] b' t the record of the divorce suit, including an order for the payment of alimony by accused, is not competent [49]

On the other hand, accused may prove that his relations with his wife were of an affectionate character, and that he was an affectionate and devoted husband, in order to show the want of motive,[50] or that their relations were such until a short time before the death of the wife, who was about to leave accused to join her paramour [51]

Where accused killed an innocent third person in the course of an attempt to kill one whom he believed guilty of illicit relations with his wife, pleadings in a divorce action between accused and his wife may properly be admitted to show motive [52]

§ 229. —— Loss of Affection for Spouse; Infatuation with Another

Where the victim of the crime is the spouse of the accused evidence tending to show want of affection, infatuation with another, or improper relations with persons of the opposite sex on the part of the accused is admissible to show motive

Where the victim of the crime is the spouse of accused, evidence tending to show want of affection on the part of accused,[53] or infatuation with another,[54] is admissible on the question of motive So, also, improper relations of accused survivor with persons of the opposite sex may be shown [55] Mere

Ark —Spivey v State, 169 S W 949, 114 Ark 267

48. Ala —Waldrop v State, 64 So 80, 185 Ala 20
Tex —Steward v State, 75 S W 2d 113, 127 Tex Cr 63

49. Ind —Binns v State, 57 Ind 46, 26 Am R 48

The complaint in the action for divorce is not admissible — People v McNeer, 57 P 2d 1018, 14 Cal App 2d 22

50. Ala —Morse v State, 112 So 806, 22 Ala App 93—Humber v State, 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559
30 C J p 185 note 99

Letters

In prosecution for uxoricide, letters by deceased to accused, showing good relations between them, are admissible to contradict state's evidence of ill will between them — Sharp v State, 214 N W 643, 115 Neb 737

51. Mo —State v Liolios, 225 S W 941, 285 Mo 1

52. Ga —Curtis v State, 110 S E 907, 28 Ga App 219

53. Ala —Brothers v State 183 So 433, 236 Ala 448—Marable v State, 177 So 880, 235 Ala 151—Hall v State, 113 So 64, 216 Ala 336
Mass —Commonwealth v Mercier, 153 N E 834, 257 Mass 353
Pa —Commonwealth v Westwood, 188 A 304 310, 324 Pa 289, quoting **Corpus Juris.**
Tex —Mallory v State, 106 S W 2d 317, 133 Tex Cr 50
30 C J p 185 note 3

54. Ariz —Turley v State, 59 P 2d 312, 48 Ariz 61
Cal —People v Lisenba, 94 P 2d 569, 14 Cal 2d 403, superseding 89 P 2d 39, certiorari granted Lisenba v People of State of California, 61 S Ct 68, two cases, 311 U S 617, 85 L Ed 391, affirmed 61 S Ct 832, two cases, 313 U.S. 537, 85 L Ed 1507, vacated 61 S Ct 956, two cases, 313 U S 597, 85 L Ed 1550, affirmed 62 S Ct 280 314 U S 219, 86 L Ed 166, rehearing denied 62 S Ct 620 two cases, 315 U S 826, 86 L Ed 1222
Fla —Phillips v State, 101 So 204, 88 Fla 117
Kan —State v Scott, 235 P 380, 388, 117 Kan 303 118 Kan 464, citing **Corpus Juris.**
Ky —Clemens v Commonwealth, 6 S W 2d 483, 224 Ky 370
Miss —Walton v State, 126 So 29, 156 Miss 199
N C —State v English, 159 S E 315, 201 N C 295
Okl —Britton v State, 70 P 2d 928, 62 Okl Cr 89
Pa Commonwealth v Westwood, 188 A 304, 310, 324 Pa 289, quoting **Corpus Juris**
Tex —Mallory v State, 106 S W 2d 317, 133 Tex Cr 50
Wash —State v Richardson 84 P 2d 699, 197 Wash 157
30 C J p 185 note 4

Correspondence

(1) Letters of accused tending to show infatuation with another are admissible on the question of motive
U S — Shepard v U S, C C A Kan, 62 F 2d 683, rehearing denied 64 F 2d 641, certiorari granted 53 S Ct 791 289 U S 721, 77 L Ed 1472, reversed on other grounds 54 S Ct 22, 290 U S 96, 78 L Ed 196
Tex —Parks v State, 63 S W 2d 301, 124 Tex Cr 405

(2) Letters passing between accused and a third person revealing a deep-seated love between the parties are admissible — Hubbard v State, 112 P 2d 174, 71 Okl Cr 373

Age of deceased

On the trial of a wife for murdering her husband testimony showing the age of deceased was admissible as supporting the state's theory of motive that accused had killed her husband because of her infatuation for a younger man —Williams v State, 51 S W 2d 367, 121 Tex Cr 458

55. U S —Conner v U S, C C A Wash, 7 F 2d 313
Ala —Slayton v State, 173 So 632 27 Ala App 422, reversed on other grounds 173 So 642, 234 Ala 1, reversed on other grounds 173 So 645, 234 Ala 9
Cal —People v Gosden, 56 P 2d 211 6 Cal 2d 14
Ind —Brown v State, 189 N E 133 206 Ind 223
Iowa —State v Flory, 199 N W 303 198 Iowa 75
Kan —State v Olthoff, 40 P 2d 384 141 Kan 70—State v Scott, 235 P 380 388, 117 Kan 303, 118 Kan 464, citing **Corpus Juris.**
La —State v Hagan, 150 So 852, 178 La 127
Mich —People v Powell, 194 N W 502 223 Mich 633
Miss —Church v State, 183 So 525 182 Miss 802—Magee v State, 110 So 500, 145 Miss 227
N J —State v Heathcoat, 194 A 252, 119 N J Law 33
N D —State v Gibson, 284 N W 209 69 N D 70
Pa —Commonwealth v Westwood, 188 A 304, 324 Pa 289—Commonwealth v Weisel, 9 Pa Dist & Co 161
30 C J p 185 note 5.

Reason for rule

Evidence of this character tends to repel the presumption of love and affection that arises out of the marital relation, and to establish a motive for the desire to get rid of one who, under normal conditions, would be the natural object of kindness and protection
Ala —Spicer v State, 65 So 972, 188 Ala 9
N Y —People v Montgomery, 68 N E 258, 176 N Y 219, 17 N Y Cr 503

Extent of inquiry

The extent to which detailed evidence of such illicit relations should go is in large measure within the sound discretion of the trial court —Davis v State, 131 So 900, 222 Ala 285.

lapse of time would go to the weight rather than to the admissibility of such testimony.[56] Evidence of accused's illicit relations with other women may be received only when it tends to repel the presumption of the love and affection for his wife that arises out of the marital relation, and to establish a motive for the desire to get rid of her.[57] Evidence tending to disprove the existence of such a motive for committing the crime is admissible for the defense.[58]

§ 230. —— Unlawful Relations with Deceased's Spouse

Evidence of intimate friendship or illicit relations between accused and deceased's spouse is generally admissible to show motive

Evidence of intimate friendship[59] and of illicit relations[60] between accused and the spouse of deceased is admissible to show motive, even, it has been held, where such relations occurred after divorce of deceased and his wife,[61] but as to the latter proposition there is authority to the contrary.[62] Independent acts of adultery, disconnected from other evidence in the case, cannot be shown.[63] The continuance, after the killing, of criminal or undue intimacy which existed before the killing is relevant,[64] but evidence of such intimacy after the homicide, unaccompanied by evidence of previous relations, is generally inadmissible.[65] The commission of rape on decedent's widow immediately after the killing may be shown,[66] but evidence of illicit relations which had existed between accused and the woman who several years later became the wife of deceased is too remote to be admissible.[67] A will, made by the wife of deceased after the homicide in which she left a large portion of her estate to accused is not admissible where no connection therewith on his part appeared.[68] Competent evidence in explanation of the circumstances shown by the prosecution may be introduced by accused.[69]

56 Cal.—People v. Smith, 203 P. 816, 55 Cal.App. 324.
30 C.J. p. 185 note 6.

57. Kan.—State v. Scott, 235 P. 380, 388, 117 Kan. 303, 118 Kan. 464, citing **Corpus Juris**.
30 C.J. p. 185 note 7.

Evidence held inadmissible

(1) In prosecution for murder of wife, evidence that accused had admitted having once lived with another woman prior to his marriage was inadmissible, where there was no evidence that he had communicated with her for at least five years preceding homicide, and no evidence of disregard of conjugal relations until practically the moment of the homicide.—Brown v. State, 189 N.E. 133, 206 Ind. 223.

(2) In prosecution against wife for killing husband, admitting in evidence isolated instances of wife's meretricious conduct with other men for purpose of showing motive was reversible error.—Adams v. Commonwealth, 120 S.W.2d 237, 274 Ky. 714.—Frisure v. Commonwealth, 53 S.W.2d 204, 245 Ky. 127.

58. Kan.—State v. Scott, 235 P. 380, 117 Kan. 303, 118 Kan. 464.
30 C.J. p. 185 note 10.

Evidence improperly excluded

In murder prosecution where theory of state was that accused desired to rid himself of invalid wife to be free to pursue another woman, which theory was pressed on the jury in argument, refusal to permit accused's witnesses to testify to accused's care and ministrations to his wife particularly during her illness, was error.—McClendon v. State, 8 So.2d 883, 243 Ala. 218.

59. Ala.—Beard v. State, 95 So. 333, 19 Ala.App. 102.
Ga.—Court v. State, 119 S.E. 723, 156 Ga. 536.
Ill.—People v. Selknes, 140 N.E. 852, 309 Ill. 113.
Ky.—Taylor v. Commonwealth, 98 S.W.2d 928, 266 Ky. 325.—Frost v. Commonwealth, 81 S.W.2d 583, 258 Ky. 709.
Tex.—Miller v. State, 84 S.W.2d 459, 129 Tex.Cr. 166. Story v. State, 296 S.W. 516, 107 Tex.Cr. 293.—Nami v. State, 263 S.W. 595, 97 Tex.Cr. 522.
Va.—Webb v. Commonwealth, 152 S.E. 366, 154 Va. 866.
30 C.J. p. 185 note 11.

Love letters to deceased's wife written by accused, are admissible to show motive.
Ark.—Hornsby v. State, 260 S.W. 41, 163 Ark. 396.
Ky.—Blankenship v. Commonwealth, 16 S.W.2d 478, 228 Ky. 830.

60. Ala.—Powell v. State, 123 So. 34, 219 Ala. 557.—Grimsley v. State, 101 So. 156, 20 Ala.App. 155.
Ariz.—Woodson v. State, 247 P. 1103, 30 Ariz. 448.
Cal.—People v. Clark, 233 P. 980, 70 Cal.App. 531.
Fla.—Pearce v. State, 112 So. 83, 93 Fla. 501.
Ill.—People v. Cozzi, 2 N.E.2d 915, 364 Ill. 20.—People v. Fricker, 151 N.E. 280, 320 Ill. 195.
Ky.—Taylor v. Commonwealth, 98 S.W.2d 928, 266 Ky. 325.
La.—State v. Dreher, 118 So. 85, 166 La. 924, certiorari denied Dreher v. State of Louisiana, 19 S.Ct. 36, 278 U.S. 641, 73 L.Ed. 556.
Mo.—State v. Smith, 14 S.W.2d 45, 329 Mo. 272.
Mont.—State v. Fine, 2 P.2d 1016, 1017, 90 Mont. 311, citing **Corpus Juris**.
Pa.—Commonwealth v. Foltz, 5 Pa. Dist. & Co. 559.
Tex.—Graves v. State, 44 S.W.2d 690, 119 Tex.Cr. 422.—Floyd v. State, 36 S.W.2d 719, 117 Tex.Cr. 384.—Watson v. State, 287 S.W. 265, 105 Tex.Cr. 152.—Anderson v. State, 249 S.W. 855, 94 Tex.Cr. 161.
30 C.J. p. 186 note 12.

61. Ky.—Frazier v. Commonwealth, 207 S.W. 13, 182 Ky. 620.

62 Cal.—People v. Wright, 77 P. 877, 144 Cal. 161.

63 Pa.—Commonwealth v. Ferrigan, 44 Pa. 386.

64 Okl.—Rushy v. State, 24 P.2d 1016, 55 Okl.Cr. 61.
Tex.—Miller v. State, 84 S.W.2d 459, 129 Tex.Cr. 166.
30 C.J. p. 186 note 16.

65. Ky.—Messer v. Commonwealth, 20 S.W. 702, 14 Ky.L. 492.
30 C.J. p. 186 note 17.

66. Cal.—People v. Hendrix, 221 P. 349, 192 Cal. 441.
N.Y.—People v. Barobuto, 89 N.E. 847, 196 N.Y. 293.

67. Mich.—People v. Randolph, 190 N.W. 748, 220 Mich. 617.

68. Tex.—Cates v. State, Cr., 227 S.W. 953.

69 Ala.—Bush v. State, 53 So. 266, 168 Ala. 77.
30 C.J. p. 186 note 20.

Evidence properly excluded

In a prosecution for homicide where there was evidence that accused had taken the wife of deceased out in his automobile several times, but always when others were along, so that there was no impropriety, and the evidence showed merely a friendly feeling which accused admitted, it was not error to exclude testimony by the wife of deceased

Evidence is not admissible on behalf of accused of the relation of the wife of deceased with other men [70]

§ 231. —— Jealousy and Unrequited Love

The fact that accused and deceased were rivals for or courting the same woman, or enjoyed her illicit favors, or other facts tending to establish jealousy are admissible to show motive

The fact that accused and deceased were rivals for or courting the same woman[71] or enjoyed her illicit favors,[72] or other facts tending to establish jealousy[73] are admissible to show motive So it may be shown that accused believed that his wife or mistress was being estranged from him by deceased,[74] that his advances were spurned,[75] that deceased terminated an illicit relationship previously existing between herself and accused,[76] or that deceased was an obstacle in the way of accused's marriage [77] Where a man is charged with the murder of his wife or mistress, the prosecution may show that he had discovered or been informed before the killing that she was unfaithful to him,[78] but evidence that accused and deceased frequently visited the same woman is inadmissible in the absence of any showing that accused's motive for the killing was the prevention of deceased's attentions [79] The details of the rival courtship of accused and deceased and the conduct of the parties in particular matters,[80] or the details of a difficulty between accused and a third person of whose attentions to deceased accused was jealous,[81] are not admissible; nor, in a prosecution for assault against a rival with intent to kill, is evidence admissible of hostile acts of accused toward the woman in the absence of the rival [82] Evidence of jealousy shown toward other persons, not connected with the homicide, is not admissible,[83] nor is evidence of jealousy of a wife toward deceased admissible on the trial of her husband for his murder [84] It is essential to prove accused's knowledge of facts relied on to establish jealousy as the motive for the homicide,[85] but such knowledge may be shown by circumstantial evidence [86]

Evidence of threats, made by accused against a woman in an endeavor to persuade her to leave her husband and live with him, is admissible in a prosecution against accused for assault with intent to murder the husband of said woman [87]

§ 232. —— Pecuniary Motive or Hope of Gain in General

Evidence tending to establish a mercenary motive or hope of advantage on the part of accused from the death of deceased is admissible

The prosecution is entitled to show matters tending to establish a mercenary motive or hope of advantage from the death of deceased on the part of accused,[88] as, for example, that deceased was a

that she did not know of accused ever doing any wrong—Manna v State, 192 N W 160 179 Wis 381

70 Pa—Commonwealth v De Palma 110 A 756, 268 Pa 25

71. N C—State v Casey, 193 S E 411 212 N C 352
Tex—Scarbrough v State 27 S W 2d 198 115 Tex Cr 587
30 C J p 186 note 22

72. N M—State v Quintana, 234 P 306 30 N M 318
30 C J p 186 note 23

73 Ariz—Encinas v State 221 P 239 26 Ariz 24
Cal—People v Shaver, 61 P 2d 1170 7 Cal 2d 586—People v Bannon, 209 P 1029 59 Cal App 50
Ga—Gibbs v State 153 S E 613, 41 Ga App 574
Tex—Lakin v State 49 S W 2d 771, 120 Tex Cr 340—Boles v State, 279 S W 261, 102 Tex Cr 631
Wash—State v Richardson, 84 P 2d 699 197 Wash 157
30 C J p 186 note 24

74. N C—State v Gore, 178 S E 209, 207 N C 618
Tex—Wilson v State, 31 S W 2d 815, 116 Tex Cr 512
30 C J p 186 note 25

75. Tex—Shell v State, 210 S W 516 91 Tex Cr 563
30 C J p 186 note 26

76. Ala—Poellnitz v State, 55 So 1028, 1 Ala App 121

77. Ill People v Laures 121 N E 585 289 Ill 490
30 C J p 186 note 28

78 S C State v Jones, 67 S E 160 80 S C 17
30 C J p 186 note 29

79. Ala—Terry v State, 74 So 756 15 Ala App 665

80 Cal—People v Cuff, 55 P 407, 122 Cal 589

Particular details

Where friendship of accused with girl over whom deceased was killed was admitted exclusion of details such as pictures taken, gifts exchanged, letters written, places visited and things done together, was not error—People v Santos, 26 P 2d 522, 134 Cal App 736

81. Ala—Wise v State, 66 So 128, 11 Ala App 72

82. Cal—People v Cuff, 55 P 407, 122 Cal 589

83 Tex—Walker v State, 206 S W 96, 84 Tex Cr 136

84. Tex—Stratton v State, 8 S W 2d 171, 110 Tex Cr 254

85. Ga—Monroe v State, 177 S E 836 50 Ga App 291
Ky—Bolen v Commonwealth 63 S W 2d 772 250 Ky 593—Blackerby v Commonwealth, 255 S W 824 200 Ky 832
Tex Jamar v State, 150 S W 2d 1031 142 Tex Cr 91—Bradley v State, 277 S W 147 102 Tex Cr 41—Martin v State, 236 S W 729, 91 Tex Cr 23

86. Ga—Monroe v State, 177 S E 836 50 Ga App 291
Tex—Martin v State, 236 S W 729, 91 Tex Cr 23

87. Cal—People v Minamino 205 P 163, 56 Cal App 386

88 Cal—People v Brown, 253 P 735, 81 Cal App 226—People v Willis 233 P 812 70 Cal App 165
Ga—Williams v State 119 S E 614, 156 Ga 285
Ky—Shepherd v Commonwealth, 252 S W 139, 200 Ky 25
Mass—Commonwealth v Gettigan, 148 N E 113, 252 Mass 450
Tex—Davis v State, 49 S W 2d 805, 120 Tex Cr 330—Thompson v State, 34 S W 2d 250, 116 Tex Cr 137—Sapp v State, 223 S W 159, 87 Tex Cr 606
30 C J p 187 note 38.

burden on accused[89] So also the business and social relations between accused and deceased, not only just about the time of the murder, but also for a reasonable time before, are competent evidence as having a direct tendency to show the motive of accused to obtain possession of the property of deceased[90] Even transactions subsequent to the homicide have been held admissible where they are part of a plan to gain a pecuniary advantage from the death of the victim[91]

Rebuttal Competent evidence in rebuttal of the state's theory is admissible for the defense.[92]

§ 233. —— Robbery

Where the prosecution's contention is that the homicide was committed for the purpose of robbery, any legitimate evidence tending to establish such fact is admissible.

Where the contention of the prosecution is that the homicide was committed for the purpose of robbery, any legitimate evidence tending to establish such fact is admissible,[93] as, for example, that de-

Evidence of particular facts

(1) Where state relied on theory that wife's motive in killing husband was to obtain undisputed possession of money in savings account deposited in bank under wife's maiden name, admission of evidence of amount of savings account was not error—Britton v State, 70 P 2d 828, 62 Okl Cr 89

(2) In murder prosecution based on the theory that accused and R acted together with purpose of appropriating deceased's property, evidence as to a half interest in deceased's property purchased by R and which he did not pay for, that he took it into his possession after the homicide, and that after the homicide accused claimed to have purchased an interest also, and that a horse which was part of deceased's property was thereafter in possession of accused's relatives, no explanation having been given therefor, was admissible, as were the acts of accused and R relative to the property and to each other—Simpson v State, 264 S W 273, 97 Tex Cr 57

(3) In prosecution of husband for murder of wife permitting witness to testify as to what witness told husband as to wife's intention to get divorce was not error, irrespective of whether wife really had such intention, since such testimony would tend to show husband's fear of losing property by divorce, as motive for murder—Powell v State, 175 So 213, 131 Fla 254

(4) In prosecution for murder, where alleged motive was to obtain preferred stock, in effect a bond, of a corporation of which accused was manager and principal holder of common stock, admitting evidence of insolvency of corporation was proper—State v Uhls, 247 P 1050, 121 Kan 377 rehearing denied 249 P 597 121 Kan 587

Declarations of deceased

In prosecution for murder in which motive relied on was to obtain preferred stock held by deceased, testimony of witness that deceased had stated that he owned certain amount of such stock was properly admitted—State v Uhls, **supra.**

89. N Y—People v Sutherland, 48 N E 518, 154 N Y 345
30 C J p 187 note 39

90. Neb—Clough v State, 7 Neb 320

91. Mich—People v Gerndt 222 N W 185 190, 244 Mich 622, citing **Corpus Juris.**
30 C J p 187 note 38 [a] (2)

Particular transactions

Acts of husband charged with murdering wife to obtain property of wife and her foster mother in changing bank accounts and transferring property subsequent to wife' death, were admissible—People v Gerndt 222 N W 185, 244 Mich 622

92. Evidence held inadmissible

Rejected testimony that witness, on day before homicide saw accused and another in Ford coupé was not rebuttal of theory that accused killed deceased to get his car, and testimony as to statements of accused before homicide as to Ford coupé was properly rejected, in absence of showing of connection between such coupé and one for possession of which state contended accused killed deceased—Smith v State 285 S W 1094 104 Tex Cr 567

93 Ala—Jarvis v State, 126 So 127 220 Ala 501- Thomas v State 111 So 212, 215 Ala 497
Idaho—State v Reding, 13 P 2d 253 52 Idaho 260
Ky—Keller v Commonwealth, 20 S W 2d 998, 230 Ky 815—Edmonds v Commonwealth 20 S W 2d 715 230 Ky 725
N H—State v Hause, 130 A 743, 82 N H 133
N J—State v McNamara, 184 A 797, 116 N J Law 197 dissenting opinion 185 A 479, 116 N J Law 497 certiorari denied McNamara v State of New Jersey, 57 S Ct 32 299 U S 568 81 L Ed 419
Pa—Commonwealth v Flori, 150 A 290, 300 Pa 125
S C—State v Blanden 180 S E 681, 177 S C 1
Tex—Lee v State, Cr., 161 S W 2d 290—Cantrell v State, 86 S W 2d 777 129 Tex Cr 240—Maxey v State, 285 S W 617, 104 Tex Cr 661
Wash—State v Evans, 258 P 845, 145 Wash 4
30 C J p 187 note 41
Admissibility of evidence as to possession of money of deceased generally see infra § 250

Financial condition of accused

(1) Testimony that one accused of murder in commission of robbery was without money immediately before killing and that he had considerable money short time thereafter, is admissible to show motive
Iowa—State v Swank, 296 N W 219, 229 Iowa 1123
Tex—Laves v State, 113 S W 2d 909, 133 Tex Cr 627
W Va—State v Williams, 127 S E 320, 98 W Va 458

(2) In trial for murder of one claimed to have been robbed by accused evidence that accused failed to pay taxes on his home for several years before murder had delinquent water bill at time of crime, and placed mortgage on home after homicide, was incompetent to show motive—Hodgins v State, 190 So 875, 139 Fla 226 124 A L R 450

That witness found deceased's pocketbook at scene of homicide is admissible to establish robbery as probable motive—Nichols v State, 298 P 886, 50 Okl Cr 409

Declarations of accused

Testimony that two or three weeks before homicide accused told witness that he was going to have some money, and knew that stingy man had two thousand five hundred dollars, not naming him was competent to show motive, and not too remote—Huddleston v Commonwealth, 64 S W 2d 450, 251 Ky 172

Accused's need for money

In homicide prosecution, testimony that accused gambled, offered to show accused's need for money, and, therefore, the motive for killing was admissible—Moss v People, 18 P 2d 316 92 Colo 88

Other robberies

(1) In prosecution for murder in the perpetration of robbery testimony that witness and accused had committed other robberies a short time before killing was properly admitted to show motive was to rob

ceased had the reputation of being a wealthy man,[94] at least when accused had knowledge thereof,[95] that deceased usually had money in his possession[96] on particular days of each week,[97] that deceased to the knowledge or opportunity of knowledge of accused had money or valuables on his person or in his house shortly before the homicide,[98] or that, after the homicide, deceased had on his person less money than shortly before.[99] Evidence of prior possession of money or valuables is admissible although no part thereof is traced into accused's possession,[1] or even though knowledge of the fact of possession by de-

victim—Swain v State, 15 N E 2d 381, 214 Ind 412

(2) In prosecution for murder of plant employee, evidence of accused's association with another in commission of series of holdups in vicinity of fatal shooting was admissible as tending to show motive for killing of employee—Cooper v State, 184 S E 716, 182 Ga 42, 104 A L R 1309

Excluding evidence of other motives

Where only motive involved in murder prosecution is robbery of deceased anything bearing on robbery as motive is admissible, but evidence of other motives is not admissible—People v Perkins, 66 P 2d 631, 8 Cal 2d 502

Evidence held inadmissible

Admission of testimony, in trial for murder in committing robbery as to production of letter, thanking accused for money sent at court of inquiry held in accused's absence, was prejudicial error—Luck v Commonwealth, 1 S W 2d 961, 222 Ky 546

94. Ind—Musser v State, 61 N E 1, 157 Ind 123

95 Tex—Lancaster v State, Cr., 31 S W 515

96 Ala—McDonald v State, 1 So 2d 658, 241 Ala 172
Del—State v Long, 123 A 350, 2 W W Harr 380
Ga—Westberry v State, 161 S E 905, 175 Ga 115—Thompson v State, 141 S E 301, 166 Ga 758—Thompson v State, 143 S E 896, 166 Ga 512
30 C J p 187 note 44.

Remoteness

Where the state relied on robbery as the motive evidence that deceased in May, preceding the homicide in September, was in possession of a considerable sum of money which he was accustomed to carry on his person was relevant to the issue, and not too remote as to require its exclusion—Lovel v State, 218 S W 319, 93 Tex Cr 615

Knowledge of accused necessary

Where state in seeking to show robbery as motive of homicide relies on proof as to the practice of deceased to carry large sums of money on his person, additional proof of accused's knowledge of such practice is necessary, but such evidence may be circumstantial by showing opportunity to know such practice provided practice thus shown is not too remote in time or place to be relevant to proved opportunity and question of motive—Irwin v State 22 S E 2d 499, 68 Ga App 630

97. Custom

(1) Evidence of custom or habit of deceased to secure money from bank on particular day of week, and take it to company offices to pay employees, is admissible to show motive—Commonwealth v Lawrence, 127 A 465, 282 Pa 128

(2) Evidence showing custom of decedent, who was killed on Thursday night, to have large sum of money in his possession on Thursday and Friday of each week was admissible to show he had such sum on night of homicide—State v Beard, 178 S E 242, 207 N C 673

(3) Evidence by deceased's widow as to fact that it was usual for deceased to take home money with him from store on Saturday nights was admissible, as against contention that evidence showed no established or regular custom, extent and regularity or repetition necessary to give act character of custom being matter of fact—State v Hause 130 A 713, 82 N H 133

98 Ala—Vernon v State 196 So 96, 239 Ala 593, certiorari denied Vernon v State of Alabama, 61 S Ct 135, 311 U S 694, 85 L Ed 449, rehearing denied 61 S Ct 390, 311 U S 730, 85 L Ed 475, vacated 61 S Ct 833, 313 U S 540, 85 L Ed 1509, certiorari granted 61 S Ct 833, 313 U S 540, 85 L Ed 1509, reversed on other grounds 61 S Ct 1092, 313 U S 547, 85 L Ed 1513
Colo—Moss v People, 18 P 2d 316, 92 Colo 88
Ga—Irwin v State, 22 S E 2d 499, 68 Ga App 630
Mo—State v Shepard, 67 S W 2d 91, 334 Mo 423
N J—State v Ciemiengo, 185 A 65, 116 N J Law 402
Pa—Commonwealth v Lawrence, 127 A 465, 282 Pa 128
Tex—Cobb v State, 77 S W 2d 667, 127 Tex Cr 504—Howard v State, 13 S W 2d 80, 111 Tex Cr 205—Bazan v State, 12 S W 2d 788, 111 Tex Cr 320—Moore v State, 296 S W 308, 107 Tex Cr 287—Maxey v State, 285 S W 617, 104 Tex Cr 661
W Va—State v Sauls, 116 S E 391, 93 W Va 276
30 C J p 187 note 45

Testimony that deceased sold cotton just before he was killed and cashed many checks is admissible—Thompson v State, 144 S E 301, 166 Ga 758

Remoteness

(1) It is proper to prove that deceased had money in his possession shortly before the homicide to show that the motive of the crime was robbery, how far back the inquiry should go being dependent on the character and business habits of deceased and other circumstances which would make it probable that he still had the money at the time of his death and evidence that deceased had money three weeks before his death was therefore admissible on the state's offer to show that it was not his habit to spend much money—State v Long, Del, 123 A 350, 2 W W Harr 380

(2) Evidence showing money in possession of deceased on day before the homicide was admissible as against objection that such evidence was too remote—State v Dorland, 89 P 2d 595, 161 Or 403

Payments made to deceased

(1) There being evidence that one motive for homicide was robbery it was not error to permit husband of decedent to testify that a few days before homicide he had given her forty dollars and fact that she had paid out money on household expenses afterward did not render it irrelevant and immaterial—Eugee v State, 126 S E 471, 159 Ga 604

(2) Testimony as to paying deceased monthly is inadmissible on issue of robbery as motive for murder until it is shown that accused had knowledge thereof—McCoy v State 294 S W 573, 106 Tex Cr 593

(3) Witness' testimony that he paid deceased some money before killing is inadmissible to show motive in absence of showing that accused who was not present, knew of payment or that deceased had such money at or about time of tragedy—State v Leib, 201 N W 29, 198 Iowa 1315

99 Ala—Johnson v State, 102 So 897, 212 Ala 464
Iowa—State v Swank, 296 N W 219, 229 Iowa 1123
Mo—State v Shepard, 67 S W 2d 91, 334 Mo 423
N C—State v Atwood, 97 S E 12, 176 N C 704
Or—State v Dorland, 89 P 2d 595, 161 Or 403

1. Ark—Houston v State, 264 S W 869, 165 Ark 294

ceased is not brought home to accused [2] Testimony that deceased had money of the same character and denomination as that in the possession of accused after the crime has been held relevant [3] It may be shown that accused was endeavoring to ascertain what money deceased had and was purposing to get it by devious ways [4] A previous proposal by accused to undertake a robbery has been held admissible,[5] but evidence of subsequent suggestions by accused as to a bank robbery, not connected with the crime under investigation, has been held inadmissible to show that such crime was committed by him to obtain money [6] Where it is shown that deceased was possessed of a considerable sum, payments by the prisoner before, as well as after, the homicide may be shown [7]

Rebuttal Evidence in rebuttal of the state's theory is admissible for the defense [8] The exclusion of evidence that accused was in comfortable financial circumstances has, however, been held not prejudicial to accused [9] It is not permissible to prove that deceased had no funds at a period long prior to the homicide,[10] and testimony as to the largest sum deceased ever had in a bank is incompetent to disprove the motive of robbery [11] A declaration by accused before the homicide to show his possession of money at that time is inadmissible [12]

§ 234. —— Obtainment of Property by Grant, Devise, or Descent

Evidence that accused was an heir of deceased or believed, although erroneously, that title would be cast to his advantage in the event he survived the victim, and of the forgery of papers vesting property in accused on the death of deceased is admissible on the question of motive

Evidence of the fact that accused was an heir of deceased and would come into the possession of property on his death is admissible as showing a motive for the commission of the crime,[13] and the value of such property known to accused before the homicide,[14] or accused's knowledge or information as to the existence of such property[15] may be shown, but it is error to allow evidence that accused was in indigent circumstances [16] Evidence of accused's belief that the title to property would be cast to his advantage if he survived the owner by reason of his homicidal act, is admissible,[17] even though the belief was erroneous [18] Evidence of a will made by decedent in favor of accused is admissible,[19] provided the latter had knowledge thereof prior to the homicide [20] It may be shown that deceased, to the knowledge of accused, had delivered a deed in escrow to be delivered to a relative of accused at the death of deceased [21] Accused may show in rebuttal declarations of deceased to estab-

Neb—Fouse v State, 119 N W 478, 83 Neb 258
Tex—Ramirez v State, Cr, 164 S W 2d 1020

2. Cal—People v Rongo, 145 P 1017, 169 Cal 71
30 C J p 187 note 48

3. Ky—Edmonds v Commonwealth, 20 S W 2d 745, 230 Ky 725

Remoteness
In murder prosecution admission of testimony as to withdrawals of gold made by deceased from bank some five years before the homicide, to substantiate prosecution's theory that ten dollar gold piece used by accused to purchase certain articles was taken by him from deceased, was not error as against contention that such evidence was too remote—People v Green, 87 P 2d 821, 13 Cal 2d 37

4. Ala—Byers v State, 16 So 716, 105 Ala 31

5. Ga—Stafford v State, 55 Ga 591

6. Ill—People v Pfanschmidt, 104 N E 804, 262 Ill 411, Ann Cas 1915 A 1171
30 C J p 188 note 51.

7. Neb—Clough v State, 7 Neb 320

8. Tex—Lancaster v State, Cr, 31 S W 515
30 C J p 188 note 53

Bank deposits by decedent
Where on the state's theory of robbery, it is permitted to show that shortly before the homicide deceased had money on his person in a considerable amount which was not found on him immediately after the homicide it was error to reject evidence offered by accused showing or tending to show, that deceased on the evening of the same day had deposited in bank to his credit a considerable amount of currency and checks thereby to account for the absence of the money from his person after the homicide—State v Sauls, 116 S E 391, 93 W Va 276

9 Idaho—State v Allen, 131 P. 1112, 23 Idaho 772

Evidence irrelevant
Testimony that accused had interest in bank account was properly rejected as irrelevant, where state made no effort to show that accused was without money before the homicide or did not attempt to identify money found on the person of accused as that of deceased Graham v State, 69 S W 2d 73, 126 Tex Cr 531

10. Tex—Lancaster v State, 35 S W 165, 36 Tex Cr 16

11. Wash—State v Coella, 36 P 474, 8 Wash 512

12 Mass—Commonwealth v Sturtivant, 117 Mass 122, 19 Am R 401

13 Tex—Hext v State, 271 S W 81, 100 Tex Cr 24
30 C J p 188 note 58

14 Cal—People v Weber, 86 P 671, 149 Cal 325
Ind—Davidson v State 34 N E 972, 135 Ind 254

15 Ga—Johnson v State 57 S E 84, 128 Ga 71

Inquiries by accused as to deceased's financial condition may be shown—Commonwealth v Gettigan, 118 N E 113, 252 Mass 450

16 Ga—Johnson v State, 57 S E 84, 128 Ga 71

17. Ala—Gallant v State, 52 So 739, 167 Ala 60
Mass—Commonwealth v Gettigan, 118 N E 113, 252 Mass 450

18. Ala—Gallant v State, 52 So 739, 167 Ala 60

19 N Y—People v Soper, 153 N E 413, 243 N Y 320
30 C J p 188 note 64

20. Cal—People v Brown, 253 P. 735, 81 Cal App 226
30 C J p 188 note 65

21. Mass—Commonwealth v Dorr, 103 N E 902, 216 Mass 314

lish a gift to him of the property of which he was found in possession [22]

The forgery of papers vesting property in accused on the death of decedent may be shown.[23] On a trial for homicide by an accomplice of accused in pursuance of a conspiracy, evidence that a will of deceased, in which accused is named as a residuary legatee and devisee, and in which the accomplice is not named as a beneficiary, is a forgery is material as tending to show absence of motive in the accomplice to commit the murder on his own account [24]

§ 235. —— Obtaining of Proceeds of Life Insurance

Evidence tending to show that accused's motive was to obtain the proceeds of policies of insurance on the life of deceased is admissible even where accused is not the beneficiary if he is shown to have had an interest in the collection of the insurance

Evidence tending to show that the motive of accused was to obtain the proceeds of policies of insurance on the life of deceased is admissible [25] So evidence of the existence of such insurance is admissible,[26] although accused must be shown to have had knowledge thereof[27] before the death of de-

22. Pa—Commonwealth v Twitchell, 1 Brewst 551

23. S D—State v Coleman, 98 N W 175, 17 S D 591

24. N Y—People v Ferone, 105 N Y S 448, 120 App Div 323, affirmed 89 N E 454, 196 N Y 522

25. Cal—People v Lisenba, 91 P 2d 569, 14 Cal 2d 403, superseding opinion, 89 P 2d 39, certiorari granted Lisenba v People of State of California 61 S Ct 68, two cases, 311 U S 617 85 L Ed 391, affirmed 61 S Ct 832, two cases, 313 U S 537, 85 L Ed 1507, vacated 61 S Ct 956, two cases, 313 U S 597 85 L Ed 1550, affirmed 62 S Ct 280 314 U S 219, 86 L Ed 166 rehearing denied 62 S Ct 620 two cases 315 U S 826 86 L Ed 1222
D C—Dickerson v U S, 65 F 2d 824 62 App D C 191 certiorari denied 54 S Ct 89, 290 U S 665, 78 L Ed 575
Ga—Johnson v State, 1 S E 2d 639, 188 Ga 771—Powers v State, 157 S E 195, 172 Ga 1—Tanner v State 130 S E 64, 161 Ga 193
Mo—State v Hancock, 104 S W 2d 211, 340 Mo 918
Tex—Black v State, 128 S W 2d 406, 137 Tex Cr 173
30 C J p 188 note 70

Insurance carried by accused

(1) The fact that accused carried heavy insurance on life of deceased is relevant on question of motive
S C—State v Thomas, 156 S E 169, 159 S C 76
Tex—Parks v State, 63 S W 2d 301, 124 Tex Cr 405

(2) In prosecution for murder of daughter on whose life accused carried insurance, evidence that accused carried insurance on life of widow whom he had brought to live in his home after death of second wife, and also on life of widow's mother, whose physician had stated that she had come near dying from strychnine poisoning, was competent—State v Smoak, 195 S E 72, 213 N C 79

Insurance applications

(1) In prosecution for murder by poison, wherein accused denied procuring insurance on life of victim payable to himself and contended that insurance was procured by victim, family history of victim which was a part of original application for insurance was admissible—Lambert v State, 174 So 298, 234 Ala 155

(2) In prosecution for murder of accused's wife, insurance agent's testimony that within two years before homicide accused applied for insurance on wife's life was admissible, in view of evidence that accused later obtained through different agent policy on wife's life payable to accused and in force at time of homicide—Beckworth v State, 190 S E 184, 183 Ga 871

(3) Accused's applications for insurance on decedent's life although refused were admissible as showing motive—State v Thomas, 156 S E 169, 159 S C 76

Additional insurance sought by accused

In prosecution of accused for murdering deceased for insurance money by drowning, trial court did not err in admitting evidence that accused had negotiated for additional life insurance on the life of deceased for the purpose of showing motive, where accused had no insurable interest in deceased, and in applying for the insurance made himself the beneficiary and falsely described himself as deceased's nephew Commonwealth v Petrillo, 19 A 2d 288, 341 Pa 209

Evidence of accused's first wife's death from poisoning, and of insurance of her life with accused as beneficiary, was admissible in trial for murder of his second wife, killed and insured in same manner, in order to show his motive—People v Gosden, 56 P 2d 211, 6 Cal 2d 14

Financial condition of accused

(1) In prosecution of beneficiary for murder of insured, evidence that accused was in embarrassed financial circumstances is admissible in some jurisdictions on the question of motive
S C—State v Thomas, 156 S E 169, 159 S C 76
Tex—Parks v State, 63 S W 2d 301, 124 Tex Cr 405

(2) But in other jurisdictions it has been held that evidence of accused's financial condition is inadmissible—Johnson v State, 57 S E 81, 128 Ga 71

(3) Under the latter rule, however, evidence that accused had procured loans by false pretenses which were settled by payment of insurance proceeds is not inadmissible as relating to accused's financial condition—Williams v State, 170 S E 281, 177 Ga 391

26. Tex—Hext v State, 271 S W 81 100 Tex Cr 24
30 C J p 189 note 71

Policy admissible

(1) The insurance policy is generally admissible
Ariz—Turley v State, 59 P 2d 312, 48 Ariz 61
Ga—Canady v State, 154 S E 332 171 Ga 11
N M—State v Wickman, 43 P 2d 933, 39 N M 198
Okl—Scott v State 57 P 2d 639, 59 Okl Cr 231
Tex—Reese v State 151 S W 2d 828, 142 Tex Cr 254
Wash—State v Leuch, 88 P 2d 440, 198 Wash 331

(2) In a prosecution of a wife for murdering her husband insurance policies on his life payable to her and found in her custody were admissible to show motive even though they were not shown to be in force, it not appearing that they were not in force—Williams v State, 119 S E 611, 156 Ga 285

Certificate admissible

Certificates of group insurance on life of deceased, one of which named accused as beneficiary, were admissible over objection that certificates were not complete contracts without master policy, since statutory rule applied in civil cases where policy constitutes cause of action is not applicable in criminal cases where sole purpose is to show motive—Jones v State, 185 S E 571, 182 Ga 378

27. Wash—State v Leuch, 88 P 2d 440, 198 Wash 331
30 C J p 189 note 72.

cedent[28] Evidence of such knowledge on the part of accused is admissible[29] Where there is evidence tending to show an interest in accused in the collection of insurance payable to another, the existence of such insurance may be shown,[30] but otherwise evidence is not admissible as to insurance on the life of deceased unless accused is the beneficiary or believed himself to be the beneficiary[31] References by accused to insurance on the life of deceased may be shown as indicating his impression or belief and possible motive[32] The payment of premiums by accused[33] and the financial inability of deceased to carry the insurance[34] may be shown It may also be shown that accused made proof of the death shortly after the killing[35] Evidence as to the details of procuring and collecting the proceeds of insurance policies is inadmissible[36]

Where the contention of the prosecution is that accused killed deceased with a view of causing the body of deceased to be mistaken for that of accused, evidence that accused had taken out insurance on his own life payable to a member of his family[37] and that he was in an embarrassed financial condition[38] is admissible on the question of motive.

Rebuttal Competent evidence in rebuttal of the state's theory is admissible for the defense[39] Thus it may be shown in rebuttal that accused knew that the insurance policies were of slight value[40] Evidence of insurance procured by accused in favor of deceased, however, is not admissible in rebuttal of evidence of such motive[41]

§ 236. Threats by Accused

a In general
b Indefinite, impersonal, and conditional threats
c Threats against class

a. In General

Evidence of previous threats by the accused to kill the deceased ordinarily is admissible

Previous threats by accused to kill deceased may be shown,[42] for example, for the purpose of identi-

Knowledge of co-conspirator

In prosecution of wife for murder of husband on theory that wife and third person were acting in concert in perpetration of crime, there was no error in admitting evidence regarding insurance taken out by third person on husband's life notwithstanding absence of showing that wife knew of insurance until after husband's death, where evidence was admitted in connection with evidence that wife made no protest objection or comment on learning that third person had taken out insurance —Commonwealth v Giacobbe, 19 A 2d 71 341 Pa 187

28 Mich—People v Auerbach 141 N W 869 176 Mich 23

29 Ala—Burton v State, 69 So 913, 191 Ala 2
Mich—People v Auerbach, 141 N W 869, 176 Mich 23

30. Ala—Price v State, 65 S W 308, 10 Ala App 67

Necessity for showing how interest acquired

"It is not essential that it be shown just how he came to have an interest in the insurance money If there be evidence tending to show he did have an interest in it, evidence is proper to show the existence of such fund"—Turner v State, 140 So 447, 448, 224 Ala 5 granting certiorari and remanding cause 140 So 445 25 Ala App 21, certiorari denied 140 So 448, 224 Ala 345 Conformed to 140 So 445, 25 Ala App 21

Where evidence showed conspiracy and illicit relationship between accused and the wife of deceased, the latter's life insurance policies naming the wife as beneficiary were properly admitted—People v Dorf, 178 N E 476 346 Ill 295

Policy payable to accused's wife

In prosecution of boy's stepfather for murder of boy, evidence relating to insurance policies on boy's life was admissible, although policies were payable to boy's mother who lived with stepfather, on showing that stepfather knew of the policies —Johnson v State 197 S E 786, 186 Ga 324

31. Ga—Johnson v State, 57 S E 84 128 Ga 71
Ill—People v Weitzman 195 N E 711 362 Ill 11
Tex—Black v State, 128 S W 2d 406, 137 Tex Cr 173
30 C J p 189 note 76

32. Ga—Johnson v State, 60 S E 158, 130 Ga 22

33 N C—State v French, 166 S E 747, 203 N C 632

Advance payments

In prosecution for murder of daughter, testimony that insurance carried by accused on daughter's life was paid two weeks farther in advance than any other policy which accused held in same company was competent—State v Smoak, 195 S E 72, 213 N C 79.

34. Evidence of particular facts held admissible

(1) Testimony that deceased lived in a small, meagerly furnished box house and was in very poor circumstances was competent in determining question of conspiracy to murder deceased to collect proceeds of life policy, as tending to show that deceased was not financially able to carry insurance—State v Mansker 98 S W 2d 666, 339 Mo 913

(2) Testimony of parents as to whether their boy had ever had sixty dollars was admissible in prosecution for assault to murder boy to procure insurance, where state claimed accused paid for insurance— Cotton v State 19 S W 2d 319, 113 Tex Cr 188

35. Ala—Spicer v State, 65 So 972, 188 Ala 9

36. Ala—Spicer v State, supra

37. Or—State v Brumfield, 209 P 120, 104 Or 506

38. Mass—Commonwealth v Di Stasio, 1 N E 2d 189 294 Mass 273

39. Evidence held admissible to refute charge of procuration of insurance on husband to divide proceeds after murdering him—State v Condit, 270 S W 286, 307 Mo 393

40 Neb—Jahnke v State, 94 N W 158 104 N W 154, 68 Neb 154

41. Ga—Walker v State, 73 S E 368, 137 Ga 398

42. Ala—Jackson v State, 96 So 206 209 Ala 376—Buffalow v State 143 So 907, 25 Ala App 227 certiorari denied 143 So 908 225 Ala 513—Gladden v State, 125 So 398 23 Ala App 416—Valentine v State, 98 So 483, 19 Ala App 510
Ky—Dean v Commonwealth, 83 S W 2d 887, 260 Ky 97
La—State v. Davis, 97 So 419, 154 La 295.

fying accused as the person who did the killing,[43] or of determining whether the blow given deceased was intentional or accidental,[44] or whether accused or deceased was the aggressor on the occasion of the killing,[45] or to show malice, as discussed supra § 206, or motive, as discussed supra § 228 The fact that the threats were made a considerable time before the homicide generally affects their weight and not their admissibility,[46] but it has been held that a threat made a considerable time before the homicide may be inadmissible on the ground of remoteness[47] A threatening anonymous letter not connected with accused is inadmissible[48] Where evidence of threats is admissible, it is proper to give the names of those present when they were made[49]

Evidence of threats is subject to rebuttal by accused by disproving or explaining the threats[50] or by showing reconciliation,[51] but it is not admissible to show in rebuttal that accused is a man of violent passions and in the habit of using threatening language,[52] and it is not error to exclude an explanation which is already in evidence so far as relevant[53] Where accused unequivocally denies threats attributed to him, it is not error to refuse to permit him to state that if he used such expression, he had no reference to deceased[54] The state may in turn reply to accused's evidence in rebuttal[55]

Threats against life of president of United States In a prosecution for knowingly and willfully threatening the life of the president of the United States, evidence of other statements and instances showing the sympathy of accused with the cause of a country with which the United States is at war is admissible to show the willful and serious nature of the threats charged[56]

b. Indefinite, Impersonal, and Conditional Threats

Indefinite, impersonal, and conditional threats are admissible when they are shown to refer to the deceased

A threat to kill or injure someone, not definitely designated, is admissible in evidence[57] when other facts adduced give individuation to it so that, as it is generally held, the jury may infer that they were made against deceased,[58] but there is authority requiring it to appear to a reasonable certainty that accused directed the threat against deceased, and holding, if the evidence leaves that matter in doubt, that the doubt must be resolved in accused's

Mo—State v Millsap, 276 S W 625, 310 Mo 500

Tex - Easley v State, 44 S W 2d 385, 119 Tex Cr 408—Dover v State, 277 S W 675 102 Tex Cr 113 Sayles v State, 275 S W 831, 101 Tex Cr 333

30 C J p 189 note 83

Hostile expressions not amounting to threats see infra § 243

Time, place, and circumstances

(1) The particular time or place and circumstances of making of threats by accused against deceased need not be shown—Shelton v State, 117 So 8, 217 Ala 465

(2) But the manner in which the threats were made may be shown—Martin v State, 295 S W 1098, 107 Tex Cr 151

(3) So also the time may be shown and for this purpose a bond furnished by accused on a jointist charge is admissible to show the date he was released from custody to determine the time of making the threats against his wife the testimony of witnesses being that they were made about the next day after his release—State v Cook, 217 P 42, 126 Wash 81

43 Ga—Aycock v State, 4 S E 2d 221, 188 Ga 550- Burden v State 186 S E 555 182 Ga 533

30 C J p 189 note 84

Inadmissible as substantive evidence

(1) Previous threats made by accused against deceased are inadmissible as substantive evidence that accused committed the acts constituting the crime charged—Holman v Commonwealth, 165 S W 2d 167, 291 Ky 622—Decker v Commonwealth, 128 S W 2d 600 278 Ky 145—Evans v Commonwealth, 299 S W 553, 221 Ky 648

(2) As appears infra § 321, the guilt of accused cannot be established by mere threats

44. Cal—People v Palassou, 111 P 109, 14 Cal App 123

45. Ky—Decker v Commonwealth, 128 S W 2d 600, 278 Ky 145—Hensley v Commonwealth, 95 S W 2d 564, 264 Ky 718—Evans v Commonwealth, 299 S W 553, 221 Ky 648

La - State v Wooten, 67 So 366, 136 La 560

Threats of deceased as bearing on self-defense generally see infra § 276

46. Ala—Shelton v State 117 So 8, 217 Ala 465

Ga—Shafer v State, 13 S E 2d 798 191 Ga 722—Burden v State, 186 S E 555 182 Ga 533

Ky—Conn v Commonwealth, 53 S W 2d 931, 935, 245 Ky 583, quoting **Corpus Juris.**

La—State v Davis, 97 So 449, 154 La 295

N C—State v Hudson, 10 S E 2d 730, 218 N C 219

30 C J p 189 note 89

47 U S—Stevenson v U S, Tex, 86 F 106 29 C C A 600

30 C J p 190 note 90

48 Ala—Karr v State 14 So 851 100 Ala 4 46 Am S R 17

49 Ala—Bigham v State, 82 So 192 203 Ala 162

50 Iowa—State v Cross, 26 N W 62 68 Iowa 180

30 C J p 190 note 93

51. Miss—Petty v State 35 So 213, 83 Miss 260

52 N C—State v Duncan, 28 N C 236

53 Ala McClain v State, 62 So 211, 182 Ala 67

30 C J p 190 note 96

54 Mo—State v Harlan, 32 S W 997, 130 Mo 381

55. Iowa—State v Cross, 26 N W 62 68 Iowa 180

56. U S—U S v Reid, D C La, 49 F Supp 313 affirmed, C C A, Reid v U S 136 F 2d 476

57. Ky—Benge v Commonwealth, 94 S W 2d 38, 41, 264 Ky 28, citing **Corpus Juris.**

30 C J p 190 note 99

58 Ky—Evans v Commonwealth, 299 S W 553, 221 Ky 648

N C—State v Hudson 10 S E 2d 730 218 N C 219—State v Casey 159 S E 337, 348, 201 N C. 185, quoting **Corpus Juris.**

30 C J. p 190 note 1.

favor and the threat excluded.[59] General threats not shown to have any reference to deceased cannot be proved.[60] Words uttered under such circumstances as prima facie to import a threat are admissible.[61] The fact that the threat made was conditional[62] or was immediately retracted[63] does not affect its admissibility, and the meaning of a condition may be shown, if it does not appear from the bare language of the threat.[64] Evidence is admissible to show that threats not naming any person applied to deceased,[65] but the opinion of a witness that threats were directed against deceased is inadmissible.[66]

c. Threats against Class

Threats made by the accused against a class to which the victim belonged are admissible

Threats made by accused against a class to which deceased belonged, and prima facie referable to deceased, although his name is not mentioned, are admissible against accused.[67] Thus threats against peace officers,[68] persons of a certain nationality,[69] the members of a family,[70] or any persons visiting a certain woman[71] are admissible, where deceased was a member of the class referred to.

§ 237. Threats by Person Killed or Assaulted

In general, threats by the deceased against the accused, unaccompanied by overt acts or not made as part of the res gestæ, are inadmissible

Ordinarily, in the absence of overt acts, threats on the part of deceased against accused[72] or threats of a general nature[73] are inadmissible, but threats by deceased against accused are admissible as part of the res gestæ when they were made at the time of the act which they are supposed to characterize, and so harmonize with it as to constitute one transaction,[74] provided such threats refer to accused.[75] Whether such threats were communicated to accused,[76] or whether the threats were seriously made or not, if deceased did that which justified a reasonable belief on accused's part that deceased intended to execute the threats,[77] is immaterial. Such threats are also in explanation of a statement of accused, shown by the prosecution, that he would have to kill deceased.[78] It has also been held that where the evidence of the killing is wholly circumstantial, threats of deceased, even if unknown to accused, are admissible in evidence as tending to show the inherent probabilities of the transaction irrespective of any question of self-defense.[79] Threats of deceased may also be admissible to show

59 Idaho—State v. Rogers, 163 P. 912, 30 Idaho 259

60 N.C.—State v. Hudson, 10 S.E. 2d 730, 218 N.C. 219
30 C.J. p. 190 note 3

61. Tex.—White v. State, 25 S.W. 781, 32 Tex.Cr. 625
30 C.J. p. 190 note 4

62 La.—State v. Breedlove, 7 So. 2d 921, 199 La. 965
Tex.—Parrish v. State, 114 S.W.2d 559, 134 Tex.Cr. 187
30 C.J. p. 191 note 5

63 Ala.—Cribbs v. State, 6 So. 109, 86 Ala. 613

64. Ala.—Smith v. State, 62 So. 864, 183 Ala. 10

65 Tex.—Parker v. State, 201 S.W. 173, 83 Tex.Cr. 77

66. Ky.—Johnson v. Commonwealth, 9 Bush 224

67. Ala.—King v. State, 96 So. 636, 19 Ala.App. 153, certiorari denied Ex parte King, 96 So. 639, 209 Ala. 146
La.—State v. Dunn, 109 So. 56, 71, 161 La. 532, citing **Corpus Juris**, and error dismissed Dunn v. State of Louisiana, 47 S.Ct. 344, 273 U.S. 656, 714, 71 L.Ed. 825
Mo.—State v. Markel, 77 S.W.2d 112, 111 336 Mo. 129, citing **Corpus Juris**
N.C.—State v. Casey, 168 S.E. 512, 513, 204 N.C. 411, quoting **Corpus Juris**—State v. Casey, 159 S.E. 337, 338, 201 N.C. 185, quoting **Corpus Juris**
Tex.—Parrish v. State, 114 S.W.2d 559, 134 Tex.Cr. 187
30 C.J. p. 191 note 10

68. Ga.—Shafer v. State, 13 S.E.2d 798, 191 Ga. 727
Pa.—Commonwealth v. Luccitti, 115 A. 85, 295 Pa. 190
Tex.—Martin v. State, 295 S.W. 1098, 107 Tex.Cr. 151
30 C.J. p. 191 note 11

69. Tex.—Mathis v. State, 28 S.W. 817, 34 Tex.Cr. 39.—Miller v. State, 21 S.W. 925, 31 Tex.Cr. 609, 37 Am.St.R. 836

70 Cal.—People v. Richardson, 73 P.2d 610, 23 Cal.App.2d 428
Ga.—Burden v. State, 186 S.E. 555, 182 Ga. 533
30 C.J. p. 191 note 13

71. Tex.—Mathis v. State, 28 S.W. 817, 34 Tex.Cr. 39
30 C.J. p. 191 note 14

72. Cal.—People v. Campbell, 59 Cal. 243, 13 Am.R. 257
30 C.J. p. 191 note 16
Admissibility of threats by victim against accused on issue of self-defense see infra § 276
Necessity of claim of self defense see infra § 276
Statutory rule
Under the statutes in some jurisdictions evidence of deceased's threats against accused is inadmissible in the absence of proof of hostile demonstration or overt act on the part of deceased.—State v. Carter, 1 So.2d 62, 197 La. 155
Evidence held inadmissible
Evidence of deceased's threats against accused was properly excluded before assertion of self-defense claim where apparently uncommunicated to accused and not corroborating communicated threats.—State v. Guptill, 137 A. 400, 126 Me. 239

73. Ala.—Pippin v. State, 73 So. 310, 197 Ala. 613.—Bullington v. State, 69 So. 319, 13 Ala.App. 61

74. Ala.—Burton v. State, 22 So. 585, 115 Ala. 1
30 C.J. p. 191 note 18

75. Ala.—King v. State, 7 So. 750, 89 Ala. 146

76. Fla.—Garner v. State, 9 So. 835, 28 Fla. 113, 29 Am.St.R. 242
Miss.—Gibson v. State, 16 So. 298

77. Tex.—Wilson v. State, 18 Tex.App. 576

78. La.—State v. Pruett, 21 So. 842, 49 La.Ann. 283

79. N.C.—State v. Baldwin, 71 S.E. 212, 155 N.C. 491, Ann.Cas.1912C 172
30 C.J. p. 191 note 23

who was the aggressor,[80] or to show motive,[81] state of mind,[82] or malice, as considered supra § 207 The prosecution may introduce evidence tending to explain threats made by deceased in a manner inconsistent with the color placed thereon by the testimony for accused[83] A vague letter of warning not traced to deceased is inadmissible[84]

§ 238. Threats by or against Third Person

Under certain circumstances threats by or against third persons may be admissible

As a general rule, threats made by accused to kill or injure one person are not admissible in evidence on an indictment charging the murder of another person[85] Such threats are not admissible under circumstances which show no connection with the injury inflicted on deceased,[86] but they are admissible where a sufficient connection is shown[87] or where they are necessarily shown in proving threats against deceased[88]

Threats by deceased against a third person usually are inadmissible[89]

Threats by third persons As appears supra § 220, threats by third persons against deceased are admissible on behalf of accused within certain limitations to show that such third person, and not accused, committed the crime Where the existence of a conspiracy is proved, threats of the co-conspirators with accused are admissible within proper limits[90] Threats made in the presence of accused against deceased may be proved[91] Threats with which accused is not connected and of which he is not shown to have had knowledge are inadmissible[92] Threats by third persons against accused usually are inadmissible,[93] particularly when it does not appear that he knew of them[94] Such threats against accused are inadmissible to show a conspiracy against him as far as deceased was concerned[95]

§ 239. Preparations and Previous Attempts

Evidence tending to show preparation by the accused for the crime or previous attempts by him to kill deceased is admissible

Evidence tending to show preparation by accused for the crime is admissible[96] So a conversation between accused and another tending to show that at the time of the conversation accused contemplated the commission of the crime is admissible,[97] if the time of such conversation is not too remote[98] So also it is usually proper to show that shortly before the killing accused purchased, borrowed, or otherwise possessed himself of the means of committing the crime,[99] or endeavored to make such prepara-

80. Ky —Commonwealth v Girkey, 12 S W 2d 513 240 Ky 382

Effect of admissions by state

Evidence of uncommunicated threats by deceased to kill accused cannot be excluded, when offered to show an intention from which it might be inferred that deceased was the aggressor because the prosecution fails to dispute or even concedes, that deceased attempted to kill accused, as this does not show who the aggressor was, and, moreover, accused is entitled to prove his defense in his own way —Commonwealth v Santos, 119 A 596, 275 Pa 515

81. Ky —Commonwealth v Girkey, 12 S W 2d 513 240 Ky 382

82. Ky —Commonwealth v Girkey, supra

83 Tex - Powers v State, 227 S W 671 88 Tex Cr 457

84. Mo —State v Smith, 222 S W 155

85. Tex —Russell v State, 209 S W 671 84 Tex Cr 245
30 C J p 191 note 26

86. Ga - Helms v State, 76 S E 353 138 Ga 826
30 C J p 191 note 27

87. Ala —Redd v State 165 So 409, 27 Ala App 19
Ky —Chatt v Commonwealth, 103 S W 2d 952, 268 Ky 141
30 C J p 191 note 28

88. Cal —People v Ruha Singh 188 P 987, 182 Cal 457

89. Ala -Kuykendall v State, 87 So 878, 17 Ala App 582, certiorari denied 87 So 882, 205 Ala 265
Tex —Drake v State, 5 Tex App 649

When admissible

Where there was evidence that deceased began combat and was killed by accused in self-defense, evidence that deceased abused cursed, and threatened accused's father the night before about the same matter, was admissible to show deceased's motive or state of mind —Whitsett v State, 117 S E 376 155 Ga 522

90. Ky —Ball v Commonwealth, 7 S W 2d 237, 221 Ky 806
Tex —Bell v State 267 S W 718, 99 Tex Cr 28
Admissibility of acts and declarations of co-conspirators generally see Criminal Law §§ 754–785

91. Ky —Hoffman v Commonwealth 121 S W 690, 134 Ky 726
30 C J p 192 note 33

92. Wash —State v Smith, 197 P 770, 115 Wash 105

93. Colo —Patton v People, 221 P 1086 74 Colo 322

94 Ill —Perteet v People, 70 Ill 171
30 C J p 192 note 35

95 Ky —Holly v Commonwealth 36 S W 532, 18 Ky L 441

96. Ala —Elmore v State, 158 So 771 26 Ala App 290—Daugherty v State 139 So 439 24 Ala App 591
Ill —People v Nusbaum 158 N E 142 326 Ill 518
Ky —Adams v Commonwealth, 120 S W 2d 237, 274 Ky 714
La —State v Smith, 192 So 92, 193 La 665
N H —State v Thorp 171 A 633, 86 N H 501
N J —State v Rusnak 154 A 754, 108 N J Law 84
Or —State v Banks, 32 P 2d 571, 147 Or 157
30 C J p 192 note 38
Preparations showing malice and premeditation see supra § 212

Armed gathering

Testimony in mine union officers' trial for murder of deputy sheriff pursuant to conspiracy that a group of armed men was at station at train time was competent to show preparation for killing Jones v Commonwealth, 60 S W 2d 991 249 Ky 502

97. La - State v Smith 192 So 92, 193 La 665
Mo - State v Saale, 274 S W 393, 308 Mo 573
N J —State v Tomaini, 191 A 870, 118 N J Law 162
30 C J p 192 note 39

98. Mass —Commonwealth v Hersey, 2 Allen 173

99 Ala —Lewis v State, 164 So 92, 231 Ala 211—Frost v State, 142

tion,[1] or obtained information as to how the crime might be committed in the manner in which it apparently was thereafter committed,[2] but the means procured by accused must be sufficiently identified with the means actually employed[3] It is not permissible, when the means of causing death are known, to show that accused procured weapons not so used,[4] and evidence of preparation not connected with accused is inadmissible[5]

Accused ordinarily is permitted to show why he happened to be armed with the weapon with which the crime was committed,[6] or why he happened to purchase poison of the kind which caused deceased's death[7] He is not, however, in some jurisdictions allowed to testify as to his secret motive or purpose,[8] and it has been held that it is not relevant to show that he armed himself because of feeling arising from quarrels with a person other than deceased[9] So also in some states he is entitled to prove remarks made by him at the time the weapon was purchased,[10] while in others he is not[11] Evidence tending to show preparations by accused, before the homicide, for flight is admissible[12]

Previous attempts Evidence of previous attempts by accused to kill deceased is admissible as showing the probability of his having committed the crime in question[13]

§ 240. Antecedent Circumstances

a In general
b Circumstances of conspiracy or concerted action

a. In General

Competent evidence of relevant antecedent circumstances is admissible

In a prosecution for homicide, evidence of connected acts and transactions leading up to, and explanatory of, the killing is admissible[14] Where the

So 427, 225 Ala 232—Enzor v State 135 So 595 24 Ala App 346 certiorari denied 135 So 598, 223 Ala 297 Cunningham v State 118 So 242 22 Ala App 583, certiorari denied 118 So 248, 218 Ala 166
Ark—Decker v State 51 S W 2d 521, 185 Ark 1085
Ga—Powers v State, 157 S E 195 172 Ga 1
Ill—People v Corry 181 N E 603 349 Ill 122 86 A L R 828
Ky—Nash v Commonwealth 42 S W 2d 898 240 Ky 691
La—State v Smith 192 So 92 193 La 665
Okl—Quinn v State 25 P 2d 711, 55 Okl Cr 116
Pa—Commonwealth v Bruno 188 A 320 324 Pa 236
30 C J p 192 note 41
Previous possession of weapon showing ability to commit crime see supra § 214

Remoteness

In prosecution for murder by administering strychnine where accused denied having bought strychnine druggist's evidence in rebuttal that, fourteen months before deceased's death accused had purchased strychnine from druggist was not inadmissible as too remote People v K Nakamaru 29 P 2d 320 136 Cal App 582

1. Ala—Poe v State, 46 So 521, 155 Ala 31
Tex—Bozeman v State, 215 S W 319, 85 Tex Cr 653

2. Mass—Commonwealth v Howard, 94 N E 397, 205 Mass 128

3. Pa—Commonwealth v. Bruno 188 A 320, 324 Pa 236.
30 C J p 193 note 44.

4. Ky—Etherton v Commonwealth 55 S W 2d 313 246 Ky 553
Mo—State v Edwards, 102 S W 520 203 Mo 528

5. **Failure to identify accused as purchaser**
Evidence of hardware dealer that two men came into his store on evening of homicide and asked to buy shells was inadmissible where he could not identify them—State v White 292 S W 411, 316 Mo 576

6. Mo—State v Burns 280 S W 1076 312 Mo 673 44 A L R 848
30 C J p 193 note 46

Arms carried by third person
Evidence that accused's brother alleged to have killed deceased at accused's request, carried revolver for his own protection, was incompetent, where accused knew nothing of revolver—Commonwealth v Prophet, 160 A 597, 307 Pa 122

7. **Evidence that dogs had been destroying chickens** in community about time that accused, according to druggist's testimony, purchased strychnine for stated purpose of poisoning dogs bothering his chickens was admissible in trial for murder by administering strychnine—Pearce v State 147 So 617, 226 Ala 436

8 Ala—Gregory v State, 37 So 259, 140 Ala 16

9. Nev—State v Anderson, 4 Nev 265

10. Tex—Taliaferro v. State 40 Tex 523

11. Mo—State v Holcomb, 86 Mo 371

12. Ala—Teague v State, 25 So 209, 120 Ala 309
30 C J p 193 note 51
Declarations by accused indicating preparation for flight see infra § 243

13. Tex—Anderson v State 202 S W 953 83 Tex Cr 276
30 C J p 193 note 52

14. Ala—Smallwood v State 159 So 699 26 Ala App 360—Pelham v State, 125 So 688 23 Ala App 359—Ex parte Moulton, 98 So 715 210 Ala 656
Ky—Smith v Commonwealth, 288 S W 768 216 Ky 832
Mass—Commonwealth v Sheppard, 48 N E 2d 630, 313 Mass 590, certiorari denied Sheppard v Commonwealth of Massachusetts 63 S Ct 1450 320 U S 213, 87 L Ed —
Okl—Starks v State, 93 P 2d 50, 67 Okl Cr 156
30 C J p 193 note 53

Complete picture
The state is not confined to proof of what occurred at the very time of the killing It is entitled to trace accused's movements within a reasonable period prior to the instant of the crime, in order to present a complete picture of the entire transaction—State v Simborski, 182 A 221, 120 Conn 624

Evidence held admissible
(1) Generally
Ala—Pruitt v State, 168 So 149 232 Ala 121—Boan v State, 143 So 454, 225 Ala 128—Stinson v State 135 So 571, 223 Ala 127—Higdon v State, 143 So 213, 25 Ala App 209—Morris v State 142 So 685, 25 Ala App 175—Spelce v State, 103 So 691, 20 Ala App 112, certiorari denied Ex parte Spelce 103 So 705, 212 Ala 559—Gotcher v. State, 101 So 310, 20 Ala App 207.

evidence as to the commission of the crime is largely circumstantial, the inquiry naturally takes a wide range, and many facts antecedent to the crime, innocent in themselves, may have a bearing on the issues involved[15]

Under the general rule evidence is admissible of matters occurring before the homicide which legitimately tend to show accused's animus toward deceased,[16] or which legitimately tend to explain

Ark.—Spear v State, 44 S W 2d 663, 184 Ark 1047
Cal.—People v Smitherman, App., 135 P 2d 674
Ga.—Lance v State, 142 S E 105, 166 Ga 15
Ind.—Hall v State, 159 N E 420, 199 Ind 592
Ky.—McClain v Commonwealth, 144 S W 2d 816 284 Ky 359—Barton v Commonwealth, 77 S W 2d 397, 257 Ky 23—Elecnor v Commonwealth, 75 S W 2d 1, 255 Ky 526—Poore v Commonwealth, 61 S W 2d 390, 249 Ky 665—Etherton v Commonwealth, 55 S W 2d 343, 246 Ky 553—Cook v Commonwealth 24 S W 2d 269, 232 Ky 613—Browder v Commonwealth, 23 S W 2d 940, 232 Ky 500—Hill v Commonwealth, 23 S W 2d 930 232 Ky 453—Fitzpatrick v Commonwealth, 275 S W 819, 210 Ky 385 Smith v Commonwealth, 268 S W 328, 206 Ky 728—Foure v Commonwealth, 265 S W 113, 205 Ky 62
La.—State v Iles, 9 So 2d 601, 201 La 398—State v Ussery, 152 So 302, 178 La 593—State v Newport 151 So 770, 178 La 459—State v Cullens, 123 So 645, 168 La 976—State v Foster, 114 So 696, 161 La 813
Mass.—Commonwealth v Sacco 151 N E 839, 255 Mass 369
Miss.—Garrett v State, 193 So 152, 187 Miss 441—Floyd v State 148 So 226, 166 Miss 15
Mo.—State v Johnson, 163 S W 2d 780 349 Mo 910—State v Hamilton, 102 S W 2d 612 340 Mo 768—State v Keller 281 S W 960
N J.—State v Weiner, 127 A 582, 101 N J Law 46
N C.—State v Neal 23 S E 2d 911, 222 N C 546—State v Buffkin, 183 S E 543, 209 N C 117
N D.—State v Gummer, 200 N W 20, 51 N D 445
S C.—State v Hester, 134 S E 885 137 S C 145—State v Bigham, 131 S E 603, 133 S C 491
Tex.—Stapp v State 117 S W 2d 256 140 Tex Cr 669—Crabtree v State, 127 S W 2d 906, 137 Tex Cr 63—Rylee v State, 117 S W 2d 85, 135 Tex Cr 87—Downey v State, 86 S W 2d 1084, 129 Tex Cr 282—May v State, 83 S W 2d 338 129 Tex Cr 2—Wilson v State, 79 S W 2d 852, 128 Tex Cr 175—Burkhart v State, 74 S W 2d 692 127 Tex Cr 1—Langford v State, 63 S W 2d 1027, 124 Tex Cr 473—McBride v State, 51 S W 2d 385, 121 Tex Cr 409—Chrvar v State, 4 S W 2d 47, 109 Tex Cr 283—Davis v. State, 279 S W 275, 102 Tex Cr 608—Dover v State, 277 S W 675, 102 Tex Cr 113—Rueda v State, 277 S W 116, 101 Tex Cr 651—Stevens v State, 273 S W 586, 100 Tex Cr 438—Ballew v State, 260 S W 1045, 97 Tex Cr 325
Va.—Compton v Commonwealth, 175 S E 879, 163 Va 999
Wash.—State v Davis, 108 P 2d 641, 6 Wash 2d 696

(2) As to conduct of accused and his companion from time of their escape from the jail.—State v Godwin, 3 S E 2d 347, 216 N C 49

(3) As to movements of accused preceding homicide
Iowa.—State v Williams, 192 N W 901, 195 Iowa 785
Kan.—State v Criger, 98 P 2d 133 151 Kan 176

(4) That accused had taken drink of whisky shortly before killing.—Hatfield v Commonwealth, 20 S W 2d 461, 230 Ky 630

(5) That accused requested witness to participate in the robbery of deceased.—Knight v State, 110 S W 2d 575, 133 Tex Cr 291

(6) That accused threw gun in witness' face and made him leave car just before killing.—Bass v State, 122 So 45, 219 Ala 282

(7) That two days before attempted robbery accused questioned witness about functioning of state police and town police in vicinity thereof.—State v Genese, 130 A 642 102 N J Law 131

(8) As to when deceased left accused's employment, in prosecution for murder by abortion.—People v Rongetti 163 N E 373, 331 Ill 581

(9) Where dispute as to ownership of land apparently caused homicide, deed and writ of possession relating thereto were admissible.—Winkler v Commonwealth, 17 S W 2d 999, 229 Ky 708

Exact time

The prosecution may give evidence of circumstances immediately preceding the homicide for the purpose of showing the exact time when it occurred
Cal.—People v Glaze, 72 P 965, 139 Cal 154
Mass.—Commonwealth v Spencer, 99 N E 266, 212 Mass 438, Ann Cas 1913D 552

Presence of parties

(1) Evidence tending to explain the presence of the parties at the time of the difficulty is relevant
Ala.—Spelce v State, 103 So 694, 20 Ala App 412, certiorari denied Ex parte Spelce, 103 So 705, 212 Ala 559
Cal.—People v Jo Fong, 210 P 548, 59 Cal App 259
Ky.—Howard v Commonwealth, 56 S W 2d 362, 246 Ky 738

(2) On the other hand, evidence tending to explain the presence of police officers on a street within their jurisdiction is immaterial.—Cobb v State, 97 So 779 19 Ala App 315 certiorari denied Ex parte Cobb, 97 So 783, 210 Ala 252

State of mind

(1) Evidence of accused's actions shortly before the homicide are admissible to show his state of mind
D C.—Grock v U S, 289 F 544, 53 App D C 146
Okl.—Phelps v State, 78 P 2d 1068, 61 Okl Cr 240 McCollum v State, 48 P 2d 872 57 Okl Cr 381—Walker v State, 19 P 2d 622, 54 Okl Cr 279

(2) In prosecution for killing of one alleged to have raped accused's wife exclusion of details of rape and collateral facts tending to show state of accused's mind was error.—State v Flory, 276 P 458, 40 Wyo 184

To determine punishment

Under some statutes all relevant facts and circumstances surrounding the killing and the previous relationship existing between accused and deceased together with all relevant facts and circumstances going to show the condition of the mind of accused at the time of the homicide are admissible for the jury's consideration in determining the punishment to be assessed.—Brewer v State, Tex Cr, 167 S W 2d 747 Foster v State, 155 S W 2d 938, 142 Tex Cr 615—Halbert v State, 51 S W 2d 321, 121 Tex Cr 355—Whatley v State, 36 S W 2d 751, 117 Tex Cr 147

15. Ala.—Sandlin v State, 146 So 82, 25 Ala App 311—Cunningham v State, 118 So 242, 22 Ala App 583, certiorari denied 118 So 248, 218 Ala 166
La.—State v Gunter, 156 So 203, 180 La 145

Last seen in company

State relying on circumstantial evidence in murder prosecution could show deceased was last seen in company with accused - White v State, 285 P 503, 52 Nev 235

16. Ala.—Smallwood v State, 159 So 699, 26 Ala App 360—Newman v State, 149 So 724, 25 Ala App 526—Roberts v State, 149 So 356, 25 Ala App 477.

the conduct or actions of deceased[17] or the person assaulted,[18] even though such facts do not constitute a part of the res gestæ[19] When accused denies that he killed deceased, evidence of antecedent circumstances legitimately tending to connect him with the homicide is admissible[20] Evidence of the conduct of accused shortly before the homicide indicating that he was in a reckless or vicious humor and desired trouble is admissible,[21] and the prosecution may also show that accused was armed at the time of such conduct[22] Evidence is admissible of antecedent circumstances which tend to throw light on the difficulty in which the homicide or assault occurred,[23] or to show the circumstances under which the killing occurred[24] For example, where the homicide was the result of an altercation the entire transaction leading up to the killing is admissible in evidence against accused[25] Evidence of matters occurring before the killing may be admitted to show the manner in which the crime was committed,[26] even though, it is said, accused is not identified in connection therewith[27]

Irrelevant circumstances Evidence of circumstances occurring before the homicide which form no part of the res gestæ and do not throw any light on the actions, animus, or intent of accused or the circumstances of the killing or any issues in the case, is inadmissible,[28] especially where the only

Okl.—Austin v. State, 228 P. 1113, 28 Okl.Cr. 73.
30 C.J. p. 194 note 57.

Flushed face

Testimony in murder trial that accused's face was flushed with anger and that he was very bitter toward deceased when talking to witness before homicide was admissible.—Hill v. State, 59 S.W.2d 411, 123 Tex.Cr. 552.

17. Cal.—People v. Middleton, 223 P. 418, 65 Cal.App. 175.
Ga.—Pryor v. State, 147 S.E. 97, 168 Ga. 136.
Ky.—Locklitter v. Commonwealth, 60 S.W.2d 355, 249 Ky. 95—Woodall v. Commonwealth, 50 S.W.2d 939, 244 Ky. 320.
30 C.J. p. 194 note 58.

Escape and attempted arrest

In prosecution for murder of deputy sheriff who was attempting to arrest accused, who had escaped from state prison on preceding day, evidence of accused's escape and circumstances thereof was admissible to explain why deputy attempted to arrest accused.—Short v. State, 87 P.2d 266, 53 Ariz. 185.

Official capacity

Permitting state to prove that deceased was deputy sheriff was not error where he was in fact such and proof showed he was assaulted by reason thereof.—Branham v. Commonwealth, 8 S.W.2d 411, 225 Ky. 286.

Unarmed

Evidence that deceased was not armed prior to the killing is admissible as tending to illustrate his act and conduct immediately before and at the time of the fatal encounter.—Roberson v. State, 118 So. 654, 218 Ala. 442.

18. Ark.—Howard v. State, 208 S.W. 293, 137 Ark. 111.

19. Ala.—Smallwood v. State, 159 So. 699, 26 Ala.App. 360—Newman v. State, 149 So. 724, 25 Ala.App. 526—Roberts v. State, 149 So. 356, 25 Ala.App. 477.

20. Cal.—People v. Vatek, 236 P. 163, 71 Cal.App. 453.
30 C.J. p. 195 note 61.

21. S.C.—State v. Smalls, 53 S.E. 976, 73 S.C. 516.
30 C.J. p. 195 note 64.

22 Ala.—Medley v. State, 47 So. 218, 156 Ala. 78.
Md.—Kernan v. State, 4 A. 124, 65 Md. 253.
N.Y.—People v. Sutherland, 48 N.E. 518, 154 N.Y. 345.

23. Ariz.—McCreight v. State, 42 P.2d 1102, 45 Ariz. 269.
Ky.—Winkler v. Commonwealth, 17 S.W.2d 999, 229 Ky. 708.
30 C.J. p. 195 note 66.

Disturbing peace

Testimony that defendants were disturbing peace at time of officer's interference was admissible as part of res gestæ in trial for assault to kill officer.—State v. Lamb, Mo., 278 S.W. 1009.

24 Mich.—People v. Gosch, 16 N.W. 101, 82 Mich. 22.
30 C.J. p. 196 note 67.

Movements of the parties at the scene of, and shortly before a difficulty are admissible.—Dover v. State, 277 S.W. 675, 102 Tex.Cr. 113.

25. Ky.—Lewis v. Commonwealth, 36 S.W.2d 639, 237 Ky. 786.
Tex.—Davis v. State, 279 S.W. 275, 102 Tex.Cr. 608.
30 C.J. p. 196 note 68.

Evidence held admissible

(1) On behalf of state, evidence that accused deceased, and others were drinking and gambling for several hours before killing occurred.—Sandlin v. State, 146 So. 82, 25 Ala.App. 311.

(2) On behalf of state, evidence that deceased was one of party in accused's house drinking whiskey just before shooting.—Hill v. State, 141 So. 582, 25 Ala.App. 264, certiorari denied 144 So. 583, 225 Ala. 610.

(3) Evidence that place where killing occurred was house of prostitution and that deceased had visited the witness.—Harris v. State, 46 P.2d 1082, 46 Ariz. 121.

Mental condition

Facts leading up to killing which disclose the mental condition of all the parties at the time of the fatal difficulty is a proper inquiry.—Hill v. State, 141 So. 582, 25 Ala.App. 264, certiorari denied 141 So. 583, 225 Ala. 610.

26 S.D.—State v. Kammel, 122 N.W. 420, 23 S.D. 465.
30 C.J. p. 196 note 69.

Condition of curtains on accused's automobile prior to alleged attack thereon by deceased was admissible to show manner, method, and extent of attack.—Watson v. State, 112 So. 181, 22 Ala.App. 57.

27 Kan.—State v. Reed, 100 P. 66, 79 Kan. 508.

28 Ala.—Bryan v. State, 167 So. 255, 232 Ala. 226—Gulledge v. State, 167 So. 252, 232 Ala. 209—Grooms v. State, 152 So. 155, 228 Ala. 133—Doss v. State, 139 So. 290, 224 Ala. 90—Stinson v. State, 135 So. 571, 223 Ala. 327—Beaird v. State, 121 So. 38, 219 Ala. 46—Shelton v. State, 117 So. 8, 217 Ala. 465—Davis v. State, 113 So. 393, 216 Ala. 475—Letson v. State, 110 So. 21, 215 Ala. 229—Beaird v. State, 109 So. 161, 215 Ala. 27—Slayton v. State, 173 So. 632, 27 Ala.App. 422, reversed on other grounds 173 So. 642, 234 Ala. 1, and 173 So. 645, 234 Ala. 9—Pounders v. State, 136 So. 741, 24 Ala.App. 326, certiorari denied 136 So. 743, 223 Ala. 431—King v. State, 134 So. 133, 24 Ala.App. 267—Orrick v. State, 126 So. 890, 23 Ala.App. 156—Smith v. State, 125 So. 64, 23 Ala.App. 329—Walding v. State, 122 So. 206, 23 Ala.App. 185—Vinson v. State, 115 So. 695, 22 Ala.App. 338—West v. State, 114 So. 568, 22 Ala.App. 187, certiorari denied 114 So. 570, 217 Ala. 62—Hembree v. State, 110 So. 171, 21 Ala.App. 577, certiorari denied 110 So. 172, 215 Ala. 246—Johnson v. State, 109 So. 293, 21 Ala.App. 456.

legitimate effect thereof would be to excite the sympathies of the jury either for or against deceased or accused.[29] Evidence of antecedent facts which were unknown to accused and hence could not have influenced his conduct or motives, and which is not otherwise relevant, is not admissible.[30]

—Lancaster v State, 106 So 609, 21 Ala App 140 certiorari denied 106 So 617, 214 Ala 2, and 106 So 618, 214 Ala 76—Moon v State, 105 So 427 21 Ala App 111—Williams v State, 101 So 367, 20 Ala App 257—Jones v State, 101 So 331, 20 Ala App 247—Gotcher v State, 101 So 310, 20 Ala App 207—Snoddy v State, 101 So 303, 20 Ala App 168

Ark—Barber v State, 32 S W 2d 619, 182 Ark 738—Morton v State, 20 S W 2d 872, 180 Ark 197—Spohn v State, 285 S W 377, 171 Ark 672—Adams v State, 254 S W 832, 160 Ark 405

Cal—People v Fuller, 13 P 2d 689, 216 Cal 81—People v Farrington, 2 P 2d 814, 213 Cal 459, certiorari denied Farrington v People of State of California, 52 S Ct 456, 285 U S 530, 76 L Ed 926—People v Roberts, 21 P 2d 449, 131 Cal App 376, rehearing denied 22 P 2d 25, 131 Cal App 376—People v Gibson, 237 P 53, 72 Cal App 318

Colo—Patton v People, 221 P 1086, 74 Colo 322

Conn—State v Manganella, 155 A 74, 113 Conn 209

Ga—Lance v State, 142 S E 105, 166 Ga 15—Tanner v State, 130 S E 61, 161 Ga 193

Idaho—State v McClurg, 300 P 898, 50 Idaho 762

Ill—People v Braune, 2 N E 2d 839, 363 Ill 551, 104 A L R 1513—People v Fiorita, 170 N E 690, 339 Ill 78—People v Scalisi, 154 N E 715, 321 Ill 131—People v Harrison, 149 N E 236, 318 Ill 316

Ky—Mills v Commonwealth, 171 S W 2d 38, 291 Ky 92—Taylor v Commonwealth, 108 S W 2d 645, 269 Ky 656—Etherton v Commonwealth, 55 S W 2d 343, 246 Ky 553—Deaton v Commonwealth, 55 S W 2d 47, 246 Ky 367—Saylor v Commonwealth, 29 S W 2d 629 235 Ky 78 followed in 29 S W 2d 632, 235 Ky 85—Epperson v Commonwealth, 13 S W 2d 247, 227 Ky 404—Bates v Commonwealth, 10 S W 2d 1099, 226 Ky 318—Bryant v Commonwealth, 288 S W 680, 216 Ky 724—Howard v Commonwealth 261 S W 216, 202 Ky 711—Commonwealth v Clark 254 S W 1051, 200 Ky 358—Terrell v Commonwealth, 240 S W 81, 194 Ky 608

La—State v Stracner, 182 So 571, 190 La 457—State v Scarbrock, 145 So 261, 176 La 48—State v Holbrook, 97 So 27, 153 La 1025

Mass—Commonwealth v Mercier, 154 N E 834, 257 Mass 353

Mich—People v Foodfellow, 211 N W 184, 257 Mich 196

Miss—Prine v State, 193 So 446, 188 Miss 147—Allen v State, 159 So 533, 172 Miss 472—Earl v State, 151 So 172, 168 Miss 124

Mont—State v Reed, 210 P 756, 65 Mont 51

N H—State v Thorp, 171 A 633, 86 N H 501

N M—State v Archer, 255 P 396, 32 N M 319

N Y—People v Caruso, 159 N E 390, 246 N Y 437

S C—State v Gilbert, 150 S E 321, 153 S C 25

S D—State v Wilcox, 204 N W 369, 48 S D 289

Tex—Villareal v State, 146 S W 2d 406, 140 Tex Cr 675—Romine v State, 101 S W 2d 812, 132 Tex Cr 52—Deuran v State, 94 S W 2d 181, 130 Tex Cr 308—Latta v State, 64 S W 2d 968, 124 Tex Cr 618—Palmertree v State, 59 S W 2d 137, 123 Tex Cr 511—Deckard v State 40 S W 2d 127 118 Tex Cr 414—Roebuck v State, 18 S W 2d 643, 113 Tex Cr 112—Tait v State, 294 S W 557 106 Tex Cr 642—Britton v State, 291 S W 541, 107 Tex Cr 32—Seaton v State 288 S W 1082, 105 Tex Cr 451—Marshall v State, 286 S W 214 104 Tex Cr 619—Dover v State 277 S W 675, 102 Tex Cr 113 Nami v State, 263 S W 595, 97 Tex Cr 522—Stovall v State 253 S W 526, 95 Tex Cr 189—Holt v State, 249 S W 481, 94 Tex Cr 46

Va—Nelson v Commonwealth, 150 S E 407 153 Va 909

30 C J p 193 note 54

Illegal search

That it had been reported to accused, a policeman, that deceased was at the place where the killing took place selling whiskey, is inadmissible for the purpose of justifying an illegal search—Cobb v State, 97 So 779, 19 Ala App 345 certiorari denied Ex parte Cobb, 97 So 783, 210 Ala 252

Other crimes

Evidence of other crimes committed by accused held irrelevant—State v Dobbs, 129 A 275, 148 Md 34

Particular evidence held inadmissible or properly excluded

(1) Childhood experiences of deceased—Manchester v State, 155 S E 11, 171 Ga 121

(2) Accused's act in shooting before the homicide, where such shooting was wholly disconnected with difficulty between accused and deceased culminating in the homicide—Robinson v State, 191 So 655, 238 Ala 441 denying certiorari 191 So 649, 29 Ala App 47

(3) Evidence of insult to accused's aunt by prosecuting witness on morning before night of shooting—Hurst v State, 108 So 77, 21 Ala App 313

(4) Identity of owner of automobile in which defendants were riding at driver's invitation at time of battle with police—People v Scalisi, 154 N E 715, 321 Ill 131

(5) That assaulted party had fallen and cut his head at time prior to difficulty—Kirkland v State, 108 So 262, 21 Ala App 348

(6) That accused's father had been assassinated and that assassin had never been apprehended—Serna v State, 7 S W 2d 543, 110 Tex Cr 220

(7) That on a former occasion not connected with the transaction accused had a pistol in his possession—Shepherd v Commonwealth, 252 S W 139, 200 Ky 25

(8) Evidence as to when deceased left home that day—Hill v State 144 So 582, 25 Ala App 264, certiorari denied 144 So 583, 225 Ala 610

(9) As to whether accused ever served in the United States army—Carlisle v State 114 So 475, 22 Ala App 255

(10) As to why accused went to a place other than where homicide occurred—Stovall v State 93 So 275 18 Ala App 559

(11) As to why witness and accused were not living together as man and wife—Roberson v State, 119 So 863 23 Ala App 26

Where there was no evidence of delusional insanity, refusal to permit physician as witness to answer question whether accused, when talking with him, was disturbed about fact that he thought his wife, whom he killed, was untrue, was not error—Mars v State, 135 S E 410, 163 Ga 43

29. Ala—Taylor v State, 179 So 646, 28 Ala App 112—Morris v State, 142 So 685 25 Ala App 175—King v State, 134 So 133, 24 Ala App 267

N Y—People v Buzzi 144 N E 653, 238 N Y 390

Tex—Allen v State, 278 S W 201, 102 Tex Cr 441

Wash—State v Hiatt, 60 P 2d 71, 87 Wash 226

30 C J p 194 note 55

30. Tex—King v State, 286 S W 231, 104 Tex Cr 583—Elkins v State, 276 S W 291, 101 Tex Cr 377

30 C J p 194 note 56.

In order to be admissible, evidence of prior occurrences must be such as to connect accused therewith,[31] and evidence of criminating acts of one not sufficiently identified as accused has been held inadmissible[32]

Relevancy in connection with other evidence Evidence of antecedent circumstances which is explanatory of,[33] or corroborative of, disputed evidence,[34] or which rebuts evidence previously introduced by the other side,[35] as a general rule is admissible When part of an antecedent conversation, or part of a transaction, is put in evidence, the opposing party is entitled to introduce or to enquire into other parts or the whole thereof[36] Where accused has treated certain acts and declarations as though they were in fact the acts and declarations of a certain person, such acts and declarations may be introduced in evidence against accused and treated as the acts and declarations of such person, if they would be competent evidence, and if they were in fact his acts and declarations, unless the contrary is shown[37]

b. Circumstances of Conspiracy or Concerted Action

The acts and declarations of one conspirator during the existence of the conspiracy and in furtherance thereof is admissible against the other conspirators

Where a third person has apparently acted with accused in the transaction which culminated in the homicide, the acts and declarations of such third person shortly before the homicide in the furtherance of the conspiracy are competent,[38] even though done or made in accused's absence[39] In making proof of such a conspiracy, the evidence takes a wide range[40] Any fact or circumstance, either

31. Cal.—People v Wilson, 138 P 971, 23 Cal App 513

32. Miss.—Leverett v State, 73 So 273, 112 Miss 394

33. Ala.—Pearce v State, 147 So 617, 226 Ala 436—Fancher v State 117 So 123, 217 Ala 700—Satterfield v State, 102 So 691, 212 Ala 349—Enzor v State, 135 So 595, 24 Ala App 346, certiorari denied 135 So 598, 223 Ala 297 Blevins v State 101 So 478 20 Ala App 229, certiorari denied Ex parte Blevins, 101 So 482 211 Ala 615—Burgess v State 92 So 911, 18 Ala App 529, certiorari denied Ex parte Burgess 93 So 922 208 Ala 696

Ga.—Lance v State 142 S E 105, 166 Ga 15

Ky.—Crawford v Commonwealth, 136 S W 2d 754, 281 Ky 557—Hendrickson v Commonwealth, 97 S W 2d 80, 233 Ky 820—Fitzpatrick v Commonwealth 275 S W 819 210 Ky 285

N J.—State v Clemengo, 185 A 65, 116 N J Law 402

Tex.—Mohler v State, 265 S W 553, 98 Tex Cr 238

30 C J p 195 note 63

Reason for being armed

In prosecution for assaulting officers with intent to murder, with evidence being in conflict as to whether accused assaulted the officers or they assaulted him evidence of presence of jugs of liquor near by accused was properly admitted as tending to explain presence of accused armed.—Davis v State, 105 So 677, 213 Ala 541

Reason for guards

Evidence in murder trial that store had been broken into was admissible to explain why there were guards around it.—Jones v Commonwealth, 60 S W 2d 991, 249 Ky 502

34. Flourishing pistol resembling fatal weapon

In murder prosecution, admission of testimony, elicited on cross-examination, that witness saw accused flourishing a shiny pistol in accused's room a few hours before the homicide was not error, as against contention that testimony put in issue the character of accused for violence and that accused had offered no evidence as to character where an alleged eyewitness testified that pistol used by accused was shiny.—Black v State 199 S E 810, 187 Ga 136

35 Ala.—Crosby v State 102 So 459, 20 Ala App 344 certiorari denied Ex parte Crosby, 102 So 461 212 Ala 313

La.—State v Swain 156 So 162 180 La 20—State v Foster, 114 So 696 164 La 813

Mass.—Commonwealth v Williams, 139 N E 317 241 Mass 515

Miss.—Smith v State 147 So 482, 167 Miss 85

Mo.—State v Hamilton, 102 S W 2d 612 340 Mo 768

S C.—State v Strickland, 145 S E 101, 147 S C 514

Tex.—Clark v State, 61 S W 2d 517 121 Tex Cr 136—Mohler v State 265 S W 553 98 Tex Cr 238

Wash.—State v Wilkins, 287 P 23 156 Wash 456

36 Ala.—Whittle v State 104 So 668, 213 Ala 301—Rakestraw v State, 101 So 181, 211 Ala 535

37. Kan.—State v Winner, 17 Kan 298

30 C J p 196 note 78

38 Ala.—Griffin v State, 158 So 316 229 Ala 482—Browning v State 180 So 105, 28 Ala App 129 certiorari denied 180 So 108 235 Ala 520 Scott v State, 141 So 260 25 Ala App 60, certiorari denied 141 So 262 224 Ala 561

Ark.—Decker v State, 51 S W 2d 521, 185 Ark 1085

Ga.—Jenkins v State, 9 S E 2d 909, 190 Ga 556 Westberry v State, 161 S E 905 175 Ga 115—Powers v State, 157 S E 195 172 Ga 1—Tanner v State, 130 S E 61 161 Ga 193

La.—State v McKee 190 So 325 193 La 39—State v Walton 155 So 756 179 La 1006

Mich.—People v Salimone 251 N W 594, 265 Mich 186

N C.—State v Beal, 154 S E 604 199 N C 278

Ohio.—Lucavoli v State App 34 N E 2d 450

Tex.—Hanks v State 269 S W 106, 99 Tex Cr 218

Killing one step in program

In prosecution for murder, pursuant to conspiracy, although indictment charged that conspiracy was to kill deceased, it was competent to show conspiracy existed to prevent truck from passing, and that deceased was shot in effort to stop deputy sheriff and posse from protecting truck.—Poore v Commonwealth 61 S W 2d 320, 249 Ky 665

39 Ky.—Poore v Commonwealth supra

40. Ala.—Johnson v State 110 So 55, 21 Ala App 565

Ky.—Hudson v Commonwealth 61 S W 2d 874 249 Ky 845—Jones v Commonwealth, 60 S W 2d 991 249 Ky 502

Preliminary questions leading up to evidence to show a planned premeditated and conspired homicide are proper.—State v Dreher 118 So 85 166 La 924 certiorari denied Dreher v State of Louisiana, 49 S Ct 36 278 U S 641 73 L Ed 556

Some latitude allowed

When a homicide is committed as the result of a conspiracy, some lati-

direct or circumstantial, tending to establish a concurring agreement to carry into effect a common purpose to commit the homicide is relevant[41] On the other hand, evidence of antecedent circumstances and declarations tending to rebut the showing of a conspiracy is relevant on behalf of accused[42] Where there is no evidence of a conspiracy, it is error to permit a witness to testify that accused and another purchased cartridges of him the day before the killing, and not to permit the other to explain how he came to be with accused,[43] or to permit a witness to testify that he took a shotgun from one place to another previous to the homicide[44] In the absence of conspiracy a witness should not be permitted to testify respecting the purpose of witness or accused in going together to a place where they expected to see deceased[45] Evidence as to the members composing a mob is material only in connection with other evidence that accused was one of the party[46]

§ 241. —— Previous Difficulties

Competent evidence of prior difficulties which is relevant to the issues is admissible on behalf of the prosecution

Evidence of quarrels or difficulties prior to the killing or assault, and out of which it might have resulted, is admissible on behalf of the prosecution,[47] although they may have occurred long pre-

tude is permitted in the proof to show the relations of the parties and the object and purpose of the conspiracy—People v Billburg, 145 N E 373 314 Ill 182

41. Ala—Johnson v State, 110 So 55, 21 Ala App 565

Exciting discontent

Where police officer's killing resulted from alleged conspiracy to resist, it was competent to ascertain what part defendants took in exciting resistance to officers and discontent with government—State v Beal, 154 S E 601, 199 N C 278

Victim previously unknown

That traffic officer murdered by automobilists was not known to them before he stopped them on highway did not preclude admission of evidence of conspiracy to murder him, in view of evidence of interval of time between halt of car and killing, and other evidence which jury might consider in determining motive of one person accused in handing revolver to other who fired shot while otherwise engaging officer's attention passing of weapon constituting overt act People v Yeiger, 229 P 40 196 Cal 452

Particular acts held admissible

(1) Generally

Ala—Browning v State, 180 So 105 28 Ala App 129, certiorari denied 180 So 108 235 Ala 520

Ga—Tanner v State, 130 S E 64, 161 Ga 193

Ill—People v Rooney, 190 N E 85 55 Ill 613

Ky Hudson v Commonwealth 61 S W 2d 871 249 Ky 845

Mo—State v Stogsdill 23 S W 2d 22 324 Mo 105—State v Millsap, 276 S W 625, 310 Mo 500

N C—State v Beal, 151 S E 604 199 N C 278

(2) Evidence tending to show accused's participation in the conspiracy—State v Nasello 30 S W 2d 132, 325 Mo 442

(3) Perfection of plans to kill made at a meeting - Jones v Commonwealth, 60 S W 2d 991, 249 Ky 502

(4) Possession of stolen articles—Eagles v U S, 25 F 2d 546 58 App D C 122, certiorari denied 48 S Ct 603 277 U S 609 72 L Ed 1013

(5) Request by conspirator that witness join in the conspiracy to murder State v Walton 155 So 756, 179 La 1006

(6) Relations of accused with other occupants of car—Hanks v State, 269 S W 106 99 Tex Cr 218

(7) That one of accused had been seen at place of killing some days prior thereto to show preparation for commission of crime—State v McKee, 190 So 825, 193 La 39

(8) Where accused testified he had fallen out with one jointly indicted about a week before homicide evidence that accused and such person after such time held up merchant is admissible—Hord v Commonwealth 13 S W 2d 214 227 Ky 439

(9) Whipping in trade union meeting, which was mere prelude to homicide of officer attempting to make an arrest therefor—Jones v Commonwealth, 60 S W 2d 991, 249 Ky 502

Prior association

(1) After testimony showing accused's presence at the scene of crime, it is proper to establish that he was an associate of other men who had been convicted and condemned therefor - Commonwealth v Fasco 131 A 465, 287 Pa 1

(2) Evidence of association of defendants before the crime held admissible

Cal—People v Arnold 250 P 168 199 Cal 471

Mass—Commonwealth v Snyder 185 N E 376 282 Mass 401 certiorari granted Snyder v Commonwealth of Massachusetts, 51 S Ct 67 290 U S 606 78 L Ed 531, affirmed 54 S Ct 330 291 U S 97, 78 L Ed 674, 90 A L R 575

Purpose of admission

In prosecution for murder committed as result of a common design evidence of conspiracy is not considered for purpose of establishing existence of a conspiracy as such, but to show circumstances under which homicide was committed—People v King, 85 P 2d 928 30 Cal App 2d 185

42. **Absence of communication**

In prosecution for assault to murder in which state's theory was that accused's associates committed assault pursuant to conspiracy with accused exclusion of accused's testimony that nothing was said between him and his associates in regard to committing assault was error - Brown v State, 77 S W 2d 694 127 Tex Cr 342

Business of alleged conspirator

Where commonwealth contended that accused and another woman conspired to poison accused's husband accused should have been permitted to prove that other woman was engaged in business of curing people Commonwealth v Giovanetti, 19 A 2d 119 341 Pa 345

Presence at request of victim

In homicide prosecution based on circumstantial evidence, in which state's theory was that accused and others conspired and plotted death of deceased, accused may show that he was present on fishing party on which deceased was killed, at solicitation and on request of deceased himself—Hand v State, 159 So 275, 26 Ala App 317

43. Miss—Pulpus v State, 36 So 190 84 Miss 49

44. Ala—Folkes v State 82 So 567, 17 Ala App 119

45. Iowa State v Brooks, 186 N W 46 192 Iowa 1107

46. Ala—Lancaster v State, 106 So 617 214 Ala 2, denying certiorari 106 So 609 21 Ala App 140, and certiorari denied 106 So 618, 214 Ala 76

47. Ala Ratliff v State, 102 So 621, 212 Ala 410—Pierce v State, 178 So 218, 28 Ala App 40—Kyle

viously,[48] provided the evidence shows that the disagreeable conditions continued to the time of the killing.[49] Evidence of previous difficulties between accused and persons other than deceased is admissible where there is a direct connection between the facts sought to be proved and the homicide,[50] or assault with intent to kill.[51] Proof of a quarrel between one who acted with accused and a third person whom the former was attempting to kill when he killed deceased is admissible.[52] On the other hand, evidence of a difficulty or fight between deceased and accused which occurred some time before the homicide and is not connected therewith,[53] or of a previous difficulty between accused and a third person with which deceased had no connection, and which was not a part of the transaction in which deceased was killed,[54] or of a difficulty between deceased or person assaulted and others than accused having no connection with the fatal difficulty,[55] or with which accused is not shown to have had any connection,[56] or of a difficulty between two third persons with which accused is not shown to have been connected,[57] is inadmissible.

As a general rule accused will not be permitted to introduce evidence of previous quarrels and difficulties,[58] although such evidence may be admissible if constituting a part of the res gestæ[59] or within proper limitations on the issue of self-defense, as considered infra § 275. Proof that deceased had been guilty of acts of violence to third persons of which accused had been informed is inadmissible.[60] On the other hand evidence having a tendency to show that accused was seeking to avoid further difficulty should be admitted.[61]

The details and merits of a former difficulty, however, cannot be inquired into,[62] further than to shed light on the question as to who was the aggressor

v State, 107 So 222, 21 Ala App 256—Drummond v State 102 So 723, 20 Ala App 286, certiorari denied Ex parte Drummond, 102 So 726, 212 Ala 410—Knott v State, 96 So 731, 19 Ala App 258.

Kan.—State v Barnett, 137 P 2d 133, 156 Kan 746.

Ky.—Mills v Commonwealth, 171 S W 2d 38, 294 Ky 92—Simpson v Commonwealth, 53 S W 2d 364, 245 Ky 202—Maiden v Commonwealth, 9 S W 2d 1018, 225 Ky 671.

Tex.—Patterson v State, 289 S W 398, 105 Tex Cr 508—Parker v State, 261 S W 782, 98 Tex Cr 209, petition dismissed, 45 S Ct 507, 267 U S 604, 69 L Ed 810.

30 C J p 196 note 80, p 197 note 91.

Previous treatment of wife in prosecution of husband for killing wife, see supra § 226.

As showing state of mind

In a prosecution for assault on O with intent to commit murder where accused had testified regarding a previous altercation with O, it was error to exclude testimony of disinterested witnesses regarding this altercation, since it was admissible to show accused's state of mind and his relation with O and enable the jury to determine whether his action was influenced by fear, malice, or done in heat of passion.—People v Dugas, 141 N E 769, 310 Ill 291.

Fights leading up to homicide

Admitting evidence respecting two fights between others, leading up to homicide few minutes later was proper.—Etherton v Commonwealth, 55 S W 2d 343, 246 Ky 553.

48. Ala.—Harbin v State, 72 So 594, 15 Ala App 57.

Four to six years

In murder trial, accused's testimony on cross-examination, as to fist fight between him and deceased during their school days four to six years before homicide and ill feeling still harbored by accused because of such fight was admissible as concerning circumstance to be considered in connection with evidence that fight was mere school-day incident followed by friendly associations between participants.—Cox v State, 199 So 806, 240 Ala 368.

49. Ky.—Holcomb v Commonwealth, 269 S W 349, 207 Ky 372.

30 C J p 196 note 82.

50. Ala.—Moulton v State, 98 So 709, 19 Ala App 116, certiorari denied Ex parte Moulton, 98 So 715, 210 Ala 656.

30 C J p 197 note 90.

Showing state of mind

Evidence as to quarrel between accused and his wife at roadhouse where killing occurred and as to accused's fighting with and cursing her just prior to fight which resulted in killing was competent as tending to show accused's state of mind during his period of "running amuck".—Clark v Commonwealth, 108 S W 2d 532, 269 Ky. 587.

51. Mich.—People v Owen, 118 N W 590, 154 Mich 571, 21 L R A N S 520.

52. Ky.—Creech v Commonwealth, 107 S W 212, 32 Ky L 808.

53. Mich.—People v Wright, 292 N W 539, 542, 294 Mich 20, quoting **Corpus Juris.**

30 C J p 197 note 85.

54. Ala.—Foster v State, 9 So 2d 29, 30 Ala App 541—Ratliff v State, 98 So 193, 19 Ala App 505.

Ky.—Mills v Commonwealth, 171 S W 2d 38, 294 Ky 92—Kinder v Commonwealth, 86 S W 2d 297, 260 Ky 534—Ayers v Commonwealth, 212 S W 624, 195 Ky 343.

Mich.—People v Wright, 292 N W 539, 542, 294 Mich 20, quoting **Corpus Juris.**

Mo.—State v Maddox, 98 S W 2d 535, 536, 339 Mo 840, quoting **Corpus Juris.**

30 C J p 197 note 86.

Prior connection with family difficulty

In prosecution of husband for murder of cousin who had accompanied accused's wife to make affidavit against husband for assault, neither testimony concerning whipping administered by husband to wife nor affidavit made by wife should have been admitted.—Russell v State, 189 So 90, 185 Miss. 464.

55. Mo.—State v Fletcher, 190 S W 317.

30 C J p 197 note 87.

56. Ga.—Sasser v State, 59 S E 255, 129 Ga 511.

57. Ky.—Jones v Com., 106 S W 802, 32 Ky L 598.

S C.—State v McPhail, 105 S E 638, 115 S C 333.

58. Colo.—Griffin v People, 231 P 1113, 76 Colo. 422.

Ga.—Gunter v State, 10 S E 2d 264, 63 Ga App 65.

Ky.—Stepp v Commonwealth, 43 S W 2d 180, 241 Ky 12.

La.—State v Steele, 109 So 494, 161 La 796.

30 C J p 197 note 98.

59. Particular evidence held not part of the res gestae.—Gunter v State, 10 S E 2d 264, 63 Ga App 65.

60. S D.—State v Raice, 123 N W 708, 24 S D 111.

61. Tex.—Sunday v State, 177 S W 97, 77 Tex Cr 26.

62. Ala.—Sanders v State, 7 So 2d 483, 242 Ala 535—Davis v State, 113 So 393, 216 Ala 475—Hawkins v State, 195 So 762, 29 Ala App

in the difficulty in question[63] Where the killing occurred in a dispute between deceased and accused's wife, it has been held that her acts and conduct in the transaction were admissible[64] If a part of the details of a prior difficulty have been admitted, accused is entitled to introduce the whole transaction in explanation of his acts[65]

§ 242. —— Remoteness

Evidence of antecedent circumstances which are so remote in point of time as to have no bearing on the matters in issue is inadmissible

Evidence of matters antecedent to the homicide but so remote in point of time as to have no legitimate bearing on the circumstances of the homicide or the points at issue on the trial is not admissible[66] Where, however, the matter has a bearing on the circumstances of the homicide, it will not be rejected for remoteness alone, the lapse of time affecting only the weight to be given the testimony[67]

§ 243. —— Declarations

a Of accused
b Of deceased
c Of third persons

a. Of Accused

Relevant declarations and statements of accused, made before the homicide, are admissible for the prosecution

Declarations and statements of accused, made before the homicide, are admissible for the prosecution if they are relevant to the issue,[68] and tend to

221, certiorari denied 195 So 765, 239 Ala 532—Patterson v State, 109 So 375, 21 Ala App 464, certiorari denied 109 So 922, 215 Ala 699—Drummond v State, 102 So 723, 20 Ala App 286 certiorari denied Ex parte Drummond, 102 So 726, 212 Ala 410—Knott v State 96 So 731 19 Ala App 258

Ark—Clements v State 133 S W 2d 814, 199 Ark 69—Adams v State, 254 S W 832 160 Ark 405

Fla—Deeb v State, 179 So 894, 903, 131 Fla 362, citing **Corpus Juris.**

Ky—Bradley v Commonwealth 148 S W 2d 737 285 Ky 579—Carpenter v Commonwealth, 92 S W 2d 355, 357 263 Ky 408, citing **Corpus Juris**—McIntosh v Commonwealth, 272 S W 423 209 Ky 203—Stamp v Commonwealth 253 S W 242, 200 Ky 133

S C—State v Abercrombie, 176 S E 112, 130 S C 358 State v Gregory 120 S E 499 127 S C 87

Va—Rasnake v Commonwealth, 115 S E 513, 135 Va 677

30 C J p 196 note 83 p 197 notes 92 93

63. Ala Knotts v State 78 So 640 16 Ala App 442, certiorari denied 78 So 989 201 Ala 699

Illustrating acts

Evidence offered by state showing the conduct of accused at a prior difficulty between accused and deceased is admissible for the purpose of illustrating accused's acts at the time of the fatal difficulty—Sanders v State 7 So 2d 483 242 Ala 535

64. Tex—Neyland v State 187 S W 196, 79 Tex Cr 652

65. Ala—Patterson v State, 109 So 375, 21 Ala App 464, certiorari denied 109 So 922, 215 Ala 699

66. Ala—White v State 136 So 420, 24 Ala App 442—Hembree v State, 110 So 171, 21 Ala App 577, certiorari denied 110 So 172, 215 Ala 246—Nolen v State, 109 So 295 21 Ala App 455

Cal—People v Vuyacich, 206 P 1031, 57 Cal App 233

Del—State v Higgins, 138 A 597 3 W W Harr 388

Ky—Bradley v Commonwealth 148 S W 2d 737 285 Ky 579—Jack v Commonwealth 1 S W 2d 961, 222 Ky 516—Stamp v Commonwealth, 253 S W 242, 200 Ky 133—Shepherd v Commonwealth, 252 S W 139, 200 Ky 25

Mass Commonwealth v Sheppard, 48 N E 2d 630 313 Mass 590 certiorari denied Sheppard v Commonwealth of Massachusetts, 63 S Ct 1450 320 U S 213, 87 L Ed ——

Mo—State v Stogsdill, 23 S W 2d 22 321 Mo 105

Or—State v Grayson 270 P 104 126 Or 560

Tex—Trammell v State Cr 167 S W 2d 171—Jordan v State, 296 S W 582, 107 Tex Cr 307

Wyo—State v Rouse, 134 P 2d 1116 30 C J p 197 note 4

67. Cal—People v Mount, 269 P 177 93 Cal App 81

Ga Black v State, 199 S E 810, 187 Ga 136

Mass—Commonwealth v Sheppard, 48 N E 2d 630, 313 Mass 590, certiorari denied Sheppard v Commonwealth of Massachusetts 63 S Ct 1450, 320 U S 213, 87 L Ed ——

Miss—Hendrix v State 161 So 151 153 172 Miss 589, citing **Corpus Juris.**

N M—State v Holden, 113 P 2d 171, 45 N M 147

Pa—Commonwealth v Fragassa, 122 A 88, 278 Pa 1

Wyo—Lampitt v State, 242 P. 812, 31 Wyo 217

30 C J p 198 note 5

Possession of knife five hours before homicide was held not too remote to be admissible—State v Francis, 52 S W 2d 552, 330 Mo 1205

Knowledge of effect of poison

Evidence of accused's first wife's death from strychnine poisoning was admissible in trial for murder of his second wife in same way to show his knowledge of effect of strychnin on human being, although his first wife died almost seven years before second wife's death People v Gosden 56 P 2d 211, 6 Cal 2d 14

68 Ala—Lewis v State 164 So 92 231 Ala 211—Frost v State 142 So 427, 225 Ala 232—Bass v State 142 So 15 219 Ala 282—Harden v State 101 So 112 211 Ala 656—Reeder v State, 97 So 73, 210 Ala 111—Salts v State 110 So 169, 21 Ala App 573, certiorari denied 110 So 170, 215 Ala 247

Cal—People v Lee Yick 209 P 538, 189 Cal 599

Ga—Wells v State 167 S E 709, 46 Ga App 412

Ky—Taylor v Commonwealth 42 S W 2d 689 240 Ky 450—Winstead v Commonwealth, 32 S W 2d 749, 236 Ky 154—Oney v Commonwealth 9 S W 2d 723 225 Ky 590—Shelton v Commonwealth, 6 S W 2d 1094, 224 Ky 671

Mo—State v Dodson 29 S W 2d 60

N C—State v Neal 23 S E 2d 911, 222 N C 546

Tex—Owens v State 56 S W 2d 867, 122 Tex Cr 561—Davis v State, 296 S W 897, 107 Tex Cr 444—Martin v State, 295 S W 1098, 107 Tex Cr 151

30 C J p 198 note 6

Admissibility of admissions and declarations by one accused of crime generally see Criminal Law §§ 730–738

Connection with offense

Statements of accused tending to connect him with the commission of the offense are admissible—Warren

explain or reconcile his conduct,[69] whether they are part of the res gestæ or not,[70] especially where the case depends on circumstantial evidence.[71] If such declarations and the homicide form parts of one continuous transaction, the declarations are admissible, although not shown to have any immediate connection with the crime.[72] As discussed supra § 236, threats of accused against the life of deceased are admissible within proper limits. Mere predictions of trouble not amounting to threats are held inadmissible,[73] but evidence that accused on several occasions had used language expressing hostility to, and dislike of, deceased has been held admissible, although the language proved did not amount to threats,[74] and it is not necessary to lay a foundation for such evidence by asking accused whether he made the statements.[75] On the other hand, statements of accused which do not form a part of the res gestæ of the crime and which do not tend to prove or disprove any matter in issue are not admissible,[76] particularly where they merely tend to damage him in the estimation of the jury.[77]

When the declaration or conversation is given in evidence, any other declaration which is necessary to make it fully understood or to explain it may also be given in evidence.[78]

Declarations of accused some time before the homicide and not connected with the transaction in which the killing occurred, but amounting merely to statements in his own favor, are not part of the res gestæ and are not admissible on his behalf,[79]

v State, 94 S.W.2d 463, 130 Tex.Cr. 156—30 C.J. p. 198 note 12

Conspiracy

Declarations tending to show conspiracy between accused and the person who did the killing are admissible

Ala.—Ferguson v. State, 43 So. 16, 149 Ala. 21—Ferguson v. State, 37 So. 448, 141 Ala. 20

Tex.—Pinkston v. State, 241 S.W. 152, 91 Tex.Cr. 644

Conversation immediately before the shooting was held admissible—Rainey v. State, 283 S.W. 816, 104 Tex.Cr. 371

Means of killing

Testimony as to statements by accused as to what he could make by killing deceased and as to the different ways in which he could accomplish it was admissible.—State v. Leeper, 200 N.W. 732, 199 Iowa 432

Preparation for flight

Declarations indicating preparation for flight are admissible.—Hocker v. Commonwealth, 111 S.W. 676, 33 Ky.L. 944

Reason for stopping at scene of crime

Witness who had given accused a ride on day of murder was properly questioned concerning reason accused gave for stopping at place where crime was committed.—State v. Thorp, 171 A. 633, 86 N.H. 501

Warnings to victim

Where there is some evidence of self-defense, and where accused found person assaulted in a compromising position with his wife, it is relevant to prove that accused had warned person assaulted to stay away from his wife.—Turner v. State, 194 So. 687, 29 Ala.App. 197, certiorari denied Ex parte State ex rel. Attorney General, 194 So. 689, 239 Ala. 238

69. Ala.—Bass v. State, 122 So. 45, 219 Ala. 282
Miss.—Fleming v. State, 108 So. 143, 142 Miss. 872.
Mo.—State v. Johnson, 252 S.W. 623
Tex.—Moore v. State, 296 S.W. 308, 107 Tex.Cr. 287
Va.—Palmer v. Commonwealth, 130 S.E. 398, 143 Va. 592
30 C.J. p. 198 note 7

Declarations explanatory of purpose, made by accused when starting on the trip ending at the place of the homicide, are admissible.—Good v. State, 267 S.W. 505, 98 Tex.Cr. 556

State of mind

(1) Particular statements of accused, made prior to the commission of the crime, are held admissible to show his state of mind

Ala.—Floyd v. State, 116 So. 318, 22 Ala.App. 347, certiorari denied 116 So. 320, 217 Ala. 326
Ky.—Walker v. Commonwealth, 31 S.W.2d 721, 235 Ky. 471
Mo. State v. Dodson, 29 S.W.2d 60
N.H.—State v. Thorp, 171 A. 633, 86 N.H. 501

(2) Declarations of accused a few minutes before the homicide showing his intention to attack or kill deceased are admissible.—State v. King, 21 P. 265, 9 Mont. 445

(3) Admission of testimony that, about a week before homicide, accused said he did not have long to live and that he would just as soon swap out with any one, was not error.—Bridges v. State, 271 S.W. 87, 99 Tex.Cr. 627

(4) Consideration of testimony of conduct and declarations of accused a few minutes before the killing, indicative of accused being in good humor and having gone to deceased's office on a peaceful mission, is properly limited by instruction to the question of motive and the state of accused's mind.—Selman v. State, 251 S.W. 882, 159 Ark. 131

70. Ala.—Jones v. State, 61 So. 434, 181 Ala. 63
Res gestae generally see Criminal Law §§ 662–675

71. Tex.—Hand v. State, 179 S.W. 1155, 77 Tex.Cr. 623

Where corpus delicti has been shown, statements of accused in proximity as to time and place of the homicide are admissible as circumstances tending to connect accused therewith.—Gross v. State, 165 So. 840, 231 Ala. 529

72. Ala.—Dudley v. State, 64 So. 309, 185 Ala. 27—Armour v. State, 63 Ala. 173

73. Miss.—Owens v. State, 32 So. 152, 80 Miss. 499

74. Ky.—Bates v. Commonwealth, 276 S.W. 119, 210 Ky. 421
30 C.J. p. 198 note 17

75. Ala.—Ex parte State, 61 So. 53, 181 Ala. 4, reversing 61 So. 54, 7 Ala.App. 43

76. Ala.—Roberson v. State, 119 So. 863, 23 Ala.App. 26—Spelce v. State, 103 So. 694, 20 Ala.App. 412, certiorari denied Ex parte Spelce, 103 So. 705, 212 Ala. 559
Ark.—Harmon v. State, 81 S.W.2d 30, 190 Ark. 823
Ga.—Lance v. State, 142 S.E. 105, 166 Ga. 15
Ky.—Stanifer v. Commonwealth, 283 S.W. 84, 214 Ky. 280—Binion v. Commonwealth, 282 S.W. 775, 214 Ky. 125
Okl.—Fulton v. State, 254 P. 761, 36 Okl.Cr. 358
Tex.—Holt v. State, 249 S.W. 481, 94 Tex.Cr. 46
30 C.J. p. 198 note 19

77. Kan.—State v. Moore, 95 P. 409, 77 Kan. 736
20 C.J. p. 198 note 20

78. Tex.—Powers v. State, 227 S.W. 671, 88 Tex.Cr. 457

79. Fla.—Pelham v. State, 70 So. 87, 70 Fla. 295
30 C.J. p. 198 note 22
Admissibility of self-serving acts and declarations in criminal prosecutions generally see Criminal Law § 737.

but declarations of accused on starting out for the place of the fatal encounter showing that he did not anticipate a hostile meeting are admissible[80] It has also been held that evidence of a conversation between accused and others before the homicide is admissible on behalf of accused for the purpose of showing his innocent intentions in seeking to have a friendly conversation with deceased[81]

b. Of Deceased

Statements and declarations of deceased are inadmissible unless they come within some of the exceptions to the hearsay rule

As a general rule, statements and declarations by deceased are not evidence either for or against accused,[82] unless they come within some of the recognized exceptions to the hearsay rule Declarations of the victim before the homicidal act are admissible where they were so connected therewith as to form a part of the same transaction and illustrate and explain the killing,[83] or the assault, in a

Explanation of acts

Declarations of accused made a considerable time before the killing cannot be made evidence to explain his carrying arms on the day of the killing—Terrell v Commonwealth, 13 Bush, Ky , 246

80 Ala—Davis v State 66 So 67, 188 Ala 59, overruling Jones v State, 57 So 31 174 Ala 53
Iowa—State v Cross, 26 N W 62, 68 Iowa 180

81. Tex—Cammack v State, 278 S W 1105, 102 Tex Cr 579

82. Ala—Snoddy v State, 101 So 303, 20 Ala App 168
Cal—People v Perkins, 66 P 2d 631, 8 Cal 2d 502
Ga—Crews v State, 162 S E 146 44 Ga App 516
Ky—Adams v Commonwealth, 120 S W 2d 237, 274 Ky 714
Mo—State v Taylor 118 S W 2d 802 347 Mo 607—State v Benson 142 S W 2d 52, 346 Mo 497
N Y—People v Creasy, 140 N E 563, 236 N Y 205
S C—State v Bigham, 131 S E 603 133 S C 491
Tex—Graham v State, 69 S W 2d 73, 126 Tex Cr 531—Dennis v State, 276 S W 715 101 Tex Cr 454
Admissibility of admissions and declarations by person injured in criminal cases generally see Criminal Law §§ 740–745

Fear of others

Testimony as to deceased's statements that he feared some one from another state would kill him was inadmissible, in absence of circumstances tending to connect such party with his death—Commonwealth v Zervas 153 A 767 302 Pa 510

Irrelevant statements by deceased should be excluded
N C—State v Sisk, 116 S E 721, 185 N C 696
Tex—Russell v State, 242 S W 217, 92 Tex Cr 114

Knowledge of accused

The mere fact that accused knew of statements made by deceased, not amounting to threats, will not make evidence thereof admissible—Nugent v State, 273 S W 598, 101 Tex Cr 86.

Statements not made in presence of accused

(1) Statements and declarations of deceased, which do not constitute a part of the res gestae and which were not made in the hearing or presence of accused, are inadmissible
Ky—Fitch v Commonwealth 103 S W 2d 98 267 Ky 646—Thacker v Commonwealth, 91 S W 2d 998 263 Ky 97—Barney v Commonwealth 80 S W 2d 513, 258 Ky 432—Wood v Commonwealth 70 S W 2d 677 253 Ky 794—Shoemaker v Commonwealth 292 S W 307, 218 Ky 721—Shepherd v Commonwealth, 252 S W 139 200 Ky 25
S C—State v Williams, 118 S E 783, 125 S C 385
30 C J p 199 note 29

(2) A statement of a person killed made prior to killing not in presence of accused is inadmissible in prosecution therefor unless containing threat and in such trial accused is not entitled to show stated purpose of deceased to take his wife from him nor that deceased did not regard accused favorably—Cain v State, 100 So 578 135 Miss 892

Obscene or vulgar statements

(1) Obscene statements of deceased which do not contain a threat should not be elicited from a witness—State v Jones Mo 256 S W 787

(2) Evidence of vulgar statements by deceased with reference to his conduct with women generally unknown to accused was properly excluded—Livingston v State, 280 S W 802 103 Tex Cr 372

Self-serving declarations of deceased, such as declarations expressing an apologetic frame of mind toward accused are held inadmissible—State v Ardoin, 216 P 1048 28 N M 641

83. Ala—Hall v State, 159 So 500, 26 Ala App 344
30 C J p 199 note 25

Res gestae

Statements of deceased, which constitute a part of the res gestae, are admissible—Pouncey v State, 136 So 741, 24 Ala App 326 certiorari denied 136 So 743, 223 Ala 431.

Homicide by abortion

(1) Statements of deceased showing preparation for abortion and visits to accused's office therefor are admissible—Max v People, 240 P 697, 78 Colo 178—30 C J p 199 note 25 [e]

(2) Statements by deceased as to her treatment by accused during progress of abortion are admissible—State v Doty, 208 N W 760, 167 Minn 164—State v Newell, 159 N W 829 134 Minn 384—State v Hunter, 154 N W 1083, 131 Minn 252, L R A 1916C 566

(3) Testimony as to declarations of deceased with respect to abortion operation was admissible on ground that they were statements made in furtherance of a criminal conspiracy and were evidence against others engaged with deceased in such conspiracy—Kraut v State, 280 N W 327 228 Wis 386

(4) Accused may prove that the alleged victim declared that she came to him to be treated for a condition resulting from an operation for abortion already performed by some other person—People v Berg 274 P 433 96 Cal App 430

(5) It has been held, however, that accused could not show what the victim told him of her condition and symptoms—Commonwealth v Morris, 162 N E 362 264 Mass 314

(6) Exclusion of testimony as to contents of statement signed by deceased on entering accused's hospital was held not to be erroneous—People v Rongetti, 163 N E 373, 331 Ill 581

(7) Any statement by deceased of her intention to have a criminal abortion performed by accused cannot prove the actual performance of such an operation by him—Clark v People, 86 P 2d 257, 103 Colo 371

(8) Statement of deceased before operation indicating only that she had consulted physician other than accused was properly excluded for lack of relevancy—State v French, 210 N W 45, 168 Minn 341

(9) Statement made by deceased before her death that she had taken medicine more than week before visiting accused was held not to be ad-

prosecution for assault with intent to murder,[84] particularly where they were made in the presence of accused.[85] Where the fact that deceased made a statement is relevant, the fact that the statement was made is admissible.[86] Where deceased's intention is material, his declarations as to his intentions are relevant,[87] and his declarations are likewise admissible to explain his conduct and motive where such is relevant.[88] A declaration by deceased indicating a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, has been held to be admissible to prove that the act was in fact performed,[89] and to explain deceased's conduct.[90] Evidence explanatory of statements in evidence may be admitted.[91]

c. Of Third Persons

As a general rule, declarations of third persons, not constituting a part of the res gestae, are not admissible unless they fall within some exception to the hearsay rule

Generally declarations of third persons not part of the res gestæ are mere hearsay and are not admissible.[92] Declarations of third persons before the homicide may be admitted if so connected with the transaction as to form part of the res gestæ,[93] or when made in the presence of accused or brought to his knowledge before the killing,[94] and the state

missible as showing that deceased was not pregnant at time of visit—People v Coltrin, 55 P.2d 1161, 5 Cal.2d 649.

Dying declarations in prosecutions for abortion see Abortion § 25.

Dying declarations in prosecutions for homicide see infra §§ 286, 306.

Admissibility of deceased's acts or declaration evincing intent to commit suicide see supra § 217.

84. Ala.—Huguley v. State, 158 So. 903, 26 Ala.App. 295.

85. Ala.—Hutchens v. State, 92 So. 409, 207 Ala. 126.
Tex.—Marshall v. State, 286 S.W. 214, 104 Tex.Cr. 619.

86. Basis for arrest
Statements by deceased a policeman showing knowledge of accused's commission of a felony as a basis for legal arrest, are admissible—Rickman v. State, 134 S.W.2d 668, 138 Tex.Cr. 191.

Evidence held improperly excluded
Okl.—Short v. State, 125 P.2d 227, 74 Okl. 272.

Fixing of time
A remark of deceased by which witness fixed the time is admissible—Commonwealth v. Spencer, 99 N.E. 266, 212 Mass. 438, Ann.Cas.1913D 552.

Manner of receiving bruises
In prosecution for murder of accused's wife, where defense was accidental homicide, testimony showing that wife had previously received a severe beating leaving bruises on her face and body and that she had told witness how she had received those injuries was relevant.—State v. Goodwin, 179 So. 591, 189 La. 443.

87. Del.—State v. Long, 123 A. 350, 2 W.W.Harr. 380.
Hawaii—Territory v. Duvauchelle, 28 Hawaii 350.
La.—State v. Dunn, 109 So. 56, 161 La. 532, error dismissed Dunn v. State of Louisiana, 47 S.Ct. 344, 273 U.S. 656, 744, 71 L.Ed. 825.

Agreement for divorce
Communications by a murdered wife disproving the theory of the defense as to an agreement with her for divorce may be shown.—Borah v. State, 160 P. 27, 12 Okl.Cr. 540.

State of mind
Declarations of deceased showing her state of mind toward accused have been held admissible.—Sapp v. State, 223 S.W. 459, 87 Tex.Cr. 606.

Where questions put are vague, indefinite and irrelevant objection thereto is properly sustained.—Williamson v. State, 111 So. 245, 92 Fla. 1094.

88. Okl.—Starks v. State, 93 P.2d 50, 67 Okl.Cr. 156.—Stogsdill v. State, 216 P. 681, 24 Okl.Cr. 152.

Fear
Evidence to the effect that on the night before the homicide his wife victim of the homicide, stated that "she was scared" of accused, and asked another person to accompany her when she was about to meet accused at his request was admissible for the purpose of showing conduct and motive on the part of the wife.—Thompson v. State, 11 S.E.2d 795, 191 Ga. 222.

89. Ala.—Roberson v. State, 118 So. 651, 218 Ala. 442.
Conn.—State v. Perelli, 5 A.2d 705, 125 Conn. 321, 121 A.L.R. 1357.

Not res gestae
Such evidence is admissible not as a part of the res gestae, but as a fact relevant to a fact in issue.—State v. Journey, 161 A. 515, 115 Conn. 344.

To meet accused
(1) Statement of deceased made a short time before he was last seen alive that he was going to meet accused was competent.
Nev.—White v. State, 285 P. 503, 52 Nev. 235.
Pa.—Commonwealth v. Marshall, 135 A. 301, 287 Pa. 512.
Tex.—Cobb v. State, 77 S.W.2d 667, 127 Tex.Cr. 504.

(2) Deceased's statement that he was going to take automobile ride with defendants was competent.—State v. Lang, 154 A. 864, 108 N.J.Law 98.

To tell accused something
Deceased's wife could testify that deceased had stated that he was going to a certain place to meet defendants and that he was going "to tell them something".—State v. Perelli, 21 A.2d 389, 128 Conn. 172.

90. Ga.—Shirley v. State, 118 S.E. 91, 168 Ga. 344.

Design or plan
Testimony that deceased, on leaving his home, had stated he was going to a certain place to see a brother of accused and to get from him a pistol was properly received as showing design or plan.—Mercado v. State, 258 S.W. 180, 96 Tex.Cr. 450.

91. Ga.—Giddens v. State, 108 S.E. 788, 152 Ga. 195.

Homicide by abortion
In prosecution for manslaughter for having performed an abortion on a certain person resulting in her death, where the people were permitted to prove what accused told witness as to what was said by deceased when she first consulted him as to condition of which she complained, prior treatment administered and her history, refusal to permit accused to relate what deceased told him at time she first visited him was error.—People v. Gordon, 17 N.Y.S.2d 503, 258 App.Div. 983.

92. Ky.—Johnson v. Commonwealth, 62 S.W.2d 1025, 250 Ky. 297.—Shell v. Commonwealth, 53 S.W.2d 954, 245 Ky. 535.—Turk v. Commonwealth, 38 S.W.2d 937, 239 Ky. 55.
Tex.—Graham v. State, 69 S.W.2d 73, 126 Tex.Cr. 531.
30 C.J. p. 200 note 35.

Irrelevant statements of third persons are not admissible.—Aplin v. State, 99 So. 734, 19 Ala.App. 604.—Knott v. State, 96 So. 731, 19 Ala.App. 258.

93. Tex.—Hull v. State, 100 S.W. 103, 50 Tex.Cr. 607.
30 C.J. p. 199 note 31.

94. Ill.—People v. Hauke, 167 N.E. 1, 335 Ill. 217.
N.C.—State v. Graham, 140 S.E. 26, 194 N.C. 459.

may show that the declarations offered in evidence against accused were made known to him prior to the killing [95] Statements and remarks of a third person, not otherwise admissible, may be received where they are part of a conversation in which accused made declarations, and where they are useful in ascertaining the full meaning of such declarations [96] Statements made by third persons to accused shortly before the killing may be admissible where they tend to throw some light on his state of mind [97]

§ 244. Contemporaneous Circumstances

Competent evidence of circumstances contemporaneous with the killing or homicidal assault which tend to throw light on matters in issue is admissible

Competent evidence of all the facts and circumstances surrounding the killing or murderous assault which tend to throw light on the transaction is admissible [98] It is proper to show what persons

Tex —Dennis v State, 276 S W 715, 101 Tex Cr 154—Robbins v State, 166 S W 528, 73 Tex Cr 367

95. Tex —Robbins v State, supra

96. Mass —Commonwealth v. Howard, 91 N E 397, 205 Mass 128

97. Ky —Shelton v Commonwealth, 6 S W 2d 1094, 224 Ky 671

98. Ala —Sanders v State, 11 So 2d 740—Grissett v State 2 So 2d 399, 241 Ala 343—George v State, 200 So 602, 240 Ala 633—Birchfield v State 115 So 297, 217 Ala 225—Johnson v State, 53 So 769, 169 Ala 10—Williams v State, 41 So 992 147 Ala 10—Sconyers v State, 152 So 609, 26 Ala App 60—King v State, 134 So 133, 24 Ala App 267—South v State, 118 So 248, 22 Ala App 491—Lancaster v State 106 So 609, 21 Ala App 140, certiorari denied 106 So 617 214 Ala 2, and 106 So 618, 214 Ala 76 —Moulton v State, 98 So 709, 19 Ala App 446 certiorari denied Ex parte Moulton 98 So 715, 210 Ala 656—Hamlett v State, 96 So 371, 19 Ala App 218

Ark —Stribling v State, 284 S W 38, 171 Ark 184—Owens v State, 252 S W 25, 159 Ark 503

Cal —People v Arnold, 250 P 168 199 Cal 471—People v Bauman, 103 P 2d 1020, 39 Cal App 2d 587

Ga —Sweat v State 11 S E 2d 40, 63 Ga App 299

Ill —People v Hartwell, 173 N E 112, 341 Ill 155

Iowa —State v Hickman, 193 N W 21, 195 Iowa 765

Kan —State v Bundy, 75 P 2d 236, 147 Kan 4

Ky —Marion v Commonwealth, 108 S W 2d 721, 269 Ky 729—Quinn v Commonwealth, 86 S W 2d 328, 260 Ky 690—Oney v Commonwealth, 9 S W 2d 723, 225 Ky 590—Combs v Commonwealth, 246 S W 132, 196 Ky 804

La —State v Iles, 9 So 2d 601, 201 La 398

Mass —Commonwealth v Simpson, 13 N E 2d 939 300 Mass 15, certiorari denied Simpson v Commonwealth of Massachusetts, 58 S Ct 950, 304 U S 565 82 L Ed 1531

Miss —Irby v State 185 So 812, 186 Miss 161

Mo —State v Privett 130 S W 2d 575 344 Mo 1020—State v Richards, 67 S W 2d 58, 334 Mo 485—State v Golden, 51 S W 2d 91 330 Mo 784 —State v Jamerson 252 S W 682

N H —State v Rheaume, 116 A 758, 80 N H 319

N C —State v Bowser, 199 S E 31, 214 N C 249—State v Buffkin, 183 S E 543 209 N C 117—State v Jones, 153 S E 259 198 N C 704—State v Hall, 112 S E 431, 183 N C 806

Okl —Stogsdill v State, 216 P 681, 24 Okl Cr 152

Or —State v Kingsley, 2 P 2d 3, 137 Or 305 rehearing denied 3 P 2d 113, 137 Or 305

Tex —Salazar v State, 131 S W 2d 761, 137 Tex Cr 448—Black v State, 128 S W 2d 406, 137 Tex Cr 173—Kelley v State 112 S W 2d 470, 133 Tex Cr 460 Curtis v State, 46 S W 2d 303 119 Tex Cr 398—Hickox v State, 285 S W 621, 104 Tex Cr 649—Davis v State, 258 S W 188, 96 Tex Cr 417—Bennett v State, 252 S W 790, 95 Tex Cr 70—Nelson v State, 101 S W 1012, 51 Tex Cr 319

Vt —State v Stacy, 160 A 257, 104 Vt 379, motion denied 160 A 747, 104 Vt 379

Va —Mercer v Commonwealth, 142 S E 369 150 Va 588

Wash State v Davis, 108 P 2d 641, 6 Wash 2d 696

30 C J p 200 note 33

Cause of victim's presence

Occasion or cause of deceased's presence at place of killing may be proper inquiry in some cases —Harden v State, 101 So 412, 211 Ala 656

Character of house

(1) Evidence of the character of the house where the homicide occurred may be admissible —Gibson v State, 5 S W 314, 23 Tex App 414—30 C J p 201 note 46

(2) Testimony as to character of business conducted at place of killing as well as reputation, however, has been held to be properly excluded —People v Andrews, 158 N E 462, 327 Ill 162

Compromising position

Where there is some evidence that accused shot in self defense, it is relevant to prove that at time of difficulty accused went into his wife's room and found person assaulted in a compromising position with accused's wife —Turner v State, 194 So 687, 29 Ala App 197, certiorari denied Ex parte State ex rel Attorney General, 194 So 689, 239 Ala 238

Double crime

In prosecution for homicide where killing and assault on man accompanying deceased were in the nature of a double crime, any evidence that would have been competent at trial for assault was admissible —Commonwealth v De Matteo, 195 A 873, 328 Pa 359

Inflammatory character

Evidence of surrounding circumstances is not inadmissible merely because it might prove inflammatory in murder case —Howard v State, 13 S W 2d 80, 111 Tex Cr 205

Particular facts held admissible

(1) Evidence as to clothes worn by deceased at time of death especially when clothes were subsequently traced to accused's possession —Frost v State, 142 So 427, 225 Ala 232

(2) Facts relating to robbery, during which shooting occurred —Spear v State, 44 S W 2d 663, 184 Ark 1017

(3) In prosecution for murder by abortion that accused, failing to call in consulting physician, did not follow usual medical practice or code of ethics —People v Rongetti 176 N E 298, 344 Ill 278

(4) Kind of blows struck —Simons v State, 149 S W 2d 103, 141 Tex Cr 458

(5) Possession by accused of several guns and pistols, a cartridge belt and ammunition, where the evidence was restricted to showing intent, scheme, design, purpose and state of mind of accused —Shafer v State, 13 S E 2d 798, 191 Ga 722

(6) That deceased was unarmed when killed, as tending to prove that killing was felonious —State v. Thornhill, 178 So 343, 188 La 762

(7) That deceased wore uniform and badge of policeman —Beaird v State, 109 So 161, 215 Ala 27

(8) That prosecuting witness and deceased were intoxicated at time of shooting —Byrd v State, 123 So 867, 154 Miss 712

(9) That deceased's husband was absent from his home on the day of

were present at the time,[99] and what was done.[1] Circumstances tending to fix material dates may be shown.[2] Evidence of circumstances tending to elucidate the motives and acts of the persons is admissible.[3] Where accused denies the killing, evidence of circumstances pointing to him as the guilty person[4] or evidence indicating his innocence[5] is admissible as relevant. Testimony of contemporaneous circumstances which, isolated from the other facts in the case, would be irrelevant may become relevant when viewed in the light of, and in connection with, other testimony adduced on the trial.[6]

On the other hand, evidence of circumstances which, although contemporaneous with the homicide, are not relevant to any issue in the case and have no bearing on or connection with the killing, is not admissible.[7] A statute providing that in all prosecutions for felonious homicide the state or

the murder—Commonwealth v Thomas, 118 A 667, 275 Pa 137

(10) That witnesses, who resided near hotel where difficulty between accused and deceased, his wife, commenced, on night of alleged homicide heard a woman scream, the fact that witnesses were unable to give exact hour or location of sound affecting merely the weight of their testimony—Ratliff v State 102 So 621, 212 Ala 410

(11) Other matters see 30 C J p 200 note 38 [a]-[f], p 201 notes 42 43

Provocation

Evidence of surrounding circumstances shedding some light on the question of provocation is admissible—Rakestraw v State 101 So 181, 211 Ala 535

Time of death

Time it would take to smoke cigar of brand purchased and lighted by victim before he was killed and robbed at place of employment, and time it would take to walk to place of employment, was admissible as tending to show time of death, where partly smoked cigar of the brand bought by victim was found at place of crime—State v Thorp 171 A 643 86 N H 501

99. Ala—Collins v State, 34 So 993, 138 Ala 57

In adjoining building

In murder prosecution, evidence that many people were in building adjoining that into which bomb was thrown was admissible, where some were near window—Bridges v State, 142 So 56, 225 Ala 81

1. N Y—People v Conroy, 47 N E 258, 153 N Y 174
30 C J p 201 note 41

Course of bullet

On a prosecution for murder, testimony that some of the shots from accused's gun passed through the clothing of witness was admissible as part of the res gestæ—Hammond v State, 41 So 761, 147 Ala 79

Effort to open knife

In homicide prosecution, testimony that deceased was feeble old man, struggling as though he were trying to get his knife open, was properly admitted—Murphy v State, 144 So 114, 25 Ala App 237.

2. Mass—Commonwealth v Chance 54 N E 551, 171 Mass 245, 75 Am S R 306

3. La—State v Williams, 171 So 52, 185 La 849
30 C J p 201 note 45

Unsigned directions

Unsigned writing found on murdered officer directing him to still of accused's co-conspirator which was destroyed by officer, held properly admitted—Ethridge v State, 136 S E 72, 163 Ga 186

4 Ala—Terry v State, 23 So 776, 118 Ala 79
30 C J p 201 note 47

Poisoning others

(1) In prosecution for mingling poison with food with intent to kill prosecuting witness, testimony of witness that after eating cake baked in prosecuting witness' home, he became sick and had symptoms similar to those displayed by prosecuting witness and members of his family after eating food made from flour was admissible as a link in the chain of circumstances tending to establish the crime, and that the crime was designed and not accidental or the result of mistake—State v Holden 113 P 2d 171, 45 N M 147

(2) Evidence of the presence of arsenic in the stomach of one who drank in company with deceased some liquor given them by accused is admissible—People v Robinson, 2 Park Cr, N Y, 235

Possession of means

It may be shown that accused had the means of committing one of the acts which attended and may have induced the homicide—People v Place, 52 N E 576, 157 N Y 584

5. Explaining possession

Accused may introduce evidence to explain his possession of poison of the kind with which it is claimed the crime was committed—People v Cuff 55 P 407, 122 Cal 589—30 C J p 201 note 51

6. Tex—Flores v State, 55 S W 2d 822, 122 Tex Cr 405

Evidence held admissible

(1) Generally

Ala—Satterfield v State, 102 So. 691, 212 Ala 349

Okl—Nichols v State, 298 P 886, 50 Okl Cr 409

Tex—Archer v State 263 S W 305, 98 Tex Cr 91

(2) In rebuttal—Howard v Commonwealth, 27 S W 2d 410, 234 Ky 45

Settlement of controversy

Where on the trial of one charged as accomplice in a murder, a letter from accused to deceased asking him to meet him at the time and place of the killing is admitted it is error to exclude evidence that accused wished to meet deceased to settle a controversy between the latter and accused's accomplice—State v Welch, 55 P 97, 22 Mont 92

7 Ala—Locklayer v State 96 So 759, 209 Ala 605—Jones v State, 116 So 896, 22 Ala App 472—Valentine v State 98 So 183, 19 Ala App 510—Williams v State 93 So 281, 18 Ala App 573 Lawman v State 93 So 69, 207 Ala 419, 18 Ala App 569

Conn—State v Leopold 147 A 118, 110 Conn 55

Fla—Herring v State 154 So 187, 111 Fla 156

Ga—Lance v State 142 S E 105, 166 Ga 15

Ky—Taylor v Commonwealth, 108 S W 2d 615, 269 Ky 656—McHargue v Commonwealth, 38 S W 2d 927, 239 Ky 23

La—State v Louviere, 124 So 188, 169 La 109—State v Ashworth 120 So 865, 167 La 1085

Me—State v Sprague, 199 A 705, 135 Me 470

Md—Carey v State 142 A 497, 142 Md 471

Miss—McCaffrey v State 187 So 740, 185 Miss 659

Mo—State v Malone, 62 S W 2d 909, 333 Mo 591

Pa—Commonwealth v Yeager 196 A 827, 329 Pa 81

Tex—Henderson v State 106 S W 2d 291, 132 Tex Cr 596—Glover v State 70 S W 2d 155, 126 Tex Cr 56—Davis v State 66 S W 2d 339, 125 Tex Cr 131—Curtis v State, 46 S W 2d 303, 119 Tex Cr 398—Billings v State 277 S W 687, 102 Tex Cr 338—Hanks v State, 269 S W 106, 99 Tex Cr 218

30 C J p 200 note 39

constitute part of the res gestæ, or point to the accused as the cause of the death or injury, but not otherwise. Thus evidence of the acts, demeanor, or conduct of the accused shortly after the crime may be admissible.

Circumstances occurring subsequently to a homicide or assault with intent to kill or murder may be admissible where they throw light on the transaction,[31] or constitute part of the res gestæ, or are of such a character as to point to accused as the person through whose agency deceased came to his death or was injured.[32] Evidence of circumstances subsequent to the homicide or assault which are not part of the res gestæ and throw no light on the circumstances of the killing or any of the issues of the case is not admissible.[33]

Except where it would be self-serving in effect if offered on accused's behalf,[34] evidence may be admissible of the demeanor and conduct,[35] appear-

31. Ala.—Ratliff v. State, 102 So. 621, 212 Ala. 410—Hammond v. State, 41 So. 761, 147 Ala. 79.
Ark.—Harris v. State, 6 S.W.2d 34, 177 Ark. 186.
Ga.—Owens v. State, 136 S.E. 530, 163 Ga. 561.
Tex.—Millikin v. State, 296 S.W. 547, 107 Tex.Cr. 332.
Wash.—State v. Mahoney, 208 P. 37, 120 Wash. 633.
30 C.J. p. 203 note 82.

Extensive search for accused immediately following homicide.—Gillis v. State, 7 So.2d 563, 242 Ala. 550.

Reason for, and manner of, search for deceased
N.C.—State v. Gore, 178 S.E. 209, 207 N.C. 618.

Disturbance of body
Testimony as to what witness and others did when they came to deceased's body after shooting held admissible as tending to prove that body had not been disturbed.—Higgs v. State, 264 S.W. 859, 165 Ark. 613.

Details as to shooting of witness by accused immediately after he shot deceased at same place, held admissible.—Peters v. State, 200 So. 404, 240 Ala. 531.

Relations between codefendants
Mass.—Commonwealth v. Gillo, 175 N.E. 718, 275 Mass. 320, 79 A.L.R. 1380.

32. Ala.—Pearce v. State, 147 So. 617, 226 Ala. 436—Whittle v. State, 104 So. 668, 213 Ala. 301—Evers v. State, 129 So. 785, 24 Ala.App. 55—Lancaster v. State, 106 So. 609, 21 Ala.App. 140, certiorari denied 106 So. 617, 214 Ala. 2, and 106 So. 618, 214 Ala. 76.
Ga.—Thompson v. State, 113 S.E. 896, 166 Ga. 512.
N.M.—State v. Grissom, 298 P. 666, 35 N.M. 323.
Tex.—Mercado v. State, 258 S.W. 176, 96 Tex.Cr. 120.
30 C.J. p. 204 note 83.

Presence of accused with gun
Evidence that, when witness reached scene of shooting, accused with shotgun in his hand was standing a short distance from the assaulted man, was admissible.—Sanders v. State, 97 So. 294, 19 Ala.App. 367.

33. Ala.—Dyson v. State, 2 So.2d 787, 241 Ala. 335, denying certiorari 2 So.2d 784, 30 Ala.App. 121—Underwood v. State, 193 So. 155, 239 Ala. 29—Reeder v. State, 97 So. 73, 210 Ala. 114—Whetstone v. State, 113 So. 491, 22 Ala.App. 120, certiorari denied 113 So. 495, 216 Ala. 474.—Salts v. State, 110 So. 169, 21 Ala.App. 573, certiorari denied 110 So. 170, 215 Ala. 247—Snoddy v. State, 101 So. 303, 20 Ala.App. 168.
Cal.—People v. Orosco, 239 P. 82, 73 Cal.App. 580.
Ky.—Morgan v. Commonwealth, 79 S.W.2d 1, 257 Ky. 691—Etherton v. Commonwealth, 55 S.W.2d 313, 246 Ky. 553.
La.—State v. Zeigler, 167 So. 456, 184 La. 829—State v. Harvey, 106 So. 28, 159 La. 674, error dismissed Harvey v. State, 47 S.Ct. 20, 273 U.S. 635, 71 L.Ed. 815.
Mass.—Commonwealth v. Belenski, 176 N.E. 501, 276 Mass. 35.
Miss.—Hunter v. State, 181 So. 835, 183 Miss. 779.
Mont.—State v. Park, 289 P. 1037, 88 Mont. 21.
S.C.—State v. Woodham, 160 S.E. 885, 162 S.C. 492.
S.D.—State v. Staley, 223 N.W. 943, 946, 54 S.D. 552, citing **Corpus Juris,** and reversed on other grounds, 229 N.W. 473, 56 S.D. 495.
Tex.—Downey v. State, 86 S.W.2d 1084, 129 Tex.Cr. 282—Cammack v. State, 278 S.W. 1105, 102 Tex.Cr. 579.
W.Va.—State v. Lane, 182 S.E. 784, 116 W.Va. 636.
30 C.J. p. 204 note 84.

Particular circumstances held inadmissible
(1) That accused failed to attend deceased's funeral.—Fowler v. State, 38 S.W.2d 97, 118 Tex.Cr. 419.

(2) That codefendant who had been separately tried and acquitted, had been lynched.—Fisher v. State, 116 So. 746, 150 Miss. 206.

(3) That victim's wife had had police officers detailed at her home for some time just prior to the trial.—People v. Herbert, 196 N.E. 821, 361 Ill. 64.

(4) That no one at scene of killing would tell sheriff anything about it.—Greer v. State, 125 S.E. 52, 159 Ga. 85.

(5) That accused disposed of brains of deceased shot in head, in a gruesome manner.—Blackburn v. State, 117 So. 614, 22 Ala.App. 561.

(6) That deceased had requested accused to go to hospital with him after being shot.—Long v. Commonwealth, 90 S.W.2d 1007, 262 Ky. 619.

(7) That accused passed himself off as a preacher in a county to which he went after the offense.—Gilbert v. State, 100 So. 566, 20 Ala.App. 28.

(8) That deceased's brother, after the shooting of deceased shot into accused's hat which was lying on ground, Bryant v. Commonwealth, 288 S.W. 680, 216 Ky. 724.

(9) That a neighbor had contributed money for the payment of medical services rendered to deceased after he was shot.—State v. Lasseur, Mo., 242 S.W. 900.

(10) That accused's son arrested at same time as he, was mistreated while in confinement.—Mohler v. State, 265 S.W. 553, 98 Tex.Cr. 238.

(11) Other circumstances see 30 C.J. p. 204 note 84 [a].

34. Fla.—Smith v. State, 176 So. 506, 129 Fla. 388.
30 C.J. p. 205 note 96.

35. Ala.—Williams v. State, 41 So. 992, 147 Ala. 10—Williams v. State, 133 So. 737, second case, 24 Ala.App. 206, certiorari denied 133 So. 738, 222 Ala. 685.—Sanders v. State, 97 So. 294, 19 Ala.App. 367.
Fla.—Smith v. State, 176 So. 506, 129 Fla. 388.
Ky.—Neace v. Commonwealth, 26 S.W.2d 189, 233 Ky. 545, followed in Miller v. Commonwealth, 28 S.W.2d 45, 234 Ky. 346.
Mo.—State v. Cade, 34 S.W.2d 82, 326 Mo. 1132—State v. Mathis, 18 S.W.2d 8, 323 Mo. 37.
N.C.—State v. Godwin, 3 S.E.2d 347, 216 N.C. 49.
Okl.—Walker v. State, 19 P.2d 622, 54 Okl.Cr. 279.
Pa.—Commonwealth v. Karmendi, 195 A. 62, 328 Pa. 321.
S.D.—State v. Strain, 262 N.W. 237, 63 S.D. 639.
Tex.—Willis v. State, 239 S.W. 212, 91 Tex.Cr. 329.
30 C.J. p. 204 note 85.

Conduct when first accused of crime
Iowa.—State v. Johnson, 264 N.W. 596, 267 N.W. 91, 221 Iowa 8.

ance,[36] and acts[37] or omissions[38] of accused shortly after the homicide or assault, such as acts or conduct evidencing accused's state of mind at the time of the killing,[39] consciousness of guilt,[40] or a desire to elude discovery,[41] to cast the blame on another,[42] to conceal the crime or the evidence of it,[43] to fabricate a defense[44] or false testimony in his behalf,[45] or acts showing malice toward deceased, as discussed supra § 211, or a motive for taking his life, as discussed supra § 227, or, particularly where there is a close relationship,[46] indifference to his fate,[47] or acts of communication with a person known to have been concerned in the crime.[48] Accused should be permitted to offer evidence to refute evidence offered for such purposes.[49]

It has been held that occurrences in the presence of accused a short time after the homicide may be shown,[50] but evidence as to the acts, conduct, or manner of decedent in the presence of accused after the fatal injury is held inadmissible where accused did nothing that could be considered an admission.[51]

Evidence is admissible to show assistance rendered by accused, charged as an accomplice, to the

Demeanor at funeral
Ga—Beckwith v State, 190 S E 184, 183 Ga 871

Circumstances attending arrest
Excluding evidence of officer who participated in arrest of accused as to circumstances attending arrest during flight and what accused had on his person as bearing on conduct and guilty knowledge of accused, held discretionary—State v Palko, 186 A 657, 121 Conn 669

36. Ala—Sinders v State, 97 So 294, 19 Ala App 367
Ky—Neace v Commonwealth, 26 S W 2d 189, 233 Ky 545 followed in Miller v Commonwealth, 28 S W 2d 45, 234 Ky 346
Tex—Willis v State, 239 S W 212, 91 Tex Cr 329
30 C J p 204 note 86

Testimony that accused "didn't look right" held admissible—Smith v State, 176 So 506, 507, 129 Fla 388

37. Ala—Bass v State 122 So 45 219 Ala 282 Williams v State 133 So 737, second case 24 Ala App 206, certiorari denied 133 So 738, 222 Ala 688—Slaughter v State 106 So 891, 21 Ala App 211 - Sinders v State, 97 So 294, 19 Ala App 367
Cal—People v Roberts 250 P 208, 79 Cal App 506
Ky—Smith v Commonwealth, 22 S W 2d 118, 232 Ky 52—Haywood v Commonwealth 298 S W 985, 221 Ky 378
Mass—Commonwealth v Sacco, 151 N E 839, 255 Mass 369
N C—State v Godwin 3 S E 2d 317 216 N C 49—State v Steele 130 S E 308, 190 N C 506
Okl—Walker v State, 19 P 2d 622, 54 Okl Cr 279
S D—State v Strain, 262 N W 237, 63 S D 639
30 C J p 205 note 87
"The proof of the homicide necessarily involved proof of the actions of the accused immediately preceding and subsequent to its actual commission in order to present a complete picture of the entire transaction"—State v Simborski, 182 A 221, 225, 120 Conn 624.

That accused attempted to commit suicide is a circumstance which may be considered by the jury in connection with all other facts and circumstances
Iowa—State v Bittner, 227 N W 601, 209 Iowa 109
Mo—State v Painter, 44 S W 2d 79, 329 Mo 314
N C—State v Exum, 195 S E 7, 213 N C 16—State v Lawrence, 116 S E 395, 196 N C 562
30 C J p 205 note 87 [a]

Offer to pay for release
Arresting officers' testimony that accused offered to pay them for his release held admissible—Bass v State 122 So 45 219 Ala 282

Purpose of consulting counsel
Although one learning that he was suspected of murder had a right to consult counsel, where he denied that he consulted counsel about the crime and claimed that the consultation was to obtain a renewal of his chauffeur's license which had been taken away, the character of the license and the date of its suspension were proper subjects of inquiry—Commonwealth v Rollins 136 N E 360, 242 Mass 127

38. Failure to call physician
Cal—People v Roberts, 250 P 208 79 Cal App 506
Failure to aid victim after encounter—Waters v State, 211 S W 496, 91 Tex Cr 592

Failure to arrange for funeral of murdered wife
Ga—Beckworth v State, 190 S E 184, 183 Ga 871

Silence
That accused remained silent regarding whereabouts of man with whom deceased was last seen was circumstance provable against accused—Leahy v State, 13 S W 2d 874, 111 Tex Cr R 570

39. Okl—Walker v State, 19 P 2d 622, 54 Okl Cr 279

40. Cal—People v Clark, 259 P 47, 201 Cal 474
Flight, avoidance of arrest, concealment, and escape see infra § 251
Securing gun after encounter with deceased—People v Clark, 259 P 47, 201 Cal 474

41 Md—Cothron v State 113 A 620, 138 Md 101
30 C J p 205 note 88

Adopting assumed name
Cal—People v Wheaton, 220 P 451, 64 Cal App 58
Pa—Commonwealth v Lucitti, 145 A 85, 295 Pa 190

42. Ky—Haywood v Commonwealth, 298 S W 985, 221 Ky 378

43. Ala—Elmore v State, 158 So 771 26 Ala App 290
N C—State v Steele 130 S E 308, 190 N C 506
30 C J p 205 note 89

Hiding body
N C—State v Steele supra

Destruction of weapon
In prosecution for homicide accomplished with knife testimony that accused gave witness knife a few minutes after killing and told him to destroy it held competent where there was testimony indicating that this was same knife with which accused had stabbed deceased—Pelham v State 134 So 888 24 Ala App 330, certiorari denied 134 So 890, 223 Ala. 155

44. Ky—Bates v Commonwealth, 225 S W 1085 189 Ky 727
30 C J p 205 note 90

45 Tex—Hughes v State, 262 S W 745, 97 Tex Cr 607

46. Pa—Commonwealth v Karmendi, 195 A 64, 328 Pa 321

47. Ga—Perry v State, 36 S E 781, 110 Ga 234
30 C J p 205 note 93

48. Ala—Parker v State 65 So 90, 10 Ala App 53
Tex—Darlington v State, 50 S W 375 40 Tex Cr 333

49 Ala—Parker v State, 123 So 107, 23 Ala App 217

50 Mich—People v Tubbs, 110 N W 132, 147 Mich 1

51. N Y—People v Smith, 64 N E 814, 172 N Y 210.

person who did the killing [52] The acts of an accomplice of accused in connection with the homicide may be shown [53]

The acts of third persons out of the presence and hearing of accused, subsequent to the homicide, have been held inadmissible,[54] but in some circumstances such evidence has been admitted [55]

A witness' explanation of his action in secretly removing the bones of deceased is admissible [56] Where accused has not attempted to show that the sole cause of death was maltreatment of the wound and not the wound itself, evidence as to whether a certain treatment was proper is inadmissible [57]

§ 248. —— Physical and Mental Conditions

a Physical conditions
b Mental conditions

a. Physical Conditions

(1) In general
(2) Condition and location of body; wounds and marks

(1) In General

Evidence of physical facts and conditions observed after the crime and connected therewith, and tending to establish the accused's guilt or innocence, is admissible This rule has been applied to such matters as the condition of the place of the crime, the finding of articles, and the presence of blood or bloodstains on clothing or elsewhere

Evidence of physical facts observed after the homicide or assault with intent to kill or murder and connected therewith, and tending to establish the guilt or innocence of the accused, is admissible,[58] but evidence of disconnected facts is not admissible [59] Under this general rule evidence is ad-

52. Tex —Millner v State, 162 S W 318, 72 Tex Cr 45

53. Tex – Jenkins v State, 75 S W 312, 45 Tex Cr 173
30 C J p 205 note 1

Appearance and manner of murderer, since deceased, three hours after commission of homicide held admissible in prosecution of those alleged to have been with him —People v Arnold, 250 P 168, 199 Cal 471

54. Tex —Cates v State, 227 S W 953 88 Tex Cr 570
30 C J p 205 note 4

55. Rebuttal of defense

Where accused secured ride with deceased witness and another in truck, and killed deceased when they stopped on journey, evidence showing movements of witness shortly after murder was admissible to support his testimony and to rebut defense that accused had been assaulted by the others –Lives v State, 113 S W 2d 909 133 Tex Cr 627

Whereabouts of close associate of accused

In the prosecution of a night hotel clerk for murder of a guest admission of evidence as to the whereabouts and appearance of the roommate and intimate associate of accused after the apparent time of commission of the crime, held not erroneous where it was state's theory that such roommate wrote a fictitious name on the hotel register — State v Gummer, 200 N W 20, 51 N D 445

56. Mich – People v Lipsczinska, 180 N W 617, 212 Mich 481

57. Mo —State v Strong, 55 S W 78, 153 Mo 548

58. Ala —Underwood v State, 193 So 155 239 Ala 29—Watson v State 112 So 181 22 Ala App 57—Lancaster v. State, 106 So 609, 21 Ala App 140 certiorari denied 106 So 617, 214 Ala 2, and 106 So 618, 214 Ala 76
Ark —Nagel v State, 17 S W 2d 317, 179 Ark 625
Ga King v State, 142 S E 160, 166 Ga 10
La —State v Harvey, 106 So 28, 159 La 671, error dismissed Harvey v State, 47 S Ct 20 273 U S 635, 71 L Ed 815
Mo —State v Taylor, 118 S W 2d 802 347 Mo 607
Mont —State v Walsh, 232 P 194, 72 Mont 110
S C —State v Bigham, 131 S E 603 133 S C 191
Tex —Salazar v State 131 S W 2d 761 137 Tex Cr 448—Rueda v State 277 S W 116, 101 Tex Cr 651 —Mohler v State, 265 S W 553, 98 Tex Cr 238
Vt —State v Stacy, 160 A 257, 104 Vt 379, motion denied 160 A 747 104 Vt 379
30 C J p 205 note 6

Rebuttal or contradiction of accused's testimony

(1) State's evidence that no one went to deceased's body before arrival of sheriff held proper rebuttal of contrary testimony —Magee v State 122 So 766 154 Miss 671

(2) Where accused claimed an accidental killing while on an automobile ride testimony of the condition of the house and premises of deceased immediately after night of killing tending to show that an act of violence had been committed during night, was competent as tending to contradict accused's story —Houston v State, 264 S W 869, 165 Ark 294

(3) Commonwealth could meet testimony of accused's witnesses, regarding pistol found at scene of killing, by rebuttal testimony —Castle v Commonwealth, 14 S W 2d 387, 228 Ky 151.

59. Ala —Powe v State, 106 So 503 214 Ala 91— Jones v State, 101 So 331, 20 Ala App 247
Ky —Banks v Commonwealth, 126 S W 2d 1122 277 Ky 647—Adams v Commonwealth 120 S W 2d 237 271 Ky 714—Woodall v Commonwealth, 50 S W 2d 939 244 Ky 320
Mich —People v Keller, 246 N W 151, 261 Mich 367
Miss —Bouchillon v State, 118 So 726 151 Miss 752
30 C J p 206 note 7

Lapse of time; remoteness

(1) Lapse of a week before finding of bullet holes held not to render evidence inadmissible for remoteness — Houston v State, 264 S W 869, 165 Ark 294

(2) Lapse of three months after shooting before finding of bullet, goes merely to weight and not to admissibility of evidence — Bates v Commonwealth, 276 S W 119, 210 Ky 421

(3) Where but one shot had been fired and that was fired by accused with a shotgun, testimony that three shotgun wads were found a few yards from the front door of victim's home was not inadmissible although the wads were found twelve or fifteen hours after the alleged shooting objection going more to weight of evidence than to admissibility —McElroy v State, 115 S W 2d 971, 134 Tex Cr 415

(4) That hair similar to that of deceased who was alleged to have been beaten to death with a blunt instrument, was not discovered on accused's shovel until several months after shovel had come into possession of authorities went only to weight and not to admissibility of evidence —State v Rowe, 280 N W 646, 203 Minn 172

(5) Where deputy sheriff produced in court a bush which had been

missible as to the condition of the place of the alleged homicide,[60] or of the place where the body was found,[61] the finding of articles,[62] including articles belonging to accused[63] or a codefendant,[64] footprints or tracks,[65] the mark of a shot,[66] or bullet holes,[67] and as to physical conditions generally as the witness found them.[68] It is proper to show

growing near the spot where deceased was shot, several months after the shooting, and the bush indicated that it had been struck by something, but deputy was unable to say it had been struck by a shot, court did not err in permitting him to testify as to location of bush as tending to refute accused's version as to where accused stood at time of shooting, the lapse of time affecting the weight to be given the testimony rather than its admissibility—Salyers v. Commonwealth, 118 S.W.2d 208, 274 Ky. 284

(6) Evidence of finding furniture in ruins of building burned about nine months after fire held properly excluded as too remote—State v. Leopold, 147 A. 118, 110 Conn. 55

60. Ala.—Vaughn v. State, 143 So. 211, 25 Ala.App. 204
Miss.—Huddleston v. State, 98 So. 839, 134 Miss. 382
S.C.—State v. Orr, 126 S.E. 766, 131 S.C. 276
Tex.—Lewis v. State, 128 S.W.2d 798, 137 Tex.Cr. 197—Langford v. State, 63 S.W.2d 1027, 124 Tex.Cr. 473

Condition after interval; change of condition

(1) Competency of evidence as to condition, number of days after killing of objects surrounding the scene of killing depends on whether it is shown with reasonable certainty or whether the jury may infer with certainty that conditions were same as at time of or immediately after killing.—Houston v. State, 264 S.W. 869, 165 Ark. 294

(2) Where shooting took place on rarely traveled road, testimony as to condition of ground on day following murder was admissible—Adcock v. State, 20 S.W.2d 120, 179 Ark. 1055

(3) Testimony as to powder burns on door facing was not competent without proof that it was in same condition as just after shooting—Meek v. Commonwealth, 11 S.W.2d 996, 227 Ky. 83

(4) Evidence of condition and surroundings of isolated cabin, to which none but accused had access since time of killing therein, when premises were examined about seven months later, held properly received, without preliminary showing that conditions were same as at time of killing—State v. Leib, 201 N.W. 29, 198 Iowa 1315

(5) It was not error to admit evidence of the condition of a room in which the homicide occurred, about two months thereafter, where it was shown that the room was in substantially the same condition as when the difficulty occurred—State v. Chacon, 209 P. 889, 36 Idaho 118

(6) Testimony as to position in which witness found deceased's gun more than hour after homicide held admissible, in absence of showing that surroundings had changed—Callabrizzi v. State, 288 S.W. 207, 105 Tex.Cr. 272

Existence of possible cause of injury

Testimony that there was nothing standing up around deceased's head where he was lying on which he might have struck his head in falling held competent, since state had right to show locus in quo.—Hall v. State, 159 So. 500, 26 Ala.App. 344

61. Pa.—Commonwealth v. Ware, 123 A. 795, 279 Pa. 282

Lapse of two days after killing and before discovery of corpse does not necessarily render such evidence inadmissible.—Commonwealth v. Ware, supra

62. Ala.—Pruitt v. State, 168 So. 149, 232 Ala. 421—Whittle v. State, 104 So. 668, 213 Ala. 301—Pynes v. State, 92 So. 666, 207 Ala. 413—Eden v. State, 129 So. 797, 24 Ala.App. 37
Ill.—People v. Selknes, 140 N.E. 852, 309 Ill. 113
Tex.—Vickers v. State, 242 S.W. 1032, 92 Tex.Cr. 182
Wyo.—Lampitt v. State, 242 P. 812, 31 Wyo. 247
30 C.J. p. 206 note 8

Clothing

Ky.—Simpkins v. Commonwealth, 17 S.W.2d 245, 229 Ky. 118
Tex.—Dial v. State, 113 S.W.2d 905, 133 Tex.Cr. 610
30 C.J. p. 206 note 8 [c]

Money

Cal.—People v. Perkins, 66 P.2d 631, 8 Cal.2d 502

Weapon

Ala.—McClendon v. State, 121 So. 2, 23 Ala.App. 83

Bullet mark

S.C.—State v. Orr, 126 S.E. 766, 131 S.C. 276
Tex.—Alvarado v. State, 77 S.W.2d 534, 127 Tex.Cr. 499

Bullets lodged in walls

Mo.—State v. Richards, 67 S.W.2d 58, 334 Mo. 485

Shot; shells

(1) Evidence as to finding of shot or shells held admissible
Ala.—Allbritton v. State, 191 So. 268, 29 Ala.App. 1, certiorari denied 191 So. 270, 238 Ala. 439
Ga.—Carter v. State, 114 S.E. 194, 154 Ga. 359
Mo.—State v. Richards, 67 S.W.2d 58, 334 Mo. 485

(2) It was not error to rule, with regard to a question as to where three shells were claimed to have been found, that it was not proper to go into the question of shells other than those found on the premises immediately after the killing—Combs v. State, 260 S.W. 736, 163 Ark. 550

Article not introduced

(1) A large bloody stick found near body of deceased was an object within the "locus in quo," and a description of the stick was admissible notwithstanding it was never introduced in evidence.—Stephenson v. State, 185 So. 910, 28 Ala.App. 418

(2) In prosecution for assault with intent to kill evidence that hat was found at scene of shooting was admissible even though hat was not produced and introduced in evidence, since fact that such hat was found and that next morning accused was found traveling bareheaded was a circumstance for jury to consider—Collier v. State, 154 S.W.2d 569, 202 Ark. 939

63. N.J.—State v. Catania, 134 A. 110, 102 N.J.Law 569
30 C.J. p. 206 note 9

64. Ga.—Westberry v. State, 164 S.E. 905, 175 Ga. 115

65. Ala.—Thompson v. State, 193 So. 323, 29 Ala.App. 124, certiorari denied 193 So. 324, 239 Ala. 16
Miss.—Huddleston v. State, 98 So. 839, 134 Miss. 382
30 C.J. p. 206 note 10
Tracks as evidence of identity and presence of accused see supra § 215

66. Tex.—Barnes v. State, 116 S.W.2d 408, 134 Tex.Cr. 461

67. Ark.—Houston v. State, 264 S.W. 869, 165 Ark. 294
Tex.—Davis v. State, 258 S.W. 188, 96 Tex.Cr. 117

68. Ala.—Eden v. State, 129 So. 797, 24 Ala.App. 37
Ark.—Collier v. State, 154 S.W.2d 569, 202 Ark. 939
Mich.—People v. Keywell, 239 N.W. 288, 256 Mich. 139
Tex.—Morgan v. State, 117 S.W.2d 76, 135 Tex.Cr. 76—Bennett v. State, 252 S.W. 790, 95 Tex.Cr. 70
30 C.J. p. 206 note 11

Description by first person discovering facts

Ky.—Dockery v. Commonwealth, 292 S.W. 336, 218 Ky. 703
Tex.—Salazar v. State, 131 S.W.2d 761, 137 Tex.Cr. 448.

the physical condition of accused[69] or his codefendant[70] soon after the homicide, or of deceased after the fatal blow and before death resulted,[71] or of the person assaulted, soon after the event[72] So also it is proper to show the condition of the clothing of accused[73] or his codefendant[74] after the crime, or of deceased when he was found,[75] or the appearance of the clothing worn by deceased at the time of the fatal difficulty,[76] or the place where the clothing of deceased was found[77] Testimony as to a search of accused made at his instance, in which no knife or weapon of any kind was found, is admissible[78]

Blood, bloodstains It is proper to show the presence of blood or bloodstains on the person, clothing, or possessions of accused[79] or his codefendant,[80] or another person involved,[81] or on the clothing of deceased,[82] or at the place of the crime,[83] or at a place where the evidence tends to show accused has been since the crime,[84] or to show bloodstains as tending to show where the crime was committed[85] Evidence as to bloodstained articles in possession of the state may, however, be excluded, when the articles themselves are not produced, and their nonproduction is not explained[86]

Condition of weapon Evidence is admissible as to the condition, after the crime, of the weapon with which the killing was done, or the assault made,[87] or of the weapon carried by deceased,[88] or of a weapon taken from accused after the homicide[89]

Expert and opinion evidence Subject to the rules governing the use of expert and opinion evidence in criminal prosecutions generally, see Criminal Law §§ 858–891, a duly qualified expert may express his opinion bearing on the physical conditions surrounding the homicide where it is as to a matter within his special skill and knowledge,[90] and generally the opinion of a nonexpert witness may be received as to those facts as to which judgment or opinion is all that can be expressed,[91] but expert or opinion evidence is not admissible as to matters concerning which the jury are as competent to

Measurement of distances

Witness' testimony in murder prosecution that after shooting he measured distances between persons and objects involved, held admissible - Vintson v State, 121 So 698, 23 Ala App 51, certiorari denied 121 So 699, 219 Ala 193

69. Ala—Roan v State 113 So 154, 225 Ala 128
Ky—Neace v Commonwealth, 26 S W 2d 189, 233 Ky 515, followed in Miller v Commonwealth, 28 S W 2d 45, 234 Ky 316
Tex—Rueda v State, 277 S W 116, 101 Tex Cr 651—Broussard v State, 271 S W 385, 99 Tex Cr 589
30 C J p 206 note 12

Liquor on breath

Cal—People v Darrow, 298 P 1, 212 Cal 167

Lapse of time, opportunity for preparation

However, evidence as to accused's condition on arrival at witness house four miles from place of homicide held inadmissible in his behalf in view of time that had elapsed since commission of crime and opportunity given him for preparation—Smith v Commonwealth, 268 S W 328, 206 Ky 728

70. Tex—Rueda v State, 277 S W 116, 101 Tex Cr 651

71. Mass—Commonwealth v Hughes 66 N E 716 184 Mass 221
N C—State v Stewart, 72 S E 193 156 N C 636

72. Ala—Phillips v State, 54 So 111, 170 Ala 5

Death of victim of assault

In prosecution charging accused with being accessary after fact to assault with intent to kill and murder evidence that victim was dead held competent—People v Haskins 169 N E 18 337 Ill 131

73. Tex—Rueda v State, 277 S W 116, 101 Tex Cr 651
30 C J p 206 note 15

74. Tex—Rueda v State supra

75. Ala—Brothers v State, 183 So 133 236 Ala 448
Tex—Reese v State 151 S W 2d 828, 142 Tex Cr 254—Feeney v State 59 S W 2d 385 123 Tex Cr 188
30 C J p 206 note 16

76. Ala—Jones v State, 101 So 331 20 Ala App 247

77. Ark—Bennett v State, 128 S W 851 95 Ark 100

78. Tex—Mansell v State, 182 S W 1137, 79 Tex Cr 18

79. Tex—Langford v State, 63 S W 2d 1027 124 Tex Cr 473—Milliken v State 296 S W 547, 107 Tex Cr 332
30 C J p 206 note 19
Blood on deceased's body see infra subdivision a (2) of this section

Wearing of particular clothing at time of homicide

Testimony that certain spots on accused's overalls were human blood was inadmissible in absence of other evidence that accused was wearing overalls on night of homicide than one witness' testimony that accused said he was wearing them on that night—Hodgins v State 190 So 875 139 Fla 226, 124 A L R 450

80. Ga—Westberry v State, 161 S E 905, 175 Ga 115
Ky—Spencer v Commonwealth, 35 S W 2d 319 237 Ky 283

81. Ala—Pruitt v State, 168 So 149, 232 Ala 421

82. Tex—Reese v State, 151 S W 2d 828, 142 Tex Cr 254

83. Cal—People v Santos, 26 P 2d 522 134 Cal App 736
Miss—Hunter v State 102 So 282 137 Miss 276
Tex—Regittano v State 257 S W 906, 96 Tex Cr 477

84. Ind—Hinshaw v State 47 N E 157 147 Ind 334
N Y—Greenfield v People, 85 N Y 75, 39 Am R 636

85. Ala—Jones v State, 75 So 830, 16 Ala App 154

86. Miss—Johnson v State 32 So 49, 80 Miss 798

87. Ark—Nagel v State, 17 S W 2d 317, 179 Ark 625
N C—State v Pritchett, 11 S E 357, 106 N C 667
Tex—Barnes v State, 116 S W 2d 408 134 Tex Cr 461

88. La—State v Chevallier, 36 La Ann 81
Tex—Vickers v State, 242 S W 1032, 92 Tex Cr 182

89 Blood spots

Doctor's testimony that spots on accused's pistol showed blood, without proof that it was human blood, held admissible—Milliken v State, 296 S W 547, 107 Tex Cr 332

90 Tex—Milliken v State, supra
30 C J p 206 note 26

91. Mass—Commonwealth v Dorsey 103 Mass 412.
30 C J p 207 note 27.

form an opinion as the witnesses may be, and such facts should be established and the jury left to form their own opinion [92] A witness, although not an expert, may testify as to the condition in which the victim was found shortly after the assault [93] Where a witness has testified as to certain matters which a particular scientific test is essential to determine and then testifies that he did not make such test, his conclusion should be stricken out [94]

(2) Condition and Location of Body, Wounds and Marks

Details with respect to the condition and location of the body of the deceased or the assaulted person may be shown by proper evidence, and expert and opinion evidence may, subject to general rules, be admitted for this purpose

It is proper to show the condition of the body of deceased or the assaulted person when found,[95] or thereafter,[96] its location[97] and position,[98] the existence of wounds,[99] their nature,[1] location,[2] cause,[3] appearance,[4] and result,[5] the existence and location of bruises,[6] or the presence of blood on deceased's body [7] Evidence of the condition of the body of deceased in a certain particular which has no tendency to connect accused with the crime, but tends to throw prejudice on accused, should be rejected [8]

Where accused contends that his wounds were received in the fatal difficulty, evidence as to his having received them otherwise is admissible [9]

Expert and opinion evidence Subject to the rules as to expert and opinion evidence generally, as discussed in Criminal Law §§ 858-891, a properly qualified witness may be permitted to testify as to the significance of wounds,[10] their probable result,[11] the character of instrument with which they were made,[12] the direction from which a blow inflicting them was delivered[13] and its force.[14] the point of entry and departure of a bullet[15] and the course which a shot took,[16] the marks of powder burns,[17] or that bruises were caused by a blow of the fist,[18] but the opinion of a witness is not ad-

92. Tex —Hardin v State, 49 S W 607, 40 Tex Cr 208
30 C J p 207 note 28

93. Ala Jacobs v State, 42 So 70 146 Ala 103

94. Ill —People v Schultz-Knighton, 115 N E 140, 277 Ill 238
30 C J p 207 note 30

95 Ala —Jones v State, 101 So 331 20 Ala App 247—Sanders v State, 97 So 294 19 Ala App 367
Miss —Hunter v State, 102 So 282 137 Miss 276
N C - State v Holland, 6 S E 2d 217, 216 N C 610
Tex —Morgan v State 117 S W 2d 76 135 Tex Cr 76—Outlaw v State, 69 S W 2d 120, 125 Tex Cr 636
30 C J p 207 note 31

Concealment of crime
Under indictment charging murder by shooting evidence as to appearance of victim's body when found, showing that head was severed held properly admitted to show severance was for purpose of concealing murder —Spencer v Commonwealth, 35 S W 2d 319, 237 Ky 283

96 D C —Grock v U S, 289 F 544, 53 App D C 146
Tex —Salazar v State, 131 S W 2d 761, 137 Tex Cr 418

97. Ala —Underwood v State, 193 So 155, 239 Ala 29—Eden v State, 129 So 797, 21 Ala App 37
30 C J p 207 note 32

98. Ala —Underwood v State, 193 So 155, 239 Ala 29
Tex —Davis v State, 296 S W 897, 107 Tex Cr 414
30 C J p 207 note 33

99. Ala —Powe v State, 106 So 503, 214 Ala 91.

Me —State v Sprague, 199 A 705 135 Me 470
Tex —Long v State 288 S W 1074, 105 Tex Cr 494
30 C J p 207 note 34

Wounds on bodies of victim's relatives
(1) Testimony as to wounds on body of deceased's widow who testified that she and deceased were assaulted held admissible —Meador v State, 289 S W 691, 105 Tex Cr 590

(2) Testimony as to wounds found on bodies of relatives of deceased alleged to have been murdered at same time held admissible facts being closely related in point of time to the homicide —State v Bigham, 131 S E 603 133 S C 491

1. Ala —Beck v State, 197 So 43 240 Ala 19, reversing 197 So 42 29 Ala App 410

2. Tex — Long v State, 288 S W 1074 105 Tex Cr 494
30 C J p 207 note 35

Testimony of undertaker
Ala —Lewis v State 121 So 447 23 Ala App 92

3. Iowa —State v Baker, 135 N W 1097, 157 Iowa 126, petition for rehearing overruled 138 N W 841, 157 Iowa 126

4. Ala —Hill v State, 41 So 621 146 Ala 51
Ga —Crawley v State, 104 S E 410 150 Ga 586

5. Ala —Beck v State, 197 So 43, 240 Ala 19, reversing 197 So 42, 29 Ala App 410

6. Ark —Nelson v State, 82 S W 2d 519, 190 Ark 1027
30 C J p 207 note 38.

Bruises on body of deceased's widow, who testified that she and deceased were assaulted —Meador v State, 289 S W 691, 105 Tex Cr 590

7. Ala —Powe v State, 106 So 503, 214 Ala 91

8. R I —State v Mariano, 91 A 21, 37 R I 168

9 La —State v Ussery, 152 So 302, 178 La 593

10. N H —State v Greenleaf, 54 A 38 71 N H 606
30 C J p 207 note 41

11. Tex —Streight v State, 138 S W 742 62 Tex Cr 453
30 C J p 207 note 42

12. Vt —State v Marino, 99 A 882, 91 Vt 237
30 C J p 208 note 43

13. Iowa —State v Giudice 153 N W 336, 170 Iowa 731, Ann Cas 1917C 1160
30 C J p 208 note 44

14. Cal —People v Knapp, 117 P 792, 16 Cal App 682
Tex —Harris v State 148 S W 1074 67 Tex Cr 251

15 Tex —Welch v State, 122 S W 880 57 Tex Cr 111
30 C J p 208 note 46

16. Tex —Sanford v State, 185 S W 22 79 Tex Cr 346
30 C J p 208 note 47

Testimony of undertaker held admissible —Lewis v State, 121 So 447, 23 Ala App 92

17. Ala —Barlow v State, 57 So 601, 5 Ala App 290
Tex —Smith v State, 232 S W 497, 90 Tex Cr 24

18. S C —State v Stockman 64 S E 595, 82 S C 388, 129 Am S R 888.
30 C J p 208 note 49.

missible where the facts necessary for its foundation are not in evidence,[19] and where the appearance of a wound has changed before it has been observed by the expert, he cannot testify as to the point of entry and departure of a bullet.[20] According to one view, the question whether a wound is such as might be self-inflicted is not a proper matter of expert or opinion evidence,[21] but it has been held that an expert may testify as to such fact.[22]

A nonexpert witness may describe a wound which he has seen,[23] the angle of a shot,[24] or the course or range of the wound,[25] and witnesses who are not experts in the strict sense may testify as to their conclusions of fact, such as are drawn by men in their ordinary affairs of life.[26] Where the wound received by decedent necessitated the amputation of his leg, evidence of a nonexpert witness as to the appearance of the leg just before the death of deceased is admissible.[27] Where the homicide was of a newly born infant, a nonexpert witness, after testifying that he observed a red mark upon the infant's lip and also other marks on the lips and chin, may state his opinion that the child had the appearance of being smothered.[28] A nonexpert cannot testify as to how long deceased had been dead when witness saw him.[29] A witness has been held not entitled to give his opinion that wounds on the bodies of two persons killed at the same time and place and in the same fight were inflicted by the same instrument.[30]

b. Mental Conditions

Evidence of the accused's mental condition after the homicide is admissible.

Evidence of the mental condition of accused after the homicide, such as his nervousness[31] or coolness,[32] is admissible.[33]

Evidence of the mental condition of the person who did the killing for which accused is charged as an accomplice, showing that such person could be influenced, is not admissible.[34] A witness cannot testify as to the mental condition of decedent as a matter of conjecture from the observed or imagined condition, appearance, movements, conduct, and demeanor of decedent after a meeting between decedent and accused.[35]

Evidence as to the state of mind of accused's wife after the commission of the offense has been declared irrelevant.[36]

§ 249. —— Possession of Weapons and Other Objects

Evidence of the accused's possession, after the crime, of a weapon similar to that used, or of other objects tending to show his guilt, is admissible under a number of authorities, but others reject such evidence where connection of the weapon with the crime is not shown, and evidence of the finding of weapons and objects not shown to be connected with the accused is inadmissible.

Evidence is admissible to show that after the homicide or assault with intent to kill or murder accused had in his possession a weapon similar to that with which the killing was done or the assault made,[37] or that such a weapon was found on his

19. Ala.—Sanders v. State, 56 So. 69, 2 Ala. App. 13.
30 C.J. p. 208 note 51.

20. Tex.—Roberts v. State, 156 S.W. 651, 70 Tex. Cr. 297.

21. Ill.—People v. Curtright, 101 N.E. 551, 258 Ill. 430.

22. N.M.—Mirra v. Territory, 81 P. 586, 13 N.M. 192.

23. Tex.—Balls v. State, Cr., 40 S.W. 801.
30 C.J. p. 208 note 54.

24. Tex.—Spangler v. State, 61 S.W. 314, 42 Tex. Cr. 233.

Lay witness
Tex.—Spangler v. State, supra.

25. Ala.—Reid v. State, 61 So. 321, 183 Ala. 11.

26. U.S.—Hopt v. Utah, 7 S.Ct. 614, 120 U.S. 430, 30 L.Ed. 708.
30 C.J. p. 209 note 57.

27. Ala.—Pitts v. State, 37 So. 101, 140 Ala. 70.

28. Ga.—Lanier v. State, 80 S.E. 5, 141 Ga. 17.

29. Ala.—White v. State, 34 So. 177, 136 Ala. 58.

30. Ariz.—Marinoni v. State, 136 P. 626, 15 Ariz. 94.

31. S.D.—State v. Strain, 262 N.W. 237, 63 S.D. 639.
30 C.J. p. 209 note 62 [a].

32. Tex.—Davis v. State, 296 S.W. 897, 107 Tex. Cr. 444.—Curlee v. State, 282 S.W. 580, 104 Tex. Cr. 15.

33. Tex.—Boyd v. State, 272 S.W. 134, 100 Tex. Cr. 98.
30 C.J. p. 209 note 62.
Intoxication see infra § 260.

Eccentric actions of accused, immediately after homicide, although not part of res gestæ, and not easily understandable, held admissible as tending to show his state of mind.—Smith v. Commonwealth, 22 S.W.2d 418, 232 Ky. 52.

Fear
A jailer's testimony that accused was "scared to death" when taken to jail on night of homicide was admissible to show that accused knew he had committed offense against law, and probably recognized enormity thereof in contravention of his testimony that he had no knowledge or recollection of what he did.—Kelley v. State, 112 S.W.2d 470, 133 Tex. Cr. 460.

34. Tex.—Millner v. State, 162 S.W. 318, 72 Tex. Cr. 45.

35. N.Y.—People v. Smith, 61 N.E. 814, 172 N.Y. 210.

36. Ala.—Cagle v. State, 100 So. 318, 21 Ala. App. 316.

37. Ala.—Carter v. State, 123 So. 50, 219 Ala. 670.—Birchfield v. State, 115 So. 297, 217 Ala. 225.—Cunningham v. State, 118 So. 242, 22 Ala. App. 583, certiorari denied 118 So. 248, 218 Ala. 166.
Ill.—People v. Selknes, 140 N.E. 852, 309 Ill. 113.
Mass.—Commonwealth v. Bartolini, 13 N.E.2d 382, 299 Mass. 503, certiorari denied Bartolini v. Commonwealth of Massachusetts, 58 S.Ct. 950, 304 U.S. 565, 82 L.Ed. 1531.
N.C.—State v. Fogleman, 168 S.E. 536, 204 N.C. 401.
Okl.—Bradbury v. State, 299 P. 510, 51 Okl. Cr. 56.
Tex.—Ebers v. State, 86 S.W.2d 761, 129 Tex. Cr. 287.
30 C.J. p. 209 note 65.

premises[38] or in a place where he was after the homicide,[39] and circumstances tending to connect a weapon found in accused's possession with the homicide are admissible.[40] Failure of the prosecution to identify the weapon as the one used has been held not to render the admission of the evidence erroneous,[41] but it has been held, on the other hand, that evidence of possession of a weapon or weapons other than that with which the crime was committed and having no connection with the homicide,[42] or the finding of a weapon not traced to the possession of accused or shown to be connected with him in any way,[43] is inadmissible. The mere fact that accused carried a weapon after the offense has been held inadmissible,[44] particularly where such possession was after the lapse of a considerable period,[45] but other authority is opposed.[46]

Evidence of the finding of other objects apparently employed in the commission of the homicide,[47] or of accused's possession of, or access to, other objects tending to show his guilt,[48] is admissible, but the finding of objects in the house of another, without a showing that accused was connected in any way either with the house or with such other person, is inadmissible.[49]

Accused, on his part, should be allowed to explain his possession of such objects.[50] He may also rebut evidence tending to trace to his possession the weapon with which the killing was done.[51]

Possession by deceased. Where accused testified that deceased attacked him with a weapon, testimony that no such weapon was found on deceased's person after the difficulty is admissible, in the absence of a showing of change in the surrounding conditions.[52]

The possession of a weapon by a witness at the trial, when he demanded that accused surrender his weapon, is immaterial.[53]

§ 250. —— Possession of Money or Property of Deceased

It may be shown that after a homicide the accused had money or property belonging to the deceased, or similar property, particularly where robbery is also charged, and the accused's apparent acquisition of funds at the time of the homicide is relevant and material, even without identification of the funds as those of the deceased

It is competent to introduce in evidence the fact that, after the killing, accused had possession of

Pistol with one chamber exploded
N.C.—State v. Buffkin, 183 S.E. 543, 209 N.C. 117

38. Iowa.—State v. Giudice, 153 N.W. 336, 170 Iowa 731, Ann.Cas. 1917C 1160.
30 C.J. p. 209 note 66

39. Ark.—Spear v. State, 44 S.W.2d 663, 184 Ark. 1017.
Cal.—People v. Weston, 146 P. 871, 169 Cal. 393.
30 C.J. p. 209 note 67

40. Mo.—State v. Fitzgerald, 32 S.W. 1113, 130 Mo. 407.
30 C.J. p. 209 note 68

41. Ill.—People v. Sullivan, 177 N.E. 733, 345 Ill. 87.—People v. Lenhardt, 173 N.E. 155, 340 Ill. 538.
Iowa.—State v. Weems, 65 N.W. 387, 96 Iowa 426.

Detail of arrest
Evidence of finding pistols on accused arrested for killing held competent as detail of arrest, pistols not being offered in evidence as against contention that neither was shown to have been used in the shooting.—People v. Durkin, 161 N.E. 739, 330 Ill. 391.

42. Tex.—Goss v. State, 284 S.W. 578, 104 Tex.Cr. 456.—Hightower v. State, 281 S.W. 1063, 103 Tex.Cr. 665.
30 C.J. p. 209 note 70

Where connection is shown
In prosecution for assault with intent to kill where victim had been struck with a club and thrown into well, although crime was not committed with a pistol, it was not error for state to show by witness that pistol handed to him was one given to him by accused soon after her husband had been taken from the well, it being incriminating circumstance tending to show her guilt.—State v. Saale, 274 S.W. 393, 308 Mo. 573.

43. Ky.—Ireland v. Commonwealth, 57 S.W. 616, 22 Ky.L. 478.

Cartridges
Ky.—Davis v. Commonwealth, 76 S.W.2d 259, 256 Ky. 423.

Obliteration of factory number
Evidence that factory number on revolver found at home of alleged accomplice had been obliterated held erroneously admitted where revolver was found long after offense, and no connection was shown between revolver and accused.—State v. Richards, 67 S.W.2d 58, 334 Mo. 485.

44. Ala.—Hardaman v. State, 78 So. 321, 16 Ala.App. 408.

45. Cal.—People v. Yee Fook Din, 39 P. 530, 106 Cal. 163.

Nearly a month
Cal.—People v. Yee Fook Din, supra.

46. Tex.—Ely v. State, 150 S.W.2d 1018, 142 Tex.Cr. 80.—Martinez v. State, 140 S.W.2d 187, 140 Tex.Cr. 159, mandate issued 153 S.W.2d 721, 140 Tex.Cr. 159.

47. Kan.—State v. Smith, 171 P. 551, 103 Kan. 148.

48. Mass.—Commonwealth v. Bartolini, 13 N.E.2d 382, 299 Mass. 503, certiorari denied Bartolini v. Commonwealth of Massachusetts, 58 S.Ct. 950, 304 U.S. 565, 82 L.Ed. 1531.
N.C.—State v. Fogelman, 168 S.E. 536, 204 N.C. 401.
30 C.J. p. 209 note 75

Cartridges
(1) Where there was testimony that the wound in deceased's body might have been made by either a .32 or a .38 caliber revolver, evidence that accused had .32 caliber cartridges in his possession held admissible.—People v. Kircher, 141 N.E. 151, 309 Ill. 500.

(2) Finding of cartridges in codefendant's pocket held admissible.—Ruedi v. State, 277 S.W. 116, 101 Tex.Cr. 651.

49. Cal.—People v. Cuff, 55 P. 407, 122 Cal. 589.
Va.—McBride v. Commonwealth, 30 S.E. 154, 95 Va. 818.

50. Ala.—Ousley v. State, 122 So. 300, 23 Ala. 139.
Tex.—Ridford v. State, 27 S.W. 113, 33 Tex.Cr. 520.

51. Ala.—Burton v. State, 22 So. 585, 115 Ala. 1.

52. Ala.—Holland v. State, 132 So. 601, 24 Ala.App. 199.

53. Ala.—Sanders v. State, 97 So. 294, 19 Ala.App. 367.

property belonging to deceased,[54] particularly where it is claimed that deceased was robbed as well as murdered,[55] or of property similar to that which deceased had and of which he was robbed,[56] and evidence tending to identify such property as that of deceased is admissible.[57] It may also be shown that accused had possession of money of a kind and denomination similar to that which deceased was known to have had,[58] and where accused had no money before the murder, but had money afterward, it may be shown that deceased had money of a similar kind and denomination which was not found on his body.[59] Facts showing an apparent acquisition of funds by accused at the time of the homicide are relevant and material,[60] even though there is no identification of the funds as those of deceased,[61] and even evidence as to the amount and kind of money found in the possession of accused's wife has been held admissible to show that robbery was the motive.[62]

The finding of property of deceased at a place where defendants have been since the homicide may be proved,[63] provided there is evidence connecting defendants with the placing of the articles in such place.[64]

Accused's evidence in explanation of his possession of property of deceased may be rebutted by competent evidence on behalf of the prosecution.[65]

Effect of lapse of time There is no rule prescribing a time beyond which the possession of property taken from a murdered man ceases to be evidence of guilt, lapse of time does not render the evidence incompetent, but simply goes to its cogency as proof of guilt.[66]

§ 251. —— Flight, Avoidance of Arrest, Concealment, and Escape

Evidence of the accused's flight, or attempted flight, after the homicide or assault generally is admissible even where he admits the commission of the crime, and his resistance to, or attempt to avoid, arrest, or attempt to escape after arrest, may be shown. He should be allowed to account for or explain his flight or to refute testimony as to it, but if the state makes no attempt to show flight he may not prove that he did not flee or conceal himself, or that he voluntarily surrendered himself.

Evidence of the flight, or attempted flight, of accused after the homicide or assault with intent to kill or murder is admissible, as this tends to show his state of mind and indicates a consciousness of guilt,[67] and the incidents or details of the flight

54. Ga.—Gibson v. State, 174 S.E. 351, 178 Ga. 707.
N.M.—State v. Grissom, 298 P. 666, 35 N.M. 323.
30 C.J. p. 210 note 79.

Revolver.
Mass.—Commonwealth v. Sacco, 151 N.E. 839, 255 Mass. 369.

55. N.C.—State v. Puckett, 189 S.E. 183, 211 N.C. 66.
W.Va.—State v. Williams, 127 S.E. 320, 98 W.Va. 458.
30 C.J. p. 210 note 80.
Robbery as motive of homicide generally see supra § 233.

58. Ala.—Pope v. State, 57 So. 215, 174 Ala. 63.
30 C.J. p. 210 note 81.

57. Ala.—Braham v. State, 38 So. 919, 143 Ala. 28.
Mont.—State v. Lucey, 61 P. 994, 24 Mont. 295.

58. Tex.—Hampton v. State, 183 S.W. 887, 78 Tex.Cr. 639.
30 C.J. p. 210 note 83.

59. Mass.—Commonwealth v. Williams, 50 N.E. 1035, 171 Mass. 461.
30 C.J. p. 210 note 84.

60. Ga.—Westberry v. State, 164 S.E. 905, 175 Ga. 115.
30 C.J. p. 210 note 85.

Possession of money by accomplice after homicide held incompetent as not proving charge against defendants.—People v. McGeoghegan, 156 N.E. 378, 325 Ill. 337.

61. Tex.—Chapman v. State, 65 S.W. 1098, 43 Tex.Cr. 328, 96 Am.S.R. 874.
30 C.J. p. 210 note 86.

62. Wash.—State v. Cracmer, 40 P. 944, 12 Wash. 217.

63. N.Y.—People v. Giusto, 99 N.E. 190, 206 N.Y. 67.—People v. Morse, 89 N.E. 816, 196 N.Y. 306.

64. N.Y.—People v. Kinney, 95 N.E. 756, 202 N.Y. 389, 26 N.Y.Cr. 143, distinguished in People v. Giusto, 99 N.E. 190, 206 N.Y. 75, 27 N.Y.Cr. 321.
30 C.J. p. 210 note 89.

65. Mo.—State v. Blackburn, 201 S.W. 96, 273 Mo. 169.
30 C.J. p. 210 note 91.

66. N.Y.—Linsday v. People, 63 N.Y. 143.
Or.—State v. Barnes, 85 P. 998, 47 Or. 592, 7 L.R.A.N.S., 181.

67. Ala.—Pruitt v. State, 168 So. 149, 232 Ala. 421.—Hicks v. State, 136 So. 278, 24 Ala.App. 430.
D.C.—Liggins v. U.S., 297 F. 881, 54 App.D.C. 302.
Ga.—Johnson v. State, 4 S.E.2d 639, 188 Ga. 771.
Ill.—People v. Rappaport, 200 N.E. 165, 362 Ill. 462.—People v. White, 113 N.E. 108, 311 Ill. 356.
Ky.—Patton v. Commonwealth, 159 S.W.2d 1006, 289 Ky. 627.—Noah v. Commonwealth, 116 S.W.2d 315, 273 Ky. 272.—Lester v. Commonwealth, 40 S.W.2d 306, 309, 239 Ky. 703, citing **Corpus Juris**.—Hord v. Commonwealth, 13 S.W.2d 244, 227 Ky. 439.—Fugate v. Commonwealth, 260 S.W. 338, 202 Ky. 509.
La.—State v. Smith, 192 So. 92, 193 La. 665.—State v. Jefferson, 116 So. 391, 165 La. 911.
Minn.—State v. Rowe, 280 N.W. 646, 203 Minn. 172.
Miss.—Young v. State, 117 So. 119, 150 Miss. 787.—Huggins v. State, 115 So. 213, 149 Miss. 280.
Mo.—State v. Frazier, 98 S.W.2d 707, 339 Mo. 966.—State v. Garrison, 49 S.W. 508, 147 Mo. 548.
N.Y.—People v. Reddy, 185 N.E. 705, 261 N.Y. 479.
N.C.—State v. Steele, 130 S.E. 308, 190 N.C. 506.
Okl.—Bruner v. State, 238 P. 1000, 31 Okl.Cr. 351.
Pa.—Commonwealth v. Del Giorno, 154 A. 786, 303 Pa. 509.—Commonwealth v. Lucietti, 145 A. 85, 295 Pa. 190.
Tex.—Martinez v. State, 140 S.W.2d 187, 140 Tex.Cr. 159, mandate issued 153 S.W.2d 721, 140 Tex.Cr. 159.—Washington v. State, 21 S.W.2d 524, 113 Tex.Cr. 291.—Pinkston v. State, 241 S.W. 152, 91 Tex.Cr. 644.
30 C.J. p. 210 note 93.
Preparation for flight before homicide see supra § 239.

Evidence as to search for accused after the homicide is admissible to show flight.
Ala.—Brewer v. State, 96 So. 198, 209 Ala. 411.
Mo.—State v. Jackson, 253 S.W. 734

may be shown when relevant.[68] Even where accused admits the commission of the homicide or assault, it has been held that evidence of flight is admissible in connection with other circumstances and facts immediately connected with the homicide, to enable the jury to determine the condition of accused's mind at the time of flight,[69] and the degree of the crime.[70] This rule has been applied where the defense was accident,[71] insanity,[72] or self-defense;[73] on the other hand it has been held that, where the only question at issue is whether the killing by accused was justified, evidence of flight is not relevant.[74]

The evidence offered, to be admissible, must have some tendency to show flight.[75]

Evidence of accused's resistance to arrest,[76] evasion of arrest,[77] attempt to conceal himself[78] or his identity,[79] preparation for escape,[80] or attempt to escape after he was arrested[81] is admissible. There is, however, authority denying the admissibility of evidence of accused's forfeiture of his bail bond and evasion of arrest thereafter.[82] Evidence as to the manner of accused's escape from jail is admissible.[83]

Accused should be allowed to explain or account for his flight or concealment,[84] or the appearance or implication of flight,[85] as by showing his apprehension of violence at the hands of persons likely to attack him,[86] or to refute testimony as to

N Y —People v Ogle, 11 N E 53, 104 N Y 511, 6 N Y Cr 165
N C —State v Graham, 140 S E 26, 194 N C 459

Rifle and cartridges found in accused's possession held admissible as evidence of flight, even though obtained after time of crime —People v Hall, 249 P 859, 199 Cal 451

Accused's immediate departure from community after homicide held proper for jury's consideration —State v Beal, 154 S E 604, 199 N C 278

68 Ariz —Burnett v State, 268 P 611, 34 Ariz 129
D C —Liggins v U S, 297 F 881, 54 App D C 302
Ga —De Vere v State, 164 S E 485, 45 Ga App 330
N C —State v Payne, 197 S E 573, 213 N C 719
Tex —McCall v State, 117 S W 2d 794, 135 Tex Cr 252—Jackson v State, 68 S W 2d 211, 125 Tex Cr 287
30 C J p 211 note 94

Requiring accused to testify to details connected with his flight after homicide held not error —Burnett v State, 268 P 611, 34 Ariz 129

69. N C —State v Payne, 197 S E 573, 213 N C 719
30 C J p 211 note 95

70 Cal —People v Fowler, 174 P 892 178 Cal 657
30 C J p 211 note 95

71. Okl - Yarbrough v State, 162 P 678 13 Okl Cr 140

72. Okl - Yarbrough v State, supra

73. Okl —Yarbrough v State, supra
Tex —Washington v State, 21 S W 2d 524, 113 Tex Cr 291

74. U S -- Trapp v New Mexico, 225 F 968, 141 C C A 28

75 Tex —Henry v State, 221 S W 1083, 87 Tex Cr 392
30 C J p 211 note 2

76 Ky —Patton v Commonwealth, 159 S W 2d 1006 289 Ky 627—Lester v Commonwealth, 40 S W 2d 306, 309, 239 Ky 703, citing **Corpus Juris.**
Pa —Commonwealth v Luccitti, 145 A 85 295 Pa 190
30 C J p 211 note 3

77. Ky —Hord v Commonwealth 13 S W 2d 244 227 Ky 439—Aiken v Commonwealth, 68 S W 849, 24 Ky L 523
N C —State v Payne, 197 S E 573, 213 N C 719
Tex —McCall v State, 117 S W 2d 794, 135 Tex Cr 252

Denial of identity when arrested
La —State v Smith, 192 So 92 193 La 665

Drawing gun on officer attempting arrest —Owens v State, 136 S E 530, 163 Ga 561

78. Cal —People v Kelly, 263 P 226, 203 Cal 128
Ky —Fugate v Commonwealth 260 S W 338 202 Ky 509
N Y People v Reddy, 185 N E 705 261 N Y 479
Pa —Commonwealth v Del Giorno, 154 A 786, 303 Pa 509
30 C J p 211 note 5

79. Pa Commonwealth v Luccitti, 145 A 85 295 Pa 190

Adopting assumed name and growing mustache after flight —Commonwealth v Luccitti, supra

80 Mo —State v Houser, 28 Mo 233
30 C J p 211 note 6

81. Cal —People v Kelly, 263 P 226 203 Cal 128
Ga —Johnson v State, 4 S E 2d 639 188 Ga 771
Miss —Huggins v State, 115 So 213, 149 Miss 280
Mo —State v Garrison, 49 S W 508, 147 Mo 548
Mont —State v Walsh, 232 P 194, 72 Mont 110
30 C J p 211 note 7

82. Ky —Morgan v Commonwealth, 14 Bush 106

83. Ala —Nelson v State, 30 So 728, 130 Ala 83

84. Ala —Gilbert v State, 100 So 566 20 Ala App 28
Ill —People v Rappaport, 200 N E 165, 362 Ill 462
Ind —Caveney v State, 4 N E 2d 137, 210 Ind 455
Ky —Noah v Commonwealth, 116 S W 2d 315, 273 Ky 272
Va —Hines v Commonwealth, 117 S E 843, 136 Va 728
30 C J p 211 note 11

Mode of explanation
"Defendant has the right to explain the flight not only by his own testimony, but also by other proof —State v Mull, 145 S E 677, 678, 196 N C 351

Testimony as to a vague and indefinite threat by the county attorney not shown with any degree of certainty to have been pointed at accused, held properly excluded —Pickett v State 104 So 358, 139 Miss 529

Settlement of other cases against accused
It is incompetent for accused in explanation of his flight from arrest to show that he settled certain prohibition cases against him a few days after he surrendered such fact throwing no light on the cause of his flight - Montgomery v State, 91 So 630, 18 Ala App 213, certiorari denied 91 So 923 207 Ala 713

85. Ala Crenshaw v State, 87 So 328 205 Ala 256
N C —State v Beard, 178 S E 242, 207 N C 673

86. Ind —Caveney v State, 4 N E 2d 137, 210 Ind 455
Ky —Fugate v Commonwealth, 260 S W 338, 202 Ky 509
Miss —Prewitt v State, 126 So 824, 156 Miss 731
N C —State v Mull, 145 S E 677, 196 N C 351

Threats not influencing flight
However, evidence as to threats made against accused by armed men after the homicide was held properly excluded in the absence of evidence

flight[87] However, it has been held that, where it is clearly proved that accused struck the fatal blow, he cannot complain that his explanation of his motive in running away was not received in evidence,[88] and statements of accused, not part of the res gestæ, made to persons having nothing to do with the case, a considerable time after flight, and before arrest, are not admissible[89] The evidence offered to account for flight must be relevant[90] Uncommunicated plans of accused are not admissible to explain flight,[91] and the advice of an attorney cannot be shown to explain accused's absence from the state[92] The prosecution may offer evidence to weaken accused's explanation of his flight[93]

Where the prosecution relies on certain matters to show flight and evasion of arrest, accused may show that he was ready to surrender[94] or did surrender[95] Where the prosecution offers no evidence, or makes no contention, of flight, accused is not entitled to prove that he did not flee,[96] or to explain his flight,[97] or to prove that he did not give trouble to the officer who arrested him,[98] or that he voluntarily surrendered himself,[99] or did not attempt to escape or conceal himself.[1]

§ 252. —— Declarations

a. Of accused
b Of victim
c Of third persons

a. Of Accused

Declarations made by the accused after the homicide or assault and constituting part of the res gestæ may be proved, and even if not part of the res gestæ may be admissible against him, under general rules as to the admissibility of declarations Thus the accused's subsequent declarations may be admitted to prove such matters as his commission of the crime, consciousness of guilt, and state of mind The accused s subsequent threats have been admitted in a number of cases, although not in others

Declarations of accused made subsequently to the homicide and constituting a part of the res gestæ may be proved[2] Subject to the rules applicable to the admissibility of declarations generally, as discussed in Criminal Law §§ 730-753, his subsequent statements may be admissible against him even though not part of the res gestæ,[3] and if relevant to any issue involved,[4] but not where the only possible

that he had heard of such threats or that his flight was influenced thereby -State v Collins, 126 S E 98, 189 N C 15

Statement to accused by relatives

Accused's testimony that he left state after homicide because his mother and brother told him deceased's people might kill him held properly excluded —Conley v Commonwealth, 8 S W 2d 415, 225 Ky 275

Permission to explain further properly refused

Where accused had testified that he had left the state immediately after the killing because he felt himself in danger and feared that the family of the deceased might harm him refusal to permit him to explain more fully why he left home and went to other state, held not error —Martin v Commonwealth 245 S W. 869, 197 Ky 43

87. Tex --Martin v State, 295 S W 1098 107 Tex Cr 151

Conversation inadmissible

Where accused was given while on witness stand full opportunity to explain his leaving state, his offer of a conversation in which he participated to show why he did not surrender and to explain his alleged flight was properly refused —State v Jackson 233 P 49 30 N M 309

Statement of attorney as to surrender

Testimony that accused's attorney stated that accused if indicted would be surrendered to authorities within twenty-four hours, offered to rebut state's evidence that accused was in flight during trip made several months later was properly excluded as immaterial where there was nothing to show that attorney could have produced accused during time accused was out of city on trip —State v Rowe, 280 N W 616, 203 Minn 172

88. Idaho —People v Ah Choy, 1 Idaho 317

89. Pa —Hester v Commonwealth, 85 Pa 139

90 Ala Montgomery v State, 91 So 630, 18 Ala App 213
30 C J p 211 note 15

91. Ala —Montgomery v State, 56 So 92, 2 Ala App 25

92 Ky --Aiken v Commonwealth, 68 S W 849, 24 Ky L 523

93. Ga --Clarke v State, 140 S E 889, 165 Ga 326

94 Tex —Martin v State, 295 S W 1098 107 Tex Cr 151—Cole v State 75 S W 527, 45 Tex Cr 225

95. Ala —Allen v State, 41 So 624, 146 Ala 61
Tex —Martin v State, 295 S W 1098, 107 Tex Cr 151

96. Ala - Smith v State, 178 So 240, 28 Ala App 49
Cal —People v Estrada, 213 P 67, 60 Cal App 477
30 C J p 212 note 20

Proof as to where accused went after killing held properly excluded, state not attempting to prove flight —Bowen v State 117 So 204, 217 Ala 574

97. La —State v. Jones, 145 So 9, 175 La 1066

98. Mo —State v Green, 129 S W 700, 229 Mo 642

99. Ala Lockett v State 117 So 157 218 Ala 40—Beverett v State, 136 So 843 24 Ala App 470, certiorari denied 136 So 845, 223 Ala 105
30 C J p 212 note 22

Running from place of killing

State's testimony that accused, after stabbing deceased ran from place of killing held not attempt to show flight, so as to justify admission of accused's testimony as to surrender --Beverett v State, 136 So 843 24 Ala App 470 certiorari denied 136 So 845 223 Ala 405

1. Ala —Delaney v State, 42 So 815, 148 Ala 586
Cal People v Estrada, 213 P 67 60 Cal App 477

2. Ala —Roan v State, 143 So 454, 225 Ala 428 - Bass v State 122 So 45 219 Ala 282—Hall v State, 94 So 59 208 Ala 199
Ky -Williams v Commonwealth, 81 S W 2d 891 258 Ky 830
Tex - Calloway v State, 244 S W 519 92 Tex Cr 506
30 C J p 212 note 21

Preliminary proof that declarations were voluntary is not required for admission as res gestæ —Williams v State, 41 So 992, 147 Ala 10

3. Tex --Smith v State, 119 S W 2d 1039, 135 Tex Cr 327—Daniels v State, 16 S W 2d 539, 112 Tex Cr 305
30 C J p 212 note 26

4 Ala —Ratliff v. State, 102 So 621,

purpose of showing them is to create a prejudice against him,[5] and it must first be made to appear that a crime has been committed.[6] Where they are not part of the res gestæ, statements and declarations of accused are not admissible in his behalf,[7] especially where they partake of the nature of self-serving declarations,[8] or are in the nature of a narrative of a past transaction,[9] or amount merely to an effort by accused to manufacture evidence in his own behalf.[10] However, on an issue as to flight, it has been held that statements by accused indicating his willingness that his whereabouts be made known to those in the vicinity of the crime are admissible.[11]

As against accused, his statements may be admissible, whether or not part of the res gestæ, for the purpose of showing that he committed the homicide or assault,[12] or of showing the manner thereof,[13] purpose or motive,[14] state of accused's mind in the heat of the killing,[15] ill will or hostility toward the victim or another,[16] or for the purpose

212 Ala 410—Gunn v State, 136 So 870, 24 Ala App 494
Ky—Fitzpatrick v Commonwealth 275 S W 819, 210 Ky 385
N H—State v Thorp, 171 A 633, 86 N H 501
Pa—Commonwealth v Luccitti, 145 A 85, 295 Pa 190
Va—Nelson v Commonwealth, 191 S E 620, 168 Va 742
30 C J p 212 note 27

Letter from accused to witness
Tex—Blackmon v State 252 S W 803 95 Tex Cr 116

Voluntary character of inculpatory statement by accused must be shown to warrant admission—Weaver v State 132 So 706, 24 Ala App 208

Giving false name and making untrue statements after arrest—Commonwealth v Madeiros 151 N E 297, 255 Mass 301, 47 A L R 962

Expression of desire to make statement
Testimony of accused's father concerning conversations had with accused and reported to district attorney was erroneously admitted where testimony did not disclose any confession or admission of guilt but only that accused had told father that he wished to make a statement to district attorney—Irby v State, 185 So 812, 186 Miss 161

Testimony as to what witness said to accused held admissible as inducement to accused's inculpatory statement and as part thereof—Gunn v State, 136 So 870, 24 Ala App 494

Interrogation as to testimony at preliminary hearing of another charged with same crime held proper—State v Williams 197 N W 991, 197 Iowa 813

Particular statements held irrelevant or immaterial
(1) Statement as to sorrow and offer to pay funeral expenses Little v State, 129 So 99, 23 Ala App 547

(2) In prosecution for murder of new-born infant, nonincriminatory statement by accused as to disposal of body—Weaver v State, 132 So 706, 24 Ala App 208

(3) Whether accused, while evading arrest, told the witness about his suspended road sentence for another offense, whether accused talked of coming in and giving up was objectionable, where the character and relevancy of such talk did not appear, where all the facts in connection with accused's evasion of arrest and his reason therefor were in evidence, whether he told the witness he was dodging the officers because of the prohibition cases and a suspended hard labor sentence—Montgomery v State, 91 So 630 18 Ala App 213, certiorari denied 91 So 993 207 Ala 713

(4) Other statements
Ala—Vintson v State 115 So 695, 22 Ala App 338
Tex—Brooks v State, 93 S W 2d 417, 130 Tex Cr 134

5. N Y—People v Creasy 140 N E 563 236 N Y 205

6 Ala—Richardson v State 114 So 789 22 Ala App 277

7 Ala—Lockett v State, 117 So 457 218 Ala 40
Wis—Johnson v State 108 N W 55, 129 Wis 116, 5 L R A, N S, 809, 9 Ann Cas 923
30 C J p 212 note 28

Evidence held admissible in rebuttal
Ark—Sharp v State, 3 S W 2d 23, 175 Ark 1083

8 Ky—Jones v Commonwealth 102 S W 2d 345, 267 Ky 465
N H—State v Thorp, 171 A 633, 86 N H 501
Tex—Deneaner v State, 127 S W 201, 58 Tex Cr 624
30 C J p 212 note 29

9. Tex—Deneaner v State, supra
30 C J p 212 note 30

10 Ala—Walker v State, 35 So 1011 139 Ala 56
La—State v Giantula, 37 So 30, 113 La 463

11. S C—State v Freely, 89 S E 643, 105 S C 213
30 C J p 212 note 32

12. Ark—Kidwell v State, 42 S W 2d 13, 184 Ark 236
Cal—People v Glab, 59 P 2d 195 15 Cal App 2d 120
Ga—Taylor v State, 118 S E 675, 155 Ga 785
Ky—Wireman v Commonwealth, 102 S W 2d 34, 267 Ky 304—Williams v Commonwealth, 81 S W 2d 891, 258 Ky 830 Morgan v Commonwealth, 15 S W 2d 273 228 Ky 432
La—State v Brown, 156 So 359, 180 La 299
Mass—Commonwealth v Simpson, 13 N E 2d 939 300 Mass 45, certiorari denied Simpson v Commonwealth of Massachusetts 58 S Ct 950 304 U S 565, 82 L Ed 1531
Mo—State v Todd, 116 S W 2d 113, 342 Mo 601—State v Johnson, 252 S W 623—State v Delcour, 248 S W 606, 297 Mo 321
Pa—Commonwealth v Yeager, 196 A 827, 329 Pa 81
Va—Mohler v Commonwealth, 111 S E 154 132 Va 713
30 C J p 212 note 33 p 213 note 34

Statements during flight shortly after killing—Bass v State, 122 So 15 219 Ala 282

Statement to fellow-prisoner
Testimony by a witness who had been confined in jail with accused as to statements there made by accused in which he admitted that he had done the shooting, held properly admitted—State v Adams, 121 A 418

Accused's presence at time of killing
Evidence of declarations at variance with facts tending to conceal accused's presence at time of killing is admissible against him, without laying predicate for his impeachment as witness—Harden v State, 101 So 442 211 Ala 656

Falsity of statements may be shown—People v Garcia, 256 P 876, 83 Cal App 463

13 Ky—Davis v Commonwealth, 97 S W 2d 43, 265 Ky 488

14. Ky—Wireman v Commonwealth, 102 S W 2d 34, 267 Ky 304
Tex—Watson v State, 287 S W 265, 105 Tex Cr 152—Hughes v State, 262 S W 745, 97 Tex Cr 607
Admissibility of evidence of motive generally see supra §§ 227-235

15. Ill—People v Andrews, 158 N E 462, 327 Ill 162

16. Ala—Roberson v State, 118 So 654, 218 Ala 412—Kilpatrick v State, 104 So 656, 213 Ala 358—Hall v State, 94 So 59, 208 Ala 199—Crosby v State, 102 So 459,

of showing the absence of remorse,[17] or showing consciousness of guilt,[18] guilty knowledge of the offense,[19] apprehension on accused's own account because of deceased's condition,[20] an attempt to suppress evidence or intimidate a witness,[21] or that the defense set up was fabrication and an afterthought.[22] So it is proper to show conflicting statements by accused as to circumstances connected with the homicide,[23] or as to his movements or whereabouts at about the time of the crime.[24]

Remarks of accused when arrested have been held admissible.[25]

Threats made by accused after the homicide or assault have been admitted where they indicate a consciousness of guilt and fear of discovery on his part,[26] or shed light on the animus with which the act was done,[27] or show accused's attitude or state of mind,[28] or were made in aid of his design to flee from arrest,[29] and his statement that if he had not killed the victim he would do so,[30] or that if the victim was not dead he would kill him,[31] has likewise been admitted. In other cases, however, subsequent threats have been held not admissible.[32]

Explanation and rebuttal. Accused may introduce evidence in explanation of his declarations,[33] so he is entitled to testify as to his undisclosed purpose or motive.[34] Where the state proves a statement by accused charging another with the crime, he may show his information as the basis for such charge,[35] but not mere rumors not shown to have been conveyed to him.[36] Where accused showed his expressions of grief as res gestæ, it was competent for the state in rebuttal to show his expressions to other witnesses to the opposite effect, although made some time after the killing.[37]

Evidence as to accused's mental condition after the homicide may be shown as affecting the weight to be given by the jury to his declarations.[38]

Codefendant. The declarations of one accused of a crime may be admissible on behalf of his codefendant as part of the res gestæ,[39] but where the

20 Ala App 344, certiorari denied Ex parte Crosby, 102 So 461, 212 Ala 313

Pa.—Commonwealth v. Yeager, 196 A 827, 831, 329 Pa 81, citing **Corpus Juris.**

Tex.—Smith v. State, 119 S.W. 1039, 135 Tex.Cr. 327—Daniels v. State, 16 S.W.2d 539, 112 Tex.Cr. 305—Watson v. State, 287 S.W. 265, 105 Tex.Cr. 152—Hughes v. State, 262 S.W. 745, 97 Tex.Cr. 607

30 C.J. p. 213, note 35

Admission of declarations to show malice see supra § 211

Abusive remarks about deceased

La.—State v. Price, 188 So. 718, 192 La. 615

Where animus or hostility is not involved, as on a charge of involuntary manslaughter, statements of accused are not admissible to show such feeling on his part.—Sawyer v. State, 103 So. 309, 20 Ala App 504

17. Okl.—Austin v. State, 228 P. 1113, 28 Okl.Cr. 73

18. Ky.—Burton v. Commonwealth, 58 S.W.2d 650, 248 Ky. 408

Mass.—Commonwealth v. Simpson, 13 N.E.2d 939, 300 Mass. 45, certiorari denied Simpson v. Commonwealth of Massachusetts, 58 S.Ct. 950, 304 U.S. 565, 82 L.Ed. 1531

Pa.—Commonwealth v. Yeager, 196 A. 827, 831, 329 Pa. 81, citing **Corpus Juris.**

30 C.J. p. 213, note 36

Misstatement as to source of money found in accused's possession.—People v. Darrow, 298 P. 1, 212 Cal. 167

A denial of guilt not part of the res gestæ is not admissible as against accused where there are no accompanying circumstances under which it may be interpreted as evidencing consciousness of guilt, thus accused's declaration when arrested that he had not done anything and had no gun was not admissible as indicating consciousness of guilt.—People v. Wong Loung, 114 P. 829, 159 Cal. 520

19. Cal.—People v. Singh, 28 P.2d 416, 136 Cal.App. 233

N.C.—State v. Plyler, 69 S.E. 269, 153 N.C. 630

Pa.—Commonwealth v. Yeager, 196 A. 827, 831, 329 Pa. 81, citing **Corpus Juris.**

20. Tex.—Toomey v. State, 8 Tex.App. 452

21. Ala.—Roan v. State, 143 So. 454, 225 Ala. 428

Tenn.—Ellis v. State, 50 S.W. 756, 102 Tenn. 141

22. Tex.—Baines v. State, 66 S.W. 817, 43 Tex.Cr. 490

23. Cal.—People v. Hill, 82 P. 398, 1 Cal.App. 414

30 C.J. p. 213, note 41

24. Pa.—Commonwealth v. Du Boise, 112 A. 461, 269 Pa. 169

30 C.J. p. 213, note 42

25. Ill.—People v. Herbert, 172 N.E. 740, 340 Ill. 320—People v. Durkin, 161 N.E. 739, 330 Ill. 394

Pa.—Commonwealth v. Lucitti, 145 A. 85, 295 Pa. 190

26. Cal.—People v. Chin Hane, 41 P. 697, 108 Cal. 597

Admissibility of threats by accused generally see supra § 236

Threat or attempt to kill witness

Where a witness for the prosecution, had been cross-examined as to a statement made in the office of accused's counsel, he was properly permitted to state, on redirect examination, that he was then informed that if he did not testify as accused wished he would be killed, but it was error to admit his further statement that not long afterward he "was tried to be killed." Shepherd v. Commonwealth, 252 S.W. 139, 142, 200 Ky. 25

27. Ala.—Williams v. State, 133 So. 737 (second case), 21 Ala.App. 206, certiorari denied 133 So. 738, 222 Ala. 688

Malice see supra § 211

28. Mo.—State v. Cade, 34 S.W.2d 82, 326 Mo. 1132

29. Miss.—Morris v. State, 183 So. 691, 182 Miss. 763

30. Fla.—Taylor v. State, 124 So. 445, 98 Fla. 881

31. Miss.—Irby v. State, 185 So. 812, 186 Miss. 161

32. Ky.—Holt v. Commonwealth, 13 S.W. 71, 11 Ky.L. 773

30 C.J. p. 213, note 47

33. Ala.—Spicer v. State, 65 So. 972, 188 Ala. 9

34 Ala.—Madry v. State, 78 So. 866, 201 Ala. 513

35. Tex.—Ingram v. State, 182 S.W. 290, 78 Tex.Cr. 559

36. Tex.—Ingram v. State, supra

37. Tex.—Crowder v. State, 180 S.W. 706, 78 Tex.Cr. 344

38. Ala.—Olden v. State, 58 So. 307, 176 Ala. 6

La.—State v. Breedlove, 7 So.2d 221, 199 La. 965

39. Ky.—Galloway v. Commonwealth, 5 Ky.L. 213

issue between the prosecution and accused is whether he or his codefendant committed the homicide, evidence of a statement made by the codefendant, that accused had killed the deceased, is incompetent [40]

b. Of Victim

Declarations made by the victim shortly after receiving the wound may be admitted if they constitute part of the res gestæ, but generally not otherwise, except in the case of dying declarations, but declarations of the victim in the accused's presence may be admitted to show the accused's conduct, such as his silence, when charged with causing the injury

Declarations made by the victim shortly after receiving the wound may be admitted as part of the res gestæ,[41] although they were not made in the presence of accused,[42] but, except in the case of dying declarations,[43] and whether offered by the state or accused,[44] the declarations of the victim are not admissible where they were made some time after the commission of the criminal act and form no part of the res gestæ,[45] but are rather in the nature of a narrative statement of what occurred at the time of the alleged homicide,[46] or where they do not throw any light on the circumstances of the killing but tend to prejudice the jury against accused [47] Although not dying declarations, declarations of the victim made in the presence of accused may be given in evidence, under certain circumstances, for the purpose of showing accused's conduct and behavior, such as his silence, when charged with causing the injury done to the victim,[48] but not, it has been held, when accused was at the time under arrest [49]

Evidence that the victim, while in the presence of accused, identified the latter as the person who committed the crime is admissible,[50] but an accusation of accused by the victim, which accused immediately denies has been declared not admissible.[51] It has been held that statements of the victim, after the shooting, including threats, are admissible to show the state of mind of the victim [52] Where accused has introduced evidence that the victim refused to make a dying declaration, evidence as to a statement by the victim relating to the matter is admissible in rebuttal [53]

The victim's statements, made in accused's presence, that his fatal wound was accidentally inflicted have been held inadmissible as hearsay,[54] and not binding on the state [55]

A natural and spontaneous exclamation of pain by the victim may be shown, even though not made in the presence of accused [56] Where a physician is called to testify, the history of the case, as related to him by deceased for the purpose of securing treatment, is admissible [57]

The exclusion of a nurse's testimony that the victim had told her he did not know who injured him was held not erroneous, where accused on cross-examination showed by a physician that the victim had said he did not know who had injured him, but did not say that accused had not [58]

c. Of Third Persons

Declarations of third persons are as a rule not admissible, especially when made out of the accused's presence and hearing, and for any purpose other than to

40. Ky —Shepherd v Commonwealth 252 S W 139 200 Ky 25

41. Ala —Walker v State, 41 So 878, 146 Ala 45
Ark —Baker v State, 107 S W 983, 85 Ark 300
Fla —Williams v State, 50 So 719 58 Fla 138
La —State v Chandler, 150 So 386, 178 La 7
N C —State v Spivey, 65 S E 995 151 N C 676
Philippine – People v Palamos, 49 Philippine 601
Tex —Ward v State, 159 S W 272 70 Tex Cr 393—Franklin v State, Tex Cr, 88 S W 357
Wis —Bliss v State, 94 N W 325, 117 Wis 596
30 C J p 213 note 55
Question seeking information held not admissible as res gestæ —Regnier v Territory, 82 P 509, 15 Okl 652

42. Ariz —Solice v State, 193 P 19, 21 Ariz 592
30 C J p 214 note 56.

43. Fla —Lambright v State, 16 So 582, 34 Fla 564
La —State v Chandler, 150 So 386 178 La 7
S C —State v Wyse, 10 S E 612, 32 S C 45
Admissibility of dying declarations generally see infra §§ 286–306

44 Ala —Dumas v State 49 So 224 159 Ala 42, 133 Am S R 17

45. Ala —Snyder v State, 104 So 140, 20 Ala App 570
Ark —Baker v State, 107 S W 983, 85 Ark 300
La —State v Chandler, 150 So 386, 178 La 7
Va —Richards v Commonwealth 59 S E 1104, 107 Va 881
30 C J p 214 note 59

46. Ga – Cole v State, 53 S E 958, 125 Ga 276
30 C J p 214 note 60

47. Ala —Bentley v State, 67 So 620, 12 Ala App 39
30 C J p 214 note 61

48. Ala —Simmons v State, 29 So 929, 129 Ala 41
Pa —Commonwealth v Green, 10 Pa Dist & Co 56, affirmed 141 A 624, 292 Pa 579
30 C J p 214 note 63

49. Mo —State v Kelleher, 100 S W 470, 201 Mo 614

50 Minn —State v Findling 144 N W 142, 123 Minn 413, 49 L R A, N S, 449

51. Miss —Wells v State, 70 So. 452, 110 Miss 400

52. S C —State v Thomas, 88 S E 20 103 S C 316

53. Tex – Mansell v State, 182 S W 1137, 79 Tex Cr 48

54. Ky – Stewart v Commonwealth, 32 S W 2d 29, 235 Ky 670

55. Ky —Stewart v Commonwealth, supra

56. N D —State v Myres, 274 N W 851, 67 N D 572

57. N D —State v Myres, supra
Wis —Kraut v State, 280 N W 327, 228 Wis 386

58. Okl —Neeld v State, 30 P 2d 193, 55 Okl Cr 288

impeach a witness; but a statement to the accused or in his presence may be admissible.

While statements tending to show preconcert between declarant and accused may be admitted,[59] and a statement by a third person, as part of the res gestæ, that he shot and accused did not is admissible,[60] declarations of third persons are as a rule not admissible, in a trial for homicide or assault with intent to kill or murder,[61] especially when made out of the presence and hearing of accused,[62] and for any purpose other than to impeach a witness,[63] and such testimony, impeaching a witness, is not competent as substantive evidence as to how the difficulty occurred.[64] A statement made directly to accused with reference to the crime,[65] or in his presence,[66] and evidence of what took place when accused was taken before the victim for identification,[67] may be admitted, but not where accused was not permitted to speak.[68]

Where a witness who testified concerning a homicide was nearly killed herself by one who murdered deceased, her declaration, shortly after the homicide, that she expected to die, and that she wanted a neighbor to be sent for, so that she could tell him all about it, was held admissible as confirmatory evidence.[69]

§ 253. Commission of or Attempt to Commit Other Offenses

Evidence that the killing was done in the commission of a felony is admissible to establish that the killing constituted murder.

To establish that a killing constituted murder, evidence to show that it was done in the commission of, or in an attempt to commit, a felony is admissible.[70] In a proper case, testimony in rebuttal of evidence of the commission of another crime by accused should be admitted.[71]

A general discussion of the competency in a homicide prosecution of evidence of the commission of other offenses by accused is to be found in Criminal Law § 691 m.

§ 254. Killing of Person Attempting Arrest or Officer Making Search

Any competent and relevant evidence tending to show that accused killed deceased while the latter was, to the knowledge of accused, lawfully attempting to arrest him is admissible.

In a prosecution for killing an arresting officer, evidence that deceased at the time of the homicide was endeavoring to effect accused's arrest,[72] that accused was armed and resisted arrest,[73] and that accused was a fugitive from justice[74] is admissible. So also is evidence on the issue whether accused was resisting a lawful attempt to arrest him, or in good faith making a defense against an unlawful assault on himself.[75] The warrant of arrest, if regular on its face, is admissible to establish the fact that deceased was an officer acting in the discharge

59. Ala.—Newsom v. State, 72 So. 579, 15 Ala. App. 43, certiorari denied 73 So. 1001, 198 Ala. 692.

60. Ga.—O'Shields v. State, 55 Ga. 696.

61. Ala.—Roan v. State, 143 So. 454, 225 Ala. 428.
Ark.—Clements v. State, 133 S.W.2d 844, 199 Ark. 69.
Ky.—Hendrickson v. Commonwealth, 24 S.W.2d 561, 232 Ky. 691.—Fitzpatrick v. Commonwealth, 275 S.W. 819, 210 Ky. 385.
30 C.J. p. 214, note 69.

Exclamation of "Murder!" by persons near the scene of the crime is not admissible as res gestæ since it does not elucidate any part of the transaction, it is inadmissible as but the expression of an opinion and as tending to prejudice unduly the minds of the jury.—Benjamin v. State, 41 So. 739, 148 Ala. 671.

62. Okl.—Anderson v. State, 91 P.2d 794, 66 Okl.Cr. 291.
Tex.—Gates v. State, 227 S.W. 953, 88 Tex.Cr. 570.
Va.—Guynn v. Commonwealth, 177 S.E. 227, 163 Va. 1042.

Statements held made in accused's hearing.
Ill.—People v. Browning, 152 N.E. 552, 321 Ill. 559.

Statement by defense witness, immediately after shooting and out of accused's presence, held admissible.—Serna v. State, 7 S.W.2d 543, 110 Tex.Cr. 220.

Evidence held admissible as against objection.—McArthur v. State, 105 S.W.2d 227, 132 Tex.Cr. 447.

63. Cal.—People v. Gray, 83 P. 707, 148 Cal. 507.
30 C.J. p. 215, note 71.

64. Ky.—Redden v. Commonwealth, 136 S.W. 817, 140 Ky. 94.

65. Tex.—Cotton v. State, 217 S.W. 158, 86 Tex.Cr. 387.
30 C.J. p. 215, note 73.

66. D.C.—Liggins v. U. S., 297 F. 881, 54 App.D.C. 302.
Mich.—People v. Hossler, 97 N.W. 754, 135 Mich. 384.

Accusation of accused, made in his presence and not denied by him, may be shown.—Oakley v. State, 68 S.W.2d 201, 125 Tex.Cr. 258.

67. Mich.—People v. Foster, 179 N.W. 295, 211 Mich. 486.

68. N.Y.—People v. Kennedy, 58 N.E. 652, 161 N.Y. 449.

69. N.C.—State v. Adair, 66 N.C. 298.

70. D.C.—Lee v. U. S., 112 F.2d 46, 72 App.D.C. 147.
Or.—State v. McCarthy, 83 P.2d 801, 160 Or. 196.
30 C.J. p. 215, note 80.
Evidence of other offenses as variance from charge see supra § 175.
As bearing on killing of officer attempting arrest or making search see infra § 251.

71. Fla.—Johnson v. State, 152 So. 176, 115 Fla. 161.

72. Pa.—Commonwealth v. Yeager, 196 A. 827, 831, 329 Pa. 81, citing **Corpus Juris.**
30 C.J. p. 215, note 81.

73. Ga.—Yates v. State, 56 S.E. 1017, 127 Ga. 813, 9 Ann.Cas. 620.

74. Cal.—People v. Prantikos, 127 P. 1029, 161 Cal. 113.
Ga.—Harper v. State, 59 S.E. 792, 129 Ga. 770.

75. Ga.—Glaze v. State, 120 S.E. 530, 156 Ga. 807.—Smalls v. State, 25 S.E. 614, 99 Ga. 25.
Ky.—Patton v. Commonwealth, 159 S.W.2d 1006, 289 Ky. 627.
Pa.—Commonwealth v. Yeager, 196 A. 827, 831, 329 Pa. 81, citing **Corpus Juris.**
Unlawful character of act of deceased see infra § 268.

of his duty when he was killed,[76] although held by another officer, the companion of the officer killed[77] Warrants not in all respects regular, but which authorize accused's arrest, are admissible,[78] and parol evidence is admissible to show that the warrant was sufficient for attempting arrest[79] Evidence that deceased procured a warrant and went to accused's home ostensibly to arrest him was admissible as characterizing his attitude toward accused and to account for his presence, although the warrant may have been illegal and have furnished no protection to the officer[80] Evidence is admissible of circumstances justifying an arrest without a warrant,[81] or a search of accused's person without a warrant[82] Thus it may be shown that accused had committed a felony,[83] that such fact had been communicated to deceased,[84] that the officer had reasonable belief of accused's guilt,[85] or that his conduct and threats demanded his arrest without a warrant[86] Evidence of the former felony is admissible to show the attitude of accused resisting arrest[87] Evidence of the former felony, however, is not admissible on the trial for killing one who has attempted an arrest without warrant, when such arrest is not justified by any honest and well founded belief of accused's complicity therein[88] Presumptive knowledge on the part of the prisoner of the official character of deceased may be established by circumstantial evidence[89] However, where deceased was not an officer, evidence that he was dressed as an officer and wore the insignia of office is not admissible[90] In a prosecution for the murder of a private citizen who was aiding officers to apprehend accused, evidence is admissible to show deceased's intention in pursuing accused,[91] and the knowledge of accused of such intention[92]

§ 255. Negligence

Where accused's negligence is an element of the offense charged, competent and relevant evidence of such negligence is admissible

Where negligence of accused is an element of the offense charged, see supra § 62, competent and relevant evidence of such negligence is admissible[93] The effect on others of the accident in which deceased was killed may be shown[94] While, as appears supra § 62, the conduct of deceased, if amounting to contributory negligence, is no defense to a charge of manslaughter, it is material and relevant to the extent that it bears on the question of the negligence of accused,[95] but not otherwise[96] Evidence offered on behalf of accused of similar accidents at the same place is properly excluded[97]

§ 256. Extent of Injury from Assault with Intent to Kill

In a prosecution for assault with intent to kill, evidence as to the nature and extent of the injuries inflicted is admissible

In a prosecution for assault with intent to kill, evidence as to the nature and extent of the injuries inflicted is admissible,[98] to show the intent of ac-

76. Pa—Commonwealth v Yeager supra, citing **Corpus Juris.**
30 C J p 215 note 85

77 Mich—People v Durfee, 29 N W 109, 62 Mich 487

78 Ill—Palmer v People, 28 N E 130, 138 Ill 356, 32 Am S R 146
30 C J p 215 note 87

79 Mass—Commonwealth v Moran 107 Mass 239

80 N M—State v Middleton, 192 P 483, 26 N M 353

81 Fla—Presley v State, 78 So 532, 75 Fla 134, L R A 1918D 975
30 C J p 215 note 90

82 Colo—Keady v People 71 P 892, 32 Colo 57, 66 L R A 353

83 Ky—Patton v Commonwealth 159 S W 2d 1006, 289 Ky 627
30 C J p 215 note 92

84. Ala—Miller v State, 30 So 379, 130 Ala 1
Mass—Commonwealth v Phelps, 95 N E 868, 209 Mass 396, Ann Cas 1912B 566

85. Ky—Patton v Commonwealth, 159 S W 2d 1006, 289 Ky 627
30 C J p 215 note 94

86. Tex—Miller v State, 20 S W 1103, 32 Tex Cr 319

87. Ky—Graham v Commonwealth, 175 S W 981, 164 Ky 317

88 Mich People v Burt, 16 N W 378, 51 Mich 199

89 S C—State v Messervy, 68 S E 766, 86 S C 503
30 C J p 216 note 98

90. Ky—Bates v Commonwealth, 19 S W 928, 14 Ky L 177

91 N J—State v Bertchey 73 A 524, 77 N J Law 640, 18 Ann Cas 931
30 C J p 216 note 1

92 N J—State v Bertchey, supra

93 Mich People v Thompson, 81 N W 311, 122 Mich 411
30 C J p 216 note 5
In prosecutions for homicide through operation of motor vehicles see the C J S title Motor Vehicles § 666, also 42 C J p 1360 note 29—p 1362 note 62

94. Mich—People v Thompson, supra

95 Ga—Cain v State, 190 S E 371, 55 Ga App 376
30 C J p 216 note 9

96. Conn—State v Campbell 74 A 927, 82 Conn 671, 135 Am S R 293, 18 Ann Cas 236

97 D C—Sinclair v U S, 265 F 991, 49 App D C 351

96. Ala—Berry v State 175 So 407, 27 Ala App 507, certiorari denied 175 So 412, 231 Ala 414—Elmore v State 158 So 771, 26 Ala App 290—Salts v State, 110 So 169, 21 Ala App 573, certiorari denied 110 So 170, 215 Ala 247—Williams v State, 101 So 367, 20 Ala App 257
Ky—Williams v Commonwealth, 17 S W 2d 706, 229 Ky 580
30 C J p 216 note 12

Examination in absence of accused
Testimony as to taking injured party to hospital and result of examination out of accused's presence, was held admissible in prosecution for assault to murder—Daniels v State 16 S W 2d 539, 112 Tex Cr R 305

Evidence held admissible
(1) Evidence as to whether bullet had been removed from assaulted party, and as to how long such party was in hospital—Spurling v State, 191 So 919, 29 Ala App 73, certiorari denied 191 So 921, second case, 238 Ala 522

(2) Statement by injured party that he stayed in bed nearly six

cused,[99] and to be considered in determining the punishment.[1] A physician or surgeon who has examined such wounds may testify as to their character,[2] and as to what in his opinion would be the natural and probable results thereof,[3] and the time and medical attention necessary to heal them.[4] Other causes contributing to the illness of the person assaulted following the assault may be shown on behalf of accused.[5]

§ 257. Cause of Death

a In general
b Post-mortem examinations
c Chemical analyses

a. In General

Any competent and relative evidence is admissible to show the cause of death or to show that a particular circumstance was not the cause of death. An expert must qualify to testify as such, but a layman may also testify as to the cause of death in some instances.

As a general rule any evidence which shows or tends to show the cause of the death of deceased is admissible.[6] Thus evidence is admissible as to the character and location of the wounds on the body of deceased,[7] of his previous state of health,[8] of particular symptoms of poisoning,[9] of how deceased acted at the time he was said to have been poisoned,[10] or of the finding by a physician of poison in the stomach of deceased.[11] Direct testimony as to the wounds inflicted on deceased and his subsequent death is of course admissible.[12] The court cannot be put in error in admitting such evidence by the subsequent admission by accused that he killed deceased.[13] It having been proved that accused beat deceased, complaints of pain made by deceased within a short time of the beating are admissible in evidence.[14] In connection with evidence of physicians that death was caused by abortion, evidence as to the details of the last sickness, the medicine taken, and attendance received is admissible.[15] Evidence of symptoms of poisoning experienced by witnesses who partook of portions of the same substance by which deceased came to death is admissible,[16] but the symptoms produced by the administration of a particular kind of poison cannot be shown by evidence of the circumstances of the illness and death of a third person who is alleged to have died from the same poison,[17] particularly where the implication is present that accused was also responsible for that death.[18] Where an issue is raised as to whether some circ-

months as result of injury. Jackson v. State, 68 S.W.2d 211, 125 Tex.Cr. 287.

(3) Testimony by prosecuting witness as to how long he remained unconscious as result of injury inflicted by accused.—Langley v. State, 86 S.W.2d 755, 129 Tex.Cr. 254.

99. Ark.—Killian v. State, 42 S.W.2d 12, 184 Ark. 239.
Tex.—Griffith v. State, 152 S.W.2d 349, 142 Tex.Cr. 304.
30 C.J. p. 216 note 13.

1. Ala.—Ezzell v. State, 68 So. 578, 13 Ala.App. 156.
Ky.—Williams v. Commonwealth, 43 S.W. 455, 102 Ky. 381, 19 Ky.L. 1127.
Evidence in aggravation or mitigation of penalty generally see infra § 266.

2. Ala.—Elmore v. State, 158 So. 771, 26 Ala.App. 290.
Tex.—Griffith v. State, 152 S.W.2d 349, 142 Tex.Cr. 304.
30 C.J. p. 216 note 15.

Evidence held admissible.

(1) Testimony that wounds could not have been inflicted with one bullet was held admissible to rebut accused's claim that he shot only once at prosecuting witness' hand to prevent his drawing his pistol.—Morton v. State, 20 S.W.2d 872, 180 Ark. 197.

(2) In a prosecution for assault to murder, permitting physician to state that wound on the neck of complaining witness passed over the jugular vein and carotid artery, exposing them to view, was held not error.—Vineyard v. State, 257 S.W. 548, 97 Tex.Cr. 401.

3. Tex.—Griffith v. State, 152 S.W.2d 349, 142 Tex.Cr. 304.
30 C.J. p. 217 note 16.

4. Ala.—Elmore v. State, 158 So. 771, 26 Ala.App. 290.

5. Ala.—Ezzell v. State, 68 So. 578, 13 Ala.App. 156.

6. Ala.—Wilson v. State, 8 So.2d 422, 243 Ala. 1.
Ga.—Hicks v. State, 18 S.E.2d 637, 66 Ga.App. 577.
La.—State v. Champagne, 106 So. 670, 160 La. 47.
30 C.J. p. 218 note 47.
Corpus delicti generally see supra § 201.

Condition of other bodies.

Where it appears that one charged with murder killed two or more persons at the same time and place, with the same weapon, and in the same encounter, evidence of the condition of any one or all of the bodies, showing the cause or means of death, is admissible against accused on trial for the murder of any one of the deceased persons.—State v. Price, 115 S.E. 393, 92 W.Va. 542.

7. Ala.—Kilpatrick v. State, 104 So. 656, 213 Ala. 358.—Gunn v. State, 136 So. 870, 24 Ala.App. 494.—Thomas v. State, 136 So. 419, 24 Ala.App. 125.
La.—State v. Smith, 192 So. 92, 193 La. 665.
Tex.—Byler v. State, 294 S.W. 205, 106 Tex.Cr. 570.
30 C.J. p. 218 note 48.

8. Ala.—Smith v. State, 96 So. 779, 209 Ala. 666.
30 C.J. p. 218 note 49.

9. Ala.—Wilson v. State, 8 So.2d 422, 243 Ala. 1.
Cal.—People v. Bowers, 82 P. 553, 1 Cal.App. 501.

10. Mo.—State v. David, 33 S.W. 28, 131 Mo. 380.

11. Mich.—People v. Quinby, 96 N.W. 1061, 131 Mich. 625.
Neb.—Davis v. State, 215 N.W. 785, 116 Neb. 90.

12. Tex.—Byler v. State, 294 S.W. 205, 106 Tex.Cr. 570.
30 C.J. p. 218 note 54.

13. Ala.—Hill v. State, 69 So. 941, 194 Ala. 11, 2 A.L.R. 509.

14. Va.—Livingston v. Commonwealth, 14 Gratt. 592, 55 Va. 592.

15. Mich.—People v. Aikin, 33 N.W. 821, 66 Mich. 460, 11 Am.S.R. 512.

16. Cal.—People v. Botkin, 98 P. 861, 9 Cal.App. 244.

17. N.Y.—People v. Buffom, 108 N.E. 184, 214 N.Y. 53, Ann.Cas.1916B 962.

18. N.Y.—People v. Buffom, supra.

cumstance other than the act of accused caused death, evidence tending to disprove such contention is admissible.[19] Of course, all evidence offered to establish the cause of death is subject to the general rules of law excluding irrelevant evidence[20]

Evidence on behalf of accused generally Subject to the usual rules of relevancy, materiality, and competency,[21] evidence is admissible on behalf of accused which tends to disprove that death was caused by an act or injury performed or inflicted by him,[22] or to prove that other injuries were in fact the cause of death,[23] but evidence of other injuries is inadmissible where they are not shown to have occurred within such time as to render them material[24] Evidence tending to show causes, other than administration by accused, for the presence of poisons in deceased's body may be admitted[25] However, evidence that deceased took poison medicinally several years before his death is not admissible unless accompanied by evidence that he also took it shortly before his death,[26] and evidence that deceased took large quantities of a certain drug several months before his death is properly rejected where no evidence is offered to connect his death with the use of the drug[27] Similarly, evidence that deceased had previously suffered from a poisoned condition due to disease is not admissible in the absence of a showing that such condition existed at the time of death[28] Since accused is liable if he inflicts a wound which causes death, although the life of decedent might have been saved by skillful treatment, see supra § 11, where death follows an injury without other independent intervening cause calculated to produce the death of the injured person had he not been injured by the wrongful act of accused, proof of lack of proper treatment which might have saved or prolonged his life cannot be shown[29] Accused may show, if he can, that the wound was not calculated to endanger or destroy life and that deceased died solely from improper treatment[30] Where the criminal act of accused is clearly shown to have caused death, evidence of a diseased condition which accelerated it is properly excluded[31] Where the body of deceased indicated physical violence, it has been held that evidence of the turning on of gas, to show accident or suicide, is properly excluded[32] Where there is evidence of licentiousness and debauchery of deceased which would account for her death and the symptoms of the last illness, evidence of particular occasions of drunkenness not shown to have been connected with the death is inadmissible[33]

Expert and opinion evidence A properly qualified physician who has himself examined the body of deceased, or in response to a hypothetical question on the facts as to it described by other witnesses, may be allowed to express his opinion as to the cause of the death of deceased,[34] or may state

19. Tex.—Waters v. State, 241 S.W. 496, 91 Tex.Cr. 592

20. Wis.—State v. Law, 136 N.W. 803, 150 Wis. 313, rehearing denied 137 N.W. 157, 150 Wis. 313
30 C.J. p. 218 note 62

Previous wound

Where deceased was in good health when shot by defendants with a pistol and died a few hours later, and a physician testified that his death was caused by internal hemorrhage from the wound, evidence that he had previously been wounded was properly excluded, he having recovered from the previous wound.—State v. Sisemore, 92 So. 274, 151 La. 675

Evidence held inadmissible

(1) Exclusion in murder prosecution of testimony that witnesses had seen a tank on a certain model of automobile explode was held not error, where it was not claimed that decedent's automobile had exploded.—People v. Hanson, 191 N.E. 520, 359 Ill. 266

(2) In prosecution for murder by poison, exclusion of testimony that deceased took medicines recommended by her neighbors, and as result thereof became more ill than before taking medicine, was held proper, in absence of proof that such medicines were poisonous.—State v. Schneider, 208 N.W. 566, 53 N.D. 931

(3) Refusal to admit evidence as to preventive treatment for lockjaw was held not error, where it did not appear that deceased neglected wounds caused by accused.—Carraway v. State, 289 S.W. 1007, 105 Tex.Cr. 621

21. Mass.—Commonwealth v. Gettigan, 148 N.E. 113, 252 Mass. 450
Mo.—State v. Decker, 104 S.W.2d 307, 340 Mo. 972

22. N.D.—State v. Moeller, 126 N.W. 568, 20 N.D. 114
30 C.J. p. 218 note 63

23. Ohio.—State v. Bynum, 43 N.E. 2d 636, 69 Ohio App. 317
30 C.J. p. 218 note 64

24. Ala.—Null v. State, 79 So. 678, 16 Ala.App. 542
30 C.J. p. 218 note 65

25. Ala.—Wilson v. State, 8 So.2d 422, 243 Ala. 1

26. Pa.—Goersen v. Commonwealth, 106 Pa. 477, 51 Am.R. 534

27. Ind.—Shields v. State, 49 N.E. 351, 149 Ind. 395

28. Iowa.—State v. Flory, 210 N.W. 961, 203 Iowa 918

29. Ala.—Bailey v. State, 113 So. 830, 22 Ala.App. 185
30 C.J. p. 219 note 69

30. Ky.—Tibbs v. Com., 125 S.W. 871, 138 Ky. 558, 28 L.R.A.,N.S., 665

31. Ala.—Dumas v. State, 19 So. 224, 159 Ala. 42, 133 Am.S.R. 17
30 C.J. p. 219 note 71

32. Mo.—State v. Weber, 188 S.W. 122

33. Mass.—Commonwealth v. Ryan, 134 Mass. 223
Mo.—State v. Strong, 54 S.W. 78, 153 Mo. 548

34. Mo.—State v. Frazier, 98 S.W. 2d 707, 339 Mo. 966
Neb.—Davis v. State, 215 N.W. 785, 116 Neb. 90
30 C.J. p. 219 note 74
Expert and opinion evidence generally see Criminal Law §§ 858–891

Identification of deceased as person examined

Where a physician testified that he attended a negro brought to him by another physician, testimony of the other physician that he carried deceased to the first witness, and that it was the only case of the kind, sufficiently identified the negro referred to by the first witness to render his testimony concerning cause

in what different ways death might have been caused,[35] or that no natural cause of death was discovered,[36] or that death was not from a particular cause,[37] and similar evidence may be given by the physician attending deceased between the time of the injury and his death,[38] or by other qualified experts,[39] such as chemists.[40] In any event, an expert witness must be qualified as such,[41] and an expert cannot give his opinion as to matters as to which the jury are equally as competent to draw inferences from the evidence.[42] A lay witness who has viewed the body and examined the wound or wounds may give his opinion as to the cause of death,[43] and an ordinary witness may testify as to the cause of death where it is within his knowledge.[44] So, where the opinions of experts are not available, nonexperts, after describing the wounds, may state whether, in their opinion, they caused the death.[45] Where deceased died through a knife wound in his throat, evidence of nonexpert witnesses, as to whether in cases of suicide which they had observed committed in that manner the muscles of the hand were relaxed or rigid after death, is not admissible.[46]

b. Post-Mortem Examinations

Evidence of a post-mortem examination of the body of deceased is admissible to show the cause of death, even though it was made after the prosecution had been commenced and without notice to accused.

Evidence of a post-mortem examination of the body of deceased is admissible to show the cause of death.[47] The fact that a post-mortem examination was made long after death is no reason in itself for its exclusion as evidence, if the body was in such a state of preservation that the jury could judge whether its condition was caused by injuries inflicted before or after death.[48] Evidence obtained by making a post-mortem examination is not inadmissible because such examination was made after a prosecution for murder had been commenced,[49] and without notice to accused.[50] An expert may properly testify that a larger quantity of a drug had been in the system of deceased before death than that found at a post-mortem.[51] Questions asked a medical expert, based on a hypothetical state of facts assumed to have been proved, relative to the condition of the body as shown at an autopsy, are properly admitted in a trial for murder, notwithstanding accused's objections to the manner of making the autopsy.[52] Two witnesses having testified

of death admissible.—White v State 101 So 312 20 Ala App 213

35. Iowa.—State v Sayles, 155 N W 837 173 Iowa 371
30 C J p 219 note 75

36. N Y.—People v Benham, 55 N E 11 160 N Y 402 14 N Y Cr 188

37 Mich.—People v La Panne, 237 N W 38, 255 Mich 38
N C.—State v Wilcox, 44 S E 625, 132 N C 1120

38 S C.—State v Foote 36 S E 551, 58 S C 218

39. Ala.—Scott v State 37 So 357, 141 Ala 1

40. Ala.—Scott v State, 37 So 357 141 Ala 1
Tex.—Hand v State, 179 S W 1155, 77 Tex Cr 623

41. Tex.—Smith v State, Cr, 99 S W 100
30 C J p 219 note 81
Examination of expert witnesses generally see Criminal Law §§ 879–890

Embalmer held qualified to testify as to the arterial system.—Gunn v State 136 So 870 24 Ala App 194

42. Or.—State v Morris 163 P 567, 83 Or 429
30 C J p 219 note 82

43. Tex.—Espinoza v State, 165 S W 208, 73 Tex Cr 237
30 C J p 219 note 83

44. Ky.—Commonwealth v Sullivan, 148 S W 2d 343, 285 Ky 477.
30 C J p 219 note 84.

45. Fla.—Revels v State, 59 So 951 64 Fla 432.—Edwards v State, 23 So 537 39 Fla 753

46 Ark.—Redd v State, 40 S W 374, 63 Ark 457

47 Ala.—Wilson v State, 8 So 2d 422, 243 Ala 1
Neb.—Davis v State 215 N W 785 116 Neb 90
30 C J p 220 note 87

Exhumation of body

Examination of body after interment and result disclosed thereby are proper matters of evidence in homicide case.—Bilberry v State, 18 S W 2d 615, 113 Tex Cr 9

Identification of body

In murder prosecution body of deceased was held identified sufficiently to render admissible testimony of coroner's physician that he had performed an autopsy on deceased's body.—People v Munzer, 193 N E 370, 358 Ill 345

Authority to make examination

(1) In prosecution of husband for murder of wife where autopsy was performed in presence of brother and sister of deceased without any objection by husband or anyone else, evidence of result of autopsy was held admissible notwithstanding objections that physician had not been authorized by husband to enter home and perform autopsy, was not official authorized by law to hold inquest, and was not acting under order of court or magistrate.—McNeill v State 80 S W 2d 995, 128 Tex Cr 250

(2) Evidence obtained from an autopsy performed after deceased's disinterment was admissible in murder prosecution notwithstanding no formal inquest was held and autopsy and disinterment were made without compliance with statutes.—People v Franszkiewicz, 4 N W 2d 500, 302 Mich 141

48. Ky.—Tarkany v Commonwealth 13 S W 2d 34 37, 240 Ky 790 quoting **Corpus Juris.**
30 C J p 220 note 88

49 Ark.—King v State 19 S W 110, 55 Ark 601
Ky.—Benge v Commonwealth, 97 S W 2d 51 265 Ky 503

50. Colo.—Lowe v People, 234 P 169 76 Colo 603
D C.—Lancy v U S, 294 F 112 54 App D C 56
Ky.—Benge v Commonwealth 97 S W 2d 54, 56 265 Ky 503, quoting **Corpus Juris.**
30 C J p 220 note 90

51 N J.—State v Crivelli, 98 A 250, 89 N J Law 259

Absorption

An expert may properly be asked what portion of a certain amount of morphine would likely be absorbed through the system.—State v Crivelli, supra

52. Mich.—People v. Foley, 31 N W 94, 64 Mich 148.

for the prosecution as to the condition of the body examined, it is not error to allow the prosecution to call other witnesses afterward, one of whom is a physician, to testify as to the same matter [53]

c. Chemical Analyses

Evidence of the result of a chemical analysis of an organ or substance is admissible to show the cause of death when and only when it is sufficiently identified as the organ or substance it is purported to be

Testimony as to the result of a chemical analysis should not be admitted in the absence of sufficient evidence identifying the organ or substance analyzed as the organ or substance it is purported to be [54] However, the identification need not be positive [55] It is not necessary to the admission of testimony regarding the analysis of the internal organs of deceased that they shall have been placed in hermetically sealed jars,[56] or so preserved as to preclude the possibility of their having been tampered with,[57] or that the expert chemist be sworn before taking charge of or analyzing them,[58] but it is necessary to satisfy the court that the organs were in the same condition when examined as when removed from the body [59] Evidence of precautions to insure the identity of the organs submitted is of course admissible [60] Where poison is alleged to have been placed in food of which deceased partook, before the jury can consider evidence of an analysis of the food, the jury must be satisfied beyond a reasonable doubt that the food was a part of the same which caused the death, and had not been tampered with between the time it came into the hands of the analysts and its examination [61] Where the question arises whether a particular substance introduced into deceased's body contained a certain poison or a certain amount thereof, it is proper to admit evidence of the result of a chemical analysis of some of the same substance taken from the identical box, bottle, package, or other container from which the original substance had been taken [62] Furthermore, testimony of a chemist who analyzed another container of the same substance is admissible where there is sufficient evidence of the likeness between the substance analyzed and the substance introduced into deceased's body [63] So, where accused has procured an article of trade which is shown by the evidence to be a uniform article, a chemical analysis of another box of the article showing that it contained the poison which had been administered is admissible [64] It has been held, however, that, where evidence has been given of the chemical composition of the substance left in the container out of which the substance introduced into deceased's body had been taken, cross-examination as to the chemical composition of the contents of other containers may be properly excluded [65] In order to render admissible evidence of a chemical analysis of the body showing the presence of poison in deadly quantities, it is not essential that there be evidence negativing the possibility that such poison was introduced into the body otherwise than through the agency of accused [66]

§ 258. —— Means or Instruments Used

Evidence tending to prove the character or identity of the weapon or means used to commit the offense is admissible, as is evidence bearing on the question whether the weapon used was one calculated and likely to produce death

It is competent for the state to prove the character or identity of the weapon or means used [67] Thus evidence is admissible as to the finding at or

53 Tex—McConnell v State, 3 S W 699, 22 Tex App 354, 58 Am R 647

54. Mich—People v Miller, 203 N W 862, 231 Mich 273
Mo—State v Smith, 222 S W 455

55 N J—State v Crivelli, 98 A 250, 89 N J Law 259
N Y—People v Williams, 3 Abb Dec 596, 2 Cow Cr 13, 3 Park Cr 84

56 Mo—State v Smith, 222 S W 455—State v Thompson, 31 S W 31, 132 Mo 301

57 Mo—State v Daly, 109 S W 53, 210 Mo 664
30 C J p 220 note 95

58. Mo—State v Thompson, 42 S W 949, 141 Mo 108, affirmed 18 S Ct 922, 171 U S 380, 43 L Ed 204

59 Mo—State v Smith, 222 S W 455

60. Ala—Nordan v State, 39 So 406, 143 Ala 13.

61 N C—State v Best, 15 S E 930, 111 N C 638

62 Mich—People v Franszkiewicz, 4 N W 2d 500, 302 Mich 144

Powder administered by physician
Where poison was found in the stomach of deceased and the question was raised whether a powder administered to him by his attending physician during his illness contained traces of the same poison the testimony of a chemist who analyzed a part of the powder taken from the same package as that administered by the physician was admissible—Epps v State, 1 N E 491, 102 Ind 539

63. Mich—People v Franszkiewicz, 4 N W 2d 500, 302 Mich 144—People v Gerndt, 222 N W 185, 244 Mich 622

64. Mich—People v Franszkiewicz, 4 N W 2d 500, 302 Mich 144.
30 C J p 220 note 4

65 Iowa—State v Flory, 210 N W 961, 203 Iowa 918

66 Neb—Davis v State, 215 N W 785, 116 Neb 90

67. Ala—Redus v State, 9 So 2d 911, 243 Ala 320, motion and application granted 63 S Ct 771, two cases 318 U S 742, 87 L Ed ——, petition denied 63 S Ct 852, 318 U S 802, 87 L Ed —— —Dukes v State, 98 So 368, 210 Ala 412
Ga—Blakewood v State, 25 S E 2d 643—Banks v State, 15 S E 2d 190, 192 Ga 181—Hicks v State, 173 S E 395, 178 Ga 561
Ind—Hall v State, 159 N E 420, 199 Ind 592
Kan—State v Bigler, 23 P 2d 598, 138 Kan 13
Tex—Hampton v State, 135 S W 2d 122, 138 Tex Cr 271—Gay v State, 115 S W 2d 929, 134 Tex Cr 356—Ebers v State, 86 S W 2d 761, 129 Tex Cr 287—Arnold v State, 79

near the scene of the crime of the weapon or instrument apparently used by accused,[68] or of cartridges or bullets, when a gun or pistol is shown to have been used,[69] or of portions of a bomb, found soon after its explosion, showing its composition,[70] or of the finding in accused's bedroom of cartridge shells of the caliber of bullets found in the body of deceased,[71] or that a bullet taken from the body of deceased and one taken from a tree near the place of the homicide fit the molds found in the possession of accused,[72] or as to the condition of the weapon of accused,[73] or of deceased,[74] after the homicide. Where accused testifies that he formerly owned a certain revolver, but has disposed of it to his codefendant, evidence as to the finding of the revolver near the place of the commission of the crime is pertinent,[75] but evidence of the finding of a weapon of a kind not shown to have been used[76] and not traced to the possession of accused,[77] or of the condition of a weapon, not connected with the use thereof at the time of the killing,[78] or of a bullet not shown to have any connection with, or tending to solve, any issue in the case,[79] is inadmissible. Evidence in relation to the examination of guns in the neighborhood, to ascertain whether any of them carried a bullet of the size of one found in the body of deceased, is admissible.[80] Testimony of a physician who conducted an autopsy on the bodies of other persons killed at the same time as the person for the killing of whom accused is on trial is admissible to show that the killing was accomplished in such instance by the same instrument.[81] When properly identified and connected with the crime, the weapon itself is admissible.[82]

Evidence of the nature of the wound caused by the weapon used is admissible to show whether the weapon was one calculated and likely to produce death,[83] and evidence that the wound could not have been made with the gun of accused,[84] or that the

S W 2d 130, 128 Tex Cr 40—McLaughlin v State, 76 S W 2d 768, 127 Tex Cr 390—Newsom v State, 39 S W 2d 69, 118 Tex Cr 496—Broom v State, 242 S W 236, 92 Tex Cr 65—White v State, 241 S W 165, 92 Tex Cr 15

30 C J p 217 note 19

Possession of means

After crime see supra § 249

Before crime see supra § 214

Pressure of the hands

Where in a trial for the murder of an infant, the evidence of the state tends to show that it came to its death by a fracture of the skull, it is admissible to show by a doctor that it is possible to fracture an infant's skull by pressure of the hands in order to show that accused possessed the means by which the infant's skull might have been crushed —State v Noakes, 40 A 249, 70 Vt 247

63. Kan—State v Bigler, 23 P 2d 598, 138 Kan 13

Tex—Arnold v State, 79 S W 2d 130, 128 Tex Cr 40—Clayton v State, 298 S W 601, 108 Tex Cr 19

30 C J p 217 note 20

Rocks

Evidence that the ground at the place where deceased was killed was covered with pieces of rock, where the character of the wound indicated that it could not have been produced with the fist, is admissible—Caw v People, 3 Neb 357

Where evidence of use removed

Evidence of finding of pipe in fire which might have removed evidence of use was admissible—State v Harris, 22 S W 2d 802, 324 Mo 223

69 Tex—Davis v State, 49 S W 2d 805, 120 Tex Cr 330

30 C J p 217 note 21

Bullet not from accused's gun

Testimony that copper jacket bullet was taken from back of deceased's horse was not objectionable because uncontradicted evidence showed that accused's gun could not have fired such bullet—Meade v Commonwealth, 16 S W 2d 1016, 229 Ky 207

70 Cal—People v Mooney, 171 P 690, 177 Cal 642

71. Conn—State v Laudano, 51 A 860, 74 Conn 638

72 N C—State v Outerbridge, 82 N C 617

73 Ala—Burton v State, 69 So 913, 191 Ala 2

N C—State v Pritchett, 11 S E 357, 106 N C 667

Number of shells

In a prosecution for murder, where one of the accused left his pistol in the possession of deceased after deceased was shot, evidence of firing of a shot and of shouting before the offense was competent as bearing on the number of shells in the pistol of accused—State v Hall, 112 S E 431, 183 N C 806

74. Ala—Phillips v State, 49 So 794, 161 Ala 60

La—State v Chevallier, 36 La Ann 81

75. Mo—State v Jeffries, 109 S W 614, 210 Mo 302, 14 Ann Cas 524

76. Ky—Ireland v Commonwealth, 57 S W 616, 22 Ky L 478

77 Ky—Ireland v Commonwealth, supra

78 Ala—Stephenson v State, 185 So 910, 28 Ala App 418

Ga—McDuffie v State, 49 S E 708, 121 Ga 580

Remoteness

In murder prosecution, with date of homicide fixed as being June 28, examination and condition of pistol on July 4, alleged to have been delivered to accused on July 3, assuming that it was the pistol used in killing deceased, was too remote to be admissible in evidence—Merrell v State, 101 So 881, 21 Ala App 38

79. Ala—Catrett v State, 146 So 287, 25 Ala App 334

Tex—Hickey v State, 76 S W 920, 45 Tex Cr 297

80. Va—Dean v Commonwealth, 32 Gratt 912, 73 Va 912

Other guns fired at same time

In prosecution for murder in first degree permitting policeman to testify that only three guns were fired on night of homicide and that policeman's gun and gun of deceased policemen were .22 automatics, was not error—Redus v State, 9 So 2d 914, 243 Ala 320, motion and application granted 63 S Ct 771, two cases 318 U S 742, 87 L Ed —, petition denied 63 S Ct 852, 318 U S 802, 87 L Ed —

81 Mass—Commonwealth v Sturtivant, 117 Mass 122, 19 Am R 401

82. Tex—Freeney v State, 59 S W 2d 385, 123 Tex Cr 188—Clayton v State, 298 S W 601, 108 Tex Cr 19

83 Ga—Blakewood v State, 25 S E 2d 613—Banks v State, 15 S E 2d 190, 192 Ga 181

Tex—Gay v State, 115 S W 2d 929, 134 Tex Cr 356—Ebers v State, 86 S W 2d 761, 129 Tex Cr 287—Arnold v State, 79 S W 2d 130, 128 Tex Cr 40—McLaughlin v State, 76 S W 2d 768, 127 Tex Cr 390—Newsom v State, 39 S W 2d 69, 118 Tex Cr 496—White v State, 241 S W 165, 92 Tex Cr 15

84. Ky—Franklin v Commonwealth,

weapon used was insufficient to inflict death or serious bodily harm under the circumstances in which it was used,[85] is admissible in behalf of accused Where an instrument with which an assault was committed and a serious injury was inflicted is before the jury, no further direct proof of its deadly character is necessary,[86] but the admission of testimony with reference thereto is not error[87] It is not error to permit the prosecuting witness in a prosecution for assault with intent to kill to describe in his testimony the weapon with which he was assaulted and other similar weapons merely because the state could not procure the particular weapon with which the assault was made,[88] especially where it was last seen in the hands of accused who fled presumedly with it in his hand[89] Any witness, after describing an instrument, may express under oath the opinion that it is capable of causing death[90]

§ 259. Insanity

a In general
b Causes
c Rebuttal

a. In General

Any competent evidence on the issue of accused's insanity is admissible, and much latitude is permitted in the introduction of evidence as to accused's acts, condition, and conduct both before and after the offense in so far as it bears on this defense

Provided it is properly within the issues raised by the pleadings, see supra § 175, accused is entitled to a hearing of any competent evidence in his behalf offered on the issue of his sanity[91] To be admissible to sustain this defense, the evidence must tend to cause a reasonable man to doubt accused's sanity,[92] and not merely to prove that accused was eccentric, passionate, and excitable,[93] or mentally unbalanced, although not insane,[94] or of low mentality[95] Clearly matters not throwing any light on the mental condition of accused are inadmissible[96] Accused may be permitted to testify whether he knew what he was doing at the time of the offense,[97] or that he was acting under an impulse which he could not control[98] A lay witness who has testified to facts sufficient to form the basis of an opinion as to accused's sanity may state his opinion,[99] but a witness may not, in the guise of testifying as to facts, state his conclusion concerning a particular occurrence rather than what he observed[1] A comparison of the actions of accused with those of insane persons is inadmissible[2] Evidence of the presence or absence of motive on the part of accused is admissible on the issue of insanity[3]

48 S W 986, 105 Ky 237, 20 Ky L 1137

85. Ala—Smith v State 62 So 575, 8 Ala App 187

86. Mo—State v Drumm, 56 S W 1086 156 Mo 216

87. Tex—Jones v State, 167 S W 1110, 74 Tex Cr 205
30 C J p 217 note 10

88. Mo—State v Ruck, 92 S W 706, 194 Mo 416, 5 Ann Cas 976

89. Mo—State v Ruck, supra

90. Ga—Perry v State, 36 S E 781 110 Ga 234

91. Ala—Underwood v State 193 So 155 239 Ala 29
Pa—Commonwealth v Williams, 160 A 602, 307 Pa 134
30 C J p 220 note 6

92. Miss—Garner v State, 73 So 50, 112 Miss 317

93. Miss—Garner v State, supra

94. Mo—State v Glenn, 262 S W 1030

95. Ga—Goosby v State, 112 S E 467, 153 Ga 496
N C—State v Jenkins, 182 S E 324, 208 N C 740
Pa—Commonwealth v McCabe, 39 Pa Dist & Co 93, 56 Montg Co 214
30 C J p 221 note 13

Lack of "good sense"

Evidence that accused did not act like a man with "good sense" was not admissible, since the issue was whether he was in fact insane when homicide was committed—Williams v State, 188 So 316 185 Miss 419

96. Ala—Shelton v State, 117 So 8, 217 Ala 465—Guinn v State 115 So 417, 22 Ala App 331
Cal—People v Sliscovich 226 P 611 193 Cal 544—People v Lizarraga 291 P 434 108 Cal App 152
La—State v Messer, 193 So 633 194 La 238
Md—Price v State, 151 A 409, 159 Md 491
Mass—Commonwealth v Sheppard, 18 N E 2d 630, 313 Mass 590 certiorari denied Sheppard v Commonwealth of Massachusetts, 63 S Ct 1150 320 U S 213, 87 L Ed ——
Pa—Commonwealth v Williams 160 A 602, 307 Pa 134—Commonwealth v Winter, 137 A 261, 289 Pa 284
30 C J p 221 note 8

Evidence held inadmissible

(1) In prosecution for murder, where the defense was insanity, evidence as to the nervousness of the right arm of accused as the result of an injury, which was not shown by competent evidence to indicate insanity, was properly stricken—State v Hoagland, 228 P 314 39 Idaho 405

(2) In murder prosecution, exclusion of hospital records of accused's brother while brother was inmate of state hospital for nervous diseases was held not error since record had no bearing on accused's alleged insanity—Niven v State, 80 S W 2d 644, 190 Ark 514

97. Ill—People v Phipps, 109 N E 25, 268 Ill 210

98. Ky—Abbott v Commonwealth 62 S W 715 23 Ky L 226

99. Ariz—State v Macias, 131 P 2d 810
Pa—Commonwealth v Winter, 137 A 261, 289 Pa 284
Expert and opinion evidence of insanity in criminal proceedings generally see Criminal Law § 467

1. Ala—Bell v State, 37 So 281, 140 Ala 57

What accused appeared to be thinking

Where, in describing the actions of accused at the time of a shooting the witness stated that "defendant acted like he thought five or six men were after him," such statement was properly excluded as a mere conclusion—Bell v State, supra

2. Mass—Commonwealth v Spencer, 99 N E 266, 212 Mass 138, Ann Cas 1913D 552

3. Ark—Scott v State, 159 S W 1095, 109 Ark 391.

On a separate trial of the issue of insanity the fact that certain evidence relates to the homicide with which accused is charged does not render it inadmissible [4]

Time and scope of inquiry Much latitude is generally permitted in the introduction of evidence as to the acts, condition, and conduct of accused,[5] and, while such evidence is clearly admissible where it relates to the time of the offense,[6] it is also admissible where it relates to events or conditions prior[7] and subsequent[8] thereto While it has been said broadly that, where the defense is insanity, every act of accused's life is relevant to the issue,[9] and that the law fixes no particular limitation as to the period of time which the inquiry may cover,[10] nevertheless, there is a reasonable discretion in the trial court to restrict such evidence,[11] and such evidence may be excluded where it is too remote,[12] or does not have a tendency to show the mental condition of accused at the time of the act charged [13] So, where considerable time has elapsed since a homicide, the admission or rejection of evidence of subsequent insanity is within the judicial discretion of the trial court [14]

Evidence of adjudication Proof of an inquisition of lunacy resulting in a verdict of sanity or insanity is admissible, although it is not conclusive [15] While there is authority for the view that the entire record of such proceedings is admissible,[16] other authorities hold that only proof of the adjudication may be admitted, and that the evidence adduced at the inquisition is incompetent,[17] particularly where the inquisition resulted in a verdict of sanity [18] A verdict as to accused's sanity subsequent to the commission of the offense has been held inadmissible,[19] but it has also been held that a subsequent adjudication of insanity is admissible as bearing on the question of accused's sanity at the

Pa —Commonwealth v Williams, 160 A 602, 307 Pa 134
Tex —Epps v State, 10 S W 2d 566, 110 Tex Cr 406
Evidence of motive generally see supra § 227

4. Colo —Arridy v People, 82 P 2d 757, 103 Colo 29

5. Ala —Naugher v State 1 So 2d 294 241 Ala 91 -Grammer v State, 196 So 268, 239 Ala 633—Brothers v State, 183 So 433, 236 Ala 418—Boyle v State, 154 So 575, 229 Ala 212
Miss —Elmore v State, 108 So 722, 144 Miss 318
Mo —State v Murphy, 90 S W 2d 103, 338 Mo 291 State v Warren, 297 S W 397, 317 Mo 343
Okl Sloan v State, 218 P 717 25 Okl Cr 15

6. Pa —Commonwealth v Williams, 160 A 602 307 Pa 134
30 C J p 221 note 17

Conduct of others acting with accused

In prosecution of five convicts for murder of prison warden, where convicts had acted together in attacking prison officers, what was said and done at the time was evidence to be considered in determining the sanity of each of the convicts —People v Eudy, 82 P 2d 359, 12 Cal 2d 41

7 Ala —Naugher v State, 1 So 2d 294, 241 Ala 91—Grammer v State, 196 So 268, 239 Ala 633—Underwood v State, 193 So 155 239 Ala 29 - Brothers v State, 183 So 433, 236 Ala 148
Cal --People v David, 86 P 2d 811, 12 Cal 2d 639
Mass —Commonwealth v Sheppard 48 N E 2d 630 313 Mass 590, certiorari denied Sheppard v Commonwealth of Massachusetts 63 S Ct 1450, 320 U S 213, 87 L Ed —.
Mo —State v Glenn, 262 S W 1030
Pa —Commonwealth v Williams, 160 A 602, 307 Pa 134
Tex —Epps v State, 10 S W 2d 566, 110 Tex Cr 406
30 C J p 221 note 18

8. Ala —Naugher v State 1 So 2d 294 241 Ala 91- -Grammer v State 196 So 268, 239 Ala 633—Underwood v State, 193 So 155, 239 Ala 29 Boyle v State, 154 So 575 229 Ala 212
Cal —People v David, 86 P 2d 811, 12 Cal 2d 639—People v Mallette 102 P 2d 1084, 39 Cal App 2d 294
Colo — Arridy v People, 82 P 2d 757 103 Colo 29
Mass --Commonwealth v Sheppard, 48 N E 2d 630, 313 Mass 590, certiorari denied Sheppard v Commonwealth of Massachusetts, 63 S Ct 1450, 320 U S 213, 87 L Ed —
Mo —State v Glenn, 262 S W 1030
N Y - People v Esposito, 39 N E 2d 925, 287 N Y 389
Pa —Commonwealth v Williams, 160 A 602, 307 Pa 134
Vt —State v Stacy 160 A 257, 104 Vt 379 motion denied 160 A 747, 104 Vt 379
30 C J p 221 note 19

9. Ala —Brothers v State 183 So 433, 236 Ala 148
Miss —Elmore v State, 108 So 722, 144 Miss 318

10. Mo --State v Murphy, 90 S W 2d 103, 338 Mo 291

11. Cal —People v Nolan, 14 P 2d 880, 126 Cal App 623
30 C J p 220 note 7

12. Colo —King v People 285 P 157, 87 Colo 11
Mo —State v Tarwater, 239 S W 480, 293 Mo 273
Okl —Parton v State, 215 P 435, 23 Okl Cr 429
30 C J p 221 note 20

13 Mich —People v Zabijak 280 N W 149 285 Mich 164
Mo —State v Murphy 90 S W 2d 103 338 Mo 291— State v Miller, 225 S W 913
N M —State v Archer, 255 P 396 32 N M 319
Okl —Hoggatt v State, 94 P 2d 264 67 Okl Cr 377

14. Cal — People v David 86 P 2d 811, 12 Cal 2d 639
Vt —State v Stacy 160 A 257 104 Vt 379 motion denied 160 A 747 104 Vt 379
30 C J p 221 note 22

15. Wash -- State v Champoux, 74 P 557 33 Wash 339

Void judgment

In a prosecution for murder there was no error in excluding evidence that prior to the homicide accused was confined in an insane asylum for about eight months, the proceeding whereby confinement resulted being by commission of physicians, and the statute having been held unconstitutional and judgment thereunder void Thompson v State, 256 S W 279, 96 Tex Cr 87

16 Wash —State v Champoux, 74 P 557, 33 Wash 339

17. Ky —Gulley v Commonwealth, 143 S W 2d 1059, 284 Ky 98—Swonshire v Commonwealth, 55 S W 2d 356, 246 Ky 593—Berry v Commonwealth, 13 S W 2d 521, 227 Ky 528

18 Ky —Gulley v Commonwealth, 143 S W 2d 1059, 284 Ky 98—Swopshire v Commonwealth, 55 S W 2d 356, 246 Ky 593

19. Ill --People v Gavrilovich, 106 N E 521, 265 Ill 11.

time of the offense.[20]

Declarations and statements. Declarations by accused or statements in conversations tending to show his mental condition at the time of the homicide have been held admissible,[21] whether made at the time of,[22] before,[23] or after[24] the homicide, but on the other hand, evidence of general conversations between accused and a witness on the day of the homicide has been held inadmissible.[25]

Reputation and belief. Reports current in the neighborhood where accused resides concerning the condition of his mind are not generally admissible on the question of insanity.[26] The belief of accused's relatives is not competent on the issue.[27]

b. Causes

Evidence of facts or circumstances tending to render the accused insane generally is held admissible provided there is other proof of his insanity.

It is generally held that evidence of facts or circumstances tending to render accused insane is admissible,[28] and the fact that accused's insanity took the form of an insane delusion or frenzy, and the actuating cause thereof, may be shown,[29] provided there is evidence in the case of his insanity,[30] and, according to one view, provided there is substantial proof of latent insanity or latent tendency to insane paroxysms.[31] The competency of evidence of circumstances of provocation, introduced to show their effect as causing insanity of accused, is not affected by the fact that the killing was done deliberately.[32] The admissibility of such evidence is subject to the usual rules excluding incompetent, immaterial, or irrelevant evidence.[33] Facts which, if known to accused, might have produced insanity, cannot be proved if they were not known to accused at the time of the homicide.[34] Where accused claims that he killed deceased because of insanity produced by the information of deceased's misconduct on a certain occasion, evidence of the truth of such information,[35] or of deceased's conduct on other occasions,[36] is inadmissible. Where evidence has been received of the confession of accused's wife to him as to misconduct of deceased, and of accused's prior knowledge of deceased's licentious conduct with other women, the details of his conduct with such

20. Cal.—People v. Mallette, 102 P. 2d 1081, 39 Cal. App. 2d 294.
Mich.—People v. Zabijak, 280 N.W. 119, 285 Mich. 164.

21. Okl.—Hoggatt v. State, 94 P. 2d 264, 67 Okl. Cr. 377—Sloan v. State, 218 P. 717, 25 Okl. Cr. 15.

22. Okl.—Reed v. State, 174 P. 800, 14 Okl. Cr. 651.

23. Ala.—Naugher v. State, 1 So. 2d 291, 241 Ala. 91—Grammer v. State, 196 So. 268, 239 Ala. 633—Underwood v. State, 193 So. 155, 239 Ala. 29.
Cal.—People v. David, 86 P. 2d 811, 12 Cal. 2d 639.
30 C.J. p. 222 note 32.

24. Ala.—Naugher v. State, 1 So. 2d 291, 241 Ala. 91—Grammer v. State, 196 So. 268, 239 Ala. 633—Underwood v. State, 193 So. 155, 239 Ala. 29.
Cal.—People v. David, 86 P. 2d 811, 12 Cal. 2d 639.
Miss.—Wallace v. State, 108 So. 810, 143 Miss. 438.
30 C.J. p. 222 note 33.

Incriminating statement before warning

Unless they are admissible as res gestæ, incriminating statements made by accused after the homicide, without his having been warned that what he said might be used against him, are inadmissible even though limited to the issue of insanity.—Calloway v. State, 244 S.W. 549, 92 Tex. Cr. 506.

25. D.C.—Taylor v. U.S., 7 App. D.C. 27.

26. Miss.—Williams v. State, 188 So. 316, 185 Miss. 449.
30 C.J. p. 222 note 35.

27. Md.—Price v. State, 151 A. 409, 159 Md. 491.
30 C.J. p. 222 note 37.

28. Ill.—People v. Moor, 189 N.E. 318, 355 Ill. 393.
Mo.—State v. Warren, 297 S.W. 397, 317 Mo. 843.
Okl.—Alexander v. State, 90 P. 2d 949, 66 Okl. Cr. 219.
Pa.—Commonwealth v. Williams, 160 A. 602, 307 Pa. 134.

Injuries to accused

(1) Evidence as to injuries received by accused, and effect of such injuries on his mind and ability to know what he was doing, was competent on plea of insanity.—State v. Nall, 188 S.E. 637, 211 N.C. 61—30 C.J. p. 222 note 41 [a].

(2) Where one of the defenses on trial for homicide was that deceased attacked accused, and committed injuries which rendered accused mentally irresponsible, and that while in that condition, if at all, accused killed deceased and her child, evidence of deceased's uncommunicated threats to kill accused was admissible to show an intention from which it might be inferred that deceased was the aggressor.—Commonwealth v. Santos, 119 A. 596, 275 Pa. 515.
30 C.J. p. 222 note 41.

29. Tex.—Merritt v. State, 45 S.W. 21, 39 Tex. Cr. 70.
30 C.J. p. 222 note 42.

30. Ala.—Naugher v. State, 1 So. 2d 291, 241 Ala. 91.
30 C.J. p. 222 note 43.

31. D.C.—Taylor v. U.S., 7 App. D.C. 27.

32. N.Y.—People v. Wood, 27 N.E. 362, 126 N.Y. 249.

33. Mich.—People v. Beverly, 66 N.W. 379, 108 Mich. 509.
30 C.J. p. 222 note 46.

Normal sexual relations

In homicide case evidence relating to normal sexual relations between accused and wife growing out of fact that accused was 31 years her senior held properly excluded as immaterial on issue of insanity.—French v. State, 111 So. 713, 25 Ala. App. 53, certiorari denied 111 So. 717, 225 Ala. 8.

Source of disease

In a trial for murder, where accused seeks to show that he was insane at the time of the homicide, as the result of a disease, it is not material from whom or in what manner he contracted such disease.—State v. Price, 115 S.E. 393, 92 W. Va. 542.

34. Ky.—Blackerby v. Commonwealth, 255 S.W. 824, 200 Ky. 832.
N.Y.—People v. Osmond, 33 N.E. 739, 138 N.Y. 80.
Okl.—Alexander v. State, 90 P. 2d 949, 66 Okl. Cr. 219.

35. N.C.—State v. Green, 68 S.E. 16, 152 N.C. 835.

36. Ala.—Harris v. State, 62 So. 477, 8 Ala. App. 33.

women are inadmissible[37] Evidence of specific acts of violence by deceased toward accused has been held inadmissible to show insanity[38]

Heredity Accused can show a tendency to hereditary insanity by showing insanity of his kinsmen,[39] provided it is offered in connection with other evidence directly tending to show that accused is himself insane[40] and the evidence offered for such purpose is competent and relevant,[41] and it is held that the remoteness of evidence of a hereditary tendency to insanity affects its force and not its competency[42] The insanity of accused's ancestors or relatives cannot be proved by reputation,[43] or by statements on a family tree of accused[44] It has been held that evidence of insanity of collateral kindred is not admissible[45] unless there is proof that such insanity was inherited from a common ancestor,[46] but other cases have held that such evidence is admissible,[47] and that the degree that the collateral insane relative is removed from accused goes only to the weight of the evidence[48] It has also been held that the admission of insanity in accused's collateral kinsmen lies, within reasonable limitations, in the discretion of the trial court[49]

c. Rebuttal

Evidence tending to disprove the defense of insanity is admissible on behalf of the prosecution

Evidence tending to disprove the defense of insanity is admissible on behalf of the prosecution,[50]

37. Kan—State v Murray, 110 P 103, 83 Kan 148

38. Or—State v Marshall, 57 P 902 35 Or 265

39. Colo—Baker v People, 209 P 791, 72 Colo 68
R I -State v Fenik, 121 A 218, 45 R I 309
30 C J p 221 note 25

40. Ala—James v State, 69 So 569, 193 Ala 55, Ann Cas 1918B 119
Ky—Winburn v Commonwealth, 203 S W 1073, 181 Ky 183

41 Ala—Shelton v State, 117 So 8, 217 Ala 465
30 C J p 221 note 27

Record of adjudication

In a prosecution for homicide, where the defense of insanity was interposed, it was not error to exclude the entire record of proceedings in another state in which the mother of accused was adjudged insane, the verdict of the jury and the decree being admitted—Baker v People, 209 P 791, 72 Colo 68

42. Ala—Russell v State, 78 So 916, 201 Ala 572

43. D C—Snell v U S, 16 App D C 501
Ky - Wright v Commonwealth, 72 S W 310 24 Ky L 1838

44. Ky - Wright v Commonwealth supra

45 Mo--State v Warren, 297 S W 397 317 Mo 843

46. Mo—State v Warren, supra

47 Utah—State v Green, 6 P 2d 177 78 Utah 580

48. Utah—State v Green, supra

49. R I -State v Fenik, 121 A 218, 45 R I 309

50 Ala—Naugher v State, 1 So 2d 291 241 Ala 91—Grammer v State, 196 So 268, 239 Ala 633—Brothers v State 183 So 433 236 Ala 448--Guinn v State, 115 So 417, 22 Ala App 331
Cal—People v David, 86 P 2d 811, 12 Cal 2d 639—People v Vukich, 257 P 46, 201 Cal 290—People v Valcalda, 205 P 452, 188 Cal 366
Mass—Commonwealth v Sheppard 48 N E 2d 630 313 Mass 590, certiorari denied Sheppard v Commonwealth of Massachusetts, 63 S Ct 1450, 320 U S 213, 87 L Ed
Miss—Wallace v State 108 So 810 143 Miss 438—Elmore v State 108 So 722, 144 Miss 318
Okl—Ditmore v State, 293 P 581, 49 Okl Cr 228
Tex—Harris v State, 58 S W 2d 513 123 Tex Cr 161
30 C J p 222 note 52

Feigned insanity

(1) Evidence tending to show that claimed insanity is feigned is admissible
Ala Bass v State, 122 So 45 219 Ala 282
Tex - Arnold v State, 79 S W 2d 130, 128 Tex Cr 40

(2) Thus testimony that accused, while being prosecuted for another crime made threats against the charge of the prosecuting attorney, and stated that, if convicted, he would kill both and claim insanity is admissible to show that accused was feigning insanity at the time he was confined in insane asylum—State v Tarwater 239 S W 480, 293 Mo 273

Intelligence tests

Intelligence of accused disclosed by various intelligence tests was properly admitted in rebutting defense of lack of mental capacity to murder—Clark v State, 156 N E 219, 23 Ohio App 474

Prior threats

In a murder prosecution, in which defense was insanity, claimed to have been caused by statements told accused the night before the homicide as to certain acts of deceased where accused, in aid of his defense testified that on the night of the homicide everything turned black" just before the killing, evidence in behalf of state that ten days before the homicide accused was drunk, and threatened to kill somebody, held admissible, being in a measure rebuttal in character—People v Siscovich, 226 P 611 193 Cal 544

Intoxication

(1) In murder prosecution, where defense was insanity testimony offered in rebuttal of affirmative testimony relating to insanity to show that at time of killing accused was drunk and engaged in usual habit of pulling pistol and attempting to kill some one when in such condition, was admissible—Chapman v State, 124 S W 2d 112 136 Tex Cr 285 rehearing denied 124 S W 2d 996 136 Tex Cr 285

(2) Evidence of intoxication generally see infra § 260

Limiting effect of evidence

In murder trial refusal to limit testimony of fellow employee of defendant as to accused's duties manner of discharging them etc to issue of insanity vel non held not error where there was no other real issue in cause and it did not appear that limitation would have been more than useless ceremony or of any possible benefit to accused—Kilpatrick v State 104 So 656, 213 Ala 358

Evidence held admissible

(1) Where accused in murder prosecution attempted to establish mental incapacity and offered evidence to establish infidelity of his deceased wife by rumor and by specific acts or circumstances as bearing on his mental condition, state had right to refute and rebut such evidence by showing that no such rumors or grounds therefor existed—Morris v State 175 So 283 234 Ala 520 appeal dismissed Morris v State of Alabama, 58 S Ct 58, 302 U S 642 82 L Ed 499 rehearing denied 58 S Ct 264, 302 U S 778, 82 L Ed 602

(2) Police officer's evidence that,

provided it is relevant and the matters offered clearly relate to accused[51] The remoteness of the time referred to in such evidence goes to its weight rather than to its admissibility[52] Evidence tending to show that accused is of sound mind will not be rejected because it tends to prove another offense[53] Where insanity is pleaded the state may prove that during the period covered by accused's conduct as testified to by his witnesses, accused was under the influence of liquor and was intoxicated at the time of the killing[54] After evidence of a disease impairing accused's memory has been received, cross-examination to test his memory is competent[55] Evidence of the absence of reports of accused's insanity in the neighborhood in which he resides prior to the homicide has been held admissible in rebuttal of evidence of insanity of long standing[56] Where accused asserts that he was acting under an insane delusion, the state is entitled to introduce evidence bearing on the question of general insanity[57] and the conduct of accused as showing or failing to show general insanity may be considered in order to determine whether or not he is laboring under a delusion[58]

§ 260. Intoxication

Evidence tending to show the accused's state of intoxication at the time of the offense generally is held admissible, at least as bearing on the question of deliberation and premeditation, malice, or intent

Although, as appears supra § 5, voluntary intoxication does not excuse a homicide, nevertheless, as a general rule evidence of intoxication of accused is held admissible as tending to cast some light on the circumstances of the crime,[59] or on the issue of

immediately after homicide, accused who pleaded insanity "seemed all right" and that he "talked rationally," was admissible to show accused's appearance, emotions, and mental condition—Deloney v State, 142 So 432, 225 Ala 65

(3) Testimony that large quantities of money were being exchanged at time of alleged attempted bank robbery and homicide held admissible on insanity as showing design—Jarvis v State, 126 So 127, 220 Ala 501

(4) Other evidence

Ala.—Wilkes v State, 110 So 908, 215 Ala 428

Cal.—People v French 87 P 2d 1014, 12 Cal 2d 720

51. Ala.—Brothers v State, 183 So 433, 236 Ala 448

Cal.—People v French, 87 P 2d 1014, 12 Cal 2d 720

D C.—Sabens v U S, 40 App D C 440

Falsity of information received by accused

Where it is contended that certain statements made to accused caused his insanity, the truth of those statements is immaterial, and evidence to show that they were not true, as distinguished from evidence that they were not made is inadmissible—People v Slisovich 226 P 611, 193 Cal 544

52. Cal.—People v Loper 112 P 720, 159 Cal 6, Ann Cas 1912B 1193

53. Ala.—Brothers v State, 183 So 433, 236 Ala 448

Cal.—People v David, 86 P 2d 811, 12 Cal 2d 639

Ind.—Baker v State, 129 N E 468, 190 Ind 385

Okl.—Dilmore v State, 293 P 581, 49 Okl Cr 228

Prior conviction

In murder prosecution, in which accused entered plea of not guilty by reason of insanity, testimony of his wife on cross-examination that he had previously been convicted of assault with a weapon, and that he and her father had had a shooting affair, which testimony was limited to question of accused's insanity, was properly admitted—Grammer v State, 196 So 268, 239 Ala 633

54. Ala.—Porter v State, 33 So 691, 135 Ala 51

55. N Y.—People v Tice, 30 N E 494 131 N Y 651, 4 Silv A 99, 15 L R A 669

56. Tex.—Merritt v State, 45 S W 21, 39 Tex Cr 70

57. Ark.—Kelley v State, 242 S W 572, 154 Ark 246

58. Ark.—Kelley v State, supra

59. Ala.—Beaird v State, 109 So 161, 215 Ala 27—Evers v State 150 So 172, 25 Ala App 537, certiorari denied 150 So 174, 227 Ala 387—Vinson v State, 121 So 698, 23 Ala App 51, certiorari denied 121 So 699, 219 Ala 193 Wright v State, 108 So 641, 21 Ala App 391—Jones v State, 101 So 331, 20 Ala App 247

Ill.—People v Klein, 137 N E 145 305 Ill 141—Rafferty v People, 66 Ill 118

Ky.—Woodall v Commonwealth, 50 S W 2d 939, 244 Ky 320—Percifull v Commonwealth, 279 S W 1062, 212 Ky 673—Harris v Commonwealth, 209 S W 509, 183 Ky 509

La.—State v Price, 188 So 718, 192 La 615

Mich.—People v McKernan 210 N W 219, 236 Mich 226

Tex.—Graham v State, 69 S W 2d 73, 126 Tex Cr 531—McCarty v State, 27 S W 2d 189, 115 Tex Cr 571

30 C J p 223 note 59

Character of accused when intoxicated see supra § 221

Intoxication on issue of

Apprehension of danger as element of self-defense see infra § 278

Insanity see supra § 259

Passion and provocation see infra § 262

Evidence held admissible

(1) Evidence that accused appeared to have been drinking held properly admitted—Humphries v State, 106 So 697, 21 Ala App 200

(2) Testimony, in trial for assault to kill, that defendants had been "drinking some," held competent to show their frame of mind and general condition—State v Jernigan, 153 S E 480, 156 S C 509

(3) Testimony respecting liquor on premises held admissible in murder prosecution in view of contradiction between witnesses as to whether accused and brother taking part in difficulty were drunk at time of killing State v Ussery, 152 So 302, 178 La 593

(4) In murder prosecution, evidence that shortly before homicide accused and his associates demanded money from other persons held admissible as showing that accused and his associates were drunk—Burke v Commonwealth, 66 S W 2d 21 252 Ky 34

(5) In prosecution of negro for shooting and wounding with intent to kill, testimony of victim's white niece that accused had insulted her was admissible as bearing on whether accused and victim left cafe and were together on street at time of shooting, and on whether accused was intoxicated as testified to by other witness—McClain v Commonwealth, 144 S W 2d 816, 284 Ky 359

(6) In murder prosecution permitting evidence showing that one of the defendants had drunk a certain quantity of alcoholic liquor shortly

deliberation and premeditation,[60] even though accused voluntarily became drunk[61] for the purpose of nerving himself to commit the homicide,[62] or on the issue of malice[63] or intent.[64] Sometimes such evidence is held admissible to lower the grade of the crime,[65] as, for example, to lessen the offense to murder in the second degree,[66] and there is authority for the view that such evidence may be considered only to determine the degree of the crime.[67] According to some authorities, evidence of intoxication is admissible only for the purpose of determining whether accused was capable of entertaining the specific intent or malice which is an indispensable ingredient of certain grades of the offense,[68] and only where there is no evidence of actual malice or intent,[69] it is not admissible, apart from its bearing on the question of specific intent, for the purpose of reducing the crime to manslaughter[70] or of rebutting evidence of actual malice.[71] Other authorities hold, contrary to the general weight of opinion above stated, that evidence of intoxication is never admissible, whether to show that murder was not committed, to reduce its grade, or to determine whether accused acted willfully, deliberately, and premeditatedly,[72] but this rule has been held not to require the exclusion of evidence of accused's intoxication offered by the state to refute some other defense relied on by accused.[73]

Evidence of intoxication shortly after the homicide is admissible in corroboration of evidence of intoxication at the time thereof,[74] but in the absence of evidence of intoxication at the time of the offense such evidence has been held inadmissible.[75] Evidence that accused was drinking or intoxicated shortly before the homicide is also held admissible[76] as bearing on his state of intoxication at the time of the offense[77] where,[78] and only where,[79] there is other evidence that he was intoxicated at the time of the offense. Where there is evidence of drunkenness of accused at the time of the offense, its probable degree, it is held, may be illustrated by showing that it was immediately preceded by protracted drinking.[80] It has, however, also been held that, unless it is relevant to an issue of insanity properly raised in the case, it is not error to exclude evidence of intoxication for a long time prior to the offense.[81] Evidence that accused was in the habit at

before incidents involved was not error.—State v. Coleman, 285 N.W. 269, 226 Iowa 968.

60. D.C.—McAffee v. U.S., 111 F.2d 199, 72 App.D.C. 60, certiorari denied 60 S.Ct. 1094, 310 U.S. 643, 84 L.Ed. 1410.
N.C.—State v. Edwards, 191 S.E. 1, 211 N.C. 555.—State v. Ross, 136 S.E. 193, 193 N.C. 25.
Ohio.—Rucker v. State, 162 N.E. 802, 119 Ohio St. 189.
30 C.J. p. 223, note 60.

61. Ohio.—Rucker v. State, supra.

62. D.C.—Sabens v. U.S., 40 App.D.C. 440.

63. Ky.—Triplett v. Commonwealth, 114 S.W.2d 1108, 272 Ky. 714.—Fleenor v. Commonwealth, 298 S.W. 376, 221 Ky. 175.—Thomas v. Commonwealth, 245 S.W. 164, 196 Ky. 549.
Ohio.—Rucker v. State, 162 N.E. 802, 119 Ohio St. 189.
30 C.J. p. 223, note 62.

64. Ala.—Mitchell v. State, 98 So. 285, 210 Ala. 457.
Cal.—People v. Malone, 269 P. 628, 205 Cal. 29, rehearing denied 270 P. 196, 205 Cal. 29.—People v. Clifton, 198 P. 1065, 186 Cal. 143.—People v. Selph, 289 P. 918, 106 Cal. App. 704.
Ind.—O'Neil v. State, 22 N.E.2d 825, 216 Ind. 21.
Ky.—Richardson v. Commonwealth, 111 S.W.2d 192, 281 Ky. 319.—Blackburn v. Commonwealth, 255 S.W. 99, 200 Ky. 638.
Miss.—Huddleston v. State, 98 So. 859, 134 Miss. 382.
Ohio.—Rucker v. State, 162 N.E. 802, 119 Ohio St. 189.
30 C.J. p. 223, note 63.

65. Ohio.—Rucker v. State, 162 N.E. 802, 119 Ohio St. 189.
30 C.J. p. 223, note 64.

66. Del.—State v. Faino, 41 A. 134, 15 Del. 192.
30 C.J. p. 223, note 65.

67. Cal.—People v. Hopper, 183 P. 836, 42 Cal.App. 499.

68. Ky.—Triplett v. Commonwealth, 114 S.W.2d 1108, 272 Ky. 714.—Fleenor v. Commonwealth, 298 S.W. 376, 221 Ky. 175.
Nev.—State v. Fisko, 70 P.2d 1113, 58 Nev. 65.
N.C.—State v. Ross, 136 S.E. 193, 193 N.C. 25.
30 C.J. p. 221, note 69.
Fact of intoxication as affecting capacity and responsibility, see supra § 5.
Weight of evidence of intoxication on issue of capacity and responsibility, see infra § 324.

69. Ky.—Harris v. Commonwealth, 209 S.W. 509, 183 Ky. 542.

70. Ky.—Percival v. Commonwealth, 279 S.W. 1062, 212 Ky. 673.—Harris v. Commonwealth, 209 S.W. 509, 183 Ky. 542.
Nev.—State v. Fisko, 70 P.2d 1113, 58 Nev. 65.

71. Ky.—Percival v. Commonwealth, 279 S.W. 1062, 212 Ky. 673.—Harris v. Commonwealth, 209 S.W. 509, 183 Ky. 542.

72. Mo.—State v. Brown, 79 S.W. 1111, 181 Mo. 192.
30 C.J. p. 221, note 79.

73. Mo.—State v. Johnson, 163 S.W. 2d 780, 349 Mo. 910.—State v. Todd, 116 S.W.2d 113, 342 Mo. 601.

74. Ala.—Tyler v. State, 92 So. 478, 207 Ala. 129.
Tex.—Runnels v. State, 19 S.W.2d 322, 113 Tex.Cr. 207.

75. Ala.—Barber v. State, 129 So. 492, 23 Ala.App. 584.

76. Ky.—Caudill v. Commonwealth, 289 S.W. 371, 217 Ky. 403.
N.C.—State v. LeFevers, 19 S.E.2d 488, 221 N.C. 184.—State v. Hall, 112 S.E. 181, 183 N.C. 806.

Length of time before offense.
(1) Immediately.—Wright v. State, 108 So. 641, 21 Ala.App. 391.
(2) Few minutes.—People v. McKernan, 210 N.W. 219, 236 Mich. 226.

77. Cal.—People v. Selph, 289 P. 918, 106 Cal.App. 704.
Miss.—Huddleston v. State, 98 So. 859, 134 Miss. 382.
Tex.—Graham v. State, 69 S.W.2d 73, 126 Tex.Cr. 531.

78. Ala.—Vintson v. State, 121 So. 698, 23 Ala.App. 51, certiorari denied 121 So. 699, 219 Ala. 193.
Ill.—Upstone v. People, 109 Ill. 169.

79. Ala.—Stewart v. State, 165 So. 840, 231 Ala. 591.

80. Ala.—James v. State, 69 So. 569, 193 Ala. 55, Ann.Cas.1918B, 119.

81. Cal.—People v. Malone, 269 P.

times of drinking to excess,[82] and of the effect of this habit on his mind[83] is incompetent, unless it is confined to a period near the time of the homicide[84] or is offered in corroboration of other evidence that he was drunk at the time of the offense,[85] and evidence of accused's habit of drinking to excess is inadmissible where the evidence affirmatively shows his sobriety at the time of the offense.[86] Where the evidence sought to be adduced relating to intoxication is wholly irrelevant and immaterial, and does not tend to throw light on any issue in the case, it should be excluded.[87] So evidence that accused had been drinking at other times has been held inadmissible where it had no bearing on his capacity to commit the crime.[88]

Evidence is admissible on behalf of the prosecution to rebut the defense of intoxication,[89] and, conversely, accused has a right to refute evidence for the state that he was intoxicated.[90]

§ 261. Somnambulism

Proof that the crime was committed during a paroxysm of somnambulism is admissible

One accused of crime is entitled to offer evidence to prove that he committed the crime while in a paroxysm of somnolentia or somnambulism.[91]

§ 262 Passion and Provocation

Evidence of circumstances of provocation, as tending to arouse passion, is admissible in mitigation of the crime

Evidence of circumstances of provocation, as tending to arouse passion, is admissible in mitigation of the crime,[92] as, for example, to disprove premeditation.[93] Evidence of such facts, to be admissible, must tend directly to establish provocation[94] of the character required to accomplish the purpose for which it is offered.[95] They must also have been within the knowledge of accused at the time of the killing,[96] and that they were within his

628, 205 Cal 29, rehearing denied 270 P 196, 205 Cal 29

Remoteness

In murder case limiting testimony concerning accused's intoxication to period of three weeks before crime held not error.—People v Selph, 289 P 918, 106 Cal App 704

82. Ala.—Smith v State, 39 So 329, 142 Ala 14

83. Ala.—James v State, 69 So 569, 193 Ala 55, Ann Cas 1918B 119
30 C J p 224 note 72

84 Ala.—Sharp v State, 69 So 122, 193 Ala 22
30 C J p 224 note 73

85 Ga.—Peek v State, 116 S E 629, 155 Ga 49

86. Ky.—Etherton v Commonwealth, 85 S W 2d 343, 246 Ky 553

87 Ala.—Henley v State, 97 So 112, 19 Ala App 307
Ga.—Vincent v State, 112 S E 120, 153 Ga 278
Tex.—Spivey v State, Cr., 171 S W 2d 110
Wis.—Montgomery v State, 190 N W 105, 178 Wis 461

Source of liquor

Refusal to permit testimony as to where accused and deceased got liquor preceding homicide held not prejudicial error. State v Petit, 142 S E 725, 144 S C 452

Odor

(1) Permitting witness to testify that he detected odor of whisky in accused's automobile shortly after killing, after another person entered automobile in accused's place, was error, in the absence of evidence that such other person was not the source of the odor.—Hayes v State, 142 So 675, 225 Ala 253

(2) Testimony of sheriff not present at fight, but called to scene thereof to arrest persons accused of assault with intent to murder, that they had been drinking and that he smelled whisky on them held inadmissible as irrelevant.—Turner v State, 160 So 774, 26 Ala App 397, followed in Ryan v State, 160 So 774, 26 Ala App 398

Offer of drink

Evidence that accused offered a witness a drink shortly before the killing was inadmissible.—James v State, 69 So 569, 193 Ala 55, Ann Cas 1918B 119

88 Ala.—James v State, supra
30 C J p 224 note 76

89. Tex.—Johnson v State, 125 S W 2d 561, 136 Tex Cr 322
30 C J p 224 note 83

Subsequent sobriety

In prosecution for first degree murder, wherein accused testified that he was intoxicated for several hours after time of killing, state's testimony as to accused's sober condition three or four hours after killing held admissible.—Oliver v State, 175 So 305, 231 Ala 460

90 Okl.—Scott v State, 268 P 312, 40 Okl Cr 296

91. Ky. Fain v Commonwealth, 78 Ky 183, 39 Am R 213

92. Ala.—Hill v State, 166 So 60, 63, 27 Ala App 55, citing **Corpus Juris,** and certiorari denied 166 So 64, 231 Ala 539.—Eden v State, 129 So 797, 24 Ala App 37
Fla.—Rountree v State, 152 So 20, 113 Fla 443
Tex.—Ward v State, 257 S W 536, 96 Tex Cr 278
30 C J p 224 note 85

Provocation as element of manslaughter generally see supra § 46

Severity of blow inflicted on accused by deceased may be shown as bearing on contention that accused was thrown into sudden heat of passion thereby, so as to reduce felonious homicide from murder to manslaughter.—State v Joiner, 109 So 51, 161 La 518

93. Tex.—Richardson v State, 12 S W 870, 28 Tex App 216
30 C J p 224 note 86

94 Tex.—Curlee v State, 282 S W 580, 104 Tex Cr 15
30 C J p 224 note 87

95. Cal.—People v Golsh, 219 P 456, 63 Cal App 609

Circumstances making accused especially excitable

Evidence that, by reason of a sunstroke, a sudden quarrel would more readily excite in accused a blinding passion than in the case of the average man, was not admissible as bearing on accused's contention that the killing was done in the heat of passion and was at most manslaughter, since to reduce the crime to manslaughter, the provocation must be such as would have affected the average person in the same way.—People v Golsh, supra

96. Ala.—Hill v State, 166 So 60, 27 Ala App 55, certiorari denied 166 So 64, 231 Ala 539
Tex.—Curlee v State, 282 S W 580, 104 Tex Cr 15
30 C J p 224 note 88.

knowledge cannot be shown by general reputation of the alleged matter of provocation [97] To render proof thereof admissible, matters of provocation must be so recent that the passions have not had time to cool before the homicide, see infra § 265, but the proof need not be limited to acts of provocation occurring at the time of the homicide [98] Where it is not certain whether accused designed to effect the death of deceased and his act was not one likely to cause death, evidence is admissible that shortly before the homicide accused was informed by a third person of matters of a provocative nature which would be likely to induce him to chastise deceased [99] Evidence of intoxication may be considered in determining whether the crime was done in the heat of passion caused by sufficient provocation [1] Evidence of provocation by one person is inadmissible in mitigation of punishment for the killing of another who did not encourage or prompt the act of provocation [2]

The prosecution may introduce evidence to rebut accused's claim of provocation [3] Where accused pleads in mitigation a communication made to him by deceased, evidence of the nonexistence of the fact forming the subject matter of the communication generally is incompetent and inadmissible [4]

§ 263. —— Insults and Defamation

Evidence of insulting or outrageous conduct or language by the deceased toward a member of the accused's family, and particularly a female relative, or evidence that the accused was informed of such conduct, is admissible to show provocation

Insulting or outrageous conduct or language offered by deceased to a member of accused's family or a female relative may be shown in evidence as affording a sufficient provocation to reduce the degree of the crime,[5] where it is first shown that accused had knowledge thereof when he killed deceased [6] Such evidence, however, to be admissible, must have direct connection with the crime charged [7] Provided time enough for the cooling of passions had not elapsed, as discussed infra § 265, evidence of accused's learning of deceased's insulting conduct is admissible although the homicide did not follow immediately on accused's receipt of the information,[8] but under some statutes, in the absence of a fresh insult thereafter, the evidence is inadmissible unless the killing occurred at the first meeting between accused and deceased following accused's learning of the insulting conduct [9] In determining accused's claimed belief in a statement claimed to have been made to him by a female relative, of an insult offered to her by the man whom accused afterward shot, it has been held on the one hand that it is proper for the jury to consider the truthfulness of that statement,[10] but, on the other hand, it has been held proper to exclude such evidence [11] On an issue as to provocation by insults to or defamation of a female relative of accused, evidence of the good or bad character of deceased or the person assaulted for chastity is held irrelevant,[12] except to show accused's belief of the information received by him as to the conduct of deceased [13] Accused's previous treatment of his wife is relevant in determining the effect on his mind of the information that deceased had insulted her [14] Evidence of opprobrious epithets applied to accused by deceased at the time of the commission of the homicide is admissible [15] The admissi-

97. Kan—State v Kirby, 63 P 752, 62 Kan 136

98. Fla—Rountree v State, 152 So 20, 113 Fla 113
30 C J p 225 note 91

99. N Y People v Lewis, 3 Abb Dec 535, 3 Transcr A 1, 6, Abb Pr,N S 190, 41 How Pr 508, 1 Cow Cr 102

1. La—State v Hogan, 42 So 352, 117 La 863
30 C J p 225 note 93
Admissibility of evidence of intoxication generally see supra § 260

2. Tex—Moore v State, 151 S W 2d 595, 142 Tex Cr 99

3. Tex—Livingston v State, 280 N W 802, 103 Tex Cr 372—Broussard v State, 271 S W 385, 99 Tex Cr 589
Wash—State v Miller 13 P 2d 52, 168 Wash 689
30 C J p 225 note 94

4. N Y—People v Harris, 102 N E 456, 209 N Y 70.

5. Ala—Higdon v State, 143 So 213, 216, 25 Ala App 209, citing **Corpus Juris**—Eden v State, 129 So 797, 24 Ala App 37
Fla—Rountree v State, 152 So 20, 113 Fla 113
Tex—Stratton v State, 8 S W 2d 171, 110 Tex Cr 254
30 C J p 225 note 98
Insults as provocation affecting manslaughter see supra § 47

6. Ala—Bolton v State, 95 So 874, 209 Ala 179
Tex—Newchurch v State, 121 S W 2d 998, 135 Tex Cr 619 Stovall v State 265 S W 572 98 Tex Cr 294
30 C J p 225 note 99

7. Tex—Red v State, 46 S W 408, 39 Tex Cr 414
30 C J p 225 note 1

8. Ala—Higdon v State, 143 So 213, 25 Ala App 209- Eden v State, 129 So 797, 24 Ala App 37
Fla—Rountree v State, 152 So 20, 113 Fla 443

9 Tex—Smith v State, 288 S W 458, 105 Tex Cr 327

10. La—State v Foster, 91 So 411, 150 La 971
Tex—Davis v State, 87 S W 2d 481, 129 Tex Cr 317

11 Mo—State v Young, 286 S W 29 314 Mo 612

12 Tex—Green v State App, 12 S W 872

13 Tex—McComas v State, Cr, 72 S W 189, modified on other grounds 75 S W 533- Jones v State, 40 S W 807, 38 Tex Cr 87

14. Tex—Stovall v State, 265 S W 572, 98 Tex Cr 294

15. Mo - State v Brown, 79 S W 1111, 181 Mo 192

In prosecution for assault with intent to murder

Evidence of opprobrious words or abusive language used by the person assaulted at or near the time of the assault are not admissible in mitigation in a prosecution for an assault

bility of evidence of the truth of insulting words has been both sustained[16] and denied[17]

Evidence is admissible to rebut the defense of provocation by insulting or outrageous conduct,[18] and, on the other hand, to rebut the contention of the state that such defense was fabricated[19]

Character of female insulted Where insulting conduct toward a female relative of accused is relied on to reduce the degree of the offense, the reputation and character of the female are put in issue under some statutes[20] Under such statutes the rule with regard to evidence of reputation is the same as that which applies to reputation of witnesses[21] Remoteness of time to which such evidence relates generally bears only on its weight and not on its admissibility,[22] but the state cannot show unchastity of the female before marriage long before the killing[23] Evidence that the female had been guilty of specific acts of immoral conduct with another person of which accused had knowledge prior to the killing is admissible,[24] and, where accused attempts to show his belief that such relations were the first on the part of his relative, the prosecution may introduce evidence to show his knowledge to the contrary[25] In the absence of such a statute, it has been held that where accused has shown improper relations between deceased and a female relative of accused, the prosecution is not thereupon entitled to show the lewdness of such female with other men[26]

§ 264. —— Infidelity of Husband or Wife

Competent and relevant evidence of a spouse's infidelity is admissible as bearing on the question of provocation

Accused on trial for the murder of his wife may show that he was informed, and believed, that she had been unfaithful, as bearing on the question of provocation,[27] although such evidence has been held irrelevant to the issue where the defense was a denial of the commission of the homicide[28] While it has been held that testimony of accused as to what he had heard prior to the difficulty concerning improper relations between deceased and his wife is inadmissible in the absence of evidence of threats or other predicate,[29] the general rule is that such evidence is admissible for the purpose of showing provocation[30] It has been held that deceased's criminal intimacy with accused's wife may be shown to corroborate evidence that such fact was communicated to accused before the killing,[31] but, on the other hand, proof of the truth of the wife's confession has been excluded on the ground that the only question involved is the effect the confession had on the mind of accused[32] The state may offer

with intent to murder, under a statute making such evidence admissible in prosecutions for assault assault and battery, or affray — Elmore v State 146 So 826 226 Ala 327 denying certiorari 146 So 824 25 Ala App 326

16. Cal People v Glaze, 72 P 965, 139 Cal 154

17 N Y Re Higerman, 3 City Hall Rec 73

18. Tex —Livingston v State, 280 S W 802, 103 Tex Cr 372
30 C J p 225 note 3

Showing improbability of information
Evidence of voluntary improper relations between accused's wife and deceased and others was admissible to rebut claim that she had told accused of decedent's forced attentions —Watson v State, 48 S W 2d 623, 120 Tex Cr 482

Previous similar insults
(1) In prosecution of wife for killing husband where defense was that husband had called her a whore and knocked her down, and that while in a dazed condition by reason thereof she shot him, it was held that state was properly permitted to inquire of wife, who had been married four times previously whether her former husbands had not also accused her of being unchaste —Broussard v State, 271 S W 385 99 Tex Cr 589

(2) Agreement showing that accused did not derive his first knowledge of testimony reflecting on his mother from brief of deceased, claimed to have been read night before homicide held competent Crawford v State 288 S W 213, 105 Tex Cr 281

19. Tex —Messer v State, 61 S W 613, 43 Tex Cr 97

20. Tex —Stratton v State, 8 S W 2d 171, 110 Tex Cr 254—Stovall v State, 265 S W 572, 98 Tex Cr 294
30 C J p 225 note 10

21. Tex —Bibb v State, 215 S W 312 86 Tex Cr 112

22. Tex —Bibb v State, supra

23. Tex —Bereal v State, 225 S W 252 88 Tex Cr 138

24. Tex —Stratton v State 8 S W 2d 171, 110 Tex Cr 254—Bozeman v State, 215 S W 319 85 Tex Cr 653

25. Tex —Livingston v State, 280 S W 802, 103 Tex Cr 372

26. S C —State v Tidwell, 84 S E 778, 100 S C 248
30 C J p 225 note 95

27. Mo —State v Stewart, 204 S W 10, 274 Mo 649
30 C J p 226 note 15.

Adultery as provocation affecting plea of manslaughter see supra § 49

28 N C State v Rash, 34 N C 382, 55 Am D 420

29. Ala —Chappell v State, 73 So. 134, 15 Ala App 227

30 Tex - Wilburn v State, 271 S W 606, 99 Tex Cr 656
30 C J p 226 note 18

31. Tex —Bereal v State 225 S W 252 88 Tex Cr 138

Corroboration of wife's letter to deceased
Where accused, to reduce killing to manslaughter testified as to finding a letter addressed to deceased which he claimed was in his wife's handwriting and which contained statements warranting conclusion that deceased and accused's wife had been guilty of adultery, evidence that deceased was often seen visiting accused's wife during accused's absence held admissible as tending to corroborate accused's statement that letter was written by his wife —Wilburn v State 271 S W 606, 99 Tex Cr 656

32 Cal —People v Hurtado, 63 Cal 288
Va —Bryan v Commonwealth, 109 S E 477, 131 Va 709

in rebuttal any evidence tending to disprove this defense,[33] but such evidence must not be too remote [34] The infidelity of the wife,[35] or reports and rumors thereof,[36] cannot be shown in the absence of proof that accused had knowledge thereof, but such evidence is admissible where knowledge on the part of accused is shown [37]

§ 265. —— Cooling Time

Provocative circumstances occurring so long before the homicide as to allow the blood to cool may not be proved in mitigation, but may be considered in connection with more recent provocation

Evidence of circumstances alleged as provocation is inadmissible in mitigation if sufficient time for the blood to cool has elapsed between the occurrence of such circumstances and the homicide,[38] but such evidence may be considered in connection with more recent provocation in determining accused's state of mind at the time of the killing [39] The state may show that accused knew the circumstances of the alleged provocation long before the homicide, and that he had met deceased several times in the interim [40]

§ 266. Grade or Degree of Offense

Where the jury have discretion in fixing the punishment, aggravating and mitigating circumstances may be shown; and evidence tending to show the degree of the offense is likewise admissible

Where the jury have a discretion in fixing the punishment, evidence bearing on the enormity of the offense,[41] and evidence of mitigating circumstances,[42] is admissible, provided such evidence is competent and relevant[43] and within the issues raised by the indictment or information and plea [44] It has been held that evidence to enable the jury to determine whether the death penalty should be imposed in a murder case must be confined to circumstances connected with the offense for which accused is tried,[45] but, under some statutes, evidence of prior convictions is admissible in some instances in aggravation of the penalty [46] The admission of evidence of mitigating circumstances to reduce the

33. Md—Garlitz v State, 18 A. 39, 71 Md 293, 4 L R A 601
30 C J p 226 note 21

Explanation of conduct of deceased
Where accused's evidence showed undue intimacy between deceased and accused's wife, as wife's intimacy with deceased's fiancée was explanatory of deceased's conduct, admitting marriage license held not reversible error—Swain v State, 135 S E 187, 162 Ga 777

Prior suspicions
In a prosecution for murder, committed by accused after his wife had confessed to him illicit relations with deceased, evidence of suspicions entertained by accused of his wife's fidelity prior to the homicide is proper on the issue of the probable effect of the confession on accused's mind—Bryan v Commonwealth, 109 S E 477, 131 Va 709

34. Tex—Ballard v State, 160 S W 716, 71 Tex Cr 587
30 C J p 226 note 22

35 Ky—Blackerby v Commonwealth 255 S W 824, 200 Ky 832
30 C J p 226 note 23

36 Ind—Combs v State, 75 Ind 215
Mo—State v Stewart, 204 S W 10, 271 Mo 649

37. Ala—Crowder v State, 93 So 838, 18 Ala App 632, petition dismissed Ex parte Crowder, 93 So 922, 208 Ala 697
Va—Bryan v Commonwealth, 109 S E 477, 131 Va 709

38. Ark—Stoddard v State, 276 S W 358, 169 Ark 594.
Mo—State v Lloyd, 87 S W 2d 418, 337 Mo 990
30 C J p 226 note 26

Killing subsequent to first meeting
Rejection of testimony as to deceased's acts which accused had been told of held proper where accused's mind was apparently not inflamed by passion at subsequent meeting with deceased prior to murder—Cutlee v State, 282 S W 580, 104 Tex Cr 15

39. Tex—Ward v State, 257 S W 536, 96 Tex Cr 278—Willis v State, 166 S W 1172, 74 Tex Cr 16

40. Tex—De Arman v State, 189 S W 145, 80 Tex Cr 147

41. Ala—Vincent v State 165 So 844, 231 Ala 657, certiorari denied 56 S Ct 960, 298 U S 682, 80 L Ed 1400
Okl—Stogsdill v State, 216 P 681, 24 Okl Cr 152
Pa—Commonwealth v Clark, 185 A 764, 322 Pa 321—Commonwealth v Kurutz, 168 A 28, 312 Pa 343—Commonwealth v Williams, 160 A 602, 307 Pa 134
Tex—Arcos v State, 29 S W 2d 395, 120 Tex Cr 315
30 C J p 250 note 75

42. Ill—People v Mangano, 30 N E 2d 428, 375 Ill 72
Ky—Fallis v Commonwealth, 247 S W 22, 197 Ky 813
Okl—Stogsdill v State, 216 P 681, 24 Okl Cr 152
Pa—Commonwealth v Williams, 160 A 602, 307 Pa 134
30 C J p 250 note 76

Character of persons
In a prosecution for an assault with intent to kill, evidence of the good character of accused or of the quarrelsome, turbulent character of his adversary may be received and considered in mitigation of the punishment—Oliver v State, 216 P 488, 24 Okl Cr 134

43. Ill—People v Mangano, 30 N E 2d 428, 375 Ill 72—People v Corry, 181 N E 603, 349 Ill 122, 86 A L R 828
30 C J p 250 note 77

Nature of circumstances admissible
Acts or circumstances considered by jury in passing sentence for murder in the first degree should be such as naturally beget mercy, not such as exhibit a mind filled with anger, vindictiveness, and mercenary gain—Commonwealth v Williams, 160 A 602, 307 Pa 134

44 Cal—People v Witt, 148 P 928, 170 Cal 104

45 Cal—People v Troche 273 P 767, 206 Cal 35, appeal dismissed and certiorari denied Troche v People of State of California, 50 S Ct 87, 280 U S 524, 74 L Ed 592

Evidence on guilt or innocence
Evidence which jury may consider in murder case on question of recommending life imprisonment is evidence adduced on question of guilt or innocence of murder charged in indictment—State v Barth, 176 A 183, 114 N J Law 112

Past life and antecedents
In murder prosecution, accused's evidence relating to his past life and antecedent background, offered for purpose of averting capital punishment, held properly excluded—State v Barth, supra

46. Pa—Commonwealth v. Clark, 185 A. 764, 322 Pa 321.

penalty for murder in the first degree has been held to rest largely within the trial judge's sound judicial discretion.[47] Concealment and flight are circumstances of little, if any, bearing on the grade of a homicide,[48] although, as appears supra § 251, evidence thereof is admissible as tending to show guilt Where the jury have nothing to do with fixing the punishment, evidence that goes only to the mitigation of punishment is irrelevant and inadmissible.[49] Evidence tending to show the degree of the offense, which is to be determined by the jury, is admissible.[50] Accordingly evidence as to the presence or absence of particular elements affecting the degree of the offense is admissible,[51] including particular matters made an element of the higher degree by statute.[52] So, under statutory provisions making the use of a weapon concealed before the affray an element of murder, evidence of such concealment is, of course, admissible on a trial for murder,[53] although not on a trial for manslaughter.[54]

§ 267. Excuse or Justification in General

Any legitimate evidence tending to show matters which would excuse or justify the act of the accused or which would rebut evidence of justification is admissible.

On the trial of an indictment for murder any legitimate evidence tending to show matters which would excuse or justify the act of accused is admissible on his behalf.[55] Thus accused may introduce evidence to show that the killing was accidental,[56] or that it was done while he was under a hallucination or illusion,[57] but evidence is not admissible to show facts which, even if proved, would furnish no excuse or justification for the homicide,[58] or assault with intent to kill,[59] and the admissibility of evidence of this character is subject to the general rules as to competency.[60] Where the defense is accidental killing, evidence which attempts to in-

Limitations

(1) Evidence of prior convictions should be admitted in aggravation of the penalty for murder in the first degree only in cases involving professional criminals who are a menace to society and wage war on it for profit and in cases of those who commit murders of a cold-blooded and atrocious nature, and such evidence should be restricted to convictions tending to show that accused is such a person—Commonwealth v Clark, 185 A 761, 322 Pa 321—Commonwealth v Kurutz, 168 A 28, 312 Pa 343—Commonwealth v Williams, 160 A 602, 307 Pa 134

(2) Thus evidence disclosing accused's conviction of firing a revolver at his former wife and of stabbing is admissible as proper for jury in determining sentence—Commonwealth v Kurutz, supra

(3) But it has been held that in no case should records of prior convictions of pick-pocketry, adultery embezzlement, etc., be admitted in aggravation of penalty for murder in the first degree—Commonwealth v Williams, supra

47. Pa—Commonwealth v Williams, supra

48. N J—State v Agnew, 10 N J L J 163

49. La—State v Farris, 83 So 791, 146 La 523—State v Tally, 23 La Ann 677

50. Ga—Smith v State, 55 S E 1024, 126 Ga 803
Miss—Lee v State, 134 So 185, 160 Miss 618
Okl—Oliver v State, 216 P 488, 24 Okl Cr 134
Tex—Gilmore v State, 241 S W 492, 91 Tex Cr 31
Va—Parsons v Commonwealth, 121 S E 68, 138 Va 764

51. Va—Parsons v Commonwealth, 121 S E 68, 138 Va. 764

Provocation

To support provocation alleged, accused should have been allowed to show threats by deceased, of respective size of persons involved, and that deceased was drunk or drinking to be considered by jury in fixing degree of accused's guilt—Davis v State 107 So 737, 214 Ala 273

52. N C—State v Westmoreland, 107 S E 438 181 N C 590
30 C J p 250 note 84

53 Ala—Morris v State, 39 So 608

Relevancy for other purposes

In murder prosecution, testimony whether pistol with which killing was done was concealed was relevant, and might affect the verdict, not within meaning of the statute relating to the degree of offense where it is committed by assailant with a concealed weapon, since deceased was assailant, but as any relevant testimony might affect the verdict—Ferguson v State, 105 So 435, 21 Ala App 116

54. Ala—Morris v State, 39 So 608

55 Cal—People v Campanella, 116 P 2d 633, 46 Cal App 2d 697
30 C J p 226 note 34

56. Iowa—State v Wright, 84 N W 541, 112 Iowa 436
Miss—Nelson v State, 61 Miss 212
30 C J p 226 note 34
Admissibility of evidence that killing was accidental result of justifiable defense against attack of third person see infra § 283
What constitutes excuse or justification see supra §§ 97–138

Previous difficulties

In prosecution for murder of accused's brother, alleged to have been shot unintentionally while accused was shooting at another brother in defense of himself and deceased, evidence of previous difficulties, not too remote, between accused and other brother or between deceased and other brother and other brother's threats against either, should have been admitted—Fyffe v Commonwealth, 75 S W 2d 778, 256 Ky 145

57. Ky—Fain v Commonwealth, 78 Ky 183, 39 Am R 213

58. Fla—Pearce v State, 112 So. 83, 93 Fla 504
Mo—State v Yates, 256 S W 809, 301 Mo 255
Tex—Lacy v State, 128 S W 2d 1165, 137 Tex Cr 362, certiorari denied 60 S Ct 87, 308 U S 551 84 L Ed 463
30 C J p 227 note 36

59. Ind T—Roper v U S, 104 S W. 584, 7 Ind T 185
Tex—Wilhelt v State, 298 S W. 426, 107 Tex Cr 614

Warning

In a prosecution for assault with intent to kill, evidence offered before any testimony tending to prove justification was introduced that prosecuting witness had been warned not to come to the house where he was shot, which was not owned by accused, was properly excluded as immaterial—Willis v State, 254 S W. 439, 160 Ark 69

Evidence of abusive language by person assaulted is not admissible in justification of assault with intent to murder—Elmore v State, 146 So 826, 226 Ala 327, denying certiorari 146 So 824, 25 Ala App 326

60. La—State v Ross, 32 La Ann. 854
Or—State v Doty, 5 Or. 491
30 C J p 227 note 38

ject into the case the element of self-defense is inadmissible [61] Questions whether the injured person had been indicted or prosecution started against him on the same grounds are immaterial in a trial for assault with intent to murder [62] The state may introduce evidence in rebuttal of evidence of justification [63]

In a prosecution for being an accessary after the fact in a murder, evidence of statements of the killer to the companion of deceased at the time of the tragedy is competent on the question of whether the killing was justifiable or felonious [64]

§ 268. —— Unlawful Character of Act of Deceased

Evidence is admissible to show the unlawful character of the act of deceased in resistance to which the homicide was committed, and also to rebut the accusation that deceased was acting without authority

Evidence tending to show the unlawful character of the act of deceased in resistance to which the homicide was committed,[65] as that the killing was committed in resisting an illegal arrest,[66] is admissible in mitigation of the crime, and such evidence is not incompetent because offered by the state [67] Evidence of the customary practice of deceased while making an arrest is not admissible in the absence of a showing that deceased was in fact attempting to make an arrest [68] Evidence is admissible on behalf of the state to meet the accusation that officers were acting without authority,[69] and to show that the officer had no opportunity to examine the premises after he was shot, and that accused did not ask him whether he had a warrant for his arrest [70] So testimony is admissible to explain the conduct of the officer assaulted or killed,[71] and also to show the necessity for such officer's superior to order him to go to the house of accused in haste [72] In a prosecution for murder committed while accused was attempting to recover animals which deceased was endeavoring to impound, evidence that a stock law prohibiting stock running at large was in force in the county is admissible [73]

§ 269 —— Exercise of Authority or Duty

The accused may introduce evidence tending to show that his acts were in the performance of authority or duty, and in rebuttal the state may show that the killing was not done in the exercise of the accused's authority or duty

Accused may introduce evidence tending to show that his acts were in the performance of authority or duty [74] Thus he may show facts tending to prove that he was trying to arrest deceased [75] A warrant, indorsement, and acts done under it are

61. Fla Roberts v State 107 So 242 90 Fla 779
La—State v Holloway, 136 So 281 173 La 96
Md—Gray v State, 30 A 2d 741
Admissibility of evidence to prove self-defense generally see infra §§ 271-281

62 Ala—Craven v State, 111 So 767, 22 Ala App 39

63. D C—Crawford v U S, 41 F 2d 979, 59 App D C 356
Utah—State v Gardner, 213 P 794, 61 Utah 359
30 C J p 227 note 39

Negativing accident
In murder prosecution, evidence that an altercation took place between accused and deceased two days prior to the homicide and that in the course of the altercation accused declared his intention of killing deceased was admissible to negative accused's contention that the killing was the result of an accident—State v Graffam, La, 13 So 2d 249

Reaction to opprobrious epithet
In murder prosecution, cross-examination as to what accused's feelings were when called a "skunk" by deceased was relevant on issue of accidental shooting—State v Corrado, 172 A 571, 113 N J Law 53

64. Mo—State v Hamilton, 102 S W 2d 642, 340 Mo 768

65 Tex—Hillis v State, 166 S W 1151, 74 Tex Cr 59

66 Tex—Miller v State, 21 S W 925, 31 Tex Cr 609, 37 Am S R 836 30 C J p 226 note 30

67. Tex—Miller v State, supra

68. Ky Campbell v Commonwealth, 157 S W 2d 729 289 Ky 31

69 Ala Berry v State 175 So 407 27 Ala App 507, certiorari denied 175 So 412, 234 Ala 411
Cal—People v Brite, 72 P 2d 122 9 Cal 2d 666
Tex—Buckman v State, 134 S W 2d 668, 138 Tex Cr 191—Vaughn v State, 113 S W 2d 895, 134 Tex Cr 97—Kelley v State, 112 S W 2d 470, 133 Tex Cr 460—McCoy v State, 54 S W 2d 530, 122 Tex Cr 298

City ordinance
In prosecution for murder of city policeman, city ordinance prohibiting disorderly conduct was admissible to show policeman's authority to arrest accused—Reed v State, Ga, 25 S E 2d 692

Search warrant and testimony of deputy sheriff, who attempted to serve it, and of justice of peace, who issued it, were admissible in prosecution for assault to murder deputy sheriff—Stevens v State, 273 S W 586, 100 Tex Cr 438

Question held irrelevant
Question to deputy sheriff who went to accused's home without search warrant, as to occasion of his going there—Wiggins v State 143 So 188 95 Ala App 192

Evidence of commission and bond held immaterial where accused knew that deceased was a deputy sheriff—Forehand v State, 177 So 550 130 Fla 355

70 Tex—Stevens v State, 273 S W 586 100 Tex Cr 438

71 Ga—Pryor v State, 147 S E 97, 168 Ga 136
Tex—McCoy v State 54 S W 2d 530, 122 Tex Cr 298—Rutherford v State, 283 S W 512, 104 Tex Cr 127

72. Ga—Pryor v State, 147 S E 97, 168 Ga 136

73. Tex—Barnett v State, 176 S W 580, 76 Tex Cr 555

74. Ky—Meek v Commonwealth, 11 S W 2d 996, 227 Ky 83
La—State v Halliday, 35 So 380, 111 La 47
Tex—Waggoner v State, 256 S W 266, 96 Tex Cr 96
30 C J p 227 note 40

75. Ala—Holland v. State, 50 So 215, 162 Ala 5.

admissible,[76] although the warrant is insufficient to authorize the arrest[77] Evidence of facts authorizing an arrest without a warrant is admissible in a prosecution for homicide in making such arrest[78] Where accused seeks to show that he, as an officer, was making an arrest for a continuous offense committed partly in his presence, evidence of all facts tending to show the crime is admissible[79] Where the defense was that accused, a peace officer, was in good faith endeavoring to arrest decedent, it was error to exclude evidence of threats made by decedent against accused[80] or evidence tending to show that decedent was a dangerous character,[81] but his reputation among a particular class cannot be shown[82] Evidence of an unauthorized appointment as an officer is inadmissible[83] Where the officer had authority to make arrests outside the city limits, evidence that he knew he was outside the city limits at the time of the homicide or that killing occurred there is not material[84] The accused officer should be allowed to tell what he did, and why[85] Accused, in justification of a killing in making an arrest, is limited to proof of the charges against deceased[86] Details of the acts and conduct on the part of deceased on which the charges were based are incompetent and inadmissible[87] Where the evidence is insufficient to sustain the defense that accused, as a private person, was attempting to make an arrest for a felony, evidence relating to the alleged felony is inadmissible[88] Where the circumstances show a willful murder rather than an attempt to arrest deceased, evidence that accused had a warrant for his arrest is incompetent,[89] and the same principle applies where accused was acting in excess of the authority he claims to have had,[90] or where no such office legally existed as that which he claims to have held,[91] neither can an ordinance which it is not claimed accused was attempting to enforce at the time of the homicide be admitted in evidence[92] On the prosecution of a saloon keeper for an assault with intent to kill, committed in his saloon, an ordinance requiring saloon keepers to give bond to keep an orderly place is not admissible[93] Where accused had a warrant for deceased's arrest, evidence that the warrant was read and explained to him and that he was told what to do under it with reference to the arrest is inadmissible[94] Where there was no evidence that deceased, in attempting to arrest accused, disclosed his authority, and no presumption that accused knew of it, evidence that a year or two before the killing, deceased, with the sheriff, made search for accused is inadmissible, there being nothing to show that accused ever knew of it[95]

In rebuttal the state may show that the killing was not done in the exercise of accused's authority or duty[96] Thus evidence that accused had not au-

76. Ky - Wood v Commonwealth, 56 S W 2d 556, 246 Ky 829—Commonwealth v West, 113 S W 76
30 C J p 227 note 12

77. Ky —Commonwealth v West, supra

78. Ala Burnell v State, 139 So 435, 24 Ala App 588
Ky —Commonwealth v West 113 S W 76

Evidence held inadmissible

(1) Evidence that automobile occupants had whisky and had been drinking is immaterial in prosecution of deputy sheriff for homicide by shooting at car —Jackson v State, 111 So 68, 22 Ala App 133, certiorari denied 111 So 69, 216 Ala 564

(2) So, in prosecution of policeman for homicide while making arrest without a warrant, where accused's testimony showed that bottles were not considered by him when making arrest, evidence regarding finding bottles near scene was properly excluded —West v State, 111 So 568, 23 Ala App 187, certiorari denied 111 So 570, 217 Ala 62

79. Ala —Tarwater v State, 75 So 816, 16 Ala App 140

80. Ala —Hammond v. State, 41 So 761, 147 Ala. 79.

81. Miss —Cirtee v State, 139 So 618, 162 Miss 263
30 C J p 227 note 47

82. Ky —Stevens v Commonwealth, 98 S W 281, 30 Ky L 290

83. Ga - Davis v State 149 S E 51, 40 Ga App 123

84. Ky —Fitzpatrick v Commonwealth 275 S W 819, 210 Ky 385 —Partin v Commonwealth, 248 S W 189, 197 Ky 840

85. Ky - Rowe v Commonwealth, 268 S W 571, 206 Ky 803

86. Ala —Hammond v State 41 So 761, 147 Ala 79

Commission of felony and knowledge of defendants

Where defendants seek to justify in a homicide case under statute authorizing a private citizen to arrest a felon the fact that a felony had been committed and that they knew of it is all that is admissible in evidence on that issue —Coker v State 223 P 711, 26 Okl Cr 230

87. Ala —Hammond v State, 41 So 761, 147 Ala 79
Okl —Coker v State, 223 P 711, 26 Okl Cr 230

88. Ala —Sullivan v State, 142 So 110, 25 Ala App 140—Burnell v State, 139 So 435, 24 Ala App 588

89. Ala —Holland v State, 50 So 215, 162 Ala 5
Ky — Angel v Commonwealth 18 S W 849, 14 Ky L 10

90. Ky —York v Commonwealth, 82 Ky 360, 6 Ky L 331

91. Ind T —Helms v U S, 52 S W 60, 2 Ind T 595

92. Ky —Davis v Commonwealth, 77 S W 1101, 25 Ky L 1426

93. Mo —State v Nickens, 27 S W 339, 122 Mo 607
30 C J p 227 note 55

94. Miss —Jackson v State, 5 So 690, 66 Miss 89, 14 Am S R 542

95. Ala —Johnson v State, 95 So. 583, 19 Ala App 111

96. Wis —Holtz v State, 44 N W 1107, 76 Wis 99
30 C J p 228 note 57

Value of material believed stolen

In prosecution for manslaughter against policeman who claimed that he believed a crime was being committed by occupants of Ford coupé which deceased was driving in vicinity of a junk yard when shot by policeman, testimony concerning value of scrap iron, introduced for purpose of showing that policeman could not have had reasonable ground to believe that a felony had been commit-

thority to make the arrest is admissible[97] Where however, defendants contend that they were officers of the law, and killed deceased in overcoming his resistance to the execution of valid process placed in their hands for his arrest on a criminal charge, the state cannot show that deceased was not guilty of the offense charged,[98] and, where a police officer killed one whom he rightfully believed to be an escaping felon, evidence that deceased went to the place where he was killed on lawful business is irrelevant[99] The uncommunicated intention of a constable, authorized to appoint a deputy constable, that a certain appointee should not act in that capacity, is inadmissible in evidence, on trial of the deputy for a homicide committed under color of office, in order to affect the consideration of his official status[1]

§ 270. —— Prevention of Commission of Offense

Evidence tending to show that at the time of the homicide the accused was lawfully engaged in an effort to prevent the commission of a criminal offense by the deceased is admissible, but evidence of facts not shown to be connected with the killing is inadmissible.

Accused is entitled to introduce evidence tending to show that at the time of the homicide he was lawfully engaged in an effort to prevent the commission of a criminal offense by deceased,[2] and, where it is contended for accused that deceased was killed while in the act of committing a felony, evidence of the previous bad character of deceased may be admitted to determine the intent of deceased and the offense of accused[3] Where it is claimed that deceased was killed on being detected in a felony, circumstances tending to show the repeated commission of such a felony by deceased leading up to the detection may be shown[4] Evidence of a conversation between accused and a deputy sheriff a few hours before the killing in which accused sought to ascertain his rights and duties as a watchman is admissible as bearing on his intent and negligence[5] Evidence of facts not shown to be connected with the killing is inadmissible,[6] and evidence that the action of accused who fired into an automobile after the driver failed to stop at his command was the customary method adopted by peace officers in the community is inadmissible.[7]

§ 271. Self-Defense

Where the accused claims that he acted in self-defense, evidence showing any facts legitimately tending to bear out this theory, such as declarations of the deceased, is admissible, but evidence which does not have a tendency to prove the defense, such as the mere opinions of witnesses, or self-serving declarations of the accused, is not admissible Proper rebuttal evidence is admissible

Where accused claims that he acted in self-defense, evidence is admissible to show any facts legitimately tending to bear out this theory,[8] but evidence is not admissible which has no tendency to show that in killing deceased accused acted in defense of his own life or to avoid serious bodily harm[9] When accused admits that he began the attack which resulted in the killing, and offers no evidence tending to prove the facts necessary to revive his right of self-defense, it is competent for the judge, as a preliminary to ruling on the admis-

ted, was admissible—State v Turner, 182 So 325, 190 La 198

97. Utah—People v Tidwell, 12 P 61 4 Utah 506
30 C J p 228 note 58

98. Fla—Roten v State, 12 So 910, 31 Fla 511

99. Cal—People v Kilvington 37 P 799 104 Cal 86 13 Am S R 73

1. Mo—State v Dierberger, 2 S W 286, 90 Mo 369

2 Ky—Lindle v Commonwealth, 64 S W 986, 111 Ky 866 23 Ky L 1307

3. U S—U S v Gilliam, D C, 25 Fed Cas No 15 205a, 1 Hayw & H 109

4 Tex—Fread v State, 210 S W 695 85 Tex Cr 121
30 C J p 228 note 64

5. Cal—People v Silver, 108 P 2d 4 16 Cal 2d 714, prior opinion App, 102 P 2d 763

6. Ala—Hill v State, 46 So 864, 156 Ala 3

7. Ill—People v Klein, 137 N E 145, 305 Ill 141.

8. U S—De Groot v U S, C C A Alaska, 78 F 2d 244
Ala—Washington v State, 123 So 277, 23 Ala App 253
Iowa—State v Kelly, 195 N W 611, 196 Iowa 897
Ky—Smith v Commonwealth 268 S W 328 206 Ky 728 Combs v Commonwealth, 246 S W 132, 196 Ky 804
Mo—State v Moore 29 S W 2d 148—State v Yates, 256 S W 809, 301 Mo 255
Tex—Musslewhite v State, 132 S W 2d 858 137 Tex Cr 590—Beckham v State, 109 S W 2d 764 133 Tex Cr 206—Schutz v State, 257 S W 880, 96 Tex Cr 287
30 C J p 228 note 66
Admissibility of evidence tending to show killing in self-defense where defense is accidental killing see supra § 267
Particular circumstances admissible see infra §§ 272–281

9. Ala—Fancher v State, 117 So 423, 217 Ala 700—Tyler v State, 92 So 478, 207 Ala 129—Jarrell v State, 115 So 146, 22 Ala App 301—Dennis v State 109 So 183, 21 Ala App 415—Gotcher v State 101 So 310, 20 Ala App 207—Russell v State, 97 So 845, 19 Ala App 425
Cal—People v McCurdy, 35 P 2d 569, 140 Cal App 199
Ill—People v Hauke, 167 N E 1, 335 Ill 217
Iowa—State v Price, 200 N W 195, 198 Iowa 747
Ky—Stewart v Commonwealth, 118 S W 2d 734, 274 Ky 401—Huff v Commonwealth, 59 S W 2d 985 248 Ky 700—Griffin v Commonwealth, 265 S W 327, 204 Ky 783
La—State v Holbrook, 97 So 27, 153 La 1025
N M—State v Martinez, 278 P 210, 34 N M 112
Okl—Adams v State, 70 P 2d 821, 62 Okl Cr 167—Graham v State, 220 P 967, 25 Okl Cr 372
Tex—Fagan v State, 14 S W 2d 838, 112 Tex Cr 107—Brown v State, 281 S W 210, 103 Tex Cr 420
Wyo—State v Flory, 276 P 458, 40 Wyo 184
30 C J p 228 note 67, p 247 note 13.

sibility of evidence, to assume the nonexistence of such facts, even though they bear on the question of guilt or innocence,[10] but where the evidence offered relates to and tends to prove all the facts required, and those facts bear on the question of the guilt or innocence of accused, the question whether such facts are established should be submitted to the jury, together with the evidence, the admissibility of which is dependent on the determination of such question[11] When accused submits a particular act done by deceased at the time of the homicide as evidence of an overt act of dangerous intentions, the act must either be one of such character as would per se be indicative thereof, or it must be shown affirmatively to have been done under circumstances such as to have led reasonably to a belief that it was of that character[12]

The presumption that a willful, intentional killing is murder, as considered supra § 199, does not prevent accused from showing, if he can, that the killing was in self-defense[13]

Declarations Where self-defense is set up, any of the declarations of deceased, explanatory of accompanying acts, are admissible in evidence as part of the res gestæ[14] Self-serving declarations of accused made before the killing with reference to his anticipation of trouble with deceased, his desire to avoid it, and the like are not admissible,[15] nor are exculpatory declarations made by accused after the killing[16]

Opinions The opinions of witnesses at the inquest that accused committed the homicide in necessary self-defense are not competent as direct evidence[17]

Rebuttal Where self-defense is set up the prosecution may introduce evidence in rebuttal[18] The prosecution has even the right to anticipate the defense of self-defense, predicated on the theory that deceased brought on the difficulty, and was in the act of shooting accused when accused fired,[19] or at least the admission of the evidence, before it is shown to be competent, is not cause for reversal unless special injury resulted[20] Evidence which has no tendency to prove that the killing was not done in self-defense and is not otherwise relevant, however, cannot be introduced by the prosecution[21]

§ 272. —— Character and Habits of Deceased

a In general
b Knowledge of accused
c Necessity of claim or showing of self-defense
d Habit of carrying weapons
e. Showing by prosecution of peaceable reputation
f Manner of proving character

a. In General

Where there is evidence tending to show self-defense, or the character of the transaction is in doubt, the reputation of the deceased for violence, turbulence, and bloodthirstiness, as well as his actual character with respect to such matters, can be shown, but the evidence should be confined to the trait of character which is in issue, and his general or moral character should not be inquired into

Where there is evidence tending to show self-defense or the character of the transaction is in doubt, the reputation of deceased for being a violent and dangerous character can be shown for the purpose of showing a reasonable apprehension of immediately impending danger on the part of accused,[22]

10. La —State v Kellogg, 29 So 285 104 La 580

11. La —State v Kellogg, supra

12. Ala —Cook v State, 59 So 519 5 Ala App 11
La —State v Baum, 26 So 97 51 La Ann 1112

13. Mo —State v Larkin, 157 S W 600, 250 Mo 218, 46 L R A,N S, 13

14 Ill —Wilson v People, 94 Ill 299
Mo —State v Bundy, 14 S W 2d 121, 123, quoting **Corpus Juris.**

15. Ky —Martin v Commonwealth, 199 S W 603, 178 Ky 540
30 C J p 228 note 74

16. N C —State v Peterson, 63 S E 57, 149 N C 533
30 C J p 228 note 75

17. Cal —People v Reed, 52 P 835, 5 Cal Unrep Cas 967

18. Iowa —State v Coleman, 285 N W 269, 226 Iowa 968
Ky —Noble v Commonwealth, 103 S W 2d 258 267 Ky 809—Estes v Commonwealth, 17 S W 2d 757, 229 Ky 617
Okl —Austin v State, 228 P 1113, 28 Okl Cr 73
Tex —Watson v State, 59 S W 2d 126, 123 Tex Cr 360—Sanford v State, 185 S W 22, 79 Tex Cr 345
30 C J p 228 note 77, p 247 note 25

19. Ala —Stevens v State, 35 So 122 138 Ala 71

20 Cal —People v Yokum, 50 P 686, 118 Cal 437

21. Iowa —State v Coleman, 285 N W 269, 226 Iowa 968
Ky —Brown v Commonwealth, 74 S W 2d 939, 255 Ky 486
La —State v Fisher, 122 So 858, 168 La 584
Va —Counts v Commonwealth, 119 S E 79, 137 Va 744
30 C J p 229 note 80, p 248 note 28

22. Ala —Russell v State, 122 So 683, 219 Ala 567—Wilson v State, App, 11 So 2d 563, certiorari denied 11 So 2d 568—Sanderson v State 181 So 506, 28 Ala App 216, reversed on other grounds 181 So 508, 236 Ala 27—Daugherty v State 139 So 439 24 Ala App 591
Ariz —Mendez v State, 229 P 1032, 27 Ariz 82
Cal —People v Jefferson, 93 P 2d 230, 34 Cal App 2d 278—People v Parker, 40 P 2d 836, 4 Cal App 2d 421
Del —State v Gordon, 181 A 361, 7 W W Harr 219
D C —Preston v U S, 80 F 2d 702, 65 App D C 110
Idaho —State v Wilson, 243 P 359, 362, 41 Idaho 616, citing **Corpus Juris.**
Ill —People v Brindley, 17 N E 2d 218, 369 Ill 486
Iowa —State v Rhone, 275 N W 109, 223 Iowa 1221
Ky —Kinder v Commonwealth, 92 S. W 2d 8, 263 Ky 145—Conley v.

particularly under the circumstances prevailing at the time of the homicide,[23] and accused may also show the general reputation of deceased as to using firearms or other deadly weapons when engaged in quarrels.[24] Evidence of the actual character of deceased as well as his reputation regarding turbulence, violence, and similar matters is admissible.[25] Evidence as to the character of deceased should be confined to the trait of character which is in issue,[26] and the inquiry should be limited to his character as a violent and dangerous man,[27] and not extended to embrace his general character,[28] or his moral character,[29] as whether he was honest, or a thief, a gambler, etc.,[30] or other particular traits or characteristics.[31] Evidence as to the unpleasant relations existing between deceased and a particular witness and the latter's unwillingness to work under deceased is not admissible.[32] Even the character of deceased for peace and quiet, not coupled with his character as a violent, dangerous, turbulent, and bloodthirsty man, is not provable by accused.[33] When it is shown that, according to general reputation, deceased was a dangerous and bloodthirsty man, it may be shown further that according to such reputation he would act stealthily and treacherously.[34] It has been held that a mere quarrelsome and fighting character cannot be shown,[35] but there is other authority holding to the contrary,[36] and that,

Commonwealth, 8 S W 2d 415, 225 Ky 275

Mass—Commonwealth v Festo, 146 N E 700, 251 Mass 275

Mich—People v Cellura, 284 N W 643, 288 Mich 54—People v Dunn, 206 N W 568, 233 Mich 185—People v Walters, 194 N W 538, 223 Mich 676

Miss—Anderson v State, 179 So 560, 181 Miss 300—Sprinkle v State, 102 So 844, 137 Miss 731

Mo—State v Naylor, 40 S W 2d 1079, 328 Mo 335

N C—State v Champion, 22 S E 2d 232, 222 N C 160—State v LeFevers, 19 S E 2d 488, 221 N C 184

Okl—Murphy v State, 112 P 2d 438, 72 Okl Cr 1—Edwards v State, 48 P 2d 1087, 58 Okl Cr 15

Tex—Ball v State, 18 S W 2d 641, 113 Tex Cr 58

Wash—State v Moore, 45 P 2d 605, 182 Wash 111

W Va—State v Peoples, 115 S E 389, 106 W Va 262

30 C J p 229 note 81—22 C J p 175 note 72

As tending to show who was aggressor

(1) In a prosecution for murder court properly limited testimony as to deceased's character and disposition to such evidence which tended to show which person was the aggressor—Lawrence v State, 210 P 863, 29 Ariz 247, rehearing denied 211 P 511, 29 Ariz 318, certiorari denied 46 S Ct 201, 269 U S 585, 70 L Ed 425

(2) Evidence of dangerous character of deceased was admissible only to corroborate testimony that he provoked fatal difficulty by making a hostile demonstration or committing an overt act—State v Richardson, 111 So 587, 165 La 823

(3) So in prosecution wherein self-defense is an issue, accused may prove that victim had had the general reputation of being a violent and dangerous man to show who probably began the difficulty

Ark—Bridges v State, 4 S W 2d 12, 176 Ark 756

Tex—Meeks v State, 117 S W 2d 454, 135 Tex Cr 170—Ross v State, 29 S W 2d 381, 115 Tex Cr 152

(4) On the other hand it has been held that evidence of deceased's reputation was inadmissible to indicate probability that deceased was aggressor—State v Padula, 138 A 456, 106 Conn 154

In prosecution for assault with intent to murder

(1) When evidence has been introduced from which the jury may find that the person injured was the assailant, evidence of his vicious disposition or of threats made against accused is admissible as tending to show the circumstances by which accused was surrounded, the extent of his apparent danger and the motive by which he was influenced—People v Dugas, 141 N E 769, 310 Ill 291

(2) So where there is some evidence of self-defense exclusion of evidence that prosecuting witness prior to and at time of difficulty, had general reputation of being a violent quarrelsome, and turbulent man, and that such reputation was known to accused was erroneous—Ammons v State, 231 P 326, 28 Okl Cr 133

23. Ala—Long v State, 121 So 453, 23 Ala App 107

Ky—Fitzpatrick v Commonwealth, 275 S W 819, 210 Ky 385

La—State v Domingue, 118 So 46, 166 La 859

30 C J p 229 note 82

24 Mass—Commonwealth v Festo, 146 N E 700, 251 Mass 275

Wash—State v Ellis, 70 P 963, 30 Wash 369

25. Iowa—State v Rhone, 275 N W 109, 223 Iowa 1221

26 Cal—People v Jefferson, 93 P 2d 230, 31 Cal App 2d 278

30 C J p 229 note 84

27. Ala—Anderson v State, 2 So 2d 461, 463, 30 Ala App 124, citing **Corpus Juris,** and certiorari denied 2 So 2d 463, 241 Ala 381

30 C J p 229 note 85

28. Ala—Nobles v State, 7 So 2d 770, 30 Ala App 134, certiorari denied 7 So 2d 773, 242 Ala 613—Anderson v State, 2 So 2d 461, 463, 30 Ala App 124, citing **Corpus Juris,** and certiorari denied 2 So 2d 463, 241 Ala 381

D C—Preston v U S, 80 F 2d 702, 65 App D C 110

30 C J p 229 note 86

29 Kan—State v Allen, 160 P 795, 98 Kan 778, 99 Kan 187

30 C J p 229 note 87

30 La—State v Thompson, 33 So 220, 109 La 296

30 C J p 229 note 88

Robbery

In murder prosecution wherein accused pleaded self-defense objection to cross-examination is to whether deceased had general reputation of having held up and robbed a man with firearms was properly sustained—State v LeFevers, 19 S E 2d 488, 221 N C 184

31 Ala—Black v State, 59 So 692, 5 Ala App 87

30 C J p 230 note 89

General reputation as law-abiding citizen

Tex—McClellan v State, 40 S W 2d 87, 118 Tex Cr 473—Ball v State, 18 S W 2d 641, 113 Tex Cr 58

General reputation for chastity and virtue

Tex—McClellan v State, 40 S W 2d 87, 118 Tex Cr 473

30 C J p 230 note 89 [a] (10)

32. Fla—Sylvester v State, 35 So 112, 46 Fla 166

33 Ala—Wilson v State, App, 11 So 2d 563, certiorari denied, Sup, 11 So 2d 568

30 C J p 230 note 91

34. Ala—Pate v State, 50 So 357, 162 Ala 32

35 Ala—Wilson v State, App, 11 So 2d 563, certiorari denied, Sup, 11 So 2d 568—Bullington v State, 69 So 319, 13 Ala App 61

36. Ky—McLain v Commonwealth, 188 S W 377, 171 Ky 373

where particular circumstances, known to accused, are shown to have existed at the time of the homicide, evidence of the reputation of deceased for quarrelsomeness under such conditions is admissible.[37]

Intoxication While evidence of the intoxication of deceased at the time of the difficulty may be admissible, as discussed infra § 278, his habits with reference to being intoxicated cannot be shown[38] where his condition at the time of the homicide is shown,[39] or where, on the other hand, there is no evidence that he had been drinking on the occasion in question.[40]

Subsequent character The general character of the prosecutor as a violent and dangerous man, at a time subsequent to an alleged assault with intent to murder made on him by accused, is immaterial on a trial for the assault.[41]

b. Knowledge of Accused

In order to admit evidence of the violent character of deceased as bearing on the apprehension of danger by the accused, it must appear to have been known to him, consequently evidence of his knowledge of such character is admissible As bearing on the question of who was the aggressor, however, evidence of the character of the deceased is admissible although the accused had no knowledge thereof

It is generally considered to be necessary, in order to admit evidence of the dangerous and violent character of deceased as bearing on the apprehension of danger by accused, that this should appear to have been known to him as otherwise it could not have influenced him,[42] and hence evidence of accused's knowledge of such character is admissible.[43] It has been said that such knowledge is involved in a proposition to prove the general character of deceased for violence, for if it is proved that his general character in this respect was bad it would reasonably appear that accused knew this as well as others,[44] although the rule does not apply to decedent's reputation at other times and places than that of his killing where no overt act of deceased has been shown,[45] but, on the other hand, there is authority holding it proper to exclude what the neighborhood believed, limiting the issue to what accused had heard and believed.[46] As bearing on the question of who was the aggressor, however, it is not essential that accused shall have had knowledge of the character of deceased to permit proof thereof.[47] Where no evidence has been introduced as to the violent character of deceased, a question asked of accused as to whether he knew that deceased was a bloodthirsty, violent man is properly excluded.[48]

c. Necessity of Claim or Showing of Self-Defense

Evidence of the violent and dangerous character of the decedent is inadmissible unless there is a claim of self-defense supported by evidence of some overt act or hostile demonstration on the part of the decedent or one of his confederates, and consequently such evidence is not admissible where it appears that the accused provoked the difficulty, or was in no danger, or did not believe himself to be in danger, or did not avoid the difficulty when he might safely have done so, or where he claims the killing was accidental, or denies that he killed the deceased

In order that evidence of the violent and dangerous character of deceased or the person assaulted may be admissible, there must be a claim of self-defense, supported by some evidence.[49] It is within

37 N C State v Carraway 107 S E 142 181 N C 561
30 C J p 230 note 95

38 Ala—Neilson v State, 40 So 221

Insufficient foundation for testimony
In prosecution for murder, where deceased's widow testified for state at stage of trial prior to proof of attack by deceased on accused one year before killing when deceased was intoxicated, sustaining objection to question on cross-examination whether deceased had habit of drinking intoxicating liquor was proper—People v Orosco, 239 P 82, 73 Cal App 580

39 N C State v Canup, 105 S E 322 180 N C 739
30 C J p 230 note 98

40. Ala—Sanford v State, 57 So 134, 2 Ala App 81

41. Tex—Burks v State, 49 S W 389, 40 Tex Cr 167

42. Cal—People v Hoffman, 232 P 974 195 Cal 295—People v Jefferson, 93 P 2d 230, 34 Cal App 2d 278
Colo—Catalina v People, 93 P 2d 897 101 Colo 585
Conn—State v Padula 138 A 156, 106 Conn 454
Ill—People v Allen 37 N E 2d 854 378 Ill 164
Mass—Commonwealth v Festo 146 N E 700, 251 Mass 275
Mich People v Walters, 194 N W 538 223 Mich 676
Mo—State v Carroll, 62 S W 2d 863 333 Mo 558
30 C J p 230 note 3

43 Cal—People v Jefferson, 93 P 2d 230, 34 Cal App 2d 278
Ill—People v Allen, 37 N E 2d 854, 378 Ill 164
Miss—Sprinkle v State, 102 So 844, 137 Miss 731
Ohio—McGaw v State 174 N E 741, 123 Ohio St 196—Nelson v State, 181 N E 448, 42 Ohio App 252
30 C J p 230 note 4

44. S C—State v Turner, 6 S E 891 29 S C 34, 13 Am S R 706

45. La—State v Blassengame, 61 So 219, 132 La 250—State v Nash, 13 So 732 45 La Ann 1137, modified on other grounds on rehearing 13 So 734, 45 La Ann 1137

46. Mich—People v Walters, 194 N. W 538, 223 Mich 676

47. Cal—People v Jefferson, 93 P 2d 230 34 Cal App 2d 278
Mich—People v Cellura, 284 N W 643 288 Mich 54
30 C J p 230 note 7

48. Ala—Dean v State, 17 So 28, 105 Ala 21

49 Ala—Delbridge v State, 8 So 2d 160, 242 Ala 677—Sanders v State, 7 So 2d 483 242 Ala 535—Lambert v State 93 So 708, 208 Ala 42—Studemeyer v State, 93 So 528, 207 Ala 609—Barnum v State, 190 So 310 28 Ala App 590—Dredd v State, 164 So 309, 26 Ala App 594—King v State, 134 So 133, 24 Ala App 267
Ariz—Mendez v State, 229 P 1032, 27 Ariz 82
Cal—People v Soules, 106 P 2d 639, 643, 41 Cal App 2d 298, quoting **Corpus Juris.**

the discretion of the trial judge to determine when a proper foundation is laid,[50] which, according to some authorities, may consist in the testimony of accused alone,[51] but according to other authorities the unsupported statement of accused is insufficient.[52] There must be evidence of some overt act or hostile demonstration on the part of deceased[53] or one of his confederates[54] of such character as would per se be indicative of dangerous intentions,[55] or it must be shown affirmatively to have been done under circumstances such as reasonably to have led to a belief that it was of that character.[56] Evidence of the dangerous and violent character of deceased is not admissible where, at the time such evidence is offered, it appears from the evidence already introduced that accused provoked the difficulty,[57] or was the assailant,[58] where he was in no danger of loss of life or serious bodily harm,[59] or did not believe himself to be in such danger,[60] or there was nothing to excite the fears of a reasonable man that such danger existed,[61] where he did not retreat while he might safely have done so,[62] where deceased was retreating or running away from accused at the time of the killing,[63] or had declined further to combat before the fatal shot was fired,[64] or where it is claimed that the killing was accidental,[65] or accused denies that he killed deceased.[66]

d Habit of Carrying Weapons

As a general rule, where the evidence tends to show that the accused acted in self-defense, evidence is admissible to show that the deceased was in the habit of carrying dangerous weapons or had the reputation of doing so, provided such habit or reputation was known

Ga—Chapman v State, 117 S E 321, 155 Ga 393
Ill—People v Moore, 14 N E 2d 494, 368 Ill 455
La—State v Straeher, 182 So 571, 190 La 457
N C—State v Baldwin, 114 S E 837, 184 N C 789
Okl—Edwards v State, 48 P 2d 1087, 58 Okl Cr 15
Tex—McCullough v State 132 S W 2d 112, 137 Tex Cr 577
Vt—State v Lescord, 117 A 242, 96 Vt 85
Va—Burford v Commonwealth, 20 S E 2d 509, 179 Va 752
30 C J p 230 note 10
Evidence as to character and habits of deceased generally see supra § 222

There must be evidence of some demonstration which, although considered independently of the dangerous character of deceased, might have been regarded as innocent or harmless when received and considered in connection with or illustrated by such character may arouse a reasonable belief of imminent peril
Conn—State v Padula, 138 A 156, 106 Conn 454
Fla—Hart v State, 20 So 805, 38 Fla 39

Showing sufficient to admit evidence of dangerous character
Ill—People v Brindley, 17 N E 2d 218, 369 Ill 486
La—State v Richardson, 141 So 587, 175 La 823
30 C J p 230 note 10 [c]

Showing insufficient to admit evidence of dangerous character
Ala—Russell v State, 122 So 683, 219 Ala 567
Ga—Luffman v State, 143 S E 371, 166 Ga 296—Fraser v State, 182 S E 418, 52 Ga App 92
La—State v Handy 164 So 616, 183 La 653—State v Maines 161 So 321, 183 La 499—State v Scarbrock, 145 So 264, 176 La 48—State v Bridges 144 So 602, 175 La 872—State v Brown, 133 So 383, 172 La 121
30 C J p 230 note 10 [d]

50. La—State v Boudreaux, 169 So 459, 185 La 434—State v Scarbrock, 145 So 264, 176 La 48—State v Richardson, 141 So 587, 175 La 823—State v Dreher, 118 So 85, 166 La 924, certiorari denied Dreher v State of Louisiana 49 S Ct 36, 278 U S 611, 73 L Ed 536
Va—Burford v Commonwealth, 20 S E 2d 509, 179 Va 752
30 C J p 231 note 11

51. Fla—Hart v State 20 So 805, 38 Fla 39 followed in Allen v State, 20 So 807, 38 Fla 44

Exculpatory part of confession can be regarded as proof of overt act forming basis for introduction of evidence of dangerous character of deceased—State v Richardson, 141 So 587, 175 La 823

52. Ga—Luffman v State, 143 S E 371, 166 Ga 296—Jones v State 114 S E 326, 151 Ga 423
30 C J p 231 note 13

53. Ala—Russell v State, 122 So 683, 219 Ala 567
Ariz—Mendez v State, 229 P 1032, 27 Ariz 82
Ind—Howe v State, 115 N E 81, 186 Ind 139
La—State v Straeher, 182 So 571, 190 La 457—State v Boudreaux 169 So 459, 185 La 434—State v Maines, 161 So 321, 183 La 499—State v Disotell, 158 So 825, 181 La 119—State v Bridges, 144 So 602, 175 La 872—State v Richardson, 144 So 587, 175 La 823—State v Brown, 133 So 383 172 La 121—State v Smith, 131 So 296, 171 La 452—State v Joiner, 112 So 503, 163 La 609—State v Steele, 109 So 491, 161 La 796—State v. Doty, 104 So 736, 158 La 842

"Overt act" warranting character evidence affecting self-defense means any act manifesting to mind of reasonable person present intent to kill him or do him great bodily harm, to constitute overt act, assault or demonstration by deceased must have been such as to create reasonable apprehension of danger in accused's mind at time of fatal assault—State v Brown, 133 So 383, 172 La 121

54. Ala—Russell v State, 122 So 683, 219 Ala 567

55. La—State v Baum, 26 So 67, 51 La Ann 1112

56. La—State v Baum, supra

57. Ala—Sanders v State, 7 So 2d 483, 242 Ala 535
La—State v Disotell, 158 So 825, 181 La 149
30 C J p 231 note 17

58. Ala—Russell v State, 122 So 683, 219 Ala 567
30 C J p 231 note 18

59. Ala—Sanders v State, 7 So 2d 483, 242 Ala 535
30 C J p 231 note 19

60. Ga—Monroe v State, 5 Ga 85

61. Cal—People v Soules, 106 P 2d 639, 643, 41 Cal App 2d 298, quoting **Corpus Juris**
30 C J p 231 note 21

62. Ala—Sanders v State, 7 So 2d 483, 242 Ala 535
30 C J p 231 note 22

63. Tex—Smith v State Cr. 20 S W 831
Va—Jackson v Commonwealth, 36 S E 487, 98 Va 845

64. Ariz—Jaime v Territory, 94 P 1092, 12 Ariz 5

65. D C—Travers v U S, 6 App D C 450

66. Tenn—Lemons v State, 37 S W 552, 97 Tenn 560
Wis—Manning v State, 48 N W 209, 79 Wis 178.

to the accused; and where such a showing is made evidence is admissible to rebut it.

While there is authority apparently to the contrary, based on the rule that an accused may prove the general reputation of deceased for being a violent or turbulent person, but not his reputation for committing any particular unlawful act,[67] the general rule is that, where the evidence tends to show that accused might have acted in self-defense, evidence is admissible to show that deceased was in the habit of carrying firearms or other deadly weapons or that he had the reputation of habitually being armed.[68] It must, of course, be made to appear that such habit or reputation of deceased was known to accused, as otherwise it could not have influenced his conduct,[69] and evidence showing such knowledge is admissible,[70] but it has been held that if it was generally known that deceased was in the habit of carrying firearms it is reasonable to assume that accused knew of that habit as well as others,[71] although there is no such presumption where accused and decedent live a considerable distance apart.[72] Where there is no claim or evidence that the killing was done in self-defense, evidence of deceased's habit of going armed is inadmissible.[73] Where an unfriendly feeling existed between accused and deceased for several months before the homicide, it was error to limit evidence of the fact of deceased's carrying arms to a short period preceding the tragedy,[74] but what deceased said months prior to the homicide with regard to his carrying firearms is not admissible on a question of self-defense.[75] Since a gun is a weapon not readily hidden about the person, evidence as to the reputation of deceased as to carrying a gun is immaterial, as, even if accused knew of the habit of deceased to carry a gun, he might readily see that deceased had none with him at the time of the difficulty.[76]

In rebuttal the prosecution may introduce evidence to show that deceased was not in the habit of carrying weapons,[77] or that he was never known to use weapons of any sort in any of his fights, either as boy or man,[78] but it is held that where there is testimony tending to show that deceased was making a move as though to draw a pistol, evidence that he was not in the habit of carrying a pistol is incompetent.[79]

e. Showing by Prosecution of Peaceable Reputation

Although such evidence cannot be introduced by the state in the first instance, rebuttal evidence showing the deceased to have had, at the time of the homicide, the reputation of being a quiet and peaceable individual is admissible where the accused has set up self-defense and introduced evidence tending to show the turbulent and violent character of the deceased, and such evidence is also admissible under express authority of some statutes where there is evidence of threats made by the deceased

The state is entitled to show the good reputation of deceased, where such reputation has been put in issue by accused.[80] Where accused has set up self-defense and introduced evidence tending to show the turbulent, violent, and quarrelsome character of deceased it is competent for the prosecution in rebuttal to introduce evidence showing the reputation of deceased to have been that he was of a quiet and peaceable character,[81] limiting such inquiry, however, to the general character of deceased as a qui-

67. Ark—Graham v State, 3 S W 2d 15, 176 Ark 249
Fla—Palm v State, 184 So 881, 135 Fla 258

68. Cal—People v Singh, 248 P 986, 78 Cal App 488
DC—Preston v U S, 80 F 2d 702 65 App D C 110
Ga—Gibson v State, 168 S E 47, 176 Ga 384
Ky—Kinder v Commonwealth, 92 S W 2d 8, 263 Ky 145
Mass—Commonwealth v Festo, 146 N E 700, 251 Mass 275
Miss—Sprinkle v State, 102 So 844, 137 Miss 731
30 C J p 231 note 28
Possession and use of weapon see infra § 278

69. Ala—Nicholson v State, 118 So 814, 22 Ala App 635
Ill—People v Allen, 37 N E 2d 854 373 Ill 164
30 C J p 232 note 29

70 Ill—People v Allen, supra
Miss—Sprinkle v State, 102 So 844, 137 Miss 731
30 C J p 232 note 30

71. S D—State v Yokum, 84 N W 389, 14 S D 84, modifying rehearing on other grounds 79 N W 835 11 S D 544

72 Ark—Long v State 81 S W 387, 72 Ark 427

73. Ark—Willis v State, 251 S W 439 160 Ark 69
Mass—Commonwealth v Festo, 146 N E 700 251 Mass 275
30 C J p 232 note 33

74. Tex—Becker v State, 190 S W 185, 80 Tex Cr 186

75. S D—State v Yokum 79 N W 835, 11 S D 544, modified on other grounds on rehearing 84 N W 389 14 S D 84

76. Ala—Gary v State, 92 So 533 18 Ala App 367

77. Cal—People v Adams, 70 P 662 137 Cal 580
Or—State v Mims, 61 P 888 36 Or 315
30 C J p 232 note 37

78. Kan—State v Sayer, 213 P 667, 113 Kan 190

79. Tex—McCandless v State, 57 S W 672, 42 Tex Cr 58

80. Tex—Henry v State, 220 S W. 1108, 87 Tex Cr 148

81. Ala—Webster v State 93 So 545, 207 Ala 668
Ariz—Burnett v State, 268 P 611, 34 Ariz 129
Cal—People v Fitch, 81 P 2d 1019, 28 Cal App 2d 31
Ga—McKie v State, 140 S E 625, 165 Ga 210
Ky—Ferguson v Commonwealth, 34 S W 2d 959 237 Ky 93
N C—State v Champion, 22 S E 2d 232, 222 N C 160
Okl—Brock v State, 32 P 2d 88, 55 Okl Cr 110—Cody v State, 214 P 201, 23 Okl Cr 236
Pa—Commonwealth v Castellana, 121 A 50, 277 Pa 117
Wash—State v Stone, 13 P 2d 427, 169 Wash 233
30 C J p 232 note 40

Fair fighter

Where accused in murder prosecution offered evidence that deceased was dangerous fighting man, state's

et, peaceable man, or as a violent or dangerous one,[82] but it has been held that the prosecution cannot in the first instance and as a part of its case, before anything as to deceased's character has been shown by accused, introduce evidence showing deceased to have been quiet and peaceable.[83] Within this rule, evidence of the acts of deceased constituting part of the res gestæ and showing him to be a dangerous man does not authorize the production of evidence by the state on his reputation for being quiet and peaceful.[84] Testimony by accused, brought out on the state's cross-examination only, is not sufficient basis for such evidence on behalf of the state.[85] There is, however, authority for the view that a plea of self-defense and evidence in support thereof, showing an attack by deceased, is sufficient to let in evidence by the prosecution that deceased was peaceable and quiet, although accused has not attacked his general character in this respect.[86]

Under some statutes, evidence of the peaceable character of deceased is admissible where there is evidence of threats made by him,[87] except where the threats are part and parcel of the immediate difficulty,[88] but the privilege of the state extends no further than the statute provides,[89] and the state cannot introduce such evidence in the first instance before the introduction by accused of evidence relative to the character of deceased or threats by him.[90]

It is the character of deceased for peace and quietude at the time of the homicide which is the subject of inquiry,[91] but much is left to the discretion of the court as to the time covered by such testimony.[92]

f. Manner of Proving Character

As a general rule, evidence of the character of the deceased or assaulted person must be confined to his general reputation in the community within a reasonable time of the alleged crime, and evidence of particular acts of violence or lawlessness is inadmissible unless they were directly connected with the crime charged. In some, but not in all, jurisdictions proof of conviction of crimes of violence is admissible. The state may introduce competent evidence in rebuttal.

As a general rule the evidence of the character of deceased must be confined to his general reputation, and evidence of particular acts of violence or lawlessness is inadmissible,[93] unless they were di-

evidence on rebuttal of deceased's reputation as fair fighter was admissible.—Daugherty v. State, 139 So. 439, 24 Ala. App. 591.

What amounts to attack on character.

(1) Accused may attack a deceased person's reputation by his own testimony, as well as by the testimony of others, as respects the state's right to rebut such attack by evidence of deceased's good character and accused's testimony that he had heard that deceased was a dangerous man and knew that his own life was in danger from deceased made such rebuttal proper.—Ray v. State, 124 S.W.2d 119, 136 Tex.Cr. 246.

(2) Evidence of specific acts of deceased, when admissible, tending to show his violent and dangerous character, authorizes the state, on rebuttal, to show his general reputation in such regard to be good.—State v. Todd, 214 P. 899, 28 N.M. 518.

(3) Other illustrations see 30 C.J. p. 232 note 40 [e].

Opinion and personal observation.

Where witnesses in murder prosecution qualified under proper questions to testify concerning deceased's reputation as a peaceable citizen, objection that such witnesses testified from their own opinion and personal observation went to the weight rather than admissibility of their testimony.—Ray v. State, 124 S.W.2d 119, 136 Tex.Cr. 246.

82. N.C.—State v. Champion, 22 S.E. 2d 232, 222 N.C. 160.
30 C.J. p. 232 note 41.

83. Ala.—Isom v. State, 174 So. 538, 27 Ala. App. 488.
Cal.—People v. Hoffman, 232 P. 974, 195 Cal. 295.
Mich.—People v. Dunn, 206 N.W. 568, 233 Mich. 185.
30 C.J. p. 232 note 42.

Evidence not basis for rebuttal.

(1) Evidence that an insulting proposal by deceased to accused's wife and daughter was communicated to him the night before the homicide did not entitle the state to show the good character of deceased.—Webster v. State, 93 So. 545, 207 Ala. 668.

(2) So evidence of deceased's reputation as peaceable citizen is not admissible merely because accused has interposed plea of self-defense and offered evidence that deceased was aggressor.—Miller v. State, 72 P.2d 520, 63 Okl.Cr. 64.—Coulson v. State, 291 P. 152, 48 Okl.Cr. 206.

(3) Other instances see 30 C.J. p. 232 note 42 [b].

84. Tex.—Bullock v. State, 165 S.W. 196, 43 Tex.Cr. 419.

85. Tex.—Barrett v. State, 215 S.W. 858, 86 Tex.Cr. 101.

86. Ind.—Thrawley v. State, 55 N.E. 95, 153 Ind. 375.
30 C.J. p. 233 note 45.

87. Tex.—Butler v. State, 100 S.W. 2d 707, 131 Tex.Cr. 543.—Clyburn v. State, 90 S.W.2d 248, 129 Tex. Cr. 581.—Chappell v. State, 61 S.W. 2d 842, 124 Tex.Cr. 187.—Pollard v. State, 45 S.W.2d 618, 119 Tex.Cr. 452.—Matthews v. State, 38 S.W.2d 815, 118 Tex.Cr. 468.—Ross v. State, 29 S.W.2d 381, 115 Tex.Cr. 152.—Denson v. State, 298 S.W. 604, 107 Tex.Cr. 649.—Alexander v. State, 255 S.W. 408, 95 Tex.Cr. 497.—Ferguson v. State, 253 S.W. 290, 95 Tex.Cr. 212.—Richardson v. State, 253 S.W. 273, 94 Tex.Cr. 616.—Dunn v. State, 242 S.W. 1049, 92 Tex.Cr. 126.
30 C.J. p. 233 note 46.

Statute held applicable to prosecution for assault with intent to murder.

Tex.—Davis v. State, 5 S.W.2d 987, 109 Tex.Cr. 530.

88. Tex.—Pollard v. State, 45 S.W. 2d 618, 119 Tex.Cr. 452.—Henry v. State, 220 S.W. 1108, 87 Tex.Cr. 148.

89. Tex.—Ross v. State, 29 S.W.2d 381, 115 Tex.Cr. 152.—Martin v. State, 17 S.W.2d 1069, 112 Tex.Cr. 521.—Denson v. State, 298 S.W. 604, 107 Tex.Cr. 649.

90. Tex.—Johnson v. State, 95 S.W. 2d 968, 130 Tex.Cr. 596.—Pollard v. State, 45 S.W.2d 618, 119 Tex.Cr. 452.

91. Mo.—State v. Pettit, 24 S.W. 1011, 119 Mo. 410.

92. Mo.—State v. Pettit, supra.

93. Ala.—Lambert v. State, 93 So. 708, 208 Ala. 42.—Studemeyer v. State, 93 So. 528, 207 Ala. 609.—Daugherty v. State, 139 So. 439, 24

rectly connected with, and involved in, the homicide,[94] especially where accused had no knowledge of, and was not concerned in, such acts,[95] but, on cross-examination of a witness for the prosecution who has testified as to deceased's good character, testimony of particular facts tending to show his character to have been otherwise may be elicited as going to discredit the witness,[96] and some authorities hold that specific acts of violence by deceased, known to accused prior to the homicide, may be shown,[97] although it is not error to refuse to permit accused to testify of what he has heard, concerning such acts, from others unless such acts are so closely connected with the homicide as to be a part of the res gestæ.[98] It is held on the one hand that information conveyed to accused before the killing that deceased was a violent and turbulent man, and accustomed to go about armed, is admissible whether the informant gained his knowledge from the general reputation of deceased or from personal observation of his specific acts,[99] or from other sources,[1] and, on the other, that evidence as to the character of deceased should be based on his general reputation rather than on the observation of the witness.[2] A witness may have sufficient knowledge of decedent's reputation to testify with reference thereto without having had a personal acquaintance with him.[3] Evidence irrelevant to the issues on which it is offered and tending to discredit the character of deceased should be excluded.[4] Evidence of the temper of the person assaulted is not proper to show his reputation for violence and bloodthirstiness.[5]

Place and time. Evidence of the reputation of deceased should relate to the community in which he lived,[6] and to some reasonable time previous to,

Ala App 591—Gibbs v State 127 So 788, 23 Ala App 475, certiorari denied 127 So 790, 221 Ala 130—Davis v State, 111 So 615, 21 Ala App 619

Ark—Bridges v State, 4 S W 2d 12, 176 Ark 756

Cal—People v Soules, 106 P 2d 639, 41 Cal App 2d 298

Conn—State v Padula, 138 A 456, 106 Conn 454

Fla—Palm v State, 184 So 881, 135 Fla 258

Ga—Ivey v State, 156 S E 290, 42 Ga App 357

Idaho—State v Wilson, 243 P 359, 362, 41 Idaho 616 citing **Corpus Juris**

Ky—Stegall v Commonwealth 36 S W 2d 338, 237 Ky 691—Cox v Commonwealth, 273 S W 515, 209 Ky 787

La—State v Sharpe 127 So 368, 170 La 69—State v Williams, 98 So 738, 155 La 9

Mich—People v Cellura, 284 N W 613, 288 Mich 54

Mo—State v Naylor 40 S W 2d 1079, 328 Mo 335 State v Roberts, 212 S W 669, 291 Mo 284

N C—State v LeFevers, 19 S E 2d 488, 221 N C 184

Tex—McGrew v State 80 S W 2d 718, 128 Tex Cr 238 Brazzell v State 266 S W 788, 99 Tex Cr 33, leave to file second motion for rehearing denied 266 S W 1119, 99 Tex Cr 33

30 C J p 233 note 51

Previous quarrels, ill feeling, or hostile acts generally see infra § 275

Witness' knowledge of reputation

In murder case, witness who knew deceased, knew others who knew him, and knew his reputation for quietude, may state what that reputation was without preliminary examination. So hotel keeper, acquainted with deceased, who saw him about twice in neighborhood knew people who knew him and discussed his character with various people, may state deceased's reputation for quietude, and witness well acquainted with deceased may testify to deceased's reputation for quietude without showing that he knew any one who knew deceased—People v Alpine 254 P 281, 81 Cal App 456

Statements of deceased

(1) Evidence in murder trial that deceased said he killed priest in his native country many years before was inadmissible to establish his character as a violent and dangerous man in absence of evidence of circumstances surrounding such occurrence—Commonwealth v Romanic, 166 A 902, 311 Pa 415

(2) Testimony showing truth or falsity of statements by deceased to accused regarding specific acts of violence by deceased toward others was inadmissible where accused did not have knowledge of such acts of violence prior to homicide, other than deceased's statements—Brock v State, 32 P 2d 88, 55 Okl Cr 410

94. Mich—People v Cellura, 284 N W 613, 288 Mich 54

30 C J p 234 note 52

95. Conn—State v Padula, 138 A 456, 106 Conn 454

Mont—State v Harkins, 281 P 551, 85 Mont 585

Tex—Ellis v State, 57 S W 2d 170, 122 Tex Cr 624

W Va—State v Peoples, 145 S E 389, 106 W Va 262

30 C J p 234 note 53

96. Ala—Lambert v State, 93 So 708, 208 Ala 12

30 C J p 234 note 54

Discretion of court

There was no abuse of the discretion of the court in limiting cross-examination of state's character witness as to hearsay knowledge that deceased had violated liquor law, where deceased's reputation for peaceableness was concerned in murder case—State v Stone, 13 P 2d 427, 169 Wash 233

97. Del—State v Gordon, 181 A 361, 7 W W Harr 219

W Va—State v Walker, 115 S E 413, 92 W Va 499

30 C J p 234 note 55

98. W Va—State v Walker supra

99. Kan—State v Burton, 66 P 633, 63 Kan 602

1. Tex—Mason v State, 183 S W 1153, 79 Tex Cr 169—Childers v State 16 S W 903, 30 Tex App 160 **28 Am S R 899.**

2. Ala—Twitty v State 53 So 308, 168 Ala 59

Tex—Rogers v State, 70 S W 2d 188, 126 Tex Cr 39

Proof held insufficient

What witness thought he knew from his own knowledge and what he had heard as to deceased's having character of dangerous man was inadmissible as insufficient to show general character as 'dangerous, violent, bloodthirsty'—Graham v State 112 So 93, 22 Ala App 48

3. Pa—Commonwealth v Principatti, 101 A 53, 260 Pa 587

4. Mont—State v Jones, 139 P 411, 48 Mont 505

5. Ala—Williams v State 107 So 37, 21 Ala App 227

6. Ala—Jackson v State, 93 So 258, 18 Ala App 627

Colo—Lynch v People, 79 P 1015, 33 Colo 128

Ga—Ivey v State, 156 S E 290, 42 Ga App 357

Tex—Baker v State, 288 S W. 226, 105 Tex Cr 291.

dence admissible.[48] It is not permissible to show the reputation of deceased's family for violence.[49]

§ 275. —— Previous Quarrels, Ill Feeling, or Hostile Acts

Evidence of ill feeling or hostile acts on the part of the deceased toward the accused or of previous difficulties between them is admissible where the issue of self-defense is in the case and there is a connection between the previous difficulties and the crime charged, and evidence of difficulties with, or specific acts of violence by the deceased against, third persons may, in the discretion of the court, be admitted if the accused knew of the circumstances prior to the alleged crime, but details of prior difficulties are generally inadmissible. The accused's evidence is subject to rebuttal.

Where there is a claim supported by some evidence of self-defense,[50] or, as it has been well stated, where the proof justifies the giving of a charge on the law of self-defense,[51] accused may for the purpose of showing deceased to have been the aggressor, and the killing to have been necessary in self-defense, introduce evidence tending to show that deceased entertained hostile feelings toward him.[52] Thus he may show that there had been previous difficulties or quarrels between himself and deceased,[53] or the person assaulted,[54] and the cause of such difficulties,[55] explaining his own reason for being at the place where the difficulty occurred.[56] So, too, accused may show that previous to the killing deceased had been guilty of acts and conduct evincing hostility toward accused,[57] or of conduct which would tend to explain the motive of deceased in acting as the aggressor.[58] A previous quarrel between decedent and another concerning accused is admissible where it tends to confirm accused's story of the killing.[59] Mere declarations of deceased which do not show hostility may be excluded,[60] and an indictment returned at a former term charging deceased with the offense of shooting at accused is properly excluded as without probative value.[61]

On the question whether specific acts of violence have a relevancy independent of the general reputation of deceased, the authorities seem to be in a state of hopeless confusion, announcing rules ranging from that denying proof of specific acts of violence on the part of the deceased under any circumstances to the other extreme of holding such evidence admissible under all circumstances.[62] Gen-

48. Ala.—Berry v. State, 175 So. 407, 27 Ala. App. 507, certiorari denied 175 So. 412, 234 Ala. 414.
Mo.—State v. McGehee, 274 S.W. 70, 308 Mo. 560.
30 C.J. p. 235 note 94.
Killing in defense against third person see infra § 283.

Confederates of deceased.
In a murder prosecution exclusion of accused's testimony in support of his plea of self-defense as to the quarrelsome disposition of deceased's two brothers, against whom accused claimed he was also defending himself at the time of the killing, was held error.—State v. Kelly, 195 N.W. 614, 196 Iowa 897.

49. La.—State v. Hamilton, 49 So. 1001, 124 La. 132, 18 Ann.Cas. 981.
Tex.—Rhodes v. State, 7 S.W.2d 569, 570, 110 Tex.Cr. 353, quoting **Corpus Juris.**

50. Ala.—Sanders v. State, 7 So.2d 483, 242 Ala. 535.—Tillis v. State, 119 So. 215, 218 Ala. 527.
30 C.J. p. 235 note 96.

51. Ind.T.—Helms v. U. S., 52 S.W. 60, 2 Ind.T. 595.
Mo.—State v. Burns, 280 S.W. 1026, 1029, 312 Mo. 673, 44 A.L.R. 848, quoting **Corpus Juris.**
Wyo.—Durham v. State, 210 P. 934, 29 Wyo. 85.

52. Ala.—Robinson v. State, 176 So. 812, 235 Ala. 7, denying certiorari, App., 176 So. 811, 27 Ala.App. 577.
Colo.—Bershenyi v. People, 207 P. 591, 71 Colo. 432.
Ky.—Winkler v. Commonwealth, 17 S.W.2d 999, 229 Ky. 708.—Foure v. Commonwealth, 283 S.W. 958, 214 Ky. 620.—Griffin v. Commonwealth, 265 S.W. 327, 204 Ky. 784.
Mo.—State v. Burns, 280 S.W. 1026, 1029, 312 Mo. 673, 44 A.L.R. 848, quoting **Corpus Juris.**
Wyo.—Durham v. State, 210 P. 934, 29 Wyo. 85.
30 C.J. p. 235 note 98.

53. Ala.—Doss v. State, 139 So. 290, 224 Ala. 90.—Fancher v. State, 117 So. 423, 217 Ala. 700.—Davis v. State, 111 So. 645, 21 Ala.App. 649.—Mills v. State, 104 So. 889, 21 Ala.App. 46.—Woods v. State, 101 So. 314, 20 Ala.App. 200.
Ariz.—Burgen v. State, 256 P. 111, 32 Ariz. 111.
Ark.—Ross v. State, 25 S.W.2d 769, 181 Ark. 331.
Fla.—Deeb v. State, 179 So. 894, 903, 131 Fla. 362, citing **Corpus Juris.**
Ky.—Murphy v. Commonwealth, 266 S.W. 14, 205 Ky. 193.—Forman v. Commonwealth, 15 S.W.2d 150, 228 Ky. 696.
Miss.—Lee v. State, 134 So. 185, 160 Miss. 618.—Hester v. State, 110 So. 143, 144 Miss. 789.
Mo.—State v. Williams, 274 S.W. 50.
Wyo.—Durham v. State, 210 P. 934, 29 Wyo. 85.
30 C.J. p. 235 note 99.

54. Ala.—Craven v. State, 111 So. 767, 22 Ala.App. 39.—Ezzell v. State, 68 So. 578, 13 Ala.App. 156.
Ill.—People v. Dugas, 141 N.E. 769, 310 Ill. 291.
S.C.—State v. Kennedy, 141 S.E. 559, 143 S.C. 318.

55. Ky.—McCandless v. Commonwealth, 185 S.W. 1100, 170 Ky. 301.
Tex.—Becker v. State, 190 S.W. 185, 80 Tex.Cr. 186.
30 C.J. p. 236 note 2.

56. Ky.—McCandless v. Commonwealth, 185 S.W. 1100, 170 Ky. 301.

57. Ill.—People v. Rappaport, 200 N.E. 165, 362 Ill. 462.
Ky.—Ross v. Commonwealth, 259 S.W. 50, 202 Ky. 204.
Mo.—State v. Burns, 280 S.W. 1026, 1029, 312 Mo. 673, 44 A.L.R. 848, quoting **Corpus Juris.**
30 C.J. p. 236 note 4.

58. Ala.—Downs v. State, 93 So. 76, 18 Ala.App. 451.
Mo.—State v. Burns, 280 S.W. 1026, 1029, 312 Mo. 673, 44 A.L.R. 848, quoting **Corpus Juris.**
30 C.J. p. 236 note 5.
What happened on some previous occasions is only competent as illustrating the motives of the parties, or showing what they would reasonably do under the circumstances." Davidson v. Commonwealth, 264 S.W. 1051, 1053, 204 Ky. 114.

59. Ky.—Allen v. Commonwealth, 119 S.W. 795, 134 Ky. 110, 20 Ann.Cas. 884.

60. Ala.—Knott v. State, 96 So. 731, 19 Ala.App. 258.
S.C.—State v. Stockman, 64 S.E. 595, 82 S.C. 388, 129 Am.St.R. 888.

61. Ga.—Wynn v. State, 177 S.E. 695, 179 Ga. 874.

62. N.M.—State v. Ardoin, 216 P. 1048, 28 N.M. 641.

erally accused may show that on former occasions deceased assaulted or attacked,[63] beat,[64] waylaid,[65] or shot at[66] him, but, on the other hand, it has been held that accused may not show that deceased had beaten him[67] Previous specific acts of violence by decedent toward accused and others in his presence, may be shown[68]

While evidence of disconnected difficulties of deceased with third persons has been held incompetent in several cases,[69] this rule cannot apply to proof of a mental condition which would continue down to the time of the event under investigation and enter thereinto, as bearing on the question as to who was the probable aggressor,[70] and accordingly, if the circumstances were known to accused prior to the assault or homicide, the courts, in the exercise of reasonable discretion,[71] frequently hold such evidence admissible,[72] the admissibility in each case being determined on the facts of the individual case,[73] and the evidence being properly rejected where the acts were not so closely connected in point of time or occasion with the homicide as reasonably to indicate decedent's state of mind at the time of the homicide, or to produce apprehension of great bodily harm on the part of accused[74] So it has been held that accused cannot testify as to statements of deceased as to difficulties he had had with third persons[75] Testimony that deceased had been in trouble prior to the shooting is inadmissible, however, where the character of the alleged trouble was not shown,[76] evidence of specific acts of misconduct not shown to have a tendency to characterize deceased as a violent or dangerous man is not admissible[77] Specific acts of violence not known to accused prior to the homicide ordinarily cannot be shown in evidence,[78] although it has been held that if such acts relate to the same transaction, or reflect on the conduct or motives of the persons involved, and the aggressor's identity is doubtful, the evidence is admissible[79] Information to accused of other such acts by decedent may be shown[80]

Words and acts of one of a class of persons, importing hostility toward another, on a charge of homicide committed on one of the class by the other, while decedent was apparently in pursuit of the

63. Mo—State v Bundy, 44 S W 2d 121, 123, citing **Corpus Juris.**
W Va—State v Stanley, 164 S E 251, 112 W Va 310
30 C J p 236 note 9

64. Tex—Williams v State, 70 S W 756, 44 Tex Cr 300

65. Ala—Gunter v State, 20 So 632, 111 Ala 23, 56 Am S R 17
30 C J p 236 note 11

66 Ala—Nelson v State, 68 So 573, 13 Ala App 28

67. Ala—Mills v State 104 So 889, 21 Ala App 46

68 Mont—State v Hanlon, 100 P 1035, 38 Mont 557
30 C J p 236 note 4

69 Ark—Ross v State, 25 S W 2d 769, 181 Ark 331
Mo—State v Creighton, 52 S W 2d 556, 330 Mo 1176
Admissibility to prove character of deceased see supra § 272 f

70 Mo—State v Creighton supra

71. N M—State v Ardoin, 216 P 1018, 28 N M 641

Good faith of accused
The trial court has a sound discretion to determine whether a prima facie showing of good faith by accused has been established to warrant the reception of evidence of prior acts of violence by deceased on other persons—People v Soules, 106 P 2d 639, 41 Cal App 2d 298

Held no error in excluding evidence
Okl—Murphy v State, 112 P 2d 438, 72 Okl Cr 1

72. Ariz—Murphy v State, 264 P 685, 33 Ariz 336—Mendez v State, 229 P 1032, 27 Ariz 82
Ind—McKee v State, 151 N E 372, 198 Ind 590
Mont—State v Jennings, 28 P 2d 448, 96 Mont 80, 12 A L R 375
N M—State v Davis, 234 P 311, 30 N M 395
Okl—Murphy v State 112 P 2d 438, 72 Okl Cr 1—Sweet v State 107 P 2d 817, 70 Okl Cr 443—Edwards v State, 48 P 2d 1087, 58 Okl Cr 15
Tex—Jackson v State, 147 S W 2d 1078, 141 Tex Cr 251—Beckham v State 109 S W 2d 761, 133 Tex Cr 206—Romine v State, 101 S W 2d 812, 132 Tex Cr 52—Leal v State, 17 S W 2d 1064, 112 Tex Cr 479—Bailey v State 17 S W 2d 1051, 112 Tex Cr 550—Knighton v State 271 S W 906, 100 Tex Cr 516—Ferguson v State, 253 S W 290, 95 Tex Cr 212
Va—Burford v Commonwealth, 20 S E 2d 509, 179 Va 752

Hostile attitude toward other officers
In homicide prosecution against constable testimony concerning deceased's hostile attitude toward officers previously serving process on deceased is admissible—Carter v State, 139 So 618, 162 Miss 263

73 Ariz—Murphy v State, 264 P 685, 33 Ariz 336—Mendez v State, 229 P 1032, 27 Ariz 82

74. Ariz—Mendez v State, supra
S C—State v Mill, 123 S E 817, 129 S C 166

Statement of third person to accused
Where his state of mind could not have been affected thereby excluding question to accused whether some one told him of deceased having been in fight where he had razor was held proper—State v Padula 138 A 456, 106 Conn 451

75 Pa—Commonwealth v Romanic, 166 A 902, 311 Pa 415
30 C J p 243 note 24

76. Tex—Jackson v State, 147 S W 2d 1078, 141 Tex Cr 251

77. Tex—Jackson v State, supra

78. Cal—People v Parker 40 P 2d 836, 4 Cal App 2d 421
Okl—Short v State, 125 P 2d 227, 74 Okl Cr 272
Tex—Musslewhite v State, 132 S W 2d 858, 137 Tex Cr 590—Delaney v State 59 S W 2d 397, 123 Tex Cr 129—McRoberson v State 38 S W 2d 82, 117 Tex Cr 105—Arredondo v State 290 S W 1105, 106 Tex Cr 78 Collins v State 259 S W 941, 97 Tex Cr 31—Ferguson v State 253 S W 290, 95 Tex Cr 212—Nicholson v State, 239 S W 206, 91 Tex Cr 383
W Va—State v Porter, 127 S E 386, 98 W Va 390
Facts unknown to accused generally see infra § 279

79. Ariz—Lepker v State, 11 P 2d 351, 40 Ariz 186

80 Mont—State v Jennings, 28 P 2d 448, 96 Mont 80, 121 A L R 375 State v Hanlon, 100 P 1035, 38 Mont 557
Tenn—Holt v State, 92 S W 2d 397, 401, 170 Tenn 76, quoting **Corpus Juris.**

common hostile purpose, are held admissible in favor of accused for the same purpose and under the same limitations as evidence of specific acts of violence of decedent[81] Thus, in a prosecution of an officer for killing a striker, evidence of conduct of, and assaults by, other strikers is admissible to show the condition of accused's mind[82] Such evidence, however, may be inadmissible for remoteness,[83] or, it has been held, for lack of evidence of the connection of deceased therewith[84]

Testimony pertaining to prior difficulties between accused and third persons wholly disconnected with the homicide in question is inadmissible as bearing on the question of self-defense,[85] although it has been held that where there is evidence that deceased and his companions were the aggressors, evidence showing bias or ill will of deceased's companions toward accused is admissible[86]

Necessity of issue of self-defense Where the law of self-defense is not in the case, evidence of the hostile feelings[87] or acts of deceased,[88] or of previous quarrels,[89] is irrelevant and inadmissible Where there was no danger, evidence of prior difficulties is inadmissible on the issue of quantum of punishment[90] Where the evidence showed without contradiction that accused was the aggressor, evidence that deceased was the aggressor in a former difficulty is inadmissible[91]

Connection with homicide There must be some connection between the previous difficulties and the homicide,[92] accused cannot go back to a remote period and prove a particular quarrel or grudge unless he also proves a continued difference flowing from that source,[93] but where there has been a series of difficulties down to the time of the killing accused may introduce evidence of previous affrays, difficulties, and attacks, although remote in time and place, the weight thereof being for the jury[94]

Details While it has been held that the details of the former difficulty are admissible to show who was the aggressor therein,[95] the general rule is that the details or particulars of the former difficulty cannot be shown[96] where they are in no manner connected with the homicide,[97] but this rule does not prevent the introduction of facts which show the general nature and gravity of the former difficulty or disagreement between the parties,[98] as that

81. Mont—State v Hanlon, 100 P 1035, 38 Mont 557
Threats of third person against accused see infra § 277

82 Tex—Pearce v State, 288 S W 227, 105 Tex Cr 369
Imminence and apprehension of danger generally see infra § 278

83. Pa—Commonwealth v Principatti 104 A 53, 260 Pa 587

84. Pa—Commonwealth v Principatti supra

85. Ala—Kirkland v State, 96 So 892, 209 Ala 661
Tex—Payne v State, 272 S W 788, 100 Tex Cr 241

86. Ind—Everett v State, 195 N E 77, 208 Ind 115

87. Ala Rutledge v. State, 7 So 335, 88 Ala 85
30 C J p 236 note 14

88. Ala—Maxwell v State, 125 So 682, 220 Ala 419
Ariz—Lepker v State, 11 P 2d 351, 40 Ariz 186—Murphy v State, 264 P 685, 33 Ariz 336
Cal—People v Soules, 106 P 2d 639, 41 Cal App 2d 298
La—State v Handy, 164 So 616, 183 La 653—State v Williams, 98 So 738, 155 La 9
30 C J p 236 note 15

89. Ala—Fancher v State, 117 So 423, 217 Ala 700
La—State v Scott, 3 So 2d 545, 198 La 162—State v Thornhill, 178 So 343, 188 La 762
30 C J p 236 note 16.

Where accused is aggressor in the difficulty resulting in the killing or where he approaches deceased for the purpose of bringing on the difficulty, accused is precluded from introduction of evidence of former difficulties with deceased—Sanders v State, 7 So 2d 483, 242 Ala 535

90. Ariz—Campbell v Territory, 125 P 717, 14 Ariz 109

91. Miss—Huggins v State, 60 So 209, 103 Miss 227

92 La—State v Vincent, 5 So 2d 327, 198 La 1037
S C—State v Peak, 133 S E 31, 134 S C 329
30 C J p 236 note 19

93. Ark—Crafford v State, 273 S W 13, 169 Ark 225
Iowa—State v Johnston, 267 N W 698, 221 Iowa 933
La—State v Vincent, 5 So 2d 327, 198 La 1037
30 C J p 236 note 20

94 Ga—Baker v State, 83 S E 531, 142 Ga 619
30 C J p 236 note 21

95. Iowa—State v Blee, 111 N W 19, 133 Iowa 725
Miss—Brown v State, 40 So 737, 88 Miss 166

96. Ala—Doss v State, 139 So 290, 224 Ala 90—Maxwell v State, 125 So 682, 220 Ala 419—Fancher v State, 117 So 423, 217 Ala 700—McClusky v State, 96 So 925, 209 Ala 611—White v State, 96 So 709, 209 Ala 546—Buffalow v State, 143 So 907, 25 Ala App 227, certiorari denied 143 So 908, 225 Ala 513—Davis v State, 111 So 645, 21 Ala App 619—Mills v State, 104 So 889, 21 Ala App 46—Knott v State, 96 So 731, 19 Ala App 258
Cal—People v Achal, 14 P 2d 773, 125 Cal App 652
Fla—Deeb v State, 179 So 894, 131 Fla 362
Ky—Griffin v Commonwealth 265 S W 327, 204 Ky 783—Davidson v Commonwealth 264 S W 1051, 204 Ky 414—Frazier v Commonwealth 238 S W 769, 194 Ky 240
La—State v Pichon, 97 So 463, 154 La 334
Mo State v Bundy, 44 S W 2d 121, 123 citing **Corpus Juris.**
S C—State v Kennedy, 141 S E 559, 143 S C 318—State v Williams, 118 S E 783, 125 S C 385
30 C J p 236 note 23

97. Iowa—State v Blee, 111 N W 19, 133 Iowa 725
Miss—Hughes v State, 38 So 33
30 C J p 237 note 24

98 Ala—Buffalow v State, 122 So 633, 219 Ala 407—White v State, 96 So 709, 209 Ala 546—Mills v State, 104 So 889, 21 Ala App 46—Jones v State, 104 So 878, 21 Ala App 33—Wright v State, 99 So 52, 19 Ala App 562

Evidence held admissible
Under evidence that deceased came toward accused with two bricks in hands during argument on day of murder, testimony as to how many times deceased ordered accused off

weapons were used[99] The trial court is allowed a latitude of discretion in determining whether evidence as to previous quarrels and assaults relates to mere details or to a matter of substance[1]

Rebuttal The prosecution may prove that the hostile feeling was on the part of accused rather than of deceased,[2] or may contradict accused's statement that ill feeling existed between him and deceased,[3] and may prove that deceased did not assault accused,[4] for that purpose showing what did occur at the time referred to in accused's evidence[5] All the facts leading up to the killing, including a previous fight between the persons involved, may be shown[6] Where the victim was the husband of accused, and the defense was that accused was compelled to kill in self-defense against the attack of deceased, testimony tending to show accused's illicit relations with another some years prior to the killing is inadmissible, such infidelity not depriving accused of her right of self-defense against violence offered by deceased immediately prior to the killing[7] In a prosecution for murder growing out of an attempt to serve process, where the defense was self-defense, and accused introduced proof that decedent had committed a crime, and that the result of serving such process would be to place in the hands of the officers the evidence of such offense, the state's rebuttal is limited to such evidence as decedent could have introduced in his defense had he been on trial for the offense.[8] Where the state has introduced evidence of friendly relations between accused and the person assaulted or killed, the refusal to permit accused to contradict such evidence is error.[9]

§ 276. —— Threats of Deceased or Person Assaulted against Defendant

a Communicated threats in general
b Nature of threats
c. Necessity of claim or showing of self-defense
d. Necessity of communication of threats to accused
e. Rebuttal of evidence of threats

a. Communicated Threats in General

Where it is claimed that accused acted in self-defense, evidence of threats against him by deceased or the person assaulted, of which he had knowledge, and that such threats were communicated to him, if otherwise competent, is admissible, but such evidence should specify the occasion, the person making them, the time when they were made, and the character of the threats

Where it is claimed that accused's act was in self-defense, evidence of threats against him by deceased or the person assaulted, whether made to accused directly or to third persons, where accused knew thereof, is admissible[10] to show that deceased

deceased's premises was admissible to determine who was aggressor in subsequent fatal altercation —Robertson v State, 172 So 250, 233 Ala 442

99. Ala —Doss v State, 139 So 290 224 Ala 90—Buffalow v State, 122 So 633 219 Ala 407—Woods v State, 101 So 314, 20 Ala App 200

1. Iowa —State v Gabriella, 144 N W 9, 163 Iowa 297

2 Ala —Nickerson v State, 88 So 905 205 Ala 684
30 C J p 237 note 26

3. Ark —Harris v State, 2 S W 2d 66, 175 Ark 1166

4. Ky —White v Commonwealth, 102 S W 1199, 125 Ky 699, 31 Ky L 720

5. Ky —White v Commonwealth, supra.

6. Ky —Hamilton v Commonwealth, 18 S W 2d 995, 230 Ky 207
S C —State v Moody, 77 S E 713, 94 S C 26

7. Tex —Smith v State, 250 S W 1025, 94 Tex Cr 427

8. Okl —Gibbons v Territory, 115 P 129, 5 Okl Cr 212

9. Miss —Cunningham v State, 42 So 172, 89 Miss 356.

10. Ala —Narrell v State, 132 So 47, 222 Ala 115, reversing 132 So 45 24 Ala App 149, mandamus denied Ex parte Narrell 132 So 47, 222 Ala 13—Craven v State, 111 So 767, 22 Ala App 39—Terry v State, 105 So 386, 21 Ala App 100 —Mills v State 104 So 889, 21 Ala App 46—Woods v State, 101 So 314, 20 Ala App 200

Ariz —Burgen v State, 256 P 111, 32 Ariz 111

Ark —Clements v State, 133 S W 2d 844, 199 Ark 69

Cal —People v McGann, 230 P 169, 194 Cal 688—People v Vallier, 293 P 621 109 Cal App 733

Ill —People v Stapf, 155 N E 360, 324 Ill 404

Ind —Southerland v State, 197 N E 841, 209 Ind 308

Ky —Banks v Commonwealth, 126 S W 2d 1122, 277 Ky 647—Commonwealth v Girkey, 42 S W 2d 513, 240 Ky 382—Murphy v Commonwealth, 266 S W 33, 205 Ky 493

Mich —People v Giacalone, 217 N W 758, 242 Mich 16—People v Dunn, 206 N W 568, 233 Mich 185

Miss —Butler v State, 176 So 589, 179 Miss 865

Mo —State v Williams, 274 S W 50

N C —State v Rice, 24 S E 2d 483, 222 N C 634

Okl —Compton v State, Cr, 122 P 2d 819—Stanfield v State, 235 P 256, 30 Okl Cr 82

S C —State v Bigham, 131 S E 603 133 S C 491—State v Williams, 118 S E 783, 125 S C 385

Tex —Ross v State, Cr, 29 S W 2d 381—Ball v State, 18 S W 2d 641, 113 Tex Cr 58—Knighton v State, 271 S W 906, 100 Tex Cr 516

W Va —State v Hardin, 112 S E 401, 91 W Va 149

Wyo —State v Aragon, 285 P 803, 41 Wyo 308

30 C J p 237 note 31½

Admissibility of all threats made

(1) Refusal to admit all threats and previous manifestations of hostility by deceased against accused was error, where there was recent declaration of reformation by deceased and it became material point for decision whether that declaration of reformation was in good faith, and whether accused would be justified in disbelief of good faith thereof —Hendrix v State, 161 So 151, 172 Miss 589

(2) In homicide prosecution, the fact that testimony as to threats against accused by deceased had been adduced on issue of self-defense would not preclude introduction of testimony of other witnesses as to

was the aggressor,[11] to throw light on accused's motive and show whether in killing deceased or in making the assault with which he is charged he was actuated by malice or acted in the belief that it was necessary to take life to preserve his own life or save himself from serious bodily harm,[12] and as relevant to the question whether accused had reasonable cause to apprehend an attack fatal to life or fraught with peril of great bodily injury, and hence was justified in acting on a hostile demonstration of less pronounced character than would have justified his act if such threats had not preceded it,[13] but for no other purposes.[14] Evidence of threats must be otherwise competent[15] and should specify the occasion,[16] the person making them,[17] the time when they were made,[18] and the character of the threats[19] or the words used.[20] Threats by deceased may be too remote in time to be relevant,[21] but evidence of threats is not to be excluded for remoteness if the court can see that they would legitimately affect accused's apprehensions,[22] and generally the remoteness affects only the weight of the evidence.[23] There is no error in excluding evidence of threats at a remote time when there is uncontradicted evidence of recent threats.[24] Evidence of the communication of such threats to accused is admissible[25] without preliminary proof that the threats had in fact been made,[26] and may be given by any person who heard the communication,[27] but any advice or warning given him at the time of the communication should be excluded.[28] The method of communication is immaterial, the material point being the fact of communication.[29] An offer to prove the repetition by another to the prisoner of a

further threats, or repetition of threats.--Vinson v State, 194 So 705, 29 Ala App 234

(3) It has been held, however, that exclusion of evidence of threats made by deceased to kill accused was not error, where such evidence would have been merely accumulative.—Fugler v State, 7 So 2d 873, 192 Miss 775

Threatening gesture

Testimony as to deceased's threatening gesture was admissible to rebut claim that accused provoked difficulty, and to show self-defense.—Crowley v State, 35 S W 2d 437, 117 Tex Cr 372

11. Ala.—Narrell v State, 132 So 47, 222 Ala 145, reversing 132 So 45, 24 Ala App 119, mandamus denied Ex parte Narrell, 132 So 47, 222 Ala 13; Robinson v State, 176 So 811, 27 Ala App 577, certiorari denied 176 So 812, 235 Ala 7—Downs v State, 93 So 76, 18 Ala. App 451
Ark.—Cook v State, 258 S W 136, 162 Ark 205
Ky.—Davidson v Commonwealth, 87 S W 2d 119, 261 Ky 158—Colson v Commonwealth, 255 S W 60, 200 Ky 402
La.—State v Vernon, 2 So 2d 629, 197 La 867
Okl.—Compton v. State, Cr., 122 P 2d 819
Tex.—Ainsworth v State, 56 S W 2d 157, 122 Tex Cr 483—Crowley v State, 35 S W 2d 437, 117 Tex Cr 372—Green v State, 23 S W 2d 721, 113 Tex Cr 555—Holt v State, 249 S W 481, 94 Tex Cr 46.
30 C J p 237 note 32

12. Ala.—Binns v State, 151 So 611, 25 Ala App 590
Del.—State v Lynch, 128 A 564, 2 W W Harr 597
Ky.—Winkler v Commonwealth, 17 S W 2d 999, 229 Ky 708
Tex.—Crowley v State, 35 S W 2d 437, 117 Tex Cr 372—Holt v State, 249 S W 481, 94 Tex Cr 46
W Va.—State v Laura, 116 S E 251, 93 W Va 250
Wyo.—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 237 note 33

13. Ky.—Davidson v Commonwealth, 87 S W 2d 119, 261 Ky 158
Okl.—Edwards v State, 48 P 2d 1087, 58 Okl Cr 15
30 C J p 238 note 34

14. Ark.—McGough v State, 177 S W 398, 119 Ark 57—Brooks v State, 108 S W 205, 85 Ark 376
30 C J p 238 note 35

15. Ark.—Cook v State, 258 S W 136, 162 Ark 205
Tex.—Mercer v State, 13 S W 2d 689, 111 Tex Cr 657
30 C J p 238 note 36

Record held not to reveal improper exclusion of testimony

Cal.—People v Martinez, 88 P 2d 758, 31 Cal App 2d 625

16. Ala.—May v State, 52 So 602, 167 Ala 36

17. Iowa.—State v Blee, 111 N W 19, 133 Iowa 725
30 C J p 238 note 38

18. Ind.—Gillooly v State, 58 Ind 182
30 C J p 238 note 39

19. Miss.—Brice v State, 148 So 348, 167 Miss 255, suggestion of error overruled 150 So 662

20. Ala.—Narrell v State, 132 So 47, 222 Ala 145, reversing 132 So 45, 24 Ala App 119, mandamus denied Ex parte Narrell, 132 So 47, 222 Ala 13

21. Iowa.—State v Johnston, 267 N W 698, 221 Iowa 933
30 C J p 238 note 40

22. Wyo.—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 238 note 41.

Threats held not too remote

Ky.—Banks v Commonwealth, 126 S W 2d 1122, 277 Ky 647

23. Wyo.—Durham v State, 210 P 934, 29 Wyo 85

24. Fla.—Stafford v State, 39 So 106, 50 Fla 134

25 Cal.—People v Alpine, 254 P 281, 81 Cal App 456
30 C J p 238 note 43

Evidence held inadmissible

(1) Admitting testimony by accused's daughter showing statements to mother regarding deceased's threats and excluding what mother said was held not erroneous.—Howard v Commonwealth, 27 S W 2d 410, 234 Ky 45

(2) Ruling sustaining commonwealth's objection to question why deceased wanted to kill accused must be sustained where accused's avowal as to deceased's threats against him did not name persons who communicated threats to him, and he had previously testified thereon in his direct examination.—Simmons v Commonwealth 269 S W 732, 207 Ky 570

26 Okl.—Rogers v State, 127 P 365, 8 Okl Cr 226
30 C J p 238 note 44

27 Tex.—Collins v State, 227 S W 189, 88 Tex Cr 358

Evidence not hearsay

On issue of self-defense evidence that witness heard deceased's threats against accused communicated to defendant is not inadmissible as hearsay.—People v Alpine, 254 P 281, 81 Cal App 456

28. Ala.—Davis v State, 113 So 393, 216 Ala 475

Exclusion held not prejudicial

Ky.—Hanna v Commonwealth, 46 S W 2d 1098, 242 Ky 584

29. Ga.—Thurman v State, 81 S E 796, 14 Ga App 543
30 C J p 238 note 46.

threat by deceased to a prisoner charged with murder is properly excluded where there is no suggestion that the prisoner did not hear the threat when made, or that he had forgotten it[30] The partial execution of threats made may be shown[31] In corroboration of evidence of threats by deceased against accused, which has been contradicted by evidence of amicable relations between their respective families, accused may show threats against other members of his family by deceased[32]

b. Nature of Threats

In order that alleged threats be provable, they must have been actual threats to do serious harm made by deceased or reported to accused as such, and generally they must have been directed against accused, but the mere fact that the threats were conditional or were made indirectly does not make them inadmissible Significant surrounding circumstances may be shown, and evidence corroborating the evidence of threats is admissible

In order that alleged threats may be provable in favor of accused they must have been actual threats made by deceased or must at least have been reported to accused as actual threats coming from deceased[33] The threats must have been of a nature to show the intention or desire of deceased to take accused's life,[34] or at least to do him serious bodily harm[35] The fact that threats of deceased were to a certain degree conditional does not render them inadmissible,[36] even though the event on which the condition is based has not transpired[37] The fact that the threats were made indirectly or by innuendo does not make proof of them irrelevant[38] Statements in the presence of deceased as to his prospective action, to which he did not dissent, have been held admissible[39] The fact that threats are vague and indefinite is held no bar to their admission,[40] but the opposite view is also maintained[41]

Direction against accused It has been held that, in order to show deceased's motive or state of mind, evidence of threats of deceased are admissible although they are not actually directed against accused,[42] or are directed against third persons,[43] but as a general rule, the threats must have been directed against accused,[44] and mere impersonal threats are not admissible[45] However, it is not necessary that accused should have been named in the threats, it being sufficient if the circumstances show that he was the person against whom they were directed,[46] and evidence of threats against a class to which accused belongs is admissible, it being for the jury to determine whether they were made against accused[47] Evidence of general threats against any

30. N Y—Thomas v People, 67 N Y 218

31. Okl—Price v State, 98 P 447, 1 Okl Cr 358

32 Ky—Rutherford v Commonwealth, 13 Bush 608

33. Tex—Wade v State, 263 S W 589, 98 Tex Cr 27
30 C J p 238 note 50

Remarks not amounting to threats

(1) Statement of deceased to the effect that third person ought to go down there and give accused a whipping—Burris v State, 273 S W 19, 168 Ark 1145

(2) Statement that accused ought to be killed—Knott v State, 96 So 731, 19 Ala App 258

(3) Statement of intent to "kick" employee "off of the job"—Holt v State, 249 S W 481, 94 Tex Cr 46

(4) In prosecution for attempt to kill testimony of accused's daughter that accused had given her a whipping for associating with the prosecuting witness, that she had related the fact to prosecuting witness, and that he had told her that "he would see about it," as against contention that it was properly stricken out showed an uncommunicated threat—Johnson v State, 101 P 2d 265, 69 Okl Cr 51

(5) Other instances see 30 C J p 278 note 50 [b].

34. La—State v Compagnet, 21 So 46, 48 La Ann 1170
30 C J p 238 note 51

35 Tex—Gregory v State, Cr, 43 S W 1017
Wash—State v Gruber, 272 P 89, 150 Wash 66
30 C J p 239 note 52

36 Ky—McCandless v Commonwealth, 185 S W 1100, 170 Ky 301
30 C J p 239 note 53

37 Ala—Wilson v State 54 So 572, 171 Ala 25
Contra Harbour v State, 37 So 330 140 Ala 103

38. Ala—Tarwater v State, 129 So 708 24 Ala App 28
30 C J p 239 note 56

39 Ind—Maxfield v State, 11 N E 618, 110 Ind 591

40 Mo—State v McNally, 87 Mo 644
Mont—State v Whitworth, 133 P 364, 47 Mont 424.

Implied threat

Language which did not contain express threat, but was of such import that jury might have concluded it was intended as threat, is admissible—Stoddard v State, 276 S W 358, 169 Ark 594

41. Ky—Cardwell v Commonwealth, 46 S W 705, 20 Ky L 196
Okl—Phelps v State, 78 P 2d 1068, 64 Okl Cr 240
Tex—Brazzell v State, 266 S W 788 99 Tex Cr 33, leave to file second motion for rehearing denied 266 S W 1119 99 Tex Cr 33

42. Ky—Commonwealth v Girkey, 42 S W 2d 513, 240 Ky 382—Commonwealth v Thomas, 104 S W 326, 31 Ky L 899

43. Ga—Whitsett v State, 117 S E 376 155 Ga 522

44. Ark—Lewis v State, 244 S W 478, 155 Ark 205
Miss—Young v State, 117 So 119, 150 Miss 787
Mont—State v Houston 97 P 2d 330 331 109 Mont 303, citing **Corpus Juris.**
N J—State v Di Dolce, 160 A 516, 109 N J Law 233
Okl—Phelps v State, 78 P 2d 1068, 64 Okl Cr 240
Tex—Gilliam v State, 53 S W 2d 60, 121 Tex Cr 329
30 C J p 239 note 60

45. Ky—Commonwealth v Girkey, 42 S W 2d 513, 240 Ky 382
Tex—Brazzell v State, 266 S W 788, 99 Tex Cr 33, leave to file second motion for rehearing denied 266 S W 1119, 99 Tex Cr 33.
30 C J p 239 note 61

46. W Va—State v Cassim, 163 S E 769 112 W Va 92
30 C J p 239 note 62

47 Ala—Tarwater v State, 129 So 708, 24 Ala App 28
30 C J p 239 note 63.

person found in a certain situation or attempting to do certain things is admissible where it appears that deceased found accused within the scope of the threats [48]

Accompanying circumstances Deceased's attitude and manner in making the threat may be shown,[49] and other significant surrounding circumstances,[50] although particular circumstances unknown to accused may be immaterial [51] Other parts of the conversation which would aid accused in judging the weight to be given to threats are held admissible,[52] but it is held, on the other hand, that the details of the conversation between witness and decedent are inadmissible [53]

Corroboration Evidence that deceased or the person assaulted waylaid accused is admissible to corroborate evidence of threats against accused [54]

c. Necessity of Claim or Showing of Self-Defense

In order that evidence of threats of the person killed or assaulted against accused may be admissible, the law of self-defense must be in the case.

In order that evidence of threats of deceased against accused may be admissible, the law of self-defense must be in the case, that is to say, there must be a claim on the part of accused that the killing was necessary to prevent the loss of his own life or serious bodily injury to himself through deceased, and some evidence in support of such claim, or as it has been expressed, there must have been some overt act on the part of deceased [55] The same rule applies in a prosecution for assault with intent to kill or murder as to evidence of threats by the person assaulted [56] Evidence of such threats is not admissible where accused was the aggressor or assailant in the difficulty in which the killing occurred,[57] where accused brought on or sought the difficulty,[58] where the combat was mutual,[59] where deceased was fleeing from accused at the time,[60] where accused was in no danger at the time,[61] or

48. Ark—Rogers v State, 237 S W 435, 152 Ark 40
30 C J p 239 note 64

49. Ala—Woods v State, 101 So 314, 20 Ala App 200
Tex—Mason v State, 183 S W 1153 79 Tex Cr 169
Physical or mental state as matter of fact or opinion generally see Criminal Law § 871

50. Ala—Tarwater v State, 129 So 708, 24 Ala App 28—Woods v State, 101 So 314, 20 Ala App 200
Ark—Clark v State, 259 S W 378, 163 Ark 180
30 C J p 239 note 66

51. Mo—State v Parker, 72 S W 650, 172 Mo 191
30 C J p 239 note 67

52. Miss—Powell v State, 110 So 515, 145 Miss 252
30 C J p 239 note 68

53. Ala—Bluett v State, 44 So 84, 151 Ala 41—Nolen v State, 109 So 295 21 Ala App 455

54. Ala—Gunter v State, 20 So 632, 111 Ala 23, 56 Am S R 17

55. Ala—Hall v State, 94 So 59, 208 Ala 199 -Ferguson v State, 137 So 315, 21 Ala App 491, certiorari denied 137 So 317, 223 Ala 521 -Holland v State, 132 So 601, 21 Ala App 199—Middleton v State, 113 So 625, 22 Ala App 146—Patterson v State, 109 So 375, 21 Ala App 464, certiorari denied 109 So 922 215 Ala 699—Crosby v State, 102 So 459, 20 Ala App 344, certiorari denied Ex parte Crosby, 102 So 461, 212 Ala 313
Ark—Wilson v State, 42 S W 2d 378, 184 Ark 252
Cal—People v Spraic, 262 P. 795, 87 Cal App. 724.
Ga—Davis v State, 153 S E 203, 41 Ga App 366
Ill—People v Moore, 14 N E 2d 494, 368 Ill 455—People v Stapf, 155 N E 360, 324 Ill 404
La—State v Vernon, 2 So 2d 629 197 La 867—State v Thornhill, 178 So 343, 188 La 762—State v Williams, 171 So 52, 185 La 849—State v Washington, 166 So 669, 184 La 541—State v Maines, 164 So 921, 183 La 499—State v Avery, 145 So 535, 176 La 264—State v Jefferson, 116 So 391, 165 La 941
Mich—People v Cellura, 284 N W 613, 288 Mich 54
Miss—Kelly v State, 126 So 194, 156 Miss 535—Reece v State, 123 So 892 154 Miss 862
Mo—State v Whitchurch, 96 S W 2d 30, 339 Mo 116—State v Baublits, 27 S W 2d 16, 324 Mo 1199
Okl—Edwards v State, 48 P 2d 1087, 98 Okl Cr 15
Wash—State v Walton, 228 P 841, 130 Wash 649
30 C J p 239 note 71

"Overt act," the proof of which is necessary to justify introduction of evidence of prior threats and dangerous character of deceased in homicide prosecution, is a hostile demonstration of such character as to create in the mind of a reasonable person the belief that he is in immediate danger of losing his life or of suffering great bodily harm—State v Straener, 182 So 571, 190 La 457

56. Mo—State v Layton, 58 S W 2d 454, 332 Mo 216
30 C J p 240 note 72

57. Iowa—State v Matheson, 261 N W 787, 220 Iowa 132
La—State v Leslie, 120 So. 614, 167 La 967—State v Dreher, 118 So 85, 166 La 921, certiorari denied Dreher v State of Louisiana, 49 S Ct 36, 278 U S 641, 73 L Ed 556—State v Harvey 106 So 28, 159 La 674, error dismissed Harvey v State, 47 S Ct 20, 273 U S 635—State v Poole, 100 So 613, 156 La 434
Miss—Salmon v State, 118 So 610, 151 Miss 539
Pa—Commonwealth v Tyrell, 145 A 855 296 Pa 332
30 C J p 240 note 73

58 Ala—Sanders v State, 7 So 2d 483, 242 Ala 535
Pa—Commonwealth v Tyrell, 145 A 855 296 Pa 332
30 C J p 240 note 74

59. Okl—Hudson v State, 288 P 500, 48 Okl Cr 54
Tex—Foreman v State, 26 S W 212, 33 Tex Cr 272

60. N M—Thomason v Territory, 13 P 223, 4 N M 150
Okl—Hudson v State, 288 P 500, 48 Okl Cr 54

61. Ala—Sanders v State, 7 So 2d 483, 242 Ala 535
Okl—Gina v State, 239 P 685, 31 Okl Cr 428
30 C J p 240 note 77

Abandonment of aggression

In prosecution for manslaughter where deceased was the aggressor but, after accused's first shot, which missed, deceased raised his hands and said "I give," but accused fired two more shots which struck deceased, there was no evidence tending to show that killing was in self-defense, and exclusion of uncommunicated threats by deceased against accused was not error—State v Vernon, 2 So 2d 629, 197 La. 867.

had no reason to believe himself to be in danger,[62] where there was nothing sufficient to justify accused in believing that deceased was about to carry out his threats,[63] where accused could have avoided killing deceased,[64] or where accused waylaid and killed deceased,[65] but evidence of threats should not be excluded on the ground that accused was the aggressor, where his evidence sustains the theory that he did nothing except what he had a right to do at the opening of the difficulty.[66] In some jurisdictions the court is vested with discretion to determine the sufficiency of the evidence to show an overt act on the part of deceased,[67] and it is said there must be not merely evidence, but proof, of an overt act to justify the admission of threats.[68] Other authorities hold that, where the evidence does not authorize the conclusion that there was nothing in the conduct of deceased to induce the belief of a purpose to execute his threat, accused should be given the benefit of the rule applicable to previous threats communicated to him.[69] The sufficiency of the testimony of accused as a foundation for evidence of threats has been sustained,[70] but other authorities hold the statement of accused insufficient for this purpose,[71] even though sworn.[72]

d. Necessity of Communication of Threats to Accused

Although as a general rule evidence of uncommunicated threats of deceased against defendant is not admissible, such evidence may be admitted to show that deceased was probably the aggressor and to corroborate evidence of communicated threats

It has been laid down as a general rule that threats of deceased against accused are not admissible in evidence unless such threats were communicated to accused before the homicide,[73] but there are important modifications of this rule. Thus in case the evidence leaves it doubtful as to whether or not deceased was the aggressor in the difficulty in which the killing occurred as claimed by accused, evidence of threats of deceased against accused, even though not communicated to him, tends to show deceased's animus toward accused and bears on the probability of his having been the aggressor, and hence is admissible for this purpose,[74] and evidence of uncommunicated threats is also admis-

62. Cal.—People v. Spraic, 262 P. 795, 87 Cal. App. 724.
Mich.—People v. Cook, 39 Mich. 236, 33 Am. R. 380.

63. La.—State v. Cosgrove, 7 So. 714, 42 La. Ann. 753.
Okl.—Reed v. State, 103 P. 1042, 2 Okl. Cr. 589.

64. Ala.—Sanders v. State, 7 So. 2d 483, 242 Ala. 535.
Ky.—Hays v. Commonwealth, 14 S. W. 833, 12 Ky. L. 611.

65. Tex.—Gonzales v. State, 31 Tex. 195; King v. State, 9 Tex. App. 515.

66. Colo.—Warford v. People, 92 P. 24, 41 Colo. 203.

67. La.—State v. Thornhill, 178 So. 343, 188 La. 762—State v. Jones, 145 So. 9, 175 La. 1066—State v. Dreher, 118 So. 85, 166 La. 924, certiorari denied Dreher v. State of Louisiana, 49 S. Ct. 36, 278 U.S. 641, 73 L. Ed. 556.
30 C.J. p. 240 note 83.

68. La.—State v. Straener, 182 So. 571, 190 La. 457—State v. Thornhill, 178 So. 343, 188 La. 762—State v. Washington, 166 So. 669, 184 La. 544—State v. Maines, 164 So. 321, 183 La. 499—State v. Dreher, 118 So. 85, 166 La. 924, certiorari denied Dreher v. State of Louisiana, 49 S. Ct. 36, 278 U.S. 641, 73 L. Ed. 556.
30 C.J. p. 240 note 84.

69. Fla.—Garner v. State, 9 So. 835, 28 Fla. 113, 20 Am. S. R. 232.
Miss.—Kendrick v. State, 55 Miss. 436.
30 C.J. p. 240 note 85.

70. Wash.—State v. Cushing, 45 P. 145, 14 Wash. 527, 53 Am. S. R. 883.

71. Ga.—Pride v. State, 66 S.E. 259, 133 Ga. 438—Davis v. State, 153 S.E. 203, 41 Ga. App. 366.
30 C.J. p. 241 note 87.

72. Fla.—Steele v. State, 14 So. 841, 33 Fla. 348, 354.

73. Cal.—People v. Spraic, 262 P. 795, 87 Cal. App. 724.
Ga.—Johnson v. State, 15 S.E. 2d 786, 192 Ga. 571.
Ind.—Southerland v. State, 197 N.E. 841, 209 Ind. 308.
La.—State v. Poole, 100 So. 613, 156 La. 434.
Miss.—Banks v. State, 145 So. 104—Salmon v. State, 118 So. 610, 151 Miss. 539.
Pa.—Commonwealth v. Tyrrell, 145 A. 855, 296 Pa. 332.
Tex.—Anderson v. State, 294 S.W. 584, 106 Tex. Cr. 338.
30 C.J. p. 241 note 89.

74. Ala.—Tyler v. State, 92 So. 478, 207 Ala. 129—Harlan v. State, 129 So. 482, 23 Ala. App. 592.
Ark.—Crews v. State, 14 S.W. 2d 261, 179 Ark. 94—Stoddard v. State, 276 S.W. 358, 169 Ark. 594.
Cal.—People v. McGann, 230 P. 169, 194 Cal. 688—People v. Spraic, 262 P. 795, 87 Cal. App. 724—People v. Swigart, 251 P. 343, 80 Cal. App. 31.
Del.—State v. Lynch, 128 A. 564, 2 W. W. Harr. 597—State v. Long, 123 A. 350, 2 W. W. Harr. 380.
Fla.—Gathers v. State, 176 So. 771, 129 Fla. 758.
Ga.—Johnson v. State, 15 S.E. 2d 786, 192 Ga. 571—Whitsett v. State, 117 S.E. 376, 155 Ga. 522.
Ind.—Southerland v. State, 197 N.E. 841, 209 Ind. 308.
Ky.—Davidson v. Commonwealth, 87 S.W. 2d 119, 261 Ky. 158—Miller v. Commonwealth, 45 S.W. 2d 461, 241 Ky. 818—Patton v. Commonwealth, 32 S.W. 2d 405, 235 Ky. 845—Jackson v. Commonwealth, 254 S.W. 913, 200 Ky. 316.
La.—State v. Vernon, 2 So. 2d 629, 197 La. 867.
Mich.—People v. Wright, 292 N.W. 539, 294 Mich. 20—People v. Cellura, 284 N.W. 643, 288 Mich. 54.
Miss.—Hendrix v. State, 161 So. 151, 172 Miss. 589—Muse v. State, 130 So. 693, 158 Miss. 449—Hambrick v. State, 103 So. 364, 138 Miss. 729—Beauchamp v. State, 91 So. 202, 128 Miss. 523.
N.M.—State v. Houston, 263 P. 754, 33 N.M. 259.
N.C.—State v. Dickey, 174 S.E. 316, 206 N.C. 417.
Okl.—Compton v. State, 122 P. 2d 819, 71 Okl. Cr. 42.
Pa.—Commonwealth v. Peronace, 195 A. 57, 328 Pa. 86.
Tex.—Porter v. State, 49 S.W. 2d 767, 120 Tex. Cr. 414—Anderson v. State, 294 S.W. 584, 106 Tex. Cr. 338—Roebuck v. State, 291 S.W. 1108, 106 Tex. Cr. 318—King v. State, 286 S.W. 231, 104 Tex. Cr. 583—Holt v. State, 249 S.W. 481, 94 Tex. Cr. 46.
Wash.—State v. Reuben, 287 P. 887, 156 Wash. 655.
W. Va.—State v. Cassim, 163 S.E. 769, 112 W. Va. 92.

sible when accompanied by proof of threats which have been communicated to accused, as such evidence corroborates the communicated threats and tends to establish the reality of the peril in which accused considered himself to be at the time of the killing[75] Evidence of uncommunicated threats of deceased shortly before the killing, together with acts and conduct indicating an intention to put the threats into execution, may be admissible as part of the res gestæ[76] Although it has been stated broadly that, when the issue of self-defense is presented, threats of deceased are admissible whether communicated or not,[77] other authorities hold them inadmissible when not relevant for the purposes or under the conditions just stated[78]

e. Rebuttal of Evidence of Threats

Any relevant and material facts and circumstances tending to discredit evidence of threats by deceased may be proved in rebuttal

The prosecution may prove any relevant and material facts and circumstances tending to discredit evidence of threats by deceased,[79] or tending to show that they were of such character, or came from such a source, as not to be the basis of a well grounded apprehension of danger in the mind of accused,[80] as, that the threats were mere idle talk,[81] or that deceased did not intend to execute or had abandoned any intention of executing them,[82] at least, where the threats were uncommunicated,[83] although it has been held that evidence of a statement, made by deceased but not communicated to accused, that he did not want any more trouble with accused, is inadmissible[84] Evidence of dishonest conduct of accused toward deceased is inadmissible in explanation of threats of the latter[85]

§ 277. —— Threats of Third Persons against Defendant

Evidence of threats of third persons against accused is generally irrelevant and inadmissible, although the circumstances of the particular case may be such as to render such evidence admissible.

Evidence of threats of third persons against accused is, as a rule, irrelevant and inadmissible,[86] until it is shown that accused had reasonable ground to believe that such third person was acting with decedent in a common design to injure or kill accused[87] The rule is particularly applicable when the threats are uncommunicated to accused,[88] but it has been held that threatening statements made by associates of deceased shortly before the fatal encounter, although not communicated to accused, are admissible in evidence together with threats of deceased to show the state of mind of deceased and his associates, and to characterize the conduct of deceased[89] Communicated threats of a third person are admissible to show the state of mind of accused at the time of the homicide where they shed light on his interpretation of the conduct of deceased and there is other evidence that accused had reason to believe that his life was in danger[90] Thus, where accused contends that the difficulty was brought on by one who was acting with deceased, evidence of previous threats by such a one is admissible,[91] and, where deceased and the third

Wyo—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 241 note 90

Conversation including uncommunicated threat and opprobrious epithet was held admissible to show deceased's state of mind before shooting—Roberson v State, 117 So 412, 217 Ala 696

75 La—State v Vernon, 2 So 2d 629, 197 La 867
Tex—Reynolds v State, 274 S W 974, 101 Tex Cr 192
30 C J p 241 note 91

76 Ark—Pitman v State, 22 Ark 354
Ohio—Dickson v State, 39 Ohio St 73

77. Ky—Banks v Commonwealth, 126 S W 2d 1122, 277 Ky 647—Colson v Commonwealth, 255 S W 60, 200 Ky 402
30 C J p 242 note 93

78. Ark—Crews v State, 14 S.W 2d 261, 179 Ark 94
30 C J p 242 note 94

79. Tex—Myatt v State, 26 S W 2d 915, 916, 114 Tex Cr 516, citing **Corpus Juris**—Denson v State, 298 S W 604, 107 Tex Cr 619 Alexander v State, 255 S W 408, 95 Tex Cr 197
30 C J p 242 note 95

Admissibility of evidence of character of deceased where evidence of threats made by him has been introduced see supra § 272 e

80. Okl—Price v State, 98 P 447, 1 Okl Cr 358

81 Tex—Miller v State 10 S W 445, 27 Tex App 63
30 C J p 242 note 97

82. Ala—Timmerson v State, 32 So 141, 133 Ala 18
30 C J p 242 note 98

83 Tex—Howe v State, 177 S W 497, 77 Tex Cr 573

84. Tex—Matthews v State 28 S W 2d 164, 116 Tex Cr 519

85. Miss—Holt v State, 29 So 527, 78 Miss 631

86. Ala—Kirkland v State, 96 So 892, 209 Ala 661—Spelce v State, 103 So 694, 20 Ala App 412, certiorari denied Ex parte Spelce, 103 So 705, 212 Ala 559
Ark—Clements v State, 133 S W 2d 841, 199 Ark 69
Mo State v Lowry 12 S W 2d 469 474 321 Mo 870, quoting **Corpus Juris.**
30 C J p 242 note 2

87. Mo—State v Lowry, 12 S W 2d 469 471 321 Mo 870, quoting **Corpus Juris**
30 C J p 242 note 3

88. Ala—Webb v State, 33 So 487, 135 Ala 36
Ark—Jackson v State, 145 S W 559, 103 Ark 21
30 C J p 242 note 4

89. W Va—State v Cassim, 163 S E 769, 112 W Va 92

90. Ark—Jackson v State, 145 S W 559, 103 Ark 21
Ky—Fain v Commonwealth, 78 Ky. 183, 39 Am D 213

91. Ky—Magan v Commonwealth, 119 S W 734
S C—State v Gaylord, 50 S E 20, 70 S C 415

person were advancing on accused in a threatening manner evidence of threats of the third person which had been communicated to accused is admissible, without proof of conspiracy [92]

§ 278. —— Imminence and Apprehension of Danger

a In general
b Physical characteristics of parties
c Possession and use of weapons by deceased
d Intoxication of deceased

a. In General

Relevant evidence of any fact legitimately tending to show the imminence of the danger to accused of loss of life or serious bodily injury at the time he acted, together with his apprehension of danger and the reasonableness thereof is admissible, and in rebuttal the prosecution may show that accused had no reasonable grounds to apprehend that there was any imminent danger to him

Accused, in order to support his claim of self-defense may introduce evidence of any fact legitimately tending to show the imminence of the danger to himself of loss of life or serious bodily injury at the time he acted,[93] together with his apprehension of danger,[94] the reasonableness thereof,[95] and the reasonableness of his belief that the means or force employed in self-defense was necessary [96] The evidence must, of course, be relevant,[97] and must relate to the time of the assault [98] Accused may testify as to his belief that his life was in danger,[99] although an overt act by deceased must have been shown[1] and there must have been reasonable cause for that belief [2] Accused's exclamations indicating fear of a crowd of whom deceased was one are competent as tending to show his state of mind with reference to deceased [3] Where statements or exclamations of accused are admitted, details thereof not necessary to show his state of mind should be excluded [4] Previous acts or declarations of accused, offered to show his fear of deceased, not constituting part of the res gestæ, are inadmissible [5] A fortiori, where evidence of precautions taken by accused is admitted, the exclusion of his reasons therefor is not error [6] Facts not known to accused are not admissible to show his apprehension of danger [7] Evidence that accused was a person of nervous temperament and constantly apprehensive that attacks would be made on him is not admissible [8]

92. Or—State v Horseman, 98 P 135, 52 Or 572

93 Iowa—State v Evans, 97 N W 1008, 122 Iowa 174
30 C J p 242 note 11

94. U S—De Groot v U S, C C A Alaska, 78 F 2d 214
Ala—Tyler v State, 92 So 478, 207 Ala 129
Cal—People v Alpine, 254 P 281, 81 Cal App 456
Conn—State v Padula, 138 A 456 106 Conn 451
Fla—Palm v State, 184 So 881, 135 Fla 258- Deeb v State, 179 So 894, 131 Fla 362
Ill People v Rappaport, 200 N E 165, 362 Ill 462
Ind—McKee v State, 154 N E 372 198 Ind 590
Ky—Winkler v Commonwealth 17 S W 2d 999, 229 Ky 708—Ross v Commonwealth, 259 S W 50, 202 Ky 204
Mass—Commonwealth v Festo, 146 N E 700, 251 Mass 275
Mich—People v Giacalone 217 N W 758, 242 Mich 16
Wyo—Durham v State, 210 P 934, 29 Wyo 85
30 C J p 242 note 12
Admissibility of evidence of difficulties between deceased and third persons as bearing on accused's apprehension of danger see supra § 275

Discretion of court

In murder prosecution, conduct of deceased previous to homicide which would naturally excite apprehension is admissible when accused interposes plea of self-defense and proper foundation is laid and court should exercise sound discretion in determining whether proper foundation was laid—State v Jennings 28 P 2d 448, 96 Mont 80, 121 A L R 375

95 Cal—People v Ryan, 92 P 853, 152 Cal 364
Conn—State v Padula, 138 A 456, 106 Conn 154
Mo—State v Williams, 271 S W 50
Tex—Beckham v State, 109 S W 2d 764 133 Tex Cr 206
30 C J p 243 note 13, p 246 note 9 [b]

Lascivious conduct toward accused's wife

Testimony of lascivious approaches of prosecuting witness toward accused's wife was held admissible as bearing on reasonableness of defendant's apprehension of danger—State v Burns, 280 S W 1026, 312 Mo 673, 44 A L R 848

96 Ind—Dukes v State, 11 Ind 557, 71 Am D 370
Manner and means of repelling attack see supra § 131

97. D C—Bolden v U S, 69 F 2d 121, 63 App D C 45
La—State v Vincent, 5 So 2d 327, 198 La 1037
30 C J p 243 note 15

98. La—State v Vincent, supra
Tex—Wynne v State, Cr., 51 S W 909

99. Cal—People v Ah Wing, 169 P 402 35 Cal App 218
Fla—Rowe v State, 163 So 22, 120 Fla 619
Ill—People v Biella 28 N E 2d 111, 374 Ill 87
Ky—Ray v Commonwealth, 113 S W 2d 851 852, 272 Ky 34, citing **Corpus Juris.**
Mo—State v Sterling 72 S W 2d 70
30 C J p 243 note 17

1 Ky—Ray v Commonwealth, 113 S W 2d 851 852, 272 Ky 34 citing **Corpus Juris.**
La—State v Bouvy, 50 So 849, 124 La 1054

2. Ky—Ray v Commonwealth, 113 S W 2d 851 852 272 Ky 34, citing **Corpus Juris**
Mo—State v Webb, 205 S W 187

3. Mass—Commonwealth v Crowley, 43 N E 509, 165 Mass 569

4. Fla—White v State, 59 So 17, 63 Fla 49

5. Ala—James v State, 72 So 299, 14 Ala App 652
30 C J p 243 note 22

6. Ky—Nunn v Commonwealth, 33 S W 941 17 Ky L 1211

7. Wash—State v Walton, 225 P 811, 130 Wash 619
Facts unknown to accused generally see infra § 279

8. Minn—State v Sorenson, 19 N W 738 32 Minn 118.
30 C J p 243 note 25.

The opinion of a witness as to the intention of deceased in approaching accused and as to danger of accused is not admissible [9]

Warnings to accused against deceased, without any showing that they were based on acts or conduct of the latter, are inadmissible [10]

Danger from others The evidence must be confined to danger from the acts of deceased, and accused cannot show that he was in danger from other people, as this has no proper bearing on his act in killing deceased,[11] but a continuous course of conduct by a body of persons with whom deceased was associated at the time of the killing may be shown to prove that such persons, and not defendants, were the aggressors [12]

Effect on third person The effect produced on a bystander by the conduct of deceased may be shown as illustrating the effect likely to be produced on accused,[13] but evidence as to how the appearance and manner of deceased would impress a stranger or one who had but slight acquaintance with him is not admissible [14] Evidence that a witness carried a pistol because he had heard of a prior difficulty between accused and deceased, and was afraid of deceased, is not admissible [15]

In rebuttal the prosecution may show that accused had no reasonable grounds to apprehend that there was any imminent danger to him,[16] but not, in distinction therefrom, that there was not in fact any danger [17]

b. Physical Characteristics of Parties

Where self-defense is the plea, evidence of the physical characteristics of the parties to the homicide or assault is admissible.

Where self-defense is the plea, evidence of the physical characteristics of deceased or assaulted party is admissible [18] Accordingly, as bearing on the imminence of the danger to accused, accused may show that deceased was a larger and stronger man than himself,[19] and that accused was weak and enfeebled from disease,[20] or that he was crippled,[21] or that accused was pregnant, of which fact deceased had knowledge [22] The relative strength must be proved by reputation, and not by the opinions of witnesses[23] or proof of specific acts of strength [24] Such evidence should be confined to the time of the homicide [25] Evidence as to the reason of accused's not being robust is not admissible [26] Where the entire encounter was with weapons and neither party used direct bodily force against the other, it has been held that evidence of the weight and height of deceased was not material to any issue in the case [27] On the other

9. La—State v Hamilton, 49 So 1004, 124 La 132, 18 Ann Cas 981
30 C J p 243 note 26

10. Iowa—State v Cross, 26 N W 62, 68 Iowa 180
30 C J p 243 note 27

11. Ark—Green v State, 71 S W 665, 71 Ark 150
30 C J p 243 note 28

12. N J—State v Baiver, 98 A 431, 89 N J Law 214
30 C J p 243 note 29

13. Tex—Cochran v State, 13 S W 651, 28 Tex App 422
30 C J p 243 note 30

14. Ala—Jackson v State, 41 So 178, 147 Ala 699

15. Tex—Echols v State, 170 S W 786, 75 Tex Cr 369

16. Ky—Baker v Commonwealth, 134 S W 2d 997, 281 Ky 45—Belcher v Commonwealth 53 S W 2d 214 245 Ky 125
La—State v McFarlain, 13 So 2d 62—State v Soileau, 138 So 92, 173 La 531
Mass—Commonwealth v Peterson, 154 N E 260, 257 Mass 473
Tex—Wade v State, 263 S W. 589, 98 Tex Cr 27
30 C J p 243 note 33

Ability to avert difficulty
Cross-examining accused officer in prosecution for murder as to whether he could have had deceased, who he alleged was attacking him, throw up his hands or halt, was held proper as bearing on whether accused made efforts to avoid or avert difficulty—Weaver v State, 11 S W 2d 513, 111 Tex Cr 70

Evidence that accused was intoxicated is competent - Pollock v State, 223 P 210, 26 Okl Cr 196—30 C J p 243 note 33 [a]

Victim holding up hands
State in rebutting theory of self-defense had right to show that accused followed deceased into store and shot him as he lay on floor with hands upraised—Wharton v State, 38 S W 2d 72, 117 Tex Cr 439

17. Ala—Cox v State, 96 So 83, 19 Ala App 205
30 C J p 243 note 34

18. Ala—Williams v State, 107 So 37, 21 Ala App 227
30 C J p 244 note 36

19. Ala—Spelce v State, 103 So 694, 20 Ala App 412, certiorari denied Ex parte Spelce, 103 So 705, 212 Ala 559
Mich—People v Glacalone, 217 N W 758 242 Mich 16
30 C J p 244 note 37
Admissibility of evidence as to relative size, strength, and physical condition of parties to homicide in absence of evidence of self-defense see supra § 224

20. Cal People v Smith, 91 P 511, 151 Cal 619
Ill—People v Renick, 14 N E 2d 500, 368 Ill 436—People v Rappaport, 200 N E 165, 362 Ill 462
Mo—State v Fielder, 50 S W 2d 1031 330 Mo 747

Epileptic
Exclusion of evidence that one accused of murder, pleading self-defense, was physical weakling and subject to epileptic fits creating highly nervous temperament was held erroneous—Batchan v State, 284 S W 549, 104 Tex Cr 398

21. Ala—Skeggs v State, 135 So 431, 24 Ala App 307, certiorari denied 135 So 433, 223 Ala 221.

22. Ala—Mills v State, 104 So 889, 21 Ala App 46

23. Wash - State v Cushing, 50 P 512, 17 Wash 544

24. Wash—State v Cushing, supra

25. Idaho—State v Crea, 76 P 1013, 10 Idaho 88

26. Ala—Mann v State, 32 So 704, 134 Ala 1

27. Miss—Wright v State, 139 So 846, 162 Miss 592
Tex—Burton v State, 178 S W 334, 77 Tex Cr 314.

hand, it is competent for the prosecution to show that there was not such disparity in the size and strength of the two men as to induce accused to believe himself in greater peril in consequence of such disparity,[28] or that accused was the larger and stronger of the two,[29] or that deceased was deformed[30] or seriously crippled,[31] or was a weak, delicate man,[32] or was partially blind,[33] or had recently been ill,[34] or was physically unable to pursue, kill, or dangerously injure accused,[35] but the prosecution cannot show that deceased, by reason of some accident or injury, was not as strong as he appeared, when accused did not know of this[36]

c. Possession and Use of Weapons by Deceased

Evidence is admissible on behalf of accused to show that deceased was armed and that in the difficulty with accused he used or attempted to use deadly weapons, but such evidence is subject to rebuttal

As bearing on the question of self-defense and as tending to support the contention of accused that at the time of the killing he acted under a well grounded apprehension of loss of life or serious bodily injury to himself through deceased, evidence is admissible to show that at the time of the difficulty in which the killing occurred deceased was armed, and that in such difficulty he used or attempted to use deadly weapons,[37] and that accused had previously been informed that deceased was armed[38] It is held that evidence as to possession by deceased of a weapon at a time previous to the homicide is not admissible,[39] at least in the absence of knowledge on the part of accused[40] or proof that the carrying of the weapons had any relation or reference to accused,[41] especially when such possession was before any difficulty between the parties,[42] but that such evidence is admissible if knowledge of such possession is brought home to accused[43] On the other hand, it has been held permissible to prove that deceased was armed just prior to the fatal difficulty[44] It may be shown that weapons such as accused claims deceased or the person assaulted had were found at or near the place of the encounter or near the body of deceased,[45] that in the difficulty accused received a wound apparently made with a deadly weapon,[46] or that after the difficulty there were cuts in his clothes which were not there before[47] It is not permissible, however, to introduce evidence as to whether deceased had a license to carry a pistol,[48] or as to declarations of deceased that he owned a pistol,[49] or declarations of a bystander,[50] or that a few moments before the homicide deceased attempted to borrow a larger pistol than the one he had,[51] or that he drew a weapon after receiving the mortal wound from accused,[52] or with reference to a weapon other than that alleged to have been used by deceased[53] So testimony showing that on the morning of the homicide deceased had refused to lend his pistol to another party, saying that he was going to need it, is inadmissible in the absence of a showing that deceased expected or intended trouble with accused[54] In the absence of an attempt to prove that deceased

28. Mo—State v Clough, 38 S W 2d 36, 327 Mo 700
30 C J p 244 note 44

29. Tex—Hawkins v State, Cr, 32 S W 2d 202—Deuran v State, 24 S W 2d 840, 114 Tex Cr 210—Dunn v State, 242 S W 1049, 92 Tex Cr 126
30 C J p 244 note 45

30. Ky—Pack v Commonwealth, 8 S W 2d 422, 225 Ky 340

31. Ky—Belcher v Commonwealth, 53 S W 2d 214, 245 Ky 125
Tex—Laake v State, 245 S W 681, 93 Tex Cr 84
30 C J p 244 note 46

32. Ky—Graham v Commonwealth, 53 S W 2d 219, 245 Ky 113

33. La—State v Soileau, 138 So 92, 173 La 531

34. Ala—Rector v State, 66 So 857, 11 Ala App 333

35. Ala—Watts v State, 59 So 270, 177 Ala 24
30 C J p 244 note 48

36. Iowa—State v Cross, 26 N W 62, 68 Iowa 180

37. Tex—Couch v State, 245 S W 692, 93 Tex Cr 27, 25 A L R 1359
30 C J. p 244 note 51.
Habit of carrying weapons see supra § 272 d

Removal of snapped shell from deceased's gun

In murder prosecution, evidence that deputy sheriff, at scene of shooting, took snapped shell from shotgun of deceased was improperly excluded—Muse v State, 130 So 693, 158 Miss 449

38 Ky—Carico v Commonwealth, 7 Bush 124

39. La—State v Scarbrock, 145 So 264, 176 La 48
30 C J p 244 note 53

40. Ala—Crumpton v State, 52 So 605, 167 Ala 4—Smith v State, 75 So 192, 16 Ala App 47

41. Ala—Barber v State, 116 So 322, 22 Ala App 322, certiorari denied 116 So 323, 217 Ala 330
Mo—State v Naylor, 40 S W 2d 1079, 328 Mo 335

42. Tex—Becker v State, 190 S W 185, 80 Tex Cr 186

43. Ga—Wilson v State, 110 S E 8, 152 Ga 337
30 C J. p 244 note 56.

44. Ala—Jones v State, 101 So 331, 20 Ala App 247
Ky—Roop v Commonwealth, 258 S W 667, 201 Ky 828

45. Mo—State v McLaughlin, 50 S W 315, 149 Mo 19
30 C J p 244 note 57

46. Ark—Atkins v State, 16 Ark 568

47 Miss—Ellzey v State, 37 So 837
Tex—Good v State, 18 Tex App 39

48. Ga—Williams v State, 88 S E 958, 145 Ga 177

49 Ala—Wilson v State, 54 So 572, 171 Ala 25

50. La—State v Riley, 8 So 469, 12 La Ann 995

51. Mo—State v McAfee, 50 S W 82, 148 Mo 370

52 Tex—Stacey v State, Cr, 33 S W 348

53. Cal—People v Turcott, 3 P 461, 65 Cal 126
30 C J p 244 note 65

54. Tex—Johnson v State, 244 S W 1019, 92 Tex Cr 550

was in the habit of going armed, or that defendants knew of any such habit, questions to a witness whether he ever saw deceased with pistols or knew anything about his carrying a pistol were properly excluded.[55] Where accused testified that decedent assaulted him with a pistol, and the state gave evidence that decedent did not have or own a pistol, accused could show that decedent owned a pistol at or near the time of the difficulty.[56] Evidence of the possession and preparation of a weapon is not admissible before other evidence of a justification.[57]

In rebuttal the prosecution may introduce evidence legitimately tending to show that deceased or assaulted party was not armed at the time of the difficulty,[58] that he did not have any such weapon as accused claims he used or sought to use,[59] that he had no weapon in his hand,[60] that accused's father had a pistol similar to one found on the ground near the scene of the difficulty and alleged to have been carried by deceased,[61] that deceased did not use a weapon which he had,[62] or that his possession of a weapon was not because of any hostile intention,[63] and that accused did not act under an impression that it was,[64] but testimony as to what deceased's wife said or did to establish that her husband had no weapon at the time of the difficulty is not competent,[65] and it has been held error to admit evidence to show the innocent purpose of deceased in acquiring a weapon without showing communication of such purpose to accused.[66] Evidence of threats against the life of deceased, made by persons other than accused, but who had a grudge against deceased in common with accused, and which threats the witness communicated to deceased, is admissible against accused to show a motive on the part of deceased in carrying a rifle at the time of the homicide.[67] Evidence that a firearm carried by deceased could not be discharged is not admissible, however, where knowledge of the defect is not brought home to accused,[68] nor can the prosecution show that deceased's gun was load-

55. Ill.—McDonnall v. People, 48 N.E. 86, 168 Ill. 93.

56. Ala.—Wilson v. State, 54 So. 572, 171 Ala. 25.

57. Ala.—Gibbs v. State, 47 So. 65, 156 Ala. 70.—Kirby v. State, 14 So. 38, 151 Ala. 66.

Hostile demonstration

Excluding evidence that deceased displayed pistol to accused on morning of homicide was not error, in absence of showing hostile demonstration by deceased at time of killing, although accused testified to hip pocket movement.—State v. Joiner, 109 So. 51, 161 La. 518.

58. Ala.—Davis v. State, 113 So. 393, 216 Ala. 475.
Cal.—People v. Hoffman, 232 P. 974, 195 Cal. 295.
Kan.—State v. Abrams, 223 P. 301, 115 Kan. 520.
Ky.—Foure v. Commonwealth, 265 S.W. 443, 205 Ky. 62.
Miss.—Young v. State, 117 So. 119, 150 Miss. 787.
Tex.—Cranfill v. State, 87 S.W.2d 740, 129 Tex.Cr. 318.—McBride v. State, 51 S.W.2d 385, 121 Tex.Cr. 109.—Starland v. State, 32 S.W.2d 657, 116 Tex.Cr. 423.—Hillen v. State, 1 S.W.2d 883, 108 Tex.Cr. 516.—Carpenter v. State, 265 S.W. 706, 98 Tex.Cr. 307.—Blackmon v. State, 252 S.W. 803, 95 Tex.Cr. 116.
30 C.J. p. 245 note 69.

Circumstantial evidence

(1) Permitting witness for state to testify that deceased was not armed nine hours before killing is not error.—Honea v. State, 280 S.W. 819, 103 Tex.Cr. 242.

(2) As tending to show that deceased had no knife, as claimed by accused, testimony that witness had at time of fatal difficulty knife belonging to deceased is admissible.—Hadley v. State, 125 So. 899, 23 Ala. App. 382.

(3) Testimony that the body of deceased or the person of the assaulted party was searched shortly after the alleged crime, and that no weapons were found is admissible.
Ala.—Hyche v. State, 113 So. 644, 22 Ala. App. 176, certiorari denied 114 So. 906, 217 Ala. 114.
Ind.—Mora v. State, 138 N.E. 755, 193 Ind. 87.
Ky.—Harris v. Commonwealth, 33 S.W.2d 666, 236 Ky. 666.
La.—State v. Vernon, 2 So.2d 629, 197 La. 867.
Tex.—Johnson v. State, 117 S.W.2d 1100, 135 Tex.Cr. 248.—Cupp v. State, 74 S.W.2d 701, 127 Tex.Cr. 10.—Owens v. State, 56 S.W.2d 867, 122 Tex.Cr. 561.—Hanners v. State, 300 S.W. 71, 108 Tex.Cr. 302.—Davis v. State, 279 S.W. 275, 102 Tex.Cr. 608.
30 C.J. p. 245 note 69 [b].

(4) Admitting evidence that deceased had left weapons at another place was not error.—Hanners v. State, supra.—Smith v. State, 288 S.W. 458, 105 Tex.Cr. 327.

(5) Evidence was held competent to show deceased had not purchased knife on day of killing.—Hunter v. State, 298 S.W. 429, 107 Tex.Cr. 609.

59. Tex.—Stephens v. State, 245 S.W. 687, 93 Tex.Cr. 164.
30 C.J. p. 245 note 70.

60. Ala.—Gibbs v. State, 127 So. 788, 23 Ala. App. 475, certiorari denied 127 So. 790, 221 Ala. 130.—Valentine v. State, 98 So. 483, 19 Ala. App. 510.

61. Tex.—Blackwell v. State, 294 S.W. 552, 107 Tex.Cr. 58.

62. Ala.—Clark v. State, 111 So. 227, 216 Ala. 7.
Ky.—Pitts v. Commonwealth, 287 S.W. 32, 215 Ky. 837.
30 C.J. p. 245 note 71.

Subsequent condition of weapon

Evidence of condition of deceased's pistol on morning following homicide indicating it had not been fired was admissible.—Young v. Commonwealth, 283 S.W. 431, 211 Ky. 475.

63. Ky.—Baker v. Commonwealth, 20 S.W.2d 117, 230 Ky. 569.
Mo.—State v. Mitchell, 262 S.W. 717.
Okl.—Pennequame v. State, 253 P. 303, 33 Okl.Cr. 216.
30 C.J. p. 245 note 72.

64. Ala.—Styles v. State, 59 So. 698, 5 Ala.App. 36.
30 C.J. p. 245 note 72.

65. Ky.—Foure v. Commonwealth, 265 S.W. 443, 205 Ky. 62.

66. Tex.—Butchan v. State, 284 S.W. 519, 104 Tex.Cr. 398.

67. W.Va.—State v. Hatfield, 37 S.E. 626, 48 W.Va. 561.

68. Cal.—People v. Wright, 77 P. 877, 144 Cal. 161.
Tex.—Everett v. State, 18 S.W. 674, 30 Tex.App. 682.

Earlier use by accused

In murder prosecution wherein accused pleaded self-defense, in that decedent threatened him with a shotgun, permitting witness to testify that on morning preceding murder accused, after shooting birds with the gun, had placed it in decedent's room where it was found near the

ed with small shot when it is not shown that accused knew this [69] On a trial for assault with intent to murder, evidence that after the assault the prosecutor carried arms for the avowed purpose of shooting accused is immaterial [70] Evidence that deceased did not have a particular weapon exhibited to the jury is incompetent [71] Testimony on behalf of the prosecution that witness saw another knife in deceased's possession but not the one in question is immaterial [72] Evidence of the habit [73] and declarations [74] of deceased is inadmissible, except that his declarations as to carrying arms made in the presence of, and to, accused, are admissible [75] The state has been permitted to show, however, that deceased, who stated soon after being shot that his pistol was empty, had, earlier in the evening, discharged his pistol a number of times and showed its empty cylinder to companions and stated that he had emptied it [76]

d. Intoxication of Deceased

The intoxication of deceased at the time of the fatal difficulty may be shown provided there is some evidence in the case on the issue of self-defense, and the state may introduce evidence in rebuttal.

On the issue of self-defense the intoxicated condition of deceased at the time of the fatal difficulty may be shown,[77] but such evidence is inadmissible when offered before there is any evidence as to the question of self-defense,[78] or when all the evidence introduced shows that accused was the aggressor,[79] or when the time of the intoxication was too remote to affect the mental state of the person killed or assaulted at the time of the alleged crime [80] The state may introduce competent evidence in rebuttal to disprove the intoxication of deceased [81]

§ 279. —— Facts Unknown to Defendant

Facts unknown to accused at the time of the homicide cannot ordinarily be shown by either the defense or the prosecution

As a general rule, facts unknown to accused at the time of the homicide cannot be shown by either the defense[82] or the prosecution,[83] as such facts could not have influenced his action Where the meeting between accused and deceased is accidental, or is brought about by deceased, evidence of an innocent motive of deceased for being at the place of the fatal encounter, unknown to accused, is inadmissible,[84] but, where accused went where he knew he would meet or be likely to meet deceased, the admission of such evidence is not error [85]

body was not error where there was evidence that gun had been picked up unloaded as testimony was relevant on question whether accused knew or should have known that gun was unloaded —State v McFarlain, La , 13 So 2d 62

69 Tex —Carr v State, 53 S W 51, 41 Tex Cr 380

70 Tex —Burks v State, 49 S W 389 40 Tex Cr 167

71 Ky -Parker v Commonwealth, 28 S W 500, 96 Ky 212, 16 Ky L 449

72. N Y —People v Taylor, 86 N Y S 996, 92 App Div 29

73 Cal —People v Powell 25 P 481, 87 Cal 348, 11 L R A 75
Admissibility of accused's evidence of deceased's habit of carrying weapons see supra § 272 d

Habit of carrying unbreached gun
In a prosecution for murder, where the defense was self-defense, state's testimony that deceased and some of his family were in the habit of carrying their guns with them wherever they went, and carrying them unbreached should have been omitted —State v Williams, 118 S E 783, 125 S C 385

74. Cal —People v Powell, 25 P 481, 87 Cal 348, 11 L R A 75
Ky —Gills v Commonwealth, 37 S W 269, 18 Ky L 560.

75. Cal —People v Adams, 70 P 662, 137 Cal 580

76. Tex Oliver v State, 259 S W 589, 96 Tex Cr 633

77. Ala —Click v State, 196 So 286 29 Ala App 377—Gibbs v State, 127 So 788, 23 Ala App 475, certiorari denied 127 So 790, 221 Ala 130 Ferguson v State, 105 So 435 21 Ala App 116- Hembree v State, 101 So 221, 20 Ala App 181
Mo - State v Creighton, 52 S W 2d 556 564 330 Mo 1176, citing **Corpus Juris.**
30 C J p 216 note 82
Intoxication of accused see supra § 278 a

Finding bottle on deceased
Testimony of accused's witness that would have showed witness found bottle containing whisky on body of deceased should have been admitted, where other evidence tended to show deceased was slightly intoxicated prior to homicide and was ill-tempered when under influence of intoxicants —Banks v Commonwealth, 126 S W 2d 1122, 277 Ky 647

78. Ala —Harrell v State, 52 So 345, 166 Ala 11—Smith v State, 39 So 329, 142 Ala 14

79 Ala —Gregory v State, 37 So 259, 140 Ala 16

80. Ala —Gregory v State, supra—Dobbins v State, 72 So 692, 15 Ala App 166

81. Ala —Stevens v State, 35 So 122, 138 Ala 71

82. Ky —Cross v Commonwealth, 109 S W 2d 1214 270 Ky 537
La - State v Hickerson, 103 So 189, 157 La 852
Wash State v Walton, 228 P 841, 130 Wash 649
30 C J p 246 note 88
Particular facts unknown to accused
Physical condition of deceased see supra § 278 b
Possession or use of weapons by deceased see supra § 278 c
Specific acts of violence by deceased toward third persons see supra § 275
Uncommunicated threats see supra § 276 d

83. Tex —Archer v State, 263 S W 305 98 Tex Cr 91
30 C J p 246 note 89

Admission of evidence held not reversible error
Tex —Mercer v State, 13 S W 2d 689, 111 Tex Cr 657

84 Tex —Haynie v State, 21 S W 2d 721, 113 Tex Cr 650
30 C J p 246 note 90

Rule recognized but held inapplicable under facts
Tex —Hickox v State, 253 S W 823, 95 Tex Cr 173

85. Tex —Singleton v State, 167 S W 46, 71 Tex Cr 71.

§ 280. —— Other Particular Matters to Sustain Right

Evidence of particular matters, conditions, or occurrences which legitimately tends to sustain accused's contention that the killing or assault was perpetrated in self-defense is admissible

Among particular items admissible, in accordance with the general rule, to sustain the right of self-defense, in addition to those already enumerated supra §§ 272-279, are the facts that accused endeavored to avoid meeting deceased,[86] that he avoided rather than sought the difficulty in which deceased was killed,[87] that he had no intention of provoking any difficulty,[88] that deceased brought on the difficulty or was the aggressor therein,[89] that deceased appeared angry just before the fatal encounter and when overtaking accused on the street,[90] that deceased was dangerously insane,[91] that accused was in good faith attempting to retreat,[92] that he was in such a place that he could not retreat out of the reach of deceased and thus escape his attack,[93] that it was accused's intention merely to hurt or repel and not to kill deceased,[94] or that there was a conspiracy between deceased and others to take accused's life.[95] Evidence is also admissible which tends to show the character of the attack which accused resisted,[96] the purpose and attitude of deceased at the time,[97] or of the person assaulted,[98] the motive of deceased to attack accused,[99] the extent of the injuries received by accused in the combat,[1] and the time when and place where they were inflicted.[2] Evidence that accused was rightfully at the scene of the combat[3] or that he was looking for deceased to have a peaceful adjustment of a prior difficulty[4] is also admissible. So it may be relevant to show adulterous intimacies between deceased wife of accused and another, causing accused to order her to leave his home,[5] intimacies between deceased and accused's wife[6] or daughter,[7] and that accused had heard rumors that deceased had been bragging of such intimacies,[8] but on the other hand, it has been held that evidence that deceased told a witness that he had had intercourse with the wife of accused is inadmissible.[9] Evidence is not admissible, for the purpose of showing self-defense, that accused had been attacked by third persons with murderous weapons just before he killed deceased, in the absence of any evidence showing a conspiracy between such third persons and de-

86. Tex.—Russell v. State, 11 Tex. App. 288

87. Ky.—Mays v. Commonwealth, 6 Ky. L. 48

88. Tex.—Hillis v. State, 166 S.W. 1154, 74 Tex. Cr. 59
30 C.J. p. 246 note 9 [a] (1)

89. Ala.—Jones v. State, 101 So. 331, 20 Ala. App. 247—Savage v. State, 100 So. 919, 20 Ala. App. 97
Ill.—People v. Durand, 139 N.E. 78, 307 Ill. 611
Iowa.—State v. Price, 200 N.W. 195, 198 Iowa 747
Miss.—Cole v. State, 159 So. 296, 172 Miss. 19
Va.—Counts v. Commonwealth, 119 S.E. 79, 147 Va. 744
30 C.J. p. 246 note 96

Evidence held inadmissible
Evidence that deceased owned and operated still and was bootlegger was properly rejected as not showing aggressor in difficulty.—Hendry v. State, 112 So. 212, 215 Ala. 635

90. Iowa.—State v. Cross, 26 N.W. 62, 68 Iowa 180
30 C.J. p. 246 note 97

91. N.D.—State v. Shahane, 219 N.W. 132, 56 N.D. 642

92. Fla.—Cox v. State, 50 So. 875, 58 Fla. 33

93. Idaho.—State v. Crea, 76 P. 1013, 10 Idaho 88

94. Mass.—Commonwealth v. Woodward, 102 Mass. 155.

95. Ill.—Williams v. People, 54 Ill. 422
Tex.—Hall v. State, 60 S.W. 769, 42 Tex. Cr. 141

96. Ind.—Dukes v. State, 11 Ind. 557, 71 Am. D. 370

97. Iowa.—State v. Price, 200 N.W. 195, 198 Iowa 747
Ky.—Lee v. Commonwealth, 261 S.W. 842, 203 Ky. 63
Miss.—Butler v. State, 176 So. 589, 179 Miss. 865
Tex.—Rezeau v. State, 254 S.W. 574, 95 Tex. Cr. 323
W.Va.—State v. Laura, 116 S.E. 251, 93 W. Va. 250
30 C.J. p. 246 note 4

Abusive language of parties and newspaper article which provoked difficulty are admissible in connection with evidence showing self-defense.—Elmore v. State, 146 So. 826, 226 Ala. 327, denying certiorari 146 So. 824, 25 Ala. App. 326

Evidence held immaterial
In murder prosecution in which all the facts as to an alleged attack by victim on accused, its continuance, and hereceness, in support of a plea of self-defense and victim's dying declaration that accused "fooled" him to his house and shot him for nothing, were before the jury, testimony that victim had feloniously attacked wife of accused earlier in the evening offered for purpose of showing victim's state of mind at time of homicide, was held properly excluded as immaterial.—State v. Clifton, 174 So. 109, 187 La. 62

98. Miss.—Shields v. State, 39 So. 1010, 87 Miss. 429

99. Ga.—Curington v. State, 134 S.E. 41, 162 Ga. 307
30 C.J. p. 246 note 6

Love letter to accused's wife
In prosecution for assault with intent to commit murder, admission of love letter from prosecuting witness to accused's wife is admissible as bearing on question of who was aggressor in altercation and of existence of hostile motive in mind of prosecuting witness although written thirteen or fourteen months before fight.—State v. Price, 200 N.W. 195, 198 Iowa 747

1. Ill.—People v. Simmons, 113 N.E. 887, 274 Ill. 528
30 C.J. p. 246 note 7

2. Cal.—People v. Hall, 57 Cal. 569

3. Ill.—People v. Stapf, 155 N.E. 360, 324 Ill. 404

4. Fla.—Deeb v. State, 179 So. 894, 131 Fla. 362

5. Ala.—Lassiter v. State, 189 So. 781, 28 Ala. App. 540

6. Ky.—Blickerby v. Commonwealth, 255 S.W. 824, 200 Ky. 832.

7. Ky.—Lee v. Commonwealth, 261 S.W. 842, 203 Ky. 63

8. Ala.—Little v. State, 129 So. 99, 23 Ala. App. 547

9. Mo.—State v. Rider, 8 S.W. 723, 95 Mo. 474.

ceased,[10] or of evidence of peace overtures made by accused prior to the fatal encounter,[11] or of acts of deceased after the fatal difficulty[12]

§ 281. —— Particular Evidence to Rebut Right

Evidence of particular matters which legitimately tends to rebut contention of accused that the killing or assault was perpetrated in self-defense is admissible

In rebuttal of evidence of the right of self-defense, in accordance with the general rule stated supra § 271, the courts have held admissible, in addition to the matters heretofore set out, evidence on behalf of the prosecution which tends to show that deceased was not the aggressor,[13] that accused was the aggressor,[14] that accused provoked the difficulty under such circumstances as would excite certain and probably desperate resistance,[15] that deceased or assaulted person was following a customary course at the time of the difficulty;[16] that deceased had a lawful purpose in going to the place of the difficulty,[17] and in his conduct at the time of the difficulty,[18] and had a right to be there,[19] evidence of an attempt to fabricate the defense,[20] and evidence of a friendly feeling on the part of deceased toward accused,[21] or that deceased and accused were close friends[22] The prosecution may introduce evidence of the surrounding circumstances,[23] including the killing of another person by accused at the same time he killed the person for whose murder he is on trial,[24] or an assault committed by him immediately thereafter,[25] and may

10. S C—State v Brown 12 S E 662, 34 S C 41

11. Ala—Letson v State, 110 So 21, 215 Ala 229
Ark—Morrison v State, 297 S W 830, 174 Ark 1180

12. Ky—Botts v Commonwealth, 8 Ky Op 37

13. Ala—Brown v State, 107 So 29, 21 Ala App 214
Tex—Smith v State, 294 S W 221, 106 Tex Cr 586
30 C J p 247 note 16

14. Ala—Hurston v State, 178 So 223, 235 Ala 213
Ark—Ballentine v State, 276 S W 1002, 169 Ark 871
Cal—People v Sambrano, 91 P 2d 221, 33 Cal App 2d 200
La—State v Woods, 109 So 519, 161 La 863
Miss—Self v State, 171 So 41, 178 Miss 560
Tex—Thompson v State, 276 S W 609, 101 Tex Cr 587
30 C J p 247 note 16

Accused's state of mind toward deceased
Ky—Fleenor v Commonwealth, 75 S W 2d 1, 255 Ky 526
Miss—Butler v State, 176 So 589, 179 Miss 865
Tex—Johnson v State, 252 S W 551, 95 Tex Cr 269

Threats made by accused against victim
Ky—Decker v Commonwealth, 128 S W 2d 600, 278 Ky 145
La—State v Vial, 96 So 796, 153 La 883
Mo—State v Rodgers, 102 S W 2d 566
30 C J p 247 note 25 [c]

Prior difficulties between accused and deceased
(1) Evidence of prior difficulties between accused and his victim which tends to show that accused was the aggressor is admissible
Ky—Fleenor v Commonwealth, 75 S W 2d 1, 255 Ky 526
La—State v Bradford, 114 So 83, 164 La 423

(2) It has been held, however, that evidence that defendants had some thirty minutes prior to gun battle assaulted one of two victims thereof had no bearing on question of self-defense—State v Miller, 25 S E 2d 623, 223 N C 184

Evidence of accused's statement that deceased's wife was accused's "woman" was admissible to rebut plea of self-defense—Collins v State 115 So 223, 217 Ala 212

Testimony as to accused's carrying gun and trouble with another party
Ark—Owens v State, 278 S W 3, 169 Ark 1188

Violence growing out of strike
In prosecution for murder, where accused, who was a striker, alleged that the guards on train coming into a mining area fired on the strikers without cause, and strikers returned the fire in self-defense, evidence that one month previous a crowd of armed strikers had searched the train near the scene of the homicide and had removed and mistreated strike breakers, was admissible as tending to show which party was the probable aggressor—State v Pagialakis, 238 P 256, 65 Utah 552

15. Ill—Gedye v People, 48 N E 987, 170 Ill 284

16. Ala—Witherspoon v State, 53 So 271, 168 Ala. 87

17 Ala—Stevens v State, 75 So 708, 16 Ala App 116
30 C J p 247 note 19, p 246 note 9 [a] (2)

18. Ala—Ezzell v State, 68 So 578, 13 Ala App 156
30 C J p 247 note 20 [a]
Facts unknown to accused see supra § 279

Evidence explaining conduct held admissible
Ky—Warman v Commonwealth, 270 S W 48, 207 Ky 738

19. Ala—Williams v State, 163 So 663, 26 Ala App 531, certiorari denied 163 So 667, 231 Ala. 127
30 C J p 247 note 22 [a]

20. N Y—People v Barnes, 95 N E 15, 202 N Y 77
30 C J p 247 note 23

21. Nev—State v Skinner, 139 P 773, 37 Nev 107, Ann Cas 1916D 269

22. Okl—Durant v State, 240 P 1088, 32 Okl Cr 288

23. Ala—Watson v State, 94 So 787, 19 Ala App 59
Ky—Combs v Commonwealth, 83 S W 2d 46, 259 Ky 703
N M—State v Davis, 234 P 311, 30 N M 395
30 C J p 247 note 25 [a] (5)

Accused's statements to third persons
Evidence that accused, having stabbed deceased, asked third person if he "wanted to take it up," was admissible to controvert self-defense—Collins v State, 115 So 223, 217 Ala 212

Position of accused
Allowing witness to say whether deceased was in position to be shot in back was not abuse of discretion—Clark v State, 111 So 227, 216 Ala 7

Description of deceased's companion and evidence showing what companion had in hand was held admissible on issue as to whether they were attempting to withdraw—Gibbs v State, 127 So 788, 23 Ala App 475, certiorari denied 127 So 790, 221 Ala 130

24. Ky—Combs v Commonwealth, 83 S W 2d 46, 259 Ky 703

25. Nev—State v Hall, 13 P 2d 624, 54 Nev 213
30 C J p 247 note 25 [a] (2).

inquire as to accused's feelings when deceased addressed an opprobrious epithet to him[26] On the other hand, a question to a witness for the state on cross-examination as to the direction in which accused was retreating when he was walking back from deceased, and as to whether he was walking in the direction of his home, is properly excluded[27] Where deceased had made several threats to kill accused, and accused claimed that the killing was in self-defense, it was error to compel him to answer on cross-examination whether he had filed any complaint to place deceased under a peace bond after he heard of the threats, as his applying for a peace bond could not enlarge or restrict his right of self-defense, and under the evidence the jury might have considered his failure to apply for a bond as limiting or restricting his right[28] Where the undisputed evidence shows that deceased was the aggressor, evidence of illicit relations between accused and deceased's wife is inadmissible to show who was the aggressor[29] Evidence that accused's wife, believing her husband intoxicated, had, just prior to the fatal encounter, requested a third person to look after him is inadmissible[30] It has been held that evidence is admissible which tends to show that accused had the means to have avoided the combat but made no effort to do so,[31] but where the law does not place on a citizen the duty or burden to retreat in order to avoid the necessity of killing his assailant, the state is not authorized to prove that accused failed to retreat[32] The prosecution may rebut accused's evidence of improper relations between his daughter and deceased by showing that no improper relationship existed[33]

§ 282. Defense of Another

Evidence which would be competent to establish justification in the case of a person killing another in self-defense is competent to establish it in the case where the killing was done in defense of another, but such evidence is subject to being rebutted

Every fact which would be competent to establish justification in the case of a person killing another in self-defense is competent to establish it in the case where the killing was done in defense of another[34] Thus accused may show that deceased was assaulting or attacking the person defended,[35] that deceased entertained hostile feelings toward,[36] and had made threats against,[37] and assaults on, the person defended,[38] and the basis for such threats,[39] that deceased was larger and stronger than the person defended,[40] that accused believed the person defended was in danger of death or great bodily injury,[41] or that deceased was a fierce, violent, and dangerous man[42] It has been held that uncommunicated threats of deceased against a codefendant not on trial are inadmissible,[43] but there is also

26. N J - State v Corrado, 172 A 571, 113 N J Law 53

27. Ala —Gordon v State, 36 So 1009, 140 Ala 29

28 Tex —Newman v State, Cr, 70 S W 951

29. Ariz - Woodson v State, 247 P 1103 37 Ariz 448

30. Tex - Lemons v State, 62 S W 2d 128, 121 Tex Cr 366

31. Cal —People v Campanella, 116 P 2d 633, 46 Cal App 2d 697

32 Tex —Dennis v State, 276 S W 715 101 Tex Cr 454
Duty to retreat generally see supra §§ 127–130

33 Ky —Lee v Commonwealth 261 S W 842, 203 Ky 63

34. Ky - Commonwealth v Girkey, 42 S W 2d 513 515, 240 Ky 382, citing **Corpus Juris.**
30 C J p 248 note 29

Evidence held inadmissible
Testimony given on examining trial, that witness feared deceased — Rivera v State, 8 S W 2d 129, 110 Tex Cr 298

35. Ky —Commonwealth v Girkey, 42 S W 2d 513, 515, 240 Ky 382, citing **Corpus Juris**
Okl - Head v State, 221 P. 791, 26 Okl Cr 33
30 C J p 248 note 30.

Effect of attack
(1) In prosecution for murder, in which defense was that accused ran for gun after decedent knocked accused's mother down and that gun discharged accidentally exclusion of physician's testimony as to effect of blow on accused's mother was held error —Childs v State, 232 N W 575, 120 Neb 310

(2) Evidence of time accused's father, in defense of whom accused claims to have shot decedent who was attacking the father, was treated for injuries was competent to corroborate accused's testimony as to viciousness of attack on him -Gregor v State, 161 N E 37, 27 Ohio App 272

36. Ky - Commonwealth v Girkey, 42 S W 2d 513, 515, 240 Ky 382 citing **Corpus Juris.**
30 C J p 248 note 31

37. Ky —Commonwealth v Girkey, supra, citing **Corpus Juris**
30 C J p 248 note 32

Declaration held not to constitute threat
S C - State v Smith, 20 S E 2d 726, 200 S C 188

Details held inadmissible
In murder prosecution, where fatal shooting occurred during lull in fight between son of accused and victim, and accused and other witnesses had been allowed great latitude in testifying in support of theory of justifiable homicide, that victim had threatened various persons, refusal to permit testimony in detail as to what actually happened when the threats were made was proper — State v Heaston, 97 P 2d 330, 109 Mont 304

38 Colo —Bailey v People, 130 P 832 54 Colo 337, 45 L R A, N S, 145, Ann Cas 1914C 1142
30 C J p 248 note 33

39. Mo State v Turner, 152 S W 813, 246 Mo 598, Ann Cas 1914B 451
30 C J p 248 note 34

40. Tenn - Foster v State, 49 S W 717, 102 Tenn 32, 73 Am S R 855

41. Tex —Shelton v State, 277 S W 663, 102 Tex Cr 126
30 C J p 248 note 36

42. Colo — Bailey v People, 130 P 832, 54 Colo 337, 45 L R A, N S, 145, Ann Cas 1914C 1142
30 C J p 248 note 37.

43. Minn —State v Dumphey, 4 Minn 438
Tex —Hammons v State, 177 S W 493, 77 Tex Cr 116.

authority holding that uncommunicated threats against a person defended are admissible as bearing on the probability of who was the aggressor.[44] Evidence of threats of deceased against accused himself is inadmissible[45] Evidence tending to show who provoked the difficulty between deceased and the person defended is admissible,[46] although accused was absent at the time[47] Evidence of insanity of the person defended, prompting accused to act more quickly than he would otherwise have done, is admissible[48] The relationship existing between the slayer and the person defended may be considered, in connection with all the circumstances, in determining whether the homicide stands on a like footing of reason and justice with that of self-defense[49] Evidence to sustain the right of defense of another is admissible only where it would be admissible to sustain the right of self-defense[50] Accused may not introduce evidence as to what eyewitnesses of the homicide thought respecting the danger to the person accused claims to have been protecting[51] Evidence of the mistreatment of the person defended which was unknown to accused at the time of the shooting is ordinarily inadmissible,[52] but, where accused claims that the sole cause of the killing was insulting conduct of deceased toward accused's wife at the time of the homicide, which conduct was denied by the prosecution, proof of previous conduct of a similar nature is admissible to corroborate accused's testimony, even though accused did not know of such prior conduct at the time of the killing[53] Evidence that deceased had theretofore raped or attempted to seduce and rape women, offered as a justification for accused's belief that deceased would thereafter so treat the person in whose defense the homicide is alleged to have been committed is incompetent[54] Evidence of the good character of the person defended is admissible[55]

In rebuttal the prosecution may show that accused's plea is a fabrication,[56] that the person defended was the aggressor,[57] even though accused did not know that such person was at fault,[58] or that the purposes of deceased were not felonious[59] Facts explanatory of threats by deceased against the person defended are admissible[60] Where it is claimed that accused's act was for the purpose of protecting the virtue of a female relative against deceased, evidence of the bad character of the female is admissible,[61] but particular acts on her part, not known to accused, cannot be shown,[62] and, where a father kills to prevent the rape of his daughter, the bad reputation of the daughter for morality cannot be shown[63] Evidence of acts and declarations of the person defended, before the arrival of accused, which are not shown to have been known to accused at the time of the killing, is inadmissible to show that the person defended was the aggressor[64] It has been held that evidence of motives of decedent not disclosed to accused is not admissible against the latter,[65] but, where accused's wife testified that deceased attacked her on entering accused's place of business, and accused claimed that the killing was in defense of his wife, evidence that deceased had said he was going there to collect some money, although this was said out of accused's hearing, has been held admissible[66] Testimony of the wounding and death of the person whom accused claimed to have been defending is relevant[67]

§ 283. Defense against Third Person

Evidence that the killing occurred accidentally while accused was justifiably defending himself against the attack of a third person is admissible, but may be rebutted

44. U S —Trapp v New Mexico, N M , 225 F 968, 141 C C A 28
30 C J p 248 note 39

45. Ky — Commonwealth v Girkey, 42 S W 2d 513 240 Ky 382
30 C J p 248 note 40

46 Ala -Morris v State, 39 So 608—Wood v State 29 So 557, 128 Ala 27, 86 Am S R 71

47. Ala —Morris v State, 39 So 608

48. Tex —Holland v State, 206 S W 89, 84 Tex Cr 154

49. Ga —Gillis v State, 70 S E 53, 8 Ga App 696

50. Mont —State v Heaston, 97 P 2d 330, 109 Mont 303
30 C J p 248 note 45

51. Wyo —Mortimore v State, 161 P 766, 24 Wyo 452
30 C J p 248 note 46.

52. Ky —Fallis v Commonwealth, 247 S W 22, 197 Ky 313

53. Tex —Ryan v State, 23 S W 2d 375, 114 Tex Cr 12

54 Ga —Johnson v State, 15 S E 2d 786 192 Ga 571
Miss —Lewis v State, 118 So 708

55. Va —Mitchell v Commonwealth, 125 S E 311, 140 Va 572

56. La —State v Vial, 96 So 796, 153 La 883

57. Ala —Wood v State, 29 So 557, 128 Ala 27, 86 Am S R 71
La —State v Webb, 103 So 191, 157 La 858
Tex —Newsome v State, 249 S W 477, 93 Tex Cr 622

58. Ala —Wood v State, 29 So 557, 123 Ala 27, 86 Am S R 71

59. Ala —Hardaman v State, 78 So 324, 16 Ala App 408.

Idaho —People v Pierson, 3 P 688, 2 Idaho Hash 76
30 C J p 249 note 49

60. Tex —White v State 225 S W 511, 88 Tex Cr 159

61. Ga —Gossett v State 51 S E 391, 123 Ga 431

62. Ga —Gossett v State, supra

63. Okl —Litchfield v State, 126 P 707, 8 Okl Cr 164, 45 L R A ,N S , 153

64. N Y —People v Maine, 59 N E 696, 166 N Y 50

65. Tex —White v State, 225 S W. 511, 88 Tex Cr 159

66 La —State v Vial, 96 So 796, 153 La 883

67. Tex —Forrester v State, 248 S W 40, 93 Tex Cr 415, 26 A L R 537

Evidence that the wound causing death was inflicted accidentally on deceased by accused in justifiable self-defense against the attack of a third person is admissible,[68] subject to such limitations as would be imposed if the third person had been killed.[69] Such evidence may be rebutted by the prosecution.[70]

§ 284. Defense of Habitation

Evidence which tends to sustain or disprove the defense that the killing was in defense of accused's habitation is admissible

Where there is evidence to show that accused's act was in defense of his habitation, evidence of the general reputation of deceased as a quarrelsome and dangerous man is admissible.[71] Where deceased sought to gain admittance into a house of ill fame by violence, and against the will of the keeper thereof, who attacked the aggressor, from which death ensued, it was held that testimony that threats had been made a week previous to the assault by persons who had broken into the house that they would return some other night and break in again might be received and submitted to the jury under the instructions of the court,[72] but, where the acts of officers of the law who were attempting to break into accused's house to arrest him were such as conferred on him the undoubted right of self-defense if he was mistaken as to their character or object, and the question was as to whether or not accused was ignorant of their official character, evidence that the night before a part of the crowd who were with the officers at the time of the homicide had stoned accused's house was immaterial.[73] Where deceased, who was an officer, was shot while ejecting accused from her home under a writ of possession, and he had previously ejected accused, but she had returned to the premises, evidence as to the advice of counsel given accused concerning her rights was inadmissible.[74] Evidence may be admitted on behalf of the prosecution to prove that accused's act was not in defense of his habitation.[75] An affidavit and search warrant are inadmissible where the officer who had them in his possession did not attempt to use them or make search thereunder,[76] and a search warrant under which deceased or the injured party had no authority to act as he did is not admissible to show that he was not a trespasser.[77]

§ 285. Defense of Property

Evidence is admissible to prove or disprove that the killing or assault was a justifiable act in defense of property, but evidence having no tendency to prove or disprove that fact is inadmissible on the issue

Where accused claims that the killing was done in defense of his property, evidence of accused's title or claim to the property may be admissible,[78] but such evidence is not admissible where the violence used was unjustifiable,[79] and, where only the possession of the land in dispute at the time of the homicide is involved, evidence as to the title is not admissible.[80] Evidence of the reputation of deceased for being a violent and dangerous person is admissible,[81] but not evidence of his general reputation as to character[82] or specific acts of bad conduct on his part.[83] Where deceased was shot while entering on accused's land, testimony as to what he said to a witness with reference to his intention to go on the land at all hazards was proper, accused having had notice of the conversation,[84] but, on a trial for assault with intent to kill one of a party coming on accused's mining claim, evidence that another of the party went to accused's claim, intending to cross it against the will of accused, was inadmissible, as it did not show that the person

68. Colo.—Agnes v. People, 93 P. 2d 891, 104 Colo. 527
30 C.J. p. 249 note 56
Admissibility of evidence of accidental killing generally see supra § 267

Relations between third person and accused's wife

Accused, claiming to have killed deceased accidentally when he shot at deceased's son in self-defense could show any relationship existing between deceased's son and accused's wife.—People v. Hauke, 167 N.E. 1, 335 Ill. 217

69. Okl.—Agent v. State, 194 P. 233, 18 Okl.Cr. 281
30 C.J. p. 249 note 57 [a]

70. Ky.—Warren v. Commonwealth, 35 S.W. 1028, 99 Ky. 370, 18 Ky.L. 141.

71. Colo.—Bailey v. People, 130 P. 832, 54 Colo. 337, 45 L.R.A.,N.S., 145, Ann.Cas.1914C 1142

72. N.Y.—People v. Rector, 19 Wend. 569

73. Ill.—Cahill v. People, 106 Ill. 621

74. Tex.—Smith v. State, 81 S.W. 936, 46 Tex.Cr. 267

75. Ala.—Castona v. State, 84 So. 871, 17 Ala.App. 421
Ga.—Day v. State, 66 S.E. 250, 133 Ga. 434

76. Ala.—Booth v. State, 117 So. 492, 22 Ala.App. 508

77. Ala.—Booth v. State, supra—Lakey v. State, 93 So. 51, 18 Ala.App. 442

78. Mont.—State v. Donyes, 35 P. 455, 14 Mont. 70
30 C.J. p. 249 note 65

79. Ala.—Williams v. State, 163 So. 663, 26 Ala.App. 531, certiorari denied 163 So. 667, 231 Ala. 127
30 C.J. p. 249 note 66

80. Tex.—Sims v. State, 41 S.W. 522, 38 Tex.Cr. 637

81. Ky.—Kinder v. Commonwealth, 92 S.W.2d 8, 263 Ky. 145—Howard v. Commonwealth, 248 S.W. 1059, 198 Ky. 453

82. Ky.—Kinder v. Commonwealth, 92 S.W.2d 8, 263 Ky. 145—Howard v. Commonwealth, 248 S.W. 1059, 198 Ky. 453

83. Ky.—Kinder v. Commonwealth, 92 S.W.2d 8, 263 Ky. 145—Howard v. Commonwealth, 248 S.W. 1059, 198 Ky. 453
La.—State v. Sharpe, 127 So. 368, 170 La. 69

84. Wash.—State v. Lattin, 52 P. 314, 19 Wash. 57.

assaulted so intended [85] Where an officer had dispossessed deceased and placed accused in possession of premises on which the homicide occurred, evidence of the instructions given accused by the officer at the time of placing him in possession was admissible [86] Evidence of former trespasses committed by deceased on the same land is inadmissible in the absence of any evidence tending to establish an alleged conspiracy to drive defendant off his land [87] Evidence that deceased did not try to rebuild his broken down fence is inadmissible unless it is shown that his purpose was to permit trespass on accused's property [88] Where it was undisputed that deceased had forfeited the property which accused subsequently acquired and that accused was entitled to possession, admission of evidence as to payments made on the property by deceased prior to the forfeiture is prejudicial error [89] Where a killing arose out of a claim for certain hogs which were alleged to be wild, evidence as to efforts of deceased and his brother to take up hogs belonging to other persons is not material on the issue of defense of property [90] Under a statute authorizing a person to defend his legal possession of property, although the right of property is not in him, evidence that accused, although legally, was not rightfully in possession is inadmissible [91] As bearing on the defense that the killing occurred while deceased and an associate were attempting to rob accused in his store, the state may introduce evidence of all actions of deceased and his companions while in the store.[92] Where it appears that deceased had attempted to burglarize accused's store, evidence of the dangerous and lawless reputation of the vicinity of the locus in quo, of previous burglaries and attempted burglaries of the store, and of the communication to accused of threats to burglarize the store is admissible [93] Where the defense was that the killing occurred in an attempt to prevent a burglary of a house owned by accused's wife but occupied by deceased, it was not error, however, to exclude evidence that at some indefinite time in the past a burglary had been committed at accused's house [94] So, in a trial for murder by a trap gun set to kill a chicken thief, evidence that other property of accused had been stolen before he set the gun is properly excluded [95] In a prosecution for assault with intent to commit murder defended on the ground that the act committed was in defense of defendants' property, testimony of one of those accused that he had gone into the question fully and knew the property belonged to him and the other defendant is inadmissible,[96] and testimony that defendants had forcibly ejected a witness from the premises by means of weapons is competent to rebut defendants' claim that the assault was committed while in peaceable possession of such property [97]

C DYING DECLARATIONS

§ 286. Definition

Dying declarations are statements of material facts concerning the cause and circumstances of homicide made by the victim under the fixed and solemn belief that his death is inevitable and near at hand

Dying declarations are statements of material facts concerning the cause and circumstances of homicide made by the victim under the fixed and solemn belief that his death is inevitable and near at hand[98] and as such are to be distinguished from other admissible declarations such as declarations which constitute a part of the res gestæ,[99] or declarations made in the presence of accused which, although not admissible as dying declarations, may be admitted to show the conduct of accused when charged with the crime [1]

85 Mont.—State v. Donyes, 35 P. 155, 14 Mont. 70

86 Tex.—Carr v. State, 55 S.W. 51, 41 Tex.Cr. 380

87 Cal.—People v. Clark, 24 P. 813, 84 Cal. 573

88 S.C.—State v. Perry, 59 S.E. 851, 78 S.C. 184

89 Ariz.—McCreight v. State, 42 P. 2d 1102, 45 Ariz. 269

90 Ark.—Brown v. State, 233 S.W. 762, 149 Ark. 588

91. Tex.—Carr v. State, 55 S.W. 51, 41 Tex.Cr. 380

92. Tex.—Rylee v. State, 117 S.W. 2d 85, 135 Tex.Cr. 87

93. Ariz.—Viliborghi v. State, 43 P. 2d 210, 45 Ariz. 275

94. Ga.—Crews v. State, 162 S.E. 146, 44 Ga.App. 546

95. La.—State v. Plumlee, 149 So. 425, 177 La. 687

96. Tex.—Torrans v. State, 265 S.W. 560, 98 Tex.Cr. 298

97. Tex.—Torrans v. State, supra

98. Ala.—Ratliff v. State, 98 So. 495, 19 Ala.App. 505
Ill.—People v. Hatcher, 166 N.E. 74, 334 Ill. 526—People v. Borella, 143 N.E. 471, 312 Ill. 34—People v. Selknes, 140 N.E. 852, 309 Ill. 113—People v. Corder, 137 N.E. 845, 306 Ill. 261
Ind.—McKee v. State, 154 N.E. 372, 198 Ind. 590
30 C.J. p. 250 note 85.

99. Fla.—Johnson v. State, 152 So. 176, 113 Fla. 461
30 C.J. p. 250 note 86

Different basis

(1) Dying declaration rests on different basis and requires different proof from res gestæ statement in order to make it admissible.—Hale v. State, 16 S.W.2d 1068, 112 Tex.Cr. 422

(2) "Dying declaration" regards declarant as testifying in that sense of impending death takes place of oath, while "res gestæ" means that event itself speaks.—Jones v. State, 11 S.W.2d 798, 111 Tex.Cr. 172

1. Ill.—People v. Borella, 143 N.E. 471, 312 Ill. 34.

A final statement made by a person prior to the time he was executed is not a dying declaration [2]

§ 287. General Rule as to Admissibility

a In general
b Reasons for rule
c Constitutionality of rule

a. In General

While dying declarations are secondary evidence or a species of hearsay evidence, they constitute one of the several exceptions to the rule which excludes hearsay evidence

In prosecutions for homicide, the declarations of deceased, voluntarily made, while in articulo mortis, and under the solemn conviction of approaching dissolution, concerning the facts and circumstances constituting the res gestæ of his destruction, where deceased would be a competent witness if living, discussed in detail infra § 288 et seq, are always admissible in evidence [3] The rule admitting dying declarations is not confined to their introduction by the prosecution, they are also admissible in behalf of the defense [4]

Although dying declarations are secondary[5] or a species of hearsay evidence,[6] they constitute one of the several exceptions to the rule which excludes hearsay evidence [7] However, they should be received with caution[8] and the rule authorizing their admission should not be extended beyond the reasons which justify it,[9] because, while the solemnity of the occasion may supply the place of an oath, nothing can fully supply the absence of a cross-examination,[10] and because such declarations have great and sometimes due weight with juries [11] It

Mo—State v Conway, 154 S W 2d 128, 348 Mo 580
30 C J p 250 note 87

2. Ala Sanders v State, 79 So 375, 202 Ala 37
Ky—Lovell v Commonwealth, 75 S W 2d 4, 255 Ky 518

3. Ala—Thomas v State, App 9 So 2d 150—Collins v State, 176 So 219, 27 Ala App 499, certiorari denied 176 So 223, 231 Ala 612—Sexton v State, 172 So 125, 27 Ala App 335—Braseale v State 167 So 15 26 Ala App 519—Ratliff v State, 98 So 493, 19 Ala App 505
Cal—People v Smith, 77 P 2d 277, 25 Cal App 2d 211
Colo—Davis v People, 238 P 25, 77 Colo 516
Ga—Court v State, 119 S E 723 156 Ga 536—Satterfield v State App, 21 S E 2d 861—Dudley v State, 19 S E 2d 833, 67 Ga App 256
Hawaii—Territory v Buick, 27 Hawaii 28
Idaho State v Wilson, 213 P 359, 41 Idaho 616
Ky—Stein v Commonwealth, 102 S W 2d 363, 267 Ky 413—Walls v Commonwealth, 78 S W 2d 322, 323, 257 Ky 478, citing **Corpus Juris**—Holmes v Commonwealth 44 S W 2d 592 241 Ky 573—Hunter v Commonwealth, 298 S W 379, 221 Ky 170—Little v Commonwealth, 272 S W 721, 209 Ky 263—Blackerby v Commonwealth, 255 S W 821, 200 Ky 832—Eastridge v Commonwealth, 241 S W 806, 195 Ky 126
Neb—Howard v State 201 N W 968, 113 Neb 67—Johnson v State, 199 N W 808, 112 Neb 530
N C—State v Thomas, 16 S E 2d 399, 220 N C 34
Okl—Blair v Rogers 89 P 2d 928, 929, 185 Okl 63, citing **Corpus Juris.**
Or—Mercep v State Industrial Accident Commission, 118 P 2d 1061 167 Or 460
Pa—Commonwealth v Foltz, 5 Pa Dist & Co 559
Philippine—U S v Montes, 6 Philippine 143 5 Off Gaz 88—U S v Palanca, 5 Philippine 269, 4 Off Gaz 193
S C—State v Robinson, 147 S E 441, 149 S C 139—State v Hall, 133 S E 24, 134 S C 361 State v Bigham, 131 S E 603 133 S C 491
Tex—Arseneau v State Cr, 171 S W 2d 132
Wash—State v Gallagher, 103 P 2d 1100 1 Wash 2d 437 State v Mooney, 56 P 2d 722, 185 Wash 681
30 C J p 251 note 95
Admissibility of dying declarations in
Actions for wrongful death see Death § 83
Civil cases generally see Evidence § 238
Criminal cases generally see Criminal Law § 741
Prosecutions for Abortion see Abortion § 25

4. Cal People v Costa, 227 P 201, 67 Cal App 175
Ga—Johnson v State, 152 S E 76, 169 Ga 814
Ky—Justice v Commonwealth, 108 S W 2d 1011, 269 Ky 846—Thacker v Commonwealth, 91 S W 2d 998, 263 Ky 97
Miss—McNair v State, 157 So 908 171 Miss 358—Scott v State, 148 So 239, 166 Miss 6
N C—State v Puett, 188 S E 75, 210 N C 633—State v Mitchell, 182 S E 695, 209 N C 1—State v Wallace, 165 S E 716, 203 N C 284—State v Blackwell, 136 S E 868, 869, 193 N C 313, citing **Corpus Juris.**
30 C J p 252 note 99

5. Ala—White v State, 136 So 420, 24 Ala App 442
30 C J p 252 note 96

6. Ariz—Collins v State, 294 P 625, 37 Ariz 353
Miss—Conway v State, 171 So 16, 177 Miss 461
30 C J p 252 note 97

7. Ala—Ratliff v State, 98 So 493, 19 Ala App 505
Ariz—Collins v State, 294 P 625, 37 Ariz 353
Fla—McRane v State, 194 So 632 142 Fla 240 Johnson v State, 152 So 176 113 Fla 461
Ga—Court v State, 119 S E 723, 156 Ga 536
Nev State v Hunter, 232 P 778, 48 Nev 358 rehearing denied 235 P 645, 48 Nev 358
N Y—People v Bartelini, 35 N E 2d 29 285 N Y 433 People v Portuguese 2d N Y S 389, 110 Misc 688
N C—State v Dobnam 22 S E 2d 562 222 N C 266—State v Jordan 5 S E 2d 156, 216 N C 356—State v Franklin 135 S E 859, 192 N C 723
Okl—Adams v State, 70 P 2d 821, 62 Okl Cr 167.
Tex Berry v State, 143 S W 2d 593 140 Tex Cr 3
Vt—State v Tubbs, 139 A 769, 101 Vt 5
Wash—State v Labbee, 234 P 1019, 134 Wash 55
30 C J p 252 note 98

8. Ala—White v State, 136 So 420, 24 Ala App 442
Miss—Conway v State, 171 So 16, 177 Miss 461—Walton v State, 126 So 29, 156 Miss 499
N C—State v Williams, 67 N C 12
W Va—State v Meek, 148 S E 208, 107 W Va 324

9. N C—State v Williams, 67 N C 12

10. N C—State v Stewart, 186 S E 488, 210 N C 362—State v Williams, 67 N C 12

11. N C—State v Stewart, 186 S E 488, 210 N C 362—State v. Williams, 67 N C 12

has been stated that the rule admitting dying declarations may not be broadened, except by statute [12]

Use of profanity. The fact that decedent used profane language does not render his dying declaration inadmissible [13]

Motive, self-serving purpose. The declaration must not spring from a motive to fabricate or serve himself,[14] and a dying declaration clearly shown to have been actuated by malice, venom, ill will, and desire for revenge should be excluded [15] However, the absence of any self-serving purpose is not an essential element of the circumstantial guaranty of the trustworthiness of dying declarations [16]

Where accused admits homicide The fact that accused admitted killing deceased has been held not to render a dying declaration inadmissible where it tended to negative accused's claim of self-defense [17]

b. Reasons for Rule

One reason for the admission of dying declarations lies in the necessity of the case, and an important reason for excepting them from the rule against hearsay evidence is that the solemnity of the circumstances under which they are made naturally constitutes a guaranty of their truth equal to that which is afforded by the customary oath

An important reason for excepting dying declarations from the rule against hearsay evidence is that the solemnity of the circumstances under which such declarations are made naturally constitutes a guaranty of their truth equal to that which is afforded by the customary oath [18]

In addition to the fact that the solemnity of the circumstances under which a dying declaration is made may operate as a substitute for a positive oath, an additional reason for the admission of dying declarations lies in the necessity of the case[19] and the impossibility of producing better proof of the fact where the victim of the homicide has died, and there is, as often happens, no other witness to the transaction [20] However, the admissibility of dying declarations does not depend on the absence of other evidence of the same facts They are admissible in evidence, although there are eyewitnesses who testify positively to the facts, and it is no objection to their admission that the exigencies of the case do not require it [21]

c. Constitutionality of Rule

It is well settled that the admission in evidence of dying declarations is not an infraction of the constitutional or statutory right of the accused to be confronted by the witnesses against him

It is well settled that the admission in evidence of the dying declarations of the person murdered is not an infraction of the constitutional or statutory right of accused to be confronted by the witnesses against him [22]

Weight as evidence see infra § 304

12. N Y - People v Becker, 109 N E 127, 215 N Y 126 33 N Y Cr 93, Ann Cas 1917A 600

13. Ala —Kirby v State, 44 So 38 151 Ala 66
La —State v Brady, 50 So 806, 124 La 951

14. Ky —Madden v Commonwealth 36 S W 2d 316 237 Ky 703

15. Miss —Marley v State, 69 So 210, 109 Miss 717—Reeves v State, 61 So 886, 106 Miss 885, Ann Cas 1917A 1245

16. Va —Pendleton v Commonwealth, 109 S E 201, 131 Va 676, disapproving Patterson v Commonwealth, 75 S E 737, 114 Va 807

17. Cal —People v Brown, 216 P 411, 62 Cal App 96

18. Ala —Lewis v State, 164 So 92, 231 Ala 211
Ariz —Collins v State, 294 P 625, 37 Ariz 353
Fla —Johnson v State, 152 So 176, 113 Fla 461
Hawaii —Territory v Buick, 27 Hawaii 28
Ill —People v Cheney, 13 N E 2d 171 368 Ill 131, 114 A L R 1514—People v Borella, 143 N E 471, 312 Ill 34.
Ky —Stean v Commonwealth, 102 S W 2d 363, 267 Ky 413—Harrod v Commonwealth, 300 S W 625 222 Ky 248—Whitehead v Commonwealth, 255 S W 93, 200 Ky 410
Miss —Conway v State, 171 So 16, 177 Miss 461—Dean v State, 160 So 584, 173 Miss 251 suggestion of error overruled 162 So 155, 173 Miss 254
Mo —State v Custer, 80 S W 2d 176 336 Mo 514 —Selleck v Hawley, 56 S W 2d 385, 387, citing **Corpus Juris.**
Neb —Edwards v State 204 N W 780, 113 Neb 698
N Y —People v Bartelini 35 N E 2d 29, 285 N Y 133—People v Smith, 281 N Y S 294, 245 App Div 69
N C —State v Debnam, 22 S E 2d 562, 222 N C 266 - State v Stewart 186 S E 488, 210 N C 362—State v Dalton 174 S E 422, 206 N C 507 —State v Wallace, 165 S E 716, 203 N C 284
N D —State v Phillips, 277 N W 609 68 N D 113
Vt —State v Tubbs, 139 A 769 101 Vt 5
Wash —State v Labbee 234 P 1049, 134 Wash 55
30 C J p 252 note 8

19. Ga —Bryant v State, 163 S E 219, 44 Ga App 781
Mich —People v Arnett, 214 N W 231, 239 Mich 123
Miss —Conway v State, 171 So 16, 177 Miss 461
Mo —State v Custer, 80 S W 2d 176, 336 Mo 514
N Y - People v Bartelini, 35 N E 2d 29 285 N Y 133
N C —State v Stewart, 186 S E 488, 210 N C 362
Tex —Webb v State, 106 S W 2d 683, 133 Tex Cr 32
Vt - State v Tubbs 139 A 769 101 Vt 5
30 C J p 253 note 10

20 N C - State v Jordan, 5 S E 2d 156 216 N C 356
30 C J p 253 note 10

Accused should not be allowed to escape consequences of crime by putting sole witness of crime beyond power of court by killing him —People v Portugay, 251 N Y S 389, 140 Misc 688

21. Colo —Davis v People, 238 P 25, 77 Colo 546
N M —State v Sanford, 97 P 2d 915, 44 N M 66
30 C J p 253 note 12

22 N M —State v Stewart, 231 P 692, 30 N M 227
Okl —Armstrong v State, 95 P 2d 919 68 Okl Cr 105
30 C J p 253 note 13.

In sustaining the constitutionality of this rule, the courts have sometimes taken the position that the declarant is not regarded as the "witness" whom accused is constitutionally entitled to meet "face to face"[23] This reasoning has, however, been criticized as unsatisfactory[24] Further reasons are that the rule admitting dying declarations existed at common law before the adoption of the United States Constitution, although the right to have the witness against him examined in his presence was practically secured to accused by Magna Charta,[25] and that, as the evidence is admissible for accused as well as for the state, accused might be deprived of a very important right if this evidence were excluded[26]

§ 288. Conditions Essential to Admissibility

The conditions essential to admissibility of dying declarations are discussed in detail infra §§ 289–291

Examine Pocket Parts for later cases

§ 289. —— Declarant Must Be in Extremis

Unsworn statements can be admitted in evidence as dying declarations only when made in extremis.

Unsworn statements can be admitted in evidence as dying declarations only when made in extremis,[27] and after death has ensued[28] However, the admissibility of evidence of this character does not depend on the length of the interval between the declaration and the death,[29] but on the state of de-

23. Ohio—State v Kindle, 24 N E 485, 47 Ohio St 358
30 C J p 253 note 14

24. Mo—State v Houser, 26 Mo 431, 437
30 C J p 254 note 15

Corpus Juris has been cited in connection with a statement that the rule admitting dying declarations has not been adopted and applied without difficulty in logic and reason in view of the general constitutional provisions relating to fair trials in criminal prosecutions - Blair v Rogers, 89 P 2d 928, 929, 185 Okl 63

25 Va—Hill v Commonwealth, 2 Gratt 594 43 Va 594
30 C J p 254 note 16

26 Or—State v Saunders, 12 P 441, 14 Or 300
30 C J p 254 note 18

27. Ala—Humber v State, 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559
Ga—Cooper v State, 184 S E 716 719 181 Ga 42 citing **Corpus Juris** —Johnson v State, 152 S E 76 169 Ga 814—Green v State, 113 S E 536 154 Ga 117
Ky—Bailey v Commonwealth, 157 S W 2d 100, 288 Ky 613—Huff v Commonwealth, 108 S W 2d 1044, 270 Ky 36- Hord v Commonwealth, 13 S W 2d 244, 227 Ky 439 —Meade v Commonwealth, 7 S W 2d 1052, 225 Ky 177
Mo—State v Strawther, 116 S W 2d 133 342 Mo 618 120 A L R 583
N Y—People v Portugay, 251 N Y S 389, 140 Misc 688
N C—State v Jordan, 5 S E 2d 156 216 N C 356—State v Bright, 2 S E 2d 541, 215 N C 537—State v Stewart, 186 S E 488 210 N C 362 —State v Carden 183 S E 898, 209 N C 404, certiorari denied Carden v State of North Carolina, 56 S Ct 960, 298 U S 682, 80 L Ed 1402— State v Wallace, 165 S E 716 203 N C 284—State v Collins, 126 S E 98, 189 N C. 15.
Va—Waller v Commonwealth, 16 S E 2d 808, 178 Va 294, certiorari denied Waller v Youell, 62 S Ct 1106, 316 U S 679, 86 L Ed 1752, rehearing denied 62 S Ct 1289, 316 U S 712, 86 L Ed 1777—Compton v Commonwealth 170 S E 613, 161 Va 980
30 C J p 254 note 19

28. Ala—Thomas v State, App., 9 So 2d 150—Humber v State, 99 So 68 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559
N Y—People v Portugay, 251 N Y S 389, 140 Misc 688
N C—State v Jordan, 5 S E 2d 156, 216 N C 356—State v Bright, 2 S E 2d 541, 215 N C 537 -State v Carden, 183 S E 898, 209 N C 404, certiorari denied Carden v State of North Carolina 56 S Ct 960, 298 U S 682, 80 L Ed 1402—State v Wallace, 165 S E 716, 203 N C 284—State v Collins, 126 S E 98, 189 N C 15

29. Ala—Sowell v State, 199 So 900, 30 Ala App 18 -Russell v State, 137 So 460, 21 Ala App 496, certiorari denied 137 So 462 223 Ala 523—Moomaw v State, 137 So 40, 24 Ala App 459, certiorari denied 137 So 42, 223 Ala 438
Ark—Burns v State, 243 S W 963, 155 Ark 1
Cal—People v Wilson, 129 P 2d 149 54 Cal App 2d 434—People v Pollock, 89 P 2d 128, 31 Cal App 2d 747
Fla—Handley v State, 170 So 748, 754, 125 Fla 632, citing **Corpus Juris.**
Ga—Cooper v State, 184 S E 716, 182 Ga 42—Coart v State, 119 S E 723, 156 Ga 536
Ill—People v Kreutzer, 188 N E 422, 254 Ill 430
Ind—Williams v State, 147 N E 153, 196 Ind 84
Ky—Meade v Commonwealth, 7 S W 2d 1052, 225 Ky 177
La—State v Robertson, 110 So 888, 889, 162 La 641, quoting **Corpus Juris.**
Mass—Commonwealth v Vona, 146 N E 20, 250 Mass 509
Minn—State v Brown, 296 N W 582, 209 Minn 478
Mo—State v Flinn, 96 S W 2d 506, 510, citing **Corpus Juris**—State v Custer, 80 S W 2d 176, 336 Mo 514 —State v Brockington 36 S W 2d 911—State v Anderson, 34 S W 2d 25
Neb—Penn v State, 227 N W 314, 119 Neb 95—Johnson v State, 199 N W 808 112 Neb 530
N Y—People v Weiss, 261 N Y S 646, 147 Misc 595
N C—State v Dalton, 174 S E 422, 206 N C 507
N D—State v Phillips, 277 N W 609, 68 N D 113
S C - State v Ferguson, 141 S E 361 143 S C 175
Tenn—Crittendon v State, 8 S W 2d 371, 157 Tenn 403
Wash - State v Mooney, 56 P 2d 722, 185 Wash 681
30 C J p 254 note 20

Actually at point of death

For declarations to be admissible as dying declarations it is not necessary that deceased actually have been at the point of death or that the statement have been made at the time deceased was breathing his last
Cal—People v Hoffman, 232 P 974, 195 Cal 295
Ill—People v Corder, 137 N E 815, 306 Ill 264
N C—State v Stewart, 186 S E 488, 210 N C 362

Rule applied to particular periods

(1) Within one hour
Fla—Davis v State, 157 So 783, 137 Fla 123
Ky—Salvers v Commonwealth, 16 S. W 2d 509, 229 Ky 153--Spencer v Commonwealth, 240 S W 750, 194 Ky 699
La—State v. Willis, 158 So 826, 181 La 154
(2) About six hours—Anderson v. State, 186 N E 316, 205 Ind 607

(3) About twelve hours—Hol-

clarant's mind and his belief that he is in a dying condition, as discussed infra § 290 The length of time elapsing between the making of the declarations and the declarant's death is, however, one of the elements to be considered in determining whether the declarations were made under a sense of impending death.[30]

Before infliction of injury Declarations made before the infliction of the mortal injury are, of course, inadmissible as dying declarations[31]

§ 290. —— Consciousness of, and Belief in, Impending Death

It is essential that a dying declaration be made when declarant has abandoned all hope of recovery from the injury inflicted by the accused and is under the firm conviction that his death is inevitable and near at hand. It is the condition of mind of the declarant, and not the belief of others, which determines admissibility, and an inadmissible statement may become admissible if approved or repeated after all hope of recovery is abandoned.

It is not enough that the statement be made when declarant is in extremis, it is also essential that it be made when he has abandoned all hope of recovery from the injury inflicted by accused and is under the firm conviction that his death is inevitable and near at hand,[32] and the fact that declarant believes himself in great danger and entertains a

brook v Commonwealth, 61 S W 2d 644, 249 Ky 795

(4) Eighteen or twenty hours—Jones v State, 116 So 90, 149 Miss 758

(5) Forty-six hours—Simpson v State, 148 S E 511, 168 Ga 598

(6) Within forty-eight hours—Clements v State, 133 S W 2d 844, 199 Ark 69

(7) Three days
N Y—People v Chase, 29 N Y S 376, 79 Hun 296, affirmed 39 N E 21, 143 N Y 669
N D—State v Phillips, 277 N W 609, 68 N D 113

(8) Within four days—Gardner v Commonwealth, 42 S W 2d 319, 240 Ky 283

(9) Four days
Ill—People v Corder, 137 N E 845, 306 Ill 264
Mass—Commonwealth v Hancy, 127 Mass 455
Mo—State v Brockington, 36 S W 2d 911

(10) Ten days
Pa—Commonwealth v Lockett, 139 A 836, 291 Pa 319
Tex—Rawls v State, 76 S W 2d 1053, 127 Tex Cr 414
Va—Swisher v Commonwealth, 26 Gratt 963, 67 Va 963, 21 Am R 330

(11) Eleven days
Cal—People v Ybarra, 228 P 868, 68 Cal App 259
Mo—State v Clift, 285 S W 706
30 C J p 254 note 20 [a] (9)

(12) Fourteen days—Anderson v State, 182 So 643, 133 Fla 63

(13) More than two weeks—Webb v State, 117 S W 2d 426, 135 Tex Cr 207

(14) Thirty-three or thirty-four days
Ga—Miles v State, 185 S E 286, 182 Ga 75
S C—State v Hall, 133 S E 24, 134 S C 361

(15) Nearly two months—State v Robertson, 110 So. 888, 162 La 641

(16) Two months
Ala—Boulden v State, 15 So 341, 102 Ala 78
Ga—Johnson v State, 152 S E 76, 169 Ga 814

(17) About three and one-half months—Kalb v State, Ga, 25 S E 2d 24—Emmett v State, Ga, 25 S E 2d 9

(18) Other periods see 30 C J p 254 note 20 [a]

30. Ga—Kalb v State, 25 S E 2d 24 Emmett v State, 25 S E 2d 9—Cooper v State, 184 S E 716, 182 Ga 42
Iowa—State v Sweeney, 214 N W 735, 203 Iowa 1305
Ky—Whitehead v Commonwealth 255 S W 93 200 Ky 110
S C—State v Hall, 133 S E 24 26, 134 S C 361, quoting **Corpus Juris.** 30 C J p 255 note 21

31. N Y—People v Wansker, 182 N Y S 782, 191 App Div 875
Statement prior to execution as not dying declaration see supra § 286

32 U S—Shepard v U S, Kan, 54 S Ct 22, 290 U S 96, 78 L Ed 196, reversing C C A 62 F 2d 683, rehearing denied 64 F 2d 641 certiorari granted 53 S Ct 794 289 U S 721 77 L Ed 1472
Ala—Lewis v State, 161 So 92, 231 Ala 211—Marshall v State 121 So 72 219 Ala 83, 63 A L R 560—Nolan v State, 93 So 529 207 Ala 663—Wilson v State, 185 So 274, 28 Ala App 496—Moomaw v State, 137 So 40, 24 Ala App 459 certiorari denied 137 So 42, 223 Ala 438—Moomaw v State, 121 So 904, 23 Ala App 125—Culberson v State, 117 So 397, 22 Ala App 493—Humber v State, 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559—Mayhall v State, 92 So 33, 18 Ala App 290
Ariz—Collins v State, 294 P 625, 37 Ariz 353
Ark—Fulbright v State, 74 S W 2d 965, 189 Ark 637—Sutton v State, 63 S W 2d 278, 187 Ark 870
Cal—People v Coltrin, 55 P.2d 1161, 5 Cal 2d 619
Colo—Polly v People, 108 P 2d 220, 107 Colo 6—Clark v People, 86 P 2d 257, 103 Colo 371
Conn—State v Manganella, 155 A 71, 113 Conn 209
Fla—Handley v State, 170 So 748, 754 125 Fla 632, citing **Corpus Juris**—Green v State, 113 So 121, 93 Fla 1076—Kirkland v State, 111 So 351, 93 Fla 172—Frier v State, 109 So 334 92 Fla 241—Sealey v State, 105 So 137 89 Fla 439
Ga—Miles v State, 185 S E 286, 287, 182 Ga 75 citing **Corpus Juris**—Gibson v State, 168 S E 47, 176 Ga 384—Faulkner v State, 144 S E 193 166 Ga 645
Ill—People v Maria 194 N E 510, 359 Ill 231—People v Corder, 137 N E 845, 306 Ill 264
Ind—McKee v State, 154 N E 372, 198 Ind 590
Iowa—State v Rowley, 248 N W 340, 216 Iowa 140
Ky—Huff v Commonwealth, 108 S W 2d 1044, 270 Ky 36—Commonwealth v Belcher 71 S W 2d 955, 255 Ky 475—Griffith v Commonwealth 63 S W 2d 594, 250 Ky 506—Holmes v Commonwealth, 41 S W 2d 592 241 Ky 573—Barton v Commonwealth 38 S W 2d 218, 238 Ky 356—Madden v Commonwealth 36 S W 2d 346 237 Ky 703—Stewart v Commonwealth 32 S W 2d 29, 235 Ky 670—Caudill v Commonwealth 294 S W 1042, 220 Ky 191—Lyons v Commonwealth, 287 S W 531, 216 Ky 202—Gillis v Commonwealth, 261 S W 591 202 Ky 821—Thomas v Commonwealth, 213 S W 1, 195 Ky 623
La—State v Price, 188 So 718, 192 La 615
Mich—People v Arnett, 214 N W 231, 239 Mich 123
Minn State v Brown, 296 N W 582, 209 Minn 478—State v Elias, 285 N W 475 205 Minn 156
Miss—Scott v State, 148 So 239, 166 Miss 6—Walton v State, 126 So 29, 156 Miss 499—Wade v. State, 112 So 677, 147 Miss 479—

fear that he must die is not sufficient [33] It is immaterial how or by what means deceased became conscious that he was dying [34] It is no objection to the admissibility of the declarations that declarant's belief of impending death was induced by the statements of attendants,[35] and, conversely, that no physician or other person had told declarant that there was no hope for him does not render the statement inadmissible [36]

Degree of apprehension No absolute standard of the degree of apprehension or the depth of the solemnity into which declarant has been submerged can be fixed for the introduction of dying declarations [37] While it has sometimes been thought that a declaration should not be excluded simply because the declarant entertained a faint and lingering hope of recovery,[38] according to the clear preponderance of authority if deceased had the slightest hope of recovery when the declarations were made they are inadmissible [39]

There is authority for the view that the person making the declaration must entertain a settled and hopeless expectation of immediate or, in other words, of impending death,[40] and that a mere be-

Crawford v State, 110 So 517, 144 Miss 793 -Wilkinson v State, 108 So 711, 143 Miss 324, 16 A L R 805--Donahue v State, 107 So 15, 142 Miss 20—Hathorn v State 102 So 771, 138 Miss 11—Haney v State, 92 So 627, 129 Miss 186

Mo —State v King 119 S W 2d 322, 342 Mo 1067—State v Strawther, 116 S W 2d 133, 342 Mo 615, 120 A L R 583—State v Richardson 102 S W 2d 653, 340 Mo 680—State v Flinn, 96 S W 2d 506 510 citing **Corpus Juris** --State v Davis 84 S W 2d 930, 337 Mo 411—State v Custer, 80 S W 2d 176, 336 Mo 511

Mont -State v Martin 248 P 176, 177, 76 Mont 565, quoting **Corpus Juris**

Neb -- Nanfito v State, 287 N W 58 136 Neb 658 Penn v State, 227 N W 314 119 Neb 95

N M -- State v Sanford, 97 P 2d 915 41 N M 66—State v Stewart, 231 P 692, 30 N M 227

N Y —People v Smith 281 N Y S 294, 245 App Div 69 People v Flaherty, 218 N Y S 148 218 App Div 204—People v Mikulec, 202 N Y S 551, 207 App Div 505 modified on other grounds 207 N Y S 896, and affirmed 148 N E 710, 240 N Y 573--People v Portugay, 251 N Y S 389, 140 Misc 688

N C —State v Jordan, 5 S E 2d 156 216 N C 356—State v Bright, 2 S E 2d 541, 215 N C 537- State v Stewart, 186 S E 488, 210 N C 362 —State v Mitchell, 182 S E 695, 209 N C 1—State v Wallace, 165 S E 716 203 N C 284—State v Collins, 126 S E 98, 189 N C 15

N D —State v Hanson, 207 N W 1000, 53 N D 879

Okl - Looper v State, 276 P 503 12 Okl Cr 341 - Foreman v State, 259 P 176 38 Okl Cr 50—Moore v State 219 P 175 25 Okl Cr 151

Pa —Commonwealth v Guida 148 A 501, 298 Pa 370- Commonwealth v Lockett, 139 A 836, 291 Pa 319—Commonwealth v Gardner, 128 A 87, 282 Pa 458

S C —State v Davis, 137 S E 139, 138 S C 532

Tex —Gilbreth v State, 63 S W 2d 560, 124 Tex Cr. 465—Vickers v State, 242 S W 1032, 92 Tex Cr 182

Vt -State v Tubbs, 139 A 769, 101 Vt 5

Va —Waller v Commonwealth, 16 S E 2d 808 178 Va 294, certiorari denied Waller v Youell, 62 S Ct 1106 316 U S 679 86 L Ed 1752, rehearing denied 62 S Ct 1289, 316 U S 712, 86 L Ed 1777—Compton v Commonwealth, 170 S E 613, 161 Va 980

Wis - Ochler v State, 232 N W 866, 202 Wis 530

30 C J p 255 note 24

33. U S —Shepard v U S Kan, 54 S Ct 22, 290 U S 96, 78 L Ed 196, reversing C C A, 62 F 2d 683, rehearing denied 64 F 2d 641 certiorari granted 53 S Ct 794, 289 U S 721, 77 L Ed 1472

Ark - Sutton v State, 63 S W 2d 278, 187 Ark 870

La —State v Price, 188 So 718, 192 La 615

Minn —State v Elias, 285 N W 475, 205 Minn 156

N Y —People v Smith, 281 N Y S 294, 245 App Div 69

Tex —Fambro v State, 141 S W 2d 354 139 Tex Cr 480

Va —Compton v Commonwealth, 170 S E 613, 161 Va 980

30 C J p 256 note 25

34. Colo —Davis v People, 238 P 25, 77 Colo 546

Ga —Smith v State, 71 S E 606, 9 Ga App 403

35. Ill - People v Borella, 143 N E 471, 312 Ill 34—People v Selkner 140 N E 852 309 Ill 113—People v Buettner 84 N E 218 233 Ill 272 13 Ann Cas 235

Pa —Commonwealth v Guida, 148 A 501, 298 Pa 370

36 Ill —People v Zachary, 141 N E 732 310 Ill 351

Mo —State v Flynn, 96 S W 2d 506, 510, quoting **Corpus Juris.**

30 C J p 256 note 28

37. N C —State v Jordan, 5 S E 2d 156, 159, 216 N C 356

"In this connection we can find almost as many expressions of opinion as there are cases, but in most instances they are general expressions addressed to the philosophy back of the admission of such evidence rather than intending to fix the exact degree of apprehension, only to emphasize the point that the declaration must be solemnized by a full sense of approaching dissolution"—State v Jordan, supra

38. N Y —People v Anderson, 2 Wheel Cr 390

39. Ark —Sutton v State, 63 S W 2d 278, 187 Ark 870

Fla —McRane v State, 194 So 632, 142 Fla 240

Ky —Perkins v Commonwealth, 137 S W 2d 701, 282 Ky 46—Huff v Commonwealth, 108 S W 2d 1044, 270 Ky 36—Commonwealth v Belcher 74 S W 2d 955 255 Ky 475—Madden v Commonwealth, 36 S W 2d 346, 237 Ky 703 -Wells v Commonwealth, 272 S W 389, 209 Ky 208

Minn -State v Brown, 296 N W 582, 209 Minn 478

Miss —Lea v State, 103 So 368, 138 Miss 761 Hathorn v State, 102 So 771, 138 Miss 11

N Y --People v Bertelini, 35 N E 2d 29, 285 N Y 113—People v Block, 275 N Y S 873 243 App Div 551—People v Bicken 273 N Y S 470, 242 App Div 106—People v Weiss, 261 N Y S 646, 147 Misc 595

S C —State v Hall, 120 S E 819, 127 S C 256

Tex -Fambro v State, 141 S W 2d 354, 139 Tex Cr 480

30 C J p 257 note 32

40. U S —Shepard v U S, Kan, 54 S Ct 22, 290 U S 96, 78 L Ed 196, reversing C C A, 62 F 2d 683, rehearing denied 64 F 2d 641 certiorari granted 53 S Ct 794, 289 U S 721, 77 L Ed 1472

Fla —McRane v State, 194 So 632, 142 Fla 240

Miss —Dean v State, 160 So 581, 173 Miss 254, suggestion of error overruled 162 So 155, 173 Miss 254

Mont —State v Martin, 248 P 176, 76 Mont 565

N Y —People v Smith, 281 N Y S 294, 245 App Div 69

30 C J p 257 note 33.

lief of declarant that he will not recover from his injuries, but that he will ultimately die from them, is not sufficient to admit his declarations in evidence[41] However, it has also been held that it is not necessary to show that deceased was apprehensive of immediate dissolution, it being sufficient to show that he had abandoned all hope and regarded his death as impending and certain as a result of the injury inflicted by accused,[42] or, as it is otherwise stated, that it is not necessary that the declaration should have been made in articulo mortis[43]

Condition of mind, belief of others It is the condition of mind of declarant which determines the admissibility of this class of proof,[44] and the fact that others believe declarant would not recover would not render the statement admissible where declarant showed no realization of impending death[45] Conversely, the belief of others that he would recover does not render the evidence inadmissible,[46] although death may not have followed for some time[47] If declarant believes himself beyond hope, the declaration is admissible, although the attending physician or surgeon may believe him to be progressing favorably,[48] even when such belief is expressed to declarant,[49] and hence, of course, when it is not expressed,[50] or is expressed after the declarations are made[51]

Reiteration A statement made under circumstances which would not render it admissible as a dying declaration becomes admissible as such, it is held, if approved or repeated by the declarant after he had abandoned all hope of recovery,[52] but, on the other hand, it has been said that a declaration prepared by a person in full possession of his mental faculties, and in confident hope of recovery, to be signed in the possible event of a subsequent conviction of a fatal termination, is too much tainted to be admissible in evidence[53] The reiteration of the alleged facts cannot, of course, be admitted if made when hope has been regained[54]

§ 291. —— Other Conditions

Dying declarations must be voluntary A declaration which is competent when made will not be rendered incompetent by the fact that the declarant, either before or afterward, entertained some hope of recovery

While one of the prime requisites for the admission of a dying declaration is, sometimes by vir-

Knowledge of impending unconsciousness

To render dying declaration of physician who knew that poison given him was liable at any hour thereafter to render him unconscious and result in convulsions thereafter, admissible in evidence on trial for his murder by poisoning, it was unnecessary that he should then have expected immediate death but sufficient that he entertained settled and hopeless expectation of certain and impending death at once or in very few days after period of total or partial unconsciousness – Dean v State 160 So 584 173 Miss 254 suggestion of error overruled 162 So 155, 173 Miss 254

41. Ky—Starr v Commonwealth, 30 S W 397, 97 Ky 193, 16 Ky L 843
30 C J p 257 note 34

42 Ala—Ragland v State, 192 So 198 238 Ala 587
Cal—People v Wilson, 129 P 2d 119, 54 Cal App 2d 434—People v Pollock 89 P 2d 128 31 Cal App 2d 747 —People v Pollock, 80 P 2d 106, 26 Cal App 2d 602
La—State v Moore, 115 So 445, 165 La 163
Minn—State v Brown, 296 N W 582, 209 Minn 478
Okl—Killingsworth v State, 56 P 2d 1200, 59 Okl Cr 134
Wash—State v Mooney, 56 P 2d 722, 723, 185 Wash 681, citing **Corpus Juris.**
30 C J p 257 note 35.

43 N C—State v Stewart, 186 S E 488 210 N C 362—State v Beal, 154 S E 604 199 N C 278
30 C J p 257 note 36

44 U S Shepard v U S, Kan 51 S Ct 22 290 U S 96, 78 L Ed 196 reversing C C A, 62 F 2d 683, rehearing denied 61 F 2d 611, certiorari granted 53 S Ct 794 289 U S 721 77 L Ed 1472
Fla—Hindley v State 170 So 748 125 Fla 632
Ill—People v Selknes, 140 N E 852 309 Ill 113
Minn State v Elias 285 N W 475 205 Minn 156
Mo—State v Flynn, 96 S W 2d 506
Mont—State v Martin 248 P 176, 76 Mont 565
N C—State v Layton, 169 S E 650, 204 N C 704
30 C J p 254 note 20, p 256 note 30 "The belief of the dying man and not the belief of those around him furnishes the guaranty of truthfulness that makes his dying declaration admissible in evidence"—People v Maria, 194 N E 510, 511, 359 Ill 231

45. Ill—People v Maria, supra

46. Ga—Faulkner v State, 144 S E 193, 166 Ga 645
30 C J p 257 note 37

47. Mich—People v Simpson, 12 N W 662 48 Mich 474

48. Ga—Faulkner v State, 144 S E 193, 166 Ga 645
Pa—Commonwealth v. Lockett, 139 A 836, 291 Pa 319.
30 C J p 257 note 39

49 Mo—State v Flinn, 96 S W 2d 506 510, quoting **Corpus Juris.**
Pa—Commonwealth v Lockett, 139 A 836, 291 Pa 319
30 C J p 256 note 29, p 257 note 40

50. S C—State v Bradley, 13 S E 315, 34 S C 136

51. Ga—Thompson v State, 73 S E 363, 137 Ga 164

52. Colo—Flor v People, 215 P 875 73 Colo 407
Kan—State v Barbour, 46 P 2d 841 142 Kan 200
Ky Crum v Commonwealth, 46 S W 2d 1093, 242 Ky 568—Chadwell v Commonwealth 20 S W 2d 1005 230 Ky 810—Colson v Commonwealth 255 S W 60, 200 Ky 402
Minn—State v Brown, 296 N W 582, 209 Minn 478
30 C J p 257 note 43

Variance in reaffirmation

Homicide victim's declaration was not rendered admissible by subsequent declaration made in anticipation of impending dissolution which contained nothing of like character, and departure was one of substance and later declaration did not amount to reaffirmation State v Hughes, 125 S W 2d 66, 344 Mo 116

53. Miss—Harper v State, 31 So 195, 79 Miss 575, 56 L R A 372

54. U S—Carver v U S, Ark, 16 S Ct 388, 160 U S 553, 40 L Ed 532
N M—State v Sanford, 97 P 2d 915, 44 N M 66.

tue of statutory provisions, that it be made voluntarily,[55] it is not necessary that deceased have expressed a wish to make a dying declaration[56] Also it is not necessary that the declaration have been made immediately after the injury[57]

A declaration which is competent evidence when made will not be rendered incompetent by a subsequent temporary revival of the dying person,[58] or by the fact that before or afterward he entertained some hope of recovery.[59] The subsequent expression of hope may, however, have a tendency to show that the same hope existed while the previous declarations were being made[60] Where the declarations were made under a sense of impending death, the fact that deceased did not seek spiritual comfort does not destroy their effect[61]

§ 292. Form of Declaration and Manner of Communication

a. In general

b Written declarations

a. In General

A dying declaration may be partly oral and partly written, and the fact that it was made in response to questions does not necessarily deprive it of its voluntary character. Where the victim is unable to speak audibly a dying declaration, communicated by signs, may be received in evidence.

It is immaterial in what form a dying declaration is made,[62] and it matters not to whom it was made[63] It need not be in writing,[64] and it may be partly oral and partly written[65]

Interruptions and successive statements. The declaration need not all be made at one time without interruption or turning aside to other matters[66] Where several dying declarations are made at different times, all are admissible,[67] even though contradictory,[68] and the fact that a dying declaration has been reduced to writing will not preclude evidence of unwritten declarations made on other occasions[69]

Voluntary character; interrogatories. It is not essential that a dying declaration should be wholly voluntary,[70] and the fact that a dying declaration

55. Colo—Polly v People, 108 P 2d 220, 107 Colo 6
Ky—Meade v Commonwealth, 7 S W 2d 1052, 225 Ky 177.
30 C J p 257 note 46
Form of declaration as affecting voluntary character see infra § 292
Statement obtained by police officer
Fact that dying declaration was obtained by police officer for purpose of being used against accused did not render declaration inadmissible—State v Logan, 126 S W 2d 256, 344 Mo 351, 122 A L R 417

56. La—State v Pierfax, 105 So 16, 158 La 927

57. Mich—People v Beverly, 66 N W 379, 108 Mich 509
Tex—Williams v State, 51 S W 2d 367, 121 Tex Cr 458

58. Fla—Handley v State, 170 So 748 125 Fla 632
Ky—Shell v Commonwealth, 255 S W 516, 200 Ky 722
La—State v Robertson, 110 So 888, 889, 162 La 641, quoting **Corpus Juris.**
30 C J p 258 note 48

59 Cal—People v Hoffman, 232 P 974, 195 Cal 295
Ky—Commonwealth v Belcher, 74 S W 2d 955, 255 Ky 475—Crum v Commonwealth, 46 S W 2d 1093, 242 Ky 568—Meade v Commonwealth, 7 S W 2d 1052 225 Ky 177—Lyons v Commonwealth 287 S W. 534, 216 Ky 202—Wells v Commonwealth, 272 S W 389, 209 Ky 208—Calico v Commonwealth 267 S W 167, 206 Ky 271—Griffin v Commonwealth, 265 S W 327, 204 Ky 783—Shell v Commonwealth, 255 S W 516, 200 Ky 722
La—State v Newport, 151 So 770, 773, 178 La 459, quoting **Corpus Juris**—State v Robertson, 110 So 888, 889, 162 La 641, quoting **Corpus Juris.**
Mo—State v Baxter, 130 S W 2d 584, 344 Mo 1034
N M—State v Sanford, 97 P 2d 915, 44 N M 66
N C—State v Bright, 2 S E 2d 541, 215 N C 537—State v Williams, 116 S E 570, 185 N C 643
Tex—Hanners v State, 284 S W 551 104 Tex Cr 442
30 C J p 258 note 49

60. Ky—Shell v Commonwealth, 255 S W 516, 200 Ky 722
30 C J p 258 note 50

61. Ky—Moore v Commonwealth, 7 Ky Op 218

62 Neb—Piercy v. State, 293 N W 99, 138 Neb 301, modified on other grounds 297 N W 137, 138 Neb 905—Penn v State, 227 N W 314, 119 Neb 95—Edwards v State, 204 N W 780, 113 Neb 698
N Y—People v Bartelini, 35 N E 2d 29, 285 N Y 433
Wash—State v Gallagher, 103 P 2d 1100, 4 Wash 2d 437
30 C J p 258 note 52
Foreign language
Dying declarations may be made in the language familiar to declarant—Nanfito v. State, 287 N W 58, 136 Neb 658

63. La—State v Pierfax, 105 So 16, 158 La 927

64 Tex—Moore v State, 78 S W.2d 189 127 Tex Cr 637
30 C J p 258 note 53

65. Ark—Gray v State, 48 S W 2d 224, 185 Ark 515
Pa—Commonwealth v Green, 10 Pa Dist & Co 56, 58, citing **Corpus Juris,** and affirmed 141 A 624, 292 Pa. 579
Tex—Bray v State, 143 S W 2d 593, 140 Tex Cr 3
30 C J p 258 note 54

66. Ga—Cooper v State, 184 S E 716, 182 Ga 42, 104 A L R 1309
30 C J p 258 note 56

67. Fla—Handley v State, 170 So 748, 754, 125 Fla 632, citing **Corpus Juris.**
Iowa—State v Sweeney, 214 N W. 735, 203 Iowa 1305
Kan—Bagnall v Hunt, 293 P 733, 736, 131 Kan 805, citing **Corpus Juris.**
Va—Evans v Commonwealth, 170 S E 756, 161 Va 992
30 C J p 258 note 57

68. Va—Evans v. Commonwealth, supra

69. Ala—Windom v State, 93 So 79, 18 Ala App 430, certiorari denied Ex parte Windom, 93 So 924, 208 Ala 701
Ark—Gray v State, 48 S W 2d 224, 185 Ark 515
Tex—Bray v State, 143 S W 2d 593, 140 Tex Cr 3.
Va—Evans v Commonwealth, 170 S E 756, 762 161 Va 992, citing **Corpus Juris.**
30 C J p 258 note 55
Parol evidence of written declaration see infra § 296

70. Ala—Tyler v State 97 So 573, 19 Ala App 380, reversed on other grounds Ex parte State ex rel Davis, 97 So 573, 210 Ala 96.

was made in response to questions does not necessarily deprive it of its voluntary character or render it inadmissible [71] While it has been held that dying declarations may be elicited by means of leading questions,[72] and that declarant may even be urged to answer, as this affects only the value of the evidence and not its admissibility,[73] it has also been held, sometimes by virtue of statutory provisions, that it is essential to the admissibility of dying declarations that they were not made in answer to leading interrogatories[74] which were calculated to lead declarant to make any particular statement,[75] and this requirement applies also to the statements of the wounded person in regard to his hope of recovery [76] The interrogation of decedent as to the sense of impending death by reference to printed questions is not necessarily objectionable, provided the questions are put, not in a perfunctory manner, but in such a way as to impress the injured person with their true character and meaning [77]

Communication by signs Unless the response is one prohibited as an answer to a leading question,[78] where the victim was unable to speak audibly, a dying declaration communicated by signs may be received in evidence,[79] although deceased previously and subsequently made verbal communications [80] Where the declaration is communicated by signs, it must appear that declarant understood the language employed in the statement, or was able to detect any erroneous inference as to his real meaning [81]

Presence of, and notice to, accused It is not necessary that accused should be present[82] or be represented by counsel,[83] or that he should even have notice of the taking of the ante-mortem statement of his victim [84]

b. Written Declarations

A dying declaration which is read by or to declarant, or signed by him, is ordinarily admissible, notwithstanding it is not in his exact language The fact that it is made under oath does not render it inadmissible.

A written declaration may be received in evidence where it was approved by declarant after reading it or hearing it read by another, and where it is shown by a competent witness who was present at the time to be the identical statement so made and approved,[85] although it is not signed by declarant,[86] or it may have been signed without hav-

71 Ala.—Stover v State, 143 So 239, 25 Ala App 222
Conn.—State v Manganella, 155 A 74, 113 Conn 209
Fla.—Morris v State, 130 So 582, 100 Fla 850
Ga.—Benton v State, 122 S E 775, 158 Ga 41
Kan.—State v Barbour, 46 P 2d 841, 142 Kan 200
La.—State v Pierfax, 105 So 16, 158 La 927
S D.—State v Mathis, 201 N W 153, 47 S D 577
Tex.—Lewis v State, 128 S W 2d 798, 137 Tex Cr 197—Moore v State, 78 S W 2d 189, 127 Tex Cr 637—Rawls v State, 76 S W 2d 1053, 127 Tex Cr 414—Williams v State, 51 S W 2d 367, 121 Tex Cr 458—Morgan v State, 49 S W 2d 788, 121 Tex Cr 424—Stroud v State, 46 S W 2d 689, 120 Tex Cr 466—Griffin v State, 31 S W 2d 812, 116 Tex Cr 497—McKenzie v State, 258 S W 832, 96 Tex Cr 564
Vt.—State v Tubbs, 139 A 769, 101 Vt 5
30 C J p 258 note 58

72. Neb.—Edwards v State, 204 N W 780, 113 Neb 698
30 C J p 258 note 59

73. Cal.—People v Sanchez, 24 Cal 17
Md.—Worthington v State, 48 A 355, 92 Md 222, 84 Am S R 506, 56 L R A 353

74. Tex.—Lewis v State, 128 S W 2d 798, 137 Tex Cr 197—Moore v State, 78 S W 2d 189, 127 Tex Cr 637—Rawls v State, 76 S W 2d 1053, 127 Tex Cr 414—Williams v State, 51 S W 2d 367, 121 Tex Cr 458—Morgan v State, 49 S W 2d 788, 121 Tex Cr 424—Stroud v State, 46 S W 2d 689, 120 Tex Cr 466—Griffin v State, 31 S W 2d 812, 116 Tex Cr 497—Edmondson v State, 292 S W 231, 106 Tex Cr 321
30 C J p 258 notes 61, 62

75 N Y.—People v Kane, 107 N E 655, 213 N Y 260, 32 N Y Cr 365, L R A 1915F 607, Ann Cas 1916C 685

76. N Y.—People v Kane, supra

77 N Y.—People v Kane, supra

78. Tex.—Edmondson v State 292 S W 231 106 Tex Cr 321

79 Ky.—Simpkins v Commonwealth 17 S W 2d 245 229 Ky 348
Pa.—Commonwealth v Green, 10 Pa Dist & Co 56, 58, citing **Corpus Juris** and affirmed 141 A 624, 292 Pa 579
30 C J p 259 note 66

80 Ky.—Jones v Commonwealth, 216 S W 607, 186 Ky 283

81. Ala.—McHugh v State, 31 Ala 317
30 C J p 259 note 68

82. Conn.—State v Manganella, 155 A 74 113 Conn 209
Ky.—Thomas v Commonwealth, 78 S W 2d 777, 257 Ky 605
30 C J p 259 note 69

83 Or.—State v Foot You, 32 P 1031, 33 P 537, 24 Or 61

84 Mich.—People v Beverly 66 N W 379, 108 Mich 509

85. Pa.—Commonwealth v Thomas, 94 Pa Super 353
Tex.—Rawls v State, 76 S W 2d 1053, 127 Tex Cr 414
W Va.—State v Dotson 123 S E 463 464 96 W Va 596, quoting **Corpus Juris**
30 C J p 259 note 72

Declaration prepared by another
Declarant is not required to prepare his own written dying declarations in order to render them admissible in evidence.—Piercy v State, 293 N W 99, 138 Neb 301 modified on other grounds 297 N W 137, 138 Neb 905

86. Tex.—Arseneau v State Cr 171 S W 2d 132—Story v State, 296 S W 516 107 Tex Cr 293
W Va.—State v Wriston, 116 S E 9 93 W Va 568
30 C J p 259 note 73

In Kentucky
(1) It has been held that a written declaration was inadmissible where neither signed read over, nor in any way recognized by declarant after it was written.—Winstead v Commonwealth 243 S W 40, 195 Ky 484—30 C J p 259 note 78

(2) However, in a late case a written declaration was held inadmissible where not signed by declarant, although approved by him.—Huff v Commonwealth, 108 S.W 2d 1044, 270 Ky 36.

ing been read[87] So a declaration is admissible where it is taken down in writing by a person present, after which it is read to deceased,[88] or read by him,[89] and he assents to it and signs it[90]

However, a written declaration which was neither read by declarant nor read to him by another, or signed, or assented to, or in any way recognized by him after it was written cannot be received in evidence[91]

Form and contents According to the more generally accepted rule, dying declarations written down by a third person and assented to by declarant need not be in his exact language,[92] nor is it material that the questions are omitted and the answers only given when they are reduced to writing and are read and approved by declarant,[93] but a statement amounting substantially to the conclusion of the person writing it as to what declarant meant is inadmissible[94] The fact that a witness was unable to detail all that was said by deceased at the time does not affect the admissibility as a dying declaration of a written statement read to, and signed by, deceased[95]

It has been held not necessary that a written declaration be dated[96]

Dying declarations may be admissible, although they are given in a foreign language through an interpreter to the person writing them down,[97] and for that reason do not contain all of decedent's testimony[98]

Oath or attestation The fact that a dying declaration is made under the sanction of an oath does not render it inadmissible,[99] and the fact that the declaration is subscribed and sworn to does not entitle it to any additional force where the oath is not authorized by law[1]

A written declaration is not required to be attested,[2] and the fact that persons signing a written declaration as witnesses were not witnesses of the facts stated therein does not affect the admissibility of the writing[3]

On reaffirmance of a previous declaration after declarant became conscious of approaching death and was without hope of recovery, the statements need not be again shown to or read over to him[4]

§ 293 In What Cases Admissible

As a general rule, dying declarations are admissible only in cases of homicide, where the death of the declarant is the subject of the charge

87. Mont.—State v. Byrd, 111 P. 407, 41 Mont. 585.

Prior statement as corroborative circumstance

Where deceased signed a declaration without reading it or having it read to him, on being informed that it was the same as a prior written declaration the prior declaration was held admissible as a corroborative circumstance of the fact that both declarations were the same.—Court v. State, 119 S.E. 723, 156 Ga. 536.

88. Minn.—State v. Elias, 285 N.W. 475, 205 Minn. 156.
30 C.J. p. 259 note 75.

89. Mo.—State v. Gore, 237 S.W. 993, 292 Mo. 173.

90. Iowa.—State v. Gibson, 214 N.W. 713, 201 Iowa 1306.
Ky.—Cole v. Commonwealth, 86 S.W.2d 984, 260 Ky. 758.—Madden v. Commonwealth, 36 S.W.2d 346, 237 Ky. 703.
Minn.—State v. Elias, 285 N.W. 475, 205 Minn. 156.
Neb.—Pierce v. State, 293 N.W. 99, 138 Neb. 301, modified on other grounds 297 N.W. 137, 138 Neb. 905.
Tex.—Hemphill v. State, 110 S.W.2d 64, 133 Tex.Cr. 257.
Va.—Mitchell v. Commonwealth, 17 S.E.2d 370, 178 Va. 407.
30 C.J. p. 259 note 77.

Presumption of knowledge

Where oral statement of deceased was taken down in writing and signed by deceased, but it was not shown that statement was ever read to or approved by deceased, the presumption would be that it had been read to him or that he knew its contents.—Edmonds v. Commonwealth, 264 S.W. 1100, 204 Ky. 495.

91. Ky.—Daughters v. Commonwealth, 73 S.W.2d 10, 255 Ky. 172, 94 A.L.R. 673.—Winstead v. Commonwealth, 243 S.W. 10, 195 Ky. 484.—Eastridge v. Commonwealth, 241 S.W. 806, 195 Ky. 126.
Tex.—Story v. State, 296 S.W. 516, 107 Tex.Cr. 293.
30 C.J. p. 259 note 78.

92. Okl.—Melton v. State, 47 P.2d 195, 57 Okl.Cr. 57.
30 C.J. p. 259 note 82.

Ambiguities and interlineations

Ambiguities in written instrument offered in evidence as dying declaration, caused by interlineations made by writer who prepared it must be explained, if testimony for that purpose can be procured.—State v. Stewart, 231 P. 692, 30 N.M. 227.

93. Nev.—State v. Williams, 82 P. 353, 28 Nev. 395.
30 C.J. p. 259 note 83.

94. Tex.—Walker v. State, 214 S.W. 331, 85 Tex.Cr. 482.
30 C.J. p. 260 note 84.

95. Mo.—State v. Gore, 237 S.W. 993, 292 Mo. 173.

96. Tex.—Bray v. State, 143 S.W.2d 593, 140 Tex.Cr. 3.

Error in date

Written dying declaration was held competent notwithstanding it bore date prior to actual homicide, where discrepancy was obviously due to slip of pen.—McDow v. State, 168 S.E. 869, 176 Ga. 764.

97. Neb.—Nanfito v. State, 287 N.W. 58, 59, 136 Neb. 658, quoting **Corpus Juris.**
30 C.J. p. 260 note 88.

98. Pa.—Commonwealth v. Mika, 33 A. 65, 171 Pa. 273.
30 C.J. p. 260 note 88.

99. Ill.—People v. Kreutzer, 188 N.E. 422, 354 Ill. 430.
Neb.—Nanfito v. State, 287 N.W. 58, 59, 136 Neb. 658, citing **Corpus Juris.**
N.Y.—People v. Weiss, 261 N.Y.S. 646, 147 Misc. 595.
30 C.J. p. 260 note 89.

1. N.Y.—People v. Smith, 281 N.Y.S. 294, 245 App.Div. 69.
30 C.J. p. 260 note 91.

Effect of oath

Where written statement is sworn to by deceased it is some evidence that the statement is not a dying declaration.—People v. Weiss, 261 N.Y.S. 646, 147 Misc. 595.

2. Ala.—McHugh v. State, 31 Ala. 317.
Ky.—Drake v. Commonwealth, 10 Ky. Op. 381.

3. Ill.—People v. White, 95 N.E. 1036, 251 Ill. 67.

4. Tex.—Snell v. State, 15 S.W. 722, 29 Tex.App. 236, 25 Am.S.R. 723.

Subject to statutory provisions, it is the general rule that dying declarations are admissible only in cases of homicide,[5] where the death of declarant is the subject of the charge.[6] According to the weight of authority this rule is adhered to where accused has killed two or more persons by the same felonious act and is on trial for the murder of one of them,[7] but there are cases holding that on the trial of accused for the murder of one of his victims the dying declarations of another are admissible, inasmuch as he might have been charged in one indictment for the murder of all of them when such evidence would have been clearly admissible.[8]

Where there is evidence of a conspiracy connecting accused with the person who killed declarant, dying declarations as to who killed declarant are held admissible against accused.[9]

The admissibility of dying declarations in civil actions is discussed in Death § 83, and in Evidence § 238, and in criminal prosecutions generally, in Criminal Law § 741.

Abortion. On an indictment for feloniously producing an abortion, the death of the woman is not an essential ingredient of the crime and her dying declarations are not admissible in evidence, unless they are made so by statute, as shown in Abortion § 25, but, where the death of a woman results from an unlawful attempt to produce an abortion, the perpetrator of the offense may be prosecuted for felonious homicide and then her dying declarations are admissible in evidence.[10]

§ 294. Mode of Proof and Use in Evidence

The mode of proof and use in evidence of dying declarations is considered infra §§ 295-297.

Examine Pocket Parts for later cases.

§ 295. —— Foundation or Predicate

a In general
b Sense of impending death
c Presence or absence of jury
d Questions for court and jury

a. In General

A proper foundation must be laid for the admission of an alleged dying declaration and general rules apply with respect to the admissibility and sufficiency of the evidence thereof

While proof of a predicate is premature until it has been made to appear that a dying statement had been made,[11] a proper foundation must be laid for the admission of an alleged dying declaration,[12] and, a fortiori, the production of evidence which would serve as a foundation for receiving dying declarations is proper.[13]

5 Ala.—Cummings v. State, 154 So. 609, 610, 26 Ala.App. 131, citing **Corpus Juris.**
Mass.—Commonwealth v. Morris, 162 N.E. 36, 264 Mass. 314.
30 C.J. p. 260 note 98.

Early cases contra
Rex v. Reason, 16 How.St.Tr. 1.

Effect of conviction merely of assault
That accused charged with second degree murder was convicted merely of assault did not render erroneous admission of victim's dying declarations.—People v. Ricken, 273 N.Y.S. 470, 242 App.Div. 106.

6. Ala.—Cummings v. State, 154 So. 609, 610, 26 Ala.App. 131, citing **Corpus Juris.**
Ark.—Howell v. State, 22 S.W.2d 47, 180 Ark. 241.
Ga.—Westberry v. State, 164 S.E. 905, 175 Ga. 115.
Ill.—People v. Cox, 172 N.E. 64, 340 Ill. 111, 69 A.L.R. 1215—People v. Huff, 171 N.E. 261, 339 Ill. 328.
Ky.—Hansel v. Commonwealth, 84 S.W.2d 68, 260 Ky. 148—Commonwealth v. Smith, 268 S.W. 346, 206 Ky. 709.
N.Y.—People v. Ricken, 273 N.Y.S. 470, 242 App.Div. 106.
N.C.—State v. Puett, 188 S.E. 75, 210 N.C. 633.
30 C.J. p. 260 note 99.

7. Ill.—People v. Cox, 172 N.E. 64, 340 Ill. 111, 69 A.L.R. 1215.
N.C.—State v. Puett, 188 S.E. 75, 210 N.C. 633.
30 C.J. p. 261 note 1.

8. La.—State v. Wilson, 23 La.Ann. 558.
S.C.—State v. Terrell, 46 S.C.L. 321.

9. Cal.—People v. Moran, 77 P. 777, 144 Cal. 18.

10. Conn.—State v. Yochelman, 139 A. 632, 107 Conn. 148.
Ill.—People v. Huff, 171 N.E. 261, 339 Ill. 328.
Neb.—Piercy v. State, 293 N.W. 99, 138 Neb. 301, modified on other grounds 297 N.W. 137, 138 Neb. 905—Edwards v. State, 201 N.W. 780, 113 Neb. 698—Mathews v. State, 197 N.W. 602, 111 Neb. 593.
Pa.—Commonwealth v. Stallone, 126 A. 56, 57, 281 Pa. 41, citing **Corpus Juris.**
30 C.J. p. 261 note 6.

11. Ala.—Few v. State, 159 So. 272, 26 Ala.App. 316.

12. Ark.—Adcock v. State, 20 S.W.2d 120, 179 Ark. 1055—Weakley v. State, 273 S.W. 374, 168 Ark. 1087.
Cal.—People v. Moore, 51 P.2d 141, 10 Cal.App.2d 161.
Fla.—Handley v. State, 170 So. 748, 125 Fla. 632.
Mo.—State v. Cook, 44 S.W.2d 90—State v. Clift, 285 S.W. 706.
Tex.—Carter v. State, 95 S.W.2d 447, 130 Tex.Cr. 569.
Proof of competency of declarant as a witness see infra § 303.

Determines prima facie admissibility
Preliminary examination into admissibility of alleged dying declaration is intended to determine whether declaration is prima facie admissible.—Simpson v. State, 148 S.E. 511, 168 Ga. 598.

In manslaughter prosecutions
The rule regarding the preliminary proof necessary to entitle dying declarations to be admitted in evidence applies as well to manslaughter as it does to murder.—People v. Pollock, 89 P.2d 128, 31 Cal.App.2d 747.

13. Cal.—People v. Costa, 227 P. 201, 67 Cal.App. 175.
Mich.—People v. Bradfield, 1 N.W.2d 550, 300 Mich. 303.
Tex.—Arseneau v. State, Cr., 171 S.W.2d 132.

Parol proof
A predicate for a dying declaration reduced to writing can be made by parol proof as well as where the dying declaration is not reduced to

Witnesses and examination thereof The preliminary evidence as to admissibility may be shown by the testimony of any competent witness having knowledge of the fact,[14] and it need not be given by the same witnesses who testify as to the declarations themselves.[15] The examination of witnesses may be conducted either by the court[16] or by counsel in its presence.[17] Where a witness is being examined concerning dying declarations in the absence of the jury for the purpose of testing the legality of his testimony, and the prosecuting attorney refuses to question the witness for the information of the court, counsel for accused should be permitted so to do.[18] Ordinarily, the court should permit both the state's attorney and the accused's attorney to examine the witness in determining whether dying declarations are admissible,[19] and it is within the discretion of the court to determine how far the preliminary examination to determine the admissibility of dying declarations of deceased shall extend.[20] However, counsel for accused may not question the witness as to irrelevant matters.[21] Evidence of the circumstances under which a declaration is taken is admissible in addition to the statement itself,[22] but where testimony is admitted as a predicate for the introduction of a dying declaration, it should be limited to that purpose.[23]

The judge cannot require the testimony introduced to lay the foundation for offering dying declarations to be reduced to writing, in the absence of disagreement between him and accused's counsel, as to what that testimony is.[24]

Contradictory evidence While it has been held that the court may determine the admissibility of dying declarations reduced to writing on the evidence produced by the state, without hearing any evidence from the other side,[25] the view is also taken that the party opposing the admission of the declaration has the right to introduce countervailing testimony on the issue of declarant's sense of impending death.[26] However, evidence which at best is but a mere speculation was held properly excluded.[27] Although it has been held that evidence that deceased did not have a sense of his impending death, to be admissible, must relate to the time of the declaration,[28] it has also been held that subsequent expressions of hope are admissible and may be considered in determining the weight to be

writing—Bray v State, 143 S W 2d 593, 140 Tex Cr 3

Circumstances

The foundation for the admission of a dying declaration may be shown by circumstances

Neb—Nanfito v State, 287 N W 58 136 Neb 658—Penn v State, 227 N W 314, 119 Neb 95—Johnson v State, 199 N W 808, 112 Neb 530

N Y—People v Ludkowitz, 194 N E 688, 266 N Y 233

Evidence held admissible

Conn—State v Manganella, 155 A 74, 113 Conn 209

Ga—Jenkins v State, 9 S E 2d 909, 190 Ga 556

N Y—People v Weiss, 261 N Y S 646, 147 Misc 595

Tex—Fambro v State, 141 S W 2d 354, 139 Tex Cr 480

Evidence held inadmissible

(1) In general—Fuson v Commonwealth, 20 S W 2d 742, 230 Ky 761

(2) Irrelevant statements of declarant—Fambro v State, 141 S W 2d 354, 139 Tex Cr 480—Story v State, 296 S W 516, 107 Tex Cr 293

14. Neb—Howard v State, 201 N W 968 113 Neb 67

Tex—Denson v State, 298 S W 604, 107 Tex Cr 619

Va—Patterson v Commonwealth, 123 S E 657, 139 Va 589

Wash—State v Mooney, 56 P 2d 722, 185 Wash 681

15. Conn—State v Manganella, 155 A 74, 113 Conn 209

Ga—Emmett v State, 25 S E 2d 9, 195 Ga 517—Gibbs v State, 9 S E 2d 248, 190 Ga 207—Simpson v State, 148 S E 511, 168 Ga 598

30 C J p 262 note 19

Proper witness to prove declaration see infra § 296

Knowledge of impending death

The fact that deceased did not say anything about the fact that he was going to die in the presence of the person to whom he made the dying declaration is immaterial—Thomas v State, Ala App, 9 So 2d 150

16. Tex—Chalk v State, 32 S W 534, 35 Tex Cr 116

17. Mich—People v Cutler, 163 N W 493, 197 Mich 6

18. Mo—State v Minor, 92 S W 466, 193 Mo 597

19. Ga—Phillips v State, 145 S E 106, 38 Ga App 648

Before state's attorney concludes examination

It has been held not error to refuse to permit accused's attorney to examine the witness before the state's attorney had concluded his examination at least where the evidence was clearly sufficient to warrant the court in admitting the dying declarations—Phillips v State, supra

20. Ky—Commonwealth v Johnson, 165 S W 984, 158 Ky 579

N Y—People v Smith, 10 N E 873, 104 N Y 491, 58 Am R 537.

On motion to exclude

It is error for the court, in passing on a motion to exclude all testimony of dying declarations, to sustain the motion only as to the testimony of one witness who had stated that deceased said nothing about impending death, and whose testimony was therefore favorable to accused, and to deny it as to the rest of the testimony—Flowers v State, 37 So 814, 85 Miss 591

21. Tex—Mangum v State, 139 S W 2d 94, 139 Tex Cr 111

22. Ala—Stover v State, 143 So 239 25 Ala App 222

Cal—People v Jones, 20 P 2d 713, 130 Cal App 717

Mich—People v Knapp, 26 Mich 112

23. Ga—Gibbs v State, 9 S E 2d 248, 190 Ga 207

30 C J p 262 note 14

24. La—State v Jones, 18 So 515, 47 La Ann 1524

25. Mo—State v Zorn, 100 S W 591, 202 Mo 12

30 C J p 262 note 27

26. Ark—McClendon v State, 18 S W 2d 1021, 179 Ark 998

Fla—McRae v State, 194 So 632, 142 Fla 240

Mo—State v Thomas, 180 S W 886

Okl—Looper v State, 276 P 503, 42 Okl Cr 341

27. Ala—Gurley v. State, 113 So 391, 216 Ala 342

28. Ark—Scoggin v State, 159 S W. 211, 109 Ark 510.

given the declaration,[29] and that accused may be permitted after an alleged dying declaration has been introduced to introduce evidence as to the condition and state of mind of deceased[30] Accused is entitled to submit to the jury a paper bearing deceased's signature where such paper is separate from the dying declaration, and this is not a violation of the rule that a written dying declaration cannot go to the jury room for investigation[31]

Order of proof The admission in evidence of a dying declaration before proof of the facts rendering it admissible has been held not to be harmful error, where the facts are subsequently established,[32] but, although there is authority to the contrary,[33] it has been held error to compel accused to proceed, pending a decision as to the admissibility of such a declaration, where it is subsequently held inadmissible in part and accused is convicted[34] The admission of evidence prejudicial to accused after a dying declaration has been received on proper foundation previously laid cannot be justified on the ground that it is evidence of decedent's sense of impending death[35]

Notice to accused The prosecution is not required to give notice to accused that it had the dying declaration as a condition precedent to the admission of such declaration[36]

Sufficiency of predicate Because of their inherent infirmities as evidence, it has been held that dying declarations should not be admitted or considered by the jury unless the prerequisites which are essential to their admissibility are clearly established,[37] or, as the rule is otherwise stated, beyond a reasonable doubt,[38] or to the satisfaction of the court,[39] and declarant's hopeless state of mind must not be left to conjecture[40] It has been held that the fact that dying declarations are taken under suspicious circumstances or drawn out by doubtful means is not ground for their exclusion, but they may be permitted to go to the jury for what they are worth[41] In the notes will be found cases in which the sufficiency of the evidence to permit the admission of dying declarations was considered[42]

29. Ky.—Shell v. Commonwealth, 255 S.W. 516, 200 Ky. 722

30. Ky.—Whitehead v. Commonwealth, 255 S.W. 93, 200 Ky. 440
R.I.—State v. Jeswell, 46 A. 405, 22 R.I. 136

31. Wash.—State v. Swartz, 182 P. 953, 108 Wash. 21
Taking written dying declarations to jury room see Criminal Law § 1169 b (3)

32. Va.—Hill v. Commonwealth, 2 Gratt. 594, 43 Va. 594
30 C.J. p. 262 note 24

33. Ga.—Waters v. State, 104 S.E. 626, 150 Ga. 623

34. Ala.—Johnson v. State, 47 Ala. 9

35. Ky.—Griffith v. Commonwealth, 63 S.W.2d 594, 250 Ky. 506
Mich.—People v. Johnson, 152 N.W. 1096, 186 Mich. 516

36. Tex.—Bennett v. State, 280 S.W. 594, 103 Tex.Cr. 279
Notice of taking of ante-mortem statement see supra § 292

37. Ind.—McKee v. State, 154 N.E. 372, 377, 198 Ind. 590, citing **Corpus Juris.**
N.Y.—People v. Bartelini, 35 N.E.2d 29, 285 N.Y. 433—People v. Smith, 281 N.Y.S. 294, 245 App.Div. 69
30 C.J. p. 261 note 9

38. Ark.—Parker v. State, 275 S.W. 758, 169 Ark. 421
Fla.—Johnson v. State, 152 So. 176, 113 Fla. 461
Ill.—People v. Maria, 194 N.E. 510, 359 Ill. 231—People v. Corder, 137 N.E. 815, 306 Ill. 264
Miss.—Baylis v. State, 183 So. 527, 182 Miss. 791—Scott v. State, 148 So. 239, 166 Miss. 6—Hathorn v. State, 102 So. 771, 138 Miss. 11—Wilkerson v. State, 98 So. 770, 131 Miss. 853
30 C.J. p. 261 note 10

Fanciful or imaginary doubt
Juror is not justified in rejecting alleged dying declaration because he may entertain a fanciful or imaginary doubt as to whether declaration was made under sense of impending death.—Fruhage v. U.S., C.C.A.Alaska, 56 F.2d 127

39. U.S.—Shepard v. U.S., Kan., 54 S.Ct. 22, 290 U.S. 96, 78 L.Ed. 196, reversing, C.C.A., 62 F.2d 683, rehearing denied 64 F.2d 641, certiorari granted 53 S.Ct. 794, 289 U.S. 721, 77 L.Ed. 1472
Ala.—Ragland v. State, 192 So. 498, 238 Ala. 587—Collins v. State, 176 So. 219, 27 Ala.App. 499, certiorari denied 176 So. 223, 231 Ala.App. 612—Culberson v. State, 117 So. 397, 22 Ala.App. 493
Fla.—Sealey v. State, 105 So. 137, 89 Fla. 139
Minn.—State v. Elias, 285 N.W. 475, 205 Minn. 156
N.Y.—People v. Ludkowitz, 194 N.E. 688, 266 N.Y. 233
30 C.J. p. 262 note 11

40. U.S.—Shepard v. U.S., Kan., 54 S.Ct. 22, 290 U.S. 96, 78 L.Ed. 196, reversing, C.C.A., 62 F.2d 683, rehearing denied 64 F.2d 641, certiorari granted 53 S.Ct. 794, 289 U.S. 721, 77 L.Ed. 1472
Minn.—State v. Elias, 285 N.W. 475, 205 Minn. 156

41. Mich.—People v. Knapp, 26 Mich. 112

42. Evidence held sufficient to warrant introduction of dying declaration
Ala.—Crowell v. State, 171 So. 267, 233 Ala. 201—Hanve v. State, 101 So. 108, 211 Ala. 555—Cunningham v. State, 93 So. 446, 207 Ala. 433—Lashley v. State, 131 So. 454, 24 Ala.App. 136—Mayhall v. State, 92 So. 33, 18 Ala.App. 290
Ark.—Dacus v. State, 118 S.W.2d 259, 196 Ark. 437—Lowmack v. State, 12 S.W.2d 909, 178 Ark. 928
Cal.—People v. K. Nakamaru, 29 P.2d 320, 136 Cal.App. 582.—People v. Trotter, 7 P.2d 731, 120 Cal.App. 54
Fla.—Handley v. State, 170 So. 748, 125 Fla. 632
Ga.—Simpson v. State, 148 S.E. 511, 168 Ga. 598—Powell v. State, 119 S.E. 693, 156 Ga. 636—Satterfield v. State, 21 S.E.2d 861, 68 Ga.App. 7
Ind.—Stephenson v. State, 179 N.E. 633, 205 Ind. 141, error coram nobis dismissed 186 N.E. 293, 205 Ind. 141
Ky.—Smith v. Commonwealth, 288 S.W. 768, 216 Ky. 832—Noble v. Commonwealth, 279 S.W. 1073, 212 Ky. 668
Mo.—State v. Smith, 130 S.W.2d 550, 341 Mo. 1129—State v. Ryan, 50 S.W.2d 999—State v. Rozell, 279 S.W. 705
Nev.—State v. Watts, 296 P. 26, 53 Nev. 200, affirming 290 P. 732, 52 Nev. 453—State v. Hunter, 232 P. 778, 48 Nev. 358, rehearing denied 235 P. 645, 48 Nev. 358
Ohio.—Gaskins v. State, 160 N.E. 500, 26 Ohio App. 435
Okl.—McKee v. State, 5 P.2d 176,

Successive or interrupted declarations. A predicate laid for the introduction of evidence of a dying declaration at one time cannot be used as a basis for the admission of evidence of another dying declaration made at another time,[43] but the fact that an interruption took place does not affect the admissibility of the statement where it was not shown that either declarant's bodily condition or mental apprehension thereof had changed for the better[44]

Declarations offered by accused It is held that the requirements as to preliminary proof apply as well when the offer is made by accused as when by the prosecution,[45] but in some jurisdictions it is held that the same strictness will not be required when the declaration is offered in favor of accused as when it is made against him[46] Accused cannot complain of the exclusion of evidence offered to lay a foundation for the introduction of a dying declaration when such purpose is not shown at the time of the offer[47]

b. Sense of Impending Death

(1) In general

(2) Particular evidentiary circumstances

(1) In General

As a foundation for the admission of a dying declaration, it must be shown that it was made by the declarant under a sense of impending death and without hope of recovery

As a foundation for the admission of a statement as a dying declaration, it must be shown that it was made by decedent under a sense of impending death and without hope of recovery[48] For this purpose

52 Okl Cr 289—Looper v State, 276 P 503, 42 Okl Cr 341

Pa—Commonwealth v Thomas, 94 Pa Super 353

Tex—Stroud v State, 46 S W 2d 689, 120 Tex Cr 466—Millsaps v State, 38 S W 2d 339, 118 Tex Cr 491—Jackson v State, 27 S W 2d 1102, 115 Tex Cr 495—Downing v State, 20 S W 2d 202, 113 Tex Cr 235

43. Ala—Moomaw v State, 121 So 904, 23 Ala App 125

Ark—Mayberry v State, 85 S W 2d 1015, 191 Ark 270

30 C J p 262 note 17

44. Ga—Park v State, 55 S E 489, 126 Ga 575

Neb—Mathews v State, 197 N W 602, 111 Neb 593

45. Tex—Carter v State, 95 S W 2d 447, 130 Tex Cr 569—Sims v State 263 S W 289, 98 Tex Cr 101

30 C J p 262 note 33

46. Ill—People v Hotz, 103 N E 1007, 261 Ill 239

La—State v Ashworth, 23 So 270, 50 La 94

Reasonable satisfaction

Where accused introduced dying declarations, charge requiring jury to be satisfied beyond reasonable doubt instead of reasonable satisfaction, that deceased, when he made declarations, was in dying condition, and conscious thereof, was error—Poole v State, 170 S E 309, 47 Ga App 303

47. Ill—People v Hotz, 103 N E 1007, 261 Ill 239

48. Ala—Ratliff v State, 98 So 493, 19 Ala App 505

Ariz—Collins v State, 294 P 625, 37 Ariz 353

Cal—People v Jones, 20 P 2d 713, 130 Cal App 717

Fla—Covington v State, 200 So 531, 145 Fla 680—McRane v State, 194 So 632, 142 Fla 240—Davis v State, 187 So. 783, 137 Fla 423—Sealey v State, 105 So 137, 89 Fla 439

Ga—Court v State, 119 S E 723, 156 Ga 536

Ind—McKee v State, 154 N E 372, 198 Ind 590

Ky—Bailey v Commonwealth, 157 S W 2d 100, 288 Ky 613—Long v Commonwealth, 90 S W 2d 1007, 262 Ky 619—Sanders v Commonwealth 71 S W 2d 922, 255 Ky 456

La—State v Chandler, 150 So 386, 178 La 7

Mich—People v Arnett, 214 N W 231, 239 Mich 123

Minn—State v Elias, 285 N W 475, 205 Minn 156

N M—State v Stewart, 231 P 692, 695, 30 N M 227, citing **Corpus Juris.**

N Y—People v Bartelini, 35 N E 2d 29, 285 N Y 433—People v Hall, 22 N Y S 2d 973, 260 App Div 421

N D—State v Phillips, 277 N W 609, 68 N D 113

Okl—Orme v State, 75 P 2d 482, 63 Okl Cr 325—Chastain v State, 287 P 826, 46 Okl Cr 123

Tex—Vickers v State, 242 S W 1032, 92 Tex Cr 182

Va—Compton v Commonwealth, 170 S E 613, 161 Va 980

30 C J p 263 note 36

Burden is on the state to show that at the time the declaration was made deceased believed that he was going to die and had no hope whatever of recovery

Ark—Mayberry v State, 85 S W 2d 1015, 191 Ark 270

Miss—Smith v State, 137 So 96, 161 Miss 430—Haney v State, 92 So 627, 129 Miss 486

Mont—State v Martin, 248 P 176, 76 Mont 565

30 C J p 263 note 36 [a]

Evidence held sufficient to show that declarant was under a sense of impending death

Ala—Brasceale v State, 163 So 15, 26 Ala App 519—Sawyer v State, 162 So 314, 26 Ala App 434, certiorari denied 162 So 317, 230 Ala 571

Ark—Callahan v State, 9 S W 2d 2[illegible] 177 Ark 1193—Sanderlin v State 2 S W 2d 11, 176 Ark 217—Martin v State, 283 S W 29, 170 Ark 1193—Parker v State, 275 S W 758, 169 Ark 421—Hudson v State, 271 S W 3, 168 Ark 634

Cal—People v Wilson, 129 P 2d 119, 54 Cal App 2d 434

Conn—State v Manganella, 155 A. 74, 113 Conn 209

Ga—Kulb v State, 25 S E 2d 24—Emmett v State, 25 S E 2d 9—Jenkins v State, 9 S E 2d 909, 190 Ga 556—Rounds v State 162 S E 696, 174 Ga 308—Johnson v State, 152 S E 76, 169 Ga 814—Crews v State, 162 S E 146, 44 Ga App 516—Phillips v State, 145 S E 106, 38 Ga App 618

Ill—People v Cheney, 13 N E 2d 171, 368 Ill 131, 111 A L R 1514—People v Kreutzer, 188 N E 422, 354 Ill 430—People v Hatcher, 166 N E 71, 334 Ill 526—People v Borella, 143 N E 471, 312 Ill 34

Ind—Southerland v State, 197 N E 841, 209 Ind 308

Ky—Gardner v Commonwealth, 42 S W 2d 319, 240 Ky 283—Smith v Commonwealth, 33 S W 2d 688, 236 Ky 736—Cochran v Commonwealth, 33 S W 2d 30, 236 Ky 284—Williams v Commonwealth, 19 S W 2d 964, 230 Ky 327—Kindrick v Commonwealth, 10 S W 2d 639, 226 Ky 144—Meade v Commonwealth, 7 S W 2d 1052, 225 Ky 177—Blankenship v Commonwealth, 276 S W 112, 210 Ky 413

La—State v Newport, 151 So 770, 178 La 459—State v Boyd, 103 So 190, 157 La 854

Mich—People v Powell, 194 N W 502, 223 Mich 633

Miss—Conway v State, 171 So 16, 177 Miss 461—Yarbrough v State,

his own express statements are admissible and may be sufficient.[49] Although it was formerly assumed

147 So 780, 165 Miss 847—Muse v State, 130 So 693, 158 Miss 449—Woulard v State, 102 So 781, 137 Miss 808—Ealy v State, 91 So 417, 128 Miss 715

Mo—State v Logan, 126 S W 2d 256, 344 Mo 351, 122 A L R 417—State v Hughes, 125 S W 2d 66 344 Mo 116—State v Strawther, 116 S W 2d 133, 342 Mo 618, 120 A L R 583—State v Davis, 84 S W 2d 930 337 Mo 411—State v Anderson 34 S W 2d 25—State v Kunkel, 289 S W 865, 315 Mo 1259 - State v Clift, 285 S W 706 - State v Lee, 259 S W 798, 303 Mo 246

Mont—State v Vettere, 248 P 179, 76 Mont 571—State v Kicar, 240 P 365 74 Mont 269

N H—State v Peters, 10 A 2d 242, 90 N H 438

N J—State v Stephan, 194 A 273 118 N J Law 592

N M—State v Stewart, 277 P 22, 34 N M 65

N Y—People v Ludkowitz, 194 N E 688, 266 N Y 233

Okl—Spratt v State, 23 P 2d 223, 55 Okl Cr 1

Pa Commonwealth v Flori, 150 A 290 300 Pa 125—Commonwealth v Cicere, 128 A 446, 282 Pa 492

S D State v Mathis, 201 N W 153 47 S D 577

Tenn—Crittendon v State, 8 S W 2d 371, 157 Tenn 403

Tex—Arseneau v State Cr 171 S W 2d 132—Autry v State 157 S W 2d 924, 143 Tex Cr 252—Barnes v State 95 S W 2d 421, 130 Tex Cr 505 - Hyles v State, 92 S W 2d 450, 130 Tex Cr 154 Hill v State, 1 S W 2d 639, 108 Tex Cr 489 - Denson v State, 298 S W 601, 107 Tex Cr 619—McKenzie v State, 258 S W 832, 96 Tex Cr 564 Hughes v State, 245 S W 410, 92 Tex Cr 650

Va Mitchell v Commonwealth, 17 S E 2d 370, 178 Va 407

Wash—State v Kwan, 25 P 2d 101, 174 Wash 528

W Va—State v Sauls, 124 S E 670, 97 W Va 184 - State v Sauls, 116 S E 391, 93 W Va 276—State v Winston 116 S E 9, 93 W Va 568

Evidence held insufficient to show that declarant was under a sense of impending death

Ala—Inman v State, 127 So 262, 23 Ala App 484—Moomaw v State 121 So 904, 23 Ala App 125

Minn—State v Elias, 285 N W 475, 205 Minn 156

Miss—Lea v State, 103 So 368, 138 Miss 761

N Y—People v Flaherty, 218 N Y S 148, 218 App Div 204—People v Mikulec, 202 N Y S 551, 207 App Div 505, modified on other grounds 207 N Y S 896, and affirmed 148 N E 710, 240 N Y 573—People v. Weiss, 261 N Y S 646, 147 Misc 595

Tex—Sims v State, 263 S W 289 98 Tex Cr 101

49. Ala—Ragland v State, 192 So 498, 238 Ala 587—Stover v State, 143 So 239, 25 Ala App 222—White v State, 136 So 420, 24 Ala App 442—Parker v State, 130 So 525, 24 Ala App 72, certiorari denied 130 So 527, 222 Ala 26

Ariz—Lawrence v State, 240 P 863 29 Ariz 247, rehearing denied 241 P 511, 29 Ariz 318, certiorari denied 46 S Ct 201, 269 U S 585, 70 L Ed 425

Ark—Sanderlin v State, 2 S W 2d 11, 176 Ark 217—Burns v State, 243 S W 963, 155 Ark 1

Cal—People v Hoffman, 232 P 974, 195 Cal 295—People v Pollock, 89 P 2d 128, 31 Cal App 2d 747—People v Page, 83 P 2d 77, 28 Cal App 2d 642—People v Brown, 216 P 411, 62 Cal App 96

Fla Covington v State, 200 So 531, 145 Fla 680

Ga Prater v State, 127 S E 296, 160 Ga 138—Thompson v State, 111 S E 651, 153 Ga 147—Harvey v State, 115 S E 31, 29 Ga App 300

Ill People v Maria, 194 N E 510 359 Ill 231

Ky - Cochran v Commonwealth 33 S W 2d 30 236 Ky 284—Bagley v Commonwealth, 276 S W 834, 210 Ky 747

Mich—People v Bradfield, 1 N W 2d 550 300 Mich 303

Mo—State v Flinn 96 S W 2d 506, 510, citing **Corpus Juris.**

N H—State v Peters 10 A 2d 242, 90 N H 438

N Y People v Ludkowitz, 194 N E 688, 266 N Y 233

N D State v Phillips 277 N W 609, 68 N D 113

Okl Looper v State, 276 P 503, 42 Okl Cr 341

Pa—Commonwealth v Guida, 118 A 501 298 Pa 370

Tex—Arseneau v State Cr, 171 S W 2d 132 - Fambro v State 141 S W 2d 351, 139 Tex Cr 180—Downing v State, 20 S W 2d 202, 113 Tex Cr 235 Hunners v State, 284 S W 554, 101 Tex Cr 412

Vt—State v Tubbs, 139 A 769, 101 Vt 5

Wis Schlesak v State, 287 N W 707, 232 Wis 510—Oehler v State, 232 N W 866 202 Wis 530

30 C J p 263 note 37

Manner of expression immaterial

How deceased expressed his understanding that he was about to die has been held immaterial—Davis v People, 238 P 25, 77 Colo 516

Time

(1) Dying declaration, to be admissible, requires only proof that deceased knew that he was about to die when he made the declaration, and such proof may be furnished by what was said immediately after as well as by what was said immediately before so-called dying declaration—State, v Clifton, 174 So 109, 187 La 62—State v Willis, 158 So 826, 181 La 154—30 C J p 263 note 37 [a] (1)

(2) A statement as to impending dissolution made immediately after being shot has been held not a sufficient predicate for a declaration made the following day, without any showing that declarant was then under the belief of impending dissolution—Lakey v State, 93 So 51, 18 Ala App 442

(3) A declaration made at night was held inadmissible where deceased has said nothing concerning his belief of impending death since early that morning - Bailey v Commonwealth 157 S W 2d 100, 288 Ky 613

(4) Other statements and illustrations see 30 C J p 263 note 37 [a]

Strict proof not required

Statements of deceased that "they got him this time" and that "he was going to die" from his wounds without charging accused with stabbing him or relating details of affray in which deceased was stabbed, were mere declarations of facts which did not require strict proof of realization of impending death to be admissible—People v Pollock, 89 P 2d 128, 31 Cal App 2d 747

Particular statements held sufficient

(1) In general

Ala—Fowler v State, 181 So 266, 236 Ala 87—Crowell v State, 171 So 267 233 Ala 201—Gulledge v State, 167 So 252, 232 Ala 209—Burns v State 145 So 436 226 Ala 117—Marshall v State, 121 So 72 219 Ala 83, 63 A L R 560—Satterfield v State, 102 So 691, 212 Ala 349—Davidson v State, 100 So 641, 211 Ala 171—Husch v State 100 So 321 211 Ala 274—Evans v State, 96 So 923, 209 Ala 563—Harlan v State 129 So 482 23 Ala App 592—Clemmons v State, 116 So 910 22 Ala App 418, certiorari denied 116 So 913, 217 Ala 519—Dempsey v State 116 So 504 22 Ala App 434—Bailey v State 113 So 830, 22 Ala App 185—Griggs v State, 109 So 611, 21 Ala App 530—Davis v State, 109 So 385, 21 Ala App 474—Ham v State 105 So 390, 21 Ala App 103 - Adkins v State 101 So 779, 20 Ala App 278, certiorari denied Ex parte Adkins, 101 So 780, 212 Ala. 125—Tyler v State, 97 So 573, 19 Ala App 380, reversed on other grounds Ex parte State ex rel Davis, 97 So. 573, 210 Ala 96—Win-

that any evidence of the condition of deceased, other than his own statement, was inadmissible,[50] it is now settled that declarant's consciousness of impending death may be established by other evidence;[51] and while such fact may be shown by the declaration itself,[52] it need not appear there,[53] and may be determined from all of the surrounding circumstances.[54] Also, if the circumstances show

dom v State, 93 So 79, 18 Ala App 430, certiorari denied Ex parte Windom, 93 So 924, 208 Ala 701
Ariz—Macias v State, 6 P 2d 423, 39 Ariz 303
Ark—Cross v State, 143 S W 2d 530, 200 Ark 1165—Middleton v State, 293 S W 1012, 173 Ark 890
Cal—People v Hoffman, 232 P 974, 195 Cal 295—People v Mount, 269 P 177, 93 Cal App 81
Fla—Morris v State, 130 So 582, 100 Fla 850—Soles v State, 119 So 791, 97 Fla 61
Ga—Gibbs v State, 9 S E 2d 248, 190 Ga 207—Pierce v State, App, 21 S E 2d 913
Iowa—State v Rowley, 248 N W 340, 216 Iowa 140
Kan—State v Snow, 247 P 437, 121 Kan 436
Ky—Farley v Commonwealth, 139 S W 2d 745, 282 Ky 668—Perkins v Commonwealth, 137 S W 2d 701, 282 Ky 16—Lowe v Commonwealth, 124 S W 2d 60, 276 Ky 251—Huff v Commonwealth, 122 S W 2d 143 275 Ky 578—Fields v Commonwealth, 120 S W 2d 1021, 275 Ky 136 Huddleston v Commonwealth, 108 S W 2d 1010, 269 Ky 811—Tharp v Commonwealth, 105 S W 2d 145, 268 Ky 376—Turner v Commonwealth, 101 S W 2d 1087, 268 Ky 311—Sloan v Commonwealth 102 S W 2d 363, 267 Ky 413—Long v Commonwealth, 90 S W 2d 1007, 262 Ky 619—Walker v Commonwealth, 78 S W 2d 754, 257 Ky 613—Daughters v Commonwealth, 73 S W 2d 10, 255 Ky 172, 94 A L R 673—Smith v Commonwealth 16 S W 2d 775, 229 Ky 159—Sparks v Commonwealth, 9 S W 2d 992, 225 Ky 660—Fields v Commonwealth, 9 S W 2d 990, 225 Ky 655—Harrod v Commonwealth, 300 S W 625, 222 Ky 248—Foure v Commonwealth, 283 S W 958, 214 Ky 620—Begley v Commonwealth, 276 S W 834, 210 Ky 747—Warman v Commonwealth, 270 S W 48, 207 Ky 738—Griffin v Commonwealth, 265 S W 327, 204 Ky 783—Baker v Commonwealth, 263 S W 667, 201 Ky 45—Burnett v Commonwealth, 255 S W 544, 200 Ky 765—Whitehead v Commonwealth, 255 S W 93, 200 Ky 440—Steele v Commonwealth, 251 S W 1014, 199 Ky 760—Daniel v Commonwealth, 248 S W 511, 198 Ky 158
La—State v Harrison, 123 So 800, 168 La 1115—State v Rosette, 112 So 372, 163 La 481—State v Pierfax, 105 So 16, 158 La 927
Mass—Commonwealth v Vona, 146 N E 20, 250 Mass 509.
Mich—People v Franszkiewicz, 4 N W 2d 500, 302 Mich 144—People v Bradfield 1 N W 2d 550, 300 Mich 303—People v Madaj, 192 N W 614, 221 Mich 660
Miss—Sullivan v State, 191 So 413, 186 Miss 423—Dean v State, 160 So 584, 173 Miss 254, suggestion of error overruled 162 So 155, 173 Miss 254—Walton v State, 126 So 29, 156 Miss 199—Jones v State, 98 So 340, 133 Miss 842—Jones v State, 94 So 851, 130 Miss 703
Mo—State v Baxter, 130 S W 2d 584, 341 Mo 1034
Neb—Johnson v State, 199 N W 808, 112 Neb 530
N M—State v Sanford, 97 P 2d 915, 44 N M 66
N Y—People v Bartelini, 35 N E 2d 29, 285 N Y 433
N C—State v Lewis, 197 S E 160, 213 N C 646—State v Bell, 192 S E 852, 212 N C 20—State v Triplett, 189 S E 123, 211 N C 105—State v Carden 183 S E 898, 209 N C 404, certiorari denied Carden v State of North Carolina 56 S Ct 960, 298 U S 682 80 L Ed 1402—State v Beard, 178 S E 242, 207 N C 673—State v Deal, 177 S E 332, 207 N C 418—State v Dalton, 174 S E 122 206 N C 507—State v Layton, 169 S E 650, 201 N C 704—State v Wallace, 165 S E 716, 203 N C 284—State v Franklin, 135 S E 859, 192 N C 723
Ohio—State v Kotowicz, 9 N E 2d 1003, 55 Ohio App 497
Okl—Dick v State, 205 P 516, 21 Okl Cr 146
Tex—Arseneau v State, Cr, 171 S W 2d 132—Terry v State 150 S W 2d 87, 141 Tex Cr 585—Perez v State 119 S W 2d 1041, 135 Tex Cr 311—Webb v State, 106 S W 2d 683, 133 Tex Cr 32—Sanders v State, 104 S W 2d 864, 132 Tex Cr 466—Metz v State, 74 S W 2d 1025, 127 Tex Cr 126—Johnson v State, 71 S W 2d 280, 126 Tex Cr 356—Gilbreth v State 63 S W 2d 560 124 Tex Cr 465—Williams v State, 51 S W 2d 367, 121 Tex Cr 458—Rivera v State, 8 S W 2d 129, 110 Tex Cr 298
Va—Waller v Commonwealth, 16 S E 2d 808, 178 Va 294, certiorari denied Waller v Youell, 62 S Ct 1106, 316 U S 679, 86 L Ed 1752, rehearing denied 62 S Ct 1289, 316 U S 712, 86 L Ed 1777
Wis—Pollack v State 253 N W 560, 215 Wis 200, adhered to on rehearing 254 N W 471, 215 Wis 200
30 C J p 263 note 37 [d]

(2) Dying declaration containing equivocal expression "if I die," was held admissible

U S—Freihage v U S, C C A Alaska, 56 F 2d 127
La—State v Moore, 115 So 445, 165 La 163

(3) A statement was admissible as a dying declaration where deceased at time of making statement, shortly after shooting, was bleeding badly, and stated that "I am dying, ain't I"—Broughton v State, 133 S W 2d 3, 199 Ark 1187

Particular statements held insufficient

Ark—Sutton v State, 63 S W 2d 278, 187 Ark 870
Cal—People v Westcott, 260 P 901, 86 Cal App 298
Ga—Roe v State, 137 S E 824, 164 Ga 95
La—State v Chandler, 150 So 386, 178 La 7
Miss—Baylis v State, 183 So 527, 182 Miss 791—Smith v State, 137 So 96, 161 Miss 430—Wilkinson v State, 108 So 711, 143 Miss 324, 46 A L R 805
N Y—People v Ricken, 273 N Y S 470, 242 App Div 106
N C—State v Casey, 193 S E 411, 212 N C 352
30 C J p 263 note 37 [e]

50. Mont—State v Crean, 114 P 603, 606, 43 Mont 47, Ann Cas 1912C 424
51. Cal—People v Jones, 20 P 2d 713, 130 Cal App 717
Ga—Etheridge v State, 199 S E 185, 187 Ga 30—Coart v State, 119 S E 723, 156 Ga 536
Ind—McKee v State, 154 N E 372, 198 Ind 590
Ky—Holbrook v Commonwealth, 61 S W 2d 644, 249 Ky 795
Minn—State v Brown, 296 N W 582, 209 Minn 178
Neb—Mathews v State, 197 N W 602, 111 Neb 593
N M—State v Stewart, 231 P 692, 30 N M 227
30 C J p 264 note 40
52. N J—State v Biango, 68 A 125, 75 N J Law 284, affirmed 80 A 487, 79 N J Law 523
30 C J p 264 note 38
53. Ga—Emmett v State, 25 S E 2d 9, 195 Ga 517—Etheridge v State, 199 S E 185, 187 Ga 30—Simmons v State, 184 S E 291, 181 Ga 761—Coart v State, 119 S E 723, 156 Ga 536
Ind—McKee v State, 154 N E 372, 198 Ind 590
Okl—Melton v State, 47 P 2d 195, 57 Okl Cr 57
Wash—State v Gallagher, 103 P 2d 1100, 4 Wash 2d 437
30 C J p 264 note 41
54. U S—Shepard v U. S., Kan, 54

that at the time of making the declaration declarant was under a sense of impending death, the declaration may be admissible in evidence, although declarant may not have expressly stated that he was without hope of recovery or was dying or going to die [55] On the other hand, the mere fact that de-

S Ct 22, 290 U S 96, 78 L Ed 196, reversing, C C A, 62 F 2d 683, rehearing denied 64 F 2d 641, certiorari granted 53 S Ct 794, 289 U S 721, 77 L Ed 1472

Ark —Burns v. State, 243 S W 963, 155 Ark 1

Cal —People v Hoffman, 232 P 971, 195 Cal 295—People v Wilson, 129 P 2d 149, 54 Cal App 2d 434—People v Pollock 89 P 2d 128, 31 Cal App 2d 747—People v Page, 83 P 2d 77, 28 Cal App 2d 642

Colo —Reppin v People, 34 P 2d 71, 95 Colo 192

Fla —McRane v State, 194 So 632, 142 Fla 240—Frier v State, 109 So 334 92 Fla 241

Ga —Emmett v State, 25 S E 2d 9, 195 Ga 517—Simmons v State, 184 S E 291, 292, 181 Ga 761, citing **Corpus Juris**—Johnson v State, 152 S E 76, 169 Ga 814—Morrow v State, 148 S E 500 168 Ga 575—Duren v State, 124 S E 343, 158 Ga 735—Coart v State, 119 S E 723, 156 Ga 536—Satterfield v State, 21 S E 2d 861, 68 Ga App 7 —Gibson v State, 183 S E 83, 52 Ga App 297—Bryant v State, 163 S E 219, 44 Ga App 781—Phillips v State, 145 S E 106, 38 Ga App 648—Jordan v State, 129 S E 7, 34 Ga App 222

Ill —People v Marla, 194 N E 510, 359 Ill 231

Ind —McKee v State, 154 N E 372, 198 Ind 590

Ky —Huff v Commonwealth, 108 S W 2d 1044 270 Ky 36—Sanders v Commonwealth 74 S W 2d 922, 255 Ky 456- Holbrook v Commonwealth, 61 S W 2d 644, 249 ky 795 --Cochran v Commonwealth, 33 S W 2d 30 236 Ky 284—Meade v Commonwealth, 7 S W 2d 1052, 225 Ky 177—Begley v Commonwealth, 276 S W 831, 210 Ky 747—Whitehead v Commonwealth, 255 S W 93, 200 Ky 440

Minn —State v Brown, 296 N W 582, 209 Minn 478

Mo —State v Davis, 84 S W 2d 930, 337 Mo 411—State v Anderson, 34 S W 2d 25

N C —State v Stewart, 186 S E 488, 210 N C 362—State v Mitchell, 182 S E 695, 209 N C 1

N D —State v Phillips 277 N W 609, 68 N D 113—State v Hanson, 207 N W 1000, 53 N D 879

Okl —Armstrong v State 95 P 2d 919, 68 Okl Cr 105—Sanders v State, 252 P 855, 36 Okl Cr 120

Tex —Fambro v State, 141 S W 2d 354 139 Tex Cr 480—Perez v State, 119 S W 2d 1044, 135 Tex Cr 311—Moore v State, 78 S W 2d 189, 127 Tex Cr 637—Rawls v State, 76 S W 2d 1053, 127 Tex Cr 414—Story v State, 296 S W 516, 107 Tex Cr 293

Vt —State v Tubbs, 139 A 769, 101 Vt 5

30 C J p 264 note 42

Facts of each case govern

No general rule has been laid down by courts for admission of dying declarations, and facts of each case must be considered in determining whether requisite consciousness of impending dissolution existed to render statement admissible as dying declaration —Lewis v State, 164 So 92, 231 Ala 211—Wilson v State, 188 So 274, 28 Ala App 496

Circumstances held sufficient

Ala —Ragland v State 192 So 498, 238 Ala 587—Lewis v State, 164 So 92, 231 Ala 211—Gurley v State, 113 So 391, 216 Ala 342—Wilson v State, 188 So 274, 28 Ala App 496 -Collins v State, 176 So 219, 27 Ala App 499, certiorari denied 176 So 223, 234 Ala 612—Russell v State, 137 So 460, 24 Ala App 496, certiorari denied 137 So 462, 223 Ala 523—Moomaw v State, 137 So 40, 24 Ala App 459 certiorari denied 137 So 42, 223 Ala 438

Ark —Neal v State, 246 S W 470, 156 Ark 419

Cal —People v Jones, 20 P 2d 713, 130 Cal App 717—People v Brown, 216 P 411, 62 Cal App 96

Fla —Johnson v State, 152 So 176, 113 Fla 461

Ga —Etheridge v State, 199 S E 185, 187 Ga 30—Cobb v State, 195 S E 758, 185 Ga 462—Sisk v State, 185 S E 777 182 Ga 448—Prater v State, 127 S E 296, 160 Ga 138 —Benton v State, 122 S E 775, 158 Ga 41 Green v State, 113 S E 536, 154 Ga 117- -Simmemon v State, 117 S E 471, 30 Ga App 113

Ill —People v Selknes, 140 N E 852, 309 Ill 113

La —State v Moore, 115 So 445, 165 La 163—State v Boyd, 103 So 190 157 La 854

Mo —State v Custer, 80 S W 2d 176, 336 Mo 514

Mont —State v Le Duc, 300 P 919, 89 Mont 545

N C —State v Jordan, 5 S E 2d 156, 216 N C 356

Okl - -Smith v State, 38 P 2d 591, 56 Okl Cr 318—Chastain v State, 287 P 826, 46 Okl Cr 123—McClendon v State, 251 P 515, 36 Okl Cr 11—Moore v State, 219 P 175, 25 Okl Cr 151

Pa —Commonwealth v Jones, 19 A 2d 389, 341 Pa 541—Commonwealth v Guida, 148 A 501, 298 Pa 370

Tex —Puckett v State, 97 S W 2d 214, 131 Tex Cr 242—Garza v State, 50 S W 2d 322, 121 Tex Cr. 321

Wash —State v Gallagher, 103 P 2d 1100, 4 Wash 2d 437

30 C J p 264 note 42 [a]

Circumstances held insufficient

Ill —People v Holmes, 17 N E 2d 562, 369 Ill 624

Ind —McKee v State, 154 N E 372, 198 Ind 590

N M —State v Sanford, 97 P 2d 915, 44 N M 66—State v Stewart, 231 P 692, 30 N M 227

N Y —People v Sullivan, 268 N Y S 108, 239 App Div 511

30 C J p 264 note 42 [b]

55. Ala —Lewis v State, 164 So 92, 231 Ala 211—Gurley v State, 113 So 391, 216 Ala 342—Wilson v State 188 So 274, 28 Ala App 496 —Collins v State 176 So 219, 27 Ala App 499, certiorari denied 176 So 223 234 Ala 612—Oldham v State, 161 So 546, 26 Ala App 329, certiorari denied 161 So 548 230 Ala 465 -Moomaw v State, 137 So 40 24 Ala App 459, certiorari denied 137 So 42, 223 Ala 438—Culberson v State, 117 So 397, 22 Ala App 493

Ark —Parker v State 275 S W 758, 169 Ark 421- Neal v State 246 S W 470 156 Ark 419

Cal —People v Wilson, 129 P 2d 149, 54 Cal App 2d 434

Colo - Reppin v People 34 P 2d 71, 95 Colo 192

Fla —McRane v State, 194 So 632, 142 Fla 240—Johnson v State, 152 So 176 113 Fla 461—Morris v State 130 So 582 100 Fla 850—Kirkland v State, 111 So 351 93 Fla 172—Frier v State, 109 So 334, 92 Fla 241

Ga —Cooper v State 184 S E 716, 182 Ga 42, 104 A L R 1309—Morrow v State, 148 S E 500, 168 Ga 575—Phillips v State 135 S E 421, 163 Ga 12 Duren v State, 124 S E 343 158 Ga 735—Benton v State 122 S E 775 158 Ga 41- - Thompson v State, 111 S E 651 153 Ga 147 -Gibson v State, 183 S E 83, 52 Ga App 297—Bryant v State, 163 S E 219, 44 Ga App 781 —Jordan v State 129 S E 7, 34 Ga App 222

Ky —Huff v Commonwealth 108 S W 2d 1044 270 Ky 36—Sanders v Commonwealth, 74 S W 2d 922 255 Ky 456—Hord v Commonwealth, 13 S W 2d 241 227 Ky 439—Begley v Commonwealth, 276 S W 834, 210 Ky 747—Whitehead v Commonwealth, 255 S W 93, 200 Ky 440

La —State v Boyd, 103 So 190, 157 La 854

Mich —People v Arnett, 214 N W 231, 239 Mich. 123.

clarant said that he would die does not necessarily show that he was without hope and expected a speedy dissolution; his statements in this regard may be overcome by the surrounding circumstances,[56] and it is possible that, even where declarant expressed an opinion that he would recover, the circumstances may distinctly show that such was not his real belief.[57]

Opinions and conclusions Testimony that deceased realized he was mortally wounded,[58] or that deceased knew he was going to die, the witness not being cross-examined as to the basis for this statement,[59] or the opinion of a witness who has had full opportunity for reaching a correct conclusion that deceased was aware of impending dissolution,[60] has been held sufficient. However, it has been held, on the other hand, that declarant's belief that death was impending could not be shown by the bare conclusion of the witness that declarant knew he was going to die in a short time,[61] and that the opinion of the witness that deceased was under a religious sense of responsibility to his Maker is inadmissible.[62]

Contradictory statements of deceased as to expectation of impending death may prevent the admission of a statement as a dying declaration.[63]

(2) Particular Evidentiary Circumstances

Various particular circumstances have been considered in determining whether the declarant was under a sense of impending death at the time he made a statement

Among the specific circumstances that are often referred to as tending to show declarant's sense of impending dissolution are the fact that a priest had been summoned who, before the making of the statement, had administered to declarant the last rites of the church,[64] or that declarant had sought the consolation of religion in the belief that his end was near.[65] However, declarant's failure to call a minister raises no inference against the declaration when there was none of declarant's faith in the vicinity.[66]

That declarant was under a sense of impending dissolution may be inferred from his apparent condition,[67] such as the nature of his injuries, or state of his illness,[68] and may be inferred from his

Mont.—State v. Martin, 248 P. 176, 76 Mont. 565.
Neb.—Mathews v. State, 197 N.W. 602, 111 Neb. 593.
N.C.—State v. Jordan, 5 S.E.2d 156, 216 N.C. 356.—State v. Stewart, 186 S.E. 488, 210 N.C. 362.—State v. Mitchell, 182 S.E. 695, 209 N.C. 1.—State v. Beal, 154 S.E. 601, 199 N.C. 278.—State v. Franklin, 135 S.E. 859, 192 N.C. 723.
N.D.—State v. Hanson, 207 N.W. 1000, 53 N.D. 879.
Okl.—Armstrong v. State, 95 P.2d 919, 68 Okl.Cr. 105.—Melton v. State, 47 P.2d 195, 57 Okl.Cr. 57.—Smith v. State, 38 P.2d 591, 56 Okl.Cr. 318.—Walters v. State, 32 P.2d 345, 55 Okl.Cr. 454.—Chastain v. State, 287 P. 826, 46 Okl.Cr. 123.—Sanders v. State, 252 P. 855, 36 Okl.Cr. 120.—McClendon v. State, 251 P. 515, 36 Okl.Cr. 11.—Moore v. State, 219 P. 175, 25 Okl.Cr. 151.
Pa.—Commonwealth v. Guida, 148 A. 501, 298 Pa. 370.
Tex.—Perez v. State, 119 S.W.2d 1044, 135 Tex.Cr. 311.—Moore v. State, 78 S.W.2d 189, 127 Tex.Cr. 637.—Rawls v. State, 76 S.W.2d 1053, 127 Tex.Cr. 414.—Downing v. State, 20 S.W.2d 202, 113 Tex.Cr. 235.
Wash.—State v. Gallagher, 103 P.2d 1100, 4 Wash.2d 437.
30 C.J. p. 265 note 43.

56. Ill.—People v. Holmes, 17 N.E.2d 562, 369 Ill. 624.—People v. Maria, 194 N.E. 510, 359 Ill. 231.
La.—State v. Price, 188 So. 718, 192 La. 615.
N.Y.—People v. Sullivan, 268 N.Y.S. 108, 239 App.Div. 511.
S.C.—State v. Hall, 120 S.E. 849, 127 S.C. 256.
30 C.J. p. 266 note 44.

57. Pa.—Commonwealth v. Murray, 2 Ashm. 41.
30 C.J. p. 266 note 45.

58. S.C.—State v. Burton, 98 S.E. 856, 111 S.C. 526.
30 C.J. p. 266 note 46.

59. Iowa.—State v. Johnson, 34 N.W. 177, 72 Iowa 393.

60. S.C.—State v. Burton, 98 S.E. 856, 111 S.C. 526.
Tenn.—Pennington v. State, 190 S.W. 546, 136 Tenn. 533.
Wash.—State v. Mooney, 56 P.2d 722, 185 Wash. 681.—State v. Kwan, 25 P.2d 101, 174 Wash. 528.

61. Ky.—Caudill v. Commonwealth, 294 S.W. 1042, 220 Ky. 191.
N.Y.—People v. Hall, 22 N.Y.S.2d 973, 260 App.Div. 421.—People v. Smith, 281 N.Y.S. 294, 245 App.Div. 69.
N.C.—State v. Layton, 169 S.E. 650, 204 N.C. 704.
30 C.J. p. 266 note 49.

62. La.—State v. Brunetto, 13 La.Ann. 45.

63. Okl.—Bilton v. Territory, 99 P. 163, 1 Okl.Cr. 566.

64. Cal.—People v. Wilson, 129 P.2d 149, 51 Cal.App.2d 134.
Ind.—McKee v. State, 154 N.E. 372, 198 Ind. 590.
Wis.—Schlesak v. State, 287 N.W. 703, 232 Wis. 510.
30 C.J. p. 266 note 52.

65. Ky.—Gillis v. Commonwealth, 261 S.W. 591, 202 Ky. 821.
30 C.J. p. 266 note 53.

66. Ill.—People v. White, 95 N.E. 1036, 251 Ill. 67.

67. Ala.—Lewis v. State, 164 So. 92, 94 231 Ala. 211, citing **Corpus Juris**—Moomaw v. State, 137 So. 40, 24 Ala.App. 459, certiorari denied 137 So. 42, 223 Ala. 438.
Ark.—Hudson v. State, 271 S.W. 3, 168 Ark. 634.
Cal.—People v. Pollock, 89 P.2d 128, 31 Cal.App.2d 747.—People v. Mount, 269 P. 177, 93 Cal.App. 81.
Ga.—Cobb v. State, 195 S.E. 758, 185 Ga. 462.—Green v. State, 113 S.E. 536, 154 Ga. 117.
N.D.—State v. Hanson, 207 N.W. 1000, 53 N.D. 879.
Okl.—Armstrong v. State, 95 P.2d 919, 68 Okl.Cr. 105.—Chastain v. State, 287 P. 826, 46 Okl.Cr. 123.—Sanders v. State, 252 P. 855, 36 Okl.Cr. 120.
Tex.—Arseneau v. State, Cr., 171 S.W.2d 132.
30 C.J. p. 266 note 55.

68. Ala.—Rigland v. State, 192 So. 498, 238 Ala. 587.—Collins v. State, 176 So. 219, 27 Ala.App. 499, certiorari denied 176 So. 223, 234 Ala. App. 612.
Ark.—Broughton v. State, 133 S.W.2d 3, 199 Ark. 1187.—Sanderlin v. State, 2 S.W.2d 11, 176 Ark. 217.—Burns v. State, 243 S.W. 963, 155 Ark. 1.
Cal.—People v. Jones, 20 P.2d 713, 130 Cal.App. 717.
Colo.—Reppin v. People, 34 P.2d 71, 95 Colo. 192.
Fla.—Johnson v. State, 152 So. 176, 113 Fla. 461.
Ga.—Emmett v. State, 25 S.E.2d 9.—Etheridge v. State, 199 S.E. 185,

evident danger or peril.[69] So also the court may consider whether the conduct of deceased was that of a person conscious of impending death, as whether he gave directions respecting his funeral, his will, the care and custody of his children, or took leave of his relatives and friends, and the like.[70]

Opinion of physician or attendant The previously disclosed opinion of declarant's physician or other attendants that his injuries were mortal and must speedily prove fatal is often considered as a circumstance tending to show decedent's consciousness of impending death,[71] but such an opinion by itself is not always sufficient.[72] If declarant believes himself beyond hope, the belief of the attending physician or surgeon is immaterial, as shown supra § 290

Request for, or consent to, medical assistance The bare circumstance that declarant consents to an operation[73] or to removal to a sanitarium or hospital for the satisfaction of his family[74] does not necessarily indicate hope of recovery. Requests made by deceased for a physician's aid may, in connection with his other expressions and the circumstances, be regarded as indicating a hope of cure,[75] but not necessarily so,[76] and the expression of a desire to see another physician does not show that declarant did not appreciate his condition.[77]

c. Presence or Absence of Jury

The safer and better practice is to retire the jury during the preliminary investigation into the admissibility of dying declarations

Since the admissibility of dying declarations is a question for the court, as shown infra subdivi-

187 Ga 30—Cobb v State, 195 S E 758, 185 Ga 462—Simmons v State, 184 S E 291, 181 Ga 761—Johnson v State 15* S E 76 169 Ga 814—Hill v State 129 S E 617, 161 Ga 188—Prater v State 127 S E 296, 160 Ga 138—Dixon v State 121 S E 313 158 Ga 735 Benton v State 122 S E 775, 158 Ga 41—Coart v State, 119 S E 723, 156 Ga 536—Green v State, 113 S E 536 154 Ga 117—Thompson v State 111 S E 651, 153 Ga 147—Satterfield v State, App 91 S E 2d 861—Irvant v State 163 S E 219 44 Ga App 781—Phillips v State 145 S E 106, 38 Ga App 648—Jordan v State, 129 S E 7, 34 Ga App 222

Ky—Sanders v Commonwealth 74 S W 2d 922 255 Ky 456 Daughters v Commonwealth, 73 S W 2d 10, 255 Ky 172, 94 A L R 673 Cochran v Commonwealth, 33 S W 2d 30, 236 Ky 284—Whitehead v Commonwealth, 255 S W 93, 200 Ky 440

Mich—People v Gorman, 233 N W 430 252 Mich 603—People v Hardman, 213 N W 63, 238 Mich 351

N M—State v Sanford, 97 P 2d 915, 44 N M 66—State v Stewart, 231 P 692 30 N M 227

Okl—Armstrong v State, 95 P 2d 919, 68 Okl Cr 105—Chastain v State, 287 P 826, 46 Okl Cr 123—McClendon v State, 251 P 515, 36 Okl Cr 11

Pa Commonwealth v Guida, 148 A 501 298 Pa 370—Commonwealth v Lockett, 139 A 846, 291 Pa 319

Vt—State v Tubbs, 139 A 769, 101 Vt 5

Wis—Oehler v State, 232 N W 866, 202 Wis 530

30 C J p 266 note 56

69. Ala—Wilson v State, 188 So 274, 276, 28 Ala App 496, quoting **Corpus Juris.**

Ky—Huff v Commonwealth, 108 S W 2d 1041, 270 Ky 36—Holbrook v Commonwealth, 61 S W 2d 644, 249 Ky 795

N M—State v Sanford, 97 P 2d 915, 44 N M 66

Okl—Melton v State 47 P 2d 195, 57 Okl Cr 57—Sanders v State, 252 P 855 36 Okl Cr 120—McClendon v State 251 P 515 36 Okl Cr 11—Moore v State, 219 P 175, 25 Okl Cr 151

Tex—Fambro v State, 141 S W 2d 351, 139 Tex Cr 480—Perez v State, 119 S W 2d 1044 135 Tex Cr 311 Moore v State 78 S W 2d 189 127 Tex Cr 637—Rawls v State, 76 S W 2d 1053, 127 Tex Cr 414

30 C J p 267 note 57

70. Ark—Neal v State, 246 S W 170 156 Ark 419

Ind McKee v State, 154 N E 372 198 Ind 590

Tex Fambro v State, 141 S W 2d 351 139 Tex Cr 480

30 C J p 267 note 58

71 Ala—Tyler v State, 92 So 478 207 Ala 129—Howard v State, 191 So 863, 29 Ala App 199, certiorari denied 191 So 857, 239 Ala 274

Cal—People v Wilson, 129 P 2d 149, 54 Cal App 2d 434

Ga Sisk v State 185 S E 777, 182 Ga 418

Ill—People v Maria 194 N E 510, 359 Ill 231—People v Borella, 143 N E 471 312 Ill 34

Ky—Blankenship v Commonwealth 276 S W 112, 210 Ky 113

N Y—People v Ludkowitz, 194 N E 688, 266 N Y 233

Tex—Fambro v State 141 S W 2d 351, 139 Tex Cr 480—Perez v State, 119 S W 2d 1044, 135 Tex Cr 311—Puckett v State, 97 S W 2d 214 131 Tex Cr 242—Moore v State, 78 S W 2d 189, 127 Tex Cr 637—Rawls v State, 76 S W 2d 1053 127 Tex Cr 414—Hughes v State, 245 S W 440, 92 Tex Cr 650—Vickers v State, 242 S W 1032, 92 Tex Cr 182

Wash—State v Gallagher, 103 P 2d 1100, 1 Wash 2d 437

W Va—State v Sauls, 121 S E 670, 97 W Va 184—State v Sauls, 116 S E 391 93 W Va 276

30 C J p 267 note 59

72 Ala—Rector v State, 66 So 857 11 Ala App 333

Tex—Johnson v State, 218 S W 496 86 Tex Cr 566

73 Ariz—Macias v State 6 P 2d 423 39 Ariz 303

Cal—People v Page 83 P 2d 77, 28 Cal App 2d 642

30 C J p 267 note 62

74. Ky—Huff v Commonwealth 122 S W 2d 143 275 Ky 578—Turner v Commonwealth 104 S W 2d 1087, 268 Ky 314

La—State v Rosette, 112 So 372, 163 La 481—State v Howard, 45 So 260, 120 La 311

75 Ill—People v Maria, 194 N E 510, 359 Ill 231

Ky Gillis v Commonwealth, 261 S W 591, 202 Ky 821

30 C J p 267 note 64

76. Ky—Wells v Commonwealth, 78 S W 2d 822, 823 257 Ky 478, citing **Corpus Juris**

Miss—Wade v State, 112 So 677, 147 Miss 479

30 C J p 267 note 65

More consistent with hope than despair

As regards issue whether declaration of deceased was admissible as dying declaration fact that deceased asked for a physician to be sent for did not of itself prove that she had hope of recovery, but it was more consistent with hope than despair—State v Sanford, 97 P 2d 915, 44 N M 66

77. Pa—Commonwealth v. Barille, 113 A 663, 270 Pa 388

sion d of this section, the preliminary proof touching the question of admissibility is in the first instance very properly made to the court in the absence of the jury,[78] but as to whether such preliminary evidence should or should not be given in the presence of the jury the authorities are not agreed.[79] While it has been held that the preliminary examination may, in the discretion of the court, be conducted in the presence of the jury,[80] it has also been held that the jury should be withdrawn before the preliminary proof is given,[81] and a failure to do so constitutes error provided objection is made to the preliminary proof's being made in the presence of the jury,[82] and provided, of course, the declaration is not properly admissible.[83] It has been said that the safer and better practice is to retire the jury during the preliminary investigation.[84] An accused is not injured by the refusal to admit such evidence in the presence of the jury where he fails thereafter to take advantage of an opportunity to introduce it in the absence of the jury.[85]

The same facts which were considered by the court in passing on the admissibility of the declarations must of necessity be considered by the jury in deciding on their credibility,[86] hence, when the court, having examined the question in the absence of the jury, decides in favor of the admissibility of the declarations, the preliminary proof should then be submitted to the jury to enable them to determine the credibility of the evidence,[87] and, even though evidence to disprove the admissibility of a dying declaration preliminary to its presentation to the jury is properly excluded, it may subsequently be introduced as bearing on the weight to be given thereto.[88]

d. Questions for Court and Jury

While it has been held that it is for the court to determine the admissibility of dying declarations and that it is error to submit such question to the jury, it has also been held that it is for the jury, under proper instructions from the court, to determine ultimately whether declarant was in articulo mortis and conscious of his dying condition

In limine the question whether alleged dying declarations were made under such circumstances as to render them admissible in evidence is to be determined by the court on the preliminary proof or predicate for their introduction,[89] and there is au-

78. Miss.—Baylis v State, 183 So 527, 182 Miss 794—Conway v State, 171 So 16, 177 Miss 461
Mo.—State v Davis, 84 S W 2d 930, 337 Mo 411—State v Custer, 80 S W 2d 176, 336 Mo 514
Wis.—Schlesak v State, 287 N W 703, 232 Wis 510
30 C J p 267 note 68

79. Mich.—People v Kelsey, 7 N W 2d 120, 121, 303 Mich 715, citing **Corpus Juris.**

80. Ky.—Harrod v Commonwealth, 300 S W 625, 222 Ky 248—Whitehead v Commonwealth, 255 S W 93, 200 Ky 440
Mont.—State v Kacar, 240 P 365, 74 Mont 269
30 C J p 268 note 70

Discretion not abused

In prosecution for manslaughter resulting from an abortion, trial court did not abuse its discretion in taking in presence of jury preliminary testimony to determine the admissibility of a proffered dying declaration which was held inadmissible because it did not appear that deceased sensed impending death at the time it was given.—People v Kelsey, 7 N W 2d 120, 303 Mich 715

81. Ky.—Walls v Commonwealth, 78 S W 2d 322, 257 Ky 478—Cochran v Commonwealth, 33 S W 2d 30, 236 Ky 284—Meade v Commonwealth, 7 S W 2d 1052, 225 Ky 177
Miss.—Baylis v State, 183 So 527, 182 Miss 794—Scott v State, 148 So 239, 166 Miss 6—Wilkerson v State, 98 So 770, 134 Miss 853
Okl.—Smith v State, 38 P 2d 591, 56 Okl Cr 318
Tex.—Taylor v State, 56 S W 2d 646, 122 Tex Cr 507
Wis.—Oehler v State, 232 N W 866, 202 Wis 530
30 C J p 268 note 71

82. Okl.—Smith v State, 38 P 2d 591, 56 Okl Cr 318—Beason v State, 195 P 792, 18 Okl Cr 388
30 C J p 268 note 71
Harmless error with respect to admission of dying declarations see infra § 495

83. Ky.—Whitehead v Commonwealth, 255 S W 93, 200 Ky 440
30 C J p 268 note 73

84. Ga.—Phillips v State, 145 S E 106, 38 Ga App 618
Ind.—Stephenson v State, 179 N E 633, 205 Ind 141, error coram nobis dismissed 186 N E 293, 205 Ind 141
Ky.—Harrod v Commonwealth, 300 S W 625, 222 Ky 248—Strong v Commonwealth, 287 S W 235, 216 Ky 98—Whitehead v Commonwealth, 255 S W 93, 200 Ky 440
Mont.—State v Kacar, 240 P 365, 74 Mont 269
Tex.—Edmondson v State, 292 S W 231, 106 Tex Cr 321—Couch v State, 245 S W 692, 93 Tex Cr 27, 25 A L R 1359
Vt.—State v Tubbs, 139 A 769, 101 Vt 5

85. Ill.—People v Hotz, 103 N E 1007, 261 Ill 239

86 Miss.—Conway v State, 171 So 16, 17, 177 Miss 461, citing **Corpus Juris.**
Mont.—State v Kacar, 240 P 365, 74 Mont 269
W Va.—State v Dotson, 123 S E 463, 464, 96 W Va 596, citing **Corpus Juris.**
30 C J p 268 note 75

Reading shorthand notes

Testimony of court reporter reading shorthand notes of witness' testimony taken to determine admissibility of dying declaration was incompetent where witness was present in court.—People v Greenig, 174 N E 371, 342 Ill 254

87. Miss.—Conway v State, 171 So 16, 177 Miss 461
Mont.—State v Kacar, 240 P 365, 74 Mont 269
Vt.—State v Tubbs, 139 A 769, 101 Vt 5
W Va.—State v Dotson, 123 S E 463, 464, 96 W Va 596, citing **Corpus Juris.**
30 C J p 268 note 76

88. Del.—State v Van Winkle, 86 A 310, 27 Del 132

89 Ala.—Lewis v State, 164 So 92, 231 Ala 211—Marshall v State, 121 So 72, 219 Ala 83, 63 A L R 560—Thomas v State, App., 9 So 2d 150—Wilson v State, 188 So 274, 28 Ala App 496—Moomaw v State, 137 So 40, 24 Ala App 459, certiorari denied 137 So 42, 223 Ala 438—Pouncey v State, 136 So 741, 24 Ala App 326, certiorari denied 136 So 743, 223 Ala 431—

thority for the view that the court must determine the admissibility of such evidence and that it is error to submit to the jury the question whether declarant was under the sense of impending death necessary to render the declaration admissible.[90] However, it has been held that, while it is the right of the court to decide primarily whether the statement was made when declarant was in articulo mortis and conscious of his dying condition, it is for the jury to determine ultimately whether such conditions exist,[91] and that, if there is a conflict of evidence or the court is not satisfied that the state-

Parker v State, 130 So 525, 24 Ala App 72, certiorari denied 130 So 527, 222 Ala 26

Ark —Cross v State, 143 S W 2d 530, 200 Ark 1165—Gray v State 48 S W 2d 224, 185 Ark 515—Goynes v State, 42 S W 2d 406, 184 Ark 303—Adcock v State, 20 S W 2d 120, 179 Ark 1055—Sanderlin v State, 2 S W 2d 11, 176 Ark 217—Burns v State, 243 S W 963, 155 Ark 1

Cal —People v Wilson, 129 P 2d 149, 54 Cal App 2d 134—People v Pollock, 89 P 2d 128, 31 Cal App 2d 747

Fla —Handley v State 170 So 748 125 Fla 632—Kirkland v State, 111 So 351, 93 Fla 172

Ga —Morrow v State, 148 S E 500, 168 Ga 575—Jordan v State, 129 S E 7, 34 Ga App 222

Ill —People v Greenig, 174 N E 374, 342 Ill 254—People v Selknes, 110 N E 852 309 Ill 113—People v Corder, 137 N E 815, 306 Ill 264

Ind —Southerland v State, 197 N E 841 209 Ind 308—McKee v State, 154 N E 372, 198 Ind 590—Williams v State, 147 N E 153, 196 Ind 84

Ky —Cochran v Commonwealth, 33 S W 2d 30, 236 Ky 284

Minn —State v Elias, 285 N W 475, 205 Minn 156

Mo —State v Custer, 80 S W 2d 176 336 Mo 514

Mont —State v Kacar, 240 P 365, 74 Mont 269

Neb —Nanfito v State, 287 N W 58 136 Neb 658—Penn v State, 227 N W 314, 119 Neb 95—Johnson v State, 199 N W 808, 112 Neb 530

N Y —People v Portugay, 251 N Y S 389, 140 Misc 688

N C —State v Jordan, 5 S E 2d 156, 216 N C 356—State v Stewart, 186 S E 488, 210 N C 362

N D —State v Phillips, 277 N W 609, 68 N D 113

Okl —Smith v State, 38 P 2d 591, 56 Okl Cr 318—Chastain v State, 287 P 826 46 Okl Cr 123—Looper v State, 276 P 503, 42 Okl Cr 341—Sanders v State, 252 P 855, 36 Okl Cr 120

Or —State v Casey, 213 P 771, 108 Or 386, motion denied 217 P 632, 108 Or 386

Pa —Commonwealth v Lockett, 139 A 836, 291 Pa 319

S C —State v Swygert, 124 S E 636, 130 S C 91

Tex —Walthall v State, Cr, 165 S W 2d 184

30 C J p 268 note 78

Mixed question of law and fact

Whether the declaration is admissible as a dying declaration is a mixed question of law and fact for the court to decide before permitting the introduction of the dying declaration —Covington v State, 200 So 531, 145 Fla 680—McRane v State, 194 So 632, 142 Fla 240—Davis v State, 187 So 783 137 Fla 423—Johnson v State, 152 So 176 113 Fla 461—Morris v State, 130 So 582, 100 Fla 850—Frier v State 109 So 334, 92 Fla 241—Sealey v State, 105 So 137, 89 Fla 439

Where a proper predicate was shown, the court could have so held without submitting question to jury —Yarbrough v State, 252 S W 1069, 95 Tex Cr 36—Marshbanks v State, 192 S W 216, 80 Tex Cr 507

Matters considered

(1) In determining whether declarations were made under a sense of impending death so as to render them admissible as dying declarations, trial court should consider all circumstances surrounding declarant at the time the declarations were made, such as the character of the wound, the declaration of deceased himself that he could not live and the fact that he died shortly afterward —Cross v State, 143 S W 2d 530, 200 Ark 1165—Clements v State, 133 S W 2d 844, 199 Ark 69

(2) In determining frame of mind of declarant regarding his belief with respect to impending death as respects admissibility of dying statements, the court may consider his physical condition, the nature and seriousness of his wounds, his knowledge of his grave condition, and his conduct, language, and statements —People v Wilson, 129 P 2d 149, 54 Cal App 2d 434

Nature of each case

Admission of dying declaration is primarily to be determined by nature of each case —Penn v State 227 N W 314, 119 Neb 95—Edwards v State, 204 N W 780, 113 Neb 698

90. Ala —Ragland v State, 192 So 498, 238 Ala 587—Thomas v State, App, 9 So 2d 150

Mont —State v Le Duc, 300 P 919 89 Mont 545—State v Vetter, 248 P 179, 76 Mont 574

N M —State v Wright, 8 P 2d 443 36 N M 74

W Va —State v Meek, 148 S E 208, 107 W Va 324

30 C J p 269 note 80

91. Ark —Cross v State, 143 S W 2d 530, 200 Ark 1165—Clements v. State, 133 S W 2d 844, 199 Ark 69—Fulbright v State, 74 S W 2d 965, 189 Ark 637—McClendon v State, 18 S W 2d 1021, 179 Ark 998—Alford v State, 255 S W 884, 161 Ark 256

Ga —Emmett v State, 25 S E 2d 9—Miles v State, 185 S E 286, 182 Ga 75—Johnson v State, 152 S E 76, 169 Ga 814—Morrow v State, 148 S E 500, 168 Ga 575—Phillips v State, 135 S E 421, 163 Ga 12—Duren v State, 124 S E 343, 158 Ga 735—Court v State, 119 S E 723, 156 Ga 536—Satterfield v State, App, 21 S E 2d 861—Gibson v State, 183 S E 83, 52 Ga App 297—Gibbs v State, 153 S E 613, 41 Ga App 574—Jordan v State, 129 S E 7, 34 Ga App 222

Mich —People v Bradfield, 1 N W 2d 550, 300 Mich 303

Miss —Conway v State, 171 So 16, 17, 177 Miss 461, citing **Corpus Juris.**

S C — State v Hall, 133 S E 24, 134 S C 361

Tex —Autry v State, 157 S W 2d 924, 143 Tex Cr 252—Berry v State, 157 S W 2d 650, 143 Tex Cr 67—Stroud v State 46 S W 2d 689, 120 Tex Cr 166—Denson v State, 298 S W 601, 107 Tex Cr 649

Wash —State v Mooney, 56 P 2d 722, 185 Wash 681

30 C J p 269 note 79

Establishing predicate beyond reasonable doubt see supra subdivision a of this section

Sanity of declarant

Whether deceased was sane when purported dying declaration was made is properly submitted to jury —Perez v State, 119 S W 2d 1044, 135 Tex Cr 311—Stroud v State, 46 S W 2d 689, 120 Tex Cr 466

Manner in which issue raised

It is immaterial whether issue as to sufficiency of predicate for dying declaration be raised by direct proof offered by the defense, or be developed from the state's evidence alone, and it may arise from surrounding facts or from nature of the declaration itself —Yarbrough v State, 252 S W 1069, 95 Tex Cr 36

"If I die"

Whether use of words "if I die" by declarant in dying declaration manifested doubt or uncertainty as to declarant's impending death held for jury —Freihage v U S, C C A Alaska, 56 F 2d 127

ment was made under a sense of impending death, it should be submitted to the jury with an instruction that they must disregard it,[92] or that they cannot consider it,[93] or, as it is sometimes stated by the court, that they should disregard it,[94] if on all the evidence they believe that such statement was not made in articulo mortis and under a sense of impending death

It is the province of the jury to determine whether the declaration was in fact made,[95] and whether the witnesses testifying thereto speak the truth,[96] especially where apparent discrepancies may have resulted from difference of recollection of the persons who heard them[97] When the preliminary question of admissibility has been determined by the court and dying declarations have been admitted in evidence, their credibility is exclusively for the jury, whose province it is to weigh them and the circumstances under which they were made, and give to them only such credit as they may think they deserve, on the whole evidence in the case,[98] including those circumstances which were proved to the court in laying the foundation for their admission[99] The jury may even pass on the credibility of declarations which are incompetent as evidence when no motion to strike out or request to instruct with reference thereto has been made[1]

The court may instruct the jury as to the proper rule for determining the weight to be given such declarations,[2] but should be particular not to invade the province of the jury[3] Where it is held that declarations should not go to the jury unless the court is satisfied beyond a reasonable doubt that they were made under a sense of impending death, the court is not bound to instruct that it entertains no opinion whether the declaration submitted is the dying declaration of decedent[4]

Evidence held sufficient to present question for jury

Ga—Wallace v State, 165 S E 432, 175 Ga 426
Ky—Crico v Commonwealth, 267 S W 167, 206 Ky 271
Tex—Yarbrough v State, 252 S W 1089, 95 Tex Cr 36—Kennamer v State, 247 S W 560, 93 Tex Cr 430

92. Ga—Green v State, 113 S E 536, 154 Ga 117

93. Ark—Taylor v State, 101 S W 2d 956, 193 Ark 691—Sanderlin v State, 2 S W 2d 11, 176 Ark 217—Sullivan v State, 258 S W 643, 163 Ark 11
Ga—Etheridge v State, 199 S E 185, 187 Ga 30—Rounds v State, 162 S E 696, 174 Ga 308
Minn—State v Brown, 296 N W 582, 209 Minn 478
Okl—Looper v State, 276 P 503, 42 Okl Cr 341

On failure to attack predicate

In murder prosecution, refusal of special charge not to consider dying declarations unless deceased was of sane mind, conscious and approaching death, was held proper in absence of any attack in testimony on sufficiency of predicate for admission of the dying declarations—Banks v State, 97 S W 2d 219, 131 Tex Cr 196

94. Mich—People v La Pann, 237 N W 38, 255 Mich 38
Tex—Yarbrough v State, 252 S W 1069, 95 Tex Cr 36
30 C J p 269 note 79 [f]

95. Nev—State v Scott, 142 P 1053, 37 Nev 412
30 C J p 269 note 81

96. N C—State v Davis, 46 S E 722 134 N C 633
30 C J p 269 note 82

97. Pa—Commonwealth v. Winkelman, 12 Pa Super 497

98. Ala—Thomas v State, App, 9 So 2d 150—Moomaw v State, 137 So 40, 24 Ala App 459, certiorari denied 137 So 42, 223 Ala 438—Parker v State, 130 So 525, 24 Ala App 72, certiorari denied 130 So 527 222 Ala 26
Ark—Cross v State 143 S W 2d 530, 200 Ark 1165—Clements v State 133 S W 2d 814, 199 Ark 69—Broughton v State 133 S W 2d 3 199 Ark 1187—Gray v State, 18 S W 2d 224, 185 Ark 515—Goynes v State, 42 S W 2d 406, 184 Ark 303—Adcock v State, 20 S W 2d 120, 179 Ark 1055—Burns v State, 243 S W 963, 155 Ark 1
Ga—Etheridge v State, 199 S E 185 187 Ga 30—Simmons v State, 184 S E 291, 181 Ga 761
Kan—State v Keester, 4 P 2d 679, 134 Kan 64
Ky—Huddleston v Commonwealth 108 S W 2d 1010 269 Ky 811
Minn—State v Elias, 285 N W 475, 205 Minn 156
Miss—Chase v State, 112 So 785, 147 Miss 694
Mo—State v Morgan, 56 S W 2d 385—State v Taylor, 51 S W 2d 1003, 330 Mo 1036
Mont—State v Vettere, 248 P 179 76 Mont 574
Neb—Penn v State, 227 N W 314, 119 Neb 95
N M—State v Wright, 8 P 2d 443, 36 N M 74
N Y—People v Portugay, 251 N Y S 389, 140 Misc 688
N C—State v Franklin, 135 S E 859, 192 N C 723
Or—State v Casey, 213 P 771, 108 Or 386, motion denied 217 P 632, 108 Or 386
Pa—Commonwealth v Lockett, 139 A 836, 291 Pa 319
S C—State v Hall, 133 S E 24, 134 S C 361
Vt State v Tubbs, 139 A 769, 101 Vt 5
Va—Evans v Commonwealth, 170 S E 756, 161 Va 992
W Va—State v Dotson, 123 S E 463, 96 W Va 596
30 C J p 270 note 84

Effect of impeachment

Dying declarations tending to show that accused shot deceased were competent and properly submitted to jury to support state's contention that accused had shot deceased, notwithstanding credibility of testimony of witnesses concerning declarations and of declarations themselves was sharply impeached by evidence offered by accused State v Patterson 194 S E 283, 212 N C 659

Declaration by lunatic

The credibility of a dying declaration made by a person who had been adjudged a lunatic is for the jury—Downing v State, 20 S W 2d 202, 113 Tex Cr 235

99. W Va—State v Dotson, 123 S E 463, 96 W Va 596
30 C J p 270 note 85

1. La—State v Pence, 47 So 28, 121 La 1071

2. Mo—State v Hendricks, 73 S W 194, 172 Mo 654
N C—State v Whitson, 16 S E 332, 111 N C 695

Instruction held not too general or indefinite

Ga—Rounds v State, 162 S E 696, 174 Ga 308

3. Mont—State v Gay, 44 P 411, 18 Mont 51
30 C J p 270 note 88

4. Ill—People v White, 95 N E. 1036, 251 Ill 67.

§ 296. —— Proof of Oral Declaration; Secondary Evidence of Written Declarations

Ordinarily, where a dying declaration is not reduced to writing, it may be proved by witnesses who heard it, but where there is a competent written declaration it must first be introduced or its nonproduction accounted for

Where it does not appear that the declarations of deceased were reduced to writing, they may be proved by witnesses who heard them[5] When the declaration is made by question and answer, the entire conversation, question and answer, should be given as far as possible,[6] although it has been held not error to permit the reading of questions and answers without following the order in which they were asked, and omitting some questions and answers[7] However, if the witness cannot state the exact language of declarant he may state the substance of the declaration,[8] although he is subject to criticism as to its accuracy[9] Mere expressions of opinion by the witness in the course of questioning declarant should not be admitted[10]

Number and competency of witnesses Analogously to the general rule that it is not necessary for the prosecution to produce all the witnesses to a homicide as shown in Criminal Law § 1019, it is not necessary in proving a dying declaration to call all the witnesses who were present when it was made,[11] and the court may, in proper cases, place a reasonable limit on the number of witnesses who may be called to prove a dying declaration.[12] However, it has been held the proper practice to place on the stand all present when the declaration was made[13]

The evidence as to the declaration need not be given by the witnesses who testify as to the foundation or predicate for the admission of the dying declaration,[14] and an eyewitness to a homicide may properly testify to deceased's dying declaration[15] Dying declarations may be proved by declarant's wife,[16] but the competency of accused's wife to prove the dying declarations of deceased is dependent on her competency as a witness against her husband[17] That a witness may have made a statement as to alleged dying declarations, on the examination by the court into their admissibility, different from that thereafter made by him in the hearing of the jury is not ground for excluding his evidence[18]

Declarations delivered in a foreign language may be testified to in that language and translated into English by a sworn interpreter[19]

Effect of written declarations Where there is a complete written declaration properly authenticated, it must first be introduced, if accessible,[20] and unless its nonproduction is satisfactorily explained it cannot be proved by parol evidence[21] or by a copy of the original declaration[22] Also oral testimony

5. N Y —People v Apicello, 9 N E 2d 844, 275 N Y 222, 111 A L R 40
30 C J p 270 note 91

Just as deceased made them
Witnesses giving to jury dying declarations of deceased held entitled to repeat statements of deceased of the actions, conduct and statements of all parties involved, just as deceased made them —Martin v Commonwealth 96 S W 2d 1011, 265 Ky 292

The better practice, in examining a witness is to dying declarations is to request the witness to repeat what declarant said about the difficulty — Ward v State, 79 So 699, 75 Fla 756

6. Conn —State v Perretta, 105 A 690, 93 Conn 328

7. Mont —State v Le Duc, 300 P 919, 89 Mont 545

8. Wash —State v Baldwin, 45 P 650, 15 Wash 15
30 C J p 270 note 94

9. Iowa —State v Murdy, 47 N W 867, 81 Iowa 603

10. Miss —Boyd v. State, 36 So 525, 84 Miss 414

11. Mo —State v Johnson, 76 Mo 121

12 Tenn —Baxter v State, 15 Lea 657

13 Pa —Commonwealth v Green 141 A 624, 292 Pa 579

14. La —State v Smothers, 123 So 781, 168 La 1099
Miss —Magee v State, 110 So 500 145 Miss 227
Proper witness to prove foundation or predicate see supra § 295 a

15 Ky —Rooney v Commonwealth 237 S W 103, 193 Ky 723

16 La - State v Ryan 30 La Ann 1176
30 C J p 271 note 2

17. Tex —Ex parte Fatheree, 31 S W 403, 34 Tex Cr 594

18 Ga —Carter v State, 58 S E 532, 2 Ga App 254

19. Or —State v Foot You, 32 P 1031 24 Or 61, rehearing denied 33 P 537, 24 Or 61

20 Ala —Williams v State, 163 So 663, 26 Ala App 531, certiorari denied 163 So 667, 231 Ala 127
30 C J p 271 note 6

In Kentucky
(1) It has been held that, although a dying declaration was reduced to writing, oral evidence thereof is admissible —Stanifer v Commonwealth, '83 S W 84, 214 Ky 280

(2) And this has been held to be true notwithstanding such written declaration was signed by deceased —Noble v Commonwealth, 279 S W 1073 212 Ky 668—Saylor v Commonwealth, 276 S W 841, 210 Ky 796 —Nichols v Commonwealth 245 S W 518 196 Ky 706

(3) This is especially true where the written statement has been lost and cannot be produced on trial — Noble v Commonwealth, supra

(4) However it has also been held that, where a dying declaration was reduced to writing and signed by deceased, parol evidence of its contents is inadmissible, in the absence of proof of the loss of the writing — Saylor v Commonwealth, 30 S W 390, 97 Ky 184

21. Ala —Williams v State, 163 So 663, 26 Ala App 531 certiorari denied 163 So 667, 231 Ala 127

22. Fla —Gardner v State, 45 So. 1028, 55 Fla 25
Tenn —Beets v State, Meigs 106

to vary a written declaration is incompetent.[23] However, where the absence of the original writing has been satisfactorily accounted for, the declarations may be established by secondary evidence.[24] The declaration in such circumstances may be proved by parol, although there may be a copy in existence.[25]

An unsigned written declaration will not preclude the introduction of parol evidence of such declaration on the ground that the writing is the best evidence,[26] although read to declarant and approved by him.[27] A fortiori, where a dying declaration is not wholly reduced to writing, and the writing is not signed by declarant, parol evidence is admissible to prove the declaration.[28] Where a written statement is sworn to as correct as far as it goes, although not complete and not signed by declarant, it is proper to read such statement to the jury,[29] and for the witness to supply from his recollection the remainder of the statement.[30]

Where a written declaration has been rejected at the instance of accused, he cannot object to the admission of parol evidence as to what deceased said.[31] Testimony that deceased said that the statement read over to him was correct is admissible.[32] Where, after a written declaration is signed by decedent, a statement relating to the res gestæ is added, it should not be admitted as a part of the written declaration, but should be proved in the same manner and under the same conditions as an oral declaration.[33]

Refreshing recollection Where the declarations of deceased have been reduced to writing and signed by declarant, use of the writing to establish the terms of the declaration is not limited to refreshing the memory of the witness; the writing is proper evidence to establish the terms of the declaration.[34] Even where a written memorandum of a dying declaration is not regarded as primary evidence, the witness who made it may use it to refresh his memory,[35] although it is not necessary to do so.[36]

§ 297. —— Compelling Introduction

Where part of a written dying declaration has been introduced by the state, the accused has been held entitled to have the whole declaration introduced in evidence

Whether the prosecution shall, at the instance of accused, be required to introduce the dying statement of deceased rests in the sound discretion of the court.[37] Where part of a written dying declaration has been introduced by the state, accused is entitled to have the whole declaration introduced in evidence in order that the jury may pass on the weight and credibility.[38]

§ 298. Competency of Declarations as Evidence

Dying declarations generally are admissible only as to those facts and circumstances which constitute the res gestæ of the homicide, the fact and cause of the killing, and the identity of the parties, they are usually incompetent if only narrative of matters happening before or after the killing and not directly connected with it

Although dying declarations are substitutes for sworn testimony and must yield to the general rules governing the admissibility of evidence,[39] it has

23. Va.—Evans v. Commonwealth, 170 S.E. 756, 161 Va. 992

24. Ala.—Howard v. State, 194 So. 853, 29 Ala. App. 199, certiorari denied 194 So. 857, 239 Ala. 274
Kan.—State v. Abrams, 223 P. 301, 115 Kan. 520
30 C.J. p. 271 note 9

25. N.J.—State v. Barnes, 68 A. 145, 75 N.J. Law 426

26. Ala.—Williams v. State, 163 So. 663, 26 Ala. App. 531, certiorari denied 163 So. 667, 231 Ala. 127
Ky.—Mullins v. Commonwealth, 108 S.W.2d 658, 269 Ky. 666.—Winstead v. Commonwealth, 243 S.W. 10, 195 Ky. 481.—Couch v. State, 245 S.W. 692, 93 Tex.Cr. 27, 25 A.L.R. 1359
30 C.J. p. 271 note 11

27. Ala.—Jarvis v. State, 34 So. 1025, 138 Ala. 17
30 C.J. p. 271 note 12

28. Ark.—Jackson v. State, 145 S.W. 559, 103 Ark. 21
Ky.—Allen v. Commonwealth, 119 S.W. 795, 134 Ky. 110, 20 Ann.Cas. 881

29. Ark.—Mitchell v. State, 101 S.W. 763, 82 Ark. 324

30. Ark.—Mitchell v. State, supra
30 C.J. p. 271 note 15

31. Ky.—Hines v. Commonwealth, 13 S.W. 445, 90 Ky. 64, 11 Ky.L. 865

32. Ala.—Phillips v. State, 65 So. 441, 11 Ala. App. 15

33. Or.—State v. Doris, 94 P. 44, 51 Or. 136, 16 L.R.A.,N.S., 660

34. Tenn.—Turner v. State, 15 S.W. 838, 89 Tenn. 547
30 C.J. p. 271 note 19

35. Ky.—Sailsberry v. Commonwealth, 107 S.W. 774, 32 Ky.L. 1085
30 C.J. p. 271 note 20

36. Ark.—Mitchell v. State, 101 S.W. 763, 82 Ark. 324

37. Wash.—State v. Payne, 39 P. 157, 10 Wash. 545

38. Ala.—Parker v. State, 59 So. 518, 5 Ala. App. 64
Mont.—State v. Le Duc, 300 P. 919, 924, 89 Mont. 545, citing **Corpus Juris.**

39. Ala.—White v. State, 136 So. 420, 24 Ala. App. 442
Ky.—Saylor v. Commonwealth, 300 S.W. 330, 222 Ky. 130
N.C.—State v. Layton, 169 S.E. 650, 204 N.C. 701
30 C.J. p. 272 note 24

Hearsay evidence cannot be rendered admissible by being included in a dying declaration
Ala.—White v. State, 136 So. 420, 24 Ala. App. 442
Ky.—Osborne v. Commonwealth, 59 S.W.2d 975, 248 Ky. 692
Tex.—Matthews v. State, 26 S.W.2d 269, 114 Tex.Cr. 526
30 C.J. p. 272 note 24 [a]

Self-serving declaration inadmissible
A dying declaration as to decedent's purpose in visiting house where he was shot was held self-serving and inadmissible.—State v. Clift, Mo., 285 S.W. 706.

been stated that the strict rules which ordinarily are applicable to the admission in evidence of the spoken word do not always apply with the same strictness to dying declarations[40] Dying declarations are admissible as to those facts and circumstances constituting the res gestæ of the homicide,[41] the res gestæ embracing not only the actual facts of the assault and the circumstances surrounding it, but the matters immediately antecedent to, and having a direct causal connection with, the assault, as well as acts immediately following the assault and so closely connected with it as to form a part of the occurrence[42] Thus they are admissible to prove the fact of the killing,[43] the name of the victim,[44] the cause of the killing,[45] the identity of the murder-

40. Neb—Edwards v State, 204 N W 780, 113 Neb 698

41. Ala—Handley v State, 102 So 628, 212 Ala 347—White v State 136 So 420, 24 Ala App 442—Humber v State, 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559—Le Nier v State, 96 So 459, 19 Ala App 227
Ark—Gray v State, 48 S W 2d 224 185 Ark 515
Fla—Sealey v. State, 105 So 137, 89 Fla 439
Ga—Gibson v State, 168 S E 47, 176 Ga 384
Ill—People v Kreutzer, 188 N E 422 121 351 Ill. 430, citing **Corpus Juris.**
Iowa—State v Sweeney, 214 N W 735 203 Iowa 1305
Ky Smith v Commonwealth, 33 S W 2d 688 236 Ky 736—Winstead v Commonwealth, 243 S W 40, 195 Ky 484.
Mo—State v Matthews, 111 S W 2d 62, 341 Mo 1121
N C—State v Dalton, 174 S E 422, 206 N C 507—State v Hall, 112 S E 431, 183 N C 806
S D—State v Clark, 194 N W 655, 46 S D 490
Tex—Walthall v State, 165 S W 2d 184, 144 Tex Cr 585—Webb v State, 106 S W 2d 683 133 Tex Cr 32—Teague v State, 19 S W 2d 156, 120 Tex Cr 479—Whiteside v State, 12 S W 2d 218 111 Tex Cr 116
Utah—State v Gardner, 217 P 976, 62 Utah 62
Wash—State v Bezemer, 14 P 2d 460, 169 Wash 559—State v Long, 1 P 2d 844, 163 Wash 607
W Va—State v Shelton, 178 S E 633, 116 W Va 75—State v Graham, 117 S E 699, 94 W Va 67
30 C J p 272 note 25

Conduct and conversation

Dying declarations are admissible to prove any relevant fact embraced in the res gestæ of the killing, including conduct and conversation—Strickland v State, 145 S E 879, 167 Ga 452

42. Ala—Handley v State, 102 So 628, 212 Ala 347
Ky—Smith v Commonwealth, 33 S W 2d 688 236 Ky 736—Hatfield v Commonwealth, 20 S W 2d 461, 230 Ky 630—Farley v Commonwealth, 291 S W 734, 218 Ky 435—Winstead v Commonwealth, 243 S W 40 195 Ky 484
La—State v Clifton, 174 So 109, 187 La 62
Mo—State v Kunkel, 289 S W 865, 315 Mo 1259
N C—State v Dalton, 174 S E 422, 206 N C 507
Wash—State v Long, 1 P 2d 844, 163 Wash 607
30 C J p 273 note 37

Res gestæ declaration

A statement made by a participant in a central fact at the time or immediately after the fact and relative to that fact and not to something or based on something which preceded it, the statement being apparently the spontaneous result of the occurrence operating on the perceptive senses of the speaker rather than the result of his inference or surmise, is admissible as a res gestæ declaration—Commonwealth v Fugmann, 198 A 99, 330 Pa 4

Staging a deathbed scene before the jury is not evidence of the facts and circumstances of the homicide and should not be permitted—White v State, 136 So 420, 24 Ala App 442

Res gestæ of murder from abortion

(1) Where accused was prosecuted as an accessary to murder from abortion, dying declarations as to the intercourse, pregnancy, and operation were within the res gestæ and admissible, but declarations as to deceased's shame, accused's promise to marry, the payment of bills, and other similar matters were not admissible—State v Sweeney, 214 N W 735, 203 Iowa 1305

(2) In a prosecution for causing death by abortion, the portion of a dying declaration wherein deceased related her betrayal and desertion by an assumed lover, not the accused shortly after she became pregnant some six months prior to her death was inadmissible—State v Clark, 194 N W 655, 46 S D 490

(3) In a prosecution for homicide resulting from an operation to procure an abortion, the declarations of the patient tending to prove a conspiracy between her and others to perform the unlawful act were admissible as part of the res gestæ—Edwards v State, 204 N W 780, 113 Neb 698

Statements admissible as part of res gestæ

(1) Homicide victim's declaration "that is the knife he stabbed me with"—State v Hughes, 125 S W 2d 66, 69, 344 Mo 116

(2) A statement by deceased that accused shot him, "me begging her not to" and a further statement that accused "accused me of trying to steal everything she had"—Humber v State, 108 So 646, 648, 21 Ala App 378

(3) A police officer's dying declaration to the effect that just before the shooting he had been told there were suspicious persons in the building where he was killed—State v Siverly 218 P 69, 140 Wash 58

Statements inadmissible as not part of res gestæ

(1) Declarations by deceased as to his suffering—Humber v State 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559

(2) Declarant's statements to the effect that he was killed because he would not live with his wife, and his explanation why he could not live with her—Caudill v Commonwealth, 294 S W 1042, 220 Ky 191

43 Ala—Humber v State 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559
Conn—State v Manganella, 155 A 74, 113 Conn 209
Ky—Smith v Commonwealth, 288 S W 768, 216 Ky 832—Lucas v Commonwealth, 155 S W 721, 153 Ky 421
N H—State v Peters, 10 A 2d 242, 90 N H 138
N C—State v Mitchell, 182 S E 695, 209 N C 1
Tex—Webb v State, 106 S W 2d 683, 133 Tex Cr 32
W Va—State v Shelton, 178 S E 633, 116 W Va 75—State v Graham 117 S E 699, 94 W Va 67

44. Ind—Wolfe v State, 159 N E 545, 200 Ind 557
Tex—Webb v State, 106 S W 2d 683, 133 Tex Cr 32—Lister v State, 1 Tex App 739

45. Ala—Nolan v State, 93 So 529, 207 Ala 663—Humber v State, 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559

er,[46] and to show facts and circumstances immediately connected therewith[47]

Although it has been stated that if dying declarations relate to facts to which declarant could have testified they are admissible,[48] such a statement has been criticized as too broad and sweeping,[49] and the rule is frequently laid down, sometimes by virtue of statutory provisions which are merely declaratory of the common law, that such declarations are restricted to the act of killing and the circumstances immediately attending it and forming part of the res gestæ,[50] and, likewise, such declarations are

N H —State v Peters, 10 A 2d 242, 90 N H 438
30 C J p 272 note 29

No reason for killing

Deceased's statement that accused shot him for nothing was part of the res gestæ and admissible —Liston v State, 289 S W 395, 105 Tex Cr 531

46. Ala —Collins v State 176 So 219, 27 Ala App 499, certiorari denied 176 So 223, 234 Ala 612
Conn —State v Manganella, 155 A 74, 113 Conn 209
Ind —Wolfe v State, 159 N E 515, 200 Ind 557
Iowa —State v Sweeney, 214 N W 735, 203 Iowa 1305
La —State v Clifton, 171 So 109, 187 La 62
Mich —People v Franszkiewicz, 4 N W 2d 500, 302 Mich 144
Tex —Webb v State, 106 S W 2d 683, 133 Tex Cr 32
W Va —State v Shelton, 178 S E 633, 116 W Va 75—State v Graham, 117 S E 699, 94 W Va 67
30 C J p 272 note 30

Identification of photograph

A statement by deceased identifying a photograph as a picture of the man who shot him was properly admissible as part of a dying declaration made a number of months thereafter in which the previous conversation concerning the picture was affirmed —Cooper v State, 184 S E 716, 182 Ga 42, 101 A L R 1309

Failure to identify known person

Where it was established that accused was well known to deceased, the latter's dying statement that he saw the man who shot him but did not know him or have any idea who he was should have been admitted in evidence in favor of accused —State v Mitchell, 182 S E 695, 209 N C 1

No knowledge of assailant

Where there was a controversy as to whether deceased was shot in the back or was facing accused and advancing on him with a dangerous weapon, his dying declaration that he did not know who shot him and that all he could remember was hearing the report and then falling, was material —Jones v State, 91 So 851, 130 Miss 703

47. Ark —Gray v State, 48 S W 2d 224, 185 Ark 515
Conn —State v Manganella, 155 A 74, 113 Conn 209
Fla —Morris v State, 130 So 582, 100 Fla 850
Ga —Strickland v State, 145 S E 879, 167 Ga 452
Ill —People v Kreutzer, 188 N E 422, 354 Ill 430
Ky —Huff v Commonwealth, 108 S W 2d 1044, 270 Ky 36—Smith v Commonwealth, 33 S W 2d 688, 236 Ky 736
N H —State v Peters, 10 A 2d 242, 90 N H 438
Tex —Walthall v State, 165 S W 2d 184, 144 Tex Cr 585—Webb v State, 106 S W 2d 683, 133 Tex Cr 32—Teague v State, 49 S W 2d 456, 120 Tex Cr 479—Whiteside v State, 12 S W 2d 218, 111 Tex Cr 116
Utah —State v Gardner, 217 P 976, 62 Utah 62
Wash —State v Bezemer, 14 P 2d 460, 169 Wash 559—State v Long, 1 P 2d 844, 163 Wash 607
W Va —State v Shelton, 178 S E 633, 116 W Va 75—State v Graham, 117 S E 699, 94 W Va 67
30 C J p 272 note 31

Essential elements of crime

Statements in a dying declaration which tend to establish the essential elements of the crime are properly admissible —Jones v State, 104 So 878, 21 Ala App 33

Circumstances leading up to crime

A statement in a dying declaration of the circumstances leading up to the shooting was competent as tending to show whether it was unprovoked or warranted, and was not incompetent because not restricted to what occurred at the shooting —Burnett v Commonwealth, 255 S W 514, 200 Ky 765

Statements as to physical condition, symptoms, and suffering were admissible when contained in a dying declaration —People v Franszkiewicz, 4 N W 2d 500, 302 Mich 144

48 Ala —White v State, 136 So 420, 24 Ala App 442—Jones v State, 104 So 878, 21 Ala App 33
Conn —State v Manganella, 155 A 74, 113 Conn 209
Fla —Morris v State, 130 So 582, 100 Fla 850
Ill —People v Kreutzer, 188 N E 422, 354 Ill 430
Iowa —State v Sweeney, 214 N W 735, 203 Iowa 1305
Ky —Nolan v Commonwealth, 87 S W 2d 946, 261 Ky 384—Osborne v Commonwealth, 59 S W 2d 975, 248 Ky 692—Stewart v Commonwealth, 32 S W 2d 29, 235 Ky 670
Miss —Walton v State, 126 So 29, 156 Miss 499
N C —State v Layton, 169 S E 650, 204 N C 704
Pa —Commonwealth v Fugmann, 198 A 99, 330 Pa 4
S D —State v Clark, 194 N W 655, 46 S D 490
Tex —Webb v State, 106 S W 2d 683, 133 Tex Cr 32—Denson v State, 298 S W 604, 107 Tex Cr 619—Couch v State 245 S W 692, 93 Tex Cr 27, 25 A L R 1359
Wash —State v Siverly, 248 P 69, 140 Wash 58
W Va —State v Burnett, 35 S E 983, 47 W Va 731
30 C J p 272 note 26

49. W Va —State v Graham, 117 S E 699, 701 94 W Va 67

"This statement would imply that declarant becomes a general witness, and that anything he might say in a dying declaration, if he could give it in evidence were he alive, would be competent evidence upon a trial of the accused for his homicide. This is not the law and never has been in this state. The declarant does not become a general witness, but his dying declarations are confined to such facts and circumstances as immediately attend the homicide and form a part of the res gestæ. A declaration as to a previous transaction separate and distinct from the homicide, is not admissible even though it be a threat made by the defendant against the declarant"—State v Graham, supra

Evidence which might have been competent

Parts of a dying declaration which were not within the res gestæ of the killing were inadmissible, although as independent facts they might have been competent and relevant coming from the mouth of a witness on the stand who knew the facts.—Handley v State, 102 So 628, 212 Ala 347

50. U S —Freihage v U S, C C A Alaska, 56 F 2d 127
Ala —Handley v State, 102 So 628, 212 Ala 347—Nolan v State, 93 So 529, 207 Ala 663—Collins v State, 176 So 219 27 Ala App 499, certiorari denied 176 So 223, 234 Ala 612—White v State, 136 So 420, 423, 24 Ala App 442, citing **Corpus Juris**—Humber v State, 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala

restricted to the cause of the death,[51] and the identity of accused[52] and deceased.[53] Dying declarations may extend to the entire circumstances of the fatal occurrence, but they should not include a narrative of matters not immediately connected with it, such as separate and distinct transactions,[54] and

559—Le Nier v State, 96 So 459, 19 Ala App 227
Del—State v Koester, 156 A 694, 5 W W Harr 263
Fla—Sealey v State, 105 So 137, 89 Fla 439
Ga—Gibson v State, 168 S E 47, 176 Ga 384
Iowa—State v Sweeney, 214 N W 735, 203 Iowa 1305
Ky—Huff v Commonwealth, 63 S W 2d 606, 250 Ky 486—Alford v Commonwealth, 50 S W 2d 1, 244 Ky 27—Smith v Commonwealth, 33 S W 2d 688, 236 Ky 736—Stewart v Commonwealth, 32 S W 2d 29, 235 Ky 670—Meade v Commonwealth, 7 S W 2d 1052, 225 Ky 177—Caudill v Commonwealth, 294 S W 1042, 220 Ky 191—Farley v Commonwealth, 291 S W 734, 218 Ky 435—Mays v Commonwealth, 255 S W 257, 200 Ky 678—Wooton v Commonwealth, 255 S W 153, 200 Ky 588—Winstead v Commonwealth, 243 S W 40, 195 Ky 484
Miss—Walton v State, 126 So 29, 156 Miss 499
Mo—State v Hughes, 125 S W 2d 66, 344 Mo 116—State v Strawther, 116 S W 2d 133, 342 Mo 618, 120 A L R 583—State v Matthews, 111 S W 2d 62, 341 Mo 1121—State v Majors, 44 S W 2d 163, 329 Mo 148—State v Clift, 285 S W 706
Mont—State v Le Duc, 300 P 919, 89 Mont 545—State v Crean, 114 P 603, 43 Mont 47, Ann Cas 1912C 424
N C—State v Aiken, 1 S E 2d 821, 215 N C 317—State v Stewart, 186 S E 488, 210 N C 362—State v Beal, 154 S E 601, 199 N C 278
Okl—Orme v State, 75 P 2d 482, 63 Okl Cr 325—Goss v State, 218 P 339, 24 Okl Cr 383
Or—State v Casey, 213 P 771, 108 Or 386, motion denied 217 P 632, 108 Or 386
S D—State v Clark, 194 N W 655, 46 S D 490
Tex—Walthall v State, 165 S W 2d 184, 144 Tex Cr 585—Webb v State, 106 S W 2d 683, 131 Tex Cr 32—Whiteside v State, 12 S W 2d 218, 111 Tex Cr 116—Simmons v State, 3 S W 2d 449, 109 Tex Cr 157—Edmondson v State, 292 S W 231, 106 Tex Cr 321
Utah—State v Gardner, 217 P 976, 62 Utah 62
Wash—State v Long, 1 P 2d 844, 163 Wash 607
W Va—State v Graham, 117 S E 699, 94 W Va 67
30 C J p 272 note 32

Portions of declaration ordinarily admissible

Ordinarily the admissible portions of a dying declaration, other than that portion which would show that declarant had abandoned all hope of recovery, must be confined to those particulars of fact as to the identity of the criminal agent, the facts of the delivery of the fatal wound or the giving of the poison, and to such further statements as belong to the cause and circumstances of the act—Dean v State, 160 So 581, 173 Miss 254, suggestion of error overruled 162 So 155, 173 Miss 254

Manner and circumstances of injuries

The statements of a dying person can be admitted as his dying declaration only when the statements relate to the manner and circumstances of the infliction on him by another of injuries resulting in his death—Stevens v Commonwealth, 298 S W 678, 221 Ky 222

Statement properly confined

It was held proper to confine the statements to the act of killing, position of persons, what was said by the persons involved, what instruments were used, and in substance exclude everything except what related to the res gestæ—Morris v State, 130 So 582, 100 Fla 850

51. Ala—Handley v State, 102 So 628, 212 Ala 347
Del—State v Koester, 156 A 694, 5 W W Harr 263
Ky—Stewart v Commonwealth, 32 S W 2d 29, 235 Ky 670—Mays v Commonwealth, 255 S W 257, 200 Ky 678
N C—State v Layton, 169 S E 650, 204 N C 701
Wash—State v Long, 1 P 2d 844, 163 Wash 607
30 C J p 273 note 33

Includes res gestæ

Statutory provisions authorizing the admission of the act or declaration of a dying person as to the cause of death have been considered sufficiently broad to include the facts and circumstances constituting the res gestæ of the homicide
Mont—State v Le Duc, 300 P 919, 89 Mont 545—State v Crean, 114 P 603, 43 Mont 47, Ann Cas 1912C 424
Or—State v Casey, 213 P 771, 108 Or 386, motion denied 217 P 632, 108 Or 386

Transactions causing death

The dying declaration is limited to the transactions causing the death, with such continuing statements and conduct as may throw light on it—Freihage v U S, C C A Alaska, 56 F 2d 127

Negative statement admissible

Where an affirmative statement concerning the cause of death would be admissible as a dying declaration, a negative statement would likewise be admissible, but in either event the statement must relate to or constitute a part of the res gestæ—State v Aiken, 1 S E 2d 821, 215 N C 317

52. Mo—State v Hughes, 125 S W 2d 66, 344 Mo 116—State v Strawther, 116 S W 2d 133, 342 Mo 618, 120 A L R 583—State v Matthews, 111 S W 2d 62, 341 Mo 1121—State v Majors, 44 S W 2d 163, 329 Mo 148
30 C J p 273 note 34

53. Mo—State v Hughes, 125 S W 2d 66, 344 Mo 116—State v Strawther, 116 S W 2d 133, 342 Mo 618, 120 A L R 583

54. U S—Freihage v U S, C C A Alaska, 56 F 2d 127
Ala—Handley v State, 102 So 628, 212 Ala 347—Jones v State, 104 So 878, 21 Ala App 33—Ratliff v State, 98 So 493, 19 Ala App 505
Del—State v Koester, 156 A 694, 5 W W Harr 263
Fla—Sealey v State, 105 So 137, 89 Fla 439
Ind—Wolfe v State, 159 N E 545, 200 Ind 557
Ky—Huff v Commonwealth, 79 S W 2d 940, 258 Ky 274—Woodall v Commonwealth, 50 S W 2d 939, 244 Ky 320—Alford v Commonwealth, 50 S W 2d 1, 244 Ky 27—Madden v Commonwealth, 36 S W 2d 316, 227 Ky 703—Smith v Commonwealth, 33 S W 2d 688, 236 Ky 736—Fuson v Commonwealth, 20 S W 2d 742, 230 Ky 761—Caudill v Commonwealth, 294 S W 1042, 220 Ky 191
Mo—State v Strawther, 116 S W 2d 133, 342 Mo 618, 120 A L R 583—State v Majors, 44 S W 2d 163, 329 Mo 148—State v Clift, 285 S W 706
Okl—Goss v State, 218 P 339, 24 Okl Cr 383
Tex—Walthall v State, 165 S W 2d 184, 144 Tex Cr 585—Terry v State, 150 S W 2d 87, 141 Tex Cr 585—Webb v State, 117 S W 2d 426, 135 Tex Cr 207—Cranfill v State, 87 S W 2d 740, 129 Tex Cr 338—Teague v State, 60 S W 2d 244, 124 Tex Cr 59—Teague v State, 49 S W 2d 456, 120 Tex Cr 479—Simmons v State, 3 S W 2d 449, 109 Tex Cr 157
Wash—State v Bezemer, 14 P 2d 460, 169 Wash 559—State v Long, 1 P 2d 844, 163 Wash 607
W Va—State v Shelton, 178 S E 633, 116 W Va 75—State v Graham, 117 S E 699, 94 W Va 67
30 C J p 253 note 11, p 273 note 38

they are usually inadmissible to prove what occurred either before the commission of the act which caused declarant's death[55] or after that transaction[56] However, dying declarations have been considered competent although the facts stated were not a part of the res gestæ of the homicide,[57] as where they related to declarant's state of extremis and his consciousness thereof,[58] or tended to establish declarant's mental competency when that was in issue,[59] and it has been said that since such evidence is already confined to the act of killing and attendant circumstances, the res gestæ, public policy should not be further narrowed by limitations not within its spirit, to the extent that such an important instrument of proof should be impaired or destroyed[60]

While there is authority for the view that dying declarations must go in as a whole, although some of the statements, if standing alone, would be inadmissible,[61] and that irrelevant matter will not exclude the declaration as a whole,[62] as a general rule any part of a dying declaration which is admissible may go to the jury, and the inadmissible part will be excluded,[63] unless the objectionable portion is

Reason for rule

As a general rule dying declarations are admitted from the necessity of the case to identify the prisoner and deceased, to establish the circumstances of the res gestæ, and to show the transaction from which death resulted When, however, they relate to former and distinct transactions they do not come within the principle of necessity—Webb v State, 106 S W 2d 683, 133 Tex Cr 32

A mere interruption of a few moments in the conflict between deceased and accused will not exclude deceased's declarations as to the proceedings before the interruption, when it is apparent that the entire occurrence was one conflict—U S v Heath, 20 D C 272

A chronological recital of the events leading up to and including the alleged commission of the crime charged was admissible since the incidents and occurrences set forth were directly connected with the crime—People v Kreutzer, 188 N E 422 354 Ill 430

Continuous transaction

Dying declarations consisting of a narrative of the entire difficulty from the time deceased first met accused until after the shooting were an account of one continuous transaction and consequently formed a part of the res gestæ—Hanye v State, 101 So 108, 211 Ala 555

55 U S—Freihage v U S, C C A Alaska, 56 F 2d 127
Del—State v Koester, 156 A 694, 5 W W Harr 263
Ind Wolfe v State, 159 N E 545, 200 Ind 557
Iowa—State v Sweeney 214 N W 735, 203 Iowa 1305
Ky Alford v Commonwealth, 50 S W 2d 1 244 Ky 27—Madden v Commonwealth, 36 S W 2d 346, 237 Ky 703—Smith v Commonwealth 33 S W 2d 688 236 Ky 736—Wooton v Commonwealth, 255 S W 153, 200 Ky 588—Winstead v Commonwealth, 213 S W 40, 195 Ky 484
Miss—Dean v State, 160 So 584, 173 Miss 254, suggestion of error overruled, 162 So 155, 173 Miss 254
Mo—State v Matthews, 111 S W 2d 62, 341 Mo 1121—State v Majors, 44 S W 2d 163, 329 Mo 148—State v Kunkel, 289 S W 865, 315 Mo 1259—State v Clift, 285 S W 706
Tex—Walthall v State, 165 S W 2d 184, 144 Tex Cr 585—Webb v State 106 S W 2d 683, 133 Tex Cr 32—Teague v State, 49 S W 2d 456, 120 Tex Cr 479
Wash—State v Bezemer, 14 P 2d 460, 169 Wash 559—State v Long, 1 P 2d 844, 163 Wash 607
30 C J p 273 note 39

Unrelated antecedent acts

Dying declarations cannot be extended to acts which were antecedent and unrelated to the act causing death—State v Dalton, 174 S E 422, 206 N C 507

Conclusion drawn from conduct

Evidence of the way accused acted before the criminal act occurred and the conclusion deceased drew from such conduct was not admissible when stated in a dying declaration—Huff v Commonwealth, 63 S W 2d 606, 250 Ky 486

Previous threats not admissible

Utah—State v Gardner, 217 P 976, 62 Utah 62

56. U S—Freihage v U S, C C A Alaska 56 F 2d 127
Fla—Williamson v State, 95 So 569, 85 Fla 188
Ga—Gibson v State, 168 S E 47, 176 Ga 384
Iowa—State v Sweeney, 214 N W 735 203 Iowa 1305
30 C J p 271 note 40

Statement indicating prior statement

A statement in a dying declaration indicating that at a previous time another statement had been made was inadmissible where at the time the previous statement was made declarant had no fixed belief of impending death—People v Cheney, 13 N E 2d 171, 368 Ill 131, 114 A L R 1514

Preparation for flight

Where part of a dying declaration was offered for the purpose of showing preparation for flight, it was inadmissible as not a part of the killing or the circumstances immediately attendant thereon, and, for the same reason, a statement contained in the declaration to the effect that on a previous occasion accused had struck deceased with a weapon was also inadmissible—Whiteside v State, 12 S W 2d 218, 111 Tex Cr 116

57. Cal—People v Attema, 243 P 461, 75 Cal App 642
Colo - Davis v People, 238 P 25, 77 Colo 546

Admissible if relevant to material issue

A statement offered as a dying declaration, when made under the conditions prescribed by the law, is competent as to any matter material to the issue on trial, even though not admissible as a part of the res gestæ - People v Borella, 143 N E 471 312 Ill 34

58. Ky—Alford v Commonwealth 50 S W 2d 1, 244 Ky 27—Madden v Commonwealth, 36 S W 2d 346, 237 Ky 703—Lewis v Commonwealth 6 S W 2d 502, 224 Ky 502
La—State v Clifton, 174 So 109, 187 La 62
Miss—Dean v State, 160 So 584, 173 Miss 254 suggestion of error overruled 162 So 155, 173 Miss 254
Tenn—Wooten v State, 103 S W 2d 324, 171 Tenn 362
Statements contained in dying declaration as evidence of state of extremis of deceased and consciousness thereof see supra § 295

59. Ky—Alford v Commonwealth, 50 S W 2d 1, 244 Ky 27
Miss—Dean v State, 160 So 584, 173 Miss 254, suggestion of error overruled 162 So 155, 173 Miss. 254

60. N C—State v Jordan, 5 S E 2d 156, 216 N C 356

61. La—State v Blount, 50 So 12, 124 La 202—State v Carter, 32 So 183, 107 La 792

62 La—State v Carter, supra—State v Trivas, 32 La Ann 1086, 36 Am R 293

63. Ala—Handley v State, 102 So 628, 212 Ala 347.

so intimately interwoven with the thread of the narrative that it could not be separated without marring or destroying the sense of the statement[64] or the remainder of the declaration is necessary to understand fully declarant's meaning.[65] That the declaration contains matter in rebuttal does not affect its admissibility.[66]

Expressions of forgiveness of accused by deceased are inadmissible.[67]

Corroboration A dying declaration, otherwise incompetent, may not be introduced in evidence for the purpose of corroborating other testimony.[68]

§ 299. —— Conclusions and Opinions

a In general
b Provocation
c. Identity of malefactor

a. In General

Generally, a mere conclusion or expression of opinion or belief by a dying man is not admissible as a dying declaration

Although there is some authority to the effect that the same consideration of necessity which is the foundation of the rule excepting dying declarations from the rule of hearsay evidence, discussed supra § 287, operates in favor of admitting in evidence dying declarations of conclusions of fact as well as in favor of admitting such declarations of specific facts,[69] the rule supported by the great weight of authority is to the effect that a mere conclusion or expression of opinion or belief by a dying man is not admissible as a dying declaration,[70] except, it may be, to impeach other declarations or portions of the declaration of decedent, discussed infra § 305, and, where a dying declaration contains unimportant expressions of opinion, which, taken in connection with the entire declaration are not prejudicial, the entire declaration has been held admissible.[71] A fortiori, a part of a declaration stating a matter of fact, which is separable from the opinions stated, is admissible.[72] However, the rule excluding opinions or conclusions has not always been strictly enforced where the declaration was favorable to accused.[73]

It is immaterial whether the fact that the declaration is a mere opinion appears from the statement itself, or from other undisputed evidence, showing that it was impossible for declarant to

Ark.—Gray v. State, 48 S.W.2d 224, 185 Ark. 515.
Conn.—State v. Manganella, 155 A. 74, 113 Conn. 209.
Ky.—Madden v. Commonwealth, 36 S.W.2d 346, 237 Ky. 703—Wooton v. Commonwealth, 255 S.W. 153, 200 Ky. 588.
Tex.—Kennamer v. State, 247 S.W. 560, 93 Tex.Cr. 430.
Wash.—State v. Long, 1 P.2d 844, 163 Wash. 607.
W.Va.—State v. Shelton, 178 S.E. 633, 116 W.Va. 75.

Specifying incompetent portions
Admission of the whole of a dying declaration was held not error where the incompetent portions were not pointed out to the trial judge.—Cruttendon v. State, 8 S.W.2d 371, 157 Tenn. 403.

64. Tex.—Terry v. State, 150 S.W.2d 87, 141 Tex.Cr. 585.

65. Tex.—Edmondson v. State, 26 S.W.2d 220, 114 Tex.Cr. 290.

66. Puerto Rico.—People v. Barrios, 23 Puerto Rico 772.

Statements explanatory of inconsistencies
Where other inconsistent statements are shown, a dying declaration containing a statement which gives the reason for the inconsistencies is admissible, although the statements are not related to, and do not shed any light on, the act of killing or that which apparently led to it.—Evans v. State, 96 So. 923, 209 Ala. 563.

Necessity of rebuttal
In the absence of competent evidence to sustain accused's contention that deceased received the fatal injuries from being struck by a train, deceased's dying declaration to the effect that no train struck him was inadmissible as unrelated to the res gestæ although it was held that, had accused produced competent evidence to establish his contention, such a statement might be admissible in rebuttal.—State v. Aiken, 1 S.E.2d 821, 215 N.C. 317.

67. Tex.—Walthall v. State, 165 S.W.2d 184, 144 Tex.Cr. 585.
30 C.J. p. 274 note 45.

68. Mo.—State v. Kyle, 225 S.W. 1012.
Corroboration of dying declarations see infra § 306.

69. Va.—Pendleton v. Commonwealth, 109 S.E. 201, 131 Va. 676.

70. U.S.—Shepard v. U.S., C.C.A. Kan., 62 F.2d 683, 685, citing **Corpus Juris**, and rehearing denied, 64 F.2d 641, certiorari granted 53 S.Ct. 794, 289 U.S. 721, 77 L.Ed. 1472, reversed on other grounds, 54 S.Ct. 22, 290 U.S. 96, 78 L.Ed. 196.
Ala.—Marshall v. State, 121 So. 72, 219 Ala. 83, 63 A.L.R. 560—White v. State, 136 So. 420, 24 Ala.App. 442—Jones v. State, 104 So. 878, 21 Ala.App. 33—Le Nier v. State, 96 So. 459, 19 Ala.App. 227.
Ill.—People v. Selknes, 140 N.E. 852, 309 Ill. 113.
Ky.—Osborne v. Commonwealth, 59 S.W.2d 975, 248 Ky. 692—Stewart v. Commonwealth, 32 S.W.2d 29, 235 Ky. 670—Barnett v. Commonwealth, 287 S.W. 12, 215 Ky. 786—Philpot v. Commonwealth, 266 S.W. 348, 205 Ky. 636—Philpot v. Commonwealth, 242 S.W. 839, 195 Ky. 555, 25 A.L.R. 1367.
Mo.—State v. Strawther, 116 S.W.2d 133, 342 Mo. 618, 120 A.L.R. 583—State v. Clift, 285 S.W. 706—State v. Jamerson, 252 S.W. 682.
N.Y.—People v. Bartelini, 35 N.E.2d 29, 285 N.Y. 433—People v. Haber, 223 N.Y.S. 133, 221 App.Div. 150.
N.C.—State v. Layton, 169 S.E. 650, 204 N.C. 704—State v. Beal, 154 S.E. 604, 199 N.C. 278.
Tex.—Walthall v. State, 165 S.W.2d 184, 144 Tex.Cr. 585.
30 C.J. p. 274 note 48.

Existence of conspiracy to take the life of deceased is not provable by deceased's expression while in extremis of the opinion or conclusion that it existed.—Handley v. State, 102 So. 628, 212 Ala. 347—Norwood v. State, 65 So. 851, 11 Ala.App. 30.

71. Ky.—Cleveland v. Commonwealth, 101 S.W. 931, 31 Ky.L. 115.

72. Miss.—Lipscomb v. State, 25 So. 158, 76 Miss. 223.

73. Ky.—Justice v. Commonwealth, 108 S.W.2d 1011, 1013, 269 Ky. 846, citing **Corpus Juris**.
30 C.J. p. 275 note 55.

have known the fact stated [74] If the context shows that the statement, in form a statement of fact, is really an opinion of declarant, it must be excluded [75] The true test as to admissibility is whether the statement is the direct result of observation through declarant's senses, or comes from a course of reasoning from collateral facts If the former, it is admissible, if the latter, it is inadmissible [76] Where it is doubtful whether a declaration was the opinion of deceased or the statement of a fact, it should be submitted to the jury under proper instructions [77]

Statements which would be admissible as testimony as against the objection that they were opinions or conclusions, are likewise admissible as dying declarations [78] A statement of a collective fact involving accused's guilt, although general in its nature, is admissible [79] In some cases a statement by deceased that accused poisoned him was regarded as a mere expression of opinion, [80] while in other cases such a statement has been regarded as not a statement of opinion [81]

It has been held that the mere expression of an opinion that accused was not at fault or of a desire that he should not be prosecuted cannot be received in evidence, [82] although, on the other hand, a statement that accused was not at fault has been admitted [83] So, too, a statement of deceased as to the intentional or accidental nature of the act of accused has been held admissible [84]

b. Provocation

Dying declarations tending to show provocation or the want thereof have been held admissible when such utterances relate immediately to the act of killing and are not mere reflections of the inner consciousness or condition of mind of the deceased

Dying declarations, otherwise admissible, are not rendered incompetent by reason of the fact that they contain statements tending to show provocation or the want of provocation when such utterances relate immediately to the act of killing, [85] and are not mere reflections of the inner consciousness or condition of mind of deceased [86] A declaration by the victim of a homicide that the act was without provocation, or words of a like import, although very general, has been held admissible where it is a statement of a collective fact and not a mere conclusion, [87] and a statement that declarant was not doing anything at the time of his mortal injury has been held one of fact, and admissible [88]

74. Mo—State v Wilks, 213 S W 118, 278 Mo 481
30 C J p 275 note 51

75. Mo—State v Wilks, supra

76. Miss—House v State, 48 So 3, 94 Miss 107, 21 L R A N S 840

77. N C State v Williams, 83 S E 714, 168 N C 191—State v Watkins, 75 S E 22, 159 N C 480

78. Ala—Mealer v State, 8 So 2d 178, 179, 242 Ala 682, citing **Corpus Juris.**
Tex—Kennamer v State, 247 S W 560, 93 Tex Cr 430
30 C J p 275 note 57

Declarations held admissible as statements of fact

(1) In general
Ky—Elton v Commonwealth, 19 S W 2d 218, 230 Ky 250
Mo—State v Matthews, 111 S W 2d 62, 341 Mo 1121

(2) That deceased had been followed all morning by accused and his relatives—Denson v State, 298 S W 604, 107 Tex Cr 649

(3) Declaration of woman dying from abortion that she had had a criminal operation which was performed by accused
Mich—People v Bradfield, 1 N W 2d 550, 300 Mich 303
Okl—Lovejoy v State, 194 P 1087, 18 Okl Cr 335

(4) A shorthand rendition of the facts—Couch v State, 279 S W 821, 103 Tex Cr 188—Fleming v State, 274 S W 616, 101 Tex Cr 19

(5) Other declarations see 30 C J p 275 note 57 [a]

79. Ala—Marshall v State, 121 So 72, 219 Ala 83, 63 A L R 560
Ill—People v Kreutzer, 188 N E 422, 354 Ill 430
Mont—State v Le Duc, 300 P 919, 924, 89 Mont 545, citing **Corpus Juris.**
30 C J p 275 note 58

80 Ark—Berry v State, 38 S W 1038, 63 Ark 382
30 C J p 275 note 59

81. Tex—Fults v State, 204 S W 108, 83 Tex Cr 602
30 C J p 275 note 60

82 Mo—State v Finley, 150 S W 1051, 245 Mo 465
30 C J p 275 note 61

83 Ky—Justice v Commonwealth, 108 S W 2d 1011, 269 Ky 816
30 C J p 275 note 62

84. Iowa—State v Nettlebush, 20 Iowa 257
Ky—Commonwealth v Matthews, 12 S W 333, 89 Ky 287, 11 Ky L 505

Opinion or statement of fact

(1) A declaration that, in declarant's opinion, the infliction of the wound was accidental has been held not admissible—Kearney v State, 29 S E 127, 101 Ga 803, 65 Am S R 344

(2) However, a statement that deceased and accused were not fighting was held admissible, the nature of the struggle or scuffle being in question—Flanagan v State, 69 S E 171, 135 Ga 221

85. N C—State v Beal, 154 S E 604, 199 N C 278
30 C J p 275 note 69

86. Va—Richardson v Commonwealth, 104 S E 788, 789, 128 Va 691

87 Ala—Clemmons v State, 116 So 910, 22 Ala App 118, certiorari denied 116 So 913, 217 Ala 519—Humber v State, 108 So 616, 21 Ala App 378
Ky—Cochran v Commonwealth, 33 S W 2d 30, 236 Ky 284
Miss—McLeod v State, 92 So 828, 130 Miss 83
Mont—State v Le Duc, 300 P 919, 924, 89 Mont 545, citing **Corpus Juris**
Tex—Tucker v State, 148 S W 2d 1111, 141 Tex Cr 428
30 C J p 275 note 67

Detailing occurrence

Particular declarations of deceased have been held admissible when followed immediately by a statement detailing the occurrence
Ky—Woods v Commonwealth, 139 S W 2d 439, 282 Ky 596—Mays v Commonwealth, 255 S W 257, 200 Ky 678—Luker v Commonwealth, 5 S W 351, 9 Ky L 385
Va—Reynolds v Commonwealth, 115 S E 379, 135 Va 716

88. Ky—Lowe v Commonwealth, 124 S W 2d 60, 276 Ky 251—Huff v Commonwealth, 122 S W 2d 143, 275 Ky 578—Nolan v Commonwealth, 87 S W 2d 946, 261 Ky 384—Engle v Commonwealth, 79 S W

Also, statements of deceased that he was shot for nothing,[89] or that he was murdered in cold blood[90] have been held admissible However, statements of deceased that he was shot like a dog,[91] that he was killed in cold blood,[92] that he was shot without any cause,[93] or that he was shot for nothing[94] have been held inadmissible

c. Identity of Malefactor

Positive statements as to the identity of the malefactor are admissible as dying declarations where the deceased was in a position to know the fact stated

Positive statements as to the identity of the malefactor are always admissible in evidence when deceased was in a position to know the fact stated,[95] and the positive declaration of deceased, although he did not know who his assailant was, that it was not accused is admissible,[96] but, where it was manifestly impossible that deceased could have seen his assailant or known certainly who he was, a mere expression of opinion as to who he was is not admissible as a dying declaration[97] Where, however, want of knowledge does not appear either from the statement itself or from other evidence in the case, it must be presumed that declarant stated a fact within his knowledge[98] Under such circumstances it is a question for the jury whether the declarations represent the primary knowledge of deceased or merely his opinion[99] Of course, statements indicating mere suspicion instead of knowledge of the murderer's identity do not render incompetent other statements of his identity as a matter of fact[1]

Where the declaration by its terms, taken in connection with the circumstances, merely expresses declarant's belief as to the identity of the guilty person, it should be excluded[2] If declarant sees his assailant and from appearances which he may describe he draws a conclusion as to his identity, it is admissible,[3] but if his opinion is the result of a course of reasoning from collateral facts it is inadmissible[4] A conviction has been sustained, however, where there was in evidence a dying declaration that accused did the shooting, although declarant probably did not see who shot him, but based his statement on suspicion, the reviewing court disregarding such evidence in passing on the sufficiency of the evidence to sustain the conviction[5]

The admissibility of a declaration which does not definitely or positively identify the assailant is considered infra § 301

§ 300. —— State of Feeling between Parties

Declarations tending to show the state of feeling that existed between the accused and the deceased prior to the homicidal act are not admissible in evidence for the prosecution

Declarations tending to show the state of feeling that existed between accused and deceased prior to the homicidal act are not admissible in evidence for the prosecution[6] For example, it is not permissible thus to prove that accused had previously threat-

2d 417, 258 Ky 118—Triplett v Commonwealth, 53 S W 2d 848, 245 Ky 149—Hunter v Commonwealth, 298 S W 879, 221 Ky 170—Strong v Commonwealth 287 S W 235, 216 Ky 98
30 C J p 275 note 68

89. Ala —Humber v State, 108 So 646, 21 Ala App 378
Pa —Commonwealth v Lehman, 161 A 526, 309 Pa 186
30 C J p 275 note 67 [a] (1)

90. Tex —Couch v State, 279 S W 821, 103 Tex Cr 188—Couch v State, 245 S W 692, 93 Tex Cr 27, 25 A L R 1359—Finley v State, 244 S W 526, 92 Tex Cr 543

91. Ala —White v State 136 So 420, 24 Ala App 412—Humber v State, 99 So 68, 19 Ala App 451, certiorari denied Ex parte State ex rel Attorney General, 99 So 73, 210 Ala 559

92. Ala —Skeggs v State, 135 So 431, 24 Ala App 307, certiorari denied 135 So 433, 223 Ala 221
Ky —Mann v Commonwealth, 286 S W 1044, 215 Ky 731

93. Ky —Helphenstine v Commonwealth, 248 S W 497, 198 Ky 188—Wagner v Commonwealth 108 S W 318, 32 Ky L 1185

94. Ky —Reno v Commonwealth, 79 S W 2d 692, 258 Ky 166 —Jones v Commonwealth, 38 S W 2d 251, 238 Ky 453—Eaton v Commonwealth, 19 S W 2d 218, 230 Ky 250—Caudill v Commonwealth, 291 S W 1042, 220 Ky 191—Philpot v Commonwealth, 266 S W 348, 205 Ky 636 —Philpot v Commonwealth, 242 S W 839 195 Ky 555 25 A L R 1367
30 C J p 275 note 69 [c] (5)

95. Ala —Marshall v State, 121 So 72, 219 Ala 83, 63 A L R 560—Collins v State 176 So 219, 27 Ala App 449, certiorari denied 176 So 223, 231 Ala 612
Wis —State v Germana, 280 N W 375, 228 Wis 368
30 C J p 276 note 70

Source of knowledge need not be stated —Waters v Commonwealth, 62 S W 2d 1027, 250 Ky 302

96. U S —Mattox v U S, Kan, 13 S Ct 50, 146 U S 140, 36 L Ed 917

97. Ky —Stevens v Commonwealth, 298 S W 678, 221 Ky 222.
30 C J p 276 note 72

98. N C —State v Arnold, 35 N C 184
30 C J p 276 note 73

99 Ark —Walker v State 39 Ark 221
Cal —People v Rulia Singh, 188 P 987, 182 Cal 457

1. Mo —State v Barnes, 204 S W 264

2. Cal —People v Wasson, 4 P 555, 65 Cal 538

3. Ga —Strickland v State, 145 S E 879 882, 167 Ga 452 citing **Corpus Juris.**
30 C J p 276 note 76

4. Mo —State v Wilks, 213 S W 118, 278 Mo 481

5. Ga —Brown v State, 61 S E 477, 130 Ga 623

6. Fla —Sealey v State, 105 So 137, 89 Fla 439
30 C J p 277 note 82

Declarations held not improperly admitted on the ground that they disclosed passion and prejudice —State v Taylor, 51 S W 2d 1003, 330 Mo 1036.

ened violence to deceased[7] or any other former and distinct transaction not relating to the particular facts constituting the subject matter of the charge or the identification of accused, from which the jury might infer malice toward deceased[8] However, it has been held that a declaration showing the state of mind of deceased toward accused at the time of the shooting,[9] or that the shooting was willful and malicious, based on previous quarrels between them,[10] is admissible Where the killing is admitted, and the only defense is insanity, the dying declaration of deceased is admissible when only a general objection is made, although it contains statements as to prior threats[11]

§ 301. —— Vague, Indefinite, or Incomplete Statements

a Vague and indefinite statements
b Incomplete statements

a. Vague and Indefinite Statements

Generally vague and indefinite expressions which do not point distinctly to the res gestæ of the fatal occurrence should not be admitted as dying declarations

Generally vague and indefinite expressions which do not point distinctly to the res gestæ of the fatal occurrence, but require a resort to inference or supposition to establish facts tending to incriminate the accused, should be excluded[12] So also mere expressions or ejaculations not connected with any statement of facts or circumstances connected with the killing are not admissible.[13] However, as evidence tending to identify the person to whom a dying declaration referred is admissible,[14] a dying declaration is not inadmissible because it does not definitely and positively identify the assailant,[15] especially where there is other evidence tending to show that deceased referred to accused[16]

b. Incomplete Statements

Evidence of dying declarations is inadmissible when the witness does not pretend to give either the words or the substance of what deceased said, or all that he said

Dying declarations are inadmissible when the witness does not pretend to give either the words or the substance of what deceased said, or all that he said[17] This rule, however, does not require that deceased should have stated everything which constituted the res gestæ of the fatal occurrence If he stated anything material to the issue, and it appears that he said all he desired to say, his statement should not be excluded on the ground of incompleteness[18] The fact that an interruption took place, after which declarant completed his statement, does not affect its admissibility[19] A dying declaration which was uncompleted because declarant became unconscious before finishing his statement is not thereby rendered inadmissible,[20] the rule excluding fragmentary declarations applying only to a case in which a witness relates a part of the conversation and not to a case where the witness relates the entire dying declaration,[21]

7. Iowa—State v Perigo, 45 N W 399, 80 Iowa 37
30 C J p 277 note 83

8 Mo—State v Spivey, 90 S W 81, 191 Mo 87
30 C J p 277 note 84

9. Ark—Adcock v State, 20 S W 2d 120, 179 Ark 1055

10. S C—State v Lee, 36 S E 706, 58 S C 335

11. Pa—Commonwealth v Spahr, 60 A 1081, 211 Pa 542

12. Ky—Barnett v Commonwealth, 287 S W 12, 15, 215 Ky 786, citing **Corpus Juris.**
30 C J p 277 note 87

"Reckoned"
In murder prosecution against wife that deceased husband did not state positively that he was shot by wife but said only that he "reckoned" that she shot him about time he turned to go out of room, held not to render declaration inadmissible—Sanders v Commonwealth, 74 S W 2d 922, 255 Ky 156

13. Iowa—State v Perigo, 45 N W 399, 80 Iowa 37
30 C J p 277 note 88

14. Ala—Ragland v State, 192 So 498, 238 Ala 587—Greer v State, 47 So 300, 156 Ala 15

15. Ga—Strickland v State, 145 S E 879, 167 Ga 452—Leatherwood v State, 16 S E 2d 515, 65 Ga App 805
N C—State v Layton 169 S E 650, 204 N C 704
30 C J p 277 note 80

Misspelling of name of accused
A misspelling of the name of accused in one part of a dying declaration does not render the entire statement incompetent where the name is correctly spelled elsewhere in the declaration, and the statement in its entirety discloses that accused was the person described—Rawls v State, 76 S W 2d 1053, 127 Tex Cr 414

Doubt affects weight only
If dying declarations left identity of assailants doubtful doubt would affect only weight not competency, of declarations—State v Beal, 154 S E 604, 199 N C 278

Statement held not indefinite
Ga—De Vere v State, 164 S E 485, 45 Ga App 330

16. Ala—Diamond v State, 123 So 55, 219 Ala 674
Ga—Emmett v State, 25 S E 2d 9
N C—State v Layton, 169 S E 650, 204 N C 704

17 Mo State v Johnson, 24 S W 229 118 Mo 491, 40 Am S R 405

Substance of essential facts
A written statement which included substantially all the essential facts has been held not inadmissible—People v Weiss 261 N Y S 646, 147 Misc 595

18. Ky—Thomas v Commonwealth, 78 S W 2d 777, 257 Ky 605—Daughters v Commonwealth, 73 S W 2d 10, 255 Ky 172, 94 A L R 673
N C—State v Collins, 126 S E 98, 189 N C 15
Vt—State v Tubbs, 139 A. 769, 101 Vt 5
30 C J p 277 note 91

Declarations held not incomplete
Vt—State v Tubbs, 139 A 769, 101 Vt 5

19. Ga.—Park v State, 55 S E 489, 126 Ga 575

20. Ga—Kalb v State, 25 S E 2d 24, 31, 195 Ga 514, quoting **Corpus Juris.**
N C—State v Brinkley, 110 S E 783, 183 N C 720

21. N C—State v Brinkley, supra.

but if it appears that the statement was intended by declarant to be connected with and qualified by other statements which for any cause he was prevented from making, it should be excluded as fragmentary and incomplete [22]

§ 302. —— False or Contradictory Statements

The falsity or inconsistency of dying declarations does not preclude their admission in evidence, but only affects their weight

The fact that dying declarations are untrue[23] or inconsistent with each other[24] does not preclude them, but bears only on their weight as evidence A second statement contradicting a former one should be received as evidence of the facts stated and not limited to the purpose of discrediting the first [25]

§ 303. Declarant's Competency as Witness

a In general
b Evidence as to competency

a. In General

A dying declaration is admissible when, and only when, declarant would have been a competent witness had he lived, and if, by reason of infamy, mental condition, or lack of religious belief, declarant would not have been competent as a witness, his dying declaration will not be received.

A dying declaration is admissible only if declarant would, if living, be a competent witness, and the declaration is not otherwise objectionable,[26] but, where for any reason declarant would not have been competent to testify, had he survived, his dying declaration is not admissible in evidence [27] The determination of the question of whether declarant would have been competent as a witness had he survived is governed by the general rules relating to the competency of a witness,[28] which are discussed in the C J S title Witnesses §§ 49–314, also 70 C J p 82 note 93 et seq

At common law the dying declarations of a person who is irreligious and does not believe in a state of future reward and punishment are not admissible in evidence,[29] but where this disqualification of a witness has been abolished by statutory or constitutional provisions, his dying declarations are admissible [30] Also, a dying declaration made by a person who would not have been a competent witness because of infamy is inadmissible,[31] unless such disqualification has been removed [32] If declarant at the time of making the declarations was not mentally qualified to be a witness, as, for example, where he is under the influence of drugs or opiates, or is not conscious, his dying declarations cannot be received [33] However, it has been

22. Ga—Kalb v State, 25 S E 24, 31, 195 Ga 514, quoting **Corpus Juris.**
30 C J p 278 note 95
Purposeful concealment
Admitting dying statement made to brother of declarant who said that he wanted only brother to know how fatal shooting happened and that he was not telling brother all that occurred was error—Daughters v Commonwealth, 73 S W 2d 10, 255 Ky 172, 94 A L R 673

23. Tex—White v State, 18 S W 462 30 Tex App 652

24. Ky—Walls v Commonwealth 78 S W 2d 322 257 Ky 478
N D—State v Phillips 277 N W 609, 68 N D 113
S C—State v Hall, 133 S E 24 134 S C 361
Tex—Williams v State, 51 S W 2d 367, 121 Tex Cr 458
Wis—Schlesak v State, 287 N W 703, 232 Wis 510
30 C J p 278 note 97

25. Ala—Tittle v State 66 So 10, 188 Ala 46, 52 L R A,N S, 910

26. Ala—Wright v State, 135 So 636, 24 Ala App 378
Fla—Morris v State, 130 So 582, 100 Fla 850
Ky—Brown v Commonwealth, 43 S W 2d 511, 241 Ky. 151
N C—State v Jordan, 5 S E 2d 156 216 N C 356—State v Aiken 1 S E 2d 821, 215 N C 317—State v Stewart 186 S E 488 210 N C 362—State v Beal 154 S E 604, 199 N C 278
30 C J p 278 note 99

27. Ala—Wright v State, 135 So 636, 24 Ala App 378
Idaho—State v Williams, 209 P 1068 36 Idaho 214
30 C J p 278 note 1

28 Ala—Wright v State 135 So 636, 24 Ala App 378—Pilcher v State, 77 So 75 16 Ala App 237

29. Ala—Marshall v State, 121 So 72, 75 219 Ala 83 63 A L R 560, citing **Corpus Juris.**
N J—Donnelly v State 26 N J Law 463, affirmed 26 N J Law 601

30. Idaho—State v Williams 209 P 1068 36 Idaho 214
Miss—Gambrell v State, 46 So 138, 92 Miss 728
Okl—McClendon v State, 251 P 515, 36 Okl Cr 11
30 C J p 278 note 3
Lack of religious belief as means of discrediting dying declaration see infra § 305
Civil rights not affected by religious beliefs
A constitutional provision that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles has been held to abrogate the common-law rule and to make admissible a dying declaration without regard to declarant's religious belief or disbelief—Wright v State 135 So 636 24 Ala App 378

31 Ark—Walker v State 39 Ark 221
N C State v Williams, 67 N C 12
30 C J p 278 note 5

32 Wash—State v Baldwin, 45 P 650, 15 Wash 15

33. Ariz—Macias v State, 6 P 2d 423, 39 Ariz 303
Fla—Frier v State, 109 So 334, 92 Fla 241
Pa—Commonwealth v Alessio 169 A 764 311 Pa 537
Tex—Mayfield v State 25 S W 2d 833, 111 Tex Cr 125
W Va—State v Meek 148 S E 208, 210 107 W Va 324, citing **Corpus Juris**
30 C J p 278 notes 8, 99 [a], [b], 1 [b]
Intelligence, consciousness, and memory
If deceased, at the time she made the questioned statements, possessed intelligence, consciousness, and memory sufficient to have known what she was saying and doing, and to

held that the objection that declarant was not sound in mind goes to the credibility rather than the admissibility of the declaration [34]

Husband and wife Since either a husband or wife may testify to personal violence received at the hands of the other, as shown in the C J S title Witnesses § 101, also 70 C J. p 162 note 41 et seq, the dying declarations of one are admissible on a trial of the other for the murder of declarant [35]

b. Evidence as to Competency

Although it has been held that it must be shown as a preliminary requisite that declarant was competent as a witness, it has also been held that proof of the competency of declarant as a witness is not required unless there is evidence suggesting that he was not a competent witness

It has been held in some jurisdictions that it must be established as a preliminary requisite that declarant was competent as a witness,[36] and sometimes, by reason of statutory provisions, it must appear that deceased was of sane mind at the time of the making of the dying declaration [37] However, other authorities have held that it is not a preliminary requisite to show that deceased would have been a competent witness had he survived,[38] and that the law will presume that he would have been such, and the burden of establishing the contrary is on the party objecting to the introduction of his statement,[39] but if it appears that the injury sustained by deceased, or the administration of anæsthetics, opiates, or narcotics, or other causes, either separately or combined, were calculated to damage his mental faculties,[40] or if it appears that, in close proximity in point of time to the declaration, declarant was alternately rational and irrational,[41] or that after the fatal injury he was in a semiconscious condition,[42] or in the case of a child of tender years,[43] it is incumbent on the party offering the declaration to show that declarant had sufficient consciousness and intelligence to make a declaration understandingly

While evidence tending to show the mental condition of declarant at the time of making the statement is admissible,[44] direct evidence is not required, it being sufficient if it appears from all the facts and surrounding circumstances [45] In the absence of specific objection, testimony that declarant was in his right mind is sufficient to authorize admission of the declaration [46] Testimony relating to the competency of declarant should tend to show the status at the time of the declaration [47]

§ 304. Weight as Evidence

In determining the weight and credit to be given

have understood clearly the import of what had been said to her her dying declarations were competent — State v Phillips, 277 N W 609, 68 N D 113

Declarant not rendered incompetent by reason of administration of opiate

Fla —Covington v State, 200 So 531, 145 Fla 680

Wis —Schlesak v State, 287 N W 703 232 Wis 510

34. Ark —Bramlett v State 43 S W 2d 364, 184 Ark 808—Goynes v State, 42 S W 2d 406 108 184 Ark 303, citing **Corpus Juris**

Puerto Rico —People v Barrios, 23 Puerto Rico 772

30 C J p 278 note 99 [c]

35 Ky —Brown v Commonwealth, 43 S W 2d 511 241 Ky 151

30 C J p 278 note 12

36 Fla —Frier v State, 109 So 334, 92 Fla 241

Idaho —State v Wilmbusse, 70 P 849, 8 Idaho 608

37. Tex —Frank v State, 49 S W 2d 759, 120 Tex Cr 350 —Matthews v State, 26 S W 2d 269, 114 Tex Cr 526—Downing v State, 20 S W 2d 202, 113 Tex Cr 235

30 C J p 278 note 10

38. Ark —Bramlett v State, 43 S W 2d 364, 184 Ark 808—Goynes v State, 42 S W 2d 406, 184 Ark 303

30 C J p 279 note 15

That deceased was rational

The party offering a dying declaration need not show that deceased was rational at the time the declaration was made —Mayberry v State, 85 S W 2d 1015, 191 Ark 270

39. Vt —State v Tubbs, 139 A 769, 101 Vt 5

30 C J p 279 note 16

40 Tenn —Jollay v State, 170 S W 58, 130 Tenn 286

30 C J p 279 note 17

41. Tenn —Jollay v State, supra

42. S C —State v Quick, 93 S E 127, 107 S C 435

43. La —State v Frazier, 33 So 561, 109 La 458

44. Fla —Frier v State, 109 So 334, 92 Fla 241

30 C J p 279 note 14

45. Ariz —Macias v State, 6 P 2d 423, 39 Ariz 303

Fla —Frier v State, 109 So 334, 92 Fla 241

N C State v Williams, 116 S E 570, 185 N C 643

Tex —Gilbreth v State, 63 S W 2d 560 124 Tex Cr 465—Frank v State, 49 S W 2d 759, 120 Tex Cr 350—Denson v State, 298 S W 604, 107 Tex Cr 649—Roberts v State, 295 S W. 609, 107 Tex Cr. 139

Judicial adjudication of declarant as insane and his confinement in an insane institution would not be sufficient to render inadmissible his dying declaration where there was testimony that at the time he made the declaration he was rational and was not suffering from an epileptic spasm Downing v State, 20 S W 2d 202, 113 Tex Cr 235

Sufficient to relate circumstances of killing

It is sufficient to show that declarant was conscious and clear-minded enough at the time to relate the circumstances of the killing —Matthews v State 26 S W 2d 269, 114 Tex Cr 526

Sanity suggested from testimony

Where there was nothing in the record to suggest lack of sanity on the part of deceased, and all of the testimony as to his conduct, conversations, and actions tends to indicate sanity, the declaration would be admitted in evidence —McKenzie v State, 258 S W 832, 96 Tex Cr 564

Evidence held insufficient to show mental competency

Mont —State v Martin, 248 P 176 76 Mont 565

46. Pa —Commonwealth v Silcox, 29 A 105, 161 Pa 484

47. Idaho —State v Wilmbusse, 70 P 849, 8 Idaho 608

30 C J p 279 note 21.

dying declarations, the jury should consider the circumstances under which they were made and all the evidence in the case, and give to them the credit and weight to which they believe they are entitled.

Dying declarations do not fall within the rule that hearsay evidence is without probative value,[48] and it has been held that the credibility of dying declarations is to be determined largely by the same rules as are applied in weighing other testimony.[49] Their value depends on their intrinsic probability, and the candor and truthfulness of the person who made them, as well as on the fullness and fairness with which they are reported.[50] In weighing dying declarations, the jury may consider the circumstances under which they were made,[51] as, whether they were due to outside influence[52] or were made in a spirit of revenge,[53] or when declarant was unable or unwilling to state the facts,[54] the inconsistent or contradictory character of the declarations,[55] and the fact that deceased has not appeared and accused has been deprived of the opportunity to cross-examine him,[56] and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled.[57]

It has been said that the dying declarations of a person who has been mortally wounded, with re-

48. Ga—Roberts v State, 76 S E 361, 138 Ga 815

49. Mo—State v Anderson, 34 S W 2d 25
N Y—People v Ricken, 273 N Y S 470, 242 App Div 106
N C—State v Franklin, 135 S E 859, 192 N C 723—State v Collins, 126 S E 98, 189 N C 15
Pa—Commonwealth v Gardner, 128 A 87, 282 Pa 458
30 C J p 279 note 23

No sanctity of oath

Dying declarations are not to be considered as given under the sanctity of an oath—Commonwealth v Gardner, supra.

Rules not applicable

The rules usually applied to determine credibility of a witness are applicable only to the witnesses who assume to repeat to the jury what declarant is alleged to have said, such rules do not apply in determining declarant's credibility, since he does not appear before the jury and his demeanor while testifying, and his carelessness and fairness while on the witness stand, cannot be observed—State v Gallegos 213 P 1030, 28 N M 403

50. Mich—People v Knapp, 26 Mich 112

51. Ark—Parker v State, 275 S W 758 169 Ark 421
Mo—State v Morgan, 56 S W 2d 385—State v Taylor, 51 S W 2d 1003, 330 Mo 1036
N Y—People v Ludkowitz, 194 N E 688, 266 N Y 233
Vt—State v Tubbs, 139 A 769, 101 Vt 5
Va—Evans v Commonwealth, 170 S E 756, 161 Va 992
30 C J p 279 note 26

Declarant's expectation of death may be considered by the jury in determining what weight, if any, should be given his dying statements—Whitehead v Commonwealth, 255 S W 93, 200 Ky 440

Physical and mental condition

In determining what weight is to be given dying declarations, the jury should consider the physical and mental condition of declarant at the time as well as all the other evidence—Beavers v State, 251 S W 375, 158 Ark 640

Consciousness and language

It was proper for the jury, in testing the weight of the testimony, to consider whether deceased was or was not conscious, as well as the language he used—Bramlett v State, 43 S W 2d 364 184 Ark 808

Theory of law

It has been held proper to instruct that the theory of the law is that a person is apt to tell the truth in such a solemn moment, but the fact that a man is dying when he makes a declaration must be considered in the light of all the conditions and circumstances surrounding him—Commonwealth v Chiemilewski, 89 A 964, 243 Pa 171

52. Ga—Smith v State, 71 S E 606, 9 Ga App 403

Response to questions

Fact that statements of deceased were made in response to questions asked may affect their weight—Benton v State, 122 S E 775, 158 Ga 41

53. Ga—Smith v State, 71 S E 606, 9 Ga App 403
Pa—Commonwealth v Gardner, 128 A 87, 282 Pa 458
Wash—State v Long, 1 P 2d 844, 163 Wash 607

Failure to give a specific instruction that the jury might consider whether declarant's account of the occasion was influenced by resentment and revenge and was, therefore, biased and incomplete was not error in view of the general instructions which were given—Rounds v State, 162 S E 696, 174 Ga 308.

54. Ga—Smith v State, 71 S E 606, 9 Ga App 403
N Y—People v Ludkowitz, 194 N E 688, 266 N Y 233
Pa—Commonwealth v Gardner, 128 A 87, 282 Pa 458

The memory of declarant may be impaired by his wounds, or it may be impaired by the excitement and confusion of the difficulty—Conway v State, 171 So. 16, 177 Miss 461

55. Ark—Grey v State, 48 S W 2d 224, 185 Ark 515
Colo—Flor v People, 215 P 875, 73 Colo 403
Nev—State v Watts, 290 P 732, 52 Nev 453, affirmed 296 P 26, 53 Nev 200
Pa—Commonwealth v Gardner, 128 A 87, 282 Pa 458
S C—State v Hall, 133 S E 24, 134 S C 361
Va—Evans v Commonwealth, 170 S E 756, 161 Va 992
30 C J p 279 note 30

Inherent falsity

Where a dying declaration bears manifest evidence of its own falsity, it may be entirely disregarded—O'Neal v State, 48 So 225

56. N M—State v Gallegos 213 P 1030, 28 N M 403
N Y—People v Ludkowitz, 194 N E 688, 266 N Y 233
Pa—Commonwealth v Lockett, 139 A 836, 291 Pa 319
Tenn—Crittendon v State, 8 S W 2d 371, 157 Tenn 403

Jury deprived of seeing witness

Where a dying declaration is admitted in evidence, the jury are deprived of deceased's presence, his manner, and his deportment on the witness stand, which are often very valuable—Conway v State, 171 So. 16, 177 Miss 461

57. Ark—Adcock v State, 20 S W. 2d 120, 179 Ark 1055—Parker v State, 275 S W 758, 169 Ark 421
Ga—Thompson v State, 111 S E 651, 153 Ga 147
Ill—People v Greenig, 174 N E 374, 342 Ill 254
Mo—State v Morgan, 56 S W 2d 385—State v Taylor, 51 S W 2d 1003, 330 Mo 1036
Nev—State v Watts, 290 P 732, 52 Nev 453, affirmed 296 P 26, 53 Nev 200
Va—Evans v Commonwealth, 170 S. E 756, 161 Va 992
30 C J p 279 note 31, p 270 note 84.

gard to the circumstances which caused his death, are to be received with the same degree of credit as the testimony of deceased would have been had he survived and been examined on oath,[58] and, where this view obtains, it is not error to instruct the jury to that effect,[59] or to refuse to instruct that a dying declaration is not so satisfactory as the evidence of witnesses on the stand[60] However, a dying declaration has also been regarded as of less value and weight than the testimony of a witness given in open court,[61] and it has been considered error to instruct the jury that dying declarations are entitled to the same credit and force as though the statements had been regularly sworn to before the court and jury,[62] or to refuse to instruct that dying declarations are not entitled to the same credit and force as if deceased were alive and testifying,[63] but, even where such instructions are not authorized, the court, in stating the reasons for the admission of dying declarations, may instruct that, when a man realizes he is in a dying condition, his statement has the same weight as if made under oath[64] In any event, dying declarations are not regarded as on a higher plane than the testimony of an ordinary witness[65] They are admitted only as evidence and are not conclusive,[66] and should be considered with all the other evidence in the case,[67] and the jury may or may not give them the same weight and credit as would be given the testimony of declarant had he survived and testified in court,[68] and on a consideration of all the evidence, the jury may accept or reject them in whole or in part[69]

It has frequently been stated that a dying declaration should be received by the jury with caution and considered with the greatest deliberation in the light of all the evidence in the case,[70] and it has been held that an instruction to this effect is proper[71] and should be given[72]

58. Iowa—State v Troy, 220 N W 95, 206 Iowa 859, opinion supplemented 221 N W 370
30 C J p 279 note 32

59. N C—State v Kennedy, 85 S E 42, 169 N C 326, L R A 1915F 656
30 C J p 279 note 33

60. Minn—State v Pearce, 57 N W 652, 1065, 56 Minn 226
30 C J p 279 note 34

61. N M—State v Gallegos, 213 P 1030, 28 N M 403
N Y—People v Bartelini, 35 N E 2d 29, 285 N Y 433—People v Ludkowitz, 194 N E 688, 266 N Y 233—People v Portugay, 251 N Y S 389, 140 Misc 688

62. N Y—People v Ludkowitz, 194 N E 688, 266 N Y 233
Tenn—Jackson v State, 293 S W 539, 155 Tenn 371—Dickason v State, 202 S W 922, 139 Tenn 601
30 C J p 280 note 40

63. Miss—Muse v State, 130 So 693, 158 Miss 449

64. Tenn—Crittendon v State, 8 S W 2d 371, 376, 157 Tenn 403
30 C J p 280 note 41

Amplifying instruction

It was held not error to refuse to amplify an instruction that dying declarations have the same weight and sanctity as evidence testified to under oath, where no request for additional instructions had been made—Powers v State, 97 S W 815, 117 Tenn 363

65. Ill—People v Cheney, 13 N E 2d 171, 365 Ill 131, 111 A L R 1514
30 C J p 279 note 36

No presumption of witness testifying truthfully

It is error to charge that the law presumes that a person who has given up all hope will tell the truth there being no presumption that any witness will tell the truth—State v Riley, 82 S E 621, 98 S C 386

66 N Y—People v Ricken, 273 N Y S 170, 242 App Div 106
N C—State v Franklin, 135 S E 859, 192 N C 723—State v Watkins, 75 S E 22, 150 N C 480

67. Ark—Parker v State, 275 S W 758, 169 Ark 121

68. Neb—Mathews v State, 197 N W 602, 111 Neb 593

No instructions as to weight or credibility

The court should not give any specific instructions as to the weight or credibility to be given a dying declaration—Evans v Commonwealth, 170 S E 756, 161 Va 992

69. Ark—Bowers v State, 251 S W 375, 158 Ark 610—Cranford v State, 245 S W 189, 156 Ark 39
Cal—People v City, 106 P 257, 11 Cal App 702
Ga—Court v State, 119 S E 723, 156 Ga 536

70. Miss—Conway v State, 171 So 16, 177 Miss 461
N Y—People v Bartelini, 35 N E 2d 29, 285 N Y 433—People v Haber, 223 N Y S 133, 221 App Div 150—People v Portugay, 251 N Y S 389, 140 Misc 688
N C—State v Williams, 116 S E 570, 185 N C 643
Tenn—Humphreys v State, 64 S W 2d 5, 166 Tenn 523—Jackson v State, 293 S W 539, 155 Tenn 371, citing **Corpus Juris**
30 C J p 280 note 39
Caution in receiving declarations generally see supra § 287

Uncorroborated dying declaration

is to be regarded with greater caution than a dying declaration with additional evidence in support—People v Ludkowitz, 194 N E 688, 266 N Y 233

71. N C—State v Williams, 116 S E 570, 185 N C 643

Repetitions of defendants' statements

It is not error to refuse to give, in instructions the same rule of caution that applies to the consideration of repetitions by witnesses of statements made by defendants—State v Hendricks, 71 S W 194, 172 Mo 654.

In Georgia

(1) It has been held by the supreme court that an instruction to the jury that a dying declaration should be received with caution is necessary—Court v State, 119 S E 723, 156 Ga 536

(2) In a decision by the court of appeals it was stated that since the adoption of the code, it is not incumbent on the court to charge that great caution should be observed in the use of a dying declaration—Robinson v State, 88 S E 410, 17 Ga App 751

72. Mont—State v Le Duc, 300 P. 919, 89 Mont 545
Tenn—Humphreys v State, 64 S W 2d 5, 166 Tenn 523

Rule relates to admissibility

It is true that dying declarations are to be admitted with great caution, but that is an admonition addressed to the court in ruling on the admissibility of an alleged dying statement, a question with which the jury has no concern. The jury being the sole judges of the weight to be given to the testimony, it is not error to refuse to give an instruction that a dying declaration should be viewed with great caution—State v Le Duc, supra.

Use by prosecution or defense Dying declarations are entitled to the same consideration and credit, whether in favor of the state or of accused [73]

Fact or opinion Whether alleged dying declarations, introduced in evidence, were statements of fact or opinions of the injured party may be considered by the jury in determining their evidential value,[74] and the court may instruct the jury not to give any weight to a mere opinion expressed by declarant [75]

Direct or circumstantial Dying declarations giving the details of a murder and the name of the murderer are direct, and not circumstantial, evidence [76]

§ 305 Impeachment

Dying declarations generally are subject to impeachment in any of the modes by which the testimony of the deceased could have been impeached had he been alive and testifying under oath

Dying declarations generally are subject to impeachment[77] in any of the modes by which the testimony of deceased could have been impeached had he been alive and testifying under oath [78] Also an interpreter,[79] or the witness who testifies as to dying declarations of deceased,[80] may be impeached.

Dying declarations may be overcome by any competent evidence which impairs its value [81] Impeaching evidence must not be irrelevant or too remote in time [82] Thus dying declarations cannot be impeached by proof of statements of deceased made before the killing which were not communicated to accused and did not relate to the subject of the dying declarations,[83] nor can deceased be impeached by what somebody else said and did [84] Evidence as to declarant's motive in making the statement is admissible,[85] and a dying declaration may be impeached by establishing that when it was made declarant was in a reckless, irreverent state of mind and entertained feelings of malice and hostility toward accused [86]

Contradictory or inconsistent statements Dying declarations may be impeached by showing that they are conflicting or contradictory,[87] and it is held con-

73. Del—State v Uzzo, 65 A 775, 22 Del 212

74 Ga—Thompson v State 111 S E 651, 153 Ga 147
N Y—People v Haber, 223 N Y S 133 221 App Div 150
Pa—Commonwealth v Fugmann, 198 A 99, 330 Pa 4
30 C J p 280 note 45

75. Iowa—State v Towne, 160 N W 10 180 Iowa 339

76. Ind—Wolfe v State, 159 N E 515 200 Ind 557
Mo—State v Sexton, 48 S W 452, 147 Mo 89
Wash State v Kwan, 25 P 2d 104, 174 Wash 528

77 Ga—Green v State, 25 S E 2d 502

78 U S—Freihage v U S C C A Alaska, 56 F 2d 127
Ala—Marshall v State, 121 So 72, 219 Ala 83, 63 A L R 560
Ark—Sutton v State, 63 S W 2d 278, 187 Ark 870—Clark v State 259 S W 378, 163 Ark 180—Alford v State 255 S W 881, 161 Ark 256
Ky—Dorroh v Commonwealth, 32 S W 2d 550, 551, 236 Ky 68, citing **Corpus Juris**—Blackerby v Commonwealth, 255 S W 824, 200 Ky 832
Minn—State v French, 210 N W 45, 168 Minn 341
Mont—State v Kacar, 240 P 365, 370 74 Mont 269 citing **Corpus Juris.**
Nev State v Watts, 290 P 732, 52 Nev 453 affirmed 296 P 26, 53 Nev 200
N M—State v Gallegos, 213 P 1030, 28 N M. 403.
N Y—People v Ricken, 273 N Y S 470, 242 App Div 106
N C State v Debnam 22 S E 562, 222 N C 266
Okl McClendon v State 251 P 515, 36 Okl Cr 11
Tex—Jones v State 13 S W 2d 815 112 Tex Cr 31—Couch v State 245 S W 692, 93 Tex Cr 27, 25 A L R 1359
30 C J p 281 note 49
Impeachment of witnesses generally see the C J S title Witnesses §§ 458–651 also 70 C J p 759 note 9 et seq

79 Idaho—State v Fong Loon 158 P 243, 29 Idaho 218 L R A 1916F 1198
30 C J p 282 note 72

80. Miss—Muse v State 130 So 693, 158 Miss 419
Mo—State v Baxter, 130 S W 2d 584 344 Mo 1034
Mont—State v Kacar 240 P 365 74 Mont 269

81. Mont—State v Kacar supra
Okl—McClendon v State 251 P 515 36 Okl Cr 11
Tex—Green v State, Cr. App., 20 S W 712

Denial by accused
Where a statement in a dying declaration was to the effect that accused waylaid deceased it was reversible error not to permit accused to deny the statement—Bell v State, 261 S W 773, 97 Tex Cr 390

82. Ala—Humber v State, 108 So 646, 21 Ala App 378
Ark—Clements v State, 133 S W 2d 844, 199 Ark 69
Ga—Green v State, 25 S E 2d 502—Willbanks v State, 152 S E 619, 11 Ga App 268
Ky—Smith v Commonwealth 157 S. W 2d 79 285 Ky 831
Tex Couch v State 245 S W 692, 93 Tex Cr 27, 25 A L R 1359

Irrelevant statements in declaration
Evidence which tends to disprove statements in a dying declaration which are irrelevant to the issue is properly excluded—State v Stuckey, 35 S E 263 56 S C 576

Hearsay evidence offered for the purpose of explaining and contradicting a dying declaration is inadmissible in the absence of an explanation as to how and in what particulars it will accomplish the purpose for which it is tendered—Commonwealth v Bryson 120 A 558, 276 Pa 566

Amplification by witness of testimony given on a previous occasion is not of itself alone a sufficient reason for questioning the integrity of the witness or the accuracy of his testimony—State v Smothers, 123 So 781, 168 La 1099

83 Ga—Land v State, 76 S E 78, 11 Ga App 761

84 Ala—Phillips v State, 65 So 441, 11 Ala App 15

85 Or—State v Yee Gueng, 112 P 424 57 Or 509—State v Doris, 94 P 44, 51 Or 136 16 L R A, N S, 660

86. Ill—Nordgren v People, 71 N E 1042, 211 Ill 425
30 C J p 282 note 65

87. Ky—Blackerby v Commonwealth, 255 S W 824, 200 Ky 832

petent to prove statements of deceased made at other times after the fatal occurrence in conflict with his dying declarations,[88] although the contradictory statements are not themselves admissible as dying declarations,[89] and notwithstanding a contradictory dying declaration has previously been admitted by way of impeachment.[90] There is, however, authority to the effect that evidence of statements made by deceased when not in extremis, to contradict statements in decedent's dying declaration, is incompetent.[91]

Where the doctrine permitting impeachment by showing inconsistent or contradictory statements prevails, the rule requiring that a foundation be laid by first asking the witness whether he had made contradictory statements at other times has no application.[92]

Character or reputation While it has been held competent to impeach a dying declaration by showing declarant's general bad character,[93] or bad reputation for truth and veracity in the community in which he lives,[94] it has also been held that evidence as to general character is not admissible for the purpose of impeachment.[95]

So also it may be shown that declarant has been convicted of crime, where that is admissible to impeach a witness,[96] as, for example, that he has been convicted of a felony or other crime involving moral turpitude,[97] but the rule that a witness cannot be impeached by evidence of misdemeanors applies to an attempt to impeach dying declarations.[98]

Religious belief It has been held that a dying declaration may be impeached by relevant evidence[99] showing a lack of religious belief of declarant to the extent that he did not believe in future rewards or punishments,[1] and that a dying

Nev—State v Watts, 290 P 732, 52 Nev 453, affirmed 296 P 26, 53 Nev 200
Tex—Hill v State, 114 S W 2d 1180, 134 Tex Cr 163
30 C J p 281 note 50

88. Ark—Clark v State, 259 S W 378, 163 Ark 180
Ky—Cole v Commonwealth, 86 S W 2d 984, 260 Ky 758—Dorroh v Commonwealth, 32 S W 2d 550, 236 Ky 68—Blackerby v Commonwealth, 255 S W 824, 200 Ky 832—Colson v Commonwealth, 255 S W 60, 200 Ky 102
Nev—State v Watts 290 P 732, 52 Nev 453, affirmed 296 P 26, 53 Nev 200
N C—State v Debnam, 22 S E 2d 562, 222 N C 266
Pa—Commonwealth v Gardner, 128 A 87, 282 Pa 158
Tex—Jones v State, 13 S W 2d 845, 112 Tex Cr 31—Fleming v State, 274 S W 616, 101 Tex Cr 19—Couch v State 245 S W 692, 93 Tex Cr 27, 25 A L R 1359
30 C J p 281 note 51

Dying declaration offered by accused

When accused introduces dying declarations of deceased to show his innocence, the state can rebut them by proving declarations of deceased tending to show that the dying declarations are not a true account of the homicide, or that they were made for a purpose which discredited their veracity—Johnson v State, 152 S E 76, 169 Ga 814

89. Pa—Commonwealth v Gardner, 128 A 87, 282 Pa 458
30 C J p 281 note 52

Whole of contradictory declaration admissible

Where deceased made two dying declarations, the first being inadmissible because not made under a sense of impending dissolution, and the second one was introduced by the state and thereafter accused introduced a portion of the first for the purpose of impeachment, it was then proper to admit the whole of the first declaration on behalf of the prosecution—Blackerby v Commonwealth 255 S W 824, 200 Ky 832

90 Ind—Green v State, 57 N E 637, 154 Ind 655

91. S C—State v Brown, 95 S E 61, 108 S C 490
30 C J p 281 note 55

92. Ky—Dorroh v Commonwealth, 32 S W 2d 550 236 Ky 68—Blackerby v Commonwealth, 255 S W 824, 200 Ky 832
30 C J p 281 note 54

93. Ga—Johnson v State, 152 S E 76, 169 Ga 814
30 C J p 282 note 69

Bad reputation for morality admissible

N M—State v Gallegos 213 P 1030, 28 N M 403

Lack of knowledge of prevailing impression

While recognizing the text rule, the court held that if the witness who is offered for the purpose of impeaching the character or reputation of declarant is not acquainted with the prevailing impression in the community, or if his knowledge is too remote in time, his testimony will not be admitted People v Cord, 108 P 511, 157 Cal 562

94 N J—State v Tomassi, 69 A 214, 75 N J Law 739
Tex—Couch v State, 245 S W 692, 93 Tex Cr 27, 25 A L R 1359
Wash—State v Kwan 25 P 2d 104, 174 Wash 528
30 C J p 282 note 64

Declarant unworthy of belief

Where a witness testifies that the reputation of deceased declarant for truth and morality was bad in the community in which he lived, it was reversible error to exclude the question whether, judging from the reputation shown, witness would believe declarant under oath—Alford v State 255 S W 884 161 Ark 256

95. N J—State v Tomassi, 69 A 214, 75 N J Law 739
Wash—State v Kwan, 25 P 2d 104, 174 Wash 528

Bitter and vindictive

A husband charged with killing his wife cannot show her reputation for being bitter and vindictive for the purpose of affecting her dying declaration against him—People v Simpson, 12 N W 662, 48 Mich 474

Reputation for honesty and fair dealing of deceased is not admissible—Couch v State 245 S W 692, 93 Tex Cr 27 25 A L R 1359

96 Ky—Cole v Commonwealth, 86 S W 2d 984, 260 Ky 758
Mo—State v Digley, 147 S W 111, 242 Mo 161
N Y—People v Ricken, 273 N Y S 170, 242 App Div 106

Term in penitentiary

Evidence that deceased declarant had served a term in the penitentiary was admissible for impeachment purposes—Sutton v State, 63 S W 2d 278, 187 Ark 870

97. Ark—McClendon v State, 18 S W 2d 1021, 179 Ark 998
Ky—Cole v Commonwealth, 86 S W 2d 984, 260 Ky 758
30 C J p 282 note 67

98. Ky—Martin v Commonwealth, 78 S W 1104, 25 Ky L 1928

99. Mo—State v Zorn, 100 S W 591, 202 Mo 12
30 C J p 281 note 63

1. Okl—McClendon v State, 251 P. 515, 36 Okl Cr 11
30 C J p 281 note 59

declaration by one obtuse to religious convictions and disbelieving in a future spiritual existence should not be submitted without an admonition to view it with caution [2] However, it is not to be presumed because deceased was an adherent of a heathen religion that he did not believe in future rewards and punishments,[3] and there is authority for the view that the nature or lack of religious belief does not affect the weight of the declaration [4]

§ 306. Corroboration

The prosecution may introduce evidence in corroboration of an impeached dying declaration

When dying declarations have been impeached, it is competent for the prosecution to introduce evidence in corroboration,[5] but statements of deceased other than dying declarations are not admissible for this purpose [6] Where deceased is impeached by proof of his conviction of crime, it is not competent to prove his pardon [7] Where the reputation of deceased has not been directly attacked, evidence of his good reputation is not admissible to bolster his declaration [8]

Abortion Under a statute providing that, in prosecutions for abortion, no conviction can be based alone on a dying declaration unless corroborated as to the fact that an abortion or miscarriage has taken place, such corroboration is necessary to sustain a conviction of manslaughter, based on an unlawful operation with intent to produce an abortion [9]

D PROCEEDINGS AT INQUEST

§ 307. Admissibility in General

The proceedings at a coroner's inquest are generally not admissible in evidence at a trial for homicide

As a general rule the proceedings before the coroner are not admissible in evidence at a trial for murder,[10] at least when the object is merely to corroborate accused's testimony on the trial,[11] but it has been held that the rule excluding such evidence is to guard against unwarranted inferences by the jury, and that on trial by the court the evidence may be received and considered for what it is worth [12] The holding of an inquest may be shown by the testimony of the officer who conducted it [13] Evidence as to whether a particular witness had been subpœnaed to appear at the coroner's inquest is irrelevant and immaterial [14]

§ 308. Testimony and Statements of Accused

Testimony at a coroner's inquest, given by one as an accused or person under arrest, cannot be used against him on a subsequent trial of an indictment growing out of such inquest, unless it was given voluntarily after his being advised of his rights, but testimony given by

Must show incompetency of declarant

Evidence of religious unbelief to be admissible for the purpose of impeachment, must be such as would have rendered declarant incompetent as a witness—Marshall v State, 121 So 72, 219 Ala 83, 63 A L R 560

2. Cal—People v Lim Foon, 155 P. 477, 29 Cal App 270

3. Cal—People v Lim Foon, supra

4. Or—State v Yee Gueng, 112 P 424, 57 Or 509
Contra Goodall v State, 1 Or 333, 80 Am D 396

5. N.C—State v Williams, 83 S E 714, 168 N C 191, 194
30 C J p 282 note 77

Circumstantial evidence

Dying declaration may be corroborated by circumstantial evidence—Wolfe v State, 159 N E 545, 200 Ind 557

Although the dying declaration was not impeached, evidence has been admitted on the grounds that it corroborated the declaration, established the truth of accused's confession, and threw light on what actually happened at the time of the killing—Vickers v State, 242 S W 1032, 92 Tex Cr 182

6. Mo—State v Hendricks, 73 S W 194, 172 Mo 654
N C—State v Williams, 83 S E 714, 168 N C 191

7. Ky—Martin v Commonwealth, 78 S W 1104, 25 Ky L 1928

8. Mo—State v Reed, 157 S W 316, 250 Mo 379

9. Mo—State v Keller, 229 S W 203, 287 Mo 124

Corroborating evidence insufficient

Medical testimony to the effect that death was caused by an infection from a puncture of the vaginal wall was not sufficient to constitute corroboration of the dying declaration as to the fact that an abortion had taken place—State v Smith, 130 S W 2d 550, 341 Mo 1129

10. Miss—Blackwell v State, 116 So 626, 629, 166 Miss 524
30 C J p 282 note 82

Reason for rule

"The only object and result of a coroner's proceeding is to furnish prompt information which may guide the officers of the law in apprehending and prosecuting those who appear to have been connected with a supposed homicide and by discovering the evidence by which it may be investigated, and strictly speaking, it has no legal effect The verdict and proceedings are therefore inadmissible in evidence in such a case, as to admit them to be used as evidence on the trial to influence perhaps to control, the verdict of the jury, would lead to the subversion and final overthrow of the jury system, whilst in nearly every case the rights of either the commonwealth or the accused would be inevitably prejudiced"—Blackwell v State, supra 30 C J p 282 note 82 [a]

11. Mich—People v Coughlin, 35 N W 72, 67 Mich 466

12 U S—U S v Sonico, 3 Mill Rev 287

13 Ala—Peel v State, 39 So 251, 144 Ala 125
30 C J p 282 note 87

Justice of peace, may testify that he was requested to hold an inquest and authorized the removal of deceased to his home in coroner's absence—State v Louviere 124 So 188, 169 La 109

14. Cal—People v Farrington, 2 P 2d 814, 213 Cal 459 certiorari denied Farrington v People of State of California, 52 S Ct 456, 285 U S 530, 76 L Ed 926.

one simply as a witness and not as a party, generally may be used against him on a subsequent indictment and trial.

The testimony and statements of accused at the coroner's inquest are admissible against him on a subsequent trial of an indictment growing out of the inquest, only where they were voluntary, and not where they were made or given under compulsion,[15] but the admissibility of testimony, amounting to a confession, voluntarily given at the inquest, is not affected by the fact that a confession had been previously procured from accused by duress, while he was in jail.[16] If a person testifies at an inquest as accused or person under arrest, his testimony cannot be used against him on a subsequent trial of an indictment growing out of the inquest, unless it has been voluntarily given after he has been fully advised of all his rights, and has been given an opportunity to avail himself of them,[17] or, although not cautioned, if he was aware of his right to decline to answer.[18] Where a part of accused's statements at the inquest is admitted against him, another part of the same testimony which does not contradict or tend to explain the part admitted may be excluded.[19] On the other hand, if a person testifies at the inquest simply as a witness, and not as a party, he not being under arrest or accused of the crime, his testimony, in the absence of proof to the contrary, will be presumed to be voluntary,[20] and may be used against him under a subsequent indictment and trial for the commission of the crime disclosed by the inquest,[21] even though he was not cautioned as to his rights before giving his testimony,[22] and such testimony will not be rendered inadmissible against him as an involuntary statement because it was made under oath.[23] This rule has been held to apply even though the person so testifying was under suspicion at the time of giving his testimony,[24] but there is authority to the contrary.[25] Under a statute providing that evidence of any statement made by accused as a witness on a legal examination shall not be given against him unless such statement was made when examined as a witness in his own behalf, evidence of accused at the coroner's inquest before he was accused, but at which he did not voluntarily appear but was duly summoned as a witness, was not in his behalf, although such evidence tended to exculpate him.[26] The testimony of accused given at the inquest cannot be received on his behalf at the trial.[27]

Statements by accused to the coroner and jury before being sworn are admissible,[28] although he had not been informed of his legal rights before making them.[29]

15. Ariz.—Miranda v. State, 26 P.2d 241, 42 Ariz. 358
Kan.—State v. Taylor, 13 P. 550, 36 Kan. 329
Miss.—Steele v. State, 24 So. 910, 76 Miss. 387—Farkas v. State, 60 Miss. 847
Mont.—State v. O'Brien, 43 P. 1091, 18 Mont. 1, rehearing denied 44 P. 399, 18 Mont. 1
30 C.J. p. 283 note 90

Such statements offered as admissions against interest, and not as confessions, are less rigidly construed.—Miranda v. State, 26 P.2d 241, 42 Ariz. 358

16. Cal.—People v. Coen, 271 P. 1074, 205 Cal. 596

17. Ariz.—Miranda v. State, 26 P.2d 241, 42 Ariz. 358
Cal.—People v. Perry, 91 P.2d 559, 14 Cal.2d 387, 124 A.L.R. 1123
Colo.—Reagan v. People, 112 P. 785, 49 Colo. 316
Fla.—Williamson v. State, 133 So. 109, 101 Fla. 1219
Ind.—Evans v. State, 155 N.E. 203, 199 Ind. 55
Ky.—Pruett v. Commonwealth, 250 S.W. 131, 199 Ky. 35
La.—State v. Page, 136 So. 609, 173 La. 279
30 C.J. p. 282 note 88

That accused was not represented by counsel at the inquest does not make his testimony given thereat inadmissible, where he could have requested counsel, and where he offered his testimony freely after having his rights explained.—Miranda v. State, 26 P.2d 241, 42 Ariz. 358

Statement of attorney as to incriminating nature of testimony, immaterial

Whether an attorney who examined accused at the inquest told the truth or not in informing accused before signing the testimony that he did not know whether it would clear or incriminate accused is immaterial.—Epps v. State, 1 N.E. 491, 102 Ind. 539

18. Wis.—Anderson v. Proceedings, 114 N.W. 112, 133 Wis. 601

19. Ind.—Evans v. State, 155 N.E. 203, 199 Ind. 55

20. Miss.—Steele v. State, 24 So. 910, 76 Miss. 387
Mo.—State v. David, 33 S.W. 28, 131 Mo. 180
N.Y.—People v. Molineux, 61 N.E. 286, 168 N.Y. 264, 62 L.R.A. 193, 10 N.Y. Ann. Cas. 256
30 C.J. p. 283 note 91

21. Ala.—Jones v. State, 25 So. 204, 120 Ala. 303.—Wilson v. State, 20 So. 115, 110 Ala. 1, 55 Am.S.R. 17
Ariz.—Miranda v. State, 26 P.2d 241, 42 Ariz. 358
Idaho.—State v. McClurg, 300 P. 898, 50 Idaho 762
Ky.—Pruett v. Commonwealth, 250 S.W. 131, 199 Ky. 35.
Wis.—Shiefel v. State, 192 N.W. 386, 180 Wis. 186
30 C.J. p. 283 note 89

22. Idaho.—State v. McClurg, 300 P. 898, 50 Idaho 762
Ky.—Pruett v. Commonwealth, 250 S.W. 131, 199 Ky. 35
Wis.—State v. Lloyd, 119 N.W. 514, 132 Wis. 24, Ann.Cas.1914C 415
30 C.J. p. 283 note 89

23. Ala.—Wilson v. State, 20 So. 115, 110 Ala. 1, 55 Am.S.R. 17
Me.—State v. Gilham, 51 Me. 206
Mo.—State v. Wisdom, 24 S.W. 1047, 119 Mo. 539

24. Ky.—Pruett v. Commonwealth, 250 S.W. 131, 199 Ky. 35

Burden is on him to show that the circumstances and the public feeling were such as to amount to a compulsion to testify at the inquest.—Pruett v. Commonwealth, supra

25. Colo.—Tuttle v. People, 79 P. 1035, 33 Colo. 243, 70 L.R.A. 33, 3 Ann.Cas. 513

26. Va.—Thanel v. Commonwealth, 111 S.E. 259, 132 Va. 795

27. Cal.—People v. Beacock, 102 P. 513, 10 Cal.App. 450
30 C.J. p. 283 note 91

28. W.Va.—State v. Hobbs, 17 S.E. 380, 37 W.Va. 812

29. N.Y.—People v. Strollo, 83 N.E. 573, 191 N.Y. 42.

Person jointly accused. A witness for the defense, who was originally included in the indictment with accused, but as to whom it has been nolled, may be required on cross-examination to state what he said when examined before the coroner, if he was not under arrest at that time,[30] but under some statutes, the testimony before a coroner, of one jointly charged with the crime cannot be used against him on the subsequent trial[31]

§ 309. Testimony of Witnesses

The testimony of witnesses taken at a coroner's inquest, although taken in the presence of defendant, generally is not admissible on the trial for the homicide, unless the witness himself is not available

The testimony of a witness taken at a coroner's inquest, although taken in the presence of defendant, who did not contradict it,[32] is not as a general rule admissible on a trial for homicide,[33] where the witness is present[34] However, under proper circumstances, as where such testimony was taken at the inquest in the presence of accused, with an opportunity to cross-examine,[35] it is admissible where the witness has since died,[36] or has removed from the state,[37] but there are decisions to the effect that the testimony is inadmissible if the witness has removed from the state or cannot be found[38] The fact that the witness is ill is not sufficient to render his testimony before the coroner admissible[39] The court may refuse to compel the coroner to produce the testimony of witnesses at the inquest, which has not closed, but is in progress[40]

When admissible, such testimony may be admitted for the purpose of contradicting the statement of the witness made on the trial of the person accused,[41] but not to prove the existence of any fact deposed to by the witness[42] Opinions of witnesses at the inquest on an ultimate fact to be determined at the homicide trial are not admissible[43] Where evidence given on the inquest has been admitted without objection both sides may use it,[44] but where testimony of accused's witness on cross-examination that he has given certain testimony at the inquest is not denied and the prosecution does not introduce his testimony at the inquest, accused is not entitled to introduce it[45] Where accused's witness has been permitted to show that at the coroner's inquest, whereon his testimony was claimed to differ from that given on the trial, he requested that corrections be made in his deposition, evidence as to the response made to the request by accused's attorney is properly excluded[46]

§ 310. Verdict

The verdict of the coroner's jury, or the finding of the coroner, is ordinarily inadmissible on the trial of an indictment for homicide

On an indictment for homicide, as a general rule, the finding of a coroner, or the verdict of a coroner's jury as to the manner and cause of the death of deceased, is not admissible in evidence for any purpose[47] In Louisiana, however, the procès-verbal of the coroner's inquest is admissible in evidence on the trial for homicide to show the death and the cause thereof,[48] although it cannot be used to fix ac-

30. S C—State v Merriman, 12 S E 519, 34 S C 16

31. Ark—Dunn v State, 2 Ark 229, 35 Am D 54

32. Mo State v Mullins 11 S W 625, 101 Mo 514

33. Idaho—State v McClurg 300 P 898, 50 Idaho 762—State v Squires 98 P 413, 15 Idaho 545—State v Corcoran 61 P 1031, 7 Idaho 220
Mich People v De Witt, 206 N W 562, 233 Mich 222
30 C J p 283 note 1

34. Cal—People v Heacock, 102 P 513, 10 Cal App 450
S C—State v McElmurray, 34 S C L 33

35. Ga—Campbell v State, 116 S E 807, 155 Ga 127
Mich—People v De Witt, 206 N W 562, 233 Mich 222
Tex—Ex parte Meyers, 26 S W 196, 33 Tex Cr 204

36. Ga—Campbell v State, 116 S E 807, 155 Ga 127
La—State v McNeil, 33 La Ann 1332
Pa—McLain v. Commonwealth, 99 Pa. 86
S C State v Campbell, 30 S C L 124
Tex—Ex parte Meyers, 26 S W 196, 33 Tex Cr 204

Testimony taken in absence of accused at the inquest although taken down in writing by the coroner, signed by the witness and returned to the clerk is not competent evidence against accused after the death of the witness—State v Campbell, 30 S C L 124

37 Tex—Johnson v State, 10 S W 235, 26 Tex App 631

38 Ala—Sylvester v State, 71 Ala 17 Dupree v State 33 Ala 380 73 Am D 422
Mich—People v De Witt, 206 N W 562 233 Mich 222
N C—State v Grady, 83 N C 643

39 Pa—McLain v Commonwealth, 99 Pa 86

40. Idaho State v Corcoran 61 P 1031, 7 Idaho 220

41. Ill—People v Gleitsmann, 197 N E 557 361 Ill 165
Ky—Canterbury v Commonwealth 1 S W 2d 976, 222 Ky 510
30 C J p 283 note 10

42. Ill—Ritter v People, 22 N E 605 130 Ill 255
Va—Wormeley v Commonwealth, 10 Gratt 658 51 Va 658
30 C J p 283 note 11

43 Cal—People v Reed, 52 P 835, 5 Cal Unrep Cas 957

44. Mich People v Dowd 86 N W 546 127 Mich 140
S C—State v Terry, 23 S C 603

45. Ill—Halloway v People 54 N E 1030, 181 Ill 544

46 Mich—People v McAtron 79 N W 944, 121 Mich 1

47 Miss—Blackwell v State, 146 So 628 166 Miss 524
30 C J p 284 note 18

48 La—State v Hayden, 131 So 575 171 La 495—State v Davis, 110 So 733 162 La 500—State v Joiner 109 So 51 161 La 518
30 C J p 284 note 19

Delay in filing
That proces-verbal of coroner's inquest was filed more than five days after inquest did not make it inadmissible in murder prosecution—State v Hayden, 131 So 575, 171 La 495

cused with the commission of the crime.[49]

§ 311. Method of Proof

A coroner's record or minutes of the evidence taken at the inquest may be admitted on the trial, and generally parol evidence of the testimony taken at the inquest is not admissible unless a proper and sufficient record thereof is not available.

A coroner's minutes, or a record of the evidence, the correctness of which is properly proved by other testimony, is admissible on the trial,[50] but where a transcript of the evidence is introduced for the purpose of contradicting certain witnesses, it should contain only the evidence of such witnesses.[51] The coroner, or a member of his jury, may testify as to matters that came under his observation on the inquest,[52] and the coroner may give oral testimony of matters brought out on a preliminary investigation prior to the final inquest,[53] and as to voluntary acts of accused in the course of such investigation,[54] but ordinarily parol evidence of the testimony given is not admissible, when the record can be used.[55] Where, however, the testimony at a coroner's inquest is not reduced to writing,[56] or has become lost,[57] or the proceedings before the coroner are so irregular that the written examination is not admissible in evidence,[58] or the coroner's written report or transcript is not regarded as constituting the best evidence of statements or testimony on the inquest,[59] parol evidence of what was sworn to at such inquest is admissible as being the best evidence procurable, even where the statute requires the testimony at the inquest to be reduced to writing,[60] but the proper foundation for secondary evidence must first be laid.[61] Where a witness at the trial is shown his testimony before the coroner, and admits his signature thereto, and it is then offered and admitted without objection, it is error to refuse to allow it to be read in argument on the ground that it was not sufficiently identified.[62] A physician employed by a coroner to make a post-mortem examination is not rendered incompetent to testify to the result of his own autopsy by the fact that the law requires the coroner to make a record of his inquest.[63] If officially transcribed notes of accused's testimony at the inquest is admitted without objection as an entity, it should be read to the jury as an entity.[64]

Informality in the certificate of death, in that there was no proof of the officer's signature, and the purported procès-verbal did not have the signatures of the members of the coroner's jury, is no ground for its exclusion.[65]

49. La.—State v. Parker, 7 La. Ann. 83
30 C.J. p. 284 note 20

50. Ga.—Mack v. State, 138 S.E. 153, 164 Ga. 250
N.J.—State v. Mangino, 156 A. 430, 108 N.J. Law 475

Stenographic record
Ga.—Mack v. State, 138 S.E. 153, 164 Ga. 250

A coroner's minutes of evidence are admissible where they consist in part of the prisoner's own evidence, and as to the remainder, of evidence of another for whose veracity the prisoner vouched.—Lovett v. State, 60 Ga. 257

51. Ky.—Canterbury v. Commonwealth, 1 S.W.2d 976, 222 Ky. 510

52. Ky.—Pruett v. Commonwealth, 250 S.W. 131, 199 Ky. 35
N.J.—State v. Powell, 7 N.J. Law 244

As to voluntary admissions
Members of coroner's jury or coroner may testify regarding accused's voluntary admissions made at coroner's inquest.—State v. McClurg, 300 P. 898, 50 Idaho 762

As to writing down only part of testimony
The coroner may testify that, as he was not a stenographer, he wrote down only the important parts of accused's testimony at the inquest.—State v. Page, 136 So. 609, 173 La. 279

53. N.Y.—People v. Strollo, 83 N.E. 573, 191 N.Y. 42

54. S.C.—State v. Sanders, 56 S.E. 35, 75 S.C. 409

55. Ark.—Dunn v. State, 2 Ark. 229, 35 Am.D. 54
30 C.J. p. 284 note 21

56. Ark.—Nelson v. State, 32 Ark. 192
Ill.—Lyons v. People, 27 N.E. 677, 137 Ill. 602
Ky.—Pruett v. Commonwealth, 250 S.W. 131, 199 Ky. 35

57. N.J.—State v. Mangino, 156 A. 430, 108 N.J. Law 475

58. Ind.—Brown v. State, 71 Ind. 470

59. Ga.—Clifton v. State, 2 S.E.2d 102, 187 Ga. 502.—Bradberry v. State, 154 S.E. 351, 170 Ga. 870.—Green v. State, 52 S.E. 431, 124 Ga. 343
La.—State v. Lazarone, 57 So. 532, 130 La. 1

60. Fla.—Bennett v. State, 63 So. 842, 66 Fla. 369
Idaho.—State v. McClurg, 300 P. 898, 50 Idaho 762

61. Ind.—Woods v. State, 63 Ind. 353

Evidence given by state's witnesses at an inquest before a justice of the peace is not admissible on the trial, where no predicate has been laid.—Head v. State, 50 S.W. 352, 40 Tex.Cr. 265

62. Mich.—People v. Dowd, 86 N.W. 546, 127 Mich. 110

63. Mo.—State v. Vaughan, 53 S.W. 420, 152 Mo. 73

64. Mont.—State v. Askin, 3 P.2d 654, 90 Mont. 394

65. La.—State v. Hopkins, 42 So. 660, 118 La. 99.

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36. Ill —Tylitzki v Triple X Service, Inc., 261 N E 2d 533, 126 Ill App 2d 144

Iowa—Iowa Power & Light Co v Iowa State Highway Commission, 117 N W 2d 425, 254 Iowa 534

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37. N J —State v Maas & Waldstein Co, 199 A 2d 248 83 N J Super 211

N Y —Neddo v State, 85 N Y S 2d 54, 194 Misc 379, affd 90 N Y S 2d 650, 275 App Div 492, affd 89 N E 2d 253 300 N Y 533 Affd 91 N Y S 2d 515, 275 App Div 982—Buffington v State, 152 N Y S 2d 716, 2 Misc 2d 496

39 N H —Wiseman v Merrill, 109 A 2d 42, 99 N H 256

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Pa —Sculley v City of Philadelphia, 112 A 2d 321, 381 Pa 1

W Va —Thacker v Ashland Oil & Refining Co, 41 S E 2d 111, 129 W Va 520

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U S —Citizens to Preserve Overton Park, Inc v Volpe, D C Tenn, 309 F Supp 1189, affd, C A, 432 F 2d 1307, revd on oth grds 91 S Ct 814 401 U S 402, 28 L Ed 2d 136, on remand, D C, 335 F Supp 873, op supp 357 F Supp 846, revd on oth grds 494 F 2d 1212

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40. Cal —Wine v Boyar, 33 Cal Rptr 787, 220 C A 2d 375

La —Wall v American Emp Ins Co, App, 215 So 2d 913, writ ref 217 So 2d 415, 253 La 325

41. U S —Sinclair Pipe Line Co v Archer County, Tex, C A Tex, 245 F 2d 79, cert den 78 S Ct 96, 355 U S 862, 2 L Ed 2d 69

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44. Ind —Town of Argos v Harley, 49 N E 2d 552, 114 Ind App 290

Ohio—City of Lakewood v Thormyer, 168 N E 2d 289, 171 Ohio St 135

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46. Ariz —Hudson v Brooks, supra, n 30

Pa —Metropolitan Edison Co v Berks County, 59 Pa Dist & Co 287, 39 Berks Co 167

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(10) Cal —Holloway v Purcell, supra, n 30

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47. Del —Campbell v Commissioners of Town of Bethany Beach, 139 A 2d 493, 37 Del Ch 233

Okl —White v Board of County Com'rs of Tulsa County, 267 P 2d 579

Tex —Jefferson County v Board of County and District Road Indebtedness, 182 S W 2d 908, 143 Tex 99

49. Iowa—Iowa Power & Light Co v Iowa State Highway Commission, 117 N W 2d 425, 254 Iowa 534

50. Iowa—Iowa Power & Light Co v Iowa State Highway Commission, 117 N W 2d 425, 254 Iowa 534

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58. Ala —Jefferson County v City of Birmingham, 27 So 2d 584, 248 Ala 319

59. Ark —Clayton v City of Little Rock, supra, n 30

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60. Fla —State v Florida State Imp Commission, 34 So 2d 443, 160 Fla 230

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64. Tenn —Carter County v Williams, 190 S W 2d 311, 28 Tenn App 352

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70. U S —Citizens Organized to Defend Environment, Inc v Volpe, D C Ohio, 353 F Supp 520—State of Ark ex rel Arkansas State Highway Commission v Goldschmidt, C A Ark, 627 F 2d 839

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U S —Citizens to Preserve Overton Park, Inc v Volpe, D C Tenn, 357 F Supp 846, revd on oth grds, C A, 494 F 2d 1212, cert den 95 S Ct 1997, 421 U S 991, 44 L Ed 2d 481

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Wash —Automobile Club of Wash v City of Seattle, 346 P 2d 695, 55 Wash 2d 161—State ex rel Washington State Highway Commission v. O'Brien, 523 P 2d 190 83 Wash 2d 878

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60. N C —Teer v Jordan supra n 49

61. Fla —City of Waldo v Alachua County, App, 239 So 2d 63, affd in part, disapproved in part, Sup, 349 So 2d 419

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62. Wash —State ex rel Washington State Highway Commission v O Brien, 523 P 2d 190, 83 Wash 2d 878

66. Ohio—State ex rel Preston v Ferguson 166 N E 2d 365, 170 Ohio St 450

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67. Absence of appropriated funds for breach of contract

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73. Wis —Immega v City of Elkhorn, 34 N W 2d 101 253 Wis 282

77. Statute construed

Fla —Alachua County Fla v Florida Dept of Transp, App 1 Dist, 408 So 2d 709

80. Fla —Alachua County, Fla v Florida Dept of Transp, App 1 Dist 408 So 2d 709

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86. Mont —Sjostrum v State Highway Commission, 228 P 2d 238 124 Mont 562

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90. N D —State ex rel Syvertson v Jones, supra, n 47

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96. Ky —Rice v Marcum, 172 S W 2d 75, 294 Ky 486—Clay County v Kentucky Department of Highways, supra, n 19

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4. N D —State ex rel Syvertson v Jones, 23 N W 2d 54, 74 N D 465

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33. Ala —Pruett v Las Vegas, Inc, 74 So 2d 807, 261 Ala 557

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34. Del —State Highway Dept v Delaware Power & Light Co., 167 A 2d 27, 39 Del Ch 467

Neb —Omaha Parking Authority v City of Omaha, 77 N W 2d 862, 163 Neb 97—Vap v City of McCook, 136 N W 2d 220, 178 Neb 844

35. Ariz —State v Leeson, 323 P 2d 692, 84 Ariz 44

Fla —State v Florida State Imp Commission, 75 So 2d 1

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36. Del —State Highway Dept v Delaware Power & Light Co., 167 A 2d 27, 39 Del Ch 467

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40. U S —U.S v Certain Parcels of Land in Riverside County, Cal, D C Cal, 67 F Supp 780

41. Pa —Pennsylvania Dept of Transp v Pennsylvania Public Utility Commission, 284 A 2d 155, 3 Pa Cmwlth 473

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60. Colo —Board of County Com'rs of Jefferson County v Cottingham, 301 P 2d 135, 134 Colo 156

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62. Ill —Rosemont Bldg Supply, Inc v Illinois Highway Trust Authority, 258 N E 2d 569, 45 Ill 2d 243, app after remand 281 N E 2d 338, 51 Ill.2d 126

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N C—De Bruhl v State Highway & Public Works Commission, 95 S E 2d 553, 245 N C 139

68. S.C—C.J.S. quoted at length in Johnson v South Carolina State Highway Dept, 114 S E 2d 591, 592, 236 S C 424

69. Tex—Futch v Greer, Civ App, 353 S W 2d 896, err ref no rev err cert den 83 S Ct 728, 372 U S 913, 9 L Ed 2d 721

70. D C—D C Federation of Civic Ass'ns, Inc v Airis, C A, 391 F 2d 478, 129 U S App D C 125

N Y—Flynn v State, 280 N Y S 2d 512, 53 Misc 2d 929

A state, in constructing a highway, may be required to obtain approval of congress or of federal agencies or officials for particular phases of the work, such as in constructing a bridge, a dike, a causeway, or in performing a fill operation.[70.5]

70.5. U S—Citizens Committee for Hudson Valley v Volpe, D C N Y, 302 F Supp 1083, affd, C A, 425 F 2d 97 Cert den 91 S Ct 237, two cases, 400 U S 949, 27 L Ed 2d 256

77. Criminal liability for construction of road without permission—McCandless v Burn, 104 A 2d 123, 377 Pa 18

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77.1. Mont—Sjostrum v State Highway Commission 228 P 2d 238, 124 Mont 562

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83. Pa—Com v Municipal Authority of Borough of Latrobe, 34 West Co 159

89. U S—Contino v Baltimore & A R Co, C A Md, 178 F 2d 521

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N Y—Kedenberg v Town of North Hempstead, 349 N Y S 2d 891, 75 Misc 2d 892

91. Ind—Town of Argos v Harley, 49 N E 2d 552, 114 Ind App 290

92. Ind—Town of Argos v Harley, supra, n 91

93. Ohio—State ex rel City of Cleveland v Masheter, 221 N E 2d 704, 8 Ohio St 2d 11

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2. N Y—Neddo v State, 85 N Y S 2d 54, 194 Misc 379, affd 90 N Y S 2d 650, 275 App Div 492, affd 89 N E 2d 253, 300 N Y 533 Affd 91 N Y S 2d 515, 275 App Div 982

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S C—South Carolina State Highway Dept v Parker Water and Sewer Sub-District, 146 S E 2d 160, 247 S C 137

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12. La—Barnett v City of Opelousas, App, 13 So.2d 788

N Y—Brown v State, 139 N Y S 2d 832, 207 Misc 613

N C—C C T Equipment Co v Hertz Corp, 123 S E 2d 802, 256 N C 277

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Iowa—Rhodes v Iowa State Highway Commission, 94 N W 2d 97, 250 Iowa 416

Payment of a nominal consideration by a highway commission is insufficient to show fraud on the grantor.[151]

15.1. Mo—State ex rel State Highway Commission v Jacobs, App, 281 S W 2d 597

16. Fla.—Webb v Hill, 75 So 2d 596

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30. Ill—Rocke v Cook County, 377 N E 2d 287, 18 Ill Dec 134, 60 Ill App 3d 874

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Neb—Henneberg v Burt County, 69 N W 2d 920, 160 Neb 250

N Y—Citron v Nassau County, 268 N Y S 2d 909, 49 Misc 2d 928

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33. Mo—State ex rel State Highway Commission v Shultz, 243 S W 2d 808, 241 Mo App 570
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37. Ky—Madison Fiscal Court v Edester 190 S W 2d 695, 301 Ky 1—Steinfeld v Jefferson County Fiscal Court, 208 S W 2d 939 306 Ky 621

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51. Kan—Parmelee v Ziegler, 314 P 2d 340 181 Kan 701

Limitation by contract invalid
Mo—Handlan-Buck Co v State Highway Commission, 315 S W 2d 219

52. Ga—Martin v Fulton County, 101 S E 2d 716, 213 Ga 761

54. Rights acquired by county
N Y—Cobb v Monroe County, 165 N Y S 2d 583, 7 Misc 2d 141, affd in part and revd in part on oth grds 185 N Y S 2d 693, 8 A D 2d 755

57. U S—State of Tenn v U S, C A Tenn, 246 F 2d 244

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59. Fla—Webb v Hill, 75 So 2d 596
Wis—State ex rel Cabott, Inc v Wojcik 177 N W 2d 828, 47 Wis 2d 759

62. Period within which road must be opened
Ohio—O'Neil v Herbert, 313 N E.2d 815, 39 Ohio St 2d 67

§ 178. —— As Dependent on Availability of Funds

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67. Neb—State ex rel Stansbery v Schwasinger, 289 N W 2d 506, 205 Neb 457
Ohio—Adamson v Wetz, App, 124 N E 2d 832

69. U S—Ford v Train, D C Wis, 364 F Supp 227
N Y—Holscher v State, 399 N Y S 2d 268, 59 A D 2d 224, affd 386 N E 2d 831, 46 N Y 2d 792, 413 N Y S 2d 920

§ 179. Mode, Plan, and Sufficiency

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82. U S—Montana Wildlife Federation v Morton, D C Mont, 406 F Supp 489
Fla—Webb v Hill, 75 So 2d 596
Ky—C J S cited in Com Dept of Highways v King, 375 S W 2d 688 690
Md—County Council for Montgomery County v Lee, 148 A 2d 568, 219 Md 209
Mich—New Products Corp v Ziegler, 88 N W 2d 528, 352 Mich 73
Minn—Mitchell v City of St Paul, 31 N W 2d 46, 225 Minn 390
Mo—Rice v Stoddard App, 312 S W 2d 374—State ex inf Stephens v Fletchall, 412 S W 2d 423
Mont—Coldwater v State Highway Commission, 162 P 2d 772, 118 Mont 65—Erie v State By and Through State Highway Commission, 461 P 2d 207 154 Mont 150
N H—Kostrelos v Merrill, 143 A 2d 400, 101 N H 317
N J—Borough of Paramus, Bergen County v Bergen County 137 A 2d 425, 25 N J 492
N C—Pelham Realty Corp v Board of Transp, 279 S E 2d 826, 303 N C 424
Okl—Oldfield v Donelson, 565 P 2d 37

Preliminary plans
Minn—City of New Prague, Scott County v Hendricks 286 N W 2d 696

83. U S--Louisiana Environmental Soc, Inc v Brinegar, D C La 513 F Supp 179
D C—D C Federation of Civic Associations v Volpe, C A 459 F 2d 1231, 148 U S App D C 207, cert den 92 S Ct 1290, 405 U S 1030 31 L Ed 2d 489, app after remand 520 F 2d 451, 172 U S App D C 51, on remand, D C, 71 F R D 206
Kan—Brown v State Highway Commission, 444 P 2d 882, 202 Kan 1
Ky—C J S cited in Com Dept of Highways v King, 375 S W 2d 688, 690
Md—State Roads Commission v Franklin, 95 A 2d 99, 201 Md 549
Neb—State ex rel Johnson v Gage County, 49 N W 2d 672 154 Neb 822
N Y—Murphy v New York State Thruway Authority, 204 N Y S 2d 953, 23 Misc 2d 1078
Ohio—Hulbert v Linzell, 148 N E 2d 675, 167 Ohio St 350—Van Scyoc v Roth, 205 N E 2d 617, 2 Ohio Misc 155—Masheter v Ashland Pipe Line Co, 208 N E 2d 162, 2 Ohio Misc 179
Pa—Snelling v Department of Transp, 366 A 2d 1298, 27 Pa Cmwlth 276
Vt—Gardner v Town of Ludlow, 369 A 2d 1382, 135 Vt 87

Statute held to authorize taking over existing streets rather limitation on authority
N J—Borough of Barnegat Light, Ocean County v Board of Chosen Freeholders of Ocean County, 130 A 2d 409, 44 N J Super 332

Restriction to use of county forces
Ohio—Pincelli v Ohio Bridge Corp, 198 N E 2d 483, affd 204 N E 2d 696, 1 Ohio App 2d 342, affd 213 N E 2d 356, 5 Ohio St 2d 41

84. Iowa—Perkins v Palo Alto County, 60 N W 2d 562, 245 Iowa 310
Utah—Shaw v Salt Lake County, 224 P 2d 1037, 119 Utah 50
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No right to prevent improvements
N Y—Stevens v State, 197 N Y S 2d 111, 21 Misc 2d 79, affd 218 N Y S 2d 535, 14 A D 2d 823

Right to erect guardrails
N Y—Red Apple Rest, Inc v McMorran, 237 N Y S 2d 707, 12 N Y 2d 203, 188 N E 2d 137

Statutory remedy provided
Pa—Vance v Kassab, 325 A 2d 924, 15 Pa Cmwlth 328

85. U S—Daly v Volpe, D C Wash, 376 F Supp 987 affd, C A, 514 F 2d 1106
Fla—State v Florida State Imp Commission, 75 So 2d 1
Iowa—Branderhorst v Iowa State Highway Commission on Behalf of State, 202 N W 2d 38
Mo—State ex rel State Highway Commission v Shultz, supra, n 33
Mont—Erie v State By and Through State Highway Commission, 461 P 2d 207, 154 Mont 150
Okl—White v Board of County Com'rs of Tulsa County, 267 P 2d 579

Objection as to exercise of eminent domain not sustained
Miss—McRaney v Covington County, 49 So 2d 248, 210 Miss 192

Median barrier
Ill—J C & S Corp v Winnebago County, 252 N E 2d 761, 117 Ill App 2d 8
Neb—Deyle v State, Dept of Roads, 229 N W 2d 565, 194 Neb 36

86. Mont—Coldwater v State Highway Commission, supra, n 82
Or—City of Maywood Park v Jackson, App, 468 P 2d 905, 2 Or App 568

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88. "Open job" and "closed job" defined
N Y—DeLia v American Mut Liability Ins Co of Boston 43 N Y S 2d 158, 160

89. Reconstruction and relocation
Pa—Hinaman v Vandergrift, 177 A 2d 174, 197 Pa Super 140

Curb cuts
Ind—City of Richmond v S M O, Inc, 333 N E 2d 797, 165 Ind App 641

92. N Y—Maloney v Oneida County, 97 N Y S 2d 161, 199 Misc 220

Snow and ice removal
N Y—Neddo v State, supra, n 8

93. Choosing new routes
U S—Citizens to Preserve Overton Park, Inc v Brinegar, C A Tenn, 494 F 2d 1212, cert den 95 S Ct 1997, 421 U S 991, 44 L Ed 2d 481—Benton Franklin Riverfront Trailway and Bridge Committee v Lewis, D C Wash, 529 F Supp 101, affd in part revd in part on oth grds, C A, 701 F 2d 784

95. U S—Monroe County Conservation Council, Inc v Volpe, C A N Y, 472 F 2d 693

96. U S—Citizens Environmental Council v Volpe, D C Kan, 364 F Supp 286, affd, C A, 484 F 2d 870, cert den 94 S Ct 1935, 416 U S 936, 40 L Ed 2d 286

97. Effect of resolution requiring recommendation
Ga—Wright v Dover, 67 S E 2d 112, 208 Ga 400

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5. U.S.—Sinclair Pipe Line Co v Archer County, Tex., D C Tex., 147 F Supp 650, affd, C A, 245 F 2d 79, cert den 78 S Ct 96, 355 U S 862, 2 L Ed.2d 69

Mo—Handlan-Buck Co v State Highway Commission, 315 S W 2d 219

N J—Safeway Trails, Inc v Furman, 197 A 2d 366, 41 N.J 467, app dism and cert den 85 S Ct 144

Or—Harland v Chandler, 300 P 2d 412, 208 Or 167

Wyo—State Highway Commission v Peters, 416 P 2d 390

Limited access highways

U S—Creasy v Stevens, D C Pa., 160 F Supp 404, revd on oth grds 79 S Ct 1034, 360 U S 219, 3 L Ed 2d 1186

Cal—People v Thomas, 239 P 2d 914, 108 C A 2d 832

N H—Kostrelos v Merrill, 143 A 2d 400, 101 N H 317

N Y—People v Sack, 110 N Y S 2d 556, 202 Misc 571

Vt—State Highway Bd v Jackson, 258 A 2d 575 128 Vt 17, app after remand 276 A 2d 620 129 Vt 288

Discretion as to width

Miss—Reed v Mississippi State Highway Commission 260 So 2d 184

Wash—State ex rel Agee v Superior Court, 365 P 2d 16, 58 Wash 2d 838

Service roads

Cal—Reid v State By and Through Dept of Public Works, Division of Highways, 14 Cal Rptr 597 193 C A 2d 799

Ill—Department of Public Works and Buildings v Farina, 194 N E 2d 209, 29 Ill 2d 474

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Ohio—Village of Fairlawn v Preston, 207 N E 2d 656, 2 Ohio St 2d 165

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U S—Thompson v Fugate D C Va., 347 F Supp 120

Statewide primary roads

Fla—Sattler v Askew 295 So 2d 289

No common-law power

Pa—Clifford Tp v Ransom, 398 A 2d 768 41 Pa Cmwlth 211

6. Kan—Tillotson v Farr, 159 P 2d 471, 160 Kan 81

Miss—Hudson v Farrish Gravel Co., 279 So 2d 630

7. Fla—State v Florida State Imp Commission, 75 So 2d 1

Miss—Muse v Mississippi State Highway Commission, 103 So 2d 839, 233 Miss 694

Number of lanes

Miss—Reed v Mississippi State Highway Commission, 260 So 2d 184

Removal of traffic hazards

Pa—Klink v Com., Dept of Transp., 370 A 2d 389, 29 Pa Cmwlth 106

8. N J—State by State Highway Comr v Board of Chosen Freeholders of Bergen County, 183 A 2d 8, 38 N J 33

Wash—Ault v Washington State Highway Commission, 432 P 2d 546, 77 Wash 2d 376

9. Wash—Ault v Washington State Highway Commission, 462 P 2d 546, 77 Wash 2d 376

10. Ala—C.J.S. quoted in St Clair County v Town of Riverside 128 So 2d 333, 336, 272 Ala 294

Ga—City of Carrollton v Walker, 111 S E 2d 79, 215 Ga 505

N J—Hopewell Tp v Goldberg, 245 A 2d 67, 101 N J Super 589

Ohio—C.J.S. quoted in City of Lakewood v Thormyer, 154 N E 2d 777, 789 affd, 157 N E 2d 431, 111 Ohio App 403, affd 168 N E 2d 289, 171 Ohio St 139

Or—Harland v Chandler, 300 P 2d 412, 208 Or 167

Statute held valid

Ohio—City of Lakewood v Thormyer, App., 157 N E 2d 431, affd 168 N E 2d 289, 171 Ohio St 139

11. Pa—Witwer v Borough of Ephrata, 48 Lanc L Rev 507—In re Change of Location and Lines of Highway Known as State Highway Route 222 in Stonycreek Tp., Cambria County, 161 A 2d 380, 400 Pa 51

Approval of highway plans

Pa—In re Ruggiero, 43 Mun 282, 33 North 85

12. **Submission of plans prior to issuance of permit not required**

Pa—Bruhn v Com., 320 A 2d 907, 14 Pa Cmwlth 300

13 **Deliberate pace**

Cal—Smith v State, 123 Cal Rptr 745, 50 C A 3d 529

14 Me—Larson v New England Tel & Tel Co., 44 A 2d 1, 141 Me 326

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17 N Y—Aschmutat v State, 187 N Y S 2d 174, 17 Misc 2d 553, motion den 207 N Y S 2d 254, 11 A D 2d 962, affd 209 N Y S 2d 566 12 A D 2d 844

W Va—Sturm v City of St Albans, 78 S E 2d 462, 138 W Va 911

Reconstruction of sidewalks destroyed

Pa—Hinaman v Vandergrift, 177 A 2d 174 197 Pa Super 140

18. Cal—Merced County Bd of Sup'rs, Merced County v California Highway Commission, 129 Cal Rptr 504, 57 C A 3d 952

Kan—Eastborough Corp v City of Eastborough, 441 P 2d 891, 201 Kan 491

Ky—Sarver v Allen County, By and Through Its Fiscal Court 582 S W 2d 40

N Y—Sleepy Hollow Valley Committee v McMorran 229 N E 2d 32 20 N Y 2d 190, 282 N Y S 2d 242

N C—Thompson v Seaboard Air Line R Co., 104 S E 2d 181 248 N C 577

Ohio—C J S quoted at length in City of Lakewood v Thormyer, 154 N E 2d 777 784, affd 157 N E 2d 431, 111 Ohio App 403, affd 168 N E 2d 289, 171 Ohio St 135

Freeways

Cal—Sinclair v State, 15 Cal Rptr 493, 194 C A 2d 397 cert den 82 S Ct 600, 368 U S 986, 7 L Ed 2d 524, reh den 82 S Ct 865, 369 U S 842, 7 L Ed 2d 846

20. N J—Mayor, City Council, Bd of Public Works of City of Elizabeth v New Jersey Turnpike Authority, 72 A 2d 399 7 N J Super 540

Role of counties

Ill—City of Highland Park v Cook County, 344 N E 2d 665, 37 Ill App 3d 15

22. Ga—Southern Ry Co v Wages, 47 S E 2d 501, 203 Ga 502

Iowa—Curtis v Board of Sup'rs of Clinton County, 270 N W 2d 447

Mo—Floreth v State Highway Commission, 472 S W 2d 614

Decision held not appealable

Idaho—Villages of Eden and Hazelton v Idaho Bd of Highway Directors of Dept of Highways, 367 P 2d 294 83 Idaho 554

Local service roads beyond bounds of freeway

Cal—Reid v State By and Through Dept of Public Works, Division of Highways, 14 Cal Rptr 597, 193 C A 2d 799

23. Idaho—C.J S. cited in Villages of Eden and Hazelton v Idaho Bd of Highway Directors of Dept of Highways, 367 P 2d 294, 300, 83 Idaho 554

24. Iowa—Curtis v Board of Sup'rs of Clinton County, 270 N W 2d 447

N H—Kostrelos v Merrill, 143 A 2d 400, 101 N H 317

26. U S—Movement Against Destruction v Trainor, D C Md., 400 F Supp 533—Adler v Lewis, C A Wash., 675 F 2d 1085

Ky—Southeastern Displays, Inc v Ward, 414 S W 2d 573

N J—Hopewell Tp v Goldberg, 245 A 2d 67, 101 N J Super 589

Tex—Futch v Greer, Civ App., 353 S W 2d 896, err ref no rev err Cert den 83 S Ct 728, 372 U S 913, 9 L Ed 2d 721

Judicial review

N J—Hopewell Tp v Goldberg, 245 A 2d 67, 101 N J Super 589

Conditions of approval

U S—Hopewell Tp v Volpe, C A N J., 446 F 2d 167

Use of park lands

U S—Monroe County Conservation Council, Inc v Volpe, C A N Y., 472 F 2d 693

National Environmental Policy Act

U S—Scottsdale Mall v State of Ind., D C Ind., 418 F Supp 296, vac on oth grds, C A., 549 F 2d 484, cert den 98 S Ct 717, 434 U S 1008, 54 L Ed 2d 750

Injunction

U S—Essex County Preservation Ass'n v Campbell, C A Mass., 536 F 2d 956—Citizens Committee Against Interstate Route 675 v Lewis, D C Ohio, 542 F Supp 496

N C—Orange County v North Carolina Dept of Transp., 265 S E 2d 890, 46 N C App 350

Compliance must be had with statutory requirements as to public hearing to consider economic and social effect of the proposed location and its impact on environment [27.5]

27.5. U S—Elliot v Volpe, D C Mass., 328 F Supp 831—Willamette Heights Neighborhood Ass'n v Volpe, D C Or., 334 F Supp 990—Keith v Volpe, D C Cal., 352 F Supp 1324, affd, C A., 506 F 2d 696, cert den 96 S Ct 826, 420 U S 908, 42 L Ed 2d 837—Concerned Citizens on I-190 v Secretary of Transp C A Mass., 641 F 2d 1

Vt—Barnes v State, 403 A 2d 684, 137 Vt 230

Hearing required

U S—Monroe County Conservation Council, Inc v Volpe, C A N Y., 472 F 2d 693

Retroactive application of statute not required

U S—Pizitz, Inc v Volpe, C A Ala., 467 F 2d 208

Laches

U S—Coalition for Canyon Preservation v Bowers, C A Mont., 632 F 2d 774

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28. Md—State Roads Commission v Franklin, 95 A 2d 99, 201 Md 549

N Y—Sleepy Hollow Valley Committee v McMorran, 229 N E 2d 32, 20 N Y 2d 190, 282 N Y S 2d 242—Schesch v People, 316 N Y S 2d 862, 65 Misc 2d 44

Under Federal Highway Act

Cal—Marin County v Superior Court of Marin County, 2 Cal Rptr 758, 349 P 2d 526, 53 C 2d 633

31. U S—U S v Certain Parcels of Land in Riverside County, Cal., D C Cal., 67 F Supp 780

Ala—Pruett v Las Vegas, Inc., 74 So 2d 807, 261 Ala 557

Fla—Webb v Hill, 75 So 2d 596

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44. N J—C J S. quoted in Mayor, City Council, Bd of Public Works of City of Elizabeth v New Jersey Turnpike Authority, supra, n 20

48. **Allowance for future needs**

Fla—Dickson v St Lucie County, 67 So 2d 662

49. U S—Fayetteville Area Chamber of Commerce v Volpe, C A N C., 515 F 2d 1021, cert den 96 S Ct 216, 423 U S 912, 46 L Ed 2d 140

Fla—State v Florida State Imp Commission, 75 So 2d 1

Ga—State Highway Dept v MacDonald, 144 S E 2d 363, 221 Ga 312—Morningside-Lenox Park Ass'n

v State Highway Dept., 161 S E.2d 859, 224 Ga 344

Idaho—Beltz v State ex rel Dept of Highways, 388 P 2d 982, 86 Idaho 544.

Ill—Rocke v Cook County, 377 N.E 2d 287, 18 Ill Dec 134, 60 Ill App 3d 874

Iowa—A & S, Inc v Iowa State Highway Commission, 116 N W 2d 496, 253 Iowa 1377—Fort Dodge, D M & S Ry v American Community Stores Corp, 131 N W 2d 515, 256 Iowa 1344

La—State v Cooper, 36 So 2d 22, 213 La 1016

Minn—Village of McKinley v Waldor, 170 N W 2d 430, 284 Minn 394

Mo—State ex rel State Highway Commission v Curtis, 222 S W 2d 64, 359 Mo 402—State ex rel State Highway Commission v Rist, 432 S W 2d 193—State ex rel State Highway Commission v Public Service Commission, App, 459 S W 2d 736

N H—Kostrelos v Merrill, 143 A 2d 400, 101 N H 317

N J—Burnett v Abbott, 102 A 2d 16, 14 N J 291

N C—Yost v Hall, 64 S E 2d 554, 233 N C 463—Southern Ry Co v City of Winston-Salem, 165 S E 2d 751 4 N C App 11, affd 168 S E 2d 396, 275 N C 465

Ohio—Neuweiler v Kauer, 107 N E 2d 779

Vt—State Highway Bd v Coburn, 219 A 2d 582, 125 Vt 513—State Highway Bd v Shepard, 253 A 2d 155, 127 Vt 525

W Va—State ex rel Dunn v Griffith, 82 S W 2d 300, 139 W Va 894

Design techniques

Or—Mayse v Coos County, 583 P 2d 7, 35 Or App 779

Wash—Raybell v State, 496 P 2d 559, 6 Wash App 795

Landscaping

Idaho—City of Boise City v Idaho Bd of Highway Directors of Dept of Highways, 486 P 2d 1015, 94 Idaho 302

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50. U S—Continued Action on Transp and Environment, Inc v Adams, C A Va, 618 F 2d 1078

N J—Burnett v Abbott, supra, n 49

N C—Orange County v North Carolina Dept of Transp, 265 S E 2d 890, 46 N C App 350

S D—McCullen v Anderson, 62 N W 2d 881, 75 S D 234

Limited access highways statute construed

Ill—Department of Public Works and Bldgs v Lanter, 110 N E 2d 179, 431 Ill 581

N C—Barnes v North Carolina State Highway Commission, 126 S E 2d 732 257 N C 507

Wash.—State ex rel Troy v Superior Court of Cowlitz County, 225 P 2d 890, 37 Wash 2d 660

Public hearing

Wash—State v Lauman, 490 P 2d 450, 5 Wash App 670

Decision not defective

U S—D C Federation of Civic Associations v Adams, C A Va, 271 F 2d 1310

53. Cal—Holloway v Purcell, 217 P 2d 665, 35 Cal 2d 220, cert den 71 S Ct 196, 340 U S 883, 95 L Ed 641

Fla—Orange County v Fordham, 34 So 2d 438, 160 Fla 259

Most direct and practicable location

Cal—Sinclair v State, 15 Cal Rptr 493, 194 C A 2d 397, cert den 82 S Ct 600, 368 U S 986, 7 L Ed 2d 524, reh den 82 S Ct 865, 369 U S 842 7 L Ed 2d 846

55. Conn—Schwartz v Town of Hamden, 357 A 2d 488, 168 Conn 8

Fla—Lupford v Harris, App, 202 So 2d 109, affd in part, quashed in part, Sup., 212 So 2d 766

Ga.—City of Carrollton v Walker, 111 S E 2d 79, 215 Ga 505—Morningside-Lenox Park Ass'n v State Highway Dept, 161 S E.2d 859, 224 Ga 344

Iowa—A & S, Inc. v Iowa State Highway Commission, 116 N.W 2d 496, 253 Iowa 1377

La—State v Cooper, supra, n 49

Md—Zion Evangelical Lutheran Church of United Church of Christ of Stemmers Run v State Highway Administration, 350 A 2d 125, 276 Md 630

N J—Hopewell Tp v Goldberg, 245 A 2d 67, 101 N J Super 589

Pa—Satina v Supervisors of Somerset Tp, 48 Mun 146, 37 Wash Co 39

Discretion held not abused

U S—Scottsdale Mall v State of Ind, D C Ind, 418 F Supp. 296, vac on oth grds, C A, 549 F 2d 484, cert den 98 S Ct 717, 434 U S 1008, 54 L Ed 2d 750

La—State v Cooper, supra, n 49

Exercise of discretion not to be considered by court

Wyo—Town of Clearmont v State Highway Commission, 357 P 2d 470

Unsworn witnesses at hearing

Wash—Leschi Imp Council v Washington State Highway Commission, 525 P 2d 774, 84 Wash 2d 271

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56. Ala—St Clair County v Town of Riverside, 128 So 2d 333, 272 Ala 294

Ark—Woollard v State Highway Commission, 249 S W 2d 564, 220 Ark 731

Iowa—Fort Dodge, D M & S Ry v American Community Stores Corp, 131 N W 2d 515, 256 Iowa 1344

Nev—Harrison v Department of Highways, 484 P 2d 716, 87 Nev 183

N Y—Brown v McMorran, 247 N Y S 2d 737, 42 Misc 2d 211, revd in part on oth grds and app dism in part 257 N Y S 2d 74, 23 A D 2d 661

Action held not arbitrary or unreasonable

Iowa—A & S, Inc. v Iowa State Highway Commission, 116 N W 2d 496, 253 Iowa 1377

Mo—State ex rel State Highway Commission v Public Service Commission, App, 459 S W 2d 736

Wash—Deaconess Hospital v Washington State Highway Commission, 403 P 2d 54, 66 Wash 2d 378

57. Md—Sollins v Baltimore County, 252 A 2d 819, 253 Md 407

Mich—Petition of Highway US-24, in Bloomfield Tp, Oakland County, 220 N W 2d 416, 392 Mich 159

58. Mich—Petition of Highway US-24, in Bloomfield Tp Oakland County, 220 N W 2d 416, 392 Mich 159

59. U S—Scottsdale Mall v State of Ind, D C Ind, 418 F Supp 296, vac on oth grds, C A, 549 F 2d 484, cert den 98 S Ct 717, 434 U S 1008, 54 L Ed 2d 750

N J—Hopewell Tp v Goldberg, 245 A 2d 67, 101 N J Super 589

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60. U S—Finish Allatoona's Interstate Right, Inc v Volpe, D C Ga, 355 F Supp 933, affd, C A, 484 F 2d 638

61. N Y—Brown v McMorran, 247 N Y S 2d 737, 42 Misc 2d 211, revd in part on oth grds and app dism in part 257 N Y S 2d 74, 23 A D 2d 661

Legislative act not reviewable

N Y—Brown v McMorran, 241 N Y S 2d 483, 39 Misc 2d 716

Persons not aggrieved

N Y—Brown v McMorran, 241 N Y S 2d 483, 39 Misc 2d 716

62. Persons who are "affected"

Conn—Schwartz v Town of Hamden, 357 A 2d 488, 168 Conn 8

Matters relating to review of decisions of federal officers as to location of interstate highways have been adjudicated.[61.5]

63.5. U S—Pennsylvania Environmental Council, Inc v. Bartlett, D C Pa, 315 F Supp 238, affd, C A, 454 F 2d 613—National Wildlife Federation v Goldschmidt, C A.Conn., 677 F 2d 259

Determinations subject to review

U S—Citizens Organized to Defend Environment, Inc v Volpe, D C Ohio, 353 F.Supp 520

N C—Orange County v North Carolina Dept of Transp, 265 S E 2d 890, 46 N C App 350

Who may sue

U S—Road Review League, Town of Bedford v Boyd, D C N Y, 270 F Supp 650

Scope of review

U S—Road Review League, Town of Bedford v Boyd, D C N Y, 270 F Supp 650—Adler v Lewis, C A Wash, 675 F 2d 1085

D C—D C Federation of Civic Associations v Volpe, D C, 316 F Supp 754 Revd on oth grds., C A, 459 F 2d 1231, 148 U S App D C 207, cert den 92 S Ct 1290, 405 U S 1030, 31 L Ed 2d 489, app after remand 520 F 2d 451, 172 U S App D C 51, on remand 71 F R D 206

Decision to be upheld unless plainly wrong

U S—Road Review League, Town of Bedford v Boyd, D C N Y, 270 F Supp 650

Factors considered

U S—Fayetteville Area Chamber of Commerce and Interstate 95 Committee v Volpe, C A N C, 463 F 2d 402, on remand, D C, 386 F Supp 572, app after remand 515 F 2d 1021, cert den 96 S Ct. 216, 423 U S 912, 46 L Ed 2d 140

D C—D C Federation of Civic Associations v Volpe, D C, 316 F Supp 754 Revd on oth grds, C A, 459 F 2d 1231, 148 U S App D C 207, cert den 92 S Ct 1290, 405 U S 1030, 31 L Ed 2d 489, app after remand 520 F 2d 451, 172 U S App D.C 51, on remand 71 F R D 206

Hearing

U S—Fayetteville Area Chamber of Commerce and Interstate 95 Committee v Volpe, C A N C, 463 F 2d 402, on remand, D C, 386 F Supp 572, app after remand 515 F 2d 1021, cert den 96 S Ct 216, 423 U S 912, 46 L Ed 2d 140—Ward v Ackroyd, D C Md, 344 F Supp 1202

D C—D C Federation of Civic Associations v Volpe, D C, 316 F Supp 754 Revd on oth grds, C A, 459 F 2d 1231, 148 U S App D C 207, cert den 92 S Ct 1290, 405 U S 1030, 31 L Ed 2d 489, app after remand 520 F 2d 451, 172 U S App D C 51, on remand 71 F R D 206

Evidence

D C—D C Federation of Civic Associations v Volpe, D C, 316 F Supp 754, revd on oth grds, C A, 459 F 2d 1231, 148 U S App D C 207, cert den 92 S Ct 1290, 405 U S 1030, 31 L Ed 2d 489, app after remand 520 F 2d 451, 172 U S App D C 51 On remand 71 F R D 206

Burden of proof

U S—Pennsylvania Environmental Council, Inc v Bartlett, C A Pa, 454 F 2d 613

Discretion not abused

U S—Citizens Organizes to Defend Environment, Inc, v Volpe, D C Ohio, 353 F Supp 520

Environmental findings

U S—Pennsylvania Environmental Council, Inc v Bartlett, C A Pa, 454 F 2d 613

Minn—Urban Council on Mobility v Minnesota Dept of Natural Resources, 289 N W 2d 729

N Y—Flacke v Town of Fine, 448 N Y S 2d 359, 113 Misc 2d 56

Presumptions

U S—Pennsylvania Environmental Council, Inc v Bartlett, C A Pa, 454 F 2d 613

Discretion not abused

U S—Citizens Organized to Defend Environment, Inc, v Volpe, D C Ohio, 353 F Supp 520

Record

U S—Citizens to Preserve Wilderness Park, Inc v Adams, D C Neb, 543 F Supp 21

64. U S —Citizens to Preserve Overton Park, Inc v Volpe, D C Tenn, 309 F Supp 1189, affd, C A 432 F 2d 1307 revd on oth grds 91 S Ct 814, 401 U S 402 28 L Ed 2d 136, on remand, D C, 335 F Supp 873, op supp 357 F Supp 846, revd on oth grds 494 F 2d 1212, cert den 95 S Ct 1997, 421 U S 991 44 L Ed 2d 481

Ala —Pruett v Las Vegas, Inc, 74 So 2d 807, 261 Ala 557

Fla —State v Florida State Imp Commission, 75 So 2d 1

Mich —C.J.S. quoted at length in Michigan State Highway Com'n v Vanderkloot, 204 N W 2d 22, 26, 27, 43 Mich App 56, affd 220 N W 2d 416, 392 Mich 159

Mont —State By and Through State Highway Commission v Lavoie, 466 P 2d 594, 155 Mont 39

Pa —Plymouth Tp v Com, Dept of Transp, 391 A 2d 42, 37 Pa Cmwlth 571

Parklands under federal statute

U S —Pennsylvania Environmental Council Inc v Bartlett, C A Pa, 454 F 2d 613—Citizens to Preserve Overton Park, Inc v Volpe, D C Tenn, 335 F Supp 873, op supp 357 F Supp 846, revd on oth grds 494 F 2d 1212 Cert den 95 S Ct 1997, 421 U S 991, 44 L Ed 2d 481—Benton Franklin Riverfront Trailway and Bridge Committee v Lewis, D C Wash, 529 F Supp 101, affd in part revd in part on oth grds, C A, 701 F 2d 784—Citizens to Preserve Wilderness Park Inc v Adams D C Neb, 543 F Supp 21

Economic effects

U S —Arlington Coalition on Transp v Volpe, C A Va, 458 F 2d 1323, cert den 93 S Ct 312 409 U S 1000, 34 L Ed 261

Preservation of parklands

U S —Monroe County Conservation Council Inc v Adams, C A N Y, 566 F 2d 419 cert den 98 S Ct 1876, 435 U S 1006, 56 L Ed 2d 388

D C —D C Federation of Civic Associations v Volpe C A, 459 F 2d 1231, 148 U S App D C 207, cert den 92 S Ct 1290 405 U S 1030, 31 L Ed 2d 489 app after remand 520 F 2d 148 U S App D C 207 cert den 451 172 U S App D C 51, on remand, D C, 71 F R D 206

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67. Ohio—C J S. cited in City of Lakewood v Thormyer, 154 N E 2d 777, 793, affd 157 N E 2d 431, 111 Ohio App 403, affd 168 N E 2d 289, 171 Ohio St 135

69. Neb —Kunz v Bornemeier, 102 N W 2d 842, 170 Neb 463

70. Colo —William E Russell Coal Co v Board of County Com'rs of Boulder County, 270 P 2d 772 129 Colo 330

Ohio—C.J.S cited in City of Lakewood v Thormyer, 154 N E 2d 777, 793, affd 157 N E 2d 431, 111 Ohio App 403, aff 168 N E 2d 289 171 Ohio St 135

Air pollution

D C —D C Federation of Civic Associations v Volpe C A, 459 F 2d 1231, 148 U S App D C 207, cert den, 92 S Ct 1290, 405 U S 1030 31 L Ed 2d 489 app after remand 520 F 2d 451, 172 U S App D C 51, on remand D C, 71 F R D 206

71. Neb —Kunz v Bornemeier, 102 N W 2d 842 170 Neb 463

75. U S —Concerned Citizens of Marlboro v Volpe C A N J, 459 F 2d 332

Ohio—C.J.S. cited in City of Lakewood v Thormyer, 154 N E 2d 777, 793, affd 157 N E 2d 431, 111 Ohio App 403, affd 168 N E 2d 289 171 Ohio St 135

83. Statute held procedural only

Iowa—Christensen v Board of Sup'rs of Woodbury County, 114 N W 2d 897, 253 Iowa 978

Ga —Morningside-Lenox Park Ass'n v State Highway Dept 161 S E 2d 859 244 Ga 344

Held recommendation supported by sufficient evidence

N J —Hopewell Tp v Goldberg, 245 A 2d 67, 101 N J Super 589

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93. Mo —Moulder v Webb, App, 527 S W 2d 417

Pa —Rankin v Com, 48 Lanc L Reg 501

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5. Ohio—C.J S. cited in City of Lakewood v Thormyer, 154 N E 2d 777, 793, affd 157 N E 2d 431, 111 Ohio App 403, affd 168 N E 2d 289, 171 Ohio St 135

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11 U S —Arlington Coalition on Transp v Volpe, C A Va, 458 F 2d 1323 cert den 93 S Ct 312, 409 U S 1000, 34 L Ed 2d 261

Waiver

Conn —Schwartz v Town of Hamden, 357 A 2d 488, 168 Conn 8

14 Pa —Rankin v Com, 48 Lanc L Rev 501

Immaterial change

(2) Other statements

N D —Huber v Miller, 101 N W 2d 136

Particular constitutional and statutory provisions held not to preclude relocation

Ark —Woollard v State Highway Commission, 249 S W 2d 564, 220 Ark 731

Cal Holloway v Purcell, 217 P 2d 665, 35 Cal 2d 220, cert den 71 S Ct 196, 340 U S 883, 95 L Ed 641

17. U S —La Raza Unida of Southern Alameda County v Volpe C A Cal 488 F 2d 559, cert den 94 S Ct 3171 417 U S 968 41 L Ed 2d 1138

Iowa—Pundt Agricultural, Inc v Iowa Dept of Transp 291 N W 2d 340

Ohio—Masheter v Ashland Pipe Line Co, 208 N E 2d 162 2 Ohio Misc 179

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18. Ga —Southern Ry Co v Wages, 47 S E 2d 501, 203 Ga 502

Kan —Riddle v State Highway Commission 339 P 2d 301 184 Kan 603

N Y —Brown v McMorran, 257 N Y S 2d 74, 23 A D 2d 661

Wash —Public Utility Dist No 2 of Grant County v State, 365 P 2d 22 58 Wash 2d 873

Hearing not a contested case

Wis —Town of Ashwaubenon v State Highway Commission, 115 N W 2d 498 17 Wis 2d 120

20 Ga —State Highway Dept v MacDonald, 144 S E 2d 363, 221 Ga 312

N C —Snow v North Carolina State Highway Commission 136 S E 2d 678, 262 N C 169

21 Ohio—C J S cited in City of Lakewood v Thormyer, 154 N E 2d 777, 793, affd 157 N E 2d 431 111 Ohio App 403, affd 168 N E 2d 289, 171 Ohio St 135

22. Iowa—Hinrichs v Iowa State Highway Commission, 152 N W 2d 248

N Y —Maurer v McMorran, 197 N Y S 2d 257, 19 Misc 2d 1090

Ohio—C.J S cited in City of Lakewood v Thormyer, 154 N E 2d 777, 792 affd 157 N E 2d 431, 111 Ohio App 403, affd 168 N E 2d 289, 171 Ohio St 135

Wash —Schrock v King County, 349 P 2d 594, 55 Wash 2d 655 2 A L R 3d 979

24. Iowa—Harvey v Iowa State Highway Commission, 130 N W 2d 725, 256 Iowa 1229

N Y —Onondaga County by Edgcomb v McMorran, 238 N Y S 2d 453, 38 Misc 2d 384

In absence of capricious, arbitrary or fraudulent exercise

W Va —State, by State Road Commission v Darnall, 38 S E 2d 663, 129 W Va 159

25. New highway held not replacement within provision for appeal

Idaho—Villages of Eden and Hazelton v Idaho Bd of Highway Directors of Dept of Highways, 367 P 2d 294, 83 Idaho 554

Other matters with respect to judicial review have been adjudicated.[25.5]

25.5. Matters considered on review

Wis —Town of Ashwaubenon v State Highway Commission, 115 N W 2d 498, 17 Wis 2d 120

Determination held supported by evidence

Wis —Town of Ashwaubenon v State Highway Commission, 115 N W 2d 498, 17 Wis 2d 120

Independent review

U S —City of Davis v Coleman, C A Cal, 521 F 2d 661

26. Fla —Orange County v Fordham 34 So 2d 438, 160 Fla 259

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28. N D —Huber v Miller, 101 N W 2d 136

Benefit to urban renewal area not prohibited

N Y —Schesch v People 316 N Y S 2d 862, 65 Misc 2d 44

30. Cal —Holloway v Purcell, supra, n 16

32. Pa —Krell v Com, 14 Fay Co Leg J 86

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50. Mo —Floreth v State Highway Commission, 472 S W 2d 614

Closing of street not abandonment

Cal —People v Vallejos, 59 Cal Rptr 450, 251 C A 2d 414

53 Ariz —State ex rel Herman v Tucson Title Ins Co 420 P 2d 286, 101 Ariz 415

Discretion

Fla —Central and Southern Florida Flood Control Dist v Scott App, 169 So 2d 368

La —Lamartiniere v Daigrepont, App 168 So 2d 373

55 Ga —Southern Ry Co v Wages, supra, n 18

56. Ky —Ex parte Com Dept of Highways, 291 S W 2d 814

N Y —City of Rome v State, 266 N Y S 2d 859 25 A D 2d 486

Highway held not properly vacated

Pa —Beglin v Balazick, 171 A 2d 841 195 Pa Super 495

Compliance with statutory formalities required

La —Lamartiniere v Daigrepont, App, 168 So 2d 373

Under statute expressly so providing certain public bodies are vested with authority to abandon sections of secondary roads if satisfied that no public necessity exists for continuance of such sections[56.5] or if the welfare of the public would be served best by abandoning them[56.10]

56.5. Va —Smith v Board of Sup'rs of Franklin County, 109 S E 2d 501, 201 Va 87

56.10. "Public welfare" construed

Va —Smith v Board of Sup'rs of Franklin County, 109 S E 2d 501, 201 Va 87

Abandonment need not be for highway purposes

Va —Smith v Board of Sup'rs of Franklin County, 109 S E 2d 501, 201 Va 87

Conditional abandonment held proper under circumstances

Va —Smith v Board of Sup'rs of Franklin County, 109 S E 2d 501, 201 Va 87

Construction of hydro electric project held to justify abandoning sections of roads

Va —Smith v Board of Sup'rs of Franklin County, 109 S W 2d 501, 201 Va 87

Judicial review

(1) Provisions for review of board's order by court was held to protect constitutional rights of all interested parties

Va —Smith v Board of Sup'rs of Franklin County, 109 S E 2d 501, 201 Va 87

(2) On review of trial court's action it will be presumed that trial court decided case on proper evidence

Va —Smith v Board of Sup'rs of Franklin County, 109 S E 2d 501, 201 Va 87

(3) Harmless error of the trial court will be disregarded on appeal

Va —Smith v Board of Sup'rs of Franklin County, 109 S E 2d 501, 201 Va 87

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58. Ga —Southern Ry Co v Wages, supra, n 18

Where a state ceded jurisdiction of land over which a highway existed to the federal government so it was within jurisdiction of secretary of interior, landowner had no right to require secretary to restore and open the highway [63.5]

63.5. U S —Halpert v Udall D C Fla, 231 F Supp 574, affd 85 S Ct 610 379 U S 645 13 L Ed 2d 550

64. Ky —Ex parte Com, Dept of Highways 291 S W 2d 814

S D —Appeal of Hansen, 27 N W 2d 245 71 S D 542

W Va —State, by State Road Commission v Darnall supra, n 24—State ex rel County Court of Wood County v State Road Commission, 129 S E 2d 726, 147 W Va 623

69. Ky —Williams v Woodward, 240 S W 2d 94

70. Miss —Wheeler v State Highway Commission 55 So 2d 225, 212 Miss 606

Ohio—Van Scyoc v Roth, 205 N E 2d 617, 2 Ohio Misc 155

Okl —State v Anderson 315 P 2d 253

S C —Wessinger v Goza, 99 S E 2d 395, 231 S C 607

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72. N Y —Geraghty v State, 128 N E 2d 302, 309 N Y 188

N D —Casey v Corwin, 71 N W 2d 553

73. S C —Wessinger v Goza, 99 S E 2d 395, 231 S C 607

Where public does not own fee, etc.

Ga —Southern Ry Co v Wages, supra, n 18

75. Mo —Hamer v State Highway Commission, 304 S W 2d 869

N M —State ex rel State Highway Commission v Mauney, 411 P 2d 1009, 76 N M 36

S C —Wessinger v Goza, 99 S E 2d 395 231 S C 607

Limited Access Act

Wash —Leschi Imp Council v Washington State Highway Commission, 525 P 2d 774, 84 Wash 2d 271

77. W Va —State, by State Road Commission v Darnall, supra, n 24

§ 180. —— Materials for Construction or Repair

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79. Ala —Rollings v Marshall County, 82 So 2d 428, 263 Ala 317

Cal —Marin County v Superior Court of Marin County, 2 Cal Rptr 758, 349 P 2d 526, 53 C 2d 633

La —Boswell v Department of Highways, 14 So 2d 627, 203 La 760

N D —Northwestern Sheet & Iron Works v Sioux County, 36 N W 2d 605, 76 N D 451—Mag Const Co v McLean County, 181 N W 2d 718

Pa —Duquesne Slag Products Co v Woolworth, 62 Dauph Co 265, exceptions over 62 Dauph Co 431

Contracting for purchase of materials

Colo —State Highway Dept v Dawson, 253 P 2d 593, 126 Colo 490

Particular powers possessed

(1) To purchase and operate quarry for road construction and repair —Everett v Clinton County, Mo, 282 S W 2d 30

(2) To sell crushed stone to special road districts —Everett v Clinton County Mo, 282 S W 2d 30

Restriction on use of materials as requiring specific constitutional or statutory grant

Tex —Texas Ass'n of Steel Importers, Inc v Texas Highway Commission Civ App, 364 S W 2d 749, err gr

Actions or judicial proceedings

N M —State for Use of Walker v Hastings, 443 P 2d 508 79 N M 338

Or —State ex rel Hawkins-Hawkins Co v Travelers Indem Co, 442 P 2d 612, 250 Or 356

Waiver

La —Paul M Davison Petroleum Products v L T Brown Contractor, Inc 364 So 2d 583

80. Okl —Hisel v State 264 P 2d 375 97 Okl Cr 356, foll Litton v State, 264 P 2d 386, 97 Okl Cr 367

Vt —Hinesburg Sand & Gravel Co v Town of Hinesburg, 180 A 2d 64, 135 Vt 484

Rights and responsibilities

Colo —State Highway Dept v Dawson 253 P 2d 593, 126 Colo 490

82. Wash —Florito v M A Segale, Inc 566 P 2d 1268 18 Wash App 158

Accuracy of scale

N C —Propst Const Co v North Carolina Dept of Transp 290 S E 2d 387, 56 N C App 759, mod on oth grds 296 S E 2d 295, 307 N C 124

85. Wis —Amoco Oil Co v Capitol Indem Corp, 291 N W 2d 883, 95 Wis 2d 530

87. Appropriation of public lands for use as source of materials

U S —Southern Idaho Conference Ass'n of Seventh Day Adventists v U S, C A Idaho, 418 F 2d 411

§ 181. —— Removal of Fences, Buildings, and Other Property

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93. Ordinance requiring removal of pipes held inapplicable

Cal —Wofford Heights Associates v Kern County, 32 Cal Rptr 870, 219 C A 2d 34

96. Relocation of public service facilities

Ariz —City of Mesa v Salt River Project Agr Imp and Power Dist, 373 P 2d 722, 92 Ariz 91, app dism 83 S Ct 1018 372 U S 704, 10 L Ed 2d 124

La —Department of Highways v Southwestern Elec Power Co, 145 So 2d 312, 243 La 564

N Y —New York City Tunnel Authority v Consolidated Edison Co of N Y, 68 N E 2d 445, 295 N Y 467, rearg den 70 N E 2d 551, 296 N Y 745

Pa —Department of Highways v Pennsylvania Public Utility Commission, 182 A 2d 267, 198 Pa Super 87

Tex —Travis-Williamson County Water Control and Imp Dist No 1 v State, Civ App, 359 S W 2d 528, err ref no rev err

"May" construed as mandatory

Wyo —Board of County Com'rs of Fremont County v State ex rel Miller, 369 P 2d 537

3. Ohio—C.J.S cited in City of Lakewood v Thormyer, 154 N E 2d 777 79 1 affd 157 N E 2d 431 111 Ohio App 403, affd 168 N E 2d 289 171 Ohio St 135

§ 182. —— Guideposts

5. Guideposts within statute

N Y —Bischoff v Town of East Hampton, 263 N Y S 2d 61, 47 Misc 2d 615

§ 183. Existence and Character of Road

Library References

Highways ⇐99½, 105.

7. Ohio—City of Lakewood v Thormyer, 168 N E 2d 289, 171 Ohio St 135

Question of law

Iowa—Lemke v Mueller, 166 N W 2d 860

Withdrawal by state of highway project

U S —La Raza Unida of Southern Alameda County v Volpe, C A Cal, 488 F 2d 559, cert den 94 S Ct 3171, 417 U S 968, 41 L Ed 2d 1138

8. U S —U S v Certain Parcels of Land in Riverside County, Cal, D C Cal, 67 F Supp 780

Iowa—Lemke v Mueller, 166 N W 2d 860

Wash —Schinaman v Skamania County, 162 P 2d 827, 23 Wash 2d 904

Public highway

(2) Other matters

Mont —State ex rel Elakovich v Zbitnoff, 386 P 2d 343, 142 Mont 576

"Controlled access" described

Ark —Arkansas State Highway Commission v Union Planters Nat Bank, 331 S W 2d 904, 231 Ark 907, motion den 334 S W 2d 879, 232 Ark 200

Legislative power to designate classifications

Fla —Ahlheit v State Road Dept of Fla, App, 114 So 2d 623

"Thruway"

N Y —New York State Thruway Authority v Ashley Motor Court, Inc, 210 N Y S 2d 193, 12 A D 2d 223, affd 218 N Y S 2d 640, 10 N Y 2d 151, 176 N E 2d 566, motion gr 221 N Y S 2d 518, 10 N Y 2d 814, 178 N E 2d 232

"Limited-access highway"

Iowa—Iowa Power & Light Co v Iowa State Highway Commission, 117 N W 2d 425, 254 Iowa 534

Tenn —State ex rel Moulton v Williams, 343 S W 2d 857, 207 Tenn 695

County roads for which state obtained federal matching funds

N D —Northern Pac Ry Co v Morton County, 131 N W 2d 557

"Approach" and "approaches"

Ohio—Masheter v Ashland Pipe Line Co, 208 N E 2d 162, 2 Ohio Misc 179

Public roads

Or —Major v Douglas County, 488 P 2d 808, 6 Or App 544

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9. Miss —Coleman v Shipp, 78 So 2d 778, 223 Miss 516

N C —Sherrill v N C State Highway Commission, 142 S E 2d 653, 264 N C 643

Pa —Appeal of Chryst, 81 Pa Dist & Co 533

Detours not state highway —Lungstrum v State Highway Commission, 276 P 2d 346, 177 Kan 57

Detour over old highway held state highway until replaced

Kan —Schroder v Kansas State Highway Commission, 428 P 2d 814, 199 Kan 175

"Existing roads" outside state highway system

Kan —Schroder v Kansas State Highway Commission, 428 P 2d 814, 199 Kan 175

10. Ga —Powell v Barker, 101 S E 2d 113, 96 Ga App 592

Miss —Coleman v Shipp, 78 So 2d 778, 223 Miss 516

S C —Bell v South Carolina State Highway Department, 30 S E 2d 65 204 S C 462

11. Miss —Coleman v Shipp, 78 So 2d 778, 223 Miss 516.

12. Fla —Padgett v Bay County, App, 187 So 2d 410

13. Miss —Coleman v Shipp, supra, n 11

N Y —Feuer v Brenning, 115 N Y S 2d 384, 201 Misc 792, affd 112 N Y S 2d 382, 279 App Div 1033, affd 110 N E 2d 173, 304 N Y 881

16. Miss —Coleman v Shipp, 78 So 2d 778, 223 Miss 516

Statute construed

Mich —Pulleyblank v Mason County Road Commission, 86 N W 2d 309, 350 Mich 223

§ 184. —— Roads in Different Jurisdictions

28. Ill —People ex rel Village of South Barrington v Village of Hoffman Estates, 198 N E 2d 97, 30 Ill 2d 385

La —Jerry Joseph Fontenot, Ind v State Through Dept of Highways, App, 346 So 2d 849, writ den, Sup, 349 So 2d 1270

County road within township

N Y —Maloney v Oneida County, 97 N Y S 2d 161, 199 Misc 220

Necessity of agreement

Okl —Musgrove v Tooley, 382 P 2d 150

Road touching partly on town line as not necessarily town-line road

Wis —Town of Muskego v Town of Vernon, 119 N W 2d 474, 19 Wis 2d 159

A statute relating to municipal control of parts of sections of streets which have been taken over for maintenance by a state highway commission does not deprive it of control over highways in which it owns the right of way.[29.5]

29.5. Miss —Mississippi State Highway Commission v Adams, 93 So 2d 650 230 Miss 559

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30. Minn —Shinneman v Arago Tp, 288 N W 2d 239

N Y —Neddo v State, 90 N Y S 2d 650, 275 App Div 492, affd 89 N E 2d 253, 300 N Y 533

Ohio—Adamson v Wetz, App, 124 N E 2d 832

Statutory duties placed on county not altered

N Y —Malcuria v Town of Seneca, 403 N Y S 2d 880, 93 Misc 2d 799, mod on oth grds 414 N Y S 2d 401, 66 A D 2d 421

31. Ind —Town of Argos v Harley, 49 N E 2d 552, 114 Ind App 290

N J —Borough of Barnegat Light, Ocean County v Board of Chosen Freeholders of Ocean County, 130 A 2d 409, 44 N J Super 332

N Y —Neddo v State, 85 N Y S 2d 54, 194 Misc 379, affd 90 N Y S 2d 650, 275 App Div 492, affd 89 N E 2d 253, 300 N Y 533 Affd 91 N Y S 2d 515, 275 App Div 982

Contract authority for financing

Tex —City of Piney Point Village v Harris County, Civ App, 479 S W 2d 358, err ref no rev err, app dism 93 S Ct 1503, 410 U S 976, 36 L Ed 2d 173

County roads

Tex —City of Piney Point Village v Harris County, Civ App, 479 S W 2d 358, err ref no rev err, app dism 93 S Ct 1503, 410 U S 976, 36 L Ed 2d 173

Time for extension

Tex —City of Piney Point Village v Harris County, Civ.App, 479 S W 2d 358, err ref no rev err, app dism 93 S Ct 1503, 410 U S 976, 36 L Ed 2d 173

County policy invalid

N J —Wayne Tp v Passaic County, 332 A 2d 207, 132 N J Super 42

32. Cal —Cameron v City of Gilroy, 230 P 2d 838, 104 Cal App 2d 76

Ill —Andrews v City of Springfield, 205 N E 2d 798, 56 Ill App 2d 201

La —Written v Police Jury of St Mary Parish, App, 297 So 2d 708

N H —Vaughn v New Durham, 35 A 2d 390, 93 N H 81

35. Fla —Lesaloha v City of Jacksonville, 64 So 2d 924—Schonfield v City of Coral Gables, App, 174 So 2d 453 Cert discharged, Sup, 183 So 2d 682

N Y —Malcuria v Town of Seneca, 403 N Y S 2d 880, 93 Misc 2d 799, mod on oth grds 414 N Y S 2d 401, 66 A D 2d 421—Nack v Town of Ghent, 451 N Y S 2d 938, 88 A D 2d 1007

Okl —Terry v Edgin, 561 P 2d 60, app after remand, Sup, 598 P 2d 228

Public highways as including city streets and county roads

Ga —Mayor and Council of City of Woodbury v State Highway Dept, 171 S W 2d 272, 225 Ga 723

S D —Hurley v Rapid City, 121 N W 2d 21, 80 S D 180

Consent of municipality

Ga —Macon County v City of Oglethorpe, 194 S E 2d 97, 229 Ga 687

Ohio—Village of Fairlawn v Preston, 207 N E 2d 656, 2 Ohio St 2d 165

§ 186. —— Power and Duty

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36. Cal —Sheffet v Los Angeles County, 84 Cal Rptr 11, 3 C A 3d 720

Kan —Cow Creek Valley Flood Prevention Ass n v City of Hutchinson, 200 P 2d 299, 166 Kan 78

N Y —Holscher v State, 399 N Y S 2d 268, 59 A D 2d 224, affd 386 N E 2d 831, 46 N Y 2d 792, 413 N Y S 2d 920

N D —Rynestad v Clemetson, 133 N W 2d 559

Liability for expense of repair of drainage facilities

(2) Other cases —Verdigris River Drainage Dist No 1 v City of Coffeyville 97 P 2d 105, 150 Kan 765

No statutory duty on county to supply drainage for state project

Utah—Andrus v State, 541 P 2d 1117

37. Cal —Bacigalupi v Bagshaw, 196 P 2d 66, 87 Cal App 2d 48

Hawaii—Rodrigues v State, 472 P 2d 509, 52 Haw 156, 283

Iowa—Grimes v Polk County, 34 N W 2d 767, 240 Iowa 228—Owens v Fayette County, 40 N W 2d 602, 241 Iowa 740

N Y —Christman v State, 70 N Y S 2d 12, 189 Misc 383

N D —Lemer v Koble, 86 N W 2d 44

Pa —Ventura v City of Pittsburgh, 47 A 2d 668, 159 Pa Super 279

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38. Conn —Anderson v Argraves, 127 A 2d 620, 20 Conn Sup 138, affd 150 A 2d 295, 146 Conn 316

41. Me —Austin v Inhabitants of St Albans, 65 A 2d 32, 144 Me 111

44. Iowa—Owens v Fayette County, supra, n 37

Mass —Lincoln Park Amusement Co v Town of Westport, 159 N E 2d 68, 339 Mass 334

45. Md —Irvine v Montgomery County, 210 A 2d 359, 239 Md 113

Negligence of state highway department

(2) Other cases —Loman v State, 59 N.Y S 2d 492

46. Ill —Savoie v Town of Bourbonnais, 90 N E 2d 645, 339 Ill App 551

48. Ill.—Savoie v Town of Bourbonnais, supra, n 46

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50. In Washington

(4) Other cases

Wash —Peterson v King County, 252 P 2d 797, 41 Wash 2d 907—Buxel v King County, 252 P 2d 797, 41 Wash 2d 907

Effect of deeds referring to plans

Ga —Tift County v Goodman, 124 S E 2d 290, 105 Ga.App 229

54. Tenn —Jones v Hamilton County, 405 S W 2d 775, 56 Tenn App 240

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55. Ill —Hargadine v Sharkey, 131 N E 2d 134, 8 Ill App 2d 209

Iowa—Grimes v Polk County, supra, n 37

Miss —Stigall v Sharkey County, 42 So 2d 116, 207 Miss 188

56. In New York

(5) Other cases —Loman v State, 59 N Y S 2d 492—Andrews v Town of Pierrepont, 403 N Y S 2d 822, 62 A D 2d 1092

57. Me —Austin v Inhabitants of St Albans, 65 A 2d 32, 144 Me 111

58. Pa —Messinger v Washington Tp, 137 A 2d 890, 185 Pa Super 554

59. Neb —Clare v Lancaster County, 71 N W 2d 190, 160 Neb 622

The liability of the United States for damages caused by the overflow of waters from its highways onto adjacent lands has been adjudicated by the courts.[59.5]

59.5. United States immune

U S —Burhson v U S C A Mo, 627 F 2d 119, cert den 101 S Ct 1740, 450 U S 1030, 68 L Ed 2d 225

Recovery allowed

U S —Jones v U S, 175 F Supp 182, 146 Ct Cl 754

60. Iowa—Grimes v Polk County, supra, n 37

N D —C.J.S cited in Little v Burleigh County, 82 N W 2d 603, 614

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62. Ariz —L H Bell & Associates, Inc v Granger, 543 P 2d 428, 112 Ariz 440

Md —Laird, Rock & Small, Inc v Harry T Campbell & Sons, 92 A 2d 380, 200 Md 627

Ohio—Meier v Frank Mashuda Co, App, 168 N E 2d 319

W Va —Bailey v S J Groves & Sons Co, 230 S E 2d 267, 159 W Va 864

Construction in accordance with plans and without negligence

(2) Other statements

Vt —Lane Const Corp v State, 265 A 2d 441, 128 Vt 421

Damages

Mo —Rector v Tobin Const Co, App, 351 S.W 2d 816, transf to, Sup, 377 S W 2d 409

Evidence

Mo —Rector v Tobin Const Co, App, 351 S W 2d 816, transf to, Sup, 377 S W 2d 409

Vt —Lane Const Corp v State, 265 A 2d 441, 128 Vt 421

63. Ohio—Meier v Frank Mashuda Co, App, 168 N E 2d 319

66. Neb —Clare v Lancaster County, 71 N W 2d 190, 160 Neb 622

S D —La Fleur v Kolda, 22 N W 2d 741, 71 S D 162

In Louisiana

(3) Other matters

La —State Through Dept of Highways v Mouledous, App, 199 So 2d 185, writ ref 199 So 2d 927, 250

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In Minnesota, etc.

(2) Liability of county

Minn—Dunn v Ramsey County, 184 N W 2d 773, 289 Minn 422

67. Iowa—Wheatley v Cass County, 31 N W 2d 872, 239 Iowa 932—Droegmiller v Olson, 40 N W 2d 292, 241 Iowa 456—Owens v Fayette County supra n 37—Perkins v Palo Alto County, 60 N W 2d 562, 245 Iowa 310

N D—CJS. cited in Little v Burleigh County, 82 N W 2d 603, 613

S C—Hill v City of Greenville, 76 S E 2d 294, 223 S C 392

Vt—Town of Manchester v Cherbonneau, 300 A 2d 548, 131 Vt 107

Culvert

Miss—Mississippi State Highway Commission v Tyner, 345 So 2d 1050

Neb—Walla v Oak Creek Tp in Saunders County, 92 N W 2d 542, 167 Neb 225

N D—Olson v Cass County, 253 N W 2d 179

Construction so as not to obstruct flow and drainage

Alaska—Mercer v Yutan Const Co, 420 P 2d 323

No responsibility for unforeseeable accumulations

N D—Frank v Mercer County, 186 N W 2d 439

Prevention of ice formation

Wis—Sambs v City of Brookfield 224 N W 2d 582, 66 Wis 2d 296

69. Iowa—Jacobson v Camden, 20 N W 2d 407, 236 Iowa 976—Rosendahl Levy v Iowa State Highway Commission, 171 N W 2d 530

Mich—Maynard v Hawley, 49 N W 2d 92, 331 Mich 123

Neb—Clare v Lancaster County, 71 N W 2d 190, 160 Neb 622

Pa—Com v Gorham, 56 Lack Jur 189

Tex—Messer v Refugio County, Civ App, 435 S W 2d 220, err ref no rev err

Protection of servient estate

Iowa—Droegmiller v Olson, supra, n 67

Returning surface water to its natural course

(4) Other cases

Ill—Savoie v Town of Bourbonnais, supra, n 46

Wis—Gibeau v Town of Pratt, 42 N W 2d 286, 256 Wis 617

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71. Mich—Toth v Charter Tp of Waterford 274 N W 2d 7, 87 Mich App 173

Neb—Andersen v Town of Maple, 36 N W 2d 620, 151 Neb 103

72. Iowa—Nixon v Welch, 24 N W 2d 476, 238 Iowa 34, 169 A L R 1141—Morrow v Harrison County, 64 N W 2d 52, 245 Iowa 725

La—Adkins v Department of Transp, App, 388 So 2d 113, writ den Sup, 409 So 2d 675

Mass—Triangle Center, Inc v Department of Public Works, 438 N E 2d 798, 386 Mass 858

Wash—Colella v King County, 433 P 2d 154, 72 Wash 2d 386, app after remand 451 P 2d 667, 75 Wash 2d 953

In Pennsylvania

(3) Other cases—Matthews v Plum Tp, 33 A 2d 38, 152 Pa Super 544

73. Mich—Bennett v Eaton County, 65 N W 2d 794, 340 Mich 330

N D—Viestenz v Arthur Tp, 54 N W 2d 572, 78 N D 1029

S D—Bogue v Clay County, 60 N W 2d 218, 75 S D 140

Wash—Harkoff v Watcom County 241 P 2d 932 40 Wash 2d 147

74. Mich—Bennett v Eaton County, supra, n 73

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76. Conn—Postemski v Watrous, 195 A 2d 425, 151 Conn 183

77. Cal—San Diego County v California Water & Tel Co 186 P 2d 124, 30 Cal 2d 817, 175 A L R 747

Conn—Postemski v Watrous, 195 A 2d 425, 151 Conn 183

78. Ga—Reid v Gwinnett County, 249 S E 2d 559, 242 Ga 88

S D—Bogue v Clay County, supra, n 73

In Wisconsin

(3) Other cases

Wis—Lloyd v Chippewa County, 61 N W 2d 479, 265 Wis 293, reh den 62 N W 2d 431, 265 Wis 293

81. Ark—Ben M Hogan & Co v Fletcher, 370 S W 2d 801, 236 Ark 951

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85 Pa—Petition of Hostetter 6 Lebanon 40

86. Pa—Com v Gorham, 56 Lack Jur 189

Tex—State v Sparks Civ App, 296 S W 2d 609

Duty of highway authorities

(1) N Y—Incorporated Village of Flower Hill v State, 168 N Y S 2d 89 8 Misc 2d 679, revd on oth grds 182 N Y S 2d 230, 7 A D 2d 940

N D—Lemer v Koble 86 N W 2d 44

(2) N D—Little v Burleigh County, 82 N W 2d 603

S C—Lail v South Carolina State Highway Dept 136 S E 2d 306, 244 S C 237

(3) Other matters

La—Hortman v Department of Highways App, 265 So 2d 812 application den 267 So 2d 213, 263 La 110

N C—Shapiro v Toyota Motor Co, Ltd, 248 S E 2d 868 38 N C App 658

N D—Brenna v Hjelle, 161 N W 2d 356

S C—Spradley v South Carolina State Highway Dept, 182 S E 2d 735 256 S C 431

87. Or—Kernan Livestock Farm, Inc v Multnomah County By and Through State Highway Commission, 355 P 2d 719

88. C J S cited in Postemski v Watrous, 195 A 2d 425 428 151 Conn 183

N Y—Alley v State 284 N Y S 2d 19 28 A D 2d 1147

89. Ky—Com Dept of Highways v Baird, 444 S W 2d 541

Minn—Lahman v Commissioner of Highways, 282 N W 2d 573

Pa—Steckley v Com, Dept of Transp, 407 A 2d 79, 46 Pa Cmwlth 367

Tex—State v Sparks, Civ App 296 S W 2d 609

Wis—Niesen v State, 141 N W 2d 194, 30 Wis 2d 490

In New York

(7) Other cases—Bantelman v State, 221 N Y S 2d 615, 30 Misc 2d 698—Wolferts Roost, Inc v State, 234 N Y S 2d 473, 17 A D 2d 1022 affd 191 N E 2d 904, 13 N Y 2d 719 241 N Y S 2d 848

90. Conn—Anderson v Argraves 127 A 2d 620, 20 Conn Sup 138, affd 150 A 2d 295, 146 Conn 316

Ky—Wade v Crowe, 258 S W 2d 490

Va—State Highway Commissioner v Richmond, F & P R Co, 179 S E 2d 640 211 Va 612

Wis—Niesen v State, 154 N W 2d 316, 36 Wis 2d 671

In New York

(5) Other cases—Strickland v State, 177 N Y S 2d 983, 13 Misc 2d 425, app dism 202 N Y S 2d 1006 10 A D 2d 797

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93. Ala—Hunt v Grissom, 157 So 2d 682 42 Ala App 176

N C—Midgett v North Carolina State Highway Commission, 144 S E 2d 121, 265 N C 373

94. U S—Ernst v General Refractories Co, C A Ky, 202 F 2d 485

N Y—Costanzo v State, 137 N Y S 2d 878, 207 Misc 242 app dism 152 N Y S 2d 427—Incorporated Village of Flower Hill v State, 182 N Y S 2d 230, 7 A D 2d 940

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97. In New York

(1) Fuller v State supra, n 89

98. Good engineering practice held no defense

N Y—Kerhonkson Lodge, Inc v State, 168 N Y S 2d 56, 4 A D 2d 575

99. Iowa—Nixon v Welch, supra, n 72

N Y—Scamp v State, 70 N Y S 2d 752, 189 Misc 802

Right to drain held not to exist

Mass—Deyo v Athol Housing Authority, 140 N E 2d 393 335 Mass 459

Pa—Martin v Riddle, 26 Pa 415—Lorah v Amity Township, 35 Pa Super 529

1. Neb—Wells v Miller, 115 N W 2d 137, 173 Neb 780

2. Tex—Soule v Galveston County, Civ App., 246 S W 2d 491, err ref

4 Iowa—Jacobson v Camden, 20 N W 2d 407, 236 Iowa 976—Droegmiller v Olson, 40 N W 2d 292, 241 Iowa 456

5. Neb—Town of Everett, Burt County v Teigeler, 77 N W 2d 467, 162 Neb 769

Pa—Com v Gorham 56 Lack Jur 189

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8 Iowa—Droegmiller v Olson supra, n 4

9. Conn—Corentin v Town of Columbia, Super, 294 A 2d 80, 29 Conn Sup 499

10 Cal—Enos v Harmon, 321 P 2d 810, 157 C A 2d 746

La—J B LaHaye Farms, Inc v Louisiana Dept of Highways, App, 377 So 2d 1286, writ den, Sup, 381 So 2d 1222

N Y—Martin v State, 113 N Y S 2d 314, 280 App Div 846

Wash—Harkoff v Whatcom County, 241 P 2d 932, 40 Wash 2d 147

County liable only for increase in floodwater

N D—Little v Burleigh County, 82 N W 2d 603

Measure of damages

Wash—Colella v King County, 433 P 2d 154, 72 Wash 2d 386, app after remand 451 P 2d 667, 72 Wash 2d 386

Coercive and speculative damages

Wash—Colella v King County, 433 P 2d 154, 72 Wash 2d 386, app after remand 451 P 2d 667, 72 Wash 2d 386

11. Me—Austin v Inhabitants of St Albans, 65 A 2d 32, 144 Me 111

In New York, etc.

(2) Other cases—Foster v Webster, 44 N Y S 2d 153, 8 Misc 2d 61—Fuller v State, 46 N Y S 2d 762

Determination by viewers

Pa—Hilkert v Pennsylvania Dept of Highways, 38 D & C 2d 471

Art. 78 proceeding

U S—Kohlasch v New York State Thruway Authority, D C N Y, 460 F Supp 956

Recovery not barred

Ga—Reid v Gwinnett County, 249 S E 2d 559, 242 Ga 88

There have been adjudications as to matters of defense [11.5]

11.5. Contributory negligence

Hawaii—Rodrigues v State, 472 P 2d 509, 52 Haw 156, 283

La—Hortman v Department of Highways, App, 265 So 2d 812 application den 267 So 2d 213, 263 La 110

Assumption of risk

Hawaii—Rodrigues v State 472 P 2d 509, 52 Haw 156, 283

Proximate cause

Wash —Burton v Douglas County, 539 P 2d 97, 14 Wash.App 151

12. Conn —Anderson v Argraves, 127 A 2d 620, 20 Conn Sup 138, affd 150 A 2d 295, 146 Conn 316

Ga —Davis v City of Barnesville, 54 S E 2d 915, 80 Ga App 3

Ill —Savoie v Town of Bourbonnais, 90 N E 2d 645, 339 Ill App 551

Md —Laird, Rock & Small, Inc v Harry T Campbell & Sons, 92 A 2d 380, 200 Md 627

Mich —Burch v Mackie, 107 N W 2d 791, 362 Mich 488

Miss —State Highway Commission v McClendon, 53 So 2d 35, 212 Miss 18

N Y —Sherman v State, 174 N Y S 2d 736, 11 Misc 2d 756

Pa —Matthews v Plum Tp, 33 A 2d 38, 152 Pa Super 544

Petition held sufficient as against demurrer

Ga —Dougherty County v Long, 91 S E 2d 198, 93 Ga App 212—Floyd County v Griffin, 137 S E 2d 483, 109 Ga App 802

Pleading held sufficient

Ga —Bartow County v Darnell, 97 S E 2d 610, 95 Ga App 193

Ill —Smith v General Paving Co, 321 N E 2d 689, 24 Ill App 3d 858

N C —Braswell v State Highway and Public Works Commission, 108 S E 2d 912, 250 N C 508

Ohio—Meier v Frank Mashuda Co, App, 168 N E 2d 319

Interest of plaintiff insufficient

Ill —Looby v Buck, 155 N E 2d 641, 20 Ill App 2d 156

Allegations held immaterial

Ga —Tift County v Goodman, 124 S E 2d 290, 105 Ga App 229

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14. Mo —Rice v Stoddard, App 312 S W 2d 374

15. Ill —Smith v General Paving Co, 321 N E 2d 689, 24 Ill App 3d 858

La —Holley v State Through Dept of Highways App, 128 So 2d 908—Hortman v Department of Highways, App, 265 So 2d 812, application den 267 So 2d 213, 263 La 110

Me —Austin v Inhabitants of St Albans, supra, n 11

N Y —Costanzo v State, 137 N Y S 2d 878, 207 Misc 242, app dism 152 N Y S 2d 427

Claim against state

N Y —Strickland v State, 177 N Y S 2d 983, 13 Misc 2d 425, app dism 202 N Y S 2d 1006 10 A D 2d 797

N Y —Andrews v Town of Pierrepont, 403 N Y S 2d 822, 62 A D 2d 1092

Easement

S D —Bogue v Clay County, 60 N W 2d 218, 75 S D 140

Under the rules applicable to civil actions generally, evidence in an action for damages caused by interference with drainage as a result of improving or constructing a highway must be competent and relevant.[16.5]

16.5. Evidence held admissible

Ariz —L H Bell & Associates, Inc v Granger, 543 P 2d 428, 112 Ariz 440

Ill —Grommes v Town of Aurora, 185 N E 2d 3, 37 Ill App 2d 1

Testimony of expert witnesses unnecessary

Ky —Com, Dept of Highways v Robbins, 421 S W 2d 820

17. Miss —Stigall v Sharkey County, 42 So 2d 116, 207 Miss 188

Evidence held sufficient

(1) Mich —Bennett v Eaton County, 85 N W 2d 794, 340 Mich 330

N Y —Musumeci v State, 351 N Y S 2d 211, 43 A D 2d 288

(7) Other cases

Ariz —L H Bell & Associates, Inc v Granger, 543 P 2d 428, 112 Ariz 440

Cal —Conklin v Goodson, 271 P 2d 147, 125 C A 2d 823

Hawaii—Rodrigues v State, 472 P 2d 509, 52 Haw 156, 283

Ill —Grommes v Town of Aurora, 185 N E 2d 3, 37 Ill App 2d 1

Ind —Newton v Lyons, 90 N E 2d 917, 120 Ind App 465

Iowa—Johnson v Iowa State Highway Commission, 94 N W 2d 773, 250 Iowa 521

La —Holley v State Through Dept of Highways, App, 128 So 2d 908—Baird v T L James & Co, App, 240 So 2d 428

Md —Laird Rock & Small, Inc v Harry T Campbell & Sons, supra, n 12

Mass —Lincoln Park Amusement Co v Town of Westport, 159 N E 2d 68, 339 Mass 334

Neb —Schwank v Platte County, 40 N W 2d 863 152 Neb 273

N Y —Costanzo v State, 137 N Y S 2d 878, 207 Misc 242, app dism 152 N Y S 2d 427—Cook v State, 209 N Y S 2d 588, 26 Misc 2d 1, affd 245 N Y S 2d 62, 20 A D 2d 585

N C —Midgett v North Carolina State Highway Commission, 144 S E 2d 121, 265 N C 373

Ohio—Meier v Frank Mashuda Co, App, 168 N E 2d 319

Pa —Hayes Creek County Club, Inc v Central Penn Quarry Stripping & Const Co, 181 A 2d 301, 407 Pa 464

S D —Bogue v Clay County, supra, n 16—Heezen v Aurora County 157 N W 2d 26, 83 S D 198

Va —B G Young & Sons Inc v Kirk 116 S E 2d 38, 202 Va 176

Wash —Harkoff v Whatcom County, supra, n 10—Hill v King County, 250 P 2d 960, 41 Wash 2d 592—Buxel v King County, 374 P 2d 250, 60 Wash 2d 404

Evidence held insufficient

(5) To show other matters

La —Stewart v T L James & Co App, 139 So 2d 791

N Y —Gellis v Town of Harrison 159 N Y S 2d 228, affd 172 N Y S 2d 546, 5 A D 2d 870

N C —Midgett v North Carolina State Highway Commission, 144 S E 2d 121, 265 N C 373

Tex —Crow v State, Civ App, 325 S W 2d 419, err ref no rev err

Utah—Combe v Utah Const Co 318 P 2d 1106, 7 Utah2d 97

Wash —Peterson v King County, 252 P 2d 797, 41 Wash 2d 907—Wilkening v State, 344 P 2d 204, 54 Wash 2d 692

Damages

(2) Other cases

Ariz —L H Bell & Associates, Inc v Granger, 543 P 2d 428, 112 Ariz 440

Ill —First Nat Bank, Mattoon v Standard Paving Co, 303 N E 2d 29, 15 Ill App 3d 7

Ky —Com, Dept of Highways v Robbins, 421 S W 2d 820—Com, Dept of Highways v S & M Land Co, Inc, 503 S W 2d 495

La —Daspit v State Through Dept of Highways, App, 325 So 2d 368

N Y —Loman v State, 59 N Y S 2d 492—La Rose v State, 100 N Y S 2d 717, 199 Misc 317—Holmes v State, 226 N Y S 2d 626, 32 Misc 2d 1077

S D —Smith v Charles Mix County, 182 N W 2d 223, 85 S D 343

Tex —Falls County v Kluck, Civ App, 199 S W 2d 704

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18. Cal —Bacigalupi v Bagshaw, 196 P 2d 66, 87 Cal App 2d 48

Ky —Jones v Boyd County, 178 S W 2d 606 296 Ky 753

Minn —Poynter v Otter Tail County, 25 N W 2d 708, 223 Minn 121

Wash —Burton v Douglas County, 539 P 2d 97, 14 Wash App 151

Instruction held proper

N C —Braswell v State Highway and Public Works Commission, 108 S E 2d 912, 250 N C 508

Pa —Hayes Creek Country Club, Inc v Central Penn Quarry Stripping & Const Co, 181 A 2d 301, 407 Pa 464

Utah—Andrus v State, 541 P 2d 1117

Questions held for jury or trier of facts

(8) Other questions

Ariz —L H Bell & Associates, Inc v Granger, 543 P 2d 428, 112 Ariz 440

Cal —Bacigalupi v Bagshaw, supra, n 18

Ill —Grommes v Town of Aurora, 185 N E 2d 3, 37 Ill App 2d 1

Ky —Com, Dept of Highways v Robbins, 421 S W 2d 820

Mich —Smith v Board of County Road Com'rs of Chippewa County, 161 N W 2d 561, 381 Mich 363

Neb —Kraka v Sarpy County, 14 N W 2d 194, 144 Neb 613

N C —Braswell v State Highway and Public Works Commission, 108 S E 2d 912, 250 N C 508

Tex —State v Sparks, Civ App, 296 S W 2d 609

Vt —Lane Const Corp v State, 265 A 2d 441, 128 Vt 421

Wash —Peterson v King County, supra, n 17

Questions held not for jury or trier of fact

Wash —Peterson v King County, supra, n 17

20. Verdict defective

Ky —Com, Dept of Highways v S & M Land Co, Inc 503 S W 2d 495

§ 187. —— Personal Liability of Officer

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26 Mass —Van Szyman v Town of Auburn, 188 N E 2d 453, 345 Mass 444

28. Neb —Harmer v Petersen, 37 N W 2d 511 151 Neb 412

N Y —Foster v Webster, supra, n 11

Pa —Messinger v Washington Tp, 137 A 2d 890, 185 Pa Super 554

33 Long-established drain

Mass —Van Szyman v Town of Auburn, 188 N E 2d 453 345 Mass 444

§ 188. —— Abatement of Drainage Nuisance

35. Cal —People v Stowell, 294 P 2d 474, 139 C A 2d 728

Tex —Willacy County v Oakes, Civ App, 239 S W 2d 692, err ref no rev err

Landowner has no duty to remove debris caused by drainage

N Y —Kerhonkson Lodge, Inc v State, 168 N Y S 2d 56, 4 A D 2d 575

§ 189. —— Injunction

38. Mo —Chicago, R I & P Ry Co v State Highway Commission of Missouri, 17 S W 2d 535, 322 Mo 419

N C —Town of Greenville v State Highway Commission, 145 S E 2d 31, 196 N C 226

Pa —Ostioch v Wilson, 406 A 2d 1200, 46 Pa Cmwlth 524

Reverse condemnation

Tenn —Monday v Knox County, 417 S W 2d 536, 220 Tenn 313

39. Cal —Enos v Harmon, 321 P 2d 810, 157 C A 2d 746—Sheffet v Los Angeles County, 84 Cal Rptr 11, 3 C A 3d 720

Iowa—Rosendahl Levy v Iowa State Highway Commission, 171 N W 2d 530

Mass—Van Styman v Town of Auburn, 188 N E 2d 453, 345 Mass 444

Miss—McClendon v Mississippi State Highway Commission, 38 So 2d 325, 205 Miss 71

Neb—Andersen v Town of Maple, 36 N W 2d 620, 151 Neb 103—Wilson Concrete Co v Sarpy County, 202 N W 2d 597, 189 Neb 312

N Y—Foster v Webster, supra, n 11

N D—Rynestad v Clemetson, 133 N W 2d 559

Tex—Falls County v Kluck, supra, n 17

Evidence held sufficient

(3) Other cases

Cal—Enos v Harmon, 321 P 2d 810, 157 C A 2d 746

Iowa—Jacobson v Camden, supra, n 4

La—Elam v Cortinas, 53 So 2d 146, 219 La 406

Neb—Henneberg v Burt County, 69 N W 2d 920, 160 Neb 250—Wells v Miller, 115 N W 2d 137, 173 Neb 780

N D—Viestenz v Arthur Tp, 54 N W 2d 572, 78 N D 1029

Evidence held insufficient to warrant injunction

(2) Other evidence

Ga—Charles v Cobb County, 203 S E 2d 503, 231 Ga 696

Iowa—Perkins v Palo Alto County, 60 N W 2d 562, 245 Iowa 310

Md—Kennedy-Chamberlin Development Co v Snure, 129 A 2d 142, 212 Md 369

Neb—Henneberg v Burt County, 69 N W 2d 920, 160 Neb 250

N Y—Nolan v Carr, 189 N Y S 2d 82, 19 Misc 2d 167

Complaint held insufficient

N Y—Erie R Co v Sells, 80 N E 2d 332, 298 N Y 58

Chancery jurisdiction of action for injunction and damages

Miss—Douglas v Wayne County, 139 So 2d 372, 243 Miss 637

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40. Iowa—Jacobson v Camden, supra, n 4—Wheatley v Cass County, 31 N W 2d 871, 239 Iowa 932

Mich—Burch v Mackie, 107 N W 2d 791, 362 Mich 488

Neb—Walla v Oak Creek Tp in Saunders County, 92 N W 2d 542, 167 Neb 225

Wash—Harkoff v Whatcom County, 241 P 2d 932, 40 Wash 2d 147

Record showed adequate compliance with statutory requirements

Iowa—Morrow v Harrison County, 64 N W 2d 52, 245 Iowa 725

Irreparable injury not shown

N C—State Highway & Public Works Commission v Brown, 77 S E 2d 780, 238 N C 293

41. N Y—Foster v Webster, supra, n 11

Okl—Furgason v Mitchell, 262 P 500, 128 Okl 232

42. Conn—Corentin v Town of Columbia, Super, 294 A 2d 80, 29 Conn Sup 499

Tenn—Wright v Roane County, 315 S W 2d 97, 203 Tenn 578

Factor considered

Iowa—Morrow v Harrison County, supra, n 40

43. Iowa—Wheatley v Cass County, supra, n 40—Perkins v Palo Alto County, supra, n 39

Neb—Probert v Grant, 28 N W 2d 548, 148 Neb 666

N D—Lemer v Koble, 86 N W 2d 44

44. Mich—Maynard v Hawley, 49 N W 2d 92, 331 Mich 123

Tex—Messer v Refugio County, Civ App, 435 S W 2d 220, err ref no rev err

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45. Iowa—Owens v Fayette County, 40 N W 2d 602, 241 Iowa 740—Rosendahl Levy v Iowa State Highway Commission, 171 N W 2d 530

N Y—Foster v Webster, supra, n 11

N D—Viestenz v Arthur Tp, supra, n 39

Evidence sufficient to support grant of injunction

(3) Other evidence

Md—Beane v Prince George's County, 315 A 2d 777, 20 Md App 383

S D—Bogue v Clay County, 60 N W 2d 218, 75 S D 140

46. Iowa—Rosendahl Levy v Iowa State Highway Commission, 171 N W 2d 530

N Y—Nolan v Carr, 189 N Y S 2d 82, 19 Misc 2d 167

Tex—Falls County v Kluck, supra, n 17

48. Mo—Miller Land Co v Liberty Tp, 510 S W 2d 473

A permanent injunction may be enforced by the landowners in an appropriate proceeding.[48.5]

48.5. Application for order

N D—Viestenz v Arthur Tp, Cass County, 129 N W 2d 33

Order granted

N D—Viestenz v Arthur Tp, Cass County, 129 N W 2d 33

49. Conn—Corentin v Town of Columbia, Super, 294 A 2d 80, 29 Conn Sup 499

Iowa—Droegmiller v Olson, supra, n 4

Pa—Miller v Butterworth, 40 Mun 188, 31 West Co 55—Com v Gorham, 56 Lack Jur 189

Tex—Soule v Galveston County, Civ App, 246 S W 2d 491, err ref

Evidence held sufficient

Neb—Town of Everett, Burt County v Teigeler, 77 N W 2d 467, 162 Neb 769

Counterclaim

Pa—Com v Devlin, 23 D & C 2d 552, 76 Dauph 27

50. Iowa—Droegmiller v Olson, supra, n 4

Ohio—Grasley v Eppley, 114 N E 2d 742

54. Pa—Messinger v Washington Tp, 137 A 2d 890, 185 Pa Super 554

Land purchased subsequent to construction of drain

Iowa—Perkins v Palo Alto County, 60 N W 2d 562, 245 Iowa 310

§ 190. —— Drainage Districts

58. Iowa—Drainage Dist No 119, Clay County v Incorporated City of Spencer, 268 N W 2d 493

§ 191. Lighting and Lighting Districts

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59. Cal—Fischer v Shasta County, 299 P 2d 222, 46 C 2d 771

Interstate highways

Ohio—State ex rel City of Cleveland v Masheter, 221 N E 2d 704, 8 Ohio St 2d 11

§ 192. Proceedings for Improvement of Highways and for Construction of Free Gravel Roads or Turnpikes

Library References

Highways ⇐107

Modern Legal Forms Ch. 48 Notices.

62. Md—Eggert v Montgomery County Council, 282 A 2d 474, 263 Md 243

N Y—In re Van Tassell, 283 N Y S 2d 743, 54 Misc 2d 989

Pa—Mt Lebanon Tp v Scheck, 48 A 2d 53, 159 Pa Super 189

Statutes construed

Or—Moore Mill & Lumber Co v Foster, 337 P 2d 810, 216 Or 204

Delay in filing action unreasonable

U S—Centerview/Glen Avalon Homeowners Ass'n v Brinegar, D C Cal, 367 F Supp 633

63. Ohio—City of Lakewood v Thormyer, 168 N E 2d 289, 171 Ohio St 135

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71. Wis—Zache v Town of West Bend, 67 N W 2d 301, 268 Wis 291

§ 193. —— Submission of Question to Vote

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Fla—State v Dade County, 125 So 2d 833

91. D C—D C Federation of Civic Associations, Inc v Volpe, C A, 434 F 2d 436, 140 U S App D C 162, on remand, D C, 316 F Supp 754, revd on oth grds, C A, 459 F 2d 1231, 148 U S App D C 207 cert den 92 S Ct 1290, 405 U S 1030, 31 L Ed 2d 489, app after remand 520 F 2d 451, 172 U S App D C 51, on remand, D C, 71 F R D 206

§ 194. —— Commissioners or Viewers

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27. Pa—In re Change of Location and Lines of Highway Known as State Highway Route 222, Stonycreek Tp, Cambria County, 20 Cambria 214

§ 195. —— Hearing and Record

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43. D C—D C Federation of Civic Associations, Inc v Volpe, C A, 434 F 2d 436, 140 U S App D C 162 On remand, D C, 316 F Supp 754, revd on oth grds, C A, 459 F 2d 1231, 148 U S App D C 207, cert den 92 S Ct 1290, 405 U S 1030, 31 L Ed 2d 489, app after remand 520 F 2d 451, 172 U S App D C 51, on remand, D C, 71 F R D 206

Nev—Linnecke v Department of Highways, 348 P 2d 235, 76 Nev 26

44. Nev—Linnecke v Department of Highways, 348 P 2d 235, 76 Nev 26

§ 196. —— Appeal and Certiorari

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59. Md—Eggert v Montgomery County Council, 282 A 2d 474, 263 Md 243

Ohio—Ahrens v Board of County Com'rs of Hamilton County, 97 N E 2d 722, app dism 93 N E 2d 286, 154 Ohio St 73—C J S quoted in City of Lakewood v Thormyer, 154 N E 2d 777, 784, affd 157 N E 2d 431, 111 Ohio App 403, affd 168 N E 2d 289, 171 Ohio St 135

60. Ohio—City of Lakewood v Thormyer, 168 N E 2d 289, 171 Ohio St 135

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65. Ohio—C J S cited in City of Lakewood v Thormyer, 154 N E 2d 777, 781, affd 157 N E 2d 431, 111 Ohio App 403, affd 168 N E 2d 289, 171 Ohio St 135—City of Lakewood v Thormyer, 168 N E 2d 289, 171 Ohio St 135

66. Ohio—City of Lakewood v Thormyer, 168 N E 2d 289, 171 Ohio St 135

§ 198. Compelling Construction, Improvement, or Repair and Remedies for Breach of Duty

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82. Cal —City of Fresno v California Highway Commission, 173 Cal Rptr 671, 118 C A 3d 687
Conn.—Town of Waterford v Cone, 196 A 2d 767, 151 Conn 702
Iowa—Licht v Ehlers, 13 N W 2d 688, 234 Iowa 1331
Ky.—Madison Fiscal Court v Edester, 190 S W 2d 695, 301 Ky 1
Md —Board of County Com'rs of Harford County v MacPhail, 133 A 2d 96, 214 Md 192
Mich —Board of County Road Com'rs of Oakland County v Michigan State Highway Commission, 261 N W 2d 329, 79 Mich App 505
Minn —St Paul Area Chamber of Commerce v Marzitelli, 258 N W 2d 58
N J —Wayne Tp v Passaic County, 312 A 2d 168, 125 N J Super 546, affd in part, revd in part, 332 A.2d 207, 132 N J Super 42
N Y.—Bogner-Settel Lumber Co, Inc v Town of Liberty, 392 N Y S 2d 545, 89 Misc 2d 751
Pa —Merner v Department of Highways, 3 Bucks 113, affd 101 A 2d 759, 375 Pa 609
Va —Ord v Fugate, 152 S E 2d 54, 207 Va 752

83. Ala —Pruett v Las Vegas, Inc, 74 So 2d 807, 261 Ala 557
Ga.—Southern Ry Co v State Highway Dept, 134 S.E.2d 12, 219 Ga 430
Mont —State Highway Commission v Danielsen, 409 P 2d 443, 146 Mont 539
Tex —Dennett v Dancy, Civ App, 10 S W 2d 1057, err ref
W Va —Brady v Smith, 79 S E 2d 851, 139 W Va 306

Absence of appeal

Vt —Town of Woodstock v Cleveland, A 2d 691, 125 Vt 510

84. Me —Board of Selectmen, Town of China v Kennebec County Com'rs, 393 A 2d 526
Minn —In re Maintenance of Road Areas Snown on Plat of Suburban Estates, 250 N W 2d 827, 311 Minn. 446
N Y —McCreary v Town of Thurston, 90 N Y S 2d 184, 275 App Div 424, affd 91 N E 2d 333, 300 N Y 683—Feuor v Brenning, 115 N Y S 2d 184, 201 Misc 792 affd 112 N Y S 2d 382, 279 App Div 1033, affd 110 N E 2d 173, 304 N Y 881
Vt.—Town of Woodstock v Cleveland, 218 A 2d 691, 125 Vt 510

85. Ga —Swiney v De Kalb County, 117 S E 2d 559, 102 Ga App 731
Ohio—State ex rel Ramey v Township Trustees of Porter Tp, Scioto County, 277 N E 2d 245, 28 Ohio Misc 215

Parties

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N Y —East Bay Contracting Co v State, 298 N Y S 2d 337, 59 Misc 2d 220

72. Miss —O J Stanton and Co, Inc v Mississippi State Highway Commission, 370 So 2d 909

74. U S —U S v Johnson, C C A Or, 153 F 2d 846

N Y —Ruggiano & Son Corp v State, 110 N Y S 2d 770, 201 Misc 690, motion den 114 N Y S 2d 567, 202 Misc 368—Bantelman v State, 221 N Y S 2d 615, 30 Misc 2d 698

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76. U S —Forsgren v Gilhoz, D C Ark, 123 F Supp 231

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89. N Y —Deverho Const Co, Inc v State, 407 N Y S 2d 399, 94 Misc 2d 1053

91 Cal —Bear River Sand & Gravel Corp v Placer County supra, n 76

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96. Fla —Ashland Oil & Refining Co v State Road Dept, App, 343 So 2d 878

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N C —Nello L Teer Co v North Carolina State Highway Commission, 166 S E 2d 705, 2 N C App 126

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(5) Other contracts

U S —Foshee v Daoust Const Co, C A Ind, 185 F 2d 23—Fidelity & Cas Co of New York v Dykstra, D C Minn, 208 F Supp 717—North Denver Bank v U S, 432 F 2d 466, 193 Ct Cl 225—Anthony Grace & Sons, Inc v U S, 433 F 2d 766, 193 Ct Cl 248

Ark —Ben M Hogan Co, Inc v Nichols, 496 S W 2d 404, 254 Ark 771

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S D—Brezina Const Co, Inc v South Dakota Dept of Transp, 297 N W 2d 168

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(5) La—Makofsky v Department of Highways, La App, 12 So 2d 485, mod on oth grds, 18 So 2d 605, 205 La 1029

(7) Other contracts

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Miss—Edward E. Morgan Co v State Highway Commission, 54 So 2d 742, 212 Miss 504

Mo—Denton Const Co v Missouri State Highway Commission, 454 S W 2d 44

N Y—Rusciano & Son Corp v State, 110 N Y S 2d 770, 201 Misc 690, motion den 114 N Y S 2d 567, 202 Misc 368—Carlo Bianchi & Co v State, 230 N Y S 2d 471, 17 A D 2d 38, rearg den 233 N Y S 2d 239, 17 A D 2d 896, affd 268 N E 2d 121, 28 N Y 2d 536, 319 N Y S 2d 439—Twin Village Const Corp v State, 421 N E 2d 827, 53 N Y 2d 724, 439 N Y S 2d 335

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N Y—Fehlhaber Corp v State, 312 N Y S 2d 123, 63 Misc 2d 298, am on oth grds 314 N Y S 2d 574, 64 Misc 2d 167, affd 337 N Y S 2d 42, 40 A D 2d 881

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8. La—Makofsky v Department of Highways, supra, n 5

N H—Peter Salvucci & Sons, Inc v State, 268 A 2d 899, 110 N H 136, reaffd 281 A 2d 164, 111 N H 259

N Y—Johnson, Drake & Piper, Inc v State, 259 N Y S 2d 685, 46 Misc 2d 303

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N Y—Armco Drainage & Metal Products, Inc v State, 156 N Y S 2d 90, 3 Misc 2d 803, affd 165 N Y S 2d 276, 4 A D 2d 366—Yonkers Contracting Co v New York State Thruway Authority, 270 N Y S 2d 16 25 A D 2d 811, affd 245 N E 2d 800, 23 N Y 2d 856, 298 N Y S 2d 67

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9. N Y—Johnson, Drake & Piper, Inc v State, 259 N Y S 2d 685, 46 Misc 2d 303

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(3) Other instances

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29 U S—Roberts v U S, 357 F 2d 938, 174 Ct Cl 940

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33. La—Freeman v Department of Highways, App, 197 So 2d 188, affd 217 So 2d 166, 253 La 105

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40. Minn—McCree & Co v State, 91 N W 2d 713, 253 Minn 295

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41. N Y—Peru Associates, Inc v State, 334 N Y S 2d 772, 70 Misc 2d 775, 335 N Y S 2d 373, 39 A D 1018

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57. Mich—Charles J Rogers, Inc v State, 194 N W 2d 203, 36 Mich App 620

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58. N Y—S J Groves & Sons Co v State, 264 N Y S 2d 198, 24 A D 2d 829 Mod on oth grds 244 N E 2d 708, 23 N Y 2d 775, 297 N Y S 2d 140

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N Y—John Arborio, Inc v State, 245 N Y S 2d 274, 41 Misc 2d 145

59. N Y—Bero Const Corp v State, 354 N Y S 2d 477, 44 A D 2d 735

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N Y—East Bay Contracting Co v State, 298 N Y S 2d 337, 59 Mis. 2d 220

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U S—Roberts v U S, 357 F 2d 938, 174 Ct Cl 940

61. Cal—Wiechmann Engineers v State ex rel Dept of Public Works, App, 107 Cal Rptr 529, 31 C A 3d 741

N Y—Yonkers Contracting Co v New York State Thruway Authority, 270 N Y S 2d 16, 25 A D 2d 811, affd 245 N E 2d 800, 23 N Y 2d 856, 298 N Y S 2d 67—Yonkers Contracting Co v New York State Thruway Authority, 250 N E 2d 27, 25 N Y 2d 1, 302 N Y S 2d 521

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73. Particular contracts construed

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77. La—Barnhill Bros, Inc v Louisiana Dept of Highways, App, 147 So 2d 650

78. Hawaii—E E Black, Limited v State, 439 P 2d 213, 50 Haw 267

79. Minn – Megarry Bros, Inc v State, 188 N W 2d 919, 291 Minn. 12

84. Ill—Contracting & Material Co v City of Chicago, 349 N E 2d 389, 64 Ill 2d 21

Kan—Freeto v State Highway Commission, 166 P 2d 728, 161 Kan 7

Neb—Appeal of Francis R Orshek Co, 119 N W 2d 48, 174 Neb 668

85. Waiver of request for extension

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87.1. Md—McKaig v Mayor and City Council of Cumberland, 116 A 2d 384, 208 Md 95

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91. Wash—Wilson v Wright, 329 P 2d 461, 52 Wash 2d 805

92. Ga—State Highway Dept v Hewitt Contracting Co, 155 S E 2d 422, 115 Ga.App 606

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97. Time as essential element

N Y—D'Onfro v State, 59 N Y S 2d 205, 270 App Div 9

99. U S—Morrison-Knudsen Co v U S, 397 F 2d 826, 184 Ct Cl 661

Ga—State Highway Dept v Knox-Rivers Const Co, 160 S E 2d 641, 117 Ga App 453

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Neb—In re Roberts Const Co, 111 N W 2d 767, 172 Neb 819

N Y—Tehlhaber Corp v State, 312 N Y S 2d 123, 63 Misc 2d 298, am on oth grds 314 N Y S 2d 574, 64 Misc 2d 167, affd 337 N Y S 2d 42, 40 A D 2d 881

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(3) Other statements

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9. Ky—Humphreys v J B Michael & Co, 341 S W 2d 229

La—Freeman v Department of Highways, App, 197 So 2d 188, affd 217 So 2d 166, 253 La 105—Freeman v Department of Highways, 217 So 2d 166, 253 La 105

Mass—Wes-Julian Const Corp v Com, 223 N E 2d 72, 351 Mass 588

Pa—Acchione v Com, 53 Dauph Co. 271, affd. 32 A.2d 764, 347 Pa 562

13. Neb—In re Roberts Const Co, 111 N W 2d 767, 172 Neb 819

14. Ky.—Humphreys v J B Michael & Co, 341 S.W 2d 229

15. N.Y—Grandview Const Corp v State, 124 N Y S.2d 10, 204 Misc 389—County Excavation, Inc. v State, 255 N Y S 2d 708, 44 Misc 2d 1057

Rent of equipment kept on site

N Y—H L. Baughman, Inc v New York Thruway Authority, 221 N Y S 2d 656, 30 Misc 2d 1002—Anders v State, 248 N Y S 2d 4, 42 Misc 2d 276

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N Y—D'Angelo v State, 362 N Y S 2d 283, 46 A D 2d 983, app dism 328 N E 2d 789, 36 N Y 2d 730, 368 N Y S 2d 159, affd 350 N E 2d 615, 39 N Y 2d 781, 385 N Y S 2d 284

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18. Conn—State v Hartford Acc & Indem Co, 70 A 2d 109, 136 Conn 157

Ky.—Humphreys v J B Michael & Co, 341 S W 2d 229

19. N Y—A W Banko, Inc, v State, 60 N Y S 2d 758, 186 Misc 491

20. N Y—Carlo Bianchi & Co v State, 212 N Y S 2d 266, 27 Misc 2d 524

21. N Y—County Excavation, Inc v State, 255 N Y S 2d 708, 44 Misc 2d 1057

Or.—Eldon v Chandler, 275 P 2d 748, 202 Or 407

23. N Y—Terry Contracting, Inc v State, 273 N Y S 2d 528, 51 Misc 2d 545, revd 280 N Y S 2d 450, 27 A D 2d 499—Ingalls Iron Works Co v Fehlhaber Corp, 285 N Y S 2d 369, 29 A D 2d 29, app den 239 N E 2d 202, 22 N Y 2d 719, 292 N.Y S 2d 105, affd 248 N E 2d 923, 24 N Y 2d 862, 301 N Y S 2d 95

24. Miss—State ex rel Summer v Denton, 382 So 2d 461, 11 A L R 4th 813

Pa.—Hewes v McWilliams, 194 A 2d 339, 412 Pa 270

31. N Y—Ingalls Iron Works Co v Fehlhaber Corp, 285 N Y S 2d 369, 29 A D 2d 29, app den 239 N E 2d 202, 22 N Y 2d 719, 292 N Y S 2d 105, affd 248 N E 2d 923, 24 N Y 2d 862, 301 N Y S 2d 95

Latent defects

U S—Roberts v U S, 357 F 2d 938, 174 Ct Cl 940

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39. U S—Roberts v U.S, 357 F 2d 938, 174 Ct Cl 940

40. **Work held "extra work"**

Ga.—State Highway Dept v Wright Contracting Co, 131 S E 2d 808, 107 Ga App 758, 1 A L R 3d 1260

N Y—Twin Village Const Corp v State, 407 N Y S 2d 366, 64 A D 2d 866, revd, 421 N E 2d 827, 53 N Y 2d 724, 439 N Y S 2d 335

Unknown subsurface conditions held not anticipated with reasonable diligence

Ga.—State Highway Dept v Wright Contracting Co, 131 S.E.2d 808, 107 Ga App 758, 1 A L R 3d 1260

No requirement to make independent subsurface investigation

N Y—County Asphalt, Inc v State, 337 N Y S 2d 415, 40 A D 2d 26

41. U.S.—Clack v U S., 395 F 2d 773, 184 Ct Cl 40

N Y—Michael v State, 79 N Y S.2d 107, 192 Misc 464, mod on oth grds, 80 N Y S 2d 79, 192 Misc 464, affd 93 N Y S 2d 234, 276 App Div 806

Okl—State Highway Commission v Green-Boots Const Co, 187 P 2d 209, 199 Okl 477

Or—Morrison v State By and Through State Highway Commission, 357 P 2d 389, 225 Or 178, 85 A L R 2d 203.

Pa—C J Langenfelder & Son, Inc v Com., Dept of Transp, 404 A 2d 745, 44 Pa Cmwlth 585

Tex—State v F & C Engineering Co Civ.App., 438 S W 2d 647, err ref no rev err

42. U S—First-Citizens Bank & Trust Co v U S, 76 F Supp 250, 110 Ct Cl 280—Roberts v U.S., 357 F 2d 938, 174 Ct Cl 940

Alaska—Mat-Su/Blackard/Stephan & Sons v State, 647 P 2d 1101

Ga—State Highway Dept v MacDougald Const Co, 115 S E 2d 863, 102 Ga App 254—State Highway Dept v W L Cobb Const Co, 143 S E 2d 500, 111 Ga App 822

Hawaii—J A Thompson & Son, Inc v State, 465 P 2d 148, 51 Haw 529, 672

Mo—Rock Hill Asphalt & Const Co v State Highway Commission of Mo, 452 S W 2d 810

Nev—Helms Const and Development Co v State, ex rel Dept of Highways, 634 P 2d 1224, 97 Nev 500

N Y—Savin Bros, Inc v State, 405 N Y S 2d 516, 62 A D 2d 511, affd 393 N E 2d 1041, 47 N Y 2d 934, 419 N Y S 2d 969

N C—Nello L Teer Co v North Carolina State Highway Commission, 166 S E 2d 705, 4 N C App 126

Ohio—Condon-Cunningham, Inc v Day, 258 N E 2d 264, 22 Ohio Misc 71

Okl—State Highway Commission v Green-Boots Const Co, supra, n 41

Or—Morrison v State By and Through State Highway Commission, 357 P 2d 389, 225 Or 178, 85 A L R 2d 203

Pa—Central Penn Industries, Inc v Com, Dept of Transp, 358 A 2d 445, 25 Pa Cmwlth 25

S D—Alexander v State, 57 N W 2d 121, 74 S D 593

Tex—State v F & C Engineering Co, Civ App, 438 S W 2d 647, err ref no rev err

43. U S—First-Citizens Bank & Trust Co v U S, supra, n 42

N Y—Fehlhaber Corp v State, 312 N Y S 2d 123, 63 Misc 2d 298, am on oth grds 314 N Y S 2d 574, 64 Misc 2d 167, affd 337 N Y S 2d 42, 40 A D 2d 881

Or—Morrison v State By and Through State Highway Commission, 357 P 2d 389, 225 Or 178, 85 A L R 3d 203

Wash—Hamilton v Whittaker, 186 P 2d 609, 29 Wash 2d 173

Risk of relying on preliminary estimate

Hawaii—J A Thompson & Son, Inc v State, 465 P 2d 148, 51 Haw 529, 672

Mo—Webb-Boone Paving Co v State Highway Commission, 173 S W 2d 580, 351 Mo 922

Recovery not precluded by provision in contract

Pa—Gasparini Excavating Co v Pennsylvania Turnpike Commission, 187 A 2d 157, 409 Pa 465

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44. U S—First-Citizens Bank & Trust Co v U S, supra, n 42—J G Watts Const Co v U S, 355 F 2d 573, 174 Ct Cl 1—Clack v U S, 395 F 2d 773, 184 Ct Cl 40

Mass—Farina Bros Co v Com, 257 N E 2d 450, 357 Mass 131—Alpert v Com, 258 N E 2d 755, 357 Mass 306

Minn—McCree & Co v State, 91 N W 2d 713, 253 Minn 295

Mo—Denton Const Co v Missouri State Highway Commission, 454 S W 2d 44

Mont—Kiely Const Co v State By and Through State Highway Commission, 463 P 2d 888, 154 Mont 363

N Y—D'Angelo v State, 362 N Y S 2d 283, 46 A D 2d 983, app dism 328 N E 2d 789, 36 N Y 2d 730, 368 N Y S 2d 159, affd 350 N E 2d 615, 39 N Y 2d 781, 258 N E 2d 264, 22 Ohio Misc 71

Ohio—Condon-Cunningham, Inc v Day, 385 N Y S 2d 284

Pa—Pennsylvania Turnpike Commission v Smith, 39 A 2d 139, 350 Pa 355—Board of Arbitration v Department of Highways, 82 Dauph 79

Utah—Thorn Const. Co., Inc. v. Utah Dept of Transp., 598 P 2d 365

Underrun-overrun

U S—Morrison-Knudsen Co v U S, 397 F 2d 826, 184 Ct Cl 661

Wash—Bignold v King County, 399 P 2d 611, 65 Wash 2d 817

Misrepresentation

N Y—County Asphalt, Inc v State, 337 N Y S 2d 415, 40 A D 2d 26

45. U S—First-Citizens Bank & Trust Co v. U.S., 76 F Supp. 250, 110 Ct Cl 280—Morrison-Knudsen Co v U S, 397 F 2d 826, 184 Ct Cl 661—Radcliff Materials, Inc v Gaines P Wilson & Son, Inc, C A La, 451 F 2d 1385

Mass—Wes-Julian Const Corp v Com, 223 N E 2d 72, 351 Mass 588

N Y—L G DeFelice & Son Inc v State, 313 N Y S 2d 21, 63 Misc 2d 357

N C—Nello L Teer Co v North Carolina State Highway Commission, 166 S E 2d 705, 4 N C App 126

S D—State Highway Commission v J H Beckman Const Co, 171 N W 2d 504, 84 S D 337

47. U S—First-Citizens Bank & Trust Co v U S, supra, n 42

Ga—State Highway Dept v Hewitt Contracting Co, 155 S E 2d 422, 115 Ga App 606

Mass—Campanella & Cardi Const Co v Com, 158 N E 2d 304, 339 Mass 231—Wes-Julian Const Corp v Com, 223 N E 2d 72, 351 Mass 588—Farina Bros Co v Com, 257 N E 2d 450, 357 Mass 131

Mich—Washtenau Asphalt Co v State, 201 N W 2d 277, 42 Mich App 132

Mont—Kiely Const Co v State By and Through State Highway Commission, 463 P 2d 888, 154 Mont 363

N Y—L B Foster Co v Terry Contracting, Inc, 310 N Y S 2d 76, 34 A D 2d 638, motion den 261 N E 2d 413, 27 N Y 2d 612, 313 N Y S 2d 416

S D—Alexander v State, supra, n 42

Wash—Bignold v King County, 399 P 2d 611, 65 Wash 2d 817

49. U S—Raymond Constructors of Africa, Limited v U S, 411 F 2d 1227, 188 Ct Cl 147

Ala—McFarland v McKee, 41 So 2d 574, 252 Ala 434

Mont—Sandkay Const Co v State, 399 P 2d 1002, 145 Mont 180

N Y—Rizzuto v State, 48 N Y S 2d 135—Tufano Contracting Corp v State, 281 N Y S 2d 699, 28 A D 2d 951, affd 257 N E 2d 901, 26 N Y 2d 823, 309 N Y S 2d 355

N C—S J Groves & Sons and Co v State, 273 S E 2d 465, 50 N C App 1

Pa—C J Langenfelder & Son, Inc v Com, Dept of Transp, 404 A 2d 745, 44 Pa Cmwlth 585

No right to extra compensation

(2) Other instances

U S—Clark v U S, 395 F 2d 773, 184 Ct Cl 40

Ky—Trentz v Van Arsdale, 331 S W 2d 734

La—Freeman v Department of Highways, 217 So 2d 166, 253 La 105

Mass—M De Matteo Const Co v Com, 156 N E 2d 659, 338 Mass 568—Daniel O'Connell's Sons, Inc v Com, 212 N E 2d 219, 349 Mass 642

Mich—Rieth-Riley Const Co, Inc v Department of Transp, 357 N W 2d 62, 136 Mich App 425

N Y—Slattery Contracting Co v State, 288 N Y S 2d 126, 56 Misc 2d 111

Pa—Maryland Cas Co v Darby Tp, 47 Del 121, 51 Mun 252, exceptions dism in part 20 D & C 2d 543, 47 Del 274, affd 160 A 2d 706, 399 Pa 492—J E Brenneman Co v Com, Dept of Transp, 424 A 2d 592, 56 Pa Cmwlth 210

S D—Northern Imp Co v South Dakota State Highway Commission, 267 N W 2d 208, app after remand 314 N W 2d 857

Increase in rates paid to truckers

Neb.—Appeal of Francis R Orshek Co, 119 N W 2d 48, 174 Neb 668

Petition held sufficient

Ga—State Highway Dept v Hewitt Contracting Co, 155 S E 2d 422, 115 Ga App 606

80. N C—Nello L Teer Co v North Carolina State Highway Commission, 166 S E 2d 705, 4 N C App 126

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U S—Morrison-Knudsen Co v U S, 397 F 2d 826, 184 Ct Cl 661

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U S—Gallagher v Continental Ins Co, C A Colo, 502 F 2d 827

51. N Y—Defoe Const Corp v Beame, 347 N Y S 2d 626, 75 Misc 2d 309

N C—Nello L Teer Co v North Carolina State Highway Commission, 166 S E 2d 705, 4 N C App 126

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Fla—State, Dept of Transp v Edward M Chadbourne, Inc, 382 So 2d 293

52. Ala—McFarland v McKee, supra, n 49

Ga—State Highway Dept v Hewitt Contracting Co, 149 S E 2d 499, 113 Ga App 685

Requirement held waived

Ga—State Highway Dept v Wright Contracting Co, 131 S E 2d 808, 107 Ga App 758, 1 A L R 3d 1260

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53. Del—State v Dabson, 217 A 2d 497, 9 Storey 270

Del—Kuhn Const Co v State Acting Through Price, Super, 248 A 2d 612

Ga—State Highway Dept v Wright Contracting Co, 131 S E 2d 808, 107 Ga App 758, 1 A L R 3d 1260—State Highway Dept v Hewitt Contracting Co, 149 S E 2d 499, 113 Ga App 865

N Y—Michael v State, supra, n 41—County Excavation, Inc v State, 255 N Y S 2d 708, 44 Misc 2d 1057—Johnson, Drake & Piper, Inc v State 287 N Y S 2d 480, 29 A D 2d 793

Or—Savage v Peter Kiewit Sons' Co, 432 P 2d 519, 249 Or 147, mod on oth grds, 437 P 2d 487, 249 Or 147, app after remand 461 P 2d 59, 254 Or 411

Pa—Com, Dept of Transp v Buckley & Co, Inc, 350 A 2d 438, 23 Pa Cmwlth 18

54. Mass—State Line Contractors, Inc v Com, 249 N E 2d 619, 356 Mass 306

55. U S—Clack v U S, 395 F 2d 773, 184 Ct Cl 40

Mass—State Line Contractors, Inc v Com, 249 N E 2d 619, 356 Mass. 306—Farina Bros Co v Com, 257 N E 2d 450, 357 Mass 131

N Y—D'Angelo v State, supra, n 42—Tufano Contracting Corp v State, 281 N Y S 2d 699, 28 A D 2d 951, affd 257 N E 2d 901, 26 N Y 2d 823, 309 N Y S 2d 355

N C—S J Groves & Sons and Co v State, 273 S E 2d 465, 50 N C App 1

Waiver of notice

U S—Morrison-Knudsen Co v U S, 397 F 2d 826 184 Ct Cl 661

56. Cal—A Teichert & Son, Inc v State, 48 Cal Rptr 225, 238 C A 2d 736

60. Mo—Webb-Boone Paving Co v State Highway Commission, 173 S W 2d 580, 351 Mo 922

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65. N Y—A W Banko v State, 46 N Y S 2d 558—Johnson, Drake & Piper, Inc v New York State Thruway Authority, 255 N Y S 2d 368, 22 A D 2d 321

Wash—Saddler v State, 401 P 2d 848, 66 Wash 2d 215

68. U S—Morrison-Knudsen Co v U S., 397 F 2d 826, 184 Ct Cl 661

N Y—Nugent v State, 40 N Y S 2d 361, 265 App Div 549, rearg gr 41 N Y S 2d 956, 266 App Div 759—A W Banko v State, supra, n 45

70. Pa—Bertocci v Com, Dept of Highways, 360 A 2d 247, 25 Pa.Cmwlth 213

Reduction not duress

Mich—Cooke Contracting Co v State, 217 N W 2d 435, 52 Mich App 402

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5. Del—Kuhn Const Co v. State Acting Through Price, Super, 248 A 2d 612

Prior statute held repealed by later one

Ark—Great Am Indem Co. of N Y v State ex rel Arkansas Bitumuh Co, 328 S W 2d 504, 231 Ark 181

Gross discrepancy between work done and payments made as indicating gross mistake or fraud

Ga—State Highway Dept v W L Cobb Const Co, 143 S E 2d 500, 111 Ga App 822

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5. Ohio—Condon-Cunningham, Inc v Day, 258 N E 2d 264, 22 Ohio Misc 71

Filing claims with state auditor

Wyo—Rissler & McMurry Co v Wyoming Highway Dept, 582 P 2d 583

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6. Okl—State Highway Commission v Green-Boots Const Co, 187 P 2d 209, 199 Okl 477

15. Pa—M Glosser & Sons, Inc v Micco, 309 A 2d 602, 10 Pa Cmwlth 320

23. Pa—Teer Co v Com, 74 Dauph 181

Defective claim waived

Pa—Board of Arbitration v Department of Highways, 82 Dauph 79

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Del—Kuhn Const Co v State Acting Through Price, Super, 248 A 2d 612

N C—Nello L Teer Co v North Carolina State Highway Commission, 143 S E 2d 247, 265 N C 1

24. Del—Wilson Contracting Co v State, Super, 243 A 2d 65—Kuhn Const Co v State Acting Through Price, Super, 248 A 2d 612

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25. Del—State v Dabson, 217 A 2d 497 9 Storey 240—Kuhn Const Co v State Acting Through Price, Super, 248 A 2d 612

Ga—John Monaghan, Inc v State Highway Dept, 58 S E 2d 242, 81 Ga App 289

31. N Y—A W Banko, Inc, v State, 60 N Y S 2d 758, 186 Misc 491

33. Conn—State v Hartford Acc & Indem Co, 70 A 2d 109, 136 Conn 157

36. Conn—State v Hartford Acc & Indem Co, 84 A 2d 579, 138 Conn 334

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43. Conn—Anderson Const Corp v Savin Bros, Inc, 280 A 2d 349, 160 Conn 438

Joint adventure

Wyo—Dunn v Gilbert, 254 P 121, 36 Wyo 249

44. U S—A T Smith and Sons v N P Van Valkenburgh Co, C A Cal, 337 F 2d 702

Ark—Wade v Pioneer Contracting Co, 424 S W 2d 852, 244 Ark 297

La—Campbell Const Co v Barnhill Bros, Inc, App, 245 So 2d 776

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53. Or—State ex rel Salem Pac Corp v Combo Const Co, 458 P 2d 410, 254 Or 89

54. Ark—Wade v Pioneer Contracting Co, 424 S W 2d 852, 244 Ark 297

61. La—Campbell Const Co v Barnhill Bros Inc App, 245 So 2d 776

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Where subcontractors are intended to be included in a contract, the liability of the state under the contract extends to such subcontractors.[67.5]

67.5. N Y—Armco Drainage & Metal Products, Inc v State, 156 N Y S 2d 90, 3 Misc.2d 803, affd 165 N Y S 2d 276, 4 A D.2d 366

68. Anticipated profits improper measure of damages

Tex—South Builders, Inc v Brown, Civ App, 449 S W 2d 542, err ref no rev err

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82. Mont—Hash v R J Sundling & Son, Inc, 436 P 2d 83, 150 Mont 388

84. Iowa—Hercules Mfg Co v Burch, 16 N W 2d 350, 235 Iowa 568

Wis—In re Bossell, Van Vechten and Chapman, 140 N W 2d 255, 30 Wis.2d 215

Purpose of statute

Iowa—Sinclair Refining Co v Burch, 16 N W 2d 359, 235 Iowa 594

90. La—Carr Oil Co, Inc v. Donald G Lambert Contractor, Inc, App, 380 So 2d 157, writ den, Sup, 383 So 2d 24

91. U S—U S v Com of Pa, Dept of Highways, D C Pa, 349 F Supp 1370

N Y—Hartford Acc & Indem Co v Ritter, 331 N Y S 2d 471, 69 Misc 2d 981

Statutory trust

(3) Other statements

Mass—J J Struzziery Co v A V Taurasi Co, 165 N E 2d 120, 340 Mass 481

Wis—In re Bossell, Van Vechten and Chapman, 140 N W 2d 255, 30 Wis 2d 215

Filing of claims

(9) Other statements

Ky—Whayne Supply Co v Morgan Const Co, 440 S W 2d 779

Priority

(3) Other cases

Iowa—Sinclair Refining Co v Burch, supra, n 84

Mass—J J Struzziery Co v A V Taurasi Co, 165 N E 2d 120, 340 Mass 481

Statute construed

Iowa—Hercules Mfg Co v Burch, supra, n 84—Sinclair Refining Co v Burch, supra, n 84

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N H—New England Metal Culvert Co v A E Williams Const Co, 196 A 2d 713, 105 N H 235

Retention authorized

N H—State v A D Ingalls, Inc, 197 A 2d 214, 105 N H 244

Statute not limited to contracts for less than $2,000

Tex—Trinity Universal Ins Co v McLaughlin, Civ App, 373 S W 2d 66, reh den 374 S W 2d 350

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Mont—General Ins Co of America v State Highway Commission, 414 P 2d 526, 147 Mont 450

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92. N H—State v A D Ingalls, Inc, 197 A 2d 214, 105 N H 244

Pa—Jacobs v Northeastern Corp, 206 A 2d 49, 416 Pa 417, 11 A L R 3d 1220

93. Wis—In re Bossell, Van Vechten and Chapman, 140 N W 2d 255, 30 Wis 2d 215

95. Mass—J J Struzziery Co v A V Taurasi Co, 165 N E 2d 120, 340 Mass 481

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97. Materialman's right not dependent upon status of accounts between contractor and subcontractor

Tex—John F Buckner & Sons v Arkansas Fuel Oil Corp, Civ App, 301 S W 2d 325

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4. Wash—Union Oil Co of Cal v Turner, 207 P 2d 733, 34 Wash 2d 25

9. Cal—Grigsby v Ross, 33 P 2d 450, 138 Cal App 757

Wis.—Boehek Const Equipment Corp v Voigt, 115 N W 2d 627, 17 Wis 2d 62, reh den 117 N W 2d 372, 17 Wis 2d 62

No lien on highway

Ariz—Wells-Stewart Const. Co v Martin Marietta Corp., 442 P 2d 119, 103 Ariz 375

Iowa—Cities Service Oil Co v Longerbone, 6 N W 2d 325, 232 Iowa 850

10. N Y—Dorn v Arthur A Johnson Corp., 229 N Y S 2d 266, 16 A D 2d 1009

11. Notice of lien

N Y—Application of Callanan Industries, Inc., 389 N Y S 2d 80, 88 Misc 2d 802

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16. Held not "materialman" within statute

N Y—New York Trap Rock Corporation v National Bank of Far Rockaway, 32 N Y S 2d 443, 177 Misc 954, affd 39 N Y S 2d 991, 265 App Div 994, app den 41 N Y S 2d 198, 266 App Div 655, motion den 49 N E 2d 1011, 290 N Y 745, affd 50 N E 2d 1010, 291 N Y 598, app den 68 N E 2d 15, 293 N Y 776, revd on oth grds 59 N E 2d 787, 293 N Y 884, motion den 60 N E 2d 843, 294 N Y 691

17. Fla—Belcher v Russell, App., 128 So 2d 623

Time for filing

(4) Other matters

N Y—Ingalls Iron Works Co v Fehlhaber Corp., 285 N Y S 2d 369, 29 A D 2d 29, app den 239 N E 2d 202, 22 N Y 2d 719, 292 N Y S 2d 105, affd 248 N E 2d 923, 24 N Y 2d 862, 301 N Y S 2d 95

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22. U S—Colonial Oil Co v U S Guarantee Co D C Ga., 56 F Supp 545, affd., C C A., 145 F 2d 496

Held not within statute

(14) N Y—Application of Johnson, Drake & Piper, 94 N Y S 2d 737, 197 Misc 595

(15) Other items

La—B & G Crane Service, Inc v Anderson Bros Corp., App., 132 So 2d 681—Waldrip Tire & Supply Co v Campbell Const Co., App., 158 So 2d 464

Tex—Pelphrey v Walker, Civ App., 323 S W 2d 266, err ref no rev err

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24. U S—Colonial Oil Co v U S Guarantee Co., supra, n 22

25. Tex—John F Buckner & Sons v Arkansas Fuel Oil Corp., Civ App., 301 S W 2d 325

Overruled case

Since the publication of the bound volume the case of H R Hayes Lumber Co v McConnell, 146 So 2d 14, 176 La. 431 has been overruled the court holding that the statutory lien granted to persons furnishing materials for construction of public works extended to nails, lumber and plyforms, which were consumed in construction though such items were not incorporated in the permanent structure

La—Slagle-Johnson Lumber Co., Inc v Landis Const Co., Inc., 379 So 2d 479

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43. Tex—Austin Bridge Co v Drake, Civ App., 79 S W 2d 677

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44. N Y—Geroux Haulage & Warehouse Corp v Prospect Iron Works, Inc., 197 N Y S 2d 936

Some statutes have been held not to give a lien to a supplier of a subcontractor.[49.5]

49.5. Wis—Lehmann Tire & Supply, Inc v Mashuda Const Co., 109 N W 2d 650, 14 Wis 2d 176

52. Release held valid

U S—Spanos Painting Contractors, Inc v Union Bldg & Const Corp., C A N Y 334 F 2d 457, cert den 85 S Ct 897, 380 U S 912, 13 L Ed 2d 798

§ 210. —— Contractor's Bonds

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55. Ariz—Wells-Stewart Const Co v Martin Marietta Corp., 442 P 2d 119, 103 Ariz 375

Mont—Mountain Const., Inc v Crick Co., 491 P 2d 1224, 158 Mont 345

56. Work held not within statute

Idaho—Rogers v Nez Perce County, 364 P 2d 1049, 83 Idaho 467

La—Construction Materials, Inc v American Fidelity Fire Ins Co., App., 383 So 2d 1291, revd 388 So 2d 365

Statute not retroactive

N Y—A & J Buyers, Inc v People, 284 N Y S 2d 42, 54 Misc 2d 995, affd 292 N Y S 2d 376, 30 A D 2d 775, revd on oth grds 250 N E 2d 845, 25 N Y 2d 265, 303 N Y S 2d 841

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65. Repeal of statute

U S—Fort Smith Structural Steel Co v Western Sur Co., D C Ark 247 F Supp 674

69. Verification by State

Alaska—Arctic Contractors, Inc v State, 564 P 2d 30 app after remand 573 P 2d 1385

73. Me—Carpenter v Seaboard Engineering Co., 183 A 2d 216, 158 Me 277

Or—U S Fidelity & Guaranty Co v Thomlinson-Arkwright Co., 141 P 2d 817, 172 Or 307

S D—Margulies v Ogdie, 10 N W 2d 513, 69 S D 352

74. Or—U S Fidelity & Guaranty Co v Thomlinson-Arkwright Co., supra, n 73

75. N C—State Highway Commission v L A Reynolds Co., 159 S E 2d 198, 272 N C 618

S C—Roberts v Lawrence, 133 S E 2d 74, 243 S C 158, 8 A L R 3d 1433

S D—Margulies v Ogdie, supra, n 73

76. Pa—Com to the Use of William Land, Inc v U S Fidelity & Guaranty Co., 65 Lack Jur 209

S D—C J S cited in State for Use of Don's Heavy Hauling, Inc v Frank D Malone Const Co., 129 N W 2d 900, 902, 81 S D 1

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77. N Y—Hartford Acc & Indem Co v Moraldo, 375 N Y S 2d 973, 84 Mis 2d 1082

Or—U S Fidelity & Guaranty Co v Thomlinson-Arkwright Co., supra, n 73

80. Ind—State ex rel Lawson v Warren Bros Roads Co., App., 59 N E 2d 912

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90. Ga—Goodyear Tire & Rubber Co v New Amsterdam Cas Co., 114 S E 2d 546, 101 Ga App 577

La—Lambert v Maryland Cas Co., 418 So 2d 553

Or—U S Fidelity & Guaranty Co v Thomlinson-Arkwright Co., supra, n 73

91. Or—U S Fidelity & Guaranty Co v Thomlinson-Arkwright Co., supra, n 73

Pa—Com to Use of Walters Tire Service, Inc v National Union Fire Ins Co., 252 A 2d 593, 434 Pa 235

S D—State for Use of Don's Heavy Hauling, Inc v Frank D Malone Const Co., 129 N W 2d 900, 81 S D 1

92. Ariz—Wells-Stewart Const Co v Martin Marietta Corp., 442 P 2d 119 103 Ariz 375

Or—U S Fidelity & Guaranty Co v Thomlinson-Arkwright Co., supra, n 73

Pa—Com to Use of Walters Tire Service, Inc v National Union Fire Ins Co., 252 A 2d 593, 434 Pa 235

93. La—Whitman v Central Sur & Ins Corp., App., 41 So 2d 116

94. Pa—Com., to Use of Pa Mfrs' Ass'n Cas Ins Co v Fidelity & Deposit Co of Md., 50 A 2d 211, 355 Pa 434

S D—State for Use of Don's Heavy Hauling, Inc v Frank D Malone Const Co., 129 N W 2d 900, 81 S D 1

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3. Me—Newport Trust Co v Susi, 134 A 2d 543, 153 Me 51

Purpose

N Y—State Bank of Albany v Dan-Bar Contracting Co., 199 N Y S 2d 309, 23 Misc 2d 487, affd 212 N Y S 2d 386, 12 A D 2d 416, app den 218 N Y S 2d 587, 14 A D 2d 459, affd 187 N E 2d 19, 12 N Y 2d 804, 235 N Y S 2d 835

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S D—State for Use of Farmers State Bank v Ed Cox and Son, 132 N W 2d 282, 81 S D 165

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Alaska—Arctic Contractors, Inc v State, 564 P 2d 30, app after remand 573 P 2d 1385

4. Construed strongly in favor of indemnity

S D—State for Use of Farmers State Bank v Ed Cox and Son, 132 N W 2d 282, 81 S D 165

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5. Recovery on bond without showing of damages

Md—Montgomery County v Phoenix Ins Co., 192 A 2d 111, 232 Md 58

7. Ind—State ex rel Lawson v Warren Bros Roads Co., App., 59 N E 2d 912

Ohio—Kline v Federal Ins Co., 152 N E 2d 911

Person injured on highway, etc—Foshee v Daoust Const Co., C A Ind., 185 F 2d 23

Money lender

S D—State for Use of Farmers State Bank v Ed Cox and Son, 132 N W 2d 282, 81 S D 165

13. Kan—Thompson Transport Co v Middlestates Const Co., 397 P 2d 368, 194 Kan 52, reh 403 P 2d 999, 195 Kan 172

Tex—Hastings v American General Ins Co., Civ App., 547 S W 2d 360, err ref no rev err

14. Ky—Continental Cas Co v L G Wasson Coal Min Corp., 407 S W 2d 426

Mich—Genesee County Bd of Road Com'rs v North Am Development Co., 119 N W 2d 593, 369 Mich 229

Miss—Mississippi Road Supply Co v Western Cas & Sur Co 150 So 2d 847, 246 Miss 510

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24. U S—In re Cline Const Co., D C Ky., 141 F Supp 696

Right to recover percentage withheld from contractor

U S—Southern Surety Co v Ft Smith Dist of Sebastian County, C C A Ark., 17 F 2d 63—Seaboard Sur Co v State of N D., D C N D., 94 F Supp 177

Assignment to surety of contract balances due contractor

U S—Continental Cas Co v Department of Highways, State of La., C A La., 379 F 2d 673

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25. Contract held valid

Ky—Continental Cas Co v L G Wasson Coal Mini Corp., 407 S W 2d 426

26. Purpose of condition

Mass—Bayer & Mingolla Const Co v Deschenes, 205 N E.2d 208, 348 Mass 594

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38. Me—Newport Trust Co v Susi, 134 A 2d 543, 153 Me 51

S C—Rish v Theo Bros Const Co, Inc, 237 S E.2d 61, 269 S C 226

39. Ind—State ex rel Lawson v Warren Bros Roads Co, supra, n 7

Iowa—Sinclair Refining Co v Burch, 16 N W 2d 359, 235 Iowa 594

Utah—Steel Components, Inc v U S Fidelity & Guaranty Co, 497 P 2d 646, 28 Utah 2d 25

Notice of claim

N H—New England Metal Culvert Co v A E Williams Const Co, 196 A 2d 713, 105 N H 235

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41. Tex—Seldon v S & S Aggregates Co, Civ App, 441 S W 2d 950, err ref no rev err

42. Iowa—Sinclair Refining Co v Burch, supra, n 39

44. U S—U S Guarantee Co v Colonial Oil Co, C C A Ga, 145 F 2d 496

Me—Carpenter v Susi, 121 A 2d 336, 152 Me 1

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52. Iowa—Sinclair Refining Co v Burch, supra, n 39

Minn—Elk River Concrete Products Co v American Cas Co of Reading, Pa, 114 N W 2d 655, 262 Minn 310

54. Me—Newport Trust Co v Susi, 134 A 2d 543, 153 Me 51

55. Ga—American Surety Co of New York v Koehring Co, 162 S E 840, 44 Ga App 769

Minn—Wheeler Lumber Bridge & Supply Co v Seaboard Sur Co, 16 N W 2d 519, 218 Minn 443

56. Ind—State ex rel Lawson v Warren Bros Roads Co, supra, n 7

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61. U S—U S v Com of Pa, Dept of Highways, D C Pa, 349 F Supp 1370

Ga—Whitley v Bryant, 31 S E 2d 701, 198 Ga 328

64. U S—New Amsterdam Cas Co v Carlton Co, C A Ga, 307 F 2d 881

Pa—Com to the Use of William Land, Inc v U S Fidelity & Guaranty Co, 65 Lack Jur 209

Rights of materialman independent of public's right

U S—Fort Smith Structural Steel Co v Western Sur Co, D C Ark, 347 F Supp 674

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66. Subcontractor supplying labor

(2) U.S—Lucas v Western Cas & Sur Co, C A Okl, 176 F 2d 506

Supplier of material not protected as "subcontractor"

La—Brouillette v Atlas Const Co, App, 151 So 2d 582

67. U S—Vulcan Materials Co v Betts, D C Va, 315 F Supp 1049

Ariz—Ed Stearman & Sons, Inc v State ex rel Union Rock & Materials Co, 400 P 2d 861, 1 Ariz App 192—Wells-Stewart Const Co v Martin Marietta Corp, 442 P 2d 119, 103 Ariz 375

Ill—Illinois State Toll Highway Commission ex rel Patten Tractor & Equipment Co v M J Boyle & Co, 186 N E 2d 390, 38 Ill App 2d 38

N D—Nelson v Hagen, 146 N W 2d 873

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69. N Y—Long v Ferris, 94 N Y S 2d 493, 196 Misc 567

76. Ariz—Tiffany Const Co v Hancock & Kelley Const Co, 539 P 2d 978, 24 Ariz App 504

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77. Rental of trucks

Mass—Bayer & Mingolla Const, Co v Deschenes, 205 N E 2d 208, 348 Mass 594

78. Ariz—B J Cecil Trucking Co v Tiffany Const Co, App, 597 P 2d 184, 123 Ariz 31

N H—New England Metal Culvert Co v A E Williams Const Co, 196 A 2d 713, 105 N H 235

N Y—Saw Mill Supply, Inc v Hartford Acc & Indem Co, 172 N Y S 2d 600, 11 Misc 2d 886

Fundamental test etc—Margulies v Ogdie, 10 N W 2d 513, 69 S D 352

80. U S—U S Guarantee Co v Colonial Oil Co, supra, n 44

Idaho—State ex rel Modern Motor Co v H & K Const Co, 274 P 2d 1002, 75 Idaho 492

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85 Ky—Taylor Bros, Inc v Indiana Equipment Co, 336 S W 2d 590

Determination of nature of article

(5) Other tests—Margulies v Ogdie, supra, n 78

86. Ky—Taylor Bros, Inc v Indiana Equipment Co, 336 S W 2d 590

Md—Williams Const Co v Construction Equipment, Inc 251 A 2d 864, 253 Md 60

88. Wis—Amoco Oil Co v Capital Indem Corp, App, 291 N W 2d 883 95 Wis 2d 530

89 Ariz—Wells-Stewart Const Co v Martin Marietta Corp, 442 P 2d 119, 103 Ariz 375

Md—Williams Const Co v Construction Equipment, Inc 251 A 2d 864 253 Md 60

94. S D—State for Use and Benefit of J D Evans Equipment Co, Sioux Road v Johnson, 160 N W 2d 637, 83 S D 444

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95. U S—Colonial Oil Co v U S Guarantee Co D C Ga, 56 F Supp 545, aff'd, C C A, 145 F 2d 496

Idaho—State ex rel Modern Motor Co v H & K Const Co, supra, n 80

Pa—Com to Use of Walters Tire Service, Inc v National Union Fire Ins Co, 252 A 2d 593, 434 Pa 235

96. Idaho—State ex rel Modern Motor Co v H & K Const Co, supra, n 80

La—B & G Crane Service, Inc v Anderson Bros Corp, App, 132 So 2d 681

Okl—Tway v Thompson, 16 P 2d 76, 160 Okl 279, 84 A L R 457

97. Me—Carpenter v Susi, 121 A 2d 336, 152 Me 1

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1 U S—Columbus Rock Co v Alabama General Ins Co, D C Ala, 153 F Supp 827

14. Idaho—State ex rel Modern Motor Co v H & K Const Co, 274 P 2d 1002, 75 Idaho 492

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16. La—B & G Crane Service, Inc v Anderson Bros Corp, App, 132 So 2d 681

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34. Neb—McElhose v Universal Sur Co, 158 N W 2d 228, 182 Neb 847

Tenn—Thompson & Green Machinery Co v M P Smith Const Co, 311 S W 2d 614, 44 Tenn App 26

Lease or conditional sale

(2) Other cases

Tenn—U S Fidelity & Guaranty Co v Thompson & Green Machinery Co, Inc, 568 S W 2d 821

Tex—Seldon v S & S Aggregates Co, Civ App, 410 S W 2d 231, err ref no rev err after remand 411 S W 2d 950 ref no rev err

36. Fla—United Bonding Ins Co v M D Moody & Sons, Inc, App, 213 So 2d 263

Tex—Seldon v S & S Aggregates Co, Civ App, 441 S W 2d 950, err ref no rev err

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37. In Pennsylvania, etc—Com to Use of Pandolfo v Pavia Co, 113 A 2d 224, 381 Pa 488—Com v Ambar Const Inc, 45 West 147

39. Ky—Taylor Bros, Inc v Indiana Equipment Co, 336 S W 2d 590

43. Me—Carpenter v Susi, 121 A 2d 336, 152 Me 1

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45. Me—Carpenter v Seaboard Engineering Co, 183 A 2d 216, 158 Me 277

S D—Margulies v Ogdie, 10 N W 2d 513, 69 S D 352

46. S D—Margulies v Ogdie, supra, n 45

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50. Ky—Reliance Ins Co v Com, Dept of Transp, App, 576 S W 2d 231

Unemployment compensation taxes

N M—Employment Sec Commission v C R Davis Contracting Co, 462 P 2d 608, 81 N M 23—Employment Sec Commission v Big 4 Paving, Inc, 462 P 2d 611, 81 N M 26

53. Fla—Troup Bros, Inc v State for Use and Benefit of Meadows Southern Const Co, App, 135 So 2d 755

La—Waldrip Tire & Supply Co v Campbell Const Co, App, 158 So 2d 464

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85. Me—Carpenter v Seaboard Engineering Co, 183 A 2d 216, 158 Me 277

S D—State for Use and Benefit of J D Evans Equipment Co, Sioux Road v Johnson, 160 N W 2d 637, 83 S D 444

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88. Miss—Webb v Blue Lightning Service Co, 116 So 2d 753, 237 Miss 862

92. Tires for trucks not used on project

Ark—Proctor Tire Service, Inc v National Sur Corp, 415 S W 2d 45, 242 Ark 695

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99. Pa—Com, to Use of Pa Mfrs.' Ass'n Cas Ins. Co v Fidelity & Deposit Co of Md, 50 A 2d 211, 355 Pa 434

Where the statute specifically so provides, insurance premiums are covered [15]

1.5. Claim of agent who paid insurer and took note from subcontractor

Mo—State for Use of Fager and Friesen Ins Agency v Storms-Green Const Co, App, 382 S W 2d 812

2. Ky—C.J S cited in York v Cline Const Co, 330 S W 2d 34, 37

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13. Only to extent lumber is actually consumed, etc.

Okl—Tway v Thompson, 16 P 2d 76, 160 Okl 279, 84 A L R 457

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23. Me—Carpenter v Seaboard Engineering Co, 183 A 2d 216, 158 Me 277

Okl—National Auto & Cas Ins Co of Los Angeles, Cal v Adair 292 P 2d 403

24. Kan—Thompson Transport Co v Middlestates Const Co, 397 P 2d 368, 194 Kan 52, reh 403 P 2d 999, 195 Kan 172

Pa—Com to the Use of William Land, Inc v U S Fidelity & Guaranty Co, 65 Lack Jur 209—Com v U S Fidelity & Guaranty Co, 35 D & C 2d 152

27. U.S.—Columbus Rock Co v Alabama General Ins. Co, D C Ala, 153 F Supp 827

Neb—Chicago & N W Ry Co v Mallory, 23 N W 2d 735, 147 Neb 548

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30. Neb—Chicago & N W Ry Co v Mallory, supra, n 27

32. Ohio—Whitaker Merrell Co v Claude A Janes, Inc, 173 N E 2d 402

Surety not obligated to creditor of contractor who loaned money for contractor's wage payment

Me—Newport Trust Co v Susi, 134 A 2d 543, 153 Me 51

Liability for interest

Or—State ex rel J F Konen Const Co v U S Fidelity & Guaranty Co, 380 P 2d 795, 234 Or 554, reh 382 P 2d 858, 234 Or 554

33. W Va—Cecil I Walker Machinery Co v Stauben, Inc, 230 S E 2d 818, 159 W Va 563

34. Ohio—Whitaker Merrell Co v Claude A Janes, Inc, 173 N E 2d 402

35. Utah—Steel Components, Inc v U S Fidelity & Guaranty Co, 497 P 2d 646, 28 Utah 2d 25

37. Effect of provision against subletting

Or—State ex rel Salem Pac Corp v Combo Const Co, 458 P 2d 410, 254 Or 89—State ex rel Thuney Logging, Inc v Fireman's Fund Ins Co, 458 P 2d 413, 254 Or 145

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40. U S—Fort Smith Structural Steel Co v Western Sur Co, D C Ark, 241 F Supp 674

Cal—Maulhardt v California Director of Public Works, 336 P 2d 631, 168 C A 2d 723

45. Md—Glens Falls Ins Co v Baltimore County for Use and Benefit of Dyer, 187 A 2d 875, 230 Md 524

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The obligation on the part of a surety and creditor to act in good faith toward a road contracting corporation did not require that the surety continue to support the corporation [52.5] and such surety and creditor did not, breach its obligation to act in good faith when it exercised its right under an assignment to direct the state and other public bodies to make payment of contract funds to it as assignee [52.10]

52.5 La—Lambert v Maryland Cas Co, 418 So 2d 553

52.10 La—Lambert v Maryland Cas Co, 418 So 2d 553

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62. Liability on bond prior to acceptance of work

N Y—People v Westchester Colprovia Corp, 186 N Y S 2d 986, 8 A D 2d 906

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66. Or—U S Fidelity & Guaranty Co v Thomlinson-Arkwright Co, 141 P 2d 817, 172 Or 307

67. U S—L G Defelice & Son v Globe Indem Co, D C N Y, 189 F Supp 455

Or—U S Fidelity & Guaranty Co v Thomlinson-Arkwright Co, supra, n 66.

68. Miss—Alexander v Fidelity & Cas Co, 100 So 2d 347, 232 Miss 629

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71. U S—L G Defelice & Son v Globe Indem Co D C N Y 189 F Supp 455

77. Tex—Trinity Road & Bridge Co v Watson, Civ App, 341 S W 2d 956, err ref no rev err

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82. Tenn—Tullahoma Concrete Pipe Co v T E Gillespie Const. Co, 405 S W 2d 657, 56 Tenn App 208

86. N D—Nelson v Hagen, 146 N W 2d 873

93. U S—Wright Contracting Co v Saint Paul Mercury Indem Co, D C N C, 151 F Supp 179, affd, C A 250 F 2d 758

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9 Prescriptive period

La—Marquette Cement Mfg Co v Normand App, 186 So 2d 395, affd 192 So 2d 552 249 La 1027

Matters relating to defenses have been adjudicated [55]

15.5. Defense held insufficient

Conn—International Harvester Co v L G DeFelice & Son, Inc, 197 A 2d 638, 151 Conn 325

Frustration or supervening impossibility of performance

Alaska—Merl F Thomas Sons, Inc v State, 396 P 2d 76

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22. U S—Lucas v Western Cas & Sur Co, C A Okl, 176 F 2d 506—Ingalls Iron Works Co v Fehlhaber Corp, D C N Y, 275 F Supp 623

Ohio—Whitaker Merrell Co v Claude A Janes, Inc 173 N E 2d 402

Tex—Gulf Oil Corp v Austin Contracting Co Civ App, 326 S W 2d 925 err ref no rev err

Validity of requirement

Nev—Zalk-Josephs Co v Wells Cargo, Inc 366 P 2d 339, 77 Nev 441

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24. Notice of claim

Or—State ex rel J F Konen Const Co v U S Fidelity & Guaranty Co, 380 P 2d 795, 234 Or 554, reh 382 P 2d 858, 234 Or 554

Tenn—U S Fidelity & Guaranty Co v Thompson & Green Machinery Co, Inc 568 S W 2d 821

26. U S—American Fidelity Co v Delaney, D C Vt 114 F Supp 702—Holmes v Insurance Co of North America, D C Mich, 288 F Supp 325

Mass—Bayer & Mingolla Const Co v Deschenes, 205 N E 2d 208, 348 Mass 594

Mich—People, for Use and Benefit of Wheeling Corrugating Co v W L Thon Co, 11 N W 2d 886, 307 Mich 273—Dover & Co v United Pac Ins Co, 197 N W 2d 126 38 Mich App 727

Minn—Wheeler Lumber Bridge & Supply Co v Seaboard Sur Co, 16 N W 2d 519, 218 Minn 443

N H—American Fidelity Co v Cray, 194 A 2d 763, 105 N H 132

Tex—Seldon v S & S Aggregates Co Civ App, 441 S W 2d 950, err ref no rev err

Nature of requirements

Nev—Zalk Josephs Co v Wells Cargo, Inc, 366 P 2d 339, 77 Nev 441

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35. U S—Holmes v Insurance Co of North America, D C Mich, 288 F Supp 325

N C—American Bridge Division U S Steel Corp v Brinkley, 120 S E 2d 529, 255 N C 162

Tex—Trucker's, Inc v South Texas Const Co, Civ App 561 S W 2d 855

Waiver

Mich—People, for Use and Benefit of Wheeling Corrugating Co v W L Thon Co supra n 26

37. Tex—Seldon v S & S Aggregates Co Civ App, 441 S W 2d 950 err ref no rev err

38 Notice held insufficient

Ga—Brown v Seaboard Sur Co, 131 S E 2d 776, 107 Ga App 820

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46. Ga—American Sur Co of N Y v Ed Smith & Sons, Inc 112 S E 2d 211, 100 Ga App 658

48. Ohio—A Bentley & Sons Co v Thormyer, 166 N E 2d 423, 110 Ohio App 384

Tex—Houston Fire & Cas Ins Co v Col Tex Refining Co, Civ App, 231 S W 2d 468

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52. Bond given pursuant to statute

(3) State ex rel Lawson v Warren Bros Roads Co, Ind App, 59 N E 2d 912

Laborers and materialmen

(3) Other matters

Ohio—Mountaineer Euclid, Inc v Western Cas & Sur Co 250 N E 2d 768, 19 Ohio App 2d 185

S C—Roberts v Lawrence, 133 S E 2d 74, 243 S C 158, 8 A L R 3d 1433

Joinder

W Va—National Equipment Corporation v Pinnell, 172 S E 790 114 W Va 558

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67. La—Marquette Cement Mfg Co v Normand, 192 So 2d 552, 249 La 1027

Mass—Marinucci Bros & Co v Semper Const Co 180 N E 2d 683 343 Mass 738

Tenn—Thompson & Green Machinery Co v Travelers Indem Co, 421 S W 2d 643 57 Tenn App 592

Suit held timely filed

U S—Fort Smith Structural Steel Co v Western Sur Co, D C Ark 247 F Supp 674

Ariz—Wells Stewart Const Co v Martin Marietta Corp, 442 P 2d 119, 103 Ariz 375

Limitation in bond

Tenn—Tullahoma Concrete Pipe Co v T E Gillespie Const Co 405 S W 2d 657, 56 Tenn App 208

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72 Tenn—Thompson & Green Machinery Co v Travelers Indem Co 421 S W 2d 643, 57 Tenn App 592

73 Tex—Gulf Oil Corp v Austin Contracting Co, Civ App, 326 S W 2d 925, err ref no rev err

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78. Effect of insufficient notice

N C—American Bridge Division U S Steel Corp v Brinkley, 120 S E 2d 529, 255 N C 162

82. Suits held premature

(3) Other instances

Miss—Euclid Mississippi v Wester Cas & Sur Co 163 So 2d 676, 249 Miss 547

Recovery allowed

Tex—Seldon v S & S Aggregates Co, Civ App 441 S W 2d 950 err ref no rev err

85 Pleadings held sufficient

Kan—Dial v Freeto Const Co, 381 P 2d 363 191 Kan 401

Pleadings held insufficient

Ind—State ex rel Lawson v Warren Bros Roads Co supra n 52

Ohio—A Bentley & Sons Co v Thormyer, 166 N E 2d 423 110 Ohio App 384

Demurrer

Ohio—Kline v Federal Ins Co, 152 N E 2d 911

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98. U S—Columbus Rock Co v Alabama General Ins Co D C Ala 153 F Supp 827

99. Va—Fidelity & Casualty Co of New York v Lackland 8 S E 2d 306, 175 Va 178

1. Alaska—Arctic Contractors, Inc v State, 564 P 2d 30, app after remand 573 P 2d 1385

Idaho—C.J.S. cited in State ex rel Modern Motor Co v H & K Const Co, 274 P 2d 1002, 1003, 75 Idaho 492

2. Tex—Houston Fire & Cas Ins Co v Col-Tex Refining Co, Civ App, 231 S W 2d 468

4. Idaho—State ex rel Modern Motor Co v H & K Const Co, 274 P 2d 1002, 75 Idaho 492

Tex—C.J.S quoted in Houston Fire & Cas Ins Co v Col-Tex Refining Co, Civ App, 231 S W 2d 468, 470

5. Tex—National Sur Corp v Dabney, Civ App, 282 S W 2d 70

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8. Idaho—State ex rel Modern Motor Co v H & K Const Co, supra n 4

12. Evidence held sufficient

(3) Tex—Houston Fire & Cas Ins Co v Col-Tex Refining Co, supra, n 2

(8) U S—U S Guarantee Co v Colonial Oil Co, C C A Ga, 145 F 2d 496

Cal—Maulhardt v California Director of Public Works, 336 P 2d 631, 168 C A 2d 723

Ga—St Paul Mercury Indemnity Co v Motor Supply Co, 29 S E 2d 640, 70 Ga App 808

Idaho—State ex rel Modern Motor Co v H & K Const Co, supra, n 4

La—Moore v Coastal Contractors, Inc, App, 188 So 2d 467

Md—State Highway Administration v Transamerica Ins Co, 367 A 2d 509, 278 Md 690

S C—Carolina Equipment & Parts Co v Continental Cas Co, 169 S E 2d 379, 253 S C 129

S D—State for For of Farmers State Bank v Bd Cox and Son, 132 N W 2d 282, 81 S D 165

Utah—State By and Through Road Commission v Union Const Co, 339 P 2d 421, 9 Utah 2d 107

Evidence held insufficient

(8) N Y—Hartford Acc & Indemn Co v Kranz, 184 N Y S 2d 918, 7 A D 2d 604—People v Westchester Colprovia Corp, 186 N Y S 2d 986, 8 A D 2d 906—Ingalls Iron Works Co v Golden, 224 N Y S 2d 158, 32 Misc 2d 426

Tenn—Tullahoma Concrete Pipe Co v T E Gillespie Const Co, 405 S W 2d 657, 56 Tenn App 208

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14. Pa—Com to Use of Walters Tire Service, Inc v National Union Fire Ins Co, 252 A 2d 593, 434 Pa 235

15. Instructions held not erroneous

Pa—Com to Use of Walters Tire Service, Inc v National Union Fire Ins Co, 252 A 2d 593, 434 Pa 235

Instruction held erroneous

Or—State Highway Commission v R A Heintz Const Co, 423 P 2d 175, 245 Or 530

17. Evidence sufficient to take case to jury

Ill—Trompeter Const Co v Higby, 161 N E 2d 159, 22 Ill App 2d 420

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21. Pa—Com to Use of Walters Tire Service Inc v National Union Fire Ins Co, 252 A 2d 593, 434 Pa 235

Tenn—Tullahoma Concrete Pipe Co v T E Gillespie Const Co, 405 S W 2d 657, 56 Tenn App 208

Va—Richmond Shopping Center, Inc v Wiley N Jackson Co, 255 S E 2d 518, 220 Va 135

Suit on wrong bond

S C—Carolina Equipment & Parts Co v Continental Cas Co, 169 S E 2d 379, 253 S C 129

23. Ariz—Ed Stearman & Sons, Inc v State ex rel Union Rock & Materials Co, 400 P 2d 863, 1 Ariz App 192

24. Ariz—Ed Stearman & Sons, Inc v State ex rel Union Rock & Materials Co, 400 P 2d 863, 1 Ariz App 192

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34. Ariz—Gustafson v State of Use and Benefit of Mahan, 462 P 2d 869, 11 Ariz App 176

S C—Roberts v Lawrence, 133 S E 2d 74, 243 S C 158, 8 A L R 3d 1433

Allowance held reasonable

Cal—Maulhardt v California Director of Public Works, 336 P 2d 631, 168 C A 2d 723

Purpose of statute

Wash—Brear v Washington State Highway Commission, 407 P 2d 423, 67 Wash 2d 308

Settlement of action

Wash—Brear v Washington State Highway Commission, 407 P 2d 423, 67 Wash 2d 308

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39. S C—Carolina Equipment & Parts Co v Continental Cas Co 169 S E 2d 379, 253 S C 129

41. S C—Carolina Equipment & Parts Co v Continental Cas Co, 169 S E 2d 379, 253 S C 129

S D—State for Use of Farmers State Bank v Ed Cox and Son, 132 N W 2d 282, 81 S D 165

Claimants held entitled to interest

Md—Peerless Ins Co v Board of County Com'rs for Prince George's County To and For Use of Ben Dyer Associates, Inc, 237 A 2d 15, 248 Md 439

Miss—Dixie Contractors, Inc v Ballard, 249 So 2d 653

Law applicable

U S—U S, for Use and Benefit of Belmont, v Mittry Bros Const Co D C Idaho, 4 F Supp 216, affd, C C A, 75 F 2d 79

42. U S—U S, for Use and Benefit of Belmont, v Mittry Bros Const Co, supra, n 41

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47. Alaska—State v Lundgren Pac Const Co, Inc, 603 P 2d 889

Fla—State Road Dept v Cone Bros Contracting Co, App, 207 So 2d 489

Kan—Peter Kiewit & Sons Co v State Highway Commission, 339 P 2d 267, 184 Kan 737

Mo—Bernard McMenamy Contractors, Inc v Missouri State Highway Com'n, App, 582 S W 2d 305

N J—Frapaul Const Co, Inc v State, Dept of Transp, 417 A 2d 592, 175 N J Super 84

N Y—R H Cunningham & Sons Co v State, 52 N Y S 2d 65, affd 60 N Y S 2d 206, 270 App Div 864

Pa—Com, Dept of Transp v Mosites Const Co, 402 A 2d 303, 43 Pa Cmwlth 266

Nonperformance precluding recovery of overpayments

La—C & W Const Co v Travelers Indem Co, App 147 So 2d 706

Proceedings before administrative board

U S—Clack v U S, 395 F 2d 773, 184 Ct Cl 40

La—Louisiana Paving Co, Inc v State Through Dept of Highways, App, 372 So 2d 245

Tenn—Carter County v Williams, 190 S W 2d 311, 28 Tenn App 352

Notice

N J—Frapaul Const Co, Inc v State, Dept of Transp, 417 A 2d 592, 175 N J Super 84

49. Tenn—Carter County v Williams, supra, n 48

53. Del—State v Dabson, 217 A 2d 497, 9 Storey 240

N C—Inland Bridge Co, Inc v North Carolina State Highway Commission, 227 S E 2d 648, 30 N C App 535

Amendment to include "design" contract

Conn—Horn v State, 330 A 2d 109, 31 Conn Super 313

54. La—Bailey v R E Heidt Const. Co, App., 205 So 2d 503

Tenn—Carter County v Williams, supra, n 48.

Subcontractor

N Y—Harrison & Burrowes, Inc v State, 386 N Y S.2d 551, 87 Misc 2d 637

62. Performance held not required

Wash—Bignold v King County, 399 P 2d 611, 65 Wash 2d 817

63. Mo—Bernard McMenamy Contractors, Inc v Missouri State Highway Com'n, App, 582 S.W.2d 305

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64. Cal—A Teichert & Son, Inc v State, 48 Cal. Rptr 225, 238 C A 2d 736

Pa—Dickens v Pennsylvania Turnpike Commission, 54 Dauph Co 422, affd 40 A 2d 431, 351 Pa 252

Under statute providing for administrative settlement of disputed contract items by the state engineer, his determination is conclusive except in case of gross error [66.5]

66.5. "Gross error" construed

(1) Held not limited to sense of fraud, constructive fraud, or bad faith

Cal—Clack v State, Dept of Public Works, Division of Highways, 80 Cal Rptr 274, 275 C A 2d 743

(2) Held to connote arbitrary decision

Cal—Clack v State, Dept of Public Works, Division of Highways, 80 Cal Rptr 274, 275 C A 2d 743

68. Where formal default unnecessary

U S—Department of Highways of La v Morse Bros & Associates, Inc, C A La, 211 F 2d 140

70. N Y—D'Onfro v State, 59 N Y S 2d 205, 270 App Div 9

Contract requirements of notice of intention to claim extra compensation must be complied with [72.5]

72.5. Ga—State Highway Dept v Hewitt Contracting Co, 149 S E 2d 499, 113 Ga App 685

Md—Rea Const Co v State Roads Commission, 174 A 2d 577, 226 Md 569

N C—Inland Bridge Co, Inc v North Carolina State Highway Commission, 227 S E 2d 648, 30 N C App 535

Timely perfection of claim not required

Mass—Farina Bros Co v Com, 257 N E.2d 450, 257 Mass 131

Not "contested case"

Mich—Greenfield Const Co, Inc, v Michigan Dept of State Highways, 227 N W 2d 223, 58 Mich App 49, affd 261 N W 2d 718, 402 Mich 172

Submission to arbitration is not a prerequisite for contractor's filing of action against highway department for "extra work" performed [72.10]

72.10. Contract provision not giving arbitrators authority to decide questions of law

Ga—State Highway Dept v Wright Contracting Co, 131 S E 2d 808, 107 Ga App 758, 1 A L R 3d 1260

Refusal of department to arbitrate

Ga—State Highway Dept v Charles R Shepard, Inc, 168 S E 2d 922, 119 Ga App 872

73 Unauthorized waiver does not preclude action

U S—Department of Highways of La v Morse Bros & Associates, Inc, supra, n 68

Immunity from tort liability no defense

Mo—Bernard McMenamy Contractors, Inc v Missouri State Highway Com'n, App, 582 S W 2d 305

Liability for trespass

(1) La—Gray v State Through Dept of Highways, 202 So 2d 24, 250 La 1045

Minn—Jacobs v Riverdale Tp, 196 N W 2d 295, 293 Minn 390

Liability for negligence

N C—Sale v State Highway and Public Works Commission, 89 S E 2d 290, 242 N C 612—Wrape v North Carolina State Highway Commission, 139 S E 2d 570, 263 N C 499

Ordinary care

Wis—Wisconsin Power & Light Co v Columbia County, 117 N W 2d 597, 18 Wis 2d 39

95. Minn—Mace v Ramsey County, 42 N W 2d 567, 231 Minn 151

N C—Moore v Clark, 70 S E 2d 182, 235 N C 364

Tex—Weber v Texas Highway Dept, Civ App, 215 S W 2d 256, revd on oth grds, 219 S W 2d 70, 147 Tex 628

96. Fla—State Road Dept of Fla v Darby, App, 109 So 2d 591

Iowa—Perkins v Palo Alto County, 60 N W 2d 562, 245 Iowa 310

Ky—Department of Highways of Ky v Parker, 206 S W 2d 73, 306 Ky 14

Md—Irvine v Montgomery County, 210 A 2d 359, 239 Md 113

Minn—Mace v Ramsey County, supra, n 95

Statute inapplicable

La—Klein v Department of Highways, App, 175 So 2d 454, writ ref 178 So 2d 658, 248 La 369

97. Miss—Curtis v Mississippi State Highway Commission, 195 So 2d 497

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(3) Other cases

Ky—Pursifull v City of Pineville, supra, n 89

Mich—Reich v State, 204 N W 2d 226, 43 Mich App 284

N Y—Eason v State, 104 N Y S 2d 683, 201 Misc 336, affd 113 N Y S 2d 479, 280 App Div 358

Pa—Petition of Borough of Baden, 41 Mun 97

Tex—Texas Highway Dept v Weber, 219 S W 2d 70, 147 Tex 628

98. Ohio—Day v Manrod, 13 Ohio Supp 83

Statute inapplicable

La—Reymond v State Through Dept of Highways, 231 So 2d 375, 255 La 425

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62. Approval of plans no longer grounds for liability

S C—Roddey v Lyle, 234 S E 2d 236, 268 S C 424

3. Liability as trespasser

(2) Other instances

Tenn—Morris v Ostertag, 376 S W 2d 720, 52 Tenn App 561

5. Ga—Fulton County v Woodside, 155 S E 2d 404, 223 Ga 316

Miss—Stigall v Sharkey County, 42 So 2d 116, 207 Miss 188

Joint liability of state highway department and county

N D—Northern Pac Ry Co v Morton County, 131 N W 2d 557

6. Ga—State Highway Dept v Dayhoof, 32 S E 2d 860, 72 Ga App 34

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13. U S—Boston Edison Co v Campanella & Cardi Const Co, C A Mass, 272 F 2d 430

Cal—Veterans' Welfare Bd v City of Oakland, 169 P 2d 1000, 74 Cal App 2d 818

Miss—C.J.S. quoted in C F W Construction Co v McNutt, 179 So 2d 806, 809, 253 Miss 783

Pa—Dumbaugh v DeFelice & Son, 82 Pa Dist & Co 294, 14 Beaver Co Leg J 79

14. U S—Myers v U S C A Alaska, 323 F 2d 580

Ark—Southeast Const Co v Ellis, 342 S W 2d 485, 233 Ark 72

Cal—Veterans Welfare Bd v City of Oakland, supra, n 13

La—Myevre v Boh Bros Const Co, App, 192 So 2d 859

Mass—Murray Realty, Inc v Berke Moore Co, 175 N E 2d 366, 342 Mass 689

Miss—C.J.S. quoted in C F W Construction Co v McNutt, 179 So 2d 806, 809, 253 Miss 783

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Tenn—Wood v Foster & Creighton Co, 235 S W 2d 1, 191 Tenn 478

Va—C J S cited in V N Green & Co v Thomas, 140 S E 2d 635, 637, 205 Va 903, 9 A L R 3d 376

W Va—Perdue v S J Groves & Sons Co, 161 S E 2d 250, 152 W Va 222

No liability for injuries to trespasser

Mo—Pitts v Fred Weber Contractor Inc, App, 466 S W 2d 124

Noise and vibration

Ohio—Clabaugh v Harris, 273 N E 2d 923, 27 Ohio Misc 153

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Ohio—Clabaugh v Harris, 273 N E 2d 923, 27 Ohio Misc 153

18. Minn—C J S quoted at length in C F W Construction Co v McNutt, 179 So 2d 806, 809, 253 Miss 783

Mo—C J S quoted at length in Rector v Tobin Const Co, App, 351 S W 2d 816, 821, transf to, Sup, 377 S W 2d 409

N C—Moore v Clark, supra, n 14

19. U S—Ernst v General Refractories Co, C A Ky, 202 F 2d 485—Holland v Yellowstone Pipe Line Co, C A Mont, 306 F 2d 621

Ark—Bucton Const Co v Carlson, 280 S W 2d 408, 225 Ark 208

La—Curry v Frum Colnon Contracting Co, App, 202 So 2d 345, writ ref 204 So 2d 573, 251 La 359—Reymond v State, Through Dept of Highways, App, 217 So 2d 488, am 231 So 2d 375, 255 La 425, writ issued 219 So 2d 512, 253 La 731—Womack v Travelers Ins Co, App, 258 So 2d 562, writ den 260 So 2d 701, 261 La 775

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Nev—C.J.S. cited in Smith v Aldridge, 356 S W 2d 532, 535

N Y—Rochester Tel Corp v Green Island Const Corp, 419 N Y S 2d 346, 71 A D 2d 798, affd 412 N E 2d 1314, 51 N Y 2d 788, 433 N Y S 2d 88

Ohio—Clabaugh v Harris, 273 N E 2d 923, 27 Ohio Misc 153

Or—Gerlinger Industries Corp v Oregon Dept of Transp, Highway Division, 600 P 2d 428, 42 Or App 103

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(2) However the contractor is not liable for negligence of an independent contractor

Pa—Dumbaugh v DeFelice & Son, supra, n 13

(3) Other matters

Pa—Lobozzo v Adam Eidemiller, Inc, 263 A 2d 432, 437 Pa 360

W Va—Whitney v Ralph Myers Contracting Corp, 118 S E 2d 622, 146 W Va 130

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20. Tenn—Morris v Ostertag, 376 S W 2d 720, 52 Tenn App 561

Tex—Austin Road Co v Anderson, 209 S W 2d 595, 146 Tex 553, conf to, Sup, 211 S W 2d 765

Contractor not trespasser

Ohio—Kubin v Remeck, 113 N E 2d 914, 93 Ohio App 320

21. U S—Holland v Yellowstone Pipe Line Co, C A Mont, 306 F 2d 621

Ark—C J S quoted in Tri-B Advertising Inc v Arkansas State Highway Commission, 539 S W 2d 430, 432, 260 Ark 227

Mo—Rector v Tobin Const Co, App, 351 S W 2d 816, transf to, Sup, 377 S W 2d 409

§ 215. —— Measure of Damages; Deduction of Benefits

33. N Y—Mennito v Town of Wayland, 56 N Y S 2d 654

34. Ark—Bucton Const Co v Carlson, 280 S W 2d 408, 225 Ark 208

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35. N Y—Davis v State, 221 N Y S 2d 654, 30 Misc 2d 1000

Crops

N Y—Mennito v Town of Wayland, supra, n 33

Award not excessive

Tenn—Morris v Ostertag, 376 S W 2d 720, 52 Tenn App 561

§ 216. —— Actions or Proceedings to Recover

37. S D—Dohrman v Lawrence County, 143 N W 2d 865, 82 S D 207

In Georgia

(4) Other statements

Ga—State Highway Dept of Ga v McClain, 114 S E 2d 125, 216 Ga 1

38 Interest

N Y—Mennito v Town of Wayland, supra, n 33

39. Pa—Matthews v Plum Tp, 33 A 2d 38, 152 Pa Super 544

41. Idaho—Padgett v Williams, 348 P 2d 944, 82 Idaho 28, op supp 350 P 2d 353, 82 Idaho 114

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42. N C—Lewis v North Carolina State Highway & Public Works Commission, 46 S E 2d 705, 228 N C 618

Right of property owner to damages resulting from a change of grade in highway does not accrue until actual change is made[44.5]

44.5 Pa—Belusko v Department of Highways, 39 D & C 2d 372

48. Ga—Gardner v Richmond County, 113 S E 2d 411, 101 Ga App 261

52. Ark—Roesler v Denton, 390 S W 2d 98, 239 Ark 462

Ga—Estes v State Highway Dept, 119 S E 2d 136, 103 Ga App 406

Statute of limitations

W Va—Dell Coal Co v Boone County Court, 178 S E 2d 621, 115 W Va 568

Sufficiency of defense

Ky—Com, Dept of Highways v Litteral, 319 S W 2d 458

Petition held not to state claim

Mo—Miller v Ste Genevieve County, 358 S W 2d 28

Allegations construed

N Y—Bronxville Palmer, Limited v Posner & McLane Corp, 224 N Y S 2d 524, 32 Misc 2d 507

Pleading held sufficient to state cause of action

Mich—Herro v Board of County Road Com'rs for Chippewa County, 118 N W 2d 271, 368 Mich 263

53. S C—Scott v Richland County, 65 S E 729, 83 S C 506

Complaints held sufficient

(1) Cal—Veterans' Welfare Bd v City of Oakland, supra, n 13

N C—Billings v Taylor, 89 S E 2d 743, 243 N C 57

W Va—Perdue v S J Groves & Sons Co, 161 S E 2d 250, 152 W Va 222

Nature of allegation of negligence

Ky—Hopkins County v Rodgers, 122 S W 2d 743, 275 Ky 778

54. Complaint held insufficient

Miss—Curtis v Mississippi State Highway Commission, 195 So 2d 497

57. Exclusion of proof held not error under pleadings

Idaho—Gates v Pickett & Nelson Const Co, 432 P 2d 780, 91 Idaho 836

58. Neb—Spellman v State, 135 N W 2d 137, 178 Neb 738

Evidence held sufficient, etc.

(2) Other cases

U S—Myers v U S, C A Alaska, 323 F 2d 580

Ky—Com, Dept of Highways v Litteral, 319 S W 2d 458

La—Myevre v Boh Bros Const Co, App, 192 So 2d 859

Minn—Jacobs v Riverdale Tp, 196 N W 2d 295, 293 Minn 390

N Y—Bronxville Palmer, Limited v State, 318 N Y S 2d 57, 36 A D 2d 10, app dism 270 N E 2d 733, 28 N Y 2d 817, 321 N Y S 2d 917, mod on oth grds 284 N E 2d 577, 30 N Y 2d 760, 333 N Y S 2d 422

S C—Marsh Plywood Corp v South Carolina State Highway Dept, 187 S E 2d 515, 258 S C 119

Evidence held insufficient

(2) As regards other matters—Gibson v Letcher County, 185 S W 2d 403, 299 Ky 304

La—Reymond v State Through Dept of Highways, 231 So 2d 375, 255 La 425

N H—Crocker v W W Wyman, Inc, 110 A 2d 271, 99 N H 330

Burden of proof

Va—Legum v Harris, 135 S E 2d 125

W Va—Perdue v S J Groves & Sons Co, 161 S E 2d 250, 152 W Va 222

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59. Questions of law and fact

(2) Other questions—Kubin v Reineck, 113 N E 2d 914, 93 Ohio App 320

Or—Larson v Heintz Const Co, 345 P 2d 835, 219 Or 25

Pa—Smith v Allegheny County, 107 P L J 287

Wash—Peterson v King County, 278 P 2d 774, 45 Wash 2d 860

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(2) Other instructions—Kubin v Reineck, supra

Award held justified

N Y—Town of Lancaster v Malinowski, 193 N Y S 2d 1, 9 A D 2d 862

Evidence held sufficient for jury

Ohio—Walczesky v Horvitz Co, 269 N E 2d 844, 26 Ohio St 2d 146

Award excessive

N Y—Bronxville Palmer, Limited v State, 318 N Y S 2d 57, 36 A D 2d 10, app dism 270 N E 2d 733, 28 N Y 2d 817, 321 N Y S 2d 917, mod on oth grds 284 N E 2d 577, 30 N Y 2d 760, 333 N Y S 2d 422

60. Death of plaintiff subsequent to appellate decision does not affect such decision—Starrett v Inhabitants of Town of Thomaston, 150 A 609, 129 Me 132

64. Effect of award

Pa—Pennsylvania Turnpike Commission v Smith, 39 A 2d 139, 350 Pa 355

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Mo—C.J.S. quoted at length in State ex rel State Highway Commission v Johns, App, 507 S W 2d 75, 77

N Y—Clawson v Central Hudson Gas & Elec Corp, 83 N E 2d 121, 298 N Y 291

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R I—Moretti v C S Realty Co, 82 A 2d 608, 78 R I 341, 39 A L R 2d 963

The purpose of the statute, etc.

(2) Purpose of other statutes

Ky—Jasper v Com, 375 S W 2d 709

La—State Through Dept of Highways v National Advertising Co, App, 356 So 2d 557

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67. Cal—People v Henderson, 194 P 2d 91, 85 Cal App 2d 653

Conn—Hartford Elec Light Co v Water Resources Commission, 291 A 2d 721, 162 Conn 89

Ill—McCue v Berge, 52 N E 2d 789 385 Ill 292, transf 50 N E 2d 438, 320 Ill App 229

Ky—Stephenson v Adams, 433 S W 2d 347

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N Y—Clawson v Central Hudson Gas & Elec Corp supra n 66—Sweet v State, 89 N Y S 2d 506, 195 Misc 494

R I—Wolfe v City of Providence, 74 A 2d 843, 77 R I 192

Va—Anderson v Stuarts Draft Water Co, 87 S E 2d 756, 197 Va 36

Statutes held constitutional

(4) Other statutes

U S—Hamilton v Andrews, D C Wash, 416 F Supp 24

Ky—Jasper v Com, 375 S W 2d 709—Moore v Ward, 377 S W 2d 881

La—HiWay Ads, Inc v State, Through Dept of Highways, App, 356 So 2d 501

N M—Stuckey's Stores Inc v O'Cheskey, 600 P 2d 258, 93 N M 312, app dism 100 S Ct 2145, 446 U S 930, 64 L Ed 2d 783

Ohio—State v Buckley, 243 N E 2d 66, 16 Ohio St 2d 128, app dism cert den 89 S Ct 1647 395 U S 163, 23 L Ed 2d 174

Or—Van v Travel Information Council, 628 P 2d 1217, 52 Or App 399

W Va—Farley v Graney, 119 S E 2d 833, 146 W Va 22

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(3) Other matters

U S—E B Elliott Adv Co v Metropolitan Dade County, C A Fla, 425 F 2d 1141, petition dism 91 S Ct 12, 400 U S 805, 27 L Ed 2d 35

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La—Giardina v Marrero Furniture Co, Inc, 310 So 2d 607

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Md—Mayor and City of Baltimore v Foster & Kleiser, 416 A 2d 762, 46 Md App 163

Mich—Central Advertising Co v Michigan State Highway Commission, 172 N W 2d 432, 383 Mich 1—O'Brien v State Highway Commissioner, 134 N W 2d 700, 375 Mich 545

Mo—State ex rel State Highway Commission, App, 597 S W 2d 257—Drury Development Corp. v State Highway Com'n, App, 637 S W 2d 354

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Neb—State v Mayhew Products Corp, 281 N W 2d 783, 204 Neb 266—State, Dept of Roads v Mayhew Products Corp, 318 N W 2d 280, 211 Neb 300

N M—Stuckey's Stores, Inc v O'Cheskey, 600 P 2d 258, 93 N M 312 app dism 100 S Ct 2145, 446 U S 930, 64 L Ed 2d 783

N H—Opinion of the Justices, 169 A 2d 762, 103 N H 268

N Y—City of Buffalo v George Irish Paper Co, 299 N Y S 2d 8, 31 A D 2d 470, affd 258 N E 2d 100, 26 N Y 2d 869 309 N Y S 2d 606

N C—Days Inn of America, Inc v Board of Transp, 211 S E 2d 864, 24 N C App 636, cert den 214 S E 2d 429, 287 N C 258

N D—Newman Signs, Inc v Hjelle, 268 N W 2d 741, app dism 99 S Ct 1205, 440 U S 901, 59 L Ed 2d 449, app after remand, Sup, 317 N W 2d 810

Ohio—Ghaster Properties, Inc v Preston, 200 N E 2d 328, 176 Ohio St 425

Or—Webb v State By and Through Nilsen, 340 P 2d 968 217 Or 1

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U S—John Donnelly & Sons v Campbell, C A Me, 639 F 2d 6, affd 101 S Ct 3151, 453 U S 916, 69 L Ed 2d 999

Neb—State Dept of Roads v Houtwed, 320 N W 2d 97 211 Neb 681

S D—Hogen v South Dakota State Bd of Transp, 245 N W 2d 493

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U S—Southern New Jersey Newspapers, Inc v State of N J Dept of Transp, D C N J, 542 F Supp 173

Or—Van v Travel Information Council, 628 P 2d 1217, 52 Or App 399

68. U S—Rueter v Village of Versailles, C A Ill, 213 F 2d 233

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N H —City of Manchester v Anton, 213 A 2d 919, 106 N.H 478

N J —Ross v O'Keefe, 51 A 2d 23, 135 N J Law 287—Milstrey v City of Hackensack, 79 A 2d 37, 6 N J 400—Longt v Raymond-Commerce Corp, 113 A 2d 69, 34 N J Super 593

N Y —Merritt Manor Estates, Inc v Village of Elmsford, 218 N Y S 2d 371, 30 Misc 2d 935

N C —Chandler v Forsyth Royal Crown Bottling Co, 125 S E 2d 584, 257 N C 245

Tenn —Harkins v Ramsey, 273 S W 2d 1, 197 Tenn 302

Wis —Walley v Patake, 74 N W 2d 130, 271 Wis 530—Krejci v Lojeski, 80 N W 2d 794, 275 Wis 20

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(2) Other definitions

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51 C.J p 104 note 89

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§ 218. What Constitutes

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Tex —Gehring v Strakos, Civ App, 345 S W 2d 764, revd on oth grds, Sup, 360 S W 2d 787

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Ariz —National Advertising Co v Arizona Dept of Transp, App, 617 P 2d 50, 126 Ariz 542

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79. Ark —Pierce v Jones, 179 S W 2d 454 207 Ark 139

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82 Okl —State v Hamilton, Cr, 298 P 2d 1073

88 Ill —Simpson v Adkins, supra, n 75

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N J —Messier v City of Clifton, 93 A 2d 600, 24 N J Super 133

89. Ariz —Rodgers v Ray, 457 P 2d 281, 10 Ariz App 119

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90. Okl —Suter v City of Okmulgee 373 P 2d 527

Signboards

(2) Other matters

U S —Metromedia, Inc v City of San Diego, Cal, 101 S Ct 2882, 453 U S 490, 69 L Ed 2d 800, on remand 185 Cal Rptr 260, 649 P 2d 902, 32 C 3d 180—Southern New Jersey Newspapers, Inc v State of N J Dept of Transp, D C N J, 542 F Supp 173

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N D —Newman Signs, Inc v Hjelle, 317 N W 2d 810

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Wash —State v Lotze 593 P 2d 811, 92 Wash 2d 52, app dism 100 S Ct 257, 444 U S 921, 62 L Ed 2d 177

Wis —Smuda v Milwaukee County, 89 N W 2d 186 3 Wis 2d 473

Signs readable primarily from limited access facility

Vt —Brattleboro Chalet Motor Lodge, Inc v Thomas, 279 A 2d 580, 129 Vt 405

Highway Beautification Act

La —State Through Dept of Highways v Lamar Advertising Co of Louisiana Inc App 304 So 2d 779

Nev —Alper v State, 621 P 2d 492, 96 Nev 925 app after remand 706 P 2d 139

N D —Newman Signs, Inc v Hjelle, 268 N W 2d 741, app dism 99 S Ct 1205, 440 U S 901, 59 L Ed 2d 449, app after remand, Sup, 317 N W 2d 810

A provision of the Highway Beautification Act, 23 U S C A § 131(g) which allows for just compensation to be paid upon the removal of certain outdoor advertising signs, displays, and devices does not provide for a private right of action therefor [90.5]

90.5 U S —Parks v Donrey, Inc D C Ark, 596 F Supp 347

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92 Ariz —Rodgers v Ray, 457 P 2d 281, 10 Ariz App 119

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96 Particular objects

(3) other objects

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97. Mass —Town of Dartmouth v Silva, 90 N E 2d 832, 325 Mass 401

99. Ala —C J S quoted in Sandlin v Blanchard, supra n 74

§ 219. Existence or Legality of Highway

1 La —Bernard v W B Delafield Trucking Lines, App, 58 So 2d 276

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3. Ala —C.J.S cited in Sandlin v Blanchard, 33 So 2d 472, 473, 250 Ala 170

7. Ind—Smolek v Board of County Com'rs of Pulaski County, 386 N E 2d 997, 179 Ind App 603

15. Ala.—C.J.S. cited in Valenzuela v Sellers, 20 So 2d 469, 471, 246 Ala 329

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35. Colo.—Curtis v Lawley, 346 P 2d 579, 140 Colo 476

Okl—C.J.S. cited in Shell Pipe Line Corp v State ex rel Brett, 164 P 2d 970, 971, 196 Okl 330

§ 220. Defenses

38. Cal—People v Henderson, 194 P 2d 91, 85 Cal App.2d 653

39. Pa.—Jordan v. Craig, 67 Montg Co 285

40. Ark—Buffalo v Arkansas State Highway Commission, 451 S W 2d 737, 248 Ark 406

43. Cal—People v Henderson, supra, n 38

46. U S—Citizens Organized to Defend Environment, Inc. v Volpe, D C Ohio, 353 F Supp 520

Ga—Stanfield v Johnson, 98 S E.2d 106, 95 Ga App 349, revd on oth grds 99 S E 2d 209, 213 Ga 436, conf to 99 S E 2d 834, 96 Ga App 305

Miss—C.J.S quoted at length in United Gas Pipe Line Co v Jones, 111 So 2d 240, 249, 236 Miss 471—Vines v Southwestern Mississippi Elec Power Ass'n, 129 So 2d 396, 241 Miss 120—United Gas Corp v Parker, 174 So 2d 370, 252 Miss 486

N C—Luther v Asheville Contracting Co, 151 S E 2d 649, 268 N C 636

Pa—Ference v Booth & Flinn Co, 88 A 2d 413, 370 Pa 400

Tenn—Harkins v Ramsey, 273 S W 2d 1, 197 Tenn 302

Statutory bond or deposit

Mo—State ex rel St Louis County v St Johns-Overland Sanitary Sewer Dist, 185 S W 2d 780, 352 Mo 974, foll 185 S W 2d 784

Public authority not obligated to obtain permit

Cal—Weber v Milpitas County Water Dist, 20 Cal Rptr 45, 201 C A 2d 666

Advertising sign which became effective before statutory change

Fla—Brazil v Division of Administration, State Dept of Transp, App, 347 So 2d 755

Utah—Rock Manor Trust v State Road Commission, 550 P 2d 205

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47. Cal—El Dorado County v Al Tahoe Inv Co, 346 P 2d 205, 175 C A 2d 407

Ky—Com Dept of Highways v Trimble, 451 S W 2d 641

Wis—Russell Dairy Store v City of Chippewa Falls, 74 N W 2d 759, 272 Wis 138

48. Cal—People v Henderson, supra, n 38

Miss—United Gas Corp v Parker, 174 So 2d 370, 252 Miss 486

Or—Lincoln County v Bruesch, 254 P 2d 690, 197 Or 571

More license

Cal—People By and Through Dept of Public Works v DiTomaso, 57 Cal Rptr 293, 248 C A 2d 741

49. Miss—United Gas Corp v Parker, 174 So 2d 370, 252 Miss 486

Mo—C.J.S. cited in Eidson v. Dean Const Co, 233 S W 2d 820, 825

51. Idaho—State ex rel Rich v Idaho Power Co, 346 P 2d 596, 81 Idaho 487

Miss—C.J.S. quoted at length in United Gas Pipe Line Co. v Jones, 111 So 2d 240, 249, 236 Miss 471

52. U S—Rueter v Village of Versailles, C A Ill, 213 F 2d 233

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56. Ala—Holz v. Lyles, 251 So 2d 583, 287 Ala 280

Ark—Buffalo v Arkansas State Highway Commission, 451 S W 2d 737, 248 Ark 406

N J—Board of Chosen Freeholders of Passaic County v Cimorelli, 91 A 2d 890, 22 N J Super 275

Okl—Rummer v Quanilty, 179 P 2d 164, 198 Okl 395

§ 221. Persons Liable

59. Ala—Birmingham Slag Division of Vulcan Materials Co v Chandler, Civ, 231 So 2d 329, 45 Ala App 406

Cal—Ball v Stephens, 158 P 2d 207, 68 Cal App 2d 843

Colo—Stanley Heights Property Owners Ass'n, Inc v Whiteside, 378 P 2d 399, 151 Colo 429

Del—Salevan v Wilmington Park, 72 A 2d 239, 6 Terry 290, 16 A L R 2d 1450

La—Page v Green, App, 306 So 2d 847

Okl—Haas v Firestone Tire & Rubber Co, 563 P 2d 620

S D—Norman v Cummings, 45 N W 2d 839, 73 S D 559

Tex—Gehring v Strakos, Civ App, 345 S W 2d 764, revd on oth grds, Sup, 360 S W 2d 787

Contractor for removal of obstruction held not liable for delay—Ohio River Coach Co v Booth & Flinn Co, Pa, 99 Pittsb Leg J 389

State highway commissioner not liable on theory of nuisance

Conn—Murphy v Ives, Super, 188 A 2d 68, 24 Conn Sup 158, affd 196 A 2d 596, 151 Conn 259

66. R I—Wolfe v City of Providence, 74 A 2d 843, 77 R I 192

§ 222. Remedies

67. Ga—Hudspeth v Early County, 80 S E 2d 185, 210 Ga 386—Overton v Alford, 82 S E 2d 836, 210 Ga 780

Ill—City of Chicago v Sanitary Dist of Chicago, 89 N E 2d 35, 404 Ill 315

Miss—Mississippi State Highway Commission v Adams, 93 So 2d 650, 230 Miss 559

Mo—Drury Development Corp v State Highway Com'n, App, 637 S W 2d 354

Alternative remedies

Utah—Blonquist v Summit County, 483 P 2d 430, 25 Utah2d 387

No duty on county to police and remove vegetation causing visual obstruction

Tex—Jezek v City of Midland, 605 S W 2d 544

68. Cal—People v Henderson, supra, n 38—El Dorado County v Al Tahoe Inv Co, 346 P 2d 205, 175 C A 2d 407

Ind—New York, C & St L R Co v Lincoln Nat Life Ins Co, 142 N E 2d 437, 127 Ind App 608

Ky—Kemper v Cooke, App, 576 S W 2d 263

Neb—C.J.S cited in Schroder v City of Lincoln, 52 N W 2d 808, 812, 155 Neb 599

S C—C.J S cited in Brown v Hendricks, 45 S E 2d 603, 605, 211 S C 395

Tenn—Knierim v Leatherwood, 542 S W 2d 806

Tex—Hale County v Davis, Civ App, 572 S W 2d 63, err ref no rev err

§ 223. —— Actions and Proceedings to Compel Removal in General

Library References

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69. U S—Southern New Jersey Newspapers, Inc v State of N J Dept of Transp, D C N J, 542 F Supp 173

Ark—Arkansas State Highway Commission v Staples, 389 S W 2d 432, 239 Ark 290

Ga—Department of Transp v Spells Sign Co, 233 S E 2d 435, 141 Ga App 350

Idaho—Boise City By and Through Amyx v Fails, 499 P 2d 326 94 Idaho 840

Neb—Art-Kraft Signs, Inc v Hall County, 279 N W 2d 159, 203 Neb 523

N H—David v Whitaker, 358 A.2d 404, 116 N H 266

S D—Board of County Com'rs of Davison County v Althen, 39 N W 2d 520, 73 S D 112

Tex—West v Ellis County, Civ App, 241 S.W 2d 344

Lapse of time no bar to action

Ohio—Village of Orangeville v Powell, 126 N E 2d 86

Constitutional

Cal—People By and Through Dept of Transp v Hadley Fruit Orchards, Inc, 130 Cal Rptr 287, 59 C A 3d 49

La—Inn of Hammond, Inc v State, Dept of Transp and Development, App, 376 So 2d 1318

Me—State By and Through Dept. of Transp v National Advertising Co, 387 A 2d 745

Permission of board of supervisors

N D—Saetz v Heiser, 240 N W 2d 67

Collateral attack

U S—U S v 40 00 Acres of Land More or Less in Henry County, Mo, D C Mo, 427 F Supp. 434

Compensation for removal

Fla—La Pointe Outdoor Advertising v Florida Dept of Transp, App, 382 So 2d 1347, approved, Sup, 398 So.2d 1370—Lamar-Orlando Outdoor Advertising v City of Ormond Beach, App 5 Dist, 415 So 2d 1312

La—State Through Dept of Highways v National Advertising Co, App, 356 So 2d 557

Neb—State v Mayhew Products Corp, 281 N W 2d 783, 204 Neb 266

N Y—Suffolk Outdoor Advertising Co, Inc v Town of Southampton, 449 N Y S 2d 766, 88 A D 2d 601, motion dism 442 N E 2d 67, 57 N Y 2d 860, 455 N Y S 2d 770 motion dism 442 N E.2d 68, 57 N Y 2d 862, 455 N Y S 2d 771, app dism 444 N E 2d 37, 52 N Y 2d 1045, 457 N Y S 2d 787, dismissal den 444 N E 2d 38, 57 N Y 2d 1047, 457 N Y S 2d 788, reargument ordered 453 N E 2d 545, two cases, 59 N Y 2d 890, 466 N Y S 2d 316, affd 455 N E 2d 1245, 60 N Y 2d 70, 468 N Y S 2d 450, rearg den 460 N E 2d 232, two cases, 61 N Y 2d 670, 472 N Y S 2d 1028, app dism 444 N E.2d 39, 57 N Y 2d 610, 457 N Y S 2d 1026, two cases

Tenn—Outdoor Advertising Ass'n of Tennessee, Inc v Shaw, App, 598 S W 2d 783, 21 A L R 4th 1296

Wash—Ackerley Communications, Inc v City of Seattle, 602 P 2d 1177, 92 Wash 2d 905, app dism, cert den 101 S Ct 49, two cases, 449 U S 804, 66 L Ed 2d 7

Removal of nonconforming billboard signs

Me—State v National Advertising Co, 409 A 2d 1277

Mo—Eller Outdoor Advertising of Kansas City Through Eller Outdoor Advertising of St. Louis Division v Missouri State Highway Commission, App, 629 S W 2d 462

70. Fla—Beal v State, Dept of Transp, App, 402 So 2d 1347

La—Giardina v Marrero Furniture Co, Inc, 310 So 2d 607

Mo—State ex rel Nat Advertising Co v State Highway Commission, App, 624 S W 2d 453

S D—Board of County Com'rs of Davison County v Althen, supra, n 69

Suits in name of county not required

Tenn—Knierim v Leatherwood, 542 S W 2d 806, overruling Ledbetter v Turnpike Co, 110 Tenn 92, 73 S W 117

71. Ala—Barnes v Kent, 296 So 2d 881, 292 Ala. 508

La—Giardina v Marrero Furniture Co, Inc, 310 So 2d 607

N D—Newman Signs, Inc v Hjelle, 268 N W 2d 741, app dism 99 S Ct 1205, 440 U S 901, 59 L Ed 2d 449, app after remand, Sup, 317 N W 2d 810

75. Ark—Arkansas State Highway Commission v White Advertising Intern, 620 S W 2d 280, 273 Ark 364

Accounting

Mich—People ex rel Hoffmaster v La Duc, 46 N W 2d 442, 329 Mich 716

Interlocutory injunction not justified

Ga—Stephens v State Highway Dept, 157 S E 2d 751, 223 Ga 713

Failure to describe road not fatal

Tenn—Reeves v Perkins, App, 509 S W 2d 233

6. Pa.—Press v Manning, 68 Dauph 114

General rules govern with respect to the review of such actions [61]

6.1. Cal—Brumbaugh v Imperial County, 184 Cal Rptr 11, 134 C A 3d 556

Harmless error

Tex—Brown v Kelley, Civ App, 212 S W 2d 834

Record on appeal held to support judgment for injunction

Ky—Holmes v Garland, 284 S W 2d 324

§ 228. —— Action for Damages

Library References

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8. Ill—Town of Centreville v Deckard, 53 N E 2d 717, 322 Ill App 9

Iowa—State v F W Fitch Co, 17 N W 2d 380, 236 Iowa 208

9. Kan—State Highway Commission v Stadler, 148 P 2d 296, 158 Kan 289

State highway department

Ga—State Highway Dept v Florence, 38 S E 2d 628, 73 Ga App 852

A statute imposing liability for damages resulting from specified acts without first obtaining an order therefor, probably refers to an intentional, rather than a negligent, act [95]

9.5. Ga—Mauldin v Patten, 130 S E 2d 797, 107 Ga App 549, revd on oth grds 132 S E 2d 664, 219 Ga 211, conf to 133 S E 2d 44, 108 Ga App 368

12. Ala—Holz v Lyles, 251 So 2d 583, 287 Ala 280

Fla—Wedner v Escambia Chemical Corp, App, 102 So 2d 631

N M—Hindi v Smith, 388 P 2d 60, 73 N M 335

N Y—Gilligan v Cunningham, 78 N Y S 2d 908, 273 App Div 1046

N C.—Owens v Elliott, 125 S E 2d 589, 257 N C 250

S C—Huggin v Gaffney Development Co, 92 S E 2d 883, 229 S C 340—Burrell v Kirkland, 130 S E 2d 470, 242 S C 201

S D—Norman v Cummings, 45 N W 2d 839, 73 S D 559

13. Action or inaction by public authorities is immaterial

S C—Huggin v Gaffney Development Co, 92 S E 2d 883, 229 S C 340

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15. Fla—Wedner v Escambia Chemical Corp, App, 102 So 2d 631

18. U S—Pace v American Radiator & Standard Sanitary Corp, C A Ind, 346 F 2d 321

22. Ky—Powell v Peel, 217 S W 2d 959, 309 Ky 380

27. Pa—Com v Montour Transport Co, 1 Lycoming Rep 130

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Pleadings held insufficient

Ky—Com, Dept of Highways v Stephens, 428 S W 2d 605

39. Utah—Condas v Condas, 618 P 2d 491

40. U S—Pace v American Radiator & Standard Sanitary Corp, C A Ind, 346 F 2d 321

N Y—D A Collins Const Co., Inc v State, 451 N Y S 2d 314, 88 A D 2d 698

41. Evidence held inadmissible

Conn—Town of Southington v Francis, 266 A 2d 387, 159 Conn 64

44. Pa—Ference v Booth & Flinn Co, 88 A 2d 413, 370 Pa 400

Va—Haywood v Massie, 49 S E 2d 281, 188 Va 176

46. Tex—Mallett v Houston Contracting Co, Civ App, 388 S W 2d 216, err ref no rev err

48. Ga—Turner v Brown, 216 S E 2d 853, 234 Ga 605

52. Findings upheld

Utah—Condas v Condas, 618 P 2d 491

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59. Conn—Town of Southington v Francis, 266 A 2d 387, 159 Conn 64

N H—Moulton v Groveton Papers Co, 323 A 2d 906, 114 N H 505

Utah—Blonquist v Blonquist, 516 P 2d 343, 30 Utah2d 234

60. Cal—Ball v Stephens, 158 P 2d 207, 68 Cal App 2d 843

71. Kan—State Highway Commission v Stadler, supra, n 9

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Matters with respect to sign owner's entitlement to compensation have been adjudicated. [73.5]

73.5. Waiver of right

N D—Newman Signs, Inc v Hjelle, 268 N W 2d 741, app dism 99 S Ct 1205, 440 U S 901, 59 L Ed 2d 449, app after remand Sup, 317 N W 2d 810

No right to compensation

Tenn—Outdoor Advertising Ass'n of Tennessee, Inc v Shaw, App, 598 S W 2d 783, 21 A L R 4th 1296

§ 229. —— Penalties and Actions Therefor

74. Advertising signs

N J—Kingsley v Wes Outdoor Advertising Co 280 A 2d 168 59 N J 182

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97 N Y—Gould v Glass, 19 N Y 179, 19 Barb 179

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42. N J—Kingsley v Wes Outdoor Advertising Co, 280 A 2d 168, 59 N J 182

§ 230. —— Criminal Responsibility

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54. U S—Medrano v Allee, D C Tex, 347 F Supp 605, affd in part, revd in part, on oth grds 94 S Ct 2191, 416 U S 802, 40 L Ed 2d 566

Idaho—State v Nesbitt, 310 P 2d 787, 79 Idaho 1

N C—State v Spencer, App, 172 S E 2d 280, 7 N C App 282, mod on oth grds 173 S E.2d 765, 276 N C 535—State v Spencer, 173 S E 2d 765, 276 N C 535

Okl—King v State, Cr, 270 P 2d 370

Tex—West v Ellis County, Civ App, 241 S W 2d 344—Goldston v Wieghat, Civ App, 243 S W 2d 404

Offense held not to have been committed

Ind—Copeland v Public Service Co of Ind, 108 N E 2d 273, 123 Ind App 345, transfer den 111 N E 2d 47, 232 Ind 10

Mo—Camden Special Road Dist of Ray County v Taylor, App, 495 S W 2d 93

N Y—People v. Trois, 141 N Y S 2d 90, 207 Misc 463

56. N C—State v Spencer, 172 S E.2d 280, 7 N C App 282, mod on oth grds. 173 S E.2d 765, 276 N C 535.

Va—C.J.S. cited in Moore v Virginia Transit Co, 50 S E 2d 268, 272, 188 Va 493

Statute held invalid

Cal—People v Goodspeed, Super, 192 P 2d 130, 85 Cal App.2d Supp 821

N C—State v Brown, 108 S E.2d 74, 250 N C 54

Strict construction

Mo—Camden Special Road Dist of Ray County v Taylor, App, 495 S W 2d 93

Statute construed

N Y—People v Mann, 450 N Y S 2d 275, 113 Misc 2d 980

58. Action in negligence

Colo—Kirkham v Hickerson Bros Truck Co, 425 P 2d 34, 162 Colo 125

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63. Idaho—State v Nesbitt, 310 P 2d 787, 79 Idaho 1

N M—State v Brown, 383 P 2d 243, 72 N M 274

N Y—People v Trois, 141 N Y S 2d 90, 207 Misc 463

Okl—King v State, supra, n 54

64. Tex—McCall v Alpine Telephone Corporation, Civ App, 183 S W 2d 205, affd 184 S W 2d 830, 143 Tex 335

71. Idaho—State v Nesbitt, 310 P 2d 787, 79 Idaho 1

§ 231. —— Prosecution and Punishment

77. N Y—People v Calabro, 170 N Y S 2d 876, 7 Misc 2d 732

Indictments held insufficient

Cal—People v Goodspeed, supra, n 56

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28. N Y—People v Calabro, 170 N Y S 2d 876, 7 Misc 2d 732

Evidence held admissible

Idaho—State v Nesbitt, 310 P 2d 787, 79 Idaho 1

29. Wash—State v Wren, 321 P 2d 911, 51 Wash 2d 749, cert den 79 S Ct 37, 358 U S 823, 3 L Ed 2d 63

Evidence held sufficient

(2) Idaho—State v Nesbitt, 310 P 2d 787, 79 Idaho 1

(3) As to other matters

Ga—Leggett v State, 209 S E 2d 257, 132 Ga App 815

Idaho—State v Nesbitt, 310 P 2d 787, 79 Idaho 1

Evidence held insufficient

(1) Simpson v State, 195 S W 2d 545, 210 Ark 309

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35. Instructions held proper

Ala—Coleman v State, 130 So 2d 826, 41 Ala App 306

37. Idaho—State v Nesbitt, 310 P 2d 787, 79 Idaho 1

52. Ala—Coleman v State, 130 So 2d 826, 41 Ala App 306

N C—State v Spencer, 173 S E 2d 765, 276 N C 535

§ 232. Power to Control and Regulate Generally

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58. Cal—Escobedo v State Dept of Motor Vehicles, 222 P 2d 1, 35 Cal 2d 870

Conn—State v Smolen, Cir A D., 232 A.2d 339, 4 Conn Cir 385, certification den 231 A.2d 283, 155 Conn 720, cert den 88 S Ct 787, 389 U S 1044, 19 L Ed 2d 835

Miss —C J S quoted at length Muse v Mississippi State Highway Commission 103 So 2d 839, 846, 233 Miss 694

S C – South Carolina State Highway Dept v Parker Water and Sewer Sub-District 146 S E 2d 160, 247 S C 137

59. Cal —Haggerty v Kings County, 256 P 2d 393, 117 C A 2d 470

Fla —Stewart v Mack, 66 So 2d 811

Va —Richmond Funeral Directors' Ass n v Groth 120 S E 2d 467, 202 Va 792

60. U S —U S v Husband R (Roach) C A Canal Zone, 453 F 2d 1054, cert den 92 S Ct 1785, 406 U S 935, 32 L Ed 2d 136

Alaska—B & G Meats, Inc v State, 601 P 2d 252

Ariz —City of Mesa v Salt River Project Agr Imp and Power Dist, 373 P 2d 722, 92 Ariz 91, app dism 83 S Ct 1018, 372 U S 704, 10 L Ed 2d 124

Ark —Pickens v McMath, 220 S W 2d 602, 215 Ark 332

Cal —Haggerty v Kings County, supra, n 59—People v Amdur, 267 P 2d 445 123 C A 2d Supp 951 – Stevenson v City of Downey, 23 Cal Rptr 127 205 C A 2d 585

Colo —Lewis v Lorenz 354 P 2d 1008 144 Colo 23

Conn —State v Washington 184 A 2d 556 23 Conn Sup 468 1 Conn Cir 316

Ga —Williams v Grier 26 S E 2d 698 196 Ga 327 conf to 27 S E 2d 352, 70 Ga App 75—Smith v Nelson, 182 S E 2d 332, 123 Ga App 712

Hawaii—State v Cotton, 516 P 2d 709 55 Haw 138

Idaho—Bare v Department of Highways, 401 P 2d 552 88 Idaho 467

Ill —People ex rel Curren v Schommer, 63 N E 2d 744 392 Ill 17 167 A L R 1347—City of Decatur v Chasteen 166 N E 2d 29 19 Ill 2d 204— People v Tadd 299 N E 2d 8, 12 Ill App 3d 391

Ind —State v Roberts, 76 N E 2d 832 226 Ind 106— State v Roberts 78 N E 2d 440 226 Ind 106

Iowa—Tott v Sioux City, 155 N W 2d 502 261 Iowa 677—Lemke v Mueller 166 N W 2d 860

Kan —Smith v State Highway Commission 346 P 2d 259 185 Kan 445—Jones v Garrett, 386 P 2d 194, 192 Kan 109

Ky —Withers v Marshall 225 S W 2d 121

La —Bardfield v New Orleans Public Belt R R 171 So 2d 783 on remand 375 So 2d 716

Mich —Village of Bangor v Bangor Tp, 37 N W 2d 666 324 Mich 665—Green v Dearborn Municipal Court 188 N W 2d 98, 31 Mich App 591

Miss —Milam v Gulf Mobile & O R/ Co 284 So 2d 309

Mo —State ex rel Toedebusch Transfer, Inc v Public Service Commission 520 S W 2d 38

Mont—Bidlingmeyer v City of Deer Lodge 274 P 2d 821 128 Mont 292

Neb —Koutsky v Grabowski, 34 N W 2d 893, 150 Neb 508—Montgomery v Blazek, 73 N W 2d 402, 161 Neb 349—Fougeron v Seward County 119 N W 2d 298, 174 Neb 753—Omaha Parking Authority v City of Omaha 77 N W 2d 862 163 Neb 97—Vap v City of McCook, 136 N W 2d 220, 178 Neb 844

N H —Opinion of the Justices, 51 A 2d 836, 94 N H 501

N J —Hackensack Water Co v Ruta, 69 A 2d 321 3 N J 139

N M —State ex rel State Highway Commission v Silva 378 P 2d 595 71 N M 350

N Y —People v Bielmeyer 282 N Y S 2d 797 54 Misc 2d 466

N C —Suddreth v City of Charlotte, 27 S E 2d 650, 223 N C 630—Davis v Jessup, 125 S E 2d 440 257 N C 215

N D —Chandler v Hjelle, 126 N W 2d 141

Ohio—Superior Laundry & Towel Supply Co v City of Cincinnati, App 168 N E 2d 447 app dism 163 N E 2d 164, 170 Ohio St 191

Pa —William Laubach & Sons v City of Easton 32 A 2d 881 347 Pa 542—Gross v Westmoreland County 91 Pa Dist & Co 673 36 Mun 20 26 West Co 107

S D —Hurley v Rapid City, 121 N W 2d 21, 80 S D 180

Tex —City of Piney Point Village v Harris County, Civ App, 479 S W 2d 358, err ref no rev err, app dism 93 S Ct 1503, 410 U S 976, 36 L Ed 2d 173

Va —Ladd v Lamb 81 S E 2d 756, 195 Va 1031

Wash —State ex rel York v Board of Com rs of Walla Walla County, 184 P 2d 577, 28 Wash 2d 891, 172 A L R 1001—Peden v City of Seattle, 510 P 2d 1169, 9 Wash App 106

W Va —Reynolds Transp Co v Public Service Commission, 26 S E 2d 519, 125 W Va 690—Herold v Hughes, 90 S E 2d 451, 141 W Va 182

Wis —City of Milwaukee v Milwaukee & Suburban Transport Corp, 94 N W 2d 584, 6 Wis 2d 299— City of Madison v Reynolds, 180 N W 2d 7, 48 Wis 2d 156, 43 A L R 3d 1389

Wyo —Fanning v City of Laramie, 402 P 2d 460

12 C J p 755 note 73

Plenary power

Ariz —Kelly v Anderson, 249 P 2d 833, 74 Ariz 364

Kan —State ex rel Arn v State Commission of Revenue and Taxation, 181 P 2d 532 163 Kan 240— Riddle v State Highway Commission, 339 P 2d 301 184 Kan 603—Moore v State Highway Commission, 383 P 2d 549, 191 Kan 624

Mont —City of Billings v Herold 296 P 2d 263 130 Mont 138

Neb —State v Luttrell 68 N W 2d 332, 159 Neb 641

Pa —Com Dept of Transp v Gallagher, 283 A 2d 508, 3 Pa Cmwlth 371

Power is extensive

Cal —People v Kimbley, 11 Cal Rptr 519, 189 C A 2d 300

Highways included

(2) Freeways

Ohio—Janoviak v Cregan App, 162 N E 2d 561

Wis —Schneider v State (Division of Highways), 187 N W 2d 172 51 Wis 2d 458

(3) Other places

N H – State v Rosier, 191 A 2d 526, 105 N H 6

Patrolling highways

(2) Other cases

N Y —Saari v State 119 N Y S 2d 507, 203 Misc 859, affd 125 N Y S 2d 507, 282 App Div 526

Okl —Rapet v State, 248 P 2d 267, 96 Okl Cr 18

Effect of federal aid statutes

Ky Southern Bell Tel & Tel Co v Com, 266 S W 2d 308

Minn —Minneapolis Gas Co v Zimmerman, 91 N W 2d 642 253 Minn 164

Power is broad and pervasive

U S —Bibb v Navajo Freight Lines, Inc, Ill, 79 S Ct 962, 359 U S 520, 3 L Ed 2d 1003

Entries upon highway

Cal —People By and Through Department of Public Works v Murray, 342 P 2d 485, 172 C A 2d 219

N M —State ex rel State Highway Commission v Lavasek 385 P 2d 361, 73 N M 33

Statute construed

D C —D C Federation of Civic Ass'ns, Inc v Airis, C A, 391 F 2d 478, 129 U S App D C 125

Mont —Kuchan v Harvey 585 P 2d 1298, 179 Mont 7

N J —Weinstein v City of Newark, 241 A 2d 478, 100 N J Super 199

Wis —City of Janesville v Garthwaite, 266 N W 2d 418, 83 Wis 2d 866

Driveway regulations

Pa —Bruhin v Com, 320 A 2d 907, 14 Pa Cmwlth 300

Interstate highways

U S —Consolidated Freightways Corp of Delaware v Kassel, D C Iowa, 475 F Supp 544, affd, C A, 612 F 2d 1064 and 101 S Ct 1309, 450 U S 662, 67 L Ed 2d 580, cert dism 102 S Ct 1496, 455 U S 329, 71 L Ed 2d 187

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61. U S —U S v Certain Land in City of Portsmouth, Rockingham County, State of N H, D C N.H, 247 F Supp 932—Houser v Hill, D C La., 278 F Supp 920

Ala —Trans-Continental Mut Ins Co v Harrison, 78 So 2d 917, 262 Ala 373, 51 A L R 2d 917

Cal —Chavez v Municipal Court of Visalia Judicial Dist, 64 Cal Rptr 76, 256 C A 2d 149

Kan —C J S cited in Smith v State Highway Commission, 346 P 2d 259, 267, 185 Kan 445

N M —State ex rel State Highway Commission v Lavasek, 385 P 2d 361, 73 N M 33

N Y —People v Paddock, 288 N Y S 2d 96, 56 Misc 2d 123

62 U S —Wright v City of Montgomery, Ala, D C Ala, 282 F Supp 291, affd, C A, 406 F.2d 867, vac 91 S Ct 1218, 401 U S 989, 28 L Ed 2d 528, on remand 441 F 2d 1169

Ky —Withers v Marshall, supra, n 60

Tenn —State ex rel Phillips v Smith, 241 S W 2d 844, 34 Tenn App 608

64 Ariz —Sanitary Dist No 1 of Pima County v State ex rel Willey, 399 P 2d 179, 1 Ariz App 45—State ex rel Herman v Schaffer, 467 P 2d 66, 105 Ariz 478, 42 A L R 3d 1

Cal —People ex rel Department of Public Works v Ayon, 5 Cal Rptr 151, 352 P 2d 519, 54 C 2d 217, cert den 81 S Ct 65, 364 U S 827, 5 L Ed 2d 55

Conn —State v Smolen, Cir A D, 232 A 2d 339, 4 Conn Cir, 385, certification den 231 A 2d 283, 155 Conn 720, cert den 88 S Ct 787, 389 U S 1044, 19 L Ed 2d 835

Fla —Dade County v Palladeno, App, 303 So 2d 692

Hawaii—State v Cotton, 516 P 2d 715, 55 Haw 148

Idaho—Sanders v Hamilton, 419 P 2d 667, 91 Idaho 225

Ill —Department of Public Works and Bldgs for and in Behalf of People v Mokres, 328 N E 2d 357, 28 Ill App 3d 422

Iowa—Caulkins v Wilkes, 58 N W 2d 391, 244 Iowa 856

Kan —C J S cited in Riddle v State Highway Commission, 339 P 2d 301, 309, 184 Kan 603—Smith v State Highway Commission, 346 P 2d 259, 185 Kan 445—Moore v State Highway Commission, 383 P 2d 549, 191 Kan 624

Mich —American Motorcycle Ass'n v Davids, 158 N W 2d 72, 11 Mich App 351

Miss —C J S quoted in Harreld v Mississippi State Highway Commission, 103 So 2d 852, 859, 234 Miss 1

Mo —C J S cited in City of Clayton v Nemours, 182 S W 2d 57, 60, 353 Mo 61, app dism 65 S Ct 560, two cases, 323 U S 684, 89 L Ed 554—C J S cited in Turner v Kansas City, 191 S W 2d 612, 615, 354 Mo 857—Jones v Walker, 209 S W 2d 147, 357 Mo 476

Mont —C J S cited in City of Billings v Herold, 296 P 2d 263, 264, 130 Mont 138

Neb —Bridgeford v U-Haul, 238 N W 2d 443, 195 Neb 308

N J —State v Smith, 276 A 2d 369, 58 N J 202

N Y —Leighton v Roper, 91 N E 2d 876, 300 N Y 434, 18 A L R 2d 537—Tucci v State, 280 N Y S 2d 789, 28 A D 2d 774

N C —Honeycutt v Scheidt, 119 S E 2d 777, 254 N C 607—Barnes v North Carolina State Highway Commission, 126 S E 2d 732, 257 N C 507—State v Anderson, 164 S E 2d 48, 3 N C App 124, affd 166 S E 2d 49, 275 N C 168

N D —Timm v State, 110 N W 2d 359

Ohio—City of Cincinnati v Wright, 67 N E 2d 358, 77 Ohio App 261

Pa —Hertz v Drivurself Stations v Siggins, 58 A 2d 464, 359 Pa 25, 7 A L R 2d 438—Com v Arnold, 258 A 2d 885, 215 Pa Super 444

S C —C.J.S. cited in Atlantic Coast Line R Co. v South Carolina Public Service Commission, 139 S E 2d 911, 912, 245 S C 229—South Carolina State Highway Dept v Parker Water and Sewer Sub-District, 146 S E 2d 160, 247 S C 137

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S D —C J S. cited in Darnall v State 108 N W 2d 201, 206, 79 S D 59

Tex —Ex parte Smith, Cr., 441 S W 2d 544

Vt —State v Solomon 260 A 2d 377, 128 Vt 197

Va —Joyner v Matthews, 68 S E 2d 127, 193 Va 10—Richmond Funeral Directors Ass'n v Groth, 120 S E 2d 467, 202 Va 792—State Highway Com'r v Howard, 195 S E 2d 880 213 Va 731

Wash —Walker v State, 295 P 2d 328, 48 Wash.2d 587—State v Fox, 332 P 2d 943, 53 Wash 2d 216—City of Seattle v Wright, 433 P 2d 906 72 Wash 2d 556

W Va —State ex rel Schroath v Condry, 83 S E 2d 470, 139 W Va 827

Wis —Bisenius v Karns, 165 N W 2d 377, 42 Wis 2d 42, app dism 89 S Ct 2033, 395 U S 709, 23 L Ed 2d 655—Schneider v State (Division of Highways), 187 N W 2d 172, 51 Wis 2d 458

Police power may limit property rights if public interest so requires

Cal —People By and Through Department of Public Works v Murray, 342 P 2d 485, 172 C A 2d 219

Operation of highway governmental function of state and county

U S —Petition of Nueces County, Tex., Road Dist No 4, D C Tex., 174 F Supp 846

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65. U S —Moon v Makowski, D C Ohio 114 F Supp 914

Del —Castelline v Goldfine Truck Rental Service, Super., 107 A 2d 915, 9 Terry 550, revd on oth grds, Sup., 112 A 2d 840, 10 Terry 155

N Y —Leighton v Roper supra, n 64

Contracts which relate to the use of highways must be deemed to have been made in contemplation of the regulatory authority of the state [66.5]

66.5. U S —Sproles v Binford, 52 S Ct 581, 286 U S 374, 76 L Ed 1167

Tex —State v Logue, Sup 376 S W 2d 567—Parker Bros & Co v City of Hunter's & Creek Village, Civ App., 459 S W 2d 915

N M —Primus v City of Hot Springs, 256 P 2d 1065, 57 N M 190

N Y —Wiggins v Town of Somers, 173 N Y S 2d 579, 4 N Y 2d 215, 149 N E 2d 869

R I —Nugent v City of East Providence 238 A 2d 758, 103 R I 518

Wis —City of Madison v Reynolds, 180 N W 2d 7 48 Wis 2d 156, 43 A L R 3d 1389

68. Ariz —Mitchell v Emblade, 298 P 2d 1034 80 Ariz 398, adhered to 301 P 2d 1032, 81 Ariz 121

N H —J E D Assoc., Inc v Town of Sandown, 430 A 2d 129, 121 N H 317

Okl —Maras v Smith, 420 P 2d 483

Local ordinance held valid

N Y —Long Island Beach Buggy Ass'n v Town of Islip, 295 N Y S 2d 268, 58 Misc 2d 295, affd 316 N Y S 2d 430, 35 A 2d 739.

70. Pa —Carlino v Whitpain Investors, Whitpain, Tp., 415 A 2d 461, 52 Pa Cmwlth 145, affd 453 A 2d 1385, 499 Pa 498

75. Ill —People ex rel Curren v Schommer, supra, n 60—People v Chicago Transit Authority, 64 N E 2d 4, 392 Ill 77

Mo —C J S cited in State ex rel Audrain County v City of Mexico, 197 S W 2d 301, 303, 355 Mo 612—Jones v Walker, supra, n 64

Mont —Bidlingmeyer v City of Deer Lodge, 274 P 2d 821, 128 Mont 292

N H —Opinion of the Justices, supra, n 60

N J —State v Hubschman, 195 A 2d 913, 81 N J Super 452

N C —Parsons v Wright, 27 S E 2d 534, 223 N C 520

N D —Zueger v Boehm, 164 N W 2d 901

Pa —Wolf v Com., Dept of Highways, 220 A 2d 868, 422 Pa 34

S D —Hurley v Rapid City, 121 N W 2d 21, 80 S D 180

Tex —State v City of Austin, 331 S W 2d 737, 160 Tex 348—Hale v City of Dallas, Civ App., 335 S W 2d 785, err ref no rev err —Hill Farm, Inc v Hill County, Civ App., 425 S W 2d 414, affd, Sup., 436 S W 2d 320

Wash —Peden v City of Seattle, 510 P 2d 1169, 9 Wash App 106

Limitations on power to delegate

(3) Other statements

Ga —Seaboard Const Co v Wells, 141 S E 2d 782, 111 Ga App 375

Provisions held not conflicting

Tex —John F Buckner & Sons, v Allen, Civ App., 289 S W 2d 387

76. Cal —People v Sweetser, 140 Cal Rptr 82, 72 C A 3d 278

Kan —Smith v State Highway Commission, 346 P 2d 259, 185 Kan 445 Grantham v City of Topeka, 411 P 2d 634, 196 Kan 393

Iowa—Lemke v Mueller, 166 N W 2d 860

Mass —McCarthy v Planning Bd of Edgartown, 407 N E 2d 348, 381 Mass 86

Mont —Bidlingmeyer v City of Deer Lodge, supra, n 75

N J —Sexton v Public Service Co-ordinated Transport, 68 A 2d 648, 5 N J Super 555

N Y —Cities Service Oil Co v City of New York, 180 N Y S 2d 769, 5 N Y 2d 110, 154 N E 2d 814, cert den 79 S Ct 1453, 360 U S 934 3 L Ed 2d 1546

N C —Thompson v Seaboard Air Line R Co., 104 S E 2d 181, 248 N C 577

Ohio—Hoover v Blackmore, 87 N E 2d 477—Slicker v Board of Ed., Boardman Local School Dist App., 187 N E 2d 392—City of Oakwood v Gummer, 311 N E 2d 517 38 Ohio St 2d 164

Tex —Shell Oil Co v Jackson County Civ App., 193 S W 2d 268

Va —Richmond Funeral Directors Ass'n v Groth, 120 S E 2d 467, 202 Va 792

County roads

Md —County Council for Montgomery County v Lee 148 A 2d 568 219 Md 209

(2) Large discretion rests in county authorities—

Bentley v County Commission for Russell County, 84 So 2d 490, 264 Ala 106

(3) Other statements

Tex —Hill Farm, Inc v Hill County, Civ App., 425 S W 2d 414, affd, Sup., 436 S W 2d 320

Delegation held constitutional

Colo —Asphalt Paving Co v County Comm'rs of Jefferson County, 425 P 2d 289, 162 Colo 254

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77. Ark —Arkansas State Highway Commission v City of Little Rock, 300 S W 2d 929, 227 Ark 660

Conn —Rodgers v Cox, 36 A 2d 373, 130 Conn 616

Md —State, for Use and Benefit of Hopkins v Marvil Package Co., 98 A 2d 94, 202 Md 592

N J —McKenna v New Jersey Highway Authority, 116 A 2d 29, 19 N J 270—State v Hubschman, 195 A 2d 913, 81 N J Super 452

Or —Savage v Palmer, 280 P 2d 982, 204 Or 257

Pa —Gross v Westmoreland County, 51 Pa Dist & Co., 673, 36 Mun 20, 26 West Co 107

S C —South Carolina State Highway Dept v Parker Water and Sewer Sub-District, 146 S E 2d 160, 247 S C 137

Wash —State v Fox, 332 P 2d 943, 53 Wash 2d 216

Location of stop signs

(1) Conn —Losier v Consumers Petroleum Corporation, 38 A 2d 670, 131 Conn 161

(3) Other matters

Iowa—State v Wissler, 113 N W 2d 721, 253 Iowa 792

Nev —Application of Smith, 418 P 2d 997, 82 Nev 368

Statute construed

Ala —Bentley v County Commission for Russell County, 84 So 2d 490, 264 Ala 106

Ariz —Harlan v City of Tucson, 309 P 2d 244, 82 Ariz 111

Mont —Williams v Maley, 434 P 2d 398, 150 Mont 261

Action by commission prerequisite to statute becoming effective

Or —Ashland v Pacific Power & Light Co., 397 P 2d 538, 239 Or 241

Statute authorizing agreements between department of roads and political subdivisions

Neb —Vap v City of McCook, 136 N W 2d 220, 178 Neb 844

Purpose of regulation

U S —Citizens Organized to Defend Environment, Inc v Volpe, D C Ohio, 353 F Supp 520

County board of supervisors

Miss —Hudson v Farrish Gravel Co., 279 So 2d 630

78. Mo —Kroeger v St Louis County, 218 S W 2d 118, 358 Mo 929

N J —Hackensack Water Co v Ruta, supra n 60

N C —Parsons v Wright, supra, n 75

79. Cal —Chavez v Municipal Court of Visalia Judicial Dist., 64 Cal Rptr 76, 256 C A 2d 149

La —State v Dowling, 18 So 2d 616, 205 La 1061

N J —Hackensack Water Co v Ruta, supra, n 60

N Y —People v Cull, 210 N Y S 2d 10, 26 Misc 2d 668, affd 218 N Y S 2d 38, 10 N Y 2d 123, 176 N E 2d 495

N C —C J S cited in Clayton v Liggett v Myers Tobacco Co., 35 S E 2d 691, 693, 225 N C 563

Action of township trustees as not abuse of discretion

Ohio—Slicker v Board of Ed., Boardman Local School Dist., App., 187 N E 2d 392

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81. Neb —Omaha Parking Authority v City of Omaha, 77 N W 2d 862, 163 Neb 97—Vap v City of McCook, 136 N W 2d 220, 178 Neb 844

83. Mont —Bidlingmeyer v City of Deer Lodge, 274 P 2d 821, 128 Mont 292

S D —Hurley v Rapid City, 121 N W 2d 21, 80 S D 180

§ 233. Right and Mode of Use

84. Ala —Shuttlesworth v City of Birmingham, 180 So 2d 114, 43 Ala App 68, revd on oth grds 206 So 2d 348, 281 Ala 542, and 89 S Ct 935, 394 U S 147, 22 L Ed 2d 162, on remand 222 So 2d 377, 45 Ala App 723

Conn —Berger v Town of Guilford, 68 A 2d 371, 136 Conn 71—Stavola v Palmer, 73 A 2d 831, 136 Conn 670

Ill —Simpson v Adkins, 53 N E 2d 979, 386 Ill 64

Ind —Northern Ind Transit v Burk, App., 83 N E 2d 430—Spindler v Toomey, 111 N E 2d 715, 232 Ind 328

Iowa —State v F W Fitch Co., 17 N W 2d 380, 236 Iowa 208

Kan —Drake v Moore, 336 P 2d 807, 184 Kan 309

Mass —Loosian v Goudreault, 139 N E.2d 403, 335 Mass 253

Mo —C J S cited in State ex rel., Audrain County v City of Mexico, supra, n 75—C J.S. cited in Jones v Walker, 209 S W 2d 147, 148, 357 Mo 476

N Y —People ex rel Hunter v Department of Sanitation, 86 N Y S 2d 437, 193 Misc 233—Harmik v Levine, 106 N Y S 2d 460, affd, 115 N Y S 2d 25, 202 Misc 648, revd on oth grds 120 N Y S 2d 62, 281 App Div 878, app den 122 N Y S 2d 817, 282 App Div 684—Townsley v State, 164 N Y S 2d 840, 6 Misc 2d 557

N C —State v Anderson, 164 S E 2d 48, 3 N C App 124, affd 166 S E 2d 49, 275 N C 168

N D —Lalim v Williams County, 105 N W 2d 339

Ohio —State ex rel Copland v City of Toledo, 62 N E 2d 256, 75 Ohio App 378

Tex —State v City of Austin, 331 S W 2d 737, 160 Tex 348—Hill Farm, Inc v Hill County, Civ App., 425

S W 2d 414, affd, Sup, 436 S W 2d 320—Hill Farm, Inc v Hill County, 436 S W 2d 320

Vt —Abraham v Dougherty, 51 A 2d 133, 115 Vt 71

Va —Powell v Virginian Ry Co, 46 S E 2d 429, 187 Va 384

Wash —State ex rel York v Board of Com'rs of Walla Walla County, supra, n 60

W Va —Reynolds Transp Co v Public Service Commission, 26 S E 2d 519, 125 W Va 690

Necessity that highway be public

(2) Other statements

N Y —People v Koenig, 187 N Y S 2d 379, 17 Misc 2d 934

Use for travel is first right

Minn —State v Perry, 130 N W 2d 343, 269 Minn 204—State v Sugarman, 148 N W 466, 126 Minn 477, 52 L R A,N S, 999—Hanson v Hall 279 N W 227, 202 Minn 381

Use inconsistent with highway purposes

N Y —Town of Vienna v State, 119 N Y S 2d 545, 203 Misc 1053

85. Cal —Haggerty v Kings County, supra, n 59

Mass —Loosian v Goudreault, 139 N E 2d 403, 335 Mass 253

Wyo —C J S cited in Blumenthal v City of Cheyenne, 186 P 2d 556, 571, 64 Wyo 75

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86. Ark —Westlake v Duncan, Dieckman & Duncan Min Co, 307 S W 2d 220, 228 Ark 336

Cal —People v Sweetser, 140 Cal Rptr 82 72 C A 3d 278

Mass —Loosian v Goudreault, 139 N E 2d 403, 335 Mass 253

Neb —Michelsen v Dwyer, 63 N W 2d 513, 158 Neb 427—Born v Matzner's Estate, 65 N W 2d 593, 159 Neb 169

S D —Norman v Cummings, supra, n 12

Tex —Shell Oil Co v Jackson County, supra, n 76

Utah—Wold v Ogden City, 258 P 2d 453, 123 Utah 270

Wis —Bisenius v Karns, 165 N W 2d 377, 42 Wis 2d 42 app dism 89 S Ct 2033, 395 U S 709, 23 L Ed 2d 655

Particular uses held reasonable

S D —Syres v Eastern Clay Products, Inc, 59 N W 2d 248, 75 S D 45

"Procession"

Ala —Shuttlesworth v City of Birmingham, 180 So 2d 114, 43 Ala App 68 Revd on oth grds 206 So 2d 348, 281 Ala 542, and 89 S Ct 935, 394 U S 147 22 L Ed 2d 162, on remand 222 So 2d 377, 45 Ala App 723

88. Ga —Draffin v Massey, 92 S E 2d 38, 93 Ga App 329

Md —C.J.S. quoted in Stottlemyer v Crampton, 200 A 2d 644, 645, 235 Md 138

Neb —Guynan v Olson, 133 N W 2d 571, 178 Neb 335

Wash —Burback v Bucher, 355 P 2d 981, 56 Wash 2d 875

93. N J —Benton & Holden, Inc v Central R Co of New Jersey, 19 A 2d 672, 126 N J Law 340

95. Temporary closing held authorized

N C —C C T Equipment Co v Hertz Corp, 121 S E 2d 802, 256 N C 277

96. Ill —Simpson v Adkins, supra, n 84

Neb —Kuska v Nichols Const Co, 48 N W 2d 682, 154 Neb 580

Pa —Sadler v Frost, 14 Cumb 10

Shoulder

(1) Cal —Altman v Petrano, 245 P 2d 313 112 C A 2d 8

Conn —State v Switchenko, Cir A D, 217 A 2d 484, 3 Conn Cir 511

(2) N Y —Years v Waite, 178 N Y S 2d 283, 14 Misc 2d 193—Waterfall v Taylor, 312 N Y S 2d 753, 35 A D 2d 619

(4) Other statements

Md —Flohr v Coleman 225 A 2d 868, 245 Md 254

N Y —McNaughton v State, 194 N Y S 2d 873, 9 A D 2d 990

The court should be cautious in granting an injunction prohibiting the use of a public road except in emergency situations.[97.5]

97.5. Highway contractor entitled to injunctive relief

Miss —Hudson v Farrish Gravel Co, 279 So 2d 630

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98. U S —U S v Barner D C Cal, 195 F Supp 103

Cal —C J S cited in Escobedo v State Dept of Motor Vehicles, 222 P 2d 1, 5 35 Cal 2d 870

Ill —Zacny v Sasyk 332 N E 2d 568, 30 Ill App 3d 93

Mich —People ex rel Hoffmaster v La Duc, 46 N W 2d 442, 329 Mich 716

Minn —Kachman v Blosberg, 87 N W 2d 687, 251 Minn 224

N C —Wofford v North Carolina State Highway Commission 140 S E 2d 376, 263 N C 677, cert den 86 S Ct 50, 382 U S 822, 15 L Ed 2d 67

N D —Saetz v Heiser, 240 N W 2d 67

Pa —Freas v Campbell, 48 Lanc L Rev 464

Right is paramount

Va —Wray v Norfolk & W Ry Co, 61 S E 2d 65, 191 Va 212

Ill —Peoples Gas Light & Coke Co v City of Chicago, 109 N E 2d 777, 413 Ill 457

99. Ala —Holz v Lyles, 195 So 2d 897, 280 Ala 521

Wyo —C J S quoted in Thomas v Jultak, 231 P 2d 974, 985, 68 Wyo 198

1. Ga —Jordan v Way 220 S E 2d 258, 235 Ga 496

Md —Miller v Graff 78 A 2d 220, 196 Md 609

N C —Cook v City of Winston-Salem, 85 S E 2d 696, 241 N C 422

Tex —Ex parte Smith, Cr, 441 S W 2d 544

"The public is entitled," etc —People ex rel Hoffmaster v LaDuc, 46 N W 2d 442, 329 Mich 716

N H —Papademas v State, 237 A 2d 665, 108 N H 456

All qualified citizens

Ariz —Schecter v Killingsworth, 380 P 2d 136, 93 Ariz 273

3. La —Neyrey v Maillot, App, 21 So 2d 158

5. Ga —Southland Butane Gas Co v Blackwell, 88 S E 2d 6, 211 Ga 665, conf to 88 S E 2d 424, 92 Ga App 288—Roseberry v Freeman, 103 S E 2d 745, 97 Ga App 545

N Y —Gille v State, 96 N Y S 2d 148, 197 Misc 1043

Pa —Com v Miller, 15 Law L J 21

Pedestrians may travel etc —McLaughlin v City of Los Angeles, 140 P 2d 416, 60 Cal App 2d 241

6. La —Neyrey v Maillet, supra, n 3

S D —Allen v Martley, 87 N W 2d 355, 77 S D 133

8. Cal —People v Sweetser, 140 Cal Rptr 82, 72 C A 3d 278

Ky —Withers v Marshall, 225 S W 2d 121

Mo —Dillen v Edwards, 254 S W 2d 44 transf, Sup, 263 S W 2d 433

Neb —Matson v Dawson, 178 N W 2d 588, 185 Neb 686

9. Cal —People v Sweetser, 140 Cal Rptr 82, 72 C A 3d 278

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14. Ind —Northern Ind Transit v Burk, 89 N E 2d 905, 228 Ind 162, 17 A L R 2d 572

Neb —Caldwell v Heckathorn, 127 N W 2d 182, 176 Neb 704

N D —Bergley v Mann's, 99 N W 2d 849

15. Ind —C.J.S. cited in Northern Ind Transit v Burk, App, 83 N E 2d 430, 431

Wis —Vanderhei v Carlson, 94 N W 2d 141, 6 Wis 2d 13

17. Mo —C.J.S quoted in State ex rel State Highway Commission v Smith, 393 S W 2d 544, 547

18. S D —C.J.S. cited in Norman v Cummings, 45 N W 2d 839, 841, 73 S D 559

19. Or —C.J.S cited in Lincoln County v Bruesch, 254 P 2d 690, 693, 197 Or. 571

20. Ark —Farm Bureau Lumber Corp v State, for Use of Saline County, 199 S W 2d 593, 211 Ark 95

Ky —Com, Dept of Highways v Pine Coal Co, 414 S W 2d 134

S D —C.J.S cited in Norman v Cummings, supra, n 18

Highway structure

Ill —Summit Tp Road Dist v Hayes Freight Lines, Inc, 194 N E 2d 682, 44 Ill App 2d 274

La —State, Through Dept of Transp and Development v REB Transp, Inc, App 4 Cir, 408 So 2d 1

21. Ga —Zeiger v State, 231 S E 2d 494, 140 Ga App 610

Invitation necessary to use

Ga —Powell v Barker, 101 S E 2d 113, 96 Ga App 592

22. N C —Honeycutt v Scheidt, 119 S E 2d 777, 254 N C 607

23. Vested right in use of highways see Constitutional Law § 225

25. Inalienable right

Colo —People v Nothaus, 363 P 2d 180, 147 Colo 210

27. U S —Prince v Commonwealth of Massachusetts, Mass, 64 S Ct 438, 321 U S 158, 88 L Ed 645, reh den 64 S Ct 784, 321 U S 804, 88 L Ed 1090

N D —Timm v State, 110 N W 2d 359

Okl —West v State, Cr, 277 P 2d 199

S C —Sammons v City of Beaufort, 83 S E 2d 153, 225 S C 490

28. U S —U S v Barner, D C Cal, 195 F Supp 103 —Williams v Wallace, D C Ala, 240 F Supp 100

Ariz —Schecter v Killingsworth, 380 P 2d 136, 93 Ariz 273

Ark —Arkansas State Highway Commission v Staples, 389 S W 2d 432, 239 Ark 290

Cal —Escobedo v State Dept of Motor Vehicles, 222 P 2d 1, 35 Cal 2d 870—People ex rel Dept of Public Works v Russell, 309 P 2d 10, 48 C 2d 189

Iowa—Merchants Motor Freight v State Highway Commission, 32 N W 2d 773, 239 Iowa 688

La —Ramsey v State, Through Dept of Highways, App, 322 So 2d 340

Miss —Southern Bell Tel & Tel Co v City of Meridian, 131 So 2d 666, 241 Miss 678

N Y —Schutt v MacDuff, 127 N Y S 2d 116, 205 Misc 43—State v Hart, 292 N Y S 2d 320, 57 Misc 2d 296

Tex —Drake v Texas Dept of Public Safety, Civ App, 400 S W 2d 819, err ref no rev err

Construction of regulations

(3) Other matters

S C —Bates v Legette, 121 S E 2d 289, 239 S C 25

Right to make improvements

Cal —Gibson v State, 25 Cal Rptr 284, 208 C A 2d 458

Partial repeal

Okl —Smith v Southwestern Bell Tel Co, 349 P 2d 646, 83 A L R 2d 454

Broad interpretation

N H —David v Whittaker, 358 A 2d 404, 116 N H 266

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29. U S —U S v Barner, D C Cal, 195 F Supp 103

Cal —Airways Water Co v Los Angeles County, 236 P 2d 199, 106 C A 2d 787

Colo —People v Nothaus, 363 P 2d 180, 147 Colo 210

Okl —West v State, supra, n 27

Pa —Com, Dept of Transp, Bureau of Traffic Safety v Abraham, 300 A 2d 831, 7 Pa Cmwlth 535

Wash —State ex rel York v Board of Com'rs of Walla Walla County, 184 P 2d 577, 28 Wash 2d 891, 172 A L R 1001

30. Miss —Roberts v Mississippi State Highway Commission, 309 So 2d 156

31. Cal —Haggerty v Kings County, 256 P 2d 393 117 C A 2d 470

33. U S —Cottonreader v Johnson, D C Ala, 252 F Supp 492

34. Ariz —Campbell v Superior Court In and For Maricopa County, 479 P 2d 685, 106 Ariz 542

La.— Wes-T-Erre Development Corp v Terrebonne Parish, Through Police Jury of Terrebonne Parish, App 1 Cir 416 So 2d 209, writ den Sup, 421 So 2d 251

Ohio—Rothwell v Linzell, 127 N E 2d 524, 163 Ohio St 517, app dism 76 S Ct 658, 350 U S 1012, 100 L Ed 872

Burden on movant

Va —State Highway Com'r v Easley, 207 S E 2d 870, 215 Va 197

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42. W Va —State ex rel Schroath v Condry, 83 S E 2d 470 139 W Va 827

43. Revocation of license

Mass —Woodbury v Municipal Council of Gloucester, 61 N E 2d 647, 318 Mass 385

Ohio—Rothwell v Linzell, 127 N E 2d 524 163 Ohio St 517, app dism 76 S Ct 658, 350 U S 1012, 100 L Ed 872

Liberal construction of statutes

Ill —Northern Ill Coal Corp v Langmeyer, 96 N E 2d 820, 342 Ill App 406

Scope of exception of construction vehicles

Ga —Ed Smith & Sons Inc v Mathis, 120 S E 2d 646, 103 Ga App 661, revd on oth grds, Sup, 122 S E 2d 97, 217 Ga 354, conf to, 122 S E 2d 593, 104 Ga App 774

Summary inquiry into unusual behavior

Ohio—State v Burns 217 N E 2d 57, 7 Ohio Misc 275

47. Ga —Zeiger v State, 231 S E 2d 494, 140 Ga App 610

48. Cal —T E Connolly, Inc, v State, 164 P 2d 60, 72 Cal App 2d 145

50. Ark —Farm Bureau Lumber Corp v State, for Use of Saline County, supra, n 20

51. Bicycles

U S —Wherrett v Doyle, D C Neb, 456 F Supp 203

52. N Y —People v Thomas, 105 N Y S 2d 611, 199 Misc 163

53. N H —Gatto v Cloutier, 41 A 2d 609, 93 N H 331

Saddle horse held "vehicle"

Kan —Conrad v Dillinger, 270 P 2d 216, 176 Kan 296

54. Ohio—Winters v Pence, 123 N E 2d 669, 97 Ohio App 59

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55. Parking on state highway system held matter of statewide concern

Neb —Vap v City of McCook, 136 N W 2d 220, 178 Neb 844

57. N H —Gatto v Cloutier, supra, n 53

61. Ga —Crook v State, 275 S E 2d 794, 156 Ga App 756

Ill —People v Warren, 143 N E 2d 28, 11 Ill 2d 420—City of Decatur v Chasteen, 166 N E 2d 29, 19 Ill 2d 204

62. Ill —Bode v Barrett, 106 N E 2d 521, 412 Ill 204 affd 71 S Ct 468, 344 U S 583, 97 L Ed 2d 567—City of Decatur v Chasteen 166 N E 2d 29 19 Ill.2d 204

Wash —Horluck Transp Co v Eckright, 352 P 2d 205 56 Wash 2d 218

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64. Ill —City of Decatur v Chasteen, 166 N E 2d 29, 19 Ill 2d 204

Tex —Chevron Oil Co v City of El Paso, Civ App, 537 S W 2d 472

Wash —Horluck Transp Co v Eckright, 352 P 2d 205, 56 Wash 2d 218

69. Ill —Bode v Barrett, supra, n 62

71. Cal —Ex parte Mares, 171 P 2d 762, 75 Cal App 2d 798

Ky —Louisville Taxicab & Transfer Co v Blanton, 202 S W 2d 413, 305 Ky 179, 175 A L R 1329

Wis —State ex rel Hermann v Madison Gas & Elec Co, 58 N W 2d 522, 264 Wis 31

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76. Iowa—Caulkins v Wilkes, 58 N W 2d 391, 244 Iowa 856

85. Tenn —Large v City of Elizabethton, 203 S W 2d 907, 185 Tenn 156

Common carriers

Tenn —Dilworth v State, 322 S W 2d 219, 204 Tenn 522

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93. U S —State of Tenn v U S, C A Tenn, 256 F 2d 244

Mo —City of Camdenton v Sho-Me Power Corp, 237 S W 2d 94, 361 Mo 790

N H —Hartford v Town of Gilmanton, 146 A 2d 851 101 N H 424

Pa —Hindin v Samuel, 45 A 2d 370 158 Pa Super 539

S D —State v Black Hills Transp Co, 20 N W 2d 683, 71 S D 28

94. Ky —Warfield Natural Gas Co v Lawrence County, 189 S W 2d 357, 300 Ky 410

Pa —Philadelphia Elec Co v Camper, 51 Del Co 277

Tex —McLennan County v Sinclair Pipe Line Co, Civ App, 323 S W 2d 471, err ref no rev err

95 N J —Hackensack Water Co v Ruta, 69 A 2d 321, 3 N J 139

S D —Lien v Rowe, 92 N W 2d 922, 77 S D 422

Parade permit

Ala —Shuttlesworth v City of Birmingham, 180 So 2d 114, 43 Ala App 68 Revd on oth grds 206 So 2d 348, 281 Ala 542, and 89 S Ct 935, 394 U S 147, 22 L Ed 2d 162, on remand 222 So 2d 377, 45 Ala App 723

96. Utah—White v Salt Lake City, 239 P 2d 210, 121 Utah 134

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1. S C —Sammons v City of Beaufort, 83 S E 2d 153, 225 S C 490

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10. Ky —Warfield Natural Gas Co v Lawrence County, 189 S W 2d 357, 300 Ky 410

17. N D —Consolidated Freightways v Lamb, 15 N W 2d 74, 73 N D 339

18. Ill —Northern Ill Coal Corp v Langmeyer, 96 N E 2d 820, 342 Ill App 406

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21. Mass —Opinion of the Justices to the Senate, 352 N E 2d 197, 370 Mass 895

Mich —Winter v Perez, 56 N W 2d 276, 335 Mich 575

22. Cal —Wright v Sniffin, 181 P 2d 675, 80 Cal App 358—Acosta v Los Angeles County, 14 Cal Rptr 433, 363 P 2d 473, 56 C 2d 208, 88 A L R 2d 1417

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Bicycle held not vehicle under statute

Fla —Eicholz v Frey, App, 173 So 2d 771

Regulation construed

N Y —Viggiano v State, 262 N Y S 2d 152, 47 Misc 2d 205

25. Pa —Adams v Mackleer, 361 A 2d 439, 239 Pa Super 244

Regulation construed

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30. Ill —Cihal v Carver, 79 N E 2d 82, 334 Ill App 214

Mo —State ex rel Audrain County v City of Mexico, 197 S W 2d 301, 355 Mo 612

Inapplicable to roads on public domain of United States

U S —King v Edward Hines Lumber Co, D C Or, 68 F Supp 1019

31. Mo —C J S quoted in City of Clayton v Nemours, 182 S W 2d 57, 60, 353 Mo 61, app dism 65 S Ct 560, two cases, 323 U S 684, 89 L Ed 554—C J S cited in Melba v Yourter, 203 S W 2d 727, 730—C.J.S. cited in Melber v Yourtee, 203 S W 2d 727, 730

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34. Shoulder of road

(2) Other statements

Tenn —Woods v Meacham, 333 S W 2d 567, 46 Tenn App 711

37. Pa —Gallenz v Griffiths, 38 A 2d 721, 155 Pa Super 306

Applicable to driver but not passenger

Va —Phillips v Schools, 175 S E 2d 279, 211 Va 19

42. Horsemen bound by common-law rules

Neb —Matson v Dawson, 178 N W 2d 588, 185 Neb 686

A horse being ridden alongside a road may not be subject to all of the duties applicable to the driving of a vehicle.[45.5]

45.5. La —Broussard v Annaloro, App, 268 So 2d 293

47. Kan —Baze v Groff, 473 P 2d 59, 205 Kan 736

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52. Nev —C.J.S. cited in Botts v Rushton, 172 P 2d 147, 154, 63 Nev 426

53. Ind—Fort Wayne Transit, Inc. v Shomo, 143 N E 2d 431, 127 Ind App 542

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58. Idaho—Rosenberg v Toetly, 456 P 2d 779, 91 Idaho 135

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84. U S—Vogler v Greimann, D C Alaska, 78 F Supp 575, 12 Alaska 19

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87. U S—Vogler v Greimann, supra, n 84

97. Standing vehicle

Minn—Wright v Minneapolis St Ry Co, 23 N W 2d 347, 222 Minn 105

3 Ohio—Houser v Humbel, 72 N E 2d 590, 79 Ohio App 122

Favored or nonfavored highways

(2) Lawrence v E W Wylie Co, 64 N W 2d 820, 267 Wis 239

(12) However courts are loath to assume a common law process of designating through highways, and until designated in statutory manner, one road has no preference over another

Ky—Hall v Kolb, 374 S W 2d 854

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4. Minn—Wright v Minneapolis St Ry Co 23 N W 2d 347, 222 Minn 105

Tenn—Western Union Tel Co v Dickson 173 S W 2d 714, 27 Tenn App 752

"Right of way" rule explained

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6. N Y—Ryan v State 197 N Y S 2d 106, 21 Misc 2d 74

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(8) Other cases

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Mo—Wilson v Toliver 285 S W 2d 575, 365 Mo 640

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Wash—Gile v Nielsen, 145 P 2d 288, 20 Wash 2d 1

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11. U S—Haagenson v Matanuska Val Lines, D C Alaska 103 F Supp 579, 13 Alaska 648

Or—Henderson v C-K, Inc. 492 P 2d 266, 261 Or 15

§ 238. —— Overtaking and Passing

23. Mo—Steuernagel v St Louis Public Service Co, App 202 S W 2d 516, affd 211 S W 2d 696, 357 Mo 904

§ 240. Care Required in Use of Road

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51. La—Blanchard v Ashby Const Co, App, 95 So 2d 670

Mich—Beers v Arnot, 14 N W 2d 511, 308 Mich 604

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(2) Other matters

Neb—Matson v Dawson, 178 N W 2d 588, 185 Neb 686

54 Neb—Bezdek v Patrick, 82 N W 2d 583, 164 Neb 398

55. Ga—Anderson v Williams, 98 S E 2d 579, 95 Ga App 684

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Neb—Parsons v Cooperman, 73 N W 2d 235, 161 Neb 292—Coyle v Stopak, 86 N W 2d 758, 165 Neb 594

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56 Ill—Humbert v Lowden, 53 N E 2d 418, 385 Ill 437 conf to 56 N E 2d 323, 323 Ill App 557

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No duty to anticipate negligence of other users

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57 Mo—C J S cited in Branstetter v Gerdeman, supra, n 56

62. La—Vincent v Superior Iron Works & Supply Co App, 170 So 2d 184, writ ref 172 So 2d 292, 247 La 482

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73. Placing of signs unnecessary

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83. Cal—Wright v Sniffin, 181 P 2d 675, 80 Cal App 358

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U S—King v Edward Hines Lumber Co, D C Or, 68 F Supp 1019

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N Y—Martin v Herzog, 126 N E 814, 228 N Y 164

45 C J p 722 note 85

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Or—Lovins v Jackson, 378 P 2d 727, 233 Or 369—Ashland v Pacific Power & Light Co, 397 P 2d 535, 239 Or 241

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84. Conn—Squires v Wolcott, 52 A 2d 305, 133 Conn 449

86. Iowa—Koll v Manatt's Transp Co., 253 N W 2d 265

Neb—Guerin v Forburger, 74 N W 2d 870, 161 Neb 824—Barney v Adcock, 75 N W 2d 683, 162 Neb 179—Egenberger v National Alfalfa Dehydrating & Milling Co, 83 N W 2d 523, 164 Neb 704

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87. Minn—Flaherty v Great Northern Ry Co, 16 N W 2d 553, 218 Minn 488

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90. La—Watkins v Strickland Transp Co, App, 90 So 2d 561

91. Neb—Caldwell v Heckathorn, 127 N W 2d 182, 176 Neb 704

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(3) Other cases

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Miss—Smith v Walton, 271 So 2d 409

Tenn—Spain v Livingston, 440 S W 2d 805, 59 Tenn App 346, 45 A L R 3d 652

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93. Neb—Caldwell v Heckathorn, 127 N W 2d 182, 176 Neb 704

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(3) Blind or handicapped person

N C—Cook v City of Winston-Salem, 85 S E 2d 696, 241 N C 422

(4) Other matters

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94. Pa—Kasanovich v George, 34 A 2d 523, 348 Pa 199

99. Cal—Francis v City and County of San Francisco, 282 P 2d 496, 44 C 2d 335

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Pa—Bennett v Boney, 77 A 2d 694, 168 Pa Super 385, revd on oth grds 80 A 2d 81, 367 Pa 249

3. Minn—Wright v Minneapolis St Ry Co, 23 N W 2d 347, 222 Minn 105

6. Va—Moore v Warren, 122 S E 2d 879, 203 Va 117

10 U S—Drigotas v Doyle, D C Me, 85 F Supp 908—Lester v McFaddon, D C S C, 288 F Supp 735 affd, C A 415 F 2d 1101

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11 Mich—Beers v Arnot, 14 N W 2d 511, 308 Mich 604

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Ga—Griffin v Odum, 133 S E 2d 910, 108 Ga App 572

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12. Pa—Dean v Trembley, 137 A 2d 880, 185 Pa Super 50

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N H—State v Moore, 37 A 2d 15, 93 N H 169

17. U S—Drigotas v Doyle, supra, n 10

19. U S—Drigotas v Doyle, supra, n 10

24. Ind—Gary Rys v Dillon, 92 N E 2d 720, 228 Ind 558

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51. Minn —C.J.S cited in Mortenson v Hindahl, 77 N W 2d 185, 188, 247 Minn 356

56. Wyo —Hinkle v Siltamaki, 361 P 2d 37

61. Permits dog to run at large

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90. U S —LaBuff v Texas & N O R Co, D C La, 126 F Supp 759

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91. Cal —Lewis v Contra Costa County, 278 P 2d 756, 130 C A 2d 176

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(2) Double traffic line painted on highway held not safety zone —Sherrod v Saunders, 234 P 2d 693, 106 C A 2d 160

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93. N C —Watson v Stallings, 154 S E 2d 308 270 N C 187

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99. Pa —Gallenz v Griffiths, 38 A 2d 721, 155 Pa Super 306

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3. Or —Savage v Palmer, 280 P 2d 982, 204 Or 257

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7. Cal —Wright v Sniffin, 181 P 2d 675, 80 Cal App 358

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17. No fatal variance

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19. Fla —Smith v Allison, App, 332 So 2d 631

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20. N Y —Godfrey v Nassau County, 262 N Y S 2d 60, 24 A D 2d 569

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26. U.S —Lyons v U S, D C Me, 158 F Supp 436

27. La —Rodrigue v Mayet, App, 359 So 2d 1324

31. Ariz —State v Watson, 436 P 2d 175, 7 Ariz App 81

40. 45 C J p 718 note 37

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42. N H —Gatto v Cloutier, 41 A 2d 609, 93 N H 331

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47. Issue one of fact or law

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92. Ind —Price v Reed, 51 N E 2d 36, 114 Ind App 253

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(3) To sustain convictions for other violations

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9. Ariz —Delarosa v State, 518 P 2d 582, 21 Ariz App 263

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12. N Y —Neddo v State, supra, n. 10

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Ohio—Moore v Geiger, 215 N E 2d 607, 6 Ohio App 2d 14

Okl —Briscoe v Worley, 253 P 2d 145, 208 Okl 60

Tenn —Trigg v H K Ferguson Co, supra, n 8

Tex —Ross Anglin and Son v Brennan, Civ App, 466 S W 2d 832

Va —T E Ritter Corp v Rose, 107 S E 2d 479, 200 Va 736

Wyo —Brasel & Sims Const Co v Neuman Transit Co 378 P 2d 501—Phelan v Read Const Co, 379 P 2d 829—Gilpatrick Const Co v Wind River Ready-Mix Concrete Co, 473 P 2d 586

Duty to protect public

(2) Ga —State Const Co v Johnson, 62 S E 2d 413, 82 Ga App 698

Tex —Wedegartner v Skoruppa, Civ App, 236 S W 2d 216

Statute providing for exemption held unconstitutional

Ind —Crawford v Calumet Paving Co, 117 N E 2d 368, 233 Ind 127

Subcontractor

Tex —Gehring v Strakos, Civ App, 345 S W 2d 764, revd on oth grds, Sup, 360 S W 2d 787

78. Ga —Trammell v Matthews, 66 S E.2d 183, 84 Ga App. 332

Neb.—Kuska v Nichols Const Co, 48 N W 2d 682, 154 Neb 580—Gorges v Dobson Bros Const Co, 187 N W 2d 91, 187 Neb 19

Pa —Cimino v Laub, 43 A.2d 446, 157 Pa Super 371

79. Idaho—Hoffman v Barker, 317 P 2d 335, 79 Idaho 339, foll 317 P 2d 340, 79 Idaho 349

Neb —Fahrenbruch v Peter Kiewit Sons' Co, 27 N W 2d 680, 148 Neb 460

Tex —M C Winters, Inc v Eubank, Civ App, 456 S W 2d 500, err ref no rev err

80 Different standard cannot be prescribed by authorities

N C —C C T Equipment Co v Hertz Corp, 123 S E 2d 802, 256 N C 277

81. U S —Concho Const Co v Oklahoma Natural Gas Co, C A Okl, 201 F 2d 673—Welch v Amalgamated Sugar Co, D C Idaho, 154 F Supp 3

Conn —Przwgocki v Wikris, 34 A 2d 879, 130 Conn 419

No duty as to conditions existing prior to dedication

Or —Ashland v Pacific Power & Light Co, 395 P 2d 420, 239 Or 241, reh den 397 P 2d 538, 239 Or 241

No duty to remove structure obscuring stop sign subsequently erected

Or —Ashland v Pacific Power & Light Co, 395 P 2d 420, 239 Or 241, reh den 397 P 2d 538, 239 Or 241

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82 Wis —C.J S cited in Steeno v Wolff, 109 N W 2d 452, 455, 14 Wis 2d 68

83. **Contractor constructing bridge over highway**

N C —Hoover v Hoover 176 S E 2d 10, 9 N C App 310

84. Wis —Schicker v Leick, 162 N W 2d 66, 40 Wis 2d 295

88. U S —C.J.S cited in Burchfield v Smith, D C Miss, 295 F Supp 1126, 1134

Ariz —Arizona State Highway Dept v Bechtold, 460 P 2d 179, 105 Ariz 125—Pima County v Southern Pac Co, 386 P 2d 400, 95 Ariz 41—Walker v Coconino County, 473 P 2d 472, 12 Ariz App 547

D C —Newman v U S, D C, 248 F Supp 669

Hawaii—Levy v Kimball, 443 P 2d 142, 50 Haw 497, 637 app after remand 465 P 2d 580, 51 Haw 540—Ikene v Maruo, 511 P 2d 1087, 54 Haw 548

Idaho—Smith v State, 473 P 2d 937, 93 Idaho 795

Ind —State v Bouras, App, 423 N E 2d 741

Ky —Com Dept of Highways v General & Excess Ins Co, 355 S W 2d 695—Com, Dept of Highways v Higdon, 383 S W 2d 331

La —Wilkinson v American Ins Co of Newark, New Jersey, App, 311 So 2d 584

Me —Thorbjohnson v Rockland-Rockport Lime Co, Inc, 309 A 2d 240

Mich —Mullins v Wayne County, 168 N W 2d 246, 16 Mich App 365

Mont —State v District Court of Fourteenth Judicial Dist, In and For Golden Valley County, 572 P 2d 201, 175 Mont 63

Neb —Olson v Wayne County, 59 N W 2d 400, 157 Neb 213

Nev —State v Webster, 504 P 2d 1316, 88 Nev 690

N Y —People v Ditmiak, 268 N E 2d 768, 28 N Y 2d 74, 320 N Y S 2d 25

Ohio—State ex rel Litterst v Smith, 94 N E 2d 802, 87 Ohio App 513

Pa —Conklin v City of Scranton, 49 Lack Jur 53—Rodgers v Shaler Tp, supra, n 72—Weyandt v Mangus, 19 Cambria 184

S C —Campbell v South Carolina State Highway Dept, 135 S E 2d 838, 244 S C 186—Stanley v South Carolina State Highway Dept, 153 S E 2d 687, 249 S C 230

Tenn —Trigg v H K Ferguson Co, supra, n 8

Wash —Albin v National Bank of Commerce of Seattle, 375 P 2d 487, 60 Wash 2d 745—Kelly v Gifford, 386 P 2d 415, 63 Wash.2d 221

Duty to maintain shoulders in reasonable repair

La —Watson v Morrison, App., 340 So 2d 588, writ issued, Sup, 342 So 2d 218, application den 341 So 2d 1134

Mich —Johnson v State, 188 N W 2d 33, 32 Mich App 37

Highway safety program

Mich —People of City of Adrian v Poucher, 247 N W 2d 798, 398 Mich 316

Highway design professional service

N Y —Hall v State, 435 N Y S 2d 663, 106 Misc 2d 860

89. La —Dowden v State, App, 81 So.2d 48—Kilpatrick v State Through Dept of Highways, App, 154 So 2d 439, writ ref 156 So 2d 601, 245 La 55, and 156 So 2d 601, 245 La 56

Md —County Com'rs of Carroll County v Staubitz, 190 A 2d 79, 231 Md 309

N Y —Murphy v New York State Thruway Authority, 204 N Y S 2d 953, 23 Misc 2d 1078

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90. La —Dowden v State, App, 81 So 2d 48

N Y —Rasher v State, 154 N Y S 2d 621, 3 Misc 2d 324, app dism 182 N Y S 2d 347, 7 A D 2d 952, 182 N Y S 2d 1018, 7 A D 2d 954, and 182 N Y S 2d 1019, 7 A D 2d 954

Duty not dischargeable

La —Picou v Highlands Ins Co, App, 298 So 2d 307, writ ref, Sup, 302 So 2d 25

91. D C —Husovsky v U S, C A, 590 F 2d 944

N Y —Sher v State, supra, n 90

Amount of travel

(4) Other matters

Hawaii—Levy v Kimball, 443 P 2d 142, 50 Haw 497, 637, app after remand 465 P 2d 580, 51 Haw 540

92. Ariz —Jensen v Maricopa County, 522 P 2d 1096, 22 Ariz App 27

Iowa—C.J S quoted at length in Engman v City of Des Moines, 125 N W 2d 235, 237, 255 Iowa 1039

N Y —Lyons v State, 82 N Y S 2d 563, 192 Misc 983, affd 86 N Y S 2d 264, 274 App Div 1086, rearg and app den 88 N Y S 2d 259, 275 App Div 741, app dism 86 N E 2d 110, 299 N Y 593—C.J.S. cited in Doremus v Incorporated Village of Lynbrook, 269 N Y S 2d 55, 56, 25 A D 2d 749, revd on oth grds 222 N E 2d 376, 18 N Y 2d 362, 275 N Y S 2d 505

Pa —Potter Title & Trust Co v Young, 80 A 2d 76, 367 Pa 239

Tenn —Trigg v H K Ferguson Co, supra, n 8

Wash —Meabon v State, 463 P 2d 789, 1 Wash App 824

Test

La —Jones v Louisiana Dept of Highways, App, 338 So 2d 338

93. Neb —Dickenson v Cheyenne County, supra, n 61

94. Colo —Wheeler v Baker, App, 636 P 2d 1326, revd on oth grds, Sup, 666 P 2d 559

Conn —Baker v Ives, 294 A 2d 290, 162 Conn 295

N Y —Gille v State, 96 N Y S 2d 148, 197 Misc 1043—Ingham v State, 158 N Y S 2d 557, 4 Misc 2d 1

95. Conn —Baker v Ives, 294 A 2d 290, 162 Conn 295

N Y —Aschmutat v State, 187 N Y S 2d 174, 17 Misc 2d 553, motion den 207 N Y S 2d 254, 11 A D 2d 962, affd 209 N Y S 2d 566, 12 A D 2d 844

96. R I —Ferretti v Berry, 189 A 2d 344, 96 R I 67

Bicyclist riding at extreme right of highway

N Y —Viggiano v State, 262 N Y S 2d 152, 47 Misc 2d 205

98. Alaska—State v I'Anson, 529 P 2d 188

Cal —Loewen v City of Burbank, 269 P 2d 121, 124 C A 2d 551

a —Dabov v Allstate Ins Co, App, 302 So 2d 697, writ ref, Sup, 305 So 2d 539, 540

Neb —Olson v Wayne County, supra, n 61—Clouse v Dawson County, 74 N W.2d 67, 161 Neb 544 55 A L R 2d 991—Lyon v Paulsen Bldg & Supply, Inc, 160 N W 2d 191, 183 Neb 365

N Y —Boyce Motor Lines, Inc v State, supra, n 90—Bertram v State, supra, n 90—Suligowski v State, 179 N Y S 2d 228, 14 Misc 2d 585—Aschmutat v State, 187 N Y S 2d 174, 17 Misc 2d 553, motion den 207 N Y S 2d 254, 11 A D 2d 962, affd 209 N Y S 2d 566, 2 A D 2d 844

Pa —Rodgers v Shaler Tp, supra, n 72

Wash —Meabon v State, 463 P 2d 789, 1 Wash App 824

99. N Y —Kaufman v State, 275 N Y S 2d 757, 27 A D 2d 587—Shaw v State, 290 N Y S 2d 602 56 Misc 2d 857

Other tests

N Y —Rasher v State, 154 N Y S 2d 621, 3 Misc 2d 324, app dism 182 N Y S 2d 347, 7 A D 2d 952, 182 N Y S 2d 1018, 7 A D 2d 954, and 182 N Y S 2d 1019, 7 A D 2d 954

1. N Y —C J S cited in Armstrong v Bacher, 113 N Y S 2d 813, 817, 280 App Div 512, app dism 116 N E 2d 78, 306 N Y 610

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4. Conn —Fabrizi v Golub, 55 A 2d 625, 134 Conn 89

Kan —Thompson v Board of County Com'rs, Morris County, 223 P 2d 749 170 Kan 74

Recovery for "insufficiency" of highway

Neb —Olson v Wayne County, 59 N W 2d 400, 157 Neb 213—Shields v Buffalo County, 71 N W 2d 701, 161 Neb 34

Wis —Cable v Marinette County, 117 N W 2d 605, 17 Wis 2d 390

6. Insufficiency or want of repair

Neb —Christensen v City of Tekamah, 268 N W 2d 93, 201 Neb 344

7 N Y —Camuglia v State, 84 N Y S 2d 579, 197 Misc 180

8. La —Porta v State Through State Bd, App, 242 So 2d 64

N Y —Karrat Bros & Co v State, 156 N Y S 2d 924, 2 A D 2d 538, affd in part and revd in part on oth grds 169 N Y S 2d 909, 3 N Y 2d 993, 147 N E 2d 477

Wash —Goodner v Chicago, M, St P & P R Co, 377 P 2d 231, 61 Wash 2d 12—Meabon v State, 463 P 2d 789 1 Wash App 824

Extent of duty

N Y —Acorn v State, 142 N Y S 2d 813, 286 App Div 940

Time to correct condition

Iowa—Koehler v State, 263 N W 2d 760

La —Maggio v East Baton Rouge Parish, App, 262 So 2d 72

N J —Brown v Brown, 432 A 2d 493, 86 N J 565

10. Conn —Donnelly v Ives, 268 A 2d 406, 159 Conn 163

Liability where plan adopted without adequate study or reasonable basis

N Y —Natina v Westchester County Park Commission, 268 N Y S 2d 414, 49 Misc 2d 573

Manifestly dangerous plan or design

Kan —Martin v State Highway Commission, 518 P 2d 437, 213 Kan 877

11. Idaho—Mason v Hillsdale Highway Dist, 154 P 2d 490, 65 Idaho 833

12. Mich —Fraley v. City of Flint, 221 N W 2d 394, 54 Mich App 570

Judging adequacy of design

Kan —Martin v State Highway Commission, 518 P 2d 437, 213 Kan 877

Authorities may be liable where they failed to abate nuisance created by design defect [13.5]

13.5. U S —Jennings v U S, C A Md, 291 F 2d 880, on remand, D C, 207 F Supp 143, affd 318 F 2d 718

14. Cal —Hansen v Matich Corp, 44 Cal Rptr 149, 234 C A 2d 129

Conn —Rodgers v Cox, 36 A 2d 373, 130 Conn 616

N C —Luther v Asheville Contracting Co, 151 S E 2d 649, 268 N C 636

§ 255. Roads and Portions Thereof to Which Duty Extends

15. N C —Sherrill v N C State Highway Commission, 142 S E 2d 653, 264 N C 643

Tex —C J S cited in Driver v Worth Construction Company, 273 S W 2d 603, 607 154 Tex 66

17. S D —Pederson v Canton Tp, 34 N W 2d 172, 72 S D 332

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18. S D —Pederson v Canton Tp, supra, n 17

20. Mass —Boyce v Town of Templeton, 138 N E 2d 276, 335 Mass 1

21. Kan —Thummel v Kansas State Highway Commission, 164 P 2d 72, 160 Kan 532

La —Gayle v Department of Highways, 205 So 2d 775, writ refused 207 So 2d 538, 251 La 932, and, 207 So 2d 539, application not considered 207 So 2d 539, 251 La 934

N H —Savoie v Littleton Const Co 57 A 2d 772, 95 N H 67

Relocation without notice

Kan —Schroder v Kansas State Highway Commission, 428 P 2d 814 199 Kan 175

27. Waterways, culverts, ditches and drains

N Y —Mennito v Town of Wayland, 56 N Y S 2d 654

28. Conn —Tuckel v Argraves, 170 A 2d 895 148 Conn 355

N Y —Kaplan v State, 82 N Y S 2d 561—Lyons v State, 82 N Y S 2d 563, 192 Misc 983, affd 86 N Y S 2d 264, 274 App Div 1086, rearg and app den 88 N Y S 2d 259, 275 App Div 741, app dism 86 N E 2d 110, 299 N Y 593—Whitmire v State, 99 N Y S 2d 83, 198 Misc 481

Pa —Rodgers v Shaler Tp, 96 Pa Law J 232

30. Cal —Briggs v State, 92 Cal Rptr 433, 14 C A 3d 489

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36. Neb —Shupe v Antelope County, 59 N W 2d 710, 157 Neb 374

37. Traffic control device

Mich —Lynes v St Joseph County Road Commission, 185 N W 2d 111, 29 Mich App 51

39. Miss —United Gas Corp v Parker 174 So 2d 370 252 Miss 486

N Y —Fitzgerald v State, 135 N Y S 2d 115, 284 App Div 790

40. N Y —Gardner v State, 133 N Y S 2d 852, 206 Misc 503—Harrow v State, 225 N Y S 2d 438, 32 Misc 2d 170, affd 251 N Y S 2d 798, 21 A D 2d 571, affd 216 N E 2d 28, 17 N Y 2d 619, 268 N Y S 2d 933

41. Neb —Farmers Co-op Co v Dodge County, 148 N W 2d 922, 181 Neb 432

N Y —Tennessee v State, 117 N Y S 2d 89, 280 App Div 640—Grace v State, 262 N Y S 2d 339, 47 Misc 2d 253

45. Conn —C J S. quoted in State v Switchenko, Conn Cir A D, 217 A 2d 484, 486, 3 Conn Cir 511

La —C J S. quoted at length in Hopkins v State Through Dept of Highways, App, 167 So 2d 441, 445, writ ref 168 So 2d 268 246 La 885

N Y —Meeker v State, 185 N Y S 2d 651, 17 Misc 2d 288

S C —Ankrim v South Carolina State Highway Dept, 159 S E 2d 911, 251 S.C 42

46. Hawaii—Terranella v City and County of Honolulu, 479 P 2d 210, 52 Haw 490

Neb —Richardson v State, Dept of Roads, 263 N W 2d 442, 200 Neb 225, op supp 265 N W 2d 457, 200 Neb 781

N M —New Mexico State Highway Dept. v Van Dyke, 563 P 2d 1150, 90 N M 357

N Y —McLane v State, 53 N Y S 2d 194—Sweet v State, supra, n 45—McCauley v State, 195 N Y S 2d 253, 9 A D 2d 488, revd on oth grds 204 N Y S 2d 174, 8 N Y 2d 938, 168 N E 2d 843

Freshly plowed part not a nuisance

Cal —Zeppi v State, 345 P 2d 33, 174 C A 2d 484

Unanticipated use

N Y —Frasier v State, 263 N Y S 2d 730, 24 A D 2d 777

47. N Y —Gilbert v State supra, n 45—Kaplan v State, supra n 28—Eckerlin v State, 184 N Y S 2d 778, 17 Misc 2d 224, affd 193 N Y S 2d 236, 9 A D 2d 717 and 193 N Y S 2d 237, 9 A D 2d 717—Harrison v State, 197 N Y S 2d 662, 19 Misc 2d 578, affd 239 N Y S 2d 809, 19 A D 2d 564—Viggiano v State, 262 N Y S 2d 152, 47 Misc 2d 205

Traps prohibited

Ky —Dillingham v Department of Highways, 253 S W 2d 256—Falender v City of Louisville, 448 S W 2d 367

48 Bicyclist

N Y —Viggiano v State, 262 N Y S 2d 152, 47 Misc 2d 205

No duty to protect against unusual or extraordinary occurrences

Neb —Richardson v State, Dept of Roads, 263 N W 2d 442 200 Neb 225 op supp 265 N W 2d 457, 200 Neb 781

51 N Y —Arno v State, 195 N Y S 2d 924, 20 Misc 2d 995

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53. Conn —Hornyak v Town of Fairfield, 67 A 2d 562, 135 Conn 619

N Y —Ryan v State, 197 N Y S 2d 106, 21 Misc 2d 74

55. R I —Di Palma v Zoning Bd of Review of Town of Bristol 50 A 2d 779 72 R I 286, 175 A L R 399

56. Conn —Tuckel v Argraves, 170 A 2d 895, 148 Conn 355

N Y —Kaplan v State, supra, n 28

65. La —Turner v Louisiana Dept of Highways, App, 319 So 2d 840

N Y —Petzold v State, 114 N Y S 2d 572, 202 Misc 255—McAfee v State, 149 N Y S 2d 547, 1 Misc 2d 545

Detour

(2) Other cases —Broedon v White, 156 P 2d 904, 62 Ariz 256

Kan —Schroder v Kansas State Highway Commission, 428 P 2d 814, 199 Kan 175

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66. La —Glover v Town of Ponchatoula, App, 17 So 2d 44

N Y —Moore v State, 221 N Y S.2d 72, 30 Misc 2d 740

Established road

(2) Other statements

Ohio—Van Scyoc v Roth, 205 N E 2d 617, 2 Ohio Misc 155

68. Md —Godwin v County Com'rs of St Mary's County, 260 A 2d 295, 256 Md 326

70. Ariz —Harlan v City of Tucson, 309 P 2d 244, 82 Ariz 111

Ky — Perry v City of Cumberland, 227 S W 2d 411, 312 Ky 375

73. Wis —Dunwiddie v Rock County, 137 N W 2d 388, 28 Wis 2d 568

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85. N C —C.J.S quoted in Reynolds v J C Critcher, Inc., 123 S E 2d 738, 744, 256 N C 309

§ 256. —— Roads Under Repair

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86. Iowa—Ehlinger v State, 237 N W 2d 784

Ky —C.J S. cited in Com Dept of Highways v Young, 354 S W 2d 23, 24

N Y —Lawrence v State, 110 N Y S 2d 10, 200 Misc 1119, motion den 112 N Y S 2d 782, affd 119 N Y S 2d 620, 281 App Div 922—Goodman v State, 117 N Y S 2d 300, 203 Misc 945

Tenn —C.J.S cited in Foster & Creighton Co v Hale, 222 S W 2d 222, 225, 32 Tenn App 208—C J.S cited in Brinkley v Gallahar, 359 S W 2d 857, 860 50 Tenn App 129—C.J S cited in Mid-South Pavers, inc v Whitaker, 385 S W 2d 284, 287, 53 Tenn App 584

87. Ky —C.J S cited in Com Dept of Highways v Young, 354 S W 2d 23, 24

89. Conn —Rodgers v Cox, supra, n 14

Ky —C.J.S. quoted in Com Dept of Highways v Young, 354 S W 2d 23, 24

§ 257. Defects and Obstructions Causing Injury

Library References

Highways ⇐192

92. Alaska—State v Guinn, 555 P 2d 530

Conn —Chazen v City of New Britain, 170 A 2d 891, 148 Conn 349

Iowa—Koehler v State 263 N W 2d 760

Kan —Shafer v State Highway Commission, 219 P 2d 448, 169 Kan 264—Summers v State Highway Commission, 284 P 2d 612, 178 Kan 234—Hampton v State Highway Commission, 498 P 2d 236, 209 Kan 565

La —Vervik v State Through Dept of Highways, App, 278 So 2d 530, affd, Sup, 302 So 2d 895—Hudson v State Through Dept of Highways, App 289 So 2d 503 writ den, Sup, 293 So 2d 178

Mass —Riley v New England Tel & Tel Co, 234 N E 2d 746, 354 Mass 8

Neb —Shupe v Antelope County, 59 N W 2d 710, 157 Neb 374

N Y —C J.S. cited in Messinger v State 51 N Y S 2d 506, 507, 183 Misc 811—Julian v State, 63 N Y S 2d 364, 187 Misc 146—Reynolds v State 231 N Y S 2d 681, 35 Misc 2d 757

Ohio—Pancake v Wakefield, 140 N E 2d 887, 102 Ohio App 5

Tenn —C.J S. cited in Foster & Creighton Co v Hale, supra, n 86—Sherman White & Co v Long, 326 S W 2d 469 205 Tenn 295

Damage to property by vibrations caused by vehicular traffic

N Y —Tompkins v State, 227 N Y S 2d 475, 33 Misc 2d 878

Defect dangerous or in nature of trap

La —Maggio v East Baton Rouge Parish, App, 262 So 2d 72

93. Fla —State, Dept of Transp v Eades, App, 383 So 2d 973

N Y —Brown v State, 139 N Y S 2d 832, 207 Misc 613—Retzel v State, 405 N Y S 2d 391, 94 Misc 2d 562

N C —Wood v Carolina Tel & Tel Co, 46 S E 2d 717, 228 N C 605, 3 A L R 2d 1, foll 46 S E 2d 719, 228 N C 608

S C —Stanley v South Carolina State Highway Dept, 153 S E 2d 687, 249 S C 230

Duty to remove or warn of dangerous obstruction

Neb —Johnson v Metropolitan Utilities Dist, 125 N W 2d 708, 176 Neb 276

94. Mich —Hoag v Hyzy, 63 N W 2d 632, 339 Mich 163

N J —Longi v Raymond-Commerce Corp 113 A 2d 69, 34 N J.Super 593

What constitutes defect

Kan —Schroder v Kansas State Highway Commission, 428 P 2d 814, 199 Kan 175—Brown v State Highway Commission, 444 P 2d 882, 202 Kan 1

La —Oliver v Jefferson Parish, App 4 Cir, 408 So 2d 275, writ den Sup, 413 So 2d 495

Mass —Daigneault v Town of Auburn 259 N E 2d 574, 357 Mass 612

Neb —Christensen v City of Tekamah, 268 N W 2d 93, 201 Neb 344

Tex —Sutton v State Highway Dept, Civ App 549 S W 2d 59, err ref no rev err

Slippery condition held not disrepair

W Va —Christo v Dotson, 155 S E 2d 571, 151 W Va 696

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99. N Y —Meil v Syracuse Constructors, Inc, 240 N Y S 2d 403, 19 A D 2d 10

1. La —Autrey v City of Baton Rouge, App, 58 So 2d 246

N Y —Hayes v City of New York, 47 N Y S 2d 324, 267 App Div 535—Breckles v State, 48 N Y S 2d 488

Chuck hole

La —Maggio v East Baton Rouge Parish, App, 262 So 2d 72

3. N Y —Brown v State, 139 N Y S 2d 832, 207 Misc 613

4. N Y —Cook v State, 96 N E 2d 90, 301 N Y 780

10 N H —Twardosky v New England Tel & Tel Co, 62 A 2d 723, 95 N H 279

N Y —Meeker v State 185 N Y S 2d 651, 17 Misc 2d 288

11 N Y —Julian v State, 63 N Y S 2d 364, 187 Misc 146—Siegel v State, 290 N Y S 2d 351, 56 Misc 2d 918

13. U S —Aubertin v Board of County Com'rs of Woodson County, Kan, C A Kan, 588 F 2d 781

15. D C —Washington Gas Light Co v Jones, App, 332 A 2d 358

N Y —Weiler v Town of Osceola, 273 N Y S 2d 90, 51 Misc 2d 163, affd 287 N Y S 2d 365, 29 A D 2d 737

Pa —Yingst v Cassel, 62 Dauph Co 248

Hydrant base

La —Vega v St Bernard Water Dist No 1, App, 398 So 2d 1248, writ not considered, Sup, 401 So 2d 986

16. U S —Murphy v City of Asbury Park, C C A N Y, 139 F 2d 888, cert den 64 S Ct 1048, 322 U S 735, 88 L Ed 1569

N Y —Scally v State, 271 N Y S 2d 386, 26 A D 2d 606, affd 47 N E 2d 497, 24 N Y 2d 747, 299 N Y S 2d 624

Utah —C.J S cited in Stevens v Salt Lake County, 478 P 2d 496, 499, 25 Utah2d 168

Wis —Loche v Village of Fox Point, 34 N W 2d 126, 253 Wis 375

Poles of power line

N Y —Sweet v State, 89 N Y S 2d 506, 195 Misc 494

Ditch and drain

N Y —Cruise v New York State Thruway Authority, 283 N Y S 2d 779, 28 A D 2d 1029, affd 260 N E 2d 553, 26 N Y 2d 1037, 311 N Y S 2d 924

Catch basin

N Y —Dara v State, 349 N Y S 2d 203, 42 A D 2d 493

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17. Neb —C.J.S. cited in Olson v Wayne County, 59 N W 2d 400, 405, 157 Neb 213

23. La —Pickens v St Tammany Parish Police Jury, 323 So 2d 430

24. La —Cain v Houston General Ins Co, App, 327 So 2d 526, cert den 330 So 2d 279

27. N Y —Mascaro v State, 362 N Y S 2d 78, 46 A 2d 941, affd 346 N E 2d 543, 38 N Y 2d 870, 382 N Y S 2d 742

Pa —Diller v J D Eckman, Inc, 58 Lanc Rev 171

33. N Y —Mosher v State, 77 N Y S 2d 643, 191 Misc 804, affd 90 N Y S 2d 198, 275 App Div 891

S C —Stanley v South Carolina State Highway Dept, 153 S E 2d 687, 249 S C 230

34. N Y —Brown v State, 58 N Y S 2d 691, affd 66 N Y S 2d 922, 923, 271 App Div 811—Kemp v State, 170 N Y S 2d 850, 9 Misc 2d 781—Edgett v State, 184 N Y S 2d 952, 7 A D 2d 570

35. N Y —C.J.S. cited in Brown v State, 58 N Y S 2d 691, 692, affd 66 N Y S 2d 922, 923, 271 App Div 811—C.J.S. cited in Fitzgerald v State, 96 N Y S 2d 452, 198 Misc 39—Lapchenko v State, 153 N Y S 2d 364, 2 Misc 2d 478

Defective tree growing just off the right of way, etc —Brown v State, supra, n 34

§ 258. —— Defects Caused by Elements; Snow and Ice

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38. Alaska—State v Abbott, 498 P 2d 712

Ariz —Walker v Coconino County, 473 P 2d 472, 12 Ariz App 547

Conn —Baker v Ives, 294 A 2d 290, 162 Conn 295

La —C.J.S quoted in Rosier v State, App, 50 So 2d 31—C.J.S cited in Hogg v Department of Highways of State, App, 80 So 2d 182, 185

N Y —Hughes v State, 215 N Y S 2d 565, 14 A D 2d 449

39. Conn —Cairns v Shugrue, 441 A 2d 185, 186 Conn 300

40. Ariz —Walker v Coconino County, 473 P 2d 472, 12 Ariz App 547

As to highways under its control, the United States has the duty of inspecting at intervals, and of sanding in case of ice [41.5]

41.5. U S —Jennings v U S, C A Md, 291 F 2d 880, on remand, D C, 207 F Supp 143, affd, C A, 318 F 2d 718

45. Iowa—C.J.S. cited in Koehler v State, 263 N W 2d 760, 765

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62. Latency

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66. Alaska—Kaatz v State, 540 P 2d 1037 app after remand 572 P 2d 775

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La—Willis v State ex rel Louisiana Dept of Highways, App, 321 So 2d 819, writ den 325 So 2d 280

15. Del—Burk v Artesian Water Co, Super, 91 A 2d 545, 8 Terry 405

Me—Morneault v Inhabitants of Town of Hampden, 74 A 2d 455

Mich—Young v Groenendal, 159 N W 2d 158, 10 Mich App 112, affd 169 N 2d 920, 382 Mich 456—Young v Groenendal, 169 N W 2d 920, 382 Mich 456

N Y—Warren v State, 156 N Y S 2d 728, 3 Misc 2d 1036—Aschmutat v State, 187 N Y S 2d 174, 17 Misc 2d 553, motion den 207 N Y S 2d 254, 11 A D 2d 962, affd 209 N Y S 2d 566, 12 A D 2d 844—Aschmutat v State, 209 N Y S 2d 566, 12 A D 2d 844—Flynn v City of New York, 316 N Y S 2d 494, 35 A D 2d 936, affd 275 N E 2d 335, 29 N Y 2d 715 325 N Y S 2d 752

S C—Coffee v Anderson County, 80 S E 2d 51, 224 S C 477

Wash—C J S cited in Christensen v Grays Harbor County, 210 P 2d 693, 695, 34 Wash 2d 878

Not proximate cause

La—Willis v State ex rel Louisiana Dept of Highways App, 321 So 2d 819, writ den 325 So 2d 280

17. U S—Ferguson v Ben M Hogan Co, D C Ark, 307 F Supp 658

N Y—Meeker v State, 185 N Y S 2d 651, 17 Misc 2d 288

18. Conn—Baker v Ives, 294 A 2d 290, 162 Conn 295

19. Alaska—State v Kaatz, 572 P 2d 775

20. U S—C J S cited in mcKee v Jamestown Baking Co, C A Pa, 198 F 2d 551, 555

Ark—C J S quoted in McGeorge Contracting Co v Mizell, 226 S W 2d 566, 571, 216 Ark 509

Fla—Watson v Drew, App, 197 So 2d 53

Idaho—C.J.S cited in Deway v Keller, 388 P 2d 988, 995, 86 Idaho 506

La—Raphael Bros v Cerophyl Laboratories, 30 So 2d 116, 211 La 354

Mo—C.J.S cited in Trantham v Gilliaz, App, 348 S W 2d 737, 741

N Y—Murphy v State, 130 N Y S 2d 638, 283 App Div 980

Okl—Caddo Elec Co-op v Bollinger, 285 P 2d 200, 55 A L R 2d 172

Tex—Hadaway v Lone Star Gas Co, Civ App, 355 S W 2d 590, mandamus over

Well-travelled track, etc.

Neb—Kuska v Nichols Const Co, 48 N W 2d 682, 154 Neb 580

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21. U S—Newman v U S, D C, 248 F Supp 669

Ind—Gwaltney Drilling, Inc v McKee, 259 N E 2d 710, 148 Ind App 1

22. Okl—Caddo Elec Co-op v Bollinger, 285 P 2d 200, 55 A L R 2d 172

25. N Y—Wilkinson v State, 178 N Y S 2d 55, 14 Misc 2d 616, mod on oth grds 200 N Y S 2d 99, 11 A D 2d 621

Unusual heavy equipment on secondary road

La—Norman v State, 80 So 2d 858, 227 La 904

30. N Y—Dara v State, 349 N Y S 2d 203, 42 A D 2d 493

§ 270. —— Knowledge of Defect or Obstruction

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40. Ill—Gibson v Healy Bros & Co, 248 N E 2d 771, 109 Ill App 2d 342

Mich—Cloutier v City of Owosso, 72 N W 2d 46, 343 Mich 238, 62 A L R 2d 389

N Y—Clohessy v State, 173 N Y S 2d 835, 11 Misc 2d 952

Pa—Tennstrom v Hachmeister, 97 Pittsb Leg J 281

Wash—Impero v Whatcom County, 430 P 2d 173, 71 Wash 2d 438

41. Md—Neely v Brewer, 71 A 2d 872, 194 Md 691

N Y—Gille v State, 96 N Y S 2d 148, 197 Misc 1043

44. U S—Ferguson v Ben M Hogan Co, D C Ark, 307 F Supp 658

La—Porta v State Through State Bd, App, 242 So 2d 64

Mich—Cloutier v City of Owosso, 72 N W 2d 46, 343 Mich 238, 62 A L R 2d 389

N C—C.J S cited in Dennis v City of Albemarle, 87 S E 2d 561, 566, 242 N C 263, reh dism 90 S E 2d 532, 243 N C 221

Tex—Hadaway v Lone Star Gas Co, Civ App, 355 S W 2d 590, mandamus over

47. Miss—Bush Const Co, Inc v Blakeney, 350 So 2d 1371

48. Conn—Farrell v L G De Felice & Son, 42 A 2d 697, 132 Conn 81

51. Neb—Huber v Cornhusker Paving Co, 214 N W 2d 269, 191 Neb 108

52. Mich—Cloutier v City of Owosso, 72 N W 2d 46, 343 Mich 238, 62 A L R 2d 389

53. Neb—Lyon v Paulsen Bldg & Supply, Inc, 160 N W 2d 191, 183 Neb 365

Particular questions of negligence

(1) Conn—Hay v Hill, supra, n 3

N Y—Qunn v Sullivan County, 369 N Y S 2d 551, 48 A D 2d 965

Sufficiency of guardrails

Me—Thorbjohnson v Rockland-Rockport Lime Co, Inc., 309 A 2d 240

Duty to inspect

Md—Hensley v Montgomery County, 334 A 2d 542, 25 Md App 361, 94 A L R 3d 1148

57. U S—C.J.S cited in McKee v Jamestown Baking Co, C A Pa 198 F 2d 551, 556

Pa—Rodgers v Shaler Tp, 67 A 2d 806, 164 Pa Super 558

58. Tenn—C.J.S cited in City Water Co v Butler, 251 S W 2d 433, 438, 36 Tenn App 55

59. Cal—Electrical Products Corp v Tulare County, 253 P 2d 111 116 C A 2d 147—Newman v San Mateo County, supra, n 41

60. U S—Wrachford v S J Groves & Sons Co, C A Md, 405 F 2d 1061

Mich—Stremler v Michigan Dept of State Highways, 228 N W 2d 492, 58 Mich App 620

Minn—Thurmer v Hervin, 200 N W 2d 314, 294 Minn 518

Neb—Bruno v Gunnison Contractors, Inc, 126 N W 2d 477, 176 Neb 462—Huber v Cornhusker Paving Co, 214 N W 2d 269, 191 Neb 108

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61. Conn—Hay v Hill, supra, n 3

64. U S—W Hodgman & Sons, Inc v Motis, C A Minn, 268 F 2d 82

Ariz—Beltran v Stroud, supra n 55—C J S cited in City of Phoenix v Weedon, 226 P 2d 157, 159, 71 Ariz 259

Kan—Shafer v State Highway Commission, supra, n 55

N Y—Evans v Town of Bridgewater, supra, n 56

Pa—Rodgers v Shaler Tp supra, n 57

R I—Ferretti v Berry, 189 A 2d 344, 96 R I 67

Contributory negligence not shown as matter of law

(3) U S—Wratchford v S J Groves & Sons Co, C A Md, 405 F 2d 1061

Mich—Torma v Montgomery Ward & Co, 58 N W 2d 149, 336 Mich 468

Person traveling at night

(1) Conn—Hay v Hill, supra, n 3

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67. Conn—Schaap v City of Meriden, 93 A 2d 152, 139 Conn 254—Dunn v Ives, 177 A 2d 467, 23 Conn Sup 113

70. Conn—Morico v Cox, 56 A 2d 522, 134 Conn 218

72. Cal—Lewis v Contra Costa County, 278 P 2d 756, 130 C A 2d 176

S D—Williams v Wessington Tp, 14 N W 2d 493, 70 S D 75

75. Instructions held correct

Va—Collins v Smith, 96 S E 2d 818, 198 Va 778

Instructions held erroneous

(3) Hopper v Bulatch, 164 P 2d 483, 27 Cal 2d 431—Lewis v Contra Costa County, supra, n 72

Instructions properly refused

Va—Collins v Smith, 96 S E 2d 818, 198 Va 778

76. Instructions held erroneous

Va—Collins v Smith, 96 S E 2d 818, 198 Va 778

80. Wash—Impero v Whatcom County, 430 P 2d 171, 71 Wash 2d 438

82. U S—Wratchford v S J Groves & Sons Co, C A Md, 405 F 2d 1061

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7. Evidence held sufficient to support finding

(4) Other cases

N Y—Wishart v Andrews, 361 N Y S 2d 791, 46 A D 2d 998—Ashkinazy v City of New York, 469 N Y S 2d 437, 98 A D 2d 737

Pa—Rodgers v Shaler Tp, 67 A 2d 806, 164 Pa Super 558

§ 282. —— Damages

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15. La—Ferrente v Tantilla, App, 42 So 2d 379—Foshee v Longino, App, 216 So 2d 870

§ 283. Highway Taxes

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30 Miss—Hutchins v Board of Sup'rs of Alcorn County, 87 So 2d 54, 227 Miss 766

§ 284. —— Power to Impose

35 U S—Miller Bros Co v State of Md, Md, 74 S Ct 535, 347 U S 340, 98 L Ed 744, reh den 74 S Ct 708, 347 U S 964, 98 L Ed 1106

Kan—State ex rel Arn v State Commission of Revenue and Taxation, 181 P 2d 532, 163 Kan 240

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48. Ill—People ex rel Kramer v Chicago, B & Q R Co, 134 N E 2d 335, 8 Ill 2d 382

City streets included

S C—Leonard v Talbert, 71 S E 2d 603, 222 S C 79

50. Mo—State ex rel and to use of Moore v Wabash R Co, 208 S W 2d 223, 357 Mo 380

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54. Ill—People ex rel Schmulbach v Louisville & N R Co, 88 N E 2d 879, 404 Ill 381

57 Statutes held valid

Minn—Hoene v Jamieson, 182 N W 2d 834 289 Minn 1, app dism 91 S Ct 2251, 403 U S 926, 29 L Ed 2d 706

Tenn—City of Greenfield v Butts, App, 582 S W 2d 80

Statutes held invalid

Minn—Hoene v Jamieson, 182 N W 2d 834, 289 Minn 1, app dism 91 S Ct 2251, 403 U S 926, 29 L Ed 2d 706

§ 285. —— Construction, Amendment, and Repeal of Statutes

66. Ill—People ex rel Moore v Chicago, B & Q R Co, 111 N E 2d 509 414 Ill 419

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82. Ala—Jefferson County v City of Birmingham, 37 So 2d 584, 248 Ala 319—Jefferson County v City of Birmingham, 38 So 2d 844, 251 Ala 634

§ 286. —— Purpose

88. Ohio—State ex rel Kauer v Defenbacher, 91 N E 2d 512, 153 Ohio St 268

89. Fla—State v Special Road and Bridge Dist No 9 of Polk County, 13 So 2d 801, 153 Fla 44

Particular purposes for which road taxes may be levied

(7) Other purposes—People ex rel McWard v Wabash R Co, 70 N E 2d 36, 395 Ill 243—Connelly v Clark County, 307 N E 2d 128, 16 Ill App 3d 947

Ohio—State ex rel Ohio Turnpike Commission v Allen, 107 N E 2d 345, 158 Ohio St 168

Particular purposes for which road taxes may not be levied

(3) Other purposes

Tex—Harris County v Shepperd, 291 S W 2d 721, 156 Tex 18

§ 287. —— Amount or Rate

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98. Ill—People ex rel Schmulbach v Baltimore & O R Co, 79 N E 2d 598, 400 Ill 216—People ex rel Kramer v Chicago, B & Q R Co, 134 N E 2d 335, 8 Ill 2d 382

Wis—McDonald v City of Black River Falls, 16 N W 2d 410, 246 Wis. 172

§ 288. —— Persons and Property Liable

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22. Kan—State ex rel Arn v State Commission of Revenue and Taxation, 181 P 2d 532, 163 Kan 240—Farmers Union Central Co-op Exchange v Director of Revenue, 181 P 2d 541, 163 Kan 266

La—United Gas Pipe Line Co v Mouse, 58 So 2d 197, 220 La 969

§ 289. —— Levy and Assessment

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47. Idaho—Idaho Power Co v Three Creek Good Roads Dist, 390 P 2d 960, 87 Idaho 109

Ill—Seaborn v Town of Hadley, 60 N E 2d 46, 325 Ill App 333—People ex rel Schmulbach v Baltimore & O R Co, 79 N E 2d 598, 400 Ill 316—People ex rel Schmulbach v Louisville & N R Co, 88 N E 2d 879, 404 Ill 381—People ex rel Bailey v Illinois Cent R Co, 95 N E 2d 352, 407 Ill 426—People ex rel Nordstrom v Chicago & N W Ry Co, 142 N E 2d 26, 11 Ill 2d 99

52. Fla—State v Special Road and Bridge Dist No 9 of Polk County, 13 So 2d 801, 153 Fla 44

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53. Fla—City of Orlando v Orange County, 276 So 2d 41

Ill—People ex rel Schmulbach v Baltimore & O R Co, supra, n 47

58. Ill—People ex rel Schmulbach v Baltimore & O R Co, supra, n 47

59. Ill—People ex rel Schmulbach v Baltimore & O R Co, supra, n 47

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70. Necessity of record

Ill—Seaborn v Town of Hadley, supra, n 47

72. Pa—In re McKean County Road Tax, 28 Erie Co 328

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79. Ala—Jefferson County v City of Birmingham, 38 So 2d 844, 251 Ala 634

Levy to pay bonds

(5) Other cases

Mich—Ziegler v Witherspoon, 49 N W 2d 318, 331 Mich 337

§ 290. —— Payment, Collection, and Enforcement

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11. Ill—People ex rel B M Lewis Union Drainage Dist No 1 of Manteno and Summer Tps v Rust, 76 N E 2d 532, 332 Ill App 662

§ 291. —— Remedies for Erroneous Taxation

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53. N Y—Conway v Sahm, 109 N Y S 2d 662, 202 Misc 519

Intervention

Ark.—Buffington v Carson, 244 S W 2d 954, 219 Ark 804

55. Okl—White v Board of County Com'rs of Tulsa County, 267 P 2d 579

§ 292. —— Disposition of Proceeds

58. Ala—Jefferson County v City of Birmingham, 38 So 2d 844, 251 Ala 634

Ill—Town of Thornton v Winterhoff, 92 N E 2d 163, 406 Ill 113

60. Iowa—Plank v Grimes, 28 N W 2d 34, 238 Iowa 594

Mo—Gladstone Special Road Dist of Clay County v County Court of Clay County, 293 S W 2d 351, 365 Mo 1097

Tenn—City of Greenfield v Butts, App, 582 S W 2d 80

Apportionment among road districts

(1) State ex rel Essex Special Road Dist of Stoddard County v Vinson Mo, 198 S W 2d 232

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61. Iowa—Plank v Grimes, supra, n 60

Operation of statutes in general

(6) Other matters

Ill—Village of Monsanto v Touchette, 211 N E 2d 471 63 Ill App 2d 390

63. Fla—City of Orlando v Orange County, 276 So 2d 41

Funds subject to apportionment

(1) Fla—City of Waldo v Alachua County, App, 239 So 2d 63, affd in part, disapproved in part, Sup, 249 So 2d 419

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64. Mo—State ex rel Essex Special Road Dist of Stoddard County v Vinson, supra, n 60

Statutes held invalid

(3) Other statutes

La—Tugwell v Members of Bd of Highways, 83 So 2d 893 228 La 662

67. Action by county against city

Wis—Sheboygan County v City of Sheboygan 245 N W 87, 209 Wis 452

68. Tex—Phillips Inv Co v Road Dist No 18 of Limestone County, Civ App, 172 S W 2d 707, err ref

§ 293. Local Assessments

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79. Kan—Washington Tp of Nemaha County v Hart, 215 P 2d 180, 168 Kan 650

Mich—Eilender v City of Pontiac, 124 N W 2d 806, 371 Mich 671

Mo—State ex rel and to Use of Hughes v Southwestern Bell Telephone Co, 179 S W 2d 77, 352 Mo 715

80. Wis—Larsen v Chairman and Sup rs of Town of Spider Lake, 92 N W 2d 859, 5 Wis 2d 540

§ 294. —— Power to Levy in General

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85. Ala—Jefferson County v City of Birmingham, 27 So 2d 584 248 Ala 319

90. Mo—State ex rel and to Use of Hughes v Southwestern Bell Telephone Co, supra, n 79

§ 295. —— Construction and Repeal of Statutes

91. Particular statutes or provisions construed

Ill—People ex rel Kramer v Chicago, B & Q R Co, 134 N E 2d 335, 8 Ill 2d 382

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96. Ala—Jefferson County v City of Birmingham, supra, n 85

§ 296. —— Amount and Purposes of Assessment

3. Neb—Chicago, B & Q R Co v Gosper County, 46 N W 2d 147, 153 Neb 805

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19. Cal—Fresno County v Malmstrom, 156 Cal Rptr 777, 94 C A 3d 974

Idaho—Idaho Power Co v Three Creek Good Roads Dist, 390 P 2d 960, 87 Idaho 109

Pa—Mt Lebanon Tp v Scheck, 48 A 2d 53, 159 Pa Super 189

§ 297. —— Property Liable

24. Minn—Nyquist v Town Center, Crow Wing County, 251 N W 2d 695, 312 Minn 266

Mo—Mudd v Wehmeyer, 19 S W 2d 891, 323 Mo 704

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26. Ind—State v Smith, 143 N E 2d 666, 237 Ind 72

Some general benefit as not invalidating assessment

Minn—Village of Edina v Joseph, 119 N W 2d 809, 264 Minn 84

27. Md—Silver Spring Memorial Post No 2562, Veterans of Foreign Wars v Montgomery County, 115 A 2d 249 207 Md 442

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43. Ky—Henry Bickel Co v Texas Gas Transmission Corp 336 S W 2d 345

47 Exemption not allowed

Pa—Cheltenham Tp v Berachah Church, 85 Montg 81

§ 298. —— Mode of Assessment; Apportionment of Benefits

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51. Ky—Wallitsch v Bennett, 266 S W 2d 100

Evidence held sufficient to show special benefits at least equal to amount of assessment

Minn—Village of Edina v Joseph, 119 N W 2d 809, 264 Minn 84

54. Kan—Johnston v City of Coffeyville, 264 P 2d 474, 175 Kan 357

55. Assessment held valid

(2) Other assessments

Ark—Borden v Armstrong, 403 S W 2d 731, 240 Ark 1050

Md—Silver Spring Memorial Post No 2562, Veterans of Foreign Wars v Montgomery County 115 A 2d 249, 207 Md 442

Assessments held invalid

Mich—Johnson v City of Inkster, 258 N W 2d 24, 401 Mich 263

Minn—Nyquist v Town Center, Crow Wing County, 251 N W 2d 695, 312 Minn 266

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59. Md—Montgomery County Council v Summers, 332 A 2d 646, 274 Md 110

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67. Ark—Borden v Armstrong, 403 S W 2d 731, 240 Ark 1050

68. Md—Tyler v Baltimore County, 247 A 2d 704, 251 Md 420

§ 299. —— Proceedings for Assessment

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79. Ill—People ex rel Harrell v Baltimore & O R Co, 103 N E 2d 76, 411 Ill 55

81. Fla—Hillsborough County v De Sear, 162 So 703, 120 Fla 317, foll 163 So 925, 121 Fla 354, 163 So 925, 121 Fla 354, and 163 So 926, 121 Fla 353

82. Ark—Borden v Armstrong, 403 S W 2d 731, 240 Ark 1050

83. Ark—Borden v Armstrong, 403 S W 2d 731, 240 Ark 1050

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92. Notices held sufficient

(4) Cal—Bing v City of Duarte, 55 Cal Rptr 920, 422 P 2d 608, 65 C 2d 627

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9 Ky—Henry Bickel Co v Texas Gas Transmission Corp, 336 S W 2d 345

§ 300. —— Defective or Invalid Assessments and Remedies Therefor in General

14. Injunction improper

Idaho—Idaho Power Co v Three Creek Good Roads Dist, 390 P 2d 960, 87 Idaho 109

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16. Adequate remedy not shown

Mich—Knott v City of Flint, 109 N W 2d 908, 363 Mich 483

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23. La—Rozas v Evangeline Parish Police Jury, App, 214 So 2d 398, app den 215 So 2d 646, 252 La 1018

26. Evidence held sufficient

Mich—Knott v City of Flint, 109 N W 2d 908, 363 Mich 483

28. Mitigation of presumption of benefits

Cal—Yaeger v City Council of City of Fullerton, 41 Cal Rptr 904, 231 C A 2d 557

§ 301. —— Estoppel of Landowner

34. Facts held not to show estoppel

(2) Other facts

Wis—Garfield Inv Co v Town of Oconomowoc, 42 N W 2d 361, 257 Wis 98

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38. Fla—Hillsborough County v De Sear, 162 So 703, 120 Fla 317, foll 163 So 925, 121 Fla 354, 163 So 925, 121 Fla 354, and 163 So 926, 121 Fla 353

§ 303. —— Reassessment and Additional Assessments

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55. Original assessment adequate

Mich—City of Berkley v Royal Oak Tp, 31 N W 2d 825, 320 Mich 597

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81. Ky.—Henry Bickel Co v Texas Gas Transmission Corp, 336 S W 2d 345

§ 304. —— Collection, Enforcement, and Lien

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23. Fla—Hillsborough County v De Sear, 162 So 703, 120 Fla 317, foll 163 So 925, 121 Fla 354,

163 So 925, 121 Fla 354, and 163 So 926, 121 Fla 353

Claims held barred

Tex —Leonard v State, Civ App, 242 S W 2d 199

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27. Mich —Eilender v City of Pontiac, 124 N W 2d 806 371 Mich 671

31. Fla —Scott v Scott, 30 So 2d 620, 158 Fla 781

32. Ky —Henry Bickel Co v Texas Gas Transmission Corp, 336 S W 2d 345

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36. Ark —London v Montgomery 201 S W 2d 760, 211 Ark 434

§ 305. —— Disposition of Proceeds

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61. Ala —Jefferson County v City of Birmingham, 27 So 2d 584, 248 Ala 319

Md —Hillyard v Chevy Chase Village, 137 A 2d 555 215 Md 243

Particular application of funds held unauthorized

Fla —Nelson v City of Fort Lauderdale, 54 So 2d 207

Ky —Thompson v Bracken County, 294 S W 2d 943

Right to proceeds

Ill —First Nat Bank of Jonesboro v Road Dist No 8, Union County, 65 N E 2d 396, 328 Ill App 122

Proceeds may not be expended for purposes or debts which will exceed constitutional debt limitations [61.1]

61.1. Ala —Rollings v Marshall County 82 So 2d 428, 263 Ala 317

§ 306. Poll Taxes

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70. Pa —Application of Colerain Tp Supvrs, 55 Pa Dist & Co 555

§ 307. Work on Roads by Taxpayers

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95. 61 C J p 69 note 21[a](1)

§ 311. Rights and Remedies of Taxpayers

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25. Action held not in time

Ark —Buffington v Carson 244 S W 2d 954 219 Ark 804

26. Ohio—Dickinson v Hot Mixed Bituminous Industry of Ohio, App 58 N E 2d 78

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30. Evidence held sufficient

(1) Cal —Wine v Boyar, 33 Cal Rptr 787, 220 C A 2d 375

Evidence held insufficient

(1) Willis v Hathaway, 117 So 89, 95 Fla 608

Tex —Rowan v Puckett, Civ App, 237 S W 2d 734

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34. Cal —Copeland v Kern County, 234 P 2d 314, 105 C A 2d 281

HI-JACK To rob from bootleggers and rumrunners.

Iowa—State v Saltzman, 44 N W 2d 24, 29, 241 Iowa 1373

HI-JACKER or HIGH-JACKER.

4. Iowa—State v Slatzman, 44 N W 2d 24, 29, 241 Iowa 1373

HIJUELA.

8. Similarly expressed

(1) "Hijuelas" are papers or documents, of ancient Spanish origin, commonly given to parties entitled to distribution of decedent's estate and containing an exact account of their distributive share —Payne Land & Livestock Co v Archuleta, D C N M, 180 F Supp 651, 654

N M —Martinez v Mundy, 295 P 2d 209, 215, 61 N M 87

HIND-END MAN.

A "hind-end man" is a trainman who aligns the switches for intended movement of the train and is usually on the rear end of a line of cars during a pulling movement or on the front end of a shoving movement [20.5]

20.5. N Y —Juiditta v Bethlehm Steel Corp, 428 N Y S 2d 535, 538 75 A D 2d 126

HINDER.

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24. Similarly defined

'Hinder' means obstruct, that is, to interpose obstacles or impediments, to hinder, impede or in any manner intrude or prevent, and the term does not necessarily imply employment of direct force or exercise of direct means —People v Longo, 227 N Y S 2d 815, 817, 16 A D 2d 297

(2) To place obstacles in the path of to impede, obstruct, or block

Iowa—C J S cited in Powers v McCullough, 140 N W 2d 378 384

(3) 'Hinder" means obstruct or impede – DeLeo v Orlando 273 A 2d 725 726 29 Conn Sup 107

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Phrases

35. Providentially hindered

A term of strict legal significance, wholly unambiguous including such acts only as may be attributed to the act of God, and not to mere unavoidable cause, such as accident resulting from, and attributable to, human conduct —Day v Jeffords, 29 S E 591, 593, 102 Ga 714, 719

HIP Coxa, the lateral prominence of the pelvis from the waist to the thigh, more strictly the hipjoint [43.50]

43.50. Stedman Med D

Hip joint

The joint connecting the femur or thigh to the trunk —Texas Emp Ins Ass'n v Sevier, Tex Civ App, 279 S W 2d 473, 477

Broken hip

A "broken hip" is technically known as a fracture to neck of femur" —Backman v Fitch, 137 N W 2d 574, 577, 272 Minn 143

HIRE.

As a Noun

49. Connotes payment of some kind

The word "hire" connotes payment of some kind — Ferrell v Industrial Commission of Ariz, 288 P 2d 492, 494, 79 Ariz 278

(2) As used in its traditional or ordinary way in course of business and everyday life, word "hire" connotes payment, reward, compensation or consideration of some kind – State v Pitzenbarger, 214 N E 2d 849, 852, 6 Ohio Misc 134

Comprehends elements of price, reward, and compensation

La —Ouachita Federal Sav & Loan Ass'n v Brown, La App, 175 So 2d 428, 430

51. Ohio—C.J.S. quoted in State v Pitzenbarger, 214 N E 2d 849, 851, 6 Ohio Misc 134

52 For temporary use

(1) The word "hire" means price, reward or compensation paid or contracted to be paid for temporary use of a thing —Insurance Co of North America v Crippen, Tex Civ App, 223 S W 2d 297, 301

The noun "hire" is also defined as the act of hiring; an instance of such act, the state of being hired.[55.1]

55.1. Ohio—State v Pitzenbarger, 214 N E 2d 849, 851, 6 Ohio Misc 134

As a Verb

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61. Ohio—C J S quoted in State v Pitzenbarger, 214 N E 2d 849 852, 6 Ohio Misc 134

Similarly expressed

To engage or purchase the labor or services of anyone for compensation or wages —Ozark Minerals Co v Murphy, 51 N E 2d 197, 201, 384 Ill 94

Mont —Aleksich v Industrial Accident Fund, 151 P 2d 1016, 1018, 116 Mont 127

62. Ill —Ozark Minerals Co v Murphy, supra, n 61

Ohio—C J.S quoted in State v Pitzenbarger, 214 N E 2d 849, 852, 6 Ohio Misc 134

63. Ohio—C J S quoted in State v Pitzenbarger, 214 N E 2d 849, 852, 6 Ohio Misc 134

64. Ohio—C J.S quoted in State v Pitzenbarger, 214 N E 2d 849, 852, 6 Ohio Misc 134

65 Ohio—C.J S quoted in State v Pitzenbarger, 214 N E 2d 849, 852, 6 Ohio Misc 134

66. Cal —C J S quoted in Linnell v State Dept of Finance, 21 Cal Rptr 785, 787

The word denotes the relationship of master and servant arising out of a contract, express or implied [66.1]

66.1. Mont —Aleksich v Industrial Accident Fund, supra, n 61

Phrases

67. Phrases construed

(7) 'Hired in this state —Buhler v Maddison, 140 P 2d 933, 938, 105 Utah 39

Hiring

68. Inescapably carries idea of paying persons hired

Ind —City of Lafayette v Keen, 48 N E 2d 63, 69, 113 Ind App 552

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69. "General or indefinite hiring"

Wyo —Long v Forbes, 136 P 2d 242, 246, 58 Wyo 533

70. La —Munson v Blaise, App, 12 So 2d 623, 624

HISTORICAL.

78. Phrases construed

(5) "Historical cost," defined as the amount which normally should have been paid for all the property which is usefully devoted to the public service —Hope Natural Gas Co v Federal Power Commission, C C A, 134 F 2d 287, 301

HISTORICALLY At some time or times in the past.[78.50]

78.50. U S —U S v Fallbrook Public Utility Dist, D C Cal, 109 F Supp 28, 78

HIT.

Physical contact

"Hit' in the ordinary sense, requires some physical contact —Lawrence v Beneficial Fire & Cas Ins Co, 444 P 2d 446, 449, 8 Ariz App 155

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HOAAINA FISHING RIGHTS. Rights of tenants of the ili.[94.50]

94.50. Hawaii—State v Hawaiian Dredging Co, 397 P 2d 593, 610, 48 Haw 152

HOARD.

Hoarding.

3. Conn—Katsoff v Lucertini, 103 A 2d 812, 813, 141 Conn 74

HOBBY. A pursuit, the objective of which is pleasure or relaxation

U S—Coffey v Commissioner of Internal Revenue C C A Fla, 141 F 2d 204, 205

HOCKEY. A game played on ice by two opposing teams of six persons each, and generally, considered to be the fastest game played in this country and Canada.

Game further described

Minn—Modec v City of Eveleth, 29 N W 2d 453, 455, 224 Minn 556

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HODGE'S RULE A rule of instruction first announced in Hodge's Case, 2 Lewin 227, 168 Eng.Rep 1156 (1838).[15.30]

15.30. Ariz—State v Wood, 435 P 2d 857, 860, 7 Ariz App 22

HOE.

Phrases:

An implement, consisting, in its commonest form, of a thin flat blade set traversely on a long handle, used for weeding, loosening the earth around plants, etc., a one-horse tillage implement for cultivating between the rows of vines, bushes, and the like [15.50]

15.50. U S—Allied Wheel Products v Rude, C A Ohio, 206 F 2d 752, 758

Mulching hoe described

U S—Allied Wheel Products v Rude, C A Ohio, 206 F 2d 752, 759

Rotary hoe described

U S—Allied Wheel Products v Rude, C A Ohio, 206 F 2d 752, 758

The verb "to hoe" is defined as meaning to dig, scrape, clean, or the like, with a hoe; also, to clear weeds, or to loosen or arrange the earth about, with a hoe.[15.51]

15.51. U S—Allied Wheel Products v Rude, C A Ohio, 206 F 2d 752 758

22. Other phrases

(1) "Feral hogs" are wild animals and by statute title to these animals is in the state—Key v State, Tenn, 384 S W 2d 22, 24, 215 Tenn 136

HOIST. As applied to a flag, the "hoist" is the height as opposed to the horizontal length of it.[27.1]

27.1. Ohio—Butcher v Churchill, App, 159 N E 2d 620 622, 85 A L R 2d 689

HOLD.

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As a Noun

The term is sometimes applied to any ruling of the court during trial.[33.1]

33.1. Wash—Becwar v Bear, 246 P 2d 1110, 1111, 41 Wash 2d 37

As a Verb

34. U S—C J S quoted in Kederick v Heintzleman, D C Alaska, 132 F Supp 582, 583, 15 Alaska 582

38. Similarly defined

(1) "Hold" means to maintain or sustain, to possess, to keep, to retain—Strigas v Durham Life Ins Co, 73 S E 2d 788, 790, 236 N C 734

(2) To possess, to control, to direct the operations of, to keep—Kederick v Heintzleman, D C Alaska 132 F Supp 582, 583, 15 Alaska 582

39. N H—C.J.S. cited in Petition of Public Service Co, 75 A 2d 786, 788, 96 N H 310

—Technical Sense.

44. Ky—Rash v North British & Mercantile Ins Co, 246 S W 2d 990, 991

Nev—In re Devincenzi's Estate, 190 P 2d 842, 848, 65 Nev 158

46. Similarly expressed

To own or possess—State ex rel Nicolai v Nolte, 180 S W 2d 740, 741, 352 Mo 1069

47. Mo—State ex rel Nicolai v Nolte supra, n 46

48. Similarly defined

(1) "Hold" means to retain the ownership or control of, to keep as one's own, to own or control, to possess or occupy—Van Lengen v Town Bd of Onondaga, 253 N Y S 2d 865, 868 869 44 Misc 2d 479

49. N H—C J S cited in Petition of Public Service Co, supra n 39

50. Mo—State ex rel Nicolai v Nolte, supra, n 46

51. Mo—State ex rel Nicolai v Nolte, supra, n 46

53. Similarly defined

(1) "Hold" means to possess in virtue of a lawful title—Hendley v Perry, 47 S E 2d 480, 483, 229 N C 15

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60. U S—Howell v Commissioner of Internal Revenue, C C A Tex, 140 F 2d 765, 767

"Hold" has been held to be synonymous with "maintain," [60.1] and "possess" [60.2]

60.1. N Y—City of New York v Long Island R Co, 289 N Y S 217, 219, 248 App Div 820

60.2. Ky—Bingham's Adm'r v Com, 244 S W 2d 781, 196 Ky 318

Cal—In re Coe's Estate, 202 P 2d 1022, 1024, 33 Cal 2d 502

Held.

61. No connotation of time

Or—Holman Transfer Co v City of Portland, 250 P 2d 929, 930, 196 Or 551

63. Ill—People ex rel Gibson v Cannon, 357 N E 2d 1180, 1182, 2 Ill Dec 737, 65 Ill 2d 366

66. Similarly expressed

(1) As applied to property, the word "held" is a technical one embracing two ideas, that of actual possession of some subject of dominion or property, and that of being invested with legal title of right to hold on claim such possession—In re Coe's Estate, 202 P 2d 1022, 1024, 33 Cal 2d 502

(2) The word "held" is commonly used to describe the ownership of an interest in property either possessed or controlled by the owner—South Coast Lumber Co v State Tax Commission, 403 P 2d 714, 715, 240 Or 636

It has been said that the word "held" ordinarily means owned, but it does not ordinarily mean any particular user.[67.1]

67.1. Minn—State v Ritschel, 20 N W 2d 673, 678, 220 Minn 578, 168 A L R 274

64. Ill—People ex rel Gibson v Cannon, 357 N E 2d 1180, 1182, 2 Ill Dec 737, 65 Ill 2d 366

The word "held" may connote a state or degree of physical restraint.[69.5]

69.5. Ill—People ex rel Gibson v Cannon, 357 N E 2d 1180, 1182, 2 Ill Dec 737, 65 Ill 2d 366

"Purchasing" has been distinguished from "holding." [73.1]

73.1. Pa—Leazure v Hillegas, 7 Serg & R 313, 319

Holding.

76. N C—Burney v Holloway, 36 S E 2d 5, 8, 225 N C 633

The word, often used in the plural, is also defined as meaning property in general, especially stocks and bonds; land, or a piece of land, particularly land held of a superior.[76.1]

76.1. N C—Burney v Holloway, supra, n 76

Phrases.

78. Phrases construed

(7) 'Holds office," held applicable to official-elect—State ex rel Bland v St John, 13 So 2d 161, 166, 244 Ala 269

(8) "Hold it" The phrase "hold it" is generally accepted to mean stop or cease whatever is being done—Texas & N O R Co v Grace, Tex Civ App, 204 S W 2d 857, 858

(9) "Hold order" is an informal demand by one exercising public authority for the possession of a person already in lawful custody of another—State v Milner, Ohio, 149 N E 2d 189, 190

80. Phrases construed

(11) "Holding office" held to include qualifying for, and entering into, the office and assuming its obligations and its powers—State ex rel Bland v St John, supra, n 78

(12) "Holding time," construed as referring to the length of a telephone conversation—Pennsylvania Telephone Corporation v Pennsylvania Public Utility Commission, 33 A 2d 765, 766, 768, 153 Pa Super 316

HOLDDOWN. A "holddown" is the imposition by the Interstate Commerce Commission of a maximum increase on a rate below the full level of the general increase [81.5]

81.5. D C—Asphalt Roofing Mfrs Ass'n v I C C, 567 F 2d 994, 1000, 186 U S App D C 1

HOLDER.

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86. Held included

(5) One in possession of chose in action as assignee of former owner thereof—Schwarz v Avery, 31 A 2d 916, 919, 920, 113 Vt 175

(6) Successor bank—Dillow v Stafford, 25 S E.2d 330, 331, 181 Va 483

Phrases

89. Phrases construed

(8) 'Holder for value"—Hoffer v Eastland Nat Bank, Tex Civ App, 169 S W 2d 275, 279

See also Bills and Notes § 301 et seq

HOLE.

Phrases

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95. Phrases construed

(7) "Potato hole" is a dugout, covered by a mound supported by boards or stones, in which potatoes are stored and protected from freezing—Bowling v Com., 161 S W 2d 942, 945, 290 Ky 455

(8) 'The hole" is the prison term for solitary-confinement cell —Roberts v Pepersack, D C Md., 256 F Supp 415, 419

HOLIDAY. In a nautical sense, a spot left untouched by the brush in painting, tarring, whitewashing etc.[96.50]

96.50. New Standard D

In pipe industry

Holes in coating placed on underground pipe to retard corrosion are called "holidays' —Stearns v Tinker & Rasor, D C Cal., 108 F Supp 237, 238

Holiday detector

An apparatus which detects or discovers the holes or defects in coating on pipes which are to be placed underground —Stearns v Tinker & Rasor supra

HOLIDAYS

§ 1. Definitions and Distinctions

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2. Conn —C J S cited in Lamberti v City of Stamford 40 A 2d 190, 192, 131 Conn 396

Scope of term generally

Cal —Laubisch v Roberdo 277 P 2d 9 43 C 2d 702

4. Cal —C J S cited in Mandel v Hodges, 127 Cal Rptr 244, 251, 54 C A 3d 596 90 A L R 3d 728, app after remand 155 Cal Rptr 269, 92 C A 3d 747, app after remand 183 Cal Rptr 702, 133 C A 3d 1, hearing gr

In some jurisdictions holidays are classified as those enumerated by the legislature, those designated by the President or Governor, and those applying only to special classes of business or persons [4.1]

4.1. Cal —Francis v Superior Court in and for City and County of San Francisco, 157 P 2d 23, 68 Cal App 2d 643

§ 2. Creation and Designation

Library References

Holidays ⇐1 et seq

12. Memorial day recognized

Fla —City of St Petersburg v Division of Administration, State Dept of Transp., App., 276 So 2d 229

La —State Through Dept of Highways v Gifford-Hill & Co 119 So 2d 445, 239 La 506

Pa —Department of Highways of Com of Pa v Pennsylvania Public Utility Commission, 149 A 2d 552, 189 Pa Super 111

Tex —Suarez v Brown, Civ App., 414 S W 2d 537, err ref

Lincoln's birthday not recognized

La —Interstate Oil Pipe Line Co v Friedman, App., 137 So 2d 700—Hulin v Hale, App., 137 So 2d 709

(1) Recognized

Ohio—Kilgore v Krubach 192 N E 2d 664, 117 Ohio App 439

Washington's birthday recognized

Ohio—Kilgore v Krubach, 192 N E 2d 664, 117 Ohio App 439

Memorial day not recognized

Ala —Underwood v Brantley, 191 So 2d 220, 280 Ala 215

12. Federal statute inapplicable to states

La —Consolidated Marketing, Inc v Bush, App., 256 So 2d 695

Statutory list for commercial and banking purposes only

Ala —League of Women Voters v Renfro, 290 So 2d 167, 292 Ala 128

Town code valid

N Y —People v Pergament, 387 N Y S 2d 791, 87 Misc 2d 1098

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15. La —Brown on Behalf of State v Bernard, App., 374 So 2d 127

Constitutional

Cal —Mandel v Hodges, 127 Cal Rptr 244, 54 C A 3d 596, 90 A L R 3d 728, app after remand 155 Cal Rptr 269, 92 C A 3d 747, app after remand 183 Cal Rptr 702, 133 C A 3d 1, hearing gr

16. Declaration of days for mourning does not create public holidays

N Y —Schmidt v Christ, 348 N Y S 2d 473 75 Misc 2d 947, affd 347 N Y S 2d 950, 42 A D 2d 963

A day of religious observance is not to be deemed a public holiday unless so proclaimed by the President or the Governor [16.5]

16.5. N Y —Bloom v New York City Transit Authority, 240 N Y S 2d 124, 19 A D 2d 521

Unconstitutional

Cal —Mandel v Hodges, 127 Cal Rptr 244, 54 C A 3d 596 90 A L R 3d 728, app after remand 155 Cal Rptr 269, 92 C A 3d 747, app after remand 183 Cal Rptr 702 133 C A 3d 1, hearing gr

17. Ohio—Leibrock v Briggs, 134 N E 2d 392, 99 Ohio App 452

However, Saturday has been held to be a legal day,[17.1] but in some jurisdictions in certain places Saturday is a full legal holiday [17.2]

17.1. La —Riverside Transfer Co v Service Drayage Co., 135 So 79, 16 La App 621

Saturday not legal holiday for all purposes

Tex —Riggs v Bartlett, Civ App., 286 S W 2d 669, err ref no rev err

Va —Cousins v Com., 47 S E 2d 391, 187 Va 506

Saturday not legal holiday

Ark —Parrish Esso Service Center v Adams, 374 S W 2d 468, 237 Ark 560

17.2. Ala —League of Women Voters v Renfro, 290 So 2d 167, 292 Ala 128

La —Coney v Coney, 48 So 2d 902, 218 La 218—Ball v Campbell, 62 So 2d 621, 222 La 399

19. Tex —Suarez v Brown, Civ App., 414 S W 2d 537, err ref

§ 3. Operation and Effect of Designation

Library References

Holidays ⇐4 et seq.

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23. Okl —C.J.S quoted in State ex rel Sizemore v State Election Bd., 217 P 2d 805, 807, 203 Okl 1

25. Okl —C.J.S quoted in State ex rel Sizemore v State Election Bd., supra, n 23

29. Va —Cousins v Com., 47 S E 2d 391, 187 Va 506

§ 4. —— Private Acts and Transactions

31. Mo —Bullock v Peoples Bank of Holcomb, 173 S W 2d 753, 351 Mo 587

Okl —Meyer v World Concrete, Inc., 431 P 2d 403

R I —C W Stuart & Co v Pezza, 135 A 2d 261, 86 R I 383

Tex —Riggs v Bartlett, Civ App., 286 S W 2d 669, err ref no rev err

Saturdays

La —James W Crumb, Inc v Spinnen App., 230 So 2d 749

Va —Cousins v Com 47 S E 2d 391, 187 Va 506

Municipal prohibition

Ga —Watson v Mayor, etc of Thomson, 42 S E 747, 116 Ga 548, 94 Am St Rep 137 59 L R A 602

Mich —Americans United for Separation of Church and State v Kent County, 293 N W 2d 723, 97 Mich App 72

12 C J p 926 note 70[a]

Reasonableness of ordinance

N J —Amodio v Board of Comrs of Town of West New York, 43 A 2d 889, 133 N J Law 220

32. La —State ex rel Madere v St John the Baptist Parish Democratic Executive Committee, App., 73 So 2d 211

Minn —Kantack v Kreuer, 158 N W 2d 842, 280 Minn 232

33. Ariz —Moody v Vans Gila Gin Co., 361 P 2d 541, 89 Ariz 280

La —State ex rel Madere v St John the Baptist Parish Democratic Executive Committee, supra, n 32

N J —Amodio v Board of Com'rs of Town of West New York, 43 A 2d 889, 133 N J Law 220

N Y —People v Pergament, 387 N Y S 2d 791, 87 Misc 2d 1098

34. Statute not violated

Mich —Americans United for Separation of Church and State v Kent County 293 N W 2d 723, 97 Mich App 72

35. Saturday

N J —Mercer County Park Commission v DiTullio Plumbing & Heating Co., Inc., 352 A 2d 264, 139 N J Super 36

§ 5. —— Judicial Proceedings

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38. D C —Campbell v U S., Mun App., 65 A 2d 191

Fla —C.J.S cited in Farrell v Bendix Corporation, 232 So 2d 419, 420

Ga —Parker v Mayor, etc., of Savannah, 115 S E 2d 555, 216 Ga 210—C J S cited in Moore v Dearing, 118 S F 2d 366, 368, 216 Ga 596, 85 A L R 2d 591

La —State v Frierson, 302 So 2d 605

Mont —Miller v Emerson, 186 P 2d 220, 120 Mont 380

N H —C.J.S. cited in Larochelle v Birch, 96 A 2d 573, 574, 98 N H 190

Ohio—Dursa v Dursa, App., 150 N F 2d 306

Tex —Housing Authority of City of Dallas v Blackman, Civ App., 254 S W 2d 548, affd 254 S W 2d 103, 152 Tex 21—London v Chandler, Civ App., 400 S W 2d 862, err ref no rev err, 406 S W 2d 203—Koehler v Pioneer Am Ins Co., Civ App., 425 S W 2d 889

W Va —Means v Kidd, 67 S E 2d 740, 136 W Va 514

Saturdays

(1) Va —Cousins v Com., supra, n 31

(3) Other matters

U S —Muse v Freeman, D C Va., 197 F Supp 67—In re Atlas Sewing Centers, Inc., D C Va., 336 F Supp 684, C A., affd 461 F 2d 1002

Cal —People v Lee, 83 Cal Rptr 715, 3 C A 3d 514

La —Hebert v Spano, 98 So 2d 199, 233 La 813, conf to, App., 101 So 2d 713

Tex —Riggs v Bartlett, Civ App, 286 S W 2d 669, err ref no rev err —Angelina County v McFarland, 374 S W 2d 417

49. Wis —Reimers v State, 143 N W 2d 525, 31 Wis 2d 457, cert den 87 S Ct 528, 385 U S 980, 17 L Ed 2d 442

Arraignment

N Y —People v Darling, 269 N Y S 2d 175, 25 A D 2d 791

50. U S —U S v 329 22 Acres of Land, More or Less, in Brevard County, State of Fla, D C Fla, 307 F Supp 34 affirmed 418 F 2d 551

Fla —Collins Avenue & Ocean Inv Co v Crawford, 154 So 211, 114 Fla 469

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52. D C —Campbell v U S, supra, n 38

57. Rule inapplicable to election contests

La —O'Keefe v Burke, 78 So 2d 165, 226 La 1039

Minn —Lebens v Harbeck, 243 N W 2d 128, 308 Minn 433

Writ of possession

Ala —Jones v State, Cr, 280 So 2d 801, 50 Ala App 541, cert den 280 So 2d 803, 291 Ala 785

58. Minn —Lebens v Harbeck, 243 N W 2d 128, 308 Minn 433

59. W Va —Baggs v Freiberger, 85 S E 2d 841, 140 W Va 560

61. Appeals

Minn —Andrusick v City of Apple Valley, 258 N W 2d 766

65. Conn —Lamberti v City of Stamford, 40 A 2d 190, 131 Conn 396

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78. U S —Skolnick v Hallett, C A Ill, 350 F 2d 861, cert den 86 S Ct 580, 382 U S 996, 15 L Ed 2d 482, reh den 86 S Ct 903 383 U S 922 15 L Ed 2d 679

Ala —Smith v State, 55 So 2d 202, 36 Ala App 209, cert den 55 So 2d 208, 256 Ala 444

Ohio—Dursa v Dursa, App, 150 N E 2d 306

79. Commencement of trial

(3) Other cases —State v Ledet, 30 So 2d 830, 211 La 769—State v Sears, 55 So 2d 881, 220 La 103

80. Mont —C.J.S cited in Miller v Emerson, 186 P 2d 220, 222, 120 Mont 380

Wash —State v Snider, 422 P 2d 816, 70 Wash 2d 326

Waiver

Wis —State v Wimberly, 198 N W 2d 360, 55 Wis 2d 437 overruling any holding to contrary in Lampe v Manning (1875), 38 Wis 673, and Milwaukee Harvester Co v Teasdale (1895), 91 Wis 59, 64 N W 422

86. La —State Through Dept of Highways v Gifford-Hill & Co, 119 So 2d 445, 239 La 506

Tex —Philpot v State 332 S W 2d 323, 169 Tex Cr R 91

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94. Ga —Jesup Carpet Factory Outlet, Inc v Ken Carpets of LaGrange, Inc, 235 S E 2d 684, 142 Ga App 301

Tex —London v Chandler, Civ App, 400 S W 2d 862, err ref no rev err 406 S W 2d 203

Judgment entered

Tex —Angelina County v McFarland, 374 S W 2d 417

§ 6. —— Official Acts

99. Okl —State ex rel Sizemore v State Election Bd, 217 P 2d 805, 203 Okl 1

1. N Y —Westchester County v Westchester County Civil Service Emp Ass'n, Inc, 378 N Y S 2d 952, 85 Misc 2d 251

2. Okl —State ex rel Sizemore v State Election Bd, 217 P 2d 805, 203 Okl 1

Publication

Neb —Hollstein v Adams, 194 N W 2d 216, 187 Neb 781

HOLLOW.

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3. Similarly defined

Wash —Ochampaugh v City of Seattle, 588 P 2d 1351, 1359, 91 Wash 2d 514

7. Minn —C J S quoted at length in Kantack v Kreuer, 158 N W 2d 842, 844, 280 Minn 232

HOLLYWOOD. A geographical name of a district within the city of Los Angeles

Cal —Jackman v Mau, 177 P 2d 599, 605, 78 Cal App 2d 234

HOLOGRAPH or OLOGRAPH.

12. Mont —In re Irvine's Estate, 139 P 2d 489, 114 Mont 577, 147 A L R 882

Similarly expressed

(1) The derivative and applied meaning of word "holograph" indicates an instrument written entirely in handwriting of maker —In re Goodman's Will, 50 S F 2d 34, 35, 229 N C 444

13. Derivation

It is a combination of the Greek words 'holds" meaning all complete whole, and "graphos" signifying something written a writing —In re Irvine's Estate, supra, n 12

HOLOS A Greek word meaning all, complete, whole

Mont —In re Irvine's Estate, supra, n 12

HOME.

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23. Mich —C J S quoted in In re Scheyer's Estate, 59 N W 2d 33, 36, 336 Mich 645, 38 A L R 2d 835

Ohio—C J S quoted in Cross v Motorists Mut Ins Co, 90 N E 2d 166, 167, 88 Ohio App 113

Word of common understanding, and not of art

D C —Byrd v U S, 312 F 2d 357, 358, 114 U S App D C 117

As defined in Restatement of Law

U S —Larana v U S, D C Mass, 232 F Supp 602, 604

Me —Guilford Trust Co v Milo Community Hospital, Me, 227 A 2d 612, 615

24. Mich —C J S quoted in In re Scheyer's Estate, supra, n 23

Ohio—C J S quoted in Cross v Motorists Mut Ins Co, supra, n 23

Va —C J S cited in White v White, 31 S E 2d 558, 562, 183 Va 239

25. Mich —C J S quoted in In re Scheyer's Estate, supra, n 23

Various connotations of the word

(12) Broad enough to include land on which house stands —Seismic Explorations v Dobray, Tex Civ App, 169 S W 2d 739, 744

(13) The word "home" has many implications It has been immortalized in song and story Men and animals have an instinctive idea of its meaning The toddling infant knows a yearning for the place which he conceives to be his home Domestic animals instinctively yield to the longing to return to their abiding place —White v White, 31 S E 2d 558, 562, 183 Va 239

(14) "Home" implies the exercise of the exclusive privilege of selection by an individual —Ex parte Mullins, 174 P 2d 790, 804, 26 Wash 2d 419

(15) Home is sometimes used to refer to the particular place in which one was born or reared —In re Montgomery's Estate, 42 N W 2d 923, 924, 257 Wis 223

(16) The word "home" has many meanings when used in legislation, depending on the purpose of act Thus it may refer to particular spot, or to the whole country, to residence or domicile, or to place of business as, for example, a tourist home —Alexander v Neal, 110 N W 2d 797, 799, 364 Mich 485

Elements

(1) Throughout the definitions of "home" run the thought of permanence of a place to which one returns, a place where one intends to remain, a haven or domicile, and suggested too is the thought of one unit or one place may contrasted with several One cannot be permanently located in more than one place, one cannot be domiciled in more than one place, one cannot intend to remain for an extended period of time in more than one place —In re Scheyer's Estate's 59 N W 2d 33, 36, 336 Mich 645, 38 A L R 2d 835

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26. Mich —C.J.S quoted in In re Scheyer's Estate, supra, n 23

Ohio—C J S quoted in Cross v Motorists Mut Ins Co, supra, n 23

Tex —Sanchez v Brandt, Civ App, 567 S W 2d 254, 258

Similarly expressed

(1) Ariz —Maryland Cas Co v Hoffman, 252 P 2d 82, 85, 75 Ariz 103

(3) Other statements of similar import

U S —Auler v Melrose, D C Ill, 102 F Supp 28, 30

Iowa—In re Zang's Estate, 123 N W 2d 883, 887, 255 Iowa 736

Pa —In re Stabile, 36 A 2d 451, 452, 348 Pa 587

Vt —Hoadley v Hoadley, 39 A 2d 769, 773, 114 Vt 75

(4) Whether any structure, even a house, is a home depends upon whether it is the dwelling place of a person of persons Even though it may be constructed of palm leaves, carboard, of discarded corrugated roofing and only large enough to shelter one person, if a person dwells therein it is his home It is the dwelling therein that characterizes it as a home, not its size nor its facilities —Maryland Cas Co v Hoffman, 252 P 2d 82, 84, 75 Ariz 103

27. Mich —C J S quoted in In re Scheyer's Estate, supra, n 23

28. Ariz —Maryland Cas Co v Hoffman, 252 P 2d 82 85, 75 Ariz 103

Mich —C J S quoted in In re Scheyer's Estate, supra, n 23

Ohio—C J S quoted in Cross v Motorists Mut Ins Co, supra, n 23—In re Nielsen's Estate, 103 N E 2d 24, 26

Similar definitions

(4) Home refers to the house in which one lives with his family, together with land upon which it is located —In re Montgomery's Estate, supra, n 24

(5) Word "home" means one's own dwelling place, the habitual abode of one's family, the social unit formed by a family residing together in one dwelling, the influences or environement of such a home, and an organized center of family life —In re Morgan's Estate, 228 N Y S 2d 36, 37, 38, 34 Misc 2d 279

(6) Abode at principal place of business or employment

U S —Jones v C I R, C A Tex, 444 F 2d 508, 509

More than house

One's "home" is something more than a house in which he lives and it includes surrounding grounds, buildings such as garages, sterhouses not others used in connection with occupancy of the property and many other things to the fancy of the owner —In re Marshall's Estate, 198 N Y S 2d 535, 536, 537, 22 Misc 2d 503

29. U S —James v U S, C A Nev, 308 F 2d 204, 206, 207, 208

Mich —C.J.S quoted in In re Scheyer's Estate, supra, n 23

Ohio—C J S quoted in Cross v Motorists Mut Ins Co, supra, n 23

30. Mich —C J S quoted in In re Scheyer's Estate, supra n 23

Sentiment as element

A man's "home" is his habitation, his place of abode, his domicile as specifically located in a given are in

addition, there is the element of sentiment which animates the image with the breath of family affection and the gentle warmth of hospitality shared with friends, and endows it with comfort in affliction, with respite from care, and the promise of pleasant repose

Me—Guilford Trust Co v Milo Community Hospital, Me, 227 A 2d 612, 615

Mo—State upon Information of Reardon v Mueller, Mo App, 388 S W 2d 53, 57, 58

31. Mich—C.J.S. quoted in In re Schyer's Estate, supra, n 23

Ohio—C.J.S. quoted in Cross v Motorists Mut Ins Co, supra, n 23

Similarly expressed

A "home" is not a sleeping room alone, but includes the places where one eats, bathes, reads, visits, rests, throws off cares of business, and surrenders to his desire for creature comforts and human associations—In re Morgan's Estate, 228 N Y S 2d 36, 38, 34 Misc 2d 279

32. U S—James v U S, D C Nev, 176 F Supp 270, 273

Mich—C.J.S. quoted in In re Scheyer's Estate, supra, n 23

Ohio—C.J.S. quoted in Cross v Motorists Mut Ins Co, supra, n 23

Where trade or business is located

Ordinarily a man maintains his home in the city or locality where he carries on his trade or business—Coburn v C I R, C C A 2d 138 F 2d 763, 764

No intent to change

(1) That is a man's home which, for the time at least, he does not contemplate changing, and which he expects to retain, unless some event, not then in view may make it desirable or necessary to give up—Welch v Whelpley, 28 N W 744, 745, 62 Mich 15—In re Scheyer's Estate, 59 N W 2d 33, 37, 336 Mich 645, 38 A L R 2d 835

Where duty is located

The place where one has his principal place of duty and where he has an abode while pursuing such duty—Cockrell v C I R, C A Mo, 321 F 2d 504, 507

33. Mich—C.J.S. quoted in In re Scheyer's Estate, supra, n 23

34. Mich—C.J.S quoted in In re Scheyer's Estate, supra, n 23

Ohio—C.J.S. quoted in Cross v Motorists Mut Ins Co, supra, n 23

Home is focus of domestic affections; (home is where the heart is)

Me—Guilford Trust Co v Milo Community Hospital, 227 A 2d 612, 615

35. "Home" held to include

(8) It comprehends, in addition to shelter, available palatable food and congenial companionship—Brinkley v Patton, 149 P 2d 261, 263, 194 Okl 244

(9) Household goods, and not merely roof and walls—In re Schwartz' Estate, 71 A 2d 831, 833, 166 Pa Super 459

(10) A garage—In re Niesen's Estate, Ohio Prob, 103 N E 2d 24, 27

(11) A person's "home" ordinarily is the place where he resides and such could be an apartment, a house or other type of dwelling and when directed to a house, the term includes not only the structure and the land upon which it is situated, but also any yards and grounds and any garage or outbuildings which make up a residence—In re Sandersfeld's Estate, 9 Cal Rptr 447, 449, 450 187 C.A 2d 14

(12) Any appurtenances which contribute to enjoyment and convenience of estate as an abode—Carlisle v Carlisle's Estate, Miss., 252 So 2d 894, 895, 896

(13) Personalty as well as realty

Nev—Hartford Ins Group v Statewide Appliances, Inc, 484 P 2d 569, 570, 87 Nev 195

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36. Held not to include

(3) House trailer used to facilitate the transportation, receipt, and possession of contraband opium—Biasotti v Clarke, D C R I, 51 F Supp 608, 610

(4) A penitentiary—Orent v Equitable Life Assur Soc. of U S, 51 N Y S 2d 115, 118, 268 App Div 299

38. Mo—State Upon Information of Reardon v Mueller, Mo App, 388 S W 2d 53, 57, 58

39. Md—Jones v Holloway, 36 A 2d 551, 553, 183 Md 40, 152 A L R 933

More comprehensive than "house"

Tex—Seismic Explorations v Dobray, supra, n 25

40. Not necessarily synonymous

Wash—In re Moore's Estate, Wash, 415 P 2d 653, 656, 68 Wash 2d 792

Other terms have been held synonymous or have been compared or distinguished.[42.1]

42.1. Household held synonymous

U S—Gaston v Gardner, D C S C, 247 F Supp 441, 443

N M—Anaya v Foundation Reserve Ins Co, 414 P 2d 848, 849, 76 N M 334

Homestead not necessarily synonymous

Tex—West v Austin Nat Bank, Tex Civ App, 427 S W 2d 906, 912, err ref no rev err

Home rule.

44–45. Similarly expressed

La—Fernandez v Alford, 11 So 2d 483, 489, 490, 203 La 111

Other phrases:

46. Phrases construed

(21) A "rest home" furnishes a dwelling place for patients or occupants and may also furnish services of nursing and medical care and attention—West v Conrad, C A Cal, 177 F 2d 252, 254

Additional phrases are set out in the note[46.1]

46.1. Phrases

(1) "To have one's home" held equivalent to "reside"—Leroux v Industrial Accident Commission, 35 P 2d 624, 626, 140 Cal App 569

(2) "Home trailer" Two wheel metal automobile trailer, 12 to 14 feet in length, which was equipped with venetian blinds, screened windows, screen door, and sleeping facilities, was home trailer—Potheir v New Amsterdam Cas Co, C A N C, 192 F 2d 425, 426, 31 A L R 2d 295

(3) "Tourist home"—Woods v Polino, D C W Va, 86 F Supp 650, 653

(4) "Speculative home" means simply a home built with expectation of selling it at cost plus a profit and of the type and price of homes then generally being built and sold in the area—Rivers v Beadle, 7 Cal Rptr 170, 173, 183 C A 2d 691

(5) "Mobile home" is nothing more or less than an automobile house trailer, and both are designed and built as a moveable family dwelling—City of Rutland v Keiffer, 205 A 2d 400, 403, 124 Vt 357

(5a) Home which rested on permanent foundation, with wheels detached, was not "mobile home"—Douglass Tp v Badman, 213 A 2d 88, 89, 206 Pa Super 390

Mobile home

(1) An automobile house trailer—City of Rutland v Keiffer, 205 A 2d 400, 403, 124 Vt 357

(2) "Mobile home" is dwelling or abode where people live—Reetz v Ellis, 186 So 2d 915, 918, 279 Ala 453

(3) Mobile home resting on foundation with its wheels detached was not "mobile home"—Douglass Tp v Badman, 213 A 2d 88, 89, 206 Pa Super 390

(4) "Mobile home" even after being placed upon foundation was "house trailer"—Mobile Home Owners Protective Ass'n v Town of Chatham, 305 N Y S 2d 334, 335, 33 A D 2d 78

Prefabricated home

(1) One having walls, partitions, floors, ceilings, and/or roof composed of sections or panels varying in size which have been fabricated in factory prior to erection on building foundation, this is in contrast to conventionally built home which is constructed piece by piece on the site—National Homes Corp v. Lester Industries, Ind, D C Va, 293 F Supp 1025, 1031

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A location suitable for a home.

Ohio—Vekoske v Cleveland Trust Co, 79 N E 2d 356, 359, 81 Ohio App 511

HOMESTEADS

§ 1. Definition

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1. Hawaii—C.J.S. quoted in In re Taxes of Johnson, 356 P 2d 1028, 1037, 44 Haw. 519

Neb—J H Melville Lumber Co v Maroney, 16 N W 2d 527, 145 Neb 374

N C—Boyd v Brooks, 150 S E 178, 197 N C 644

Tex—C J.S. quoted in Gann v Montgomery, Civ App, 210 S W 2d 255, 258, err ref no rev err

Other definitions

(2) Neb—Smith v Wade, 100 N W 2d 770, 169 Neb 710

(7) Additional definitions

Ariz—In re Stanger's Estate, 257 P 2d 593, 75 Ariz 399

Tex—Anderson v Bundick, Civ App, 245 S W 2d 318, err ref no rev err

2. Cal—Keyes v Cyrus, 34 P 722, 100 Cal 322, 38 Am St Rep 296

Ky—Kelly v Kelly's Ex'r, 186 S W 2d 902, 904, 299 Ky 861, 158 A L R 792

3. Cal—Gregg v Bostwick, 33 Cal 220, 91 Am Dec 637—Robson v Meder, 151 P 2d 662, 663, 66 Cal App 2d 47

4. Cal—Keyes v Cyrus, supra, n 2

Okl—Matter of Wallace's Estate, 648 P 2d 828

Tex—C.J.S. cited in Cade v Dudney, Civ App, 379 S W 2d 370, 372, err ref no rev err

5. Homestead as land

(2) Other matters

U S—In re Bell, D C Or, 181 F Supp 387

6. Similar definitions

U S—In re Neale, D C Tex, 274 F Supp 969

§ 2. Origin of Homestead Right and Purpose of Homestead Laws

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13. Tex—C.J.S black letter summary quoted in Gann v Montgomery, Civ App, 210 S W 2d 255, 257, err ref no rev err

How evolved

Tex—1018-3rd St v State, Civ App, 331 S W 2d 450

14. U S—In re Bell, D C Or, 181 F Supp 387

Mo—Wyatt v Bauer, App, 332 S W 2d 301

16. U S—Jones v Kemp, C C A Okl, 144 F 2d 478—Karbs v Bouse, 154 P 2d 968, 195 Okl 23—U S Nat Bank of Portland v U S, D C Or, 188 F Supp 332

Cal—Viotti v Giomi, 41 Cal Rptr 345, 230 C A 2d 730

Okl—Keel v Jones, 413 P 2d 549

Tex—C.J.S cited in Allen v Monk, 505 S W 2d 523, 524

18. Nev—1 H Kent Co v Miller, 366 P 2d 520, 77 Nev 471

Wash—C.J.S. quoted at length in Clark v Davis, 226 P 2d 904, 905, 37 Wash 2d 850

19. U S—In re Carstens, Bkrtcy Iowa, 8 B R 524

Ala—C.J.S cited in Walker v Hayes, 28 So 2d 413, 415, 248 Ala 492

Mo —C.J.S. cited in Owen v Riffle, 323 S W 2d 765 769

20. U S —Wetzner v U.S., C A Fla, 309 F 2d 45, cert den 83 S Ct 727, 372 U S 913, 9 L.Ed 2d 720—In re Davis, D C Mich, 329 F Supp 1067—In re Joy Bkrtcy Minn, 5 B R 681

Ala —Walker v Hayes, 28 So 2d 413, 248 Ala 492

Ariz —Ferguson v Roberts, 170 P 2d 855, 64 Ariz 357

Cal —In re Claussenius Estate, 216 P 2d 485, 96 Cal App 2d 600—Thorsby v Babcock, 222 P 2d 863 36 Cal 2d 202—Johnson v Brauner, 281 P 2d 50, 131 C A 2d 713—Squibb v Squibb, 12 Cal Rptr 346, 190 C A 2d 766—Sherwood v Cornfield, 31 Cal Rptr 264, 216 C A 2d 364

Colo —Helkey v Ashley, 155 P 2d 143, 113 Colo 175

Fla —In re Noble's Estate, 73 So 2d 873

Ill —Dixon v Moller, 356 N E 2d 599, 1 Ill Dec 411, 42 Ill App 3d 688

Kan —Iowa Mut Ins Co v Parr, 370 P 2d 400, 189 Kan 475, 94 A L R 2d 960

La —State ex rel Code v Code, 41 So 2d 62, 215 La 485—Cloud v Cloud, App, 127 So 2d 560

Okl —In re Carother's Estate, 167 P 2d 899, 196 Okl 640—Wood v Biggs, 424 P 2d 59

S D —Ramsey v Lake County, 14 N W 2d 125, 70 S D 61—Brodsky v Maloney 105 N W 2d 911, 78 S D 605

Wash —First Nat Bank of Everett v Tiffany, 242 P 2d 169, 40 Wash 2d 193—Lien v Hoffman, 306 P 2d 240, 49 Wash 2d 642—C J S cited in City of Algona v Sharp, 638 P 2d 627, 629, 30 Wash App 837

Other similar statements of purpose

(4) Additional statements

U S —In re Stotler, D C Cal, 114 F Supp 301, revd on oth grds, C A, 215 F 2d 776—In re Eade, D C Cal, 237 F Supp 320—In re Blackburn D C Cal 286 F Supp 33—In re Grimes, Bkrtcy Md, 18 B R 132

Alaska—Spracher v Spracher, 17 Alaska 698

Ariz —McFarland v Pruitt, 210 P 2d 936 69 Ariz 133—In re Stanger's Estate, supra, n 1

Cal —Viotti v Giomi 41 Cal Rptr 345 230 C A 2d 730—Schoenfeld v Norberg, 72 Cal Rptr 924, 267 C A 2d 496, app after remand 90 Cal Rptr 47, 11 C A 3d 735

Colo —In re Wallace's Estate, 246 P 2d 894, 125 Colo 584

Fla —Barlow v Barlow, 23 So 2d 723, 156 Fla 458

Miss —Grantham v Ralle, 158 So 2d 719, 248 Miss 364

N C —Williams v Johnson, 53 S E 2d 277, 230 N C 338

S D —Speck v Anderson, 318 N W 2d 339, app after remand 349 N W 2d 49

Utah—Sanders v Cassity, 586 P 2d 423

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21. U S —U S v Field, D C Wyo, 190 F Supp 216

N Y —Wyoming County Bank & Trust Co v Kiley, 430 N Y S 2d 900, 75 A D 2d 477

24. La —C.J.S. cited in Malone v Cannon, 41 So 2d 837, 844, 215 La 939

25. Ala —Leonard v Whitman, 30 So 2d 241 249 Ala 205

La —Cloud v Cloud, 127 So 2d 560—Engstrom's of Alexandria, Inc v Vaughn, App, 138 So 2d 672

Wash —First Nat Bank of Everett v Tiffany supra, n 20

Wyo —C.J.S. cited in Osborn v Warner, 694 P 2d 730, 732

26. U S —In re Davis, D C Mich, 329 F Supp 1067

Ariz —In re Stanger's Estate, supra, n 1

Cal —Barham v Barham, 202 P 2d 289, 33 Cal 2d 416

Fla —Frase v Branch, App, 362 So 2d 317

Minn —Holden v Farwell, Ozmun Kirk & Co, 27 N W 2d 641, 223 Minn 550

Ohio—Mutual Bldg & Inv Co v Efros, App 75 N E 2d 75

Tenn —Chapman v Tipton, 292 S W 2d 25, 200 Tenn 237

27. Iowa—Davis v Davis, 67 N W 2d 566, 246 Iowa 262

La —Lafayette Bldg Ass'n v Spofford, 59 So 2d 880, 221 La 549

28. Cal —Sherwood v Cornfield, 31 Cal Rptr 264, 216 C A 2d 364

Fla —Vandiver v Vincent, App, 139 So 2d 704

§ 3. Nature of Interest Created

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29. U S —U S v Thurston County Neb, D C Neb, 54 F Supp 201, affd, C C A, 149 F 2d 485, cert den 66 S Ct 58, 326 U S 744, 90 L Ed 444, reh den 66 S Ct 138, 326 U S 808, 90 L Ed 493—C J.S cited in In re Blodgett, D C Wis, 115 F Supp 33, 37—In re Bell, D C Or 181 F Supp 387

Cal —Rich v Ervin, 194 P 2d 809, 86 Cal App 2d 386

Iowa—In re Ragan's Estate, 23 N W 2d 521 237 Iowa 619

Mo —Karsznia v Kelsey, 262 S W 2d 844—Wyatt v Bauer, App, 332 S W 2d 301

Okl —Van Meter v Field, 159 P 2d 546, 195 Okl 555—Ludeman v Armbruster 165 P 2d 835, 196 Okl 452

Or —Bush v Shepherd, 205 P 2d 842, 186 Or 105—In re Doody's Estate, 313 P 2d 444, 210 Or 658

Vt —In re Prudenzano's Will 68 A 2d 704, 116 Vt 55

No splitting of homestead rights

Iowa—Merchants Mut Bonding Co v Underberg, 291 N W 2d 19

30. U S —In re Bell D C Or, 181 F Supp 387—Matter of Jolly, Bkrtcy Wis, 13 B R 123

Mo —Wyatt v Bauer, App, 332 S W 2d 301

Or —In re Doody's Estate 313 P 2d 444, 210 Or 658

32. U S —In re McDaniel, Bkrtcy Cal 13 B R 628

33. U S —In re Ladd Bkrtcy Me, 21 B R 579

Ala —Stafford v State, 31 So 2d 146, 33 Ala App 163

Cal —Rich v Ervin, supra, n 29

Minn —Title Ins Co of Minnesota v Agora Leases, Inc, 320 N W 2d 884

Ohio—Gledhill v Walker, 55 N E 2d 647 143 Ohio St 381

Tex —Williamson v Kelley, Civ App, 444 S W 2d 311, err ref no rev err

Wash —Cody v Herberger, 371 P.2d 626 60 Wash 2d 48

Marital right

U S —Wetzner v U S C A Fla, 309 F 2d 45, cert den 83 S Ct 727, 372 U S 913, 9 L Ed 2d 720

34. U S —U S Nat Bank of Portland v U S, D C Or, 188 F Supp 332

35. Ky —Ferguson v Board of Drainage Com'rs of Graves County for Mayfield Creek Drainage Dist No 2, 186 S W 2d 16, 299 Ky 538

Okl —Van Meter v Field, supra, n 29

36. U S —Brown v Lewis, D C Fla, 520 F Supp 1114

Mo —Osborn v Osborn, 274 S W 2d 32, 241 Mo App 1175

37. U S —In re Farnik, Bkrtcy Ill, 17 B R 856

Ill —De Martini v De Martini, 52 N E 2d 138, 385 Ill 128—Watt v Watt, 78 N E 2d 224, 400 Ill 35—Kleinschmidt Laboratories v Kleinschmidt, 100 N E 2d 796, 344 Ill App 213

38. Alaska—Spracher v Spracher, 17 Alaska 698

Cal —Application of Rauer's Collection Co, 196 P 2d 803, 87 Cal App 2d 248

39. U S —In re Blodgett, D C Wis, 115 F Supp 33

42. Cal —Squibb v Squibb, 12 Cal Rptr 346, 190 C A 2d 766—Blackburn v Drake, 27 Cal Rptr 651, 211 C A 2d 806

Possessory homestead interest

Tex —Shepler v Kubena, Civ App 563 S W 2d 382

45. U S —Jones v Kemp supra, n 16—U S Nat Bank of Portland v U S, D C Or 188 F Supp 332—Wetzner v U S C A Fla, 309 F 2d 45, cert den 83 S Ct 727, 372 U S 913, 9 L Ed 2d 720—In re Wood, Bkrtcy S D, 8 B R 882

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S D —Schutterle v Schutterle, 260 N W 2d 341

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In Tennessee

(1) Tenn —Hamilton Nat Bank v Woods, 217 S W 2d 14, 31 Tenn App 501—Walters v Walters, 241 S W 2d 503, 192 Tenn 392

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46. U S —Doing v Riley, C A Fla, 176 F 2d 449—In re Golden, Bkrtcy Fla, 16 B R 580

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Mich —Cross v Commons, 59 N W 2d 41, 336 Mich 665

N Y —Michaels v Chemical Bank, 441 N Y S 2d 638, 110 Misc 2d 74

N C —Sample v Jackson, 35 S E 2d 236, 225 N C 380

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(1) Travelers Ins Co v Nauert Tex Civ App, 200 S W 2d 661—Tucker v Cole Civ App, 215 S W 2d 252, err ref no rev err—Williamson v Kelley, Civ App, 444 S W 2d 311, err ref no rev err

(3) Thompson v Thompson, 236 S W 2d 779, 149 Tex 632—Sparks v Robertson, Civ App, 203 S W 2d 622 err ref no rev err

49. Possessory freehold estate

Ill —Dixon v Moller, 356 N E 2d 599, 1 Ill Dec 411, 42 Ill App 3d 688

50. Mo —Bushnell v Loomis, 137 S W 257, 234 Mo 171 36 L R A,N S, 1029

Tenn —Oliver v Milford, 230 S W 2d 563, err dism

51. In California

(1) In re Falcone's Estate, 27 Cal Rptr 38, 211 C A 2d 40

(2) Holmes v Grange Fraternal Fire Ins Ass'n of Cal, 228 P 2d 889, 102 Cal App 2d 911

52. Ark —Lambert v Childs, 362 S W 2d 10, 235 Ark 714

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§ 4. —— Interest of Spouse or Children During Life of Person Acquiring Homestead

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Mo —Bushnell v Loomis, supra, n 50

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58. Va —Seaton v Seaton, 34 S E 2d 236, 184 Va 180

59. La —State ex rel Code v. Code, supra, n 20

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63. Okl —Ludeman v Armbruster, 165 P 2d 835, 196 Okl 452—Keel v Jones, 413 P 2d 549

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64. Tex —Paddock v Stemonett, 218 S W 2d 428, 147 Tex 571—Orr v Orr Civ App, 226 S W 2d 172

§ 5. What Law Governs Right

66. U S —In re Murillo, Bkrtcy Cal, 4 B R 612

67. Tenn —Bruce v Bruce, App, 222 S W 2d 228

Waiver contrary to public policy

Fla —Sherbill v Miller Mfg Co, 89 So 2d 28, 60 A L R 2d 1445

Statute in force at time exemption claimed controls

Ill —Cochran v Cutler, 350 N E 2d 59, 39 Ill App 3d 602

§ 6. Constitutional and Statutory Provisions in General

68. S D —Brodsky v Maloney, 105 N W 2d 911, 78 S D 605

Statute held valid

U S —In re Statham, C A Wash, 483 F 2d 436, cert den 94 S Ct 578, 414 U S 1069, 38 L Ed 2d 474—In re Kelley, Bkrtcy Fla, 21 B R 375

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70. Enabling act

U S —In re Morse, D C Cal, 237 F Supp 579

Codification of existing law

Ill —Petrulionis v Dudek, 252 N E 2d 23, 113 Ill App 2d 398

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Fla —Tullis v Tullis, 360 So 2d 375

Wash —Bank of Anacortes v Cook, 517 P 2d 633, 10 Wash App 391

71. Not self-executing

Or —In re Doody's Estate, 313 P 2d 444, 210 Or 658

§ 7. —— Character of Legislation Permissible under Organic Law in General

72. Ariz —Maryland Nat Ins. Co v Ozzie Young Drilling Co 526 P 2d 402, 22 Ariz App 195

Cal —Taylor v Madigan, 126 Cal Rptr 376, 53 C A 3d 943

Kan —Beard v Montgomery Ward & Co, 524 P 2d 1159, 215 Kan 343

La —Smith v Marino, App, 28 So 2d 780

Or —Wilkinson v Carpenter, 561 P 2d 607 277 Or 557

Different exemptions for single and married persons

U S —In re Unkefer, Bkrtcy Ariz, 44 B R 55

74. S D —Brodsky v Maloney, 105 N W 2d 911, 78 S D 605

75. U S —In re Swift D C Va, 96 F Supp 44—In re Davis, Bkrtcy Md, 16 B R. 62—In re Quinlan, Bkrtcy Ala, 12 B R 824

Ark —Henderson v Henderson, 204 S W 2d 911, 212 Ark 31

Kan —State ex rel Apt v Mitchell, 399 P 2d 556, 194 Kan 463

S D —Brodsky v Maloney, 105 N W 2d 911, 78 S D 605

Homestead provision not violated

Cal —Taylor v Madigan, 126 Cal Rptr 376, 53 C A 3d 943

77. U S —In re Swift, supra, n 75

Not unreasonably restrictive

Cal —Taylor v Madigan, 126 Cal Rptr 376, 53 C A 3d 943

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84. Cal —Schoenfeld v Norberg, 72 Cal Rptr 924, 267 C A 2d 496, app after remand 90 Cal Rptr 47, 11 C A 3d 755

Statute held invalid

Wis —Ohio Cas, Ins Co v Holz & Holz, Inc, 129 N W 2d 330, 24 Wis.2d 587

Statute held valid

Ky —Lester v City of Fort Thomas, 531 S W 2d 490

Increase not retroactive

U S —In re Bobbitt, D C Tex, 3 B R 372

94. Cal —Taylor v Madigan, 126 Cal Rptr 376, 53 C A 3d 943

§ 8. —— Construction of Homestead Laws

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95. Ariz —Phiegar v Elmer, 325 P 2d 881, 84 Ariz 204

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96. Not a statute of descent

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99. Wis —Reckner v Reckner, App, 314 N W 2d 159, 105 Wis 2d 425

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2. Tenn —Walters v Walters, 241 S W 2d 503, 192 Tenn 392

6. U S —In re Tognetti, D C Cal, 57 F Supp 286—Beall v Pinckney, C C A Fla, 150 F 2d 467, 161 A L R 1281—Rutherford v Hughes, D C Tex, 103 F Supp 161, revd on oth grds, C A, 201 F 2d 161—King v Sweatt, D C Ark, 115 F Supp 215—In re Mapes, D C Cal, 120 F Supp 316—In re Stotler, D C Cal, 114 F Supp 301, revd on oth grds, C A, 215 F 2d 776—Lynch v Stotler, C A Cal, 215 F 2d 776—Lewis v Morrison Supply Co, C A Tex, 231 F 2d 632—In re Haas, D C Colo, 165 F Supp 488—Bank of Sun Prairie v Hovig, D C Ark, 218 F Supp 769—Elliott v Ostman, C A Cal, 340 F 2d 581—In re Eade, D C Cal, 237 F Supp 320—In re Morse D C Cal, 237 F Supp 579—In re Waltrip, D C Va, 260 F Supp 448—Monson v First Nat Bank of Bradenton, C A Fla, 497 F 2d 135

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N D —Larson v Cole, 33 N W 2d 325, 76 N D 32

Okl —Cooper v Kester, 185 P 2d 458, 199 Okl 238—First Nat Bank of Sentinel v Anderson, 240 P 2d 1066, 206 Okl 54

S D —Ramsey v Lake County, 14 N W 2d 125, 70 S D 61

Tex —Garrard v Henderson, Civ App, 209 S W 2d 225—Uptmor v Janes, Civ App, 210 S W 2d 235, err ref no rev err —Orr v Orr, Civ App, 226 S W 2d 172—Long Bell Lumber Co v Miller, Civ App, 240 S W 2d 405—Simank v Alford, Civ App, 441 S W 2d 234, err ref no rev err

Va —C.J.S cited in Goldburg Co v Salyer, 50 S E 2d 272, 274, 188 Va 573

Wash —In re Poli's Estate, 179 P 2d 704, 27 Wash 2d 670—Cody v Herberger, 371 P 2d 626, 60 Wash 2d 48—Bank of Anacortes v Cook, 517 P 2d 633, 10 Wash App 391

Wis —Schwanz v Teper, 223 N W 2d 896, 66 Wis 2d 157

Homestead exemption is favorite of law, etc.

U S —In re Shelton, D C Wash, 102 F Supp 629

Cal —Lee v Brown, 132 Cal Rptr 649, 553 P 2d 1121, 18 C 3d 110

Wash —First Nat Bank of Everett v Tiffany, 242 P 2d 169, 40 Wash 2d 193—Lien v Hoffman, 306 P 2d 240, 49 Wash 2d 642—Webster v Rodrick, 394 P 2d 689, 64 Wash 2d 814

Jealously guarded by the law

Iowa—Merchants Mut Bonding Co v Underberg, 291 N W 2d 19

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8. U S —King v Sweatt, supra, n 6

Fla —Anderson v Anderson, 44 So 2d 652

Neb —Horn v Gates, supra, n 6

Or —Fleischhauer v Bilstad, 379 P 2d 880, 233 Or 578

Va —Goldburg Co v Salyer, 50 S E 2d 272, 188 Va 573

9. Ark —Drennen v Wheatley, 195 S W 2d 43, 210 Ark 222

10. Okl —Matter of Wallace's Estate, 648 P 2d 828

11. Derogation of creditors' rights

Wash —Bank of Anacortes v Cook, 517 P 2d 633, 10 Wash App 391

13. U S —King v Sweatt, D C Ark, 115 F Supp 215

Fla —In re Van Meter's Estate, App, 214 So 2d 639, writ discharged, Sup, 231 So 2d 524

Wash —Webster v Rodrick, 394 P 2d 689, 64 Wash 2d 814

16. N Y —Perry v Zarcone, 414 N Y S 2d 604, 98 Misc 2d 899, mod on oth grds 431 N Y S 2d 50, 77 A D 2d 881, app dism 417 N E 2d 1010, 52 N Y 2d 785, 436 N Y S 2d 622

Or —Fleischhauer v Bilstad, 379 P 2d 880, 233 Or 578

Tex —Carson v McFarland, Civ App, 206 S W 2d 130, err ref

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18. U S —In re Gustinis, Bkrtcy Va, 16 B R 108

19. La —Davis v Davis, App, 23 So 2d 651

§ 9. —— Retroactive Operation

20. U S —U S v Smith, D C La, 486 F Supp 76—In re Bassin, C A Cal, 637 F 2d 668—In re Lattimore, Bkrtcy N Y, 12 B R 111—Matter of Hinson, Bkrtcy S C, 20 B R 753

Cal —Application of Rauer's Collection Co, 196 P 2d 803, 87 Cal App 2d 248

Miss —Hall v Panola County Bank, 412 So 2d 238

N D —Young v White, 267 N W 2d 799

Tex —Dallas Power & Light Co v Loomis, App 5 Dist, 672 S W 2d 309, err ref no rev err

Statute held retroactive

U S —In re Barnhart, Bkrtcy Tex, 47 B R 277

Codification of existing law

Ill —Petrulionis v Dudek, 252 N E 2d 23, 113 Ill App 2d 398

U S —In re Skipwith, Bkrtcy Cal, 9 B R 730

Constitutional provision

Fla —Jones v Jones, App 2 Dist, 412 So 2d 387

22. U S —Fidelity & Deposit Co of Md v Lovell, D C Miss, 108 F Supp 360 affd, C A, 214 F 2d 565—Matter of Echavarren, Bkrtcy Idaho, 2 B R 215

§ 10. —— Change or Repeal of Homestead Exemption

23. U S —In re Bassin, C A Cal, 637 F 2d 668

Ill —Petrulionis v Dudek, 252 N E 2d 23, 113 Ill App 2d 398

Iowa —C J S cited in In re Ragan's Estate, 23 N W 2d 521, 523, 237 Iowa 619

24. Miss —Odom v Luehr, 85 So 2d 218, 226 Miss 661

Wash —Macumber v Shafer, 637 P 2d 645, 96 Wash 2d 568

25. U S —Fidelity & Deposit Co of Md v Lovell, supra, n 22—In re Sanderson, D C Cal, 134 F Supp 484, revd on oth grds, C A, 236 F 2d 641, 61 A L R 2d 744

Cannot affect previous right of creditor

U S —England v Sanderson, C A Cal, 236 F 2d 641, 61 A L R 2d 744

Tex —First Realty Bank and Trust v Youngkin, Civ App, 568 S W 2d 428

§ 13. Existence of More than One Homestead

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31. U S —In re Towers, D C Cal, 146 F Supp 882, affd, C A, 247 F 2d 738—Towers v Curry, C A Cal, 247 F 2d 738—First Nat Bank of Dona Ana County v Boyd, D C Ariz, 378 F Supp 961—In re Brasington, Bkrtcy Ala, 10 B R 76

Ark —Exchange Bank & Trust Co v Mathews, 591 S W 2d 354, 267 Ark 415

Cal —Strangman v Duke, 295 P 2d 12, 140 C A 2d 185

Ga —Worley v Arnold, 41 S E 2d 568, 74 Ga App 772

Ill —Dixon v Moller, 356 N E 2d 599, 1 Ill Dec 411, 42 Ill App 3d 688

La —Corcoran v Andrews, App, 195 So 2d 767

Mich —Cross v Fruehauf Trailer Co, 93 N W 2d 233, 354 Mich 455, 74 A L R 2d 1346

Neb —Horn v Gates, 53 N W 2d 527, 145 Neb 374—Strumpler v Peterson, 206 N W 2d 629, 190 Neb 133

Okl —Wood v Biggs, 424 P 2d 59—Matter of Wallace's Estate, 648 P 2d 828

Tex —Davis v Hawn Lumber Co, Civ App, 193 S W 2d 263—Bass v Ware Civ App, 203 S W 2d 1001, err ref no rev err

32. Tex —Davis v Hawn Lumber Co, supra, n 31—R B Spencer & Co v Green, Civ App, 203 S W 2d 957

36. Neb —Horn v Gates, supra, n 6

39. Cal —C J S cited in Strangman v Duke, 295 P 2d 12, 16, 140 C A 2d 185

§ 14. Separate Homesteads in Same Tract

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44. U S —In re Towers, D C Cal, 146 F Supp 882, affd, C A 247 F 2d 738

Cal —Strangman v Duke, 295 P 2d 12, 140 C A 2d 185

Ill —Morris Inv Co v Skeldon, 78 N E 2d 504, 399 Ill 506

Two homestead exemptions on same property

U S —First Nat Bank of Dona Ana County v Boyd, D C Ariz, 378 F Supp 961

§ 15. Duration and Termination

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Homestead ⇐15, 134

47. U S —In re Grisanti, D C Ky, 58 F Supp 646—Beall v Pinckney, supra, n 6

Cal —California Bank v Schlesinger, 324 P 2d 119, 159 C A 2d Supp 854

Ill —Watt v Watt 78 N E 2d 224, 400 Ill 35

Ohio —Gledhill v Walker, 55 N E 2d 647, 143 Ohio St 381

S D —Ramsey v Lake County, supra, n 6

Tex —Cline v Henry, Civ App, 239 S W 2d 205, err ref no rev err

Right to terminate homestead in joint tenancy property

Cal —Bradley v Scully, 62 Cal Rptr 834, 255 C A 2d 101

Tolling of period

U S —Matter of Widdershoven, D C Cal, 452 F Supp 503—In re Ehmke, Bkrtcy Cal, 4 B R 331

48. Cal —Vieth v Klett, supra, n 6

Fla —Wilson v Florida Nat Bank & Trust Co at Miami, 64 So 2d 309

Neb —In re Jacobson's Estate, 281 N W 2d 552, 204 Neb 180

Tex —Donahoe v Allen, Civ App, 608 S W 2d 745

49. U S —In re Crump, Bkrtcy Fla, 2 B R 222

Ark —Cole v Sparks, 172 S W 2d 20, 205 Ark 937

Cal —In re Falcone's Estate, 27 Cal Rptr 38, 211 C A 2d 40

Fla —Wilson v Florida Nat Bank & Trust Co at Miami, supra, n 48

N C —C J S cited in Williams v Johnson, 53 S E 2d 277, 280, 230 N C 338

Okl —Russell v Key, 155 P 2d 238, 195 Okl 49—Kunauntubbee v Greer, 323 P 2d 725

50. Neb —Strumpler v Peterson, 206 N W 2d 629, 190 Neb 133

51. Ill —Watt v Watt, supra, n 47—Kleinschmidt Laboratories v Kleinschmidt, 100 N E 2d 796, 344 Ill App 213

§ 16. In General

54. U S —In re Carr, Bkrtcy Fla, 19 B R 173

55. Fla —Brown v Hutch, App, 156 So 2d 683

La —Corcoran v Andrews, App 195 So 2d 767

§ 17. Citizenship

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58. Fla —Matter of Cooke, 412 So 2d 340

§ 18. Residence

62. U S —Matter of Cooke, Bkrtcy Fla, 1 B R 537

Ariz —In re Graham's Estate, 239 P 2d 365, 73 Ariz 179

N C —S D Scott & Co v Jones, 52 S E 2d 219, 230 N C 74

Wis —C J S, cited in Duda v Beben, 31 N W 2d 603, 604, 252 Wis 295

Continued residence by wife and children

Wis —Eloff v Riesch, 111 N W 2d 578, 14 Wis 2d 519

65. U S —Turnbeaugh v Santos, C C A Cal, 146 F 2d 168

66. U S —In re Wood, Bkrtcy S D, 8 B R 882—In re Lumb, Bkrtcy Wis 12 B R 862

Fla —Vandiver v Vincent, App, 139 So 2d 704

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74. Fla —Hussa v Hussa, 65 So 2d 759

Wis —Duda v Beben, 31 N W 2d 603, 252 Wis 295

76 Ala —Matthews v Matthews, 32 So 2d 514, 249 Ala 611

§ 20. Insolvency

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82. N C —Williams v Johnson, 53 S E 2d 277, 230 N C 338

§ 23. —— Family

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85. N D —Albrecht v Albrecht, 99 N W 2d 229

Tex —Orr v Orr, supra, n 6

87. Fla —Solomon v Davis, 100 So 2d 177, 67 A L R 2d 774

Iowa —Magel v Hunt, 265 N W 119, 221 Iowa 199

Okl —Filtsch v Curtis, 234 P 2d 377, 205 Okl 67

Tex —Barker v Lee, Civ App, 337 S W 2d 637

Debtor must have family

La —Lamar Life Ins Co v Babin, 163 So 2d 81, 246 La 19

Intended to protect

U S —In re Statham, C A Wash, 483 F 2d 436, cert den 94 S Ct 578, 414 U S 1069, 38 L Ed 2d 474

88. Tex —Garrad v Henderson, supra, n 6

Wash —Code v London, 178 P 2d 293, 27 Wash 2d 279

92. Fla —Brown v Hutch, App, 156 So 2d 683

Mo —State v Haney, 277 S W 2d 632, 55 A L R 2d 717

Necessity of head

(2) Fla —In re Van Meter's Estate, App, 214 So 2d 639, writ discharged, Sup, 231 So 2d 524

Test

Fla —Heard v Mathis, App, 144 So 2d 651—In re Schorr's Estate, App, 409 So 2d 487

94. Fla —Brown v Hutch, App, 156 So 2d 683

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96. Mo—State v Haney, supra, n 92, 55 A L R 2d 717

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97. U S—Matter of Sullivan, C A Ill, 680 F 2d 1131, cert den 103 S Ct 349, 459 U S 992, 74 L Ed 2d 388

Ill—First Nat Bank & Trust Co of Rockford v. Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

Tex.—Stout v Anthony, Civ App, 254 S W 2d 879, err ref

98. Fla—Vandiver v Vincent, App, 139 So 2d 704

Tex—Garrard v Henderson, supra, n 6

99. Ill—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

6. Fla—In re Kionka's Estate, App, 113 So 2d 603, affd, Sup, 121 So 2d 644—Brown v Hutch, App, 156 So 2d 683—In re Van Meter's Estate, App, 214 So 2d 639, writ discharged, Sup, 231 So 2d 524

Okl—Flitsch v Curtis, 234 P 2d 377, 205 Okl 67

9. U S—Jones v Kemp, C C A Okl, 144 F 2d 478

Cal—Rich v Ervin, 194 P 2d 809, 86 Cal App 2d 386

Tex.—Senegar v La Vaughan, Civ App, 230 S W 2d 311, err ref no rev err—Barker v Lee, Civ App, 337 S W 2d 637

10. Tex—Senegar v La Vaughan, supra, n 9

11. Fla—In re Kionka's Estate, App, 113 So 2d 603, affd, Sup, 121 So 2d 644

Tex—Senegar v La Vaughan, Civ App, supra, n 9

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Father and married daughter having husband in service

FL—Beehsen v Burgess, App, 218 So 2d 517

23. Common-law marriage

Tex—Baker v Mays & Mays, 199 S W 2d 279, err dism

26. Tex—Garrard v Henderson, Civ App, 209 S W 2d 225

§ 24. —— Head of Family, or Householder or Housekeeper with or Having Family

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49. U S—U S v Thurston County, Neb, D C Neb, 54 F Supp 201, affd, C C A, 149 F 2d 485, cert den 66 S Ct 58, 326 U S 744, 90 L Ed 444, reh den 66 S Ct 138, 326 U S 808, 90 L Ed 2d 493—In re Skipwith, Bkrtcy Cal, 9 B R 730

Ariz—Phlegar v Elmer 325 P 2d 881, 84 Ariz 204

Colo—Thomas v Hysom, 446 P 2d 911, 167 Colo 218

Fla—Shambow v Shambow, 15 So 2d 836, 153 Fla 760—Scoville v Scoville, 40 So 2d 840—In re Kionka's Estate, App, 113 So 2d 603, affd, Sup, 121 So 2d 644—In re Mahaffey's Estate, App, 194 So 2d 636—Jablonski v Caputo, App, 297 So 2d 310

Alternative requirement

La—Anderson v Finley, App, 84 So 2d 845

(1) La.—Engstrom's of Alexandria, Inc v Vaughn, App, 138 So 2d 672—Corcoran v Andrews, App, 195 So 2d 767

50. Ark—Monroe v Monroe, 465 S W 2d 347, 250 Ark 434

Fla—In re Noble's Estate, 73 So 2d 873—Nelson v Boyer, App 2 Dist, 412 So 2d 31

51. Ill—De Martini v De Martini, 52 N E 2d 138, 385 Ill 128—Morris Inv Co v Skeldon, 78 N E 2d 504, 399 Ill 506

52. U S—In re Carr, Bkrtcy Fla, 19 B R 173

Ill—De Martini v De Martini, supra, n 51

57. Fla—Solomon v Davis, 100 So 2d 177, 67 A L R 2d 774—In re Kionka's Estate, App 113 So 2d 603, affd, Sup, 121 So 2d 644

58. U S—In re Mitchell, Bkrtcy Fla, 19 B R 189

Fla—Anderson v Anderson, 44 So 2d 652—Brady v Brady, 55 So 2d 907—Passmore v Morrison, 63 So 2d 297—Stephens v Campbell, 70 So 2d 579—Solomon v Davis, 100 So 2d 177, 67 A L R 2d 774—In re Wilder's Estate, App, 240 So 2d 514

Ill—Scherman v Scherman, 71 N E 2d 16, 395 Ill 574

59. Fla—In re Wilder's Estate, App, 240 So 2d 514

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60. U S—In re Ehmke, Bkrtcy Cal, 4 B R 331

Fla—Anderson v Anderson, supra, n 58—Hussa v Hussa, 65 So 2d 759—In re Wilder's Estate, App, 240 So 2d 514

N D—Albrecht v Albrecht, 99 N W 2d 229

61. Fla—Solomon v Davis, 100 So 2d 177, 67 A L R 2d 774—Barnett v Pan Am Sur Co, App, 139 So 2d 192, cert discharged, Sup, 147 So 2d 522—Anderson v Garber, App, 183 So 2d 693

62. U S—In re Doan, Bkrtcy Va, 11 B R 704

"Householder" and "head of family" used interchangeably

Ill—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

67. Mo—State v Haney, 277 S W 2d 632, 55 A L R 2d 717

68. Mo—State v Haney, supra, n 67

71. U S—In re Gren, Bkrtcy Fla, 9 B R 20—In re Carr, Bkrtcy Fla, 19 B R 173

Ariz—Phlegar v Elmer, 325 P 2d 881, 84 Ariz 204

Fla—In re Kionka's Estate, App, 113 So 2d 603, affd, Sup, 121 So 2d 644

Tex—Renaldo v Bank of San Antonio, 630 S W 2d 638

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79. **Terminated moral obligation**

Fla—In re Kionka's Estate, App, 113 So 2d 603, affd, Sup, 121 So 2d 644

80. Fla—Lockhart v Sasser, 22 So 2d 763, 156 Fla 339—Vandiver v Vincent, App, 139 So 2d 704

82. U S—Doing v Riley, C A Fla, 176 F 2d 449

Fla—Passmore v Morrison, supra, n 58—In re Kionka's Estate, App, 113 So 2d 603, affd, Sup, 121 So 2d 644—In re Van Meter's Estate, App, 214 So 2d 639, writ discharged, Sup, 231 So 2d 524

83. Tex—Stout v Anthony, Civ App, 254 S W 2d 879, err ref

87. Fla—Solomon v Davis, 100 So 2d 177, 67 A L R 2d 774—In re Kionka's Estate, App, 113 So 2d 603, affd Sup, 121 So 2d 644—Barnett v Pan Am Sur Co, App, 139 So 2d 192, cert discharged, Sup, 147 So 2d 522

Ill—La Placa v La Placa, 126 N E 2d 239, 5 Ill 2d 468—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

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88. U S—C.J.S. cited in In re Haas, D C Colo, 165 F Supp 488, 489

91. Fla—In re Kionka's Estate, App, 113 So 2d 603, affd, Sup, 121 So 2d 644

Tex—Balcomb v Vasquez, Civ App, 241 S W 2d 650, err ref no rev err

95. Ill—Morris Inv Co v Skeldon, 78 N E 2d 504, 399 Ill 506—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479—Skach v Heskin, 328 N E 2d 59, 28 Ill App 3d 346

4. Fla—Scoville v Scoville, 40 So 2d 840

6. U S—In re Lumb, Bkrtcy Wis, 12 B R 862

Ark—Obenshain v Obenshain, 480 S W 2d 567, 252 Ark 701

Fla—Beensen v Burgess, App, 218 So 2d 517

Tex—Renaldo v Bank of San Antonio, 630 S W 2d 638

9. Fla—Larsen v Austin, 54 So 2d 63

10. U S—Matter of Estridge, Bkrtcy Fla, 7 B R 873

Fla—Brodgon v McBride, 75 So 2d 770

Obligation of support and recognition as one in charge

U S—In re Jacobson, Bkrtcy Fla., 46 B R 617

11. Fla—Anderson v Anderson, 44 So 2d 652—Vandiver v Vincent, App, 139 So 2d 704

Tenn—Bean v Huddleston, 405 S W 2d 767, 219 Tenn 1

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16. U S—Matter of Hartmann, Bkrtcy Neb, 19 B R 844

Cal—Harley v Whitmore, 51 Cal Rptr 468, 242 C A 2d 461

Fla—Solomon v Davis, 100 So 2d 177, 67 A L R 2d 774

N D—Watson v Kresse, 130 N W 2d 602

20. Wash—Code v London, 178 P 2d 293, 27 Wash 2d 279

21. U S—U S v Hershberger, D C Kan, 338 F Supp 804, affd, C A, 475 F 2d 677

Fla—Anderson v Anderson, supra, n 11—Solomon v Davis, 100 So 2d 177, 67 A L R 2d 774—Vandiver v Vincent, App, 139 So 2d 704

Ill—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

Neb—In re Grassman's Estate, 158 N W 2d 673, 183 Neb 147

Effect of remarriage after divorce

Fla—Barnett v Pan Am Sur Co, App, 139 So 2d 192, cert discharged, Sup, 147 So 2d 522

24. Ill—La Placa v La Placa, 126 N E 2d 239, 5 Ill 2d 468

N Y—In re Gakis's Estate, 299 N Y S 2d 723, 59 Misc 2d 511

25. Fla—Anderson v Anderson, supra, n 11

28. Ill—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

29. Ill—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

33. Ill—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

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39. La—Engstrom's of Alexandria, Inc v Vaughn, App, 138 So 2d 672

Tex—Ratliff v Smith, Civ App, 178 S W 2d 138 err ref

However, it has beenheld that a childless widower is entitled to homestead exemption

Cal—California Bank v Schlesinger, 324 P 2d 119, 159 C A 2d Supp 854

41. Pa—In re Henry's Estate, 2 D & C 2d 27, 4 Fiduciary 589

42. Tex—Garrard v Henderson, Civ App, 209 S W 2d 225

50. Fla—Passmore v Morrison, 63 So 2d 297

Tex—Ratliff v Smith, supra, n 39

Utah—Mower v Bohmke, 337 P 2d 429, 9 Utah2d 52

53. U S—In re Statham, C A Wash, 483 F 2d 436, cert den 94 S Ct 578, 414 U S 1069, 38 L Ed 2d 474

Fla—Smith v Stewart, App, 390 So 2d 178

Iowa—Perez v Pogge, 303 N W 2d 145

55. U S—In re Geyo, Bkrtcy Fla, 9 B R 75

Ark—Monroe v Monroe, 465 S W 2d 347, 250 Ark 434

56. Fla—Zimmerman v Gardner, App, 355 So 2d 157

It has also been held that a divorced woman who subsequently remarries cannot claim a homestead in property she held as a homestead as a single person where she cannot show that the property was a homestead of the new family [57.5]

57.5 U S—Matter of Claflin, C A 5 (Tex), 761 F 2d 1088

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63. Foreign prison

U S —In re Godinez, Bkrtcy Fla , 10 B R 70

§ 25. —— Unmarried person

66. U S —First Nat Bank of Dona Ana County v Boyd, D C Ariz , 378 F Supp 961—In re Ehmke, Bkrtcy Cal , 4 B R 331—In re Hansen, Bkrtcy S.D , 17 B R 239

Cal —McGaffey v Sudowitz, 10 Cal Rptr 862, 189 C A 2d 215

Tex —Tremaine v Showalter, Civ App , 613 S W 2d 35—Eggemeyer v Eggemeyer, App , 623 S W 2d 462, err dism

Separated spouse prior to divorce held not unmarried within statute

Cal —Harley v Whitmore, 51 Cal Rptr 468, 242 C A 2d 461

§ 26. —— Wife

67. Cal —Johnson v Brauner, 281 P 2d 50 131 C A 2d 713

La —Watson v Bethany 26 So 2d 12, 209 La 989

Existing estate

U S —U S v Hershberger, C A Kan , 475 F 2d 677

68. U S —Morgan v Moynahan, D C Tex , 86 F Supp 522

Fla —In re Ritter's Estate, App 1 Dist , 407 So 2d 386

Vested, one half interest

U S —U S v Hershberger, C A Kan , 475 F 2d 677

Conveyance by husband of his undivided interest in property

Ill —Skach v Heakin, 328 N E 2d 59, 28 Ill App 3d 346

71. Ark —Campbell v Geheb, 523 S W 2d 185, 258 Ark 225

Okl —Weever v Weever, App 579 P 2d 216

§ 28. —— Other Designations

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85. U S —In re Howell, C A Cal , 638 F 2d 81

La —Engstrom's of Alexandria, Inc v Vaughn, App , 138 So 2d 672

86. Fla —Vandiver v Vincent, App , 139 So 2d 704

§ 29. In General

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91. Cal —McGaffey v Sudowitz, 10 Cal Rptr 862, 189 C A 2d 215

La —Baham v Vernon, App , 42 So 2d 141

Tex —Gill v Quinn, Civ App , 613 S W 2d 324

Wash —Code v London, supra, n 20

93. Colo —Johnson v Mountain Sav & Loan Ass'n, 426 P 2d 962, 162 Colo 474

95. U S —In re Foley, D C Neb , 97 F Supp 843

Neb —Schroeder v Ely, 73 N W 2d 172, 161 Neb 262

96. Fla —Bowers v Mozingo, App , 199 So 2d 492

Tex —Tolman v Overstreet, Civ App , 590 S W 2d 635

97. Ohio—C.J.S. cited in Mutual Bldg & Inv Co v Efros, 89 N E 2d 648, 651, 152 Ohio St 369

98. Tex —Ellisor v Ellisor, App 1 Dist , 630 S W 2d 746

99. Tex —Galloway v Galloway, Civ App , 236 S W 2d 832

§ 30. Intent

1. La —Azar v Azar, App , 185 So 2d 113

S D —Sidle v Cheney, 56 N W 2d 86, 74 S D 540

Declaration not invalid

La —Phillips v Nereaux, App , 357 So 2d 813, reh den 361 So 2d 228

3. U S —In re Sivley, Bkrtcy Tenn , 14 B R 905

5. U S —Bank of Sun Prairie v Hovig, D C Ark , 218 F Supp 769—Mott v, Groves, C A Cal , 428 F 2d 1208—Matter of Cooke, Bkrtcy Fla 1 B R 537

Cal —Ellsworth v Marshall, 16 Cal Rptr 588, 196 C A 2d 471

Fla —Engel v Engel, App , 97 So 2d 140—Matter of Cooke, 412 So 2d 340

Mo —State v Haney, 277 S W 2d 632, 55 A L R 2d 717

Okl —Weever v Weever, App , 579 P 2d 216

Tex —Barton v Wood, Civ App 175 S W 2d 437, err ref —Balcomb v Vasquez Civ App , 241 S W 2d 650, err ref no rev err —Simank v Alford, Civ App , 441 S W 2d 234, err ref no rev err

Wash —Clark v Davis, 226 P 2d 904, 37 Wash 2d 850

7. U S —Bank of Sun Prairie v Hovig, D C Ark , 218 F Supp 769

Wash —Webster v Rodrick, 394 P 2d 689, 64 Wash 2d 814

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9. Fla —In re Newman's Estate, App 5 Dist , 413 So 2d 140

Mo —State v Haney, supra, n 5, 55 A L R 2d 717

12. Tex —Ray v Metzger, Civ App , 165 S W 2d 207, affd 172 S W 2d 480, 141 Tex 372—Garrard v Henderson, Civ App , 209 S W 2d 225—Prince v North State Bank of Amarillo, Civ App 484 S W 2d 405, err ref no rev err

14. Wash —Clark v Davis, supra n 5

"There can be no such thing as the fraudulent acquisition of a homestead, etc "

U S —Bank of Sun Prairie v Hovig, D C Ark , 218 F Supp 769

15. Fla —Quigley v Kennedy & Ely Ins , Inc , App , 202 So 2d 610

§ 31. —— Mere Intent to Occupy

17. U S —Bank of Sun Prairie v Hovig, D C Ark , 218 F Supp 769 In re White, Bkrtcy Vt , 18 B R 95

Ark —Hinton v Willard 220 S W 2d 423, 215 Ark 204

Ohio—Mutual Bldg & Inv Co v Efros, 89 N E 2d 648, 152 Ohio St 369

Tex —Meadows v Russell, Civ App , 203 S W 2d 647—Surratt v Thomas, Civ App , 233 S W 2d 350—Balcomb v Vasquez, supra, n 5—Bond v Owen, Civ App , 257 S W 2d 833—Davis v McClurkan Civ App , 378 S W 2d 358

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20. Ohio—Mutual Bldg & Inv Co v Efros, supra, n 17

§ 32. Occupancy

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21. Mo —Lutz v Kehr, 333 S W 2d 61

22. La —Azar v Azar, App , 185 So 2d 113

Tex —Purdin v Jenkins, Civ App 337 S W 2d 418—Houston Lumber Supply Co v Wockenfuss, Civ App , 386 S W 2d 330, err ref no rev err

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23. U S —C.J.S. cited in In re Thomas, Bkrtcy N Y , 27 B R 367, 370

24. U S —U S v Thurston County, Neb , D C Neb , 54 F Supp 201, affd , C C A , 149 F 2d 485, cert den 66 S Ct 58, 326 U S 744, 90 L Ed 444, reh den 66 S Ct 138, 326 U S 808, 90 L Ed 493—In re Bouchard, Bkrtcy Cal , 11 B R 869—In re Tevaga, Bkrtcy Hawaii, 35 B R 157—In re Brassington, Bkrtcy Ala , 10 B R 76—In re Mason, Bkrtcy Ala , 48 B R 382

Ala —Mordecai v Scott, 320 So 2d 642, 294 Ala 626

Ariz —In re Stanger's Estate, 257 P 2d 593, 75 Ariz 399

Ark —Hinton v Willard, supra, n 17

Conn —State ex rel Levine v Lee, 145 A 2d 378, 21 Conn Sup 116, stating Florida law

Ill —Rice v United Mercantile Agencies of Louisville, Ky , 70 N E 2d 618, 395 Ill 512

Iowa—In re Sueppel's Estate, 124 N W 2d 154, 255 Iowa 974

Kan —State ex rel Apt v Mitchell, 399 P 2d 556, 194 Kan 463—Bellport v Harder, 411 P 2d 725, 196 Kan 294

La —Anderson v Finley, App , 84 So 2d 845—Engstrom's of Alexandria, Inc v Vaughn, App , 138 So 2d 672

Mo —Lutz v Kehr, 333 S W 2d 61—Riggs v Department of Public Health and Welfare, App , 483 S W 2d 769

Neb —J H Melville Lumber Co v Maroney, 16 N W 2d 527, 145 Neb 374—Horn v Gates, 53 N W 2d 84, 155 Neb 667

N Y —First Federal Sav and Loan Ass'n of Rochester v Brown, 434 N Y S 2d 306, 78 A D 2d 119, app after remand 448 N Y S 2d 302, 86 A D 2d 963

Ohio—Mutual Bldg & Inv Co v Efros, supra, n 17

Tex —Meadows v Russell, supra, n 24—Garrard v Henderson, Civ App , 209 S W 2d 225—Simank v Alford, Civ App , 441 S W 2d 234, err ref no rev err —Prince v North State Bank of Amarillo, Civ App , 484 S W 2d 405, err ref no rev err

Wash —Security Sav and Loan Ass'n v Busch, 523 P 2d 1188, 84 Wash 2d 52

Wyo —Wambeke v Hopkin, 372 P 2d 470

27. Ark —Keylon v Arnold, 209 S W 2d 459, 213 Ark 130

31. Colo —Helkey v Ashley, 155 P 2d 143, 113 Colo 175

Wash —Clark v Davis, supra, n 5—Heck v Kaiser Gypsum Co , 351 P 2d 1035, 56 Wash 2d 212

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33 Kan —Security State Bank of Scott City v Coberly, 623 P 2d 544, 5 Kan App 2d 691

S D —Brodsky v Maloney, 105 N W 2d 911, 78 S D 605

Tex —Switzerland General Ins Co v Gulf Ins Co , Civ App , 213 S W 2d 161, err dism —Blackburn v Temple Nat Bank, Civ App , 216 S W 2d 233, err ref no rev err —Anderson v Bundick, Civ App , 245 S W 2d 318, err ref no rev err

Present right of occupancy

Tenn --Hipshire v Stapleton, 418 S W 2d 457, 57 Tenn App 339

34. U S —Matter of Cottingim, Bkrtcy Ohio, 7 B R 56

Kan —Security State Bank of Scott City v Coberly, 623 P 2d 544, 5 Kan App 2d 691

S D —Brodsky v Maloney 105 N W 2d 911, 78 S D 605

Tex —Surratt v Thomas, supra, n 17—Chewsick v Freeman, 287 S W 2d 171, 155 Tex 372—Houston Lumber Supply Co v Wockenfuss, Civ App , 386 S W 2d 330, err ref no rev err

Reason for rule

(1) U S —In re Cummings, D C Kan , 40 B R 208

36. Tex —Cheswick v Freeman, 287 S W 2d 171, 155 Tex 372—Davis v McClurkan, Civ App , 378 S W 2d 358

Elements of constructive occupancy

Kan —Security State Bank of Scott City v Coberly, 623 P 2d 544, 5 Kan App 2d 691

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A fee owner subject to a life estate can claim a homestead exemption irrespective of question of possession.[38.5]

38.5. Utah—Rich Co-op Ass'n v Dustin, 385 P 2d 155, 14 Utah2d 408

40. Wis —In re Fish's Estate, 253 N W 387, 214 Wis. 464

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54. U S —In re Blackburn, D C Cal, 284 F Supp 33

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60. Tex —Blackburn v Temple Nat Bank, supra, n 33—Bond v Owen, supra, n 17

Subjective intent controlling where two residencies occupied

U S —In re Neale, D C Tex, 274 F Supp 969

§ 35. —— Character and Mode of Occupancy in General

70. Fla —In re Noble's Estate, 73 So 2d 873

Minn.—Denzer v Prendergast, 126 N W 2d 440, 267 Minn 212

Tex —Spence v Spence, Civ App, 455 S W 2d 365

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71. U S —In re Grimes, Bkrtcy Md, 18 B R 132

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U S —Monson v First Nat Bank of Bradenton, C A Fla, 497 F 2d 135

Fla —De Jonge v Wayne, 76 So 2d 273—In re Van Meter's Estate, App 214 So 2d 639, writ discharged, Sup 231 So 2d 524

Ga —Turner v Board of County Tax Assessors, 31 S E 2d 61, 71 Ga App 374 transf 28 S E 2d 902, 197 Ga 241

Ill —Morris Inv Co v Skeldon, 78 N E 2d 504, 399 Ill 506

Kan —State ex rel Apt v Mitchell, 399 P 2d 556, 194 Kan 463

La —Lamar Life Ins Co v Babin, 163 So 2d 81, 246 La 19

Miss —Adams v Bounds, 81 So 2d 235, 224 Miss 518

Ohio—Mutual Bldg & Inv Co v Efros, supra, n 17

Tex —Cook v Young, Civ App, 269 S W 2d 497—Simank v Alford, Civ App, 441 S W 2d 234, err ref no rev err —Clark v Salinas, App 13 Dist, 626 S W 2d 118, err ref no rev err Sup, 628 S W 2d 51

72. Fla —Beck v Wylie, 60 So 2d 190

Kan —Security State Bank of Scott City v Coberly, 623 P 2d 544, 5 Kan App 2d 691

Okl —Bowman v Bowman, 206 P 2d 582, 201 Okl 384

Tex —Garrard v Henderson, supra, n 12

Utah—Stucki v Ellis 201 P 2d 486, 114 Utah 486

75. Miss —Adams v Bounds, 81 So 2d 235, 224 Miss 518

§ 36. —— Use for Other Purposes Than Residence

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78. Kan —Beard v Montgomery Ward & Co, 524 P 2d 1159, 215 Kan 343

"Commercial purpose or the conduct of a business" construed

Ga —Jones v Johnson, 55 S E 2d 904, 80 Ga App 340

79. Ala —Lacey v Davis, 361 So 2d 543

Cal —Phelps v Loop, 148 P 2d 674, 64 Cal App 2d 332—Viotti v Giomi, 41 Cal Rptr 345, 230 C A 2d 730—Bodden v Community Nat Bank of Kern County, 76 Cal Rptr 278, 271 C A 2d 432

Fla —Heil Co v Lavieri, App, 205 So 2d 21

Ga.—Jones v Johnson, supra, n 78

Iowa—Olsen v Lohman, 13 N W 2d 332, 234 Iowa 580

Kan —State ex rel Apt v Mitchell, 399 P 2d 556, 194 Kan 463

Miss —Daily v City of Gulfport, 54 So 2d 485, 212 Miss 361

80. U S —Riley v Doing, D C Fla, 77 F Supp 415, affd. in part and mod in part on oth, grds, C A., 176 F 2d 449

Fla —Brodgon v McBride, 75 So 2d 770

81. Cal —Phelps v Loop, supra, n 79

Iowa—Olsen v Lohman, supra, n 79

Wash —In re Cooper's Estate, 202 P 2d 439, 32 Wash 2d 444

86. Tex —Vaughn v Vaughn, Civ App, 279 S W 2d 427, err ref no rev err

87. Miss —Hendry v Hendry, 300 So 2d 147

Mont —Hamilton v Rock, 191 P 2d 663, 121 Mont 245

88. Cal —Bodden v Community Nat Bank of Kern County, 76 Cal Rptr 278, 271 C A 2d 432

Fla —Weiss v Stone, App, 220 So 2d 403

89. Cal —Phelps v Loop, supra, n 79

90. Cal —Phelps v Loop, 148 P 2d 674, 64 Cal App 2d 332—Bodden v Community Nat Bank of Kern County, 76 Cal Rptr 278, 271 C A 2d 432

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91. Cal —Bodden v Community Nat Bank of Kern County, 76 Cal Rptr 278, 271 C A 2d 432

91. Investment property

U S —Matter of Fettig, Bkrtcy Wis, 3 B R 321

94. Cal —Phelps v Loop, supra, n 75

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Neb —Schroeder v Ely, 73 N W 2d 172, 161 Neb 262

§ 37. —— Occupancy by Tenant

1. Permission by corporation to reside in building

Tex —Texas Commerce Bank-Irving v McCreary, App, 677 S W 2d 643

5. Cal —Bodden v Community Nat Bank of Kern County, 76 Cal Rptr 278, 271 C A 2d 432

Tex —Folse v Monroe, Civ App, 190 S W 2d 604, err ref w m —Vaughn v Vaughn, Civ App, 279 S W 2d 427, err ref no rev err

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7. Mo —Brune v Rathbun, 204 S W 2d 705

§ 39. —— Unlawful Use of Premises

16. Padlocking

Tex —1018-3rd St v State, Civ App, 331 S W 2d 450

§ 40. —— Business Homestead

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20. Permitting foreclosure error

Tex —O'Neil v Mack Trucks, Inc, Civ App, 533 S W 2d 832, revd on oth grds, Sup, 542 S W 2d 112, mand recalled and reissued 551 S W 2d 32

21. Construed reasonably

Fla —Union Trust Co v Glunt, 85 So 2d 877

23. Tex —Haynes v Vermillion, Civ App, 242 S W 2d 444, err ref no rev err

24. Tex —Haynes v Vermillion, supra, n 23

26. Terms distinguished

(2) Other cases

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35. Tex —Davis v Hawn Lumber Co, Civ App, 193 S W 2d 263

42. U S —Lewis v Morrison Supply Co, C A Tex, 231 F 2d 632

46. U S —Lewis v Morrison Supply Co, C A Tex, 231 F 2d 632

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53. Tex —Orr v Orr, supra, n 26

55. Tex —Haynes v Vermillion, supra, n 23

§ 41. —— Time and Continuity of Occupancy

65. U S —In re Neale, D C Tex, 274 F Supp 969

Fla —Burdick v Burdick, App, 399 So 2d 410

Minn —Denzer v Prendergast, 126 N W 2d 440, 267 Minn 212

67. Miss —Philan v Turner, 13 So 2d 819, 195 Miss 172

§ 43. —— Necessity, Requisities, and Sufficiency in General

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69. Specific interest in property set apart

U S —In re Waltrip, D C Va, 260 F Supp 448.

70. Fla —C.J.S. cited in Frase v Branch, App, 362 So 2d 317, 319

71. Wash —Costanzo v Harris, 427 P 2d 963, 71 Wash 2d 254

72. U S —In re Spencer, Bkrtcy Cal, 7 B R 458

Cal —San Diego County Carpenters Group Ins v Lorea, 169 Cal Rptr 157, 112 C A 3d 221

Fla —Grant v Credithrift of America, Inc, App, 402 So 2d 486

Tex —Blake v Fuller, Civ App, 184 S W 2d 148

73. Ala —Nix v McCoy, 195 So 2d 893, 280 Ala 516

Cal —Phelps v Loop, 148 P 2d 674, 64 Cal App 2d 332

75. Miss —C.J.S. quoted in Biglane v Rawls, 153 So 2d 665, 669, 247 Miss 226

76. U S —In re Martin, Bkrtcy Cal, 6 B R 827

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78. Miss —Biglane v Rawls, 153 So 2d 665, 247 Miss 226

§ 44. —— Occupancy as Selection

83. U S —In re Wenner, Bkrtcy Wash, 39 B R 288

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§ 46. —— Declaration or Certificate

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Cal —In re Wooten's Estate, 148 P 2d 33, 64 Cal App 2d 96

Wash —Bank of Anacortes v Cook, 517 P 2d 633, 10 Wash App 391

98. N D —Larson v Cole, 33 N W 2d 325, 76 N D 32

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5. Okl —Mercer v Mercer, 365 P 2d 554

10. Wash —Morley v Morley, 280 P. 645, 131 Wash 540

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Cal —Shumaker v Biscaluz, 278 P 2d 939, 130 C A 2d 414

15. U S —Lynch v Stotler, C A Cal, 215 F 2d 776

Ariz —Matcha v Winn, App, 638 P.2d 1361, 131 Ariz 115

Cal —Rich v Ervin, 194 P 2d 809, 86 Cal App 2d 386—Shumaker v Biscaluz, supra, n 10
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Purpose of statute
U S —Samuels v Delucchi, C A Cal, 286 F 2d 504

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17. U S —Elliott v Ostman, C A Cal, 340 F 2d 581
Cal —Johnson v Brauner, 281 P 2d 50, 131 C A 2d 713—Viotti v Giomi, 41 Cal Rptr 345, 230 C A 2d 730—Michelman v Frye, 48 Cal Rptr 142, 238 C A 2d 698
Tex —Blake v Fuller, Civ App, 184 S W 2d 148

18. Cal —Johnson v Brauner, supra, n 17

20. U S —Esten v Cheek, C A Cal, 254 F 2d 667
Ariz —Matcha v Winn, App, 638 P 2d 1361, 131 Ariz 115
Cal —Crenshaw v Smith, 168 P 2d 752, 74 Cal App 2d 255

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(2) Other instances —Godfrey v Witten, 292 P 2d 247, 138 C A 2d 610

24. Compelled temporary absence
Cal —Michelman v Frye, 48 Cal Rptr 142, 238 C A 2d 698

27. U S —Jackson v Merrick, C A Cal, 260 F 2d 563
Cal —Clausseneus v Anderson, 30 Cal Rptr 772, 216 C A 2d 171
Wash —Strand v Pekola, 138 P 2d 204, 18 Wash 2d 164

28. U S —Esten v Cheek, C A Cal, 254 F 2d 667

Description held sufficient
(2) Other descriptions
Cal —Oktanski v Burn, 291 P 2d 954, 138 C A 2d 419—Clausseneus v Anderson, 30 Cal Rptr 772, 216 C A 2d 171—Viotti v Giomi, 41 Cal Rptr 345, 230 C A 2d 730
Tex —Blake v Fuller, Civ App, 184 S W 2d 148
Wash —Barouh v Israel, 281 P 2d 238, 46 Wash 2d 327

30. U S —In re Stotler, D C Cal, 114 F Supp 301, revd on oth grds, C A, 215 F 2d 776—Samuels v Delucchi, C A Cal, 286 F 2d 504—In re Delucchi, D C Cal, 184 F Supp 30, affd, C A, 286 F 2d 504

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U S —In re Morse, D C Cal, 237 F Supp 579—In re Waltrip, D C Va, 260 F Supp 448

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31. U S —In re Morse, D C Cal, 237 F Supp 579

32. U S —Elliott v Ostman, C A Cal, 340 F 2d 581—In re Eade, D C Cal, 237 F Supp 320
Cal —Viotti v Giomi, 41 Cal Rptr 345, 230 C A 2d 730

Statements held sufficient
(2) U S —In re Morse, D C Cal, 237 F Supp 579

It is more important that creditors know the value of declarant's interest in property than the market value of the premises [34.5]

34.5. U S —Samuels v Delucchi, C A Cal, 286 F 2d 504—In re Eade, D C Cal, 237 F Supp 320

35. Cal —Schuler-Knox Co v Smith, 144 P 2d 47, 62 Cal App 2d 86—Godfrey v Witten, 292 P 2d 247, 138 C A 2d 610—Strangman v Duke, 295 P 2d 12, 140 C A 2d 185—Harley v Whitmore, 51 Cal Rptr 468, 242 C A 2d 461

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Cal —Turnbill v Hayes, 66 Cal Rptr 369, 259 C A 2d 154

36. Cal —Harley v Whitmore 51 Cal Rptr 468, 242 C A 2d 461

38. U S —Towers v Curry, C A Cal, 247 F 2d 738
Wash —Pekola v Strand, supra, n 15

Amended declaration invalid
U S —In re Towers, D C Cal, 146 F Supp 882, affd, C A, 247 F 2d 738

Amendment to correct valuation held proper
U S —In re Waltrip, D C Va, 260 F Supp 448

39. U S —In re Kossack, D C Cal, 113 F Supp 884
La —Barlow v Carr's Estate, App, 292 So 2d 721

Valid
Cal —Taylor v Madigan, 126 Cal Rptr 376, 53 C A 3d 943

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44. Wash —Edgley v Edgley, 644 P 2d 1208, 31 Wash App 795

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50. U S —Holahan v Nugent, C A La, 198 F 2d 653
Ariz —In re Graham's Estate, 239 P 2d 365, 73 Ariz 179
La —Davis v Davis, App, 23 So 2d 651
Wash —Locke v Collins, 256 P 2d 832, 42 Wash 2d 532—Bank of Anacortes v Cook, 517 P 2d 633, 10 Wash App 391

51. U S —In re Mapes, D C Cal, 120 F Supp 316
La —Krauss Co v Manton, App, 68 So 2d 130, foll 68 So 2d 131, and 68 So 2d 132, two cases, and 68 So 2d 133, two cases, transf 78 So 2d 489, 227 La 1—Dutel v Bitterwolf, App, 166 So 2d 526, 10 A L R 3d 661

55. U S —Esten v Cheek, C A Cal, 254 F 2d 667—In re Dulgarian D C Cal, 182 F Supp 954, affd, C A, 287 F 2d 30
Cal —Wood v Emig 137 P 2d 875, 58 Cal App 2d 851—Clausseneus v Anderson, 30 Cal Rptr 772, 216 C A 2d 171—Harley v Whitmore, 51 Cal Rptr 468, 242 C A 2d 461

56. Cal —Rich v Ervin, supra, n 15—Clausseneus v Anderson, 30 Cal Rptr 772, 216 C A 2d 171

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58. Cal —Taylor v Madigan, 126 Cal Rptr 376, 53 C A 3d 943
Or —Stewart v Black, 22 P 2d 336, 143 Or 291

Statute construed
Miss —Adams v Bounds, 81 So 2d 235, 224 Miss 518

60. Cal —Holmes v Grange Fraternal Fire Ins Ass'n of Cal, 228 P 2d 889, 102 Cal App 2d 911

65. Cal —Gera v Gera, 77 Cal Rptr 336, 272 C A 2d 492
La —Phillips v Nereaux, App, 357 So 2d 813, reh den 361 So 2d 228

66. Colo —American Heritage Bank & Trust Co v Trees, 532 P 2d 380, 35 Colo App 147

68 Wash —Costanzo v Harris, 427 P 2d 963, 71 Wash 2d 254

74. Cal —Application of Rauer's Collection Co, 196 P 2d 803, 87 Cal App 2d 248

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Tex —Maryland Cas Co v Davenport, Civ App, 323 S W 2d 615

75. Cal —Gera v Gera, 77 Cal Rptr 336, 272 C A 2d 492

76. Cal —Oktanski v Burn, 291 P 2d 954, 138 C A 2d 419

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79. Miss —Livelar v Kepner, 146 So 2d 346, 244 Miss 723
Tex —City of El Paso v Long, Civ App, 209 S W 2d 950, err ref no rev err —Balcomb v Vasquez, Civ App, 241 S W 2d 650, err ref no rev err —Childress v Smith, Civ App, 140 S W 2d 537—Arlin Properties, Inc v Utz Civ App, 465 S W 2d 231—Burk Royalty Co v Riley, 475 S W 2d 566—Prince v North State Bank of Amarillo, Civ App, 484 S W 2d 405, err ref no rev err
Wis —Siegel v Clemons, 63 S W 2d 725, 266 Wis 369.

84. Miss —C J S cited in Biglane v Rawls, 153 So 2d 665, 668, 247 Miss 226

85. Miss —C.J.S. cited in Biglane v Rawls, 153 So 2d 665, 668, 247 Miss 226

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88. Absence of attempted seizure
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56. Description held insufficient
Ga —Worley v Arnold, 41 S E 2d 568, 74 Ga App 772

§ 49. Time of Acquisition of Homestead

57. U S —In re Grisanti, D C Ky, 58 F Supp 646—Finn v Gilbert, C A Ariz, 307 F 2d 380
Colo —Helkey v Ashley, 155 P 2d 143, 113 Colo 175
Nev —Massey-Ferguson, Inc v Childress, 510 P 2d 1358, 89 Nev 272

61. Fla —Bessemer Properties v Gamble, 27 So 2d 832, 158 Fla 38

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63. U S —In re Hamill D C Kan, 317 F Supp 909

65. Wash —Bank of Anacortes v Cook, 517 P 2d 633, 10 Wash App 391

70 Wis —Price v Ruggles, 11 N W 2d 513, 244 Wis 187

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75. Utah—Sanders v Cassity, 586 P 2d 423

76. Ariz —Ferguson v Roberts, 170 P 2d 855, 64 Ariz 357
Cal —Goodson v Goodson, App, 232 P 2d 876, hearing dism
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Tex —Spence v Spence, Civ App, 455 S W 2d 365

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(1) Domke v Beck, 139 P 2d 1017, 18 Wash 2d 568—Pekola v Strand, 168 P 2d 407, 25 Wash 2d 98

80. Cal —Salsbery v Ritter, 306 P 2d 897, 48 C 2d 1
Colo —Garcia v Adjustment Bureau, Inc, 365 P 2d 687, 148 Colo 270

§ 50. Change of Homestead

81. Cal —Thorsby v Babcock, 222 P 2d 863, 36 Cal 2d 202
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Manner of making change
(2) Other cases —Blake v Fuller Tex Civ App, 184 S W 2d 148

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82. Tex —Blake v Fuller, supra, n 81

86. Tex —Bass v Ware, Civ App, 203 S W 2d 1001, err ref no rev err

90. Miss —Livelar v Kepner, 146 So 2d 346, 244 Miss 723

§ 51. Evidence and Questions for Jury

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96. Ark —Fisher v Knight, 200 S W 2d 799, 211 Ark 465—Kinney v Patterson, 282 S W 2d 809, 225 Ark 393

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(1) Tex —Marks v Calcasieu Lumber Co, Civ App, 245 S W 2d 749, err ref no rev err

97. La —Lamar Life Ins Co v Babin, 163 So 2d 81, 246 La 19

Tex —Savell v Flint, Civ App, 347 S W 2d 24, err ref no rev err

98. U S —Bank of Sun Prairie v Hovig, D C Ark, 218 F Supp 769

Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294

Tex —Vaughn v Vaughn, supra, n 96

1. Tex —Bouldin v Woosley, Civ App, 525 S W 2d 276

2. Tex —Prince v North State Bank of Amarillo, Civ App, 484 S W 2d 405, err ref no rev err

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Fla —Anderson v Garber, App, 183 So 2d 693

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5. Ohio—Rehm v Adams, App, 176 N E 2d 184

11. Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294

Neb —Sanne v Sanne, 94 N W 2d 367, 167 Neb 683

14. Other presumptions held rebuttable

Cal —Collison v Thomas, 11 Cal Rptr 555, 360 P 2d 51, 55 C 2d 490

15. Kan —Beard v Montgomery Ward & Co, 524 P 2d 1159, 215 Kan 343

Evidence held not admissible

(2) Other evidence

U.S —In re Morse, D C Cal, 237 F Supp 579

Miss —Davis v Lammons, 151 So 2d 907, 246 Miss 624

24. Cal —Schuler-Knox Co v Smith, 144 P 2d 47, 62 Cal App 2d 86—Valley Title Co v Parish Egg Basket, Inc, App, 107 Cal Rptr 717, 31 C A 3d 776

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25. Mich —Cross v Fruehauf Trailer Co, 93 N W 2d 233, 354 Mich 455, 74 A L R 2d 1346

Neb —Martin v Norris Public Power Dist, 124 N W 2d 221, 175 Neb 815

Tex —Vaughn v Vaughn, Civ App, 279 S W 2d 427, err ref no rev err —Hilliard v Home Builders Supply Co, Civ App, 399 S W 2d 198—Prince v North State Bank of Amarillo, Civ App, 484 S W 2d 405, err ref no rev err

27. Miss —Daily v. City of Gulfport, 54 So 2d 485, 212 Miss 361

29. Tex —Surratt v Thomas, Civ App, 233 S W 2d 350

31. La —State ex rel Code v Code, 41 So 2d 62, 215 La 485

33. Miss —Adams v Bounds, 81 So 2d 235, 224 Miss 518

34. Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294

Evidence held sufficient

(1) Tex —Surratt v Thomas, Civ App, 233 S W 2d 350—Glover v Glover, Civ App, 416 S W 2d 500, err ref no rev err

Evidence held insufficient

(1) Fla —Sheaf v Klose, 75 So 2d 595

Okl —Harrell v Bank of Wilson, 445 P 2d 266

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35. Evidence held sufficient

Miss —Adams v Bounds, 81 So 2d 235, 224 Miss 518

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38. Evidence held sufficient

(1) U S —Bank of Sun Prairie v Hovig, D C Ark, 218 F Supp 769

Kan —Beard v Montgomery Ward & Co, 524 P 2d 1159, 215 Kan 343

Neb —Smith v Wade, 100 N W 2d 770, 169 Neb 710

S D —Broadsky V Maloney, 105 N W 2d 911, 78 S D 605

Tex —Orr v Orr, Civ App, 226 S W 2d 172—Crosswhite v Moore, Civ App, 248 S W 2d 520, err ref —Cade v Dudney, Civ App, 379 S W 2d 370, err ref no rev err —Houston Lumber Supply Co v Wockenfuss, Civ App, 386 S W 2d 330, err ref no rev err —Casto v Johnson, Civ App, 392 S W 2d 591, err ref no rev err —Modern Homes Const Co v Henderson, Civ App, 407 S W 2d 21, err ref no rev err

(3) Okl —Pearson v Logan, 255 P 2d 255, 208 Okl 234

(5) Okl —Gomes v Davis, 169 P 2d 200, 197 Okl 126

(11) Other matters

Ala —Matthews v Matthews, 32 So 2d 514, 249 La 611—Davis v Reid, 88 So 2d 857, 264 Ala 560

Ariz —Seaney v Molling, 153 P 2d 532, 62 Ariz 81

Cal —Phelps v Loop, 148 P 2d 674, 64 Cal App 2d 332—Collison v Thomas, 11 Cal Rptr 555, 360 P 2d 51, 55 C 2d 490—Clausseneus v Anderson, 30 Cal Rptr 772, 216 C A 2d 171

Fla —Benvenuti v Benvenuti, App, 227 So 2d 895

Mich —Cross v Fruehauf Trailer Co, 93 N W 2d 233, 354 Mich 455, 74 A L R 2d 1346

Miss —Stringer v Craft, 55 So 2d 869

Mo —Hunott v Critchlow, 285 S W 2d 594, 365 Mo 600

Tex —Childress v Smith, Civ App, 340 S W 2d 537—Capitol Aggregates, Inc v Walker, Civ App, 448 S W 2d 830, err ref no rev err

Wash —Security Sav and Loan Ass'n v Busch, 523 P 2d 1188, 84 Wash 2d 52

Wis —Price v Ruggles, 11 N W 2d 513, 244 Wis 187

Evidence held insufficient

(1) Fla —Hussa v Hussa, 65 So 2d 759

(6) As regards other matters

Ark —Hinton v Willard, 220 S W 2d 423, 215 Ark 204

Ga —Rose v Crane Heating Co, 31 S E 2d 717, 198 Ga 295

Miss —Cross v Field, 141 So 2d 733, 244 Miss 397

39. Evidence held sufficient

(1) Ala —Caldwell v Johnson, 83 So 2d 230, 263 Ala 473—Scroggins v Reneau, 168 So 2d 614, 277 Ala 243

Alaska—Spracher v Spracher, 17 Alaska 698

Cal —Wood v Emig, 137 P 2d 875, 58 Cal App 2d 851

Fla —Winkler v Neslinger, 14 So 2d 403, 153 Fla 288—Engel v Engel, App, 97 So 2d 140—In re Thornton's Estate, App, 259 So 2d 760

Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294

La —Anderson v Finley, App, 84 So 2d 845

Minn —Jensen v Christensen, 11 N.W 2d 798, 216 Minn 92

Miss —Robbins v Berry, 57 So 2d 576, 213 Miss 744

Neb —Sanne v Sanne, 94 N W 2d 367, 167 Neb 683

Okl —Bowman v Bowman, 206 P 2d 582, 201 Okl 384—Mercer v Mercer, 365 P 2d 554

Tex —Weaver v Blackburn, 258 So 2d 755

(2) Tex —Meza v Ramirez, Civ App, 415 S W 2d 530

Evidence held insufficient

(1) Mo —Trenton Motor Co v Watkins, App, 291 S W 2d 659

Tex —Gordon v Roseman, Civ App, 175 S W 2d 747, err ref —Marks v Calcasieu Lumber Co, Civ App, 245 S W 2d 749, err ref no rev err —Hilliard v Homes Builders Supply Co, Civ App, 399 S W 2d 198

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40. Evidence held sufficient

(1) Fla —De Jonge v Wayne, 76 So 2d 273

Ill —De Martini v De Martini, 52 N E 2d 138, 385 Ill 128

Mo —Trenton Motor Co v Watkins, App, 291 S W 2d 659

Tex —Underwood v Livings, Civ App, 389 S W 2d 685, err ref no rev err

41. Okl —Massey v Priddy, 301 P 2d 684

Evidence held sufficient

(1) Ala —Haney v Ray, 43 So 2d 889, 253 Ala 224

Iowa—Olsen v Lohman, 13 N W 2d 332, 234 Iowa 580

Okl —Cooper v Kiester, 185 P 2d 458, 199 Okl 238

Tex —Culpepper v Green, Civ App, 324 S W 2d 257—Capitol Aggregates, Inc v Walker, Civ App, 448 S W 2d 830, err ref no rev err

Evidence held insufficient

Miss —Thompson v Dyess, 67 So 2d 721, 218 Miss 770

Tex —Lewis v Brown, Civ App, 321 S W 2d 313, err ref no rev err

42 Ala —Greer v Altoona Warehouse Co, 20 So 2d 513, 246 Ala 297

Evidence held sufficient

Ala —Kirkman v Pittman, 111 So 2d 583, 269 Ala 159

Tex —Vaughn v Vaughn, Civ App, 279 S W 2d 427, err ref no rev err —Brown v Brown, Civ App 282 S W 2d 90, err ref no rev err

43. Tex —Marino v Lombardo, Civ App, 277 S W 2d 749, err ref no rev err —Morris v Morris Civ App, 482 S W 2d 400

Evidence held sufficient

(1) Tex —Henry S Miller Co v Shoaf, Civ App, 434 S W 2d 243, err ref no rev err —Morris v Morris, Civ App, 482 S W 2d 400

Evidence held insufficient

(1) Ky —Castle v Allen, 172 S W 2d 58, 294 Ky 416

Mo —Trenton Motor Co v Watkins, App, 291 S W 2d 659

44. Mo —State v Haney, 277 S W 2d 632, 55 A L R 2d 717

Evidence held sufficient etc.

(2) Other cases —Shambow v Shambow, 15 So 2d 836, 153 Fla 760

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45. Tex —Kimmey v Goodrum, Civ App, 346 S W 2d 901, err ref no rev err

46. Evidence held sufficient

Okl.—Cooper v Kiester, supra n 41

48. Cal —Ellsworth v Marshall, 16 Cal Rptr 588, 196 C A 2d 471

Miss.—Adams v Bounds, 81 So 2d 235, 224 Miss 518

51. Tex—Sims v Besson, Civ.App., 545 S W 2d 262, err ref no rev err

53. Okl—Massey v Priddy, 301 P 2d 684

55. Kan.—Matter of Fink's Estate, 609 P 2d 211, 4 Kan App 2d 523

Tex—Prince v North State Bank of Amarillo, Civ App, 484 S W 2d 405, err ref no rev err

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59. Rural or urban homestead

(2) Other matters

Tex—Kimmey v Goodrum, Civ App, 346 S W 2d 901, err ref no rev err

60. Tex—Savell v Flint, Civ App, 347 S W 2d 24, err ref no rev err

61. Tex—Balcomb v Vasquez, Civ App, 241 S W 2d 650, err ref no rev err

§ 52. Nature and Character

Library References

Homestead ⇐58 et seq.

64. Tex—C.J.S. black letter summary quoted in Gann v Montgomery, Civ App, 210 S W 2d 255, 258, err ref no rev err

66. Ky—Kelly v Kelly's Ex'r, 186 S W 2d 902, 299 Ky 861, 158 A L R 792—Lunsford v Witt, 309 S W 2d 348

Okl—In re Carothers Estate, 167 P 2d 899, 196 Okl 640—First Nat Bank of Sentinel v Anderson, 240 P 2d 1066, 206 Okl 54

Tex—Prince v North State Bank of Amarillo, Civ App, 484 S W 2d 405, err ref no rev err

In Oklahoma, etc.

(2) Additional statements

Okl—Grenard v McMahan, 441 P 2d 950

Trailer

U S—In re Foley, D C Neb, 97 F Supp 843—Matter of Hanks, D C La, 11 B R 706

Kan—In re Dahn's Estate, 464 P 2d 238, 204 Kan 535

La—Ellis v Dillon, App, 345 So 2d 1241

Tex—Gann v Montgomery, Civ App, 210 S W 2d 255, err ref no rev err—Capitol Aggregates, Inc v Walker, Civ App, 448 S W 2d 830, err ref no rev err

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68. Tex—Gann v Montgomery, supra, n 66

73. U S—In re Grimes, Bkrtcy Md, 18 B R 132

Fla—Brady v Brady, 55 So 2d 907

Tex—Abilene White Truck Co v Petrey, Civ App, 384 S W 2d 211, err ref no rev err

A homestead may be declared on property containing more than one residence accommodation.[74.5]

74.5. Cal—In re Levy's Estate, 75 P 301, 141 C 646, 99 Am St R 92—Viotti v Giomi, 41 Cal Rptr 345, 230 C A 2d 730

A homestead is not restricted to the dwelling house alone.[74.10]

74.10. U S—In re Thexton, Bkrtcy Kan, 39 B R 367

76. "City", "town", or "village" construed

(6) Presumed that such words are used in their popular sense

U S—Bank of Sun Prairie v Hovig, D C Ark, 218 F Supp 769

77. Miss.—Horton v Horton, 48 So 2d 850, 210 Miss 116

§ 53. —— Rural or Urban Homestead

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80. U S—King v Sweatt, D C Ark, 115 F Supp 215

Ark—Farmers Co-op Ass'n v Stevens, 543 S W 2d 920, 260 Ark 735

Factors considered

Alaska—Dalton v Interior Credit Bureau, Inc, 615 P 2d 631

82. U S—Rutherford v Hughes, D C Tex, 103 F Supp 161, revd on oth grds, C A, 201 F 2d 161—Bank of Sun Prairie v Hovig, D C Ark, 218 F Supp 769

83. U S—Bank of Sun Prairie v Hovig, D C Ark, 218 F Supp 769

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90. U S—Bank of Sun Prairie v Hovig, D C Ark, 218 F Supp 769

96. U S—Rutherford v Hughes, supra, n 82

§ 54. —— Necessity of Use for Residential Purposes

3. U S—In re Kimball, Bkrtcy La, 2 B R 560

4. U S—In re Brents-Pickell, Bkrtcy Cal, 12 B R 352

5. U S—Knowles v Knowles, D C Virgin Islands, 354 F Supp 239

Kan—In re Dahn's Estate, 464 P 2d 238, 204 Kan 535

§ 55. —— Manner of Acquisition as Affecting Right to Homestead

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8. U S—McMerty v Herzog, C A Minn, 661 F 2d 1184, cert den 102 S Ct 1439, 455 U S 943, 71 L Ed 2d 655

§ 56. Amount and Extent

Library References

Homestead ⇐62 et seq

15. Ala—Drake v Drake, 80 So 2d 268, 262 Ala 609—Rhodes v Schofield, 82 So 2d 236, 263 Ala 256

Fla—C.J.S. quoted in Quigley v Kennedy & Ely Ins Inc, 207 So 2d 431, 433, mand conf to 208 So 2d 853

Kan—Kirkpatrick v Ault, 280 P 2d 637, 177 Kan 542

Tex—Blake v Fuller, Civ App, 184 S W 2d 148—Kunkel v Kunkel, Civ App, 515 S W 2d 941, err ref no rev err

In Florida, etc—Richards v Byrnes, 15 So 2d 610, 153 Fla 705—Anemaet v Martin-Senour Co, App 114 So 2d 23

In Michigan, etc.

(1) "Housing" includes premises within actual control of homeowner

Mich—McCallister v Sun Valley Pools, Inc, 298 N W 2d 687, 100 Mich App 131

In Mississippi

(2) Other cases—Horton v Horton, supra, n 43

16. Fla—C.J.S. quoted in Quigley v Kennedy & Ely Ins Inc, 207 So 2d 431, 433, mand conf to 208 So 2d 853

Ouachita Nat Bank in Monroe v Rowan, App, 345 So 2d 1014, cert den 98 S Ct 1242, 434 U S 1065, 55 L Ed 2d 767

17. U S—In re Martin, Bkrtcy Cal, 6 B R 827

Ala—Boozer v Boozer, 16 So 2d 863, 245 Ala 264

19. Ga—Jones v Johnson, 55 S E 2d 904, 80 Ga App 340

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24. Tex—O'Neil v Mack Trucks, Inc, 542 S W 2d 112, mand recalled and reissued, Sup, 551 S W 2d 32

§ 57. —— In City, Town, or Village

29. U S—Rutherford v Hughes, D C Tex, 103 F Supp 161, revd on oth grds, C A, 201 F 2d 161

Ark—Jordan v Jordan, 228 S W 2d 636, 217 Ark 30

Inclusion of place of business

U S—Matter of Cannady, C A Tex, 653 F 2d 210, reh den, 659 F 2d 1075, two cases

31. Minn—Cysewski v Steingraber, 24 N W.2d 266, 222 Minn 221

32. Iowa—In re McDowell's Estate, 20 N W 2d 24, 237 Iowa 112

§ 58. —— Effect of Extension of Municipal Limits

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34. U S—C J S quoted at length in Stafos v Jarvis, C A Kan, 477 F 2d 369, 373, cert den 94 S Ct 230, 414 U S 944, 38 L Ed 2d 168—In re Boucher, Bkrtcy Fla, 8 B R 713.

C J S quoted at length in In re Stafos, D C Kan, 354 F Supp 299, 300, affd, C A, 477 F 2d 369, cert den 94 S Ct 230

35. Ark—Farmers Co-op Ass'n v Stevens, 543 S W 2d 920, 260 Ark 735

Statute construed

La—Phillips v Nereaux, App, 357 So 2d 813, reh den 361 So 2d 228

§ 59. Value

Library References

Homestead ⇐66 et seq.

41. N C—Seeman Printery, Inc v Schinhan, 239 S E 2d 744, 34 N C App 637 app dism, 241 S E 2d 844, 294 N C 442

Tex—O'Neil v Mack Trucks, Inc, 542 S W 2d 112, mand recalled and reissued, Sup, 551 S W 2d 32

Applicable to persons sixty five or over

Ky—Lester v City of Fort Thomas, 531 S W 2d 490

42. Minn—O'Brien v Johnson, 148 N W 2d 357, 275 Minn 305

43 U S—In re Bell, D C Or, 181 F Supp 387

Ala—Mitchell v Mitchell, 64 So 2d 104, 258 Ala 572—Gilbreath v Levi, 119 So 2d 210, 270 Ala 413

Ariz—Seaney v Molling, 153 P 2d 532, 62 Ariz 81

Ill—Morris Inv Co v Skeldon, 78 N E 2d 504, 399 Ill 506

Miss—Horton v Horton, 48 So 2d 850, 210 Miss 116

Mo—Karsznia v Kelsey, 262 S W 2d 844

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44. U S—In re Blodgett, D C Wis, 115 F Supp 33

Ala—Drake v Drake, supra, n 15

La—Anderson v Finley, App 84 So 2d 845—Engstrom's of Alexandria, Inc v Vaughn, App, 138 So 2d 672—Lamar Life Ins Co v Babin, 163 So 2d 81, 246 La 19—Corcoran v Andrews, App, 195 So 2d 767

N Y—Sailors' Snug Harbor in City of New York v Tax Commission of City of New York, 259 N E 2d 910, 26 N Y 2d 444, 311 N Y S 2d 486

Wash—Edgley v Edgley, 644 P 2d 1208, 31 Wash App 795

§ 60. —— Effect of Excess in Value

47. U S—First Nat Bank of Dona Ana County v Boyd, D C Ariz, 378 F Supp 961

Cal—Barham v Barham, 202 P 2d 289, 33 Cal 2d 416

49. Ala—Boozer v Boozer, supra, n 17

Cal—Zimberoff v Bank of America Nat Trust & Sav Ass'n, 246 P 2d 961, 112 C A 2d 555—Vest v Superior Court In and For City and County of San Francisco, 294 P 2d 988, 140 C A 2d 91—Schoenfeld v Norberg 90 Cal Rptr 47 11 C A 3d 735

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Ill.—De Martini v Le Martini, 52 N E 2d 138, 385 Ill 128

S D—Crawford v Carter, 37 N W 2d 241, 72 S D 514

Utah—Gilroy v Lowe, 626 P 2d 469

§ 61. —— Effect of Increase or Depreciation in Value

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59. Cal—Ruddell v Warne, 157 P 2d 428, 68 Cal App 2d 600—Application of Rauer's Collection Co, 196 P 2d 803, 87 Cal App 2d 248

Mo.—Hunott v Critchlow, 285 S W 2d 594, 365 Mo 600

Or—Shepard & Morse Lumber Co v Clawson, 486 P 2d 542, 259 Or 154

60. Ala—Matthews v Matthews, 43 So 2d 111 253 Ala 116

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67. Tex—Hoffman v Love, Civ App, 494 S W 2d 591, err ref no rev err, Sup, 499 S W 2d 295

§ 62. —— Determination of Value

72. Neb—Sanne v Sanne, 94 N W 2d 367, 167 Neb 683

Mortgagors' equity, etc.

Wis.—Eloff v Riesch, 111 N W 2d 578, 14 Wis 2d 519

74. U S—Matter of Holyst, Bkrtcy Conn, 19 B R 14

Ohio—Economy Sav & Loan Co v Spencer, App, 144 N E 2d 267

76. Ill—Adams v Adams 76 N E 2d 495, 398 Ill 581

80. Ala—Barber v Beckett, 39 So 2d 17, 251 Ala 569

Cal.—In re Durham's Estate, 238 P 2d 1057, 108 C.A 2d 148

Iowa—C.J S cited in Millsap v Faulkes, 20 N W 2d 40, 42, 236 Iowa 848, 161 A L R 1252

Mich—Cross v Commons, 59 N W 2d 41 336 Mich 665

Mo—Hyde v Copeland, 173 S W 2d 684, 351 Mo 580

Neb—Sanne v Sanne, 94 N W 2d 367, 167 Neb 683

Or—Everett v Pape Bros, Inc, 525 P 2d 996, 269 Or 575

Fair market value less outstanding encumbrances

Okl—Dallas Ceramic Co v Morgan, 560 P 2d 197

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83. Tenn—In re Moore's Estate, 234 S W 2d 847, 34 Tenn App 131

§ 63. Form and Physical Characteristics

88. Ky—Lunsford v Witt, 309 S W 2d 348

Tex—Mobile Housing, Inc v Moss, Civ App, 483 S W 2d 56

91. Tex—Simank v Alford, Civ App, 441 S W 2d 234, err ref no rev err

94. Miss—Hendry v Hendry, 300 So 2d 147

Neb—C.J.S. cited in In re Thomas' Estate, 134 N W 2d 237, 242, 178 Neb 578

Part of apartment house

Fla—Lockhart v Sasser, 22 So 2d 763, 156 Fla 339

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95. Neb—C.J.S. cited in In re Thomas' Estate 134 N W 2d 237, 242, 178 Neb 578

97. U S—King v Sweatt, D C Ark, 115 F Supp 215

Minn—Wilson v First Nat Bank of Mankato, 60 N W 2d 69, 239 Minn 550

§ 64. —— Adjoining Lots or Tracts

4. U.S—U S. v Thurston County, Neb, D C Neb, 54 F Supp 201, affd, C C A, 149 F 2d 485, cert den 66 S Ct 58, 326 U S 744, 90 L Ed 444, reh den 66 S Ct 118, 326 U S 808, 90 L Ed 493

Fla—Wilson v Florida Nat Bank & Trust Co at Miami, 64 So 2d 309—Buckels v Tomer, 78 So 2d 861—Quigley v Kennedy & Ely Ins, Inc, App, 202 So 2d 610

Miss—Daily v City of Gulfport, 54 So 2d 485, 212 Miss 361

Aggregation not mandatory

U S—Nelson's Estate v C I R, C A, 232 F 2d 720

5. Tex—H Kohnstamm & Co of Tex v Burleson, Civ App, 237 S W 2d 319

7 Fla—Buckels v Tomer, supra, n 4

9. Neb—In re Thomas' Estate, 134 N W 2d 237, 178 Neb 578

10. Ala—Mordecai v Scott, 320 So 2d 642, 294 Ala 626

Fla—Wilson v Florida Nat Bank & Trust Co at Miami, supra, n 4—In re Ritter's Estate, App 3 Dist, 407 So 2d 386

Miss—Daily v City of Gulfport, supra, n 4

12. Tex—H Kohnstamm & Co of Tex v Burleson, supra, n 5

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14. Swimming pool and patio

Fla—White v Posick, App, 150 So 2d 263

22. Tex—Vistron Corp v Winstead, Civ App, 521 S W 2d 754

31. Neb—C.J.S cited in In re Thomas Estate, 134 N W 2d 237, 242, 178 Neb 578

32. Ark—Edgar v Edgar, 451 S W 2d 450, 248 Ark 215

§ 65. —— Separate and Detached Parcels of Land

34. U S—Rutherford v Hughes, D C Tex, 103 F Supp 161, revd on oth grds, C A, 201 F 2d 161

Miss—Horton v Horton, 48 So 2d 850, 210 Miss 116—Hendry v Hendry, 300 So 2d 147

Tex—Rancho Oil Co v Powell, 175 S W 2d 960 142 Tex 63—Galloway v Galloway, Civ App, 236 S W 2d 832

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35. Miss—Hendry v Hendry, 300 So 2d 147

38. La—Baham v Vernon, App 42 So 2d 141—Cloud v Cloud, App, 127 So 2d 560

41. Ala—Greer v Altoona Warehouse Co, 20 So 2d 513, 246 Ala 297

Ark—Edgar v Edgar, 451 S W 2d 450, 248 Ark 215

Miss—Horton v Horton, supra, n 34

Mo—Brune v Rathbun, 204 S W 2d 705

S D—Crawford v Carter, 37 N W 2d 241, 72 S D 514

Tex—Ford v Aetna Ins Co, 424 S W 2d 612

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42. Miss—Horton v Horton, supra, n 34

44. Mo—Brune v Rathbun, supra, n 41

§ 66. —— Division of Lot or Tract by Highway, Street, or Alley, Railway, Stream of Water, Fence, or Garden

46. Ark—C.J.S. quoted at length in Hambleton v Coopwood, 388 S W 2d 92, 94, 239 Ark 184

47. Miss—Daily v City of Gulfport, supra, n 4

Dirt road

Ark—Hambleton v Coopwood, 388 S W 2d 92, 239 Ark 184

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56. La—C.J S cited in Bryant v Long, La, 180 So 2d 22, 28

Neb—In re Thomas' Estate, 134 N W 2d 237, 178 Neb 578

§ 67. —— Part of Lot, Tract, or Building

58. Miss—Mosley v Clark, 362 So 2d 615

Tex—Blake v Fuller, Civ.App, 184 S W 2d 148

59. Ala—Rhodes v Schofield, 82 So 2d 236, 263 Ala 256,

Fla—Buckels v Tomer, supra, n 4

Kan—Kirkpatrick v Ault, 280 P 2d 637, 177 Kan 552

Income producing property

Minn—O'Brien v Johnson, 148 N W 2d 357, 275 Minn 305

60. Neb—In re Thomas' Estate, 134 N W 2d 237, 178 Neb 578

Tex—Blake v Fuller, supra, n 58

63. Ala.—Lacey v Davis, 361 So 2d 543

Ariz—In re Stanger's Estate, 257 P 2d 593, 75 Ariz 399

Fla—White v Posick, App, 150 So 2d 263

Neb—In re Thomas' Estate, 134 N W 2d 237, 178 Neb 578

Tex—Clark v Vitz, Civ App, 190 S W 2d 736, err ref

§ 68. —— Appurtenances

64. Ala—Lacey v Davis, 361 So 2d 543

Garage apartment, swimming pool and patio

Fla—White v Posick, App, 150 So 2d 263

65. Iowa—In re Sueppel's Estate, 124 N W 2d 154, 255 Iowa 974

76. Iowa—In re Sueppel's Estate, 124 N W 2d 154, 255 Iowa 974

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78. Ariz—In re Stanger's Estate, supra, n 63

§ 69. —— Improvements, Additions, and Materials Therefor

86. U S—In re Bobbitt, D C Tex, 3 B R 372

Ala—Greer v Altoona Warehouse Co, supra, n 41

Fla—Union Trust Co v Glunt, 85 So 2d 877

Mobile home

Tex—Minnehoma Financial Co v Ditto, Civ App, 566 S W 2d 354, err ref no rev err

89. Fla—Quigley v Kennedy & Ely Ins Inc, 207 So 2d 431, mand conf to 208 So 2d 853

§ 70. Rents, Profits, and Products of Homestead

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96. Wis—C.J.S. quoted at length in Schwanz v Teper, 223 N W 2d 896, 900, 66 Wis 2d 157

Oil royalties

Okl—Hancock v Farmers Mill & Elevator Co, 287 P 2d 214

97. Ark—Gibson v Gibson, 572 S W 2d 148, 264 Ark 420

Iowa—Olsen v Lohman, 13 N W 2d 332, 234 Iowa 580

Tex—Cline v Henry, Civ App, 239 S W 2d 205, err ref no rev err

4. Kan—C.J.S. cited in In re Estate of Johnson, 452 P 2d 286, 297, 202 Kan 684, 203 Kan 262

§ 71. Proceeds of Voluntary Sale or Mortgage

Library References

Homestead ⇐76 et seq.

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8. Value determined at time of sale

Or—State ex rel Nilsen v Jones, 577 P 2d 541, 33 Or App 581

Where judgment creditors seek to assert a lien against the premises and not against the proceeds, a statute governing proceeds of the sale of a homestead is not applicable.[85]

8.5. Ill—Cochran v Cutler, 350 N E 2d 59, 39 Ill. App 3d 602

9. Miss—C.J.S. cited in Davis v Lammons, 151 So 2d 907, 909, 246 Miss 624

Tex—Harrington v Schuble, Civ App, 608 S W 2d 253

Wis—Lueptow v Guptill, 202 N W 2d 255, 56 Wis 2d 396

In Florida, etc.

(2) Other cases

Fla—Olsen v Simpson, 39 So 2d 801—Orange Brevard Plumbing & Heating Co v La Croix, 137 So 2d 201

In Mississippi

(2) Agreement to sell homestead prior to bankruptcy does not deprive debtor of exemption

U S—Matter of Williamson, Bkrtcy Miss, 49 B R 675

(3) By statute, Mississippi now places a cap of $30,000 on exempted proceeds

U S—Matter of Williamson, Bkrtcy Miss, 49 B R 675

Order violating statutory protection

Tex—Delaney v Delaney, Civ App, 562 S W 2d 494, err dism

10. U S—In re Sjostrom, C A Ill, 338 F 2d 676

Ariz—McLaws v Kruger, 636 P 2d 95, 130 Ariz 317

Ark—Drennen v Wheatley, 195 S W 2d 43, 210 Ark 222—Ashabranner v Pearlstein, 451 S W 2d 176, 248 Ark 212—Obenshain v Obenshain, 480 S W 2d 567, 252 Ark 701

Tex—Nash v Conatser, Civ App, 410 S W 2d 512

12. Cal—Thorsby v Babcock, 222 P 2d 863 36 Cal 2d 202—California Bank v Schlesinger 324 P 2d 119, 159 C A 2d Supp 854—Chase v Bank of America, Nat Trust & Sav Ass'n, 38 Cal Rptr 567, 227 C A 2d 259

Minn—Johnson v Brajkovich, 40 N W 2d 273, 229 Minn 529

Tex—Jones v Maroney, Civ App, 619 S W 2d 296

Statute inapplicable

Or—Credit Service Co v Cameron, 597 P 2d 363, 41 Or App 57

Tex—Grant v Marshall, 280 S W 2d 559, 154 Tex 531

Purpose

U S—Matter of Widdershoven, D C Cal, 452 F Supp 503

Cal—Ortale v Mulhern, 130 Cal Rptr 277, 58 C A 3d 861

Defense not established

Tex—Braden v New Ulm State Bank, Civ App, 618 S W 2d 780

14. Creation of double exemption

Minn—O'Brien v Johnson, 148 N W 2d 357, 275 Minn 305

15. Tex—Rabon v Tolliver, Civ App, 188 S W 2d 594

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18. As meaning net proceeds

Iowa—Millsap v Faulkes, 20 N W 2d 40, 236 Iowa 848, 161 A L R 1252

Or—State ex rel Nilsen v Jones, 577 P 2d 541, 33 Or App 581

20. Ill—La Placa v La Placa, 126 N E.2d 239, 5 Ill 2d 468

Wis—Schwanz v Teper, 223 N W 2d 896, 66 Wis 2d 157

Filing bankruptcy petition within reinvestment time period

U S—In re Earnest, Bkrtcy Or, 42 B R 395

Fund must be kept separate

Fla—Orange Brevard Plumbing & Heating Co v La Croix, 137 So 2d 201

21. Kan—In re Carlson's Estate, 270 P 2d 200, 176 Kan 299—International Harvester Credit Corp v Ross, 538 P 2d 655, 217 Kan 683

Okl—Harrell v Bank of Wilson, 445 P 2d 266

25. U S—In re Vidana, Bkrtcy Fla., 19 B R 787

Iowa—Millsap v Faulkes, supra, n 18

Okl—Harrell v Bank of Wilson, 445 P 2d 266

Where home unsold despite good faith efforts

U S—In re Tardiff, Bkrtcy Me 38 B R 974.

26. Fla—Orange Brevard Plumbing & Heating Co v La Croix, 137 So 2d 201

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33. Proceeds held not exempt

Cal—Sherwood v Cornfield, 31 Cal Rptr 264, 216 C A 2d 364

§ 72. Exchange of Homestead

34. Mo—Lutz v Kehr, 333 S W 2d 61

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44 Fla—C.J.S. cited in Sun First Nat Bank of Orlando v Grieger, App, 402 So 2d 428, 431

§ 73. Proceeds of Involuntary Conversion

45. La—Cloud v Cloud, App, 127 So 2d 560

N M—Laughlin v Lumbert, 362 P 2d 507, 68 N M 351

Or—Credit Service Co v Cameron, 597 P 2d 363, 41 Or App 57

Tenn—Burris v McConnell, 206 S W 2d 894, 185 Tenn 489, 6 A L R 2d 509, reh den 208 S W 2d 331, 185 Tenn 489, 6 A L R 2d 509

46. Ark—Sims v McFadden, 233 S W 2d 375, 217 Ark 810

Wis—Lueptow v Guptill, 202 N W 2d 255, 56 Wis 2d 396

However, in other jurisdictions it has been held that the homestead exemption attaches to the entire proceeds of an involuntary sale of the homestead property.[46.5]

46.5 U S—In re Webb, Bkrtcy Va, 49 B R 646, op after remand 48 B R 454

Tex—Poston v Poston, Civ App, 572 S W 2d 800

§ 74. —— Proceeds of Insurance

50. Ark—Exchange Bank & Trust Co v Mathews, 591 S W 2d 354, 267 Ark 415

Minn—Nicollet County on Behalf of Block v Havron, App, 357 N W 2d 134, review den

N Y—Reed v Rivera, 365 N Y S 2d 470, 80 Misc 2d 991

N D—Albrecht v Albrecht, 99 N W 2d 229

Va—C.J.S. cited in Goldburg v Salyer, 50 S E 2d 272, 275, 188 Va 573

§ 75. —— Judicial and Execution Sales of Homestead

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59. La—Lamar Life Ins Co v Babin, 163 So 2d 81, 246 La 19

60. Cal—Chase v Bank of America, Nat Trust & Sav Ass'n, 38 Cal Rptr 567, 227 C A 2d 259

61. Ark—Sims v McFadden, 233 S W.2d 375, 217 Ark 810—Obenshain v Obenshain, 480 S W 2d 567, 252 Ark 701

65. Cal—Chase v Bank of America, Nat Trust & Sav Ass'n, 38 Cal Rptr 567, 227 C A 2d 259

N Y—First Federal Sav and Loan Ass'n of Rochester v Brown, 434 N Y S 2d 306, 78 A D 2d 119, app after remand 448 N Y S 2d 302, 86 A D.2d 963

§ 77. Property Purchased with Proceeds of Sale

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70. Ga—Roquemore v Goldstein, 112 S E 2d 24, 100 Ga App 591

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81. Wash—Aronson v Murk, 406 P 2d 607, 67 Wash 2d 1

85. Mo—Lutz v Kehr, 333 S W 2d 61

§ 78. Ownership, Estate, or Interest in Property

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95. U S—McCoy v Howard's Furniture Co, D C Ga, 222 F Supp 974, affd, C A, 323 F 2d 869—In re Avery, Bkrtcy Vt, 41 B R 224

Ala—Central Bank of Alabama, N A v Gillespie, 404 So 2d 35

N Y—Jagiello v Jagiello, 215 N Y S 2d 15, 29 Misc 2d 584

Tex—Sparks v Robertson, Civ App, 203 S W 2d 622, err ref—Maxey v Citizens Nat Bank of Lubbock, Civ App, 432 S W 2d 722

Co-operative apartment

Fla—In re Wartels' Estate, 357 So 2d 708

Condominium

U S—In re Blecker, Bkrtcy Fla, 9 B R 31

96. Husband and wife

(4) Other cases

Fla—In re Wartels' Estate, App, 338 So 2d 48, affd, Sup, 357 So 2d 708

Ill—Jones v Kilfether, 139 N E 2d 801, 12 Ill App 2d 390

In Louisiana, etc

La—Anderson v Finley, App, 84 So 2d 845—Engstrom's of Alexandria, Inc v Vaughn, App, 138 So 2d 672—Lamar Life Ins Co v Babin, 163 So 2d 81, 246 La 19—Corcoran v Andrews, App, 195 So 2d 767

97. U S—In re Foley, D C Neb, 97 F Supp 843—In re Wood, Bkrtcy S D, 8 B R 882

98. U S—In re Hellman, D C Colo, 474 F Supp 348

Wyo—Wambeke v Hopkin, 372 P 2d 470

1. U S—In re Parrish, Bkrtcy Colo, 19 B R 331

Cal—Wood v Emig, 137 P 2d 875, 58 Cal App 2d 851—Collison v Thomas, 11 Cal Rptr 555, 360 P 2d 51, 55 C 2d 490

Ill—Rice v United Mercantile Agencies of Louisville, Ky, 70 N E 2d 618, 395 Ill 512—Sterling Sav and Loan Ass'n v Schultz, 218 N E 2d 53, 71 Ill App 2d 94—First Nat Bank & Trust Co of Rockford v Sandifer, 258 N E 2d 35, 121 Ill App 2d 479

Kan—Matter of Fink's Estate, 609 P 2d 211, 4 Kan App 2d 523

Mich—Barnes v City of Detroit, 150 N W 2d 740, 379 Mich 169

Wash—Edgley v Edgley, 644 P 2d 1208, 31 Wash App 795

Wis—Lueptow v Guptill, 202 N W 2d 255, 56 Wis 2d 396

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4. Cal—California Bank v Schlesinger, 324 P 2d 119, 159 C A 2d Supp 854—Schoenfeld v Norberg, 90 Cal Rptr 47, 11 C A 3d 735

Wyo—Wambeke v Hopkin, 372 P 2d 470

5. Ill—Sterling Sav and Loan Ass'n v Schultz, 218 N E 2d 53, 71 Ill App 2d 94

6. U S—In re Quinlan, Bkrtcy Ala, 12 B R 824

§ 97. Liabilities Existing before Establishment of Homestead

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32. U S—Sampsell v Straub, C A Cal, 189 F 2d 379, vac on oth grds, C A, 194 F 2d 228, cert den 72 S Ct 761, 343 U S 927, 96 L Ed 1338—Holahan v Nugent, supra, n 6

Miss—Flowers v R A Vinton Lumber Co, 35 So 2d 300, 203 Miss 420

Neb—Martin v Norris Public Power Dist, 124 N W 2d 221, 175 Neb 815

33. U S—In re Ehmke, Bkrtcy Cal, 4 B R 331

34. Limitation respecting judgment liens

(1) Wash—Damascus Milk Co v Morriss, 463 P 2d 212, 1 Wash App 501

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35. Cal.—Bracey v Gray, 121 P 2d 770, 49 Cal App 2d 274

Fla—Kirkland v Kirkland, App, 253 So 2d 728

Iowa—In re Williams' Estate, 216 N W 2d 568

Tex—Puckett v Rolison, Civ App, 193 S W 2d 974, revd on oth grds 198 S W 2d 74, 145 Tex 366

37. Ark—Automotive Supply, Inc v Powell, 599 S W 2d 735, 269 Ark 255

Cal—Schuler-Knox Co v Smith, 144 P 2d 47, 62 Cal App 2d 86—Crenshaw v Smith, 168 P 2d 752, 74 Cal App 2d 255

Fla—Abernathy v Gruppo, App, 119 So 2d 398

Mo—Lutz v Kehr, 333 S W 2d 61

N D—Young v White, 267 N W 2d 799

39. Attachment defeated

Cal—Johnson v Brauner, 281 P 2d 50, 131 C A 2d 713

40. Ark—Mack v Marvin, 202 S W 2d 590, 211 Ark 715

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52. Fla—Aetna Ins Co v LaGasse, 223 So 2d 727

Alimony

Miss—Felder v Felder's Estate, 13 So 2d 823, 195 Miss 326

55. La—Watson v Bethany, 26 So 2d 12, 209 La 989

56. Cal—Priddel v Shankle, 159 P 2d 438, 69 Cal App 2d 319

Colo—Johnson v Mountain Sav & Loan Ass'n, 426 P 2d 962, 162 Colo 474

La—Community Associates, Inc v St Clair, App, 365 So 2d 931

58. U S—In re Haas, D C Colo, 165 F Supp 488

Cal—Becker v Lindsay, 127 Cal Rptr 348, 545 P 2d 260, 16 C 3d 188

59. Wash—Locke v Collins, 256 P 2d 832 42 Wash 2d 532—Leen v Hoffman, 306 P 2d 240, 49 Wash 2d 642

Lien of judgment in action based on prior judgment

Cal—Provisor v Nelson, Super, 44 Cal Rptr 894, 234 C A 2d Supp 876

61. Utah—Sanders v Cassity, 586 P 2d 423

64. La—Watson v Bethany, supra, n 55

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67. Cal—Priddel v Shankle, supra, n 56

Fla—Simpson v Simpson, App, 123 So 2d 289

N Y—Wyoming County Bank & Trust Co v Kiley, 430 N Y S 2d 900, 75 A D 2d 477

Okl—Van Meter v Field, 159 P 2d 546, 195 Okl 555

78. Ga—Rose v Crane Heating Co, 31 S E 2d 717, 198 Ga 295

Renewal or extension

(2) Other matters

Child support judgment

Iowa—In re Marriage of McMorrow 342 N W 2d 73

Tex.—Lewis v Investors Sav Ass'n, Civ App, 411 S W 2d 794

§ 100. Debts or Obligations for Purchase Money

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93. Ark—Mack v Marvin, supra, n 40

94. Okl—Boroughs v Whitley, 363 P 2d 150

97. Tex—Minnehoma Financial Co v Ditto, Civ App, 566 S W 2d 354, err ref no rev err

98. Minn—Wright v Wright 311 N W 2d 484

Defrauded creditor

Cal—Stoner v Walsh, 101 Cal Rptr 485, 24 C A 3d 938

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99. Kan—Hill v Hill, 345 P 2d 1015, 185 Kan 389—In re Dahn's Estate, 464 P 2d 238, 204 Kan 535

Tex—Dillard v Dillard, Civ App, 341 S W 2d 668, err ref no rev err

1. La—W K Inv Co v Tyler, App, 303 So 2d 777, writ den, Sup 305 So 2d 543

4. Okl—Douglass v Douglass, 188 P 2d 221, 199 Okl 519

§ 101. —— Obligations Secured by Vendor's Lien or Mortgage

5 U S—Smathers v Fulton Federal Sav and Loan Ass'n, C A Ga 653 F 2d 977, reh den 664 F 2d 291

Ala—Waters v Union Bank of Repton, 370 So 2d 957

Ark—Langley v Reames, 197 S W 2d 291, 210 Ark 624

Kan—In re Dahn's Estate, 464 P 2d 238, 204 Kan 535

Mich—Walker v Woods, 13 N W 2d 193, 308 Mich 24

Tex—Walters v Thompson, Civ App, 189 S W 2d 766, err ref w m—Travelers Ins Co v Nauert Civ App, 200 S W 2d 661—Frye v Frye, Civ App, 239 S W 2d 406, err ref—Stertz v Stertz, Civ App, 262 S W 2d 262, err dism—McGoodwin v McGoodwin, 671 S W 2d 880

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6. Ala—Martin v First Nat Bank of Opelika, 184 So 2d 815 279 Ala 303

Ill—Harlem Sav Ass'n v Lesniak, 257 N E 2d 230, 121 Ill App 2d 137

Ohio—Gledhill v Walker, 55 N E 2d 647, 143 Ohio St 381

§ 102. —— Unsecured Obligations

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15. Ark—Mack v Marvin, 202 S W 2d 590, 211 Ark 715

§ 103. —— Change in Form of Debt or Taking of Security

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32. S C—C.J S quoted at length in Brookline Sav & Trust Co v Barnett, 134 S E 2d 569, 571, 243 S C 481

§ 104. —— Transfer of Obligation

40. S C—C.J.S. cited in Brookline Sav & Trust Co v Barnett, 134 S E 2d 569, 571, 243 S C 481

§ 105. Liabilities for Improvement and Protection of Property

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41. U S—U S v Lucas, D C Minn, 66 F Supp 7

Ark—Mack v Marvin, supra, n 15

Cal—First Nat Trust & Sav Bank of San Diego v Cerveny, 208 P 2d 1018, 93 Cal App 2d 255—Duhart v O'Rourke, 221 P 2d 767, 99 Cal App 2d 277

Fla—Perry v Beckerman, 97 So 2d 860

Kan—De Priest v Ransom 193 P 2d 191, 165 Kan 147

Ky—Hazard Lumber & Supply Co v Horn, 15 S W 2 492, 228 Ky 554

Minn—Wallace T Bruce, Inc v Najarian, 81 N W 2 282, 249 Minn 99—Mortgage Associates, Inc v Duax, 162 N W 2d 363, 282 Minn 47

S C—Brookline Sav & Trust Co v Barnett, 134 S E 2 569, 243 S C 481

Tex—Hilliard v Home Builders Supply Co, Civ App 399 S W 2d 198—First Nat Bank, Perryton, Tex v McClung, Civ App, 483 S W 2d 935, err ref n rev err

Registration of notice of claim held unnecessary

La—Corcoran v Andrews, App, 195 So 2d 767

43. Utah—Stucki v Ellis, 201 P 2d 486, 114 Utah 486

Wash—City of Algona v Sharp, 638 P 2d 627, 30 Wash App 837

48. U S—Builders and Remodelers, Inc v Hanson Bkrtcy Minn, 20 B R 440

Minn—Wallace T Bruce Inc, v Najarian, 81 N W 2d 282, 249 Minn 99

Tex—Magee v I & G N Wood & Coal Co Civ App, 269 S W 2d 498, err ref no rev err—Jim Walter Corp v Bass, Civ App, 356 S W 2d 156

49. U S—U S v Lucas, supra, n 41

Contract construed

Tex—Rice v Brown, Com App, 296 S W 495—Uvalde Paving Co v Townsend, Civ App, 92 S W 2d 1128

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62. Fla—C J S. cited in Perry v Beckerman, 97 So 2d 860, 863

§ 106. —— Wages and Materials

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70 U S—In re Epperley, Bkrtcy Va, 4 B R 124

Iowa—In re Keane, Bkrtcy Iowa, 7 B R 844

La—Harvey v Thomas, 119 So 2d 446, 239 La 510—Lumber Products, Inc v Crochet, 156 So 2d 438, 244 La 1060

Minn—Curran v Nash, 29 N W 2d 436, 224 Minn 571, 174 A L R 411—Wallace T Bruce, Inc v Najarian, 81 N W 2d 282, 249 Minn 99

Tex—Hennemuth v Weatherford, Civ App, 278 S W 2d 271, err ref no rev err

73. Tex—Banks v Gumm, Civ App, 360 S W 2d 836, err ref no rev err—Murchison v Caruth Bldg Service, Civ App, 369 S W 2d 380, err ref no rev err

§ 107. —— Loans and Advances Used in Removing Encumbrances

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U S—Matter of Davis, Bkrtcy Ohio, 12 B R 15

Mich—Walker v Woods, supra, n 5

88. Tex—Lewis v Investors Sav Ass'n, Civ App 411 S W 2d 794

§ 108. Debts Due to Government

93. U S—Matter of Am Business Machines, Inc Bkrtcy Nev, 6 B R 166

Ark—C.J.S cited in White v Thornbrough, 313 S W 2d 384 387, 229 Ark 96

Ill—City of Chicago v Mardat, 182 N E 2d 716, 25 Ill 2d 60

Iowa—In re Ragan's Estate, 23 N W 2d 521, 237 Iowa 619

S D—In re Schneider's Estate, 31 N.W.2d 261, 72 S.D 174

Tex—Hatch v Kubena, Civ App., 190 S W 2d 175, revd on oth. grds 193 S W 2d 175, 144 Tex 627.

Wis—State Dept of Public Welfare v Le Mere, 120 N W 2d 695, 19 Wis 2d 412

Judgment debt based on erroneously refunded federal income tax held not to impose lien on homestead as debt due for taxes

U S—Marshall v U S, D C Tex, 158 F Supp 793

95. Ark—Kell v. Bella Vista Village Property Owners Ass'n, 528 S W 2d 651, 258 Ark 757

Cal—Morrison v Barham, 7 Cal Rptr 442, 184 C A 2d 267

96. Sentence exceeding two years

Neb—Canada v State, 26 N W 2d 509, 148 Neb 115

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Other debts. Whether or not homestead exemption applies to other debts due government has been considered by the courts.[2.5]

2.5. "Taxes" construed as limited to those against homestead itself

Ark—White v Thornbrough, 313 S W 2d 384, 229 Ark 96

(2) Other statements

U S—Herndon v U S, C A Ark, 501 F 2d 1219

La—Harvey v Thomas, 119 So 2d 446, 239 La 510

Homestead held exempt from judgment for unemployment contributions

Ark—White v Thornbrough, 313 S W 2d 384

§ 109. Judgments

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3. Ala—Barber v Beckett, 39 So 2d 17, 251 Ala 569

Minn—Triangle Refineries, Inc v Bura, App, 364 N W 2d 863

Wis—Northern State Bank & Toal, 230 N W 2d 153, 69 Wis 2d 50

4. Ark—Sulcer v Northwestern Nat Ins Co (of Milwaukee, Wis), 566 S W 2d 397, 263 Ark 583

N D—Young v White, 267 N W 2d 799

In North Carolina

(4) Other Matters.—Wadford v Davis, 135 S E 353, 192 N C 484—Sample v Jackson, 35 S E 2d 236, 225 N C 380

In Texas

(1) Englander Co v Kennedy, Civ App, 424 S W 2d 305, err ref no rev err 428 S W 2d 806

(2) Lewis v Brown, Civ App, 321 S W 2d 313, err ref no rev err

(6) Other statements

Tex—Spence v Spence, Civ App, 455 S W 2d 365—Wierzchula v Wierzchula, Civ App, 623 S W 2d 730

Rights in nature of vendor's lien

Wash—Adams v Rowe, 236 P 2d 355, 39 Wash 2d 446

Judicial mortgage may attach to homestead

La—Socony Mobil Oil Co, Inc v Burdette, App, 295 So 2d 854, affd 309 So 2d 655

5. U S—In re Shelton, D C Wash., 102 F Supp 629, stating Washington law—U S v Olgeirson, D C N D, 284 F Supp 655—In re Keane, Bkrtcy Iowa, 7 B R 844—In re Brents-Pickell, Bkrtcy Cal, 12 B R 352—In re Golden, Bkrtcy Fla, 16 B R 580

Ala—Bank of Huntsville v Oellerich, Civ App, 406 So 2d 983

Cal—Engelman v Gordon, 146 Cal Rptr 835, 82 C.A 3d 174

Fla—Daniels v Katz, App, 237 So 2d 58

Ill—Skach v Heakin, 328 N.E 2d 59, 28 Ill App 3d 346

Minn—Denzer v Prendergast, 126 N W.2d 440

Neb—Ehlers v Campbell, 66 N W 2d 585, 159 Neb 328—Schroeder v Ely, 73 N W 2d 172, 161 Neb 262

N D—Small v Cunningham, 120 N W 2d 13

Ohio—State, Dept of Taxation v Jones, 399 N E 2d 1215, 61 Ohio St 2d 99, 15 O O 3d 132

Okl—Kelough v Neff, 382 P 2d 135

Or—Fleischhauer v Bilstad, 379 P 2d 880, 233 Or 578, overruling Bush v Shepherd, 205 P 2d 842, 186 Or 105

S D—Ausenbrey v Hensley, 17 N W 2d 267, 70 S D 294

Tex—Hoffman v Love, Civ App, 494 S W 2d 591, err ref no rev err, Sup, 499 S W 2d 295

Utah—Stucki v Ellis, 201 P 2d 486, 114 Utah 486

Wis—Ohio Cas Ins Co v Holz & Holz, Inc, 129 N W 2d 330, 24 Wis 2d 587

Statutory exceptions

Wash—Lien v Hoffman, 306 P 2d 240, 49 Wash 2d 642

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6. Minn—Application of Hickman, 23 N W 2d 593, 222 Minn 161

8. Ala—Barber v Beckett, supra, n 3

Cal—Engelman v Gordon, 146 Cal Rptr 835, 82 C A 2d 174

Neb—Schroeder v Ely, 73 N W 2d 172, 161 Neb 262—Sanne v Sanne, 94 N W 2d 367, 167 Neb 683

12. Utah—Gray v Stevens, 302 P 2d 273, 5 Utah2d 361

§ 110. —— Judgments for Alimony

14. U S—In re Scott, Bkrtcy Okl, 12 B R 613

Ala—Horan v Horan, 65 So 2d 486, 259 Ala 117

15. Ark—Williams v Williams, 432 S W 2d 830, 245 Ark 475

Fla—Bendl v Bendl, App, 246 So.2d 574

Okl—Putz v Putz, 572 P 2d 970

Wash—Stafford v Stafford, 140 P 2d 545, 18 Wash 2d 775

16. Miss—Felder v Felder's Estate, 13 So 2d 823, 195 Miss 326

17. Ala—Coon v Coon, 85 So 2d 430, 264 Ala 127

Iowa—C.J.S. cited in Davis v Davis, 67 N W 2d 566, 575, 246 Iowa 262

18. N D—Albrecht v Albrecht 99 N W 2d 229

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25. Iowa—C.J.S. cited in Davis v Davis, 67 N W 2d 566, 576, 246 Iowa 262

Miss—Felder v Felder's Estate, supra, n 16

§ 111. —— Judgments for Torts

28. Fla—Olesky v Nicholas, 82 So 2d 510

Minn—Johnson v Brajkovich, 40 N W 2d 273, 229 Minn 529

Miss—Davis v Lammons, 151 So 2d 907, 246 Miss 624

30. Cal—Schoenfeld v Norberg, 72 Cal Rptr 924, 267 C A 2d 496, cert den 90 Cal Rptr 47, 11 C A 3d 735

§ 112. Miscellaneous Claims Enforceable against Homestead

36. Wash—Webster v Rodnick, 394 P 2d 689, 64 Wash.2d 814

37. Tex—Baucum v Texam Oil Corp, Civ App, 423 S W 2d 434, err ref no rev err

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39. Wash—Webster v Rodnick, 394 P 2d 689, 64 Wash 2d 814

41. Iowa—In re Munsell's Guardianship, 31 N W 2d 360, 239 Iowa 307

45. Ala—First Nat Bank of Mobile v. Pope, 117 So 2d 174, 270 Ala 202

Ark—Mack v Marvin, 202 S W 2d 590, 211 Ark 715

48. La—J B Beard Co v Aubrey, 35 So 2d 129, 213 La 509

50. Iowa—McGaffee v McGaffee, 58 N.W 2d 357, 244 Iowa 879

54. N Y—In re Rapalje's Estate, 341 N Y S 2d 183, 73 Misc 2d 16

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61. Fla—Anderson v Anderson, 44 So 2d 652

Tex—Eggemeyer v Eggemeyer, App, 623 S W 2d 462, err dism

Adult incapacitated child

Iowa—Davis v Davis, 67 N W 2d 566, 246 Iowa 262

Under some authority a homestead cannot be ordered sold to satisfy the parent's child support arrearages.[61.5]

61.5 Minn—Nicollet County on Behalf of Block v Havron, App, 357 N W 2d 134, review den

§ 113. —— Costs and Attorney's Fees

64. Okl—Sooner Federal Sav and Loan Ass'n v Mobley, 645 P 2d 1000

No exemption

Or—Dressler v Dressler, 493 P 2d 1053, 261 Or 265

65. No exemption

Ariz—Bickel v Bickel, 495 P 2d 154, 17 Ariz App 29

67. Ga.—Pate v Morrow, 87 S E 2d 357, 91 Ga App 864

Minn—Northwestern Nat Bank of South St Paul v Kroll, 306 N W 2d 104

69. Tex—Black v Commercial Securities Co, Civ App, 91 S W 2d 470, err ref

§ 114. —— Debts Due for Necessaries

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71. Debts held not for necessaries

Tex—Dallas Building & Loan Ass'n v Henry, Civ App, 98 S W 2d 1030, err dism

§ 116. Time of Contracting Liability; Computation

76. Colo—Johnson v Mountain Sav & Loan Ass'n, 426 P 2d 962, 162 Colo 474

77. Fla—Lamb v Ralston Purina Co, 21 So 2d 127, 155 Fla 638

§ 117. Proceedings for Enforcement of Claims

Library References

Homestead ⇐107 et seq.

78. Cal—Engelman v Gordon, 146 Cal Rptr 835, 82 C A 3d 174

Minn—Curran v Nash, 29 N W 2d 436, 224 Minn 571, 174 A L R 411

Not restricted as to form

Minn—Wallace T Bruce, Inc v Najaman, 81 N W 2d 282, 249 Minn 99

A temporary injunction issued in connection with a claim for unliquidated damages after the status quo of property as a homestead has been established does not give rise to an enforceable lien against the homestead.[80.5]

80.5. Tex—Wiggins v Hilleman, Civ App, 327 S W 2d 774, err ref no rev err

81. Jurisdiction upheld under circumstances
Wash—Adams v Rowe, supra, n 4

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89. Wis—Hunt v McDonald, 102 N W 318, 124 Wis 82

90. Okl—Douglass v Douglass, 188 P 2d 221, 199 Okl 519

92. Ga—Maxwell v Cofer, 39 S E 2d 314, 201 Ga 222

Minn—Wallace T Bruce, Inc v Najarian, 81 N W 2d 282, 249 Minn 99

Utah—Bell v Jones, 139 P 2d 884, 104 Utah 306

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2. Cal—Schuler-Knox Co v Smith, 144 P 2d 47, 62 Cal App 2d 86

Fla—Clutter Const Corp v Clutter, App, 173 So 2d 761

Kan—De Priest v Ransom, 193 P 2d 191, 165 Kan 147

A claimant has the burden of proving all facts which render the defense of homestead unavailable [4.1]

4.1. Iowa—Olsen v Lohman, 13 N W 2d 332, 234 Iowa 580

The admissibility of other evidence has been considered [5.5]

5.5. Contract for repairs held admissible
Miss—Taylor v Murphy, 203 So 2d 82

6. Evidence held sufficient
(4) U S—U S v Olgeirson, D C N D, 284 F Supp 655

Cal—Duhart v O'Rourke, 221 P 2d 767 99 Cal App 2d 277

Neb—Schroeder v Ely, 73 N W 2d 172 161 Neb 262

Okl—Douglass v Clutts, 250 P 2d 31 207 Okl 434

Tex—Haynes v Vermillion, Civ App, 242 S W 2d 444, err ref no rev err

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11. Utah—Bell v Jones, 139 P 2d 884, 104 Utah 306

Although a statutory minimum bid requirement on execution sale of homestead must be complied with, [17.5] mere failure to obtain a proper bid on an otherwise fully authorized execution sale does not render the sale void but merely voidable at instance of aggrieved party [17.10]

17.5. Protection of debtor
Cal—Van Bogaert v Avery, 76 Cal Rptr 608, 271 C A 2d 492

17.10. Presumptive title in purchaser
Cal—Van Bogaert v Avery, 76 Cal Rptr 608, 271 C A 2d 492

Homestead claimant as aggrieved party
Cal—Van Bogaert v Avery, 76 Cal Rptr 608, 271 C A 2d 492

Judgment creditor cannot collaterally attack sale
Cal—Van Bogaert v Avery, 76 Cal Rptr 608, 271 C A 2d 492

Waiver or estoppel
Cal—Van Bogaert v Avery, 76 Cal Rptr 608, 271 C A 2d 492

§ 118. —— Waiver, Forfeiture, and Estoppel

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28. Cal—Gray v Bybee, 141 P 2d 32, 60 Cal App 2d 564—Crenshaw v Smith, 168 P 2d 752, 74 Cal App 2d 255

Waiver generally
Kan—De Priest v Ransom, supra, n 2

§ 120. —— Exhausting Other Property before Resorting to Homestead

41. Fla—Aetna Ins Co v LaGasse, 223 So 2d 727

In Alabama
(4) Other matters—Coon v Coon, 85 So 2d 430, 264 Ala 127

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42. Ark—Strickland v West 238 S W 2d 489 218 Ark 649

Iowa—Weir & Russell Lumber Co v Kempf, 12 N W 2d 857, 234 Iowa 450

Kan—De Priest v Ransom, supra, n 2

N D—Douglas County State Bank v Steele, 210 N W 657, 54 N D 686

Mortgages
(3) Transferee of mortgaged homestead—Robert Moody & Son v Century Sav Bank, Iowa, 36 S Ct 111 239 U S 374, 60 L Ed 336

Tex—Pickett v Dallas Trust & Sav Bank, Tex Com App 24 S W 2d 354

(4) Other cases
Ark—Sims v McFadden 233 S W 2d 375, 217 Ark 810

Iowa—American Sav Bank of Marengo v Willenbrock 228 N W 295 209 Iowa 250

43. S D—Alsenbrey v Hensley, 17 N W 2d 267, 70 S D 294

44 Ark—Sims v McFadden, supra n 42

§ 121. —— Application of Proceeds

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64. La—Consolidated Credit Corp of Baton Rouge v Forkner, App, 219 So 2d 213

Proration proper
Tex—Hoffman v Love Civ App, 494 S W 2d 591, err ref no rev err, Sup, 499 S W 2d 295

65. Colo—Patterson v Serafini, 532 P 2d 965, 187 Colo 209

N H—Savings Bank of Walpole v French, 200 A 2d 858, 105 N H 407

Tex—Gross Nat Bank of San Antonio v Merchant, Civ, 459 S W 2d 483

Amount in excess of homestead right held subject to attachments
N H—Manchester Federal Sav and Loan Ass'n v Emery Waterhouse Co, 153 A 2d 918 102 N H 233

Cost of sale of property not to be imposed on exempt homestead interest
Tex—Hoffman v Love, Civ App, 494 S W 2d 591, err ref no rev err, Sup, 499 S W 2d 295

66. Cal—Chase v Bank of America, Nat Trust & Sav Ass'n, 38 Cal Rptr 567, 227 C A 2d 259

67. Mo—Johnson v Fotie, 308 S W 2d 662

69. Tex—Walters v Thompson, Civ App 189 S W 2d 766, err ref w m

§ 122. Perfecting and Keeping Alive Liens

78. Cal—Ruddell v Warne 167 P 2d 811, 73 Cal App 2d 907

Minn—Curran v Nash, 29 N W 2d 436, 224 Minn 571 174 A L R 411

Wash—Locke v Collins, 256 P 2d 832, 42 Wash 2d 532

Waiver by obtaining personal money judgment
Cal—James v P C S Ginning Co, 80 Cal Rptr 457, 276 C A 2d 19

Equitable lien
Fla—Ryskind v Robinson, App, 302 So 2d 427

A lien that attaches to property remains dormant or in abeyance while the premises are occupied as a homestead, and becomes active or potential as soon as the homestead right is lost, abandoned or terminated [78.5]

78.5. N Y—First Federal Sav and Loan Ass'n of Rochester v Brown, 434 N Y S 2d 306, 78 A D 2d 119, app after remand 448 N Y S 2d 302, 86 A 2d 963

§ 123. In General

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(2) Held invalid
Fla—Denham v Sexton, supra, n 79—Reed v Fain, App 122 So 2d 322 affd, Sup, 145 So 2d 858

(3) Additional statements
U S—Gregory v Lloyd, D C Fla, 284 F Supp 264

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Tex—King v Whatley, Civ App, 236 S W 2d 186, err ref no rev err

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81. Mass—Atlantic Sav Bank v Metropolitan Bank and Trust Co, 400 N E 2d 1290, 9 Mass App 286

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89. Tex —Williamson v Lewis, Civ App , 346 S W 2d 957, err ref
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96. Tex —Williams v Saxon, Civ App , 521 S W 2d 88

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97. U S —In re Keane, Bkrtcy Iowa, 7 B R 844
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3. Mo —Osborn v Osborn, 274 S W 2d 32, 241 Mo App 1175

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(2) Other statements
Fla —Moore v Moore, App , 237 So 2d 217

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7. Ark.—Penney v Vessells, 253 S W 2d 968, 221 Ark 389
10. N C —Castleberry v Maynard, 95 N C 281

In Missouri

It has been held that the homestead right is a mere exemption or privilege and not a vested right, so that a homestead right acquired prior to the enactment of a prohibitory alienation or encumbrance statute is governed by such statute —Bushnell v Loomis, 137 S W 257, 234 Mo 371, 36 L R A ,N S , 1029

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15. Neb —Van Steenberg v Nelson, 22 N W 2d 414, 147 Neb 88

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16. Colo —C J.S black letter summary quoted in Wise v Thomas, 188 P 2d 444, 446, 117 Colo 376
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Tex —Ryan v Long, Civ App , 183 S W 2d 473

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Tex —Morris v Porter, Civ App , 393 S W 2d 385, err ref no rev err

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(3) Other matters
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24 Wis —Siegel v Clemons, 63 N W 2d 725, 266 Wis 369—Wangen v Leum 174 N W 2d 266, 46 Wis 2d 60

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25. Ark —Campbell v Geheb, 523 S W 2d 185, 258 Ark 225
26. Colo —C J S quoted in Wise v Thomas supra, n 21
27 La —Ryan v Barthelmy, App , 32 So 2d 467
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32. Okl —Keel v Jones, 413 P 2d 549—Grenard v McMahan, 441 P 2d 950

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36. Miss —Sims v Douglas, 381 So 2d 617
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Miss —Hughes v Hahn, supra, n 23
43. Cal —California Bank v Schlesinger, 324 P 2d 119 159 C A 2d Supp 854

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48. Ark—Childs v Lambert, 323 S W 2d 564, 230 Ark 366

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59. N D—Hoffer v Crawford, 65 N W 2d 625

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92. Ark—Rowe v Gose, 401 S W 2d 745, 240 Ark 722
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(1) Tex—Lewis v Brown, Civ App 321 S W 2d 313, err ref no rev err

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93. Wis—State Bank of Drummond v Christophersen, 286 N W 2d 547, 93 Wis 2d 148

1. Miss—Hill v Capps, 160 So 2d 186, 248 Miss 601

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10. Ark—George v George, App, 591 S W 2d 655 267 Ark 823

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29. Ala—Freed v Sallade, 17 So 2d 868, 245 Ala 505

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31. Miss—Philan v Turner, supra, n 30
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(2) Other matters

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34. Wis—Duda v Beben, 31 N W 2d 603, 252 Wis 295

37. Misconduct of husband

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41. Ala—Freed v Sallade, supra, n 29—Wise v Helms, 40 So 2d 700, 252 Ala 227—Ruffin v Crowell, 46 So 2d 218, 253 Ala 653
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N D—Neuberger v Daily, 210 N W 2d 269

46. La—Thomas v Thomas, App 63 So 2d 468
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47. Fla—Estep v Herring, 18 So 2d 683, 154 Fla 653

48. Fla—Moore v Hunter 13 So 2d 909, 153 Fla 158

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49. Husband need not pay rent

Miss—May v May 90 So 2d 169, 229 Miss 97

50. Ala—Bryant v Jones, 71 So 2d 831, 260 Ala 659

51. Okl—Howard v Stanolind Oil & Gas Co, 169 P 2d 737, 197 Okl 269

In Florida

(6) Under a statute so providing, one spouse may now convey real estate, involving a homestead, to the other spouse without joinder of the other spouse

Fla—Williams v Foerster, Fla, 335 So 2d 810

(7) There is distinction between interspousal alienability of solely owned homestead property and interspousal alienability of estate by entirety occupied as home of parties

Fla—Williams v Foerster, 335 So 2d 810

(8) Conveyance to stranger however still requires joinder of both spouses

Fla—Walker v Walker, App 336 So 2d 1259

(9) Other matters

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53. Kan—Bradley v Hall, 194 P 2d 943, 165 Kan 358

54. Ark—Penney v Vessells, 253 S W 2d 968, 221 Ark 389

55. In Texas

(4) Other cases—Carter v Green, Civ App, 64 S W 2d 1069, err ref—Duarte v Gutierrez, Civ App, 175 S W 2d 480—Higginbotham v Fort Worth Nat Bank Civ App, 172 S W 2d 402, err ref—Reed v Behcler, Tex Civ App 198 S W 2d 625—Schmidt v Schmidt, Civ App 403 S W 2d 531—City of Fort Worth v Brandt, Civ App 444 S W 2d 210

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57 Mortgage

(2) Manner of execution—Hayes-Lucas Lumber Co v Grieseke, 215 N W 857, 172 Minn 504

58. Insanity conceded

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59 Ark—Penney v Vessells, supra n 54

63 Kan—Clark v Axley, 176 P 2d 256 162 Kan 339
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64. Presence of fraud

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74 Alaska—Spracher v Spracher, 17 Alaska 698
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76. Wis—Tupitza v Tupitza, 29 N W 2d 54, 251 Wis 257

79 Ala—Cates v White, 41 So 2d 401, 252 Ala 422
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91. Tex—Faine v Wilson, supra, n 63—Uptmor v Janes, Civ App, 210 S W 2d 235, err ref no rev err—Ball v Yowell, Civ App 222 S W 2d 277, err ref no rev err

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95. Tex—Ball v Yowell, supra, n 91

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Tex—Lewis v Investors Sav Ass'n, Civ App, 411 S W 2d 794

97. Tex—Watson v Wiseheart, Civ App, 258 S W 2d 350 err ref no rev err

99 Tex—Lewis v Investors Sav Ass'n, Civ App, 411 S W 2d 794

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5. Fla—Porter v Childers App 162 So 2d 301

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8. By instrument "duly executed"

(4) Additional statements

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Mass—Atlantic Sav Bank v Metropolitan Bank and Trust Co, 400 N E 2d 1290, 9 Mass App 286

Joinder held sufficient, etc.—Mayfield v Sehon, 172 S W 2d 914, 205 Ark 1142

The consent required, etc.

Tex—Home Imp Loan Co v Johnson, Civ App, 294 S W 2d 418 err ref no rev err

Statutory requirement not met

Wis—Glinski v Sheldon, 276 N W 2d 815, 88 Wis 2d 509, 5 A L R 4th 1298

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28. Fla—Heath v First Nat Bank in Milton, App, 213 So 2d 883

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43 Miss—Hughes v Hahn, 46 So 2d 587, 209 Mass 293

45. Iowa—Wagner v Wagner, 45 N W 2d 508, 242 Iowa 480

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48 Forgery

(2) Other instances

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57 Okl—Whitaker v Whitaker, 167 P 2d 895, 196 Okl 689

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58 Mortgage held valid in absence of notice

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84. Tex—Crosswhite v Moore, Civ App, 248 S W 2d 520, err ref

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86. Tex—Jones v Mawman, Civ App, 197 S W 2d 875 affd 200 S W 2d 819, 145 Tex 596

95. Tex—Albers v Saenger, Civ App, 222 S W 2d 409 err ref no rev err

Transaction held bona fide sale, etc.

(2) Other cases

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96 Tex—Jones v Mawman, supra, n 86—Rosnbaum v Billingsley, Civ App, 272 S W 2d 591—Cade v Dudney, Civ App, 379 S W 2d 370, err ref no rev err

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97. Permissible to prove deed intended as a mortgage

Tex—Kemper v Freeman, supra, n 95

98. Tex—Rosnbaum v Billingsley, supra, n 96

99. Tex—Rosnbaum v Billingsley, supra, n 96

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8. Fla—Moorefield v Byrne, App, 140 So 2d 876

12. Fla.—Florida Nat Bank of Jacksonville v Winn, 30 So.2d 298, 158 Fla 750—Marsh v Hartley, App, 109 So 2d 34—Reed v Fain, 145 So.2d 858

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18. Cal —Carpenter v Hamilton, App, 138 P 2d 356, subs op 147 P 2d 563, 24 Cal 2d 95, 153 A L R 733

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Tex —McGahey v Ford, Civ App, 563 S W 2d 857, err ref no rev err

20. Insane grantee

Tex —Gaither v Gaither, Com App, 25 S W 2d 299

23. U S —Gregory v Lloyd, D C Fla, 284 F Supp 264

Fla —Gotshall v Taylor, App, 196 So 2d 479

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(4) Other matters

Fla —Betts v Hawkins, App, 202 So 2d 135

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Tex —Lewis v Investors Sav Ass'n, Civ App, 411 S W 2d 794

24. Tex —Smith v Smith, Civ App, 205 S W 2d 676, revd on oth grds 209 S W 2d 164, 146 Tex 420

25. 18 C J p 173 note 10[b]

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Fla —Wickes Corp v Moxley, App, 342 So 2d 839, affd, Sup, 356 So 2d 785—Moxley v Wickes Corp, 356 So 2d 785

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26. Necessity of attestation

(1) Fla —Hamilton v Corcoran, App, 177 So 2d 64—Commercial Acceptance Corp v Barnes, App, 179 So 2d 251

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(2) Other matters

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34. Colo —Johnson v Mountain Sav & Loan Ass'n, 426 P 2d 962, 162 Colo 474

La —Provost v Harrison, 16 So 2d 892, 205 La 21

Nonexistent homestead right need not be released

Wyo —McConnell v Dixon, 233 P 2d 877, 68 Wyo 301

§ 137. Acknowledgment

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42. Colo —Helkey v Ashley, 155 P 2d 143, 113 Colo 175

Fla —Ford v Barnes, App, 366 So 2d 1235

43. Tex —Sullivan v Barnett, 471 S W 2d 39

Conveyance of minerals, etc.

Tex —Farmers Royalty Holding Co v Anglin, Civ App, 205 S W 2d 410, err ref no rev err

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(2) Other cases

Tex —Watson v Wischeart, Civ App, 258 S W 2d 350 err ref no rev err

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U S —Kennemer v Billington, C C A Tex, 141 F 2d 555, cert den 65 S Ct 65, 323 U S 709, 89 L Ed 570

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Neb —Trowbridge v Bixson, 44 N W 2d 810, 153 Neb 389—Krueger v Callies, 208 N W 2d 685, 190 Neb 176

N D —Nichols v Schutte 26 N W 2d 515, 75 N D 207—Larson v Cole, 33 N W 2d 325, 76 N D 32—Dixon v Kaufman, 58 N W 2d 797, 79 N D 633—Docketer v Crawford 65 N W 2d 691—Eisenbarth v Eisenbarth, 80 N W 2d 118—Watson v Kresse, 130 N W 2d 602

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Neb —Miles Homes, Inc v Muhs, 169 N W 2d 691, 184 Neb 617, disapproving City Savings Bank v Thompson, 91 Neb 628, 136 N W 992, 41 L R A, N S 89

46. U S —Kennemer v Billington, supra, n 43

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N D —Dockter v Crawford, supra, n 44

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49. Neb —Marston v Drobny, 90 N W 2d 408, 166 Neb 747

55. Statute inapplicable to widow

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58. Tex —Behrens v Behrens, Civ App, 186 S W 2d 697

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60. N D —Hoffer v Crawford, 65 N W 2d 625

62. Disqualifications

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94. U S —Hillmer v Farmers Royalty Holding Co, C A Tex, 196 F 2d 124

Fla —Regero v Daugherty, 69 So 2d 178

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95. Miss —McFarlane v Plant, 188 So 530, 185 Miss 616

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Wyo —Burnell v Roush 404 P 2d 836

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1. U S —Manvell v Carroll, C A Okl, 379 F 2d 682

Cal —Bradley v Scully, 62 Cal Rptr 834, 255 C.A 2d 101

Minn —First Fiduciary Corp v Blanco, 276 N W 2d 30

Miss —Jones v Lamensdorf, 167 So 624, 175 Miss 565—Stringer v Arrington, 32 So 2d 879, 202 Miss 798—Hendry v Hendry, 300 So 2d 147

Okl —Atkinson v Barr, 428 P 2d 316

Tex —Watson v Toler, Civ App, 153 S W 2d 506—Lewis v Investors Sav Ass'n, Civ App, 411 S W 2d 794—Kunkel v Kunkel, Civ App, 515 S W 2d 941

Wis —Tupitza v Tupitza, 29 N W 2d 54 251 Wis 257

6. Deed not to be delivered until divorce granted

Tex —Chasteen v Miller, Civ App, 349 S W 2d 772, err ref no rev err

7. Neb —Mazanec v Lincoln Bonding & Ins Co, 100 N W 2d 881, 169 Neb 629

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8. Ark —Bowden v Wilson 218 S W 2d 374, 214 Ark 828

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13. Neb —David v Tucker, 244 N W 2d 197, 196 Neb 575

17. U S —Schmidt v Humble Oil & Refining Co, C A Miss, 219 F 2d 551

Tex —Gore v Gore, Civ App, 203 S W 2d 262—Lewis v Brown, Civ App, 321 S W 2d 313, err ref no rev err —Davis v Crockett, Civ App, 398 S W 2d 302—Pollard v State, Civ App, 484 S W 2d 387, err ref no rev err

18. Tex —Gore v Gore, supra, n 17

S D —Speck v Anderson, 318 N W 2d 339, app after remand 349 N W 2d 49

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Summers, The Law of Oil and Gas § 217

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20. Minn —Seitz v Sitze, 10 N W 2d 426, 215 Minn 452

Tex —Cockrell v Farmers State Bank in Mexia, Civ App, 255 S W 2d 886, err ref —Davis v Crockett, Civ App, 398 S W 2d 302—Pollard v State, Civ App, 484 S W 2d 387, err ref no rev err —Hollifield v Hilton, Civ App, 515 S W 2d 717, err ref no rev err

24. Fla —Hamilton v Corcoran, App, 177 So 2d 64

Okl —Jenkins v Seiglar, 142 P 2d 851, 193 Okl 226

Held not estopped

Minn —Dvorak v Maring, 285 N W 2d 675

Neb —McIntosh v Borchers, 241 N W 2d 534, 196 Neb 109, app after remand 266 N W 2d 200, 201 Neb 35

Tex —Home Imp Loan Co v Johnson, Civ App, 294 S W 2d 418 err ref no rev err —City of Fort Worth v Brandt, Civ App, 444 S W 2d 210

31. Miss —Thompson v Dyess 67 So 2d 721, 218 Miss 770

33. U S —U S v Lucas, D C Minn 66 F Supp 7

Tex —Brown v Federal Land Bank of Houston, Civ App, 180 S W 2d 647, err ref

Wife held estopped

Tex —Southland Life Ins Co v Barrett Civ App, 172 S W 2d 997, err ref

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Where the statutory requirements of signature and acknowledgement by both husband and wife to an encumbrance of the homestead are wanting, they cannot be supplied by estoppel [50.5]

50.5. Neb—O'Neill Production Credit Ass'n v Mitchell, 307 N W 2d 115, 209 Neb 206

51. Heirs

Minn—Seitz v Sitze, supra, n 20

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57. Miss—Travis v Dantzler, 141 So 2d 556, 244 Miss 360

Tex—Crosswhite v Moore, Civ App, 248 S W 2d 520, err ref

61. Neb—O'Neill Production Credit Ass'n v Mitchell, 307 N W 2d 115, 209 Neb 206

Tex—Crosswhite v Moore, Civ App, 248 S W 2d 520, err ref—Republic Nat Bank of Dallas v Stetson, Civ App, 382 S W 2d 775, affd in part, revd in part on oth grds, Sup, 390 S W 2d 257

67. Acts held not to raise independent estoppel

Tex—Crews v General Crude Oil Co Civ App, 287 S W 2d 243

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68. Ark—Elms v Hall, 215 S W 2d 1021, 214 Ark 601

75. Tex—Schwarzer v Calcasieu Lumber Co, Civ App, 176 S W 2d 597—Prince v North State Bank of Amarillo, Civ App, 484 S W 2d 405, err ref no rev err

76. Tex—Schwarzer v Calcasieu Lumber Co, supra, n 75

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77. Tex—Davis v Hawn Lumber Co, Civ App, 193 S W 2d 263

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81. Tex—Brown v Federal Land Bank of Houston, Civ App, 180 S W 2d 647, err ref

§ 143. Ratification

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97. U S—Hillmer v Farmers Royalty Holding Co, C A Tex, 196 F 2d 124

Fla—Shedd v Luke, App, 299 So 2d 58

Tex—Reserve Petroleum Co v Hodge, 213 S W 2d 456, 147 Tex 115, 7 A L R 2d 288—Kunkel v Kunkel, Civ App, 515 S W 2d 941, err ref no rev err

98. Tex—Jones v Mawman, Civ App, 197 S W 2d 875, affd 200 S W 2d 819, 145 Tex 596—McLain v Class, Civ App, 204 S W 2d 668, err ref no rev err—Reserve Petroleum Co v Miller Civ App, 209 S W 2d 222

After death of spouse executing conveyance

3. Miss—Hughes v Hahn, 46 So 2d 587, 209 Miss 293—Thompson v Dyess, 67 So 2d 721, 218 Miss 770

4. Tex—Crews v General Crude Oil Co, Civ App, 287 S W 2d 243

6. Ratification not shown

(1) Minn—Dvorak v Maring, 285 N W 2d 675

Tex—Crews v General Crude Oil Co, Civ App, 287 S W 2d 243

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10. Okl—Methvin v American Savings & Loan Ass'n of Anadarko, Okl, 151 P 2d 370, 194 Okl 288

§ 144. —— Curative Acts

12. Okl—Saak v Hicks, 321 P 2d 425

13. Fla—Robbins v Robbins, App, 160 So 2d 10, app after remand, App 2 Dist, 411 So 2d 1024

§ 146. Lands Conveyed or Leased in Excess of Homestead

Library References

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14. Miss—C J S quoted at length in Biglane v Rawls, 153 So 2d 665, 668, 247 Miss 226

15. Ala—Maroney v Whitaker, 91 So 2d 668 265 Ala 409

Fla—C.J.S cited in Frase v Branch, App, 362 So 2d 317, 319

Miss—Hughes v Hahn, supra, n 3—Lee v Duncan, 70 So 2d 615, 220 Miss 234

Neb—Struempler v Peterson, 277 N W 2d 691, 203 Neb 173

Tex—Blake v Fuller, Civ App, 184 S W 2d 148—Viersen v Bucher Civ App, 342 S W 2d 203—Kunkel v Kunkel, Civ App, 515 S W 2d 941, err ref no rev err

Wyo—Stolldorf v Stolldorf, 384 P 2d 969

Enforceable as equitable mortgage

Ala—Rhodes v Schofield 82 So 2d 236 263 Ala 256

Lien of judgment

Ill—Cochran v Cutler, 350 N E 2d 59, 39 Ill App 3d 602

16. Ark—Rowe v Gose, 401 S W 2d 745, 240 Ark 722

Fla—C J S cited in Frase v Branch, App 362 So 2d 317, 320

18. Fla—Frase v Branch, App, 362 So 2d 317

Miss—C J S quoted in Biglane v Rawls, 153 So 2d 665, 669, 247 Miss 226

19 Fla—C J S quoted in Frase v Branch, App, 362 So 2d 317, 319

Miss—C J S quoted in Biglane v Rawls, 153 So 2d 665, 669, 247 Miss 226

Tex—Kunkel v Kunkel, Civ App, 515 S W 2d 941 err ref no rev err

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21. U S—Brown v Lewis, D C Fla, 520 F Supp 1114

Tex—Wilson v Fuston, Civ App, 189 S W 2d 769 revd on oth grds, 192 S W 2d 444, 144 Tex 588—Smith v Little, Civ App, 217 S W 2d 881 err ref no rev err—Buehring v Hudson Civ App 219 S W 2d 810, err ref—Soper v Medford Civ App, 258 S W 2d 118—Evans v Steiner, Civ App, 511 S W 2d 430

Utah—Tanner v Lawler, 305 P 2d 882 6 Utah2d 84, set aside in part on oth grds 311 P 2d 791 6 Utah2d 268

22. Utah—Sanders v Cassity, 586 P 2d 423

Trust instrument invalid

Miss—Smith v Smith, 233 So 2d 527

As defense to oral contract

Iowa—Becker v Gustafson, 279 N W 2d 744

23. N D—Larson v Cole, 33 N W 2d 325, 76 N D 32

S D—Crawford v Carter, 37 N W 2d 241, 72 S D 514

Wyo—Stolldorf v Stolldorf 384 P 2d 969

Liability in damages

Miss—Thompson v Dyess, supra n 3

26 Miss—Smith v Smith 233 So 2d 527

Mo—Hyde v Copeland, 173 S W 2d 684, 351 Mo 580

31. Ala—Martin v First Nat Bank of Opelika, 184 So 2d 815, 279 Ala 303

Cal—Katsivalis v Serrano Reconveyance Co, 138 Cal Rptr 620, 70 C A 3d 200

Iowa—Hall Roberts' Son, Inc v Plaht, 114 N W 2d 548, 253 Iowa 862

Kan—Hill v Hill, 345 P 2d 1015, 185 Kan 389

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33. La—Harrell v Crow, 38 So 2d 226, 214 La 543

Tex—Pappas v Gounaris, 311 S W 2d 644, 158 Tex 355

35. Wash—Great Northwest Federal Sav and Loan Ass'n v T B & R F Jones, Inc, 596 P 2d 1059, 23 Wash App 55

Wis—Lueptow v Guptill 202 N W 2d 255 56 Wis 2d 396

38. S D—C.J.S quoted in Sidle v Cheney, 56 N W 2d 86, 88, 74 S D 540

41. Alaska—Spracher v Spracher 17 Alaska 698

Kan—Mid Kansas Federal Sav and Loan Ass'n of Wichita v Binter, 415 P 2d 278, 197 Kan 106

La—Davis v Davis, App, 23 So 2d 651

Minn—First Fiduciary Corp v Blanco, 276 N W 2d 30

Tex—Davis v Hawn Lumber Co Civ App, 193 S W 2d 263

Wash—Barouh v Israel, 281 P 2d 238, 46 Wash 2d 327

Immune from rights of creditor

Or—Smith v Popham 513 P 2d 1172, 266 Or 625

44 Cal—Bodden v Community Nat Bank of Kern County, 76 Cal Rptr 278, 271 C A 2d 432

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46 Or—W J Seufert Land Co v Greenfield 541 P 2d 814, 273 Or 408

Tex—Nelson v Jenkins, Civ App, 214 S W 2d 140, err ref

47. Ala—Watkins v Pennell, 231 So 2d 83 285 Ala 208

Tex—Southland Life Ins Co v Barrett, Civ App, 172 S W 2d 997, err ref—Pappas v Gounaris 311 S W 2d 644, 158 Tex 355

50 Fla—Heath v First Nat Bank in Milton App 213 So 2d 883

51 Fla—Heath v First Nat Bank in Milton, App 213 So 2d 883

53 Evidence held insufficient

Fla—Heath v First Nat Bank in Milton, App, 213 So 2d 883

57 Tex—Uptmor v Janes, Civ App 210 S W 2d 235, err ref no rev err

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63. Tex—Crosswhite v Moore, Civ App, 248 S W 2d 520 err ref

Slightest knowledge

Tex—Evans v Steiner Civ App 511 S W 2d 430

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71. Tex—Crosswhite v Moore, supra, n 63

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79 Minn—Sisco v Paulson 45 N W 2d 385 232 Minn 250

N D—Larson v Cole, supra, n 23

S D—C J S cited in Sidle v Cheney 56 N W 2d 86 88 74 S D 540

Tenn—Hale v Sandusky, 178 S W 2d 386 181 Tenn 26

80. Ga—Citizens' Bank & Trust Co v Pendergrass Banking Co 138 S E 223, 164 Ga 302

Ill—Cochran v Cutler 350 N E 2d 59, 39 Ill App 3d 602

Minn —Application of Hickman, 23 N W 2d 593, 222 Minn 161

Mo.—Hyde v Copeland, supra, n 26

Or —Fleischhauer v Bilstad, 379 P 2d 880, 233 Or 578—Smith v Popham, 513 P 2d 1172, 266 Or 625

Tex —Englander Co v Kennedy, Civ App, 424 S W 2d 305, err ref no rev. err 428 S W 2d 806

Wash —Lien v Hoffman, 306 P 2d 240, 49 Wash 2d 642—Aronson v Murk, 406 P 2d 607, 67 Wash 2d 1—Damascus Milk Co v Morriss, 463 P 2d 212, 1 Wash App 501

Failure of grantee to record

Minn —Sisco v Paulson, supra, n 79

81. Or —Clawson v Anderson, 434 P 2d 462, 248 Or 347

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94. Or —Clawson v Anderson, 434 P 2d 462, 248 Or 347—Smith v Popham, 513 P 2d 1172, 266 Or 625

7. Tex —Amos v Adams, Civ App, 352 S W 2d 540

§ 151. —— Remedies and Proceedings for Enforcement of Rights

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22. Okl —Keel v Jones, 413 P 2d 549

23. Tenn —Hestand v Johnson, 184 S W 2d 175, 182 Tenn 84

Tex —Menzies v Blum, Civ App, 218 S W 2d 875

24. Tex —Johnson v Miller, 177 S W 2d 249, 142 Tex 228

Presumption and burden of proof

Ark —Rowe v Gose, 401 S W 2d 745, 240 Ark 722

Sufficiency of evidence

Ark —Rose v Gose, 401 S W 2d 745, 240 Ark 722

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25. Portion of entire contract unenforceable

Tex —King v Whatley, Civ App, 236 S W 2d 186, err ref no rev err

After termination of homestead

Tex —Nash v Conatser, Civ App, 410 S W 2d 512

Contract includes homestead and nonhomestead property

Neb —McIntosh v Borchers, 241 N W 2d 534, 196 Neb 109, app after remand 266 N W 2d 200, 201 Neb 35

26. Mich —Lamberts v Lemley, 22 N W 2d 759, 314 Mich 417

Tex —City of El Paso v Long, Civ App, 209 S W 2d 950, err ref no rev err —Nash v Conatser, Civ App, 410 S W 2d 512

Breach relieves obligation

Tex —Dickey v Johnson, Civ App, 513 S W 2d 876, err ref no rev err

28. Tex —City of El Paso v Long, supra, n 26—Housing Authority of El Paso v Lira, Civ App, 282 S W 2d 746, err ref no rev err

31. Fla —Jacobs v Berlin, 28 So 2d 539, 158 Fla 259

As a result of the repeal of prior statutory impediments, specific performance may lie, as available under common law, to compel the sale of a homestead under a written contract executed by the husband and wife.[33.5]

33.5. Tex —Allen v Monk, 505 S W 2d 523—Rich v McMullan, 506 S W 2d 745, err ref no rev err

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34. Tex —Menzies v Blum, supra, n 23

Liquidated damages enforceable

Tex —Dickey v Johnson, Civ App, 513 S W.2d 876, err ref no rev err

35. Minn —Dvorak v Maring, 285 N W 2d 675

N D —Larson v Cole, 33 N W 2d 325, 76 N D 32

37. Tex —Housing Authority of El Paso v Lira, Civ App, 282 S W 2d 746, err ref no rev err

38. Mich —Lamberts v Lemley, supra, n 26

Tex —Reserve Petroleum Co v Harp, Civ App, 221 S W 2d 366, revd on oth grds 226 S W 2d 839, 148 Tex 448

39. Neb —C.J.S. cited in Struempler v Peterson, 277 N W 2d 691, 693, 203 Neb 173

43. Ark —Mayfield v Sehon, 172 S W 2d 914, 205 Ark 1142

Fla —Hicks v Mid-Florida Production Credit Ass'n, App, 374 So 2d 566

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53. Evidence held sufficient

(1) Tex —Dickey v Johnson, Civ App, 513 S W 2d 876, err ref no rev err

54. Questions of law and fact

Fla —Anderson v Garber, App, 183 So 2d 693

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57. Cal —Carpenter v Hamilton, 138 P 2d 356, subs op 147 P 2d 563, 24 Cal 2d 95, 153 A L R 733

Enforcement of deficiency judgment

(2) Other cases —Shatelrow v Brim, 14 Ohio Supp 130

58. Enforcement of deficiency judgment

(2) Ohio—Mutual Bldg & Inv Co v Efros, App, 75 N E 2d 75

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72. Neb —First Trust Co of Lincoln v Bauer, 260 N W 194, 128 Neb 725

73. Iowa—Fellers v Sanders, 210 N W 2d 530, 202 Iowa 503

Wis —Zerfas v Johnson, 16 N W 2d 427, 246 Wis 60—Dick & Reuteman Co v Jem Realty Co, 274 N W 416, 225 Wis 428

74. Neb —First Trust Co of Lincoln v Bauer, supra, n 72

Wash —State ex rel White v Douglas, 107 P 2d 593, 6 Wash 2d 356

76. Wash —First Nat Bank of Everett v Tiffany, 242 P 2d 169, 40 Wash 2d 193—Costanzo v Harris, 427 P 2d 963, 71 Wash 2d 254

Defaulting mortgagor

Wash —State ex rel White v Douglas, supra

78. Tenant's occupancy

Wash —Prudential Ins Co of America v Ewing, 50 P 2d 694, 184 Wash 203

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79. Wife as purchaser

Miss —Peeler v Peeler, 24 So 2d 338, 199 Miss 492, cert den 67 S Ct 54, 329 U S 720, 91 L Ed 624, reh den 67 S Ct 295, 329 U S 829, 91 L Ed 703

§ 152. Persons Entitled to Assert Invalidity

Library References

Homestead ⇐131 et seq.

86. Miss —Swales v Swales, 378 So 2d 215

Neb —Cunningham v Brewer, 13 N W 2d 113, 144 Neb 211, adhered to 16 N W 2d 533, 144 Neb 211

Tex —Franklin v Woods, Civ App, 598 S W 2d 946

Relief held unwarranted

Miss —Wilbourn v Wilbourn, 37 So 2d 256, 204 Miss 206, sugg err over 37 So 2d 775, 204 Miss 206

Tex —Gaither v Gaither, Com App, 25 S W 2d 299—Sullivan v Barnett, 471 S W 2d 39

Retraction of contract to convey

Tex —King v Whatley, supra, n 25—Alexander v Hanover Fire Ins Co of N Y, Civ App, 346 S W 2d 667, err ref no rev err

89. Tex —Morris v Porter, Civ App, 393 S W 2d 385, err ref no rev err

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90. Fla —Pace v Woods, App, 177 So 2d 779.

93. U S —Arnold v Kelsey, D C Alaska, 114 F.Supp 650, 14 Alaska 387

Ala —Allagood v DuBose, 243 So 2d 668, 286 Ala 559

Fla —Gotshall v Taylor, App, 196 So 2d 479

99. Knowledge of sale

Minn —Sisco v Paulson, 45 N W 2d 385, 232 Minn 250

Limitation of rule where grantor insane

Tex —Chandler v Welborn, Civ App, 282 S W 2d 940, affd, Sup, 294 S W.2d 801

3. Deed executed absent constitutional requirements voidable

Fla —Robbins v Robbins, App, 360 So 2d 10, app after remand, App 2 Dist, 411 So 2d 1024

§ 153. Nature and Form of Action and Time to Sue

4. Grantee of homestead by parents

Fla —Rennolds v Rennolds, App, 312 So 2d 538

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8. What constitutes direct attack

(1) Ala —Montgomery v Parker Bank & Trust Co, 53 So 2d 566, 256 Ala 20

An illegal sale of property on which a valid homestead claim exists may be collaterally attached at a later date.[10.5]

10.5. Tex —Cline v Niblo, 8 S W 2d 633, 117 Tex 474, 66 A L R 916—Franklin v Woods, Civ App, 598 S W 2d 946

12. Conditions precedent

Ala —Lee v Lee, 90 So 2d 775, 265 Ala 226

13. N D —Larson v Cole, 33 N W 2d 325, 76 N D 32

14. Miss —Robbins v Berry, 57 So 2d 576, 213 Miss 744

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15. Miss —Robbins v Berry, 47 So 2d 846, 209 Miss 422

Neb —Cunningham v Brewer, 16 N W 2d 533, 144 Neb 211

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40. Mo —C.J.S. cited in Powell v Hoffman, 213 S W 2d 473, 476, 358 Mo 138

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49. Tex —Johnson v Miller, Civ App, 173 S W 2d 280, affd, 177 S W 2d 249, 142 Tex 228

53. Ala —Rhodes v Schofield, 82 So 2d 236, 263 Ala 256

Fla —Scoville v Scoville, 40 So 2d 840

Miss —Etheridge v Webb, 37 So 2d 168, 204 Miss 159

Tex —Kemper v Freeman, Civ App, 254 S W 2d 837

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57. Ala —Jones v Jones, 18 So 2d 365, 245 Ala 613

Miss —Philan v Turner, 13 So 2d 819, 195 Miss 172

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73. Tex —Jones v Mawman, 197 S W 2d 875, affd 200 S W 2d 819, 145 Tex 596

75. Evidence held sufficient

(3) To show other matters

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U S —Gregory v Lloyd, D C Fla, 284 F Supp 264
Alaska—Spracher v Spracher, 17 Alaska 698
Miss —Oatis v Mingo, 26 So 2d 453, 199 Miss 896—McGehee v Middleton, 58 So 2d 16
Neb —Cunningham v Brewer, 13 N W 2d 113, 144 Neb 211, adhered to 16 N W 2d 533, 144 Neb 211—Trowbridge v Bisson, 44 N W 2d 810, 153 Neb 389

Evidence held to sustain findings

(5) Other findings

Ala —Jones v Jones, supra, n 57—Barton v Lumpkin, 171 So 2d 101, 277 Ala 394
Miss —Etheridge v Webb, 50 So 2d 603, 210 Miss 729
Tex —Kemper v Freeman, supra, n 53

Evidence held insufficient

(7) Additional statements

U S —Gregory v Lloyd, D C Fla, 284 F Supp 264

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76. Evidence held sufficient

(1) Tex —McLain v Class, Civ App 204 S W 2d 668, err ref no rev err

78. Evidence held sufficient

(5) To show other matters

Okl —Girdner v Girdner, 337 P 2d 741
Tex —Farmers Royalty Holding Co v Anglin Civ App, 205 S W 2d 410, err ref no rev err

Evidence held insufficient

(2) To show other matters

Tex —Farmers Royalty Holding Co v Anglin supra

80. Evidence held sufficient etc.

Okl —Girdner v Girdner 337 P 2d 741

(2) Other matters —Duarte v Gutierrez Tex Civ App, 175 S W 2d 480

82. Evidence held to sustain findings

(1) Martin v Tucker, 14 N W 2d 107 217 Minn 108
83 —Smith v Lockhart, Civ App, 177 S W 2d 117

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86. Evidence held sufficient, etc

(2) Other matters

Fla —Morgan v Riley, App, 239 So 2d 524
88. Tex —Duarte v Gutierrez supra, n 80

Issues held for jury

(5) Tex —Leonard v Smith, Civ App, 186 S W 2d 284

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92. Tex —Duarte v Gutierrez supra, n 80—Tucker v Cole, Civ App, 215 S W 2d 252, err ref no rev err

§ 155. Nature and Conditions of Relief

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3. Tex —Anderson v Bundick, Civ App, 245 S W 2d 318, err ref no rev err

§ 156. —— Restoration of Status Quo

7. Ala —Hewett v McGaster, 133 So 2d 189, 272 Ala 498

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9. Sale to satisfy amount due

(2) Other holdings —Donaldson v Meyer, Tex Com App, 261 S W 369

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22. Tex —Moore v Glasscock Civ App, 217 S W 2d 428, err ref no rev err

§ 157. General Statement

Library References

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28. N D —C J S. cited in Larson v Cole, 33 N W 2d 325, 328, 76 N D 32
29. U S —Towers v Curry, C A Cal, 247 F 2d 738
Cal —Shive v Barrow, 199 P 2d 693, 88 Cal App 2d 838—In re Teel's Estate, 210 P 2d 1, 34 Cal 2d 349
Fla —Reed v Fain 145 So 2d 858
Ill —Stombaugh v Morey, 58 N E 2d 545, 388 Ill 392, 157 A L R 254
La —Baham v Vernon, App, 42 So 2d 141
Ohio—Gledhill v Walker, 55 N E 2d 647, 143 Ohio St 381
Vt —Budde v Pierce, 375 A 2d 984 135 Vt 152

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31. Iowa—Francksen v Miller, 297 N W 2d 375
N C —Williams v Johnson 53 S E 2d 277, 230 N C 338
Tex —Hoffman v Love Civ App, 494 S W 2d 591, err ref no rev err, Sup, 499 S W 2d 295
Wash —In re Brown's Estate, 183 P 2d 768, 28 Wash 2d 436
32. Fla —Burdick v Burdick, App 399 So 2d 410
Neb —McIntosh v Borchers, 241 N W 2d 534, 196 Neb 109 app after remand 266 N W 2d 200, 201 Neb 35
N C —Williams v Johnson, supra, n 31
Okl —Alexander v Love County Nat Bank of Marietta 223 P 2d 363 201 Okl 402—Matter of Wallace's Estate 648 P 2d 828
Tex —Garrard v Henderson, Civ App, 209 S W 2d 225—Paddock v Siemoneit 218 S W 2d 428 147 Tex 571—Long Bell Lumber Co v Miller, 240 S W 2d 405

Wash —Code v London 178 P 2d 293, 27 Wash 2d 279

Intent required

Tex —Franklin v Woods Civ App, 598 S W 2d 946
Wis —Reckner v Reckner App, 314 N W 2d 159 105 Wis 2d 425
33 Ariz —State v Smith App 628 P 2d 65 129 Ariz 28
Okl —Hildebrand v Harrison, 361 P 2d 498
Tex —Long Bell Lumber Co v Miller, 240 S W 2d 405—Hollifield v Hilton, Civ App, 515 S W 2d 717 err ref no rev err
34 Tex —Long Bell Lumber Co v Miller supra, n 32

However, it has been held that death does not terminate homestead exemption

Cal —California Bank v Schlesinger 324 P 2d 119, 159 C A 2d Supp 854
36. Fla —Anemaet v Martin Senour Co App, 114 So 2d 23
41 Okl —Hildebrand v Harrison, 361 P 2d 498
42. Okl —Brown v Turner, 207 P 2d 927 201 Okl 470

§ 158. Dissolution of Family Relationship

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47. Fla —U S v Boyette, App 1 Dist, 413 So 2d 1250
Ga —Bentley v Still, 32 S E 2d 814 198 Ga 743
Okl —Van Meter v Field, 159 P 2d 546, 195 Okl 555

Increase of family by marriage not termination

Fla —Brady v Brady, 55 So 2d 907

49. N D —Portland Credit Union v Hauge, 169 N W 2d 106
53. Tex —Julian v Andrews, Civ App, 491 S W 2d 721, err ref n r e

Death of husband

Tex —Cox v Messer, Civ App, 469 S W 2d 611
54. Okl —In re Snider's Estate, 226 P 2d 429, 204 Okl 22—State ex rel Com'rs of Land Office v Creswell, 391 P 2d 220
56. Tex —Williamson v Lewis, Civ App, 346 S W 2d 957, err ref

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59. Tex —C.J.S. cited in Julian v Andrews, Civ App, 491 S W 2d 721, 727, err ref n r e
60. Cal —C.J S cited in California Bank v Schlesinger, 324 P 2d 119 124, 159 C A 2d Supp 854
61. Ill —Bydalek v Bydalek, 71 N E 2d 19, 396 Ill 65
62 Miss —Etheridge v Webb, 50 So 2d 603, 210 Miss 729
72 Ill —Kawszewicz v Kawszewicz 53 N E 2d 386 385 Ill 461

Rights under statute where property of wife

Miss —Etheridge v Webb supra n 62
74. U S —In re Grisanti, D C Ky, 58 F Supp 646—C J S cited in In re Haas, D C Colo, 165 F Supp 488, 489
Cal —California Bank v Schlesinger, 324 P 2d 119, 159 C A 2d Supp 854

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76. U S —C J S quoted in In re Haas, D C Colo, 165 F Supp 488, 490
Cal —C J S cited in California Bank v Schlesinger, 324 P 2d 119 125 159 C A 2d Supp 854

Rights under statute where property of wife

Miss —Etheridge v Webb, supra n 62

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81 Cal —California Bank v Schlesinger, 324 P 2d 119, 159 C A 2d Supp 854
Tex —Eagle Lumber Co v Trainham Civ App, 365 S W 2d 702, err ref no rev err
82. Fla —Barnett Bank of Cocoa, N A v Osborne, App, 349 So 2d 223
Tex —Wierzchula v Wierzchula, Civ App 623 S W 2d 730

83 Intent not decisive

Tex —Burk Royalty Co v Riley, 475 S W 2d 566
84 Tex —Smith v Smith Civ App 187 S W 2d 116—Clack v Williams, Civ App, 189 S W 2d 503 err ref w m —Stertz v Stertz, Civ App, 262 S W 2d 262 err dism —Burk Royalty Co v Riley, 475 S W 2d 566
86 U S —Master Lubricants Co v Cook C C A Cal, 159 F 2d 679
Ariz —Phlegar v Elmer 325 P 2d 881 84 Ariz 204
Miss —Blackmon v Blackmon, 350 So 2d 44
Tex —Phillips v Interstate Securities Co of Tex, Civ App 250 S W 2d 444

In California, however the text rule is not the law, under statute —California Bank v Schlesinger, 324 P 2d 119 159 C A 2d Supp 854

87 U S —Master Lubricants Co v Cook supra, n 86—In re Jordan, Bkrtcy Ky, 16 B R 590
91. Mich —Irvine v Irvine 60 N W 2d 298, 337 Mich 344
93 Ark —Rodgers v Rodgers 611 S W 2d 175, 271 Ark 762
Tex —Mangum v Mangum, Civ App 184 S W 2d 338

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96 "Children" construed

Tenn —Oliver v Milford, 230 S W 2d 963 190 Tenn 456
97. Tenn —Chapman v Tipton, 292 S W 2d 25, 200 Tenn 237—Oliver v Milford 230 S W 2d 963 190 Tenn 456
98 U S —In re Bouchhard, Bkrtcy Cal, 11 B R 869

Reversionary interest

Tenn —Cobb v Brown, 305 S W 2d 241, 42 Tenn App 595

Wife's divorce procured by fraud

Cal —Eischen v Eischen 342 P 2d 37, 172 C A 2d 158

99. Wyo—CJS quoted in Cassas v Cassas, 276 P 2d 456, 464, 73 Wyo 147 69 A L R 2d 187

Title acquired by husband after divorce decree

U S—Green v Green D C Alaska 113 F Supp 697 14 Alaska 395

1. Liability for rent

Miss—May v May 90 So 2d 169 229 Miss 97

2. Cal—Kaupe v Kaupe, 280 P 2d 856, 131 C A 2d 511

5. Tex—White v Edzards, Civ App, 399 S W 2d 935 err ref no rev err

6. Fla—Nationwide Financial Corp of Colorado v Thompson, App, 400 So 2d 559

8. Tex—Reisberg v Hubbard, Civ App, 326 S W 2d 605

9. Tex—Day v Day, Civ App, 610 S W 2d 195, err ref no rev err

13. Alaska—C J S cited in Spracher v Spracher 17 Alaska 698, 705

Ark—Biddle v Biddle, 177 S W 2d 32, 206 Ark 623—Elms v Hall, 215 S W 2d 1021 214 Ark 601

Cal—Walton v Walton, 138 P 2d 54, 59 Cal App 2d 26

Fla—Moore v Hunter 13 So 2d 909, 153 Fla 158

Wyo—Burnell v Roush 404 P 2d 836

Application for limited divorce effects saving of wife's homestead right

Ala—Adair v Adair 62 So 2d 437 258 Ala 293

14. Ill—Krusemark v Stroh 52 N E 2d 156, 385 Ill 64

15 Ill—Taylor v Bukowski 169 N E 2d 89 19 Ill 2d 586 84 A L R 2d 698—In re Marriage of Naguit 433 N F 2d 296, 60 Ill Dec 499 104 Ill App 3d 709

Wyo—C J S quoted in Cassas v Cassas, 276 P 2d 456, 464, 73 Wyo 147 69 A L R 2d 187

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20 Neb—Sanne v Sanne, 94 N W 2d 367 167 Neb 683

23 Ala—Drake v Drake 80 So 2d 268 262 Ala 609

24. Homestead of new family created by remarriage

Tex—Burk Royalty Co v Riley, 475 S W 2d 566

§ 161. —— Separation by Agreement

25. U S—C J S cited in In re Thomas Bkrtcy N Y 27 B R 367 371

28. U S—Schmidt v Humble Oil & Refining Co, C A Miss 219 F 2d 551

Wis—Siegel v Clemons 63 N W 2d 725, 266 Wis 369

29 Vt—In re Prudenzano's Will, 68 A 2d 704 116 Vt 55

Technical noncom-with statute may not be asserted by administrator of husband

Cal—Godfrey v Witten, 292 P 2d 247, 138 C A 2d 610

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32. Kan—State ex rel Apt v Mitchell 399 P 2d 556, 194 Kan 463

36. Minn—Northwest Holding Co v Evanson 122 N W 2d 596, 265 Minn 562

Okl—Gilpatrick v Hutter 258 P 2d 1200

Tex—Long Bell Lumber Co v Miller, Civ App 240 S W 2d 405

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40. Fla—Barlow v Barlow, 23 So 2d 723, 156 Fla 458—Olesky v Nicholas, 82 So 2d 510—Marsh v Hartley, App, 109 So 2d 34

42. U S—Leslie v Western Steel Co D C Tex, 202 F Supp 27

Ark—Gibson v Gibson, 572 S W 2d 148, 264 Ark 420

Wyo—C J S cited in Goodson v Smith 243 P 2d 163, 173, 69 Wyo 439, reh den 244 P 2d 805, 69 Wyo 439

44. Tex—Coleman v Banks, Civ App, 349 S W 2d 737 err ref no rev err

45. U S—Brown v Lewis D C Fla, 520 F Supp 1114

Fla—Wilson v Florida Nat Bank & Trust Co at Miami, Fla, 64 So 2d 309—Poppell v Padrick App, 117 So 2d 435

Tex—Flew v Qualtrough, App 624 S W 2d 335 err ref no rev err

46. U S—Brown v Lewis, D C Fla, 520 F Supp 1114

Fla—Olesky v Nicholas 82 So 2d 510—Marsh v Hartley, App, 109 So 2d 34—Beensen v Burgess, App, 218 So 2d 517

La—Cloud v Cloud App, 127 So 2d 560

Neb—Phifer v Miller, 45 N W 2d 907 153 Neb 748

N D—Larson v Cole 33 N W 2d 325, 76 N D 37

51 U S—Giblin v Beeler, C A Kan, 396 F 2d 584

Neb—Phifer v Miller supra n 46

Tex—R B Spencer & Co v Green Civ App, 203 S W 2d 957—Crews v General Crude Oil Co, Civ App, 287 S W 2d 243

52. Ill—Kawszewicz v Kawszewicz, 53 N E 2d 386, 385 Ill 461

Tex—Thompson v Thompson, 236 S W 2d 779 149 Tex 632

54. Tex—Bass v Ware, Civ App, 203 S W 2d 1001, err ref no rev err—Morris v Porter, Civ App, 393 S W 2d 385 err ref no rev err

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55 Neb—Phifer v Miller supra n 46—Horn v Gates, 53 N W 2d 84, 155 Neb 667—Struempler v Peterson 206 N W 2d 629, 190 Neb 133

Tex—Lewis v Brown, Civ App 321 S W 2d 313 err ref no rev err

65. Tex—West v Austin Nat Bank, Civ App, 427 S W 2d 906 err ref no rev err

§ 164. Removal From Premises

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However, it has also been held that where a husband and wife jointly hold property, and the husband has been found to have intended to abandon the property, but the wife has not,' the property does not lose its character as a homestead with regard to either the wife or husband[66.5]

66.5 Minn—Vickery v First Bank of LaCrosse, App, 368 N W 2d 758, review den

67 Cal—California Bank v Schlesinger, 324 P 2d 119, 159 C A 2d Supp 854

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71. U S—In re McCarthy, Bkrtcy Fla, 13 B R 389

72. Kan—Brooks v Marquess, 139 P 2d 395, 157 Kan 244

73. Ark—Monroe v Monroe, 465 S W 2d 347, 250 Ark 434

Minn—Wilson v First Nat Bank of Mankato, 60 N W 2d 69, 239 Minn 550

74. Ala—Hammond v Shipp, 289 So 2d 802, 292 Ala 113

Ill—Kawszewicz v Kawszewicz, supra, n 52

75. Continued occupancy by wife and children held sufficient

Wis—Eloff v Riesch, 111 N W 2d 578, 14 Wis 2d 519

77. Ark—Coleman v Gardner, 330 S W 2d 954, 231 Ark 521

Tex—West Texas State Bank of Snyder v Helms, Civ App, 326 S W 2d 47

Wis—Lietz v Bogumill, 28 N W 2d 320, 251 Wis 199

78. Fla—Dean v Heimbach, App 1 Dist, 409 So 2d 157

79 Ark—Coleman v Gardner, 330 S W 2d 954, 231 Ark 521—Vesper v Woolsey, 332 S W 2d 602, 231 Ark 782

Fla—Saint-Gaudens v Bull, 74 So 2d 693

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82. U S—In re Hansen, Bkrtcy S D, 17 B R 239

Tex—West v Austin Nat Bank, Civ App, 427 S W 2d 906, err ref no rev err

89. Tenn—Hale v Sandusky, 178 S W 2d 386, 181 Tenn 26—Rutherford v Parker, 195 S W 2d 328, 29 Tenn App 179—Hipshire v Stapleton, 418 S W 2d 457, 57 Tenn App 339

§ 165. —— Removal Without Intent to Return

94 U S—Giblin v Beeler, C A Kan, 396 F 2d 584—In re Joy, Bkrtcy Minn, 5 B R 681

Ala—Barber v Beckett, 39 So 2d 17, 251 Ala 569

Ark—Monroe v Monroe 465 S W 2d 347, 250 Ark 434

Kan—Bellport v Harder, 411 P 2d 725, 196 Kan 294

Neb—Phifer v Miller supra, n 46

Okl—Cooper v Kiester, 185 P 2d 458, 199 Okl 238—Bowman v Bowman, 206 P 2d 582, 201 Okl 384—Alexander v Love County Nat Bank of Marietta, 223 P 2d 363, 203 Okl 402—First Nat Bank of Sentinel v Anderson, 240 P 2d 1066, 206 Okl 54

Tex—Funderburk v Dofflemyer, Civ App, 234 S W 2d 889 err ref—Long Bell Lumber Co v Miller, supra, n 36

Removal must be with definite intent, etc.

Tex—West Texas State Bank of Snyder v Helms, Civ App, 326 S W 2d 47

95 Tex—Hix v De Phillipi, supra, n 94—Long Bell Lumber Co v Miller, supra, n 36

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97 N D—Larson v Cole, supra, n 46

98. U S—Brown v Lewis, D C Fla, 520 F Supp 1114

Ala—Thomas v Thomas, 18 So 2d 544, 245 Ala 607

Minn—Application of Hickman 23 N W 2d 593, 222 Minn 161

Mo—R F C v Ball, 206 S W 2d 35, 239 Mo App 1189

Or—Fleischhauer v Bilstad, 379 P 2d 880, 233 Or 578

Wis—Plan Credit Corp v Swinging Singles, Inc, 194 N W 2d 822, 54 Wis 2d 146

99. Okl—Kunauntubbee v Greer, 323 P 2d 725

2 Tex—Hollifield v Hilton Civ App, 515 S W 2d 717, err ref no rev err

3. Fla—Barlow v Barlow, 23 So 2d 723, 156 Fla 458

§ 166. —— Removal with Intent to Return

8. Ark—Kinney v Patterson, 282 S W 2d 809, 225 Ark 393

9. Ala—Barber v Beckett, 39 So 2d 17, 251 Ala 569

Fla—Dean v Heimbach, App 1 Dist, 409 So 2d 157

Okl—Hildebrand v Harrison, 361 P 2d 498

10. Tex—West Texas State Bank of Snyder v Helms, Civ App, 326 S W 2d 47

11. Tex—West Texas State Bank of Snyder v Helms, Civ App, 326 S W 2d 47

12. Tex—West Texas State Bank of Snyder v Helms, Civ App, 326 S W 2d 47

13. Tex —Wash Texas State Bank of Snyder v Helms, Civ App, 326 S W 2d 47

14. Ark —Monroe v Monroe, 465 S W 2d 347, 250 Ark 434

Cal —California Bank v Schlesinger, 324 P 2d 119, 159 C A 2d Supp 854

Fla —City of Jacksonville v Bailey, 30 So 2d 529, 159 Fla 11—L'Engle v Forbes, 81 So 2d 214—Marsh v Hartley, App, 109 So 2d 34

Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294

Minn —Jensen v Christensen, 11 N W 2d 798, 216 Minn 92

N D —C.J.S. cited in Larson v Cole, 33 N W 2d 325, 330, 76 N D 32

Okl —Brown v Turner, 207 P 2d 927, 201 Okl 570—C.J.S. cited in Alexander v Love County Nat Bank of Marietta, 223 P 2d 363, 365, 203 Okl 402

S D —Knittel v G Sommers & Co, 28 N W 2d 878, 72 S D 5

Tex —Hix v De Philipi, Civ App, 216 S W 2d 643 err ref no rev err —Long Bell Lumber Co v Miller, Civ App, 240 S W 2d 405

16. Fla —City of Jacksonville v Bailey, supra, n 14

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18. Okl —Russell v Key, 155 P 2d 238, 195 Okl 49

24. S D —Knittel v G Sommers & Co, supra, n 14

39. Minn —Cysewski v Steingraber, 24 N W 2d 266, 222 Minn 221

Okl —First Nat Bank of Sentinel v Anderson, 240 P 2d 1066, 206 Okl 54

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56. N D —C.J.S cited in Larson v Cole, supra, n 14

57. Minn —Cysewski v Steingraber, supra, n 39

Wis —Eloff v Riesch, 111 N W 2d 578, 14 Wis 2d 519

63. Kan —Matter of Fink's Estate, 609 P 2d 211, 4 Kan App 2d 523

67. U S.—In re Godinez, Bkrtcy Fla, 10 B R 70

Fla —Dean v Heimbach, App 1 Dist, 409 So 2d 157

Minn —Application of Hickman, 23 N W 2d 593, 222 Minn 161

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74. Facts held not to constitute an abandonment

Fla —Olesky v Nicholas, 82 So 2d 510

75. Fla —Olesky v Nicholas, 82 So 2d 510—Marsh v Hartley, App, 109 So 2d 34

Ill —Dixon v Moller, 356 N E 2d 599, 1 Ill Dec 411, 42 Ill App 3d 688

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93. Tex —R B Spencer & Co v Green, Civ App, 203 S W 2d 957

6. Minn —First Nat Bank of Mankato v Wilson, 47 N W 2d 764, 234 Minn 160

10. Minn —Cysewski v Steingraber, 24 N W 2d 266, 222 Minn 221

§ 167. —— Effect of Intent to Remove without Actual Removal

11. Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294

§ 169. Offer or Unexecuted Intention to Sell

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23. Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294

N D —C.J.S. quoted in Larson v Cole, 33 N W 2d 325, 329, 76 N D 32

§ 170. Acquisition of New Homestead

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29. Miss —Grantham v Ralle, 158 So 2d 719, 248 Miss 364—Patterson v Adams, 245 So 2d 13

Tex —Rancho Oil Co v Powell, 175 S W 2d 960, 142 Tex 63

Business and residence homesteads in same structure

Tex —City of El Paso v Long, Civ App, 209 S W 2d 950, err ref no rev err

34. Okl —Hildebrand v Harrison, 361 P 2d 498

Tex —Davis v Hawn Lumber Co, Civ App, 193 S W 2d 263—Smith v Stegall, Civ App, 336 S W 2d 470—West v Austin Nat Bank, Civ App, 427 S W 2d 906, err ref no rev err

35. N D —Larson v Cole, 33 N W 2d 325, 76 N D 32

Tex —Rancho Oil Co v Powell, supra, n 29—R B Spencer & Co v Green, Civ App, 203 S W 2d 957

37. Tex —Floyd v Rice, Civ App, 444 S W 2d 834, err ref no rev err

§ 171. Change in Character or Use of Property

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45. U S —In re White, Bkrtcy Vt, 18 B R 95

Tex —Lewis v Brown, Civ App, 321 S W 2d 313, err ref no rev err —Duncan v Woolf, Civ App, 380 S W 2d 862, err ref no rev err

Erection, on part of property, of apartment house or other building for rental purposes, etc.

Tex —Canales v Oliver, Civ App, 322 S W 2d 411, err ref no rev err

49. U S —King v Sweatt, D C Ark, 115 F Supp 215

52. Change to duplex

Cal —Oppenheim v Goodley, 306 P 2d 944, 148 C A 2d 325

53. Building new residence

Cal —Ray v Valdez, 346 P 2d 464, 175 C A 2d 502

56. Building for other purposes

Tex —Norwood v Childress, Civ App, 250 S W 2d 927, err ref no rev err

§ 172. Declaration of Abandonment

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59. Wash —C.J.S cited in Washington Credit, Inc v Houston, 650 P 2d 1147, 1149, 33 Wash App 41

60. U S —In re Towers, D C Cal, 146 F Supp 882, affd, C A, 247 F 2d 738

Signature of both spouses required

Cal —Kaupe v Kaupe, 280 P 2d 856, 131 C A 2d 511—Johnson v Brauner, 281 P 2d 50, 131 C A 2d 713

70. Cal —In re Teel's Estate, 210 P 2d 1, 34 Cal 2d 349

72. Wash —C.J S. cited in Security Sav and Loan Ass'n v Busch, 523 P 2d 1188, 1191, 84 Wash 2d 52

§ 173. Sale and Conveyance

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Homestead ⇐167, 171.

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77. U S —In re Johnson, D C Cal, 97 F Supp 779, revd on oth grds, C A, 195 F 2d 717—In re McCarthy, Bkrtcy Fla, 13 B R 389

Ark —Sims v McFadden, 233 S W 2d 375, 217 Ark 810—Lambert v Childs, 362 S W 2d 10, 235 Ark 714

Cal —Schuler-Knox Co v Smith, 144 P 2d 47, 62 Cal App 2d 86—In re Falcone's Estate, 27 Cal Rptr 38, 211 C A 2d 40

Fla.—Sackheim v Marine Bank & Trust Co, App, 341 So 2d 247

Ill —De Martini v De Martini, 52 N E 2d 138, 385 Ill 128

Kan —Matter of Fink's Estate, 609 P 2d 211, 4 Kan App 2d 523

Tex —Nash v Conatser, Civ App, 410 S W 2d 512

Wash —C.J.S. cited in Security Sav and Loan Ass'n v Busch, 523 P 2d 1188, 1191, 84 Wash.2d 52

Conveyance of part of tract

(1) Rathff v Smith, Tex Civ App, 178 S W 2d 138, err ref

(3) Other cases

Cal —Ray v Valdez, 346 P 2d 464, 175 C A 2d 502

Neb —Phifer v Miller, 45 N W 2d 907, 153 Neb 748

S D —Crawford v Carter, 37 N W 2d 241, 72 S D 514

Tex —Cline v Henry, Civ App, 239 S W 2d 205, err ref no rev err

Reservation of life estate

Ill —Rice v United Mercantile Agencies of Louisville, Ky, 70 N E 2d 618, 395 Ill 512

Not abandoned as against creditor

U S —U S v Wilson, D C Tex, 500 F Supp 831

Cal —Oppenheim v Goodley, 306 P 2d 944, 148 C A 2d 325

S D —Christiansen v United Nat Bank of Vermillion, 176 N W 2d 65, 84 S D 695

Conveyance expressly releasing and waiving homestead

U S —In re Sjostrom, C A Ill, 338 F 2d 676

No abandonment by void transfer

Tex —McGahey v Ford, Civ App, 563 S W 2d 857, err ref no rev err

Abandonment by wrongful sale

Tex —Franklin v Woods, Civ App, 598 S W 2d 946

79. Wash —C.J.S cited in Security Sav and Loan Ass'n v Busch, 523 P 2d 1188, 1191, 84 Wash 2d 52

82. N D —Falconer v Farmers Union Oil Co, 260 N W 2d 1

83. Cal —Vieth v Klett, 198 P 2d 314, 88 Cal App 2d 23

Retention of possession by claimant

Tex —Sullivan v Barnett, 471 S W 2d 39

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87. Retention of interest

U S —In re Johnson, supra, n 77

90. Okl —First Nat Bank of Sentinel v Anderson, 240 P 2d 1066, 206 Okl 54

93. Cal —In re Ronayne's Estate, 231 P 2d 105, 104 Cal App 2d 53

94. Tex —Nash v Conatser, Civ App, 410 S W 2d 512

96. Tex —Moorhouse v Crew, Civ App, 273 S W 2d 654, err ref no rev err

99. U S —Beall v Pinckney, C C A Fla, 150 F 2d 467, 161 A L R 1281

Ala —MacPherson v Tillman, 414 So 2d 943

Cal —Vieth v Klett, supra, n 83

Minn —Cysewski v Steingraber, supra, n 10

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5. U S —In re Johnson, D C Cal, 97 F Supp 779, revd on oth grds, C A, 195 F 2d 717

§ 174. —— Conveyance as Security for Debt

10. N C —Stokes v Smith, 100 S E.2d 85, 246 N C 694

§ 175. Lease

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Summers, The Law of Oil and Gas § 217.

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26. Ala—Barber v Beckett, 39 So 2d 17 251 Ala 569
Tex—Vaughn v Vaughn, Civ App, 279 S W 2d 427, err ref no rev err

27. Ark—Vesper v Woolsey 332 S W 2d 602, 231 Ark 782
Fla—Marsh v Hartley, App, 109 So 2d 34
Iowa—In re Sueppel's Estate 124 N W 2d 154, 255 Iowa 974
Kan—Bellport v Harder, 411 P 2d 725 196 Kan 294
N D—Larson v Cole 33 N W 2d 325, 76 N D 32
Okl—Bowman v Bowman, 206 P 2d 582, 201 Okl 384
Tex—Thompson v Thompson, 236 S W 2d 779, 149 Tex 632—Cline v Henry Civ App, 239 S W 2d 205 err ref no rev err—Hollifield v Hilton Civ App, 515 S W 2d 717, err ref no rev err

28. Tex—Long Bell Lumber Co v Miller, Civ App 240 S W 2d 405

30. Tex—Long Bell Lumber Co v Miller, Civ App 240 S W 2d 405—West v Austin Nat Bank Civ App, 427 S W 2d 906, err ref no rev err

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35. Tex—Duncan v Woolf Civ App, 380 S W 2d 862, err ref no rev err

38. Rental to obtain funds to make payments on property
U S—In re Turner Bkrtcy Mo, 44 B R 118

41 Iowa—Olsen v Lohman 13 N W 2d 332 234 Iowa 580

45. Mineral lease
Tex—Crews v General Crude Oil Co, Civ App 287 S W 2d 243

§ 176. Miscellaneous Acts of Abandonment

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49 N D—C J S cited in Larson v Cole, 33 N W 2d 325 329 76 N D 32

60 Ala—Riggan v Johnson 105 So 2d 101 268 Ala 101

§ 177. Abandonment of Business Homestead

62 Tex—Long Bell Lumber Co v Miller, supra, n 28

63 Tex—City of El Paso v Long Civ App 209 S W 2d 950 err ref no rev err

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74. Tex—City of El Paso v Long, supra n 63

§ 178. Power of Husband to Abandon Homestead without Wife's Consent

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81. U S—Radtke v Radtke, 19 N W 2d 169 247 Wis 330

83. Ark—Sims v McFadden, 213 S W 2d 375, 217 Ark 810

88. S D—Crawford v Carter 37 N W 2d 241 72 S D 514
Tex—Crews v General Crude Oil Co Civ App 287 S W 2d 243

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94 U S—C J S cited in Mims v Dixie Finance Corp D C Ga 426 F Supp 627 638
Ariz—State v Smith App 628 P 2d 65 129 Ariz 28
Kan—Iowa Mut Ins Co v Parr, 370 P 2d 400, 189 Kan 475 94 A L R 2d 960
Minn—Wallace T Bruce, Inc v Najarian, 81 N W 2d 282, 249 Minn 99
Or—In re Moore's Estate, 307 P 2d 483, 210 Or 23, 65 A L R 2d 715, mandate recalled 308 P 2d 180, 210 Or 23
Wash—In re Brown's Estate, 183 P 2d 768, 28 Wash 2d 436

Abandonment of portion of homestead
N D—Falconer v Farmers Union Oil Co, 260 N W 2d 1

95. Kan—In re Garden's Estate, 148 P 2d 745, 158 Kan 554

§ 180. By Whom Made

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6. Nev—I H Kent Co v Miller, 366 P 2d 520, 77 Nev 471
N D—Larson v Cole, 33 N W 2d 325, 76 N D 32

Divorced wife's waiver of rights in community property
La—Knight v Parish Nat Bank, App 1 Cir, 457 So 2d 1219

§ 181. How Waived

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13. U S—U S v McDonald, D C Ill, 86 F R D 204
La—Miller v Southeastern Finance Service, Inc, App, 122 So 2d 877 82 A L R 2d 979

14 La—Miller v Southeastern Finance Service, Inc App 122 So 2d 877 82 A L R 2d 979

16. As against third persons
La—Miller v Southeastern Finance Service, Inc, App 122 So 2d 877, 82 A L R 2d 979

§ 182. —— By Contract in General

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19 Vt—In re Prudenzano's Will, 68 A 2d 704, 116 Vt 55

Antenuptial agreements
S D—Schutterle v Schutterle, 260 N W 2d 341

Waiver by executory contract contrary to public policy
Kan—Celco Inc of America v Davis Van Lines, Inc 598 P 2d 188, 226 Kan 366

21. Alaska—Mealey v Martin 468 P 2d 965
Kan—Iowa Mut Ins Co v Parr, 370 P 2d 400, 189 Kan 475, 94 A L R 2d 960

23. Cal—In re Teel's Estate 210 P 2d 1, 34 Cal 2d 149
Wash—In re Funderburk's Estate, 521 P 2d 60, 10 Wash App 863

Homestead right held not waived
(3) Other instances
Alaska—Mealey v Martin, 468 P 2d 965
La—Barlow v Carr's Estate, App, 292 So 2d 721
Tex—Home Imp Loan Co v Brewer, Civ App, 318 S W 2d 673, err ref no rev err—Englander Co v Kennedy, Civ App, 424 S W 2d 305, err ref no rev err 428 S W 2d 806

24. Ga—Bell v Allied Finance Co, 112 S E 2d 609 215 Ga 631
Tex—Home Imp Loan Co v Brewer, Civ App, 318 S W 2d 673, err ref no rev err

§ 183. —— Mortgage Waiving Exemption

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36. U S—In re Kelley, Bkrtcy S D, 7 B R 384
Colo—Landmeier v Hanna, 401 P 2d 86, 157 Colo 82
La—Miller v Southeastern Finance Service, Inc, App, 122 So 2d 877, 82 A L R 2d 979
Tex—Abilene White Truck Co v Patrey, Civ App, 384 S W 2d 211, err ref no rev err

§ 184. —— Joinder of Husband and Wife

39. Iowa—Merchants Mut Bonding Co v Underberg, 291 N W 2d 19
Ky—Forster v Smith 267 S W 2d 741

§ 185. —— Implied Waiver in General

40. Cal—In re Teel's Estate, supra, n 23
N C—North Carolina Nat Bank v Sharpe, 272 S E 2d 368, 49 N C App 687, app dism 276 S E 2d 916, 302 N C 217

Implied waiver not favored
N C—Narron v Musgrave, 73 S E.2d 6, 236 N C 388

41. Facts creating implied waiver
(5) Other matters
Tex—Lee v Honea, Civ App, 349 S W 2d 110, err ref no rev err, 352 S W 2d 717, 163 Tex 129

42. N C—North Carolina Nat Bank v Sharpe, 272 S E 2d 368, 49 N C App 687, app dism 276 S E 2d 916, 302 N C 217

§ 186. —— Failure to Object or Consent to Levy and Sale

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45. Ariz—McFarland v Pruitt, 210 P 2d 963, 69 Ariz 133
Mo—Martin v Lewis, 244 S W 2d 87
N C—North Carolina Joint Stock Land Bank of Durham v Bland, 56 S E 2d 30, 231 N C 26

A mere failure to resist a forced sale in violation of exemption rights is not a waiver of such rights [51.5]

51.5. Fla—Albritton v Scott, 74 So 975, 73 Fla 856—White v Posick, App, 150 So 2d 263

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Homestead ⇐175, 176.

53. U S—Elzea v National Bank of Georgia, C A Ga, 570 F 2d 1248
La—Ouachita Nat Bank in Monroe v Rowan, App, 345 So 2d 1014, cert den 98 S Ct 1242, 434 U S 1065, 55 L Ed 2d 767
N D—Neset v Rudman, 74 N W 2d 826
Tex—Franklin v Woods, Civ App, 598 S W 2d 946

Waiver not enforceable
Fla—Sherbill v Miller Mfg Co, 89 So 2d 28, 60 A L R 2d 1445—Daniels v Katz, App, 237 So 2d 58

Effect on right to possession
Okl—Cassina v Jones, 340 P 2d 482

56. La—Corcoran v Andrews, App, 195 So 2d 767

57. Cal—Wood v Emig, 137 P 2d 875, 58 Cal App 2d 851
La—Lamar Life Ins Co v Babin, App, 148 So.2d 366, affd 163 So 2d 81, 246 La 19
N D—Small v Cunningham, 120 N W 2d 13
Or—Fleischhauer v Bilstad, 379 P 2d 880, 233 Or 578
Tex—Eagle Lumber Co v Trainham, Civ App, 365 S W 2d 702, err ref no rev err—Hoffman v Love, Civ App, 494 S W 2d 591, err ref no rev err, Sup, 499 S W 2d 295

59. Iowa—Merchants Mut Bonding Co v Underberg, 291 N W 2d 19
N C—Stokes v Smith, 100 S E 2d 85, 246 N C 694

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67. S D —Sidle v Cheney, 56 N W 2d 86, 74 S D 540

71. Okl —Kunauntubbee v Greer, 323 P 2d 725

72. Minn —Cysewski v Steingraber, 24 N W 2d 266 222 Minn 221

§ 188. Special Waiver

73. N C —North Carolina Joint Stock Land Bank of Durham v Bland, supra, n 45

74. N C —North Carolina Joint Stock Land Bank of Durham v Bland, supra, n 45

77. N C —North Carolina Joint Stock Land Bank of Durham v Bland, supra, n 45

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87. La —Anderson v Finley, App, 84 So 2d 845
S D —Sidle v Cheney, supra, n 67

90. La —Lamar Life Ins Co v Babin, 163 So 2d 81, 246 La 19

92. Ark —Sims v McFadden, 233 S W 2d 375, 217 Ark 810

96. La —Harvey v Thomas, 119 So 2d 446, 239 La 510

§ 192. By Record

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1. Cal —Gray v Bybee, 141 P 2d 32, 60 Cal App 2d 564

§ 193. By Conduct

5. U S —Shell Oil Co v Manley Oil Corporation, D C Ill, 50 F Supp 21
Iowa—Becker v Gustafson 279 N W 2d 744
Minn —Argonaut Ins Co v Cooper, 261 N W 2d 743
Tex —Barton v Wood, Civ App 175 S W 2d 437, err ref —Duin v King, Civ App, 317 S W 2d 236—Mazow v Brazle, Civ App 337 S W 2d 734—Savell v Flint, Civ App, 347 S W 2d 24, err ref no rev err
Wash —Code v London, 178 P 2d 293 27 Wash 2d 279

6. Estoppel not warranted
Okl —Williams v Jones 324 P 2d 541
Tex —Anderson v Bundick, Civ App, 245 S W 2d 318, err ref no rev err

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8. Kan —Carter v Carter, 353 P 2d 499, 187 Kan 74
La —Smith v Marino, App, 28 So 2d 780—Cloud v Cloud, App, 127 So 2d 560

9. Ala —C.J.S. cited in Harrell v Henderson 69 So 2d 868 870 260 Ala 211
Fla —Jones v Neibergall, 53 So 2d 918
Where no showing of injury to heirs of homesteader by widow's delay in filing petition, estoppel did not bar exemption —Harrell v Henderson, 69 So 2d 868, 260 Ala 211

14. Tex —Chasteen v Miller, Civ App, 349 S W 2d 772, err ref no rev err

17. Tex —Englander Co v Kennedy, Civ App, 424 S W 2d 305, err ref no rev err 428 S W 2d 806

19. Tex —Barton v Wood supra, n 5

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21. Fla —Shambow v Shambow, 15 So 2d 836, 153 Fla 760

Additional acts or representations have been held not to estop one from claiming a homestead.[36]

36.1. U S —Grant v Mossman, C A Kan, 184 F 2d 496
Cal —Viotti v Giumi, 41 Cal Rptr 345, 230 C A 2d 730—James v P C S Ginning Co 80 Cal Rptr 457 276 C A 2d 19
Fla —Race v Moseley, App, 308 So 2d 137

Failure to select exemption prior to levy
Mo —Krauzma v Kelsey, 262 S W 2d 844

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Additional acts have been held not to estop one from claiming a homestead[43]

43.5. Ark —Pascall v Smith 588 S W 2d 700, 267 Ark 66

Election to have proceeds of sheriff's sale
La —Cloud v Cloud, App, 145 So 2d 331

§ 195. Estoppel of Either Spouse by Acts of the Other

53. S D —Christiansen v United Nat Bank of Vermillion 176 N W 2d 65, 84 S D 695

56. Tex —Balcomb v Vasquez, Civ App, 241 S W 2d 650, err ref no rev err

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59. Idaho—C J S cited in Matter of Estate of Bowman, 609 P 2d 663, 667, 101 Idaho 131
S D —Alsenbrey v Hensley, 17 N W 2d 267, 70 S D 294
Tenn —Hipshire v Stapleton, 418 S W 2d 457, 57 Tenn App 339

Continuance following divorce
Tex —Burk Royalty Co v Riley, 475 S W 2d 566

60. Ark —Vesper v Woolsey, 332 S W 2d 602, 231 Ark 782
N C —Williams v Johnson, 53 S E 2d 227, 230 N C 338
Okl —Pearson v Logan, 255 P 2d 255, 208 Okl 234
Tex —Alley v Barnes, Civ App, 231 S W 2d 990—Sullivan v Barnett, 471 S W 2d 39

62. U S —Giblin v Beeler, C A Kan, 396 F 2d 584

63. Neb —C J S cited in Karls v Nichols, 28 N W 2d 595, 597, 148 Neb 712—Sanne v Sanne, 94 N W 2d 367, 167 Neb 683
Tex —West v Austin Nat Bank, Civ App, 427 S W 2d 906, err ref no rev err

64. Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294
La —Smith v Marino, supra, n 8—Anderson v Finley, App, 84 So 2d 845
Neb —Phifer v Miller, 45 N W 2d 907, 153 Neb 748—Horn v Gates, 53 N W 2d 84, 155 Neb 667
Okl —Brown v Turner, 207 P 2d 927, 201 Okl 570—Alexander v Love County Nat Bank of Marietta, 223 P 2d 363, 203 Okl 402—State ex rel Com'rs of Land Office v Creswell, 391 P 2d 220
Tex —Alley v Barnes, Civ App, 231 S W 2d 990—Long Bell Lumber Co v Miller, Civ App, 240 S W 2d 405—Morris v Porter Civ App, 393 S W 2d 385, err ref no rev err

Intention to abandon
U S —Giblin v Beeler, C A Kan, 396 F 2d 584
Okl —Russell v Key, 155 P 2d 238, 195 Okl 49

65. La —Anderson v Finley, App, 84 So 2d 845

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67. Minn —First Nat Bank of Mankato v Wilson, 47 N W 2d 764, 234 Minn 160
Neb —Horn v Gates, supra, n 64
Or —C.J.S. cited in Fleischhauer v Bilstad, 379 P 2d 880, 887, 233 Or 578

68. Ark —Kinney v Patterson, 282 S W 2d 809, 225 Ark 393
Neb —Horn v Gates, supra, n 64.

69. Neb —Horn v Gates, 53 N W 2d 84, 155 Neb 667—Musser v Zurcher, 146 N W.2d 559, 180 Neb 882

70. Miss —Livelar v Kepner, 146 So 2d 346, 244 Miss 723
Or —C.J.S. cited in Fleischhauer v Bilstad, 379 P 2d 880, 887, 233 Or 578

77. Tex —Canales v Oliver, Civ App, 322 S W 2d 411, err ref no rev err

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80. Business homestead
Tex —Long Bell Lumber Co v Miller, supra, n 64

85. U S —Giblin v Beeler, C A Kan, 396 F 2d 584

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18. Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294
La —Smith v Marino, 28 So 2d 780
Minn —Application of Hickman, 23 N W 2d 593, 222 Minn 161
N D —C.J.S. quoted in Larson v Cole, 33 N W 2d 325, 328, 76 N D 32
Okl —Mercer v Mercer, 365 P 2d 554—State ex rel Com'rs of Land Office v Creswell, 391 P 2d 220

Certain and conclusive evidence
(3) Other statements
Tex —Morris v Porter Civ App, 393 S W 2d 385, err ref no rev err

Other designations of required evidence or proof of abandonment
(3) Okl —Hildebrand v Harrison, 361 P 2d 498

19. Other designations of required evidence or proof
(3) Okl —Cooper v Kiester, 185 P 2d 458, 199 Okl 238
(4) Tex —City of El Paso v Long, Civ App, 209 S W 2d 950, err ref no rev err
(6) Additional designations
Okl —First Nat Bank of Sentinel v Anderson, 240 P 2d 1066 206 Okl 54—Kunauntubbee v Greer, 323 P 2d 725
Tex —Walker-Smith Co v Whaley, Civ App, 185 S W 2d 614—West v Austin Nat Bank, Civ App, 427 S W 2d 906, err ref no rev err

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20. Tex —City of El Paso v Long, supra, n 19

22. Okl —Alexander v Love County Nat Bank of Marietta, 223 P 2d 363, 203 Okl 402

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55 Miss —Livelar v Kepner, 146 So 2d 346, 244 Miss 723

Intent
(2) Other statements
Neb —Musser v Zurcher, 146 N W 2d 559, 180 Neb 882

56. Or —Fleischhauer v Bilstad, 379 P 2d 880, 233 Or 578

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61. Ark —Vesper v Woolsey, 332 S W 2d 602, 231 Ark 782
N D —C.J.S. cited in Larson v Cole, 33 N W 2d 325, 330, 76 N D 32
Tex —City of El Paso v Long, supra, n 19

62. Ark —Monroe v Monroe, 465 S W 2d 347, 250 Ark 434

65. Registering as voter
(3) Other cases
Neb —Horn v Gates, 53 N W 2d 84, 155 Neb 667

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67. Neb —Horn v Gates, supra, n 65

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89. N D —Larson v Cole, 33 N W 2d 325, 76 N D 32

98. Ala —Thomas v Thomas, 18 So 2d 544, 245 Ala 607

Ark —Washington v Jolliff, 288 S W 2d 600, 226 Ark 190

Fla —Johnson v Johnson, App, 140 So 2d 358

Ill —Wiegand v Wiegand, 103 N E 2d 137, 410 Ill 533—Peck v Peck, 157 N E 2d 249, 16 Ill 2d 268, 73 A L R 2d 723

Mo —Borchers v Borchers, 179 S W 2d 8, 352 Mo 601

N D —Neset v Rudman, 74 N W 2d 826

Okl —Brown v Turner, 207 P 2d 927, 201 Okl 570—Alexander v Love County Nat Bank of Marietta, supra, n 22—In re Snider's Estate, 226 P 2d 429, 204 Okl 22—Kunauntubbee v Greer, 323 P 2d 725

Tex —Hix v De Phillipi, Civ App, 216 S W 2d 643 err ref no rev err —Prince v North State Bank of Amarillo, Civ App, 484 S W 2d 405, err ref no rev err

Wis —Radtke v Radtke, 19 N W 2d 169, 247 Wis 330

1. Neb —Horn v Gates, 53 N W 2d 84, 155 Neb 667

4. S D —Crawford v Carter, 52 N W 2d 302, 74 S D 316

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7. Fla —Marsh v Hartley, App, 109 So 2d 34

Ill —Kawszewicz v Kawszewicz, 53 N E 2d 386, 385 Ill 461—Rice v United Mercantile Agencies of Louisville, Ky, 70 N E 2d 618, 395 Ill 512

Kan —Bellport v Harder, 411 P 2d 725, 196 Kan 294

La —Smith v Marino, App, 28 So 2d 780

Minn —Cysewski v Stemgraber, 24 N W 2d 266, 222 Minn 221

Okl —Russell v Key, 155 P 2d 238, 195 Okl 49—Cooper v Kiester, 185 P 2d 458, 199 Okl 218

S D —Knittel v G Sommers & Co, 28 N W 2d 878, 72 S D 5

Tex —Richerson v Pounds, Civ App, 223 S W 2d 668—Alley v Barnes, Civ App, 231 S W 2d 990—West v Austin Nat Bank, Civ App, 427 S W 2d 906, cert ref no rev err —Simank v Alford, Civ App, 441 S W 2d 234, err ref no rev err

11. U S —Giblin v Beeler, C A Kan, 396 F 2d 584

Miss —Crosby v Hatten, 56 So 2d 705, 213 Miss 240

N D —Larson v Cole, 33 N W 2d 325, 76 N D 32

13. Tex —Smith v Little, Civ App, 217 S W 2d 881 err ref no rev err

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16. Fla —Beensen v Burgess, App, 218 So 2d 517

Neb —Karls v Nichols, 28 N W 2d 595, 148 Neb 712

N D —Larson v Cole, supra, n 11

Okl —State ex rel Com'rs of Land Office v Creswell, 391 P 2d 220

Tex —West v Austin Nat Bank, Civ App, 427 S W 2d 906, err ref no rev err

22. Validity of lease

Tex —Crews v General Crude Oil Co, Civ App, 287 S W 2d 243

§ 199. Questions of Law and Fact

24. Ala —Eddleman v Cade, 73 So 2d 362, 261 Ala 154

Ark —Vesper v Woolsey, 332 S W 2d 602, 231 Ark 782

Fla —City of Jacksonville v Bailey, 30 So 2d 529, 159 Fla 11

Neb —Horn v Gates, supra, n 1

Okl —Kunauntubbee v Greer, 323 P 2d 725—Mercer v Mercer, 365 P 2d 554—State ex rel Com'rs of Land Office v Creswell, 391 P 2d 220

Tex —Walker-Smith Co v Whaley, Civ App, 185 S W 2d 614—Hix v De Phillipi, Civ App, 216 S W 2d 643, err ref no rev err —Lewis v Brown, Civ App, 321 S W 2d 313, err ref no rev err —West Texas State Bank of Snyder v Helms, Civ App, 326 S W 2d 47—Coleman v Banks, Civ App, 340 S W 2d 737, err ref no rev err —Day v Day, Civ App, 421 S W 2d 703

25. Tex —Ray v Metzger, 172 S W 2d 480, 141 Tex 372—R B Spencer & Co v Green, Civ App, 203 S W 2d 957—Coleman v Banks, Civ App, 349 S W 2d 737, err ref no rev err

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27. Tenn —Hughett v Hughett, 196 S W 2d 720, 29 Tenn App 580

28. Okl —Cooper v Kiester, supra, n 7—Hildebrand v Harrison, 361 P 2d 498

30. Tex —Hollifield v Hilton, Civ App, 515 S W 2d 717, err ref no rev err

32. Fla —Beck v Wylie 60 So 2d 190

34. Tex —Walker-Smith Co v Whaley, supra, n 24

35. Tex —West Texas State Bank of Snyder v Helms, Civ App, 326 S W 2d 47

36. Tex —Crews v General Crude Oil Co, Civ App, 287 S W 2d 243

Abandonment not shown as matter of law

Tex —City of El Paso v Long, Civ App, 209 S W 2d 950 err ref no rev err

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41 Tex —Schwarzer v Calcasieu Lumber Co, Civ App, 176 S W 2d 597

44 Okl —Alexander v Love County Nat Bank of Marietta, 223 P 2d 363, 203 Okl 402—State ex rel Com rs of Land Office v Creswell, 391 P 2d 220

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52. Ariz —McFarland v Pruitt, 210 P 2d 963, 69 Ariz 133

Ark —Sulcer v Northwestern Nat Ins Co (of Milwaukee, Wis), 566 S W 2d 397, 263 Ark 583

Cal —Walton v Walton, 138 P 2d 54, 59 Cal App 2d 26

N Y —Wyoming County Bank & Trust Co v Kiley, 430 N Y S 2d 900, 75 A D 2d 477—People v McArdle, 430 N E 2d 1309, 55 N Y 2d 639, 446 N Y S 2d 256

Tex —Whalen v Richardson, Civ App, 351 S W 2d 941—Williams v Saxon, Civ App, 521 S W 2d 88

53. Ill —Loekelt v Stoltz, 55 N E 2d 286, 323 Ill App 164

§ 202. Levy of Attachment or Execution

55 Ariz —McFarland v Pruitt supra, n 52

Colo —Patterson v Serafini, 532 P 2d 965, 187 Colo 209

Miss —Felder v Felder's Estate, 13 So 2d 823, 195 Miss 326

Tex —Panhandle Lumber Co v Fairey, Civ App, 3 S W 2d 941

Attachment lien void

(2) Other matters

Tex —Lewis v Brown, Civ App, 321 S W 2d 313, err ref no rev err

Lien on excess value of property over maximum homestead exemption

Cal —Swearingen v Byrne, 136 Cal Rptr 736, 67 C A 3d 580

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56. U S —U S v McDonald, D C Ill, 86 F R D 204 —In re Latulippe, Bkrtcy Vt, 13 B R 528

Cal —Bonner v Superior Court for Los Angeles County, 133 Cal Rptr 592, 63 C A 3d 156

Mich —Williams v Dean, 97 N W 2d 42, 356 Mich 426

N C —Stokes v Smith, 100 S E 2d 85, 246 N C 694

Tex —O Neil v Mack Trucks, Inc, 542 S W 2d 112, mand recalled and reissued, Sup, 551 S W 2d 32

Execution absolutely void

(2) Other matters

Minn —Triangle Refineries, Inc v Bura, App, 364 N W 2d 863

Tex —Lewis v Brown, Civ App, 321 S W 2d 313, err ref no rev err

62. Ala —Gilbreath v Levi, 119 So 2d 210, 270 Ala. 413

65. Wash —Aronson v Murk, 406 P 2d 607, 67 Wash 2d 1

§ 203. Execution and Judicial Sales

67 U S —Bennett v Behring Corp, D C Fla, 466 F Supp 689

Cal —Robbins v Bueno, 68 Cal Rptr 347, 262 C A 2d 79

Fla —Olesky v Nicholas, 82 So 2d 510

N M —Laughlin v Lumbert 362 P 2d 507, 68 N M 351

N C —Williams v Johnson, 53 S E 2d 277, 230 N C 338—Stokes v Smith, 100 S E 2d 85, 246 N C 694

Tex —Hatch v Kubena, Civ App, 190 S W 2d 175, revd on oth grds, 193 S W 2d 175, 144 Tex 627—Meza v Ramirez, Civ App, 415 S W 2d 530

Wash —City of Algona v Sharp, 638 P 2d 627, 30 Wash App 837

Homestead exemption unavailable

N M —Speckner v Riebold, 523 P 2d 10, 86 N M 275

Intent of prohibition

Fla —Tullis v Tullis, App, 342 So 2d 88 Approved, Sup, 360 So 2d 375

Constitutional provision

Fla —Point East One Condominium Corp, Inc v Point East Developers, Inc, App 348 So 2d 32

Creditors of deceased husband

Kan —Matter of Fink's Estate, 609 P 2d 211, 4 Kan App 2d 523

68. La —Ellis v Dillon, App, 345 So 2d 1241

Wash —First Nat Bank of Everett v Tiffany, 242 P 2d 169, 40 Wash 2d 193

69. U S —In re Smith, Bkrtcy Fla, 21 B R 345

Fla —Chasteen v Chasteen, App, 213 So 2d 509

Ill —Dixon v Moller, 356 N E 2d 599, 1 Ill Dec 411, 42 Ill App 3d 688

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72 Or —Clawson v Anderson, 434 P 2d 462, 248 Or 347

Tex —Blake v Fuller Civ App, 184 S W 2d 148

73 Operation of constitutional provision

(1) La —Cloud v Cloud, App, 127 So 2d 560

(5) La —Cloud v Cloud, App, 127 So 2d 560—Cloud v Maryland Cas Co, App, 256 So 2d 830

75 Utah—C J S cited in Gray v Stevens, 302 P 2d 273, 274, 5 Utah2d 361

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78. N Y —Wyoming County Bank & Trust Co v Kiley, 430 N Y S 2d 900, 75 A D 2d 477

Ohio—Cleveland Trust Co v Smith, App, 87 N E 2d 381

83 Fla —Hicks v Mid-Florida Production Credit Ass'n, App, 374 So 2d 566

N H —Curtis Inn, Inc v Pratte, 54 A 2d 357, 94 N H 380

84 Forced sale exemption inapplicable

Wash —Felton v Citizens Federal Sav and Loan Ass'n of Seattle, 679 P 2d 928, 101 Wash 2d 416 (overruling Mahalko v Arctic Trading Co, 99 Wash 2d 30, 659 P 2d 502)

§ 205. —— Partition

85. Ill —Ball v Ball, 326 N E 2d 782, 27 Ill App 3d 678

Wis —Reckner v Reckner App, 314 N W 2d 159, 105 Wis 2d 425

87. Tex —Cheswick v Freeman Civ App, 282 S W 2d 315, revd on oth grds 287 S W 2d 171, 155 Tex 372

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88. Mich —Dunn v Minnema, 36 N W 2d 182, 323 Mich 687, 7 A L R 2d 1099

89. Ohio—Gledhill v Walker, 55 N E 2d 647, 143 Ohio St 381

§ 207. Statutory Provisions

94. U S —Valley Bank of Nevada v Skeen, D C Tex, 401 F Supp 139, affd 532 F 2d 185, cert den 97 S Ct 98, 429 U S 834, 50 L Ed 2d 99

§ 208. Duty of Officer Making Levy

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96. Mo —Hallauer v Lackey, 188 S W 2d 30, 353 Mo 1244—Hallauer v Lackey, Mo, supra

N C —North Carolina Nat Bank v Sharpe, 272 S E 2d 368, 49 N C App 687, app dism 276 S E 2d 916, 302 N C 217

§ 210. —— Necessity of Claim

2. U S —I H Kent Co v Busscher C A Nev, 277 F 2d 901

La —Acosta v Whitney Nat Bank of New Orleans 38 So 2d 391, 214 La 700

N M —Speckner v Riebold, 523 P 2d 10, 86 N M 275

Ohio—Gledhill v Walker, 55 N E 2d 647, 143 Ohio St 381

Or —Troutman v Erlandson, 611 P 2d 343, 46 Or App 273

Tex —Smith v Lockhart, Civ App, 177 S W 2d 117

Wis —Anchor S & L Ass'n v Week, 213 N W 2d 737, 62 Wis 2d 169

Creditor's bill

Or —Smith v Popham, 513 P 2d 1172, 266 Or 625

3. Fla —Grant v Credithrift of America, Inc, App, 402 So 2d 486

Ill —Rice v United Mercantile Agencies of Louisville, Ky, 70 N E 2d 618, 395 Ill 512

Mo —Hyde v Copeland, 173 S W 2d 684, 351 Mo 580—C J S. cited in Kurszma v Kelsey, 262 S W 2d 844, 846

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9. Ariz —State v Smith, App, 628 P 2d 65, 129 Ariz 28

§ 211. —— Persons Who May Make Claim

11. Nev —I H Kent Co v Miller 366 P 2d 520, 77 Neb 471

12. La —Lamar Life Ins Co v Babin App, 148 So 2d 366, affd 163 So 2d 81 246 La 19

13. Tex —Walters v Thompson, Civ App, 189 S W 2d 766, err ref w m

14. Owner of life estate

Tex —Conrad v Judson, Civ App, 465 S W 2d 819, err ref no rev err, cert den 92 S Ct 1312, 405 U S 1041, 31 L Ed 2d 582

Purchaser of homestead

Tex —Hoffman v Love, Civ App, 494 S W 2d 591, err ref no rev err, Sup 499 S W 2d 295

Purchasers

Tex —McGahey v Ford Civ App, 563 S W 2d 857, err ref no rev err

17. Ill —Magner v Muslin, 100 N E 2d 344, 344 Ill App 475

18. Extent of right

Ala —Lee v Lee, 90 So 2d 775, 265 Ala 226

§ 212. —— Time of Making Claim

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However, where either spouse makes a homestead exemption claim, the other spouse may not make an in lieu of homestead exemption claim [22.5]

22.5 U S —In re Reinour, Bkrtcy N D, 49 B R 406

23 Ky —Moore v Sanders, 178 S W 2d 842, 297 Ky 13

Prior to proceedings against homestead

(2) Other cases —Young v Hensler, 164 P 2d 65, 72 Cal App 2d 67

25. U S —In re Hamill, D C Kan, 317 F Supp 909

26. U S —In re Baum Bkrtcy Va, 15 B R 538

Iowa—Francksen v Miller, 297 N W 2d 375

Or —Garrison v Seiber, 513 P 2d 1180, 266 Or 368

Va —Wilson v Virginia Nat Bank, 196 S E 2d 920, 214 Va 14

In Louisiana

(1) La —Guidry v Sigler, 20 So 2d 631 set aside on oth grds 21 So 2d 232

Cloud v Cloud App, 127 So 2d 560

(2) La —Lamar Life Ins Co v Babin, 163 So 2d 81 246 La 19

28. Ga —Slade v Barber 37 S E 2d 143, 200 Ga 405

Okl —Kelough v Neff, 382 P 2d 135

Wis —Anchor S & L Ass'n v Week, 213 N W 2d 737, 62 Wis 2d 169

30 Cal —Hansford v Lassar, 125 Cal Rptr 804, 53 C A 3d 364

31. Neb —J H Melville Lumber Co v Maroney, 16 N W 2d 527, 145 Neb 374

N M —Inman v Brown 281 P 2d 474, 59 N M 196

Before expiration of period of redemption

Ill —Wabash Production Credit Ass'n v Stroup, 250 N E 2d 184, 111 Ill App 2d 289

33. Neb —J H Melville Lumber Co v Maroney, supra, n 31

34. In subsequent partition suit

Ill —Dixon v Moller, 356 N E 2d 599, 1 Ill Dec 411, 42 Ill App 3d 688

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41. U S —In re Smith, Bkrtcy Fla, 21 B R 345

Ky —Feltner v Colwell, 172 S W 2d 219, 294 Ky 581—Moore v Sanders, supra, n 23

La —Cloud v Cloud, App, 127 So 2d 560

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Ill —Dixon v Moller, 356 N E 2d 599, 1 Ill Dec 411, 42 Ill App 3d 688

§ 214. —— Notice and Filing of Claim

53. Fla —Grant v Credithrift of America, Inc, App, 402 So 2d 486

§ 215. —— Contest and Determination of Claim

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58. Cal —Application of Rauer's Collection Co, 196 P 2d 803, 87 Cal App 2d 248—Schoenfeld v Norberg, 90 Cal Rptr 47, 11 C A 3d 735

La —Acosta v Whitney Nat Bank of New Orleans, supra, n 2

Tex —Home Imp Loan Co v Brewer, Civ App, 318 S W 2d 673, err ref no rev err

Wash —Barouh v Israel, 281 P 2d 238, 46 Wash 2d 327—Costanzo v Harris, 427 P 2d 963, 71 Wash 2d 254

59. Particular remedies

(1) Ehlers v Campbell, 23 N W 2d 727, 147 Neb 572

60. Fla —Grant v Credithrift of America, Inc, App, 402 So 2d 486

Neb —Ehlers v Campbell, supra, n 59

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77. Cal —Blue v Superior Court, Los Angeles County, 305 P 2d 209, 147 C A 2d 278—Schoenfeld v Norberg, 90 Cal Rptr 47, 11 C A 3d 735

N C —Stokes v Smith, 100 S E 2d 85, 246 N C 694

Ohio—Gledhill v Walker, supra, n 2

Who entitled to exemption

U S —In re Schneider, C A Cal, 9 B R 488

85. Wash —Costanzo v Harris, 427 P 2d 963, 71 Wash 2d 254

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94. N C —Williams v Johnson, 53 S E 2d 277, 230 N C 338—Stokes v Smith, 100 S E 2d 85, 246 N C 694

5. Wash —Costanzo v Harris, 427 P 2d 963, 71 Wash 2d 254

Separate appraisals and sales for separate liens

La —Corcoran v Andrews, App, 195 So 2d 767

Failure to comply not prohibiting sale

N Y —Perry v Zarcone, 414 N Y S 2d 604, 98 Misc 2d 899 mod on oth grds 431 N Y S 2d 50, 77 A D 2d 881, app dism 417 N E 2d 1010, 52 N Y 2d 785, 436 N Y S 2d 622

6. Mo —Ferm v Crenshaw, App, 468 S W 2d 706

7. Cal —Viotti v Giomi, 41 Cal Rptr 345, 230 C A 2d 730

Who entitled to exemption

Cal —Strangman v Duke, 295 P 2d 12, 140 C A 2d 185

95. Tex —Blake v Fuller, Civ App, 184 S W 2d 148

96. Ky —Ball v Smiddy, 249 S W 2d 715

98. Miss —Thompson v Dyess, 67 So 2d 721, 218 Miss 770

5 Cal —Blue v Superior Court, Los Angeles County, 305 P 2d 209, 147 C A 2d 278

7. Cal —Vest v Superior Court In and For City and County of San Francisco, 294 P 2d 988, 140 C A 2d 91

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12. Cal —Phelps v Loop, 165 P 2d 738, 78 Cal App 2d 39

13. Effect of failure to comply with statute

(2) Other cases —Phelps v Loop, 165 P 2d 738, 73 Cal App 2d 39—Viotti v Giomi, 41 Cal Rptr 345, 230 C A 2d 730

15. Cal —Blue v Superior Court, Los Angeles County, 305 P 2d 209, 147 C A 2d 278

27. Cal —Blue v Superior Court, Los Angeles County, 305 P 2d 209, 147 C A 2d 278

Fla —Race v Moseley, App, 308 So 2d 137

N C —ITCO Corp v West, 260 S E 2d 443, 44 N C App 185

§ 218. —— Powers, Duties, and Determination of Appraisers

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65. Cal —Wells Fargo Bank v Pal Investments, Inc, 157 Cal Rptr 818, 96 C A 3d 431

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76. Compensation

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78. N C —Williams v Johnson, 53 S E 2d 277, 230 N C 338

84. Cal —Application of Rauer's Collection Co, supra, n 76

91. Ala —Harrell v Henderson, 69 So 2d 868, 260 Ala 211

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3. N C —ITCO Corp v West 260 S L 2d 443 44 N C App 185

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22. Cal —Blue v Superior Court, Los Angeles County 305 P 2d 209 147 C A 2d 278

23. N C —Williams v Johnson 53 S E 2d 277, 230 N C 338

33. N M —Laughlin v Lumbert, 362 P 2d 507 68 N M 351

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39 La —Acosta v Whitney Nat Bank of New Orleans, 38 So 2d 391, 214 La 700

Wyo —Stolldorf v Stolldorf, 384 P 2d 969

Property incapable of division

Neb —Schroeder v Ely, 73 N W 2d 172, 161 Neb 262

Ala —Brown v Sieber Civ App 379 So 2d 620

44. Ill —Taylor v Bukowski, 169 N E 2d 89 19 Ill 2d 586, 84 A L R 2d 698

§ 223. —— Sale of Property Subject to Homestead Right

48. Mo —Hyde v Copeland 173 S W 2d 684, 351 Mo 580

Conveyance by husband of his one-half interest to wife

Ill —Skach v Heakin 328 N E 2d 59, 28 Ill App 3d 346

49. La —Ellis v Dillon, App, 345 So 2d 1241

Mo —Rodewald v Rodewald 297 S W 2d 536

Tenn —Hamilton Nat Bank v Woods, 217 S W 2d 14, 31 Tenn App 501—Waddy v Waddy, 291 S W 2d 581 200 Tenn 140

50. U S —C J S cited in In re Walls, Bkrtcy Tenn, 45 B R 145 147

§ 224. —— Retaining Property Beyond Exemption on Payment of Excess

51. U S —Valley Bank of Nevada v Skeen D C Tex 401 F Supp 139, affd 532 F 2d 185, cert den 97 S Ct 98, 429 U S 834, 50 L Ed 2d 99

Wyo —Stolldorf v Stolldorf 384 P 2d 969

Purchaser

Tex —Hoffman v Love Civ App, 494 S W 2d 591, err ref no rev err, Sup, 499 S W 2d 295

§ 225. —— Rights of Purchasers

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62. Tex —Smith v Little, Civ App, 217 S W 2d 881, err ref no rev err

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67. Ky —Moore v Sanders, 178 S W 2d 842, 297 Ky 13

77. Pleading statutory limitation

Iowa—Helfenstein v Cave, 6 Iowa 374, 6 Clarke 374

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87. Who is "judgment debtor"

(3) Other cases

Wash —Perkins v La Varne, 17 P 2d 857, 171 Wash 240

§ 226. Jurisdiction

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91. Ill —Adams v Adams, 76 N E 2d 495, 398 Ill 581

Tex —Pace v McEwen, Civ App, 617 S W 2d 816

93. Fla —In re Weiss Estate, App, 102 So 2d 154, cert discharged, Sup, 106 So 2d 411

La —Acosta v Whitney Nat Bank of New Orleans, supra, n 39

County where homestead situated

Cal —Wood v Emig, 137 P 2d 875, 58 Cal App 2d 851

§ 227. Right of Action for Denial and Infringement of Right and Defenses Thereto

95. Tex —Blake v Fuller Civ App, 184 S W 2d 148 —Scott v Highland Park State Bank, Civ App, 218 S W 2d 877 err ref no rev err

96. Cal —Johnson v Brauner 281 P 2d 50, 131 C A 2d 713

Ill —Rice v United Mercantile Agencies of Louisville, Ky, 70 N E 2d 618 395 Ill 512—Heabler v Jewel Tea Co, 192 N E 2d 147 42 Ill App 2d 267

Neb —Ehlers v Campbell 23 N W 2d 727 147 Neb 572

§ 228. Nature of Actions or Proceedings in Which Relief Granted

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2 In detainer action

Ill —Kleinschmidt Laboratories v Kleinschmidt, 100 N E 2d 796, 344 Ill App 213

A determination of rights under a claimed homestead exemption may be decided in an action independent of a mortgage foreclosure on the property and proceedings auxiliary thereto [75]

7.5. Wash —Costanzo v Harris, 427 P 2d 693 71 Wash 2d 254

8. Equitable defense available

Ill —Kleinschmidt Laboratories v Kleinschmidt, supra n 2

Or —Smith v Popham, 513 P 2d 1172, 266 Or 625

In a partition proceeding, homestead rights may be adjudicated.[101]

10 1 Ill —Wiegand v Wiegand, 103 N E 2d 137, 410 Ill 533

Sale for less than exempted value

La —Cloud v Cloud, App, 127 So 2d 560

11. Tex —Ford v Aetna Ins Co, 424 S W 2d 612—Bank of Texas v Laguarta, Civ App, 565 S W 2d 363

12. Neb —Sanne v Sanne, 94 N W 2d 367, 167 Neb 683

13. U S —Morgan v Moynahan, D C Tex, 86 F Supp 522

21. Comity as to foreign exemption law

Tex —Wm Cameron & Co v Abbott, Civ App, 258 S W 562

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26. Ill —Rice v United Mercantile Agencies of Louisville, Ky, 70 N E 2d 618, 395 Ill 512

33. Ark —White v Thornbrough, 313 S W 2d 384, 229 Ark 96

Cal —Viotti v Giomi 41 Cal Rptr 345, 230 C A 2d 730—James v P C S Ginning Co, 80 Cal Rptr 457, 276 C A 2d 19

Wash —Domke v Beck, 139 P 2d 1017, 18 Wash 2d 568

No justiciable controversy

Tex —Mauro v Lavlies, Civ App, 386 S W 2d 825

§ 229. —— Motions and Other Summary Remedies

35 Wash —Enyart v Humble, 562 P 2d 648, 17 Wash App 181

Formal pleading and rules inapplicable

Or —McFadden v McFadden, 390 P 2d 671, 237 Or 125

38. Creditor's bill

Or —Clawson v Anderson, 434 P 2d 462, 248 Or 347

§ 230. Time to Sue and Limitations

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49. Fla —Chasteen v Chasteen, App, 213 So 2d 509

52. Discretion of chancellor

Miss —Biglane v Rawls, 153 So 2d 665, 247 Miss 226

54. Miss —Travis v Dantzler, 141 So 2d 556, 244 Miss 360

§ 231. Parties

55. Ala —B F Goodrich Silvertown Stores v Brown, 46 So 2d 204, 253 Ala 576

Okl —Van Meter v Field, 159 P 2d 546, 195 Okl 555

58. Cal —Hart v Church, 58 P 910, 126 Cal 471, 77 Am S R 195, mod on oth grds 59 P 296, 126 Cal 471, 77 Am S R 195

Non-joinder of insane husband

Miss —Columbia Mut Life Ins Co v Jones, 133 So 149, 160 Miss 41

60. Necessity of showing fault of husband

Tex —Crowder v Crowder, Civ App, 111 S W 2d 1161, err dism

64. Held not necessary parties

Cal —King v King, 99 Cal Rptr 200, 22 C A 3d 319

65. Cal —Schoenfeld v Norberg, 90 Cal Rptr 47, 11 C A 3d 735

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66 Okl —Sixkiller v Weete, 51 P 2d 807, 175 Okl 204—Priddy v Massey, 256 P 2d 425, 208 Okl 369—Massey v Priddy, 301 P 2d 684

67. Tex —Behrens v Behrens, Civ App, 186 S W 2d 697—Kirby v Houston Oil Co of Texas, Civ App, 200 S W 2d 246, err ref Cert den 68 S Ct 86, 332 U S 772 92 L Ed 357, reh den 68 S Ct 152, 332 U S 820, 92 L Ed 397

§ 232. Pleading

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83. Okl —Van Meter v Field, supra, n 55

84. Ala —Montgomery v Montgomery, 74 So 2d 254, 261 Ala 416

Tex —Bouldin v Woosley, Civ App, 525 S W 2d 276

86. Ala —Horan v Horan, 65 So 2d 486, 259 Ala 117

93. Mo —C J S cited in Powell v Huffman, 213 S W 2d 473, 476, 358 Mo 138

Petitions or allegations held sufficient

(1) Ala —Caldwell v Johnson, 83 So 2d 230, 263 Ala 473

96. Petitions or allegations held sufficient

(1) Fla—Sherbill v Miller Mfg Co, 89 So 2d 28, 60 A L R 2d 1445—Miller v Miller, App, 293 So 2d 760, app after remand 322 So 2d 49

Ill.—Moore v Moore, 154 N E 2d 256, 15 Ill 2d 239

Tex.—Meza v Ramirez, Civ App, 415 S W 2d 530

Petitions or allegations held insufficient

(1) Ariz—Jordan v Phoenix Finance Co, 443 P 2d 921, 8 Ariz App 106

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13. Description held sufficient

Cal—Oktanski v Burn, 291 P 2d 954, 138 C A 2d 419

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28. Okl—Kane v Ferguson, 157 P 2d 194, 195 Okl 292

§ 233. Evidence

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43. Ala—Busby v Pierson, 128 So 2d 516, 272 Ala 59

Tex—Blake v Fuller, Civ App, 184 S W 2d 148—Nelkin v Young, Civ App, 397 S W 2d 956, err ref no rev err—Hilliard v Home Builders Supply Co, Civ App, 399 S W 2d 198

46. Ark—Price v Price, 491 S W 2d 793, 253 Ark 1124

Fla—Banks v Banks, 98 So 2d 337—Liles v Boyette, App, 163 So 2d 52

Mo—C.J.S. cited in State v Haney, 277 S W 2d 632, 637, 55 A L R 2d 717

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47. Miss—Adams v Bounds, 81 So 2d 215, 224 Miss 518

51. Iowa—Olsen v Lohman, 13 N W 2d 332, 234 Iowa 580

54. Cal—Shivell v Hurd, 276 P 2d 895, 129 C A 2d 320

62. Exclusion held erroneous

U S—Lewis v Morrison Supply Co, C A Tex, 231 F 2d 632

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76. Tex—Balcomb v Vasquez, Civ App, 241 S W 2d 650, err ref no rev err

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87. N M—Inman v Brown, 281 P 2d 474, 59 N M 196

Tex—Alley v Barnes, Civ App, 231 S W 2d 990

Writing or other tangible evidence

Miss—Grantham v Ralle, 158 So 2d 719, 248 Miss 364

88. Fla—Weiss v Stone, App, 220 So 2d 403

89. Fla—Weiss v Stone, App, 220 So 2d 403

Tex—H Kohnstamm v Co of Tex v Burleson, Civ App, 237 S W 2d 319—First State Bank of Grapeland v Brown, Civ App, 490 S W 2d 248

99. Ala—Busby v Pierson, 128 So 2d 516, 272 Ala 59

Cal—Shivell v Hurd, 276 P 2d 895, 129 C A 2d 320

Fla—Brady v Brady, 55 So 2d 907

Miss—Travis v Dantzler, 141 So 2d 556, 244 Miss 360

Neb—Sanne v Sanne, 94 N W 2d 367, 167 Neb 683

Tex—H Kohnstamm v Co of Tex v Burleson, supra, n 89—Matlock Humble Oil & Refining Co, Civ App, 284 S W 2d 407, err ref no rev err

1. Ala—Caldwell v Johnson, 83 So 2d 230, 263 Ala 473

2. Fla—Ledee v Ledee, App, 321 So 2d 446

3. Fla—Brady v Brady, 55 So 2d 907

Tex—Schmuck v Mayfield, Civ App, 181 S W 2d 724

7. Ark—Edgar v Edgar, 451 S W 2d 450, 248 Ark 215

Tex—Nelkin v Young, Civ App, 397 S W 2d 956, err ref no rev err

8. Tex—Allen v Byrd, Civ App, 314 S W 2d 134

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14. Cal—Shivell v Hurd, 276 P 2d 895, 129 C A 2d 320

§ 234. Trial

15. Tex—Smith v Stegall, Civ App, 336 S W 2d 470—Henry v Miller Co v Shoaf, Civ App, 434 S W 2d 243, err ref no rev err

16. Tex—Smith v Stegall, Civ App, 336 S W 2d 470

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33. Failure to obtain jury finding as to existence of homestead

Tex—Sullivan v Barnett, 471 S W 2d 39

35. Findings held not conflicting

(2) Other findings

Tex—Smith v Stegall, Civ App, 336 S W 2d 470—Coleman v Banks, Civ App, 349 S W 2d 737, err ref no rev err

§ 235. —— Questions of Law and Fact

44. Miss—Thompson v Dyess, 67 So 2d 721, 218 Miss 770

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45. Ark—Kinney v Patterson, 282 S W 2d 809, 225 Ark 393

Cal—Ellsworth v Marshall, 16 Cal Rptr 588, 196 C A 2d 471

Tex—Balcomb v Vasquez Civ App, 241 S W 2d 650, err ref no rev err

47. Tex—First State Bank of Grapeland v Brown, Civ App, 490 S W 2d 248

§ 236. Judgment and Enforcement

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49. Tex—H Kohnstamm & Co of Tex v Burleson, Civ App, 237 S W 2d 319

54. Neb—Sanne v Sanne, 94 N W 2d 367, 167 Neb 683

Tex—Tucker v Cole, Civ App, 215 S W 2d 252, err ref no rev err—Home Imp Loan Co v Brewer, Civ App, 318 S W 2d 673, err ref no rev err

55. La—Harrell v Crow, 38 So 2d 226, 214 La 543

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Utah—Gray v Stevens, 302 P 2d 273, 5 Utah2d 361

56. Cal—Schoenfeld v Norberg, 72 Cal Rptr 924, 267 C A 2d 496, app after remand 90 Cal Rptr 47, 11 C A 3d 735

Tex—Folse v Monroe, supra, n 55

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62. Cal—Breeden v Smith, 260 P 2d 185, 120 C A 2d 62

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§ 237. Review

85. Mich—Adams v Evans, 72 N W 2d 131, 343 Mich 94

Findings should not be disturbed on appeal if supported by substantial evidence [87.5]

87.5. Cal—Ellsworth v Marshall, 16 Cal Rptr 588, 196 C A 2d 471

89. Preliminary injunction held not abuse of discretion

Cal—Oktanski v Burn, 291 P 2d 954, 138 C A 2d 419

90. Tex—Rogers v. Texas Industries, Inc, Civ App, 328 S W 2d 483

92. La—Baham v Vernon, App, 42 So 2d 141

§ 238. Damages

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95. La—Smith v Marino, App, 28 So 2d 780

§ 239. In General

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3. Ala—Young v Seale, 96 So 2d 746, 266 Ala 398

Cal—Rich v Ervin, 194 P 2d 809, 86 Cal App 2d 386

Fla—Wilson v Florida Nat Bank & Trust Co at Miami, 64 So 2d 309—Deem's Estate v Shinn, App, 297 So 2d 611

Ill—Matter of Millhouse's Estate, 377 N E 2d 382, 18 Ill Dec 229, 60 Ill App 3d 549

Okl—Karbs v Rouse, 154 P 2d 968, 195 Okl 23

Or—In re Doody's Estate, 313 P 2d 444, 210 Or 658

Tex—Wicker v Rowntree, Civ App, 185 S W 2d 150, err ref—Chisholm v Mills, Civ App, 250 S W 2d 268, err ref

4. Ill—Watt v Watt, 78 N E 2d 224, 400 Ill 35

Iowa—In re Ragan's Estate, 23 N W 2d 521, 237 Iowa 619

Ky—Ferguson v Board of Drainage Com'rs of Graves County for Mayfield Creek Drainage Dist No 2, 186 S W 2d 16, 299 Ky 538

Wash—Cody v Herberger, 371 P 2d 626, 60 Wash 2d 48

Ownership necessary

Ala—Mordecai v Scott, 320 So 2d 642, 294 Ala 626

Okl—Matter of Wallace's Estate, 648 P 2d 828

6. Tex—Chisholm v Mills, supra, n 3—George v Taylor, Civ App, 296 S W 2d 620, err ref no rev err

7. Okl—Filtsch v Curtis, 234 P 2d 377, 205 Okl 67

8. Fla—Regero v Daugherty, 69 So 2d 178—Kinney v Mosher, App, 100 So 2d 644

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Or—In re Doody's Estate, 313 P 2d 444, 210 Or 658

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Tex—George v Taylor, Civ App, 296 S W 2d 620, err ref no rev err

Devise to owner's spouse

Fla—Estate of Murphy, 340 So 2d 107

9. Fla—In re Ritter's Estate, App 3 Dist, 407 So 2d 386

Kan—C.J.S quoted in Cole v Coons, 178 P 2d 997, 1002, 162 Kan 624

10. Cal—Morrison v Barham, 7 Cal Rptr 442, 184 C A 2d 267

Fla—Bendl v Bendl, App, 246 So 2d 574

Mo—Karsznia v Kelsey, 262 S W 2d 844

11. Ark—Cole v Sparks, 172 S W 2d 20, 205 Ark 937

Fla—In re McCartney's Estate, 299 So 2d 5

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12. Ariz—In re Moore's Estate, 190 P 2d 914, 67 Ariz 65

Okl—Turner v Hubbell, 288 P 2d 394

13. Ariz—In re Stanger's Estate, 257 P 2d 593, 75 Ariz 399

Cal—Robson v Meder, 151 P 2d 662, 66 Cal App 2d 47—In re Branam's Estate, 152 P 2d 354, 66 Cal App 2d 309

Right to probate homestead is favored, etc.

Ariz—In re Moore's Estate, supra n 12

Probate homestead not different from homestead under exemption laws

Wyo—Wambeke v Hopkin, 372 P 2d 470

14. Basis

US—US Nat Bank of Portland v U S, D C Or, 188 F Supp 332

15. Or—In re Doody's Estate, 313 P 2d 444, 210 Or 658

§ 240. Constitutional and Statutory Provisions

17. Ala—Allagood v DuBose 243 So 2d 668 286 Ala 559

Mo—Rodewald v Rodewald, 297 S W 2d 536

Wash—In re Lyons' Estate, 515 P 2d 1293, 83 Wash 2d 105

In Alabama

(1) Busby v Pierson 128 So 2d 516, 272 Ala 59—Bedsole v Bedsole, 133 So 2d 217, 272 Ala 589—Hicks v Huggins, Civ App, 405 So 2d 1324 writ den 405 So 2d 1328

21. Wash—In re Scheldt's Estate 536 P 2d 4 13 Wash App 570

22. Fla—Wilson v Florida Nat Bank & Trust Co at Miami 64 So 2d 309

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25. Colo—C J S quoted in In re Wallace's Estate, 246 P 2d 894, 901, 125 Colo 584

27. Ark—Van Pelt v Johnson, 259 S W 2d 519, 222 Ark 398

Fla—Nesmith v Nesmith, 21 So 2d 789 155 Fla 823—In re McCartney's Estate, 299 So 2d 5

Idaho—In re Kennedy's Estate, 211 P 2d 410, 70 Idaho 47

Miss—Horton v Horton, 48 So 2d 850 210 Miss 116

Constitution controls

Fla—In re McGinty's Estate, 258 So 2d 450

§ 241. —— Retroactive Operation

33. Ala—Craig v Root 25 So 2d 147 247 Ala 479—Finerson v Hubbard, 52 So 2d 506, 255 Ala 551—Early v Jones 148 So 2d 214 274 Ala 251—Hicks v Huggins, Civ App 405 So 2d 1324 writ den 405 So 2d 1328

§ 242. Course of Descent of Homestead

37. Ala—Mitchell v Mitchell, 64 So 2d 104 258 Ala 572

Mo—Osborn v Osborn 274 S W 2d 32, 241 Mo App 1175

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38. U S—Riley v Doing D C Fla 77 F Supp 415 affd in part and mod in part on oth grds C A 176 F 2d 449

Ala—Scroggins v Reneau 168 So 2d 614, 277 Ala 243

Ark—Farmers Co-op Ass'n, Inc. of Rogers v Webb 459 S W 2d 815, 249 Ark 277

Fla—Wilson v Florida Nat Bank & Trust Co at Miami supra n 22—In re Newman's Estate App 5 Dist 413 So 2d 140

Ill—Watt v Watt supra n 4

Neb—Stocker v Hilger, 13 N W 2d 106 144 Neb 202

Okl—Van Meter v Field 159 P 2d 546, 195 Okl 555

Tex—George v Taylor, Civ App 296 S W 2d 620 err ref no rev err

40 Ark—Shackelford v Shackelford 107 S W 2d 344, 194 Ark 381

Neb—Mainelli v Neuhaus, 59 N W 2d 607, 157 Neb 392

Okl—Matter of Wallace's Estate 64 P 2d 828

Tex—Anderson v Bundick Civ App 245 S W 2d 318 err ref no rev err

42. Ohio—Morgridge v Converse, 81 N E 2d 112 150 Ohio St 239

Tex—Chandler v Welborn Civ App 282 S W 2d 940 affd, Sup 294 S W 2d 801—George v Taylor Civ App 296 S W 2d 260 err ref no rev err

Homestead exempt from claims of estate

Iowa—In re Williams' Estate, 216 N W 2d 568

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44. Ala—Shull v Shull, 40 So 2d 708, 252 Ala 320

§ 243. Surviving Wife

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Miss—Jones v Jones, 161 So 2d 640, 249 Miss 322

Okl—Matter of Wallace's Estate, 648 P 2d 828

Wash—In re Funderburk's Estate, 521 P 2d 60, 10 Wash App 863

In Louisiana

(3) Golden v Crawley, La App, 28 So 2d 129

(7) Other matters

La—Barlow v Carr's Estate, App, 292 So 2d 721

Homestead rights same regardless of gender

Tex—Hunter v Clark, App 4 Dist, 687 S W 2d 811

Surviving wife as having no vested interest

Ala—Skipworth v Skipworth, 383 So 2d 524

Va—Colbert v Priester, 203 S E 2d 134, 214 Va 606

Sale of property to satisfy widow's allowance

Miss—Mills v Mills 279 So 2d 917

Mineral rights constitute real estate of other than homestead

Ala—Locke v Locke 280 So 2d 773, 291 Ala 344

Life estate

Fla—Creary v Creary's Estate, App, 338 So 2d 26

Life estate to widow

Ala—Taylor v Russell, 369 So 2d 537—Hicks v Huggins, Civ App, 405 So 2d 1324 writ den 405 So 2d 1328

Tex—Franklin v Woods, Civ App 598 S W 2d 946—Hill v Hill, App 623 S W 2d 779, err ref no rev err

47. U S—Beall v Pinckney, C C A Fla, 150 F 2d 467, 161 A L R 1281—Weitzner v U S, C A Fla, 309 F 2d 45, cert den 83 S Ct 727, 372 U S 913, 9 L Ed 2d 720

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Ark—Henderson v Henderson, 204 S W 2d 911, 212 Ark 31

Cal—In re Branam's Estate, supra, n 13—In re Cecala's Estate, 232 P 2d 48, 104 Cal App 2d 526—In re Falcone's Estate, 27 Cal Rptr 38, 211 C A 2d 40

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Tex—Morris v Porter, Civ App, 393 S W 2d 385 err ref no rev err

Husband's contract to convey held unenforceable against surviving widow

Tex—Cox v Messer, Civ App, 469 S W 2d 611

48. Ala—Skelton v Tyner, 25 So 2d 160, 247 Ala 511—Nix v McCoy, 280 Ala 516

Ark—Henderson v Henderson, supra, n 47—Jordan v Jordan, 228 S W 2d 636, 217 Ark 30—Vesper v Woolsey, 332 S W 2d 602, 231 Ark 782

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Okl—Barry v Phillips, 329 P 2d 1046

49. Okl—Wood v Biggs, 424 P 2d 59

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51. U S—Heyser v Frankfort Oil Co, C A Okl, 316 F 2d 441, cert den 84 S Ct 64, 375 U S 824, 11 L Ed 2d 56

Ala—Walker v Hayes, supra, n 17

Ark—Drennan v McCarthy, 210 S W 2d 791, 213 Ark 286

Cal—In re Branam's Estate, 152 P 2d 354, 66 Cal App 2d 309

La—Barlow v Carr's Estate, App, 292 So 2d 721

52. Cal—In re Branam's Estate, supra, n 13

Under some statutory provisions a homestead allowance is in lieu of former dower and homestead.[54.5]

54.5. Mo—Schubel v Bomacker, 331 S W 2d 552—In re Schell's Estate, App, 370 S W 2d 816, transf to, Sup, 381 S W 2d 864, transf to 390 S W 2d 618

56. Ala—Gladden v Macri, 18 So 2d 552, 245 Ala. 605

Fla—Jablonski v Caputo, App, 297 So 2d 310

Okl—Wood v Biggs, 424 P 2d 59

57. Fla—Jablonski v Caputo, App, 297 So 2d 310

58. Ala—Crawford v Crawford, 28 So 2d 196, 248 Ala 447

Homestead in undivided one-half interest

(1) Tex—Cook v Cook, Civ App, 331 S W 2d 77

60. Okl—C J S. cited in Wood v Biggs, 424 P 2d 59, 61

61. Ala—Hutchins v Shepard, 370 So 2d 275

63. Fla—In re Van Meter's Estate, App, 214 So 2d 639, writ discharged, Sup, 231 So 2d 524

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70. Ariz—C J S cited in In re Graham's Estate, 239 P 2d 365, 367, 73 Ariz 179

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71. Ala—Mordecai v Scott, 320 So 2d 642, 294 Ala 626

72. Ariz—C J S cited in In re Graham's Estate, supra, n 70

73. Tex—Grant v Marshall, 280 S W 2d 559, 154 Tex 531

76. Colo—In re Wallace's Estate, 246 P 2d 894, 125 Colo 584

Fla—Chasteen v Chasteen, App, 213 So 2d 509

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81. Ala—Leonard v Whitman, 30 So 2d 241, 249 Ala 205—Jay v Jay, 268 So 2d 788, 289 Ala 513

Fla—Efstathiou v Saucer, 29 So 2d 304, 158 Fla 422—In re Van Meter's Estate, App, 214 So 2d 639, writ discharged, Sup, 231 So 2d 524—In re Parrish's Estate, App, 286 So 2d 35

Kan—In re Barnett's Estate, 485 P 2d 1290, 207 Kan 484

Miss—Rush v Rush, 360 So 2d 1240

Okl—In re Carothers' Estate, 167 P 2d 899, 196 Okl 640

S D—Anderson v Anderson, 16 N W 2d 43, 72 S D 165

Va—Seaton v Seaton, 34 S E 2d 236, 184 Va 180

83. Homestead right held cut off

Kan—In re Fawcett's Estate, 183 P 2d 403, 163 Kan 448

85. Widow may have homestead in realty devised to her, etc.

Ill—Sterling Sav and Loan Ass'n v Schultz, 218 N E 2d 53, 71 Ill App 2d 94

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89. Miss—Rush v Ruth, 360 So 2d 1240

§ 244. —— Conveyance During Coverture and Abandonment During Husband's Lifetime

91. Cal—In re Teel's Estate, 210 P 2d 1, 34 Cal 2d 349

Fla—Porter v Childers, App, 162 So 2d 301

Ill—Brod v Brod 61 N E 2d 675, 390 Ill 312

La—Barlow v Carr's Estate, App 292 So 2d 721

Tenn—Hestand v Johnson, 184 S W 2d 175, 182 Tenn 84

Va—Seaton v Seaton, supra, n 81

Wyo—Stolldorf v Stolldorf, 384 P 2d 969

92. Ark—Barnett v Barnett, 193 S W 2d 319, 209 Ark 973

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3.5. Miss—Case v Case 254 So 2d 879

A wife, who with her husband conveys their homestead, has such an interest therein that a life estate can be reserved to her as well as to her husband.[15]

4. Tenn—Hestand v Johnson 184 S W 2d 175, 182 Tenn 84

§ 245. —— Existence of Children

11. Ariz—Schock v Schock, 461 P 2d 697 11 Ariz App 53

N C—Elledge v Welch, 76 S E 2d 340, 238 N C 61

15. Fla—In re Finch's Estate, 401 So 2d 1308, over ruling In re Estate of Ritz, 385 So 2d 1102 (1980)

§ 246. —— Validity and Continuance of Marriage Relation

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17. Fla—In re Van Meter's Estate App, 214 So 2d 639, writ discharged, Sup, 231 So 2d 524

Okl—In re Jones' Estate, 155 P 2d 980, 195 Okl 168

18. Fla—Barlow v Barlow, 23 So 2d 723, 156 Fla 458

24. Ala—Hammond v Shipp, 289 So 2d 862, 292 Ala 113

30. Probate homestead

Cal—In re Nelson's Estate, 36 Cal Rptr 352, 224 C A 2d 138

31. Tenn—Kercher v Mysinger, 198 S W 2d 330, 184 Tenn 226

32. Tenn—Rhodes v McAfee, 457 S W 2d 522, 224 Tenn 495

§ 247. —— Effect of Possession of Other Property

33. Cal—In re Somers' Estate, 191 P 2d 776, 84 Cal App 2d 726

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35. Cal—In re Nelson's Estate, 36 Cal Rptr 352 224 C A 2d 138

§ 249. —— Waiver, Release, or Bar in General

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41. Ala—Decker v Decker, 44 So 2d 435, 253 Ala 345

Mo—In re Schell's Estate, App, 370 S W 2d 816, transf to, Sup, 381 S W 2d 864, transf to 390 S W 2d 618

Okl—Meyer v Security Nat Bank of Norman, 294 P 2d 572—Matter of Wallace's Estate, 648 P 2d 828

Tenn—Johnson v Browder, 207 S W 2d 1, 185 Tenn 601—In re Moore's Estate, 234 S W 2d 847, 34 Tenn App 131—Cripps v Cripps, 302 S W 2d 340, 202 Tenn 67

Tex—Williams v Williams, 569 S W 2d 867

Wyo—Goodson v Smith, 243 P 2d 163, 69 Wyo 439, reh den 244 P 2d 805, 69 Wyo 439

42. Ala—Anderson v Byrd, 37 So 2d 115, 251 Ala 257

Cal—In re Branam's Estate, 152 P 2d 354, 66 Cal App 2d 309

Mo—Lambert v Clark, 275 S W 2d 240

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51. Ala—Nix v McCoy, 195 So 2d 893, 280 Ala 516

54. Tenn—Johnson v Browder, supra, n 41

55. Fla—Chasteen v Chasteen, App, 213 So 2d 509

59. Ark—Regional Agr Credit Corp of Washington, D C, v Polk, 215 S W 2d 523, 214 Ark 285

60. La—Acosta v Whitney Nat Bank of New Orleans, 38 So 2d 391, 214 La 700

66 Release not favored by courts

Fla—Youngelson v Youngelson's Estate, App, 114 So 2d 642

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78. Cal—In re Howe's Estate, 183 P 2d 329, 81 Cal App 2d 95

Kan—In re Elliott's Estate, 255 P 2d 645, 174 Kan 252

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Ill—Christy v Marmon, 45 N E 150, 163 Ill 225

30 C J p 650 note 35

79 Or—C J S cited in In re Moore's Estate, 307 P 2d 483, 491 210 Or 23, 65 A L R 2d 715, mandate recalled 308 P 2d 180, 210 Or 23

80. Wash—In re Brown's Estate, 183 P 2d 768, 28 Wash 2d 436

82 Kan—In re Place's Estate, 203 P 2d 132, 166 Kan 528—In re Neis' Estate, 225 P 2d 110, 170 Kan 254

Or—C J S, cited in In re Moore's Estate 307 P 2d 483, 492, 210 Or 23, 65 A L R 2d 714, mandate recalled 308 P 2d 180, 210 Or 23

83. Contract held unenforceable

(2) Other matters

Ala—Allison v Stevens, 112 So 2d 451, 269 Ala 288

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Ill—Turner v Black, 166 N E 2d 588, 19 Ill 2d 296

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89. Kan—In re Winter's Estate, 192 P 2d 186, 164 Kan 615

§ 252. —— Election Between Homestead and Distributive Share, or Year's Support

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Survivor not estopped to elect

N C—Smith v Smith, 143 S E 2d 300, 265 N C 18

91. Tex—Ward v Braun, Civ App, 417 S W 2d 888

95. Effect on cotenancy with son

N C—Smith v Smith, 143 S E 2d 311, 265 N C 34

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96. Neb—Horn v Gates, 53 N W 2d 84, 155 Neb 667

3. Iowa—Mensinger v Hass, 35 N W 2d 461, 240 Iowa 71

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N C—Smith v Smith, 143 S E 2d 300, 265 N C 18

4. Iowa—Mensinger v Hass, supra, n 3

7. Iowa—Mensinger v Hass, supra, n 3

10. Iowa—Mensinger v Hass, supra, n 3

12. Tenn—Bruce v Bruce, App, 222 S W 2d 228

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16. Iowa—Mensinger v Hass supra, n 3

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25. In Missouri

(1) Mo—Schubel v Bonacker, 331 S W 2d 552—Possien v Higgins, 421 S W 2d 327

26. Ala—Wilder v Scott 89 So 2d 682, 265 Ala 106

Ark—Tennison v Carroll, 243 S W 2d 944, 219 Ark 658—Van Pelt v Johnson, 259 S W 2d 519, 222 Ark 398—Vesper v Woolsey, 332 S W 2d 602, 231 Ark 782

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28. Ala—Wilder v Scott, 89 So 2d 682, 265 Ala 106

Ark—Van Pelt v Johnson, supra, n 26

Tex—Rancho Oil Co v Powell, supra, n 26

§ 254. Alienation after Husband's Death

38. Ala—Harrell v Henderson, 69 So 2d 868, 260 Ala 211

Tenn—Stephens v Stephens, 195 S W 2d 915, 28 Tenn App 58

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40. U S—U S v 164 51 Acres of Land, More or Less, in Van Buren and Cleburne Counties, Ark, D C Ark, 205 F Supp 202

Ky—Burchett v James, 246 S W 2d 461

41. Ky—Smith v Vanover, 264 S W 2d 884

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55 Ala—Dorough v Johnson, 373 So 2d 1082

Iowa—In re Frentress' Estate, 89 N W 2d 367, 249 Iowa 783—In re Sueppel's Estate, 124 N W 2d 154, 255 Iowa 974

La—Barlow v Carr's Estate, App, 292 So 2d 721

Okl—Matter of Wallace's Estate, 648 P 2d 828

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Iowa—In re Williams' Estate, 216 N W 2d 568

Remainder to children after life estate to surviving wife

Fla—Creary v Creary's Estate, App, 338 So 2d 26

56. Ala—Mordecai v Scott, 320 So 2d 642, 294 Ala 626

Miss—Jones v Jones, 161 So 2d 640, 249 Miss 322

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(1) Efstathion v Saucer, 29 So 2d 304, 158 Fla 422

(3) Expectancy only during life of father

Fla —Reed v Fain App 122 So 2d 322 Affd, Sup, 145 So 2d 858—Aetna Ins Co v LaGasse, 223 So 2d 727

(4) Other particular statements

Fla —Reed v Fain, 145 So 2d 858

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(4) Other cases —Jones v Duffy, 252 P 2d 440, 207 Okl 674—Mercer v Mercer, 365 P 2d 554

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(1) Cheswick v Freeman, 287 S W 2d 171, 155 Tex 372

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Nonresidence of children does not affect their right to inherit under the homestead statute.[57.5]

57.5. Fla —Moorefield v Byrne, App 140 So 2d 876

§ 256. —— Persons Entitled

60. In Alabama

(1) Crawford v Crawford, 28 So 2d 196, 248 Ala 447

(4) Under the 1951 amendatory act the restriction of benefits to 'minor children has been eliminated — Mitchell v Mitchell, 64 So 2d 704 258 Ala 572

(5) Other matters —Young v Seale 96 So 2d 746 266 Ala 398—Sanders v Thigpen, 168 So 2d 228, 277 Ala 198

61. Mo —Possien v Higgins 421 S W 2d 327

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70. Tex —Carson v McFarland, Civ App, 206 S W 2d 130, err ref

77. Fla —Moorefield v Byrne, App, 140 So 2d 876

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83. Ala —B F Goodrich Silvertown Stores v Brown 46 So 2d 204, 253 Ala 576

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Okl —Bevan v Shelton, 469 P 2d 245

87. Kan —Cole v Coons, 167 P 2d 295, 161 Kan 332, op adhered to 178 P 2d 997 162 Kan 624

88. Ark —Stover v Holman, 317 S W 2d 722 229 Ark 658

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97. Cal —In re Claussenius' Estate 216 P 2d 485 96 Cal App 2d 600

Okl —In re Carothers Estate 167 P 2d 899, 196 Okl 640

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(1) Efstathion v Saucer, supra n 56

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11. Okl —Yost v Cassel, 255 P 2d 914, 208 Okl 330

20. La —Acosta v Whitney Nat Bank of New Orleans 38 So 2d 391, 214 La 700

23. Ala —Gladden v Macri 18 So 2d 552, 245 Ala 605

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33. Ala —Mordecai v Scott, 320 So 2d 642, 294 Ala 626

Tex —Grant v Marshall, 280 S W 2d 559, 154 Tex 531

34. U S —In re Shaw, Bkrtcy Tenn, 5 B R 107—Matter of Fink, Bkrtcy Fla 17 B R 726

Ark —Trice v Miller 229 S W 2d 233, 217 Ark 229

Cal —In re Davis Estate, 194 P 2d 713, 86 Cal App 2d 263 —In re Falcone's Estate, 27 Cal Rptr 38 211 C A 2d 40

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Tex —Clayman v Lindsay, Civ App, 247 S W 2d 300, affd in part and revd in part on oth grds 254 S W 2d 777, 151 Tex 593—Jenkins v Hutchens Civ App, 287 S W 2d 295, err ref no rev err

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(2) La —Barlow v Carr's Estate, App, 292 So 2d 721

(3) Other matters

La —Barlow v Carr's Estate, App, 292 So 2d 721

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Tex —Hunter v Clark, App 4 Dist, 687 S W 2d 811

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Va —Colbert v Priester, 203 S E 2d 134, 214 Va 606

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36. Nev —Forshay v Johnston, 13 N W 2d 873, 144 Neb 525

40 Absent waiver by husband

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42 Cal —In re Ronayne's Estate 231 P 2d 105 104 Cal App 2d 53

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Neb —In re Parker's Estate, 128 N W 2d 696, 177 Neb 197

46 Cal —In re Davis Estate supra, n 34— In re Claussenius Estate 216 P 2d 485, 96 Cal App 2d 600—In re Dell's Estate 17 Cal Rptr 46 196 C A 2d 809

Miss —Biggs v Roberts, 115 So 2d 151 237 Miss 406

Okl —In re Carothers Estate 167 P 2d 899, 196 Okl 640

Tex —Wicker v Rowntree, Civ App 185 S W 2d 150, err ref Hodge v Ellis Civ App, 268 S W 2d 275, affd in part and revd in part on oth grds 277 S W 2d 900 154 Tex 341

§ 260. —— Waiver, Forfeiture, Release, or Estoppel

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48 Iowa—Weis v Bach, 125 N W 211, 146 Iowa 320

Tex —McDaniel v Thompson Civ App 195 S W 2d 202, err ref

Utah—In re Dalton's Estate 167 P 2d 690 109 Utah 503

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Tex —Keenan v Burgess, Civ App, 206 S W 2d 1021

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Cal —In re Durham's Estate 238 P 2d 1061, 108 C A 2d 154

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Wash —Cody v Herberger, 365 P 2d 767

49 Cal —In re Claussenius Estate, supra n 46

50 Cal —In re Claussenius' Estate, supra, n 46

57. Fla —Porter v Childers, App, 162 So 2d 301

Neb —Forshay v Johnston, supra, n 36

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58. Ark —Tennison v Carroll, 243 S W 2d 944, 219 Ark 658

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§ 262. —— Debts of Decedent

60 Kan —Jones v St Francis Hospital & School of Nursing, Inc, 594 P 2d 162, 225 Kan 649

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Tex —Blake v Fuller, Civ App, 184 S W 2d 148—Anderson v Bundick, Civ App, 245 S W 2d 318, err ref no rev err

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Cal —In re Nelson's Estate, 36 Cal Rptr 352, 224 C A 2d 138

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63. Tex —George v Taylor, Civ App, 296 S W 2d 620, err ref no rev err

69. Kan —C J S quoted in Cole v Coons, 178 P 2d 997 1002 162 Kan 624

75 Vendor's lien

(3) Other statements

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77. Kan —In re Dahn's Estate, 464 P 2d 238 204 Kan 535

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81 La —Harrell v Crow, 38 So 2d 226, 214 La 543

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92 Iowa—Gardner v Bailey 85 N W 2d 586, 248 Iowa 1341

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Colo —In re Wallace's Estate, 246 P 2d 894, 125 Colo 584

Miss —Gresham v Clark, 95 So 2d 234, 231 Miss 206—Jones v Jones 161 So 2d 640, 249 Miss 322

Okl —Turner v Hubbell, 288 P 2d 394—Mercer v Mercer, 365 P 2d 554

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2. Tex —Sparks v Robertson, Civ App, 203 S W 2d 622, err ref

§ 265. Nature of Estate or Interest Transmitted

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7 Fla —Regero v Daugherty 69 So 2d 178

Tex —George v Taylor, Civ App, 296 S W 2d 620, err ref no rev err

8 Okl – Kemp v Turnbull, 174 P 2d 384, 198 Okl 27

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14 Tex – French v French Civ App, 188 S W 2d 586, err ref w m

15. Ala – Shull v Shull, 40 So 2d 708, 252 Ala 320—Freeman v Steele, 59 So 2d 801, 257 Ala 554—Bryant v Jones, 71 So 2d 831, 260 Ala 659—Smith v Persons, 228 So 2d 806, 285 Ala 48

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Ala —Mordecai v Scott 320 So 2d 642, 294 Ala 626

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16. Community property

(1) Cal —In re Teel's Estate, 210 P 2d 1, 34 Cal 2d 349

(2) Cal —In re Branam's Estate, 152 P 2d 564, 66 Cal App 2d 309

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(1) Cal —In re Durham's Estate, 238 P 2d 1061, 108 C A 2d 154

(2) Cal —In re Claussenius' Estate, 216 P 2d 485 96 Cal App 2d 600—In re Adams' Estate, 39 Cal Rptr 522, 228 C A 2d 264

17. In Florida

(5) Other cases —Barlow v Barlow, 23 So 2d 723, 156 Fla 458—Wagner v Moseley, App, 104 So 2d 86—In re Rothman's Estate App, 104 So 2d 607—Porter v Childers, App, 162 So 2d 301—Rennolds v Rennolds, App, 312 So 2d 538

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23. Vt —Proulx v Parrow, 56 A 2d 623 115 Vt 232—In re Cooke's Estate, 91 A 2d 683, 117 Vt 336—Cole v Cole, 91 A 2d 819, 117 Vt 354

24. U S —U S v 164 51 Acres of Land, More or Less, in Van Buren and Cleburne Counties, Ark, D C Ark, 205 F Supp 202

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(2) Other cases —Hale v Sandusky, 178 S W 2d 386, 181 Tenn 26

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(2) Rancho Oil Co v Powell, 175 S W 2d 960, 142 Tex 63—Clayton v Canida, Civ App, 223 S W 2d 264—Cline v Henry, Civ App, 239 S W 2d 205 err ref no rev err —Williamson v Kelley, Civ App, 444 S W 2d 311, err ref no rev err

(4) Other cases —Miller v Miller, 230 S W 2d 237, revd on oth grds 235 S W 2d 624, 149 Tex 543—Grant v Marshall, 280 S W 2d 559, 154 Tex 531—George v Taylor, Civ App, 296 S W 2d 620 err ref no rev err —Kelley v Shields, Civ App, 448 S W 2d 135, err ref no rev err

29. In Oklahoma

(2) Kemp v Turnbull, supra, n 8

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32. Tex —Carson v McFarland, Civ App, 206 S W 2d 130, err ref

35. Tex —Grant v Marshall, 280 S W 2d 559, 154 Tex 731

36. Ala —Harrod v Farmer, 139 So 2d 115, 273 Ala 298

Cal —In re Claussenius' Estate, supra, n 16

37. Subject to indebtedness running against homestead

Tex —George v Taylor, Civ App, 296 S W 2d 620, err ref no rev err

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38. Fla —Florida Nat Bank of Jacksonville v Winn, 30 So 2d 298, 158 Fla 750

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52. Devise upheld or claimant held not qualified for statutory protection

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65. Iowa—Gardner v Bailey, 85 N W 2d 586, 248 Iowa 1341

70. Neb —Horn v Gates, supra, n 24

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78. Tex —Grieder v Marsh, Civ App, 247 S W 2d 590

79. Tex —Springer v Strahan, Civ App, 180 S W 2d 654—Chandler v Welborn, Civ App, 282 S W 2d 940, affd, Sup, 294 S W 2d 801—George v Taylor, Civ App, 296 S W 2d 620, err ref no rev err

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81. Tex —Robinson v Snyder Nat Bank, Civ App, 175 S W 2d 482—Butler v Summers, 253 S W 2d 418, 151 Tex 618—George v Taylor, Civ App, 296 S W 2d 620, err ref no rev err

83. Miss —Stockett v Stockett, 337 So 2d 1237

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2. Tex —Orr v Orr, Civ App, 226 S W 2d 172

4. Ill —Siekmann v Siekmann, 203 N E 2d 28, 53 Ill App 2d 263

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9. U S —Heyser v Frankfort Oil Co, C A Okl, 316 F 2d 441, cert den 84 S Ct 64, 375 U S 824, 11 L Ed 2d 56

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10. U S —Heyser v Frankfort Oil Co, C A Okl, 316 F 2d 441, cert den 84 S Ct 64 375 U S 824, 11 L Ed 2d 56

14 When children attain majority, etc.

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17. Tex —Vermillion v Haynes, 215 S W 2d 605, 147 Tex 359

18. U S —Heyser v Frankfort Oil Co C A Okl, 316 F 2d 441, cert den 84 S Ct 64, 375 U S 824, 11 L Ed 2d 56

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23. Ala —Simpson v Simpson, 49 So 2d 314, 254 Ala 648

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Fla —Adams v Adams, 28 So 2d 254, 158 Fla 173

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34. Apartment house

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38. Cal —In re Claussenius' Estate, 216 P 2d 485, 96 Cal App 2d 600—In re Schmelz' Estate, 66 Cal Rptr 480, 259 C A 2d 440

Tex —French v French, supra, n 14

39. Neb —Ehlers v Campbell, 66 N W 2d 585, 159 Neb 328

49. Tex —Grant v Marshall, 280 S W.2d 559, 154 Tex 531

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52. Okl —Filtsch v Curtis, 234 P 2d 377, 205 Okl 67

53. Tex —Ratliff v Smith, Civ App, 178 S W 2d 138, err ref

§ 268. —— Nature of Estate, Ownership, or Interest of Decedent

59. Tex —Marino v Lombardo, Civ App, 277 S W 2d 749, err ref no rev err

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60. No interest in joint tenancy held with another

Fla —Ostyn v Olympic, App, 455 So 2d 1137

74. Kan —C J S cited in Conns, 178 P 2d 997, 1002, 162 Kan 624

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(4) Other matters

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§ 269. —— Allowance in Lieu of Homestead

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80. Wash —Leslie v Midgate Center, Inc, 436 P 2d 201, 72 Wash 2d 977

Joint tenancy Where husband and wife held homestead in joint tenancy, no probate homestead arose on death of wife [80.5]

80.5. Okl —Mercer v Mercer, 365 P 2d 554

85. Neb —In re Grassman's Estate, 158 N W 2d 673, 183 Neb 147

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Wash —Cody v Herberger, 365 P 2d 767

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87. Widow's right or interest until limited to certain realty by court general charge against estate

Mo —In re Schell's Estate, App, 370 S W 2d 816, transf to, Sup, 381 S W 2d 864, transf to 390 S W 2d 618

93. Ala —Beck v Beck, 262 So 2d 596, 288 Ala 479

Wyo —C J S cited in Wambeke v Hopkin, 372 P 2d 470, 474

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5. Ark —Cannon v Ferrell, 278 S W 2d 652, 225 Ark 31

6. Ala —Jay v Jay, 268 So 2d 788, 289 Ala 513

Ark —Price v Price, 491 S W 2d 793, 253 Ark 1124—Price v Price, 527 S W 2d 322, 258 Ark 363

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8. Ala —Ganus v Sullivan, 99 So 2d 204, 267 Ala 16—McCarver v Womack, 231 So 2d 301, 285 Ala 264

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9. Ark —Price v Price, 527 S W 2d 322, 258 Ark 363

La —Harrell v Crow, 38 So 2d 226, 214 La 543

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10. Ara —Walton v Walton, 54 So 2d 498, 256 Ala 236

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21. Ala —Thompson v Bryant, 38 So 2d 590, 251 Ala 566

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(1) Ala —Mordecai v Scott, 320 So 2d 642, 294 Ala 626

22. Iowa—In re Williams Estate, 216 N W 2d 568

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24. Iowa—McMinimee v McMinimee 31 N W 2d 495, 239 Iowa 1111

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Ky —Smith v Vanover, 264 S W 2d 884

Okl —Meyer v Security Nat Bank of Norman, 294 P 2d 572—Matter of Wallace's Estate, 648 P 2d 828

Wyo —C J S. quoted in Goodson v Smith, 243 P 2d 163, 173, 69 Wyo 439, reh den 244 P 2d 805, 69 Wyo 439

36. Okl —Hixson v Cook, 379 P 2d 677

37. Evidence held sufficient

(1) Okl —Hixson v Cook, 379 P 2d 677

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(2) Tex —Gonzalez v Guazardo de Gonzalez, Civ App, 541 S W 2d 865

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38. Tenn —Bruce v Bruce, App, 222 S W 2d 228

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Okl —Meyer v Security Nat Bank of Norman, 294 P 2d 572

41. Tenn —Hale v Sandusky, 178 S W 2d 386, 181 Tenn 26

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(4) Other statements

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46. Ark —Ingram v Seaman, 267 S W 2d 6, 223 Ark 414

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49. Ill —Stathos v La Salle Nat Bank, 210 N E 2d 828, 62 Ill App 2d 398

50. Tex —Stephens v Stephens, supra, n 8

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Tenn —Hipshire v Stapleton, 418 S W 2d 457, 57 Tenn App 339

51. Ark —Cannon v Ferrell, supra, n 5

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Tenn —Hale v Sandusky, supra, n 41

58. Tex —La Brier et al v Williams, Civ App, 212 S W 2d 828 err ref no rev err

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61. Ill —Siekmann v Siekmann, 203 N E 2d 28, 53 Ill App 2d 263

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63. Ga —Martin v Fulton County 101 S E 2d 716, 213 Ga 761

§ 276. —— Death of Surviving Parent or Children

70. Ala —Walker v Hayes, 28 So 2d 413, 248 Ala 492—Finerson v Hubbard, 52 So 2d 506, 255 Ala 551

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Mo —C J S cited in Schubel v Bonacker, 331 S W 2d 552, 554

Neb —Edgerton v Hamilton County 36 N W 2d 258, 150 Neb 821

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73. Cal —In re Claussenius' Estate, 216 P 2d 485, 96 Cal App 2d 600

§ 277. —— Merger

74. Homestead title not merged in life estate

U S —Leslie v Western Steel Co, 202 F Supp 27

§ 278. Rights as Affected by Administrator's Sale

79. Ala —Mitchell v Mitchell, 64 So 2d 104, 258 Ala 572

Iowa—McMinimee v McMinimee, supra, n 24

Kan —Curry v Perney, 402 P 2d 316, 194 Kan 722

§ 279. Proceedings for Selection, Setting Apart, and Protection of Rights

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87. Ala —Simpson v Simpson, supra, n 23

Or —C J S quoted in Benedict v Lee, 256 P 2d 507, 513, 198 Or 378

On death of person entitled

(2) Other cases

Ala —Shull v Shull, 40 So 2d 708, 252 Ala 320

88. Or —C.J.S. quoted in Benedict v Lee, supra, n. 87

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94. Mo —Osborn v Osborn, 274 S W 2d 32, 241 Mo App 1175

95 Ala —Anderson v Byrd, 37 So 2d 115, 251 Ala 257

Unilateral selection not permitted

Ark —Price v Price 491 S W 2d 793, 253 Ark 1124

96. Ala —Wilder v Scott, 89 So 2d 682, 265 Ala 106—Nathanson v Key, 242 So 2d 389, 286 Ala 486

Continuance of occupancy

(1) Okl —Karbs v Bouse, 154 P 2d 968, 195 Okl 23—Turner v Hubbell, 288 P 2d 394

97. Ala —Dorough v Johnson, 373 So 2d 1082

Wash —In re Cooper's Estate 202 P 2d 439, 32 Wash 2d 444

99. Ala —Craig v Root, 25 So 2d 147 247 Ala 479—Crawford v Crawford 28 So 2d 196, 248 Ala 447—Walker v Hayes, 28 So 2d 413, 248 Ala 492—Nix v McCoy, 195 So 2d 893 280 Ala 516

Mo —Osborn v Osborn, supra, n 94

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4. Mo —Osborn v Osborn, 274 S W 2d 32, 241 Mo App 1175

8. Ala —Harrell v Henderson, 69 So 2d 868, 260 Ala 211

Mo —Osborn v Osborn, supra, n 4

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27. Okl —Yost v Cassell, 255 P 2d 914, 208 Okl 330

29 Ala —Harrell v Henderson, supra, n 8

Cal —In re Schmelz Estate, 66 Cal Rptr 480, 259 C A 2d 440

In Alabama

(1) Ala —Craig v Root 25 So 2d 147, 247 Ala 479—Anderson v Byrd, 37 So 2d 115 251 Ala 257—Hicks v Huggins, Civ App, 405 So 2d 1324, writ den 405 So 2d 1328

(3) Ala —Craig v Root supra

(5) Other matters

Ala —Stafford v State, 31 So 2d 146, 33 Ala App, 163—Davis v Davis, 81 So 2d 314, 263 Ala 42—Gilbreath v Levi, 119 So 2d 210, 270 Ala 413

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32. Cal —In re Schmelz Estate, 66 Cal Rptr 480, 259 C A 2d 440

33. In absence of injury

Ala —Harrell v Henderson, supra, n 8

Ark —Marsh v Marsh, 320 S W 2d 754, 230 Ark 59

Laches not shown

Ala —Nix v McCoy, 195 So 2d 893, 280 Ala 516—Hicks v Huggins, Civ App, 405 So 2d 1324, writ den 405 So 2d 1328

35. Ala —Craig v Root, supra, n 29

37. Ala —Bryant v Jones, 71 So 2d 831, 260 Ala 659

39. Ala —Laurance v Mitchell, 15 So 2d 583, 244 Ala 678—Shull v Shull, 40 So 2d 708, 252 Ala

120—White v Manassa, 41 So 2d 395, 252 Ala 196—Parker v Money, 64 So 2d 108, 258 Ala 568

Cal—In re Dalton's Estate, 197 P 2d 62, 87 Cal App 2d 333

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40. Ala—Laurance v Mitchell, supra, n 39—Craig v Root, supra, n 29—Howton v Howton, 30 So 2d 1, 249 Ala 122—Pryor v Heard, 106 So 2d 171, 268 Ala 310

In absence of administration

(5) Other matters

Ala—Davis v Reid, 88 So 2d 857, 264 Ala 560

Jurisdiction not presumed

Ala—Walton v Walton, 54 So 2d 498, 256 Ala 236

41. Ala—Johnson v Johnson, 41 So 2d 287, 252 Ala 366

Tenn—Edwards v Hawks, 222 S W 2d 28, 189 Tenn 17

42. Ala—Davis v Davis, 81 So 2d 314, 263 Ala 42

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49. Ala—Jacobs v Murphy, 16 So 2d 859, 245 Ala 260

Cal—In re Rosland's Estate, 173 P 2d 830, 76 Cal App 2d 709—In re Claussenius Estate, 216 P 2d 485, 96 Cal App 2d 600

Kan—Schroeder's Estate v Schroeder, 150 P 2d 173 158 Kan 783

Wyo—C.J.S. cited in In re Bergman's Survivorship, 151 P 2d 360, 368, 60 Wyo 355

Notice provisions of statute held not to require actual notice

Cal—Arens v Superior Court In and For San Bernardino County, 290 P 2d 257, 45 C 2d 623

50. In Alabama

(5) Other matters—Jacobs v Murphy, supra, n 49

Personal notice to legatees not required

Cal—In re Dell's Estate, 17 Cal Rptr 46, 196 C A 2d 809

53. Ala—Matthews v Matthews, 25 So 2d 259, 247 Ala 472

54. Ala—Matthews v Matthews, supra, n 53

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60. Ala—Jacobs v Murphy, 16 So 2d 859 245 Ala 260

72. Allegations sufficient

Ala—Casey v Beck, 350 So 2d 429

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74. Ala—Gilbreath v Levi, 119 So 2d 210, 270 Ala 413—Head v Taylor, 130 So 2d 4, 272 Ala 241

75. Ala—Johnson v Johnson supra, n 41

78. Ala—Quicksey v Hall, 69 So 2d 698, 260 Ala 162

79. Ala—Carter v Carter, 38 So 2d 557, 251 Ala 598—Nathanson v Key, 242 So 2d 389, 286 Ala 486

Jurisdictional allegations in probate court

(2) Ala—Smith v McPherson, 117 So 2d 698 270 Ala 289

(5) Other cases

Ala—Simpson v Simpson, 49 So 2d 314, 254 Ala 648—Walton v Walton, supra n 40—Freeman v Steele, 59 So 2d 801 257 Ala 554—Vann v Carter, 71 So 2d 811, 260 Ala 634—Davis v Reid, 88 So 2d 857, 264 Ala 560—Durham v Mims, 114 So 2d 245, 269 Ala 477—Head v Taylor, 130 So 2d 4, 272 Ala 241—Early v Jones, 148 So 2d 214, 274 Ala 251

Averments as to heirs and next of kin

(3) Other averments.—Forbes v Summers, 66 So 2d 762, 259 Ala 271—Davis v Davis, 81 So 2d 314, 263 Ala 42—Durham v Mims, 114 So 2d 245, 269 Ala 477

Real property not in excess of exemption

(4) Ala—Boozer v Boozer, 16 So 2d 863, 245 Ala 264—Davis v Davis, 81 So 2d 314, 263 Ala 42

Residence in state or county

Ala—Forbes v Summers, 66 So 2d 762, 259 Ala 271—Early v Jones, 148 So 2d 214, 274 Ala 251

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81. N C—Elledge v Welch, 76 S E 2d 340, 238 N C 61

Separate or community character of property may be determined

Cal—In re Dell's Estate, 17 Cal Rptr 46, 196 C A 2d 809

83. Ala—Byars v Mixon, 299 So 2d 262, 292 Ala 661

86. Ala—Laurance v Mitchell, supra, n 39

89. Ala—Howton v Howton, supra, n 40

Establishment of right generally

(3) Ala—Whitman v Whitman, 46 So 2d 422, 253 Ala 643

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90. Utah—In re Delton's Estate, 167 P 2d 690, 109 Utah 503

Appraisers' report as to value

Ala—Tolar v Clemons, 33 So 2d 21, 250 Ala 16

Continuance of right

Tex—Moorhouse v Crew, Civ App, 273 S W 2d 654, err ref no rev err

92. Ala—Craig v Root, supra, n 29

Evidence held sufficient

(3) Ark—Marsh v Marsh, 320 S W 2d 754, 230 Ark 59

(4) Cal—In re Ades' Estate, 184 P 2d 1, 81 Cal App 2d 334

(8) Ala—Tolar v Clemons, supra, n 90—Shull v Shull, supra, n 39

(17) Tex—La Brier et al v Williams, Civ App, 212 S W 2d 828, err ref no rev err

(20) To show other matters

Ala—Thompson v Bryant, 38 So 2d 590, 251 Ala 566—Stacey v Smith, 172 So 2d 41, 277 Ala 477

Kan—In re Winter's Estate, 192 P 2d 186, 164 Kan 615

Evidence held insufficient

(8) Other matters

Ala—Quicksey v Hall, supra, n 78

(9) To show other matters

Ala—Roberts v Roberts, 83 So 2d 348, 263 Ala 517

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93. Ala—Early v Jones, 148 So 2d 214, 274 Ala 251

Cal—In re Bonner's Estate, 35 Cal Rptr 264, 222 C A 2d 426

94. Idaho—In re Henry's Estate 212 P 2d 393, 70 Idaho 108

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2. Ariz—In re Moore's Estate, 190 P 2d 914, 67 Ariz 65

Mo—Osborn v Osborn, 274 S W 2d 32, 241 Mo App 1175

Duty with respect to probate homestead held mandatory

Cal—In re Alba's Estate, 48 Cal Rptr 100, 238 C A 2d 618

3. Cal—In re Claussenius' Estate, 216 P 2d 485, 96 Cal App 2d 600

Discretion held not abused

Cal—In re Nelson's Estate, 36 Cal Rptr 352, 224 C A 2d 138

5. Cal—In re Claussenius' Estate, supra, n 3

Statement as to method used did not render claim invalid—Beasley v Beasley, 57 So 2d 68, 256 Ala 647

Matters for consideration

Cal—In re Nelson's Estate, 36 Cal Rptr 352, 224 C A 2d 138

9. Ala—Early v Jones, 148 So 2d 214, 274 Ala 251

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12. Report valid though not unanimous

Ala—Roberts v Roberts, 83 So 2d 348, 263 Ala 517

13. Ala—Roberts v Roberts, 83 So 2d 348, 263 Ala 517

14. Cal—In re Falcone's Estate, 27 Cal Rptr 38, 211 C A 2d 40

Extent and limits of homestead

(2) Cal—In re Raymond's Estate, 289 P 2d 890, 137 C A 2d 134

19. Ala—Mitchell v Mitchell, 64 So 2d 104, 258 Ala 572—Parker v Money, 64 So 2d 108, 258 Ala. 568—Early v Jones, 148 So 2d 214, 274 Ala 251—Fretwell v Fretwell, 211 So 2d 795, 282 Ala 377, app after remand 218 So 2d 138, 283 Ala 424—Nathanson v Key, 242 So 2d 389, 286 Ala 486

Cal—In re Rosland's Estate, 173 P 2d 830, 76 Cal App 2d 709

Kan—Schroeder's Estate v Schroeder, 150 P 2d 173, 158 Kan 783

22. Ala—Freeman v Steele, 59 So 2d 801, 257 Ala 554—Early v Jones, 148 So 2d 214, 274 Ala 251

26. Wash—In re Scheldt's Estate, 536 P 2d 4, 13 Wash App 570

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27. Nature of holding as community, quasi-community or separate required

Cal—In re Alba's Estate, 48 Cal Rptr 100, 238 C A 2d 618

31. Ala—Parker v Money, supra, n 19

32. Cal—In re Rosland's Estate, supra, n 19

Duration An order selecting a homestead for the surviving spouse from a decedent's separate property, must prescribe a limited period not exceeding the survivor's life time [33.1]

33.1. Cal—In re Raymond's Estate, 289 P 2d 890, 137 C A 2d 134

Discretion of court

Cal—In re Bonner's Estate, 35 Cal Rptr 264, 222 C A 2d 426

§ 280. —— Operation and Effect of Assignment of Homestead

34. Ala—Laurance v Mitchell, 15 So 2d 583, 244 Ala 678—Cassady v 222 Ark 315

Matters determined

(5) Other matters

Okl—Hixson v Cook, 379 P 2d 677

35. Okl—Hixson v Cook, 379 P 2d 677

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38. Ala—Howton v Howton, 30 So 2d 1, 249 Ala 122—Smith v Jackson, 169 So 2d 21, 277 Ala 257

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53. Ala—Laurance v Mitchell, supra, n 34

54. Okl—Turner v Hubbell, 288 P 2d 394

59. Ala—Cassady v Davis, supra, n 34—Albright v Creel, 482 So 10, 236 Ala 286

Direct attack

Ala—Wright v Fannin, 156 So 849, 229 Ala 278—Durham v Mims, 114 So 2d 245, 269 Ala 477

Held not collateral attack

Okl—Hixson v Cook, 379 P 2d 677

60. Wyo—Addison v Fleenor, 196 P 2d 991, 65 Wyo 119

Decree must be void on face
Ala —Durham v Mims, 114 So 2d 245, 269 Ala 477

§ 281. —— Vacating and Setting Aside Allotment

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67. Ala —Carter v Carter, 38 So 2d 557, 251 Ala 598

73. Order may not be set aside after becoming final
Cal —In re Dell's Estate, 17 Cal Rptr 46, 196 C A 2d 809

75. Ala —Hutchins v Shepard, 370 So 2d 275

Decree held not void
Ala —Durham v Mims, 114 So 2d 245, 269 Ala 477

76. Laches
Ala —Cassady v Davis, supra n 34—Smith v McPherson, 117 So 2d 698, 270 Ala 289—Abernathy v Mitchell, 406 So 2d 862

Grounds for vacation not shown
Ala —Hutchins v Shepard, 370 So 2d 275

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80. Ala —Smith v McPherson, 117 So 2d 698, 270 Ala 289

§ 282. —— Review

81. Cal —Arens v Superior Court In and For San Bernardino County 290 P 2d 257, 45 C 2d 623

Judgment held not appealable
Mo —Osborn v Osborn, App, 252 S W 2d 837

82. Cal —Arens v Superior Court In and For San Bernardino County, 290 P 2d 257, 45 C 2d 623

89. Cal —In re Somers Estate, 191 P 2d 776, 84 Cal App 2d 126—In re Schmelz' Estate, 66 Cal Rptr 480 259 C A 2d 440

Rule applicable to court's discretion in selecting probate homestead
Cal —In re Raymond's Estate, 289 P 2d 890, 137 C A 2d 134—In re Nelson's Estate, 36 Cal Rptr 352, 224 C A 2d 138

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92. Value of property
(2) Other statements
Mo —In re Walton's Estate 330 S W 2d 834

Error as such, unaccompanied by prejudice, is not ground for reversal [92.5]

92.5. Failure to serve findings
Cal —In re Rosland's Estate, 173 P 2d 830 76 Cal App 2d 709

§ 284. Transfer or Encumbrance

Library References
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4. Sale not permitted
Ark —Smith v Wofford 259 S W 2d 507, 222 Ark 315

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14. Affect of solvency or insolvency
Ala —Compton v Cook 66 So 2d 176, 259 Ala 256

§ 285. —— By Surviving Wife

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20. Okl —C.J.S cited in Kemp v Turnbull, 174 P 2d 184, 387, 198 Okl 27—Filtsch v Curtis, 234 P 2d 177, 205 Okl 67
Tex —Smith v Little Civ App, 217 S W 2d 881 err ref no rev err

As personal right
Tex —Williamson v Kelley, Civ App, 444 S W 2d 311, err ref no rev err

21. Tenn —Hale v Sandusky, 178 S W 2d 386, 181 Tenn 26
Tex —Cook v Young, Civ App, 269 S W 2d 457—Grant v Marshall, Civ App, 272 S W 2d 580, revd on oth grds, Sup, 280 S W 2d 559, 154 Tex 531

Payment of community debts
(1) Tex —Grant v Marshall, 280 S W 2d 559, 154 Tex 531—Jackson v Smith, Civ App, 281 S W 2d 342
(7) Other cases
Tex —English v Paschall, Civ App, 229 S W 2d 645, err ref

Life estate
Neb —Fisher v Peden, 137 N W 2d 349, 179 Neb 150

22 Fla —Regero v Daugherty, 69 So 2d 178

23. Kan —In re Younkin's Estate, 147 P 2d 726, 158 Kan 431

§ 286. —— By Surviving Husband

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31. Ky —Sams v Sampson, 255 S W 2d 626

34. Neb —Forshay v Johnston 13 N W 2d 873, 144 Neb 525

§ 288. —— Rights Acquired by Grantee or Purchaser

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39. Ala —Head v Taylor, 130 So 2d 4, 272 Ala 241

Life estate
Neb —Fisher v Peden, 137 N W 2d 349, 179 Neb 150

40 Tex —English v Paschall supra n 21

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47. Under void proceedings
Ala —Vann v Carter 71 So 2d 811, 260 Ala 634

51. Tex —Anderson v Bundick Civ App, 245 S W 2d 318 err ref no rev err

§ 289. Liability of Homestead for Debts of Decedent

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52 Iowa—Ames Trust and Sav Bank v Reichardt 121 N W 2d 200, 254 Iowa 1272 7 A L R 3d 900
Neb —Stocker v Hilger 13 N W 2d 106, 144 Neb 202
Tex —Blake v Fuller, Civ App 184 S W 2d 148

54. Okl - Hixson v Cook, 379 P 2d 677
Tex —Robinson v Snyder, Nat Bank, Civ App 175 S W 2d 482

55. U S —Doing v Riley C A Fla, 176 F 2d 449
Iowa—In re Shumaker's Estate, 12 N W 2d 207, 234 Iowa 195
Or —Jenning v Jenning, 253 P 2d 276 197 Or 366

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68. Fla —Stephens v Campbell, 70 So 2d 579

§ 290. —— After Termination of Homestead

76. Tex —Harms v Ehlers, Civ App, 179 S W 2d 582, err ref

Freedom from debts during occupancy
(4) Other instances
Miss —Weaver v Blackburn, 294 So 2d 786

78 Fla —Hospital Affiliates of Florida Inc v McElroy, App, 393 So 2d 25

80. Iowa—In re Ragan's Estate, 23 N W 2d 521, 237 Iowa 619
Tex —Chisholm v Mills, Civ App, 250 S W 2d 268, err ref

HOMICIDE

§ 1. Definitions and Classification

Library References
Homicide ⇐2, 101

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1. Ill —People v Sulton, 266 N E 2d 351, 130 Ill App 2d 1098
La —State v Brown, 378 So 2d 916
Mich —People v Andrus, 50 N W 2d 310, 331 Mich 535

2. Md —State v Ward, 396 A 2d 1041, 284 Md 189, app after remand, 427 A 2d 1008, 290 Md 76, app after remand 447 A 2d 872 52 Md App 63
Mich —People v Andrus, supra, n 1

3. Del —State v Winsett, Super, 205 A 2d 510, 8 Storey 111
Mont —State v Rivers, 320 P 2d 1004, 133 Mont 129
Ohio—State ex rel Christopher v Amrine, 75 N E 2d 227, affd app 80 N E 2d 648
Pa —Com v Redline, 137 A 2d 472, 391 Pa 486
S D —State v Painter, 17 N W 2d 12 70 S D 277

Other definitions
Mo —State v Anderson, Mo 384 S W 2d 591

7. Under Texas statutes, etc.
(2) Other matters
Tex —Dockery v State, Cr, 542 S W 2d 644

Homicide has been said to be a graded offense [7.5]

7.5. Mo —State v Foster, 338 S W 2d 892

8. Ala – Flint v State, Cr App, 370 So 2d 332
Ill —People v Mahon, 395 N E 2d 950, 32 Ill Dec 569, 77 Ill App 3d 413

9. Voluntary act
Tex —Womble v State, Cr App, 618 S W 2d 59

10. Md —Whitehead v State, 262 A 2d 316, 9 Md App 7
Mich —People v Andrus, supra, n 1

11 Ala —Hodge v State, 70 So 2d 285, 37 Ala App 450—Alexander v State, 71 So 2d 520, 37 Ala App 533—Knight v State, Cr, 276 So 2d 624, 50 Ala App 39, cert den 276 So 2d 628, 290 Ala 368—Champion v State 44 So 2d 616, 35 Ala App 7, cert den 44 So 2d 622, 253 Ala 436—Kent v State, Civ App, 367 So 2d 508, writ den 367 So 2d 518—Morris v State, Cr App, 405 So 2d 81
Ariz —Harding v State, 225 P 482, 26 Ariz 334
Cal —People v Danielly, 202 P 2d 18, 33 Cal 2d 362, cert den 69 S Ct 1162 337 U S 919, 93 L Ed 1728
La —C.J S cited in State v Gyles, 313 So 2d 799, 800
Md —Smith v State, 398 A 2d 426, 41 Md App 277, 18 A L R 4th 927
N J —State v Kress, 253 A 2d 481, 105 N J Super 514
N Y —People v Joyce, 84 N Y S 2d 238, 192 Misc 107
Ohio—State ex rel Christopher v Amrine, supra, n 3
Pa —Com v Johnston, 263 A 2d 376, 438 Pa 485, 41 A L R 3d 576—Com v Mahoney, 331 A 2d 488, 460 Pa 201

Similar definitions
(3) Other definitions
Pa —Com v Redline, 137 A 2d 472, 391 Pa 486

12. Cal —People v Jacobs, 244 P 2d 500, 111 C A 2d 281
Mont —State v Kirkaldie, 587 P 2d 1298, 179 Mont 283

"Reckless homicide"
Ind —Comer v State, App, 428 N E 2d 48

13. Cal —People v Dewberry, 334 P 2d 852, 51 C 2d 548
Kan —State v Jensen, 417 P 2d 273, 197 Kan 427
Mich —People v Andrus, supra, n 1
N J —State v Brown, 126 A 2d 161, 22 N J 405

S D —State v Brech, 169 N W 2d 242, 84 S D 177
W Va —State v Stevenson, 127 S E 2d 638, 147 W Va 211, cert den 83 S Ct 886, 372 U S 938 9 L Ed 2d 768

Common law definition

Mo —State v Rumble, 680 S W 2d 939

Depends upon attendant circumstances

U S —U S ex rel Crosby v Brierley, C A Pa 404 F 2d 790

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14. N C —State v Street 86 S E 2d 277, 241 N C 689
Pa —Com v Redline, 137 A 2d 472 391 Pa 486
W Va —State v Stevenson, 127 S E 2d 638, 147 W Va 211, cert den 83 S Ct 886, 372 U S 938 9 L Ed 2d 768

Withdrawal of life support systems. Criminal liability with respect to the termination of medical treatment[14.5] or the withdrawal of life sustaining mechanisms[14.10] from incompetent patients have been adjudicated by the courts

14.5. Competent adult refusing medication, liability of spouse for failure to summon medical aid, see infra § 11

Pursuant to right of privacy

N J —Matter of Quinlan, 355 A 2d 647, 70 N J 10, 79 A L R 3d 205, cert den 97 S Ct 319, 429 U S 922, 50 L Ed 2d 289

14.10. Wash —Matter of Welfare of Colyer, 660 P 2d 738, 99 Wash 2d 114, mod on oth grds 689 P 2d 1372 102 Wash 2d 810

In the case of a comatose and terminally ill individual who has executed a "living" or "mercy" will, it is not necessary that a court-appointed guardian of his person obtain court approval before terminating extraordinary life support systems in order for consenting family members, attending physicians, and a hospital and its administrator, acting in good faith to be relieved of criminal liability [14.15]

14.15. Fla —John F Kennedy Memorial Hosp Inc v Bludworth, 452 So 2d 921

Femicide. The killing of a woman, also one who kills a woman [15.5]

15.5. Black L D

18. Fla —Murray v State, App, 328 So 2d 501

19. N Y —Gilpin v Gilpin 94 N Y S 2d 706, 197 Misc 319

28.1. Prolicide defined

Black L D
60 C J p 715, note 29

§ 2. Persons Subject of Homicide

Library References

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29. Corporation not subject

N Y —People v Ebasco Services Inc, 354 N Y S 2d 807 77 Misc 2d 784

Foreign officials and others

D C —U S v Mariano Garcia, D C, 456 F Supp 1358

34. N Y —People v Dlugash, 363 N E 2d 1155, 41 N Y 2d 725 395 N Y S 2d 419, on remand 398 N Y S 2d 560 59 A D 2d 745
N C —State v Simpson 93 S E 2d 425, 244 N C 325

Under a statute to the effect that a person is guilty of an attempt when, with intention to commit the crime, he engages in conduct which tends to effect the commission thereof, it is no defense to a charge of attempted murder that the victim was already dead when the attempt was made [35.5]

35.5 N Y —People v Dlugash, 363 N E 2d 1155, 41 N Y 2d 725, 395 N Y S 2d 419, on remand 398 N Y S 2d 560, 59 A D 2d 745

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38. Cal —C.J S cited in Keeler v Superior Court of Amador County, 87 Cal Rptr 481, 494, 470 P 2d 617 2 C 3d 619, 40 A L R 3d 420
N J —State v Anderson, 343 A 2d 505, 135 N J Super 423—State in Interest of A W S, 440 A 2d 1144, 182 N J Super 278
Ohio—State v Dickinson 263 N E 2d 253, 23 Ohio App 2d 259 affd 275 N F 2d 599, 28 Ohio St 2d 65
Utah—State v Larsen, 578 P 2d 1280

Viable fetus

Cal —People v Smith, 129 Cal Rptr 498, 59 C A 3d 751
Ky —Hollis v Com, 652 S W 2d 61
S C —State v Horne 319 S E 2d 703 282 S C 444
Tex —Showery v State, App 8 Dist, 690 S W 2d 689
W Va —State ex rel Atkinson v Wilson, 332 S E 2d 807

Cesarean section

Ill —People v Bolar, 440 N E 2d 639 64 Ill Dec 919, 109 Ill App 3d 384

39 La —State v Gyles 313 So 2d 799

Other statutes have been construed to make the offense of foeticide either murder or a misdemeanor, depending on whether the child was "quick." [39.1]

39.1. Ga —Porter v Lassiter, 87 S E 2d 100, 91 Ga App 712
Ill —People v Greer, 402 N E 2d 203, 37 Ill Dec 313, 79 Ill 2d 103
Mich —Larkin v Cahalan, 208 N W 2d 176 389 Mich 533

Statute held valid

Ga —Brinkley v State, 322 S E 2d 49, 253 Ga 541

Feticide not merged into mother's murder

Miss —State v Willis, 457 So 2d 959

43. N J —State v Anderson, 343 A 2d 505, 135 N J Super 423

§ 3. Capacity and Responsibility

48 Cal —People v Bufarale, 14 Cal Rptr 381, 193 C A 2d 551—People v Danielly, 202 P 2d 18, 33 C 2d 362, cert den 69 S Ct 1162, 337 U S 919, 93 L Ed 2d 1728—People v Conley 73 Cal Rptr 673, 268 C A 2d 47—People v Newton, 87 Cal Rptr 394, 8 C A 3d 359
Fla —Andrews v State, App, 372 So 2d 143, writ discharge, Sup, 390 So 2d 61

Diminished capacity defense implied

Cal —People v Conley, 49 Cal Rptr 815, 411 P 2d 911, 64 C 2d 310—People v Hoxie, 61 Cal Rptr 37, 252 C A 2d 901

Self-induced unconsciousness

Va —Greenfield v Com, 204 S E 2d 414, 214, Va 710, 92 A L R 3d 432

Youth and illiteracy are no defense for committing homicide.[48.5]

48.5. Fla —Daugherty v State, 17 So 2d 290, 154 Fla 308

§ 4. —— Insanity

49. U S —Leland v State of Or, Or, 72 S Ct 1002, 343 U S 790, 96 L Ed 1302, reh den 73 S Ct 4, 344 U S 848, 97 L Ed 2d 659
Cal —People v Henderson, 35 Cal Rptr 77, 386 P 2d 677, 60 C 2d 482—People v Fusselman, 120 Cal Rptr 282, 46 C A 3d 289
Ga —Handspike v State, 45 S E 2d 662, 203 Ga 115
Mo —State v Sturdivan, 497 S W 2d 139
N Y —People v Draper, 104 N Y S 2d 703, 278 App Div 298, affd 101 N E 2d 763, 303 N Y 653
N C —State v Mercer, 165 S E 2d 328, 275 N C 108—State v Sanders, 209 S E 2d 870, 24 N C App 33, cert den 211 S E 2d 218, 286 N C 420
Ohio—State v Johnson, 285 N E 2d 751, 31 Ohio St 2d 106
Pa —Com ex rel Smith v Ashe, 71 A 2d 107, cert den 71 S Ct 40, 340 U S 812, 95 L Ed 597—Com v Patskin, 100 A 2d 472, 375 Pa 368—Com v Vogel, 268 A 2d 89, 440 Pa 1
Tex —Purcell v State, 322 S W 2d 268, 167 Tex Cr R 565

Insanity of codefendant held not shield

Mass —Com v McGrath, 264 N E 2d 667, 358 Mass 314
Mo —Babcock v State, 485 S W 2d 85

Incapability of deliberate premeditation held not defense

Mass —Com v Fleming, 274 N E 2d 809, 360 Mass 404

Incapacity of due to disease of mind

N M —State v Valenzuela, 559 P 2d 402, 90 N M 25

Rulings relative to insanity defense not violative of federally protected rights

U S —Baldwin v Blackburn, D C La, 524 F Supp 332, affd 653 F 2d 942, cert den 102 S Ct 2021, 456 U S 950, 72 L Ed 2d 475, reh den 102 S Ct 2918, 457 U S 1112 73 L Ed 2d 1323

Defense precluded

(1) When defendant ruled sane
Ariz—State v Billhymer, 561 P 2d 311, 114 Ariz 390
(2) When defendant refused examination by psychiatrist
Fla —Christopher v State, 416 So 2d 450

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51. U S —Walker v Butterworth, C A Mass, 599 F 2d 1074, cert den 100 S Ct 288, 444 U S 937, 62 L Ed 2d 197

52 U S —Government of Virgin Islands v Downey, D C Virgin Islands, 396 F Supp 349, affd, C A, 529 F 2d 511

Ala —Fitzhugh v State, 43 So 2d 831, 35 Ala App 18, cert den 43 So 2d 839, 253 Ala 246, cert den 70 S Ct 1007 339 U S 986, 94 L Ed 1388
Cal —People v Nance, App, 102 Cal Rptr 266, 25 C A 3d 925—People v Crosier, 116 Cal Rptr 467, 41 C A 3d 712, cert den 95 S Ct 1956, 421 U S 966 14 L Ed 2d 453, reh den 95 S Ct 2669, 422 U S 1049, 45 L Ed 2d 703
Pa —Com v Tyson, 402 A 2d 995, 485 Pa 344

53. Mass —Com v Mazza, 313 N E 2d 875, 366 Mass 30

54 Fla —Holston v State, 208 So 2d 98

Belief in justification insufficient

Cal —People v Yanikian, 114 Cal Rptr 188, 39 C A 3d 366

55. Ariz —State v Schantz 403 P 2d 521, 98 Ariz 200, cert den 86 S Ct 628, 382 U S 1015, 15 L Ed 2d 530—State v Harwood, 51 P 2d 177, 110 Ariz 375
Cal —People v Walker, 201 P 2d 6, 33 Cal 2d 250, cert den 69 S Ct 744, 336 U S 940, 93 L Ed 2d 1098—People v Seastone, 82 Cal Rptr 907, 3 C A 3d 60
Colo —Battalino v People, 199 P 2d 897, 118 Colo 587
Kan —State v Topham, 642 P 2d 986, 231 Kan 167
Mass —Com v Sires, 350 N E 2d 460, 370 Mass 541

Mo —State v Glenn, 429 S W 2d 225

N J —State v King, 181 A 2d 158, 37 N J 285, 2 A L R 3d 1278

Pa —Com v Ahearn, 218 A 2d 561, 421 Pa 311

Diminished responsibility theory rejected

Colo —People v Cornelson, 559 P 2d 1102, 192 Colo 337

Mass —Com v Costa, 274 N E 2d 802, 360 Mass 177—Com v Lannon, 306 N E 2d 248 364 Mass 480

56. Cal —People v Baker, 268 P 2d 705, 42 C 2d 550—People v Conley, 49 Cal Rptr 815, 411 P 2d 911, 64 C 2d 310—People v Ford, 52 Cal Rptr 228, 416 P 2d 132, 65 C 2d 41, cert den 87 S Ct 737, 385 U S 1018, 17 L Ed 2d 554, on remand 61 Cal Rptr 329, 253 C A 2d 390—People v Theriot, 60 Cal Rptr 279, 252 C A 2d 222—People v Juarez, 65 Cal Rptr 630, 258 C A 2d 349—People v Caylor, 66 Cal Rptr 448, 259 C A 2d 191—People v Gibson, 101 Cal Rptr 620, 23 C A 3d 917—People v Wingo, 121 Cal Rptr 97, 534 P 2d 1001, 14 C 3d 169

Neb —C.J.S. cited in Washington v State, 85 N W 2d 509, 511, 165 Neb 275

N M —State v Padilla, 347 P 2d 312, 66 N M 289, 78 A L R 2d 908

N C —State v Cooper 213 S E 2d 305, 286 N C 549

Ohio—State v Nichols, 209 N E 2d 750, 3 Ohio App 2d 182

Or —C.J.S. cited in State v Jensen, 296 P 2d 618, 628, 209 Or 239, app dism 77 S Ct 329, 352 U S 948, 1 L Ed 2d 241, reh den 77 S Ct 388, 352 U S 990, 1 L Ed 2d 369

Pa —Com v Melton, 178 A 2d 728 406 Pa 343, cert den 83 S Ct 93 371 U S 851, 9 L Ed 2d 87

Utah—State v Thompson, 170 P 2d 153, 110 Utah 113

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Alaska—Hensel v State 604 P 2d 222

Cal —People v Sedeno, 112 Cal Rptr 1, 518 P 2d 913, 10 C 3d 703

People v Ward, 66 Cal Rptr 893, 260 C A 2d 79—People v Seastone, 82 Cal Rptr 907, 3 C A 3d 60—People v Harris, 87 Cal Rptr 46, 7 C A 3d 922

Iowa—Veverka v Cash, 318 N W 2d 447, 8 A L R 4th 705

Mont —State v McKenzie, 608 P 2d 428, 186 Mont 481, cert den 101 S Ct 626, 449 U S 1050 66 L Ed 2d 507

W Va —State v Simmons, 309 S E 2d 89

Intent merely put in issue

Ga —Johnson v State, 220 S E 2d 448, 235 Ga 486

Mental illness does not necessitate finding of not guilty of murder

Mich —People v Ramsey, 280 N W 2d 565, 89 Mich App 468, app after remand 375 N W 2d 297—People v Thomas, App, 292 N W 2d 523, 796 Mich App 210

57. Cal —People v Reece, 128 Cal Rptr 918, 58 C A 3d 382

58. Limited defense under statute

N Y —People v Shelton, 385 N Y S 2d 708, 88 Misc 2d 136, affd 434 N Y S 2d 649, 78 A D 2d 821

62. N J —State v Deegan, 44 A 2d 104, 133 N J Law 263

63. Cal —People v Goedecke, 56 Cal Rptr 625, 423 P 2d 777, 65 C 2d 850, 22 A L R 3d 1213

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65. Ga —Handspike v State, supra, n 49

Mental examination immediately after homicide not mandatory

Pa —Com v Howard, 231 A 2d 860, 426 Pa 305, cert den 88 S Ct 839, 390 U S 911, 19 L Ed 2d 884

66. Ariz —State v Steelman, 585 P 2d 1213, 120 Ariz 301 app after remand 612 P 2d 475, 126 Ariz 19, cert den 101 S Ct 287, 449 U S 913, 66 L Ed 2d 141

Fla —Rojas v State App, 296 So 2d 627

Kan —State v Andrews, 357 P 2d 739, 187 Kan 458, cert den 82 S Ct 80, 368 U S 868, 7 L Ed 2d 65

Md —Armstead v State, 175 A 2d 24, 227 Md 73—Robinson v State, 238 A 2d 875, 249 Md 200, cert den 89 S Ct 259

Miss —Wilson v State, 30 So 2d 62, 201 Miss 627—Hamburg v State, 35 So 2d 324, 203 Miss 565—Myrick v State, 290 So 2d 259

Neb —C.J.S. cited in State v Hall, 125 N W 2d 918, 926, 176 Neb 295

N Y —People v Boykins, A D, 439 N Y S 2d 181, 81 A D 2d 922

Pa —Com v Daverse, 73 A 2d 405, 364 Pa 623—Com v Carluccetti, 85 A 2d 391, 369 Pa 190—Com v Heller, 87 A 2d 287, 369 Pa 457—Com v Lance, 113 A 2d 290, 381 Pa 293, 381 Pa 447—Com v Dick, 12 Bucks 316

Tex —Purcell v State, 322 S W 2d 268, 267 Tex Cr R 565

69. N Y —People v Draper, supra n 49—People v Graupman, 228 N Y S 2d 911 34 Misc 2d 633

Ohio—State v Stewart, 201 N E 2d 793, 120 Ohio App 199, affd 198 N E 2d 439, 176 Ohio St 156, cert den 85 S Ct 443, 379 U S 947, 13 L Ed 2d 544

70. Ariz —State v Janovic, 417 P 2d 527, 101 Ariz 203, cert den 87 S Ct 777, 385 U S 1036, 17 L Ed 2d 683

N J —State v Forcella, 171 A 2d 649, 35 N J 168, cert den 82 S Ct 1035, 369 U S 866, 8 L Ed 2d 86

Pa —Com v Bruno, 407 A 2d 413, 268 Pa Super 15

Capacity to kill, included

N C —State v Cooper, 213 S E 2d 305, 286 N C 549

71. Ark —Jones v State, 213 S W 2d 974, 213 Ark 863

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74 Tenn —Temples v State, 194 S W 2d 332, 183 Tenn 531

75. Cal —People v Wilson 168 P 2d 683, 28 Cal 2d 185

Pa —Com v Levin, 66 Pa Dist & Co 55

Epilepsy

Iowa—State v Arthur, 160 N W 2d 470

Md —Armstead v State, 175 A 2d 24, 227 Md 73

N Y —People v Knight, 237 N Y S 2d 846, 18 A D 2d 890 affd, 194 N E 2d 133, 13 N Y S 2d 948, 244 N Y S 2d 318, cert den 84 S Ct 687, 376 U S 925, 11 L Ed 2d 621

76. Fla —Van Eaton v State, 205 So 2d 298, disapproving Reid v Florida Real Estate Commission App, 188 So 2d 846

Mass —Com v McCann, 91 N E 2d 214, 325 Mass 510

77. Colo —People v Gallegos, 628 P 2d 999

N C —State v Cooper, 213 S E 2d 305 286 N C 549

Tenn —Davis v State, 28 S W 2d 993, 161 Tenn 23

Tex —Ross v State, 220 S W 2d 137, 153 Tex Cr R 312—Morris v State, 246 S W 2d 184, 157 Tex Cr R 14

78. Wash —State v Collins, 314 P 2d 660, 50 Wash 2d 740

79. Cal —People v Wingo, 121 Cal Rptr 97, 534 P 2d 1001, 14 C 3d 169

Ga —Whitaker v State, 67 S E 2d 396, 84 Ga App 781

No defense to voluntary manslaughter

Cal —People v Jennings, 136 Cal Rptr 249, 66 C A 3d 743

83. Miss —Burr v State, 114 So 2d 764, 237 Miss 338

85. Miss —Stewart v State, 33 So 2d 787, 203 Miss 295

Pa —Com v McCausland, 25 Erie Co 177, affd 35 A 2d 70, 348 Pa 275

Spell

Miss —Jones v State, 288 So 2d 833

86. Ga —Reeves v State, 27 S E 2d 375, 196 Ga 604—Bailey v State, 291 S E 2d 704, 249 Ga 535

Delusional compulsion

Ga —Graham v State, 223 S E 2d 803, 236 Ga 378

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88. Ga —Johnson v State, 175 S E 2d 840, 226 Ga 511—Bailey v State, 291 S E 2d 704, 249 Ga 535

Voodoo curse

Tex —Conaway v State, App 1 Dist, 663 S W 2d 53, review ref

94. Cal —People v R ttger, 7 Cal Rptr 901, 355 P 2d 645, 54 C 2d 720

96. Del —C.J.S. cited in Ruffin v State, 123 A 2d 461, 464, 11 Terry 83

Temporary mania

Ala —Barbour v State, 78 So 2d 328, 262 Ala 297—Bowen v State, 145 So.2d 421, 274 Ala 66

Fla —Smith v State, App, 314 So 2d 226, cert den discharged, Sup, 343 So 2d 598

Under the provisions of some statutes extreme emotional disturbance may constitute an affirmative defense.[96.5]

96.5. La —State v McAllister, 366 So 2d 1340

N Y —People v Shelton, 385 N Y S 2d 708, 88 Misc 2d 136, affd 434 N Y S 2d 649, 78 A D 2d 821

Emotional stress

Ohio—State v Muscatello, 378 N E 2d 738, 55 Ohio St 2d 201, 9 O O 3d 148

97. Ariz —State v Prewitt, 452 P 2d 500, 104 Ariz 326

Cal —People v Danielly, supra, n 11

S C —State v Gardner, 64 S E 2d 130, 219 S C 97

§ 5. —— Intoxication

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99. Conn —State v Crawford, 372 A 2d 154, 172 Conn 65

Iowa—C.J.S. cited in State v Hall, 214 N W 2d 205, 209, 73 A L R 3d 85

Me —State v Arsenault, 124 A 2d 741, 152 Me 121

Mass —Com v Rollins, 241 N E 2d 809, 354 Mass 630

1. U S —Pierce v Turner D C Utah, 276 F Supp 289, affd, C A, 402 F 2d 109, cert den 89 S Ct 1290, 394 U S 950, 22 L Ed 2d 485—Johnson v Coiner, D C W Va, 308 F Supp 1373

Ala —Lewis v State, 157 So 2d 38, 42 Ala App 166—Wyman v State, Cr, 259 So 2d 849, 47 Ala App 643

Alaska—McIntyre v State, 379 P 2d 615 8 A L R 3d 1231—Evans v State, 645 P 2d 155

Ariz —State v Contreras, 481 P 2d 861, 107 Ariz 68

Cal —People v Diaz, 158 P 2d 194, 26 Cal 2d 318—People v Dorman, 172 P 2d 686, 28 Cal 2d 846—People v Isby 186 P 2d 405, 30 Cal 2d 879—People v Dement, 311 P 2d 505 48 C 2d 600—People v Conley, 49 Cal Rptr 815, 411 P 2d 911, 64 C 2d 310—People v Waters, 71 Cal Rptr 863, 266 C A 2d 116—People v Roy, 95 Cal Rptr 884, 18 C A 3d 537, cert den 92 S Ct 1202, 405 U S 976, 31 L Ed 2d 251—People v Reyes, 116 Cal Rptr 217, 526 P 2d 225, 12 C 3d 486

Fla —Griffin v State, App, 96 So 2d 424

Ga —Lewis v State, 27 S E 2d 659, 196 Ga 755—Richardson v State, 61 S E 2d 489, 207 Ga 373

Idaho—State v Gomez, 487 P 2d 686, 94 Idaho 323

Ill —People v Egner, 237 N E 2d 747, 95 Ill App 2d 314—People v Hawkins, 302 N E 2d 128, 14 Ill App 3d 549

Ind —Dobbs v State, 143 N E 2d 99, 237 Ind 119—DeBoor v State, 182 N E 2d 250, 243 Ind 87, cert den 83 S Ct 83, 371 U S 848, 9 L Ed 2d 83—Taylor v State, 295 N E 2d 600, cert den 94 S Ct 377, 414 U S 1012, 38 L Ed 2d 250

Ky —Rose v Com, 408 S W 2d 621

Me —C.J.S. cited in State v Arsenault, 124 A 2d 741, 743, 152 Me 121

Md —Chisley v State, 95 A 2d 577, 202 Md 87—Parker v State, 254 A 2d 381, 7 Md App 167, cert den 91 S Ct 1670, 402 U S 984, 29 L Ed 2d 150

Mass —Com v Podlaski, 375 N E 2d 1379, 377 Mass 339

Miss —Stokes v State, 128 So 2d 341, 240 Miss 453

Mo —State v Owens, 486 S W 2d 462

N Y —People v Lee, 91 N E 2d 870, 300 N Y 422 conf to 98 N Y S 2d 223, 277 App Div 833

Okl —Myers v State, 174 P 2d 395, 83 Okl Cr 177—Tipton v State, Cr, 308 P.2d 670

Pa —Com v McCausland, 25 Erie Co 177, affd 35 A 2d 70, 348 Pa 275—Com v Thompson, 113 A 2d 274, 381 Pa 299—Com v Walters, 244 A 2d 757, 431 Pa 74—Com v Ingram, 270 A 2d 190, 440 Pa 239—Com v Hinson, 284 A 2d 720, 445 Pa 356—Com v Foster, 317 A 2d 188, 455 Pa 216

Vt —State v Frotten 46 A 2d 921, 114 Vt 410

Wyo —Goodman v State, 573 P 2d 400 App after remand 601 P 2d 178

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Wis —Loveday v State, 247 N W 2d 116 74 Wis 2d 503

2. U S —U S ex rel Rucker v Myers C A Pa, 311 F 2d 311 cert den 83 S Ct 1901, 374 U S 844, 10 L Ed 2d 1064

Ind —Ashbaugh v State, 400 N E 2d 767, 272 Ind 557

N J —State v Sinclair 231 A 2d 565, 49 N J 525, app after remand 269 A 2d 153 57 N J 39 and 269 A 2d 161, 57 N J 56

N Y —People v LeGrand, 402 N Y S 2d 209, 61 A D 2d 815, cert den 99 S Ct 117, 439 U S 835, 58 L Ed 2d 130

Murder in third degree

Pa —Com v Milburn, 413 A 2d 388 488 Pa 601

3. Ark —Robertson v State, 206 S W 2d 748, 212 Ark 301—Newsome v State, 214 S W 2d 778, 214 Ark 48

Cal —People v Nixon, 203 P 2d 748 33 Cal 2d 688

Ky —Salisbury v Com, App, 556 S W 2d 922

Me —State v Duguay, 178 A 2d 129, 158 Me 61—State v Rollins, 295 A 2d 914

Md —Chisley v State, 95 A 2d 577, 202 Md 87—C.J.S. cited in Mock v State, 237 A 2d 811, 813, 2 Md App 771—Bateman v State, 272 A 2d 64, 10 Md App 630

N C —State v Bunn, 196 S E 2d 777, 283 N C 444

4. Pa —Com v Edwards, 110 A 2d 216 380 Pa 52—Com v Simmons, 65 A 2d 353, 361 Pa 391, cert den 70 S Ct 96 338 U S 862, 94 L Ed 2d 528, reh den 70 S Ct 181, 338 U S 888, 94 L Ed 2d 546

Tenn —Claiborne v State, Cr, 555 S W 2d 414

W Va —State v Painter, 63 S E 2d 86, 135 W Va 106

5. Pa —Com v Wooding, 50 A 2d 328, 355 Pa 555

Tenn —Jackson v State, 172 S W 2d 821 180 Tenn 158

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6. Cal —People v Conley, 49 Cal Rptr 815 411 P 2d 911, 64 C 2d 310

10. Cal —People v Dixie, 159 Cal Rptr 717, 98 C A 3d 852

Colo —Watkins v People, 408 P 2d 425, 158 Colo 485

Del —Dashiell v State, 154 A 2d 688

Ill —People v Cunningham, 260 N E 2d 10, 123 Ill App 2d 190

Md —McCord v State 289 A 2d 7, 15 Md App 63

Mich —People v Williams, 179 N W 2d 48, 23 Mich App 459, affd 192 N W 2d 466, 386 Mich 277—People v Coffey, 202 N W 2d 456, 42 Mich App 683—C.J S cited in People v Langworthy, 331 N W 2d 171 179 416 Mich 630

N J —State v Polk, 397 A 2d 330, 164 N J Super 457, affd 397 A 2d 327, 78 N J 539

N M —State v Tapia, 466 P 2d 551, 81 N M 274—State v Gray, App 461 P 2d 233, 80 N M 751

Pa —Com v Ingram, 270 A 2d 190, 440 Pa 2d 239

Tenn —Harper v State, 334 S W 2d 933, 206 Tenn 509—Bostick v State 360 S W 2d 472, 210 Tenn 620—Simpson v State Cr, 437 S W 2d 538, 1 Tenn Cr App 256—Collins v State, Cr 506 S W 2d 179

Wis —Ameen v State, 186 N W 2d 206, 51 Wis 2d 175

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Colo —People v Campisi, 649 P 2d 1053

11. U S —Kane v U S, C A Ariz, 399 F 2d 730, cert den 89 S Ct 698, 393 U S 1057, 21 L Ed 2d 699

Tenn —Lewis v State, 304 S W 2d 322, 202 Tenn 328

Mass —Com v Huot, 403 N E 2d 411, 380 Mass 403

14. Ala —Gosa v State, 139 So 2d 321, 273 Ala 346

Cal —People v Reyes, 116 Cal Rptr 217, 526 P 2d 225, 12 C 3d 486

Ill —People v Zynda, 368 N E 2d 1079, 11 Ill Dec 471, 51 Ill App 3d 794

Ky —Henson v Com, 314 S W 2d 197

15 Ala —Coats v State, 45 So 2d 35, 253 Ala 290—Lewis v State, 157 So 2d 38, 42 Ala App 166

Cal —People v Waters 71 Cal Rptr 863, 266 C A 2d 116

D C —King v U S, C A, 372 F 2d 383, 125 U S App D C 318

Mich —People v Duffield, 174 N W 2d 137, 20 Mich App 473 affd 197 N W 2d 25, 387 Mich 300—People v Coffey 202 N W 2d 456 42 Mich App 683

16. Ind —Hooker v State, 387 N E 2d 1354, 180 Ind App 222

17 Cal —People v Coogler, 77 Cal Rptr 790, 454 P 2d 686, 71 C 2d 153 cert den 92 S Ct 2417 406 U S 971, 32 L Ed 2d 672—People v Graham, 78 Cal Rptr 217 455 P 2d 153 71 C 2d 303—People v Morgan 79 Cal Rptr 911, 275 C A 2d 603

Ill —People v Cunningham, 260 N E 2d 10, 123 Ill App 2d 190—People v Arndt 280 N E 2d 230, 50 Ill 2d 390

Ind —Minton v State 195 N E 2d 355, 244 Ind 636

Pa —Com v Harm, Super 416 A 2d 533, 272 Pa Super 431

18. Ala —Clayton v State 54 So 2d 719, 36 Ala App 175 cert den 54 So 2d 723 256 Ala 378—Gosa v State, 139 So 2d 321 273 Ala 346—Martin v State Cr, 318 So 2d 772, 56 Ala App 33, cert den 318 So 2d 775 294 Ala 765

19 N Y —People v Walker, 396 N Y S 2d 121, 58 A D 2d 737

Pa —Com v Ingram, 270 A 2d 190, 440 Pa 239

20. Ariz —State v Contreras, 481 P 2d 861, 107 Ariz 68

Cal —People v Caylor, 66 Cal Rptr 448, 259 C A 2d 191 - People v Nance, App, 102 Cal Rptr 266, 25 C A 3d 925—People v Sedeno, 112 Cal Rptr 1, 518 P 2d 913, 10 C 3d 703

Ky —Lee v Com, 329 S W 2d 57

Drunkenness held consistent with common law malice

Del —Dashiell v State, 154 A 2d 688

21. Ark —Newsome v State, supra, n 3

22 U S —Jackson v Virginia, Va, 99 S Ct 2781 443 U S 307, 61 L Ed 2d 560, reh den 100 S Ct 195, 444 U S 890, 62 L Ed 2d 126

Nev —Leaders v State, 548 P 2d 1374, 92 Nev 250

Pa —Com v Ruff, 405 A 2d 929, 266 Pa Super 497

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24. Iowa —C.J S quoted in State v Hall, 214 N W 2d 205, 209, 73 A L R 3d 85

26. Iowa—C J S quoted in State v Hall, 214 N W 2d 205, 209, 73 A L R 3d 85

30. Cal —People v Aubrey, 61 Cal Rptr 772, 253 C A 2d 912

32. U S —Johnson v Coiner, D C W Va, 308 F Supp 1373—Tahi v O'Connor, D C Cal, 336 F Supp 576, C A, affd 460 F 2d 1068, cert den 93 S Ct 536, 409 U S 1042, 34 L Ed 2d 493

Ala —Ledbetter v State, 36 So 2d 564, 34 Ala App 35, cert den 36 So 2d 571, 251 Ala 129—Helms v State, 47 So 2d 276, 254 Ala 14—Rogers v State, Cr, 268 So 2d 859, 49 Ala App 78

Ariz —State v Contreras, 481 P 2d 861, 107 Ariz 68—State v Duke, 518 P 2d 570, 110 Ariz 320

Cal —People v Coston, 185 P 2d 632, 82 Cal App 2d 23—In re Cameron, 67 Cal Rptr 529, 439 P 2d 633—People v Juarez, 65 Cal Rptr 630, 258 C A 2d 349—People v Seastone, 82 Cal Rptr 907, 3 C A 3d 60

Colo —People v Manier, 518 P 2d 811, 184 Colo 44

Conn —State v Davis, 260 A 2d 587, 158 Conn 341, vac in part on oth grds 92 S Ct 2856, 408 U S 935, 33 L Ed 2d 750, mand conf to, 316 A 2d 512, 163 Conn 642

Fla —State ex rel Goepel v Kelly, 68 So 2d 351—Griffin v State, App, 96 So 2d 424—Cirack v State, 201 So 2d 706

Ill —People v Jones, 247 N E 2d 40, 107 Ill App 2d 1—People v Huggy, 311 N E 2d 355, 19 Ill App 3d 247

Ind —Taylor v State, 295 N E 2d 600, 260 Ind 264, cert den 94 S Ct 377, 414 U S 1012, 38 L Ed 2d 250

Iowa—State v Wilson, 11 N W 2d 737, 234 Iowa 60

Md —Chisley v State, supra, n 1

Mass —Com v Ricard, 246 N E 2d 433, 355 Mass 509—Com v Appleby, 265 N E 2d 485, 358 Mass 407

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N J —State v Trantino, 209 A 2d 117, 44 N J 358, cert den 86 S Ct 573, 382 U S 993, 15 L Ed 2d 479, reh den 86 S Ct 901, 383 U S 922 15 L Ed 2d 679

N M —State v Padilla, 347 P 2d 312, 66 N M 289, 78 A L R 2d 908

N C —State v Cummings, 206 S E 2d 781, 22 N C App 452, cert den 209 S E 2d 284, 285 N C 760

Ohio—State v Pierce, 62 N E 2d 270—State v Salmon, 226 N E 2d 784, 10 Ohio App 2d 175

Okl —Myers v State, 174 P 2d 385, 83 Okl Cr 177—Gibson v State, Cr, 501 P 2d 891—Jones v State, Cr, 648 P 2d 1251, cert den 103 S Ct 799, 459 U S 1155, 74 L Ed 2d 1002

Pa —Com v Thompson, 113 A 2d 274, 381 Pa 299—Com v Barnosky, 258 A 2d 512 436 Pa 59—Com v Tarver, 284 A 2d 759, 446 Pa 233

Tenn —Dezarne v State, 470 S W 2d 25, 4 Tenn Cr App 209

Utah—State v Thompson 170 P 2d 153, 110 Utah 113

Va —Giarratano v Com, 266 S E 2d 94, 220 Va 1064—Fitzgerald v Com 292 S E 2d 798, 223 Va 615, cert den 103 S Ct 1235, 459 U S 1228, 75 L Ed 2d 469, reh den 103 S Ct 1809, 460 U S 1105 76 L Ed 2d 371

W Va —State v Bragg, 87 S E 2d 689, 140 W Va 585

Wyo —Goodman v State, 573 P 2d 400 App after remand 601 P 2d 178

Affirmative defense

(2) Other statements

N C —State v Baldwin, 174 S W 2d 526, 276 N C 690

No defense

Mass - Com v McAlister, 313 N E 2d 113, 365 Mass 454, cert den 95 S Ct 794, 419 U S 1115, 42 L Ed 2d 814

N C —State v King, 272 S E 2d 26, 49 N C App 499, review den, 276 S E 2d 917, 302 N C 220

Evidence did not negative required specific intent

Ill —People v Pace, 339 N E 2d 785, 34 Ill App 3d 440

Attempted murder

Ohio—State v Fox, 428 N E 2d 410, 68 Ohio St 2d 53, 22 O O 3d 259

33. Cal —People v Daniel, 151 P 2d 275, 65 Cal App 2d 622

Colo —People v Cornelison, 559 P 2d 1102, 192 Colo 337

Idaho—State v Miller, 154 P 2d 147, 65 Idaho 756

Statute not vague

Pa —Com v Green, 413 A 2d 651, 488 Pa 611

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34. U S —U S ex rel Thompson v Dye, C A Pa, 221 F 2d 763, cert den 76 S Ct 120, 350 U S 875, 100 L Ed 2d 773

Ala —Ray v State, 59 So 2d 582, 257 Ala 418

Del —Dashiell v State, 154 A 2d 688—Fisher v State, 182 A 2d 333, 4 Storey 542—Kalejta v State, 282 A 2d 622

Md —Bateman v State, 272 A 2d 64, 10 Md App 630

Mass —Com v Gould, 405 N E 2d 927, 380 Mass 672

Mont —State v Palen, 178 P 2d 862, 119 Mont 600

N J —State v Wolak, 140 A 2d 385, 26 N J 464—State v Sinclair, 231 A 2d 565, 49 N J 525, app after remand 269 A 2d 153, 57 N J 39 and 269 A 2d 161, 57 N J 56

N C —State v McLaughlin, 213 S E 2d 238, 286 N C 597, vac in part on oth grds 96 S Ct 3206, 428 U S 903, 49 L Ed 2d 1208—State v Bock, 217 S E 2d 513, 288 N C 145, vac in part on oth grds 96 S Ct 3208, 428 U S 903, 49 L Ed 2d 1209

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Tenn —Mullendore v State, 191 S W 2d 149 183 Tenn 53

Wis —Ameen v State 186 N W 2d 206, 51 Wis 2d 175

35. Ala —Ray v State, supra, n 34—Lewis v State, 157 So 2d 38 42 Ala App 166

Ariz —State v Saunders, 435 P 2d 39, 102 Ariz 565

Cal —People v Garcia, App, 104 Cal Rptr 69, 27 C A 3d 639—People v Ray 120 Cal Rptr 377, 533 P 2d 1017, 14 C 3d 20

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Ky —Lee v Com, 329 S W 2d 57—Geary v Com, 503 S W 2d 505

Okl —Williams v State, Cr, 513 P 2d 335—Jones v State, Cr, 648 P 2d 1251, cert den 103 S Ct 799, 459 U S 1155, 74 L Ed 2d 1002

Utah—State v Norman, 580 P 2d 237

Relates only to knowledge or intent but not criminal negligence

Wash —State v Collins, 632 P 2d 68, 30 Wash App 1

36. Fla —State ex rel Goppel v Kelly, supra, n 32

Vt —State v Barrett, 266 A 2d 441, 128 Vt 458, app after remand 290 A 2d 14, 130 Vt 197

37. Cal —People v Asher, 78 Cal Rptr 885, 273 C A 2d 876

Mo —State v Hegwood, App, 558 S W 2d 378

39. U S —Government of Virgin Islands v Crowe D C Virgin Islands 391 F Supp 987, affd C A 529 F 2d 511

40. Nev —State v Butner, 206 P 2d 253, 66 Nev 127, cert den 70 S Ct 479, 338 U S 950, 94 L Ed 2d 586, reh den 220 P 2d 631 67 Nev 436, cert den 71 S Ct 285, 340 U S 913, 95 L Ed 660

N C —State v Baldwin, 174 S E 2d 526, 276 N C 690

Vt —State v Pease 271 A 2d 835, 129 Vt 70

W Va —State v Bragg, 87 S E 2d 689, 140 W Va 585

42. Ohio—Long v State, 141 N E 691, 109 Ohio St 77

43. Cal —People v Roy 95 Cal Rptr 884 18 C A 3d 537, cert den 92 S Ct 1202, 405 U S 976, 31 L Ed 2d 251—State v Goodman, 257 S E 2d 569, 298 N C 1

Mass —Com v Whipple, 387 N E 2d 575, 377 Mass 709

Evidence of drinking without sufficient intoxication no defense

N C —State v Lowery, 309 S E 2d 232, 309 N C 763

44. Fla —James v State,, 9 So 2d 926, 151 Fla 534, petition den 64 S Ct 86, 320 U S 710, 88 L Ed 417

Iowa—State v Wilson, supra, n 32—State v Christie, 53 N W 2d 887, 243 Iowa 1199, mod on oth grds and reh den 54 N W 2d 927, 243 Iowa 1199

Nev —King v State, 392 P 2d 310, 80 Nev 269

Pa —Com v Chapman, 58 A 2d 433, 359 Pa 164—Com v Keller 21 Lehigh Co Leg J 189

Va —Fitzgerald v Com, 292 S E 2d 798, 223 Va 615, cert den 103 S Ct 1235, 459 U S 1228, 75 L Ed 2d 469, reh den 103 S Ct 1809, 460 U S 1105, 76 L Ed 2d 371

Wis —Roberts v State, 164 N W 2d 525, 41 Wis 2d 537—State v Nemoir, 214 N W 2d 297, 62 Wis 2d 206

45. Ala —Scott v State, Cr, 333 So 2d 619

Ariz —State v Hudson, 331 P 2d 1092, 85 Ariz 77

Cal —People v Cheary, 309 P 2d 431, 48 C 2d 301

Ill —People v Shaw, 211 N E 2d 394, 64 Ill App 2d 262—People v Green, 245 N E 2d 506, 105 Ill App 2d 345—People v Williams, 303 N E 2d 585, 14 Ill App 3d 789

Iowa—State v Wilson, supra, n 32

N C —State v Simmons, 213 S E 2d 280, 286 N C 681, vac in part on oth grds 96 S Ct 3207 428 U S 903, 49 L Ed 2d 1208—State v Medley, 243 S E 2d 374, 295 N C 75—State v Gerald, 284 S F 2d 312, 304 N C 511 -State v Lowery, 309 S F 2d 232, 309 N C 763

Okl —Sharp v State, Cr, 407 P 2d 593—Jones v State, Cr, 648 P 2d 1251, cert den 103 S Ct 799

Pa —Com v Jones, 50 A 2d 317 355 Pa 522– Com v Simmons, 65 A 2d 353, 361 Pa 391, cert den 70 S Ct 96, 338 U S 862, 94 L Ed 528, reh den 70 S Ct 181, 338 U S 888, 94 L Ed 546—Com v Smith, 7 Bucks 139

Tenn —State v Bullington 532 S W 2d 556

Vt —State v Pease, 271 A 2d 835 129 Vt 70

Va —Fitzgerald v Com, 292 S E 2d 798, 233 Va 615 cert den 103 S Ct 1235, 459 U S 1228, 75 L Ed 2d 469 reh den 103 S Ct 1809, 460 U S 1105, 76 L Ed 2d 371

W Va —State v Burdette, 63 S E 2d 69, 135 W Va 312

Wis —State v Nemoir, 214 N W 2d 297, 62 Wis 2d 206—Jones v State 230 N W 2d 677, 69 Wis 2d 337—State v Stregc 343 N W 2d 100, 116 Wis 2d 477—State v Flattum App 346 N W 2d 787 118 Wis 2d 108, affd 361 N W 2d 705 122 Wis 2d 282

State of unconsciousness required

U S —Adams v Stone, D C Cal 378 F Supp 315

Cal —People v Long, 113 Cal Rptr 530, 38 C A 3d 680

Intent to commit underlying felony

Utah—State v Wood, 648 P 2d 71, cert den 103 S Ct 341, two cases, 459 U S 988, 74 L Ed 2d 383

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46. Ill —People v Brown, 412 N E 2d 580, 45 Ill Dec 229, 89 Ill App 3d 852

Rules stated

(2) Ill —People v Smith, 325 N E 2d 623, 26 Ill App 3d 1062

47 Wis —Roe v State, 290 N W 2d 291, 95 Wis 2d 226

48. Ind —Jackson v State, 426 N E 2d 685

49. N J —State v Roman, 403 A 2d 24, 168 N J Super 344

Held not involuntarily intoxicated

Ill —People v Walcher, 246 N E 2d 256, 42 Ill 2d 159

52. Iowa—State v Christie, supra, n 44

53. Kan —State v Palacio, 559 P 2d 804, 22 Kan 394

55. Alaska—McIntyre v State, 379 P 2d 615, 8 A L R 3d 1231

May mitigate offense

Colo —People v Manier, 518 P 2d 811, 184 Colo 44

58. Me —State v Arsenault, 124 A 2d 741, 152 Me 121

Mont —State v White, 632 P 2d 1118

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59. Ariz —State v Dante, 541 P 2d 941, 25 Ariz App 150, cert den 97 S Ct 146, 429 U S 853, 50 L Ed 2d 128

Fla —Griffin v State, App, 96 So 2d 424

Me —State v Arsenault, 124 A 2d 741, 152 Me 121

Okl —Myers v State, supra, n 1

Tenn —Atkins v State, 105 S W 353, 119 Tenn 458, 13 L R A, N S, 1031—Harper v State, 334 S.W 2d 933, 206 Tenn 509—Haile v State, 11 Hump 154, 30 Tenn 154

Tex —Evilsizer v State, Cr, 487 S W 2d 113

60. Okl —Mott v State, 232 P 2d 166, 94 Okl Cr 145

65. However, voluntary drunkenness with mental weakness does not constitute defense of insanity.

N J —State v Wolak, 140 A 2d 385, 26 N J 464

§ 6. —— Narcosis and Hypnosis

Responsibility for homicide while voluntarily under the influence of drugs is similar to responsibility while voluntarily intoxicated.[68.5]

68.5. U S —Pierce v Turner, D C Utah, 276 F Supp 289, affd, C A, 402 F 2d 109, cert den 89 S Ct 1290, 394 U S 950, 22 L Ed 2d 485

Okl —Jones v State, Cr, 648 P 2d 1251, cert den 103 S Ct 799, 459 U S 1155, 74 L Ed 2d 1002

Pa —Com v Campbell, 284 A 2d 798, 445 Pa 488

May reduce murder to manslaughter

Ky —Geary v Com, 503 S W 2d 505

May not reduce murder to manslaughter

Iowa—State v Hall, 214 N W 2d 205, 73 A L R 3d 85

N Y —People v Edwards, 409 N Y S 2d 872, 64 A D 2d 201

May reduce degree of murder from first to second

Mass —Com v Gould, 405 N E 2d 927, 380 Mass 672

§ 7. Parties to Offenses

Library References

Homicide ⇐29, 30, 82, 83.

69. U S —U S v Greer, C A Ill 467 F 2d 1064, cert den 93 S Ct 1364, 410 U S 929, 35 L Ed 2d 590

Ala —Durden v State, 93 So 342, 18 Ala App 498, cert den 93 So 922, 208 Ala 697

Cal —People v Jentry, 138 Cal Rptr 250, 69 C A 3d 615

Fla —Bryant v State, 412 So 2d 347

Ill —People v Gregory, 357 N E 2d 1251, 2 Ill Dec 808, 43 Ill App 3d 1052

Mass —Com v Florentino, 408 N E 2d 847, 381 Mass 193

Mo —State v Parcel, App, 546 S W 2d 571

Nev —McKinney v State, 596 P 2d 503, 95 Nev 494

N J —State v Thomas, 387 A 2d 1187, 76 N J 344

Pa —Com v Howard, 402 A 2d 674, 265 Pa Super 535

Tex —White v State, 228 S W 2d 165, 154 Tex Cr R 489

Wis —Holland v State, 280 N W 2d 288, 91 Wis 2d 134, cert den 100 S Ct 1320, 445 U S 931, 63 L Ed 2d 764

Joint presence considered by jury

Tex —Machado v State, Cr, 494 S W 2d 859

Issue of accountability

Ill —People v Horton, 356 N E 2d 1044, 1 Ill Dec 762, 43 Ill App 3d 150—People v Dunklin, 432 N E 2d 1323, 60 Ill Dec 424, 104 Ill App 3d 685

70. Ala —Wright v State, Cr, 333 So 2d 215

Okl —Riddle v State, 223 P 2d 379, 92 Okl Cr 397

Wis —State v Bachmeyer, 19 N W 2d 261, 247 Wis 294

§ 8. —— Principals in First Degree

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73. U S —U S ex rel Feinberg v Rundle, C.A Pa, 444 F 2d 402

Fla —Crittendon v State, App, 838 So 2d 1088

Miss —White v State, 330 So 2d 877

N C —State v Minton, 68 S E 2d 844, 234 N C 716, 31 A L R 2d 682

Tex,—McFall v State, 200 S W 2d 184, 150 Tex Cr R 242

Va.—Johnson v Com, 255 S E.2d 525, 220 Va 146, app after remand 273 S.E 2d 784, 221 Va 736, cert den 102 S Ct 422, 454 U S 920, 70 L Ed 2d 231

74. Cal—People v Simmon, 172 P 2d 18, 28 Cal 2d 699—People v Whitfield, 66 Cal Rptr 438, 259 C A 2d 605—People v Chapman, 67 Cal Rptr 601, 261 C A 2d 149

La—State v Batiste, 410 So 2d 1055

Mo—State v Deyo, 358 S W 2d 816

Okl.—Daugherty v State, Cr, 640 P 2d 558

Tex—Bagley v State, Cr, 425 S W 2d 656

Not limited to specified crimes

Pa—Com v Grays, 110 A 2d 422, 380 Pa 77

75. Pa—Com v Moyer, 53 A 2d 736, 357 Pa 181—Com v Almeida, 68 A 2d 595, 362 Pa 596, 12 A L R 2d 183, cert den 70 S Ct 614, 339 U S 924, 94 L Ed 1346, reh den 70 S Ct 798, 339 U S 950, 94 L Ed 1364, cert den 71 S Ct 83, 340 U S 867, 95 L Ed 633

76. U S—Park v Huff, C A Ga, 506 F 2d 849, cert den 96 S Ct 38, 423 U S 824, 46 L Ed 2d 40

Mont—State v Morran, 306 P 2d 679, 131 Mont 17

Tex—Garza v State, 194 S W 2d 406, 149 Tex Cr R 359

Wis—State v Marshall, 284 N W 2d 592, 92 Wis 2d 101

The fact that the victim's death may have been justifiable homicide in the eyes of the police who were used as innocent agents in causing the death of the victim, does not bar the manslaughter conviction of defendant who is adjudged principal in the first degree.[76.5]

76.5 Va—Bailey v Com, 329 S E 2d 37, 229 Va 258

§ 9. —— Principals in Second Degree and Accessaries before the Fact

77. U S—Miller v Cardwell, C A Ohio, 448 F 2d 186, cert den 92 S Ct 1295, 405 U S 1033, 31 L Ed 2d 490

Conn—Washington v State, 372 A 2d 106, 171 Conn 683

Ill—People v Cawley, 396 N W 2d 865, 33 Ill Dec 338, 77 Ill App 3d 780

Iowa—C.J.S. cited in State v Wilson, 17 N W 2d 138, 140, 235 Iowa 538

Ky—Sams v Com, 171 S W 2d 989, 294 Ky 393

Md—Todd v State, 338 A 2d 350, 26 Md App 583

Minn—State v Gruber, 264 N W 2d 812

Miss—Jackson v State, 311 So 2d 658

N C—State v Powell, 81 S E 310, 168 N C 134—State v Allison, 156 S E 547, 200 N C 190—State v Minton, supra, n 73

Pa—Com v Wilson, 426 A 2d 575, 493 Pa 332

Va—Epps v Com, 216 S E 2d 64, 216 Va 150

Wis—Hardison v State, 212 N W 2d 103, 61 Wis 2d 262

78. Iowa—C.J.S. cited in State v Wilson, supra, n 77

Md—State v Ward, 396 A 2d 1041, 284 Md 189, app after remand 427 A 2d 1008, 290 Md 76, app after remand 447 A 2d 872, 52 Md App 63

Mass—Com v O'Toole, 92 N E 2d 618, 326 Mass 35

Mo—C.J.S. cited in State v Deyo, 358 S W 2d 816, 823

N C—State v Philyaw, 230 S E 2d 370, 291 N C 312

Tenn—State v Teague, 680 S W 2d 785

79. U S—U S ex rel Karadzole v Artukovic, D C Cal, 170 F Supp 383, stating Yugoslavia and California law—U S ex rel Kern v Maroney, D C Pa, 275 F Supp 435—Lockett v Ohio, Ohio, 98 S Ct 2954, 438 U S 586, 57 L Ed 2d 973, 9 O O 3d 26

Ala—Stokley v State, 49 So 2d 284, 254 Ala 534

Ark—Dorsey v State, 240 S W 2d 30, 219 Ark 101, cert den 72 S Ct 80, 342 U S 851, 96 L Ed 642

Cal—People v Dickerson, 100 Cal Rptr 533, 23 C A 3d 721

Colo—Graham v People, 302 P 2d 737, 134 Colo 290

Conn—State v DiLorenzo, 83 A 2d 479, 138 Conn 281

Ga—McAfee v State, 54 S E 2d 434, 205 Ga 545

Ill—People v Marshall, 75 N E 2d 310, 398 Ill 256—People v Dennis, 284 N E 2d 67, 5 Ill App 3d 708—People v Stephens, 301 N E 2d 89, 13 Ill App 3d 642

Iowa—State v Gilroy, 199 N W 2d 63

Kan—State v Sullivan, 578 P 2d 1108, 224 Kan 110

Mass—Com v Hooks, 376 N E 2d 857, 375 Mass 284

Mich—People v Goree, 186 N W 2d 872, 30 Mich App 490

Mo—State v Strickland, 609 S W 2d 392

Neb—C.J S. quoted in Moore v State, 29 N W 2d 366, 370, 148 Neb 747

N C—State v Ham, 76 S E 2d 346, 238 N C 94—State v Holloway, 171 S E 2d 475, 7 N C App 147, app after remand 192 S E 2d 75, 16 N C App 266—State v Benton, 174 S E 2d 793, 276 N C 641

Ohio—State v Palfy, 229 N E 2d 76, 11 Ohio App 2d 142

Or—State v Bouse, 264 P 2d 800, 199 Or 676—State v Walker, 282 P 2d 344, 204 Or 69, foll 282 P 2d 347, 204 Or 69

Tex—Leviness v State, 247 S W 2d 115, 157 Tex Cr R 160—Sapet v State, 266 S W 2d 154, 159 Tex Cr R 620

Wash—State v Burnett, 225 P 2d 416, 37 Wash 2d 619

Wis—State v Marshall 284 N W 2d 592, 92 Wis 2d 101

80. U S—Simpson v Wainwright, C A Fla, 439 F 2d 948, cert den 91 S Ct 2199, 402 U S 1011, 29 L Ed 2d 434

Cal—People v Hopkins, 226 P 2d 74, 101 Cal App 2d 704—People v Ellenberg, 331 P 2d 1053, 165 C A 2d 495—People v Washington, 44 Cal Rptr 442, 402 P 2d 130, 62 C 2d 777—People v Medina, 116 Cal Rptr 133 41 C A 3d 438

Conn—State v Bradley, 55 A 2d 114, 134 Conn 102, cert den 68 S Ct 453, 333 U S 827, 92 L Ed 1112

Ind—Schmidt v State, 265 N E 2d 219, 255 Ind 443, reh den 267 N E 2d 554, 256 Ind 218

Kan—State v Payton, 622 P 2d 651, 229 Kan 106

La—State v Cook, 39 So 2d 898, 215 La 163

Me—State v Burbank, 163 A 2d 639, 156 Me 269, 95 A L R 2d 166

Md—Shockley v State, 148 A 2d 371, 218 Md 491

Mo—State v Henderson, 204 S W 2d 774, 356 Mo 1072—State v Lunsford, 331 S W 2d 538—State v Deyo, 358 S W 2d 816

N Y—People v Hayes, 325 N Y S 2d 815, 37 A D 2d 375

Pa—Com v Coyle, 203 A 2d 782, 415 Pa 379

Tenn—Gant v State, Cr, 466 S W 2d 518

Wyo—Jones v State, 568 P 2d 837

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81. U S—Lewis v State of Okl, D C Okl, 304 F Supp 116—U S ex rel Owens v Mack, D C Pa, 383 F Supp 1328

Ala—Williams v State, Cr App, 384 So 2d 1205

Ariz—State v Collins, 528 P 2d 829, 111 Ariz 303

Cal—People v Machado, 309 P 2d 903, 150 C A 2d 190

D C—U S v Carter, C A, 445 F 2d 669, 144 U S App D C 193, cert den 92 S Ct 988, 405 U S 932, 30 L Ed 2d 806

Fla—State v Jefferson, 347 So 2d 427

Ga—Pistor v State, 132 S E 2d 183, 219 Ga 161, cert den 84 S Ct 357, 375 U S 947, 11 L Ed 2d 277

Ill—People v Robinson, 251 N E 2d 766, 113 Ill App 2d 89—People v Ballauer, 320 N E.2d 163, 23 Ill App 3d 711

Ind—Rogers v State, 315 N E 2d 707, 262 Ind 315

Ky—Edwards v Com, 182 S.W 2d 948, 298 Ky 366

Miss—Alexander v State, 250 So 2d 629

Mo—State v Grebe, 461 S W.2d 265—State v Collins, App, 520 S W 2d 155

N C—State v Brooks, 44 S E 2d 482, 228 N C 68—State v Riddle, 45 S E.2d 366, 228 N C 251

Okl—Oxendine v State, Cr, 350 P 2d 606—Hinds v State, Cr, 514 P 2d 947

Pa—Com v Vaughn, 326 A 2d 393, 459 Pa 35

Tex—Brown v State, 177 S W 2d 64, 146 Tex Cr R 602—Scott v State, 190 S W 2d 828, 149 Tex Cr R 4—Barron v State, Cr, 566 S W 2d 929

Va—Jefferson v Com, 204 S E 2d 258, 214 Va 747

Wash—State v Carothers, 525 P 2d 731, 84 Wash 2d 256

"Depraved indifference" murder

N Y—People v Brathwaite, 472 N E 2d 29, 63 N Y 2d 839, 482 N Y S 2d 509, on remand 484 N Y S 2d 499, 106 A D 2d 509

85. Cal—People v Francis, 180 Cal Rptr 873, 129 C A 3d 241

R I—State v Patriarca, 43 A 2d 54, 71 R I 151, 160 A L R 387

86. N Y—People v Hayes, 325 N Y S 2d 815, 37 A D 2d 375

87. Me—State v Ayers, 433 A 2d 356, app after remand 468 A 2d 606, cert den 104 S Ct 1919

89. U S—Smith v State of Tex, D C Tex, 225 F Supp 150, affd, C A, 329 F 2d 498, revd on oth grds 395 F 2d 958

Ark—Sumlin v State, 617 S W 2d 372, 273 Ark 185

Cal—People v Le Grant, 172 P 2d 554, 76 Cal App 2d 148

Ky—Maloney v Com, 204 S W 2d 939, 305 Ky 549

Md—Jeter v State, 267 A 2d 319, 9 Md App 575, affd 274 A 2d 337, 261 Md 221

N J—State v Zelichowski, 245 A 2d 351, 52 N J 377

N C—State v Brooks, 44 S E 2d 482, 228 N C 68—State v Wright, 192 S E 2d 818, 282 N C 364

Ohio—State v McKinney, App, 94 N E 2d 392

Tex—Brothers v State, 321 S W 2d 311, 167 Tex Cr R 521

93. U S—Nichols v Vance, D C Tex, 293 F Supp 680

La—State v Hudson, 221 So 2d 484, 253 La 992, cert dism 91 S Ct 2273, 403 U S 949, 29 L Ed 2d 855, revd on oth grds 91 S Ct 2282, 403 U S 946, 29 L Ed 2d 856, on remand 257 So 2d 135, 260 La 644

Mo—State v Coleman, App, 660 S W 2d 201

Pa—Com v Waddy, 290 A 2d 238, 447 Pa 262

94. U S—Shockley v U S, C C A Cal, 166 F 2d 704, cert den 68 S Ct 1502, 334 U S 850, 92 L Ed 1773

Ill—People v Nelson, 210 N E 2d 212, 33 Ill 2d 48, cert den 86 S Ct 911, 383 U S 918, 15 L Ed 2d 671

Mo—State v Deyo, 358 S W 2d 816, 823

Pa—Com v Coleman, 166 A 2d 525, 402 Pa 238

95. Ala—Payne v State, Cr, 314 So 2d 100, 55 Ala App 181

Ill—People v Ray, 399 N E 2d 977, 35 Ill Dec 688, 80 Ill App 3d 151

First-degree murder

Fla—State v Aguiar, 418 So 2d 245

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96. Defendant deemed present

Miss—Scales v State, 289 So 2d 905

99. Ga—Tarpkin v State, 222 S E 2d 364, 236 Ga 67

Ky—Martin v Com, 361 S W 2d 654, cert den 83 S Ct 553, 371 U S 969, 9 L Ed 2d 540, reh den 83 S Ct 744, 372 U S 925, 9 L Ed 2d 731

3. N Y—People v Porter, 54 N Y S 2d 3—People v Harvin, 259 N Y S 2d 883, 46 Misc 2d 417

4. Colo—People v Jones, 518 P 2d 819, 184 Colo 96

Md —Jeter v State, 267 A 2d 319, 9 Md App. 575, affd 274 A 2d 337, 261 Md 221

N Y —People v Hallett, 419 N Y S 2d 397, 71 A D 2d 815, motion den 455 N E 2d 1262, 60 N Y 2d 698, 468 N Y S 2d 467

Wash —State v Wilder, 608 P 2d 270, 25 Wash App 568, 9 A L R 4th 965,

5. Mass —Com v Welansky, 55 N E 2d 902, 316 Mass 383

6. Cal —People v Antick, 123 Cal Rptr 475, 539 P 2d 43, 15 C 3d 79

Ill —People v Kilgore, 305 N E 2d 328 15 Ill App 2d 862, affd, 319 N E 2d 489 59 Ill 2d 171

However, it has been held that a defendant may be convicted as a principal in the second degree notwithstanding the fact that the alleged perpetrator of the homicide was found not guilty [65]

6.5. Mich —People v Parker 257 N W 2d 109, 76 Mich App 432

Pa —Com v Jackson 344 A 2d 842 463 Pa 301

7. Del —State v Winsett Super 205 A 2d 510, 8 Storey 111

Iowa—C J S cited in State v Wilson, 17 N W 2d 138 142, 235 Iowa 538—C J S cited in State v Wilson 19 N W 2d 232 239 236 Iowa 429

8. Ala —Dye v State 40 So 2d 641, 34 Ala App 371 cert den 40 So 2d 644, 252 Ala 275

Colo —Leick v People 322 P 2d 674 136 Colo 535, cert den 78 S Ct 1363 357 U S 922, 2 L Ed 2d 1366

Fla —Sons v State, App 99 So 2d 888, cert den 78 S Ct 1157 357 U S 910, 2 L Ed 2d 1160

Iowa—State v Brant, 295 N W 2d 434

Ky —Fields v Com 219 S W 2d 991, 310 Ky 162

N J —C J S cited in State v Fair, 211 A 2d 359 45 N J 77

N Y —People v Guraj 431 N Y S 2d 925 105 Misc 2d 176

N C —State v Maynard 101 S E 2d 340, 247 N C 462

Pa —Com ex rel Ruger v Day 108 A 2d 818, 176 Pa Super 479

Tenn —Gant v State Cr, 507 S W 2d 133

Necessary to prove coconspirator committed murder

Cal —People v Antick 123 Cal Rptr 475 539 P 2d 43, 15 C 3d 79

Offense of killing prison guards

Va —Washington v Com, 217 S E 2d 815, 216 Va 185

10. Ark —Gammel v State, 531 S W 2d 474 259 Ark 96

Mich —People v Parker, 257 N W 2d 109, 76 Mich App 432

12. Del —State v Winsett, Super, 205 A 2d 510 8 Storey 111

Minn —State v Gowdy 113 N W 2d 578 262 Minn 70

N J —State v Dissicini, 316 A 2d 12, 126 N J Super 565 affd 331 A 2d 618 66 N J 411

13. N Y —People v Moll, 272 N Y S 2d 611 26 A D 2d 654 motion den 226 N E 2d 702 19 N Y 2d 810 279 N Y S 2d 969 affd 235 N E 2d 698 21 N Y 2d 706, 287 N Y S 2d 674 am on oth grds 235 N E 2d 456 21 N Y 2d 794 288 N Y S 2d 485, cert den 88 S Ct 1858, 391 U S 953 20 L Ed 2d 868 vac on oth grds 89 S Ct 2033, 395 U S 709 23 L Ed 2d 655, conf to 251 N E 2d 150, 25 N Y 2d 894, 304 N Y S 2d 13 on remand 256 N E 2d 185 26 N Y 2d 1 307 N Y S 2d 876, cert den 90 S Ct 1707, 398 U S 911 26 L Ed 2d 71

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15. U S —Charlton v Wainwright C A Fla 588 F 2d 162

Ark —C J S cited in Lewis v State 251 S W 2d 490, 494 220 Ark 914

16. Ky —Sams v Com, 171 S W 2d 989, 294 Ky 393

Accidental slaying

Tenn —Huff v State, Cr, 553 S W 2d 90

17. Ga —Young v State, 236 S E 2d 586, 239 Ga 351

18. Mo —State v Guyton, App, 635 S W 2d 353

20. Pa —Com v Parmer, 70 A 2d 296, 364 Pa 11

Tex —Curtis v State, Cr App, 573 S W 2d 219

21. Criminally negligent manslaughter

Minn —Matter of Welfare of S W T, 277 N W 2d 507

23. N C —C J S cited in State v Benton, 174 S E 2d 793, 803, 276 N C 641

25. Mass —Commonwealth v Richards, 293 N E 2d 854, 363 Mass 299

28. U S —Shockley v U S, C C A Cal, 166 F 2d 704, cert den 68 S Ct 1502, 334 U S 850, 92 L Ed 1773

Cal —People v Gonzales, 84 Cal Rptr 863, 4 C A 3d 593

Ill —People v Hill, 368 N F 2d 714, 11 Ill Dec 163, 53 Ill App 3d 280

Ind —Mobley v State, 85 N E 2d 489, 227 Ind 335

Kan —C J S cited in State v Turner, 392 P 2d 863, 870, 193 Kan 189

Ky —Hensley v Com, 280 S W 2d 540

Me —C J S cited in State v Burbank, 163 A 2d 639, 645, 156 Me 269, 95 A L R 2d 166

Miss —Gibbs v State, 77 So 2d 705 223 Miss 1

Nev —Sheriff, Clark County v Hanks, 530 P 2d 1191, 91 Nev 57

N Y —People v Joseph 172 N Y S 2d 463 11 Misc 2d 219—People v King, 236 N Y S 2d 457, affd 242 N Y S 2d 617, 19 A D 2d 656 affd 19 N E 2d 162 14 N Y 2d 718 250 N Y S 2d 63

N C —State v Spencer 219 S E 2d 231, 27 N C App 301

Ohio—State v White 239 N E 2d 65, 15 Ohio St 2d 146

Pa —Com v Lawrence 442 A 2d 234, 497 Pa 501

Wis —Hardison v State, 212 N W 2d 103, 61 Wis 2d 262

Participation or knowledge necessary

(2) Other statement

N Y —People v May, 195 N Y S 2d 792, 9 A D 2d 508

Tex —Randolph v State, Cr App, 656 S W 2d 475

Person held not responsible for homicide

Alaska—Gray v State, 463 P 2d 897

Cal —People v Velasquez, 126 Cal Rptr 11, 53 C A 3d 547

Fla —Casey v State, App, 266 So 2d 366

Ill —People v Mitchell, 299 N E 2d 472 12 Ill App 3d 960

N Y —People v Wood 186 N Y S 2d 141, 18 Misc 2d 893, affd 195 N Y S 2d 133, 9 A D 2d 433 affd 201 N Y S 2d 328 8 N Y 2d 48, 167 N E 2d 736—People v Lewis, 444 N Y S 2d 1003, 111 Misc 2d 682

Ohio—State v Trocodaro, 301 N E 2d 898, 36 Ohio App 2d 1 cert den 94 S Ct 1595, 415 U S 993, 39 L Ed 2d 891

Wife not responsible for husband's slaying of child

Ga —Singleton v State, 200 S E 2d 507, 129 Ga App 644

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29. Ky —Sams v Com, supra, n 16

31. Ala —Kelly v State, 13 So 2d 691, 31 Ala App 194

Ky —Fields v Com, supra, n 8

Ohio—State v McKinney, 64 N E 2d 129, 77 Ohio App 309

Wyo —Cole v State 423 P 2d 382—Borrego v State, 423 P 2d 393

Agreement immaterial

Or —State v Bouse 264 P 2d 800, 199 Or 676

Wyo —Lujan v State 423 P 2d 388

34. Ga —Watkins v State, 33 S E 2d 325, 199 Ga 81

Utah—State v Roedl, 155 P 2d 741, 107 Utah 538

Wash —State v Todd, 474 P 2d 542, 78 Wash 2d 362

Circumstances showing participation

(4) Other circumstances

Cal —Pizano v Superior Court of Tulare County, 145 Cal Rptr 524, 577 P 2d 659, 21 C 3d 128

Fla —Alligood v State, App, 193 So 2d 767

Ill —People v Fields, 382 N F 2d 337, 22 Ill Dec 17, 65 Ill App 3d 278

Mass —Com v Soares, 387 N E 2d 499 Cert den 100 S Ct 170, 444 U S 881, 62 L Ed 2d 110, app after remand 422 N E 2d 810, 12 Mass App 226

36. Pa —Com v Grays, 110 A 2d 422, 380 Pa 77

38. "Russian roulette"

Mass —Com v Atencio, 189 N E 2d 223, 345 Mass 627

39. Or —State v Bouse, supra, n 31

40. U S —Young v U S, C C A Tex, 138 F 2d 838

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43 Or —State v Bouse, supra, n 31

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49 Ark —Rush v State, 379 S W 2d 29, 238 Ark 149

51. Ky —Luttrell v Com, 554 S W 2d 75

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53. Ill —People v Jordan, 230 N E 2d 161, 38 Ill 2d 83

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69. U S —U S v Wilson, C A Mo, 665 F 2d 825, reh den 671 F 2d 1138, cert den 102 S Ct 2279, 456 U S 994, 73 L Ed 2d 1291, reh den 103 S Ct 582, 459 U S 1092, 74 L Ed 2d 941

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W Va —C J S black letter summary quoted in State v Ashcraft, 309 S E 2d 600, 614

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Neb —State v Rice, 199 N W 2d 480, 188 Neb 728, cert den 97 S Ct 1584, 430 U S 947, 51 L Ed 2d 795

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Tex —Baldridge v State Cr, 543 S W 2d 639

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Mo —State v White, 622 S W 2d 939, cert den 102 S Ct 2040, 456 U S 963, 72 L Ed 2d 487

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Me —State v Johnson, 434 A 2d 532

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U S —Sanders/Miller v Logan, C A Okl, 710 F 2d 645

70. Fla —Hutchinson v State, App, 309 So 2d 184

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Pa —Com v Mengine, 838 A 2d 870, 477 Pa 156

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81. U S —U S ex rel Almeida v Rundle, D C Pa, 255 F Supp 936, affd, C A 383 F 2d 421, cert den 89 S Ct 144 393 U S 863, 21 L Ed 2d 131

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N Y —People v Kampshoff, 385 N Y S 2d 672 53 A D 2d 125, cert den 97 S Ct 2979, 433 U S 911, 53 L Ed 2d 1096

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(1) Cal —People v Terry 85 Cal Rptr 409, 466 P 2d 961 cert dism 92 S Ct 1619, 406 U S 912, 32 L Ed 2d 112

(4) Other matters

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Me —State v Kimball 424 A 2d 684

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88. U S —Shockley v U S, C C A Cal, 166 F 2d 704, cert den 68 S Ct 1502, 334 U S 850, 92 L Ed 2d 1773—Tilford, v Page, D C Okl, 307 F Supp 781, vac in part on oth grds 92 S Ct 2873 408 U S 939, 33 L Ed 2d 761

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93. Cal —People v Asher, 78 Cal Rptr 885, 273 C A 3d 876

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54. Concealment of homicidal death

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(1) Spouse not criminally liable for failure to summon medical aid

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N Y —People v Robbins, 443 N Y S 2d 1016, 83 A D 2d 271

(3) Failure to render medical aid where duty exists as involuntary manslaughter see infra § 63

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Tex —Wright v State, Cr App , 388 S W 2d 703

Wis —C J S cited Cranmore v State, 271 N W 2d 402, 428, 85 Wis 2d 722

D C —Matter of J N , App , 406 A 2d 1275

Kan —State v Shaffer 574 P 2d 205, 223 Kan 244

Minn —State v Schaub, 44 N W 2d 61, 231 Minn 512

Foreseeable consequence

Tex —Ned v State App 14 Dist , 654 S W 2d 732

72. Cal —People v Dilworth, 78 Cal Rptr 817 274 C A 2d 27, cert den 90 S Ct 1148, 397 U S 1001, 25 L Ed 2d 411

74. Ala —Cazart v State 171 So 2d 77 42 Ala App 535, cert den 171 So 2d 84, 277 Ala 698

Cal —People v Dilworth, 78 Cal Rptr 817, 274 C A 2d 27, cert den 90 S Ct 1148, 397 U S 1001 25 L Ed 2d 411—Taylor v Superior Court of Alameda County, 91 Cal Rptr 275, 477 P 2d 131, 3 C 3d 578

Del —Littlejohn v State, 219 A 2d 155, 9 Storey 291

Ill —People v Jackson 180 N E 2d 973, 20 Ill Dec 764, 64 Ill App 3d 1014

Ind —Powell v State, 437 N E 2d 969

N C —State v Horner 103 S E 2d 694 248 N C 342

Pa —Com v Bolish, 113 A 2d 464 381 Pa 500—Com v Robinson, 299 A 2d 220, 450 Pa 145—Com v McCloud, 122 A 2d 691 457 Pa 310

At common law

Cal —People v Burden 140 Cal Rptr 282, 72 C A 3d 603

Definition of death

Cal —People v Mitchell, 183 Cal Rptr 166 132 C A 3d 389

Mass —Com v Golston, 366 N E 2d 744, 373 Mass 249, cert den 98 S Ct 777, 434, U S 1039 54 L Ed 2d 788

N C —State v Holsclaw, 257 S E 2d 650, 42 N C App 696, app dism , review den 261 S E 2d 126, 298 N C 571

75. Cal —People v Montecino, 152 P 2d 5, 66 Cal App 2d 85

Conn —State v Spates, 405 A 2d 656, 176 Conn 227, cert den 99 S Ct 1248, 440 U S 922, 59 L Ed 2d 475

Mass —Com v Hall, 78 N E 2d 644, 322 Mass 523

Failure to supply medical care for wife's child

Wash —State v Williams, 484 P 2d 1167, 4 Wash App 908

Preventing another from procuring decedent medical aid

Mass —Com v Marcelli, 441 N E 2d 270, 14 Mass App 567

Termination of medical treatment not unlawful failure to perform legal duty

Cal —Barber v Superior Court of State of Cal for Los Angeles County, 2 Dist , 195 Cal Rptr 484, 147 C A 3d 1006

76. Ga —C J S cited in Durden v State, 297 S E 2d 237, 241, 250 Ga 325

Ky —Tucker v Com , 199 S W 2d 631 303 Ky 864—C J S cited in Graves v Com , 273 S W 2d 380 382, 47 A L R 2d 1068

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77. Ky —C J S cited in Hubbard v Com , 202 S W 2d 634, 636, 304 Ky 818

78. Ky —C J S cited in Graves v Com , supra, n 76

79 N C —C J S cited in State v Knight, 102 S E 2d 259 265 247 N C 754

80 Ariz —State v Shumway 672 P 2d 929, 137 Ariz 585

Cal —People v Barnett, 175 P 2d 237, 77 Cal App 2d 299

Conn —State v Pope, Cir A D , 313 A 2d 84, 6 Conn Cir 712

D C —U S v Hamilton D C , 182 F Supp 548

Ind —Coffelt v State, 307 N E 2d 497, 159 Ind App 485

Kan —State v Betts, 519 P 2d 655, 214 Kan 271

Mo —C J S cited in State v Medlin, 197 S W 2d 626, 630 355 Mo 564—C J S, cited in State v Adams, 224 S W 2d 54 59, 359 Mo 845

Neb —C J S cited in State v Harris, 230 N W 2d 203, 207 194 Neb 74

Nev —Trent v Clark County Juvenile Court Services, 502 P 2d 385, 88 Nev 573

N J —State v Diamond, 83 A 2d 799 16 N J Super 26

N M —State v Myers, App , 536 P 2d 280, 88 N M 16

N Y —People v Joseph, 172 N Y S 2d 463, 11 Misc 2d 219

N D —C J S quoted in State v Steele, 211 N W 2d 855, 865

S C —State v Caldwell, 98 S E 2d 259, 231 S C 184

Relevant and material

N C —State v Harrington, 133 S E 2d 452, 260 N C 663

82. Ariz —State v Shumway, App , 672 P 2d 944, 137 Ariz 585

Conn —State v Pope, Cir A D , 313 A 2d 84, 6 Conn Cir 712

Kan —State v Gordon, 549 P 2d 886, 219 Kan 643

N J —State v Diamond, supra, n 80

N C —State v Foust 128 S E 2d 889, 258 N C 453

Pa —Com v Amecca 50 A 2d 725, 160 Pa Super 257

83. Ky —Penix v Com , 233 S W 2d 89, 313 Ky 587

Minn —State v Schaub, supra, n 71

84. Me —State v Shanahan, 404 A 2d 975, cert den 100 S Ct 1029, 444 U S 1079, 62 L Ed 2d 762

Mo —C J S quoted in State v Coleman, App , 660 S W 2d 201, 215

Placing poison for another to take

Mo —C J S cited in State v Deyo, 358 S W 2d 816, 821

85. Fla —C J S cited in Whaley v State, 26 So 2d 656, 658, 157 Fla 593—Parrish v State, App , 97 So 2d 356

Minn —Vesey v Vesey, 54 N W 2d 385, 237 Minn 295

Mo —State v Williams, 652 S W 2d 102—C J S quoted in State v Coleman, App , 660 S W 2d 201, 215

N J —State v Myers, 81 A 2d 710, 7 N J 465, 25 A L R 2d 1171

Pa —Com v Dorazio, 74 A 2d 125, 365 Pa 291

Causing victim to jump from window

(2) Other instances

Ill —People v Smith, 307 N E 2d 353, 56 Ill 2d 328

The act of a drug user in administering to himself an overdose of a drug sold to him by the accused has been held to be a concurrent rather than an intervening cause of death, so that the drug seller could be convicted of homicide,[86 5] but under some statutes the act of selling a dangerous drug which, when injected with instruments furnished by the seller of the drug, causes the death of the user, does not constitute homicide [86 10]

86 5 N J —State v Thomas, 288 A 2d 32, 118 N J Super 377

86.10. N Y —People v Pinckney, 328 N Y S 2d 590, 38 A D 2d 217, affd 297 N E 2d 523, 32 N Y 2d 749, 344 N Y S 2d 643

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87 Ala —C J S cited in Welch v State 235 So 2d 906, 908, 45 Ala App 657

Cal —People v Clark, 235 P 2d 56, 106 C A 2d 271—C J S black letter summary quoted in and C J S quoted at length in People v Harrison, 1 Cal Rptr 414, 418, 176 C A 2d 330

Fla —Tegethoff v State, App , 220 So 2d 399

Ga —Redfield v State, 241 S E 2d 217, 240 Ga 460

Idaho—C J S cited in State v Garcia, 630 P 2d 665, 671, 102 Idaho 378

Ind —Reed v State, 387 N E 2d 82, 180 Ind App 5

Ky —C J S cited in Hubbard v Com , 202 S W 2d 634, 636, 304 Ky 818—Flynn v Com , 302 S W 2d 851

Mich —People v Flenon, 202 N W 2d 471, 42 Mich App 457

Minn —State v Schaub, supra, n 71

Mo —State v Cheatham, 340 S W 2d 16—C J S cited in State v Brandt, 467 S W 2d 948, 951

Mont —State v Mally, 366 P 2d 868, 139 Mont 599—C J S black letter summary quoted in State v Newman, 513 P 2d 258, 162 Mont 450

Neb —State v Hare, 208 N W 2d 264, 190 Neb 339

N M —C J S, black letter summary quoted in State v Fields, 395 P 2d 908, 912, 74 N M 559

N J —State v Zelichowski, 245 A 2d 351, 52 N J 377

N Y —People v Stewart, 358 N E 2d 487, 40 N Y 2d 692, 389 N Y S 2d 804

N C —State v Jones, 225 S E 2d 549, 290 N C 292

Ohio—State v Kotowski, 183 N E 2d 262

Pa —Com v Amecca, 50 A 2d 725, 160 Pa Super 257—Com v Johnson, 284 A 2d 734, 445 Pa 276

Direct cause

(1) As distinguished from proximate cause in tort liability

Mich —People v Scott, 185 N W 2d 576, 29 Mich App 549

Pa —Com v Chrisman, 58 Lanc Rev 197

(2) As essential and separate element in involuntary manslaughter

Pa —Com v Chrisman, 58 Lanc Rev 197

First degree murder

Ohio—State v Cochrane, 84 N E 2d 742, 151 Ohio St 128—State v Swiger, 214 N E 2d 417, 5 Ohio St 2d 151, cert den 87 S Ct 148, two cases, 149, 385 U S 874, 17 L Ed 2d 101

Sine qua non test

Iowa—State v Marti, 290 N W 2d 570

Greater showing thru required tort concept

Ohio—State v Uhler, 402 N E 2d 556, 61 Ohio Misc 37, 15 O O 3d 457

Direct cause

(1) Other statements

Pa—Com v Kennedy, 412 A 2d 886, 271 Pa Super 206, affd in part, revd in part on oth grds, 453 A 2d 927, 499 Pa 389

88. N C—State v Ellis, App, 212 S E 2d 909, 25 N C App 319

Pa—Com v Almeida, supra, n 70

Foreseeability not element of proximate cause

N C—State v Woods, 179 S E 2d 358 278 N C 210

89. Ariz—State v Ulin, 548 P 2d 19, 113 Ariz 141

Conn—State v Spates, 405 A 2d 656, 176 Conn 227, cert den 99 S Ct 1248, 440 U S 922, 59 L Ed 2d 475

Del—Wright v State, 374 A 2d 824

N M—State v Harrison, 564 P 2d 1321, 90 N M 439

Pa—Com v Howard, 402 A 2d 674, 265 Pa Super 535

Remote cause insufficient

Wyo—State v Osmus, 276 P 2d 469, 73 Wyo 183

"Efficient intervening cause"

Neb—State v Lytle, 231 N W 2d 681, 194 Neb 353—State v Meints, 322 N W 2d 809 212 Neb 410

90. U S—C.J.S. cited in U S v Guillette, C A Conn, 547 F 2d 743, 749, cert den 98 S Ct 132 434 U S 839, 54 L Ed 2d 102

Ariz—State v Hitchcock, 350 P 2d 681, 87 Ariz 277, cert den and app dism 81 S Ct 823, 365 U S 609, 5 L Ed 2d 821—State v Contreras 481 P 2d 861, 107 Ariz 68—Drury v Burr, 483 P 2d 539, 107 Ariz 124

Cal—People v Harrison, 1 Cal Rptr 414, 176 C A 2d 330—People v Sam, 77 Cal Rptr 804, 454 P 2d 700, 71 C 2d 194

Colo—Hamrick v People, 624 P 2d 1320

Conn—C.J.S. cited in State v Spates, 405 A 2d 656, 660, 176 Conn 227 cert den 99 S Ct 1248, 440 U S 922, 59 L Ed 2d 475

D C—Matter of J J, App, 406 A 2d 1275

Fla—Karl v State, App, 144 So 2d 869

Ga—Wyrick v State, 102 S E 2d 53, 96 Ga App 847

Ill—People v Reader, 186 N E 2d 298, 26 Ill 2d 210—People v Dillon 327 N E 2d 225, 28 Ill App 3d 11—People v Olson, 377 N E 2d 371, 18 Ill Dec 218, 60 Ill App 3d 535

Ind—Gibbs v State, App, 426 N E 2d 1150

Ky—Tucker v Com, supra, n 76—C.J S cited in Hubbard v Com, 202 S W 2d 634, 637, 304 Ky 818—Mason v Com, 423 S W 2d 532

Mich—People v Geiger, 159 N W 2d 383, 10 Mich App 339

Minn—State v Schaub, supra, n 71

Mo—State v Brinkley, 193 S W 2d 49, 354 Mo 1051—State v Cheatham, 340 S W 2d 16—State v Cooley, 387 S W 2d 544

Neb—C.J S. cited in State v Harris, 230 N W 2d 203, 207, 194 Neb 74—State v Meints 322 N W 2d 809, 212 Neb 410

N Y—People v Aponte, 369 N Y S 2d 342, 82 Misc 2d 283

N C—C.J.S. cited in State v Minton, 68 S E 2d 844, 848, 234 N C 716, 31 A L R 2d 682—State v Ward, 128 S E 2d 673, 258 N C 330—State v Boone, 192 S E 2d 13, 16 N C App 368—State v Luther, 203 S E 2d 343, 21 N C App 13, affd 206 S E 2d 238, 285 N C 570

Ohio—State v Perryman, 358 N E 2d 1040, 49 Ohio St 2d 14, 3 O O 2d 8 Cert gr 98 S Ct 3136, 438 U S 911, 57 L Ed 2d 1156

Okl—Johnson v State, Cr, 386 P 2d 336

Pa—Com v Kostan, 37 A 2d 606, 349 Pa 560—C.J S cited in Com v Almeida, 68 A 2d 595, 605, 362 Pa 596, 12 A L R 2d 183, cert den 70 S Ct 614, 339 U S 924, 94 L Ed 1346, reh den 70 S Ct 798, 339 U S 950, 94 L Ed 1364, cert den 71 S Ct 83, 340 U S 867, 95 L Ed 633—Com v Cheeks, 223 A 2d 291, 423 Pa 67—Com v Johnson, 284 A 2d 734, 445 Pa 276

R I—In re Leon, 410 A 2d 121, 121 R I 548

Tenn—Fine v State, 246 S W 2d 70, 193 Tenn 422

Intervening cause as natural result

Ariz—State v Powers, 571 P 2d 1016, 117 Ariz 220

Me—State v Hachey, 278 A 2d 397

Tort liability concept inapplicable

Md—Campbell v State, 444 A 2d 1034, 293 Md 438

N J—State v Canola 374 A 2d 20, 73 N J 206

N Y—People v Kibbe, 321 N E 2d 773, 35 N Y 2d 407, 362 N Y S 2d 848

Pa—Com v Root, 170 A 2d 310, 403 Pa 571, 82 A L R 2d 452—Com v Evans, 58 Sch L R 1—Com v Stafford, 301 A 2d 600 451 Pa 95

Ultimate harm reasonably foreseeable

N Y—People v Kibbe 321 N E 2d 773, 35 N Y 2d 407, 362 N Y S 2d 848

Removal of artificial life-support systems

Cal—People v Saldana, 121 Cal Rptr 243 47 C A 3d 954

Mich—People v Vanderford, 258 N W 2d 502, 77 Mich App 370

Victim short by another victim

Tex—Blansett v State, Cr 556 S W 2d 322

Victim struck by automobile

Ind—Manna v State 440 N E 2d 473

Link in chain of causes

N Y—People v Stewart 358 N E 2d 487, 40 N Y 2d 692 389 N Y S 2d 804

91. Fla—Hornbeck v State 77 So 2d 876

Ga—Singley v State 31 S E 2d 149, 198 Ga 212—Kilgore v State, 98 S E 2d 72 95 Ga App 462—Wyrick v State 102 S E 2d 53, 96 Ga App 847

Ill—People v Meyers 64 N E 2d 531, 392 Ill 355—People v Paulson 225 N E 2d 424 80 Ill App 2d 44

Ind—Swafford v State, 421 N E 2d 596

Miss—Schroer v State 160 So 2d 681 250 Miss 84—C J S cited in Proctor v State, 267 So 2d 899, 900

Neb—State v Harris 230 N W 2d 203, 194 Neb 74

N C—C J S cited in State v Duncan, 93 S E 2d 421, 422 244 N C 374

Ohio—State v Foster 396 N E 2d 246, 60 Ohio Misc 46 14 O O 3d 144

Wyo—State v Osmus, supra, n 89

Provocative conduct inducing perpetrator

Cal—People v Williams, App, 142 Cal Rptr 704 75 C A 3d 731

Contributing cause

Ill—People v Brown 373 N E 2d 459 15 Ill Dec 113 57 Ill App 3d 528

92. Mass—Com v Golston, 366 N E 2d 744, 373 Mass 249 cert den 98 S Ct 777, 434 U S 1039, 54 L Ed 2d 788—State v Meints, 322 N W 2d 809, 212 Neb 410

Pa—Com v Matthews, 389 A 2d 71, 480 Pa 33

Superseding cause

Ariz—State v Powers, 571 P 2d 1016, 117 Ariz 220

93. Ariz—State v Brown, App 631 P 2d 129, 129 Ariz 347—State v Hall, 633 P 2d 398, 129 Ariz 589

Ky—Tucker v Com, 199 S W 2d 631, 303 Ky 864

Mich—C J S quoted in People v Moss, 245 N W 2d 389, 403 70 Mich App 18, affd 273 N W 2d 471, 405 Mich 38

N Y—People v Richardson, 382 N Y S 2d 61, 51 A D 2d 462

Pa—Com v Bolish, 113 A 2d 464, 381 Pa 500

Wash—State v Williams 484 P 2d 1167, 4 Wash App 908

Not responsible for inadvertent killing by policeman

Pa—Com ex rel Smith v Myers, 261 A 2d 550, 438 Pa 218, 56 A L R 3d 217, overruling Com v Almeida, 68 A 2d 595, 362 Pa 596, 12 A L R 2d 183, cert den 70 S Ct 614, 339 U S 924, 94 L Ed 1346 reh den 70 S Ct 798, 339 U S 950, 94 L Ed 1364, cert den 71 S Ct 83, 340 U S 867, 95 L Ed 633

94. Ga—Styles v State, 164 S E 2d 156, 118 Ga App 445, app after remand 171 S E 2d 310, 225 Ga 731

Miss—Houston v State, 70 So 2d 338

Tenn—Fine v State, supra n 90

Where the procedure for the proposed withdrawal of extraordinary life-sustaining measures for a terminally ill and comatose patient is complied with, and the court concludes that such measures should be discontinued, no participant, either medical or lay, shall be subject to criminal liability as a result of such termination[95.5] Should death occur in such case, its proximate cause shall be deemed to be whatever caused the patient to lapse into a coma in the first place[95.10]

95.5. N Y—Eichner v Dillon, 426 N Y S 2d 517, 73 A D 2d 431 mod on oth grds 420 N E 2d 64, 52 N Y 2d 363, 438 N Y S 2d 266, cert den 420 N E 2d 64 52 N Y 2d 363, 438 N Y S 2d 266

Court approval without state procedure

Conn—Foody v Manchester Memorial Hosp, 482 A 2d 713, 40 Conn Supp 127

95.10 Neb—State v Meints, 322 N W 2d 809, 212 Neb 410

N Y—Eichner v Dillon, 426 N Y S 2d 517, 73 A D 2d 431 mod on oth grds 420 N E 2d 64, 52 N Y 2d 363, 438 N Y S 2d 266, cert den 420 N E 2d 64, 52 N Y 2d 363, 438 N Y S 2d 266

96 Ariz—State v Hall 633 P 2d 398, 129 Ariz 589

Ill—People v Arnold 232 N E 2d 483, 89 Ill App 2d 185 cert den 89 S Ct 245 393 U S 917, 21 L Ed 2d 203—People v Dillon 327 N E 2d 225, 28 Ill App 3d 11

Ind—Miller v State 335 N E 2d 206 263 Ind 595

Neb—State v Harris 230 N W 2d 203, 194 Neb 74

Pa—Com v Carn, 296 A 2d 753, 449 Pa 228—Com v Stafford 301 A 2d 600, 451 Pa 95

S C—State v Riley 64 S E 2d 127 219 S C 112

97 Colo—People v Fite, 627 P 2d 761

Ga—Singley v State supra n 91

Ill—People v Paulson, 225 N E 2d 424 80 Ill App 2d 44

Mich—People v Flenon, 202 N W 2d 471, 42 Mich App 457

Mo—State v Bolder 635 S W 2d 673, cert den 103 S Ct 770, 459 U S 1137, 74 L Ed 2d 983

Neb—State v Lytle, 231 N W 2d 681 194 Neb 353—State v Meints 322 N W 2d 809, 212 Neb 410

Tex—Adams v State, 202 S W 2d 933 150 Tex Cr R 431

W Va—State v Durham 195 S E 2d 144, 156 W Va 509

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99. Ala—Warren v State 25 So 2d 51 32 Ala App 273—Pyles v State, 78 So 2d 813, 38 Ala App 123 revd on oth grds 78 So 2d 816, 262 Ala 1—Hearns v State, Cr, 261 So 2d 64, 47 Ala App 725—Smith v State Cr 307 So 2d 47, 54 Ala App 217

Ariz—State v Hills 605 P 2d 893, 124 Ariz 491

D C—Baylor v U S App, 407 A 2d 664

Ga—Styles v State 164 S E 2d 156, 118 Ga App 445, app after remand 171 S E 2d 310, 225 Ga 731

Ill —People v Gulliford, 407 N E 2d 1094, 41 Ill Dec 596, 86 Ill App 3d 237

Iowa—State v McClain, 125 N W 2d 764, 256 Iowa 175, 4 A L R 3d 134—State v Jackson, 223 N W 2d 229—State v Unger, 292 N W 2d 119

Md —DeVaughn v State, 194 A 2d 109, 232 Md 447, 100 A L R 2d 761, cert den 84 S Ct 693, 376 U S 927, 11 L Ed 2d 623

Mich —People v Vanderford, 258 N W 2d 502, 77 Mich App 370

Neb —State v Lytle, 231 N W 2d 681, 194 Neb 353

N Y —People v Stewart, 358 N E 2d 487, 40 N Y 2d 692, 389 N Y S 2d 804

N C —State v Jones, 225 S E 2d 549, 290 N C 292

Okl —C.J.S. quoted at length in Pettigrew v State, Cr 554 P 2d 1186, 1193

Tenn —Gray v State, 250 S W 2d 86 194 Tenn 234

Utah—State v Wilson, 216 P 2d 630, 117 Utah 368

Wyo —State v Catellier, 179 P 2d 203, 63 Wyo 123

Absence of prompt medical aid

(3) Other cases

Cal —People v McGee, 187 P 2d 706, 31 Cal 2d 229

Intervening cause

Ohio—State v Johnson, 381 N E 2d 637, 56 Ohio St 2d 35, 10 O O 3d 78

1. D C —U S v Hamilton, D C , 182 F Supp 548

Neb —State v Meints, 322 N W 2d 809, 212 Neb 410

Wash —State v Little, 358 P 2d 120, 57 Wash 2d 516

2. Ariz —State v Sauter 585 P 2d 242 120 Ariz 222

Cal —People v Freudenberg, 263 P 2d 875, 121 C A 2d 564

Colo —People v Calvaresi, 534 P 2d 316 188 Colo 277

Conn —State v Tomassi, 75 A 2d 67 137 Conn 113

Del —Wright v State, 374 A 2d 824

D C —Matter of J N , App , 406 A 2d 1275

Ga —Campbell v State, 221 S E 2d 212, 136 Ga App 338

Ill —People v Stamps, 291 N E 2d 274, 8 Ill App 3d 896—People v Olson, 377 N E 2d 371 18 Ill Dec 218, 60 Ill App 3d 535

Neb —State v Harris, 230 N W 2d 203, 194 Neb 74—State v Meints, 322 N W 2d 809, 212 Neb 410

N J —State v Anderson, 343 A 2d 505, 135 N J Super 423

N C —State v Holsclaw, 257 S E 2d 650, 42 N C App 696, app dism review den 261 S E 2d 126, 298 N C 571

S C —State v Doe, 63 S E 2d 303, 218 S C 520

Wash —State v Little, 358 P 2d 120, 57 Wash 2d 516

Organ removal upon negligent premature pronouncement of death

N Y —People v Eulo, 472 N E 2d 286, 63 N Y 2d 341, 482 N Y S 2d 436, 42 A L R 4th 723

Usual course of good medical practice

Del —Quillen v State, 110 A 2d 445, 10 Terry 114, rearg den 112 A 2d 848, 10 Terry 163

N J —State v Clark 248 A 2d 559, 104 N J Super 67, affd 266 A 2d 315, 110 N J Super 562, cert den 91 S Ct 988, 401 U S 958, 28 L Ed 2d 243

3. Del —C.J.S cited in Wright v State, 374 A 2d 824, 828

Neb —State v Meints, 322 N W 2d 809, 212 Neb 410

4. Pa —Com v Cheeks, 223 A 2d 291, 423 Pa 67

5. Ga —Campbell v State 221 S E 2d 212, 136 Ga App 338

Kan —State v Rueckert, 561 P 2d 850, 221 Kan 727

Ohio—State v Johnson, 381 N E 2d 637, 56 Ohio St 2d 35, 10 O O 3d 78

8. Ariz —State v Ulin, 548 P 2d 19, 113 Ariz 141

Del —C.J.S cited in Wright v State, 374 A 2d 824, 828

Iowa—State v McClain, 125 N W 2d 764, 256 Iowa 175 4 A L R 3d 134

Mich —People v Flenon, 202 N W 2d 471, 42 Mich App 457

Neb —C.J.S cited in State v Harris, 230 N W 2d 203 207, 194 Neb 74—State v Meints, 322 N W 2d 809 212 Neb 410

Malpractice resulting in new wounds

Wash —State v Little, 358 P 2d 120, 57 Wash 2d 516

9. Colo —People v Calvaresi 534 P 2d 316, 188 Colo 277

D C —Baylor v U S , App , 407 A 2d 664

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10. Colo —C J S quoted in People v Cox, 228 P 2d 163, 166, 123 Colo 179

Ga —Styles v State, 164 S E 2d 156, 118 Ga App 445, app after remand 171 S E 2d 310, 225 Ga 731

La —C J S cited in State v Chavers, 294 So 2d 489 492, cert den 95 S Ct 786, 419 U S 1111 42 L Ed 2d 808

Minn —State v Smith, 119 N W 2d 838, 264 Minn 307

Mont —State v Mally, 366 P 2d 868, 139 Mont 599

Nev —State v Sala, 169 P 2d 524, 63 Nev 270

N C —State v Atkinson, 259 S E 2d 858 298 N C 673

Okl —C J S black letter summary quoted in Chase v State, Cr , 382 P 2d 457, 460 cert den 84 S Ct 506, 375 U S 979, 11 L Ed 2d 424

S C —C J S cited in State v Fields, 214 S E 2d 320, 322 264 S C 260, cert den 96 S Ct 269, 423 U S 925, 46 L Ed 2d 252

W Va —C.J.S. black letter summary quoted in State v Durham, 195 S E 2d 144, 150, 156 W Va 509

11 Alaska—Armstrong v State, 502 P 2d 440, 65 A L R 3d 266

Ariz —State v Contreras, 481 P 2d 861 107 Ariz 68

Cal —People v Stamp, 82 Cal Rptr 598, 2 C A 3d 203, cert den 91 S Ct 36, 400 U S 819, 27 L Ed 2d 46

Conn —State v Spates, 405 A 2d 656 176 Conn 227, cert den 99 S Ct 1248, 440 U S 922, 59 L Ed 2d 475

Ill —People v Baer 342 N E 2d 177, 35 Ill App 3d 391

Ky —Tucker v Com 199 S W 2d 631, 303 Ky 864—Hubbard v Com 202 S W 2d 634 304 Ky 818

Md —DeVaughn v State, 194 A 2d 109, 232 Md 447, 100 A L R 2d 761 cert den 84 S Ct 693, 376 U S 927, 11 L Ed 2d 623

Minn —State v Berry, 309 N W 2d 777

Mo —State v Johnson, 475 S W 2d 95

N J —State v Loray, 195 A 2d 289, 41 N J 131—State v Anderson, 343 A 2d 505 135 N J Super 423

N C —State v Thompson, 258 S E 2d 800, 43 N C App 380

Pa —Com v Hicks, 353 A 2d 803, 466 Pa 499

Victim's intoxication

N C —State v Cummings, 271 S E 2d 277, 301 N C 374

12. N C —State v Luther, 206 S E 2d 238 285 N C 570

Okl —Chase v State, Cr , 382 P 2d 457 cert den 84 S Ct 500, 375 U S 979 11 L Ed 2d 424

13. U S —C J S cited in Rice v State of Wis 424 F 2d 12, 14, cert den 91 S Ct 73, 400 U S 836 27 L Ed 2d 69, reh den 91 S Ct 190, 400 U S 931, 27 L Ed 2d 191

Utah—C J S cited in State v BeBee, 195 P 2d 746, 747, 113 Utah 398

Wis —C J.S quoted at length in State v Rice, 156 N W 2d 409, 417, 38 Wis 2d 344

14 Cal —People v Phillips, 51 Cal Rptr 225, 414 P 2d 353 64 C 2d 574

15. Minn —C J S cited in State v Smith, 119 N W 2d 838, 848, 264 Minn 307

16 Ga —Com v Newkirk, 317 A 2d 216, 455 Pa 559

Utah—C J S cited in State v BeBee, supra n 13

18. W Va —C.J S cited in State v Durham, 195 S E 2d 144, 150, 156 W Va 509

§ 12. Time of Death

20. Ala —Mitchell v State, 191 So 2d 385 43 Ala App 427—Flannagin v State, Cr , 266 So 2d 637 48 Ala App 559, affd 266 So 2d 643 289 Ala 177

D C —Matter of J N , App 406 A 2d 1275

Ind —State v Carrier, 134 N E 2d 688, 235 Ind 456, 59 A L R 2d 896—State v Dailey, 134 N E 481, 191 Ind 678, 20 A L R 1004

Md —State v Brown, 318 A 2d 257, 21 Md App 91

Mass —Com v Vanetzian, 215 N E 2d 658, 350 Mass 494—Com v Pinnick, 234 N E 2d 756, 354 Mass 13

Mich —C J.S cited in People v Stevenson, 300 N W 2d 449, 451, 101 Mich App 61, affd 331 N W 2d 143, 416 Mich 383—C J S cited in People v Stevenson, 331 N W 2d 143, 145, 416 Mich 383

N J —State v Young, 390 A 2d 556, 77 N J 245

Okl —C J S quoted in Elliott v Mills, Cr , 335 P 2d 1104, 1108

Pa —C J.S quoted in Com v Ladd, 166 A 2d 501, 513, 402 Pa 164

Tenn —Colo v State Cr , 512 S W 2d 598

Rule of evidence

Cal —People v Clark, 235 P 2d 56, 106 C A 2d 271

Pa —Com v Ladd, 166 A 2d 501, 402 Pa 164

Death hastened by third person

Cal —People v Clark, supra

Rule not abrogated by statute providing no limitation of time for prosecution of murder

Okl —Elliott v Mills, Cr 335 P 2d 1104

Rule inapplicable to voluntary manslaughter

Ohio—State v Sandridge, 365 N E 2d 898, 5 O O 3d 419

Involuntary manslaughter

N C —State v Hefler, 310 S E 2d 310, 310 N C 135

22 N J —State v Anderson, 343 A 2d 505, 135 N J Super 423

Rule of evidence

Cal —People v Snipe, App , 102 Cal Rptr 6, 25 C A 3d 742

The common law "year and a day rule," which has been a part of the basic law of many states, does not conform to present-day medical realities, principles of equity or public policy, and the rule is rejected as an anachronism and declared to be no longer part of the common law [22.5]

22.5. State v Young 372 A 2d 1117, 148 N J Super 405, revd on oth grds 390 A 2d 556, 77 N J 245

Or —State v Hudson, 642 P 2d 331, 56 Or App 462

Judicially abrogated

Mich —People v Stevenson, 331 N W 2d 143, 416 Mich 383

23. D C —Matter of J N , App , 406 A 2d 1275

Ga —Manning v State, 182 S E 2d 690, 123 Ga App 844

Md —State v Brown, 318 A 2d 257 21 Md App 91

Neb —State v Hare, 208 N W 2d 264, 190 Neb 339

24. Statute held retroactive

Cal —People v Snipe App , 102 Cal Rptr 6, 25 C A 3d 742

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Ark —Degler v State, 517 S W 2d 515, 257 Ark 388

Cal —People v Endner, 165 P 2d 712, 73 Cal App 2d 20—People v Yokum, 302 P 2d 406, 145 C A 2d 745

Colo —Walker v People, 489 P 2d 584, 175 Colo 173

Conn —State v Edwards 316 A 2d 387, 163 Conn 527

Idaho—State v Snowden, 313 P 2d 706, 79 Idaho 266

Ill —People v Clemens, 292 N E 2d 232, 9 Ill App 3d 312

Iowa—State v Christie, 53 N W 2d 887, 243 Iowa 1199, mod on oth grds and reh den 54 N W 2d 927, 243 Iowa 1199—State v Drosos 114 N W 2d 526 253 Iowa 1152

Kan —State v Jensen 417 P 2d 273, 197 Kan 427

Me —State v Woodbury, 403 A 2d 1166

Mass —Com v McCauley, 246 N E 2d 425, 355 Mass 554

Md —Faulcon v State, 126 A 2d 858, 211 Md 249—Elliott v State, 137 A 2d 130, 215 Md 452—Parker v State 254 A 2d 381, 7 Md App 167, cert den 91 S Ct 1670, 402 U S 984, 29 L Ed 2d 150

Mich —People v Morrin 187 N W 2d 434, 31 Mich App 301

Miss —Carter v State, 25 So 2d 470 199 Miss 871

Mo —*C J S* cited in State v Foster, 197 S W 2d 313, 321, 355 Mo 577

Mont —State v Rivers 320 P 2d 1004, 133 Mont 129

Neb —State v Hutter, 18 N W 2d 203 145 Neb 798

N Y —People v Mollette, 383 N Y S 2d 817 87 Misc 2d 236

Okl —Myers v State, 174 P 2d 395, 83 Okl Cr 177

Pa —Com v Palmer, 292 A 2d 921, 448 Pa 282

R I —State v Jefferds 152 A 2d 231, 89 R I 272, rearg 162 A 2d 536, 91 R I 214

Tex —Lovelady v State, 198 S W 2d 570 150 Tex Cr R 50

Utah—State v BeBee, 175 P 2d 478, 110 Utah 484

Va —Pannill v Com, 38 S E 2d 457 185 Va 244

Other definitions

(1) Kan —State v Goetz 237 P 2d 246 171 Kan 703

(2) People v Luscomb, 55 N E 2d 469, 292 N Y 390

(4) U S —Turner v McKaskle, C A Tex 721 F 2d 999

Ala —Smelcher v State, 33 So 2d 380 32 Ala App 326—Johnson v State 169 So 2d 773 42 Ala App 511

Cal —People v Phillips 51 Cal Rptr 225 414 P 2d 353, 64 C 2d 574

Ill —People v Martinez, 283 N E 2d 268, 4 Ill App 3d 1072

Iowa—State v Wilson, 11 N W 2d 737, 234 Iowa 60—State v Haffa, 71 N W 2d 35 246 Iowa 1275 cert den 76 S Ct 198, 350 U S 914 100 L Ed 801

Me —State v Lafferty, 309 A 2d 647

Mass —Com v Caine, 318 N E 2d 901, 366 Mass 366

Mich —People v Carter, 197 N W 2d 57, 387 Mich 397

Miss —Rogers v State, 76 So 2d 702, 222 Miss 609

N J —State v Brown, 126 A 2d 161 22 N J 405—State v Gardner, 242 A 2d 1, 51 N J 444

N Y —People v Jackson 231 N E 2d 722, 20 N Y 2d 440, 285 N Y S 2d 8 cert den 88 S Ct 1815, 391 U S 928, 20 L Ed 2d 668

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Pa —Com v Ladd, 166 A 2d 501 402 Pa 164—Com v Carroll, 194 A 2d 911, 412 Pa 525—Com v Kirkland, 195 A 2d 338 413 Pa 48—Com v Bowden, 309 A 2d 714, 456 Pa 278

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Peace of state

(1) Pa —Com v Simpson, Pa 26 Erie Co 36

(2) Va —Thomas v Com, 41 S E 2d 476, 186 Va 131

Absence of extreme emotional distress not element

Ky —Wellman v Com, 694 S W 2d 696 overruling Ratliff v Commonwealth 567 S W 2d 307, Bartrug v Commonwealth 568 S W 2d 925 Edmonds v Commonwealth 586 S W 2d 24

Distinguished from assault and battery with intent to kill and murder

Miss —Hatcher v State 50 So 2d 387, 210 Miss 661

Unlawful killing not necessarily murder

Ariz —State v Folk 277 P 2d 1016 78 Ariz 205

Capital felony

Tex —Martinez v State, 318 S W 2d 66, 167 Tex Cr R 97

There can be no murder without homicide, but the converse is not true

W Va State v Stevenson, 127 S E 2d 638, 147 W Va 211, cert den 83 S Ct 886 372 U S 938, 9 L Ed 2d 768

Felony

Kan —State v Gloyd, 84 P 2d 966, 148 Kan 706

Me —State v Chase 99 A 2d 71 149 Me 80

N C —State v Alston, 141 S E 2d 793, 264 N C 398

Essential requisites lacking

Ill —People v Taylor, 279 N E 2d 143, 3 Ill App 3d 734

Elements

Ala —Young v State Cr App, 363 So 2d 1007

Hawaii—State v Apao, 586 P 2d 250, 59 Haw 625, subs resolution 693 P 2d 405

Ill —People v Walden, 357 N E 2d 232, 2 Ill Dec 255, 43 Ill App 3d 744

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Mo – State v Duren 547 S W 2d 476

Statute valid

Ark —Ford v State, 633 S W 2d 3 276 Ark 98, cert den 103 S Ct 389, 459 U S 1022, 74 L Ed 2d 519

Colo —People v Favors 556 P 2d 72 192 Colo 136

Del – Waters v State 443 A 2d 500

Ind —Jones v State 385 N E 2d 426 270 Ind 285

La —State v Toomer 395 So 2d 1320- State v Mitchell 412 So 2d 547

Me —State v Crockett, 435 A 2d 58, 25 A L R 4th 270

Okl —Thomas v State, Cr 556 P 2d 1321

Wash —State v Wanrow, 588 P 2d 1320, 91 Wash 2d 301

Brain death

Mass —Com v Golston 366 N E 2d 744, 373 Mass 249 cert den 98 S Ct 777, 434 U S 1039, 54 L Ed 2d 788

Statute invalid

Colo People v Roark, 643 P 2d 756

Absence of self-defense not element

Ohio -State v Davis, 456 N E 2d 1256 8 Ohio App 3d 205 80 B R 276

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26. Nev – State v Blackwell, 198 P 2d 280, 65 Nev 405, reh den 200 P 2d 698, 65 Nev 405, cert den 69 S Ct 742, 336 U S 939 93 L Ed 1097

Pa —Com v Redline 49 Berks 116

27 Conn —State v Kurz, 37 A 2d 808 131 Conn 54—State v Rossi 42 A 2d 354 132 Conn 39

Md – McDowell v State 358 A 2d 624 31 Md App 652

N C -State v Doss 183 S E 2d 671, 279 N C 413 vac in part on oth grds 92 S Ct 2875, 408 U S 939, 33 L Ed 2d 762 mand conf to 191 S E 2d 70, 281 N C 751

Or – State v Sanne, 601 P 2d 880 42 Or App 815

S C –State v Judge 38 S E 2d 715 208 S C 497

Tex - Galloway v State, Cr, 420 S W 2d 721

Statute valid

U S —Warhtner v Weatherholtz, D C Va, 447 F Supp 82, dism C A 598 F 2d 617

Colo —People v Reynolds 575 P 2d 1286, 194 Colo 543

Fla —Antone v State, 382 So 2d 1205 cert den 101 S Ct 287, 449 U S 913 66 L Ed 2d 141 reh den 101 S Ct 632, 449 U S 1057, 66 L Ed 2d 512

N Y —People v Wilson 363 N Y S 2d 417 80 Misc 2d 753

28. Ky —Spirko v Com, 480 S W 2d 169

La —State v Kelly, 375 So 2d 1344

Minn —Vesey v Vesey, 54 N W 2d 385, 237 Minn 295

Mo —State v Thomas, App, 595 S W 2d 325

Mont —State v Collins, 582 P 2d 1179, 178 Mont 36

Pa —Com v Redline, 137 A 2d 472, 391 Pa 486

Tex —Mosley v State, 196 S W 2d 822, 149 Tex Cr R 523

Murder as degree of criminal homicide

Md —Jackson v State, 408 A 2d 711, 286 Md 430

Or – State v McCoy, 521 P 2d 1074, 17 Or App 155, affd, 527 P 2d 725, 270 Cr 340

Statute not unconstitutional

U S —Carter v Jago, C A Ohio, 637 F 2d 449, cert den 102 S Ct 2249, 456 U S 980 72 L Ed 2d 856

Ark —Cromwell v State, 598 S W 2d 733, 269 Ark 104—Penn v State, 681 S W 2d 307, 284 Ark 234

Colo —People v Mendoza, 575 P 2d 403, 195 Colo 19

Del —Gray v State 441 A 2d 209

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Me —State v Flick, 425 A 2d 167

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N Y —People v Wingate, 422 N Y S 2d 245, 72 A D 2d 955—People v Sturgis, 448 N Y S 2d 61, 86 A D 2d 775

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Statute invalid

Colo —People v Curtis, 627 P 2d 734

N Y —People v Craig, 440 N Y S 2d 839, 81 A D 2d 413

Coherent definition required

Colo — People v Marcy, 628 P 2d 69

29 Utah—State v Russell, 145 P 2d 1003, 106 Utah 116

30. N Y —Horan v Wallander, 58 N Y S 2d 471, 186 Misc 40

31. Alaska—Flores v State, 443 P 2d 73

Mass —Com v Juvenile (No 1), 313 N E 2d 120, 365 Mass 421, app after remand 348 N E 2d 760, 370 Mass 450

Wash —State v Golladay, 470 P 2d 191, 78 Wash 2d 121

Regardless of means

Ala – Wesson v State, 36 So 2d 361, 251 Ala 33

Murder of unborn child

Cal —People v Apodaca 142 Cal Rptr 830, 76 C A 3d 479

"Murder, a second and subsequent offense" is not a defined crime.[31.5]

31.5 Okl – Application of Igo, Cr, 331 P 2d 969

Crime of murder may be committed without commission of any of the felonies mentioned in the statute defining the degrees of murder [31.10]

31.10. Idaho– State v Hall, 383 P 2d 602, 86 Idaho 63

A killing done in the commission of an act eminently dangerous to others, and evincing a depraved heart, regardless of human life, is under some statutes murder [31.15]

31.15 Miss —Bass v State 54 So 2d 259—Neighbors v State, 361 So 2d 345

Depraved mind murder

N Y —People v Register 457 N E 2d 704 60 N Y 2d 270 469 N Y S 2d 599 cert den 104 S Ct 2159, 466 U S 953 80 L Ed 2d 544

34. U S —Clark v Jago C A Ohio 676 F 2d 1099 cert den 104 S Ct 2360, 80 L Ed 2d 832, on remand 600 F Supp 1520

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Ala—King v State, Cr., 262 So 2d 764, 48 Ala App 154, cert den 262 So 2d 767, 288 Ala 744, cert den 93 S Ct 339, 409 U S 986, 34 L Ed 2d 252—Swann v State, Cr App., 412 So 2d 1253

Cal—People v Washington, 44 Cal Rptr 442, 402 P 2d 130, 62 C 2d 777

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Md—Smith v State, 398 A 2d 426, 41 Md App 277, 18 A L R 4th 927

35. Ala—Smith v State, 109 So 2d 853, 40 Ala App 158

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N J—State v Fair, 211 A 2d 359, 45 N J 77

Tex—Ray v State, 266 S W 2d 124, 160 Tex Cr R 12

Absence of intent from lack of capacity

Cal—People v Cisneros, 110 Cal Rptr 269, 34 C A 3d 399

Voluntariness

Tex—Rivas v State, Cr., 496 S W 2d 600

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U S—Victory v Bombard, C A N Y., 570 F 2d 66

Intent to cause death

Conn—State v Avcollie, 423 A 2d 118, 178 Conn 450, app after remand 453 A 2d 418, 188 Conn 626, cert den 102 S Ct 2088, 461 U S 928, 77 L Ed 2d 299

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41. U S—Bizup v Tinsley, D C Colo., 211 F Supp 545, affd., C A., 316 F 2d 284

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Del—State v Winsett, Super., 205 A 2d 510, 8 Storey 111—Howard v State, 303 A 2d 653

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Md—Allison v State, 98 A 2d 273, 203 Md 1

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S C—State v Harvey, 68 S E 2d 409, 220 S C 506

Va—Moxley v Com 77 S E 2d 389, 195 Va 151

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Tex—O'Brien v State, Cr., 365 S W 2d 797

Absence of malice from lack of capacity

Cal—People v Cisneros, 110 Cal Rptr 269, 34 C A 3d 399

42 U S—Government of Virgin Islands v Lake, C A Virgin Islands, 362 F 2d 770

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Ark—Bly v State, 214 S W 2d 77, 213 Ark 859

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N C—State v Setzer, 256 S E 2d 485, 42 N C App 98, cert den 261 S E 2d 127, 298 N C 571

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Va—Moxley v Com., supra, n 41

(2) Other matters

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43. Cal—People v Ray, 120 Cal Rptr 377, 533 P 2d 1017, 14 C 3d 20

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(2) Other cases

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45 Kan—C.J.S. quoted at length in State v Goetz, 237 P 2d 246, 249, 171 Kan 703

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46. U S—Government of Virgin Islands v Lake, C A Virgin Islands, 362 F 2d 770

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Pa—Com v Lawrence, 236 A 2d 768, 428 Pa 188

Tex—Ex parte Lynch, 200 S W 2d 828, 150 Tex Cr R 239

"Willfully" not equivalent of "maliciously"

Kan—State v Roberson, 499 P 2d 1117 210 Kan 209

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47. Ala—Warren v State, 41 So 2d 201, 34 Ala App 447—Wallace v State, 124 So 2d 110, 41 Ala App 65, cert den 124 So 2d 115, 271 Ala 701—Harris v State Ct 267 So 2d 512, 48 Ala App 723

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49. Malice is not confined, etc.

Iowa—State v Myers, 79 N W 2d 382, 248 Iowa 44

(2) Other statements

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29 C J p 1084 note 46[a]

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S C—State v Mouzon, 99 S E 2d 672, 231 S C 655

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Va—Thomas v Com, supra, n 25

52. U S—Government of Virgin Islands v Lake, C A Virgin Islands, 362 F 2d 770

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N C—State v Love, 250 S E 2d 220, 296 N C 194

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53. U S—U S v Celestine, C A Wash, 510 F 2d 457

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54. Ind—Corbin v State, 234 N E 2d 261, 250 Ind 147, reh den 237 N E 2d 376, 250 Ind 147

Iowa—C.J.S. cited in State v Hofer, 28 N W 2d 475, 482, 238 Iowa 820

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56. Del—State v Winsett, Super, 205 A 2d 510, 8 Storey 111

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57. Del—State v Winsett, Super, 205 A 2d 510, 8 Storey 111

58 Neb—State v Beers, 271 N W 2d 842, 201 Neb 714

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60. Nev—Briano v State, Nev, 581 P 2d 5, 94 Nev 422

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Okl—Wood v State, Cr, 486 P 2d 750

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R I—State v Page, 244 A 2d 258, 104 R I 323

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S D—State v Marshall, 264 N W 2d 911

Tenn—Sherod v State, 470 S W 2d 860, 4 Tenn Cr App 344

Va.—Coleman v Com, 35 S E 2d 96, 184 Va 197

In Louisiana

(1) Under a recent statute malice aforethought in no longer an element—State v Sears 55 So 2d 881, 220 La 103

(2) Formerly the text rule was held—State v Adams, 28 So 2d 269, 210 La 782

Element must exist when homicide is committed

Okl—Tarter v State, Cr 359 P 2d 596

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Ind—Corbin v State, 234 N E 2d 261, 250 Ind 147, reh den 237 N E 2d 376, 250 Ind 147

No longer element of murder

Ga—Burnett v State, 242 S E 2d 79, 240 Ga 681

Or—State v McCoy, 521 P 2d 1074, 17 Or App 155, affd, 527 P 2d 725, 270 Or 140

Conduct deemed to have high likelihood of causing death

Me—State v Lafferty, 309 A 2d 647

62. Cal—People v Wells, 202 P 2d 53, 33 Cal 2d 330, cert den 70 S Ct 43, 338 U S 836 94 L Ed 510

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(3) Ill will or hatred not necessary

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63. Pa—Com v Carroll, 194 A 2d 911, 412 Pa 525

S C—State v Judge, supra n 27

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Me—State v Lafferty, 309 A 2d 647

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Mo—State v Proctor, App, 546 S W 2d 544

64. Ind—Holt v State, 365 N E 2d 1209, 266 Ind 586

Kindly motive does not eliminate premeditation—People v Dessauer, 241 P 2d 238, 38 C 2d 547, cert den 73 S Ct 96, 344 U S 858, 97 L Ed 666

Voluntary intoxication does not negative malice aforethought

Mo—State v Lane, 371 S W 2d 261

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65. U S—Government of Virgin Islands v Lake, C A Virgin Islands, 362 F 2d 770

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66. Colo—English v People, 497 P 2d 691, 178 Colo 325

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(2) Ind—Owens v State, 333 N E 2d 745, 263 Ind 487

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69. Hawaii—State v Moeller, 433 P 2d 136, 50 Haw 110

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74. U S—Ornelas v U S, C A Nev, 236 F 2d 392

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78. Ark —Cheney v State, 172 S W 2d 427, 205 Ark 1049
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79. Kan —State v Jensen, 417 P 2d 273 197 Kan 427

81. U S —Government of Virgin Islands v Lake, C A Virgin Islands, 362 F 2d 770
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82. Colo —Walker v People, 489 P 2d 584, 175 Colo 173
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(2) Del —Seeney v State, 277 A 2d 670, vac in part on oth grds 92 S Ct 2871, 408 U S 939, 33 L Ed 2d 760
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97. Cal —People v Bender, supra, n 61
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Kan —State v Hamilton, 534 P 2d 226, 216 Kan 559
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Mass.—Com v Balliro, 209 N E 2d 308, 349 Mass 505, 14 A L R 3d 640—Com v LePage, 226 N E 2d 200, 352 Mass 403—Com v White, 232 N E 2d 335, 353 Mass 409, cert den 88 S Ct 2039, 391 U S 968, 20 L Ed 2d 881—Com v McGrath, 264 N E 2d 667, 358 Mass 314—Com v Rego, 274 N E 2d 795, 360 Mass 385

Mich —People v Smith, 189 N W 2d 833, 33 Mich App 336

Mo —State v Conway, 171 S W 2d 677, 351 Mo 126—C.J.S cited in State v Beal, 470 S W 2d 509 513—State v Jewell, 473 S W 2d 734—State v Ford, 495 S W 2d 408

Nev —Rogers v State, 432 P 2d 331, 83 Nev 376

N M —State v Pace, 456 P 2d 197, 80 N M 364

N Y —People v Porter, 54 N Y S 2d 3—People v Levan, 64 N E 2d 341, 295 N Y 26—People v Conforti, 72 N Y S 2d 458—People ex rel Santangelo v Tutuska, 192 N Y S 2d 350, 19 Misc 2d 308, affd 205 N Y S 2d 1006, 11 A D 2d 906, motion den 216 N Y S 2d 684, 9 N Y 2d 862, 175 N E 2d 818

N C —C.J.S cited in State v Streeton, 56 S E 2d 649, 652, 231 N C 301—State v Hairston, 185 S E 2d 633, 280 N C 220, cert den 93 S Ct 194, 409 U S 888, 34 L Ed 2d 145—State v Thompson, 185 S E 2d 666, 280 N C 202—C.J S. cited in State v Shrader, 225 S E 2d 522, 528 290 N C 253

Ohio—State v Hill, 232 N E 2d 394, 12 Ohio St 2d 88

Or —State v Grooms, 615 P 2d 1130, 47 Or App 1001

Pa —C.J.S cited in Com v Bolish, 112 A 2d 464, 471, 381 Pa 500—Com v Crews, 239 A 2d 350, 429 Pa 16, app after remand 260 A 2d 771 436 Pa 346—C.J.S. cited in Com v Commander 260 A 2d 773, 776, 436 Pa 532—Com v Tomlinson, 284 A 2d 687, 446 Pa 241

Tenn —Bass v State, 231 S W 2d 707, 191 Tenn 259—Phillips v State, Cr , 455 S W 2d 637, 2 Tenn Cr App 609

Tex —Smith v State, 225 S W 2d 846, 154 Tex Cr R 234

W Va —C.J.S cited in State v Lewis, 57 S E 2d 513, 526, 133 W Va 584

Attempt

(4) Other cases

Conn —State v Rogers, 120 A 2d 409, 143 Conn 167 cert den 76 S Ct 850, 351 U S 952, 100 L Ed 1476

Del —Jenkins v State, 240 A 2d 146, affd 89 S Ct 1677, 395 U S 213, 23 L Ed 2d 253, reh den 90 S Ct 469, 396 U S 995, 24 L Ed 2d 460

Idaho—State v Owen, 253 P 2d 203, 73 Idaho 394

Ill —People v Danner, 245 N E 2d 106, 105 Ill App 2d 126—People v Muir, 349 N E 2d 423, 38 Ill App 3d 1051 Revd on oth grds, 365 N E 2d 332, 8 Ill Dec 94, 67 Ill 2d 86, cert den 98 S Ct 615, 434 U S 986, 54 L Ed 2d 481

N J —State v Smith, 161 A 2d 520, 32 N J 501, cert den 81 S Ct 383, 364 U S 916, 5 L Ed 2d 367

Malice

(1) Ky —Tarrence v Com , 265 S W 2d 40, cert den 75 S Ct 220, first case, 348 U S 899, 99 L Ed 706

Va —Heacock v Com , 323 S E 2d 90, 228 Va 397

(2) Mass —Com v Venuti, 52 N E 2d 192, 315 Mass 255

(3) Mass.—Com v Moran, 442 N E 2d 399, 387 Mass 644

Vt —State v Doucette, 470 A 2d 676, 143 Vt 573

(4) Other matters

U S —Bizup v Tinsley, D C Colo , 211 F Supp 545, affd , C A , 316 F 2d 284

Cal —People v Stamp, 82 Cal Rptr 598, 2 C A 3d 203, cert den 91 S Ct 36, 400 U S 819, 27 L Ed 2d 46—Carlos v Superior Court of Los Angeles County 197 Cal Rptr 79, 672 P 2d 862, 35 C 3d 131

Me —State v Lafferty, 309 A 2d 647

Md —Warren v State, 350 A 2d 173, 29 Md App 560

Mo —State v Owens, 486 S W 2d 462

N Y —People v Luscomb, 55 N E 2d 469, 292 N Y 390

Pa —Com v Redline, 137 A 2d 472, 391 Pa 486—Com v Bolish, 138 A 2d 447, 391 Pa 550, cert den 78 S Ct 1376, 357 U S 931, 2 L Ed 2d 1373—Com v Cater, 152 A 2d 259, 396 Pa 172—Com v Simpson, 260 A 2d 751, 436 Pa 459

Tex —Smith v State, 323 S W 2d 443, 168 Tex Cr R 102

Statute held valid

U S —U S ex rel Stukes v Shovlin, C A Pa , 464 F 2d 1211

Ariz —State v Celaya, 660 P 2d 849, 135 Ariz 248—State v McLoughlin, 679 P 2d 504, 139 Ariz 481

Ark —Ruiz v State, 617 S W 2d 6, 273 Ark 94, cert den 102 S Ct 659, 454 U S 1093, 70 L Ed 2d 631

Cal —People v Johnson, 112 Cal Rptr 834, 39 C A 3d 1

Ga —Larkin v State 278 S E 2d 365, 247 Ga 586

Hawaii—State v Wakinekona, 499 P 2d 678, 53 Haw 574

La —State v Frezal, 278 So 2d 64

N M —State v Hicks, 555 P 2d 689, 89 N M 568

Vt —State v Doucette 470 A 2d 676, 143 Vt 573

W Va —State v Taylor 285 S F 2d 635

Wash —State v Peyton 630 P 2d 1362 29 Wash App 701

Basis

Pa —Com v Bolish, 55 Lack Jur 213, revd on oth grds 113 A 2d 464, 381 Pa 500, affd 138 A 2d 447, 391 Pa 550, cert den 78 S Ct 1376, 357 U S 931, 2 L Ed 2d 1373

Accidental occurrence used only in determining penalty

Cal —People v Jones 343 P 2d 577, 52 C 2d 636, cert den 80 S Ct 364 361 U S 926, 4 L Ed 2d 350

Md —Adams v State, 262 A 2d 69, 8 Md App 684, cert den 91 S Ct 193, 400 U S 928, 27 L Ed 2d 188

Malice and felonious intent

N Y — People v Harvin, 259 N Y S 2d 883 46 Misc 2d 417

Importation of intent

Cal - -People v Sears, 44 Cal Rptr 330, 401 P 2d 938, 62 C 2d 737—People v Fain, 75 Cal Rptr 633 451 P 2d 65, 70 C 2d 588

W Va —State v Young, 311 S E 2d 118

Purpose

Ark —Grigsby v State, 542 S W 2d 275, 260 Ark 499

Cal —People v Johnson, 104 Cal Rptr 807, 28 C A 3d 653

Fla —State v Williams, App , 254 So 2d 548

Kan —State v Clark, 460 P 2d 586, 204 Kan 38

N Y —People v Miller, 297 N E 2d 85, 32 N Y 2d 157, 344 N Y S 2d 342

Felony murder doctrine should not be extended beyond rational function

Cal —People v Washington, 44 Cal Rptr 442, 402 P 2d 130, 62 C 2d 777—People v Jennings, 52 Cal Rptr 329, 243 C A 2d 124—People v Cline, 75 Cal Rptr 459, 270 C A 2d 328, 32 A L R 3d 582

Prior to judgment it is felony murder

Cal —People v Finley, 33 Cal Rptr 31, 219 C A 2d 330, cert den 84 S Ct 1174, 377 U S 912 12 L Ed 2d 181—Brooks v Superior Court of Los Angeles County, 48 Cal Rptr 762, 239 C A 2d 518—People v Cline, 75 Cal Rptr 459, 270 C A 2d 328, 32 A L R 3d 582

Intent to commit felony

Cal —People v Brunt, 101 Cal Rptr 457, 23 C A 3d 945

Ill —People v Morris, 274 N E 2d 898, 1 Ill App 3d 566

Mo —State v Rumble, 680 S W 2d 939

N Y —People v Joyner, 257 N E 2d 26, 26 N Y 2d 106, 308 N Y S 2d 840

Pa —Com v Spallone, 406 A 2d 1146, 267 Pa Super 486

Vt —State v Doucette, 470 A 2d 676, 143 Vt 573

Expectation of death immaterial

Pa —Com v Johnson, 485 A 2d 397, 336 Pa Super 1

Negligence of accomplice immaterial

Conn —State v Pellegrino, 480 A 2d 537, 194 Conn 279

Only intent to commit particular felony required

Cal —People v Fortman, 64 Cal Rptr 669, 257 C A 2d 45—People v Baglin, 76 Cal Rptr 863, 271 C A 2d 411

Narrow construction

Cal —People v Satchell 98 Cal Rptr 33 489 P 2d 1361, 6 C 3d 28, 50 A L R 3d 383

Statute held constitutional

N Y —People v Kampshoff, 385 N Y S 2d 672, 53 A D 2d 325, cert den 97 S Ct 2979, 433 U S 911 53 L Ed 2d 1096

Accomplice liability

D C —Christian v U S , App 394 A 2d 1 cert den 99 S Ct 2889 442 U S 944 61 L Ed 2d 315

Mo —State v Boggs, 634 S W 2d 447

Pa —Com v Waters, 345 A 2d 613 461 Pa 465

Va —Briley v Com , 273 S E 2d 57 221 Va 563

Wyo —Jones v State, 568 P 2d 837

Applies to property offenses involving special danger to life

Minn —State v Back 341 N W 2d 273

50 Cal —People v Johnson, 104 Cal Rptr 807, 28 C A 3d 653—People v Cantrell, 105 Cal Rptr 792, 504 P 2d 1256—People v Conrad App , 107 Cal Rptr 421, 31 C A 3d 308

Kan —State v Lamb 497 P 2d 275, 209 Kan 453

Mo —State v Shuler, 486 S W 2d 505

Ohio—State v Carver 283 N E 2d 662, 30 Ohio App 2d 115, affd 285 N E 2d 26 30 Ohio St 2d 280, cert den 93 S Ct 542, 409 U S 1044, 34 L Ed 2d 295

Or —State v Little 431 P 2d 810 249 Or 297, cert den 88 S Ct 1048, 390 U S 955 19 L Ed 2d 1148

Pa —Com v Wooding, 50 A 2d 328, 355 Pa 555

Vt —State v Doucette 470 A 2d 676 143 Vt 573

W Va —C J S quoted in State v Lewis 57 S E 2d 513 525, 133 W Va 584

Substitute for mens rea

Ark —Bosnick v State, 454 S W 2d 311 248 Ark 846

Colo —Whitman v People, 420 P 2d 416 161 Colo 110—People v Priest App , 672 P 2d 539

Conn —State v Rossi, 42 A 2d 354 132 Conn 39

Fla —Adams v State, 341 So 2d 765 cert den 98 S Ct 232, 434 U S 878, 54 L Ed 2d 158, reh den 98 S Ct 541, 434 U S 977 54 L Ed 2d 471

Mass —Commonwealth v Gricus, 58 N E 2d 241, 317 Mass 403

Neb —Wilson v State, 103 N W 2d 258, 170 Neb 494 cert den 81 S Ct 178, 364 U S 887, 5 L Ed 2d 108

Nev —State v Fouquette, 221 P 2d 404, 67 Nev 505 cert den 71 S Ct 799, 341 U S 932, 95 L Ed 2d 1361 and 72 S Ct 369 342 U S 928, 96 L Ed 2d 691

N Y —People v Berzups 402 N E 2d 1155, 49 N Y 2d 417, 426 N Y S 2d 253, on remand 432 N Y S 2d 852 76 A D 2d 867

N C —State v Foster 239 S E 2d 449 293 N C 674

Okl —Wade v State App , 581 P 2d 914

Or —State v Jensen, 296 P 2d 618, 209 Or 239, cert den 77 S Ct 329, 352 U S 948 1 L Ed 2d 241, reh den 77 S Ct 388 352 U S 990, 1 L Ed 2d 369

Tex —Garrett v State App , 573 S W 2d 543

Wyo—Osborn v State, 672 P 2d 777, cert den 104 S Ct 1331, 465 U S 1051, 79 L Ed 2d 726

In some jurisdictions the felony-murder doctrine is not applicable where the underlying felony is an integral part of the homicide.[50.5]

50.5. Cal—People v Ireland, 75 Cal Rptr 188, 450 P 2d 580, 70 C 2d 522, 40 A L R 3d 1323—People v Segura, 80 Cal Rptr 794, 276 C A 2d 589, cert den 90 S Ct 1251, 397 U S 1016, 25 L Ed 2d 430—People v Wilson, 82 Cal Rptr 494, 462 P 2d 22, 1 C 3d 431

Kan—State v Brown, 696 P 2d 954, 236 Kan 800

Okl—Sullinger v State, Cr, 675 P 2d 472

Underlying felony held not included within homicide

Cal—People v Mattison, 93 Cal Rptr 185, 481 P 2d 193, 4 C 3d 177—People v Calzada, 91 Cal Rptr 912, 13 C A 3d 603—People v Burton, 99 Cal Rptr 1, 491 P 2d 793, 6 C 3d 375

N Y—People v Miller, 334 N Y S 2d 250, 70 Misc 2d 594, affd 334 N Y S 2d 252, 39 A D 2d 893, motion den 289 N E 2d 552, 31 N Y 2d 698, 337 N Y S 2d 510, revd 297 N E 2d 85, 32 N Y 2d 157, 344 N Y S 2d 342, affd, 366 N Y S 2d 369, 47 A D 2d 613

However, in at least one other jurisdiction it has been held that a conviction for felony-murder may be predicated upon the underlying felony which is itself a part of the homicide.[50.10]

50.10. Ga—Baker v State, 225 S E 2d 269, 236 Ga 754—Golden v State, 297 S E 2d 479, 250 Ga 428, cert den 103 S Ct 1448, 460 U S 1046, 75 L Ed 2d 802—Graham v State, 308 S E 2d 844, 251 Ga 640

51. Cal—People v Stamp, 82 Cal Rptr 598, 2 C A 3d 203, cert den 91 S Ct 36, 400 U S 819, 27 L Ed 2d 46—People v Nichols, 89 Cal Rptr 721, 474 P 2d 673, 3 C 3d 150, cert den 91 S Ct 1388, 402 U S 910, 28 L Ed 2d 652

Iowa—C.J.S. cited in State v Gavin, 328 N W 2d 501, 503, app after remand

Kan—State v Moffitt, 431 P 2d 879, 199 Kan 514

Mo—State v Moore, 580 S W 2d 747

N Y—People v Luscomb, supra, n 49

Pa—Com v Redline, 49 Berks 116

Rule inapplicable where accomplice killed

Ill—People v Hudson, 287 N E 2d 41, 6 Ill App 3d 1062—People v Morris, 274 N E 2d 898, 1 Ill App 3d 566

Pa—Com v Redline, 137 A 2d 472, 391 Pa 486

Person killed need not be person robbed, etc.

Ala—Taylor v State, Cr App, 442 So 2d 128

Mo—State v McClain, App, 531 S W 2d 40

N C—State v Carter, 238 S E 2d 493, 293 N C 532

Rule not precluded where victim is participant

Ill—People v Rice, 438 N E 2d 1333, 64 Ill Dec 14, 108 Ill App 3d 344—People v Graham, 11 Dist, 477 N E 2d 1342, 87 Ill Dec 814, 132 Ill App 3d 673

52. Ala—C.J.S. cited in Davis v State, supra, n 49

Alaska—Gray v State, 463 P 2d 897

Cal—People v Phillips, 51 Cal Rptr 225, 414 P 2d 353, 64 C 2d 310—Brooks v Superior Court of Los Angeles County, 48 Cal Rptr 762, 239 C A 2d 538—People v Mattison, 93 Cal Rptr 185, 481 P 2d 193, 4 C 3d 177

Del—Jenkins v State, 230 A 2d 262, app after remand 240 A 2d 146, affd 89 S Ct 1677, 395 U S 213, 23 L Ed 2d 253, reh den 90 S Ct 469, 396 U S 995, 24 L Ed 2d 460

Kan—State v Moffitt, 431 P 2d 879, 199 Kan 514

N J—State v McKeever, 213 A 2d 320, 89 N J Super 52

N C—C.J.S. cited in State v Streeton, supra, n 49

Okl—Johnson v State, Cr, 386 P 2d 336

Pa—C.J.S. cited in Com v Myers, Pa, 167 A 2d 295, 300, 402 Pa 451, cert den 81 S Ct 1099, 366 U S 921, 6 L Ed 2d 243

Unlawful distribution of cocaine

Va—Heacock v Com, 323 S E 2d 90, 228 Va 397

Violence necessary to carry out common purpose

Ill—People v Golson, 207 N E 2d 68, 32 Ill 2d 398, cert den 86 S Ct 1951, 384 U S 1023, 16 L Ed 2d 1026, reh den 87 S Ct 21, 385 U S 892, 17 L Ed 2d 125

Felony in abstract

Cal—People v Lovato, 65 Cal Rptr 638, 258 C A 2d 290—People v Cline, 75 Cal Rptr 459, 270 C A 2d 328, 32 A L R 3d 582—People v Nichols, 89 Cal Rptr 721, 474 P 2d 673, 3 C 3d 150, cert den 91 S Ct 1388, 402 U S 910, 28 L Ed 2d 652—People v Satchell, 98 Cal Rptr 33, 489 P 2d 1361, 6 C 3d 28, 50 A L R 3d 383—People v Satchell, 98 Cal Rptr 33, 489 P 2d 1361, 6 C 3d 28, 50 A L R 3d 383

N C—State v Thompson, 185 S E 2d 666, 280 N C 202

Practicing medicine without license not dangerous

Cal—People v Burroughs, 201 Cal Rptr 319, 678 P 2d 894, 35 C 3d 824

53. Cal—People v Cline, 75 Cal Rptr 459, 270 C A 2d 328, 32 A L R 3d 582

Del—Jenkins v State, 230 A 2d 262, app after remand 240 A 2d 146, affd 89 S Ct 1677, 395 U S 213, 23 L Ed 2d 253, reh den 90 S Ct 469, 396 U S 995, 24 L Ed 2d 460

Ohio—State v Johnson, 381 N E 2d 637, 56 Ohio St 2d 35, 10 O O 3d 78

Tenn—Fine v State, 246 S W 2d 70, 193 Tenn 422

Direct causal result

Cal—People v Stamp, 82 Cal Rptr 598, 2 C A 3d 203, cert den 91 S Ct 36, 400 U S 819, 27 L Ed 2d 46

Foreseeable consequence

Tex—Gordon v State, App 4 Dist, 640 S W 2d 743

However, it has been held that a statute defining felony-murder does not limit its scope to felonies that are foreseeably dangerous [53.2]

53.2 Va—Heacock v Com, 323 S E 2d 90, 228 Va 397

The felony attempted or committed in order to establish felony-murder must be one of the independent felonies listed in the statute [53.5]

53.5. Mich—People v Allen, 197 N W 2d 874, 39 Mich App 637

N Y—People v Parker, 2 Dept, 466 N Y S 2d 700, 96 A D 2d 1063

Okl—Swaim v State, Cr, 569 P 2d 1009

Breaking and entering not included

Mich—People v Whetstone, 326 N W 2d 552, 119 Mich App 546, on reh 346 N W 2d 845, 131 Mich App 669

54. Miss—Lackey v State, 53 So 2d 25, 211 Miss 892

N H—State v Millette, 299 A 2d 150, 112 N H 458

Pa—Com v Wilson, 296 A 2d 719, 449 Pa 235

Vt—State v Doucette, 470 A 2d 676, 143 Vt 573

W Va—C.J.S. quoted in State v Lewis, supra, n 49

Intoxication negativing intent

N C—State v Simmons, 213 S E 2d 280, 286 N C 681, vac in part on oth grds 96 S Ct 3207, 428 U S 903, 49 L Ed 2d 1208

In some jurisdictions the felony-murder rule has been abolished [54.5]

54.5. Mich—People v Aaron, 299 N W 2d 304, 409 Mich 672, 13 A L R 4th 1180

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55. Iowa—State v Anderson, 33 N W 2d 1, 239 Iowa 1118

Kan—State v Brown, 236 P 2d 59, 171 Kan 557

Mo—State v Werbin, 345 S W 2d 103

56. S C—State v Steadman, 51 S E 2d 91, 214 S C 1

57. U S—Chavez v Dickson, C A Cal, 280 F 2d 727, cert den 81 S Ct 379, 364 U S 934, 5 L Ed 2d 366, reh den 1092, 366 U S 922, 6 L Ed 2d 244

Ariz—State v Singleton, 182 P 2d 920, 66 Ariz 49—In re Anonymous, Juvenile Court No 6358-4, 484 P 2d 235, 14 Ariz App 466

Conn—State v Valeriano, 468 A 2d 936, 191 Conn 659, cert den 104 S Ct 2351, 80 L Ed 2d 824

Ohio—State v Cooney, 263 N E 2d 407, 24 Ohio App 2d 12

Rule applicable to common law arson and not statutory arson

N J—State v Lucas, 152 A 2d 50, 30 N J 37

58. Ariz—State v Henry, 562 P 2d 374, 114 Ariz. 494—State v Arias, 641 P 2d 1285, 131 Ariz 441

Cal—People v Walker, 201 P 2d 6, 33 Cal 2d 250, cert den 69 S Ct 744, 336 U S 940, 93 L Ed 1098—People v Jones, 343 P 2d 577, 52 C 2d 636, cert den 80 S Ct 364, 361 U S 926, 4 L Ed 2d 350—People v Hamilton, 13 Cal Rptr 649, 362 P 2d 473, 55 C 2d 881—People v Thomas, 117 Cal Rptr 855, 44 C A 3d 573

Del—Jenkins v State, 230 A 2d 262, app after remand 240 A 2d 146, affd 89 S Ct 1677, 395 U S 213, 23 L Ed 2d 253, reh den 90 S Ct 469, 396 U S 995, 24 L Ed 2d 460

D C—Blango v U S, App, 373 A 2d 885

Ill—People v Aullar, 319 N E 2d 514, 59 Ill 2d 95

Ind—Irons v State, 397 N E 2d 603, 272 Ind 287

Iowa—State v Hinkle, 229 N W 2d 744 State v Cuevas, 282 N W 2d 74

Kan—State v Sullivan, 578 P 2d 1108, 224 Kan 110

Mich—People v Young, 340 N W 2d 805, 418 Mich 1

Minn—State v Nunn, 297 N W 2d 752

N Y—People v Miller, 334 N Y S 2d 250, 70 Misc 2d 594, affd 334 N Y S 2d 252, 39 A D 2d 893, motion den 289 N E 2d 552 31 N Y 2d 698, 337 N Y S 2d 510, revd 297 N E 2d 85, 32 N Y 2d 157, 344 N Y S 2d 342, affd, 366 N Y S 2d 369, 47 A D 2d 613

N C—State v Thompson, 185 S E 2d 666, 280 N C 202

Or—State v Barton, 492 P 2d 828, 8 Or App 186, cert den 93 S Ct 64, 409 U S 852, 34 L Ed 2d 95

Pa—Com v Maloney, supra, n 48—Com v Carey, 66 Montg Co 263, affd 82 A 2d 240, 368 Pa 157—Com v Klinger, 337 A 2d 569, 461 Pa 606

Tex—Cline v State, Cr App, 204 S W 2d 512

Wash—State v Dudrey, 635 P 2d 750, 30 Wash App 447

Common-law burglary

N J—State v Butler, 143 A 2d 530, 27 N J 560

Inapplicable to storehouse breaking

Md—Jeter v State, 267 A 2d 319, 9 Md App 575, affd 274 A 2d 337, 261 Md 221

No particular degree required

N Y—People v Johnson, 453 N Y S 2d 539, 89 A D 2d 814

59. Cal—People v Jones, 343 P 2d 577, 52 C 2d 636, cert den 80 S Ct 364, 361 U S 926, 4 L Ed 2d 350—People v Fain, 75 Cal Rptr 633, 451 P 2d 65, 70 C 2d 588—People v Goodridge, 76 Cal Rptr 421, 452 P 2d 637, 70 C 2d 824—People v Medina, 116 Cal Rptr 133, 41 C A 3d 438

Ga—C.J.S. cited in Hill v State, 39 S E 2d 675, 680, 201 Ga 300

Ill—People v Kolep, 193 N E 2d 753, 29 Ill 2d 116

La—State v Square, 244 So 2d 200, 257 La 743, vac in part on oth grds 92 S Ct 2871, 408 U S 938, 33 L Ed 2d 760, mand conf to 268 So 2d 229, 263 La 291

Md —Thompson v State, 186 A 2d 461, 230 Md 113—Middleton v State, 251 A 2d 224, 6 Md App 380—Sydnor v State, 387 A 2d 297, 39 Md App 459

Mass —Com v O'Neal, 327 N E 2d 662, 367 Mass 440, op supp 339 N E 2d 676, 369 Mass 242

Mich —People v McDonald, 293 N W 2d 588, 409 Mich 110

Neb —MacAvoy v State, 15 N W 2d 45, 144 Neb 827, cert den 65 S Ct 559, 323 U S 804, 89 L Ed 642

N C —State v Woods, 213 S E 2d 214, 286 N C 612, vac in part on oth grds 96 S Ct 3207, 428 U S 903, 49 L Ed 2d 1208

Pa —Com v Cappa, 4 Bucks 189, affd 114 A 2d 338, 382 Pa 72

Statutory definition of rape applicable

Pa —Com v Cappa, 114 A 2d 338, 382 Pa 72

Attempted rape

Wash —State v Kroll, 558 P 2d 173, 87 Wash 2d 829

60. U S —Clark v U S, C A Okl, 281 F 2d 230—Simpson v Wainwright, C A Fla, 439 F 2d 948, cert den 91 S Ct 2199, 402 U S 1011, 29 L Ed 2d 434

Ala —King v State, Cr, 269 So 2d 130, 49 Ala App 111

Ariz —State v Akins, 383 P 2d 180, 94 Ariz 261

Ark —Murray v State, 462 S W 2d 438, 249 Ark 887—Stewart v State, 519 S W 2d 733, 257 Ark 753, cert den 96 S Ct 113, 423 U S 859, 46 L Ed 2d 86—Simpson v State, 623 S W 2d 200 274 Ark 188, app after remand 645 S W 2d 688, 278 Ark 334

Cal —People v Sirignano, App, 117 Cal Rptr 131, 42 C A 3d 794

Colo —McKenna v People, 235 P 2d 351, 124 Colo 112—Jones v People, 360 P 2d 686, 146 Colo 40—Oaks v People, 424 P 2d 115, 161 Colo 561

Conn —State v Buteau, 68 A 2d 681, 136 Conn 113, cert den 70 S Ct 516, 339 U S 903, 94 L Ed 1332—State v Gunning, 439 A 2d 339 183 Conn 299

D C —Wheeler v U S, 165 F 2d 225, 82 U S App D C 363, cert den 68 S Ct 448, 333 U S 829, 92 L Ed 1115, and 68 S Ct 448, 333 U S 830, 92 L Ed 1115

Fla —Leiby v State, 50 So 2d 529—Mills v State, App, 407 So 2d 218

Ga —Edwards v State, 100 S E 2d 172, 213 Ga 552

Idaho—State v Hokenson, 527 P 2d 487, 96 Idaho 283

Ill —People v Woods, 118 N E 2d 248, 2 Ill 2d 240, cert den 74 S Ct 858, 347 U S 993, 98 L Ed 1126—People v Connolly, 210 N E 2d 523, 33 Ill 2d 128, cert den 86 S Ct 1959 384 U S 1023, 16 L Ed 2d 1027—People v Morris, 274 N E 2d 898, 1 Ill App 3d 566

Ind —Jones v State, 195 N E 2d 460, 244 Ind 682, cert den 92 S Ct 2511, 408 U S 927, 33 L Ed 2d 339—Layton v State, 221 N E 2d 881, 248 Ind 52, app after remand 240 N E 2d 489, 251 Ind 205—Hollowell v State, 269 N E 2d 755, 256 Ind 467

Kan —State v Rueckert, 561 P 2d 850 221 Kan 727

Me —State v MacDonald, 229 A 2d 321

Md —Stansbury v State, 146 A 2d 17, 218 Md 255—Brady v State, 154 A 2d 434, 220 Md 454—Veney v State, 246 A 2d 608, 251 Md 159, cert den 89 S Ct 1284, 394 U S 948, 22 L Ed 2d 482

Mass.—Com v Lussier, 128 N E 2d 569, 333 Mass 83

Mich —People v Goree, 186 N W 2d 872, 30 Mich App 490—People v Smith, 189 N W 2d 833 33 Mich App 336—People v Smith, 222 N W 2d 172, 55 Mich App 184

Mo.—State v Bradley, 234 S W 2d 556, 361 Mo 267—State v Burnett, 293 S W 2d 335, 365 Mo 1060, cert den 77 S Ct 367, 352 U S 976, 1 L Ed 2d 326—State v Devoe, 430 S W 2d 164—State v Sykes, 436 S W 2d 32

Neb —State v Hall, 125 N W 2d 918, 176 Neb 295—State v Kauffman, 164 N W 2d 469, 183 Neb 817

Nev —C.J.S. cited in State v Fouquette, 221 P 2d 404, 417, 67 Nev 505, cert den 71 S Ct 799, 341 U S 923, 95 L Ed 1361, and 72 S Ct 369, 342 U S 928, 96 L Ed 691

N J —State v Reynolds, 195 A 2d 449, 41 N J 163, 1 A L R 3d 1438, cert den 84 S Ct 1930, 1914, 377 U S 1000, 12 L Ed 2d 1050, reh den 85 S.Ct 23, 379 U S 873, 13 L Ed 2d 81—State v Kress, 253 A 2d 481, 105 N J Super 514—State v Burton, 325 A 2d 856, 130 N J Super 174

N Y —People v Hawkins, 224 N Y S 2d 457, 33 Misc 2d 821—People v Harvin, 259 N Y S 2d 883, 46 Misc 2d 417—People v Lewis, 444 N Y S 2d 1003, 111 Misc 2d 682

N C —State v Maynard, 101 S E 2d 340, 247 N C 462—State v Bunton, 101 S E 2d 454, 247 N C 510

Okl —Hampton v State, Cr, 407 P 2d 210

Or —State v Smith, 458 P 2d 687, 1 Or App 153

Pa —Com v Taranow, 59 A 2d 53, 359 Pa 342—Com v Darcy, 66 A 2d 663, 362 Pa 259, cert den 70 S Ct 96, 338 U S 862, 94 L Ed 528—Com v Thomas, 117 A 2d 204, 382 Pa 639—Com v Simpson, 260 A 2d 751, 436 Pa 459—Com v Myers, 282 A 2d 347, 444 Pa 465—Com v Tarver, 284 A 2d 759, 446 Pa 233—Com v Magee, 284 A 2d 769, 445 Pa 367

Tenn —Tosh v State, Cr, 527 S W 2d 146—State v Johnson, 661 S W 2d 854, app after remand 698 S W 2d 631

Tex —Smith v State, 323 S W 2d 443, 168 Tex Cr R 102—Lopez v State Cr, 482 S W 2d 179

Utah—State v Murphy, 489 P 2d 430, 26 Utah2d 330

Va —Harrison v Com, 257 S E 2d 777, 220 Va 188—Whitley v Com, 286 S E 2d 162, 223 Va 66, cert den 103 S Ct 181, 459 U S 882, 74 L Ed 2d 148, reh den 103 S Ct 771, 459 U S 1137, 74 L Ed 2d 984

W Va —State v Dawson, 40 S E 2d 306, 129 W Va 279

Taking from presence

(2) Other matters

N J —State v Butler, 143 A 2d 530, 27 N J 560

N Y —People v Santiago, 402 N E 2d 121, 48 N Y 2d 1023, 425 N Y S 2d 782

Common-law robbery

N J —State v Butler, 143 A 2d 530, 27 N J 560

Rule inapplicable where homicide by victim

Cal —People v Washington, 44 Cal Rptr 442, 402 P 2d 130, 62 C 2d 777

N J —State v Suit 323 A 2d 541, 129 N J Super 336

"Attempted commission" of armed robbery

Mass —Com v Ladetto, 207 N E 2d 536, 349 Mass 237

Intent necessary

U S —Palfy v Cardwell C A Ohio, 448 F 2d 328

Cal —People v Thompson, 165 Cal Rptr 289, 611 P 2d 883, 27 C 3d 303

Me —State v Snow, 383 A 2d 1385

Neb —State v Montgomery, 215 N W 2d 881, 191 Neb 470

Attempted robbery

Cal —People v Johnson, 104 Cal Rptr 807, 28 C A 3d 653

Okl —McDonald v State, Cr, 674 P 2d 51

Va —Ball v Com, 273 S E 2d 790, 221 Va 754

Completed robbery

Mo —State v Harley, App, 543 S W 2d 288

Underlying robbery necessary element of offense

Ill —People v Falkner, 377 N E 2d 824, 18 Ill Dec 339, 61 Ill App 3d 84

Victim's state of mind and presence of drugs in victim's blood not relevant

Ind —Thomas v State, 436 N E 2d 1109

No particular degree required

N Y —People v Johnson, 453 N Y S 2d 539, 89 A D 2d 814

Statute held valid

U S —Westberry v Murphy, C A Me, 535 F 2d 1333, cert den, 97 S Ct 245, 429 U S 889, 50 L Ed 2d 172—Watkins v Callahan, C A Mass, 724 F 2d 1038

"Aggravated robbery"

Wyo —Osborn v State, 672 P 2d 777, cert den 104 S Ct 1331, 465 U S 1051, 79 L Ed 2d 726

The rule also applies where a homicide was committed while committing other crimes [61.5]

61.5. Ark —Johnson v State, 482 S W 2d 600, 252 Ark 1113

Ga —Marable v State, 268 S E 2d 720, 154 Ga App 426

La —State v Hayden, 267 So 2d 551, 263 La 142

Intent to assault

Cal —People v Talbot, 51 Cal Rptr 417, 414 P 2d 633, 64 C 2d 691, cert den 87 S Ct 729, 385 U S 1015, 17 L Ed 2d 551

Assault

Or —State v Shirley, 488 P 2d 1401, 7 Or App 166

Wash —State v Harris, 421 P 2d 662, 69 Wash 2d 928

"Other felony"

Kan —State v Moffitt, 431 P 2d 879, 199 Kan 514

Conspiracy to rob

Ga —Lindsey v State, 178 S E 2d 848, 227 Ga 48

Tex —Ruiz v State, Cr App, 579 S W 2d 206

Attempted escape by force and violence

Cal —People v Lynn, 94 Cal Rptr 16, 16 C A 3d 259

Furnishing heroin illegally

Cal —People v Taylor 89 Cal Rptr 697, 11 C A 3d 57

Assault and battery high and aggravated

Me —State v Trott, 289 A 2d 414

Kidnapping

N C —State v Woods, 213 S E 2d 214, 286 N C 612, vac in part on oth grds, 96 S Ct 3207

Possession of firearm by convicted felon

Ga —Scott v State, 297 S E 2d 18 250 Ga 195

63. Del —Jenkins v State, 240 A 2d 146 Affd 89 S Ct 1677, 395 U S 213, 23 L Ed 2d 253, reh den 90 S Ct 469, 396 U S 995, 24 L Ed 2d 460

N Y —People v Luscomb, supra, n 49

Second degree murder

Cal —People v Satchell, 98 Cal Rptr 33, 489 P 2d 1361, 6 C 3d 28, 50 A L R 3d 383

65. N H —State v Millette, 299 A 2d 150, 112 N H 458

Tex —Smith v State, 179 S W 2d 965, 147 Tex Cr R 278

At common law

Pa —Com v Redline, 137 A 2d 472, 391 Pa 486

Misdemeanor larceny sufficient predicate

Mich —People v Hawkins, 319 N W 2d 644, 114 Mich App 714, application for leave to app held in abeyance 335 N W 2d 473

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66. Cal —People v Johnson 104 Cal Rptr 807, 28 C A 3d 653

Fla —State v Andreu, App, 222 So 2d 449

Kan —State v Moffitt, 431 P 2d 879, 199 Kan 514

N M —State v Nelson, 338 P 2d 301, 65 N M 403, cert den 80 S Ct 142 361 U S 877, 4 L Ed 2d 115

N C —C.J.S cited in State v Thompson, 185 S E 2d 666, 673, 280 N C 202

Or —State v Schwensen, 392 P 2d 328, 237 Or 506

Wash —State v Harris, 421 P 2d 662, 69 Wash 2d 928—State v Golladay, 470 P 2d 191, 78 Wash 2d 121

Break in chain of events

(2) Other instances

Ohio—State v Milam, 163 N E 2d 416

Precise causal connection not required

Cal —People v Jackson, 31 Cal Rptr 356, 217 C A 2d 161—People v Mitchell, 88 Cal Rptr 726, 392 P 2d 526 61 C 2d 353—People v Chapman, 67 Cal Rptr 601, 261 C A 2d 149—People v Baglin, 76 Cal Rptr 863, 271 C A 2d 411

Pa —Com v Thomas, 219 A 2d 354, 429 Pa 227
Rule inapplicable where defendant guilty of willful murder
Cal —People v Muszalski, 67 Cal Rptr 378, 260 C A 2d 611, cert den 89 S Ct 701, 393 U S 1059, 21 L Ed 2d 701
Pa —Com v Yarnal, 239 A 2d 318, 429 Pa 6, cert den 90 S Ct 224, 396 U S 911 24 L Ed 2d 186
67. Cal —People v Hardy, 198 P 2d 865, 33 Cal 2d 52—People v Jackson, 78 Cal Rptr 20, 273 C A 2d 248—People v Asher, 78 Cal Rptr 885, 273 C A 3d 876—People v Martinez 79 Cal Rptr 18, 274 C A 2d 170
D C —Harris v U S, App, 377 A 2d 34
Ill —People v Doherty, 193 N E 2d 37, 28 Ill 2d 528
Kan —C.J.S cited in State v Smith 594 P 2d 218, 221, 225 Kan 796
N Y —People v Wood, 201 N Y S 2d 328, 8 N Y 2d 48 167 N E 2d 736—People v Joyner, 257 N E 2d 26, 26 N Y 2d 106 308 N Y S 2d 840
Pa —Com v Redline, 137 A 2d 472 391 Pa 486
Tenn —Farmer v State, 296 S W 2d 879, 201 Tenn 107

Cofelon justifiably killed

Ill —People v Morris, 274 N E 2d 898, 1 Ill App 3d 566

Unlawful sale of narcotic

Ariz —State v Dixon, 511 P 2d 623, 109 Ariz 441
68. Cal —People v Taylor 89 Cal Rptr 697, 11 C A 3d 57
La —State v Tuckson, 414 So 2d 360
Mich —People v Podolski 52 N W 2d 201 332 Mich 508, cert den 73 S Ct 62 344 U S 845, 97 I Ed 657, reh den 73 S Ct 185, 344 U S 888, 97 L Ed 687
Or —State v Schwensen, 392 P 2d 328, 237 Or 506
Pa —Com v Moyer, 53 A 2d 736, 357 Pa 181—Com v Bolish, 55 Lack Jur 213, revd on oth grds 113 A 2d 464, 381 Pa 500, affd 138 A 2d 447, 391 Pa 550, cert den 78 S Ct 1376, 357 U S 931, 2 L Ed 2d 1373
Va —Briley v Com, 273 S E 2d 48, 221 Va 532, cert den 101 S Ct 3022, 451 U S 1031, 69 L Ed 2d 400

One continuous transaction

Ark —Grigsby v State, 542 S W 2d 275, 260 Ark 499
Cal —People v Welch, 104 Cal Rptr 217, 501 P 2d 225
69. D.C —U S v Naples, D C, 192 F Supp 23, revd on oth grds, C A, 307 F 2d 618, 113 U S App D C 281, on remand 205 F 2d 944
La —State v Garner, 115 So 2d 855, 238 La 563
Md —Campbell v State, 444 A 2d 1034, 293 Md 438
Mass —Com v Gricus, 58 N E 2d 241, 317 Mass 403
Nev —State v Fouquette, 221 P 2d 404, 67 Nev 505, cert den 71 S Ct 799, 341 U S 923, 95 L Ed 1361, and 72 S Ct 369, 342 U S 928, 96 L Ed 691
N Y —People v Draper, 104 N Y S 2d 703, 278 App Div 298, affd 101 N E 2d 761, 303 N Y 653

Killing required to be by felon or accomplice

Cal —People v Washington, 44 Cal Rptr 442, 402 P 2d 130, 62 C 2d 777—People v Jennings, 52 Cal Rptr 329, 243 C A 2d 324—People v Reed, 75 Cal Rptr 430, 270 C A 2d 37—People v Johnson, 104 Cal Rptr 807, 28 C A 3d 653—Pizano v Superior Court of Tulare County, 145 Cal Rptr 524, 577 P 2d 659, 21 C 3d 128
Del —Wesck v State, 420 A 2d 159
Fla —State v Wright, 404 So 2d 155
Ill —People v Stevens, 423 N E 2d 1340, 53 Ill Dec 536, 98 Ill App 3d 158
Md —Campbell v State, 444 A 2d 1034, 293 Md 438
Nev —Sheriff, Clark County v Hicks, 506 P 2d 766, 89 Nev 78
N.Y —People v Jackson, 231 N E 2d 722, 20 N Y 2d 440, 285 N Y S 2d 8, cert den 88 S Ct 1815, 391 U S 928, 20 L Ed 2d 668
Pa —Com v Batley, 260 A 2d 793, 436 Pa 377—Com ex rel Smith v Myers, Pa, 261 A 2d 550, 438 Pa 218, 56 A L R 3d 217, overruling Com v Almeida, 362 Pa 596, 68 A 2d 595

Killing by victim of felony

Cal —People v Washington, 44 Cal Rptr 442, 402 P 2d 130, 62 C 2d 777
Del —Weick v State 420 A 2d 159
Md —Campbell v State, 444 A 2d 1034, 293 Md 438
Mass —Com v Ballitro, 209 N E 2d 308, 349 Mass 505, 14 A L R 3d 640
Mo —State v Baker, 607 S W 2d 153
Va —Wooden v Com, 284 S E 2d 811 222 Va 758

Killing of accomplice

Cal —People v Johnson, 104 Cal Rptr 807, 28 C A 3d 653—People v Cobaltero, 87 P 2d 164, 31 C A 2d 52
Fla —State v Presley App, 389 So 2d 216

Accomplice need not be at scene

Colo —People v Priest, App, 672 P 2d 539
70 Ala —Clements v State, Cr App, 370 So 2d 708, affd in part, revd in part on oth grds, Sup, 370 So 2d 723, on remand, Cr App, 370 So 2d 730
Cal People v Chavez, supra, n 68—People v Jennings 52 Cal Rptr 329, 243 C A 2d 324
Del —C.J S cited in Parson v State, 222 A 2d 326, 332, cert den 87 S Ct 961, 386 U S 935, 17 L Ed 2d 807
Fla —C J S cited in Frazier v State, 107 So 2d 16—Jefferson v State, 128 So 2d 132
Ga —C J.S quoted in Jones v State, 142 S E 2d 801, 804, 220 Ga 899
Mich —People v Podolski, supra, n 68
Neb —MacAvoy v State, supra, n 59
Nev —C J S cited in State v Fouquette, supra, n 60
N J —State v Artis, 269 A 2d 1, 57 N J 24
N M —State v Nelson, 338 P 2d 301, 65 N M 403, cert den 80 S Ct 142, 361 U S 877, 4 L Ed 2d 115

Burglary

D C —U S v Naples, D C, 192 F Supp 23, revd on oth grds C A, 307 F 2d 618, 113 U S App D C 281, on remand 205 F Supp 944
Ill —People v Hickman, 297 N E 2d 582, 12 Ill App 3d 412, affd, remd, Sup, 319 N E 2d 511, 59 Ill 2d 89, cert den 95 S Ct 1571, 421 U S 913, 43 L Ed 2d 779
N D —State v Olson, 290 N W 2d 664
Or —State v Reams, 636 P 2d 913, 292 Or 1

Robbery

(1) D C —Carter v U S, C A, 223 F 2d 332, 96 U S App D C 40, cert den S Ct 324 350 U S 949, 100 L Ed 827—U S v Bolden, C A, 514 F 2d 1301, 169 U S App D C 60
N Y —People v Moll, 272 N Y S 2d 611, 26 A D 2d 654 motion den 226 N E 2d 702, 19 N Y 2d 810, 279 N Y S 2d 969 Affd 234 N E 2d 698, 21 N Y 2d 706, 287 N Y S 2d 675, am 235 N E 2d 706, 21 N Y 2d 794, 288 N Y S 2d 485, cert den 88 S Ct 1858, 391 U S 953, 20 L Ed 2d 868, vac on oth grds 89 S Ct 2033, 395 U S 709, 23 L Ed 2d 655, conf to 251 N E 2d 150 25 N Y 2d 894, 304 N Y S 2d 13 on remand 256 N E 2d 185, 26 N Y 2d 1, 307 N Y S 2d 876, cert den 90 S Ct 1707 398 U S 911, 26 L Ed 2d 71
N C —State v Bush, 221 S E 2d 333, 289 N C 159, vac in part on oth grds 97 S Ct 46 429 U S 809, 50 L Ed 2d 69—State v Wooten, 245 S E 2d 699, 295 N C 378
Pa —Com v Almeida, 68 A 2d 595, 362 Pa 596, 12 A L R 2d 183, cert den 70 S Ct 614, 339 U S 924, 94 L Ed 1346, reh den 70 S Ct 798, 339 U S 950, 94 L Ed 1364, cert den 71 S Ct 83, 340 U S 867, 95 L Ed 633
Wash —State v Temple, 485 P 2d 93, 5 Wash App 1
(2) Cal —People v Chapman, 67 Cal Rptr 601, 261 C A 2d 149
(3) Mass —Com v Dellelo, 209 N E 2d 303, 349 Mass 525
(7) Cal —People v Schader, 44 Cal Rptr, 193 401 P 2d 665, 62 C 2d 716
Ga —Jones v State, 142 S E 2d 801, 220 Ga 899
Mo —State v Jasper, 486 S W 2d 268
Pa —Com v Almeida, supra
(11) Ala —Bufford v State, Cr App, 382 So 2d 1162, writ den, Sup, 382 So 2d 1175, app after remand 399 So 2d 894
Cal —People v Morales, 122 Cal Rptr 157, 49 C A 3d 134
Colo —People v Morgan 637 P 2d 338
Conn —State v Rogers, 120 A 2d 409, 143 Conn 167, cert den 76 S Ct 850, 351 U S 952, 100 L Ed 1476
Fla —Campbell v State, 227 So 2d 873, petition dism 91 S Ct 7, 400 U S 801, 27 L Ed 2d 33
Ind —Adams v State, 314 N E 2d 53, 262 Ind 220
Kan —State v Bey, 535 P 2d 881, 217 Kan 251
La —State v West, 408 So 2d 1302
Md —Jackson v State, 408 A 2d 711, 286 Md 430
Mass —Com v Dellelo, 209 N E 2d 303, 349 Mass 525
Mich —People v Bufkin, App, 204 N W 2d 762, 43 Mich App 585, adhered to, on reh 210 N W 2d 390, 48 Mich App 290, affd 236 N W 2d 500, 395 Mich 434
Mo —State v Glenn, 429 S W 2d 225
N M —Nelson v Cox, 349 P 2d 118, 66 N M 397
Okl —Oxendine v State, Cr, 350 P 2d 606
Pa —Com ex rel Walls v Rundle, 198 A 2d 528, 414 Pa 53

Kidnapping

Ariz —State v Gillies, 691 P 2d 655, 142 Ariz 564, cert den 105 S Ct 1775, 84 L Ed 2d 834
N Y —People v La Marca, 165 N Y S 2d 753 3 N Y 2d 452, 144 N E 2d 420, cert den 78 S Ct 351, 355 U S 920 2 L Ed 2d 279

Housebreaking

D C —U S v Naples D C, 192 F Supp 23, revd on oth grds, C A, 307 F 2d 618, 113 U S App D C 281 on remand 205 F Supp 944

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71. Pa —Com v Bolish supra, n 68
72 Cal —People v Ford, 52 Cal Rptr 228, 416 P 2d 132 65 C 2d 41 cert den 87 S Ct 737, 385 U S 1018, 17 L Ed 2d 554, on remand 61 Cal Rptr 329, 253 C A 2d 390

Securing plunder

N Y —People v Jackson 231 N E 2d 722, 20 N Y 2d 440, 285 N Y S 2d 8 cert den 88 S Ct 1815, 391 U S 928 20 L Ed 2d 668

When escape ceases to be part of felony

Mich —People v Goree, 186 N W 2d 872, 30 Mich App 490

Surrender

Mich —People v Goree, 186 N W 2d 872, 30 Mich App 490
73. Ill —People v Burke, 407 N E 2d 728, 41 Ill Dec 230, 85 Ill App 3d 939
La —C J S cited in State v Besar 34 So 2d 785, 216 La 299
Mass —Com v Lussier 128 N E 2d 569, 333 Mass 83—Com v Dellelo, 209 N E 2d 303, 349 Mass 525
Mo —State v Beal, 470 S W 2d 509
N J —C.J S cited in State v Mirault, 457 A 2d 455, 460, 92 N J 492
Pa —Com v Redline, 49 Berks 116—Com v Meas, 56 Berks 24, revd on oth grds, 202 A 2d 74, 415 Pa 41

Attempt to escape

(2) Other matters
Cal —People v Ketchel, 30 Cal Rptr 538, 381 P 2d 394, 59 C 2d 503
S C —Gore v Leeke, 199 S E 2d 755, 261 S C 308, cert den 94 S Ct 1975, 416 U S 958 40 L Ed 2d 309
Va —Haskell v Com, 243 S E 2d 477, 218 Va 1033

Surrender attempt

Cal —People v Mitchell, 38 Cal Rptr 726, 392 P 2d 526, 61 C 2d 353
N Y —People v Donovan, 385 N Y S 2d 385, 53 A D 2d 2/

74. Pa —Com v Johnson, 485 A 2d 397, 336 Pa Super 1

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77. U S —Gilmore v U S, C C A Okl, 124 F 2d 537, cert den 62 S Ct 941, 316 U S 661, 86 L Ed 1738—U S v Etheridge, C A Tenn, 424 F 2d 951, cert den 91 S Ct 463, 400 U S 993, 27 L Ed 2d 442, and 91 S Ct 464, 400 U S 1000, 27 L Ed 2d 452, cert dism 91 S Ct 2174, 402 U S 547, 29 L Ed 2d 102, reh den 92 S Ct 32, 404 U S 872, 30 L Ed 2d 122

78. Ill —People v Muir, 349 N E 2d 423, 38 Ill App 3d 1051, revd on oth grds 365 N E 2d 332, 8 Ill Dec 94, 67 Ill 2d 86, cert den 98 S Ct 615, 434 U S 986, 54 L Ed 2d 481

N Y —People v Streiff, 342 N Y S 2d 543, 41 A D 2d 259, affd in part, revd in part, on oth grds 315 N E 2d 762, 35 N Y 2d 22, 358 N Y S 2d 701

80. Officer killed by fellow policeman

Mich —People v Smith, 224 N W 2d 676, 56 Mich App 560

81. Cal —People v Lindley, 161 P 2d 227, 26 Cal 2d 780

Pa —Com v Moyer, supra, n 68

83. Ark —Upton v State, 516 S W 2d 904, 257 Ark 424, op supp 502 S W 2d 454, 255 Ark 1071

Ill —People v Green, 325 N E 2d 316, 26 Ill App 3d 662, affd in part, revd in part on oth grds 340 N E 2d 9, 62 Ill 2d 146, cert den 96 S Ct 2635 426 U S 925, 49 L Ed 2d 379

§ 23. —— Fact of Killing

84. Ga —Huntsinger v State, supra, n 3—Weatherby v State, 97 S E 2d 698, 213 Ga 188

Hawaii—C.J.S cited in State v Foster, 354 P 2d 960, 978, 44 Haw 403

85. Cal —People v Gorshen, 336 P 2d 492, 51 C 2d 716—People v Davis, 47 Cal Rptr 801, 408 P 2d 129, 63 C 2d 648—People v Williams, 79 Cal Rptr 65, 456 P 2d 633, 71 C 2d 614—People v Lewis, 81 Cal Rptr 900, 1 C A 3d 698

Ga —Pressley v State, 39 S E 2d 478, 201 Ga 267—Patrick v State, 74 S E 2d 848, 209 Ga 645—Jackson v State, 98 S E 2d 571 213 Ga 275—Wiggins v State, 146 S E 2d 294, 221 Ga 609

Ill —People v Wesley, 163 N E 2d 500, 18 Ill 2d 138, cert den 81 S Ct 87, 364 U S 845, 5 L Ed 2d 609—People v Slaughter, 194 N E 2d 193, 29 Ill 2d 384—People v Robinson, 251 N E 2d 766, 113 Ill App 2d 89

Ind —Butler v State, 229 N E 2d 471, 249 Ind 484

Iowa—State v Myers, 79 N W 2d 382, 248 Iowa 44

Md —Chisley v State, 95 A 2d 577, 202 Md 87—Tate v State, 203 A 2d 882, 236 Md 312—Lawrence v State, 237 A 2d 81, 2 Md App 736—McFadden v State, App, 237 A 2d 93, 2 Md App 725—Dyson v State, 251 A 2d 606, 6 Md App 453

Mo —State v Davis, 400 S W 2d 141, cert den 87 S Ct 142, 385 U S 872, 17 L Ed 2d 99

Mont —State v Dillon, 230 P 2d 764, 125 Mont 24

N C —State v Floyd, 39 S E 2d 598, 226 N C 571—State v Adams, 85 S E 2d 918, 241 N C 559—State v Todd, 142 S E 2d 154, 264 N C 524—State v McConnaughey, 311 S E 2d 26, 66 N C App 92

Ohio—State v Robinson, 118 N E 2d 517, 161 Ohio St 213

Or —State v Ogilvie, 175 P 2d 454, 180 Or 365

Pa —Com v Malone, 47 A 2d 445, 354 Pa 180—Com v Gates, 141 A 2d 219, 392 Pa 557

Tex —Adams v State, 202 S W 2d 933, 150 Tex Cr R 431—Rodriguez v State, 202 S W 2d 940, 150 Tex Cr R 526

Va —Moxley v Com, 77 S E 2d 389, 195 Va 151—Barber v Com, 142 S E 2d 484, 206 Va 241

86. Ariz —Moore v State, 174 P 2d 282, 65 Ariz 65—State v Rivera, 381 P 2d 584, 94 Ariz 45—State v Maloney, 416 P 2d 544, 101 Ariz 111, app after remand 433 P 2d 625, 102 Ariz 495 App after remand 464 P 2d 793, 105 Ariz 348, cert den 91 S Ct 82, 400 U S 841 27 L Ed 2d 75—State v Coward, 496 P 2d 131 108 Ariz 270

Ark —Bly v State, 214 S W 2d 77 213 Ark 859—Carson v State, 232 S W 2d 835, 217 Ark 658

Cal —People v Cornett, 141 P 2d 916, 61 Cal App 2d 98—People v Thomas, 156 P 2d 7, 25 Cal 2d 880—People v Bender, 163 P 2d 8, 27 Cal 2d 164—People v Roy, 95 Cal Rptr 884, 18 C A 3d 537, cert den 92 S Ct 1202, 405 U S 976, 31 L Ed 2d 251

Colo —Baker v People, 160 P 2d 983, 114 Colo 50

Ga —Anderson v State, 26 S E 2d 755, 196 Ga 468—Smithwick v State, 34 S E 2d 28, 199 Ga 292—Taylor v State, 41 S E 2d 236, 74 Ga App 701—Lester v State, 42 S E 2d 141, 75 Ga App 42—Peters v State, 86 S E 2d 106, 211 Ga 370—Radcliff v State, 137 S E 2d 654, 220 Ga 169

Ill —People v Washington, 73 N E 2d 275, 397 Ill 122—People v Henderson, 75 N E 2d 847, 398 Ill 348—People v Bush, 111 N E 2d 326, 414 Ill 441—People v Winters, 193 N E 2d 809, 29 Ill 2d 74—People v Slaughter, 194 N E 2d 193 29 Ill 2d 384

Ky —Risner v Com, 242 S W 2d 623

Me —State v Duguay, 178 A 2d 129, 158 Me 61—State v Wardwell, 183 A 2d 896, 158 Me 307

Md —Williams v State, 234 A 2d 760, 2 Md App 170, cert den 88 S Ct 2074, 392 U S 913, 20 L Ed 2d 1372—Day v State, 234 A 2d 894, 2 Md App 334—Brown v State, 242 A 2d 570, 4 Md App 261

Mich —People v Carter, 197 N W 2d 57, 387 Mich 397—People v Brown, 194 N W 2d 560, 37 Mich App 192

Mo —State v Nolan, 316 S W 2d 630—State v Williams, 369 S W 2d 408

Mont —State v Rivers, 320 P 2d 1004, 133 Mont 129

Neb —Woodard v State, 68 N W 2d 166, 159 Neb 603—State v Marion 119 N W 2d 164, 174 Neb 698

N J —State v Hufl, 102 A 2d 8, 14 N J 240—State v Williams, 148 A 2d 22, 29 N J 27

N C —State v Davis, 26 S E 2d 869, 223 N C 381—State v De Graffenreid, 27 S E 2d 130, 223 N C 461—State v Redfern, 98 S E 2d 322, 246 N C 293—State v Cooper, 159 S E 2d 305, 273 N C 51—State v Moore, 166 S E 2d 652, 275 N C 198, app after remand 171 S E 2d 453, 276 N C 142—State v Barrow, 172 S E 2d 512, 276 N C 381

Ohio—State v Cope, supra, n 14

Or —State v Hansen, 244 P 2d 990, 195 Or 169—State v Brown, 491 P 2d 1193, 8 Or App 72

Pa —Com v Wucherer, 41 A 2d 574, 351 Pa 305—Com v Carluccetti, 85 A 2d 391, 369 Pa 190—Com v Carroll, 194 A 2d 911, 412 Pa 525—Com v Finnie, 202 A 2d 85, 415 Pa 166—Com v O'Neal, 271 A 2d 497, 441 Pa 17

Tenn —Gann v State, 383 S W 2d 32, 214 Tenn 711—Bivens v State, 474 S W 2d 431, 4 Tenn Cr App 580—Gordon v State, Cr, 478 S W 2d 911—Hornsby v State, Cr, 479 S W 2d 653—Bailey v State, Cr, 479 S W 2d 829

Tex —Lopez v State, 216 S W 2d 183, 152 Tex Cr R 562—Cole v State, 250 S W 2d 201, 157 Tex Cr R 469

Va —Huffman v Com, 39 S E 2d 291, 185 Va 524—Ward v Com, 138 S E 2d 293, 205 Va 564

30 C J p 148 note 84

As constituting murder

(2) Other cases

Cal —People v Yokum, 302 P 2d 406, 145 C A 2d 245

Me —State v Arsenault, 124 A 2d 741, 152 Me 121

Felonious homicide

(2) However, there is contrary authority

Pa —Com v Jordan, 181 A 2d 310, 407 Pa 575 disapproving Com ex rel Johnson v Myers, 167 A 2d 295, 402 Pa 451

Statutes construed

(3) Additional statements

Ohio—State v Esherick, 249 N E 2d 78, 19 Ohio App 2d 40

Statute held not invalid

Ga —Woods v State 149 S E 2d 674, 222 Ga 321, cert den 87 S Ct 1311, 386 U S 994, 18 L Ed 2d 340

Failure to provide food, medical and hygienic care to infant

Or —State v House, 489 P 2d 381, 260 Or 138

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87. Md —Stansbury v State, 146 A 2d 17, 218 Md 255

Mich —People v Carter, 197 N W 2d 57, 387 Mich 397

88. Cal —People v King, 76 Cal Rptr 145, 270 C A 2d 817—People v Baglin, 76 Cal Rptr 863, 271 C A 2d 411—People v Johnson, 104 Cal Rptr 807, 28 C A 3d 653

Md —Stansbury v State, 146 A 2d 17, 218 Md 255

90. Ohio—State v Cosby, 137 N E 2d 282, 100 Ohio App 459

Ga —Elder v State, 95 S E 2d 373, 212 Ga 705

N C —State v Ellison, 39 S E 2d 824, 226 N C 628

92. Ga —Mullis v State, supra, n 21—Jones v State, 91 S E 2d 514, 212 Ga 195

Miss —Johnson v State, 77 So 2d 824, 223 Miss 167

Pa —Com v Wucherer, supra, n 86

Provocation

(3) Additional statements

Cal —People v Williams, 79 Cal Rptr 65, 456 P 2d 633, 71 C 2d 614

93. U S —Yarnal v Brierley, D C Pa, 324 F Supp 311, affd, C A, 468 F 2d 816, cert den, 93 S Ct 1405, 410 U S 940, 35 L Ed 2d 607—DeMarrias v U S, C A S D, 453 F 2d 211

Ark —Wootton v State, 337 S W 2d 651, 232 Ark 300

D C —Logan v U S, C A, 411 F 2d 679, 133 U S App D C 365

Ga —Mullis v State, supra, n 92

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Neb —Wright v State, 100 N W 2d 51, 169 Neb 497—Clown Horse v State, 102 N W 2d 625, 170 Neb 336

Ohio—State v Callihan, 227 N E 2d 654, 11 Ohio App 2d 23

Relative size and strength of parties

Tex —Sowell v State, Cr, 503 S W 2d 793

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94. Malice for second degree murder as inferrable from circumstances

Ind —Baker v State, 195 N E 2d 91, 245 Ind 129

95. Ga —Myrick v State, supra, n 1—Duke v State, 52 S E 2d 455, 205 Ga 106—Elder v State, 95 S E 2d 373, 212 Ga 705

30 C J p 148 note 85

Malice is never implied or presumed as a matter of law, where the circumstances of the killing are testified to on the trial by eyewitnesses [95.5]

95.5. Neb —State v Hizel, 139 N W 2d 832, 179 Neb 661

§ 24. —— Circumstances of Cruelty or Brutality

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96. U S —Evans v U S, C C A Kan, 122 F 2d 461, cert den 62 S Ct 478, 314 U S 698, 86 L Ed 558

Del —State v Winsett, Super, 205 A 2d 510, 8 Storey 111

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Md —Moore v State, 291 A 2d 73, 15 Md App 396

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Va —Thomas v Com, 41 S E 2d 476, 186 Va 131—Carson v Com, 49 S E 2d 704, 188 Va 398
W Va —State v Burdette, 63 S E 2d 69, 135 W Va 312—State v Painter, 61 S E 2d 86, 135 W Va 106

Character of assault

Ill —People v Marrow, supra, n 6
(2) Other matters —People v Teixeira, 288 P 2d 535, 136 C A 2d 136
Ill —People v Jones, 186 N E 2d 246, 26 Ill 2d 381—People v Tillman, 187 N E 2d 731, 26 Ill 2d 552
Tex —Sowell v State, Cr, 503 S W 2d 793

§ 25. —— Use of Deadly Weapon

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97. Ala —Wallace v State, 124 So 2d 110, 41 Ala App 65, cert den 124 So 2d 115, 271 Ala 701—Hackman v State, 148 So 2d 253, 41 Ala App 642
Ark —Higdon v State, 213 S W 2d 621, 213 Ark 881
Va —Henry v Com, 77 S E 2d 863 195 Va 281
98. Ala —Smith v State, Cr, 298 So 2d 71, 53 Ala App 141
Ariz —State v Rivera, 381 P 2d 584, 94 Ariz 45—State v Wallace, 403 P 2d 550, 98 Ariz 243—State v Sellers, 475 P 2d 722, 106 Ariz 315
Ark —Wallin v State, 197 S W 2d 26, 210 Ark 616—Cramer v State 238 S W 2d 482, 218 Ark 624—Wooten v State, 249 S W 2d 964 220 Ark 750—Long v State, 266 S W 2d 66 223 Ark 387—Lillard v State, 365 S W 2d 144, 236 Ark 74
Cal —People v Bjornsen, 180 P 2d 443, 79 Cal App 2d 519—People v McAuliffe, 316 P 2d 381, 154 C A 2d 332, cert den 80 S Ct 266, 361 U S 920 4 L Ed 2d 188—People v Torres, 29 Cal Rptr 706, 214 C A 2d 734—People v Lewis, 81 Cal Rptr 900, 1 C A 3d 698—People v Goodman, 87 Cal Rptr 665, 8 C A 3d 705
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Del —Powell v State, 86 A 2d 371, 7 Terry 551—Brown v State, 234 A 2d 442—Freeman v State, 242 A 2d 311—Seeney v State, 277 A 2d 670, vac in part on oth grds 92 S Ct 2871, 408 U S 939, 33 L Ed 2d 760
Ga —Huntsinger v State, supra, n 3—Plummer v State, 38 S E 2d 411, 200 Ga 641—Thomas v State, 43 S E 2d 352 75 Ga App 334—Duke v State, supra, n 95—Carrigan v State, 58 S E 2d 407, 206 Ga 707—Radcliff v State, 137 S E 2d 654, 220 Ga 169—Pruitt v State, 150 S E 2d 695, 114 Ga App 265—Holmes v State, 163 S E 2d 803, 224 Ga 553
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S C —State v Lee, 178 S E 2d 652, 255 S C 309
Tenn —Gordon v State, Cr, 478 S W 2d 911—Hornsby v State, Cr, 479 S W 2d 653
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Vt —State v Oakes, 276 A 2d 18, 129 Vt 241, cert den 92 S Ct 340, 404 U S 965, 30 L Ed 2d 285—State v Barrett, 290 A 2d 14, 130 Vt 197
Va —Pannill v Com, 38 S E 2d 457, 185 Va 244—Lloyd v Com, 40 S E 2d 258, 185 Va 674—Henry v Com, 77 S E 2d 863, 195 Va 281
W Va —State v Toler, 41 S E 2d 850, 129 W Va 575—State v Boggs, 42 S E 2d 1, 129 W Va 603—State v Dean, 58 S E 2d 860, 134 W Va 257—State v Bragg, 87 S E 2d 689, 140 W Va 585—State v Morris, 95 S E 2d 401 142 W Va 303—State v Johnson, 95 S E 2d 409, 142 W Va 284—State v Bowyer, 101 S E 2d 243, 143 W Va 302—State v Hamric, 151 S E 2d 252, 151 W Va 1
Wyo —State v Bruner, 319 P 2d 863, 78 Wyo 111

Against vital part of body

Md —Bruce v State, 145 A 2d 428, 218 Md 87—Lawrence v State, 237 A 2d 81, 2 Md App 736—McFadden v State, 237 A 2d 93, 2 Md App 725
(2) Inference held constitutional
Md —Carroll v State, 274 A 2d 677, 11 Md App 412
Pa —Com v Myers, 266 A 2d 756, 439 Pa 381—Com v Stromberg, 269 A 2d 741, 440 Pa 168—Com v Hornberger, 270 A 2d 195 441 Pa 57
(3) Other statements
Md —Chase v Jenifer, 150 A 2d 251, 219 Md 564—Jacobs v State, 251 A 2d 33, 6 Md App 218—Bagley v State, 251 A 2d 246, 6 Md App 375—James v State, 288 A 2d 644 14 Md App 689
Mich —People v Nelson, 192 N W 2d 682, 35 Mich App 368
Pa —Com v Moore, 74 Dauph 68, affd 157 A 2d 65, 398 Pa 198, 93 A L R 2d 616—Com v Winebrenner, 265 A 2d 108, 439 Pa 73

Intent and purpose to kill, etc.

Ark —Rand v State, 341 S W 2d 9, 232 Ark 909
Ind —Jones v State, 255 N E 2d 105, 253 Ind 456
Md —Bruce v State, 145 A 2d 426, 218 Md 87

May be murder

(2) Other cases
Okl —Jones v State, 236 P 2d 102, 94 Okl Cr 359

Inference held constitutional

Md —Lindsay v State, 258 A 2d 760, 8 Md App 100

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99. N C —State v Childress, 45 S E 2d 42, 228 N C 208
Or —State v Cunningham, supra, n 96
W Va —State v Boggs, supra, n 98

Rule inapplicable

W Va —State v Bragg, supra, n 98
1. Ala —Shiflett v State, 78 So 2d 805 262 Ala 337—Miller v State, 90 So 2d 166 30 Ala App 593
Ga —Radcliff v State, 137 S E 2d 654, 220 Ga 169
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Ind —Dickinson v State, 55 N E 2d 325, 222 Ind 551
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Vt —State v Oakes, 276 A 2d 18, 129 Vt 241, cert den 92 S Ct 340, 404 U S 965, 30 L Ed 2d 285

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(2) W Va —State v Morris, 95 S E 2d 401, 142 W Va 303—State v Bowyer, 101 S E 2d 243, 143 W Va 302
(3) Other instances
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Neb —Woodard v State, 68 N W 2d 166, 159 Neb 603

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2. Ill —People v Marrow, 85 N E 2d 34, 403 Ill 69
Neb —Tvrz v State, 48 N W 2d 761, 154 Neb 641
3. Cal —People v Lewis, 9 Cal Rptr 263, 186 C A 2d 585
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Pa —Com v Buzard, 76 A 2d 394, 365 Pa 511, 22 A L R 2d 846

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Mo —State v Haynes, 329 S W 2d 640
4 N M —State v Ochoa 297 P 2d 1053, 61 N M 225
6. Mo —State v Richardson, 321 S W 2d 423
7. Ala —C J S cited in Williams v State, 39 So 2d 37, 39 251 Ala 397—Matthews v State, Cr, 286 So 2d 91, 51 Ala App 417
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9. Ga —Osterloh v State, App , 580 P 2d 1008

Tex —Ray v State, 266 S.W 2d 124, 160 Tex Cr R 12

Va —Pannill v Com , 38 S E 2d 457, 185 Va 244

10. Carrying active bomb

Idaho—State v Hokenson, 527 P 2d 487, 96 Idaho 283

11. Pa —Com v Prenni, 55 A 2d 532, 357 Pa 572

Va —Pannill v Com , supra, n 9

Not per se deadly

(2) Other instruments

Pa —Com v Collazo, 12 Cumb 110

Pool cue

Ill —People v Spagnola, 260 N E 2d 20, 123 Ill App 2d 171, cert den 91 S Ct 1389, 402 U S 911, 28 L Ed 2d 653

15. Ala —Williams v State, 39 So 2d 37, 251 Ala 397

Mo —State v Lawson, 227 S W 2d 642, 340 Mo 95

18. Gal —Harris v State supra, n 7

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Va —Pannill v Com , supra n 9

21. Pa —Com v Prenni, supra, n 11

26. Cal —People v Morlock, 292 P 2d 897, 46 C 2d 141

28. N C —State v Powell, 78 S E 2d 248, 238 N C 527

S C —State v Watts, 152 S E 2d 684, 249 S C 80

Tex —Burns v State, 262 S W 2d 406, 159 Tex Cr R 183—Taylor v State, Cr 470 S W 2d 693—Gamblin v State, Cr , 476 S W 2d 18—Stafford v. State, Cr , 481 S W 2d 831—Machado v State, Cr , 494 S W 2d 859

"Pistol" as a gun

Ga —Cobb v State, 133 S E 2d 596 219 Ga 388

Various other instruments have been regarded as deadly weapons [30]

30.1. Shoes

Ky —Jones v Com , 256 S W 2d 520

Hands and feet not per se deadly

Colo —Bishop v People, 439 P 2d 342, 165 Colo 423

Ky —Jones v Com , supra

Ice pick

Ga —Elder v State, 95 S E 2d 373, 212 Ga 705

Hands and muscles

Ohio—State v Schaffer, 177 N E 2d 534, 113 Ohio App 125

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31. Colo —Smith v People, 351 P 2d 457, 142 Colo 523—Stafford v People, 388 P 2d 774, 154 Colo 113

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Disparity in size and strength may result in murder

Ill —People v Drumheller, 304 N E 2d 455, 15 Ill App 3d 418

32. Mo —C.J.S cited in State v Allen, 530 S W 2d 415, 420

Or —State v Wilson 142 P 2d 680, 172 Or 373

Pa —Com v Dorazio, 74 A 2d 125, 365 Pa 291

Hands and feet

Colo —Balltrip v People, 401 P 2d 259, 157 Colo 108—Bishop v People, 439 P 2d 342, 165 Colo 423

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33. Ind —Martin v State, 141 N E 2d 455, 236 Ind 504

N C —State v Childress, 45 S E 2d 42, 228 N C 208—State v Gordon, 85 S E 2d 322, 241 N C 356—State v Currie, 173 S E 2d 49, 7 N C App 439—State v Drake, 174 S E 2d 132, 8 N C App 214

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35 Mo —State v Mills, 179 S W 2d 95, 352 Mo 774

N C —State v Griffin, 159 S E 2d 889, 273 N C 333

Conduct evincing depraved indifference to human life

N Y —People v Register 456 N Y S 2d 562 90 A D 2d 972, affd 457 N E 2d 704, 60 N Y 2d 270, 469 N Y S 2d 599 cert den 104 S Ct 2159, 466 U S 953, 80 L Ed 2d 544

37 Cal —People v James, 151 Cal Rptr 354 88 C A 3d 150

Ill —People v Muir, 365 N E 2d 332, 8 Ill Dec 94 67 Ill 2d 86, cert den 98 S Ct 615, 434 U S 986, 54 L Ed 2d 481

Tenn —Gann v State, 483 S W 2d 32, 214 Tenn 711

38 N C —State v Gordon, supra, n 33

U S —C J S cited in Government of Virgin Islands v Lake, C A Virgin Islands 362 F 2d 770 775

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Ind —Haley v State, 133 N E 2d 565, 235 Ind 333—Martin v State, 141 N F 2d 455 236 Ind 504

N C —State v Gordon, supra n 33

Okl —Gatewood v State, 157 P 2d 473, 80 Okl Cr 135

Tenn —Lewis v State, 304 S W 2d 322, 202 Tenn 328

Va —Moxley v Com 77 S E 2d 389, 195 Va 151

Malice never implied by use of mere words

Ill —People v Sally, 162 N E 2d 396, 17 Ill 2d 578, cert den 80 S Ct 1069, 362 U S 981, 4 L Ed 2d 1017

39. Ind - Maxwell v State 260 N E 2d 787, 254 Ind 490, cert den 91 S.Ct 1525, 402 U S 930, 28 L Ed 2d 863

N C —State v Meadows, 158 S E 2d 638, 272 N C 327—State v Drake, 174 S E 2d 132, 8 N C App 214—State v Woods, 179 S E 2d 358, 278 N C 210

Tenn —Morelock v State, 460 S W 2d 861, 3 Tenn Cr App 292

§ 26. —— Administration of Poison

44. Ga —C J S cited in Hardy v State, 72 S E 2d 723, 209 Ga 361

Mich —People v Brown, 194 N W 2d 560, 37 Mich App 192

Narcotics

Ala —Napier v State Cr 357 So 2d 1001, revd 357 So 2d 1011, on remand 357 So 2d 1014

Mich —People v Brown, 194 N W 2d 560, 37 Mich App 192

N Y —People v Cruciani 334 N Y S 2d 515 70 Misc 2d 528

47. Ala —Hamby v State, 47 So 2d 218, 254 Ala 139

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52. Wanton acts

Tex —Hernandez v State, 247 S W 2d 260, 157 Tex Cr R 112

§ 28. Burden of Overcoming Inference of Malice

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N C —State v Staton, 42 S E 2d 401, 227 N C 409—State v Gordon supra, n 33 - State v Cooper, 159 S E 2d 305 273 N C 51—State v Freeman, 170 S E 2d 461, 275 N C 662 State v Crump 178 S E 2d 366, 277 N C 573—State v Dubose 181 S E 2d 393, 279 N C 73

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N C —State v Todd 30 S E 2d 157 224 N C 358—State v Robinson, 36 S E 2d 655 226 N C 95—State v Downey 117 S E 2d 39 253 N C 348

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Statute imposing burden of proof held invalid

Hawaii—State v Cuevas, 488 P 2d 322 53 Haw 110 - State v Irvin, 488 P 2d 327, 53 Haw 119—State v Niskromoni 488 P 2d 329, 53 Haw 122

58 Hawaii—C J S cited in State v Foster, 354 P 2d 960, 978, 44 Haw 403

N C —State v Todd supra n 57

§ 29. In General

59. U S —Beardslee v U S C A S D , 387 F 2d 280—Richards v Comer, D C W Va , 290 F Supp 922

Ala —Hill v State Cr App , 409 So 2d 943

Ark —Smith v State, 262 S W 2d 272, 222 Ark 650

Del —Bantum v State, 85 A 2d 741, 7 Terry 487

Md —Jackson v State, 408 A 2d 711, 286 Md 430

Neb —State v Hutter 18 N W 2d 203, 145 Neb 798

N C —State v Streeton, 56 S E 2d 649, 231 N C 301

W Va —State v Stevenson, 127 S E 2d 638, 147 W Va 211, cert den 83 S Ct 886, 372 U S 938, 9 L Ed 2d 768

"Murder in first degree" by common law definition

U S —Hiatt v Brown, C A Ga 175 F 2d 273, revd on oth grds 70 S Ct 495 339 U S 103, 94 L Ed 691 reh den 70 S Ct 672 339 U S 939, 94 L Ed 1356

60. Distinction between degrees as subjective
N.J —State v. McAllister, 196 A 2d 786, 41 N J 342

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61. Cal —People v Holt, 153 P 2d 21, 25 Cal 2d 59
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Neb —State v Hutter, supra, n 59
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Dependent on circumstances
(2) Other statements
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Neb —State v Marion, 119 N W 2d 164, 174 Neb 698
Nev —Graves v Young, 420 P 2d 618, 82 Nev 433

Not unconstitutional
Ark —Earl v State, 612 S W 2d 98, 272 Ark 5
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Neb —State v Hutter, supra, n 59—Moore v State, 29 N W 2d 366, 148 Neb 747—Vanderheiden v State, 57 N W 2d 761, 156 Neb 735
N J —State v Paris, 72 A 2d 558, 8 N J Super 383
Pa —Com v De Pofi, supra, n 61—Com v Stamm, 53 Berks 262
Wyo —Buckles v State, 500 P 2d 518, cert den 93 S Ct 475, 409 U S 1026, 34 L Ed 2d 320

Rational difference
Colo —People v Sneed, 514 P 2d 776, 183 Colo 96

63. Ariz —State v Schantz, 403 P 2d 521, 98 Ariz 200, cert den 86 S Ct 628, 382 U S 1015, 15 L Ed 2d 530—C.J.S. cited in Yavapai County, Atty v Mahoney, 491 P 2d 469, 471, 107 Ariz 615
Iowa—State v Woodson, 59 N W 2d 556, 244 Iowa 1262, cert den 74 S Ct 433, 247 U S 907, 98 L Ed 2d 1065—State v Nutter, 81 N W 2d 20, 242 Iowa 772—State v Hodge, 105 N W 2d 613, 252 Iowa 449, app dism and cert den 82 S Ct 437, 368 U S 402, 7 L Ed 2d 394
Md —Gladden v State, 330 A 2d 176, 273 Md 383
Neb —State v Hutter, supra, n 59
N Y —People ex rel Bianculli v McDonnell, 103 N Y S 2d 18, revd on oth grds 103 N Y S 2d 853, 278 App Div 782, affd 100 N E 2d 187, 302 N Y 922
Tex —Taylor v State, Cr., 491 S W 2d 922—Hilliard v State, Cr., 513 S W 2d 28

64. N J —State v Kress, 25 A 2d 481, 105 N J Super 514

65. Utah—State v Russell, 145 P 2d 1003, 106 Utah 116
Vt —State v Battick, 349 A 2d 221, 133 Vt 558

66. Or —State v Norris, 595 P 2d 1261, 40 Or App 505

The statutory offense of homicide by wilfully striking, stabbing, or shooting is not a degree of murder.[67.5]

67.5. Ky —Conner v Com., 13 Bush 714, 76 Ky 714—Sizemore v Com., 347 S W 2d 77

A single offense cannot be first-and second-degree murder[68.5]

68.5. D C —Naples v U S, C A., 344 F 2d 508, 120 U S App D C 123, motion den 359 F 2d 276, 123 U S App D C 292

§ 30. First Degree

69. U S —Franco v Wyrick, D C Mo., 465 F Supp 679
Ala —Lewis v State, Cr., 320 So 2d 106, 56 Ala App 174
La —State v Liner, 373 So 2d 121, app after remand 397 So 2d 506, op concurred 406 So 2d 1312
Md —Gilbert v State, 373 A 2d 311, 36 Md App 196
Mich —People v King, 228 N W 2d 391, 58 Mich App 390
Tenn —Dukes v State, Cr App., 578 S W 2d 659

Circumstances to be proven to raise degree
Me —State v Snow, 383 A 2d 1385

Lack of excuse or justification
Wash —State v Stallworth, 577 P 2d 617, 19 Wash App 728

§ 31. —— Particular Statutory Provisions

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70. U S —U S ex rel Almeida v Rundle, C A Pa., 383 F 2d 421, cert den 89 S Ct 144 393 U S 863, 21 L Ed 2d 131
Ala —Lucky v State, Cr., 278 So 2d 772, 50 Ala App 324
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D C —Fisher v U S., App D C., 66 S Ct 1318, 328 U S 463, 90 L Ed 1382, 166 A L R 1176, reh den 67 S Ct 24, 329 U S 818, 91 L Ed 697—U S v Brawner, C A., 471 F 2d 969, 153 U S App D C 1
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Mass —Com v Arsenault, 280 N E 2d 129, 361 Mass 287
Minn —State v Wahlberg, 296 N W 2d 408
Mo —State v Grubbs, 214 S W 2d 435, 358 Mo 323—State v Sturdivan, 497 S W 2d 139
N C —State v Lamm, 61 S E 2d 188, 232 N C 402
Neb —State v Johnson, 266 N W 2d 193, 200 Neb 760
N J —State v Collins, 67 A 2d 158, 2 N J 406—State v Anderson, 173 A 2d 377, 35 N J 472—State v Billingsley, 216 A 2d 217, 46 N J 219
Ohio—State v Robbins, 388 N E 2d 755, 58 Ohio St 2d 74, 12 O O 3d 84
Okl —Wishon v State, Cr., 550 P 2d 575, mod on oth grds, App., 562 P 2d 931
Or —State v Ogilvie, 175 P 2d 454, 180 Or 365
Pa —Com v Wucherer, 41 A 2d 574, 351 Pa 305—Com v Dorazio, 74 A 2d 125, 365 Pa 291—Com v Magee, 38 Erie Co 30—Com v Burkett, 2 Cumb 92—Com ex rel McCant v Rundle, 211 A 2d 460, 418 Pa 394—Com v Bowden, 309 A 2d 714, 456 Pa 278
Tenn —Bass v State, 231 S W 2d 707, 191 Tenn 259
Utah—State v Thompson, 170 P 2d 153, 110 Utah 113
W Va —State v Stevenson, 127 S E 2d 638, 147 W Va. 211, cert den 83 S Ct 886, 372 U S 938, 9 L Ed 2d 768

Malice, premeditation, and deliberation
Ala —Graham v State, Cr., 339 So 2d 110, cert den., Ala., 339 So 2d 114
Colo —Walker v People, 489 P 2d 584, 175 Colo 173
Mich —People v King, 228 N W 2d 391, 58 Mich App. 390
Mo —State v Ayers, 470 S W 2d 534
N C —State v McLaughlin, 213 S E 2d 238, 286 N C 597, vac in part on oth grds 96 S Ct 3206, 428 U S 903, 49 L Ed 2d 1208
Ohio—State v Esherick, 249 N E 2d 78, 19 Ohio App 2d 40
(2) Malice aforethought is not synonymous with deliberation and premeditation, characteristic of murder in first degree
U S —Beardslee v U S., C A S D., 387 F 2d 280
Cal —People v Bender, 163 P 2d 8, 27 Cal 2d 164—People v Lewie, 344 P 2d 861, 174 C A 2d 281

"Murder" need not be defined
Mo —State v Anderson, 384 S W 2d 591

"Murder" synonymous with "homicide"
Mo —State v Anderson, 384 S W 2d 591

Technical common-law definition incorporated
Mass —Com v Balliro, 209 N E 2d 308, 349 Mass 505, 14 A L R 3d 640

Motive is immaterial
Neb —State v Beers, 271 N W 2d 842, 201 Neb 714
Vt —State v Pray 298 A 2d 859, 130 Vt 613

Statute valid
Ark —Simpson v State, 623 S W 2d 200, 274 Ark 188, app after remand 645 S W 2d 688, 278 Ark 334
Colo —People v Sneed, 514 P 2d 776, 183 Colo 96
La —State v Whitt, 404 So 2d 254
Okl —Clark v State, Cr., 558 P 2d 674

Homosexuality neither justifies, excuses, or mitigates
Ariz —State v Durham, 523 P 2d 47, 111 Ariz 19

No offense of aggravated first-degree murder contemplated
Ariz — State v Blazak, 560 P 2d 54, 114 Ariz 199

Effect of Supreme Court decision declaring death penalty under statute invalid
N C —State v Warren, 232 S E 2d 419, 292 N.C 235

Capital murder
Tex —Burns v State, Cr., 556 S W 2d 270, cert den 98 S Ct 422, 434 U S 935, 54 L Ed 2d 294

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71. Del —State v Moyer, 387 A 2d 194
Mich —People v Younger 158 N W 2d 493, 380 Mich 678
N C —State v Smith, 226 S E.2d 10, 290 N C 148, cert den 97 S Ct 339, 429 U S 932, 50 L Ed 2d 301

Deliberate, premeditated malice aforethought
U S —Palakiko v Harper, C A Hawaii, 209 F 2d 75, cert den 74 S Ct 683, 347 U S 956, 98 L Ed 1101 reh den 74 S Ct 789, 347 U S 979, 98 L Ed 1118
Mich —People v Folkes, 246 N W 2d 403, 71 Mich App 95
Mo —State v Anderson, 515 S W 2d 534

Premeditated design, etc.
Fla —Purkhiser v State, 210 So 2d 448

Willful, deliberate, malicious, and premeditated killing
Ala —Smith v State Cr., 329 So 2d 158
Ark —Walker v State, 388 S W 2d 13, 239 Ark 172

Okl—Collins v State, Cr, 561 P 2d 1373 Cert den 98 S Ct 306, 434 U S 906, 54 L Ed 2d 193

There is no such crime as murder in the first degree with recommendation of mercy.[72.5]

72.5. N C—State v Denny, 105 S E 2d 446, 249 N C 113—State v Foye, 120 S E 2d 169, 254 N C 704

A particular statute defines murder in the first degree as only those homicides which are neither excusable nor justifiable.[72.10]

72.10. N Y—People v Wood, 201 N Y S 2d 328, 8 N Y 2d 48, 167 N E 2d 736

73. Ga—Park v State, 51 S E 2d 832, 204 Ga 766

La—State v Rowan, 96 So 2d 569, 233 La 284

Miss—Bass v State, 54 So 2d 259

N Y—People v Arzon, 401 N Y S 2d 156, 92 Misc 2d 739

Utah—State v Thompson, supra, n 70

Wash—State v Harris, 421 P 2d 662, 69 Wash 2d 928

Depravity as to second degree murder distinguished

Wis—Zenou v State, 91 N W 2d 208, 4 Wis 2d 655

75. Colo—People v Jones, 565 P 2d 1333, 193 Colo 250, app dism 98 S Ct 498, 434 U S 962, 54 L Ed 2d 447 Rehearing denied July 18, 1977

Extreme indifference to human life generally

Colo—People By and Through Russel v District Court For Fourth Judicial Dist, 521 P 2d 1254, 185 Colo 78

76. Cal—People v Bernard, 169 P 2d 636, 28 Cal 2d 207

Pa—Com v Smith, 7 Bucks 139—Com v Bowden, 309 A 2d 714, 456 Pa 278

Statute not confined to first degee murder

Ala—Howard v State, 132 So 2d 384, 41 Ala App 360

77. Cal—People v Valentine, 169 P 2d 1, 28 Cal 2d 121—People v Gonzales, supra, n 70—People v Gibson, 206 P 2d 375, 92 Cal App 2d 55, cert den 70 S Ct 302, 338 U S 906—People v Thomas, 261 P 2d 1, 41 C 2d 470

Mich—People v Nadeau, 254 N W 2d 893, 75 Mich App 369

N C—State v Allison, 257 S E 2d 417, 298 N C 135

Pa—Com v Bey, 70 A 2d 342, 364 Pa 150—Com v Bowden, 309 A 2d 714, 456 Pa 278

78. Ariz—State v Brooks, 445 P 2d 831, 103 Ariz 472—State v Miller, 520 P 2d 1113, 110 Ariz 489

Cal—*C.J.S. cited in* People v Tuthill, 187 P 2d 16, 20, 31 Cal 2d 92, err den 198 P 2d 505, 32 Cal 2d 819, cert den 69 S Ct 57, 335 U S 846, 93 L Ed 396—People v Merkouris, 297 P 2d 999, 46 C 2d 540—People v Mattison, 93 Cal Rptr 185, 481 P 2d 193, 4 C 3d 177

Pa—Com v Sutton, 49 Del 11, revd on oth grds 176 A 2d 679, 406 Pa 121

Victim's discovery or awareness of accused's presence before the killing does not preclude the crime from being one committed by lying in wait within the statute

Cal—People v Tuthill, 187 P 2d 16, 31 Cal 2d 92, err den 198 P 2d 505, 32 Cal 2d 819, cert den 69 S Ct 57, 335 U S 846, 93 L Ed 396—People v McNeal, 325 P 2d 166, 160 C A 2d 446

N C—State v Allison, 257 S E 2d 417, 298 N C 135

"Lying in wait" as evidence

Cal—People v Wolff, 40 Cal Rptr 271, 394 P 2d 959, 61 C 2d 795

Elements

Cal—People v Ward, App, 103 Cal Rptr 671, 27 C A 3d 218

79. U S—Shockley v U S, C C A Cal, 166 F 2d 704, cert den 68 S Ct 1502, 334 U S 850, 92 L Ed 1773—Stein v People of State of N Y, N Y, 73 S Ct 1077, 346 U S 156, 97 L Ed 1522, reh den 74 S Ct 13, 346 U S 842, 98 L Ed 362, three cases—Bizup v Tinsley, D C Colo, 211 F Supp 545, affd, C A, 316 F 2d 284

Ala—Buchanan v State, Cr, 282 So.2d 95, 50 Ala App 656

Cal—People v Gilbert, 140 P 2d 9, 22 Cal 2d 522—People v Bautista, 141 P 2d 417, 22 Cal 2d 867—People v Laya, 266 P 2d 157, 123 C A 2d 7—People v Cartier, 5 Cal Rptr 573, 353 P 2d 53, 54 C 2d 300—People v Massie, 59 Cal Rptr 733, 428 P 2d 869, 66 C 2d 899

Colo—Bizup v People, 371 P 2d 786, 150 Colo 214, cert den 83 S Ct 144, 371 U S 873, 9 L Ed 2d 112

D C—Christian v U S, App, 394 A 2d 1, cert den 99 S Ct 2889, 442 U S 944, 61 L Ed 2d 315

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Mich—People v Smith, 274 N W 2d 844, 87 Mich App 584

Neb—Garcia v State, 68 N W 2d 151, 159 Neb 571

Pa—Com v Smith, 7 Bucks 139

Tex—Rodriquez v State, Cr, 548 S W 2d 26

W Va—State ex rel Peacher v Sencindiver, 233 S E 2d 425, 160 W Va 314

Escape

(2) Statute held valid

Nev—Hinrichs v First Judicial Dist Court In and For Ormsby County, 283 P 2d 614, 71 Nev 168

Murder must not be collateral

Tenn—Farmer v State, 296 S W 2d 879, 201 Tenn 107—Smith v State, 354 S W 2d 450, 209 Tenn 499

Purpose

Nev—Payne v State 406 P 2d 922, 81 Nev 503

Statutes valid

Colo—People v Morgan, 617 P 2d 338

Fla—Alford v State, 307 So 2d 433, cert den 96 S Ct 3227, 428 U S 912, 49 L Ed 2d 1221, reh den 97 S Ct 191, 429 U S 873, 50 L Ed 2d 155

Attempted robbery

Okl—McDonald v State, Cr, 674 P 2d 1154

80. Ariz—State v Singleton, 182 P 2d 920, 66 Ariz 49—State v Schantz, 403 P 2d 521, 98 Ariz 200, cert den 86 S Ct 628, 382 U S 1015, 15 L Ed 2d 530—State v Maloney, 416 P 2d 544, 101 Ariz 111 app after remand 433 P 2d 625, 102 Ariz 495 and 464 P 2d 793, 105 Ariz 348, cert den 91 S Ct 82, 400 U S 841, 27 L Ed 2d 75

Cal—People v Floyd, 83 Cal Rptr 608, 464 P 2d 64 1 C 3d 694, cert den 92 S Ct 2418, two cases, 92 S Ct 2418, 406 U S 972, 32 L Ed 2d 672

Fla—Martin v State, 377 So 2d 706

N M—State v Ortega, 419 P 2d 219, 77 N M 7

Or—State v Thomas, 400 P 2d 549, 240 Or 181

Pa—Com v Bolish, 113 A 2d 464, 381 Pa 500—Com v Redline, 137 A 2d 472, 391 Pa 486—Com v Bowden, 309 A 2d 714, 456 Pa 278

Wash—State v Forrester, 587 P 2d 179, 21 Wash App 855

Completion not essential

(2) Other cases

Cal—People v Chavez, 234 P 2d 632, 37 C 2d 656—People v Delaney, 8 Cal Rptr 170, 185 C A 2d 261, cert den 81 S Ct 1665, 366 U S 938, 6 L Ed 2d 849

Mo—State v Cole, 188 S W 2d 43, motion den 189 S W 2d 541, 354 Mo 181

Or—State v Reyes, 308 P 2d 182, 209 Or 595

Mayhem

Cal—People v Cartier, 5 Cal Rptr 573, 353 P 2d 53, 54 C 2d 300—Carlos v Superior Court of Los Angeles County, 197 Cal Rptr 79, 672 P 2d 862, 35 C 3d 131

Fact that murder committed in perpetration of additional felony held not to reduce degree

Cal—People v Teale, 45 Cal Rptr 729, 404 P 2d 209, 63 C 2d 178, revd on oth grds 87 S Ct 824, 386 U S 18, 17 L Ed.2d 705, reh den 87 S Ct 1283, 386 U S 987, 18 L Ed 2d 241

81. U S—Ornelas v U S, C A Nev, 236 F 2d 392

Cal—People v Isby, 186 P 2d 405, 30 Cal 2d 879

D C—Green v U S, C A, 218 F 2d 856, 95 U S App D C 45

Mont—State v Morran, 306 P 2d 679, 131 Mont 17

Common-law arson

(2) However, since Penal Code of 1939 only statutory arson is intended

Pa—Com v Bolish, supra, n 80

Statutory arson

Cal—People v Chavez, 329 P 2d 907, 50 C 2d 778, cert den 79 S Ct 356, 358 U S 946, 3 L Ed 2d 353, cert den 79 S Ct 1126, 359 U S 993, 3 L Ed 2d 982

82. U S—Ornelas v U S, C A Nev, 236 F 2d 392

Ariz—State v Ferrari, 541 P 2d 921, 112 Ariz 324—State v McLoughlin, 679 P 2d 504, 139 Ariz 481

Cal—People v Isby, supra, n 81—People v Lava, supra, n 79—People v Morlock, 292 P 2d 897, 46 C 2d 141—People v Chenry, 309 P 2d 431, 48 C 2d 301

Fla—Robles v State, 188 So 2d 789, app after remand 210 So 2d 441

N J—State v Sinclair, 231 A 2d 565, 49 N J 525, app after remand 269 A 2d 153, 57 N J 39 and 269 A 2d 161, 57 N J 56

Pa—Com v Elliott, 54 Dauph Co 308—Com v Pepperman, 45 A 2d 35, 353 Pa 373—Com ex rel Pickwell v Burke, 43 Luz Leg Reg 13, affd 93 A 2d 482, 372 Pa 450—Com v Dickerson, 176 A 2d 421, 406 Pa 102

Elements of wilfulness, deliberation, and premeditation not indispensable

Cal—People v Delaney 8 Cal Rptr 170, 185 C A 2d 261, cert den 81 S Ct 1665, 366 U S 938, 6 L Ed 2d 849

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83. U S—Degler v Hutto, C A Ark, 553 F 2d 49, cert den 98 S Ct 777, 434 U S 1038, 54 L Ed 2d 788

Wash—State v Wilson 174 P 2d 553, 26 Wash 2d 468

84. U S—Ornelas v U S C A Nev, 236 F 2d 392

Cal—People v Isby, supra, n 81—People v Cheary 309 P 2d 431, 46 C 2d 301—People v Moore, 310 P 2d 969, 48 C 2d 541—People v Subia, 48 Cal Rptr 584, 239 C A 2d 245

Md—Lipscomb v State, 165 A 2d 918, 223 Md 599

Mich—People v McDonald, 272 N W 2d 179, 86 Mich App 5, affd 293 N W 2d 588, 409 Mich 110

Mo—State v Cole, 189 S W 2d 541, 354 Mo 181—State v Thresher, 350 S W 2d 1

N C—State v Mays, 35 S E 2d 494, 225 N C 486

Pa—Com v Meholchick, 55 Pa Dist & Co 88, 38 Luz Leg Reg 361—Com v Prenni, supra, n 11—Com v Neill, 67 A 2d 276, 362 Pa 507—Com v Gossard, 18 Cambria 1, affd 177 A 2d 902, 383 Pa 239—Com v Meas, 56 Berks 24, revd on oth grds, 202 A 2d 74, 415 Pa 41—Com v Meas, 57 Berks 215

Wash—State v Thompson, 364 P 2d 527, 58 Wash 2d 598, cert den 82 S Ct 1590, 370 U S 945, 8 L Ed 2d 811, reh den 83 S Ct 50, 371 U S 855, 9 L Ed 2d 94

W Va—State v Stevenson, 127 S E 2d 638, 147 W Va 211, cert den 83 S Ct 886, 372 U S 938, 9 L Ed 2d 768

85. U S—Sampsell v People of State of Cal, C A Cal, 191 F 2d 721, stating California law Cert den 72 S Ct 369, 342 U S 929, 96 L Ed 692—Ornelas v U S, C A Nev, 236 F 2d 392

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Ark—Brown v State, 395 S W 2d 344, 239 Ark 909, cert den 86 S Ct 1985, 384 U S 1016, 16 L Ed 2d 1037

Cal—People v Reed, 75 Cal Rptr 430, 270 C A 2d 37

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D C—Wheeler v U S 165 F 2d 225, 82 U S App D C 363, cert den 68 S Ct 448 333 U S 829, 92 L Ed

1115, and 68 S Ct 448, 333 U S 830, 92 L Ed 115—Goodall v U S, C A, 180 F 2d 397, 86 U S App D C 148, 17 A L R 2d 1070, cert den 70 S Ct 1009, 339 U S 987, 94 L Ed 1339

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Iowa—State v Jackson, 101 N W 2d 731, 251 Iowa 537—State v Brown, 113 N W 2d 286, 253 Iowa 658

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Md—Stevens v State, 192 A 2d 73, 232 Md 33, cert den 84 S Ct 160, 375 U S 886, 11 L Ed 2d 115

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Mo—Dickson v State, 449 S W 2d 576

Neb—Garcia v State, 68 N W 2d 151, 159 Neb 571—Wilson v State, 103 N W 2d 258, 170 Neb 494, cert den 81 S Ct 178, 364 U S 887, 5 L Ed 2d 108

Nev—Archibald v State, 362 P 2d 721, 77 Nev 301

N J—State v McKeiver, 213 A 2d 320, 89 N J Super 52

N M—State v Ortega, 419 P 2d 219, 77 N M 7

N C—State v Bailey, 119 S E 2d 165, 254 N C 380

Pa—Com v Dickerson, 176 A 2d 421, 406 Pa 102

Wash—State v Self, 366 P 2d 193, 59 Wash 2d 62, cert den 82 S Ct 1569, 370 U S 929, 8 L Ed 2d 508—State v Forrester, 587 P 2d 179, 21 Wash App 855

W Va—State v Stevenson, 127 S E 2d 638, 147 W Va 211, cert den 83 S Ct 886, 372 U S 938, 9 L Ed 2d 768

Conception of design to rob

Wash—State v Craig, 514 P 2d 151, 82 Wash 2d 777

Robbery and escape

Cal—People v Coefield, 236 P 2d 570, 37 C 2d 865

Person killed need not be victim of robbery

Fla—Hornbeck v State, 77 So 2d 876

Assault with intent to commit robbery

Conn—State v Reid, 149 A 2d 698, 146 Conn 227

"Perpetration" and "perpetrate" as used in statute defined

Cal—People v Harrison, 1 Cal Rptr 414, 176 C A 2d 330

Killing of co-robber by victim or officer did not render surviving robbers guilty of murder in first degree

Mich—People v Austin, 120 N W 2d 766, 370 Mich 12

Pa—Com v Redline, 137 A 2d 472, 391 Pa 486

86. Iowa—State v Brown, 113 N W 2d 286, 253 Iowa 658

87. La—State v Abney, 347 So 2d 498

Mass—Com v Beaulieu, 133 N E 2d 226, 333 Mass 640, cert den 76 S Ct 859, 351 U S 957, 100 L Ed 1480, cert den 77 S Ct 70, 352 U S 857, 1 L Ed 2d 61

89. U S—Ward v U S, C A Okl, 183 F 2d 270, cert den 71 S Ct 87, 340 U S 864, 95 L Ed 631

Ariz—State v Eastman, 403 P 2d 540, 98 Ariz 228

Kan—State v Severns, 148 P 2d 488, 158 Kan 453

N Y—People v Fitzpatrizk, 308 N Y S 2d 18, 61 Misc 2d 1043, application den 311 N Y S 2d 577, 34 A D 2d 730, app dism 263 N E 2d 390, 27 N Y 2d 742, 314 N Y S 2d 992

Okl—Tarter v State, Cr, 359 P 2d 596

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N Y—People v Draper, 104 N Y S 2d 703, 278 App Div 298, affd 101 N E 2d 763, 303 N Y 653—People v Koslow, 174 N Y S 2d 709, 6 A D 2d 713

90. Cal—People v Chavez, supra, n 80

Mo—State v Cole, 188 S W 2d 43, motion den 189 S W 2d 541, 354 Mo 181

N Y—People v Woodley, supra, n 90

A strict causal relation between the felony and the murder is not required [90.5]

90.5. Cal—People v Chavez, 234 P 2d 632, 37 C 2d 656—People v Mason, 4 Cal Rptr 841, 351 P 2d 1025, 54 C 2d 164—People v Whitehorn, 32 Cal Rptr 199, 383 P 2d 783, 60 C 2d 256, disap People v Harrison 1 Cal Rptr 414, 176 C 2d 330

92. U S—Palakiko v Harper, supra, n 71

Hawaii—State v Molina, 390 P 2d 132, 47 Haw 391

Mass—Com v McGarty, 82 N E 2d 603, 323 Mass 435

Single blow

Mass—Com v Golston, 366 N E 2d 744, 373 Mass 249, cert den 98 S Ct 777, 434 U S 1039, 54 L Ed 2d 788

93. Cal—People v Mattison, 93 Cal Rptr 185, 481 P 2d 193, 4 C 3d 177

Characteristics stated

Cal—People v Pickens, 11 Cal Rptr 795, 190 C A 2d 138—People v Pickens, 75 Cal Rptr 352, 269 C A 2d 844

Cruel suffering

Cal—People v Tubby, 207 P 2d 51, 34 Cal 2d 12—People v Pickens, 75 Cal Rptr 352, 269 C A 2d 844

Suffering alone insufficient

Cal—People v Misquez, 313 P 2d 206, 152 C A 2d 471—People v Pickens 11 Cal Rptr 795, 190 C A 2d 138—People v Dalton, 20 Cal Rptr 51 201 C A 2d 396, 95 A L R 2d 628—People v Butler, 23 Cal Rptr 118, 205 C A 2d 437—People v Pickens, 75 Cal Rptr 352, 269 C A 2d 844

Intent that victim suffer inferable from condition of body

Cal—People v Cooley, 27 Cal Rptr 543, 211 C A 2d 173—People v Misquez, 313 P 2d 206, 152 C A 2d 471—People v Perrotta, 36 Cal Rptr 813, 224 C A 2d 498

94. Ariz—State v Folk 277 P 2d 1016, 78 Ariz 205

Cal—People v Heslen supra, n 93

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Colo—Becksted v People, 292 P 2d 189, 133 Colo 72—People v Morant, 499 P 2d 1173, 179 Colo 287

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Minn—State v Hare, 154 N W 2d 820, 278 Minn 405, cert den 88 S Ct 1823, 391 U S 925, 20 L Ed 2d 663

Mont—State v Dillon, 230 P 2d 764, 125 Mont 24

N Y—People v King, 236 N Y S 2d 457, affd 242 N Y S 2d 617, 19 A D 2d 656 Affd 199 N E 2d 162, 14 N Y 2d 718, 250 N Y S 2d 63—People v Dumas, 274 N Y S 2d 764, 51 Misc 2d 929

N C—State v McLaughlin, 213 S E 2d 238, 286 N C 597, vac in part on oth grds 96 S Ct 3206, 428 U S 903, 49 L Ed 2d 1208

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Pa—Com v Malone, 47 A 2d 445 354 Pa 180—Com v Jones, 50 A 2d 117, 355 Pa 522—Com v Levin, 66 Pa Dist & Co 55—Com v Stepper 54 Lack Jur 221—Com v Goodwyn, 3 Bucks 230—Com v Plows, 20 Cambria 1—Com, v Ahearn, 218 A 2d 561, 421 Pa 311

S D—State v Bittner, 359 N W 2d 121

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Utah—State v Thompson, supra, n 70

Va—Pannill v Com, supra, n 9—Bailey v Com, 62 S E 2d 28, 191 Va 510

W Va—Edwards v Leverette, 258 S E 2d 436, 163 W Va 571

Wis—State v Bougnett, App, 294 N W 2d 675, 97 Wis 2d 687—State v Strege, 343 N W 2d 100, 116 Wis 2d 477

Distinction between degrees

(1) U S—Hughes v Mathews, C A Wis, 576 F 2d 1250, cert dism 99 S Ct 43, 439 U S 801, 58 L Ed 2d 94

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(2) State v Stanford, 15 So 2d 817, 204 La 439

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(3) Other matters

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Pa—Com v Hornberger 270 A 2d 195, 441 Pa 57—Com v Bowden, 309 A 2d 714 456 Pa 278

First or second degree

Wash—State v Colwash, 550 P 2d 57, 15 Wash App 530, affd 564 P 2d 781 88 Wash 2d 468

Motive distinguished

(2) Not element of homicide

Ind—Robinson v State, 317 N E 2d 850, 262 Ind 460

Premeditated design to effect death etc.

Fla—Hines v State, App, 227 So 2d 334

Ohio—State v Jenkins, 355 N E 2d 825, 48 Ohio App 2d 99, 2 O O 3d 73

"Purposely"

D C—Collazo v U S, C A, 196 F 2d 573, 90 U S App D C 241, cert den 72 S Ct 1065, 343 U S 968, 96 L Ed 1364

Neb—Luster v State, 29 N W 2d 364, 148 Neb 743

(2) Other matters

Alaska—Gray v State, 463 P 2d 897

Ohio—Foutty v Maxwell, 186 N E 2d 623 174 Ohio St 35

Purpose to kill

(2) As necessary element

Ala—Sanders v State, Cr App, 392 So 2d 1280

N Y—People v Duncan, 372 N Y S 2d 879, 83 Misc 2d 608, affd 389 N Y S 2d 41, 55 A D 2d 690

Ohio—State v Loudermill, 206 N E 2d 198, 2 Ohio St 2d 79

More than specific intent to kill

Cal—People v Caylor, 66 Cal Rptr 448 259 C A 2d 91

Not a specific intent crime

Mich—People v Acosta 167 N W 2d 897, 16 Mich App 249

Mo—State v Boggs, 634 S W 2d 447

Failure to feed child

Mich —People v Lynch, 208 N W 2d 656, 47 Mich App 8, 61 A L R 3d 1195

96. Mich —People v Van Camp, 97 N W 2d 726 356 Mich 593

Intentional murder committed in cold blood

D C —Austin v U S , C A , 382 F 2d 129, 127 U S App D C 180

97. Ala —Roberts v State, 63 So 2d 584, 258 Ala 534

Alaska—Gray v State, 463 P 2d 897

Cal —People v Morton, 181 P 2d 32, 79 Cal App 2d 828

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Nev —State v Fitch, 200 P 2d 991, 65 Nev 668

N J —State v Smith, 142 A 2d 890, 27 N J 433

Tex —Phillips v State, 216 S W 2d 213 152 Tex Cr R 612

Provocation and passion as precluding murder in second degree

Pa —Com v Moore, 157 A 2d 65, 398 Pa 198, 93 A L R 2d 616

99. Cal —People v Cornett, 141 P 2d 916, 61 Cal App 2d 98—People v Bjornsen, 180 P 2d 443, 79 Cal App 2d 519

Colo —People By and Through Russel v District Court For Fourth Judicial Dist , 521 P 2d 1254, 185 Colo 78

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Pa —Com ex rel McCant v Rundle, 211 A 2d 460, 418 Pa 394

Utah—State v Trujillo, 214 P 2d 626, 117 Utah 237

Wash —State v Collins, 314 P 2d 660, 50 Wash 2d 740

Rule inapplicable if underlying intent is missing

Ohio—State v Cosby, 137 N E 2d 282, 100 Ohio App 459

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5. Pa —Com ex rel McCant v Rundle, 211 A 2d 460, 418 Pa 394

6. Ga —Wright v State, 34 S E 2d 879, 199 Ga 576

Tenn —Harper v State, 334 S W 2d 933, 206 Tenn 509

Utah—State v Thompson, 170 P 2d 153, 110 Utah 113

10. Mass —Com v Golston, 366 N E 2d 744, 373 Mass 249, cert den 98 S Ct 777, 434 U S 1039 54 L Ed 2d 788

N C —State v Davis, 26 S E 2d 869, 223 N C 381

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11. U S —U S ex rel Rucker v Myers, C A Pa , 311 F 2d 311, cert den 83 S Ct 1901, 374 U S 844, 10 L Ed 2d 1064

Cal —People v Osborn, 231 P 2d 850, 37 C 2d 380

D C —Stewart v U S , C A , 214 F 2d 879, 94 U S App D C 293

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N C —State v Streeton, 56 S E 2d 649, 231 N C 301

Pa —Com v Simmons, 65 A 2d 353, 361 Pa 391, cert den 70 S Ct 96, 338 U S 862, 94 L Ed 528, reh den 70 S Ct 181, 338 U S 888, 94 L Ed 2d 546—Com v Edwards, 110 A 2d 216 380 Pa 52

Killing by one of several participants

Pa —Com v Tarver, 284 A 2d 759, 446 Pa 233

Intent to commit felony

Ariz —State v Ferrari, 541 P 2d 921, 112 Ariz 324—State v Arias, 641 P 2d 1285, 131 Ariz 441—State v McLoughlin, 679 P 2d 504, 139 Ariz 481

12. Cal —People v Thomas 230 P 2d 351, 37 C 2d 74—People v Turville, 335 P 2d 678, 51 C 2d 620, app den 79 S Ct 1465, 360 U S 939, 3 L Ed 2d 1551—People v Dickerson, 100 Cal Rptr 533, 23 C A 3d 721

Ga —Ford v State, 44 S E 2d 263, 202 Ga 599—Owen v State, 44 S E 2d 266, 202 Ga 616

Mich —People v Wright, 23 N W 2d 213, 315 Mich 81

Nev —State v Sala, 169 P 2d 524, 63 Nev 270

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Or —State v Jensen, 296 P 2d 618, 209 Or 239 cert dism 77 S Ct 329, 352 U S 948, 1 L Ed 2d 241, reh den 77 S Ct 388, 352 U S 990, 1 L Ed 2d 369

Pa —Com v Phillips, 93 A 2d 455, 372 Pa 223

Wash —State v Rio, 230 P 2d 308, 38 Wash 2d 446, cert den 72 S Ct 106, 342 U S 867, 96 L Ed 652

Accidental discharge of gun, etc.

Fla —C J S cited in Jefferson v State, 128 So 2d 132, 136

Or —State v Wilson, 189 P 2d 403, 182 Or 681

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Physical suffering and intent to cause suffering required

Cal —People v Caldwell, 279 P 2d 539 43 C 2d 864

Untoward propensity sufficient

Cal —People v Hopper, 302 P 2d 94, 145 C A 2d 180—People v Washington, 80 Cal Rptr 567, 458 P 2d 479, 71 C 2d 1061

Necessity that extreme pain and suffering be intended for one of purposes specified

Ariz —State v Brock, 416 P 2d 601, 101 Ariz 168

20 Cal —People v Thomas, 261 P 2d 1, 41 C 2d 470

Elements necessary to constitute lying in wait

Cal —People v Atchley, 346 P 2d 764, 53 C 2d 160, cert gr 80 S Ct 1081, 362 U S 987, 4 L Ed 2d 1021, cert dism 81 S Ct 1051, 366 U S 207, 6 L Ed 2d 233—People v Gaulden, 111 Cal Rptr 803 36 C A 3d 942

§ 33. —— Willfulness, Deliberation, and Premeditation; Premeditated Design

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(2) Mass —Com v Blaikie, 378 N E 2d 1361, 375 Mass 601

Mich —People v Vail, 227 N W 2d 535, 393 Mich 460

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(2) Other cases —State v French, 34 S E 2d 157, 225 N C 276

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Okl —Jones v State, Cr , 542 P 2d 1316

Or —State v Braley, 355 P 2d 467, 224 Or 1

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(2) Other cases

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N C —State v Brown, 106 S E 2d 232, 249 N C 271

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Ariz —State v Gillies, 691 P 2d 655, 142 Ariz 564, cert den 105 S Ct 1775, 84 L Ed 2d 834

Pa —Com v Ensminger, 4 Cumb 84

Tenn —Amburn v State, Cr , 553 S W 2d 922

Manslaughter distinguished by absence of deliberation

Colo —Becksted v People, 292 P 2d 189, 133 Colo 72

Pre-meditated malice

Ind—Barker v State, 150 N E 2d 680, 238 Ind 271—Ellis v State, 304 N E 2d 546, 159 Ind App 1

May be committed with fists

Mo—State v Floyd, 403 S W 2d 613

High degree of turpitude required

Cal—People v Fonville, 111 Cal Rptr 53, 35 C A 3d 693

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Ohio—State v Pierce, 414 N E 2d 1038, 64 Ohio St 2d 281, 18 O O 3d 466

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N C—State v Bondurant, 309 S E 2d 170 309 N C 674

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Cal—People v Holt, 153 P 2d 21, 25 Cal 2d 59—People v Bender, 163 P 2d 8 27 Cal 2d 164

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Mich—People v Sparks, 220 N W 2d 153, 53 Mich App 452, cert den 224 N W 2d 481, 393 Mich 135

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W Va —State v Painter, 63 S E 2d 86, 135 W Va 106

Sufficient if elements coexist for moment

Ala —Sanders v State, Cr App, 392 So 2d 1280

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53. U S —Yarnal v Brierley, D C Pa, 324 F Supp 311, affd, C A 468 F 2d 816, cert den 93 S Ct 1405, 410 U S 940, 35 L Ed 2d 607

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Neb —State v Lynch, 340 N W 2d 128, 215 Neb 528

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61. Mo —State v Shaw, App 569 S W 2d 375

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Neb —State v Bautista, 227 N W 2d 835, 193 Neb 476

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N J —State v Hipplewith, 164 A 2d 481 33 N J 300

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Cannot be simultaneous

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(6) Mackiewicz v State, 114 So 2d 684, cert den 80 S Ct 883, 362 U.S 965, 4 L Ed 2d 879, reh den 80 S Ct 1083, 362 U S 992, 4 L Ed 2d 1024

"Second look"

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65. Cal —People v Theriot, 60 Cal Rptr 279, 252 C A 2d 222

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67. Cal —People v Wolff, 40 Cal Rptr 271, 394 P 2d 959, 61 C 2d 795

68. Utah—State v Warwick, 355 P 2d 703, 11 Utah2d 116

Time span must occur between initial intent and ultimate action

Mich —People v Oster, 241 N W 2d 260, 67 Mich App 490

69. N C —State v Chavis, supra, n 56

70. Utah—State v Warwick, 355 P 2d 703, 11 Utah2d 116

71. Mo —State v Mitchell, 408 S W 2d 39

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72. Ala —Sanders v State, 392 So 2d 1280

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"Premeditated" and necessary element

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74. Cal —People v Theriot, 60 Cal Rptr 279, 252 C A 2d 222—People v Rosenhoover, 73 Cal Rptr 533, 447 P 2d 925, 70 C 2d 39, cert den 90 S Ct 123, 396 U S 857, 24 L Ed 2d 108—People v Fonville, 111 Cal Rptr 53, 35 C A 3d 693 People v Rowland, 184 Cal Rptr 346, 134 C A 3d 1

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Cal —People v Conley, 73 Cal Rptr 673, 268 C A 2d 47

75. N C —C.J.S. quoted at length in State v Faust, 118 S E 2d 769, 773 254 N C 101, 96 A L R 2d 1422, cert den 82 S Ct 85, 368 U S 851, 7 L Ed 2d 49—State v Britt, 204 S E 2d 817, 285 N C 256, app after remand 220 S E.2d 283, 288 N C 699, app after remand 231 S E 2d 644, 291 N C 528

Tenn —Drye v State, 184 S W 2d 10, 181 Tenn 637

"Passion," etc.

(2) "Passion" means any of human emotions which renders mind incapable of cool reflection

Tenn —State v Bullington, 532 S W 2d 556

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Cal —People v Perrotta, 36 Cal Rptr 813, 224 C A 2d 498

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76. Va —Wells v Com , 57 S E 2d 898, 190 Va 619—Bailey v Com , 62 S E 2d 28, 191 Va 510

77. U S —Faust v State of N C , C A N C , 307 F 2d 869, cert den 83 S Ct 547, 371 U S 964, 9 L Ed 2d 511

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Deliberation key factor

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78. Cal —People v Thomas, supra, n 39

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79. Cal —People v Webb, 300 P 2d 130, 143 C A 2d 402

82. Tex —Lovelady v State, 198 S W 2d 570, 150 Tex Cr R 50

Police victim

N J —State v Thomas, 356 A 2d 433, 140 N J Super 429, revd on oth grds 387 A 2d 1187, 76 N J 344—State v Thomas, 387 A 2d 1187, 76 N J 344

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83. Ariz —State v Singleton, supra, n 23—State v Serna, 211 P 2d 455 69 Ariz 181, app dism and cert den 70 S Ct 1031, 339 U S 973, 94 L Ed 1380—State v Atkins, 383 P 2d 180, 94 Ariz 263

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Nev —State v Fouquette, 221 P 2d 404, 67 Nev 505, cert den 71 S Ct 799, 341 U S 923, 95 L Ed 1361, and 72 S Ct 369, 342 U S 928 96 L Ed 691

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Tex —Stubblefield v State, 334 S W 2d 150, 169 Tex Cr R 350

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Killing done in perpetration of robbery

Md —McDowell v State, 358 A 2d 624, 31 Md App 652

85. Cal —People v Cornett, supra, n 37—People v Ford, 52 Cal Rptr 228, 416 P 2d 132, 65 C 2d 41, cert den 87 S Ct 737, 385 U S 1018, 17 L Ed 2d 554, on remand 61 Cal Rptr 329, 253 C A 2d 390

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86. Cal —People v Byrd, 266 P 2d 505, 42 C 2d 200, cert den 75 S Ct 73, 348 U S 848, 99 L Ed 668—People v McNeal, 325 P 2d 166, 160 C A 2d 446—People v Lo Cigno, 14 Cal Rptr 354, 193 C A 2d 360—People v Ward, App , 103 Cal.Rptr 671, 27 C A 3d 218

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87. Cal —People v Lo Cigno, 14 Cal Rptr 354, 193 C A 2d 360

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89. Cal —People v Steger, 128 Cal Rptr 161, 546 P 2d 665 16 C 3d 539, 83 A L R 3d 1206

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90. Cal —People v Murphy, 32 P 2d 635, 1 Cal 2d 37—People v Marquez, 313 P 2d 206, 152 C A 2d 471—People v Turville, 335 P 2d 678, 51 C 2d 620, cert den 79 S Ct 1465, 360 U S 939, 3 L Ed 2d 1551—People v Pickens, 11 Cal Rptr 795, 190 C A 2d 138—People v Lo Cigno, 14 Cal Rptr 354, 193 C A 2d 360—People v Cooley, 27 Cal Rptr 543, 211 C A 2d 173

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§ 34. —— Malice

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Malice aforethought

Cal —Jackson v Superior Court of City and County of San Francisco, 42 Cal Rptr 838, 399 P 2d 374, 62 C 2d 521—People v Conley, 49 Cal Rptr 815, 411 P 2d 911, 64 C 2d 310

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92. Ind —Hutchinson v State, 225 N E 2d 828, 248 Ind 226

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98. Cal—People v Thomas, supra n 39

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Va—Pannill v Com., 38 S E 2d 457, 185 Va 244—Thomas v Com., 41 S E 2d 476, 186 Va 131

2. Deliberate and premeditated malice not element

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§ 35. Second Degree

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Cal—People v Cayer, 228 P 2d 70, 102 Cal App 2d 643

Unconscious influences

N J—State v Sikora, 210 A 2d 193, 44 N J 453

New offense not created

Md—Gladden v State, 330 A 2d 176

Extreme emotional disturbance as defense

N Y—People v Shelton, 385 N Y S 2d 708, 88 Misc 2d 136, affd 434 N Y S 2d 649, 78 A D 2d 821

Lack of excuse or justification

Wash—State v Stallworth, 577 P 2d 617, 19 Wash App 728

6. Ala—Holcey v State Cr., 296 So 2d 750, cert den 296 So 2d 753, 292 Ala 723

Cal—People v Hudgins, 60 Cal Rptr 176, 252 C A 2d 174, cert den 88 S Ct 1073, 390 U S 965, 19 L Ed 2d 1167

Colo—People v Marcy, 628 P 2d 69

D C—Hansborough v U S, C A, 308 F 2d 645, 113 U S App D C 392

Mo—State v Baber, 297 S W 2d 439—State v Henderson, App., 510 S W 2d 813

Mont—Territory v Rowand, 20 P 688, 8 Mont 432

N Y—People v Walker, 396 N Y S 2d 121, 58 A D 2d 737

N C—State v Jennings, 171 S E 2d 447, 276 N C 157, app after remand 184 S E 2d 254, 279 N C 604—C J S quoted in State v Benton, 174 S E 2d 793, 804, 276 N C 641

Pa—Com v O'Searo, 352 A 2d 30, 466 Pa 224

R I—State v Prescott, 40 A 2d 721, 70 R I 403

Wis—Wagner v State, 250 N W 2d 331, 76 Wis 2d 30

Requisites

Idaho—State v Atwood, App., 669 P 2d 204, 105 Idaho 315

Mont—State v Dillon, 230 P 2d 764, 125 Mont 24

Provocation and passion as precluding murder in second degree

Ariz—State v Drury, 520 P 2d 495, 110 Ariz 447

Pa—Com v Moore, 157 A 2d 65, 398 Pa 198, 93 A L R 3d 616

Shooting at one and killing another

Ark—Jordon v State, 382 S W 2d 185, 238 Ark 398

N C—State v Barber, 154 S E 2d 104, 270 N C 222

Pa—Com v Lucks, 16° Northum Leg J 223

Utah—State v Trujillo, 214 P 2d 626, 117 Utah 237

Wash—State v Clarke, 377 P 2d 449, 61 Wash 2d 138

In Nebraska, etc—Clown Horse v State, 102 N W 2d 625, 170 Neb 336

(2) Other matters

Neb—Wright v State, 100 N W 2d 51, 169 Neb 497

Common-law voluntary manslaughter included

Wash—State v Johnson, 418 P 2d 238, 69 Wash 2d 264

Use of lethal weapon

Mich—People v Hoffmeister, 229 N W 2d 305, 394 Mich 155, reh den 230 N W 2d 270, 394 Mich 944

7. Ariz—State v Mendell, 523 P 2d 79, 111 Ariz 51

Ind—Stinson v State, 348 N E 2d 23, 264 Ind 559

La—State v Landry, 388 So 2d 699, cert den 101 S Ct 1487, 450 U S 968, 67 L Ed 2d 618

N J—State v Sinclair, 231 A 2d 565, 49 N J 525, app after remand 269 A 2d 153, 57 N J 39 and 269 A 2d 161, 57 N J 56

N C—State v Winford, 181 S E 2d 423, 279 N C 58

Wash—State v Parr, 606 P 2d 263, 93 Wash 2d 95

Statute upheld

Colo—People v Gladney, 570 P 2d 231, 194 Colo 68, cert den 98 S Ct 776, 434 U S. 1038, 54 L Ed 2d 787—People v Padilla, 638 P 2d 15

8. N C—Thomas v U S, C A, 419 F 2d 1203, 136 U S App D C 222

Fla—Darty v State, App., 161 So 2d 864—Hines v State, App., 227 So 2d 334—Smith v State, App., 282 So 2d 179, quashed on oth grds, Sup., 300 So 2d 257

Ill—People v Garcia, 382 N E 2d 316, 21 Ill Dec 952, 65 Ill App 3d 13

Mich—People v Bryant, 204 N W 2d 746, 43 Mich App 659

N H—State v Howland, 402 A 2d 168, 119 N H 413

N C—State v Wingler, 78 S E 2d 303, 238 N C 485—State v Withers, 156 S E 2d 733, 271 N C 364

Depravity of mind, etc.

(2) Other statements

Fla—Luke v State, App., 204 So 2d 359 Cert den 89 S Ct 290, 393 U S 932, 21 L Ed 2d 269—Weaver v State, App., 220 So 2d 53—Raneri v State, App., 255 So 2d 291

Utah—State v Watts, 675 P 2d 566

Reduction to manslaughter held error

Fla—Mixon v State, 59 So 2d 38

"Act"; acts of tool

(1) "Act" construed

Fla—Parrish v State, 97 So 2d 356

(2) The acts of person as tool of accused, constituted the "acts" of accused

Fla—Parrish v State, App., 97 So 2d 356

Accidental discharge of weapon

Fla—State v Bryan, 287 So 2d 73, cert den 94 S Ct 2611, 417 U S 912, 41 L Ed 2d 216

Act evincing a depraved mind must be intentional

Okl—Smith v State, Cr., 674 P 2d 569

9. Ala—Smith v State, Cr App., 380 So 2d 345

Ariz—State v Robin App., 562 P 2d 1376, 115 Ariz 9

Cal—People v Phillips 51 Cal Rptr 225, 414 P 2d 353, 64 C 2d 574

D C—U S v Lucas, C A, 447 F 2d 338, 144 U S App D C 368—U S v Brawner, C A, 471 F 2d 969, 153 U S App D C 1

N C—State v Harrington, 206 S E 2d 768, 22 N C App 473, affd 210 S E 2d 424, 286 N C 327

Wis—Jones v State, 233 N W 2d 430, 70 Wis 2d 41

A depraved mind, etc.

(2) Other statements

U S—Hughes v Mathews, C A Wis, 576 F 2d 1250, cert dism 99 S Ct 43, 439 U S 801, 58 L Ed 2d 94

Wis—Seidler v State, 219 N W 2d 320, 64 Wis 2d 456, 67 A L R 3d 890

Reckless shooting

(3) Other instances

Del—Brinkley v State, 233 A 2d 56

Or—State v Gill, 474 P 2d 23, 3 Or App 488

10. Cal—People v Powell, 208 P 2d 974, 34 Cal 2d 196

Hawaii—Territory v Young, 37 Haw 189

11. Del—Ruffin v State, 123 A 2d 461, 11 Terry 83

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12. Ariz—State v Jones, 385 P 2d 1019, 95 Ariz 4, cert den 85 S Ct 97, 379 U S 852, 12 L Ed 2d 55

Cal—People v Moore, 85 Cal Rptr 194, 5 C A 3d 486

Del—Jenkins v State, 230 A 2d 262, app after remand 240 A 2d 146, affd 89 S Ct 1677, 395 U S 213, 23 L Ed 2d 253, reh den 90 S Ct 469, 396 U S 995, 24 L Ed 2d 460

Fla—Hile v State, App., 364 So 2d 771

Mo—State v Jasper, 486 S W 2d 268

Pa—Com v DiNicola, 468 A 2d 1078, 503 Pa 90

13. U S—Ornelas v U S C A Nev., 236 F 2d 392

Ala —Warren v State, 41 So 2d 201, 34 Ala App 447—Young v State, Cr, 260 So 2d 406, 49 Ala App 674

Ariz —State v Singleton, 182 P 2d 920, 66 Ariz 49—State v Kabinto, 480 P 2d 1, 106 Ariz 575

Ark —Wooten v State 249 S W 2d 964, 220 Ark 750—Lillard v State, 365 S W 2d 144, 236 Ark 74

Cal —People v Harris, 87 Cal Rptr 46, 7 C A 3d 922

Colo —People v Lankford, 524 P 2d 1382, 185 Colo 445

Conn —State v Vennard, 270 A 2d 837, 159 Conn 385, cert den 91 S Ct 576, 400 U S 1011, 27 L Ed 2d 625

Del —Bennett v State, 164 A 2d 442, 3 Storey 36

D C —Hansborough v U S, C A, 308 F 2d 645, 113 U S App D C 392—Belton v U S, C A 382 F 2d 150, 127 U S App D C 201—Logan v U S, C A, 411 F 2d 679, 133 U S App D C 365

Fla —Turner v State, App, 298 So 2d 559

Ind —Manlove v State, 232 N E 2d 874, 250 Ind 70, reh den 235 N E 2d 62, 250 Ind 70—Brown v State, 247 N E 2d 76, 252 Ind 161

Iowa—State v Beverlin, 263 N W 2d 535

Kan —State v Roberson, 499 P 2d 1137, 210 Kan 209

Mass —Com v Boyajian, 181 N E 2d 577, 344 Mass 44

Mich —People v Geiger, 159 N W 2d 383, 10 Mich App 339—People v Stinson, 227 N W 2d 303, 58 Mich App 243, 86 A L R 3d 559

Mo —C.J.S cited in State v Ferguson, 182 S W 2d 38, 40, 353 Mo 46—State v Smith, 240 S W 2d 671—State v Jewell, 473 S W 2d 714

Neb —State v Johnson, 266 N W 2d 193, 200 Neb 760

N C —State v Rummage, 185 S E 2d 221, 280 N C 51, app after remand 193 S E 2d 475, 17 N C App 239

Ohio—State v McGhee, App, 96 N E 2d 419—State v Robinson, 118 N E 2d 517, 161 Ohio St 213—State v Nichols 209 N E 2d 750, 3 Ohio App 2d 182—State v Butler, 227 N E 2d 627, 11 Ohio St 2d 23, 21 A L R 3d 102—In re Williams, 324 N E 2d 182, 41 Ohio App 2d 144

Or —State v Collins, 413 P 2d 53, 243 Or 222

Pa —Com v Wucherer, 41 A 2d 574, 351 Pa 305—Com v Buzard 76 A 2d 394, 365 Pa 511, 22 A L R 2d 846—Com v Bowden, 309 A 2d 714, 456 Pa 278

Tenn —Smith v State 370 S W 2d 543, 212 Tenn 510—Gordon v State Cr, 478 S W 2d 911—Hornsby v State, Cr, 479 S W 2d 653—Lay v State, Cr, 501 S W 2d 820

Utah—Farrow v Smith, 541 P 2d 1107

Va —Thomas v Com, 38 S E 2d 457, 185 Va 244

Vt —State v Barrett, 290 A 2d 14, 130 Vt 197

W Va —State v Lewis 57 S E 2d 513 133 W Va 584—State v Bowyer 101 S E 2d 243, 143 W Va 302—State ex rel Combs v Boles, 151 S E 2d 115, 151 W Va 194—State v Evans, 310 S E 2d 877

Wyo —State v Bruner, 319 P 2d 863, 78 Wyo 111

"Depraved mind," etc.

Fla —Huntley v State, 66 So 2d 504—Bega v State, App, 100 So 2d 455—Smith v State, App, 282 So 2d 179, quashed on oth grds, Sup, 300 So 2d 257, mand conf to 305 So 2d 876

Distinction, etc.

Ark —Bly v State 214 S W 2d 77, 213 Ark 859

Cal —People v Dugger, App, 4 Cal Rptr 388—People v Jones, 30 Cal Rptr 280, 215 C A 2d 341

D C —U S v Hamilton, D C, 182 F Supp 548

Ind —Ellis v State 304 N E 2d 546, 159 Ind App 1—Robinson v State, App, 309 N E 2d 833, reh den, mod on oth grds 311 N E 2d 461, affd, 317 N E 2d 850, 262 Ind 463

Mo —State v Lawson 227 S W 2d 642, 360 Mo 95

Neb —Clown Horse v State, 102 N W 2d 625, 170 Neb 316

N J —State v Brown, 126 A 2d 161, 22 N J 405

(2) Other statements

Wis —State v Hoyt 124 N W 2d 47, 21 Wis 2d 310, reh 128 N W 2d 645, 21 Wis 2d 284

Malicious killing

(1) N C —State v Gordon, 85 S E 2d 322, 241 N C 356—State v Mercer, 165 S E 2d 328, 275 N C 108

Sudden passion

(2) Murder in the second degree

Minn —State v Turner, 203 N W 2d 539, 295 Minn 539

Malice defined

Ariz —State v Hudson, 331 P 2d 1092, 85 Ariz 77

D C —U S v Comer, C A, 421 F 2d 1149, 137 U S App D C 214

Mo —State v Mosley, 415 S W 2d 796

N C —State v Johnson, 322 S E 2d 810, 71 N C App 607, cert den 329 S E 2d 397, 313 N C 511

Malice aforethought

Ala —Mitchell v State, 342 So 2d 927, writ den, Ala, Ex parte Mitchell, Cr, 342 So 2d 933

Iowa—State v Smith 242 N W 2d 320

Mich —People v Benberry, 180 N W 2d 191, 24 Mich App 188

Malice not required

Colo —People v Gladney, 570 P 2d 231, 194 Colo 68, cert den 98 S Ct 776, 434 U S 1038, 54 L Ed 2d 787

14. Ala —Clark v State, Cr, 333 So 2d 885, cert den 333 So 2d 890

Cal —People v Lewis, 344 P 2d 861, 174 C A 2d 281—People v Harmon, 108 Cal Rptr 43, 33 C A 3d 308—People v Watson, 179 Cal Rptr 43, 637 P 2d 279, 30 C 3d 290, app after remand, 198 Cal Rptr 26, 150 C A 3d 313

Colo —Pine v People, 455 P 2d 868, 168 Colo 290—Romero v People, 460 P 2d 784, 170 Colo 234—People v Garcia 526 P 2d 292, 186 Colo 167

Del —State v Winsett Super, 205 A 2d 510, 8 Storey 111

Ind —Hutchinson v State 225 N E 2d 828, 248 Ind 226

Iowa—State v Baratta 49 N W 2d 866, 242 Iowa 1308—State v Schatterman 171 N W 2d 890

Mich —People v McKeller, 185 N W 2d 905, 30 Mich App 135—People v McBride, 186 N W 2d 70, 30 Mich App 201—People v Carter, 197 N W 2d 57, 387 Mich 397

N M —State v Ochoa 297 P 2d 1053, 61 N M 225—State v Vigil, 533 P 2d 578, 87 N M 345

N C —State v Chavis, 56 S E 2d 678, 231 N C 307—State v Lamm, 61 S E 2d 188, 232 N C 402—State v Foust, 128 S E 2d 889, 258 N C 453

Ohio—State v Stallings 79 N E 2d 925 82 Ohio App 337—State v McGhee, App, 96 N E 2d 419

Tenn —Fox v State, Cr, 441 S W 2d 491 1 Tenn Cr App 308—Gordon v State, Cr, 478 S W 2d 911

W Va —State v Morris, 95 S E 2d 401, 142 W Va 303

Absence of provocation

Ariz —State v Kabinto, 480 P 2d 1, 106 Ariz 575—State v Mendell, 523 P 2d 79, 111 Ariz 51

Cal —People v Bender, 163 P 2d 8, 27 Cal 2d 164—People v Gonzales, 84 Cal Rptr 863, 4 C A 3d 593

Colo —Washington v People, 405 P 2d 735, 158 Colo 115, cert den 86 S Ct 1217, 383 U S 953, 16 L Ed 2d 215—Watkins v People, 408 P 2d 425, 158 Colo 485

Fact of unlawful killing

(1) Cal —People v Gonzales, 198 P 2d 81, 87 Cal App 2d 867—People v Todd, 317 P 2d 40, 154 C A 2d 601—People v Thompson, 14 Cal Rptr 512, 193 C A 2d 620

(2) N C —State v McNeill, 49 S E 2d 733, 229 N C 377—State v Howell, 79 S E 2d 235, 239 N C 78—State v Brown, 106 S E 2d 232, 249 N C 271—State v Downey, 117 S E 2d 39, 253 N C 348—State v Crump, 178 S E 2d 366, 277 N C 573—State v Boyd, 180 S E 2d 794, 278 N C 682—State v Parker, 181 S E 2d 432, 279 N C 168, cert den 93 S Ct 342, 409 U S 987, 34 L Ed 2d 253

(3) Cal —People v Brunk, 65 Cal Rptr 727, 258 C A 2d 453

Use of deadly weapon

(1) Cal —People v Brunk, 65 Cal Rptr. 727, 258 C A 2d 453

Del —Herhal v State, 243 A 2d 703, app after remand 283 A 2d 482

Ind —Fletcher v State, 88 N E 2d 146, 227 Ind 687—Hill v State, 251 N E 2d 429, 252 Ind 601—Dinning v State, 269 N E 2d 371, 256 Ind 399

Iowa—State v Myers, 79 N W 2d 382, 248 Iowa 44

N C —State v Todd, 30 S E 2d 157, 224 N C 358—State v Cooper, 159 S E 2d 305, 273 N C 51—State v Reams, 178 S E 2d 65, 277 N C 391, cert den 92 S Ct 133, 404 U S 840, 30 L Ed 2d 74—State v Duboise, 181 S E 2d 393, 279 N C 73—State v Winford, 181 S E 2d 423, 279 N C 58

Tenn —Nance v State, 358 S W 2d 327, 210 Tenn 328—Bailey v State, Cr, 479 S W 2d 829

W Va —State v Bowyer, 101 S E 2d 243, 143 W Va. 302

(2) N Y —People v Horton, 241 N Y S 2d 224, 19 A D 2d 80, affd 221 N E 2d 909, 18 N Y 2d 355, 275 N Y S 2d 377, am on oth grds 224 N E 2d 884, 19 N Y 2d 600, 278 N Y S 2d 388, cert den 87 S Ct 2059, 387 U S 934, 18 L Ed 2d 997

N C —State v Warren, 89 S E 2d 109, 242 N C 581

(3) Killing with malice aforethought in course of assault with deadly weapon constitutes second degree murder

Cal —People v Welborn, 51 Cal Rptr 644, 242 C A 2d 668

(4) Other matters

Pa —Com v Durant, 319 A 2d 675, 456 Pa. 416

Accidental murder during felony supplies malice

Va —Heacock v Com, 323 S E 2d 90, 228 Va 397

Cruelty and brutality

Ark —Stockton v State, 388 S W 2d 382, 239 Ark 228

Mass —Com v Leate, 225 N E 2d 921, 352 Mass 452

Reckless or wanton conduct

Cal —People v Poddar, 111 Cal Rptr 910, 518 Pa 342, 10 C 3d 750

D C —Mitchell v U S, C A, 434 F 2d 483, 140 U S App D C 209, cert den 91 S Ct 109, 400 U S 867, 27 L Ed 2d 106—U S v Lucas, C A, 447 F 2d 338, 144 U S App D C 368

Pa —Com v Taylor, 337 A 2d 545, 461 Pa 557

Infant or enfeebled person

N C —State v Sallie, 186 S E 2d 667, 13 N C App 499, cert den 188 S E 2d 900, 281 N C 316

Effect of diminished capacity

Cal —People v Poddar, 111 Cal Rptr 910, 518 P 2d 342, 10 C 3d 750

Malice not implied

Ind – Shutt v State, 367 N E 2d 1376, 267 Ind 110

Pa —Com v Bowden, 309 A 2d 714, 456 Pa 278

Motive not element

Iowa—State v Smith, 242 N W 2d 320

Implied by intentional killing

N C —State v Robbins, 309 S E 2d 188, 309 N C 771

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15. Cal —People v Mattison, 93 Cal Rptr 185, 481 P 2d 193, 4 C 3d 177

Colo —Smith v People, 351 P 2d 357, 142 Colo 523—Bishop v People, 439 P 2d 342, 165 Colo 423—Walker v People, 489 P 2d 584, 175 Colo 173

N C —State v Powell, 78 S E 2d 248, 238 N C 527—State v Downey, 117 S E 2d 39, 253 N C 348—State v Rich, 185 S E 2d 288, 13 N C App 60, cert den 186 S E 2d 179, 280 N C 304

Ohio—State v Stallings, supra, n 14

In Delaware

(3) Other statements

Del —State v Winsett, Super, 205 A 2d 510, 8 Storey 111—Seeney v State, 277 A 2d 670 Vac in part on oth grds 92 S Ct 2871, 408 U S 939, 33 L Ed 2d 760

16. Conviction in second degree not precluded

Ala —Sashington v State, Cr, 325 So 2d 205, 56 Ala. App 698, cert den 325 So 2d 211, 295 Ala 416

18. U S —Government of Virgin Islands v Carmona, C A Virgin Islands, 422 F 2d 95

Ala —Ivery v State, Cr, 263 So 2d 712 48 Ala App 257—Rogers v State, Cr, 268 So 2d 859, 49 Ala App 78

Ariz —State v Ramirez, 533 P 2d 671, 111 Ariz 504

Ark —Everett v State, 210 S W 2d 918, 213 Ark 470—McGaha v State, 224 S W 2d 534, 216 Ark 165—Ezell v State, 229 S W 2d 32, 217 Ark 94—Wooten v State, supra, n 13—Rand v State, 341 S W 2d 9, 232 Ark 909—Seabourn v State, 365 S W 2d 133, 236 Ark 175

Cal —People v Torres supra, n 14—People v Stradwick, 30 Cal Rptr 791, 215 C A 2d 839—Jackson v Superior Court of City and County of San Francisco, 42 Cal Rptr 838, 399 P 2d 374, 62 C 2d 521—People v Caylor, 66 Cal Rptr 448, 259 C A 2d 191—People v Gonzales, 84 Cal Rptr 863, 4 C A 3d 593

D C —U S v Wilson, D C, 178 F Supp 881

Iowa—State v Baratta, supra, n 14—State v Leedom, 76 N W 2d 773, 247 Iowa 911—State v Drosos, 114 N W 2d 526, 253 Iowa 1152

Mass —Com v Soffen, 386 N E 2d 1030, 377 Mass 433

Mich —People v Jones, 321 N W 2d 723, 115 Mich App 543, affd 358 N W 2d 837, 419 Mich 577

Mont —State v Dillon, 230 P 2d 764, 125 Mont 24—State v Zachmeier, 441 P 2d 737, 151 Mont 256, app after remand 453 P 2d 783, 153 Mont 64

N J —State v Alexander, 83 A 2d 441 7 N J 585, cert den 72 S Ct 638, 343 U S 908, 96 L Fd 1326—State v Wynn, 121 A 2d 534, 21 N J 264

N M —State v Tapia, 466 P 2d 551, 81 N M 274

N C —State v Gerdon, 85 S E 2d 322, 241 N C 356—State v Barber, 154 S E 2d 104, 270 N C 222—State v Mercer, 165 S E 2d 328, 275 N C 108

Or—State v Reyes, 308 P 2d 182, 209 Or 595

Pa —Com v Hickerson, 58 Dauph Co 203—Com v Baylor, 71 Dauph 1—Com v Stamm, 53 Berks 257—Com v Stamm, 53 Berks 262—Com v Lloyd, 55 Luz L Reg 121—Com v Hornberger, 270 A 2d 195, 441 Pa 57—Com v Campbell, 284 A 2d 798, 445 Pa 488—Com v Fostar, 317 A 2d 188, 455 Pa 216

Tex —Fazzino v State, Cr, 531 S W 2d 818

Utah—State v Russell, 145 P 2d 1003, 106 Utah 116

Wash —State v Myers, 334 P 2d 536, 53 Wash 2d 446

Wis —State v Kanzelberger, 137 N W 2d 419, 28 Wis 2d 652, cert den 87 S Ct 127, 385 U S 867, 17 L Ed 2d 93—State v Carter, 170 N W 2d 681 44 Wis 2d 151—Christian v State, 195 N W 2d 470, 54 Wis 2d 447—State v Verhasselt, 266 N W 2d 342, 83 Wis 2d 647—State v Shaffer, App, 292 N W 2d 370, 96 Wis 2d 531

Accidental or unintentional, etc.

D C —Hansborough v U S, C A, 308 F 2d 645, 113 U S App D C 392—Thomas v U S, C A 419 F 2d 1203, 136 U S App D C 222

Irresistible impulse

Tenn —Davis v State, 28 S W 2d 993, 161 Tenn 23

N J —State v Wynn, 121 A 2d 534 21 N J 264

Pa —Com v Southard, 33 Del Co 464

Utah—State v Russell, supra, n 18—State v Jensen, 236 P 2d 445, 120 Utah 531

Reclassification before trial

La —State v Meshell, 352 So 2d 1020

19. N J —State v Anderson, 173 A 2d 377, 35 N J 472—State v Mulero, 238 A 2d 682, 51 N J 224

Pa —Com v Laws, 74 Montg 395

Utah—State v Canfield, 422 P 2d 196, 18 Utah2d 292

Police victim

N J —State v Thomas, 387 A 2d 1187, 76 N J 344

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20. W Va —State v Lewis, supra, n 13

21. N C —State v Woods, 179 S E 2d 358, 278 N C 210

Pa —Com v Coleman, 318 A 2d 716, 455 Pa 508

Destructive consequences

(2) Other cases

Utah—State v Jensen, supra, n 19

22. Alaska—Padie v State, 557 P 2d 1138

Mont —State v Palen, 178 P 2d 862, 119 Mont 600

N C —State v Gause, 400 S E.2d 463, 227 N C 26

Pa —Com v Malone, 47 A 2d 445, 354 Pa 180—Com v Burks, 34 Del Co 284—Com. v Dombrowski, 41 Erie 1—Com v Bressler, 32 Northumb L J 12

Wis —Zenou v State, 91 N W 2d 208, 4 Wis 2d 655—Brook v State, 123 N W 2d 535, 21 Wis 2d 32—Turner v State, 218 N W 2d 302, 64 Wis 2d 45

"Russian poker" defined

Pa —Com v Malone, 47 A 2d 445, 446, 354 Pa 180

Inherently dangerous act

Wis —Virgil v State, 267 N W 2d 852, 84 Wis 2d 166

23. Cal —People v Butts, 46 Cal Rptr 362, 236 C A 2d 817

Utah—State v Jensen, supra, n 19

It is immaterial as an element of second-degree murder that the person killed is not one of the persons threatened [23.5]

23.5. Mich —People v Vail, 212 N W 2d 268, 49 Mich App 578, revd on oth grds 227 N W 2d 535, 393 Mich 460

24. Cal —People v Nichols, 198 P 2d 538, 88 Cal App 2d 221—People v Ward, supra, n 13

Colo —Bishop v People, 439 P 2d 342, 165 Colo 423

Idaho— State v Birrueta, 570 P 2d 868, 98 Idaho 631

La —State v Payton, 361 So 2d 866—State v Turner, App 2 Cir, 440 So 2d 834

Mich —People v Stinson 227 N W 2d 303, 58 Mich App 243, 86 A L R 3d 559

Minn —State v Ware 126 N W 2d 429, 267 Minn 191

Mo —State v Chamineak, 343 S W 2d 153

Neb —State v Hizel 139 N W 2d 832, 179 Neb 661

N Y —People v May, 49 N E 2d 486, 290 N Y 369—People v Graham, 249 N Y S 2d 97, 20 A D 2d 949

N C —State v Williams, 71 S E 2d 138, 235 N C 752

Ohio—State v Robinson, supra, n 13—State v Powell, App, 142 N E 2d 244—In re Williams, 324 N E 2d 182, 41 Ohio App 2d 144

R I —State v Amado, 433 A 2d 233

Utah—State v Thompson, 170 P 2d 153, 110 Utah 113

Purposely

Ind —Dickinson v State, 55 N E 2d 325, 222 Ind 551—Baker v State, 195 N E 2d 91, 245 Ind 129

Neb —Vanderheiden v State, supra, n 13

(2) Other statements

Ohio—State v Butler, 227 N E 2d 627, 11 Ohio St 2d 23, 21 A L R 3d 102

Or —State v Davis, 462 P 2d 448, 1 Or App 285—State v Brown, 491 P 2d 1193, 8 Or App 72

Specific knowledge

N M —State v Beach, 699 P 2d 115, 102 N M 642 (clarifying State v Doe, 100 N M 481, 672 P 2d 654)

Not only intent but purpose as element

Ohio—State v Loudermill, 206 N E 2d 198, 2 Ohio St 2d 79

Purpose held important ingredient

Ohio—State v Nichols, 209 N E 2d 750, 3 Ohio App 2d 182

Intent to kill particular person necessary

Colo.—People By and Through Russel, v District Court For Fourth Judicial Dist, 521 P 2d 1254, 185 Colo 78

25. Colo —People v Davis, 530 P 2d 499, 187 Colo 117

Ind —Robinson v State, App, 309 N E 2d 833, reh den, mod on oth grds 311 N E 2d 461, affd, 317 N E 2d 850, 262 Ind 463

26. Neb —Woodard v State, 68 N W 2d 166, 159 Neb 603—State v Walle, 136 N W 2d 810, 182 Neb 642, cert den 89 S Ct 182, 393 U S 880, 21 L Ed 2d 153—State v Blackwell, 165 N W.2d 730, 184 Neb 121

27. U S —C.J.S cited in Beardslee v U S, C A S D, 387 F 2d 280, 291

Ala —Culbert v State, Cr, 290 So 2d 235, 52 Ala.App 167—Pardue v State, Cr, 292 So 2d 147, 52 Ala App 339

Ariz —State v Schantz, 403 P 2d 521, 98 Ariz 200, cert den 86 S Ct 628, 382 U S 1015, 15 L Ed 2d 530

Cal —People v Stansbury, 69 Cal Rptr 827, 263 C A 2d 499

Colo —Tate v People, 247 P 2d 665, 125 Colo 527

D C —Howard v U S, C A, 389 F 2d 287

Fla —Polk v State, App, 179 So 2d 236—Hines v State, App, 227 So 2d 334

Ind —Brown v State, 383 N E 2d 1029, 270 Ind 177

Mo —State v Howard, 177 S W 2d 616, 352 Mo 410—State v Archer, 328 S W 2d 661

N M —State v Aragon, App, 512 P 2d 974, 85 N M 401

N C —State v Street, 86 S E 2d 277, 241 N C 689—State v Foust, 128 S E 2d 889, 258 N C 453—State v Canhady, 192 S E 2d 677, 16 N C App 649

Or —State v Braley, 355 P 2d 467, 224 Or 1

Pa —Com v Brabham, 252 A 2d 378, 433 Pa 491

R I —State v Clark, 423 A 2d 1151

Vt —C.J.S cited in In re Dunham, 479 A 2d 144, 146, 144 Vt 444

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Colo —Romero v People, 460 P 2d 784, 170 Colo 234

N C —State v Suddreth, 52 S E 2d 924, 230 N C 239—State v Crisp, 94 S E 2d 402, 244 N C 407, 67 A L R 2d 236—State v Mangum, 96 S E 2d 39, 245 N C 323—State v Downey, 117 S E 2d 39, 253 N C 348—State v Kea, 124 S E 2d 174, 256 N C 492—State v Propst, 161 S E 2d 560, 274 N C 62—State v McCain, 170 S E 2d 531, 6 N C App 558—State v Duboise, 181 S E 2d 393, 279 N C 73

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D C —Austin v U S, C A, 382 F 2d 129, 127 U S App D C 180

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Cal —People v Smith, 108 Cal Rptr 698, 33 C A 3d 51

28. Ala —Allred v State, Cr, 313 So 2d 195, 55 Ala App 74, writ den 313 So 2d 203, cert den 96 S Ct 113, 423 U S 859, 46 L Ed 2d 86—Posey v State, Cr, 358 So 2d 516

Ariz —Moore v State, 174 P 2d 282, 65 Ariz 65

Colo —Washington v People, 405 P 2d 735, 158 Colo 115, cert den 86 S Ct 1217, 383 U S 953, 16 L Ed 2d 215

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29. U S —Beardslee v U S, C A S D, 387 F 2d 280

Ariz —State v Marvin, 606 P 2d 406, 124 Ariz 555

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Colo —People v Lankford, 524 P 2d 1382, 185 Colo 445

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"Design" construed

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30. U S —Beardslee v U S, C A S D, 387 F 2d 280—Government of Virgin Islands v Carmona, C A Virgin Islands, 422 F 2d 95

Ala —Cooper v State, Cr App, 364 So 2d 382, writ den, Sup, 364 So 2d 388

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32 Colo —People v Sneed 514 P 2d 776, 183 Colo 96

D C —Kitchen v U S, C A 205 F 2d 720, 92 U S App D C 382

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Minn —State v Ware, 126 N W 2d 429 267 Minn 191

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33 Okl —Dennis v State Cr, 561 P 2d 88

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34 Cal —People v Montgomery 45 Cal Rptr 475 235 C A 2d 582

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35. Mo —State v Chamineak, 343 S W 2d 153—State v Anderson 375 S W 2d 116—State v Bruton 383 S W 2d 525 State v Woodard App, 499 S W 2d 553 app after remand 521 S W 2d 498—State v Chambers 524 S W 2d 826—State v Meaney App 563 S W 2d 117

Premediation defined

Mo —State v Baber 297 S W 2d 439—State v Powell, App, 630 S W 2d 168

Differs from first degree murder only in length of time premediation existed

R I —State v Crough 152 A 2d 644, 89 R I 338

36. Ala —Carter v State Cr 298 So 2d 668, 53 Ala App 248

Mo —State v Foster, 197 S W 2d 313, 355 Mo 577—State v Baber 297 S W 2d 439—State v Strong 339 S W 2d 759—State v Anderson, 375 S W 2d 116—State v Bruton 383 S W 2d 525—State v Davis, 400 S W 2d 141, cert den 87 S Ct 142, 385 U S 872, 17 L Ed 2d 99—State v Booth App, 515 S W 2d 586—State v Guyton App 635 S W 2d 353

Deliberation key factor

Mo —State v Seuls, 515 S W 2d 481

37. Cal —People v Thomas, supra, n 5—People v Heslen, 153 P 2d 21, mod on oth grds 165 P 2d 250, 27 Cal 2d 520—People v Cartier, 5 Cal Rptr 573 353 P 2d 53 54 C 2d 300—People v Perrotta, 36 Cal Rptr 813 224 C A 2d 498

D C —U S v Edmonds D C 63 F Supp 968—Austin v U S C A, 382 F 2d 129 127 U S App D C 180

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N M —State v Smith 558 P 2d 46, 89 N M 777, revd on oth grds Smith v State, App, 558 P 2d 39, 89 N M 770

Okl —President v State Cr, 602 P 2d 222

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Tenn —Drye v State, 184 S W 2d 10, 181 Tenn 637—Howard v. State, Cr, 506 S W 2d 951

Wis —Brook v State, 123 N W 2d 535, 21 Wis 2d 32

38. W Va —State v Green, 206 S E 2d 923, 157 W Va 1031

§ 36. Third and Lesser Degrees

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Malice required

Pa —Com v Young 431 A 2d 230, 494 Pa 224—Com v Wanamaker 444 A 2d 1176 298 Pa Super 283

Use of weapon not element

Fla —Streeter v State App 3 Dist, 416 So 2d 1203

40. Minn —State v Johnson, 152 N W 2d 529, 277 Minn 368—State v Mytych, 194 N W 2d 276, 292 Minn 248

41 Minn —State v Johnson 152 N W 2d 529, 277 Minn 368

Wis —State v Carlson 93 N W 2d 354 5 Wis 2d 595

Causing death not necessarily third degree murder

Wis —Briggs v State, 251 N W 2d 12 76 Wis 2d 313

Aggravated assault

Minn —State v Martin 293 N W 2d 54

42 Fla —Grimes v State 64 So 2d 920

44 Minn —State v Hanson 176 N W 2d 607 286 Minn 317

Where, as stated infra § 38, statutes provide that a death in the course of abortion shall constitute manslaughter, such death cannot result in a conviction of third degree murder[45.5]

45.5 Fla —Weightnovel v State, 35 So 856 46 Fla 1—Johnson v State 91 So 2d 185

§ 37. In General

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49. Md —Chase v Jenifer, 150 A 2d 251 219 Md 564—State v Gibson, 242 A 2d 575, 4 Md App 236, affd 254 A 2d 691, 254 Md 399

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50. U S —U S v Barbeau, D C Alaska, 92 F Supp 196, 12 Alaska 725, affd, C A, 193 F 2d 945, 13 Alaska 551, cert den 72 S Ct 1064, 343 U S 968, 96 L Ed 1364

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Ariz —State v Quila, 502 P 2d 525, 108 Ariz 488

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Kan —State v Jensen, 417 P 2d 273, 197 Kan 427

Md —Faulcon v State, 126 A 2d 858, 211 Md 249—Rolfes v State, 268 A 2d 795, 10 Md App 204

Mass —Com v Beaulieu, 133 N E 2d 226, 333 Mass 640, cert der 76 S Ct 859, 351 U S 957, 100 L Ed 1480, cert den 77 S Ct 70, 352 U S 857, 1 L Ed 2d 61

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N C —State v Childress, supra, n 13—State v Street, supra, n 27—State v Horner, 103 S E 2d 694, 248 N C 342—State v Kea, 124 S E 2d 174, 256 N C 492

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(5) Additional definitions

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Neb —Application of Skinner, 135 N W 2d 134, 178 Neb 733

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State of mind

Neb —Wright v State, 100 N W 2d 51, 169 Neb 497

Where malice exists, etc.

Del —State v Winsett, Super, 205 A 2d 510, 8 Storey 111

Destruction of viable human life involved

Mich —Larkin v Cahalan 208 N W 2d 176 389 Mich 533

Malum prohibitum and malum in se not involved

Mich —People v Meyer, 208 N W 2d 230, 46 Mich App 357

52. U S —U S v Marshall, D C Mont , 470 F Supp 194

Colo —Baker v People, supra, n 51

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53. Ga —Johnson v State, 27 S E 2d 244, 70 Ga App 4

La —State v Harper supra n 52

Mass —Com v Hebert, 368 N E 2d 1204, 373 Mass 535

Mich —People v McKee 166 N W 2d 688, 15 Mich App 382

Definition of "legal cause"

Pa —Com v Root, 9 Chest 114, affd 156 A 2d 895 191 Pa Super 238, revd on oth grds 170 A 2d 310, 403 Pa 571, 82 A L R 2d 452

Time of commission of the crime of manslaughter is not a material ingredient of the offense [55]

55.1. U S —U S v Aloowsine, D C Alaska 17 F R D 211 15 Alaska 483

The place where the victim dies is not an element of the offense of manslaughter [55]

55.5. Ohio—State v Nunley, App , 273 N E 2d 146 27 Ohio App 2d 170

56. Ala —Garrett v State, 105 So 2d 541 268 Ala 299

Ga —Conley v State 247 S E 2d 562, 146 Ga App 739

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57. U S —State of Md v Chapman, supra, n 51

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Md —Chase v Jenifer 150 A 2d 251, 219 Md 564

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58. U S —Phegley v Greer, D C Ill , 497 F Supp 519 affd C A , 685 F 2d 435 affd 691 F 2d 306, cert den 103 S Ct 262, 459 U S 946 74 L Ed 2d 204

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Wyo —Dodge v State, 562 P 2d 303

Mental disease or defect not affecting criminal responsibility does not require reduction of murder to manslaughter

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59. Mass —Com v Hebert, 368 N E 2d 1204, 373 Mass 535

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Mo —State v Chamineak, 343 S W 2d 153

Ohio—McClain v All States Life Ins Co , supra n 49

60. La —State v Walker, 15 So 2d 874, 204 La 523

§ 38. Statutory Provisions

62. D C -U S v Pender, App , 309 A 2d 492—U S v Bradford App , 344 A 2d 208

Iowa—State v Shimon 182 N W 2d 113

Mich —People v Clark, 147 N W 2d 704, 5 Mich App 672

N H — State v Howland, 402 A 2d 188, 119 N H 413

A composite crime which includes the striking and the death of the victim

Cal —People v Rehman, 41 Cal Rptr 457, 396 P 2d 913, 62 C 2d 135, cert den 85 S Ct 326, 379 U S 930, 13 L Ed 2d 342

63 Ariz —State v Schantz, 403 P 2d 521, 98 Ariz 200, cert den 86 S Ct 628, 382 U S 1015, 15 L Ed 2d 530

Cal —People v Lett, 177 P 2d 47, 77 Cal App 2d 917 — People v Jackson, 20 Cal Rptr 592, 202 C A 2d 179

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Intent that killing of each human being constitute separate offense

Ariz — State v Miranda, 416 P 2d 444, 3 Ariz App 550

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64. D C —Walker v U S , App , 403 A 2d 1163

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U S —Cobb v Wainwright, C A Fla , 666 F 2d 966, cert den 102 S Ct 2906, 457 U S 1107, 73 L Ed 2d 1315

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65. Under extreme emotional distress

U S —Vasquez v Vaughn, D C Del , 454 F Supp 194

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67. N J —State v Robinson, 354 A 2d 374, 139 N J Super 475

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(2) Mo —State v Smart, 485 S W 2d 90

(5) Other matters

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70. Other amendments

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71. Ga —State v Foster 233 S E 2d 215, 141 Ga App 258, affd 236 S E 2d 644, 239 Ga 302

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Ind — Steele v State, 229 N E 2d 237, 249 Ind 81

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N H —State v Glidden, 441 A 2d 728, 122 N H 41

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74. Involuntary manslaughter statute held to abolish crime of negligent voluntary manslaughter

Ky —Lambert v Com , 377 S W 2d 76

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Statute defining reckless homicide and involuntary manslaughter not duplicative

Ill —People v McCollough, 313 N E 2d 462, 57 Ill 2d 440, app dism 95 S Ct 614, 419 U S 1043, 42 L Ed 2d 637

81. N Y —Gilpin v Gilpin, 94 N Y S 2d 706, 197 Misc 319

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Mich —Larkin v Cahalan, 208 N W 2d 176, 389 Mich 533

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No manslaughter of fetus

Cal—People v Carlson, 112 Cal Rptr 321, 37 C A 3d 349

82. Fla—Johnson v State, 91 So 2d 185

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Or—State v Elliott, 289 P 2d 1075, 206 Or 82—State v Dewey, 292 P 2d 799, 206 Or 496—State v Elliott, 383 P 2d 382, 234 Or 522

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89. Tex—Mosley v State, 196 S W 2d 822, 149 Tex Cr R 523—Williams v State, 210 S W 2d 155, 152 Tex Cr R 18

93. Tex—Lopez v State, 216 S W 2d 183, 152 Tex Cr R 562

94. Tex—Harris v State, 198 S W 2d 264, 150 Tex Cr R 38

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95. Tex—Johnson v State, 207 S W 2d 871, 151 Tex Cr R 313—Chapman v State, 303 S W 2d 789, 165 Tex Cr R 109

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3. Tex—Harris v State, 198 S W 2d 264, 150 Tex Cr R 38

§ 39. Status as Distinct Offense or as Degree of Murder

9. U S—Wilbur v Mullaney, C A Me, 473 F 2d 943, stating Maine law

Ariz—State v Schantz, 403 P 2d 521, 98 Ariz 200 cert den 86 S Ct 628 382 U S 1015, 15 L Ed 2d 530

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10. Kan—C.J.S. cited in State v Gregory 542 P 2d 1051, 1055, 218 Kan 180

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Lesser included offense of first-degree murder

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§ 40. Definition

11. U S—Prudential Ins Co of America v Harrison, D C Cal, 106 F Supp 419, stating California law—C.J.S cited in United States v Brown, 518 F 2d 821, 826, cert den 96 S Ct 225, 423 U S 917 46 L Ed 2d 146

Ga—Randolph v State, 43 S E 2d 101, 75 Ga App 253—Ridley v State, 60 S E 2d 249, 81 Ga App 737—Spradlin v State, 82 S E 2d 238, 90 Ga App 97—Starr v State 213 S E 2d 531, 134 Ga App 149

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12. Ariz—State v Dixon, 489 P 2d 225, 107 Ariz 415

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D C—U S v Alexander, C A, 471 F 2d 923, 152 U S App D C 371, cert den 93 S Ct 541, 409 U S 1044, 34 L Ed 2d 494

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Idaho—State v Atwood, App, 669 P 2d 204, 105 Idaho 315

Ill—People v Brown, 64 N E 2d 739, 392 Ill 519—People v French, 279 N E 2d 519, 3 Ill App 3d 884—People v Kendricks, 1 Dist, 459 N E 2d 1137, 77 Ill Dec 41, 121 Ill App 3d 442

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Mass—Com v Hinckley, 294 N E 2d 562, 1 Mass App 195—Com v Caine, 318 N E 2d 901, 366 Mass 366

Mo—State v Porter, 208 S W 2d 240, 357 Mo 405—State v Hunter, 444 S W 2d 392

N J—State v Bonano, 284 A 2d 345, 59 N J 515

N C—State v Wynn 180 S E 2d 135, 278 N C 513

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Pa—Com v Komatowski 32 A 2d 905 347 Pa 445—Com v Fetzner, 25 Erie Co 403—Com v Simpson 26 Erie Co 36—Com v Wucherer, 41 A 2d 574, 351 Pa 305—Com v Cargill, 55 A 2d 373 357 Pa 510—Com v Palermo, 81 A 2d 540, 368 Pa 28—Com v Donough, 103 A,2d 694, 377 Pa 46—Com v Conner, 282 A 2d 23, 445 Pa 36

R I—State v Winston, 252 A 2d 354, 105 R I 447

S C—State v Norris, 168 S E 2d 564, 253 S C 31—State v Gandy, 324 S E 2d 65, 283 S C 571

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Other definitions

(1) U S—Stout v Grain Dealers Mut Ins Co, C A N C, 307 F 2d 521

(6) U S—Wakaksan v U S C A N D, 367 F 2d 639, cert den 87 S Ct 1312, 386 U S 994, 18 L Ed 2d 341—Norris v State of S C, Greenville County, D C S C, 309 F Supp 1113

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Mich—People v Carter, 197 N W 2d 57, 387 Mich 397

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N C—State v Davis, 190 S E 2d 434, 15 N C App 395

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Pa—Com v Lucas, 72 Montg 596—Com v Moore, 157 A 2d 65, 398 Pa 198, 93 A L R 2d 616

S C—State v Gardner, 64 S E 2d 130, 219 S C 97

Tenn—Smith v State, 370 S W 2d 543, 212 Tenn 510

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Wyo—State v Helton, 276 P 2d 434, 73 Wyo 92

(7) Diminished capacity

Cal.—People v Stephanson, 66 Cal Rptr 155, 259 C A 2d 181—People v Waters, 71 Cal Rptr 863, 266 C A 2d 116—People v Small, 86 Cal Rptr 478, 7 C A 3d 347

Slightly less culpable than murder

Ky—Hamilton v Com, 560 S W 2d 539

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13. Ariz—State v Schantz, 403 P 2d 521, 98 Ariz 200, cert den 86 S Ct 628, 382 U S 1015, 15 L Ed 2d 530—State v Dixon, 489 P 2d 225, 107 Ariz 415

Cal—People v Valentine, 169 P 2d 1, 28 Cal 2d 121—People v Narron, 261 P 2d 769, 120 C A 2d 766—People v Moles, 89 Cal Rptr 226, 10 C A 3d 611

Ind—Green v State, 229 N E 2d 726, 249 Ind 86

14. Ga—Meadows v State, 53 S E 2d 391, 79 Ga App 227

§ 41. Elements and Nature of Offense

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Voluntary manslaughter is an intermediate crime lying some place between the excusable, justifiable or privileged killing of a human being and the unlawful taking of a life with malice [51]

15.1. Minn—State v Boyce, 170 N W 2d 104, 284 Minn 242

Wyo—State v Helton, supra, n 12

Intentional pointing or discharge of firearm

Alaska—Keith v State, 612 P 2d 977

Mich—People v Duggan, 320 N W 2d 241, 115 Mich App 269

§ 42. —— Sudden Passion Due to Adequate Provocation

Kan—C J S black letter summary quoted in State v Jones, 341 P 2d 1042, 1047, 185 Kan 235

17. U S—Beardslee v U S C A S D, 387 F 2d 280

Cal—People v Slater, 140 P 2d 846, 60 Cal App 2d 358—People v Danielly, 202 P 2d 18, 33 Cal 2d 362, cert den 69 S Ct 1162, 337 U S 919, 93 L Ed 1728

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Ga—Todd v State, 37 S E 2d 779, 200 Ga 582—Jarrard v State, 55 S E 2d 706, 206 Ga 112—Brock v State, 66 S E 2d 732, 208 Ga 318—Carter v State, 87 S E 2d 655 92 Ga App 68

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Ky—Sikes v Com, 200 S W 2d 956, 304 Ky 429—Ratliff v Com, 406 S W 2d 728

Me—State v Rollins, 295 A 2d 914—State v Lafferty, 309 A 2d 647

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N H —State v Nelson, 175 A 2d 814, 103 N H 478, cert den 82 S Ct 1153, 369 U S 879, 8 L Ed 2d 282 and 82 S Ct 1155 369 U S 881, 8 L Ed 2d 283

N C —State v McLawhorn, 155 S E 2d 198, 270 N C 622—State v Cooper, 159 S E 2d 305, 273 N C 51—State v Wynn, 180 S E 2d 135 278 N C 513—State v Haight, 310 S E 2d 795, 66 N C App 104—State v McConnaughey, 311 S E 2d 26, 66 N C App 92

Ohio—State v Laswell, 66 N E 2d 555 78 Ohio App 202

Pa —Com v Moore, 157 A 2d 65, 398 Pa 198, 93 A L R 2d 616—Com v Walters, 244 A 2d 757, 431 Pa 74—Com v Jennings, 274 A 2d 767, 442 Pa 18

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Tenn —Drye v State, 184 S W 2d 10 181 Tenn 637—Whitsett v State, 299 S W 2d 2, 201 Tenn 317—Capps v State, Cr , 478 S W 2d 905

Utah—State v Ross, 501 P 2d 632, 28 Utah2d 279

Va —Martin v Com 17 S E 2d 43, 184 Va 1009

W Va —State v Bowyer, 101 S E 2d 243, 143 W Va 302

Wis —State v Hoyt, 124 N W 2d 47 21 Wis 2d 310, reh 128 N W.2d 645, 21 Wis 2d 284

The term "sudden heat and passion", etc.

N Y —People v D'Andrea, 207 N Y S 2d 215, 26 Misc 2d 95

Use of dangerous weapon

Miss —Jones v State 58 So 2d 655

Result of provocation although not necessarily so

N Y —People v D'Andrea, 207 N Y S 2d 215, 26 Misc 2d 95

The test, etc.

(2) Other tests

Or —State v Jones, 405 P 2d 514, 241 Or 142

Pa —Com v Stasko, 370 A 2d 350, 471 Pa 373

S C —State v Norris 168 S E 2d 564, 253 S C 31

Reason for rule

Mass —Com v Jones 323 N E 2d 726 366 Mass 805

Extreme emotional stress not an element

Ohio—State v Muscatello, 378 N E 2d 738, 55 Ohio St 2d 201, 9 O O 3d 148, modifying State v Toth, 371 N E 2d 831, 52 Ohio St 2d 206

Statute valid

Ind —Wolfe v State, 426 N E 2d 647

Mitigating factor

U S —Lamb v Jernigan, C A Ga , 683 F 2d 1332, cert den 103 S Ct 1276, 460 U S 1024, 75 L Ed 2d 496

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18. Ariz —State v Quila, 502 P 2d 525, 108 Ariz 488

Cal —People v Thompson, 14 Cal Rptr 512 193 C A 2d 620

Ga —Jones v State, 30 S E 2d 284, 71 Ga App 56—Cotton v State, 39 S E 2d 530, 201 Ga 285

Ill —People v Lyons, 223 N E 2d 99, 36 Ill 2d 336

Ind —Ponos v State, 184 N E 2d 10, 243 Ind 411—Jones v State, 255 N E 2d 105, 253 Ind 456—Dickens v State, 295 N E 2d 613, 260 Ind 284

Me —State v Rollins, 295 A 2d 914

Pa —Com v Brown, 260 A 2d 742, 436 Pa 423

Defendant not subject to such passion as to reduce crime

N C —State v Johnson, 322 S E 2d 810 71 N C App 607, cert den 329 S E 2d 397 313 N C 511

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19. Cal —People v Perrotta, 36 Cal Rptr 813, 224 C A 2d 498

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Pa —Com v Donough, 103 A 2d 694, 377 Pa 46—Com v Galloway 485 A 2d 776, 336 Pa Super 225

Tenn —Whitsett v State, 299 S W 2d 2, 201 Tenn 317

Hot blood

Minn —State v Boyce, 170 N W 2d 104, 284 Minn 242

20. Cal —People v Borchers, 325 P 2d 97, 50 C 2d 321

21. Cal —People v Lopez, 23 Cal Rptr 532, 205 C A 2d 807

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22. Cal —People v Morse 76 Cal Rptr 391, 452 P 2d 607, 70 C 2d 711, cert den 90 S Ct 959, 397 U S 944, 25 L Ed 2d 124 app after remand 106 Cal Rptr 177, 505 P 2d 1017, 8 C 3d 811

Mich —People v Bourne, 188 N W 2d 573 385 Mich 170

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23. Ark —Powell v State 210 S W 2d 909, 213 Ark 442

Ga —Todd v State supra n 17—Lester v State, 42 S E 2d 141, 75 Ga App 42—Carter v State, supra n 17

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Or —State v Jones, 405 P 2d 514, 241 Or 142

25. Ill —People v Weeks, 230 N E 2d 12 86 Ill App 2d 480

Mo —State v Bruton, 383 S W 2d 525

26. Tenn —Whitsett v State, 299 S W 2d 2, 201 Tenn 317

Wis —State v Stortecky 77 N W 2d 721 273 Wis 362 —State v Hoyt, 128 N W 2d 645, 21 Wis 2d 284

27. Wis —State v Babich 45 N W 2d 660, 258 Wis 290, cert den 71 S Ct 1004, 341 U S 954, 95 L Ed 1375—Zebrowski v State, 185 N W 2d 545 50 Wis 2d 715

28. Cal —People v Taylor, 17 Cal Rptr 233, 197 C A 2d 372—People v Lopez, 23 Cal Rptr 532, 205 C A 2d 807

S C —State v Gardner, supra, n 12

29. Fla —Febre v State 30 So 2d 367, 158 Fla 853

31 Mich —People v Younger 153 N W 2d 493, 380 Mich 678

N Y —People v Lewis, 123 N Y S 2d 81, 282 App Div 267

33. Utah—C J S cited in State v Leggroan, 475 P 2d 57, 60, 25 Utah2d 32

41. N M —State v Lopez, 442 P 2d 594, 79 N M 282

N C —State v Jennings, 171 S E 2d 447, 276 N C 157, app after remand 184 S E 2d 254, 279 N C 604

Okl —Wood v State, Cr , 486 P 2d 750—C.J.S. cited in Morgan v State, 536 P 2d 952, 955

Pa —Com v Galloway, 485 A 2d 776, 336 Pa Super 225

Acts of passion distinguished from acts of self defense

Ga —Odom v State, 126 S E 2d 472, 106 Ga App 60

Manslaughter conviction unjustified

Fla —Hodge v State, App , 315 So 2d 507

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42. Okl —C J.S. cited in Morgan v State, 536 P 2d 952, 955

Pa —Com v Butcher, 304 A 2d 150, 451 Pa 359

43. Ill —People v Harris, 134 N E 2d 315, 8 Ill 2d 431—People v Davis, 226 N E 2d 688, 82 Ill App 2d 282—People v Lockett, 229 N E 2d 386, 85 Ill App 2d 410—People v White, 290 N E 2d 337, 8 Ill App 3d 574—People v Brown, 312 N E 2d 789, 19 Ill App 3d 757

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Fears of slayer held immaterial

Ga —Powell v State, 44 S E 2d 285, 75 Ga App 703

Statute constitutional

Pa —Com v Gonzales, 345 A 2d 691, 463 Pa 597

44. Okl —C.J.S cited in Thomas v State, 536 P 2d 1305, 1308

Tenn —Hunt v State, 303 S W 2d 740, 202 Tenn 227

45. Ga —Taylor v State, 142 S E 2d 239, 220 Ga 801

Miss —Bangren v State, supra, n 17

46. Involves two situations

Ill —People v Johnson, 203 N E 2d 283, 54 Ill App 2d 27

§ 43. —— Sudden Combat or Affray

47. Kan —C J S quoted in State v Coop 573 P 2d 1017, 1020, 223 Kan 302

Tenn —Hunt v State, 303 S W 2d 740, 202 Tenn 227

48. Cal —People v Dugger, App , 4 Cal Rptr 388

Ky —Ratliff v Com , 406 S W 2d 728

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50 U S C J S cited in United States v McRae, C A Tex , 593 F 2d 700, 705, reh den 592 F 2d 283 cert den 100 S Ct 128, 444 U S 862, 62 L Ed 2d 83

Ky —Burris v Com , 213 S W 2d 1014 308 Ky 145—Gibbons v Commonwealth, 68 S W 2d 753, 253 Ky 72

§ 44. —— Intent; Willfulness

52. U S —Wakaksan v U S , C A N D , 367 F 2d 639, cert den 87 S Ct 1312, 386 U S 994, 18 L Ed 2d 341

Ariz —State v Douglas 407 P 2d 117, 2 Ariz App 178

Ark —Robertson v State, 206 S W 2d 748, 212 Ark 301—Seabourn v State 365 S W 2d 133, 236 Ark 175

Cal —People v Gorshen, 336 P 2d 492, 51 Cal 2d 716—People v Welborn, 51 Cal Rptr 644, 242 C A 2d 668—People v Wynn, 65 Cal Rptr 210, 257 C A 2d 664

Iowa—State v Townsend, 238 N W 2d 351

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W Va —State v Barker, 38 S E 2d 346, 128 W Va 744—State v Foley, 47 S E 2d 40, 131 W Va 326—State v Reppert, 52 S E 2d 820, 132 W Va 675—State v Duvall, 160 S E 2d 155, 152 W Va 162—State v Blizzard, 166 S E 2d 560, 152 W Va 810

Intention to do great bodily harm, etc.

(2) Similar statements

Mass —Com v Hebert, 368 N E.2d 1204, 373 Mass 535

N J —State v Williams, 148 A 2d 22, 29 N J 27

Specific intent that death shall result is not an essential element

Pa —Com v Moore, 157 A 2d 65, 398 Pa 198, 93 A L R 2d 616

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53. Ky —Dugan v Com 333 S W 2d 755

Miss —Hancock v State, 47 So 2d 833, 209 Miss 523

Okl —Wood v State, Cr , 486 P 2d 750

54. Ky —Pennington v Com , 344 S W 2d 407

57. Either killing or act causing death intentional and not accidental

Utah—State v Gallegos, 396 P 2d 414, 16 Utah2d 102

59. Cal —People v Welborn, 51 Cal Rptr 644, 242 C A 2d 668

60. Ala —Anderson v State, 120 So 2d 397, 40 Ala App 509, cert den 120 So 2d 414, 270 Ala 575, cert gr 81 S Ct 165, 364 U S 877, 5 L Ed 2d 100, revd on oth grds 81 S Ct 1050, 366 U S 208, 6 L Ed 2d 233—Green v State, Cr 269 So 2d 179, 49 Ala App 163

Colo —People By and Through Russel v District Court For Fourth Judicial Dist , 521 P 2d 1254, 185 Colo 78

Ky —Frazier v Com , 243 S W 2d 914—Owens v Com , 487 S W 2d 897

Mass —Com v Godin, 371 N E 2d 438, 374 Mass 120, cert den 98 S Ct 2263, 436 U S 917, 56 L Ed 2d 758

Mo —State v Feasel, 344 S W 2d 41—State v Zerban, 412 S W 2d 397

61. N C —State v Walker, 238 S E 2d 666, 34 N C App 485, cert den 241 S E 2d 847, 294 N C 445

Does not necessarily depend on weapon used

Tenn —Wilson v State Cr , 455 S W 2d 172, 2 Tenn Cr App 468

62. Mich —People v Clark 147 N W 2d 704, 5 Mich App 672

N Y —People v Hernandez, 432 N Y S 2d 22 78 A D 2d 555

63. Cal —People v Ray, 120 Cal Rptr 377, 533 P 2d 1017 14 C 3d 20

64. Ala —Anderson v State, 120 So 2d 297, 40 Ala App 509 cert den 120 So 2d 414, 270 Ala 575, cert gr 81 S Ct 165 364 U S 877, 5 L Ed 2d 100, revd on oth grds 81 S Ct 1050, 366 U S 208, 6 L Ed 2d 233—Taylor v State 199 So 2d 694, 43 Ala App 678

Ill —People v Walljasper, 422 N E 2d 251, 52 Ill Dec 570, 97 Ill App 3d 81

Ky —Bentley v Com , 354 S W 2d 495

Mich —People v Couch, 211 N W 2d 250, 49 Mich App 69

However, a subsequent statute relating to degrees of involuntary manslaughter renders inapplicable cases equating negligent homicide with voluntary manslaughter, no matter how gross the negligence

Ky —Hemphill v Com , 379 S W 2d 223

65. Ky —Mullins v Com 269 S W 2d 713

Statute held valid

Minn —State v Hayes, 70 N W 2d 110, 244 Minn 296

Statute construed

Minn —State v Hayes, supra

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67. Taunting emotionally disturbed wife and suggesting means for committing suicide

Mass —Pemampieri v Com , 175 N E 2d 387, 343 Mass 9

Actual knowledge of danger

Ala —Taylor v State, 199 So 2d 694, 43 Ala App 678

68. Ark —C.J.S. cited in Johnson v State, 218 S W 2d 687, 688, 214 Ark 902

Ga —Jackson v State, 26 S E 2d 485 69 Ga App 707

N C —State v Wynn 180 S E 2d 135, 278 N C 513

S C —State v Gandy 324 S E 2d 65, 283 S C 471

§ 45. —— Absence of Malice

72. Ariz —State v Chalmers, 411 P 2d 448, 100 Ariz 70

Ark —Bly v State, 214 S W 2d 77, 213 Ark 859

D C —Day v U S , App , 390 A 2d 957

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Ind —Palmer v State, 425 N E 2d 640

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Mo —State v Davis, 400 S W 2d 141, cert den 87 S Ct 142, 385 U S 872, 17 L Ed 2d 99

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73. U S —Beardslee v U S , C A S D , 387 F 2d 280

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Utah—State v Gallegos, 396 P 2d 414, 16 Utah2d 102

W Va —State ex rel Combs v Boles, 151 S E 2d 115, 151 W Va 194

Malice absent mitigating circumstances present

Pa —Com v Rife, 312 A 2d 406, 454 Pa 506

Fear of accused negates malice

Pa —Com v Nau, 373 A 2d 449, 473 Pa 1

74. U S —U S v Alexander, C A , 471 F 2d 923, 152 U S App D C 371, cert den 93 S Ct 541, 409 U S 1044, 34 L Ed 2d 494

Ind —Jones v State, 255 N E 2d 105, 253 Ind 456

Miss —Bangren v State, supra, n 17

N J —State v Robinson, 354 A 2d 374, 139 N J Super 475

Pa —Com v O'Searo, 352 A 2d 30, 466 Pa 224

Passion alone does not negate malice

N C —State v Spicer, 273 S E 2d 521, 50 N C App 214, app dism , 279 S E 2d 356, 302 N C 401

Reduction of crime due to other forms of mental impairment

Cal —People v Conley, 49 Cal Rptr 815, 411 P 2d 911, 64 C 2d 310—People v Aubrey, 61 Cal Rptr 772, 253 C A 2d 912—People v Coyne, 69 Cal Rptr 736, 263 C A 2d 445—People v Mosher, 82 Cal Rptr 379, 461 P 2d 659, 1 C 3d 379—People v Small, 86 Cal Rptr 478, 7 C A 3d 347—People v Poddar, 111 Cal Rptr 910, 518 P 2d 342, 10 C 3d 750

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80. Circumstances excluding malice

(2) Other circumstances

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§ 46. —— Provocation in General

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84. Cal —People v Valentine, 169 P 2d 1, 28 Cal 2d 121—People v Haley, 44 Cal Rptr 346, 234 C A 2d 444

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Ind —Yarber v State, 179 N E 2d 882, 242 Ind 616

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Md —Whitehead v State, 262 A 2d 316, 9 Md App 7

Mich —People v Clark, 147 N W 2d 704, 5 Mich App 672

N M —Smith v State, 558 P 2d 39, 89 N M 770

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R I —State v Winston, 252 A 2d 354, 105 R I 447

Utah—State v Norman, 580 P 2d 237

Fear of danger as provocation to excite passion

Ga —Washington v State, 292 S E 2d 836, 249 Ga 728, app after remand 318 S E 2d 55, 253 Ga 173

85. Md —Lang v State, 250 A 2d 276, 6 Md App 128, cert den 90 S Ct 457, 396 U S 971, 24 L Ed 2d 438

Miss —Gaddis v State, 42 So 2d 724, 207 Miss 508

N M —State v Castro, App , 592 P 2d 185, 92 N M 585, cert den 593 P 2d 62, 92 N M 621

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Va —Martin v Com , 37 S E 2d 43, 184 Va 1009

Wash —State v Frederick, 579 P 2d 390, 20 Wash App 175, cert den 99 S Ct 1799, 440 U S 985, 60 L Ed 2d 247

Wis —State v Hoyt, 124 N W 2d 47, 21 Wis 2d 310, reh 128 N W 2d 645, 21 Wis 2d 284

86. S C —State v Norris, 168 S E 2d 564, 253 S C 31

Wis —Bosket v State, 143 N W 2d 553, 31 Wis 2d 586—Boisvonneault v State, 184 N W 2d 846, 50 Wis 2d 662

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87. D C —Hurt v U S , App , 337 A 2d 215

88. Alaska—Padie v State, 557 P 2d 1138

Ariz —State v Schantz, 403 P 2d 521, 98 Ariz 200, cert den 86 S Ct 628, 382 U S 1015, 15 L Ed 2d 530—State v Edgin, 520 P 2d 288, 110 Ariz 416

Cal —People v Bridgehouse, 303 P 2d 1018, 47 C 2d 406—People v Cartier, 5 Cal Rptr 573, 353 P 2d 53, 54 C 2d 300—People v Wickersham, 185 Cal Rptr 436, 650 P 2d 311, 32 C 3d 307

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Ill —People v Lopez, 235 N E 2d 652, 93 Ill App 2d 426—People v Rodriguez, 262 N E 2d 815, 129 Ill App 2d 1, cert den 91 S Ct 2240, 403 U S 921, 29 L Ed 2d 700—People v Brown, 266 N E.2d 131, 131 Ill App 2d 244—People v Wilson, 278 N E 2d 473, 3 Ill App 3d 481

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Ky —Tarrence v Com , 265 S W 2d 40, cert den 75 S Ct 220, first case, 348 U S 899, 99 L Ed 706

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Me —State v Rollins, 295 A 2d 914

Md —Whitehead v State, 262 A 2d 316, 9 Md App 7

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Mo —State v Ferguson, 182 S W 2d 38, 353 Mo 46—State v Whited, supra, n 17—State v Smith, 240 S W 2d 671—State v Williams, 323 S W 2d 811

N.J.—State v Madden, 294 A 2d 609, 61 N J 377

N C —State v Wynn, 180 S E 2d 135, 278 N C 513—State v Ward, 210 S E 2d 407, 286 N C 304, vac in part on oth grds 96 S Ct 3206, 428 U S 903, 49 L Ed 2d 1207

Ohio—State v Carter, 58 N E 2d 794, 75 Ohio App 545

Or —State v O'Berry, 503 P 2d 505, 11 Or App 552

Pa —Com v Culpeper, 252 A 2d 624, 434 Pa 15—Com v Barnosky, 258 A 2d 512, 436 Pa 59—Com v Brown, 260 A 2d 742, 436 Pa 423

S C —State v Gardner, supra, n 12

Tenn —Cooper v State, 356 S W 2d 405, 210 Tenn 63

Utah—State v Ross, 501 P 2d 632, 28 Utah2d 279

Wis —Ameen v State, 186 N W 2d 206, 51 Wis 2d 175

Provocation inadequate

Mich —People v Gjidoda, 364 N W 2d 698, 140 Mich App 294

Provocation held not to exist

U.S —Young v Wyrick, D C Mo, 451 F Supp 576, affd C A, 590 F 2d 340

Md —Tripp v State, 374 A 2d 384, 36 Md App 459

N J —State v Di Paolo, 168 A 2d 401, 34 N J 279, cert den 82 S Ct 130, 368 U S 880, 7 L Ed 2d 80

N C —State v McLawhorn, 165 S E 2d 198, 270 N C 622

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N M —State v Farris, 619 P 2d 541, 95 N M 96

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S C —State v Norris, 168 S E 2d 564, 253 S C 31

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N J —State v Lamb, 342 A 2d 513, 134 N J Super 575, affd 366 A 2d 981, 71 N J 545

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Lawful act cannot provide provocation

N H —State v Smith, 455 A 2d 1041, 123 N H 46

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89. Cal —People v Hudgins, 60 Cal Rptr 176, 252 C A 2d 174, cert den 88 S Ct 1073, 390 U S 965, 19 L Ed 2d 1167

Ill —People v Proper, 385 N E 2d 882, 24 Ill Dec 741 68 Ill App 3d 250

W Va —State v Morris, 95 S E 2d 401, 142 W Va 303

90. N J —State v King, 181 A 2d 158, 37 N J 285, 2 A L R 3d 1278

W Va —State v Starkey, 244 S E 2d 219, 161 W Va 517

91. Ga —Anderson v State, 26 S E 2d 755, 196 Ga 468

Md —Tripp v State, 3 A 2d 384, 36 Md App 459

Pa —Com v Plows, 20 Cambria 1—Com v Bulted, 279 A 2d 158, 443 Pa 422

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Ky —Tarrence v Com, supra, n 88

Me —C.J.S cited in State v Park, 193 A 2d 1, 4, 159 Me 328—State v Rollins, 295 A 2d 914

Md —Lang v State, 250 A 2d 276, 6 Md App 128, cert den 90 S Ct 457, 396 U S 971, 24 L Ed 2d 438

Mo —State v Smart, 328 S W 2d 569

N J —State v McAllister, 196 A 2d 786, 41 N J 342

N M —State v Farris, 619 P 2d 541, 95 N M 96

Pa —Com v Whitfield, 380 A 2d 362, 475 Pa 297

Tenn —Owen v State, 221 S W 2d 515, 188 Tenn 459—Hargrove v State, 281 S W 2d 692, 199 Tenn 25

Utah—State v Ross, 501 P 2d 632, 28 Utah2d 279

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Wis —State v Bond, 163 N W 2d 601, 41 Wis 2d 219

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Pa —Com v McCusker, 292 A 2d 286, 448 Pa 382

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Ill —People v Crews, 231 N E 2d 451, 38 Ill 2d 331, app after remand 244 N E 2d 593, 42 Ill 2d 60

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Ill —People v Crews, 231 N E 2d 451, 38 Ill 2d 331, app after remand 244 N E 2d 593, 42 Ill 2d 60

Special traits of particular defendant not considered

Ill —People v Pecora 246 N E 2d 865, 107 Ill App 2d 283, cert den 90 S Ct 1274, 397 U S 1028, 25 L Ed 2d 538

Kan —State v Guebara, 696 P 2d 381, 236 Kan 791

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Md —Whitehead v State, 262 A 2d 316, 9 Md App 7

Mass —Com v Bermudez, 348 N E 2d 802, 370 Mass 438, 93 A L R 3d 920

N J —State v King, 181 A 2d 158, 37 N J 285, 2 A L R 3d 1278

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97. Del —State v Winsett, Super, 205 A 2d 510, 8 Storey 111

Iowa—State v Holder, 20 N W 2d 909, 237 Iowa 72

98. Mo —State v Whited, supra, n 17

1. Ark —Powell v State, 210 S W 2d 909, 213 Ark 442—Smith v State, 223 S W 2d 1011, 216 Ark 1, cert den 70 S Ct 562, 339 U S 916, 94 L Ed 1341

Ill —People v Causey, 383 N E 2d 234, 22 Ill Dec 758, 66 Ill App 3d 12

Va —Huffman v Com, 39 S E 2d 291, 185 Va 524

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2. Cal —People v Walker, 172 P 2d 380, 76 Cal App 2d 10

Ill —People v Smith, 88 N E 2d 834, 404 Ill 350

Mich —People v Machin, 300 N W 2d 642, 101 Mich App 593

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5. Ill —People v Brown, 64 N E 2d 739, 392 Ill 519

Mo —State v Sanders, App, 556 S W 2d 75

7. Ill —People v Ureste, 288 N E.2d 45, 7 Ill.App 3d 545

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10. Or —State v Carson, 640 P 2d 586, 292 Or 451

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11. Ala —Easley v State, 20 So 2d 519, 246 Ala 359—Biggs v State, Cr App, 441 So 2d 989

Ariz —State v Doss, 568 P 2d 1054, 116 Ariz 156

D C —Nicholson v U S, App, 368 A 2d 561

Ga —Edmonds v State, 39 S E 2d 24, 201 Ga 108—Cotton v State, 39 S E 2d 530, 201 Ga 285—Cawley v State, 39 S E 2d 427, 74 Ga App 214—Jarrard v State, 55 S E 2d 706, 206 Ga 112—Brock v State, 66 S E 2d 732, 208 Ga 318—Vun Cannon v State, 68 S E 2d 586, 208 Ga 608—Brooks v State, 292 S E 2d 694, 249 Ga 583, app after remand 306 S E 2d 640, 251 Ga 390

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Me —C.J.S cited in State v Park, 193 A 2d 1, 4, 159 Me 328—State v Hilliker, 327 A 2d 860

Md —Lang v State, 250 A 2d 276, 6 Md App 128, cert den 90 S Ct 457, 396 U S 971, 24 L Ed 2d 438

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Neb —Wright v State, 100 N W 2d 51, 169 Neb 497

N M —State v Castro, App, 592 P 2d 185, 92 N M 585, cert den 593 P 2d 62, 92 N M 621

N C —State v Hightower, 36 S E 2d 649, 226 N C 62—C.J.S cited in State v Watson, 214 S E 2d 85, 89, 287 N C 147

Pa —Com v Lucks, 16* Northum Leg J 223—Com v Cisneros, 113 A 2d 293, 381 Pa 447—Com v Culpeper, 252 A 2d 624, 434 Pa 15

S C —State v Judge, 38 S E 2d 715, 208 S C 497

Va —Martin v Com, 37 S E 2d 43, 184 Va 1009—Smith v Com, 64 S E 2d 761, 192 Va 186

Provocation held inadequate

(3) Other instances

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Mass —Com v Greene, 362 N E 2d 910, 372 Mass 517

Mo —State v Mosley, 415 S W 2d 796

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(1) Ky —Tarrence v Com, 265 S W 2d 40, cert den 75 S Ct 220, first case, 348 U S 899, 99 L Ed 706

Rule not absolute

Ill —People v Curwick, 338 N E 2d 468, 33 Ill App 3d 757

Informational words may amount to "provocation"

N M —Sells v State, 653 P 2d 162, 98 N M 786, overruling State v Farris, 95 N M 96, 619 P 2d 541

12. Cal —People v Dixon, 13 Cal Rptr 277, 192 C A 2d 88

Ill —People v Miller, 421 N E 2d 406, 51 Ill Dec 898, 96 Ill App 3d 212

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13. Ga—Bird v State 31 S E 2d 835, 71 Ga App 643

14. Ga—York v State, 174 S E 2d 418, 226 Ga 281
Ill—People v Carbajal 184 N E 2d 824, 23 Ill Dec 917, 67 Ill App 3d 236
Ky—Delk v Com, 215 S W 2d 109, 308 Ky 579
Mich—C.J.S. cited in People v Gill, 204 N W 2d 699, 702 43 Mich App 598
N J—State v Bonano, 284 A 2d 145, 59 N J 515
Okl—Grindstaff v State, 165 P 2d 846, 82 Okl Cr 31

More than simple threat needed

U S—U S ex rel Peery v Sielaff, C A Ill, 615 F 2d 402, cert den 100 S Ct 2163, 446 U S 940, 64 L Ed 2d 794, reh den 101 S Ct 29, 448 U S 912 65 L Ed 2d 1174

15 N M—State v Lopez, 442 P 2d 594, 79 N M 282

N C—State v McConnaughey, 311 S F 2d 26, 66 N C App 92

16 Ga—Jones v State, 30 S E 2d 284, 71 Ga App 56

S C—State v Harvey, supra, n 12

Words connected to provocative conduct

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17 Ga—Pace v State, 173 S E 2d 464 121 Ga App 251

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Md—Lang v State, 250 A 2d 276, 6 Md App 128, cert den 90 S Ct 457 396 U S 971 24 L Ed 2d 438

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18 Ill—People v Thomas 374 N E 2d 743 15 Ill Dec 960, 58 Ill App 3d 402

19 Cal—People v Valentine, 169 P 2d 1 28 Cal 2d 121

Ill—People v Matthews, 314 N E 2d 15, 21 Ill App 3d 249

21 Pa—Com ex rel Marino v Myers, 214 A 2d 491 419 Pa 448

23 Tex—Eckert v State, 251 S W 804 94 Tex Cr R 395

32 C J p 949 note 12[a]

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Assault or attempt as essential

(2) Other instances

Ga—Brock v State, supra, n 11
N C—State v Williams, 252 S E 2d 739, 296 N C 693

Excessive force

N C—State v Owens, 299 S E 2d 258, 60 N C App 434

44. Ga—Carter v State, 87 S E 2d 655, 92 Ga App 68

Mass—Com v Young, 96 N E 2d 133, 326 Mass 597
Mo—State v Finn, supra, n 11—State v Davis, 365 S W 2d 577
Va—Moxley v Com, supra, n 43

46. D C—U S v Edmonds, D C, 63 F Supp 968
Ga—Anderson v State, 26 S E 2d 755, 196 Ga 468

Assault held inadequate provocation

(2) Other cases

Ark—Peters v State, 430 S W 2d 856 245 Ark 9
Pa—Com v Cisneros, supra, n 11

47. D C—U S v Edmonds, supra, n 46
Ill—C.J S cited in People v Matthews, 314 N E 2d 15 19 21 Ill App 3d 249
Minn—State v Fulford 187 N W 2d 270 290 Minn 236
S C—State v Norris, 168 S E 2d 564, 253 S C 31

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U S—Norris v State of S C, Greenville County, D C S C, 309 F Supp 1113
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48. Ga—Willingham v State 33 S E 2d 721, 72 Ga App 372

50. Mo—State v Taylor, 309 S W 2d 621—State v Jones 515 S W 2d 504, 89 A L R 3d 258

51. Ala—Easley v State, supra, n 11
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52 Ga—Pace v State 173 S E 2d 464, 121 Ga App 251
Ill—People v Wilson, 278 N E 2d 473, 3 Ill App 3d 481
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53. Md—Whitehead v State, 262 A 2d 316 9 Md App 7
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54 **Attempt to separate combatants**

(2) Other cases—Hilliard v State, 31 S E 2d 246, 71 Ga App 528

57. N C—State v Montague, 259 S E 2d 899, 298 N C 752

58 **Fear of injury less than felony**

Ga—Gresham v State, supra, n 51—McDaniel v State, 76 S E 2d 500, 209 Ga 827

What constitutes "other equivalent circumstances"

Ga—Jones v State, supra, n 16

60. Fla—Eiland v State, App, 112 So 2d 415
Ga—Cotton v State, supra, n 11—Whitaker v State, 67 S E 2d 396, 84 Ga App 781—McKibben v State, 77 S E 2d 86, 88 Ga App 466—Spradlin v State, 82 S E 2d 238, 90 Ga App 97
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66 D C—U S v Hardin, C A, 443 F 2d 735, 143 U S App D C 320
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67. U S—Gurrieri v Gunn, D C Cal, 404 F Supp 21
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Ga—Livingston v State, 82 S E 2d 893, 90 Ga App 334—Langford v State, 93 S E 2d 1 212 Ga 364

Facts not constituting mutual combat

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72. Ga—Langford v State, 93 S E 2d 1, 212 Ga 364

73. Ga—Joyner v State, supra, n 69—Weatherby v State, 97 S E 2d 698, 213 Ga 188—Gilbert v State 94 S E 2d 109, 94 Ga App 217

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84. Ill—People v Johnson, 280 N E 2d 764, 4 Ill App 3d 249

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85. Ill—People v Tillman, 187 N E 2d 731, 26 Ill 2d 552
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87. Tenn—Hunt v State, 303 S W 2d 740, 202 Tenn 227

89 **Sufficient as a matter of law**

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Slaying held not in passion

(3) Ill—People v Arnold, 309 N E 2d 89, 17 Ill App 3d 1043

91. Ga—Campbell v State, supra, n 90

Md—Tripp v State, 374 A 2d 384 36 Md App 459

N C—State v Ward 210 S E 2d 407, 286 N C 304, vac in part on oth grds 96 S Ct 3206, 428 U S 903 49 L Ed 2d 1207

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Wife's confession, etc.

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92. Ga—Vick v State, 156 S E 2d 125, 116 Ga App 25

93. Ill—People v Jenkins, 333 N E 2d 497, 30 Ill App 3d 1034

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§ 50. —— Arrests, Detentions, or Other Acts in Discharge of Public Duty

4. Mo—C.J.S. cited in State v Nolan, 192 S W 2d 1016, 1019, 354 Mo 980

N J—State v Madden, 294 A 2d 609, 61 N J 377

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5. N M—State v Manus, 597 P 2d 280, 93 N M 95

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12. Mich—People v Eisenberg, 249 N W 2d 313, 72 Mich App 106

Mo—C.J S. cited in State v Burnett, 188 S W 2d 51, 53, 354 Mo 45

A statute requiring any person not to forcibly resist arrest makes unlawful arrest insufficient grounds to reduce homicide to manslaughter [14.5]

14.5. Cal—People v Roman, 64 Cal Rptr 268, 256 C A 2d 656

Mo—State v Thomas, 625 S W 2d 115

21. Mo—C.J.S cited in State v Burnett, 188 S W 2d 51, 54, 354 Mo 45

§ 51. —— Trespass on, or Other Invasion of, Property Right

22. Ga—Stuckey v State, 100 S E 2d 189, 213 Ga 525

Ill—People v Crews, 231 N E 2d 451, 38 Ill 2d 331, app after remand 244 N E 2d 593, 42 Ill 2d 60

Miss—Atterberry v State, 261 So 2d 467

N C—State v Jones, 261 S E 2d 1, 299 N C 103

Wash—State v Sill, 289 P 2d 720, 47 Wash 2d 647

23. D C—Foreman v U S., C A., 268 F 2d 899, 106 U S App D C 24

Fla—Pearce v State, 18 So 2d 754, 154 Fla 656, cert den 65 S Ct 683, 324 U S 851, 89 L Ed 1410—Timmons v State, 57 So 2d 36

24. Okl—Hovis v State, 176 P 2d 833, 83 Okl Cr 299

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25. Ga—Gresham v State, 27 S E 2d 463, 70 Ga App 80

Miss—Bangren v State 17 So 2d 599, 196 Miss 887

Pa - Com v Keith, 46 Berks Co 137

§ 52. —— Provocation Must Be Cause of Passion

28. Md—Davis v State, 102 A 2d 816, 204 Md 44—Whitehead v State, 262 A 2d 316, 9 Md App 7

Miss—Gaddis v State 42 So 2d 724, 207 Miss 508

N J—State v Wynn, 121 A 2d 534, 21 N J 264

N M—State v Melendez, App, 643 P 2d 609, 97 N M 740, revd on oth grds 643 P 2d 607, 97 N M 738

Wis—Zebrowski v State, 185 N W 2d 545, 50 Wis 2d 715

30. U S—Young v Wyrick, D C Mo., 451 F Supp 576, affd C A., 590 F 2d 340

§ 53. —— By Whom Provocation Must be Given

37. Ill—People v Wax, 220 N E 2d 600, 75 Ill App 2d 163, cert den 87 S Ct 2051, 387 U S 930, 18 L Ed 2d 991

Iowa—C.J S. quoted in State v Fowler, 268 N W 2d 220, 224, cert den 99 S Ct 842, 439 U S 1072, 59 L Ed 2d 37

Md—Tripp v State, 374 A 2d 384, 36 Md App 459

N M—C.J.S cited in State v Manus, 597 P 2d 280, 284, 93 N M 95

Wyo—C.J.S. cited in Krucheck v State, 671 P 2d 1222, 1232, app after remand 702 P 2d 1267

§ 54. —— Cooling Time

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41. Ala—Warren v State, 41 So 2d 201, 34 Ala App 447—Palmore v State 43 So 2d 399, 251 Ala 183—Farr v State, Cr, 304 So 2d 898, 54 Ala App 80

Alaska—LaLonde v State, 614 P 2d 808

Cal—People v Cooley, 27 Cal Rptr 543 211 C A 2d 173—People v Wickersham, 185 Cal Rptr 436, 650 P 2d 311, 32 C 3d 307

Ga—Linder v State, 208 S E 2d 630, 132 Ga App 624

Ill—People v Tanthorey, 89 N E 2d 403, 404 Ill 520—People v Wilson, 278 N E 2d 473, 3 Ill App 3d 481

Ind—Warren v State, 188 N E 2d 108, 243 Ind 508

Md—Ware v State, 237 A 2d 526, 3 Md App 62

Mass—Com v Coleman, 322 N E 2d 407, 366 Mass 705—Com v Stokes, 374 N E 2d 87, 374 Mass 583

Mich—People v Younger, 158 N W 2d 493, 380 Mich 678

Miss—Denham v State, 67 So 2d 445, 218 Miss 423

Mo—State v Parker, 214 S W 2d 25, 358 Mo 262—C.J S cited in State v Burgess, 387 S W 2d 566, 569—State v Mitchell, 408 S W 2d 39

Nev—Allen v State, 647 P 2d 389, 98 Nev 354

N M—State v Castro, App, 592 P 2d 185, 92 N M 585, cert den 593 P 2d 62, 92 N M 621

Pa—Com v Dews, 239 A 2d 382, 429 Pa 555—Com v Swaney, 284 A 2d 732, 445 Pa 244

Tex—Eckert v State, 251 S W 804, 94 Tex Cr 395

Cooling time insufficient

Ga—Davis v State, 232 S E 2d 164, 140 Ga App 890

Ill—People v Walker, 204 N E 2d 594, 55 Ill App 2d 292—People v Stowers, 273 N E 2d 493, 133 Ill App 2d 627

W Va—State v Morris, 95 S E 2d 401, 142 W Va 303

42. Mo—C.J.S cited in State v Robinson, 185 S W 2d 636, 639, 353 Mo 934

43. Cal—People v Taylor, 17 Cal Rptr 233, 197 C A 2d 372

Ga—Hamby v State, 32 S E 2d 546 71 Ga App 817

Ill—People v Smith, 88 N E 2d 834, 404 Ill 350

Ohio—State v Robinson, 118 N E 2d 517, 161 Ohio St 213

45. Ohio—State v Robinson, supra, n 43

Pa—Com v Weller, 45 Berks Co 253

47. Colo—Ferrin v People, 433 P 2d 108, 164 Colo 130—English v People, 497 P 2d 694, 178 Colo 325

48. Ga—Hamby v State, supra, n 43

Ill—People v Washington, 187 N E 2d 739, 27 Ill 2d 104

Mo—State v Robinson, 185 S W 2d 636, 353 Mo 934

Nev—Allen v State, 647 P 2d 389, 98 Nev 354

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50. Va—Potter v Com 283 S E 2d 448, 222 Va 606

52. Colo—People v Cornelison, 616 P 2d 173, 44 Colo App 283

53 Ala—Byrd v State, 57 So 2d 388, 257 Ala 100

§ 55. Definition

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Ariz—State v Dixon, 489 P 2d 225, 107 Ariz 415

Ark—Comer v State, 204 S W 2d 875, 212 Ark 66—Hearn v State, 205 S W 2d 477, 212 Ark 360

Cal—People v Montecino, 152 P 2d 5, 66 Cal App 2d 85

Colo—Sawyer v People, 478 P 2d 672, 173 Colo 351

Del—Hallowell v State, 298 A 2d 330, cert den 93 S Ct 1940, 411 U S 951, 36 L Ed 2d 413—Howard v State, 303 A 2d 653

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State, 78 S E 2d 357, 88 Ga App 894—Bond v State, 122 S E 2d 310, 104 Ga App 627

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Iowa—State v Boston, 11 N W 2d 407, 233 Iowa 1249

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Pa—Com v LaPorta 272 A 2d 516, 218 Pa Super 1

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(2) Or—C.J.S cited in State v Nodine, 259 P 2d 1056, 1060 198 Or 679

(3) Martin v State, 174 S W 2d 242, 206 Ark 151

(5) Ohio—Wadsworth v Siek, 254 N E 2d 738, 23 Ohio Misc 112

(6) U S—Stout v Grain Dealers Mut Ins Co, C A N C, 307 F 2d 521—U S ex rel Powell v Com of Pa, D C Pa, 294 F Supp 849, app dism, C A, 425 F 2d 267

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W Va—State v Bail, 88 S E 2d 634, 140 W Va 680—State v Lough, 105 S E 2d 538, 143 W Va 838

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(1) Cal—People v Tophia 334 P 2d 133, 167 C A 2d 39

(2) Ind—Green v State, 229 N E 2d 726, 249 Ind 86

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(2) Other statements

Ariz—State v Foggy 420 P 2d 934, 101 Ariz 159, cert den 87 S Ct 1386, 386 U S 1025, 18 L Ed 2d 468, reh den 87 S Ct 2060, 387 U S 938, 18 L Ed 2d 1008

Reckless homicide distinguished

Ill—People v Garman, 103 N E 2d 636, 411 Ill 279

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Colo—Eckhardt v People, 247 P 2d 673, 126 Colo 18

Ga—Washington v State, 190 S E 2d 821, 126 Ga App 396

Pa—Com v Comber 97 A 2d 343, 374 Pa 570, 37 A L R 2d 1058

Statute valid

S C—Strickland v State 274 S E 2d 430, 276 S C 17

Wyo—State v Wilson 301 P 2d 1056, 76 Wyo 297

Direct causal relationship between conduct and death required

Pa—Com v Root, 170 A 2d 310, 403 Pa 571, 82 A L R 2d 452—Com v Hartle, 188 A 2d 798, 200 Pa Super 318

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Idaho—State v Atwood, App, 669 P 2d 204, 105 Idaho 315

Pa—Com v Smoker, 59 Lanc Rev 93, affd 203 A 2d 358, 204 Pa Super 265

Common-law offense

Colo—Capra v Ballarby, 405 P 2d 205, 158 Colo 91

Conduct which tends to destroy life of human being not within statute

Colo—Edwards v People, 418 P 2d 174, 160 Colo 395

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U S—U S v Pardee, C A Md, 368 F 2d 368

Ky—Vinson v Com, 412 S W 2d 565

Aggravated battery

Ill—People v Higgins 229 N E 2d 161, 86 Ill App 2d 202

Murder distinguished

Ill—People v Johnson, 317 N E 2d 240, 33 Ill App 3d 168—People v Mifflin, 4 Dist, 458 N E 2d 1343, 76 Ill Dec 543, 120 Ill App 3d 1072

"Second-degree" manslaughter

Ala—Baldwin v State, Cr, 352 So 2d 1156

Criminally negligent homicide distinguished

Tex—Moore v State, Cr App, 574 S W 2d 122

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55. Pa—Com v Amecca, 47 Lack Jur 177, revd on oth grds 50 A 2d 725, 160 Pa Super 257—Com v Patrick, 79 York 93—Com v LaPorta, 272 A 2d 516, 218 Pa Super 1

Lowest degree of culpability

Pa—In re Klein's Estate, 378 A 2d 1182, 474 Pa 416

The crime of attempted manslaughter based on manslaughter committed without the intent to cause the death of another, does not exist.[57.5]

57.5. Involuntary manslaughter

Conn—State v Almeda, 455 A 2d 1326, 189 Conn 303, app after remand 493 A 2d 890, 196 Conn 507

§ 56. Intent and Malice

Ky—C J S black letter summary quoted in Shanks v Com, 390 S W 2d 888, 889

58. U S—State of Md v Chapman, D C Md, 101 F Supp 335—Prudential Ins Co of America v Harrison, D C Cal, 106 F Supp 419, stating California Law—U S v Pardee, C A Md, 368 F 2d 368—Prudential Ins Co of America v Doane, D C Pa, 339 F Supp 1240

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W Va—State v Boggs, 42 S E 2d 1, 129 W Va 603—State v Comstock, 70 S E 2d 648, 137 W Va 152

Intent to do act causing death

(1) Ga—King v State, 80 S E 2d 493, 89 Ga App 626—Solomon v State 147 S E 2d 467, 113 Ga App 116

(3) Pointing loaded gun at another

N C—State v Stanley, 286 S E 2d 865, 56 N C App 109

Homicide held not involuntary

Ga—Rogers v State, 73 S E 2d 215, 87 Ga App 180

Plea to attempted manslaughter accepted

Ill—People ex rel Bassin v Isreal, 335 N E 2d 53, 31 Ill App 3d 744

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59. U S—U S v Pardee, C A Md, 368 F 2d 368

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61. Mass —Com v Bouvier, 55 N E 2d 913, 316 Mass 489

62. Ga —Ford v State, 44 S E 2d 263, 202 Ga 599—Owen v State, 44 S E 2d 266, 202 Ga 616

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63. Cal —People v Wright, 131 Cal Rptr 311, 60 C A 3d 6

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§ 57. Unlawful Acts

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Cal —People v Stuart, 302 P 2d 5, 47 C 2d 167, 55 A L R 2d 705

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Ga —Norrell v State, 157 S E 2d 784, 116 Ga App 479

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Ill —People v Weathers, 309 N E 2d 795, 18 Ill App 3d 338

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65. N Y —C.J.S. cited in People v Joseph, 172 N Y S 2d 463, 479, 11 Misc 2d 219

N C —State v Blankenship, 50 S E 2d 724, 229 N C 589

66. W Va —State v Craig, supra n 54

67. Del —Littlejohn v State, 219 A 2d 155, 9 Storey 291

Pa —Com v Feinberg, 253 A 2d 636, 433 Pa 558

Statutory crime not necessary

Neb — Redding v State, 85 N W 2d 647, 165 Neb 307

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Neb —Redding v State, 85 N W 2d 647, 165 Neb 307

68. Ga —Perry v State, supra, n 64

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70. Violation of police regulation

Pa —Com v Heard, 228 A 2d 924, 209 Pa Super 452

71. N C -State v Swinney, 57 S E 2d 647 231 N C 506

72. Ariz —State v Sorensen, 455 P 2d 981, 104 Ariz 503

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73. Cal —People v Stuart 302 P 2d 5, 47 C 2d 167 55 A L R 2d 705—People v Villalobos, 25 Cal Rptr 111, 208 C A 2d 321—In re M , 75 Cal Rptr 1, 450 P 2d 296, 70 C 2d 444

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Cal —People v Wong, 111 Cal Rptr 314, 35 C A 3d 812

Ill —People v Pettis, 320 N E 2d 194, 23 Ill App 3d 623

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Ill —People v Hairston, 350 N E 2d 497, 39 Ill App.3d 747

74. Mont —State v Darchuck, 156 P 2d 173, 117 Mont 15

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76. Mont —State v Strobel, 304 P 2d 606, 130 Mont 442

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(2) Other cases —State v Lawson, 36 S E 2d 26, 128 W Va 136

77. U S —U S v Pardee, C A Md , 368 F 2d 368

77. Cal —People v Wright, 131 Cal Rptr 311, 60 C A 3d 6

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78. Cal —People v Fuentes, 61 Cal Rptr 768, 253 C A 2d 969

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79. Pa —Com v Hine, 32 Northumb L J 99

W Va —State v Craig, supra, n 54

80. Utah—C.J.S. cited in State v Wilson, 216 P 2d 630, 635, 117 Utah 368

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N C —State v Cummings, 265 S E 2d 923, 46 N C App 680, affd 271 S E 2d 277, 301 N C 374

81. Cal — People v Wong, 111 Cal Rptr 314, 35 C A 3d 812

Unforeseen injury

Md — Rolfes v State, 268 A 2d 795, 10 Md App 204

Joined and concurred with other causes

N C —State v Cummings, 265 S E 2d 923, 46 N C App 680 affd 271 S E 2d 277, 301 N C 374

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Mont —State v Darchuck, 156 P 2d 173, 117 Mont 15

Okl —Stumblingbear v State, Cr , 364 P 2d 1115

Pa —Com ex rel Green v Court of Oyer and Terminer and Quarter Sessions, Erie County, 106 A 2d 896, 176 Pa Super 103—Com v Joines, 77 York 65

§ 58. —— Assault and Battery, and Breaches of the Peace

83. U S —Prudential Ins Co of America v Harrison, D C Cal 106 F Supp 419

Cal —People v McManis, 266 P 2d 134, 122 C A 2d 891—People v Jackson, 20 Cal Rptr 592, 202 C A 2d 179—People v Morgan, 79 Cal Rptr 911, 275 C A 2d 603

D C —Williams v U S , C A , 267 F 2d 625, 105 U S App D C 348

Fla —Phillips v State, App , 289 So 2d 447

Ga —Knight v State, 37 S E 2d 435, 73 Ga App 556

Ill —People v Ford, 206 N E 2d 105, 56 Ill App 2d 153—People v Johnson, 241 N E 2d 584, 100 Ill App 2d 13—People v Johnson, 280 N E 2d 764, 4 Ill App 3d 249

Ind —Compton v State, 235 N E 2d 181, 250 Ind 103

Kan —State v Roberson, 499 P 2d 1137

La —State v Humphrey, 412 So 2d 507, op dissented Sup , 431 So 2d 751, app after remand 445 So 2d 1155

Mass —Com v Gricus, 58 N E 2d 241, 317 Mass 403—Com v Sostilio, 89 N E 2d 510, 325 Mass 143

Mich —People v Myers, 186 N W 2d 381, 30 Mich App 409—People v Brown, 195 N W 2d 60, 37 Mich App 565

Miss —Anderson v State, 25 So 2d 474, 199 Miss 885

Mo —State v Black, 227 S W 2d 1006, 360 Mo 261—State v Kinard, 245 S W 2d 890—State v Harness,

280 S W 2d 11—State v Watson, 364 S W 2d 519—State v Barry, App, 501 S W 2d 515

Neb—C.J.S. cited in Fisher v State, 47 N W 2d 349, 355, 154 Neb 166—Application of Skinner, 135 N W 2d 134, 178 Neb 733

N M—State v Holden, App, 512 P 2d 970, 85 N M 397, cert den 511 P 2d 554, 85 N M 380

N C—State v Eason, 86 S E 2d 774, 242 N C 59

Pa—Com v Dorazio, 74 A 2d 125, 365 Pa 291—Wyrick v State, 102 S E 2d 53, 96 Ga App 847

W Va—State v Barker, supra, n 54

Not involuntary manslaughter

Ga—Jackson v State, 216 S E 2d 834, 234 Ga 549

Aggravated assault

Tex—Curtis v State, Cr App, 573 S W 2d 219

84. Mo—State v Guyton, App, 635 S W 2d 353

N C—C.J.S. cited in Goldberg v United Life & Acc Ins Co Concord, N H, 102 S E 2d 521, 523, 248 N C 86

Or—State v Pruett, 546 P 2d 475, 24 Or App 555

85. Ga—Mathis v State, 26 S E 2d 606, 196 Ga 288—Jones v State, 217 S E 2d 597, 234 Ga 648

Ill—People v Joyner, 278 N E 2d 756, 50 Ill 2d 302—People v Zertuche, 282 N E 2d 201, 5 Ill App 3d 303

Ky—C.J S cited in Sikes v Com, 200 S W 2d 956, 960, 304 Ky 429

N C—State v Rummage, 185 S E 2d 221, 280 N C 51, app after remand 193 S E 2d 475, 17 N C App 239

87. U S—Prudential Ins Co of America v Harrison, supra, n 83

Ga—Lester v State, 42 S E 2d 141 75 Ga App 42—Askins v State, 81 S E 2d 471, 210 Ga 532—McClendon v State, 199 S E 2d 904, 231 Ga 47

Ill—People v Brown, supra, n 59—People v Burks, 431 N E 2d 1085, 59 Ill Dec 328, 103 Ill App 3d 616

Mass—Com v Peters, 361 N E 2d 1277, 372 Mass 319

Okl—Freeman v State, Cr, 262 P 2d 713, 97 Okl Cr 275

93. S C—State v Linder, 278 S E 2d 335, 276 S C 304

94. N J—C.J.S. cited in State v Williams, 148 A 2d 22 30, 29 N J 27

95. Ala—Champion v State, supra, n 54

N J—State v Williams, 148 A 2d 22, 29 N J 27

§ 59. —— Other Unlawful Acts

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96. Cal—People v Penny, 285 P 2d 926, 44 C 2d 861—People v Marshall, 78 Cal Rptr 16, 273 C A 2d 423

D C—Walker v U S, App, 403 A 2d 1163

N J—State v Madden, 294 A 2d 609, 61 N J 377—State v Sotteriou, 334 A 2d 47, 132 N J Super 403

N Y—People v Goodman, 44 N Y S 2d 715, 182 Misc 585

S C—State v Brown, supra, n 54

Resisting arrest

La—State v Jenkins, App 4 Cir, 454 So 2d 282, writ gr in part, remd, 458 So 2d 109

Pointing of firearm must be intentional

Tex—Harris v State, 198 S W 2d 264, 150 Tex Cr R 38

Unnecessary abortion

Ill—People v Tilley, 104 N E 2d 499, 411 Ill 473, cert den 73 S.Ct 23, 344 U S 824, 97 L Ed 2d 641

Unlawful meddling with gas pipes

Ohio—State v Thrash, 113 N E 2d 675, 93 Ohio App 458

Firing into ground

Ill—People v Post, 233 N E 2d 565, 39 Ill 2d 101

Child neglect

Mich—People v Ogg, 182 N W 2d 570, 26 Mich App 372

Child abuse

Iowa—State v Stamper, 195 N W 2d 110

Armed robbery

Ill—People v Lewis, 346 N E 2d 377, 37 Ill App 3d 870

97. Cal—People v Piorkowski, 115 Cal Rptr 830, 41 C A 3d 324

Ga—Carrigan v State, 58 S E 2d 407, 206 Ga 707—Delegal v State, 90 S E 2d 32, 92 Ga App 744

Ill—People v Tarpley, 291 N E 2d 262, 8 Ill App 3d 960

Miss—Bass v State, 54 So 2d 259—Anderson v State, 57 So 2d 169, 213 Miss 439

Neb—Turpit v State, 48 N W 2d 83, 154 Neb 385—State v Archbold, 133 N W 2d 601, 178 Neb 433

N M—State v Gilliam, 288 P.2d 675 60 N M 129

N C—State v Hovis, supra, n 54—C.J.S. cited in State v Foust, 128 S E 2d 889, 894, 258 N C 453—State v Curtis, 173 S E 2d 613, 7 N C App 707

Okl—Johnson v State, Cr, 306 P 2d 963

Pa—Com v Simonton, 56 Pa Dist & Co 220, 59 York Leg Rec 189

S C—State v McLaughlin, 38 S E 2d 492, 208 S C 462

Contrary rule under statute

Ga—Norrell v State, 157 S E 2d 784, 116 Ga App 479

99. Conn—State v DiLorenzo, 83 A 2d 479, 138 Conn 281

1. Mo—State v Fitzgerald, 174 S W 2d 211—State v Harness, 280 S W 2d 11

N C—C.J.S. cited in State v Mitchner, 124 S E 2d 831, 834, 256 N C 620

2. Ga—Murray v State, 39 S E 2d 842, 201 Ga 201

The unlawful sale of a narcotic drug to a person, who injects it into his own body and dies as a result thereof, does not constitute manslaughter [45]

4,5. Heroin

N Y—People v Pinckney, 317 N Y S 2d 416, 65 Misc 2d 265, affd 328 N Y S 2d 550, 38 A D 2d 217, affd 297 N E 2d 523, 32 N Y 2d 749, 344 N Y S 2d 643

§ 60. —— Acts Merely Mala Prohibita

5. Cal—C.J.S. cited in People v Mitchell, 166 P 2d 10 12, 27 Cal 2d 678

Mont—C J S cited in State v Strobel, 304 P 2d 606, 614, 130 Mont 442

Pa—Com v Gochenaur, 341 A 2d 163, 234 Pa Super 588

Tenn—Witlock v State, 216 S W 2d 22, 187 Tenn 522

Wyo—C.J.S. cited in Bartlett v State, 569 P 2d 1235 1238

6. Ariz—State v Puryear, App, 590 P 2d 475, 121 Ariz 359

Ga—Perry v State, 50 S E 2d 709, 78 Ga App 273

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8. Cal—C.J.S. cited in People v Mitchell, 166 P 2d 10, 13, 27 Cal 2d 678

Driving while intoxicated

Wyo—Bartlett v State, 569 P 2d 1235

9. Ind—McKinstry v State, 338 N E 2d 636, 264 Ind 29

Me—State v Hamilton, 100 A 2d 234, 149 Me 218

Tenn.—Brown v State, 296 S W 2d 848, 201 Tenn 50

Wyo—Bartlett v State, 569 P 2d 1235

11. N C—State v McLean, 67 S E 2d 75, 234 N C 283

§ 62. Negligence

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Cal—People v Nelson, 8 Cal Rptr 288, 185 C A 2d 578

Colo—People v Hernandez, 614 P 2d 900, 44 Colo. App 161

Fla—DuPree v State, App, 310 So 2d 396

Ill—People v Johnson, 241 N E 2d 584, 100 Ill App 2d 13

La—State v Adams, 28 So 2d 269, 210 La 782

Ky—Bentley v Com, 354 S W 2d 495

Me—State v Shanahan, 404 A 2d 975, cert den 100 S Ct 1029, 444 U S 1079, 62 L Ed 2d 762

Mass—Com v Bouvier, 55 N E 2d 913, 316 Mass 489

Mich—People v McKee, 166 N W 2d 688, 15 Mich App 382

Mo—State v Baker, 277 S W 2d 627—C.J.S. cited in State v Elgin, 391 S W 2d 341 345—C.J.S. cited in State v Sutton, 454 S W 2d 481, 483

N M—State v Grubbs, App, 512 P 2d 693, 85 N M 365

N C—State v Phelps, 89 S E 2d 132, 242 N C 540—State v Gurley, 116 S E 2d 143, 253 N C 55—State v Roop, 122 S E 2d 363, 255 N C 607—State v Colson, 138 S E 2d 121, 262 N C 506—State v Church, 144 S E 2d 624, 265 N C 534—State v Curtis, 173 S E 2d 613 7 N C App 707—State v Grissom, 194 S E 2d 227, 17 N C App 374, cert den 195 S E 2d 691, 283 N C 258

Ohio—C.J S black letter summary quoted in State v Ross 176 N E 2d 746, 749

Pa—Com v Jacobs, 50 Luz L Reg 233

Tex—Palafox v State, Cr 484 S W 2d 739—Stiles v State, Cr, 520 S W 2d 894—Esparza v State, Cr, 520 S W 2d 891—Williams v State, Cr App, 630 S W 2d 640

Utah—State v Hallett, 619 P 2d 335

Wash—State v Ginsberg, 548 P 2d 329 15 Wash App 244, 85 A L R 3d 1065

W Va—State v Lawson, 36 S E 2d 26, 128 W Va 136

Wyo—State v Catellier, 179 P 2d 203, 63 Wyo 123

In absence of negligence, etc.

Mont—State v Strobel 304 P 2d 606 130 Mont 442

Test

Cal—People v Rodriguez 8 Cal Rptr 863, 186 C A 2d 433

Md—Mills v State, 282 A 2d 147 13 Md App 196

Intent not an element

La—State v Guillot, 277 So 2d 146

Minn—State v Reiland, 142 N W 2d 635, 274 Minn 121

N Y—People v Duncan, 372 N Y S 2d 879, 83 Misc 2d 608 affd 389 N Y S 2d 41, 55 A D 2d 690—People v Beckles, 448 N Y S 2d 398, 113 Misc 2d 185

Intentional shooting

Fla—Kimbrough v State, App, 356 So 2d 1294

Intent supplanted by negligence

(1) Tex—Giles v State, Cr App, 617 S W 2d 690

Reckless homicide

Ill—People v LaCombe, 432 N E 2d 672, 59 Ill Dec 886, 104 Ill App 3d 66

Ind—Salrin v State, App, 419 N E 2d 1351—Slusher v State, App, 437 N E 2d 97

Distinguished from criminal negligent homicide

N Y—People v Murphy, 451 N Y S 2d 838, 88 A D 2d 1000

Complicity and criminally negligent homicide inconsistent

Ala—Ex parte Howell, 431 So 2d 1328, on remand Cr App, 431 So 2d 1331

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15. Cal—People v Nelson, 8 Cal Rptr 288, 185 C A 2 J 578

Ga—Henson v Scoggins, 47 S E 2d 643, 203 Ga 540—Williams v State, 77 S E 2d 770, 88 Ga App 761

Me—State v Smith, 382 A 2d 40

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Or —State v Davis, 296 P 2d 240, 207 Or 525

Gravamen stated

U S —Barbeau v U S , C A Alaska, 193 F 2d 945, 13 Alaska 551, cert den 72 S Ct 1064, 343 U S 968, 96 L Ed 1364

Ky —Robinson v Com App , 569 S W 2d 183

Firing of firearm

Or —State v Standard, 375 P 2d 551, 232 Or 333

16. Cal —People v Villalobos, 25 Cal Rptr 111, 208 C A 2d 321

Ind —Rhode v State, 391 N E 2d 666, 181 Ind App 265

Ky —Fugate v Com , 445 S W 2d 675

Pa —Com v Fetterolf, 17 Northumb Leg J 42

Act fraught with danger

(2) Statute construed

Neb.—Delay v Brainard, 156 N W 2d 14, 182 Neb 509

Unjustified risk that reasonable person would perceive

Colo —People v Fink, 574 P 2d 81, 194 Colo 516, app after remand 579 P 2d 659, 41 Colo App 47

Self-defense claim

Ga —Crawford v State, 263 S E 2d 131, 245 Ga 89—Donaldson v State, 289 S E 2d 242, 249 Ga 186—Green v State, 290 S E 2d 466, 249 Ga 369—Washington v State 292 S E 2d 836, 249 Ga 728, app after remand 318 S E 2d 55, 253 Ga 173

17. Cal —C.J.S quoted in People v Rodriguez, 8 Cal Rptr 863, 868, 186 C A 2d 433

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Mass —Com v Bouvier, supra, n 14

Mo —State v Adams, 224 S W 2d 54, 359 Mo 845—State v Beach, 329 S W 2d 712

Pa —Com v Wittig, 49 Berks 112—Com v Robinette, 53 Berks 121—Com v Stesney, 34 Northumb L J 1

Va —Zirkle v Com , 55 S E 2d 24, 189 Va 862

Foreseeability required

N Y —People v Warner-Lambert Co , 414 N E 2d 660, 51 N Y 2d 295, 434 N Y S 2d 159, cert den 101 S Ct 1742, 450 U S 1031, 68 L Ed 2d 227

18. Me —State v Perfetto, 424 A 2d 1095

Md —Mills v State, 282 A 2d 147, 13 Md App 196

Va —Zirkle v Com , supra, n 17

19. U S —U S ex rel Feinberg v Rundle, C A Pa , 444 F 2d 402

Negligence of person who acts with accused as principal

Tex —Kirkland v State, 285 S W 2d 743, 162 Tex Cr R 424

20. Cal —People v Rodriguez, 8 Cal Rptr 863, 186 C A 2d 433—People v Wong, 111 Cal Rptr 314, 35 C A 3d 812

Md —State v Gibson, 242 A 2d 575, 4 Md App 236, affd 254 A 2d 691, 254 Md 399—Mills v State, 282 A 2d 147, 13 Md App 196

N Y —People v Tate, 382 N Y S 2d 941, 87 Misc 2d 6

N C —State v Phelps, 89 S E 2d 132, 242 N C 540—State v De Witt, 114 S E 2d 100, 252 N C 457—State v Roop, 122 S E 2d 363, 255 N C 607—State v Ellis, 212 S E 2d 909, 25 N C App 319—State v McConnaughey, 311 S E 2d 26, 66 N C App 92

Pa —Com v Leas, 48 Berks 161

Negligently creating risk of death

Alaska—Wren v State, 577 P 2d 235

21. Ariz —C.J.S. quoted in State v Morf, 295 P 2d 842, 844, 80 Ariz 220

Mont —State v Strobel, 304 P 2d 606, 130 Mont 442

N Y —People v Buffington, 304 N Y S 2d 746, 61 Misc 2d 429

Or —State v Wojahn, 282 P 2d 675, 204 Or 84

Criminal negligence

Alaska—DeSacia v State, 469 P 2d 369

Cal —People v Villalobos, 25 Cal Rptr 111, 208 C A 2d 121—Somers v Superior Court In and For Sacramento County, 108 Cal Rptr 630, 32 C A 3d 961—People v Morales, 122 Cal Rptr 157, 49 C A 3d 134

Colo —People v Watkins, 586 P 2d 43, 196 Colo 377

D C —Hawkins v U S , App , 395 A 2d 45

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Me —State v Ellis, 325 A 2d 772

N Y —People v Haney, 30 N Y 2d 328, 333 N Y S 2d 403, 284 N E 2d 564—People v Stanfield, 355 N Y S 2d 3, 44 A D 2d 780, affd 330 N E 2d 75, 36 N Y 2d 467, 369 N Y S 2d 118—People v Stanfield, 330 N E 2d 75, 36 N Y 2d 467, 369 N Y S 2d 118

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S C —State v Gandy, 324 S E 2d 65, 283 S C 571

Tex —Jackson v State, Cr , 348 S W 2d 685—Aliff v State, Cr App , 627 S W 2d 166

Wash —State v Smith, 640 P 2d 25, 31 Wash App 226

Culpable negligence, etc.

(2) Other statements

U S —Charlton v Wainwright, C A Fla , 588 F 2d 162

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Mo —State v Cheek, 413 S W 2d 231—State v Achter, 445 S W 2d 318

N C —State v Phelps, 89 S E 2d 132, 242 N C 540—State v McAdams, 275 S E 2d 500, 51 N C App 140

22. Alaska—DeSacia v State, 469 P 2d 369

Ariz —C.J.S quoted in State v Morf, 295 P 2d 842, 844, 80 Ariz 220

Cal —People v Penny, 285 P 2d 926

Colo —Trujillo v People, 292 P 2d 980, 133 Colo 186

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Me —State v Hamilton, supra, n 9—State v Jones, 126 A 2d 273, 152 Me 188

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Mont —State v Powell, 138 P 2d 949, 114 Mont 571—State v Allison, 199 P 2d 279, 122 Mont 122

Mo —State v Cutshall, 430 S W 2d 173

N J —State v Gooze, 81 A 2d 811, 14 N J Super 277—State v Williams, 148 A 2d 22, 29 N J 27

N Y —People v Joyce, 84 N Y S 2d 238, 192 Misc 107—People v Haney, 30 N Y 2d 328, 333 N Y S 2d 403, 284 N E 2d 564

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S C —State v Barnett, 63 S E 2d 57, 218 S C 415

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Utah—C J S cited in State v Wilson, 216 P 2d 630, 635, 117 Utah 368—State v Clark, 223 P 2d 184, 118 Utah 517

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Wash —State v Fateley, 566 P 2d 959, 18 Wash App 99

Wis —State v Stortecky, 77 N W 2d 721, 273 Wis 362

Simple negligence held insufficient

U S —State of Md v Chapman, D C Md , 101 F Supp 335

Ill —People v Hawn, 425 N E 2d 1024, 54 Ill Dec 807, 99 Ill App 3d 334

N H —State v Strescino, 215 A 2d 706, 106 N H 554

N M —State v Myers, App , 536 P 2d 280, 88 N M 16

S C —DeLee v Knight, 221 S E 2d 844, 266 S C 103, cert den 96 S Ct 2658, 426 U S 939, 49 L Ed 2d 392

Victim's voluntary participation

Or —State v Petersen, 526 P 2d 1008, 270 Or 166

Substantial departure from due care

Ohio—State v Lovejoy, 357 N E 2d 424, 48 Ohio Misc 20, 2 O O 3d 320

Policy considerations against imposing responsibility for death of participant in reckless conduct on co-participant does not apply where accused is not solely a participant in agreed upon reckless conduct, but shoots and kills victim.[22.5]

22.5. Or —State v Welch, 681 P 2d 163, 68 Or App 337, review den 683 P 2d 1372, 297 Or 458

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23. Wash —State v Sill, 289 P 2d 720, 47 Wash 2d 647—State v Collins, 348 P 2d 214, 55 Wash 2d 469—State v Brubaker, 385 P 2d 318, 62 Wash 2d 964—State v Williams, 484 P 2d 1167, 4 Wash App 908

24. Ind —Smith v State, App , 408 N E 2d 614

Deadly Weapon

(2) Other statements

Cal —People v Freudenberg, 263 P 2d 875, 121 Cal App 2d 564—People v Tophia, 334 P 2d 133, 167 C A 2d 39

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N C —State v Brooks, 132 S E 2d 354, 260 N C 186

25. U S —State of Md v Chapman, supra, n 22

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Colo —Daniels v People, 411 P 2d 316, 159 Colo 190—People v Shaw, 646 P 2d 375

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Me —State v Hamilton, supra, n 9—State v Jones, 126 A 2d 273, 152 Me 188—State v Ellis, 325 A 2d 772

Md —State v Gibson, 242 A 2d 575, 4 Md App 236, affd 254 A 2d 691, 254 Md 399—Mills v State, 282 A 2d 147, 13 Md App 196

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N C—State v Wooten, 46 S E 2d 868, 238 N C 628—State v Roundtree 106 S E 669, 181 N C 535—State v Neal, 103 S E 2d 722 248 N C 544

Pa—Com v Ameca, 47 Lack Jur 177, revd on oth grds 50 A 2d 725, 160 Pa Super 257—Com v Dunkelberger, 66 Dauph Co 210—Com v Jacobs, 50 Luz L Reg 233—Com v Hartle, 188 A 2d 798, 200 Pa Super 318—Com v Hicks, 201 A 2d 294, 203 Pa Super 307—Com v Farrell, 222 A 2d 437, 208 Pa Super 200—Com v Zeringo, 257 A 2d 692, 214 Pa Super 300—Com v Stock 345 A 2d 654 463 Pa 547

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W Va—State v Lawson supra, n 14

Wis—State v Wickstrom, 111 N W 2d 176, 14 Wis 2d 416

Wyo—C J S quoted in State v Catellier, 179 P 2d 203 227, 63 Wyo 123

"Wanton conduct"

Ga—Hardrick v State, 101 S E 2d 99, 96 Ga App 670

Kan—State v Choens, 580 P 2d 1298, 224 Kan 402

Ky—Cody v Com, 449 S W 2d 749

Requirement of knowledge

Cal—People v Rodriguez, 8 Cal Rptr 863 186 C A 2d 433

Mo—State v Mayabb 316 S W 2d 609—State v Duncan, 316 S W 2d 613

Specific finding of willful and wanton conduct not required

Ill—People v Van Bussum, 219 N E 2d 695, 72 Ill App 2d 428

Vehicular-homicide standard

Wyo—Bartlett v State 569 P 2d 1235

Statute construed

Iowa—State v Conner, 292 N W 2d 682

N H—State v Bird, 440 A 2d 441, 122 N H 10

Culpable mental state

Tex—Gonzales v State, App 5 Dist, 632 S W 2d 899, review ref

26. Va—Beck v Com, 216 S E 2d 8, 216 Va 1

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27. Ala—Edson v State, Cr, 301 So 2d 226, 53 Ala App 460

Cal—People v Wong 111 Cal Rptr 314, 35 C A 3d 812

La—State v Hull, 25 So 2d 908, 209 La 950

28. N C—State v Wooten, supra, n 25—State v De Witt 114 S E 2d 100 252 N C 457

Inadvertent violation

(2) Other statements

N C—State v Sealy, 117 S E 2d 793, 253 N C 802

30. Ga—Geele v State, supra, n 25

Ill—People v Bolden, 243 N E 2d 687, 103 Ill App 2d 377

Pa—Com v Hine, 32 Northumb L J 99—Com v Patrick, 79 York 93

The word "reckless" imports, etc.

Ala—Hanby v State, 101 So 2d 553, 39 Ala App 392, revd on oth grds 101 So 2d 562, 267 Ala 69

Ill—People v Shaffer, 364 N E 2d 109, 7 Ill Dec 122, 49 Ill App 3d 207

Ky—Cody v Com, 449 S W 2d 749

Selling canned heat containing methanol to customers known to be alcoholics

Pa—Com v Feinberg, 253 A 2d 636, 433 Pa 558

However, the statement that involuntary manslaughter includes death resulting from negligence where the negligence contains some element of rash or reckless conduct which approximates an unlawful act has been stated to be erroneous law because of the use of "approximates" [30.5]

30.5. Correct rule is that when recklessness of conduct causes another's death, it must amount to unlawfulness of conduct in order to sustain a charge of involuntary manslaughter

Pa—Com v Aurick, 19 A 2d 920 342 Pa 282

31 Cal—C J S cited in People v Rodgers, 210 P 2d 71, 72, 94 Cal App 2d 166

N Y—People v Dawson, 133 N Y S 2d 423, 206 Misc 297

33 Ark—Burton v State 495 S W 2d 841 254 Ark 673

34. Ill—People v Ryan, 138 N E 2d 516, 9 Ill 2d 467

N Y—People v Joseph, 172 N Y S 2d 463 11 Misc 2d 219

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35. Cal—People v Carmen, 228 P 2d 281, 36 Cal 2d 768—People v Tophia, 334 P 2d 133, 167 C A 2d 39—People v Bross, 49 Cal Rptr 402, 240 C A 2d 157

Ill—People v Mason, 209 N E 2d 863, 60 Ill App 2d 307

Ky—Mullins v Com, 269 S W 2d 713

La—State v Brown, 339 So 2d 6

Mass—Com v Boyd, 326 N E 2d 320 367 Mass 169

N C—State v Moore 166 S E 2d 652, 275 N C 198, app after remand 171 S E 2d 453, 276 N C 142—State v Curtis, 173 S E 2d 613, 7 N C App 707—State v Putnam, 211 S E 2d 493, 24 N C App 570—State v Newcomb, 216 S E 2d 730, 26 N C App 595, cert den 217 S E 2d 680, 288 N C 249

S C—State v White, 171 S E 2d 712, 253 S C 475, cert den 90 S Ct 482, 396 U S 987, 24 L Ed 2d 451

Tex—Jackson v State, Cr, 548 S W 2d 685

Wis—State v Stortecky, 77 N W 2d 721, 273 Wis 362

Hunter

Wash—State v Green, 229 P 2d 318, 38 Wash 2d 240, 23 A L R 2d 1397

Scuffling with an open knife

S C—State v Gorey, 111 S E 2d 560, 235 S C 301

Intoxicated user

Mont—State v Bier, 591 P 2d 1115, 181 Mont 27

Wis—Jones v State, 233 N W 2d 430, 70 Wis 2d 41

The unlawful sale of a narcotic drug to a person, who injects it into his own body and dies as a result thereof, does not constitute criminally negligent homicide [37.5]

37.5. U S—C.J.S. cited in United States v. Sheffield, 3 M J 1069, 1070, affd, CMA, 7 M.J 47

Heroin

N Y—People v Pinckney, 317 N Y S.2d 416, 65 Misc 2d 265, affd 328 N Y S 2d 550, 38 A D 2d 217, affd 297 N E 2d 523, 32 N Y 2d 749, 344 N Y S 2d 643

38. Specialized standards of care

N Y—People v Tate, 382 N Y S 2d 941, 87 Misc 2d 6

41. Md—Allen v State, 389 A 2d 909, 39 Md App 686, 8 A L R 4th 868

46. Fla—Gian-Cursio v State, App 180 So 2d 396, cert discharged, Sup, 196 So 2d 105, cert den 88 S Ct 36, 389 U S 819, 19 L Ed 2d 70

N J—State Bd of Medical Examiners v Weiner, 172 A 2d 661, 68 N J Super 468

Va—Banovitch v Com, 83 S E 2d 369, 196 Va 210

Wyo—C.J S. cited in State v Catellier, 179 P 2d 203, 220, 63 Wyo 123

§ 63. Omission to Perform Duty

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52. Mich—C.J.S. quoted in People v Ogg, 182 N W 2d 570, 575, 26 Mich App 372

Mont—State v Rivers, 320 P 2d 1004, 133 Mont 129

Neb—Delay v Brainard, 156 N W 2d 14, 182 Neb 509

Pa—Com v Smoker, 203 A 2d 358, 204 Pa Super 265

Not manslaughter at common law for failure to aid one in trouble

N C—State v Willoughby, 294 S E 2d 407, 58 N C App 746, review den 297 S E 2d 403, 307 N C 129

53 Ark—Flippo v State, 523 S W 2d 390, 258 Ark 233

Cal—C J S cited in People v Montecino, 152 P 2d 5, 13, 66 Cal App 2d 85—People v Chavez, 176 P 2d 92, 77 Cal App 2d 621

Md—Craig v State, 155 A 2d 684, 220 Md 590—Palmer v State, 164 A 2d 467, 223 Md 341

Mass—Com v Hall, 78 N E 2d 644, 322 Mass 523

Neb—Delay v Brainard, 156 N W 2d 14, 182 Neb 509

N C—State v Rorie, 114 S E 2d 233, 252 N C 579

Pa—Com v Patrick, 79 York 93

Va—Biddle v Com, 141 S E 2d 710, 206 Va 14

54. Mich—C J.S quoted at length in People v Ogg, App, 182 N W 2d 570, 575, 26 Mich App 372

55. Md—Craig v State, 155 A 2d 684, 220 Md 590

56 Mass—Com v Hall, supra, n 53

59. Ala—C.J S cited in Singleton v State, 35 So 2d 375, 380, 33 Ala App 536—Albright v State, Cr, 280 So 2d 186, 50 Ala App 480, cert den 280 So 2d 191, 291 Ala 771

Cal—People v Rodriguez, 8 Cal Rptr 863, 186 C A 2d 433

Ind—Eaglen v State, 231 N E 2d 147, 249 Ind 144

Mich—C J.S quoted in People v Ogg, 182 N W 2d 570, 575, 26 Mich App 372

Neb—Delay v Brainard, 156 N W 2d 14, 182 Neb 509—State v Crawford, 196 N W 2d 915, 188 Neb 378

Assault only technically involved

Pa—Com v Comber, 87 A 2d 90, 170 Pa Super 466, revd on oth grds 97 A 2d 343, 374 Pa 570, 37 A L R 2d 1058

Care as to newborn infants distinguished

Ala—Singleton v State, 35 So 2d 375, 33 Ala App 536

Wyo—State v Osmus, 276 P 2d 469, 73 Wyo 183

Failure of mother to halt beating by boyfriend

Ohio—State v Schultz, 457 N E 2d 336, 8 Ohio App 3d 352, 8 O B R 464

60. Cal—C.J.S cited in People v Montecino, supra, n 53

D C—Jones v U S, C A, 308 F 2d 307, 113 U S App D C 352

Mich—C.J.S. quoted in People v Ogg, 182 N W 2d 570, 575, 26 Mich App 372

61. Mass —Com v Hall, supra, n 53

62. Ark —Flippo v State, 523 S W 2d 390, 258 Ark 233

Cal —People v Villalobos, 25 Cal Rptr 111, 208 C A 2d 321

Mont —State v Mally 366 P 2d 868, 139 Mont 599—State v Hoffman 619 P 2d 507, 196 Mont 268

Neb —State v Crawford, 196 N W 2d 915, 188 Neb 378

Wash —State v Williams 484 P 2d 1167, 4 Wash App 908

Competent adult refusing medication see supra § 11

Failure to obtain treatment not shown

Mont —State v Decker, 485 P 2d 695, 157 Mont 361

63. Cal —People v Montecino, 152 P 2d 5, 66 Cal App 2d 85

64. Pa —Com v Barnhart, Super, 497 A 2d 616

65. **Landlord's failure to maintain common areas**

Ind —Slusher v State, App, 437 N E 2d 97

§ 64. In General

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68. **Negligent homicide**

Tex —DeMary v State, Cr, 423 S W 2d 331

§ 65. First Degree

Library References

Homicide ⇐77

71. Ala —Mount v State 24 So 2d 142, 32 Ala App 235—Smith v State, Cr, 304 So 2d 914, 54 Ala App 96

Minn —State v Merrill, 274 N W 2d 99

Ohio—Wadsworth v Sick, 254 N E 2d 738 23 Ohio Misc 112

Wash —State v Burley, 598 P 2d 428, 23 Wash App 881

Whether or not statute includes voluntary or involuntary manslaughter immaterial

Ohio—Patrick v Baldridge, 159 N E 2d 461, 107 Ohio App 331

Other definitions

Ala —Trenor v State, Cr, 354 So 2d 1180, cert den Ex parte Trenor, 354 So 2d 1185

Ohio—State v Callihan, 227 N E 2d 654, 11 Ohio App 2d 23—In re Juvenile, 303 N E 2d 316, 36 Ohio Misc 117

Okl —Wood v State Cr 486 P 2d 750

Malice is not essential, etc.

Ala —Wilkerson v State, Cr, 277 So 2d 423 50 Ala App 150, cert den 277 So 2d 427, 291 Ala 802

Second degree manslaughter distinguished

N Y —People v Usher, 336 N Y S 2d 935, 39 A D 2d 459

72. Ala —King v State, Cr, 262 So 2d 764, 48 Ala App 154, certiorari denied 262 So 2d 767, 288 Ala 744, cert den 93 S Ct 339, 409 U S 986, 34 L Ed 2d 252

Minn —State v Swanson, 240 N W 2d 822, 307 Minn 412

Or —State v Keys, 548 P 2d 205, 25 Or App 15

No intent in subconscious mind

N Y —People v Almond, 322 N Y S 2d 500, 37 A D 2d 571

Intent lacking

N Y —People v Aponte 369 N Y S 2d 342, 82 Misc 2d 283

Recklessness

Wash —State v Berge, 607 P 2d 1247 25 Wash App 413

73. Ala —Hall v State Cr, 272 So 2d 590, 49 Ala App 381

Conn —State v Spates 405 A 2d 656, 176 Conn 227, cert den 99 S Ct 1248 440 U S 922, 59 L Ed 2d 475

Minn —State v Dahlstrom, 150 N W 2d 53, 276 Minn 301—State v Johnson, 152 N W 2d 529, 277 Minn 368

74. Ala —Rainey v State, supra, n 73—Head v State, 44 So 2d 441, 35 Ala App 71—Bradley v State, 94 So 2d 225, 39 Ala App 70—Garrett v State, 105 So 2d 541, 268 Ala 299

Tex – DeMary v State, Cr, 423 S W 2d 331

Degrees of negligence

Minn —State v Hayes, 70 N W 2d 110, 244 Minn 296

Knowledge of substantial risk

Wash —State v Parr, 606 P 2d 263, 93 Wash 2d 95

75. Ala —Lowery v State, Cr, 317 So 2d 357, 55 Ala App 511, reversed 317 So 2d 360, 294 Ala 347, on remand 317 So 2d 365, 55 Ala App 514, certiorari denied 317 So 2d 372, 294 Ala 763, app after remand, App, 342 So 2d 797, writ den, Sup, 342 So 2d 802

Okl —Williams v State, Cr, 513 P 2d 335

76. Ala —Clayton v State, supra, n 72—Bradley v State, 94 So 2d 225, 39 Ala App 70

N Y —People v Waltenberg, 317 N Y S 2d 765, 40 A D 2d 858, affd 335 N E 2d 864, 36 N Y 2d 967, 373 N Y S 2d 562

Okl —Wingfield v State, 160 P 2d 945, 81 Okl Cr 146

Use of deadly weapon

(1) Ala —Williams v State 39 So 2d 37 251 Ala 397—McMillon v State 74 So 2d 728, 37 Ala App 690

(3) Other matters

Ala —Jordan v State, 122 So 2d 545, 40 Ala App 693—Lanier v State 179 So 2d 167 43 Ala App 38

N Y —People v Eaton 268 N Y S 2d 255, 25 A D 2d 692

S D —State v Brech 169 N W 2d 242, 84 S D 177

Specific content not necessary

Okl —Chiles v State Cr, 508 P 2d 1108

Under some statutes a killing by a wanton act is involuntary manslaughter in the first degree [76.5]

76.5 Wanton act defined

Ky —Lambert v Com, 377 S W 2d 76—Fugate v Com, 445 S W 2d 675

Extreme emotional disturbance may operate to reduce a conviction for murder in the second degree to manslaughter in the first degree where "mitigating circumstances" are shown [76.10]

76.10. N Y —People v Shelton, 385 N Y S 2d 708, 88 Misc 2d 136, affd 434 N Y S 2d 649, 78 A D 2d 821

Subjective test

N Y —People v Casassa, 404 N E 2d 1310, 49 N Y 2d 668, 427 N Y S 2d 769, cert den 101 S Ct 122, 449 U S 842, 66 L Ed 2d 50

Reasonable explanation for disturbance

Ky – Henley v Com, 621 S W 2d 906

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77. Ohio—State v McDaniel, 144 N E 2d 683, 103 Ohio App 163, app dism 142 N E 2d 654, 166 Ohio St 378

Assault and battery

N H —State v Le Noir, 92 A 2d 159, 97 N H 462

Fourth degree manslaughter distinguished

Kan —State v Jensen, 417 P 2d 273, 197 Kan 427

Malice aforethought required

Kan —State v Jensen, 417 P 2d 273, overr 237 P 2d 246, 171 Kan 703 197 Kan 427

N Y —People v Walker 396 N Y S 2d 121, 58 A D 2d 737

Offense must be one which would have been common-law murder when statute first appeared

Kan —State v Jensen, 417 P 2d 273, 197 Kan 427

Purpose of provision

Kan —State v Jensen, 417 P 2d 273, 197 Kan 427

Unlawful act must be proximate cause

Okl —Lime v State, Cr, 50, P 2d 710

82. N Y —People v Nelson, 128 N E 2d 391, 309 N Y 231—People v Monaco, 248 N Y S 2d 41, 14 N Y 2d 43, 197 N E 2d 532

Intention to kill unnecessary

Ohio—State v Booth, 185 N E 2d 466

Statute inapplicable

N Y —People v Nicoll, 158 N Y S 2d 279, 3 A D 2d 64

83. Ohio—State v Booth, 185 N E 2d 466

85. N Y —People v Vollmer, 87 N E 2d 291, 299 N Y 347—People v Lee, 91 N E 2d 870, 300 N Y 422, conf to 98 N Y S 2d 233, 277 App Div 833

"In a cruel and unusual manner" defined

S D —State v Lange, 152 N W 2d 635, 82 S D 666

86. N C —C.J.S. cited in State v Mitchner, 124 S E 2d 831, 834, 256 N C 620

87. Kan —State v Brown, 236 P 2d 59, 171 Kan 557

Other statutes have been considered by the courts [88.5]

88.5. Minn —State v Boyce, 170 N W 2d 104, 284 Minn 242

Manslaughter in first and second degree distinguished

N Y —People v Munoz, 202 N Y S 2d 743, 11 A D 2d 79 affd 210 N Y S 2d 533, 9 N Y 2d 638, 172 N E 2d 291

Ohio- State v Butler, 227 N E 2d 627, 11 Ohio St 2d 23, 21 A L R 3d 102

Tex —Palafox v State, Cr 484 S W 2d 739

§ 66. Second Degree

Library References

Homicide ⇐78

89 Ala –Allen v State, 7 So 2d 91, 30 Ala App 423—Finney v State 27 So 2d 46, 32 Ala App 324, cert den 27 So 2d 48, 248 Ala 251—Fulghum v State, 277 So 2d 886, 291 Ala 71—Ex parte Monahan 412 So 2d 290

Accidental killing

Ala —Collier v State Cr, 275 So 2d 364, 49 Ala App 685

90 Ala —McWilliams v State, 294 So 2d 454, 52 Ala App 487, cert den McWilliams v State, Cr, 294 So 2d 457, 292 Ala 731—Steward v State, Cr 314 So 2d 313, 55 Ala App 238, writ den 314 So 2d 317, 294 Ala 201

Minn —State v Zupetz, 322 N W 2d 730

N Y —People v Cruciani, 327 N E 2d 803, 36 N Y 2d 304, 367 N Y S 2d 758

Without intent to kill or inflict fatal injury

Ala —Garner v State, 41 So 2d 634, 34 Ala App 551

Minn —State v Swanson, 240 N W 2d 822, 307 Minn 412

91. Ala —Garner v State, supra, n 90—White v State, supra, n 90—Pitts v State, 122 So 2d 542, 40 Ala App 702—Touchstone v State, 155 So 2d 349, 42 Ala App 141—Cook v State, 189 So 2d 595, 43 Ala App 304

Tex —Cox v State, 227 S W 2d 556, 154 Tex Cr R 404

In commission of misdemeanor

Ala —Gill v State, supra, n 90

Statutes construed as describing or classifying different means of committing single offense

S D —State v Norwick, 109 N W 2d 14, 79 S D 127

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93. Ala—Wilson v State, 28 So 2d 646, 32 Ala App 591—Rutledge v State, supra, n 90—Jackson v State, 93 So 2d 804, 38 Ala App 522, cert den 93 So.2d 808, 265 Ala 690—Pitts v State, 122 So 2d 542, 40 Ala App 702—Cook v State, 189 So 2d 595, 43 Ala App 304

Grossly negligent or improper manner

Ala—Garner v State, supra, n 90—Gill v State, supra, n 90—White v State, supra, n 90—Touchstone v State, 155 So 2d 349, 42 Ala App 141

Minn—State v Spann, 182 N W 2d 873, 289 Minn 497

94. N Y—People v Cruciani, 327 N E 2d 803, 36 N Y 2d 304, 367 N Y S 2d 758

95. Pa—Com v Embody, 69 Montg Co 369

97. Kan—State v Diggs, 402 P 2d 300, 194 Kan 812

98. Okl—Miller v State, Cr, 523 P 2d 1118

"Trespass or other invasion of private right"

Minn—State v Pankratz, 57 N W 2d 635, 238 Minn 517

N Y—People v Taylor, 297 N Y S 2d 192, 31 A D 2d 852

Okl—Elix v State, 138 P 2d 139, 77 Okl Cr 45—Jackson v State, 179 P 2d 924, 84 Okl Cr 138—Deberry v State, 219 P 2d 253, 91 Okl Cr 399—Frey v State, 265 P 2d 502, 97 Okl Cr 410

S D—State v Painter, 17 N W 2d 13, 70 S D 277

Tex—Babin v State, 194 S W 2d 563, 149 Tex Cr R 339—Harris v State, 198 S W 2d 264, 150 Tex Cr R 38

What constitutes culpable negligence

(2) N Y—People v Joyce, supra, n 22—People v Dawson, 133 N Y S 2d 423, 206 Misc 297

(3) People v Wells, 66 N Y S 2d 161, 186 Misc 979—People v Dawson, 133 N Y S 2d 423, 266 Misc 297—In re Bogart, 259 N Y S 2d 351, 45 Misc 2d 1075

(6) Other cases

N Y—People v Chrisholtz, 285 N Y S 2d 231, 55 Misc 2d 309

(7) Second-degree manslaughter requires gross negligence and recklessness in the form of an actual conscious disregard of the risk created by the conduct

Minn—State v Beilke, 127 N W 2d 516, 267 Minn 526—State v Zupetz, 322 N W 2d 730—State v Frost, 342 N W 2d 317

Statute held valid

Minn—State v Cantrell, 18 N W 2d 681, 220 Minn 13

Reckless conduct

Ky—Smith v Com, 424 S W 2d 835

99. N Y—People v Walker, 396 N Y S 2d 121, 58 A D 2d 737

N D—State v Carmody, 253 N W 2d 415

S D—State v Brech, 169 N W 2d 242, 84 S D 177

Distinguished from criminal negligent homicide

N Y—People v Usher, 336 N Y S 2d 935, 39 A D 2d 459, affd 310 N E 2d 547, 34 N Y 2d 600, 354 N Y S 2d 952—People v Stanfield, 355 N Y S 2d 3, 44 A D 2d 780, affd, 330 N E 2d 75, 36 N Y 2d 467, 369 N Y S 2d 118—People v Stanfield, 330 N E 2d 75, 36 N Y 2d 467, 369 N Y S 2d 118—People v Murphy, 451 N Y S 2d 838 88 A D 2d 1000

What constitutes culpable negligence

(6) Minn—State v Zupetz, 322 N W 2d 730

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2. Statute inapplicable

Kan—State v Noble, 264 P 2d 479, 175 Kan 398

3. Minn—State v Cantrell, 18 N W 2d 681, 220 Minn 13

N Y—People v Nelson, 128 N E 2d 391, 309 N Y 231—People v Joseph, 159 N Y S 2d 125, 4 Misc 2d 763

Under some statutes a killing by a reckless act or conduct is involuntary manslaughter in the second degree [4.5]

3.5. Reckless act defined

Ky—Lambert v Com 377 S W 2d 76

Reckless and wanton acts distinguished

Ky—Lambert v Com, 377 S W 2d 76

4. Dead fetus

Wis—State v Timm, 12 N W 2d 670, 244 Wis 508

Inconsistent statutes

Kan—State v Brown, 236 P 2d 59, 171 Kan 557

Under statute a finding of guilt may be made although the jury might not be convinced that a substance was administered with intent to procure a miscarriage [4.5]

4.5. N Y—People v Munoz, 202 N Y S 2d 743, 11 A D 2d 79, affd 210 N Y S 2d 533, 9 N Y 2d 638, 172 N E 2d 291

§ 67. Third and Lesser Degrees

7. Neb—C.J S cited in State v Worley, 132 N W 2d 764, 767, 178 Neb 232

15. Kan—State v McNichols, 363 P 2d 467, 188 Kan 582

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19. Kan—State v Scott, 439 P 2d 78, 201 Kan 134

Death resulting from commission or attempt to commit crime not amounting to felony without malice

Kan—State v Jensen, 417 P 2d 273, 197 Kan 427

§ 68. Attempts

Library References

Homicide ⇐25

24. Ark—White v State, 585 S W 2d 952, 266 Ark 499

Fla—Fleming v State, 374 So 2d 954

Hawaii—State v Alo, 558 P 2d 1012, 57 Haw 418, cert den 97 S Ct 2193, 431 U S 922, 53 L Ed 2d 235

Nev—Wheby v Warden, Nevada State Prison, 598 P 2d 1152, 95 Nev 567

N Y—People v Lanzot, 413 N Y S 2d 399, 67 A D 2d 864, app dism 403 N E 2d 455, 49 N Y 2d 796, 426 N Y S 2d 732—People v Carr, 450 N Y S 2d 94, 87 A D 2d 969

Wash—State v Gay, 486 P 2d 341, 4 Wash App 834

Attempted capital murder

N H—State v McPhail, 362 A 2d 199 116 N H 440

Tex—Morrison v State, Cr App, 625 S W 2d 729

25. Nev—Septer v Warden, Nevada State Prison, 530 P 2d 1390 91 Nev 84

Attempted second-degree murder

U S—Stewart v Blackburn, C A La, 746 F 2d 262, cert den 105 S Ct 1401, 84 L Ed 2d 788

Attempted felony-murder

Fla—Amlotte v State, 456 So 2d 448

Attempted manslaughter

U S—Charlton v Wainwright, C A Fla, 588 F 2d 162

Fla—Taylor v State, App, 401 So 2d 812, approved 444 So 2d 931—Rodriguez v State, App 3 Dist, 443 So 2d 286—Taylor v State, 444 So 2d 931—Ashley v State, App 3 Dist, 445 So 2d 360

Ind—Anthony v State, 409 N E 2d 632, 274 Ind 206

La—State v Harper, 17 So 2d 260, 205 La 228—State v Elias, 99 So 2d 1, 234 La 1

Utah—State v Norman, 580 P 2d 237

Attempted voluntary manslaughter

Mich—People v Genes, 227 N W 2d 241 58 Mich App 108

Attempted involuntary manslaughter

Ind—Williams v State, 395 N E 2d 239, 271 Ind 656

26. Mich—People v Smith, 280 N W 2d 862, 89 Mich App 478, cert den 101 S Ct 3047, 452 U S 914, 69 L Ed 2d 417

Minn—State v Dahlstrom, 150 N W 2d 53, 276 Minn 301

Attempted manslaughter through abortion

Or—State v Elliott, 289 P 2d 1075, 206 Or 82

No attempt in reckless homicide

Ind—Rhode v State, 391 N E 2d 666, 181 Ind App 265—Vandeventer v State, App 1 Dist, 459 N E 2d 1221

Attempt to cause death of police officer

Tex—Franklin v State, App 14 Dist, 632 S W 2d 839

In some jurisdictions there is no offense of attempted manslaughter. [26.5]

26.5. Me—State v Howard, 405 A 2d 206

Minn—State v Dahlstrom, 150 N W 2d 53, 276 Minn 301

N Y—People v Brown, 249 N Y S 2d 922, 21 A D 2d 738—People v McDavis, 4 Dept, 469 N Y S 2d 508, 97 A D 2d 302

Wis—State v Carter, 170 N W 2d 681, 44 Wis 2d 151

Voluntary manslaughter

Ill—People v Weeks, 230 N E 2d 12, 86 Ill App 2d 480—People v Reagan, 457 N E 2d 1260, 75 Ill Dec 701, 99 Ill 2d 238

Involuntary manslaughter

Cal—People v Van Broussard, 142 Cal Rptr 664, 76 C A 3d 193

Mass—Com v Hebert, 368 N E 2d 1204, 373 Mass 535

Mich—People v Genes, 227 N W 2d 241, 58 Mich App 108

However, it has also been held that the crime of attempted manslaughter in the first degree does exist. [26.6]

26.6. N Y—People v Spencer, 476 N Y S 2d 735, 124 Misc 2d 89

This is also true of second-degree and third-degree murder [26.10] Also, in at least one jurisdiction, there is no offense of attempted first degree murder, and when a person is charged with attempted murder it is construed as attempted murder in the second degree [26.15]

26.10. Alaska—Huitt v State, App, 678 P 2d 415

Wis—State v Carter, 170 N W 2d 681, 44 Wis 2d 151

26.15. Ariz—State v Mandel, 278 P 2d 413, 78 Ariz 226—State v Lenahan, 471 P 2d 748, 12 Ariz App 446—State v Durgin, 517 P 2d 1246, 110 Ariz 250

27. Ala—Chaney v State, Cr App, 417 So 2d 625

Cal—People v Grant 233 P 2d 660, 105 C A 2d 347—People v Adami, 111 Cal Rptr 544, 36 C A 3d 452

Fla—Deal v State, App, 359 So 2d 43

Ill—People v DeSavieu, 303 N E 2d 782, 14 Ill App 3d 912—People v Myers, 404 N E 2d 1082, 39 Ill Dec 491, 83 Ill App 3d 1073, affd in part, revd in part on oth grds 426 N E 2d 535, 55 Ill Dec 389, 85 Ill 2d 281—People v Anderson, 439 N E 2d 65, 64 Ill Dec 136, 108 Ill App 3d 563—People v Jackson, 1 Dist, 458 N E 2d 59, 75 Ill Dec 891, 119 Ill App 3d 951

Ind—Norris v State, 419 N E 2d 129, 275 Ind 608—Armstrong v State, 429 N E 2d 647

Iowa—State v Alford, 151 N W 2d 573, 260 Iowa 939

La—C J.S. cited in State v Butler, 322 So 2d 189, 192—State in Interest of Hickerson, App 1 Cir, 411 So 2d 585, writ den, Sup, 413 So 2d 508, app after remand, App 1 Cir, 424 So 2d 1233

Minn—State v Dahlstrom, 150 N W 2d 53, 276 Minn 301

N M—State v Grayson, 172 P 2d 1019, 50 N M 147

N Y—People v Falu, 325 N Y S 2d 798, 37 A D 2d 1025

Or—State v Flygare, 525 P 2d 181, 18 Or App 292

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S D —State v Bittner 359 N W 2d 121

Tex —Flanagan v State Cr App 675 S W 2d 734 (overruling Baldwin v State 538 S W 2d 615, Garcia v State, 541 S W 2d 428 and Teal v State, 543 S W 2d 371)

Va —Hargrave v Com , 201 S E 2d 597, 214 Va 436—Epps v Com , 216 S E 2d 64, 216 Va 150

Wash —State v Gay, 486 P 2d 341, 4 Wash App 834

Wis —State v Schenk, 193 N W 2d 26, 53 Wis 2d 127

No offense as attempted reckless murder

Or —State v Smith, 534 P 2d 1180, 21 Or App 270

Not essential element

Ark —Swaite v State, 612 S W 2d 307, 272 Ark 128

Defense of renunciation

Ky —Tribbett v Com , 561 S W 2d 662

No premeditation in attempt second-degree murder

Fla —Littles v State, App , 384 So 2d 744

Physical injury not necessary

Me —State v Bridges, 413 A 2d 937

Heat of passion

Ill —People v Soto, 412 N E 2d 688, 45 Ill Dec 337, 89 Ill App 3d 995

No offense as attempted criminally negligent homicide

Colo —People v Hernandez, 614 P 2d 900, 44 Colo App 161

Use of weapon not essential element of attempted third-degree murder

Fla —Streeter v State, App 3 Dist , 416 So 2d 1203

Intent to accomplish great bodily harm insufficient

Ill —People v Harris, 377 N E 2d 28, 72 Ill 2d 16, 17 Ill Dec 838—People v Childs, 428 N E 2d 185, 56 Ill Dec 866, 101 Ill App 3d 374

La —State v Guin, App 3 Cir , 444 So 2d 625

Same intent for murder

Utah—State v Maestas, 652 P 2d 903

Intent to cause serious bodily injury sufficient

Tex —Garcia v State 541 S W 2d 428—Morano v State, App 14 Dist , 662 S W 2d 748, review ref

Absence of self defense not element

Ohio—State v Davis, 456 N E 2d 1256, 8 Ohio App 3d 205, 8 O B R 276

No offense if lawful justification

Ill —People v Reagan, 457 N E 2d 1260, 75 Ill Dec 701, 99 Ill 2d 238

Manslaughter

(1) Specific intent to kill required

La —State v Turner, App 2 Cir , 440 So 2d 834—State v Lee, App 5 Cir 467 So 2d 1341

(2) Requires intent to commit unlawful act

Fla —Taylor v State, 444 So 2d 931—Tillman v State 471 So 2d 32

Second-degree murder

La —State v Lee, App , 467 So 2d 1341

28. Ala —Chaney v State, Cr App , 417 So 2d 625

Alaska—Braham v State, 571 P 2d 631, cert den 98 S Ct 2246, 436 U S 910, 56 L Ed 2d 410

Cal —People v Parrish, 197 P 2d 804, 87 Cal App 2d 853—People v Van Buskirk, 249 P 2d 49, 113 C A 2d 789—People v Meriweather, 69 Cal Rptr 880, 263 C A 2d 559—People v Adami, 111 Cal Rptr 544, 36 C A 3d 452

Ill —People v Cross, 406 N E 2d 66, 40 Ill Dec 365, 84 Ill App 3d 868—People v Childs, 428 N E 2d 185, 56 Ill Dec. 866, 101 Ill App 3d 374

La —State v Roberts, 35 So 2d 216, 213 La 559—State v Huizar, 414 So 2d 741

Minn —State v Geshick, 168 N W 2d 331, 283 Minn 180

Or —State v Macomber, 524 P 2d 574, 18 Or App 163

Pa —Com v Clopton 289 A 2d 455, 447 Pa 1, 54 A L R 3d 601

Tex —Holman v State App 1 Dist , 680 S W 2d 894

Va —Hargrave v Com , 201 S E 2d 597, 214 Va 436—Epps v Com , 216 S E 2d 64, 216 Va 150

Wis —Randolph v State, 266 N W 2d 334, 83 Wis 2d 630

Felony murder rule inapplicable

Ill —People v Davis, 286 N E 2d 8 6 Ill App 3d 622

N Y —People v Hassin, 368 N Y S 2d 253, 48 A D 2d 705—People v William M T , 369 N Y S 2d 333, 82 Misc 2d 308

Substantial step

Ill —People v Athey, 356 N E 2d 1332, 2 Ill Dec. 45, 43 Ill App 3d 261

29. U S —Dlugash v People of State of N Y , D C N Y , 476 F Supp 921

Ill —People v DeSavieu, 303 N E 2d 782, 14 Ill App 3d 912—People v Richerson, 307 N E 2d 655, 17 Ill App 3d 130, affd in part, revd in part on oth grds , 401 N E 2d 1391, 36 Ill Dec 957, 56 Ill 2d 584

La —State v Love, 26 So 2d 156, 210 La 11

Ohio—State v Fox, 428 N E 2d 410, 68 Ohio St 2d 53 22 O O 3d 259

Pa —Com ex rel Robinson v Baldi, 106 A 2d 689, 175 Pa Super 550—Com v Duke, 57 Lanc Rev 161

Wash —State v Gay, 486 P 2d 341, 4 Wash App 834

Where punishment indeterminable

Ariz – State v Cox, 543 P 2d 449, 25 Ariz App 328

Attempt on dead person

U S —U S ex rel Rangel v Brierton, D C Ill , 437 F Supp 908

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30 U S —U S ex rel Rangel v Brierton, D C Ill , 437 F Supp 908

Del —Saienni v State 346 A 2d 152

Ga —Dean v State 233 S E 2d 789, 238 Ga 537

Ill —People v Lindsey, 391 N E 2d 382, 29 Ill Dec 119, 72 Ill App 3d 764—People v Anderson 439 N E 2d 65, 64 Ill Dec 136 108 Ill App 3d 563

Intent in fact, not intent in law, required

Va —Merritt v Com , 180 S E 395, 164 Va 653—Hargrave v Com , 201 S E 2d 597, 214 Va 436—Epps v Com , 216 S E 2d 64, 216 Va 150

31. Fla —Fleming v State, 374 So 2d 954

Ill —People v Payton, 276 N E 2d 775, 2 Ill App 3d 693—People v Berry, 277 N E 2d 328, 2 Ill App 3d 760—People v DeSavieu, 303 N E 2d 782, 14 Ill App 3d 912—People v Anderson, 439 N E 2d 65, 64 Ill Dec 136 108 Ill App 3d 563

Nev —Hearne v Sheriff Clark County, 547 P 2d 322, 92 Nev 174

Intent not inferred

(2) Mere use of deadly weapon not sufficient

Va —Hargrave v Com , 201 S E 2d 597, 214 Va 436

32. Cal —People v Neal, 218 P 2d 556, 97 Cal App 2d 668

34 Alaska—Braham v State, 571 P 2d 631, cert den 98 S Ct 2246, 436 U S 56 L Ed 2d 410

Ill —People v Taylor, 237 N E 2d 797, 95 Ill App 2d 130

Ind —Scott v State, 413 N E 2d 902, 274 Ind 687

Nev —Graves v Young, 420 P 2d 618, 82 Nev 433

Pa —Com v Clopton, 289 A 2d 455, 447 Pa 1, 54 A L R 3d 601—Com v Mapp, 335 A 2d 779, 232 Pa Super 435

Vital part of body

Nev —Graves v State, 439 P 2d 476, 84 Nev 262, cert den 89 S Ct 250, 393 U S 919, 21 L Ed 2d 206

Ill —People v DeSavieu, 303 N E 2d 782, 14 Ill App 3d 912

Showing of act eliminates necessity of showing intent to kill

Ill —People v Neal, 324 N E 2d 476, 26 Ill App 3d 22

Act insufficient

Ill —People v Trinkle, 369 N E 2d 888, 12 Ill Dec 181, 68 Ill 2d 198

No requirement of particular degree of injury

Wis —State v Dix, 273 N W 2d 250, 86 Wis 2d 474, cert den 100 S Ct 205, 444 U S 898, 62 L Ed 2d 133

36. Cal —People v Parrish, 197 P 2d 804, 87 Cal App 2d 853—People v Adami, 111 Cal Rptr 544, 36 C A 3d 452

Miss —Jackson v State, 254 So 2d 876

Nev —Johnson v Sheriff, Clark County, 532 P 2d 1037, 91 Nev 161

Pa —Com v Clopton, 289 A 2d 455, 447 Pa 1, 54 A L R 3d 601

37. Ind —State v Smith, App , 409 N E 2d 1199

38. N M —State v Grayson, supra, n 27

N Y —People v Dlugash, 380 N Y S 2d 315, 51 A D 2d 974, mod on oth grds 363 N E 2d 1155, 41 N Y 2d 725, 395 N Y S 2d 419, on remand 398 N Y S 2d 560, 59 A D 2d 745

39. Ariz —State v Mandel, 278 P 2d 413, 78 Ariz 226—State v Lenahan, 471 P 2d 748, 12 Ariz App 446

Wis —State v Damms, 100 N W 2d 592, 9 Wis 2d 183, 79 A L R 2d 1402

40. Ala —C J S cited in Free v State, 455 So 2d 137, 147

Nev —Graves v Young, 420 P 2d 618, 82 Nev 433

N M —C.J.S quoted in State v Grayson, 172 P 2d 1019, 1023, 50 N M 147

Attempt not necessarily an assault

Or —Sanchez v Cupp, 480 P 2d 714, 4 Or App 606

Not identical offenses

Cal —People v Provencher, 108 Cal Rptr 792, 33 C A 3d 546

Necessity for elements of assault with intent to murder

Mich —People v Cooper, 227 N W 2d 319, 58 Mich App 284, revd in part on oth grds 247 N W 2d 866, 398 Mich 450

§ 70. Solicitation

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47. Tenn —Gervin v State, 371 S W 2d 449, 212 Tenn 653

48. Cal —People v Rubin, 158 Cal Rptr 488, 96 C A 3d 968, cert den 101 S Ct 80, 449 U S 821, 66 L Ed 2d 24

Ind —Norton v State, 408 N E 2d 514, 273 Ind 635

Me —State v Foster, 379 A 2d 1219

Mich —People v Plyler, 304 N W 2d 859, 104 Mich App 437

N C —State v Keen 214 S E 2d 242, 25 N C App 567

Criminal solicitation established

Md —Meyer v State, 425 A 2d 664, 47 Md App 679, 24 A L R 4th 1313, cert den 102 S Ct 327, 454 U S 865, 70 L Ed 2d 166

Murder and solicitation distinguished

Tex —Brown v State, Cr , 561 S W 2d 484

Completion of offense

Ill —People v Paghuca, 1 Dist , 458 N E 2d 908, 76 Ill Dec 254, 119 Ill App 3d 906

§ 71. Threats

Library References

Homicide ⇐92.

51. N J —State v Gibbs, 48 A 2d 300, 134 N J Law 366—State v Drayton, 277 A 2d 398, 114 N J Super 490—State v Kaufman, 288 A 2d 581, 118 N J Super 472

Conditional threat

(1) Unjustified conditional threat is sufficient, being an unqualified threat

N J —State v Schultheis, 272 A 2d 544, 113 N J Super 11

Tex —McFain v State, 41 Tex 385—Spencer v State, 245 S W 2d 710, 156 Tex Cr R 628

(2) Justified conditional threat bars prosecution—Spencer v State, supra

52. Pa—Com v Chorney, 46 Del Co 222

Gist of crime

N J—State v Schultheis, 272 A 2d 544, 113 N J Super 11

54. US—US v Reid, D C La, 49 F Supp 313, affd, C C A, 136 F 2d 476, cert den 64 S Ct 87, 320 U S 775, 88 L Ed 465, reh den 64 S Ct 156, 320 U S 813, 88 L Ed 491—Roy v U S, C A Cal, 416 F 2d 874—U S v Hart, C A Colo, 457 F 2d 1087, cert den 93 S Ct 150, 409 U S 861, 34 L Ed 2d 108

Held valid

U S—Watts v U S, Dist Col, 89 S Ct 1399, 394 U S 705, 22 L Ed 2d 664—U S v Patillo, C A Va, 431 F 2d 293, adhered to 438 F 2d 13

D C—Alexander v U S, C A, 418 F 2d 1203, 135 U S App D C 367

Overwhelming interest to protect

U S—Watts v U S, Dist Col, 89 S Ct 1399, 394 U S 705, 22 L Ed 2d 664

True "threat" required

U S—Watts v U S, Dist Col, 89 S Ct 1399, 394 U S 705, 22 L Ed 2d 664

Purpose of statute

U S—U S v Patillo C A Va, 438 F 2d 13

Essential element of offense

U S—U S v Patillo C A Va, 438 F 2d 13

55. U S—U S v Reid, supra, n 54

Threat against incumbent president required

U S—U S v Marino, D C Ill, 148 F Supp 75

56. U S—U S v Daulong, D C La, 60 F Supp 235—U S v Patillo C A Va, 431 F 2d 293, adhered to 438 F 2d 13

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59 U S—U S v Reid, supra, n 54

60. U S—U S v Reid, supra n 54

62. U S—U S v Hart, C A Colo, 457 F 2d 1087, cert den 93 S Ct 150 409 U S 861, 34 L Ed 2d 108

63. U S—U S v Daulong, D C La, 60 F Supp 235—U S v Hart, C A Colo, 457 F 2d 1087, cert den 93 S Ct 150, 409 U S 861, 34 L Ed 2d 108—U S v Frederickson, C A Iowa, 601 F 2d 1358, cert den 100 S Ct 281, 444 U S 914, 62 L Ed 2d 193

64 U S—Roy v U S, C A Cal, 416 F 2d 874

Statements to be considered

U S—U S v Patillo, C A Va, 431 F 2d 293, adhered to 438 F 2d 13

65. U S—U S v Hall, C A Fla, 493 F 2d 904, cert den 95 S Ct 2661 422 U S 1044, 45 L Ed 2d 696

Intent to disrupt presidential activity sufficient

U S—U S v Patillo, C A Va, 438 F 2d 13

67. U S—U S v Reid, D C La, 49 F Supp 313, affd, C C A, 136 F 2d 476, cert den 64 S Ct 87, 320 U S 775, 88 L Ed 465, reh den 64 S Ct 156, 320 U S 813, 88 L Ed 491—Watts v U S, Dist Col, 89 S Ct 1399, 394 U S 705, 22 L Ed 2d 664—Roy v U S, C A Cal, 416 F 2d 874

D C—Alexander v U S, C A, 418 F 2d 1203, 135 U S App D C 367

68. U S—Pierce v U S, C A Kan, 365 F 2d 292—Roy v U S, C A Cal, 416 F 2d 874

71. U S—U S v Hart, C A Colo, 457 F 2d 1087, cert den 93 S Ct 150, 409 U S 861, 34 L Ed 2d 108

§ 73. —— Definition and Nature of Offense

Library References

Homicide ⇐84 et seq.

72. Ala—Roberts v State, Cr, 275 So 2d 709, 49 Ala App 729

Ark—Craig v State, 172 S W 2d 256, 205 Ark 1100

Cal—People v Heffington, App, 107 Cal Rptr 859 32 C A 3d 1

Ind—Smith v State, 382 N E 2d 177 178 Ind App 310

Other statements

(5) Additional statements

Ariz—State v Cravin, 395 P 2d 706, 96 Ariz 346—State v Ganster, 433 P 2d 620, 102 Ariz 490—State v Tinghitella, 491 P 2d 834, 108 Ariz 1

Cal—People v Meriweather, 69 Cal Rptr 880, 263 C A 2d 559

Ga—McMullen v State, 48 S E 2d 703, 77 Ga App 454

Fla—Gavin v State, App, 259 So 2d 544—Williams v Wainwright, App, 312 So 2d 552

Ill—People v Curwick, 318 N E 2d 468, 33 Ill App 3d 757

Ind—Reed v State, 263 N E 2d 719, 255 Ind 298

Me—State v Gatcomb, 389 A 2d 22

Md—Webb v State 93 A 2d 80, 201 Md 158

Mich—People v Branner, 220 N W 2d 183 53 Mich App 541

Miss—Daniels v State, 17 So 2d 793 196 Miss 328

N J—State v Leibowitz, 123 A 2d 526, 22 N J 102

N C—State v Whitted 187 S E 2d 391, 14 N C App 62

Tex—Watts v State, 207 S W 2d 94, 151 Tex Cr R 349—Escobar v State, 282 S W 2d 873, 162 Tex Cr R 115

Va—Epps v Com 56 S E 2d 237, 190 Va 93

Creature of statute

Md—Taylor v State, 209 A 2d 595, 238 Md 424

Essential elements

Miss—Corley v State, 264 So 2d 384

73. Ala—Bowen v State, 26 So 2d 205 24 Ala App 357—Lawhon v State, 141 So 2d 205, 41 Ala App 577—Tolliver v State, Cr 282 So 2d 92, 50 Ala App 654

Ark—Lisenby v State, 543 S W 2d 30, 260 Ark 585

Md—James v State 358 A 2d 595 31 Md App 666

Mich—People v Smith, 280 N W 2d 862, 89 Mich App 478, cert den 101 S Ct 3047, 452 U S 914, 69 L Ed 2d 417

Mo—Lane v State, App, 565 S W 2d 186

Tex—Davis v State, Cr, 516 S W 2d 157

Distinguished from mayhem

Ga—Swain v State, 86 S E 2d 642, 91 Ga App 561

(1) S C—State v Hinson, 172 S E 2d 548, 253 S C 607

Distinguished from assault with intent to commit other felonies

Cal—People v Gonzalez, 104 Cal Rptr 530, 28 C A 3d 1091

Secret assault

N C—State v Hill, 209 S E 2d 528, 23 N C App 614, affd 214 S E 2d 67, 287 N C 207

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75. D C—C J S quoted in Logan v U S, 483 A 2d 664, 672

Md—Jenkins v State, 238 A 2d 922, 3 Md App 243

N C—C J S quoted at length in State v Hall, 297 S E 2d 614, 617, 59 N C App 567

Or—C J S quoted at length in Application of Smallman, 291 P 2d 749, 757, 206 Or 262—C J S quoted at length in State v Smith, 364 P 2d 786 791, 228 Or 340

No distinction is commonly made between expressions "intent to murder" and "intent to kill"—State v Gregory, 27 S E 2d 140, 223 N C 415

76. D C—Logan v U S, 483 A 2d 664, 672

Ind—Allison v State, 299 N E 2d 618, 157 Ind App 277

Md—Marks v State, 185 A 2d 909, 230 Md 108

S C—State v Self, 82 S E 2d 63, 225 S C 267

Tex—Kincaid v State, 198 S W 2d 899, 150 Tex Cr R 45

77. Mo—State v Webb, App, 518 S W 2d 317

78. N M—C J S entire section quoted in State v Melendrez, 159 P 2d 768, 771, 49 N M 181

79. Ala—Bowen v State, 26 So 2d 205, 32 Ala App 357

Or—C J S cited in Application of Smallwood, 291 P 2d 749 757, 206 Or 262

82. Ala—Hall v State, 348 So 2d 870, cert den Ex parte Hall, Cr, 348 So 2d 875, cert den 98 S Ct 745, 434 U S 1021, 54 L Ed 2d 768

Cal—People v Alotis 36 Cal Rptr 443, 388 P 2d 675, 60 C 2d 698—People v Jenkins, App, 58 Cal Rptr 401, 250 C A 2d 460, stating Missouri law, cert den 88 S Ct 181, 389 U S 878, 19 L Ed 2d 169

Ill—People v Cleggett, 177 N E 2d 187, 22 Ill 2d 471, cert den 82 S Ct 871, 369 U S 840 7 L Ed 2d 844

Md—Simms v State, 242 A 2d 185, 4 Md App 160

83. In North Carolina

(2) Other decisions—State v Oxendine, 32 S E 2d 648, 224 N C 825—State v Floyd, 84 S E 2d 915, 241 N C 298—State v Braxton, 144 S E 2d 5, 265 N C 342—State v Fisher, 154 S E 2d 333, 270 N C 315

Stabbing held misdemeanor

Ga—McDaniel v State, 76 S E 2d 500, 209 Ga 827

84. Ala—Bowen v State, 26 So 2d 205, 32 Ala App 357

The law recognizes no degrees of murder in the crime of assault with a deadly weapon with intent to commit murder [84.5]

84.5 Cal—People v Mason, 6 Cal Rptr 649, 183 C A 2d 168

Assault to commit murder in second degree

Fla—Dallas v State App, 170 So 2d 486

§ 74. —— Attempt or Overt Act

86. Ariz—State v Tinghitella, 491 P 2d 834, 108 Ariz 1

Cal—People v Morrison, 39 Cal Rptr 874, 228 C A 2d 707

Fla—Gavin v State, App, 259 So 2d 544

Ga—Echols v State, 213 S E 2d 907 134 Ga App 216

Ind—Petillo v State 89 N E 2d 623, 228 Ind 97, cert den 71 S Ct 481, 340 U S 936, 95 L Ed 676

Nev—Wilkerson v State, 482 P 2d 314 87 Nev 123

Tex—Boarman v State, Cr, 501 S W 2d 894

Weapons as used held dangerous or deadly

(3) Mich—People v Johnson, 220 N W 2d 705, 54 Mich App 303

87 Ga—Davis v State 111 S E 2d 116, 100 Ga App 308

Ill—People v Shields, 127 N E 2d 440, 6 Ill 2d 200

Miss—Corley v State, 264 So 2d 384

88. Miss—Edgar v State, 32 So 2d 441, 202 Miss 505

90. Del—Howard v State, 303 A 2d 653

91 Ark—Farr v State, 410 S W 2d 604, 241 Ark 819

93 Fla—Gavin v State, App, 259 So 2d 544

96. Mich—People v Smith, 280 N W 2d 862, 89 Mich App 478, cert den 101 S Ct 3047, 452 U S 914, 69 L Ed 2d 417

§ 75. —— Means Employed

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98. Ala—Bowen v State, supra, n 73

Ark—C J S cited in Morris v State, 290 S W 2d 624, 626, 226 Ark 472

Ill—People v Shields, 127 N E 2d 440, 6 Ill 2d 200—People v Hawes, 134 N E 2d 781, 8 Ill 2d 501

Ind—Reed v State, 263 N E 2d 719, 255 Ind 298

Md—Finley v Warden of Md House of Correction, 127 A 2d 134, 211 Md 650

Mo—State v Hacker, 214 S W 2d 413—State v Miles, 282 S W 2d 542

Okl —Davis v State, Cr, 300 P 2d 1000

Tex —Wesley v State, 198 S W 2d 103, 149 Tex Cr R 650—King v State, 220 S W 2d 647, 153 Tex Cr R 422—Hunter v State, 275 S W 2d 803, 161 Tex Cr R 225

Possibility of causing death

Tex —Alaniz v State, 186 S W 2d 988, 148 Tex Cr 306—Daugherty v State, 216 S W 2d 222, 153 Tex Cr R 8—Henry v State, 246 S W 2d 891, 157 Tex Cr R 88—Windham v State, 288 S W 2d 90, 162 Tex Cr R 620—Caballero v State, 354 S W 2d 940, 172 Tex Cr R 140—Washington v State, Cr, 471 S W 2d 409

99. Miss —Daniels v State, 17 So 2d 793, 196 Miss 328—Johnson v State, 230 So 2d 810

Mo —State v Hacker, 214 S W 2d 413

In Georgia

(2) Ga —Finch v State, 106 S E 2d 86, 98 Ga App 480

Weapons as used held dangerous or deadly

(3) Other weapons

Ill —People v Payton, 276 N E 2d 775, 2 Ill App 3d 693

Kan —State v Clark, 521 P 2d 298, 214 Kan 293, op mod on oth grds reh den 522 P 2d 411, 215 Kan 1

Ky —Philpot v Com, 247 S W 2d 499

Mo —State v Henderson, 204 S W 2d 774, 356 Mo 1072

Okl —Fox v State, Cr, 556 P 2d 1281

Tex —Thompson v State, Cr, 521 S W 2d 621

Particular means held not deadly weapons

Ky —Reed v Com, 248 S W 2d 911

(2) Other weapons

Ky —Philpot v Com, supra—Crumbaugh v Com, 259 S W 2d 67

Miss —Gray v State, 70 So 2d 524, 220 Miss 220—Woodall v State, 107 So 2d 598 234 Miss 759

Tex —Williams v State, Cr, 477 S W 2d 24

Nature of deadly weapon

N C —State v Cauley, 94 S E 2d 915, 244 N C 701

Ala —Helton v State, Cr App, 372 So 2d 390

7. Cal —People v Gaither, 343 P 2d 799, 173 C A 2d 662, cert den 80 S Ct 1082, 362 U S 991, 4 L Ed 2d 1023

9. "Administer" construed

Cal —People v Gaither, 343 P 2d 799, 173 C A 2d 662, cert den 80 S Ct 1082, 362 U S 991 4 L Ed 2d 1023

§ 76. Present Ability to Kill

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Continuous sequential and uninterrupted conduct

Ohio—State v Kinnemore, 295 N E 2d 680, 34 Ohio App 2d 39

13. Ohio—State v Kinnemore, 295 N E 2d 680, 34 Ohio App 2d 39

20. Miss —Rogers v State, 68 So 2d 105, 219 Miss 231

§ 77. —— Extent of Injury

22. Character of assault a factor to be considered

Md —Beall v State, 101 A 2d 233, 203 Md 380

23. Ill —People v Nickolopoulos, 185 N E 2d 209, 25 Ill 2d 451

Ind.—Washington v State, 279 N E 2d 1032, 177 Ind App 464

N C —State v Robinson, 186 S E 2d 593, 13 N C App 628

Pa.—Com v Clopton, 289 A 2d 455, 447 Pa 1, 54 A L R 3d 601

Death not essential element

Tex —Rawlins v State, Cr, 466 S W 2d 308

24. Fla —Caraker v State, 84 So 2d 50

Pa —Com v Cross, 331 A 2d 813, 231 Pa Super 148

Tex —Hunter v State, 275 S W 2d 803, 161 Tex Cr R 225—Hall v State, Cr, 418 S W 2d 810—Bell v State, Cr, 501 S W 2d 137

However, bodily injury has been held to be one of the statutory elements of the offense of assault with intent to kill [25.1]

25.1. Pa —Com ex rel Robinson v Baldi, 106 A 2d 689, 175 Pa Super 550

"Serious Injury"

N C —State v Jones, 128 S E 2d 1, 258 N C 89

§ 78. —— Malice

26. Ala —Stovall v State, 42 So 2d 636, 34 Ala App 610, cert den 42 So 2d 639, 252 Ala 670—Lawhon v State, 141 So 2d 205, 41 Ala App 577—Douglas v State, 163 So 2d 477, 42 Ala App 314, cert den 163 So 2d 496, 276 Ala 703, revd on oth grds 85 S Ct 1074, 380 U S 415, 13 L Ed 2d 934

Ark —Craig v State, 172 S W 2d 256, 205 Ark 1100

Cal —People v Otis, 168 Cal Rptr 708, 111 C A 3d 467

Ga —White v State, 40 S E 2d 782, 74 Ga App 634

Ill —People v Nickolopoulos, 185 N E 2d 209, 25 Ill 2d 451

Kan —State v Donahue, 416 P 2d 287, 197 Kan 317

Md —Bremer v State, 307 A 2d 503, 18 Md App 291, cert den 94 S Ct 1440, 415 U S 930, 39 L Ed 2d 488

Mass —Com v Henson, 476 N E 2d 947, 394 Mass 584

Mo —State v Cooper, 214 S W 2d 19, 358 Mo 269—State v Bolden, 494 S W 2d 61

Neb —State v Quinn 141 N W 2d 422, 180 Neb 70

In Texas

(1) Tex —Bryant v State, Cr, 482 S W 2d 270

(4) Other cases

Tex —Welcome v State, Cr, 438 S W 2d 99—Ellard v State, Cr, 507 S W 2d 198

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27. Ark —Cheney v State, 172 S W 2d 427, 205 Ark 1049

Md —Davis v State, 102 A 2d 816, 204 Md 44

Express not implied malice required

Cal —People v Rivera, 179 Cal Rptr 384, 127 C A 3d 136, cert den 102 S Ct 2942, 457 U S 1123, 73 L Ed 2d 1338

28. Ohio—State v Lancaster, 149 N E 2d 157, 167 Ohio St 391, 71 A L R 2d 1017

29. Mo —State v Finnell, 280 S W 2d 110

30. Ill —People v Carter, 102 N E 2d 312, 410 Ill 462

31. Ky —Taylor v Com, 302 S W 2d 378

32. Relation to sudden passion

(2) Cal —People v Otis, 168 Cal Rptr 708, 111 C A 3d 467

(3) Other matters —Usher v State, 79 S E 2d 15, 89 Ga App 209

33. Mo —State v Finnell, 280 S W 2d 110

34. Time malice existed

Ky —Lawson v Com, 218 S W 2d 41, 309 Ky 458

35. Cal —People v Murtishaw, 175 Cal Rptr 738, 631 P 2d 446, 29 C 3d 733 Cert den 102 S Ct 1280, 455 U S 922, 71 L Ed 2d 464

Miss —Wixon v State, 90 So 2d 859, 229 Miss 430

36. Ark —Jackson v State, 215 S W 2d 148, 214 Ark 194

37. Ala —Sparks v State, 75 So 2d 96, 37 Ala App 631, revd on oth grds 75 So 2d 103, 261 Ala 2, cert den 75 So 2d 109, 261 Ala 8

Ind —Summerlin v State, 271 N E 2d 411, 256 Ind 652

39. Tenn —Self v State, Cr, 527 S W 2d 153

40. Cal —People v Sartain, 73 Cal Rptr 799, 268 C A 2d 486

Ga —Jordan v State, 52 S E.2d 505, 78 Ga.App 879

Idaho—State v Buchanan, 252 P 2d 524, 73 Idaho 365

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42. Kan —C.J.S cited in State v Donahue, 416 P 2d 287, 289, 197 Kan 317

Ky —Claypoole v Com, 355 S W 2d 652

Md —Lawrence v State, 237 A 2d 81, 2 Md App 736—McFadden v State, 237 A 2d 93, 2 Md App 725

Tex —Sisneros v State, 198 S W 2d 455, 150 Tex Cr R 87

43. Ala —Powell v State, 100 So 2d 38, 39 Ala App 246, cert den 100 So 2d 46, 267 Ala 100—Douglas v State, 163 So 2d 477, 42 Ala App 314, cert den 163 So 2d 496, 276 Ala 703, revd on oth grds 85 S Ct 1074, 380 U S 415, 13 L Ed 2d 934—Dawson v State, 188 So 2d 600, 43 Ala App 265

Ark —Stovall v State, 346 S W 2d 212, 233 Ark 597

Cal —People v Watkins, 2 Cal Rptr 707, 178 C A 2d 41

Iowa—State v Jiles, 142 N W 2d 451, 258 Iowa 1324—State v Hephner, 161 N W 2d 714

Kan —C.J.S. cited in State v Donahue, 416 P 2d 287, 289, 197 Kan 317—C.J S. cited in State v Hamilton, 534 P 2d 226, 231, 216 Kan 559

Md —Houston v State, 171 A 2d 233, 225 Md 403

N C —State v Carter, 119 S E 2d 461, 254 N C 475

S C —State v Maxey, 62 S E 2d 100, 218 S C 106

Tenn —Clarke v State, 402 S W 2d 863, 218 Tenn 259 Cert den 87 S Ct 303, 385 U S 942, 17 L Ed 2d 222

Tex —Muckleroy v State, 310 S W 2d 315, 165 Tex Cr R 629

Malice not presumed

N C —State v Warren, 89 S E 2d 109, 242 N C 581—State v Weaver, 161 S E 2d 755, 1 N C App 436

Against vital part of body

Md —Tate v State, 203 A 2d 882, 236 Md 312—Wells v State, 261 A 2d 181, 8 Md App 510

44. Kan —C J S cited in State v Donahue, 416 P 2d 287, 289, 197 Kan 317

45. Ga —Colbert v State, 66 S E 2d 836, 84 Ga App 632

46. Kan —C.J.S. cited in State v Donahue, 416 P 2d 287, 289, 197 Kan 317

47. Kan —C.J.S cited in State v Donahue, 416 P 2d 287, 289, 197 Kan 317

Md —Davis v State, supra, n 27—Faulcon v State, 126 A 2d 858, 211 Md 249—Tate v State, 203 A 2d 882, 236 Md 312

48. Cal —People v Logan, 53 Cal Rptr 549, 244 C A 2d 795

§ 79. —— Intent to Kill

49. U S —Charlton v Wainwright, C A Fla, 588 F 2d 162—U S v Jones, C A Cal, 681 F 2d 610

Ala —Loyd v State, 186 So 2d 725, 43 Ala App 199, revd on oth grds 186 So 2d 731

Alaska—Hallback v State, 361 P 2d 336

Ariz —State v Garcia, 393 P.2d 668, 96 Ariz 203—State v Scott, 452 P 2d 699, 104 Ariz 345

Ark —Davis v State, 177 S W 2d 190, 206 Ark 726

Cal —People v Coffey, 60 Cal Rptr 457, 430 P 2d 15, 67 C 2d 204—People v Sartain, 73 Cal Rptr 799, 268 C A 2d 486—People v Moles, 89 Cal Rptr 226, 10 C A 3d 611

Colo —People v Baca, 503 P 2d 348, 180 Colo 166

Ga —Davis v State, 47 S E 2d 670, 76 Ga App 860—Shanks v State, 57 S E 2d 357, 80 Ga App 759—Colbert v State, supra, n 45—Smith v State, 77 S E 2d 831, 88 Ga App 778—Bennett v State, 134 S E 2d 847, 108 Ga App 881

Idaho—C.J.S. cited in State v Buchanan, 252 P 2d 524, 526, 530, 73 Idaho 365

Ill —People v Carter, supra, n 30—People v Shields, 127 N E 2d 440, 6 Ill 2d 200—People v Coolidge,

187 N E 2d 694, 26 Ill 2d 533—People v Palmer, 198 N E 2d 839, 31 Ill 2d 58—People v Drink, 229 N E 2d 409, 85 Ill App 2d 202

Ind —Stevenson v State, 318 N E 2d 573, 162 Ind App 222

Iowa—C.J.S. cited in State v Barney, 244 N W 2d 316, 318

Md —Beall v State, 101 A 2d 233, 203 Md 380—Bremer v State, 307 A 2d 503, 18 Md App 291, cert den 94 S Ct 1440, 415 U S 930, 39 L Ed 2d 488

Mass —Com v Jones, 383 N E 2d 527 6 Mass App 750—Com v Henson, 476 N F 2d 947, 394 Mass 584

Mich —People v Phillips, 194 N W 2d 501, 37 Mich App 242—People v Harris, 313 N W 2d 354 110 Mich App 636

Miss —Daniels v State, 17 So 2d 793, 196 Miss 328—Edgar v State, 32 So 2d 441, 202 Miss 505—Ceary v State, 37 So 2d 316, 204 Miss 299—Howard v State, 55 So 2d 436, 212 Miss 722—Washington v State, 77 So 2d 260, 222 Miss 782—Smith v State 102 So 2d 699, 233 Miss 503—Lindley v State, 106 So 2d 684, 234 Miss 423—Pulliam v State 298 So 2d 711

Mo —State v Watson, 202 S W 2d 784 356 Mo 590—State v Cooper, supra, n 26—State v Gannaway, 313 S W 2d 653—State v Powell App, 630 S W 2d 168

Neb —State v Moss, 155 N W 2d 435, 182 Neb 502

N C —State v Ferguson 135 S E 2d 626, 261 N C 558—State v Cooper, 173 S E 2d 604 8 N C App 79—State v Hill, 209 S E 2d 528, 23 N C App 614, affd 214 S E 2d 67, 287 N C 207—State v Irwin, 285 S E 2d 345 55 N C App 305

Okl —Bates v State, Cr 505 P 2d 991

R I —State v Fournier, 448 A 2d 1230

Tenn —Carter v State, 181 S W 2d 137, 181 Tenn 259

Tex —Boazman v State, Cr, 501 S W 2d 894

Vt —State v Murphy, 262 A 2d 456 128 Vt 288

Wyo —Fuller v State, 568 P 2d 900

Test to ascertain intent

Ala —Crear v State, Cr App 376 So 2d 778 writ den Sup, 376 So 2d 788

Md —Mahoney v State 281 A 2d 421 13 Md App 105, 64 A L R 3d 1219, cert den 93 S Ct 306, 409 U S 978 34 L Ed 2d 241

Meaning of "intent to kill"

(3) Mental attitude

N C —State v Cauley, 94 S E 2d 915 244 N C 701

Necessity of intent to assault

(3) Other statements

Cal —People v Hoxie, 61 Cal Rptr 37, 252 C A 2d 901

Specific intent unnecessary when death would have resulted in charge of murder

Md —Wimbush v State 168 A 2d 500, 224 Md 488—Tate v State, 203 A 2d 882, 236 Md 312

Intent to take life as not essential

Md —Wells v State, 261 A 2d 181, 8 Md App 510

Intent to rob not necessary

Md —Brown v State 260 A 2d 665, 8 Md App 462

Proof of injury not required

D C —Bedney v U S, App, 471 A 2d 1022

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50. Ark —Wilhite v State, 178 S W 2d 55, 206 Ark 887

Ga —Rider v State 175 S E 2d 69, 121 Ga App 677

N J —State v Mergott 355 A 2d 674, 140 N J Super 126

51. Ind —Tillman v State, 325 N E 2d 509, 163 Ind App 563

Tex —Streets v State, 188 S W 2d 582 148 Tex Cr 517

52. Ark —Nunley v State, 270 S W 2d 904, 223 Ark 838

Ill People v Shields, 127 N E 2d 440, 6 Ill 2d 200—People v Coolidge 187 N E 2d 694 26 Ill 2d 533

Appreciable time

Ark —Craig v State, 172 S W 2d 256 205 Ark 1100—Ballew v State 441 S W 2d 453, 246 Ark 1191

Ga —Rider v State, 175 S E 2d 69, 121 Ga App 677

No need for appreciable time

Ark —Cook v State, 287 S W 2d 6, 225 Ark 1003

Necessity of existence of intent at time of assault

Miss —Lindley v State, 106 So 2d 684, 234 Miss 423

No prescribed time

Fla —Gavin v State, App 259 So 2d 544

53. Md —Ruffin v State, 268 A 2d 494, 10 Md App 102

Miss —Lee v State, 83 So 2d 818, 226 Miss 276

Mo —State v Chevlin, 284 S W 2d 563

Wyo —Evanson v State, 546 P 2d 412

Wanton disregard of consequences to human life insufficient

U S —U S v Jones, C A Cal, 681 F 2d 610

54 Miss —Craddock v State 37 So 2d 778, 204 Miss 606

Rule held inapplicable

Miss —Lindley v State, 106 So 2d 684, 234 Miss 423

56 Miss —Griffin v State, 18 So 2d 437, 196 Miss 528—Lindley v State, 106 So 2d 684, 234 Miss 423

Intent to commit grievous bodily harm held sufficient

Md —McFadden v State, 237 A 2d 93, 2 Md App 725—Fitzgerald v State, 248 A 2d 667, 5 Md App 558—Smith v State, 250 A 2d 272, 6 Md App 114—Goodman v State 250 A 2d 684, 6 Md App 187—Nickerson v State, 325 A 2d 149, 22 Md App 660—Reed v State, 449 A 2d 448, 52 Md App 345

58 Ill —People v Coolidge 187 N E 2d 694, 26 Ill 2d 533

59. Miss —Walton v State, 54 So 2d 391, 212 Miss 270

Tex —Streets v State, supra, n 51—Kincaid v State, 198 S W 2d 899, 150 Tex Cr R 45

60. Ala —McArdle v State, Cr App 372 So 2d 897 writ den Sup, 372 So 2d 902

Ga —Manders v State, 27 S E 2d 105, 69 Ga App 875—Colbert v State, supra, n 45

Tex —Bell v State, Cr, 501 S W 2d 137

Mere fact of assault insufficient

Md —Webb v State, 93 A 2d 80, 201 Md 158—Beall v State, supra n 22

Each case must rest on own facts

Ark —Bonds v State, 403 S W 2d 52, 240 Ark 908

61 Ill —People v Swaney, 276 N E 2d 346, 2 Ill App 3d 857

Ky —Taylor v Com 302 S W 2d 378

Mich —People v Shegog, 205 N W 2d 278, 44 Mich App 230

62. Ala —Sparks v State, 75 So 2d 103, 261 Ala 2—Loyd v State, 186 So 2d 725, 43 Ala App 199, revd on oth. grds 86 So 2d 731

Ark —Jackson v State, supra, n 36

Mo —C.J S cited in State v Gannaway, 313 S W 2d 653, 656

N C —State v Thacker, 185 S E 2d 455, 13 N C App 299, cert allowed 186 S E 2d 927, 280 N C 725, cause remd 189 S E 2d 145, 281 N C 447, app after remand 197 S E 2d 248, 18 N C App 547

S C —C.J.S cited in State v Hayes, 250 S E 2d 342, 343

Tex —Trimble v State, 190 S W 2d 123, 148 Tex Cr 596—Henry v State, supra, n 49—Windham v State, 288 S W 2d 90, 162 Tex Cr R 620

Not presumption of law

Idaho—State v Buchanan, supra n 40

63. Ala —Sparks v State, supra, n 62

Ariz —State v Garcia, 466 P 2d 763, 105 Ariz 469

Tex —Samuel v State, Cr, 477 S W 2d 611

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64. Ala —Thompson v State, 70 So 2d 282, 37 Ala App 446

Ga —Rider v State, 175 S E 2d 69, 121 Ga App 677

Ill —People v Carter, supra, n 30

66. Tex —Gipson v State, Cr, 403 S W 2d 794

67. Fla —Dallas v State, App, 170 So 2d 486

Ga —Jackson v State, 48 S E 2d 864, 204 Ga 47

Md —Simms v State, App, 242 A 2d 185, 4 Md App 160—Morgan v State, 242 A 2d 831, 4 Md App 351

68. Ala —Thompson v State, supra, n 64

Ill —People v Carter, 102 N E 2d 312, 410 Ill 462—People v Smith, 219 N E 2d 82, 71 Ill App 2d 446, cert den 87 S Ct 859, 386 U S 910, 17 L Ed 2d 784—People v Spagnola, 260 N E 2d 20, 123 Ill App 2d 171, cert den 91 S Ct 1389, 402 U S 911, 28 L Ed 2d 653

Md —Webb v State, supra, n 60

69. Ala —Thompson v State, supra, n 64

Ga —Thomas v State, 43 S E 2d 352, 75 Ga App 334

70. Ala —Thompson v State, supra, n 64

71. Ala —Thompson v State, supra, n 64

73. Ga —Perry v State, 121 S E 2d 692, 104 Ga App 383

74. Ala —Sparks v State, supra, n 62—Douglas v State, 163 So 2d 477, 42 Ala App 314, cert den 163 So 2d 496, 276 Ala 703, revd on oth grds 85 S Ct 1074, 380 U S 415 13 L Ed 2d 934

Ark —Morris v State, 290 S W 2d 624, 226 Ark 472

D C —U S v Martin, C A, 475 F 2d 943, 154 U S App D C 359

Fla —Harvell v State, 20 So 2d 801, 155 Fla 556

Ga —Fulmer v State 39 S E 2d 732, 74 Ga App 298—Rogers v State, 73 S E 2d 215, 87 Ga App 180—Farley v State, 187 N E 2d 558, 125 Ga App 335

Ill —People v Sheppard, 84 N E 2d 377, 402 Ill 411—People v Coolidge, 187 N E 2d 694, 26 Ill 2d 533—People v Smith, 219 N E 2d 82, 71 Ill App 2d 446, cert den 87 S Ct 859, 386 U S 910, 17 L Ed 2d 784

Iowa—State v Leedom, 76 N W 2d 773, 247 Iowa 911

Md —Webb v State, supra, n 60—Beall v State, 101 A 2d 233, 203 Md 380

Pa —Com v Nelson, 73 Dauph 144

Tex —Trimble v State, supra, n 62—King v State, supra, n 49—Henry v State, supra, n 49—Torres v State, 254 S W 2d 398, 158 Tex Cr R 224—Hunter v State, 275 S W 2d 803, 161 Tex Cr R 225—Windham v State, 288 S W 2d 90, 162 Tex Cr R 620—Hernandez v State, 375 S W 2d 285—Young v State, Cr App, 384 S W 2d 710

30 C J p 141 note 65[a]

Not presumption of law

N C —State v Ferguson, 135 S E 2d 626, 261 N C 558

(2) Mere threat to use deadly weapon —Beall v State, supra

75. Ark —Nunley v State, 270 S W 2d 904, 223 Ark 838

Idaho—C J.S. quoted in State v Buchanan, 252 P 2d 524, 530, 73 Idaho 365

Iowa—State v Mart, 20 N W 2d 63, 237 Iowa 181

Md —Webb v State, supra, n 60

Miss —Griffin v State, supra, n 56

N C —State v Christy, 215 S E 2d 154, 26 N C App 57

R I —State v Fournier, 448 A 2d 1230

Conclusiveness of inference

(2) Ga —Colbert v State, supra, n 45

76. Ala —Hall v State, Cr, 348 So 2d 870, cert den Ex parte Hall, 348 So 2d 875, cert den 98 S Ct 745, 434 U S 1021 54 L Ed 2d 768

Tex —Tindall v State, 172 S W 2d 328, 200 S W 2d 187, 150 Tex Cr R 277—King v State, supra, n 49—Henry v State, supra, n 49—Davis v State, 306 S W 2d 353, 165 Tex Cr R 294—Young v State, Cr 384 S W 2d 710

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80. Tex —Barnes v State 356 S W 2d 679, 172 Tex Cr R 303

Design not test

Okl —Beeler v State, Cr, 334 P 2d 799

81. Tex —Parkman v State, 191 S W 2d 743, 149 Tex Cr R 101

Plank not dangerous or deadly weapon per se

Okl —Beeler v State, Cr, 334 P 2d 799

82. Tex —Richards v State, Cr App, 178 S W 2d 517, 147 Tex Cr R 118—Boazman v State Cr, 501 S W 2d 894

Other weapons have been held to be deadly or dangerous from the manner of their use [85]

85.5. U S —U S v Daulton, C A Ga, 488 F 2d 524, cert den 94 S Ct 2396, 416 U S 989, 40 L Ed 2d 767

Trace chain

Okl —Beeler v State, Cr, 334 P 2d 799

87. Not per se deadly

Tex —Henry v State, supra, n 49—Barnes v State, 356 S W 2d 679, 172 Tex Cr R 303—Blount v State, Cr, 376 S W 2d 844—Boazman v State Cr, 501 S W 2d 894

91. Ill —People v Nickolopoulos, 185 N E 2d 209, 25 Ill 2d 451

92. Ind —Stokes v State, 116 N E 2d 296, 233 Ind 10

96. Tex —Boazman v State, Cr, 501 S W 2d 894

§ 80. —— Murder Had Death Ensued

1. Ala —Sanders v State, Cr, 354 So 2d 44, cert den Ex parte Sanders 354 So 2d 48

Ark —Wilhite v State, 178 S W 2d 55, 206 Ark 887—Acuff v State, 484 S W 2d 698, 253 Ark 85

Fla —Harvell v State, 20 So 2d 801, 155 Fla 556—Cobb v State, App 214 So 2d 372—Bailey v State, 224 So 2d 296

Kan —State v Casanova 312 P 2d 209, 181 Kan 498

Md —Beall v State, 101 A 2d 233 203 Md 380—Bird v State, 190 A 2d 804, 231 Md 432—Oakley v State, 207 A 2d 472, 238 Md 48, cert den 86 S Ct 1927, 384 U S 1021, 16 L Ed 2d 1022—Taylor v State, 209 A 2d 59, 238 Md 424—Veney v State, 246 A 2d 608, 251 Md 159 cert den 89 S Ct 1284, 394 U S 948, 22 L Ed 2d 482—Simms v State, 242 A 2d 185, 4 Md App 160—Halcomb v State, 250 A 2d 119, 6 Md App 32

Tenn —Phillips v State, Cr, 455 S W 2d 637 2 Tenn Cr App 609

Distinguished from murder

(2) Ga —Emerson v State, 82 S E 2d 882, 90 Ga App 323

Contention particular offense does not exist

Fla —Saunders v State, 341 So 2d 773

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3. Ga —Emerson v State, supra, n 1

4. Md —Davis v State, 102 A 2d 816, 204 Md 44

Pa —Com v McCrory, 15 Cambria 157

5. Idaho—C.J.S. quoted in State v Buchanan, 252 P 2d 524, 530 73 Idaho 365

§ 81. —— Intent to Kill One Other than Person Injured

8. Ala —C.J.S. cited in Coleman v State, Cr App, 373 So 2d 1254, 1257

9. Common-law rule of transposed intent inapplicable

Miss —Barnette v State, 173 So 2d 904, 146 Tex Cr R 245—Wilson v State, 252 Miss 652.

10. Iowa—C.J.S. cited in State v Alford, 151 N W 2d 573, 574, 260 Iowa 939

Tenn —Phillips v State, Cr, 455 S W 2d 637, 2 Tenn Cr App 609

13. Iowa—State v Alford, 151 N W 2d 573, 260 Iowa 939

15. Ga —Montgomery v State, 50 S E 2d 777, 78 Ga App 258

Tex —Kitchens v State, 192 S W 2d 449, 149 Tex Cr R 135

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§ 82. —— Indiscriminate Assault on Several

16. La —C.J S cited in State v Tyler, 342 So 2d 574, 582, cert den 97 S Ct 2180, 431 U S 917, 53 L Ed 2d 227

§ 84. —— Resisting Officer

18. Ga —Benford v State, 36 S E 2d 833, 73 Ga App 426

Tex —Pritchett v State, 214 S W 2d 623, 152 Tex Cr R 432

Malice not element of assault to murder peace officer

Tex —Burrell v State, Cr, 526 S W 2d 799

19. Okl —Davis v State, Cr, 300 P 2d 1000

§ 85. Assault with Intent to Kill or Commit Manslaughter

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33. Or —C J S cited in Application of Smallwood, 291 P 2d 749 757 206 Or 262

In Maryland there is no crime of assault with intent to kill

Md —Marks v State 185 A 2d 909, 230 Md 108

34. U S —Charlton v Wainwright, C A Fla 588 F 2d 162

Fla —Walker v State, 44 So 2d 814

Iowa—Mart v Lainson, 30 N W 2d 305 239 Iowa 21 cert den 68 S Ct 791, 333 U S 868, 92 L Ed 1146

Or —C J S cited in State v Smith 364 P 2d 786, 791 228 Or 340

Statute construed

Mo —State v Null, 199 S W 2d 639, 355 Mo 1034

Or —State v Collis, 413 P 2d 53, 243 Or 222

Crime of attempted unlawful homicide

Or —State v Collis, 413 P 2d 53, 243 Or 222, over Application of Smallwood, 291 P 2d 749, 206 Or 262

35. Mass —C J S cited in Com v Parenti, 442 N E 2d 409, 14 Mass App 696

Or —C.J.S cited in State v Smith, 364 P 2d 786, 791, 228 Or 340

Wyo —Evanson v State, 546 P 2d 412

37. N C —State v Silvers, 52 S E 2d 877, 230 N C 300

S C —State v Sessions, 81 S E 2d 287, 225 S C 177

38. Mo —Turnbough v State, App, 533 S W 2d 609

Or —C J S cited in Application of Smallman, 291 P 2d 749, 757, 206 Or 262

39. Ark —Lewis v State, 189 S W 2d 641, 209 Ark 51

Ill —People v Davis, 337 N E 2d 256, 33 Ill App 3d 105

Iowa—State v Townsend, 238 N W 2d 351

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43. Ark —Keith v State, 235 S W 2d 539, 218 Ark 174

Ind —German v State, 337 N E 2d 883 166 Ind App 370

Ky —Delph v Com, 190 S W 2d 340, 300 Ky 722

S C —State v Self, 82 S E 2d 63, 225 S C 267

Inference or presumption of intent

(1) Ark —Lewis v State, supra, n 39

(2) Tex —Brown v State, 233 S W 2d 578, 155 Tex Cr R 233

Intent not presumed as matter of law

(3) Other cases —Lewis v State, supra, n 39

44. Kan —State v Gregory, 542 P 2d 1051, 218 Kan 180

S C —State v Self, supra, n 43

46. Ky —Bradley v Com, 236 S W 2d 266, 314 Ky 457

Wyo —Evanson v State, 546 P 2d 412

47. N C —State v Jones, 128 S E 2d 1, 258 N C 89

§ 86. Defenses

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52. Jurisdiction

Ind —Lindley v State, 373 N E 2d 886, 268 Ind 83

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55. Held insufficient

(1) Ga —Turner v State, 88 S E 2d 44, 92 Ga App 109

(8) Iowa—State v Frink, 120 N W 2d 432, 255 Iowa 59, cert den 84 S Ct 207, 375 U S 911, 11 L Ed 2d 150

§ 87. —— Passion and Provocation

56. Md —Wells v State, 261 A 2d 181, 8 Md App 510

Not defense to assault without malice with intent to murder

Tex —Hernandez v State, Cr, 375 S W 2d 285

65 Ala —Cain v State, 35 So 2d 574 33 Ala App 594

§ 88. —— Insanity and Intoxication

67. Gal —Drewry v State, 65 S E 2d 916, 208 Ga 239, conf to 66 S E 2d 806, 84 Ga App 632

Rule of diminished capacity

Mich —People v Mangiapane, 271 N W 2d 240, 85 Mich App 379

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69. Cal —People v Houghton, 28 Cal Rptr 351, 212 C A 2d 864

Ga —Breland v State, 56 S E 2d 921, 80 Ga App 575

Tex —Kincaid v State, 198 S W 2d 899, 150 Tex Cr R 45—Marr v State, 268 S W 2d 150, 160 Tex Cr R 216

Not complete defense

Cal —People v Flowers, 113 Cal Rptr 701, 38 C A 3d 813

70 Ala —Leach v State, 18 So 2d 285, 31 Ala App 390, cert den 18 So 2d 289, 245 Ala 539

Cal —People v Vasquez, 105 Cal Rptr 181, 29 C A 3d 81

Ky —Cummins v Com, 344 S W 2d 611

Md —Avey v State, 240 A 2d 107, 249 Md 385, app after remand 263 A 2d 609, 9 Md App 227

§ 89. —— Self-Defense in General

75. Ga —Spikes v State, 34 S E 2d 561, 72 Ga App 537

N C —C J.S cited in State v Anderson, 51 S E 2d 895, 897, 230 N C 54

76. N C —State v Barnette, 174 S E.2d 82, 8 N C App 198

Pa —Com v Light, 326 A 2d 288, 458 Pa 328

77. Md —Jacobs v State, 210 A 2d 722, 238 Md 648

N C —State v Anderson, 51 S E 2d 895, 230 N C 54—State v Barnette, 174 S E 2d 82, 8 N C App 198

80. Miss —Hartfield v State, 48 So 2d 507, 209 Miss 787

83. Ga.—Crawford v State, 263 S E 2d 131, 245 Ga 89

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84. Tenn —Hawkins v State, 378 S W 2d 777, 213 Tenn 712

87. Felonious assault

Ga —Pruitt v State, 150 S E 2d 695, 114 Ga App 265

90. Ill —People v Robinson, 302 N E 2d 228, 14 Ill App 3d 135

91. Ind —White v State, 239 N E 2d 577, 251 Ind 100

93. Ill —People v Robinson, 302 N E 2d 228, 14 Ill App 3d 135

§ 92. —— Mutual Combat

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12. Ga —Donaldson v State, 289 S E 2d 242, 249 Ga 186

N C —C.J.S cited in State v Church, 51 S E 345, 348, 229 N C 718

§ 93. —— Defense of Property

15. Tenn —C.J S. quoted at length in Brown v State, 441 S W 2d 485, 488

18. Tenn —C.J.S. quoted at length in Brown v State, 441 S W 2d 485, 488

§ 94. Defense of Habitation

Tex —Dailey v State, Cr , 436 S W 2d 346

§ 96. Persons Liable; Accessaries, Aiders, and Abettors

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41. Tex —Jennings v State, Cr , 367 S W 2d 670, app dism and cert den 84 S Ct 453, 375 U S 398 11 L Ed 2d 412

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43. Cal —People v Anthony, 202 P 2d 776 90 Cal App 2d 122

Mo —State v Tolias, 326 S W 2d 329

Basis for rule

(2) Other statements

Kan —State v Gregory, 542 P 2d 1051, 218 Kan 180

Accused not liable

Ark —Lisenby v State, 543 S W 2d 30, 260 Ark 585

Liable for consequences of aiding robbery

Okl —McDonald v State, Cr , 674 P 2d 1154

44. Ga —Flemming v State, 31 S E 2d 71, 71 Ga App 508

Miss —Fields v State, 21 So 2d 412

Knowledge beforehand and concealment not sufficient

Mass —Com v Hogg, 311 N E 2d 63, 365 Mass 290

46. Ga —Wilson v State, 75 S E 2d 25, 87 Ga App 745

Miss —Funderburk v State, 69 So 2d 496, 219 Miss 596, 42 A L R 2d 1221

47. Ala —Brown v State, 148 So 2d 255, 41 Ala App 641—Walton v State, Cr , 307 So 2d 713, 54 Ala App 317

Fla —McAfee v State, App , 264 So 2d 75

S C —State v Prince, 124 S E 2d 778, 240 S C 96

48. Ind —Johnson v State, 283 N E 2d 532, 258 Ind 648

50. Cal —People v Beaumaster, 95 Cal Rptr 360, 17 C A 3d 996

Md —Johnson v State, 262 A 2d 325, 9 Md App 37

Mich —People v Poplar, 171 N W 2d 732, 20 Mich App 132

52. Conditional or contingent purpose

Mass —Commonwealth v Richards, 293 N E 2d 854, 363 Mass 299

§ 97. What Constitutes in General

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56. Ark —Thomas v State, 583 S W 2d 32, 266 Ark 162

N J —State v Artis, 269 A 2d 1, 57 N J 24

Defenses mutually exclusive

N Y —People v Wright, 232 N Y S 2d 767 17 A D 2d 151

Negligence of deceased irrelevant

Alaska—Wren v State, 577 P 2d 235

58. Miss —Bangren v State, 17 So 2d 599, 196 Miss 887

Living will

In order to hold a physician or a hospital liable for honoring a living will, there must be a showing that their actions were intended to harm the patient

N Y —Saunders v State, 492 N Y S 2d 510, 129 Misc 2d 45

59. Ga —Rembert v State, 45 S E 2d 798, 76 Ga App 254—Smith v State, 108 S E 2d 688, 215 Ga 51—Jones v State, 217 S E 2d 597, 234 Ga 648

Md —Law v State, 318 A 2d 859, 21 Md App 13, app after remand 349 A 2d 295, 29 Md App 457

Mo —City of Gallatin ex rel Dixon v Murphy, App , 217 S W 2d 400

N J —State v Kress, 253 A 2d 481, 105 N J Super 514

N M —C J.S cited in State v Couch, 193 P 2d 405, 414, 52 N M 127

Force necessary

Cal —People v Young 29 Cal Rptr 595, 214 C A 2d 641

Fundamental question

Ga —Norrell v State, 157 S E 2d 784, 116 Ga App 479

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Cal —People v Walker, 108 Cal Rptr 548, 32 C A 3d 897

Actual good-faith state of mind of player

Ohio—State v Lovejoy, 357 N E 2d 424, 48 Ohio Misc 20, 2 O O 3d 320

60 Okl —Elix v State, 138 P 2d 139, 77 Okl Cr 45

61. U S —U S ex rel Crosby v Brierley, C A Pa , 404 F 2d 790

Ga —Trask v State, 208 S E 2d 591, 132 Ga App 645

Mich —People v Morrin, 187 N W 2d 434, 31 Mich App 301

Pa —Com v Redline, 137 A 2d 472, 391 Pa 486—Com v Lawrence 236 A 2d 768, 428 Pa 188

Tex —Howsley v Gilliam, 517 S W 2d 531

62. Ark —Stout v State, 426 S W 2d 800, 244 Ark 676, app after remand 438 S W 2d 698, and 448 S W 2d 636

Mich —People v Morrin, 187 N W 2d 434, 31 Mich App 301

Mo —State v Cook, App , 512 S W 2d 907

N J —State v Kress, 253 A 2d 481, 105 N J Super 514

N Y —People v Joseph, 172 N Y S 2d 463, 11 Misc 2d 219

Okl —Elix v State, supra, n 60

Or —State v Leos, 490 P 2d 521, 7 Or App 211

Pa —Com v Redline, 137 A 2d 472, 391 Pa 486—Com v Chruscial, 288 A 2d 521, 447 Pa 17

Wash —State v Griffith, 589 P 2d 799, 91 Wash 2d 572

Subsequent conduct immaterial

Cal —People v Sanchez, 184 P 2d 673, 30 Cal 2d 560

Homicide committed accidentally or in self defense

U S —U S ex rel Crosby v Brierley, C A Pa , 404 F 2d 790

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Md —Law v State, 318 A 2d 859, 21 Md App 13, app after remand 349 A 2d 295, 29 Md App 457

Pa —Com v Lawrence, 236 A 2d 768, 428 Pa. 188

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Ohio—State v Woods, 357 N E 2d 1059, 48 Ohio St 2d 127, 2 O O 3d 289 Cert gr 98 S Ct 3133, 438 U S 910, 57 L Ed 2d 1153

64. Va —Bailey v Com , 62 S E 2d 28, 191 Va 510

Under influence of extreme emotional disturbance

N Y —People v Woods, 375 N Y S 2d 750, 84 Misc.2d 301

65. Mo —State v Harley, App , 543 S W 2d 288

66. Colo —People v Trujillo, 596 P 2d 1202, 198 Colo 151

Del —State v Moyer, 387 A 2d 194, overruling Fuentes v State, 349 A 2d 1

N M —State v Couch, 193 P 2d 405, 52 N M 127

Not restricted to unintentional killings

Wash —State v Clarke, 377 P 2d 449, 61 Wash 2d 138

67. N J —State v Gardner, 242 A 2d 1, 51 N J 444

Defense to manslaughter

S D —State v Johnson, 139 N W 2d 232, 81 S D 600

Wash —State v Clarke, 377 P 2d 449, 61 Wash 2d 138

Statute valid

N Y —People v Wise, 405 N Y S 2d 965, 94 Misc 2d 943

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71. Killing by wife of husband's mistress, etc.

Ga —Scroggs v State, 93 S E 2d 583, 94 Ga App 28

§ 98. Matters Not Constituting

72. Ala —Clayton v State, Cr , 359 So 2d 419

Ark —Scaife v State, 182 S W 2d 679, 207 Ark 672

Cal —People v Barker, 156 Cal Rptr 407 94 C A 3d 321

Wash —State v Kerr, 544 P 2d 38, 14 Wash App 584

Fear not an element

Mass —Com v McGuirk, 380 N E 2d 662, 376 Mass 338, cert den 99 S Ct 1030, 439 U S 1120, 59 L Ed 2d 80

Miss —Shinall v State, 199 So 2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

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Unconscious influences

N J —State v Sikora, 210 A 2d 193, 44 N J 453

Excessive force will destroy justification

Cal —People v Bates, 64 Cal Rptr 575, 256 C A 2d 935

Physical force against child

Colo —People v Hosier, 525 P 2d 1161, 186 Colo 116

73. Ga —Edmonds v State, 39 S E 2d 24, 201 Ga 108—Harris v State, 40 S E 2d 664, 74 Ga App 614—Vun Cannon v State, 68 S E 2d 586, 208 Ga 608—Owens v State, 202 S E 2d 211, 130 Ga App 25

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Pa —Com v Guida, 148 A 501, 298 Pa 370

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Unreasonable fear or caution

Fla —Harris v State, App , 104 So 2d 739

74. Fla —Campbell v State, App , 143 So 2d 362

Ga —Wilkerson v State, 98 S E 2d 587, 95 Ga App 756

Pa —Com v Hammond 62 Lack Jur 49

75. Ariz —State v Harwood, 519 P 2d 177, 110 Ariz 375

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Negligent failure to perceive risk

N Y —People v Davis, 376 N Y S 2d 266, 49 A D 2d 437

76. Ga —Vun Cannon v State, supra, n 73

Miss —Reed v State, 197 So 2d 811

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77. Pa —Com v Hammond, 62 Lack Jur 49

Degredation and humiliation

Del —Feliciano v State, 332 A 2d 148

79. Ky —Collett v Com, 176 S W 2d 893, 296 Ky 267

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88. Miss —Hendrieth v State, 230 So 2d 217

Ohio—State v Barker, 372 N E 2d 1324, 53 Ohio St 2d 135, 7 O O 3d 213, cert den 99 S Ct 285, 439 U S 913, 58 L Ed 2d 260

Battered wife

Miss —May v State, 460 So 2d 778

No excuse for homicide in course of unlawful act or with deadly weapon

Miss —Hailes v State, 315 So 2d 917

Epileptic seizures no defense

Cal —In re Grissom, 150 Cal Rptr 96, 85 C A 3d 840

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89. Cal —C.J.S cited in People v Young, 29 Cal Rptr 595, 598, 214 C A 2d 641

90. Ala —Langley v State, Cr App, 371 So 2d 1267

Minn —State v Turner, 203 N W 2d 539, 295 Minn 539

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N C —State v Miller, 148 S E 2d 279, 267 N C 409, app after remand 158 S E 2d 47 272 N C 243

Judge and attorneys cannot justifiably be shot for wrong decision

Pa —Com ex rel Haines v Banmiller, 143 A 2d 661, 393 Pa 439, cert den 79 S Ct 101, 358 U S 868 3 L Ed 2d 100

91. Colo —Honda v People, 141 P 2d 178, 111 Colo 279

Ga —Freeman v State 209 S E 2d 127, 132 Ga App 742

Ill —People v Vincent, 68 N E 2d 275, 394 Ill 165, cert den 67 S Ct 196, 329 U S 778, 91 L Ed 668

Miss —Pearson v State, 179 So 2d 792, 254 Miss 275

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Daughter of girlfriend

Ky —Atwood v Com, 451 S W 2d 426

92. Cal —People v Young, 160 P 2d 132, 70 Cal App 2d 28

Miss —Beale v State, 54 So 2d 921, 213 Miss 476, cert den 72 S Ct 564, 342 U S 948, 96 L Ed 705

Okl —Creek v State, 184 P 917, 16 Okl Cr 492

93. Cal —People v Jones, 7 Cal Rptr 424, 184 C A 2d 464

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Minn —State v Hanson, 176 N W 2d 607, 286 Minn 317

94. Kan —State v Johnson, 439 P 2d 86, 201 Kan 126

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98. Ariz —State v Reynolds, 505 P 2d 1050, 19 Ariz App 159

99. Ga —Walters v State, 196 S E 2d 326, 128 Ga App 232

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Pa —Com v Peak, 12 D & C 2d 379, 16 Law L J 130—Com v Chermansky, 242 A 2d 237, 430 Pa 170, 32 A L R 3d 1072

Va —Perkins v Com 44 S E 2d 426, 186 Va 867

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Likewise, consent is no defense for recklessness [51]

5.1. Va —Banovitch v Com 83 S E 2d 369, 196 Va 210

Wash —State v Gile, 35 P 417, 8 Wash 12

Other matters held no defense [52]

5.2. As to murder

Ala —Maund v State, Cr App, 361 So 2d 1144

Ariz - State v Durham, 523 P 2d 47, 111 Ariz 19

Kan — State v Moffitt, 431 P 2d 879, 199 Kan 514

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As to involuntary manslaughter, victim's conduct contributing to his death

N Y —People v Cruciani, 327 N E 2d 803, 36 N Y 2d 304, 367 N Y S 2d 758

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Emotional unbalance

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As to negligent homicide, contributory negligence

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Standing in loco parentis

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6 U S —U S ex rel Crosby v Brierley, C A Pa, 404 F 2d 790

11. Ga —Gordy v State 92 S E 2d 737, 93 Ga App 743

Md - Whitehead v State 262 A 2d 316, 9 Md App 7

Mich — People v Fountain, 248 N W 2d 589, 71 Mich App 491

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As substantive and affirmative defense

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19 Alaska—State v Sundberg, 611 P 2d 44, app after remand app, 657 P 2d 843, app after remand 667 P 2d 1268

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20. Alaska—Gray v State, 463 P 2d 897

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Pa —C.J S. cited in Com v Lawrence, 236 A 2d 768, 771, 428 Pa 118—Com v Commander, 260 A 2d 773, 436 Pa 532—Com v Harris, 281 A 2d 879, 444 Pa 515

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22 Wash —State v Nyland, 287 P 2d 345, 47 Wash 2d 240

23. Ariz —State v McIntyre, 477 P 2d 529, 106 Ariz 439

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Or —State v Nodine, 259 P 2d 1056, 198 Or 679

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N J —State v Fair, 211 A 2d 359, 45 N J 77

Killing not justified

Ariz —State v Powers, 571 P 2d 1016, 117 Ariz 220

Cal —People v Ceballos, 116 Cal Rptr 233, 526 P 2d 241, 12 C 3d 470

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Not excusable homicide

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37 Ga —Henderson v State 221 S E 2d 633, 136 Ga App 490

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39. Fla —Weaver v State, App, 220 So 2d 53

§ 102. —— Making Arrest or Preventing Escape

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N J —Noback v Town of Montclair, 110 A 2d 339, 33 N J Super 420—Wimberly v City of Paterson, 183 A 2d 691, 75 N J Super 584

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Diminished capacity of victim

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Only where felony threatens death or great bodily harm

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68. Tenn—State v Boles, Cr App, 598 S W 2d 821

71. Killing in flight is excusable, etc.

Ariz—State v Barr, App, 565 P 2d 526, 115 Ariz 346

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73. Ala—Holcomb v State, 50 So 2d 165, 35 Ala App 528

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11. Test

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12. Ga—Williams v State, 27 S E 2d 109 70 Ga App 10

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32. "Mistress" in statute construed

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35. Mo —State v Glass, App, 554 S W 2d 426

"Mistress" in statute held not to include divorced wife residing in home of former husband but not living with him —State v Brooks, supra, n 32

However, "Mistress" in a statute has been construed to be confined to mean employer, and as not extending to paramour or concubine —Haines v State, Okl Cr, 275 P 2d 347

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Md —Law v State, 318 A 2d 859, 21 Md App 13, app after remand, 349 A 2d 295, 29 Md App 457
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Mo —State v Lawrence, App, 569 S W 2d 263
N M —C J.S cited in State v Couch, 193 P 2d 405, 409, 411, 52 N M 127
N C —State v Jones, 255 S E 2d 232, 41 N C App 465, remd 261 S E 2d 1, 299 N C 103
Ohio—State v Lovejoy, 357 N E 2d 424, 48 Ohio Misc 20, 2 O O 3d 320
Pa —Com v Wilkes, 25 Fay L J 50, affd 199 A 2d 411, 414 Pa 246, cert den 85 S Ct 344, 379 U S 939, 13 L Ed 2d 349
S C —State v Starnes, 49 S E 2d 209, 213 S C 304—State v Martin, supra, n 25
Tenn —Drake v State, Cr App, 576 S W 2d 593
Wash —State v Griffith 589 P 2d 799, 91 Wash 2d 572
W Va —State v Phelps, 310 S E 2d 863

Rule similar to that of defense of person

Md —Crawford v State, 190 A 2d 538, 231 Md 354
N C —State v Miller, 148 S E 2d 279, 267 N C 409, app after remand 158 S E 2d 47, 272 N C 243

Justification explained

N C —State v McCombs, 253 S E 2d 906, 297 N C 151

65. Ga —Bracewell v State, 41 S E 2d 168, 74 Ga App 674
Ky —Robinson v Com, 223 S W 2d 897, 311 Ky 242

67. Fla —Conner v State, App, 361 So 2d 774
Ill —People v Chapman, 364 N E 2d 577, 7 Ill Dec 416, 49 Ill App 3d 553
Ky —Davis v Com, 252 S W 2d 9

68. Ala —Maxwell v State, 27 So 2d 804, 32 Ala App 487, cert den 27 So 2d 810, 248 Ala 431
Ariz —State v Taylor, 451 P 2d 648, 9 Ariz App 290
Ky —Baker v Com, 202 S W 2d 1010, 305 Ky 88
N H —State v Grierson, 69 A 2d 851, 96 N H 36
S C —C J S cited in State v Smith, 85 S E 2d 409, 410, 226 S C 418

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73. Miss —Bangren v State, supra, n 63
Mont —State v Bashor, 614 P 2d 470, 188 Mont 397

On the other hand, under a statute so providing, one charged with deliberate homicide cannot assert the defense of occupied structure where the victim enters upon the premises lawfully, but subsequently engages in unlawful conduct and the accused seeks to expel the victim [715]

73.5. Place of business

Mont —State v Sorenson, 619 P 2d 1185

74. Iowa—State v Holder, 20 N W 2d 909, 237 Iowa 72

76. Ill —People v Stombaugh, 284 N E 2d 640, 52 Ill 2d 130
S C —State v Osborne, 25 S E 2d 561, 202 S C 473, cert den 64 S Ct 58, 320 U S 763, 88 L Ed 455—State v Bodie, 49 S E 2d 575, 213 S C 325

Effect of challenge by accused

S C —State v Osborne, supra

78. D C —Byrd v U S, C A 312 F 2d 357, 114 U S App D C 117
Fla —Falco v State, 407 So 2d 203
Utah—C J.S cited in State v Mitcheson, 560 P 2d 1120, 1122

Sister's home regarded as defendant's habitation

Utah—State v Mitcheson, 560 P 2d 1120

Bedroom

(2) Other statements

Ga —Huff v State, 147 S E 2d 840, 113 Ga App 257

82. Cal —C.J.S. cited in People v Corlett, 153 P 2d 595, 604, 67 Cal App 2d 33, reh den 153 P 2d 964, 67 Cal App 33
Ky —Davis v Com, supra, n 67

84. Ga —Jackson v State, 26 S E 2d 485, 69 Ga App 707

87. S C —State v Starnes, 49 S E 2d 209, 213 S C 304

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88. Ill —People v Smith, 88 N E 2d 444, 404 Ill 125
Va —Cox v Com, 44 S E.2d 363, 186 Va 798

89. Ky —Watts v Com, 192 S W 2d 107, 301 Ky 351
N M —State v Couch, 193 P 2d 405, 52 N M 127
Pa —Com v Harris, 281 A 2d 879, 444 Pa 515

90. Cal —C.J.S quoted at length in People v Corlett, 153 P 2d 595, 604, 67 Cal App 2d 33, reh den 158 P 2d 964, 67 Cal App 33
N C —State v Miller, 148 S E 2d 279, 267 N C 409, app after remand 158 S E 2d 47, 272 N C 243

"The right is limited to prevention;" etc.

N C —State v McLaurin, 266 S E 2d 406, 46 N C App 746

91. N M —State v Couch, 193 P 2d 405, 52 N M 127

95. Ark —Brockwell v State, 545 S W 2d 60, 260 Ark 807
Ill —People v Eatman, supra, n 63—People v Givens, 186 N E 2d 225, 26 Ill 2d 371

97. Tenn —Morrison v State, 371 S W 2d 441, 212 Tenn 633

Test of reasonableness

Tex —Sledge v State, Cr, 507 S W 2d 726

98. Ill —People v Smith, supra, n 88
Tenn —State v Kennamore, 604 S W 2d 856

99. Ga —Leverette v State, 122 S E 2d 745, 104 Ga App 743

1. Wash —State v Nyland, 287 P 2d 345, 47 Wash 2d 240

2. Mo —C.J S quoted at length in State v Brookshire, 353 S W 2d 681, 91, cert den 83 S Ct 155, 371 U S 67, 9 L Ed 2d 119

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7. Ill —People v Smith, 88 N E 2d 444, 404 Ill 125

8. Okl —Pritchett v State 155 P 2d 551, 79 Okl Cr 401
Tex —McCarley v State, 276 S W 2d 300, 161 Tex Cr R 263

9. Ill —People v Givens, 186 N E 2d 225, 26 Ill 2d 371

11. N C —State v Miller, 148 S E 2d 279, 267 N C 409, app after remand 158 S E 2d 47, 272 N C 243

14. N M —State v Couch, 193 P 2d 405, 52 N M 127
N C —State v Miller, 148 S E 2d 279, 267 N C 409, app after remand 158 S E 2d 47, 272 N C 243
Tenn —Fox v State, Cr, 441 S W 2d 491, 1 Tenn Cr App 308

May pursue assailant until out of danger

Md —Law v State, 318 A 2d 859, 21 Md App 13, app after remand 349 A 2d 295, 29 Md App 457

Amount of force justified

Utah—State v Mitcheson, 560 P 2d 1120

15. Cal —C.J.S quoted in People v Corlett, 153 P 2d 595, 604, 67 Cal App 2d 33, reh den 153 P 2d 964, 67 Cal App 33
Md —Law v State, 318 A 2d 859, 21 Md App 13, app after remand 349 A 2d 295, 29 Md App 457

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21. N M —State v Couch, supra, n 14

N C —State v Kelly, 211 S E 2d 854 24 N C App 670
S C —State v Starnes, 49 S E 2d 209, 213 S C 304

23. D C —U S v Peterson, C A , 483 F 2d 1222, 157 U S App D C 219, cert den 94 S Ct 367, 414 U S 1007, 38 L Ed 2d 244
Md —Crawford v State, 190 A 2d 538, 231 Md 354
N M —State v Couch, supra, n 14
Ohio—State v Reid, 210 N E 2d 142, 3 Ohio App 2d 215
Pa —Com v Baylor, 71 Dauph 1
Tex —Sledge v State, Cr , 507 S W 2d 726

25. Tex —Sledge v State, Cr , 507 S W 2d 726

Killing from ambush without warning not justifiable

Tex —McCarley v State, supra, n 8

§ 110. Defense of Property

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29. U S —McNabb v U S , C C A Tenn , 121 F 2d 848, revd on oth grds 63 S Ct 608, 318 U S 332, 87 L Ed 819, reh den 63 S Ct 1322, 319 U S 784, 87 L Ed 1727
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Pa —Com v Wilkes, 199 A 2d 411, 414 Pa 246, cert den 85 S Ct 344, 379 U S 939, 13 L Ed 2d 349

Reasonable man

N J —State v Bess, 247 A 2d 669, 53 N J 10
Wash —State v Theroff, 622 P 2d 1240, 95 Wash 2d 385, app after remand 657 P 2d 800, 33 Wash App 741

30. Cal —People v Mercer, 26 Cal Rptr 502, 210 C A 2d 153—People v Ceballos, 116 Cal Rptr 233, 526 P 2d 241, 12 C 3d 470

Invasion by actual force required

Ky —Shepperd v Com , 322 S W 2d 115

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33. Mo —State v Tolias, 326 S W 2d 329
Or —Hatfield v Gracen, 367 P 2d 546, 279 Or 303
Pa —Com v Wilkes, 199 A 2d 411, 414 Pa 246 cert den 85 S Ct 344, 379 U S 939, 13 L Ed 2d 349

34. U S —McNabb v U S , supra, n 29
Fla —Posey v State, App , 214 So 2d 750
Ga —Norrell v State, 157 S E 2d 784, 116 Ga App 479
Ill —People v Dillard, 284 N E 2d 490, 5 Ill App 3d 896
Ky —Shepperd v Com , 322 S W 2d 115

36. Mo —State v Browning, 442 S W 2d 55
Pa —Com v Keith, 46 Berks Co 137
Tenn —Brown v State, Cr , 441 S W 2d 485, 1 Tenn Cr App 294

37. Okl —Grindstaff v State, 165 P 2d 846, 82 Okl Cr 31

39. Okl —Turpen v State, 204 P 2d 298, 89 Okl Cr 6

40. Cal —C.J.S cited in People v Young, 29 Cal Rptr 595, 598, 214 C A 2d 641
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41. Cal —People v Smith, 57 Cal Rptr 508, 249 C A 2d 395

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45. N M —State v Waggoner, 165 P 2d 122 49 N M 199

§ 111. —— Right to Set Spring Guns

55. Okl —Hovis v State, 176 P 2d 833, 83 Okl Cr 299

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58. Cal —C.J.S cited in People v Ceballos, 116 Cal Rptr 233 236, 526 P 2d 241, 244, 12 C 3d 470

Criminal liability not precluded

Cal —People v Ceballos, 116 Cal Rptr 233, 526 P 2d 241, 12 C 3d 470

§ 112. Accident or Misfortune

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Unavoidable accident defined

Tex —Mayberry v State, 239 S W 2d 111, 156 Tex Cr R 101

60. Alaska—Des Jardins v State, 551 P 2d 181
D C —Thomas v U S , C A , 419 F 2d 1203 136 U S App D C 222
Ga —Carmichael v State, 155 S E 2d 439, 115 Ga App 591
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Miss —King v State, 181 So 2d 158, 254 Miss 162
Mo —State v Vincent, 321 S W 2d 439
N J —State v Robinson, 354 A 2d 374, 139 N J Super 475
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63. Fla —Smith v State, 65 So 2d 303
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69. Ga —Beckman v State, 213 S E 2d 527, 134 Ga App 118—DeBerry v State, 243 S E 2d 864, 241 Ga 204
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Accidental firing, not accidental course of bullet, required

Mo —State v Richardson, 321 S W 2d 423

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73 Ariz —C.J S cited in State v Reynolds, 505 P 2d 1050, 1052, 19 Ariz App 159
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77 Ga —Ford v State, supra, n 73
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79. U S —C.J S cited in Roland v Mintzes D C Md 554 F Supp 881 887—C.J.S cited in Roland v Mintzes D C Md 554 F Supp 881, 889
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80. Ala —Reynolds v State, Cr, 346 So 2d 979, cert den, Ala, 346 So 2d 986

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81. Ky —Bell v Com, 309 S W 2d 163

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82. Mo —State v Mills, 179 S W 2d 95, 352 Mo 774—State v Hinojosa, 242 S W 2d 1—State v Tatum, 414 S W 2d 566

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Tex —Sykes v State, Cr, 399 S W 2d 349

More than merely actionable negligence required

N C —State v Faust, 118 S E 2d 769, 254 N C 101, 96 A L R 2d 1422, cert den 82 S Ct 85, 368 U S 851, 7 L Ed 2d 49

Death of child from neglect of parent

Ind —Eaglen v State, 231 N E 2d 147, 249 Ind 144

84. Pa —Com v Baylor, 71 Dauph 1

87. Battle of vituperation climaxed by rude pushing held to constitute "combat" as used in statute

Fla —Tipton v State, 97 So 2d 277

89. Dangerous weapon used

Okl —Vassaur v State, Cr, 514 P 2d 673

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90. U S —**C J S cited in U S v Ferguson, CMA, 15 M J 12, 20, reconsideration den 15 M J 479**

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93. Va —Jones v Com, 82 S E 2d 482, 196 Va 10

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94. Ill —People v Adams, 291 N E 2d 54, 9 Ill App 3d 61

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May be manslaughter

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99. Tex —Hodges v State, 272 S W 2d 902, 160 Tex Cr R 579

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2. W Va —State v Green, 206 S E 2d 923, 157 W Va 1031

§ 113. Compulsion or Necessity

5. U S —U S v Buchanan, C A Ill, 529 F 2d 1148, cert den 96 S Ct 1725, 425 U S 950, 48 L Ed 2d 194

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Defense available

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Defense unavailable to aider and abettor

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29. Ala —Miller v State, 16 So 2d 335, 31 Ala App 319—Kizziah v State, supra n 10

Ill —People v Brumbeloe, 240 N E 2d 150, 97 Ill App 2d 370

Ind —Hightire v State, 213 N E 2d 707, 247 Ind 164—Cammack v State, 261 N E 2d 862, 254 Ind 637

Iowa—**C J S cited in State v Sedig, 16 N W 2d 247 250 235 Iowa 609 —C.J.S cited in State v Emery, 17 N W 2d 854, 857, 236 Iowa 60—State v Wilson, 19 N W 2d 232, 236 Iowa 429—C J S cited in State v Powell, 24 N W 2d 769, 776, 237 Iowa 1227—State v Haffa, 71 N W 2d 35, 246 Iowa 1275, cert den 76 S Ct 198, 350 U S 914, 100 L Ed 2d 801—State v Badgett, 167 N W 2d 680—State v Broten 176 N W 2d 827**

Ky —Taul v Com, 249 S W 2d 45

Md —Chandler v State, 256 A 2d 695, 7 Md App 646

Ohio—State v Melchior, 381 N E 2d 195, 56 Ohio St 2d 15 10 O O 3d 8

Pa —**C.J S cited in Com v Johnston, 263 A 2d 376, 379 438 Pa 485, 41 A L R 3d 576—Com v**

Roundtree, 269 A.2d 709, 440 Pa 199—Com v Galloway, 485 A 2d 776, 336 Pa Super 225

Tex —Witty v State, 203 S W 2d 212, 150 Tex Cr R 555

Provocation not an element

Ga —Deal v State, 88 S E 573, 145 Ga 33—Vun Cannon v State, 68 S E 2d 586, 208 Ga 608

Other elements

Ind —King v State, 234 N E 2d 465, 249 Ind 699

30. Cal —People v Cox, 153 P 2d 362, 67 Cal App 2d 166

Wash —State v Smith, 470 P 2d 214, 2 Wash App 769

31. Ky —Schull v Com, 220 S W 2d 842, 310 Ky 319

Pa —Com v Gierot, 46 Berks Co 281, 68 York Leg Rec 123

Tex —Carter v State, Cr, 515 S W 2d 668

33. Ill —People v Kendricks, 283 N E 2d 273, 4 Ill App 3d 1029

Tex —Bradford v Fort Worth Transit Co, Civ App, 450 S W 2d 919, err ref no rev err

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34. Cal —People v Toledo, 193 P 2d 953, 85 Cal App 2d 570

35. Del —State v Robinson, 36 A 2d 27, 3 Terry 419—State v Winsett, Super, 205 A 2d 510, 8 Storey 111

Ind —Banks v State, 276 N E 2d 155, 257 Ind 530

N C —State v McLawhorn, 155 S E 2d 198, 270 N C 622—State v McConnaughey, 311 S E 2d 26, 66 N C App 92

Pa —Com v Vassar, 88 A 2d 725, 370 Pa 551—C.J.S. cited in Com v Johnston, 263 A 2d 376, 379, 438 Pa 485, 41 A L R 3d 576

Va —Callahan v Com, 63 S E 2d 617, 192 Va 26—C.J.S. cited in Bailey v Com, 104 S E 2d 28, 31, 200 Va 92

36. S C —State v Osborne, 25 S E 2d 561, 202 S C 473, cert den 64 S Ct 58, 320 U S 763, 88 L Ed 455

37. Cal —People v Toledo, supra, n 34

Ga —Banks v State, 182 S E 2d 106, 227 Ga 578

Ill —People v Davis, 226 N E 2d 688, 82 Ill App 2d 282

38. Colo —Sanchez v People, 470 P 2d 857, 172 Colo 168

39. Tenn —Myers v State, 206 S W 2d 30, 185 Tenn 264

40. Ark —Eddington v State, 286 S W 2d 473, 225 Ark 929

Miss —Pearson v State, 179 So 2d 792, 254 Miss 275

N C —State v McGirt, 139 S E 2d 640, 263 N C 527

Okl —Fowler v State, Cr, 507 P 2d 929

Va —Callahan v Com, supra, n 35

42. Pa —Com v Winebrenner, 265 A 2d 108, 439 Pa 73

45. Ill —People v Johnson, 203 N E 2d 283, 54 Ill App 2d 27

47. Involuntary manslaughter

N C —State v Teel, 310 S E 2d 31, 65 N C App 423

A mere claim of self-defense may not preclude a conviction on a charge of involuntary manslaughter.[49.5]

49.5. Ill —People v Williams, 304 N E 2d 178, 15 Ill App 3d 303

§ 115. Necessity and Good Faith Basis of Right

50. Cal —C.J.S. cited in Vaughn v Jonas, 191 P 2d 432, 440, 31 Cal 2d 587

Iowa—State v Haffa, 71 N W 2d 35, 246 Iowa 1275, cert den 76 S Ct 198, 350 U S 914, 100 L Ed 801

Ky —McDaniels v Com, 249 S W 2d 546

Mass —Com v Kendrick, 218 N E 2d 408, 351 Mass. 203

Mo —C.J.S. cited in State v Richardson, 321 S W 2d 423, 429

N J —State v Bonano, 284 A 2d 345, 59 N J 515

N C —State v Gladden, 184 S E 2d 249, 279 N C 566

Pa —Com v Wrona, 275 A 2d 78, 442 Pa 201

S C —State v Osborne, 25 S E 2d 561, 202 S C 473, cert den, 64 S Ct 58, 320 U S 763, 88 L Ed 455—State v Brooks, 167 S E 2d 307, 252 S C 504

Va —Banks v Bradley, 66 S E 2d 526, 192 Va 598

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51. Ala —Kizziah v State, supra, n 10

Fla —McKinney v State, App, 260 So 2d 239

Ky —McDaniels v Com, supra, n 50

Miss —Marshall v State, 72 So 2d 169, 220 Miss 846

N C —State v Mays, 187 S E 2d 479, 14 N C App 90, cert den 188 S E 2d 366, 281 N C 157

Pa —Com v Commander, 260 A 2d 773, 436 Pa 532

Tex —Roper v State, 230 S W 2d 528, 155 Tex Cr R 59

52. Cal —People v Collins, 11 Cal Rptr 504, 189 C A 2d 575

Del —State v Robinson, supra, n 35

Fla —McKnight v State, App, 341 So 2d 261

Ill —People v Jordan, 165 N E 2d 296, 18 Ill 2d 489—People v Knox, 252 N E 2d 549, 116 Ill App 2d 427

Ky —Collett v Com, 176 S W 2d 893, 296 Ky 267

Mass —Com v Hartford, 194 N E 2d 401, 346 Mass 482

Mich —People v Godsey, 220 N W 2d 801, 54 Mich App 316

Minn —State v Boyce, 170 N W 2d 104, 284 Minn 242

Miss —Pitts v State, 51 So 2d 448, 211 Miss 268

Mo —State v Jackson, App, 522 S W 2d 317

Neb —State v Goodseal, 183 N W 2d 258, 186 Neb 359, cert den 92 S Ct 146, 404 U S 845, 30 L Ed 2d 82

N J —State v Centalonza, 86 A 2d 780, 18 N J Super 154—State v Brown, 215 A 2d 9, 46 N J 96

N C —State v Sally, 63 S E 2d 151, 233 N C 225

Pa —Com v Gray, 271 A 2d 486, 441 Pa 91, app dism, cert den 91 S Ct 1683, 402 U S 967, 29 L Ed 2d 132—Com v Mahoney, 331 A 2d 488, 460 Pa 201

S C —State v Washington, 193 S E 2d 509, 259 S C 568

Tenn —C.J S cited in Lewelling v State, 460 S W 2d 847, 849, 224 Tenn 619

W Va —State v Hamric, 151 S E 2d 252, 151 W Va 1

Wis —Ross v State, 211 N W 2d 827, 61 Wis 2d 160

Wyo —Nunez v State, 383 P 2d 726

Distinction between necessity and reasonable apprehension

N C —State v Fowler, 108 S E 2d 892 250 N C 595

53. Cal —People v Dawson, 198 P 2d 338, 88 Cal App 2d 85

Del —State v Robinson, supra, n 35

Ga —Hamby v State, 32 S E 2d 546, 71 Ga App 817—Lewis v State, 53 S E 2d 590, 79 Ga App 326

Ind —Hightire v State, 213 N E 2d 707, 247 Ind 164

Md —Thomas v State, 262 A 2d 797, 9 Md App 94

Mo —State v McGee, 234 S W 2d 587, 361 Mo 309—State v Hicks, 438 S W 2d 215—C.J.S. cited in State v Sherrill, App, 496 S W 2d 321, 325—State v Young, App, 510 S W 2d 732—State v Isom, App, 660 S W 2d 739

N J —State v Hipplewith, 164 A 2d 481, 33 N J 300

N C —State v Anderson, 51 S E 2d 895, 230 N C 54—State v Rawley, supra, n 20—State v Goode, 107 S E 2d 70, 249 N C 632—State v Fowler, 108 S E 2d 892, 250 N C 595—State v Edwards, 174 S E 2d 28, 8 N C App 296—State v Shelton, 212 S E 2d 545, 25 N C App 207

Okl —Evans v State, 206 P 2d 247, 89 Okl Cr 218 sentence mod 214 P 2d 970, 89 Okl Cr 218

Pa —Com v Light, 126 A 2d 288, 458 Pa 328

Tex —Gibson v State, supra, n 10

Mo —State v Henson, App, 552 S W 2d 378

Reasonable belief of no other alternative

Pa —Com v Anderson, 156 A 2d 624, 191 Pa Super 213

Killing not actually necessary

N C —State v Camp, 146 S E 2d 643, 266 N C 626

Appearance of reality

D C —U S v Peterson, C A, 483 F 2d 1222, 157 U S App D C, cert den 94 S Ct 367, 414 U S 1007, 38 L Ed 2d 244

Actual necessity not test

Mich —People v Shelton, 235 N W 2d 93, 64 Mich App 154

54. D C —U S v Peterson, C A, 483 F 2d 1222, 157 U S App D C 219, cert den 94 S Ct 367, 414 U S 1007, 38 L Ed 2d 244

Fla —State v Wade, App, 305 So 2d 851 Quashed on oth grds, Sup, 339 So 2d 648, vac on oth grds, 340 So 2d 982

Wis —Ross v State, 211 N W 2d 827, 61 Wis 2d 160

"When danger of death or great bodily harm ceases, the right of self-defense ceases with it"

Ind —Schlegel v State, 150 N E 2d 563, 567, 238 Ind 374

Fear of ordinary battery or simple assault

Iowa—State v Cruse, 228 N W 2d 28

Mo —State v Jackson, App, 522 S W 2d 317

After rape perpetrated

Md —Souffie v State, 439 A 2d 1127, 50 Md App 547

55. Cal —People v Dawson, supra, n 53

56. Colo —People v Bramlett 573 P 2d 94, 194 Colo 205, cert den 98 S Ct 1590, 435 U S 956, 55 L Ed 2d 808

Fla —McKnight v State, App, 341 So 2d 261

Ga —Lundy v State, 168 S E 2d 199, 119 Ga App 585

Ill —People v Jordan, 165 N E 2d 296, 18 Ill 2d 489

Mass —Com v Shaffer, 318 N E 2d 914, 2 Mass App 658, affd, Sup, 326 N E 2d 880, 367 Mass 508

Mo —State v Thornton, App, 532 S W 2d 37

Va —Banks v Bradley, supra, n 50

58 Cal —People v Lopez, 23 Cal Rptr 532, 205 C A 2d 807

Ill —People v Dillon, 180 N E 2d 503, 24 Ill 2d 122

N C —State v Clay, 256 S E 2d 176, 297 N C 555

59. Cal —People v Jones, 30 Cal Rptr 280, 215 C A 2d 341

Ill —People v Peery, 225 N E 2d 730, 81 Ill App 2d 372—People v Welsch, 249 N E 2d 714, 110 Ill App 2d 474

60 Md —Wilson v State, 242 A 2d 194, 4 Md App 192, cert den 89 S Ct 1467, 394 U S 975, 22 L Ed 2d 754

61. Tenn —Morrison v State, 371 S W 2d 441, 212 Tenn 633

§ 116. Manslaughter Distinguished

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64. Distinctions stated

(4) Other statements

Ga —Williams v State, 206 S E 2d 37, 232 Ga 203

Ill —People v Zertuche, 282 N E 2d 201, 5 Ill App 3d 303

66. U S —C J S quoted in U S ex rel Crosby v Brierley, C A Pa 404 F 2d 790, 797

Ga —Williams v State, 191 S E 2d 100, 126 Ga App 454

N C —State v Ramey, 160 S E 2d 56, 273 N C 325

Does not reduce offense from murder to manslaughter

Nev —Hill v State, 647 P 2d 370 98 Nev 295

§ 117. Aggression or Provocation by Accused in General

67. U S —Hayes v Wainwright, D C Fla, 302 F Supp 716

Ala —Rainer v State, Cr, 342 So 2d 1348

Ariz.—State v Jackson, 382 P 2d 229, 94 Ariz 117—State v Randall, 385 P 2d 709, 94 Ariz 417—State v Jones, 385 P 2d 1019, 95 Ariz 4, cert den 85 S Ct 97, 379 U S 852, 13 L Ed 2d 55

Ark —Clingham v State, 182 S W 2d 472, 207 Ark 686—Burton v State, 495 S W 2d 841, 254 Ark 673

Cal —People v Holt, 153 P 2d 21, 25 Cal 2d 59—People v McAuliffe, 316 P 2d 381, 154 C A 2d 332, cert den 80 S Ct 266, 361 U S 920, 4 L Ed 2d 188—People v Smith, 108 Cal Rptr 698, 33 C A 3d 51

Colo —Vigil v People, 353 P 2d 82, 143 Colo 328

Del —Quillen v State, 110 A 2d 445, 10 Terry 114, rearg den 112 A 2d 848, 10 Terry 163

D C —Harris v U S, C A., 364 F 2d 701, 124 U S App D C 308—Rowe v U S, C A, 370 F 2d 240, 125 U S App D C 218—U S v Grover, C A, 485 F 2d 1039, 158 U S App D C 260

Fla —Mixon v State, 59 So 2d 38—Crum v State, App, 172 So 2d 24

Ga —Hill v State, 88 S E 2d 145, 211 Ga 683

Ill —People v Tillman, 50 N E 2d 751, 383 Ill 560—People v Kelly, 136 N E 2d 785, 8 Ill 2d 604, cert den 77 S Ct 1050, 353 U S 966, 1 L Ed 2d 915—People v Himes, 334 N E 2d 233, 31 Ill App 3d 295

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Iowa—State v Emery, 17 N W 2d 854, 236 Iowa 60—State v Haffa, 71 N W 2d 35, 246 Iowa 1275, cert den 76 S Ct 198, 350 U S 914, 100 L Ed 801

Ky —Delk v Com, 215 S W 2d 109, 308 Ky 579—Lawson v Com, 218 S W 2d 41, 309 Ky 458—Lewis v Com, 226 S W 2d 934 312 Ky 191—Martin v Com, 406 S W 2d 843, app after remand 424 S W 2d 397—Townsend v Com, 474 S W 2d 352

La —State v Brent, 347 So 2d 1112

Me —State v Millett, 273 A 2d 504, 43 A L R 3d 211

Mich —People v Couch, 211 N W 2d 250, 49 Mich App 69—People v Bryant, 342 N W 2d 86, 129 Mich App 974

Minn —State v Johnson, 152 N W 2d 529, 277 Minn 368

Miss —Carroll v State, 196 So 2d 878—Patrick v State, 285 So 2d 165

Mo —State v Fuller, 302 S W 2d 906—C.J S cited in State v Spencer, 307 S W 2d 440, 443—C.J.S cited in State v Richardson, 321 S W 2d 423, 428—State v Aubuchon, 394 S W 2d 327—C.J.S. cited in State v Sherrill, App, 496 S W 2d 321, 325—C.J.S. cited in State v Adkins, App, 537 S W 2d 246, 250—State v Isom, App, 660 S W 2d 739

N C —State v Davis, 33 S E 2d 623, 225 N C 117—State v Church, supra, n 20—State v Mays, 187 S E 2d 479, 14 N C App 90, cert den 188 S E 2d 366, 281 N C 157—State v Watkins, 196 S E 2d 750, 283 N C 504—State v Sanders, 245 S E 2d 674, 295 N C 361, app after remand 259 S E 2d 258, 298 N C 512, app after remand 281 S E 2d 7, 303 N C 608, cert den 102 S Ct 523, 454 U S 973, 70 L Ed 2d 392

Ohio—State v Blanton, 170 N E 2d 754, 111 Ohio App 111

Okl —Evans v State, supra, n 53

Pa —Com v Collazo, 12 Cumb 110—Com v Blackman, 285 A 2d 521, 446 Pa 61

S C —State v Bodie, 49 S E 2d 575, 213 S C 325—State v Jackson, 87 S E 2d 681, 227 S C 271

Tex —La Farn v State, 265 S W 2d 816, 159 Tex Cr R 562—Muckleroy v State 310 S W 2d 315, 165 Tex Cr R 629—Tew v State, Cr, 379 S W 2d 893

Va —Jones v Com, 82 S E 2d 482, 196 Va 10

Wash —C.J.S. cited in State v Wilson, 174 P 2d 553, 561, 26 Wash 2d 468

68. Ala —Lovejoy v State, 15 So 2d 300, 31 Ala App 244, cert den 15 So 2d 303, 244 Ala 637—Miller v State, 16 So 2d 803, 31 Ala App 329—Parr v State, 31 So 2d 107, 33 Ala App 108, cert den 31 So 2d 114, 249 Ala 317—Moore v State, 108 So 2d 382, 40 Ala App 121

Cal —People v Bates, 64 Cal Rptr 575, 256 C A 2d 935

D C —U S v Peterson, C A, 483 F 2d 1222, 157 U S App D C 219, cert den 94 S Ct 367, 414 U S 1007, 38 L Ed 2d 244

Ga —Gilbert v State, 94 S E 2d 109, 94 Ga App 217

La —State v Rone, 62 So 2d 114, 222 La 99

Mo —C J.S. quoted in State v Potter, App, 657 S W 2d 694, 698

N C —State v Jennings, 171 S E 2d 447, 276 N C 157, app after remand 184 S E 2d 254, 279 N C 604—State v Butler, 205 S E 2d 571, 21 N C App 679—State v Potter, 244 S E 2d 397, 295 N C 126

Ohio—State v Reid, 210 N E 2d 142, 3 Ohio App 2d 215

Or —State v Burns, 516 P 2d 748, 15 Or App 552

Okl —Freeman v State, 262 P 2d 713, 97 Okl Cr 275

Pa —Com v Johnson, 331 A 2d 473 460 Pa 169—Com v Mahoney, 331 A 2d 488, 460 Pa 201—Com v Lowe, 333 A 2d 765, 460 Pa 357

S C —State v Jackson, supra, n 67

Wash —State v Craig, 514 P 2d 151, 82 Wash 2d 777

Disproportionate violence by person provoked

Ga —Norrell v State, 157 S E 2d 784, 116 Ga App 479

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69. Ala —Mack v State, Cr, 348 So 2d 524

Ariz —State v Moore, 540 P 2d 1252, 112 Ariz 271

Cal —People v Moore, 275 P 2d 485, 43 C 2d 517

Ga —Hill v State, 88 S E 2d 145, 211 Ga 683—Wilson v State, 113 S E 2d 95, 215 Ga 672

Ill —People v Tillman, 50 N E 2d 751, 383 Ill 560

Mo —State v Hurst, 178 S W 2d 437—C.J.S quoted in State v Potter, App, 657 S W 2d 694, 698

Pa —C.J S. cited in Com v Franklin, 265 A 2d 361, 365, 438 Pa 411

Tenn —Floyd v State, Cr, 430 S W 2d 888, 1 Tenn Cr App 106

Tex —Darwin v State, 185 S W 2d 988, 148 Tex Cr 210—Gibson v State, supra, n 10

Va —Huffman v Com, 39 S E 2d 291, 185 Va 524

70. Pa —Com v Minoff, 69 A 2d 145, 363 Pa 287

72. Ala —Hanby v State, 101 So 2d 553, 39 Ala App 392, revd on oth grds 101 So 2d 562, 267 Ala 69

D C —U S v Peterson, C A, 483 F 2d 1222, 157 U S App D C 219, cert den 94 S Ct 367, 414 U S 1007, 38 L Ed 2d 244

77 Ga —Gordy v State, 92 S E 2d 737, 93 Ga App 743

80. Tex —Jones v State, 192 S W 2d 155, 149 Tex Cr R 119

Va —Bailey v Com, 104 S E 2d 28, 200 Va 92

§ 118. Nature and Circumstances of Aggression or Provocation

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83. La —State v Gonday, App 1 Cir, 442 So 2d 703

Minn —State v Boyce, 170 N W 2d 104, 284 Minn 242

Victim's use of deadly force

Wis —Ruff v State, 223 N W 2d 446, 65 Wis 2d 713

84. N C —State v Randolph, 45 S E 2d 132, 228 N C 228

Tex —Curry v State, 309 S W 2d 438, 165 Tex Cr R 556

W Va —State v Clayton, 277 S E 2d 619, app after remand 317 S E 2d 499

85. Tenn —Hill v Alsobrook, App, 370 S W 2d 906 51 Tenn App 546

§ 119. —— Acts or Words

86. Ill —People v Echoles, 344 N E 2d 620, 36 Ill App 3d 845—People v Andersch, 438 N E 2d 482, 63 Ill Dec 551, 107 Ill App 3d 810

Md —Street v State, 338 A 2d 72, 26 Md App 336

Wis —State v Bougneit, App, 294 N W 2d 675, 97 Wis 2d 687

87. N C —State v Berry, 240 S E 2d 633, 35 N C App 128, petition den, 244 S E 2d 155, 294 N C 737

89. N C —State v Wynn, 180 S E 2d 135, 278 N C 513

Pa —Com v Townes, 334 A 2d 599, 460 Pa 709

92. Ariz —State v Jackson, 382 P 2d 229, 94 Ariz 117

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Tex —Curry v State, 309 S W 2d 438, 165 Tex Cr R 556

95. Tex —Morrison v State, supra, n 92

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1. N C —C.J S cited in State v Jennings, 171 S E 2d 447, 451, 276 N C 157, app after remand 184 S E 2d 254, 279 N C 604

2. Mo —C.J.S cited in State v Bartlett, 224 S W 2d 100, 104, 359 Mo 881

N C —C.J S cited in State v Jennings, 171 S E 2d 447, 451, 276 N C 157 app after remand 184 S E 2d 254, 279 N C 604

5. Ala —Henson v State, 22 So 2d 905, 247 Ala 125

Ga —Davis v State, 34 S E 2d 672, 72 Ga App 631

Miss —Fields v State, 21 So 2d 412

Ohio—State v Melchior, 381 N E 2d 195, 56 Ohio St 2d 15, 10 O O 3d 8

Tenn —Gann v State, 383 S W 2d 32, 214 Tenn 711

Va —Near v Com, 116 S E 2d 85, 202 Va 20, cert den 81 S Ct 907, 365 U S 873, 5 L Ed 2d 862

Wis —Sykes v State, 230 N W 2d 760, 69 Wis 2d 616

6. Ill —People v Bailey, 326 N E 2d 550, 27 Ill App 3d 128

7. Pa —Com v Southard, 33 Del Co 464

Tenn —Broz v State, 472 S W 2d 907, 4 149, 183 Tenn 53

8. Minn —State v Morgan, 296 N W 2d 397

Mo —C.J S cited in State v Graves, 182 S W 2d 46, 56, 352 Mo 1102

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Pa —Com v Tiernan, 314 A 2d 310, 455 Pa 88

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15. Tex —Whitlock v State, 177 S W 2d 205, 146 Tex Cr R 594—Tapley v State, 256 S W 2d 583, 158 Tex Cr R 495

16. N C —State v Potter, 244 S E 2d 397, 295 N C 126

23. Idaho—C.J.S cited in State v Owen, 253 P 2d 203, 214, 73 Idaho 394

24. Ark —Clingham v State 182 S W 2d 472, 207 Ark 686

Kan —State v Marks, 602 P 2d 1344, 226 Kan 704

N Y —People v Guraj, 431 N Y S 2d 925, 105 Misc 2d 176

Okl —Bell v State, 381 P 2d 167

Pa —Com v Elliott, 37 A 2d 582, 349 Pa 488

25. Ariz —State v Hitchcock, 350 P 2d 681, 87 Ariz 277, cert den and app dism 81 S Ct 823, 365 U S 609, 5 L Ed 2d 821

Cal —People v Ketchel, 30 Cal Rptr 538, 381 P 2d 394, 59 C 2d 503

Fla —C.J S. cited in McCoy v State, App, 175 So 2d 588, 590

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Ky —Lightfoot v Com, 219 S W 2d 984, 310 Ky 151

Pa —Com v Marvel, 411 A 2d 1254 271 Pa Super 11

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26. Kan—State v Sullivan, 578 P 2d 1108, 224 Kan 110

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27. Ariz—State v Jones, 385 P 2d 1019, 95 Ariz 4, cert den 85 S Ct 97, 379 U S 852, 13 L Ed 2d 55

29. Ga—Norrell v State, 157 S E 2d 784, 116 Ga App 479

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34. Ala—Moore v State, 108 So 2d 382, 40 Ala App 121

36. Miss—Goldsby v State, 78 So 2d 762, 226 Miss 1, cert den 76 S Ct 216, 350 U S 925, 100 L Ed 809

40. La—State v Brent, 347 So 2d 1112

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42. Ariz—State v Jackson, 382 P 2d 229, 94 Ariz 117

Md—Crawford v State, 190 A 2d 538, 231 Md 354

Mich—People v Bright, 213 N W 2d 279, 50 Mich App 401

Or—State v Burns, 516 P 2d 748, 15 Or App 552

43. Mo—C.J.S. cited in State v Malone 301 S W 2d 750, 760

Tenn—Gray v State, 313 S W 2d 246, 203 Tenn 332

D C—U S v Peterson, C A, 483 F 2d 1222, 157 U S App D C 219, cert den 94 S Ct 367 414 U S 1007, 38 L Ed 2d 244

Md—Bennett v State, 188 A 2d 142, 230 Md 562—Perry v State, 197 A 2d 833, 234 Md 48

Tenn—Floyd v State, Cr, 430 S W 2d 888, 1 Tenn Cr App 106

The authorities are in conflict as to whether criminal intercourse with the wife of another bars self-defense [44.5]

44.5. Va—Barnard v Com, 114 S E 563, 134 Va 613—C.J.S. cited in Bailey v Com, 104 S E 2d 28, 31, 200 Va 92

45. Ga—Henderson v State, 221 S E 2d 633, 136 Ga App 490

46. Md—C.J.S cited in Barger v State, 202 A 2d 344, 347, 235 Md 556, 9 A L R 3d 926

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54. Pa—Com v Johnston, 263 A 2d 376, 438 Pa 485, 41 A L R 3d 576

57. Md—C.J.S cited in Perry v State, 197 A 2d 833, 837, 234 Md 48

§ 120. —— Intent

61. Miss—Patrick v State, 285 So 2d 165

Utah—State v Schoenfeld, 545 P 2d 193

Character of act coupled with intent

La—State v Gonday, App 1 Cir, 442 So 2d 703

63. Tex—Jones v State, 192 S W 2d 155, 149 Tex Cr R 119

Utah—State v Starks, 627 P 2d 88

64. Idaho—State v Livesay, 233 P 2d 432, 71 Idaho 442

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68. Cal—People v Garnier, 213 P 2d 111, 95 Cal App 2d 489

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70. Tex—Sullivan v State, Cr, 365 S W 2d 810

W Va—C.J.S. cited in State v Bowyer, 101 S E 2d 243, 249, 143 W Va 302

71. Intent to kill not necessary

Okl—Ruth v State, Cr, 581 P 2d 919 Cert den 99 S Ct 1797, 440 U S 984, 60 L Ed 2d 246, overruling Swan v State, 165 P 627, 13 Okl Cr 546, to extent inconsistent

72. Mo—C.J.S. cited in State v Graves, 182 S W 2d 46, 56, 352 Mo 1102—State v Mayberry, 226 S W 2d 725, 360 Mo 35

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75. Ill—People v Hines, 334 N E 2d 233, 31 Ill App 3d 295

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Okl—Jenkins v State, 161 P 2d 90, 80 Okl Cr 328—Jenkins v State, 162 P 2d 336, 80 Okl Cr 328

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84. W Va—C.J.S. cited in State v Bowyer, 101 S E 2d 243, 249, 143 W Va 302

87. Md—C J S cited in Gunther v State, 179 A 2d 880, 883, 228 Md 404

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18. Does not mean fist fight or scuffle

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54. Fear of victim's size alone insufficient

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N H —State v Gorham, 412 A 2d 1017, 120 N H 162

Wis —Roe v State, 290 N W 2d 291, 95 Wis 2d 226

Belief not unreasonable

Pa —Com v Eberle, 37 A 2d 90, 474 Pa 548

Factors properly considered

Ill —People v Lofthouse, App, 374 N E 2d 921, 16 Ill Dec 146, 58 Ill App 3d 754

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Pa —Com v Watson, 431 A 2d 949, 494 Pa 467

2. U S —Clark v Ziedonis, D C Wis, 368 F Supp 544, affd, C A 513 F 2d 79

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Colo —Maes v People, 441 P 2d 1, 166 Colo 15

Fla —Raneri v State, App, 255 So 2d 291

Ill —People v Padget, 315 N E 2d 646, 21 Ill App 3d 426—People v Ellis, 437 N E 2d 409, 62 Ill Dec 882, 107 Ill App 3d 603—People v Eliason, 2 Dist, 453 N E 2d 908, 73 Ill Dec 83, 117 Ill App 3d 683

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Neb —State v Schroeder, 261 N W 2d 759, 199 Neb 822

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Va —Bailey v Com, 104 S E 2d 28, 200 Va 92

Wis —Thomas v State, 192 N W 2d 864, 53 Wis 2d 483

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Ga —Cribb v State, 31 S E 2d 248, 71 Ga App 539

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3. Tenn —State v Wilson, 556 S W 2d 232

4. Ariz —State v Copley, 418 P 2d 579, 101 Ariz 242

5. Ill —People v Golson, 64 N E 2d 462, 392 Ill 252, cert den 66 S Ct 1371, 328 U S 865, 90 L Ed 1635

8. Ind —Banks v State, 276 N E 2d 155, 257 Ind 530

W Va —State v Green, 206 S E 2d 923, 157 W Va 1031

11. Not applicable where victim is stranger

Wash —State v Fondren, 701 P 2d 810, 41 Wash App 17

12. Cal —People v Cisneros, 110 Cal Rptr 269, 34 C A 3d 399

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Okl —West v State, Cr, 617 P 2d 1362

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14. Ala —Langley v State, Cr App, 373 So 2d 1267

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W Va —State v W J B, 276 S E 2d 550

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Ill —People v Williams, 205 N E 2d 749, 56 Ill App 2d 159

Mont —State v Sunday, 609 P 2d 1188, 187 Mont 292

15. Tex —Valentine v State, Cr App, 587 S W 2d 399

Wis —State v Mendoza, 25, N W 2d 260, 80 Wis 2d 122, app after remand 291 N W 2d 478, 96 Wis 2d 106

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N C —State v Ward, 215 S E 2d 394, 26 N C App 159

17. U S —Hebah v U S, 456 P 2d 696, 197 Ct Cl 729, cert den 93 S Ct 199, 409 U S 870, 34 L Ed 2d 121

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25. Ga —Anderson v State 266 S E 2d 221, 245 Ga 619

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34. Ariz —State v Anderson, 428 P 2d 672, 102 Ariz 295

Cal —C.J S cited in People v Furber, 43 Cal Rptr 771, 776, 233 C A 2d 678, as stating the minority rule

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Mich —People v Cameron, 217 N W 2d 401, 52 Mich App 463—People v Green 318 N W 2d 547, 113 Mich App 699

N C —State v Kirby 160 S E 2d 24, 273 N C 306

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42. Wash —State v Crigler, 598 P 2d 739, 23 Wash App 716

45. No necessity to wait until badly beaten

Ill —People v Shields, 311 N E 2d 212, 18 Ill App 3d 1080

Mere attack insufficient

Tex —Burns v State 262 S W 2d 406, 159 Tex Cr R 183

46. Ill —People v Jordan, 165 N E 2d 296, 18 Ill 2d 489

La —State v Rone, 62 So 2d 114, 222 La 99—State v Faulkner, 441 So 2d 721

Miss —Yarber v State, 93 So 2d 851, 230 Miss 746

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Or —State v Weber, 423 P 2d 767, 246 Or 312 cert den 88 S Ct 121 389 U S 863, 19 L Ed 2d 131

Va —Boone v Com, 80 S E 2d 412, 195 Va 708

Avoidance of confrontation not required

Ill —People v Watkins, 308 N E 2d 180, 17 Ill App 3d 574

Size difference and disability insufficient

Ill —People v Ellis, 437 N E 2d 409, 62 Ill Dec 882 107 Ill App 3d 603

Act must indicate inability to avoid danger and necessity of force

Mo —State v Isom, App, 660 S W 2d 739

48. Demonstration held sufficient

(2) Other matters

Colo —People v La Voie 395 P 2d 1001, 155 Colo 551

Deliberate assault

Ill —People v Myers, 310 N E 2d 407, 18 Ill App 3d 700

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52. Fla —Gil v State, App, 266 So 2d 43

What constitutes deadly weapon

N C —State v McGee, 267 S E 2d 67, 47 N C App 280, review den 273 S E 2d 306, 301 N C 101

53. N C —State v Smith, 249 S E 2d 466, 39 N C App 11, cert den 254 S E 2d 37, 297 N C 179

54. Ill —People v Brumbeloe, 240 N E 2d 150, 97 Ill App 2d 370

Tex —Middleton v State, 179 S W 2d 510, 147 Tex Cr R 146

55. Ill —People v Goodman, 396 N E 2d 274, 33 Ill Dec 49, 77 Ill App 3d 569

Mass —Com v Shaffer, 326 N E 2d 880, 367 Mass 508

57. Ala —Rice v State, 35 So 2d 617, 250 Ala 618

Ga —Pace v State, 173 S E 2d 464, 121 Ga App 251

Ill —People v Lockett, 229 N E 2d 386, 85 Ill App 2d 410

61. Ark —Ford v State, 257 S W 2d 30, 222 Ark 16

Pa —Com v Johnston, 263 A 2d 376, 438 Pa 485, 41 A L R 3d 576

Tex —Witty v State, 203 S W 2d 212, 150 Tex Cr R 555

Threats and intimidation coupled with possession of a deadly weapon can be sufficient basis for self-defense [61.5]

61.5. Circumstances create reasonable expectation of imminent danger

Wash —State v Negrin, 681 P 2d 1287, 37 Wash App 516

64. Ill —People v Foster, 401 N E 2d 1221, 37 Ill Dec 128, 81 Ill App 3d 915

Miss —Scott v State, 34 So 2d 718, 203 Miss 349

65. Ill —People v Easter, 430 N E 2d 612, 58 Ill Dec 580, 102 Ill App 3d 974

Pa —Com v Watson, 431 A 2d 949, 494 Pa 467

Use or possession of deadly weapon not essential

Ill —People v Kelly, 322 N E 2d 527, 24 Ill App 3d 1018

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69. Ill —Schnepf v Grubb, 261 N E 2d 47 125 Ill App 2d 432

Miss —Stennis v State, 234 So 2d 611

76. Ala —May v State, 45 So 2d 695 35 Ala App 228, cert den 45 So 2d 698, 253 Ala 517

Cal —People v Lucas, 324 P 2d 933, 160 C A 2d 305

Ill —People v Odum, 279 N E 2d 12, 3 Ill App 3d 538

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77 Neb —Bell v State, 67 N W 2d 762, 159 Neb 474

Okl —Fields v State 188 P 2d 231, 85 Okl Cr 439—Jamison v State, Cr, 304 P 2d 371

78. Threat of simple assault

Ky —Rose v Com, 422 S W 2d 130

80. Tenn —Myers v State, 206 S W 2d 30, 185 Tenn 264

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82. Ill —People v Tillman 50 N E 2d 751, 383 Ill 560—People v Golson, 64 N E 2d 462, 392 Ill 252, cert den 66 S Ct 1371, 328 U S 865, 90 L Ed 1635—People v Brumbeloe, 240 N E 2d 150, 97 Ill App 2d 370

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84 Fla —State v Coles, 91 So 2d 200

85. Fla —Darty v State, App, 161 So 2d 864

91. Tex —Mounts v State, 185 S W 2d 731, 148 Tex Cr 177

97. Miss —Lomax v State, 39 So 2d 267 205 Miss 635

98. Fla —Harris v State, App, 104 So 2d 739

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W Va —State v Toler, 41 S E 2d 850, 129 W Va 575

99. Ga —York v State, 174 S E 2d 418, 226 Ga 281

§ 127. Duty to Retreat or Avoid Danger

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No general duty to retreat

Ill —People v Vance, 368 N E 2d 758, 11 Ill Dec 207, 53 Ill App 3d 573

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20. W Va —State v Zannino, 41 S E 2d 641, 129 W Va 775

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27. D C —U S v Peterson, C A, 483 F 2d 1222, 157 U S App D C 219, cert den 94 S Ct 367, 414 U S 1007, 38 L Ed 2d 244

28. Miss —Pitts v State, 51 So 2d 448, 211 Miss 268

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30. Ariz —State v Jackson, 382 P 2d 229, 94 Ariz 117

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69. Ill —People v Williams, 205 N E 2d 749, 56 Ill App 2d 159

70. Ala —Early v State, 18 So 2d 873, 31 Ala App 488—May v State, 45 So 2d 695, 35 Ala App 228, cert den 45 So 2d 698, 253 Ala 517

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30 C J p 72 n 58[a]

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(2) Other matters —State v Frizzelle, 89 S E 2d 725, 243 N C 49, 52 A L R 2d 1455

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83. N J —State v Bonano, 284 A 2d 345, 59 N J 515

84. Ala —Ison v State, 39 So 2d 249, 252 Ala 25

Fla —C.J.S. cited in Watkins v State, App, 197 So 2d 312, 313

Md —Garner v State, 391 A 2d 856, 40 Md App 382, 100 A L R 3d 522

Mich —People v McGrandy, 156 N W 2d 48, 9 Mich App 187, 26 A L R 3d 1292—People v Lenkevich, 229 N W 2d 298, 394 Mich 117—People v Mroue, 315 N W 2d 192, 111 Mich App 759

N J —State v Provoid, 266 A 2d 307, 110 N J Super 547

Duty to retreat

N J —State v Felton, 434 A 2d 1131, 180 N J Super 361

Pa —Com v Walker, 288 A 2d 741, 447 Pa 146

85. Mich —People v Mathis, 255 N W 2d 214, 75 Mich App 320

N J —State v Pontery, 117 A 2d 473, 19 N J 457

Rule of no duty to retreat not applicable

Fla —State v Bobbitt, 415 So 2d 724, on remand App 1 Dist, 420 So 2d 362

N J —State v Lamb, 342 A 2d 533, 134 N J Super 575, affd 366 A 2d 981, 71 N J 545

86. Pa —Com v Edwards, 292 A 2d 361, 448 Pa 79

87. N Y —People v Childs, 250 N Y S 2d 926, 21 A D 2d 809

A trespasser may have the right of self-defense within reasonable bounds, to repel a dangerous, unlawful attack, after he has availed himself of every reasonable means of retreat.[88.5]

88.5. Okl —Womack v State, 253 P 1027, 36 Okl Cr 44—Thompson v State, Cr, 462 P 2d 299

92. Fla —Redondo v State, App, 380 So 2d 1107, quashed on oth grds in part and remanded, Sup, 403 So 2d 954 on remand, App 3 Dist, 406 So 2d 125

95. N Y —People v White, 484 N Y S 2d 994, 127 Misc 2d 219

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96. Mich —People v Smith, 221 N W 2d 464, 54 Mich App 652

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98. Ala —Doswell v State, 42 So 2d 480, 34 Ala App 546, cert den 42 So 2d 483

Ark —Thomas v State, 583 S W 2d 32, 266 Ark 162

Cal —People v Lopez, 23 Cal Rptr 532, 205 C A 2d 807—People v Bates, 64 Cal Rptr 575, 256 C A 2d 935

Del —State v Robinson, O & T, 36 A 2d 27, 3 Terry 419—State v Winsett, Super, 205 A 2d 510, 8 Storey 111

D C —Inge v U S, C A, 356 F 2d 345, 123 U S App D C 6

Fla —Raneri v State, App, 255 So 2d 291—C.J.S. cited in McLaughlin v State, App, 286 So 2d 601

Ga —C.J.S. cited in Spradlin v State, 260 S E 2d 517, 519, 151 Ga App 585, op supp, 266 S E 2d 310, app after remand 286 S E 2d 310, 160 Ga App 132, cert den 102 S Ct 1287, 455 U S 925, 71 L Ed 2d 468

Ill —People v Pirovolos, 253 N E 2d 481, 116 Ill App 2d 73, op supp 261 N E 2d 701, 126 Ill App 2d 361—People v Martinez, 283 N E 2d 268, 4 Ill App 3d 1072

Ind —Bullard v State, 195 N E 2d 856, 245 Ind 190, reh den 197 N E 2d 295, 245 Ind 190—Banks v State, 276 N E 2d 155, 257 Ind 530—Sanders v State, 428 N E 2d 23

Kan —State v Stokes, 523 P 2d 364, 215 Kan 5—State v Cates, 576 P 2d 657, 223 Kan 724

Ky —Sikes v Com, 200 S W 2d 956, 304 Ky 429—Lewis v Com, 226 S W 2d 934, 312 Ky 191—Jones v Com, 233 S W 2d 1007, 313 Ky 827

Md —Ware v State, 237 A 2d 526, 3 Md App 62—Brown v State, 242 A 2d 570, 4 Md App 261—Thomas v State, 262 A 2d 797, 9 Md App 94

Mass —Com v Shaffer, 326 N E 2d 880, 367 Mass 508

Mich —People v Lenkevich, 229 N W 2d 298, 394 Mich 117

Miss —Howard v State, 18 So 2d 148—Hinson v State, 218 So 2d 36

Mo —C.J.S. cited in State v Adkins, App, 537 S W 2d 246, 250

Neb —State v Schroeder, 261 N W 2d 759, 199 Neb 822

N J —State v Fair, 211 A 2d 359, 45 N J 77

N M —State v McLam, 478 P 2d 570, 82 N M 242

N Y —People v Conigliaro, 249 N Y S 2d 792, 20 A D 2d 930

N C —State v Gladden, 184 S E 2d 249, 279 N C 566—State v Kelly, 211 S E 2d 854, 24 N C App 670

Pa —Com v Wrona, 275 A 2d 78, 442 Pa 201

R I —State v Tribble, 42, A 2d 1079

S C —State v Jackson, 87 S E 2d 681, 227 S C 271

Tenn —May v State, 420 S W 2d 647, 220 Tenn 541

Tex —Witty v State, supra, n 1

Vt —State v Wilson, 37 A 2d 400, 113 Vt 524

Wash —State v Bius, 599 P 2d 16, 23 Wash App 807

Wis —Thomas v State, 192 N W 2d 864, 53 Wis 2d 483

Matters considered

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Standard of force

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Cal —People v Hatchett, 146 P 2d 469, 63 Cal App 2d 144—People v Collins, 11 Cal Fptr 504, 189 C A 2d 575—People v Clark, 181 Cal Rptr 682, 130 C A 3d 371

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Ill —People v Knox, 236 N E 2d 384, 94 Ill App 2d 36

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Mass —Com v Kendrick, 128 N E 2d 408, 351 Mass 203

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N C —State v Johnson, 136 S E 2d 84, 261 N C 727—State v Miller, 148 S E 2d 279, 267 N C 409, app after remand 158 S E 2d 47, 272 N C 243—State v Pearson, 215 S E 2d 598, 288 N C 34

Pa —Com v Wilkes, 199 A 2d 411, 414 Pa 246, cert den 85 S Ct 344, 379 U S 939, 13 L Ed 2d 349

W Va —State v W J B, 276 S E 2d 550

Objective prudent person standard

Wis —State v Mendoza, 258 N W 2d 260, 80 Wis 2d 122, app after remand 291 N W 2d 478, 96 Wis 2d 106

Injury to innocent persons

Ky —Kohlheim v Com, App, 618 S W 2d 591

Force determined at scene

Okl —Hommer v State, Cr, 657 P 2d 172, overruling Franks v State, 8 Okl Cr 71, 126 P 582 (1912) and Wingfield v State, 89 Okl Cr 45, 205 P 2d 320 (1949)

99. Ala —Kittrell v State, 279 So 2d 426 291 Ala 156

Ill —In Interest of S M, 416 N E.2d 1212, 48 Ill Dec 690, 93 Ill App 3d 105

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N C—State v Shelton, 212 S E 2d 545, 25 N C App 207
Pa—Com v Walley, 353 A 2d 396, 466 Pa 363
Tenn—State v Wilson, 556 S W 2d 232

1. Mo—C.J.S. cited in State v Adkins, App, 537 S W 2d 246, 250

2. Cal—People v Beyea, 113 Cal Rptr 254, 38 C A 3d 176
Ill—People v Driver, 379 N E 2d 840, 20 Ill Dec 7, 62 Ill App 3d 847
N C—State v Miller, 148 S E.2d 279, 267 N C 409, app after remand 158 S E 2d 47, 272 N C 243
Va—Cox v Com, 44 S E 2d 363, 186 Va 798

3. Cause of death required
N Y—People v Patterson, 250 N Y S 2d 715, 21 A D 2d 356

4. Colo—Sanchez v People, 470 P 2d 857, 172 Colo 168
Mass—Com v Jones, 320 N E 2d 726, 366 Mass 805
N C—State v Cooper, 159 S E 2d 305, 273 N C 51—State v Ramey, 160 S E 2d 56, 273 N C 325—State v Wynn, 180 S E 2d 135, 278 N C 513—State v Locklear, 212 S E 2d 404, 25 N C App 74—State v Burdeu, 244 S E 2d 204, 36 N C App 332, cert den 246 S E 2d 216, 295 N C 468

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N C—State v Woods, 179 S E 2d 358 278 N C 210—State v Norris, 279 S E 2d 570, 303 N C 526—State v McConnaughey, 311 S E 2d 26 66 N C App 92

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5. D C—Inge v U S, C A, 356 F 2d 345, 123 U S App D C 6
Ill—People v Hill, 253 N E 2d 617, 116 Ill App 2d 157
Ky—Sikes v Com, 200 S W 2d 956, 304 Ky 429
Mo—State v Rash, 221 S W 2d 124, 359 Mo 215
N C—State v Ealy, 171 S E 2d 24, 7 N C App 42
Pa—Com v Fisher, 420 A 2d 427, 491 Pa 231
Tenn—Morrison v State, 371 S W 2d 441, 212 Tenn 633

6. Ill—People v Williams, 205 N E 2d 749, 56 Ill App 2d 159
Ind—Gunn v State, 365 N E 2d 1234 174 Ind App 26
N Y—C.J.S. cited in People v Patterson, 250 N Y S 2d 715, 722, 21 A D 2d 356
N C—State v Molko, 274 S E 2d 271, 50 N C App 551

9. Ky—Sikes v Com, supra, n 5
N C—State v Pearson, 215 S E 2d 598, 288 N C 34
Tex—Pickett v State, 189 S W 2d 741, 148 Tex Cr 577—Bertrand v State, 234 S W 2d 244, 155 Tex Cr R 280

10. N C—State v Clay, 256 S E 2d 176, 297 N C 555
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Tex—Dunlavey v State, 232 N W 2d 714, 155 Tex Cr R 131

11. Del—Brown v State, 105 A 2d 646, 9 Terry 427
Ill—People v Wilson, 223 N E 2d 472, 79 Ill App 2d 200
Ind—King v State, 234 N E 2d 465, 249 Ind 699—Nuss v State, 328 N E 2d 747, 164 Ind App 396
Mass.—Com v Houston, 127 N E 2d 294, 332 Mass 687—Com v Kendrick, 218 N E 2d 408, 351 Mass. 203—Com v Shaffer, 326 N E 2d 880, 367 Mass 508
Mo—State v Tolias, 326 S W 2d 329—State v Neria, App, 526 S.W 2d 396
N C—State v Molko, 274 S E 2d 271, 50 N C App 551
Okl—Easterling v State, Cr, 267 P 2d 185

Using stock of gun as justified against one advancing with knife
Ga—Bobo v State, 120 S E 2d 203, 103 Ga App 685

12. D C—Inge v U S, C A, 356 F 2d 345, 123 U S App D C 6

13. U S—Gurnieri v Gunn, D C Cal, 404 F Supp 21
Cal—People v Whitfield, 66 Cal Rptr 438, 259 C A 2d 605
Miss—Holland v Martin, 58 So 2d 62, 214 Miss 1
Okl—C.J.S quoted at length in Easterling v State, Cr, 267 P 2d 185, 188

14. Tenn—Etter v State, 205 S W 2d 1, 185 Tenn 218

15. Ind—Bullard v State, 195 N E 2d 856, 245 Ind 190, reh den 197 N E 2d 295, 245 Ind 190
N C—State v Winford, 181 S E 2d 423, 279 N C 58

16. N C—State v Watkins, 196 S E 2d 750, 283 N C 504—State v Bock, 217 S E 2d 513, 288 N C 145, vac in part on oth grds 96 S Ct 3208, 428 U S 903, 49 L Ed 2d 1209

18. La—Willis v Willis, App, 287 So 2d 642
Pa—Com v White, 288 A 2d 759, 446 Pa 378

19. Verbal assault
N C—State v Hutchison, 215 S E 2d 820, 26 N C App 290, cert den 217 S E.2d 671, 288 N C 247

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20. Ala—Willingham v State 80 So 2d 280, 262 Ala 550
Ky—Taul v Com, 249 S W 2d 45
Md—Nixon v State, 105 A 2d 243, 204 Md 475
Miss—Hinson v State, 218 So 2d 36
N C—State v Pearson 215 S E 2d 598, 288 N C 34

22. S C—C.J S quoted in State v Hendrix, 244 S E 2d 503, 507 270 S C 653

23. Ill—C J.S cited in People v McBridge, 264 N E 2d 446 450, 130 Ill App 2d 201—People v DeSavieu, 1 Dist, 458 N E 2d 504, 76 Ill Dec 104, 120 Ill App 3d 420
Md—Gray v State, 241 A 2d 909, 4 Md App 175
Tex—La Farn v State 265 S W 2d 816, 159 Tex Cr R 562
W Va—C J S cited in State v Clark, 331 S E 2d 496, 500

24. Ill—C J.S cited in People v McBride, 264 N E 2d 446, 450, 130 Ill App 2d 201
S C—State v Hendrix, 244 S E 2d 503, 270 S C 653
W Va—C J S cited in State v Clark, 331 S E 2d 496, 500

27. Ill—People v DeSavieu, 1 Dist, 458 N E 2d 504, 76 Ill Dec 104, 120 Ill App 3d 420

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28. Cal—People v Collins, 11 Cal Rptr 504, 189 C A 2d 575
Ind—C J S cited in Montague v State, 360 N E 2d 181, 189, 266 Ind 51

29. Ark—Jordon v State, 382 S W 2d 185, 238 Ark 398

30. U S—U S v Garcia, C A Ill, 625 F 2d 162, cert den 101 S Ct 325, 449 U S 923, 66 L Ed 2d 152
Ariz—State v Powers, 571 P 2d 1016, 117 Ariz 220
Cal—People v Keys, 145 P 2d 589, 62 Cal App 2d 903
Fla—Huntley v State 66 So 2d 504
Ill—People v Thornton, 186 N E 2d 239, 26 Ill 2d 218—People v Peery, 225 N E 2d 730, 81 Ill App 2d 372—People v Hines, 334 N E 2d 233, 31 Ill App 3d 295—People v Easter, 430 N E 2d 612, 58 Ill Dec 580, 102 Ill App 3d 974
Mass—C.J S cited in Com v Maguire, Mass 378 N E 2d 445, 449, 375 Mass 768
Mo—State v Sherrill, App, 496 S W 2d 321
Okl—Peterson v State, 192 P 2d 286 86 Okl Cr 302
Pa—Com v Daniels 301 A 2d 841 451 Pa 163—Com v Camp, 330 A 2d 844, 459 Pa 569
Tenn—Nance v State, 358 S W 2d 327 210 Tenn 328

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32. Ala—Jones v State, 70 So 2d 543, 37 Ala App 467—Conley v State, 92 So 2d 7, 38 Ala App 618, cert stricken 92 So 2d 9, 265 Ala 450
Del—State v Robinson O & T, 36 A 2d 27, 3 Terry 419
D C—U S v Peterson C A, 483 F 2d 1222, 157 U S App D C 219, cert den '94 S Ct 367, 414 U.S 1007, 38 L Ed 2d 244
Ill—People v Jordan, 165 N E 2d 296, 18 Ill 2d 489
Mo—C.J S. cited in State v Adkins App, 537 S W 2d 246, 250—C.J.S. cited in State v Henson, 552 S W 2d 278, 381
N C—C.J.S cited in State v Vaden, 36 S E 2d 913, 915, 226 N C 138—State v Wynn 180 S E 2d 135, 278 N C 513
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Utah—State v Schoenfeld, 545 P 2d 193
Va—Coleman v Com, 35 S E 2d 96, 184 Va 197

37. Ill—People v Hall, 254 N E 2d 793, 118 Ill App 2d 160

§ 134. Self-Defense by or against Particular Persons

38. Mo—State v Morris, 248 S W 2d 847

§ 135. —— Against Third Person

40. Ill—People v Benson, 270 N E 2d 181, 132 Ill App 2d 443

Accidental killing
Ala—Gettings v State, 29 So 2d 677, 32 Ala App 644, cert den 29 So 2d 683, 249 Ala 509

§ 136. —— Against Two or More Persons

42 Ill—People v Bush, 111 N E 2d 326, 444 Ill 441
Iowa—C J S quoted in State v Powell, 24 N W 2d 769, 779, 237 Iowa 1227
Mich—C J.S quoted in People v Johnson 316 S W 2d 247 249, 112 Mich App 483

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44. Ga—Gordy v State, 92 S E 2d 737, 93 Ga App 743
Ill—Schnepf v Grubb, 261 N E 2d 47, 125 Ill App 2d 432
Ky—Scott v Com, 204 S W 2d 432, 305 Ky 365
N C—State v Brannon, 67 S E 2d 633, 234 N C 474
Pa—Com v Duerr 45 A 2d 235, 158 Pa Super 484

45. Ky—Scott v Com, 190 S W 2d 345, 301 Ky 127
N J—C J S cited in State v Williams 148 A 2d 22, 29, 29 N J 27

47. Ga—Gordy v State, 92 S E 2d 737, 93 Ga App 743
Ky—Collett v Com 176 S W 2d 893, 296 Ky 267

56. Ky—Scott v Com, supra, n 45
N C—C J S cited in State v Ellis, 86 S E 2d 272, 274, 241 N C 702

Rational basis
U S—Washington v Harris, D C N Y, 486 F Supp 1037

57. Mich—People v Johnson, 254 N W 2d 667, 75 Mich App 317

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59. Tex—Young v State, 243 S W 2d 587, 156 Tex Cr R 454

64. Alaska—Gray v State, 463 P 2d 897
D.C—U S v Taylor, C A, 510 F 2d 1283, 167 U S App D C 62, reh den 516 F 2d 1243, 170 U S App D C 315
Ga—Mullins v State, 115 S E 2d 547, 216 Ga 183
Ky—Morris v Com, 411 S W 2d 678
Mass.—Com v Walden, 405 N E 2d 939, 380 Mass 724
Mich—People v Eisenberg, 249 N W 2d 313, 72 Mich App. 106
Mo—State v Nolan, 192 S W 2d 1016, 354 Mo 980—State v Ussery, 208 S W 2d 245, 357 Mo 414
Tex—Cline v State, Cr App, 204 S W 2d 512

65. Ala—Shine v State, 204 So 2d 817, 44 Ala App 171
Del—State v Winsett, Super, 205 A 2d 510, 8 Storey 111
Ga—Mullis v State, 27 S E 2d 91, 196 Ga 569—Napper v State, 38 S E 2d 269, 200 Ga 626—Gordy v State, 92 S E 2d 737, 93 Ga App 743
La—State v Bryan, 398 So 2d 1019, app after remand 427 So 2d 1169
Tex—Daugherty v State, 176 S W 2d 571, 146 Tex Cr R 488—Williams v State, 191 S W 2d 31, 149 Tex Cr R 36
Wash—State v Rousseau, 241 P 2d 447, 40 Wash 2d 92

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(5) Other cases
Mass—Com v Walden, 405 N E 2d 939, 380 Mass 724

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74. Ala—Odoms v State, Cr, 359 So 2d 1162
Ark—Baxter v State, 281 S W 2d 931, 225 Ark 239
D C—Abrams v U S, C A, 237 F 2d 42, 99 U S App D C 46, cert den 77 S Ct 575, 352 U S 1018, 1 L Ed 2d 554
Ga—Mullis v State, supra, n 65—Napper v State, supra, n 65
Ky—Morris v Com, 411 S W 2d 678
Mo—State v Measley, 366 S W 2d 390
N C—State v Sanders, 281 S E 2d 7, 303 N C 608, cert den 102 S Ct 523, 454 U S 973, 70 L Ed 2d 392
Wash—State v Rousseau, supra, n 65

75. Ga—Mullis v State, supra, n 65

76. N C—State v Mobley, 83 S E 2d 100, 240 N C 476

80. Mich—People v Morehouse, 444 N W 2d 830, 328 Mich 689, 34 A L R 2d 676, cert den 71 S Ct 739, 341 U S 922, 95 L Ed 2d 1335

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82. Del—State v Winsett, Super, 205 A 2d 510, 8 Storey 111

89. U S—Schook v U S, C A Mo, 337 F 2d 563

92. **Officer not trespassing**
Ky—Morris v Com, 411 S W 2d 678

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Barron and Holtzoff, Federal Practice and Procedure §§ 4525, 4526

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99. Tex—Curry v State, 242 S W 2d 421, 156 Tex Cr R 379

Defendant held not precluded from obtaining more specific details

Ark—Smith v State, 330 S W 2d 58, 231 Ark 235

1. Mo—State v Kenton, 298 S W 2d 433
N Y—People v Donaldson, 65 N E 2d 757, 295 N Y 158

Indictment held bad

(2) Other indictments
Colo—Sawyer v People, 478 P 2d 672, 173 Colo 351
N Y—People v Clough, 353 N Y S 2d 260, 43 A D 2d 451
N C—State v Benton, 167 S E 2d 775, 275 N C 378
Or—State v England, 349 P 2d 668, 220 Or 395, 89 A L R 2d 392

Conviction of prior offense

Tex—Palmer v State, 81 S W 2d 76, 128 Tex Cr R 293

Indictment held sufficient

Colo—Gallegos v People, 358 P 2d 1028, 145 Colo 53, revd on oth grds, 82 S Ct 1209, 370 U S 49, 8 L Ed 2d 325, 87 A L R 2d 614, reh den 82 S Ct 1579, 370 U S 965, 8 L Ed 2d 835
Ill—People v Dodge, 104 N E 2d 633, 411 Ill 549—People v Lowe, 258 N E 2d 370, 122 Ill App 2d 197
N M—State v Gutierrez, 541 P 2d 628, 88 N M 448
Or—State v Nunn, 321 P 2d 356, 212 Or 546
Tenn—Bramlett v State, Cr, 515 S W 2d 895

Successive indictments for same offense

N J—State v Hunt, 138 A 2d 1, 25 N J 514

Information held sufficient

Ark—Smith v State, 330 S W 2d 58, 231 Ark 235

Evidence need not be pleaded

Mo—State v Spica, 389 S W 2d 35, cert den 86 S Ct 1277, 383 U S 972, 16 L Ed 2d 312

Not required to allege motive

Iowa—State v Lass, 228 N W 2d 758

2. Cal—People v Mosher, 82 Cal Rptr 379, 461 P 2d 659, 1 C 3d 379
Me—State v Chase, 99 A 2d 71, 149 Me 80
N J—State v Hunt 138 A 2d 1, 25 N J 514
W Va—State v Loveless, 80 S E 2d 442, 139 W Va 454

Indictment held sufficient as to accusatory part

(2) Other indictments
Ga—Woodring v State, 202 S E 2d 696, 130 Ga App 247
Or—State v Reyes, 308 P 2d 182, 209 Or 595
Tenn—Wheeler v State, 415 S W 2d 121, 220 Tenn 155

Indictments held insufficient

N H—State V, Superior Court 208 A 2d 832, 106 N H 228, 7 A L R 3d 1

4. N Y—People v Joseph, 159 N Y S 2d 125, 4 Misc 2d 763

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Signature of pro tempore officer on indictment is not invalid because it was not signed by prosecuting attorney.[95]

9.5. Mo—State v Falbo, 333 S W 2d 279

Mode of affixing prosecuting attorney's signature by deputy held sufficient

Ark—Bingley v State, 363 S W 2d 530, 375 U S 909, 11 L Ed 2d 148

10. **Indictment held proper**
Mass—Com v Devlin, 141 N E 2d 269, 235 Ark 982, cert den 84 S Ct 202, 335 Mass 555

11. **Indictments held sufficient**
(2) Other indictments
N Y—People v Nicoll, 158 N Y S 2d 279, 3 A D 2d 64

12. Kan—State v Brown, 236 P 2d 59, 171 Kan 557
Mo—State v Falbo, 333 S W 2d 279

Surplusage

(2) Minn—State v Kopetka, 121 N W 2d 783, 265 Minn 371
Pa—Com v Barry, 20 Monroe L R 55

Motive need not be alleged.[145]

14.5. Ill—People v Wagner, 61 N E 2d 354, 390 Ill 384

§ 141. Statutory Provisions and Forms

Library References

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26. U S—C.J.S. cited in Bizup v Tinsley, D C Colo, 211 F Supp 545, 549, affd, C A, 316 F 2d 284
Ala—Danley v State, 41 So 2d 414, 34 Ala.App 412, cert den 41 So 2d 417, 252 Ala 420—Buffalo v State, 41 So 2d 417, 34 Ala.App 418, cert den 41 So 2d 420, 252 Ala 536
Ill—People v Williams, 92 N E 2d 120, 405 Ill 574, cert den 71 S Ct 29, 340 U S 841, 95 L Ed 617
N Y—People ex rel Wysokowski v Conboy, 241 N Y S 2d 245, 19 A D 2d 663

Indictments or informations held sufficient

(1) Ala—Pack v State, 18 So 2d 700, 31 Ala App 477
Ark—Thompson v State, 172 S W 2d 234, 205 Ark 1040
Ga—Lyles v State, 109 S E 2d 785, 215 Ga 229
Ky—Com v Smith, 244 S W 2d 724—Godby v Com, 491 S W 2d 647
La—State v Willson, 41 So 2d 69, 215 La 507
Mo—State v Malone, 382 S W 2d 679—State v Crump, 412 S W 2d 490
Mont—State v Duncan, 305 P 2d 761, 130 Mont 562—State v London, 310 P 2d 571, 131 Mont 410
N J—State v Hunt, 138 A 2d 1, 25 N J 514
N C—State v Frazier, 185 S E 2d 652, 280 N C 181
Or—State v Holland, 277 P 2d 386, 202 Or 656
Wis—Christian v State, 195 N W 2d 470, 54 Wis 2d 447

(13) Cal—People v Coston, 191 P 2d 521, 84 Cal App 2d 645

(15) Fla—Taylor v State, 22 So 2d 639, 156 Fla 122
La—State v Simpson, 43 So 2d 585, 216 La 212, cert den 70 S Ct 625, 339 U S 929, 94 L Ed 1350
Nev—Langley v State, 439 P 2d 986, 84 Nev 295

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27. Me—Ex parte Thompson, 42 A 2d 900, 141 Me 250

28. N M—State v Smith, 416 P 2d 146, 76 N M 477
Tenn—Campbell v State, 491 S W 2d 359
Wyo—C.J.S. cited in State v Catellier, 179 P 2d 203, 215, 63 Wyo 123

Indictment held sufficient, etc—State v Ward, 22 So 2d 740, 208 La 56—State v Nichols, 44 So 2d 318, 216 La 622—State v Cooper, 190 So 2d 86, 249 La 654
Mo—Rayford v State, App, 504 S W 2d 285
Wis—State v Bachmeyer, 19 N W 2d 261, 247 Wis 2d 294

33. Ky—Wills v Com, 489 S W 2d 823

34. **Failure to mention section number held not fatal**
Ohio—Foutty v Maxwell, 186 N E 2d 623, 174 Ohio St 35

36. U S—Richards v Comer, D C W Va, 290 F Supp 922
Ala—Rice v State, 35 So 2d 617, 250 Ala 638—Nixon v State, 105 So 2d 349, 268 Ala 101—Duncan v State, 176 So 2d 840, 278 Ala 145
Cal—People v Dobbs, 161 P 2d 46, 70 Cal App 2d 261—People v Atchley, 282 P 2d 160, 132 C A 2d 444—People v Jordan, 290 P 2d 484, 45 C 2d 697—People v Curry, 13 Cal Rptr 596, 192 C A 2d 664
Ill—People v Kocielko, 87 N E 2d 778, 404 Ill 54
Ky—Moore v Com, 346 S W 2d 39

La —State v Nichols, supra, n 28
Md —West v State, 238 A 2d 292, 3 Md App 123
Mass.—Com v Galvin 80 N E 2d 625, 323 Mass 205—Chin Kee v Com., 235 N E 2d 787, 354 Mass 156
N J —State v Bunk, 73 A 2d 249, 4 N J 461, 19 A L R 2d 1316, cert den 71 S Ct 25, 340 U S 839, 95 L Ed 615
N C —State v Mays, 35 S E 2d 494, 225 N C 486—State v Grayson, 80 S E 2d 387, 239 N C 453
Ohio—State v Collett, 58 N E.2d 417, app dism 60 N E.2d 170, 144 Ohio St 639
Pa.—Com v Sallade, 97 A 2d 528, 374 Pa 429
Vt —State v Dopp, 255 A 2d 186, 127 Vt 567

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U S —Donnelly v U S., C A Okl., 185 F 2d 559, cert den 71 S Ct 528, 340 U S 949, 95 L Ed 684

37. Ala.—Todd v State, 46 So 2d 567, 35 Ala App 356—Golden v State, 103 So 2d 52, 39 Ala App 361, cert den 103 So 2d 62, 267 Ala 456
Ga —Manry v State, 47 S E 2d 817, 77 Ga App 43
Ind —Dennis v State, 102 N E 2d 650, 230 Ind 210
Mass —Persampieri v Com., 175 N E 2d 387, 343 Mass 9
Miss —Washington v State, 77 So 2d 260, 222 Miss 782
Pa —Com v Rozsa, 30 North Co 190
W Va —State v Burdette, 63 S E 2d 69, 135 W Va 312
30 C J p 118 note 80
31 C J p 706 note 3[c]

38. Mo —Rayford v State, App., 504 S W 2d 285

41. Ind —Rogers v State, 88 N E 2d 755, 227 Ind 709

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42. Me —Ex parte Thompson, supra, n 27

44. Ala —Danley v State, 41 So 2d 414, 34 Ala App 412, cert den 41 So 2d 417, 252 Ala 420—Buffalow v State, 41 So 2d 417, 34 Ala App 418, cert den 41 So 2d 420, 252 Ala 536—Glasper v State, 61 So 2d 758, 258 Ala 211
La —State v Nix, 31 So 2d 1, 211 La 865, cert den 68 S Ct 100, 332 U S 791, 92 L Ed 371—State v Heiman, 79 So 2d 78, 227 La 235—State v Elias, 99 So 2d 1, 234 La 1
Mass —Com v Chase, 217 N E 2d 195, 350 Mass 738, cert den 87 S Ct 222, 385 U S 906, 17 L Ed 2d 137
Mich —People v McKinney, 237 N W 2d 215, 65 Mich App 131
Neb —Puckett v State, 15 N W 2d 63, 144 Neb 876
N Y —People v Williams, 180 N Y S 2d 955, 7 A D 2d 826
Utah—State v Crank, 142 P 2d 178, 105 Utah 332, 170 A L R 542
Wyo —State v Wilson, 301 P 2d 1056, 76 Wyo 297

Indictment or information held sufficient, etc.

Cal —People v Terry, 21 Cal Rptr 185, 370 P 2d 985, 57 C 2d 538, cert den 84 S Ct 446, 375 U S 960, 11 L Ed 2d 318
La —State v Lamison, 57 So 2d 755, 220 La 878—State v James, 128 So 2d 21, 241 La 233—State v Fulghum, 138 So 2d 569, 242 La 767, app dism 83 S Ct 82, 371 U S 5, 9 L Ed 2d 50
N Y —People v Langford, 261 N Y S 2d 873, 16 N Y 2d 32, 209 N E 2d 537
Va —Barber v Com., 142 S E 2d 484, 206 Va 241
(2) To charge negligent homicide
La —State v Scheler, 144 So 2d 389, 243 La 443—State v McAllister, 150 So 2d 557, 244 La 42, app dism and cert den 84 S Ct 362, 375 U S 260, 11 L Ed 2d 311

Statute held valid

La —State v Moody, 173 So 2d 195, 247 La 640

47. La —State v Cooper, 190 So 2d 86, 249 La 654

48. La —State v Coleman, 108 So 2d 534, 236 La 629

52. Ala —Golden v State, 103 So 2d 52, 39 Ala App 361, cert den 103 So 2d 62, 267 Ala 456

53. La —State v Durbin, 106 So 2d 443, 235 La 989

Formal defects not prejudicial

La —State v Johnson, 38 So 2d 162, 214 La 515

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56. Mo —Billington v State, 478 S W 2d 395

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61. Miss —Washington v State, 77 So 2d 260, 222 Miss 782
Neb —Anderson v State, 33 N W 2d 362, 150 Neb 116
Ohio—White v Maxwell, 187 N E 2d 878, 174 Ohio St 186, cert den 84 S Ct 151, 375 U S 880, 11 L Ed 2d 112
Pa —Com v Roberts, 44 Luz Leg Reg 175

62. Neb —Anderson v State, supra, n 61

74. Poisoning

Ga —Lyles v State, 109 S E 2d 785, 215 Ga 229

77. Del —State v Blendt, 120 A 2d 321, 10 Terry 528
Pa —Com ex rel Bandi v Ashe, 80 A 2d 62, 367 Pa 234, cert den 72 S Ct 60, 342 U S 836, 96 L Ed 632

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87. Ind —State v Carner, 134 N E 2d 688, 235 Ind 456, 59 A L R 2d 896
Nev —Application of Alexander, 393 P 2d 615, 80 Nev 354
N Y —People v Jordan, 128 N Y S 2d 457
S C —State v Bostick, 131 S E 2d 841, 243 S C 14

Indictment held sufficient

Mass —Com v Burke, 159 N E 2d 836, 339 Mass 521, 77 A L R 2d 451

88 Neb —Anderson v State, supra, n 61
Ohio—White v Maxwell, 187 N E 2d 878, 174 Ohio St 186, cert den 84 S Ct 151, 375 U S 880, 11 L Ed 2d 112

89. Ky —Burkhart v Commonwealth, 175 S W 2d 1 295 Ky 559

91. Allegations held insufficient

Ky —Gregory v Com 238 S W 2d 137

97. Ind —State v Carner, 134 N E 2d 688, 235 Ind 456, 59 A L R 2d 896

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2. D C —Jones v U S., C A., 296 F 2d 398, 111 U S App D C 276, cert den 82 S Ct 1260, 370 U S 913, 8 L Ed 2d 406

Averment sufficient

Va —Washington v Com 217 S E 2d 815, 216 Va 185

§ 145. Description of Person Killed

6. Ala —Hardie v State, 68 So 2d 35, 260 Ala 75
Mo —C J S cited in State v Lieberknecht, 608 S W 93, 101
N C —State v Duncan, 93 S E 2d 421, 244 N C 374
Tex —Ward v State, Cr., 427 S W 2d 876

19. Mo —State v Lowe, 260 S W 2d 729

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42. Ala —Williams v State, Cr., 308 So 2d 743, 54 Ala App 384, writ quashed 308 So 2d 744, 293 Ala 781

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51. Ill —People ex rel Miller v Twomey, 277 N E 2d 151, 2 Ill App 3d 757—People ex rel Brown v Brantley, 288 N E 2d 92, 7 Ill App 3d 558
Me —C.J.S quoted in State v Hachey, 278 A 2d 397 398

Omission not fatal

Ga —Alexander v Luzier, 192 S E 2d 160, 229 Ga 434

§ 146. Act or Omission Causing Death

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63. Ind —Durham v State, 238 N E 2d 9, 250 Ind. 555
Tex —Robertson v State, Cr., 531 S W 2d 342

64. Ill —People v Williams, 130 N E 2d 194, 7 Ill 2d 271
Or —State v Nunn, 321 P 2d 356, 212 Or 546

"Drown" construed

Fla —Drozewski v State, 84 So 2d 329

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70. Ind —Johnson v State, 326 N E 2d 637, 164 Ind App 12

Allegation of every instance not required

Or —State v House, 489 P 2d 381, 260 Or 138

75. Indictment held sufficient

(2) Other indictments
N C —State v Parker, 156 S E 2d 677, 271 N C 414

77. Ga —Kennemore v State, 149 S E 2d 471, 222 Ga 252
Mo —State v Bradley, 234 S W 2d 556, 361 Mo 267

§ 147. —— Omission of Duty or Negligence

78. Indictments or informations held sufficient

(5) State v Cantrell, 18 N W 2d 681, 220 Minn 13

79. D C —U S v Interstate Properties, 153 F 2d 469, 80 U S App D C 392

81. D C —U S v Interstate Properties, supra, n 79

82. Tex —Bullock v State, 320 S W 2d 663, 167 Tex Cr R 419

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87. Ga —Geele v State, 47 S E 2d 283, 203 Ga 369

94. Ind —Kain v State, 123 N E 2d 177, 234 Ind 160, reh den 125 N E 2d 436, 234 Ind 160

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99. Ill —People v Randolph, 116 N E 2d 876, 2 Ill 2d 87
Ind —Loftus v State, 52 N E 2d 488, 222 Ind 139—Finch v State, 56 N E.2d 851, 222 Ind 633

Indictments or informations held sufficient

(4) Other indictments or informations
Fla —Lewis v State, 93 So 2d 46 cert den app dism 78 S Ct 80, 355 U S 16, 2 L Ed 2d 23, reh den 78 S Ct 143, 355 U S 879, 2 L Ed 2d 110
Nev —Thedford v Sheriff, Clark County, 476 P 2d 25, 86 Nev 741
Tex —Bonham v State, Cr App., 680 S W 2d 815, cert den 106 S Ct 184, 88 L Ed 2d 153

1. Colo —Bizup v Tinsley, 393 P 2d 556, 155 Colo. 131
Fla —Barton v State, App., 193 So 2d 618
Kan —C.J S cited in State v Turner, 392 P 2d 863, 870, 193 Kan 189—Allen v State, 427 P 2d 598, 199 Kan 147
Mo —State v Sykes, 436 S W 2d 32—Dickson v State, 449 S W 2d 576—State v Stanchiff, 467 S W 2d 26—State v Jenkins, 494 S W 2d 14—State v Mudgett 531 S W 2d 275, cert den 96 S Ct 2234, 426 U S 910 48 L Ed 2d 835
Nev —Rogers v State, 432 P 2d 331, 83 Nev 376
N M —C J S cited in State v Smith, 181 P 2d 800, 805, 51 N M 184
N Y —People v Fitzpatrick, 308 N Y S 2d 18, 61 Misc 2d 1043, application den 311 N Y S 2d 577, 34 A D 2d 710 app dism 263 N E 2d 390, 27 N Y 2d 742 314 N Y S 2d 992—People v Weisser,

319 N Y S 2d 131, 36 A D 2d 54, affd 295 N E 2d 188, 31 N Y 2d 1051, 342 N Y S 2d 377

Or.—C.J.S. cited in State v Reyes, 308 P 2d 182, 191, 209 Or 595

Pa —Com v Lowry, 98 A 2d 733, 374 Pa 594, cert den 74 S Ct 479, 347 U S 914, 98 L Ed 2d 1070—Com v Hamda, 292 A 2d 337, 448 Pa 67

S C —State v Hicks, 185 S E 2d 746, 257 S C 279

Tenn —Farmer v State, 296 S W 2d 879, 201 Tenn 107

W Va.—State v Lewis, 57 S E 2d 513, 133 W Va 584—State v Bragg, 235 S E 2d 466, 160 W Va 455—State v Young, 311 S E 2d 118

2. Tex —Forbes v State, Civ App, 513 S W 2d 72, cert den 95 S Ct 830, 420 U S 910, 42 L Ed 2d 840

4. Or —State v Merten, 152 P 2d 942, 175 Or 254

Common-law murder count rendered exclusive of felony-murder count

N Y —People v Wenaer, 319 N Y S 2d 131, 36 A D 2d 54, affd 295 N E 2d 188, 31 N Y 2d 1051, 342 N Y S 2d 377

5. D C —Goodall v U S, C A, 180 F 2d 397, 86 U S App D C 148, 17 A L R 2d 1070, cert den 70 S Ct 1009, 339 U S 987, 94 L Ed 1339

Or —State v Thomas, 400 P 2d 549, 240 Or 181

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6. Mo —C.J.S. quoted in State v Reese, 687 S W 2d 635, 637

Averment of connected crime held sufficient

(2) Other averments —People v Randolph, 116 N E 2d 876, 2 Ill 2d 87

7. Mo —C.J.S. quoted in State v Reese, 687 S W 2d 635, 637

N J —State v Smith, 161 A 2d 520, 32 N J 501, cert den 81 S Ct 383, 364 U S 936, 5 L Ed 2d 367

N Y —People v La Belle, 253 N Y S 2d 895, 43 Misc 2d 1002

Ohio—State v Curnutt, 84 N E 2d 230, 84 Ohio App 101, app dism 83 N E 2d 70, 150 Ohio St 491—Glowacki v Sacks, App, 176 N E 2d 844

Wash —State v Bird, 198 P 2d 978, 31 Wash 2d 777, cert den 69 S Ct 876, 336 U S 954, 93 L Ed 1109, reh den 69 S Ct 1040, 337 U S 911, 93 L Ed 1722—State v Forler, 227 P 2d 727, 38 Wash 2d 39

12. Mont —Petition of Dixson, 430 P 2d 642, 149 Mont 412, cert den 88 S Ct 824, 390 U S 907 19 L Ed 2d 875

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16. Ind —Ensign v State, 235 N E 2d 162, 250 Ind 119

17. Conn —State v DiLorenzo, 83 A 2d 479 138 Conn 281

18. Manslaughter caused by abortion

(1) Fla —Johnson v State, 91 So 2d 185

19. N H —State v Millette, 299 A 2d 150, 112 N H 458

21. Or —State v Elliott, 383 P 2d 382, 234 Or 522

§ 149. —— Assault and Battery and Infliction of Mortal Wound

23. Allegation not required under statute

Me —State v Chase, 99 A 2d 71, 149 Me 80

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31. Mo —Morgan v State, 472 S W 2d 373

§ 150. —— Manner and Means of Killing

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32. Aggressor disarmed

Fla —Jones v State, App, 286 So 2d 29

42. Ill —People v Skinner, 73 N E 2d 427, 397 Ill 273, cert den 67 S Ct 1747, 331 U S 857, 91 L Ed 1864, 68 S Ct 43, 332 U S 779, 92 L Ed 363, and 71 S Ct 84, 340 U S 868, 95 L Ed 633

Me —C.J.S. letter summary quoted in Ex parte Thompson, 42 A 2d 900, 902, 141 Me 250

Mo —C.J.S. cited in State v Rizor, 182 S W 2d 525, 527, 353 Mo 368—State v Brinkley, 193 S W 2d 49, 354 Mo 1051

Or —State v Sack, 300 P 2d 427, 210 Or 552, app dism and cert den 77 S Ct 1048, 353 U S 962, 1 L Ed 2d 912

43 Ala —C.J.S cited in Howard v State, Cr App, 420 So 2d 828, 831

Cal —People v Golston, 25 Cal Rptr 83, 275 P 2d 51, 58 C 2d 535, cert den 83 S Ct 954, 372 U S 955, 9 L Ed 2d 979—People v Rusenhoover, 73 Cal Rptr 533, 447 P 2d 925, 70 C 2d 39, cert den 90 S Ct 123, 396 U S 857, 24 L Ed 2d 108

Mass —Com v Juvenile (No 1), 313 N E 2d 120, 365 Mass 421, app after remand 348 N E 2d 760, 370 Mass 450

Mich —People v Kregger, 56 N W 2d 349, 335 Mich 457

Miss —Sessum v State, 221 So 2d 368

Mo —State v Courtney, 202 S W 2d 72, 356 Mo 531

Neb —Anderson v State, 33 N W 2d 362, 150 Neb 116

N C —State v Smith, 27 S E 2d 114, 223 N C 457

Ohio—White v Maxwell, 187 N E 2d 878, 174 Ohio St 186, cert den 84 S Ct 151, 375 U S 880, 11 L Ed 2d 112

Tenn —Davis v State, 250 S W 2d 534, 194 Tenn 282

W Va —State v Lewis, supra, n 1

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Ohio—State v Mineer, 456 N E 2d 590, 8 Ohio Misc 2d 11, 8 O B R 70

44 Ill —People v Drink, 229 N E 2d 409, 85 Ill App 2d 202

Me —State v Chase, 99 A 2d 71, 149 Me 80

Pa —Com v Fabrizio, 21 D & C 2d 564, 50 Luz L Reg 13

S D —State v Belt, 111 N W 2d 588, 79 S D 324

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47. Me —State v Chase, supra, n 44

Mich —People v Quicksall, 33 N W 2d 904, 322 Mich 351, app den, and cert gr 69 S Ct 635, 336 U S 916, 93 L Ed 1079 affd 70 S Ct 910, 339 U S 660 94 L Ed 1188, reh den 71 S Ct 13, 340 U S 846, 95 L Ed 620

52. Or —State v Sack, 300 P 2d 427, 210 Or 552, app dism and cert den 77 S Ct 1048, 353 U S 962, 1 L Ed 2d 912—State v Schwensen, 392 P 2d 328, 237 Or 506

Tex —Gragg v State, 214 S W 2d 292, 152 Tex Cr R 386

54. Ala —Douglas v State, 58 So 2d 608, 257 Ala 269—Bradfield v State, 64 So 2d 890, 258 Ala 638, conf to 64 So.2d 893, 37 Ala App 155

Tex —Gragg v State, 186 S W 2d 243, 148 Tex Cr 267—Northern v State, 203 S W 2d 206 150 Tex Cr R 511

55. Ky —Wilson v Com 445 S W 2d 446

Okl —C J S cited in Fields v State, 322 P 2d 431, 435

Pa —Com v Fabrizio, 21 D & C 2d 564, 50 Luz L Reg 13—Com v Hudson, 314 A 2d 231, 455 Pa 117

Tex —Burrell v State, Cr, 526 S W 2d 799

57. Ala —Bradfield v State, supra, n 54

Mo —State v Courtney, supra, n 43

Tex —Clark v State, 208 S W 2d 637, 151 Tex Cr R 381—Gentry v State, 356 S W 2d 793, 172 Tex Cr R 345—Anderson v State, Cr, 479 S W 2d 57

58. Tex —Gragg v State, 186 S W 2d 243, 148 Tex Cr 267

60. Tex —Heath v State, 210 S W 2d 586, 151 Tex Cr R 609

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61. Manner of use sufficiently shown

(3) Other instances

Mo —State v Haynes, 329 S W 2d 640

73. Indictment held sufficient

Mass —Com v Burke, 159 N E 2d 856, 339 Mass 521, 77 A L R 2d 451

Indictment held sufficiently definite and certain

Ga —Gardner v State, 114 S E 2d 852, 216 Ga 146

74. Mo —Collins v State, 479 S W 2d 470

Tex —Johnson v State, Cr, 465 S W 2d 372

Averments held sufficient

(1) Ill —People v Shannon, 236 N E 2d 369, 94 Ill App 2d 110

Mo —State v Finn, 243 S W 2d 67

(8) Ala —Duncan v State, 176 So 2d 840, 278 Ala 145

Ill —People v Jones, 186 N E 2d 246, 26 Ill 2d 381

Ind —Madison v State, 130 N E 2d 35, 234 Ind 517

Mich —People v Kregger, supra, n 43

Tex —Kuykendall v State, 227 S W 2d 825, 154 Tex Cr R 384—Wilson v State, 234 S W 2d 882, 155 Tex Cr R 323—Philpot v State, 352 S W 2d 323, 169 Tex Cr R 91

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76. Designation held sufficient

(5) Dotson v State, 191 S W 2d 33, 149 Tex Cr R 354, cert den 66 S Ct 1119 328 U S 850, 90 L Ed 1623, affd 195 S W 2d 372, 149 Tex Cr R 434—Cassell v State 216 S W 2d 813, 154 Tex Cr R 648, revd on oth grds 70 S Ct 629, 339 U S 282, 94 L Ed 839—Smith v State Cr, 410 S W 2d 642

79 Ill —People v Swiontek 63 N E 2d 741, 391 Ill 618

82. Ill —People v Williams, 92 N E 2d 120, 405 Ill 574 cert den 71 S Ct 29

Description held sufficient

(2) Other descriptions

Wash —State v Griffith, 328 P 2d 897, 52 Wash 2d 721

84 Ky —Turner v Com, 260 S W 2d 646

86. Ind —Nicholas v State, 165 N E 2d 149, 240 Ind 463

87. Ky —Delk v Com 215 S W 2d 109, 308 Ky 579

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90 Ky —Delk v Com supra, n 87

Okl —Pruitt v State, 290 P 2d 424, cert den 76 S Ct 703, 351 U S 913, 100 L Ed 1446

4. Tex —Moree v State, 183 S W 2d 166, 147 Tex Cr R 564—Jackson v State, Cr, 516 S W 2d 167

5. Ky —C J S cited in Acrey v Com 229 S W 2d 748 751 312 Ky 732

6. Neb —Cramer v State, 15 N W 2d 323, 145 Neb 88

§ 151. —— Description of Mortal Wound

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28. Ill —People v Williams, 192 N E 2d 356, 28 Ill 2d 280

§ 153. —— Fact of Death

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53. Cal —People v Jordan, 290 P 2d 484, 45 C 2d 697

§ 154. —— Connection with Criminal Act

60. Mo —State v Kerr, App, 531 S W 2d 536

Indictment or information held insufficient

(2) Other instances

Mo —State v Brooks, 507 S W 2d 375

66. Tex —Townsend v State, 252 S W 2d 941 158 Tex Cr R 29

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72. Mo —State v Warner, 237 A 2d 150

76. Ky —Sizemore v Com, 347 S W 2d 77

88. Ind —Buchanan v State, 332 N E 2d 213, 263 Ind 360

Me —State v Warner, 237 A 2d 150.

Mo.—State v Luttrell, 366 S W 2d 453—Larson v State, 437 S W 2d 67

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95. Wash —State v Hartley, 170 P 2d 333, 25 Wash 2d 211

3. Ind —State v Carrier, 134 N E 2d 688, 235 Ind 456, 59 A L R 2d 896

S C —State v Bostick, 131 S E 2d 841, 243 S C 14

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7. S C —C.J.S. cited in State v Gregg, 95 S E 2d 255, 259, 230 S C 222

§ 156. Malice

12. N H —State v Conklin, 341 A 2d 770, 115 N H 331

Tenn —Sherod v State, 470 S W 2d 860, 4 Tenn Cr App 344

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20. U S —Coleman v Smyth, D C Va, 166 F Supp 934

Iowa—State v Rinehart, 125 N W 2d 242, 255 Iowa 1132

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U S —Ochoa v U S, C C A Cal, 167 P 2d 341—Carter v U S, C A Kan, 173 F 2d 684, cert den 69 S Ct 1503, 337 U S 946, 93 L Ed 1749

25. D C —U S v Lucas, C A, 447 F 2d 338, 144 U S App D C 368

28. U S —Bizup v Tinsley, D C Colo, 211 F Supp 545, affd, C A, 316 F 2d 284

Ariz —State v Lantz, 231 P 2d 454, 72 Ariz 115

Ohio—Foutty v Maxwell, 186 N E 2d 623, 174 Ohio St 35

29. Indictment not defective

Tex —Lee v State, Cr, 503 S W 2d 244, cert den 94 S Ct 2611, 417 U S 912, 41 L Ed 2d 216

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34. Ga —Perry v State, 50 S E 2d 709, 78 Ga App 273

38. Mo —C.J.S. quoted in State v Beck, 449 S W 2d 608

41. Averment held sufficient

Tex —Sanders v State, Cr, 402 S W 2d 735—Davis v State, Cr, 429 S W 2d 466—Hinkle v State, Cr, 442 S.W 2d 728—Carew v State, Cr App, 471 S W 2d 860

45. Tenn —Campbell v State, 491 S W 2d 359

Tenn —Campbell v State, 491 S W 2d 359, overruling Witt v State, 46 Tenn 5 (1968) and Sherod v State, Tenn Cr App, 470 S W 2d 860

Expressions held equivalent

(4) Other expressions

D C —Jackson v U S, C A, 313 F 2d 572, 114 U S App.D C 181

46. Expressions held equivalent

(3) Kan —State v Bright, 543 P 2d 928, 218 Kan 476

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64. Mo —C.J.S. cited in Patrick v State, 460 S W 2d 693, 699

N Y —People v Donaldson, 65 N E 2d 757, 295 N Y 158

65. Purpose to kill

Alaska—Gray v State, 463 P 2d 897

Intent to cause serious bodily harm imputed to commission of act clearly dangerous to life

Tex —Ned v State, App 14 Dist., 654 S W 2d 732

66. Ill —People v Shrum, 146 N E.2d 12, 12 Ill 2d 261

Ky —Delk v Com, 215 S W 2d 109, 308 Ky 579

Mo —Patrick v State, 460 S W 2d 693

Ohio—White v Maxwell, 187 N E 2d 878, 174 Ohio St 186, cert den 84 S Ct 151, 375 U S 880, 11 L Ed 2d 112

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79. Sufficiency of averments

(1) Cal —People v Curry, 13 Cal Rptr 596, 192 C A 2d 664

Ill —People v Cesarz, 255 N E 2d 1, 44 Ill 2d 180—People v Carpenter, 266 N E 2d 478, 131 Ill App 2d 187

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80. Ind —Way v State, 66 N E 2d 608, 224 Ind 280

§ 158. Deliberation and Premeditation

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94. Ariz —State v Peats, 397 P 2d 631, 97 Ariz 133—State ex rel Corbin v Superior Court In and For Maricopa County 449 P 2d 594, 104 Ariz 129

96. Cal —People v Curry, 13 Cal Rptr 596, 192 C A 2d 664

98. U S —Ornelas v U S, C A Nev, 236 F 2d 392

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Nev —Graves v Young, 420 P 2d 618, 82 Nev 433

3. Ariz —State v Lantz, 231 P 2d 454, 72 Ariz 115

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§ 159. Deliberate and Premeditated Design

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22. Okl —Easley v State, Cr App, 143 P 2d 166, 78 Okl Cr 1

29. Okl —Easley v State, supra, n 22

§ 160. Willfulness, Unlawfulness, and Feloniousness

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38. Iowa—State v Nutter, 81 N W 2d 20, 248 Iowa 772

42. Not deficient

Kan —State v Bright, 543 P 2d 928, 218 Kan 476

45. Me —State v Hachey, 278 A 2d 397

47. Mo —State v Smith, 451 S W 2d 35

50. Mo —State v Stringer, 211 S W 2d 925, 357 Mo 978

N M —Ex parte Williams, 265 P 2d 359, 58 N M 37

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51. Me —State v Chase, 99 A 2d 71 149 Me 80

52. U S —Coleman v Smyth, D C Va, 166 F Supp 934

58. N M —Ex parte Williams, supra, n 50

62. Or —State v Holland, 277 P 2d 386, 202 Or 656

64. Neb —Redding v State, 85 N W 2d 647, 165 Neb 307

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68. Me —State v Chase, 99 A 2d 71, 149 Me 80.

§ 162. Designation of Crime or Degree

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83. Ariz —Yavapai County Atty v Mahoney, 491 P 2d 469, 107 Ariz 615

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Fla —Hargrett v State, App, 255 So 2d 298

Iowa—State v Martin, 55 N W 2d 258, 243 Iowa 1323, 34 A L R 2d 904

Nev —Howard v Sheriff of Clark County, 425 P 2d 596, 83 Nev 150

N Y —People ex rel Williams v LaVallee, 294 N Y S 2d 824, 30 A D 2d 1034

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Va —Hevener v Com, 54 S E 2d 893, 189 Va 802

First degree and felony-murder

N C —State v McLaughlin, 213 S E.2d 238, 286 N C 597, vac in part on oth grds 96 S Ct 3206, 428 U S 903, 49 L Ed 2d 1208

86. Or —State v Wilson, 142 P 2d 680, 172 Or 373

88. Cal —People v Coston, 191 P 2d 521, 84 Cal App 2d 645

89. Ohio—White v Maxwell, 187 N E 2d 878, 174 Ohio St 186, cert den 84 S Ct 151, 375 U S 880, 11 L Ed 2d 112

90. Kan —Blevins v Hudspeth, 199 P 2d 171, 166 Kan 117, cert den 69 S Ct 743, 336 U S 940, 93 L Ed 1098

Mich —People v Brown, 179 N W 2d 58, 23 Mich App 528

N C —State v Haynes, 171 S E 2d 435, 276 N C 150

Charging "attempted" felony murder improper

N Y —People v Hassin, 368 N Y S 2d 253, 48 A D 2d 705

91. Ky —Pryor v Thomas, 361 S W 2d 279, cert den 83 S Ct 739, 372 U S 922, 9 L Ed 2d 727

Charge of murder in third degree improper

Pa —Com v Komatowski, 32 A 2d 905, 347 Pa 445

Prosecutorial discretion

Ariz —State v Cox, 543 P 2d 449, 25 Ariz App 328

94. Ariz —State v Woolery, 378 P 2d 751, 93 Ariz 76—State v Intogna, 419 P 2d 59, 101 Ariz 275, app after remand 445 P 2d 431, 103 Ariz 455

Cal —In re Walker, 112 Cal Rptr 177, 518 P 2d 1129, 10 C 3d 764

D C —Coleman v U S, C A, 295 F 2d 555, 111 U S App D C 210, cert den 82 S Ct 689, 369 U S 813, 7 L Ed 2d 613, reh den 82 S Ct 870, 369 U S. 842, 7 L Ed 2d 847—Fuller v U S, C A, 407 F 2d 1199, 132 U S App D C 264, cert den 89 S Ct 999, 393 U S 1120, 22 L Ed 2d 125

Mass —Metcalf v Com, 156 N E 2d 649

Nev —Howard v Sheriff of Clark County, 425 P 2d 596, 83 Nev 150

N J —State v Sullivan, 203 A 2d 177, 43 N J 209, cert den 86 S Ct 564, 382 U S 990, 15 L Ed.2d 477

N C —State v McLamb, 200 S E 2d 838, 20 N C App 164

R I —State v Jefferds, 152 A 2d 231, 89 R I 272, rearg 162 A 2d 536 91 R I 214

95. Mass —Com v Baker, 177 N E.2d 783, 343 Mass 162

96. Fla.—Robles v State, 188 So 2d 789, app after remand 210 So.2d 441
Vt.—In re Murphy, 243 A 2d 788, 127 Vt 198

Not charge of second degree

Mich—People v McKinney, 237 N W 2d 215, 65 Mich App 131

3. N Y—People ex rel Williams v LaVallee, 294 N Y S 2d 824, 30 A D 2d 1034

4. Mo—State v Finn, 243 S W 2d 67

Pa.—Com v Koch, 288 A 2d 791, 446 Pa 469

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5. Kan—Skelton v Hudspeth, 199 P 2d 470, 166 Kan 70, cert. den 69 S Ct 649, 336 U S 927, 93 L.Ed 1088

Pa.—Com v Koch, 288 A 2d 791, 446 Pa 469

6. Mo—State v Mahurin, 240 S W 2d 110, cert den 72 S Ct 71, 342 U S 842, 96 L Ed 636, 74 S Ct 55, 346 U S 836, 98 L Ed 358 and 76 S Ct 315, 350 U S 940, 100 L Ed 820 and 76 S Ct 655, 350 U.S 1009, 100 L Ed 870

Neb—Bryant v State, 45 N W 2d 169 153 Neb 490

Va—Ward v Com, 138 S E 2d 293, 205 Va 564

7. Va.—Ward v Com, 138 S E 2d 293, 205 Va 564

8. Mo—State v Brookshire, 368 S W 2d 373

N C—State v Kirksey, 42 S E 2d 613, 227 N C 445

Indictments held sufficient

(3) Other instances

La—State v Peterson, 290 So 2d 307

Mo—State v Floyd, 403 S W 2d 613

N C—State v Boyd, 214 S E 2d 14, 287 N C 131

Or—State v Draves, 524 P 2d 1225, 18 Or App 248

Tex—Jurek v State, Cr, 522 S W 2d 934, affd 96 S Ct 2950, 428 U S 262, 49 L Ed 2d 929, reh den 97 S Ct 198, 429 U S 875, 50 L Ed 2d 158

Informations held sufficient

Mich—People v Brown, 179 N W 2d 58, 23 Mich App 528

Where felony-murder is charged a second count for that degree of homicide which the prosecution feels the facts support may be permissible.[95]

9.5. Choice of prosecution

Cal—People v Romo, 121 Cal Rptr 684, 47 C A 3d 976

Mich—People v Bufkin, 210 N W 2d 390, 48 Mich App 290, affd 236 N W 2d 500, 395 Mich 434

16. Indictments held sufficient

(3) Other cases

U S—Barker v Comer, D C W Va, 306 F Supp 227

Mo—State v Felder, 242 S W 2d 535—State v Shriver, 275 S W 2d 304—State v Bounds, 305 S W 2d 487—State v Cheatham, 340 S W 2d 16

N.Y—People v Heteny, 270 N Y S 2d 273, 50 Misc 2d 311

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19. U S—Davis v Slayton, D C Va, 353 F Supp 571

Mich—People v Charles, 227 N W 2d 348, 58 Mich App 371

§ 163. Manslaughter

23. Md—Carroll v Warden of Md Penitentiary, 106 A.2d 71, 205 Md 631

Mo—State v Foster, 338 S W 2d 892

24. U S—U S v Dixon, D C N Y, 73 F Supp 683

25. Pa—Com v Barry, 20 Monroe L R 55

W Va—State v Comstock, 70 S E 2d 648, 137 W Va 152

Wyo—State v Dobbs, 244 P 2d 280, 70 Wyo 26

26. U S—U S v Aloowsine, D C Alaska, 17 F R D 211, 15 Alaska 483

D C—U S v Pender, App, 309 A 2d 492

Ga—Goele v State, 47 S E 2d 283, 203 Ga 369

Nev—Bielling v Sheriff, Clark County, 508 P 2d 546, 89 Nev 112

Indictments held insufficient

Ga—Musick v State, 136 S E.2d 149, 109 Ga App. 370

Elements of first degree manslaughter

S D—State v Lange, 152 N W 2d 635, 82 S.D 666

Indictments held sufficient

N C—State v Sawyer, 180 S E 2d 387, 11 N C App 81

27. Mo—State v Stringer, 211 S W 2d 925, 357 Mo 978

33. Ga—Hughes v State, 88 S E 2d 211, 92 Ga App 231

34. Ga—Shockley v State, 82 S E 2d 735, 90 Ga App 237

Ind—Kain v State, 123 N E 2d 177, 234 Ind 160, reh den 125 N E 2d 436, 234 Ind 160

38. Ky—Burris v Com, 213 S W 2d 1014, 308 Ky 145

Or—State v Standard, 375 P 2d 551, 232 Or 333

Contra, see

Cal—People v Freudenberg, 263 P 2d 875, 121 C A 2d 564

Charge not sufficiently broad to include lesser offense

Ga—Shockley v State, supra, n 34

39. U S—U S ex rel Reid v Brierley, D C Pa, 296 F Supp 294

Cal—People v Dobbs, 161 P 2d 46, 70 Cal App 2d 261—People v Freudenberg, supra, n 38

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40. Elimination of confusing phrase

Minn—State v Lundstrom, 171 N W 2d 718, 285 Minn 130

41. Ga—Walters v State, 83 S E 2d 48, 90 Ga App 360

Kan—State v Brown, 236 P 2d 59, 171 Kan 557

Minn—State v Kopetka 121 N W 2d 783, 265 Minn 371

Mo—State v Holliday, 182 S W 2d 553, 353 Mo 397—State v Stringer, supra, n 27—State v Black, 227 S W 2d 1006, 360 Mo 261

N J—State v Pickles, 218 A 2d 609, 46 N J 542

Okl—Coslow v State, 177 P 2d 518, 83 Okl Cr 378

Wyo—C J S cited in State v Catellier, 179 P 2d 203, 215, 63 Wyo 123—Shoemaker v State, 444 P 2d 309

Statutory form insufficient

U S—U S v Aloowsine, D C Alaska, 17 F R D 211 15 Alaska 483

Immaterial repugnancy

Ga—Hughes v State, 88 S E 2d 211, 92 Ga App 231

42. Mo—State v Maggard, 188 S W 2d 9

Neb—Schluter v State, 44 N W 2d 588, 153 Neb 317

Or—State v Andrews, 517 P 2d 1062, 16 Or App 144

43. La—State v Iseringhausen, 16 So 2d 65, 204 La 593

Mass—Com v Welansky, 55 N E 2d 902, 316 Mass 383

Minn—State v Cantrell, 18 N W 2d 681, 220 Minn 13

46. Reference to statute

La—State v Cooper, 190 So 2d 86, 249 La 654

§ 164. Elements of Offense in General

Library References

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48. Ind—Brooks v State, 120 N E 2d 182, 233 Ind 391

Mo—State v Keith, App, 235 S W 2d 1023, transf, Sup, 241 S W 2d 901—State v Couch, App, 523 S W 2d 612

Doubts resolved in defendant's favor

Cal—People v Schueren, 111 Cal Rptr 129, 516 P 2d 833, 10 C 3d 553

50. Ind—Wilson v State, 112 N E 2d 449, 232 Ind 495

Indictments held sufficient

(1) Ga—Barber v State, 98 S.E 2d 575, 95 Ga App 763

Iowa—Mart v Lainson, 30 N W 2d 305, 239 Iowa 21, cert den 68 S Ct 791, 333 U S 868, 92 L Ed 1146

Ky—Cavitt v. Com, 397 S W 2d 54—Wills v. Com, 502 S W 2d 60

Me—Lemay v State, 244 A 2d 556

Miss—Bone v State, 41 So 2d 347, 207 Miss 20.

Mo—State v Ivory, 327 S W 2d 870—State v Lane, 371 S W 2d 261

N C—State v Lane, 162 S E 2d 149, 1 N C App 539—State v McKinnon, 166 S E 2d 534, 4 N C 299

Okl—Carico v State, Cr, 418 P 2d 702, cert den 87 S Ct 2084, 387 U S 947, 18 L Ed 2d 1336—Eaton v State, Cr, 418 P 2d 710

Tex—Ekern v State, 200 S W 2d 412, 150 Tex Cr R 319—Johnson v State, 208 S W 2d 94, 151 Tex Cr R 405—Griffith v State, Cr, 430 S W 2d 197

(2) Ind—Peltz v State, 112 N E 2d 853, 232 Ind 518

Information held sufficient

Fla—Kirkland v State, 91 So 2d 656

Idaho—State v Polson, 448 P 2d 229, 92 Idaho 615, cert den 89 S Ct 2129, 395 U S 977, 23 L Ed 2d 765, app after remand 478 P 2d 292, 93 Idaho 912, cert den 91 S Ct 1527, 402 U S 930, 28 L Ed 2d 863

Ind—Johnson v State, 283 N E 2d 532, 258 Ind 648

51. Ky—Haley v Com, 286 S W 2d 525

Mo—State v Jones, 382 S W 2d 675

Okl—Davis v State, Cr, 300 P 2d 1000

Affidavit held sufficient

Ind—Chastain v State, 116 N E 2d 107, 233 Ind 64—Britt v State, 180 N E 2d 235, 242 Ind 548

Indictment sufficient

Tex—Peterson v State, Cr, 508 S W 2d 844

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60. Ala—Stratford v State, 24 So 2d 453, 32 Ala App 249

Or—State v Noblin, 328 P 2d 139, 214 Or 60

63. Ind—Anderson v State, 156 N E 2d 384, 239 Ind 372

N C—State v Randolph, 45 S E 2d 132, 228 N C 228

31 C J p 705 note 1[c]

31 C J p 707 note 9[6]

70. Ga—Robinson v State, 73 S E 2d 578, 87 Ga App 305

71. Me—Bessey v State, 297 A 2d 373

§ 166. Description of Person Assaulted

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80. Misnomer of victim held fatally defective

Tex—Albidrez v State, 254 S W 2d 522, 158 Tex Cr R 229

Policeman

Tex—Terry v State, Cr, 517 S W 2d 554

83. Indictments held sufficient

(2) Tex—Terry v State, Cr, 517 S W 2d 554

§ 168. —— Manner and Means

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10. Del—State v Grimms, Super, 193 A 2d 92, 6 Storey 230

Ill—People v Drink, 229 N E 2d 409, 85 Ill App 2d 202

Okl—Davis v State, Cr, 300 P 2d 1000

Tex—Welcome v State, Cr, 438 S W 2d 99

12. Conn—State v Mele, 100 A 2d 570, 140 Conn 398

Tex—Templeton v State, supra, n 10

16. Indictment held not vitiated

Tex—Johnson v State, Cr, 384 S W 2d 885

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26. Indictment held insufficient

Ky —Charles v Com., 321 S W 2d 253

Mo —State v Couch, App., 523 S W 2d 612

33. Mo —State v Null, 199 S W 2d 639, 355 Mo 1034

37. Okl —Beard v State, 218 P 2d 655, 91 Okl Cr 319

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41. Ga —Davis v State, 103 S E 2d 86, 97 Ga App 342

Mo —State v Henderson, 204 S W 2d 774, 356 Mo 1072

47. Particular averments held sufficient

(2) Other statements

Mo —State v Cooley, 388 S W 2d 807

§ 169. —— Wound or Injury Inflicted

53. Mo —State v Stucker, 180 S W 2d 719, 352 Mo 1056

54. N C —State v Gregory, 27 S E 2d 140, 223 N C 415

§ 170. Intent, Malice, Etc.

58. Tex —Price v State, Cr., 523 S W 2d 950

61. Fla —Black v State, App., 173 So 2d 166

62. La —State v Coco, 14 So 2d 45, 203 La 424

Allegations, indictments, or informations held sufficient

Kan —State v Lytle, 280 P 2d 924, 177 Kan 408

Tex —Griffith v State, Cr., 430 S W 2d 197

Allegations, indictments, or informations held insufficient

Fla —Black v State, App., 173 So 2d 166

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63. Or —Application of Smallman, 291 P 2d 749, 206 Or 262

81. Tex —Roming v State, 228 S W 2d 160, 154 Tex Cr R 605, reh den 229 S W 2d 627, 154 Tex Cr R 605

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91. Miss —Watson v State, 55 So 2d 441, 312 Miss 788

94. U S —Bowen v Johnson, C C A Cal., 97 F 2d 860, affd 59 S Ct 442, 306 U S 19, 83 L Ed 455

99. Mo —State v Woody, 406 S W 2d 659—State v Huffer, App., 424 S W 2d 776

2. Mo —State v Gannaway, 313 S W 2d 653

Tex —Washington v State, 193 S W 2d 531, 149 Tex Cr R 265

Statute prescribing different punishment

Tex —Rios v State, 180 S W 2d 439, 147 Tex Cr R 326—Crowley v State, 199 S W 2d 526, 150 Tex Cr R 114

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6. Mo —State v Keith, 241 S W 2d 901, app transf 235 S W 2d 1023

Or —State v Collis, 413 P 2d 53, 243 Or 222

7. Ky —Jones v Com., 347 S W 2d 520

§ 173. Attempt or Solicitation

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36. Or —State v Olson, 459 P 2d 445, 1 Or App 90

Tex —Holman v State, App. 1 Dist., 680 S W 2d 894

Allegations held sufficient

Cal —People v Briggs, 24 Cal Rptr 417, 374 P 2d 257, 28 C 2d 385.

Ill —People v Miller, 205 N E 2d 49, 55 Ill App 2d 436—People v Drink, 229 N E 2d 409, 85 Ill App 2d 202—People v Gensbacher, 242 N E 2d 277, 102 Ill App 2d 165, affd 255 N E 2d 429, 44 Ill 2d 321—People v Horne, 249 N E 2d 282, 110 Ill App 2d 167—People v Payton, 276 N E 2d 775, 2 Ill App 3d 693

La —State v Frazier, 24 So 2d 620, 209 La 373

Miss —Ford v State, 218 So 2d 731

37. Ill —People v Drink, 229 N E 2d 409, 85 Ill App 2d 202—People v Payton, 276 N E 2d 775, 2 Ill App 2d 693—People v Abney, 314 N E 2d 459, 31 Ill App 3d 768

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42. Prosecutorial discretion

Ariz —State v Cox, 543 P 2d 449, 25 Ariz App 328

48. Wash —State v Gay 486 P 2d 341, 4 Wash App 834

§ 174. Threat

54. Allegations held insufficient

U S —U S v Marino, D C Ill., 148 F Supp 75

§ 175. In General

Library References

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59. N C —State v Mays, 35 S E 2d 494, 225 N C 486

Wash —State v Huff, 458 P 2d 180, 76 Wash 2d 577

Guilt and punishment as basic issues

Miss —Rouse v State, 222 So 2d 145

60. Insanity

(2) Cal —People v Wells, 202 P 2d 53, 33 Cal 2d 330, cert den 70 S Ct 43, 338 U S 836, 94 L Ed 2d 510

Self-defense, etc

(2) Other cases

Ark —Ellis v State 356 S W 2d 426, 234 Ark 1072

N C —State v Hipp, 95 S E 2d 452, 245 N C 205

Amnesia

Cal —People v Cox, 153 P 2d 262, 67 Cal App 2d 166

61. Md —Wood v State, 62 A 2d 576, 191 Md 658

62. Ark —Williams v State, 396 S W 2d 834, 239 Ark 1109

Cal —People v Weatherford, 178 P 2d 816, 78 Cal App 2d 669—People v Motherwell, 16 Cal Rptr 140, 195 C A 2d 545

N Y —People v Porter, 54 N Y S 2d 3

N C —State v Davis, 116 S E 2d 365, 253 N C 86, cert den 81 S Ct 816, 365 U S 855, 5 L Ed 2d 819—State v Whitted, 187 S E 2d 391, 14 N C App 62

Ohio—State v McKinney, 64 N E 2d 129, 77 Ohio App 309

Wyo —State v Catellier, 179 P 2d 203, 63 Wyo 123

It is essential to prove every constituent element, etc.

Ga —Williams v State, 101 S E 2d 747, 96 Ga App 833

Death by starvation

Ala —Bliley v State, 160 So 2d 507, 42 Ala App 261

Indictment charging assault with a dangerous weapon with intent feloniously, willfully, and with malice aforethought to kill

Me —State v Doyon, 221 A 2d 827

63. Colo —Jorgensen v People, 495 P 2d 1130, 178 Colo 8

Fla —Munn v State, 30 So 2d 501, 158 Fla 892

Ind —Hollowell v State, 269 N E 2d 755, 256 Ind 467

Mass —Com v Valcourt, 133 N E 2d 217, 333 Mass 706

Miss —Murray v State, 33 So 2d 291

N Y —People v Nelson, 128 N E 2d 391, 309 N Y 231

N C —State v Jenerett, 187 S E 2d 735, 281 N C 81

Okl —Dunham v State, Cr App., 143 P 2d 834, 78 Okl Cr 54

Tex —Shelton v State, Cr., 441 S W 2d 536

65. Cal —People v Letourneau, 211 P 2d 865, 34 Cal 2d 478—People v Henderson, 35 Cal Rptr 77, 386 P 2d 677, 60 C 2d 482

Fla —Larry v State 104 So 2d 352

Ky —Burns v Com., supra, n 38

N M —State v Smith, 181 P 2d 800, 51 N M 184

Tex —Meyer v State, 276 S W 2d 286, 160 Tex Cr R 521

Wash —State v Putzell, 242 P 2d 180, 40 Wash 2d 174

On trial of plea of not guilty

Cal —People v Coleman, 126 P 2d 349, 20 Cal 2d 399, app dism 63 S Ct 162, 317 U S 596, 87 L Ed 487, cert den 64 S Ct 66, 320 U S 767, 88 L Ed 458—People v Danielly, 202 P 2d 18, 33 Cal 2d 362, cert den 69 S Ct 1162, 337 U S 919, 93 L Ed 1728

Evidence held admissible

Tex —Jenkins v State, 175 S W 2d 83, 146 Tex Cr R 364

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66. Ga —Perry v State, 50 S E 2d 705, 78 Ga App 273

N M —State v Bell, App., 500 P 2d 418, 84 N M 133

Evidence admissible without specific allegation

(4) State v Holloway, 195 S W 2d 662, 355 Mo 217

(5) Other cases

Ind —Wahl v State, 98 N E 2d 671, 229 Ind 521

70. Ill —People v Nelson, 210 N E 2d 212, 33 Ill 2d 48, cert den 86 S Ct 911, 383 U S 918, 15 L Ed 2d 671

Ind —C.J.S. cited in Madison v State, 130 N E 2d 35, 46, 234 Ind 517

N J —State v Mathis, 221 A 2d 529, 47 N J 455, app after remand 245 A 2d 20, 52 N J 238, revd on oth grds 91 S Ct 2277, 403 U S 946, 29 L Ed 2d 855

Particular variance held not material

Ga —Jordan v State, 52 S E 2d 505, 78 Ga App 879

(2) Other variances

Ga —Holmes v State, 163 S E 2d 803, 224 Ga 553

Ind —Callahan v State, 201 N E 2d 338, 246 Ind 65, cert den 214 N E 2d 648, 247 Ind 350, cert den 87 S Ct 305, 385 U S 942, 17 L Ed 2d 222

Nev —Eisentrager v State, 378 P 2d 526, 79 Nev 38

N J —State v Rios, 112 A 2d 247, 17 N J 572

Or —State v Fuller, 280 P 2d 980, 203 Or 608

Tex —Stout v State, Cr., 460 S W 2d 911

§ 176. Proof of Distinct Offense

71. Md —Marks v State, 185 A 2d 909, 230 Md 108

72. Mo —State v Phillips, 299 S W 2d 431

In prosecution for homicide in commission of felony, state is not limited to proof as to any one of such felonies [72.5]

72.5. W Va —State v Bruner, 105 S E 2d 140, 143 W Va 755

On trial of a felony murder indictment the prosecution may prove facts necessary to constitute the felony accused is charged with committing. [72.10]

72.10. N Y —People v La Belle, 253 N Y S 2d 895, 43 Misc 2d 1002

73. W Va —State v Plantz, 180 S E 2d 614, 155 W Va 24

§ 177. Nature or Degree of Offense

77. Ind —Mimms v State, 231 N E 2d 151, 249 Ind 168

La —State v Hudson, 221 So 2d 484, 253 La 992 cert dism 91 S Ct 2273, 403 U S 949, 29 L Ed 2d 855 revd on oth grds 91 S Ct 2282, 403 U S 946, 29 L Ed 2d 856, on remand 257 So 2d 135, 260 La 644

Md —McFadden v State, 231 A 2d 910, 1 Md App 511

Mo —State v Havens, 177 S W 2d 625

Rule not affected by statute providing that murder committed in commission or attempted commission of crime punishable by death or life imprisonment is murder in first degree

Mass —Com v Chase, 217 N E 2d 195, 350 Mass 738, cert den 87 S Ct 222, 385 U S 906, 17 L Ed 2d 137

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80. Pa —Com v Spriggs, 12 Chest 303

81. Colo —Early v People, 496 P 2d 1021, 178 Colo 167

Fla —Roberts v State, 164 So 2d 817—Barton v State, App, 193 So 2d 618

Idaho—State v Hall, 383 P 2d 602, 86 Idaho 63

Ill —People v McKee, 235 N E 2d 625, 39 Ill 2d 265

Mich —People v Mihalko, 10 N W 2d 914, 306 Mich 356

Mo —State v Conway, 171 S W 2d 677, 351 Mo 126—State v Smith, 310 S W 2d 845, cert den 79 S Ct 237, 358 U S 910, 3 L Ed 2d 231—State v Sykes, 436 S W 2d 32—State v Beal, 470 S W 2d 509—State v Granberry, 484 S W 2d 295—State v Owens, 486 S W 2d 462

N J —State v LaPierre, 188 A 2d 10, 39 N J 156, cert den 83 S Ct 1920, 374 U S 852, 10 L Ed 2d 1073—State v Mayberry, 245 A 2d 481, 52 N J 413, cert den 89 S Ct 673, 393 U S 1043, 21 L Ed 2d 593

N Y —People v Snelling, 227 N Y S 2d 143, 33 Misc 2d 735

N C —State v Smith, 27 S E 2d 114, 223 N C 457—State v Mays, supra, n 59—State v Grayson, 80 S E 2d 387, 239 N C 453—State v Scales, 87 S E 2d 916, 242 N C 400—State v Lee, 176 S E 2d 765, 277 N C 205—State v Moore, 202 S E 2d 169, 284 N C 485

Or —State v Earp, 440 P 2d 214, 250 Or 19, cert den 89 S Ct 212, 393 U S 891, 21 L Ed 2d 170

83. D C —Burton v U S, 151 F 2d 17, 80 U S App D C 17, cert den 66 S Ct 473, 326 U S 789, 90 L Ed 479

Miss —Andrews v State, 116 So 2d 749, 237 Miss 875

N J —State v Zelichowski, 245 A 2d 351, 52 N J 377

84. Kan —State v Lamb, 497 P 2d 275, 209 Kan 453

La —State v Progue, 144 So 2d 352, 243 La 317

85. Fla —Everett v State, 97 So 2d 241, cert den 78 S Ct 432, 355 U S 941, 2 L Ed 2d 422

Kan —State v Jones, 545 P 2d 323, 218 Kan 720

Mo —State v Cole, 188 S W 2d 43, motion den 189 S W 2d 541, 354 Mo 181

Okl —Moore v State, 169 P 2d 575, 82 Okl Cr 317

88. N Y —People v Birmingham, 260 N Y S 2d 785, 24 A D 2d 468, cross app dism 211 N E 2d 648, mod on oth grds 212 N E 2d 780, 16 N Y 2d 984, 265 N Y S 2d 295

89. Or —State v Morris, 405 P 2d 369 241 Or 253

Other matters relating to rules governing issues, proof and variance as involving the nature or degree of the offense have been adjudicated [90.5]

90.5. Charge of assault with malice as justifying conviction for assault with intent to kill

Mo —State v Cooley, 388 S W 2d 807

§ 178. Time and Place

91. Cal —People v Barreras, 5 Cal Rptr 454, 181 C A 2d 609

La —State v Franklin, 268 So 2d 249, 263 La 344

Tex —Neal v State, 374 S W 2d 668

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94. Ill —People v Wells, 66 N E 2d 866, 393 Ill 626

Proof held to correspond to allegation

N M —State v Mosley, 404 P 2d 304, 75 N M 348

95. Purpose

S C —State v Bostick, 131 S E 2d 841, 243 S C 14

An allegation of a specific place must be proved as laid.[96.5]

96.1. Failure to prove public highway as alleged is a fatal variance —Baker v State, 87 S E 2d 644, 92 Ga App 60

Held no variance

N M —State v Mosley, 404 P 2d 304, 75 N M 348

98. Pa —Com v Roberts, 44 Luz Leg Reg 175

§ 179. Description of Person Killed or Assaulted

9. Ala —Levert v State, 42 So 2d 525, 34 Ala App 523, revd on oth grds 42 So 2d 532, 252 Ala 308, cert den 42 So 2d 534, 252 Ala, 659

Ill —People Rettig, 264 N E 2d 835, 131 Ill App 2d 687, aff'd 278 N E 2d 781, 50 Ill 2d 317, cert den 93 S Ct 186, 409 U S 895, 34 L Ed 2d 152

Miss —McDaniels v State 33 So 2d 785, 203 Miss 239—Dooley v State 116 So 2d 820, 238 Miss 16, 86 A L R 2d 718—Duke v State, 139 So 2d 370, sug err over 140 So 2d 863, 243 Miss 602

10. Ala —Green v State, 73 So 2d 879, 37 Ala App 652

N M —State v Vallo, App, 464 P 2d 567, 81 N M 148

Tex —Jackson v State, Cr, 419 S W 2d 370, app after remand 447 S W 2d 922, and 454 S W 2d 733

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12. Ala —Green v State supra, n 10

14. Ala —Levert v State, supra, n 9—Hardie v State 68 So 2d 35 260 Ala 75

Tex —Clark v State, 286 S W 2d 939, 162 Tex Cr R 493—Smith v State, Cr, 446 S W 2d 883

16 Ala —Hardie v State supra, n 14

Ga —Anderson v State, 26 S E 2d 755, 196 Ga 468

Ill —People v Lomax, 262 N E 2d 63, 126 Ill App 2d 156

Miss —Hughes v State, 42 So 2d 805, 207 Miss 594

Variance held immaterial

(2) Other variances

N C —State v Buck, 171 S E 2d 10, 6 N C App 726

Tex —Scott v State, Cr App, 368 S W 2d 216
Langston v State, Cr, 416 S W 2d 821

18. Tex —Bell v State, Cr, 313 S W 2d 606

W Va —State v Wyant, 328 S E 2d 174

21. Fla —Hall v State, App, 203 So 2d 202

23. Tex —Clark v State, Cr, 449 S W 2d 231

24. Variance immaterial

Tex —Rivas v State, Cr, 501 S W 2d 918, 63 A L R 3d 1107

25. Tex —Lott v State 299 S W 2d 145, 191, 164 Tex Cr R 395

26. U S —U S v Good Shield, C A S D, 515 F 2d 1

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30. Ala —Hardie v State, supra, n 14

§ 180. Indictments against Several and for Killing and Assaults on Several

36. Tex —Royal v State, 228 S W 2d 162, 154 Tex Cr R 567, reh den 229 S W 2d 808, 154 Tex Cr R 567

37. Ill —People v Tanthorey, 89 N E 2d 403, 404 Ill 520

§ 181. Liability as Principal, Abettor, or Accessory

42. Ga —Watkins v State, 33 S E 2d 325, 199 Ga 81

Me —State v Rainey, 99 A 2d 78, 149 Me 92

Wash —State v Cooper, 174 P 2d 545, 26 Wash 2d 405

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44. Ill —People v Hyde, 275 N E 2d 239, 1 Ill App 3d 831

So also it has been held that one who is instrumental in committing a crime may be subject to punishment as a principal though not present at the immediate scene of the crime.[44.5]

44.5. N J —State v Rosania, 163 A 2d 139, 33 N J 267, cert den 81 S Ct 828, 365 U S 864, 5 L Ed 2d 826

45. Mo —C J S. cited in State v Spica, 389 S W 2d 35, 40, cert den 86 S Ct 1277, 383 U S 972, 16 L Ed 2d 312

48. Ga —Wilson v State, 95 S E 2d 733, 94 Ga App 588

Proof that defendant acted as a principal is permissible under an homicide indictment for being an accessory.[49.5]

49.5. Tex —Stein v State, 355 S W 2d 723, 172 Tex Cr R 248

§ 182. Manner and Means

54. Pa —Com ex rel Lagana v Burke, 93 A 2d 478, 372 Pa 298

55. W Va —State v Lewis, 57 S E 2d 513, 133 W Va 584

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57. Ala —Hunter v State, Cr, 335 So 2d 194, cert den 335 So 2d 203

Ga —Habersham v State, 53 S E 2d 578, 79 Ga App 244

Ky —Warnell v Com, 246 S W 2d 144

Mo —State v Baker, 453 S W 2d 918

Or —State v Wilson, 142 P 2d 680, 172 Or 373—State v Sack, 300 P 2d 427, 210 Or 552, app dism and cert den 77 S Ct 1048, 353 U S 962, 1 L Ed 2d 912

Tex —Bell v State, 196 S W 2d 923, 149 Tex Cr R 509—Bumry v State, 198 S W 2d 887, 150 Tex Cr R 6—Johnson v State, Cr, 384 S W 2d 885

58. Ala —Wesson v State, 36 So 2d 361, 251 Ala 33

Ga —Habersham v State, supra, n 57

Tex —Burrell v State, Cr, 526 S W 2d 799

Variance held immaterial

(3) Other matters

Ga —Thaxton v State, 153 S E 2d 415, 223 Ga 59—Garmon v State, 176 S E 2d 218, 122 Ga App 61

Ind —Shaw v State, 156 N E 2d 381, 239 Ind 248

Mo —Franklin v State, 455 S W 2d 479—State v Johnson, 457 S W 2d 795

Tex —Williams v State, Cr, 449 S W 2d 271

Wis —State v Johnson, 51 N W 2d 491, 261 Wis 77

59. Ind —Madison v State, 130 N E 2d 35, 234 Ind 517—Miller v State, 335 N E 2d 206, 263 Ind 595

60. Ala —Wesson v State, supra, n 58

61. Mo —State v Rizor, 182 S W 2d 525, 353 Mo 368

65. Mo —State v Brinkley, 193 S W 2d 49, 354 Mo 1051

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70. Conn —State v Mele, 100 A 2d 570, 140 Conn 398

Ga —Davis v State, 132 S E 2d 814, 108 Ga App 274

Ind —C J S cited in Madison v State, 130 N E 2d 35, 50, 234 Ind 517

71. Ala —Wesson v State, 36 So 2d 361, 251 Ala 33—Dawson v State, Cr, 266 So 2d 806, 48 Ala App 594, cert den 266 So 2d 812, 289 Ala 741

Ariz —State v Garcia, 466 P 2d 763 105 Ariz 469

Ark —Ridgeway v State, 472 S W 2d 108, 251 Ark 157

Fla —Nelson v State, 97 So 2d 250

Ga.—Davis v State, 84 S E 2d 46, 211 Ga 76

Ill —People v Peterson, 295 N E 2d 529, 10 Ill App 3d 1053

Ind —State v Carner, 134 N E 2d 688, 235 Ind 456, 59 A L R 2d 896

Variance held immaterial

Ill —People v Stoudt, 232 N E 2d 800, 90 Ill App 2d 140

72. Ala —Threatt v State, 26 So 2d 530, 32 Ala App 416—Matthews v State, Cr, 286 So 2d 91, 51 Ala App 417

Ga —Brawner v State, 58 S E 2d 238, 81 Ga App 163

Ind —Anderson v State, 217 N E 2d 840, 247 Ind 552—Holsey v State, 254 N E 2d 859, 253 Ind 437

Tex —Childers v State, 202 S W 2d 930, 150 Tex Cr R 453

73. Ky —Oliver v Com, 262 S W 2d 693

Mo —State v Cobb, 484 S W 2d 196

Variance held immaterial

(1) Ga —Brawner v State, supra, n 72

Tex —Adams v State, 202 S W 2d 933, 150 Tex Cr R 431

(2) Campbell v Com, 174 S W 2d 778, 295 Ky 511

74. Ala —Matthews v State, Cr, 286 So 2d 91, 51 Ala App 417

Tex —Northern v State, 216 S W 2d 192, 152 Tex Cr R 569

Variance held immaterial

Ind —Montes v State, 332 N E 2d 786

(3) Other matters

Tex —Estrada v State, Cr, 422 S W 2d 453

80. Variance to be decided from evidence

Ala —Layne v State, Cr, 310 So 2d 249, 54 Ala App 529

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82. Tex —Clark v State, 208 S W 2d 637, 151 Tex Cr R 383—Gragg v State, 214 S W 2d 292, 152 Tex Cr R 386—Simon v State Cr, 488 S W 2d 439

83. Ind —Montes v State, 332 N E 2d 786

84. Wash —State v Unosawa, 188 P 2d 104, 29 Wash 2d 578

85. Ala —Layne v State, Cr, 310 So 2d 249, 54 Ala App 529

86. Burden of showing due diligence

Tex —Diaz v State, App 1 Dist, 663 S W 2d 114

90. S C —State v Gantt, 76 S E 2d 674, 223 S C 431, cert den 74 S Ct 433, 347 U S 906, 98 L Ed 1065

Tex —Daugherty v State, 216 S W 2d 200, 152 Tex Cr R 590

§ 183. Wound or Injury

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97. Ill —People v Williams, 192 N E 2d 356, 28 Ill 2d 280

98. Or —State v Bodi, 354 P 2d 831, 223 Or 486

§ 184. Intent

6. Miss —Garner v State, 87 So 2d 80, 227 Miss 840

Tex —Johnson v State, 208 S W 2d 94, 151 Tex Cr R 383

7. N Y —People v Agron, 218 N Y S 2d 625, 10 N Y 2d 130, 176 N E 2d 556 cert den 82 S Ct 245, 368 U S 922, 7 L Ed 2d 136—People v King, 236 N Y S 2d 457, affd 242 N Y S 2d 617, 19 A D 2d 656, affd 199 N E 2d 162, 14 N Y 2d 718, 250 N Y S 2d 63

8. Miss —Brandon v State, 263 So 2d 560

9. Ind —Matthews v State, 148 N E 2d 334, 237 Ind 677

In order to support a conviction for murder in the first degree, under the so-called "felony-murder rule," it is not necessary to prove that the intent to commit the particular felony existed before the beginning of the fatal assault.[95]

9.5. Pa —Com v Hart, 170 A 2d 850, 403 Pa 652, cert den 82 S Ct 130, 368 U S 881, 7 L Ed 2d 81

10. Ark —Bonds v State, 403 S W 2d 52, 240 Ark 908

Mo —State v Chevlin, 284 S W 2d 563

Proof of intent to murder not required

Ind —Ellis v State, 304 N E 2d 546, 159 Ind App 1

13. W Va —State v Currey, 57 S E 2d 718, 133 W Va 676

§ 185. In General

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19. Cal —People v Garcia, App, 104 Cal Rptr 69, 27 C A 3d 639

Fla —Orr v State, 176 So 516, 129 Fla 398

Unnecessary to show coindictee's participation

Ala —Matthews v State, Cr, 308 So 2d 718, 54 Ala App 359

21. Ark —Stanley v State, 454 S W 2d 72, 248 Ark 787

Cal —People v Eggers, 185 P 2d 1, 30 Cal 2d 676, cert den 68 S Ct 728, 333 U S 858, 92 L Ed 1138, reh den 68 S Ct 786, 333 U S 870, 92 L Ed 1147

Ill —People v Jones 273 N E 2d 421, 133 Ill App 2d 363—People v Calhoun, 281 N E 2d 363, 4 Ill App 3d 683—People v Muldrow, 332 N E 2d 664, 30 Ill App 3d 209

Kan —State v Jones, 545 P 2d 323, 218 Kan 720

La —State v Walker, 15 So 2d 847, 204 La 523

Mo —State v Cheatham, 340 S W 2d 16

N Y —People v King, 236 N Y S 2d 457, affd 242 N Y S 2d 617, 19 A D 2d 656, affd 199 N E 2d 162, 14 N Y 2d 718 250 N Y S 2d 63

N C —State v Johnson, 136 S E 2d 84, 261 N C 727—State v Crews, 201 S E 2d 840, 284 N C 427

Ohio—State v Hagert, App 58 N E 2d 399, revd on oth grds 58 N E 2d 764, 144 Ohio St 316—State v Ellis, App, 105 N E 2d 65

Okl —Saulsbury v State, 172 P 2d 440, 83 Okl Cr 7—Smith v State, 175 P 2d 148, 83 Okl Cr 209—Thompson v State, Cr, 365 P 2d 834

Pa —Com v Bolish, 55 Lack Jur 213, revd on oth grds 113 A 2d 464, 381 Pa 500, affd 138 A 2d 447, 391 Pa 550, cert den 78 S Ct 1376, 357 U S 931, 2 L Ed 2d 1373—Com v Young, 285 A 2d 499, 446 Pa 122

Assault with intent to kill or murder

Ind —Summerlin v State, 271 N E 2d 411, 256 Ind 652

Manslaughter by abortion

Kan —State v Brown, 236 P 2d 59, 171 Kan 557

Wash —State v Unosawa, 296 P 2d 315, 48 Wash 2d 616

Aiding and abetting

(1) U S —Goldsmith v Cheney, C A Wyo, 447 F 2d 624

(3) Other matters

Iowa—State v Jones, 271 N W 2d 761

Identity of deceased

(2) State not relieved of burden by concession in argument on objection

La —State v Hamilton, 187 So 2d 417, 249 La 392

(3) Other instances

Mass —Com v Devlin 310 N E 2d 353, 365 Mass 149

Negligent homicide statute, constitutionality

La —State v Nix, 31 So 2d 1, 211 La 865, cert den 68 S Ct 100, 332 U S 791, 92 L Ed 373

Lack of evidence insufficient

Miss —Herron v State, 38 So 2d 720, 365 Mass. 149

Motive need not be proved

Pa —Com v Whiting, 74 Montg 412, affd 187 a.2d 563, 409 pa 492

Matters not required to be proved

Cal —People v Phillips, 51 Cal Rptr 225, 414 P 2d 353, 64 C 2d 574

Pa —Com ex rel Sprangle v Maroney, 225 A 2d 236, 423 Pa 589

All elements of offense need not be shown

Mich —People v Randall, 201 N W 2d 292, 42 Mich App 187

Concession of fact and cause of death by defendant immaterial

Idaho—State v Hatton, 522 P 2d 64, 95 Idaho 856—State v Hokenson, 527 P 2d 487, 96 Idaho 283

22. Ala —Duck v State, 92 So 2d 55, 38 Ala App 652

Fla —McVeigh v State, 73 So 2d 694, app dism 75 S Ct 210, 348 U S 885, 99 L Ed 696

Mass —Com v Welansky, 55 N E 2d 902, 316 Mass 383

Mo —State v Colbert, 226 S W 2d 685—State v Feger, 340 S W 2d 716

N C —State v Palmer, 52 S E 2d 908, 230 N C 205—State v Hipp, 95 S E 2d 452, 245 N C 205

Okl —Brady v State, 219 P 2d 267, 90 Okl Cr 367

Pa —Com v Fabrizio, 36 North 278

Burden not on defendant

Ala —Payne v State, Cr, 293 So 2d 877, 52 Ala App 453

24. N Y —People v Nicoli, 158 N Y S 2d 279, 3 A D 2d 64

N J —State v Brooks, 57 A 2d 34 136 N J L 577

§ 186. Corpus Delicti

25. D C —Hemphill v U S, C A, 402 F 2d 187, 131 U S App D C 46

26. U S —Goldsmith v Cheney, C A Wyo, 447 F 2d 624

Ark —Hays v State, 324 S W 2d 520, 230 Ark 731

Ga —Logue v State 32 S E 2d 397, 198 Ga 672—Delegal v State, 90 S E 2d 32, 92 Ga App 744

Ill —People v Wilson, 81 N E 2d 211, 400 Ill 461

Ind —Miller v State, 58 N E 2d 114, 223 Ind. 50—Wahl v State, 98 N E 2d 671, 229 Ind 521

Ky —Hollin v Com, 307 S W 2d 910

Md —Bagley v State, 192 A 2d 53, 232 Md 86, 100 A L R 2d 1249

Miss —Chinn v State, 276 So 2d 456, cert den 94 S Ct 366, 414 U S 1006, 38 L Ed 2d 244

Mo —State v Hubbard, 171 S W 2d 701, 351 Mo 143—State v Colbert supra, n 22—State v Feger, 340 S W 2d 716

Pa —Com v Haley, 59 A 2d 62, 359 Pa 477, cert den 69 S Ct 400, 335 U S 904, 93 L Ed 438, reh den 69 S Ct 740, 336 U S 944, 93 L Ed 1098—Com v Hine, 32 Northumb L J 99

S C —State v Thomas, 71 S E 2d 722, 222 S C 484

Tex —Bunn v State, 226 S W 2d 646, 154 Tex Cr R 279

Wis —State v Timm, 12 N W 2d 670, 244 Wis 508

Viable child en ventre sa mere

Mich —Larkin v Cahalan, 208 N W 2d 176, 389 Mich 533

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27. Ala —Welch v State, Cr, 235 So 2d 906, 45 Ala App 657

Colo —Tate v People, 247 P 2d 665, 125 Colo 527

Ill —People v Gendron, 243 N E 2d 208, 41 Ill 2d 351, cert den 90 S Ct 179, 396 U S 889, 24 L Ed 2d 164—People v Hairston 294 N Ed 2d 748, 10 Ill App 3d 678

Md —Davis v. State, 205 A 2d 254, 237 Md 97, cert den 86 S Ct 402, 382 U S 945, 15 L.Ed 2d 354

Miss.—White v State, 306 So 2d 299, app after remand 330 So 2d 877—Dickerson v State, 441 So 2d 536

Pa —Com v Homeyer, 94 A 2d 743, 373 Pa 150

Utah—State v Jackson, 454 P 2d 290, 22 Utah 2d 408

Va —Garner v Com, 43 S E 2d 911, 186 Va 600

28. Ark —Hall v State, 189 S W 2d 917, 209 Ark 180—Hays v State, 324 S W 2d 520, 230 Ark 731

Cal —People v Cornett, 141 P 2d 916, 61 Cal App 2d 98—People v Collins, 182 P 2d 585, 80 Cal App 2d 526, cert den 69 S Ct 16, 335 U S 831, 93 L Ed 384 Cert den 69 S Ct 1524, 337 U S 961, 93 L Ed 1759

Colo.—Tate v People, supra, n 27

Miss —Gilleylen v State, 255 So 2d 661

Mo —C.J.S. cited in State v O'Kelley, 213 S W 2d 963, 966

Neb —Reyes v State, 38 N W 2d 539, 151 Neb 636

N C —State v Adams, 85 S E 2d 918, 241 N C 559

Tenn —McCord v State, 278 S W 2d 689, 198 Tenn 226—Davis v State, Cr, 445 S W 2d 933, 1 Tenn Cr.App 479

Va —Bowie v Com, 35 S E 2d 345, 184 Va 381—Bond v Com, 311 S E.2d 769, 226 Va 534

W Va —C.J.S cited in State v Durham, 195 S E 2d 144, 148, 156 W Va 509

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(3) Other cases

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Tenn —Cagle v State, Cr, 507 S W 2d 121, 73 A L R 3d 891—State v LaChance, 524 S W 2d 933

Unaffected by presumption

N C —State v Carter, 119 S E 2d 461, 254 N C 475

Presumption of infant victims' incapacity for negligence held not to shift burden

N C —State v Harrington, 133 S E 2d 452, 260 N C 663

State not relieved of burden by concession in course of argument on objection

La —State v Hamilton, 187 So 2d 417, 249 La 392

29. Ala —Daniel v State, 17 So 2d 542, 31 Ala App 376—Gurley v State, 61 So 2d 137, 36 Ala App 606—Cook v State, 189 So 2d 595, 43 Ala App 304—Mitchell v State, 191 So 2d 385, 43 Ala App 427

Cal —People v Bernhardt, 35 Cal Rptr 401, 222 C A 2d 567

Ga —Delegal v State, 90 S E 2d 32, 92 Ga App 744

Ill —People v Wilson, 81 N E 2d 211, 400 Ill 461—People v Bailey, 205 N E 2d 736, 56 Ill App 2d 261—People v Gendron, 243 N E 2d 208, 41 Ill 2d 351, cert den 90 S Ct 179, 396 U S 889, 24 L Ed.2d 164

Ky —Buckett v Com, 172 S W 2d 439, 294 Ky 671—Hollin v Com, 307 S W 2d 910

Mo —State v Cheatham, 340 S W 2d 16

N Y —People v Joseph, 172 N Y S 2d 463, 11 Misc 2d 219

N C —State v Ellison, 39 S E 2d 824, 226 N C 628—State v Palmer, supra, n 22—State v Simpson 93 S E.2d 425, 244 N C 325—State v Griffin 159 S E 2d 889, 273 N C 333—State v Moore, 166 S E 2d 652, 275 N C 198, app after remand 171 S E 2d 453, 276 N C 142—State v Fox, 175 S E 2d 561, 277 N C 1—State v Jones, 184 S E 2d 862 280 N C 60

Okl —Thompson v State, Cr, 365 P 2d 834

Pa —Com v Homeyer, supra, n 27—Com v Leitrich, 91 P L J 1, 35 Berks 99, affd 31 A 2d 155, 346 Pa 497

Tex —Townsend v State, 252 S W 2d 941, 158 Tex Cr R 29—Wright v State, Cr, 422 S W 2d 184, vac in part on oth grds 92 S Ct 2850, 408 U S 934, 33 L Ed 2d 746, reh den 93 S Ct 86, 409 U S 897, 34 L Ed 2d 155, on remand 490 S W 2d 828—Cruz v State, Cr, 482 S W 2d 264

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Wash —State v Green, 229 P 2d 318, 38 Wash 2d 240, 23 A L R 2d 1397

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30. Conn —State v Hanna, 191 A 2d 124, 150 Conn 457

Kan —State v Doyle, 441 P 2d 846, 201 Kan 469

Pa —Com v May, 301 A 2d 368, 451 Pa 31

Tex —Ray v State, 266 S W 2d 124, 160 Tex Cr R 12—Martinez v State, 306 S W 2d 131, 165 Tex Cr R 244

Wyo —State v Osmus, 276 P 2d 469, 73 Wyo 183

No duty on prosecution to affirmatively exclude possibility of accident or suicide

Pa —Com v May, 301 A 2d 368, 451 Pa 31

Where homicide occurs in the perpetration of another felony, the prosecution is not required, in order to establish the corpus delicti, to show by independent proof that death occurred in the perpetration of such felony [30.5]

30.5. Reason for rule

Commission of homicide in perpetration of another felony is merely one of the circumstances that classifies the homicide

D C —U S v Naples, D C, 192 F Supp 23, revd on oth grds, C A, 307 F 2d 618, 113 U S App D C 281, on remand 205 F Supp 944

32. Fla —Hopper v State, 54 So 2d 165—Coachman v State, App, 114 So 2d 189—Penton v State, App, 114 So 2d 381—Land v State, 156 So 2d 8 cert den 84 S Ct 1635, 377 U S 959, 12 L Ed 2d 503

Ga —Heath v State, 47 S E 2d 906, 77 Ga App 127

Miss —C.J.S. quited in Talbert v State, 347 So 2d 352, 353

Tenn —C.J.S quoted in Bean v State, 213 S W 2d 23, 24, 187 Tenn 107

33. Ky —Bartley v Com, 188 S W 2d 102, 300 Ky 152—Arthur v Com, 307 S W 2d 182—Hollin v Com, 307 S W 2d 910

La —State v Nix, supra, n 21

S C —Browder v Southern Ry Co, 83 S E 2d 455, 226 S C 26

No presumption of death after absence of person for seven years

Cal —People v Scott, 1 Cal Rptr 600, 176 C A 2d 458, cert den and app dism 81 S Ct 245, 365 U S 471, 5 L Ed 2d 222, reh den 81 S Ct 462, 364 U S 944, 5 L Ed 2d 376, cert den 82 S Ct 81, 368 U S 849, 7 L Ed 2d 47

34. La —State v Nix, supra, n 21

Criminal agency not presumed from emaciation in starvation case

Ala —Bliley v State, App, 160 So 2d 507, 42 Ala App 261

35. Neb —Reyes v State, supra, n 28

36. Ala —Gardner v State, 111 So 2d 916, 40 Ala App 276

Cal —People v Graham, 21 Cal Rptr 893, 191 C A 2d 521, cert den 82 S Ct 112, 368 U S 864, 7 L Ed 2d 61

Ga —Roberts v State, 41 S E 2d 173, 74 Ga App 661

N C —State v Crisp, 94 S E 2d 402, 244 N C 407, 67 A L R 2d 236—State v Todd, 142 S E 2d 154, 264 N C 524—State v Phillips, 142 S E 2d 337, 264 N C 508

Pa —Com v Wilkes 199 A 2d 411, 414 Pa 246, cert den 85 S Ct 344, 379 U S 939, 13 L Ed 2d 349

Use of deadly weapon

Mo —Fisk v State, App, 515 S W 2d 865

N C —State v Revis, 116 S E 2d 171, 253 N C 50—State v Johnson, 136 S E 2d 84, 261 N C 727—State v Barber 154 S E 2d 104, 270 N C 222—State v Propst, 161 S E 2d 560, 274 N C 62—State v Jones, 171 S E 2d 17, 6 N C App 712

37. Fla —Tongay v State, 79 So 2d 673

Ill —People v Meyers, 64 N E 2d 531, 392 Ill 355—Garmon v People, 221 N.E 2d 320, 76 Ill App 2d 24—People v Mead, 278 N E 2d 15, 3 Ill App 3d 565—People v Hills, 328 N E 2d 42, 27 Ill App 3d 1073

38. Tenn —Ford v State, 201 S W 2d 539, 184 Tenn 443—Cathey v State, 235 S W 2d 801, 191 Tenn 617

39 Ark —Burton v State, 495 S W 2d 841, 254 Ark 673

Me —State v Peterson, 75 A 2d 368, 145 Me 279

§ 187. Intent

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§ 188. —— Specific Intent to Kill

41. Ga —Colbert v State, 66 S E 2d 836, 84 Ga App 632

Ill —People v Koshiol, 262 N E 2d 446, 45 Ill 2d 573, cert den 91 S Ct 1209, 401 U S 978, 28 L Ed 2d 329—People v Johnson, 335 N E 2d 144, 32 Ill App 3d 36

Miss —C J.S cited in King v State, 181 So 2d 158, 160, 254 Miss 162

Mo —State v Hudson, App, 521 S W 2d 43

N Y —People v De Mino, 100 N Y S 2d 982, 277 App Div 1121—People v Monaco, 248 N Y S 2d 41, 14 N Y 2d 43 197 N E 2d 532

N C —State v Snead, 44 S E 2d 359, 228 N C 37

Ohio—State v Nichols, 209 N E 2d 750, 3 Ohio App 2d 182—State v Flonnory, 285 N E 2d 726 31 Ohio St 2d 124

Tex —Jones v State, 205 S W 2d 590, 151 Tex Cr R 115

Burden of proof not changed by accidental homicide defense

Ohio—Jones v State, 38 N E 2d 79, 51 Ohio St 331—State v Creech, 214 N E 2d 675, 5 Ohio App 2d 179

42. Cal —People v Wong, 187 P 2d 828, 83 Cal App 2d 60—People v Butts, 46 Cal Rptr 362, 236 C A 2d 817

N C —State v Thacker, 189 S E 2d 145, 281 N C 447, app after remand 197 S E 2d 248, 18 N C App 547

Lack of intent in "heat of passion" manslaughter case

N Y —People v D Andrea, 207 N Y S 2d 215 26 Misc 2d 95

Intent to shoot some one other than decedent

Ind —McCurdy v State 124 N E 2d 489, 263 Ind 66

43. Ga —Jackson v State, 48 S E 2d 864, 204 Ga 47—Holmes v State, 163 S E 2d 803, 224 Ga 553

Ill —People v Shields, 127 N E 2d 440, 6 Ill 2d 200—People v Coolidge 187 N E 2d 694, 26 Ill 2d 533—People v Wilson, 278 N E 2d 473, 3 Ill App 3d 481

Ind —Maxwell v State, 260 N E 2d 787, 254 Ind 490, cert den 91 S Ct 1525, 402 U S 930, 28 L Ed 2d 863

Ky —Titsworth v Com, 184 S W 2d 228, 298 Ky 814—Bates v Com, 211 S W 2d 130, 307 Ky 357

Mich —People v Morrin, 187 N W 2d 434, 31 Mich App 301

Mo —State v Lamborn, 452 S W 2d 216

N C —State v Thacker, 189 S E 2d 145, 281 N C 447, app after remand 197 S E 2d 248, 18 N C App 547

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Wash —State v Collins, 314 P 2d 660, 50 Wash 2d 740

Wis —State v Wells, 187 N W 2d 328, 51 Wis 2d 477, cert den 93 S Ct 1614, 406 U S 907, 31 L Ed 2d 817

Other statements of rule

(2) Ill —People v Simmons, 71 N E 2d 269, 399 Ill 572—People v Marrow, 85 N E 2d 34, 403 Ill 69

(3) Further statements

Ill—People v. Smith, App., 219 N E 2d 82, 71 Ill. App 2d 446, cert den 87 S Ct 859, 386 U S. 910, 17 L.Ed.2d 784.

Permissive not mandatory presumption

Iowa—State v Price, App., 365 N W 2d 632

Conclusive presumption not created by findings

Iowa—State v Price, App., 365 N W 2d 632

Solicitation

Ill—People v. Pagluca, 458 N E 2d 908, 76 Ill Dec 254, 119 Ill App 3d 906.

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44. U S—Government of Virgin Islands v Lake, C A Virgin Islands, 362 F 2d 770

Ariz—Drury v Burr, 483 P 2d 539, 107 Ariz 124

Ark—Ward v State, 186 S W 2d 950, 208 Ark 602—Tippett v State, 278 S W 2d 110, 224 Ark 981—Figeroa v State, 425 S W 2d 516, 244 Ark 457

Cal—People v Dorsey, 75 Cal Rptr 658, 270 C A 2d 423

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Me—State v Barnett, 114 A 2d 245, 150 Me 473

Mich—People v Geiger, 159 N W 2d 383, 10 Mich App 339—People v Person, 174 N W 2d 67, 20 Mich App 246—People v Shugar, 185 N W 2d 178, 29 Mich App 139—People v McBride, 186 N W 2d 70, 30 Mich App 201—People v McFee, 192 N W 2d 355, 35 Mich App 227

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N C—State v Revels, 40 S E 2d 474, 227 N C 34

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Ariz—State v Prest, 362 P 2d 660, 89 Ariz. 336, cert den 82 S Ct 372, 368 U S 934, 7 L Ed.2d 196

Pa—Com v Hammond, 62 Lack Jur 49

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(1) Ala—Davenport v State, 38 So 2d 285, 34 Ala App 204

Ariz—State v Mathis, 375 P 2d 388, 92 Ariz 194

(2) Md—Chase v Jenifer, 150 A 2d 251, 219 Md 564

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Kan—State v Greenwood, 421 P 2d 24, 197 Kan 676

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48. Cal—People v Steward, 318 P 2d 806, 156 C A 2d 177

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(4) Other statements

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(2) Ohio—State v Farmer, 102 N E 2d 11, 156 Ohio St 214—State v Creech, 214 N E 2d 675, 5 Ohio App.2d 179

50. Ala —Trammell v State, Cr , 298 So 2d 666, 53 Ala App 246

Ga.—Huntsinger v State, supra, n 48

51. Ga.—Perry v State, 121 S E.2d 692, 104 Ga App 383

Intent to kill cannot be inferred from a sudden, simple fist fight [315]

53.5. Ky —White v Com , 333 S W 2d 521—White v Com , 360 S W 2d 198, overruling Smith v Com , 15 S W 2d 458, 228 Ky 710 and Kearns v Com , 49 S W 2d 1009, 243 Ky 745

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N C —State v Warren, 89 S E 2d 109, 242 N C 581

Tex —Hernandez v State, Cr , 375 S W 2d 285

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59. Md —Davis v State, supra, n 58

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64. Ind —Ponos v State, 184 N E 2d 10, 243 Ind 411

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65. Ark —Carson v State, 232 S W 2d 835, 217 Ark 658

Cal —People v Zankich, 11 Cal Rptr 115, 189 C A 2d 54

Colo —People v Spinuzzi, 369 P 2d 427, 149 Colo 391

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Or —State v Cunningham, supra, n 48

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Cal —People v Butts, 46 Cal Rptr 362, 236 C A 2d 817—People v Gonzales, 84 Cal Rptr. 863, 4 C A 3d 593

69. Fla —Daniels v State, 108 So 2d 755

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(2) Del —Bantum v State, 85 A 2d 741, 7 Terry 487

72. U S —Lundberg v Buchkoe, C A Mich , 338 F 2d 62

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Cal —People v Cartwright, 305 P 2d 93, 147 C A 2d 263—People v Brubaker, 346 P 2d 8, 53 C 2d 37, cert den 81 S Ct 763, 365 U S 824, 5 L Ed 2d

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(1) Cal—People v Hills, 185 P 2d 11, 30 Cal 2d 694
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Particular facts held not to authorize inference

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Va—Henry v Com., 77 S E 2d 863, 195 Va 281

Brutality alone does not justify inference

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The passage of time, standing alone, may not support an inference that deliberation took place.[72.5]

72.5. D C—Parman v U S, C A, 399 F 2d 559, 130 U S App D C 188, cert den 89 S Ct 109, 393 U S 858, 21 L Ed 2d 126—U S v Mack, C A, 466 F 2d 333, 151 U S App D C 162, cert den 93 S Ct 297, 409 U S 952, 34 L Ed 2d 223

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Ga—Tiller v State, 26 S E 2d 883, 196 Ga 508—Cady v State, 31 S E 2d 38, 198 Ga. 99, cert den 65 S Ct 190, 323 U S 676, 89 L Ed 549—Bivins v State, 38 S E 2d 273, 200 Ga 729—Holmes v State, 163 S E 2d 803, 224 Ga 553—McTerrell v State, 164 S E 2d 276, 118 Ga App 494—McKinnon v State, 186 S E 2d 315, 124 Ga App 821
Ill—People v Wilkes, 276 N E 2d 761, 2 Ill App 3d 626—People v Young, 297 N E 2d 298, 11 Ill App 3d 609—People v Carlton, 326 N E 2d 100, 26 Ill App 3d 995
Ky—Wheeler v Com., 472 S W 2d 254
Md—Day v State, 234 A 2d 894, 2 Md App 334
Miss—Dobbs v State, 29 So 2d 84, 200 Miss 595, app den, cert dism 67 S Ct 1318, 331 U S 787, 91 L Ed 1817, reh den 67 S Ct 1533, 331 U S 868, 91 L Ed 1871
N C—State v Calloway, 160 S E 2d 501, 1 N C App 150
Ohio—State v Urick, App., 58 N E 2d 216—State v Callihan, 227 N E 2d 654, 11 Ohio App 2d 23
Okl—Saulsbury v State, 172 P 2d 440, 83 Okl Cr 7—Sawyer v State, 237 P 2d 167, 94 Okl Cr 412—Thompson v State, Cr., 365 P 2d 834—Cottrell v State, Cr., 458 P 2d 328
Or—State v Nodine, 259 P 2d 1056, 198 Or 679
Pa—Com v Winebrenner, 265 A 2d 108, 439 Pa 73—Com v Harris, 281 A 2d 879, 444 Pa 515
Tenn—Thomas v State, 358 S W 2d 315, 210 Tenn 297—Massey v State, 456 S W 2d 867, 3 Tenn Cr App 26
Va—Thomas v Com., 41 S E 2d 476, 186 Va 131—Johnson v Com., 51 S E 2d 152, 188 Va 848—Randolph v Com., 56 S E 2d 226, 190 Va 256—Bailey v Com., 62 S E 2d 28, 191 Va 510—Smith v Com., supra, n 72—Leigh v Com., 66 S E 2d 586, 192 Va 583—Bailey v Com., 104 S E 2d 28, 200 Va 92
W Va—State v Hamric, 151 S E 2d 252, 151 W Va 1—State v Angel, 177 S E 2d 562, 154 W Va 615

Legal excuse or justification

Md—Cook v State, 263 A 2d 33, 9 Md App 214

Presumption of innocence, etc.

(2) Other matters
Ga—Smith v State, 46 S E 2d 583, 203 Ga 317—Ayers v State, 103 S E 2d 574, 214 Ga 156

Burden is not on state, etc.

Ala—Duck v State, 92 So 2d 55, 38 Ala App. 652
(2) Other matters.
Pa—Com v Wilkes, 199 A 2d 411, 414 Pa 246, cert den 85 S Ct 344, 379 U S 939, 13 L Ed 2d 349

Burden of going forward, etc.

Ariz—State v Horwood, 519 P 2d 177, 110 Ariz 375
Cal—People v Ray, 61 Cal Rptr 1, 252 C A 2d 932, cert den 89 S Ct 145, 393 U S 864, 21 L Ed 2d 132

Admission of fact of shooting

(2) Other cases—People v Belcher, 70 N E.2d 201, 395 Ill 348

Mitigation defined

Cal—People v. Leong Fook, 273 P 779, 782, 206 Cal 64

Burden of overcoming presumption of malice

Md—Law v State, 318 A.2d 859, 21 Md App. 13, app. after remand 349 A 2d 295, 29 Md App 457

Statute not unconstitutional

N.Y—People v Donovan, 385 N Y S 2d 385, 53 A D 2d 27

Objective and subjective facets of heat-of-passion defense

Wis—State v Lee, 321 N W 2d 108, 108 Wis 2d 1—State v Healer, App., 344 N W 2d 190, 116 Wis.2d 657

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76. Ala—Champion v State, 44 So 2d 16, 35 Ala App 7, cert den 44 So 2d 622, 253 Ala. 436—Hodge v State, 70 So 2d 285, 37 Ala App 450—Alexander v State, 71 So 2d 520, 37 Ala.App 533—Gardner v State, 111 So 2d 916, 40 Ala. App 276—Wallace v State, 124 So 2d 110, 41 Ala App 65, cert den., 124 So 2d 115, 271 Ala 701
Ga—Parker v State, 29 S E.2d 61, 197 Ga. 340—Brown v State, supra, n 75—Jackson v State, 98 S E 2d 571, 213 Ga 275—Smith v State, 46 S E.2d 583, 203 Ga 317—Ayers v State, 103 S E 2d 574, 214 Ga 156
Ill—People v Washington, 187 N E 2d 739, 27 Ill 2d 104—People v Slaughter, 194 N E 2d 193, 29 Ill 2d 384
N J—State v Williams, 148 A 2d 22, 29 N J 27
N C—State v Warren, 89 S E 2d 109, 242 N C 581—State v Jackson, 200 S E 2d 596, 284 N.C. 303
Ohio—State v Robinson, 118 N E 2d 517, 161 Ohio St 213—State v Sheppard, 128 N E 2d 471, 100 Ohio App 345, affd 135 N E 2d 340, 165 Ohio St 293, cert den 77 S Ct 118, 352 U S 910, 1 L Ed 2d 119, reh den 77 S Ct 323, 352 U S 955, 1 L Ed 2d 245

77. Ariz—State v Maloney, 416 P 2d 544, 101 Ariz 111, app after remand 433 P 2d 625, 102 Ariz 495, and 464 P 2d 793, 105 Ariz 348, cert den 91 S Ct 82, 400 U S 841, 27 L Ed 2d 75
Cal—People v Loggins, 100 Cal Rptr 528, 23 C A 3d 597
Colo—Leonard v People, 369 P 2d 54, 149 Colo 360
Conn—State v Anonymous (1976-5), 359 A 2d 715, 33 Conn Sup 28
Ill—People v Neal, 240 N E 2d 784, 98 Ill App 2d 454
N J—State v Gardner, 242 A 2d 1, 51 N J 444
N Y—People v Sandgren, 98 N E 2d 460, 302 N Y 331, mand conf to 106 N Y S 2d 607, 278 App Div 935
N C—State v Weaver, 161 S E 2d 755, 1 N C App 436—State v Wrenn, 185 S E 2d 129 N C 676, app after remand 191 S E 2d 913, 16 N C App 411, cert den 192 S E 2d 839, 282 N C 430
Pa—Com v Woong Knee New, 47 A 2d 450, 354 Pa. 188

Rule of procedure

Cal—People v Deloney, 264 P 2d 532, 41 C 2d 832
Okl—Meadows v State, Cr., 487 P 2d 359

78. N Y—People v Sandgren, supra, n 77—People v Townsel, 226 N Y S 2d 897, 16 A D 2d 178
Pa—Com v Edwards, 292 A 2d 361, 448 Pa. 79

Partial affirmative defense

Ill—People v Bolden, 477 N E 2d 1380, 87 Ill Dec 852, 132 Ill App 3d 1047 (abandoning People v. March, 419 N E 2d 1212, 50 Ill Dec 763, 95 Ill App 3d 46)

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79. Ky—Monroe v Com., 343 S W 2d 143

81. Statement held not exculpatory

Tex—East v State, Cr., 420 S W.2d 414

§ 194. —— Insanity and Intoxication

83. Miss —Keeler v State, 84 So.2d 153, 226 Miss 199

Vt —State v Miner, 258 A.2d 815, 128 Vt 55

84. Ala —Lokos v State, 179 So 2d 714, 278 Ala 586, vac in part on oth grds 92 S Ct 2854, 408 U S 935, 33 L Ed 2d 749, on remand 274 So 2d 303, 290 Ala 122

D C —U S v Greene, C A, 489 F 2d 1145, 160 U S App D C 21, cert den 95 S Ct. 239, 419 U S 977, 42 L Ed 2d 190, reh den 95 S Ct 530, 419 U S 1041, 42 L Ed 2d 318

Fla.—Evans v State, App, 140 So 2d 348

Ga —Handspike v State, 45 S E.2d 662, 203 Ga 115—Boyd v State, 63 S E 2d 394, 207 Ga 567—Carter v State 168 S E 2d 158, 225 Ga 310—Grace v State, 200 S E 2d 248, 231 Ga 113

Idaho—State v. Behler, 146 P 2d 338, 65 Idaho 464

Mo —State v Peterson, Mo, 154 S W 2d 134

N J —State v Tansimore, 71 A 2d 169, 3 N J 516

N Y —People v DiPiazza, 248 N E 2d 412, 24 N Y 2d 342, 300 N.Y S 2d 545

N C —State v Wood, 55 S E 2d 491, 230 N C 740

Ohio—State v Hagert, 58 N E 2d 399, revd on oth grds, 58 N E 2d 764, 144 Ohio St 316—State v Tudor, App, 92 N E 2d 33, revd on oth grds 95 N E 2d 385, 154 Ohio St 249

Okl —High v State, Cr, 401 P 2d 189

Or —State v Unsworth, 384 P 2d 207, 235 Or 214

Pa.—Com v Lesher, 6 Adams L J 162—Com v Zlatovich, 269 A 2d 469, 440 Pa 388

Va —Taylor v Com, 157 S E 2d 185, 208 Va 316—Bloodgood v Com, 183 S E 2d 737, 212 Va 253

W Va —State v Myers, 222 S E 2d 300, 159 W Va 353

In Texas

(1) Thomas v State, 177 S W 2d 777, 147 Tex Cr R 45—Williams v State, 210 S W 2d 155, 152 Tex Cr R 18

85. Fla —McVeigh v State, 73 So 2d 694, app dism 75 S Ct 210, 348 U S 885, 99 L Ed 696

La.—State v Chinn, 87 So 2d 315, 229 La 984

Va —Lucas v Com, 112 S E 2d 915, 201 Va 599

86. Brutality not per se basis for finding

N C —State v Cooper, 213 S E 2d 305, 286 N C 549

87. Ill —People v Davidson, 225 N E 2d 727, 82 Ill App 2d 245

Mich —People v Woody, 157 N W 2d 201, 380 Mich 332

Mo —State v Terry, 472 S W 2d 426, vac in part on oth grds 92 S Ct 2876, 408 U S 940, 33 L Ed 2d 763

N Y —In re Pinnock's Estate, 371 N Y S 2d 797, 83 Misc 2d 233

N C.—State v Harris, 28 S E.2d 232, 233 N C 697

R I —State v McGregor, 111 A 2d 231, 82 R I 437

Tex —Purcell v State, 322 S W.2d 268, 167 Tex Cr R 565

Va.—Taylor v Com, 157 S E 2d 185, 208 Va 316

88. U S —U S v Collier, C A Fla, 453 F 2d 1173—U S v McCracken, C A Miss, 488 F 2d 406

Ariz —State v Karstetter, 521 P 2d 626, 110 Ariz 539

D C.—Williams v U S, C A, 312 F 2d 862, 114 U S App D C 135, cert den 83 S Ct 1894, 374 U S 841, 10 L Ed 2d 1061, and 85 S Ct 689, 379 U S 982, 13 L Ed 2d 572

Fla —Hixon v State, App, 165 So 2d 436

Ill —People v Lono, 297 N E.2d 349, 11 Ill.App 3d 443

Ind.—Stamper v State, 294 N E 2d 609, 260 Ind 211

Mich —People v Woody, 157 N W 2d 201, 380 Mich 332.

Or —State v Siens, 504 P 2d 1056, 12 Or App 97

Pa —Com v Bruno, 352 A 2d 40, 466 Pa 245

Tex —Chandler v State, supra, n 55

Where prior insanity is shown, etc.

Fla —Wells v State, 98 So 2d 795

Evidence held not to shift burden

Okl —Whisenhunt v State, Cr., 279 P 2d 366

Wash —State v Hawkins, 425 P 2d 390, 70 Wash 2d 697, cert den 88 S Ct 840, 390 U S 912, 19 L Ed 2d 883

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91. Fla —Hixon v State, App, 165 So 2d 436.

92. U S —U S ex rel Thompson v Dye, D C Pa, 113 F Supp 807, petition den 123 F Supp 759, revd on oth grds, C A, 221 F 2d 763, cert den 76 S Ct 120, 350 U S 875, 100 L.Ed 2d 773

Iowa—State v Wilson, supra, n 46—State v Christie, 53 N W 2d 887, 243 Iowa 1199, mod on oth grds and reh den 54 N W 2d 927, 243 Iowa 1199

N J.—State v Tansimore, supra, n 84

Pa —Com v Chapman, 58 A 2d 433, 359 Pa 104—Com v Thompson, 113 A 2d 274, 381 Pa 299

Degree of intoxication

(2) Beall v State, 101 A 2d 233, 203 Md 380

Wis —Jones v State, 230 N W 2d 677, 69 Wis 2d 337

Mitigation of offense

Pa —Com v Rook, 31 Northumb L J 164

Statutory presumption held inapplicable

Idaho—State v Fisk, 448 P 2d 768, 92 Idaho 675

93. D C —U S v Martin, C A, 475 F 2d 943, 154 U S App D C 359

Neb —Tvrz v State, 48 N W 2d 761, 154 Neb 641

However, evidence of intoxication creates no new presumption for the defendant and imposes no new burden on the prosecution [93.5]

93.5. Pa —Com v Rose, 344 A 2d 824, 463 Pa 264

§ 195. —— Self-Defense

95. Del —State v Robinson, O & T, 36 A 2d 27, 3 Terry 419—Brown v State, 105 A 2d 646, 9 Terry 427—Quillen v State, 110 A 2d 445, 10 Terry 114, rearg den 112 A 2d 848, 10 Terry 163—State v Winsett, Super, 205 A 2d 510, 8 Storey 111

Fla —Robbins v State, App, 312 So 2d 243

Ky —Farris v Com, 174 S W 2d 415, 295 Ky 324—Whitaker v Com, 179 S W 2d 448, 297 Ky 279—Gross v Com, 186 S W 2d 190, 299 Ky 518—Lewis v Com, 226 S W 2d 934, 312 Ky 191—Jones v Com, 233 S W 2d 1007, 313 Ky 827—Carson v Com, 239 S W 2d 262

Md —Wilson v State, 343 A 2d 537, 28 Md App 168

Minn —State v White, 203 N W 2d 852, 295 Minn 217

N C —State v Grainger, 28 S E 2d 228, 223 N C 716—State v Jernigan, 56 S E 2d 599, 231 N C 338—State v Pennell, 58 S E 2d 341, 231 N C 631—State v Boyd, 180 S E 2d 794, 278 N C 682

Ohio—State v Kennedy, 52 N E 2d 873, 72 Ohio App 462—State v Reid, 210 N E.2d 142, 3 Ohio App 2d 215—State v Selsakar, 298 N E 2d 582, 35 Ohio St 2d 95

Pa —Com v Commander, 260 A 2d 773, 436 Pa 532—Com v Winebrenner, 265 A 2d 108, 439 Pa 73

Tex —Parkman v State, supra, n 49

W Va —State v Harlow, 71 S E 2d 330, 137 W Va 251

In Alabama

(1) Tolbert v. State, 15 So 2d 745, 31 Ala.App 301—Moore v State, 18 So 2d 803, 31 Ala App 483, cert den 18 So 2d 805, 246 Ala 94—Davenport v State, 38 So 2d 285, 34 Ala App 204—Langley v State, 22 So.2d 920, 32 Ala App 163, cert den 22 So 2d 923, 247 Ala 176—Kemp v State, 179 So 2d 762, 278 Ala 637

(2) Ala —Hill v State, Cr, 286 So.2d 924, 51 Ala App 515

No burden on state to refute anticipated defense

Ind —Patterson v State, 324 N E 2d 482, 263 Ind 55

96. Ala —Cosby v State, 114 So 2d 250, 269 Ala 501

D C.—U.S v Alexander, C A., 471 F 2d 923, 152 U S App D C 371, cert. den 93 S.Ct. 541, 409 U S 1044, 34 L Ed 2d 494

Ill —People v Haynes, 260 N E.2d 377, 124 Ill.App 2d 91

Ky —Carson v Com, supra, n 95—Taul v Com, 249 S W 2d 45—Ward v Com, 287 S W.2d 601—Harvey v. Com, 318 S W 2d 868

Pa —Com v Johnston, 263 A 2d 376, 438 Pa 485, 41 A L.R 3d 576—Com v Daniels, 301 A 2d 841, 451 Pa 163—Com v. Mahoney, 331 A 2d 488, 460 Pa 201

S D —State v Reddington, 125 N W 2d 58, 80 S D 390

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97. Ga —Mullis v State, 27 S E 2d 91, 196 Ga 569—Thomas v State, 70 S E 2d 539, 86 Ga App 15

Ill —People v Moore, 242 N E.2d 435, 101 Ill App 2d 230—People v Halley, 300 N E 2d 645, 13 Ill App 3d 719

La.—State v Patterson, 295 So 2d 792

Mich —People v Johnson, 163 N W 2d 686, 13 Mich App 69, revd on oth grds 172 N W 2d 369, 382 Mich 632, cert den 90 S Ct. 1533, 397 U S 1079, 25 L Ed 2d 816

Mo —State v Minnis, 486 S W 2d 280—State v Ford, 491 S W 2d 540—State v Tindall, App, 496 S W 2d 267

N J —State v Gardner, 242 A 2d 1, 51 N J 444

N M —State v Harrison, App, 471 P 2d 193, 81 N M 623, cert den 472 P 2d 382, 81 N M 668

Tenn —Henely v State, Cr, 520 S W 2d 361

98. Ala —Collier v State, Cr, 275 So 2d 364, 49 Ala App 685

Colo —Eckhardt v People, 247 P 2d 673, 126 Colo 18

Ga —Mullis v State, supra, n 97

Ill —People v Bonner, 298 N E 2d 221, 12 Ill App 3d 245—People v St Pierre, 324 N E 2d 226, 25 Ill App 3d 644

Ind —King v State, 234 N E 2d 465, 249 Ind 699—Banks v State, 276 N E 2d 155, 257 Ind 530—Patterson v State, 324 N E 2d 482, 263 Ind 55

Iowa—State v Hodge, 105 N W 2d 613, 252 Iowa 449, app dism and cert den 82 S Ct 437, 368 U S 402, 7 L Ed 2d 394—State v Badgett, 167 N W 2d 680

La —State v Bell, App 1 Cir, 442 So 2d 715, writ den 444 So 2d 1244

Mich —People v Stallworth, 111 N W 2d 742, 364 Mich 528—People v Jackson, 212 N W 2d 918, 390 Mich 621 App after remand 234 N W 2d 471, 63 Mich App 249

Mo —State v Blair, App, 531 S W 2d 755

Vt —State v Barrett, 266 A 2d 441, 128 Vt 458, app after remand 290 A 2d 14, 130 Vt 197

State must show felonious killing, etc —State v Carter, 80 So 2d 420, 227 La 820

Burden to negate one or more of necessary elements

Ind —McCraney v State, 447 N E 2d 589, disapproving statement in Spinks v State, 437 N E 2d 963

Where accused provides some evidence

Ill —People v DeSavieu, 1 Dist, 458 N E 2d 504, 76 Ill Dec 104, 120 Ill App 3d 420

99. Fla —Bolin v State, App, 297 So 2d 317

Me —State v Millett, 273 A 2d 504, 43 A L R.3d 211

1. S C —State v Richburg, 158 S E 2d 769, 250 S C 451, app. after remand 171 S E.2d 592, 253 S C 458, cert den 90 S Ct 2260, 399 U S 930, 26 L Ed 2d 799

2. Ala —Cosby v State, 114 So 2d 250, 269 Ala. 501

Fla —State v Coles, 91 So 2d 200.

N C —State v Walker, 73 S E 2d 868, 236 N C 742

Pa —Com. v Urshitz, 26 Wash Co 154

Good faith and necessary force

N C —State v Cooper, 159 S E 2d 305, 273 N C 51

Provocation

N.C —State v Howell, 79 S E 2d 235, 239 N C 78

Necessary force

N C —State v McDonald, 106 S E.2d 477, 249 N C 419—State v Boyd, 180 S E 2d 794, 278 N C 682—State v Locklear, 212 S.E.2d 404, 25 N C App 74

3. Ala—May v State, 45 So 2d 695, 35 Ala App 228, cert den 45 So 2d 698, 253 Ala 517—Cosby v State, 114 So 2d 250, 269 Ala 501

4. N C—State v Taylor, 37 S E 2d 901, 226 N C 286

5. Ala—Cochran v State, 35 So 2d 363, 33 Ala App 515

Ohio—State v Davis, 456 N E 2d 1256, 8 Ohio App 3d 205, 8 O B R 276

6. Ala—Henson v State, 22 So 2d 905, 247 Ala 125—Pate v State, 163 So 2d 645, 42 Ala App 334

Ill—People v Bailey, 326 N E 2d 550, 27 Ill App 3d 128

Mo—State v Holt, 434 S W 2d 576

Presumption of unlawfulness disappears

N C—State v Hankerson, 220 S E 2d 575, 288 N C 632, revd on oth grds 97 S Ct 2339, 432 U S 233, 53 L Ed 2d 306

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12. Ala—Payne v State, Cr, 265 So 2d 185, 48 Ala App 401, cert den 265 So 2d 192, 288 Ala 748, cert den 93 S Ct 703, 409 U S 1079, 34 L Ed 2d 669

Tex—Escamilla v State, Cr, 464 S W 2d 840

Mere possession of a weapon is not sufficient to invoke the presumption [14.5]

14.5. Mere possession of weapon by deceased is not sufficient to invoke the statutory presumption

Tex—De Vault v State 264 S W 2d 125, 159 Cr R 360—Booker v State, 302 S W 2d 431, 165 Tex Cr R 44—Henderson v State, 332 S W 2d 705, 169 Tex Cr R 206

15. Tex—Lightfoot v State, 296 S W 2d 554, 164 Tex Cr R 73

17. Tex—Cain v State, 226 S W 2d 640 154 Tex Cr R 284—Booker v State 302 S W 2d 431, 165 Tex Cr R 44

§ 196. —— Accident

26. Colo—C J S quoted in Wright v People, 171 P 2d 990, 996, 115 Colo 247

N C—State v Crews, 201 S E 2d 840, 284 N C 427

Ohio—State v Poole, 294 N E 2d 888, 33 Ohio St 2d 18 63 A L R 3d 932

27 N C—C J S. cited in State v Phillips, 142 S E 2d 337, 340, 264 N C 508—State v Woods, 179 S E 2d 358, 278 N C 210—State v Jones 214 S E 2d 24, 287 N C 84

N J—State v Gardner, 242 A 2d 1, 51 N J 444

Pa—Com v Muehlman, 16 Bucks 558

S D—State v Brown, 32 S E 2d 825, 205 S C 514

Va—Hubbard v Com, 59 S E 2d 102, 190 Va 917

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28. Cal—People v Hearn, 198 P 2d 305, 88 Cal App 2d 146

Del—Ruffin v State, 123 A 2d 461, 11 Terry 83

Ga—Chandle v State, 198 S E 2d 289, 230 Ga 574

Ill—People v Franklin, 60 N E 2d 870, 390 Ill 108—People v Morrison, 201 N E 2d 639, 52 Ill App 2d 9

N C—State v Robinson, 36 S E 2d 655, 226 N C 93—State v Vaden, 36 S E 2d 913, 226 N C 138—State v Powell, 78 S E 2d 248, 238 N C 527—State v Howell, supra, n 2—State v Wagoner, 107 S E 2d 81 249 N C 637

Pa—Com v Chermansky, 242 A 2d 237, 430 Pa 170, 32 A L R 3d 1072

Tex—Bussey v State, 181 S W 2d 94, 147 Tex Cr R 447

Va—Henry v Com, 77 S E 2d 863 195 Va 281

§ 197. —— Other Particular Matters of Defense

33. Va—Smith v Com, 40 S E 2d 273 185 Va 800

34. Pa.—C.J S. cited in Com v Donough, 103 A.2d 694, 697, 377 Pa 46

39. Ill—People v Ellis, 437 N E 2d 409, 62 Ill Dec. 882, 107 Ill App 3d 603

Defense of another. The burden of adducing evidence to support the defense that accused killed in defense of another is on accused,[39.5] but when such evidence appears the burden is on the state to prove that the defense is untrue [39.10]

39.5. N J—State v Fair, 211 A 2d 359, 45 N J 77

39.10. N J—State v Fair, 211 A 2d 359, 45 N J 77

§ 198. Personal Relations

Library References

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40 Wyo—C J S cited in State v Bruner, 319 P 2d 863, 865, 78 Wyo 111

§ 199. Grade or Degree of Offense

Library References

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47. Ariz—State v Johnson, 211 P 2d 469, 69 Ariz 203

Ark—Houston v State, 223 S W 2d 188, 215 Ark 754

Cal—People v Thompson, 14 Cal Rptr 512, 193 C A 2d 620—People v Lewis, 81 Cal Rptr 900, 1 C A 3d 698

Ga—Colbert v State 66 S E 2d 836, 84 Ga App 632

Md—Chisley v State 95 A 2d 577, 202 Md 87—Faulcon v State, 126 A 2d 358, 211 Md 249—Elliott v State, 137 A 2d 130, 215 Md 152—Bagley v State, 251 A 2d 246, 6 Md App 375

Mass—Com v Costa, 274 N E 2d 802, 360 Mass 177

Miss—Wright v State, 48 So 2d 509, 209 Miss 795

N J—State v Gardner, 242 A 2d 1, 51 N J 444

Tenn—Shanklin v State, Cr, 491 S W 2d 97

48. U S—Wilbur v Mullaney, C A Me, 496 F 2d 1303 affd 95 S Ct 1881, 421 U S 684, 44 L Ed 2d 508

Cal—People v Cornett, 141 P 2d 916, 61 Cal App 2d 98—People v Rhinehart, 107 Cal Rptr 34, 507 P 2d 642

Fla—Weaver v State, App, 220 So 2d 53

Ga—Cotton v State, 39 S E 2d 530, 201 Ga 285—Ogletree v State, 73 S E 2d 201, 209 Ga 413

Ill—People v Wiggins, 147 N E 2d 80, 12 Ill 2d 418—People v Sally, 162 N E 2d 396, 17 Ill 2d 578, cert den 80 S Ct 1069, 362 U S 981, 4 L Ed 1017

Md—Chisley v State, supra, n 47—Faulcon v State, 126 A 2d 858, 211 Md 249—Elliott v State, 137 A 2d 130, 215 Md 152—Jacobs v State, 251 A 2d 33, 6 Md App 238—Whitehead v State, 262 A 2d 316, 9 Md App 7

N C—State v Jennings, 171 S E 2d 447, 276 N C 157, app after remand 184 S E 2d 254, 279 N C 604

Okl—Sawyer v State, 237 P 2d 167, 94 Okl Cr 412

Pa—Com v Robinson, 305 A 2d 354, 452 Pa 316

Tenn—Cooper v State, 356 S W 2d 405, 210 Tenn 63—Thomas v State, 358 S W 2d 315, 210 Tenn 297—Miller v State, Cr, 452 S W 2d 369, 2 Tenn Cr App 169—McClain v State, Cr, 445 S W 2d 942, 1 Tenn Cr App 499

Va—Huffman v Com, 39 S E 2d 291, 185 Va 524—Callahan v Com, 63 S E 2d 617, 192 Va 26

Under statute relating to mitigating circumstances

Cal—People v Cornett, 198 P 2d 877, 33 Cal 2d 33—People v Lewis, 81 Cal Rptr 900, 1 C A 3d 698

Prima facie case

Ga—Delegal v State, 90 S E 2d 32, 92 Ga App 744

N J—State v Gardner, 242 A 2d 1, 51 N J 444

N C—State v Howell, 79 S E 2d 235, 239 N C 78

Pa—Com v Lesher, 6 Adams L J 162

Va—Sanderson v Com, 103 S E 2d 800, 200 Va 51

49. Ga—Fisher v State, 184 S.E 2d 156, 228 Ga. 100—Jones v State, 214 S E 2d 544, 234 Ga. 108

Wis—State v Wells, 187 N W 2d 328, 51 Wis.2d 477, cert den 93 S Ct 1614, 406 U S 907, 31 L Ed 2d 817

51. Iowa—State v Myers, 79 N W 2d 382, 248 Iowa 44

53. Ga—Mullis v State, 27 S E 2d 91, 196 Ga. 569.

55. U S—Burton v Cox, D C Va, 312 F Supp 264

Cal—People v Bender, 163 P 2d 8, 27 Cal 2d 164—People v Hopper, 302 P 2d 94, 145 C A 2d 180—People v Steward, 318 P 2d 806, 156 C A 2d 177—People v Jones, 37 Cal Rptr 454, 225 C A 2d 598—Jackson v Superior Court of City and County of San Francisco, 42 Cal Rptr 838, 399 P 2d 374, 62 C 2d 521—People v Brunk, 65 Cal Rptr 727, 258 C A 2d 453

Colo—Hervey v People, 495 P 2d 204, 178 Colo 38

Md—DeVaughn v State, 194 A 2d 109, 232 Md 447, 100 A L R 2d 761, cert den 84 S Ct 693, 376 U S 927, 11 L Ed 2d 623—Abney v State, 223 A 2d 792, 244 Md 444, cert den 87 S Ct 2043, 387 U S 925, 18 L Ed 2d 981—Dyson v State, 251 A 2d 606, 6 Md App. 453—King v State, 287 A 2d 52, 14 Md App 385—Wilkins v State, 300 A.2d 411, 16 Md App 587, affd 310 A 2d 39, 270 Md 62, cert den 94 S Ct 1592, 415 U S 992, 39 L Ed 2d 889

Mo—State v Hogan, 177 S W 2d 465, 352 Mo 379—State v Nolan, 192 S W 2d 1016, 354 Mo 980—State v Smith, 194 S W 2d 905, 355 Mo 59—State v Smith, 240 S W 2d 671—State v Nolan, 316 S W 2d 630—State v Goodwin, 352 S W 2d 614 cert den 83 S Ct 262, 371 U S 915, 9 L Ed 2d 174—State v Williams, 442 S W 2d 61

Mont—State v Dillon, 230 P 2d 764, 125 Mont 24

N J—State v Wynn, 121 A 2d 534, 21 N J 264—State v Fair, 211 A 2d 359, 45 N J 77—State v Brown, 215 A 2d 9, 46 N J 96—State v Gardner, 242 A 2d 1, 51 N J 444

N C—State v Grainger, 28 S E 2d 228, 223 N C 716—State v McCoy, 71 S E 2d 921, 236 N C 121—State v Jones, 214 S E 2d 24, 287 N C 84

Ohio—State v Cope, 67 N E 2d 912, 78 Ohio App 429

Pa—Com v Gossard, 18 Cambria 1, affd 117 A 2d 902, 383 Pa 239—Com v Etzoola, 52 Luz L Reg 270—Com v Laboy, 270 A 2d 695, 440 Pa 579

Tenn—Fox v State, Cr, 441 S W 2d 491, 1 Tenn Cr App 308—Craig v State, Cr, 455 S W 2d 190, 2 Tenn Cr App 510—Covey v State, Cr, 504 S W 2d 387

Va—Boone v Com, 80 S E 2d 412, 195 Va 708—Bailey v Com, 104 S E.2d 28, 200 Va 92

Wash—State v Petty, 358 P 2d 136, 57 Wash 2d 513—State v Swartos, 396 P 2d 971, 65 Wash 2d 335—State v Watson, 459 P 2d 67, 1 Wash App 43—State v Mayner, 483 P 2d 151, 4 Wash App 549—State v Smith, 531 P 2d 843, 12 Wash App 720, affd 559 P 2d 970, 88 Wash 2d 127, cert den 98 S Ct 226, 434 U S 876, 54 L Ed 2d 155

W Va—State v Stevenson, 127 S E 2d 618, 147 W Va. 211, cert den 83 S Ct 886, 372 U S 938, 9 L Ed 2d 768

Killing with a deadly weapon

(1) Mo—State v Martin, 260 S W 2d 536, 364 Mo 258—State v Davis, 400 S W 2d 141, cert den 87 S Ct 142, 385 U S 872, 17 L Ed 2d 99

(2) Or—State v Nodine, 259 P 2d 1056, 198 Or 679

(3) Mo—State v Lyle, 182 S W 2d 530, 353 Mo 386—State v Battles, 212 S W 2d 753, 357 Mo 1223—State v Lawson, 227 S W 2d 642, 360 Mo 95—State v Whited, 231 S W 2d 618, 360 Mo 956—State v McQueen, 399 S W 2d 3, cert den 86 S Ct 1873, 384 U S 977, 16 L Ed 2d 687, adhered to, Sup, 431 S W 2d 445

N C—State v Davis, 26 S E 2d 869, 223 N.C 381—State v Robinson, 36 S E 2d 655, 226 N C 95.

Tenn—McGhee v State, 460 S.W 2d 875, 3 Tenn Cr App 324—Sharp v. State, Cr, 513 S W 2d 189

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56. US—US ex rel Parker v Rundle, D C Pa 259 F Supp 420—US ex rel Duncan v Brierley, D C Pa, 277 F Supp 751—Richards v Coiner, D C W Va, 290 F Supp 922—Hale v Cox, D C Va, 336 F Supp 1364

Cal—People v Thomas, 156 P 2d 7, 25 Cal 2d 880

D C—Hemphill v U S, C.A, 402 F 2d 187, 131 U S App D C 46

Fla—Snipes v State, 17 So 2d 93, 154 Fla 262

Md—Wilson v State, 276 A 2d 214, 261 Md 551

N J—State v Gardner, 242 A 2d 1, 51 N J 444

N C—State v McCoy, supra n 55

Pa—Com v Laboy, 270 A 2d 695, 440 Pa 579—Com v Bricker, 326 A 2d 279, 458 Pa 367

Tenn—Gordon v State, Cr, 478 S W 2d 911—Bailey v State, Cr, 479 S W 2d 829

Va—Evans v Commonwealth, 212 S E 2d 268, 215 Va 609

W Va—State v Stevenson, 127 S E 2d 618, 147 W Va 211 cert den 83 S Ct 886 372 U S 938, 9 L Ed.2d 768—State v Hamric, 151 S E 2d 252, 151 W Va 1

57. US—US ex rel Duncan v Brierley, D C Pa, 277 F Supp 751

Cal—People v Todd, 317 P 2d 40, 154 C A 2d 601—People v Hall, 28 Cal Rptr 164, 212 C A 2d 480—People v Salcido, 69 Cal Rptr 193, 263 C A 2d 1, cert den 89 S Ct 902, 393 U S 1102, 21 L Ed 2d 795

Ill—People v Tripp, 64 N E 2d 498, 392 Ill 351

Ky—Partin v Com, 445 S W 2d 433

Me—State v Hilliker 327 A 2d 860

Mich—People v Williams, 182 N W 2d 347, 26 Mich App 218

N C—State v Wagoner, 107 S E 2d 83, 249 N C 637—State v Crump, 178 S E 2d 366, 277 N C 573—State v Boyd, 180 S E 2d 794, 278 N C 682—State v Dubose, 181 S E 2d 393, 279 N C 73

Pa—Com v Plows 20 Cambria 1—Com v Sutton, Pa O & T, 49 Del 11, revd on oth grds 176 A 2d 679, 406 Pa 121—Com v Fizoola, Pa O & T, 52 Luz L Reg 270

Tenn—Bunch v State 463 S W 2d 956, 3 Tenn Cr App 481—Hornsby v State, Cr, 479 S W 2d 653

Va—Adams v Com, 111 S E 2d 396, 201 Va 321—Evans v Com, 212 S E 2d 268, 215 Va 609

Wash—State v Scheeler 277 P 2d 341, 45 Wash 2d 661—State v Sill, 289 P 2d 720, 47 Wash 2d 647—State v Petty, 358 P 2d 136, 57 Wash 2d 513—State v Mayner, 483 P 2d 151, 4 Wash App 549

W Va—State ex rel Williams v Riffe, 34 S E 2d 21, 127 W Va 573—State v Stevenson, 127 S E 2d 618, 147 W Va 211, cert den 83 S Ct 886, 372 U S 938, 9 L Ed 2d 768

58. W Va—State v McCauley, 43 S E 2d 454, 130 W Va 401

61. Pa—Com v Tyrrell, 36 North 153

62. Ga—Taylor v State, 41 S E 2d 236, 74 Ga App 701

Ky—Pittman v Com, 242 S W 2d 875

N J—State v Sinclair, 231 A 2d 565, 49 N J 525, app after remand 269 A 2d 153, 57 N J 39 and 269 A 2d 161, 57 N J 56—State v Bess, 247 A 2d 669, 53 N J 10

Under statute defining voluntary manslaughter

Ill—People v Bailey, 205 N E 2d 756, 56 Ill App 2d 261

Statute held inapplicable

Cal—People v Wynn, 65 Cal Rptr 210, 257 C A 2d 664

Statute invalid

U S—Mullaney v Wilbur, Me, 95 S Ct 1881, 421 U S 684, 44 L Ed 2d 508

Burden on defendant

N C.—State v Smith, 215 S E 2d 830, 26 N C App 283

A state may not draft its homicide statutes in such a manner as to place upon the accused the burden of proving or disproving an element of the offense charged.[62.5]

62.5. U S—Mullaney v Wilbur, 95 S Ct 1881, 421 U S 684, 44 L Ed 2d 508

Ohio—State v Muscatello, 387 N E 2d 627, 57 Ohio App 2d 231, 11 O O 3d 320, affd and remd 378 N E 2d 738, 55 Ohio St 2d 201, 9 O O 3d 148

63. Cal—People v Isby, 186 P 2d 405, 30 Cal 2d 879

Mo—State v King, 433 S W 2d 825—State v Rumble, 680 S W 2d 939

N C—State v Stanley, 44 S E 2d 196, 227 N C 650

Or—State v Ogilvie, 175 P 2d 454, 180 Or 365

Pa—Com v Prenni, 55 A 2d 532, 357 Pa 572

W Va—State v McCauley, supra, n 58

64. U S—Kibert v Slayton, D C Va, 356 F Supp 760

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67. Okl—Sawyer v State, 237 P 2d 167, 94 Okl Cr 412

69. Ariz—State v Akins, 383 P 2d 180, 94 Ariz 263

Cal—People v Lynn, 94 Cal Rptr 16, 16 C A 3d 259

Conn—State v Hanna, 191 A 2d 124, 150 Conn 457

Fla—Bogan v State, App, 226 So 2d 110

Ill—People v Falkner, 377 N E 2d 824, 18 Ill Dec 339, 61 Ill App 3d 84

La—State v Frezal, 278 So 2d 64

Mo—State v Conway 171 S W 2d 677, 351 Mo 126

N J—State v Loray, 195 A 2d 289, 41 N J 131

N Y—People v Wood, 195 N Y S 2d 133, 9 A D 2d 433, affd 201 N Y S 2d 328, 8 N Y 2d 48, 167 N E 2d 736—People ex rel Santangelo v Tutuska, 192 N Y S 2d 350, 19 Misc 2d 308, affd 205 N Y S 2d 1006, 11 A D 2d 906, motion den 216 N Y S 2d 684, 9 N Y 2d 862, 175 N E 2d 818

N C—State v Davis 116 S E 2d 365, 253 N C 86, cert den 81 S Ct 816, 365 U S 855, 5 L Ed 2d 819

Wash—State v Craig, 514 P 2d 151, 82 Wash 2d 777

Proof of any particular kind of robbery not required

In prosecution for murder committed in perpetrating or attempting to perpetrate any robbery

Conn—State v Reid 149 A 2d 698, 146 Conn 227

In a prosecution for first degree murder in the perpetration of a felony the prosecution has the burden of proving a specific intent to commit, the felony.[69.5]

However, it has also been held that it is not incumbent on the prosecution to prove that accused entertained an intent to commit the felony at the time of the killing.[69.10]

69.5. Cal—People v Cheary, 309 P 2d 431, 48 C 2d 301—People v Vigil, 51 Cal Rptr 860, 242 C A 2d 862—People v Craig, 316 P 2d 947, 49 C 2d 313—People v Sears, 44 Cal Rptr 330, 401 P 2d 938, 62 C 2d 737—People v Anderson, 46 Cal Rptr 763, 406 P 2d 43, 63 C 2d 351—People v Chapman, 67 Cal Rptr 601, 261 C A 2d 149—People v Mulqueen, 88 Cal Rptr 235, 9 C A 3d 532

Ind—Pruett v State, 234 N E 2d 501, 250 Ind 359

69.10. Wash—State v Craig, 514 P 2d 151, 82 Wash 2d 777.

71. Minn—State v Gavle, 48 N W 2d 44, 234 Minn 186

74. Pa—Com v Dunkelberger, 66 Dauph Co 210—Com v Hurley, 31 Northumb L J 105

On a charge of voluntary manslaughter the state has the burden of proving that the killing was unlawful, without malice, and voluntary.[74.5]

74.5. Ohio—State v McDaniel, 144 N E 2d 683, 103 Ohio App 163, app dism 142 N E 2d 654, 166 Ohio St 378—State v McCoy, 14 Ohio Law Abst 363

Inferences from evidence

Cal—People v Wynn, 65 Cal.Rptr 210, 257 C A 2d 664

In prosecution for manslaughter because of failure to provide medical aid for one to whom such duty was owed, state is not required to show defendant's ability to furnish such aid.[74.10]

74.10. Mont—State v Mally, 366 P 2d 868, 139 Mont 599

In a prosecution for involuntary manslaughter there is a presumption that deceased used due care.[74.15]

74.15. Pa—Com v Butts, 204 A 2d 481, 204 Pa Super 302

§ 200. Statement of Rule

75. Ga—Williams v State, 78 S E 2d 521, 210 Ga 207

Kan—State v Martin, 265 P 2d 297, 175 Kan 373

La—State v Rogers, 132 So 2d 819, 241 La 841, cert den 82 S Ct 1589, 370 U S 963, 8 L Ed 2d 830

Mass—Com v Noxon, 66 N.E 2d 814, 319 Mass 495

Mo—State v Emrich, 237 S W 2d 169, 361 Mo 922

N J—State v Mount, 152 A 2d 343, 30 N J 195

S C—State v Gantt, 76 S E 2d 674, 223 S C 431, cert den 74 S Ct 433, 847 U S 906, 98 L Ed 1065

Original evidence

La—State v Goodwin, 179 So 591, 597, 189 La 443

77. U S—Simms v U S, C A, 248 F 2d 626, 101 U S App D C 304, cert den 78 S Ct 127, 355 U S 875, 2 L Ed 2d 79—U S ex rel Witherspoon v Ogilvie, C A Ill, 337 F 2d 427, cert den 86 S Ct 122, 382 U S 861, 15 L Ed 2d 99

Ala—Dockery v State, 114 So 2d 394, 269 Ala 564

Ariz—State v Coey, 309 P 2d 260, 82 Ariz 133—State v Kruchten, 417 P 2d 510, 101 Ariz 186, cert den 87 S Ct 784, 385 U S 1043, 17 L Ed 2d 687

Ark—Dixon v State, 307 S W 2d 792, 228 Ark 430

Cal—People v Carmen, 273 P 2d 521, 43 C 2d 342—People v Todd, 317 P 2d 40, 154 C A 2d 601—People v Morris, 344 P 2d 333, 174 C A 2d 193

Conn—State v Smith, 82 A 2d 816, 138 Conn 196—State v Johnson, 90 A 2d 905, 139 Conn 89—State v Tillman, 202 A 2d 494, 152 Conn 15

Ga—Pulliam v State, 28 S E 2d 139, 196 Ga 782—Pierce v State, 90 S E 2d 417, 212 Ga 88—Waller v State, 99 S E 2d 113, 213 Ga 291

Ill—People v Sustak, 153 N E 2d 849, 15 Ill 2d 115

Ky—Stacy v Com, 254 S W 2d 917—Acres v Com, 259 S W 2d 38

La—State v Rogers, 132 So 2d 819, 241 La 841, cert den 82 S Ct 1589, 370 U S 963, 8 L Ed 2d 830

Mass—Com v Theberge, 115 N E 2d 719, 330 Mass 520—Com v Bonomi, 140 N E 2d 140, 335 Mass 327—Com v Nassar, 218 N E 2d 72, 351 Mass 37 app after remand 237 N E 2d 39, 354 Mass 249, cert den 89 S Ct 662, 393 U S 1039, 21 L Ed 2d 586

Mo—State v Mayberry, 272 S W 2d 236

Neb—Garcia v State, 68 N W 2d 151, 159 Neb 571

N J—State v Roscus, 109 A 2d 1, 16 N J 415

N Y—People v Miller, 188 N Y S 2d 534, 6 N Y 2d 152, 160 N E 2d 74

Ohio—State v Sheppard, 128 N E 2d 471, 100 Ohio App 345, affd 135 N E 2d 340, 165 Ohio St 293, cert den 77 S Ct 118, 352 U S 910, 1 L Ed 2d 119, reh den 77 S Ct 323, 352 U S 955, 1 L Ed 2d 245

Okl—Holman v State, 262 P 2d 456, 97 Okl Cr 279

Pa—Com v McGrew, 100 A 2d 467, 375 Pa 518—Com v Butts, 204 A 2d 481, 204 Pa Super 302

Tex—Sample v State, 254 S W 2d 401, 158 Tex Cr R 220

Va —Opanowich v Com, 83 S E 2d 432, 196 Va 342—Boggs v Com, 100 S E 2d 766, 199 Va 478
Wash —State v Collins, 314 P 2d 660, 50 Wash 2d 740

Pertinent hypothesis defined

Tex —Vaughn v State, 125 S W 2d 568, 570, 136 Tex Cr R 455

Particular evidence held immaterial

Mass —Com v Glinsecki, 159 N E.2d 657, 339 Mass 464

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78. Or —State v Sack, 300 P 2d 427, 210 Or 552, app dism and cert den 77 S Ct 1048, 353 U S 962, 1 L Ed 2d 912

§ 201. Corpus Delicti

80. Ala —Gurley v State, 61 So 2d 137, 36 Ala App 606
Ill —People v Hairston, 294 N E 2d 748, 10 Ill App 3d 678
La —State v Jackson, 65 So 2d 903, 223 La 435
Miss —May v State, 199 So 2d 635, app after remand 211 So 2d 845—Duck v State, 247 So 2d 689
82. Ariz —State v Lantz, 231 P 2d 454, 72 Ariz 115
Md —Watson v State, 117 A 2d 549, 208 Md 210
Va —Epperly v Com, 294 S E 2d 882, 224 Va 214
89. Okl —C.J.S quoted in Drake v State, Cr, 437 P 2d 461, 464
90. Ala —Petty v State, 110 So 2d 319, 40 Ala App 151, cert den 110 So 2d 325, 269 Ala 48
92. S C —C.J.S quoted in State v Fields, S C, 214 S E 2d 320, 322, 264 S C 260, cert den 96 S Ct 269, 423 U S 925, 46 L Ed 2d 252

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97. Pa —Com v Ross, 169 A 2d 780, 403 Pa 358, cert den 82 S Ct 182, 368 U S 904, 7 L Ed 2d 98
Utah—State v Warwick, 355 P 2d 703, 11 Utah2d 116
98. In murder during robbery or attempted robbery only the homicide need be shown
Fla —Reyes v State, App, 155 So 2d 663
99. Okl —C.J.S quoted at length in Drake v State, Cr, 437 P 2d 461, 464

§ 202. Identity of Deceased

2. Fla —Lipford v State, App, 161 So 2d 16—Furr v State, App, 229 So 2d 269
Ill —People v Henenberg, 302 N E 2d 27, 55 Ill 2d 5, app. after remand 346 N E 2d 11, 37 Ill App 3d 464
La —State v Goins, 94 So 2d 244, 232 La 238, cert den 78 S Ct 74, 355 U S 847, 2 L Ed 2d 57
Tenn —Cathey v State, 235 S W 2d 601, 191 Tenn 617

Evidence in substantiation

(2) Other evidence
Ill —People v Speck, 242 N E 2d 208, 41 Ill 2d 177, revd on oth grds 92 S Ct 2279, 403 U S 946, 29 L Ed 2d 855, reh den 92 S Ct 32, 404 U S 875, 30 L Ed 2d 121
3. Ga —McVeigh v State, 53 S E 2d 462, 205 Ga 326
4. Fla —Terzado v State, App, 232 So 2d 232
Tenn —Cathey v State, supra, n 2
6. Okl —Fields v State, Cr, 322 P 2d 431
10. Tex —Bagley v State, Cr, 425 S W 2d 656

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13. Me —State v Wardwell, 183 A 2d 896, 158 Me 307

§ 203. Intent in General

Library References

Homicide ⇐156(1) et seq.

20. Ga —Echols v State, 74 S E 2d 128, 87 Ga App 199
La —State v Blanton, 312 So 2d 329
Mich —People v Chism, 211 N W 2d 193, 390 Mich 104
Mo —C.J.S. cited in State v Sumpter, 184 S W 2d 1005, 1006
Or —State v McCoy, 521 P 2d 1074, 17 Or App 155, affd 527 P 2d 725, 270 Or 340
Pa —Com v Homeyer, 94 A 2d 743, 373 Pa 150—Com v Novak, 150 A 2d 102, 395 Pa 199, cert den 80 S Ct 152, 361 U S 882, 4 L Ed 2d 118, reh den 80 S Ct 290, 361 U S 926, 4 L Ed 2d 241—Com v Kravitz, 161 A 2d 861, 400 Pa 198, cert den 81 S Ct 807, 365 U S 846, 5 L Ed 2d 811—Com v Glover, 286 A 2d 349, 446 Pa 492
Tenn —Wilson v State, Cr, 455 S W 2d 172, 2 Tenn Cr App 468
Tex —Brazile v State, Cr, 497 S W 2d 302
Wash —State v Messinger, 509 P 2d 382, 8 Wash App 829, cert den 94 S Ct 1433, 415 U S 926, 39 L Ed 2d 483

Mental deficiency

Colo —Becksted v People, 292 P 2d 189, 133 Colo 72
21. Ala —Redus v State, 9 So 2d 914, 243 Ala 320, cert den 63 S Ct 771, 318 U S 774, 87 L Ed 1143, reh den 63 S Ct 852, 318 U S 802, 87 L Ed 1166
N J —State v Bucanis, 138 A 2d 739, 26 N J 45, 73 A L R 2d 760, cert den 78 S Ct 1157, 357 U S 910, 2 L Ed 2d 1160
Pa —Com v Howells, 58 Dauph Co 111

Location and path of bullet

Conn —State v Bzdyra, 334 A 2d 917, 165 Conn 400
22. Ala —Stallings v State, 32 So 2d 236, 249 Ala 580
Colo —Romero v People, 460 P 2d 784, 170 Colo 234

Showing animus of accused

(2) Tex —Harwell v State, 242 S W 2d 388, 156 Tex Cr R 337
23. Cal —People v Eggers, 185 P 2d 1, 30 Cal 2d 676, cert den 68 S Ct 728 333 U S 858, 92 L Ed 1138, reh den 68 S Ct 786, 333 U S 870, 92 L Ed 1147
Fla —Lipford v State, App, 161 So 2d 16
Ind —Dickinson v State, 55 N E 2d 325, 222 Ind 551
Miss —Wilson v State, 270 So 2d 697
Mo —State v Knight, 206 S W 2d 330, 356 Mo 1233
Or —State v Flygare, 525 P 2d 181, 18 Or App 292
Pa —Com v Duke, 57 Lanc Rev 161
Tenn —Sims v State, 348 S W 2d 293, 208 Tenn 615
Tex —Barr v State, 172 S W 2d 322, 146 Tex Cr R 178—Coleman v State, Cr, 442 S W 2d 338

Prior acts of hostility, cruelty and abuse

Ala —Baker v State, Cr App, 441 So 2d 1061
24. Cal —People v Merkouris, 297 P 2d 999, 46 C 2d 540
Ill —People v Poland, 174 N E 2d 804, 22 Ill 2d 175
Ind —Smith v State, 175 N E 2d 27, 241 Ind 665
Ky —Lewis v Com, 226 S W 2d 934, 312 Ky 191
Mo —State v Meidle, 202 S W 2d 79

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25. Cal —People v Gibson, 206 P 2d 375, 92 Cal App 2d 55, cert den 70 S Ct 302, 338 U S 906, 94 L Ed 558
Fla —McVeigh v State, 73 So 2d 694, app dism 75 S Ct 210, 348 U S 885, 99 L Ed 696
La —State v Watson, 301 So 2d 653
Okl —Brewer v State, Cr, 414 P 2d 559
27. U S —Wakaksan v U S, C A N D, 367 F 2d 639, cert den 87 S Ct 1312, 386 U S 994, 18 L Ed 2d 341
Cal —People v Tubby, 207 P 2d 51, 34 Cal 2d 72
Idaho—State v Clokey, 364 P 2d 159, 83 Idaho 322
Ill —People v Harris, 134 N E 2d 315, 8 Ill 2d 431
Ind —McKinstry v State, 338 N E 2d 636, 264 Ind 29
Ky —Burchfield v Com, 186 S W 2d 412, 299 Ky 549
N Y —People v Levan, 64 N E 2d 341, 295 N Y 26
Tex —Beard v State, 171 S W 2d 869, 146 Tex Cr R 96—Burnett v State, Cr, 466 S W 2d 561—Yates v State, Cr, 509 S W 2d 600, cert den 95 S Ct 310, 419 U S. 996, 42 L.Ed 2d 270
Va —Hubbard v Com, 59 S E 2d 102, 190 Va 917—Opanowich v Com, 83 S E 2d 432, 196 Va 342
28. Tex —Mounts v State, 185 S W 2d 731, 148 Tex Cr 177
31. Ill —People v Stombaugh, 284 N E 2d 640, 52 Ill 2d 130
Ind —Dickinson v State, supra, n 23
N C —State v Williams, 71 S E 2d 138, 235 N C 752
Pa —Com v Stewart, 336 A 2d 282, 461 Pa 274
Tex —Burnett v State, Cr, 466 S W 2d 561

Evidence held inadmissible

Wash —State v Huff, 458 P 2d 180, 76 Wash 2d 577

Psychiatric testimony of a lack of specific intent to kill is inadmissible on the issue of guilt, but is admissible on the subject or issue of penalty or sentence [31.5]

31.5. Pa —Com v Rightnour, 253 A 2d 644, 435 Pa 104

Psychiatric testimony showing that accused did not have the specific intent to commit a homicide may be admissible where it is material.[31.10]

31.10. Properly excluded where different insanity rule followed

Ariz —State v Richardson, 514 P 2d 1236, 110 Ariz 48, cert den 94 S Ct 1439, 415 U S 929, 39 L Ed 2d 487
32. Ala —Grimes v State, Cr, 322 So 2d 729, 56 Ala App 439, cert den 322 So 2d 733, 295 Ala 403
Mo —State v Gannaway, 313 S W 2d 653
Or —State v Klamert, 455 P 2d 607, 253 Or 485
33. Ark —Wilhite v State, 178 S W 2d 55, 206 Ark 887—Nunley v State, 270 S W 2d 904, 223 Ark 838—Shaddox v State, 418 S W 2d 780, 243 Ark 55, app after remand 427 S W 2d 198, 244 Ark 747
Colo —Swift v People, 465 P 2d 391, 171 Colo 178
Ga —Uley v State, 56 S E 2d 123, 80 Ga App 434
Ind —Petillo v State, 89 N E 2d 623, 228 Ind 97, cert den 71 S Ct 481, 340 U S 936, 95 L Ed 676
Ky —Claypoole v Com, 337 S W 2d 30, 87 A L R 2d 923
La —State v Pettle, 286 So 2d 625
Mo —State v Gannaway, 313 S W 2d 653
Tex —Windham v State, 288 S W 2d 90, 162 Tex Cr R 620
Va —Batten v Com, 56 S E 2d 231, 190 Va 235

Remote matters not considered

Wis —State v Carter, 170 N W 2d 681, 44 Wis 2d 151
34. Ariz —Shaddox v State, 418 S W 2d 780, 243 Ark 55, app after remand 427 S W 2d 198, 244 Ark 747
35. Mo —State v Gannaway, 313 S W 2d 653

Testimony as to fear of prosecuting witness

Wash —State v Stationak, 463 P 2d 260, 1 Wash App 558
36. Cal —People v Dreyer, 162 P 2d 468, 71 Cal. App 2d 181
37. Wash —State v Stationak, 463 P 2d 260, 1 Wash App 558
38. Ala —Bryant v State, 17 So 2d 427, 31 Ala App 334
Ark —Shaddox v State, 418 S W 2d 780, 243 Ark 55, app after remand 427 S W 2d 198, 244 Ark 747
Ga —Breland v State, 56 S E.2d 921, 80 Ga App 575
Tex —Lindsey v State, Cr, 501 S W 2d 647, cert den 94 S Ct 1953, 416 U S 944, 40 L.Ed 2d 296.

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40. U S —Reid v U S, C C A La, 136 F 2d 476, cert den 64 S Ct 87, 320 U S 775, 88 L Ed 465, reh den 64 S Ct 156, 320 U S 813, 88 L Ed 491

All relevant facts concerning background of defendant

U S —U S v Patillo, C A Va, 438 F 2d 13

§ 204. Malice, Deliberation, and Premeditation

Library References

Homicide ⇐156(1) et seq.

Evidence of the mental condition of accused at the time of the crime is admissible to show absence of deliberate or premeditated design.[40.50]

40.50. Cal —People v Welborn, 65 Cal Rptr 8, 257 C A 2d 513, app after remand 82 Cal Rptr 845, 2 C A 3d 715—People v Harris, 87 Cal Rptr 46, 7 C A 3d 922

Colo —Battalino v People, 199 P 2d 897, 118 Colo 587

Mental age and intelligence quotient

Neb —Washington v State, 85 N W 2d 509, 165 Neb 275

On issue of willfulness, deliberation, and premeditation

Iowa—State v Gramenz, 126 N W 2d 285, 256 Iowa 134

Where a defendant is acquitted of first degree murder but convicted of second degree murder, on a subsequent trial following reversal on the charge of second degree murder proof of premeditation is not rendered irrelevant by the first verdict [40.55]

40.55. W Va —State v McLane, 27 S E 2d 604, 126 W Va 219

§ 205. —— Attending Circumstances Admissible

41. Ark —Higdon v State, 213 S W 2d 621, 213 Ark 881—Bly v State, 214 S W 2d 77, 213 Ark 859—Stanley v State, 454 S W 2d 72, 248 Ark 787

Cal —People v Harrison, 30 Cal Rptr 841, 381 P 2d 665, 59 C 2d 622—People v Lopez, 98 Cal Rptr 44, 489 P 2d 1372, 6 C 3d 45

Ga —Kilgore v State, 98 S E 2d 72, 95 Ga App 462

Ind —Buise v State, 281 N E 2d 93, 258 Ind 321

Iowa—State v Hephner, 161 N W 2d 714—C.J.S. quoted at length in State v Nowlin, 244 N W 2d 591, 593

Md —Davis v State, 205 A 2d 254, 237 Md 97, cert den 86 S Ct 402, 382 U S 945, 15 L Ed 2d 354

Mo —State v Kopf 481 S W 2d 7

Mont —State v Taylor, 515 P.2d 695, 163 Mont 106

N J —State v Conforti, 250 A 2d 6, 53 N J 239

N C —State v Harris, 28 S E 2d 232, 223 N C 697—State v Peterson, 210 S E 2d 883, 24 N C App 404

Or —State v Freeman, 374 P 2d 453, 232 Or 267, cert den 83 S Ct 1310, 373 U S 919, 10 L Ed 2d 418, reh den 83 S Ct 1894, 374 U S 858, 10 L Ed 2d 1083

Pa —Com v Kravitz, 161 A 2d 861, 400 Pa 198 cert den 81 S Ct 807, 365 U S 846, 5 L Ed 2d 811

Tenn —C J.S. cited in Evans v State, 557 S W 2d 927, 934

Tex —Griffin v State, 198 S W 2d 587, 150 Tex Cr R 27—Jones v State, 220 S W 2d 156, 153 Tex Cr R 345—Henry v State, 300 S W 2d 79, 164 Tex Cr R 199, 433

Before or after homicide

Ind —Wahl v State, 98 N E 2d 671, 229 Ind 521

Purpose of statute

Tex —Wheeler v State, 239 S W 2d 105, 156 Tex Cr R 140

42. Ariz —State v Coey, 309 P 2d 260, 82 Ariz 133

Cal —People v Steward, 318 P 2d 806, 156 C A 2d 177—People v Lookadoo, 57 Cal Rptr 608, 425 P 2d 208, 66 C 2d 307—People v Stansbury, 69 Cal Rptr 827, 263 C A 2d 499

Colo —Battalino v People, 199 P 2d 897, 118 Colo 587

D C —Hemphill v U S, C A, 402 F 2d 187, 131 U S App D C 46

Iowa—State v Powell, 24 N W 2d 769, 237 Iowa 1227

N C —State v Stewart, 38 S E 2d 29, 226 N C 299—State v Chavis, 56 S E 2d 678, 231 N C 307

Or —State v Freeman, 374 P 2d 453, 232 Or 267, cert den 83 S Ct 1310, 373 U S 919, 10 L Ed 2d 418, reh den 83 S Ct 1894, 374 U S 858, 10 L Ed 2d 1083

Tenn —Gray v State, 250 S W 2d 86, 194 Tenn 234

43. Cal —People v Tubby, supra, n 27—People v Steward, 318 P 2d 806, 156 C A 2d 177—People v Lookadoo, 57 Cal Rptr 608, 425 P 2d 208, 66 C 2d 307—People v Stansbury, 69 Cal Rptr 827, 263 C A 2d 499

D C —Hemphill v U S, C A, 402 F 2d 187, 131 U S App D C 46

Mo —State v Holland, 189 S W 2d 989, 354 Mo 527

N C —State v Stewart, supra, n 42—State v Artis, 42 S E 2d 409, 227 N C 371—State v Chavis, supra, n 42

Not limited to fact in indictment

Tenn —State v Caldwell, Cr App, 656 S W 2d 894

44. Ala —Bowen v State, 26 So 2d 205, 24 Ala App 357—Washington v State, 112 So 2d 179, 269 Ala 146

Ark —Craig v State, 172 S W 2d 256, 205 Ark 1100—Cheney v State, 172 S W 2d 427, 205 Ark 1049

Cal —People v Steward 318 P 2d 806, 156 C A 2d 177—People v Butts 46 Cal Rptr 362, 236 C A 2d 817

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La —State v Bradford, 250 So 2d 375, 259 La 382—State v Pettle, 286 So 2d 625

Md —Davis v State, 205 A 2d 254, 237 Md 97, cert den 86 S Ct 402, 382 U S 945, 15 L Ed 2d 354

Miss —Shinall v State, 199 So 2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

Or —State v Cunningham, 144 P 2d 303, 173 Or 25

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Tex —Tindall v State, 172 S W 2d 328, 146 Tex Cr R 245—Griffin v State, supra, n 41—Lindsey v State, 202 S W 2d 467, 150 Tex Cr R 480

Location of wound

Wash —State v Madry, 529 P 2d 463, 12 Wash App 178

46. Cal —People v Lookadoo, 57 Cal Rptr 608, 425 P 2d 208, 66 C 2d 307

La —State v Dowdy, 47 So 2d 496, 217 La 773, cert den 71 S Ct 75, 340 U S 856, 95 L Ed 627

Wash —State v Ross, 353 P 2d 885, 56 Wash 2d 344

47. Tex —Cunningham v State, 306 S W 2d 723, 165 Tex Cr R 284

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49. Cal —People v Letourneau, 211 P 2d 865, 34 Cal 2d 478

Iowa—State v Gramenz, 126 N W 2d 285, 256 Iowa 134

53. U S —U S v Celestine, C A Wash, 510 F 2d 457

§ 206. —— Previous Declarations and Threats by Accused

55. Ga —Perry v State, 50 S E.2d 709, 78 Ga App 273

Abandoned and malignant heart

Utah—State v Kelsey, 532 P 2d 1001

58. **Mental infirmity**

Cal —People v Baker, 268 P 2d 705, 42 C 2d 550

59. **Any evidence other than that which proves killing held admissible**

W Va —State v Morris, 95 S E.2d 401, 142 W Va 303—State v Bowyer, 101 S E 2d 243, 143 W Va 302

63. S D —State v Watts, 188 N W 2d 913, 85 S D 638

64. **When threats against deceased irrelevant**

(2) Other statements

Md —Epperson v State, 256 A 2d 372, 7 Md App 464, cert den 90 S Ct 1530, 397 U S 1078, 25 L Ed 2d 814

65. Ala —Hill v State, Cr, 286 So 2d 924, 51 Ala App 515

Ariz —State v Coey, 309 P 2d 260, 82 Ariz 133—State v Crow, 457 P 2d 256, 104 Ariz 579

Ark —Smith v State, 223 S W 2d 1011, 216 Ark 1, cert den 70 S Ct 562, 339 U S 916, 94 L Ed 1341—Willis v State, 251 S W 2d 816, 220 Ark 965

Cal —People v Cooley, 27 Cal Rptr 543, 211 C A 2d 173

Conn —State v Kurz, 37 A 2d 808, 131 Conn 54

Ga.—Rooker v State, 86 S E 2d 307, 211 Ga 361—Barber v State, 98 S E 2d 575, 95 Ga App 763

Ill —People v Lion, 139 N E 2d 757, 10 Ill 2d 208—People v Slaughter, 194 N E 2d 193, 29 Ill 2d 384

Ind —Taylor v State, 295 N E 2d 600, 260 Ind 264, cert den 94 S Ct 377, 414 U S 1012, 38 L Ed 2d 250

Iowa—State v Hofer, 28 N W 2d 475, 238 Iowa 820—State v Tornquist, 120 N W 2d 483, 254 Iowa 1135—State v Tharp, 138 N W 2d 78, 258 Iowa 224

Kan – State v Amicker, 536 P 2d 1355, 217 Kan 314

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Md —Knowles v State, 65 A 2d 179, 192 Md 664

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Mo —C.J.S. cited in State v Burnett, 188 S W 2d 51, 54, 354 Mo 45—C J S. cited in State v Hunter, 444 S W 2d 392, 395

Nev —Peoples v State, 423 P 2d 883, 83 Nev 115, cert den 88 S Ct 132, 389 U S 866, 19 L Ed 2d 138

N C —State v Faust, 118 S E 2d 769, 254 N C 101, 96 A L R 2d 1422, cert den 82 S Ct 85, 368 U S 851, 7 L Ed 2d 49

Okl —Mayberry v State, 238 P 2d 362, 94 Okl Cr 301—Padillow v State, Cr, 501 P 2d 837

Pa —Com v Moore, 157 A 2d 65, 398 Pa 198, 93 A L R 2d 616—Com v Kravitz, 161 A 2d 861, 400 Pa 198, cert den 81 S Ct 807, 365 U S 846, 5 L Ed 2d 811—Com v Bederka, 331 A 2d 181, 459 Pa 653

S C —State v Swilling, 142 S E 2d 864, 246 S C 144—State v Lee, 178 S E 2d 652, 255 S C 309

Tex —Salazar v State, Cr, 397 S W 2d 220—Crawford v State, Cr, 412 S W 2d 57—Hartman v State, Cr, 507 S W 2d 553

Vt —State v Oakes, 276 A 2d 18, 129 Vt 241, cert den 92 S Ct 340, 404 U S 965, 30 L.Ed 2d 285

Va —Lloyd v Com, 40 S E 2d 258, 185 Va 674—Belton v Com, 104 S E.2d 1, 200 Va 5

W Va —State v Jones, 37 S E 2d 103, 128 W Va 496

Wyo —Lonquest v State, 495 P 2d 575 Cert den 93 S Ct 432, 409 U S 1006, 34 L Ed 2d 299

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66. Ala—Sashington v State, Cr., 325 So 2d 205, 56 Ala App 698, cert den 325 So 2d 211, 295 Ala 416
La—State v Winstead, supra, n 65
Mich—People v Freeman, 188 N W.2d 200, 32 Mich App 321
Tex—Goodwyn v State, 306 S W 2d 357, 165 Tex Cr R 297

67. Ala—Little v State, 39 So 2d 587, 34 Ala App 114, cert den 39 So 2d 593, 252 Ala 81
Ga—Spradlin v State, 82 S E 2d 238, 90 Ga App 97
Pa—Com v Moore, 74 Dauph 68, affd 157 A 2d 65, 398 Pa 198, 93 A L R 2d 616
S C—State v Cox, 68 S E 2d 624, 221 S C 1

71. Ky—Burden v Com., 178 S W 2d 1, 296 Ky 553

75. Ga—Pate v State, 74 S.E 2d 138, 87 Ga App 422
La—State v Rocco, 62 So 2d 265, 222 La 177
Me—State v Eaton, 309 A 2d 334
Miss—Lee v State, 83 So 2d 818, 226 Miss 276
S C—State v Bush, 45 S E 2d 847, 211 S C 455
Tex—Caudle v State, 286 S W 2d 434, 162 Tex Cr R 439

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83. Neb—State v Rice, 199 N W 2d 480, 188 Neb 728, cert den 97 S Ct 1584, 430 U S 947, 51 L Ed 2d 795
Tex—Meyer v State, 276 S W 2d 286, 160 Tex Cr R 521

84. Kan—State v Anicker, 536 P 2d 1355, 217 Kan 314

85. **Particular statements held admissible as threats**

(3) Ala—Duke v State, supra, n 65

90. Ariz—State v Moore, 529 P 2d 1172, 111 Ariz 355
Ky—Hicks v Com., 269 S W 2d 181
Mo—State v Meidle, supra, n 24
Tex—Duke v State, 182 S W 2d 808, 147 Tex Cr R 533

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94. Fla—C.J S cited in Sikes v State, 252 So 2d 258, 260
N C—C.J.S cited in State v Dockery, 77 S E 2d 664, 666, 238 N C 222—State v Faust, 118 S E 2d 769, 254 N C 101, 96 A L R 2d 1422, cert den 82 S Ct 85, 368 U S 851, 7 L Ed 2d 49
S C—C.J.S. cited in State v Swilling, 142 S E 2d 864, 867, 246 S C 144
Tex—Jones v State, 205 S W 2d 590, 151 Tex Cr R 115
Va—C.J.S. black letter summary quoted in Hubbard v Commonwealth, 59 S E 2d 102, 108, 190 Va 917

96. Ky—Webb v Com., 229 S W 2d 455, 312 Ky 684
Ohio—State v Whitley 245 N E 2d 232, 17 Ohio App 2d 159

General malice

(1) Burden v Com., supra, n 71

97. Iowa—C.J.S quoted in State v Mayhew, 170 N W 2d 608, 616, app after remand 183 N W 2d 723
La—State v Zeno, 322 So 2d 136
N C—C.J.S. cited in State v Dockery, supra, n 94—State v Faust, 118 S E 2d 769, 254 N C 101, 96 A L R 2d 1422, cert den 82 S Ct 85, 868 U S 851, 7 L Ed 2d 49

98. Ga—Wright v State, 30 S E 2d 839, 71 Ga App 146
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1. Ala—Brooks v State, Cr., 228 So 2d 24, 45 Ala App 196
Ariz—State v Presley, 514 P 2d 1234, 110 Ariz 46
Cal—C.J.S. cited in People v Manson, 132 Cal Rptr 265, 286, 61 C A 3d 102, cert. den 97 S Ct 1686, 430 U S 986, 52 L Ed 2d 382, app after remand 170 Cal Rptr 189, 113 C A 3d 280, cert den 102 S Ct 158, 454 U S 844, 70 L Ed 2d 130
Fla—Sikes v State, App., 252 So 2d 258
Iowa—State v Mayhew, 170 N W 2d 608 App after remand 183 N W 2d 723
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Tenn—C.J.S quoted at length in Hull v State, 553 S W 2d 90, 93
Wyo—State v Spears, 300 P 2d 551, 76 Wyo 82

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3. Ala—Shikles v State, 18 So 2d 412, 31 Ala App 423, cert den 18 So 2d 417, 245 Ala 641
Mo—State v Hermann, 283 S W 2d 617
Okl—Sikes v State, Cr., 271 P 2d 733

4. Fla—Sikes v State, App., 252 So 2d 258
N M—State v Garcia, 487 P 2d 1356, 83 N M 51

5. Ala—McGuff v State, Cr., 268 So 2d 868, 49 Ala App 88, cert den 268 So 2d 877, 289 Ala 746
Cal—People v Guthrie, 229 P 2d 841, 103 Cal.App 2d 468
Ky—Burden v Com., 178 S W 2d 1, 296 Ky 553
N H—State v Gagnon, 276 A 2d 3, 111 N H 94
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Okl—Hudman v State supra, n 1

6. Cal—People v Merkouris, 297 P 2d 999, 46 C 2d 54—People v Bufarale, 14 Cal Rptr 381, 193 C A 2d 551
Ill—People v McCrory, 184 N E 2d 846, 25 Ill 2d 213
Ohio—State v Whitley, 245 N E 2d 232, 17 Ohio App 2d 159
Pa—Com v Minoff, 69 A 2d 145, 363 Pa 287
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7. Cal—People v Merkouris, 297 P 2d 999, 46 C 2d 540—People v Ogg, 66 Cal Rptr 289, 258 C A 2d 841
Miss—Ladner v State, 197 So 2d 257
Pa—Com v Bederka, 331 A 2d 181, 459 Pa 653
S C—State v Alford, 212 S E 2d 252, 264 S C 26
Wyo—C.J.S. cited in Opie v State, 389 P 2d 684, 690

8. Conn—State v Hoyeson, 224 A 2d 735, 154 Conn 302

10. Ark—Browning v State, 346 S W 2d 210, 233 Ark 607
Miss—Carroll v State, 196 So 2d 878

Discretion of court

(2) Other statements

Mass—Herron v State, 287 So 2d 759, cert den 94 S Ct 3179, 417 U S 972, 41 L Ed 2d 1144

11. Ala—Thigpen v State, Cr., 277 So 2d 922, 50 Ala App 176—Flurry v State, Cr., 289 So 2d 632, 52 Ala App 64, writ den 289 So 2d 644, 292 Ala 720
Ariz—State v Moore, 529 P 2d 1172, 111 Ariz 355
Cal—People v Granados, 319 P 2d 346, 49 C 2d 490
Colo—People v Lazare, 542 P 2d 1290, 189 Colo 530
Ga—Vun Cannon v State, 68 S E 2d 586, 208 Ga 608—Spradlin v State, 82 S E 2d 238, 90 Ga App 97—Pierce v State, 90 S E 2d 417, 212 Ga 88
Ky—Grant v Com., 240 S W 2d 572
Tex—Porter v State, 229 S W 2d 68, 154 Tex Cr R 540
Utah—State v Russell, 145 P 2d 1003, 106 Utah 116
Vt—State v Oakes, 276 A 2d 18, 129 Vt 241, cert den 92 S Ct 340, 404 U S 965, 30 L Ed 2d 285

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12. Or—State v Flygare, 525 P 2d 181, 18 Or App 292
Pa—Com v Minoff, supra, n 6—Com v Boden, 159 A 2d 894, 399 Pa 298, 88 A L R 2d 223, cert den 81 S Ct 89, 364 U S 846, 5 L Ed.2d 70
Wash—State v Tikka, 509 P 2d 101, 8 Wash.App 736.

14. Ky—Burchfield v Com., 186 S W.2d 412, 299 Ky 549

15. Ala—Woodard v State, 44 So 2d 241, 253 Ala. 259—Shiflett v State, 78 So 2d 805, 262 Ala. 337
Ariz—State v Presley, 514 P 2d 1234, 110 Ariz. 46

16. Ga—Rooker v State, 86 S E 2d 307, 211 Ga. 361
Pa—Com. v Boone, 319 A 2d 679, 456 Pa 312.

17. Ala—Stephens v State, 40 So 2d 90—Woodard v State, supra, n 15
Colo—People v Lazare, 542 P 2d 1290, 189 So 2d 530.
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Ga—Spradlin v State, supra, n 11
Mass—Com v Haley, 296 N E 2d 207 363 Mass 513—Com v Rodriquez, 300 N E.2d 192, 364 Mass 87
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18. Ala—Blue v State, 19 So 2d 11, 246 Ala 73—Bennefield v State, 202 So 2d 48, 44 Ala App 33, reversed on oth grds 202 So 2d 55, 281 Ala. 283—Dowdey v State, Cr., 227 So 2d 815, 45 Ala App 185
Cal—People v Schindler, 78 Cal Rptr 633, 273 C A 2d 624
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19. Conn—State v Hoyeson, 224 A 2d 735, 154 Conn 302

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28. Fla—Patterson v State, 25 So 2d 713, 157 Fla 304, cert den 67 S Ct 352, 329 U S 789, 91 L Ed 676
Miss—C.J.S. cited in Shinall v State, 199 So 2d 251, 259, cert den 88 S Ct 590, 389 U S. 1014, 19 L Ed 2d 660
Nev—State v Lawrence, 302 P 2d 285, 72 Nev 243, reh den 303 P 2d 704, 72 Nev 286

31. Cal—People v Hamilton, 13 Cal Rptr 649, 362 P 2d 473, 55 C 2d 881

§ 208. —— State of Feeling between Parties in General

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Cal—People v Cartier, 5 Cal Rptr 573, 353 P 2d 53, 54 C 2d 300—People v Lint, 6 Cal Rptr 95, 182 C A 2d 402—People v Jones, 37 Cal Rptr 454, 225 C A 2d 598.
Colo—Berger v People, 224 P 2d 228, 122 Colo. 367
Conn—State v Kurz, 37 A 2d 808, 131 Conn 34.
D C—U S v Grover, C.A., 485 F 2d 1039, 158 U.S. App D C 260

Ga —Williams v State, 69 S E.2d 199, 208 Ga 704—Haynes v State, 215 S E 2d 342, 134 Ga App 588

Ill —People v Holland, 297 N E 2d 310, 11 Ill.App 3d 591

Ky —Scott v Com, 495 S W.2d 800, cert den 94 S Ct 587, 414 U S 1073, 38 L Ed 2d 479

La —State v Burkhalter, 30 So 2d 112, 211 La 342

Me.—State v Lafferty, 309 A 2d 647

Mich —People v Shugar, 185 N W 2d 178, 29 Mich App 139

Miss —May v State, 38 So 2d 726, 205 Miss 295—Butler v State, 65 So 2d 244, 217 Miss 750

Neb —Reizenstein v State, 87 N W 2d 560, 165 Neb 865, mod on oth grds and reh den 89 N W 2d 265, 166 Neb 450.

Nev —State v Lawrence, 303 P 2d 704, 72 Nev 286

N C —State v Harris, 28 S E 2d 232, 223 N C 697—State v Moore, 171 S E 2d 453, 276 N C 142

Okl —Brown v State, 169 P 2d 772, 82 Okl Cr 344—Seals v State, 222 P 2d 1037, 92 Okl Cr 272—Sawyer v State, 237 P 2d 167, 94 Okl Cr 412—Green v State, Cr, 319 P 2d 321—Proctor v State, Cr, 536 P 2d 381

Or —State v Bouse, 264 P 2d 800, 199 Or 676

Pa —C.J.S. cited in Commonwealth v Barnak, 54 A 2d 865, 876, 357 Pa 391—Com v Peyton, 62 A 2d 37, 360 Pa 441

S C —State v. Bush, 45 S E 2d 847, 211 S C 455—State v Swilling, 142 S E 2d 864, 246 S C 144

Tex —Northcutt v State, 229 S W 2d 373, 154 Tex Cr R 600—Martin v State, 248 S W 2d 126, 157 Tex Cr R 210—Brown v State, 349 S W 2d 722, 171 Tex Cr R 320

Va —Hubbard v Com, 59 S E 2d 102, 190 Va 917

Wash —State v Horner, 150 P 2d 690, 21 Wash 2d 278

Wyo —Lonquest v State, 495 P 2d 575 Cert den 93 S Ct 432, 409 U S 1006, 34 L Ed 2d 299

Evidence held inadmissible under circumstances

Va —Williams v Com, 127 S E 2d 423, 203 Va 837

That defendant was placed under peace bond

Ala —Bennefield v State, 202 So.2d 48, 44 Ala App 33, reversed on oth grds 202 So 2d 55, 281 Ala 283—Hill v State, Cr, 286 So 2d 924, 51 Ala App 515

No significant valve on intent issue

Conn —State v Bzdyra, 334 A 2d 917, 165 Conn 400

36. Ala —McClendon v State, Cr, 307 So 2d 723, 54 Ala App 327—Bryant v State, Cr App, 428 So 2d 641, certiorari denied Ex parte Bryant, Cr App, 428 So 2d 646, cert den, Sup, 428 So 2d 646

37. Ala —Williams v State, 61 So 2d 861, 36 Ala App 583, cert den 61 So 2d 865, 258 Ala 196—Bennefield v State, 202 So 2d 55, 281 Ala 283

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Tex —Firo v State, 272 S W 2d 370, 160 Tex Cr R 469—Brown v State, 349 S W 2d 722, 171 Tex Cr R 320

39. Ala —Nettles v State, supra, n 35—Dodd v State, supra, n 35—Jackson v State, 50 So 2d 282, 35 Ala.App 542—Spain v State, supra, n 35—Johnson v State, 91 So 2d 476, 265 Ala 360

Or —State v Bouse, supra, n 35

S C —State v Bush, supra, n 35—State v Clinkscales, 99 S E 2d 663, 231 S C 650

Fact and gravity of difficulty only admissible

Ala —Hutchinson v State, 114 So 2d 412, 40 Ala App 404

40. Ala.—Nettles v State, App, 22 So 2d 179—Bryant, v State, 39 So 2d 657, 252 Ala 153

Tex —Jones v State, Cr, 515 S W 2d 126

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41. Ala —Hutchinson v State, 114 So 2d 412, 40 Ala App 404—Sashington v State, Cr, 325 So 2d 502, 56 Ala App 698, cert den 325 So 2d 211, 295 Ala 416

43. Ala —Spain v State, supra, n 35

44. Ark —Graham v State, 271 S W 2d 614, 224 Ark 25—Shaddox v State, 418 S W 2d 780, 243 Ark 55, app after remand 427 S W 2d 198, 244 Ark 747

Me —State v Eaton, 309 A 2d 334

Tex —Davis v State, 288 S W 2d 113, 162 Tex Cr R 652—Salinas v State, Civ, 458 S W 2d 933

Assaults and grudges

(3) Other instances

Okl —Holman v State, 262 P 2d 456, 97 Okl Cr 279

45. Ala —Mahaley v State, supra, n 35

46. Ala —Sashington v State, Cr, 325 So 2d 205, 56 Ala App 698, cert den 325 So 2d 211, 295 Ala 416

Ga —Haynes v State, 215 S E 2d 342, 134 Ga App 588

48. Ala —Johnson v State, 91 So 2d 476 265 Ala 360

La —State v Butler, 89 So 2d 294, 230 La 765

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49. Conn —State v Hoyeson, 224 A 2d 735, 154 Conn 302

Ky —Young v Com, 332 S W 2d 536

La —State v Hamilton, 187 So 2d 417, 249 La 392

Tex —Hoover v State, Cr, 449 S W 2d 60

50. Idaho—State v Sanchez, 483 P 2d 173, 94 Idaho 125

59. Ala —Connell v State, 105 So 2d 695, 39 Ala App 531, cert den 105 So 2d 700, 268 Ala 692

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N C —State v Artis, 203 S E 2d 347, 21 N C App 73, cert den 204 S E 2d 393, 285 N C 236

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63. Tex —Ramsour v State, 308 S W 2d 56, 165 Tex Cr R 481

64. Ala —Mahaley v State, supra, n 35—Shiflett v State, 78 So 2d 805, 262 Ala 337

Ark —Tippett v State, 278 S W 2d 110, 224 Ark 981

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Ga —Parker v State, 29 S E 2d 61, 197 Ga 340—Brown v State, 135 S E 2d 480, 109 Ga App 212—Hobbs v State, 216 S E 2d 674, 134 Ga App 850

Ill —People v Smythe, 270 N E 2d 431, 132 Ill App 2d 685

Kan —State v Amicker, 536 P 2d 1355, 217 Kan 314

Md —Jones v State, 35 A.2d 916, 182 Md 653

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Nev —State v Gregory, 212 P 2d 701, 66 Nev 423, cert den 71 S Ct 19, 340 U S 836, 95 L Ed 613, reh den 225 P 2d 1059, 67 Nev 659

N J —State v Donohue, 67 A 2d 152, 2 N J 381—State v Myers, 81 A 2d 710, 7 N J 465, 25 A L R 2d 1171

N C —State v Creech, 51 S E 2d 348, 229 N C 662—State v Moore, 166 S.E 2d 652, 275 N C 198, app after remand 171 S E 2d 453, 276 N C 142—State v Patterson, 200 S E 2d 16, 284 N C 190.

Okl —Kobyluk v State, 231 P.2d 388, 94 Okl Cr 73

Or —State v Sack, 300 P.2d 427, 210 Or 552, app dism and cert den 77 S Ct 1048, 353 U.S 962, 1 L Ed 2d 912—State v Flygare, 525 P 2d 181, 18 Or App. 292

Pa —Com v Barnak, 54 A.2d 865, 357 Pa 391—Com v Nelson, 152 A 2d 913, 396 Pa 359

R I —State v Pepper, 237 A 2d 330, 103 R I 310

S C —State v Clinkscales, 99 S E 2d 663, 231 S C 650

Tex —McClure v State, Cr, 430 S W 2d 813—Dunlap v State, Cr, 462 S W 2d 591

Va —Smith v Com, 40 S E 2d 273, 185 Va 800

65. Ala —Connell v State, 105 So 2d 695, 39 Ala App 531, cert den 105 So 2d 700, 268 Ala 692

Cal —People v Jones, 7 Cal Rptr 424, 184 C A 2d 464

S C —State v Bush, supra, n 35 State v Clinkscales, 99 S E 2d 663, 231 S C 650

Tex —Jones v State, Cr, 515 S W 2d 126

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Ala —Emerson v State, 198 So 2d 613, 281 Ala 29

66. Pa —Com v Lippert, 311 A 2d 586, 454 Pa 381

68. Cal —People v Grasso, 298 P 2d 131, 142 C A 2d 407—People v Hopper, 302 P 2d 94, 145 C A 2d 180

Miss —May v State, 38 So 2d 726, 205 Miss 295

Okl —Williams v State, supra, n 37

Pa —Com v Peyton, 62 A 2d 37, 360 Pa 441

70. U S —Simms v U S, C A, 248 F 2d 626, 104 U S App D C 304, cert den 78 S Ct 127, 355 U S 875, 2 L Ed 2d 79

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Nev —Cranford v State, 349 P 2d 1051, 76 Nev 113

71. Ala —Blue v State, supra, n 18—Dodd v State, supra, n 35—Crawford v State, 49 So 2d 231, 35 Ala App 513—Williams v State, 61 So 2d 861, 36 Ala App 583, cert den 61 So 2d 865, 258 Ala 196

Ark —Parnell v State, 182 S W 2d 206, 207 Ark 644

Ga —Dunson v State, 43 S E 2d 504, 202 Ga. 515—Gray v State, 49 S E 2d 829, 77 Ga App 747—June v State, 99 S E 2d 70, 213 Ga 311—Wells v State, 218 S E 2d 131, 135 Ga App 421

La —State v Burkhalter, supra, n 35

Mich —People v Parker, 164 N W 2d 615, 8 Mich App 414

Okl —Williams v State, supra, n 37

Tex —Stephen v State, 293 S W 2d 789, 163 Tex Cr R 505

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73. Cal —People v Cartier, 5 Cal Rptr 573, 353 P 2d 53, 54 C 2d 300

La —State v Burkhalter, 30 So 2d 112, 211 La 342—State v Watson, 301 So 2d 653

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74. Ala —Helms v State, 37 So 2d 229, 34 Ala App 82, cert den 37 So 2d 231, 251 Ala 275—Sashington v State, Cr, 325 So 2d 205, 56 Ala App 698, cert den 325 So 2d 211, 295 Ala 416—Holsembeck v State, Cr.App, 443 So 2d 1371

Ark —Browning v State, 346 S W 2d 210, 233 Ark 607

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Ga —Wilson v State, 93 S E 2d 354, 212 Ga 412

Mo —State v Earvin, 510 S W 2d 419 App after remand, App., 539 S W 2d 615

N.C —C.J.S. black letter summary quoted in State v Moore, 171 S E 2d 453, 456, 276 N C 142

S C —C.J.S. quoted in State v. Alford, 212 S.E.2d 252, 254, 264 S C 26

Tex —Kincheloe v State, 175 S.W 2d 593, 146 Tex Cr R 414

W.Va.—State v Comstock, 70 S E.2d 648, 137 W Va 152

76. Cal —People v. Chand, 253 P 2d 499, 116 C.A.2d 242

77. Ala —C.J.S. quoted in Phelps v State, Cr App 435 So 2d 158, 163
Ind —Reynolds v State, 56 N E 2d 495, 222 Ind 600
Ky —Fields v Com., 219 S W 2d 991, 310 Ky 162
La —State v Hamilton, 187 So 2d 417, 249 La 392
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78. Ala —Keith v State, 46 So 2d 705, 253 Ala 670—C.J.S quoted in Phelps v State, Cr App 435 So 2d 158 163
N C —C.J S. quoted in State v Moore, 171 S E 2d 453, 456, 276 N C 142
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Tex —Scott v State, supra, n 77—Watts v State, 207 S W 2d 94, 151 Tex Cr R 349

80. Possible mistake in identity
(2) Other matters
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81. Gang wars
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83. Ky —Jackson v Com., 275 S W 2d 788

87 Miss —Phillips v State, 183 So 2d 908—Pendergraft v State 213 So 2d 560 app dism 89 S Ct 1453, 394 U S 715 22 L Ed 2d 671, reh den 89 S Ct 1993 395 U S 941, 23 L Ed 2d 459
Tex —Ekern v State, 200 S W 2d 412, 150 Tex Cr R 319

88. Ga —Spradlin v State, 82 S E 2d 238, 90 Ga App 97

96 Miss —C.J S cited in Shinall v State 199 So 2d 251, 258, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

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Ky —C.J S black letter summary cited in White v Com., 360 S W 2d 198, 202

98. Ark —Parnell v State supra, n 71
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(3) Other declarations
Ga —Echols v State, 74 S E 2d 128, 87 Ga App 399
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1. Ky —White v Com., 360 S W 2d 198
2. U S —Swann v U S C A Md., 195 F 2d 689
3. Md —Chisley v State, 95 A 2d 577, 202 Md 87
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4. N C —C.J.S quoted in State v Westbrook, 181 S E 2d 572, 581, 279 N C 18, vac in part on oth grds 92 S Ct 2873, 408 U S 939, 33 L.Ed 2d 761, mand conf to 191 S E 2d 68, 281 N C 748

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8. Ga —Dye v State, 127 S E 2d 674, 218 Ga 330
Mo —State v Shilkett, 204 S W 2d 920, 356 Mo 1081
Tenn —Franks v State, 213 S W 2d 105, 187 Tenn 174
W Va —State v Whitt, 40 S E 2d 319, 129 W Va 187

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9. Possession of weapon
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10. Md —Barger v State, 235 A 2d 751, 2 Md App 565
N M —State v White, 295 P 2d 1019, 61 N M 109
N C —State v Ferguson, 185 S E 2d 119, 280 N C 95

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19. Evidence held admissible
Ala —Pattillo v State, 16 So 2d 303, 245 Ala 192

§ 213. Commission of or Participation in Act by Accused

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23. U S —U S v Puff, C A N Y., 211 F 2d 171, cert den 74 S Ct 713, 347 U S 963, 98 L Ed 1106, reh den 74 S Ct 876, 347 U S 1022, 98 L Ed 1142, reh den 75 S Ct 20 348 U S 853, 99 L Ed 672
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Cal —People v Chavez, 329 P 2d 907, 50 C 2d 778, cert den 79 S Ct 356 358 U S 947, 3 L Ed 2d 353, cert den 79 S Ct 1126, 359 U S 993, 3 L Ed 2d 982
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24. Ga —Uley v State, 56 S E 2d 123, 80 Ga App 434
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25. Iowa—State v Knox, 18 N W 2d 716, 236 Iowa 499
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26. Wash —State v Golladay, 470 P 2d 191, 78 Wash 2d 121

27. Wash —State v Finnegan, 495 P 2d 674, 6 Wash App 612, cert den 93 S Ct 1450, 410 U S 967, 35 L Ed 2d 702

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35. Ky —Quarles v Com., 245 S W 2d 947

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39. Ark —Moore v State, 315 S W 2d 907, 229 Ark 335, cert den 79 S Ct 356, 358 U S 946, 3 L Ed 2d 353
Cal —People v Adamson, 165 P 2d 3, 27 Cal 2d 478, affd 67 S Ct 1672, 332 U S 46, 91 L Ed 1903, 171 A L R 1223, reh den 68 S Ct 27, 332 U S 784, 92 L Ed 367
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N Y —People v Mleczko, 81 N.E 2d 65, 298 N Y 153
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40. Cal —People v Jordan, 290 P.2d 484, 45 C.2d 697
Ga —Kennemore v State, 149 S E.2d 471, 222 Ga. 252

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Ala —Carter v State, App., 442 So 2d 150, cert den. 104 S Ct 2682, 81 L Ed 2d 877

42. Ala —Blackmon v State, 22 So 2d 29, 246 Ala 675
Mass —Com. v Burke, 159 N E 2d 856, 339 Mass 521, 77 A L R 2d 451
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82. Cal —People v McMonigle, 177 P 2d 745, 29 Cal 2d 730
Pa —Com v Saunders, 125 A 2d 442, 386 Pa 149

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80. Mo —C J.S. cited in State v Stevens, 467 S W 2d 10, 17, 50 A L R 3d 96, cert den 92 S Ct 531, 404 U S 994, 30 L Ed 2d 546
Okl —Hendricks v State, Cr., 296 P 2d 205, app dism 77 S Ct 329, 352 U S 949, 1 L Ed 2d 241

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90. Ohio—State v McKinney, supra, n 39

91. Ala —O'Neal v State, Cr., 298 So 2d 62, 53 Ala App 133, cert den 298 So 2d 70, 292 Ala 744

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Ala —Pruett v State, 35 So 2d 115, 33 Ala App 491

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Tenn —Collins v State, Cr., 506 S W 2d 179

99 N M —State v Nelson, 338 P 2d 301, 65 N M 403, cert den 80 S Ct 142, 361 U S 877, 4 L Ed 2d 115

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(3) Other facts and circumstances
Cal —People v Merkouris, 344 P 2d 1—People v Lewis, 31 Cal Rptr 817, 217 C A 2d 246—People v Miller, 78 Cal Rptr 449, 455 P 2d 377, 71 C 2d 459, cert den 92 S Ct 2417, 406 U S 971, 32 L Ed 2d 672
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24. Particular evidence
(5) Other evidence —Hall v State, 219 S W 2d 475, 153 Tex Cr R 215

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26. Cal —People v Gonzales, 84 Cal Rptr 863, 4 C A 3d 593

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48. Cal —People v Thompson, 14 Cal Rptr 512, 193 C A 2d 620
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49. Cal —People v Salcido, 54 Cal Rptr 820, 246 C A 2d 450, app after remand 69 Cal Rptr 193, 263 C A 2d 1, cert den 89 S Ct 902, 393 U S 1102, 21 L Ed 2d 795

50. Ala —Jarrell v State, supra, n 47

51. Cal —People v Salcido, 54 Cal Rptr 820, 246 C A 2d 450, app after remand 69 Cal Rptr. 193, 263 C A 2d 1, cert den 89 S Ct 902, 393 U S 1102, 21 L Ed 2d 795

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54. Ky.—Marcum v Com., 215 S W 2d 846, 308 Ky 740

55. Pa—Com v Donough, supra, n 48

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63. Wyo—State v Kump, 301 P 2d 808, 76 Wyo 273

65. Ala—C.J.S. cited in Blue v State, 19 So 2d 11, 20, 246 Ala 73

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73. Ala—Williams v State, 39 So 2d 29, 34 Ala App 253, cert den 39 So 2d 37, 251 Ala 397, cert den 39 So 2d 39, 251 Ala 696

74. Minn—C.J.S. cited in State v Hawkins, 260 N W 2d 150, 158

77. D C—Guthrie v U S., C A., 207 F 2d 19, 92 U S App D C 361

85. Miss—Hancock v State, 47 So 2d 833, 209 Miss 523

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86. Miss—Hancock v State, supra, n 85

88. Alaska—Galauska v State, 527 P 2d 459, mod on oth grds., reh gr 532, P 2d 1017

89. Cal—People v Clark, 86 Cal Rptr 106, 6 C A 3d 658

4. Ga—Lewis v State 27 S E 2d 659, 196 Ga 755

Minn—C J S cited in State v Hawkins, 260 S W 2d 150, 160

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23. Tenn—Montesi v State, 417 S W 2d 554, 220 Tenn 354

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28. Minn—C.J.S cited in State v Hawkins, 260 N W 2d 150, 158

31. Cal—C.J.S cited in People v Buono, 12 Cal Rptr 604, 619 191 C A 2d 203—C.J S cited in People v Thompson, 14 Cal Rptr 512, 519, 193 C A 2d 620

33. Minn—C.J S cited in State v Hawkins, 260 N W 2d 150, 159

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36. Alaska—Marrone v State, 359 P 2d 969

Cal—People v Buono, 12 Cal Rptr 604, 191 C A 2d 203

Mo—State v Gibson, 502 S W 2d 310

Tenn—C.J.S. quoted in State v Jones, 385 S W 2d 80, 86, 215 Tenn 206

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Tenn—C.J.S. quoted in State v Jones, 385 S W 2d 80, 86, 215 Tenn 206

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42. Ala—Williams v State, 35 So 2d 562, 33 Ala App 304, affd 35 So 2d 567, 250 Ala 549

Ill—People v Fedora, 65 N E 2d 447, 393 Ill 165, cert den 67 S Ct 57, 329 U S 744, 91 L Ed 642—People v Thornton, 186 N E 2d 239, 26 Ill 2d 218

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50. Ala—Williams v State, supra, n 42

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51. Ariz—State v Sorensen, 455 P 2d 981, 104 Ariz 503

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57. Ind—Smith v State, 235 N E 2d 177, 250 Ind 125

58. N Y—People v Nitzberg, 38 N E 2d 490, 287 N Y 183, 138 A L R 1253, reargument denied 40 N E 2d 40, 287 N Y 754, 139 A L R 1266

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62. Md—Allison v State, 98 A 2d 273, 203 Md 1

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70. General good character includes trait as to peaceableness

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71. Mass—Com v Makarewicz, 132 N E 2d 294, 333 Mass 575

73. Ala—Hayden v State, 79 So 2d 558, 262 Ala 457—Thomas v State 122 So 2d 731, 41 Ala App 19, cert den 122 So 2d 736, 271 Ala 700

74. Ky—Wells v Com., 231 S W 2d 30, 313 Ky 371

77. D C—U S v White, D C., 225 F Supp 514, remd., C A., 349 F 2d 965, 121 U S App D C 287

81. Cal—People v Letourneau, 211 P 2d 865, 34 Cal 2d 478

82. Ala—Foster v State, 66 So 2d 204, 37 Ala App 213—Corbitt v State, 68 So 2d 860, 37 Ala App 375

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87. N J—State v Mount, 152 A 2d 343, 30 N J 195—State v Di Paolo, 168 A 2d 401, 34 N J 279, cert den 82 S Ct 130, 368 U S 880, 7 L Ed 2d 80

88. N J—State v Mount, 152 A 2d 343, 30 N J 195

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91. Wash—State v Lewis, 225 P 2d 428, 37 Wash 2d 540

93. Ga—Wilson v State, 95 S E.2d 733, 94 Ga App 588—Leverette v State, 122 S E 2d 745, 104 Ga App 743

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99. Ala—Smith v State, 80 So 2d 302, 38 Ala.App 23, affd 80 So 2d 307, 262 Ala 584

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1. Tex—Parrish v State, 290 S W 2d 245, 163 Tex Cr R 252—Minor v State, 311 S W.2d 241, 166 Tex Cr R 69

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2. Ala—Posey v State, 90 So 2d 94, 38 Ala App 585

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5. Miss—Evans v State, 315 So 2d 1

16. Ga—Rodgers v State, 102 S E 2d 10, 213 Ga. 797

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Okl—Jones v State, 141 P 2d 109, 71 Okl Cr 285

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(7) Other evidence

Ga—Rooker v State, 86 S E 2d 307, 211 Ga 361

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17. Evidence held admissible

(4) Other evidence

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Wash—State v Grove, 398 P 2d 170, 65 Wash 2d 525

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Evidence concerning intoxicating liquor

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24. Ala—Wright v State, 39 So 2d 395—Williamson v State, 61 So 2d 1, 258 Ala 24—Dockery v State, 114 So 2d 394, 269 Ala 564—Wheat v State, 202 So 2d 65, 44 Ala App 45, certiorari denied 202 So 2d 73, 281 Ala 287

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Mo—State v Crow, 486 S W 2d 248

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26. Ark—Walker v State, 388 S W 2d 13, 239 Ark 172

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28. Cal —People v Talle, 245 P 2d 633, 111 C A 2d 650

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Miss —Hinton v State, 45 So 2d 805, 209 Miss 608, sug of err over 46 So 2d 445, 209 Miss 608, app dism 71 S Ct 68, 340 U S 802, 95 L Ed 590, reh den 71 S Ct 205, 340 U S 894, 95 L Ed 648

Tenn —C.J.S. cited in Solomon v State, Cr, 489 S W 2d 547, cert den 93 S Ct 2744, 412 U S 923, 37 L Ed 2d 150

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30. Pa —Com v Capps, 4 Bucks 189, affd 114 A 2d 338, 382 Pa 72

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34. N M —State v Alderette, App, 526 P 2d 194, 86 N M 600, cert den 526 P 2d 187, 86 N M 593

39. Ala —Jones v State, 83 So 2d 68, 38 Ala App 325

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Tex —Henry v State, 207 S W 2d 76, 151 Tex Cr R 284

40. Ala —Williamson v State, supra, n 24

Ga —Davis v State, supra, n 24

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N C —State v Rawley, 74 S E 2d 620, 237 N C 233

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41. Mich —C.J.S. quoted at length in People v Burks, 196 N W 2d 777, 387 Mich 393

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Ala —Poellnitz v State, Cr, 262 So 2d 631, 48 Ala App 144

Cal —People v Matlock, 336 P 2d 505, 51 C 2d 682, 71 A L R 2d 605

44. Cal —People v Yokum, 302 P 2d 406, 145 C A 2d 245

45. Miss —Shinall v State, 199 So 2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

N C —State v Rawley, supra, n 40

46. Miss —Shinall v State, 199 So 2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

48. Ky —Blackburn v Co, supra, n 28

Under statute where threats by victim are proved

Tex —Clark v State, 254 S W 2d 106, 158 Tex Cr R 180

49. Ala —Brooks v State, 82 So 2d 553 263 Ala 386

50. Ark —McCray v State, 494 S W 2d 708, 254 Ark 601

N C —State v Anderson, 216 S E 2d 166, 26 N C App 422, cert den 217 S E 2d 667, 288 N C 243

52. La —State v Rollins, 271 So 2d 519, 264 La 274

Utah—State v Rivenburgh, 355 P 2d 689, 11 Utah2d 95, cert den 82 S Ct 246, 368 U S 922, 7 L Ed 2d 137

Absence of connection with homicide

(3) Other instances

Md —Smith v State, 315 A 2d 76, 20 Md App 254, revd oth grds, 328 A 2d 274, 273 Md 152, app after remand 256 A 2d 320, 31 Md App 310

58. Ala —Willis v State, 66 So 2d 753, 37 Ala App 185, cert den 66 So 2d 756, 259 Ala 500

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60. S C —C.J.S cited in State v Amburgey, 34 S E 2d 779, 780, 206 S C 426

65. Ark —Sanders v State, 432 S W 2d 467, 245 Ark 321

Kan —State v Parker, 276 P 2d 317, 177 Kan 39

66. Cal —C J S cited in People v Cornavacci 258 P 2d 1121, 1123, 119 C A 2d 14

Md —Nixon v State, 105 A 2d 243, 204 Md 475

N Y —C J S cited in People v Yankouski, 143 N Y S 2d 737, 739

Reputation in place of homicide

Ga —Keener v State, 18 Ga 194, 63 Am Dec 269

Reputation in community proven

Ala —McCaghren v State, Cr, 294 So 2d 756, reversed 294 So 2d 766, 292 Ala 378

67. Ala —Standard v State, Cr, 283 So 2d 627, 51 Ala App 176

68. Ala —Standard v State, Cr, 283 So 2d 627, 51 Ala App 176

69. Trial judge has discretion, etc.

Ala —Holloway v State 89 So 2d 313, 38 Ala App 434, cert den 89 So 2d 317, 265 Ala 697

70. Ala —Lovejoy v State, 34 So 2d 692 33 Ala App 414, cert den 34 So 2d 700, 250 Ala 409

Ark —Sanders v State, 432 S W 2d 467, 245 Ark 321

Fla —Horne v State, App, 116 So 2d 654

Ga —Hamby v State, 32 S E 2d 546, 71 Ga App 817

Miss —McDonald v State, 218 So 2d 21

Mo —State v Davis, 365 S W 2d 577

N Y —C.J S cited in People v Yankouski, 143 N Y S 2d 737, 739—C.J.S. cited in People v Miller, 349 N E 2d 841, 39 N Y 2d 534, 384 N Y S 2d 741

S C —C.J S cited in State v Franklin, 226 S E 2d 896, 899, 267 S C 240

Tenn —Mullendore v State, 191 S W 2d Tenn Cr App 457, cert den 92 S Ct 2054, 406 U S 949, 32 L Ed 2d 336

Specific acts of violence

Ala —Hogue v State, 78 So 2d 670, 38 Ala App 131

Fla.—Rafuse v State, App, 215 So 2d 71

Md —Barger v State, 235 A 2d 751, 2 Md App 565

Miss —Shinall v State, 199 So 2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

Mo —State v Bozarth, 361 S W 2d 819

Wis —Werner v State, 226 N W 2d 402, 66 Wis 2d 736

Details of antecedent difficulty, encounter, or transaction

Miss —Shinall v State, 199 So 2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

Mo —State v Davis, App, 504 S W 2d 221

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71. Acts which occurred at remote date

U S —Hayes v U S, C A Kan, 367 F 2d 216

Pa —Com v Mennyweather, 329 A 2d 493, 458 Pa 12

Violations of municipal ordinances

Ala —Higginbotham v State, 78 So 2d 637, 262 Ala 236

75. Ky —C.J.S. cited in Amos v Com, 516 S W 2d 836, 837

Conviction not known to accused

(2) Other statements

Hawaii—Territory of Hawaii v Aquino, 43 Haw. 347

Acts or conduct not known to defendant

(2) Other cases

Ky —Friley v Com, 255 S W 2d 483

N J —State v Roscus, 109 A 2d 1, 16 N J 415

79. Ark —Riddle v State, 196 S W 2d 226, 210 Ark 255—Harris v State, 394 S W 2d 135, 239 Ark 771, cert den 87 S Ct 1043, 386 U S 964, 18 L Ed 2d 114

Cal —People v Roberts, 55 Cal Rptr 62, 246 C A 2d 715

Ga —Key v State, 86 S E 2d 212, 211 Ga. 384

N M —State v Pace, 456 P 2d 197, 80 N M 364

80. Evidence held irrelevant

Nev —Sefton v State, 295 P 2d 385, 72 Nev 106, cert den 77 S Ct 329, 352 U S 954, 1 L Ed 2d 244

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83. Ga —Crawford v State, 184 S E 2d 361, 124 Ga App 469

Ky —Cessna v Com, 465 S W 2d 283

87. Mo —State v Smith, 194 S W 2d 905, 355 Mo 59

N H —State v Lavalle, 189 A 2d 475, 104 N H 443

N D —State v Maresch, 27 N W 2d 1, 75 N D 229

Proof required

(1) That deceased was dangerous or violent when under influence of drugs

Ill —People v Wesley, 163 N E 2d 500, 18 Ill 2d 138, cert den 81 S Ct 87

(2) Also that deceased was under such influence at the time of the homicide

Ill —People v Wesley, 163 N E 2d 500, 18 Ill 2d 138, cert den 81 S Ct 87

Acts and conduct of deceased on other occasions when under the influence of drugs have been held admissible [90.1]

90.1 Ala —Blue v State, 19 So 2d 11, 246 Ala 73

§ 223. Character and Habits of Third Persons

93. Miss —C.J.S cited in Shinall v State, 199 So 2d 251, 258, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

3. Ill —C.J S cited in People v Moretti, 129 N E 2d 709, 723, 6 Ill 2d 494, cert den 78 S Ct 794, 356 U S 947, 2 L Ed 2d 822

§ 224. Physical Condition of Parties

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5. Ala —Brooks v State, Cr, 228 So 2d 24, 45 Ala App 196

6. Tex —Jones v State, 220 S W 2d 156, 153 Tex Cr R 345—Hunter v State, 275 S W 2d 803, 161 Tex Cr R 225

8. Okl —Holman v State, 262 P 2d 456, 97 Okl Cr 279

9. Ala —Stowe v State, Cr, 268 So 2d 45, 49 Ala App 13

Ky —Howell v Com, 233 S W 2d 270, 313 Ky 662

14. Ga —Johnson v State, 205 S E 2d 190, 232 Ga 61

Md —Jones v State, 35 A 2d 916, 182 Md 653

Pa —Com v Roberts, 44 Luz Leg Reg 175

15. Prior assaults

Mass —Com v DiMarzo, 308 N E 2d 538, 364 Mass 669

16. Ala —Nixon v State, 72 So 2d 846, 261 Ala 74

Ky —Broughton v Com, 216 S W 2d 935, 309 Ky 127

18. Ala —Chavers v State, Cr, 327 So 2d 762, 57 Ala App 268

N C —State v Johnson, 154 S E.2d 48, 270 N C 215

Ohio—State v Nunley, 273 N E 2d 146, 27 Ohio App 2d 170

Pregnancy

Ill —People v Pendleton, 321 N E 2d 433, 24 Ill App 3d 385

The physical condition of the deceased may also be shown when vital to refutation of the State's evidence [20.5]

20.5. Ala —Fillman v State, 127 So 2d 628, 41 Ala App 175, cert den 127 So 2d 632, 271 Ala 698

24. Tenn —Jenkins v State, Cr, 509 S W 2d 240

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25. Miss —C.J.S. cited in Shinall v State, 199 So 2d 251, 259, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

Admissible to prove necessity

Miss —Shinall v State, 199 So 2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

Inadmissible when no evidence of provocation

Ala —Carter v State, Cr App, 442 So 2d 150, cert den 104 S Ct 2682, 81 L Ed 2d 877

27. Ala —Helms v State, 37 So 2d 229, 34 Ala App 82, cert den 37 So 2d 231, 251 Ala 275

Ark —McMillan v State, 314 S W 2d 483, 229 Ark 249

N C —State v Dawson, 180 S E 2d 140, 278 N C 351

Heart condition

Ala —Stowe v State, Cr, 268 So 2d 45, 49 Ala App 13

28. Fla —Mixon v State, 59 So 2d 38

29. Mass —Com v Venuti, 52 N E 2d 392, 315 Mass 255

32. Ga —Johnson v State 205 S E 2d 190, 232 Ga 61

36. Ark —McGarrah v State, 229 S W 2d 665, 217 Ark 186

Tex —Porter v State, 229 S W 2d 68 154 Tex Cr R 540

§ 225. Surviving Family of Deceased

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Ohio—C.J.S. black letter summary quoted in State v White, 239 N E 2d 65 69, 15 Ohio St 2d 146

53. Ala —Lovejoy v State, 15 So 2d 300, 31 Ala App 244, cert den 15 So 2d 303, 244 Ala 637

54. Ala.—C.J.S cited in Knight v State, 142 So 2d 899, 910, 273 Ala 480

58. Ala —Lovejoy v State, 15 So 2d 300, 31 Ala App 244, cert den 15 So 2d 303, 244 Ala 637—Hutto v State, 178 So 2d 810, 278 Ala 416

68. Ala —Grant v State, 33 So 2d 466, 250 Ala 164

69. Ind —Rowe v State, 237 N E 2d 576, 250 Ind 547

§ 226. Personal Relations of Parties

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70. Cal —People v Aikin, 97 Cal Rptr 251, 19 C A 3d 685

Ill —People v Ruel, 256 N E 2d 672, 120 Ill App 2d 374

71. Colo —Wright v People, 171 P 2d 990, 115 Colo 247

Ill —People v Hairston, 263 N E 2d 840, 46 Ill 2d 348, cert den 91 S Ct 1658, 402 U S 972, 29 L Ed 2d 136

Iowa—State v Peterson, 219 N W 2d 665

Kan —State v Green, 652 P 2d 697, 232 Kan 116

Pa —Com v Cheatham, 60 Dauph Co 273—Com v Watterson, 10 Chest 113

Tex —King v State, 243 S W 2d 846, 156 Tex Cr R 508—Stokes v State, 286 S W 2d 141, 162 Tex Cr R 401—Bowles v State, 324 S W 2d 841, 168 Tex Cr R 241—Coleman v State, Cr, 442 S W 2d 338

Va —Smith v Com, 40 S E 2d 273, 185 Va 800

Admissible to prove ill will motive, or malice toward decedent

Pa —Com v Nelson, 152 A 2d 913, 396 Pa 359

Evidence refuting claim of friendship

(1) Lack of grief after being informed of death

Idaho—State v Rodriquez, App, 674 P 2d 1029, 106 Idaho 30

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72. Evidence not admissible

Miss —Hubbard v State, 288 So 2d 716

73. Minn —State v Thurston, 216 N W 2d 267, 299 Minn 30

84. Tex —Robinson v State, Cr App 238 S W 2d 193

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93. Wis —Jones v State, 233 N W 2d 430, 70 Wis 2d 41

95. Irrelevant evidence excluded

Mont —State v Newman, 511 P 2d 258, 162 Mont 450

Tex —Stanley v State, Cr, 471 S W 2d 72, vac in part on oth grds 92 S Ct 2875, 408 U S 939, 33 L Ed 2d 762, reh den 93 S Ct 182, 409 U S 899, 34 L Ed 2d 159, on remand 490 S W 2d 828

97. Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

98. Evidence wife knew of rape

U S —Quinn v Duckworth, D C Ind, 567 F Supp 518, affd 749 F 2d 34

So also it is proper to show pendency of a suit for divorce brought by accused,[10.5] and petition for separate maintenance brought later by the wife,[10.10] and that a hearing had been held on the petition [10.15]

10.5. Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

10.10. Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

10 15. Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

12. Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

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37. Tex —McElroy v State, 224 S W 2d 254, 154 Tex Cr R 15—Sample v State, 254 S W 2d 401, 158 Tex Cr R 220

S C —C.J S cited in State v Griffin, 285 S E 2d 631, 633, 277 S C 193

45. Colo —Wright v People, 171 P 2d 990, 115 Colo 247

47. Miss —Knight v State, 60 So 2d 638 215 Miss 251

Tex —Love v State, Cr, 533 S W 2d 6

§ 227. Motive

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Homicide ⇐166.

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72. U S —Barbeau v U S, C A Alaska, 193 F 2d 945, 13 Alaska 551, cert den 72 S Ct 1064, 343 U S 968, 96 L Ed 1364—U S v Roberts, D C Ark, 223 F Supp 49, affd, C A, 332 F 2d 892, cert den 85 S Ct 1344, 380 U S 980, 14 L Ed 2d 274

Ala —Luckie v State, Cr, 318 So 2d 337, 55 Ala App 642, certiorari denied 318 So 2d 341, 294 Ala 764

Alaska—Gafford v State, 440 P 2d 405 Cert den 89 S Ct 996, 393 U S 1120, 22 L Ed 2d 125

Ark —Parnell v State, 182 S W 2d 206, 207 Ark 644—Higdon v State, 213 S W 2d 621, 213 Ark 881

Cal —People v Flanagan, 150 P 2d 927, 65 Cal App 2d 371—People v Gonzales, 198 P 2d 81, 87 Cal App 2d 867—People v. Beyea, 113 Cal Rptr 254, 38 C A 3d 176

Colo —Brown v People, 273 P 2d 128, 130 Colo 77—C.J.S. cited in Wooley v People, 367 P 2d 903, 907

D C —Collazo v U S, C A, 196 F 2d 573, 90 U S App D C 241, cert den 72 S Ct 1065, 343 U.S 968, 96 L Ed 1364

Fla —Freeman v State, App, 97 So 2d 633

Ga —Spencer v State, 203 S E.2d 856, 231 Ga 705

Ill —People v Gougas, 102 N E.2d 152, 410 Ill 235, 28 A L R 2d 852—People v Davis, 107 N E 2d 607, 412 Ill 391—People v Harvey, 145 N E 2d 88, 12 Ill 2d 88—People v Palmer, 198 N E 2d 839, 31 Ill 2d 58

Ind —Kallas v State, 83 N E 2d 769, 227 Ind 103, cert den 69 S Ct 744, 336 U S 940, 93 L Ed 1098

Ky —Scott v Com, 495 S W 2d 800, cert den 94 S Ct 587, 414 U S 1073, 38 L Ed 2d 479

La —State v Dowdy, 47 So 2d 496, 217 La 773, cert den 71 S Ct 75, 340 U S 856, 95 L Ed 627

Mass —Com v Goldenberg, 51 N E 2d 762, 315 Mass 26—Com v Bonomi, 140 N E 2d 140, 335 Mass 327

Mich —People v Mihalko, 10 N W 2d 914, 306 Mich 366—People v Rogers, 165 N W 2d 337, 14 Mich App 207

Miss —Freeman v State, 89 So 2d 716, 228 Miss 687—Wilson v State, 270 So 2d 697

N C —State v Oxendine, 32 S E 2d 648, 224 N C 825—State v King, 37 S E 2d 684 226 N C 241—State v Vestal, 180 S E 2d 755, 278 N C 561 App after remand 195 S E 2d 297, 283 N C 249

Ohio—State v Lancaster, 155 N E 2d 215, 106 Ohio App 401, affd 149 N E 2d 157, 167 Ohio St 391, 71 A L R 2d 1017

Okl —Vaughn v State, Cr, 497 P 2d 769

Pa —Com v Glover, 286 A 2d 349, 446 Pa 492

Tenn —Lawhorn v State, 464 S W 2d 305, 3 Tenn Cr App 488

Tex —Guillory v State, 250 S W 2d 218, 157 Tex Cr R 502—Brown v State, 355 S W 2d 718 172 Tex Cr 229

Va —Hubbard v Com, 59 S E 2d 102, 190 Va 917

Wash —State v Horner, 150 P 2d 690, 21 Wash 278—State v Haga, 536 P 2d 648, 13 Wash App 630, cert den 96 S Ct 1740, 425 U S 959, 48 L Ed 2d 204

Evidence of motive to negate intent properly excluded

D C —Lebron v U S, C A, 229 F 2d 16, 97 U S App D C 133 cert den 76 S Ct 1035, 351 U S 974, 100 L Ed 1492

Evidence held inadmissible

Ill —People v Weinstein, 213 N E 2d 115, 66 Ill App 2d 78, revd on oth grds 220 N E 2d 432, 35 Ill 2d 467, app after remand 249 N E 2d 687, 110 Ill App 2d 382, affd, 263 N E 2d 62, 46 Ill 2d 222

Tenn —Levy v State, 360 S W 2d 1, 210 Tenn 422

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74. Ala —Pruett v State, 35 So 2d 115, 33 Ala App 491—Woodard v State, 44 So 2d 241, 253 Ala 259

Fla —Lipford v State, App, 161 So 2d 16

Ga —McAfee v State, 54 S E 2d 434, 205 Ga 545—Scott v State, 103 S E 2d 545, 214 Ga 154—Gresham v State, 115 S E 2d 191, 216 Ga 106

Ky —Peters v Com, 221 S W 2d 629, 316 Ky 649

Mo —State v Brown, 227 S W 2d 646, 360 Mo 104

Or —State v Flygare, 525 P 2d 181, 18 Or App 292

Tex —Robinson v State, Cr App, 238 S W 2d 193

Recent abuse of victim by accused

Ala —Baker v State, Cr App, 441 So 2d 1061

75. Ala —Parvin v State, 26 So 2d 573, 248 Ala 704

Ill —People v Poland, 174 N E 2d 804, 22 Ill 2d 175

Ky —Lewis v Com, 226 S W 2d 934, 312 Ky 191

Okl —Lowrey v State, 197 P 2d 637, 87 Okl Cr 313

Tex —Duke v State, 182 S W 2d 808, 147 Tex Cr R 533

77. N C —State v Netcliff, 187 S E 2d 450, 14 N C App 100

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78. Ala—C.J.S. quoted in Senn v State, 43 So 2d 540, 543, 35 Ala App 62
Ariz—State v Robinson, 360 P 2d 474, 89 Ariz 224
Ark—Higdon v State, supra, n 72—Bly v State, 214 S W 2d 77, 213 Ark 859
Cal—People v Weatherford, 178 P 2d 816, 78 Cal App 2d 669—People v Gonzales, 198 P 2d 81, 87 Cal App 2d 867
Mass—Com v Nassar, 218 N E 2d 72, 351 Mass 37, app after remand 237 N E 2d 39, 354 Mass 249, cert den 89 S Ct 662, 393 U S 1039, 21 L Ed 2d 586
Mo—State v Brown, supra, n 74—State v Henderson, 301 S W 2d 813
N C—State v King, supra, n 72
Ohio—State v Lancaster, 149 N E 2d 157, 167 Ohio St 391, 71 A L R 2d 1017
Or—State v Sack, 300 P 2d 427, 210 Or 552, app dism and cert den 77 S Ct 1048, 353 U S 962, 1 L Ed 2d 912

Letters

(1) Mo—State v Truster, 334 S W 2d 104
Wash—State v Huson, 440 P 2d 192, 73 Wash 2d 660, cert den 8 S Ct 886, 393 U S 1096, 21 L Ed 2d 787

State of mind

Wash—State v Haga, 536 P 2d 648, 13 Wash App 630, cert den 96 S Ct 1740, 425 U S 959, 48 L Ed 2d 204

79. D C—Jackson v U S, App, 329 A 2d 782, cert den 96 S Ct 95, 423 U S 851, 46 L Ed 2d 74

80. Ky—Sizemore v Com, 347 S W 2d 77

82. La—State v Hodgeson, 305 So 2d 421

83. N J—State v Guido, 191 A 2d 45, 40 N J 191

Opinion of psychologist as to motive inadmissible

N J—State v Reynolds, 195 A 2d 449, 41 N J 163, 1 A L R 3d 1438, cert den 84 S Ct 1930, 1934, 377 U S 1000, 12 L Ed 2d 1050, reh den 85 S Ct 23, 379 U S 873, 13 L Ed 2d 81

84. Colo—Brown v People, 273 P 2d 128, 130 Colo 77

Evidence held admissible

Cal—People v Arguello, 56 Cal Rptr 274, 423 P 2d 202, 65 C 2d 768

86. Ga—Spradlin v State, 76 S E 2d 435, 88 Ga App 230—Roger v State 162 S E 2d 411, 413, 224 Ga 436
N J—State v De Paola, 73 A 2d 564, 5 N J 1
Tex—Henson v State, 200 S W 2d 1007, 150 Tex Cr R 344

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87. Cal—People v Gonzales, supra, n 78
Ill—People v Hutter, 329 N E 2d 873, 29 Ill App 3d 92

88. Ala—DeSilvey v State, 16 So 2d 183, 245 Ala 163
Colo—C.J.S. quoted in Wooley v People, 367 P 2d 903, 908, 148 Colo 392
Fla—C.J.S. cited in McVeigh v State, 73 So 2d 694, 697, app dism 75 S Ct 210, 348 U S 885, 99 L Ed 696
Ky—Powell v Com, 214 S W 2d 1002, 308 Ky 467—Ellison v Com, 225 S W 2d 470, 311 Ky 757

Evidence not inadmissible as showing like motive of other participants in prior crime

N J—State v Baldwin, 221 A 2d 199, 47 N J 379, cert den 87 S Ct 527, 385 U S 980, 17 L Ed 2d 442

89. Ky—Bircham v Com, 238 S W 2d 1008, app dism. and cert den 72 S Ct 55, 342 U S 805, 96 L.Ed 609
Tex.—Stephens v State, 182 S.W 2d 707, 147 Tex Cr R 510—Williams v State, 182 S W 2d 715, 147 Tex Cr R 523

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93. N J—State v Baldwin, 221 A 2d 199, 47 N J 379, cert den 87 S Ct 527, 385 U S 980, 17 L Ed 2d 442

2. D C—Collazo v U S, C A, 196 F 2d 573, 90 U S App D C 241, cert den 72 S Ct 1065, 343 U S 968, 96 L Ed 1364

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4. Pa—Com v Schwartz, 285 A 2d 154, 445 Pa 515

Evidence held inadmissible

(4) Other evidence
Cal—People v Yanikian, 114 Cal Rptr 188, 39 C A 3d 366
S D—State v Hamm, 214 N W 2d 60, 89 S D 507

9. Cal—People v Sears, 84 Cal Rptr 711, 465 P 2d 847, 2 C 3d 180

10. Ga—Bell v State, 31 S E 2d 109, 71 Ga App 430

11. U S—Wakaksan v U S, C A N D, 367 F 2d 639, cert den 87 S Ct 1312, 386 U S 994, 18 L Ed 2d 341

§ 228. —— Quarrels and Ill Feeling

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13. Ala—Ray v State, 45 So 2d 4, 253 Ala 329—Garrett v State, 105 So 2d 541, 268 Ala 299—Holifield v State, 159 So 2d 65, 42 Ala App 209, cert den 159 So 2d 70, 276 Ala 705—McClendon v State Cr, 307 So 2d 723, 54 Ala App 327
Ala—McClendon v State, Cr, 307 So 2d 723, 54 Ala App 327
Ark—Parnell v State 182 S W 2d 206, 207 Ark 644—Freeman v State 385 S W 2d 156, 238 Ark 804
Ga—Haynes v State 215 S E 2d 342, 134 Ga App 588
Miss—May v State, 38 So 2d 726, 205 Miss 295
N C—State v Artis, 42 S E 2d 409, 227 N C 371
Okl—Williams v State, 205 P 2d 1164, 89 Okl Cr 146
Pa—Com v Tomaski, 84 A 2d 390, 170 Pa Super 136
Tex—Jordan v State, 226 S W 2d 449, 154 Tex Cr R 217—Ramsour v State, 308 S W 2d 56, 165 Tex Cr R 481
Wash—State v Noyes, 418 P 2d 471, 69 Wash 2d 441, cert den 87 S Ct 1053, 386 U S 968, 18 L Ed 2d 122
Wyo—Lonquest v State, 495 P 2d 575 Cert den 93 S Ct 432, 409 U S 1006, 34 L Ed 2d 299

That defendant was placed under peace bond

Ala—Bennefield v State, 202 So 2d 48, 44 Ala App 33, reversed on oth grds 202 So 2d 55, 281 Ala 283—Hill v State, Cr, 286 So 2d 924, 51 Ala App 515

"Battered Child Syndrome" testimony

S D—State v Best, 232 N W 2d 447, 89 S D 227

16. Cal—People v Ray, 61 Cal Rptr 1, 252 C A 2d 932, cert den 89 S Ct 145, 393 U S 864, 21 L Ed 2d 132
Ky—Barnett v Com, 403 S W 2d 40
La—State v Blanton, 312 So 2d 329

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18. Cal—People v Planagan, 150 P 2d 927, 65 Cal App 2d 371
La—State v Gunn, 32 So 2d 895, 212 La 475
Nev—State v Plunkett, 149 P 2d 101, 62 Nev 258

19. Ala—Bowman v State, 47 So 2d 657, 35 Ala App 420
Colo—People v Miller, 529 P 2d 648, 187 Colo 239
Del—Hutchins v State, 153 A 2d 204, 2 Storey 98
Idaho—State v Radabaugh, 471 P 2d 582, 93 Idaho 727
Miss—Crockerham v State, 30 So 2d 417, 202 Miss 25
Okl—Brown v State, Cr, 271 P 2d 733
Pa—Com v Southard, 33 Del Co 464
Tex—Sheffield v State, 206 S W 2d 1016, 151 Tex Cr R 334

Threats

(1) Ark—Freeman v State, 385 S W 2d 156, 238 Ark 804
Ga—Pierce v State, 90 S E 2d 417, 212 Ga 88
N J—State v Royster, 273 A 2d 574, 57 N J 472, cert den 92 S Ct 235

20. Ill—People v Hairston, 294 N E 2d 748, 10 Ill App 3d 678

Police officers

Del—Henry v State, 298 A 2d 327
Ill—People v Witherspoon, 190 N E 2d 281, 27 Ill 2d 483

Gang members

Mass—Com v Pickles, 305 N E.2d 107, 364 Mass 395

22. Ala—Parsons v State, 25 So 2d 44, 32 Ala App 266
Miss—Carr v State, 218 So 2d 737

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24 La—State v Hillman, 298 So 2d 746

33. Ala—Parsons v State, supra, n 22
Ga—Brown v State, 135 S E 2d 480, 109 Ga App 212
Mo—State v Earvin, 510 S W 2d 419 App after remand App, 539 S W 2d 615

34. Colo—People v Miller, 529 P 2d 648, 187 Colo 239
Pa—Com v Petrakovich, 329 A 2d 844, 459 Pa 511

36. Ind—Reynolds v State, 56 N E 2d 495, 222 Ind 600

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40. Cal—People v Miller, 53 Cal Rptr 720, 245 C A 2d 112, cert gr 88 S Ct 460, 389 U S 968, 19 L Ed 2d 459, cert dism 88 S Ct 2258, 392 U S 616, 20 L Ed 2d 1332—People v. Theriot, 60 Cal Rptr 279, 252 C A 2d 222
Colo—Romero v People 460 P 2d 784, 170 Colo 234
Ga—Parker v State, 29 S E 2d 61, 197 Ga 340—Manry v State, 47 S E 2d 817, 77 Ga App 43—Kilgore v State, 98 S E 2d 72, 95 Ga App 462
La—State v Roy, 58 So 2d 323, 220 La 1017
Md—Corens v State, 45 A 2d 340, 185 Md 561
Mo—State v Holland, 189 S W 2d 989, 354 Mo 527
N C—C.J.S cited in State v Creech, 51 S E 2d 348, 354, 229 N C 662
Okl—Brewer v State, Cr, 414 P 2d 559
Pa—Com v Musto, 35 A 2d 307, 348 Pa 300

Defendant and ex-wife

Ind—Haggenjos v State, 441 N E 2d 430

41. Colo—Romero v People, 460 P 2d 784, 170 Colo 234
Ga—Williams v State 69 S E 2d 199, 208 Ga 704—Wyatt v State, 142 S E 2d 810, 220 Ga 867—Wells v State, 218 S E 2d 131, 135 Ga App 421
Kan—State v Anicker, 536 P 2d 1355, 217 Kan 314
La—State v Burkhalter, 30 So 2d 112, 211 La 342
Miss—Ladner v State, 197 So 2d 257
Pa—Com v Holt, 39 A 2d 372, 350 Pa 375

Peace bond

Ala—Bennefield v State, 202 So 2d 55, 281 Ala 283

42. **Admission of restraining order prohibiting communication**

Mass—Com v Gil, 471 N E 2d 30, 393 Mass 204

43. Pa—Com v Petrakovich, 329 A 2d 844, 459 Pa 511

Evidence held inadmissible

Ala—Bennefield v State, 202 So 2d 55, 281 Ala 283

44. Pa—Com v Petrakovich, 329 A 2d 844, 459 Pa 511

46. Ala—Jarrell v State, 50 So 2d 767, 35 Ala App 256, revd on oth grds 50 So 2d 774, 255 Ala 128, affd 50 So 2d 776, 255 Ala 209—Garrett v State, 105 So 2d 541, 268 Ala 299

47. Ala—Senn v State, 43 So 2d 540, 35 Ala App 62

Mo—C.J.S cited in State v Holland, 189 S W 2d 989, 992, 354 Mo 527

Intention of divorce

Ohio—State v Sheppard, 128 N E 2d 471, 100 Ohio App 345, aff'd 135 N E 2d 340, 165 Ohio St 293, cert den 77 S Ct 118, 352 U S 910, 1 L Ed 2d 119, reh den 77 S Ct 323, 352 U S 955, 1 L Ed 2d 245

§ 229. —— Loss of Affection for Spouse; Infatuation With Another

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50. Ala—Kitchens v State, 37 So 2d 428, 251 Ala 344—Shiflett v State, 78 So 2d 805 262 Ala 337

N C—C.J S cited in State v Creech, supra n 40

53. La—C.J.S cited at length in State v Flood, 301 So 2d 637, 647, cert den 95 S Ct 1577, 421 U S 916, 43 L Ed 2d 782

Miss—Ladner v State, 197 So 2d 257

N J—State v Seefeldt, 242 A 2d 322, 51 N J 472

Pa—Com v Littlejohn, 250 A 2d 811, 433 Pa 336—Com v Davis 336 A 2d 888, 462 Pa 27, cert den 96 S Ct 456, 423 U S 1019, 46 L Ed 2d 391

S C—C.J.S cited in State v Anderson 169 S E 2d 706, 710, 253 S C 168, cert den 90 S Ct 386, 396 U S 948, 24 L Ed 2d 253, cert den 90 S Ct 971, 397 U S 958, 25 L Ed 2d 143, reh den 90 S Ct 1268 397 U S 1031, 25 L Ed 2d 545

54. Ala—Ray v State, 59 So 2d 582, 257 Ala 418

Ga—Ellis v State, 34 S E 2d 171 72 Ga App 469—McAfee v State, 54 S E 2d 434, 205 Ga 545—Rodgers v State, 102 S E 2d 10, 213 Ga 797

Kan—State v Booker, 434 P 2d 801, 200 Kan 166, cert den 88 S Ct 2031, 391 U S 965, 20 L Ed 2d 879

Ky—Goodman v Com, 285 S W 2d 146

Mass—Com v Bonomi, 140 N E 2d 140, 335 Mass 327—Com v Burke, 159 N E 2d 856, 339 Mass 521, 77 A L R 2d 451

N C—State v Porth, 153 S E 2d 10, 269 N C 329

Pa—Com v McCarter, 122 A 2d 714, 385 Pa 236—Com v Littlejohn, 250 A 2d 811, 433 Pa 336

Correspondence

(1) Md—Corens v State, supra, n 40

55. Ill—People v Branion, 265 N E 2d 1, 47 Ill 2d 70, cert den 91 S Ct 2213, 403 U S 907 29 L Ed 2d 683

Ky—Cawthorn v Com, 189 S W 2d 970, 300 Ky 641

La—State v Flood, 301 So 2d 637, cert den 95 S Ct 1577, 421 U S 916, 43 L Ed 2d 782

Md—Corens v State, supra, n 40

Mo—C.J.S cited in State v Ferguson, 182 S W 2d 38 42, 353 Mo 46

Or—C.J.S cited in State v Flett, 380 P 2d 634, 636, 234 Or 124, 94 A L R 2d 1082

Pa—Com v Littlejohn, 250 A 2d 811, 433 Pa 336

Tenn—C.J.S cited in Humphreys v State, 531 S W 2d 127, 138

Claim of accused that affair terminated as not rendering evidence inadmissible

Cal—People v Miller, 53 Cal Rptr 720, 245 C A 2d 112, cert gr 88 S Ct 460, 389 U S 968 19 L Ed 2d 459, cert dism 88 S Ct 2258, 392 U S 616, 20 L Ed 2d 1332

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56. Md—Corens v State, supra, n 40

Mass—Com v Burke, 159 N E 2d 856, 339 Mass 521, 77 A L R 2d 451

57. Ill—People v Provo, 97 N E 2d 802, 409 Ill 63

N C—State v Phillips, 41 S E 2d 766, 227 N C 277

Evidence held inadmissible

(1) Other matters

Mass—Com v Burke, 159 N E 2d 856, 339 Mass 521, 77 A L R 2d 451

§ 230. —— Unlawful Relations with Deceased's Spouse

59. Ala—Williams v State, 51 So 2d 250, 255 Ala 229—Powell v State, 100 So 2d 38, 39 Ala App 246 cert den 100 So 2d 46, 267 Ala 100

Idaho—State v Newman, 214 P 2d 159, 70 Idaho 184

La—State v Leming, 46 So 2d 262, 217 La 257

N Y—People v Pobliner, 298 N E 2d 637, 32 N Y 2d 356, 345 N Y S 2d 482, cert den 94 S Ct 1609, 416 U S 905, 40 L Ed 2d 110

60 Ala—Bailey v State, 123 So 2d 304, 41 Ala App 39, cert den 123 So 2d 310, 271 Ala 696

Ark—Mode v State, 350 S W 2d 675, 234 Ark 46, cert den 82 S Ct 1255 370 U S 909, 8 L Ed 2d 403

Mich—People v Johnson 179 N W 2d 658, 24 Mich App 1

N C—State v Needham 71 S E 2d 29, 235 N C 555

Or—State v Brown, 475 P 2d 973, 4 Or App 219

S C—State v Chasteen 88 S F 2d 880, 228 S C 88

W Va—State v Bailey, 155 S E 2d 850, 151 W Va 796

64 Ark—Mode v State, 350 S W 2d 675, 234 Ark 46 cert den 82 S Ct 1225, 370 U S 909, 8 L Ed 2d 403

69 Md—Nickerson v State App 325 A 2d 149

§ 231. —— Jealousy and Unrequited Love

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71. Ala—C.J S quoted in Senn v State, 43 So 2d 540, 543 35 Ala App 62

Pa—Com v Bederka 331 A 2d 181, 459 Pa 653

72 Ky—Hollon v Com, 325 S W 2d 340

73. Ala—Spain v State 68 So 2d 53 37 Ala App 311, cert den 68 So 2d 58 259 Ala 606—Hurst v State, Cr 307 So 2d 62, 54 Ala App 254 cert den 307 So 2d 73 293 Ala 548

Ga—Kelley v State 105 S E 2d 798, 98 Ga App 324

Ky—Riley v Com 183 S W 2d 958, 298 Ky 687

La—State v Winstead, 15 So 2d 793, 204 La 366

Evidence held inadmissible

Ohio—State v Young 220 N E 2d 146 7 Ohio App 2d 194

78. Mo—State v Whipkey 215 S W 2d 492 358 Mo 563

80. Iowa—State v Stump, 119 N W 2d 210, 254 Iowa 1181, cert den 84 S Ct 113, 375 U S 853 11 L Ed 2d 80

85 Colo—Honda v People, 141 P 2d 178, 111 Colo 279

§ 232. —— Pecuniary Motive or Hope of Gain in General

88. Ala—Willis v State, 66 So 2d 753, 37 Ala App 185 cert den 66 So 2d 756, 259 Ala 500

Cal—People v Miller, 53 Cal Rptr 720, 245 C A 2d 112, cert gr 88 S Ct 460, 389 U S 968, 19 L Ed 2d 459, cert dism 88 S Ct 2258, 392 U S 616, 20 L Ed 2d 1332

Miss—C.J S cited in Pendergraft v State, 191 So 2d 830, 837, app after remand 213 So 2d 360, app dism 89 S Ct 1453, 394 U S 715 22 L Ed 2d 671 reh den 89 S Ct 1993, 395 U S 941, 23 L Ed 2d 459

Mo—C J S cited in State v Holland, supra n 47

Or—State v Sack, 300 P 2d 427, 210 Or 552, app dism and cert den 77 S Ct 1048, 353 U S 962, 1 L Ed 2d 912

Evidence of particular facts

(5) Other facts—State v Rogers, 116 A 2d 37, 19 N J 218

More than poverty required to tie accused to criminal milieu

N J—State v Mathis 221 A 2d 529, 47 N J 455, app after remand 245 A 2d 20, 52 N J 238, revd on oth grds 91 S Ct 2277, 403 U S 946, 29 L Ed 2d 855

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90. Fla—McVeigh v State, 73 So 2d 694, app dism 75 S Ct 210, 348 U S 885, 99 L Ed 696

Creditor-debtor relation between deceased and accused

N J—State v Mathis, 221 A 2d 529, 47 N J 455, app after remand 245 A 2d 20, 52 N J 238, revd on oth grds 91 S Ct 2277, 403 U S 946, 29 L Ed 2d 855

91. Colo—Wooley v People, 367 P 2d 903, 148 Colo 392

§ 233. —— Robbery

93. Ariz—State v Collins, 528 P 2d 829, 111 Ariz 303

Cal—People v Chapman, 67 Cal Rptr 601, 261 C A 2d 149

Ga—Whippler v State, 126 S E 2d 744, 218 Ga 198 cert den 84 S Ct 446, 375 U S 960, 11 L Ed 2d 318

La—State v Hudson, 221 So 2d 484, 253 La 992, cert dism 91 S Ct 2273, 403 U S 949, 29 L Ed 2d 855, revd on oth grds 91 S Ct 2282 403 U S 946, 29 L Ed 2d 856 on remand 257 So 2d 135, 260 La 644

Md—Gross v State 201 A 2d 808, 235 Md 429

Okl—Fields v State, Cr, 322 P 2d 431

Tex—Brown v State, Cr, 475 S W 2d 938

Financial condition of accused

(1) La—State v Robertson, App 1 Cir, 441 So 2d 1281, writ den 446 So 2d 314

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96 Ala—Flanigan v State, 25 So 2d 685, 247 Ala 642

98 Ill—People v McKee, 235 N E 2d 625 39 Ill 2d 265

1 Md—Gross v State, 201 A 2d 808, 235 Md 429

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8 Wash—State v Hein, 201 P 2d 691, 32 Wash 2d 315

§ 234. —— Obtainment of Property by Grant, Devise, or Descent

13 Mo—C J S cited in State v Ferguson 182 S W 2d 38, 42 353 Mo 46

19 Miss—Pendergraft v State 213 So 2d 560, app dism 89 S Ct 1453, 394 U S 715, 22 L Ed 2d 671, reh den 89 S Ct 1993, 375 U S 941 23 L Ed 2d 459

20. Cal—People v Goedecke, 56 Cal Rptr 625, 423 P 2d 777, 65 C 2d 850, 22 A L R 3d 1213

Accused's wife as heir

Ga—Roger v State, 162 S E 2d 411, 224 Ga 436

§ 235. —— Obtaining of Proceeds of Life Insurance

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25. Ga—Spencer v State, 203 S E 2d 856, 231 Ga 705

Mo—C.J S cited in State v Ferguson, 182 S W 2d 38, 42, 353 Mo 46—C J.S cited in State v Elgin, 391 S W 2d 341, 345

Pa—Com v Boden, 159 A 2d 894, 399 Pa 298, 88 A L R 2d 223, cert den 81 S Ct 89, 364 U S 846, 5 L Ed 2d 70—Com v Riley, 326 A 2d 384, 458 Pa 390

Testimony prejudicial

Fla —Evans v State, App 2 Dist, 432 So 2d 584

26. Ill —People v Coleman, 276 N E 2d 721, 49 Ill 2d 565

Wash —State v Crudup, 524 P 2d 479, 11 Wash App 583

Policy admissible

(1) Fry v State, 147 P 2d 803, 78 Okl Cr 299

Time of purchase

Ark —Nelson v State, 513 S W 2d 496, 257 Ark 1

Tex —Jones v State, 243 S W 2d 848, 156 Tex Cr R 475

27. Cal —C.J.S. cited in People v Goedecke, 56 Cal Rptr 625, 632, 423 P 2d 777, 65 C 2d 850, 22 A L R 3d 1213

Ill —C.J.S cited in People v Gougas, 102 N E 2d 152, 154, 410 Ill 235, 28 A L R 2d 852

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29. Knowledge of double indemnity clause

Cal —People v Miller, 53 Cal Rptr 720, 245 C A 2d 112, cert gr 88 S Ct 460, 389 U S 968, 19 L Ed 2d 459, cert dism 88 S Ct 2258, 392 U S 616, 20 L Ed 2d 1332

31. Cal —State v Crudup, 524 P 2d 479, 11 Wash App 583

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§ 236. Threats by Accused

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42. Cal —People v Goldbach, App, 103 Cal Rptr 800, 27 C A 3d 563

Conn —State v Penn, 127 A 2d 833, 144 Conn 148

Del —Hutchins v State, 153 A 2d 204, 2 Storey 98

Ky —Hollon v Com, 325 S W 2d 340

La —State v Winstead, 15 So 2d 793, 204 La 366

Me —State v Doyon, 221 A 2d 827

Miss —Thurmond v State, 53 So 2d 44, 212 Miss 36

N J —State v Slobodian, 293 A 2d 399, 120 N J Super 68

N C —State v Thompson, 215 S E 2d 371, 26 N C App 171

S C —State v Alford, 212 S E 2d 252 264 S C 26

Threats must be heard or witnessed

Mass —Com v DelValle, 221 N E 2d 922, 351 Mass 489, app after remand 234 N E 2d 721, 353 Mass 684

Threat held not shown

Ill —People v Smith, 254 N E 2d 596, 118 Ill App 2d 65

Nev —Marquette v State, 541 P 2d 1099, 91 Nev 696

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44. Va —Newberry v Com, 61 S E 2d 318, 191 Va 445

Wis —Kasseta v State, 215 N W 2d 412, 62 Wis 2d 564

45. Ky —Richie v Com, 242 S W 2d 1000

46. Cal —People v Merkouris, 297 P 2d 999, 46 C 2d 540

Wyo —Lonquest v State, 495 P 2d 575 Cert den 93 S Ct 432, 409 U S 1006 34 L Ed 2d 299

48. La —State v Winstead, supra, n 42

56. U S.—U.S v Reid, D C La, 49 F Supp 313, affd, C C A, 136 F 2d 476, cert den 64 S Ct 87, 320 U S 775, 88 L Ed 465, reh den 64 S Ct 156, 320 U S 813, 88 L Ed 491—U S v Stepp, D C Colo, 144 F Supp. 826

57. Miss —C.J.S. cited in Sharplin v State, Miss, 330 So 2d 591, 595, app after remand, 357 So 2d 940

§ 237. Threats by Person Killed or Assaulted

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72. Ala —McCaghren v State, Cr, 294 So 2d 756, reversed 294 So 2d 766, 292 Ala 378

La —State v Winstead, supra, n 42

Refusal proper

Ala —Steele v State, Cr, 323 So 2d 721, 56 Ala App 539, cert den 323 So 2d 726, 295 Ala 423

73. La —State v Houston, 316 So 2d 724

§ 238. Threats by or against Third Person

74. Mich —People v Ake, 106 N W 2d 800, 362 Mich 134

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82 La —State v Burkhalter, 319 So 2d 392

35. Neb —Hampton v State, 28 N W 2d 322, 148 Neb 574

Ohio—C J S. cited in State v Moore, 78 N E 2d 365, 367

86. Ala —Martz v State, Cr, 290 So 2d 661, 52 Ala App 200, writ den 290 So 2d 665, 292 Ala 731

87. Neb —Hampton v State, supra, n 85

Tenn —C J S cited in Long v State, 304 S W 2d 492, 497, 202 Tenn 373

Miss —Russell v State, 51 So 2d 199

89 Ill —People v Allen, 341 N E 2d 431, 35 Ill App 3d 342

Va —Boggs v Com, 100 S E 2d 766, 199 Va 478

When admissible

(2) Other cases

S C —State v Alford 212 S E 2d 252, 264 S C 26

91. La —State v Rone 62 So 2d 114, 222 La 99

92. Okl —Holman v State, 262 P 2d 456, 97 Okl Cr 279

Tenn —State v Jones, 385 S W 2d 80, 215 Tenn 206

93 Okl —Gatewood v State, 157 P 2d 473, 80 Okl Cr 135

§ 239. Preparations and Previous Attempts

96 Ala —Williams v State, 51 So 2d 250, 255 Ala 229—McGuff v State, Cr, 268 So 2d 868 49 Ala App 88, cert den 268 So 2d 877 289 Ala 746

Ga —Allanson v State, 221 S E 2d 3, 235 Ga 584, cert den 96 S Ct 1670, 425 U S 937, 48 L Ed 2d 178

Mo —State v Kerr, App, 531 S W 2d 536

N Y —C J S cited in People v Taylor, 427 N Y S 2d 439, 440, 74 A D 2d 177

99. Ala —Payne v State, 74 So 2d 630, 261 Ala 397

Ky —Tarrence v Com, 265 S W 2d 40, cert den 75 S Ct 220, first case, 348 U S 899, 99 L Ed 706

Md —Hayes v State, 237 A 2d 531, 3 Md App 4

Wash —State v Thomas, 364 P 2d 930, 58 Wash 2d 746

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13. Ala —Tillman v State, Cr, 291 So 2d 373, 52 Ala App 282

§ 240. Antecedent Circumstances

14. Ala —Arnold v State, 279 So 2d 130, 291 Ala 149, app after remand 296 So 2d 796, 52 Ala App 702

Ark —Wooten v State, 249 S W 2d 968, 220 Ark 755

Cal —People v Buckowski, 233 P 2d 912, 37 C 2d 629, cert den 72 S Ct 369, 342 U S 928, 96 L Ed 2d 692—People v Dorsey, 75 Cal Rptr 658, 270 C A 2d 423

Del —Herhal v State, 243 A 2d 703, app after remand 283 A 2d 482

Fla —Coker v State, App, 212 So 2d 648—Walter v State, App, 272 So 2d 180

Ga —Booth v State, 32 S E 2d 303, 198 Ga 648—Hewitt v State, 193 S E 2d 47, 127 Ga App 180

Ky —Friley v Com, 255 S W 2d 483

Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

Mo —State v Stringer, 211 S W 2d 925, 357 Mo 978—State v Bell, 223 S W 2d 469, 359 Mo 785

Nev —State v Fitch, 200 P 2d 991, 65 Nev 668

N J —State v De Paola, 73 A 2d 564, 5 N J 1

N C —State v Faust, 118 S E 2d 769, 254 N C 101, 96 A L R 2d 1422, cert den 82 S Ct 85, 368 U S 851, 7 L Ed 2d 49—State v Doss, 183 S E 2d 671, 279 N C 413, vac in part on oth grds 92 S Ct 2875, 408 U S 939, 33 L Ed 2d 762, mand conf to 191 S E 2d 70, 281 N C 751

Or —State v Long, 244 P 2d 1033, 195 Or 81—State v Hollingsworth 465 P 2d 490, 2 Or App 186

Pa —Com v Cave, 281 A 2d 733, 219 Pa.Super 512—Com v Skufca, 321 A 2d 889, 457 Pa 124, app dism 95 S Ct 510, 419 U S 1028, 42 L Ed 2d 304

Tex —Scott v State, 100 S W 2d 828, 149 Tex Cr R 4—Gamble v State, 193 S W 2d 680, 149 Tex Cr R 282—Crenshaw v State, 208 S W 2d 647, 151 Tex Cr R 467

Wash —State v Canaday, 488 P 2d 1064, 79 Wash 2d 647, vac in part on oth grds 92 S Ct 2878, 408 U S 940, 33 L Ed 2d 764

W Va —State v Peterson, 51 S E 2d 78, 132 W Va 99

Evidence held admissible

(1) U S —U S v Puff, C A N Y, 211 F 2d 171, cert den 74 S Ct 713 347 U S 963, 98 L Ed 1106, reh den 74 S Ct 876, 347 U S 1022, 98 L Ed 1142, reh den 75 S Ct 20, 348 U S 853, 99 L Ed 672

Ala - Danley v State, 41 So 2d 414, 34 Ala App 412, cert den 41 So 2d 417, 252 Ala 420—Morris v State 104 So 2d 810, 268 Ala 60—Duff v State, 111 So 2d 621, 40 Ala App 80, cert den 111 So 2d 627, 269 Ala 696

Ark —Rand v State, 341 S W 2d 9, 232 Ark 909—Connelly v State, 350 S W 2d 298, 233 Ark 826, 234 Ark 143

Cal —People v McMonigle, 177 P 2d 745, 29 Cal 2d 730—People v Matlock, 336 P 2d 505, 51 C 2d 682, 71 A L R 2d 605—People v Williams, 19 Cal Rptr 743, 200 C A 2d 838

Conn —State v Tillman, 202 A 2d 494, 152 Conn 15

D C —Morton v U S, 183 F 2d 844, 87 U S App D C 135

Fla —Kellogg v State, App, 219 So 2d 745

Ga —Fuller v State, 26 S E 2d 281, 196 Ga 237—Lewis v State, 27 S E 2d 659, 196 Ga 755—Rozier v State 29 S E 2d 602, 197 Ga 420—Ledford v State, 80 S E 2d 828, 89 Ga App 683—Crawford v State, 84 S E 2d 354, 211 Ga 166—Bowen v State, 169 S E 2d 322, 225 Ga 423

Ill —Abernathy v People, 259 N E 2d 363, 123 Ill App 2d 263

Ind —Pirtle v State 323 N E 2d 634, 263 Ind 16

Me —State v Wallace, 333 A 2d 72

Md —Johnson v State, 244 A 2d 632, 4 Md App 648

Mass —Com v Welansky, 55 N E 2d 902, 316 Mass 383—Com v Makarewicz, 132 N E 2d 294, 333 Mass 575—Com v Russell, 311 N E 2d 581 2 Mass App 293

Mich —People v Van Camp, 97 N W 2d 726, 356 Mich 593—People v Van Epps, 229 N W 2d 414, 59 Mich App 277

Mo —State v Mills, 179 S W 2d 95, 352 Mo 774—State v Winn, 324 S W 2d 637—State v Davis, 400 S W 2d 141, cert den 87 S Ct 142, 385 U S 872, 17 L Ed 2d 99

Neb —Hampton v State, 28 N W 2d 322, 148 Neb 574

N J —State v Ernst, 161 A 2d 511, 32 N J 567, cert den 81 S Ct 464, 364 U S 943, 5 L Ed 2d 374

N C —State v Moore, 171 S E 2d 453, 276 N C 142

Or —State v Brewton, 344 P 2d 744, 220 Or 266

Pa —Com v Boden, 159 A 2d 894—Com v Myers, 266 A 2d 756, 439 Pa 381

S C —State v Britt, 117 S E 2d 379, 237 S C 293, cert den 81 S Ct 1040, 365 U S 886, 6 L Ed 2d 197—State v Anderson, 169 S E 2d 706, 253 S C 168,

cert den 90 S Ct 386, 396 U S 948, 24 L Ed 2d 253, cert den 90 S Ct 971, 397 U S 958, 25 L Ed 2d 143, reh den 90 S Ct 1268, 397 U S 1031, 25 L Ed 2d 545

Tex —Murphy v State, 198 S W 2d 98, 149 Tex Cr R 624—Newton v State, 202 S W 2d 921, 150 Tex Cr R 500—Witty v State, 203 S W 2d 212, 150 Tex Cr R 555

Wyo —State v Kump, 301 P 2d 808, 76 Wyo 273

(3) Ala —Smith v State, 43 So 2d 821, 253 Ala 220

D C —Turbeville v U S, C A, 303 F 2d 411, 112 U S App D C 400, cert den 82 S Ct 1596, two cases, 370 U S 946, 8 L Ed 2d 813, and 82 S Ct 1607, 370 U S 946, 8 L Ed 2d 813

Ga —Harris v State, 40 S E 2d 664, 74 Ga App 614

Md —Howard v State, 199 A 2d 611, 234 Md 410

Ohio—State v Hymore, 224 N E 2d 126, 9 Ohio St 2d 122, cert den 88 S Ct 1409, 390 U S 1024 20 L Ed 2d 281

Va —Rees v Com, 127 S E 2d 406, 203 Va 850, cert den 83 S Ct 1088, 372 U S 964, 10 L Ed 2d 128, reh den 83 S Ct 1533, 373 U S 947, 10 L Ed 2d 702

(4) Mo —State v Fisher, 302 S W 2d 902

State of mind

(1) Ga —Shellman v State 112 S E 2d 267, 100 Ga App 663

Ky —Adkins v Com, 191 S W 2d 935, 301 Ky 384

Miss —Phillips v State, 183 So 2d 908

Tex —Flores v State, Cr, 491 S W 2d 144

Wis —Kaneta v State, 215 N W 2d 412, 62 Wis 2d 564

Sexual advances

Tex —Anderson v State, Cr, 479 S W 2d 57

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15. Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

Neb —State v Crawford, 196 N W 2d 915, 188 Neb 378

N D —State v Maresch, 27 N W 2d 1, 75 N D 229

Tex —Flores v State, Cr, 491 S W 2d 144

16. Ala —Chappelle v State, 99 So 2d 431, 267 Ala 37

N C —State v Moore, 166 S E 2d 652, 275 N C 198, app after remand 171 S E 2d 453, 276 N C 142—State v McGhee, 193 S E 2d 446, 16 N C App 702, cert den 194 S E 2d 154, 282 N C 674

Pa —Com v Wentzel, 61 A 2d 309, 360 Pa 137

S C —State v Bush, 45 S E 2d 847 211 S C 455

Tex —Perez v State, Cr, 491 S W 2d 672

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17. Ala —Chaney v State, supra, n 14

Ky —Albertson v Com, 214 S W 2d 394, 308 Ky 294—Layne v Com, 254 S W 2d 724

N C —State v Phillips, 138 S E 2d 626, 262 N C 723

20. Mo —State v Francies, 295 S W 2d 8—State v Lunsford, 338 S W 2d 868

Or —State v Broadhurst, 196 P 2d 407, 184 Or 178, cert den 69 S Ct 1046, 337 U S 906 93 L Ed 1718

22. Mich —People v Hill, 177 N W 2d 220, 22 Mich App 91, remd 262 N W 2d 641, 402 Mich 272

Miss —Murphy v State, 99 So 2d 595, 232 Miss 424

Neb —Grandsinger v State, 73 N W 2d 632, 161 Neb 419, cert den 77 S Ct 104

23. Kan —State v Cushinberry, 304 P 2d 561, 180 Kan 448

Okl —Dodson v State, Cr, 284 P 2d 437

Tex —Jennings v State, Cr, 367 S W 2d 670, app dism and cert den 84 S Ct 453, 375 U S 398, 11 L Ed 2d 412

25. Evidence held admissible

(1) Ky —Asher v Com, 275 S W 2d 416

(4) Other evidence

N M —State v Smith, 216 P 2d 921, 54 N M 170

26. Prior child abuse

Ill —People v Sexton, 334 N E 2d 107, 31 Ill App 3d 593

28. Ala —Crook v State, 160 So 2d 884, 42 Ala App 270, revd on oth grds 160 So 2d 896, 276 Ala 268, cert den 160 So 2d 897, 276 Ala 702

Cal —People v Avery, 218 P 2d 527, 35 Cal 2d 487—People v Armstrong, 235 P 2d 242, 106 C A 2d 490—People v Chand, 253 P 2d 499, 116 C A 2d 242—People v Hillman, 295 P 2d 939

D C —U S v White, D C, 225 F Supp 514, remd, C A, 349 F 2d 965, 121 U S App D C 287

Fla —Boyd v State, App, 162 So 2d 271

Ky —Roberts v Com, 191 S W 2d 242, 301 Ky 294—Shearer v Com, 194 S W 2d 494, 302 Ky 250

La —State v Walker, 15 So 2d 874, 204 La 523—State v Rollins, 271 So 2d 519, 264 La 274

Mo —State v Gibson, 502 S W 2d 310

Neb —Parker v State, 83 N W 2d 347, 164 Neb 614 cert den 78 S Ct 775 356 U S 933, 2 L Ed 2d 763

N J —State v Sturdivant, 155 A 2d 771 31 N J 165, cert den 80 S Ct 873 362 U S 956 4 L Ed 2d 873

N Y —People v Feldman 85 N E 2d 913 299 N Y 153

Okl —Gatewood v State 157 P 2d 473, 80 Okl Cr 135

Or —State v Flett, 380 P 2d 634, 234 Or 124, 94 A L R 2d 1082

S C —State v Bush, supra n 16

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Wash —State v Summers, 375 P 2d 143 60 Wash 2d 702—State v Golladay 470 P 2d 191 78 Wash 2d 121

W Va —State v Hamric 151 S E 2d 252 151 W Va 1

Particular evidence held inadmissible or properly excluded

(12) Other evidence

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Ark —Rand v State, 341 S W 2d 9 232 Ark 909

Mass —Com v Makarewicz 132 N E 2d 294 333 Mass 575

Miss —Shinall v State 199 So 2d 251 cert den 88 S Ct 590 389 U S 1014 19 L Ed 2d 660

Neb —Edmonds v State 79 N W 2d 453 163 Neb 323

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29. Tex —Cadenhead v State Cr 369 S W 2d 44

30. Ala —Ward v State, 44 Ala App 229 206 So 2d 897, certiorari denied 206 So 2d 922, 281 Ala 650

N C —State v Brice, 193 S E 2d 299 17 N C App 189 cert den 195 S E 2d 690, 283 N C 258

Tex —Dinklage v State, 185 S W 2d 573 148 Tex Cr 123—Moses v State, 328 S W 2d 885, 168 Tex Cr R 409 cert den 80 S Ct 882 362 U S 966, 4 L Ed 2d 879

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31 Or —State v Flett 380 P 2d 634, 234 Or 124 94 A L R 2d 1082

33 Ga —McKeever v State, 163 S E 2d 919, 118 Ga App 386

Miss —Lee v State, 83 So 2d 818, 226 Miss 276

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(2) Other matters

Va —Boggs v Com, 100 S E 2d 766 199 Va 478

35. Ill —People v Smith, 254 N E 2d 596, 118 Ill App 2d 65

N M —State v Duran, App, 496 P 2d 1096 83 N M 700, cert den 496 P 2d 1095, 83 N M 699

40. Ala —Carlisle v State, 58 So 2d 638 36 Ala App 241, cert den 58 So 2d 641, 257 Ala 282

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41 La —State v Sneed, 328 So 2d 126

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(1) Simmons v State, 26 S E 2d 785, 196 Ga 395

(7) N J —State v Rios, 112 A 2d 247, 17 N J 572

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Cal —People v Cartier, 5 Cal Rptr 573, 353 P 2d 53, 54 C 2d 300—People v Aikin, 97 Cal Rptr 251 19 C A 3d 685

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Iowa —C J S cited in State v Kellogg, 263 N W 2d 539, 542

Kan —State v Parker, 276 P 2d 317, 177 Kan 39

Ky —Bradley v Com, 205 S W 2d 685, 305 Ky 781

La —State v Winstead 15 So 2d 793 204 La 366

Md —Wiggins v State, 261 A 2d 503 8 Md App 598

Mass —Com v Baker, 190 N E 2d 555, 346 Mass 107

Miss —C J S, cited in Rucker v State, 158 So 2d 39, 42, 248 Miss 65—Ladner v State, 197 So 2d 257—C J S cited in Washington v State, Miss, 307 So 2d 430, 432

N H —State v Lavallee, 189 A 2d 475, 104 N H 443

S C —State v Williams, 72 S E 2d 830, 222 S C 354

Tex —Brinkley v State, 277 S W 2d 704, 161 Tex Cr R 413 cert den 76 S Ct 310 350 U S 938, 100 L Ed 819, reh den 76 S Ct 441 350 U S 977 100 L Ed 847, err den 76 S Ct 550 350 U S 992, 100 L Ed 857 reh den 76 S Ct 785, 351 U S 928 100 L Ed 1458—Fleming v State, 360 S W 2d 153 172 Tex Cr R 520

Utah—State v Warwick, 355 P 2d 703, 11 Utah2d 116

Va —Crockett v Com, 47 S E 2d 377, 187 Va 687

As showing state of mind

(2) Other instances

Tex —Smith v State, Cr, 502 S W 2d 814

On behalf of defense

La —State v Domino App 1 Cir, 444 So 2d 268

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48 La —State v Winstead, supra n 47

N M —State v Smith, supra n 25

49 Ala —Foreman v State, Cr, 278 So 2d 238 50 Ala App 236

50. Ala —Wright v State, 188 So 2d 272, 279 Ala 543

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53 Ala —Campbell v State, 27 So 2d 220, 32 Ala App 461—Brown v State, 112 So 2d 40 Ala App 226 cert stricken 112 So 2d 504, 268 Ala 180

Ky —Bolen v Com, 252 S W 2d 423

54. Ala —McGraw v State, 84 So 2d 773 38 Ala App 215, cert den 84 So 2d 777, 264 Ala 698

Ark —Ramick v State, 208 S W 2d 3, 212 Ark 700

Ky —Bales v Com 231 S W 2d 61, 313 Ky 272

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Ohio—C J S cited in State v Moore, 78 N E 2d 365, 367

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55. Fla —Skipper v State, App, 319 So 2d 634

57. Ala —Williams v State, 47 So 2d 417, 254 Ala 94

58. Ala —McCaghren v State, Cr, 294 So 2d 756, reversed 294 So 2d 766, 292 Ala 378

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62. Ala —Adams v State, 29 So 2d 148, 32 Ala App 626—Wright v State, 39 So 2d 395—Alberson v State, 47 So 2d 182, 254 Ala 87

Ky —Jackson v Com, 192 S W 2d 480, 301 Ky 562

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S C —State v Peterson, 180 S E 2d 341, 255 S C 579, cert den 92 S Ct 159, 404 U S 860, 30 L Ed 2d 102

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63. Illustrating acts

(2) Other cases

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64. Kan —State v Gray, 369 P 2d 330, 189 Kan 398

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66. Ala —Cain v State, 35 So 2d 574, 33 Ala App 594—Smith v State, Cr, 230 So 2d 536, 45 Ala App 346

Cal —People v Duncan, 164 P 2d 313, 72 Cal App 2d 247—People v McNeal, 325 P 2d 166, 160 C A 2d 446—People v Lewis, 344 P 2d 861 174 C A 2d 281—People v Bufarale, 14 Cal Rptr 381, 193 C A 2d 551

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67 Ga —Van Cannon v State, 68 S E 2d 586 208 Ga 608

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Ark —Wooten v State, 249 S W 2d 968, 220 Ark 755—Tillman v State, 307 S W 2d 886, 223 Ark 433—Ederington v State, 428 S W 2d 271, 244 Ark 1096

Cal —People v Armstrong, supra, n 28—People v Amaya, 251 P 2d 324, 40 C 2d 70

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La —State v Faciane, 99 So 2d 33, 233 La 1028

Md —Gross v State, 201 A 2d 808, 235 Md 429

Mo —C.J.S. cited in State v Whipkey, supra, n 67

Nev —State v Fitch, 200 P 2d 991, 65 Nev 668

N J —State v Butler, 160 A 2d 8, 32 N J 166, cert den 80 S Ct 1074, 362 U S 984, 4 L Ed 2d 1019—State v Baldwin, 221 A 2d 199 47 N J 379, cert den 87 S Ct 527 385 U S 980, 17 L Ed 2d 442

S C —State v Anderson, 169 S E 2d 706, 253 S C 168, cert den 90 S Ct 386, 396 U S 948, 24 L Ed 2d 253, cert den 90 S Ct 971, 397 U S 958, 25 L Ed 2d 143, reh den 90 S Ct 1268, 397 U S 1031, 25 L Ed 2d 545

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Conversation immediately before, etc.

Ala —Johnson v State, 91 So 2d 476, 265 Ala 360

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69. Okl —Lowrey v State, 197 P 2d 637, 87 Okl Cr 313

Tex —Bell v State, Cr, 442 S W 2d 716

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(1) S C —State v Anderson, 169 S E 2d 706 253 S C 168, cert den 90 S Ct 386 396 U S 948, 24 L Ed 2d 253, cert den 90 S Ct 971, 397 U S 958, 25 L Ed 2d 143 reh den 90 S Ct 1268 397 U S 1031, 25 L Ed 2d 545

(2) Ala —Johnson v State, 91 So 2d 476, 265 Ala 360

70. Ala —Smarr v State supra, n 68—Golden v State, 103 So 2d 52, 39 Ala App 361 cert den 103 So 2d 62, 267 Ala 456—Espey v State 120 So 2d 904, 270 Ala 669

76 Ala —Smarr v State, supra n 68

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S C —State v Swilling 142 S E 2d 864, 246 S C 144

79. Mo —State v Cavener 202 S W 2d 869

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Ala —Lovell v State Cr 284 So 2d 741, 51 Ala App 286

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82. Ala —Harbin v State, App 82 So 2d 565 38 Ala App 251, cert den 82 So 2d 569, 263 Ala 699—Lovell v State, Cr, 284 So 2d 741, 51 Ala App 286

Cal —People v Purvis, 13 Cal Rptr 801, 362 P 2d 713, 56 C 2d 93

D C —U S v Hardin, C A, 443 F 2d 735 143 U S App D C 320—U S v Brown C A, 490 F 2d 758 160 U S App D C 190

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(1) N Y —People v Trudeau 228 N Y S 2d 785, 16 A D 2d 886

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(3) Other statements —Campbell v Superintendent Virginia State Penitentiary, D C Va, 386 F Supp 778, affd C A, 539 F 2d 705, cert den 97 S Ct 791 429 U S 1064, 50 L Ed 2d 781

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(2) Other cases

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Tenn —Nichols v State, 289 S W 2d 849, 200 Tenn 65

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(1) Wash —State v Payne, 171 P 2d 227, adhered to 175 P 2d 494, 25 Wash 2d 407

83 Ill —People v Perry, 318 N E 2d 17, 22 Ill App 3d 738

Nev —Bails v State, 545 P 2d 1155, 92 Nev 95

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86 Cal —People v Arguello, 56 Cal Rptr 274, 423 P 2d 202, 65 C 2d 768

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Okl —Sallee v State, Cr, 544 P 2d 902

87. Cal —C J S quoted at length in People v Feasby, 3 Cal Rptr 230, 237, 178 C A 2d 723—People v Salcido 54 Cal Rptr 820, 246 C A 2d 450, app after remand 69 Cal Rptr 193, 263 C A 2d 1, cert den 89 S Ct 902, 393 U S 1102, 21 L Ed 2d 795

Idaho—State v Radabaugh, 471 P 2d 582, 93 Idaho 727

Minn —State v Thurston 216 N W 2d 267, 299 Minn 30

N C —State v Jarrette, 202 S E 2d 721, 284 N C 625, vac in part 96 S Ct 3205, 428 U S 903 49 L E 2d 1206

Pa —Com v Sutton, 49 Del 11, revd on oth grds 176 A 2d 679, 406 Pa 121

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Cal —People v Finch, 29 Cal Rptr 420, 213 C A 2d 752

(2) Other matters

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Ky —Carnes v Com 453 S W 2d 595

Mass —Com v Lowe, 461 N E 2d 192, 391 Mass 97, cert den 105 S Ct 143, 83 L Ed 2d 82

Okl —Dandridge v State, Cr, 519 P 2d 529—Sallee v State, Cr, 544 P 2d 902

Or —State v Shirley, 488 P 2d 1401, 7 Or App 166

Wyo —Alcala v State, 487 P 2d 448, cert den 92 S Ct 1259 405 U S 997, 31 L Ed 2d 466, reh den 92 S Ct 1613, 406 U S 911, 31 L Ed 2d 823

88. Cal —People v Armstrong, supra, n 28—People v Matlock, 336 P 2d 505, 51 C 2d 682 71 A L R 2d 605

Okl —Lowrey v State, supra n 69

Wash —State v Bauers, 172 P 2d 279, 25 Wash 2d 825

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(2) Other matters

Cal —People v Finch, 29 Cal Rptr 420, 213 C A 2d 752—People v Spencer, 80 Cal Rptr 99, 458 P 2d 43, 71 C 2d 933

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89. N J —State v Baldwin, 221 A 2d 199, 47 N J 379, cert den 87 S Ct 527, 385 U S 980, 17 L Ed 2d 442

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93. To show killing was intentional
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94. Ky—Bradley v Com, supra, n 47
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Wash—State v Nelson, 396 P 2d 540, 65 Wash 2d 189

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(3) Other cases—Bangren v. State, 22 So.2d 360, 198 Miss 359

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(1) U S.—Government of Virgin Islands v Torres, C.A Virgin Islands, 476 F 2d 486.
(2) Com v. Brooks, 50 A 2d 325, 355 Pa 551
(11) Ala—Petty v. State, 110 So 2d 319, 40 Ala App 151, cert den 110 So.2d 325, 269 Ala 48
Ariz—State v Swafford, 520 P 2d 1151, 21 Ariz App 474
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99. N C—State v Woods, 213 S E 2d 214, 286 N C 612, vac in part on oth grds 96 S Ct 3207, 428 U S 903, 49 L Ed.2d 1208

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30 C J p 201 note 41[g]

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2. Ind—Webb v State, 140 N E 2d 396, 236 Ind 498

3. Miss—Musselwhite v State, 54 So 2d 911, 212 Miss 526
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4. U S—U S v Slaughter, C A N C, 366 F 2d 833
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(2) Other statements
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7. Ala—Edwards v State, 96 So 2d 202, 39 Ala App 144
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8. Tex—Scott v State, 190 S W 2d 828, 149 Tex Cr R 4—Moore v. State, Cr, 380 S.W 2d 626

9. Ga—Lewis v State, 27 S E 2d 659, 196 Ga 755—Booth v State, 32 S E 2d 303, 198 Ga 648

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12. Ala—Johnson v State, 24 So 2d 17, 247 Ala 271—Pilley v State, 25 So 2d 57, 247 Ala 523
Ga—Smith v State, 27 S E 2d 369, 196 Ga 595.
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17. Ala—Adams v State, 29 So 2d 148, 32 Ala App 626—Dobbins v State, 149 So 2d 814, 274 Ala. 524

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23. Ind—Dickinson v State, 55 N E 2d 325, 222 Ind 551
Mo—State v Chevlin, 284 S W 2d 563
Nev—State v Fitch, 200 P 2d 991, 65 Nev 668
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25. Cal—People v Keelin, 289 P 2d 520, 136 C.A 2d 860, 56 A L R 2d 355

26. Ark—Covey v State, 334 S W 2d 648, 232 Ark 79
Cal—People v Salcido, 54 Cal Rptr 820, 246 C A 2d 450, app after remand 69 Cal Rptr 193, 263 C A 2d 1, cert den 89 S Ct 902, 393 U S 1102, 21 L Ed 2d 795

28. N C—State v Cauley, 94 S E 2d 915, 244 N C 701
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30. Cal—People v Fain, 345 P 2d 305, 174 C A 2d 856
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Fla—Mackiewicz v State, 114 So 2d 684, cert den 80 S Ct 883, 362 U S 965, 4 L Ed 2d 879, reh den 80 S Ct 1083, 362 U S 992, 4 L Ed 2d 1024
Ga—Booth v. State, 32 S E 2d 303, 198 Ga 648—Wooten v State, 160 S E 2d 403, 224 Ga 106
Ill—People v. Bassett, 307 N E 2d 359, 56 Ill 2d 285, app after remand, 367 N E 2d 543, 10 Ill Dec 155, 52 Ill App 320
Iowa—State v Anderson, 33 N W 2d 1, 239 Iowa 1118
Ky—Hoskins v. Com, 374 S W.2d 839
La—State v Winstead, 15 So 2d 793, 204 La 366—State v Dowdy, 47 So 2d 496, 217 La. 773, cert den 71 S Ct 75, 340 U S 856, 95 L Ed. 627
Md—Chisley v. State, 95 A.2d 577, 202 Md. 87
Mich—People v Van Camp, 97 N W.2d 726, 356 Mich 593.
Miss—Vassar v. State, 27 So 2d 541, 200 Miss. 412—Knight v State, 60 So.2d 638, 215 Miss. 251—Moore v. State, 237 So.2d 844.

Mo —State v Davis, 400 S W 2d 141, cert den 87 S Ct 142, 385 U S 872, 17 L Ed 2d 99—C.J.S. cited in State v Jones, 518 S W 2d 304, 309

N J —State v Grillo, 93 A 2d 328, 11 N J 173 cert den 73 S Ct 1123, 345 U S 976 97 L Ed 1391, and 73 S Ct 1123, 345 U S 976, 97 L Ed 1391

N C —State v Marsh, 66 S E 2d 684, 234 N C 101—State v Faust, 118 S E 2d 769, 254 N C 101, 96 A L R 2d 1422, cert den 82 S Ct 85, 368 U S 851, 7 L Ed 2d 49

Or —State v Broadhurst, 196 P 2d 407, 184 Or 178, cert den 69 S Ct 1046, 337 U S 906, 93 L Ed 1718

Tenn —Ford v State, 201 S W 2d 539, 184 Tenn 443

32. Ala —Higginbotham v State, 78 So 2d 637 262 Ala 236

Ky —Burton v Com, 217 S W 2d 627 309 Ky 282—Bircham v Com, 238 S W 2d 1008, app dism and cert den 72 S Ct 55, 342 U S 805, 96 L Ed 609

La —State v Blaton, 312 So 2d 329

Neb —Hampton v State, 28 N W 2d 322, 148 Neb 574

Nev —State v Fitch 200 P 2d 991, 65 Nev 668

Okl —Hathcox v State, 230 P 2d 927, 94 Okl Cr 110

Pa —Com v Foster, 72 A 2d 279, 364 Pa 288

Tex —Webster v State, Cr, 376 S W 2d 880

33 Ala —Spain v State, 68 So 2d 53 37 Ala App 311, cert den 68 So 2d 58, 259 Ala 606—Shiflett v State, 78 So 2d 805, 262 Ala 337—Brooks v State, Cr, 228 So 2d 24, 45 Ala App 196

Colo—Stafford v People 388 P 2d 774 154 Colo 113

Ga —Olds v State, 66 S E 2d 396, 84 Ga App 397

N J —State v Tansimore, 71 A 2d 169, 3 N J 516

Tex —Lee v State, 182 S W 2d 490, 147 Tex Cr R 548

Particular circumstances held inadmissible

(11) Cal —People v Jennings, 298 P 2d 56, 142 C A 2d 160

Ga —Wilson v State 95 S E 2d 733 94 Ga App 588

35 Cal —People v Ogg, 323 P 2d 117 159 C A 2d 38

Ga —Lewis v State, supra, n 9

Ill —People v O'Connell 228 N E 2d 154 84 Ill App 2d 184, cert den 88 S Ct 2042, 391 U S 969, 20 L Ed 2d 883

Mo —C J S cited in State v Jones, 518 S W 2d 304 309

Okl —Dodson v State, Cr, 284 P 2d 437

Or —State v Hansen, 244 P 2d 990, 195 Or 169

Tenn —Cooper v State, 356 S W 2d 405, 210 Tenn 63

Failure to cry

Ga —Allanson v State, 221 S E 2d 3 235 Ga 584 cert den 96 S Ct 1670, 425 U S 937, 48 L Ed 2d 178

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36. Del —Garner v State, 145 A 2d 68, 1 Storey 301

Mo —C.J.S. cited in State v Jones, 518 S W 2d 304, 309

37. Ala —Willingham v State, 74 So 2d 241, 261 Ala 454—Espey v State, 120 So 2d 904, 270 Ala 669

Cal —People v Scott, 1 Cal Rptr 600, 176 C A 2d 458 cert den and app dism 81 S Ct 245 364 U S 471, 5 L Ed 2d 222, reh den 81 S Ct 462, 364 U S 944, 5 L Ed 2d 376, cert den 82 S Ct 81, 368 U S 849, 7 L Ed 2d 47

Del —Garner v State, 145 A 2d 68, 1 Storey 301

Ind —Rogers v State, 315 N E 2d 707, 262 Ind 315

Ky —Wills v Com, 489 S W 2d 823

Md —Howard v State, 199 A 2d 611, 234 Md 410

Mass —Com v O'Toole, 92 N E 2d 618, 326 Mass 35

Okl —Dodson v State, Cr, 284 P 2d 437

Va —Williams v Com, 160 S E 2d 781, 208 Va 724, cert den 89 S Ct 497, 393 U S 1006, 21 L Ed 2d 470

Wash —State v Messinger, 509 P 2d 382, 8 Wash App 829, cert den 94 S Ct 1433, 415 U S 926, 39 L Ed 2d 483

That accused attempted to commit suicide, etc.

Mont —State v Campbell, 405 P 2d 978, 146 Mont 251, 22 A L R 3d 824

Pa —Com v Homeyer, 94 A 2d 743, 373 Pa 150

38. Failure to reveal purchase of gravel

Mass —Com v Bonomi 140 N E 2d 140, 335 Mass 327

39. Va —Grubb v Com, 54 S E 2d 881, 189 Va 954

40. Colo —Stafford v People, 388 P 2d 774, 154 Colo 113

Ky —Adkins v Com 191 S W 2d 935 301 Ky 384—Bircham v Com, 238 S W 2d 1008, app dism and cert den 72 S Ct 55, 342 U S 805, 96 L Ed 609

Mass —Com v Bonomi, 140 N E 2d 140 335 Mass 327

Mo —State v Handerson, App, 510 S W 2d 813

Or —State v Kader, 270 P 2d 160, 201 Or 300

S C —State v Epes, 39 S E 2d 769, 209 S C 246

41 Mass —Com v Bonomi, 140 N E 2d 140 335 Mass 327

Mo —State v Stringer 211 S W 2d 925, 357 Mo 978

43. N C —State v Minton, 68 S E 2d 844, 234 N C 716, 31 A L R 2d 682

S C —State v Epes supra, n 40

Tenn —Franks v State 213 S W 2d 105, 187 Tenn 174

Hiding body

Tenn —Cagle v State, Cr 507 S W 2d 121, 73 A L R 3d 891

Burying body

Colo —Stafford v People, 388 P 2d 774, 154 Colo 113

44 Okl —C J S cited in Langley v State, 213 P 2d 886, 892 90 Okl Cr 310

§ 248. —— Physical and Mental Conditions

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53 Or —State v Broadhurst 196 P 2d 407, 184 Or 178, cert den 69 S Ct 1046, 337 U S 906 93 L Ed 1718

Penalty phase of prosecution Evidence of post-murder events are not admissible at penalty phase of the prosecution on specific aggravating factors [57.5]

57.5 N J —State v Monturi, 478 A 2d 1266, 195 N J Super 317

58 Ala —Dodd v State 27 So 2d 259 32 Ala App 504—Ott v State supra, n 31

Ark —Harris v State 394 S W 2d 135 239 Ark 771 cert den 87 S Ct 1043, 386 U S 904, 18 L Ed 2d 114

Ky —Elliott v Com 284 S W 2d 78

Md —Day v State, 76 A 2d 729 196 Md 384

Mo —C J S cited in State v Jones, 518 S W 2d 304, 309

Tex —Hamie v State, 208 S W 2d 373, 151 Tex Cr R 395

Rebuttal or contradiction of accused's testimony

(4) Other cases —Berry v State, 36 So 2d 784, 160 Fla 834, cert den 69 S Ct 401, 335 U S 904, 93 L Ed 438

59. Ala —Wiggins v State, 191 So 2d 30, 43 Ala App 382

Cal —People v Torrillo, 141 P 2d 472, 60 Cal App 2d 755

Fla —Harrell v State, 34 So 2d 241, 160 Fla 186

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60. Ala —Coats v State, 45 So 2d 35, 253 Ala 290

La —State v Sneed, 328 So 2d 126

Tex —Hamie v State, supra, n 58—Hall v State, 301 S W 2d 161, 164 Tex Cr R 573

Condition after interval; change of condition

(7) Other cases

Ala —Williams v State, 61 So 2d 861, 36 Ala App 583, cert den 61 So 2d 865 258 Ala 196

Ky —Friley v Com, 255 S W 2d 483

Mass —Com v Johnson, 225 N E 2d 360, 352 Mass 311, cert gr 88 S Ct 158, 389 U S 816, 19 L Ed 2d 69, cert dism 88 S Ct 1155, 390 U S 511 20 L Ed 2d 69

62 Ala —Dodd v State, supra, n 58—Busbee v State, 63 So 2d 290, 36 Ala App 701

Weapon

Ala —Pruett v State, 35 So 2d 115, 33 Ala App 491

Miss —Murrary v State, 32 So 2d 789, 202 Miss 849, sug err over 33 So 2d 291, 202 Miss 849, cert den 68 S Ct 787, 333 U S 869, 92 L Ed 1147, motion sus, Sup, 35 So 2d 323

Shot; shells

(1) Ala —Strickland v State, 114 So 2d 407, 269 Ala 573

Ky —Daniels v Com 195 S W 2d 265, 302 Ky 672

Brains on wall

Tex —Hall v State, 301 S W 2d 161, 164 Tex Cr R 573

66. Ala —Wood v State 75 So 2d 489, 37 Ala App 673, cert den 75 So 2d 492, 261 Ala 701

67 Cal —People v Jackson, 167 P 2d 776, 74 Cal App 2d 22

Ky —Asher v Com, 190 S W 2d 20, 300 Ky 661

N C —State v Tyson, 89 S E 2d 738, 242 N C 574

W Va —State v Bail, 88 S E 2d 634, 140 W Va 680

68. Ala —Pilley v State, supra, n 12

Vehicle's warmth

N M —State v Lunn, App 537 P 2d 672, 88 N M 64, cert den 540 P 2d 248, 88 N M 318, cert den 96 S Ct 793, 423 U S 1058, 46 L Ed 2d 648

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69 Mo —C J S cited in State v Malone, 301 S W 2d 750, 757

Lapse of time, opportunity for preparation

(2) Other cases —State v Collins, 174 P 2d 126, 162 Kan 34

Admission held proper

Ariz —State v Lantz, 231 P 2d 454 72 Ariz 115

Defendant's wounds related to crime

Ill —People v Fetterman, 302 N E 2d 218, 14 Ill App 3d 120

71 Ga —Toler v State, 96 S E 2d 593, 213 Ga 12

72 N C —State v Fox 175 S E 2d 561, 277 N C 1

73 Mo —C J S cited in State v Jones, 518 S W 2d 304 309

79 Ariz —State v Lantz, supra, n 69

Mass —Com v Robertson 259 N E 2d 553, 357 Mass 559

Mo —C J S cited in State v Jones, 518 S W 2d 304, 309

S C —State v Fields, 214 S E 2d 320, 264 S C 260, cert den 96 S Ct 269, 423 U S 925 46 L Ed 2d 252

Evidence held inadmissible

Ky —Fyffe v Com, 205 S W 2d 335, 305 Ky 760

Mass —Com v Burke, 159 N E 2d 856, 339 Mass 521, 77 A L R 2d 451

83. Ala —Pilley v State, supra, n 12—Willingham v State 74 So 2d 241, 261 Ala 454—Strickland v State, 114 So 2d 407, 269 Ala 573

Ky —Asher v Com, supra, n 67

Or —State v Freeman, 374 P 2d 453, 232 Or 267, cert den 83 S Ct 1310, 373 U S 919, 10 L Ed 2d 418, reh den 83 S Ct 1894, 374 U S 858, 10 L Ed 2d 1083

Tex —Campbell v State, Cr 525 S W 2d 4

85 Mass —Com v DiMarzo, 308 N E 2d 538, 364 Mass 669

87. Ark —Wooten v State 249 S W 2d 964, 220 Ark 750

Tex —Wilson v State, Cr, 400 S W 2d 923

90. Mo —State v Varner, 329 S W 2d 623, cert den 81 S Ct 468, 365 U S 803, 5 L Ed 2d 460—State v Bozarth, 361 S W 2d 819

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95. Ala —Palmore v State, 218 So 2d 830, 283 Ala 501

Cal —People v Reese, 301 P 2d 582, 47 C 2d 112, cert den 78 S Ct 420, 355 U S 929, 2 L Ed 2d 419—People v Washington, 80 Cal Rptr 567, 458 P 2d 479, 71 C 2d 1061

Idaho—State v Hokenson, 527 P 2d 487, 96 Idaho 283

Mo —C.J.S quoted at length in State v Thresher, 350 S W 2d 1, 7

Tex —McCaine v State, 211 S W 2d 190, 152 Tex Cr R 108

96. Tex —Harding v State, Cr App, 208 S W 2d 892

Va —Newberry v Com, 61 S E 2d 318, 191 Va 445

Wyo —State v Goettina, 158 P 2d 865, 61 Wyo 420

97. Tex —Williams v State, 227 S W 2d 568, 154 Tex Cr R 446

98. Mass —Com v Johnson, 225 N E 2d 360, 352 Mass 311, cert gr 88 S Ct 158, 389 U S 816, 19 L Ed 2d 69, cert dism 88 S Ct 1155, 390 U S 511, 20 L Ed 2d 69

99. Fla —Land v State, 156 So 2d 8, cert den 84 S Ct 1635, 377 U S 959, 12 L Ed 2d 503

Ill —People v King, 193 N E 2d 790, 29 Ill 2d 150—People v Cunningham, 218 N E 2d 827, 73 Ill App 2d 357

N C —State v Artis, 42 S E 2d 409, 227 N C 371—State v Dirby, 160 S E 2d 24, 273 N C 306

1. Cal —People v Reese, 301 P 2d 582, 47 C 2d 112, cert den 78 S Ct 420, 355 U S 929, 2 L Ed 2d 419

Ga —Shanks v State, 57 S E 2d 357 80 Ga App 759—Biegun v State, 58 S E 2d 149, 206 Ga 618

S C —State v Byrd, 93 S E 2d 900, 229 S C 593

2. Mass —Com v Johnson, 225 N E 2d 360, 352 Mass 311, cert gr 88 S Ct 158, 389 U S 816, 19 L Ed 2d 69, cert dism 88 S Ct 1155, 390 U S 511, 20 L Ed 2d 69

3. Mass —Com v Martin, 257 N E 2d 444, 357 Mass 190

6. La —State v Devore, 309 So 2d 325

Injuries to third person

Tex —Ballard v State, 202 S W 2d 682, 150 Tex Cr R 440

10. Ala —Maund v State, 48 So 2d 553 254 Ala 452

Tex —Burris v State, 276 S W 2d 260, 161 Tex Cr R 210, cert den 76 S Ct 61, 350 U S 830, 100 L Ed 741

11. Tex —Craig v State, 347 S W 2d 255, 171 Tex Cr R 256

12. Witness held not qualified

Mo —State v Varner, 329 S W 2d 623, cert den 81 S Ct 468, 365 U S 803, 5 L Ed 2d 460

17. Cal —People v Kendrick, 14 Cal Rptr 13, 363 P 2d 13, 56 C 2d 71

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31. Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

Mo —State v Jones, App, 518 S W 2d 304

N C —State v Moore, 171 S E 2d 453, 276 N C 142

33. Mass —Com v Bonomi, 140 N E 2d 140, 335 Mass 327

Fear

(2) Other cases

Pa —Com v Homeyer, 94 A 2d 743, 373 Pa 150

Evidence of mental instability inadmissible

Wis —Zebrowski v State, 185 N W 2d 545, 50 Wis 2d 715

Insanity

Ariz —State v Karstetter, 521 P 2d 626, 110 Ariz 539

§ 249. —— Possession of Weapons and Other Objects

Library References

Homicide ⇐174(6).

37. Ala —Payne v State, 74 So 2d 630, 261 Ala 397—Lokos v State, 179 So 2d 714, 278 Ala 586, vac in part on oth grds 92 S Ct 2854, 408 U S 935, 33 L Ed 2d 749, on remand 274 So 2d 303, 290 Ala 122

Kan —State v Jones, 446 P 2d 851, 202 Kan 31

Mass —Com v Lee, 88 N E 2d 713, 324 Mass 714

Tex —Wilson v State, Cr, 436 S W 2d 542

Pistol with one chamber exploded

Okl —Hayes v State, Cr, 292 P 2d 442

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38. Ala —Pruett v State, 35 So 2d 115, 33 Ala App 491

Ill —People v O'Connell, 228 N E 2d 154, 84 Ill App 2d 184, cert den 88 S Ct 2042, 391 U S 969, 20 L Ed 2d 883

39. Ala —Holland v State, Cr, 268 So 2d 883, 49 Ala App 104

Ky —Hoskins v Com, 374 S W 2d 839

Wash —State v Hawkins, 425 P 2d 390, 70 Wash 2d 697, cert den 88 S Ct 840, 390 U S 912, 19 L Ed 2d 883

40. Ala —Landry v State, Cr, 321 So 2d 759, 56 Ala App 421

Miss —Jones v State, 87 So 2d 573, 228 Miss 296, cert den 77 S Ct 236, 352 U S 937, 1 L Ed 2d 167

Okl —Denney v State, Cr, 346 P 2d 359

41. Ill —People v Carrington, 150 N E 2d 586, 13 Ill 2d 602—People v Moore, 246 N E 2d 299, 42 Ill 2d 73 Revd in part on oth grds and remd 92 S Ct 2562, 408 U S 786, 33 L Ed 2d 706, reh den 93 S Ct 87, 409 U S 897, 34 L Ed 2d 155—People v Pendleton, 321 N E 2d 433, 24 Ill App 3d 385

Mass —Com v Bonomi, 140 N E 2d 140 355 Mass 327

42 Cal —People v Riser, 305 P 2d 1, 47 C 2d 566, cert den 77 S Ct 721, 353 U S 930, 1 L Ed 2d 724

Miss —Bangren v State 22 So 2d 360, 198 Miss 359

Rule not violated

Mo —C J S cited in State v Riley, 270 S W 2d 741, 743

43. Admissible when pointing to concealment or disposition of murder weapon

Okl —Grimes v State, Cr, 365 P 2d 739

46 Tex —Meyer v State, 276 S W 2d 286, 160 Tex Cr R 521

47. Colo —Miller v People, 349 P 2d 685, 141 Colo 576, cert den 81 S Ct 97, 364 U S 851, 5 L Ed 2d 75

48. Ga —Clark v State, 161 S E 2d 836, 224 Ga 311

La —State v Bailey 96 So 2d 34, 233 La 40, 69 A L R 2d 340

Mich —People v Bergin, 168 N W 2d 459, 16 Mich App 443

N J —State v Anderson, 173 A 2d 377, 35 N J 472

§ 250. —— Possession of Money or Property of Deceased

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54. Ala —Blackmon v State, 22 So 2d 29, 246 Ala 675

Cal —People v Baglin, 76 Cal Rptr 863, 271 C A 2d 411—People v Mulqueen, 88 Cal Rptr 235, 9 C A 3d 532

La —State v Dowdy, 47 So 2d 496, 217 La 773, cert den 71 S Ct 75, 340 U S 856, 95 L Ed 627

Use of victim's stolen credit card

Tex —Skidmore v State, Cr, 530 S W 2d 316

55. Ill —People v Weber, 83 N.E 2d 297, 401 Ill 584, cert den 69 S Ct 930, 336 U S 969, 93 L Ed 1120

56. Ala —Blackmon v State, supra, n 54

Ky —Hoskins v Com, 374 S W 2d 839

58. Pa —Com v Wilson, 148 A 2d 234, 394 Pa 588, cert den 80 S Ct 97, 361 U S 844, 4 L Ed 2d 82

Kan —State v Jones, 446 P 2d 851, 202 Kan 31

64. Ala —Holland v State, Cr, 268 So.2d 883, 49 Ala App 104

Mo —State v Emrich, 237 S W 2d 169, 361 Mo 922

§ 251. —— Flight, Avoidance of Arrest, Concealment, and Escape

Library References

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67. Ala —DeSilvey v State, 16 So 2d 183, 245 Ala 163—Dodd v State, 27 So 2d 259, 32 Ala App 504

Cal —People v Torrillo, 141 P 2d 472, 60 Cal App 2d 755—People v Holman, 164 P 2d 297, 72 Cal App 2d 75—People v Norman, 346 P 2d 221, 175 C A 2d 348—People v Mulqueen, 88 Cal Rptr 235, 9 C A 3d 532

D C —Edmonds v U S, C A, 273 F 2d 108, 106 U S App D C 373, cert den 80 S Ct 1062, 362 U S 977, 4 L Ed 2d 1012

Ga —Woodward v State, 28 S E 2d 480, 197 Ga 60—McClung v State, 57 S E 2d 559, 206 Ga 421

Ill —People v Bailey, 205 N E 2d 756, 56 Ill App 2d 261

Ind —Fletcher v State, 88 N E 2d 146, 227 Ind 687

La —State v Goins, 94 So 2d 244, 232 La 238, cert den 78 S Ct 74, 355 U S 847, 2 L Ed 2d 57

Md —Jones v State, 35 A 2d 916, 182 Md 653

N C —State v Blanks, 53 S E 2d 452, 230 N C 501

Pa —Com v Homeyer, 94 A 2d 743, 373 Pa 150—Com v Coyle, 203 A 2d 782, 415 Pa 379

Tex —Johnson v State, 244 S W 2d 235, 156 Tex Cr R 534—Hemphill v State, Cr, 505 S W 2d 560

Evidence as to search, etc —Abercrombie v State, 36 So 2d 111 33 Ala App 581, cert den 36 So 2d 115, 250 Ala 701

Tenn —Waldie v State, 230 S W 2d 993, 190 Tenn 537

Flight of companion

Kan —State v Martin, 265 P 2d 297, 175 Kan 373

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68. Cal —People v Toledo, 193 P 2d 953, 85 Cal App 2d 570

Kan —State v Martin, supra, n 67

Where incidents refer to another offense

Okl —Killough v State, 231 P 2d 381, 94 Okl Cr 131

69. Idaho—State v Hargraves, 107 P 2d 854, 62 Idaho 8

70 Wash —State v Gregory, 488 P 2d 757, 79 Wash 2d 637

71. Iowa—State v Bester, 167 N W 2d 705

73 Ark —Thomas v State, 217 S W 2d 839, 214 Ark 736—Thomas v State, 218 S W 2d 379, 214 Ark 736

76. Ill —People v Sustak, 153 N E 2d 849, 15 Ill 2d 115

Tex —Johnson v State, supra, n 67

77. Willingness to commit capital crime of killing police officer

Ind —Meredith v State, 214 N E 2d 385, 247 Ind 233

79. Cal —People v Mulqueen, 88 Cal Rptr 235, 9 C A 3d 532

Colo —Stafford v People, 388 P 2d 774, 154 Colo 113

81. U S —Shockley v U S, C C A Cal, 166 F 2d 704, cert den 68 S Ct 1502, 334 U S 850, 92 L Ed 1773

Ala —DeSilvey v State, supra, n 67

83. Fla —Mackiewicz v State, 114 So 2d 684, cert den 80 S Ct 883, 362 U S 965, 4 L Ed 2d 879, reh den 80 S Ct 1083, 362 U S 992, 4 L Ed 2d 1024

84. Ala —Peoples v State, 56 So 2d 665, 256 Ala 612—Coleman v State, 69 So 2d 481, 37 Ala App 406

Ga —Woodward v State, supra, n 67

86. Utah—State v Neal, 262 P 2d 756, 1 Utah2d 122, cert den 75 S Ct 573, 348 U S 982, 99 L Ed 764

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95. Ga—Lester v State, 42 S E 2d 141, 75 Ga App 42

§ 252. —— Declarations

2. Ala.—Johnson v State, 91 So 2d 476, 265 Ala 360
D C—Jones v U S, C A, 296 F 2d 398, 111 U S App D C 276, cert den 82 S Ct 1260, 370 U S 913, 8 L Ed 2d 406
Miss—Carroll v State, 196 So 2d 878
Or—Smarr v State, 68 So 2d 6, 260 Ala 30

3. Ga.—Toler v State, 96 S E 2d 593, 213 Ga 12
Mass—Com v Bonomi, 140 N E 2d 140, 335 Mass 327
Or—State v Hansen, 244 P 2d 990, 195 Or 169

4. Cal—People v Carter, 312 P 2d 665, 48 C 2d 737
Ga—Dye v State, 137 S E 2d 465, 220 Ga 113
Me—State v Lafferty, 309 A 2d 647
Md—Smith v State, 32 A 2d 863, 182 Md 176
Nev—State v Plunkett, 149 P 2d 101, 62 Nev 258
Or—State v Wilson, 142 P 2d 680, 172 Or 373
Pa—Com v Frazier, 191 A 2d 369, 411 Pa 195
Tex—Sherman v State, Cr, 428 S W 2d 338

Particular statements held irrelevant or immaterial

(4) Ga—Wilson v State, 95 S E 2d 733, 94 Ga App 588
Miss—Berry v State, 54 So 2d 222, 212 Miss 164

No proof of voluntariness needed for statements denying guilt

Ariz—State v Robinson, 360 P 2d 474, 89 Ariz 224

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7. Ala—Coats v State, 45 So 2d 35, 253 Ala 290—Smarr v State, supra, n 2—Espey v State, 120 So 2d 904, 270 Ala 669

8. Ala—Kozlowski v State, 27 So 2d 811, 32 Ala App 453, revd on oth grds, 27 So 2d 818, 248 Ala 304
Okl—Bruton v State, Cr, 305 P 2d 1045

12. Ark—McMillan v State, 314 S W 2d 483, 229 Ark 249
Cal—People v Bjornsen, 180 P 2d 443, 79 Cal App 2d 519—People v Haley, 44 Cal Rptr 346, 234 C A 2d 444
D C—Porter v U S, C A, 258 F 2d 685, 103 U S App D C 385, cert den 79 S Ct 1289, 360 U S 906, 3 L Ed 2d 1257
Ga—Wright v State, 34 S E 2d 879, 199 Ga 576
Ill—People v O'Connell, 228 N E 2d 154, 81 Ill App 2d 184, cert den 88 S Ct 2042, 391 U S 969, 20 L Ed 2d 883—People v Johnson, 335 N E 2d 144, 32 Ill App 3d 36
La—State v Dowdy, 47 So 2d 496, 217 La 773, cert den 71 S Ct 75, 340 U S 856, 95 L Ed 627
Mass—Com v Devlin, 141 N E 2d 269, 335 Mass 555—Com v Rogers, 222 N E 2d 766, 351 Mass 522, cert den 88 S Ct 484, 389 U S 991, 19 L Ed 2d 483
Mo—State v Phillips, 299 S W 2d 431
Nev—State v Fitch, 200 P 2d 991, 65 Nev 668
N J—State v Ripa, 212 A 2d 22, 45 N J 199
Tex—Marion v State, Cr, 387 S W 2d 56

14. Ala.—Hall v State, Cr, 275 So 2d 374, 49 Ala App 695
Miss—Moore v State, 237 So 2d 844

Intent

Conn—State v Bzdyra, 334 A 2d 917, 165 Conn 400

15. U.S—Jones v U S, C A, 296 F 2d 398, 111 U S App D C, 276, cert den 82 S Ct. 1260, 370 U S 913, 8 L Ed 2d 406
Ala—Dobbins v State, 149 So 2d 814, 274 Ala 524—Wright v State, 188 So 2d 272, 279 Ala 543
Ark—Wooten v State, 249 S W 2d 964, 220 Ark 750
Kan—State v Blake, 495 P 2d 905, 209 Kan 196

16. Ala—Henley v State, 18 So 2d 98, 31 Ala App 433
Conn—State v Bzdyra, 334 A 2d 917, 165 Conn 400
Ga—Jackson v State, 86 S E 2d 306, 211 Ga 490
Ky—Prince v Com, 196 S W 2d 872, 303 Ky 15
Mass—Com v Bonomi, 140 N E 2d 140, 335 Mass 327
Miss—McNeer v State, 87 So 2d 568, 228 Miss 308
Tex—Gentry v State, 356 S W 2d 793, 172 Tex Cr R 345—Salazar v State, Cr, 397 S W 2d 220

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18. Ala—Davenport v State, 38 So 2d 285, 34 Ala App 204
Mass—Com v Bonomd, 140 N E 2d 140, 335 Mass 327—Com v Devlin, 141 N E 2d 269, 335 Mass 555—Com v McCauley, 246 N E 2d 425, 355 Mass 554
Mo—State v Jones, App, 518 S W 2d 304
N C—State v Redfern, 98 S E 2d 322, 246 N C 293
Or—State v Broadhurst, 196 P 2d 407, 184 Or 178, cert den 69 S Ct 1046, 337 U S 906, 93 L Ed 1718
Wash—State v Messinger, 509 P 2d 382, 8 Wash App 829, cert den 94 S Ct 1433, 415 U S 926 39 L Ed 2d 483

Conversations held inadmissible

Mass—Com v Burke, 159 N E 2d 856, 339 Mass 521, 77 A L R 2d 451

Lying as to disappearance of victim

Colo—Stafford v People, 388 P 2d 774 154 Colo 113

19. Mass—Com v Bonomi, 140 N E 2d 140, 335 Mass 327
Or—State v Broadhurst, supra, n 18

23. Mass—Com v Bonomi, 140 N E 2d 140, 335 Mass 327
Wash—State v Gregory, 171 P 2d 1021, 25 Wash 2d 773

24. Mass—Com v Bonomi, 140 N E 2d 140, 335 Mass 327
Mo—State v Jones, App, 518 S W 2d 304

25. Ark—Martin v State, 366 S W 2d 281, 236 Ark 409

Held inadmissible

Tex—Dowling v State, 301 S W 2d 920, 164 Tex Cr R 650—Phillips v State, 312 S W 2d 644, 166 Tex Cr R 206

26. U S—U S ex rel Hill v Pinto, C A N J, 394 F 2d 470

28. Ky—Layne v Com, 254 S W 2d 724
N J—State v Hudson, 185 A 2d 1, 38 N J 364
Tex—Salazar v State, Cr, 397 S W 2d 220

32. Ark—Ederington v State, 428 S W 2d 271, 244 Ark 1096

33. Md—Corens v State, 45 A 2d 340, 185 Md 561

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41. D C—Guthrie v U S, C A, 207 F 2d 19, 92 U S App D C 361
N H—State v Lavallee, 189 A 2d 475, 104 N H 443
Pa—Com v Rogozinski, 128 A 2d 28, 387 Pa 399

43. Kan—State v Lomax, 264 P 2d 908, 175 Kan 368

44. Cal—People v Dalton, 20 Cal Rptr 51, 201 C A 2d 396, 95 A L R 2d 628

45. Ala—Shiflett v State, 93 So 2d 523, 38 Ala App 662, cert den 93 So.2d 526, 265 Ala 652
Tex—Minor v State, 311 S W 2d 241, 166 Tex Cr R 69

However, statements by decedent a few moments after defendant and his companions left his home that they tried to kill him and that they wanted more money were admissible in prosecution for murder over objection that they were conjectural in nature and statements of conclusions—Com v Ross, 169 A 2d 780, 403 Pa 358, cert den 82 S Ct 182, 368 U S 904, 7 L Ed 2d 98

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61. Colo—Archina v People, 307 P.2d 1083, 135 Colo 8
Mo—State v Phillips, 299 S W 2d 431
Tenn—Harper v State, 334 S W 2d 933, 206 Tenn 509
Tex—De Lira v State, 297 S W 2d 953, 164 Tex Cr R 194

Evidence held admissible

Mo—State v Sarkis, 313 S W 2d 723
Tex—Monroe v State, 313 S W 2d 610, 166 Tex Cr R 306

65. N C—State v Artis, 42 S E 2d 409, 227 N C 371

66. Miss—Martin v State, 240 So 2d 132

§ 253. Commission of or Attempt to Commit Other Offenses

70. Ariz—State v Folk, 277 P 2d 1016, 78 Ariz 205
Ark—Murphy v State, 498 S W 2d 884, 255 Ark 90—Upton v State, 516 S W 2d 904, 257 Ark 424, op supp 502 S W 2d 454, 255 Ark 1071
Cal—People v Amaya, 251 P 2d 324, 40 C 2d 70—People v Tolbert, 76 Cal Rptr 445, 452 P 2d 661, 70 C 2d 790, cert den 92 S Ct 2416, 406 U S 971, 32 L Ed 2d 671—People v Nye, 78 Cal.Rptr 467, 455 P 2d 395, 71 C 2d 356, cert den 92 S Ct 2417, 406 U S 972, 32 L Ed 2d 672
Colo—Bizup v People, 371 P 2d 786, 150 Colo 214, cert den 83 S Ct 144, 371 U S 873, 9 L Ed 2d 112
Iowa—State v Anderson, 33 N W 2d 1, 239 Iowa 1118
La—State v Faciane, 99 So 2d 333, 233 La 1028
Mo—State v Anderson, 386 S W 2d 225
N C—State v King, 37 S E 2d 684, 226 N C 241
Tex—Cherry v State, Cr, 488 S W 2d 744, cert den 93 S Ct 1538, 411 U S 909, 36 L Ed 2d 199
W Va—State v Bruner, 105 S E 2d 140, 143 W Va 755

Act held not a crime

Pa—Com v Heard, 228 A 2d 924, 209 Pa Super 452

§ 254. Killing of Person Attempting Arrest or Officer Making Search

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81. Cal—People v Torrillo, 141 P 2d 472, 60 Cal App 2d 755

§ 255. Negligence

Library References

Homicide ⇐171(1)

95 Ala—Hanby v State, 101 So 2d 553, 39 Ala.App 392, revd on oth grds 101 So 2d 562, 267 Ala 69
Ariz—State v Shumway, 672 P 2d 929, 137 Ariz 585
N Y—People v Joseph, 172 N Y S 2d 463, 11 Misc 2d 219
Pa—Com v Hine, 32 Northumb L J 99

§ 256. Extent of Injury from Assault with Intent to Kill

98. Ala—Patterson v State, 39 So 2d 709, 34 Ala App 359—Stewart v State, 88 So 2d 580, 38 Ala App 497—Hodges v State, Cr, 263 So 2d 518 48 Ala App 217
Ark—Shaddox v State, 418 S W 2d 780, 243 Ark 55, app after remand 427 S W 2d 198, 244 Ark 747
Ga—Brooks v State, 26 S E 2d 549, 69 Ga App 697—Robinson v State, 43 S E 2d 111, 75 Ga App 246—Shanks v State, 57 S E 2d 357, 80 Ga App 759
Ill—People v Weaver, 290 N E 2d 691, 8 Ill App 3d 299
Ky—Damron v Com 313 S W 2d 854—Claypoole v Com, 355 S W 2d 652
Nev—Graves v State, 439 P 2d 476, 84 Nev 262, cert den 89 S Ct 250, 393 U S 919, 21 L Ed 2d 206

N C —State v Oxendine, 32 S E 2d 648, 224 N C 825
Tex —Flores v State, 172 S W 2d 336, 146 Tex Cr R 232—Robinson v State Cr 457 S W 2d 572

Evidence held admissible

(4) Other cases

Ala —Burton v State, 69 So 2d 477, 37 Ala App 396—Frazier v State, Cr, 301 So 2d 256 53 Ala App 492
Ark —Farrar v State, 400 S W 2d 289, 240 Ark 447—Ballew v State, 441 S W 2d 453, 246 Ark 1191
Fla —Battles v State, App, 208 So 2d 150
Mo —State v Allen, 343 S W 2d 63
Okl —Terrell v State, Cr 524 P 2d 36
Tex —Gilmer v State, 246 S W 2d 639, 157 Tex Cr R 109

Evidence held inadmissible

Ill —People v Carter, 102 N E 2d 312 410 Ill 462—People v Carpenter, 199 N E 2d 457 49 Ill App 2d 101

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99. Ind —Arnett v State, 244 N E 2d 912, 251 Ind 685
Ky —Smith v Com, 473 S W 2d 829
Mo —State v Duncan, 499 S W 2d 476
Nev —Graves v State, 439 P 2d 476, 84 Nev 262 cert den 89 S Ct 250, 393 U S 919, 21 L Ed 2d 206

1. S C —State v Owens, 80 S E 2d 113 224 S C 533

2. Ala —Stewart v State 88 So 2d 580 38 Ala App 497
Ky —Claypoole v Com, 355 S W 2d 652
Nev —Graves v State, 439 P 2d 476, 84 Nev 262 cert den 89 S Ct 250, 393 U S 919, 21 L Ed 2d 206

3. Mo —State v Allen, 343 S W 2d 63
Tex —Hall v State, 219 S W 2d 475 153 Tex Cr R 215

4. Mo —State v Kopf, 481 S W 2d 7

§ 257. Cause of Death

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6. Ariz —State v Turrubiates 542 P 2d 427, 25 Ariz App 234
Ga —Brundage v State, 29 S E 2d 316 70 Ga App 696
Ky —Witt v Com, 202 S W 2d 612 305 Ky 31
Mass —Com v Vakouri, 133 N E 2d 217 333 Mass 706—Com v Cutler, 249 N E 2d 632, 356 Mass 245
Neb —C.J.S. cited in Vanderheiden v State, 57 N W 2d 761, 768, 156 Neb 735
N C —State v Atwood, 108 S E 2d 219 250 N C 141
Pa —Com v Hoffman, 266 A 2d 726, 439 Pa 348
Tex —Curry v State, App, 468 S W 2d 455, vac in part on oth grds 92 S Ct 2872 408 U S 939 33 L Ed 2d 761, reh den 93 S Ct 181 409 U S 899 34 L Ed 2d 159, on remand 490 S W 2d 828
Va —Bowie v Com, 35 S E 2d 345 184 Va 381

7. Conn —State v Conte, 251 A 2d 81 157 Conn 209, cert den 90 S Ct 439, 396 U S 964 24 L Ed 2d 428
Ga —Bryan v State, 55 S E 2d 574, 206 Ga 73 cert den 70 S Ct 513, 339 U S 904, 94 L Ed 1333
Ill —People v Henenberg, 302 N E 2d 27 55 Ill 2d 5, app after remand 346 N E 2d 11, 37 Ill App 3d 464
Mo —State v Whipkey, 238 S W 2d 374, 361 Mo 1008
Tex —Williams v State 179 S W 2d 297, 147 Tex Cr R 178

8. Ala —Brooks v State, 29 So 2d 4, 248 Ala 628

12. Tex —Fisher v State, 185 S W 2d 567, 148 Tex Cr 133

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19. Ill —People v Welch, 326 N E 2d 190, 27 Ill App 3d 197

20. Ky —Witt v Com, supra, n 6

Evidence held inadmissible

(4) Other evidence

Neb —Edmonds v State, 79 N W 2d 453 163 Neb 323
Tenn —Gray v State, 250 S W 2d 86, 194 Tenn 234

21. Ala —McMurtrey v State, 101 So 2d 88, 39 Ala App 319, cert den 101 So 2d 93, 267 Ala 259
Miss —Barnes v State, 23 So 2d 405, 199 Miss 86
Tex —Perez v State, 221 S W 2d 915, 153 Tex Cr R 223

22. N M —State v Smith, 216 P 2d 921, 54 N M 170

23. N J —State v Sturdivant, 155 A 2d 771, 31 N J 165, cert den 80 S Ct 873, 362 U S 956, 4 L Ed 2d 873

29. Ala —Warren v State, 25 So 2d 51, 32 Ala App 273

34. Ala —Gaddis v State, 106 So 2d 268, 32 Ala App 630—Hill v State, Cr, 286 So 2d 924, 51 Ala App 515
Ind —C J S quoted in Wright v State, 363 N E 2d 1221 1228 266 Ind 327
Ky —Delk v Com 215 S W 2d 109 308 Ky 579
La —State v Carter 46 So 2d 897 217 La 547
Mo —C.J S cited in State v Rizor, 182 S W 2d 525, 529, 353 Mo 368—State v Thresher, 350 S W 2d 1
N J —State v Nelson 175 A 2d 814 103 N H 478, cert den 82 S Ct 1153, 369 U S 879, 8 L Ed 2d 282 and 82 S Ct 1155, 369 U S 881, 8 L Ed 2d 283
Tenn —Bramlett v State, Cr 515 S W 2d 895
Tex —Morris v State, 322 S W 2d 632, 168 Tex Cr R 29
W Va —C J S cited in State v Jackson, 298 S E 2d 866, 874

Particular evidence held inadmissible

Tex —McCray v State Cr 365 S W 2d 9

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39. Ala —Williams v State 51 So 2d 250 255 Ala 229—Nixon v State 72 So 2d 846, 261 Ala 74

42 Pa —Com v Rogozinski 70 York 21 affd 128 A 2d 28, 387 Pa 399

43. Embalmer

Ga —Gladney v State 61 S E 2d 287, 82 Ga App 397

45. Ky —C.J S cited in White v Commonwealth, 333 S W 2d 521 523
Miss —Moore v State 117 So 2d 469 238 Miss 103

47. Ark —Stewart v State, 519 S W 2d 713, 257 Ark 753 cert den 96 S Ct 113 423 U S 859, 46 L Ed 2d 86
Cal —People v Finley, 33 Cal Rptr 31 219 C A 2d 330 cert den 84 S Ct 1174 377 U S 912 12 L Ed 2d 181
Ky —Blackburn v Com 247 S W 2d 528
Mass —Com v Murphy, 254 N E 2d 895, 356 Mass 604
Or —State v Leland, 227 P 2d 785 190 Or 598, affd 72 S Ct 1002, 343 U S 790, 96 L Ed 1302, reh den 73 S Ct 4 344 U S 848, 97 L Ed 659
R I —State v Blood, 37 A 2d 452 70 R I 85—State v Ruggiero, 174 A 2d 555 93 R I 241

Authority to make examination

(3) Other matters

R I —State v Ruggiero, 174 A 2d 555, 93 R I 241

48. Ala —Kemp v State, 179 So 2d 762, 278 Ala 617

§ 258. —— Means or Instruments Used

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67 Ala —Singley v State, 53 So 2d 729, 256 Ala 56
Ark —Shaddox v State, 418 S W 2d 780, 243 Ark 55, app after remand 427 S W 2d 198, 244 Ark 747
Cal —People v Dreyer, 162 P 2d 468, 71 Cal App 2d 181—People v Kristy 245 P 2d 547, 111 C A 2d 695—People v Steward, 318 P 2d 806, 156 C A 2d 177—People v Malki, 5 Cal Rptr 207, 181 C A 2d 118—People v Welborn, 51 Cal Rptr 644, 242 C A 2d 668
Ga —Shanks v State, 57 S E 2d 357, 80 Ga App 759—Johnson v State 62 S E 2d 837, 82 Ga App 840
Ill —People v Dismuke, 263 N E 2d 611, 130 Ill App 2d 525
Ind —C.J S cited in May v State, 112 N E 2d 439, 441, 232 Ind 523—Greer v State, 245 N E 2d 158, 252 Ind 20
Mo —State v Chevlin, 284 S W 2d 563
N M —State v White, 295 P 2d 1019, 61 N M 109
Or —State v Jackson, 385 P 2d 623, 235 Or 481
Pa —Com v Heard, 228 A 2d 924, 209 Pa Super 452
Tex —Whitlock v State, 177 S W 2d 205, 146 Tex Cr R 594—Richards v State, 178 S W 2d 517, 147 Tex Cr R 118

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68 Ga —Wilson v State, 113 S E 2d 447, 215 Ga 782—Ivy v State, 141 S E 2d 541 220 Ga 699
Mass —Com v Rodriquez, 300 N E 2d 192, 364 Mass 87
Miss —Pendergraft v State, 213 So 2d 560, app dism 89 S Ct 1453, 394 U S 715, 22 L Ed 2d 671, reh den 89 S Ct 1993, 395 U S 941, 23 L Ed 2d 459
S C —State v Byrd, 93 S E 2d 900, 229 S C 593

69 N C —State v Conner, 92 S E 2d 668, 244 N C 109
Pa —Com v Wittig, 38 Berks Co 69

Bullet not from accused's gun

(2) Other circumstances

N M —State v Lunn, App, 537 P 2d 672, 88 N M 64, cert den 540 p 2d 248, 88 N M 318, cert den 96 S Ct 793 423 U S 1058, 46 L Ed 2d 648

73. Fla —McGowan v State, App, 240 So 2d 512

Faulty condition

Ala —Madison v State, Cr, 318 So 2d 329, 55 Ala App 634, certiorari denied 318 So 2d 337, 294 Ala 764

74 Ky —Asher v Com, 190 S W 2d 20, 300 Ky 661

76 Admissible to show nonuse

Kan —State v Martin, 265 P 2d 297 175 Kan 373

78. U S —Kane v U S, C A Ariz 399 F 2d 730, cert den 89 S Ct 698, 393 U S 1057, 21 L Ed 2d 699
Neb —Reyes v State 38 N W 2d 539 151 Neb 636

82. Tex —Chavira v State, 319 S W 2d 115 167 Tex Cr R 197

83 Ala —Morris v State 104 So 2d 810 268 Ala 60
Mo —C J S cited in State v Rizor 182 S W 2d 525 529, 353 Mo 368—State v Kopf, 481 S W 2d 7
Tex —Washburn v State, 318 S W 2d 627, 167 Tex Cr R 125 cert den 79 S Ct 876 359 U S 965, 3 L Ed 2d 834—Johnson v State, Cr, 421 S W 2d 918

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85 Cal —People v Wynn, 65 Cal Rptr 210, 257 C A 2d 664

88. Miss —McGinnis v State, 29 So 2d 109, 201 Miss 219

90. Ga —Clay v State 64 S E 2d 898, 83 Ga App 719

§ 259. Insanity

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91 Ala —Farley v State, 37 So 2d 434, 34 Ala App 54, cert den 37 So 2d 440, 251 Ala 391—Fillman v State 127 So 2d 628, 41 Ala App 175, cert den 127 So 2d 632, 271 Ala 698—Felton v State, Cr, 252 So 2d 108, 47 Ala App 182—Setbold v State, 255 So 2d 33, 287 Ala 693—Hawes v State Cr, 266 So 2d 652, 48 Ala App 565
Ariz —State v Hudgens, 423 P 2d 90 102 Ariz 1, cert den 88 S Ct 162, 389 U S 873 19 L Ed 2d 155—State v Martin, 426 P 2d 639, 102 Ariz 142—State v Ganster, 433 P 2d 620, 102 Ariz 490
Cal —People v O'Connor, 11 Cal Rptr 172, 189 C A 2d 295—People v Cantrell, 105 Cal Rptr 792, 504 P 2d 1256
Colo —Berger v People, 224 P 2d 228, 122 Colo 367
Conn —State v Kenyon, 54 A 2d 585 134 Conn 43

D C—U S v Peterson, C A, 509 F 2d 408, 166 U S App D C 75

Fla—Smith v State, App, 314 So 2d 226 Cert discharged, Sup, 343 So 2d 598

Ill—People v Pecora, 246 N E 2d 865, 107 Ill App 2d 283, cert den 90 S Ct 1274, 397 U S 1028, 25 L Ed 2d 538

Miss—Lewis v State, 46 So 2d 78, 209 Miss 110—Johnson v State, 77 So 2d 824, 223 Miss 167

Mo—State v Linders, 224 S W 2d 386

Nev—Fox v State, 316 P 2d 924, 73 Nev 241

N J—State v Risden, 254 A 2d 812, 106 N J Super 226, mod on oth grds 264 A 2d 214, 56 N J 27

N Y—People v Feliciano, 86 N Y S 2d 533

Pa—Com v Wooding, 50 A 2d 328, 355 Pa 555—Com v Patskin, 93 A 2d 704, 372 Pa 402, cert den 74 S Ct 534, 347 U S 931, 98 L Ed 1082—Com v Thompson, 133 A 2d 207, 389 Pa 382, cert den 78 S Ct 77, 355 U S 849, 2 L Ed 2d 59—Com ex rel Butler v Banmiller, 159 A 2d 212, 398 Pa 442

Tex—Bingham v State, 275 S W 2d 819, 161 Tex Cr R 204

Vt—State v Miner, 258 A 2d 815, 128 Vt 55

Va—Painter v Com, 171 S E 2d 166, 210 Va 360

Wash—State v Williams, 209 P 2d 331, 34 Wash 2d 367—State v Collins, 314 P 2d 660, 50 Wash 2d 740

92. Ill—People v Davidson, 225 N E 2d 727, 82 Ill App 2d 245

Degrees

Cal—People v O'Connor, 11 Cal Rptr 172, 189 C A 2d 295

93. Pa—Com v Daverse, 73 A 2d 405, 364 Pa 623

94. Ariz—State v Schantz, 403 P 2d 521, 98 Ariz 200, cert den 86 S Ct 528, 382 U S 1015, 15 L Ed 2d 530

Fla—Grissom v State, App, 237 So 2d 57

Mass—Com v Costa, 274 N E 2d 802, 360 Mass 177

Mich—People v Fields, 235 N W 2d 95, 64 Mich App 166

95. N C—State v Scales, 87 S E 2d 916, 242 N C 400

W Va—State v Flint, 96 S E 2d 677, 142 W Va 509, cert den 78 S Ct 564, 356 U S 903, 2 L Ed 2d 581

96. Cal—People v Rupp, 260 P 2d 1, 41 C 2d 371

Fla—Young v State, 140 So 2d 97—Evans v State, App, 140 So 2d 348

Ga—Barnes v State, 37 S E 2d 141, 200 Ga 402

Ill—People v Kenzik, 177 N E 2d 162, 22 Ill 2d 567

Nev—State v Plunkett, 149 P 2d 101, 62 Nev 258

Or—State v Grieco, 195 P 2d 183, 184 Or 253

S C—State v Allen, 98 S E 2d 826, 231 S C 391

Wis—State v Carlson, 93 N W 2d 354, 5 Wis 2d 595

Evidence held inadmissible

(3) Other matters

Ala—Carr v State, 198 So 2d 791, 43 Ala App 642, cert den 198 So 2d 798, cert den 88 S Ct 175, 389 U S 877, 19 L Ed 2d 165

Ariz—State v Intogna, 419 P 2d 59, 101 Ariz 275, app after remand 445 P 2d 431, 103 Ariz 455

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Tex—Martinez v State, 333 S W 2d 370, 169 Tex Cr R 229

99. N J—State v Risden, 264 A 2d 214, 56 N J 27

S C—State v Allen, 98 S E 2d 826, 231 S C 391

Tex—Autry v State, 264 S W 2d 735, 159 Tex Cr R 419

2. Mass—Com v Chapin, 132 N E 2d 404, 333 Mass 610, cert den 77 S Ct 75, 352 U S 857, 1 L Ed 2d 63

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4. Colo—Trujillo v People, 372 P 2d 86, 150 Colo 235

5. Ala—Eldridge v State, 22 So 2d 713, 247 Ala 153—Grissom v State, 30 So 2d 19, 33 Ala App 23, cert den 30 So 2d 26, 249 Ala 125

Mo—State v Linders, 224 S W 2d 386

6. Ala—Eldridge v State, supra, n 5

Ariz—State v Griffin, 406 P 2d 397, 99 Ariz 43

Tex—Burnet v State, 205 S W 2d 47, 150 Tex Cr R 575

7. Ala—Grant v State, 33 So 2d 466, 250 Ala 164—Barbour v State, 78 So 2d 328, 262 Ala 297—Moody v State, 100 So 2d 733, 267 Ala 204—Goldin v State, Ala, 127 So 2d 375, 171 Ala 678

Ill—People v Greenfield, 333 N E 2d 36, 30 Ill App 3d 1044

Ind—Stamper v State, 294 N E 2d 609, 360 Ind 211

N J—State v Monahan, 106 A 2d 287, 16 N J 83, cert den 75 S Ct 210, 348 U S 889, 99 L Ed 698

Pa—Com v Woodhouse, 164 A 2d 98, 401 Pa 242

Tex—Barrera v State, 174 S W 2d 735, 146 Tex Cr R 328

Wash—State v Music, 489 P 2d 159, 79 Wash 2d 699 vac in part on oth grds 92 S Ct 2877, 408 U S 940, 33 L Ed 2d 767

8. Ala—Parvin v State, 26 So 2d 573, 248 Ala 704—Goldin v State, 127 So 2d 375, 271 Ala 678

Ga—Handspike v State, 45 S E 2d 662, 203 Ga 115

Ind—Brattain v State, 61 N E 2d 462, 223 Ind 489

Miss—McGarrh v State, 148 So 2d 494, 249 Miss 247, cert den 84 S Ct 50, 375 U S 816, 11 L Ed 2d 51

N Y—People v Draper, 104 N Y S 2d 703, 278 App Div 298, affd 101 N E 2d 763 303 N Y 653

Pa—Com v Woodhouse, 164 A 2d 98, 401 Pa 242

S C—State v Livingston 105 S E 2d 73, 233 S C 400

11. Ala—Eldridge v State, supra, n 5

Iowa—State v Hansen 225 N W 2d 343

N Y—People v Yankouski, 143 N Y S 2d 737

Pa—Com v Chase, 73 Dauph 138

Wis—Hughes v State, 227 N W 2d 911, 68 Wis 2d 159

12. Ala—Coffey v State, 14 So 2d 122, 244 Ala 514

Mo—State v Linders, supra, n 5

S C—State v Lewis, 71 S E 2d 308, 221 S C 491

W Va—State v McCauley, 43 S E 2d 454, 130 W Va 401

13 Ala—Benton v State, 18 So 2d 423, 31 Ala App 338, cert den 18 So 2d 428, 245 Ala 625—Smith v State, 57 So 2d 513, 257 Ala 47

Cal—People v Atchley, 346 P 2d 764, 53 C 2d 160, cert gr 80 S Ct 1081, 362 U S 987, 4 L Ed 2d 1021, cert dism 81 S Ct 1051 366 U S 207, 6 L Ed 2d 233—People v O'Connor, 11 Cal Rptr 172, 189 C A 2d 295

Md—Van Meter v State, 352 A 2d 850, 30 Md App 406

Tex—Ross v State, 220 S W 2d 137, 153 Tex Cr R 312

14. Not abuse of discretion

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15. Ind—Blackburn v State, 291 N E 2d 686, 260 Ind 5, app dism 93 S Ct 2755, 412 U S 925, 37 L Ed 2d 152

Nev—Sollars v State, 316 P 2d 917, 73 Nev 248, reh den 319 P 2d 139, 73 Nev 343

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Or—State v Garver, 225 P 2d 771, 190 Or 291, 27 A L R 2d 105

19. Ala—Benton v State, supra, n 13

Mont—State v French, 531 P 2d 373, 166 Mont 196

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20. N C—State v Duncan, 93 S E 2d 421, 244 N C 374

21. Miss—Bean v State, 297 So 2d 903

23. Alaska—Chase v State 369 P 2d 997

Miss—Gallego v State 77 So 2d 321, 222 Miss 719

Pa—Com v Woodhouse, 164 A 2d 98, 401 Pa 242

24. Ala—Eldridge v State, supra, n 5—Nichols v State, 160 So 2d 619, 276 Ala 209

Ga—Cochran v State, 91 S E 2d 601, 212 Ga 245

Miss—Roberts v State, 50 So 2d 356, 210 Miss 777

Pa—Com v Woodhouse, 164 A 2d 98, 401 Pa 242

Tex—Kindle v State, 285 S W 2d 740, 162 Tex Cr R 395

28. Ala—Eldridge v State, supra, n 5—Barbour v State, 78 So 2d 328, 262 Ala 297

Ky—Fannon v Com, 175 S W 2d 531, 295 Ky 817

Tex—Bell v State, Cr, 456 S W 2d 112

Injuries to accused

(3) Other cases—State v Plunkett, 149 P 2d 101, 62 Nev 258

Effect of drugs

S C—State v Mitchell, 200 S E 2d 448, 261 S C 452

Brain damage and intoxication

Or—State v Matthews, 532 P 2d 250, 20 Or App 466

29. Ky—Fannon v Commonwealth, supra, n 28

30 Ala—Mullis v State, 62 So 2d 451, 258 Ala 309

33 Ill—People v Haun, 217 N E 2d 470, 71 Ill App 2d 262

W Va—State v McCauley, supra, n 12

Evidence not admissible

Ala—Brown v State, , Cr, 287 So 2d 910, certiorari denied 287 So 2d 912, 51 Ala App 587, affd 287 so 2d 914, 291 Ala 764

35. Ala—Barbour v State, 78 So 2d 328, 262 Ala 297

Ky—Lewis v Com, 318 S W 2d 857

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40. Ga—Jarrard v State, 55 S E 2d 706, 206 Ga 112

N J—State v Vigliano, 232 A 2d 129, 50 N J 51

49. R I—State v McGregor, 111 A 2d 231, 82 R I 437

50. U S—Government of Virgin Islands v Downey, D C Virgin Islands, 396 F Supp 349, affd, C A, 529 F 2d 511

W Va—State v McCauley, supra, n 12

Intoxication

(2) Ky—Sharp v Com, 215 S W 2d 983, 308 Ky 765

Evidence held admissible

(4) Ala—Fillman v State, 127 So 2d 628, 41 Ala App 175, cert den 127 so 2d 632, 271 Ala 698

Cal—People v Rupp, 260 P 2d 1, 41 C 2d 371

D C—Edmonds v U S, C A, 273 F 2d 108, 106 U S App D C 373, cert den 80 S Ct 1062, 362 U S 977, 4 L Ed 2d 1012

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Wash—State v Huson, 440 P 2d 192, 73 Wash 2d 660, cert den 89 S Ct 886, 393 U S 1096, 21 L Ed 2d 787

Evidence held inadmissible

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N Y—People v Lund, 223 N Y S 2d 49, 15 A D 2d 582—People v Jackson, 225 N Y S 2d 200, 10 N Y 2d 510, 180 N E 2d 561

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53. Mich—People v Woody, 157 N W 2d 201, 380 Mich 332

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Colo —Yerby v People, 489 P 2d 1308, 176 Colo 115

Miss —Hughes v State 42 So 2d 805, 207 Miss 594

N C —State v Dawson, 44 S E 2d 527, 228 N C 85

Tex —Ekern v State, 200 S W 2d 412, 150 Tex Cr R 319

Evidence held admissible

(7) Other instances

Ga —Henderson v State, 179 S E 2d 76, 227 Ga 68, vac in part on oth grds 92 S Ct 2868 408 U S 938, 33 L Ed 2d 758, reh den 93 S Ct 179, 409 U S 898, 34 L Ed 2d 164, on remand 194 S E 2d 410, 229 Ga 731

Vt —State v Oakes, 276 A 2d 18, 129 Vt 241, cert den 92 S Ct 340, 404 U S 965, 30 L Ed 2d 285

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60. Cal —People v Bjornsea, 180 P 2d 443, 79 Cal App 2d 519

Colo —Washington v People 405 P 2d 735, 158 Colo 115, cert den 86 S Ct 1217, 383 U S 953, 16 L Ed 2d 215

Nev —Jackson v State, 438 P 2d 795 84 Nev 203

Okl —Myers v State, 174 P 2d 395, 83 Okl Cr 177—Sharp v State Cr 407 P 2d 593

Vt —State v Barrett 266 A 2d 441 128 Vt 458 app after remand 290 A 2d 14, 130 Vt 197

63. Cal —People v Stines, 82 Cal Rptr 850, 2 C A 3d 970

64. Ala —Walker v State, 17 So 2d 428 31 Ala App 345—Brown v State, 96 So 2d 197, 39 Ala App 149

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Mont —State v Palen, 178 P 2d 862, 119 Mont 600

N C —State v Propst, 161 S E 2d 560 274 N C 62

Pa —Com v Graves, 334 A 2d 661, 461 Pa 118 app after remand 398 A 2d 644, 484 Pa 29

65. Ky —Geary v Com 503 S W 2d 505

66. Colo —Washington v People, 405 P 2d 735, 158 Colo 115, cert den 86 S Ct 1217, 383 U S 953 16 L Ed 2d 215

W Va —State v Painter, 63 S E 2d 86, 135 W Va 106

67. Md —Chisley v State, 95 A 2d 577, 202 Md 87

68. Ala —Walker v State, supra, n 64

Cal —People v Gorshen, 336 P 2d 492, 51 C 2d 716

68. Pa —Com v Fostar, 317 A 2d 188, 455 Pa 216

Blood alcohol level

Cal —People v Roberts, 123 Cal Rptr 893 51 C A 3d 125

72. Not probative material to guilt

N M —State v Lunn, App, 537 P 2d 672, 88 N M 64 cert den 540 P 2d 248, 88 N M 318, cert den 96 S Ct 793, 423 U S 1058, 46 L Ed 2d 648

75. Ala —Ayers v State, Cr, 267 So 2d 533, 48 Ala App 743

76. S C —State v Swilling, 142 S E 2d 864, 246 S C 144

Tex —Pugh v State 186 S W 2d 258, 148 Tex Cr 277

79. Ala —Brown v State, 31 So 2d 652 33 Ala App 152, cert den 31 So 2d 656, 249 Ala. 433

81. Ala —McMurtrey v State, 101 So 2d 88, 39 Ala App 319, cert den 101 So 2d 93, 267 Ala 259

Ill —People v Stamps, 291 N E 2d 274, 8 Ill App 3d 896

Wash —State v Rio, 230 P 2d 308, 38 Wash 2d 446, cert den 72 S Ct 106, 342 U S 867, 96 L Ed 652

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Ariz —State v Durgin, 517 P 2d 1246, 110 Ariz 250

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83. N J —State v Hudson, 185 A 2d 1, 38 N J 364

87. Cal —People v Martinez, 241 P 2d 224, 38 C 2d 556

89 Cal —People v Curry, 13 Cal Rptr 596, 192 C A 2d 664

92. Pa —Com v McCusker, 292 A 2d 286, 448 Pa 382

§ 262. Passion and Provocation

94. Cal —People v Brust, 306 P 2d 480 47 C 2d 776

95. Pa —Com ex rel Haines v Banmiller, 143 A 2d 661, 393 Pa 439, cert den 79 S Ct 101, 353 U S 868 3 L Ed 2d 100

96. N M —State v Moraga, App, 487 P 2d 178, 82 N M 750

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1. Subjective effect on accused

Wis —State v Heisler, App, 344 N W 2d 190, 116 Wis 2d 657

3. N C —State v Spence, 155 S F 2d 802, 271 N C 23, vac 88 S Ct 2290, 392 U S 649, 20 L Ed 2d 1350, on remand 164 S F 2d 593, 274 N C 536

§ 263. —— Insults and Defamation

11 Iowa—State v Boston, 11 N W 2d 407, 233 Iowa 1249

§ 264. —— Infidelity of Husband or Wife

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16. Tex —Smithwick v State 234 S W 2d 237 155 Tex Cr R 292

27 Ala —Palmore v State, 43 So 2d 399, 253 Ala 183—Palmore v State, 218 So 2d 830, 283 Ala 501

31 Okl —Whisenhunt v State Cr 279 P 2d 366

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35 Ala —Palmore v State 218 So 2d 830 283 Ala 501

§ 265. —— Cooling Time

38. Cal —People v Jones, 7 Cal Rptr 424 184 C A 2d 464

Ky —Carnes v Com, 206 S W 2d 44 306 Ky 55

Nev —Cranford v State, 349 P 2d 1051 76 Nev 113

§ 266. Grade or Degree of Offense

41 Ala —Gilliam v State 89 So 2d 584, 38 Ala App 420, cert den 89 So 2d 587 265 Ala 695

42 U S U S ex rel Witherspoon v Ogilvie, C A Ill, 337 F 2d 427, cert den 86 S Ct 122, 382 U S 861 15 L Ed 2d 99

Colo —Gallegos v People 316 P 2d 884 136 Colo 321—Jones v People, 393 P 2d 366, 155 Colo 148

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Mental capacity of defendant

N J —State v McAllister, 196 A 2d 786 41 N J 342

43. Ariz —State v Kruchten 417 P 2d 510, 101 Ariz 186, cert den 87 S Ct 784 385 U S 1043 17 L Ed 2d 687

Colo —Jones v People 393 P 2d 366, 155 Colo 148

Wash — State v Thompson, 364 P 2d 527, 58 Wash 2d 598, cert den 82 S Ct 1590 370 U S 945, 8 L Ed 2d 811 reh den 83 S Ct 50, 371 U S 855, 9 L Ed 2d 94

45. Mass —Com v McNeil, 104 N E 2d 153, 328 Mass 436

N J —State v Molnar, 44 A 2d 197, 133 N J Law 327

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(2) Other matters

Ariz —State v Kruchten, 417 P 2d 510, 101 Ariz 186, cert den 87 S Ct 784, 385 U S 1043, 17 L Ed 2d 687

46. Pa —Com v Jones, 50 A 2d 342, 355 Pa 594—Com v De Pofi, 66 A 2d 649, 362 Pa 229, cert den 70 S Ct 82, 338 U S 852, 94 L Ed 522

Pa —Com v Bromley, 29 Erie Co 328

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50. Cal —People v Mendes, 219 P 2d 1, 35 Cal 2d 537

Pa —Com v De Pofi, 66 A 2d 649, 362 Pa 229, cert den 70 S Ct 82, 338 U S 852, 94 L Ed 2d 522

Tenn —Myers v State, 206 S W 2d 30, 185 Tenn 264

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Conn —State v Kenyon, 54 A 2d 585, 134 Conn 43

51. Ala —Sashington v State, Cr, 325 So 2d 205, 56 Ala App 698, cert den 325 So 2d 211, 295 Ala 416

Cal —People v Nichols, 198 P 2d 538, 88 Cal App 2d 221

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N J —State v Di Paolo, 168 A 2d 401 34 N J 279 cert den 82 S Ct 130, 368 U S 880, 7 L Ed 2d 80

52 Intention and malice

Ala —Sashington v State, Cr, 325 So 2d 205, 56 Ala App 698, cert den 325 So 2d 211, 295 Ala 416

§ 267. Excuse or Justification in General

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55 Or — State v Bouse 264 P 2d 800 199 Or 676

56. N J —State v Conyers, 275 A 2d 721 58 N J 123

58 U S —Sims v Eyman C A Ariz 405 F 2d 439 vac in part on oth grds 92 S Ct 2850 408 U S 934 33 L Ed 2d 746

Pa —Com v Daverse, 73 A 2d 405, 364 Pa 623

Tenn —Fox v State Cr, 441 S W 2d 491, 1 Tenn Cr App 308

Tex — Wilson v State, Cr 481 S W 2d 155

Wyo — State v Goettina, 158 P 2d 865, 61 Wyo 420

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61 Fla —Outler v State App 322 So 2d 623

§ 268. —— Unlawful Character of Act of Deceased

69 City ordinance

(2) Other cases Bell v State 22 So 2d 116, 32 Ala App 118

71 Tex —Stephens v State 182 S W 2d 707, 147 Tex Cr R 510

§ 269 —— Exercise of Authority or Duty

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78 Evidence held inadmissible

(3) Other evidence —State v Carroll, 38 A 2d 798 131 Conn 224

Tex —Eckels v State, 220 S W 2d 175, 153 Tex Cr R 402

85. N C —State v Ellis, 90 S E 2d 225, 243 N C 142

§ 271. Self-Defense

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8. Ariz —State v Wallace, 319 P 2d 529 83 Ariz 220—State v Turner, 375 P 2d 567 92 Ariz 214

Cal —People v Lo Cigno, 14 Cal Rptr 354 193 C A 2d 360

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La —State v Bailey, 261 So 2d 583, 261 La 831
Mass —Com v Gibson, 333 N E 2d 400, 368 Mass 518
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Tex —Wood v State, Cr, 486 S W 2d 359

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Ohio—State v Davis, 456 N E 2d 1256, 8 Ohio App 3d 205, 8 O B R 276

9. Ala —Lovell v State, Cr, 284 So 2d 741, 51 Ala App 286
La —State v Jones, 269 So 2d 810, 263 La 909

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18. Ind —Nuss v State 328 N E 2d 747, 164 Ind App 396

21. Miss —Patrick v State, 285 So 2d 165
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§ 272. —— Character and Habits of Deceased

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22. Ala —McGuff v State, 27 So 2d 241, 248 Ala 259—Brown v State, 31 So 2d 670, 33 Ala App 97, revd on oth grds 31 So 2d 681 affd 31 So 2d 684, 249 Ala 412—C.J S cited in Brooks v State 82 So 2d 553, 555, 263 Ala 386—Butler v Hughes, 88 So 2d 195, 264 Ala 532—Jones v State, 83 So 2d 68, 38 Ala App 325—Holloway v State, 89 So 2d 313, 38 Ala App 434, cert den 89 So 2d 317 265 Ala 697—Farley v State, 182 So 2d 364, 279 Ala 98—McCaghren v State, Cr, 294 So 2d 756, 52 Ala App 509 revd on oth grds 294 So 2d 766, 292 Ala 378—White v State 314 So 2d 857, 294 Ala 265, cert den 96 S Ct 373 423 U S 951, 46 L Ed 2d 288
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Wyo —C.J S cited in State v Velsir, 159 P 2d 371, 374, 161 A L R 220
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As tending to show who was the aggressor

(3) U S —Peoples Loan & Inv Co v Travelers Ins Co, C C A Ark 151 F 2d 437, applying Arkansas rule
Ala —Headley v State, Cr, 283 So 2d 458, 51 Ala App 148, app after remand 314 So 2d 905 55 Ala App 303, cert den 314 So 2d 908, 294 Ala 758
Tex —Henry v State, 207 S W 2d 76 151 Tex Cr R 284
Minn —State v Keaton, 104 N W 2d 650, 258 Minn 359, 86 A L R 2d 649

(5) Other cases

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Okl —Jenkins v State, 161 P 2d 90, 80 Okl Cr 328—Jenkins v State, 162 P 2d 336, 80 Okl Cr 328
Tex —Wood v State, Cr, 486 S W 2d 359

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(1) Ga —Wilcher v State, 73 S E 2d 57, 87 Ga App 93

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Nev —Coombs v State 538 P 2d 162, 91 Nev 489

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23 Ill —People v Wright, 302 N E 2d 632, 14 Ill App 3d 445
Tex —Henry v State, supra, n 22

24. Ga —Henderson v State, 218 S E 2d 612, 234 Ga 827
Ohio—State v Morris 136 N E 2d 653 100 Ohio App 307, app dism 120 N E 2d 305, 161 Ohio St 591

25 Ala —Pope v State, 96 So 2d 441, 39 Ala App 42, cert den 96 So 2d 447 266 Ala 699
Cal —People v Brophy, 265 P 2d 593, 122 C A 2d 638 46 A L R 2d 1410—People v Yokum, 302 P 2d 406, 145 C A 2d 245
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Ill —People v Baer, 342 N E 2d 177, 35 Ill App 3d 391
Mo —State v Maggitt, 517 S W 2d 105
Neb —State v Escamilla, 239 N W 2d 270, 195 Neb 558
N Y —People v Yankouski, 143 N Y S 2d 737
Okl —Roberson v State, 218 P 2d 414, 91 Okl Cr 217—Harris v State, Cr, 400 P 2d 64
Va —Hubbard v Com, 59 S E 2d 102, 190 Va 917

In a prosecution for murder, testimony that accused's child was subjected to physical and sexual abuse by the victim is admissible [25.5]

25.5. N J —State v Kelly, 487 A 2d 364, 97 N J 178

26. Cal —People v Keys, supra, n 22
Fla —Rafuse v State, App, 215 So 2d 71

27. Cal —People v Keys, supra n 22
La —State v Rollins, 271 So 2d 519, 264 La 274

28. Ill —People v Baer, 342 N E 2d 177, 35 Ill App 3d 391
Neb —State v Escamilla, 239 N W 2d 270, 195 Neb 558

29. Evidence of bigamy irrelevant

Ark —Clark v State, 509 S W 2d 812, 256 Ark 658

31. Ala —Jones v State, 83 So 2d 68, 38 Ala App 325
Ill —People v Herron, 260 N E 2d 428, 125 Ill App 2d 18
Miss —Pearson v State, 179 So 2d 792, 254 Miss 275
Tex —Roberts v State, 276 S W 2d 821, 161 Tex Cr R 382

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Colo —Wafer v People, 488 P 2d 73, 175 Colo 332

35. La – State v Chapman, 298 So 2d 753

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38 Or —State v Griffin, 529 P 2d 399, 19 Or App 822

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(2) Other matters

Ala —Nixon v State, 72 So 2d 846, 261 Ala 74

39 Ga —Smith v State, 45 S E 2d 267, 202 Ga 851

41. Ind —Bates v State, 269 N E 2d 749

42. U S – U S ex rel Randazzo v Follette, D C N Y, 282 F Supp 2, cause remd, C A, 444 F 2d 625, cert den 92 S Ct 232, 404 U S 916, 30 L Ed 2d 191
Cal —People v Keys, supra, n 22—People v McDaniels, 160 P 2d 854, 70 Cal App 2d 207
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N C —State v Johnson, 154 S E 2d 48, 270 N C 215—State v Alston, 195 S E 2d 312, 17 N C App 718
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43 Ariz —State v Wallace, 319 P 2d 529, 83 Ariz 220
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Mo —State v Parker, supra, n 22
Okl —Fields v State, 188 P 2d 231, 85 Okl Cr 438
Tex —Medina v State, Cr App, 639 S W 2d 947

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Ga —Henderson v State, 218 S E 2d 612, 234 Ga 827
Mass —Com v Edmonds, 313 N E 2d 429, 365 Mass 496

Mo —State v Blair, 305 S W 2d 435

45. La —State v Basco, 43 So 2d 761, 216 La 365

47. Alaska—Pedersen v State 420 P 2d 327

Ariz —State v Griffin, 406 P 2d 397, 99 Ariz 43

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D C —Evans v U S, C A, 277 F 2d 354, 107 U S App D C 324, 1 A L R 3d 566

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Iowa—State v Wilson, 19 N W 2d 232, 236 Iowa 429

Miss —Freeman v State, 204 So 2d 842

Tex —Dempsey v State, 266 S W 2d 875, 159 Tex Cr R 602—Lewis v State, Cr, 463 S W 2d 186

Wash —State v Cloud, 498 P 2d 907, 7 Wash App 211

Not necessary that reputation of deceased be known to accused

Ga —Henderson v State, 218 S E 2d 612, 234 Ga 827

Minn —State v Keaton, 104 N W 2d 650, 258 Minn 359, 86 A L R 2d 649

49. Ala —McCaghren v State, Cr 294 So 2d 756 52 Ala App 509, revd on oth grds 294 So 2d 766, 292 Ala 378

Ark —Edwards v State, 185 S W 2d 556, 208 Ark 231

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Wash —State v Walker, 536 P 2d 657, 13 Wash App 545

Showing sufficient to admit evidence of dangerous character

Ill —People v Moore, 326 N E 2d 420, 27 Ill App 3d 337

Showing insufficient to admit evidence of dangerous character

Ala —Jones v State, 70 So 2d 543, 37 Ala App 467—Sidney v State, 89 So 2d 745, 265 Ala 136—Mitchell v State, Cr, 297 So 2d 383, 53 Ala App 58, cert den 297 So 2d 388 292 Ala 742

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Ga —Hall v State, 33 S E 2d 743, 72 Ga App 427—Beam v State, 67 S E 2d 573 208 Ga 497—Mathis v State, 80 S E 2d 159, 210 Ga 408

Ill —People v Hill, 240 N E 2d 373, 97 Ill App 2d 385

Ind —Madison v State, 269 N E 2d 164, 256 Ind 353

La —State v Rowland, 167 So 2d 346, 246 La 729—State v Mitchell, 290 So La 829—State v Groves, 311 So 2d 230

Okl —Thompson v State Cr, 365 P 2d 834

W Va —State v Collins, 180 S E 2d 54, 154 W Va 771

Prima facie showing that deceased was assailant

Ga —Black v State, 198 S E 2d 314, 230 Ga 614—Henderson v State, 218 S E 2d 612, 234 Ga 827

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50. Ala —**C J S cited in** Thompson v State, Cr App, 405 So 2d 717, 719, writ den Sup, 405 So 2d 721

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Tex —Vela v State, Cr, 516 S W 2d 176

51. Ga —Robertson v State, 183 S E 2d 47, 124 Ga App 119

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Ill —People v Hines, 334 N E 2d 233, 31 Ill App 3d 295

52 Ga —Head v State, 26 S E 2d 842, 69 Ga App 843—Smithwick v State 34 S E 2d 28, 199 Ga 292—Weaver v State 37 S E 2d 802, 200 Ga 598—Beam v State, supra, n 49—Tanner v State 102 S E 2d 176, 213 Ga 820—Dennis v State, 115 S E 2d 527, 216 Ga 206

53. Ga —Mathis v State supra n 49—Tanner v State, 102 S E 2d 176 213 Ga 820

Ill —People v Stombaugh, 284 N E 2d 640 52 Ill 2d 130

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57 Ala —Parker v State 94 So 2d 209, 266 Ala 63

58 Ga —Weaver v State, supra n 52

Ill —People v Moore 326 N E 2d 420, 27 Ill App 3d 337

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Miss —Amis v State, 204 So 2d 848

59 Ill —People v Rooney, 233 N E 2d 440, 91 Ill App 2d 46

N C —State v Allmond, 217 S E 2d 734, 27 N C App 29

61. La —State v Singleton, 311 So 2d 881

66 Alaska—Marrone v State, 359 P 2d 969

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67 Cal —People v Wong, 187 P 2d 828, 83 Cal App 2d 60

Miss —McGill v State 235 So 2d 451

Testimony not relevant

Mo —State v Stewart, App, 529 S W 2d 182

68. Ala —**C J S cited in** Degro v State, 38 So 2d 354, 357, 34 Ala App 232—**C J S. quoted at length in** Clinkscale v State, 73 So 2d 244, 245, 37 Ala App 593—Vander Wielen v State, Cr, 251 So 2d 240, 47 Ala App 108, writ den 251 So 2d 246, 287 Ala 742

Md —Williamson v State, 333 A 2d 653, 25 Md App 338

Mo —**C J S cited in** State v Robinson, 556 S W 2d 73, 74

69. Ala —**C.J.S cited in** Degro v State, 38 So 2d 354, 358, 34 Ala App 232—Frazier v State, Cr, 263 So 2d 511 48 Ala App 210, cert den 263 So 2d 516, 288 Ala 743

Tex —Dinklage v State, 185 S W 2d 573, 148 Tex Cr 123

70. Ariz —State v Jackson, 382 P 2d 229, 94 Ariz 117

73. Ala —Vander Wielen v State, Cr, 251 So 2d 240, 47 Ala App 108, writ den 251 So 2d 246, 287 Ala 742

Kan —State v Metcalf, 452 P 2d 842, 203 Kan 63

80. Iowa—State v Rutledge, 47 N W 2d 251, 243 Iowa 179, reh den 50 N W 2d 801, 243 Iowa 201

N M —State v Brock, 244 P 2d 131, 56 N M 328, 34 A L R 2d 447

N C —State v Thomas, 168 S E 2d 459, 5 N C App 448

Tex —Dinklage v State, supra, n 69

81. Iowa—**C J S cited in** State v Rutledge, 47 N W 2d 251, 262, 243 Iowa 179, reh den 50 N W 2d 801, 243 Iowa 201

Kan —**C J.S. cited in** State v Gray, 292 P 2d 698, 701, 179 Kan 133

Tex —Murphy v State, 198 S W 2d 98, 149 Tex Cr R 624—Johnson v State, 319 S W 2d 720, 167 Tex Cr R 289

Va —Lee v Com, 49 S E 2d 608, 188 Va 360

Knowledge by defendant necessary

Ohio—State v Morris, 136 N E 2d 653, 100 Ohio App 307, app dism 120 N E 2d 305, 161 Ohio St 591

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82 Tex —Dinklage v State, supra, n 69

83. Kan —**C J.S. cited in** State v Bradley, 576 P 2d 647 649, 223 Kan 710

Tenn —Solomon v State, Cr, 489 S W 2d 547, cert den 93 S Ct 2744, 412 U S 923, 37 L Ed 2d 150

Evidence not basis for rebuttal

(2) Va —Lee v Com, supra, n 81

(3) N C —State v Thomas, 168 S E 2d 459, 5 N C App 448

86. Tex —Murphy v State, supra, n 81

87 Kan —**C J S cited in** State v Gray, 292 P 2d 698, 701 179 Kan 133

90. Tex —Arthur v State, 339 S W 2d 538, 170 Tex Cr R 161

93. U S —Peoples Loan & Inv Co v Travelers Ins Co, C C A Ark, 151 F 2d 437

Ala —Higginbotham v State 78 So 2d 637, 262 Ala 236—Metcalf v State, 108 So 2d 435, 40 Ala App 25, cert den 108 So 2d 446, 268 Ala 533

Ark —Montague v State, 211 S W 2d 879, 213 Ark 575—Baxter v State, 298 S W 2d 47, 227 Ark 215—Mode v State, 350 S W 2d 675, 234 Ark 46, cert den 82 S Ct 1255, 370 U S 909, 8 L Ed 2d 403—Stout v State, 426 S W 2d 800, 244 Ark 676 App after remand 438 S W 2d 698 And 448 S W 2d 636—Perry v State 497 S W 2d 10, 254 Ark 939

Cal —People v Keys, supra, n 22—People v Wong, supra, n 67

Del —Ruffin v State, 123 A 2d 461, 11 Terry 83

Fla —Freeman v State, App, 97 So 2d 633—Convington v State, App, 302 So 2d 483

Ga —Smithwick v State, supra, n 49—Weaver v State, supra, n 52—Wilcher v State, 73 S E 2d 57, 87 Ga App 93—Campbell v State, 151 S E 2d 132, 222 Ga 570—Hensler v State, 188 S E 2d 401, 125 Ga App 554

Ill —People v Dixon, 295 N E 2d 556, 10 Ill App 3d 1038—People v Peeler, 299 N E 2d 382, 12 Ill App 3d 940

Kan —**C J S cited in** State v Gray, 292 P 2d 698, 701, 179 Kan 133—State v Mason, 490 P 2d 418, 208 Kan 39

La —State v Boudreaux, 61 So 2d 878, 221 La 1078

Md —Jones v State, 35 A 2d 916, 182 Md 653—Long v State, 254 A 2d 707, 7 Md App 256—Williamson v State, App, 333 A 2d 653, 25 Md App 338

Mass —Com v Connolly, 255 N E 2d 191, 356 Mass 617, cert den 91 S Ct 87, 93, 400 U S 843, 27 L Ed 2d 79

Mich —People v Johnson, 172 N W 2d 369, 382 Mich 632, cert den 90 S Ct 1533, 397 U S 1076, 25 L Ed 2d 816—People v Knott, 228 N W 2d 838, 59 Mich App 105

Minn —State v Keaton, 104 N W 2d 650, 258 Minn 359, 86 A L R 2d 649

Mo —State v McDonald, App, 527 S W 2d 380
Neb —State v Kimbrough, 115 N W 2d 422, 173 Neb 873—State v Ralls, 223 N W 2d 432 192 Neb 621
N M —State v Marquez, App, 529 P 2d 283, 87 N M 57, cert den 529 P 2d 273, 87 N M 47

Witness' knowledge of reputation

(2) Other matters

Mo —State v Chamineak, 343 S W 2d 153

Carrying of drugs inadmissible

Ill —People v Wesley, 163 N E 2d 500, 18 Ill 2d 138, cert den 81 S Ct 87, 364 U S 845, 5 L Ed 2d 69
Mass —Com v Lacasse, 304 N E 2d 438, 1 Mass App 590, affd 310 N E 2d 605, 365 Mass 271

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94. Kan —C.J.S. cited in State v Gray, 292 P 2d 698, 701, 179 Kan 133

95. Cal —People v Keys, 145 P 2d 589, 62 Cal App 2d 903—People v Thomas, 74 Cal Rptr 617, 269 C A 2d 327

97. Ariz —State v Jackson, 382 P 2d 229, 94 Ariz 117
Cal —People v Smith, 57 Cal Rptr 508 249 C A 2d 395—People v Rowland, 69 Cal Rptr 269, 262 C A 2d 790
Md —Williamson v State, 333 A 2d 653, 25 Md App 338
Mo —State v Davis, 365 S W 2d 577
Neb —State v Ralls, 223 N W 2d 432, 192 Neb 621
Wis —McMorris v State, 205 N W 2d 559, 58 Wis 2d 144
Wyo —State v Goettina, 158 P 2d 865, 61 Wyo 420

2. Neb —Cranford v State, 349 P 2d 1051, 76 Nev 113
Tex —Watson v State, 244 S W 2d 515 156 Tex Cr R 585

4. Cal —People v Keys 145 P 2d 589, 62 Cal App 2d 903

6. Kan —C J S cited in State v Gray 292 P 2d 698 701, 179 Kan 133

Reputation in place of homicide

Ga —Keener v State, 18 Ga 194, 63 Am Dec 269

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7. Iowa—State v Badgett, 167 N W 2d 680
Kan —C.J.S. cited in State v Gray, 292 P 2d 698, 701 179 Kan 133

11. Ill —People v Gibson, 52 N E 2d 1008 385 Ill 371

Evidence held improperly admitted

Kan —State v Gray, 292 P 2d 698, 179 Kan 133
N C —State v King, 214 S E 2d 597, 26 N C App 86 cert den 217 S E 2d 672, 288 N C 248

12. Tex —Kennedy v State, 200 S W 2d 400, 150 Tex Cr R 215

16. Ark —Edwards v State, 185 S W 2d 556, 208 Ark 231—Taylor v State, 261 S W 2d 401, 222 Ark 491
Cal —People v Davis, 47 Cal Rptr 801, 408 P 2d 129, 63 C 2d 648
Fla —Boston v State, 15 So 2d 607, 153 Fla 698
Md —Jones v State 35 A 2d 916, 182 Md 653
Mich —People v Rapier, 204 N W 2d 339, 43 Mich App 297
Miss —Newsome v State, 20 So 2d 708, 197 Miss 797
Mo —State v Timson, 461 S W 2d 764 App after remand 491 S W 2d 279

19. N C —State v Morgan, 95 S E 2d 507, 245 N C 215

The rule of exclusion applies also to record of conviction of murder.[21.1]

23.1. La —State v Boudreaux, 61 So 2d 878, 221 La 1078

26. Del —Ruffin v State, 123 A 2d 461, 11 Terry 83
Ky —McGill v Com, 365 S W 2d 470—C.J.S. cited in Johnson v Com, 477 S W 2d 159, 161
Mo —C.J.S. cited in State v Robinson, 556 S W 2d 73, 74
Okl —Stacey v State, 155 P 2d 736, 79 Okl Cr 417

Juvenile record

Cal —People v Pena, 2 Dist, 198 Cal Rptr 819, 151 C A 3d 462

27. Mo —State v Nenninger, 188 S W 2d 56, 354 Mo 53—State v Hicks, 438 S W 2d 215
Pa —C J S cited in Com v Darby, 373 A 2d 1073, 1075 473 Pa 109

Proof of convictions of deceased may be made by offering in evidence the judgment and sentence or commitment, and by proving the identity of the person named in the documents [29.5]

29.5. Okl —Drake v State, Cr, 437 P 2d 461

Identity of deceased not proven

Tex —Nichols v State, Cr 504 S W 2d 439

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30 Hawaii—State v Clyde 388 P 2d 846, 47 Haw 345

42. N M —State v Marquez, App 529 P 2d 283, 87 N M 57, cert den 529 P 2d 273 87 N M 47

§ 274. —— Character of Third Persons

Library References

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47 Ala —Farley v State, 182 So 2d 364, 279 Ala 98
Ill —People v Turner 226 N E 2d 667, 82 Ill App 2d 10

Narcotic addict

Ill —People v Moretti 129 N E 2d 709, 6 Ill 2d 494, cert den 78 S Ct 794 356 U S 947, 2 L Ed 2d 822

§ 275. —— Previous Quarrels, Ill Feeling, or Hostile Acts

Library References

Homicide ⇐189, 191

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48 Ill —C J S cited in People v Moretti 129 N E 2d 709, 723, 6 Ill 2d 494, cert den 78 S Ct 794, 356 U S 947, L Ed 2d 822—People v Turner, 226 N E 2d 667 82 Ill App 2d 10
Miss —Tillman v State, 83 So 2d 86, 225 Miss 275
Wash —State v Smith, 470 P 2d 214, 2 Wash App 769

50 Ala —Abernathy v State 187 So 2d 287 43 Ala App 231
Wis —Bedford v State 222 N W 2d 658 65 Wis 2d 357

Overt act or hostile demonstration must be shown

La —State v Tobias, 48 So 2d 905, 218 La 226

51. Ala —Holloway v State, 89 So 2d 313, 38 Ala App 434, cert den 89 So 2d 317, 265 Ala 697

52. Ala —Holloway v State, 89 So 2d 313, 38 Ala App 434, cert den 89 So 2d 317, 38 Ala App 434—Foreman v State, Cr, 278 So 2d 238, 50 Ala App 236
Cal —People v Schindler, 100 Cal Rptr 110, 23 C A 3d 369
Ga —Black v State, 198 S E 2d 314, 230 Ga 614
La —State v Winstead, 15 So 2d 793, 204 La 366
Miss —Ridgeway v State, 148 So 2d 513 245 Miss 506
Mo —State v Laspy, 298 S W 2d 357
Wyo —State v Goettina, 158 P 2d 865, 61 Wyo 420

Evidence of intimate relationship between deceased and defendant's wife held inadmissible

Ky —Lewis v Com, 318 S W 2d 857

53. Ala —McGuff v State, 27 So 2d 241, 248 Ala 259—Wright v State, 39 So 2d 395—Hoomes v State, 37 So 2d 686, 34 Ala App 121, cert den 37 So 2d 690, 251 Ala 392—Parker v State, 94 So 2d 209, 266 Ala 63
Ariz —State v Wallace, 319 P 2d 529, 83 Ariz 220
Ark —Freeman v State, 385 S W 2d 156, 238 Ark 804
Ill —People v Davis, 193 N E 2d 841, 29 Ill 2d 127—People v Ruel, 256 N E 2d 672, 120 Ill App 2d 374
Kan —State v Blocker, 505 P 2d 1099, 211 Kan 185
La —State v Terry, 61 So 2d 888, 221 La 1109
Tex —Wood v State, Cr, 486 S W 2d 359
Wyo —C J S quoted at length in State v Goettina, 158 P 2d 865, 883, 884, 61 Wyo 420

54 Ala —Crawford v State, 49 So 2d 231, 35 Ala App 513

55. Miss —Ridgeway v State, 148 So 2d 513, 245 Miss 506
N J —State v Seefeldt, 242 A 2d 322, 51 N J 472

57 Ala —Metcalf v State, 108 So 2d 435, 40 Ala App 25, cert den 108 So 2d 446, 268 Ala 533—Abernathy v State, 187 So 2d 287, 43 Ala App 231
Ariz —State v Wallace 319 P 2d 529, 83 Ariz 220
Ill —People v Wheeler, 206 N E 2d 727, 57 Ill App 2d 452
Va —Randolph v Com, 56 S E 2d 226, 190 Va 256

60. Ark —Dixon v State, 307 S W 2d 792, 228 Ark 430

62. Ariz —State v Young, 508 P 2d 51, 109 Ariz 221
Ga —Anderson v State, 211 S E 2d 728, 233 Ga 433
La —State v McMillian, 64 So 2d 856, 223 La 96
Wis —Werner v State, 226 N W 2d 402, 66 Wis 2d 736

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63. Ill —People v Adams, 185 N E 2d 676, 25 Ill 2d 568
Minn —State v Matthews, 221 N W 2d 563, overruling State v Ronk, 98 N W 334, 91 Minn 419
Mo —State v Martin, 260 S W 2d 536, 364 Mo 258
N M —State v Marquez, App, 529 P 2d 283, 87 N M 57, cert den 529 P 2d 273, 87 N M 47

64. Tex —Wood v State, Cr, 486 S W 2d 359

68. N M —State v Marquez, App, 529 P 2d 283, 87 N M 57, cert den 529 P 2d 273, 87 N M 47
Okl —Thompson v State, Cr, 365 P 2d 834
S C —State v Amburgey, 34 S E 2d 779, 206 S C 426
Va —Jordan v Com, 222 S E 2d 573, 216 Va 768

Prior specific acts inadmissible

Ga —Jordon v State, 208 S E 2d 840, 232 Ga 749

Police report admissible

N M —State v Alderette, App, 526 P 2d 194, 86 N M 600, cert den 526 P 2d 187 86 N M 593

69 Ga —Smithwick v State, 34 S E 2d 28, 199 Ga 292
Ill —People v Simpson, 222 N E 2d 102, 76 Ill App 2d 441
Ky —Wooten v Com, 478 S W 2d 701
La —State v Anderson, 20 So 2d 288, 206 La 986, cert den 65 S Ct 913 324 U S 868, 89 L Ed 1423
Miss —Tillman v State, 83 So 2d 86, 225 Miss 275
N C —State v Davis, 129 S E 2d 894, 259 N C 138—State v Brown, 215 S E 2d 802, 26 N C App 314
Tenn —Chaffin v State, 354 S W 2d 772, 209 Tenn 590—Henely v State, Cr, 520 S W 2d 361

70. Ala —McGuff v State, supra, n 53
Tex —Dempsey v State, 266 S W 2d 875, 159 Tex Cr R 602—Ybarra v State, 275 S W 2d 484, 161 Tex Cr R 118

71. Held no error in excluding evidence

Ala —Higginbotham v State, 78 So 2d 637, 262 Ala 236
Ark —Halfacre v State, 639 S W 2d 734, 277 Ark 168
Fla —Rolle v State, App, 314 So 2d 167
Wash —State v Walker, 536 P 2d 657, 13 Wash App 545

Refusal erroneous

Ill —People v Moore, 326 N E 2d 420, 27 Ill App 3d 337

72. Cal —People v Mathis, 46 Cal Rptr 785, 406 P 2d 65 63 C 2d 416, cert den 87 S Ct 105 385 U S 857, 17 L Ed 2d 84—People v Smith, 57 Cal Rptr 508, 249 C A 2d 395

D C —King v U S Mun App, 177 A 2d 912—U S v Burks, C A, 470 F 2d 432 152 U S App D C 284

N C —State v Johnson, 154 S E 2d 48, 270 N C 215

Okl —Jackson v State, 179 P 2d 924, 84 Okl Cr 138—Harris v State, Cr, 400 P 2d 64

Tex —Ybarra v State, 275 S W 2d 484, 161 Tex Cr R 118

73. Tex —Navarro v State, Cr App 639 S W 2d 945

74. Va —Short v Com, 196 S E 2d 79, 213 Va 746

Wash —State v Huff, 477 P 2d 22, 3 Wash App 632

State of mind

La —State v Edwards, 420 So 2d 663

77. D C —Jones v U S C A, 385 F 2d 296, 128 U S App D C 36

Ky —Friley v Com, 255 S W 2d 483

La —State v Foreman, 240 So 2d 736, 256 La 999

Mo —State v Laspy, 323 S W 2d 713

78. Ala —Pope v State, 96 So 2d 441 39 Ala App 42, cert den 96 So 2d 447, 266 Ala 699

Md —Barger v State, 235 A 2d 751 2 Md App 565

N Y —People v Washington, 125 N Y S 2d 231, 282 App Div 896

N C —State v Arnold, 216 S E 2d 164, 26 N C App 484

Pa —Com v Banks, 103 A 2d 726 376 Pa 531

Tex —Key v State 192 S W 2d 563, 149 Tex Cr R 200—Ashley v State, Cr, 362 S W 2d 847, cert den 83 S Ct 955, 372 U S 956 10 L Ed 2d 10

Wash —State v Cloud, 498 P 2d 907 7 Wash App 211

79. Va —Randolph v Com, supra, n 57

80 Cal —People v Jones 288 P 2d 544 136 C A 2d 175

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87. Ala —Boyd v State 71 So 2d 119 37 Ala App 429, cert den 71 So 2d 120 260 Ala 696

Ariz —State v Wallace 319 P 2d 529, 83 Ariz 220

88. Ariz —State v Wallace, 319 P 2d 529, 83 Ariz 220

Colo —Ballay v People 419 P 2d 446, 160 Colo 309

Ill —People v Moore, 326 N E 2d 420, 27 Ill App 3d 337

La —State v Knight, 80 So 2d 391, 227 La 739—State v Bailey, 261 So 2d 583, 261 La 831

Okl —Thompson v State, Cr, 365 P 2d 834

89. Ala —Wright v State, supra, n 53—Byrd v State 57 So 2d 388 257 Ala 100—Farley v State, 182 So 2d 364 279 Ala 98—Plemmons v State, 176 So 2d 45 42 Ala App 638 cert den 176 So 2d 48 278 Ala 711

Ariz —State v Wallace, 319 P 2d 529, 83 Ariz 220

92. Fla —Rolle v State, App, 314 So 2d 167

La —State v Butler, 89 So 2d 294, 230 La 765

93. Fla —Freeman v State, App, 97 So 2d 633

Okl —Holman v State, 262 P 2d 456, 97 Okl Cr 279

96. Ala —Byrd v State, supra, n 89—Parker v State, 94 So 2d 209, 266 Ala 63—Chappelle v State, 99 So 2d 431, 267 Ala 37

Fla —Armstrong v State, App, 243 So 2d 181

La —State v Weathers 304 So 2d 662

S C —State v Bush, 45 S E 2d 847, 211 S C 455

97. Fla —Rolle v State, App 314 So 2d 167

Ky —Lee v Com, 329 S W 2d 57

Mich —People v Knott, 228 N W 2d 838, 59 Mich App 105

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1. Va —Jordan v Com 222 S E 2d 573, 216 Va 768

2. La —State v Winstead, 15 So 2d 793, 204 La 366

§ 276. —— Threats of Deceased or Person Assaulted against Defendant

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10 Ala —McGuff v State, 27 So 2d 241, 248 Ala 259—Hayden v State, 79 So 2d 558, 262 Ala 457—Butler v Hughes, 88 So 2d 195, 264 Ala 532—Harbin v State, 82 So 2d 565, 38 Ala App 251, cert den 82 So 2d 569, 263 Ala 699—Parker v State, 94 So 2d 209, 266 Ala 63—Farley v State, 182 So 2d 364, 279 Ala 98—McCaghren v State, Cr, 294 So 2d 756, 52 Ala App 509, revd on oth grds 294 So 2d 766, 292 Ala 378

Ga —Jarrard v State, 55 S E 2d 706, 206 Ga 112—Haynes v State 215 S E 2d 342, 134 Ga App 588

Ill —People v Golson, 64 N E 2d 462, 392 Ill 252, cert den 66 S Ct 1371, 328 U S 865, 90 L Ed 1635—People v Arcabascio, 70 N E 2d 608, 395 Ill 487—People v Davis, 193 N E 2d 841, 29 Ill 2d 127—People v Wheeler, 206 N E 2d 727, 57 Ill App 2d 452—People v Herron, 260 N E 2d 428, 125 Ill App 2d 18—People v Peeler 299 N E 2d 382, 12 Ill App 3d 940

Kan —State v Blocker, 505 P 2d 1099, 211 Kan 185

Ky —Minix v Com, 249 S W 2d 48—McQueen v Com, 393 S W 2d 787—Carnes v Com, 453 S W 2d 595—Cessna v Com, 465 S W 2d 283

La —State v Cox, 49 So 2d 12, 218 La 277

Md —Barger v State 235 A 2d 751, 2 Md App 565

Mich —People v Griner, 186 N W 2d 800, 30 Mich App 612

Mo —C J S cited in State v Finn, 243 S W 2d 67, 73—State v Laspy, 298 S W 2d 357

S C —State v Mason, 56 S E 2d 90, 215 S C 457

Admissibility of all threats made

(4) Additional statements

N C —State v Thomas, 168 S E 2d 459, 5 N C App 448

Hearsay rule not violated

Mich —People v Cameron, 217 N W 2d 401, 52 Mich App 463

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11. Ark —Freeman v State, 385 S W 2d 156 238 Ark 804

Ill —People v Stombaugh, 284 N E 2d 640, 52 Ill 2d 130

Md —Barger v State, 235 A 2d 751, 2 Md App 565

Mo —C J S cited in State v Finn, supra, n 10—State v Bounds, 305 S W 2d 487

12. Ala —McGuff v State, supra, n 10

Ark —Decker v State, 353 S W 2d 168, 234 Ark 518, 98 A L R 2d 1

Fla —Parrish v State, App, 113 So 2d 860

Ga —Bird v State, 31 S E 2d 835, 71 Ga App 643

Iowa—State v Wilson, 19 N W 2d 232, 236 Iowa 429

Mo —State v Finn, 243 S W 2d 67

Evidence improperly excluded

Ariz —State v Wallace, 319 P 2d 529, 83 Ariz 220

13. Ill —People v Wright, 302 N E 2d 632, 14 Ill App 3d 445

Mass —Com v Rubin, 63 N E 2d 344, 318 Mass 587

Mo —State v Bounds, 305 S W 2d 487

Evidence not offered to prove truth of matters recited

Mich —People v Cameron, 217 N W 2d 401, 52 Mich App 463

Evidence held inadmissible

Ind —Henderson v State, 455 N E 2d 1117

15. S C —State v Mason, supra, n 10

21. Miss —Stewart v State, 226 So 2d 911

22. Threats held not too remote

Ky —Faulkner v Com, 423 S W 2d 245

S C —State v Smith, 208 S E 2d 533, 263 S C 150

25. Evidence held inadmissible

(3) Other evidence

Mo —State v Chamineak, 343 S W 2d 153

28. Ala —Parker v State, 94 So 2d 209, 266 Ala 63

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33. N C —State v Clontz, 170 S E 2d 624, 6 N C App 587

34. Fla —Bailey v State, 21 So 2d 217, 155 Fla 597, cert den 65 S Ct 1580, 325 U S 890, 89 L Ed 2003, reh den 66 S Ct 16, 326 U S 805, 90 L Ed 490, cert den 66 S Ct 520, 327 U S 778, 90 L Ed 1006

35. La —State v Groves, 311 So 2d 230

S C —C J S cited in State v Griffin, 285 S E 2d 631, 633, 277 S C 193

36. Ga —Smith v State, 197 S E 2d 866, 128 Ga App 777

41. Ala —Hayden v State, 79 So 2d 558, 262 Ala 457

43 Okl —Jackson v State, 179 P 2d 924, 84 Okl Cr 138

44. Ark —Brown v State, 329 S W 2d 521, 231 Ark 363

Ill —People v Moore, App, 326 N E 2d 420

Tex —Caldwell v State, Cr App, 206 S W 2d 1013

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55. Ala —Abernathy v State, 187 So 2d 287, 43 Ala App 231

Ill —People v Arcabascio, 70 N E 2d 608, 395 Ill 487—People v Herron, 260 N E 2d 428, 125 Ill App 2d 18—People v McNair 332 N E 2d 696, 30 Ill App 3d 603

La —State v Winstead, supra, n 2—State v Cox, supra, n 10—State v Sears, 55 So 2d 881, 220 La 103—State v Jones, 244 So 2d 849, 257 La 966

Md —Magness v State, 234 A 2d 481, 2 Md App, 320—Bowyer v State, 235 A 2d 317, 2 Md App 454

Okl —Jenkins v State, 161 P 2d 90, 80 Okl Cr 328—Jenkins v State, 162 P 2d 316, 80 Okl Cr 328—Fields v State, 188 P 2d 231, 85 Okl Cr 438—Ridinger v State, 267 P 2d 175, 97 Okl Cr 377—Thompson v State, Cr, 365 P 2d 834

"Overt act," etc.

(2) Other cases

La —State v Magee, 41 So 2d 499, 215 La 675—State v Groves, 311 So 2d 230

Overt act not shown

La —State v Walker 296 So 2d 310

56. Ala —Shepard v State, Cr, 282 So 2d 418, 51 Ala App 66

57 Ark —Decker v State, 353 S W 2d 168, 234 Ark 518, 98 A L R 2d 1

La —State v Magee, supra, n 55

58. Fla —Thompson v State, 34 So 2d 36, 160 Fla 147

61 N C —State v Allmond, 217 S E 2d 734, 27 N C App 29

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67 Ala —Corbitt v State, supra, n 55

Discretion not abused

La —State v Mitchell, 290 So 2d 829—State v Weathers, 304 So 2d 662

73. U S —Griffin v U S, App D C, 69 S Ct 814, 336 U S 704, 93 L Ed 993

Ga —Salter v State, 45 S.E 2d 106, 76 Ga App 209—Spradlin v State, 82 S E 2d 238, 90 Ga App 97—Burgess v State, 175 S E 2d 829, 226 Ga 529

La —State v Cox, supra, n 10

Me —State v Mitchell, 68 A 2d 387, 144 Me 320

Md —Magness v State, 234 A 2d 481, 2 Md App 320—Bowyer v State, 235 A 2d 317, 2 Md App 454

Miss —Shinall v State, 199 So 2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

N C —State v Minton, 44 S E 2d 346, 228 N C 15—State v Vestal, 180 S E 2d 755, 278 N C 561, app after remand 195 S E 2d 297, 283 N C 249

Ohio—State v Debo, 222 N E 2d 656, 8 Ohio App 2d 325

Okl —Jenkins v State, 161 P 2d 90, 80 Okl Cr 328—Jenkins v State, Cr App, 188 P 2d 231

The Corpus Juris Secundum text has been quoted at length as stating "the general and almost universal rule, including its modifications"

Ohio—State v Debo, 222 N E 2d 656, 659

74. Ala —McGuff v State, supra, n 10—Corbitt v State, supra, n 55—Rowell v State, 105 So 2d 877, 39 Ala App 613

Ark —Decker v State, 353 S W 2d 168, 234 Ark 518, 98 A L R 2d 1—Sanders v State, 432 S W 2d 467, 245 Ark 321—Armstrong v State, 475 S W 2d 541, 251 Ark 865

Cal —People v Rigney, 10 Cal Rptr 625, 359 P 2d 23, 55 C 2d 236, 98 A L R 2d 186

Ga —Salter v State, supra, n 73—Spradlin v State, supra, n 73

Ind —Pollard v State, 94 N E 2d 912, 229 Ind 62

Me —State v Mitchell, supra, n 73

Mass —Com v Rubin, supra, n 13

Minn —State v Thurston, 216 N W 2d 267, 299 Minn 30

N C —State v Minton, supra, n 73—State v Goode, 107 S E 2d 70, 249 N C 632

Ohio—State v Debo, 222 N E 2d 656, 8 Ohio App 2d 325

Okl —Jenkins v State, supra, n 55

S C —State v Mason, supra, n 10

Tex —Crenshaw v State, 208 S W 2d 647, 151 Tex Cr R 467

Va —C J S. cited in Riddick v Com, 41 S E 2d 445, 447, 186 Va 100

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75. Ark —Davis v State, 533 S W 2d 202, 259 Ark 403

Me —State v Mitchell, supra, n 73

Ohio—State v Debo, 222 N E 2d 656, 8 Ohio App 2d 325

Va —C.J.S. cited in Riddick v Com, supra, n 74

76. Colo —C.J.S. quoted in Sowards v People, 408 P 441, 443, 158 Colo. 557

77. Ind —Nuss v State, 328 N E 2d 747, 164 Ind App 396

Miss —Washington v State, 307 So 2d 430

N C —State v Minton, supra, n 73

Okl —Jenkins v State, 161 P 2d 90, 80 Okl Cr 328—Jenkins v State, Cr App, 188 P 2d 231

Evidence other than threats tending to support plea

Miss —Evans v. State, 315 So 2d 1

Okl —Harris v State, Cr., 400 P.2d 64.

§ 278. —— Imminence and Apprehension of Danger

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94. Ala —Walker v State, 71 So 2d 47, 260 Ala 451

Cal —People v Sonier, 248 P 2d 155, 113 C A 2d 277—People v. Ogg, 66 Cal Rptr 289, 258 C.A 2d 841

Miss —Eaton v State, 28 So 2d 230, 200 Miss 729

95. Cal.—People v Davis, 47 Cal.Rptr. 801, 408 P 2d 129, 63 C 2d 648.

Ga.—Truitt v State, 82 S E 2d 166, 90 Ga App 181.

Iowa—State v Wilson, supra, n 12.

N.C —State v. Miller, 190 S.E.2d 888, 16 N.C.App. 1, mod on oth. grds. 194 S.E.2d 353, 282 N.C. 633

Tex.—Dempsey v State, 266 S.W.2d 875, 159 Tex Cr R 602.

Evidence held inadmissible

Wash.—State v. Smith, 470 P.2d 214, 2 Wash App. 769

97. La.—State v McMillian, 64 So.2d 856, 223 La. 96

Mass —Com v Rubin, supra, n 13.

Evidence held inadmissible

Cal —People v Pena, 2 Dist, 198 Cal Rptr 819, 151 C A 3d 462

Irrelevant absent evidence of immediate danger

Mo —State v Martin, App, 666 S W 2d 895

98. Evidence inadmissible

Ill —People v Saunders, 309 N E 2d 350, 18 Ill App 3d 117

99. Tex —Dempsey v State, supra, n 95

7. Mass —Com v Shaffer, 318 N E 2d 914, 2 Mass App 658, affd, Sup, 326 N E 2d 880, 367 Mass 508

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Evidence of a defendant's state of mind showing that he did not believe that he was in imminent danger of having deadly physical force inflicted on him is admissible [17.5]

17.5 N Y —People v Emick, 481 N Y S 2d 552, 103 A D 2d 643

18. Ala —Webb v State, 35 So 2d 373, 33 Ala App 520—Dobbins v State, 149 So 2d 814, 274 Ala 524

Tex —Schuler v State, 342 S W 2d 765, 170 Tex Cr R 612

Evidence held inadmissible

W Va —State v McLane, 27 S E 2d 604, 126 W Va 219

20. Cal —People v Moore, 275 P 2d 485, 43 C 2d 517

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37. D C —Griffin v U S., 183 F 2d 990, 87 U S App D C 172

38. Ala —Poellnitz v State, Cr, 262 So 2d 631, 48 Ala App 144

45. Ala —Nixon v State, 72 So 2d 846, 261 Ala 74

Ky —Claypoole v Com, 355 S W 2d 652

53. Ky —Branham v. Com, 189 S W 2d 675, 300 Ky 459

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57. La —State v Richard, 14 So 2d 615, 203 La 722

58. Ark —Bly v State, 214 S W 2d 77, 213 Ark 859

Circumstantial evidence

(3) Starke v State, 16 So 2d 426, 31 Ala App. 322

59. Ala —Harbin v State, 82 So 2d 565, 38 Ala App 251, cert den 82 So 2d 569, 263 Ala 699

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77. Mo —C.J S. cited in State v Cole, 377 S W.2d 306, 312

78. Miss —Shinall v State, 199 So.2d 251, cert den 88 S Ct 590, 389 U S 1014, 19 L Ed 2d 660

§ 279. —— Facts Unknown to Defendant

82. Ark —Junior v State, 236 S W 2d 1016, 218 Ark 481

§ 280. —— Other Particular Matters to Sustain Right

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89. N D —State v. Haakenson, 213 N W.2d 394

Okl —Brown v. State, 169 P.2d 772, 82 Okl.Cr 344

93. Defendant not required to retreat

Ala —Cole v. State, 144 So 2d 54, 41 Ala.App. 465, cert den. 144 So 2d 57, 273 Ala. 706.

94. Ill.—People v. Johnson, 247 N.E.2d 10, 108 Ill App.2d 150

96. Ala —Biggs v State, Cr.App., 441 So.2d 989

§ 281. —— Particular Evidence to Rebut Right

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13. Ark —Bartley v State, 199 S W 2d 965, 210 Ark 1061

Ky —Jackson v Com, 296 S W 2d 472

N C —State v De Mai, 44 S E 2d 213, 227 N C 657

Tex —Richardson v State, 228 S W 2d 179, 154 Tex Cr R 422—Sherman v State, Cr, 428 S W 2d 338

14. U S —Peoples Loan & Inv Co v Travelers Ins Co, C C A Ark, 151 F 2d 437—U S v Alvarez, C A Fla, 755 F 2d 830, cert den 106 S Ct 274, 88 L Ed 2d 235, clarifying United States v Danehy, 680 F 2d 1311 and United States v Young, 464 F 2d 160

Cal —People v Ogg, 66 Cal Rptr 289, 258 C A 2d 841

Pa —Com v Carey, 39 Berks Co 203

Prior difficulties between accused and deceased

(1) Ala —Byrd v State, 57 So 2d 388, 257 Ala 100

Tape recording of police emergency call

Mont —State v Johns, 653 P 2d 494, 201 Mont 192

15. D C —Harris v U S, C A, 364 F 2d 701, 124 U S App D C 308

16. Ala —Tolbert v State, 15 So 2d 745, 31 Ala App 301

18. Mich —People v Morehouse, 44 N W 2d 830, 328 Mich 689, 34 A L R 2d 676, cert den 71 S Ct 739, 341 U S 922, 95 L Ed 1335.

23. Ala —Cook v State, 115 So 2d 101, 269 Ala 646

Mo —State v Nenninger, 188 S W 2d 56, 354 Mo 53

N C —State v Gardner, 46 S E 2d 824, 228 N C 567

Accused's statements to third persons

(2) Other instances

Md —Wilson v State, 315 A 2d 788, 20 Md App 318

Accused's knowledge of victim's federal status

U S —U S v Alvarez, C A Fla, 755 F 2d 830, cert den 106 S Ct 274, 88 L Ed 2d 235, clarifying U.S v Danehy, 680 F 2d 1311 and U S v Young, 464 F 2d 160

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31. Ability to defend self without killing

Mass —Com v Oram, 457 N E 2d 284, 17 Mass.App 941, review den 465 N E 2d 261, 392 Mass 1101

§ 282. Defense of Another

Library References

Homicide ⇐196.

34. Ga —Shellman v. State, 112 S E 2d 267, 100 Ga App 663.

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57. Ala —Lovejoy v. State, 15 So.2d 300, 31 Ala App 244, cert den 15 So 2d 303, 244 Ala. 637—Lovejoy v. State, 34 So 2d 692, 33 Ala App 414, cert den 34 So.2d 700, 250 Ala. 409.

§ 285. Defense of Property

Library References

Homicide ⇐198.

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Other evidence has been held admissible.[97.1]

97.1. Intoxication after commission of offense

Ky —Stephens v Com., 175 S.W.2d 5, 295 Ky. 542.

Still other evidence has been held inadmissible.[97.2]

97.2. Wound of deceased's companion

Ky —Stephens v Com, supra, n. 97.1.

§ 286. Definition

98. Ill—People v Hubbs, 83 N E 2d 289, 401 Ill 613—People v Odum, 188 N E 2d 720, 27 Ill 2d 237

Okl—Graham v State, 157 P 2d 758, 80 Okl Cr 159—Hampton v State, Cr, 407 P 2d 210—C.J.S black letter summary cited in Pettigrew v State, Cr, 554 P 2d 1186, 1193

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2.5. Ark—Phillips v State, 408 S W 2d 883, 241 Ark 601

Likewise, a death bed statement made by a third person exculpating the accused is not admissible as a dying declaration,[2.5] nor, is it admissible as a statement against interest unless the interest is of a pecuniary character[2.10]

2.5. Declaration not concerning declarant's death

Okl—Newton v State, 71 P 2d 122, 61 Okl Cr 237—Petition of Winneger, Cr, 337 P 2d 445

2.10. Okl—Petition of Winneger, Cr, 337 P 2d 445

§ 287. General Rule as to Admissibility

Library References

Homicide ⇐200 et seq

3. U S—Pointer v State of Tex, Tex, 85 S Ct 1065, 380 U S 400, 13 L Ed 2d 923, mand conf to, Cr, 391 S W 2d 62

Ala—Anderson v State, 2 So 2d 461, 30 Ala App 124, cert den 2 So 2d 463, 241 Ala 381

Colo—Ferguson v People, 192 P 2d 523, 118 Colo 54

Ga.—Lingo v State, 175 S E 2d 657, 226 Ga 496

Ky—Woods v Com, 220 S W 2d 1012, 310 Ky 396—Minix v Com, 249 S W 2d 48

La—State v Lea, 84 So 2d 169, 228 La 724, cert den 76 S Ct 655, 350 U S 1007, 100 L Ed 869

Me—State v Lafferty, 309 A 2d 647

Minn—State v Eubanks, 152 N W 2d 453, 277 Minn 257, cert den 88 S Ct 1070, 390 U S 964, 19 L Ed 2d 1165

Nev—State v Teeter, 200 P 2d 657, 65 Nev 584

N Y—People v Little, 371 N Y S 2d 726, 83 Misc 2d 321

N C—State v Rich, 58 S E 2d 717, 231 N C 696

Okl—Smith v State, 175 P 2d 348, 83 Okl Cr 209—Hampton v State, Cr, 407 P 2d 210

Or—State v Garver, 225 P 2d 771, 190 Or 291, 27 A L R 2d 105—State v Reyes, 308 P 2d 182, 209 Or 595

Pa—Com v Knable, 85 A 2d 114, 369 Pa 171—Com v Gilpin, 31 Wash Co 135—Com v Brown, 131 A 2d 367, 388 Pa 613

S C—State v Dawson, 26 S E 2d 506, 203 S C 167

Tenn—Hawkins v State, 417 S W 2d 774, 220 Tenn 383

Tex—Martellano v State, 237 S W 2d 857, 155 Tex Cr R 570

Va—Thomas v Com, 32 S E 2d 711, 183 Va 501—Batten v Com, 56 S E 2d 231, 190 Va 235

Inflammatory nature

Pa—Com v Knable, supra

Rule not statutory but traditionally recognized

La—State v Jacobs, 281 So 2d 713

4. Ala—C.J.S. cited in Cotney v State, 26 So 2d 598, 601, 32 Ala App 46, affd 26 So 2d 603, 248 Ala 1, cert den 67 S Ct 488, 329 U S 798, 91 L Ed 683

Mo—State v Proctor, 269 S W 2d 624, 48 A L R 2d 724

Nev—Wilson v State, 468 P 2d 346, 86 Nev 320

7. Ala—Hutcherson v State, 108 So 2d 177, 40 Ala App 78, cert den 108 So 2d 180, 268 Ala 696

Cal—People v Keelin, 289 P 2d 520, 136 C A 2d 860, 56 A L R 2d 355

D C—U S v Kearney, C A, 420 F 2d 170, 136 U S App D C 328

Ky—Coots v Com, 175 S W 2d 139, 295 Ky 637

La—State v Reese, 194 So 2d 729, 250 La 151, cert den 88 S Ct 485, 389 U S 996, 19 L Ed 2d 495

Me—State v O'Clair, 292 A 2d 186

Pa—Com v Plubell, 80 A 2d 825, 367 Pa 452—Com v Hawkins, 292 A 2d 302, 448 Pa. 206—Com v Douglas, 337 A 2d 860, 461 Pa 749

S C—State v Bethea, 126 S E 2d 846, 241 S C 16

Tenn—Beard v State, Cr, 485 S W 2d 882

Tex—Seay v State, Cr, 395 S W 2d 40

8. U S—U S v Mobley, C A Ga, 421 F 2d 345

Ga—Hardy v State, 46 S E 2d 536, 76 Ga App 488

Mich—People v Johnson, 54 N W 2d 206, 334 Mich 169

Statements by victim while in hospital not admissible

Pa—Com v Sherman, 488 A 2d 348, 339 Pa Super 138

Refusal held error

Pa—Com v Plubell, supra, n 7

Treated with a jaundiced eye although not presumed to be involuntary

Ala—Hutcherson v State, 108 So 2d 177, 40 Ala App 78, cert den 108 So 2d 180, 268 Ala 696

9. Ala—Cotney v State, supra, n 3

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14. Motive plus circumstances must be considered

Alaska—Hewitt v State, 514 P 2d 6

17. Iowa—C.J.S cited in State v Powell, 24 N W 2d 769, 778, 237 Iowa 1227

18. Ala—Cotney v State, supra, n 3

Ill—People v Beier, 194 N E 2d 280, 29 Ill 2d 511

Ky—Woods v Com, supra, n 3

N Y—People v Gezzo, 121 N E 2d 380, 307 N Y 385

19. Ga—Hardy v State, supra, n 8

21. Ga—Hardy v State, supra, n 8

22. U S—Chandler v State of Md, D C Md, 360 F Supp 305

S C—C J.S cited in State v Bethea, 126 S E 2d 846, 849, 241 S C 16

Tenn—C.J.S cited in Hawkins v State, 41 S W 2d 774, 777, 220 Tenn 383

§ 289. —— Declarant Must be in Extremis

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27. U S—U S v Sacasas, C A N Y, 381 F 2d 451

Ala—Brooks v State, 27 So 2d 48, 32 Ala.App 389, cert den 27 So 2d 55, 248 Ala 239

Cal—People v Jones, 17 Cal Rptr 252, 197 C A 2d 503

Ky—Shearer v Com, 194 S W 2d 494, 302 Ky 250

Miss—Rouse v State, 222 So 2d 145

Mo—State v Proctor, 269 S W 2d 624, 48 A L R 2d 724

N Y—People v Allen, 90 N E 2d 48, 300 N Y 222

N C—State v Crump, 178 S E 2d 366, 277 N C 573

Or—State v Garver, supra, n 3—State v Brewton, 344 P 2d 744, 220 Or 266.

Pa—Com v Peyton, 62 A 2d 37, 360 Pa 441—Com v Plubell, supra, n 7

28. Ala.—Shikles v State, 18 So 2d 412, 31 Ala App 423, cert den 18 So 2d 417, 245 Ala 641

Ill—People v Beier, 194 N E 2d 280, 29 Ill 2d 511

Nev—State v Teeter, 200 P 2d 657, 65 Nev 584

N C—State v Ensley, 45 S E 2d 357, 228 N C 271—State v Brown, 139 S E 2d 609, 263 N C 327

29. Ala—Shikles v State, supra, n 28—Booth v State, 25 So 2d 427, 247 Ala 600—Brooks v State, supra, n 27

Colo—Ferguson v People, supra, n 3

Ga—Davis v State, 50 S E 2d 604, 204 Ga 467—Stembridge v State, 60 S E 2d 491, 82 Ga App 214—Ward v State, 177 S E 2d 378, 226 Ga 724—Butts v State, 191 S E 2d 329, 126 Ga App 512

Ky—Asher v Com, 275 S W 2d 416

Mich—People v Denton, 19 N W 2d 476, 312 Mich 32

Mo—State v Woodard App, 521 S W 2d 498

N Y—People v Little, 371 N Y S 2d 726, 83 Misc 2d 321

Tex—Whitson v State, Cr, 495 S W 2d 944

Va—Batten v Com, supra, n 3

Rule applied to particular periods

(9) Ga—Ayers v State, 110 S E 2d 669, 215 Ga 325

(10) Pa—Com v Knable, supra, n 3

(17) Emmett v State, 25 S E 2d 9, 195 Ga 517, cert den 64 S Ct 76, 320 U S 774, 88 L Ed 464

(18) Cal—People v Bazaure, 44 Cal Rptr 831, 235 C A 2d 21, cert den 86 S Ct 1951, 384 U S 1026, 16 L Ed 2d 1032, reh den 87 S Ct 21, 385 U S 892, 17 L Ed 2d 125

Mich—People v Johnson, supra, n 8

Pa—Com v Knable, 2 Cumb 3, revd on oth grds 85 A 2d 114, 369 Pa 172

Tex—Bumry v State, 198 S W 2d 887, 150 Tex Cr R 6

Actually at point of death

Mo—State v Woodard, App, 499 S W 2d 553, app after remand 521 S W 2d 498

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30. Ala—Cotney v State, supra, n 3

Ga—Emmett v State, supra, n 29

Ky—Roberts v Com, 191 S W 2d 242, 301 Ky 294

Pa—Com v Edwards, 110 A 2d 216, 380 Pa 52

§ 290. —— Consciousness of, and Belief in, Impending Death

32. Ala—Shikles v State, supra, n 28—Booth v State, supra, n 29—Cotney v State, supra, n 3—Brooks v State, supra, n 27—Thomas v State, 53 So 2d 340, 255 Ala 632—Shiflett v State, 78 So 2d 805, 262 Ala 337

Alaska—Hewitt v State, 514 P 2d 6

Ark—Pinson v State, 194 S W 2d 190, 210 Ark 56—Comer v State, 204 S W 2d 875, 212 Ark 66—Kennecott Copper Corp v Industrial Commission, 420 P 2d 194, 4 Ariz App 327—Patrick v State, 436 S W 2d 275, 245 Ark 923

Cal—People v Gonzales, 198 P 2d 81, 87 Cal App 2d 867—People v Tahl, 56 Cal Rptr 318, 423 P 2d 246, 65 C 2d 719, cert den 88 S Ct 301

Colo—People v Mackey, 521 P 2d 910, 185 Colo 24

Fla—Simmons v State, 36 So 2d 262, 160 Fla 676—Castle v State, App, 305 So 2d 794

Ga—Freeman v State, 213 S E 2d 643, 233 Ga 745

Ill—People v Smith, 316 N E 2d 170, 21 Ill App 3d 366

Ky—Burchfield v Com, 186 S W 2d 412, 299 Ky 549—Shearer v Com, supra, n 27—Allen v Com, 195 S W 2d 96, 302 Ky 546—Bates v Com, 211 S W 2d 130, 307 Ky 357—Woods v Com, supra, n 3—Asher v Com, 275 S W 2d 416—Goff v Com, 433 S W 2d 350—Couch v Com, 479 S W 2d 636

La—State v Jacobs, 281 So 2d 713

Me—State v Chaplin, 286 A 2d 325, app after remand 308 A 2d 873

Md—Connor v State, 171 A 2d 699, 225 Md 543, 86 A L R.2d 892, cert den 82 S Ct 186, 368 U S 906, 7 L Ed 2d 100

Mich—People v Johnson, supra, n 8—People v Kregger, 56 N W 2d 349, 335 Mich 457—People v Wilborn, 225 N W 2d 727, 57 Mich App 277

Miss—Dillon v State, 18 So 2d 454, 196 Miss 625—Houston v State, 149 So 2d 331, 246 Miss 77—Jolly v State, 269 So 2d 650

Mo—State v Proctor, 269 S W.2d 624, 48 A L R 2d 724—State v Woodard, App, 499 S W 2d 553, app after remand 521 S W 2d 498—State v Woodard, App, 521 S W 2d 498

Neb —State v Brown, 202 N W 2d 591, 189 Neb 319
Nev —Wilson v State, 468 P 2d 346, 86 Nev 320
N Y —People v Allen, supra, n 27—People v Marks, 188 N Y S 2d 465, 6 N Y 2d 67, 160 N E 2d 26, cert den 80 S Ct 662, 362 U S 912, 4 L Ed 2d 620—People v Coniglio, 361 N Y S 2d 524, 79 Misc 2d 808
N C —State v Thompson, 39 S E 2d 823, 226 N C 651—State v Ensley, supra, n 28—State v Gordon, 85 S E 2d 322, 241 N C 356—State v Brown, 139 S E 2d 609, 263 N C 327—State v Dunlap, 150 S E 2d 436, 268 N C 701—State v Crump, 178 S E 2d 366, 277 N C 573
Okl —Jones v State, 236 P 2d 102, 94 Okl Cr 359—Ward v State, Cr, 444 P 2d 255, cert den 89 S Ct 665, 393 U S 1040, 21 L Ed 2d 588
Or —State v Brewton, 344 P 2d 744, 220 Or 266
Pa —Com v Peyton, 62 A 2d 37, 360 Pa 441—Com v Riskis, 46 Schuyl Leg Reg 7—Com v Knable, supra, n 3
S D —State v Pickering, 217 N W 2d 877, 88 S D 230—State v Nelson, 220 N W 2d 2, 88 S D 348, cert den 95 S Ct 784, 419 U S 1110, 42 L Ed 2d 807
Tex —Crow v State, 180 S W 2d 354 147 Tex Cr R 292—Bell v State, Cr, 442 S W 2d 716
Va —Batten v Com, supra, n 3
W Va —State v Barker, 38 S E 2d 346, 128 W Va 744

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33. S D —State v Pickering, 217 N W 2d 877, 88 S D 230
34. U S —U S v Mobley, C A Ga, 421 F 2d 345
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Pa —Com v Hawkins, 292 A 2d 302, 448 Pa 206—Com v Gause 330 A 2d 856, 459 Pa 595
35. Ark —Comer v State supra, n 32
36. Cal —People v Gonzales 198 P 2d 81, 87 Cal App 2d 867
Pa —Com v Gause, 330 A 2d 856, 459 Pa 595
37. Ala —Booth v State, supra, n 29
N Y —People v Coniglio, 361 N Y S 2d 524 79 Misc 2d 808
38. N C —State v Brown, 139 S E 2d 609, 263 N C 327
39. Alaska—Hewitt v State, 514 P 2d 6
Miss —Kidd v State, 258 So 2d 423, 53 A L R 3d 774
Mo —State v Woodard, App, 521 S W 2d 498
S C —State v Dawson, supra, n 3
40. U S —U S v Mobley, C A Ga, 421 F 2d 345
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Mich —People v Jackson, 175 N W 2d 891, 21 Mich App 377
Minn —State v Eubanks, 152 N W 2d 453, 277 Minn 257, cert den 88 S Ct 1070, 390 U S 964, 19 L Ed 2d 1165
Miss —Simmons v State, 40 So 2d 289, 206 Miss 535
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N C —State v Thompson, 39 S E 2d 823, 226 N C 651—State v Brown, 156 S E 2d 272, 271 N C 250
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41. N Y —People v Miller, 58 N Y S 2d 525, 270 App Div 107
42 Ill —People v Tilley, supra, n 32
Pa —Com v Edwards, 110 A 2d 216, 380 Pa 52—Com v Cooley, 348 A 2d 103, 465 Pa 35
44. Ala —Booth v State, supra, n 29—Brooks v State, supra, n 27
Cal —People v Tahl, 56 Cal Rptr 318, 423 P 2d 246, 65 C 2d 719, cert den 88 S Ct 301
Ill —People v Odum, 188 N E 2d 720, 27 Ill 2d 237—People v Calvin, 253 N E 2d 922, 116 Ill App 2d 471—People v Smith, 316 N E 2d 170, 21 Ill App 3d 366
Ky —Goff v Com, 433 S W 2d 350
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N Y —People v Allen, supra, n 27
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47 Mo —State v Proctor, 269 S W 2d 624, 48 A L R 2d 724—State v Woodard App, 521 S W 2d 498
48 Nev —Ennis v State, 539 P 2d 114, 91 Nev 530
Pa —Com v Knable, 2 Cumb 3, revd on oth grds 85 A 2d 114, 369 Pa 172
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49. N C —C J S cited in State v Brown, 139 S E 2d 609 612, 263 N C 327

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N C —State v White 306 S E 2d 468 63 N C App 734, review den 310 S E 2d 357 309 N C 825
52 Ala —Garrett v State, 31 So 2d 151, 33 Ala App 168
54 Va —Batten v Com, supra, n 3

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58. Va —Batten v Com, supra n 3

§ 292. Form of Declaration and Manner of Communication

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62. Pa —Com v Hawkins, 292 A 2d 302, 448 Pa 206
64 N J —State v O'Leary, 135 A 2d 321 25 N J 104

67. Rules of integration and merger inapplicable

N J —State v O'Leary, 135 A 2d 321 25 N J 104
69. N J —State v O'Leary, 135 A 2d 321, 25 N J 104

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71. Colo —People v Mackey, 521 P 2d 910, 185 Colo 24
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S D —State v Nelson, 220 N W 2d 2, 88 S D 348, cert den 95 S Ct 784, 419 U S 1110, 42 L Ed 2d 807

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Pa —Com v Cooley, 348 A 2d 103, 465 Pa. 35
73. Md —Connor v State, 171 A 2d 699, 225 Md 543, 86 A L R 2d 892, cert den 82 S.Ct 186, 368 U S 906, 7 L Ed 2d 100
74. Colo —People v Mackey, 521, P 2d 910, 185 Colo 24
79. Ga —C J S cited in Bland v State, 78 S E 2d 51, 55, 210 Ga 100
Or —State v Holterman, 687 P 2d 1097, 69 Or App 509, review den 691 P 2d 481, 298 Or 172
84. Mich —People v Johnson, 54 N W 2d 206, 334 Mich 169
86. Mass —Com v Dunker, 298 N E 2d 813, 363 Mass 792

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90. Guided signature of decedent valid

N J —State v O'Leary, 135 A 2d 321, 25 N J 104

§ 293. In What Cases Admissible

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5 Ariz —Kennecott Copper Corp v Industrial Commission, 420 P 2d 194, 4 Ariz App 327
Fla —Castle v State, App, 305 So 2d 794
N Y —People v Little, 371 N Y S 2d 726, 83 Misc 2d 321
6. Ark —Comer v State, 204 S W 2d 875, 212 Ark 66
Fla —Castle v State, App, 305 So 2d 794
Ill —People v Murawski 117 N E 2d 68, 2 Ill 2d 143
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§ 295 —— Foundation or Predicate

12 Ala —Shaneyfelt v State, 124 So 2d 466, 41 Ala App 130
Ga —Lee v State, 84 S E 2d 353, 211 Ga 170
Ill —People v Tilley, 94 N E 2d 328, 406 Ill 398
Mich —People v Johnson, 54 N W 2d 206, 334 Mich 169
Nev —State v Teeter, 200 P 2d 657 65 Nev 584
Va —Batten v Com, 56 S E 2d 231, 190 Va 235

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S D —State v Nelson, 220 N W 2d 2, 88 S D 348, cert den 95 S Ct 784, 419 U S 1110, 42 L Ed 2d 807

13. Circumstances

Mich —People v Johnson, supra, n 12

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14 Me —State v Chaplin, 286 A 2d 325 App after remand 308 A 2d 873

Procedural error not prejudicial

Fla —Merchant v State, App, 313 So 2d 416
15 Ga —Emmett v State, 25 S E 2d 9, 195 Ga 517, cert den 64 S Ct 76, 320 U S 774, 88 L Ed 464
Mass —Com v Dunker 298 N E 2d 813, 363 Mass 792
22. Ill —People v Tilley, supra, n 12
Mich —People v Denton, 19 N W 2d 476, 312 Mich 32

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37. S D —C J S. cited in State v Nelson, 220 N W 2d 2, 88 S D 348, cert den 95 S Ct 784, 419 U S 1110, 42 L Ed 2d 807
Tex —Whitson v State, Cr, 495 S W 2d 944
38. Miss —Hardeman v State, 61 So 2d 797, 216 Miss 115

Admission required where only one inference possible

Or —State v Dorris, 94 P 44, 51 Or 136, 16 L R A,N S, 660—State v Brewton, 344 P 2d 744, 220 Or 266

39. Ala —Cotney v State, 26 So 2d 598, 22 Ala App 46, affd 26 So 2d 603, 248 Ala 1, cert den 67 S Ct 488, 329 U S 798, 91 L Ed 683—Brooks v State, 27 So 2d 48, 32 Ala App 389, cert den 27 So 2d 55, 248 Ala 239

40. Mo —State v Proctor, 269 S W 2d 624, 48 A L R 2d 724

41. Or —State v Brewton, 344 P 2d 744, 220 Or 266

42. Ill —People v Tilley, supra, n 12

Evidence held sufficient, etc.

U S —U S v Etheridge, C A Tenn, 424 F 2d 951, cert den 91 S Ct 463, 400 U S 993 27 L Ed 2d 442, and 91 S Ct 464, 400 U S 1000, 27 L Ed 2d 452 cert dism 91 S Ct 2174, 402 U S 547, 29 L Ed 2d 102, reh den 92 S Ct 32, 404 U S 875, 30 L Ed 2d 122

Ala —Brooks v State, supra, n 39—Lawrence v State, 40 So 2d 447, 34 Ala App 416—Kissic v State 94 So 2d 202, 266 Ala 71, 67 A L R 2d 530—Kissic v State, 110 So 2d 327, 40 Ala App 178

Cal —People v Bazaure 44 Cal Rptr 831, 235 C A 2d 21, cert den 86 S Ct 1951, 384 U S 1026, 16 L Ed 2d 1032, reh den 87 S Ct 21, 385 U S 892, 17 L Ed 2d 125

Colo —Dolan v People, 449 P 2d 828, 168 Colo 19

Ga —Parker v State, 29 S E 2d 61, 197 Ga 340—Francis v State, 173 S E 2d 710, 121 Ga App 256

Ill —People v Tilley, 104 N E 2d 499, 411 Ill 473, cert den 73 S Ct 23, 344 U S 824 97 L Ed 2d 641

Ky —Allen v Com, 195 S W 2d 96 302 Ky 546

Md —Connor v State, 171 A 2d 699, 225 Md 543, 86 A L R 2d 892, cert den 82 S Ct 186, 368 U S 906, 7 L Ed 2d 100

Mo —State v Nenninger, 188 S W 2d 56, 354 Mo 53—State v Proctor, 269 S W 2d 624, 48 A L R 2d 724

Mont —State v Morran, 306 P 2d 679, 131 Mont 17

Nev —Application of Wheeler, 406 P 2d 713, 81 Nev 495

N C —State v Rich, 58 S E 2d 717, 231 N C 696—State v Gordon, 85 S E 2d 322 241 N C 356

Okl —Hampton v State, Cr, 407 P 2d 210

Pa —Com v Edwards, 244 A 2d 683, 431 Pa 44

Tenn —Helton v State 255 S W 2d 694, 195 Tenn 36 cert den 74 S Ct 28, 346 U S 816 98 L Ed 343

Utah—State v St Clair, 282 P 2d 323, 3 Utah2d 230

Evidence held insufficient

Ala —Cotney v State, supra, n 39

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43. Miss —Simmons v State, 40 So 2d 289, 206 Miss 535

48. Ala —Robertson v State, 47 So 2d 227, 35 Ala App 273, cert den 47 So 2d 230 254 Ala 92

Cal —People v Tahl, 56 Cal Rptr 318, 423 P 2d 246, 65 C 2d 719, cert den 88 S Ct 301

Fla —Simmons v State, 36 So 2d 262, 160 Fla 676—Tillman v State, 44 So 2d 644

Ga —Parker v State, supra, n 42

Ill —People v Odum, 188 N E 2d 720, 27 Ill 2d 237

Mich —People v Williams, 207 N W 2d 180, 45 Mich App 630

N Y —People v Allen, 90 N E 2d 48, 300 N Y 222

Okl —Jones v State, 236 P 2d 102, 94 Okl Cr 359

S D —State v Pickering, 217 N W 2d 877, 88 S D 230

Tex —Crow v State, Cr App, 180 S W 2d 354

Evidence held sufficient, etc —Emmett v State, supra n 15

Mass —Com v Viera, 109 N E 2d 171, 329 Mass 470—Com v Dunker, 298 N E 2d 813, 363 Mass 792

Pa —Com v Smith, 314 A 2d 224, 454 Pa 515

Evidence held insufficient, etc.

Cal —People v Keelin, 289 P 2d 520, 136 C A 2d 860, 56 A L R 2d 355

Mich —People v Johnson, supra, n 12

Miss —Hardeman v State, supra, n 38

Va —Batten v Com, supra, n 12

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49 Ala —Shikles v State, 18 So 2d 412, 31 Ala App 423, cert den 18 So 2d 417, 245 Ala 641—Brooks v State supra, n 39—Maxwell v State, 27 So 2d 804, 32 Ala App 487, cert den 27 So 2d 810, 248 Ala 431—Sidney v State, 89 So 2d 745, 265 Ala 136

Ark —Comer v State, supra, n 6

Ga —Parker v State, supra, n 42

Ky —Allen v Com, supra, n 42

Miss —Thomas v State, 76 So 2d 242, 222 Miss 488

N C —State v Ensley, 45 S E 2d 357, 228 N C 271

Tenn —Hawkins v State 417 S W 2d 774, 220 Tenn 383

Tex —Jones v State, 205 S W 2d 590, 151 Tex Cr R 115

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(4) Roberts v Com, 191 S W 2d 242 301 Ky 294

Particular statements held sufficient

(1) Ala —Gettings v State, 29 So 2d 677, 32 Ala App 644 cert den 29 So 2d 683 249 Ala 509—Ledbetter v State 36 So 2d 564, 34 Ala App 35, cert den 36 So 2d 571, 251 Ala 129

Cal —People v Hashaway, 155 P 2d 101, 67 Cal App 2d 554—People v Bagwell, 113 Cal Rptr 122, 38 C A 3d 127

Fla —Higginbotham v State, 19 So 2d 829, 155 Fla 274

Ga —Ayers v State, 110 S E 2d 669, 215 Ga 325

Ill —People v Hubbs, 83 N E 2d 289, 401 Ill 613

Ky —Burchfield v Com, 186 S W 2d 412,, 299 Ky 549—Slone v Com, 354 S W 2d 497

Pa —Com v Harris, 41 A 2d 688, 351 Pa 325—Com v Logan, 63 A 2d 28, 361 Pa 186

Tenn —Hawkins v State 417 S W 2d 774, 220 Tenn 383

Va —Thomas v Com, 32 S E 2d 711, 183 Va 501

W Va —State v Hamric, 151 S E 2d 252, 151 W Va 1

Particular statements held insufficient

Ala —Thomas v State, 53 So 2d 340 255 Ala 632

N C —State v Deck, 203 S E 2d 830, 285 N C 209

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51 Mo —State v Woodard, App, 499 S W 2d 553, app after remand 521 S W 2d 498

S D —State v Nelson, 220 N W 2d 2, 88 S D 348, cert den 95 S Ct 784, 419 U S 1110, 42 L Ed 2d 807

52. Tenn —Helton v State, supra, n 42

53 Ga —Emmett v State, supra, n 15

Miss —Fulton v State, 47 So 2d 883, 209 Miss 565

Okl —Johnson v State, 151 P 2d 801, 79 Okl Cr 71

54 Ala —Shikles v State, supra, n 49

Fla —Mills v State, App, 264 So 2d 71

Ga —Emmett v State, supra, n 53—Patterson v State, 35 S E 2d 504, 199 Ga 773—Stembridge v State 60 S E 2d 491, 82 Ga App 214—Francis v State 173 S E 2d 710, 121 Ga App 256

La —State v Rankins, 30 So 2d 837, 211 La 791

Pa —Com v Riskis, 46 Schuyl Leg Reg 7

Tenn —Helton v State, supra, n 42

Circumstances held sufficient

Ga —Brown v State, 64 S E 2d 313, 83 Ga App 650—Bland v State, 78 S E 2d 51, 210 Ga 100

Okl —Johnson v State, supra, n 53

Or —State v Brewton, 344 P 2d 744, 220 Or 266

S D —State v Pickering, 217 N W 2d 877 88 S D 230—State v Nelson, 220 N W 2d 2, 88 S D 348, cert den 95 S Ct 784, 419 U S 1110, 42 L Ed 2d 807

Tenn —Kilburn v State, Cr, 509 S W 2d 237

Circumstances held insufficient

Mo —State v Woodard, App, 499 S W 2d 553, app after remand 521 S W 2d 498

N Y —People v Miller, 58 N Y S 2d 526, 270 App Div 107

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55. Ala —Pattillo v State, 16 So 2d 303, 245 Ala 192—Shikles v State, supra, n 49—Cotney v State, supra, n 39—Brooks v State, supra, n 39—Kissic v State, 94 So 2d 202, 266 Ala 71, 67 A L R 2d 530

Cal —People v Tahl, 56 Cal Rptr 318, 423 P 2d 246, 65 C 2d 719, cert den 88 S Ct 301

Ga —Morakes v State, 40 S E 2d 120, 201 Ga 425—Stembridge v State, supra, n 54—Ayers v State, 110 S E 2d 669, 215 Ga 325

Ky —Allen v Com, supra, n 42—Slone v Com, 354 S W 2d 497

La —State v Verrett, App 4 Cir, 467 So 2d 1290

Md —Chandler v State, 256 A 2d 695, 7 Md App 646

Nev —State v Teeter, supra, n 12

N C —State v Thompson, 39 S E 2d 823, 226 N C 651

Okl —Johnson v State, supra, n 53—Hathcox v State, 230 P 2d 927, 94 Okl Cr 110

Pa —Com v Plubell, 80 A 2d 825, 367 Pa 452—Com v Knable, 85 A 2d 114, 369 Pa 171—Com v Smith, 225 A 2d 691, 424 Pa 9

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58. Ala —Morgan v State, 45 So 2d 802, 35 Ala App 269

Mo —CJS quoted at length in State v Proctor, 269 S W 2d 624, 628, 48 A L R 2d 724

60. Ga —Plummer v State, 38 S E 2d 411, 200 Ga 641

Mo —State V Proctor, 269 S W 2d 624, 48 A L R 2d 724

Neb —Reizenstein v State, 87 N W 2d 560, 165 Neb 865, mod on oth grds and reh den 89 N W 2d 265, 166 Neb 450

64 Ill —People v Tilley, supra, n 12

Mo —State v Proctor, 269 S W 2d 624, 48 A L R 2d 724

65. Ala —CJS cited in Riddle v State, 149 So 2d 465, 466, 41 Ala App 682

67 Ga —Parker v State, supra, n 42

N C —State v Gordon, 85 S E 2d 322, 241 N C 356

68 Ga —Emmett v State, supra, n 53—Brown v State, 64 S E 2d 313, 83 Ga App 650—Francis v State, 173 S E 2d 710, 121 Ga App 256

Nev —State v Teeter, supra, n 12

Pa —Com v Smith, 225 A 2d 691, 424 Pa 9

Tenn —Helton v State, supra, n 42—Crawford v State, 273 S W 2d 689, 197 Tenn 411—Hawkins v State, 417 S W 2d 774, 220 Tenn 383

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69 Nev —Ennis v State, 539 P 2d 114, 91 Nev 530

70 Ala —CJS cited in Riddle v State, 149 So 2d 465, 466 41 Ala App 682

71. Ga —Davis v State, 50 S E 2d 604, 204 Ga 467

Miss —Fulton v State, supra, n 53

Pa —Com v Riskis, supra, n 54

Tenn —Crawford v State, 273 S W 2d 689, 197 Tenn 411

76. Ala —CJS cited in Riddle v State, 149 So 2d 465, 466, 41 Ala App 682

Ga —Patterson v State, supra, n 54

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78. Ill —People v Tilley, supra, n 12

Okl —Johnson v State, supra, n 53

80. Mont —State v Morran, 306 P 2d 679, 131 Mont 17

81. Ky —Burchfield v Com, 186 S W 2d 412, 299 Ky 549

Nev —State v Teeter, supra, n 12

Okl —Graham v State, 157 P 2d 758, 80 Okl Cr 159

83. Ky —Roberts v Com, supra, n 49

84. Me —State v Chaplin, 286 A 2d 325, App after remand 308 A 2d 873

Okl —Johnson v State, 151 P 2d 801, 79 Okl Cr 71—Jones v State, 236 P 2d 102, 94 Okl Cr 359

89. Ala —Cotney v State, supra, n 39—Lawrence v State, 40 So 2d 447, 34 Ala App 416

Ark —Comer v State, supra, n 6

Cal —People v Hashaway, 155 P 2d 101, 67 Cal App 2d 554—People v Gonzales, 198 P 2d 81, 87 Cal App 2d 867—People v Keelin, 289 P 2d 520, 136 C A 2d 860, 56 A L R 2d 355—People v Tahl, 56 Cal Rptr 318, 423 P 2d 246, 65 C 2d 719 cert den 88 S Ct 301—People v Bagwell, 113 Cal Rptr 122, 38 C A 3d 127—People v Chapman, 123 Cal Rptr 862, 50 C A 3d 872

Iowa—State v Powell, 24 N W 2d 769 237 Iowa 1227

Me —State v Chaplin, 286 A 2d 325, app after remand 308 A 2d 873

Miss —Rouse v State, 222 So 2d 145

Mich —People v Johnson, 54 N W 2d 206, 334 Mich 169

Mo —State v Proctor, 269 S W 2d 624 48 A L R 2d 724

Neb —Reizenstein v State, 87 N W 2d 560 165 Neb 185, mod on oth grds and reh den 89 N W 2d 265, 166 Neb 450

N Y —People v Conigho, 361 N Y S 2d 524, 79 Misc 2d 808

N C —State v Rich, 58 S E 2d 717 231 N C 696—State v Brown, 139 S E 2d 609, 263 N C 327

Okl —Graham v State, 157 P 2d 758, 80 Okl Cr 159—Jones v State, supra, n 48

Or —State v Garver, 225 P 2d 771, 190 Or 291, 27 A L R 2d 105—State v Achziger, 497 P 2d 383, 10 Or App 198, adhered to 502 P 2d 1162 11 Or App 574

S D —State v Pickering, 217 N W 2d 877 88 S D 230—C J S cited in State v Nelson, 220 N W 2d 2, 88 S D 348, cert den 95 S Ct 784 419 U S 1110, 42 L Ed 2d 807

Utah—State v St Clair 282 P 2d 323, 3 Utah2d 230

W Va —State v Hamric 151 S E 2d 252 151 W Va 1

Mixed question of law and fact

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Matters considered

(2) People v Gonzales 198 P 2d 81 87 Cal App 2d 867

Pa —Com v Knable, supra n 55

Nature of each case

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90. Ark —Comer v State supra n 6

Cal —People v Keelin, 289 P 2d 520 136 C A 2d 860 56 A L R 2d 355

91. Fla —Mills v State, App 264 So 2d 71

Ga —Emmett v State, supra, n 53—Parker v State, supra, n 42—Morakes v State, supra, n 55—Stembridge v State, supra n 54—Ayers v State 110 S E 2d 669, 215 Ga 325—Francis v State, 173 S E 2d 710, 121 Ga App 256

Mich —People v Denton, supra, n 22

Mo —State v Nenninger, 188 S W 2d 56, 354 Mo 53—State v Woodard, App , 499 S W 2d 553, app after remand 521 S W 2d 498

Nev —State v Teeter, supra, n 12

Okl —Graham v State, supra, n 89

Pa —Com v Smith, 225 A 2d 691, 424 Pa 9

Tex —Crow v State, supra, n 48

Evidence held sufficient to present question for jury

Ark —Pinson v State, 194 S W 2d 190 210 Ark 56

Ga —Bland v State, 78 S E 2d 51 210 Ga 100

Mo —State v Proctor, 269 S W 2d 624, 48 A L R 2d 724

Sanity of declarant

Tex —Martelano v State, 237 S W 2d 857, 155 Tex Cr R 570

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93. Ky —Burchfield, v. Com , supra, n 49

Or —State v Brewton, 344 P 2d 744, 220 Or 266

95. Cal —People v Keelin, 289 P 2d 520, 136 C A 2d 860, 56 A L R 2d 355

Mo —State v Proctor, 269 S W 2d 624, 48 A L R 2d 724

98. Ark —Thurman v State, 204 S W 2d 155, 211 Ark 819

Cal —People v Keelin, 289 P 2d 520, 136 C A 2d 860, 56 A L R 2d 355

Ky —Slone v Com , 354 S W 2d 497

Mont —State v Donges, 251 P 2d 254, 126 Mont 341

N Y —People v Little, 371 N Y S 2d 726, 83 Misc 2d 321

Okl —Graham v State, supra, n 89

Or —State v Garver, supra, n 89

Pa —Com v Smith, 225 A 2d 691, 424 Pa 9

99 Pa —Com v Knable, supra n 55

2. Tex —Tuck v State, 231 S W 2d 436 155 Tex Cr R 113

§ 296 —— Proof of Oral Declaration; Secondary Evidence of Written Declarations

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14 Ga —Fowler v State, 27 S E 2d 557, 196 Ga 748—Parker v State, 29 S E 2d 61 197 Ga 340

20 Ala —Lawrence v State, 32 So 2d 223, 33 Ala App 224, cert den 32 So 2d 227, 249 Ala 565

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(1) Lewis v Com 332 S W 2d 656

21 Ala Lawrence v State 32 So 2d 223, 33 Ala App 224 cert den 32 So 2d 227 249 Ala 565

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26 Ala —Lawrence v State 32 So 2d 223, 33 Ala App 224 cert den 32 So 2d 227, 249 Ala 565

35 Colo C J S cited in Ferguson v People 192 P 2d 523, 524, 118 Colo 54

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La —State v Rankins, 30 So 2d 837 211 La 791

N Y —People v Conigho 361 N Y S 2d 524 79 Misc 2d 808

Pa —Com v Plubell, 80 A 2d 825, 367 Pa 452—Com v Knable, 85 A 2d 114 369 Pa 171

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41. Ill – People v Murawski, 117 N E 2d 88, 2 Ill 2d 143

Me —State v Chaplin, 286 A 2d 325 app after remand 308 A 2d 873

Miss Powell v State, 118 So 2d 304, 238 Miss 283

N Y – People v Little, 371 N Y S 2d 726, 83 Misc 2d 321

42 Ga —Rozier v State, 29 S E 2d 602, 197 Ga 420

Md —Connor v State, 171 A 2d 699, 225 Md 543 86 A L R 2d 892, cert den 82 S Ct 186, 368 U S 906 7 L Ed 2d 100

N Y —People v Conigho, 361 N Y S 2d 524 79 Misc 2d 808

Statements inadmissable as not part of res gestae

N Y —People v Little, 371 N Y S 2d 726, 83 Misc 2d 321

44. Ga —Patterson v State, 35 S E 2d 504 199 Ga 773

45. Or —State v Garver, 225 P 2d 771, 190 Or 291 27 A L R 2d 105

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46 Ala —Williams v State, 61 So 2d 861, 36 Ala App 583, cert den 61 So 2d 865, 258 Ala 196—Kissic v State, 94 So 2d 202, 266 Ala 71, 67 A L R 2d 530—Pate v State, App , 163 So 2d 645, 42 Ala App 334

Ga —Gilbert v State, 94 S E 2d 109, 94 Ga App 217

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(2) Other matters

N J —State v O'Leary 135 A 2d 321, 25 N J 104

47 Miss —Powell v State, 118 So 2d 304, 238 Miss 283

N C —State v Curtis, 207 S E 2d 308, 22 N C App 606, cert den 209 S E 2d 284, 285 N C 760

Okl —Hathcox v State, 230 P 2d 927, 94 Okl Cr 110

W Va —State v Hamric, 151 S E 2d 252, 151 W Va 1

48. La —State v Rankins, supra, n 39

Mich —People v Wilborn, 225 N W 2d 727, 57 Mich App 277

50 Ga —Rozier v State, supra, n 42

Ill —People v Tilley, 94 N E 2d 328, 406 Ill 398

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W Va —State v McLane, 27 S E 2d 604, 126 W Va 219

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54 Md —Connor v State 171 A 2d 699, 225 Md 543, 86 A L R 2d 892, cert den 82 S Ct 186, 368 U S 906 7 L Ed 2d 100

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W Va —State v McLane supra n 50

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55 Me —State v Chaplin, 286 A 2d 325 App after remand 308 A 2d 873

63. Ga —Rozier v State supra, n 42

Mo – State v Proctor 269 S W 2d 624, 48 A L R 2d 724

Inconsistent statements by recipient of dying declaration

Pa —Com v Douglas 337 A 2d 860, 461 Pa 749

§ 299. —— Conclusions and Opinions

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Pa —Com v Peyton, 62 A 2d 37 360 Pa 441—Com v Knable, supra n 39

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N J —State v Hegel, 273 A 2d 383 113 N J Super 193

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N J —State v Hegel, 273 A 2d 383 113 N J Super 193

70. Ark —Riddle v State, 196 S W 2d 226, 210 Ark 255

Ga —Bland v State 78 S E 2d 51 210 Ga 100

Ky —Coots v Com 175 S W 2d 139 295 Ky 637—Roberts v Com 191 S W 2d 242, 301 Ky 294—Broughton v Com , 202 S W 2d 1014, 305 Ky 66—Couch v Com , 321 S W 2d 39

Miss —Fulton v State, 47 So 2d 883, 209 Miss 565—Powell v State, 118 So 2d 304 238 Miss 283

N J —State v Hegel, 273 A 2d 383, 113 N J Super 193

Pa —Com v Perry, supra, n 54

71 Tex —Lee v State, 185 S W 2d 978, 148 Tex Cr 220

73. Ala —Sidney v State, 89 So 2d 745, 263 Ala 136
Pa —Com v Plubell, supra, n 39

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76. Miss —Powell v State, 118 So 2d 304, 238 Miss 283
Mo —State v Proctor, 269 S W 2d 624, 48 A L R 2d 724
77. Ark —Riddle v State, supra, n 70
78. Mo —State v Proctor, 269 S W 2d 624, 48 A L R.2d 724
N C —C.J.S. cited in State v Vestal, 180 S E 2d 755, 788, 278 N C 561
Tex —Henderson v State, 192 S W 2d 273, 149 Tex Cr R 160

Declarations held admissible as statements of fact

(1) Ky —Couch v Com , 321 S W 2d 39
(4) Tex —Lee v State, supra, n 71
(5) Ky —Roberts v Com , supra, n 70—Marcum v Com , 256 S W 2d 22
79. Ala —Shikles v State, 18 So 2d 412, 31 Ala App 423, cert den 18 So 2d 417, 245 Ala 641
Pa —Com v Plubell, supra, n 39
82. Miss —Hardeman v State, 61 So 2d 797, 216 Miss 115
Pa —Com v Plubell, supra, n 39
84. Md —Connor v State, 171 A 2d 699 225 Md 543, 86 A L R 2d 892, cert den den 82 S Ct 186, 368 U S 906, 7 L Ed 2d 100
Nev —State v Teeter, supra, n 12
Pa —Com v Peyton, supra, n 69
85. Tex —Lee v State, 185 S W 2d 973, 148 Tex Cr 220—Munoz v State, Cr , 524 S W 2d 710
88. Ky —Roberts v Com , supra, n 70—Mayhew v Com , 196 S W 2d 612, 302 Ky 783

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93. Ky —Broughton v Com , supra, n 70
95. Ky —Mayhew v Com , supra, n 88
Mich —C.J.S. quoted in People v Wilborn, 225 N W 2d 727, 732, 57 Mich App 277—People v Wilborn, 225 N W 2d 727, 57 Mich App 277
N Y —People v Mleczko, 81 N E 2d 65, 298 N Y 153
N C —State v Mitchner, 124 S E 2d 831, 256 N C 620
97. Mich —C.J.S. quoted at length in People v Wilborn, 225 N W 2d 727, 732, 57 Mich App 277
98. Ark —Riddle v State, supra, n 70

§ 300. —— State of Feeling between Parties

6. Cal —People v Keelin, 289 P 2d 520, 136 C A 2d 860, 56 A L R 2d 355
Okl —Jones v State, 236 P 2d 102, 94 Okl Cr 359
Wyo —C.J.S. cited in State v Kump, 301 P 2d 808, 814, 76 Wyo 273

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7. Okl —Jones v State, supra, n 6
8. Okl —Jones v State, supra, n 6

§ 301. —— Vague, Indefinite, or Incomplete Statements

12. Ill —People v Scott, 288 N E 2d 478, 52 Ill 2d 432, cert den 93 S Ct 1406, 410 U S 941, 35 L Ed 2d 607
Pa —Com v Plubell, 80 A 2d 825, 367 Pa 452
13. Pa —Com v Knable, 85 A 2d 114, 369 Pa 171
14. N Y —People v Mleczko, 81 N E 2d 65, 298 N Y 153
15. U S —U S v Mobley, C A Ga , 421 F 2d 345

Statement held not indefinite

Md —Connor v State, 171 A 2d 699, 225 Md 543, 86 A L R 2d 892, cert den 82 S Ct 186, 368 U S 906, 7 L Ed 2d 100
17. Fla —Grimes v State, 64 So 2d 920

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Ky —Mayhew v Com , 196 S W 2d 612, 302 Ky 783
La —State v Rankins, 30 So 2d 837, 211 La 791
N Y —People v Coniglio, 361 N Y S 2d 524, 79 Misc 2d 808
N C —State v Gordon, 85 S E 2d 322, 241 N C 356
27. Ark —Riddle v State, supra, n 26
28. Ala —Maxwell v State, supra n 26
30. Nev —Wilson v State, 468 P 2d 346, 86 Nev 320
33. La —State v Rankins supra, n 26

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34 Md —Connor v State, 171 A 2d 699, 225 Md 543, 86 A L R 2d 892, cert den 82 S Ct 186, 368 U S 906 7 L Ed 2d 100
37 Ill —People v Tilley, 94 N E 2d 328, 406 Ill 398
38. **That deceased was rational**
Ga —Hubbard v State, 67 S E 2d 562, 208 Ga 472
39. Ala —Maxwell v State, supra, n 26
45. Ark —Riddle v State, supra, n 26

§ 304. Weight as Evidence

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49. Ala —Lawrence v State, 40 So 2d 447, 34 Ala App 416
Ill —People v Aarhus, 248 N E 2d 820, 111 Ill App 2d 167
Or —State v Garver, 225 P 2d 771, 190 Or 291, 27 A L R 2d 105
51. Ark —Riddle v State, supra, n 26
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Ky —Allen v Com , 199 S W 2d 453, 303 Ky 783—Woods v Com , 220 S W 2d 1012, 310 Ky 396
55. N C —State v Mitchner, 124 S E 2d 831, 256 N C 620
56. Ky —Allen v Com , supra, n 51
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Nev —State v Teeter, 200 P 2d 657, 65 Nev 584—Wilson v State, 468 P 2d 346, 86 Nev 320
N C —State v Stalnaker, 162 S E 2d 76, 1 N C App 524
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58. Pa —Com v Brown, 131 A 2d 367, 388 Pa 613
61. N Y —People v Little, 371 N Y S 2d 726, 83 Misc 2d 321
68. Ill —People v Tilley, supra, n 37
Ga —Hawkins v State, 101 S E 2d 710, 213 Ga 749
Ky —C.J.S. cited in Allen v Com , 199 S W 2d 453, 454, 303 Ky 783
69. Ala —Hutcherson v State, 114 So 2d 572, 40 Ala App 417
71. Ky —C.J.S cited in Allen v Com , supra, n 70

In Georgia

(3) There are cases to the effect that an instruction that dying declarations must be received with caution need not be given —Williams v State, 97 S E 77, 148 Ga 483—Key v State, 170 S E 230, 177 Ga 329—Morakes v State, 40 S E 2d 120, 201 Ga 425

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73. Mo —State v Woodard, App , 499 S W 2d 553, app after remand 521 S W 2d 498
76. Ala —C.J.S cited in Booth v State, 25 So 2d 427, 431, 247 Ala 600

§ 305. Impeachment

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77. Ala —C.J.S. cited in Booth v State, 25 So 2d 427, 430, 247 Ala 600—Maxwell v State, supra, n 26
Nev —Wilson v State, 468 P 2d 346, 86 Nev 320
N C —State v Stalnaker, 162 S E 2d 76, 1 N C App 524
78. Ala —Hutcherson v State, 108 So 2d 177, 40 Ala App 78, cert den 108 So 2d 180, 268 Ala 696
Ky —Allen v Com , supra, n 51
82. **Evidence eld inadmissible**
Ala —Maxwell v State, supra, n 26
87 Ala —Cotney v State, 26 So 2d 603, 248 Ala 1

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88. Ala —Cotney v State, supra, n 87
93. Nev —Wilson v State, 468 P 2d 346, 86 Nev 320

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10. Cal —People v Lessard, 25 Cal Rptr 78, 375 P 2d 46, 58 C 2d 447
Pa —Com v Buzard, 76 A 2d 394, 365 Pa 511, 22 A L R 2d 846
Tenn —Morton v State, 458 S W 2d 808, 3 Tenn Cr App 195

Coroner's autopsy report held admissible

U S —Jones v People of State of Cal , C A Cal , 364 F 2d 522
Ala —Sheperd v State, 325 So 2d 551, 57 Ala App 35, cert den 325 So 2d 557, 295 Ala 417
La —State v Pettle, 286 So 2d 625—State v Berry, 324 So 2d 822, cert den 96 S Ct 1731, 425 U S 954, 48 L Ed 2d 198
Mo —State v Davis, 491 S W 2d 549
11. Ga —Ellington v State, 49 S E 2d 872, 204 Ga 456
12. Tex —Fishbeck v State, 225 S W 2d 854, 154 Tex Cr R 186

§ 308. Testimony and Statements of Accused

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15. Ark —Ezell v State, 229 S W 2d 32, 217 Ark 94
Mo —State v Black, 227 S W 2d 1006, 360 Mo 261—State v Cox, 333 S W 2d 25

Testimony under subpoena not involuntary

Mo —State v Mayabb, 316 S W 2d 609
17. Ark —Ezell v State, supra, n 15
Ky —Brown v Com , 275 S W 2d 928
Mo —State v Black, supra, n 15
Wyo —State v Catellier, 179 P 2d 203, 63 Wyo 123

That accused was not represented by counsel, etc.

Mo —State v Mayabb, 316 S W 2d 609

§ 309. Testimony of Witnesses

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36. Ark —Brown v State, 395 S W 2d 344, 239 Ark 909, cert den 86 S Ct 1985, 384 U S 1016, 16 L Ed 2d 1037
38. N Y —Guber v State, 294 N Y S 2d 468, 31 A D 2d 555

§ 310. Verdict

47. Ariz —State v Barker, 385 P 2d 516, 94 Ariz 383

Ark —Sims v State, 530 S W 2d 182, 258 Ark 940

Ga —Rails v State, 75 S E 2d 26, 87 Ga App 655

Va —Bond v Com, 311 S E 2d 769, 226 Va 534

Not binding on prosecution

Ariz —State v Caruthers, 519 P 2d 44, 110 Ariz 345

48. La —State v Alberts, 19 So 2d 98, 206 La 213—State v Winey, 44 So 2d 115, 216 La 560—State v Leming, 46 So 2d 262, 217 La 257

Findings not binding on district attorney

La —State v Winstead, 15 So 2d 793, 204 La 366

"Autopsy report" prepared by coroner

La —State v Holmes, 245 So 2d 707, 258 La 221, cert den 92 S Ct 1612, 406 U S 909, 31 L Ed 2d 820

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49. La —State v Winstead, supra, n 48

50. R I —State v Cohen, 173 A 2d 925, 93 R I 215

Autopsy report admissible without coroner's testimony

La —State v Holmes, 245 So 2d 707, 258 La 221, cert den 92 S Ct 1612, 406 U S 909, 31 L Ed 2d 820

52. **Testimony of physician assisting in autopsy** held not inadmissible under a statutory provision that the county physician had the exclusive right to conduct autopsies —State v Rios, 112 A 2d 247, 17 N J 572

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